

X51A:
Part 1 Repayment of overpaid Excise Duty

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1. Introduction

1.1 Scope of this guidance

Our books of guidance are the main reference material for people in the Department. All Customs and Excise's formal procedures and work systems are outlined in these books which give managers and staff the Department's rules and guidelines and general advice on interpreting them.

The guidance is aimed at C&E staff and should not be relied upon by businesses in calculating their taxes and/or duties.

This guidance gives best practice advice on:

- recovery of overpaid excise duty;
- the principles of Unjust Enrichment; and
- the reimbursement scheme.

It should be read in conjunction with Notice 212 *Statutory interest and repayment of overpaid excise duty*, which explains the procedures for claimants to follow and the conditions that apply.

The use of the word duty in this guidance in all cases means excise duty.

The general principles in this guidance apply equally to Air Passenger Duty, but see X47 *Air Passenger Duty* for guidance on the provisions that are specific to that regime. It does not apply to Landfill tax, Aggregates Levy or Climate change levy, all of which have their own provisions for overpaid tax/levy.

This guidance does not explain how a trader may obtain a remission, rebate, repayment, refund or drawback of excise duty in cases where there is already a method or regime in place for doing this. You can find more information on how they may obtain a remission, rebate, repayment, refund or drawback of excise duty in the books of guidance and notices for the specific excise regime.

1.2 Release of information: Open Government Code of Practice

No exemptions under the Government's Code of Practice apply to this part and all information in this guidance may be released on request.

1.3 Other related Guidance

You may also need to refer to:

- X-51 *Assessments*;
- X-51A part 2 *Statutory Interest*;
- X-47 *Air Passenger Duty*;
- V1-33 *VAT refunds: unjust enrichment, statutory interest, ex-gratia payments*;

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- A6-1 *Departmental payments.*

1.4 Background

Where a revenue trader has paid excise duty to the Commissioners, which was not due to them, then the Commissioners are liable to repay that amount of duty. This right to recover overpaid duty became law in December 1995 and is provided for by section 137A of the Customs and Excise Management Act 1979.

This right to the recovery of overpaid excise duty was extended by Schedule 3 of the 2001 Finance Act to include situations where a person has overpaid excise duty, as a direct result of "Official error".

Repayment by the Commissioners of the overpaid duty is subject to the submission of a satisfactory claim, which must meet certain conditions.

In some situations the Commissioners may refuse repayment if the claimant would be unjustly enriched.

1.5 What are the laws and regulations?

Acts

Provision	Law
Claims for recovery of overpaid excise duty.	Customs and Excise Management Act 1979 (CEMA), section 137A.
Claims for recovery of overpaid excise duty where there has been official error.	Finance Act 2001, Schedule 3, Paragraphs 1- 3.
Refuse repayment if the claimant would be unjustly enriched, and the extent to which loss or damage should be disregarded.	Customs and Excise Management Act 1979 (CEMA) section 137A (3) as effected by Finance Act 1997, Schedule 5, Paragraph 1 (1) - (3).
Establish how reimbursements should be arranged and the provisions for the undertakings.	Finance Act 1997, Schedule 5, Paragraphs 3 (1) - (8).

Regulations

Relevant Statutory Instruments include:

- Revenue Traders (Accounts and Records) Regulations 1992, Regs 9-17;
- Aircraft Operators (Accounts and Records) Regulations 1994, Regs 9-16;
- Excise Duty (Payments in Case of Error or Delay) Regs 2001; and
- Excise Duty Points (Duty Suspended Movements of Excise Goods) Regulations 2001, Regs 5-6.

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Please note that repayment of excise duty that falls outside the scope of CEMA section 137A and Finance Act 2001, schedule 3, will be specified in the legislation appropriate to those excise regimes and is not covered in this guidance.

1.6 The role of Errors and Assessments team

The Errors and Assessments team, within Policy Group's Compliance Framework Division, is responsible for tax and duty assessment and error correction policies.

The team provides policy advice on:

- assessment powers;
- best judgement;
- time limits;
- repayment claims;
- unjust enrichment;
- assessing liable persons; and
- provisions and processes to establish debts as recoverable.

The team does not provide policy advice on:

- liability (refer to the *Excise Holding & Movement team*);
- duty points (refer to the *Excise Holding & Movement team*);
- use of guarantees (refer to the *Excise Holding & Movement team*);
- interest, penalties, debt management (refer to the *Penalties & Debt Management team*); or
- maintenance of operational systems (refer to the *Excise Group Intranet Site*).

The team is located on:

4th Floor NE
Queens Dock
Liverpool
L74 4 AA
Tel: 0151 703 8959

2. Recovery of Excise Duty overpaid by a revenue trader

2.1 What is the legal basis for such claims?

When a revenue trader overpays excise duty directly to us, we are liable to repay this duty, as long as the revenue trader submits a satisfactory claim.

