FTD 2010/1 - Fuel tax: apportionment may apply when determining total fuel tax credits in calculating the net fuel amount under section 60-5 of the Fuel Tax Act 2006

There is a Compendium for this document: **FTD 2010/1EC** .

From 1 July 2015, the term 'Australia' is replaced in nearly all instances within the Fuel Tax legislation with the term 'indirect tax zone' by the *Tax and Superannuation Laws Amendment (2015 Measures No. 1) Act 2015*. The scope of the new term, however, remains the same as the now repealed definition of 'Australia' used in those Acts. This change was made for consistency of terminology across the tax legislation, with no change in policy or legal effect. For readability and other reasons, where the term 'Australia' is used in this document, it is referring to the 'indirect tax zone' as defined in subsection 195-1 of the *A New Tax System (Goods and Services Tax) Act 1999*.

This document has changed over time. This is a consolidated version of the ruling which was published on *30 October 2019*

Fuel Tax Determination

Fuel tax: apportionment may apply when determining total fuel tax credits in calculating the net fuel amount under section 60-5 of the *Fuel Tax Act 2006*

From 1 July 2015, the term 'Australia' is replaced in nearly all instances within the Fuel Tax legislation with the term 'indirect tax zone' by the *Tax and Superannuation Laws Amendment (2015 Measures No. 1) Act 2015*. The scope of the new term, however, remains the same as the now repealed definition of 'Australia' used in those Acts. This change was made for consistency of terminology across the tax legislation, with no change in policy or legal effect. For readability and other reasons, where the term 'Australia' is used in this document, it is referring to the 'indirect tax zone' as defined in subsection 195-1 of the *A New Tax System (Goods and Services Tax) Act 1999*.

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If you rely on this ruling, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided that the Commissioner is not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

[**Note:** This is a consolidated version of this document. Refer to the Legal database (ato.gov.au/law) to check its currency and to view the details of all changes.]

Ruling

1. Section 60-5 of the *Fuel Tax Act 2006* (FT Act)[1] provides that in working out your net fuel amount your total fuel tax credits is the sum of all fuel tax credits to which you are entitled that are attributable to the period.

2. The sum of all fuel tax credits to which you are entitled is determined with reference to Divisions 41, 42 and 43.

3. You are entitled to a fuel tax credit to the extent that you acquire taxable fuel:

[1] All legislative references in this Determination are to the FT Act unless indicated otherwise.
[2] [Omitted.]

- for use in carrying on your enterprise for the purposes of section 41-5;[3]
- to make a taxable supply or package in accordance with the requirements of section 41-10; or
- for use in generating electricity for domestic use under Division 42.

4. The amount of your fuel tax credit entitlement may be reduced by the road user charge.[4]

5. The use of the phrase 'to the extent that' in the FT Act contemplates apportionment, in the case of:

- section 41-5 between a use that entitles you to a fuel tax credit and one that does not, and between uses that give rise to different rates of fuel tax credit, taking into account the operation of Division 41
- section 41-10 between a use that entitles you to a fuel tax credit and one that does not;
- section 42-5 between a use that entitles you to a fuel tax credit and one that does not; and
- subsection 43-10(3) between a use that reduces your fuel tax credit amount by the road user charge and one that does not.

Apportionment to work out the sum of all fuel tax credits to which you are entitled

6. For the purposes of the provisions outlined in paragraph 5 of this Determination and section 60-5, the Commissioner's view is that the 'fair and reasonable' principle applies in determining the extent of your entitlement to a fuel tax credit and/or the amount of your fuel tax credit.

7. You can use any apportionment method that is fair and reasonable in your circumstances to determine the fuel tax credit that is available for the taxable fuel that you acquire.

8. Where there is more than one fair and reasonable way of apportioning, you may choose any method as long as it is fair and reasonable in your circumstances.

Need for separate calculations

9. In working out your net fuel amount, section 60-5 requires the sum of all fuel tax credits to which you are entitled that are attributable to the period to be calculated.

