HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

BETWEEN: **THE COMMISSIONER OF TAXATION OF THE COMMONWEALTH OF AUSTRALIA**

Appellant

and

TRAVELEX LIMITED

Respondent

RESPONDENT'S SUBMISSIONS

Part I: Certification

1. It is certified that these submissions are in a form suitable for publication on the internet.

Part II: Concise Statement of the Issues

2. The issues before the Court, and the answers the Court should give, are as follows.

3. ***First***, should the Commissioner be given leave to advance his sole ground of appeal? No. It is inconsistent with his Defence, the Agreed Facts and the case he ran at first instance. It could have been met by evidence. There are no exceptional circumstances.

4. ***Secondly***, was the approach of the majority below to the construction of the RBA provisions correct? Yes. The Commissioner's alternative approach robs the RBA scheme of its efficacy. It destroys the statutory purpose of creating a single, comprehensive account which would bring certainty and make tax administration simpler.

5. ***Thirdly***, even if the Commissioner's construction of the RBA provisions is correct, did the Commissioner nevertheless assess a negative net amount for the November 2009 tax period of $111,269 on or around the date that he allocated $149,020 to Travelex's RBA? Yes. The Commissioner made the allocation because he had completed the process by

which the provisions of the Act relating to debts and credits were given concrete application in the particular case. That is an assessment. And the Commissioner gave notice to Travelex of the negative net amount he had assessed shortly afterwards on 3 July 2012. The Commissioner does not dispute that, if there was an assessment, the primary judge's decision should stand.

Part III: Section 78B notices

6. Travelex has considered whether this cause involves a matter arising under the Constitution or involving its interpretation. Travelex does not consider that a constitutional issue arises on its case. However, Travelex does consider that the Commissioner's contentions at AS [38]-[43] may involve constitutional issues, and considers that it would be prudent for the Commissioner to issue s 78B notices.

Part IV: Material Facts

7. The Commissioner's elucidation of the background is materially incomplete.

8. The Commissioner's position at trial could not have been clearer; nor could it have been more clearly inconsistent with the position he now takes.

9. The Statement of Agreed Facts (**SOAF**) at trial was signed by the Solicitor for the Commissioner. Paragraph 16 of the SOAF read:

> On 28 June 2012 the Commissioner allocated the amount of $149,020 to the Applicant's ICA as a credit amount (the **November 2009 Amount**). The effective date of the allocation of the November 2009 Amount was 16 December 2009.

10. Paragraph 17 of the SOAF read:

> **The November 2009 Amount constituted part of a RBA surplus** for the purposes of Part IIB of the Administration Act and Part IIIAA of the Overpayments Act. That part of the RBA surplus constituted by the November 2009 Amount arose on 16 December 2009.
>
> (emphasis added).

11. Paragraphs 16 and 17 of the SOAF reflected paragraph 21 of the Commissioner's Defence, which stated:

> The Respondent ... says further that:
>
> (a) on 28 June 2012 **the Respondent allocated the amount of $149,020.00 to the ICA of the Applicant and this amount constituted part of a "RBA surplus"** for the purposes of Part IIB of the [Administration Act] and Part IIIAA of the [Overpayments Act]; and

(b) **the RBA surplus arose on 16 December 2009**, being the date on which the Applicant gave the Respondent the GST return referred to at paragraph 14(a) of the Statement of Claim.

(emphasis added)

12. The Commissioner's Defence was signed by his legal representative who attested that there was a proper basis for each allegation in it.

13. It is incorrect to say that the "legal premise" of the Commissioner's long-standing administrative practice "was not put in issue by the parties": cf AS [12]. This was not a case where the parties simply overlooked an issue and implicitly assumed it. To the contrary, the parties were conscious of the issue of whether an RBA Surplus had arisen, and it was the subject of both pleading and express agreement.

14. That express agreement rendered it unnecessary for Travelex to adduce evidence to establish *why* there was an RBA surplus. For example, it was unnecessary for Travelex to adduce evidence to establish that the Commissioner had made an assessment, if what the Commissioner describes as a "substantive and legitimate entitlement" was necessary before there could be an effective allocation to an RBA.

15. It is also incorrect to say that once the Commissioner's administrative practice was shown to be ill-founded, "the statement of legal characterisation at SOAF [17] was wrong": cf AS [48]-[49]. It may or may not have been wrong, depending on how various other issues of fact and law played out. It would not have been wrong had there been an assessment supporting the application of the amount to the BAS (as the Commissioner concedes).

Part V: Summary of Argument

Introduction

16. The Commissioner's appeal fails for two independently sufficient reasons. First, he should not be entitled to advance it. Secondly, it depends on an erroneous approach to the RBA provisions of the TAA which, if correct, destroys the purpose and practical utility of the RBA scheme.

The Commissioner should not be entitled to advance his new case

17. The Commissioner should not be entitled in this Court to put his sole appeal ground. It was not put at trial; it is inconsistent with the Commissioner's Defence (which he was not been given leave to amend and has not sought to amend); the Commissioner was not

given leave to take the point in the Full Court; and the point, if taken, might very well have called for and been met by further evidence.

