



TC04173

Appeal number: TC/2012/08656

Income tax – cessation of optician’s franchise business – optician subsequently working as a locum – whether continuation of professional activity – carry forward of loss from franchise business claimed – section 83 ITA 2007 – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

HAROLD LESLIE AMAH

Appellant

- and -

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

**TRIBUNAL: JUDGE MALACHY CORNWELL-KELLY
MS SONIA GABLE**

Sitting in public at Portal House, 27 Southway, Colchester on 17 November 2014

The taxpayer in person

Ms Beverley Levy of HMRC for the Crown

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DECISION

1 Mr Amah's appeal to the tribunal is dated 3 September 2012 and made against a
closure notice issued on 16 November 2011 following an enquiry into the taxpayer's
5 return for 2009-10, and the amendment of the return to show tax payable of
£2,682.44. Permission for a late appeal against this decision was given by Judge
Radford and Mrs Myerscough in a decision released on 26 July 2013.

2 We received sworn evidence both from Mr Amah and from Mr Derek Miles, the
10 officer who conducted the enquiry and issued the closure notice; we saw both as
honest and straightforward witnesses. We also received documentary evidence which
included the template of Dolland & Aitchison's franchise agreement. This document
was supplied to us following a production order issued to the successor to Dolland &
Aitchison's business on 11 June 2014. (The original could not be found either by Mr
15 Amah or the franchisor, but Mr Amah confirmed that the template contained the terms
of the agreement which he had actually had). We find the following facts established
on at least the balance of probabilities.

Facts

20 3 Mr Amah had since 1999 been a franchisee of Dolland & Aitchison in High Road,
Wembley, London, and as such had maintained an optician's business on his own
account. (Whether it was a trade or a profession that Mr Amah carried on is a
material issue and is addressed below but for convenience, and without prejudice to
that issue, we refer throughout to the franchise operation as a 'business'.)
25

4 Mr Amah is a dispensing optician and, at all relevant times, was a fully recognised
member of his professional body, the Association of British Dispensing Opticians,
and subject to regulation by the General Optical Council. The presence for 40% of
the time of a professionally qualified person who was either an ophthalmic optician or
30 an ophthalmic medical practitioner was necessary for the conduct of a Dolland &
Aitchison franchise, and formally required under clause 13.1 of the franchise
agreement. This necessitated Mr Amah employing an ophthalmic optician (also
apparently known as an optometrist). Clause 8.3.1 of the agreement required Mr
Amah to maintain his registration with the General Optical Council.
35

5 Mr Amah's professional participation was therefore a necessary, though not
sufficient, element of the conduct of a Dolland & Aitchison franchise. In the course
of the franchise, Mr Amah acquired the lenses and frames needed for the spectacles
sold to customers after their eyesight had been tested, he employed staff and he was
40 responsible for the premises from which the business was operated.

6 The franchise agreement made detailed provision for the relationship between
franchisor and franchisee, and the manner in which the business was to be carried on:

- The franchisor is described as having developed "a successful business of
45 opticians", which is then defined as "the Business" and the franchisee is
described as having "the right and franchise to operate the Business" –
recitals and clause 1.1.

- The franchisor is further described as being “the owner of confidential information on the management and operation of the Business and in methods of conducting, marketing and promoting the Business” – recitals.
- 5 • The “Franchisee’s Business” is defined as “that part of the Business operated by the Franchisee in accordance with the provisions of this agreement” – clause 1.1.
- The Franchisee is at first to be the tenant at will and then the lessee of the Franchisor – clause 5.1.
- 10 • The Franchisor has the right to train the Franchisee’s staff, must make available technical, marketing and management advice, supply Dolland & Aitchison’s products, provide the use of Dolland & Aitchison’s computer software and the Manual, which sets out “the way in which the Franchisee shall operate the Franchisee’s Business” - clauses 1.1, 6 & 7.
- 15 • The Franchisee is obliged to use and sell only the Dolland & Aitchison range of products, only their stationery, business signs, keep open as required by Dolland & Aitchison, keep to the maximum prices allowed by Dolland & Aitchison, use only telephone numbers which Dolland & Aitchison can control, comply with the Dolland & Aitchison Manual – clauses 8.2, 8.4, 8.5, 9 & 17.
- 20 • Detailed financial provisions are made to ensure that Dolland & Aitchison receive 7% of the gross monthly sales made by the franchisee – clauses 4.1 & 10.