The relevant legal provisions are contained in section 137A of the Customs and Excise Management Act 1979 (CEMA):

137A Recovery of overpaid excise duty

- (1) Where a person pays to the Commissioners an amount by way of excise duty that is not due to them, the Commissioners are liable to repay that amount.
- (2) The Commissioners shall not be required to make any such repayment unless a claim is made to them in such form, and supported by such documentary evidence, as may be prescribed by them by regulations; and regulations under this subsection may make different provisions for different cases.
- (3) It is a defence to a claim for repayment that the repayment would unjustly enrich the claimant.
- (4) The Commissioners shall not be liable, on a claim made under this section, to repay any amount paid to them more than three years before the making of the claim.
- (5) Except as provided by this section the Commissioners are not liable to repay an amount paid to them by way of excise duty by reason of the fact that it was not due to them.

2.2 Are there any conditions?

There are a number of conditions attached to claims made under CEMA section 137A; these are as follows:

- the claim must be made within three years from the date the duty was overpaid;
- the revenue trader must not be unjustly enriched if they are to receive a repayment (see also paragraph 2.4 and section 5 The reimbursement scheme);
- the revenue trader must submit a claim in the format and manner prescribed by the appropriate regulations; and
- the revenue trader must provide documentary evidence in support of their claim.

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2.3 How do you apply the time limits for recovery of overpaid excise duty?

The time limits for making a claim are contained in CEMA section 137A (4), which provides that:

(4) The Commissioners shall not be liable, on a claim made under this section, to repay any amount paid to them more than three years before the making of the claim.

This means that when a revenue trader is making a claim under CEMA section 137A for excise duty that was declared on a return, the three year rule does not run from the end of the prescribed accounting period for that return, or when the return was rendered to us, but rather from the time that the excise duty declared on that return was **paid**.

So long as the return was **paid** less than three years from the date the claim is made, then the claim would be allowed. This means that you must take full account of when the excise duty was **paid** when considering claims under CEMA section 137A.

The paid date is the date we receive the revenue trader's cash, cheque or direct electronic transfer payment. Valid claims cannot be made if the amount in question was paid more than three years ago.

For example if a return was "paid" on 31 December 1995, a recovery claim for this return must be submitted **before** 31 December 1998 that is 30 December 1998 at the **latest**. This is because 31 December 1998 is the start of the fourth year whilst 30 December 1998 is the end of the third.

In cases where the amount being claimed is not the subject of a return or prescribed accounting period then the paid date is the date we received the revenue trader's cash, cheque or direct electronic transfer payment.

2.4 What is unjust enrichment?

We may refuse repayment of a claim if we consider that the repayment would unjustly enrich the claimant. The principle of unjust enrichment was introduced into excise by CEMA section 137A, which was inserted by the Finance Act 1995 with respect to all repayments made on or after 1 December 1995.

When claims are submitted under CEMA section 137A we are entitled to refuse repayment if the claimant would be unjustly enriched:

CEMA 137A

(3) It is a defence to a claim for repayment that the repayment would unjustly enrich the claimant.

In simple terms, we use the phrase unjust enrichment where we believe that by meeting the repayment claim, the claimant would be put in a better economic position.

In other words they would receive a windfall profit, because the consumer had effectively paid the excise duty they are seeking to recover in whole or part, and the claimant is not planning or is unable to pass the monies back to the consumer.

However it is not always the case that the excise duty has effectively been paid by the consumer. In some instances the claimant may have chosen to absorb some or all of the excise duty and therefore will not have charged it on. Additionally there may be instances where the claimant is intending to pass on some or all of the repayment. These situations are covered in more detail in section 5 of this guidance.

There is no definition of unjust enrichment and so we have to use the principles, which have been established in the case law of the European Court of Justice. These principles demonstrate that the defence is for us to invoke and therefore for us to prove.

You can find further and more detailed information regarding unjust enrichment and the tests to apply in order to establish unjust enrichment in V1-33 *VAT refunds: unjust enrichment, statutory interest, ex-gratia payments* section 3.

2.5 How should a claim be made?

Claims should be submitted in the format and manner prescribed by the appropriate regulations

Details of how to make a claim are contained in the **Revenue Traders (Accounts and Records) Regulations 1992**.

Regulation 9 states:

Regulation 9 Claims for recovery of overpaid excise duty
Any claim under section 137A of the Customs and Excise Management Act 1979 shall be made in writing to the Commissioners and shall, by reference to such documentary evidence as is in the possession of the claimant, state the amount of the claim and the method by which that amount was calculated.

This means that to be valid, a claim must:

- be in writing;
- state the amount of the claim;
- explain the method used to calculate the amount; and
- be substantiated by documentary evidence possessed by the trader.

The form and type of documentary evidence acceptable to us is not prescribed in law. Anything that is able to substantiate the claim can be considered. However for examples of the more common types of documents you may come across refer to Notice 206 *Revenue Traders records*.

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Before repayment you must be satisfied that the claimant is eligible and that they have met all the terms and conditions as prescribed in law. You should also be satisfied that the duty being claimed has actually been paid by the claimant and has not previously been repaid, refunded, rebated or drawn back.

2.5.1 What about claims for recovery of overpaid Air Passenger Duty?

The Aircraft Operators (Accounts and Records) Regulations 1994 regulations 9-16 provide for recovery of overpaid Air Passenger Duty. For details of how claims should be made and voluntary disclosures refer to X-47 *Air passenger duty* sections 2 and 5.

