FTD 2010/D1 - Fuel tax: is apportionment used when determining total fuel tax credits in calculating the net fuel amount under section 60-5 of the Fuel Tax Act 2006 ?

This document has been finalised by FTD 2010/1.

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

Draft Fuel Tax Determination

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

This publication provides you with the following level of protection:

This publication is a draft for public comment. It represents the Commissioner's preliminary view about the way in which a relevant taxation 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.

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

Ruling

1. Yes. 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 of the FT Act; subject to the operation of Items 10 and 11 of Schedule 3 to the *Fuel Tax (Consequential and Transitional Provisions) Act 2006* (Transitional Act).[2]

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

- 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.

[1] All legislative references in this draft Determination are to the FT Act unless indicated otherwise.
[2] The Transitional Act applies during the transitional phase. The transitional phase extends from 1 July 2006 to 30 June 2012.
[3] This includes taking into account the operation of Items 10 and 11 of Schedule 3 to the Transitional Act and Division 41 of the FT Act.

4. The amount of your fuel tax credit entitlement may be reduced by a cleaner fuel grant or 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 of the FT Act 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 of the FT Act and Items 10 and 11 of Schedule 3 to the Transitional Act;[5]
- 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;
- subsection 43-10(1) between a use of taxable fuel that had fuel tax imposed to fund a cleaner fuel grant and a taxable fuel that did 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 draft 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.

10. Where the following circumstances apply, you are generally required to perform separate calculations so that you are applying a fair and reasonable basis of apportionment:

- one type of taxable fuel in multiple activities that either attract no fuel tax credit, a full fuel tax credit, a half fuel tax credit,[6] or the amount of your fuel tax credit entitlement may be reduced by a cleaner fuel grant or the road user charge;
- more than one type of taxable fuel in the same activity; or

[4] See Division 43 of the FT Act.
[5] During the transitional phase, which extends from 1 July 2006 to 30 June 2012.
[6] During the transitional period which ends on 30 June 2012.

- more than one type of taxable fuel for multiple activities that either attracts no fuel tax credit, a full fuel tax credit, a half fuel tax credit,[7] or the amount of your fuel tax credit entitlement may be reduced by a cleaner fuel grant or the road user charge.

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.

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 before 1 July 2012. The diesel fuel is acquired for use, in a generator to generate electricity for which it is entitled to a full fuel tax credit, in a forklift to load goods onto the trucks in the warehouse for which it is entitled to a half fuel tax credit, and in trucks with a gross vehicle mass (GVM) of more than 4.5 tonnes to deliver goods for which it is entitled to a partial fuel tax credit.*

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 use in the generator, forklift and trucks.*

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

14. *Following on from Example 1 of this draft Determination, Whelan Enterprises Ltd decides to replace its vehicle 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 draft 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, half or partial fuel tax credit for the diesel fuel and petrol acquired for use in the vehicles and equipment. Similar to the approach in Example 1 of this draft 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 and petrol and that their older vehicles and equipment may not be as fuel efficient as their new vehicle 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] During the transitional period which ends on 30 June 2012.

Class of entities

18. This draft 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

19. This draft Determination will replace 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 the final Determination and until FTD 2006/1 is withdrawn.

Note: the Australian Taxation Office is also providing guidance to tax officers on the apportionment methods that may be used for the purposes of the FT Act in draft Law Administration Practice Statement PS LA 3309. Comments are also invited on this draft practice statement and you may refer to draft Law Administration Practice Statement PS LA 3309 for further information.

Date of effect

20. When the final Determination is issued, it is proposed to apply from its date of issue. However, the Determination will not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Determination (see paragraphs 75 to 77 of Taxation Ruling TR 2006/10).

Commissioner of Taxation
19 May 2010

Appendix 1 – Explanation

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

Background

21. In this draft Determination, unless otherwise stated:

- a reference to:
  - 'activity' is to be read in context of this draft 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 of the FT Act;
  - 'enterprise' is a reference to 'enterprise' as defined in section 110-5 of the FT Act;[8]
  - 'taxable fuel' is a reference to 'taxable fuel' as defined in section 110-5 of the FT Act 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;
- 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] and
  - if you are entitled to a fuel tax credit the requirements of either Item 10 or 11 of Schedule 3 to the Transitional Act are met.

[8] 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*?

