



**Appeal number: FTC/97/2014**

*INCOME TAX – section 38A Capital Allowances Act 2001 - annual investment allowance - exclusion where expenditure incurred in chargeable period in which trade permanently discontinued - whether trade discontinued at end of period was discontinued in that period - yes - appeal dismissed*

**UPPER TRIBUNAL  
TAX AND CHANCERY CHAMBER**

**DAVID KEYL**

**Appellant**

**- and -**

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

**Respondents**

**Tribunal: Judge Greg Sinfield  
Judge Swami Raghavan**

**Sitting in public in London on 2 June 2015**

**Robert Milton of Milton & Co for the Appellant**

**Marika Lemos, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents**

## DECISION

### Introduction and summary

1. This appeal concerns the discontinuance of a trade by the person carrying it on when it was transferred as a going concern to another person at the end of a period for which accounts of the trade ('a period of account') are drawn up. The single question raised by this appeal is whether a trade that is discontinued at a time to coincide with the end of a period of account is permanently discontinued in that period.

2. The Appellant ('Mr Keyl') appealed to the First-tier Tribunal ('FTT') against a decision by the Respondents ('HMRC') to amend his self assessment return for the tax year 2008-09. The FTT directed, under rule 5 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ('FTT Rules'), that the issue of whether Mr Keyl was entitled to an annual investment allowance ('AIA') for 2008-09 in connection with the purchase of a new van in July 2008 should be dealt with as a preliminary issue in the proceedings. Entitlement to an AIA turned on whether Mr Keyl permanently discontinued his trade in the tax year ended 31 March 2009. If he permanently discontinued his trade in that period, Mr Keyl was not entitled to the AIA. If the trade was not permanently discontinued in that period then Mr Keyl was entitled to the AIA.

3. In a decision released on 23 May 2014, [2014] UKFTT 493 (TC), ('the Decision'), the FTT (Judge Cannan) held that Mr Keyl had permanently discontinued his trade in the tax year ending 31 March 2009. Mr Keyl now appeals against the Decision, with permission of the Upper Tribunal, on the ground that the FTT had made an error of law when it concluded that the discontinuance occurred in the year ended 31 March 2009. Save as otherwise indicated, paragraph references in square brackets in this decision are to the paragraphs in the Decision.

### Background

4. The facts found by the FTT are recorded in [11]-[21] of the Decision and are not disputed. The relevant facts for the purposes of this appeal may be briefly summarised as follows.

5. Until 31 March 2009, Mr Keyl carried on business as a sole trader under the name 'Changing Climates' installing, maintaining and repairing air conditioning systems. His accounting year-end was 31 March.

6. It was not disputed that Mr Keyl purchased a new van for use in his business in July 2008. On the advice of his accountants, Mr Keyl incorporated a company called Changing Climates Ltd ('CC Ltd') and transferred his business to it. Mr Keyl did not produce any sole trader accounts for any period after 31 March 2009.

7. The FTT found that all the assets required to carry on the business, including tools and equipment, a computer, the van and storage boxes and racking, were transferred to CC Ltd. The FTT concluded that the business had been transferred to CC Ltd as a going concern. CC Ltd commenced trading with effect from 1 April 2009. The first accounting period of CC Ltd was 1 April 2009 to 31 March 2010.

## **Legislation**

8. Section 11 of the Capital Allowances Act 2001 ('CAA 2001') provides that capital allowances for plant and machinery are available under Part 2 of the Act if a person carries on a 'qualifying activity' and incurs 'qualifying expenditure'. The definition of qualifying activity in section 15 CAA 2001 includes a trade. Section 11(4) of CAA 2001 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.

9. One type of capital allowance available under Part 2 is AIA. Section 38A of CAA 2001 provides that AIA qualifying expenditure must be incurred by a qualifying person on or after 6 April 2008 and must not be excluded by any of the general exclusions in section 38B. This appeal is concerned with General Exclusion 1 which reads as follows:

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

Section 6 CAA 2001 defines 'chargeable period' for income tax purposes as the period for which accounts are drawn up for the purposes of the trade.

