



# ***PS LA 2013/1 (GA) - Attribution of wine equalisation tax (WET) where contracts include a retention of title clause and the purchaser sells or otherwise uses the wine before title passes***

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# Practice Statement Law Administration (General Administration)

**PS LA 2013/1 (GA)**

*This law administration practice statement is issued under the authority of the Commissioner and must be read in conjunction with Law Administration Practice Statement [PS LA 1998/1](#). ATO personnel, including non ongoing staff and relevant contractors, must comply with this law administration practice statement, unless doing so creates unintended consequences or is considered incorrect. Where this occurs, ATO personnel must follow their business line's escalation process.*

<b>SUBJECT:</b>	<b>Attribution of wine equalisation tax (WET) where contracts include a retention of title clause and the purchaser sells or otherwise uses the wine before title passes</b>
<b>PURPOSE:</b>	<b>To allow entities to treat the time of the sale as being in the month after the goods and services tax (GST) on the taxable supply is attributable, and to attribute the wine tax payable to that month, if:</b> <ul style="list-style-type: none"><li>• <b>they have sold wine under a sale contract that contains an 'effective' retention of title clause,</b></li><li>• <b>they experience practical difficulties in determining when the wine is first sold or otherwise used by the purchaser,</b></li><li>• <b>on average, they receive full payment for their sale of wine at least one month after the invoice date, and</b></li><li>• <b>on average, their major customers on-sell the wine at least one month after the invoice date.</b></li></ul>

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## BACKGROUND

1. The broad aim of the *A New Tax System (Wine Equalisation Tax) Act 1999* (WET Act)<sup>1</sup> is to tax the last wholesale sale of wine (usually the sale from the last wholesaler to the retailer).<sup>2</sup> The wine tax is a single stage tax<sup>3</sup> which is imposed on dealings with wine in Australia. Dealings which attract wine tax are called assessable dealings.<sup>4</sup> An assessable dealing means any dealing covered by the Assessable Dealings Table in the WET Act and can include selling wine, using wine, or making a local entry of imported wine at the customs barrier.<sup>5</sup> An assessable dealing is a taxable dealing unless an exemption applies.<sup>6</sup>
2. The most common assessable dealing is a wholesale sale.<sup>7</sup> A wholesale sale is a sale to an entity that purchases the wine for the purposes of resale.<sup>8</sup>
3. The rules for when the wine tax becomes *payable* are specified in paragraph 5-5(2)(c). Specifically, the wine tax becomes payable at the time of the dealing as specified in column 4 of the Assessable Dealings Table. For a wholesale sale of wine, the time of the dealing when the wine tax becomes payable is the time of sale. The term 'time of sale' is not defined in the WET Act and therefore it takes its ordinary meaning, subject to statutory context and applicable rules of interpretation.<sup>9</sup>
4. In broad terms, the Commissioner considers that, under the wine tax law,<sup>10</sup> the time of sale is when title to the wine transfers from one person (the seller) to another (the purchaser) for a 'price'.<sup>11</sup> When wine is sold under an 'effective' retention of title clause, title generally passes when the purchaser pays for the wine.
5. Section 5-10, however, provides that the time of sale is brought forward if the purchaser uses the wine before title passes. In this case, under subsection 5-10(2), the time of sale is when the purchaser first uses the wine.
6. The rules for when the wine tax payable is *attributable* are specified in section 21-10. Absent an 'effective' retention of title clause, wine tax payable on a taxable dealing that is a taxable supply for GST is attributable to the same tax period in which the GST on the taxable supply is attributed. Accordingly, the general rule is that the wine tax and GST are attributable to the same tax period.
7. For a wholesale sale of wine where the entity does not account for GST on a cash basis, GST is attributable in the tax period in which the invoice is issued

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<sup>1</sup> All legislative references are to the WET Act, unless otherwise indicated.

<sup>2</sup> Section 2-5.

<sup>3</sup> Section 2-1.

<sup>4</sup> Section 5-5.

<sup>5</sup> Section 33-1.

<sup>6</sup> Section 33-1.

<sup>7</sup> Items AD1a and AD1b of the Assessable Dealings Table in section 5-5.

<sup>8</sup> See section 33-1. A wholesale sale does not include a sale of wine from a retail store to another retail entity if the sale is to make up for a temporary shortage of stock for the purchaser.

<sup>9</sup> See section 15AA of the *Acts Interpretation Act 1901*.

<sup>10</sup> See section 33-1 for the definition of 'wine tax law' which includes the WET Act.

