

# ***ER 2022/D1 - Excise: the meaning of 'legally and economically independent'***

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## Draft Excise Ruling

# Excise: the meaning of ‘legally and economically independent’

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### **📌 Relying on this draft Ruling**

This publication is a draft for public comment. It represents the Commissioner’s preliminary view on how a relevant provision could apply.

If this draft Ruling applies to you and you rely on it reasonably and in good faith, you will not have to pay any interest or penalties in respect of the matters covered, if this draft Ruling turns out to be incorrect and you underpay your tax as a result. However, you may still have to pay the correct amount of tax.

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### What this draft Ruling is about

1. This draft Ruling<sup>1</sup> sets out the Commissioner's view of the meaning of 'legally and economically independent' for the purposes of the 'excise remission scheme for manufacturers of alcoholic beverages' (Remission Scheme) and the 'excise refund scheme for alcohol manufacturers' (Refund Scheme).<sup>2</sup> The Remission Scheme replaced the Refund Scheme for eligible alcoholic beverages that entered home consumption on or after 1 July 2021.
2. This Ruling does not consider the other eligibility criteria for the Remission Scheme or the Refund Scheme.
3. All legislative references in this Ruling are to the *Excise Regulation 2015*, unless otherwise indicated.

## Ruling

### Remission Scheme

4. Under the Remission Scheme, an entity is only entitled to a remission for goods entered in a financial year if the entity is legally and economically independent from any other alcohol manufacturer that has already received a remission for goods entered in the same year.<sup>3</sup> The entity seeking to apply a remission must also reasonably expect that they will continue to remain legally and economically independent for the remainder of the financial year from any other alcohol manufacturer that has already received a remission in that year prior to when the entity's entitlement arose.<sup>4</sup>

### Refund Scheme

5. Under the Refund Scheme, to claim a refund in the same financial year in which duty was paid, an entity must be legally and economically independent from any other alcohol manufacturer that has received a refund of duty paid in that same year. The entity must also reasonably expect to remain independent for the remainder of the financial year from any other alcohol manufacturer that has received a refund of duty paid in that year.
6. To claim a refund for duty paid in the financial year prior to lodgment of the entity's claim, the entity must, for the entirety of that prior year, have been legally and economically independent from any other alcohol manufacturer that received a refund of duty paid in that prior year.<sup>5</sup>

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<sup>1</sup> All further references to 'this Ruling' refer to the Ruling as it will read when finalised. Note that this Ruling will not take effect until finalised.

<sup>2</sup> The Refund Scheme applies to excise duty that has been paid on or before 30 June 2021 on an alcoholic beverage that is manufactured by an alcohol manufacturer. A transitional rule applies to make the Refund Scheme applicable for goods entered for home consumption from 1 June 2021 to 30 June 2021 (inclusive) when the duty is paid on or after 1 July 2021. This transitional rule allows for a refund claim to be made under the Refund Scheme up to a maximum amount of \$8,333 (see section 62). The Remission Scheme applies to an alcoholic beverage manufactured by an alcohol manufacturer that is entered for home consumption on or after 1 July 2021.

<sup>3</sup> Table item 10(b) of subclause 2(1) of Schedule 1. An entity will also be ineligible under the Remission Scheme in respect of goods entered in a financial year if another alcohol manufacturer has received a refund under table item 3 in respect of goods entered in that same financial year because they could have received a remission but instead paid duty.

<sup>4</sup> Subclause 2(4) of Schedule 1.

<sup>5</sup> Table item 21 of subclause 1(1) of Schedule 1 (now repealed).

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### **Legal and economic independence**

7. The phrase ‘legally and economically independent’ is not defined in the Excise legislation.
8. The text and the statutory context in which the phrase appears indicate that there are 2 aspects which must both be satisfied; that is, whether the alcohol manufacturers are legally independent and whether they are economically independent. Each aspect must be considered to ensure that where 2 or more alcohol manufacturers are not legally and economically independent, only one of the alcohol manufacturers is entitled to remissions or refunds per year.
9. In collectively interpreting the phrase ‘legally and economically independent’, it is necessary to consider whether, through the legal and economic connections between 2 manufacturers, they each have capacity to take business decisions independently.<sup>6</sup> This requires a balanced analysis of relevant factors against the particular facts and circumstances.

