

LEGISLATIVE COUNCIL BRIEF

Dutiable Commodities Ordinance (Cap. 109)

DUTIABLE COMMODITIES (AMENDMENT) BILL 1999

INTRODUCTION

At the meeting of the Executive Council on 26 October 1999, the Council **ADVISED** and the Chief Executive **ORDERED** that the Dutiable Commodities (Amendment) Bill 1999 as set out in Annex should be introduced into the Legislative Council.

BACKGROUND AND ARGUMENT

Supply and use of illicit fuel

2. Under the Dutiable Commodities Ordinance (the Ordinance), the import and manufacturing of three types of hydrocarbon oil, namely, light diesel oil, petrol (leaded and unleaded) and aircraft spirit for local consumption is chargeable to duty. Supply and purchase of dutiable hydrocarbon oil (i.e. oil for which duty has not been paid) is prohibited.

3. The price difference between duty-paid and duty-not-paid light diesel oil and petrol has given rise to a market for illicit fuel for use by vehicles in Hong Kong. Arising from the recent economic downturn, there has been a noticeable increase in the supply of illicit fuel in recent years. In 1998, Customs and Excise Department (C&ED) seized 5.23 million of litres of illicit fuel in 856 cases. In the first half of 1999, 4.91 million litres of illicit fuel were seized in 526 cases. The problem has not only led to revenue loss but also caused environmental pollution and fire hazards. In 1998, there were four fires which occurred in premises used for storage and supply of illicit fuel. In the first half of 1999, there were six cases.

4. There are three principal types of illicit fuel, namely -

- (a) dutiabale light diesel oil and petrol: these are oils on which the full duty prescribed by law has not been paid. They mainly come from illegal imports or light diesel oil purported to be exported but illicitly diverted into the local market;
- (b) marked oil: marked oil is light diesel oil to which a prescribed marker and colouring substance have been added to make it red in colour and distinguishable from ordinary light diesel oil. Marked oil is exempted from duty. It is designated for industrial and marine uses by the Ordinance and is not allowed to be used as fuel for motor vehicles except for the following three types of vehicles-
 - (i) vehicles not registered under the Road Traffic Ordinance and solely for industrial use;
 - (ii) franchised public buses operating on specified routes; and
 - (iii) vehicles owned and operated by the Kowloon-Canton Railway Corporation in maintaining bus services within the North-west Transit Service Area.

There have been cases where marked oil was found to be supplied for use in vehicles other than those specified above in order to evade duty payment.

- (c) detreated oil: detreated oil is marked oil with the colouring substance and marker removed or impeded illegally in order to make it visually indistinguishable from ordinary light diesel oil to facilitate sale in the black market for vehicles' use.

To address enforcement difficulties

5. Under the Ordinance and its relevant Regulations, it is an offence to supply or purchase *dutiabale light diesel oil, petrol and detreated oil* or to supply or use *marked oil* as fuel in motor vehicles. However, when taking enforcement actions under these provisions, C&ED has encountered two major difficulties, and we propose to overcome them as set out in the following paragraphs.

Difficulty in proving the supply of certain illicit fuel

6. Since dutiable light diesel oil, petrol, and detreated oil are no different in appearance from those which are duty-paid, it is difficult for C&ED to establish a case to take prosecution action against the supply, sale and use of illicit fuel even if they suspect such activities taking place. C&ED may make inquiry into the activities but the suspect can claim, without any proof, that duty has been paid for the fuel in question. It is difficult for C&ED to rebut the claim and take further action. Currently, C&ED can only rely on section 40(c) of the Ordinance to address the problem. This section presumes hydrocarbon oil to be dutiable under certain conditions and puts the burden of proof on the suspects. However, the presumption can be invoked only if a person is actually transferring hydrocarbon oil to or from a vehicle's fuel tank at any locations other than those premises licensed under Part VI of the Dangerous Goods (General) Regulations (DGR). The problem is that in many cases the supply of illicit fuel does not necessarily involve a transfer of the fuel to a vehicle on the spot. For example, illicit light diesel oil and petrol can be sold in takeaway cans for drivers to refuel their vehicles at locations other than the supplying station.

