

GIR/respresentatives-incapacitated-entities-Ch5 -

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Representatives of incapacitated entities

This issues register, originally published on our main website, provides guidance on issues identified during past consultation with industry participants.

Issues in this register that are a public ruling can now be found in the *Public Rulings* section of this Legal Database.

Issues in this register that have not been labelled as public rulings, constitute written guidance. We are committed to providing you with accurate, consistent and clear information to help you understand your rights and entitlements and meet your obligations.

If you follow our information on these issues and it turns out to be incorrect, or it is misleading and you make a mistake as a result, we must still apply the law correctly. If that means you owe us money, we must ask you to pay it but we will not charge you a penalty. Also, if you acted reasonably and in good faith we will not charge you interest. If correcting the mistake means we owe you money, we will pay it to you. We will also pay you any interest you are entitled to.

If you feel that the guidance in this issues register does not fully cover your circumstances, or you are unsure how it applies to you, you can seek further assistance from us.

Issues register

On 4 December 2009, the Tax Laws Amendment (2009 Measures No.5) Bill 2009 was enacted to replace Division 147 of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) with Division 58.

Amendments effective from 4 December 2009

Division 58 also introduces new obligations on representatives including:

- If directed by the Commissioner, a representative of an incapacitated entity must give to the Commissioner a GST return for a tax period applying to the incapacitated entity if the incapacitated entity has failed to give such a return [section 58-50].
- If a representative becomes aware, or could reasonably be expected to have become aware of, any increasing adjustments or GST liability that an incapacitated entity has, and the amount of GST or increasing adjustment has not been reported in a GST return, the representative must notify the Commissioner of the amount of GST or increasing adjustment [section 58-60].

This register has been updated to provide responses to key questions relating to the operation of Division 58. The following abbreviations are used throughout the log:

- ABN refers to Australian Business Number
- Bankruptcy Act refers to the *Bankruptcy Act 1966*
- BAS refers to Business activity statement
- CAC refers to client activity centre
- Corporations Act refers to the Corporations Act 2001
- GST Act refers to the *A New Tax System (Goods and Services Tax) Act 1999*

- GST Regulations refer to the *A New Tax System (Goods and Services Tax) Regulations 1999*
- ITAA 1936 refers to the *Income Tax Assessment Act 1936*
- TAA refers to the *Taxation Administration Act 1953*.

All legislative references in the issue log are to the GST Act unless otherwise specified.

Amendments effective from 1 July 2000

Briefly, the key provisions of Division 58 are:

- A supply, acquisition or importation by a representative, in its capacity as a representative, is taken, for GST purposes, to be a supply, acquisition or importation of the incapacitated entity [section 58-5].
- However, the representative (and not the incapacitated entity) is liable for or entitled to certain GST consequences that arise from a supply, acquisition or importation or related acts or omissions during the representative's appointment [section 58-10].

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28/06/2010	7.2. What information needs to be provided to meet the requirements of notifying the Australian Taxation Office (ATO) of a GST liability or an increasing adjustment (under section 58-60)?
28/06/2010	7.3. When should the notification of GST liability or increasing adjustments under section 58-60 be made?

1 Basic concepts

1.1. Who is a representative under Division 58?

Non-interpretative – straight application of the law

Division 58 applies to representatives of incapacitated entities. A representative is defined in the GST dictionary to be either of the following:

- a trustee in bankruptcy
- a liquidator
- a receiver
- a controller within the meaning of section 9 of the Corporations Act
- an administrator appointed under Division 2 of Part 5.3A of the Corporations Act
- a person appointed or authorised under an Australian law to manage the affairs of an entity because it is unable to pay all of its debts as and when they become due and payable
- an administrator of a deed of company arrangement executed by the entity.

'Liquidator' has the meaning given by subsection 6(1) of the ITAA 1936. It means the person who, whether or not appointed as liquidator, is the person required by law to carry out the winding-up of a company.

We consider that the term 'receiver' in this definition includes a receiver and manager.

Special rules prevent Division 58 applying to the extent that the representative is a creditor of the incapacitated entity. An example of this is a mortgagee in possession of the entity's property who is not a representative of the entity for any other reason.

In these circumstances, the mortgagee – in its own right – will register for an ABN, TFN and GST, if required. This means the mortgagee – in its own right – will account for GST for the property and any other tax liabilities.

1.2. Who is an incapacitated entity under Division 58?

Non-interpretative – straight application of the law

The GST dictionary defines an 'incapacitated entity' to mean one of the following:

- an individual who is a bankrupt
- an entity that is in liquidation or receivership
- an entity that has a representative.

