

**20677**

*VALUE ADDED TAX — input tax — right to deduct — dealer in mobile phones — credit claimed by reference to invalid VAT invoices, lacking supplier's VAT registration number — whether Commissioners right to refuse to exercise discretion in trader's favour — VAT Regs 1995, reg 29(2), Statement of Practice — no other evidence of supply produced — discretion properly exercised — appeal dismissed*

**MANCHESTER TRIBUNAL CENTRE**

**BALMORAL LIMITED**

**Appellant**

**- and -**

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

**Respondents**

**Tribunal: Colin Bishopp (Chairman)  
John Laphorne FCMA**

**Sitting in public in Birmingham on 29 April 2008**

**Andrew Kelly, director, for the Appellant**

**Ben Collins, counsel, instructed by the Solicitor and General Counsel for HM Revenue and Customs, for the Respondents**

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## DECISION

1. The Appellant, Balmoral Limited (“Balmoral”) is a dealer in mobile phones. It has been registered for VAT since July 2002 and has, we understand, been engaged in the same trade from the outset. The Commissioners had a number of  
5 concerns about its trade, including in particular the adequacy of the checks it carried out on its suppliers and customers, and those concerns led to its de-registration in March 2003, although it was re-registered very soon afterwards. The Commissioners nevertheless remained concerned, and sent further warnings to Balmoral, one relating to a particular transaction, another of a more general  
10 nature. In October 2004 the Commissioners decided to require Balmoral to give security as a condition of its continuing to trade, using the powers conferred on them by paragraph 4(2)(b) of Schedule 11 to the Value Added Tax Act 1994.

2. Balmoral appealed against that requirement. The appeal was eventually compromised, and nothing turns on the appeal itself. Its importance is that, in the  
15 course of it, the Commissioners learnt that between 17 and 20 August 2004 Balmoral had bought as many as 26 consignments of phones from a company calling itself Direct Phones Limited. In fact, as is not disputed, the identity of the true Direct Phones Limited had been “hijacked”—that is, Balmoral had dealt with someone only purporting to be Direct Phones Limited. Balmoral claimed credit  
20 for the input tax incurred in the purchases (a total of £2,017,366) in its VAT return for the period, and that credit was allowed. When the Commissioners discovered what had happened they issued an assessment, dated 3 October 2005, to recover the input tax credit which, they say, should not have been allowed. They rely, not on the hijack of Direct Phones’ identity, but upon the fact that none of the  
25 invoices which support Balmoral’s claim bears Direct Phones’ VAT registration number, with the consequence that they are not valid VAT invoices.

3. Balmoral appealed against the assessment. It was at first represented by solicitors but about two months before the date listed for the hearing those  
30 solicitors ceased to act for it, and when the appeal was called on Balmoral was represented by its only director, Andrew Kelly. Mr Kelly asked for a postponement of the hearing, in order that he could arrange representation by a VAT consultant whom, he said, he had consulted, but who was not available on that day. He was unable to produce any correspondence with the VAT consultant, who had not informed the tribunal of his interest. The application was opposed by  
35 Ben Collins, counsel appearing for the Commissioners. We refused it, taking the view that a long time had already elapsed since the assessment was made and that Balmoral had had ample time to arrange alternative representation once its solicitors had ceased to act. Mr Kelly then represented Balmoral himself, and gave evidence on its behalf.

4. Section 25 of the 1994 Act entitles a taxable person to claim credit for  
40 allowable input tax, and section 26 defines what is allowable, but provides that entitlement is to be determined in accordance with regulations made for the purpose. Nothing turns on either of those sections. The relevant regulations are the Value Added Tax Regulations 1995 (SI 1995/2518). Regulation 29 is entitled  
45 “Claims for input tax” and, so far as presently material, reads:

“(1) Subject to paragraphs (1A) and (2) below, and save as the Commissioners may otherwise allow or direct either generally or specially, a person claiming deduction of input tax under section 25(2) of the Act shall do so on a return made by him for the prescribed accounting period in which the VAT became chargeable.

5 (1A) [immaterial]

(2) At the time of claiming deduction of input tax in accordance with paragraph (1) above, a person shall, if the claim is in respect of—

(a) a supply from another taxable person, hold the document which is required to be provided under regulation 13; ...

10 provided that where the Commissioners so direct, either generally or in relation to particular cases or classes of cases, a claimant shall hold or provide such other evidence of the charge to VAT as the Commissioners may direct.”

5. The “document which is required to be provided under regulation 13” is a VAT invoice. Regulation 14 sets out the requirements which a VAT invoice must satisfy: they include, among other details, the supplier’s VAT registration number and a unique sequential number. Those requirements are not peculiar to the United Kingdom, but reflect the provisions of the European legislation then in force, the Sixth VAT Directive (77/388/EEC), article 22(3)(b).

