

ICAEW TAX REPRESENTATION

TAXREP 43/11

INCAPACITATED PERSON – A MODERN DEFINITION

Comments submitted on 31 August 2011 by the Tax Faculty of the Institute of Chartered Accountants in England & Wales to HM Revenue & Customs in response to the consultation document *Incapacitated person – a modern definition* issued on 24 May 2011.

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INCAPACITATED PERSON – A MODERN DEFINITION

INTRODUCTION

1. In this document we present the comments of the Tax Faculty of the Institute of Chartered Accountants in England and Wales (ICAEW) on the consultation document *Incapacitated persons – a modern definition* (the condoc) issued by HM Revenue & Customs (HMRC) on 24 May 2011.
2. We are pleased to have the opportunity to respond to this consultation. We would be happy to discuss any aspect of our comments and to take part in all further consultations on this area.
3. Information about the Tax Faculty and the ICAEW is given below. We have also set out, in Appendix 1, the Tax Faculty's ten tenets for a better tax system, by which we benchmark proposals to change the tax system.

WHO WE ARE

4. The Institute operates under a Royal Charter, working in the public interest. Its regulation of its members, in particular its responsibilities in respect of auditors, is overseen by the Financial Reporting Council. As a world leading professional accountancy body, the Institute provides leadership and practical support to over 132,000 members in more than 160 countries, working with governments, regulators and industry in order to ensure the highest standards are maintained. The Institute is a founding member of the Global Accounting Alliance with over 775,000 members worldwide.
5. Our members provide financial knowledge and guidance based on the highest technical and ethical standards. They are trained to challenge people and organisations to think and act differently, to provide clarity and rigour, and so help create and sustain prosperity. The Institute ensures these skills are constantly developed, recognised and valued.
6. The Tax Faculty is the focus for tax within the Institute. It is responsible for technical tax submissions on behalf of the Institute as a whole and it also provides various tax services including the monthly newsletter *TAXline* to more than 11,000 members of the Institute who pay an additional subscription and a free weekly newswire.

KEY POINTS SUMMARY

7. We agree that the current definition of an incapacitated person in s 118, Taxes Management Act 1970 (TMA 1970) as 'any infant, person of unsound mind, lunatic, idiot or insane person' is outdated and inappropriate, and should be revised. We welcome the fact that HMRC is proposing to do this.
8. HMRC should take the opportunity for wider revisions, rather than attempting to keep within the scope of the existing s 118. The definition should reflect modern ideas of what constitutes mental incapacity.
9. The current s 118 definition brackets 'infants' with mentally incapacitated persons. It would be clearer if infants were separately defined, and the term 'minor' used rather than 'infant'.
10. HMRC should also re-draft s 72, TMA 1970, the section which s 118 supports. This section uses obsolete terminology for those who take on responsibility for the affairs of an incapacitated person. It should include correct current terminology.

11. Section 72 should also include a requirement for a person to confirm that they are taking on the responsibility for another person's tax affairs. This is so that the person taking on responsibility is aware of it and is clearly identifiable.
12. As well as clearer legislation, there should be much clearer guidance for both HMRC and the public about the situations in which one person can take on responsibility for another person's tax affairs.
13. We do not consider that HMRC's current approach to reasonable excuse deals adequately with situations of temporary or intermittent mental incapacity where responsibility for the person's tax affairs does not pass formally to someone else.
14. Any tax definition of mental incapacity should be in line with definitions under the general law. We consider that the definition in the Mental Capacity Act 2005 would be suitable.

RESPONSES TO SPECIFIC QUESTIONS

Q1 Are these principles correct and fair?

