HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	S116/2020
File Title:	The Commissioner of Taxation of the Commonwealth of Austr
Registry:	Sydney
Document filed:	Form 27A - Appellant's submissions
Filing party:	Appellant
Date filed:	13 Aug 2020

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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

APPELLANT'S SUBMISSIONS

Part I: CERTIFICATION

1. We certify that this submission is in a form suitable for publication on the internet.

Part II: CONCISE STATEMENT OF THE ISSUES

2. The issue in this appeal is:

(a) whether the act of the appellant (**Commissioner**) in crediting an amount to an entity's Running Balance Account (**RBA**) established pursuant to the *Taxation Administration Act 1953* (Cth) (**Administration Act**) generates, by its own force, an "RBA surplus" for the purposes of s8AAZLF(1) of the Administration Act giving rise to an obligation to refund the RBA surplus and to pay interest under s12AA of the *Taxation (Interest on Overpayments and Early Payments) Act 1983* (Cth) (**Overpayments Act**), even if the credit is a mistake and does not reflect any entitlement of the entity under a "taxation law" as defined in the Administration Act, as the majority of the Full Court held (FC[165]; CAB 90); or

(b) whether, as held by Derrington J, an obligation on the part of the Commissioner to refund a "RBA surplus" under s8AAZLF(1) of the Administration Act and to pay interest under s12AA of the Overpayments Act on the RBA surplus only arises when the payments and credits to which the entity is actually entitled under a

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taxation law that have been allocated to the RBA exceed the primary tax debts allocated to the RBA (FC[59] and [80]).

3. The Notice of Contention raises the question whether the Commissioner made an assessment for the November 2009 tax period on or around 28 June 2012, a matter not raised before the primary judge or the Full Court on appeal.

Part III: SECTION 78B NOTICE

4. The appellant has considered whether any notice should be given in compliance with s78B of the *Judiciary Act 1903* (Cth) and considers that no such notice is required.

Part IV: CITATIONS

5. *Travelex Limited v Commissioner of Taxation* [2018] FCA 1051 (**PJ**), and *Commissioner of Taxation v Travelex Limited* [2020] FCAFC 10 (**FC**).

Part V: STATEMENT OF FACTS

Background facts

6. From 1 July 2000 Travelex has been registered under Division 25 of the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) (**GST Act**) and lodged GST returns for monthly tax periods (FC[8]-[9]; CAB 50).

7. The business of Travelex included the operation of an enterprise (as defined in s 9-20(1) of the GST Act) in the course of which it, for consideration, supplied foreign currency from, inter alia, business premises on the departure side of the customs barrier at international airports in Australia (FC[11]; CAB 50). On 16 December 2009, Travelex lodged its Business Activity Statement (**BAS**) and GST return for the November 2009 tax period (**November 2009 BAS**) reporting a net amount of $37,751 (FC[13]; CAB 50; AFM 12). This amount was payable to the Commissioner on 21 December 2009 (pursuant to ss17-5 and 33-5(1) of the GST Act (FC[14]; CAB 50). The next day the Commissioner allocated a debit in that amount to Travelex's "Integrated Client Account" which is an RBA for the purposes of Part IIB of the Administration Act (FC[10], [16]; CAB 50, 51; AFM 16).

8. The November 2009 BAS was prepared on the basis that the supply of foreign currency by Travelex was not GST-free (FC[15]; CAB 50). On 29 September 2010, this Court

delivered judgment and made orders in *Travelex Ltd v FC of T* (2010) 241 CLR 510 (***Travelex***) declaring to the effect that a certain supply of foreign currency by Travelex in November 2007 was GST-free. This Court made no determination in relation to the veracity of the November 2009 BAS given by Travelex (FC[17]; CAB 51).

9. Following the judgment of this Court in *Travelex,* by letter dated 8 June 2012 and received on 12 June 2012, Travelex's accountants wrote to the Commissioner asking the Commissioner to (in effect and *inter alia*) amend the November 2009 BAS to substitute a net amount of $111,269 (expressed as a negative) for the reported net amount of $37,751 (expressed as a positive) with a resultant refund of $149,020 for "under claimed input tax credits" (FC[21]; CAB 51-52; AFM 19).

10. On 28 June 2012, the Commissioner allocated an amount of $149,020 to Travelex's RBA with an "effective date" of 16 December 2009 (FC[24]; CAB 52; AFM 26). On 3 July 2012, the Commissioner advised Travelex to the effect that he had amended the November 2009 BAS as requested and allocated a credit adjustment of $149,020 to Travelex's RBA for that period (FC[28]-[29]; CAB 53; AFM 29) (**November 2009 Amount**). On 6 July 2012, the Commissioner paid Travelex $149,020 (FC[31]; CAB 53) and on 19 September 2012 he paid interest on that amount pursuant to s12AA of the Overpayments Act for the period 29 June 2012 to 6 July 2012 (FC[32]; CAB 53).

Procedural history

11. By purporting to amend Travelex's BAS and GST return for the November 2009 tax period and then reflecting that amendment in an allocation to the entity's RBA, the Commissioner applied what the primary judge described as a "long standing administrative practice" (PJ[86]; CAB 26).

