



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?

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Draft Wine Equalisation Tax Determination

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?

Preamble

This publication is a draft for public comment. It represents the Commissioner's preliminary view about the way the law applies. It is not a public ruling or advice for the purposes of section 105-60 of Schedule 1 to the *Taxation Administration Act 1953*.

You can rely on this publication to provide you with protection from interest and penalties as follows. If a statement in this publication is later found to be incorrect or misleading and you make a mistake as a result of relying on this publication, you will not have to pay a penalty. In addition, if you have relied on this publication reasonably and in good faith you will not have to pay interest charges. However, you will still have to pay the correct amount of tax, provided the time limits under the law allow it.

1. The arrangement described in Taxpayer Alert TA 2009/6 (the Alert) may not result in the taxable value of the sales of wine under the arrangement being able to be determined using the half retail price method specified in section 9-35 of the *A New Tax System (Wine Equalisation Tax) Act 1999* (WET Act)¹ because:

- (a) the sale of the wine by the 'marketer' may not be an indirect marketing sale as defined in section 5-20 of the WET Act; or
- (b) the general anti-avoidance provisions in Division 165 of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) may apply to the arrangement.

Background and Explanation

2. The Alert was issued on 1 April 2009. It describes an arrangement that seeks to reduce the wine equalisation tax (WET) liability on the sale of wine through the use of an interposed entity and an agency relationship to shift the point where the WET liability is determined and to affect the methodology used in determining it. The Alert applies to arrangements with features substantially equivalent to the following:

- (a) A retailer either purchased, or would purchase, wine directly from suppliers to on-sell directly to customers through its retail outlets. WET would be imposed on the supplier calculated on the wholesale selling price.

¹ All legislative references are to the WET Act unless otherwise indicated.

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- (b) An entity is interposed ('the marketer') between the suppliers and the retailer purportedly to purchase the wine that is to be sold by the retailer. The retailer then sells the wine through its retail outlets as agent for the 'marketer'. WET is now imposed on the 'marketer' for a lesser amount (under the half retail price method).
- (c) Under the terms of the arrangement, there are minimal requirements placed upon the 'marketer' and the 'marketer' bears little or no economic risk.
- (d) Suppliers are aware that they are contracting with the 'marketer' and invoice the 'marketer' for their supplies of wine.
- (e) The wine may be transported directly from the suppliers to the retailer's premises.
- (f) The retailer selects the wine to be purchased, and negotiates the prices to be paid, by the 'marketer'. The retailer also sets the sale price of the wine sold from its retail outlets on behalf of the 'marketer'.
- (g) The retailer guarantees that the 'marketer' will pay the suppliers for the wine.
- (h) The 'marketer' is entitled to receive some percentage of the sale price charged at the retailer's outlets. A significant part of this amount may be retained by the retailer as an agent's commission, and/or other charges making the actual amount received by the 'marketer' relatively small.
- (i) Where the retail price mark up is relatively low, calculating WET using the half retail price method can result in a lower WET liability than if the WET liability arose on the prior wholesale sale. This enables the retailer to sell the wine to its customers at a lower price and/or retain a higher profit.

Legislative context

3. Indirect marketing sales² are a type of retail sale that are assessable dealings even though the purchaser of the wine may have borne WET. These arrangements are assessable dealings to ensure that WET is taxed on the full wholesale value. In accordance with section 5-20 there is an indirect marketing sale if the sale is a retail sale by an entity which is not the manufacturer of the wine and the sale occurs in either of the following circumstances:

- the sale is made by the seller through another entity, other than an employee of the seller, who is acting for the seller under an arrangement to that effect; or
- the sale is made from premises that are:
 - used by an entity, other than the seller, mainly for making retail sales of wine; and
 - are held out to be premises of, or premises used by the other entity or entities.

² Assessable Dealings AD2d and AD12d in the Assessable Dealings Table in section 5-5 (section 5-20).

