



TC05304

Appeal number: TC/2014/04523
TC/2014/00699

*Corporation tax – small companies rate- associated companies– control –
intra-group debt outstanding – JV loan financing -discovery - held –
discovery assessments valid – companies associated – small companies rate
not available.*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**Jacobs Construction (Holdings) Limited
Comserv (UK) Limited**

Appellants

- and -

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

Respondents

**TRIBUNAL: JUDGE Rachel Short
Elizabeth Bridge (Member)**

**Sitting in public at Portsmouth Magistrates' Court, Winston Churchill Avenue,
Portsmouth on 27 May 2016**

**Paul Underwood of Morris Crocker Accountants and Kate Wood of Johnston
Wood Roach, accountants for the Appellants**

**Graham Conway, instructed by the General Counsel and Solicitor to HM
Revenue and Customs, for the Respondents**

DECISION

1. This is an appeal by the Appellant companies against HMRC's assessments
5 refusing them the right to claim the "small companies rate" of corporation tax for the
accounting periods ending 31 July 2011 and 2012 for Jacobs Construction (Holdings)
Limited ("Jacobs Holdings") and for accounting periods ended 31 December 2009
and 31 December 2011 for Comserv (UK) Limited ("Comserv").

2. The availability of the small companies' rate of taxation depends upon the level
10 of profits generated by the company in question but also takes account of other
companies which are "associated". The Respondents argue that both Jacobs Holdings
and Comserv were "associated" with other companies during the relevant periods
with the result that the small companies' rate of corporation tax is not available to
15 them. The Appellants dispute that there was any such "association" and argue that
both Jacobs Holdings and Comserv are eligible for the small companies' rate of
taxation.

3. HMRC raised an assessment on Jacobs Holdings on 17 February 2014 which
was appealed on 13 June 2014. HMRC raised assessments on Comserv on 13 May
2013 (for the December 2009 accounting period) and 16 October 2013 (for the
20 December 2011 accounting period) which were appealed on 8 July 2013 and 28
October 2013. After the assessments had been confirmed on review by HMRC,
Jacobs Holdings appealed to this Tribunal on 12 August 2014, Comserv appealed to
this Tribunal on 31 January 2014.

4. The assessments made on Jacobs Holdings for the accounting period ended July
25 2011 and Comserv for the accounting period ended December 2009 were made
outside the normal time limit for raising assessments under the "discovery" rules at
Schedule 18 Finance Act 1998.

5. The amount of tax at stake is £4,185 for Jacobs Holdings and £12,418.66 for
Comserv.

6. The Tribunal directed that these cases be heard together on 20 November 2014.

Background facts

7. The detailed group structure of Jacobs Holdings, Comserv and other relevant
entities is set out in the structure chart included as an appendix to this decision. The
group structure itself is not in dispute.

8. It is not disputed that Jacobs Holdings holds 50% of the issued share capital of
35 Comserv under a joint venture agreement with Dylex Limited ("Dylex"). Jacobs
Holdings holds all of the issued share capital of Jacobs Construction (UK) Limited
("Jacobs Construction") and is a "close" company.

Jacobs Construction and Comserv

9. On 1 January 2009, as a result of the requirements of Comserv's main customer, Portsmouth City Council, Jacobs Construction transferred vehicles to Comserv to allow Comserv to carry out a contract for Portsmouth City Council. There is no dispute that this was a commercial arrangement. The debt due for the transfer of the vehicles, £40,545 ("the Vehicle Loan") was left as an inter-company loan between
5 Jacobs Construction and Comserv. The loan was repaid in full by 19 May 2011.

Jacobs Holdings and Foreman Developments

10. The shares in Jacobs Foreman Developments Limited ("Foreman Developments") are held under a joint venture agreement between Jacobs Holdings
10 and Foreman Homes Group Limited ("Foreman Homes"). Under the terms of that agreement the JV parties are obliged to provide equal amounts of funding to the JV vehicle.