18. "[I]t is elementary that a party is bound by the conduct of his case. Except in the most exceptional circumstances, it would be contrary to all principle to allow a party, after a case has been decided against him, to raise a new argument which, whether deliberately or by inadvertence, he failed to put during a hearing when he had an opportunity to do so": *Metwally v University of Wollongong (No 2)* (1985) 60 ALR 68 at 71. The Commissioner does not deny that the argument he seeks to put was not put to the trial judge. Nor does the Commissioner assert that there are "exceptional circumstances". That is sufficient to warrant the dismissal of the appeal.

19. Further, leave to run a ground not taken below should be granted only where "the argument does not depend upon an issue of fact not litigated in the courts below and so long as it is open to the respondent on the pleadings and having regard to the way in which the case has been conducted": *Owners of the Ship "Shin Kobe Maru" v Empire Shipping Co Inc* (1994) 120 ALR 12, 14-15 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ). None of those criteria is met. The Commissioner's new case depends on the proposition that there was in fact no assessment. The Commissioner's new case is not open on the pleadings. And the Commissioner's case is not and should not be open having regard to the way the trial was conducted. This is a case where the Court might not "have before [it] all the facts bearing upon this belated [argument] as would have been the case" had it been taken at first instance: contra *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418 at 438.

20. It is erroneous to treat the issue *just* as one of whether the Court is bound to accept agreed facts (including agreed facts involving mixed issues of fact and law): cf AS [49]. The primary issue is whether the Commissioner should be entitled to run an argument which was not put at first instance, was inconsistent with the agreed position at first instance and if put might well have led to further factual enquiries. The prejudice to Travelex is patent: it pursues a Notice of Contention contending that the Commissioner in fact made an assessment, and the Commissioner says that that argument must fail because it is not made out on the facts.

21. Travelex does not dispute that a court may depart from an agreed position put by the parties. But that is different from saying that an appellate court would permit a party to

take a point that was contrary to an agreed position below and in respect of which, had it been in issue, the factual and forensic context might have been different.

In any event, the Commissioner's new case should be rejected

Introduction

22. The Commissioner now says that there was no "RBA surplus" because, in allocating an amount to Travelex's RBA, the Commissioner made a "mistake", he allocated an amount to which Travelex was not "entitled" and an "RBA surplus" can only be generated by the allocation of amounts to which the entity is "substantively and legitimately entitled".

23. Importantly, the Commissioner concedes that he in fact allocated a figure to the RBA. Further, the Commissioner does not assert (and has never asserted) that he did not have jurisdiction to make that allocation. The Commissioner's case is, therefore, that, acting within jurisdiction, he allocated a figure to the RBA, but the taking of that step nevertheless had no legal consequences. That is a most unlikely outcome.

24. Further, at the outset, it may be noted that the Commissioner has not established that Travelex was not "entitled" to the allocated amount. He concedes that there would have been an entitlement had the Commissioner made an assessment (see RS [15]), but does not then establish (beyond assertion) that there was no assessment and no other basis on which there was an entitlement. No inference favourable to the Commissioner on this issue can be drawn: the facts relevant to whether he had assessed were wholly within his power to adduce, and he did not adduce anything on that issue.

25. In any event, for reasons set out below, the Commissioner's new case fails: on the proper construction of the TAA, it is not correct that an "RBA surplus" can arise only by the allocation of amounts to which a taxpayer is "substantively and legitimately entitled". To explain why, it is necessary to say something as to the genesis of the RBA provisions of the TAA before turning to text, context and purpose.

Statutory History

26. Part IIB of the TAA is entitled "Running Balance Accounts, Application of Payments and Credits, and Related Matters". The Part was introduced by Sch 1 of the *Taxation Laws Amendment Act (No 3) 1999* (Cth) (No 11 of 1999) (**Act No 11 of 1999**), which was the enactment of the *Taxation Laws Amendment Bill (No 5) 1998* (Cth) (**the 1998 Bill**).

27. The policy animating the introduction of running balance accounts was explained in the Explanatory Memorandum to the 1998 Bill (**1998 EM**) as follows (at 5):

> Taxpayers will benefit from receiving regular periodic statements detailing their outstanding tax debts. This compares with the current arrangements where statements are generated on an ad hoc basis or following requests from taxpayers for an explanation of their outstanding debts. The provision of regular and comprehensive account statements should enable taxpayers to better manage their outstanding debts at a reduced cost. These new arrangements will particularly benefit small businesses.
>
> The Government will benefit as taxpayers are more likely to reduce outstanding debts at a faster rate as a result of taxpayer RBAs being issued and being used in the recovery process.

28. The policy intent of providing a single, comprehensive statement of a taxpayer's position vis-à-vis the Commissioner was also reflected in the Second Reading Speech. The Minister stated:[1]

> This bill also introduces amendments to support a system of running balance accounts. **The objective of this measure is to establish a taxpayer accounting system under which the Australian Taxation Office can record and monitor all of a business's different tax liabilities on a single account**. Debts under the sales tax, pay as you earn, prescribed payments and reportable payments arrangements for the year ending 30 June 2000 will be administered in this way.
>
> **The introduction of running balance accounts will provide for simpler tax accounting and collection arrangements**.
>
> These new accounting and penalty arrangements will position the ATO to better assist taxpayers in minimising any escalation of taxation debt and will allow for a simpler and more efficient process of penalty calculation.
>
> **They will also enable the ATO to provide a comprehensive statement of a taxpayer's outstanding tax debts at a particular point in time**.
>
> These amendments will provide an accounting platform in the lead up to one running balance style account to support most taxation debts after 1 July 2000.
>
> (emphasis added)

29. When Pt IIB of TAA was first introduced it provided only for the allocation of debts to an RBA: note, eg, ss 8AAZB and 8AAZD of the *Taxation Administration Act 1953* (Cth) as introduced by Act No 11 of 1999. That Pt IIB was the first step in a staged introduction of an RBA was reflected in the concluding words of the excerpt from the Second Reading Speech set out in paragraph 28.

