HIGH COURT OF AUSTRALIA

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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

# APPELLANT'S REPLY

## Part I: CERTIFICATION

1. This submission is in a form suitable for publication on the internet.

## Part II: REPLY TO THE RESPONDENT'S ARGUMENT

### Material Facts (R[7]-[15])

2. The matters raised at R[7]-[15] fail to engage with the following matters: (1) By letter dated 8 June 2012 Travelex sought to engage the Commissioner's administrative practice of amending GST returns for (inter alia) the November 2009 period (PJ[23], [71]). (2) It was that letter which led to the allocation of $149,020 to Travelex's RBA on 28 June 2012 for which it claimed interest (PJ[28], [71], [86]). (3) It was common ground before the primary judge and the Full Court that the Commissioner had not made an assessment for the November 2009 tax period and Travelex had not requested one (PJ[98]). Travelex positively asserted that position to the primary judge.[1] (4) The issue raised by [2] of the Notice of Appeal to this Court (**HC NoA**) arose from the primary judge's conclusion that that administrative practice lacked a legislative foundation, contrary to the manner in which the parties had hitherto conducted the matter (PJ[87], [89]). (5) That issue was captured as Ground 8 of the Commissioner's Notice of Appeal in the Full Court (**FC NoA**). It was fully argued by both parties, after counsel for Travelex was given the opportunity to consider its position,[2] and was determined by the Full Court. (6) It was also common ground in the Full Court that the Commissioner had not made and Travelex had not requested an assessment for the November 2009 tax period (FC[85], [111]).

### The Commissioner does not require leave for Ground 2 of his Notice of Appeal (cf., R[17]-[21])

3. By order of this Court of 25 June 2020 the Commissioner was granted special leave to appeal to this Court on the sole ground of appeal in [2] of the HC NoA. That ground, as observed above, arises from the Full Court's determination of [8] of the FC NoA on which the Full Court divided. It is not a new case or new argument. It is not a point not taken in the Court below (cf., R[18]-[19]). It is a point the Full Court substantively heard and determined without Travelex pressing its objection to it doing so. Contrary to the assertions at R[17]-[21], the Commissioner does not require any further leave to advance his appeal to this Court.

4. Consequently, this is not a case engaging the principles associated with *Suttor v Gundowda* (1950) 81 CLR 418 at 438 and *Metwally v University of Wollongong (No 2)* (1985) 68 ALJR 311 at 312-313. Those principles are concerned with points not taken in the Court below which may have

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[1] "Applicant's Submissions in Reply", 13 April 2017 at [7], fn 10: "[n]o assessment was made in the present case".
[2] At the outset of the appeal, the Court asked counsel for Travelex (at T3.11) about any issues it "contend[ed] we ought not look at". This followed the complaints at [32]-[36] of Travelex's submissions to the Full Court in response to Ground 8 of the FC NoA. However, at T51.44-58.12 senior counsel for Travelex addressed the point substantively without pressing the objection.

raised *bona fide* issues on which further evidence may have been adduced. They are not concerned to avail a party of an opportunity to perform a *volte face* from the position it positively asserted in the Courts below (viz., that there was no assessment of Travelex in the November 2009 tax period) to generate issues not previously arising and thus restrict the scope of matters which can be raised on appeal.

**Travelex's argument (R[22]-[58]):**

5. Contrary to the repeated directions of this Court,[3] Travelex does not commence its arguments on the construction of Part IIB of the Administration Act with the relevant statutory text. On the contrary, at R[26]-[37] Travelex commences by seeking to extract from various extrinsic materials *a priori* assumptions concerning the purpose and policy of the RBA provisions in Part IIB of Administration Act. However, properly understood, those extrinsic materials assist the Commissioner not Travelex. The function of RBAs as a *parallel* system of accounting that records and comprehensively states an entity's tax debts (or credits)[4] confirms that entries in the RBA do not have an independent operation generating tax debts or credit entitlement decoupled from those arising under the substantive taxation laws. Travelex's construction of Part IIB of the Administration Act does not treat RBAs and the attendant obligations and entitlements in Part IIB as a parallel scheme, but as a wholly autonomous scheme capable of operating divergently from the substantive taxation laws. Thus, it is Travelex's construction of Part IIB of the Administration Act (not the Commissioner's) which generates the potential for duplication and uncertainty (cf., R[36]).

