# TC02002

**Appeal number: TC/2010/03125**

***Excise duty – fuel duty – Hydrocarbon Oils Duties Act 1979 s 6A – fuel substitutes – £11,044 assessment and £250 penalty imposed in respect of unpaid duty and failure to produce records – Appellant alleging it sold cleaned, filtered, polished waste vegetable oil and not fuel – whether there had been a "setting aside for chargeable use" of the product – consideration of meaning of "setting aside" – held in this case that addition of Dipentene to the product with the stated aim of enhancing its Cetane value amounted to such setting aside – appeal dismissed***

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**BIO POWER (UK) LIMITED** **Appellant**

**-and-**

**THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS** **Respondents**

**TRIBUNAL**: **JUDGE KEVIN POOLE**
**TERRY BAYLISS FFA FAIA**

**Sitting in public in Phoenix House, Newhall Street, Birmingham on 3 November 2011 and 16 April 2012**

**Colin Friedlos, Director for the Appellant**

**Vinesh Mandalia of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents**

DECISION

## Introduction

1. This appeal mainly concerns an assessment for excise duty under the Hydrocarbon Oil Duties Act 1979 ("HODA79") on the setting aside by the Appellant for chargeable use of a liquid which HMRC consider to be a fuel substitute. There is also an appeal against an associated penalty for failure to produce records.

2. The Appellant maintains that what it was supplying was not a "finished product" to be used as a fuel, it was merely an ingredient which a buyer could put to a number of possible uses, including to make his own fuel (if he so wished).

3. The appeal effectively turns on the question of what amounts to "setting aside" a liquid for use as a fuel or fuel additive/extender.

## Preliminary application

4. On behalf of the Appellant, Mr Friedlos asked us to exclude the amended skeleton argument served by HMRC on the grounds that it was only served on 4 April 2012, two days later than required pursuant to the directions given at the hearing on 3 November 2011.

5. We observed that if there was any remedy for late service of the skeleton argument, it was to be found only in an adjournment of the hearing and a possible penalty in consequent costs for HMRC. We did not however consider that the Appellant had been materially prejudiced by the late service of the revised skeleton argument, which contained no significant new material beyond that which either (a) had been contained in the original skeleton argument provided for the purposes of the 3 November 2011 hearing, or (b) was obvious from the course of correspondence between the parties leading up to the hearing of the appeal. The amendments to the skeleton argument were not such as to require HMRC's statement of case to be amended.

6. We therefore rejected the application to exclude the revised skeleton argument and did not consider it appropriate to further adjourn the hearing (one adjournment having already taken place on 3 November 2011).

## The evidence

7. We received written statements from the following individuals on behalf of HMRC:

(1) HMRC officer Ajmal Dad, who was carrying out a detection exercise at a filling station in Coventry on 7 April 2009 to counter fuel duty evasion and who also attended a visit to the Appellant's premises the following day.

(2) HMRC officer Ian Warren, who attended the visit at the Appellant's premises on 8 April 2009.

(3) HMRC officer James Michie, who entered into correspondence with the Appellant from 25 June 2009, ultimately issuing the assessment which is the subject of this appeal on 9 October 2009.

(4) HMRC officer Geoff Riley, who corresponded with the Appellant from 14 August 2009 in connection mainly with policy issues raised by the Appellant in this appeal.

(5) HMRC officer Carol Kunderan, who acted as HMRC's reviewing officer in relation to officer Michie's decision to assess the Appellant.

(6) Tony Gradwell of HMRC, an expert in chemistry, who is HMRC's Trade Sector Adviser for Chemicals, Pharmaceuticals and General Manufacturing.

(7) Rattanjit Singh Gill, a forensic scientist at LGC Limited (the laboratory that analysed the samples involved in this appeal).

8. We heard oral testimony from Mr Colin Friedlos, a director of the Appellant, and from all the HMRC witnesses listed above, apart from Officers Riley and Kunderan.

## The facts

9. There was very little dispute about the primary facts, which we find as follows.

10. On 7 April 2009 HMRC were conducting a road fuel duty evasion detection exercise at a retail filling station in Coventry. They stopped an individual who they saw buying some kerosene. They took a sample from the fuel system of his vehicle, which tested positive for rebated fuel.

11. They interviewed the driver, who told them he had purchased "Green Bio Diesel" from a man at Lower Farm in Nuneaton and had not been provided with a receipt. He had made purchases totalling 240 litres at four to five week intervals, at a price of 75p per litre.

