JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 133 OF 2007

REVENUE COURT APPEAL NO.1 OF 2005

BEFORE: THE HON. MR JUSTICE PANTON, P.
THE HON. MR JUSTICE MORRISON, J.A.
THE HON. MRS JUSTICE MCINTOSH, J.A. (Ag)

BETWEEN	CIGARETTE COMPANY OF JAMAICA LTD (IN VOLUNTARY LIQUIDATION)	APPELLANT
AND	COMMISSIONER OF TAXPAYER AUDIT AND ASSESSMENT	RESPONDENT

Vincent Nelson Q.C. and Miss Tamara Robinson, instructed by Myers, Fletcher and Gordon, for the appellant.

Lackston Robinson and Miss Thalia Francis, instructed by the Director of State Proceedings, for the respondent.

27, 28, 29, 30 April, 1 May 2009 and 12 February 2010

PANTON, P.

[1] I have read in draft the reasons for judgment written by my learned brother, Morrison, JA. He has dealt with the issues in a manner which has my approval. I am of the view that the learned trial judge erred in his interpretation of section 34 of the Income Tax Act and its applicability to the facts of the case.

MORRISON, J.A.

Introduction

[2] The appellant ("CCJ") is a private company limited by shares and engaged in the business of manufacturing and marketing of cigarettes. 99.8% of its shares are owned by Carreras Group Limited ("CGL"), which was at the material time the holding company in Jamaica for the Carreras Group of Companies, which included CCJ and a number of other companies.

[3] By Notices of Estimated Assessment dated 1 April 2003, issued under section 72 of the Income Tax Act ("the Act"), the respondent ("the Commissioner") notified CCJ of assessments to pay income tax for each of the years of assessment 1997, 1998, 1999, 2000, 2001 and 2002, in respect of transfers of funds made by it to CGL in each of those years. The total amount of tax assessed was $5.7 billion, made up of tax of $2.17 billion and penalties of $3.54 billion (imposed pursuant to section 41(2)(b) of the Act).

[4] The Commissioner took the view that these transfers, which were reflected in the audited financial statements of both companies as loans by CCJ to CGL, were not genuine loans, but were in fact distributions and as such liable to income tax deducted at source. She considered that

the various amounts were in reality transferred by CCJ for the exclusive benefit of CGL, but described as loans so as to avoid the incidence of tax.

[5] CCJ appealed against these assessments to the Commissioner of Taxpayer Appeals, who dismissed the appeal on 23 November 2004, and its further appeal to the Revenue Court was dismissed by Anderson J, the judge of that court, in a judgment given on 30 October 2007. The learned judge confirmed the Commissioner's assessments, but considered that "a much more liberal penalty" was appropriate in the circumstances and accordingly remitted the matter of the penalty to the Commissioner with a recommendation that she "impose either a nil penalty or a nominal one in an amount not exceeding 5% of the total tax payable". This recommendation was in due course accepted by the Commissioner and the amount of the assessment of $2.17 billion, plus a reduced penalty of $108.6 million, have since been paid.

[6] In confirming the assessments, Anderson J found, in agreement with the Commissioner, that the transfers of funds from CCJ to CGL were not genuine loans within the provisions of section 35 of the Act and that they were in fact distributions within the meaning of section 34. He stated further that he "would also be prepared to hold that the transactions were artificial within the meaning of section 16 of the Act".

[7] This is an appeal from Anderson J's judgment, CCJ challenging the following findings of law made by him:

> " (i) that the transfers were not "loans" within the meaning of Sections 34(1)(9) and 35 of the Act;
>
> (ii) that the transfers were "distributions" within the meaning of Section 34(1)(2) of the Act;
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> (iii) that the transfers were "artificial" within the meaning of Section 16 of the Act;
>
> (iv) that even if the transfers have to be "disregarded" by virtue of Section 16, they can then be recharacterised as "distributions" within the meaning of Section 34; and
>
> (v) insofar as there is a finding of fact (at page 68 of the judgment) that "the description of these transfers as 'loans' constituted a sham" there are no primary facts which can support such a finding: it is a finding at which no reasonable Court could have arrived based on the evidence before it, and as such is wrong in law".

The background to the assessments

[8] On 18 February 2003, KMPG Peat Marwick ("KPMG"), a well known firm of chartered accountants, acting on behalf of CGL, wrote to Mr Clive Nicholas, Director-General in the Ministry of Finance, advising that CGL had under consideration the reorganisation of the structure of the group. The objective of the reorganisation was stated to be to enable CGL,

which currently operated as a holding and investment company for its subsidiaries, which included CCJ, to revert to its original core business of the manufacture and sale of cigarettes and related products. To this end, the businesses of all but one of the group's subsidiaries would be closed down or divested (as several of them already had been) and CCJ's rights to the use of various licences and cigarette trademarks (which were owned by CGL) would be terminated, as would its rights under the existing tenancy arrangements relating to the factory space it currently occupied at Twickenham Park. CCJ's raw materials, finished goods, machinery, equipment and vehicles would be transferred to CGL and CCJ's employees would be offered employment with CGL in accordance with the provisions of The Employment (Termination and Redundancy Payments) Act. In summary, CGL would once more become the manufacturer and distributor of cigarettes in place of CCJ.

[9] The letter went on to list the nine subsidiaries of CGL and to advise the Director-General of CGL's intention to place all but one of the subsidiaries in voluntary liquidation and thereafter to distribute to the shareholders of CGL "substantially all of the proceeds of the liquidations". The essential purpose of the letter was then set out as follows:

> "We anticipate that if the voluntary liquidations are implemented the board of directors of Carreras would wish to distribute to its shareholders substantially all of the proceeds of

the liquidations. In the event of such a distribution to its shareholders, it is our understanding that, subject to market conditions, British American Tobacco (BAT) as the ultimate owner of 50.4% of Carreras would wish to utilize a substantial part of such distribution to make a partial offer to all shareholders to acquire additional shares in Carreras. It is our understanding that such an offer would not affect qualification for listing on the Jamaica Stock Exchange.

Prior to implementation of the reorganization, Carreras, its shareholders, the minority shareholders of CCJ and the liquidator(s) would need to be assured that the tax implications are as set out below:

a) That the only tax payable on the distribution of the assets in the liquidation of the subsidiaries will be Transfer Tax at 7.5% and in particular, Section 34 (1) (3) of the Income Tax Act will not apply. Please also treat this letter as an application for clearance under Section 18(4) of the Income Tax Act.

(b) As the distributions in the liquidations will be from subsidiaries of Carreras, in accordance with the provisions of paragraph 3 of Part 1 of the First Schedule to the Transfer Tax Act, the shareholders of Carreras will qualify for relief from Transfer Tax on any capital distribution made by Carreras to its shareholders out of the distributions from the liquidations.

The net assets of the subsidiaries to be liquidated including all their distributable reserves will amount to over J$10 billion. The liquidator(s) will have to pay 7.5% Transfer Tax on the amounts distributed to the shareholders, We estimate that the transfer tax payable will be in the region of

> JS750 million based on the net worth of the companies.
>
> We will be available to meet and discuss the above proposal at your convenience. It is the client's wish to proceed with the proposed reorganization as soon as written confirmation of the clearances sought herein has been received."

[10] The response to KPMG's letter came from the Commissioner, to whose attention it had been brought by the Director-General. In a letter dated 21 March 2003, the Commissioner indicated that she was, "without prejudice", granting the request for clearance under section 18(4) of the Act. However, she went on to indicate that the implications of "amounts purportedly shown as loans from related companies to CGL" in the financial statements of the companies were "being examined, as in our opinion, these amounts are not bona fide loans and as such will be treated as distributions subject to withholding tax". The Commissioner concluded by stating that she would be raising assessments accordingly.

[11] The Commissioner subsequently explained, in an affidavit filed in the proceedings before the Revenue Court, that her consideration of KPMG's request for clearance had led her to an examination of the audited accounts of both CCJ and CGL, going back several years. That examination revealed "unusually large" annual transfers of funds from CCJ to CGL dating back to 1990, leading her to the view that, although

the transfers were classified in the accounts of both companies as loans, they were in fact distributions by CCJ to CGL and as such subject to income tax. It will be necessary to return to the Commissioner's detailed reasons for this conclusion in due course.

[12] On 1 April 2003, the assessments already referred to for the years 1997 to 2002 were raised by the Commissioner and, by letter dated 31 July 2003, KPMG formally objected to them on a number of grounds, submitting that they were "totally unfounded" and asking that they be withdrawn. This letter specifically challenged the characterisation of the transfers as distributions, pointing out that the assessments failed to specify the item in the distribution table set out in section 34 of the Act (see para. 44 below) being relied on by the Commissioner.

[13] By letter dated 7 October 2003, the Commissioner wrote directly to CCJ in response to KPMG's letter of objection, "to remove any doubt as to the basis on which the assessments were made", as follows:

> "In our opinion, the transfer of funds from Cigarette Company of Jamaica to Carreras Group Limited for each of the years 1997 to 2002 inclusive, were not genuine loans under section 35 of the Income Tax Act. Accordingly, we treated the said transfers as distributions made by Cigarette Company of Jamaica for which that company is assessable."

[14] By letter dated 4 November 2003, KPMG wrote to confirm that CCJ's objection to the assessments stood. The letter went on to comment on the Commissioner's stated basis for the assessments as follows:

> "With respect to the basis on which you have now indicated the assessment has been made we consider the assessments remain defective in that they do not identify to the taxpayer:
>
> > (I) The basis on which you have sought to treat the transfer of funds as not being genuine loans; and
> >
> > (ii) The specific head under which you are treating the transfers as taxable distributions.
>
> Your letter indicates that in your opinion the transfer of funds were not genuine loans. However, under Section 35 of the Income Tax Act a loan is not a transaction which is subject to the discretion of the Commissioner or on which the Commissioner needs to be satisfied by the taxpayer.
>
> Further, for a distribution to be taxable under the Income Tax Act it must fall within one of the items set out in the Distribution Table under section 34(1). Your letter of October 7, 2003 does not identify the item in the Distribution Table under which you are contending that you are - seeking to treat the "transfer of funds" from Cigarette Company of Jamaica Limited to Carreras Group Limited as distributions made by Cigarette Company of Jamaica Limited for which it is assessable.
>
> We await this information."

[15] This correspondence ended with a letter from the Commissioner to CCJ dated 29 December 2003 confirming that the assessments would stand on the basis set out in her earlier letter of 7 October 2003.