6. At R[40]-[41] Travelex draw attention to par. (a) of the definition of "RBA Surplus" in s8AAZA of the Administration Act. However, that paragraph – which incorporates the definition of "primary tax debts" – confirms that an "RBA Surplus" is concerned with obligations and entitlements arising under other taxation laws. This is because a "primary tax debt" is defined as an "amount due to the Commonwealth directly under a taxation law". Thus, it supports the Commissioner's position, not Travelex's.

7. Similarly, the words "based on" in the definition of "RBA Surplus" (referred to at R[44]-[45]) assist the Commissioner, not Travelex. They are used to identify the constituent elements of a balance in favour of an entity making up an "RBA Surplus". They are inconsistent with the proposition that there can be a divergence between the balance between (on the one hand) "amounts due to the Commonwealth directly under a taxation law" (emphasis added) allocated to the RBA (viz. "primary tax debts"); and (on the other) payments and credits "to which the entity is entitled under a taxation

[3] *FC of T v Consolidated Media Holdings* (2012) 250 CLR 503 at [39].
[4] See the extracts of the extrinsic materials appearing at R[28] and [33].

law" allocated to the RBA (emphasis added) and the "RBA Surplus". An "RBA Surplus" which did not correspond with the balance of those two things is not an "RBA Surplus" answering the definition in s8AAZA.

8. Further, the contention advanced at R[42], [44] and [47] that the Commissioner's power in s8AAZC(4) of the Administration Act to determine the "basis" on which an RBA is established for an entity enables the Commissioner to establish an RBA that is not an account of (on the one hand) the tax debts which are due, and (on the other hand) the payments made or credits to which an entity is entitled under the taxation laws, is obviously incorrect. As s8AAZC(3), (4A) and (5) indicate the power of the Commissioner to determine the "basis" on which an RBA is established is directed towards matters such as the capacity to which an RBA established in relation to an entity relates, or the activities to which it relates, or the periods to which it relates. It does not enable the Commissioner to create a set of tax obligations and entitlements divergent from those which arise by the substantive operation of the taxation laws.

9. The Commissioner's power (or "jurisdiction", cf., R[23]) to "allocate" primary tax debts (s8AAZD(1)) or "credits to which an entity is entitled to under taxation law" to an RBA (see Div 3, Part IIB) is a power to "allocate" items which meet the definition of those things. That depends, in turn, on whether the debt is due or the entitlement to the credit arises "under a taxation law". It does not depend on any state of mind formed or exercise of discretion by the Commissioner (cf., R[47]). If it does not, it is not an item the Commissioner can "allocate" to an RBA and the allocation cannot produce legal consequences (cf., R[46]). That is not an "unlikely outcome" (cf., R[23]). On the contrary, any other outcome would be "most unlikely".

10. The objectives of certainty and simplicity in tax administration favour the Commissioner's construction of Part IIB of the Administration Act (cf., R[50]-[51]). To construe Part IIB of the Administration Act as enabling entries in an RBA to give rise to tax obligations and entitlements which diverge from and are different those arising "under a taxation law" would be a potent source of uncertainty and complexity. Nothing in the construction advanced by the Commissioner – or adopted by Derrington J – renders an RBA "meaningless" or not an "account of anything" (cf., R[50]). On the contrary, it ensures that an RBA *is* meaningful *as* an account of an entity's debts and entitlements under the taxation law. Furthermore, under the approach of Travelex and the majority of the Full Court, the obligations and entitlements arising under Part IIB of the Administration Act are not "auxiliary" (ie., subordinate or supporting) of those arising "under [the] taxation law", but are rival and potentially divergent obligations and entitlements (cf., R[51]). An RBA which creates, by way of the mere act of making allocations to it, obligations and entitlements different to and divergent

from those arising under the substantive taxation law is not an RBA which provides any kind of assistance which it can have been the purpose of Part IIB of the Administration Act to provide.

11. Section 35-5(2) of the GST Act does not assist Travelex (cf., R[52]). The correct application of that sub-section was identified by Derrington J at FC[49]; that is, it applies when a GST return overstates a negative net amount and the Commissioner pays or applies amounts in accordance with that GST return which overstatement is revealed by the later making of an assessment of the correct GST amount. Thus, s35-5(2) does *not* contemplate the Commissioner making allocations to an RBA which depart from an entity's obligations or entitlements as determined by the GST Act in accordance with an extant GST return.