4. The Assessable Dealings Table in section 5-5 specifies that the normal taxable value for an indirect marketing sale is the notional wholesale selling price.³ In the case of indirect marketing sales the notional wholesale sale price is generally calculated using the half retail price method.⁴ The taxable value for the retail sale of wine, worked out using the half retail price method is 50% of the price of the sale (including WET and GST).⁵

5. Pursuant to section 13-5 an entity that intends to sell wine by way of indirect marketing sale is entitled to quote its Australian Business Number (ABN) when purchasing wine from suppliers. In accordance with section 7-10 a sale is not taxable if a purchaser quotes for the sale. Therefore a sale of wine to an entity that intends to sell that wine by indirect marketing sale ('marketer') will not be subject to WET if the indirect 'marketer' quotes their ABN at the time of purchase of the wine.

Indirect marketing sales

Where the retailer is an agent of the 'marketer'

6. The first category of indirect marketing sales referred to in section 5-20 are retail sales made under an arrangement where an entity is authorised to sell wine on behalf of another entity (the marketer), in circumstances where the marketer is not the manufacturer of the wine. For example, wine sold on consignment where a retailer sells the wine as an agent of the owner of the wine will be an indirect marketing sale for the purposes of section 5-20.

7. Under the arrangements described in the Alert the retailer purportedly sells wine through its retail outlets on behalf of the 'marketer'. If the retailer is acting as an agent⁶ of the 'marketer' with respect to these sales of wine, then, subject to the application of Division 165 of the GST Act as discussed in paragraphs 10 to 21 of this draft Determination, the sale of the 'marketer's' wine will be an indirect marketing sale pursuant to section 5-20 of the WET Act and the taxable value of the wine may be determined using the half retail price method.

Where the retailer is not an agent of the 'marketer'

8. In some circumstances, notwithstanding the description that the retailer and 'marketer' may have attributed to their business relationship, an examination of relevant facts and circumstances, and the actual conduct of the parties, may reveal that the retailer is not an agent of the 'marketer', and is not selling the wine on behalf of the 'marketer'. In these cases the relevant sales of wine will not be indirect marketing sales for the purposes of section 5-20, and the taxable value of the wine may not be able to be determined using the half retail price method.

³ Assessable Dealing AD1a, AD1b and AD11b in the Assessable Dealings Table in section 5-5.

⁴ Sections 9-25 and 9-35.

⁵ Subsection 9-35(1).

⁶ Whether or not a retailer is acting as an agent of the 'marketer' will require an examination of the facts and circumstances in each case. General principles of agency are relevant, and in most cases, relevant documentation about the business relationship, the description used by the parties and the conduct of the parties will determine whether or not an agency agreement exists. See GSTR 2000/37 Goods and services tax: agency relationships and the application of the law for a discussion on general principles of agency arrangements.

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9. For example, consignment sales undertaken on a 'sale or return' basis will not be indirect marketing sales. 'Sale or return' arrangements occur where wine is consigned by the 'marketer' to the retailer but no sale takes place until the retailer finds a buyer for the wine at which time two sales occur; the first from the 'marketer' to the retailer and the second from the 'retailer' to the end customer. In these circumstances the first sale by the 'marketer' to the retailer will be a wholesale sale and the taxable value of this wholesale sale will be the price for which the wine is sold (excluding WET and GST).⁷ In these circumstances the sales of wine by the 'marketer' will not be indirect marketing sales and the taxable value of the wine may not be determined using the half retail price method.

Division 165 of the GST Act – anti avoidance

10. Alternatively, the Commissioner will consider the application of the general anti-avoidance provisions in Division 165 of the GST Act to the arrangements as described in the Alert.

11. Division 165 of the GST Act applies to WET avoidance schemes.⁸ This is because section 21-5 of the WET Act incorporates an entity's liability for WET (other than WET on customs dealings⁹) into the net amount that the entity is liable to pay under Division 33 of the GST Act, or into the amount of refund to which an entity is entitled under Division 35 of the GST Act.

