PS LA 2012/3 - The ATO role in determining and applying quotas under the Excise Act 1901

Australian Government
Australian Taxation Office

Practice Statement Law Administration

PS LA 2012/3

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SUBJECT:	**The ATO role in determining and applying quotas under the *Excise Act 1901***
PURPOSE:	**To provide direction about the declaration of a period, the making of quota orders and associated matters under the *Excise Act 1901***

TABLE OF CONTENTS **Paragraph**

BACKGROUND

1. Section 54 of the *Excise Act 1901* (Excise Act) requires the licensed manufacturer or owner of excisable goods to pay duty on goods they enter for home consumption. Under section 59 of the Excise Act, the rate of duty that applies is the rate in force on the earlier of: the day the goods are delivered into home consumption under subsection 61C(2) of the Excise Act, or the day the duty is paid. This is subject to section 59A[1] of the Excise Act.

2. Section 59A of the Excise Act allows the Commissioner[2] to act to protect the revenue and prevent competitive advantages being obtained if people seek to reduce their duty liability by anticipating increases in the rate of excise duty.

3. The Commissioner has the discretion to declare that a period is a declared period during which quotas can be imposed. During a declared period, the Commissioner has the discretion to make a quota order that specifies the amount of excisable goods that a person may enter for home consumption at the prevailing rate of duty. If a person exceeds their quota amount during a declared period, the duty rate applicable to the excess is the rate in force on the day after the end of the declared period.[3] If the excise rate increases, they become liable to pay the increased rate for the goods that are in excess of their quota amount (excess goods).

SCOPE

4. This practice statement explains how the Commissioner administers quotas under the Excise Act.[4] It discusses:

   - when the Commissioner will consider declaring a declared period for quotas; and
   - the factors the Commissioner may take into account when declaring a declared period and making a quota order.

5. This practice statement provides guidelines on exercising the Commissioner's discretion to declare a declared period and to make a quota order under section 59A of the Excise Act. It also provides guidance on administrative aspects of quotas under the Excise Act. There is no intention to lay down conditions that may restrict the exercise of the Commissioner's discretion. Rather, the guidelines are provided to help tax officers in the exercise of the discretion.

STATEMENT

6. The Commissioner's discretion to impose quotas is intended to have an effect on the behaviour of people dealing with excisable goods. Because it can have an effect on the amount of duty payable, and therefore affect the operation of businesses, this discretion needs to be exercised with due care.

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[1] Section 59 of the Excise Act is also subject to section 59AA of the Excise Act but that is not relevant for this practice statement.

[2] Section 59A of the Excise Act uses the term 'CEO' and by definition in subsection 4(1) this is the Commissioner.

[3] Subsections 59A(6) and 59A(7) of the Excise Act.

[4] The ATO also administers the Australian Customs and Border Protection Services tobacco quotas under delegation from the Chief Executive Officer of Customs.

7. The imposition of quotas is a two step process:

- the Commissioner publishes a notice in the *Gazette* specifying that a particular period is a declared period and that another period is the base period;
- the Commissioner makes quota orders specifying the amount of quota for specific people for the declared period.

8. The Commissioner needs to be of the opinion that people are anticipating or may anticipate an increase in the rate of duty and, consequently, will enter for home consumption more excisable goods in a period than they otherwise would. This requires an objective assessment of the particular circumstances.

9. There are no specific statutory factors to take into account in forming an opinion and deciding to publish a notice in the *Gazette* declaring a declared period, but relevant factors may include:

- public statements or announced changes to Government policy;
- media speculation about excise rate rises;
- analysis of Consumer Price Index (CPI) forecasts, and comparison to the Reserve Bank of Australia (RBA) targeted inflation band;
- the size of any increase in the rate of duty that may be anticipated based on factors in the three points above;
- the manufacturing capacity and storage potential of persons subject to duty on excisable goods;
- trends indicating stockpiling amongst affected persons; and
- trends indicating unusual levels of clearances of excisable goods by affected persons.