2 Registration requirements

2.1. What are the registration and notification requirements for a representative upon appointment under the GST Act?

Non-interpretative – straight application of the law

Under section 58-20, a representative of an incapacitated entity is required to be registered in that capacity if the incapacitated entity is registered or required to be registered. Note that this section has effect despite what is said in section 23-5 about who is required to be registered. Section 25-1 provides that you must apply, in the approved form, to be registered within 21 days after becoming required to be registered.

Subdivisions 260-B and 260-C of Schedule 1 to the TAA require a liquidator and receiver respectively to notify the Commissioner of Taxation of their appointment within 14 days. This notification is in addition to the obligations under Division 58.

When the representative ceases to be a representative of the incapacitated entity, they must notify the Commissioner in an approved form within 21 days after ceasing to be the representative of the incapacitated entity. The Commissioner will then cancel the representative's registration.

See also:

- [Appointment or cessation of a representative of an incapacitated entity](#)

2.2. Is a representative of an incapacitated entity who is appointed over only part of the assets required to register under section 58-20?

Non-interpretative – straight application of the law

Section 58-20 applies to a representative that is appointed over only part of the assets of an incapacitated entity.

Section 58-20 states that a representative of an incapacitated entity is required to be registered in that capacity if the incapacitated entity is registered or required to be registered.

There is no requirement under the GST legislation for a representative to have control over all the assets of the entity.

If more than one representative is appointed over the assets of the incapacitated entity, each representative will be required to register under section 58-20 if the incapacitated entity is registered or required to be registered.

2.3. Under Division 58, a representative of an incapacitated entity may be required to be registered. Upon registration, is the representative issued with a new ABN, or will the existing ABN of the incapacitated entity be used?

Non-interpretative

For all representatives that are not trustees in bankruptcy

Once a representative of an incapacitated entity registers for GST, the Commissioner (in his capacity as Registrar for the ABN) will allow the representative to use the incapacitated entity's existing ABN for transactions conducted in its capacity as the representative of the incapacitated entity.

We will set up a new running balance account under the incapacitated entity's ABN for each representative (as required) to cover post appointment liabilities and entitlements. These accounts are called Client Activity Centres (CACs) and each CAC created will be differentiated by a numerical suffix following the ABN, for example 123 456 789/1 for the

incapacitated entity, 123 456 789/2 for the receiver and 123 456 789/3 for the provisional liquidator.

For representatives that are trustees in bankruptcy

For trustee appointments under the Bankruptcy Act (this term includes trustees of bankrupt estates and controlling trustees under Part X), the trustee will need to apply for a separate ABN and register for GST, in the normal manner, in respect of each appointment as trustee under the Bankruptcy Act. This new ABN will be used for all matters arising under the administration.

Apply for an ABN and GST registration:

- online at business.gov.au
- using the [Practitioner lodgment service \(PLS\)](#)
- or order a paper copy of The ABN and GST registration form, NAT 2939 by visiting [Order ATO publications](#)

When completing the ABN applications, trustees should tick the 'Fixed Trust' box. At attachment A, the trustee should enter its own name and TFN. The registration process will generate a new ABN, TFN and GST role for the administration.

3 Tax periods

3.1. What is the applicable tax period for the representative upon their appointment?

Non-interpretative – straight application of the law

Under section 58-35, the tax periods applying to the incapacitated entity also apply to the representative.

The representative's first tax period as a representative commences on the day that they become a representative of the incapacitated entity. Similarly, the representative's concluding tax period ends at the end of the day on which the representative ceases to be a representative of the incapacitated entity.

3.2. What happens to the current tax period of the incapacitated entity when a representative is appointed?

Non-interpretative – straight application of the law

Section 27-39 provides that the tax period applying to an incapacitated entity at the time it becomes incapacitated (called the first tax period), ends at the end of the day before the entity became incapacitated.

The next tax period starts on the day after the first tax period ends and concludes when the first tax period would have ended. Section 27-39 provides a mechanism to ensure that GST consequences flowing from pre and post-appointment transactions can be separated.

4 Joint and several liability

4.1. If there are two or more representatives of the same incapacitated entity at the same time, are they jointly and severally liable for GST payable in their capacities as representatives of the same incapacitated entity?

The content for this issue is a public ruling for the purposes of the *Taxation Administration Act 1953* and can be found [here](#).

5 In-specie distribution

5.1. Is an in-specie distribution made from a representative to a shareholder a taxable supply?

The content for this issue is a public ruling for the purposes of the *Taxation Administration Act 1953* and can be found [here](#).

6 Tax invoice

6.1. What name should appear on tax invoices issued to or by the representative so that they meet the requirements of the GST law?

For a tax invoice to be valid it must satisfy subsection 29-70(1). Subsection 29-70 (1) also applies to a recipient created tax invoice.

