Neutral citation number: [2024] UKFTT 4 (GRC)

Case References: GGE/2021/0035; GGE/2021/0036; GGE/2021/0037; GGE/2021/0038; GGE/2021/0039; GGE/2021/0040; GGE/2021/0041

First-tier Tribunal
(General Regulatory Chamber)
Environment

Decided without a hearing
Decision given on: 4 January 2024

Before

JUDGE NEVILLE

Between

KOOL BLAST EUROPE LIMITED

Appellant

and

THE ENVIRONMENT AGENCY

Respondent(s)

Decision: The appeals are allowed in part.

Substituted Decision Notice:

i. For each of the four civil penalty notices with references ending 15_1_1, 15_1_2, 15_1_3, and 15_1_4, the Tribunal substitutes a civil penalty notice of £3,451.85.

ii. The other civil penalty notices are affirmed.

REASONS

1. EU Regulation 517/2014 aims to control emissions of fluorinated greenhouse gases ("F-gases"), including hydrofluorocarbons ("HFCs"), by imposing a stepped reduction of the total amount of HFCs that can be sold in the European Union from 2015 onwards. Article 15 then obliges producers and importers to ensure that the quantity of HFCs placed on the market does not exceed that quota.

2. These joined appeals concerns seven civil penalty notices issued by the respondent to the appellant on 22 November 2021, pursuant to regulation 31A of the Fluorinated Greenhouse Gases Regulations 2015. The first six are in response to individual occasions on which the appellant placed hydrofluorocarbons ("HFCs") on the market in breach of that obligation. The seventh concerns a failure to report the activity for 2018 to the European Commission by 31 March 2019, in breach of Article 19(1) of the EU Regulation.

3. The appeals are brought pursuant to regulation 26 of the 2015 Regulations, on all four grounds listed at reg. 26(7). The appellant asks the Tribunal to exercise its powers under para 1 of Sch. 5 of the regulations to direct the Environment Agency to withdraw the notices, or alternatively to substitute notices in such lower figures as the Tribunal thinks fit.

4. Both parties have consented to the appeal being decided without a hearing. All documents and submissions upon which they rely are contained within a 224 page joint bundle produced by the Environment Agency.

The penalty notices

5. In each case, Kool Blast imported and placed upon the market "pharmaceutical grade cryogen pre-packaged in in one litre bottles specially designed to fit on dermatologic lasers for use in medical as well as cosmetic procedures" ("the product"). At no time did Kool Blast obtain HFC quotas or report this activity to the European Commission, as it now agrees it was required to do.

6. The penalty notices for placing HFCs on the market are as follows: (each notice number refers to the last digit of a very long reference number; "tCO_2e" refers to the tonnes of carbon dioxide equivalent to emission of the volume of the HFC in question)

Notice	**Date of contravention**	**tCO_2e placed on market**	**Penalty Amount**
#1	9 May 2018	824	£6,274.46
#2	8 August 2018	824	£6,274.46
#3	9 January 2019	824	£6,274.46
#4	12 February 2019	824	£6,274.46
#5	15 April 2019	824	£700
#6	20 July 2019	206	£700

7. For failure to report its 2018 annual activity by 31 March 2019, contrary to Article 19(1), a further penalty was imposed of £1,000. The total penalties therefore total £27,497.84.

8. In each case, the Environment Agency applied Annex 2 of the version of its *Enforcement and Sanctions Policy* ("ESP")[i]. Subsequent references to the ESP are to the version published at the date of the penalty notices. The structure for deciding a penalty is as follows.

9. First:

Section A explains the steps we will take to decide whether to impose a civil penalty or to work out the final penalty amount. Within the steps we will assess:

- *the nature of the breach*
- *culpability (blame)*
- *the size of the organisation*
- *financial gain*
- *any history of non-compliance*
- *the attitude of the non-compliant person*
- *personal circumstances*

[…]

How the Environment Agency sets the penalty level

When we can apply our discretion we carry out the following steps to make our decisions:

Step 1 - check or determine the statutory maximum penalty for the breach.

Step 2 - decide whether to waive the penalty or set the initial penalty amount by assessing the nature of the breach and other enforcement positions in line with sections B, C, D and E.

