

Santa Rita Hills Viticultural Area - Establishment and Judicial Challenge

By Robert Tobiasen (202) 927-7772



ATF issued a final regulation in T.D. ATF No. 454, that establishes the Santa Rita Hills American Viticultural Area (AVA) in California. Prior to the regulation becoming effective on July 30, 2001, Vina Santa Rita, a winery in Chile, filed suit in the United States District Court for the District of Columbia alleging that ATF was arbitrary and capricious in issuing the regulation and that the establishment of the Santa Rita Hills AVA infringed and diluted its trademark that employs "Santa Rita." (See, Sociedad Anonima Vina Santa Rita v. United States Department of the Treasury, et al., U.S. Dist Ct, DC, Civil Action No. 01-1573 (CKK).)

On August 13, 2001, in a lengthy memorandum opinion and order, the District Court denied the plaintiff's motion for a temporary restraining order (TRO) and preliminary injunction (PI) to enjoin the regulation from going into effect. The denial of the TRO and PI is only a preliminary ruling and is customarily followed by a ruling on the merits after a full hearing. However, subsequently the plaintiff voluntarily dismissed its lawsuit. In alleging that ATF was arbitrary and capricious in issuing the final regulation, Vina Santa Rita made three assertions: first, ATF was creating confusion among wine consumers in violation of the statutory mandate of the Federal Alcohol Administration Act by selecting the name "Santa Rita Hills;" second, that the ATF decision to select this name conflicts with the Lanham Act (the Federal trademark law); and third, ATF failed to consider alternative names. The memorandum opinion states that ATF articulated adequate reasons in the final rule to show that there is no confusion. Specifically, it notes that other wine labels bearing "Santa Rita" have been approved without any complaints or confusion and that other information on the wine label will inform the consumer about the origins of the wine from either Chile or California. Additionally, it notes that the evidence in the administrative record before the agency at the time it issued the regulation supported the application of the name Santa Rita Hills to this AVA. Regarding the allegation of conflict with the Lanham Act, the memorandum opinion states that some actual use is required before an infringement or dilution arises and that ATF has not used the name by merely establishing the AVA. Additionally, it observes that the Lanham Act recognizes an interplay between trademarks and geographical designation

and allows for the latter, and notes that the AVA is a designation that describes the geographic origin of the product. ATF is simply recognizing an existing geographic area. Finally, the memorandum opinion states that ATF has been consistent in its policy when establishing AVAs with names that include trademarks. ATF has rejected the name when confusion is present or has used modifiers such as "District", "Valley," or "Hills" to distinguish the AVA name. Regarding the allegation that ATF failed to consider alternative names, the memorandum opinion states that no alternative names had been seriously put forth during the notice and comment period, so there were no alternative names for ATF to have considered. On the remaining counts alleging that by establishing the Santa Rita Hills AVA, ATF infringed and diluted the trademarks owned by Vina Santa Rita, the memorandum opinion states that these issues are not ripe for adjudication. Until a wine label is approved by ATF and used by a winery, the court cannot adjudicate whether a particular use results in an infringement or dilution. The court considered the remaining elements of harm and public interest and determined that they did not support a TRO and PI. □



Requirements for Paying Federal Excise Tax by Electronic Fund

By Phyllis St. Clair (513) 684-3334

Alcohol and Tobacco Excise taxpayers who are liable during any calendar year for a **gross** amount (tax due prior to decreasing adjustments) of \$5 million or more in excise taxes must pay such taxes during the following year by Electronic Fund Transfer (EFT). This includes taxes imposed on distilled spirits, wines, or beer, or on tobacco products and cigarette papers and tubes. This requirement does not apply to taxpayers who are only liable for firearms and ammunition excise taxes, although they may voluntarily pay by EFT.

The term "taxpayer" includes a controlled group of business entities as defined in Title 28, United States Code, Sections 5061(e)(3) and 5703(b)(3). Examples of this type of business structure include, but are not limited to: parent-subsidiary controlled groups; brother-sister controlled groups, and combined groups. Fifty-one (51) percent stock ownership in a corporation need not be direct but may be acquired through an option to buy stock, attribution from partnerships, corporations, or estates and by family holdings. Therefore, if, in any calendar year, the combined liability of the controlled group is \$5 million or more, then, during the following calendar

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year, each member of the controlled group is required to pay applicable excise taxes by EFT.

Any taxpayer required to make tax payments by EFT may not use cash, check or money order to make such payments. Doing so will subject the taxpayer to the failure to make deposit penalty imposed by 26 U.S.C. 6656.

The \$5 million threshold applies separately to the tax on distilled spirits products, wine products and beer products. However it does apply to a combined tax liability on tobacco products and cigarette papers and tubes.

