[2011] UKUT 100(TCC)
Appeal number
FTC/69/2010

***Corporation Tax – deduction claimed in respect of loan relationship debit - whether transactions for the lending of money***

**UPPER TRIBUNAL**
**TAX AND CHANCERY CHAMBER**

**MJP MEDIA SERVICES LIMITED** **Appellant**

**- and –**

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

**Tribunal: The Hon Mr Justice Arnold**

**Sitting in public in London on 13 July 2011**

**David Goldberg QC and Hui Ling McCarthy, instructed by Berwin Leighton Paisner LLP, for the Appellant**

**David Ewart QC and James Rivett, instructed by the Solicitor to HM Revenue & Customs, for the Respondents**

## MR JUSTICE ARNOLD:

Introduction

1. This is an appeal from a decision of the First-tier Tribunal (Tax) (Sir Stephen Oliver QC and Ms Anne Redston) ("the Tribunal") dated 1 July 2010 [2010] UKFTT 298 (TC) by which the Tribunal dismissed the appeal of MJP Media Services Ltd ("MJP") against a notice of amendment issued by the Commissioners for Her Majesty's Revenue and Customs ("HMRC") to MJP's 2004 corporation tax return disallowing a deduction of £6,690,000 claimed by MJP in respect of a loan relationship debit.

2. The background to the deduction is as follows. During the period in question, MJP was a wholly-owned subsidiary of Carat International Ltd ("Carat") and Carat was a wholly-owned subsidiary of Aegis Group plc ("Aegis"). The companies used the accruals basis of accounting. Between 2001 and 2004 a series of inter-company transactions took place between MJP and Aegis. By 1 January 2004 Aegis owed MJP £6,815,366. At some date between 1 January and 26 March 2004, Ashley Milton, on behalf of MJP, and John Ross, on behalf of Aegis, signed a document stating that MJP had loaned Aegis the sum of £6,815,366 ("the Agreement"). The Agreement was not dated, but was stated to be made "effective from 1 January 2004". Interest was to be charged at base rate plus 1%. By 26 March 2004 Aegis owed MJP £6,893,977, being £6,815,366 plus accrued unpaid interest of £78,611. On 26 March 2004, Mr Milton, on behalf of MJP, and Mr Ross, on behalf of Aegis, signed a deed of waiver in which MJP waived the sum of £6,704,000. This left an amount owing of £189,976. MJP claimed a deduction in its 2004 corporation tax computation for £6,690,000, being the waived amount reduced by a foreign exchange difference of £14,000.

3. There were two issues before the Tribunal. First, whether the inter-company debt arose from "transaction[s] for the lending of money", and so within the definition of a loan relationship in section 81 of the Finance Act 1996 ("FA 1996"). Secondly, if a loan relationship subsisted, whether MJP's waiver of part of that loan allowed it to claim a deduction in its tax computation for the waived amount.

4. The Tribunal decided both issues adversely to MJP. MJP appealed to this Tribunal. It was common ground that the second issue only arose if MJP prevailed in its appeal on the first issue. Having heard argument on the first issue, I decided that the appeal against the Tribunal's decision in relation to that issue would be dismissed, and so it was unnecessary to hear argument on the second issue. These are my reasons for so deciding.

The statutory provisions

5. Chapter II of Part IV of the FA 1996 deals with loan relationships. The main charging provision is section 80. Section 80(1) provides that

> "For the purposes of corporation tax all profits and gains arising to a company from its loan relationships shall be chargeable to tax as income in accordance with this Chapter."

6. Section 81(1) defines a "loan relationship" as follows:

> "Subject to the following provisions of this section, a company has a loan relationship for the purposes of the Corporation Taxes Acts wherever:
>
> (a) the company stands (whether by reference to a security or otherwise) in the position of creditor or debtor in respect of any money debt; and
>
> (b) that debt is one arising from a transaction for the lending of money;
>
> and references to a loan relationship and to a company's being party to a loan relationship shall be construed accordingly."

7. Section 103(1) provides that:

> "'loan' includes any advance of money, and cognate expressions shall be construed accordingly".

