Decision impact statement

Coles Supermarkets Australia Pty Ltd v Commissioner of Taxation

Court citation:	[2019] FCA 1582
Venue:	Federal Court
Venue reference no:	VID 1364-1368 of 2018
Judge name):	Moshinsky J
Judgment date:	25 September 2019
Appeals on foot:	No
Decision outcome:	Favourable to the Commissioner

Précis

This case concerned whether the taxpayer was entitled to fuel tax credits or decreasing fuel tax adjustments in respect of fuel that was lost through evaporation and/or leakage whilst held for retail sale, and if so, whether any such entitlements had ceased.

Brief summary of facts

Taxpayers are (with some exceptions) entitled to a fuel tax credit to the extent that they acquire taxable fuel for use in carrying on an enterprise.

The taxpayer in this case carried on an enterprise of retailing fuel and operating convenience stores. A small portion of the fuel acquired by the taxpayer was lost through evaporation or leakage. This was an inevitable part of the delivery and storage of the fuel being held for sale.

The taxpayer was unaware of any potential fuel tax entitlement in respect of fuel anticipated to be lost through evaporation and/or leakage and accordingly made no such credit claims in its relevant Business Activity Statements (which constitute fuel tax returns, disclosing a net fuel amount).

It was common ground that the taxpayer did not 'use' fuel to the extent that it was sold to customers. The taxpayer sought a fuel tax credit for the fuel that was lost due to evaporation and/or leakage.

Issues decided by the Court

The following issues were before the Court (although not all issues arose in respect of each tax period in dispute):

(a) whether, for the purposes of section 41-5 of the *Fuel Tax Act 2006* (FTA), the relevant fuel was acquired 'for use in carrying on the taxpayer's enterprise', such that the taxpayer was entitled to a fuel tax credit in respect of the fuel lost by evaporation and/or leakage (the fuel tax credit issue)

(b) (in the alternative to issue (a)) whether, under section 44-5 of the FTA, the taxpayer was entitled to a decreasing fuel tax adjustment on the

basis that fuel acquired for retail sale, but subsequently lost by evaporation or leakage, was used in a way that was different from that intended use when acquired (the decreasing fuel tax adjustment issue), and

(c) if the taxpayer was entitled to fuel tax credits pursuant to section 41-5 of the FTA for any of the tax periods from July 2012 to January 2014, whether the taxpayer has ceased to be entitled to those fuel tax credits by reason of the operation of section 47-5 of the FTA (the section 47-5 issue).

In respect of the fuel tax credit and decreasing fuel tax adjustment issues, the Court found that the taxpayer was not entitled to fuel tax credits on the basis that the fuel that was lost through evaporation and/or leakage was not 'used' in carrying on the taxpayer's enterprise for the purposes of the FTA. The Court's reasoning was summarised at paragraph 114, as follows:

> … That is, the term "use" takes its ordinary meaning, save that it does not include making a taxable supply of fuel. In my view, for the reasons discussed above, it is artificial to ascribe different *uses* to the portion of fuel that was re-sold to Coles Express's customers and the remainder of the fuel, which evaporated or leaked. The evaporation or leakage of fuel was wholly incidental to Coles Express making a taxable supply of fuel, in the sense that it was an unwelcome, and unavoidable, part of that activity. Accordingly, it is appropriate to characterise the portion of the fuel that evaporated or leaked in the same way as the fuel that was re-sold to Coles Express's customers.

While it was unnecessary to decide the section 47-5 issue, the Court made observations regarding the parties' submissions.

The Court would have rejected the taxpayer's submission that the relevant fuel tax credits in dispute had been 'taken into account in an assessment' within the four-year period referred to in section 47-5 of the FTA. The fuel tax credits at issue were not a relevant integer in calculating the taxpayer's net amount in its fuel tax returns for the relevant tax periods.

Otherwise, the Court found force in the taxpayer's submissions that section 47-5 did not disentitle a taxpayer to fuel tax credits once a return had been assessed with a valid objection lodged against the related assessment. These observations are contrary to the Commissioner's views set out in Draft Miscellaneous Taxation Ruling MT 2018/D1 *Miscellaneous tax: time limits for claiming an input tax or fuel tax credit*.

ATO view of decision

The Court's decision with respect to evaporation or leakage of fuel is consistent with the ATO's view of the law.

Implications for impacted advice or guidance

Having regard to the Court's observations regarding the section 47-5 issue, which took into account the Full Federal Court's decision in *Linfox Australia Pty Ltd v. Commissioner of Taxation of the Commonwealth of Australia* [2019] FCAFC 131 on this issue, the Commissioner has withdrawn Draft Miscellaneous Taxation Ruling MT 2018/D1.

A final public ruling providing a revised view on the application of Division 47 of the FTA (and Division 93 of *A New Tax System (Goods and Services Tax) Act 1999*) will be published in early 2020.

Comments

We invite you to advise us if you feel this decision has consequences we have not identified. Please forward your comments to the contact officer.

Date issued:	4 December 2019
Due date:	15 January 2020
Contact officer:	Contact officer details have been removed as the comments period has expired.

Legislative references

Fuel Tax Act 2006
41-5
44-1
44-5
44-10
47-5
A New Tax System (Goods and Services Tax) Act 1999
Div 93

Case references

Linfox Australia Pty Ltd v Federal Commissioner of Taxation [2019] FCAFC 131
Linfox Australia Pty Ltd and Commissioner of Taxation [2019] AATA 222

Other references

MT 2018/D1
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