Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

[2016] AATA 824

Division	TAXATION & COMMERCIAL DIVISION
File Number(s)	**2015/6358**
Re	**NZWINEIMPORTS Pty Ltd**
	APPLICANT
And	**Commissioner of Taxation**
	RESPONDENT

DECISION

Tribunal	**Deputy President S E Frost**
Date	**19 October 2016**
Place	**Sydney (heard in Melbourne)**

The objection decisions are set aside; the matters are remitted to the Respondent for reconsideration in accordance with these reasons.

.....[sgd].....

Deputy President S E Frost

CATCHWORDS

TAXATION – Wine Equalisation Tax – Goods and Services Tax – applicant operated a business of purchasing wine from a related entity based in New Zealand and selling it to Australian customers – identification of correct assessable dealing for the purposes of A New Tax System (Wine Equalisation Tax) Act 1999 – indirect marketing sale – retail sale by an entity that obtained the wine under quote – notional wholesale selling price – 'half retail price method' – identification of retail price – objection decisions set aside and remitted to Commissioner for reconsideration

LEGISLATION

A New Tax System (Goods and Services Tax) Act 1999 (Cth) ss 9-75, 13-20
A New Tax System (Wine Equalisation Tax) Act 1999 (Cth) ss 2-1, 5-5, 5-20, 7-10, 9-25, 9-35, 13-25, 33-1

REASONS FOR DECISION

Deputy President S E Frost

19 October 2016

INTRODUCTION

1. The applicant, as its name suggests, is an importer of New Zealand wine. It has a dispute with the Commissioner about its liability to wine equalisation tax (WET, or simply 'wine tax') and goods and services tax (GST). The periods covered by the dispute are 1 November 2012 to 31 August 2014 for wine tax, and 1 November 2012 to 30 September 2014 for GST. The dispute requires the determination of the following three issues:

- What supply, or supplies, is the applicant making?
- What is the proper methodology for calculating wine tax?
- What is the proper methodology for calculating GST?

FACTUAL BACKGROUND

2. The facts have been provided by Ms Cherry Wilson, the applicant's director.

3. The applicant has an arrangement with a number of wineries in New Zealand which allows visitors to those wineries to buy wines for delivery to an overseas address. It is not disputed that the wineries sell the wines to an entity related to the applicant, which then sells the wines to the applicant. The applicant sells the wines to the customer. The applicant uses this or a similar business model for deliveries to a number of countries other than Australia but for current purposes I only need to address the Australian arrangements, which represent about 60 per cent of the applicant's business.

4. Typically, an Australian tourist, the customer, visits a New Zealand winery and chooses which wines to buy. Cellar door staff complete an order form (branded with the applicant's name and Australian Business Number, or ABN) for the selected wine. The completed form specifies the particular wines selected, the quantity and price (in Australian dollars) of each, the total price (again, in Australian dollars), and the number and expiry date of the customer's credit card. The order form also includes the following[1]:

> *AGREEMENT*
>
> *I agree to the conditions below and approve NZ Wine Imports to charge my Credit Card for the total amount of my order.*
>
> *TERMS AND CONDITIONS:*
>
> - *Deliveries can only be made to a street address. The address given must be the delivery address where wine can be received during business hours. If wine is not received on the first delivery then subsequent delivery charges will apply.*
> - *All enquiries regarding delivery and credit card charges **must** be directed to New Zealand Wine Imports at the contact details on the bottom right.*
> - *Delivery times can vary due to circumstances beyond our control.*
> - *All charges (wine and freight) will be charged by New Zealand Wine Imports.*
> - *All charges are in Australian currency.*
> - *Wine purchased includes AU WET and GST.*
> - *This is a contract of sale.* (original emphasis)

[1] T5-30 is an example

5. The wine is delivered from the various wineries to a warehouse in Blenheim, in the Marlborough region of New Zealand. In 2012 the warehouse was operated by Marlborough Wine Tours Limited (MWT). By 2014 it seems (although there was some uncertainty about this) the operation had been taken over by a partnership known as the MWT partnership, trading as either MWT Wine Export or NZ Wine Export. Nothing much turns on the uncertainty – what is clear is that the operation of the warehouse has always been undertaken by entities closely connected with Ms Wilson and her family. At all relevant times the personnel physically performing the warehouse functions has comprised, or at least included, Ms Wilson's son and daughter-in-law, Scott Lammas and Michelle Gundry.

