



**TC04108**

**Appeal number: TC/2011/02382**

*VAT – Assessment in case of incomplete or incorrect return – VATA s 73 –  
Penalty for dishonest evasion of VAT – VATA s 60 – INCOME TAX –  
Discovery assessment – TMA s 29 – Dispute concerning facts on which the  
assessments and penalties based – Appeal allowed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**BRENDAN KELLY**

**Appellant**

**- and -**

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

**TRIBUNAL: JUDGE CHRISTOPHER STAKER  
MR TONY HENNESSEY FCA**

**Sitting in public in Belfast on 14 and 15 October 2014**

**Ms Barbara Belgrano, counsel, for the Appellant**

**Mr Philip Shepherd, officer of HMRC, for the Respondents**

## DECISION

### Introduction

1. The Appellant appeals against:

- 5 (1) assessments to VAT under s 73(1) of the Value Added Tax Act 1994 (“VATA”), in respect of VAT periods 02/06 to 05/09, in the sum of £73,795;
- (2) assessments to income tax and class 4 National Insurance contributions under s 29 of the Taxes Management Act 1970, in respect of tax years  
10 2005-06 to 2008-09, in the sum of £ 76,255.62;
- (3) a penalty or penalties under s 60(1) VATA 1994 in respect of VAT periods 02/06 to 02/09, in the sum of £64,805;
- (4) a penalty under Schedule 24 to the Finance Act 2007 for deliberate  
15 inaccuracy with concealment, in respect of VAT period 05/09, in the sum of £1,610.

2. It is common ground that at material times the Appellant carried on business as a joiner in Northern Ireland. He has been registered for VAT in the UK since 1999. His business activities consist of fitting, or of supplying and fitting, double glazed doors and windows.

20 3. The basic facts of the case are otherwise in dispute between the parties.

4. The HMRC position is as follows. During the VAT periods and tax years in question, the Appellant purchased certain doors and windows from Bal4 Windows Ltd (“Bal4”), a UK company based in Northern Ireland and VAT registered in the UK. Bal4 supplied the doors and windows to the Appellant with zero rated VAT  
25 because the Appellant used a VAT number from the Republic of Ireland belonging to someone called John Cullen whose registered address was in Dundalk in the Republic of Ireland. It would have been legitimate for Bal4 to supply the doors and windows zero rated to a customer in the Republic of Ireland who was VAT-registered in that country, in which case the purchaser would have recorded the transaction in the  
30 relevant box of his Republic of Ireland VAT return dealing with goods acquired from other EU Member States. However, the goods in question were in fact either collected by the Appellant from the premises of Bal4, or were delivered by Bal4 to the Appellant at his place of business in Northern Ireland. The Appellant then made onward “off books” supplies to his own customers, for which he did not account in his  
35 VAT returns, of these doors and windows and of his own labour in fitting these doors and windows. HMRC have taken no action against Bal4 or its director, Mr Balfour, as HMRC have taken the view that Bal4 acted honestly and in good faith, albeit contrary to its obligations under VAT law. However, HMRC consider that the conduct of the Appellant involved dishonesty for the purpose of evading VAT.

40 5. The Appellant’s position is as follows. The Appellant made limited purchases of doors and windows from Bal4. Only in one or two instances did Bal4 provide the

Appellant with a VAT invoice in respect of the purchases. When an invoice was provided by Bal4, the Appellant reclaimed the input tax on the purchase in his VAT return. On other occasions when Bal4 failed to provide a VAT invoice in respect of purchases by the Appellant, he could not reclaim the input tax in his VAT return.

5 Despite this, the price charged by Bal4 for the goods still made them competitive. In every case where he made an onward supply to his own customers of doors or windows he had purchased from Bal4, the Appellant charged output VAT on that supply, and on the supply of his labour in fitting the doors and windows, and these supplies were all included in his VAT returns. The Appellant denies ever having

10 purchased doors or windows from Bal4 using a Republic of Ireland VAT number, and denies making additional “off books” purchases from Bal4 as claimed by HMRC.

### **The applicable legislation**

6. The principal legislative provisions relevant to this appeal are set out in the annex to this decision.

### **15 The hearing**

7. At the hearing, the Tribunal was presented with two documents bundles, an authorities bundle, a witness statements bundle, and skeleton arguments of the parties. Some additional documents were provided at the hearing. Witness evidence was given by the Appellant, and by the following officers of HMRC: Paul Goodman,

20 Gary Craig and Lisa Rae. The Tribunal gave directions permitting post-hearing written submissions by the parties on one of the issues, and the written submissions received have been taken into account.