### **Legal independence**

10. To determine whether one manufacturer is legally independent from another requires consideration of factors indicating whether one manufacturer is legally capable of exerting influence over the other. This includes where one manufacturer has a controlling interest in the other as evidenced by voting rights or a third party has a controlling interest in both manufacturers.
11. Factors that are relevant in determining whether alcohol manufacturers are legally independent of one another include but are not limited to:

- **Shareholding**

Where a common shareholder has control or influence over the decision making of more than one alcohol manufacturer, those manufacturers will not be legally and economically independent.

A shareholding of greater than 50% indicates that the shareholder can control the actions of a company.<sup>7</sup> However, a lesser shareholding may still be evidence of control depending on the circumstances. For example, a shareholder that holds a significantly higher percentage of shares in a company relative to any other shareholder may be able to exercise sufficient influence or control over the actions of the company. A further example is where there are different classes of shares which give one shareholder the majority voting rights in the company thereby enabling them to control the actions of the company.

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<sup>6</sup> See the Explanatory Statement to the Excise Amendment (Refund Scheme for Alcohol Manufacturers) Regulations 2017 (the 2017 ES), which sets out that ‘[a]lcohol manufacturers are legally and economically independent of one another if they have the capacity to take business decisions independently.’

<sup>7</sup> See *J Bibby & Sons, Ltd. v Commissioners of Inland Revenue* (1945) 29 TC 167 at [35], which confirms the control of a company resides in the voting power of its shareholders. Further, see *Clark (FA) & Son Ltd v Inland Revenue Comrs* [1943] AC 335 at [338–340] for the meaning of a ‘controlling interest’. It did not require an interest of a proprietary nature and a bare majority of the voting power was sufficient. It covered the relationship of one company to another where the majority of the voting power was subject either directly or indirectly to the will of the first-mentioned company.

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- *Management and control*

Another indicator that 2 or more manufacturers are not legally independent is if there is common management and control between them or one manufacturer has the ability to influence the decision making of the other. For example, where a manufacturer is under an obligation to act, or can be reasonably expected to act, in accordance with the directions, instructions or wishes of the other manufacturer (or the person or persons with management and control of the other manufacturer).

### ***Economic independence***

12. If one entity is financially reliant upon the other, the 2 manufacturers will not be economically independent. It does not matter whether the reliance is because of direct financing or access to premises, equipment or other resources. Similarly, if 2 manufacturers are financially reliant upon the same third party, such that the third party is capable of influencing the decision making of both manufacturers, they are not economically independent.

13. Factors that are relevant in determining whether alcohol manufacturers are economically independent from one another include:

- *Distinct facilities* – whether each manufacturer has distinct manufacturing facilities. While one manufacturer may still be considered independent where it leases premises and equipment from another manufacturer, this would require a commercial lease agreement entered into at arm's length that gives the lessee the certainty to enable them to carry on their business with confidence into the future without being subject to influence from the lessor.
- *Independent process and product* – whether each manufacturer develops, supervises and controls the production, testing, bottling and labelling of its own product and uses its own sales network without relying on the other alcohol manufacturer to undertake any of these activities.
- *Independent finance* – whether there are inter-entity loans, subsidies, joint bank accounts or payment facilities, joint capital investments or other similar financial arrangements between the alcohol manufacturers.
- *Independent staffing and accounting* – whether each alcohol manufacturer manages its own personnel and maintains its own accounting records.

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### ***Examples***

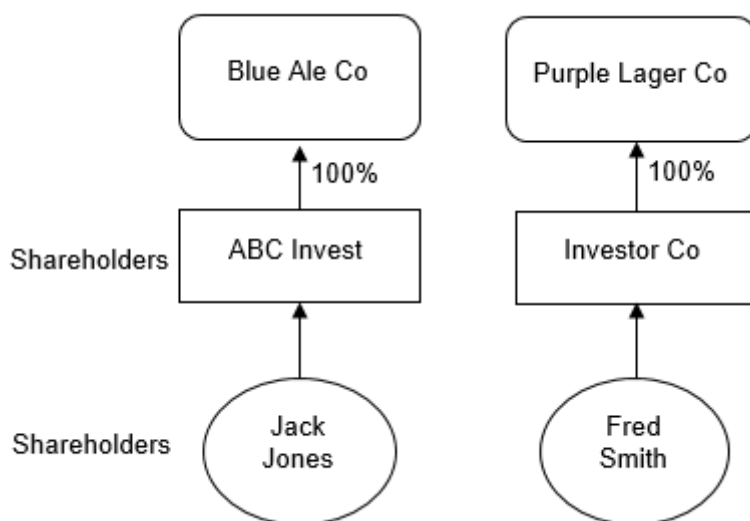
#### ***Example 1 – no common controlling shareholders – legal and economic independence***

