WETD 2011/1EC - Compendium

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Ruling Compendium – WETD 2011/1

This is a compendium of responses to the issues raised by external parties to draft 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 compendium of comments has been edited to maintain the anonymity of entities that commented on the draft ruling.

Summary of issues raised and responses

Issue No.	Issue raised	Tax Office Response/Action taken
1.	We are generally supportive of the Commissioner's challenges to uncommercial and collusive arrangements of the type described in TA 2009/7, released on 1 April 2009. However, more than 18 months is an unacceptable length of time between the publication of a tax alert outlining a potential area of concern and the publication of the Commissioner's technical position on the topic.	It is acknowledged that a significant period of time has elapsed between the publication of TA 2009/7 and the publication of the Determination. The ATO is reviewing its processes for publishing responses to Taxpayer Alerts and to improve the timeliness of the publication of public rulings and determinations.
2.	The draft Determination suggests that the arrangements under review may or may not achieve their commercial objective, which is to qualify the grower as a producer and supplier of wine instead of as a grower and supplier of fruit. The majority of the draft Determination consists of a detailed examination of the general anti-avoidance provisions (GAAP) and their application to the arrangements under review.	The Commissioner agrees that the general anti-avoidance provisions will not be relevant in cases where an arrangement of a kind described in the Determination does not give rise to an entitlement to a WET producer rebate pursuant to Division 19 of the WET legislation. In these instances there will be no 'benefit' obtained with respect to which the general anti-avoidance provisions would apply. Determining whether or not an arrangement does actually result in the grower being entitled to a WET producer rebate pursuant to Division 19 of the WET legislation requires an examination of the facts and circumstances of each individual case.

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2. cont	We question the relevance of the GAAP where the arrangements under review are found to be ineffective. In our view, the draft Determination should contain a detailed explanation of how the Commissioner would decide whether the arrangements under review are effective or ineffective in producing a GST benefit in the form of a WET producer rebate, and where they are ineffective, how the Commissioner would challenge the arrangements.	Paragraph 13 of the Determination explains that where the terms of the arrangement between the grower and the winemaker results in a sale of the wine from the grower to the winemaker, then the grower will be entitled to a WET producer rebate in relation to the wine. Paragraph 15 of the Determination sets out an example of circumstances where an arrangement may not result in a sale of the wine from the grower to a winemaker, and therefore would not give rise to an entitlement to a WET producer rebate for the grower. Although a particular arrangement may give rise to an entitlement to a WET producer rebate, as explained in the Determination, in those cases, the Commissioner will also consider whether the general anti-avoidance provisions in Division 165 of the GST Act apply to the arrangement. The considerations relevant to determining whether Division 165 of the GST Act may apply to an arrangement are set out at paragraphs 25 to 58 of the Determination. Any grower who is concerned about an arrangement to which they are a party, or in which they have been asked to participate, can seek advice or guidance from the ATO on the application of Division 19 of the WET Act and/or the application of Division 165 of the GST Act.
3.	We note that many grape growers are also licensed vignerons who each year have their fruit made into wine by a contract winemaker for subsequent sale by the grower. These growers appear to be eligible for the producer rebate and the draft Determination should distinguish them from the growers and arrangements under review and confirm their ongoing entitlement to the rebate.	New paragraph 14 has been included in the Determination to address this issue. In accordance with the Commissioner's views at paragraphs 48 to 50 of WETR 2009/2, a licensed vigneron who engages a contract winemaker to make their fruit into wine, for subsequent sale by the vigneron to a wine wholesaler or retailer would be entitled to a WET producer rebate pursuant to Division 19 of the WET Act.

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3. cont		Division 165 of the GST Act is directed at artificial and contrived schemes and does not apply to commercial arrangements and transactions that are not intended to exploit the WET producer rebate provisions. Therefore Division 165 would not apply in relation to a commercial and non-collusive arrangement between a licensed vigneron and a contract winemaker.
4.	The draft Determination should be in three parts, as follows: (1) the consequences of engaging in uncommercial and collusive arrangements which do not achieve their objective; (2) explain the consequences of engaging in uncommercial and collusive arrangements which produce an entitlement to a producer rebate; and (3) the range of circumstances in which a grower's entitlement to a producer rebate is in order and should not be disturbed.	(1) As set out in the response to issue 1, where an arrangement of a kind described in TA 2009/7 does not give rise to an entitlement to a WET producer rebate for the grower, under Division 19 of the WET Act, then the general anti-avoidance provisions in Division 165 of the GST Act will not apply because no 'benefit' will have been obtained. Instead, in these circumstances, any 'ineligible' claim for a WET producer rebate will be as a result of an incorrect application of the core provisions of the WET legislation. (2) As set out in the Determination, an uncommercial or collusive arrangement, of a kind described in TA 2009/7, that does give rise to an entitlement to a producer rebate will also be examined to determine whether or not the general anti-avoidance provisions in Division 165 of the GST Act apply. This requires a careful weighing of the individual circumstances of each case. The relevant factors and considerations are explained at paragraphs 29 to 58 of the Determination. It's not considered necessary to include further content in the Determination to address the above two issues. Paragraph 1 of the Determination states that a grower, engaging in an arrangement of a kind described in TA 2009/7, may be denied a WET producer rebate either because an entitlement does not arise under Division 19 of the WET Act, or because the general anti-avoidance provisions may apply to the relevant arrangement.

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4. cont		(3) Determining whether or not a grower is entitled to a WET producer rebate arising from an arrangement, or whether Division 165 of the GST Act applies to an arrangement requires careful consideration and examination of the individual facts and circumstances of each case. Because each case will turn on its own facts and circumstances, it is not possible to provide an absolute range of circumstances in which a grower would be entitled to WET producer and/or the general anti-avoidance provisions would not apply to an arrangement. Any grower who is concerned about an arrangement to which they are a party, or in which they have been asked to participate, can seek advice or guidance from the ATO on the application of Division 19 of the WET Act and/or the application of Division 165 of the GST Act.
5.	We are encouraged that the Draft ATO ruling appears to address some of the legitimate concerns of the wine sector. We believe that it is important to retain the WET rebate but to amend its application to remove adverse market distortions.	The ATO will continue to review and monitor uncommercial and collusive arrangements, including the arrangement described in the Determination and similar arrangements, which seek to exploit the WET producer rebate provisions in an unintended manner. Amendment of the scope, operation or application of the WET producer rebate provisions is a matter of policy that is determined by the Government.
6.	There is potential for the Draft Ruling to cause unintended consequences in some circumstances that may only be known after application of the final ruling.	As each case will turn on its individual facts and circumstances, the Commissioner would ensure that he was fully apprised of all the facts and circumstances of a particular case prior to denying a WET producer rebate to a grower, or making a declaration under Division 165 of the GST Act.