30. However, shortly after the enactment of Act No 11 of 1999, the *A New Tax System (Pay As You Go) Act 1999* (Cth) (No 178 of 1999) (**Act No 178 of 1999**) was enacted and

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[1] House of Representatives, *Parliamentary Debates*, 10 December 1998, 1898.

commenced. Sch 2 of Act No 178 of 1999 gave to the Commissioner the power to allocate credits to an RBA and introduced the current conceptions of "RBA deficit debt and "RBA surplus", which reflect the balance once debts and credits have been allocated.

31. The object of Act No 178 of 1999 was essentially the same as the object of Act No 11 of 1999: it was designed to provide for a single comprehensive statement of amounts owing as between the Commissioner and a taxpayer. The Explanatory Memorandum to the *A New Tax System (Tax Laws Amendment) Bill (No 1) 1999* (Cth) (**the 1999 Bill**)[2] stated (at 3-4):

> The running balance account (RBA) amendments in Schedule 2 to this Bill will build on the recently enacted RBA framework in anticipation of tax reform**. In particular, those amendments will support the provision of a single activity statement to record PAYG and other debts and related payments, including voluntary payments, as well as other administrative arrangements such as the refunding of excess credits referred to above**.

32. The 1999 Bill was designed to give effect to the policy outlined in the August 1998 White Paper entitled *Tax Reform: not a new tax a new tax system*: see Explanatory Memorandum at 89. The goals identified in the White Paper included ensuring that "tax laws become clearer and taxpayer rights and obligations are more certain" and to "make complying with tax obligations simpler and fairer": at 132-133.

33. The Explanatory Memorandum to the 1999 Bill (**the 1999 EM**) made it clear that amounts allocated to the RBA were intended to exist and have legal consequences independently of underlying debts and credits. At [3.18], the EM stated:

> The allocation of a primary tax debt to an RBA establishes a parallel liability ie. an amount on an RBA that relates to the underlying primary tax debt. Where the primary tax debt remains unpaid, the amount is a debt owing to the Commonwealth and payable to the Commissioner. As such, it can be sued for and recovered in the Courts. **Similarly, any unpaid balance on an RBA is a debt for which a taxpayer can be sued. This parallel system has been established to give the Commissioner the flexibility to pursue unpaid tax in proceedings for either a primary tax debt or the balance on an RBA which reflects that debt – but not both**. (emphasis added)

34. Pausing here, the intention was to create a *parallel* scheme of debts and credits which existed independently of (and can be sued on independently of) what the Commissioner would now call a "substantive and legitimate" debt or entitlement: cf AS fn 7.

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[2] Which, upon enactment, became Act No 178 of 1999.

35. The 1999 Bill achieved this by attaching legal consequences to the factual step of allocation of debts or credits to the RBA. As the 1999 EM explained:

> [3.19] Where the total amount of primary tax debts allocated to an RBA is greater than the payments and credits applied to the RBA, the account will have a deficit balance. If a primary debt allocated to the RBA is currently due and payable there will be an ***RBA deficit debt***. On the other hand, if the payments and credits applied to the RBA are greater than the primary tax debts allocated to the account there will be an ***RBA surplus***. …
>
> [3.23] The new arrangements reflect the proposed credit card type approach of reducing an outstanding balance consisting of several individual primary or non-RBA tax debts. **Applying an amount to an RBA will reduce the RBA deficit debt as well as the primary tax debts allocated to the RBA, and GIC that has accrued on those primary tax debts**. [Item 22, new section 8AAZLA]
>
> …
>
> [3.25] Where the amount of payment or credit applied to an RBA is greater than the deficit balance on the account there will be an RBA surplus. Similarly, where the payment or credit is greater than the non-RBA tax debt to which it is applied there will be an ***excess non-RBA credit***. [Item 2, amended section 8AAZA]

36. It would be anathema to the policy manifest in these extrinsic materials if taxpayers' running balance accounts were not authoritative. It would mean that the statutory scheme had not resulted in a single, comprehensive statement of a taxpayer's position, but had instead caused only duplication and the potential for uncertainty.

37. With this history in mind, it is convenient to turn to considerations of text, purpose and context.

Text

38. "RBA surplus" is defined as follows.

> ***"RBA surplus"***, in relation to an RBA of an entity, means a balance in favour of an entity, based on:
>
> (a) primary tax debts that have been allocated to the RBA; and
>
> (b) payments made in respect of current or anticipated primary tax debts of the entity, and credits to which the entity is entitled under a taxation law, that have been allocated to the RBA.

39. The Commissioner seizes on the words "to which the entity is entitled under a taxation law" to found his submission that it is only credits to which an entity is substantively and legitimately entitled which can count towards an RBA surplus.