12. The application of Division 165 of the GST Act was considered by the Administrative Appeals Tribunal in *VCE v. Federal Commissioner of Taxation* 2006 ATC 187; 63 ATR 1249, the first decision to examine the use of these provisions. Additionally, the Commissioner has set out his views on the application of Division 165 to specific arrangements and these are discussed in a number of public rulings and determinations.¹⁰

13. The application of Division 165 of the GST Act, which contains the general anti-avoidance provisions, 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.

⁷ Assessable Dealings AD1a, AD1b and AD11b in the Assessable Dealings Table in section 5-5.

⁸ See the note to section 21-1.

⁹ Although WET on customs dealings is not included in net amounts determined under the GST Act, Division 165 of the GST Act can apply in relation to customs dealings by virtue of section 23-10 of the WET Act.

¹⁰ See:

- GSTR 2004/3 Goods and services tax: arrangements of the kind described in Taxpayer Alert TA 2004/2: Avoidance of GST on the sale of new residential premises;
- GSTR 2005/3 Goods and services tax: arrangements of the kind described in Taxpayer Alert TA 2004/9 – exploitation of the second-hand goods provisions to obtain input tax credits;
- GSTR 2005/4 Goods and services tax: arrangements of the kind described in Taxpayer Alerts TA 2004/6 and TA 2004/7: use of the Grouping or Margin Scheme provisions of the GST Act to avoid or reduce the Goods and Services Tax on the sale of new residential premises;
- GSTR 2005/5 Goods and services tax: arrangements of the kind described in Taxpayer Alert TA 2004/8: use of the Going Concern provisions and the Margin Scheme to avoid or reduce the Goods and Services Tax on the sale of new residential premises;
- GSTD 2006/5 Goods and services tax: what are the results for GST purposes of barter exchanges engaging in the arrangement described in Taxpayer Alert TA 2005/4?; and
- GSTD 2007/2 Goods and services tax: what are the results for GST purposes of a charitable institution engaging with an associated endorsed charitable institution in an arrangement described in Taxpayer Alert TA 2007/1?

14. For Division 165 of the GST Act to apply, the following four elements need to be satisfied:

- (a) one or more of the steps in the arrangement is a 'scheme' as defined in subsection 165-10(2);
- (b) a 'GST benefit', as defined in subsection 165-10(1), arises under the scheme;
- (c) an entity gets a GST benefit from the scheme; and
- (d) it is reasonable to conclude, taking account of the matters in section 165-15, that the dominant purpose or principal effect of entering into or carrying out the scheme was to get a GST benefit.

Element 1: scheme

15. It is considered that all or only some of the elements comprising the arrangements described in paragraph 2 of this draft Determination would constitute a 'scheme' under the broad definition of that term in subsection 165-10(2) of the GST Act: see the observations of the High Court in *Federal Commissioner of Taxation v. Hart* (2004) 217 CLR 216 at 234-238 and 260-261 in relation to the virtually identical definition of 'scheme' for the purposes of Part IVA of the *Income Tax Assessment Act 1936* (ITAA 1936) and the decision of Deputy President Forgie of the Administrative Appeals Tribunal in *VCE v. Federal Commissioner of Taxation* 2006 ATC 187; 63 ATR 1249 that specifically dealt with a scheme in the context of the application of Division 165 of the GST Act.

16. The scheme in the arrangements may be concisely described as one involving the interposition of the 'marketer' between the suppliers of the wine and the retailer, and the sale of wine by the retailer through its retail outlets, on behalf of the 'marketer'.

Element 2: GST benefit

17. Further, it is considered that the arrangement constitutes a scheme which would give rise to a GST benefit under paragraph 165-10(1)(a) of the GST Act. That is, had the 'marketer' not been interposed between the suppliers and the retailer, the suppliers would have continued, as before, to make wholesale sales of wine to the retailer and the suppliers would have been liable for WET on those sales of wine based upon the price for which the wine was sold (excluding WET and GST).

