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**Paper for the House Committee meeting
on 16 June 2000**

**Report of the Bills Committee on
Dutiable Commodities (Amendment) Bill 1999**

Purpose

This paper reports on the deliberations of the Bills Committee on Dutiable Commodities (Amendment) Bill 1999 (“the Bill”).

Background

2. In recent years, there has been a noticeable increase in the supply of illicit fuel for use in motor vehicles. The problem has not only led to revenue loss but has also caused environmental pollution and fire hazards in premises used for the storage and supply of illicit fuel.

3. In accordance with the Dutiable Commodities Ordinance (Cap. 109) (“the Ordinance”) and its relevant Regulations, it is an offence to supply or purchase dutiable light diesel oil, petrol and detreated oil or to supply or use marked oil as fuel in motor vehicles. However, under the existing presumption provisions in section 40(c) of the Ordinance, the Customs and Excise Department (C&ED) has difficulties in taking prosecution action against the supply, sale and use of illicit fuel. The Administration therefore proposes to add presumptions to the Ordinance to facilitate enforcement action by C&ED.

The Bill

4. The Bill seeks to amend the Dutiable Commodities Ordinance (Cap.109):

- to strengthen the enforcement efforts by extending the scope of presumptions;

- to increase the penalty for offences relating to use of illicit fuel in vehicles or pleasure vessels; and
- 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.

The Administration also takes this opportunity to make some technical amendments to the Ordinance.

The Bills Committee

5. At the meeting of the House Committee on 19 November 1999, Members decided to form a Bills Committee to study the Bill. At the first meeting of the Bills Committee on 16 May 2000, Hon James TO Kun-sun was elected Chairman. The membership list of the Bills Committee is at **Appendix I**. The Bills Committee has held three meetings to exchange views with the Administration on the details of the Bill.

Deliberation of the Bills Committee

6. The Bills Committee is in support of strengthening the enforcement efforts of the Administration to combat supply and use of illicit fuel as well as increasing the existing penalty for the related offences. Members also agree to relax control on home brewing. For the technical amendments, the Bills Committee is in agreement with most of the proposals made by the Administration.

7. The Bills Committee has examined closely the statistics on prosecution provided by the Administration in respect of the supply and use of illicit fuel and studied in detail the effectiveness of the proposed measures to defer commitment of the illicit fuel-related offences, particularly the increased penalty levels for the related offences. In the course of deliberation, members have also taken into consideration the concern of the transport trade. A gist of the deliberations of the Bills Committee is given in the following paragraphs.

Proposed expansion of the presumption provisions

8. At present, C&ED can only rely on section 40(c) of the Dutiable Commodities Ordinance to institute a prosecution against supply, sale and use of illicit diesel oil or petrol. However, the presumption provision in this section can only be invoked if a person is caught transferring light diesel oil or petrol to or from a vehicle's fuel tank at locations other than the licensed premises. 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. To address the enforcement difficulties, the Administration proposes in the current Bill an expansion of the scope of the presumption provision in section 40(c) of the Ordinance so that it can be invoked if a person is found to be selling, supplying, buying, receiving or otherwise dealing in light diesel oil or petrol outside licensed premises. The Bills Committee unanimously supports this proposal to strengthen enforcement actions.

9. As regards the other proposal to add a presumption about dutiability of fuel in the fuel tanks of vehicles based on sulphur content test, the Bills Committee notes that this is the method employed by C&ED on the spot to detect detreated oil, as 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%. The Bills Committee considers that the Administration should conduct prior consultation with the transport trade on the proposal. Members are concerned that if the fuel found in the fuel tank of a vehicle has a sulphur content higher than the specified standard, the driver who may have no knowledge about the source of the vehicular fuel in question, will be exposed to the risk of criminal liability.

