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

There is a Compendium for this document: **FR 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 The scope of the new term, however, remains the same as the now repealed definition of 'Australia' used in those Acts.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 Ruling

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

Contents Para

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What this Ruling is about

1. This Ruling explains which entity is entitled to a fuel tax credit under section 41-5 of the *Fuel Tax Act 2006* (FT Act) in a vehicle or equipment hire arrangement.

2. It sets out the principles in determining whether fuel has been disposed of by the hire company to the hirer, and consequently acquired by the hirer, and which entity has fuel tax credit entitlements under section 41-5 of the FT Act.

Legislative context

3. Section 41-5 of the FT Act 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 its enterprise. Subsection 41-5(1) of the FT Act states:

> 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.

4. In the context of vehicle and equipment hire arrangements, the relevant issues are, whether the entity, for the purposes of section 41-5 of the FT Act has:

- acquired the fuel; and
- whether that acquisition of fuel is for use in carrying on its enterprise.

Interpretation

5. Unless otherwise stated, all legislative references in this Ruling are to the FT Act.

6. In this Ruling, unless otherwise stated:

- a reference to:
  - 'Energy Grants Act' is a reference to the *Energy Grants (Credits) Scheme Act 2003*;
  - 'enterprise' is a reference to 'enterprise' as defined in section 110-5 of the FT Act;[1]
  - '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*. 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);[2]
  - 'fuel' is a reference to 'taxable fuel' as defined in section 110-5 of the FT Act;
  - 'GST Act' is a reference to the *A New Tax System (Goods and Services Tax) Act 1999*;
  - 'heavy vehicle' means:
    (a) a vehicle of more than 4.5 tonnes GVM (gross vehicle mass);[3] or

[1] Section 110-5 of the FT Act provides that enterprise has the meaning given by section 9-20 of the *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*.
[2] Subsections 41-5(2) and 41-5(3).
[3] For what is meant by the term 'GVM' see paragraph 7 of Fuel Tax Ruling FTR 2008/1 Fuel tax: vehicle's travel on a public road that is incidental to the vehicle's main use and the road user charge.

(b) a vehicle of 4.5 tonnes GVM acquired before 1 July 2006 that uses on-road diesel fuel acquired, manufactured or imported on or after that date for travelling on a public road;[4]

- 'hirer' (a common industry term) refers to the entity that hires the vehicle or equipment from the hire company;
- 'hire company' refers to the entity that hires out vehicles or equipment to the hirer;
- 'Revised Explanatory Memorandum' is a reference to the Revised Explanatory Memorandum to the Fuel Tax Bill 2006 and the Fuel Tax (Consequential and Transitional Provisions) Bill 2006;
- 'Transitional Act' is a reference to the *Fuel Tax (Consequential and Transitional Provisions) Act 2006*; and
- 'you' in relation to provisions applies to entities generally unless its application is expressly limited;[5] and

- 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[6] in the FT Act;
  - if you are entitled to a fuel tax credit the requirements of either item 10 or 11 under Part 3 of Schedule 3 to the Transitional Act are met; and
  - during the period 1 July 2006 to 30 June 2009, if you claimed more than $3 million each financial year in fuel tax credits you met the requirements of the Greenhouse Challenge Plus Programme or another programme determined, by legislative instrument, by the Environment Minister for the purposes of section 45-5 (as at 30 June 2009) of the FT Act.[6A]

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[4] See item 12 under Part 4 of Schedule 3 to the *Fuel Tax (Consequential and Transitional Provisions) Act 2006*, 'on-road diesel fuel' has the meaning given by Section 4 of the Energy Grants Act and regulation 8 of the Energy Grants (Credits) Scheme Regulations 2003. See also the Revised Explanatory Memorandum to the Fuel Tax Bill 2006 and the Fuel Tax (Consequential and Transitional Provisions) Bill 2006 at paragraph 3.49 and Example 3.5.

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

[6] The disentitlement rules are set out in Subdivision 41-B.

[6A] Division 45 of the FT Act has been repealed from 1 July 2009. Consequently, you are no longer required to be a member of the GCPP in order to take into account

Class of entities

7. This Ruling applies to the class of entities who acquire fuel for use and use that fuel under vehicle or equipment hire arrangements in carrying on their enterprise.[7] Paragraphs 8 to 11 of this Ruling discuss the meaning of vehicle and equipment hire and contain examples of each.

Meaning of 'vehicle'

8. For the purposes of this Ruling, the Commissioner's view on the meaning of 'vehicle' that is expressed at paragraphs 11 to 13 of FTR 2008/1 is applicable.

9. Examples of vehicles are:

backhoe loader

bobcat

fertiliser spreader

forklift

front-end loader

grader

harvester

mobile crane

mobile concrete pump

mobile elevated working platform (travel tower, cherry picker)

tractor

truck

truck-mounted drilling rig

wheeled bulldozer

wheeled excavator

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more than $3 million in fuel tax credits in your net fuel amount for tax periods ending in a financial year. In addition, if you were not a member of the GCPP on 30 June 2009 then you are deemed to have been a member of the GCPP on that date: see subitems 16(4) and 16(5) of Part 3 of Schedule 7 to the *Tax Laws (2009 Measures No. 2) Act 2009*.This means that you can take into account fuel tax credits in excess of $3 million in your net fuel amount for any financial year between 1 July 2006 and 30 June 2009.: see subsection 65-5(5) of the FT Act (as at 30 June 2009).These credits are claimed as a decreasing fuel tax adjustment. The decreasing fuel tax adjustment is attributable to the tax period ending 30 June 2009. You will have four years from the end of that tax period to claim the entitlement: see section 105-55 of Schedule 1 to the *Taxation Administration Act 1953* (TAA 1953).

[7] Subsections 41-5(2) and 41-5(3).

Meaning of 'equipment'

10. For the purposes of this Ruling the reference to 'equipment' in the phrase 'equipment hire' refers to plant, machinery or equipment that does not fall within the meaning of 'vehicle'. The equipment must use fuel to enable an entitlement for fuel tax credits.

11. Examples of equipment are:

asphalt pavers

augers

blower vacuum

chainsaw

grinder – single, double or four head

lawn mower

water pump

wacker-packer

whipper-snipper

Qualifications

12. The class of entities defined in this Ruling may rely on its contents provided the arrangement actually carried out is carried out in accordance with the arrangements described in paragraphs 55 to 82J of this Ruling. If the arrangement actually carried out is different from any of the arrangements described in this Ruling in paragraphs 55 to 82J then this Ruling has no binding effect on the Commissioner because the arrangement entered into is not one of the arrangements on which the Commissioner has ruled.

13. This Ruling does not apply to marine hire arrangements.

Ruling

Entitlement to a fuel tax credit under a vehicle or equipment hire arrangement

14. Which entity acquires fuel for use for the purposes of section 41-5 in vehicle or equipment hire arrangements is a question of fact to be determined on the facts and circumstances of each case.[8]

15. The entity which acquires fuel for use (and uses the fuel)[9] in vehicle or equipment hire arrangements in carrying on their enterprise

[8] This Ruling applies to six arrangements at paragraphs 55 to 82J.

[9] Section 41-5 allows an entity to claim fuel tax credits on a prospective basis by providing that there is an entitlement in relation to fuel acquired for use in carrying on your enterprise. See Fuel Tax Determination FTD 2009/1 Fuel tax: what is the meaning of 'use' for the purposes of section 41-5 of the *Fuel Tax Act 2006* for the Commissioner's view on the meaning of 'use'.

will be entitled to a fuel tax credit under section 41-5, subject to the disentitling provisions.[10]

16. Where the hire company acquires fuel and does not dispose of the fuel to the hirer, the hire company will be entitled to a fuel tax credit for fuel used in the hire vehicle or equipment in carrying on their enterprise, subject to the disentitling provisions.[11]

17. However, where the hire company acquires fuel and disposes of the fuel to the hirer, the hire company will not be entitled to a fuel tax credit.

18. Where the hirer acquires the fuel and does not dispose of the fuel, the hirer will be entitled to a fuel tax credit for fuel used in the hire vehicle or equipment in carrying on their enterprise, subject to the disentitling provisions.[12]

19. Therefore, an entity must establish whether it has first acquired fuel prior to determining if it has used the fuel in carrying on its enterprise. The meaning of 'acquire' and 'use' is discussed in paragraph 20 to 24 of this Ruling.