40. Although the Commissioner gives emphasis to the expression "to which the entity is entitled", those words cannot be critical to the Commissioner's case: those words do not appear in sub-paragraph (a) of the definition of "RBA surplus", and the Commissioner's case is that if the Commissioner errs in allocating debts to an RBA that allocation is just as ineffective as an erroneous allocation of credits. It must follow that the textual difference between sub-paragraphs (a) and (b) of the definition of "RBA surplus" is not determinative: cf AS [28].

41. Sub-paragraph (b) of the definition of "RBA surplus" must be construed in its statutory context and, in particular, in the context of the balance of the definition of "RBA surplus".

42. Importantly, an "RBA surplus" is something which exists "in relation to an RBA of an entity". An "RBA" is "a running balance account established under section 8AAZC": s 8AAZA. Section 8AAZC(1) confers a discretionary power on the Commissioner to "establish one or more systems of accounts for primary tax debts". Each such account "is to be known as a Running Balance Account (or RBA)": s 8AAZC(2). Section 8AAZC(4) then states that "RBAs for entities may be established on any basis that the Commissioner determines". This gives the Commissioner a flexible power to establish RBAs and, in respect of each such RBA, to decide the "basis" on which it is established. The language of s 8AAZC does not support a proposition that the Commissioner must establish an RBA on the basis that it will contain only debts and credits which are "substantive and legitimate". To the contrary, the Commissioner's discretion is textually broad.

43. Returning to the definition of "RBA surplus": an RBA surplus is a balance in favour of an entity. This corresponds with the concept of an "RBA deficit debt", which involves "a balance in favour of the Commissioner". The Act thus contemplates that, at any point in time, the RBA for an entity will have a particular balance, whether that be in favour of the entity, or in favour of the Commissioner or nil; and that the existence of that balance shall have legal consequences.

44. Further, and critically, the balance is to be "based on" the matters set out in sub-paragraphs (a) and (b). The language has been carefully selected. An "RBA surplus" does not "comprise" the integers set out in (a) and (b); rather, it is to be "based on" those integers. Those words indicate that the surplus need not precisely correspond with the underlying integers, provided it is nevertheless based on them. This reflects the policy articulated in the 1999 EM ie the balance identified in an RBA was to operate in *parallel*

with and be *related to* underlying debts, but nevertheless have a distinct and independent operation.

45. There is a textual link between the words "based on" in the definition of "RBA surplus" and the Commissioner's power to decide the "basis" on which an RBA is to be established given by s 8AAZC(4). Reading the two provisions together, for the purposes of the definition of "RBA surplus", a balance is "based on" the integers identified in the definition if it reflects the Commissioner deciding the basis on which he will in fact allocate debts, payments and credits to an RBA and then having implemented that decision by in fact allocating amounts.

46. One further textual feature of the definition of "RBA surplus" should be noted. Each of sub-paragraphs (a) and (b) conclude with the words "that have been allocated to the RBA". Those words direct attention to the factual act of allocating a particular figure to the RBA of a particular entity. The fact of allocation is intended to produce legal consequences: cf, eg, *State of NSW v Kable* (2013) 252 CLR 118 at [52] (Gageler J).

47. So understood, and contrary to the outcome reached by the Commissioner, there is no disconnect between the text of the definition of "RBA surplus" and the statutory policy that an RBA be a single and comprehensive statement of a taxpayer's position vis-à-vis the Commissioner. The Commissioner has the power to establish RBAs on the basis that the balance will reflect actual allocations he has made to the account, based on his view that there are debts, payments or credits in respect of the entity. If he then proceeds to make allocations on that basis, there does not cease to be a "balance" one way or the other merely because the allocated amounts do not accurately reflect underlying substantive and legitimate obligations or entitlements. Rather, where the Commissioner, having faithfully turned his mind to underlying rights and obligations, mistakenly allocates a debt or credit absent an underlying substantive and legitimate obligation or entitlement, it remains the case that the balance is "based on" debts and credits.

48. The definitions of "credit" (and "primary tax debt") similarly do not provide a compelling basis for the Commissioner's approach: cf AS [26]-[27]. The Commissioner is entitled to establish RBAs on the basis that "mistaken" allocations of positive and negative amounts are nevertheless effective at creating a balance.

Purpose and context

49. These textual observations are supported by purpose and context.

50. For reasons addressed in paragraphs 26 to 37, the purpose of the RBA scheme is to give taxpayers more certainty and to simplify the tax administration process by introducing a comprehensive statement of a taxpayer's position. That object strongly supports a construction which ensures that the RBA means what it says. And it is strongly against the Commissioner's construction: on the Commissioner's approach, the RBA is meaningless, as one must always inquire into the correctness of the underlying allocations with the result (cf AS [36]) an RBA is not an "account" of anything. His Honour, Steward J, correctly said below that the approach now embraced by the Commissioner "would seriously undermine the effectiveness of the RBA system": FC [165].

51. The Commissioner correctly characterises the RBA scheme as an "auxiliary" one (see AS [35] and [37]), but he does not acknowledge the consequence of that characterisation. The scheme is auxiliary in the sense that it is designed to facilitate the conduct of the relationship between the Commissioner and taxpayers and, in particular, to make the collection of tax debts and the return of tax credits more effective by providing a single, comprehensive statement of the balance as between the Commissioner and taxpayers. Once it is appreciated that the scheme is an auxiliary one designed to render underlying tax debts and credits more effective, there is no difficulty in the proposition that obligations and rights may exist by reason of the RBA scheme which did not exist independently of that scheme. The potential for erroneously applied debts and credits to generate legal consequences does not arbitrarily disconnect the RBA provisions from underlying obligations and entitlements (cf AS [38]): Parliament must have assumed that the Commissioner would faithfully endeavour to apply the law.