12. We should emphasise at this point that there was no evidence or suggestion that the rebated fuel in that vehicle originated from the Appellant. The implication was that rebated fuel had been mixed in the tank with product supplied by the Appellant.

13. Following this interview HMRC visited the premises identified by the driver, namely the Appellant's premises at Lower Farm in Nuneaton, the following day.

14. They interviewed Mr Friedlos and took samples of three liquids.

15. In the interview, Mr Friedlos explained the Appellant's business process. Officer Dad took a written note, which Mr Friedlos countersigned as accurate after some changes were made to it at his request. The relevant part of the note reads as follows:

"Colin Friedlos…. explained the process of ~~fuel production~~ cleaned process oil[1].

1. Waste oil is collected from various restaurants.
2. The waste oil is then pumped into IBC[2] settlement chambers which are then raised.
3. The waste oil is allowed to heat naturally for 1 week to 10 days.
4. Waste oil is then allowed to be gravity fed into 45 gallon drums.
5. Depentine[3] is then added (250 ml) to boost the Cetane value.
6. A blue dye is then added which is an aesthetic measure to turn the fuel green. Bought from eBay.
7. People then buy the final products. Mr Friedlos said that he fuels the vehicle with a watering can or they fill up their own drums."

16. The three samples which HMRC took were as follows:

(1) A sample of a green liquid from a container which Mr Friedlos described as the final product which the Appellant sold to customers.

(2) A sample of a blue liquid from a 1 litre bottle described as containing Dipentene.

(3) A sample of another blue liquid described as a dye.

17. The samples were sent for analysis at LGC Forensics (formerly the Laboratory of the Government Chemist).

18. They reported that the green liquid consisted of 89% vegetable oil with a maximum total ester content of 94%. A blue dye was also present. The Appellant has not disputed this analysis. The total ester content was too low to satisfy the definition of "biodiesel" in HODA 79.

19. They reported that the other two samples were both blue dye concentrates, of almost identical chemical composition, but one of them was approximately 100 times more concentrated than the other. They also expressed the opinion that the blue dye in the green liquid and in the sample taken from the vehicle's fuel system in Coventry on 7 April 2009 were "very similar" to the blue dye concentrates.

20. Mr Gradwell gave evidence (which was not challenged by the Appellant, and which we accept) to the effect that "Cetane value" is an expression particular to fuel for diesel engines; it refers to a measurement of how efficiently a fuel burns in a diesel engine (akin to octane ratings for petrol). Given that Mr Friedlos had said he added Dipentene to improve the Cetane value, Mr Gradwell could not think of any other purpose for adding it; nor was it clear to him what other purpose there could be for enhancing the Cetane value, apart from using the liquid in question as fuel.

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[1] The words "fuel production" were struck through and replaced by the words "cleaned process oil" at the request of Mr Friedlos. Both Mr Friedlos and officer Warren initialled the amendment.

[2] Intermediate Bulk Container

[3] The correct spelling is Dipentene

21. The Appellant had been registered as a fuel producer under the Biofuels and Other Fuel Substances (Payment of Excise Duties, etc) Regulations 2004 ("the 2004 Regulations") since 5 December 2005. Up until 31 May 2007 it had declared and paid duty on the production of fuel at the biodiesel rate, but since then it had declared no production and paid no duty.

22. On 17 July 2009 Mr Michie wrote to Mr Friedlos asking for the production and sale records from 1 June 2007 to 8 April 2008 *[sic]* and asking for other information concerning the production and use of what he referred to as the "fuel".

23. In his reply dated 22 July 2009, Mr Friedlos confirmed that:

> "I produce about 200 litres per week of cleaned, filtered and polished vegetable oil derived from used cooking oil… I do not produce a 'finished fuel' I merely produce a product that can then be used to make an 'environmentally friendly' biofuel, one example is by transesterifaction etc, it is sold on this basis and therefore I maintain that no duty is payable on this vegetable oil".

24. In the same letter, he went on to say that:

> "I do indeed hold accurate sales and purchase records for these dates, but as I maintain that as I do not actually produce any 'finished fuel', these details will be withheld from you until at the very least you have replied in a satisfactory and lawful manner to this letter."