The Tribunal's decision on the first issue

8. Having set out the background to the appeal at [1]-[7], identified the issues at [8]-[9], described the individuals who gave evidence on behalf of MJP at [10]-[15] and set out the statutory provisions at [16]-[24], the Tribunal considered the first issue at [25]-[96]. At [25] it recorded MJP's primary argument as being that Aegis' debt to MJP arose from a series of cash payments from MJP to Aegis, and that these were transactions for the lending of money. At [26]-[27] it recorded certain alternative arguments advanced by MJP. At [28] it recorded that counsel for MJP had expressly abandoned an argument that by signing the Agreement the parties had brought themselves into a loan relationship by virtue of section 81(3) of the FA 1996.

9. The Tribunal considered MPJ's primary argument at [29]-[78]. Having set out a little more of the background at [29]-[32], the Tribunal made two important general points about the evidence before it at [33]-[39]. First, MJP had only disclosed four bank statements, which only showed a few of the transactions relied on. Furthermore, its witnesses had given unsatisfactory explanations for its failure to produce bank statements for the other transactions. Secondly, none of the witnesses had first-hand knowledge of the transactions. As the Tribunal noted at [38], "there was no witness from Aegis's treasury department, despite the fact that they had responsibility for managing the group's funds and even though they were the best placed to explain what had happened to the bank statements". Instead, the Tribunal said at [39], it was taken by counsel for MJP on "a journey through a jigsaw of accounting

entries, mostly from MJP's ledger, with supporting roles played by the companies' statutory accounts and by Aegis's Nominal Audit Trail".

10. The Tribunal then proceeded to consider the evidence, and in particular the documentary evidence, relating to the four main transactions during the period in question: (i) a transaction involving £686,500 in September 2001 ([40]-[44]); (ii) a transaction involving £830,500 in June 2002 ([45]-[52]); (iii) a transaction involving £6,101,401 in September 2002 ([53]-[66]); and (iv) a transaction involving £883,418 in September 2003 ([67]-[69]). It also considered some minor transactions ([70]-[72]).

11. The Tribunal expressed its conclusions in relation to MJP's primary argument as follows:

"*Generally*

> 73. In claiming a tax relief, the burden of proof is on the Appellant, and the standard of proof is the balance of probabilities. It would have been a simple matter for MJP to prove that the payments were in cash: it had only to produce the relevant bank statements.
>
> 74. The companies had apparently not retained copies of their bank statements. These are classed as business records for VAT purposes (VAT Notice 700 paragraph 19, given statutory force by SI 1995/2518, Reg 31(2)). As such, they must be retained for six years (VATA 1994, Sch 11 para 6(3)). Although this appeal is unconnected with VAT, these statutory provisions mean that bank statements should have been retained, and thus should have been available as evidence for this case. Moreover, MJP did not put forward any witnesses who could explain their absence. The deduction claimed was also for a significant sum, causing an enquiry to be opened into the return on 18 October 2006, well within the six year period following the transactions.
>
> 75. It is hard to understand why this basic documentation was not available to explain the transactions. The Tribunal was instead faced with a patchwork of accounting entries and partial documentation.

*Failure to meet the burden of proof*

> 76. We found that the burden of proof was clearly not met in the following respects:
>
> (a) it was improbable that a cash payment would be made to a group company by way of cheque, and we agreed with Mr Ewart that the second transaction, for £830,500, was, on the balance of probabilities, not a

cash payment to Aegis. Exactly what occurred, and why cash of the same amount turned up some three weeks later in the books of Aegis, we were unable to say, given the paucity of evidence provided, but that was not our task;

(b) the intercompany transactions for £6.1m between Aegis and Carat, and Carat and MJP, had, on the evidence provided, been not been made in cash, but by intercompany transfer. As a result, there was an effective assignment by Carat to MJP of the debt owed to it by Aegis, in exchange for MJP writing off the debt it was owed by Carat. This automatically moved Aegis's debt between Carat and MJP: in other words, MJP stood in the shoes of Carat, without any funds changing hands. We thus agree with Mr Ewart that the book-keeping entries themselves complete the triangle. If further cash was paid by MJP to Aegis (or by Carat to Aegis on behalf of MJP), Aegis would owe £12.1m. If this were the case, the statutory accounts would show a movement of £12.2m and not £6.1. Again, we cannot explain the entries in the Nominal Ledger Audit Trail;

(c) the accrued interest of £78,611 was by definition not paid in cash;

(d) we have also excluded the £13,367 as its status was unclear even to MJP.