2.6 Are there any special cases?

Yes there is provision in the **Excise Duty Points (Duty Suspended Movements of Excise Goods) Regulations 2001** to claim repayment of excise duty under the provisions of section 137A of the Customs and Excise Management Act 1979. This however only applies in very specific circumstances, where excise duty has been paid in respect of an irregularity in a duty suspended movement. For more details regarding such claims see section 4 of this guidance.

3. Recovery of Excise Duty where there has been an error by the Commissioners

3.1 What is the legal basis for such claims?

If because of an **error** on our part a person failed to:

- (a) claim relief from excise duty, or
- (b) claimed less relief than they were entitled,

then that excise duty should be repaid.

Or if because of an **error** on our part a person is refused authorisation or approval to obtain excise goods:

- (c) without payment of excise duty, or
- (d) upon which less than full rate of excise duty has been paid,

then that excise duty should be repaid.

The above situations would arise where a person had been refused an authorisation, approval, direction or consent by us and it was subsequently found that the refusal was in error.

Recovery of the excise duty paid in the above scenarios is provided for by **Finance Act 2001, Schedule 3, paragraphs 1- 3** which allow for excise duty to be claimed, and the **Excise Duty (Payments in Case of Error or Delay) Regs 2001**, which specify how a claim should be made.

Note: this legislation came into force on 1 November 2001 and cannot be applied retrospectively.

3.1.1 Could such claims be made under the provisions of CEMA section 137A?

Under CEMA section 137A the person making the claim must have paid excise duty **directly** to us.

This means that if a person has paid a **duty inclusive** price for excise goods to their supplier, as a result of an “official error”, they would not be able to claim under 137A. This is because they would not have paid excise duty **directly** to us.

In such instances the supplier of the goods would have correctly accounted for excise duty and paid it directly to us, not the claimant. Because the excise duty had been correctly paid at the time, the supplier could not submit a claim to recover it, since they had not paid it in error.

This means that excise duty paid in such instances cannot be recovered under the provisions of CEMA section 137A.

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3.1.2 What if the claimant paid excise duty **directly to us as a result of our error?**

If the claimant had paid excise duty **directly** to us, due to an error on our part then it is possible that they would be able to recover this duty under the provisions of both the FA 2001 Schedule 3 and CEMA 137A.

However Sub section (6) to CEMA 137A specifically prevents this. This states:

137A(6) This section does not apply in a case where the Commissioners are-

- (a) entitled to pay an amount under Part I of Schedule 3 to the Finance Act 2001, or
- (b)

Therefore when excise duty has been paid directly to us because of an error on our part recovery of that excise duty cannot be claimed under the provisions of CEMA section 137A.

3.1.3 What if there are provisions to recover excise duty already in the regulations specific to that excise regime?

If regime specific regulations contain provisions to recover excise duty (for the situations described at paragraph 3.1 in this guidance), via repayment, remission, rebate or drawback, then the provisions in those regulations should be used.

However you should note that Finance Act 2001, Schedule 3 allows for statutory interest to be claimed in instances of official error. If statutory interest is to be claimed then it must be done under the appropriate paragraphs, of that schedule.

For more information on the claiming and payment of statutory interest refer to X-51A part 2 *Statutory Interest*.

3.2 When may a claim be made under Schedule 3 of the Finance Act 2001?

When a situation arises as described at paragraph 3.1, and there are no regime specific regulations that would enable the person or revenue trader to recover the overpaid excise duty, then they should make a claim under the Finance Act 2001, Schedule 3.

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Examples of when claims may be made under Schedule 3 are shown in the following table:

Goods	Type of refusal (error)	Law
Spirits used for medical or scientific purposes.	Refused authorisation to acquire duty free spirits. Notice 47	Section 8 ALDA FA 2001 Sched 3 para 1 (2) (a)
Spirits used in art or manufacture.	Refused authorisation to acquire duty free spirits. Notice 47	Section 10 ALDA FA 2001 Sched 3 para 1 (2) (a)
Spirits in imported goods not for human consumption.	Refused direction to treat imported goods as not containing spirits. Notice 64	Section 11 ALDA FA 2001 Sched 3 para 1 (2) (b)
Oil delivered for home use for certain industrial purposes.	Refused approval to acquire duty-free oil delivered for home use for certain industrial purposes. Notice 184A	Section 9(1) HODA FA 2001 Sched 3 para 1 (2) (c)
Heavy oil used for a permitted purpose.	Refused consent to put oil acquired duty-free under section 9(1) HODA to a non-qualifying use.	Section 10(1) HODA FA 2001 Sched 3 para 1 (2) (d)
Light oil used for furnace fuel.	Refused approval to use rebated light oil as furnace fuel. Notice 184B	Section 14(1) HODA FA 2001 Sched 3 para 1 (2) (c)
Rebated heavy oil on whose delivery for home use a rebate has been allowed.	Refused approval to use rebated heavy oil for a permitted purpose.	Section 11(1) HODA FA 2001 Sched 3 para 2

The above list may not be exhaustive and you should consider each case on its own merit in order to determine whether or not it meets the criteria described at paragraph 3.1 in this guidance.

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3.3 How should a claim be made?

Regulation 2 of the Excise Duty (Payments in Case of Error or Delay) Regulations 2001 describes what must be included in any claim for recovery of excise duty.