25. Following further correspondence, Officer Michie wrote to the Appellant on 27 August 2009, repeating his request for records and warning of the possibility of a £250 penalty in the event of non-compliance. After a further letter from Mr Friedlos, he wrote again on 9 September 2009, warning that a penalty would be imposed if the records were not delivered by 25 September 2009.

26. By letter dated 1 October 2009, the Appellant responded to HMRC's request for records as follows:

> "I am pleased to submit the following information:
>
> 1. My production and sales records for the production of biodiesel as a finished product from 1 June till 8th April ~~2008~~ 2009.
>
> *The total is nil*"

27. In the same letter, he replied to the question "Has all of your production been set aside or used as road fuel?" as follows:

> *"My production has been set aside for the purchaser to use as they see fit, If they convert my filtered, polished vegetable oil as road fuel by whatever means, then it is their obligation to submit returns if their production exceeds the 2500 litres limit for personal road use."*

28. Mr Michie then wrote again to the Appellant on 9 October 2009, enclosing a formal assessment in respect of what HMRC regarded as the unpaid excise duty and a civil penalty of £250 in respect of the non-production of the required records.

29. The duty assessment (£11,044.00) was calculated on the basis of Mr Friedlos's estimated figure of 200 litres per week over the relevant period, applying the rates of duty from time to time applicable to fuel substitutes under section 6A HODA 79. The Appellant has taken no issue with the calculation of the assessment; it argues solely that the assessment is wholly invalid because it never produced "finished fuel".

30. Following a review of Mr Michie's decision, it was upheld by Officer Kunderan by letter dated 9 January 2010. This appeal was then notified to the Tribunal by the Appellant by notice of appeal dated 25 March 2010. HMRC consented to the appeal being notified late.

31. The appeal was first listed for hearing on 3 November 2011. Mr Friedlos did not attend, nor was the Appellant represented by any other person. The appeal was adjourned on that day because HMRC were unable to provide evidence to show that the liquid sold by the Appellant was not a "hydrocarbon oil", therefore they were unable to establish that it fell within section 6A HODA 79.

32. The evidence of Mr Gradwell was subsequently produced by HMRC to address this point. At the adjourned hearing on 16 April 2012, Mr Friedlos attended and confirmed he agreed that the substance the Appellant sold was not a "hydrocarbon oil" and therefore the evidence of Mr Gradwell to that effect was not required (except to confirm for the benefit of the Tribunal and the Appellant the correctness of Mr Friedlos's concession on this point).

**The law**

33. The main relevant charging section is section 6A HODA 79, which at all material times read as follows:

> "**6A Fuel Substitutes**
>
> (1) A duty of excise shall be charged on the setting aside for a chargeable use by any person, or (where it has not already been charged under this section) on the chargeable use by any person, of any liquid which is not –
>
> (a) hydrocarbon oil,
>
> (b) biodiesel,
>
> (c) bioblend,
>
> (d) bioethanol, or
>
> (e) bioethanol blend.

(2) In this section "chargeable use" in relation to any substance means the use of that substance –

(a) as fuel for any engine, motor or other machinery, or

(b) as an additive or extender in any substance so used."

34. Various provisions of The Biofuels and Other Fuel Substitutes (Payment of Excise Duties etc) Regulations 2004 ("the 2004 Regulations"), the Customs & Excise Management Act 1979 ("CEMA 79") and the Finance Act 1994 ("FA 94") are, so far as relevant and as they applied at all material times, set out in the schedule to this decision.

**Submissions of the parties**

*The £11,044 duty assessment*

*(a) HMRC's submissions*

35. On behalf of HMRC Mr Mandalia submitted that:

(1) The liquid which the Appellant had admittedly produced and sold was suitable for use as vehicle fuel and/or as an additive or extender for vehicle fuel. This could clearly be seen from the fact that Mr Friedlos had admitted pouring it directly into vehicle fuel tanks for immediate use, and providing facilities for purchasers of the product to do so themselves.

(2) The liquid did not fall within the definition of any of the products referred to in section 6A(1)(a) to (e) HODA 79. As such, any "setting aside" of the liquid for a chargeable use would be dutiable under section 6A HODA 79, to the exclusion of any other charging provision.

(3) The liquid had been produced and sold specifically for the purpose of use as a fuel or fuel additive/extender. The surrounding circumstances made it clear that this was the case, and as a matter of fact the liquid was so used. The addition of Dipentene, specifically as a Cetane value enhancer, could have no other purpose.