<sup>11</sup> See paragraphs 92 to 96 of Wine Equalisation Tax Ruling WETR 2009/1 Wine equalisation tax: the operation of the wine equalisation tax system.

for the supply or any of the consideration is received for the supply, whichever is earlier.<sup>12</sup>

### **Retention of title clauses and attribution**

8. Wine wholesalers may use retention of title clauses, which postpone the transfer of title until the earlier of when the goods are sold by the purchaser or paid for in full.<sup>13</sup>
9. An entity that does not account on a cash basis would attribute GST to the tax period in which they issued an invoice for the supply or any of the consideration is received for the supply, whichever is earlier. However, if property in the wine does not pass to the purchaser until a later tax period, the wine tax does not become payable until that later period. This means that once the time of sale has passed (that is, when the purchaser has paid for the wine in full), the entity would need to revise the activity statement for the tax period in which they attributed the GST to include the wine tax payable.
10. To address this issue, paragraph 202 of WETR 2009/1 also states that, if the time of the dealing occurs after the end of the tax period or periods that the GST is attributable to, the wine tax payable may be treated as being attributable to the tax period in which the time of the dealing occurs.<sup>14</sup> Accordingly, wine wholesalers who sell under a retention of title clause may account for their wine tax liabilities in the same period as the GST on the taxable supply is attributable or in the tax period in which the sale occurs.
11. As mentioned in paragraph 5, section 5-10 brings forward the time of sale if the purchaser uses the wine before title passes to the time when the purchaser first uses the wine. As stated at paragraph 205 of WETR 2009/1, the term 'use' is not defined in the WET Act but the Commissioner considers that 'use' includes the on-selling of the wine by a purchaser.
12. For the entity to be able to determine the time of sale under the wine tax law for wine sold under a contract that includes a retention of title clause, they must be able to establish which of the following events occurs first, and account for the wine tax accordingly:
  - the time when title passes to the purchaser under the contract,
  - the time when the purchaser first uses the wine, or
  - the time when the purchaser on-sells the wine.
13. This imposes administrative difficulties and significant compliance costs on the entity which may lessen the commercial benefits of using retention of title clauses because:
  - the entity needs to maintain systems that trace all payments from their purchasers, and allocate them to sales invoices,
  - additional difficulties arise when part payments are made, as the entity must then allocate the payment to only part of the invoiced wine. The allocation is even more difficult if the invoice includes a combination of wine and other alcoholic beverages, and
  - practical difficulties arise in determining the time when each purchaser uses the wine.

<sup>12</sup> See subsection 29-5(1) of *A New Tax System (Goods and Service Tax) Act 1999*.

<sup>13</sup> *Hardy Wine Co Ltd v. Tasman Liquor Traders Pty Ltd* [2006] SASC 168.

<sup>14</sup> This position was originally published in WETR 2002/2 at paragraph 115 and then in paragraph 119 in WETR 2004/1. WETR 2004/1 has been replaced by WETR 2009/1.

## STATEMENT

14. The Commissioner is empowered with the general administration of the WET Act under section 356-5 of Schedule 1 to the *Taxation Administration Act 1953* (TAA).<sup>15</sup> Broadly, the purpose of the general administration power is to place the day-to-day administration of the various tax laws in the hands of the Commissioner.
15. Subject to four conditions being satisfied (refer to paragraph 19), the Commissioner will allow entities that sell wine under a contract of sale that includes a retention of title clause to:
- treat the time of the sale under the wine tax law (that is, the earlier of when the purchaser first uses the wine or when full payment is received) as being in the month after the GST on the taxable supply is attributed, and
  - attribute the wine tax payable in the month after the GST on the taxable supply is attributed.
16. Where the entity has a quarterly tax period, they will be able to attribute the wine tax payable to the next tax period only if the wine is supplied in the last month of the quarter.

### **Entities may choose whether or not they treat the time of sale under the wine tax law as being in the month after the GST on the taxable supply is attributed**

17. If an entity satisfies the four conditions given in paragraph 19, they can choose to:
- establish which of the following events occurs first, and account for the wine tax accordingly:
    - the time when title passes to the purchaser under the contract,
    - the time when the purchaser first uses the wine, or
    - the time when the purchaser on-sells the wine; or
  - treat the time of sale under the wine tax law as being made in the month after the GST on the taxable supply is attributable.
18. An entity that does not meet the four criteria must account for the wine tax based on when title passes, or when the purchaser uses, or on-sells, the wine. However, the ATO would not seek to adjust the amount brought to account for a tax period if the entity chose to account for the wine tax in the same tax period to which the GST on the taxable supply is attributable.<sup>16</sup>

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<sup>15</sup> Section 356-5 of Schedule 1 to the TAA provides that the Commissioner has the general administration of each indirect tax law. 'Indirect tax law' is defined in subsection 995-1(1) of the *Income Tax Assessment Act 1997* to include the wine tax law, which in turn is defined in that subsection to have the meaning given by section 33-1 of the WET Act. Section 33-1 of the WET Act provides that 'wine tax law' includes the WET Act.

<sup>16</sup> It should be noted, however, that should there be a legislative amendment to increase the rate of wine tax an additional payment may, depending on the application provisions, be required to take into account those dealings where title passed after the date of effect of the amendments. Similarly, a decrease in the rate of wine tax may result in an entitlement to a credit subject to any legislative restrictions.