14. *Blue Ale Co and Purple Lager Co each have an excise licence to manufacture beer. Each brewery has its own premises, equipment and workers, and obtains its finance from third parties. Each brewery sells its beer into the marketplace using its own marketing team. The shareholdings of the 2 entities are shown in Diagram 1 of this Ruling.*

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**Diagram 1**

15. Jack Jones and Fred Smith are cousins who previously worked together in the bar industry before each established their own brewery. Neither has any financial nor strategic involvement in the other's business.

16. The 2 alcohol manufacturers have different corporate shareholders and the management and control of those corporate shareholders is separate and distinct. The alcohol manufacturers are legally independent.

17. Each alcohol manufacturer has distinct manufacturing facilities and is not reliant on the other for the use of those facilities. Each alcohol manufacturer undertakes its own production, sales and distribution processes independent of the other.

18. There are no inter-company loans between the alcohol manufacturers and their finances are separate. Neither corporate shareholder is reliant upon the other financially and Jack and Fred financed their investments in the corporate shareholders separately.

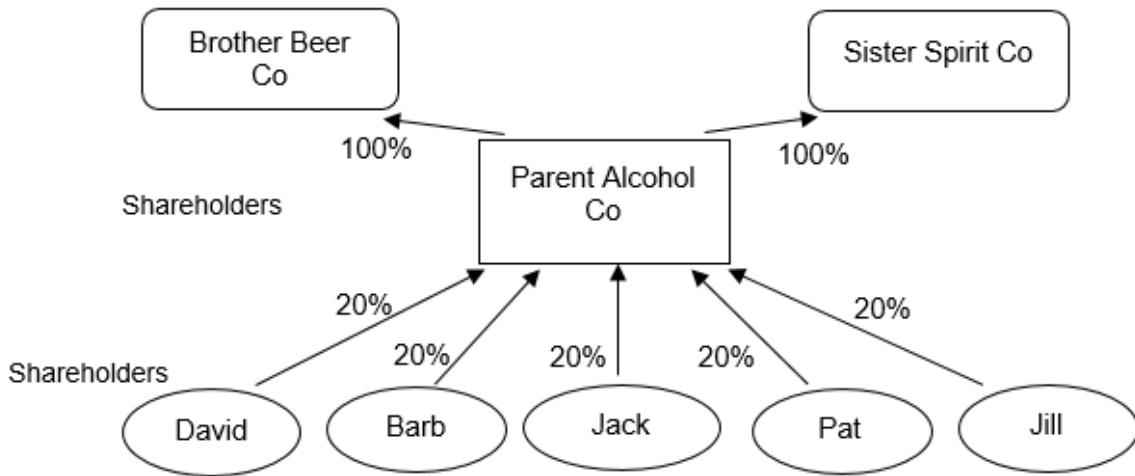
19. Each alcohol manufacturer has the capacity to make business decisions independently. They are legally and economically independent of each other.

**Example 2 – common controlling shareholders – no legal and economic independence**

20. Brother Beer Co has an excise licence to manufacture beer and Sister Spirit Co has an excise licence to manufacture spirits. The shareholdings of the 2 entities are shown in Diagram 2 of this Ruling.

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**Diagram 2**



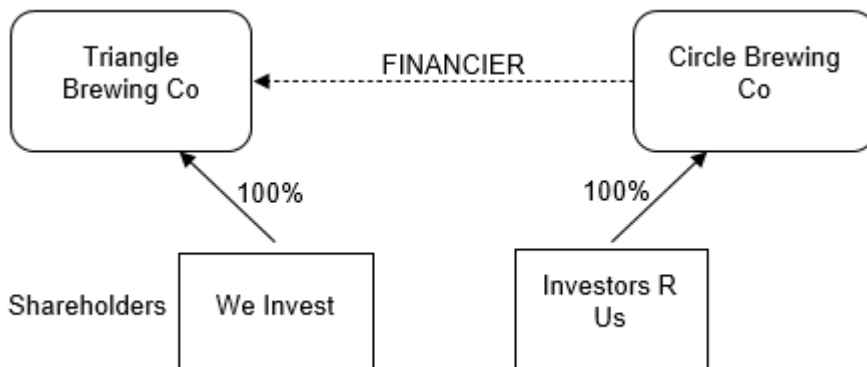
21. *Parent Alcohol Co owns 100% of the shares in both Brother Beer Co and Sister Spirit Co, and is therefore a common controlling shareholder in both manufacturers. Brother Beer Co and Sister Spirit Co are not legally independent.*

