

# Red diesel and road use

by Ian Fleming

In the first article on this subject (Formula one tractors, *Tax Adviser*, July 2005, p 16), I discussed how difficult it was to decide whether or not a Fastrac four-wheel drive tractor fell within the definition of an agricultural tractor by reference to *Hydrocarbon Oil Duties Act (HODA) 1979*, Sch. 1 para 2. In particular, is a tractor, irrespective of whether it is a Fastrac or a conventional agricultural tractor, entitled to use gas oil (rebated heavy oil), otherwise known as red diesel, when moving plant and equipment for use on an agricultural land drainage contract, from the company's premises to the farmer's field?

In the case of *M W Plant*, to be discussed in more detail later, Customs, in seizing the vehicle when it was found to be running on gas oil, were adamant that the movement of the vehicle from private premises to the farm was not 'solely for the purposes of agriculture', but was general haulage for which white diesel should be used. It does not take much imagination to realise that if the company had lost its appeal before the Edinburgh VAT & Duties Tribunal, the next step would be to stop farmers running Fastrac-type vehicles on gas oil taking livestock from the farm to market on the grounds that this also was general haulage.

Since the first article was written two VAT & Duties Tribunal cases have been reported – they have a direct bearing on the issues discussed and have, as a result, become the test cases that the RFTU were seeking in order to 'clarify' the legal position – their words, not mine. It has to be said that both cases were determined on the basis of their individual facts, but as the two Tribunal chairmen (T Gordon Couatts QC and J Gordon Reid QC) came to identical conclusions on the basic issues, the two cases taken together should provide a sufficient precedent to defend any future attack by HMRC on these or similar grounds

My previous article set out in some detail the statutory background to the problem. In essence, *HODA 1979*, s. 12, prohibits the use of rebated oil in road vehicles unless the rebate is repaid, s. 13 prescribes penalties where rebated oil is used in contravention of s. 12, and s. 27 defines a road vehicle as a vehicle constructed or adapted for use on roads, but does not include an excepted vehicle within the meaning given by Sch. 1 to the Act. In Sch.1 under the heading of Excepted Vehicles, and at para. 2(1), included in excepted vehicles is 'an agricultural tractor'. In sub-para. 2, agricultural tractor is defined as one used on public roads solely for purposes relating to agriculture, horticulture, or forestry. In sub-para. 4, an 'off-road tractor' is defined as a tractor that is not an agricultural tractor, designed and constructed primarily for use otherwise than on roads, and is incapable by reason of its construction of exceeding a speed of 25 mph on the road under its own power.

## Andrew Clark t/a Andrew Clark Plant Hire<sup>1</sup>

This appeal was brought in respect of an HMRC reviewing officer's decision to uphold an assessment of £185 excise duty alleged to be due in respect of the use of an agricultural tractor fuelled by gas oil. Two penalties of £250 each were also levied in respect of alleged contraventions of *HODA 1979*, s. 13(1)(a) and (b). These penalties were imposed in respect of both the use of, and the taking in of, red diesel.

The following facts were found. On the day in question, the work being

done for the farmer finished early, and he asked the self-employed driver if he could go to another farm nine miles away, to repair a field drain. On the return journey to the appellant's premises, the police stopped the vehicle and, not surprisingly, the RFTU found the vehicle to be fuelled with rebated oil – red diesel.

In coming to its decision, the Tribunal was satisfied that on the occasion in question, the tractor was being used solely for purposes related to agriculture. The transport of the digging machine from A to B was for that purpose and not for the purpose of a contract of hire as such. In the particular circumstances of the case before the Tribunal, the sole use of the tractor was related to agriculture.

In relation to the penalties, there should have been no question of the imposition of a double penalty on a proper consideration of the facts. The agricultural tractor was entitled to have red diesel in its tank, so it was not an offence to put it there.

## M W Plant (Contractors) Limited<sup>2</sup>

The appeal was lodged in this case following the reviewing officer's decision to uphold two assessments after minor clerical adjustments. Customs withdrew the second, and by far the larger, assessment after the review process but before coming to a hearing, when they accepted that two agricultural tractors working on a motorway construction site were entitled to be fuelled by rebated oil. The first assessment related to a Fastrac tractor being used for agricultural land drainage work.

The Tribunal was asked to determine whether or not the tractor was used for purposes 'solely relating to agriculture'. The Tribunal, however, split that single question asked into three parts:

1. Is a Fastrac-type tractor an agricultural tractor?
2. Was it used on public roads?
3. Was it used solely for purposes relating to agriculture?