10. There was no dispute that Mr Keyl carried on a qualifying activity for the purposes of Part 2 of CAA 2001 and that his expenditure on the van was qualifying expenditure unless it was excluded by General Exclusion 1. It was also agreed that the relevant chargeable period was the year ended 31 March 2009.

## **The Decision**

11. The issue for the FTT was whether Mr Keyl permanently discontinued his trade on 31 March or at a later date.

12. Dr Milton, who appeared for Mr Keyl before the FTT and us, submitted that Mr Keyl was the same man doing the same job before and after 31 March 2009 and, as such, the trade was not discontinued. The FTT did not accept this submission. The FTT noted, at [36], that the question of whether a trade has been discontinued is a question of fact to be determined in the light of all the circumstances. The FTT decided, at [38] that Mr Keyl had permanently discontinued his trade when he transferred it to CC Ltd and that what he did as a sole trader thereafter was a different trade, namely maintaining systems and dealing with warranty claims in relation to his customers.

13. Dr Milton also submitted in the alternative that, if the trade was permanently discontinued when Mr Keyl transferred it to CC Ltd, the trade was discontinued on 1 April 2009 and not during the preceding tax year, ie on 31 March. The FTT rejected this submission at [41] - [42] for the following reasons:

"41. ... 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."

14. The FTT concluded, at [43], that Mr Keyl had permanently discontinued his trade in the tax year ending 31 March 2009 and, accordingly, was not entitled to the AIA.

15. Mr Keyl applied to the FTT for permission to appeal against the Decision on a number of grounds. In a decision released on 30 June 2014, the FTT (Judge Cannan) refused permission to appeal. Mr Keyl applied to the Upper Tribunal ('UT') under Rule 21 of the Tribunal Procedure (Upper Tribunal) Rules 2008 ('the UT Rules') for permission to appeal on the same grounds as he had put forward previously. In a decision released on 21 July 2014, the UT (Judge Berner) granted Mr Keyl permission to appeal on the single ground that there was no *scintilla temporis* between the cessation of a trade by one person and its continuance by another.

#### **Issue on appeal and summary of submissions**

16. The only issue in this appeal is whether the FTT made an error of law when it found that Mr Keyl discontinued the trade in the year ended 31 March 2009.

17. Dr Milton submitted that the trade was not discontinued *in* the chargeable period. He contended that the discontinuance occurred either at the end of the period or after it and in neither case did General Exclusion 1 apply. Dr Milton submitted that the key words of General Exclusion 1 for the purposes of the appeal are "in which". The General Exclusion only applies where the trade is permanently discontinued *in* a chargeable period. He contended that the use of the word "in" implies that something must occur between two points which, in this case, are the start and end of the chargeable period. He argued that, as there was a full period of account in relation to Mr Keyl's trade from 1 April 2008 to 31 March 2009, the trade could not have been permanently discontinued *in* that period.

18. Dr Milton submitted out that HMRC had never disputed that the transfer of the trade took place on 1 April 2009. The FTT had found that Mr Keyl had transferred the business to CC Ltd as a going concern which, Dr Milton contended, showed that the trade had not been discontinued at the time of the transfer. He submitted that if the trade had been permanently discontinued in the *scintilla temporis* before midnight on 31 March, there would have been nothing to transfer on 1 April. He argued that Mr Keyl had stopped carrying on his trade immediately after midnight on 31 March, ie on 1 April.

