

**Decision 004/03/ED of 14th October 2003
in virtue of Malta Resources Authority Act (Cap. 423)
on the complaint by Malta Freeport Terminals Limited
with regard to duty-free price of fuel**

I. Determination

Whereas

- A. On 4th March 2003 the Malta Resources Authority received a complaint from Malta Freeport Terminals Limited (“MFT”) claiming that Enemalta Corporation (“Enemalta”) charges duty on fuels supplied to MFT and thus deprives MFT of the latter’s entitlement to duty-free fuels and requesting the Authority to intervene and resolve this situation;
- B. MRA has taken note of the request and has investigated the matters raised in it;

Now, therefore, for the reasons stated in Section II.B. of this Decision, the Malta Resources Authority hereby determines as follows:

- I.1. The charge by Enemalta to MFT, in its selling price, of a part of customs duty which Enemalta itself did not pay at all to Customs, is abusive in being a misrepresentation of the elements which are to be included in the selling price of duty-free fuel.
- I.2. The Authority with immediate effect directs Enemalta to exclude any duty whatsoever from the selling price of duty-free fuel supplied to MFT and to bring the price structure for such supplies in line with the following formula:
Selling price = Purchase price + ‘Non-abusive’ mark-up
- I.3. The Authority holds that the charge as imposed by Enemalta to MFT was abusive *ab initio* and directs Enemalta to take the necessary remedial action.

II. Considerations

II.A. Facts

The facts of the case are as follows:

- II.A.1. On 3rd February 2003, Malta Freeport Terminals Ltd, in its letter to Enemalta, requested the latter to give explanation for the diesel price charged to MFT. MFT asserted that supply of fuel to MFT is exempt, in terms of Article 16 of the Malta Freeports Act, 1989, from customs and excise duty, and therefore the price should be 11c45 per litre, while Enemalta was charging 14c9042. The price was calculated by MFT by

deducting currently applicable VAT (15%) and customs duty (10c20 per litre) from the retail price (24c9) of the fuel in question.

- II.A.2. Enemalta, in its reply to MFT of 6th February 2003, stated that while it does not dispute MFT's entitlement to duty-free fuel, the price cannot be arrived at by deducting the full amount of duty from the retail diesel price to the inland industry, since Enemalta does not recover the full duty from its customers but carries part of the burden itself. Enemalta further reiterated that from 10c2 duty on diesel it recovers only 6c and that, in Enemalta's view, only this 6c should be deducted to arrive at the price to be charged to MFT.
- II.A.3. MFT, in its letter to Enemalta of 12th February 2003, insisted that (1) it should be supplied with diesel at a rate that reflects the full deduction of the 10c2 per litre duty; and (2) it should be compensated for the duty not deducted, namely 4c1 per litre, for the period from 1st January 2002.
- II.A.4. On 4th March 2003 the Malta Resources Authority received a formal complaint from Malta Freeport Terminals Limited ("MFT") claiming that Enemalta Corporation ("Enemalta") charges duty on fuels supplied to MFT and thus deprives MFT of the latter's entitlement to duty-free fuels and requesting the Authority to intervene and resolve this situation.
- II.A.5. In reply to correspondence, in a letter of the 8th July 2003 Mr Paul Mifsud, Permanent Secretary of the Ministry for Resources and Infrastructure confirmed to the Chief Executive Officer, Malta Resources Authority that "Customs have never charged Enemalta any duty on supplies of diesel to the Freeport."

II. B. Assessment

- II.B.1. In terms of Article 16(1) of the Malta Freeports Act (Cap 334), all goods imported into a Freeport are exempt from customs duty. Thus, supply of diesel to MFT, a company operating in the Freeport, is exempt from customs duty. MFT is also exempt from the payment of VAT under the VAT Act.
- II.B.2. The investigation carried out by the Authority with the Customs Department confirmed that Enemalta is not – and have not been - charged customs duty in respect of diesel to be supplied to Freeport.
- II.B.3. Accordingly, Enemalta should supply diesel to MFT free from customs duty.
- II.B.4. The 'duty-free price' means that the sale price cannot include duty. The proper way of calculating duty-free price is not by deducting part or full duty from the retail price, but by not adding the duty to the purchase price of the supplying entity in the first place. In other words, a duty-free price can only include the purchase price of the supplying entity and a mark-up which is not abusive.

II.B.5. Therefore, the price that Enemalta should charge MFT for duty-free fuel should be calculated in accordance with the following price structure:

Selling price = Purchase price + 'Non-abusive' mark-up

II.B.6. The fact that Enemalta does not recover full duty from its inland customers has absolutely no relation with the price to be charged to MFT, the latter being a licensed company under Cap 344 exempt from customs duty. No level of cross-subsidisation can even be contemplated in this case where the supplied entity (MFT) is clearly exempt from customs duty and Enemalta simply does not incur this duty at all in relation to purchases for MFT.

II.B.7. The Authority therefore finds that the charge by Enemalta to MFT, in its selling price, of a part of customs duty which Enemalta itself did not pay at all to Customs, is abusive in being a misrepresentation of the elements which are to be included in the selling price of duty-free fuel and with immediate effect directs Enemalta to bring the price structure for duty-free fuel supplied to MFT in line with the structure stipulated in II.B.5 above, thus excluding completely any duty whatsoever from the selling price.

II.B.8. Moreover and pursuant to the above the Authority holds that such a charge as imposed by Enemalta to MFT was abusive *ab initio* and directs Enemalta to take the necessary remedial action.

J N Tabone
Chairman
MRA