



TC03619

Appeal number: TC/2012/07393

INCOME TAX – preliminary issue – Capital Allowances Act 2001 – annual investment allowance – whether trade permanently discontinued – if so, whether discontinuance was in the chargeable period in which expenditure incurred – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

DAVID ALEXANDER KEYL

Appellant

- and -

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

TRIBUNAL: JUDGE JONATHAN CANNAN

Sitting in public in Manchester on 19 March 2014

Dr R Milton of Milton & Co appeared for the Appellant

Mr P Donnelly of HM Revenue & Customs appeared for the Respondents

DECISION

Background

5 1. This appeal concerns a decision by the respondents to amend Mr David Keyl's
self assessment return for tax year 2008-09. By a direction released on 13 November
2013 the Tribunal directed the hearing of a preliminary issue. The issue relates to Mr
Keyl's entitlement to annual investment allowance ("AIA") in that tax year. Mr Keyl
10 claimed entitlement to AIA in connection with the purchase of a new van in July
2008.

2. At the beginning of 2008-09 Mr Keyl was a self employed air conditioning
engineer trading under the name "Changing Climates". His accounting year end was
31 March 2009. On the advice of his accountants Mr Keyl incorporated a company
with a view to the company taking over his business. The company was called
15 Changing Climates Ltd ("CC Ltd"). CC Ltd commenced trading with effect from 1
April 2009.

3. Part 2 Capital Allowances Act 2001 provides for capital allowances for plant
and machinery where a person carrying on a qualifying activity incurs qualifying
expenditure – see section 11. Section 15 defines qualifying activity to include a trade.
20 Section 11(4) sets out the general rule that expenditure is qualifying expenditure if it
is capital expenditure on the provision of plant and machinery wholly or partly for the
purposes of the qualifying activity carried on by the person incurring the expenditure.

4. One type of capital allowance available under Part 2 is AIA.

5. Section 38A provides that AIA qualifying expenditure must be incurred by a
25 qualifying person on or after 6 April 2008. A qualifying person includes an
individual. Expenditure will not be AIA qualifying expenditure if it is excluded by
section 38B. This appeal is concerned with *General Exclusion 1* which reads as
follows:

30 *"The expenditure is incurred in the chargeable period in which the qualifying
activity is permanently discontinued."*

6. For present purposes section 6 defines 'chargeable period' as the period for
which accounts are drawn up for the purposes of the trade. Both parties agreed that
the chargeable period for present purposes was the year-ended 31 March 2009.

7. The preliminary issue I have to decide is whether Mr Keyl permanently
35 discontinued his trade in the year ended 31 March 2009. If the trade was permanently
discontinued in that period then Mr Keyl would not be entitled to AIA. If the trade
was not permanently discontinued in that period then Mr Keyl would be entitled to
AIA.

Findings of Fact

8. During the course of the appeal I heard evidence from Mr Keyl and I was also provided with various documents.

9. Mr Donnelly relied on two cases to support a submission that the Tribunal should not accept the oral evidence of Mr Keyl without supporting material (*Garforth v Tankard Carpets Ltd [1980] STC 251 at 258b; Thompson & Son v Chamberlain (1962) 40 TC 657 at p669*). Those cases were in the context of ascertaining the intention or purpose of a company and the extent to which reliance could be placed solely on the directors' oral evidence as to that intention or purpose. They are not relevant in the present case because the underlying factual issue is whether a trade has been discontinued. Plainly that issue must be decided in the light of the evidence as a whole.

10. On the basis of the evidence I find as follows.

11. In 2009 Mr Keyl was a sole trader and employed another engineer and an apprentice. Mr Keyl would tend to do the maintenance and repair work, working on his own. The other engineer and the apprentice worked together and would tend to carry out the installation work. With effect from 1 April 2009 all three became employees of CC Ltd.

12. Mr Keyl employed a firm of accountants, Cromack & Co. That firm prepared the annual accounts for Mr Keyl's trade and submitted his tax returns. It was Cromack & Co who advised Mr Keyl to set up CC Ltd. This was because the amount of work Mr Keyl was doing had grown and a limited company would provide Mr Keyl with financial protection. Cromack & Co dealt with all matters involved in setting up CC Ltd.

13. The evidence did not include any documentation in relation to CC Ltd commencing trade on 1 April 2009. For example there was no documentation evidencing a transfer of the business to CC Ltd. Whether or not such evidence exists I do not know. I am satisfied however that all the assets required to carry on the sole trader business were transferred to CC Ltd. This included tools and equipment, a computer, the van and storage boxes and racking. I am satisfied that what was transferred was a going concern.