10. To determine the amount of a person's quota the Commissioner must[5] consider:

- the quantity of the relevant goods the person has entered for home consumption in the base period;[6]
- the quantity of the relevant goods the person has entered for home consumption during any other period the Commissioner considers relevant;
- any other matters the Commissioner considers relevant.

11. As soon as practicable after making a quota order applicable to a person, the Commissioner must serve a copy of the quota order on that person.

12. A quota order can be for a specified quantity of the relevant goods or it can be for nil.

13. Officers must record when a quota order applicable to a person is served on, or otherwise brought to the attention of, that person.

[5] Subsection 59A(5) of the Excise Act.
[6] The base period is discussed further at paragraph 29.

14. If a person exceeds their quota amount during a declared period, the Commissioner has the right to require a security before passing an entry for home consumption.[7] The amount of a security that can be required is the amount of duty payable on the goods, or the part of the goods that are excess to the quota amount, on the day that they are entered.[8] Any security taken applies in addition to the duty that is payable on the goods. The Commissioner's practice concerning the taking of securities is explained at paragraph 46 of this practice statement.

15. At the end of the declared period, action may be necessary to protect the revenue and ensure payment of the correct duty on any excess goods. The specific action depends upon the circumstances of the anticipated increase and related declaration of the declared period.

16. The Commissioner can vary or revoke a quota order at any time before the later of:[9]

- the end of the declared period; or
- 60 days after the quota order is served on the person.[10]

17. Decisions about quota orders and variation of quota orders are reviewable decisions.[11] A person who is dissatisfied with a decision can object against the decision as set out in Part IVC of the *Taxation Administration Act 1953* (TAA).[12]

EXPLANATION

Recommending and declaring a declared period

18. The Commissioner declares a declared period (and makes quota orders) to protect the revenue and prevent people from obtaining competitive advantages as a result of duty increases. To declare a declared period, the Commissioner must form an opinion that an increase in duty is, or may be, anticipated and that this may cause more goods to be entered for home consumption than would otherwise have been the case. Where officers become aware that people may be anticipating an increase in duty, they should refer this to the appropriate risk area for consideration.

19. Any authorised delegate including: the Deputy Commissioner, a Senior Assistant Commissioner, or an Assistant Commissioner within the appropriate Business Line can make the declaration.[13] The declaration must be published in the *Gazette*.

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[7] Subsection 59A(8) of the Excise Act. See also guideline 2.21.1 of the Taxation Authorisation Guidelines for identification of the level of officers authorised to take securities under the Excise Act.

[8] Subsection 59A(8) of the Excise Act.

[9] Subsection 59B(1) of the Excise Act.

[10] Subsection 59B(1) of the Excise Act refers to the time period within which an application for review of the quota order may be made. In accordance with section 162C of the Excise Act and paragraph 14ZW(1)(c) of the *Taxation Administration Act 1953* (TAA) this is 60 days after the service of the quota order.

[11] Paragraph 162C(1)(b) of the Excise Act.

[12] Objections must be lodged within 60 days of the notice of quota or variation being served. Section 162C of the Excise Act and paragraph 14ZW(1)(c) of the TAA.

[13] See Schedule 2 to the Taxation Authorisation Guidelines.

20. Where an analysis of the risk indicates that imposing quotas may be an appropriate response, the risk area should prepare a written submission for the delegate.[14] This should set out all the relevant facts and circumstances supporting an objective assessment of the likelihood of a rate increase being anticipated and acted upon. Before making a recommendation, the risk area should consult key Government stakeholders (such as the Australian Customs and Border Protection Service).[15] While the views of other stakeholders, such as Treasury, may also be sought, the discretion is the Commissioner's and the delegate cannot be directed in how or when to make a declaration. The delegate makes a decision on whether a period will be declared or not and documents the decision.

21. The relevant facts and circumstances may include:

- public statements or announced changes to Government policy;
- media speculation about excise rate rises;
- analysis of CPI forecasts, and comparison to the RBA targeted inflation band;
- the size of any increase in the rate of duty that may be anticipated based on factors in the three points above;
- the manufacturing capacity and storage potential of persons subject to duty on excisable goods;
- trends indicating stockpiling amongst affected persons; and
- trends indicating unusual levels of clearances of an excisable good by affected persons.