52. The majority's construction was supported by s 35-5 of the GST Act (as it was at material times in 2012). That section contemplated that amounts "applied" under the TAA might "excee[d] the amount" to which the taxpayer was "properly entitled". The expression "applied" in s 35-5 invokes the Commissioner's powers in Pt IIB of the TAA to allocate and apply amounts to RBAs, and indicates that the section encompasses the circumstance where the Commissioner has erroneously applied an amount to the credit of an entity's RBA: see also Note 1 to s 35-5(1), which stated "Part IIB allows the Commissioner to apply the amount owing as a credit against tax debts you owe to the Commonwealth". The section operated in that circumstance in a self-executing way to reverse the erroneous application by deeming the excess to be treated as GST that was payable and due for payment at the time of the erroneous application. That section would be redundant if

erroneous allocations to an RBA had no legal significance, for there would then be no need to reverse the erroneous allocation to the RBA. The Commissioner's submissions to the contrary at AS [30] erroneously assume that s 35-5 is concerned *only* with amounts erroneously *paid*, and does not deal with amounts erroneously *applied* to an RBA.

53. The majority's construction was also supported by s 8AAZH of the TAA: see FC [167]-[168]; cf AS [31]. That section applies "[i]f there is an RBA deficit debt on an RBA at the end of a day" and states that "the tax debtor is liable to pay the Commonwealth the amount of the debt": s 8AAZH(1). The obvious intent of that provision is to allow the Commissioner to sue for the amount on the RBA, thereby giving the RBA a legal significance independent of any underlying debts. That very point was made in the 1998 EM at [1.117], which said of s 8AAZH(1) "where the RBA is in *deficit*, that deficit will be a debt due and payable to the Commonwealth and may be recovered by the Commissioner". On the Commissioner's approach, there would only be an RBA deficit debt on an RBA if the figure in the RBA precisely corresponded with all substantive and legal entitlements and obligations of the taxpayer. That would subvert the obvious purpose of s 8AAZH(1).

54. The Commissioner's construction is not supported by the "evidentiary provisions" in ss 8AAZI and 8AAZJ: cf AS [32]-[33]. Each of those provisions is directed to documentary evidence of the RBA, not the RBA itself. Section 8AAZI is directed to the evidentiary significance of an "RBA statement" (as defined in s 8AAZI(2)). Section 8AAZJ is directed to the evidentiary significance of a "Commissioner's certificate" (as defined in s 8AAZJ(2)). The present issue is whether the RBA itself has legal significance, not whether documentary evidence of the RBA has legal significance.

55. The Commissioner is not assisted by the reference in the 1998 EM (at [1.118]) to "[t]he nature of a *tax debtor's* liability for an RBA tax debt" as being "of the same nature as their liability for the *primary tax debts* that have been allocated to the RBA": cf AS [32]. That section of the 1998 EM was directed to explaining s 8AAZH, which stated that an RBA deficit was "a debt due to the Commonwealth by the tax debtor", "payable to the Commissioner" and "may be recovered in a court of competent jurisdiction …". The point of [1.118] of the 1998 EM was not that an RBA tax debt is one and the same as the primary tax debt; the point was that it attracted the same enforcement mechanisms. If anything, [1.118] cuts against the Commissioner's position: if allocation to an RBA did

not do any work that was not already done by the imposition of the underlying tax debt, there would be no need to create a separate enforcement regime in s 8AAZH.

Parliamentary control of expenditure and the Auckland Harbour principle

56. The submissions at AS [39]-[43] are not in point. The Full Court's approach does not lead to expenditure which has not been authorised by Parliament. Section 8AAZLF(1) confers statutory authority to refund an "RBA surplus". The issue is not whether there is statutory authority to refund RBA surpluses; it is as to the meaning of RBA surplus and whether such a surplus exists in the first place.

Practical implications

57. The Full Court's construction does not create a real risk that the Commonwealth or taxpayers will be exposed to enormous liability (from erroneously applied credits or debts): cf AS [45]-[46]. The Commissioner does not suggest that difficulties have ever arisen from treating the RBA as authoritative as to what it says. Nor does the Commissioner clearly disavow Steward J's suggestion at FC [165] that errors could be corrected by filing GST returns or issuing assessments: cf AS [46]. In any event, whether by reason of s 33 of the *Acts Interpretation Act 1901* (Cth) or by implication, the TAA must be read as giving authority to revoke an erroneous decision to apply an amount to a RBA upon the error being appreciated.

58. It is the Commissioner's approach which has substantial adverse practical implications, for on his view the balance shown on the RBA is of no real assistance to either the Commissioner or taxpayers.

Part VI: Notice of contention

Introduction

59. By Notice of Contention dated 16 July 2020, Travelex asserts:

> The Court erred in failing to find that the Commissioner had, on or around 28 June 2012, made an assessment that there was a negative net amount for the November 2009 tax period of $111,269 (being $149,020 less $37,751) as at 16 December 2009.