When a taxpayer not currently making tax payments by EFT, reaches the \$5 million threshold, the Chief, National Revenue Center, must be notified, in writing, of that fact. The notice will constitute an agreement to make tax payments by EFT.

The written notification, due on or before January 10 of the year in which the taxpayer is required to begin using EFT, should identify each of the taxpayer's premises that are required to make tax payments by EFT. Each location should be identified by name (as it appears on the tax returns), registry or plant number, plant address, and employer identification number. Taxpayers already using EFT are not required to notify the Chief, National Revenue Center of their continued use of EFT in succeeding years.

Additional information about the requirement to pay excise taxes by EFT and about preparing Fedwire messages for payments made in connection with ATF tax returns should be directed to the Chief, National Revenue Center at (513) 684-3334 or 1-800-398-2282. ☐

Products Made with Fuel Alcohol



By Steve Simon (202) 927-8210

Alcohol produced at an Alcohol Fuel Plant (AFP) is restricted by law to use "exclusively for fuel use" (26 U.S.C. 5181). This means that alcohol produced at an AFP may not be used on the premises, or removed from the premises, for any purpose except for use as fuel.

But what is "fuel"? ATF has received requests to use fuel alcohol in the manufacture of products such as charcoal lighter fluid, firelighter gel, and chafing dish "fuel." These requests must be turned down, because these products are not within the intent of the law restricting the alcohol to "fuel use."

Although the law does not contain a definition of "fuel use," the legislative history states that AFP's were authorized because "Congress concluded that it was important to encourage the development of energy sources other than petroleum products for use in motor fuels." Based on this statement in the Senate Finance Committee report for the Crude Oil Windfall Profit Tax Act of 1980, ATF has concluded that "fuel use" in 26 U.S.C. 5181 means only the use of alcohol in motor fuel

products that decrease reliance on petroleum. This includes the use of fuel alcohol to manufacture gasoline additives such as ETBE (ethyl tertiary butyl ether), which are burned in the engine of a motor vehicle.

The restriction to "exclusively for fuel use" applies as well to alcoholic byproducts produced at an AFP. Such byproducts may not be used for other than fuel purposes. For example, the residue of distillation may not be used for animal feed unless the residue contains no significant alcohol.

AFP proprietors who wish to use alcohol produced at their plants for purposes other than fuel use must requalify their plants as regular distilled spirits plants (DSP's). Information on doing this may be obtained from the ATF National Revenue Center by calling 1-800-398-2282. ☐

Digital Maps



By Marjorie Ruhf (202) 927-8210

A vendor of digital maps based on United States Geological Survey (U.S.G.S.) maps has asked if the Bureau of Alcohol, Tobacco and Firearms (ATF) will accept a customized digital copy of the appropriate U.S.G.S. map in support of a viticultural area petition. We have decided that we will accept copies of U.S.G.S. maps that have been scanned, customized and reprinted, under certain conditions. Vendors should be aware that viticultural area petitions and their supporting materials, including maps, are public documents. For more information, contact the Regulations Division at (202) 927-8210. ☐

FROM THE "NET" (INTERNET)

Question: "Could you please tell me if I need a special ATF license to sell tobacco at the retail level?"

Answer: You do not need a Federal license to sell tobacco products. There are Federal recordkeeping requirements if you sell more than 60,000 cigarettes in a single transaction. Refer to ATF regulations at Subpart F of 27 CFR Part 296 at the following web site: (<http://www.atf.treas.gov/regulations/27cfr296.htm>). You should be aware of other requirements that may impact your sales of tobacco products. Please read ATF Industry Circulars 99-2 and 2000-4 and Subpart G of 27 CFR Part 296 also found at the above internet address. If you intend to engage in the business of importing tobacco products, you will have to apply and receive ATF approval before you engage in business. This requirement is stated in 27 CFR Part 275 (<http://www.atf.treas.gov/regulations/27cfr275.pdf>). If you need assistance to apply for a Federal permit, you may contact the National Revenue Center, 550 Main St., Cincinnati, OH 45203-3263, by phone at 1-800-398-2282. Other ATF forms may be required and may be available from ATF's web site. Also, you need to find out about customs duties and requirements from U.S. Customs Service (<http://www.customs.treas.gov/>). In addition, you'll need to contact the State government agencies where you will be selling tobacco products to find out their requirements. However, in general, you cannot import previously exported cigarettes, other tobacco products, cigarette papers or tubes. Refer to ATF Industry Circular 2000-4 for further information. Also, refer to ATF Industry Circular 99-2 about cigarette sales. ☐