### **The main documentary evidence**

8. The documentary evidence included the Appellant’s self-assessment tax returns and VAT returns for the relevant periods, notes of Code of Practice 9 meetings

25 attended by the Appellant’s agents, and correspondence between the parties.

9. The main additional items of documentary evidence were the following.

10. There is a customer statement said to have been supplied by Bal4 to HMRC (referred to below as the “Bal4 customer statement”). It is some 20 pages long. It is a

30 simple form with table, in which the table columns have typed titles, and the table entries have been entered in handwriting. Rows in the table apparently relate to individual invoices, and the column titles under which information is entered for each row are “date”, “job no”, “cust ref”, “invoice no”, “debit”, “credit” and “balance”. Some of the rows relate to payments rather than to invoices. The dates of the entries

35 span the period 4 November 2005 to 13 May 2009. The amounts in the debit column vary from as little as £50 to as much as several thousand pounds. On individual pages, there is a heading with typewritten titles including “Account name” and “Address” and “Telephone”. Against “Account name”, there has been typed or handwritten on each page either “Brendan Kelly” or “Brendan Kelly (fitter for John

40 Cullen)” or “(John Cullen) Brendan Kelly”. The entry “Address” has been left blank

on each page except one on which “Dundalk” has been handwritten. The entry “Telephone” has been left blank on most pages, but on a few pages a number has been entered which the Appellant accepts is his mobile telephone number.

11. There is a series of invoices issued by Bal4 to John Cullen in Dundalk, Republic of Ireland. They span the period 3 February 2006 to 23 January 2009. Each invoice gives Bal4’s UK VAT number and John Cullen’s Republic of Ireland VAT number. Each invoice indicates that the customer account number is “ZCUL001”. Each invoice indicates that no VAT has been charged. The information contained in most of the invoices corresponds to the information in one of the rows in the Bal4 customer statement, and vice versa. For example, there is an invoice dated 13 October 2006 for £530 bearing the information “document no 3021”, “order no 4344”, and details “job ref BK Dullaghan”. Correspondingly, in the Bal4 customer statement there is an entry dated 13 October 2006 showing £530 in the debit column, with the following information in other columns: “job no 4344”, “cust ref Dullaghan”, “invoice no 3021”. In each of the invoices, the information in the details box begins “job ref BK” followed by the same or similar name to that appearing in the “cust ref” column in the corresponding entry in the Bal4 customer statement, followed by details of doors and/or windows, followed by the words “supply only”.

12. There is a single invoice issued by Bal4 to the Appellant. It is in a similar format to the other invoices. It is dated 27 April 2007. It is for £640 plus tax of £112. The document number is 3821, and the customer account number is “KEL003”.

13. There are copies of four cheque stubs in in the chequebook for an account in the name of the Appellant and his wife (the “Appellant’s joint account”), showing payments to Bal4 on 18 August 2008, 24 September 2008, 18 March 2009 and 30 March 2009 respectively, in the sums of £3,000, £2,000, £2,500 and £3,500 respectively. The Bal4 customer statement shows cheque payments for the same sums being received on 19 August 2008, 24 September 2008, 18 March 2009 and 31 March 2009 respectively.

14. There are bank statements from the same joint bank account.

15. There are invoices issued by the Appellant to his customers. There are five typed invoices followed by a series of invoices numbered consecutively from 0001 to 0077, spanning the period 30 June 2006 to 29 April 2009. Two of the typed invoices related to new builds and were zero-rated. The series of invoices consists of forms pre-printed with the Appellant’s name, address and VAT number, on which dates, customer names, details of goods and amounts have been entered on individual invoices in handwriting. On each invoice the handwritten information that has been entered includes a net total and an amount of VAT.

16. There are pages showing the Appellant’s working out of the details in various of his VAT returns, showing for the relevant periods the separate items making up the respective figures for sales and purchases.

### **The evidence of the Appellant**

17. The two witness statements of the Appellant state amongst other matters as follows.

18. The Appellant has worked as a self-employed joiner for some 20 years, fitting  
5 doors and windows. For most of that time, he worked full time on jobs subcontracted  
to him by companies. This work was labour only, and he did not supply materials.  
For a period from about 2005 to 2011, he also undertook some work on weekends in  
which he both supplied and fitted doors and windows. He would only buy doors and  
10 windows in order to carry out such work, and he never simply sold them on. He  
would get quotes for the doors and windows, which were made to measure for the  
particular job, from more than one supplier. He would use the supplier who gave the  
best quote, which would not always be Bal4. Although the Appellant asked for  
invoices, Bal4 only provided one invoice. The Appellant was paid by cheque for all  
15 of his work, and he paid these cheques into his bank account ending 5053. He would  
pay Bal4 by cheque at intervals from once a week to once a month, according to  
whether the Appellant had been paid by his clients and how much. The Appellant did  
not keep a formal record of his purchases and outstanding balance with Bal4, although  
he would have written it down at the time. The Appellant did not use other bank  
accounts for his business.