The progress of the reorganisation

[16] KPMG's seemingly innocuous enquiry of 18 February 2003 had set in train the unexpected turn of events described above, resulting in the notices of assessment. However, in the meantime, the Commissioner did in due course confirm, further to her "without prejudice" approval of the request for clearance in her 21 March 2003 letter, that the tax payable on the liquidation of CGL's subsidiaries would be transfer tax of 7½% on the assets distributed by CGL to its shareholders. She also confirmed that the transactions pursuant to the reorganisation proposed by the CGL were such that no notice under section 18(3) of the Act (permitting the Commissioner in certain circumstances to counteract tax advantages obtained by a taxpayer in relation to certain transactions in securities) ought to be given (see the Commissioner's letter to KPMG dated 28 April 2003).

[17] As a result, CGL proceeded with the proposed reorganisation and on 27 February 2004 (pursuant to a decision of the board of CGL made before the Commissioner's involvement) the sum of $10.58 billion, being the full amount shown on the financial statements of both CGL and CCJ

as owing, was repaid by CGL to CCJ. On 15 March 2004, a liquidator was appointed for CCJ and the liquidation of the other subsidiaries also proceeded apace. By the time the matter came on for hearing in the Revenue Court in May 2006, the court was advised that CCJ had already paid out approximately $4.9 billion to CGL by way of partial capital distribution.

CCJ's case

[18] CCJ's factual case was based primarily on the evidence (by affidavit and viva voce) of Mr George Ashenheim, the chairman of CGL and a member of the board of CCJ (in both cases, since February 1984) and Mrs Marlene Sutherland, Finance Director of CGL since October 1989. Their evidence was supported by affidavit evidence from Miss Elizabeth Ann Jones and Mr Linroy Marshall, both partners in KPMG.

[19] CCJ also prayed in aid, in the proceedings before the Commissioner of Taxpayer Appeals, as well as before Anderson J, on parliamentary material under the principles of ***Pepper (Inspector of Taxes) v Hart*** [1993] 1 All ER 42, in support of the interpretation of sections 34 and 35 of the Act contended for by the company. However, Anderson J, after a detailed review of the judgments in that case, held that those principles had no application to the instant case. Other affidavit evidence put forward by CCJ, presumably as expert evidence, was also rejected by the judge on

the basis that "none of these persons was designated as an expert by the court, nor does any one of the declarations comply with Rules 32.12 or 32.13 of the [Civil Procedure Rules]". Given that there is no appeal from the judge's rejection of these additional items of evidence, I propose to say nothing more about them.

[20] Mr Ashenheim's affidavit set out the history of CGL, CCJ and their connection to each other as follows:

> "...
> 5. I became a Director of Carreras of Jamaica Limited from its incorporation on April 4, 1962.
>
> 6. On April 4, 1962 Carreras of Jamaica Limited was incorporated. The objects for which the company was established are stated in the Memorandum of Association (exhibited hereto and marked "GA I" for identification), inter alia, as *to carry on business as tobacco and cigar merchants and importers of and dealers in tobacco, cigars, cigarettes, snuff match lights, pipes and any other articles required by or useful to smokers and as manufacturers of any of the goods and articles aforesaid."*
>
> 7. In 1969 Carreras of Jamaica Limited was granted a Listing at the inception of the Jamaica Stock Exchange.
>
> 8. On October 31, 1973, by Special Resolution, Carreras of Jamaica Limited changed its name to Carreras Group Limited, registered as company number 3585 (Certificate of incorporation and registration is exhibited hereto and marked "GA2" for identification). The group structure was formed and Carreras Group Limited ("CGL") became the holding company for its

subsidiaries, its principal activity being the provision of management and other services to all its operating subsidiary companies (as stated annually in note 1 to - CGL financial statements exhibited in the Appellant's Documents at item **DI- D50)** have been duly performed.

9. Also on October 31, 1973, another company, Carreras of Jamaica Limited was incorporated and registered as company number 12067 to continue the cigarette operations (Certificate of incorporation and registration is exhibited hereto and marked "GA 3" for identification).

10. In 1977 Carreras Group Limited acquired the controlling interest of B & J B Machado Company Limited and caused the latter's name to be changed to Cigarette Company of Jamaica Limited and caused to be merged the tobacco businesses at that time pursued by Carreras of Jamaica Limited into the newly named Cigarette Company of Jamaica Limited. The Certificate of Incorporation on Change of Name to Cigarette Company of Jamaica Limited issued by the Registrar of Companies dated July 29, 1977 is exhibited hereto and marked 'GA' for identification.

11. I was appointed Chairman of the Board of Directors of Carreras Group Limited on February 10, 1984 and I am well acquainted with the history and operations of the companies comprising the Carreras Group.

12. I became a Director of the Cigarette Company of Jamaica Limited on February 2, 1984.

13. On September 1, 1977, an Agreement was entered into between Carreras of Jamaica Limited and Bonitto Brothers Limited (a subsidiary of Carreras of Jamaica Limited) of the FIRST PART; (the former) B & J B Machado Tobacco Company Limited of the SECOND PART;

Rothmans International Limited ("RI") of the THIRD PART; British American Tobacco Company Limited ("BAT") of the FOURTH PART; and Carreras Group Limited ("CG") of the FIFTH PART. The Agreement was duly approved by the Government of Jamaica and provided a complete code of conduct for doing business in the future among the respective companies. The Agreement established the business relationships between (the former) B & J B Machado Tobacco Company Limited (therein referred to as the "Purchasing Company") renamed Cigarette Company of Jamaica Limited ("CCJ") as aforesaid and its parent company Carreras Group Limited ("CG"). The 1977 Agreement is exhibited in the Appellant's Documents at Item C.

14. Bonitto Brothers Limited and Carreras of Jamaica Limited were put into voluntary liquidation in 1977.

15. CCJ became the tobacco entity going forward, as its parent company CGL had combined its own tobacco operations previously conducted by its subsidiary Carreras of Jamaica with that of (the former) B &JB Machado Tobacco Company Limited. The business relationship was strongly encouraged by the Government of Jamaica and the Agreement was also approved by the Bank of Jamaica. See letters from the Bank of Jamaica dated 10th October, 1977 and from the Ministry of Industry and Commerce dated 14th July, 1977 exhibited hereto marked "GA 5" and "GA 6" respectively for identification."

[21] The agreement dated 1 September 1977 referred to at paragraph 13 of Mr Ashenheim's affidavit ("the 1977 agreement"), set out in some detail the commercial basis of the future operations of CGL and CCJ and, of relevance in the instant context, provided as follows at clause 13(c)(i):

> "That [CGL] may at its sole discretion (but with the approval of [CCJ]) borrow from [CCJ] such amounts as it may from time to time require free of interest, provided however that [CGL] guarantee to [CCJ] the repayment of such borrowings at such times and in such manner as [CGL] and [CCJ] may mutually determine ...".

[22] The 1977 agreement also contained provisions for the payment of royalties by CCJ to CGL (Clauses 16-17). These royalties related to the fact that CGL controlled the major tobacco trademarks used by CCJ to generate in excess of 95% of its tobacco sales revenue. Notwithstanding this, Mr Ashenheim stated, CGL had never charged CCJ any royalties for the use of its trademarks.

[23] Mr Ashenheim stated further that transfers of fund from CCJ to CGL were sanctioned not only by the 1977 agreement, as well as the memorandum of association of CCJ, but were also fully disclosed and properly described as loans by the auditors in the financial statements of both CCJ and CGL. These transfers were always intended to be loans and were therefore correctly described as such in the financial statements. Despite the absence of a repayment schedule for these

loans, it was always the intention of both CCJ and CGL that they were repayable whenever demanded by CCJ and CGL was always in a position to repay them.

[24] Mr Ashenheim emphasised the fact that the directors of both companies were always guided by KPMG with regard to full and proper disclosure of the loans in the financial statements, in accordance with accounting standards generally accepted in Jamaica. He pointed out that KPMG had issued unqualified audit opinions on the financial statements of both CGL and CCJ over the years, including the years 1997 to 2002. The existence and validity of the loans had accordingly been acknowledged by the directors and shareholders of both companies, in particular by the shareholders' annual approval at general meetings of the audited financial statements. These financial statements had in turn always been duly filed with the Commissioner by both companies as part of their annual income tax returns.

[25] The transfer of funds by way of loan by a subsidiary to a parent was, Mr Ashenheim insisted, in accordance with "normal commercial practice" within groups of companies where the treasury function is centralised:

> "A centralised treasury is universally recognized and the loan of surplus funds to a parent company is normal business practice locally, in the UK and internationally. CGL, as the parent company, has a history of providing management and other support services

> including a centralised treasury function to its subsidiaries' operations for greater efficiency."

[26] Mr Ashenheim's affidavit spoke finally to the reorganisation, the engagement of KPMG as consultants to the process, the 18 February 2003 letter to the Ministry of Finance and the unexpected sequel which has already been described. He was, he said, "quite astonished" to see the Commissioner's response that the loans were assessable as distributions, "since it was clearly contemplated and so indicated to the Revenue Authorities that the loans would be repaid by CGL as part of the reorganisation". The repayment of the loans was agreed to by CGL's board as part of the proposed reorganisation before the Commissioner's intervention and they were in fact repaid in full on 27 February 2004. Effective 1 January 2004, CGL proceeded with the reorganisation, as planned:

> "The tobacco operations have been assumed by CGL using trademarks which it owns. Having regard to the reorganisation, as there is no longer the use of the trademarks royalty free, interest was charged by CCJ on the loans as of January 1, 2004 until the date of repayment. It is expected that the remaining aspects of the reorganisation will be finished in 2004."

[27] Mrs Marlene Sutherland, CGL's Finance Director, described the structure of the Carreras Group, as it already existed when she joined the company in 1989. CGL functioned as the holding company for its

subsidiaries, providing them with management and other services and performing certain "key functions" centrally "for greater efficiency". These functions were banking and treasury, information technology and human resources and development, as well as expertise in manufacturing operations, engineering and marketing services.

[28] As Group Finance Director, Mrs Sutherland was responsible for the accounting function of CGL as well as for overseeing that of the subsidiaries. As part of an international group of companies (initially Rothmans International plc, but at the material time British American plc), CGL followed group practices in relation to efficient use of financial resources, entailing the provision of a central treasury function for subsidiaries and the movement of surplus funds between subsidiaries "so as to minimise costs of borrowing externally".

