WETD 2010/1EC - Compendium

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Ruling Compendium – WETD 2010/1

This is a compendium of responses to the issues raised by external parties to draft WETD 2009/D1 – Wine equalisation tax: what are the results for Wine Equalisation Tax purposes for entities engaging in an arrangement described in Taxpayer Alert TA 2009/6?

Summary of issues raised and responses

Issue No.	Issue raised	ATO Response/Action taken
1	There is strong concern about the draft Determination. The draft Determination is interpreted as penalising suppliers for dealing with purchasers who may be participating in an indirect marketing scheme for tax avoidance, even though the suppliers have fulfilled all normal commercial and legal obligations for Wine Equalisation Tax (WET) quoting transactions. Whilst not wishing to condone tax avoidance schemes, it is considered that measures to counter tax avoidance should not create uncommercial and unreasonable obligations on suppliers who are neither the instigators nor the beneficiaries of the schemes.	It is acknowledged that, depending on the specific facts and circumstances, in some scenarios the application of the general anti-avoidance provisions in Division 165 of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) to arrangements described in Taxpayer Alert TA 2009/6 may penalise suppliers. As set out at paragraph 13 of the draft Determination the application of Division 165 of the GST Act requires a careful weighing of the individual circumstances of each case. Therefore, in the absence of all relevant information, it is not possible to state definitively whether a particular scheme will attract the application of Division 165 of the GST Act. The draft Determination is not intended to suggest that Division 165 will apply in all cases. Rather the draft Determination indicates that, depending on the relevant facts and circumstances of a particular case, it is open to the Commissioner to exercise his powers under section 165-40 of the GST Act. The Commissioner would ensure that he was fully apprised of all the facts and circumstances of a particular case prior to exercising his powers under section 165-40 of the GST Act. Any supplier who is concerned that an arrangement they are asked to participate in may give rise to avoidance issues can seek advice or guidance from the ATO on the application of Division 165.

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2	**Incorrect application of the general anti-avoidance provisions to suppliers** We are of the view that the general anti-avoidance provisions (GAP) do not generally apply to supplier businesses which adopt indirect marketing arrangements. • The *A New Tax System (Wine Equalisation Tax) Act 1999* (WET Act) provides rules for the payment of tax where sales of wine are made under these arrangements and as a result there is no 'benefit' to suppliers for the purposes of the GAP. • Subject to section 165-5(3), paragraph 165-5(1)(b) of the GAP specifically provides for the situation where a supplier has received an Australian Business Number (ABN) quotation and deems the GAP not to apply. We believe that there is an argument to support the view that the GAP should not apply in the situation where a supplier has received a valid ABN quotation in good faith from an unrelated party. We note that the draft Determination does not consider these provisions in great detail and strongly suggest that this needs to be considered further. • Notwithstanding the above, there is also an argument that suppliers have not obtained a benefit in any relevant sense. Suppliers selling under valid quotation of an ABN do not have a liability for WET at all, that is, there is no amount payable by the supplier and therefore no benefit to be obtained.	It is agreed that the WET Act provides special rules with respect to indirect marketing sales, and allows for the taxable value of those sales to be calculated using the half retail price method. However this does not prevent the application of Division 165 of the GST Act to artificial and contrived arrangements that are designed to obtain a tax benefit by taking advantage of these particular provisions of the WET Act. The Commissioner does not consider that paragraph 165-5(1)(b) of the GST Act applies with respect to these particular arrangements. We consider that any 'GST benefit' that arises from these type of arrangements is a direct result of the interposition of the indirect marketer into the supply chain, and is not a direct result of a choice or election made in accordance with the WET Act. It is correct that suppliers selling under valid quotation of an ABN do not have a liability for WET. However, in the absence of the interposition of the indirect marketer, suppliers would sell their wine directly to the retailer. The retailer would not be entitled to quote their ABN with respect to their purchase of the relevant wine and the suppliers would have a WET liability. Therefore those arrangements which entail the interposition of an indirect marketer into the supply chain results in a lesser WET liability for suppliers.

