

EXC 2009/1 - Explanatory statement -



Legislative instrument: Excise (Alcoholic strength of excisable goods) Determination 2009 (No. 1)

Explanatory Statement

General Outline of Instrument

1. This Explanatory Statement is provided in accordance with section 26 of the *Legislative Instruments Act 2003*.
2. Under section 65 of the *Excise Act 1901* (Excise Act) the CEO may make rules for determining the volume and strength of excisable goods. Paragraphs 2.37 to 2.42 of the Explanatory Memorandum to the amending Bills provide commentary on the intended operation of section 65.
3. This instrument is made under section 65 of the *Excise Act 1901* (Excise Act). It provides rules for working out the percentage of alcohol for all excisable goods entered for home consumption in a single determination.
4. *Excise (Alcoholic strength of excisable goods) Determination 2009 (No. 1)* replaces and revokes *Excise (Alcoholic strength of excisable beverages) Determination 2006 (No. 1)* (FRLI No. F2006L2165).

Date of effect

5. The determination will have effect from the day after registration.

Effect of this instrument:

6. This instrument is intended as a restatement of the previous instrument, and to clarify and expand points that reportedly were ambiguous or not properly covered.
7. The duty on alcoholic excisable goods is determined by the rate of duty applied to the volume of alcohol contained in the alcoholic goods. The volume of alcohol is calculated by multiplying the volume of the goods by the alcoholic strength.
8. For added clarity the term 'excisable beverages' has been replaced with 'alcoholic excisable goods' because it is arguable that some of the products that fall to item 3 of the Schedule to the *Excise Tariff Act 1921* are not beverages and thus would not be covered by the determination. Section 65 of the Excise Act specifically refers to 'excisable goods' not 'beverages'.

The rules

9. The purpose of these rules is to ensure that licensed manufacturers pay the correct amount of duty by correctly measuring the alcoholic strength of alcoholic excisable goods that are being entered for home consumption. The rules are sufficiently flexible to allow for small variations in the measurement of alcoholic strength.
10. The instrument covers:
 - sampling and analysis;

- measuring and equipment; and
 - permitted variations in alcoholic strength.
11. Sampling and analysis are to be carried out after the excisable goods have reached their maximum alcoholic strength. Equipment is to be properly calibrated.
 12. Sufficient samples must be taken from each run to ensure accuracy. What is 'sufficient' is to be judged by the manufacturer taking into account such things as the circumstances and size of the run and the consistency of the product. For example, if beer in a single run were drawn from different tanks, sampling would need to ensure that any difference in strength between tanks was adequately allowed for in determining the overall strength of the beer in the run. Strength is to be determined as an average of the strength of sample measurements.
 13. Strength is the volume of alcohol in excisable goods as a percentage of the total volume of the excisable good. Since the volume of alcohol varies according to temperature, the volume for the purpose of determining strength is the volume of alcohol as measured at 20°C. The determination also provides a standard figure for the specific gravity of alcohol in relation to water.
 14. Instruments and measuring techniques must be capable of measuring the alcoholic strength of an excisable good to an accuracy of plus or minus 0.2 percentage points of the actual strength. The determination specifically refers to certain measuring techniques as providing the necessary degree of accuracy with properly calibrated equipment. It now clarifies that while all volumetric glassware, and pycnometers need to be calibrated (usually by the manufacturer), only hydrometers, thermometers and weighing instruments need to be calibrated at intervals of one year or less against certified standard instruments.
 15. The determination has been expanded to include as authorities able to certify instruments, all verifying or authorising authorities appointed by the Chief Metrologist and authorities appointed under State and Territory Trade Measurement legislation and not just those certified by the National Association of Testing Authorities (NATA).
 16. Small breweries (producing 100,000 litres or less per financial year) can use a formula and a hydrometer, provided that the formula can be supported by a documented testing process as producing the required degree of accuracy. In other words, the strength arrived at using the formula is compared with the strength of samples of the beer measured using one of the other approved methods. Records of the testing process must be kept for 5 years after a formula has ceased to be used, in order to allow audit activity. For consistency with the regulations relating to the micro brewery refund, the determination now specifies the 100,000 litres be produced in a financial year rather than calendar year.
 17. The determination now clarifies that each batch of beer produced in a BOPS for non-commercial purposes using non-commercial equipment (ie the beer produced by the BOPS clients), does not need to be strength tested provided it is made to a recipe whose strength has been verified to the satisfaction of the ATO using one of the listed methods, including the formula method. If a brewery produces beer for commercial purposes and provides facilities for people to make beer for non commercial purposes, the volume of the beer produced for non-commercial purposes is not included in the brewery's production total for the purposes of the 100,000 litre limit. Only the strength of test brews that are used to determine the strengths of the recipes needs to be measured, as test brews are beer produced for commercial purposes. If the production of beer produced for commercial purposes is 100,000 litres or less per financial year, the brewery is eligible to use the formula and hydrometer method to measure the strength of that beer.

