



Neutral citation number: [2023] UKFTT 936 (GRC)

Case Reference: NV/2022/0063/GGE

**First-tier Tribunal
General Regulatory Chamber
Environment**

**Heard remotely by CVP
Heard on: 28 July 2023 and subsequent written submissions
Decision given on: 1 November 2023**

Before

**TRIBUNAL JUDGE NEVILLE
TRIBUNAL MEMBER MCCAUGHEY**

Between

GULLIVAIR LIMITED

Appellant

and

ENVIRONMENT AGENCY

Respondent

Representation:

For the Appellant: Written submissions only

For the Respondent: Mr G Lewis KC, instructed by the Environment Agency

Decision: The appeal is dismissed

REASONS

1. This appeal concerns a penalty of £24,200, imposed by the Environment Agency upon Gullivair Limited under the UK Emissions Trading Scheme.
2. The appeal was heard together with that brought by another airline, ABX Air, Inc. Our decision in that case has been published as ABX AIR, Inc v Environment Agency [2023] UKFTT 847 (GRC). At paragraphs 2 to 68 we set out details of the UK Emissions Trading Scheme and the principles which we consider apply to appeals against penalties for failing to surrender sufficient allowances on time, and the facts leading up to the 2021 scheme year surrender deadline of 30 April 2022. Our assessment was reached in light of Gullivair's

submissions as well as those of ABX Air, Inc. and should be taken as incorporated into this decision without being repeated. We also adopt the same terminology and abbreviations.

Gullivair's appeal

3. Gullivair's case is set out in its notice of appeal. It did not provide a rule 24 Reply to the Environment Agency's rule 23 Response, nor has it filed a witness statement or skeleton argument. It was sent notice of the remote hearing together with instructions on how to join, and did not attend. From Gullivair's notice of appeal, we can distil four grounds:
 - a. First, that it sent a Letter of Authority to enable the Environment Agency to surrender allowances on its behalf in time for the deadline;
 - b. Second, even if the Environment Agency did not receive the Letter of Authority it could have still surrendered the allowances without it;
 - c. Third, that it followed all instructions given to it in order to comply with its obligations; and
 - d. Fourth, it is still willing to surrender the required number of allowances for 2021 scheme year even though the deadline has now passed.

Consideration

Findings of fact

4. Having considered the documentary evidence, we make the following findings of fact on the balance of probabilities. It has not been necessary to have formal regard to where the burden of proof lies. As well as the evidence of the Environment Agency's actions in general, as discussed in ABX, its senior technical officers Mike Higgins and John Insole provided witness statements directly concerned with the facts surrounding the Environment Agency's interactions with Gullivair. Each attended the hearing to answer questions should it be necessary. We consider that their evidence is carefully given and supported by the contemporaneous documentation, and that we can place weight upon it.
5. On 23 March 2022, in response to the various reminders and communications sent to it, Gullivair's legal adviser Nedyalko Minkov emailed the Environment Agency setting out its belief that its number of full-scope flights fell below the threshold for inclusion in UKETS. Mr Higgins replied the same day, correcting Gullivair's misunderstanding and pointing out that it was eligible due to having emitted over 10,000 tCO₂e in 2021 and having conducted six full-scope flights. Gullivair accepts this. Mr Higgins sent Gullivair the relevant documentation and reminded it of the requirement to submit emissions reports by 31 March 2023. By that deadline, Gullivair had registered a profile on ETSWAP, and submitted its verified emissions report totalling 242 tCO₂e.
6. In an email sent to Gullivair on 11 April 2022, the Environment Agency set out the LoA procedure (described in ABX at [63]. It offered to surrender allowances on Gullivair's behalf provided that it returned the completed pro forma letter of authority by 18 April 2022 and delivered sufficient allowances to its AOHA by 22 April 2022. After having had no response, on 20 April 2022 the Environment Agency sent a reminder. We have considered both emails, and the above two requirements are set out clearly. On 29 April 2022 Mr Higgins tried to telephone Gullivair three times, and sent an email stressing the urgency. At

3.58pm Mr Minkov replied to say that he had already emailed back the pro forma on 18 April 2022. Mr Higgins replied in turn to say that it was now too late to meet the deadline, as insufficient time remained to transfer sufficient allowances to the AOHA.