11. Jacobs Holdings advanced loan funding of £1.214m to Foreman Developments in 2011 and £706,050 in 2012. Foreman Homes advanced £720,141 to Foreman
15 Developments in 2011 and £706,050 in 2012. That funding was advanced in tranches by both parties during 2011 and 2012:

	<i>Jacobs Holdings</i>	<i>Foreman Homes</i>
31 Jan 2011	£236,050	£45,247
31 May 2011	£326,000	£211,947
20 30 Sept 2011	£326,000	£37,947
31 Oct 2011	£326,000	£425,000
31 March 2012	£706,050	£706,050

Law

25 12. HMRC's right to make assessments outside the normal enquiry window derives from Schedule 18 Finance Act 1998 and in particular paragraphs 44 and 45:

"44(1) A discovery assessment for an accounting period for which the company has delivered a company tax return, or a discovery determination, may be made if at the time when an officer of Revenue and Customs

30 *(a) ceased to be entitled to give a notice of enquiry into the return, or*

(b) completed the officer's enquiries into the return

*the officer could not have been reasonably expected, on the basis of the information made available to them before that time, to be aware of the situation mentioned in paragraph 41(1) or (2)[that there has been an under
35 assessment]*

44(2) For this purpose information is regarded as made available to an officer of Revenue and Customs if

- (a) it is contained in a relevant return by the company or in documents accompanying the return, or
- 5 (b) it is contained in a relevant claim made by the company in any accounts, statements or documents accompanying such claim, or
- (c) it is contained in any documents, accounts or information produced or provided by the company to an officer of Revenue and Customs for the purposes of an enquiry into any such return or claim, or
- 10 (d) it is information the existence of which, and the relevance of which as regards the situation mentioned in paragraph 41(1) or (2) –
 - (i) could reasonably be expected to be inferred by an officer of Revenue and Customs from information falling within (a) to (c) above, or
 - 15 (ii) are notified in writing to an officer of Revenue and Customs by the company or a person acting on its behalf.”

“45 No discovery assessment for an accounting period for which the company has delivered a company tax return, or discovery determination, may be made if

- 20 –
 - (a) the situation mentioned in paragraph 41(1) or (2) is attributable to a mistake in the return as to the basis on which the company’s liability ought to have been computed, and
 - (b) the return was in fact made on the basis of or in accordance with the practice generally prevailing at the time when it was made”

13. The “convoluted” definitions of associated companies for these purposes are set out both at s 25 Corporation Tax Act 2010 (“CTA 2010”) which provides the basic definition of “associated companies” and s 29 CTA 2010 which sets out how loan creditors are taken account of.

30 “S 25(1) For the purposes of section 24 a company is another company’s associated company in an accounting period if it is an associated company(see subsection (4)) for any part of the accounting period.

35 25(2) The rule in subsection (1) applies to each of two or more associated companies even if they are associated for different parts of the accounting period.

25(3)

25(4) For the purposes of this part a company is an associated company of another at any time when-

(a) one of the two has control of the other, or

(b) both are under the control of the same persons.

25(5) In subsection (4) “control” has the same meaning as in Part 10 (see sections 450 and 451)”

5 *“s29(1) A company (“A”) is not under the control of another company (“B”) for the purposes of section 25(4) if-*

(a) B is a loan creditor of A

(b) there is no other connection between A and B, and

(c) either –

10 *(i) B is not a close company, or*

(ii) B’s relationship to A as a loan creditor arose in the ordinary course of a business which B carries on.

29(5) In this section –

15 *(a) “connection” includes a connection in the past as well as a connection in the present, and*

(b) references to a connection between two companies includes any dealings between them.

29(6) In this section references to a loan creditor of a company are to be read in accordance with section 453”

20 14. Those definitions are reliant on the definitions of “control” which are provided by s 450 – 454 CTA 2010 and in particular:

“s 450 “Control”

450(2) A person (“P”) is treated as having control of a company (“C”) if P –

(a) exercises, or

25 *(b) is able to exercise, or*

(c) is entitled to acquire

direct or indirect control over C’s affairs.

450(3) In particular P is treated as having control of C if P possesses or is entitled to acquire-

30 *(a) the greater part of the share capital or issued share capital of C,*

(b) the greater part of the voting power in C,

(c) so much of the issued share capital of C as would, on the assumption that the whole of the income of C were distributed among participators, entitle p to receive the greater part of the amount so distributed, or

5 *(d) such rights as would entitle P, in the event of a winding up of C or in any other circumstances, to receive the greater part of the assets of C which would then be available for distribution among the participators.*

450(4) Any rights that P or any other person has as a loan creditor are to be disregarded for the purpose of the assumption in subsection (3)(c)."