77. The amounts we have excluded total significantly more than the waiver. It is thus unnecessary for us to decide whether the other transfers were cash payments to Aegis.

78. However, the lack of bank statements, the absence of any witnesses with personal knowledge of the transactions, and the piecemeal documentation (however assembled) are all significant factors. It is for the Appellant to prove its case, and we find that, on the balance of probabilities, MJP also failed to discharge this burden in relation to the remaining transactions."

12. The Tribunal went on at [79]-[96] to consider and dismiss MJP's alternative arguments.

The appeal on the first issue

13. MJP's primary case is that the Tribunal's conclusion that MJP had failed to prove that cash payments had been made by MJP to Aegis was not one which was open to it on the evidence. In the alternative, MJP contends that, even if

the payments were made by MJP to third parties on behalf of Aegis, that was sufficient to amount to "transactions for the lending of monies".

The nature of an appeal to this tribunal

14. Section 11(1) of the Tribunals, Courts and Enforcement Act 2007 provides for a right of appeal to the Upper Tribunal "on any point of law arising from a decision made by the First-tier Tribunal other than an excluded decision". It was common ground before me that the principles established under section 11(1) of the Tribunals and Inquiries Act 1992 and its predecessors were equally applicable under section 11(1) of the 2007 Act.

15. In *Edwards v Bairstow* [1956] AC 14 Viscount Simonds said at 29:

> "… though it is a pure finding of fact, it may be set aside on grounds which have been stated in various ways but are, I think, fairly summarised by saying that the court should take that course if it appears that the commissioners have acted without any evidence or upon a view of the facts which could not reasonably be entertained."

Lord Radcliffe said at 36:

> "If the case contains anything ex facie which is bad law and which bears upon the determination, it is obviously, erroneous in point of law. But, without any such misconception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene."

16. In *Georgiou v Customs and Excise Commissioners* [1996] STC 463 Evans LJ, with whom Saville and Morritt LJJ (as they then were) agreed, said at 476:

> "There is a well-recognised need for caution in permitting challenges to findings of fact on the ground that they raise this kind of question of law. … It is all too easy for a so-called question of law to become no more than a disguised attack on findings of fact which must be accepted by the courts. As this case demonstrates, it is all too easy for the appeals procedure to the High Court to be abused in this way. Secondly, the nature of the factual inquiry which an appellate court can and does undertake in a proper case is essentially different from the decision-making process which is undertaken by the tribunal of fact. The question is not, has the party upon whom rests the burden of proof established on the balance of probabilities the facts upon which he relies, but was there evidence before the tribunal which was sufficient to support the finding which it made? In other words, was the finding one which the tribunal was entitled to make? Clearly, if there was no evidence, or the

> evidence was to the contrary effect, the tribunal was not so entitled.
>
> It follows, in my judgment, that for a question of law to arise in the circumstances, the appellant must first identify the finding which is challenged; secondly, show that it is significant in relation to the conclusion; thirdly, identify the evidence, if any, which was relevant to that finding; and fourthly, show that that finding, on the basis of that evidence, was one which the tribunal was not entitled to make. What is not permitted, in my view, is a roving selection of the evidence coupled with a general assertion that the tribunal's conclusion was against the weight of the evidence and was therefore wrong."

17. In *Procter & Gamble UK v Revenue and Customs Commissioners* [2009] EWCA Civ 407, [2009] STC 1990 Jacob LJ, with whom Mummery and Toulson LJJ agreed, said at [11]:

> " It is also important to bear in mind that this case is concerned with an appeal from a specialist Tribunal. Particular deference is to be given to such Tribunals for Parliament has entrusted them, with all their specialist experience, to be the primary decision maker, see per Baroness Hale in *AH (Sudan) v Secretary of State for the Home Department* [2007] UKHL 49, [2008] 1 AC 678 at [30] …."