(4) Accordingly the Appellant had plainly "set aside" the liquid for use as a fuel or fuel additive/extender for diesel engines and therefore a charge arose under section 6A HODA 79, which the Appellant was liable to pay under regulation 18 of the 2004 Regulations.

*(b) Appellant's submissions*

36. On behalf of the Appellant, Mr Friedlos submitted that the liquid which it produced and sold was not "finished fuel" but instead was an ingredient or raw material which could be used by its purchasers for any one of a number of purposes, including the making of crafted soaps, as an additive to animal feeds, or as "a

condiment used in connection with horses" (which we take to mean the flavouring of horse feed). One of the purposes for which it could be used was as a raw material in the manufacture of biodiesel. It was at no stage "described, advertised or promoted as finished motor fuel".

37. Accordingly, he submitted, the Appellant should not liable for duty on production of fuel substitute because it had never actually produced anything sold for that purpose.

*The £250 penalty for non-production of records*

*(a) HMRC's submissions*

38. Mr Mandalia on behalf of HMRC submitted that the Appellant, having set aside the liquid for use as a fuel or fuel additive/extender, was clearly a "producer" within regulation 13 of the 2004 Regulations. As such, it was required by regulation 13 of those Regulations to keep the records referred to in the Schedule to them.

39. The Appellant's activities therefore clearly made it a "revenue trader" within the meaning of section 1 CEMA 79. As such, it was under the duties to keep and produce the records (including the records required under regulation 13 of the 2004 Regulations) under sections 118A and 118B of that Act. Section 118G of that Act subjected it to a penalty under section 9 FA 94 for any non-compliance with these obligations.

40. Section 9 FA 94 therefore provided authority for the imposition of the £250 penalty imposed in this case. The Appellant had not argued there was any reasonable excuse under section 10 FA 94 for its failure to produce the records and no such excuse could, on the facts of the case, be made out. The penalty should therefore be confirmed.

*(b) Appellant's submissions*

41. Mr Friedlos did not dispute that if the Appellant was a "producer" within the meaning of the 2004 Regulations it would be required to keep the records referred to in regulation 13 of those Regulations. It had previously been such a producer, but during the relevant period he maintained that it no longer was.

42. He also did not dispute that if the Appellant was a "revenue trader" under sections 118A and 118B CEMA 79, it would have been required to produce to HMRC the records it had kept pursuant to the 2004 Regulations, under pain of a penalty under section FA 94 for non-compliance. It had previously been such a revenue trader, but during the relevant period he maintained that it no longer was. This was because, not being a "producer" under the 2004 Regulations, it no longer fell within the definition of "revenue trader" in CEMA 79.

**Evaluation of submissions and decision**

*Introduction*

43. The sole issue in relation to the £11,044 duty assessment was therefore whether the Appellant had set aside the liquid in question for use as a fuel for a diesel engine (or for use as an additive or extender for such fuel).

44. The sole issue in relation to the £250 penalty assessment was whether the Appellant was still a "producer" under the 2004 Regulations at the relevant times. This depended on whether the Appellant had "set aside biofuel for a chargeable use" or "made a chargeable use of biofuel with the consequence that biofuels duty is charged" during the period 1 June 2007 to 8 April 2008 (the period for which Mr Michie had requested records).

45. Thus the grounds for the Appellant's appeal against the imposition of the £250 penalty were effectively the same as its grounds of appeal against the fuel duty assessment.

46. The key question to be determined, therefore, is whether the Appellant had "set aside" the liquid in question for a "chargeable use".

*What amounts to "setting aside" for chargeable use?*

47. The concept of "setting aside" is an elusive one. Neither party referred us to any authority on the meaning of the phrase, nor have we found any authority through our own researches. The phrase must therefore be given its ordinary meaning.

48. The Oxford English Dictionary gives a number of definitions for the phrase "so set aside" in various different contexts, the most relevant of which for present purposes is "to separate out for a particular purpose".

49. This highlights the fact that the concept of "setting aside" involves two interlinked elements, some kind of separation and an underlying purpose for that separation.

50. A simple example provides an illustration. A distributor of goods operates a warehouse. A customer places an order for some goods. The distributor happens to have the precise quantity of goods the customer requires, no more and no less. The distributor has a computer system which includes a sophisticated stock control module. When the order is input into that system, it allocates the relevant goods to the customer. A pick list is automatically generated and sent to the warehouse operatives, who pick the stock from the warehouse shelves and place it on a pallet in the warehouse loading bay. A delivery vehicle then uplifts the load and delivers it to the customer.