7. To address the above problems, we propose to amend the Ordinance and its Regulations to expand the scope of the presumption provision in section 40(c) of the Ordinance so that it can be invoked where any of the following activities take place other than in licensed premises-

- (a) sale and supply of light diesel oil (which covers detreated oil by its definition under the Ordinance) or petrol;
- (b) purchase and receipt of light diesel oil or petrol; and
- (c) any other dealings in light diesel oil or petrol.

8. We further propose to exclude only premises licensed specifically for storage of diesel oil and petrol under Part VI of the DGR from the application of the presumption. In other words, licensed premises under that Part of the Regulations which are not for the purpose of storage of diesel oil and petrol should also be subject to the expanded presumption provision.

9. The proposed presumption will not apply to marked oil which is easily distinguishable from normal light diesel oil.

Difficulty in proving the use of detreated oil or dutiable light diesel oil as fuel by vehicles

10. Detreated oil used to be detectable through chemical testing on the spot. However, culprits have recently been able to remove the marker and colouring substance of marked oil. C&ED is no longer able to detect the colouring substance or the marker through chemical testing on the spot. This renders the setting up of roadblocks to check vehicle fuel ineffective.

11. There remains, however, one identifiable difference between detreated oil and dutiable light diesel oil on the one hand, and duty-paid light diesel oil on the other. This is their sulphur content. Detreated oil and dutiable light diesel oil have a sulphur content of more than 0.05% by weight while duty-paid light diesel oil has a sulphur content lower than 0.05%. This is so because detreated oil originates from marked oil which is mainly for industrial use, and dutiable light diesel oil is sourced from illegal imports or relandings, which all have a higher sulphur content. Marked oil, for example, may have a sulphur content as high as 0.5% by weight. As for duty-paid light diesel oil, the current Air Pollution Control (Motor Vehicle Fuel) Regulations under the Air Pollution Control Ordinance prohibits the supply of light diesel oil with a sulphur content higher than 0.05% by weight for vehicular use. Therefore, in practice, only light diesel oil with a sulphur content at or below 0.05% is available from legitimate sources. It follows that all light diesel oil used by vehicles with a sulphur content above 0.05% is likely to be detreated oil or dutiable light diesel oil. Nevertheless, it remains difficult for C&ED to show that the light diesel oil in question is duty-not-paid even if they can prove that the oil has a sulphur content over 0.05%. This is because, under the existing provisions, the vehicle driver can always claim, without giving any proof, that duty has been paid for the oil. It will then be up to C&ED to prove otherwise, which has not been practicable in many cases.

12. To address this problem, we propose to add a presumption to the Ordinance to the effect that any light diesel oil found in the fuel tank of a motor vehicle with a sulphur content in excess of the maximum sulphur content (at present 0.05%) prescribed under the Air Pollution Control (Motor Vehicle Fuel) Regulations is presumed to be dutiable. The presumption will not apply to light diesel oil in the fuel tank of vehicles arriving from the Mainland, for use in those vehicles. This is because such light diesel oil, which may or may not have a sulphur content above 0.05%, is currently exempted from payment of duty under the Dutiable

Commodities Regulations. Also, for the reason given in paragraph 9 above, the presumption will not apply to marked oil.

To rationalise the penalty levels for using illicit fuel in vehicles

13. At present, the maximum penalty for the supply or use of marked oil for vehicular use and the supply or purchase of detreated oil is a fine of **\$200,000** and imprisonment for 2 years while the maximum penalty for supply or purchase of dutiable light diesel oil (other than marked oil) is **\$1,000,000** and imprisonment for 2 years. Given that both offences involve an intention to avoid payment of duty on hydrocarbon oils, we propose to rectify this discrepancy by increasing the maximum penalty for offences in relation to marked oil and detreated oil to a fine of \$1,000,000 and imprisonment for 2 years. For the sake of consistency, we also propose to take this opportunity to increase the maximum penalty for illegal use of kerosene in vehicles to the same level, as the nature of the offence is similar to that of offences for marked oil and detreated oil.

Home-brewed liquors

14. Under the Ordinance, all alcoholic liquors for local consumption, whether imported or locally manufactured, are subject to an ad valorem duty which is charged on the basis of their normal market price at the time when they are removed from the sellers' premises for export purpose if they are imported liquors, or when they are removed from their manufactured premises if they are locally manufactured liquors. The ad valorem duty rate of alcoholic liquors with an alcoholic strength of more than 30% (such as brandy and whisky) is 100%, while that of liquors with alcoholic strength at or below 30% (such as beer and cider) is 30%. A duty rate of 60% is separately imposed on wine.