This is expanded by the attribution rules at s 451 including s 451(4);

10 *"There may also be attributed to a person all the rights and powers-*

(a) of any company of which the person has, or the person and associates of the person have, control

(b) of any two or more companies within paragraph (a)

(c) of any associates of the person, or

15 *(d) of any two or more associates of the person"*

15. A "loan creditor" is defined for the purposes of this part by s 453:

"453(1) For the purposes of this Part "loan creditor", in relation to a company means a creditor-

20 *(a) in respect of any debt within subsection (2), or*

(b) in respect of any redeemable loan capital issued by the company

but this is subject to subsection (4).

453(2) Debt is within this subsection if it is incurred by the company –

(a) for any money borrowed or capital assets acquired by the company,

25 *(b) for any right to receive income created in favour of the company, or*

(c) for consideration the value of which to the company was (at the time when the debt was incurred) substantially less than the amount of the debt (including any premium on the debt).

453(3) A person who –

(a) is not the creditor in respect of any debt or loan capital to which subsection (1) applies, but

(b) has a beneficial interest in the debt or loan capital,

5 is, to the extent of that interest, treated for the purposes of this Part as a loan creditor in respect of that debt or loan capital (but this is subject to subsection(4)).

453(4) A person carrying on a business of banking is not treated as a loan creditor in respect of any debt or loan capital incurred or issued by the company for money lent by the person to the company in the ordinary course of that business”.

16. Authorities referred to:

10 (1) *R v Commissioners of Inland Revenue ex parte Newfields Developments Limited* 73 TC 532.

Evidence

15 17. We did not see the written terms of the JV agreement between Jacobs Holdings and Foreman Homes in respect of Foreman Developments.

18. We did not see the terms of any loan agreement between Comserv and Jacobs Construction or any other evidence detailing its terms.

19. No oral witness evidence was given but we did see:

20 (i) A witness statement from Mr Nicholas Ralls dated 2 September 2009 director of Comserv and Dylex Limited, stating that “no one party has or has ever had control of Comserv (UK) Limited. For any decision to be approved it is a joint decision on a 50/50 basis which ultimately renders a locked board if the two do not agree”

25 (ii) A witness statement from Mr Trevor Jacobs dated 2 September 2009, director of Jacobs Holdings and Comserv, stating that “no one party has or has ever had control of Comserv (UK) Limited. For any decision to be approved it is a joint decision on a 50/50 basis which ultimately renders a locked board if the two do not agree”; and

30 (iii) A witness statement from Mr Richard Cooper dated 2 September 2009, group executive manager of Comserv, explaining the commercial background to the transfer of staff and fleet vehicles from Jacobs Construction to Comserv at the end of 2008 as a result of the “restructuring which was driven by the commercial and practical benefits of operating the service entirely within Comserv (UK) Limited” and stating that “The cost of the vehicles as other service costs to the company for the Portsmouth City Council contract were recovered over time and repayment of the vehicles was repaid to Jacobs Construction on a similar basis”.

35

20. We saw the reports and accounts of Jacobs Holdings for the accounting periods ending 31 July 2011 and 2012.

21. We saw the tax returns and computations for Jacobs Holdings for the accounting periods ending 31 July 2011 and 31 July 2012.

5 22. We saw the reports and accounts of Comserv for its accounting periods ended 30 December 2009, 2010 and 2011.

23. We saw the tax returns and computations for Comserv for the accounting periods ending 30 December 2010 and 2011.

10 24. We saw the annual reports and accounts for Foreman Developments for the year ended 31 March 2012 showing the loan funding received from its JV partners in 2011 and 2012.

15 25. We also saw various correspondence between the parties including the information request notices of 18 July 2013 and 20 December 2013 served on Jacobs Holdings and the enquiry notices served on Comserv of 13 August 2012 and 4 July 2013.

Appellant Arguments

Vehicle Loan

20 26. The Vehicle Loan between Comserv and Jacobs Construction was a normal commercial arrangement on which Jacobs Construction made a profit and so should not be taken account of in determining whether the three companies are associated. There was no tax planning or tax avoidance purpose in entering into these arrangements.