6. At the warehouse the various wine deliveries are first 'disaggregated', which involves taking the bottles of wine out of their cartons, packing them individually in polystyrene, and then reboxing them. The orders are then 'consolidated' for air freight to Australia. The international transport, from Christchurch to either Sydney or Melbourne, is carried out by Toll Global Forwarding. The charge for the transport is invoiced to the operator of the warehouse and the consignee is the applicant[2]. Mostly the consignments leave New Zealand on the weekend, and the wine is delivered to the customer in Australia on the following Monday or Tuesday.

7. Each month the warehouse operator invoices the applicant for the consignments that have been shipped during that month. A typical invoice is the one issued by NZ Wine Export to the applicant for the month of August 2014[3]. The invoice discloses the number of bottles shipped during the month. The charges invoiced to the applicant are separately specified, as NZ Excise; NZ GST; International Freight (Air Freight, packaging, delivery); Warehouse (Rent, Storage, Admin, Packing); and Wine.

8. Each consignment is entered through Australian Customs by the applicant as the owner. The applicant quotes its ABN on the local entry and consequently does not pay wine tax at that point. The reason it quotes is a belief that it is selling the wine by way of an

[2] An example of the paperwork is at Exhibit 2, #3.1

[3] T24-385

'indirect marketing sale' through a third party (see below). An 'indirect marketing sale' is defined in s 5-20 of the Wine Tax Act[4] as follows:

> *A sale of *assessable wine is an **indirect marketing sale** if it is a *retail sale made by an entity (the **marketer**) that is not the *manufacturer of the wine and the sale is made:*
>
> *(a) under an arrangement that provides for the sale of the wine to be made by an entity that is acting for the marketer but is not an employee of the marketer; or*
>
> *(b) from premises that:*
>
> *(i) are used, mainly for making retail sales of wine, by an entity or entities other than the marketer; and*
>
> *(ii) are held out to be premises of, or premises used by, the other entity or entities.*

9. It is not disputed that the wine in question is 'assessable wine', that it is sold by way of a 'retail sale', and the sales in question are made by an entity other than the 'manufacturer' of the wine. It is also not disputed that paragraph (b) is not satisfied; if the sales of wine are 'indirect marketing sales' then it can only be because paragraph (a) applies.

10. The Commissioner does not accept that the applicant's sales of wine are indirect marketing sales and considers the quotation of the ABN on the local entry is wrong. I will deal with that issue, and its consequences, later in these reasons.

11. When the consignment reaches the Toll distribution centre in Sydney or Melbourne, or in the day or two afterwards, the customer's payment is processed (generally by Michelle Gundry, who is located in New Zealand), by reference to the credit card details recorded on the order form. The payments are processed through the merchant facility of a third party, Vincurable Pty Ltd. (The explanation given for this arrangement is that the applicant does not have a retail liquor licence in Australia but Vincurable does.) The payments are deposited into a business account held by Vincurable in the name 'New Zealand Wine Imports', which is similar but not identical to the applicant's name. In return for allowing the applicant to use its merchant facility, Vincurable is paid a set amount per 750ml of wine sold (initially $1.00 per 750ml but later reduced to $0.80), plus 0.5 per cent of the value of all completed sales.

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[4] *A New Tax System (Wine Equalisation Tax) Act 1999*

12. It is that arrangement with Vincurable that led the applicant to believe that it was making 'indirect marketing sales' for wine tax purposes: it believed that it was selling the wine through Vincurable as its agent.

THE WINE TAX ASSESSMENT

13. When the Commissioner concluded that the sales were not indirect marketing sales, and that the applicant should not have quoted its ABN on the local entry, the Commissioner assessed the applicant to the amount of wine tax that would have been payable if the applicant's ABN had not been quoted on the local entry. The Commissioner has since retreated from that position; the reason for the retreat will become clear after the fundamentals of the wine tax are explained.

14. The wine tax is designed as a wholesale tax. As s 2-1 of the Wine Tax Act explains:

> *The wine tax is a single stage tax applying (in most cases) to dealings in wine at the wholesale level. In almost all dealings to which it applies, the GST will also apply.*

15. The single-stage nature of the tax is achieved by the system of 'quoting'. If a person sells wine to a purchaser who intends to sell the wine by wholesale, then the purchaser would be expected to quote its ABN on that sale. Similarly, if an importer imported wine for sale by wholesale, the importer would be expected to quote its ABN at the time of clearing the wine through Customs. The 'assessable dealing', either the sale of the wine in the first example, or the local entry of the wine in the second example, will not be a 'taxable dealing' because the quotation of the purchaser's or importer's ABN makes the dealing exempt: s 7-10(1). When the purchaser (or importer) subsequently sells the wine, it will generally be a taxable dealing, unless the next purchaser also quotes its ABN. The expectation is that the wine tax will eventually be levied only on the final wholesale sale.