60. The Commissioner does not dispute that, had there been an assessment of a negative net amount, that would be sufficient to support the primary judge's orders. The Commissioner does, however, dispute that there was an assessment.

The Commissioner made an assessment

61. At 28 June 2012, s 105-5 of the Schedule to the TAA stated:

> (1) The Commissioner may at any time make an assessment of:
>
> (a) your *net amount, or any part of your net amount, for a *tax period …

62. Section 105-20 provided for the Commissioner to give a notice of assessment as soon as practicable after an assessment was made, but stated that "failing to do so [did] not affect the validity of the assessment".

63. "Assessment" in s 105-5 bore its well-established revenue law meaning, subject to s 105-20. Accordingly, the Commissioner exercises his or her power to make an assessment upon "the completion of the process by which the provisions of the Act relating to liability to tax are given concrete application in a particular case": *Commissioner of Taxation v Australian Building Systems Pty Ltd (in liq)* (2015) 257 CLR 544 at [48] (Gageler J), citing *Batagol v Federal Commissioner of Taxation* (1963) 109 CLR 243 at 252. The power in s 105-5(1) was exercised when the Commissioner took the factual step of completing the process by which the provisions of the Act relating to liability to tax are given concrete application in a particular case. Whether a step is or is not an assessment is to be determined as a matter of substance. The Commissioner does not need to give it the label "assessment" in order for it to be an assessment.

64. In this case, the Commissioner took the factual step of assessing. On 29 September 2010, the High Court handed down its decision in *Travelex Limited v Commissioner of Taxation* (2010) 241 CLR 510. On the basis of that decision, Travelex calculated that, for the November 2009 tax period, Travelex was entitled to a refund of $149,020: ABFM 61 [13]. By letter dated 8 June 2012, Travelex wrote to the Commissioner notifying the Commissioner of Travelex's entitlement to a refund of $149,020 for the November 2009 period: ABFM 61 [14], 67-69. The Commissioner received that letter on 12 June 2012: ABFM 61 [14].

65. Having received Travelex's notice, on 28 June 2012, "[t]he Commissioner allocated the amount of $149,020" to Travelex's RBA "as a credit amount": ABFM 61 [16]. "The allocation was recorded" on the document which appears at ABFM 70: ABFM 61 fn 19. The document at ABFM 70 records the following:

28 Jun 2012		- Amended self assessed amount(s) for	$0.00			

		the period ended 30 Nov 09				
	16 Dec 2009	- Goods and services tax		$149,020.00	$2,373,544.86	CR

66. Thereafter, on 3 July 2012, the Commissioner sent to Travelex a document which stated that the "total amount of the activity statement" for the period 1 November 2009 to 30 November 2009 had "been changed from $37,751DR to $111,269Cr and this resulted in a credit adjustment of $149,020 for this period": ABFM 62 [20].

67. The natural inferences from these events are these: the Commissioner received a claim by Travelex for a credit of $149,020, determined that Travelex was in fact entitled to the credit claimed with the result that there was a net amount for the November 2009 period of negative $111,269 and gave concrete application to the determination by allocating the credit to Travelex's BAS. That was an assessment. The Commissioner asserts that he did not make an assessment but has adduced no evidence to deny that he in fact did so. Further, if it be necessary, the Commissioner's letter of 3 July 2012 was a notice of his assessment. And, again, the Commissioner has adduced no evidence to deny that he in fact gave notice of his assessment.

68. That it was not in dispute below that there was no assessment is beside the point: cf AS [51]. There was no reason for Travelex to contend that there had been an assessment in circumstances where it was *also* common ground that there was an "RBA surplus" at the relevant time.

69. It is not necessary for the Commissioner to think that he is making an assessment in order for him in fact to make an assessment: cf AS [52]. Whether the Commissioner in fact exercised the power under s 105-5 turns on what the Commissioner did, not on what the Commissioner's officers thought they were doing. As has been consistently held, a "mistake as to the source of authority [does not] take the exercise of discretion beyond the statutory authority which the decision-maker actually has": *Shrestha v Minister for Immigration and Border Protection* (2018) 264 CLR 151 at [11] (Kiefel CJ, Gageler and Keane JJ); see also *Australian Education Union v Department of Education and Children's Services* (2012) 248 CLR 1 at [34] (French CJ, Hayne, Kiefel and Bell JJ); *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513, 618 (Gummow J) (referring to the "settled principle that an act purporting to be done under one source of power may be supported under another statutory power").

70. Nothing in *Pintarich v Deputy Commissioner of Taxation* (2018) 262 FCR 41 at [141]-[142] stands for the proposition that an administrative decision-maker cannot unwittingly make an administrative decision: cf AS [52]. All that case stands for is that the making of a decision (rendering a decision-maker functus) ordinarily involves both a conclusion and an overt act. Here, there was both: the Commissioner reached a conclusion that there was a negative net amount of $111,269 for the November 2009 quarter and engaged in an overt act reflecting that conclusion by allocating an amount to the BAS and sending a letter to Travelex confirming the Commissioner's view on 3 July 2012.

71. In any event, this is not a case where the Commissioner has unwittingly made an administrative decision: cf AS [52]. There is no doubt the Commissioner made a series of decisions, for example, the decision to allocate the credit to Travelex's RBA. There is no evidence that the Commissioner "was not purporting" to make an assessment (cf AS [52]) and it is not open to the Commissioner to assert that, if he did assess, he did so only unwittingly.