18. What Baroness Hale said in *AH (Sudan)*, which has since been approved by Sir John Dyson SCJ giving the judgment of the Supreme Court in *MA (Somalia) v Secretary of State for the Home Department* [2007] UKSC 49, [2011] 2 All ER 65 at [43], was this:

> " … This is an expert tribunal charged with administering a complex area of law in challenging circumstances. To paraphrase a view I have expressed about such expert tribunals in another context, the ordinary courts should approach appeals from them with an appropriate degree of caution; it is probable that in understanding and applying the law in their specialised field the tribunal will have got it right: see *Cooke v Secretary of State for Social Security* [2002] 3 All ER 279, para 16. They and they alone are the judges of the facts. It is not enough that their decision on those facts may seem harsh to people who have not heard and read the evidence and arguments which they have heard and read. Their decisions should be respected unless it is quite clear that they have misdirected themselves in law. Appellate courts should not rush to find such misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently. … "

MJP's primary case

19. Counsel for MJP argued that the Tribunal's analysis of the evidence was vitiated by a number of errors. First, he submitted that the Tribunal had wrongly resorted to the burden of proof in order to determine the issue. Secondly, he submitted that the Tribunal's criticism of MJP's failure to produce bank statements was unjustified. Thirdly, he submitted that the Tribunal was wrong to attach little or no weight to the evidence of MJP's witnesses, and in particular the evidence of its principal witness Colin Richards, Head of Aegis Group Tax, about the transactions. Fourthly, he submitted that the Tribunal was wrong to dismiss the documentary evidence as a "jigsaw" or "patchwork" of accounting entries. Fifthly, he submitted that the Tribunal was wrong to say that it was not its task to explain certain things. Finally, he submitted that on the evidence the Tribunal was not entitled to reach any conclusion other than that cash had passed from MJP to Aegis. I will consider these points in turn.

*Resort to the burden of proof*

20. In *Stephens v Cannon* [2005] EWCA Civ 222, [2005] CP Rep 31 Wilson J (as he then was), with whom Auld and Arden LJJ agreed, considered seven authorities on the circumstances in which a court should resort to the burden of proof in order to determine a disputed issue of fact, from which he derived the following propositions at [46]:

> "(a) The situation in which the court finds itself before it can despatch a disputed issue by resort to the burden of proof has to be exceptional.
>
> (b) Nevertheless the issue does not have to be of any particular type. A legitimate state of agnosticism can logically arise following enquiry into any type of disputed issue. It may be more likely to arise following an enquiry into, for example, the identity of the aggressor in an unwitnessed fight; but it can arise even after an enquiry, aided by good experts, into, for example, the cause of the sinking of a ship.
>
> (c) The exceptional situation which entitles the court to resort to the burden of proof is that, notwithstanding that it has striven to do so, it cannot reasonably make a finding in relation to a disputed issue.
>
> (d) A court which resorts to the burden of proof must ensure that others can discern that it has striven to make a finding in relation to a disputed issue and can understand the reasons why it has concluded that it cannot do so. The parties must be able to discern the court's endeavour and to understand its reasons in order to be able to perceive why they have won and lost. An appellate court must also be able to do so because otherwise it will not be able to accept that the court below was in the exceptional situation of being entitled to resort to the burden of proof.
>
> (e) In a few cases the fact of the endeavour and the reasons for the conclusion will readily be inferred from the circumstances and so there will be no need for the court to demonstrate the endeavour and to

> explain the reasons in any detail in its judgment. In most cases, however, a more detailed demonstration and explanation in judgment will be necessary."

21. Counsel for MJP submitted that the Tribunal had resorted to the burden of proof in deciding whether cash had passed from MJP to Aegis and that it was wrong to do so because this was not an exceptional case in which it could not reasonably make a finding on the issue. Counsel for HMRC submitted that, on analysis, the Tribunal had not resorted to the burden of proof with regard to the second and third transactions, but on the contrary had positively decided on the balance of probabilities that there had not been a cash payment by MJP to Aegis. As for the first and fourth transactions, he accepted that the Tribunal had resorted to the burden of proof, but submitted that it was entitled to do so.