51. In this example, at what point are the goods "set aside" for delivery to the customer? Clearly by the time the delivery vehicle leaves with the goods, that setting aside has taken place. We would consider that the actions of the warehouse operatives in picking the goods from the storage shelves and palletising them in the

loading bay would most certainly amount to "setting aside" the goods for delivery, but the question arises as to whether the earlier allocation of the goods to the customer on the distributor's computer system can be said to amount to a "setting aside" of the goods.

52. This could only be the case if the allocation of the goods to the customer in the distributor's computer system was a sufficient "separation" of those goods from the remaining stock in the warehouse.

53. The question of what is a sufficient separation for these purposes must, in our view, depend at least in part upon the nature of the things being separated. In the case of intangible goods such as money (excluding bank notes and coins), their basic nature precludes any physical separation. Thus a notional allocation taking place by way of entries in accounts or computer systems may well be sufficient separation – such as the creation of a reserve in a company's accounts against a particular contingency. It would be consistent with normal English usage to say that the relevant amount has been "set aside" as a reserve against the particular contingency.

54. But for tangible goods, we consider that something more than mere allocation (either in the mind of an individual or in a computer system) is required before those goods can properly be said to have been "set aside" for the relevant purpose. The phrase "set aside" must, in our view, connote something physical done in relation to the goods.

55. One approach might be to say that the goods must be physically moved pursuant to the intended purpose before they can be said to have been "set aside" for it. We consider however that this goes too far. In our example, consider the situation if the goods had been previously ordered by another customer, whose order had been cancelled at the last minute after the goods had been palletised and placed in the load bay ready for delivery. When the new order was received, the goods were still there so that they did not need to be moved, all that was required was that they be re-labelled for delivery to the new customer. We consider that in normal English usage those goods would clearly be "set aside" for the new customer when they were re-labelled, regardless of whether they were physically moved or not.

56. This illustrates that simple physical movement cannot be the universally correct test, though in appropriate circumstances it may be.

57. We do however consider that the words "set aside", when applied to tangible goods, necessarily imply some physical act which has some discernible effect on the goods when examined in their surroundings at the time.

58. In the above example, it would be irrelevant whether the label was actually affixed to the goods themselves or clearly physically identified them in some other way when the goods were examined in situ – e.g. by being attached to a storage location in which the goods were housed. We consider that any act which physically earmarks or identifies the goods can provide the necessary "separation" element for being "set aside", as long as that act is done for the relevant purpose.

59. So, in our warehouse example, the re-labelling of the goods amounts in our view to an act of physically earmarking or identifying the goods as being allocated for delivery to the new customer. That act is done for the purpose of delivering the goods to the new customer in satisfaction of his order. The main purpose of the re-labelling is plainly to allocate the goods for the purpose of delivery to the new customer. That re-labelling therefore amounts to "setting aside" those goods for delivery to the new customer, even though it also has a subsidiary effect of "working through" the consequences of the cancellation of the previous order.

60. It is important to recognise that it is the separation of the goods *for the particular purpose* that amounts to setting them aside. So in our original example, let us assume the order had been received and entered into the computer system but before a warehouse operative received and acted on the pick list instruction, it was decided that the goods needed to be moved to a different storage location in order to utilise the warehouse space more efficiently. Even though the distributor has received and entered the order for the goods on its computer system, it is clear that the reason for moving them is nothing to do with the fulfilment of that order and therefore the movement of the goods does not amount to "setting aside" the goods for delivery to the customer.

*Have the goods in this case been set aside for a chargeable use?*

61. Applying these principles to the facts of this case, HMRC must establish on a balance of probabilities that the liquid was set aside for use as fuel for any engine, motor or other machinery (or as an additive or extender to such fuel). Thus the "purpose" to be established is "for use as fuel..." etc and some form of separation for that purpose must be shown.

62. In relation to a small and unquantified proportion of the total goods, there is evidence that Mr Friedlos (on behalf of the Appellant) actually placed the liquid in the customer's vehicle fuel tank. That action, viewed in isolation, would in our view clearly amount to "setting aside" the relevant goods "for use as fuel..." etc. However, there is no evidence of how much fuel was dealt with in this way and on any view it would be insufficient to justify the raising of an assessment on the whole of the Appellant's production of liquid.

63. We must therefore consider whether there has been any other act which could amount to a "setting aside" for the relevant purpose.