10. The Administration accepts members' view that the presumption should not be added unless the trade has established a proper record-keeping system which can help them demonstrate the extent of their knowledge about the source of illicit fuel. As it is impracticable for the Administration to complete a thorough consultation with the transport trade in time for the legislation to be enacted before the end of the current legislative session, the Bills Committee has agreed to the suggestion of the Administration that a CSA should be moved to delete the proposed presumption in order that the Bill could be enacted as soon as possible. The Administration has undertaken to immediately proceed with the discussion with the transport trade on the proposal, in particular, the mechanism in keeping record of the purchase of fuel used in the vehicle, with a view to reintroducing the presumption provision expeditiously in the next legislative session.

Penalty level

11. 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 two years while the maximum penalty for supply or purchase of dutiable light diesel oil is \$1,000,000 and imprisonment for two years. The Bills Committee is in support of the current proposal to rectify this discrepancy by increasing the maximum penalty for offences in relation of marked oil and detreated oil to a fine of \$1,000,000 and imprisonment for two years.

12. The Bills Committee however has noted from the statistics in 1999 that for purchasers of illicit fuel, the actual level of fines imposed for charges of this nature was only in the range of \$800 to \$2,000. For charges laid against suppliers of illicit fuel, 457 out of 663 charges resulted in fines. Of these 457 charges, the level of fines imposed on each convicted supplier was less than \$5,000. Members are therefore concerned about the deterrent effect of the penalty.

13. The Administration agrees with the Bills Committee that the penalty provisions for offences relating to illicit fuel should carry sufficient deterrent effect, since they not only lead to revenue loss, but also cause environmental and fire hazards. However, on the possibility of setting a mandatory minimum penalty level or introducing a penalty formula linked to the volume of the fuel tank of a vehicle with illicit fuel or the volume of illicit fuel seized, the Administration holds the view that such an arrangement will undermine the autonomy of the court in determining the level of sentences having regard to all relevant circumstances of a particular case.

14. To strike a balance between the need to provide a penalty with sufficient deterrent effect and the need to uphold the autonomy of the court, the Administration has proposed to move Committee Stage amendments (CSAs) to add the penalty provisions of disqualifying a person who has been repeatedly convicted of carrying or using illicit fuel with the use of a vehicle from holding his driving licence for a period of not less than six months. The provisions will also provide that the court or magistrate can, for special reasons, order that the person concerned be disqualified for a shorter period or that he not be disqualified. If the last previous conviction took place five years ago and beyond, the offence in question would be regarded as if it were the first offence. The Bills Committee basically accepts the additional penalty provisions. However, to address members' concern that a disqualification period of not less than six months could be too severe in the case of a second conviction, the Administration will revise its CSAs to the effect that the disqualification period for a person who has once been convicted of the "disqualifiable offence" be six months while in the case of a third or subsequent conviction, the period remains to be not less than six months.

Home-brewed liquors

15. The Bills Committee is in support of the current proposal to exempt home brewing of liquors which is not manufactured by way of distillation nor for the purpose of sale, from licencing and duty. However, some members are concerned about the effects of home-brewed liquor on health. In this respect, the Administration has confirmed, upon consultation with the Food and Environmental Hygiene Department and the Department of Health, that home-brewed alcoholic liquor will not cause any significant risk to human health as long as the hygienic principles are strictly observed during the brewing process.

16. The Bills Committee has noted that under the proposed added section 64A(2)(c)(i), a licence is not required for home brewing unless the alcoholic liquor so manufactured is stored in sealed containers marked legibly at least 4 mm high the words “Home Brewed, Not for Sale” or “家中自釀、不得售賣”. The Bills Committee is of the view that there is no need to specify in the Bill the exact wordings to be marked on the containers of home-brewed liquors, otherwise home-makers who do not use the exact words but adopt phrases of the same meaning might inadvertently commit an offence. The Administration has agreed to move a CSA to the effect that home-brewed liquor is required to be stored in sealed containers marked legibly the words “Home Brewed, Not for Sale” or words to the same effect.

