

9 November 2022

Inland Revenue Department

By email: publicconsultation@ird.govt.nz

PUB00428: GST – Section 58: Specified agents of incapacitated persons, and mortgagees in possession

1. The New Zealand Law Society | Te Kāhui Ture o Aotearoa welcomes the opportunity to comment on the draft Interpretation Statement *GST – Section 58: Specified agents of incapacitated persons, and mortgagees in possession* (**the Interpretation Statement**).
2. These comments been prepared with the assistance of the Law Society's Tax Law Committee.

Applying section 58 to voluntary administrators

3. The Interpretation Statement acknowledges that the Taxation (Annual Rates for 2022-23, Platform Economy, and Remedial Matters) Bill (No 2) (**the Bill**) proposes to amend section 58 of the Goods and Services Tax Act 1985 (**the GST Act**) so that companies in voluntary administration will be included in the definition of "incapacitated person", and voluntary administrators will be included in the definition of "specified agent".
4. However, the Interpretation Statement does not set out Inland Revenue's view of the *current* law regarding the application of section 58 to voluntary administrators. Specifically, it does not make clear whether Inland Revenue considers that a voluntary administrator constitutes a "specified agent" of an "incapacitated person" under the current wording of section 58, such that there is scope for them to be personally liable for goods and services tax (GST) under this provision.
5. We consider the Interpretation Statement should include Inland Revenue's view of the current law in relation to voluntary administrators. It is important for Inland Revenue to make clear whether, in its view, the effect of the Bill is a change to the current position.
6. In our view, the current position is that section 58 does not apply to voluntary administrators on the basis that:
 - (a) "incapacity" is a concept which at law applies exclusively to natural persons, such that a company in voluntary administration is not capable of becoming "incapacitated" under section 58;
 - (b) the words of section 58 do not support an expansive reading of "incapacitated" which, in any event, would be inconsistent with section 239ADG of the Companies Act 1993 (**the Companies Act**);
 - (c) past practice or the practical treatment of section 58 does not and cannot determine how the current law applies.
7. Further explanation of this point is set out below.

Current wording of section 58 of the GST Act

8. "Specified agent" and "incapacitated person" are defined in section 58(1) of the GST Act as:

incapacitated person means a registered person who dies, or goes into liquidation or receivership, or becomes bankrupt or incapacitated

specified agent means a person carrying on any taxable activity in a capacity as personal representative, liquidator, or receiver of an incapacitated person, or otherwise as agent for or on behalf of or in the stead of an incapacitated person.

9. A voluntary administrator will meet the definition of "specified agent" if it is carrying on any taxable activity in a capacity "as agent for or on behalf of or in the stead of an incapacitated person" (the other categories of specified agent: "personal representative, liquidator, or receiver of an incapacitated person", do not apply to voluntary administrators as these are distinct concepts).
10. As a matter of law, a company placed in voluntary administration does not "die", nor is it in receivership or liquidation, which are distinct concepts under the Companies Act. Therefore, for a company in voluntary administration to constitute an "incapacitated person", it must be "incapacitated". "Incapacitated" is not defined in the GST Act – its meaning must be ascertained by reference to other sources such as statutory interpretation and any relevant case law.

Incapacity as a concept

11. The term "incapacitated" is not used in New Zealand law to refer to companies. A search of the New Zealand legislation website suggests there are 93 Acts and legislative instruments that use the term "incapacitated". A survey of the majority of these shows that the text and context of the enactments illustrate that Parliament uses the term "incapacitated" in the context of natural persons, not companies.
12. Both *Spiller's Dictionary of New Zealand Law* and *Garner Black's Law Dictionary*¹ define "incapacity" and "incapacitated person", respectively, by reference to the capability of natural persons to form capacity for legal action or to have the ability to understand the consequences of action.

"Capacity" in the Companies Act

13. While the Companies Act refers to a "capacity" of a company in section 16 (capacity and powers) and section 17 (validity of actions), these provisions concern a company's capacity "to carry on or undertake any business or activity, do any act, or enter into any transaction." Those provisions do not mean a company can be "incapacitated" – their intention is to ensure a company's actions are not invalidated in the way that occurred under the ultra vires doctrine.
14. Accordingly, a company in voluntary administration maintains its capacity. It can carry on its taxable activity and contract with third parties, it does not act "ultra vires" and it maintains capacity as envisioned by Parliament when it enacted sections 16 and 17.

Case law

15. There is limited case law discussing "incapacitated" in the context of non-natural persons. The Law Society does not consider these cases support a wider interpretation of "incapacitated" that could apply to non-natural persons under section 58.

¹ 11th edition (2019).

