


Decision impact statement

Case name *Divas Beverages Holdings Pty Ltd v. Commissioner of Taxation*

Court citation(s): [2018] FCA 576
Venue: Federal Court of Australia
Venue reference no: VID1439/2016
Judge/AAT member name(s): Davies J
Judgment date: 27 April 2018
Appeals on foot: No
Decision outcome: Partly Favourable to the Commissioner

Impacted advice

ato.gov.au – ‘Clear or characterless grape-based products’ QC 46919

 The ATO has reviewed the impact of this decision on related advice and guidance products.

Précis

At issue before the Court was whether the proposed products to be manufactured fell within the definition of ‘wine’, specifically, whether the proposed products were ‘grape wine’ or a ‘grape wine product’, in subsection 31-1 of *A New Tax System (Wine Equalisation Tax) Act 1999* (the WET Act).

Brief summary of facts

The applicant sought approval to acquire duty free spirits to manufacture ‘VKAT’ and ‘VKAT Raspberry’ using two alternative production methods. First, the starting point for either alternative is the acquisition of ‘low-sugar juice’. Secondly, low sugar juice is then blended with either ‘liquid sugar’ (Liquid Sugar VKAT) or grape concentrate (Grape Concentrate VKAT) resulting in a ‘blend’. Both blends undergo the same subsequent processes.

Thirdly, the blend is fermented to approximately 2% alcohol content by the addition of yeast, nutrients and the application of heat (if necessary) to create a ‘fermented product’.

Fourthly, processes commonly used in wine making are applied to the fermented product to remove colour, odour and taste from the fermented product, resulting in the ‘unfortified product’.

Fifthly, grape spirit is then added to fortify the unfortified product to an alcohol content of approximately 22%.

The last and sixth stage of the process involves a final filtration resulting in a bottled product, which is a clear colourless, odourless and neutral tasting alcoholic beverage.

VKAT Raspberry is manufactured by blending VKAT (88% by volume) with further liquid sugar, colourings and non-alcoholic flavourings (12% by volume).

Issues decided by the court

The Court held that:

1. The test of whether a 'beverage' is wine is to be applied to the finished product and not to the liquid as it exists during the stages of production.
2. The statutory definition of grape wine does not impose any requirements as to the appearance, state or other characteristics of the final product, other than the requirement that the beverage is to be produced from the fermentation of fresh grapes or products derived solely from fresh grapes.
3. There is no residual operation of an 'essential character' test in relation to determining whether a beverage is grape wine after the amendments to the WET Act.
4. The application of processes commonplace in wine making to the fermented product does not prevent the finished product from being the product of the fermentation of fresh grapes or products derived solely from fresh grapes.
5. Liquid Sugar VKAT is not grape wine because one of the products fermented, liquid sugar, is not derived from grapes. Liquid Sugar VKAT is also not a grape wine product because it does not contain at least 700 millilitres of grape wine per litre.
6. Grape Concentrate VKAT is grape wine because:
 - a. both low sugar juice and grape concentrate are products derived solely from fresh grapes; and
 - b. the application of the post fermentation processes involving common wine making techniques does not have the result that Grape Concentrate VKAT is not grape wine merely because of the application of those processes.

ATO view of decision

The Commissioner accepts the Court's decision.

Implications for impacted advice or guidance

The advice provided on ato.gov.au regarding 'Clear or characterless grape-based products' (QC 46919), which was published following a consultation paper (17 November 2014) has been withdrawn.

Comments

We invite you to advise us if you feel this decision has consequences we have not identified. Please forward your comments to the contact officer.

Date issued:	18 June 2018
Due date:	16 July 2018
Contact officer:	Contact officer details have been removed as the comments period has expired.

Legislative references

A New Tax System (Wine Equalisation Tax) Act 1999 (Cth)

Excise Act 1901 (Cth)

Excise Tariff Act 1921 (Cth)

Explanatory Memorandum to A New Tax System (Indirect Tax and Consequential Amendments) Bill 1999 (Cth)

Case references

Bristol-Myers Co v. FCT (1990) 23 FCR 126; (1990) 21 ATR 417; 90 ATC 4553

Deputy Commissioner of Taxation v. Pepsi-Cola Metropolitan Bottling Co Inc [1967] 10 FLR 101; (1967) 14 ATD 433; [1967] 2 NSW 47

Esso Australia Ltd v. FCT [2011] FCA 360; (2011) 83 ATR 47

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