FTD 2009/1 - Fuel tax: what is the meaning of 'use' for the purposes of section 41-5 of the Fuel Tax Act 2006?

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There is a Compendium for this document: **FTD 2009/1EC** .

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 The scope of the new term, however, remains the same as the now repealed definition of 'Australia' used in those Acts.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 *8 January 2014*

Fuel Tax Determination

Fuel tax: what is the meaning of 'use' for the purposes of section 41-5 of the *Fuel Tax Act 2006*?

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This publication (excluding appendixes) is a public ruling for the purposes of the *Taxation Administration Act 1953*. A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

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 Tax Office Legal Database (http://law.ato.gov.au) to check its currency and to view the details of all changes.]

Ruling

1. Section 41-5 of the *Fuel Tax Act 2006* (FT Act)[1] applies to fuel you acquire, manufacture in, or import into, Australia with the intention of using it in carrying on your enterprise. The term 'use' means 'expend or consume in use', which in turn requires that the fuel be expended or consumed, such that it no longer exists as fuel, by putting it into service in carrying on your enterprise.

2. Therefore, fuel that is acquired, manufactured in, or imported into, Australia would be used in carrying on your enterprise if, in the course of carrying on that enterprise:

- it ceases to exist after an action to use it (for example, in burner applications, internal combustion engines, or as a solvent or cleaning agent);[2]
- it is used in the production of another thing that no longer constitutes a fuel (this covers the blending of fuel with other products to create a blend that no longer constitutes a fuel);[3] or

[1] All legislative references are to the FT Act unless indicated otherwise.
[2] Refer to paragraph 1.23 of the Revised Explanatory Memorandum to the Fuel Tax Bill 2006 and the Fuel Tax (Consequential and Transitional Provisions) Bill 2006. Where fuel is used as a solvent or cleaning agent it ceases to exist as fuel. Refer also to paragraph 2.24 of the Explanatory Memorandum to the Excise Laws Amendment (Fuel Tax Reform and Other Measures) Bill 2006.

- it ceases to exist as fuel as an ordinary incident of putting it into service in one of these ways (for example through evaporation or temperature changes).

3. Fuel is not used if it is sold, lost (otherwise than as an ordinary incident of putting it into service in carrying on your enterprise), stolen or otherwise disposed of. Fuel is not used if it is used in the production of another thing that constitutes a fuel. This covers the blending of fuel with other products to create a fuel blend that constitutes a fuel.

Date of effect

4. This Determination applies to years of income commencing both before and after its date of issue. However, this Determination will not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of this Determination (see paragraphs 75 to 77 of Taxation Ruling TR 2006/10).

Commissioner of Taxation
11 March 2009

[3] Under section 95-5, the Commissioner is able to make a determination that blends of fuel and other products do not constitute a fuel.

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

5. In this Determination, unless otherwise stated, a reference to:

- 'acquire' is a reference to the meaning expressed in Fuel Tax Ruling FTR 2007/1;[4]
- 'enterprise' is a reference to 'enterprise' as defined in section 110-5 of the FT Act;[5]
- 'entity' is a reference to 'entity' as defined in section 110-5 of the FT Act and has the same meaning as in section 184-1 of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act). The FT Act refers to an entity that is registered or required to be registered for GST or a non-profit body that acquires, manufactures or imports the fuel for use in providing emergency services in a clearly identifiable emergency services vehicle (or vessel);[6]
- 'fuel' is a reference to 'taxable fuel' as defined in section 110-5 of the FT Act;
- 'import' is a reference to the meaning expressed in FTR 2007/1;
- 'manufacture' is a reference to the meaning expressed in FTR 2007/1; and
- 'you' in relation to provisions applies to entities generally unless its application is expressly limited.[7]

Explanation

6. Section 41-5 provides an entitlement to a fuel tax credit for taxable fuel acquired, or manufactured in, or imported into Australia by an entity for use in carrying on an enterprise as follows:

> You are entitled to a fuel tax credit for taxable fuel that you acquire or manufacture in, or import into, Australia to the extent that you do so for use in *carrying on your *enterprise.[8]

7. The use of the fuel is relevant in determining any entitlement to a fuel tax credit under section 41-5. This Determination considers the meaning of the term 'use' as it appears in section 41-5.[9]

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[4] Fuel Tax Ruling FTR 2007/1 Fuel tax: the meaning of 'acquire', 'manufacture' and 'import' in the expression 'taxable fuel that you acquire or manufacture in, or import into, Australia to the extent that you do so for use in carrying on your enterprise' in the *Fuel tax Act 2006*.

