Wine Equalisation Tax Ruling

Wine equalisation tax: arrangements of the kind described in Taxpayer Alert TA 2013/2 *Wine equalisation tax (WET) producer rebate schemes*

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This publication provides you with the following level of protection:

This publication (excluding appendixes) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

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What this Ruling is about

1. This Ruling provides the Commissioner's views on the arrangements set out in Taxpayer Alert TA 2013/2 *Wine equalisation tax (WET) producer rebate schemes*.

2. The Ruling considers whether Division 165 of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) may apply to the arrangements in TA 2013/2. Division 165 contains the general anti-avoidance provisions for GST, WET and luxury car tax. The provisions allow the Commissioner to negate a permanent or timing advantage that an entity gets in relation to one of those taxes if the tax benefit results from a scheme and it is reasonable to conclude that the sole or dominant purpose of entering into or carrying out the scheme, or the principal effect of the scheme, is to get an entity such a benefit.

3. This Ruling does not consider whether the entities involved in these arrangements are associated producers under section 19-20 of the *A New Tax System (Wine Equalisation Tax) Act 1999* (WET Act), although this may also be the case. In these circumstances, the Commissioner will seek to recover any excess claim under section 19-25 of the WET Act and in appropriate cases may also apply Division 165 in the alternative.

4. All legislative references to provisions in Division 165 in this Ruling are to the GST Act. All other legislative references are to the WET Act unless otherwise stated.

Background

5. TA 2013/2 was issued on 8 October 2013. It describes two contrived arrangements that are designed to create additional WET producer rebate entitlements through non-commercial dealings between entities.

6. The arrangements involve the interposition of at least one entity between a grower (or bulk wine supplier) and a wine producer. The interposed entity purchases inputs from either the grower or supplier of bulk wine, and then contracts the wine producer to process those inputs. The interposed entity sells the resulting wine to the wine producer (or another purchaser arranged by the wine producer) and claims a producer rebate. In cases where there are multiple interposed entities, there are multiple sales of the wine and thus multiple claims for producer rebates.

Entitlement to wine producer rebates

7. Wine tax generally applies on the last wholesale sale of wine. A producer[1] of wine is entitled to a producer rebate for rebatable wine[2] if it is liable to wine tax for a taxable dealing in the wine during the financial year, or would have been liable to wine tax had the purchaser not quoted its ABN for the sale at or before the time of the sale.[3]

8. For sales of wine on or after 10 December 2012 involving wine manufactured using other wine (for example, blending) producers are required to reduce their rebate entitlement by earlier rebates claimed on the acquired wine.[4]

9. The maximum amount of producer rebate that a producer is entitled to for a financial year is $500,000.[5] If the producer is an associated producer of another producer, as defined in section 19-20, the maximum amount of producer rebates that the associated producers are entitled to, as a group, is $500,000.[6]

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[1] Under section 33-1, '***producer***, of rebatable wine, means an entity that manufactures the wine, or supplies to another entity the grapes, other fruit, vegetables or honey from which the wine is manufactured'. See also paragraphs 18 to 25 of Wine Equalisation Tax Ruling WETR 2009/2 *Wine equalisation tax: operation of the producer rebate for other than New Zealand participants*.

[2] Under section 33-1, '***rebatable wine*** means grape wine, grape wine products, fruit or vegetable wine, cider or perry, mead or sake'. See also paragraphs 15 to 17 of WETR 2009/2.

[3] Subsection 19-5(1) of the WET Act.

[4] Section 19-17 of the WET Act.

[5] Subsection 19-15(2) of the WET Act.

[6] Subsection 19-15(3) of the WET Act.

Features of Arrangement 1: Wine producer arranges for another entity to manufacture some of its wine

10. The features of this arrangement are:

(a) A wine producer buys grapes to make wine and claims the rebate when the wine is sold. The wine producer's sales result in it claiming the maximum rebate for that financial year.

(b) An entity, not at arm's length to the wine producer, starts buying grapes from the wine producer or someone that the wine producer would buy grapes from.

(c) The wine producer manufactures the entity's grapes into wine.

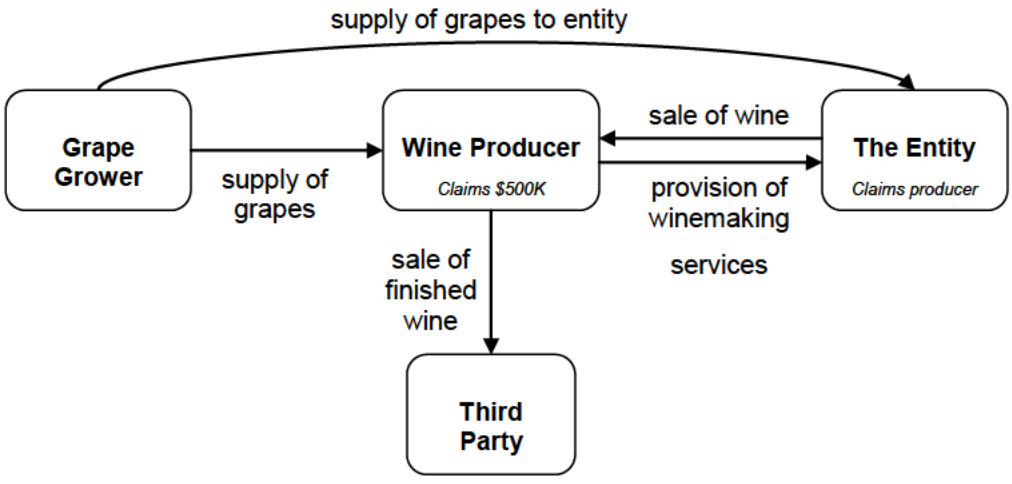
(d) The wine producer buys the wine from the entity which triggers a producer rebate claim by the entity. No WET is payable as an ABN is quoted by the time of the sale.