12. Before the primary judge the legal premise of that "long standing administrative practice" was not put in issue by the parties. That is, there was no dispute as to (a) the existence of the Commissioner's power to accept and process an amended BAS; (b) the efficacy of such an amended BAS to generate amounts payable or refunds due under GST Act; and (c) the power of the Commissioner to give effect to that refund or amount payable by making allocations to an entity's RBA. This was reflected in the Statement of Agreed Facts (**SOAF**) put before the primary judge (PJ[21]-[29]; CAB 13-14; AFM 56). Up to and

before the primary judge the matter generally proceeded on the assumption that Travelex's entitlement to a refund had crystallised (FC [5]; CAB 49).

13. The dispute between the parties before the primary judge was whether (as the Commissioner contended) Travelex's request of 8 June 2012 (received on 12 June 2012) to amend the November 2009 BAS was a notification which was required for the refund under s8AAZLG of the Administration Act and which engaged par. (b) of the definition of "RBA interest day" in s12AF of the Overpayments Act and thus fixed the "RBA interest day" (and the accrual of interest under s12AA of the Overpayments Act) at 26 June 2012 – being 14 days after the Commissioner received the notification (PJ[61]-[63]; CAB 20-21).

14. The primary judge answered that question in the negative because he rejected the legal premise of the Commissioner's administrative practice on which the parties had hitherto proceeded; that is, the primary judge rejected the proposition that the GST Act and/or the Administration Act allowed for, let alone required, an entity to give the Commissioner an amended BAS (PJ[87], [89]; CAB 26, 27).

15. The primary judge concluded to the effect that the liability of an entity to pay a positive net amount to the Commissioner, or its entitlement to a refund of a negative net amount under the GST Act, arose from the BAS as and when lodged. The means by which an adjustment to the liability or entitlement as reflected in the BAS as lodged could be made were the making of an assessment under s105-5 of Schedule 1 of the Administration Act, the making of a determination under s17-20 of the GST Act or an "adjustment event" under Div 19 of the GST Act. There was no suggestion before the primary judge that any of these had occurred in this case (PJ[34]-[43]; CAB 15-17). The primary judge rejected the contention that this conclusion was destructive of Travelex's entitlement to any refund or interest for the November 2009 tax period because the Commissioner had accepted he was liable to pay Travelex a refund as a result of this Court's judgment in *Travelex* and chose to administratively process it as a purported amendment to the November 2009 BAS (PJ[97]; CAB 28).

16. The Full Court unanimously upheld the primary judge's conclusion that the Commissioner had no power to amend a BAS (or accept an amended BAS) and the method under the GST Act for adjusting an entity's liability to pay a positive net amount or an entitlement to a refund of a negative net amount from that disclosed by the BAS as lodged was by the

Commissioner making an assessment under s105-5 of Schedule 1 to the Administration Act or by the entity claiming unclaimed input tax credits in a BAS for a later tax period under s29-10(4) of the GST Act within the four year time period specified in s93-5(1) of the GST Act (FC[86], [95]-[98] and FC[157] and [1]; CAB 67, 69-70, 88, 47).

17. The result of this conclusion was that the Commissioner's contention that an amended BAS was a required notification referred to in par. (b) of the definition of "RBA interest day" in s12AF of the Overpayments Act delaying the accrual of interest under s12AA of the Overpayments Act was also unanimously rejected (FC[124]-[130] and FC[157] and [1]; CAB 77-79, 88, 47). Likewise, the Commissioner's contention that s105-55 of Schedule 1 of the Administration Act imposed a notification requirement which engaged par. (b) of the definition of "RBA interest day" in s12AF of the Overpayments Act was unanimously rejected (FC[150] and FC[157] and [1]; CAB 85, 88, 47) as was the contention that Travelex's failure to lodge the May 2012 BAS on time engaged par. (b) of the definition of "RBA interest day" (FC[151]-[152] and FC[157] and [1]; CAB 85-86, 88, 47).

18. The point of divergence between the majority of the Full Court and Derrington J lay in the consequence of the conclusion that the Commissioner had no power to amend a BAS (or accept an amended BAS) and that, absent an assessment, the entitlement of an entity to a refund of a (negative) net amount or a liability to pay a (positive) net amount under the GST Act in relation to a tax period was determined by the BAS as lodged. For Derrington J that conclusion defeated Travelex's claim to interest on the November 2009 Amount. This was because Travelex's November 2009 BAS revealed no entitlement to a refund under the GST Act which could enter into the calculation of an "RBA surplus" within the meaning of s8AAZA of the Administration Act which was refundable under s8AAZLF(1) of the Administration Act and on which interest could accrue under s12AA of the Overpayments Act and nothing was ever effectively done to change the position as disclosed by the November 2009 BAS. This was so notwithstanding the Commissioner's credit of the November 2009 Amount to Travelex's RBA on 28 June 2012 and its payment. This is because on the proper construction of Part IIB of the Administration Act, an "RBA surplus" on which interest could accrue under s12AA of the Overpayments Act could only relevantly arise by the allocation of credits to an RBA to which the entity was substantively and legitimately entitled under a taxation law and not by the mere act of allocation by the Commissioner (FC[59], [80]-[86], [102]-[112]; CAB 59, 65-67, 71-74).