22. I accept the submission of counsel for HMRC. Although [76] of the Tribunal's decision is headed "failure to meet the burden of proof" and begins with the words, "We found that the burden of proof was clearly not met", the Tribunal went on in sub-paragraph (a) to conclude that the first transaction "was, on the balance of probabilities, not a cash transaction" and in sub-paragraph (b) to conclude that there was an intercompany transfer which resulted in "an effective assignment by Carat to MJP of the debt owed to it by Aegis, in exchange for MJP writing off the debt it was owed by Carat". As for the first and fourth payments, for reasons that will become apparent I consider that the Tribunal was entitled to resort to the burden of proof.

*Failure to produce bank statements*

23. Counsel for MJP informed me that the point about the requirement for MJP to retain bank statements for six years for VAT purposes made by the Tribunal at [74] was a point taken by the Tribunal of its own motion. He submitted that the Tribunal was not justified in criticising MJP for failing to produce bank statements because HMRC had originally accepted that there was a loan relationship and because the first specific request by HMRC for production of bank statements was made on 17 November 2009, after the expiry of six years from the date of the fourth transaction.

24. I do not accept these submissions. First, the point about the requirement to keep bank statements for six years for VAT was an obvious one, and the Tribunal was perfectly entitled to take it of its own motion. Furthermore, it can be seen from the decision at [74] that the Tribunal did not merely rely on the fact that the bank statements should have been kept for VAT purposes, but also on the inability of MJP's witnesses to explain their absence. Secondly, so far as timing is concerned, as the Tribunal pointed out, HMRC opened the enquiry on 18 October 2006, within six years of the first transaction let alone the fourth. MJP should have appreciated the need to produce the basic documentation relating to these transactions, such as bank statements, not long after that. It is true that, when the appeal to the Tribunal was launched, HMRC initially admitted that the Agreement constituted a loan relationship. But that admission was made on 15 May 2009. There is no evidence that bank statements were lost or destroyed during the period between 15 May 2009 and

17 November 2009 when HMRC specifically requested that they be disclosed. Furthermore, as counsel for HMRC pointed out, HMRC had made a request for disclosure of all relevant documents on 9 February 2009.

*The evidence of the witnesses*

25. Counsel for MJP accepted that MJP's witnesses had no first-hand knowledge of the relevant transactions, but nevertheless submitted that the Tribunal had been wrong not to place any weight on the evidence of Mr Richards. Mr Richards is a Fellow of the Institute of Chartered Accountants, and he has held various tax positions in industry since the late 1980s. Counsel for MJP submitted that Mr Richards was experienced in reading and interpreting financial documents such as the accounting documents relied on by MJP, and thus his evidence was of weight despite his lack of first-hand knowledge of the transactions.

26. I do not accept this submission. Mr Richards' evidence amounted to no more than his reading of the documents. The documents are not hard to understand in themselves. Furthermore, there is no dispute as to what they purport to show as a matter of accounting. As counsel for MJP himself pointed out, both MJP and HMRC adduced expert accountancy evidence before the Tribunal and the experts were agreed as to the figures. (This expert evidence related to another potential issue, and counsel for MJP accepted that it did not in itself advance MJP's case on the present issue.) The issue, however, is as to the nature of the transactions which gave rise to the accounting entries. That was not an issue on which Mr Richards was able to assist the Tribunal, because he did not know anything about those transactions.

*The accounting documents*

27. Counsel for MJP submitted that, if the Tribunal had properly applied its mind to the accounting documents, rather than dismissing them as a "jigsaw" or "patchwork", it would have seen that they showed cash passing from MJP to Aegis. Counsel for HMRC submitted that the Tribunal was correct to regard the documents as incomplete evidence, because they showed the results of the transactions rather that the nature of those transactions. I agree with counsel for HMRC.

*Inability to explain matters*

28. Counsel for MJP pointed out that, when considering the second transaction by way of example, the Tribunal had said that it was not its task to explain what happened, and in particular why cash of the same amount had turned up in Aegis' books subsequently. He submitted that this demonstrated an abdication of judicial responsibility, and that it was indeed the Tribunal's task to consider all the evidence and then decide, on the balance of probabilities, whether or not it showed cash passing from MJP to Aegis. He made a similar point in relation to the third transaction. Counsel for HMRC submitted that the Tribunal had applied itself properly to its task. The fault lay with MJP for relying upon mysterious and unexplained transactions. Furthermore, as discussed above, the Tribunal had decided on the balance of probabilities that

cash had not passed from MJP to Aegis in both cases. Again, I agree with counsel for HMRC.