[5] Section 110-5 of the FT Act 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*?

[6] Subsections 41-5(2) and 41-5(3) of the FT Act.

[7] See the meaning of 'you' in section 110-5 of the FT Act.

[8] To find definitions of asterisked terms, see the Dictionary in the FT Act, starting at 110-5.

[9] Other publications have explained the meaning of taxable fuel, Australia and carrying on an enterprise – see FTR 2007/1 and FTD 2006/3.

8. The term 'use' is not defined for the purposes of the FT Act.

9. Accordingly, for the purposes of section 41-5, the term 'use' should be given its ordinary meaning unless this would lead to any absurdity or inconsistency within the context in which the term is used.

10. The Macquarie Dictionary[10] relevantly defines 'use' to mean:

> verb (t)
>
> **1.** to employ for some purpose; put into service; turn to account: use a knife to cut; use a new method. **2.** to avail oneself of; apply to one's own purposes: use the front room for a conference. **3.** to expend or consume in use: his car uses a lot of oil.
>
> …

11. The term 'use' should be interpreted in a manner that gives effect to the object and purpose of the FT Act. This requires consideration of the word 'use' in the context of the relevant provisions of the FT Act, and the policy intent of the FT Act as evidenced in the Revised Explanatory Memorandum to the Fuel Tax Bill 2006 and the Fuel Tax (Consequential and Transitional Provisions) Bill 2006 (Revised Explanatory Memorandum).[11]

12. The Commissioner takes the view that, for the purposes of the FT Act, the relevant meaning of 'use' is 'expend or consume in use', which means to expend or consume a thing by putting it into service.

13. 'Expend' and 'consume' are relevantly defined in the Macquarie Dictionary[12] as follows:

> **expend 1.** to use up: to expend all one's energy; to expend time unnecessarily; to expend care on something.
>
> **consume 1.** to destroy or expend by use; use up. … **3.** to destroy, as by decomposition or burning.

14. Therefore, in accordance with the ordinary meaning, fuel is expended or consumed when it no longer exists as fuel. Accordingly, in the context of the FT Act, fuel would be 'used' in carrying on your enterprise, when it is so expended or consumed by putting it into service in carrying on your enterprise. This ordinary meaning is applied to encompass 'uses' such as:

- using fuel as a solvent (for example, as a cleaning agent where after use it can no longer be used as a fuel); or
- the fuel ceasing to exist as a fuel as an ordinary incident of putting it into service in carrying on your enterprise, for example through evaporation, temperature changes, or irrecoverable loss through leakage of fuel due to a fuel tank leak while a vehicle is in motion.

15. The Commissioner's view that the term 'use' has the ordinary meaning of 'expend or consume in use' for the purposes of the FT Act is supported by Subdivision 41-A.

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[10] *The Macquarie Dictionary,* 2001 rev. 3rd edn The Macquarie Library Pty Ltd, NSW.
[11] See for example *CIC Insurance Ltd v. Bankstown Football Club Ltd* (1997) 187 CLR 384; (1997) 141 ALR 618; (1997) 71 ALJR 312 and *HP Mercantile Pty Ltd v. Commissioner of Taxation* (2005) 143 FCR 553; (2005) 219 ALR 591; (2005) 2005 ATC 4571; (2005) 60 ATR 106.
[12] *The Macquarie Dictionary,* 2001 rev. 3rd edn The Macquarie Library Pty Ltd, NSW.

16. The interpretation of the word 'use' in its broadest meaning, that is, to employ for any purpose without it necessarily being expended or consumed, would encompass the sale or disposal of fuel and the use of fuel for any blending purposes. However, the note in section 41-5 specifies that certain blending constitutes use of fuel and section 41-10 provides a fuel tax credit entitlement for certain disposals of fuel. This indicates a legislative intent to attribute a narrower meaning to 'use' which is further supported by the Revised Explanatory Memorandum explanation on the meaning of the term 'use':