25 27. In addition s 29 (1) CTA 2010 excludes loan creditor relationships being taken into account if they arise in the ordinary course of business of the lending company. This loan to Comserv arose in the ordinary course of Jacobs Construction's business.

28. It has been accepted in the High Court that the definitions of control for these purposes are convoluted; Sedley LJ in *Newfields* "it is the least worst solution of a problem created by a mode of drafting which rewards readers who desire clarity by offering them riddles".

30 29. At no point did either party control the other in practice.

JV cash advances

35 30. Jacobs Holdings became the major loan creditor of Foreman Developments only because of timing differences in relation to the introduction of monies during the accounting periods in question when it, and its other JV partner Foreman Homes put cash into Foreman Developments. The JV agreement made it clear that both JV partners were obliged to put equal amounts of funding into Foreman Developments

and that was ultimately what was done. The periods of time during which Jacob Holdings' funding exceeded the funding from its JV partner should be excluded in determining whether the companies were associated.

5 31. At no point did either party actually control the other from a commercial and practical perspective.

HMRC arguments

Vehicle Loan

10 32. HMRC say that Jacobs Construction is a loan creditor of Comserv because of the Vehicle Loan and s 453(2)(a) CTA 2010 applies. The exception at s 453(4) is not in point; Jacobs Construction is not carrying on a banking business.

33. Jacobs Holdings' 100% share ownership of Jacobs Construction and Jacob Construction's position as a loan creditor of Comserv mean that Jacobs Holdings controls Comserv under s 450(3)(d) CTA 2010.

15 34. The rights of Jacobs Construction are imputed to its parent company under s 451(4)(a) because Jacobs Holdings controls Jacobs Construction and therefore has a right to more than 50% of the assets available on the winding up of Comserv (the Vehicle Loan, which is an asset available for distribution, plus 50% of the remaining assets) and/or as the parent company, Jacobs Holdings has a beneficial ownership in
20 the debt due from Comserv to Jacobs Construction.

35. Because Jacobs Holdings and Comserv are associated companies, Jacobs Construction must also be associated with Comserv because it and Comserv are controlled by the same persons – Jacobs Holdings, in accordance with s 25(4) CTA 2010.

25 36. HMRC referred to authorities which supported a broad interpretation of the rules for "control", including Hoffman LJ in *Newfields* "*it may be necessary to attribute to him the rights and powers of persons over whom he may in real life have little or no power of control. Plainly the intention of the legislature was to spread the net very wide*". Para[11]

30 37. The Appellants' contention that this debt between Comserv and Jacobs Construction arises in the normal course of business and so is excluded from the control test by s 29(1) CTA 2010 is not correct because (i) that provision only applies for accounting periods ending after 1 April 2010. Comserv's relevant accounting period is the period ending 31 December 2009, (ii) the exclusion only applies if there
35 are no other connections between the companies, which is not true of Comserv and Jacobs Construction; there are "dealings" between those entities represented by management charges paid from Comserv to Jacobs Construction, rental paid from Comserv to Jacobs Holdings and Jacob Holdings' 50% share ownership in Comserv

and (iii) it was not the normal course of Jacobs Constructions' or Jacobs Holdings' business to lend money or offer vehicles on credit terms.

JV cash advances

5 38. Jacobs Holdings was also a loan creditor of Foreman Developments because it was a loan creditor of that entity in accordance with s 453(2)(a) CTA 2010 and as a result had a right to more than 50% of the assets of the company on a winding up; the loan creditor balance plus 50% of the assets of Foreman Developments. The exception at s 453(4) CTA 2010 does not apply to this loan funding; Jacobs Holdings does not carry on a banking business.

10 39. It is not relevant to the analysis under s 453(2)(a) that Jacobs Holdings was the major loan creditor of Foreman Developments only for short periods of time, this is made clear by s 25(1) CTA 2010.

Discovery – earlier year assessments

15 40. The Appellants have not disputed HMRC's right to raise discovery assessments for Jacobs Holdings' accounting period ended 31 July 2011 or Comserv's accounting period ended 31 December 2009.

Jacobs Holdings

20 41. HMRC say in respect of Jacobs Holdings that it had not provided any information to HMRC which would have made an officer aware of an insufficiency in the assessment for its year ended July 2011. The company's tax return for 2011 referred to only one associated company, Jacobs Construction. The conditions at paragraph 44 Schedule 18 Finance Act 1998 are satisfied. Paragraph 45 is not in point because it was not the prevailing practice at the time for companies to understate the number of associated companies.