[29] Accordingly, the annual budgeting process for CGL and the subsidiaries would ordinarily be centrally co-ordinated, with the final budgets for subsidiary companies and CGL being "reviewed firstly by their respective executive managements in conjunction with a sub-committee of the CGL board". By the time the budgeting process was completed, the management of each individual company and CGL "had effectively approved the projected inter-company loan movements for the ensuing

financial year". Thereafter, the process would be finalised in the following manner:

> "(vi) The sub-committee of the CGL Board of Directors having conducted a detail review of the consolidated budget, would then make its recommendations to the full Board.
>
> (vii) When the full Board of Directors of CGL approved the consolidated budgeted Profit & Loss Account, Balance Sheet, Cash Flow and the capital Expenditure and Movement requirements, which were compiled from the individual companies' budgets, this approval was recorded in the minutes. Consequently there was no need for further Board approval for the inter-company loan movements as they arose during the year.
>
> (viii) In accordance with the approved budgets and standard operating procedures, inter-company transfers were arranged monthly under written instructions from each company's management through their bankers."

[30] Mrs Sutherland specifically attributed the non-payment of interest by CGL to CCJ on the loans to the 1977 agreement, further stating that, "in the interest of fairness", CGL in return opted not to charge CCJ royalties for the use of its trademarks. Though there was no repayment schedule for the loans, Mrs Sutherland stated that it was her understanding that they were repayable on CCJ's demand. As a consequence, she said, she was "careful in the CGL's treasury

management practices over the years to maintain the investment portfolio in high quality investments capable of being liquidated into cash on short notice and at all times maintained a value which could satisfy CGL's loan obligations". As to the fact that no security was given by CGL for the loans, Mrs Sutherland asserted that "it is not the usual practice within groups of companies to incur the costs of security documentation for inter-company loans because of the exorbitant costs involved in doing so and also because the companies are part of the same group".

[31] Both Mr Ashenheim and Mrs Sutherland were cross-examined on their affidavits by the Solicitor-General, who appeared for the Commissioner at the hearing before Anderson J. They were both pressed in respect of evidence that CCJ had made credit arrangements for the sum of $25 million, with interest, from Bank of Nova Scotia Jamaica Limited ("BNS") in 2002, a year in which CCJ had transferred sums in excess of $1 billon to CGL by way of loans. Mr Ashenheim was asked by the judge whether it would be "good commercial practice for CCJ to transfer interest free loans and then set up a facility to borrow with interest from [BNS]", to which his answer was "I do not know what the circumstances would have been, it may have been that the left hand didn't know what the right hand was doing". Mrs Sutherland insisted that the BNS arrangement "was a standby facility that was never used". It was, she

said, "a mere convenience", necessitated by the need for a trading company such as CCJ to establish banking relationships.

[32] Mr Linroy Marshall, a Chartered Accountant and a partner of KPMG, was, at the time of his affidavit filed in the matter (7 May 2004), the President of the Institute of Chartered Accountants of Jamaica and a director of the Institute of Chartered Accountants of the Caribbean. He was the engagement partner with responsibility for the audits of the financial statements of CGL and CCJ as at 31 March 2002 and for the year then ended, having taken over that responsibility from another, more senior, partner in the firm who had previously been the engagement partner for these accounts from 1997 to 1991. Mr Marshall stated that, for each of the years 1997 to 2002, KPMG issued unqualified audit opinions on the financial statements of both CGL and CCJ in the following terms:

> "The audit opinion was substantially as follows:
>
> > In our opinion, proper accounting records have been kept and the financial statements, which are in agreement therewith and have been prepared in accordance with generally accepted accounting principles in Jamaica, give a true and fair view of the state of affairs of the group and the company as at March 31, 2002, and the group's profit and cash flows for the year then ended and comply with the provisions of the Companies Act. "

[33] With specific reference to the subject matter of the assessments, Mr Marshall said this:

> "10. A loan creates an obligation on the borrower to repay the loan to the lender. The books of account of CGL and CCJ fully disclosed the inter-company loans. Initially, the disclosures in the Balance Sheet of each of the companies combined intra-group trading balances with the loans. As of and for year ended March 31, 1991 and thereafter, inter-company loans were, consistent with Generally Accepted Accounting Principles in Jamaica, presented separately from intra-group trading or current account balances in the Balance Sheets of each of CGL and CCJ. The loans were presented as "Due from parent company" and classified as a non-current asset in the Balance Sheet of CCJ, and as Due to subsidiary' and classified as a non-current liability in the Balance Sheet of CGL.
>
> 11. KPMG's audit teams which worked on the engagement for the years in question were satisfied as to the completeness, existence, accuracy and presentation of the balances. They were cross verified between both sets of accounting records audited by us. We established by inspection that for each of the years concerned the amount shown as a loan receivable from CGL in the accounting records of CCJ was equal to the amount shown as a loan payable to CCJ in the accounting records of CGL and determined that CGL had the ability to repay CCJ. The amounts in question are appropriately reflected as 'Due from parent company' in CCJ's Balance Sheets as at March 31, 1997 to 2002 and 'increase in parent company indebtedness' in the

Statement of Cash Flows for those years (exhibited hereto marked 'LM2' for identification.)"

[34] Mr Marshall next described the process by which dividends were proposed and declared by both companies for each of the years 1997 to 2002 and stated that, notwithstanding dividends (including capital dividends) paid, "for each relevant year, CGL had combined current assets and long-term investments far in excess of the amounts due to subsidiary companies". He then went on to explain that long-term investments were so classified on the basis of their stated maturity dates ("in accordance with Generally Accepted Accounting Standards in Jamaica") and comprised marketable securities which, "notwithstanding their presentation as long-term for financial statement purposes, would all have been convertible to cash with little or no notice, should the loans have been called by CCJ". According to Mr Marshall, a substantial portion of the marketable securities comprised "interest-bearing high-yielding government securities", with the remainder comprised of "corporate securities and some equities, all of the latter being securities for which there was an active market on the Jamaica Stock Exchange".

[35] Mr Marshall concluded with the points that had the loans assessed as being distributions made by CCJ been in fact distributions, there would have been "a serious breach of the Companies Act since such

distributions would have resulted in a return of capital to shareholders", and that, further, not being for the benefit of all the shareholders of CCJ, but only for the majority shareholder, "would clearly be a fraud on the minority". His final comment was that had the loans been in fact distributions, the result would have been "Unappropriated Profits becoming deficits as at March 31, 2001 and 2002", as also a return of share capital as at the same dates.

[36] Miss Elizabeth Ann Jones, a Chartered Accountant and a partner in KPMG also swore an affidavit in the Revenue Court proceedings, giving details about the discussions that she had with the revenue authorities on behalf of CCJ, both before and after the assessments were raised by the Commissioner. Miss Jones also made the point, as had Mr Marshall, that had the loans been distributions as alleged, CCJ "would have reduced its share capital unlawfully by more than J1 Billion dollars", in the light of the fact that, in respect of the years 2001 and 2002, the company had insufficient reserves from which to make such distributions. Miss Jones also sought to demonstrate that, certainly in relation to the period 1970 to 1997, the practice of transferring funds from CCJ to CGL provided no tax benefit to CCJ. She pointed out, finally, that, despite written requests, the Commissioner had not specified which paragraph of the distribution table she used as authority for classifying the transfers as distributions.

[37] I mean no disrespect to Mr Vincent Nelson QC's admirably detailed and skillfully organised submissions by summarising them in this way:

(i) The transfers of funds from CCJ to CGL were, contrary to Anderson J's finding, loans within the meaning of sections 34(1)(9) and 35 of the Act. The audited accounts of both companies over the years correctly reflected these transfers as debts due from CGL to CCJ and the evidence did not support the judge's findings that the transactions were shams and/or artificial within the meaning of section 16 of the Act. In any event, on the authorities the concept of a 'sham' connoted some element of dishonesty, which had not been shown on the facts of the instant case.

(ii) Even if the transfers were not in fact loans and so fell to be disregarded by the Commissioner pursuant to section 16, it was not open to her to thereafter 'recharacterise' the transfers as distributions without having regard to the definition of a distribution under the Act.

(iii) The transfers can only amount to distributions if they can be brought within any of paragraphs 1-9 of the Table of Company Distributions ("the distribution table")

contained in section 34(1). Specifically, in order for the transfers to fall within paragraph 2 of the distribution table, they would have to be payments made "in respect of" CGL's shares in CCJ, that is, in proportion to CGL's shareholdings in the company, which the payments in this case were plainly not. Neither could the transfers be said to have been made out of the assets of the company or that, the loans having been repaid in full, the cost of them fell on CCJ.

(iv) Payments by way of distributions to CGL in the circumstances of this case would have amounted to a fraud on the minority shareholders of CCJ."

[38] In support of these submissions, Mr Nelson referred us to, among other cases, ***Barclay's Mercantile Business Finance Ltd v Mawson*** [2005] 1All ER 97 (on the construction of revenue statutes generally), ***Seramco Ltd Superannuation Fund Trustees v Income Tax Commissioner*** [1977] AC 287 (on the meaning of "artificial or fictitious" within the meaning of 16(1)), ***Snook v London and West Riding Investments Ltd*** [1967] 2 QB 786 (on the meaning of a 'sham' transaction), ***Europa Oil (NZ) Ltd v Inland Revenue Commissioner*** [1976] 1 All ER 503 (on the meaning of "disregard" in section 16(1)), and ***Noved Investment Company v Revenue and Customs*** [2005] UKSPC SPC00521 (on the meaning of "in respect of shares" in

section 34(1)). Mr Nelson referred us as well to Chitty on Contracts, 28th edn, Volume 2, paragraph 38-221 (for a definition of a 'loan'), and finally to two decisions of the Court of Final Appeal of the Hong Kong Special Administrative Region, by comparison to which he sought to demonstrate the limits of the Commissioner's powers under section 16 of the Act.

The Commissioner's case

[39] The case for the Commissioner had been foreshadowed in the correspondence and discussions between the parties and their representatives before and immediately after the raising of the assessments. In her affidavit in the Revenue Court proceedings filed on 23 January 2006, she recounted the steps which had led her to conclude that the transfers from CCJ to CGL were taxable distributions.

[40] Her suspicions were initially aroused by the "unusually large sums of money being transferred annually" from CCJ to CGL. Her subsequent review of the audited accounts of both companies revealed that for several years the annual transfer of funds from CCJ exceeded its annual dividends and that there was no evidence that any interest was being paid by CGL on these sums. A balance sheet account prepared by KPMG for the years 1996 to 2002 confirmed that between 1998 and 2002, CCJ had advanced more than $1 billion to CGL annually and also that no interest was payable on these amounts. It also showed that there had

been no repayment of these amounts and that, as at 31 March 2002, the total outstanding was in excess of $8.4 billion.

[41] The Commissioner's further research revealed that "the alleged loans were not secured, that there were no terms and/or conditions for the repayment of the sums, there was no repayment schedule in place, and there was no apparent business or commercial purpose for the loans". CGL did not seem to have any need for the funds and it appeared that "the annual dividends declared by [CCJ] were a mere fraction of its annual profits".