Meaning of 'acquire'

20. For the purposes of this Ruling, the Commissioner's views on the meaning of 'acquire', as expressed in FTR 2007/1[13] at paragraphs 18 to 22, are applicable.

21. As explained in the Addendum to FTR 2007/1 issued on 3 December 2008[14], GST concepts of acquisition and treatment of a supply or composite supply are not relevant in determining whether fuel has been acquired (or sold or otherwise disposed of) for the purposes of the FT Act. The treatment of supplies under the GST Act focuses on establishing an entity's goods and services tax liability or input tax credit entitlement under that Act. This analysis is not relevant in determining whether an entity has acquired fuel for the purposes of section 41-5 of the FT Act. Therefore, it is possible to have a composite supply of a thing and fuel for GST purposes and simultaneously an acquisition of fuel for the purposes of the FT Act.

Meaning of 'use'

22. For the purposes of section 41-5 and in the context of the expression 'for use', the term 'use' means 'expend or consume in use', which in turn requires that the fuel be expended or consumed,

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[10] Refer to Subdivision 41-B.
[11] Refer to Subdivision 41-B.
[12] Refer to Subdivision 41-B.
[13] 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*.
[14] FTR 2007/1A2 - Addendum.

such that it no longer exists as fuel, by putting it into service in carrying on your enterprise.[15]

23. In the context of vehicle or equipment hire arrangements, fuel:

- is not used if it is sold or otherwise disposed of; and
- is used if it ceases to exist after an action to use it as fuel by putting it into service in carrying on the enterprise.

24. Under vehicle or equipment hire arrangements, a hire company:

- disposes of fuel when it sells the fuel or the fuel is the subject of mutuum; and
- does not dispose of fuel where it merely grants another entity a licence to use its fuel, or uses the fuel in a wet hire arrangement.

Sale of fuel

25. Generally, a sale of fuel occurs where one entity supplies fuel to another and requires payment for the fuel supplied.[16]

26. Whether there is a sale of fuel in a hire arrangement will depend on the intention of the parties, to be determined according to any relevant contracts and surrounding circumstances.[17]

Fuel the subject of mutuum

27. Fuel is the subject of mutuum (also referred to as gratuitous quasi-bailment)[18] where the terms of the agreement provide for the supplier to supply fuel to the recipient for consumption and the recipient of the fuel is required to replace the fuel with an equivalent quantity of fuel. There is a disposal of fuel by the supplier at the commencement of the arrangement as property in the fuel passes from the supplier to the recipient.[19]

Licence to use fuel

28. As explained in FTR 2007/1,[20] if you acquire a right or a licence to use another entity's fuel, you do not acquire taxable fuel for the purposes of the FT Act. The mere grant of a right or licence to use

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[15] See FTD 2009/1 for the Commissioner's view on the meaning of 'use' for the purposes of section 41-5 of the FT Act.
[16] There must be an intention to pass property in the goods (see *Colby Corporation Pty Ltd v. Commissioner of Taxation* [2008] FCAFC 10 at paragraph 25).
[17] See Fitzgerald P in *Comptroller-General of Customs v. Woodlands Enterprises Pty Ltd, ex parte Woodlands Enterprises Pty Ltd* [1996] 1 Qd R 589 at page 592.
[18] *The Laws of Australia*, Lawbook Online, Thomson Australia 2008 at [8.5.330].
[19] See paragraphs 117 to 124 of this Ruling for a full explanation of mutuum.
[20] See paragraph 23 of FTR 2007/1.

the fuel does not result in you obtaining a proprietary interest in, or ownership of, the fuel.

29. Whether there is a licence to use fuel in a hire arrangement will depend on the intention of the parties, to be determined according to any relevant contracts and surrounding circumstances.[21]

30. The following circumstances may be indicative of a hire company's intention to only provide the hirer the licence to use its fuel:

- the hire company charges a flat fee which is inclusive of all fuel used irrespective of the quantity used, including refuelling the vehicle or equipment; or
- the hire company provides the fuel for no charge.

Attribution rules for fuel tax credits for fuel you acquire

31. Where you are registered or required to be registered for GST, your fuel tax credit is attributable to the same tax period that the input tax credit for the fuel is attributable,[22] or would be attributable had the fuel been a creditable acquisition[23] under the GST Act.

32. The GST Act requires that a tax invoice[24] is held to attribute an input tax credit to a GST return for a tax period. Similarly, a tax invoice is required for the purposes of attributing fuel tax credits under subsections 65-5(1) and 65-5(4) of the FT Act.

33. A hire company/hirer will usually receive a tax invoice for the fuel or a tax invoice that includes the cost of acquiring the fuel.[25]

34. However, there will be circumstances, such as mutuum, (for example where a hirer is required to replace the fuel used or consumed) where no separate tax invoice for the original fuel[26] or a tax invoice including the cost of the original fuel is issued to the hirer even though for the purposes of the FT Act the hirer:

- is taken to have acquired that fuel under the hire arrangement; and
- has a fuel tax credit entitlement for the purposes of section 41-5, to the extent the fuel is acquired for use in carrying on their enterprise (subject to the disentitling provisions).[27]

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[21] See Fitzgerald P in *Comptroller-General of Customs v. Woodlands Enterprises Pty Ltd, ex parte Woodlands Enterprises Pty Ltd* [1996] 1 Qd R 589 at page 592.
[22] Paragraph 65-5(1)(a).
[23] Paragraph 65-5(1)(b).
[24] A tax invoice is not required where the cost of the fuel is $75 or less exclusive of GST (see section 29-80 of the GST Act).
[25] A tax invoice is not required where the cost of the fuel is $75 or less exclusive of GST (see section 29-80 of the GST Act).
[26] Original fuel is the fuel provided by the hire company in the tank at the commencement of the arrangement.
[27] See Subdivision 41-B.

35. Where there is a mutuum scenario, the Commissioner will accept the tax invoice relating to the hire of the vehicle or equipment for the purposes of attributing a fuel tax credit under subsection 65-5(1) or 65-5(4).

36. Where an entity is a non-profit body that is not registered or required to be registered for GST and meets the requirements of subsection 41-5(3),[28] the attribution rules discussed at paragraphs 31 to 35 of this Ruling do not apply to the fuel tax credit entitlement. In this case, the non-profit body will attribute a fuel tax credit for fuel acquired for use under the hire arrangement for the vehicle or equipment to the fuel tax return period in which it acquires the fuel.[29] That is, the non-profit body is not required to hold a tax invoice for the fuel in order to attribute a fuel tax credit for the fuel.

Summary of the outcomes in hire arrangements based on the principles set out in this Ruling

Where the hire company acquires the fuel and sells or otherwise disposes of the fuel

37. Where fuel is sold or otherwise disposed of under the hire arrangements, the hirer acquires the fuel for the purposes of section 41-5. As to when the hirer acquires the fuel will depend on the circumstances of each case.[30]

38. Where the hire company sells or otherwise disposes of the fuel under hire arrangements they will not have used the fuel for the purposes of section 41-5. They are not entitled to a fuel tax credit for the fuel that they acquire to provide under these arrangements as they do not acquire that fuel for use by them but to sell or dispose of to hirers.

39. In these circumstances, the hirer acquires the fuel. If the hirer acquires the fuel for use in the vehicle or equipment in carrying on an enterprise they will be entitled to a fuel tax credit under section 41-5, subject to the disentitling provisions.[31]

40. For the purposes of whether any fuel tax adjustments need to be made, the hirer uses the fuel when they drive the vehicle or use the equipment, as the fuel ceases to exist after an action to use it.

41. The hirer needs to determine the quantity of the fuel that they intend to use in carrying on the enterprise to calculate their fuel tax credit entitlement amount, taking into account the operation of items 10 or 11 under Part 3 of Schedule 3 to the Transitional Act.

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[28] Subsection 41-5(3) applies where at the time you acquire the fuel you are a non-profit body and the fuel is for use in a vehicle (or vessel) that provides emergency services and is clearly identifiable as such.
[29] Subsection 65-5(2).
[30] See paragraphs 111 and 124 of this Ruling for a full explanation as to whether the hirer acquires the fuel when they enter into a hire agreement, collect the vehicle or equipment, or as and when they consume the fuel under various hire arrangements.
[31] See Subdivision 41-B.

42. In determining any fuel tax credit amount for fuel acquired to use in a heavy vehicle for travelling on a public road, the hirer will need to consider the application of the road user charge.[32]

43. If the hirer uses the vehicle or equipment after they refill the tank and prior to returning the vehicle or equipment it is the hirer who acquires and uses this amount of fuel in carrying on their enterprise for the purposes of section 41-5, as the fuel ceases to exist after their action to use it as a fuel.