25 42. HMRC's discovery arose as a result of an enquiry into Jacobs Holdings' tax return for the year ended July 2012, during that enquiry HMRC discovered that Jacobs Holdings was associated with Comserv and Foreman Developments.

30 43. HMRC received information about the loans outstanding from Jacobs Holdings to Foreman Developments as a result of information provided under information requests issued on 18 July 2013.

Comserv

35 44. HMRC say in respect of Comserv that it had not provided any information to HMRC which would have made an officer aware of an insufficiency in the 2009 assessment. Comserv's tax return for 2009 referred to only one associated company – Multi Trade Supplies Limited. The conditions at paragraph 44 Schedule 18 Finance Act 1998 are satisfied. Paragraph 45 is not in point because it was not the prevailing practice at the time for companies to understate the number of associated companies.

45. HMRC discovered in the course of their enquiry into Comserv's tax return for the year ended 31 December 2010 that Comserv was associated with Jacobs Holdings and Jacobs Construction.

5 46. HMRC received information about the inter-company debt between Comserv and Jacobs Construction as a result of the enquiry letter served on Comserv on 13 August 2012.

Decision

Findings of Fact

10 47. The Vehicle Loan between Comserv and Jacobs Construction was entered into for commercial purposes as a result of the restructuring required to fulfil the contract with Portsmouth City Council in 2009.

15 48. The loan funding advanced to Foreman Developments by its JV partners during 2011 and 2012 was not advanced by each party in equal instalments or at the same time.

Discovery

20 49. The Appellants made no arguments in respect of HMRC's right to issue assessments outside the normal time period on the basis that at the time when the enquiry periods closed for both Jacobs Holdings in respect of its accounting period ended July 2011, in July 2013 and Comserv in respect of its accounting period ended December 2009, in December 2011, the HMRC officer could not reasonably have been aware of the insufficiency of the assessments.

25 50. The onus of proof is on HMRC to demonstrate that they have fulfilled the conditions for making discovery assessments for both of these companies for both of these periods.

51. It is clear that the relevant tax returns for both of these companies for the relevant periods (2011 for Jacobs Holdings and 2009 for Comserv) did not refer to the entities which HMRC now say are associated.

30 52. We do not agree with HMRC's formulation of the test in schedule 18 Finance Act 1998 para 45 which would protect the Appellants from a discovery assessment if returns have been made in reliance on "practice generally prevailing". HMRC formulated this as "*it was not current practice not to account for associated companies in tax returns*". Our view is that the current prevailing practice referred to is less the way in which a return was filled in, than the then current understanding of
35 the law on which that return was based, in this case, a current understanding of what determined whether companies should be treated as associated or not.

53. Nevertheless, even on the reformulated version of this test, the Appellants have not pointed to a specific extra-statutory concession or other HMRC practice on which they can rely to exclude the relevant companies from being treated as associated.

54. It is correct as HMRC state that the tax returns of neither of the Appellant companies refer to the companies which HMRC now say are associated companies. However, both companies provided accounts to HMRC with those tax returns which did refer, in the notes section referring to related parties, to the debts outstanding with the relevant entities. HMRC say that it is only as the result of the information requests served on Jacobs Holdings and Comserv that the relevant information about the inter-company debts and the potential association between these group companies was obtained.

55. In order to fulfil the requirements of Schedule 18 Finance Act 1998, HMRC must demonstrate that there was nothing in the tax returns and related documents (including the accounts delivered with those returns) which should have alerted the relevant officer to the under assessment in the earlier years.

56. The Tribunal looked at (i) Jacobs Holdings' tax return and accounts for the periods ended July 2011 and 2012 and (ii) Comserv's tax return and accounts for the periods ended December 2009 and 2010.

Jacobs Holdings

57. Jacobs Holdings' tax return for accounting period ended 31 July 2011 referred to one associated company, and gave details of related party disclosures and the inter-group debt due in the notes to its reports and accounts. No mention is made in the notes to the accounts of Comserv or Foreman Developments.

