

立法會
Legislative Council

LC Paper No. CB(1) 2045/99-00
(These minutes have been seen
by the Administration and
cleared by the Chairman)

Ref: CB1/BC/3/99/2

**Bills Committee on
Dutiable Commodities (Amendment) Bill 1999**

**Minutes of meeting held on
Tuesday, 16 May 2000, at 2:15 pm
in Conference Room B of the Legislative Council Building**

- Members present** : Hon James TO Kun-sun (Chairman)
Hon James TIEN Pei-chun, JP
Hon Ronald ARCULLI, JP
Hon HUI Cheung-ching
Hon CHAN Kam-lam
Hon SIN Chung-kai
Hon Howard YOUNG, JP
Hon Emily LAU Wai-hing, JP
- Member absent** : Hon Mrs Miriam LAU Kin-ye, JP
- Public officers attending** : Finance Bureau

Mr Martin GLASS
Deputy Secretary for the Treasury (2)

Ms Esther LEUNG
Principal Assistant Secretary for the Treasury
(Revenue)

Mr Donald CHEN
Assistant Secretary for the Treasury (R1)

Hong Kong Customs and Excise Department

Mr Simon WONG
Senior Staff Officer, Office of Dutiable
Commodities Administration

Department of Justice

Miss Betty CHEUNG
Senior Government Counsel

Clerk in attendance : Ms LEUNG Siu-kum
Chief Assistant Secretary (1)4

Staff in attendance : Miss Anita HO
Assistant Legal Adviser 2

Ms Rosalind MA
Senior Assistant Secretary (1)6

I Election of Chairman

Mr James TO was elected Chairman of the Bills Committee.

II Meeting with the Administration

Briefing on the Dutiable Commodities (Amendment) Bill (the Bill)

2. The Deputy Secretary for the Treasury (DS/T) highlighted the major proposals in the Bill for members' consideration as follows:

- (i) To facilitate enforcement action by the Customs and Excise Department (CED) against the supply and use of illicit fuel, clause 4 of the Bill sought to amend the existing section 40 of the Dutiable Commodities Ordinance (DCO)(Cap. 109) by extending the scope of presumption so that it could be invoked whenever sale, supply, purchase, receipt and any other dealings in light diesel oil or petrol took place other than in licensed premises. In addition, a new presumption was proposed in clause 4 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 was presumed to be dutiable.

- (ii) To rationalize the penalty levels for using illicit fuel in vehicles, clause 10 of the Bill proposed to increase the maximum penalty for illicit fuel offences including the supply or use of marked oil for vehicular use and the supply or purchase of detreated oil to a fine of \$1 million and imprisonment for two years, so that it was consistent with the existing maximum penalty for the supply or purchase of dutiable light diesel oil.
- (iii) To relax and bring controls on home brewing of alcoholic liquors for personal use to be in line with international practice, clause 7 of the Bill proposed to exempt home brewing of liquors which was not by distillation or for the purpose of sale from both duty payment and licensing controls. For revenue protection purposes, safeguards were built in to avoid abuse of the proposed exemption.
- (iv) To improve the structure of DCO and the Dutiable Commodities Regulations (the Regulations), the Administration took the opportunity of this amendment Bill to make technical amendments and make clear policy intent. The proposed amendments were set out in paragraph 20 of the Legislative Council (LegCo) Brief (Ref: FINCR 6/3231/89).

Discussion with members

Supply and use of illicit fuel

3. Noting that cross-border vehicles were exempted from the presumption of dutiability of light diesel fuel with excessive sulphur content, Mr Howard YOUNG was concerned that this exemption might be abused by drivers of cross-border vehicles. He sought information on the existing measures to prevent these drivers from bringing in light diesel fuel from the Mainland for resale in Hong Kong and the Administration's assessment of the possible abuse of this exemption.

4. DS/T explained that cross-border vehicles were required to obtain a permit under the current system and the maximum amount of fuel drivers could bring in from the Mainland was specified in the law. The Senior Staff Officer/Customs and Excise Department (SSO/CED) added that the current limits on the amount of fuel to be brought across the border by these vehicles ranged from 100 to 300 litres, depending on the size of the vehicles. CED officers monitored closely the amount of fuel brought in through conducting checks on the fuel tanks of cross-border vehicles. Transfer or supply of light

diesel fuel brought in from the Mainland for use in other vehicles was illegal and would be subject to enforcement actions of CED officers. As reflected from the statistics on the provision of illicit fuel, abuse of this exemption was not a problem of concern. Information of the cross-border vehicles obtained under the current permit system would facilitate investigation and enforcement actions against the illegal supply of fuel by these vehicles.