(e) The end buyers of the wine are those that the wine producer would sell to.

(f) The combined producer rebates claimed in the financial year by the wine producer and the entity will exceed the wine producer's maximum entitlement.

(g) The extra producer rebate(s) are usually shared by participants in the arrangement through manipulating prices charged between the parties for the grapes, wine or other services.

11. Arrangement 1 can be diagrammatically represented as follows:



Features of Arrangement 2: Wine producer sells wine to other entities that further blend or manufacture the wine

12. The features of this arrangement are:

(a) A wine producer makes and sells wine then claims the producer rebate.

(b) An entity not at arm's length to the wine producer buys bulk wine from the wine producer or another supplier it arranges.

(c) The wine is further processed for the entity by the wine producer.

(d) The entity sells the wine to the wine producer or to another non-arm's length entity and claims a rebate on the sale.

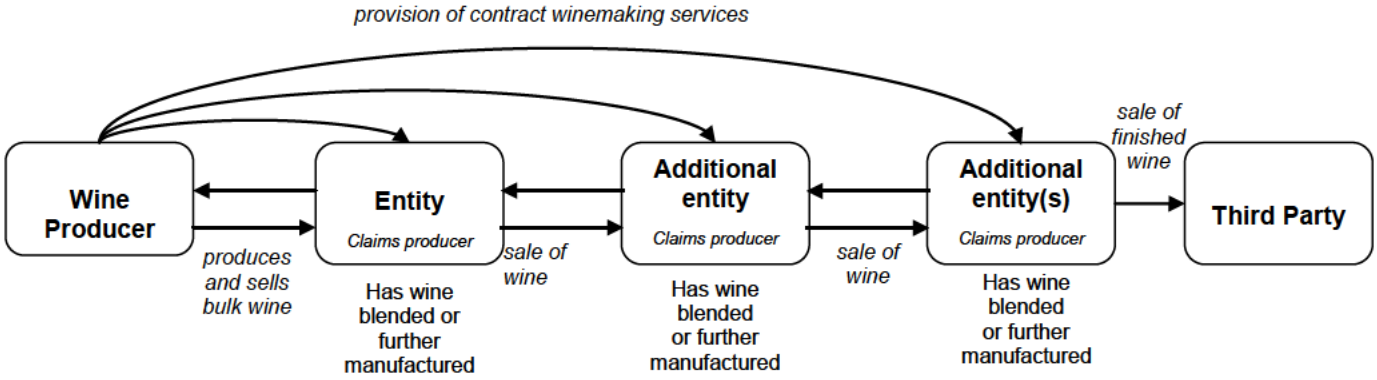
(e) Extra rebates are created by a number of staged wine sales between further interposed entities purporting to blend or further manufacture the wine.

(f) No WET is payable on wine sales between the participants as each buyer quotes its ABN by the time of sale.

(g) The end buyers of the wine are those that the wine producer would ordinarily sell to.

(h) The extra producer rebate(s) are usually shared by participants in the arrangement through manipulating prices charged between the parties for the grapes, wine or other services.

13. Arrangement 2 can be diagrammatically represented as follows:



14. The Commissioner's view on how Division 165 applies to these arrangements is set out in this Ruling.

Ruling

15. While the application of Division 165 to any particular arrangement depends on a careful weighing of all the relevant facts and the surrounding circumstances of each case, arrangements similar to Arrangements 1 and 2, described at paragraph 10 and 12 of this draft Ruling, are capable of attracting the application of Division 165.[7]

Arrangement 1: Wine producer arranges for another entity to manufacture some of its wine

16. To the extent that the interposed entity and the wine producer in Arrangement 1 are not associated producers and section 19-20 does not operate to reduce the entity's entitlement, the Commissioner considers that Division 165 is likely to apply to this arrangement.

Arrangement 2: Wine producer sells wine to other entities who further blend or manufacture the wine

17. To the extent that the entities and/or the wine producer in Arrangement 2 are not associated producers and section 19-20 does not operate to reduce the entities' entitlements, the Commissioner considers that Division 165 is likely to apply to this arrangement.

Date of effect

18. This Ruling applies both before and after its date of issue. However, this Ruling will not apply to taxpayers to the extent that it conflicts with the terms of a 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
23 April 2014

[7] In the absence of all relevant information, it is not possible to state definitively in this Ruling whether the anti-avoidance provisions apply to a particular arrangement or transaction.

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.

Division 165 – anti-avoidance

19. The general anti-avoidance provisions can only apply to the arrangements described in TA 2013/2 where the GST benefit obtained by the respective entities is not adjusted under the substantive provisions of the WET Act, and where the arrangement is not a sham, neither of which are considered in this Ruling.

20. Although Division 165 uses the terminology 'GST benefit', the Division is capable of application to benefits relating to wine tax, including producer rebates. This is because wine tax is taken into account in calculating the net amount payable under the GST Act.

