



Red diesel – can you use it?

This is a briefing paper on the regulations on the use of red diesel and is provided to local authority chief executives, council leaders and all APSE parks and open spaces contacts.

Key issues

This briefing contains:

- The law and guidance on the use of red diesel for the amenity sector

- A case study from a local authority who is appealing against a notice to pay excess duty

- Frequently asked questions

1. Introduction

In 2006, a new order was published which amended the list of vehicles allowed to use rebated fuel (or 'red diesel'). Since 2006, there has been confusion over the definition of tractors that can qualify as excepted vehicles and therefore a 'Memorandum of Agreement' was produced on 10 January 2008 which defined 'agriculture, horticulture and forestry'. This definition has implications for local authorities for the many varied operations that are carried out by their tractors.

Section 2 contains guidance issued by the National Association of Agricultural Contractors (NAAC). NAAC have stated that they are not Her Majesty Revenue and Customs (HMRC) and therefore can only explain their understanding and interpretation of the legislation from discussions with Government over recent years. It must be borne in mind that individual cases may differ.

Section 3 contains information from a local authority who recently contacted APSE in relation to the regulations, as they have been fined from 10 January 2008 for the use of red diesel in their tractors.

2. Guidance on the use of red diesel

This section contains guidance issued by the National Association of Agricultural Contractors (NAAC) in relation to the use of red diesel. For more information on this, please see the NAAC's website at: <http://www.naac.co.uk/Home.aspx>. Or if you have any

doubt about whether or not your vehicle or activity qualifies, contact the National Advice Service on Tel 0845 010 9000.

a) The Law

Legislation was initially introduced in 1935 to allow vehicle concessions for red diesel use. This was updated by the Hydrocarbons Oil Duties Act 1979, Schedule 1. This included tractors, but with little definition of specific usage.

However in December 2004, concerned that vehicles were being used for operations that were never intended to be exempted from fuel duty, HMRC and the Treasury issued a public consultation proposing changes to the exempted vehicles schedule. A new order was published in 2006. This amended the list of vehicles allowed to use rebated fuel, although for the land-based sector (thanks to heavy lobbying) there were additions rather than further exclusions. However, categories such as road construction vehicles were taken out of the legislation and were therefore forced to start paying fuel duty.

The current schedule includes vehicles used 'solely for agriculture, horticulture and forestry' (e.g. agricultural tractors, light agricultural vehicles i.e. ATV's etc), plus a list of other vehicles with their specific uses defined.

b) What does this mean?

In practice, for the amenity sector, the following operations are allowed to use red diesel (as defined in the legislation):

1. Unlicensed vehicles not used on public roads

This means untaxed vehicles which are never used on public roads. (If a vehicle has become untaxed since 31 January 1998 it requires a Statutory Off-Road Notification (SORN))

2. Mowing machines

The mowing machine must be a complete vehicle, whether pedestrian-operated or 'ride-on'. The machinery must be built into the vehicle for it to qualify under this category.

A tractor with mowing equipment attached is not a purpose-built mower. It does not, therefore, qualify in the mowing machine category.

Any type of utility vehicle with removable mowing machinery is also not a purpose-built mower. However, a vehicle consisting, for example, of a Land Rover chassis with permanently fixed grass cutters, designed and constructed for grass cutting and used solely for that purpose, would qualify in the mower category.

Full details can be found at: www.hmrc.gov.uk/briefs/excise-duty/brief4208.htm

3. Tractors

To qualify as an excepted vehicle the tractor must be an agricultural tractor designed and constructed primarily for use otherwise than on roads. It must be used on public roads solely for:

- (a) purposes relating to agriculture, horticulture or forestry,
- (b) cutting verges bordering public roads, or
- (c) cutting hedges or trees bordering public roads or bordering verges which border public roads.

