

ED 2024/D1 - Alcohol excise: the addition of water to beer

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Draft Excise Determination

Alcohol excise: the addition of water to beer

Relying on this draft Determination

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 Determination 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 Determination 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 Determination is about

1. The *Excise Tariff Act 1921* (Tariff Act) contains different classifications for alcoholic beverages, which determine the rates of excise that the beverages attract. Alcoholic beverages described as 'hard seltzers' or 'alcoholic seltzers' can be manufactured using a number of different processes and inputs. One manufacturing process involves the addition of a significant quantity of water¹ to a beer base.

2. Paragraph (e) of the definition of 'beer' in the Schedule to the Tariff Act allows the addition of water to a beverage that is potentially capable of satisfying the definition. This draft Determination explains the Commissioner's view about how much water can be added before a beverage will no longer meet the definition of beer.

Ruling

3. A beverage falls within the definition of beer only if it is a brewed beverage and it meets **all** of the tests set out in paragraphs (a) to (g) of the definition of beer in the Schedule to the Tariff Act:

- (a) is the product of the yeast fermentation of an aqueous extract, being predominantly an aqueous extract of cereals:
 - (i) whether the cereals are malted or unmalted; and

¹ All references to water in this draft Determination include carbonated water.

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- (ii) whether or not the aqueous extract contains other sources of carbohydrates; and
- (b) contains:
 - (i) hops, or extracts of hops, such that the beverage has international bitterness units of not less than 4.0; or
 - (ii) other bitters such that the beverage has a bitterness comparable to that of a beverage mentioned in subparagraph (i); and
- (c) contains not more than 4.0% by weight of sugars; and
- (d) has not had added to it, at any time, artificial sweetener; and
- (e) may have had added to it, at any time, other substances, including flavours, but only if, in the case of substances that contain alcohol (other than spirit distilled from beer), the alcohol did not add more than 0.5% to the total volume of the final beverage; and
- (f) may have had added to it, at any time, spirit distilled from beer, but only if that spirit did not add more than 0.5% to the total volume of the final beverage; and
- (g) contains more than 1.15% by volume of alcohol.

4. Paragraph (e) of the definition provides that ‘other substances’ may be added at any time (with limits imposed on the volume of alcohol which may be added). One such ‘other substance’ is water.

5. Although paragraph (e) allows the addition of water at any time, the definition of beer focuses on the product being classified under the Schedule to the Tariff Act, being the final beverage. The definition operates by reference to whether there is the necessary connection between the final beverage and the process of fermentation referred to in paragraph (a) of the definition, with that connection being sufficiently close that the final beverage can be properly described as the ‘product of’ the fermentation process.

6. It is not sufficient that a mere component of the final beverage is produced by the yeast fermentation of an aqueous extract, being predominantly an extract of cereals. The final beverage itself must satisfy the test of being the product of such fermentation.

7. The necessary connection between the beverage and the process of fermentation will not be broken in and of itself by the addition of unfermented substances, including water.

8. However, the necessary connection between the beverage and the process of fermentation may be broken where water is added in a quantity that alters the character of the final beverage, so that the beverage can no longer be regarded as the ‘product of’ the fermentation process for the purposes of the definition of beer.

9. To take the beverage outside the definition of beer, a final beverage which has an unfermented component greater than the fermented component would not be considered ‘the product of the yeast fermentation of an aqueous extract, being predominantly an aqueous extract of cereals’. Rather, it is a mixture of a substance produced by the yeast fermentation of an aqueous extract of predominantly cereals and a substance not produced by such fermentation, with the latter forming the majority of the final beverage.

10. Therefore, where water and other allowable unfermented substances have been added to the fermented substance in a volume greater than the fermented substance (that is, more than half the total volume of the final beverage), the final beverage is not ‘beer’ for the purposes of the Schedule to the Tariff Act.

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11. Instead, where a beverage does not meet the requirements of the definition of beer because the proportion of unfermented substances in the beverage exceeds the proportion of the fermented substance, the beverage is considered to be an ‘other excisable beverage’ for the purposes of the Schedule to the Tariff Act and is subject to excise duty at the applicable rate.

