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IF THE FUEL EVAPORATES, THE FUEL TAX DOES NOT!

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Coles Supermarkets Australia Pty Ltd v Commissioner of Taxation [2019] FCA 1582 sought to clarify whether the Taxpayer (Coles Supermarkets Pty Ltd) was entitled to a fuel tax credit for fuel acquired for resale to customers where a small proportion (approximately 0.3%) of the fuel was lost through evaporation or leakage.

Moshinsky J provided a summary in his judgement:-

> *" 1. There are five proceedings before the Court. The applicant in each proceeding, Coles Supermarkets Australia Pty Ltd (**Coles**), is the representative member of the Coles GST Group. The group includes Eureka Operations Pty Ltd (**Eureka**), which carries on the business of retailing fuel and operating convenience stores trading as "Coles Express". The proceedings are appeals under Pt IVC of the Taxation Administration Act 1953 (Cth) (the **Tax Administration Act**) from objection decisions made by the respondent (the **Commissioner**).*
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> *2. The proceedings concern claims for "fuel tax credits" and "decreasing fuel tax adjustments" under the Fuel Tax Act 2006 (Cth) in respect of fuel that evaporated or leaked at Coles Express stores. The proceedings arise in the context of an overall legislative scheme whereby fuel tax arises under a series of statutes including the Excise Act 1901 (Cth), the Excise Tariff Act 1921 (Cth), the Customs Act 1901 (Cth) and the Customs Tariff Act 1995 (Cth). Within that framework, the Fuel Tax Act provides a single system of credits and adjustments that reduce the incidence of tax on fuels.*
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> *3. The proceedings concern the following monthly tax periods:*
>
> *(a) July 2012 to June 2015; and*
>
> *(b) August 2017.*

4. *Coles contends that a certain proportion (approximately 0.3%) of the fuel it acquired during those tax periods was lost through evaporation or leakage. It claims fuel tax credits or decreasing fuel tax adjustments in respect of the fuel that evaporated or leaked (and thus was not sold to customers).*

5. *The Commissioner contends that Coles is not entitled to any fuel tax credits or decreasing fuel tax adjustments. Further, in respect of the tax periods from July 2012 to January 2014, the Commissioner contends that any entitlement to fuel tax credits has ceased pursuant to s 47-5 of the Fuel Tax Act.*

6. *The following issues arise for determination (although, as explained below, not all issues arise in respect of each tax period):*

    (a) *whether, for the purposes of s 41-5 of the Fuel Tax Act, the relevant fuel was acquired "for use in carrying on [the relevant] enterprise", such that Coles was entitled to a fuel tax credit in respect of the fuel lost by evaporation or leakage (the **Fuel Tax Credit Issue**);*

    (b) *(in the alternative to issue (a)) whether, under s 44-5 of the Fuel Tax Act, Coles is entitled to a decreasing fuel tax adjustment on the basis that fuel acquired for retail sale, but subsequently lost by evaporation or leakage, was used in a way that was different from that intended at the time of its acquisition (the **Decreasing Fuel Tax Adjustment Issue**); and*

    (c) *if Coles was entitled to fuel tax credits pursuant to s 41-5 for any of the tax periods from July 2012 to January 2014, whether Coles has ceased to be entitled to those fuel tax credits by reason of the operation of s 47-5 of the Fuel Tax Act (the **Section 47-5 Issue**).*

7. *For the reasons that follow, I have concluded that the three issues should be determined as follows:*

    (a) *Coles is not entitled to a fuel tax credit under s 41-5 in respect of fuel that evaporated or leaked during the relevant tax periods.*

    (b) *Coles is not entitled to a decreasing fuel tax adjustment under s 44-5 in respect of fuel that evaporated or leaked during the relevant tax periods.*

(c) *In light of my conclusion in respect of the Fuel Tax Credit Issue, it is unnecessary to determine the Section 47-5 Issue. Nevertheless, I make some observations about this issue."*

The fuel tax credit issue

The Court determined that on the construction of s 41-5(1) of the Fuel Tax Act, evaporation and leakage did not constitute a "use". The Court held:-

> *"Thus, although in some contexts the evaporation or leakage of fuel may constitute "use" of the fuel in carrying on an enterprise, in the present context, where the evaporation and leakage were wholly incidental to an application of the bulk of the fuel that did not constitute a "use" of the fuel for the purposes of the Act, I do not consider the relevant fuel to have been acquired for use in carrying on Coles Express's enterprise for the purposes of s 41-5(1)."*

In short, the Court considered that the evaporation or leakage of fuel was not "used" for resale. The Court concluded that Coles Express did not acquire the relevant fuel (that is, the fuel that subsequently evaporated or leaked) "for use in carrying on [its] enterprise" for the purposes of s 41-5(1) and therefore was not entitled to a fuel tax credit for the fuel that had evaporated or leaked during any of the relevant tax periods.

The decrease in fuel tax adjustment issue

Coles argued that if it failed on the fuel tax credits issue then in the alternative it was entitled to a decrease in fuel tax adjustment pursuant to section 44-5 of the Fuel Tax Act in respect of the fuel that was lost through evaporation or leakage. Coles argued that it was entitled to a decrease in fuel tax adjustment on "the basis that fuel acquired for retail sale, but subsequently lost by evaporation or leakage was used in a way that was different from that intended at the time of acquisition".

In holding that Coles failed on this ground also, the Court considered that the word "use" had the same meaning as in section 44-5(1) as it has in section 41-5(1). The Court noted:-

> *The evaporation or leakage of fuel was wholly incidental to Coles Express making a taxable supply of fuel, in the sense that it was an unwelcome, and unavoidable, part of that activity. Accordingly, it is appropriate to characterise the portion of the fuel that evaporated or leaked in the same way as the fuel that was re-sold to Coles Express's customers. In other words, the portion that evaporated or leaked was not "used" in carrying on the enterprise for the purposes of the Act. It follows that the "would have amount" is zero and that Coles is not entitled to a decreasing fuel tax adjustment under s 44-5 with respect to the fuel that evaporated or leaked."*

The section 47-5 issue

This issue only arises if Coles is otherwise entitled to a fuel tax credit that has been lost through evaporation or leakage. As the Court had already determined that Coles was not entitled to a fuel tax credit, it considered that the section 47-5 issue did not arise although it did provide detailed reasoning in the case if readers are interested.

This was a highly technical decision based on strict statutory interpretation and whilst some may be concerned that it was overly strict in denying Coles a potential $9m fuel tax credit, many cases, particularly tax cases, are decided on a strict construction or statutory interpretation of the relevant provisions.

Date Published: 30 January 2020

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