22. *Although the 2 manufacturers supervise and control their own production, sales and distribution processes, they are subject to the control of a common parent entity. Parent Alcohol Co is able to influence the decision making of Brother Beer Co and Sister Spirit Co. Accordingly, the 2 manufacturers are not legally and economically independent of one another.*

**Example 3 – economic connection – not legally and economically independent**

23. *Triangle Brewing Co and Circle Brewing Co each have an excise licence to manufacture beer. The shareholdings of the 2 entities are shown in Diagram 3 of this Ruling.*

**Diagram 3**



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24. *Triangle Brewing Co and Circle Brewing Co have different shareholders. The management and control of both companies is separate and distinct. The companies are legally independent.*

25. *However, Triangle Brewing Co is reliant on Circle Brewing Co for finance to continue operating. In providing this funding, the 2 companies have an informal understanding whereby Triangle Brewing Co must assist Circle Brewing Co with its production, staffing and marketing when requested to do so; otherwise, the funding may be withdrawn. Therefore, Circle Brewing Co is capable of influencing the decision making of Triangle Brewing Co as a consequence of this financing arrangement. The companies are not economically independent.*

26. *Therefore, the 2 companies are not legally and economically independent of one another.*

**Example 4 – legal connection – not legally and economically independent**

27. *John is the majority shareholder and managing director of Headphone Brewing Pty Ltd, which has its own brewing premises and equipment, brewery staff and intellectual property. It receives finance from a major bank and engages an independent marketing firm to market and sell its product.*

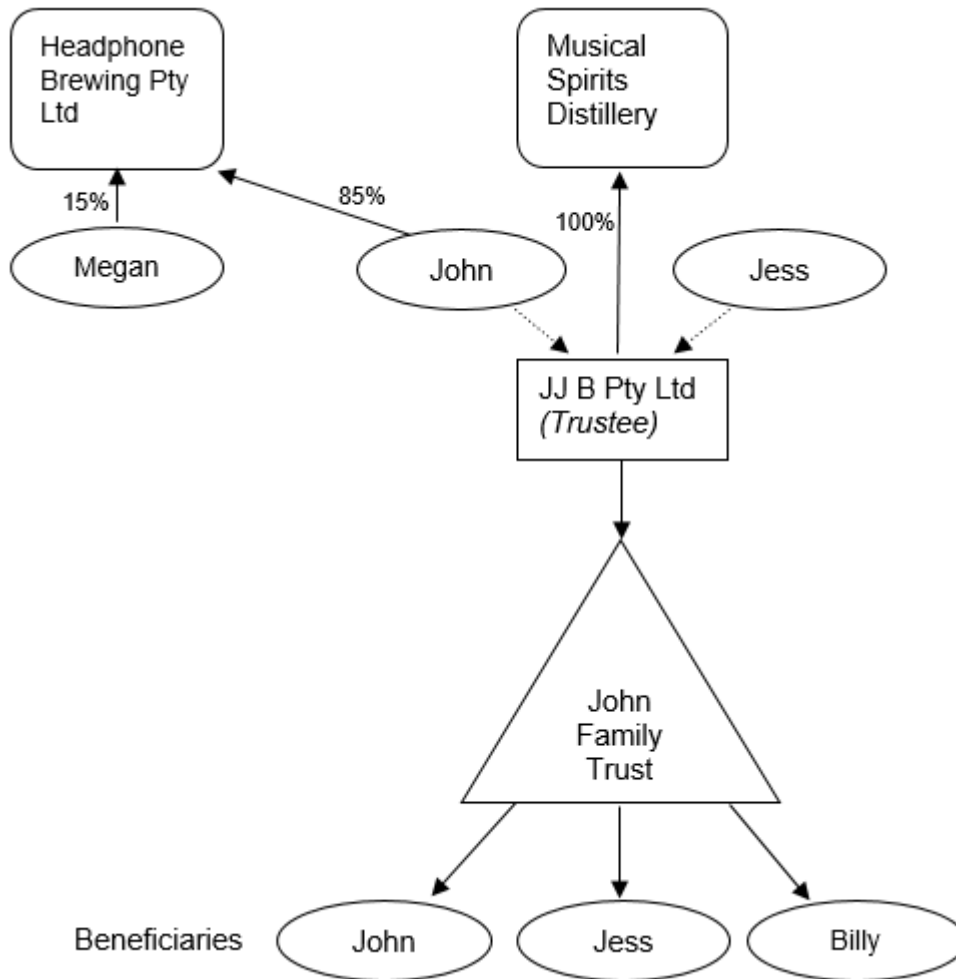
28. *John wishes to establish a distillery and commence selling spirits. To this end, he establishes a discretionary family trust with his family (including himself) listed as beneficiaries. A corporate trustee is appointed with John and his partner as directors. The distillery operates from discrete premises to those of Headphone Brewing Pty Ltd and has separate equipment, staff and intellectual property. The distillery will obtain finance from a major bank and engage the same independent marketing firm that is engaged by Headphone Brewing Pty Ltd.*