15. We agree with the first and third policy principles set out on page 7 of the condoc. We welcome the move to modernise the language used to define incapacitated persons.
16. However, we do not agree with the second principle. We see no reason to restrict the scope of any new definition to the same people as are covered by the current s 118, TMA 1970 definition. Indeed, it would be difficult to define the original scope, given that the meaning of some of these outmoded terms ('lunatic', 'idiot') is far from clear.
17. As well as re-stating the definition in modern language, HMRC should consider modern ideas of what constitutes incapacity and mental health, rather than those which prevailed when s 118 was drafted. Medical understanding of mental health issues has changed a lot since that time and the new definition should reflect that. It would also make sense for the definition to reflect existing definitions in mental health legislation rather than for the taxes acts to use something different.
18. We are concerned that any definition should take into account not only those with a permanent mental incapacity but also those for whom it is temporary, intermittent and/or recurring. We also wonder how the definition will apply to those with learning disabilities.
19. We consider that in drafting a new definition HMRC should separate minors from those who are incapacitated by mental illness. Minors are 'incapacitated' only in the sense that they do not have the legal capacity to contract, which is different from a person who by reason of illness is incapable of dealing with their tax affairs. Minors should be specifically defined. The term 'minor' is preferable to the current term 'infant'.
20. HMRC should also revise not just s 118 but the sections which it supports, principally s 72, TMA 1970, as discussed below.
21. Although we agree with the third policy objective, we do not consider that HMRC's current practice with regard to the reasonable excuse provisions adequately caters for those with mental health issues, especially if the problem is intermittent or recurring.

Q2 Who should be the recipient of the obligations and rights that are transferred from the incapacitated person?

22. This question prompts a review of s 72, TMA 1970. This section, like s 118, includes outmoded or obsolete terminology: 'trustee, guardian, tutor, curator or committee'.

23. We have recommended that there should be two new definitions to replace those in s 118: one for minors and one for incapacitated persons. It follows that there should be separate definitions of the people who will assume responsibility for the affairs of each of these two categories.
24. One important reason for revising s 72 is that, where the conditions of the definition in s 118 are met, the responsibility is automatically passed to someone else. It needs to be very clear who that person is.
25. For those permanently incapacitated, the responsibilities will generally be passed in law to someone else, either under an Enduring or Lasting Power of Attorney or to someone appointed by the Court of Protection. The tax legislation should use the current terminology.
26. A question that arises in relation to s 72 is: do the 'trustees, guardians, etc' know who they are and realise that responsibility for another person's tax affairs has been passed to them? We recommend that this section should include a requirement for the person to confirm that they agree to take on responsibility for another person's tax in the terms set out in this section.
27. For those with intermittent or temporary capacity the situation is more difficult, as responsibility will not necessarily be formally passed to anyone else, though the person may be helped by family, friends or pro bono advisers. We note from para 3.2.13 that HMRC is working with voluntary sector bodies to make informal support easier – we welcome this but have no particular suggestions in this regard.
28. As well as clearer legislation, we recommend that there should be much clearer guidance for both HMRC and the public about the situations in which one person can take on responsibility for another person's tax affairs or sign their tax returns for them. The guidance should use current terminology and explain clearly the role and responsibilities of the person who will be dealing with the tax affairs.

Q3 Do you agree that the current practice in relation to taxation obligations and mental incapacity is working satisfactorily? If not, please give examples to illustrate the difficulties you see. HMRC would also welcome respondents' views on any of its existing guidance and how it could be improved.

29. We have already commented above on the need for clearer definitions and better guidance about the classes of person who will take on responsibility for another person's tax affairs.
30. Our members have had mixed experiences in dealing with HMRC when a client has temporary capacity. We have a particular concern about this situation; we do not agree that the reasonable excuse provisions as applied by HMRC are adequate for those for whom incapacity is temporary or intermittent. Many individuals will suffer from a temporary incapacity and need to be given time to fulfil their obligations, assuming that responsibility for their affairs is unlikely to have passed formally to someone else. In the example given at para 3.2.8 an individual being treated with PTSD is likely to have fluctuating periods of incapacity and the time limits set for compliance need to be flexible without exacerbating the mental health problems of the individual. We question whether the reasonable excuse provisions allow for such flexibility.
31. The guidance on reasonable excuse in the *Compliance Handbook* at CH71580 notes that the onus is on the taxpayer to satisfy the relevant officer that they qualify. Those with a mental incapacity may be unable to adequately engage with HMRC so that their situation can be understood. We would also make reference to the problems that all taxpayers currently have in contacting the relevant officer within HMRC. The Treasury Select Committee in its recent report on the *Administration and effectiveness of HM Revenue and Customs* noted service problems such as the length of time HMRC takes to answer and respond to telephone calls

and the fact that post remains unanswered for long periods, and our members' experience bears this out. People with mental health problems may be particularly ill-equipped to cope with this sort of bureaucratic difficulty.