18. Under the arrangements described in the Alert the suppliers sell wine to the 'marketer'. The indirect 'marketer' quotes their ABN with respect to their purchase of the wine and pursuant to section 7-10 of the WET Act the sale of wine by the suppliers to the 'marketer' is not subject to WET. Therefore, because under the scheme the suppliers no longer incur a WET liability with respect to the sale of wine for sale in the retailer's outlets, it could reasonably be expected that a larger amount would be payable under the provisions of the GST Act¹¹ (apart from Division 165) than would have been payable but for the scheme: 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 Part IVA of the ITAA 1936.

¹¹ Refer to section 21-5 and paragraph 11 of this draft Determination.

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Element 3: entity gets GST benefit

19. The supplier gets the GST benefit of a lesser net amount payable as described in paragraphs 17 and 18 of this draft Determination.

Element 4: dominant purpose or principal effect

20. It would also be reasonable to conclude, having regard to the matters set out in subsection 165-15(1) of the GST Act, that the sole or dominant purpose of the scheme or part of the scheme, or the principal effect of the scheme or part of the scheme, was for the supplier to obtain the GST benefit so that the amount of WET borne on the ultimate sale of the wine to consumers could be reduced. In this context the following general observations can be made:

- The manner in which the scheme was entered into or carried out involves the ‘marketer’ being interposed between the supplier and retailer therefore creating a situation in which the supplier can sell the wine without incurring a WET liability because the ‘marketer’ can quote. The interposition of the ‘marketer’ does not introduce any further efficiency into the supply chain. The structure of the arrangement and the manner in which the arrangement was entered into is uncommercial in nature, and creates a greater impost for the retailer. The retailer continues to negotiate the terms of trade with the suppliers, selects the wine to be purchased by the ‘marketer’, guarantees payment of suppliers by the ‘marketer’, as well as maintaining requisite administrative records for the ‘marketer’ and forwarding relevant payments to suppliers and the ‘marketer’.
- The form of the scheme involves the ‘marketer’ being interposed between the supplier and the retailer. The retailer acts for the ‘marketer’ by selling the relevant wine through its retail outlets, as an agent for the ‘marketer’. The form of the arrangement is that the ‘marketer’ is selling the relevant wine, as opposed to the retailer. However, in commercial and economic substance, the scheme produces no change. The same wine is still being supplied for sale in the retailer’s outlets. End purchasers of the wine are not aware that the retailer is acting as agent for the ‘marketer’, and they consider that they are purchasing wine from the retailer.

Furthermore, the retailer sets the sale price for the wine and continues to negotiate the purchase price of the wine with the suppliers. Despite being the seller of the wine, the ‘marketer’ only receives a minimal portion of the sale proceeds from the wine, and the retailer retains almost the entire sale proceeds of the wine. The advantage of the scheme for the retailer is that the WET that is embedded in the price paid by the end consumer is less than it otherwise would be. Therefore they are able to either sell wine at a lower price compared to competitors or enjoy a higher profit margin.

- Due to the very minimal activities that the ‘marketer’ undertakes and the minimal level of risk that the ‘marketer’ bears in relation to the arrangement the scheme does not achieve a wider commercial objective, other than reduction in WET borne on the ultimate sale of the wine to the end consumer.

- The arrangement is contrary to the intention of indirect marketing sales provisions of the WET Act. As explained in the Explanatory Memorandum to the A New Tax System (Wine Equalisation Tax) Bill 1999 the indirect marketing sales provisions are designed to ensure that indirect sales arrangement do not reduce the taxable value by treating what should be a wholesale sale as a retail sale. Without the indirect marketing provisions the wholesale sale is pushed further back into the supply chain therefore eliminating part of the wholesaler's costs from the taxable value. However under the arrangements of the type described in the Alert the indirect marketing provisions operate to produce a contrary result with a lesser amount of WET being borne on the ultimate sale of the wine than would be the case if instead WET applied to the preceding sale of the wine from the suppliers to the 'marketer', or alternatively if the suppliers were to supply the wine directly to the retailer.
- But for the operation of Division 165 of the GST Act, the 'marketer' would continue to make indirect marketing sales of wine and would use the half retail price method to calculate its WET liability. The 'marketer' would quote with respect to their purchases of wine from suppliers and the suppliers would not incur a WET liability on these sales of wine. The ultimate outcome being that the amount of WET embedded in the retail sale price of the wine is reduced.