72. The Commissioner misstates at AS [52] the principle referred to in *Federal Commissioner of Taxation v Wade* (1951) 84 CLR 105 at 116 (***Wade***). The principle referred to in *Wade* was not that "an assessment made by the Commissioner under one section cannot be supported as an assessment made under another section": cf AS [52]. The principle referred to in *Wade* was, in terms, that "where there are two provisions of an assessment act, each giving the commissioner a power to make an assessment, and each creating a liability to tax in the event of the power it confers being exercised, an assessment made in exercise **only** of the power given by one of those sections cannot be supported as being effective under the other": at 116 (emphasis added). The Commissioner omits the emphasised word in his articulation of the principle and, with the emphasised word, the principle is self-evidently true. It is not necessary that there be a notice of an assessment before there can be an assessment under s 105-5(1): cf AS [53]. Section 105-20 expressly distinguishes the power to issue a notice of assessment from the power to make an assessment: the Commissioner is only obliged to give notice of assessment "after the assessment is made". Further, as indicated, failure to perform the duty to give a notice of assessment expressly "does not affect the validity of the assessment": see s 105-20(1). A notice of assessment cannot be necessary in law to complete an assessment if failure to issue the notice does not affect the validity of the assessment. The statement in s 105-20(1) that "failing to do so does not affect the validity of the assessment" applies to the

whole of the duty imposed by s 105-20, not just the *time* within which the duty must be performed. There is no textual basis for the Commissioner's submission to the contrary: cf AS [53].

73. *Batagol v Federal Commissioner of Taxation* (1963) 109 CLR 243 at 252 and *FCT v Futuris Corp Ltd* (2008) 237 CLR 146 at [2] and [49] concerned the provisions of the ITAA 1936, not the TAA. The ITAA 1936 did not include an express statutory directive that failure to give a notice of assessment did not affect the validity of the assessment: cf s 105-20(1). In *Batagol* at 253, Kitto J pointed out that s 174 of the ITAA 1936 departed from its predecessor, the *Income Tax Assessment Act 1922* (Cth),[3] the latter of which *did* include an equivalent to s 105-20. Of the 1922 Act, Kitto J observed that the "scheme … as regards assessment was much less clearly marked than is the scheme" of the 1936 Act: at 253. Nor did the ITAA 1936 include any equivalent to s 105-15 of the TAA, which (inter alia) expressly made a taxpayer's liability to pay indirect tax and the Commissioner's obligation to pay net amounts not depend on the making of an assessment. The different conclusion in relation to the 1936 Act follows from the fact that the "essential character" of an income tax assessment is that it *creates* a tax liability of a certain amount: *Batagol* at 252.9. That was not the essential character of an assessment under Pt 3-10 of the TAA. The essential character of an assessment under those provisions was not to create rights and liabilities, but to engage the "conclusive evidence" provision in s 105-100 and to allow the taxpayer to invoke the review and appeal mechanisms in Part IVC of the TAA: s 105-40.

74. Further, here there were more than "mere internal administrative acts of the Commissioner": the Commissioner allocated an amount to Travelex's RBA (an "act in the law", if that be necessary: cf AS [55]) and confirmed the basis of that allocation by the letter of 3 July 2012, thereby bringing to Travelex's attention the assessment.

Further, the Commissioner has not otherwise established that there was no "substantive and legitimate entitlement"

75. Further, the Commissioner has not established an essential premise of his case, namely that Travelex was not "substantively and legitimately entitled under a taxation law" to the

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[3] The former s 40 of the *Income Tax Assessment Act 1922* (Cth) stated: "(1) As soon as conveniently may be after an assessment is made the Commissioner shall cause notice in writing of the assessment to be given to the person liable to pay the income tax. (2) The omission to give any such notice shall not invalidate the assessment".

credits which the Commissioner applied to the running balance account to produce the RBA Surplus: cf AS [18], [19], [26].

76. The Commissioner's point is that the amounts allocated by the Commissioner to the RBA were not equal to or less than the amount of a "credit" within the meaning of the definition in s 8AAZA of the TAA. Although he does not expressly submit that this is so, his point involves the proposition that the amount was not an "amount that the Commissioner must pay to [Travelex] under a taxation law."

77. On the available material, the Commissioner was subject to a relevant obligation as at 16 December 2009.

78. The Commissioner does not dispute that Travelex had under-claimed input tax credits (arising from creditable acquisitions) for the November 2009 tax period in an amount of $149,020. Nor does the Commissioner dispute that, for the November 2009 tax period, after the GST payable by Travelex (under s 7-1 of the GST Act) was set off against Travelex's entitlements to input tax credits, there was a balance in Travelex's favour of $111,629. The Commissioner hardly could dispute these matters: it was the fact of Travelex's under-claim which led the Commissioner to allocate $149,020 to Travelex's RBA on 28 June 2012, leaving a balance in Travelex's favour of $111,629 for the November 2009 tax period.

79. Underlying all of this was that, in respect of the November 2009 tax period, Travelex had input tax credits. And, it is submitted, Travelex had an entitlement to those credits under the GST Act. That entitlement was such as to give rise to a "credit" within the meaning of s 8AAZA.