10. You are generally required to perform separate calculations so that you are applying a fair and reasonable basis of apportionment where there is:

- one or more type of taxable fuel for use in multiple activities that either attract no fuel tax credit, a full fuel tax credit or the amount of your fuel tax credit entitlement is reduced by the road user charge; or
- more than one type of taxable fuel for use in the same activity.

[3] This includes taking into account the operation of Division 41.
[4] See Division 43.
[5] [Omitted.]
[6] [Omitted.]

11. However, in your particular circumstances, you may find it fair and reasonable to perform a single calculation. For example, if the same type of equipment uses two types of taxable fuel and has the same average hourly consumption for both types of taxable fuel, or if the same type of equipment uses two types of taxable fuel and is used for the same activity, the same apportionment method can be applied to the quantities of both taxable fuels acquired for use in the equipment.

Example 1 – acquiring one fuel for use in multiple activities requiring separate calculations

12. *Whelan Enterprises Ltd, which is registered for GST, acquires diesel fuel in bulk for use in its business during October 2018. The diesel fuel is acquired for three uses: Use in a generator to generate electricity, use in a forklift to load goods onto the trucks in the warehouse, and use in trucks with a gross vehicle mass of more than 4.5 tonnes to deliver goods via public roads. The entity is entitled to a full fuel tax credit for the first two uses and a fuel tax credit reduced by the road user charge for the third use.*

13. *The activities attract different rates of fuel tax credits. To work out its entitlement to fuel tax credits, Whelan Enterprises Ltd should separately calculate the quantity of diesel fuel acquired for the first two uses and the third.*

Example 2 – acquiring three types of fuel for use in multiple activities requiring separate calculations

14. *Following on from Example 1 of this Determination, Whelan Enterprises Ltd decides to replace its vehicles and equipment to improve fuel efficiency. Some vehicles and equipment use different types of fuel (non-taxable fuel and petrol). During the transition to replace the vehicles and equipment, fuel is used in both old and new vehicles and equipment which are used in the activities described in paragraph 12 in Example 1 of this Determination.*

15. *Whelan Enterprises Ltd is not entitled to a fuel tax credit for non-taxable fuel acquired for use in the vehicles and equipment. As such, Whelan Enterprises Ltd excludes those vehicles/equipment that run on non-taxable fuel from the fuel tax credit calculation.*

16. *Depending on the activities, Whelan Enterprises Ltd is entitled to a full fuel tax credit or a credit reduced by the road user charge for the diesel fuel and petrol acquired for use in the vehicles and equipment. Similar to the approach in Example 1 of this Determination, as the activities attract different rates, Whelan Enterprises Ltd should separately calculate the quantity of fuel for use in the generator/forklifts and trucks.*

17. *However, due to Whelan Enterprises Ltd having old and new vehicles and equipment, Whelan should also have regard to the inherent difference in fuel efficiency offered by diesel fuel and petrol and that their older vehicles and equipment may not be as fuel efficient as their new vehicles and equipment. In considering these factors, Whelan Enterprises Ltd should determine whether these differences require separate calculations so that their apportionment of fuel use is fair and reasonable in their circumstances.*

[7] [Omitted.]

Example 3 – acquiring two types of fuel for use in the same activity not requiring separate calculations

18. *Vimes Company operates a mine site and uses petrol and diesel in four-wheel drives (light vehicles) for the same activity in its operation. Some light vehicles are used off public roads and others are used on public roads. Vimes Company has no entitlement to fuel tax credits for fuel used in its light vehicles while travelling on public roads. Vimes Company has a full fuel tax credit entitlement for fuel used in its light vehicles other than when travelling on public roads.*

19. *As similar types of vehicles are used for the same activity, Vimes Company may be able to apportion between eligible and ineligible diesel fuel and petrol use in the light vehicles even if the fuel consumption of the light vehicles differs between diesel fuel and petrol. For example, Vimes Company may establish that the light vehicles are used 90% off- public roads and 10% on-public roads, and therefore may use these figures to apportion between diesel fuel and petrol acquired for use in the light vehicles.*

Class of entities

20. This Determination applies to the class of entities who may be entitled to a fuel tax credit for taxable fuel that they acquire or manufacture in, or import into, Australia to the extent that they do so for use in carrying on an enterprise, to make a taxable supply or package, or for generating electricity for domestic use.

