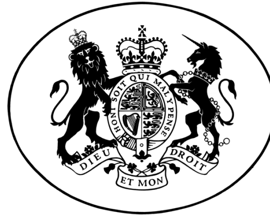

First Tier Tribunal
General Regulatory Chamber
Environment

Appeal Reference: NV/2016/0004

In the matter of an appeal against a civil penalty notice under the Greenhouse Gas Emissions Trading Scheme Regulation 2012

Decided at Fox Court without a Hearing
On 3rd November 2016

Before

JUDGE ANGELA MORRIS
& CHRISTOPHER PERRETT

Between

AIR INDIA

Appellant

-v-

ENVIRONMENT AGENCY

Respondent

Ruling

Basis of the Appeal

1. I, together with Mr. Christopher Perrett, have been appointed to determine this appeal which has been brought by Air India (the Appellant) against the imposition by the Environment Agency (EA) of a civil penalty under Regulation 50 of the Greenhouse Gas Emissions Trading Scheme ("the Regulations") for its failure to surrender sufficient allowances in the Registry to cover the sum of their annual reportable emissions for the 2013 and 2014 Scheme Years by 30th April 2015, contrary to Regulation 42A(1) of the Regulations.
2. We have been provided with a lever arch file of documents (the Appeal Bundle) which include the appeal statement, response by the EA and the legislative framework and case law relating to this matter. We have had an opportunity to consider the contents of the Appeal Bundle in advance of the hearing.
3. In respect of this particular case, the Excess Emissions is an agreed figure of 2683 tonnes CO2(e). The penalty calculation based on that excess was £319,707.45. There is no dispute by the Appellant as to the readings of the excess CO2 omissions or the basis upon which the calculation has been made by the EA and we understand that the penalty has already been paid notwithstanding this appeal.
4. The basis of the appeal and the issue for determination by this Tribunal is whether the Appellant, as the national carrier for India was legally obliged to withhold its participation in the EU-ETS Scheme due to restrictions imposed upon it by the Government of India and, therefore, they acted under *force majeure* or at the very least should be allowed a one-time extension of submission dates with a consequent withdrawal of the Penalty Notice.
5. This is an appeal on the papers; neither party attended the hearing which was considered by myself and Mr Christopher Perrett on Thursday 1st November 2016.

Chronology of Events

6. The chronology of events is as follows: -
   (i) 19th November 2015 - A Notice of Intent to impose a civil penalty was sent to the Appellant
   (ii) 22nd February 2016 – A Civil Penalty Notice was served on the Appellant
   (iii) 9th March 2016 – an appeal by the Appellant was lodged;
   (iv) 3rd May 2015 – A Response to Air India's appeal was served by the Environment Agency;
   (v) 17th May 2016 – further response to the EA by AI was served;
   (vi) 29th June 2016 – further response by the EA was served

(vii) 3rd November 2016 - hearing of the appeal on the papers; no parties in attendance
(viii) 11th January 2017 - Ruling

The EU-ETS Scheme

7. EU Directive 2008/101/EC of 19 November 2008 applied the EU ETS scheme to the aviation sector as part of the EU's policy to combat climate change and reduce emissions using a cap and trade mechanism.
8. This is the directive framework which was transposed into UK Law[1] and subsequently superseded by the Aviation Greenhouse Gas Emissions Regulations 2012 (the Regulations as amended).
9. In accordance with its EU membership obligations the UK must ensure that by 30th April each year each Aircraft Operator surrenders a number of allowances equal to its total verified omissions from its Aviation Activities[2].
10. In accordance with the Regulations, an Aircraft Operator assigned to the UK who performs an Aviation Activity in a calendar year is required to monitor the emissions from such activity in accordance within an agreed emissions plan and applicable European legislation[3].
11. A verified report of its Reportable Aviation Emissions (RAE) must be submitted to the Regulator (in this case the EA) by a specific deadline. By the reporting deadline the Aircraft Operator must propose its RAE in its Aircraft Operator Holding Account (AOHA) which they are obliged to open in the Union Registry and which must in turn be approved by a verifier or National Administrator.
12. Each Aircraft Operator must surrender general allowances or aviation allowances equal to its RAE by a statutory deadline – in this case it was 31st March 2015. Surrender in respect of REA's had to take place by 30th April 2015.
13. Failure to comply with the requirement to surrender allowances by the statutory deadline gives rise to a mandatory Excess Emissions Penalty (EEP) for each tonne of carbon dioxide equivalent emitted for which it has not surrendered allowances by 30th April.
14. Member States are obliged to ensure that any Aircraft Operator which does not surrender sufficient allowances by 30th April of each year is held liable for the said EEP, which is the sterling equivalent of 100 Euros for each allowance that Aircraft operator failed to surrender.
15. Regulation 42A (1) of the Regulations sets out the scheme by which such surrender must be made by an Aircraft Operator for the years 2013 and 2014.