44. When the hirer returns the vehicle or equipment with any amount of fuel, the hire company will acquire the fuel for the purposes of section 41-5.[33] The hirer will not have used the fuel that is returned as they will have otherwise disposed of that amount of fuel. Where they have claimed a fuel tax credit for this fuel they will need to make an increasing fuel tax adjustment under section 44-5.

45. The hirer will attribute their fuel tax credit entitlements in accordance with Division 65.

Where the hire company acquires the fuel and does not sell or otherwise dispose of the fuel – wet hire and licence to use arrangements

46. Where the hire company acquires the fuel for use in the hire vehicle or equipment in carrying on their enterprise and does not sell or otherwise dispose of the fuel, they will be entitled to a fuel tax credit under section 41-5, subject to the disentitling provisions.[34]

47. For the purposes of determining whether any fuel tax adjustments need to be made, the fuel is used by the hire company in carrying on their enterprise in:

- wet hire arrangements – when it ceases to exist when the hire company operates the vehicle or equipment; and
- licence to use arrangements – when it ceases to exist when the hirer operates the vehicle or equipment.

48. In wet hire arrangements the hire company will need to determine the quantity of fuel that will be used and the activity/activities in which the fuel will be used to calculate their fuel tax credit entitlement amount, taking into account the operation of items 10 or 11 under Part 3 of Schedule 3 to the Transitional Act.[35] In determining any fuel tax credit amount for the acquisition of fuel to

[32] See FTR 2008/1.
[33] Note that this only relates to whether the hire company has acquired the fuel – not whether they have used the fuel.
[34] See Subdivision 41-B.
[35] Items 10 and 11 under Part 3 of Schedule 3 to the Transitional Act provide for different fuel tax credit rates depending on the activity in which vehicles or equipments are used.

use in a heavy vehicle for travelling on a public road the hire company will need to consider the application of the road user charge.[36]

49. In licence to use arrangements the hire company will need to determine the quantity of fuel that will be used to calculate their fuel tax credit entitlement amount, taking into account the operation of items 10 or 11 under Part 3 of Schedule 3 to the Transitional Act.[37] In determining any fuel tax credit amount in vehicle hire arrangements for the acquisition of fuel to use in a heavy vehicle for travelling on a public road, the hire company will need to consider the application of the road user charge.[38]

50. The hire company will attribute their fuel tax credit entitlements and make any fuel tax credit adjustments in accordance with Division 65 and Division 44, respectively.

Where the hirer acquires the fuel and does not sell or otherwise dispose of the fuel

51. Where the hirer acquires the fuel for use in the hire vehicle or equipment in carrying on their enterprise and does not sell or otherwise dispose of the fuel, the hirer will be entitled to a fuel tax credit under section 41-5, subject to the disentitling provisions.[39]

52. For the purposes of determining whether any fuel tax adjustments need to be made, the hirer uses the fuel when it ceases to exist as a consequence of its use in operating the vehicle or equipment.

53. In determining any fuel tax credit amount for fuel acquired to use in a heavy vehicle for travelling on a public road, the hirer will need to consider the application of the road user charge.[40]

54. The hirer will attribute their fuel tax credit entitlements and make any fuel tax credit adjustments in accordance with Division 65 and Division 44, respectively.

The Arrangements

55. This Ruling discusses six common arrangements (fuel transactions) to explain which entity has the fuel tax credit entitlement under section 41-5 in the vehicle or equipment hire arrangement.

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[36] See FTR 2008/1.

[37] As equipment hire is an activity that would not have given rise to an entitlement to a credit under the Energy Grants Act there is a half fuel tax credit for fuel acquired for use in these activities from 1 July 2008 and a full credit from 1 July 2012. As there are specific provisions governing fuel used in vehicles, a hire company involved in vehicle hire will need to establish the hirer's use of the vehicle to determine their fuel tax credit entitlement: section 41-20 and subsection 43-10(3) of the FT Act. A hire company may have an entitlement to a fuel tax credit for off-road use of light vehicles.

[38] See FTR 2008/1.

[39] See Subdivision 41-B.

[40] See FTR 2008/1.

56. The transactions have been labelled Arrangements A, B, C, D, E and F. These arrangements appear under a separate heading in the hire agreement, generally headed fuel. There are no other clauses in the agreement that deal with fuel.

Arrangement A

The hire company offers a pre-paid fuel option. Under this option the hirer buys a full tank of fuel which is supplied in the vehicle or equipment at the time of collection. Regardless of the amount of fuel remaining in the vehicle or equipment at the time of its return no refund is available to the hirer.

Arrangement B

The vehicle or equipment is provided with a full tank of fuel at the time of collection. The arrangement provides that the hirer returns the vehicle or equipment without replacing any of the fuel used. The hirer will pay a refuelling service charge based on the fuel used. The refuelling service charge includes the cost of fuel.

Arrangement C

The vehicle or equipment is supplied with a full tank of fuel on collection. The hirer is advised to refuel the vehicle or equipment prior to its return to avoid refuelling charges. If the hirer returns the vehicle or equipment with less than a full tank of fuel, they must pay the refuelling service charge per litre. The refuelling service charge includes the cost of fuel.

Arrangement D

The hire company supplies the equipment, driver and fuel. The hire company charges the customer an hourly fee for the supply. This arrangement is sometimes referred to as wet hire or full hire.

Arrangement E

The hire company supplies the equipment to the hirer, and the hirer provides its own driver and the fuel. This arrangement is sometimes referred to as dry hire.

Arrangement F

The hire company supplies heavy vehicles, equipment and fuel to the hirer and the hirer provides its own drivers and operators. The hire company does not dispose of the fuel but grants the hirer a licence to use the fuel under the arrangement.

Example 1 – hire company sells a tank of fuel to the hirer: Arrangement A

57. *Cinderella's Truck Hire hires out heavy vehicles (trucks). An option in the hire agreement is that the hirer can purchase the initial*

tank of fuel in the truck. There is no refund if any fuel remains in the truck at the time it is returned.

58. *Pete, a market gardener who is registered for GST, hires a truck to deliver his fruit and vegetables by public road to the city markets and takes up the option to purchase an initial tank of fuel which is 130 litres of diesel.*

59. *Pete expects to use 130 litres of diesel in delivering his produce to market after which he plans to return the vehicle to the hirer with any residual fuel remaining.*

60. *At the time Pete hires the truck, he is entitled to a fuel tax credit on 130 litres of fuel. Pete is entitled to a fuel tax credit at this time because he has bought (acquired) 130 litres of fuel for use in carrying on his enterprise. However, the amount of his fuel tax credit entitlement is reduced by the road user charge because the vehicle is for use in travelling on a public road.*

61. *When Pete returns the vehicle to the hire company he realises that he used 120 litres of diesel rather than 130 litres. Pete is required to make an increasing fuel tax adjustment for the 10 litres he did not use.*

62. *Pete must reduce his entitlement because the residual 10 litres of diesel was not used in carrying on his enterprise and it has been acquired under the hire arrangement by Cinderella's Truck Hire.*

63. *However, where the whole of the transaction occurs in the same tax period Pete can claim a net entitlement on 120 litres of diesel.*

64. *Pete should attribute the fuel tax credit to the same tax period to which the respective input tax credits for the fuel is attributed.*

Example 2 – hirer pays for the fuel that they consume: Arrangement B

65. *Daniel is registered for GST. He hires a tractor for use in agricultural activities that previously qualified for an energy grant under the Energy Grants Act. The tractor is provided by the hire company with a full tank of diesel. Under the terms of the contract Daniel only pays for the fuel that he consumes.*

66. *Daniel only acquires the fuel as and when he consumes it. Therefore, where Daniel consumes 75 litres of diesel in day 1 and 25 litres in day 2 he is entitled to a fuel tax credit on 75 litres and 25 litres of diesel respectively on those days.*

67. *Daniel should attribute each fuel tax credit (for each acquisition) in the same tax period to which the respective input tax credits for the fuel is attributed.*

Example 3 – hirer returns an equivalent quantity of fuel: Arrangement C

68. *Sam hires a roller with a fuel tank (30 litres) of petrol from Sue's hire company for use in his garden maintenance enterprise and is registered for GST. Sam is advised to refuel the roller prior to its return to avoid refuelling charges. If Sam returns the roller with less than a full tank of petrol, he must pay a refuelling charge, which includes the cost of petrol.*