2 Claim for repayment

- (1) Any claim for a payment under Part 1 of Schedule 3 to the Finance Act 2001 must be made in the form and manner and contain the matters prescribed by this regulation.
- (2) A claim must be made in writing to the Commissioners.
- (3) A claim, must by reference to documents that are in the possession of the claimant, state the amount of the claim and the method by which that amount was calculated.
- (4) A claim must include a statement setting out the full particulars of the error on the part of the Commissioners that the claimant relies on to satisfy the first condition in paragraph 1 of Schedule 3 to the Finance Act 2002 or, as the case may be, the second condition in paragraph 2 of that Schedule.

This means that to be valid, a claim must:

- be in writing from an eligible claimant;
- state the amount of the claim;
- explain the method used to calculate the amount; and
- explain fully the error on the part of the Commissioners.

3.4 Are there any conditions?

Yes there are a number of conditions. These are as follows:

- (a) The claimant must demonstrate that it was as a result of “official error” that they incurred costs by way of excise duty that they shouldn’t have;
- (b) If it cannot be demonstrated that we were at fault, then they have no entitlement to claim under the provisions of Schedule 3 FA2001 (there may be other provisions specific to the excise regime under which they could make a claim);
- (c) In order to be eligible the claimant must be the person who had been refused; authorisation, approval, direction or consent;
- (d) The claim must be made in writing to us, in the format and manner prescribed by Regulation 2 of the Excise Duty (Payments in Case of Error or Delay) Regulations 2001;

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- (e) The claimant must hold documentary evidence to support the amount of their claim and their assertion that the overpayment was as a result of an error by us;
- (f) We are not required to make payment for excise goods that have not been put to the use that entitles the claimant to recover the excise duty they are claiming.

3.4.1 What sort of documentary evidence is required?

The law does not specify what form and type of documentary evidence we should find acceptable. Anything that is able to substantiate the claim can be considered. However for examples of the more common types of documents you may come across refer to Notice 206 *Revenue Traders records*.

For evidence of Commissioners' error, copies of correspondence with the Department and official publications may be of particular use.

For evidence of the claim amount, appropriate invoices are of particular use.

Other issues that require confirmation include type of goods, quantity, strength (if appropriate), their end use and the date of payment of excise duty or a duty inclusive purchase price.

Before repayment you must be satisfied that the claimant is eligible and that they have met all the terms and conditions as prescribed in law. You should also be satisfied that the duty being claimed has actually been paid and has not previously been repaid, refunded, rebated or drawn back.

3.4.2 Are there any time limits?

No. Where a person has been refused relief from excise duty and this refusal was as a result of an error by us, then there is no limit on the time in which to make a claim.

There is however a time limit with respect to any Statutory Interest that can be claimed. You can find more information on the claiming and payment of statutory interest in X-51A part 2 *Statutory Interest*.

3.4.3 What about unjust enrichment?

No we are not entitled to refuse repayment on the grounds of unjust enrichment for claims made under the provisions of Schedule 3 of the Finance Act 2001. This is because Schedule 3 does not include in its provisions the defence of unjust enrichment. This exclusion is by virtue of CEMA Section 137A(6) (see paragraph 3.1.2 in this guidance).

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3.4.4 What amount should be repaid?

There are three possible scenarios that may arise as a result of error on our behalf. These are:

Type of payment by claimant	Amount payable by the Commissioners
The person pays directly to us an amount by way of excise duty, that would not have been paid but for the error.	In this scenario we may pay an amount equal to the excise duty that would not have been paid had it not been for the error.
The person pays for goods, which includes an amount that represents “excise duty” which would not have been included but for the error.	This scenario will arise when goods purchased by the claimant will have included an amount that reflects the duty paid status of the goods. In such cases we may pay the claimant an amount that appears to be equal to the excise duty element of the retail price of the goods.
The person due to an error has been unable to use rebated oil and has used unrebated oil instead.	In this scenario we may pay an amount equivalent to the rebate that would have been allowable.

3.4.5 What constitutes an error by the Commissioners?

There is no statutory definition of an error and therefore the word takes on its natural and everyday meaning.

However it is important that we were given the full facts and details of the circumstances on which to base our decision for that decision to be considered to have been in error.

In cases of doubt, forwarded to the Errors and Assessment Team (see paragraph 1.6 for contact details), for their consideration.

4. Claims for recovery of excise duty paid in respect of an irregularity in a duty suspended movement

4.1 What is the legal background to such claims?

For excise goods subject to a duty suspended movement between the United Kingdom and other Member States, where either an irregularity has occurred or where the goods have failed to arrive at their destination, then a duty point is considered to have been reached.

This is provided for in Regulations 3(3) and 4 of the **Excise Duty Points (Duty Suspended Movements of Excise Goods) Regulations 2001**.

Any excise duty paid as a result of the above two regulations can, in very specific circumstances be recovered.