A tax invoice issued by a representative on behalf of the incapacitated entity, must satisfy the information requirements of the GST legislation for the document to be a valid tax invoice.

A representative will be unable to claim input tax credits for creditable acquisitions if the representative does not hold a valid tax invoice for the creditable acquisition.

Note: For acquisitions less than \$82.50, a representative does not need to hold a tax invoice to attribute input tax credits to a tax period (subsection 29-80(1)). A tax invoice is also not required in circumstances of a kind determined in writing by the Commissioner as per subsection 29-10(3).

A tax invoice must, amongst other things, contain enough information to enable the identity and ABN of the supplier to be clearly ascertained (subparagraph 29-70(1)(c)(i)).

Where the total amount payable for the supply to which a tax invoice relates is \$1,000 or more, or if the document was issued by the recipient, subparagraph 29-70(1)(c)(ii) requires the tax invoice to contain sufficient information to enable the recipient's identity or the recipient's ABN to be clearly ascertained.

Goods and Services Tax Ruling [GSTR 2013/1](#) provides further guidance on this requirement. It states, at paragraphs 21 and 22:

21. A tax invoice must include information to establish the identity of the supplier, and the recipient where applicable. Information sufficient enough to identify the supplier or recipient includes, but is not limited to, the legal name of the entity or the registered business name.

22. A builder's registration number or licence number is insufficient to identify the supplier, or where applicable the recipient.

Subsection 58-5(1) provides that any supply, acquisition or importation by an entity in the capacity of a representative of an incapacitated entity is taken to be a supply, acquisition or importation by the incapacitated entity.

Therefore, the identity of the incapacitated entity must be clearly ascertainable from the document.

See also:

- [GSTR 2013/1 – Goods and service tax: tax invoices](#)

7 GST liability and adjustment notification requirements

7.1. Under what circumstances is a representative of an incapacitated entity required to notify the Commissioner of the liability or adjustment under section 58-60?

Non-interpretative – straight application of the law

Subsection 58-60(1) provides that a representative must notify the Commissioner if they become aware or could reasonably be expected to become aware of:

- a GST liability or an increasing adjustment that the incapacitated entity has
- such liability or adjustment has not been taken into account in any BAS that has been lodged
- there was no previous notification of the liability, or adjustment, under this section.

The representative is required to notify the Commissioner of such amounts no later than the day prior to declaring a dividend to unsecured creditors. The representative is not required to notify under section 58-60 if the representative is a representative of a kind that does not have the capacity to declare dividends to unsecured creditors (for example a receiver).

The notification requirement under section 58-60 does not determine whether a representative has a GST liability or increasing adjustment. Section 58-10 is the provision that stipulates the circumstances under which a representative is liable for any GST, entitled to any input tax credit or has any adjustment.

If the representative is not liable for the GST liability or increasing adjustment under section 58-10, then the representative is still not liable for such amounts whether or not the representative notifies the Commissioner of the GST liability or increasing adjustment. However, if a representative does not comply with section 58-60 an administrative penalty may arise under section 286-75 of Schedule 1 to the TAA.

7.2. What information needs to be provided to meet the requirements of notifying the ATO of a GST liability or an increasing adjustment (under section 58-60)?

Non-interpretative

A written notice with the following information will satisfy the requirements for a notification under section 58-60:

- the name and ABN of the incapacitated entity
- the name and ABN (if different from the incapacitated entity) of the representative
- the date of the representative's appointment
- the amount of the GST liability or increasing adjustment and a brief explanation of what the GST liability/adjustment (or adjustments) relates to
- where available, the tax period (or periods) to which the GST liability or increasing adjustment relates; and
- a declaration that the information provided is true and correct.

The notification should be forwarded to:

Australian Taxation Office

PO Box 9003

PENRITH NSW 2740

Please note that notification of these types of liabilities and adjustments should not be reported on the business activity statement of either the representative or the incapacitated entity.

7.3. When should the notification of GST liability or increasing adjustments under section 58-60 be made?

Non-interpretative – straight application of the law

Subsection 58-60(2) stipulates that the representative must notify the Commissioner of a GST liability or increasing adjustment that an incapacitated entity has no later than the day before a dividend to unsecured creditors is declared.

In cases where there is more than one dividend to be paid to creditors, for example an interim dividend followed by a final dividend, notification will be required the day prior to the declaration of each dividend. Each successive notification will only need to notify relevant liabilities or adjustments that have not been included in prior notifications.

If a representative does not comply with section 58-60 an administrative penalty may arise under section 286-75 of Schedule 1 to the TAA for failing to lodge documents on time.

See also:

- Decision Impact Statement on the [PM Developments case](#)

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