WETD 2010/D1 - Wine equalisation tax: what are the results for entities that engage in an arrangement described in Taxpayer Alert TA 2009/7?

This document has been finalised by WETD 2011/1.

There is a Compendium for this document: **WETD 2011/1EC** .

Draft Wine Equalisation Tax Determination

Wine equalisation tax: what are the results for entities that engage in an arrangement described in Taxpayer Alert TA 2009/7?

This publication provides you with the following level of protection:

This publication is a draft for public comment. It represents the Commissioner's preliminary view about the way in which a relevant taxation provision applies, or would apply to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

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Ruling

1. The arrangement described in Taxpayer Alert TA 2009/7 (TA 2009/7) may not result in the grower[1] being entitled to a Wine Equalisation Tax (WET) producer rebate under section 19-5 of the *A New Tax System (Wine Equalisation Tax) Act 1999* (WET Act) because:

(a) notwithstanding the purported outcomes of the arrangement, in some cases the grower will not have, and will not obtain, title to the wine and will not be liable for wine tax in relation to a dealing in the wine or will not make a sale of the wine under quote, as required under subsection 19-5(1) of the WET Act;[2] or

(b) the general anti-avoidance provisions in Division 165 of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) apply to the arrangement.

[1] A reference to a grower in this draft Determination is a reference to an entity that grows fruit or vegetables to be used in the manufacture of wine, and also includes an entity that grows rice to be used in the manufacture of sake, and an entity that collects honey to be used in the manufacture of mead.
[2] See paragraph 9 of this draft Determination.

Date of effect

2. When the final Determination is issued, it is proposed to apply both before and after its date of issue. However, the Determination will not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Determination (see paragraphs 75 to 77 of Taxation Ruling TR 2006/10).

Commissioner of Taxation
3 November 2010

Appendix 1 – Explanation

This Appendix is provided as information to help you understand how the Commissioner's preliminary view has been reached. It does not form part of the proposed binding public ruling.

Background

3. TA 2009/7 was issued on 1 April 2009. It describes uncommercial and collusive arrangements where one or more growers use a contract winemaker, so each grower can attempt to claim the WET producer rebate by retaining legal title to their produce and to the resulting wine, until a pre-arranged sale of the wine to the winemaker.

4. This draft Determination applies to a scheme (being the arrangement described in TA 2009/7) with the following features:

(a) Prior to the arrangement, a winemaker either purchased, or would purchase, fruit or vegetables[3] from one or more growers to make wine.

(b) The winemaker now enters into a contract with a grower to make wine from the grower's produce on the grower's behalf, on the basis that the grower retains ownership of that produce and of the resulting wine.

(c) At or around the time of entering into the contract with the grower the winemaker commits to buy the resulting wine (possibly at a predetermined price). This removes the majority of commercial risk to the grower from the winemaking process, such as that which may arise from the quality of the wine produced.

(d) Once the wine is made by the winemaker, the winemaker pays the purchase price and the title of the wine is transferred to them. Typically, at the time of purchase the winemaker quotes their ABN which results in the grower not incurring WET.

(e) The winemaker then sells the wine to a buyer in a transaction that is liable for WET or would be liable to WET, if not for the purchaser quoting their ABN.

(f) Each grower involved claims a WET producer rebate of up to $500,000 for a financial year for the wine that they have 'sold' to the winemaker. The sum of the rebates claimed by each grower and the winemaker is likely to exceed the $500,000 maximum that the winemaker alone would be entitled to claim from the production of wine for the financial year.[4]

Legislation

5. Division 19 of the WET Act sets out the circumstances in which wine producers are entitled to a WET producer rebate for certain dealings in wine. The rebate is provided in the form of a WET credit.[5]

[3] A reference to fruit or vegetables in this draft Determination includes honey and rice.
[4] Unless the grower and the winemaker are associated producers for the purposes of section 19-20 of the WET Act.
[5] Credit ground CR9 in the table in section 17-5 of the WET Act.

6. Section 19-5 of the WET Act provides that you are entitled to a WET producer rebate for rebatable wine[6] for a financial year if, amongst other things, you are the **producer** of that wine.

7. The term **producer** is defined in section 33-1 of the WET Act as:

> **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.