19. In contrast, Steward J (with whom Kenny J agreed) concluded that it did not matter that Travelex's substantive position in relation to a refund of GST had never been effectively changed from that disclosed in the November 2009 BAS and that it was "of no moment" that there was no return filed or assessment issued to support the existence of the RBA surplus (FC[158] and [164]; CAB 88, 90). Rather, Steward J concluded that the "historical fact" of the Commissioner's allocation of a credit of $149,020 to Travelex's RBA on 28 June 2012 was sufficient and effective to reveal an "RBA surplus" within the meaning of s8AAZA of the Administration Act which the Commissioner was obliged to refund under s8AAZLF of the Administration Act and on which interest accrued under s12AA of the Overpayments Act. This was so whether or not the credit was one to which Travelex was substantively and legitimately "entitled under a taxation law" and even if it was a mistake (FC[161]-[166], [169]; CAB 89-92). Steward J concluded that the Commissioner's nomination of the "effective date" of 16 December 2009 to the credit of $149,020 to Travelex's RBA made on 28 June 2012 had the consequence that interest commenced to run on that credit under s12AF of the Overpayments Act 14 days after that date (FC[172]; CAB 92-93).

Part VI: ARGUMENT

Summary of Commissioner's argument

20. The Commissioner accepts the concurrent conclusions of the primary judge and the Full Court to the effect that there was no power in the GST Act or the Administration Act to amend a BAS (or accept an amended BAS) and that the "long standing administrative practice" described by the primary judge (PJ[86]; CAB 26) and employed by Travelex and the Commissioner in this case (see par. 11 above) lacked a statutory foundation. The Commissioner also accepts, as the Full Court also unanimously concluded, that Travelex's substantive liability to pay GST (or receive a refund of negative net amount) for the November 2009 tax period under the GST Act remains as disclosed by the November 2009 BAS (FC[86], [157], [1]; CAB 67, 88, 47).

21. The Commissioner contends that the consequence of these conclusions was correctly identified by Derrington J: Travelex has never become entitled to a "credit" for November 2009 capable of generating an "RBA surplus" which the Commissioner was obliged to refund under s8AAZLF(1) of the Administration Act and on which interest could accrue

under s12AA of the Overpayments Act. The Overpayments Act was therefore never engaged (FC[112]; CAB 74).

22. The conclusion of the majority to the contrary is unsupported by the text and context of Part IIB of the Administration Act and the Overpayments Act, contrary to the object and purpose of Part IIB of the Administration Act and in tension with other intermediate appellate court authority and fundamental principles relating to the creation and enforcement of revenue liabilities and disbursement of public moneys. Finally, the conclusion of the majority has significant administrative implications for the Commissioner and the Commonwealth, undermines the efficacy and integrity of the RBA system and is apt to generate unintended and capricious results.

Text and context of Part IIB of the Administration Act and the Overpayments Act

23. The relevant provisions of Part IIB of the Administration Act and the Overpayments Act are set out by Derrington J at FC[52]-[64]; CAB 58-61. Anterior to those are the relevant provisions of the GST Act (set out and discussed at FC[33]-[44]; CAB 53-56), in particular s33-5 of the GST Act (which imposed an obligation on a taxpayer to pay a positive net amount for a tax period to the Commissioner) and s35-5 of the GST Act (which imposed an obligation on the Commissioner to pay a negative net amount for a tax period to the taxpayer).

24. On the terms of the GST Act as it stood at the relevant time, the content of the obligation of a taxpayer to pay a (positive) net amount or receive a refund of a (negative) net amount was determined by the content of the BAS lodged by the taxpayer for the tax period, subject to any assessment made by the Commissioner under s105-5 of Schedule 1 of the Administration Act which necessarily superseded the amount reported in the BAS (FC[49]-[50]; CAB 57-58); *FC of T v Multiflex Pty Limited* (2011) 197 FCR 580 (***Multiflex***) at [25]-[27] (special leave refused: *Commissioner of Taxation v Multiflex Pty Limited* [2011] HCA Trans 344).

25. As the Notes to s35-5 of the GST Act indicate, the provisions of the GST Act creating the entitlement to refunds of (negative) net amounts are applied by Part IIB of the Administration Act. Div 3 of Part IIB addresses three kinds of amounts – payments, "credits that an entity is entitled to under a taxation law" and an "RBA surplus" - and directs how the Commissioner is to treat them (s8AAZL(1) and (2)). Both "credit" and "RBA

surplus" are defined in s8AAZA (see FC[103]-[104]; CAB 71). The Commissioner must either "allocate" such an amount to an RBA and then "apply" those amounts to tax debts allocated to the RBA or general interest on those tax debts (s8AAZLA, "Method 1"); or, "apply" the amount to non-RBA tax debts and then "allocate" the amount to the RBA (s8AAZLB, "Method 2"). Div 3A of Part IIB deals with refunds of "RBA surpluses and credits". So much of an "RBA surplus" or "credit" in an entity's favour not allocated or applied under Div 3 must be refunded to the entity (s8AAZLF(1)).