This is provided for by **Regulations 5 and 6 of the Excise Duty Points (Duty Suspended Movements of Excise Goods) Regulations 2001**:

5 Repayment of excise duty

(1) This regulation applies where:

- (a) there has been an excise duty point as prescribed by either regulation 3(3) or 4 above; and
- (b) within three years of either :
 - (ii) the date on which the accompanying administrative document for the particular duty suspended movement of excise goods was drawn up; or
 - (iii) in the absence of such a document, the date when that movement started;

the Commissioners ascertain that the member State in which the irregularity actually occurred is a member State other than the United Kingdom; and

- (c) either excise duty in relation to that irregularity has been paid in the member State where the irregularity actually occurred or no excise duty was due under the laws of that member State.

(2) Where this regulation applies, the person who paid the excise duty at the excise duty point shall be entitled to claim a repayment of that duty from the Commissioners.

(3)

Regulation 6

For the purposes of regulation 5(2) above, section **137A(1) of the Customs and Excise Management Act 1979** shall be modified so as to apply to any amounts paid by way of excise duty and not limited to excise duty which was not due to the Commissioners.

Note: the above regulations have a commencement date of 28 September 2001 and cannot be applied retrospectively.

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4.1.1 In what circumstances can a claim be made?

Where you accept that the member State in which the irregularity actually occurred is not the United Kingdom, and the excise duty has either been paid there or no excise duty was due, then the person who paid the excise duty in the United Kingdom may make a claim for recovery of that excise duty.

Only the person who paid the excise duty is eligible to make a claim.

Any claim must meet a number of conditions. These are as follows:

- (a) The claim must be made within three years of either the date on which the accompanying administrative document for the particular duty suspended movement was drawn up, or
- (b) In the absence of such a document, the date that the movement started;
- (c) There must have been an excise duty point as prescribed by Regulations 3(3) and 4 of the Excise Duty Points (Duty Suspended Movements of Excise Goods) Regulations 2001;
- (d) Either excise duty in relation to the irregularity has been paid in the member State where the irregularity actually occurred or no excise duty was due under the laws of that member State;
- (e) The claimant would not be unjustly enriched if they were to receive a repayment (see also paragraph 2.4 and section 5 in this guidance);
- (f) The eligible person (that is the person who paid the excise duty at the excise duty point), must submit a claim in the format and manner prescribed by the appropriate regulations;
- (g) The claimant must provide documentary evidence in support of their claim.

4.1.2 How should claims be made?

The provisions for making a claim, are given in the **Excise Duty Point (Duty Suspended Movements of Excise Goods) Regulations 2001**, Regulation 5 paragraph (3).

This requires that for a claim to be valid, a claim must:

- be in writing from an eligible claimant;
- state the amount of the claim;
- explain the method used to calculate the amount; and
- be substantiated by documentary evidence possessed by the trader to prove the duty payment in the Member State, or that the irregularity occurred in a Member State where no excise duty was due.

Before repayment is made you must be satisfied that the claimant is eligible and that they have met all the terms and conditions as prescribed in law. You should also be satisfied that the duty being claimed has actually been paid and has not previously been repaid, refunded, rebated or drawn back.

4.2 What if the irregularity occurred before the commencement date of 28 September 2001?

Any irregularity in a duty suspended movement that results in a duty point that pre-dates the commencement date of 28 September 2001 will be outside the scope of these regulations.

Such instances may be considered on an extra statutory basis, by way of an individual extra statutory concession.

In such instances the person who paid the excise duty in the United Kingdom should submit a request for remission of duty based on the same principals as those for claims made under **Regulations 5 and 6 of the Excise Duty Points (Duty Suspended Movements of Excise Goods) Regulations 2001**.

These submissions should be forwarded to the Errors and Assessment Team (see paragraph 1.6 for contact details), for their consideration.

Duty will only be remitted in circumstances where the terms and conditions applicable to an equivalent claim under the Excise Duty Points (Duty Suspended Movements of Excise Goods) Regulations 2001, can be fully met (see paragraph 4.1.1 for details of terms and conditions).

5. The reimbursement scheme

5.1 What is the reimbursement scheme?

The reimbursement scheme allows a revenue trader to obtain a repayment of excise duty and avoid being unjustly enriched. It can be used where the claimant accepts that by receiving a repayment of overpaid excise duty, they would be unjustly enriched at the **consumer's** expense, and they wish to refund to those **consumers** the money they have paid by way of excise duty.

5.2 Why the scheme was introduced

When claims for recovery of overpaid excise duty are made, we are entitled to refuse repayment if the claimant would be unjustly enriched (see paragraph 2.4 in this guidance). Broadly speaking this is where a claimant would get a windfall profit. This is because the **consumer** effectively paid the excise duty that they are seeking to recover, and the claimant is not planning to pass the repayment back to the **consumer**.

Until 1997 a revenue trader who accepted that they would be unjustly enriched would still receive a repayment under CEMA section 137A so long as they agreed to reimburse those **consumers** who for all practical purposes had paid all or part of the duty.

However the law did not say how that refund should be made, nor did it provide for sanctions when a revenue trader reneged on the agreement. This situation changed with the introduction of the reimbursement scheme.

5.3 What law covers the scheme?

Schedule 5, Part 1 of the Finance Act 1997 gave us the power to introduce a reimbursement scheme (the scheme).

These reimbursement provisions were incorporated into the **Revenue Traders (Accounts and Records) Regulations 1992**, and became law on 11 February 1998.