14. Since 1 April 2009 Cromack & Co have produced company accounts and submitted a corporation tax self assessment for CC Ltd. The first accounting period of CC Ltd was 1 April 2009 to 31 March 2010.

15. Cromack & Co have not produced sole trader accounts for Mr Keyl for any period after 31 March 2009.

16. Mr Keyl had public liability insurance in his own name which continued after 31 March 2009 until the next annual expiry. CC Ltd had its own public liability insurance.

17. CC Ltd opened its own bank account and received income from the trade which it commenced on 1 April 2009. Mr Keyl also lent CC Ltd monies in order to support its cashflow when it first started trading.

5 18. The evidence before me included invoices to various customers issued by Mr Keyl in February 2009 for the installation of air conditioning systems. Those customers also confirmed in writing that Mr Keyl, trading as Changing Climates, carried out all maintenance and warranty work in the 12 months following installation.

10 19. The prices quoted and charged to customers by Mr Keyl would include 12 months maintenance and warranty. This would involve 2 visits at 6 monthly intervals following installation. If maintenance and warranty work was not done then it was likely the systems would fail.

15 20. Mr Keyl operated a bank account with Nat West in the name "Mr David Keyl, Changing Climates". He paid into that account sums received from customers prior to CC Ltd commencing business on 1 April 2009. He also paid into that account sums owed by customers which were outstanding as at 31 March 2009. Expenditure in connection with maintenance work was funded by Mr Keyl from this account. This expenditure was almost exclusively the cost of labour. There were very little materials required and warranty parts would be supplied by manufacturers.

20 21. I accept that Mr Keyl continued to do maintenance and warranty work in the period after 31 March 2009. He did so in his own name and was not carrying out such work on behalf of CC Ltd.

25 22. I was provided with a printed copy of Mr Keyl's tax return for 2008-09. The return itself was made electronically via the internet. In the section for business details, Box 7 asks "*If your business ceased after 5 April 2008 but before 6 April 2009, enter the final date of trading.*" The box was left blank.

23. Curiously, the HMRC system print of Mr Keyl's tax return for 2008-09 shows this box completed with a date of cessation of 31 March 2009.

30 24. There was no explanation for this discrepancy, however I do not consider it significant for present purposes. The issue I have to resolve is whether the trade was in fact permanently discontinued in the year ended 31 March 2009. Whatever may or may not have been inserted in Box 7 provides little assistance in making that factual finding.

Reasons and Decision

35 25. Mr Donnelly who appeared for the respondents submitted that the trade was permanently discontinued in the year ended 31 March 2009.

26. Dr Milton who appeared for the appellant submitted that it was clear Mr Keyl's trade continued after 31 March 2009. He relied in particular on Mr Keyl's maintenance and warranty work after 31 March 2009.

27. In the alternative, Dr Milton submitted that if the trade was permanently discontinued, then the appropriate date of discontinuance was 1 April 2009 when CC Ltd commenced trading. As such the trade was not discontinued in the year ended 31 March 2009.

5 28. Both parties referred in submissions to summaries of the following cases bearing on the issue of whether a trade has been discontinued.

29. In *Southern v Cohen's Executors (1940) 23 TC 566* the taxpayer carried on business as a merchant and commission agent. The business was purchased by a company on terms that profit on orders which were executed before the sale date should belong to the taxpayer. Where orders were unexecuted at that date, they were to be executed by the company as agent for the taxpayer. The company was to collect payment for those orders and would receive 25% of the gross profits. The Court of Appeal held that the profits paid to the taxpayer in respect of those orders were the profits of a new business where the company acted as agent for the taxpayer.

15 30. In *Parker v Batty (1941) 23 TC 739* the taxpayer was in business selling musical instruments on hire purchase. He sold the business to a company which agreed to collect all book debts owing to the taxpayer at the time of sale at the taxpayer's expense. Those debts comprised mainly sums falling due under the hire purchase agreements. The taxpayer argued that upon sale of the business he ceased to carry on any trade. Lawrence J upheld the Special Commissioners' decision that the taxpayer had set up and commenced a new business at the date of sale. By implication, the taxpayer had ceased to carry on his original business. At p748 he said:

“...it was new because it was not carried on in the same way as it had been carried on before, but was carried on through the agency of the new company.”

25 31. It does not seem to me that there is any principle to be derived from these cases that would directly apply to the present appeal. They do however illustrate that a change in the method of doing business can lead to a conclusion that one business has ceased and another business has commenced. In particular where the receipts from the new business come via the purchasing company, but that is not the present situation.