[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 of the FT Act.

Explanation

22. The FT Act provides than 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 a cleaner fuel grant or road user charge.

The meaning of the phrase 'to the extent that'

23. 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.

24. The prescribed methods of apportioning eligible fuel and ineligible fuel under the *Energy Grants (Credits) Scheme Act 2003* are not provided for in the FT Act for the purposes of claiming an entitlement under the fuel tax credit system.

25. 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 draft Determination, allows an entity to choose a method of apportionment subject to the fair and reasonable principle.

26. 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.*[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.

[11] (1949) 78 CLR 47, (*Ronpibon Case*).
[12] *Ronpibon Case* (1949) 78 CLR 47 pages 58-59.

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

27. 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.

28. 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.

29. 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,[14] but that method needs to be fair and reasonable in the circumstances.

30. 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.

31. 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

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

33. An entitlement to a fuel tax credit arises under Division 41 of the FT Act, subject to the operation of Items 10 and 11 of Schedule 3 to the Transitional Act, or Division 42 of the FT Act. 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.

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

[14] The entitlement provisions are set out Division 41 of the FT Act, subject to the operation of Items 11 and 12 of Schedule 3 to the Transitional Act, and the calculation provisions are set out in Division 42 or 43 of the FT Act.

34. 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, subsections 43-10(1) and 43-10(3) require the amount of the fuel tax credit to be reduced to the extent a cleaner fuel grant or the road user charge is applicable to the fuel.

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

36. Due to the relationship between the FT Act and the Transitional Act, the amount of certain fuel tax credit entitlements is determined under Items 10 and 11 of Schedule 3 to the Transitional Act for the purposes of section 41-5 of the FT Act. The Commissioner considers that the phrase 'to the extent that' in section 41-5 of the FT Act contemplates apportionment between uses that give rise to different rates of fuel tax credits. With the cessation of the transitional arrangements, the amount of a fuel tax credit entitlement will be determined solely with reference to Division 43 of the FT Act.

Need for separate calculations

37. 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

38. 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 of the FT Act and Items 10 and 11 of Schedule 3 to the Transitional Act,[15] 'total fuel tax credits' for a particular period may comprise different types of fuel tax credits.

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

- one type of taxable fuel in multiple activities that either attract no fuel tax credit, a full fuel tax credit, a half fuel tax credit,[16] or the amount of your fuel tax credit entitlement may be reduced by the cleaner fuels grants or the road user charge;
- more than one type of taxable fuel in the same activity; or
- more than one type of taxable fuel for multiple activities that either no fuel tax credit, a full fuel tax credit, a half fuel tax credit,[17] or the amount of your fuel tax credit entitlement may be reduced by a cleaner fuel grant or the road user charge.

40. 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 that uses two types of taxable fuel has the same average hourly consumption for both types of taxable fuel.

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[15] During the transitional period which ends on 30 June 2012.
[16] During the transitional period which ends on 30 June 2012.
[17] During the transitional period which ends on 30 June 2012.

Appendix 2 – Your comments

41. You are invited to comment on this draft Determination. Please forward your comments to the contact officer by the due date.

42. A compendium of comments is also prepared for the consideration of the relevant Rulings Panel or relevant tax officers. An edited version (names and identifying information removed) of the compendium of comments will also be prepared to:

- provide responses to persons providing comments; and
- publish on the Tax Office website at www.ato.gov.au.

Please advise if you do not want your comments included in the edited version of the compendium.

Due date: **18 June 2010**

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

FTD 2006/3; TR 2006/10

Previous Rulings/Determinations:

FTD 2006/1

Subject references:

- acquire
- acquire, manufacture in, or import into Australia
- apportionment
- carrying on an enterprise
- constructive method
- deductive method
- enterprise
- fair and reasonable
- fuel tax credit
- full fuel tax credit
- gross vehicle mass
- half fuel tax credit
- quantity of fuel
- taxable fuel

Legislative references:

- ANTS(GST)A 1999 9-20
- Customs Act 1901
- Customs Tariff Act 1995
- Excise Act 1901
- EG(C)SA 2003
- 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
- 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
- FT(C&TP)A 2006 Sch 3 Item 10
- FT(C&TP)A 2006 Sch 3 Item 11
- FT(C&TP)A 2006 Sch 3 Item 12
- ITAA 1936 51(1)

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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