[2019] UKFTT 98 (TC)

TC06981

Appeal number: TC/2018/01733

VAT – default surcharge – failure by HMRC to prove that surcharge liability notice was issued – appeal dismissed – s59(4) VAT Act 1994

FIRST-TIER TRIBUNAL
TAX CHAMBER

ONCE UPON A TIME MARKETING LIMITED **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE ALEKSANDER
REBECCA NEWNS

Sitting in public at Taylor House, London EC1 on 23 January 2019

Daniel Millet, Finance Director of the Appellant, for the Appellant

Stuart Macleod, an officer of HMRC, for the Respondents

DECISION

1. This is an appeal by Once Upon a Time Marketing Limited against default surcharges of VAT periods 01/17, 04/17 and 07/17. Following the submission of the appeal to the Tribunal, HMRC amended the default surcharges, by reducing the 04/17 surcharge from £25,347.88 to £24,460.18 and cancelling the 07/17 surcharge. In consequence the surcharges that remain subject to this appeal are for the 01/17 and 04/17 periods totalling £33,337.17.

2. Mr Millet, who is the Appellant's finance director, represented the Appellant. Mr Macleod, an officer of HMRC, represented HMRC. A bundle of documentary evidence was placed before us.

3. Section 59, VAT Act 1994 deals with default surcharges. S59(4) provides as follows:

> (4) Subject to subsections (7) to (10) below, if a taxable person on whom a surcharge liability notice has been served—
>
> (a) is in default in respect of a prescribed accounting period ending within the surcharge period specified in (or extended by) that notice, and
>
> (b) has outstanding VAT for that prescribed accounting period,
>
> he shall be liable to a surcharge equal to whichever is the greater of the following, namely, the specified percentage of his outstanding VAT for that prescribed accounting period and £30.

4. It is clear from the drafting of this provision that a default surcharge only arises if a surcharge liability notice (SLN) has been served on the taxpayer. The whole scheme of default surcharges is dependent on the service of the SLN. Absent an SLN, there can be no liability to a default surcharge – as to which we are bound by the decision of the High Court in *HMCE v Medway Draughting & Technical Services Ltd* [1989] STC 346 (not cited to us).

5. HMRC do not keep copies of all correspondence with taxpayers, particularly where the correspondence is in a standard form. This is entirely understandable, as the amount of storage required to do so (even in electronic form) is impractical. However HMRC keep an electronic log of such correspondence. This is the case for SLNs.

6. The bundle of documents placed before us in evidence did not include any extracts from HMRC's electronic log. Nor is there any correspondence included in the bundle which otherwise evidences the receipt by the Appellant of any SLNs.

7. It falls on HMRC to prove that an SLN has been served.

8. As there was no evidence before us of any kind showing that an SLN had been printed by HMRC and posted to the Appellant, it follows that HMRC have not satisfied us that an SLN was served on the Appellant, and we so find.

9. As HMRC have not proved service of an SLN, it follows that the Appellant can have no liability to the default surcharges, and their appeal succeeds.

10. 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.

NICHOLAS ALEKSANDER
TRIBUNAL JUDGE

RELEASE DATE: 13 FEBRUARY 2019