19. Prior to the present proceedings, the Appellant had never seen the Bal4  
20 customer statement. He has marked on a copy of the Bal4 customer statement those  
jobs that he knows he has carried out. The Bal4 customer statement sometimes  
includes six purchases on a single day, which the Appellant would not have done as  
he only carried out materials and labour work on weekends. It would have been  
25 physically impossible for him to have fitted all of the doors and windows in the Bal4  
customer statement in addition to his regular labour only work. Prior to the present  
proceedings, he had never seen Bal4's invoices for sales to John Cullen, and the  
Appellant does not recognise the majority of the names given under "job ref" on those  
invoices. When the Appellant purchased materials from Bal4, he believed that he was  
30 paying VAT on those goods. However, as Bal4 did not provide invoices (except on  
one occasion), he could not reclaim the input VAT. The Appellant charged VAT on  
his onward supplies, provided invoices to his customers, and accounted for his VAT.  
The Appellant does not know John Cullen and has never used a Republic of Ireland  
VAT number. The Appellant considers that he has cooperated with HMRC. He does  
35 not lead an extravagant lifestyle.

20. In examination in chief, the Appellant added as follows. On 99% of occasions  
he fitted any doors and windows that he supplied. Only on very rare occasions did he  
simply make an onward sale of doors or windows as there was no margin in the  
supply only business. On the occasions that he did, he supplied the goods to a  
40 customer in Dublin so he charged no VAT and his profit came from charging to  
transport the goods to Dublin. Many of the invoices that he issued to his customers  
did not indicate that he had also fitted the doors and windows that he had supplied, as  
he did not really address his mind to this at the time he issued the invoice, which was  
when he was paid by his customer after the work had been completed. The Appellant  
45 was asked about a statement made at the Code of Practice 9 meeting on 14 October

2010, to the effect that he had purchased goods on which he had paid no VAT from a person who he arranged to meet on a main road where the goods were transferred between vans. The Appellant said that when he was asked by HMRC to attend the meeting, he asked Bal4 to provide invoices for his purchases from Bal4. The Appellant was told to keep his mouth shut about purchases from Bal4 so he fabricated this story about buying goods with no VAT from a person with a van.

21. In cross-examination, the Appellant said amongst other matters as follows. Even though he could not reclaim input tax on purchases from Bal4 because Bal4 provided no invoices, the cost of purchases from Bal4 was still competitive on the occasions that he made them. It was put to the Appellant that he had marked on the Bal4 customer statement the jobs that he remembered, but that there were entries in the Bal4 customer statement that he had not marked, even though the name of the customer also appeared in his own invoices, and that the dates of the jobs that he had marked in the Bal4 customer statement did not coincide with his own records. The Appellant said that with the passage of time, he could not remember exact details of individual jobs he had done. It was put to the Appellant that although he claimed that there was only one occasion on which he had received an invoice from Bal4 and had reclaimed input tax, his working out for his VAT returns showed that he had reclaimed input VAT for other purchases from Bal4. The Appellant responded that after 8 years he could not remember, but that he would not have claimed input tax if he did not have an invoice at the time. The Appellant said that he never paid Bal4 in full, but had a running balance on which he made payments from time to time.

### **The evidence of Paul Goodman**

22. Mr Goodman is a VAT assurance officer.

23. The witness statement of Mr Goodman states amongst other matters as follows. In April 2009, in response to a verification request from the authorities in the Republic of Ireland, Mr Goodman undertook a visit to Bal4. During the enquiry it was verified that zero rated sales were made in Northern Ireland to the Appellant using a Republic of Ireland VAT number. Bal4 supplied its customer statement for the Appellant which showed some cheque payments and substantial amounts of cash payments. Mr Goodman subsequently visited the Appellant's registered business address and uplifted business records. Cheque payments from the Appellant to Bal4 identified from the Appellant's cheque book stubs corresponded with the Bal4 records. There were no corresponding purchase invoices from Bal4 for those transactions. Mr Goodman concluded that there had been substantial off-record purchases between 2006 to 2009 by Bal4 to the Appellant without VAT as he had been incorrectly using a Republic of Ireland VAT number. The purchases made by the Appellant from Bal4 were greater than the total sales declared by the Appellant in his VAT returns. The case was referred to the Evasion Referral Team.

24. In examination in chief, Mr Goodman added as follows. Bal4 had two customers using the Republic of Ireland VAT number of John Cullen. One was the Appellant, the other was a Mr McKay. Bal4 had two separate customer statements for sales using that VAT number, one for the Appellant and one for Mr McKay.