16. Marketing chains are not always as predictable as that simple example. Sometimes a purchaser or importer quotes its ABN in the expectation that the wine will be sold by wholesale, but circumstances change and the wine is sold by retail. In that case the retail sale is an 'assessable dealing' but the taxable value is not the full retail selling price (since the tax is not designed as a retail tax) but the 'notional wholesale selling price'.

17. Sometimes a purchaser or importer, expecting to sell by retail, does not quote but then later sells the wine by wholesale. In that case the subsequent sale is taxed on the full (wholesale) selling price but, to stop the tax on the earlier transaction (either sale or importation) from 'cascading' into the later selling price, the entity making the later sale is entitled to a credit equal to the wine tax included in its original purchase price (or paid to Customs at the time of entry).

18. To cover all possibilities, the 'Assessable Dealings Table' in s 5-5 sets out all the assessable dealings that can be subject to wine tax: s 5-5(1). The applicant initially treated its sales as indirect marketing sales of imported wine, designated as AD12d. An entity that either purchases or imports wine for sale by indirect marketing sale is entitled to quote its ABN on the purchase or importation. The taxable value when the wine is subsequently sold by way of an indirect marketing sale is the 'notional wholesale selling price' of the wine.

19. However, as I have already indicated, the Commissioner thought the applicant was wrong to quote its ABN on the local entry of the wine. But instead of accepting the applicant's quotation of its ABN as a given, the Commissioner tried to change the local entry from what it was – an exempt assessable dealing – into what he thought it should have been – a taxable dealing.

20. When a local entry of imported goods is not exempt, the taxable value (assessable dealing AD10) is the 'GST importation value' – which is defined in s 33-1 of the Wine Tax Act as:

> *an amount equal to what would be the value of the local entry (disregarding any wine tax payable in respect of the local entry), for the purposes of the *GST Act[5], if it were a taxable importation within the meaning of section 195-1 of that Act.*

21. In simple terms, by reference to s 13-20(2) of the GST Act, the taxable value converts into an amount equal to the sum of:

- the customs value of the wine;
- the amount paid or payable for the international transport and insurance of the wine; and

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[5] *A New Tax System (Goods and Services Tax) Act 1999*

- the customs duty payable on the importation of the wine.

22. Prior to the hearing, and by reference to s 13-25 of the Wine Tax Act, the Commissioner conceded that a quotation, even if wrongly made, is nevertheless effective (subject to specified exceptions, which are not relevant here). He now submits that the proper taxable value to be applied to the wine is the taxable value specified in assessable dealing AD12b (retail sale by an entity that obtained the wine under quote) – the 'notional wholesale selling price', which is precisely the same as the taxable value of an assessable dealing AD12d (indirect marketing sale).

23. Furthermore, the parties agree that the appropriate method for working out the notional wholesale selling price of the applicant's sales of wine is the 'half retail price method': s 9-25(1) and (2) and s 9-35 of the Wine Tax Act. That, in fact, is the method that the applicant has always used (since it thought it was making indirect marketing sales). However, while the parties now agree on the appropriate method to use, they do not agree on the practical application of that method. This is the narrow area where the wine tax dispute remains unresolved.

THE GST ASSESSMENT

24. The alleged understatement of the applicant's wine tax liability led to an understatement of the applicant's GST liability. The GST shortfall is now less than was initially assessed, since the Commissioner has conceded that the wine tax liability is less than first thought.

25. The value of a taxable supply, for GST purposes, is the 'price' of the supply, multiplied by ten-elevenths. 'Price' is defined relevantly as the amount payable on the supply: s 9-75(1) of the GST Act.

26. There is no dispute between the parties in relation to these legislative requirements. The dispute revolves around how the legislation should be applied.

ISSUE 1 – WHAT SUPPLY, OR SUPPLIES, IS THE APPLICANT MAKING?

27. The applicant claims there are two supplies. One is the supply of wine, and that supply is made by the applicant. The second is the supply of services (the main ones being the warehousing of the wine in New Zealand and the transport of the wine from New Zealand

to Australia), and that supply is made by NZ Wine Export. The applicant points out that NZ Wine Export is not in the 'indirect tax zone'[6], and so its supplies cannot be subject to wine tax or GST in Australia.