80. The source of that entitlement was s 11-20 of the GST Act which stated "[y]ou are entitled to the input tax credit for any *creditable acquisitions that you make".

81. The entitlement given by s 11-20 was qualified by s 7-5 of the GST Act. Section 7-5 stated:

> Amounts of GST and amounts of input tax credits are set off against each other to produce a *net amount for a tax period (which maybe altered to take account of *adjustments).

82. The effect of s 7-5 is that, at the end of a tax period, there is an automatic, self-executing statutory set-off as between amounts of GST (payable under s 7-1) and input tax credits (in respect of which there is an entitlement under s 11-20). The result of that automatic

statutory set-off is to produce a net amount. That net amount owes its existence to s 7-5 and it exists before the taking of any further step, such as the lodgment of a BAS or the making of an assessment by the Commissioner.

83. Section 7-15 of the GST Act operates on the "net amount" referred to in s 7-5. Section 7-15 states:

> The *net amount for a tax period is the amount that the entity must pay to the Commonwealth, or the Commonwealth must refund to the entity, in respect of the period.

84. The effect of s 7-15 is to impose an obligation to pay to an entity a negative net amount which results from the statutory set-off effected by s 7-5. And that obligation exists before (and irrespective of) any subsequent lodgement of a BAS. The obligation arises upon the completion of the relevant tax period.

85. The effect of lodging a BAS is that the amount worked out in the BAS "is treated as your net amount for the tax period": s 17-15(1). That is a limited statutory deeming. It cannot mean that the amount worked out in the BAS is your net amount irrespective of other circumstances. For example, it cannot mean that the amount so worked out is your net amount even if the Commissioner later assesses a different amount. And, in Travelex's submission, it does not mean that the amount worked out in the BAS is your net amount *even if* on the proper analysis of the law and the facts, the net amount is different. So, for example, if a BAS reflects an understanding of the law which has been shown to be incorrect by a decision of the High Court, s 17-15(1) does not require the parties to act as if the High Court's decision was wrong. It would require compelling statutory language before one would read the GST Act in that way. The circumstances of this case show the potential injustice: Travelex submitted its BAS at a time when it was seeking to appeal to the High Court to establish that the basis on which its BAS's had been submitted was erroneous; the High Court ultimately agreed with Travelex's position; Parliament cannot have intended that something more was needed for the High Court's decision to confirm that the BAS did not reflect the substantive and legitimate entitlements of Travelex. Properly understood, s 17-15(1) does no more than render the amount worked out in the BAS prima facie evidence of the net amount.

86. How does this apply in the present case? In respect of the November 2009 tax period, Travelex had an entitlement to input tax credits arising from creditable acquisitions: s 11-20. The Commissioner does not dispute that. Upon the completion of the November

2009 tax period, there was an automatic statutory set-off between Travelex's input tax credits and the GST payable by Travelex, resulting in a net amount of $111,269 in Travelex's favour: s 7-5. The Commissioner does not dispute that, if there was such a set-off, the net amount would have been $111,269 (although he may dispute that there was an automatic set-off). There was an obligation to pay the amount of $111,269: s 7-15. There was, accordingly, a "credit" within the meaning of the TAA equal in amount to the under-claimed input tax credits. The Commissioner did not mistakenly allocate an amount to the RBA. To the contrary, he was correctly reflecting the amount that Travelex was entitled to under the GST Act, just as he would do if he were to choose to assess.

87. It follows that the first sentence of Derrington J's reasons at FFC [82] is only partially correct. The parties were also subject to the rights and obligations for which ss 7 and 11 of the GST Act provided. The existence of those rights and obligations was expressly acknowledged by s 105-55 of the Administration Act which contemplated that a taxpayer might be entitled to claim and the Commissioner might be obliged to pay or allocate an input tax credit independently of the issue of an assessment. Paragraph [27] of *Multiflex*, set out by Derrington J at FFC [50] recognises as much.

88. The scope of the Commissioner's contention as to what constitutes a "substantive and legitimate entitlement" is unclear. Travelex will seek leave to amend its Notice of Contention to add the contention that Travelex's entitlement to claim input tax credits in relation to the relevant period gave rise to a "credit" within the meaning of s 8AAZA of the Administration Act.

Part VII: Oral Argument

89. Travelex estimates that it will require 1.5 hours for the presentation of its argument.

Dated 10 September 2020

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Annexure

List of Constitutional Provisions, Statutes and Statutory Instruments

Statutes

Acts Interpretation Act 1901 (Cth) as at 30 June 2012

A New Tax System (Goods and Services Tax Act) 1999 (Cth) as at 30 June 2012

A New Tax System (Pay As You Go) Act 1999 (Cth) (as made)

Income Tax Assessment Act 1922 (Cth) as at 6 August 1934

Income Tax Assessment Act 1936 (Cth) as at 30 June 2012

Income Tax Assessment Act 1997 (Cth) as at 30 June 2012

10 *Taxation Administration Act 1953* (Cth) as at 30 June 2012

Taxation Laws Amendment Act (No 3) 1999 (Cth) (No 11 of 1999) (as made)

Taxation Administration Act 1953 (Cth) as at 30 June 2012

Bills

Taxation Laws Amendment Bill (No 5) 1998 (Cth)

A New Tax System (Tax Laws Amendment) Bill (No 1) 1999 (Cth)