[42] On the basis of this research, the Commissioner concluded as follows:

> "...
> 15. I have been a part of the Revenue Service of Jamaica for more than 20 years and I have never seen loans of this size being made without the payment of interest, without the provision of some form of security, without any form of loan documents, and without terms and conditions for their repayment. I have never seen loans which consistently exceeded the profits of the lender, and which were made to a borrower with no apparent need for the funds.
>
> 16. I have, on the other hand, seen numerous inter-company loans, which have not been challenged by the Revenue because they had the characteristics of loans. In my experience, no other inter-company loans have had the characteristics of the

transfers made by the Appellant to Carreras."

[43] Mr Lackston Robinson for the Commissioner sought to support Anderson J's conclusion that the transfers were not genuine loans by reference firstly to the evidence which was before the judge. He pointed out that there was no evidence that CGL had provided guarantees for repayment, as required by the 1977 Agreement, nor was there any evidence of any other terms of the so-called "loans", or that they had received any approval from the board of directors of CCJ. He asked this court not to disturb Anderson J's detailed findings of fact (referring us in this regard to the provisions of section 10(1) of the Judicature (Revenue Court) Act).

[44] While Mr Robinson accepted that even if the transactions fell to be disregarded by the provisions of section 16 of the Act, it was nevertheless necessary for the Commissioner to bring them within section 34(1) as a distribution, he contended that they fell squarely under paragraph 2 of the distribution table. These were payments obviously made, Mr Robinson submitted, out of the assets of the CCJ in respect of CGL's shares in the company, in the sense that they were made by virtue of CGL's relationship to CCJ as its principal shareholder. In this regard, Mr Robinson sought to distinguish the case of ***Noved Investment Company*** referred to by Mr Nelson, pointing out that that case applied the statutory definition

in the UK of the words "in respect of shares", a definition that was not part of our Act.

[45] On the 'sham' cases, Mr Robinson pointed out that that word does not appear in section 16 and, while he agreed that the word might give rise to a connotation of dishonesty, he submitted that the concept of artificiality, which is what the section referred to, did not. Further, relying specifically on the judgment of Marsh J in ***Liner Diner (1968) Limited and E.S. Campbell (1968) Limited v The Commissioner of Income Tax*** (Revenue Appeals Nos. 12 and 13 of 1973, judgment delivered 12 April 1973), he submitted that the so-called loan transaction in the instant case was plainly artificial within the meaning of the section.

[46] Mr Robinson accordingly asked this court to find that both Anderson J and the Commissioner had come to the correct conclusions against the appellant, substantially for the reasons given by them. He too relied on some of the authorities cited by Mr Nelson (indeed, some of them had originally formed part of the respondent's Skeleton Arguments), and he also referred us to ***Baldeo G. Singh v Board of Inland Revenue*** [2000] 1 WLR 1421, a decision of the Privy Council on appeal from the Court of Appeal of Trinidad & Tobago, which, he submitted, was on all fours with the instant case. I shall have to consider some of the authorities cited by both counsel in greater detail in due course.

[47] Finally, Mr Robinson submitted that the repayment of the amounts owing to CCJ by CGL in 2004 was the culmination of a scheme, whereby, as I understood the argument, funds were transferred from CCJ to CGL over the years as loans, so as to avoid the payment of tax, and then repaid so as to give CCJ the benefit of the money free of tax. This scheme, Mr Robinson submitted, may have been conceived from as long ago as 1977 or, he allowed, "some time later". This does not appear to have been an argument relied on by the Commissioner in the court below.

[48] Mr Nelson in a brief reply described Mr Robinson's submissions on the effect of section 10 of the Judicature (Revenue Court) Act as "clearly misconceived", referring us to ***Keith C. Burke v Commissioner of Valuations*** (1987) 24 JLR 368 (a decision of this court to which the court had referred Mr Robinson and which he had dismissed as "wrong"). Mr Nelson submitted that it was open to this court to interfere where, as here, the trial judge acted either without evidence or on a view of the facts which cannot be supported. He submitted further that there was no distinction in the cases between the concepts of artificiality and sham and maintained that for a finding of either to be made, some element of dishonesty had to be demonstrated on the evidence. This was completely absent from the instant case (particularly given the role

played by the auditors in the preparation of the financial statements of both CCJ and CGL). Finally, ***Baldeo Singh***, he submitted, was clearly distinguishable.

The issues on this appeal

[49] It is against this extended background that I now come to the issues which arise for determination on this appeal, which appear to me to be as follows:

(i) Whether Anderson J was correct in his finding that the transfers of funds from CCJ to CGL between 1998 and 2002 were not loans, within the meaning of sections 34(1)(a) and 35 of the Act. This necessarily involves a consideration of whether the transactions were "artificial or fictitious" within the meaning of section 16 or the Act, or whether they could otherwise be described as "shams" within the accepted meaning of the word;

(ii) whether, if the transfers were in fact artificial or fictitious, they were properly classified by the Commissioner as distributions, within the meaning of section 34 of the Act.

The statutory provisions

[50] The provisions of the Act which primarily arise for consideration on this appeal are to be found in sections 16(1), 34 and 35, which are set out (at regrettable, but unavoidable, length) below.

> "**16.**—(1) Where the Commissioner is of opinion that any transactions which reduces or would reduce the amount of tax payable by any person is artificial or fictitious, or that full effect has not in tact been given to any disposition, the Commissioner may disregard any such transaction or disposition, and the persons concerned shall be assessable accordingly.
>
> ...
>
> **34.**—(1) Any act by a body corporate subject to income tax which falls within any paragraph of the following Table but not within any exception to that paragraph shall be treated for the purposes of this Act as a distribution by the body corporate, but, except as provided in subsection (3) of section 36, no other act shall be so treated.
>
> *Table of Company Distributions*
>
> Note: In this Table "capital assets", in relation to a body corporate means assets not derived from income from which its chargeable income for any year is computed or would have been computed if it were subject to tax.
>
> *Distributions to shareholders*
>
> 1. Any dividend.
>
> *Exceptions*: (a) so much of any preference dividend as is deductible under subsection (3) of section 13:

(b) so much of any dividend as is proved by the body corporate to have been paid out of capital assets.

2. Any payment, other than a dividend, made (whether in cash, goods or otherwise) in respect of shares in the body corporate out of assets of the body corporate or so that the cost of it falls on the body corporate. excluding such payments made in the winding-up of a body corporate.

Exceptions: (a) so much of any payment as represents a repayment of capital on the shares (including repayment of any premium at which the shares were issued):

(b) so much of any payment as is proved by the body corporate to have been made out of capital assets.

3. As respects any payment made (whether in cash, goods or otherwise) in respect of shares in a company, being a payment made in the winding-up of the company where the sole or main object of the winding-up was to obtain a tax advantage (as defined by subsection (9) of section 18) for any members of the company, so much of the payment as it is necessary to treat as a distribution in order to prevent the tax advantage from being obtained.

4. Any redeemable share capital issued or paid up in respect of shares in the body corporate.

Exceptions: (a) such part of any redeemable share capital as is issued or paid up in return for new

consideration and is commensurate in value with that consideration:

(b) such part of any redeemable share capital as is proved by the body corporate to have been issued or paid up by way of capitalising capital assets.

5. Any securities issued in respect of shares in the body corporate.

Exceptions: (a) such part of any security as is issued in return for new consideration and is commensurate in value with that consideration;

(b) such part of any security as is proved by the body corporate to have been issued so as to give members of the body corporate rights over capital assets.

Distributions to Holders of Securities

6. Any payment of interest or other payment made (whether in cash, goods or otherwise) out of assets of the body corporate or so that the cost of it falls on the body corporate, in respect of the following securities—

(a) securities convertible into shares in the body corporate, other than securities which are quoted on a recognized stock exchange or are similar in their terms to securities so quoted;

(b) securities where the return varies with the results of the body corporate's business:

(c) securities issued otherwise than for new consideration commensurate with their value.

Exception: any payment made by way of redemption of securities.

7. In the case of a security where the return exceeds a reasonable commercial return, the amount of the excess.

Distributions to principal members, etc.

8. The provision of any quarters or residence for use by a principal member or his relative, unless the cost thereof is deductible under section 13.

9. The grant of a loan falling within section *35.*

Repatriated profits

10. The transfer of any profits of a body corporate to any person outside the Island.

(2) This section applies for the year 1970 and subsequent years, except that paragraph 4 of subsection (1) shall not apply to capital issued before 30th September, 1970, in accordance with a press notice published before 16th June, 1970.

35.—(I) A body corporate subject to income tax shall be treated as making a distribution where it grants a loan, otherwise than in the course of a *bona fide* business of lending money—

(a) to a principal member of the body corporate or of any other body corporate connected with it; or

(b) to a relative of any such principal member; or

(c) to any other person on terms such that any such principal member or relative indirectly receives the equivalent of the loan or part of it:

Provided that this subsection shall not apply—

(i) if the principal member is a body corporate resident in the Island; or

(ii) if the principal member is a body corporate resident out of the Island and the Minister has approved the loan as being beneficial to the economy of Jamaica; or

(iii) if the loan is granted by a company to a person employed by it where loans on the like terms are made available by the company to its entire staff in similar employment.

(2) A loan shall not be treated as a distribution if, and to the extent that, it is repaid within the same accounting period of the lender as that in which it was granted.

(3) Where the whole or a part of a loan treated as a distribution is repaid in a subsequent accounting period of the lender beginning not later than five years after the date of the loan, such payments of tax (if any) shall be made as are necessary to restore the persons concerned to the position they would have been in if the loan, or that part of it, had not been treated as a distribution.

(4) If, following repayment of money lent, a further loan is granted within six months of the repayment to or in respect of the same person the repayment (and the corresponding amount

of the further loan) shall be disregarded for the purposes of this section:

Provided that if the further loan is less than the repayment, only the portion of the repayment equal to the further loan shall be disregarded.

(5) For the purposes of this section the allowing of credit shall be treated as the grant of a loan."

[51] In addition, Mr Robinson relies heavily on section 10 of the Judicature (Revenue Court) Act, which is also set out below:

"10.—(1) A decision of the Court shall be final on any question of fact, but, save as may be otherwise provided in, or in relation to, any enactment for the time being specified in the Schedule, an appeal shall lie on any question of law to the Court of Appeal

(2) Subject to subsection (1), the provisions of the Judicature (Appellate Jurisdiction) Act, shall apply in relation to the Court and to the Judge in like manner, *mutatis mutandis,* as they apply in relation to the Supreme Court and to a Judge of that Court.