26. As Derrington J pointed out at FC[59] (CAB 59) the words of Part IIB of the Administration Act are "pellucid" insofar as they indicate that the "credits" which the Commissioner is empowered and obliged to allocate and apply to an RBA, and which are capable of generating an "RBA surplus" which the Commissioner is obliged to refund under s8AAZLF, are credits to which the entity is "substantively and legitimately entitled" under a taxation law (see also, FC[102]; CAB 71). The definition of "credit" and par. (b) of the definition of "RBA surplus" speak the language of legal right or obligation sourced from "a taxation law".[1] "Credits" are defined as amounts the Commissioner "must pay to a taxpayer under a taxation law" (s8AAZA, emphasis added). An "RBA surplus" is constituted by the excess of payments and "credits to which the entity is entitled under a taxation law …allocated to the RBA" over "primary tax debts" allocated to the RBA (s8AAZA, emphasis added). The definition of "primary tax debt" in s8AAZA refers to "any amount due to the Commonwealth directly under a taxation law …" (emphasis added). Thus both limbs of the definition of "RBA surplus" refer to debts or credits having their origin in other provisions of the revenue law of the Commonwealth.

27. The same language of legal entitlement is found in s8AAZL(1)(b) of the Administration Act. That section identifies the credits which can and must be allocated to an RBA in order to reveal an "RBA surplus" as being credits that "an entity is entitled to under a taxation law". It is also found in s12AA of the Overpayments Act which generates an entitlement to interest where the Commissioner has allocated a "BAS amount to an RBA" and a refundable "RBA surplus" under s8AAZLF(1) is revealed. "BAS amount" is defined as (relevantly) a "credit that arises directly under the BAS provisions" and the "BAS

[1] "Taxation law" is defined in s995-1(1) of the *Income Tax Assessment Act 1997* (Cth) and that definition is applied to the Administration Act by s2.

provisions" include the GST Act (FC[54; CAB 58-59]).[2] A net amount of GST greater or less than zero under the GST Act is a "BAS amount" for the purposes of s 12AA (FC[54]; CAB 58-59).

28. The text of Part IIB of the Administration Act and the Overpayments Act leaves no room for Steward and Kenny JJ's preferred view that an "RBA surplus" may arise from the "historical fact" of the Commissioner allocating amounts to an RBA whether or not those amounts reflect substantive entitlements under a taxation law and even if they are a mistake (FC[164]-[166]; CAB 90-91). As Derrington J correctly observed at FC[59] (CAB 59) "credits" which may give rise to an "RBA surplus" have two characteristics: first, they are credits to which the entity is "entitled under a taxation law", and, second, they have been allocated to the RBA. The view of Steward and Kenny JJ that the definition of "RBA surplus" in s8AAZA was to be read as "descriptive" of the credits which have in fact been allocated by the Commissioner (FC[165]; CAB 90) gave effect to the second requirement, but neglected the first.

29. The correct view was expressed by Derrington J at FC[80] (CAB 65), after a detailed analysis of Part IIB of the Administration Act, when his Honour observed that that "there is nothing to suggest that a surplus arises from a mere allocation – which creates a balance in an RBA in an entity's favour – if the allocation was wrongly made" (see also, FC [59]). The view of the majority to the contrary failed to give effect to the express language of the definition of "RBA surplus" in s8AAZA, failed to engage with the broader statutory language of Part IIB of the Administration Act and failed to observe the requirement frequently emphasised by this Court to begin and end with the relevant statutory text: *FC of T v Consolidated Media Holdings* (2012) 250 CLR 503 at [39].

30. At FC[165] (CAB 90) Steward J sought contextual support for his preferred view in s35-5(2) of the GST Act which his Honour construed as expressly contemplating that an RBA may contain errors and providing the Commissioner with a means of correction. However, properly understood, s35-5(2) is directed to a circumstance where a taxpayer has received a refund of a (negative) net amount consistently with a BAS lodged by the taxpayer which exceeds that which the taxpayer, on the true operation of the GST Act on the taxable facts, was "properly entitled". The effect of s35-5(2) is that once that proper entitlement is

[2] "BAS provisions" is defined in s995-1(1) of the *Income Tax Assessment Act 1997* (Cth) and that definition is applied to the Overpayments Act by s12AF.

established and given effect by subsequent assessment, the excess refund is treated as GST due for payment when paid or applied. This gives the Commissioner a method of recovery of the excess payment and a basis for the imposition of the general interest charge (see the Note to s35-5(2)). Contrary to Steward J's observation at FC[165] (CAB 90) s35-5(2) is not directed to a circumstance where entries in an RBA depart from a taxpayer's net amount as disclosed in a BAS; it does not indicate that an allocation of debits or credits to an RBA may be effective even if they find no reflection in substantive liabilities or entitlements under the taxation law; and thus, it lends no support to the majority's approach.