29. *It is clear that John has a high degree of control over both the brewery and the distillery and that he has established both enterprises for the benefit of his family. There is a lack of legal independence. Accordingly, the 2 manufacturers are not legally and economically independent of one another.*

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**Diagram 4****Date of effect**

30. When the final Ruling is issued, it is proposed to apply both before and after its date of issue. However, the Ruling 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 Ruling (see paragraphs 75 to 76 of Taxation Ruling TR 2006/10 *Public Rulings*).

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**Commissioner of Taxation**

16 November 2022

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## Appendix 1 – Explanation

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**❶** *This Explanation 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.*

31. An eligible alcohol manufacturer that is legally and economically independent from 1 July 2021 will be entitled to receive an automatic remission of their excise duty liability up to a maximum of \$350,000 each financial year.<sup>8</sup> An eligible alcohol manufacturer that is legally and economically independent and pays their excise duty prior to 1 July 2021 for goods entered up to 31 May 2021 will be entitled on application to a refund of 60% of the excise duty liability up to a maximum of \$100,000 each financial year.<sup>9</sup> A transitional rule applies for goods entered for home consumption from 1 June 2021 to 30 June 2021 (inclusive) when the duty is paid on or after 1 July 2021. This transitional rule allows for a refund claim to be made under the Refund Scheme up to a maximum amount of \$8,333.

32. The phrase ‘legally and economically independent’ appears in table item 10 of subclause 2(1) of Schedule 1:

Excise duty is payable on an alcoholic beverage that is entered for home consumption during a financial year and is manufactured by an alcohol manufacturer, and:

- (a) the duty is payable by the alcohol manufacturer; and
- (b) in accordance with subclause (4), the alcohol manufacturer is legally and economically independent of any other alcohol manufacturer that has received a remission, rebate or refund because of this item, or in the circumstances mentioned in subclause (2), in relation to duty paid or payable on an alcoholic beverage entered for home consumption during the financial year ...

### Meaning of ‘legally and economically independent’

33. In applying principles of statutory interpretation<sup>10</sup>, the undefined phrase of ‘legally and economically independent’ in Excise legislation is interpreted to have 2 aspects, with the use of ‘and’ indicating that both aspects must be satisfied.<sup>11</sup> Each aspect and the collective test should be interpreted by consideration of the context in which the test appears, surrounding provisions and the mischief which the provision intends to remedy.<sup>12</sup>

34. Read in the context of the subclause in which the phrase appears<sup>13</sup>, the phrase operates to exclude an alcohol manufacturer from receiving an excise remission or refund under the relevant scheme, where that entity is not legally and economically independent from another alcohol manufacturer.

35. This interpretation is clearly supported by the Explanatory Statement to the amendment introducing the Remission Scheme<sup>14</sup> and notably the test remains consistent with how the Refund Scheme operated.

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<sup>8</sup> Table item 10 of subclause 2(1) of Schedule 1.

<sup>9</sup> Table item 21 of subclause 1(1) of Schedule 1 (now repealed).

<sup>10</sup> *The Queen v A2* [2019] HCA 35 at [32]; *Acts Interpretation Act 1901*.

<sup>11</sup> *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41.

<sup>12</sup> *CIC Insurance Ltd v Bankstown Football Club Ltd* [1997] HCA 2.

<sup>13</sup> Table item 10 of subclause 2(1) of Schedule 1.

<sup>14</sup> The Explanatory Statement to the Excise Amendment (Alcohol Manufacturers Remissions) Regulations 2021 (the 2021 ES).

