



TA 2013/2 - Wine equalisation tax (WET) producer rebate schemes

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Taxpayer Alert

TA 2013/2

FOI status: may be released

TITLE: Wine equalisation tax (WET) producer rebate schemes

Taxpayer Alerts are intended to be an "early warning" of significant new and emerging higher risk tax planning issues or arrangements that the Australian Taxation Office (ATO) has under risk assessment, or where there are recurrences of arrangements that have been previously risk assessed.

Taxpayer Alerts provide information that is in the interests of an open tax administration to taxpayers. Taxpayer Alerts are written principally for taxpayers and their advisers and they also serve to inform tax officers of new and emerging higher risk tax planning issues. Not all potential tax planning issues that the ATO has under risk assessment will be the subject of a Taxpayer Alert, and some arrangements that are the subject of a Taxpayer Alert may on further examination be found not to be of concern to the ATO. In these latter cases, the Taxpayer Alert will be withdrawn and a notification published which will be referenced to that Taxpayer Alert.

Taxpayer Alerts give the title of the issue (which may be a scheme, arrangement or particular transaction), briefly describe the issue and highlight the features which are of concern to the ATO. These issues will generally require more detailed analysis to provide the ATO view to taxpayers.

Taxpayers who have entered into or are contemplating entering into an arrangement similar to that described in this Taxpayer Alert can seek a formal determination of the ATO's position through a private ruling (noting that the Taxation Administration Act 1953 sets out circumstances where the Commissioner may decline to issue such a ruling). Such taxpayers might also contact the tax officer named in the Taxpayer Alert and/or obtain their own advice.

This Taxpayer Alert is issued under the authority of the Commissioner.

Overview

This Taxpayer Alert describes two contrived arrangements that are designed to create additional Wine Equalisation Tax (WET) rebates through non-commercial dealings between entities.

Context

Wine Equalisation Tax (WET) generally applies on the last wholesale sale of wine. A producer rebate is available in certain circumstances to producers of wine to a maximum of \$500,000 in a financial year. This limit also applies to a group of 'associated' producers.

The arrangements are structured so that producers or groups of associated producers claim multiple rebates that combine to exceed the \$500,000 limit.

The first arrangement involves a wine producer arranging for another entity to be the producer of some of its wine. The other entity has no real role in the manufacturing process and sells the wine produced to the wine producer for resale to third parties. Both entities then claim rebates, even though the wine is actually manufactured by the wine producer.

In the second arrangement, the wine producer sells wine to other entities for blending or further manufacture. However it is the wine producer who organises and controls all the blending or further manufacture. Sales of the blended or further manufactured wine occur between the entities within the arrangement. All entities claim rebates on the sales of the wine even though it is actually manufactured by the wine producer.

The ATO is conducting compliance action on these arrangements and considers that these arrangements may not be effective in creating additional rebate entitlements for the entities involved.

Description

This Taxpayer Alert applies to arrangements with features substantially equivalent to the following:

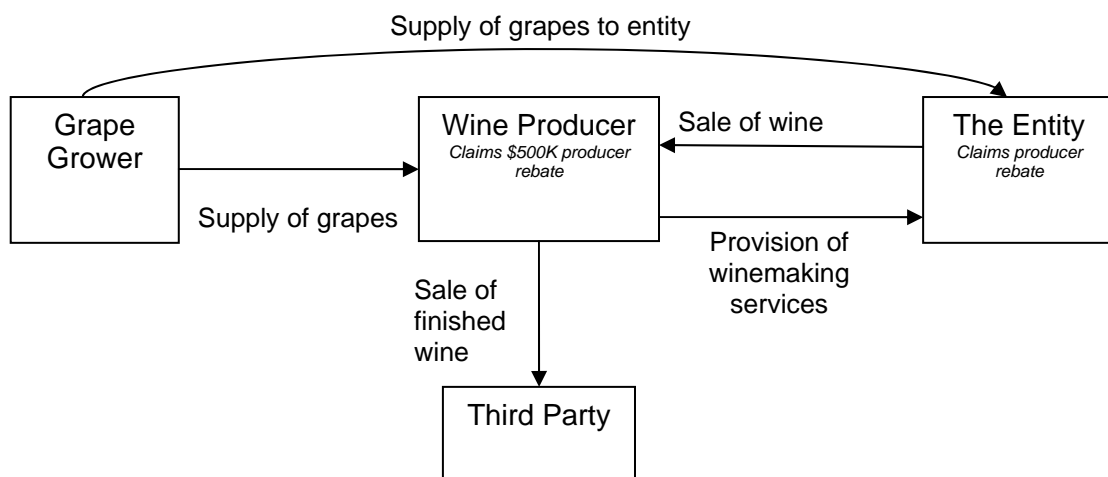
Arrangement 1: Wine Producer arranges for another entity to manufacture some of its wine