15. To ensure that duties of locally manufactured alcoholic liquors are duly paid, the Ordinance prohibits a person from manufacturing alcoholic liquors except with a licence issued by the Commissioner of Customs and Excise. It also imposes licensing controls on possession of utensils or apparatus suitable and intended for manufacturing spirits and on possession of fermenting and fermented materials.

16. The above controls are applicable to all locally manufactured alcoholic liquors, regardless of whether such alcoholic liquors are manufactured for personal use or for sale and commercial purposes. This effectively means that an individual who manufactures alcoholic liquors for his personal use needs to apply for a licence for manufacturing of

liquors and a separate licence for possession of utensil and fermenting and fermented materials for the manufacturing of the liquors. Moreover, the liquors so produced are subject to duty.

17. There have been calls from the public to relax controls on home brewing of alcoholic liquors for personal use. Having reviewed the existing controls on manufacturing of alcoholic liquors, we propose to exempt home brewing of liquors which is not by distillation nor for the purpose of sale from both duty payment and licensing controls. This proposal is made against the following considerations -

- (a) It is not our policy intention underlying the Ordinance to subject home-brewed liquors for personal use both to duty and to the same extent of controls as those over liquors for commercial purposes. The Ordinance should be amended to reflect this policy intent.
- (b) There has been public criticisms that the existing controls are too stringent and have been a disincentive for those who wish to manufacture liquors for personal use. As a matter of fact, no licence has ever been issued to a person for the manufacture of alcoholic liquors in domestic premises for personal use.
- (c) Many of our major trading partners (such as Australia, Canada, New Zealand and the UK) do not impose any licensing requirements or duty on home brewing and home-brewed liquors. Our controls appear to be out of line with international practice.

18. In proposing the above relaxation, we consider it necessary, for revenue protection purposes, to build in safeguards to avoid abuse of the proposed exemption from duty and licensing controls intended for home-brewed alcoholic liquors. We therefore propose that the above exemption be given on the following conditions -

- (a) the manufacture and packaging of the alcoholic liquors are by a person at the age of 18 years or above in his domestic premises;
- (b) the home-brewed alcoholic liquors are not distilled nor for sale;
- (c) the fermenting or fermented materials kept on the domestic premises where home brewing takes place do not exceed 60

litres which are sufficient for keeping two brewing kits in process;

- (d) home-brewed alcoholic liquors kept in the premises in which the alcoholic liquor is manufactured or in the possession of the person by whom the liquor is manufactured at any time do not exceed 50 litres which is the quantity that can be yielded from 60 litres of fermenting or fermented materials; and
- (e) home-brewed alcoholic liquors which are not immediately consumed are stored in sealed containers marked with “Home Brewed, Not for Sale” on the outside of the containers.

19. The above conditions on home brewing will be enforced by C&ED in the same manner as with other locally manufactured alcoholic liquors for commercial use. Any person who fails to comply with these conditions will be subject to the usual licence requirements and will be liable to pay duty.

Other technical amendments

20. The opportunity is also taken to make the following technical amendments to improve the structure of the Ordinance and the Dutiable Commodities Regulations, and make clear the policy intent -

- (a) To replace specific provisions on the circumstances under which the Chief Executive in Council can exempt certain goods from duty by a general exemption provision

Currently, section 6(1)(i) of the Ordinance prescribes goods that can be exempted from duty by the Chief Executive in Council. Such provisions are largely repeated in Regulation 12 of the Dutiable Commodities Regulations. The amendments seek to substitute the section with a provision conferring a general regulation-making power. Specific categories of goods will only need to be set out in the regulations. The amendments will not change the specific categories of goods currently exempted from duty. Nor will it change the power of Legislative Council to scrutinise any changes to the scope of exemption in future through negative vetting;

- (b) To put the matter beyond doubt that any person who contravenes provisions of the Ordinance commits an offence

