



PS LA 2012/3 - Determining and applying quotas under the Excise Act 1901

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This Law Administration Practice Statement provides guidance on determining and applying quotas under the *Excise Act 1901*.

This practice statement is an internal ATO document, and is an instruction to ATO staff.

Taxpayers can rely on this practice statement to provide them with protection from interest and penalties in the following way. If a statement turns out to be incorrect and taxpayers underpay their tax as a result, they will not have to pay a penalty. Nor will they have to pay interest on the underpayment provided they reasonably relied on this practice statement in good faith. However, even if they don't have to pay a penalty or interest, taxpayers will have to pay the correct amount of tax provided the time limits under the law allow it.

1. What is this practice statement about?

Under section 59 of the *Excise Act 1901*,¹ a licensed manufacturer or owner of excisable goods pays duty on goods they enter for home consumption at the rate in force on the earlier of the day the:

- goods are delivered into home consumption, or
- duty is paid.

However, in some instances, people may seek to reduce their duty liability by anticipating increases in the rate of excise duty and entering more excisable goods in a period than they otherwise would.

Therefore, to protect the revenue, and to prevent competitive advantages being obtained in those instances, the Commissioner² is provided discretion under section 59A to:

- declare that a period is a declared period during which quotas can be imposed, and
- during that declared period, make a quota order that specifies the amount of excisable goods that a person may enter for home consumption.

If a person exceeds their quota amount during a declared period, the rate of duty they pay on the excess goods is the rate in force on the day after the end of the declared period.³

This practice statement provides guidelines on exercising this discretion, and how the quota orders are administered.⁴

2. The process for imposition of a quota order

The imposition of a quota order is a two-step process, as follows:

- The Commissioner publishes a notice in the *Government Notices Gazette*⁵ specifying the declared period, the kind of goods to which the declared period relates, and a base period⁶
- The Commissioner makes quota orders specifying the amount of quota for specified people for the declared period. The amount can be a specified quantity, or a nil amount.

Recommending imposition of a quota order

Only Deputy Commissioners or Assistant Commissioners in the Indirect Tax business line are delegated to make the declaration.

A written recommendation should be prepared for the delegate, setting out all the relevant facts and circumstances to enable an objective assessment. See section 7 of this practice statement for the types of factors that should be considered.

Service of a quota order

As soon as practicable after making a quota order applicable to a person, we must serve a copy of the quota order on that person.⁷ In doing so, remember that quota orders contain commercially sensitive information so you must ensure appropriate procedures for handling sensitive information are followed.

¹ All legislative references in this practice statement are to the *Excise Act 1901*, unless otherwise specified.

² Section 59A uses the term 'CEO', but by definition in subsection 4(1) this is the Commissioner.

³ Subsections 59A(6) and 59A(7).

⁴ The ATO also administers quotas on imported tobacco under delegation from the Chief Executive Officer of Customs.

⁵ Subsections 59A(1) and 59A(2).

⁶ A base period is a period in the past that shows normal delivery activity without any influence from the expectation of a rate rise. It must end before the commencement of the declared period.

⁷ Section 59C.

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 quota order at, or sending the quota order by prepaid post to, the address of the person's last known place of residence or place of business.⁸

In the case of a company, service can be made by leaving a copy of the quota order at, or sending it by prepaid post to:

- the head office
- a registered office, or
- a principal office of the company.⁹

While the service of the quota order **must** be by one of those methods, the quota order can be brought to the attention of the person by other means such as phone or email.

Record-keeping

Full records of the decision making process must be maintained. This includes the date of service and the date we brought the quota order to the attention of the person, if this was done.

3. Providing advice on declarations and quota orders

You are permitted to provide impacted taxpayers with an indication that a declared period will be notified or a quota order made. The information should be qualified as not being a final decision and taxpayers should be informed that anyone who acts inappropriately in the interim may have any quota amount reduced to account for excess deliveries.