- 1 A wine producer buys grapes to make wine and claims the rebate when the wine is sold. The wine producer's sales result in it claiming the maximum rebate for that financial year.
- 2 An entity, not at arm's length to the wine producer, starts buying grapes from the wine producer or someone that the wine producer would buy grapes from.
- 3 The wine producer manufactures the entity's grapes into wine.
- 4 The wine producer buys the wine from the entity which triggers a producer rebate claim by the entity. No WET is payable as an ABN is quoted by the time of the sale.
- 5 The end buyers of the wine are those that the wine producer would sell to.
- 6 The combined producer rebates claimed in the financial year by the wine producer and the entity will exceed the wine producer's maximum entitlement.
- 7 The extra producer rebate(s) are usually shared by participants in the arrangement through manipulating prices charged between the parties for the grapes, wine or other services.

Diagram of arrangement 1

This arrangement can be represented diagrammatically as follows:

Arrangement 1



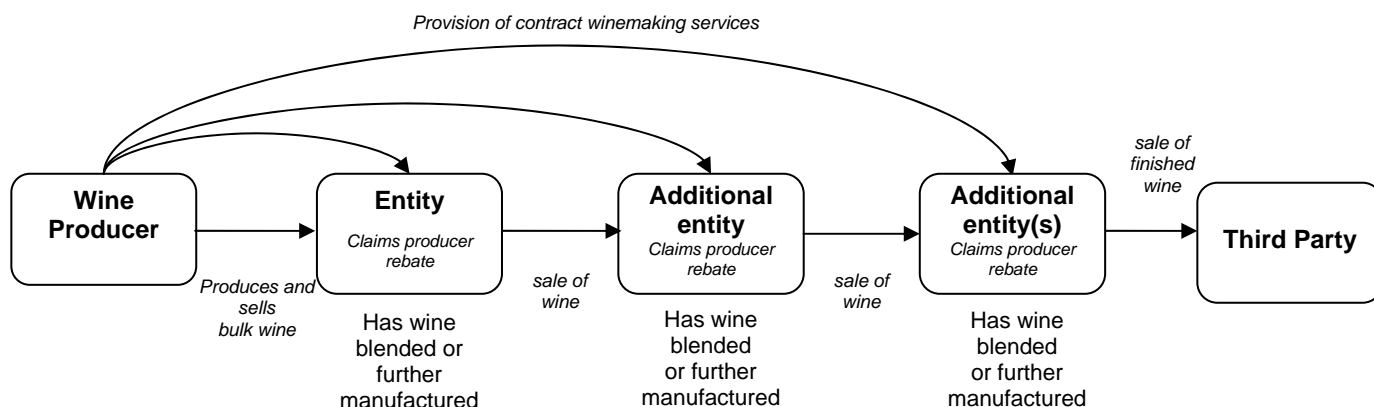
Arrangement 2: Wine producer sells wine to other entities who further blend or manufacture the wine

- 1 A wine producer makes and sells wine then claims the producer rebate.
- 2 An entity not at arm's length to the wine producer buys bulk wine from the wine producer or another supplier it arranges.
- 3 The wine is further processed for the entity by the wine producer.
- 4 The entity sells the wine to the wine producer or to another non-arm's length entity and claims a rebate on the sale.
- 5 Extra rebates are created by a number of staged wine sales between further interposed entities purporting to blend or further manufacture the wine.
- 6 No WET is payable on wine sales between the participants as each buyer quotes its ABN by the time of sale.
- 7 For sales of wine on or after 10 December 2012, involving wine manufacture using other wine (e.g. blending) producers are required to reduce their rebate entitlement by earlier rebates claimed on the acquired wine.
- 8 The end buyers of the wine are those that the wine producer would ordinarily sell to.
- 9 The extra producer rebate(s) are usually shared by participants in the arrangement through manipulating prices charged between the parties for the grapes, wine or other services.

Diagram of arrangement 2

This arrangement can be represented diagrammatically as follows:

Arrangement 2



Features which concern us

The ATO considers that arrangements of the type described above give rise to a number of issues relevant to the taxation laws, including whether:

- (a) the entity satisfies the definition of 'producer' as defined in section 33-1 of the WET Act.
- (b) the treatment of the wine, for which the producer rebate is claimed, meets the definition of 'manufacture' as defined in section 33-1 of the WET Act.
- (c) the entities in the arrangement are entitled to a producer rebate under Division 19 of the WET Act.
- (d) the entity and the wine producer are associated producers within the meaning of section 19-20 of the WET Act.