Although the Bal4 customer statement does not indicate that the goods were delivered to the Appellant in the UK, Mr Goodman was told by Mr Balfour that this was the case. Mr Balfour in admitting this was making a self-incriminatory statement. Mr Goodman considered that Mr Balfour was naïve and wrongly believed that he was  
5 entitled to deliver the goods to the Appellant in the UK, notwithstanding that they had been purchased in the name of John Cullen using a Republic of Ireland VAT number.

25. In cross-examination, Mr Goodman said amongst other matters as follows. Mr Balfour thought that in order to make sales without VAT it was sufficient to have a Republic of Ireland VAT number. Mr Balfour also thought that it was permissible to  
10 make sales to two different people using the same Republic of Ireland VAT number, as he thought that both worked for John Cullen. Mr Goodman admitted that he had never seen any goods delivered to the Appellant, or seen any goods in Bal4's premises marked for delivery to the Appellant. Although he could have asked Bal4 to see their delivery schedules, he did not do so. Mr Goodman admitted that when he  
15 stated in his witness statement that it had been identified that sales were made to the Appellant, what he meant was that Mr Balfour had told him so. Mr Goodman had not observed how Mr Kelly worked, or where he obtained goods from. Mr Goodman had not sought to verify with the customers named in the "cust ref" column in the Bal4 customer statement whether they had in fact received the goods in question, and had  
20 not otherwise sought to verify independently the truth of the information contained in the Bal4 customer statement. No action was taken against Mr Balfour or Bal4. It was considered that although Mr Balfour had not complied with VAT law, he had not acted dishonestly, he had been open and honest with HMRC, and there had been no revenue loss.

25 26. At a subsequent stage of the hearing, Mr Goodman was recalled to give further evidence. He said that Bal4's computer was used only for invoices and that their other records were all handwritten.

### **The evidence of Gary Craig**

30 27. Mr Craig is a member of the Local Compliance Civil Investigation of Fraud team.

28. The witness statement of Mr Craig states amongst other matters as follows. In June 2013, he received an evasion referral form in respect of the Appellant, with the information obtained by Mr Goodman. Looking at that information, Mr Craig found as follows. Of the £78,000 cheque payments in the Bal4 customer statement, Mr  
35 Craig was able to match £40,000 to the Appellant's joint account. Mr Craig did not request or look at statements of other accounts held by the Appellant. On 23 June 2009, it was decided that an investigation would be conducted under Code of Practice 9. On 28 July 2009, a Code of Practice 9 meeting was held with the Appellant's agent Mr Garvin, who admitted that the Appellant's record keeping was poor. On 17  
40 September 2009, a Code of Practice 9 meeting was held with the Appellant's agent Mr Daley, who also considered that the Appellant's records were poor. On 15 January 2010, Mr Craig issued pre-decision letters to the Appellant stating that VAT and direct tax assessments would be issued if a reply was not received within a

specified period. The VAT assessments were calculated by totalling the additional supplies noted from the Bal4 customer statement and adding a markup of 118%. Direct tax was calculated using a markup of 118%. Formal assessments were issued on 18 May 2010 for VAT and 24 May 2010 for direct tax. On 6 July 2010, a notification of civil penalty under s 60(1) VATA was issued in the sum of 90% of the VAT evaded (10% mitigation having been given for embracing and meeting responsibilities).

29. In examination in chief, Mr Craig added as follows. He could link £40,000 of payments in the Bal4 customer record to the Appellant but could not link a corresponding £40,000 of supplies to the Appellant, and therefore considered that the Appellant's records were incomplete. The Appellant's account of buying goods with no VAT from another person from a van on the side of the road was considered implausible. Mr Craig's role had been to investigate the Appellant (whose case had been referred to him) and not to investigate Bal4 or Mr Balfour or Mr McKay.

30. In cross-examination, Mr Craig said amongst other matters as follows. He only worked on the basis of the information that he already had, and did not undertake any further investigation. The reliability of Mr Balfour was speculated upon, but Mr Craig was satisfied that Mr Balfour was reliable and that the Bal4 customer statement was correct.

#### **The evidence of Lisa Rae**

31. Ms Rae is a member of the Civil Investigation of Fraud team. She took over Mr Craig's responsibilities for this case in September 2010.