31. At FC[167]-[169] (CAB 91-92) Steward J sought further contextual support for his view of the construction of the definition of "RBA surplus" in s8AAZA (FC[164]; CAB 90) and in s8AAZH of the Administration Act. The latter section provides for the recovery of an "RBA deficit debt" by the Commissioner. However, the criterion of the liability created by s8AAZH is the existence of an "RBA deficit debt on a RBA at the end of a day" (emphasis added). The definition of "RBA deficit debt" (like the definition of "RBA surplus", "credit" and "primary tax debt": see par. 26 above) speaks the language of substantive legal rights and obligations arising from other taxation laws; not mere accounting entries in an RBA. An "RBA deficit debt" is constituted by a balance in favour of the Commissioner between amounts "due to the Commonwealth directly under a taxation law" (see definition of "*primary tax debt*" in s8AAZA, emphasis added); and, payments plus "credits to which the entity is entitled under a taxation law …allocated to the RBA" (emphasis added). Only an "RBA deficit debt" so constituted meets the definition; and thus, only an "RBA deficit debt" so constituted is recoverable under s8AAZH of the Administration Act. Accordingly, and contrary to the view of Steward J at FC [167] (CAB 91), s8AAZH does not indicate the legal efficacy of amounts in fact debited and credited to a taxpayer's RBA (emphasis added), but only those allocated to an RBA *and* which reflect substantive legal rights and obligations arising under a taxation law.

32. This view of the nature of the liability for the recovery of an "RBA deficit debt" created by s8AAZH of the Administration Act is confirmed by the evidentiary provisions in s8AAZI and s8AAZJ (which Steward J referred to at FC[168]-[171]; CAB 91-92). Section 8AAZI(1) (set out at FC[169]; CAB 91-92) in effect makes an "RBA statement" *prima facie* evidence that the "RBA was duly kept" (par. (a)) and "that the amount and particulars in the statement are correct" (par. (b)). Section 8AAZJ(1) makes a "Commissioner's certificate" *prima facie* evidence of (among other things) that a "specified amount was the

RBA deficit debt on the date of the certificate" (par. (d)). That would necessarily involve the "Commissioner's certificate" being *prima facie* evidence that the debts and credits which make up the balance in favour of the Commissioner constituting the "RBA deficit debt" substantively and legitimately arose under a taxation law (see par. 31 above). Thus, both s8AAZI and s8AAZJ of the Administration Act assume that in an action to recover an "RBA deficit debt" it is necessary to prove that the deficit appearing in the RBA reflected the correct balance of the taxpayer's liabilities and entitlements under the taxation laws. They facilitate *prima facie* (not conclusive)[3] proof of that fact. As Derrington J pointed out at FC[64] (CAB 61) they are evidentiary provisions of a facultative nature and point strongly against the suggestion that any liability of an entity arises merely because the Commissioner debits an amount to the RBA.

33. In contrast, on the approach of the majority of the Full Court, the liability of the taxpayer to pay an "RBA deficit debt" under s8AAZH(1) is completely constituted by *the fact* of a balance in an RBA in favour of the Commissioner. This is so whether or not the integers of that balance are correct in the sense that they correctly reflect the substantive rights and liabilities arising under the taxation laws (FC[168] and [170]; CAB 91, 92). On this view, the matters of proof to which s8AAZI(1)(b) and s8AAZJ(1) are directed would necessarily be immaterial to any action to recover an "RBA deficit debt". Moreover, the view of the majority of the Full Court that an action under s8AAZH is constituted by the mere fact of a deficit appearing in the entity's RBA is inconsistent with the definition of "RBA deficit debt" which is incorporated as a criterion of liability in s8AAZH (see par. 31 above).

Object and purpose of Part IIB of the Administration Act

34. The object of Part IIB of the Administration Act was to establish an accounting framework for the management, reporting and recovery of the variety of "revenue products" administered by the Commissioner which give rise to tax debts and to provide a parallel system of recovery permitting greater flexibility in the management of tax debts.[4] The extrinsic materials to the Bill which introduced the system of RBA described "[t]he RBA framework [as] … reflect[ing] an alternative presentation, in the form of an RBA, of the specific outstanding tax debts" of the taxpayer and characterised a taxpayer's liability for

[3] Compare, s 105-100 of Schedule 1 of the Administration Act which applies to both GST assessments and declarations and is relevantly indistinguishable from s 177(1) of the *Income Tax Assessment Act 1936* (Cth): *Deputy Commissioner of Taxation v Broadbeach Properties Pty Ltd* (2008) 237 CLR 473 at [33].
[4] Explanatory Memorandum to the *Taxation Laws Amendment Bill (No 5) 1998*, (**RBA EM**) [1.81]-[1.88].

an "RBA tax debt [as] … of the same nature as their liability for the primary tax debts that have been allocated to the RBA".[5]

35. Consistently with that object, in *H'Var Steel Services Pty Limited v DC of T* (2005) 59 ATR 5 (***H'Var Steel***) the Western Australian Court of Appeal characterised an "RBA deficit debt" as an auxiliary obligation created to facilitate collection of taxes which owe their existence to, and are imposed by, other legislation and thus not infringing s55 of the Constitution (at [13], [17] and [22]).[6] By parity of reasoning, the obligation on the Commissioner to refund an "RBA surplus" in s8AAZLF(1) of the Administration Act may be accurately characterised as an auxiliary obligation to refund created to facilitate refund entitlements that owe their existence to, and are imposed by, other legislation.