These statutory provisions provide us with the powers to establish how the reimbursements should be arranged.

5.4 Is the scheme compulsory?

No the scheme is not compulsory. It allows those revenue traders who accept that they would be unjustly enriched a choice. They can either:

- do nothing; or
- claim the repayment and abide by the terms of the scheme and reimburse the **consumers** in a set manner.

The reimbursement to **consumers** must be made either in cash or by cheque. Credit notes are specifically excluded because consumers may choose not to make a purchase from the refunding revenue trader again. This is provided for by **Revenue Traders (Accounts and Records) Regulations 1992**:

Regulation 12 Reimbursement arrangements-provisions to be included
(c) reimbursement will be made only in cash or by cheque;

5.5 What is a consumer?

The regulations provide for the reimbursement of persons (**consumers**), who have, for practical purposes, borne the whole or part of the cost of the original payment by way of excise duty. But the **consumers** will not necessarily be the claimants' direct customers.

What this means is best illustrated by way of example:

A revenue trader manufactures a drinks product, which they determine to be dutiable at a rate that is higher than is appropriate. They subsequently establish that a lower rate of duty is in fact applicable.

However in the meantime the revenue trader has paid the higher rate of duty directly to us and has passed this cost on to the high street retailer through the cost of the wholesale supply (the wholesale price reflects the excise duty paid by the manufacturer).

The price that the high street retailer charges the public, in turn reflects the wholesale cost inclusive of the overpaid excise duty.

In this scenario the **consumers** are the retailers' customers and so the revenue trader's reimbursement arrangements must be aimed at the public and not the retailer. If the retailer were to be reimbursed he would be unjustly enriched.

Alternatively the retailer may choose to absorb all of the additional cost by way of the excise duty and not pass it on to their customers. In this case the **consumers** will be the retailers so the revenue trader's reimbursement arrangements must be aimed at them.

Therefore by establishing at what point the cost by way of excise duty ceased to be passed on, will determine for the purpose of reimbursement; who the **consumer** is.

5.6 Does the scheme apply to partial reimbursements?

Yes the scheme does apply to partial reimbursements.

5.7 What is a partial reimbursement?

A partial reimbursement would occur when the claimant has not passed the whole of the excise duty element onto their customer(s). Instead they have absorbed a proportion themselves and passed on the remainder.

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This again is best illustrated by way of example:

A revenue trader submits a claim for recovery of £50,000 of overpaid excise duty. They are able to demonstrate through their records and accounts that they only passed £30,000 of this onto their customers and absorbed the remaining £20,000 cost by way of excise duty, themselves.

We agree these figures. The claimant requests that they be allowed to keep £20,000 of any repayment, since they have for all practical purposes paid that part of the duty themselves.

In this case only £30,000 would be subject to the reimbursement scheme and the revenue trader's reimbursement arrangements would be arranged to refund that amount to the appropriate consumer(s).

5.8 When does the scheme not apply?

If the claimant is able to demonstrate that they have reimbursed the consumer by another means, then they do not have to use the scheme. However if the claimant accepts that they would be unjustly enriched but chooses not to reimburse the consumers or is unable to reimburse the consumers then they should not be eligible for a repayment.

The existence of the scheme does not affect a revenue trader's right to claim that a repayment would not unjustly enrich them. Should we reject this claim then the revenue trader still has the right of appeal to the VAT and Duties Tribunal (see section 7 in this guidance).

It should be remembered that the defence of unjust enrichment is for us to invoke and therefore for us to prove.

If the Tribunal finds in our favour, then the reimbursement scheme would still be available for the revenue trader to use if they so choose.

6. Administering the reimbursement scheme

Once the claimant joins the scheme, it is the claimants' responsibility to make the refund to the consumers. Our only responsibility is to ensure that the claimant meets the terms and conditions of the undertaking. We must not under any circumstances repay the consumers.

6.1.1 Can repayments be set-off against debts on file?

A repayment paid to a revenue trader's duty account for the purposes of the scheme cannot be used to offset any debt on file.

This is because the money repaid is the consumers and not the revenue trader's.

6.1.2 What about claimants who are no longer registered, authorised or approved?

In some circumstances the claimant may no longer be registered, authorised or approved and request to operate the scheme. This is acceptable so long as:

- the claimant was registered, authorised, or approved for the whole period covered by their claim; and
- they have the names and addresses of the consumers to be refunded.

If there is any doubt that a claimant can abide by the terms and conditions of the scheme, then the repayment should not be made.

6.1.3 What are the schemes conditions?

Paragraph 3(1), Schedule 5 Finance Act 1997 gives us the power to make regulations setting out how the reimbursements should be arranged. These provisions allow us to place the following requirements on a revenue trader using the scheme:

- to make payment within a set period;
- to repay to us any amounts not reimbursed to consumers under the scheme; and
- to maintain records showing how and in what form the repayment was made to consumers.

6.1.4 What are the provisions?

Under the **Revenue Traders (Accounts and Records) Regulations 1992**, **regulation 11** the claimant must include in their reimbursement scheme the **provisions** described in **regulation 12**. These provisions must be supported by the **undertakings** prescribed in **regulation 16**.