32. The witness statement of Ms Rae states amongst other matters as follows. On 14 October 2010 she had a meeting with the Appellant's agent, Mr Savage, in relation to an appeal against the VAT assessments. At that meeting, Mr Savage said that the Appellant's VAT number had been used to facilitate someone else to buy goods north and south of the border, the suppliers being "Mr Balfour" and a "Brendan McKay" and an accountant in Dundalk was involved. Mr Savage also said that the Appellant was "mentally disturbed" as a result of another "gentleman in the background", and that the Appellant was "scared stiff of third parties". Mr Savage did not provide any evidence in support of the appeal. On subsequent occasions, Mr Savage advised HMRC that the Appellant was suffering ill-health, and made complaints about HMRC's conduct of the matter, which were rejected.

#### **The submissions of the Appellant**

33. The principal submissions on behalf of the Appellant were as follows.

34. The issue in this case turns on a factual question regarding whether the Appellant dishonestly used a Republic of Ireland VAT number to obtain the supply of the goods referred to in the Bal4 customer statement, and whether he made supplies of those goods to his own customers without charging for or accounting for VAT. The Appellant's case is that he purchased some doors and windows from Bal4 but does

not recognise most of the entries in the Bal4 customer statement, and that he accounted for the correct amount of VAT on his supplies. HMRC have not led any evidence to support the essential element of their case, namely the Bal4 customer statement. There is no evidence that the Bal4 invoices issued to John Cullen relate to the Appellant. Given the size of Bal4's business, it is implausible that it would deliver goods to a customer in the UK zero rated on the basis of a Republic of Ireland VAT number in the honest belief that this was permissible. This undermines the credibility of evidence emanating from Bal4. There are inconsistencies between the Bal4 customer statement and the Bal4 invoices to John Cullen. The one invoice from Bal4 issued to the Appellant shows that VAT was paid. HMRC took no steps to investigate the correctness of the Bal4 customer statement, or to investigate the nature of the Appellant's trade.

35. HMRC have also not provided any evidence relating to the supplies of goods that the Appellant is alleged to have made to his own customers. The Appellant's invoices that are in evidence show that he charged his customers VAT on his supplies, save where the supplies related to new buildings. Even if the Appellant did receive additional supplies from Bal4, the assessments and penalties should have been based on the value of the supplies from Bal4 to the Appellant, rather than on a marked-up rate of 118%.

36. The Appellant has not had the opportunity to examine Mr Balfour, and in the circumstances it would be a breach of Article 6(3)(d) of the European Convention on Human Rights to rely on the evidence of Mr Balfour.

37. The HMRC evidence is therefore defective and incomplete and insufficient to support the assessments and penalties. The Appellant's evidence is credible, and that evidence is sufficient to outweigh the HMRC evidence. In relation to the burden of proof, the Appellant relied on *Megtian Ltd v Revenue & Customs* [2008] UKVAT V20894 and *Hamid Forati and Patricia Forati t/a Emilio's*, VAT decision no 17382, 17 July 2001 ("*Forati*").

38. Further or alternatively, any VAT on supplies from Bal4 to the Appellant ought to have been assessed on Bal4 rather than the Appellant. Reliance was placed on paragraph 4.3 of VAT Notice 725. If Bal4 supplied goods to a trader in the UK, it would have been plain to Bal4 that the goods could not be zero rated. HMRC has failed to establish that the goods were supplied to the Appellant for purposes of s 30 VATA.

39. It was also argued that the penalty under s 60(1) VATA was a single global penalty that was imposed outside the applicable statutory time limit.

### **The submissions of HMRC**

40. The principal submissions on behalf of HMRC were as follows.

41. It is not uncommon for the evidence in a case to be incomplete. The Tribunal must look at such evidence as there is and make findings of fact on a balance of

probabilities. HMRC accept that its case depends on the Bal4 customer statement being correct and on Mr Balfour being honest.

42. The Appellant has stated that he does not do any work in the Republic of Ireland, and therefore any purchases by the Appellant should not have been zero rated. Five pages of the Bal4 customer statement are headed “Brendan Kelly (fitter of John Cullen)” and one was headed “(John Cullen) Brendan Kelly”. Where there is a telephone number in the Bal4 customer statement, it is the Appellant’s number. The job references in the invoices issued by Bal4 to John Cullen begin with the letters “BK”, which the Respondent considers is a reference to the Appellant. It is not disputed that the Appellant made some purchases from Bal4. This is further confirmed by the Appellant’s cheque stubs. Furthermore, certain other payments indicated in the Bal4 customer statement correspond with entries in bank statements for the Appellant’s joint account. There is a strong correlation between the Bal4 invoices issued to John Cullen and the Bal4 customer statement. The Appellant does not have a record of even his admitted purchases from Bal4. The explanation is that invoices for these purchases were issued in the name of John Cullen.

43. If the Appellant did not acknowledge the additional purchases in the Bal4 customer statement, the inference is that he did not declare corresponding sales. It is not realistic that the Appellant would have made the additional undeclared purchases from Bal4 if he was not using them to make additional undeclared sales to his own customers. The sales by Bal4 to the Appellant continued over a number of years and there was clearly a pattern of business.