Point 3 above is the important part for the industry in trying to work out what we can and cannot do. It is clearly defined that tractors can be used by the agricultural and amenity sector on rebated fuel to cut verges and hedges bordering public roads. It is less clear what is meant by 'purposes relating to agriculture, horticulture and forestry'.

This is the main 'grey area' under which many dubious activities have slipped in recent years, such as use of tractors to manage diversification projects on farms, haulage and leisure industries etc.

HMRC were determined to get rid of the confusion and make the law clear to ourselves and the enforcement officers. As a result it was agreed a 'Memorandum of Agreement' would be produced to define 'agriculture, horticulture and forestry'.

This is where our problems really started. Throughout negotiations HMRC's view remained clear that this definition did not (and never had) include landscaping and the maintenance of recreational facilities, including beaches.

Full definitions can be found at: www.naac.co.uk/Docs/MoA_FINAL_2008.pdf

c) What now?

This is now clearly a problem for the local authority sector (unless looking after agricultural or horticultural land) and contractors.

Many amenity organisations that may have naively used rebated fuel have been forced to make expensive changes. Agricultural contractors too have faced a dilemma where they may have done off-peak winter work off the farms, or have tractors doing some amenity contracting alongside the agricultural business. Such operations have now been clearly defined as illegal if using red diesel. The view appears to be that if a tractor is used for amenity work it cannot also do agricultural work – unless it is re-taxed and the fuel drained down and changed. This is, in most cases, totally impractical. The only safe advice is to have tractors on white diesel if not 100% on agricultural, horticultural or forestry operations.

Offenders are being caught and fined and may even be asked for back-dated payments. It seems that some leniency is being shown in the amenity sector to allow for a lack of understanding, prior to the Memorandum being published in January 2008. However, in the case study below, one local authority is being asked for payments backdated to January 2008.

2. Local authority case study

APSE have recently been contacted by Bournemouth Borough Council whose parks department had their tractors dipped for red diesel usage by HMRC and the assessment that followed has resulted in a notice to pay over £20k as excess duty, which is for a period of 10 January 2008 to present. Historically, tractor usage within their grounds maintenance operations were thought to be exempt from full excise duty.

Bournemouth Borough Council is now at the stage of having lodged an appeal against the assessment. They have provided APSE with a copy of their concerns about the issues raised by the guidance on the use of rebated fuel and these are shown below.

Bournemouth Borough Council - Concerns relating to rebated fuel usage:-

1) *Historically HMRC has accepted the operations of Local Authority Parks Departments as horticultural and eligible to use rebated fuel. The Local Authority use of rebated fuels in the undertaking of its green space maintenance functions has never previously been called*

into question, and historically these functions have always been accepted as horticulture / amenity horticulture.

2) HMRC have made changes to the 2007/93 Excepted Vehicles (Amended of Schedule 1 to the Hydrocarbon Oils Duty Act 1979) Order 2007. HMRC have made the decision to charge Bournemouth Borough Council for the excess fuel duty, following the recent assessment, from 10th January 2008. Normally, as a matter of process, HMRC would go back 3 years, but have accepted that the guidance changed, subject to the issue of the 'MEMORANDUM OF AGREEMENT IN RESPECT OF THE USE OF AGRICULTURAL VEHICLES ON THE ROAD'.

3) The consultation, that was carried out to change the guidance, did not include any representation from the broad horticulture sector. The following Government departments and agencies and industry associations took part in the consultation process:

- Her majesty's Revenue and Customs
- Driver Vehicle Licensing Agency
- National Farmers Union
- National Association of Agricultural Contractors
- Confederation of Forest Industries

The stated purpose of the resulting document, 'MEMORANDUM OF AGREEMENT IN RESPECT OF THE USE OF AGRICULTURAL VEHICLES ON THE ROAD' is to provide guidance to those engaged in agriculture, horticulture and forestry. Large sections of the horticulture industry were not involved in the consultations, including Local Authorities.