7. We find that Gullivair did not have sufficient allowances in its AOHA. This is the clear evidence of Mr Higgins and Mr Insole and Gullivair says as much in its notice of appeal, confirming that since missing the deadline it has “contracted an emission allowances dealer, and had ordered a transfer of the required funds” before being told that this could not be done due to the missed deadline. The Environment Agency asserts that allowances could be transferred to the AOHA even now, but the relevant point is that there were none by the time of the surrender deadline.
8. We find that Mr Minkov’s email of 18 April 2022 was not received by the Environment Agency, whether or not it was actually sent. Mr Insole gives evidence of the comprehensive searches that were performed of the Environment Agency’s mail systems to trace it. We have seen no indication in the wider evidence of any systemic problems in the Environment Agency’s receipt and storage of emails.
9. Finally, we find that Gullivair could have complied with these surrender deadline if matters had been properly and swiftly addressed following the correspondence of 23 March 2022. Sufficient time remained for allowances to be purchased and transferred to its AOHA, and for the Environment Agency to surrender those allowances on its behalf following timely receipt of the Letter of Authority.

Addressing Gullivair’s grounds

10. Taking each in turn:
 - a. First, we have found that the Letter of Authority was not received by the Environment Agency. Given the urgency and importance of the situation it was incumbent on Gullivair to ensure that it had been safely received. In any event, authority to surrender allowances was no use in the absence of any allowances to surrender.
 - b. The second point is answered by the first, there were no allowances in the AOHA.
 - c. Third, Gullivair plainly did not follow all instructions. It was instructed to ensure that it had sufficient allowances in its AOHA but did not.
 - d. Fourth, as explained in ABX the present penalty arises on failure to surrender allowances by the surrender deadline. The only possible relevance of subsequent compliance is to A1P1, to which we shall turn shortly.

11. We reject each argument.

Article 1 First Protocol

12. Gullivair has not put forward any argument that the penalty is contrary to its rights under A1P1. Given that the issue was fully addressed at the hearing by the Environment Agency however, and on clear notice to Gullivair, we address the issue based on the limited information we have.

13. In ABX, we held as follows:

89. *Taking a step back, UK ETS is a carbon trading scheme that arises from longstanding and important commitments by governments around the world to combat the climate emergency. We have not been provided with any information concerning the size and financial resources of ABX Air, but compliance with such schemes is now a fundamental part of doing business as an airline operator. For the reasons already given, in particular by the Court of Justice in Billerung, the importance of enforcing compliance with such schemes to preserve their integrity lies behind both the mandatory nature of the penalty and the high financial level at which it is set. That objective would be seriously undermined if an operator were to escape the penalty having put forward little more than its own disorganisation and lack of engagement. None of the circumstances put forward by ABX Air come close to establishing that the penalty is disproportionate within the meaning of AIP1, and this appeal must be dismissed.*

14. The same can be said of Gullivair. It only contacted the Environment Agency at the eleventh hour, months after it was legally obliged to do so, because it had misunderstood the applicable thresholds for inclusion in UK ETS. Despite the Environment Agency doing everything it reasonably could to facilitate Gullivair's compliance, Gullivair failed to take the necessary action. Gullivair has not provided any evidence of the consequences it will face as a result of the penalty being imposed. We note its stated willingness to comply after the deadline, but this factor carries insufficient weight in the present case to alter where the balance lies. The financial penalty's interference with Gullivair's property rights is amply justified by the public interest in maintaining the integrity of the UK ETS.

Signed

Date:

Judge Neville

1 November 2023