17. As regards home-manufacturing of spirit which does not involve distillation process, the Bills Committee has noted a potential conflict between section 17(4) of the Ordinance which requires a licence for the manufacture of spirit and the proposed amendment under the Bill. To clarify the legislative intent, the Administration will move a CSA to specify that home-brewed liquor not involving distillation is exempted from section 17(4) of the Ordinance.

Regulations made under section 6(1)(i) of the Ordinance

18. 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 the Dutiable Commodities Regulations. Under the current proposal, the section will be substituted with a provision conferring a general regulation-making power on the Chief Executive in Council and the regulations made will be subject to negative vetting of the Legislative Council. The Bills Committee considers that the proposed amendment will reduce the power of the Legislative Council to scrutinize any changes in respect of the scope of exemption of goods. Upon the request of the Bills Committee, the Administration has agreed to introduce a CSA specifying that regulations made under the new section 6(1)(i) will be subject to positive vetting by the Legislative Council.

Committee Stage amendments

19. A full set of the CSAs to be moved by the Administration is at **Appendix II**. The Bills Committee has not proposed any CSAs.

Recommendation

20. The Bills Committee recommends that, subject to the CSAs to be moved by the Administration, the Second Reading debate on the Bill be resumed on 26 June 2000.

Advice sought

21. Members are invited to note the deliberations of the Bills Committee and support the recommendation in paragraph 20 above.

Prepared by
Council Business Division 1
Legislative Council Secretariat
13 June 2000

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

Membership list
(as at 16 May 2000)

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 Mrs Miriam LAU Kin-ye, JP
Hon Emily LAU Wai-hing, JP

Total : 9 Members

DUTIABLE COMMODITIES (AMENDMENT) BILL 1999

COMMITTEE STAGE

Amendments to be moved by the Secretary for the Treasury

Clause

Amendment Proposed

- 2 (a) By renumbering the clause as clause 2(1).
(b) By adding -

“(2) Section 6(4) is repealed and the following substituted -

“(4) Any regulation made by the Chief Executive in Council -

(a) on the matter stated in subsection (1) (i); or

(b) in exercise of the powers conferred by subsection

(3),

shall be subject to the approval of the Legislative Council.”.”.

- 3 (a) By renumbering the clause as clause 3(1).
(b) By adding -

“(2) Section 17(4) is amended by repealing “No” and substituting

“Subject to section 64A, no”.”.

4 By deleting paragraph (b) -

New By adding -

“5A. Section added

The following is added before section 46A -

**“46AA. Disqualification order for
hydrocarbon oil offences**

(1) This section applies to any offence -

(a) under section 17(1) or (6) in respect of hydrocarbon oil; or

(b) under regulation 5A, 5B or 9 of the Dutiable Commodities (Marking and Colouring of Hydrocarbon Oil) Regulations (Cap. 109 sub. leg.),

if the person concerned commits the offence in respect of hydrocarbon oil in the fuel tank of a vehicle used by the person or if the person concerned uses a vehicle in the course of commission of the offence. An offence to which this section applies is referred to in this section as a “relevant offence”.

(2) The court or magistrate, on convicting a person of a relevant offence, shall order the person to be disqualified for

a period of -

- (a) 6 months, if the person has one previous conviction of any relevant offence;
- (b) not less than 6 months, if the person has two or more previous convictions of any relevant offences,

whether the present and previous convictions relate to offences under the same provision or under two or more different provisions referred to in subsection (1). This subsection does not apply to a previous conviction of an offence that was committed before the commencement of section 5A of the Dutiable Commodities (Amendment) Ordinance 1999 (of 1999).

(3) An order of disqualification under this section may be taken into account in determining any other penalty for the offence.

(4) The court or magistrate may deal with an offence as a first offence if a period of 5 years has elapsed since the person's last conviction of any relevant offence.