(3) The Court or the Court of Appeal when sitting in appeal proceedings under any law relating to income may exclude from the proceedings persons other than parties thereto and their legal representatives."

The interpretation of revenue legislation

[52] Both parties rely on the line of House of Lords authorities which started with ***W.T. Ramsay Ltd v IRC*** (supra), was considered further in ***IRC v***

McGuckian [1987] 3 All ER 817 and culminated in ***Barclay's Mercantile Business Finance Ltd v Mawson (Inspector of Taxes)***, (supra). These cases all emphasise that, in interpreting revenue statutes, the paramount question "always is one of interpretation of the particular statutory provision and its application to the facts of the case" (per Lord Nicholls in ***MacNiven (Inspector of Taxes) Westmoreland Investments Ltd*** [2001] 1 All ER 865, 869). This is in fact no different from the correct approach to the interpretation of statutes generally.

[53] The significance of ***Ramsay*** was therefore that it assimilated the rules of construction of revenue statutes with the rules of interpretation of statutes generally and so, as the Appellate Committee of the House of Lords explained it in ***Barclays*** (at para. 29), it "liberated the construction of revenue statutes from being both literal and blinkered". This is how the Appellate Committee described the modern, post ***Ramsay***, approach (at para. 32):

> "The essence of the new approach was to give the statutory provision a purposive construction in order to determine the nature of the transaction to which it was intended to apply and then to decide whether the actual transaction (which might involve considering the overall effect of a number of elements intended to operate together) answered to the statutory description. Of course this does not mean that the courts have to put their reasoning into straitjacket of first construing the statute in the abstract and then looking at the facts. It might

> be convenient to analyse the facts and then ask whether they satisfy the requirements of the statute. But, however one approaches the matter, the question is always whether the relevant provision of statute, upon its true construction, applies to the facts as found."

[54] ***Barclays*** expressly recognized that in the commercial world schemes of tax avoidance can give rise to transactions, or elements of particular transactions, which appear to have no commercial purpose (para. 34):

> "Unfortunately, the novelty for tax lawyers of this exposure to ordinary principles of statutory construction produced a tendency to regard ***Ramsay*** as establishing a new jurisprudence governed by special rules of its own. This tendency has been encouraged by two features characteristic of tax law although by no means exclusively so. The first is that tax is generally imposed by reference to economic activities or transactions which exist, as Lord Wilberforce said, in the real world. The second is that a good deal of intellectual effort is devoted to structuring transactions in a form which have the same or nearly the same economic effect as a taxable transaction but which it is hoped will fall outside the terms of the taxing statute. It is characteristic of these composite transactions that they will include elements which have been inserted without any business or commercial purpose but are intended to have the effect of removing the transaction from the scope of the charge."

[55] But that does not necessarily mean that "in the application of any taxing statute, transactions or elements of transactions which [have] no commercial purpose [are] to be disregarded" (para. 36). What is required in every case is for the court to decide, on a close analysis, exactly what transaction the statute was intended to capture and then to see whether the transaction in question falls within the statutory net (see ***Barclays***, paras. 36 -38).

The scope of section 16 of the Act

[56] With regard to the meaning of section 16, both parties referred to ***Liner Diner***, ***Seramco*** and ***Europa Oil.*** In ***Liner Diner***, Marsh J stated (at page 41), "that...a Court should not confine itself to a mere examination of the ingredients of the transactions, but should also recognise, or at any rate bear in mind, that its totality may be different from the mere sum of its parts."

[57] In ***Seramco***, the Board was concerned with what is now section 16 of the Act (it was then section 10). Delivering the judgment of the Board, Lord Diplock identified the terms of the transaction in question and the circumstances in which it was made and carried out as critical factors in determining whether a transaction was 'artificial' or 'fictitious' within the meaning of the section. He then went on to state the following:

> "'Artificial' is an adjective which is in general use in the English language. It is not a term of legal art; it is capable of bearing a variety of meanings

> according to the context in which it is used. In common with all three members of the Court of Appeal their Lordships reject the trustees' first contention that its use by the draftsman of the subsection is pleonastic, that is, a mere synonym for 'fictitious'. A fictitious transaction is one which those who are ostensibly the parties to it never intended should be carried out. 'Artificial' as descriptive of a transaction is, in their Lordships' view a word of wider import. Where in a provision of an Act an ordinary English word is used, it is neither necessary nor wise for a court of construction to attempt to lay down in substitution for it some paraphrase which would be of general application to all cases arising under the provision to be construed. Judicial exegesis should be confined to what is necessary for the decision of the particular case. Their Lordships will accordingly limit themselves to an examination of the shares agreement and the circumstances in which it was made and carried out, in order to see whether that particular transaction is properly described as 'artificial' within the ordinary meaning of that word."

[58] In ***Europa Oil***, the Board was concerned with an anti-avoidance provision in the New Zealand Land and Income Tax Act, 1954. That section (section 108) provided that every contract, agreement or arrangement that "has or purports to have the purpose or effect of in any way altering the incidence of income tax, or relieving any person from his liability to pay tax" should be "absolutely void" as against the Inland Revenue Commissioner. Mr Nelson brought to our attention Lord Diplock's comment on this provision (at page 511):

> "... it is not a charging section; all it does is to entitle the commissioner when assessing the

> liability of the taxpayer to income tax to treat any contract, agreement or arrangement which falls within the description in the section as if it had never been made. Any liability of the taxpayer to pay income tax must be found elsewhere in the Act. There must be some identifiable income of the taxpayer which would have been liable to be taxed if none of the contracts, agreements or arrangements avoided by the section had been made."

[59] Mr Nelson then invited a comparison of ***Europa Oil*** with ***Commissioner of Inland Revenue v Tai Hing Cotton Mill (Development) Ltd*** (FACV No. 2 of 2007, judgment delivered 4 December 2007), a decision of the Court of Appeal of the Hong Kong Special Administrative Region. That case was concerned with section 61A of the Inland Revenue Ordinance, which provided that where any person entered into a transaction for the dominant purpose of obtaining "a tax benefit" (that is, the avoidance or postponement of the liability to pay tax or the reduction in the amount thereof), the Commissioner was entitled to assess the liability to tax of that person –

> "(a) as if the transaction or any part thereof had not been entered into or carried out; or
>
> (b) in such manner as the Assistant Commissioner considers appropriate to counteract the tax benefit which would otherwise be obtained."

[60] Delivering the leading judgment, Lord Hoffman NPG, after referring to ***Europa Oil*** (which made it clear that section 108 of the New Zealand legislation "required a comparison with what the position would have been if there had been no transaction" – para. 16), explained the position under the Hong Kong legislation in this way:

> "On the other hand, s.61A gives the Commissioner an option. Paragraph (a) says that she may assess the taxpayer as if the transaction had not been entered into or carried out. That is the equivalent of the New Zealand provision considered by Lord Diplock in *Europa Oil*. But she may also, under paragraph (b), assess the taxpayer in such other manner as she considers appropriate "counteract the tax benefit which would otherwise be obtained". The hypothesis of an "assessment under (b) must therefore be, not only that the actual transaction did not take place, but that some other transaction took place instead. Otherwise (b) would add nothing to (a). What that other transaction might be is a question to which I shall return later, but the effect of s.61A is that, unlike the position under the New Zealand Act, the benefit does not have to relate to some other pre-existing source of income, external to the transaction. The Commissioner, under s.61A(2)(b), can assess the taxpayer on the hypothesis that there was a transaction which created income, but without the features which conferred the tax benefit. That makes s.61A a much more powerful and flexible weapon in the hands of the Commissioner than the New Zealand section."

[61] In a companion judgment delivered on the same day (***Commissioner of Inland Revenue v HIT Finance Limited*** FACV Nos. 8 and 16 of 2007), Lord

Hoffman NPG observed that section 61A, by providing for the assumption of a different hypothetical transaction, went further than section 61 of the Ordinance, which only allowed for "an assessment without regard to the artificial transactions ..." (paragraph 24).

[62] Mr Nelson also pointed out that in that case, Lord Hoffman had also observed, in passing, as regards a company which, on the evidence, had been set up as a separate vehicle "to hold excess cash and earn income from its treasury operations", that it was "common for groups of trading companies to have a treasury company" and that there was "nothing odd about that".

'Sham' transactions

[63] Mr Nelson also referred to ***Snook v London and West Riding Investments Ltd*** [1967] 2 QB 786, ***Hitch and others v Stone (Inspector of Taxes)*** [2001] STC 214 and ***National Westminster Bank plc v Jones and others*** [2001] 1 BCLC 98, on the related question of what might be considered to be a 'sham' transaction. ***Snook*** (which was in fact a hire-purchase case) is best known for the following oft-cited dictum of Diplock LJ (as he then was) (at page 802):

> "As regards the contention of the plaintiff that the transactions between himself, Auto Finance and the defendants were a 'sham', it is, I think, necessary to consider what, if any, legal concept is involved in the use of this popular and pejorative word. I apprehend that, if it has any

> meaning in law, it means acts done or documents executed by the parties to the 'sham' which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create. But one thing, I think, is clear in legal principle, morality and the authorities (see ***Yorkshire Railway Wagon Co v Maclure*** and ***Stoneleigh Finance Ltd v Phillips)*** that for acts or documents to be a 'sham' with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating. No unexpressed intentions of a 'shammer' affect the rights of a party whom he deceived."

[64] In ***Hitch,*** Arden LJ, who delivered the leading judgment in the Court of Appeal, applied ***Snook*** and confirmed that the test of intention in this context is subjective ("The parties must have intended to create different rights and obligations from those appearing from (say) the relevant document, and in addition they must have intended to give a false impression of those rights and obligations to third parties" – para. 66). The intention must also be a common intention (para. 69) and "the fact that the act or document is uncommercial or even artificial does not mean that it is a sham" (para. 67).

[65] And in ***National Westminster Bank***, Neuberger J, as he then was, confirmed that "a degree of dishonesty is involved in a sham" (para. 40),

the whole point of a sham transaction being "that the parties intend to give the impression that they are agreeing that which is stated in the provision or agreement, while in fact they have no intention of honouring ... their respective obligations, or enjoying their respective rights under the provisions of the agreement".

