

## [04.03.06] Cessation of a trade: When has a trade ceased, and when is that cessation a permanent discontinuance?

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### 1. Introduction

In order to know when to apply the rules on the cessation of a trade, as set out in section 67 TCA 1997, it is necessary to be able to establish the date on which the trade or profession ceased. In addition, where a trade which was loss making is revamped and becomes profit making, it is necessary to ensure that it is indeed the same trade which is being carried on, for the purposes of section 382 loss carry forward.

Determining when a trade ceases is often a matter of fact. But exactly what facts are relevant in determining the date of cessation will depend on the circumstances of each individual case. On occasions, this examination can be further complicated by the need to consider whether that cessation is a temporary or permanent discontinuance.

Below is a summary of relevant cases (including some UK ones which while not binding in an Irish context can be persuasive) on the issue and some key principles drawn therefrom which may be of use in such cases.

### 2. Principles

- A distinction may be made between the natural decline of a trade over time and the sudden contraction of its activities<sup>1</sup>.
- Look at the substance of what is actually carried on by the taxpayer, and not just at the label which has been placed upon the trade or trades<sup>2</sup>.
- Significant changes in the supply chain, whether in how a taxpayer sources its product<sup>3</sup> or how it sells its product<sup>4</sup>, may indicate that the trade has ceased and a new one commenced.
- The intention of the person carrying on the trade is important. If they continue to seek business, even if they are unsuccessful, then they have not ceased trading.<sup>5</sup> While contemporaneous proof is usually required, the benefit of hindsight may be employed in certain cases in determining the date of cessation<sup>6</sup>.

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<sup>1</sup> Tryka Ltd v Newall (HM Inspector of Taxes) [1963] 41 TC 146

<sup>2</sup> Boland's Ltd v Davis [1925] 1 ITR 86, Gordon & Blair Ltd v IRC [1962] 40 TC 358, Tryka Ltd v Newall (HM Inspector of Taxes) [1963] 41 TC 146

<sup>3</sup> Gordon & Blair Ltd v IRC [1962] 40 TC 358, J G Ingram & Son Ltd v Callaghan [1968] 45 TC 151

<sup>4</sup> Tryka Ltd v Newall (HM Inspector of Taxes) [1963] 41 TC 146

<sup>5</sup> Kirk and Randall Limited v Dunn (HM Inspector of Taxes) [1924] 8 TC 663, M Cronin (Inspector of Taxes) v Lunham Brothers Ltd [1985] 3 ITR 363

<sup>6</sup> Marriott v Lane (Inspector of Taxes) [1996] STC 704

### 3. Case Law

#### **Kirk and Randall Limited v Dunn (HM Inspector of Taxes) [1924] 8 TC 663**

The taxpayer company was formed to take over contracts from a firm of contractors. When that business was completed it sought new contracts but failed to obtain any for a number of years. During that period it had been offered for sale, without success. Also, during this period the accounts show directors' fees and the costs of attempting to source new business. Eventually, with the introduction of a new business policy new profitable contracts were obtained.

Rowlett J found that the only change which had taken place was that more money came into the company and more energetic people got hold of it and managed to make a profit. The company solicited precisely the same class of business and all that changed was they finally got some business.

Rowlett J noted:

*... in the middle of a great career a company, or still more an individual professional man, might have a year when he was holding himself out for business, or the company was holding itself out for business, but nothing came, yet that would not effect a break in the life of the company for income-tax purposes.*

#### **Boland Ltd v Davis (Inspector of Taxes) [1925] 1 ITR 86**

Boland, the taxpayer, operated two flour mills, two bakeries and two restaurants, with shops attached. One half of the flour produced in its mills was sold to the public and the other half was used in its bakeries. While the income and expenses of the mills were tracked separately from the other aspects of the business, there was a head office from where all business was directed. No apportionment of the expenses of this head office, e.g. advertising, audits, directors' fees, to the mills took place. The food controller took possession of the company's mills from 30 April 1917 until 31 March 1921. It was agreed that two thirds of the general head office expenses related to the flour milling.

When the company retook possession of its mills in 1921 they were loss making. Both mills were shut in August 1922 and all employees discharged, other than a small number kept to look after stock on hand. In April 1923 the company reopened one mill to supply its bakeries and subsequently, to sell to the public.

Boland's contended that they had ceased the trade of milling when they closed the mills in 1922 and were entitled to loss relief on that basis. The Inspector contended that Boland's was really engaged in a single trade and that therefore no permanent discontinuance of a trade had occurred – merely a discontinuance of part of a trade.

It was held that there was a single trade of milling and baking and therefore, the closure of the mills was not a discontinuance of a trade.

**Gordon & Blair Ltd v IRC [1962] 40 TC 358**

Gordon & Blair, the taxpayer, had for many years bottled and sold a particular brew of beer. They argued that selling the beer was their trade and the fact that up a certain date they also brewed that beer was immaterial. They argued changing from brewing to buying (from a contract manufacturer) their beer did not mean a change in their trade, merely a change in the way they carried on their trade. They further contended that none of their clients was aware of the change as the beer was still brewed to their specifications and delivered in their bottles, with their labels and often by their own lorries.

The House of Lords identified that the point at issue was the description of the trade. The taxpayer was trying to put a narrow description on it while the Crown were arguing for a wider description. Looking at the facts of the case, and given the material nature of the brewing, Lord Clyde found that “It is, in my view, quite false to suggest that their trade through was essentially the distribution of a special brand of beer, whoever may be been the manufacturer.” He found that the taxpayers had changed from being brewers of beer, who had an ancillary activity of distributing beer, to being distributors of beer.