44. The Tribunal should therefore find that the majority of the Appellant’s purchases from Bal4 were not recorded and that corresponding sales were omitted from his books. In the assessments appealed against, the 118% markup is based on the ratio of income and expenses in the Appellant’s tax return, and is an appropriate best of judgment assessment by HMRC. HMRC are entitled to draw inferences in making best of judgment assessments for VAT and income tax. Reliance was placed on *Johnson v Scott (HM Inspector of Taxes)* (1978) 52 TC 383 (CA) and *Van Boeckel v Customs and Excise Commissioners* [1981] 2 All ER 505; [1981] STC 290.

45. The behaviour of the Appellant is such that it involved dishonesty, such that it renders the Appellant liable to a penalty under s 60(1) VATA. Reliance was placed on *R v Ghosh* [1982] QB 1053, [1982] EWCA Crim 2 and *Gandhi Tandoori Restaurant v Customs and Excise Commissioners* (1989) VATTR 39. The mitigation allowed in respect of the penalties was in accordance with HMRC guidelines. Although HMRC corresponded and had meetings with two different professional advisers to the Appellant, the Appellant was not present and did not engage with the enquiry process.

### **The Tribunal’s findings**

46. The assessments and penalties appealed against are premised on the Appellant having made off record supplies of the doors and windows, as well as of his own services in fitting those doors and windows.

47. There is no direct evidence that the Appellant made such off record supplies. Rather, the HMRC case relies on an inference that the Tribunal is asked to draw. That inference is in turn premised on the Appellant having made off record purchases from Bal4. HMRC argue that the Appellant would only make these off record purchases in order to make onward off record sales.

48. The initial question is therefore whether the Appellant did in fact make the off record purchases from Bal4 as claimed by HMRC.

49. The critical items of evidence relating to that question are the Bal4 customer statement, the invoices issued by Bal4 to John Cullen, and the evidence of Mr Goodman as to what he was told by Mr Balfour.

50. The Bal4 customer statement and the invoices issued by Bal4 to John Cullen establish very little by themselves in the absence of the evidence of what Mr Balfour said to Mr Goodman. The invoices do not indicate the place to which the goods described were delivered, and there is nothing on the face of the documents to indicate that the letters "BK" in the invoices are a reference to the Appellant. The Bal4 customer statement also does not indicate the place at which delivery took place, or indeed, what if anything was known by Bal4 as to the precise role of the Appellant in relation to each transaction.

51. The critical evidence for the HMRC case is the evidence given by Mr Goodman as to what he was told by Mr Balfour. The HMRC case depends on the Tribunal accepting that the information said to have been given by Mr Balfour to Mr Goodman is correct. The representative for HMRC accepted this at the hearing.

52. Mr Goodman says that Mr Balfour told him the following. The Bal4 customer statement and the invoices issued to John Cullen with the letters "BK" are an accurate record of goods delivered to the Appellant in Northern Ireland and of payments made by the Appellant to Bal4 for those goods. The goods were provided by Bal4 to the Appellant VAT zero rated because the Appellant claimed to be working for John Cullen and used John Cullen's Republic of Ireland VAT number.

53. This is merely hearsay evidence of information provided by Mr Balfour to Mr Goodman. While the Tribunal accepts that its rules of evidence do not prevent it from receiving and taking into account hearsay evidence, the fact that evidence is hearsay may very much influence the weight that the Tribunal will give to it. This is especially so where there are questions of reliability and credibility surrounding that evidence.

54. According to the HMRC case, Bal4 made very significant supplies to the Appellant over a period of years, and zero rated these supplies on the basis that the Appellant was using another person's Republic of Ireland VAT number, even though Bal4 was delivering these goods to the Appellant in Northern Ireland. If there was dishonest evasion of VAT involved in these sales, then there must be a very real question whether Bal4 and Mr Balfour were involved in the dishonesty. Mr Craig said in his evidence that the reliability of Mr Balfour was speculated upon by HMRC,

but that HMRC were satisfied that Mr Balfour was reliable and that the Bal4 customer statement was correct. This conclusion by HMRC appears to be based on the fact that Mr Goodman formed the view that Mr Balfour was open and honest and cooperative with HMRC, even though the statements he was making were potentially self-incriminating. However, for purposes of this appeal, it is the Tribunal that must form its own view on the reliability and honesty of Mr Balfour and of any information he can give. The Tribunal is not in a position to form such a view without having heard from Mr Balfour himself. There appears to be no reason why he could not have given evidence as a witness in this appeal, especially if he is cooperating with HMRC, as HMRC say he is. Had he attended, he could have been asked questions in much more detail as to exactly what transpired, and could have been cross-examined by counsel for the Appellant.