28. The Commissioner says the applicant makes only one relevant supply – the supply of wine, delivered to the customer's delivery address.

29. The applicant seems to be submitting that the warehousing charge and the transport charge, relating to services not actually carried on in Australia, must necessarily escape the Australian wine tax and GST base because those activities are not performed in Australia. But the argument seems to ignore the fact – conceded by Ms Wilson during the hearing – that the Australian customer is paying a single amount to have wine delivered to his or her door.

30. I do not accept that the arrangement is anything other than it appears – an arrangement under which the applicant sells wine to its customers. It does not separately sell the warehousing service or the transport to the customer, and neither does anyone else. The transport service is provided to NZ Wine Export by Toll. NZ Wine Export rolls up the expense of that service, together with the other expenses it incurs, and charges a price to the applicant for delivering wine to the applicant in Australia. The wine is the property of the applicant at least by the time it clears Australian Customs. It has cost the applicant the total amount charged to it by NZ Wine Export, and if not already included in that amount, any charges imposed at the wharf (including customs duty) to have the wine delivered to it or at its direction. The applicant will in turn sell the wine to its customers for a price that will enable it to cover all its expenses and (one assumes) generate a profit.

31. The only relevant supply is the supply of wine by the applicant to its customer, delivered to the customer's nominated delivery address.

ISSUE 2 – WHAT IS THE PROPER METHODOLOGY FOR CALCULATING WINE TAX?

32. The wine tax rate is 29% and the parties agree the taxable value is 'half retail price'.

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[6] Defined in s 195-1 of the GST Act as, relevantly, Australia.

33. The applicant has paid wine tax on the following value:

Value = (Wine + 29% of that amount + GST at 10% on the total) x 50%.

34. A worked example is shown in the spreadsheet at T24-386/389. It corresponds to the invoice at T24-385. The spreadsheet shows that the first component of the formula, the 'Wine' figure, is $28,267.82, which is the price of the wine as charged to the applicant by NZ Wine Export – not including the New Zealand GST, the New Zealand excise tax, the international freight charge or the warehousing charge. Applying the formula to that amount results in a 'value' of $20,056.02, or a presumed 'retail price' of $40,112.04. That outcome does not compare well with the fact that the total price charged by NZ Wine Export to the applicant is $53,176.39. Even if the applicant is entitled to an input tax credit for the New Zealand GST of $7,394.59, it must have outlaid $45,781.80 to receive the wine, delivered in Australia. It cannot possibly have then sold the wine for $40,112.04.

35. The problem with the applicant's formula is that it pays no regard to the applicant's actual retail selling price of the wine. In effect it presumes a retail selling price equal to the bare cost price, uplifted by a supposed wine tax amount and then a GST amount on top. It is an unsound methodology that does not produce a taxable value complying with the law.

36. The Commissioner's alternative approach uses the actual deposits to Vincurable's merchant facility account as the starting point. Those deposits are, in principle, the amounts received for the actual sales of wine by the applicant to its customers. The Commissioner accepts that two adjustments need to be made to the total receipts: first, Vincurable's receipts for beer and spirits must be excluded, since they have nothing to do with the applicant's sales of wine; and second, deposits by Vincurable's owner to reimburse earlier withdrawals made by him must be excluded, since they also bear no relationship to the applicant's business and their inclusion would in any event lead to an element of double-counting. Otherwise the amounts deposited to the Vincurable account equal the applicant's 'retail selling price' of its wine. Fifty per cent of that figure equals 'half retail price', and therefore the proper taxable value for wine tax purposes.

ISSUE 3 – WHAT IS THE PROPER METHODOLOGY FOR CALCULATING GST?

37. The starting point must again be the total amount deposited to Vincurable's bank account, adjusted for the two components identified in the previous paragraph.

38. Ten-elevenths of that amount is the value of the taxable supply. The GST payable is 10% of that value.

DECISION

39. The objection decisions must be set aside since the Commissioner's initial view as to the applicant's wine tax liability is wrong.

40. The appropriate course is to remit the matter for reconsideration by the Commissioner in accordance with these reasons.

I certify that the preceding 40 (forty) paragraphs are a true copy of the reasons for the decision herein of Deputy President S E Frost

.....[sgd].....

Associate

Dated 19 October 2016

Date(s) of hearing	**6 September 2016**
Applicant	**In person**
Solicitors for the Respondent	**Australian Taxation Office**