18. The instruments and measuring techniques authorised by the determination will only give accurate results if used appropriately by skilled personnel. The determination assumes that the persons measuring the alcoholic strength of excisable goods are adequately skilled in the use of their equipment and techniques and use them appropriately.
19. The permitted variation in the strength for beer undergoing secondary fermentation (0.3 percentage points) is greater than for beer that does not undergo secondary fermentation (0.2 percentage points). This is due to the nature of the process, as fermentation continues after the product has been packaged for retail sale and variations in strength are slightly less predictable. This difference is reflected in the determination, with the permitted variations for all other excisable goods (including beer that does not undergo secondary fermentation) being 0.2 percentage points.

Impact of the instrument

20. The instrument clarifies aspects of the previous instrument and somewhat expands some definitions making compliance easier.

Consultation

21. Prior to the publication of ED 2003/1, ED2003/2 and ED 2003/3, the Tax Office consulted with the Distilled Spirits Industry Council of Australia (DSICA) and individual members of the association, who agreed with the rules as a constructive guide to enable them to comply with excise legislation.
22. A revision of those rules was discussed at the Alcohol Industry Forum convened by the Tax Office in late May 2005, along the lines of the rules which are incorporated into the current instrument. DSICA welcomed the revised approach as being less restrictive and better able to accommodate changes in technology.
23. On 1 June 2006 the Tax Office initiated a 2-week public consultation process on the legislative instruments arising from the Review, with the Assistant Treasurer approving the consultation prior to the related legislation being passed by Parliament.
24. The instruments and explanatory statements were published on the Tax Office website www.ato.gov.au in the form of drafts for consultation. The instrument, together with the explanatory statement, was included in that process.
25. Selected parties in the alcohol industry were contacted and invited to comment on the content, form and language of the determination and explanatory statement.
26. As the changes made here to that instrument are minor and for the most part clarify and broaden the requirements thus making compliance somewhat easier, further consultation was considered unnecessary.
27. After consultation with the Revenue Analysis Branch, The Tax Office believes the revenue impact for this proposal will be nil as the proposal is not expected to alter the tax base. The proposal merely aims to reduce the compliance burden on taxpayers.



Tim Dyce

Deputy Commissioner and Delegate of the Commissioner of Taxation

4 March 2009

Related Rulings/Determinations:

FRLI No: TBA - Excise (Volume-excisable beverages) Determination 2009 (No. 1)

Previous Rulings/Determinations:

FRLI No: F2006L2165 - Excise (Alcoholic strength of excisable beverages) Determination 2006 (No. 1)

FRLI No: F2006L02171 - Excise (Volume-excisable beverages) Determination 2006 (No. 1)

Excise Act (Alcoholic strength of beer) Determination 2003 (ED 2003/1)

Excise Act (Alcoholic strength of spirits) Determination 2003 (ED 2003/2)

Excise Act (Alcoholic strength of ready-to-drink beverages and liqueurs) Determination 2003 (ED 2003/3)

Subject references:

Excise

Excisable goods

Excisable beverages

Alcohol

Legislative references:

Excise Act 1901

65

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Excise Laws Amendment (Fuel Tax Reform and Other Measures) Act 2006
the Act

Excise Tariff Amendment (Fuel Tax Reform and Other Measures) Act 2006
the Act

Case references:

Watson v. Winch(1916) 1 KB 688

Other references:

Commonwealth of Australia Gazette (No. GN 12, 26 March 2003)

Review of the Schedule to the Excise Tariff Act: industry discussion paper, Treasury, 2 June 2005