69. *Sam has refilled the roller on several occasions with petrol resulting in him purchasing 80 litres of fuel. After the last purchase the roller had a full tank of petrol and was returned to Sue's hire company.*

70. *As Sam has returned the roller with a full tank of fuel at the end of the hire agreement he has replaced the original tank of petrol consumed with equivalent goods. This arrangement is known as mutuum.*[41] *Under this principle he is taken to have acquired the original tank of 30 litres of fuel at the commencement of the hire arrangement. He has also acquired an additional 80 litres of fuel (in total) by purchasing fuel on several occasions himself.*

71. *At the time Sam commences the hire agreement he is entitled to a fuel tax credit for the original 30 litres of petrol in the tank as it is for use in carrying on his enterprise. He is also entitled to further fuel tax credits on another 50 litres of petrol at the times he made those acquisitions.*

72. *However, Sam has no entitlement to a fuel tax credit on the last 30 litres (of the 80 litres of petrol he purchased) because this fuel was not acquired for use in carrying on his enterprise for the purposes of section 41-5, and in returning the roller with the 30 litres fuel to Sue's hire company, the fuel has been acquired by Sue's hire company under the hire agreement.*

73. *Sam should attribute the fuel tax credit (for each eligible acquisition) to the same tax period to which the respective input tax credits for that fuel are attributed.*

Example 4 – hire company supplies vehicle, driver and fuel: Arrangement D

74. *Laurie, a building contractor who is registered for GST, is building a house for sale. He enters into a contract with Retrac's hire company for the supply of earthmoving services. Under the contract Retrac's hire company will supply a bobcat with a driver and diesel. This is commonly referred to as a wet hire (or full hire) arrangement.*

75. *Retrac's hire company invoices at a flat rate of $225 per hour for the wet hire.*

[41] See paragraphs 117 to 124 of this Ruling for further explanation of where fuel is the subject of mutuum.

76. *As the arrangement is for the supply of services, the diesel is not acquired by Laurie under the arrangement.*

77. *As Retrac's hire company is not disposing of the diesel, they are entitled to the fuel tax credit for diesel for use in these wet hire arrangements each time they acquire it for such purposes. Retrac's hire company will use the fuel when it operates the bobcat.*

78. *Retrac's hire company should attribute the relevant fuel tax credit to the same tax period to which the respective input tax credits for the fuel are attributed.*

Example 5 – hire company supplies the equipment: Arrangement E

79. *Nerraw's hire service provides small items of equipment for hire such as lawn mowers. Nerraw's hire service provides all his equipment without any fuel.*

80. *Nerraw's hire service enters into an agreement with Turfinator Lawnmowers (Turfinator), who is in a lawn mowing business and registered for GST, to supply a lawn mower over a 3 day period at $30 a day.*

81. *As Turfinator is providing its own fuel it is entitled to a fuel tax credit because it has acquired fuel and the fuel is for use in carrying on its enterprise.*

82. *Turfinator should attribute its fuel tax credits (for each acquisition) to the same tax periods to which the respective input tax credits for the fuel are attributed.*

Example 6 - hire company supplies vehicle/equipment and fuel under a licence to use situation: Arrangement F

82A. *Martin Company (Martin) is registered for GST and carries on an enterprise of hiring out heavy vehicles and equipment.*

82B. *Lewis Company (Lewis) carries on an enterprise of supplying landscaping and earthmoving services to its customers.*

82C. *Martin and Lewis are related entities.*

82D. *Lewis hires from Martin the heavy vehicles and equipment necessary for it to provide landscaping and earthmoving services to its customers.*

82E. *Under the arrangement, Martin acquires and makes available the fuel that is necessary for Lewis to operate the hired vehicles or equipment by way of Martin's fuel card account. Lewis's employees use Martin's fuel card as an agent of Martin, to purchase fuel for use in the hired vehicles or equipment in providing landscaping and earthmoving services.*

82F. *Lewis pays Martin a fixed daily rate for the hire of the vehicles or equipment including the fuel. Lewis does not pay or reimburse Martin for fuel acquired via the fuel card for use in the hired vehicles or equipment. Nor does the quantity of fuel acquired or used change the fixed daily hire rate.*

82G. *Under the arrangement, Lewis agrees that the fuel is only to be used in the hired vehicles and equipment and not for any other purpose. Martin is able to monitor the use of fuel via the fuel card statements, and under the hire agreement Martin can require Lewis to keep records about the manner in which the fuel is being used.*

82H. *In this situation, Martin has acquired the fuel and never disposes of it. Martin provides Lewis a licence to use the fuel under their hire arrangement. There is never any intention to transfer ownership in the fuel. Lewis does not have unfettered use of the fuel supplied under the arrangement. Martin has appropriate controls to ensure that all fuel is used by Lewis in the hired vehicles and equipment in providing landscaping and earthmoving services.*

82I. *As Martin does not dispose of the fuel, it is entitled to the fuel tax credit for fuel acquired and made available to Lewis under the hire arrangement as the fuel is used in carrying on Martin's enterprise and has not been disposed of.*

82J. *Martin should attribute the relevant fuel tax credit to the same tax period to which the respective input tax credits for the fuel are attributed*.

Date of effect

83. This Ruling applies to years of income commencing both before and after its date of issue. However, the Ruling 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 this Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

Commissioner of Taxation
6 May 2009

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.

84. 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 its enterprise:

> 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.[42]

85. In the context of vehicle and equipment hire arrangements, the relevant issues are, whether the entity, for the purposes of section 41-5 has:

- acquired the fuel; and
- whether that acquisition of fuel is for use in carrying on its enterprise.

Meaning of 'acquire'

86. The Commissioner's views on the meaning of 'acquire' are the same as those expressed in FTR 2007/1 at paragraphs 18 to 22,[43] which is as follows:

> 18. The term 'acquire' is not defined in the FT Act. It therefore takes its ordinary meaning.
>
> 19. In the context of the FT Act, the Commissioner considers that the term 'acquire' has the ordinary meaning of to 'get as one's own'.
>
> 20. To 'get as one's own' requires property in or ownership of the relevant taxable fuel to pass from one entity to another entity, or alternatively, that ownership is conferred because the fuel has been obtained by an entity as its own.
>
> 21. You acquire taxable fuel if:
>
> - you purchase the fuel;
> - the fuel is gifted to you; or
> - you get the fuel as your own by any other means (other than manufacture or import). This necessarily means that you get ownership of, or proprietary rights in respect of, the fuel.

[42] To find definitions of asterisked terms, see the Dictionary in the FT Act, starting at section 110-5.
[43] See FTR 2007/1 for a full discussion on the meaning of acquire.

22. Whether you get ownership of, or proprietary interest in, fuel will depend on all the facts and circumstances of each case. It will be necessary to examine the surrounding circumstances, together with any relevant documentation, including any written agreement.

87. Section 41-5 provides that 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.

88. As such, prior to considering whether fuel has been acquired for use, for the purposes of section 41-5, it is necessary, to consider whether the entity has acquired[44] the fuel. An entity acquires fuel where it gets ownership of, or proprietary interest in the fuel.[45] This aspect is inextricably linked with the issue of use, that is, if on the facts another entity has acquired the fuel, the entity from which it acquired the fuel will not have used the fuel as required under the FT Act.[46] Consequently, two entities can never use the same fuel for the purpose of section 41-5.

The relevance of GST concepts in determining whether an entity has acquired fuel for the purposes of the FT Act

89. The Commissioner's view on the relevance of GST concepts in determining whether an entity has acquired fuel for the purposes of section 41-5 is expressed in the Addendum to FTR 2007/1 issued on 3 December 2008[47].

90. That Addendum provides that as there are no specific references to GST terms and concepts in the FT Act in relation to whether an entity has acquired or disposed of fuel, the GST treatment of a supply or composite supply is not relevant in determining whether fuel has been acquired (or sold or otherwise disposed of) for the purposes of the FT Act.

Meaning of 'use'

91. The Commissioner's view on the meaning of 'use' is in FTD 2009/1. The Commissioner considers that in accordance with section 41-5, under the scheme of the FT Act only one entity is entitled to a fuel tax credit.[48]

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[44] Where the entity has not manufactured or imported the fuel.
[45] See FTR 2007/1 at paragraphs 18 to 22, and 140 to 153.
[46] However, note section 41-10 provides a fuel tax credit for certain taxable supplies of fuel.
[47] FTR 2007/1A2 – Addendum.
[48] See paragraph 18 of FTD 2009/1.