[1] Aviation Greenhouse Gas Emissions Trading Scheme Regulations 2009 and 2010.
[2] Article 12(2)(a) of the EU ETS Directive
[3] See Regulation 35 of the Regulations

16. Where there is a breach of the REA in the AOHA the EA must serve a CPN upon that person [4]. The EEP is prescribed by regulation 54. Regulation 51(2) specifically excludes the exercise of any discretion in relation to the EEP for the failure to surrender sufficient allowances.

Validity of the EU ETS Scheme according to European Case Law

17. The implementation of the EU ETS scheme has been considered in a number of authorities which the Tribunal was provided with as part of the Appeal Bundle and has read and digested. The Tribunal does not intend to set those out in detail here. Suffice it to say the European Court of Justice confirmed the validity of the EU ETS Aviation Directive[5].

The issue of Force Majeure and the Surrender Obligation

18. The mandatory nature of the EEP scheme was considered in detail by the Court of Justice[6] in the *Billerud* case. The effect of the ruling is that Aircraft Operators who have not surrendered sufficient allowances by 30th April deadline are precluded from avoiding the EEP *even* when they hold sufficient allowances on that date to do so.
19. A National Court may not vary the EEP and the only valid reason for avoiding the EEP is force majeure which "*requires an external cause that has consequences that are: **inexorable** and **inevitable** to the point of making it **objectively impossible** for the persons concerned to comply with their obligations*".
20. It is for the National Court to whether the "defence" of *force majeure* applies in the particular case but it must be considered in the legal context in which it is claimed and construed narrowly[7].
21. The Appellant is a commercial Aircraft Operator regulated for EU ETS purposes by the EA. It is the National Carrier of India. It is owned by the Indian Government. In 2014 and 2015 the Indian Government's Directions as regards the EA's determination of aviation emissions and a subsequent EEP on Jet Airways (India) Ltd became the subject of 2 appeals determined by David Hart QC[8].
22. This was determined on 27th March 2015, it was published in the press as well as on the EA's website and available to the Appellant and the India Government in advance of the 30th April 2015 deadline. It follows from this that the Government of India could not have failed to have appreciated the implications of the *Jet Airways decision* by 27th March 2015. More importantly, both the Government of India (and

[4] Regulation 50 and Part 7 of the Regulations 2012.
[5] The Air Transport Case – Judgement of the Court (Grand Chamber) 21st December 2011 – Appeal Bundle 5.2. @ pp 513 -583.
[6] As above.
[7] Case C-148/14 – Nordzucker Case – Appeal Bundle 5.4 @ pp 592 – 600.
[8] Appeal of jest Airways (India) Limited – Appeal Bundle 2.7 @ pp233 – 249.

by extension this Appellant) must have appreciated that an erroneous belief in the binding legal effect of a policy decision by the Government of India would not, of itself, afford a "defence" of *force majeure*.

23. There is no evidence placed before this tribunal to suggest that after the Jet Airways decision was published this Appellant took any steps to seek legal advice in respect of their responsibility to surrender REA by the statutory deadline, despite the Government of India's policy decision on the matter.
24. This Tribunal finds itself in the same position and concurs with the decision of David Hart QC in *Jet Airway*, namely that we have no jurisdiction to determine questions concerning the validity of the EU ETS Aviation Directive or its incompatibility with the ICAO Resolutions either, and therefore, bilateral agreements do not need to be in place before the Appellant is required to comply with EU ETS rules.
25. The requirement to surrender allowances by the statutory deadline and the mandatory EEP which applies if this is not done is prescribed by EU law and UK legislation. The EA has no discretion to extend the time for compliance with the surrender obligation or vary the EEP.

Conclusion

26. Having regard to everything set out in the Appeal Bundle and considered the EU and UK legislative framework under which the EA is required to regulate the EU ETS scheme, there is no discretion afforded the EA where an Aircraft Operator has failed to effect surrender of the correct number of allowances by the deadline.
27. The Appellant failed to effect such surrender and the consequence is a mandatory EEP. There is no provision in UK or EU legislation for any extension of the statutory surrender deadline; an accession to such a request by the Appellant would have been ultra vires the very legislative scheme under which the Regulator is expected to operate. In the same way that this Tribunal has no jurisdiction to determine questions concerning the validity of the EU ETS Aviation Directive or it's incompatibility with the ICAO Resolutions, the EA had no jurisdiction to make such an accession.
28. This Tribunal unanimously agrees that this appeal is without merit and should be dismissed.

Signed:

Angela Morris

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HHJ Angela Morris
(11th January 2017)

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Mr. Christopher Perrett

Tribunal Member