4) The Memorandum also states, "Where disputes arise these will continue to be considered on an individual basis with regard to the relevant legislation and any definitive interpretation of the law would remain to be given by the courts."

5) Even within the flawed consultation process, which failed to include representatives of the horticultural sector, HMRC failed to gain unanimous agreement from those present. At least one representative body refused to accept the Memo of Understanding in part, because of the likely impact on horticultural practitioners /deliverers undertaking maintenance of public parks and green space.

6) The guidance states that vehicles, that are exempt, must be used solely for the qualifying purposes and not for any other purpose, however infrequent. This does not reflect the prime purpose of a tractor, which is a power unit that can be used with a variety of implements, which enable it to carry out a variety of tasks. It does not make financial sense to have tractors operating for sole use with the wide scope of operations, which Local Authority Parks Departments have to cover. A tractor may be able to be employed solely on an exempt task such as grass cutting, or roadside hedge cutting, but these tasks, as almost all horticultural operations, are seasonal, and the tractor would be redundant during the off season months. The HMRC guidance does not take into account the practical reality of tractor usage within the horticultural industry.

7) Local Authority Parks Departments have made long term investments of public money in tractors prior to the HMRC change of position. The absurd situation now exists whereby a purpose built mowing machine can run on red diesel but a tractor performing the same functions cannot. HMRC will state that tractors could run on red diesel provided they never left the site (except on a low loader). This is not a practical or efficient method of operation. Had local authorities known that the goal posts were going to move, their decisions about which vehicles represented the best value for money, and most efficient and cost effective method of delivering the required maintenance functions, would have been different. Local authorities need five years to make the most of current/recent investments and contractual arrangements and avoid unnecessary waste of public monies, brought about by this change.

The choices about the number of mowing machines against the number of tractors would have been different, had it been known that the rules were going to change.

8) The influence of the National Farmers Union, the National Association of Agricultural Contractors and the Confederation of Forest Industries is clear in the resulting guidance, where many, if not all of the roles carried out by the represented industries have been deemed to be exempt from fuel duty. However, the varied roles of the horticultural industry, which was not consulted, are, in the main, not exempt from fuel duty. The resulting interpretation of horticulture by HMRC is very limited and contradicts the reality, that Parks Departments have always been considered as a significant section of the land based industries. Much of the land maintained by Parks Departments is classified as agricultural land.

9) There is inconsistency from different government agencies. Most of the vehicles in question are classed as agricultural by the DVLA, but HMRC do not class these vehicles as such, regarding fuel usage.

10) The maintenance of recreational facilities is not seen as a qualifying purpose, but it is apparent that the qualifying industries of farming and forestry have large elements of maintenance of recreational land and facilities. There is inconsistent treatment of the land based industries by HMRC.

11) Another example of inconsistency is the guidance that was offered, by HMRC on the maintenance of countryside areas under the Higher Level Stewardship Agreement. This states that land used for grazing or woodland sites that have been or are used for coppicing purposes or timber harvesting fall into the HMRC definition of agriculture, horticulture and forestry. Other uses of the land such as general maintenance of sites, other than for the stated reasons above, or the maintenance of reed beds are not accepted definitions. Again, the agriculture and forestry industries will also have areas of land that require a level of maintenance that does not fall into the present HMRC view of agriculture, horticulture or forestry, yet these operations are deemed to be exempt.

12) At a time, when Parks Departments have suffered a disproportionate reduction in revenue budgets, there seems to be little sense in a government department significantly increasing the tax burden on local authorities, when the government is trying to encourage greater investment in parks and green spaces. HMRC have not taken into consideration, the long term effect on the service provided by Local Authorities.

13) There will be widespread implications from the results of any hearing on this matter. Failure of Bournemouth Borough Council to be successful in this landmark appeal, will inevitably have an adverse financial effect on the vast majority of Local Authorities across the nation.