21. For Division 165 to apply, the following four elements are required:

- one or more of the steps in the arrangement is a 'scheme',[8]
- an entity (the avoider) gets a GST benefit[9] from the scheme,[10]
- the GST benefit is not attributable to the making of a choice, election, application or agreement that is expressly provided for by the GST law or the wine tax law,[11] and
- it is reasonable to conclude, taking account of the twelve matters in subsection 165-15(1), that either an entity entered into the scheme with the sole or dominant purpose of getting the avoider a GST benefit from the scheme, or the principal effect of the scheme is that the avoider gets a GST benefit from the scheme.[12]

[8] Subsection 165-10(2).
[9] 'GST benefit' is defined in subsection 165-10(1) by reference to amounts that are payable under the GST Act. Section 7-15 of the GST Act provides that the amount an entity must pay to the Commissioner, and the amount the Commissioner is required to refund to an entity, is the net amount. The net amount may be increased or decreased by amounts of wine tax or wine tax credits: see section 21-5 and 21-15 of the WET Act. For tax periods commencing on or after 1 July 2012 also see section 17-5 of the GST Act.
[10] Paragraph 165-5(1)(a).
[11] Paragraph 165-5(1)(b).
[12] Paragraph 165-5(1)(c).

Arrangements involving producer rebates may be 'schemes'

22. Subsection 165-10(2) of the GST Act provides that:

> A ***scheme*** is:
>
> (a) any arrangement, agreement, understanding, promise or undertaking:
>
> (i) whether it is express or implied, and
>
> (ii) whether or not it is, or is intended to be, enforceable by legal proceedings, or
>
> (b) any scheme, plan, proposal, action, course of action or course of conduct, whether unilateral or otherwise.

23. The definition is broad enough to capture a wide range of activities and therefore an entity may be involved in a number of arrangements or activities, some of which are captured by Division 165 and others which are not. Accordingly, Division 165 may be applied to those arrangements that are the subject of TA 2013/2 and which may form only part of an entity's overall business activities. That is, the entity may have other producer rebate claims arising from arrangements that do not attract the application of Division 165.

Application of Division 165 to WET schemes

24. Division 165 applies to WET schemes because whether a 'GST benefit' has been obtained is determined by reference to amounts payable under the GST Act – that is, the net amount.[13] The net amount may be increased or decreased by amounts of wine tax and wine tax credits.[14] As the producer rebate is a wine tax credit,[15] the net amount is affected by amounts of producer rebates claimed.[16]

Matters to be considered in determining purpose or effect

25. Subsection 165-15(1) prescribes a list of matters to be taken into account under section 165-5 in considering an entity's purpose in entering into or carrying out the scheme from which the avoider got a GST benefit, and the effect of the scheme.

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[13] Section 7-15 of the GST Act.
[14] Sections 21-5 and 21-15 of the WET Act and section 17-5 of the GST Act.
[15] The Wine Tax Credit Table in section 17-5 of the WET Act provides that a producer rebate is a wine tax credit.
[16] See also the note to section 21-1 of the WET Act, which states that Division 165 'will cover avoidance schemes relating to wine tax so far as they relate to net amounts'.

26. These matters are:

(a) the manner in which the scheme was entered into or carried out;

(b) the form and substance of the scheme, including:

(i) the legal rights and obligations involved in the scheme and

(ii) the economic and commercial substance of the scheme.

(c) the purpose or object of the GST Act, the *Customs Act 1901* (so far as it is relevant to the GST Act) and any relevant provision of the GST Act or the *Customs Act 190*1 (whether the purpose or object is stated expressly or not)

(d) the timing of the scheme

(e) the period over which the scheme was entered into and carried out

(f) the effect that this Act would have in relation to the scheme apart from Division 165

(g) any change in the avoider's financial position that has resulted, or may reasonably be expected to result, from the scheme

(h) any change that has resulted, or may reasonably be expected to result, from the scheme in the financial position of an entity (a ***connected entity***) that has or had a connection or dealing with the avoider, whether the connection or dealing is or was of a family, business or other nature

(i) any other consequence for the avoider or a connected entity of the scheme having been entered into or carried out

(j) the nature of the connection between the avoider and a connected entity, including the question whether the dealing is or was at arm's length

(k) the circumstances surrounding the scheme

(l) any other relevant circumstances.

27. The same considerations may apply in relation to parts of schemes.[17]

[17] Subsection 165-15(2) of the GST Act.

Commissioner may negate GST benefit

28. If Division 165 applies, the Commissioner may negate the benefit by declaring the net amount that would have been payable, and when it would have been payable, had the scheme not been entered into.[18]

29. The Commissioner must take the necessary action to give effect to the declaration. This will generally involve amending an entity's assessment.[19]

Application of Division 165 to the arrangements

Element 1: the scheme

30. It is considered that all or some of the steps comprising each of the arrangements described in TA 2013/2 constitute a 'scheme' under the broad definition of the term in subsection 165-10(2).[20]

31. The scheme in Arrangement 1 in TA 2013/2 may be concisely described as one involving an interposed entity:

(a) acquiring grapes from the wine producer or another supplier the wine producer arranges (for example, the wine producer's grower)

(b) retaining title to the grapes while the wine producer processes or manufactures the grapes into wine[21]

(c) selling the resultant wine to the wine producer[22] who quotes its ABN[23] and

(d) claiming a producer rebate.

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[18] Section 165-40 of the GST Act.

[19] Subsection 165-40(2). For tax periods commencing before 1 July 2012, the Commissioner is not required to make an assessment. Instead, the production of a declaration under section 165-40 is conclusive evidence that the declaration was properly made and that the amounts and particulars in the declaration are correct, subject to proceedings under Part IVC of the *Taxation Administration Act 1953* (TAA): section 105-100 in Schedule 1 to the TAA. Declarations made in relation to tax periods commencing after 1 July 2012 are not conclusive evidence – only the notice of assessment is conclusive evidence: subsection 350-10(1) in Schedule 1 to the TAA.