5. The Chairman opined that as the Bill sought to extend the presumption of dutiability of light diesel oil if the sale, supply, purchase, receipt or any other dealings in light diesel oil took place other than in licensed premises, the extension would also facilitate enforcement actions against the resale or transfer of light diesel oil from cross-border vehicles. He then invited the Administration to explain to members the effect of extending the presumption.

6. DS/T said that under the present legislation, the presumption of dutiability of hydrocarbon oil could only be invoked if a person was actually transferring hydrocarbon oil to or from a vehicle's fuel tank at any locations other than the licensed premises. The Bill sought to extend the scope of the presumption so that it could be invoked where any activities including sale, supply, purchase, receipt and other dealings in hydrocarbon oil took place other than in licensed premises. SSO/CED supplemented that the problem with the existing scope of the presumption was that in many cases the supply of illicit fuel did not necessarily involve a transfer of the fuel to a vehicle on the spot. Recently, more sophisticated methods of supplying the fuel had been in use. For example, illicit fuel could be sold in takeaway cans for drivers to refuel their vehicles at locations other than the supplying station, making it difficult for CED to take enforcement actions under the present scope of the presumption. The proposal to widen the scope of the presumption was made to address the above enforcement problem.

7. In response to Mr SIN Chung-kai's enquiry on the updated situation concerning the supply and use of illicit fuel, SSO/CED said that there had been a significant increase in the number of cases in 1999 over 1998. The amount of illicit fuel involved also increased from 5.23 million litres to 8.57 million litres.

8. Mr James TIEN enquired whether enforcement actions could be taken against vehicles which were waiting for the purchase of illicit fuel but not yet in the process of purchasing or receiving the fuel. DS/T responded that while the Bill sought to extend the presumption to a wider range of activities involving dealings with illicit fuel, it would be the court's decision as to whether individual cases fell within the activities stipulated in the Bill.

9. Mr SIN Chung-kai asked whether drivers found with a few cans of illicit fuel in their vehicles would be taken to court and what evidence would be required for conviction. SSO/CED responded that this would depend on the

type of illicit fuel involved. There were three principal types of illicit fuel, namely, marked oil, detreated oil and dutiable light diesel oil. As marked oil was designated for industrial and marine uses, unless the driver could prove that he was transporting the fuel for the permitted usage, he would be liable for the offence of dealing in illicit fuel. Detreated oil was marked oil with the colouring substance and marker removed or impeded illegally. It was therefore visually indistinguishable from ordinary light diesel oil unless tested in the laboratory. He pointed out that it was difficult to convict the offender under the existing legislation even though dutiable light diesel oil was found because the presumption of dutiability of the fuel could not be invoked unless the offender was caught red-handed transferring the fuel to the fuel tank. With the proposed extension in the scope of the presumption, the existing difficulties faced by enforcement staff could be resolved.

10. Miss Emily LAU pointed out that the use of illicit fuel with excessive sulphur content would generate vehicle emissions which would worsen the air quality in Hong Kong. She urged the Administration to step up enforcement actions against the supply and use of illicit fuel upon the enactment of the Bill so that air pollution from vehicle emissions could be reduced. She sought information on the financial and staff implication in this regard.

11. SSO/CED explained that CED had an action plan on the enforcement actions against supply and use of illicit fuel. During the first half of 1999, more resources were devoted to enforcement actions against illicit fuel supply stations, especially those located within the urban area, as these stations posed threats of fire hazards to their neighbourhood. During the second half of 1999, CED had allocated more resources to set up road blocks, sometimes with joint efforts of the Environmental Protection Department and the Police, to step up enforcement actions against users of illicit fuel. CED had a special task force with 24 officers who planned and headed the enforcement actions against organized activities involving the sale and supply of illicit fuel. There were over 300 CED officers undertaking patrol duties, checking the black spots for supply of illicit fuel and setting up road blocks for checking the fuel tanks of vehicles. Moreover, a team of 185 CED officers who were responsible for the enforcement actions against copyright piracy could also be deployed to take up enforcement actions against illicit fuel. As mentioned in the LegCo Brief, any additional workload arising from the proposals of the Bill would be absorbed by CED within its existing resources. There was no plan to increase manpower for enforcement at this stage. The extension in the scope of presumption and the new presumption on the dutiability of fuel with excessive sulphur content should have deterrent effect on activities relating to illicit fuel. CED could step up enforcement within its existing manpower provision.