On that basis, one trade had ceased and a new one had commenced.

**Tryka Ltd v Newall (HM Inspector of Taxes) [1963] 41 TC 146**

Tryka Ltd was engaged in the manufacture and sale of horticultural boxes and wooden crates and utility furniture. Due to large losses, in 1952 it sold about 95% of its stock and its fixed assets, including plant and machinery and leased out its factory. A receiver was appointed in 1953, and that receiver took no part in the conduct of the company’s affairs. It sold its premises in 1953 and dismissed its staff, transferring its office to the home of the principal shareholder. In December 1953 it bought a quantity of joinery board and resold part of it in later that month. Ownership of the company changed and in 1954 Tryka acted as timber merchants, making no effort to establish any links with the previous customers or staff, and at the end of 1954 it commenced making chipboard, which it had not previously done. In a company statement on its activities in 1954 it was stated, “During the year ending December 1954 the Company manufactured no goods, but acted as timber merchants in the sales of timber...”

The taxpayer contended that there was no discontinuance of trade, they had merely ceased to be actively involved in the part of their trade which related to manufacturing. They were still actively involved in the wood dealing aspect of their trade.

Wilberforce J found that by the middle of 1953 the company’s affairs were such that, unlike in the case of *Kirk & Randall*<sup>7</sup>, they could not be said to be in a “mere state of suspension, in a state of failing to get business though desirous of doing so”. He found that at that date, if not before, the company had discontinued its trading activities. He found the December 1953 transaction, which was not at a price which

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<sup>7</sup> *Kirk and Randall Limited v Dunn* (HM Inspector of Taxes) [1924] 8 TC 663

would realize a profit, to be an isolated transaction, not indicating a continuance of trading. A new trade of wood dealing was commenced in 1954.

### **J G Ingram & Son Ltd v Callaghan [1968] 45 TC 151**

J.G. Ingram & Son Ltd, the taxpayer, manufactured and sold pharmaceutical products with rubber, or synthetic rubber, parts. The taxpayer's competitors started to use plastic instead of rubber in their products. As plastic was cheaper and longer lasting than rubber, the taxpayer incurred significant losses.

The taxpayer was acquired by a large industrial conglomerate with developing expertise in the use of plastic instead of rubber. As the taxpayer was still making significant losses, it was decided to cease production with rubber, close that factory, sell the equipment and lay-off most staff, and to test a new product using plastic instead of rubber on a test machine which was installed in the factory of a sister company, and which was paid for by the sister company. The one member of staff who was not let go was a sales representative who then worked from the offices of another sister company, partly on account of the taxpayer and partly on account of that other company.

The taxpayer then continued to sell the same specialist pharmaceutical products, although made with plastic instead of rubber, to the same customers. While it had always bought in components of its products it now had no factory at all and bought the entire product from a sister company.

Goff J noted that the taxpayer's case was stronger than that of Gordon & Blair in that Gordon & Blair had no continuity of contracts with customers but it was weaker in so far as Gordon & Blair continued certain aspects of their assembly process. However, the activity carried on was so different to that which had previously been carried on as to constitute a different trade.

### **M Cronin (Inspector of Taxes) v Lunham Brothers Ltd [1985] 3 ITR 363**

The taxpayer was engaged in slaughtering pigs and manufacturing meat products. After a change in ownership, it ceased its slaughtering and manufacturing activities and acted as a distribution centre for its parent company, selling similar products to the same customers for a period of 16 months. When the taxpayer ceased its slaughtering and manufacturing activities the employees were told that it was temporary and would resume in the future. During the 16 month period the taxpayer kept all of its machinery in working order and an offer to buy the machinery was rejected. After a second change in ownership, the taxpayer recommenced its slaughtering and manufacturing processes, and over a period of time as its activities returned to their previous level, it re-employed its former staff.

Carroll J, in finding that there had only been a temporary cessation and not a permanent discontinuance, noted:

*I doubt if one can as a rule segregate the various activities involved in carrying on a trade, select one of them as being of the essence, and then*

*designate the one selected as being the real trade. There is, I think, an organic unity about a trade which invalidates this sort of dissection...*

Carroll J also noted that this case was distinguished from Gordon and Blair<sup>8</sup> as there was no contention of a temporary cessation in that case. The arguments were either that there was a cessation and a new trade, or a continuance of trade. It was distinguished from both JG Ingram & Son<sup>9</sup> and Tryka Ltd<sup>10</sup> as the facts were substantially different.

### **Marriott v Lane (Inspector of Taxes) [1996] STC 704**

While this is a capital gains tax case, it considered the date of a cessation where a trade was temporarily ceased but never actually resumes. In these cases, what is the date of the permanent discontinuance?

A museum was temporarily closed to the public. The director's intention at that time was to reopen in a new location at some point in the future and they prepared the museum accounts on that basis. The company's accountants described it as "the company is merely in the process of relocating its premises and there is a hiatus but not a cessation".

It was argued that, with hindsight, given the museum never reopened, then the date it closed its doors to the public was the date of cessation. That is, looking at the facts with hindsight, overruling the stated intention of the taxpayer at that point in time, the trade ceased permanently when the museum closed its doors.

It was held that when an intended temporary closure is not followed by a reopening, then the date the business ceased to be carried on is the date the temporary closure ultimately became the permanent closure.

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<sup>8</sup> Gordon & Blair Ltd v IRC [1962] 40 TC 358

<sup>9</sup> J G Ingram & Son Ltd v Callaghan [1968] 45 TC 151

<sup>10</sup> Tryka Ltd v Newall (HM Inspector of Taxes) [1963] 41 TC 146