[20] See the observations of the High Court in *Federal Commissioner of Taxation v. Hart* (2004) 217 CLR 216 (at 234 to 238 and 260 to 261) in relation to the virtually identical definition of 'scheme' for the purposes of Part IVA of the *Income Tax Assessment Act 1936*. See also the Administrative Appeals Tribunal decisions in *VCE v. Federal Commissioner of Taxation* 2006 ATC 187; 63 ATR 1249; 2006] AATA 821 (Deputy President Forgie) and *Re Taxpayer and Federal Commissioner of Taxatio*n [2010] AATA 497 (Deputy President Hack SC and Senior Member O'Loughlin), which specifically deal with schemes in the context of the application of Division 165.

[21] In some cases, the entity's wine is processed by another manufacturer arranged by the wine producer. As such, the description of the scheme may vary accordingly.

[22] In some cases, the entity may sell the wine to another purchaser arranged by the wine producer. As such, the description of the scheme may vary accordingly.

[23] As per subsection 7-10(1) of the WET Act, the sale will not attract wine tax if the purchaser quotes its ABN for the sale at or before the time of the sale. Division 13 sets out how and when an entity can quote its ABN.

32. The scheme in Arrangement 2 in TA 2013/2 may be concisely described as one involving an interposed entity:

(a) acquiring bulk wine from the wine producer or another supplier the wine producer arranges

(b) retaining title to the bulk wine while the wine producer further manufactures or blends the wine

(c) selling the wine to the wine producer, or another purchaser arranged by the wine producer, who quotes its ABN, and

(d) claiming a producer rebate.

In cases where multiple sales of wine occur between non-arm's length entities, those sales would also be included in the description of the scheme.

Element 2: an entity gets a GST benefit from the scheme

33. An entity (the avoider) gets a GST benefit from a scheme if one or more of the circumstances in subsection 165-10(1) applies. Paragraphs 165-10(1)(a) and (b) are relevant to the arrangements described in TA 2013/2:

(a) An amount that is payable by the entity under this Act apart from this Division is, or could reasonably be expected to be, smaller than it would be apart from the scheme or a part of the scheme.

(b) An amount that is payable to the entity under this Act apart from this Division is, or could reasonably be expected to be, larger than it would be apart from the scheme or a part of the scheme.

34. Therefore, determining whether an entity gets a GST benefit involves a prediction as to the events that would have taken place if the relevant scheme had not been entered into or carried out. The prediction (referred to in this draft Ruling as the counterfactual) can then be compared to the scheme to ascertain whether an amount payable by the interposed entity and/or refundable to the entity has changed as a result of the scheme. The prediction must be more than a possibility and must be sufficiently reliable for it to be regarded as reasonable.[24]

[24] See the comments of the High Court in *Federal Commissioner of Taxation v. Peabody* (1994) 181 CLR 359 at 385 on the reasonable expectation test in the context of the definition of 'tax benefit' for the purposes of the income tax general anti-avoidance provisions Part IVA of the *Income Tax Assessment Act 1936*.

35. In Arrangement 1, the interposed entity gets a GST benefit if, apart from the scheme, the wine producer would, or could reasonably be expected to, have purchased the grapes and produced its own wine without any involvement of the interposed entity.[25]

36. Under this counterfactual, the interposed entity would not satisfy the definition of a wine producer as it would not have produced the wine and made the requisite sales of wine. As a result, it would not be entitled to claim any producer rebates.

37. In Arrangement 2, each of the interposed entities gets a GST benefit if it is postulated that, but for the scheme, the wine producer would, or could reasonably be expected to, have produced the finished wine from the bulk wine that it owned, without any of the interposed entities being involved in the arrangement.[26]

38. Under this counterfactual, each of the interposed entities would not satisfy the definition of 'wine producer' as they would not have produced the wine and made the requisite sales of wine. As a result, none of these entities would be entitled to claim a producer rebate.

39. Based on these counterfactuals, the schemes in TA 2013/2 result in the respective entities being entitled to a WET producer rebate to which they would not otherwise be entitled, therefore each of the entities gets a GST benefit. The type of benefit obtained (such as a benefit under paragraph 165-10(1)(a) or (b), or both), will be determined by the effect that the producer rebate (and any GST consequences of the scheme transactions) has on the entities' net amounts.

Element 3: the exclusion

40. The Commissioner does not consider that the GST benefit obtained from either scheme is attributable to the making, by any entity, of a choice, election, application or agreement that is expressly provided for by the GST law or wine tax law.[27] The benefit in each arrangement is not attributable to an entity's choice to quote its ABN, rather, the benefit is attributable to the sequence of steps that make up the relevant scheme.[28]

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[25] In some cases, the evidence may indicate that the grapes would not have been purchased and processed into wine by any of the parties to the scheme. The scheme, and therefore the counterfactual, will vary accordingly.

[26] In some cases, the evidence may indicate that the bulk wine would not have been purchased and processed into wine by any of the parties to the scheme. The scheme, and therefore the counterfactual, will vary accordingly.

[27] For guidance on the operation of paragraph 165-5(1)(b) see *Commissioner of Taxation v. Unit Trend Services Pty Ltd* [2013] HCA 16.