12. Noting that the actual level of fines imposed for charges of purchase of illicit fuel in 1999 was only in the range of \$800 to \$2,000, the Chairman commented that the level of fines imposed might not be adequate to deter people from purchasing illicit fuel. Taking into consideration that such

offences not only led to revenue loss, but also caused environmental and fire hazards, he urged the Administration to consider putting in place a formula to calculate the appropriate level of penalty in relation to the volume of illicit fuel seized in each case. Mr SIN Chung-kai shared his view that the penalty provisions should carry sufficient deterrent effect. Based on the assumption that the driver of the vehicle committing the offence would fill up his fuel tank with illicit fuel, Mr SIN suggested that a formula linked to the volume of the fuel tank of a vehicle with illicit fuel should be used instead. Mr James TIEN shared their concern about the need for introducing an appropriate fine level for adequate deterrent effect against the use of illicit fuel. However, he considered that setting a mandatory minimum penalty level, say, at around \$4,000 to \$5,000, would be more effective and simple to apply. Miss Emily LAU expressed similar concerns about having sufficiently deterrent penalties to alleviate the environmental nuisance caused by the use of low quality illicit fuel. She urged the Administration to consider the proposal of setting a minimum fine level for offences relating to purchase and use of illicit fuel.

13. The Principal Assistant Secretary for the Treasury (PAS/T) explained that the concept of a maximum penalty level had long been adopted in DCO. The feasibility of members' proposal of setting a minimum fine level or introducing a penalty formula would need to be carefully considered, as this would undermine the autonomy of the court in determining the level of sentences having regard to all relevant circumstances of a particular case. The proposals would also have technical implications on other offences under DCO. DS/T added that the implementation of the proposals involved both legal and judicial technicalities. Nevertheless, he undertook to take members' views into consideration and explore the feasibility of the proposals with relevant parties.

14. Members noted that CED might apply for forfeiture of a vehicle involved in using illicit fuels, which was a power CED usually invoked for a vehicle involved in such offence for the second time. However, taxis were exempted as the Administration had accepted arguments put forward by the trade and the previous Legislative Council that the person who used illicit fuel might not be the owner of the taxi. To help members to consider appropriate penalty levels for offences relating to illicit fuel, the Chairman requested the Administration to provide statistics on the number of vehicles involving the use of illicit fuel and the number of vehicles forfeited in the past few years, with breakdown on the type of vehicles involved.

(Post-meeting note: The Administration's response to members' proposal of imposing minimum penalty and the statistics on the use of illicit fuel was circulated to members vide LC Paper No. CB(1)1638/99-00(01).)

Home-brewed liquors

15. The Chairman drew members' attention to the letter from the Administration which proposed a Committee Stage amendment (CSA) to section 17(4) of DCO. The LegCo Legal Service Division had raised a drafting point on this section. The Administration agreed to propose a CSA to clarify that home-manufacturing of spirit not involving distillation process was exempted from licensing controls and duty. The letter was tabled for members' consideration (LC Paper No. CB(1)1621/99-00).

16. While supporting the proposal to exempt home brewing of liquors which was not manufactured by way of distillation or for the purpose of sale from licensing and duty, Mr SIN Chung-kai expressed concern about the effects of home-brewed liquor on health. SSO/CED explained that as home brewing by way of distillation was prohibited under the proposed amendment, methanol, which was a toxic by-product of poorly controlled distillation, would not be generated in the home brewing process. As long as hygienic principles were strictly observed during the brewing process, home-brewed liquor would not cause any significant risk to human health. DS/T undertook to further consult relevant departments to confirm the effects of home-brewed liquor on health.

(Post-meeting note: The Administration's reply was circulated to members vide LC Paper No. CB(1)1638/99-00(01).)

17. Noting that many of the major trading partners of Hong Kong did not impose any licensing requirement or duty on home brewing and home-brewed liquor and that home brewing kits were available in supermarkets in these countries, the Chairman sought information on whether any control would be imposed on the sale of these home brewing kits in Hong Kong after the enactment of the Bill. SSO/CED replied that as these home brewing kits did not contain any spirit or liquor before they were bought and processed, they were not classified as dutiable commodities and thus would not be subject to the licensing requirement or duty under DCO.

