

New Company Exemption

A fundamental requirement to avail of the exemption is that the company commences to carry on a “new trade”. Whether the activities carried on by a new company constitute a “new trade” or are part of a trade previously carried on by another person is a question of fact.

The issue however as to whether separate trades are being carried on and whether certain activities are an extension of the existing trade has been considered in a number of different contexts in terms of other provisions of the Taxes Acts.

For example, losses can only be carried forward under section s382 TCA 1997 against profits of the same trade. The UK equivalent of this section was considered in the UK tax case of *Gordon and Blair Ltd –v- IRC* (40 TC 358). The appellant company carried on a business as brewers. In October 1953 it ceased brewing but continued to bottle and sell beer supplied to its specification by another brewery. The company claimed it carried on the same trade before and after October 1953 and as a result that losses forward could be offset against subsequent profits. It was held that the company had ceased trading as brewers and commenced a fresh trade of selling beer and the losses were disallowed.

The issue was also considered in the Irish High Court case of *H.A.O’Loan, Inspector of Taxes –v- Messrs MJ Noone and Co.*

Messrs Noone and Co., a partnership, carried on a trade of wholesale fruit merchants up to September 1939. Due to war time difficulties in sourcing supplies of fruit, their trade gradually changed over to that of retail fuel merchants. Early in 1943 they acquired interest in certain coal bearing lands with a view to coal mining, and commenced production of coal on 1 April 1943.

Thereafter they supplied coal to merchant coal dealers and certain large public concerns, although they retained some of their old customers. They continued to use the same headquarter offices and made no addition to the number of lorries which had been used prior to 1 April 1943. They acquired a quantity of mining plant, equipment and tools. Although they did not increase their office staff, they employed an additional number of workers in the coal mines. Upon appeal, the Special Commissioner decided the partnership had set up a new trade on 1 April 1943. On re hearing of the appeal the Circuit Court judge surprisingly held that a new trade had not been set up on that date. However the High Court subsequently reversed that decision and held that a new trade was set up on 1 April 1943.

The case of *H & G Kinema –v– Cooke* [1933] 18 TC 116 involved a company which gave up a business in one part of England and set up a similar business in another part of the country. It was held that the new business was different from the first.

The case of *Cannon Industries Limited –v– Edwards* [1965] is also important. In this case a company which had manufactured gas cookers started a new activity of assembling electric food mixers. It was held that the new activity was merely an extension of its existing trade.

The UK Revenue Manual (Business Income Manual paragraph 70535) also provides useful guidance as follows:

“Since the case of Cannon Industries there has been a presumption that a company carries on only one trade.

The activities carried on by a company are only likely to amount to more than one trade if:

- *One activity is so different in nature that it can be seen as quite separate; and*
- *The activities are separately organised and managed right up to Board level.*

In the context of s401 TCA 1997 which disallows the carry forward of trading losses if there is a change of ownership coupled with a major change in nature of the context of the trade it is also necessary to consider whether the same trade is being carried on.

In *Willis –v– Peeters Picture Frames Ltd* [1983] STC 453, it was found that a company which had sold its products direct to customers, mainly wholesalers, and which later did this through distribution companies, had not effected a major change in the conduct of its trade.

Pobjoy Mint Ltd –v– Lane [1984] STC 327 involved a case where a company, which carried on a business of minting coins and medallions from precious metals, purchased its principal suppliers entire stock of gold and then purchased gold directly from wholesalers. This led to a substantial increase in stock levels. It was held that there had been a major change in the conduct of the company's trade.

Although the test in section 401 is less onerous in that there must not have been “a major change” in the nature of the trade as opposed to an entirely new trade, the principles outlined in these cases are useful in determining whether a new trade is being carried on in the absence of any more definitive guidance in terms of section 486C.