- (e) section 27-10 of the WET Act applies to adjust WET liability or wine tax credit entitlement in respect of non-arm's length transactions.
- (f) the anti-avoidance provisions in Division 165 of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) apply.
- (g) the arrangement, or certain steps within it, constitutes a sham at general law.
- (h) any entity involved in the arrangement is a promoter of a tax exploitation scheme for the purposes of Division 290 of Schedule 1 to the *Taxation Administration Act 1953* (TAA).

Note 1: *You may have already sought advice from the ATO in respect of your arrangement by way of a private ruling or class ruling. If you have received a private ruling or class ruling in respect of your arrangement, you can rely on that ruling. A private or class ruling is legally binding on the Commissioner who will be bound to act in the way set out in the ruling, even if the ruling is later found to be incorrect. However, a private ruling only applies to a particular entity identified and the particular scheme described in the ruling. Similarly, a class ruling only applies to a specified class of entities and the particular scheme described in the ruling. If there is a material difference between the scheme described in the ruling, and the scheme that was actually implemented, the ruling will not be legally binding on the Commissioner. Also, other entities cannot rely on a private ruling issued in respect of a different entity.*

Note 2: *If you have received a private ruling in respect of your arrangement, please check that the application of Division 165 of the GST Act is considered in that ruling. The applicant may not have sought for us to rule on the application of Division 165 to the arrangement ruled upon, or to an associated or wider arrangement of which that arrangement is part. If you want us to rule on whether Division 165 applies to your arrangement, we will first need to obtain and consider all the relevant facts about the arrangement, including (if relevant) the manner in which it has actually been implemented.*

Note 3: *Base penalties of up to 50% of the tax avoided can apply where Division 165 of the GST Act is applied. Base penalties of up to 75% of the tax avoided can apply where you make a false and misleading statement to the Commissioner. Reductions in base penalty will be available if the taxpayer makes a voluntary disclosure to the ATO. If you have any information about the current arrangement, phone us on **1800 177 006**. Tax agents wanting to provide information about people or companies who may be promoting arrangements covered by this alert should call Tax Agent Infoline - **13 72 86** Fast Key Code **3 4**.*

Note 4: *Penalties of up to 5,000 penalty units for individuals, 25,000 penalty units for bodies corporate or up to twice the amount of consideration received or receivable may apply to promoters of tax exploitation schemes under Division 290 of Schedule 1 to the TAA. The Commissioner can also apply to the Federal Court of Australia for restraining and performance injunctions against promoters where prohibited conduct has occurred, is occurring or is proposed.*

Note 5: *Significant reductions in penalty apply to voluntary disclosures – see Miscellaneous Taxation Ruling MT 2012/3. You can view this ruling on our website, ato.gov.au, by searching the legal database on 'MT 2012/3'.*

Note 6: *In appropriate cases possible sanctions under criminal law may also apply. Where a taxpayer makes a voluntary disclosure and that disclosure indicates possible criminal offences, the Commonwealth Director of Public Prosecutions has indicated that favourable consideration will be given to granting an indemnity from criminal prosecution in relation to the taxpayer's involvement in the scheme where:*

- *the case does not exhibit a significant degree of criminality by the taxpayer*

- the taxpayer provides information about how the arrangements worked, including the role and identity of the promoter, and
- the taxpayer co-operates with the investigation and consequential proceedings.

Note 7: A registered tax agent may have their registration cancelled or suspended by the Tax Practitioners Board under the Tax Agent Services Act 2009 for breach of a condition of registration including being penalised for being a promoter of a tax exploitation scheme.

Note 8: The Commissioner may amend an assessment at any time where he is of the opinion there has been fraud or evasion. See Law Administration Practice Statement PSLA 2008/6.

References

Subject references:

- goods and services tax
- producer rebate
- wine equalisation tax

Legislative references:

A New Tax System (Goods and Services Tax) Act 1999

- [Division 165](#)

A New Tax System (Wine Equalisation Tax) Act 1999

- [Division 19](#)
- [Section 27-10](#)
- [Section 33-1](#)

Taxation Administration Act 1953

- [Division 290 of Schedule 1](#)

Related Practice Statements:

- [PS LA 2005/24](#) - Application of General Anti-Avoidance Rules
- [PS LA 2008/6](#) - Fraud or evasion
- [PS LA 2008/15](#) - Taxpayer Alerts

Related Rulings/Determinations:

- [WETR 2009/1](#)
- [WETR 2009/2](#)
- [WETD 2011/1](#)
- [MT 2012/3](#)

Case References:

- SJ Buller Pty Ltd and Commissioner of Taxation [2013] AATA 617; 2013 ATC 10-334

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