Step 3 - if we decide to impose a penalty, work out the penalty starting point and penalty range based on culpability (blame) and size of the organisation.

Step 4 - set the final penalty amount by assessing the aggravating and mitigating factors and adjust the starting point as appropriate.

10. For F-gases, Section E also provides as follows:

E2.1 Our nature of the breach assessment

We will normally impose a civil penalty for all breaches referred to in Regulation 31A of the F Gas Regulations subject to the additional enforcement position (see E2.2).

We will normally use the statutory maximum as the initial penalty amount. This is because the civil penalties in the F Gas Regulations have been set based on the seriousness of the breach taking into account the:

- *impact the breach has on the integrity of the scheme*
- *environmental effect of the breach, where relevant*

However, we may decide to use an initial penalty amount lower than the statutory maximum where we consider the breach warrants this, for example when:

- *a breach is serious because of its potential for environmental harm but the actual harm caused is much less*

- *we impose a civil penalty for failure to comply with an enforcement notice and we don't think the statutory maximum of £200,000 is justified*

E2.2 Additional enforcement position

We may not impose a civil penalty where:

- *we consider giving advice and guidance will be sufficient to rectify the breach*

- *punishment or future deterrent is not necessary*

If after we have given advice and guidance the breach is not rectified, we may then impose a civil penalty.

11. For each penalty the Environment Agency's stepped assessment was as follows:

a. Step 1 – Statutory maximum penalty

i. For placing HFCs on the market without sufficient quota, the statutory maximum penalty is £200,000.

ii. For failing to report annual activity the statutory maximum penalty is £10,000.

b. Step 2 – Initial penalty amount

i. For placing HFCs on the market without sufficient quota, the Environment Agency took the statutory maximum as the initial penalty amount, following para E2.1. It observed that the amount of tCO_2e placed on the market without quota undermined the efforts of the United Kingdom and the European Union to reduce the use of high Global Warming Potential refrigerants.

ii. For failing to report annual activity, the Environment Agency took the statutory maximum as the initial penalty amount, following para E2.1. It observed that failing to report activity undermines the efforts of the United Kingdom and the European Union to reduce the use of high Global Warming Potential refrigerants on the basis that the amount of HFCs being placed on the market cannot be quantified effectively if data is unreported. Furthermore, Kool Blast had not complied with point 4 of an Enforcement Notice issued to it on 6 November 2019 which had required it to provide its report.

c. Step 3 – Penalty starting point and penalty range

i. Both types of breach were categorised as "Low Culpability" on the basis that Kool Blast did not intend to place HFCs on the market without quota and did not intend to fail to report to the European Commission.

ii. Kool Blast was categorised as a micro-organisation.

iii. Table 1 in Annex A then calculates the penalty starting amount by using the above conclusions to provide a multiplier to the initial penalty amount, subject to a minimum of £1,000. The applicable multiplier being 0.0025, the minimum penalty amount for both types of penalty was therefore calculated at £1,000.

iv. The appropriate penalty range multiplier is 0.0005 to 0.005 of the initial penalty amount, which equals £100 to £1,000. The penalty notices for placing HFCs on the market without sufficient quota appear to misstate the range as £1,000 to £1,000.

v. Penalty notices #1 to #4 for placing HFCs on the market without sufficient quota then revise the penalty starting point to £8,963.52 to match what the Environment Agency calculated as being Kool Blast's financial gain from the breaches.

d. Step 4 – Final penalty amount

i. Each penalty starting point for placing HFCs on the market was reduced by 30% to recognise Kool Blast's cooperative attitude.

ii. No reduction was made to the penalty for failing to report annual activity due to Kool Blast still being in default of the requirement to report its activity for 2018.

Issues

12. The grounds of appeal and accompanying letter were equivocal on whether Kool Blast claimed that an exemption was in place for the product. Following a case management hearing it was conceded that no exemption was in place. The parties agreed that Kool Blast's challenge to the penalty can be approached according to the following issues:

a. The ongoing process to obtain an exemption for the product;

b. The inadvertence of the default;

c. The failure by HM Revenue & Customs to take any action, given that the products had been declared to them when they were imported;

d. The principles and figures behind the calculation of financial benefit to the Kool Blast of the breaches;

e. The financial impact of the penalties imposed on the appellant, including the cost of destruction.

