

INTERPRETATION STATEMENT

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

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This Interpretation Statement considers the application of section 58 of the Goods and Services Tax Act 1985. Section 58 covers the GST implications where there is a specified agent of an incapacitated person or a mortgagee is in possession of land or property of a mortgagor.

All legislative references are to the Goods and Services Tax Act 1985 unless otherwise stated.

REPLACES

- "GST – specified agent for incapacitated persons", *Tax Information Bulletin* Vol 7, No 6 (December 1995): 13

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Summary

- Section 58 covers two broad areas:
 - Specified agents of incapacitated persons; and
 - Mortgagees in possession of land or other property of a mortgagor.
- In each area, section 58 applies to treat the specified agent as, or deem the mortgagee in possession to be, the registered person in respect of the taxable activity of the incapacitated person, or mortgagor, respectively.
- The Commissioner issued a policy statement on this subject in 1995.¹ This Interpretation Statement replaces that earlier statement and extends the analysis beyond what it covered.

¹ "GST – specified agent of an incapacitated person", *Tax Information Bulletin* Vol 7, No 6 (December 1995): 13.

4. This Interpretation Statement reiterates the earlier view that where a registered person dies or is in liquidation, receivership, or voluntary administration, then their personal representative, liquidator, receiver, or administrator will be a specified agent of an incapacitated person and liable to fulfil the GST obligations related to the taxable activity in question.
5. However, where a person is adjudicated bankrupt (and so becomes an “incapacitated person” as defined), the Official Assignee will **generally** not be a specified agent of that bankrupt registered person and will therefore not be responsible for the GST obligations related to that bankrupt’s taxable activity. The exception is where the Official Assignee has used its power under Schedule 1(i) of the Insolvency Act 2006 (“the IA 2006”) to carry on the bankrupt’s business (taxable activity).
6. For a mortgagee in possession of land or property of a registered person mortgagor, the Commissioner **may** deem the mortgagee to be a registered person where and to the extent that the mortgagee carries on any taxable activity of the mortgagor. Unlike specified agents, who are automatically treated as registered persons in respect of an incapacitated person’s taxable activity, the Commissioner has a discretion to do the same in respect of a mortgagee in possession.

Introduction

7. This Interpretation Statement replaces and updates the policy statement entitled “GST – specified agent for incapacitated persons” published in 1995.² The 1995 statement and this Interpretation Statement relate to section 58 of the Act.
8. Section 58 covers more than just specified agents of incapacitated persons, extending to mortgagees in possession of land and other property of a mortgagor as well. While the title of the 1995 statement suggests it covered only the issue of specified agents of incapacitated persons, in its discussion it also addressed the application of section 58 to mortgagees in possession. This Interpretation Statement likewise covers both aspects of section 58.

An overview of how section 58 works

9. Section 58(1) sets out three definitions that are critical to its application to the extent that it relates to a specified agent of an incapacitated person. These define “agency period”, “incapacitated person”, and “specified agent”:

agency period means the period beginning on the date on which a person becomes entitled to act as a specified agent carrying on a taxable activity in relation to an incapacitated person and ending on the earlier of—

² *Tax Information Bulletin* Vol 7, No 6 (December 1995): 13.

- (a) the date on which some person other than the incapacitated person or the specified agent is registered in respect of the taxable activity; or
- (b) the date on which there is no longer a person acting as a specified agent in relation to the incapacitated person

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

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

- 10. As the above definition indicates, "agency period" means the period when a person acts as the specified agent carrying on a taxable activity of an incapacitated person. It begins with the date when the person is entitled to act as a specified agent and continues until either someone other than the specified agent or the incapacitated person is registered as carrying on the taxable activity **or** there is no longer a specified agent in relation to the incapacitated person.
- 11. "Incapacitated person" means a registered person, in respect of a taxable activity, who dies, goes into liquidation, receivership, or voluntary administration, or becomes bankrupt or "incapacitated". The terms "dies", "liquidation", "receivership", "voluntary administration", and "bankrupt" are very specific, but "incapacitated" is a broader and more general term.
- 12. "Specified agent" is the term linked with "incapacitated person". The first half of its definition – referring to the terms "personal representative", "liquidator", "receiver", and "administrator" – links to some of the specific circumstances in the definition of "incapacitated person" ("dies", "liquidation", "receivership", "voluntary administration"). However, the second half – "or otherwise as agent for or on behalf of or in the stead of an incapacitated person" – applies more broadly to the remaining circumstances in the definition of "incapacitated person" ("bankrupt", "incapacitated").
- 13. Section 58(1A) provides that a person who becomes a "specified agent" is treated as being a registered person carrying on the taxable activity of the incapacitated person. Additionally, the incapacitated person is treated as not carrying on the taxable activity. This treatment is different to the way an agent is usually treated (under section 60(1)) and for this reason section 58(1A) states it applies despite "sections 5(2) and 60". The treatment is different because of the context involving an agent of someone who is an "incapacitated person". That is, because an incapacitated person does not have the competence to act on their own behalf, more is expected of their (specified) agent. Section 58(1B) is a similar rule to section 58(1A) in the context of a specified agent carrying on only part of the incapacitated person's taxable activity. In either case the specified agent is personally liable for any GST liabilities arising during the agency period.