Example

22. Under subsection 6A of the *Excise Tariff Act 1921*, the rate of duty applicable to certain excisable goods is automatically subject to indexation in February and August each year, based on upward movements in the CPI.[16] This is a feature of excise law and is therefore readily anticipated. It is a matter of judgement whether a CPI-based increase in the duty rate is likely to be large enough to cause an increase in the quantity of goods entered for home consumption.

23. As a guide, if the analysis indicates that movement in the CPI is likely to be above the RBA targeted band of inflation for a six-monthly indexation period, a material increase in the rate of duty is likely. This is a strong basis for recommending that the delegate impose quotas: a material increase in the rate of duty could be anticipated, based on such a change in the CPI.

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[14] While this refers to officers in risk areas the guidance in this practice statement applies to all officers who from time to time have responsibility for recommending whether or not a period should be declared, or quota orders made. It does not dictate where those responsibilities may be.

[15] Imported goods may be subject to quotas under the *Customs Act 1901*, so coordinating action on quotas is appropriate.

[16] Excise rates applicable to goods listed at items 10 and 15 (dealing with certain petroleum, oil, and fuel products) of the Schedule to the Excise Tariff Act are not subject to indexation.

Duration of a period and notice requirements

24. The *Gazette* notice of a declared period must[17] specify:
    - the declared period;
    - the kind of goods to which the declared period relates; and
    - a base period.

25. When recommending the declaration of a declared period, risk officers must consider the relevant dates. The declared period should encompass the whole period of anticipation, up to the date when any rate rise is likely to take effect. The submission should advise the delegate of these dates. For example, people anticipating an increase in the lead up to a federal Budget would likely be anticipating the increase to be announced on budget night. The declared period would logically extend up to and including the day of the federal Budget.

26. The declared period leading up to an increase due to indexation should extend up to the day before the increase is likely to take effect. Under normal circumstances, this is 31 January or 31 July, but officers should refer to the Australian Bureau of Statistics website for the expected date of release of the relevant quarter's CPI figure. The publication date of the CPI figure can affect the date that the indexation increase takes effect. Officers should work out when, based on the expected publication date and in accordance with subsection 6A(6) of the *Excise Tariff Act 1921*, the indexation increase will take effect. The declared period should extend up to the day before that date.

27. The length of the period is often determined by the type of rate rise. For CPI-related increases, 4-6 weeks before 1 February and 1 August is a guide.[18]

28. Rate increases related to Government decisions are normally announced by way of an Excise Tariff Proposal.[19] If a declared period has not already been declared, the declared period may start when the announcement is made and finish when the announcement indicates the new rate will apply.

29. The base period should be a period in the past that shows normal delivery activity without any influence from the expectation of a duty rate rise. The base period must be a period that ends before the commencement of the declared period.[20]

30. The Commissioner may also declare a declared period without a Government announcement or CPI-related increase. This may occur if there is speculation about a rise in the rate of duty which causes unusual clearance patterns. Before making such a recommendation, risk officers should consult relevant Government stakeholders (see paragraph 20 of this practice statement).

Quota orders: making recommendations and calculating amounts

31. After publication of a *Gazette* notice, a delegate can make a quota order specifying a person's quota for excisable goods for a declared period. The quota order may specify a quantity, or it may be nil.

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[17] Subsections 59A(1) and 59A (2) of the Excise Act.
[18] See section 6A *Excise Tariff Act 1921*.
[19] An Excise Tariff Proposal itself does not change the duty rate. It notifies an intention to bring an amending bill into Parliament. It is the subsequent Act amending the Excise Tariff Act that changes the duty rate (generally with a retrospective application). An Excise Tariff Proposal can be announced by being tabled in Parliament or, in certain circumstances (see section 160B of the Excise Act), can be published in the *Gazette* by the Commissioner. The effect of an Excise Tariff Proposal for the purpose of this practice statement is the same regardless of how it is initiated.
[20] Subsection 59A(2) of the Excise Act.