[28] See *Commissioner of Taxation v. Unit Trend Services Pty Ltd* [2013] HCA 16 for a discussion about this element.

Element 4: dominant purpose or principal effect

41. Whether it is reasonable to conclude that the scheme has been carried out for the dominant purpose or with the principal effect of obtaining a GST benefit is determined by objectively considering the scheme against the twelve matters set out in subsection 165-15(1). These are outlined in paragraph 25 of this draft Ruling.

42. Consideration of some of these matters may point in the direction of a tax avoidance purpose or effect, others may point away, and some may be neutral. It is the evaluation of these matters, alone or in combination in the context of the facts and circumstances of each individual case, that is required in order to reach the conclusion to which section 165-5 refers.

43. The references to the particular matters in this draft Ruling should not be regarded as exhaustive or limiting the Commissioner in the application of Division 165 in other cases.

44. The Commissioner considers that both Arrangement 1 and Arrangement 2 give rise to a scheme that is likely to be objectively viewed as having been entered into or carried out for the dominant purpose and/or with the principal effect of getting the relevant entities a GST benefit.

Paragraph 165-15(1)(a) – the manner in which the scheme was entered into or carried out

45. This matter involves a consideration of the way in which the particular scheme was carried out compared to how the alternative postulate would have been implemented. This enables contrivance and artificiality to be identified, for example, through the identification of additional steps or complications that would not be expected to be present in a more straightforward or ordinary method of achieving the outcome of the scheme, or part of the scheme.[29]

46. In Arrangements 1 and 2, the scheme is usually implemented with the knowledge that the wine producer has exhausted, or will exhaust, its annual entitlement to the producer rebate. The structuring involved in the scheme and the order in which the transactions are undertaken ensures that the interposed entity retains title to the grapes or bulk wine, as the case may be, at the time they are processed and the interposed entity makes a sale of rebatable wine. This suggests careful planning by the entities to come within the substantive provisions of the WET Act that will allow the interposed entity to satisfy the definition of a 'producer' and claim a producer rebate.

[29] See paragraph 93 of Practice Statement Law Administration PS LA 2005/24 *Application of General Anti-Avoidance Rules*.

47. The manner in which each scheme is entered into is more complicated than its respective counterfactual. Rather than producing its own wine from inputs that it owns, the wine producer interposes at least one other entity into the arrangement to acquire the inputs, which are then processed by the wine producer and sold to the wine producer or another non-arm's length entity arranged by the wine producer.

48. The interposition of these entities requires some form of agreement between the entities and the wine producer that would not be necessary under the counterfactual, and also necessitates at least one extra sale of the resultant wine that would not otherwise have occurred. These steps often occur in the context of the interposed entities having little or no involvement with the acquisition or production of the inputs and the processing of the wine. There is no need for any involvement apart from acquiring and retaining title, and making the requisite sale of the wine, such that it meets the definition of 'producer'.

49. The increased complication and additional steps under the schemes generally have no objectively justifiable commercial rationale and are thus explicable only, or predominantly, by the tax benefit they generate.

50. In some instances, the participants in the schemes manipulate the price of the grapes, winemaking fees or wine sales in a manner inconsistent with the value added or market rates, to allow other entities to share the financial benefit of the producer rebate created by the scheme. This may also be achieved by the parties to the scheme charging uncommercial rates for services allegedly performed.

51. Participants may also enter into the schemes following advice from a tax adviser promoting the benefit of the producer rebate, or upon the suggestion of a controlling mind who is driving the scheme.

52. The above circumstances, to the extent they are present on the facts of any given case, suggest that the scheme is carried out for the sole or dominant purpose or principal effect of getting the interposed entity a WET producer rebate.

Paragraph 165-15(1)(b) – the form and substance of the scheme, including:

(i) the legal rights and obligations involved in the scheme, and

(ii) the economic and commercial substance of the scheme.

53. This matter involves comparing the form of the scheme, being the legal rights and obligations involved, and the commercial and economic substance of the scheme. Where there is incongruity between the form and substance of a scheme, this may indicate it has been implemented in a particular form so as to obtain a tax benefit. This is particularly so where the substance of the scheme may be achieved through another more straightforward or commercial transaction.

54. The form of the scheme in Arrangement 1 is that the interposed entity purchases the grapes, contracts the wine producer to manufacture wine whilst the interposed entity has title to the grapes, and subsequently sells the resultant wine to the wine producer.

55. The substance of the scheme, however, is that the wine producer acquires wine made from the same grapes, and to the same specifications, that it would have been in possession of had the scheme not been implemented.

56. In Arrangement 2, the form of the scheme is that the interposed entity acquires the bulk wine from the wine producer (or a supplier arranged by the wine producer), contracts the wine producer to blend or further manufacture the wine whilst the interposed entity retains title to the bulk wine, and sells the resultant wine to either the wine producer or another non-arm's length entity that the wine producer has arranged.

57. The substance of the scheme, however, is that the wine produced and sold to the ultimate purchaser is the same wine, made to the same specifications that the wine producer would have been in possession of and sold had the scheme not been implemented.

58. Some examples of circumstances which, if present, may point towards a discrepancy between the form and substance of a scheme are:

(a) the wine producer, or another controlling mind of the scheme, directly or indirectly funds the interposed entity's operations or purchases

(b) the interposed entity adds little or no value to the manufacture and sale of the wine

(c) it is not commercially realistic that a producer would carry out only that part of the process undertaken by the interposed entity

(d) there is no material change to the manufacturing and sale process that would be discernable to an entity outside the economic group

(e) the interposed entity is not exposed to the normal risks involved in marketing and selling the wine, as the wine producer has already arranged for itself or another buyer to purchase the wine

(f) the interposed entity bears minimal risk in relation to the wine manufacturing process, and

(g) the wine producer deals with the wine (after manufacture) as if the wine was its own.