58. We have considered whether, despite the fact that Jacobs Holdings' July 2011 tax return did not refer to Comserv or Foreman Developments as associated companies, the accounts provided with that tax return provided sufficient information that an officer of HMRC should have been aware of that there was an under assessment to tax.

59. Our view is that the information given in the accounts submitted with Jacobs Holdings' July 2011 tax return was not sufficiently detailed to provide information for HMRC to be able to conclude that Jacobs Holdings was associated with either of those companies: the debt owed by Foreman Developments was contained in a figure for "other debtors" and further details of those debtors were not set out in the notes to the 2011 accounts.

60. The debt owed by Jacobs Construction to Comserv was not included in the accounts of its parent company.

61. We have concluded that HMRC have fulfilled the conditions for raising discovery assessments in this case in respect of the accounting period ended July 2011.

Comserv

62. Comserv's tax return for the accounting period ending 31 December 2009 refers to one associated company and in the notes to its report and accounts gives details of "other creditors" but does not give a detailed split of those other creditors. The related party disclosure notes refer to both Jacobs Construction and Jacobs Holdings as related parties and sets out a creditor balance of £16,948 at 31 December 2009 due to Jacobs Construction.

63. HMRC established as a result of the information request issued on 13 August 2012 that "other creditors" in Comserv's accounts for 2010 included a debt of £44,545 to Jacobs Construction and were told in February 2013 that this debt related to the transfer of vehicles from Jacobs Construction to Comserv in January 2009.

64. We have concluded that Comserv's tax return and accompanying accounts for 2009 did not provide sufficient information to make HMRC aware that the Vehicle Loan was outstanding between Comserv and Jacobs Construction in 2009 and that Comserv should therefore be treated as associated with both Jacobs Construction and Jacobs Holdings.

Associated Companies

65. The legislation determining when and whether companies are associated for these purposes is convoluted; the Appellants referred us to the statement of Sedley LJ in *Newfields*. Nevertheless, convoluted though it might be, counter to the Appellants' suggestion, we do not consider that there is any basis on which we can apply the legislation by reference to concepts which are not part of its terms; it is not relevant for these purposes that the loan between Comserv and Jacobs Construction was for commercial purposes and did not have a tax avoidance motive. We have accepted the Appellants' evidence that this was the case, but this does not take the loan outside the prescriptive rules at s 25 CTA 2010.

66. The detailed rules contained in sections 450 CTA 2010 and related sections are prescriptive and mandatory and we do not think it is possible to approach these definitions of control by reference to a purposive approach to the meaning of "control" which could override these specific provisions, as the Appellants' approach entails.

The Vehicle Loan

67. In respect of the Vehicle Loan between Comserv and Jacobs Construction we accept HMRC's contentions that this means that each of Comserv, Jacobs Construction and Jacobs Holdings are associated companies because Jacobs Construction is a loan creditor of Comserv (s 453(2)(a) CTA 2010) and Jacobs Holdings is connected with Jacobs Construction as its 100 percent parent company. The rules at s 451(4)(a) CTA 2010 therefore apply to attribute the loan creditor rights of Jacobs Construction to Jacobs Holdings and the companies must be treated as associated for these purposes. The test is an objective test and the motive of any of the relevant companies for entering into these arrangements is not relevant.

5 68. Although not strictly relevant given our decision on the point above, it is worth pointing out that we do not agree with HMRC's alternative suggestion that Jacobs Holdings was connected with Comserv because it should be treated as beneficially owning all the assets of its 100 percent subsidiary, including the Vehicle Loan (s 453(3) CTA 2010). HMRC did not elucidate the basis for this approach and we reject it as in effect ignoring the fact that Jacobs Construction is a separate legal entity.

10 69. The Appellant argued that the Vehicle Loan should not be considered for these purposes in reliance on s 29(1) CTA 2010. We accept HMRC's point that that provision did not apply for the first of Comserv's accounting periods (ending December 2009). For the later periods HMRC argued in respect of both Jacobs Holdings and Jacobs Construction that the requirement that the loan was made in the ordinary course of business was not met because neither of those entities was in the business of lending money or transferring vehicles on credit.

