



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

**Appeal Reference: NV/2018/0003**

**Heard at Fleetbank House, London EC  
On 21 May 2018**

**Before**

**JUDGE HUGHES**

**Between**

**STEETLEY DOLOMITE LTD**

Appellant

**and**

**THE ENVIRONMENT AGENCY**

Respondent

**Appearances**

**Appellant: Stephen Tromans QC (instructed by Latham and Watkins)**

**Respondent: Gwion Lewis (instructed by Kathryn Begbey, Environment Agency)**

**DECISION AND REASONS**

1. This case relates to whether or not a company is entitled to 184,630 allowances issued to it under the EU Greenhouse Gas Emissions Trading Scheme in respect of an industrial plant, Thrislington, for the calendar year 2016 during which the plant did not produce any emissions.

2. The factual background to this case is uncontroversial and is set out in the witness statements of officers of the Appellant Steetley Dolomite Limited (SDL) and its holding company. SDL has for some years manufactured a calcium oxide product (dolime) from rocks containing calcium carbonate and supplied it to the steel makers. In 2015 the steel industry experienced a crisis with reductions in output and closure of steel production plants. Orders for dolime from SDL's plants went into a sharp decline. The Redcar steel plant closed in September 2015 which represented a reduction in demand for dolime from SDL's Thrislington plant of 50,000 tons a year. The Tata steelworks at Port Talbot ceased purchasing dolime from Thrislington during October/November. Production at Thrislington fell from 15,983 tons in May 2015 to 4,216 in November 2015. In the absence of orders from steelmakers no dolime was produced at Thrislington in December 2015 and none has been produced since. The production of dolime is an energy intensive process which emits carbon dioxide both from fuel combustion and from the thermal breakdown of limestone into calcium oxide and carbon dioxide (calcination).
3. SDL was acquired by the Lhoist Group (Lhoist) in October 2014. Faced with the downturn in business Lhoist implemented a voluntary redundancy scheme in October 2015 and Lhoist started consideration of options for the future including the closure of Thrislington in November. There were consultations with the staff in December and January, options were considered and on 26 January 2016 Lhoist decided to mothball rather than close the Thrislington works in the light of the substantial reserves of raw material at Thrislington and the potential revival of the steel market leading to a return of demand for dolime. As a result, SDL has kept a skeleton staff and continued maintenance of the plant with expenditure of approximately 600,000 p.a. It is Lhoist's intention 'to try to bring the Thrislington plant back online once it makes economic sense to do so.' Mr de Vicq, the CEO of Lhoist Europe in oral evidence confirmed that the company's position is that since it has done everything to keep the plant ready for operation it needed to retain the allowances.
4. On 4 January 2016 SDL submitted a capacity/activity level change form to the Environment Agency indicating that: - "Due to closure of SSI, the plant will be mothballed in 2016, whilst new customers/sales are being identified. There was no change to the production in 2015 but the 2016 output is currently being reviewed and will be (at least) less than 50% of the 2015 volume if not zero". The Environment Agency was unable to factor this into its actions and issued 184,630 free allowances in respect of 2016 to SDL on 25 February 2016. On 21 December 2016 SDL submitted a further form stating "This plant has NOT operated this year (2016) and has now been shut down. The plant/kiln has not been operated since December 2015. Also, there are no further plans to operate this kiln in the 2017 reporting period. The company will shortly return the permit for this site and start the process of removing the equipment." The company surrendered its Greenhouse Gas Emissions Permit in February 2017.

Following further exchanges between the parties the Environment Agency on 21 December 2017 issued a Notice of Recovery of Allowances to SDL requiring the return of 184,630 by 19 January 2018. SDL has appealed against that decision.

5. It is common ground between the parties that the Greenhouse Gas Emissions Trading Scheme Regulations 2012 accurately transpose the Directive 2003/87/EC and the decision of the European Commission 2011/278/EU which contains provisions “determining transitional Union-wide rules for harmonised free allocations of emissions allowances pursuant to Article 10a” of the Directive. Schedule 6 to the Regulations provides for the allocation and adjustment of allowances and provides at paragraph 7 for the “Adjustment of allocation to an installation: permanent cessations of regulated activities”. This provides (so far as is relevant): -

*“7. – (1) For the purposes of this paragraph, an installation permanently ceases the carrying out of regulated activities where any of the following conditions are met –*

*.....*

*(d) subject to sub-paragraphs (2) and (3), the operator –*

*(i) has suspended the carrying out of regulated activities at the installation, and*

*(ii) the carrying out of regulated activities has not recommenced within the period of 6 months following the date of the suspension.*

*.....*

*(3) Sub-paragraph (1)(d) does not apply to an installation if it is kept in reserve or on standby, or is operated on a seasonal basis, provided that –*

*(a) the operator holds a permit and a licence for the installation;*

*(b) it is technically possible to commence the carrying out of regulated activities without making physical changes to the installation; and*