59. Although the form of the arrangement alters under the scheme, if the commercial substance of the arrangement remains unchanged, this suggests that the scheme is carried out for the sole or dominant purpose or principal effect of getting the entity a WET producer rebate.

Paragraph 165-15(1)(c) – the purpose of [the GST] Act and any relevant provision of [the GST] Act (whether the purpose or object is stated expressly or not)

60. This matter refers to the purpose or object of the GST Act, whether that purpose or object is stated expressly or not.

61. The tax that is payable or refundable under the GST Act is the 'net amount'. If the net amount is greater than zero, the taxpayer must pay that amount under Division 33. If the net amount is less than zero, that amount is payable to the taxpayer under Division 35.

62. As the GST Act contains the operative provisions that give effect to the various Acts that impose GST,[30] the GST Act inherently has as one of its purposes or objects the collection, through the net amount, of the correct amount of tax.

[30] *A New Tax System (Goods and Services Tax Imposition – General) Act 1999, A New Tax System (Goods and Services Tax Imposition – Customs) Act 1999, A New Tax System (Goods and Services Tax Imposition – Excise) Act 1999, A New Tax System (Goods and Services Tax Imposition (Recipients – General) Act 2005, A New Tax System (Goods and Services Tax Imposition (Recipients) – Customs) Act 2005* and *A New Tax System (Goods and Services Tax Imposition (Recipients) – Excise) Act 2005*.

63. Sections 21-5 and 21-15 of the WET Act respectively provide that wine tax (except on customs dealings) increases a taxpayer's net amount, and wine tax credits[31] reduce a taxpayer's net amount.[32] As wine tax and wine tax credits are taken into account in working out the net amount under Division 17 of the GST Act, the purpose and object of the WET Act, and any relevant provisions of the WET Act, are relevant to the consideration of this matter.

64. The broad purpose of the WET Act is to provide for WET on taxable dealings in wine[33] and to allow for wine tax credits,[34] including producer rebates, in certain defined circumstances.

65. The Commissioner considers that Division 19 of the WET Act is not intended to provide a producer rebate to an interposed entity whose involvement adds nothing to the economic or commercial substance of an arrangement that results in another party acquiring the same wine it would have been in possession of had the interposed entity not been involved.

66. It is clear from subsection 19-15(2) of the WET Act that the legislative intent is to limit an individual producer's total rebate entitlement to $500,000 in a financial year. Both Arrangements 1 and 2 may give rise to outcomes that are contrary to this intention.

67. In form the schemes result in the interposed entities satisfying the definition of 'producer' in their own right. However, where the substance of the schemes is that the wine produced and sold to the ultimate purchasers is made from the same inputs, and in accordance with the same specifications, that it would have been had the scheme not been implemented, the scheme may result in multiple producer rebates for the respective economic group that in total exceed that to which the genuine individual producer is entitled for the financial year.

68. Such an outcome suggests that the scheme is carried out for the sole or dominant purpose or with the principal effect of getting the interposed entity a WET producer rebate.

Paragraph 165-15(1)(d) – the timing of the scheme; and
Paragraph 165-15(1)(e) – the period over which the scheme was entered into and carried out

69. The scheme is generally entered into once it has become evident that the wine producer has exceeded, or will exceed, its annual entitlement to the producer rebate.

[31] The Wine Tax Credit Table in section 17-5 of the WET Act provides that a producer rebate is a wine tax credit.
[32] From 1 July 2012, paragraph 17-5(2)(b) of the GST Act provides that an entity's net amount for a tax period may be increased or decreased under Subdivision 21-A of the WET Act.
[33] Division 5 of the WET Act.
[34] Division 17 of the WET Act.

70. In some cases the period over which the scheme is carried out will be designed to allow the interposed entity to make its producer rebate claim in a particular business activity statement or financial year.

71. Where these circumstances are present, they suggest that the scheme is carried out for the sole or dominant purpose or with the principal effect of getting the interposed entity a WET producer rebate. In some other cases, this matter may be neutral.

Paragraph 165-15(1)(f) – the effect that this Act would have in relation to the scheme apart from this Division

72. This matter refers to the effect that the GST Act would have if Division 165 was not applied.

73. As the calculation of a taxpayer's net amount under Division 17 of the GST Act includes wine tax and wine tax credits, the effect of the GST Act[35] apart from Division 165, is that each of the respective entities' relevant net amounts will include a WET producer rebate under Division 19 of the WET Act. There is no corresponding wine tax liability, because each purchaser of the entities' wine quotes its ABN. The amount of rebate included in the net amount is subject to the annual limit of $500,000 per financial year for each individual producer or group of associated producer.

74. If Division 165 is not applied, the entities' net amounts might also be affected by the GST consequences of the respective schemes. For example, an entity may be entitled to an input tax credit for its acquisition of bulk processing services from the wine producer or capital items, and may have a GST liability for its sale of wine to the wine producer or other interposed entities. If the wine is sold at a profit, for an amount greater than the net processing fee, the GST consequences would be unfavourable for the entity, but would result in an equivalent advantage to the wine producer. Whilst the GST effect on the entity's net amount may be unfavourable, it will generally be outweighed by the benefit of the WET producer rebate.