14. Section 58(1D) provides that the specified agent is not personally liable for any GST liabilities that the incapacitated person incurred on or before the date the agency period started. However, if an incapacitated person had not claimed input tax before the agency period started, section 58(1C) allows the specified agent to claim that amount.³ While a specified agent is not personally liable for GST obligations before the agency period, they may, when they have authority to do so, take responsibility as agents for filing GST returns and paying outstanding GST.
15. Section 58(2) has a specific rule for a mortgagee in possession of land or other property where the mortgagee carries on the taxable activity of the mortgagor. The Commissioner **may** deem the mortgagee to be the registered person from the time they took possession until the time they cease to be in possession. Unlike “specified agents”, who are automatically treated as registered persons under section 58(1A), a mortgagee in possession **may** be treated (“deemed”) as being a registered person.
16. Section 58(3) requires a specified agent, or a mortgagee in possession carrying on a taxable activity of a mortgagor, to notify the Commissioner within 21 days of such occurring, and to provide details of the facts leading to this.

Applying section 58 in the case of death, liquidation, receivership, and voluntary administration

17. Section 58 applies clearly in the case of death, liquidation, receivership, and voluntary administration. A person who dies or a company in liquidation, receivership, or voluntary administration will be an “incapacitated person” as defined. A personal representative of a deceased person, a liquidator of a company, a receiver of a company, or an administrator of a company satisfies the definition of “specified agent” (if they are carrying on the taxable activity of the incapacitated person). It is not uncommon to have a company that is both in receivership and liquidation, and hence there may be more than one specified agent of the company (that is, both the receiver and the liquidator).
18. In the period between the death of a person and the appointment of an executor or administrator as the deceased’s personal representative, another person may be acting as a “specified agent” in the interim if they act “as agent for or on behalf of or in the stead of” the deceased (from the definition of “specified agent”). This will be the case if a person continues to carry on the deceased’s taxable activity between the time of

³ Section 58(1C) is subject to section 46(7), which allows the Commissioner to apply any such input tax deduction towards outstanding GST obligations of the incapacitated person or to an amount payable by the incapacitated person under another Inland Revenue Act.

death and the appointment of a personal representative (by grant of probate or letters of administration).

Applying section 58 in the case of bankruptcy

19. How section 58 applies in the case of a bankruptcy is less clear. While it is clear that a "bankrupt" is an "incapacitated person", it does not follow that the Official Assignee must be a "specified agent". Unlike personal representatives, liquidators, receivers, and administrators, the Official Assignee is not listed in the definition of "specified agent". But it is acknowledged that the Official Assignee is responsible for administering all bankruptcies.
20. However, just because the Official Assignee is responsible for administering all bankruptcies, it does not follow that the Official Assignee must be a specified agent. Not every "incapacitated person" must have a "specified agent", and section 58(1A) does not have to apply every time there is an incapacitated person. Instead, the person who may be a "specified agent" must satisfy the requirements of the definition including that they must be:
 - carrying on a taxable activity; and
 - carrying on the taxable activity in a specific capacity (as personal representative, liquidator, receiver, or administrator) **or** otherwise as agent for or on behalf of or in the stead of an incapacitated person.
21. Therefore, as well as needing confirmation that a potential "specified agent" is carrying on a taxable activity, it must be confirmed that they are doing that either in a specific capacity (as personal representative, liquidator, receiver, or administrator) **or** they are doing so as agent for or on behalf of or in the stead of the incapacitated person. For example, carrying on the taxable activity for a person's own benefit would not necessarily satisfy the definition.
22. The Official Assignee will not be a "specified agent" for an incapacitated person bankrupt when the Official Assignee:
 - is not aware of and has not consented to the incapacitated person carrying on a taxable activity; or
 - has given consent for the incapacitated person to carry on a taxable activity (under section 149 of the IA 2006) but on condition that the incapacitated person meets all the GST requirements of that taxable activity (including filing GST returns and paying GST).
23. However, the Official Assignee will be a "specified agent" of an incapacitated person bankrupt when the Official Assignee carries on the bankrupt's taxable activity because that is necessary or advantageous in order to dispose of it (see Schedule 1(i) of the IA

2006). In such a case, the Official Assignee is carrying on the taxable activity “as agent for or on behalf of or in the stead of” an incapacitated person (fulfilling the definition of “specified agent”).