Consideration

13. Paragraph 4(2) of Schedule 5 to the Regulations provides that the grounds of appeal to the Tribunal are:

    a. that the decision to serve the penalty notice was:

        i. Based on an error of fact;

        ii. Wrong in law;

        iii. Wrong for any other reason;

        iv. Unreasonable;

    b. at the amount specified in, or determined by, the notice is unreasonable.

14. In Khan v Revenue & Customs [2006] EWCA Civ 89 at [73], the Court of Appeal held that the "ordinary presumption" in a statutory appeal is that it is for the appellant to prove their case, except where (as does not appear to be the case on the regulations) the statute has expressly or impliedly provided otherwise. A judge will nonetheless only resort to the burden of proof when unable to resolve an issue of fact or facts after unsuccessfully attempting to do so by examination and evaluation of the evidence: Re. B (Children) [2008] UKHL 35 at [32]; Verlander v Devon Waste Mgt [2007] EWCA Civ 835 at [18]-[19]. The standard of proof is the balance of probabilities.

15. I turn to the issues raised by Kool Blast.

The ongoing process to obtain an exemption for the product;

16. Article 15(2) of the EU Regulation sets out the applications and products that are exempt from its requirements. There is no exemption that encompasses the product placed on the market by Kool Blast. Article 15(4) enables a member state to request that the Commission exceptionally authorise an exemption for a specific application or product. Communication has been provided between Kool Blast, the Environment Agency and DEFRA from 2020 to 2022. This culminated in a decision by DEFRA on 2 March 2022 that it did not consider such an exemption was required.

17. Kool Blast complains that the Environment Agency served the penalty notice before its discussions on an exemption were complete. Even if the eventual failure of those discussions is disregarded, Kool Blast's case has no merit. An exemption should have been obtained prior to placing the HFCs on the market. While it is conceivable that the Environment Agency might exercise its discretion not to impose a penalty in relation to use of HFCs that is subsequently exempted, or might be exempted as a result of an ongoing process, there is nothing placed before the Tribunal showing that it was unreasonable in this case for it not to do so. In any event, the Environment Agency has been vindicated by the eventual failure of Kool Blast's attempts to obtain an exemption. I reject that the imposition of the penalties or their amounts is undermined by this issue.

The inadvertence of the default

18. The Environment Agency accepts that the breaches were unintentional, and I likewise accept that Kool Blast was unaware of the legislative changes in 2015 meaning that the product it imported required quota to be obtained. The ESP already takes account of the possibility that there will low or no culpability, yet still provides for a penalty.

19. It was for Kool Blast to ensure that it remained compliant with the law. DEFRA and the Environment Agency published guidance[ii] on 31 December 2014 entitled "F-gas wholesalers and resellers: record keeping requirements". It clearly states that only organisations with a quota can produce or import HFCs for the EU market and links to instructions on how a quota can be obtained.

20. I reject that Kool Blast ought to have been given any additional credit for its lack of knowledge when the Environment Agency determined whether to impose the penalties and in what amounts. Indeed, while the Environment Agency's categorisation of Kool Blast's default as 'low culpability' is not unreasonable, it might well have been open to it to apply the higher category of 'negligent' instead. Little evidence is provided of any steps taken by Kool Blast to ensure its compliance prior to the breaches, save for it having joined a trade association. Its other argument on this point comes under the next heading.

21. It does appear that the Environment Agency failed to consider section E2.2, being that it may not impose a civil penalty where giving advice and guidance will be sufficient to rectify the breach or punishment or future deterrence is not necessary. I cannot see that this error is material to the final outcome. The long period of non-compliance and the ongoing failure to report 2018 activity is sufficient to justify the imposition of a penalty as both a punishment and to deter further breaches by both Kool Blast and other operators. Furthermore, as discussed below, a failure to impose any penalty at all would leave Kool Blast having made a significant profit from unlawful activity.