8. In accordance with the definition of producer in section 33-1 of the WET Act an entity is the producer of rebatable wine if:

- it manufactures the wine from the base constituents (for example, grapes for grape wine, fruit or vegetables for fruit or vegetable wine, honey for mead, rice for sake or grape wine for grape wine products); or
- it provides another entity with the base constituents (fruit or vegetables) from which the wine is to be manufactured.[7]

9. To be eligible for a WET producer rebate an entity not only has to be a producer of rebatable wine but also:

- the entity must be liable for wine tax for a taxable dealing in the wine during the financial year; or
- the entity would have been liable for wine tax for a dealing in the wine during the financial year had the purchaser not quoted for the sale at or before the time of the sale.[8]

The grower purports to sell wine to the winemaker

10. As set out at paragraph 9 of this draft Determination, to be entitled to a WET producer rebate an entity must be liable for wine tax for a taxable dealing in the wine or make a sale of the wine under quote.[9]

11. Under the arrangement described in TA 2009/7, the grower provides their produce to be manufactured into wine by the winemaker. Purportedly, title to the grower's produce is not transferred to the winemaker, and the winemaker manufactures the wine on behalf of the grower, with the grower having and retaining ownership of the resulting wine. Title to the wine is then transferred to the winemaker upon the winemaker paying the specified purchase price to the grower.

12. The grower provides the fruit or vegetables to the winemaker and the winemaker makes wine from those fruit or vegetables. In accordance with the second limb of the definition of producer of rebatable wine, referred to in paragraph 8 of this draft Determination, the grower supplies to another entity the fruit or vegetables from which the wine is manufactured. Therefore the grower is a producer of rebatable wine.

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[6] The term **rebatable wine** is defined in section 33-1 of the WET Act to mean grape wine, grape wine products, fruit or vegetable wine, cider or perry, mead or sake, all of which are separately defined in Subdivision 31-A of the WET Act.
[7] See paragraphs 22 to 25 of WETR 2009/2.
[8] Subsection 19-5(1) of the WET Act.
[9] See paragraphs 177 to 182 of WETR 2009/1 for a discussion of eligibility to 'quote' in relation to a sale of wine.

13. If the arrangement between the grower and the winemaker does result in the sale of the wine (that is, transfer of title to the wine for a price) from the grower to the winemaker, as it purports to do, the grower will be liable for wine tax unless the winemaker quotes for their purchase of the wine. Therefore, under section 19-5 of the WET Act, the grower will be entitled to a WET producer rebate in relation to the wine. However, as discussed at paragraphs 20 to 59 of this draft Determination it is also necessary to consider whether or not the general anti-avoidance provisions in Division 165 of the GST Act may apply to the arrangement.

The arrangement may not be legally effective

14. In some circumstances, notwithstanding the description that the grower and the winemaker may have attributed to their business dealings and arrangements, an examination of relevant facts and circumstances and the actual conduct of the parties may reveal that title to the grower's produce passes to the winemaker upon its delivery to the winemaker, and the winemaker makes the wine on their own behalf rather than providing a winemaking service to the grower. Consequently the winemaker will own the resulting wine manufactured from the produce. In these cases the grower will not make a sale of the wine to the winemaker and the grower will not be entitled to a WET producer rebate because, as required by section 19-5 of the WET Act, they will not be liable to wine tax on a taxable dealing in the wine and they will not make a sale of the wine under quote.

15. For example, the pooling and co-mingling of the grower's grapes with the grapes of other growers, as part of the winemaking process, may indicate that the grower's produce is being sold to the winemaker, and the winemaker is making the wine on its own behalf, rather than providing a winemaking service to the grower. In such cases the grower's fruit becomes inextricably mixed with the fruit of other growers and the resulting wine is not identifiable as wine that has been made from any one grower's produce.

16. In other cases an examination of the relevant facts and circumstances, and the terms of the agreement between the grower and the winemaker, will determine whether title to the produce remains with the grower after its delivery to the winemaker and, whether or not, the grower has title to the resulting wine.

The grower and the winemaker are associated producers

17. A producer of rebatable wine may be an associated producer[10] of one or more other producers of rebatable wine for a financial year. The maximum amount of WET producer rebate to which a group of associated producers is entitled for a financial year is limited under Division 19 of the WET Act.