64. Here we consider the Appellant's addition of Dipentene to the liquid with the stated aim of enhancing its Cetane value. Whether or not it actually had that effect, it seems to us that the addition of the Dipentene with that aim amounted to an act which (a) had a physical effect on the goods to which the addition was made (thus identifying them as goods whose Cetane value was intended to be enhanced) and (b) was done for a particular purpose, namely that the liquid should ultimately be used as fuel (or as an additive or extender for fuel) for diesel engines – no other possible purpose for adding the Dipentene was suggested.

65. It follows that we consider a charge to fuel excise duty did arise under section 6A HODA 79 no later than the time when the Appellant added Dipentene to the liquid. On Mr Friedlos's evidence, all of the product was subjected to this addition before sale and therefore the assessments to fuel duty and the penalty must be upheld.

66. The appeal is therefore dismissed.

67. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

**KEVIN POOLE**
**TRIBUNAL JUDGE**

**RELEASE DATE: 30 April 2012**

# The Schedule

## Relevant legislative extracts

1. The Biofuels and Other Fuel Substitutes (Payment of Excise Duties etc) Regulations 2004, so far as relevant, provided at all material times as follows:

> **2. Interpretation**
>
> (1) In these Regulations–
>
> "biofuel" means ... or fuel substitute;
>
> "biofuels duty" means ... or fuel substitute duty;
>
> "chargeable use"–
>
> ….
>
> (c) in relation to fuel substitute, means chargeable use within the meaning of section 6A(2) of the Oil Act ;
>
> "fuel substitute" means a liquid that is charged with fuel substitute duty;

"fuel substitute duty" means the duty charged by section 6A of the Oil Act ;

"motor fuels record" has the meaning given in regulation 13;

"the Oil Act" means the Hydrocarbon Oil Duties Act 1979;

"producer" means a person who–

(a) sets aside biofuel for a chargeable use, or

(b) makes a chargeable use of biofuel,

with the consequence that biofuels duty is charged;

"used as motor fuel" means used–

(a) as fuel for any engine, motor or other machinery, or

(b) as an additive or extender in any substance so used.

…..

**13.— Motor fuels record**

(1) Every producer .... must keep and preserve at production premises a record ("the motor fuels record") in accordance with the provisions of, and containing the particulars specified in, the Schedule.

(2) In the Schedule, a reference to "standard litres" means a litre of any liquid at a temperature of 15°C.

(3) The motor fuels record must be preserved by the producer for a period of 6 years, or such lesser period as the Commissioners may allow, starting on the day that the record is made.

…

**18. Person liable**

The person liable to pay the biofuels duty at an excise duty point fixed by regulation 17 is–

(a) in the case of biofuel that is charged to biofuels duty on production premises, the producer;

(b) in any other case, the person who caused the biofuel to be charged with biofuels duty.

….

**SCHEDULE**

**Particulars to be entered in the motor fuels record**

**Regulation 13(1)**

**1. Charge arising on setting aside**

In respect of each consignment of biodiesel, bioethanol or fuel substitute that is charged with biofuels duty because it is set aside for chargeable use when on the premises from which it is sent out, the following particulars must be entered in the motor fuels record before the consignment is sent out from his premises–

(a) the date on which the consignment is sent out;

(b) a description of that consignment indicating whether it is biodiesel, bioethanol or fuel substitute;

(bb) …..

(c) in the case of a consignment of fuel substitute, a description indicating that the fuel substitute has been charged with fuel substitute duty upon being set aside as–

(i) suitable only as fuel for a diesel engine,

(ii) suitable only as fuel for an engine, other than a piston engine, of an aircraft,

(iii) suitable only as fuel for a petrol engine powered by fuel other than unleaded petrol,

(iv) suitable only as fuel for a petrol engine powered by unleaded petrol,

(v) specially produced as fuel for a piston engine of an aircraft,

(vi) fuel for an engine, motor or machinery, but not falling within sub-paragraphs (i) to (v),

(vii) suitable only as an additive or extender in fuel for a diesel engine,

(viii) suitable only as an additive or extender in fuel for an engine, other than a piston engine of an aircraft,

(ix) suitable only as an additive or extender in fuel for a petrol engine powered by fuel other than unleaded petrol,

(x) suitable only as an additive or extender in fuel for a petrol engine powered by unleaded petrol,

(xi) a multi-purpose additive or extender (designated, made and prepared as being for use as an additive or extender in any light oil),

(xii) an additive or extender not falling within sub-paragraphs (vii) to (xi);

(d) the quantity, in standard litres, of that consignment;

(e) the name and address of the consignee to whom that consignment is sent;

(f) the address to which that consignment is consigned;

(g) the number of the delivery note (see regulation 15) that accompanied that consignment;

(h) the date upon which the entry in relation to the consignment is made in the motor fuels record; and

(j) the amount and rate of biofuels duty charged in respect of that consignment."