The failure by HM Revenue & Customs to take any action, given that the products had been declared to them when they were imported

22. As stated in Kool Blast's agent's letter submitted in support of the notice of appeal, and in Mr Collins' written submissions of 20 May 2022, since November 2020 customs systems have been in place to intercept F-gas products where quotas are not in place. Prior to this, at the time of the breaches, the imports were declared to customs and were not intercepted. Kool Blast claim that this caused them to think that the product was not in breach of any quota obligation.

23. I recognise that customs allowing the product to be imported may have perpetuated Kool Blast's failure to appreciate the legislative changes coming into force in 2015. Yet as already held above, compliance remained its responsibility. Delay in the detection of unlawful behaviour does not excuse it, nor provide any meaningful mitigation that has not already been afforded by the finding of low culpability. I have not been referred to any part of the customs process that provides a positive representation to an importer that released goods are compliant with all applicable legal obligations.

The principles and figures behind the calculation of financial benefit to the Kool Blast of the breaches

Principles

24. I do not consider that the way in which financial gain is taken into account in the penalty notices matches the ESP, which provides no mechanism for 'revising' the penalty starting point at Step 3. Penalties #1 to #4 are clearly outside the penalty range identified at Step 3, which seem to have been miscalculated as already observed above. Yet the ESP at Step 4 lists financial gain as an aggravating factor that may justify adjusting the penalty from its starting point. It further provides that:

> *We will normally adjust a penalty within the range but, in some circumstances, we may move outside the range, including waiving the penalty.*

25. At paragraph 4 of the main ESP, the Environment Agency's enforcement and sanction penalty principles include an aim to "remove any financial gain or benefit arising from the breach". This is obviously important. If a business is able to make a profit from unlawful activity this will plainly undermine the regulatory regime as a whole. I conclude that setting the final penalty amount higher than the range to reflect financial gain is not contrary to the ESP or any legal principle.

Figures

26. In its grounds of appeal Kool Blast complains that the amount of penalty notices #1 to #4 fails to take account of the costs of destroying unsold stock and is based on a miscalculation of its profits from sales.

27. Further financial documents were provided with the notice of appeal, and again subsequent to the case management hearing. The Environment Agency accepts that this information justifies a reduction of the financial gain in penalty notices #1 to #4 to £4,931.21.After applying the 30% reduction, those penalty notice figures decrease from £6,274.46 to £3,451.85. I am grateful to the Environment Agency for performing that analysis, and have not been provided with information that could result in a calculation more beneficial to Kool Blast.

The financial impact of the penalties imposed on the appellant, including the cost of destruction.

28. Despite an opportunity having been given, no financial evidence has been provided to justify the claim in the grounds of appeal and supporting letter that the penalty amounts are unaffordable. It was for Kool Blast to prove this assertion.

Conclusion

29. Taking into account the above consideration, I decide as follows. Nothing put forward by Kool Blast justifies a decision that serving any of the penalty notices was based on an error of fact or was wrong or otherwise unreasonable. On the contrary, aside from the immaterial omissions described at paragraphs 21 and 24 above the rationale behind the Environment Agency's decision to serve the penalty notices is unimpeachable.

30. I reduce the amounts of penalty notices #1 to #4 to match what the Environment Agency now accepts was the true financial gain. This is properly categorised as an error of fact,

notwithstanding that the error could only be discerned from post-decision evidence. Aside from that, I reject Kool Blast's challenge to the amounts of the notices. This reduces the total amount of the penalty notices from £27,497.84 to £16,207.40.

Signed | Date:

Judge Neville | *3 January 2024*

[i] The version currently in force can be accessed here: https://www.gov.uk/government/publications/environment-agency-enforcement-and-sanctions-policy/annex-2-climate-change-schemes-the-environment-agencys-approach-to-applying-civil-penalties
The version in force at the time of the penalty notices can be accessed here: https://webarchive.nationalarchives.gov.uk/ukgwa/20211120043256/https://www.gov.uk/government/publications/environment-agency-enforcement-and-sanctions-policy/annex-2-climate-change-schemes-the-environment-agencys-approach-to-applying-civil-penalties
[ii] https://www.gov.uk/guidance/f-gas-wholesalers-record-keeping-requirements