[66] Mr Robinson also referred us to a number of American cases, some of which had also attracted the attention of Anderson J, on the issue of when a 'loan' could be considered to be artificial. In ***Crowley and Crowley v Commissioner of Internal Revenue*** (1992) 60 USLW 2748; 962 F. 2d 1077, a decision of the United States Court of Appeal for the First Circuit, the court considered that, on the basis of a long line of authorities, "A shareholder distribution is a loan, rather that a constructive dividend, if at the time of its disbursement the parties intended that it be repaid" (para. 6). The judgment goes on to consider the way in which the courts have sought to determine the requisite intent:

> "Courts typically determine whether the requisite intent to repay was present by examining available objective evidence of the parties' intentions, including the degree of corporate control enjoyed by the taxpayer; the corporate earnings and dividend history; the use of customary loan documentation, such as promissory notes, security agreements or mortgages; the creation of legal obligations attendant to customary lending transactions, such as payment of interest, repayment schedules and maturity dates; the manner of

> treatment accorded the disbursements, as reflected in corporate records and financial statements; the existence of restrictions on the amounts of the disbursements; the magnitude of the disbursements; the ability of the shareholder to repay; whether the corporation undertook to enforce repayment; the repayment history; and the taxpayer's disposition of the corporate funds disbursed. The constructive dividend inquiry concerns itself with the parties' subjective intent, rather than objective intent, although recourse to objective evidence is required to ferret out and corroborate actual intent."

[67] In ***Bergersen and Bergersen v Commissioner of Internal Revenue*** (1997) 109 F.3d 56, the Court of Appeal for the First Circuit described the test propounded in ***Crowley*** as "The conventional test" (page 4), while emphasising the need to look "through form to substance" when determining the proper classification of a transaction (page 6).

[68] ***Richard Walter Pty Ltd v Commissioner of Taxation*** (1995) 31ATR 95 is a decision of the Full Court of the Australian Federal Court which Anderson J found to be of significant persuasive value. The case was concerned with whether large sums of money purportedly paid over by a provider of professional pathology services on a frequent and regular basis to a service company as loans constituted a sham designed to disguise income of the payer otherwise assessable to tax. The Full Court accepted as a convenient summary of the applicable Australian law on the subject the statement of Lockhart J in ***Sharrment Pty Ltd v Official***

Trustee (1988) 18 FCR 449, 454 that "a 'sham' is therefore...something that is intended to be mistaken for something else or that is not really what it purports to be. It is a spurious imitation, a counterfeit, a disguise or a false front. It is not genuine and true but something made in imitation of something else as made to appear to be something which it is not. It is something which is false and or deceptive."

[69] The Full Court specifically approved the criteria propounded by Tamberlin J in the court below as matters relevant to the determination of the question whether the loan in question amounted to a sham. These included the fact that the moneys were paid without any written evidence of any agreement or obligation to repay apart from book entries made by accounting staff; the absence of any written or oral evidence of the terms and conditions on which the moneys were said to be lent or repaid; the fact that it did not appear that any interest was ever charged, payable, or paid in respect of these loans or that there was any group policy that interest should not be charged on intragroup loans; the fact that it was impossible for the 'borrower' to repay the 'loans' without liquidating its assets; the reclassification of the liability of the borrower as a non-current liability; the fact that whenever the lender needed funds of any size, it borrowed from external financiers instead of calling for repayment of the loan, which was interest free; and the fact that the loan was never repaid.

[70] Anderson J found that there were manifest parallels between this case (describing it at page 55 of his judgment as "this important case") and the case before him and indeed, his findings of fact were expressly structured in accordance with Tamerberlin J's stated criteria. I shall have in due course to return to whether he was correct in his conclusions on this.

"In respect of shares of the company"

[71] Mr Nelson and Mr Robinson each referred to an authority on the meaning of the phrase "in respect of shares of the company" in section 34 of the Act. To take Mr Robinson's case first, ***Baldeo G. Singh v Board of Inland Revenue*** was concerned with a question arising from section 49(1)(b) of the Income Tax Act of Trinidad & Tobago. That subsection is in pari materia with section 34 of the Jamaican Act, but the real question in the case was whether sums paid by a liquidator out of the proceeds of the winding up of the company qualified as distributions for the purposes of the sub-section, or whether the sub-section should be construed as limited to distributions by the company while a going concern. Save for this, there was no question in that case "that the payments in question fall fairly and squarely within the statutory formula...[having been] paid by the liquidator out of the assets of the company and the taxpayer [having] received them by virtue of his shareholding in the company" (per Lord

Millett, at page 1423). They were accordingly distributions of assets of the company made in respect of the company's shares and, for this purpose, it mattered not that they were in point of fact made by the liquidator and not by the company itself.

[72] ***Noved Investment Co v Revenue and Customs*** [2005] UKSPC SPC00521 (23 January 2006), a decision of the Special Commissioners, is Mr Nelson's case. Section 209(2)(b) of the Corporation Tax Act provided that the word 'distribution' for corporation tax purposes meant, among other things, "...any other distribution out of the assets of the company (whether in cash or otherwise) in respect of shares in the company...". However, section 254(12) helpfully elucidated the question by providing that "...a thing is to be regarded as done in respect of a share if it is done to a person as being the holder of the share, or as having at a particular time been the holder, or is done in pursuance of a right granted or offer made in respect of a share...".

[73] In these circumstances, the Special Commissioners had no difficulty in concluding that the words "a right granted in respect of a share" were not apt to describe a right inherent in a share, but rather to some right which the shareholders were given "on top of the rights they had as shareholders." In other words, such rights were granted in addition (or collateral) to the existing bundle of rights inherent in each share "in

respect of that existing bundle of rights" (para. 40). On this analysis, if I understand the Special Commissioners correctly, rights granted in respect of shares can only mean in accordance with or in proportion to one's shareholding.

The approach of this court on appeals from the Revenue Court

[74] And finally, I should mention, on the question of the proper approach of this court to an appeal from a judgment of the judge of the Revenue Court, the decision of this court in ***Keith C. Burke v Commissioner of Valuations*** (supra). In that case, Rowe P referred to section 10(1) of the Judicature (Revenue Court) Act, which provides that a decision of the Revenue Court shall be final on questions of fact (see para. [49] above), observing (at page 371) that "consequently this appeal must of necessity be concerned only with questions of law". However, that learned judge did go on to make the further point that even where there is no appeal on the facts, "this court will interfere if it is satisfied that the tribunal of fact has given no weight or no sufficient weight to those considerations which ought to have weighed with it or if it has been influenced by other considerations which ought not to have weighed with it or not weighed with it so much".

The applicable principles

[75] These authorities suggest to me that the following are the principles that should guide the court in considering the issues in this case:

(i) In interpreting the provisions of a revenue statute, such as the Act, the paramount question for the court is the construction of the particular provision and its application to the facts of the particular case. This question is in fact no different from the correct approach to the interpretation of statutes generally.

(ii) It is not necessarily or inevitably the case that transactions or elements of transactions that have no discernible commercial purpose are to be disregarded. What is important in every case is for the court to determine firstly exactly what transaction it was the intention of the statute to capture and then to see whether the transaction in question falls within the statutory net.

(iii) In considering whether a transaction is 'artificial' or 'fictitious' within the meaning of section 16 of the Act, the court is obliged to consider the effect of a transaction, or a series of transactions, as a whole.

(iv) A fictitious transaction is one which the parties to it never intended to be carried out. On the other hand, to determine

what is an artificial transaction, the court is required to apply the ordinary dictionary meaning of the word to the circumstances in which the impugned transaction was made and carried out.

(v) Where a transaction falls to be disregarded pursuant to section 16 as being either artificial or fictitious, the Commissioner may treat it as though it had never been made and thereafter assess the taxpayer to income tax, provided that there is some identifiable income of the taxpayer that would otherwise be liable to tax. In other words, the Commissioner has no power under section 16 to recharacterise the transaction as something which it is not.

(vi) A transaction may properly be described as a 'sham' if, after a full examination of all the relevant circumstances, it appears that it was the common (and dishonest) intention of all the parties to create different rights and obligations from those appearing in the relevant documentation. In this regard, the fact that an act or document is uncommercial does not necessarily make it a sham.

(vii) The question whether a particular transaction is a loan is to be determined by the parties' subjective intention in the light of the objective evidence of the parties' actions. In this enquiry,

it will be necessary to look beyond the form to the substance of the transaction and relevant factors for consideration will include the nature of the documentation supporting the alleged loan, the repayment terms, the repayment history, whether the loan is interest bearing or not and the ability of the borrower to repay the loan.

(viii) On an appeal from the Revenue Court, the decision of that court must be treated as final on questions of fact, save that this court will interfere with such a decision if it is satisfied that the judge of that court has given no weight, or given insufficient weight, to those considerations which ought to have weighed with it, or has been influenced by other considerations which ought not to have weighed with it or weighed with it so much.

Sections 34 and 35 of the Act – the statutory scheme

[76] Section 34 deals with company distributions and section 35 considers the effect of loans by companies to "principal members" (that is to say, persons beneficially entitled to exercise more than 5% of the voting power of a company or persons beneficially entitled to shares the paid up value of which amounts to at least 5% of the paid-up share capital, or persons who, together with connected persons, are entitled to more than 10% of the voting power or shares amounting to more than 10% of the paid-up

share capital – see section 2(1)). In order to determine what transactions the legislature intended to be caught in the charge to tax by these sections, it is necessary to determine how they were intended to work, together and with other sections of the Act.

[77] Section 5(1)(b) provides that income tax is payable on, among other things, the following sources of income:

> "...(i) dividends (other than those falling within exception (b) of paragraph (1) of the table contained in section 34),...
>
> ...(iv) distributions (not falling within subparagraph (i)) by a body corporate subject to income tax,..."

[78] Section 2(1) defines 'distribution' as having the meaning "assigned to it by section 34", thus indicating that that section was intended to be the exclusive repository of acts amounting to distributions for the purposes of the Act. Confirmation of this is then provided by section 34(1) itself, which states that any act of a body corporate falling within any paragraph of the distribution table (and not within any exception to that paragraph) shall be treated as a distribution for tax purposes, but that "except as provided by sub-section (3) of section 36c, **no other act shall be so treated**" (emphasis supplied). On this basis, Anderson J concluded, correctly in my view, as follows:

> "To be a 'distribution', therefore, the act must be one within a paragraph of section 34, must not be within any exception to the paragraph and must not be such as would bring it within section 36C(3). The sub-section then goes on to define the various acts or circumstances which would amount to 'distributions."