7 Further provisions of the franchise agreement stipulated that on termination of it
25 there would be a 12 month embargo on setting up in business in competition with Dolland & Aitchison within one mile, soliciting business from any former customer within 24 months, or referring to the fact of the franchise having existed, and that the Franchisor would have the right to operate the Franchisee’s Business in his place and to have the benefit of its goodwill – clause 22. Finally, it was provided that the
30 Franchisee should not be the agent or representative of the Franchisor *vis a vis* any third party.

8 The franchise ceased 3 April 2009 with unrelieved losses, and Mr Amah sought to carry forward £15,838 of the losses to 2009-10. On 1 June 2009, Mr Amah
35 commenced self-employment as a locum dispensing optician from his home premises in Maldon, Essex, undertaking work on contracts for services direct with established opticians introduced to him by an agency. That work was remunerated directly by the opticians to whom Mr Amah supplied his services; he claimed and was allowed his travel expenses to and from each business he worked at.

40 9 As a locum, Mr Amah worked usually on a daily basis for the optician to which the agency had introduced him. There, he did not undertake sight tests but performed the functions of a dispensing optician, that is to say giving effect to the recommendations or prescriptions of the optometrist. In doing so, Mr Amah exercised his professional
45 discretion in deciding what would be best for the patient for whom the spectacles were intended, advising on the lenses and frames suitable. These would normally be supplied by the business but Mr Amah might also supply them himself.

50 10 Mr Amah personally has liability insurance to cover any possible claim in respect of his work and he is in his own words “more or less on my own”, and not in practice

working under the direction of a manager; indeed, Mr Amah compared his autonomy to that he experienced when working as a franchisee of Dolland & Aitchison. We pressed Mr Amah on whether he encountered or perceived any conflict between his professional duty to do the best for his patient, and the interest of the business he was working for in selling the most profitable frames, and he insisted that he did not.

11 An internet search carried out by Mr Miles showed that the franchise business that had been carried on by Mr Amah had continued after Mr Amah's involvement with it had ceased. This is not disputed.

10

Legislation

12 The Income Tax Act 2007 provides as follows:-

Charge to tax on trade profits

15 5 Income tax is charged on the profits of a trade, profession or vocation.

Carry forward against subsequent trade profits

83(1) A person may make a claim for carry-forward trade loss relief if—

20 (a) the person has made a loss in a trade in a tax year, and
(b) relief for the loss has not been fully given under this Chapter or any other provision of the Income Tax Acts or under section 261B of TCGA 1992 (use of trading loss as a CGT loss).

25 (2) The claim is for the part of the loss for which relief has not been given under any such provision (“the unrelieved loss”) to be deducted in calculating the person's net income for subsequent tax years (see Step 2 of the calculation in section 23).

(3) But a deduction for that purpose is to be made only from profits of the trade.

30 (4) In calculating a person's net income for a tax year, deductions under this section from the profits of a trade are to be made before deductions of any other reliefs from those profits.

(5) This section applies to professions and vocations as it applies to trades (and section 84 is to be read accordingly).

35 (6) This section needs to be read with—

(a) section 84 (how relief works),
(b) section 85 (use of trade-related interest and dividends if trade profits insufficient),

(c) section 86 (trade transferred to a company),

(d) section 87 (ring fence trades),

40 (e) section 88 (carry forward of certain interest as loss), and

(f) sections 17(3) and 852(7) of ITTOIA 2005 (effect of becoming or ceasing to be UK resident).

How relief works

45 84 This section explains how the deductions are to be made.

The amount of the unrelieved loss to be deducted at any step is limited in accordance with section 25(4) and (5).

Step 1

Deduct the unrelieved loss from the profits of the trade of the next tax year.

50

Step 2

Deduct from the profits of the trade of the following tax year the amount of the unrelieved loss not previously deducted.

Step 3

55 Continue to apply Step 2 in relation to the profits of the trade of subsequent tax years until all the unrelieved loss is deducted.

Submissions

13 Mr Amah's case is that the essence of the matter in both cases was the exercise of his profession as a dispensing optician, which was the basis for his franchise operation as it was the basis for his work as a locum. Neither could have taken place without his being a member of that profession and in both cases he was self-employed as a dispensing optician.