19. Ms Lemos, who appeared for HMRC, submitted that a discontinuance at the end of a chargeable period is a discontinuance in the period. She contended that the beginning, middle and end of chargeable period are all part of the period. The issue was when did Mr Keyl discontinue the trade. Ms Lemos contended that the only inference that could be drawn from the facts found by the FTT was that there was a transfer, ie a discontinuance, of the trade by Mr Keyl and that transfer occurred before midnight on

31 March 2009, ie within the chargeable period in which the expenditure on the van was incurred.

## Discussion

20. In [41], the FTT found that Mr Keyl's trade was discontinued at a time to coincide with the end of the chargeable period on 31 March 2009. Mr Keyl carried on the trade until the end of 31 March. From that date, he produced no more accounts in relation to the Changing Climates business that he had carried on as a sole trader. The FTT also found that Mr Keyl's trade was not in existence on 1 April because CC Ltd was trading on that date.

21. Having made the findings that it did in [41], we consider that the reference to the *scintilla temporis* in [42] was unnecessary. The FTT observed, when refusing permission to appeal, that it was simply another way of expressing the finding in [41] that the discontinuance occurred in the year ended 31 March 2009. Ms Lemos described the comment in [42] as obiter. We consider that the reference was a source of potential confusion in that it suggested that there could be a period between the scintilla of time before midnight and the scintilla of time after midnight, leaving the precise point of midnight as a temporal no man's land. It left open the possibility that if something occurred at that precise point then it did not occur in the period that ended at midnight or the succeeding period that commenced from midnight. In fact, the contrary is true: midnight is both the last moment of a day and the first moment of the next. There is no need to identify a brief moment of time when one trade ceased and a separate moment when the successor trade commenced: both events happened simultaneously. In this case, there was no cessation of the trade before midnight on 31 March or after midnight on 1 April. Immediately the clock struck twelve, Mr Keyl ceased to carry on the trade and it began to be carried on by CC Ltd, without any hiatus.

22. We consider that it is clear, on the facts found by the FTT, that Mr Keyl did not discontinue the trade in the period starting on 1 April 2009. The FTT found that CC Ltd commenced trading on 1 April and there is nothing to suggest that Mr Keyl traded during the period of account commencing on that date. Dr Milton suggested that CC Ltd would not have started trading until it opened for business on that day but there was no evidence or finding of fact by the FTT to support that proposition. Mr Keyl did not prepare any accounts for any period after 31 March, which is consistent with him not having traded on 1 April. We consider that the FTT was right to conclude that Mr Keyl did not trade on 1 April and that CC Ltd commenced trading on that day. However, that does not answer the question that arises in and determines this appeal.

23. The question raised by this appeal is whether the discontinuance of a trade at the end of a chargeable period is a discontinuance *in* the chargeable period. In our view, the answer is yes. We do not accept Dr Milton's argument that, as there was a full period of account in relation to Mr Keyl's trade from 1 April 2008 to 31 March 2009, the trade could not have been permanently discontinued *in* that period. In our view, it follows from the finding in [41] that Mr Keyl's trade was not in existence on 1 April that the trade was discontinued before that date, ie on 31 March. Mr Keyl discontinued the trade at midnight on 31 March, which was the last moment of the accounting period ending on that date. As discussed above, it is not possible for the trade to end at a point in time between the end of one accounting period and the start of another that falls in neither period. The question is, where a trade ceases at the end of an accounting period, in which period does the trade end? We accept Ms Lemos's submission that the end of

a period is part of that period. In our view, an activity that is discontinued at the end of a period is not discontinued in the next period because it was never 'continued' in it: the trade is discontinued in the period that ends simultaneously with it.

### **Decision**

24. For the reasons set out above, we consider that a discontinuance of a trade at the end of a chargeable period is a discontinuance of that trade in that period. Accordingly, we have decided that Mr Keyl's appeal against the Decision must be dismissed.

### **Costs**

25. Any application for costs in relation to this appeal must be made within one month after the date of release of this decision. As any order in respect of costs will be for a detailed assessment, the party making an application for such an order need not provide a schedule of costs claimed with the application as required by rule 10(5)(b) of the UT Rules.

**Greg Sinfield**  
**Judge of the Upper Tribunal**

**Swami Raghavan**  
**Judge of the Upper Tribunal**

**Release date: 15 July 2015**