75. These effects suggest that the scheme is carried out for the sole or dominant purpose or with the principal effect of getting the interposed entity a WET producer rebate.

[35] The application of Division 165 is subject to the application of the substantive provisions of, in this case, the WET Act. The analysis in relation to paragraph 165-15(1)(f) does not preclude or concede the Commissioner's contentions on the application of the substantive provisions of the WET Act.

Paragraph 165-15(1)(g) – any change in the avoider's financial position that has resulted, or may reasonably be expected to result, from the scheme; and Paragraph 165-15(1)(h) – any change that has resulted, or may reasonably be expected to result, from the scheme in the financial position of an entity (a connected entity) that has or had a connection or dealing with the avoider, whether the connection or dealing is or was of a family, business or other nature

76. This matter focuses on the non-tax effects of the scheme on the financial position of the interposed entity (the avoider) and a connected entity. The absence of any practical change in the financial position of those entities, or a change in one entity's financial position that has a corresponding inverse change for another (where that other entity is an associate or alter ego of the taxpayer, for example a spouse or a wholly-owned company),[36] will be suggestive of the requisite purpose or effect.

77. The entity in Arrangement 1 has the requisite connection to the wine producer through its dealing with the wine producer.

78. In most cases, there is no real change in the financial position of the economic group comprised of the interposed entity and the wine producer – either the interposed entity assumes payment of an expense (for example, payment for the grapes) that the wine producer would otherwise have paid, or the income or expense of the interposed entity corresponds to the equivalent expense or income for the wine producer. For example, the interposed entity's income from its sale of wine to the wine producer results in an equivalent financial detriment to the wine producer's financial position. Similarly, the wine producer's sale of winemaking services to the interposed entity results in an equivalent financial detriment to the interposed entity's financial position.

79. Whilst the interposed entity may be financially better off overall as a result of the scheme, an absence of any practical change to the financial position of the economic group, other than the GST benefit, would suggest that the scheme is carried out for the sole or dominant purpose or with the principal effect of getting the interposed entity a WET producer rebate.

80. As with Arrangement 1, the entity in Arrangement 2 has the requisite connection to the wine producer and to any other interposed entity it sells wine to.

[36] See paragraph 106 of PS LA 2005/24.

81. Other than the GST benefit, there is often no real change in the financial position of the economic group comprised of the interposed entity, the wine producer and the other interposed non-arm's length entities. The facts of a particular case may indicate that had the scheme not been entered into, the wine producer would, or could reasonably be expected to, have used bulk wine that it acquired or produced to make finished wine for itself. Under the scheme, rather than selling finished wine to a third party, the wine producer sells bulk wine to the interposed entity. In some cases the interposed entity on-sells the wine (after blending or further manufacture) to another interposed entity. Any income derived from these transactions is matched by a corresponding expense for a connected entity. In cases where the sale of the finished product to a third party is made by one of the interposed entities, the income forgone by the wine producer on this sale is received by that interposed entity.

82. An absence of any practical change to the financial position of the economic group would suggest that the scheme is carried out for the sole or dominant purpose or with the principal effect of getting the interposed entity a WET producer rebate.

Paragraph 165-15(1)(i) – any other consequence for the avoider or a connected entity of the scheme having been entered into or carried out

83. A consequence of the schemes is that the interposed entity is required to declare the producer rebate it receives as income in its income tax return. As the net result is still favourable to the interposed entity, this fact is considered neutral.

Paragraph 165-15(1)(j) – the nature of the connection between the avoider and a connected entity, including the question whether the dealing is or was at arm's length

84. The nature of the connection between the interposed entity and the wine producer or another connected entity will be specific to the facts of each case.

85. However, the interposed entity and the connected entity will generally be connected via family, business or personal relationships, or through shareholdings or common officeholders. In some cases the interposed entity may also be connected to the supplier of the grapes, or the purchaser of the wine that has been arranged by the wine producer, as the case may be.

86. Whether the dealing between the interposed entity and a connected entity is at arm's length requires consideration of the way the parties conduct themselves. Hill J stated in *The Trustee for the Estate of the Late AW Furse No 5 Will Trust v. FC of T*:[37]

> What is required in determining whether parties dealt with each other in respect of a particular dealing at arm's length is an assessment whether in respect of that dealing they dealt with each other as arm's length parties would normally do, so that the outcome of their dealing is a matter of real bargaining.

87. In *Granby Pty Ltd v. FC of T*,[38] Lee J provided the following guidance:

> ... the term ... means, at least, that the parties to a transaction have acted severally and independently in forming their bargain.

88. Whether the dealing between the interposed entity and the wine producer or another interposed entity is at arm's length will be assessed with regard to facts such as:

(a) a lack of evidence that any real bargaining between the interposed entity and the wine producer has taken place

(b) an absence of the interposed entity approaching other manufacturers or purchasers apart from the wine producer (or other manufacturers or purchasers that have been arranged by the wine producer)

(c) non-conformance with payment terms by the parties to the arrangement, particularly where the creditor takes no action to recover outstanding monies from the debtor

(d) the terms of the dealing are dictated by one party to the dealing

(e) the absence of any terms governing a party's recourse in the event that the other party defaults, and

(f) price manipulation between the parties to the dealing.

Paragraph 165-15(1)(k) – the circumstances surrounding the scheme

89. Under Arrangements 1 and 2, whether any of the parties who participate in the scheme were encouraged to enter into the scheme by tax advisers or other individuals (professional or otherwise) is relevant to the circumstances surrounding the scheme.