*(c) regular maintenance of the installation is carried out.*

*(4) Subject to sub-paragraph (5), no allocation of allowances to an installation may be made for any year following the year in which the installation has permanently ceased the carrying out of regulated activities*

*(4A) for the purpose of sub-paragraph 94), where an installation permanently ceases the carrying out of regulated activities by virtue of meeting the condition in sub-paragraph (1)(d), the date of cessation is deemed to be the date on which the operator suspends the carrying out of regulated activities at the installation.”*

6. The term “regulated activities” is defined by Regulation 3(1):-

*“regulated activity” means an activity (other than an aviation activity) that –*

*(a) Is listed in Annex 1 to the Directive, and*

*(b) Results in specified emissions.*

7. In the case of the Thrislington works the regulated activity listed in the Annex to the Directive is:-

*“Production of lime or calcination of dolomite or magnesite in rotary kilns or in other furnaces with a production capacity exceeding 50 tonnes per day”*

8. SDL advanced two grounds in its appeal against the notice requiring the return of the allowances. The first was that at the relevant time i.e. the start of January 2016 SDL had not “suspended the carrying out of the regulated activities.” Since at that date SDL had made no positive decision to suspend operations, there was simply a de facto cessation due to the absence of orders. During the period from November 2015 to January 2016 the company was going through the processes of consulting staff and considering options for the future which were the necessary steps prior to making a decision to suspend operations.
9. I find this argument unsatisfactory. The Directive and Regulations are concerned with the reduction of greenhouse gas emissions - primarily carbon dioxide. Allowances are issued to cover the emissions of carbon dioxide by various industrial installations. The issue is whether emissions are produced or not. The question of whether there has been a suspension of the carrying out of regulated activities is not a board decision arising out of a strategic consideration of the future and consultation with the workforce, it is whether lime is being actually produced and carbon dioxide emitted. The suspension of regulated activities was the decision not to tip limestone into a kiln and ignite the fuel because no one wanted to buy it - in short there was nowhere to send the product. The staff responsible for the day to day operations of the plant will clearly have been responsible for the decision to charge and fire the kiln and they did not do so because there was no market for the product. It is not suggested that these individuals were acting without authority - it would not be credible to suggest such a thing. The suspension of the regulated activity occurred when the fuel supply was stopped and the last product was removed from the kiln on some date in November 2015. The regulated activity did not recommence within 6 months and so this ground of appeal fails.
10. The second ground of appeal was that on applying the ordinary meaning of the terms the Thrislington Plant was kept on reserve or on standby after December 2015 as required by 7(3) and therefore the suspension of operations should not be seen as a permanent cessation. It was in reserve since it was available to provide back up capacity if needed, it was on standby since it was available to fulfil orders if commercial considerations required it. It was uncontested that the conditions in 7(3)(a)-(c) were complied with.
11. In resisting the appeal, the Environment Agency argued that an installation could not be on “reserve or standby” simply because it could be of use at an

unknown date in the future. The Environment Agency submitted that the wording “kept on reserve or standby, or is operated on a seasonal basis” pointed to a normal operating state for the installation. There was no operational need for the installation to remain in such a state for the period. The retention of the plant in the hope that commercial conditions might improve was not the same as keeping in reserve or on standby. On that basis an operator could continue to receive free allowances for years after operations had ceased based on a speculative hope.

12. There is an absence of decided cases on this point and the terms are in common usage. The expression needs to be interpreted as a whole:- “kept on reserve or standby, or is operated on a seasonal basis”. Both parts of the expression contain a clear implication of a continuing state and intention which controls the use and justifies the ownership of the installation. The difficulty with SDL’s case is that the actual circumstances of the period point in a very different direction. SDL was acquired in 2014 a key part of the company was the Thrislington Plant with its considerable reserves which Lhoist intended to operate for many years. In 2015 the market collapsed and it still has not sufficiently recovered. From late 2015 Lhoist started to reduce costs and consider what to do with a suddenly underperforming asset. That process continued through 2016. There was no “keeping”, there was no stability, there was simply the response to unforeseen circumstances and the hope that things would improve. The UK Regulators guidance on the operation of the Emissions Trading System suggests (page 21, bundle page 581):-

*25.13. An installation is considered to be kept in reserve or standby when its normal operating state or pattern is to be kept in reserve or standby. There must be a genuine operational need for the installation to operate in this way.*

13. SDL dispute this interpretation. However, it seems to me to be an inevitable consequence of the wording of the Regulation. For something to be “kept” there needs to be stability, a continuing purpose. There is no evidence of this. I therefore conclude that the various steps taken to reduce costs and to preserve a potentially valuable asset do not amount to keeping on reserve or standby. The exception provided by paragraph 7(3) does not apply and the necessary conclusion is that the case falls properly to be considered with 7(1) (d). The regulated activities were suspended before the end of December 2015 and were not recommenced.
14. I am satisfied that the Environment Agency’s Notice of Recovery of Allowances was properly served and the appeal is dismissed.

Signed Hughes

Judge of the First-tier Tribunal

Date: 23 May 2018