

**DETERMINATION BY THE SECRETARY OF STATE OF THE APPEAL OF ATH
(RESOURCES) LIMITED**

And

THE ENVIRONMENT AGENCY

Under the CRC ENERGY EFFICIENCY SCHEME ORDER 2010

Introduction

1. This is a determination by the Secretary of State for Energy and Climate Change (“the Secretary of State”) of an appeal under article 111 of the CRC Energy Efficiency Scheme Order 2010 (“the Order”). The appeal was made by ATH (Resources) Limited against an enforcement notice served on the appellant by the Environment Agency (“the Agency”) in respect of the appellant’s failure to register as a participant under the Order.
2. The Secretary of State appointed David Hart Q.C. under paragraph 14 of Schedule 10 to the Order to hear the appeal and to make a report containing recommendations or reasons for being unable to make recommendations to the Secretary of State.
3. Mr Hart, after receiving initial written submissions, heard evidence on 7th and 8th November 2011. The appellant was represented by Mr Hugh Mercer Q.C. and the Agency was represented by Ms Emma Dixon. Mr Hart delivered his report, including recommendations to the Secretary of State on [12th] January 2012 (“the Report”).
4. Mr Hart considered whether the electricity consumed by a conveyor used by the appellant is or is not “for the purposes of transport” within the meaning of Schedule 1 to the Order. If it is for the purposes of transport the appellant would not have been obliged to register as the amount of energy used fell below the threshold of 6,000 MWh set by the Order. If he concluded that the electricity was not consumed for the purposes of transport he considered that the appellant must register as a participant under the Order.

Conclusions of the Report

5. On hearing the arguments for both sides Mr Hart concluded:

- “75. First, it is plain that the conveyor is not a “train” within the meaning of paragraph 22(1)(a) of Schedule 1 to the Scheme Order. This is because “train” is specifically defined by s.83(1) Railways Act 1993 as *“Two or more items of rolling stock coupled together, at least one of which is a locomotive, or a locomotive not coupled to any other rolling stock.”* By no stretch of the imagination can a conveyor be thus described. Even the most purposive reading of paragraph 22 cannot enable such an interpretation to be reached.
78. The key ingredients of a “network” set out in section 82 are *“(a) any railway line... and (b) any **installation associated with any of the track comprised in that line or those lines, together constituting a system of track and other installations which is used for and in connection with the support, guidance and operation of trains.**”*
79. The word “installations” is not defined, but could, if one were construing it alone, include a conveyor such as in issue. As for its context, the conveyor is in some very limited sense “associated with” the track, albeit not directly linked to it; the coal is placed by it near to the track but not into the wagons; the loading itself is done by mechanised shovel. But in my view, the conveyor is not part of a *“**system of track or other installations**”* and is not *“used for and in connection with the support, guidance and operation of trains”*. Contrary to ATH’s submissions, “support” and “guidance” are intended to refer to their use in the very specific definition of railway in section 67(1) of the Transport and Works Act 1967 set out above. “Operation” is plainly wider, but in my view the conveyor is not used “in connection with... the operation” of trains. It does not assist the trains to operate.
83. The question is therefore whether, in the words of paragraph 59 of ATH’s skeleton argument, “the service of the conveyor is comprised in the service of provision or operation of the siding.”
84. For reasons similar to those underlying my rejection of the submission that the conveyor is not “network”, it does not

provide “network services”. I derive the real intent of the definition “network services” from the admittedly non-exhaustive list of services at section 82(3), all as set out above. In each case one can readily understand why the particular service serves the network. Signalling systems enable the trains to run safely (section 82(3)(b)). Repair or recovery services in connection with any accident or failure involving locomotives keep the trains running (section 82(3)(d)). Services concerned with snow or leaves keep the track free from obstruction (section 82(3)(e)).

85. Contrast the present. The conveyor assists in the filling of wagons with coal, but it does not provide services for the network. It helps provide freight which is then carried on the network, but that in my view is not within the definition of “network services.”

86. The upshot of the above is that I conclude that ATH does not fall within the transport ‘exemption’, constructing the same as a matter of domestic law. Hence, the electricity used by the conveyor is not ‘for the purposes of transport’ as that phrase is defined in the Scheme Order.”

6. Mr Hart was also asked by the appellant to consider whether EU Directive 2003/96 would make any difference to the interpretation of the Order that he had already reached. He concluded that:

“95. At the time of writing this report, ATH would not be subject to a tax simply by registering, reporting and monitoring under the Scheme, even though those activities cost money.

96 The taxation element would only arise if and when Allocation Regulations were to be promulgated in accordance with the parties’ understanding Government proposals as explained to me at the hearing. I was told by the Agency that it would not be no part of their case that any Regulations, if passed in accordance with those proposals, did not amount to a tax.

97 ATH appealed the enforcement notice because it was concerned that it would suffer very substantial financial losses if it had to pay for every emitted tonne of CO₂. In my judgement, it falls within the Scheme as a matter of domestic law,. At the moment, there is nothing unlawful about the Scheme Order. The Climate Change Act envisages a trading scheme, but does not ordain one. The Scheme

Order (and its amending Order 2011 No.234) sets up a trading scheme, but does not enable allowances to be allocated in return for consideration.

98 On this basis, it is necessary to consider whether the appropriate course is to dismiss ATH's appeal, because, at the date of this report, it has no potential EU grounds for challenge because no tax arises at the moment simply by registration under the Scheme.

99 This seems to me to be the proper course, even though, as I have recorded above, the Directive and its potential implications for the Scheme were argued before me.

100 I therefore reach no conclusions on the questions which were argued before me as to whether allocation regulations imposing a tax would be in conformity with the Directive, and, if so, what consequences this would have for the interpretation of the Scheme Order."

7. Mr Hart's recommendation is:

I therefore recommend that the Secretary of State dismiss ATH's appeal against the enforcement notice dated 8th February 2011.

8. The Secretary of State agrees with and adopts the conclusions set out at paragraph 86 of the Report.

9. The Secretary of State further agrees with the conclusions and approach as set out in paragraph 98 to 99 of the Report.

10. The Secretary of State notes that Mr Hart reached no conclusions on whether Allocation Regulations imposing a tax would be in conformity with EU Directive 2003/96. The Secretary of State likewise considers that the determination of this appeal does not turn on that point because, as Mr Hart explains, at the date of the service of the enforcement notice following the failure to register as a participant in accordance with article 12 of the Order, the appellant had no potential EU grounds for a challenge against the obligation to register and participate in the CRC Energy Efficiency Scheme.

11. In determining the appeal the Secretary of State has the power under paragraph 12 of Schedule 9 to the Order to cancel or to affirm the enforcement notice and where the notice is affirmed, the Secretary of State may do so in its original form, or with such modifications as he sees fit.

Determination

The Secretary of State therefore determines that:

- (i) The appeal by ATH (Resources) Limited against the enforcement notice dated 8th February 2011 is dismissed on the grounds set out above and in the Report.**
- (ii) The enforcement notice is affirmed in its original form.**

Signed by:

Niall Mackenzie

1st March 2012

Head, Industrial and Energy Efficiency, Department of Energy and Climate Change