90. If multiple members of a family, social or business group enter into the same arrangement with the wine producer, this is also relevant.

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[37] 91 ATC 4007 at 4015.
[38] 95 ATC 4240 at 4243.

91. The existence of such circumstances suggests that the scheme is being carried out for the sole or dominant purpose or with the principal effect of getting the interposed entity a WET producer rebate.

Paragraph 165-15(1)(l) – any other relevant circumstances

92. Any other relevant circumstances that arise in a particular case will be taken into account.

Conclusion – Division 165

93. Subject to an examination of all of the facts and circumstances of the particular case being considered, on the analysis set out at paragraphs 19 to 91 of this draft Ruling, the Commissioner is likely to exercise his powers under section 165-40 of the GST Act to negate the GST benefit by determining that the interposed entity's net amount for the relevant tax period(s) does not include the benefit of the WET producer rebate entitlement arising as a result of the arrangements described in TA 2013/2.

Appendix 2 – Detailed contents list

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

References

Previous draft:

WETR 2013/D1

Related Rulings/Determinations:

TR 2006/10; WETR 2009/2

Subject references:

- arrangement
- dominant purpose
- GST benefit
- interposed entity
- principal effect
- scheme
- Taxpayer Alert
- WET producer rebate
- wine

Legislative references:

- ANTS(GST)A99 7-15
- ANTS(GST)A99 Div 17
- ANTS(GST)A99 17-5
- ANTS(GST)A99 17-5(2)(b)
- ANTS(GST)A99 Div 33
- ANTS(GST)A99 Div 35
- ANTS(GST)A99 Div 165
- ANTS(GST)A99 165-5
- ANTS(GST)A99 165-5(1)(a)
- ANTS(GST)A99 165-5(1)(b)
- ANTS(GST)A99 165-5(1)(c)
- ANTS(GST)A99 165-10(1)
- ANTS(GST)A99 165-10(1)(a)
- ANTS(GST)A99 165-10(1)(b)
- ANTS(GST)A99 165-10(2)
- ANTS(GST)A99 165-15(1)
- ANTS(GST)A99 165-15(1)(a)
- ANTS(GST)A99 165-15(1)(b)
- ANTS(GST)A99 165-15(1)(c)
- ANTS(GST)A99 165-15(1)(d)
- ANTS(GST)A99 165-15(1)(e)
- ANTS(GST)A99 165-15(1)(f)
- ANTS(GST)A99 165-15(1)(g)
- ANTS(GST)A99 165-15(1)(h)
- ANTS(GST)A99 165-15(1)(i)
- ANTS(GST)A99 165-15(1)(j)
- ANTS(GST)A99 165-15(1)(k)
- ANTS(GST)A99 165-15(1)(l)
- ANTS(GST)A99 165-15(2)
- ANTS(GST)A99 165-40
- ANTS(GST)A99 165-40(2)
- ANTS(WET)A99 Div 5
- ANTS(WET)A99 7-10(1)
- ANTS(WET)A99 Div 13
- ANTS(WET)A99 Div 17
- ANTS(WET)A99 17-5
- ANTS(WET)A99 Div 19
- ANTS(WET)A99 19-5(1)
- ANTS(WET)A99 19-15(2)
- ANTS(WET)A99 19-15(3)
- ANTS(WET)A99 19-17
- ANTS(WET)A99 19-20
- ANTS(WET)A99 19-25
- ANTS(WET)A99 Subdiv 21-A
- ANTS(WET)A99 21-1
- ANTS(WET)A99 21-5
- ANTS(WET)A99 21-15
- ANTS(WET)A99 33-1
- ITAA 1936 Pt IVA
- TAA 1953
- TAA 1953 Pt IVC
- TAA 1953 Sch 1 105-100
- TAA 1953 Sch 1 350-10(1)
- *A New Tax System (Goods and Services Tax Imposition - General) Act 1999*
- *A New Tax System (Goods and Services Tax Imposition - Customs) Act 1999*
- *A New Tax System (Goods and Services Tax Imposition - Excise) Act 1999*
- *A New Tax System (Goods and Services Tax Imposition (Recipients) - General) Act 2005*
- *A New Tax System (Goods and Services Tax Imposition (Recipients) - Customs) Act 2005*
- *A New Tax System (Goods and Services Tax Imposition (Recipients) - Excise) Act 2005*

Case references:

- Commissioner of Taxation v. Unit Trend Services Pty Ltd [2013] HCA 16; 2013 ATC 20-389; (2013) 87 ATR 13
- Federal Commissioner of Taxation v. Hart (2004) 217 CLR 216; [2004] HCA 26; 2004 ATC 4599; (2004) 55 ATR 712
- Federal Commissioner of Taxation v. Peabody (1994) 181 CLR 359; [1994] HCA 43;

94 ATC 4663; (1994) 28 ATR 344
- Granby Pty Ltd v. FC of T 95 ATC 4240; (1995) 129 ALR 503; (1995) 30 ATR 400
- Re Taxpayer and Federal Commissioner of Taxation (2010) 2010 ATC 1-022; [2010] AATA 497; (2010) 76 ATR 917
- The Trustee for the Estate of the Late AW Furse No 5 Will Trust v. FC of T (1990) 91 ATC 4007; (1990) 21 ATR 1123
- VCE v. Federal Commissioner of Taxation 2006 ATC 187; (2006) 63 ATR 1249; [2006] AATA 821

Other references:
- Taxpayer Alert TA 2013/2
- PS LA 2005/24

ATO references

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