92. For the purposes of section 41-5 and in the context of the expression 'for use' in that section, 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.[49]

93. In the context of vehicle hire arrangements, fuel:

- is not used if it is sold or otherwise disposed of; and
- is used if it ceases to exist after an action to use it as fuel by putting it into service in carrying on the enterprise.

Entitlement to a fuel tax credit under a vehicle or equipment hire arrangement

94. Under vehicle or equipment hire arrangements, entitlement to a fuel tax credit under section 41-5 depends on whether an entity:

- acquired the fuel; and
- whether that acquisition of fuel is for use in carrying on its enterprise.

Is fuel sold or otherwise disposed of by the hire company and acquired by the hirer under the relevant hire arrangement?

95. In the context of vehicle and equipment hire arrangements fuel is not used if it is sold or otherwise disposed of.

96. The Revised Explanatory Memorandum explains that an entity that disposes of fuel does not use the fuel and must make an increasing fuel tax adjustment under Division 44 for any fuel tax credit claimed.[50] An entity disposes of fuel where property in the fuel passes to another entity, which occurs, for example, under a contract of mutuum.[51]

97. The Commissioner considers that under vehicle and equipment hire arrangements fuel:

- is disposed of by the hire company and acquired by the hirer if the hire company sells the fuel or otherwise disposes of the fuel, for example, where the fuel is the subject of mutuum; and
- fuel is not disposed of by the hire company and acquired by the hirer if the hire company merely grants the hirer a licence to use its fuel.

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[49] See FTD 2009/1 for the Commissioner's view and further discussion on the meaning of 'use' for the purposes of the FT Act.
[50] See Revised Explanatory Memorandum at paragraph 2.95.
[51] See paragraphs 117 to 124 of this Ruling for a discussion on mutuum.

Fuel the subject of sale under hire arrangements

98. One way that an entity acquires fuel for the purposes of section 41-5 is to purchase fuel.[52] The entity which sells the fuel does not use the fuel for the purposes of section 41-5.[53]

99. Whether fuel is sold by a hire company to the hirer will depend on the facts of each case.

100. The decision in *Comptroller-General of Customs v. Woodlands Enterprises Pty Ltd, ex parte Woodlands Enterprises Pty Ltd*[54] (*Woodlands*) indicates that there can be a sale of fuel under a hire arrangement.

101. In that case, the appellant (Woodlands) engaged a contractor to rear its chickens. Under a contract labelled 'Hiring Agreement' it hired equipment to the contactor and supplied the contractor with diesel fuel to operate the equipment. The contractor would order fuel from Shell Co (Shell), which would then deliver the fuel into tanks owned by the appellant. Shell would issue an invoice to the contractor addressed to the appellant and the appellant would pay Shell. The contractor would subsequently pay the appellant for fuel it used in its operations.[55] The contract contained a separate clause (Clause 12) which specifically provided that the contractor was to pay for the fuel supplied by Woodlands that it consumed in operating the equipment:

> Fuel.
>
> At the expiration of each growing period the Owner will deliver an invoice to the Hirer with respect to all fuel whether it be in the nature of diesel, methane gas or electricity supplied to the Hirer by the Owner and consumed by him in the course [sic] of each growing period. Within seven (7) days of the delivery of the Owners invoice setting our [sic] particulars of fuel consumption, (which invoice shall if signed under the hand of the Owner be prima facie evidence as the amount of fuel consumed by the Hirer) same shall be paid forthwith to the Owner, and in default of payment shall be recoverable pursuant to Clause 6 hereunder.[56]

102. Based on the arrangement in *Woodlands,* the Court found that Woodlands had an agreement to sell fuel to the contractor, which became a sale as and when fuel was drawn and consumed by the contractor, which in turn would be when property in the fuel passed.

103. The Court stated that whether there is a sale will depend on the intention of the parties, which is to be ascertained 'according to the terms in which they have contracted, set in the context of the circumstances in which their contract was formed'.[57]

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[52] See paragraph 21 of the FTR 2007/1.
[53] See paragraph 93 of this Ruling.
[54] [1996] 1 Qd R 589; (1995) 128 FLR 113; (1995) 83 A Crim R 579.
[55] [1996] 1 Qd R 589 at 594, 599 and 600.
[56] [1996] 1 Qd R 589 at 599.
[57] See Fitzgerald P in *Woodlands* [1996] 1 Qd R 589 at 592.

104. The Court relied on the only relevant clause, requiring the contractor to pay for fuel supplied by Woodlands that it consumed, to find that there was a sale of fuel to the contractor, and not a licence to use the fuel.[58]

105. In finding that there was a sale of fuel under the hire agreement, McPherson JA made the following observations:

> … Under s. 4(1) of the *Sale of Goods Act 1896* a contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in the goods to the buyer for a money consideration, called the price. Under s. 4(3) of the Act, a contract of sale becomes a sale, as distinct from an agreement to sell, when the property in the goods is transferred from the seller to the buyer. If the contract is for the sale of specific goods in a deliverable state, the property in the goods passes when the contract is made, irrespective of whether the time for payment is postponed... Here the goods were not specific, but unascertained. It follows that no property passed unless and until the goods were ascertained…[59]
>
> …According to the well-known dictum of Atkin L.J. in Re Wait [1927] 1 Ch. 606, 630, 'ascertained' in this context probably means 'identified in accordance with the agreement after the time a contract of sale is made'... In a case like this, where quantities of the goods are from time to time drawn from bulk, it is only when a specific quantity is extracted that it is identified in accordance with the agreement and consequently ascertained... Not until then could the property in that quantity be said to pass from seller to buyer…..[60]
>
> …The property in those quantities passed to the contractor, probably at the time of consumption, or immediately before it, when it was appropriated by the contractor for that purpose. …[61]
>
> …Conceding that the Hiring Agreement describes the appellant as the owner and the contractor as the hirer, it remains difficult to identify in the Hire Agreement any licence to hire the fuel in the tank. Clause 12, which is the only relevant provision, is concerned simply with the timing and method by which the contractor is to be charged with and is to pay for fuel 'supplied to the hirer by the owner and consumed' during the course of a specified period….[62]
>
> ...It follows in my opinion that the transaction here involved a sale, or a series of sales, of the quantities of oil that were consumed by the contractor. … It is, I consider, correct to regard it as a contract for sale because it was 'a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration called the price'…
>
> For these reasons I agree that the transaction envisaged by the Hiring Agreement cannot be regarded as a hire of, or even as involving a licence to use, the fuel delivered to the tanks. Instead there was an agreement by the appellant to sell fuel to the contractor, which became a sale as and when a quantity was drawn and consumed.[63]

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[58] See the decisions of McPherson JA and Pincus JA in *Woodlands* [1996] Qd R 589 at 595 and 597.
[59] [1996] 1 Qd R 589 at 595.
[60] [1996] 1 Qd R 589 at 595.
[61] [1996] 1 Qd R 589 at 597.
[62] [1996] 1 Qd R 589 at 595.
[63] [1996] 1 Qd R 589 at 597.

106. Pincus JA also found that there was a sale of fuel, and made the following observations:

> Ordinarily, one would expect that goods which are supplied to a consumer, consumed and then paid for would be regarded as having been bought by that consumer….[64]
>
> …It was not and could hardly have been contended that it is impossible to have a contract for sale under which the property in what is sold passes as it is consumed;….[65]
>
> … Here, but for the circumstance that the fuel the contractors ordered and which Shell supplied pursuant to those orders was obtained on the appellant's account, it could hardly be doubted that the contractors bought the fuel they ordered and used and paid for, the property passing at the time of delivery by Shell. But when one adds in the factor that Shell looked to the appellant not to the contractors for payment, analysis of the relationship between the appellant and the contractors becomes less certain. Were it not for cl. 12 of the hiring agreement quoted above, the natural interpretation of the parties' dealings would be that property in the fuel would pass to the contractors when delivered by Shell at the contractors' behest, they having the appellant's authority to order the fuel on its account. But the clause makes it clear that only fuel consumed has to be paid for and the property must therefore pass to the contractors, if at all, at the time of consumption.[66]

107. Whilst in *Woodlands* the Court held that Woodlands sold the fuel to the contractor, Fitzgerald P observed:

> … Conceptually there seems no reason why an owner of fuel cannot authorise another person to cause it to be consumed or converted into energy while it remains the owner's property on the footing that, if the fuel is used in that manner, the party using it will subsequently reimburse the owner… it is not obvious that property in the goods *must* pass from the owner *to the person who must reimburse the owner*; the parties could indicate a contrary intention.[67]
>
> …Reference is also made by his Honour to a statement in 8 Am.Jur. 2d §48 that '... mutuum ... partakes more of the nature of a sale, and is so treated, since its practical effect must always be to operate as a transfer of title where chattels are deposited...'. While I see no reason to dissent from that as a general proposition, since the parties to such a contract would ordinarily intend that property pass, that does not appear to be a necessary consequence in all circumstances; for example, if the contract expressly provided otherwise, or otherwise sufficiently indicated the contracting parties' intention that the property in the goods was to remain in the owner while the goods continued to exist.