## **EXPLANATION**

19. Entities must satisfy four conditions to be allowed to treat the time of sale under the wine tax law as being in the month after the GST on the taxable supply attributed, and to attribute the wine tax payable to that month. These conditions are:
1. they have sold the wine under a sale contract that contains an 'effective' retention of title clause,
  2. they experience practical difficulties in determining when the wine is first used by the purchaser,
  3. on average, they receive full payment for their sales of wine at least one month after the invoice date, and
  4. on average, their major customers on-sell the wine at least one month after the invoice date.

### **Condition 1 – effective retention of title clause**

20. To be an 'effective' retention of title clause, the entity must have evidence to support the existence of a retention of title clause as part of the contract of sale between the entity and the relevant purchaser, and they must not be aware of any reason why the clause will not operate in practice according to its terms.
21. Factors to be taken into account in determining whether there is an effective retention of title clause include whether:
- the contract clearly states that property in the goods does not pass to the purchaser until the goods are paid for in full;
  - the purchaser must keep the goods (upon delivery) separate and sufficiently identifiable from their other stock to enable repossession where full payment is not made within the required time; and
  - where the goods are not kept separate, the purchaser forfeits ownership in their stock, and title reverts to them only when they have paid for the goods in full.
22. To be an 'effective' retention of title clause, the clause must have a legal effect and be binding on both parties to the contract.

### **Condition 2 – practical difficulties in determining when the wine is first used by the purchaser**

23. The entity must experience practical difficulties in establishing when the purchaser used the wine if the use takes place prior to the time when title passes under the contract.

### **Condition 3 – on average receive full payment for sale of wine at least one month after the invoice date**

24. The entity must have documentation detailing the date of issue of each invoice for each sale of wine for a particular month. The entity can then determine the average invoice date.
25. The entity must also have documentation (for example, debtor account, payment collection account, aged debtor list) showing the time payment was received for the invoices. From this information, the average settlement date of

each debtor can be determined (that is, how many days between issuing the invoice and receiving payment).

26. Using this information, the average time between the issue date of an invoice and the settlement date of the debt can be determined.
27. To apply this draft practice statement, the average must show that invoicing and payment occur in different tax periods. For example, if invoices are issued at the beginning of the month and payment is received, on average, before the end of the month, it is not appropriate to apply this draft practice statement.

#### **Condition 4 – on average major customers on-sell the wine at least one month after the invoice date**

28. The entity must also have information regarding their major customers' stock turnover to establish when the wine is usually on-sold to the next purchaser.
29. It will be up to the affected entities to determine who their major customers are, based on the quantity and dollar value of their sales.
30. The entity needs to obtain information from the purchaser about the average number of days until the wine is on-sold to the next purchaser and should document the information obtained. This would indicate whether or not on average the wine was on-sold in the same tax period as the invoice was issued. Where the wine is on-sold in the same tax period as the invoice is issued, it is not appropriate to apply this draft practice statement.

#### **Purpose of conditions 3 and 4**

31. The purpose of conditions 3 and 4 is to determine that, on average, the entity receives payments for sales of wine at least one month after the wine is supplied and that on average the purchaser does not use the wine (before title passes) at least one month after the wine is supplied. This is to demonstrate that the wine tax liability does not arise until one month after the date of supply.
32. The purpose of condition 4 is that, to be entitled to attribute the wine tax liability on a sale of wine under a contract that contains an effective retention of title clause one month after wine is supplied, the entity must be able to obtain information from their major customers to demonstrate that on average the stock turnover days amount to at least one month.
33. In determining whether the 4 conditions are met, it is envisaged that taxpayers and tax officers will take a practical, commonsense approach in accordance with the underlying reason for this practice statement, that is, to enable a practical approach to be taken where demonstrating strict compliance with the law would be difficult. Therefore in determining whether, for example, there is an 'effective' retention of title clause or average turnover or settlement times, it is not expected that taxpayers, or tax officers on review, would need to engage in detailed forensic analysis as that would be contrary to the purpose of the practice statement. It is sufficient if it is clear that the retention of title clause is intended to take effect according to its terms and the turnover and settlement times are likely over a period of trading to be generally within the parameters set out in the conditions.

#### **What are the consequences if any of the four conditions are not satisfied**

34. If any of the four conditions are not satisfied, entities who do not choose to account for the wine tax in the same tax period to which the GST on the

taxable supply is attributable, have to establish which of the following events occurs first and account for the wine tax accordingly:

- the time when title passes to the purchaser under the contract;
- the time when the purchaser first uses the wine; or
- the time when the purchaser on sells the wine.



**Amendment history**

<b>Date of amendment</b>	<b>Part</b>	<b>Comment</b>
7 April 2014	Contact details	Updated.

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Related public rulings	WETR 2009/1
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