Example 1 – beer

12. *MW Company manufactures a melon-flavoured brewed alcoholic beverage. A solution of malted barley, hops, yeast and water is fermented to create a ‘beer base’. Water and melon flavouring are added following fermentation of the beer base to create the final beverage. The percentages by volume of the constituents in the final beverage will be approximately 60% beer base, 38% water and 2% flavouring.*

13. *The product meets the definition of beer for the purposes of the Schedule to the Tariff Act as the unfermented component is not greater than the fermented solution (and assuming all other requirements in the definition of beer are satisfied).*

Example 2 – other excisable beverage

14. *AB Brewing Company manufactures ‘Senorita Seltzer’, a beer base to which 3 parts water are added for each part beer base. The final beverage contains 3% alcohol by volume.*

15. *Although the beer base, prior to the addition of the water, meets the requirements of paragraph (a) of the beer definition, the addition of such a large quantity of water means the final product can no longer be characterised as a ‘product of the yeast fermentation of an aqueous extract...’ and therefore cannot meet the beer definition. Rather, it is classified as ‘other excisable beverages not exceeding 10% by volume of alcohol’ under table item 2 of the Schedule to the Tariff Act.*

Date of effect

16. When the final Determination is issued, it is proposed to apply from 1 July 2024.

Commissioner of Taxation

12 June 2024

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Appendix 1 – Alternative views

❶ ***This Appendix sets out alternative views and explains why they are not supported by the Commissioner. It does not form part of the proposed binding public ruling.***

17. It is acknowledged that insofar as the addition of unfermented substances is concerned, the definition of beer in the Schedule to the Tariff Act includes substances that:

- must be included (for example, cereals, hops or other bitters)
- are expressly allowed (for example, flavours)
- are implicitly allowed (for example, water)
- are expressly allowed but limited (for example, spirit distilled from beer)
- are expressly prohibited (for example, artificial sweetener).

18. The definition of beer in the Schedule to the Tariff Act was amended by the *Excise Tariff Amendment (2009 Measures No.1) Act 2009*. The Explanatory Memorandum² relevantly provides³:

2.3 Some products, sometimes known as 'malternatives', made from beer, mimic spirit-based RTDs in terms of their taste and marketing.

2.4 These amendments seek to ensure that malternatives are subject to the same tax rate as that applying to RTDs by amending the existing taxation definition of beer. The tax changes are not designed to affect the taxation of conventional beer products that have the essential characteristics of beer, based on taste and ingredients.

...

2.15 Further changes to the beer definition seek to ensure certainty as to acceptable brewing processes for taxation purposes.

19. It may be argued that the relatively prescriptive nature of the definition of beer (particularly following the 2009 amendments) means that where there are no prescribed limits on the quantity of substances that may be added (whether expressly or by implication), such substances may be added in unlimited quantities.

20. The Commissioner considers this not to be the better view. The amendments to the definition of beer in 2009 were made to ensure that brewed beverages designed to mimic spirit-based ready-to-drink beverages would be taxed in the same way and at the same rate of duty and it was intended that only 'conventional beer products' that have the 'essential characteristics' of beer should be subject to the rates of duty applicable to beer. The Commissioner is of the view that beverages comprised mostly of unfermented substances (including water) are not 'conventional beer products' that have the 'essential characteristics' of beer.

21. Therefore, notwithstanding the apparently exhaustive nature of the beer definition in terms of what may or may not be added at various stages of the manufacturing process, the definition remains subject to the overarching requirement in paragraph (a) of the definition that the final beverage must still be capable of being regarded as 'the product of the yeast fermentation of an aqueous extract, being predominantly an aqueous extract of cereals'. A final beverage comprised of mainly unfermented substances does not meet this requirement.

² Explanatory Memorandum to the Excise Tariff Amendment (2009 Measures No.1) Bill 2009.

³ References in this quote to 'RTDs' are to 'ready-to-drink beverages', also commonly referred to as 'alcopops'.

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Appendix 2 – Your comments

22. You are invited to comment on this draft Determination including the proposed date of effect. Please forward your comments to the contact officer by the due date.

23. A compendium of comments is prepared when finalising this Determination, and an edited version (names and identifying information removed) is published to the Legal database on our website.

24. Please advise if you do not want your comments included in the edited version of the compendium.

Due date: 12 July 2024
Contact officer: Andrew Bennett
Email: Andrew.Bennett@ato.gov.au
Phone: 08 8208 1868

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References

Related Rulings/Determinations:

TR 2006/10

Legislative references:

- Excise Tariff Act 1921 the Sch
- Excise Tariff Amendment (2009 Measures No.1) Act 2009

Other references:

- Explanatory Memorandum to the Excise Tariff Amendment (2009 Measures No.1) Bill 2009

ATO references

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