[64] [1996] 1 Qd R 589 at 600.
[65] [1996] 1 Qd R 589 at 600.
[66] [1996] 1 Qd R 589 at 600.
[67] [1996] 1 Qd R 589 at 593.

> … There is insufficient indication in its contracts with its contractors that it was intended that it retain property in the fuel even when taken from storage and used in the hot air brooders; property would ordinarily be expected to pass at the point to the contractor proposing to use and pay for the fuel (cp. *Bentley Bros v. Metcalfe & Co.* [1906] 2 K.B. 548, 552), and the parties should be taken to have so intended in the absence of contrary provision in their contracts.[68]

108. Fitzgerald P's observation that it is not always the case that property must pass from the owner to the person who reimburses the owner stands alone.

109. There is a difference between purchasing and reimbursing, that is to purchase is to pay whilst to reimburse is to repay.[69] Reimbursement implies agency, in that the entity that seeks reimbursement does so in the belief that it has incurred the expenses on behalf of another entity which will repay it for the expenses that it has incurred on their behalf. Whilst a seller may include retention clauses to retain ownership of goods, it is unreasonable that in these circumstances a seller can validly attempt to retain property in goods sold where the purchaser pays the seller in full for the goods. In the context of hire arrangements the hirer is paying for and not repaying the hire company for the fuel. Nor is the hire company incurring the expense on behalf of the hirer. In this regard, the Commissioner notes the Administrative Appeals Tribunal's (the Tribunal) observations in *Re Taxpayer v. Commissioner of Taxation*:[70]

> 9.17 The absence of specific provisions in the contracts for the applicant to pay for or reimburse Robe for the Fuel is a very strong indication that as stated by Mr Willacy the Fuel was not being sold or purchased and that property in the Fuel was not intended to pass.

110. The Commissioner believes that this supports the view that in hire arrangements treating a payment as a reimbursement does not negate that there was a sale of fuel and that property does pass. Furthermore, whilst intention is ordinarily ascertained with reference to the contractual arrangement between the parties, the clauses still have to be valid. For example, an entity cannot validly express the intention to retain property in goods that it has on the facts sold to another entity or has been bought by another entity. As such, if on the facts the hirer has bought the fuel that it consumes, the hire company cannot purport to retain property in the fuel bought by the hirer.

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[68] [1996] 1 Qd R 589 at 594.
[69] See *The Macquarie Dictionary,* 2001 rev. 3rd edn, The Macquarie Library Pty Ltd, NSW.
[70] [2006] AATA 967; (2006) 64 ATR 1250; [2007] ALMD 7482.

111. The reasoning in *Woodlands* is relevant to determining whether fuel is sold by a hire company in the hire arrangements. The Commissioner considers that where the agreement only provides that fuel is supplied to a hirer by the hire company and the hirer pays for the fuel there will be a sale of fuel by the hire company. When the hirer acquires the fuel, that is, when property passes from the hire company to the hirer, will depend on when the goods (that is quantities of fuel) are ascertainable.[71]

112. Where there is an intention to the contrary it will be necessary to consider the contractual arrangement and any relevant surrounding circumstances to establish the nature of the fuel transaction between the hire company and the hirer.

Does a separate charge for fuel and the lack of refund or credit for fuel returned with the vehicle or equipment affect whether there is a sale of fuel?

113. In *Re Riviera Nautic Pty Ltd and Commissioner of Taxation* (*Riviera*),[72] the applicant submitted that it did not sell the fuel based on the fact that there was no separate charge for the fuel used by hirers and there was no entitlement to a refund or credit for any unused fuel.

114. For the purposes of the FT Act, the Commissioner considers that, other than where a flat fee is charged irrespective of the quantity of fuel supplied, the billing method should not dictate whether the hire company has sold the fuel to the hirer. As such, where the hire arrangement is based on a pre-paid option, or paying for the fuel the hirer consumes, or returning an equivalent amount of fuel supplied, the lack of an itemised bill specifying fuel will not alter the fact there is a disposal of fuel by the hire company and an acquisition of fuel by the hirer.

[71] In relation to Arrangement A discussed at paragraphs 56 and 57 to 64 of this Ruling, property in the fuel passes at the time the hirer enters into the hire agreement where the vehicle or equipment with the tank of fuel is identified, or in any event when the vehicle or equipment is delivered to the hirer. This is when the goods are specific and ascertainable, that is, the subject of the sale is the full tank of fuel. In contrast, for Arrangement B discussed at paragraphs 56 and 65 to 67, property in the fuel passes as and when the hirer consumes the fuel. The goods are specific and ascertainable as and when the fuel is consumed, that is, the subject of the sale is the fuel that is consumed by the hirer.

[72] [2002] AATA 657; (2002) 50 ATR 1106; (2002) 35 AAR 361; (2002) 68 ALD 581.

115. Unlike the Tribunal's observations in *Riviera*[73] the Commissioner considers that the fact that there is no refund for fuel returned does not necessarily play a role in determining whether there has been a sale or disposal of fuel. This factor should not determine whether there has been a sale of fuel where the hirer has acquired fuel and chooses to relinquish any residual fuel at the end of the hire period. The lack of refund only governs how the hire company and hirer will deal with residual fuel that is in the vehicle or equipment that is handed over at the conclusion of the hire period. This does not affect whether the hire company disposed of and the hirer acquired fuel under the arrangements at the time the hirer collected the vehicle or equipment.

116. When the hirer returns the vehicle or equipment with any amount of fuel, the hire company will acquire the fuel for the purposes of section 41-5 (note this only relates to whether the hire company has acquired the fuel – not whether they have used the fuel). The hirer will not have used the fuel that is returned as they will have otherwise disposed of that amount of fuel. Where the hirer has claimed a fuel tax credit for this fuel they will need to make an increasing fuel tax adjustment under section 44-5.

Fuel the subject of mutuum under the hire arrangements

Mutuum

117. Mutuum requires replacement by the equivalent in kind of the goods lent that are used or consumed. Mutuum is confined to consumables or fungibles.[74] As the thing lent will be consumed and as such incapable of being returned in specie, the property in the thing lent passes to the borrower.[75]

118. In *Woodlands,* McPherson JA, in the course of dealing with whether there was a sale or disposal of fuel under the hire arrangement, also discussed whether the fuel was the subject of bailment and mutuum:

> It must in any event be doubtful whether it is possible to defer the passing of the property in circumstances like these. Roman law recognised a contract known as *mutuum*, which was a loan for consumption or use of goods which were usually if not always fungibles. Oil is an example commonly given… In any case the Roman contract of *mutuum* required replacement by the equivalent in kind of the goods used or consumed.[76]

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[73] (2002) 68 ALD 581 at 586.
[74] Fungibles are consumables which are capable of being estimated by number, weight or measure, such as, for example wine or chocolate: *Halsbury's Laws of Australia,* LexisNexis Online, Butterworths Australia, 2008 at [40-185].
[75] *Halsbury's Laws of Australia,* LexisNexis Online, Butterworths Australia, 2008 at [40-185]. As discussed in *The Laws of Australia*, Lawbook Online, Thomson Australia 2008 at [8.5.330] mutuum is also known as gratuitous quasi-bailment.
[76] [1996] 1 Qd R 589 at 595 to 596

> …It is clear that the transaction under the Hire Agreement in this instance does not involve a bailment…Bailment requires a return of the very goods bailed, in their original or altered form, and not some other goods of equivalent value. See *Chapman Bros v. Verco Bros & Co. Ltd* (1933) 49 C.L.R. 306, 316, where Starke J. said that if the identical subject matter, either as it stood or in altered form, is not to be returned, but a different thing of equal quantity and quality may be given as an equivalent, then a bailment is not created. Having referred to the decision of the Privy Council in *South Australian Insurance Co. v. Randell* (1869) L.R. 3 P.C. 101, as 'decisive', his Honour went on to say that in the example given 'it is a transfer of property, and the title to the thing originally delivered vests in the transferee' (49 C.L.R. 306, 316). In the United States, where mutuum is evidently recognised, it has been said that in 'our system of jurisprudence... it has some of the characteristics of a bailment', but that it:
>
> > ... partakes more of the nature of a sale, and is so treated, since its practical effect must always be to operate as a transfer of title where chattels are deposited (8 Am.Jur. 2d §48, at 787).[77]

119. It is well accepted that a bailment requires the return of the very goods bailed in its original or an altered form.