Currently, certain provisions of the Ordinance are set out in Schedule 2 with the penalties for contravention stated. For simplicity, we propose to amend section 46 to make it clear that contravention of any of the specified provisions is an offence so that it is not necessary to create an offence in each provision; and

- (c) To set out the provisions in a Legislative Council resolution, which exempts certain quantities of dutiable goods purchased by arrival passengers from duty, in the Dutiable Commodities Regulations and delete the resolution accordingly

On 22 June 1999, the Executive Council approved the proposal to allow sale of duty-free goods to arrival passengers. To implement the proposal, we moved a resolution under the Ordinance in the Legislative Council which was passed on 16 July 1999. The resolution came into effect on 23 July 1999. As the resolution effectively extended the scope of duty exemption, we propose to take the opportunity of this exercise to incorporate the provisions of the resolution into the relevant provisions governing duty exemption in the Dutiable Commodities Regulations.

THE BILL

21. Clause 1 sets out the commencement date of the Bill which is to be appointed by the Secretary for the Treasury by notice in the Gazette. Clause 2 repeals the provision conferring power on the Chief Executive in Council to make regulations dispensing with or relaxing requirements under the Ordinance relating to certain categories of goods, and replaces it with a provision conferring a similar power in relation to goods generally.

22. Clauses 3, 6, 7 and 9(c) allow the manufacture without a licence, other than for sale, of alcoholic liquor not exceeding a specified quantity in residential premises and exempt such liquor from duty.

23. Clause 4 extends the scope of presumption for facilitating C&ED enforcement action in cases of use of prohibited fuel in motor vehicles so that -

- (a) light diesel oil (other than marked oil) and petrol dealt in premises other than those specifically licensed for storage of diesel oils and petrol under Part VI of the Dangerous Goods (General) Regulations is presumed to be dutiable; and
- (b) subject to specific exemptions, light diesel oil with an excessive sulphur content is presumed to be dutiable goods.

24. Clauses 8 and 9(a) and (b) relocate the provisions on exemption of duty for liquor and tobacco purchased at entry points from Schedule 1 to the Ordinance to Regulation 12 of the Dutiable Commodities Regulations.

25. Clause 10 increases the penalty for offences relating to use of kerosene and marked oil in motor vehicles or pleasure vessels and offences relating to marking and colouring of light diesel oil.

LEGISLATIVE TIMETABLE

26. The legislative timetable for the Bill is -

Publication in the Gazette	5 November 1999
First Reading and commencement of Second Reading debate	17 November 1999
Resumption of Second Reading debate, committee stage and Third Reading	to be notified

HUMAN RIGHTS IMPLICATIONS

27. The Department of Justice advises that the Bill is consistent with the human rights provisions of the Basic Law.

BINDING EFFECT OF THE LEGISLATION

28. The Bill will not affect the binding effect of the existing provisions of the Ordinance and its subsidiary legislation.

FINANCIAL AND STAFFING IMPLICATIONS

29. The possible reduction in revenue as a result of the exemption of home-brewed alcoholic liquors from duty should be negligible. The strengthening of C&ED's efforts in combating the problem of illicit fuel should lead to an increase in the use of duty-paid light diesel oil and petrol and hence the Government's revenue.

30. There are no staffing implications arising from the proposals. Any additional workload arising from the proposals will be absorbed by C&ED within its existing resources. C&ED needs to be equipped with four sets of mobile x-ray fluorescence analysers detecting the sulphur content in fuel. The cost is estimated to be \$1.4 million . C&ED will absorb the non-recurrent and recurrent costs within its existing resources.

ECONOMIC IMPLICATIONS

31. The proposals to combat the use of illicit fuel amount to preventing polluters from externalising the social cost of environmental pollution. This will also be conducive to development of a clean fuel market for vehicles.

32. The proposals on home-brewing have no significant economic implications.

ENVIRONMENTAL IMPLICATIONS

33. The proposals on strengthening C&ED's enforcement powers to combat the problem of illicit fuel should lead to the reduction in air pollution. Illicit fuel usually has a higher sulphur content and vehicles using such fuel may emit as much as 20% more particulates and nine times more sulphur oxides. The proposal should therefore help to reduce particulates and sulphur oxides emissions from vehicle sources.