Applying section 58 in the case of other incapacity

24. Section 58 also applies when a person becomes “incapacitated” (see above at paragraph 11). The *Oxford English Dictionary* (3rd ed, March 2016, most recently modified version published online December 2022)⁴ defines “incapacitate” as follows (observing that “incapacitated” is the adjectival form of “incapacitate”):

Incapacitate, v

1. *transitive*. To deprive of capacity; to render incapable; to disqualify, unfit.
2. To deprive of legal capacity; to disqualify in law.

25. The word has two possible meanings – a general meaning which is often interpreted as meaning physical, mental, or intellectual impairment, or a specifically legal meaning referring to legal incapacity.
26. So a person will be “incapacitated” in terms of the definition of “incapacitated person” when they lose physical, mental, or intellectual capacity such that they are unable to carry on their taxable activity or where they are deprived of legal capacity to carry on their taxable activity.

Applying section 58 in the case of a mortgagee in possession

27. Section 58(2) relates to the case of a mortgagee in possession of land or property of a registered person mortgagor. Where and to the extent that the mortgagee carries on any taxable activity of the mortgagor, the Commissioner may deem the mortgagee to be a registered person. Any such deemed status will apply from the date when the mortgagee took possession of the land or other property until the time the mortgagee ceases to be in possession of the land or other property.
28. The Commissioner’s view is that if he deems a mortgagee in possession to be the registered person, then the mortgagor (no longer in possession) is not the registered person for the equivalent period.

⁴ Accessed 28 February 2023.

Section 58(3) notification requirements

29. Section 58(3) requires any person who becomes a specified agent, or who is a mortgagee in possession carrying on a taxable activity of a mortgagor, to notify the Commissioner within 21 days of this event. The person must also notify the Commissioner of the date (as relevant) of the:
- death;
 - liquidation;
 - receivership;
 - voluntary administration;
 - bankruptcy; or
 - mortgagee's taking possession of the land or other property.
30. Where a person becomes otherwise "incapacitated" (within the definition of "specified agent"), the specified agent must notify the Commissioner of the nature of the incapacity and the date on which it began.

Other relevant provisions

31. Sections 15E(3) and 15E(4) provide a special rule for the early end of a taxable period when a natural person dies or is made bankrupt (section 15E(3)(a)) or a company goes into liquidation or receivership (section 15E(3)(b)). Where such an event occurs the date of the event is treated as the end of the person's taxable period.
32. A specified agent who sells a taxable activity of an incapacitated person may be able to zero-rate the supply as the supply of a going concern (section 11(1)(m)) or, if the supply wholly or partly consists of land, as a supply of land (section 11(1)(mb)). To do so, they would need to meet the specific requirements of whichever of those provisions is relevant each of those provisions.

Examples

33. The following examples illustrate the application of section 58 discussed above.

Example 1: Notification requirement

Mina owns and runs a sports memorabilia store as a sole trader, for which she is GST registered. In April 2022 Mina dies after a short illness. Her only child, Carlos, is her

personal representative and decides to keep running the store for the time being, originally as a specified agent “in the stead of” Mina, and later as Mina’s personal representative after being granted probate of her will.

Carlos is the specified agent of an incapacitated person (Mina) and notifies the Commissioner of this within 21 days of becoming a specified agent, as section 58(3) requires. Carlos is treated as a registered person in respect of the sports memorabilia taxable activity. From that time onwards he is responsible for filing GST returns and paying GST.

Example 2: Before the specified agency period

Rio and Vida Limited operated as a security company. On 21 May 2022 the company went into liquidation and Edwin was appointed as liquidator. Edwin discovers that the company’s GST systems have been poorly managed, and some GST input tax has not been claimed in the previous taxable periods when it should have been.

Edwin is entitled, under section 58(1C), to deduct the input tax that relates to supplies made before the agency period began.

As a result of going into liquidation Rio and Vida Limited’s taxable period came to an end on 21 May 2022 (section 15E(4)), whereas it would not have ended until 30 June 2022 if the liquidation had not occurred. Edwin will need to file GST returns for the period from 21 May 2022 but is not responsible for Rio and Vida Limited’s shortened taxable period from 1 May 2022 to 21 May 2022 (although he may choose to file GST returns for the shortened period subject to any other arrangements that may be in place).

Example 3: Bankruptcy scenario 1 – bankrupt operates taxable activity with the consent of the Official Assignee

Patrice runs a childcare business as a sole trader and is registered for GST. Patrice is adjudicated bankrupt on 7 July 2022. The Official Assignee is administering the bankruptcy. All of Patrice’s property has been vested in the Official Assignee (sections 101 and 102 of the IA 2006). Patrice asks the Official Assignee for consent to continue to operate the business/taxable activity. The Official Assignee agrees but on the condition that Patrice agrees to file GST returns and pay GST in respect of the taxable activity.