*Was the Tribunal entitled to reach the conclusion it did?*

29. Counsel for MJP submitted that, if the Tribunal had considered the evidence properly, there was only one possible conclusion, namely that cash had passed from MJP to Aegis. He accepted that MJP needed to succeed on all four transactions in order to prevail on the appeal. Accordingly, it is only necessary for me to consider the two transactions in relation to which the Tribunal reached a positive conclusion.

30. *Second transaction*. The documentary evidence is as follows:

    i) The section of MJP's general ledger headed "Inter Company Account – Aegis Group plc" shows a debit of £830,500, described as "Payment" together the number "145", on 5 June 2002.

    ii) On the same date the section of the general ledger headed "Bank Balance (Lloyds TSB 0250622)" shows a credit of the same amount, labelled "Aegis Group plc" again together the number "145".

    iii) A bank statement for the Lloyds account in question shows the same sum paid out on 13 June and gives a reference number 000145. It is common ground that this indicates that the payment was made by cheque.

    iv) Aegis' nominal audit trail for 2002, which consists of extracted entries from Aegis's ledger, has an entry which reads "[Description] MJP Media Services Ltd [Date] 25/06/02 [Jrnl] 2961 [Type] CashB … [Cr] 850500.00 [Detail] MJP RE I/CO MJP". This is said by MJP to show the same amount being received by Aegis from MJP.

31. The Tribunal accepted at [52] that the documents were evidence that "MJP paid £830,500 by cheque, with this sum clearing through its bank account on 13 June, some 7 days after the book entry in MJP's ledger [and] that cash of the same amount was received by [Aegis] on 25 June, 12 days after the cash had cleared through MJP's bank account and 20 days after it was deducted in MJP's own ledger".

32. As the Tribunal recorded at [47]-[49], however, the evidence of two of MJP's witnesses was that inter-company transfers were normally carried out electronically. Furthermore, one of them agreed it would be stupid to make an inter-company payment by cheque since it would cause the group to lose interest for around five days.

33. Based on this evidence, and the absence of any explanation of the transaction from a witness with knowledge of it, the Tribunal's conclusion at [76(a)] was that it was "improbable that a cash payment would be made to a group company by way of cheque", and accordingly, "on the balance of probabilities, [the second transaction] was not a cash payment to Aegis". In

my judgment this was a conclusion which the Tribunal was entitled to reach on the evidence before it. As discussed above, I agree with the Tribunal that it was not obliged to try and explain what occurred, and why the same sum subsequently turned up in Aegis' books.

34. *Third transaction*. The documentary evidence is as follows:

i) Carat's statutory accounts show that at the beginning of 2002 Aegis owed over £6m to Carat.

ii) The section of MJP's general ledger headed "Inter Company Account – Carat International" shows a balance of £6,101,401.58 owed by Carat to MJP as at 1 January 2002.

iii) Carat's statutory accounts for the year ended December 31 2002 show the repayment by Aegis of £6.1m owed to Carat. Mr Richards was unable to point to any other supporting evidence for this repayment. No inter-company balances, cash books or bank statements were produced to the Tribunal to explain how the transaction was accomplished.

iv) MJP's ledger for the Carat inter-company account shows a credit for £6,101,401.58 described as "Aegis Group plc" on 4 September 2002, in effect eliminating Carat's debt to MJP. There is no matching entry in MJP's ledger for the Lloyds account, however.

v) MJP's ledger for the Aegis inter-company account shows a debit for £6,101,401.58 described as "Carat International" on 4 September 2002.

vi) MJP's 2002 statutory accounts show a debt owed by Aegis to MJP of £6,312,488.

vii) Aegis' cashbook transfer report for 2002 contains an entry under the heading "4102 NatWest Group Treasury" which reads "12/09/2002" Cash Book MJP RE CARAT INTERCO TRF 6101401.58".

viii) Aegis' nominal audit trail for 2002 has an entry which reads "[Description] MJP Media Services Ltd [Date] 30/09/02 [Jrnl] 3051 [Type] CashB … [Cr] 6101401.58 [Detail] INTERCO TRF MJP RE CARAT".