30 32. *Sethia v John (1947) 28 TC 153* is more directly in point. The taxpayer was a merchant. He formed a company for the purpose of taking over his business and sold the business to the company as a going concern. The taxpayer was bound to indemnify the company in respect of all matters relating to the business up to the date of sale. The taxpayer argued that he had suffered losses by virtue of having to indemnify the company. Further, that he should be regarded as carrying on part of his old business through the company as his agent.

33. Macnaghten J held that the taxpayer was not carrying on part of the old business. At p156 he stated:

40 “Although it is, of course, possible for a person to assign over part of his business and to continue carrying on a part himself, I do not think that is the correct view of the relationship between the Appellant and his company under

5 *the agreement to which I have referred. Under that agreement with the Appellant the company took over the business as a going concern ... Although the persons who have made contracts with the Appellant could no doubt insist upon his carrying out those contracts, their only claim would be against him, and without their consent there could be no novation of the contracts. The company having taken over the business, I think there was ample evidence to support the conclusion ... that the Appellant had ceased to carry on his trade ...*

10 34. In the light of these authorities Mr Donnelly submitted that Mr Keyl's trade of installing air-conditioning systems ceased. A new trade of dealing with outstanding maintenance obligations and warranty claims was commenced by Mr Keyl.

35. Dr Milton submitted that Mr Keyl was the same man doing the same job before and after 31 March 2009. As such the trade was not discontinued.

15 36. The question of whether a trade has been discontinued is a question of fact to be determined in the light of all the circumstances.

20 37. The activity carried out by Mr Keyl after 31 March 2009 was undoubtedly very different to his trade and activity up to that date. In my view the circumstances bear a close resemblance to the position in *Sethia v John*. Mr Keyl was contractually bound to perform maintenance work and warranty work in relation to systems installed for customers prior to the transfer of the business. I accept that he did so himself, rather than through the agency of CC Ltd. I do not regard that as a significant distinction for present purposes.

25 38. Mr Keyl transferred his business as a going concern to CC Ltd, retaining trade debtors and his continuing maintenance and warranty obligations to customers. That amounted to a permanent discontinuance by Mr Keyl of his trade as an air conditioning engineer. What he retained was not the same trade. It was, if anything, a new trade of maintaining systems and dealing with warranty claims in relation to customers who were entitled to such support from Mr Keyl. The "new trade" did not produce any ongoing income. Mr Keyl was of course entitled to collect his trade debts as at the date of discontinuance. Unlike the position up to 31 March 2009, Mr Keyl was not seeking new customers and was not installing air conditioning systems.

35 39. Dr Milton relied on a telephone discussion he had with Mr Donnelly on 11 December 2012 in which Mr Donnelly appeared to accept that the trade had not been discontinued in the year ended 31 March 2009. Even if that is the case I must determine this appeal on the basis of the evidence before me and I must decide in the light of that evidence whether or not the trade was discontinued. With respect, Mr Donnelly's opinion is therefore irrelevant.

40 40. That leaves Dr Milton's alternative argument, namely that the trade was permanently discontinued on 1 April 2009 and was not discontinued during the chargeable period.

41. I do not accept that argument. The trade was intentionally discontinued at a time to coincide with the end of the chargeable period. Mr Keyl's trade was not in existence on 1 April 2009, because that is the date that CC Ltd commenced trade on its own account, following the transfer of Mr Keyl's business. If the trade had continued beyond 31 March 2009, Mr Keyl's sole trader accounts would have been prepared to reflect that fact. No accounts were produced for any period after 31 March 2009. In those circumstances the discontinuance clearly occurred in the year ended 31 March 2009.

42. The position might be analysed on the basis of *scintilla temporis* (see generally the discussion in *Abbey National BS v Cann [1990] 1 All ER 1085*). Mr Keyl's trade must have been discontinued prior to being commenced by CC Ltd. In the scintilla of time before midnight on 31 March 2009 Mr Keyl's trade ceased. In the scintilla of time after midnight, CC Ltd commenced its trade.

43. In all the circumstances I am satisfied that Mr Keyl permanently discontinued his trade in the chargeable period. On that basis Mr Keyl was not entitled to AIA and I answer the preliminary issue accordingly.

44. The parties should seek to agree directions for the further conduct of the appeal and should notify the tribunal of the position within 56 days from the date on which this decision is released.

45. This document contains full findings of fact and reasons for the preliminary decision. Any party dissatisfied with this preliminary 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.

JONATHAN CANNAN
TRIBUNAL JUDGE

RELEASE DATE: 23 May 2014