Customs argued that the Fastrac tractor was not an agricultural tractor because it wasn't licensed as such. The vehicle in question was registered as a Special Vehicle – the taxation class used by the previous owner. They also questioned whether the Fastrac was a tractor at all and submitted that the appellants were not carrying out any agricultural work, since they were not contracted with the farmer but with a civil engineering contractor who either had laid, or was intending to lay, ducts and cables for the telecommunications industry. That company instructed the appellant to undertake the drainage work and paid for it, and thus the Fastrac was not being used solely for purposes relating to agriculture. Furthermore, if the appellants used the Fastrac only once on a civil engineering contract, as opposed to farm drainage work, then the use was not solely for purposes relating to agriculture.

In coming to their decision, the Tribunal referred to the three requirements the Fastrac had to meet for the appeal to be successful, all of which raised questions of fact.

### Is the Fastrac a tractor?

No submissions were made as to what a tractor was, or what constituted a tractor, or what were the essential features of such a vehicle. The appellant agreed with the Tribunal's suggestion that the Fastrac he was

describing was the BMW or Rolls Royce of tractors. On the basis of that evidence, the tribunal felt that it was entitled to conclude that the Fastrac is a type of tractor.

The Tribunal did not consider the taxation class to be conclusive, and accepted that it may be necessary to review the statutory criteria in the light of advancing technology and the existence of a new generation of tractors, of which the Fastrac appeared to be an example, in the future.

### Use on public roads

There was no dispute that the vehicle had been used on public roads.

### Solely for purposes relating to agriculture

A major part of HMRC's argument was that because of the involvement of the civil engineering contractors, the farm drainage work was not related to agriculture. The Tribunal rejected this argument. In their view, the purpose of the drainage work related to agriculture. Farm drainage forms part of a farm's fixed equipment. Agricultural land is drained to enable it to be cultivated or grazed. Drainage improves the condition of the ground and eliminates or alleviates wet or marshy areas. It enables, or helps to enable, agricultural land to be maintained in good heart. These were the purposes of the drainage work, whoever did it and whoever paid for it. The purpose is the same whether the landowner carries it out himself and seeks re-imbursment from the civil engineering contractor, or engages the appellants and pays them – again seeking reimbursement – or requires the contractor to return to the site of the duct lines and repair the drainage. The function of the Fastrac was to transport the excavator to a farm site and thereafter to carry out work on site hauling materials, and on conclusion of the work, to transport it either to where the next farm drainage work was to be done or back to the appellant's premises.

In these circumstances, the Tribunal was satisfied that the statutory requirements were met and the appeal must succeed.

### The outcome

As a result of the hearings of the Edinburgh VAT and Duties Tribunal in *Andrew Clark* and *MW Plant*, two principles have been confirmed. First, the two Tribunals came to the same decision that where a tractor is driven to and from a site where it is engaged on purposes relating to agriculture, it is entitled to do so being fuelled by rebated oil otherwise known as red diesel.

Second, the modern four-wheel drive tractor is a tractor notwithstanding *HODA* 1979 Sch.1 para 2(4), which states that an off-road tractor means a tractor incapable of exceeding a speed of 25 mph on the level under its own power. The Tribunal in *M W Plant* accepted that a review was in process but the law had not yet been amended/updated to take account of advances in tractor technology since 1979, and this did not stop them taking the view that the Fastrac was a tractor.

### The future

What is considerably more worrying from a farming point of view is a change announced in the 2006 Budget, which has gone largely unnoticed.

It was stated that the Finance Bill 2006 would contain legislation enabling HMRC to amend the Excepted Vehicle Schedule by statutory instrument. It goes further, however, and explains the categories that will be unaffected by any change, eg, mowing machines and snow-clearing vehicles, and categories that will be amended, which includes tractors, vehicles used between different parts of land in the same ownership, and mobile cranes.

A paragraph headed Next Steps explains:


'To ensure that changes to the excepted vehicle schedule are made effective, these will be accompanied by appropriate education and enforcement. In addition, the government will continue to look at the potential for administrative changes to minimise the risk of fraud through abuse of the excepted vehicle regime.'

The only interpretation that can be put on this paragraph is that HMRC intend to amend the law by the back door, so to speak, to prevent rebated oil being used as fuel for journeys that they see as being general haulage but which are, under the present legislation, and confirmed by the Tribunals, as being solely for the purposes of agriculture. The increase in cost and impracticality of changing between red diesel for use on the farm and white diesel for road journeys make this a highly unwelcome development.


Whether the National Farmers Union or other representative bodies can stop this potential liability change seems highly unlikely, but unless action is taken very soon, it will be too late. As they say in notices warning of doom and gloom ahead: you have been warned!

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1. *Andrew Clark t/a Andrew Clark Plant Hire v R&C Commrs* (E0913)
2. *M W Plant (Contracts) Limited v R&C Commrs* (E0962)



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