35. MJP's case before the Tribunal was that these documents demonstrated that Aegis had repaid £6,101,401.58 of the money it owed Carat, Carat had repaid the same sum to MJP and MJP had paid Aegis the same sum. Mr Richards was unable to explain, however, why these transactions had taken place or how the transfers had been effected. Furthermore, counsel for MJP accepted that he could not show that cash had passed from Aegis to Carat or from Carat to MJP as opposed to the transfers having been made by way of book entries.

36. HMRC's case was that MJP had taken over Aegis' debt to Carat in exchange for cancelling Carat's own debt, with the consequence that no cash had passed from MJP to Aegis. Counsel for HMRC argued that, if the first two transfers had been made by book entries, then it followed that the third transfer must have been made by book entry as well.

37. The Tribunal accepted HMRC's case, as can be seen from [76(b)] quoted above. In my judgment this was a conclusion which the Tribunal was entitled to reach on the evidence before it.

MJP's alternative case

38. Counsel for MJP submitted that, even if payments were made by MJP to third parties on behalf of Aegis, that was sufficient to amount to "transactions for the lending of monies", for three reasons. First, he argued that section 81(1)(b) had to be read together with the definition of "loan" in section 103(1). A payment by MJP for the benefit of Aegis was an advance of money, and hence a loan. In support of this contention he relied on *London Financial Association v Kelk* (1884) 26 ChD 107 at 136-137 (Bacon V-C). Secondly, he argued that, where parties to a transaction agreed that it should be treated as a loan, as MJP and Aegis had in the Agreement, the court would not go behind that agreement. In support of this contention he relied on *Commissioner of Inland Revenue v HIT Finance Ltd* (2007) 10 HKCFAR 717 at [10]-[14] (Lord Hoffmann). Thirdly, he argued that, as a matter of the general law, payments to MJP for the benefit of Aegis in respect of which Aegis recognised an indebtedness to MJP amounted to a loan from MJP to Aegis. In support of this contention he relied on *Spargo's Case* (1873) LR Ch App 407 at 414 (Mellish LJ) and *Parsons v Equitable Investment Co Ltd* [1916] 2 Ch 527 at 530 (Lord Cozens-Hardy MR).

39. I do not accept these arguments. Taking the second argument first, I agree with counsel for HMRC and the Tribunal at [95(b)] that parties cannot make a transaction answer a description which it does not otherwise answer by saying that it does: see *Prudential plc v Revenue and Customs Commissioners* [2009] EWCA Civ 662, [2009] STC 2459 at [12]-[13] (Moses LJ, with whom Laws and Mummery LJJ agreed). *CIR v HIT* says nothing different.

40. I can take the first and third arguments together. The problem with both arguments is that, as counsel for HMRC submitted, they lack a proper factual foundation. Counsel for MJP submitted that, if the transactions did not comprise cash payments from MJP to Aegis, then the only alternative possibility is that they were payments by MJP on behalf of Aegis. I do not accept this. First, it was not MJP's case before the Tribunal that MJP had made payments on behalf of Aegis. Secondly, MJP adduced no evidence to support such a case. Thirdly, this is not the only alternative possibility. On the contrary, in the case of the third transaction, the Tribunal found as a fact that Carat had assigned to MJP the debt owed to Carat by Aegis in exchange for MJP writing off the debt it was owed by Carat. As I have already noted, MJP has to succeed on all four transactions. It follows that this finding is fatal to its alternative case. Even in the case of the second transaction, while I accept that

it is possible that MJP made payments to a third party on behalf of Aegis, it is also possible, as counsel for HMRC submitted, that MJP contracted with and paid the third party to obtain services the benefit of which was passed on to Aegis, and Aegis agreed to re-pay MJP but the money was left outstanding as an inter-company debt. (This would also apply to the first and fourth transactions.)

41. In these circumstances it is unnecessary for me to express any view on the issue of law raised by the third argument, and in particular the debate between the parties as to the effect of the decision of the House of Lords in *Potts' Executors v Inland Revenue Commissioners* [1951] AC 443, which the Tribunal considered at [81]-[83] and [87]-[90].

Conclusion

42. The appeal is dismissed.

Mr Justice Arnold

Release date: 02 September 2011