Previous Ruling

21. This Determination replaces Fuel Tax Determination FTD 2006/1 from its date of issue as a final Determination and FTD 2006/1 will be withdrawn with effect from that date. However, you can continue to rely on FTD 2006/1 until the date of issue of this Determination and until FTD 2006/1 is withdrawn.

Date of effect

22. This Determination applies from its date of issue.

Commissioner of Taxation
28 July 2010

Appendix 1 – Explanation

This Appendix is provided as information to help you understand how the Commissioner's view has been reached. It does not form part of the binding public ruling.

Background

23. In this Determination, unless otherwise stated:

- a reference to:
  - 'activity' is to be read in context of this Determination to cover:
  - 'eligible activity' which means an activity conducted in the course of carrying on an enterprise, to make a taxable supply or package, or generating electricity for domestic use, for which you have an entitlement to a fuel tax credit; and/or
  - 'ineligible activity' which means an activity conducted in the course of carrying on an enterprise, to make a taxable supply or package, or generating electricity for domestic use, for which you have no entitlement to a fuel tax credit;
  - 'acquire' is a reference to 'acquire, manufacture in, or import into Australia' in sections 41-5 ,41-10 and 42-5;
  - 'enterprise' is a reference to 'enterprise' as defined in section 110-5;[8]
  - 'taxable fuel' is a reference to 'taxable fuel' as defined in section 110-5 which means fuel in respect of which excise duty or customs duty is payable[9] not including fuel covered by Items 15, 20 or 21 of the Schedule to the *Excise Tariff Act 1921* or any imported goods that would be classified to Item 15 of the Schedule to the *Excise Tariff Act 1921* if the goods had been manufactured in Australia; and
- it is assumed that if you are entitled to a fuel tax credit, you meet the requirements that entitle you to the credit and are not disentitled by the disentitlement rules in the FT Act.[10]

Explanation

24. The FT Act provides that an entity is entitled to a fuel tax credit for taxable fuel to the extent that it is acquired for use or actually used in carrying on its enterprise, for taxable supply or packaging, or in generating electricity for domestic use. The amount of the fuel tax credit entitlement may be reduced by the road user charge.

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[8] Section 110-5 provides that enterprise has the meaning given by section 9-20 of *A New Tax System (Goods and Services Tax) Act 1999* and for a full explanation of the meaning of enterprise for the purposes of the FT Act see Fuel Tax Determination FTD 2006/3 *Fuel tax: what is an 'enterprise' for the purposes of the Fuel Tax Act 2006?*

[9] Under the *Excise Act 1901* and the *Excise Tariff Act 1921* or the *Customs Act 1901* and the *Customs Tariff Act 1995*.

[10] The disentitlement rules are set out in Subdivision 41-B.

The meaning of the phrase 'to the extent that'

25. Paragraph 2.86 of the Revised Explanatory Memorandum to the Fuel Tax Bill 2006 and the Fuel Tax (Consequential and Transitional Provisions) Bill 2006 explains that an entity needs to apportion fuel use between eligible and ineligible uses in calculating their fuel tax credit entitlement.

> 2.86 If a taxpayer acquires, manufactures or imports fuel for both eligible and ineligible activities, they will need to apportion the use of that fuel between eligible and ineligible uses to determine the amount of the fuel that is eligible for a fuel tax credit. Taxpayers may use the deductive or constructive methods of calculation to establish the amount of fuel eligible for a fuel tax credit depending on circumstances and pattern of fuel usage.

26. [Omitted.]

