



**TC03999**

**Appeal number: TC/2013/08083**

**LATE APPEAL – application to appeal out of time – ongoing correspondence between HMRC and Appellant’s representative – should time limit be extended – Leeds City Council, McCarthy & Stone considered – extension of time allowed**

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**MILLENIUM ENERGY TRADING LTD**

**Appellant**

**- and -**

**THE COMMISSIONERS FOR HER MAJESTY’S  
REVENUE & CUSTOMS**

**Respondents**

**TRIBUNAL: JUDGE JUDITH POWELL  
MRS RUTH A. WATTS DAVIES MIH FCIPD**

**Sitting in public at Bedford Square, London on 13 August 2014**

**Mr Robert Emanuel, on behalf of the General Counsel and Solicitors to HMRC,  
for the Respondents**

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## DECISION

1. This is an application for the appeal made by the Appellant to be heard out of  
5 time. The Appellant was not present in person nor through a representative and had  
indicated that no-one would be attending on its behalf but was prepared for the  
hearing of this application to proceed in its absence. The Respondents made a formal  
application for the application to go ahead in its absence which we granted.

2. The Appellant has applied for its appeal against a decision of the Respondents  
10 to de-register it for VAT purposes to be heard out of time. The Respondents wrote  
to the Appellant on 23 July 2013 indicating they intended to de-register it for VAT  
purposes. Section 83A Value Added Tax Act 2013 (VATA) requires the  
Respondents to offer a review of their decision in these circumstances "at the same  
time as the decision is notified to [the Appellant]". This letter did not do so.

3. It is clear that this omission was picked up by the Respondents and on 7 August  
15 2013 an email was sent by Officer Mike Perry to the Appellant's representative, Mr  
Martin O'Neil at Smith and Williamson, a firm of accountants. This email was  
copied to the Appellant. The email attached a copy of the letter of 23 July and the  
email itself contained an offer of a review. The letter of 23 July was not itself  
20 amended or replaced.

4. There is no dispute that if the email of 7 August is treated as the decision of the  
Respondents the Appellant had until 6 September 2013 to make an appeal or accept  
the offer of a review.

5. There was other correspondence concerning the Appellant's VAT affairs and in  
25 particular a letter was written by Mr O'Neill on 5 Septembers 2013 about several  
aspects of the VAT affairs. This asked the Respondents to specify the basis for its  
de-registration. The letter did not specify in terms that this was a request for a review  
of its decision to de-register but it is plain that the decision was not accepted. The  
author of the letter requested a meeting to discuss matters. On 18 September 2013  
30 HMRC responded to the letter of 5 September saying that, so far as the basis for  
deregistration was concerned they referred to the earlier response by email of 7  
August 2013. This was the email which contained the July 23 letter as an attachment.  
HMRC went on to say "I gave you and your client the opportunity to appeal the  
35 decision to either an independent officer within HMRC or to the Tribunal. I am not  
aware that either of these avenues has been pursued. these avenues would have given  
your client the opportunity to state its case".

6. The Appellant submitted a notice of appeal to this Tribunal. The notice of  
appeal was dated 7 November 2013 and was sent by email on 11 November 2013.  
The notice itself stated the appeal should have been made by 18 October 2013.

7. The Respondents opposed the appeal being heard out of time and the Appellant  
40 applied to this Tribunal for it to be heard late.

8. It seems that the Appellant considered that there was no final decision to appeal until the letter of 18 September 2013 was written. It is not clear whether they regarded this letter as a review of the earlier decision. They accept that the appeal was made late. They say it was late because it should have been made by 18 October 2013; the Respondents say it was late because it should have been made by 6 September.

9. The Respondents submit that the appeal was made some 66 days after the deadline and 53 days after the letter of 18 September which reminded them of the review offer and rights of appeal. They say that the Appellant's reason for it being late is not persuasive. The Appellant said that it has necessarily been required to take advice on the issue of its appeal, the costs of which are both considerable and serious. The Respondents said that the Appellant had professional advisors on 7 July, the matter had not been assigned to the complex category and even if it had been so allocated it could have opted out of the costs regime. They also said that the submission of an appeal is not an arduous task for a professionally represented Appellant and does not irrevocably commit it to a course of action.

10. The Respondents referred us to the decision of Judge Bishopp sitting in the Upper Tribunal in the case of *Leeds City Council v The Commissioners for Her Majesty's Revenue and Customs* [2013] UKUT 596 (TCC) in which he disagreed with an earlier decision of Judge Sinfield in *Revenue and Customs Commissioners v McCarthy & Stone (Developments) Ltd* [2014] UKUT 196 (TCC), [2014] STC 973 and held that the prevailing practices in relation to extensions of time should apply. This is the practice described by Morgan J in *Data Select v Revenue and Customs Commissioners* [2012] UKUT 187 (TCC) where Judge Bishopp observed that the pertinent passage in the decision of Morgan J is as follows:

“[34].....Applications for extensions of time limits of various kinds are commonplace and the approach to be adopted is well established. As a general rule when a court or tribunal is asked to extend a relevant time limit the court or tribunal asks itself the following questions: (1) what is the purpose of the time limit (2) how long was the delay (3) is there a good explanation for the delay (4) what will be the consequences for the parties of an extension of time and (5) what will be the consequences for the parties of a refusal to extend time. The court or tribunal then makes its decision in the light of the answers to those questions”

11. The Respondents referred in their submissions to another appeal of the same Appellant and acknowledged that if we allowed the appeal by the Appellant they would be put to very little further preparatory work in dealing with the appeal because the other appeal would involve substantially similar preparation even if some of the issues and the burden of proof might be different. They agreed that if the Appellant failed to have the opportunity to challenge the VAT de-registration it could suffer as a consequence.

12. We decided to allow the Appellant to make an appeal out of time. In reaching this decision we considered what was said by Judge Bishopp on the Leeds City Council case and in particular the passage from the Data Select case to which he referred as being pertinent. We acknowledge the purpose of time limits but when we consider the facts of this case and in particular the flaw in the original letter of 23

July, followed by the inappropriate way in which that was dealt with in the email of 7 August, the subsequent ongoing correspondence which included the letter from the Appellant's representative which may well have amounted to a request (in time) for a review which was met with a terse negative response from HMRC the unhelpful response from HMRC and the possibility for considerable disadvantage to the Appellant if his appeal is not heard out of time.

13. A number of matters flow from our decision. Mr Emanuel asked for a direction that the appeal to be consolidated with the other appeal to which he referred in making his submissions. He also asked us to direct that if we are prepared to do this then we should also direct that they should serve a consolidated statement of case and should have a period of 60 days in which to do so starting from the date of this decision. It seems to us that these matters should be dealt with in separate directions which we shall issue as soon as possible. For the avoidance of doubt we make it clear that no time limits will run in relation to the service of the statement of case until we have issued those directions.

14. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

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**JUDITH POWELL  
TRIBUNAL JUDGE**

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**RELEASE DATE: 10 September 2014**