32. A submission to the delegate recommending a quota order should consider the factors in paragraph 9 of this practice statement, to the extent they are relevant to the person to whom the order would apply.

33. The calculation of the quota quantity must take account of the quantity of goods of the relevant kind (if any) that the person has entered for home consumption during the base period, the quantity they have entered for home consumption during any other period considered relevant, and any other factor considered relevant.[21]

34. If there are reasons for considering periods other than the base period, or other relevant matters, these should be documented in the recommendation submitted to the delegate. For example, repair and maintenance operations may have affected the quantities entered for home consumption during the base period.

35. Unless there are reasons to consider other periods, the calculation:

- totals all deliveries of the relevant goods made by the person during the base period;
- calculates a daily average quantity of deliveries for the base period (based on weekdays);[22]
- applies the base period daily average to the declared period (if the declared period is for less than a full day it should be treated as a full day for the calculation of the quota order); and
- applies an appropriate uplift factor.[23]

Example – Quota amount calculation

36. For example, if the declared period is 20 June 2011 to 31 July 2011 and the base period is 21 March 2011 to 8 May 2011, and during the base period a person entered for home consumption 490,000 cigarettes:

(a) The daily average for the base period is 490,000 / 35 = 14,000 cigarettes

(b) The declared period contains 30 weekdays x 14,000 = 420,000

(c) Uplift by 5% – 420,000 x 1.05 = 441,000 cigarettes

Thus the person's quota amount would be 441,000 cigarettes.

Advice relating to whether the Commissioner will declare a period or impose a quota order

37. If a person seeks advice on whether or not a declared period will be notified or a quota order made, the response should be that because this is a discretion aimed at addressing speculation, the Commissioner will not provide advice on this matter.

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[21] Subsection 59A(5) of the Excise Act.

[22] This recognises that many businesses do not make deliveries on Saturdays or Sundays.

[23] The uplift factor is used to provide persons to whom a quota order may be issued with some latitude in clearances in recognition that there is often variability in delivery of product for home consumption unrelated to anticipation of rate increases. Without intending to fetter the decision maker in any respect, a factor of 5% has been previously applied.

Service of quota orders

38. As soon as practicable after making a quota order a copy must be served on the person to whom it applies.[24] In the case of a natural person, service can be made by:

- personally delivering a copy of the quota order; or
- leaving a copy of the order at, or sending the order by prepaid post to, the address of the person's last known place of residence or place of business.[25]

39. In the case of a company, service can be made by leaving the copy at, or sending the copy by prepaid post to: the head office; a registered office; or a principal office of the company.[26] While the service of the quota must be by one of those methods, the quota order can be brought to the attention of person by other means such as phone or email. This can have an impact on when a permission under 61C of the Excise Act ceases to have effect (see paragraph 42 of this practice statement).

40. Quota orders contain commercially sensitive information. Therefore officers should ensure that they follow the appropriate procedures for classifying and handling sensitive information,[27] and the procedures applicable to email security.[28] Officers must record details of when the quota order is served or otherwise brought to the attention of the relevant person.

41. The same guidance applies to the service of a revocation of, or variation to, a quota order.[29]

Effect of quota order on permission to deliver without entry

42. Section 61C of the Excise Act allows the Commissioner to give a person permission (PSP)[30] that authorises the person to deliver goods without first making an entry for home consumption and paying duty. If during a declared period, the person exceeds the quota amount and the quota order has been served on them or otherwise brought to their notice, the PSP ceases to have effect.[31] Officers should therefore record when the quota order is served on or brought to the attention of the person. For example, if a person is informed by phone, then the time of the phone call is when the quota order is brought to their notice.

43. People in this situation need to lodge an entry for home consumption under section 58 of the Excise Act, pay the duty (and any security required), and receive an authority to deliver the goods.