2. Sections 1, 118A, 118B and 118G Customs & Excise Management Act 1979 provided, so far as relevant, at all material times as follows:

"**1.— Interpretation.**

(1) In this Act, unless the context otherwise requires—

…

"the revenue trade provisions of the customs and excise Acts" means—

(a) the provisions of the customs and excise Acts relating to the protection, security, collection or management of the revenues derived from the duties of excise on goods produced or manufactured in the United Kingdom;

…

"revenue trader" means —

(a) any person carrying on a trade or business subject to any of the revenue trade provisions of the customs and excise Acts, or which consists of or includes—

(i) the buying, selling, importation, exportation, dealing in or handling of any goods of a class or description which is subject to a duty of excise (whether or not duty is chargeable on the goods);

….

**"118A.— Duty of revenue traders to keep records.**

(1) The Commissioners may by regulations require every revenue trader—

(a) to keep such records as may be prescribed in the regulations; and

(b) to preserve those records for such period not exceeding six years as may be prescribed in the regulations or for such lesser period as the Commissioners may require.

….

**118B.— Duty of revenue traders and others to furnish information and produce documents.**

(1) Every revenue trader shall—

(a) furnish to the Commissioners, within such time and in such form as they may reasonably require, such information relating to—

(i) any goods or services supplied by or to him in the course or furtherance of a business, or

(ii) any goods in the importation or exportation of which he is concerned in the course or furtherance of a business, or

(iii) any transaction or activity effected or taking place in the course or furtherance of a business,

as they may reasonably specify; and

(b) upon demand made by an officer, produce or cause to be produced for inspection by that officer—

(i) at the principal place of business of the revenue trader or at such other place as the officer may reasonably require, and

(ii) at such time as the officer may reasonably require,

any documents relating to the goods or services or to the supply, importation or exportation or to the transaction or activity.

(2) ….

(3) For the purposes of this section, the documents relating to the supply of goods or services, or the importation or exportation of goods, in the course or furtherance of any business, or to any transaction or activity effected or taking place in the course or furtherance of any business, shall be taken to include—

(a) any profit and loss account and balance sheet, and

(b) any records required to be kept by virtue of section 118A above,

relating to that business.

**118G. Offences under Part IXA.**

If any person fails to comply with any requirement imposed under section 118A(1) or section 118B above, his failure to comply shall attract a penalty under section 9 of the Finance Act 1994 (civil penalties) and, in the case of any failure to keep records, shall also attract daily penalties."

3. Sections 9 and 10 Finance Act 1994 provided, at all material times, so far as relevant, as follows:

**"9.— Penalties for contraventions of statutory requirements.**

(1) This section applies, subject to section 10 below, to any conduct in relation to which any enactment (including an enactment contained in this Act or in any Act passed after this Act) provides for the conduct to attract a penalty under this section.

(2) Any person to whose conduct this section applies shall be liable—

(a) …..

(b) in any other case, to a penalty of £250.

**10.— Exceptions to liability under section 9.**

(1) Subject to subsection (2) below and to any express provision to the contrary made in relation to any conduct to which section 9 above applies, such conduct shall not give rise to any liability to a penalty under that section if the person whose conduct it is satisfies the Commissioners or, on appeal, an appeal tribunal that there is a reasonable excuse for the conduct.

(2) Where it appears to the Commissioners or, on appeal, an appeal tribunal that there is no reasonable excuse for a continuation of conduct for which there was at first a reasonable excuse, liability for a penalty under section 9 above shall be determined as if the conduct began at the time when there ceased to be a reasonable excuse for its continuation.

(3) For the purposes of this section—

(a) an insufficiency of funds available for paying any duty or penalty due shall not be a reasonable excuse; and

(b) where reliance is placed by any person on another to perform any task, then neither the fact of that reliance nor the fact that any conduct to which section 9 above applies was attributable to the conduct of that other person shall be a reasonable excuse."