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3	**Unjust application of the general anti-avoidance provisions to suppliers**. • Paragraph 16 of the draft Determination describes the arrangements or scheme as one involving the interposition of a 'marketer' between the suppliers of the wine and the retailer, and the sale of the wine by the retailer through its retail outlets, on behalf of the marketer. We wish to point out that while the supplier's liability is in one sense reduced from 29% of the wholesale price to nil, this reduction results from the routine operation of the WET legislation and **not** from the direct participation of the supplier in an avoidance scheme. • Section 13-30 of the WET Act provides that suppliers are entitled to rely on a quotation unless they have reasonable grounds for believing the quote was improperly made. Suppliers dealing with unrelated third party customers, on a commercial arms length basis, are generally able to conclude that a quotation is effective. • Suppliers are generally unaware of the specific details of the business structures of their customers and more specifically any indirect marketing arrangements its customers may have in place. A supplier acting in good faith has no reason to believe the arrangements would be 'uncommercial and collusive'.	As set out in the response to issue 2, it is agreed that the WET Act provides special rules with respect to indirect marketing sales, and allows for the taxable value of those sales to be calculated using the half retail price method. However this does not prevent the application of Division 165 of the GST Act to artificial and contrived arrangements that are designed to obtain a tax benefit by taking advantage of these particular provisions of the WET Act. As set out in the response to issue 1, the draft Determination is not intended to suggest that Division 165 of the GST Act will apply in all cases. Rather the draft Determination indicates, that depending on the relevant facts and circumstances of a particular case, it is open to the Commissioner to exercise his powers under section 165-40 of the GST Act. The Commissioner would ensure that he was fully apprised of all of the facts and circumstances of a case prior to exercising his powers under section 165-40 of the GST Act.

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4	Paragraph 7 of the draft Determination refers to 'purported' sales by retailers on behalf of the marketer. If there is evidence that the arrangements between scheme participants are not what they appear to be the ATO should be directing its attack at the scheme participants themselves.	It is agreed that there will be some arrangements where the sales of wine by the 'marketer', although purported to be indirect marketing sales will not in fact be indirect marketing sales pursuant to section 5-20 of the WET Act. This is addressed at paragraphs 6 to 9 of the Determination. In these cases the 'marketer' will have incorrectly calculated their WET liability based upon a taxable value calculated using the half retail price method, and it will be the 'marketer' whose WET liability will be adjusted accordingly and who will be subject to any resulting penalty. In these cases the Commissioner would not seek to apply Division 165 of the GST Act as the arrangement will not result in a 'GST benefit' being obtained by any entity. Instead the core provisions will have been incorrectly applied.
5	**Unreasonable and impractical outcome** The draft Determination would place an additional and unrealistic administrative burden on suppliers, which detracts from the integrity of the WET Act by undermining the confidence of suppliers to accept valid ABN quotes. The draft Determination raises serious concerns if suppliers are at risk of GAP liability and penalty by selling wine WET free under quote to an unrelated customer. If the preliminary view of the ATO is maintained, then suppliers will be forced to review in greater detail the legitimacy of each purchaser's entitlement to quote in all cases (not just indirect marketing). This goes beyond normal commercial requirements and is not in line with the intention of the relevant quoting provisions in the WET Act.	See response to issue 3. It is acknowledged that if suppliers were forced to review in greater detail every quotation of an ABN this would significantly add to the compliance burden of suppliers. The Determination is not intended to place a greater onus or burden upon suppliers to verify a purchaser's entitlement to quote their ABN. Notwithstanding this, in circumstances where purchasers seek to alter their purchasing arrangements and request that suppliers enter into new arrangements for the supply of wine, suppliers may choose to make further enquiries prior to entering into these new arrangements with a purchaser. As indicated above, any supplier who is concerned that an arrangement they are asked to participate in may give rise to avoidance issues can seek advice or guidance from the ATO on the application of Division 165.