36. The description in s8AAZC(1) of the Administration Act of an RBA as a "system[..] of accounts for primary tax debts" does not import the proposition that entries into the account have independent legal force. The text of Part IIB of the Administration Act points firmly against that proposition (see pars. 23-33 above). For an RBA to be a system of accounts for primary tax debts, it must reflect the actual balance of the primary tax debts and credits; otherwise, it is not an account of them. The nature of an RBA as a parallel, but not separate, source of entitlements and liability is reflected in the two methods in ss. 8AAZLA and 8AAZLB (see par. 25 above) for the allocation and application of payments and "credits to which an entity is entitled under a taxation law" to (inter alia) the "tax debts" of the entity.[7]

37. By concluding that an entry in an RBA, unreflective of any substantive obligation or entitlement under other taxation laws and even made by mistake, can be effective to create an "RBA surplus" which is refundable under s8AAZLF(1) or an "RBA deficit debt" recoverable under s8AAZH (FC[166]-[168]; CAB 90-91), the majority of the Full Court decoupled the system of RBAs from the underlying taxation obligations and entitlements whose more effective and efficient administration the system of RBAs was established to facilitate. That approach stands counter to the conclusion of the Western Australian Court

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[5] RBA EM at [1.90] and [1.118].
[6] Applying the approach of Kitto J in *Moore v Commonwealth* (1951) 82 CLR 547 at 581.
[7] See also, Explanatory Memorandum to the *A New Tax System (Pay As You Go) Bill* 1999 at [3.18] "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**. … 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).

of Appeal in *H'Var Steel* and departs from the object and purpose of Part IIB of the Administration Act.

38. Moreover, the proposition (embraced by Steward J at FC[165]-[171]; CAB 90-92) that mere administrative accounting entries, unconnected with liabilities arising under positive taxation law and even if mistaken, can be effective to create revenue debts contravenes at least one of the four "canons" of taxation articulated by Adam Smith and referred to by Windeyer J in *Giris Pty Ltd v FC of T* (1969) 119 CLR 365 at 382 against arbitrary and uncertain taxation.[8] It is an unlikely one for Parliament to have embraced. As observed by Derrington J at FC[59] (CAB 59) it does not appear that the legislature intended that an entity is entitled to the payment of interest on an accounting surplus which has arisen by the accidental crediting to the RBA of amounts to which the entity was not entitled.

Parliamentary control of expenditure and the *Auckland Harbour Board* principle

39. At FC[109] (CAB 72-73) Derrington J observed the tension between (on the one hand) the proposition that administrative accounting entries, unreflective of any legitimate or substantive entitlement under a taxation law, could generate rights to refunds which accrued interest; and (on the other) the principle of parliamentary control of the withdrawal of funds from consolidated revenue: *Wilkie v Commonwealth* (2017) 263 CLR 487 at [60]-[61].

40. In *Auckland Harbour Board v R* [1924] AC 318 (***Auckland Harbour Board***) at 326 Lord Haldane articulated the principle by stating that "no money can be taken out of the consolidated Fund into which revenue funds have been paid, excepting under a distinct authorization from Parliament itself" (emphasis added, quoted with approval in *Brown v West* (1990) 169 CLR 195 at 205).[9] As Derrington J observed at FC[109] (CAB 73), if Parliament had intended that mere administrative entries in an RBA by the Commissioner, unreflective of substantive entitlements under a taxation law and even made by mistake, could generate an obligation by the Commissioner to make payments which accrued interest, that intention would have to be expressed in clear terms. There are no such clear

[8] A Smith, *Wealth of Nations*, Book V, Chapter II, Part II.

[9] Sub-section 16(1) of the Administration Act appropriates amounts the Commissioner is "required or permitted to pay to a person by or under a provision of a taxation law" other than a general administration provision or a prescribed provision. Like Part IIB of the Administration Act, s16 is concerned with amounts the Commissioner is substantively and legitimately obliged or enabled to pay under a provision of a taxation law.

terms in Part IIB of the Administration Act; on the contrary, the terms of Part IIB point clearly in the opposite direction (see pars. 23-33 above).

41. Parliamentary control of expenditure is allied to the further principle in *Auckland Harbour Board* to the effect that public funds disbursed without Parliamentary authorisation are recoverable, even if their disbursement was purportedly ratified by the executive government.[10] As observed by Viscount Haldane, "Any payment out of the consolidated fund made without Parliamentary authority is simply illegal and *ultra vires*, and may be recovered by the Government…" (at 326). That principle is reflected in s8AAZN of the Administration Act which provides for recovery of "administrative overpayments", being
10 defined as "an amount the Commissioner has paid … by mistake, being an amount to which the person is not entitled" (emphasis added). The language of legal entitlement used in s8AAZN is of a piece with the balance of Part IIB of the Administration Act (see pars. 26 to 29 above).

42. The approach of the majority of the Full Court turns the *Auckland Harbour Board* principle on its head. Rather than expenditure effected by the executive but unauthorized by Parliament being recoverable, under the Full Court's approach executive action (i.e., making entries in an RBA) unsupported by any substantive entitlement under the taxation laws enacted by Parliament, creates an enforceable call on public funds and a right to interest on those funds.

20 43. Further, where the Commissioner mistakenly refunds an "RBA surplus" which does not reflect an entity's substantive entitlement under the taxation law, on the majority's approach, the refund so paid would, simply because of the entry in the RBA, be legally effective and would not be an amount "to which the person is not entitled." The Commissioner would on this basis be unable to recover that payment under s8AAZN of the Administration Act and the *Auckland Harbour Board* principle (FC[171]; CAB 92). These consequences are unlikely to reflect a proper construction of Part IIB of the Administration Act and the Overpayments Act.