PUBLIC CONSULTATION

34. The Business Advisory Group of the Business & Services Promotion Unit under the Financial Secretary's Office has been consulted on the home brewing proposal and is generally supportive of it.

PUBLICITY

35. We will issue a press release on 1 November 1999.

ENQUIRIES

36. In case of enquiries about this brief, please contact Ms Esther Leung, Principal Assistant Secretary for the Treasury (Revenue), at 2810 2370.

Finance Bureau
FINCR 6/3231/89
1 November 1999

DUTIABLE COMMODITIES (AMENDMENT) BILL 1999

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A BILL

To

Amend the Dutiable Commodities Ordinance.

Enacted by the Legislative Council.

1. Short title and commencement

(1) This Ordinance may be cited as the Dutiable Commodities (Amendment) Ordinance 1999.

(2) This Ordinance shall come into operation on a day to be appointed by the Secretary for the Treasury by notice in the Gazette.

2. Regulations

Section 6(1)(i) of the Dutiable Commodities Ordinance (Cap. 109) is repealed and the following substituted -

“(i) dispensing with or relaxing any of the provisions of this Ordinance or duties imposed under this Ordinance relating to goods to which this Ordinance applies and empowering the Commissioner to impose conditions in respect of the dispensation or relaxation;”.

3. Restrictions on dealing with and possession of certain goods

Section 17 (3AB) is repealed and the following substituted -

“(3AB) A person shall not, except under and in accordance with a licence, manufacture -

- (a) alcoholic liquor, except as provided in section 64A;
- (b) methyl alcohol, tobacco or hydrocarbon oil.”.

4. Presumptions

Section 40 is amended -

- (a) by repealing paragraph (c) and substituting -

“(c) if a person -

- (i) sells, supplies, buys, receives or otherwise deals in light diesel oil (other than marked oil) or motor spirit;
or
- (ii) transfers light diesel oil (other than marked oil) or motor spirit to or from a vehicle's fuel tank,

and does so -

- (A) at a location other than premises in respect of which a licence for the storage of diesel oils (being dangerous goods in category 5, class 3) or petrol (being dangerous goods in category 5,

class 1) (as the case may be) has been issued under Part VI of the Dangerous Goods (General) Regulations (Cap. 295 sub. leg.); and

(B) in circumstances that give rise to a reasonable belief that the light diesel oil or motor spirit is dutiable, the light diesel oil or motor spirit found in or about the location is dutiable goods;”;

(b) by adding -

“(ca) any light diesel oil found in the fuel tank of a motor vehicle and having a sulphur content in excess of that stipulated in Schedule 1 to the Air Pollution Control (Motor Vehicle Fuel) Regulation (Cap. 311 sub. leg.) is dutiable goods unless the circumstances are such that the exemption under regulation 12(1)(n), (p) or (pa) of the Dutiable Commodities Regulations (Cap. 109 sub. leg.) applies;”.

5. Offences and penalties

Section 46(3) is repealed and the following substituted -

“(3) Except as expressly provided in this Ordinance, any person who contravenes a provision of this Ordinance set out in

column 1 of Schedule 2 commits an offence and is liable on conviction to the penalty set out opposite that provision in columns 2 and 3 of that Schedule.”.

6. Illegal possession of still or fermented material, etc.

Section 58(1) is amended by adding “, or except as provided in section 64A” after “Commissioner”.

7. Section added

The following is added -

“64A. Licence not required for home brewing

(1) A licence is not required for the manufacture of alcoholic liquor, other than by distillation and other than for sale, by a person aged 18 or over in premises which are used by the person exclusively as his place of residence and which constitute a separate household unit.

(2) Subsection (1) does not apply -

- (a) if the person who manufactures the liquor is in possession, anywhere in Hong Kong, of alcoholic liquor purported to be manufactured under subsection (1) of a total quantity exceeding 50 litres;
- (b) if there is kept in the premises in which the liquor is manufactured alcoholic liquor purported to be manufactured under subsection (1) of a quantity exceeding 50 litres;
- (c) unless the alcoholic liquor so manufactured -

- (i) is stored in sealed containers marked legibly in English letters or Chinese characters at least 4 mm high the words “Home Brewed, Not for Sale” or “家中自釀，不得售賣” ; or
- (ii) is for immediate consumption.