[79] I will come back in due course to paragraph 2 of the distribution table, which is where, in the Commissioner's opinion, the transfers of funds by CCJ to CGL were caught as distributions. But for the moment, I want to focus on paragraph 9, which, under the rubric "Distributions to principal members, etc.", includes "The grant of a loan falling within section 35" in the list of acts caught by the provision. Section 35(1) provides that the grant of a loan by a body corporate, otherwise than in the course of a bona fide business of lending money, to a principal member of the company or any other company connected with it, to a relative of a principal member or to any other person on such terms that a principal member or relative indirectly receives the benefit of the loan or part of it, shall be treated as a distribution by that company. However, proviso (i) to section 35(1) states expressly that the subsection shall not apply "if the principal member is a body corporate resident in the Island", and provisos (ii) and (iii) also exempt respectively loans to principal members resident outside of the island (with ministerial approval) and loans to staff members as part of a staff loan scheme from the operation of the subsection.

[80] Taking sections 34 and 35 together, therefore, it seems to me to be clear that the intention of the legislature was to bring within the tax net as distributions a wide range of payments by a company, irrespective of how these payments were described or characterised, so long as they fell within the distribution table in section 34(1). Loans by a company to principal members or their relatives, were specifically brought within the net. But it is equally clear that it was the intention of the legislature to exclude from the tax net loans by a company to its corporate principal member/s resident in Jamaica. In other words, not all loans fall to be treated as distributions by virtue of the Act. It is therefore common ground between the parties that if the amounts shown in the annual financial statements of CCJ and CGL as loans were in fact genuine loans, they would not fall to be treated as distributions pursuant to section 35(1).

What is a loan?

[81] There is no definition of a loan in the Act, but in Chitty on Contracts (28th edn, volume 2, at para. 38-221) a contract of loan of money is defined as follows:

> "A contract of loan of money is a contract whereby one person lends or agrees to lend a sum of money to another, in consideration of a promise express or implied to repay that sum on demand, or at some determinable future time, or conditionally upon an event which is bound to happen, with or without interest."

[82] With regard to the time for repayment of a loan, Chitty goes on to state (at para. 38-230) that "Where money is lent without any stipulation as to the time of repayment, a present debt is created which is generally repayable at once without any previous demand". Anderson J dismissed this statement, which was cited to him, with the comment that it "is supported by two old cases of dubious value, one dating back to the first half of the Nineteenth century". Save for that (which I am unable, with respect, to accept without more as a valid reason for discounting the proposition altogether), it is not at all clear on what basis the judge dismissed the textbook statement. For my part, I am prepared to accept it, in the absence of any contrary statutory definition, as an accurate statement of the position.

Were the transfers of funds from CCJ to CGL genuine loans?

[83] The audited accounts of CCJ showed the transfers as debts owed to it by CGL, its Jamaican resident parent company, and the audited accounts of CGL, a public company, listed on the stock exchange, showed the transfers as debts due from it to CCJ. On the face of it, therefore, given the provisions of sections 34 and 35, which when read together indicate that the legislature did contemplate that in certain circumstances loans from a subsidiary to a parent would not attract tax as distributions, there appeared to be no reason to suppose that the audited accounts ought not to be taken at face value. They were certified, as

they were required to be, by a reputable firm of accountants as providing a true and fair view of the affairs of both companies and had been submitted to the Commissioner as part of the annual income tax returns of both companies for several years prior to 2003, without attracting either adverse comment or challenge. And finally, the loans were in fact repaid by CGL on 27 February 2004, as a result of a decision taken by the board of CGL, as part of the proposed reorganisation, before the Commissioner suggested that they were other than what both companies represented them to be.

[84] But, of course, the Commissioner is empowered by section 16(1) to disregard any transaction which she considers to be artificial or fictitious, therefore giving rise to the question whether, against this background, Anderson J was correct in his conclusion that the transfers of funds reported in the audited accounts of both companies "were not genuine 'loans' within the provisions of section 35 of the Act and so do not attract any protection afforded to such genuine loans".

[85] It is common ground that the transfers were not fictitious, in the sense of being imagined or not real, since the evidence shows that the funds were in fact transferred from time to time over the years from CCJ to CGL. But 'artificial', as Lord Diplock observed in ***Seramco***, is an adjective "of wider import" (supra, at para. [57]), connoting in this

context, in my view, something which is not genuine or sincere, but is imitative and contrived (see Chambers 20th Century English Dictionary, page 72).

[86] The matters relied on by the Commissioner, and which found favour with Anderson J, were helpfully set out by the judge (at pages 95-96 of his judgment). The following is my summary of those matters:

(i) There was no evidence that CGL "required" the funds transferred or that it "guaranteed repayment of the funds", both of which were requirements of the 1977 agreement pursuant to which the loans were purportedly made.

(ii) There was no reference in the minutes of either CCJ or CGL over the 10 year period 1993 to 2002 of any policy of loans being made by CCJ to CGL or that CGL was to act in a "central treasury" role for the group.

(iii) There was no written or oral evidence as to terms and conditions on which the monies were said to have been lent, other than financial statements of both companies,

which classified them as non-current assets/liabilities.

(iv) No interest was charged or paid, neither were there any repayments on the purported loans, until the issue of reorganisation arose and the subsequent assessment was issued.

(v) There was no "objective reliable and independent evidence" that the decision not to charge interest on the loans was in consideration of CCJ not paying royalties for the use of CGL's trademarks.

(vi) No quantification was ever done of the interest foregone by CCJ or the royalties purportedly foregone by CGL.

(vii) CGL, as a 99.8% shareholder, had unlimited power "as amatter of fact and law" to determine what was to be done with CCJ's surplus cash and no explanation was ever given to CCJ of how CGL intended to use the funds in question.

(viii) There was no evidence, apart from the views of Mr Ashenheim and Mrs Sutherland, that the loans were repayable on demand and their having been classified as non current assets and liabilities in the accounts was in any event inconsistent with their being repayable on demand.

(ix) The funds were not transferred to CGL as part of its central treasury role and to reduce external borrowing, because the evidence suggested that when CCJ needed funds it had to go to its bankers to borrow and bear the costs of interest and other charges, in one case "on the very day that sums were being transferred to CGL.

[87] There can be no doubt that the authorities support the judge in treating the evidence that there was no interest payable on the loans and that there does not appear to be any evidence of repayment terms in the matter, as potentially having a significant bearing on the question that was before him. However, one cannot ignore, in my view, the terms of the 1977 agreement, in particular clause 13(c)(i), which entitles CGL at

its sole discretion, with the approval of CCJ, to borrow from CCJ "such amounts as it may from time to time require free of interest" (emphasis mine). There was never any suggestion that this agreement was itself other than it purported to be, that is, the basis of the commercial relations between CGL and CCJ upon the restructuring of the tobacco industry which was then taking place.

[88] It is clear that a loan is no less a loan because it is given free of interest (see para. [81] above) and it is equally clear that the fact that a transaction is "uncommercial" does not by itself render it artificial. It seems that the trial judge himself accepted a submission made to him, on the basis of the ***Richard Walter*** case, that "the essential element of a loan is that there is an intent that the monies advanced is [sic] to be repaid", and his own comment was that "There must be an enforceable obligation to repay on the part of the borrower" (page 63).

[89] In addition to the evidence of Mr Ashenheim and Mrs Sutherland, neither of whom could, I accept, be regarded as independent, compelling evidence of an intention to repay and an enforceable obligation on the part of CGL to do so, is in fact provided, it seems to me, by the audited financial statements of both CGL and CCJ, on the one hand as an unconditional acknowledgment and on the other hand as confirmation of that obligation. This full disclosure on an ongoing basis, in

circumstances where CGL clearly had sufficient assets to repay the loans when called upon to do so or when necessary (as indeed it did in 2004), in my view speak to the transparency of the entire process and suggest that the transfers were precisely what they were represented to be, that is, genuine inter-company loans. Were they otherwise, it seems to me that KPMG, as the statutory auditors of both companies, would have lent their name on a sustained basis to a massive fraud, not only on the minority shareholders of CCJ, but also on the revenue authorities. In addition to the full disclosure of the transfers in the financial statements, the complete openhandedness of CGL in its approach to the Commissioner in 2003 (which is what sparked her interest, apparently for the first time, notwithstanding the routine disclosure of the transactions as part of the audited financial statements over several years) is also an objective factor tending to confirm in my view the subjective intention to repay the loan.

[90] The evidence established, without contradiction, that the group structure, whereby CGL as the parent company provided management and other support services, such as a centralised treasury function, for its subsidiaries, including CCJ, had been in place for over 30 years. As Lord Hoffman NPG observed in the ***HIT Finance Ltd*** case (see para. [62] above) there is "nothing odd" about this. In my view, this longstanding relationship between CGL, the parent, and CCJ, its virtually wholly owned subsidiary, renders of far less significance than would ordinarily be the

case the absence of documentary evidence of the terms of the loans, an agreed repayment schedule or the agreement that the extending of the loans free of interest would be in exchange for the use by CCJ of CGL's trademarks without payment of royalties.

[91] The reality was that the Group Finance Director, as Mrs Sutherland's evidence indicated, was responsible for the accounting function of CGL as well as overseeing that of the subsidiaries. As a result of this functional connection between the companies, the annual budgeting process of CGL and the subsidiaries was centrally coordinated, with the further result that by the time the process was completed, the management of each subsidiary and of CGL, to quote Mrs Sutherland, "had effectively approved the projected inter-company movements for the ensuing financial year". In these circumstances, it seems to me, particularly in the light of the demonstrated ability of CGL to repay the loans when the need arose, the evidence given by both Mr Ashenheim and Mrs Sutherland that in their understanding the loans were repayable on demand appears to be entirely credible. The fact is that, notwithstanding the auditors' classification of the loans as non-current liabilities/assets of CGL and CCJ respectively, which appears to have weighed heavily with Anderson J, the evidence of what happened at the end of the day lends support to Mrs Sutherland's assertion that, as part of its treasury management practices, CGL took care over the years to maintain its investment

portfolio "in high quality investments capable of being liquidated into cash on short notice and at all times maintained a value which could satisfy CGL's loan obligations". And, despite the fact that the judge did not find Mr Marshall's evidence "particularly helpful" (page 42), it also supports his assertion, based on his knowledge and experience of the securities market in Jamaica, that the investments classified as "long term" in CGL's financial statements "would all have been convertible to cash with little or no notice, should the loans have been called by CCJ" (see para. [34] above).

[92] With regard to the condition in clause 13(c)(i) of the 1977 agreement that CGL may borrow form CCJ "such amounts as it may from time to time require", the coordinated budgeting process referred to in the previous paragraph and the evidence of the standing arrangements between CCJ and CGL in this case suffice to indicate, in my view, that the loans were from time to time required by CGL.