[10] Recognized in this Court in *NSW v Bardoplh* (1934) 52 CLR 455 at 471 (Evatt J), at 514 (Dixon J) at 522 (McTiernan J) and *Pape v FC of T* (2009) 238 CLR 1 at [59]-[60] (French CJ).

Practical implications

44. At FC[165] (CAB 90) Steward J asserted that if mistaken entries in an RBA (unreflective of substantive entitlements under taxation laws) did not create effective debts or entitlement to refunds the effectiveness of the RBA system would be "seriously undermine[d]". On the contrary, by severing the link between (on the one hand) RBAs, recoverable RBA deficit debts and refundable RBA surpluses (and the entitlement to interest thereon); and (on the other hand), the substantive and legitimate tax obligations and entitlements of the relevant entity arising under the taxation laws, the approach of the majority undermines the efficacy and integrity of the RBA system and is apt to generate unintended and capricious results.

45. For example, in the event of a mistaken allocation of a credit to an RBA (eg., a keying error or the allocation of an amount to the RBA of a different entity), the Commissioner and the Commonwealth revenue is, by reason of the majority's conclusion, exposed to a liability to pay the "RBA surplus" (plus interest) purportedly revealed by the erroneous credit with no clear method of remedying the error. The majority does not appear to contemplate a mere reversal of the credit. If the erroneous RBA surplus was actually refunded, the Commissioner may be unable to recover the erroneous payment for the reasons given in par. 43 above. By way of further example, in the case of a mistaken allocation of a primary tax debt revealing a purported "RBA deficit debt", a taxpayer would be exposed to an action to recover that (purported) tax debt without the capacity to defend the claim by showing that the balance in favour of the Commissioner in the RBA did not reflect its substantive tax liabilities arising under the taxation law.

46. Steward J suggested at FC[165] (CAB 90) that mistaken entries in an RBA could be corrected by filing GST returns or issuing assessments (and, presumably, not by simply reversing the erroneous entries). But in a case where there was no underlying error in the assessment or returns, the legislative authority to file GST returns or make assessments in order to generate taxation rights or obligations the purpose and effect of which is to cancel out erroneous RBA entries was not identified by Steward J and is, at best, doubtful. In any event, such returns or assessments would not be effective to correct the RBA unless further entries in the RBA were made as a consequence. The legislative authority to make such entries was not identified by Steward J. The presence of such entries in an RBA would only be apt to generate confusion in the relevant account.

Significance of the Statement of Agreed Facts

47. At FC [158] (CAB 88) Steward J made reference to [16]-[18] of the SOAF which his Honour regarded as giving rise to "highly unusual circumstances" (FC [161]; CAB 89). SOAF [16] recorded the act of the Commissioner in allocating the November 2009 Amount to Travelex's RBA on 28 June 2012 and the recording by the Commissioner of an "effective date" of 16 November 2009. This was a statement of fact about the Commissioner's maintenance of Travelex's RBA. SOAF [17] recorded that the November 2009 Amount "constituted part of an RBA surplus for the purposes of Part IIB of the Administration Act and Part IIIAA of the Overpayments Act" that "arose on 16 December 2009". This purported to give the Commissioner's act a legal characterisation. It was, as Derrington J observed at FC[6] (CAB 49), an (implicit) agreement as to "the legal effect or operation" of the Administration Act and the Overpayments Act and (at least) one of mixed fact and law (FC[88]; CAB 67). SOAF [18] recorded that no part of the November 2009 Amount was otherwise allocated under Part IIB of the Administration Act. That was a further statement of fact about the Commissioner's maintenance of Travelex's RBA.

48. Once it is accepted that (first) the purported amendment of Travelex's BAS and GST return for the November 2009 tax period in June 2012 was ineffective to alter its "net amount" for that tax period from that shown in the November 2009 BAS (see par. 20 above); and (second) that an "RBA surplus" can only be constituted by (relevantly) credits to which an entity is substantively and legitimately entitled to under a taxation law (see par. 26 to 29 above), it follows (as Derrington J concluded at FC[88]-[89]; CAB 67) that the statement of legal characterisation at SOAF [17] was wrong.

49. Once the agreement as to the legal characterisation of the November 2009 Amount at SOAF [17] was exposed as erroneous, the Court was not obliged to, and should not have, acted on its correctness: *Damberg v Damberg* (2001) 52 NSWLR 492 at [148]-[160] (Heydon JA; Spigelman CJ and Sheller JA agreeing); *Holdway v Arcuri Lawyers* [2009] 2 Qd R 18 at [5] (McMurdo P), [64]-[65] (Keane JA; Mackenzie AJA agreeing); *Benson v Rational Entertainment Enterprises Ltd* [2018] NSWCA 111; (2018) 97 NSWLR 798 at [104] (Leeming JA; Beazley P and Emmett AJA agreeing); *Awap SGT 26 Investment Limited v Cn 2000 Holdings Ltd* [2020] WASCA 74 at [181]-[187]. At that point, SOAF [17] lost any significance in the resolution of this case and the statements of fact in SOAF [16] and [18] did not stand in the way of Derrington J's conclusion.