55. Furthermore, even if it were to be assumed that Mr Balfour's information is honest and reliable, the Tribunal has been given only the sketchiest of information that Mr Balfour is said to have provided to HMRC. The Tribunal has no details of how it is that Mr Balfour claims to know that the person making each of the purchases recorded in the Bal4 customer statement was indeed the Appellant, and no details of the precise address to which delivery of each of the orders was made. (Mr Goodman acknowledged in his evidence that he could have asked Bal4 to see their delivery schedules, but did not do so.) Many of the payments recorded in the customer statement were cash payments. The Tribunal has no details of exactly how these cash payments were made, for instance, whether the Appellant made these payments in person to Mr Balfour. Indeed, although the Appellant himself admits making certain purchases from Bal4, there is no evidence before the Tribunal that Mr Balfour himself ever even met the Appellant in person or would recognise him. The Tribunal does not have details of how many people work at Bal4, or of whom the Appellant would have dealt with when making purchases from Bal4 or when making payments to Bal4. There are also no details of the cheque accounts from which cheque payments recorded in the Bal4 customer statement were made, other than the four cheques for which there are the Appellant's own cheque stubs. There is nothing to indicate that the other cheque payments were necessarily from accounts in the Appellant's name, and nothing to indicate how Mr Balfour could know that cheque payments were being sent by the Appellant.

56. In the absence of oral evidence from Mr Balfour, the Tribunal can in the circumstances attach only very limited weight to the Bal4 customer statement and the Bal4 invoices issued to John Cullen, and to the hearsay evidence of Mr Goodman.

57. Apart from this evidence, HMRC also rely on cheque stubs and bank statements from the Appellant's joint account. HMRC contend that this evidence establishes that £40,000 of the payments in the Bal4 customer statement were made from the Appellant's joint account. The Tribunal considers that the evidence does not go this far. The cheque stubs indicate that four payments totalling £11,000 were made to Bal4 from the Appellant's joint account between 18 August 2008 and 30 March 2009. Beyond this, the witness statement of Mr Craig identifies five instances where there is a payment recorded on a particular date in the Bal4 customer statement, and a cheque payment in the same sum recorded in the statement of the Appellant's joint bank

account one or several days later. The Tribunal is asked to draw the inference that these entries in the Bal4 customer statement and in the Appellant's bank statements relate to the same payments. However, there is nothing to indicate that they are the same payments. In effect, HMRC invite the Tribunal to draw the inference that it would be an improbable coincidence that the Appellant would have made payments of identical amounts to those recorded in the Bal4 customer statement at approximately the same time to a person other than Bal4 on five different occasions.

58. The Tribunal is not persuaded that this would be an improbable coincidence. The statements for the Appellant's joint account do not indicate to whom cheque payments were made. The Bal4 customer statement, even if assumed to be correct, does not indicate the account from which cheque payments were made. There are other cheque payments indicated in the Bal4 customer statement for which there are no corresponding entries in the statements of the Appellant's joint account. HMRC seem to suggest that these payments may have been made from other accounts held by the Appellant. However, HMRC could have, but did not, examine statements for any other accounts held by the Appellant. Alternatively it would have been a relatively straightforward task for HMRC to seek clarification from Bal4's bankers as to whether the unidentified cheques did in fact originate from other accounts held by Mr Kelly. The Tribunal cannot simply assume that other cheque payments indicated in the Bal4 customer statement must have been made from accounts held in the name of the Appellant, especially given that there are unresolved reliability issues in relation to the Bal4 customer statement itself. The Tribunal did note, for example, that Mr Kelly reclaimed VAT on an invoice for £705.00 issued by Bal4 (document bundle 2, page 47) but this invoice is not reflected in the customer statement produced by Bal4.

59. Opposed to the HMRC evidence is the sworn evidence of the Appellant. He gave sworn evidence that he did not make the majority of the purchases referred to in the Bal4 customer statement and the Bal4 invoices to John Cullen with the letters "BK". He said that he accounted in his VAT return for output tax on any items that he purchased from Bal4 and then supplied to his own customers. HMRC accept that the Appellant's VAT and income tax returns are generally consistent with his own invoices to his customers, and the HMRC representative indicated at the hearing that HMRC in this appeal does not rely on instances where there is some inconsistency.