18. From 1 July 2006 the maximum WET producer rebate a producer, or group of associated producers, is entitled to for a financial year is $500,000.[11]

19. A grower that is a party to an arrangement of a kind described in TA 2009/7 may, as explained at paragraph 11 of this draft Determination and subject to the application of Division 165 of the GST Act, be entitled to a WET producer rebate pursuant to section 19-5 of the WET Act. However if the grower and the winemaker are associated producers then the total combined WET producer rebate entitlement of the grower and the winemaker will be limited to $500,000 for each financial year.

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[10] See section 19-20 of the WET Act and paragraph 66 of WETR 2009/2 for further explanation as to when a producer will be an associated producer of another producer.
[11] Subsection 19-15(3) of the WET Act.

Application of Division 165 of the GST Act – anti-avoidance

20. 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 arrangement will attract the application of Division 165.

21. However, depending on the particular facts and circumstances, the Commissioner in many cases may, and indeed is likely to, apply the general anti-avoidance provisions in Division 165 of the GST Act to an arrangement described in TA 2009/7 or similar arrangements.

22. Division 165 of the GST Act applies to WET avoidance schemes[12] because wine tax and wine tax credits (including a WET producer rebate) affect the net amount[13] an entity is liable to pay under Division 33 of the GST Act, or the amount of any refund to which an entity is entitled under Division 35 of the GST Act.[14]

23. The application of Division 165 of the GST Act was considered by the Administrative Appeals Tribunal in *VCE v. Federal Commissioner of Taxation*[15] and *The Taxpayer v. Commissioner of Taxation.*[16] 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.[17]

24. 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 obtain a GST benefit.

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[12] Section 23-10 of the WET Act.
[13] Section 21-15 of the WET Act.
[14] See the note to section 21-1 of the WET Act.
[15] 2006 ATC 187; 63 ATR 1249.
[16] [2010] AATA 497. This decision of the Administrative Appeals Tribunal is currently the subject of an appeal to the Federal Court.
[17] 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?; 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?; and WETD 2010/1 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?

Element 1: The scheme

25. It is considered that the whole or any element of the arrangement described in TA 2009/7 would constitute a 'scheme' under the broad definition of the 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)[18] 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*[19] that specifically dealt with a scheme in the context of the application of Division 165 of the GST Act.

26. The scheme in TA 2009/7 may be concisely described as one involving the winemaker and grower entering into contractual arrangements that entail the winemaker making wine from the grower's produce on their behalf, the grower retaining ownership of the produce, the grower having title to the resulting wine and the winemaker committing to buy the resulting wine (possibly at a pre-determined price). In some instances, the grower may have previously sold fruit or vegetables to the same winemaker, or other winemakers. In other cases the grower may not have previously grown fruit or vegetables for use in the manufacture of wine, and may not have any prior business relationship with the winemaker.

Element 2: The GST benefit

27. It is considered that the arrangement in TA 2009/7 constitutes a scheme which would give rise to a GST benefit under either paragraph 165-10(1)(a) or 165-10(1)(b) of the GST Act. That is, had the arrangement not been entered into by the grower and the winemaker, the grower would have sold their produce to the winemaker without having any interest in the resulting wine, and the grower would not have been entitled to a WET producer rebate in relation to the resulting wine.

28. Under the arrangement the grower purportedly produces the wine and sells the wine to the winemaker and the grower, pursuant to Division 19 of the WET Act, claims a WET producer rebate with respect to the wine. Because under the scheme the grower is a producer entitled to a WET producer rebate that it would not ordinarily be entitled to, it could reasonably be expected[20] that either:

- pursuant to paragraph 165-10(1)(a) of the GST Act – the amount the grower is liable to pay under the provisions of the GST Act[21] (apart from Division 165) is less than the amount that would have been payable by the grower but for the scheme;[22] or

[18] 217 CLR 216 at 234 to 238 and 260 to 261.
[19] 2006 ATC 187; 63 ATR 1249.
[20] See 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.
[21] Division 33 of the GST Act.
[22] The WET producer rebate is a wine tax credit as per CR 9 in the table within section 17-5 of the WET Act. A wine tax credit reduces an entity's net amount for a tax period pursuant to section 21-15 of the WET Act which can result in a lesser amount payable to the Commissioner.