Bournemouth Borough Council has sought legal advice on the matter, and the advice was that an appeal case would probably stray into the judicial review area. This would be an expensive process, and may not be worth the financial risk for Bournemouth to tackle on their own. Bournemouth Borough Council think that if the industry as a whole were to present a collective case, based on the perceived change in the definition of horticulture and the adverse financial effect, it would be more viable.

Without the collective Local Authority approach, it seems likely that Bournemouth Borough Council will have to drop the case, and comply with the HMRC regulations as they stand.

3. Conclusion

This briefing aims to raise awareness amongst local authorities of both the guidance issued by NAAC and a case study written by Bournemouth Borough Council. The paper does not represent the views of APSE, although APSE would urge local authorities to review their practices in line with the current guidance. APSE would also welcome feedback from member authorities in relation to the issues raised in this briefing paper.

The following list of FAQ's have also been put together by the NAAC, following the publication of the Memorandum, with the approval of HMRC. You may find these useful when making decisions about your own operations:

1. *I carry out verge-cutting on public roads for the local authority. Can I use a tractor licensed as an agricultural machine and running on red diesel on the public road?*

Yes, this activity is specifically permitted in the agricultural tractor definition.

2. *I carry out hedge-cutting on public roads for the local authority. Can I use a tractor licensed as an agricultural machine and running on red diesel on the public road?*

Yes, this activity is specifically permitted in the agricultural tractor definition.

3. *I carry out hedge-cutting for local companies in our industrial area. Can I use a tractor licensed as an agricultural machine and running on red diesel on the public road?*

No, not unless the hedges are bordering public roads, or if the work is on agricultural land. If the hedges are off-road in an industrial area then you must use white diesel to travel to the site.

4. *I am a contractor engaged to pick up and remove cuttings from hedges or verges on public roads. Can I use a tractor licensed as an agricultural machine and running on red diesel on the public road?*

No, not unless you were also employed to do the cutting.

5. *I carry out highways weed control. Can I use a tractor licensed as an agricultural machine and running on red diesel on the public road?*

No, this activity is not accepted as being for the purposes of agriculture, horticulture or forestry, and is not otherwise permitted in the agricultural tractor definition. To use public road the tractor must be licensed in the Private Light Goods taxation class (PLG) if used without a trailer, or in the General Haulage taxation class if used with a trailer, and use white diesel.

6. *I carry out grass maintenance and other amenity work (e.g. playing fields, golf courses, local authority spraying, commercial property maintenance etc). Can I use a tractor licensed as an agricultural machine and running on red diesel on the public road?*

No, this activity is not accepted as being for the purposes of agriculture, horticulture or forestry, and is not otherwise permitted in the agricultural tractor definition. To use the public road the tractor must be licensed in the PLG taxation class if used without a trailer, or in the General Haulage taxation class if used with a trailer and use white diesel.

7. *I carry out grass maintenance and other amenity work with a tractor licensed as an agricultural vehicle, but the tractor is taken to site on a low-loader. I may however need to cross a road or travel short distances on the road between jobs on red diesel. Is this ok?*

No, no use of the public road is allowed.

8. *I have a self-propelled mower which I use for grass maintenance on playing fields etc. Can I use red diesel on the public road?*

Yes, mowing machines can use red diesel at all times.

9. *I carry out grass maintenance and other amenity work, taking all terrain vehicles (ATVs) to the site on a low loader using white diesel. Is it ok for me to use red diesel if only doing off-road work?*

If the vehicles are not licensed for use on the public road they can run on red diesel off road.

10. *I carry out tree surgery on public amenity land or commercial property. Can I use a tractor licensed as an agricultural machine and running on red diesel on the public road?*

No, this activity is not accepted as being for the purposes of agriculture, horticulture or forestry, and is not otherwise permitted in the agricultural tractor definition. To the use public road the tractor must be licensed in the PLG taxation class if used without a trailer, or in the General Haulage taxation class if used with a trailer and use white diesel.

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