120. The Laws of Australia provides the following explanation of bailment:

> A duty to redeliver to a bailor the exact goods bailed (or their identifiable product) is a normal accompaniment of bailment... There can be no bailment where the terms of receipt merely oblige a recipient of goods to restore to the deliverer an equivalent quantity of goods other than the exact goods delivered... Such receipt may take effect, according to circumstances, by way of sale, exchange or other transfer of property for value other than by sale, or 'mutuum' (sometimes known as gratuitous quasi-bailment).[78]

121. The quintessential definition of bailment from case law comes from *Chapman Bros v. Verco Bros & Co. Ltd*[79] (*Chapman Bros*) where Starke J. stated that:

> The principles of law applicable have been authoritatively stated in *South Australian Insurance Co. v. Randell*... If the identical subject matter is to be restored, either as it stood or in altered form, the case is one of bailment. If, on the other hand, the identical subject matter, either as it stood or in altered form, is not to be returned, but a different thing of equal quantity and quality may be given as an equivalent, then a bailment is not created: it is a transfer of property, and the title to the thing originally delivered vests in the transferee.[80]

[77] [1996] 1 Qd R 589 at 596.
[78] The Laws of Australia, Lawbook Online, Thomson Australia, 2008 at [8.5.330].
[79] (1933) 49 CLR 306.
[80] (1933) 49 CLR 306 at 316.

122. Given that fuel is a fungible which cannot be returned in specie once consumed, and that the terms of the hire agreement require the hirer to return to the hire company not the fuel that they provided but the equivalent in quantity, the transaction regarding fuel under such arrangements is the subject of mutuum and not bailment.

123. Unlike bailment, under mutuum there will be a transfer of property (that is the recipient of the good acquires the goods).

124. Under mutuum, property in the fuel passes when the fuel is delivered, which in a hire arrangement will be when the vehicle or equipment is delivered to or collected by the hirer. This is when the hirer acquires the fuel for the purposes of section 41-5.

Licence to use the fuel

125. As explained in FTR 2007/1, if you acquire a right or a licence to use another entity's fuel, you do not acquire taxable fuel for the purposes of the FT Act. The mere grant of a right or licence to use the fuel does not result in you obtaining a proprietary interest in, or ownership of, the fuel.[81]

126. The two cases relevant to this issue, as they specifically deal with the licence to use fuel, are *Riviera*[82] and *Re Taxpayer v. Commissioner of Taxation.*[83] The Tribunal's approach and findings in the latter case have been endorsed on appeal by the Full Federal Court in *Colby Corporation Pty Ltd v. Commissioner of Taxation*[84] (*Colby*).

127. In *Riviera,* the applicant (Riviera) carried on the business of hiring boats. The boats were provided to clients with a full tank of fuel at the commencement of a hire period. If a boat required refuelling, this was done at no extra charge. In submitting that it used the fuel for the purposes of the diesel fuel rebate scheme, Riviera contended that, unlike most of the companies in its industry, it did not sell or otherwise dispose of the diesel fuel to the hirer of the vessel. This contention was based on the fact that the hire rate charged was inclusive of all fuel used irrespective of the quantity used which included refuelling the boats. At no time did Riviera separately identify or account to the hirer for the fuel used and no separate charge was made for the fuel. If a boat were returned with fuel, no refund or credit was given to the hirer.[85]

128. The Tribunal relied on these submissions in finding that there was no sale of fuel.

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[81] See FTR 2007/1 at paragraph 23.
[82] [2002] AATA 657; (2002) 50 ATR 1106; (2002) 35 AAR 361; (2002) 68 ALD 581
[83] [2006] AATA 967; (2006) 64 ATR 1250; [2007] ALMD 7482.
[84] (2008) 165 FCR 133; [2008] FCAFC 10.
[85] (2002) 68 ALD 581 at 582.

129. It should be noted that in support of its claim, Riviera indicated that it did not claim a rebate in relation to the portion of the fuel it purchased and retailed to private boat owners or to those who hired a boat for day hire only, unlike the fuel that was not retailed (that is did not sell or otherwise dispose of) under the boat hire for which it did claim the rebate.[86]

130. In *Re Taxpayer v. Commissioner of Taxation*[87] the Tribunal observed that in *Riviera* the hirer essentially had a licence to use the fuel in the course of the hire of the boats.

131. In *Re Taxpayer v. Commissioner of Taxation*,[88] the Tribunal considered which entity had the entitlement to an energy grant for fuel used in drilling equipment. In determining the issue, the Tribunal considered whether under the contracts between the applicant (Colby) and a joint venture (Robe), Colby had acquired by purchase a proprietary interest in diesel fuel for the purposes of the Energy Grants Act. Under the contract, Colby supplied and used its own equipment and Robe provided diesel fuel for use in drilling equipment by Colby. Colby was entitled to keep any unused fuel. The contracts between the parties did not contain any express terms indicating that Colby was purchasing fuel from Robe, property in the fuel was to pass to Colby, or that Colby had to reimburse Robe for the fuel.[89]

132. In the course of finding that Colby did not purchase the fuel, the Tribunal observed that the absence of specific provisions in the contract requiring Colby to pay for or reimburse Robe for the fuel was a very strong indication that the fuel was not being sold by Robe or purchased by Colby and that the property in the fuel was not intended to pass to Colby.[90]

133. In dealing with Colby's contention that it acquired a proprietary interest in the fuel, the Tribunal referred to Fitzgerald P's observation in *Woodlands* that whether or not property in the fuel passes depends on the intention of the parties taking into account relevant surrounding circumstances.[91]

134. Colby also contended that property in the fuel passed to it once the fuel was placed in its equipment. Colby relied on the fact that it was entitled to keep any residual fuel at the completion of the contract to support this contention. Colby relied on the decision in *Riviera* to support its claim.

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[86] (2002) 68 ALD 581 at 583.
[87] [2006] AATA 967 at paragraph 11.14.
[88] [2006] AATA 967.
[89] [2006] AATA 967 at paragraphs 3.1 and 3.2
[90] *Re Taxpayer v. Commissioner of Taxation* [2006] AATA 967 at paragraphs 9.17 and 11.7. On appeal, this Tribunal decision was endorsed by the Full Federal Court in *Colby*.
[91] [2006] AATA 967 at paragraph 11.4.

135. The Tribunal drew the following implications from the express terms of the contracts, to find that as with *Riviera*, Robe had control over the use and consumption of fuel and Colby did not acquire a proprietary interest in or purchase the fuel:

> (a) Robe made the Fuel available for use by the applicant only for the specific purpose of enabling the applicant to perform the relevant drilling services for Robe at the specific sites and times nominated in the Contracts;
>
> (b) the applicant was granted a license by Robe to use the Fuel;
>
> (c) other than any residual Fuel at the end of the contracts, the applicant was not entitled to use the Fuel for any other purpose; and
>
> (d) the applicant could only draw as much Fuel as it required to satisfactorily perform the drilling works pursuant to the Contracts and then remove its drilling rigs and no more.[92]

136. Essentially, the Tribunal could not find anything in the contracts or surrounding circumstances indicating any intention between the parties for Colby to acquire the fuel from Robe.[93]

137. The decision in *Riviera* has led to the suggestion that the absence of a separate charge is indicative of the intention to only grant a licence to use rather than sell the fuel.

138. The Commissioner considers that the decision in *Riviera* is peculiar to its facts and circumstances. Riviera's position that it did not sell or otherwise dispose of the fuel in relation to which it claimed the rebate rested on the fact that it was hiring boats and charged a fixed hire price that was inclusive of all fuel, irrespective of the quantity used, including refuelling the boat during the course of the hire period.