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36. The 2017 ES to the amendment to the Refund scheme provides further insight into the purpose of the provision by confirming that '[o]nly one alcohol manufacturer in a group of manufacturers that are not legally and economically independent is entitled to receive the refund.'

37. The 2017 ES is also clear on the purpose of the subclause, being to ensure '... that the group as a whole is in the same position as they would be if all of the manufacturing activities were undertaken by one entity.'

38. From this, it can be seen that the policy intent is that only one member of a group should be entitled to remissions or refunds per year. The provision is intended to remedy the mischief caused when a group claims excise refunds or remissions through each of its manufacturing entities.

39. The 2021 ES to the Amending Regulation confirms that an entity which is not legally and economically independent will lack the capacity to make business decisions independently and also contains factors consistent with those outlined in paragraphs 10 and 12 of this Ruling (which are relevant but not exhaustive) in determining whether alcohol manufacturers are legally and economically independent of one another. Extrinsic materials can be used to confirm the meaning of 'legally and economically independent', considering its context in the *Excise Regulation 2015* and its underlying object.<sup>15</sup> However, care must be taken not to displace the meaning of the statutory text by reference to extrinsic materials.<sup>16</sup> This statement in the 2021 ES is consistent with the decision of the European Court of Justice in *Gluckauf Brauerei*<sup>17</sup>, which considered a similar statutory test. In that case, the phrase 'legally and economically independent' was interpreted as:

... the concept of a 'brewery which is legally and economically independent of any other brewery', within the meaning of Article 4(2) of Directive 92/83, implies ascertaining whether, as between the breweries concerned, there is a relationship of legal dependency at the level of, in particular, management of the breweries or the holding of share capital or voting rights, or even a relationship of economic dependence, such as to affect the capacity of those breweries to take business decisions independently.

40. An overall balanced assessment taking into account relevant factors is required to determine whether 2 or more entities are legally and economically independent.

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<sup>15</sup> Subparagraph 15AB(1)(b)(i) of the *Acts Interpretation Act 1901*.

<sup>16</sup> *Commissioner of Taxation v Consolidated Media Holdings Ltd* [2012] HCA 55.

<sup>17</sup> *Gluckauf Brauerer* (Approximation of laws) [2009] EUECJ C-83/08 (02 April 2009).

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## Appendix 2 – Your comments

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41. You are invited to comment on this draft Ruling, including the proposed date of effect. Please forward your comments to the contact officers by the due date.
42. A compendium of comments is prepared when finalising this Ruling and an edited version (names and identifying information removed) is published to the Legal database on [ato.gov.au](http://ato.gov.au)
43. Please advise if you do not want your comments included in the edited version of the compendium.

**Due date:** 16 December 2022

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

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## References

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### *Related Rulings/Determinations:*

TR 2006/10

### *Legislative references:*

- Acts Interpretation Act 1901 15AB(1)(b)(i)
- Excise Act 1901 4
- Excise Act 1901 77A
- Excise Act 1901 164
- Excise Regulation 2015 6
- Excise Regulation 2015 62
- Excise Regulation 2015 Sch 1 1(1)
- Excise Regulation 2015 Sch 1 2(1)
- Excise Regulation 2015 Sch 1 2(4)

### *Cases:*

- Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue [2009] HCA 41; 239 CLR 27; 83 ALJR 1152; 260 ALR 1
- J Bibby & Sons, Ltd. v Commissioners of Inland Revenue (1945) 29 TC 167
- CIC Insurance Ltd v Bankstown Football Club Ltd [1997] HCA 2; 187 CLR 384; 71 ALJR 312; 141 ALR 618

- Clark (FA) & Son Ltd v Inland Revenue Comrs [1943] AC 335
- Commissioner of Taxation v Consolidated Media Holdings Ltd [2012] HCA 55; 87 ALJR 98; 293 ALR 257
- Gluckauf Brauerer (Approximation of laws) [2009] EUECJ C-83/08
- The Queen v A2 [2019] HCA 35

### *Other references:*

- Excise guidelines for the alcohol industry
- Explanatory Statement to the Excise Amendment (Refund Scheme for Alcohol Manufacturers) Regulations 2017
- Explanatory Statement to the Excise Amendment (Alcohol Manufacturers Remissions) Regulations 2021

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### ATO references

NO: 1-O6LY0ZZ  
ISSN: 2200-6087  
BSL: PW  
ATOlaw topic: Excise ~~ Alcohol

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