(5) If satisfied that there are special reasons for doing so, the court or magistrate

may order that a person to which subsection (2) applies to be disqualified for a period shorter than 6 months or that the person not be disqualified.

(6) The following provisions apply to disqualification under this section as they apply to disqualification under the Road Traffic Ordinance (Cap. 374), namely -

- (a) (i) section 44 (offence of obtaining licence, or driving, while disqualified);
- (ii) section 71 (notification and effect of, and appeal against, disqualification);
- (iii) section 72 (removal of disqualification)

(except that a reference in subsection (5) of that section to the Commissioner of Police shall be treated as a

reference to the Commissioner of Customs

and Excise); and

(iv) section 111 (forgery of documents),

of the Road Traffic Ordinance (Cap. 374); and

(b) (i) regulation 6 (restrictions on issue of

driving licences);

(ii) regulation 10 (applications for full driving

licences);

(iii) regulation 12B (application to take a

motor cycle driving test);

(iv) regulation 31 (application to take a driving

test);

(v) regulation 35 (procedure on

disqualification);

(vi) regulation 37 (visiting drivers from abroad);

(vii) regulation 38 (application of other provisions to visiting drivers);

(viii) regulation 39 (record of driving licences and permits);

(ix) regulation 45 (appeals); and

(x) the Seventh Schedule (particulars of record),

of the Road Traffic (Driving Licences) Regulations (Cap. 374 sub. leg.).

(7) The power to order disqualification under this section does not affect the power to order disqualification under any other Ordinance.

(8) In any proceedings for a relevant offence, a certificate stating -

(a) that the person named in it was convicted of the relevant

offence specified in it and whether the person committed the offence in respect of hydrocarbon oil in the fuel tank of a vehicle used by the person or the person concerned used a vehicle in the course of commission of the offence;

- (b) the date on which the person was so convicted; and
- (c) the date of the commission of that offence,

and purporting to be signed by or on behalf of the Commissioner shall be admitted in evidence for the purpose of this section on its production without further proof; and -

- (i) until the contrary is proved, the court or magistrate shall presume that the certificate is so signed; and
- (ii) the certificate shall be prima facie evidence of the facts stated therein.

(9) In this section -

“disqualified” (取消駕駛資格) means disqualified from holding or obtaining a driving

licence;

“driving licence” (駕駛執照) means a driving licence issued under the Road Traffic Ordinance (Cap. 374);

“special reasons” (特別理由) means -

(a) special reasons that relate to the offence; or

(b) in exceptional circumstances, special reasons that relate to the offender or to such other circumstance as the court or magistrate may consider relevant.”.”.

7 By deleting the proposed section 64A(2) (c) (i) and substituting -

“(i) Is stored in sealed containers marked legibly the words “Home Brewed, Not for Sale” or “家中自釀，不得售賣” or words to the same effect; or”.

9 (a) By renumbering the clause as clause 9(1).

(b) By deleting subclause (1)(a) and substituting -

“(a) by repealing paragraph (e) and substituting -

“(e) goods, other than alcoholic liquor or tobacco, imported of

their own use and in their baggage by passengers or crew members of any ship, aircraft, train or vehicle in such quantities as the Commissioner may, by notice published in the Gazette, determine;”;

(c) In subclause (1)(b), in the proposed regulation 12(1) (ea) (ii), by deleting “may determine and publish in the Gazette” and substituting “may, by notice published in the Gazette, determine”.

(d) In subclause (1) (c), by deleting the proposed regulation 12(1) (ga) (iii) (A), and substituting -

“(A) stored in sealed containers marked legibly the words “Home Brewed, Not for Sale” or “家中自釀，不得售賣” or words to the same effect; or “.

(e) By adding -

“(2) Regulation 12 is amended by adding -

“(1A) For the avoidance of doubt, it is declared that a notice under subregulation (1) (e) or (ea) (ii) is subsidiary legislation.“.