12. To construe Part IIB of the Administration Act to require an "RBA deficit debt" conform to the balance of an entity's primary tax debts (on the one hand); and (on the other) the payments made and credits to which it is entitled under a taxation law (on the other) is not to subvert the purpose of s8AAZH(1), but to fulfil it; that purpose being to facilitate the collection of that debt so constituted and not any other (cf., R[53]). Contrary to R[54], the evidentiary provisions in s8AAZI and s8AAZJ provide for evidence of the contents of the RBA to be (prima facie) evidence of *that* debt. Thus, they assume the need for the RBA to conform with balance of the entity's debts and entitlements arising externally, facilitate proof of that fact and, as Derrington J recognised, support the Commissioner's construction of Part IIB of the Administration Act (FC[64]).

13. The suggestion at R[57] that the Commissioner has an implied power "to revoke an erroneous" application of an amount to an RBA assumes a need for entries in an RBA to conform to obligations and entitlements externally determined, something Travelex's submissions is at pains to deny. Moreover, if such allocations are (by the own force) a source of free-standing obligations and entitlements (as Travelex contend), it is far from clear an implication to reverse such allocations can be implied from s33 of the *Acts Interpretation Act 1902* (Cth).

**Travelex's notice of contention (R[59]-[88])**

14. It may be accepted that whether the Commissioner made an assessment on 28 June 2012 depends on what the Commissioner did (cf., R[69]). What the Commissioner did is established by the concurrent findings of the primary judge and Full Court – the Commissioner implemented the existing (but unauthorised) administrative practice of purporting to amend Travelex's GST return for the November 2009 period. He did not make an assessment, as Travelex positively asserted to the primary judge (PJ[98], FC[22], [85]). There is no evidential burden on the Commissioner to prove he did not make an assessment (cf., R[67], [71]). Contrary to R[63], the statutory process to change the net amount reported in Travelex's November 2009 GST return was not completed – indeed it has not

commenced. Travelex's substantive liability to pay GST for the November 2009 tax period remains as reported in the November 2009 BAS (FC[86], [157], [1]).

15. Div 105 of Schedule 1 of the Administration Act is not to be construed as contemplating assessments which do not culminate in a notice of assessment (cf., R[73]). An assessment made under s105-5 supersedes the net amount worked out in the taxpayer's GST return substituting for the obligations or entitlements determined in accordance with the GST return (to which s105-15 applies) new obligations and entitlements in accordance with the assessment and thereby attracting the conclusive evidence provisions in s105-100 and the review rights (and attendant time limitations) in Part IVC of the Administration Act.[5] The proposition that – contrary to *Batagol* – that Div 105 of Schedule 1 contemplates efficacious, but unnotified assessments is a most unlikely one and stands counter to the duty in s105-20 (cf., R[73]). It also indicates the second sentence of s105-20(1) is to be construed as directed to a failure to give a notice of assessment as soon as practicable, not a failure to give one at all (cf., R[72]). The document of 3 July 2012 cannot be a notice of assessment because it did not bring to the attention of the recipient that it was an assessment to tax (cf., R[67] and [74]).[6] Furthermore, the Commissioner does not accept that even if he made an assessment the result would be the same for Travelex, as the primary judge recognised at PJ[98].

16. Travelex's new contention at R[75]-[88] suffers from three fatal defects. First, it confuses an entitlement to an input tax credit under Div 11 of the GST Act to an "entitlement under a taxation law" giving rise to a credit within the meaning of s8AAZA of the Administration Act (cf., R[79] and [86]). The former is inchoate and only crystallises into the latter through a "net amount" determined in accordance with Div 17 of the GST Act which gives rise to obligations to make payments (Div 33) or entitlements to refunds (Div 35) and is defeasible in certain circumstances (eg., s93-5(1)). Second, as *Multiflex* established, the "net amount" *is* the figure appearing in the GST return, subject to any superseding assessment (at [25]-[27]). Travelex's submissions reprise the Commissioner's unsuccessful submissions in *Multiflex* (see [23]-[24] cf., R[85])). Third, the decision of this Court in *Travelex* said nothing directly about the net amount in Travelex's November 2009 GST return. Any entitlement to additional input tax credits for that period suggested by that decision could only crystalize into an entitlement to a refund through an adjustment of the net amount in the November 2009 GST return by the methods available under the GST Act. None has been engaged.

Dated: 1 October 2020

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[5] *FC of T v Multiflex Pty Limited* (2011) 197 FCR 580 (***Multiflex***) at [25]-[27].
[6] *FC of T v Prestige Motors Pty Limited* (1994) 181 CLR 1 at 14. Including so it can perform the function of being conclusive evidence as contemplated by s350-10 of Schedule 1 of the Administration Act.