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6	We note that, if this preliminary view is maintained, the draft Determination does not explain how the WET paid by the indirect marketer will be dealt with. Will the WET paid on the indirect marketing sales be refunded to the marketer or credited against the supplier's GAP liability? We suggest that this will create incidences of double taxation and additional claims for WET credits, further adding to the compliance cost for both suppliers and retailers.	It is difficult to provide general information in the Determination as to how the WET paid by the indirect marketer will be dealt with. How the WET paid by the indirect marketer is be dealt with will vary according to the specific facts and circumstances of each case. It can be noted also that section 165-45 of the GST Act provides scope for the Commissioner to make compensating adjustments where Division 165 has been applied to negate a GST benefit.
7	We wish to record our strong opposition to the basis on which the draft Determination proceeds. As a general principle, the adoption of commercial arrangements, which are recognised by and provided for in the GST and/or WET Acts, should not be the subject of compliance action under GAP. The mere fact that a taxpayer chooses to adopt one form of commercial arrangement instead of another, or to change from one form of arrangement to another, should not be regarded as an indirect tax avoidance scheme. If the behaviour is to be regarded as a scheme under the GAP, the Commissioner should publish clear guidelines on what is involved in an indirect tax scheme, so that taxpayers will be in a position to structure their commercial arrangements in full knowledge of the Commissioner's likely attitude about particular arrangements.	See response to issues 1 and 3.

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7 cont	We strongly oppose the approach taken in the draft Determination, believing it to be an unwarranted strike at unrelated third parties who are neither beneficiaries of, nor participants in a scheme to avoid WET. If the GAP is to be used, it should be used to challenge the participants in the alleged scheme (or their associates). Indirect taxes are designed to be passed on in prices. Similarly, reductions in indirect taxes are designed to result in lower prices. Accordingly, we strongly disagree with the approach taken in the draft Determination which foreshadows mounting an attack on arm's length suppliers who have unwittingly sold wine to a participant in an alleged scheme and received no economic benefit from any reduction in WET. Having regard to the factors identified in paragraphs 7, 8 and 20 of the draft Determination and the role played by the suppliers, we are extremely disappointed that the Commissioner would contemplate an attack on the suppliers and not the marketer or the retailer.	
8	**Purpose or effect.** Section 165-15 of the GST Act supports the view that in relation to indirect taxes the GAP should only be applied to scheme participants and their associates. Section 165-15 requires detailed consideration of an entity's purpose in entering into or carrying out a scheme and in ascertaining the effect of the scheme.	We consider that the way Division 165 of the GST Act is drafted means that it is not limited to those entities that carry out the scheme, or their associates. In accordance with section 165-5 of the GST Act there are two aspects contemplated by Division 165 of the GST Act: • the entity that enters into or carries out the scheme, and • the entity that gets the GST benefit (the avoider). It is section 165-40 of the GST Act that allows the Commissioner to make a declaration to negate a GST benefit obtained from a scheme. The entity that obtained the relevant GST benefit (the avoider) may not, in all cases, be the same entity that enters into or carries out the scheme.

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8 cont	Most of the matters listed in the section require in-depth knowledge of the workings of the scheme and its impacts and assume that the 'avoider' or a 'connected entity' will be in a position to defend an action by the Commissioner under the GAP. We are at a loss to understand how a supplier could possibly hope to defend itself against a declaration under section 165-40 of the GST Act in circumstances where it is not a participant or beneficiary in an alleged scheme.	However as set out in the response to issue 3, the Commissioner would ensure that he was fully apprised of all the facts and circumstances of a particular case prior to exercising his powers under section 165-40 of the GST Act.
9	The use of the half retail method is a legislative safe harbour. It establishes an acceptable notional wholesale value when indirect marketing sales are made. It should not be compared to the supplier's wholesale price. Differences in amounts of WET payable are not evidence of a scheme to which the GAP applies.	See response to issue 2.
10	Under section 9-25 of the WET Act the marketer can choose to pay WET on either the half retail price method or the average wholesale price method. This suggests the policy is not to maximise revenue instead it is to make taxpayer compliance easier and more certain.	See response to issue 2.
11	It is submitted that as the sale by the supplier is not part of the scheme identified in the draft Determination the supplier does not get a GST benefit for the purposes of section 165-10 of the GST Act.	We consider that the definition of scheme in subsection 165-10(2) of the GST Act is defined widely. As described at paragraph 2(b) of the Determination the relevant scheme entails the interposition of the 'marketer' between the suppliers and the retailer. The suppliers' sales of wine to the interposed 'marketer' forms part of that scheme.