4. Taking security

Although it is not our general practice to do so, if a person exceeds their quota amount during a declared period, we have the right to require a security before passing an entry for home consumption.¹⁰ We will normally only do this if it is considered necessary in particular circumstances.

The amount of such a security is the amount of duty payable on the goods, or on the excess goods (over their quota), on the day that they are entered.¹¹

Any security taken applies in addition to the duty that is payable on the goods.

5. Varying or revoking a quota order

A quota order can be varied or revoked at any time before the later of:¹²

- the end of the declared period, or
- 60 days after the quota order is served on the person.

The variation or revocation can be either at the request of the person, or made on our own initiative.

A request for a variation or revocation by a person for straightforward issues such as calculation errors can be made verbally. But if the request is complex, you should require this to be in writing.

Any complex requests for variation or revocation should be escalated to a delegated decision maker (see section 2 of this practice statement) as a written recommendation that sets out the relevant facts and circumstances that are needed to enable an objective assessment. The factors that may be relevant in making the recommendation include (but aren't limited 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)
- changes in delivery patterns
- changes in the market
- increases in client base
- changes in business structure
- potential errors in calculations, and
- risks to revenue.

A variation or revocation of a quota order needs to be in writing and served in the same way as the original quota order (see section 2 of this practice statement).

Full records of the variation or revocation need to be maintained.

⁸ Paragraph 28A(1)(a) of the *Acts Interpretation Act 1901*.

⁹ Paragraph 28A(1)(b) of the *Acts Interpretation Act 1901*.

¹⁰ Subsection 59A(8).

¹¹ Subsection 59A(8).

¹² Subsection 59B(1) and section 162C.

6. Reconciliation of duty payments

*Where the declared period is in advance of an indexation increase*¹³

At the end of the declared period the amount of goods entered for home consumption during the declared period needs to be compared to the quota amount. Where a person has entered excess goods, we must contact the person and advise them of the amount of excess goods, and the additional duty payable. The additional duty is calculated according to the following formula:¹⁴

$$\text{Additional duty} = (\text{quantity of excess goods} \times \text{new duty rate}) - (\text{quantity of excess goods} \times \text{old duty rate})$$

An alternative method of calculating the additional duty is as follows:

$$\text{Additional duty} = (\text{quantity of goods delivered over quota}) \times (\text{new duty rate} - \text{old duty rate})$$

The person should be advised to pay the additional duty via electronic funds transfer by the end of the next settlement period of their period settlement permission (PSP). This additional duty payment is usually combined with the person's normal duty payment under their PSP.¹⁵

If the payment is not made, the amount can be recovered as a debt under subsection 255-5(1) of Schedule 1 to the *Taxation Administration Act 1953* (TAA).

Where the declared period is other than in advance of an indexation increase

Any increases in duty rates, other than increases in advance of indexation, are generally announced by an Excise Tariff Proposal.¹⁶ It is our practice to protect the revenue by collecting amounts in accordance with the Excise Tariff Proposal pending the passing of amending legislation.¹⁷

¹³ Indexation increases result from Consumer Price Index (CPI) and Average Weekly Ordinary Time Earnings (AWOTE) changes.

¹⁴ Subsections 59A(6) and 59A(7).

¹⁵ While the excess goods may not have been delivered under the section 61C permission this provides an appropriate time for making the payment.

¹⁶ 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 Schedule to the Excise Tariff Act that changes the duty rate (generally with retrospective application).

¹⁷ Section 114 prevents people from initiating court proceedings against an officer for taking 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.

In these cases, we will reconcile and require payment of the excess amount as if it were excise duty in the same manner as outlined above in relation to indexation increases.

If a person does not make the requested payment and a security was not taken during the declared period, we should consider taking further action to protect the revenue pending the passage of amending legislation.

Such action might be, for example:

- revoking the person's PSP, and
- refusing to pass an entry until the correct amount is paid.

However, these examples do not limit the action that might be taken and consideration always needs to be given to the circumstances of each person in making a decision on further action.