6. The Commissioners’ position, in short, is that while Balmoral complied with paragraph (1) of regulation 29 it did not comply with paragraph (2), since the invoices did not bear Direct Phones’ VAT number. They also do not bear sequential numbers, but the Commissioners do not rely on that omission. They say that there is no basis on which they could properly exercise the discretion conferred on them by the proviso to regulation 29(2), to accept other evidence, since no acceptable other evidence of the supply (in fact, no other evidence at all) has been produced.

7. The notice of appeal put in by Balmoral’s solicitors fatuously put the Commissioners to proof that the invoices do not bear Direct Phones’ VAT number. Manifestly they do not, as Mr Kelly accepted. We add in passing, lest we be thought to have accepted the contrary, that in any event it would have been incumbent on Balmoral to establish that they did, since the burden before this tribunal is on the Appellant: see *Tynwydd Labour Working Men’s Club and Institute Ltd v Customs and Excise Commissioners* [1979] STC 570. The grounds of appeal went on to contend that Balmoral had paid the tax to Direct Phones (the hijack was not conceded), that Balmoral had an absolute right to deduct it as input tax, and that the Commissioners’ attempt to deny deduction by seeking to recover the tax represented an irrational exercise of the discretion conferred on them. The Commissioners do not dispute that Balmoral paid out the amounts shown on the invoices but they do not concede that the money was paid to Direct Phones, since in each case Balmoral was asked to, and as Mr Kelly agreed did, pay what Direct Phones identified as its own supplier.

8. The difficulty facing Balmoral is that it cannot produce any other evidence of the supply, save for Balmoral’s own purchase orders to Direct Phones. Mr Kelly agreed that his only contact with Direct Phones consisted of telephone calls with someone he knew simply as “Ian”, who had telephoned him without any sort of prior introduction, and that the only checks he had undertaken were to examine

copies of Direct Phones' VAT registration certificate and certificate of incorporation, and verify with the Commissioners' Redhill office that Direct Phones was indeed registered for VAT. He did not visit Direct Phones' premises, or ever meet Ian, and he did not inspect any of the goods, or have them inspected on his behalf by a freight forwarder or anyone else. There are no release notes, that is instructions to freight forwarders to release consignments from one trader to another, nor any documents showing that the goods have been transported. The purchase orders add nothing to the invoices. Mr Kelly agreed that he paid for the goods by sending all of the money to a third party, contrary to the Commissioners' guidance to traders in mobile phones, of which he also agreed he was aware. The Commissioners have indicated in a statement of practice that they are likely to exercise their discretion in a trader's favour if he can give satisfactory answers to various questions, and Balmoral was invited to give answers, but on 4 July 2005 its solicitors wrote to the Commissioners stating that it refused to do so.

9. Against that background it is scarcely surprising that the Commissioners have chosen not to exercise their discretion in Balmoral's favour. Mr Kelly himself has no means of knowing that any of the goods ever existed, and that supplies really took place. Even if we thought the Commissioners had been excessively cautious (which we do not) we have only limited jurisdiction to set aside the exercise of a discretionary power, when an Appellant satisfies us that the decision cannot stand: see *Kohanzad v Customs and Excise Commissioners* [1994] STC 967. In our view the decision in this case cannot be faulted.

10. We should add for completeness that the solicitors raised an additional argument in the grounds of appeal which Mr Kelly, perhaps because he did not fully understand it, did not advance before us. It was that the Commissioners had acted inconsistently by (it was assumed) accepting from Direct Phones payment of the VAT paid to it by Balmoral (which would be output tax in Direct Phones' hands), by accepting from Balmoral the output tax it had itself charged to its own customer and by allowing that amount as input tax in the customer's hands. In the light of the facts as we have set them out it seems unlikely that Direct Phones, or the hijacker of its registration, has accounted for the output tax, and we have no information about the treatment of Balmoral's customer. The Commissioners' treatment of other traders, even in relation to the same transactions, may depend on many factors and is, in our view, quite irrelevant to their treatment of Balmoral.

11. However, there may be an inconsistency in their treatment of Balmoral's output tax liability and input tax entitlement. If in truth the goods did not exist they could not be the subject of any supply, and Balmoral should not have incurred an output tax liability on their purported supply to its customer. Nevertheless, it is Balmoral which has declared the liability—this is not a case in which the Commissioners have based an assessment on an undeclared supply—and it is for Balmoral to correct its own error, if error it is, and it is not too late to do so. What is in our view clear is that a trader's having declared an output tax liability when (as here) there is no better evidence of the genuineness of the onward supply than there is of the inward supply cannot amount to the "other evidence" on which the Commissioners should be expected to exercise their discretion in the trader's favour when considering his input tax claim.

12. For those reasons the appeal must be dismissed. Mr Collins did not seek a direction in respect of costs.

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**COLIN BISHOPP**  
**CHAIRMAN**  
Release Date: 14 May 2008

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