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The **provisions** are as follows:

- (a) Reimbursement will be completed by no later than 90 days after the repayment to which it relates;
- (b) No deduction will be made from the repaid amount by way of fee or charge;
- (c) Reimbursement will be made only in cash or by cheque;
- (d) Any part of the repayment not reimbursed by the time mentioned at (a) will be repaid to the Commissioners;
- (e) Any statutory interest paid by the Commissioners is also subject to (a) to (d) above;
- (f) The claimant will keep records and produce them to the Commissioners when given notice to do so.

6.1.5 What are the undertakings?

The **undertakings** are described by **regulation 16** In the **Revenue Traders (Accounts and Records) Regulations 1992**. The undertakings must be in writing from the claimant and cover the following:

- is able to identify the names and addresses of those consumers whom he has reimbursed or whom he intends to reimburse;
- will reimburse the whole of the amount repaid to him without any deduction by way of fee or charges within 90 days of receiving the repayment;
- will apply the same conditions to any statutory interest paid in connection with the repayment;
- will repay the Commissioners without demand the whole or such part of the repayment and or statutory interest that he fails to reimburse within the 90 day time limit;
- will keep records as described by the regulations; and
- will when given notice in writing produce those records to the Commissioners.

In order to help revenue trader's decide if they want to operate the scheme they should be sent a copy of the "undertakings in connection with the reimbursement scheme" along with the accompanying explanatory notes. Copies of these can be found at section 8.

6.1.6 When should we accept an undertaking?

Before the undertaking is finally agreed you must be satisfied that the claimant has their scheme, procedures and information in place and is able to apply them as soon as repayment is made. If there are any doubts regarding a claimant's ability to satisfy the undertakings then you should request to see details of the scheme before agreeing to accept it.

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Once procedures have been agreed the revenue trader should return a formally signed copy of the undertaking set out at section 9. This must be signed by a partner, sole proprietor, authorised signatory or Official of the Company and returned to us before any repayment is made.

6.1.7 What if we refuse to accept an undertaking?

The requirements contained in the undertaking are necessary to ensure that receiving a repayment, under the scheme, will not unjustly enrich the claimant. For example if the claimant are unable to identify all the consumers who will qualify for a refund then they would not be able to satisfy us that they would not be unjustly enriched.

If we were to refuse to accept an undertaking then the claimant can request that we review the decision. Should we still refuse the undertaking following the review then the trader can then appeal to the VAT and Duties Tribunal (see section 7 in this guidance for more information).

6.1.8 In what form should the claimant's records be kept?

The claimant is required to keep records so that we can check that the money repaid has been refunded and returned in total to the correct consumers. We cannot prescribe what form these records should take. Therefore if the claimants existing business records and accounts are able to provide the required information then no additional records need to be kept.

The key function of such records is to provide a full audit trail that can be followed and assured. The records should contain at least the following information:

- (a) The names and addresses, of those consumers whom they have reimbursed or intend to reimburse;
- (b) The total amount reimbursed to each consumer;
- (c) The amount of interest included in each total amount reimbursed to each consumer; and
- (d) The date that each reimbursement is made.

6.2 Administration of the reimbursement scheme post undertaking**6.2.1 What if the claimant cannot reimburse the consumers within the 90 days?**

We consider 90 days to be a reasonable length of time for the revenue trader to pass any repayment onto the consumers. We would normally expect that the scheme would be ready to be implemented by the time the signed undertaking is received.

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Where a revenue trader has been unable to reimburse all their consumers within the 90-day limit, they may request an extension. Where there are good reasons for this failure and the revenue trader has made genuine efforts to reimburse the consumers and to meet the time limit, then an extension may be negotiated. Under no circumstances must an open-ended extension be given.

You should treat each request for an extension on its own merits and the decision as to whether or not to allow an extension is at the discretion of the Commissioners.

6.2.2 What if the claimant hasn't reimbursed their consumers after 90 days and hasn't requested an extension?

We suggest that you contact the claimant 14-days after the 90 days period has expired to confirm that all the monies have been reimbursed to the consumers.

The intention of the scheme is to reimburse the consumers so that the claimant does not benefit. Therefore any monies not reimbursed must be returned to us promptly. Revenue traders using the scheme have to repay to us any amount that is not reimbursed without our having to request it.

If the claimant has not repaid to us any monies that they have failed to reimburse within 14 days of the end of the 90-day period, then we may assess in order to recover these monies. The procedures to follow when making and notifying such assessments are described in X-51 *Assessments*.

6.2.3 Are there any other circumstances in which we can assess?

Yes. We may make and notify assessments for any failures to reimburse consumers in the manner agreed under the reimbursement scheme (see sub-paragraphs 6.1.4. and 6.1.5. The procedures to follow are described in X-51 *Assessments*.

6.2.4 When should the claimant's records be inspected?

We have to give written notice if we wish to see the scheme records. The visiting officer should agree the date and venue with the revenue trader.

The purpose of the visit is to confirm that all the monies have been reimbursed in the agreed manner.

Such a visit will usually be separate from the normal assurance visit. If an assurance visit is planned then there is no reason why the scheme records should not be checked at the same time. However the written prior notice will still be required in such instances.