In such circumstances the Official Assignee is not a specified agent, and Patrice is still the registered person in respect of the taxable activity with all the associated GST obligations.

Example 4: Bankruptcy scenario 2 – the Official Assignee conducts the bankrupt's business

The same facts of the bankruptcy apply as in Example 3, but here the Official Assignee turns down Patrice's request to continue to operate the business. Instead, the Official Assignee identifies a potential buyer, Scholes and Hargreaves Limited, and decides to carry on Patrice's business itself based on the reasoning that doing so will be necessary or advantageous in order to dispose of it to the buyer (Schedule 1(i) of the IA 2006). In such circumstances the Official Assignee will be a specified agent of an incapacitated person and will have GST obligations for the agency period, which will end with the sale to Scholes and Hargreaves Limited.

Example 5: Receiver carrying on part of an incapacitated person's taxable activity

Anderson Limited is GST registered and conducts a variety of business activities, including running a gym. Ryan has lent money to Anderson Limited in relation to the purchase of gym equipment and has a general security agreement (GSA) over the equipment and other property of the gym. Anderson Limited is in default under the loan and Ryan exercises her power to appoint a receiver, Luis. Luis only takes over the business of the gym; the remainder of Anderson Limited's activities remain under its control.

Anderson Limited is an incapacitated person as it has gone into receivership. Luis is a specified agent as he is carrying on a taxable activity as receiver of an incapacitated person. However, under section 58(1B) Luis is only treated as being a registered person carrying on the taxable activity of Anderson Limited in respect of the gym and not the other parts of Anderson Limited's taxable activity.

Example 6: Receiver and liquidator both carrying on part of an incapacitated person's taxable activity

Following on from Example 5, Anderson Limited's financial woes continue and a liquidator, Fletch, is appointed to protect and realise assets not subject to the GSA being administered by the receiver (Luis). Fletch is also a specified agent in respect of part of the incapacitated person's taxable activity. Fletch as liquidator and Luis as receiver are each responsible as specified agents for the supplies made and received in respect of their separate parts of the incapacitated person's taxable activity, pursuant to the rule in section 58(1B).

Example 7: Receiver and liquidator are both appointed but the receiver is carrying on the whole of the incapacitated person's taxable activity

Terry Limited is a GST registered company that is in financial distress. Pursuant to a GSA a receiver, Park, is appointed and, in fulfilling her role as a receiver, is authorised to carry on Terry Limited's taxable activity (business). At the same time a liquidator, Shea, is appointed to, amongst other things, protect the interests of unsecured creditors. As Park is carrying on the whole of the incapacitated person's (Terry Limited's) taxable activity, the rule in section 58(1B) would not apply and instead the general rule in section 58(1A) applies to ensure that Park is responsible for all the GST obligations of the taxable activity during the agency period.

Example 8: Other incapacity

Cris operates a coffee cart as a sole trader and is a GST-registered person. Cris is involved in an accident on 15 August 2022 and is in a coma in hospital and incapacitated. Cris' immediate family agree that the best thing to do while Cris recovers is to invite Cris' best friend Carrick to take over running the coffee cart. Carrick agrees and operates the coffee cart soon after the date of the accident.

Carrick is the specified agent of Cris (an incapacitated person) and will have GST obligations for the agency period (from 15 August 2022) until Cris is no longer incapacitated and is able to operate the taxable activity again (or until Carrick is no longer the specified agent **or** until someone else carries on the taxable activity).

Example 9: Distribution of taxable activity

After a couple of months it is clear that Cris (from Example 8) will not be able to carry on the coffee cart business in the medium term. Carrick is asked to sell the business and finds a buyer in Wes. The sale of the taxable activity may be a zero-rated supply of a going concern under section 11(1)(m) assuming all the requirements of that provision are satisfied.

Example 10: Mortgagee in possession

Wayne operates a Christmas tree business on a plot of land that he bought with finance from Alex. Alex has a mortgage over the land. Wayne's business has struggled to the point that Alex has exercised the right as mortgagee to take possession of the land and other property associated with the business.

Alex advises the Commissioner of the fact that Alex is now carrying on the taxable activity that Wayne previously carried on. Alex gives this notification within 21 days of taking over Wayne's taxable activity. The Commissioner exercises the discretion in section 58(2) to deem Alex to be a registered person in respect of the taxable activity from the date Alex took possession until the date Alex is no longer in possession. Wayne is no longer treated as the registered person in respect of this taxable activity.

References

Legislative references

Goods and Services Tax Act 1985

11(1)(m), 11(1)(mb), 15E, 46(7), 58, 60

Insolvency Act 2006

101, 102, 149; Schedule 1(i)

About this document

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