27. The Commissioner considers that where an entity is required to apportion the use of fuel between eligible and ineligible uses or multiple eligible uses, the use of the words 'to the extent that' in the provisions listed in paragraph 5 of this Determination, allows an entity to choose a method of apportionment subject to the fair and reasonable principle.

28. The principles to be applied in identifying situations where apportionment is appropriate in an income tax context, and the method to be employed where apportionment is required, were considered by the High Court in *Ronpibon Tin NL and Tongkah Compound NL v. Federal Commissioner of Taxation (Ronpibon Case).*[11] In that case, the High Court considered what parts of expenses incurred by a taxpayer were referable to gaining or producing assessable income. The High Court considered both the allocation of distinct expenditure to specific activities, and apportionment, and said:[12]

> … But the provision contained in s.51(1) [of the *Income Tax Assessment Act 1936*], as has already been said, contemplates apportionment. The question what expenditure is incurred in gaining or producing assessable income is reduced to a question of fact when once the legal standard or criterion is ascertained and understood. This is particularly true when the problem is to apportion outgoings which have a double aspect, outgoings that are in part attributable to the gaining of assessable income, and in part to some other end or activity. It is perhaps desirable to remark that there are at least two kinds of items of expenditure that require apportionment. One kind consists in undivided items of expenditure in respect of things or services of which distinct and severable parts are devoted to gaining or producing assessable income and distinct and severable parts to some other cause. In such cases it may be possible to divide the expenditure in accordance with the applications which have been made of the things or services. The other kind of apportionable items consists in those involving a single outlay or charge which serves both objects indifferently. Of this directors' fees may be an example. With the latter kind there must be some fair and reasonable assessment of the extent of the relation of the outlay to assessable income. It is an indiscriminate sum apportionable, but hardly capable of arithmetical or ratable division because it is common to both objects.
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> …The Court must make an apportionment which the facts of the particular case may seem to make just, and the facts of the present cases are rather special. In making the apportionment the peculiarities of the cases cannot be disregarded…The actual expenditure in gaining the assessable income, if and when ascertained, must be accepted. The problem is to ascertain it by an apportionment…The question of fact is therefore to make a fair appointment to each object of the companies' actual expenditure where items are not in themselves referable to one object or the other. But this must be done as a matter of fact and therefore not by this Full Court. It will be enough for this Court in answer to the

[11] (1949) 78 CLR 47.
[12] (1949) 78 CLR 47 pages 58-59.

question submitted in each case to make a declaration in accordance with the principles stated.

29. The High Court discussed apportionment between multiple purposes as well as exclusive allocation to specific purposes and the need for a fair and reasonable basis to determine the relevant extent of the outgoing, all of which depend on the facts of each case.

30. The Commissioner considers that the phrase 'to the extent that' in the FT Act incorporates the same requirement for apportionment on a fair and reasonable basis as under income tax law. The use of the terms 'extent' and 'to the extent that' in this context of the FT Act contemplates the apportionment of acquisitions of taxable fuel between multiple uses, as well as exclusive allocation based on type and use of taxable fuel. The Commissioner's view is that the 'fair and reasonable' principle applies equally to the choice of method for allocating or apportioning acquisitions in the fuel tax context.

31. Following the principles set out by the High Court in the *Ronpibon Case*,[13] an entity can use any method to apportion taxable fuel to take into account the requirements of the entitlement and calculation provisions, but that method needs to be fair and reasonable in the circumstances.

32. There may be more than one fair and reasonable basis of apportionment. It follows that the calculation of fuel tax credit entitlements cannot necessarily be carried out with absolute arithmetical precision. Rather, an entity is entitled to a fuel tax credit where the other requirements for entitlement are met and, to the extent that an apportionment is required, the amount arrived at is calculated by application of an apportionment method that is fair and reasonable in the circumstances.

33. It is not necessary for an apportionment method to track the intended use of every last drop of fuel. A method may be fair and reasonable without doing so provided that the application of the method reasonably reflects the extent to which taxable fuel is acquired for an eligible activity.