- pursuant to paragraph 165-10(1)(b) of the GST Act – the amount the Commissioner is liable to pay the grower under the provisions of the GST Act[23] (apart from Division 165) is higher than the amount that would have been payable by the Commissioner to the grower but for the scheme.[24]

Element 3: An entity gets a GST benefit under the scheme

29. The grower gets a GST benefit equivalent to the amount of the WET producer rebate to which they become entitled to as a result of the arrangement. Depending on the grower's circumstances, and as described in paragraph 28 of this draft Determination, the rebate amount may:

- reduce the amount the grower is liable to pay the Commissioner under the provisions of the GST Act to a lesser amount than that which would be payable but for the scheme; or
- increase the amount the Commissioner is liable to pay the grower under the provisions of the GST Act than that which would be payable but for the scheme.

Element 4: Dominant purpose or principal effect

30. Taking into account the twelve factors set out in subsection 165-15(1) of the GST Act, it may be reasonable to conclude that the dominant purpose or principal effect of the scheme or part of the scheme, was for the grower to obtain a GST benefit in the form of a WET producer rebate they would not otherwise be entitled to apart from the scheme. In this context the following general observations can be made:

The first factor in paragraph 165-15(1)(a) of the GST Act – The manner in which the scheme was entered into or carried out

31. The scheme is implemented through an arrangement between the grower and the winemaker, as described in TA 2009/7. The scheme may involve entities who have had previous contractual arrangements whereby the grower has sold their fruit or vegetables to the winemaker. In other cases the grower and winemaker may not have had any previous dealings with each other, and the grower may not have previously grown fruit or vegetables for use in the manufacture of wine.

32. The implementation of the scheme requires the agreement of both the grower and the winemaker. The grower and the winemaker mutually agree to enter into contractual arrangements whereby the grower bears no additional commercial risk beyond the growing of the produce. This is notwithstanding that under the arrangement the grower is purportedly the producer of the rebatable wine.

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[23] Division 35 of the GST Act.

[24] The WET producer rebate is a wine tax credit as per CR 9 in the table within section 17-5 of the WET Act. A wine tax credit reduces an entity's net amount for a tax period pursuant to section 21-15 of the WET Act which can result in the Commissioner being liable to pay a higher amount to the taxpayer.

33. In circumstances where the grower has previously been selling their fruit or vegetables to the winemaker, the implementation of the scheme will involve the grower and the winemaker agreeing to an alteration of what, in some cases, may be a previously longstanding commercial relationship without a clear commercial rationale for the alteration.

34. The involvement of advisers or promoters in the instigation of the scheme, or groups of growers collectively entering into the scheme with a winemaker in the apparent absence of genuine commercial negotiations, may be features of the scheme.

35. The above factors, to the extent present on the facts of any given case, would suggest that the scheme is carried out only or predominantly for the purpose of generating an entitlement for the grower to claim a WET producer rebate.

The second factor in paragraph 165-15(1)(b) of the GST Act – The form and substance of the scheme

36. In the absence of the scheme a grower would sell their produce to a winemaker. The winemaker would manufacture wine from the grower's produce and sell the wine to wholesalers and/or retailers, without any further involvement from the grower.

37. The form of the scheme involves the winemaker manufacturing wine on behalf of the grower, the grower selling the wine to the winemaker and the winemaker subsequently selling the wine to wholesalers and/or retailers.

38. However, in economic substance, the grower is still supplying the produce to the winemaker. The winemaker continues to make the wine, and the same wine that was being sold by the winemaker prior to the scheme is still being sold by the winemaker to wholesalers and/or retailers.

39. In particular:

(a) the grower is not exposed to the normal risks involved in marketing and selling wine as the grower already has a contract for the sale of the wine to the winemaker (possibly at a predetermined price);

(b) similarly, the grower has minimal risk in relation to the winemaking process; and

(c) in practice, the winemaker typically will deal with the wine (after manufacture) as if the wine were its own.

40. Although the commercial form of the arrangements between growers and winemakers has altered under the scheme, the commercial substance of the arrangements has remained unchanged. This is indicative of the scheme only being explicable by the taxation consequences.

