Linfox Australia Pty Ltd v Commissioner of Taxation of the Commonwealth of Australia -

Decision impact statement

Linfox Australia Pty Ltd v Commissioner of Taxation of the Commonwealth of Australia

Court/Tribunal citations:	**[2019] FCAFC 131** **[2019] AATA 222**
Venues:	Full Federal Court Administrative Appeals Tribunal
Venue reference no:	NSD 464 of 2019 (Federal Court) 2017/4041-4045 (AAT)
Judge/member names:	Robertson, Kerr and Steward JJ (Federal Court) Justice J Jagot, Deputy President (AAT)
Judgment/decision dates:	21 August 2019 (Federal Court) 22 February 2019 (AAT)
Appeals on foot:	No
Decision outcome:	Favourable to the Commissioner

Impacted advice

The ATO is reviewing the impact of this decision on relevant advice and guidance products.

Précis

Outlines the ATO's response to these cases which concern whether the taxpayer was required to reduce its fuel tax credit by the road user charge (RUC), and if not, whether Division 47 of the *Fuel Tax Act 2006* (FTA) would have operated to deny any entitlement to the fuel tax credits at issue outside of the four year limitation period.

Brief summary of facts

Taxpayers are (subject to exceptions) entitled to a fuel tax credit for taxable fuel that they acquire for use in carrying on their enterprise. However, that fuel tax credit is reduced by a RUC if the fuel is acquired to use for travelling on a public road.

The taxpayer acquired fuel that was used in vehicles which had a gross vehicle mass of more than 4.5 tonnes. These vehicles travelled, from time to time, on certain privately operated toll roads. The vehicles also had cabin air-conditioning powered by the vehicle’s main engine.

The taxpayer argued that the RUC did not apply to fuel acquired to power cabin air-conditioning and for travelling on privately operated toll roads.

Issues decided by the Tribunal and the Court

The Administrative Appeals Tribunal (Tribunal) found that:

1. The RUC applied in these situations.
2. Fuel used 'for travelling on a public road' was not confined to meaning propelling a vehicle on a public road and was apt to include fuel used to power air-conditioning in the driver's cabin.
3. A public road, for the purposes of the FTA, is one on which members of the public are generally entitled as of right to travel.
4. It did not matter whether the road was maintained by private operators, or by government, or whether a toll was imposed for use of the road.

The Tribunal also found that Division 47 of the FTA would not have operated to deny the taxpayer any increased fuel tax credit that would have occurred if the RUC did not apply. The Tribunal considered that, having applied the RUC to reduce the fuel tax credit claimed in its returns, the taxpayer had 'taken into account' the relevant fuel tax credits at issue in an assessment.

The taxpayer appealed to the Full Federal Court. The Full Federal Court was not asked to consider the Tribunal's conclusions in respect of cabin air-conditioning, and accordingly that aspect of the Tribunal's decision was not challenged and now stands.

The Full Federal Court found no error in the Tribunal's decision. In particular:

1. A public road is one to which the public have access and this includes privately operated toll roads.
2. 'Taken into account in assessment' involves the ascertainment of the taxpayer's total fuel tax credits, which in turn includes the calculation by which the taxpayer's entitlement to credits is reduced by the amount of the RUC.

ATO view of decisions

The Full Court decision confirms the ATO view that a 'public road' is a road that is available for use, or generally accessible as of right, by members of the public.

The Tribunal, in coming to its conclusions on cabin air-conditioning, found that the act of travelling involves more than mere propulsion. Rather, the Tribunal found that fuel acquired 'for travelling' included fuel used for operations other than propulsion which are part of going from one place to another. The ATO considers that this reasoning would extend to the operation of all such auxiliary equipment in vehicles and the use of fuel for travel on public roads.

The ATO notes that, in this respect, some elements of the Tribunal's reasoning are inconsistent with the Tribunal's earlier decision in *Linfox Australia Pty Ltd and Commissioner of Taxation* [2012] AATA 517. The ATO intends to apply this decision (that is, the 2019 decision) to the extent of any inconsistency.

The ATO accepts the Full Court's conclusions in relation to how the RUC was 'taken into account in an assessment'. The ATO notes that the particular facts before the Full Court did not require it to consider the situation where no credit has been claimed in respect of any particular fuel acquisition. For example, where a taxpayer

has simply forgotten to, or omitted to, claim a credit in respect of an acquisition within the four year limitation period. There is other current litigation that may address this particular factual situation.

Implications for impacted advice or guidance

The Full Court and the Tribunal decision (in respect of cabin air-conditioning) are consistent with ATO published views as set out in:

- Fuel Tax Determination FTD 2016/1 *Fuel tax: fuel tax credits – fuel used for idling and cabin air-conditioning of a vehicle on a public road,* and
- 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*.

Passenger air-conditioning

Further to the Tribunal's reasoning in respect of cabin air-conditioning, the Commissioner is now reconsidering if fuel used to power other passenger air-conditioning units (for example, in commercial buses) is used 'for travelling' and therefore whether the associated fuel tax credits would be reduced by the RUC where the fuel is used for travelling on public roads.

This would specifically impact on:

- Example 9B at paragraph 43B of FTR 2008/1, and
- the apportionment rate of 5% in respect of commercial buses or coaches set out in table item 2 in paragraph 9 of Practical Compliance Guideline PCG 2016/11 *Fuel tax credits – apportioning taxable fuel used in a heavy vehicle with auxiliary equipment*.

In reconsidering whether fuel tax credits for fuel used to power other passenger air-conditioning units is subject to the RUC, any change in view would only take effect prospectively from the date FTR 2008/1 is amended.

Auxiliary equipment

The Commissioner is also further considering, and will publicly consult on, the impact of the Tribunal's decision in respect of fuel used to power other forms of auxiliary equipment in vehicles set out in FTR 2008/1 and PCG 2016/11.

Time limits for credit claims

The Full Court and the Tribunal decisions in relation to time limits for credit claims together with the outcomes of other current litigation will be taken into account in finalising Draft Miscellaneous Tax Ruling MT 2018/D1 *Miscellaneous tax: time limits for claiming an input tax or fuel tax credit*.

Comments

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

Date issued:	24 September 2019
Due date:	25 October 2019
Contact officer:	Contact officer details have been removed as the comments period has expired.

Legislative references

FTA 2006
Div 47

Case references

Linfox Australia Pty Ltd and Commissioner of Taxation [2012] AATA 517; (2012) 89 ATR 931

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