21. It is therefore open to the Commissioner to exercise his powers under section 165-40 of the GST Act to negate the GST benefit by determining that the supplier's net amount for the relevant periods includes the WET that was not paid because the 'marketer' had quoted.

Date of effect

22. This draft Determination represents the preliminary, though considered view of the Commissioner. When the final Determination is officially released, it will explain the Commissioner's view of the law as it applies both before and after its date of issue.

23. The final Determination will be a public ruling for the purposes of section 105-60 of Schedule 1 to the *Taxation Administration Act 1953* and may be relied upon, after it is issued, by any entity to which it applies. Wine Equalisation Tax Ruling WETR 2002/1: the WET rulings system explains the WET rulings system and the Commissioner's view of when you can rely on WET public and private rulings.

Your comments

24. You are invited to comment on this draft Determination. Please forward your comments to the contact officer by the due date.

25. A compendium of comments is also prepared for the consideration of the relevant Rulings Panel or relevant tax officers. An edited version (names and identifying information removed) of the compendium of comments will also be prepared to:

- provide responses to persons providing comments; and
- publish on the Tax Office website at www.ato.gov.au.

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Please advise if you do not want your comments included in the edited version of the compendium.

Due date: 24 July 2009

Contact officer details have been removed following publication of the final determination.

Commissioner of Taxation

24 June 2009

Previous draft:

Not previously issued in draft form

Related Rulings/Determinations:

WETR 2002/1; GSTR 2000/37; GSTR 2004/3;
GSTR 2005/3; GSTR 2005/4; GSTR 2005/5;
GSTD 2006/5; GSTD 2007/2

Subject References

- anti avoidance
- schemes & shams
- tax benefit under tax avoidance schemes
- WET taxable value
- wine

Legislative references:

- ANTS (GST) Act 1999
- ANTS (GST) Act 1999 Div 33
- ANTS (GST) Act 1999 Div 35
- ANTS (GST) Act 1999 Div 165
- ANTS (GST) Act 1999 165-10(1)
- ANTS (GST) Act 1999 165-10(1)(a)
- ANTS (GST) Act 1999 165-10(2)
- ANTS (GST) Act 1999 165-15
- ANTS (GST) Act 1999 165-15(1)
- ANTS (GST) Act 1999 165-40
- ANTS (WET) Act 1999
- ANTS (WET) Act 1999 5-5
- ANTS (WET) Act 1999 5-20
- ANTS (WET) Act 1999 7-10
- ANTS (WET) Act 1999 9-25

- ANTS (WET) Act 1999 9-35
- ANTS (WET) Act 1999 9-35(1)
- ANTS (WET) Act 1999 13-5
- ANTS (WET) Act 1999 21-1
- ANTS (WET) Act 1999 21-5
- ANTS (WET) Act 1999 23-10
- ITAA 1936 Pt IVA
- TAA 1953 Sch 1 105-60

Case references:

- VCE v. Federal Commissioner of Taxation
2006 ATC 187; 63 ATR 1249
- Federal Commissioner of Taxation v. Hart
(2004) 217 CLR 216
- Federal Commissioner of Taxation v.
Peabody (1994) 181 CLR 359

Other references:

- Explanatory Memorandum to the A New
Tax System (Wine Equalisation Tax) Bill
1999
- Taxpayer Alert TA 2004/2
- Taxpayer Alert TA 2004/6
- Taxpayer Alert TA 2004/7
- Taxpayer Alert TA 2004/8
- Taxpayer Alert TA 2004/9
- Taxpayer Alert TA 2005/4
- Taxpayer Alert TA 2007/1
- Taxpayer Alert TA 2009/6

ATO references

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