> 2.33 The term 'use' is intended to take its ordinary meaning and apply in a broad sense, as long as the use of the fuel is within the confines of the conduct of carrying on an enterprise. For example, 'use' will include use of fuel that is acquired or manufactured in, or imported into Australia by a taxpayer, but actually used by a contractor in carrying on the taxpayer's enterprise as long as the taxpayer is not taken to have sold the fuel to the contractor as part of their contract.
>
> 2.34 Fuel is 'used' if it ceases to exist after an action to use it, either as a fuel or in the production of another thing. As such, a sale of fuel is not a use of the fuel and a taxpayer will not be considered to have used fuel if they sell the fuel to another entity…
>
> 2.35 The term 'use' is also intended to cover the blending of fuel with other products to create a fuel blend that no longer constitutes a fuel that can be used as a fuel in an internal combustion engine. Where a fuel blend cannot be used as a fuel in an internal combustion engine, the manufacturer of the blend, and not the end user, is entitled to claim a credit for any fuel tax paid on the constituents of the blend...
>
> 2.36 In circumstances where it is unclear whether certain blends constitute a fuel that can be used as a fuel in an internal combustion engine, the Commissioner is able to make a determination that blends of fuel and other products do not constitute a fuel. In these circumstances the manufacturer of the fuel blend and not the end user is considered to have used the fuel and is entitled to claim a fuel tax credit for any fuel tax paid on the constituents of the blend. [Section 95-5]
>
> 2.37 'Use' will also include the loss of fuel through evaporation and temperature changes in the course of carrying on a taxpayer's enterprise.

17. In relation to the discussion under paragraph 2.34 of the Revised Explanatory Memorandum, it appears that disposal of fuel is not a use and this is not confined to disposal by sale. This concept is also present in the Revised Explanatory Memorandum in discussing adjustments under Division 44 as follows:

> 2.95 A taxpayer will also need to make a fuel tax adjustment where the fuel is not used. For example, a supply of fuel that a taxpayer has paid for or been invoiced for, is cancelled or not delivered or the fuel is lost, stolen or otherwise disposed of. [Section 44-10]

18. It is the Commissioner's view that under the scheme of the FT Act only one entity is entitled to a fuel tax credit.[13] Where fuel is capable of being used as fuel in carrying on an enterprise (for example, as burner fuels, or in an internal combustion engine), it is the end user of the fuel that is entitled to the fuel tax credit. Where fuel is used in the production of a fuel blend that does not constitute a fuel (for example, paints, cleaning agents and adhesives), it is the manufacturer of the blend that is entitled to the fuel tax credit.[14] As such, a retailer of fuel that is capable of being used as fuel[15] or the manufacturer of a fuel blend that constitutes a fuel will not 'use' the fuel as required under section 41-5.

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[13] See section 41-15.
[14] Paragraphs 1.25, 1.26, 1.40, 1.41 and 1.44 of the Revised Explanatory Memorandum.
[15] Section 41-10 provides a fuel tax credit for certain taxable supplies of fuel.

19. Therefore, with regard to the legislative and broader policy context, the Commissioner considers that the term 'use' in section 41-5 should be read to mean 'expended or consumed in use'. This is the meaning which best promotes the legislative purpose or object, and is one that is capable of being given to the words of the provision. It is considered that taking a broader view of the meaning of 'use' to mean to employ for any purpose in section 41-5 would not align with the policy object of the FT Act as found in the legislation and the Revised Explanatory Memorandum.

19A. The meaning of the term 'use' in section 41-5 was confirmed in *Gem Plant Hire Pty Ltd ATF The Condello Family Trust v. Commissioner of Taxation* [2012] AATA 852 where the Administrative Appeals Tribunal observed at paragraph 14:

> The use of fuel contemplated by the legislation is use, or consumption, as a flammable or explosive agent in internal combustion engines or other dealings with the fuel that render it no longer able to be used as fuel.

20. Accordingly, the findings in cases such as *British Motor Syndicate Ltd v. Taylor & Son*[16] and *Re Riviera Nautic Pty Ltd and Commissioner of Taxation*[17] (*Riviera*), regarding the ordinary meaning of 'use' as a term of wide import based on its primary meaning of 'to employ to any purpose', are not relevant to the meaning of the term 'use' in the FT Act.

21. As observed by Stephen J in *Ryde Municipal Council v. Macquarie University*[18] the meaning of 'use' will depend on the context in which it is employed:

> … it is a truism that 'use' is not a word having any single, precise meaning. It is 'a word of wide import and its meaning in any particular case will depend to a great extent upon the context in which it is employed' per Taylor J in *City of Newcastle v. Royal Newcastle Hospital* (1957) 96 CLR 493 at 515.[19]

22. *Riviera*[20] considered the meaning of 'use' in the context of the diesel fuel rebate scheme, which preceded the energy grants credit scheme, which in turn preceded the fuel tax credit scheme.