18. Mr SIN Chung-kai sought clarification on whether a restaurant operator who offered self-brewed liquor to his customers free of charge could enjoy the same exemption given to home brewed liquor under the Bill. SSO/CED referred to the newly added section 64A(1) of DCO under clause 7 of the Bill which provided that the exemption was granted only to home brewing of liquor not by distillation "in premises which are used by the person exclusively as his place of residence and which constitute a separate household unit". Liquor manufactured or consumed in commercial premises such as a restaurant would not be exempted from the licensing or duty requirements.

Other technical amendments

19. The Assistant Legal Adviser (ALA) briefed members on her concern relating to the proposed amendment to section 6(1)(i) of DCO and the Administration's response set out in LC Paper No. CB(1)1593/99-00(03). She explained that the proposed amendment to section 6(1)(i) would give a general power to the Chief Executive (CE) in Council to make regulations for exempting any person from complying with or paying any duties under DCO. The regulations made would only be subject to negative vetting by LegCo. There was no express restriction on the scope of exemption nor any requirement for CE in Council to justify the exemption. It would reduce the power of LegCo to scrutinize any changes in respect of the scope of exemption of goods from duties. She cited a passage from *Constitutional and Administration Law* in which the authors pointed out that "the power to impose or vary taxation is, in general, too important to be delegated by Parliament". Further, there might be inconsistency between the proposed section 6(1)(i) of DCO and the existing section 4(2)(b) of the Ordinance.

20. Mr SIN Chung-kai commented that while he had no objection to the proposal of substituting the current provision prescribing the categories of goods that could be exempted from duty under section 6(1)(i) with a provision conferring a general regulation-making power to CE in Council, he disagreed with the proposal that such regulation would only be subject to negative vetting by LegCo. He pointed out that LegCo Members had great concern regarding taxation and duty exemption matters. He suggested that the regulations be subject to positive vetting by LegCo instead. Mr James TIEN shared his views.

21. The Chairman also expressed grave concern about the scrutiny of the regulations under the proposed amendments. He opined that he would rather preserve the current provision under section 6(1)(i) so that any changes made to the exemption would have to go through the legislative process of amending the main legislation. He strongly objected to any reduction in the power of LegCo to scrutinize changes in legislation relating to taxation and revenue.

22. PAS/T explained that the proposed amendment to section 6(1)(i) of DCO was meant to remove from DCO specific categories of goods, which would only be required to be set out in the Dutiable Commodities Regulations. Following the proposed amendment, LegCo could exercise its existing power of scrutiny over subsidiary legislation on all regulations made under the new section 6(1)(i). The same degree of scrutiny was accepted as sufficient for exemption orders made under the Inland Revenue Ordinance and the Rating Ordinance. As a normal practice, in specifying a commencement date for each regulation, the Administration usually allowed time for negative vetting by LegCo, except where an emergency required that the regulation came into immediate effect. The Administration would also issue a LegCo Brief on the

regulation before it was gazetted. This would in effect give prior notice to LegCo about the regulation.

23. The Senior Government Counsel pointed out that the proposed amendment was in fact consistent with the principles laid down in *Constitutional and Administrative Law*. The authors of the book had said that flexibility should be allowed in making regulations to modify, for example, rates of indirect taxation or customs duties, for the management of the economy. The regulation-making power under the proposed section 6(1)(i) was considered a flexible power to make regulations to modify customs duties rather than a power to impose or vary taxation. She also pointed out that there was a need to modify the categories of goods exempted under section 6(1)(i) from time to time to keep the legislation updated with economic development. As such, it would be preferable to simplify the legislative procedures involved in modifying the exemption list by removing the list from the main legislation.

24. DS/T added that as the proposed amendment conferred a general power to make regulation on CE in Council in relation to the exemption of prescribed categories of goods from duty but not the power to impose tax, the Administration considered the proposed mechanism appropriate. Nevertheless, he agreed to take into consideration members' concerns and to consider members' request for positive vetting of the regulations.

(Post-meeting note: The Administration agreed to introduce a CSA specifying that regulations made under the new section 6(1)(i) would be subject to positive vetting by LegCo. The Administration's reply was circulated to members' vide LC Paper No. CB(1)1638/99-00(01).)

III Any other business

25. Members agreed that the second and third meetings of the Bills Committee would be scheduled for Monday, 22 May 2000 and Tuesday, 23 May 2000 at 2:30 pm respectively.

(Post-meeting note: The third meeting of the Bills Committee was re-scheduled for Friday, 2 June 2000 at 12:45 pm.)

26. There being no other business, the meeting ended at 4:00 pm.