32. HMRC interprets reasonable excuse as 'where some unforeseeable and exceptional event beyond your control has prevented you from filing your return on time' (public guidance at www.hmrc.gov.uk/online/excuse-missed-deadline.htm). This does not allow for fluctuating mental conditions, where problems are recurrent and not a one-off event, and where the person knows that they are likely to have future episodes so these cannot be 'unforeseeable and exceptional' events. Will HMRC accept that a reasonable excuse exists in such situations?
33. We consider that the guidance on reasonable excuse should be expanded to deal specifically with mental incapacity, including temporary or recurring incapacity, taking into account all the issues we have discussed above.
34. We also recommend that there should be officers in HMRC who are given specialist training in this regard and who can be contacted by colleagues in the event that a taxpayer has a mental incapacity.

Q4 Are there any other legal considerations that need to be taken into account if the current definition is changed?

35. We have no comment on this.

Q5 Do you agree that the current definition is no longer suitable or do you think there are reasons for leaving it as it is?

36. We agree that the current definition in s 118 is no longer suitable, it is offensive and stigmatises those with mental health problems.
37. As noted above, we also consider that the legislation should deal with minors separately from people who are incapacitated.

Q6 Are there concepts in general mental health legislation such as the MCA or MHA that would be appropriate for use in a new definition?

38. Any tax definition should be in line with definitions under general law on mental capacity.
39. The definition of incapacity under the Mental Capacity Act 2005 (MCA) seems to us to be a workable definition to accept in that it notes that an individual lacks capacity to do particular things at particular times. It is thus time-specific and takes account of changing circumstances. We note that the principal objection noted in the condoc is that it might be administratively burdensome for HMRC to operate. We do not feel that this is an adequate reason to discriminate against any taxpayer. In any event the reasonable excuse provisions currently require HMRC to assess the capacity of an individual at various times if they are unable to comply with their obligations.
40. However, we are not experts on mental health issues and are happy to leave more detailed to comments in definitions to voluntary sector bodies such as the Low Incomes Tax Reform Group, Mind and Citizens Advice, whom we understand to have responded to this consultation.

Q7 What terms or phrases might a new stand-alone definition include to achieve the policy aims outlined at para 3.2.3 above?

41. We have no further comments on this question.

Q8 Would deleting 'idiot' and 'lunatic' deliver a definition of incapacitated person that meets our policy objectives?

42. We do not consider that deleting these two parts of the definition meets the policy objectives, in particular the first objective outlined.

Q9 Is there a hybrid solution which would better achieve the policy aims than a new stand-alone definition?

43. We have no comment on this question.

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APPENDIX 1

THE TAX FACULTY'S TEN TENETS FOR A BETTER TAX SYSTEM

The tax system should be:

1. Statutory: tax legislation should be enacted by statute and subject to proper democratic scrutiny by Parliament.
2. Certain: in virtually all circumstances the application of the tax rules should be certain. It should not normally be necessary for anyone to resort to the courts in order to resolve how the rules operate in relation to his or her tax affairs.
3. Simple: the tax rules should aim to be simple, understandable and clear in their objectives.
4. Easy to collect and to calculate: a person's tax liability should be easy to calculate and straightforward and cheap to collect.
5. Properly targeted: when anti-avoidance legislation is passed, due regard should be had to maintaining the simplicity and certainty of the tax system by targeting it to close specific loopholes.
6. Constant: Changes to the underlying rules should be kept to a minimum. There should be a justifiable economic and/or social basis for any change to the tax rules and this justification should be made public and the underlying policy made clear.
7. Subject to proper consultation: other than in exceptional circumstances, the Government should allow adequate time for both the drafting of tax legislation and full consultation on it.
8. Regularly reviewed: the tax rules should be subject to a regular public review to determine their continuing relevance and whether their original justification has been realised. If a tax rule is no longer relevant, then it should be repealed.
9. Fair and reasonable: the revenue authorities have a duty to exercise their powers reasonably. There should be a right of appeal to an independent tribunal against all their decisions.
10. Competitive: tax rules and rates should be framed so as to encourage investment, capital and trade in and with the UK.

These are explained in more detail in our discussion document published in October 1999 as TAXGUIDE 4/99.