[93] As to the other requirement in that clause, which is that CGL "guarantees" repayment of the loans, it may well be that this was a loose use of language by the drafters of the clause, since in its ordinary English, commercial and legal meanings, the verb 'to guarantee' refers to the taking of responsibility for the payment of a debt or performance of some obligation by the guarantor if the person primarily liable fails to pay or

perform. Confirmation of this is to be found in Words and Phrases Legally Defined, 2nd Edn, vol. 2, pages 336-337, where a guarantee is defined as "an accessory contract, whereby the promisor undertakes to be answerable to the promisee for the debt, default, or miscarriage of another person, whose primary liability must exist or be contemplated". The editors of that work do, however, refer to ***Heisler v Anglo-Dal Ltd*** [1954] 2 All ER 770, 772, where Somervell LJ observed that "The word 'guarantee' is often used in other than its legal sense...meaning simply an undertaking by the contracting party...". In the instant case, whatever was the sense in which the word was used by the parties to the 1977 agreement, nothing of significance turns, in my view, on the fact that there was, as Anderson J found, no evidence "that CGL guaranteed the repayments" (page 96), since CGL not only repeatedly acknowledged being the principal obligor in respect of the debt, but ultimately repaid it in full.

[94] Anderson J was particularly struck, in the light of Mrs Sutherland's evidence that one of the objectives of the central treasury function performed by CGL was to minimise the costs of external borrowing, by the evidence that in 2002, a year in which CCJ transferred a sum in excess of $1 billion by way of loan to CGL, the company had entered into credit arrangements with BNS. When asked by the judge whether he considered it to be "good commercial practice for CCJ to transfer interest

free loans and then set up facility to borrow with interest from BNS", Mr Ashenheim's candid response was that, while he did not know what the circumstances would have been, "it may have been that the left hand did not know what the right hand was doing". However, the judge does not appear to have made any finding on Mrs Sutherland's subsequent – and, in my view, entirely reasonable – explanation when she was cross-examined, which was that "in trading you need to establish banking relationships" and that overdraft facilities such as these "were standard for each subsidiary" of CGL. In any event, Mrs Sutherland also said, the particular facility with BNS "was a standby facility that was never used...a mere convenience". It seems to me that this evidence, had it been taken into account by the judge, might well have put the spectre of external borrowing into less sinister perspective.

[95] Finally, regard must be had, I think, to the fact that the amounts outstanding have now been repaid by CGL in full, pursuant to a decision made by the board of directors of CGL before the Commissioner's intervention in the matter. The provision in section 35(2) whereby a loan by a subsidiary to its parent company will not be treated as a distribution if "it is repaid within the same accounting period of the lender or that in which it was granted", has no application to this case because of CGL's status as a company resident in Jamaica (as a result of which section 35(1), whereby loans to principal members would ordinarily fall to be

treated as distributions, does not apply to CGL). I cannot, however, leave entirely out of account the fact of repayment as another objective factor having a clear bearing on the intention of the parties whenever funds were transferred from CCJ to CGL, given the Commissioner's position that there has never been any intention on CGL's part to repay the so-called loans.

[96] I would therefore conclude that the judge fell into error in his finding that the loans given by CCJ to CGL were artificial within the meaning of section 16(1). The learned judge referred to, and discussed in some detail, the ***Ramsay*** line of cases (at pages 50-54 of his judgment), concluding (correctly, in my view) that "What clearly emerges from these cases is that there is no substitute for the court closely examining the statutory provisions which are in question to determine what it was that the legislature intended" (page 54). However, he then went on to posit the issue to be determined in the case as "whether on a proper construction of the words of the Act, it was within the contemplation of the legislature that a subsidiary would transfer, with no tax consequences, virtually all of its profits to its parent company with no commercial benefit either for the subsidiary or its shareholders apart from CGL, all on the premise that the transfers were loans" (page 54). It is at this point, it seems to me, that, as Mr Nelson submitted, the judge fell into error by, in effect, turning the question upside down by looking at the transaction in issue and

concluding that, so startling was the result, the legislature, "on a purposive interpretation of the provisions", could not have intended such a result. A close analysis of sections 34 and 35, which is what the authorities required, would have revealed that the granting of loans by a subsidiary to its parent does not fall to be regarded as a distribution in all cases, but is in fact plainly permitted in the circumstance described in proviso (i) of section 35(1) of the Act.

[97] It therefore appears to me that this is a case in which, notwithstanding section 10 of the Judicature (Revenue Court) Act, this court is justified, for all the reasons given in the foregoing paragraphs, in interfering with the conclusion of the judge on the basis that, as Mr Nelson submitted, he acted either without evidence or on a view of the facts which cannot be supported. As to Mr Robinson's submission that the decision of this court in ***Keith C. Burke v Commissioner of Valuations*** was wrong, I do not think that, even if I considered that submission to be correct, that is a position that it is open to this court to take. In any event, the decision in that case is, it seems to me, entirely in keeping with well established authority on the question of the scope of an appeal on a point of law (see ***Edwards (Inspector of Taxes) v Bairstow*** [1955] 3 All ER 48; and see ***Runa Begum v Tower Hamlets London Borough Council*** [2003] 1 All ER 731, at para. [98], where Lord Millett refers to that case as the "controlling authority").

[98] But Anderson J also found, apparently as a separate matter, that the purported loan transactions were "shams" and the question is whether the concept of a sham transaction, as defined by Diplock LJ in ***Snook***, adds anything to the notion of an artificial transaction falling within section 16. In ***Snook***, it will be recalled, Diplock LJ made it clear that all parties to a sham transaction "must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating" (at page 802 - see para. [63] above). Subsequent authorities also make it clear (and Mr Robinson did not dispute this) that "a degree of dishonestly is involved in a sham" (per Neuberger J in ***National Westminster Bank*** at para. 44 – see para. [64] above).

[99] Mr Robinson, who appeared to accept Mr Nelson's submission that no element of dishonesty on the part of CGL and CCJ had been shown on the evidence, submitted nevertheless that, in order to establish that a transaction is artificial within the meaning of section 16(1), it is not necessary to show that some dishonesty was involved. In other words, that the threshold for establishing artificiality is lower than that required to establish a sham. However, I find it difficult to conceive how, on the facts of the instant case, one could possibly arrive at the conclusion that the transfers of large amounts of money from CCJ to CGL over the years were

artificial without at the same time concluding that there was a dishonest intention common to both parties to give the impression to the world at large that the transfers were in fact loans.

[100] I am therefore inclined to the view, in agreement with Mr Nelson, that, certainly on the facts of this case, the concept of a sham transaction adds nothing to the concept of artificiality in section 16(1). It follows from this that I cannot therefore agree with Mr Robinson that the threshold for a finding of artificiality under section 16(1) is lower than that required for a finding of sham under the ***Snook*** definition (indeed, it was Mr Robinson's submission that he relied on section 16(1) and did not need to place any reliance on the sham cases). In the absence of any evidence (or even an allegation) of a common dishonest intention on the part of CGL and CCJ, I have therefore come to the view that the impugned loans in this case were neither artificial nor sham transactions.

[101] As to Mr Robinson's more far-reaching submission that the repayment in 2004 by CGL of the loans was the culmination of a, possibly 26 year old, "scheme", it suffices to say, I think, that there was absolutely no evidence to support the existence of any such scheme.

Were the transactions properly characterised by the Commissioner as distributions?

[102] My conclusion on the first issue suffices to dispose of the appeal without having to consider the second issue, that is, whether the transactions were properly classified by the Commissioner as distributions within the meaning of section 34 of the Act. However, in the light of the full submissions by both counsel on this question, and in the event that I am wrong on the first issue, I will nevertheless express my views shortly on this issue as well.

[103] Mr Nelson submitted, and Mr Robinson agreed, that in order for the Commissioner to assess tax on the transfers of funds by CCJ to CGL on the footing that they were distributions, it was necessary for her to bring the transactions within section 34, that is, within one of the nine paragraphs of the distribution table. In my view, this concession was properly made by Mr Robinson in the light of the wording of section 16(1) and the decision in ***Europa Oil,*** which establishes that the section is not a charging section and that, even where the Commissioner becomes entitled by it to disregard a transaction, it is still necessary for the taxpayer's liability to tax, if any, to be grounded elsewhere in the Act (see para. [58] above). It follows from this that Mr Nelson was also clearly correct in his submission that, unlike the option given to the Commissioner of Inland Revenue by section 61A of the comparable legislation in Hong Kong (see paras. [59]-

[61] above), the Commissioner has no power under section 16 to "recharacterise" a transaction as something which it is not.

[104] The Commissioner contends that the 'loans' in fact fall under paragraph 2 of the distribution table (see para. [50] above) and it is now common ground between the parties that in this regard the critical question is whether the transfers can properly be described as payments made "in respect of shares", as stipulated in the section.

[105] Mr Robinson is, of course, quite correct in pointing out that ***Noved Investment Co,*** upon which Mr Nelson relied on this point, is clearly distinguishable on the basis that the court in that case was asked to apply a statutory definition which does not appear in the Act. I have nonetheless found the case to be of some value, in that the statutory definition of the phrase "in respect of shares" (something "done to a person as being the holder of the share, or...done in pursuance of a right granted or offer made in respect of a share"), in fact confirms my own inclination to regard the virtually identical language in section 34 as apt to connote a payment made to a shareholder in respect of and in proportion to his shareholding.

[106] While it is obviously also correct that, as Mr Robinson submitted, the transfers of funds to CGL by CCJ were made as a result of CGL's status of majority shareholder of CCJ, it seems to me that the intention of section

34 is to bring within the tax net as distributions all payments, whether in cash, goods or otherwise, made to shareholders as an incident of and in proportion to their respective shareholdings in the company. In other words, a payment in respect of shares is one made pursuant to "a right which derived from the shareholdings in the Company" (***Noved Investment Co***, at para. 49). In any event in the instant case, the loans having been repaid to CCJ, the cost of the payments cannot be said to have fallen on the company, as paragraph 2 of the distribution table also requires.

Conclusion

[107] In the result, I would allow the appeal against the assessments, set aside the judgment of the court below in respect of the assessments and enter judgment for the appellant, with costs in this court and in the court below to be the appellant's, to be taxed, if not sooner agreed.

[108] I wish to place on record, with gratitude, my appreciation to counsel on both sides, for the sustained high quality of their submissions in what I have not found to be an easy matter.

McINTOSH, J.A. (Ag)

[109] I have had the distinct privilege of reading in draft the judgment of Morrison, JA with its thorough analysis of the submissions and the applicable law and I agree with his conclusion that this appeal should be allowed, with costs to the appellant to be agreed or taxed.

ORDER

PANTON, P.

Appeal against the assessments allowed. Judgment of Anderson, J in respect of the assessments set aside. Judgment entered in favour of the appellant. Costs in this Court and the court below to be the appellant's; such costs to be taxed if not agreed.