7. Factors to consider before publishing a notice of a declared period.

There are no specific statutory factors to take into account before making a decision to publish a notice in the *Government Notices Gazette*. But we need to be of the opinion that people are anticipating or may anticipate an increase in the rate of duty and that this may cause more goods to be entered for home consumption than would otherwise be the case. This requires an objective assessment of the particular circumstances. Relevant considerations would be:

- public statements or announced changes to Government policy
- media speculation about excise rate rises
- for alcohol and fuel products, analysis of Consumer Price Index (CPI) forecasts,
- for tobacco products, analysis of Average Weekly Ordinary Time Earnings (AWOTE) forecasts
- the size of any increase in the rate of duty that may be anticipated based on the four 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.

Key Government agencies, such as the Department of Immigration and Border Protection or Treasury, should be consulted when relevant, as part of the decision making process.¹⁸ However, these agencies are not able to direct the decision of the delegate on how or when to make a declaration.

Example

Under section 6AA of the *Excise Tariff Act 1921*, the rate of duty applicable to excisable tobacco goods is automatically subject to indexation in March and September each year, based on upward movements in the full-time adult AWOTE estimates. This is a feature of excise law and is therefore readily anticipated. It is a matter of judgment whether an AWOTE-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.

As a guide, if the analysis indicates that movement in the AWOTE is likely to result in a material increase in the rate of duty, this is considered to be a basis for recommending that the delegate consider imposing quotas.

Timeframe for the declared period

The declared period should encompass the whole period during which the rate rise may be anticipated, up to the date when the rate rise is likely to happen. For example, where an increase is expected in the Federal Budget, this would be up to the day of the Federal Budget. Where the increase is due to indexation (either AWOTE or CPI based), the period would extend to the day before the increase takes effect (usually 28 February and 31 August for AWOTE and 31 January or 31 July for CPI).¹⁹

The length of the declared period is often determined by the type of rate rise. For indexation increases, a period of 4-6 weeks before the indexation is suggested.²⁰

If the rate rise is announced by way of an Excise Tariff Proposal (see footnote 16 of this practice statement), and a declared period is not already in place, the declared period may start when the announcement is made and finish when the announcement states that the new rate will apply.

8. Factors to consider in determining the amount of a person's quota

To determine the amount of a person's quota we must consider:²¹

- the quantity of the relevant goods the person has entered for home consumption during the base period
- the quantity of the relevant goods the person has entered for home consumption during any other relevant period
- any other relevant matter.

Unless there are reasons to consider a period other than the base period, 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

If the declared period is 20 June 2015 to 31 July 2015 and the base period is 21 March 2015 to 8 May 2015, and during the base period a person entered for home consumption 490,000 cigarettes:

- The daily average for the base period is $490,000 / 35 = 14,000$ cigarettes
- The declared period contains 30 weekdays $14,000 = 420,000$
- Uplift by 5%: $420,000 \times 1.05 = 441,000$ cigarettes

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

¹⁸ Imported goods may be subject to quotas under the *Customs Act 1901*, so coordinating action on quotas is appropriate.

¹⁹ These dates should be confirmed by reference to the Australian Bureau of Statistics website.

²⁰ See section 6A and 6AA *Excise Tariff Act 1921*.

²¹ Subsection 59A(5).

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 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.

9. Review of quota decisions

While the declaration of a declared period and nomination of a base period are not reviewable decisions, decisions about quota orders and variations of quota orders are.²⁴ Therefore, a person who is dissatisfied with these decisions can object to the decision as set out in Part IVC of the TAA.

However, care should be taken to determine, and clarify if needed, whether the person is actually objecting to a quota order, or requesting a variation, as this affects both the person's review rights and the time for actioning the request.

Section 59B limits the time in which we can, using the discretion, vary or revoke a quota order. However, we will, consistent with the statutory obligation to decide objections,²⁵ implement any favourable objection decision even if it is made after the expiry of the period in section 59B.

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²⁴ Paragraph 162C(1)(b).

²⁵ Section 14ZY of the TAA.