The third factor in paragraph 165-15(1)(c) of the GST Act – The purpose of the WET Act

41. The broad purpose of the WET Act is to provide for a WET on taxable dealings[25] in wine and to allow for wine tax credits in certain defined circumstances[26] (including a WET producer rebate).[27]

[25] Division 5 of the WET Act.

42. This purpose of the WET producer rebate is to provide assistance (in the form of a rebate) to producers of wine, particularly small wineries.[28] The WET Act imposes an annual limit on the amount of WET producer rebate to which a producer of rebatable wine is entitled to. The maximum WET producer rebate entitlement for a producer of rebatable wine is $500,000 per financial year.[29]

43. In the absence of the scheme, the grower would sell their fruit or vegetables to the winemaker, the winemaker would manufacture the wine and then sell the wine to wholesalers and/or retailers. The winemaker would be entitled to WET producer rebates up to a total of $500,000 per financial year. The grower would not be entitled to a WET producer rebate.

44. If not for the scheme, the annual $500,000 limit on entitlement to WET producer rebates may mean that the winemaker is not entitled to a WET producer rebate with respect to the manufacture of the grower's produce into wine. However, the scheme results in the grower being entitled to a WET producer rebate for that wine, notwithstanding that the winemaker is making the wine on its own behalf, from an economic point of view. That is, under the scheme, a WET producer rebate entitlement arises with respect to the wine that would not otherwise be available to the grower, and may not, otherwise be available to the winemaker due to the $500,000 annual limit the WET Act imposes on WET producer rebate entitlements.

45. The outcome of the scheme described in paragraphs 43 to 44 of this draft Determination is contrary to the purpose of the WET producer rebate provisions of the WET Act which, in the Commissioner's view, are intended to impose an annual $500,000 limit per *winemaker/winery* – not per *grower* – on entitlement to WET producer rebates. Whilst not necessarily determinative on its own, combined with a consideration of the other factors, this factor points to a conclusion of a dominant purpose of obtaining a GST benefit.

The fourth and fifth factors in paragraphs 165-15(1)(d) and (e) of the GST Act – The timing of the scheme and the period over which the scheme was entered into and carried out

46. Prior to the introduction of the WET producer rebate provisions, the scheme would not have resulted in the grower being entitled to a WET producer rebate.

47. The entry into the scheme subsequent to the introduction of the WET producer rebate provisions and, in some cases, on expiry of the term of prior contractual arrangements between a grower and a winemaker, although not determinative on its own, in the context of the other factors of the scheme suggests a dominant purpose and/or principal effect of obtaining a GST benefit.

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[26] Division 17 of the WET Act.
[27] Credit ground CR9 in the table in section 17-5 of the WET Act.
[28] Paragraph 1.6 of the Explanatory Memorandum to Tax Laws Amendment (Wine Producer Rebate and Other Measures) Bill 2004.
[29] Subsection 19-15(2) of the WET Act.

The sixth factor in paragraph 165-15(1)(f) of the GST Act – The effect that this Act would have in relation to the scheme apart from this Division

48. Apart from Division 165 of the GST Act, the scheme results in the grower obtaining a WET producer rebate as producer of the wine pursuant to Division 19 of the WET Act (this is subject to the WET producer rebate limit of $500,000 per financial year and the associated producer provisions). In the absence of the scheme the grower would not be entitled to a WET producer rebate.

49. This factor is indicative of a dominant purpose and/or principal effect of the grower obtaining a GST benefit.

The seventh and eighth factors in paragraphs 165-15(1)(g) and (h) of the GST Act – Any change in the avoider's financial position or the financial position of an entity that has or had a connection or dealing with the avoider that resulted, or might reasonably be expected to result from the scheme

50. Under the scheme, the grower is entitled to a WET producer rebate which they would not otherwise be entitled to. Prima facie this may suggest an improvement in the grower's financial position to the extent it becomes entitled to the WET producer rebate. However, the determination of the extent of change in the grower's, and any other entity's financial position, as a result of the scheme, requires an examination of the terms of the arrangement between the relevant parties.