23. In arriving at its decision to allow Riviera Nautic Pty Ltd (Riviera Nautic) a diesel fuel rebate under section 164 of the *Customs Act 1901*, the Administrative Appeals Tribunal made the following statements:

> (36) ……the use of fuel in providing fuelled boats, so that the fuel is then available as a source of power to the hirers of boats for marine transport, constitutes a sufficient 'purposive use' of the diesel fuel to satisfy s 164(1)(ac).
>
> (37) I was puzzled during the hearing by what seemed to be the very narrow meaning of the word 'use' advanced by Mr Sest. I suggested that the appropriate analysis appeared to be that both Riviera Nautic and its clients use the fuel purchased by Riviera Nautic in marine transport, but only Riviera Nautic does so 'in the course of carrying on an enterprise'.[21]

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[16] *British Motor Syndicate Ltd v. Taylor & Son* [1900] 1 Ch 577.
[17] *Re Riviera Nautic Pty Ltd and Commissioner of Taxation* [2002] AATA 657; (2002) 50 ATR 1106; (2002) 68 ALD 581.
[18] *Ryde Municipal Council v. Macquarie University* (1978) 139 CLR 633; (1978) 55 LGRA 373; (1978) 23 ALR 41; (1978) 53 ALJR 179.
[19] *Ryde Municipal Council v. Macquarie University* (1978) 23 ALR 41 at 55 and 56.
[20] *Re Riviera Nautic Pty Ltd and Commissioner of Taxation* (2002) 68 ALD 581 at 591. *Riviera* also considers when a sale or disposal of fuel occurs. The Commissioner's views on this aspect of the decision are set out in paragraphs 113 to 115 and 125 to 141 of Fuel Tax Ruling FTR 2009/1 *Fuel tax: entitlement to a fuel tax credit under section 41-5 of the Fuel Tax Act 2006 in a vehicle or equipment hire arrangement*, which discuss when there is a 'licence to use' fuel.
[21] *Re Riviera Nautic Pty Ltd and Commissioner of Taxation* (2002) 68 ALD 581 at 591.

24. However, the Commissioner considers that the term ‘use’ has to be read more restrictively for the purposes of section 41-5 to give effect to the purpose and object of the fuel tax credits system as discussed at paragraphs 17 to 19 of this Determination.

References

Previous draft:

FTD 2008/D1

Related Rulings/Determinations:

FTD 2006/3; FTR 2007/1; FTR 2009/1; TR 2006/10

Subject references:

- FTC equipment
- FTC fuel tax
- FTC hire arrangement
- FTC road user charge
- FTC vehicles
- fuel
- fuel tax credits

Legislative references:

- FTA 2006
- FTA 2006 Subdiv 41-A
- FTA 2006 41-5
- FTA 2006 41-5(2)
- FTA 2006 41-5(3)
- FTA 2006 41-10
- FTA 2006 41-15
- FTA 2006 Div 44
- FTA 2006 44-10
- FTA 2006 95-5
- FTA 2006 110-5
- ANTS(GST)A 1999 9-20
- ANTS(GST)A 1999 184-1
- Customs Act 1901 164
- Customs Act 1901 164(1)(ac)
- TAA 1953

Case references:

- British Motor Syndicate Ltd v. Taylor & Son [1900] 1 Ch 577
- CIC Insurance Ltd v. Bankstown Football Club Ltd (1997) 187 CLR 384; (1997) 141 ALR 618; (1997) 71 ALJR 312
- City of Newcastle v. Royal Newcastle Hospital (1957) 96 CLR 493
- Gem Plant Hire Pty Ltd ATF The Condello Family Trust v. Commissioner of Taxation [2012] AATA 852
- HP Mercantile Pty Ltd v. Commissioner of Taxation (2005) 143 FCR 553; (2005) 219 ALR 591; (2005) 2005 ATC 4571; (2005) 60 ATR 106
- Re Riviera Nautic Pty Ltd and Commissioner of Taxation [2002] AATA 657; (2002) 50 ATR 1106; (2002) 68 ALD 581
- Ryde Municipal Council v Macquarie University (1978) 139 CLR 633; (1978) 55 LGRA 373; (1978) 23 ALR 41; (1978) 53 ALJR 179

Other references:

- Explanatory Memorandum to the Excise Laws Amendment (Fuel Tax Reform and Other Measures) Bill 2006
- Revised Explanatory Memorandum to the Fuel Tax Bill 2006 and the Fuel Tax (Consequential and Transitional Provisions) Bill 2006
- The Macquarie Dictionary, 2001 rev. 3rd edn The Macquarie Library Pty Ltd, NSW

ATO references

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