Approaches to apportionment

34. Under the FT Act, the entitlement to a fuel tax credit and the amount of fuel tax credit is determined under separate provisions.

35. An entitlement to a fuel tax credit arises under Division 41 or Division 42. The use of the phrase 'to the extent that' allows for apportionment of taxable fuel between a use that entitles you to a fuel tax credit and one that does not, and between uses that give rise to different rates of fuel tax credits.

36. Division 43 sets out the calculation of the amount of fuel tax credit entitlement. The calculation provisions are premised on the existence of a fuel tax credit entitlement. In calculating your fuel tax credit amount, subsection 43-10(3) require the amount of the fuel tax credit to be reduced to the extent the road user charge is applicable to the fuel.

37. The relevant apportionment under these provisions is therefore between a use which attracts a full fuel tax amount and a use that will require a reduction in the fuel tax credit amount.

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[13] (1949) 78 CLR 47 at 59 and 60.
[14] [Omitted.]

38. The Commissioner considers that the phrase 'to the extent that' in section 41-5 contemplates apportionment between uses that give rise to different rates of fuel tax credits. The amount of a fuel tax credit entitlement will be determined solely with reference to Division 43.

Need for separate calculations

39. To work out your net fuel amount, section 60-5 provides the following formula:

Total fuel tax	-	Total fuel tax credits	+	Total increasing fuel tax adjustments	-	Total decreasing fuel tax adjustments

40. Relevant to this discussion, is the element 'total fuel tax credits', being the sum of all fuel tax credits to which you are entitled that are attributable to the tax period or fuel tax return period. In the context of the operation of Divisions 41, 42 and 43, 'total fuel tax credits' for a particular period may comprise different types of fuel tax credits.

41. Thus, the reference to 'the sum of all fuel tax credits' indicates that you are generally required to perform separate calculations so that you are applying a fair and reasonable basis of apportionment where there is:

- one or more types of taxable fuel for use in multiple activities that either attract no fuel tax credit, a full fuel tax credit or the amount of your fuel tax credit entitlement is reduced by the road user charge; or
- more than one type of taxable fuel for use in the same activity.

42. However, in your particular circumstances, you may find it fair and reasonable to perform a single calculation. For example, if the same type of equipment uses two types of taxable fuel and has the same average hourly consumption for both types of taxable fuel, or if the same type of equipment uses two types of taxable fuel and is used for the same activity, the same apportionment method can be applied to the quantities of both taxable fuels acquired for use in the equipment.

[15] [Omitted.]
[16] [Omitted.]
[17] [Omitted.]

References

Previous draft:

FTD 2010/D1

Related Rulings/Determinations:

FTD 2006/3

Previous Rulings/Determinations:

FTD 2006/1

Legislative references:

- FTA 2006
- FTA 2006 Div 41
- FTA 2006 41-5
- FTA 2006 41-10
- FTA 2006 Subdiv 41-B
- FTA 2006 Div 42
- FTA 2006 42-5
- FTA 2006 Div 43
- FTA 2006 43-10(1)
- FTA 2006 43-10(3)
- FTA 2006 60-5
- FTA 2006 110-5
- Excise Tariff Act 1921
- Excise Tariff Act 1921 Sch Item 15
- Excise Tariff Act 1921 Sch Item 20
- Excise Tariff Act 1921 Sch Item 21
- ITAA 1936 51(1)
- ANTS(GST)A 1999 9-20
- Customs Act 1901
- Excise Act 1901
- Customs Tariff Act 1995
- EG(C)SA 2003
- TAA 1953

Case references:

- Ronpibon Tin NL and Tongkah Compound NL v. Federal Commissioner of Taxation (1949) 78 CLR 47

Other references:

- Revised Explanatory Memorandum to the Fuel Tax Bill 2006 and the Fuel Tax (Consequential and Transitional Provisions) Bill 2006

ATO references

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