51. For example, under the scheme the grower may agree to accept a less than commercial price, from the winemaker, with respect to the winemaker's purchase of the wine under the scheme. In some cases, the winemaker may charge a less than commercial rate for undertaking the manufacture of the wine. The less than commercial prices and charges between the grower and the winemaker would be agreed to on account of the WET producer rebate that the grower becomes entitled to under the scheme. That is, the specific terms of the arrangement between the grower and the winemaker may result in the grower and the winemaker effectively sharing in the economic benefit of the producer rebates to which the grower becomes entitled to under the scheme, or the economic benefit being transferred entirely to the winemaker.

52. In summary, the scheme will result in an improvement in the financial position of either the grower or the winemaker, or both the grower and the winemaker because of the increased entitlement to the WET producer rebate, but without any substantial change in the commercial or economic position of the parties. This factor points to a dominant purpose and/or principal effect of obtaining a GST benefit.

The ninth factor in paragraph 165-15(1)(i) of the GST Act – Any other consequence for the avoider or a connected entity of the scheme having been entered into or carried out

53. Under the scheme the grower is purportedly the producer of the wine, with the winemaker undertaking the physical processes of manufacturing the wine. In an ordinary commercial context this would mean that the grower is exposed to the risk of claims in negligence and claims under relevant trade practices legislation pertaining to the manufacture of the wine.

54. The existence of specific contractual terms, as part of the arrangement between the grower and the winemaker, that seek to limit or eliminate the grower's risk of exposure to negligence claims and claims under trade practices legislation would be contrary to the premise that, under the scheme, the grower is the producer of the wine. This would point to a dominant purpose and/or principal effect of obtaining a GST benefit.

The tenth factor in paragraph 165-15(1)(j) of the GST Act – 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

55. The grower and winemaker may be unrelated and may not have any connection with each other beyond the scheme or other trading arrangements that existed between them prior to the implementation of the scheme. However an examination of the terms of the arrangement between the parties may reveal that they are dealing with each other on uncommercial and non-arm's length terms under the scheme.

56. For example, under the scheme, the winemaker may charge a less than commercial rate to the grower for the making of the wine and/or the purchase price the winemaker pays to the grower may be a less than commercial price. The presence of these factors, considered in the context of the other relevant factors would suggest a dominant purpose and/or principal effect of obtaining a GST benefit.

The eleventh factor in paragraph 165-15(1)(k) of the GST Act – the circumstances surrounding the scheme

57. All of the relevant circumstances surrounding the scheme are set out in the discussion of the other factors at paragraphs 31 to 56 of this draft Determination.

The twelfth factor in paragraph 165-15(1)(l) of the GST Act – any other relevant circumstances

58. Any other relevant circumstances will be taken into consideration. For example, the activities of advisers and/or other parties in relation to the promotion of the scheme.

Conclusion – Division 165

59. On the analysis set out at paragraphs 25 to 58 of this draft Determination, it may well be 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 grower's net amount for the relevant periods does not include the amount of the WET producer rebate entitlement as a result of an arrangement described in TA 2009/7.

Appendix 2 – Your comments

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

61. 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 ATO website at www.ato.gov.au.

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

Due date: **3 December 2010**

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

References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

WETR 2009/1; WETR 2009/2; GSTR 2004/3; GSTR 2005/3; GSTR 2005/4; GSTR 2005/5; GSTD 2006/5; GSTD 2007/2; TR 2006/10; WETD 2010/1

Subject references:

- anti-avoidance
- schemes & shams
- tax benefits under tax avoidance schemes
- WET producer rebate
- 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(1)(b)
- ANTS (GST) Act 1999 165-10(2)
- ANTS (GST) Act 1999 165-15
- ANTS (GST) Act 1999 165-15(1)
- ANTS (GST) Act 1999 165-15(1)(a)
- ANTS (GST) Act 1999 165-15(1)(b)
- ANTS (GST) Act 1999 165-15(1)(c)
- ANTS (GST) Act 1999 165-15(1)(d)
- ANTS (GST) Act 1999 165-15(1)(e)
- ANTS (GST) Act 1999 165-15(1)(f)
- ANTS (GST) Act 1999 165-15(1)(g)
- ANTS (GST) Act 1999 165-15(1)(h)
- ANTS (GST) Act 1999 165-15(1)(i)
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