44. After the declared period ends, the PSP will again provide authority to deliver the relevant goods.

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[24] Section 59C of the Excise Act.
[25] Paragraph 28A(1)(a) of the *Acts Interpretation Act 1901.*
[26] Paragraph 28A(1)(b) of the *Acts Interpretation Act 1901.*
[27] See Chief Executive Instruction CEI 2014/06/07 *ATO Security*.
[28] See Chief Executive Instruction CEI 2014/06/07 *ATO Security*.
[29] Section 59C of the Excise Act.
[30] PSP stands for period settlement permission; a term used to describe a permission under section 61C of the Excise Act.
[31] Subsections 61C(5) and 61C(6) of the Excise Act.

Securities

45. If a person exceeds their quota amount during a declared period, the Commissioner has the right to require a security before passing an entry for home consumption.[32] The amount of a security that can be required is the amount of duty payable on the goods, or the part of the goods that are excess to the quota amount, on the day that they are entered.[33] Any security taken applies in addition to the duty that is payable on the goods.

46. The Commissioner recognises that taking a security in all cases, for the amount contemplated in subsection 59A(8) of the Excise Act, may not be consistent with the level of risk to the revenue. It is not therefore the Commissioner's general practice to require securities in cases where a person has exceeded their quota amount. This will not however prevent the Commissioner from taking a security if it is considered necessary in particular circumstances.

Reconciliation of duty payments

Declared period in advance of indexation increase

47. At the end of the declared period the Commissioner's practice is to calculate the amount of goods entered for home consumption during the declared period and compare this to the quota amount. Where a person has entered excess goods, officers must contact the person and advise them of the amount of excess goods, and the additional duty payable. The additional duty is calculated by subtracting the amount of duty paid (at the old rate) on the quantity of excess goods from the amount payable (at the new rate) on the quantity of excess goods.[34]

> Additional duty = (quantity of excess goods x new duty rate) – (quantity of excess goods x old duty rate)

48. An alternative way of calculating the additional amount is to multiply the quantity of excess goods by the difference between the new duty rate and the old duty rate.

> Additional duty = quantity goods delivered over quota x (new duty rate – old duty rate)

49. The person should be advised to pay the additional duty to their Excise Account via electronic funds transfer by the end of the next settlement period of their section 61C permission.[35]

50. If the payment is not made, the amount can be recovered as a debt under subsection 255-5(1) of Schedule 1 to the TAA.[36]

Declared periods other than in advance of indexation increases

51. Increases in duty rates, other than increases from the indexation provisions, are generally announced by an Excise Tariff Proposal. It is the Commissioner's practice to protect the revenue by collecting amounts in accordance with the Excise Tariff Proposal pending the passing of amending legislation.[37]

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[32] Subsection 59A(8) of the Excise Act. See also guideline 2.21.1 of the Taxation Authorisation Guidelines for identification of the level of officers authorised to take securities under the Excise Act.
[33] Subsection 59(A)(8) of the Excise Act.
[34] Subsections 59A(6) and 59A(7).
[35] While the excess goods may not have been delivered under the section 61C permission this provides an appropriate time for making the payment.
[36] Under item 24 in the table in subsection 250-10(2) of Schedule 1 to the TAA, duty under section 54 of the Excise Act is a tax-related liability and the Commissioner may initiate collection and recovery action.
[37] Section 114 of the Excise Act prevents people from initiating court proceedings against action to protect the revenue for 12 months from when the tariff proposal is tabled in Parliament or the close of the session of Parliament in which tariff proposal is made; whichever occurs first.

52. Where a person has exceeded their quota amount and a proposed increase in duty is announced by an Excise Tariff Proposal, it is the Commissioner's practice to require payment of the excess amount as if it were duty in the same manner as outlined in paragraphs 47 to 49 of this practice statement.

53. If a person does not make the requested payment and a security was not taken during the declared period,[38] further actions to protect the revenue should be considered pending the passage of amending legislation and giving consideration according to the circumstances of each person. Without limiting what actions can be taken, the following are examples that can be considered if there is a continuing failure to pay the outstanding amount in relation to the excess goods:

- require a security[39] equal to the amount; or
- revoke the person's section 61C permission (PSP).