14 The conduct of the franchise business involved a good deal of trade and business management, but it was in principle ancillary to the professional core of the operation. The franchise could not have been undertaken without Mr Amah's professional qualification, any more than the locum work which he did subsequently could be done without that same qualification. The case was well within the criteria adopted by the House of Lords in *R v General Commissioners for the City of London (ex parte Gibbs)* 24 TC 221.

15 Section 5 of ITA 2007, submits Mr Amah, requires the tribunal to distinguish between the carrying on of a trade and of a profession, and it could not be said that the franchise operation was merely a trade because it was dependent on the exercise of a profession; it must therefore have been the conduct of a profession. It followed that there was a continuum of the same professional activity between the franchise and the locum work, and that professional activity had never as such ceased. Section 83(2) & (5) are therefore satisfied and the tax at issue is not due, the loss carried forward cancelling it out.

16 Putting the contrary view, Ms Levy points to the change of location of Mr Amah's activities, the time gap between them and the disparate nature of the two businesses. As to the relevance of change of location, Ms Levy relies on *Seldon v Croom-Johnson & Thomas* 16 TC 740 and the fact that Mr Amah's customer base with Dolland & Aitchison was wholly different from his customer base when working as a locum, and that the places where the customers were found were quite different: the old customers had been the persons who needed spectacles, while the new customers were the opticians for whose firms Mr Amah worked. As to Mr Amah's claim that the one professional activity succeeded to another, she distinguishes *ex parte Gibbs* on the facts of this case.

17 In addition to this, Mr Amah's Dolland & Aitchison franchise was, in terms of section 5 of the 2007 Act, clearly a trade rather than the practice of a profession by reason of its clearly commercial character as described in the franchise agreement, especially the provision for shared profits of the gross turnover; while there is a professional underpinning of the business model, looked at as a whole it is clearly a trade rather than a profession that is being carried on. By contrast, Mr Amah's locum work is accepted as the carrying on of a professional activity. It could not be possible to regard a trade carried on in one area and in certain circumstances, as continuing as a profession carried on in another and in different circumstances.

Conclusions

18 The case in *Seldon* concerned two members of the Bar who had taken silk, and
claimed to have ceased their practice as barristers and to have commenced a new one
as King's Counsel. The general commissioners were convinced by their argument,
but on appeal Rowlatt J upheld the Revenue's position without even calling upon their
5 counsel. The learned judge observed, at 745:

Now I want to emphasise at the start that the question is whether they set up
a new profession. It is not a question of a new business; it is a question of a
10 new profession and it may be a little different. At the same time, I go a
considerable way with Mr. Latter in his, if I may say so, extremely attractive
argument when he says that you cannot decide this question, in all cases at
any rate, by labels. It is not necessarily right to say: "A man is a clerk; he
was a clerk before. Ergo it is the same employment." Perhaps you cannot
15 say: "A man was an engineer, and now he is an engineer. Ergo it is the same
profession." Very likely not. We are here dealing with the case not only of a
barrister, but of a practising barrister, and, in my judgment, there is no
narrower classification that you can get for the purpose of defining a
profession at all.

Now in this case the learned gentleman had chambers in an important town
20 on his circuit and also chambers in London when he was a junior and he had
to give up - it was part of the terms of his appointment of course, it is well
understood - his country chambers when he became a King's Counsel. I
cannot think that throws the slightest light upon the matter. It seems to me,
25 apart from the King's Counsel step at the moment, that a barrister practising
in Bristol and in London, or, rather, who had chambers-because that is what
it comes to - in both London and Bristol, is not practising separate
professions in any sense of the word. They are all just "practising barristers",
and these places are only places where they can be met with, where
appointments can be made and where, or at one of which places they keep
30 such law library as they feel it necessary to possess. That is all it comes to.

But the profession of a practising barrister is to practise in the courts of
Great Britain and, wherever he is called upon to go, there he goes. The place
of his address is not local in the sense that many other professions are local,
35 where the business has to be done in a particular place. His business is done
in the courts to which he has to go. I think it is quite impossible to regard a
change of residence or a change of chambers from one town to another as
throwing any light at all upon the question of identity of profession.