Words of section 58 and inconsistency with section 239ADG of the Companies Act

16. Even if a voluntary administrator did *prima facie* fall within the terms of section 58 of the GST Act (which the Law Society considers is not the case) – this would be inconsistent with section 239ADG of the Companies Act. That section provides:

The administrator is not liable for the debts of the company except as provided in this subpart and in section 239Y.

17. An interpretation that a company in voluntary administration can become "incapacitated" under section 58 is irreconcilable with that section,² observations in Hansard on the intended operation of the voluntary administration regime, and the plain words of the Companies Act 1993.

Applying section 58 in the case of death

18. The definition of a specified agent includes a person carrying on any taxable activity in the capacity as personal representative of an incapacitated person. Where a personal representative is a specified agent, the agency period (in accordance with section 58) begins on the date on which a person "becomes entitled" to act as a specified agent.
19. In the case of death, the personal representatives are typically the executors named in the deceased person's will or, if they die intestate, the person or persons entitled to apply for, and are subsequently appointed as, administrators pursuant to an application for Letter of Administration.
20. In both cases, neither the executors nor the administrators are legally entitled to deal with the assets of the deceased's estate until either an order for Grant of Probate or an order for a Grant of Letters of Administration has been made.
21. While the persons named in a deceased person's will are appointed (under the will) and are entitled to deal with the assets of a person's estate, until an order for Probate is granted, they do not technically have the legal right to deal with the assets of the deceased.
22. Where a person dies intestate, who has the right to apply to be appointed as an administrator of the deceased persons estate is governed by the Administration Act 1969.
23. A personal representative of a deceased person's estate will therefore typically be an executor or administrator and therefore fall within the meaning of a "specified agent". However, for the purposes of the definition of "agency period" it is not clear from the examples provided in the Interpretation Statement when the CIR considers such a person "becomes entitled" to act as a specified agent. Legally it would be from the date the order for Grant of Probate or Letters of Administration have been made. However, the examples seem to suggest it could be as early as the date of death.
24. Tax Information Bulletin Vol 7, No. 6 "*GST – specified agent for incapacitated persons*",³ provided an example of how section 58 applies in the event of death. In the example, one of the executors stepped in to carry on the taxable activity of the deceased. The example did not, however, clarify whether an order for Grant of Probate had been made and whether that was the date from which the personal representatives became entitled to act. Rather, it provided that the personal representative was required to provide written notice to IRD that they were carrying in the taxable activity of the incapacitated person, within 21 days of the date of death of the incapacitated person.

² (26 October 2006) 634 NZPD 6172.

³ December 1995, at 13.

25. Similarly, Example 1 in the Interpretation Statement does not clarify when a personal representative “becomes entitled” to act as a specified agent in the event of the death of a registered person.
26. For legal purposes, the date a personal representative legally becomes entitled to deal with the assets of a deceased person is the date of an order for Grant of Probate/Letters of Administration. In most cases this date is typically weeks (and sometimes months) after the date of death, as opposed to automatically from the date of death.
27. In the case of a deceased registered person, it would be helpful if the Interpretation Statement clarified:
 - (a) When a personal representative is considered for GST purposes to “become entitled” to act as a specified agent (for example the date an order for the Grant of Probate/Letters of Administration is made or some other date i.e. date of death); and
 - (b) What is meant by “has been appointed” to carry on part of the incapacity persons taxable activity (i.e., does appointed mean appointed pursuant to an order for Grant of Probate/Letters of Administration or something else).

Applying section 58 in the case of the incapacity of a natural person because of events other than bankruptcy or death (other incapacity)

28. Incapacity can be both physical as well as mental. Incapacity may be temporary or permanent.
29. A registered person who has lost mental capacity may have executed an enduring power of attorney which authorises their appointed attorney/s to carry on their property affairs in the event of their incapacity. In such case, the attorney’s role commences from the date the donor is assessed as no longer having mental capacity.
30. In such case, it is clear the date from which the attorney’s power has commenced.
31. For a registered person who ceases to have mental capacity but does not have an enduring power of attorney, it is not clear who has to power or authority to carry on their property affairs and from what date that power or authority commences.
32. Section 58 of the GST Act seems to imply that any person can be a specified agent of an incapacitated registered person if that person is “carrying on any taxable activity as agent for, or on behalf of, or in the stead of an incapacitated person.” However, the definition of “agency period” provides that the agency period commences on the date on which a person “becomes entitled” to act as a specified agent.
33. In the case of specified agents of incapacitated persons (other than those who have put in place an enduring power of attorney), it is not clear what is meant by the term “becomes entitled”.
34. Example 6 of the draft Interpretation Statement appears to suggest any person who voluntarily steps into the shoes of the incapacitated registered person (whether they legally have the right to do so or not) is a specified agent. However, for the purposes of the definition of “agency period” it does not clarify what is meant by the date on which a person “becomes entitled” to act as a specified agent. It would be helpful if this point could be clarified.

Nāku noa, nā



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