60. There are concerns with the Appellant's evidence. He admits giving to HMRC a fabricated account of purchasing zero rated goods on the side of the road from a person with a van. His agent gave information to HMRC at Code of Practice 9 meetings suggesting that the Appellant was possibly aware of some wrongdoing by third parties and that he was afraid of these third parties (paragraph 32 above), but his counsel at the hearing said that he no longer relied on these statements. In his witness statement he said that he only ever received one invoice for purchases that he made from Bal4 and that he only claimed input tax on purchases from Bal4 when he had an invoice. However, it was pointed out at the hearing that his own working out for his VAT returns shows that he claimed input tax on purchases from Bal4 on several occasions. Furthermore, the payments to Bal4 indicated by the cheque stubs are not obviously reflected in the working out of the Appellant's VAT returns.

61. There is also a question as to the plausibility of the Appellant's claims that Bal4 declined to give him invoices for his purchases on request, or that he found Bal4's goods still to be competitively priced even though he could not reclaim input tax on those goods due to the lack of an invoice. The Appellant said at the hearing that when he asked Bal4 for invoices in anticipation of a meeting with HMRC, he was told to keep his mouth shut about purchases from Bal4. Again, it is regrettable that Mr Balfour did not give evidence as a witness in the proceedings, so that these claims could be tested.

62. The Tribunal notes that the items in the Bal4 customer statement marked by the Appellant as jobs that he remembers doing do not correspond with the Appellant's own records. However, the Tribunal accepts that it is unlikely that the Appellant would necessarily remember precise details of individual jobs so long after the event.

63. Looking at the evidence in the round, the Tribunal is left with the impression that there may be unresolved questions about what was really happening. However, it is not for the Tribunal to speculate. The role of the Tribunal is to reach a decision on the respective cases put by the parties, on the basis of such material as has been presented, applying the applicable burden and standard of proof.

64. The HMRC case is that the Appellant made off record purchases of the doors and windows as indicated in the Bal4 customer statement and the Bal4 invoices to John Cullen, and that the Appellant made onward off record supplies of all of the doors and windows that had been purchased off record, together with off record supplies of his own labour in fitting those doors and windows. The Appellant's case is that he has not made any off record sales, and that he did not purchase most of the doors and windows in the Bal4 customer statement.

65. The Appellant relies on *Forati*, in which it was stated that:

[34] We accept that the Commissioners had grounds for suspicion that the Appellants ... had been deliberately suppressing their takings. ... We recognise that the burden is on the Appellants to satisfy us that the assessment cannot stand; it is not for the Commissioners to establish its accuracy.

[35] Nevertheless, in our view the Appellants have discharged that burden. ... [W]e cannot accept that the [items of HMRC evidence] ... have that degree of reliability properly to be expected if they are to form the basis of an assessment. ... This is not a case in which we are satisfied that there was a suppression, but of a lesser amount than that assessed, and in which we should endeavour to determine the correct amount ourselves. Rather, we are satisfied that there is no reliable evidence of a suppression.

66. In this case also, the Tribunal finds that the items of HMRC evidence do not have that degree of reliability properly to be expected if they are to form the basis of an assessment. The Tribunal is satisfied that there is no reliable evidence that the Appellant made off record supplies of the doors and windows referred to in the Bal4

customer statement and the Bal4 invoices to John Cullen, together with off record supplies of his own labour in fitting those doors and windows.

**Conclusion**

67. For the reasons above, this appeal is allowed.

5 68. 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  
10 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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**DR CHRISTOPHER STAKER  
TRIBUNAL JUDGE**

**RELEASE DATE: 7 November 2014**

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## ANNEX

### Principal legislative provisions relied upon by the Appellant

5 Section 73(1) of the Value Added Tax Act 1994 (“VATA”) provides:

- (1) Where a person has failed to make any returns required under this Act (or under any provision repealed by this Act) or to keep any documents and afford the facilities necessary to verify such returns or where it appears to the Commissioners that such returns are  
10 incomplete or incorrect, they may assess the amount of VAT due from him to the best of their judgment and notify it to him.

Section 29(1) of the Taxes Management Act 1979 provides:

- (1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment —  
15 ...  
(b) that an assessment to tax is or has become insufficient, ...  
...  
the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be  
20 charged in order to make good to the Crown the loss of tax.

Section 60(1) VATA (since repealed) provided:

- (1) In any case where—  
25 (a) for the purpose of evading VAT, a person does any act or omits to take any action, and  
(b) his conduct involves dishonesty (whether or not it is such as to give rise to criminal liability),  
he shall be liable, subject to subsection (6) below, to a penalty equal to the amount of VAT evaded or, as the case may be, sought  
30 to be evaded, by his conduct.

Section 70(1) VATA provides:

- (1) Where a person is liable to a penalty under section 60 ..., the Commissioners or, on appeal, a tribunal may reduce the penalty to such amount (including nil) as they think proper  
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