7. Review and appeals procedures

7.1 What if a trader disagrees with our decision?

If a revenue trader does not agree with any decision we make to refuse, or only allow part of, a claim, he has the right to seek a formal Departmental review. The request must be made in writing setting out the reasons for the disagreement and submitted to the local reviewing officer. It is good practice for the reviewing officer to be independent of the original decision.

7.2 Is there a time limit for a trader to ask for a review?

A request must be submitted within 45 days of the day on which the written decision was given. We have 45 days within which to conduct that review and if we do not complete the review within the 45 days we are deemed to have upheld the decision. If not satisfied with the outcome of the review there is a right to appeal to the VAT and Duties Tribunal. A trader also has the right of appeal against a deemed decision.

For more information on the review and appeals procedures, please refer to G5-8 *Excise and Customs Appeals*.

8. Notes for claimants on the reimbursement scheme

8.1 What is the reimbursement scheme?

The reimbursement scheme (the scheme), only applies where you accept that by receiving a repayment of sums overpaid by way of excise duty your business would be unjustly enriched at the consumer's expense.

This is because the consumers have for practical purposes paid the duty charged in error and by not passing the repayment back to them your business would benefit financially as a result.

In such cases a repayment of overpaid duty will only be made if you agree to reimburse those consumers in accordance with the terms of the scheme.

8.2 Who are the consumers?

The law refers to consumers not customers. Consumers are all those persons who have for practical purposes borne the whole or part of the original amount of duty overpaid by you. They will not necessarily be your direct customers.

8.3 Who can use the scheme?

The scheme can be used by any business, which is currently registered, authorised or approved as required by the appropriate excise regime; or your business was registered, authorised, or approved for the whole period covered by your claim.

You must wish to refund to consumers any money they overpaid by way of excise duty.

8.4 When does the scheme *not* apply?

The existence of the scheme does not affect your right to claim that the repayment would not unjustly enrich you. Should we reject your claim on the grounds of unjust enrichment, you still have the right of appeal to the VAT and Duties Tribunal. Even if the Tribunal finds in our favour the option to use the scheme will still be available should you so wish.

The scheme can also be applied to part of your claim. In instances where you have not passed all the duty charged in error on to the consumer, you can request that only that portion passed on be subjected to the scheme.

8.5 What are the scheme's conditions?

A repayment under the scheme will only be made to you if you agree to the following:

- (a) Sign an undertaking (copy attached). Once signed this cannot be amended;
- (b) Refund your consumers within 90 days of receiving your repayment;

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- (c) Any amounts of monies not refunded to your consumers after 90 days must be repaid to us within 14 days. We will not issue reminders for this, but will assess;
- (d) You keep records that show details of the names and addresses of the consumers you intend to reimburse, detail the total amount paid to each consumer and the date on which the refund was made.

8.6 How soon after being repaid should we start refunding our consumers?

We would normally expect you to have the scheme ready to implement when we receive your signed undertaking. You should start contacting consumers immediately rather than waiting for the 90-day period to begin before doing this.

You may request an extension to the 90-day period but must have valid reasons for wanting to do this. A late start to refunding the money without good cause would not be seen as a valid reason for extending the 90-day limit.

8.7 What checks will Customs and Excise carry out?

To make sure that you are refunding consumers in the agreed manner, we will ask to see your scheme records. We will give written notice of this and try to arrange a mutually convenient time and date.

8.8 What about the costs of administering the scheme?

Any costs you incur in administering the scheme must not be taken out of the repayment. If you do deduct money from the repayment, then we will assess you for that amount.

8.9 Who should I contact for more information?

If you have any questions or require further information about the scheme then you should contact our National Advice Service on 0300 200 3700. You can call between 8.00am and 8.00pm, Monday to Friday.

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9. Example undertaking letter

UNDERTAKING IN CONNECTION WITH THE REIMBURSEMENT SCHEME
REGULATIONS MADE UNDER SCHEDULE 5, PARAGRAPH 3 OF THE
FINANCE ACT 1997

Dear Sir/Madam

The attached undertaking must be signed and the form returned to this office
before any money will be refunded under the reimbursement scheme.

It is only necessary to sign this undertaking where you accept that you would
be unjustly enriched by receiving a repayment *[and associated statutory
interest]** of the sums overpaid as duty to Customs and Excise, but have
agreed, for the purposes of the scheme, to reimburse those customers who
for practical purposes bore the amount of money being repaid.

None of the repayment can be kept to cover any administrative expenses you
may incur in administering the scheme.

The undertaking

This undertaking applies to my claim for repayment of overpaid excise duty
dated ___/___/___ and totalling £

"I, the undersigned, can identify the names and addresses of consumers
whom I intend to reimburse. I will repay to these persons, in cash or by
cheque, all the money I receive from Customs *[including associated interest]**
without any deductions, for whatever purpose, within 90 days of receiving the
money and understand that I cannot use the money for any other purpose.
Furthermore, any money I have not refunded to the consumers will, without
reminder, be repaid to Customs within 14 days of the 90 days expiring. I will
keep the necessary records as set out in the Regulations and I will comply
with any notice given to me by Customs about producing the records I am
required to keep."

SIGNATURE.....

NAME.....

ADDRESS.....

.....

.....

REGISTRATION NUMBER.....

**Delete as appropriate*