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12	Paragraph 165-5(1)(b) of the GST Act provides that the GAP does not apply if the GST benefit is attributable to the making of a choice, election, application or agreement that is expressly provided for by the wine tax law. The quotation of the ABN by the marketer to the supplier is a choice made by the marketer.	The Commissioner does not consider that paragraph 165-5(1)(b) of the GST Act applies with respect to these particular arrangements. We consider that any 'GST benefit' that arises from these type of arrangements is a direct result of the interposition of the indirect marketer into the supply chain, and is not a direct result of a choice or election made in accordance with the WET legislation.
13	Subsection 165-5(3) of the GST Act provides that the GST benefit that the avoider got is not taken to be attributable to a choice, election, etc if the scheme was entered into for the sole or dominant purpose of creating a state of affairs which enables the choice, election, etc to be made. The scheme as described does not depend to any extent on the quotation by the marketer to the supplier. The scheme depends upon selling wine by indirect marketing. It could operate whether the marketer purchased wine WET-free or WET inclusive. As the GST benefit received by the supplier is attributable to the quotation and not the scheme itself the GAP cannot apply to the scheme as identified.	As set out in the response to issue 11, we consider that the relevant scheme involves the interposition of the 'marketer' between the suppliers and the retailer. The particular arrangements that the Commissioner is aware of entail the 'marketer' quoting their ABN with respect to their purchases of wine from the suppliers. In the absence of the interposition of the indirect marketer, suppliers would sell their wine directly to the retailer. The retailer would not be entitled to quote their ABN with respect to their purchase of the relevant wine and the suppliers would have a WET liability. Therefore those arrangements which entail the interposition of an indirect marketer into the supply chain result in a lesser WET liability for suppliers, and that reduction in the WET liability of the supplier is a 'GST benefit' pursuant to section 165-10 of the GST Act. This 'GST benefit' arises as a result of the scheme, being the interposition of the 'marketer' in the supply chain.
14	**Misguided application of general anti-avoidance provisions** There are two potential WET benefits in the arrangements: • the difference between the WET paid by the supplier pre-scheme (29% of the wholesale price) and post-scheme (nil), and • the difference between the WET paid on the wholesale price pre-scheme and the WET paid on the half retail method.	We consider that for the purposes of Division 165, and in accordance with section 165-10 the relevant 'GST benefit' is the reduced WET liability of the supplier. Although the difference between the WET paid on the wholesale price (pre-scheme) and the WET paid using the half retail price method (post-scheme) may represent the ultimate economic benefit of the scheme, it does not represent the 'GST benefit' as defined in section 165-10 of the GST Act.

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14 cont	The interest seems to have been aroused by the second point but the Commissioner is directing the GAP at the first point. The Commissioner will be required either to seek to collect double taxation on the same wine, something that is directly contrary to the scheme of the WET Act or to refund the WET collected from the marketer once the GST benefit is collected from the supplier. The later course being an absurd outcome.	We consider that in the event of the Commissioner making a declaration under Division 165 of the GST Act, with respect to a particular arrangement, the issue of how the WET paid by the indirect marketer is treated will depend upon the individual facts and circumstances of each individual case.
15	Before a decision to issue a public ruling on the application of the GAP is taken escalation to Tax Counsel Network and the General anti-Avoidance Rules Panel as per PS LA 2005/24 should be followed. As part of these procedures the interested parties would be given the opportunity to make representations to the Panel.	As set out in the response to issue 1, the draft Determination is not intended to suggest that Division 165 will apply in all cases. Rather the draft Determination indicates that, depending on the relevant facts and circumstances of a particular case, it is open to the Commissioner to exercise his powers under section 165-40 of the GST Act. The Commissioner would ensure that he was fully apprised of all the facts and circumstances of a particular case prior to exercising his powers under section 165-40 of the GST Act. Before making a declaration under Division 165 with respect to a particular arrangement, the procedures set out in PS LA 2005/24 would be followed. The matter would be escalated to the Tax Counsel Network and the General Anti-avoidance Rules Panel (GAAR Panel), and as provided for in PS LA 2005/24 interested parties would be invited to make representations to the GAAR Panel.
16	I agree with the draft Determination and it should be finalised without change.	Comment noted.