



TC07007

Appeal number: TC/2018/05200

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**

SKELTON ELECTRICAL LIMITED

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE ALEKSANDER
SONIA GABLE**

Sitting in public at City Gate House, Brighton on 1 November 2018

The appellant did not attend and was not represented

Nickeshia Davis, an officer of HM Revenue and Customs, for the Respondents

DECISION

1. This is an appeal by Skelton Electrical Limited against a default surcharge for VAT period 04/18 in the amount of £163.60.

2. At the hearing HMRC were represented by Ms Davis. No one from Skelton Electrical attended the hearing and they were not represented. We were satisfied that that reasonable steps had been taken to notify Skelton Electrical of the hearing, as the Tribunal had written to them notifying the hearing date and venue. At the time listed for the commencement of the hearing, we arranged for the Tribunal's clerk to telephone Skelton Electrical, but there was no reply. We did not commence the hearing itself until at least an hour after the listed time. There were included in the document bundle copies of correspondence setting out Skelton Electrical's grounds of appeal. In these circumstances, we decided that it was in the interests of justice to proceed with the hearing in Skelton Electrical's absence.

3. We had before us a bundle of documents prepared by HMRC. Included in the bundle was correspondence from Skelton Electrical setting out their grounds for appeal. These were also set out in the Notice of Appeal.

4. Section 59, VAT Act 1994 deals with default surcharges. Section 59(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.

5. 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).

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

7. 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.

8. Ms Davis was unable to show us any record in the electronic log included in the bundle which recorded the issue and service of the SLN. Nor was there included in the bundle any correspondence from Skelton Electrical confirming receipt of the SLN. 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: 26 FEBRUARY 2019

Amended pursuant to rule 37 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 on 15 March 2019