Variation or revocation of a quota order

54. The Commissioner can vary or revoke a quota order in writing at any time before the later of: the end of the declared period, or 60 days after the service of the order.[40]

55. If a person makes a verbal request to vary a quota order, judgement should be exercised as to whether a written request is necessary. For example, if subject to proof of identity requirements, a person telephones and points out a simple calculation error in establishing the quota amount, this could be dealt with without a written request from the person. Requests for variation that are more complex or for revocation should be required in writing. Officers should escalate to a delegate a recommendation, in a similar manner to making a recommendation for a quota order (see paragraphs 31 to 35 of this practice statement), for addressing the requested variation.

56. The Commissioner is not restricted to varying or revoking a quota order at a person's request. If an officer believes that there are reasons for varying or revoking a quota order, the officer should escalate to a delegate a recommendation, in a similar manner to making a recommendation for a requested variation (see paragraph 55 of this practice statement).

57. After being escalated a recommendation, the delegate should make a decision, with reasons being documented.

58. In addition to the quantity of goods (if any) of the kind to which the quota order relates that were entered for home consumption during the base period (or other relevant period), other factors that may be relevant in recommending a variation or revocation include: changes in delivery patterns; changes in the market; increases in client base; changes in business structure; potential errors in calculations; and risks to revenue.

[38] See paragraphs 45 and 46 of this practice statement.
[39] Section 16 of the Excise Act allows for securities generally rather than the specific situation in subsection 59A(8).
[40] Section 162C of the Excise Act and paragraph 14ZW(1)(c) of the TAA.

Objections against decisions relating to quota orders

59. Decisions about quota orders and variations of quota orders are reviewable decisions. A person who is dissatisfied with a decision can object against the decision as set out in Part IVC of the TAA.[41] The declaration of a declared period and nomination of a base period are not of themselves reviewable decisions.

60. Because both the original quota decision and decisions relating to variations or revocations of quota orders are reviewable decisions, officers need to ensure that they clearly identify whether they are dealing with an objection or not. This affects both the person's review rights and the time for actioning the request. For example, a person may request a variation to their quota amount based on their circumstances, without objecting to the original quota order decision. The nature of such requests should be clarified when they are received.

61. While section 59B of the Excise Act limits the time in which the Commissioner can, as a matter of discretion, vary or revoke a quota order, the Commissioner will, consistent with the statutory obligation to decide objections,[42] implement a favourable objection decision even if it is made after the expiry of the period in section 59B of the Excise Act.

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[41] Paragraph 162C(1)(b) of the Excise Act.
[42] Section 14ZY of the TAA.

Amendment history

Date of amendment	Part	Comment
7 August 2014	Footnotes, References	Replace Corporate Management Practice Instructions PS CM 2006/07/09 and 2006/07/10 with Chief Executive Instruction CEI 2014/06/07 *ATO Security*.
13 May 2014	Contact details	Updated.

Subject references	Excise Duty Quotas
Legislative references	Customs Act 1901 Excise Act 1901 4(1) Excise Act 1901 16 Excise Act 1901 19 Excise Act 1901 54 Excise Act 1901 58 Excise Act 1901 59 Excise Act 1901 59A Excise Act 1901 59A(1) Excise Act 1901 59A(2) Excise Act 1901 59A(5) Excise Act 1901 59A(6) Excise Act 1901 59A(7) Excise Act 1901 59A(8) Excise Act 1901 59AA Excise Act 1901 59B Excise Act 1901 59B(1) Excise Act 1901 59C Excise Act 1901 61C Excise Act 1901 61C(2) Excise Act 1901 61C(6) Excise Act 1901 114 Excise Act 1901 160B Excise Act 1901 162C Excise Act 1901 162C(1)(d) Excise Tariff Act 1921 6A Excise Tariff Act 1921 6A(6) TAA 1953 8(2) TAA 1953 14ZW(1)(c) TAA 1953 14ZY TAA 1953 Pt IVC TAA 1953 Sch 1 250-10(2) TAA 1953 Sch 1 255-5(1) Acts Interpretation Act 1901 28A(1)
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