19 And at 747, Rowlatt J concluded:

40 In the ordinary case I do not think it makes any difference whether a
gentleman becomes a King's Counsel after practising in Liverpool and
comes here, or whether he has done patent business or Parliamentary
business. I do not think any distinction is to be made of that sort. I think
45 really the position involved in becoming a King's Counsel in all ordinary
cases of practising barristers is quite simple. I think they always fall under
the same rule. In my judgment they carry on the same profession, only they
occupy a higher rank or degree within it and therefore are in fact more
selective in the business which they do. That is all it comes to. I do not think
50 there is any evidence upon which the Commissioners could properly come to
the conclusion to which they did.

20 The matter in *ex parte Gibbs* concerned the application or otherwise of Rule 9 of
Cases I & II of Schedule D and whether there was, for that purpose, a cessation of the
55 business of a partnership of stockbrokers on the admission of a new partner or a

succession to it. Ms Levy relied upon these comments of Viscount Simon LC, at 239:-

5 Rule 9 deals with the persistence of a trade, profession or vocation
notwithstanding a change in the persons carrying it on. Such a situation
cannot arise in the case of some professions or vocations, e.g., in that of a
barrister or of a portrait painter. There are other branches of activity where
10 the persistence of the same enterprise, notwithstanding a change of
personnel, may be to some extent possible, e.g., on the sale of a country
doctor's practice; and then there is the large and important class of an
established business capable of transfer as a going concern. It may be worth
observing, in passing, that the preservation of the identity and continuity of a
business, notwithstanding a change in those who carry it on, is probably
15 most completely illustrated by changes which may occur from time to time
in a partnership firm.

21 We find it difficult to derive any great assistance from *ex parte Gibbs*, which
concerned an issue well removed from the present. It is true that the remarks of
Viscount Simon can be seen as supporting the notion for which Mr Amah contends,
20 that in a profession such as his there is necessarily a continuity, like that of the
barrister or the portrait painter to whom the learned judge refers. But that is to say no
more than was said by Rowlatt J in *Seldon* in a case where it is clear that the same
profession is being practised throughout: here, the question is whether such an
analysis can succeed in the first place. Moreover, *ex parte Gibbs* was concerned with
25 the situation of a change in the composition of a partnership and the very technical
construction of what was then Rule 9.

22 In our view, it is very plain that the conduct of Mr Amah's Dolland & Aitchison
franchise was the carrying on of a trade and not the practice of a profession, albeit that
30 it involved as part of the trade the exercise by Mr Amah of his profession as a
dispensing optician. The franchise agreement is overwhelmingly expressed in the
terms of a trade and, while the label may at times not be conclusive as to the
substance, the tribunal will be hesitant to disregard the description which parties have
freely agreed to give to their enterprise. It is equally plain that the locum work which
35 Mr Amah took up on 1 June 2009 is by contrast properly described as the practice of a
profession, and it has been treated as such in the assessment of his tax affairs.

23 The franchise business ceased on 3 April 2009 and was reported as having done so
by Mr Amah himself in his self-assessment return for that year. The space of almost
40 two months which intervened before Mr Amah took up work as a locum, the
difference in kind of the persons who received his services – patients before and
opticians' businesses afterwards – the prohibition on his acting for those whose needs
he had served at Dolland & Aitchison, and the change from a fixed location to a
unpredictable variety of locations, all emphasise that what was happening from 1 June
45 was substantially different from what had gone before.

24 In *Seldon*, the change of location was not important in the context of the continued
profession of court advocate but in this present case the change of location, or more
properly the change of locations, was part and parcel of the change of activity from
50 one which was principally commercial to one that was essentially professional.

25 The change of customer was a change in kind, from individuals who were buying
spectacles in the context of professional eye care, to businesses which were seeking

professional assistance in the course of their undertakings. Whether or not it is right to conclude that a change from a trade to a profession is inconsistent with the carry forward envisaged by section 83, the facts very clearly indicate the cessation of one business activity and the commencement of another. The appeal cannot therefore
5 succeed and we must confirm the assessment,

Appeal rights

26 This document contains the full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply in writing for permission to
10 appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by the tribunal no 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)”
15 which accompanies and forms part of this decision notice.

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**MALACHY CORNWELL-KELLY
TRIBUNAL JUDGE**

RELEASE DATE: 8 December 2014