(3) For the purpose of manufacture of alcoholic liquor under subsection (1) in any premises, a person may without a licence possess in those premises -

- (a) any utensil or apparatus, other than a still or part of a still, for manufacturing alcoholic liquor;
- (b) fermenting or fermented materials not exceeding 60 litres.

(4) In any prosecution for an offence under this Ordinance, the onus of proving the circumstances are such that subsection (1) applies shall be upon the accused.”.

8. Schedule 1 amended

Schedule 1 is amended -

- (a) in Part I -
 - (i) in paragraph 1, by repealing “Subject to paragraph 3, duty” and substituting “Duty”;
 - (ii) by repealing paragraph 3;
- (b) in Part II -

- (i) in paragraph 1, by repealing “Subject to paragraph 3, duty” and substituting “Duty”;
- (ii) by repealing paragraph 3.

Consequential Amendments

Dutiable Commodities Regulations

9. Exemptions

Regulation 12(1) of the Dutiable Commodities Regulations (Cap. 109 sub. leg.) is amended -

- (a) in paragraph (e), by adding “, other than alcoholic liquor or tobacco,” after “goods”;
- (b) by adding -
 - “(ea) subject to such conditions as the Commissioner may impose, alcoholic liquor or tobacco which is -
 - (i) either -
 - (A) imported of his own use and in his baggage by a passenger or crew member of any ship, aircraft, train or vehicle; or
 - (B) bought for his own use by such passenger or crew members at a licensed warehouse located at any

place approved by the Commissioner in the arrival area at an entry point in Hong Kong; and

- (ii) in such quantity as the Commissioner may determine and publish in the Gazette as applicable generally or to a class of passengers or crew members to which the passenger or crew member belongs;”;

(c) by adding -

“(ga) alcoholic liquor manufactured in accordance with section 64A(1) of the Ordinance if -

- (i) the person in possession of it is not in possession, anywhere in Hong Kong, of such alcoholic liquor of a total quantity exceeding 50 litres;

- (ii) it is kept in premises in which there is not kept such alcoholic liquor of a quantity exceeding 50 litres; and

(iii) it is -

- (A) stored in sealed containers marked legibly in English letters or

Chinese characters at least 4 mm high the words

“Home Brewed, Not for Sale” or “家中自

釀，不得售賣” ; or

(B) for immediate consumption;”.

Dutiable Commodities (Marking and Colouring of Hydrocarbon Oil) Regulations

10. Offences and penalties

Regulation 13(2) of the Dutiable Commodities (Marking and Colouring of Hydrocarbon Oil) Regulations (Cap. 109 sub. leg.) is amended by repealing “\$200,000” and substituting “\$1,000,000”.

Explanatory Memorandum

The object of this Bill is to amend the Dutiable Commodities Ordinance (Cap. 109) (“the Ordinance”) -

- (a) to repeal the provision conferring power on the Chief Executive in Council to make regulations dispensing with or relaxing requirements under the Ordinance relating to certain categories of goods and replace it with a provision conferring a similar power in relation to goods generally (clause 2);

- (b) to allow the manufacture without a licence, other than for sale, of alcoholic liquor not exceeding a specified quantity in residential premises and to exempt such liquor from duty (clauses 3, 6, 7 and 9 (c));
- (c) to extend the presumptions for facilitating enforcement action by the Commissioner of Customs and Excise in cases of use of prohibited fuel in motor vehicles (clause 4) so that -
 - (i) light diesel oil (other than marked oil) and motor spirit dealt in otherwise than in premises specifically licensed for the storage of diesel oils or petrol under Part VI of the Dangerous Goods (General) Regulations (Cap. 295 sub. leg.) is presumed to be dutiable goods;
 - (ii) subject to specific exemptions, light diesel oil with an excessive sulphur content is presumed to be dutiable goods;
- (d) to relocate the provisions on exemption of duty for liquor and tobacco purchased at entry points from Schedule 1 to the Ordinance to regulation 12 of the Dutiable Commodities Regulations (Cap. 109 sub. leg.) for better presentation (clauses 8 and 9(a) and (b));
- (e) to increase the penalty for offences relating to use of kerosene and marked oil in motor vehicles or pleasure vessels and offences relating to marking and colouring of light diesel oil (clause 10).