139. Under the arrangement in *Riviera*, it may be arguable that the fuel was not sold as the fixed hire price, which was inclusive of all fuel used, was not equal to the cost of fuel used by the hirer. That is, under the arrangement the hirer is not paying Riviera the full cost of the fuel.

140. As discussed at paragraphs 114 and 115 of this Ruling, the Commissioner does not consider that the fact that there is no refund for fuel returned necessarily plays a role in determining whether there has been a sale or disposal of fuel.

141. Whether a hire company grants the hirer a licence to use fuel will depend on the contractual arrangement and relevant surrounding circumstances. The Commissioner considers that the intention not to sell but only grant the hirer a licence to use the fuel will be evident where a flat fee is charged irrespective of the quantity of fuel supplied or where fuel is provided free of charge.

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[92] [2006] AATA 967 at paragraph 11.15.
[93] See *Colby* [2008] FCAFC 10 at paragraph 34.

Is fuel used under the relevant hire arrangements?

142. Where the fuel ceases to exist after an action to use it, it will be used for the purposes of section 41-5.

143. In the context of vehicle or equipment hire arrangements, fuel is used if it ceases to exist after an action to use it, for example in the internal combustion engine of the hire vehicle or equipment.

Where the hire company acquires the fuel and does not sell or otherwise dispose of the fuel

144. Where the hire company acquires the fuel and it ceases to exist after their action to use it in the vehicle or equipment, they will have used the fuel.

Where the hirer acquires the fuel and does not sell or otherwise dispose of the fuel

145. Where the hirer acquires the fuel and it ceases to exist after their action to use it in the hired vehicle or equipment, they will have used the fuel.

Attribution rules for fuel tax credits for fuel you acquire

146. The tax period to which an entity registered or required to be registered for GST can attribute a fuel tax credit for fuel is based on GST concepts as expressed in FTR 2007/1 at paragraphs 172 to 175.

147. Where the fuel acquired is $75 or less exclusive of GST[94] then the principles at paragraphs 172 to 174 of FTR 2007/1 apply. In this case, there is no requirement for a tax invoice for the fuel or a tax invoice that includes the fuel for the purpose of attributing a fuel tax credit under subsections 65-5(1) or 65-5(4).

148. Where the fuel acquired is more than $75 exclusive of GST (or there is a tax invoice for the fuel in any case) then the principles at paragraphs 172 to 175 of FTR 2007/1 apply. However, where the fuel acquired is more than $75 exclusive of GST there is a requirement for a tax invoice in respect of the fuel or a tax invoice that includes the fuel for the purposes of attributing a fuel tax credit under subsections 65-5(1) or 65-5(4).

[94] See section 29-80 of the GST Act.

149. In a mutuum arrangement[95] where there is no separate tax invoice for the original fuel[96] or a tax invoice including the cost of the original fuel then the tax invoice for the hire agreement may be used to attribute the fuel tax credit to the relevant tax period under subsection 65-5(1) or 65-5(4).

150. Where there is a hirer/hire company that has a fuel tax credit entitlement[97] at the time it acquires the fuel because:

- it is a non-profit body that is not registered or required to be registered for GST; and
- the fuel is for use in a vehicle (or vessel) that provides emergency services and the vehicle (or vehicle) is clearly identifiable as such;

then the attribution rules at subsection 61-5(2) apply to the fuel tax credit entitlement.

151. Where subsection 61-5(2) applies, the GST concepts do not apply to the attribution of any fuel tax credit for the fuel. Therefore, any entitlement to a fuel tax credit for fuel is attributable to the fuel tax return period in which the fuel is acquired.

[95] Mutuum requires the replacement by the equivalent in kind of the goods used or consumed. Mutuum is confined to consumables. As the thing lent will be consumed and as such is incapable of being returned in specie, the property in the thing lent passes to the borrower.
[96] Original fuel is the fuel provided by the hire company in the tank at the commencement of the arrangement.
[97] See Subdivision 41-B.

Appendix 2 – Alternative views

This Appendix sets out alternative views and explains why they are not supported by the Commissioner. It does not form part of the binding public ruling.

Property in fuel based on tank ownership

152. Under the alternative view, the property in fuel is governed by tank ownership.

153. The Commissioner considers that ownership of the fuel is not governed by ownership of the tank, such that even when the hirer fills the tank of the hire vehicle or equipment that it becomes the property of the hire company. If that is the case, then for example in *Woodlands,* Woodlands would have ownership of the fuel merely because the fuel was delivered into its tanks. However, in deciding who owned the fuel placed in Woodland's tank, ownership of the tank was not a significant consideration. In that case, the main consideration was who paid for the fuel.

154. Adopting the view that ownership of the fuel is governed by tank ownership means that the hirer will never be entitled to a fuel tax credit for any fuel in hire arrangements, either at the commencement of the hire or for acquisitions during the course of the hire arrangement because it could never acquire the fuel.

155. The principle from cases such as *Woodlands* and *Colby* is that contractual clauses and surrounding circumstances need to be considered to ascertain if a sale or disposal of fuel is intended, as opposed to there being no disposal by the hire company or acquisition by the hirer based on tank ownership.

Appendix 3 – Detailed contents list

156. The following is a detailed contents list for this Ruling:

References

Previous draft:

FTR 2008/D1

Related Rulings/Determinations:

FTR 2006/4; FTR 2007/1;
FTR 2007/1A2; FTR 2008/1;
FTD 2006/3; FTD 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:

- ANTS(GST)A 1999
- ANTS(GST)A 1999 9-20
- ANTS(GST)A 1999 29-80
- ANTS(GST)A 1999 184-1
- Energy Grants (Credits) Scheme Act 2003
- Energy Grants (Credits) Scheme Act 2003 4
- FTA 2006
- FTA 2006 41-5
- FTA 2006 41-5(1)
- FTA 2006 41-5(2)
- FTA 2006 41-5(3)
- FTA 2006 41-10
- FTA 2006 Subdiv 41-B
- FTA 2006 41-20
- FTA 2006 43-10(3)
- FTA 2006 Div 44
- FTA 2006 44-5
- FTA 2006 45-5
- FTA 2006 Div 65
- FTA 2006 61-5(2)
- FTA 2006 65-5(1)
- FTA 2006 65-5(1)(a)
- FTA 2006 65-5(1)(b)
- FTA 2006 65-5(2)
- FTA 2006 65-5(4)
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- Fuel Tax (Consequential and Transitional Provisions) Act 2006
- Fuel Tax (Consequential and Transitional Provisions) Act 2006 Sch 3 Pt 3 Item 10
- Fuel Tax (Consequential and Transitional Provisions) Act 2006 Sch 3 Pt 3 Item 11
- Fuel Tax (Consequential and Transitional Provisions) Act 2006 Sch 3 Pt 4 Item 12
- Sale of Goods Act 1896 4(1)
- Sale of Goods Act 1896 4(3)
- TAA 1953
- Energy Grants (Credits) Scheme Regulations 2003 8

Case references:

- Bentley Bros v. Metcalfe & Co. [1906] 2 KB 548
- Chapman Bros v. Verco Bros & Co. Ltd (1933) 49 CLR 306
- Colby Corporation Pty Ltd v. Commissioner of Taxation (2008) 165 FCR 133; [2008] FCAFC 10
- Comptroller-General of Customs v. Woodlands Enterprises Pty Ltd, ex parte Woodlands Enterprises Pty Ltd [1996] 1 Qd R 589; (1995) 128 FLR 113; (1995) 83 A Crim R 579
- Re Riviera Nautic Pty Ltd and Commissioner of Taxation [2002] AATA 657; (2002) 50 ATR 1106; (2002) 35 AAR 361; (2002) 68 ALD 581
- Re Taxpayer v. Commissioner of Taxation [2006] AATA 967; (2006) 64 ATR 1250; [2007] ALMD 7482
- Re Wait [1927] 1 Ch. 606, 630
- SA Insurance Co v. Randell (1869) 3 SALR 151; (1869) LR 3 CP 101; 16 ER 755; (1869) 22 LT 843; (1869) 6 Moore NS 341

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- Halsbury's Laws of Australia, LexisNexis Online, Butterworths Australia, 2008
- Revised Explanatory Memorandum to the Fuel Tax Bill 2006 and the Fuel Tax (Consequential and Transitional Provisions) Bill 2006

- The Laws of Australia, Lawbook Online, Thomson Australia, 2008
- The Macquarie Dictionary, 2001, rev. 3rd edn, The Macquarie Library Pty Ltd, NSW

ATO references

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