15 70. HMRC applied the s 29(1) test to both Jacobs Holdings and Jacobs Construction. Our view of s 29(1) is that it is to be applied to the entity which actually made the loan (Jacobs Construction): s 29(1) refers specifically to "B is a loan creditor of A"; Jacobs Holdings is not a loan creditor of Comserv. HMRC did not fully explain why they believed this test should be applied to Jacobs Holdings. We do not consider that Jacobs Holdings can be treated as having a beneficial interest in the Vehicle Loan by reason only of being Jacobs Construction's parent company under s 20 453(3) CTA 2010.

25 71. Considering Jacobs Construction, we were not provided with any evidence of whether Jacobs Construction had as part of its ordinary business the lending of money or the transferring of vehicles on credit terms. HMRC did not contest the Appellants' evidence that this particular lending arrangement was for commercial purposes. There is nothing in the legislation to suggest that this exclusion can only apply to companies which are lending or financial institutions, (unlike in the definitions at s 453 CTA 2010). Our view is that this test in s 29 does not depend on the creditor company having the making of loans as part of its ordinary business, but only that a particular loan arose in the ordinary course of the creditor company's business, 30 whatever that business might be.

35 72. The Appellants were clear that the purpose of this loan was to serve the commercial interests of Comserv, without it they would not have been able to fulfil the contract with Portsmouth City Council. Nevertheless, it was also clear from the Appellants' evidence that in the normal course prior to the restructuring, the work would have been done by Jacobs Construction, the entity which owned the vehicles. On this basis this loan arose because of unusual, rather than ordinary, requirements for Jacobs Construction and for this reason our view is that the exception at s 29(1) does not apply.

40 73. HMRC's second objection to the application of s 29(1) is the requirement that there should be no other connections (defined to include any dealings) between the relevant entities as set out at s 29(5). HMRC say that there were other dealings between Comserv and Jacobs Construction; management charges were paid and

purchases were made by Comserv from Jacobs Construction. This is evident from the Comserv accounts which we saw.

74. For both of these reasons our view is that the Appellants cannot rely on the exception in s 29(1) and that Jacobs Construction should be treated as a loan creditor of Comserv.

The JV Agreement

75. Again the Appellants attempted to persuade us that the intention of the two JV partners, Jacobs Holdings and Foreman Homes was that an equal amount of financing would always be provided by both companies and that in deciding whether these companies were associated that intention, and the relatively short periods of time for which there was mismatched funding in the JV vehicle, should result in the legislation not being applied.

76. For the reasons set out above our view is that we cannot take account of the intentions of the JV partners. Nor can we ignore the short periods of time for which Jacobs Holdings was the major loan creditor of Foreman Development on the basis of some de minimis approach which is counter to the legislation which is clear on this; s 25(1).

77. Unfortunately, the Tribunal was not provided with a copy of the JV agreement between Jacobs Holdings and Foreman Homes and it was later confirmed that no written JV agreement existed between the parties. In the face of a lack of any specific evidence about the legal requirement that the funding arrangements as part of the JV Agreement between these two entities should be exactly matched, the Tribunal did not accept the Appellants' arguments that there was in fact an absolute matched funding obligation between both JV partners which would have precluded Jacobs Holdings being a major loan creditor for any periods.

Conclusion

Comserv

78. (i) The assessment on Comserv for the accounting period ending December 2009 is validly made under the discovery rules.

79. (ii) Comserv and Jacobs Holdings and Jacobs Construction were associated companies for the accounting periods ending December 2009 and December 2011.

80. (iii) Comserv had three associated companies for the accounting periods ending December 2009 and December 2011; Jacobs Holdings, Jacobs Construction and Multi Trade Limited.

Jacobs Holdings

81. (i) The assessment made on Jacobs Holdings for the accounting period ending July 2011 is validly made under the discovery rules.

82. (ii) Jacobs Holdings was associated with Comserv for the accounting period ending July 2011.

83. (iii) Jacobs Holdings was associated with Foreman Developments for the accounting periods ending July 2011 and 2012.

5 84. (iv) Jacobs Holdings had three associated companies for the accounting period ending July 2011; Jacobs Construction, Foreman Developments and Comserv and two associated companies for the accounting period ending July 2012; Foreman Developments and Jacobs Construction.

10 85. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)”
15 which accompanies and forms part of this decision notice.

**RACHEL SHORT
TRIBUNAL JUDGE**

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RELEASE DATE: 05 AUGUST 2016

Appendix 1 – Schematic of company holding structure

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