Travelex's Notice of Contention

50. By Notice of Contention Travelex contends that the Full Court erred in failing to find that the Commissioner had, on or around 28 June 2012, made an assessment that Travelex had a negative net amount for the November 2009 tax period of $111,269. This contention arises from the fact that on 28 June 2012 the Commissioner allocated a credit of $149,020 to Travelex's RBA (FC[24]; CAB 52). The effect of this credit on the existing debit balance of $37,751 produced a credit balance of $111,269 (FC [28]; CAB 53).

51. Both the primary judge (PJ[98]; CAB 28-29) and the Full Court (FC[22]; CAB 52) recorded that it was common ground at first instance and on appeal that Travelex did not request the Commissioner make an assessment for the November 2009 tax period under s105-10 of Schedule 1 of the Administration Act and the Commissioner did not make an assessment under s105-5 of Schedule 1 of the Administration Act. In fact, Travelex expressly asserted the contrary to the primary judge.[11] Travelex's Notice of Contention represents a *volte face* from its position before the primary judge and the Full Court.

52. The threshold and fatal difficulty with the proposition advanced in Travelex's Notice of Contention is that the unchallenged concurrent findings of the primary judge and the Full Court are that in allocating the $149,020 credit to Travelex's RBA on 28 June 2012 the Commissioner was not purporting to, or in fact, making any assessment but was giving effect to the (unauthorised) "long standing administrative practice" by which GST returns were purportedly amended or revised and an entity's "net amount" under the GST Act purportedly adjusted accordingly (PJ[86], [97]-[98]; CAB 26, 28, 29; FC[21]-[24]; CAB 51-52). That is, the acts of the Commissioner which the Notice of Contention asserts were an assessment were, in fact, acts undertaken in the administration of Travelex's RBA in the implementation of an administrative practice now exposed as lacking legislative foundation (FC [24]; CAB 52). Just as a decision maker cannot unwittingly make an administrative decision;[12] and just as an assessment made by the Commissioner under one section cannot be supported as an assessment made under another section,[13] so an act of

[11] See Applicant's Submissions in Reply, 13 April 2017, at [7], fn 10: "No assessment was made in the present case" (AFM 78).
[12] *Pintarich v Deputy Commissioner of Taxation* (2018) 262 FCR 41 at [141]-[142] (Moshinsky and Derrington JJ).
[13] *Federal Commissioner of Taxation v Wade* (1951) 84 CLR 105 at 116 (Kitto J).

the Commissioner which was not and did not purport to be an assessment cannot be treated as an assessment.

53. Furthermore, while it is correct to say that an assessment is a process of ascertainment of the tax payable by an entity, and not a piece of paper;[14] nor is an assessment constituted by mere internal administrative acts of the Commissioner.[15] Only if the process culminates in service of a notice of assessment giving concrete application of the revenue statutes to a particular case will there be an assessment discernible as an "act in the law".[16] An essential element of a notice of assessment as the culmination of an assessment as an "act in the law" is that it brings to the attention of the person on whom it is served that the assessment to which it relates *is an assessment of that person to tax*" (emphasis added).[17]

54. The necessity for an assessment to find overt manifestation as an "act in the law" by way of a notice of assessment finds added force in the context of an assessment of net amount of a taxpayer for a tax period under the GST Act made under s105-5 of Schedule 1 of the Administration Act the effect of which is to supersede the net amount that is shown in the entity's GST return: *Multiflex* at [26]. It is confirmed by the Commissioner's obligation in s105-20(1) of Schedule 1 of the Administration Act to give a taxpayer a notice of assessment made under s105-5 as soon as practicable after the assessment is made. The second sentence of s105-20(1) is to be understood as referring to a failure to give a notice of assessment as soon as practicable, not a failure to give a notice of assessment at all.

55. The mere act of the Commissioner of allocating a credit to an RBA is not an act that has the necessary character of overtly bringing to the attention of the taxpayer that it is, or relates, to an assessment of that person to tax. It cannot, therefore, reflect the necessary culmination of a process of an assessment as an "act in the law". For this additional reason, there was no assessment in this case.

Part VII: ORDERS SOUGHT

56. The appellant seeks the following orders:

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[14] *R v Deputy Federal Commissioner of Taxation; Ex parte Hooper* (1926) 37 CLR 368 at 373 (Isaacs J).
[15] *Batagol v Federal Commissioner of Taxation* (1963) 109 CLR 243 at 252 (Kitto J). *Federal Commissioner of Taxation v Futuris Corp Ltd* (2008) 237 CLR 146 at [2] and [49] (Gummow, Hayne, Heydon and Crennan JJ).
[16] *Batagol* at 253 (Kitto J).
[17] *Federal Commissioner of Taxation v Prestige Motors Pty Limited* (1994) 181 CLR 1 at 14 (Mason CJ, Brennan, Deane, Gaudron and McHugh JJ).

1. Appeal allowed.

2. Order 2 of the Full Court of the Federal Court of Australia made on 14 February 2020 be set aside and in lieu thereof orders be made in the terms proposed by Derrington J at FC[155]-[156].

3. The appellant pay the respondent's costs of this proceeding in this Court.

Part VIII: ESTIMATE OF HEARING

57. The appellant estimates that 1 hour will be required for the presentation of the appellant's oral argument in chief plus 0.5 hour in reply and on the Notice of Contention.

10 Dated: 13 August 2020

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