



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 FOR THE
COMMONWEALTH OF AUSTRALIA**

Appellant

and

TRAVELEX LIMITED

Respondent

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RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

PART I: CERTIFICATION

1. This outline of oral submissions is in a form suitable for publication on the internet.

PART II: OUTLINE OF ORAL SUBMISSIONS

An "RBA surplus" can arise by the allocation of an amount to an RBA even if the taxpayer is not "substantively and legitimately entitled" to the amount: AS¹ [22]-[57]

Text

2. Part IIB creates a regime for the keeping of running balance accounts. The Commissioner may establish one or more systems of accounts for primary tax debts: s 8AAZC(1). Each account is to be known as a running balance account or RBA: s 8AAZC(2). RBAs may be established on any basis that the Commissioner determines: s 8AAZC(4).
3. The Commissioner is empowered to allocate primary tax debts to an RBA: s 8AAZD(1).
4. The Commissioner's power to allocate *payments, credits and RBA surpluses* is governed by Division 3 of Part IIB. Section 8AAZL(1) states that the Commissioner "must" treat such amounts in accordance with the Division. Section 8AAZLA and 8AAZLB then provide the exclusive ways in which the Commissioner must treat them.
5. Division 3 works in this way. Section 8AAZL(1) is directed to the Commissioner and imposes a duty which arises if and when he forms the view that there is an amount meeting the description in one of the sub-sections. It is not self-executing. If and when the

¹ Respondent's Written Submissions dated 10 September 2020.

Commissioner forms that view, he must treat the amount in accordance with the Division, and has a discretionary power to allocate it under either s 8AAZLA or s 8AAZLB. Whether the amount in fact meets the description in s 8AAZL(1) is a matter for the Commissioner, subject possibly only to invalidity for jurisdictional error which is not asserted here.

6. The process of allocating running balance accounts in the prescribed manner gives rise to a balance, either positive or negative. It is in that context that one comes to the concept of an *RBA surplus*, defined in s 8AAZA.

(a) An *RBA surplus* exists only “in relation to” an RBA.

10 (b) It is based on debts, on the one hand, and payments and credits, on the other. This reflects the two kinds of amounts that the Commissioner may allocate to an RBA: debts under s 8AAZD and positive amounts under Div 3.

(c) In sub-paragraph (b), the reference to “credits to which the entity is entitled, that have been allocated to the RBA” is a reference to those amounts which have been the subject of an exercise of power under ss 8AAZLA or 8AAZLB. Those are amounts which have been allocated and which, to the Commissioner’s satisfaction, are amounts meeting the description in s 8AAZL(1)(b). An amount can meet that description even if the Court considers for itself that the amount is not one to which the entity was entitled.

Context and purpose

20 7. The purpose of the RBA scheme is to provide for a single comprehensive statement of amounts owing as between the Commissioner and a taxpayer: RS [26]-[37]; Explanatory Memorandum to the *Taxation Laws Amendment Bill (No 5) 1998* (Cth) at 5; House of Representatives, *Parliamentary Debates*, 10 December 1998, 1898; Explanatory Memorandum to the *A New Tax System (Tax Laws Amendment) Bill (No 1) 1999* (Cth) at 3-4; [3.18], [3.19], [3.23].

8. Part IIB achieves this purpose by causing the balance of a running balance account, as it stands from time to time, to have the consequences identified by Steward J at FFC [167]ff.

30 9. The statutory purpose is best achieved by construing the provisions describing that balance (ie, the expressions *RBA deficit debt* and *RBA surplus* in s 8AAZA) as being descriptive of those amounts, both positive and negative, which the Commissioner has decided to allocate to the RBA and which he has in fact so allocated.

The proper construction of “RBA surplus”

10. Read in its context, an RBA surplus can be comprised of amounts which the Commissioner has decided are credits and allocated to the RBA on that basis, whether or not a Court considers that the amounts are in fact credits.

Notice of Contention: the Commissioner made an assessment: RS [61]-[74].

11. The Commissioner may at any time make an assessment of a net amount: TAA s 105-5. An “assessment” is “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”: *CoT v Australian Building Systems Pty Ltd (in liq)* (2015) 257 CLR 544 at [48]. Whether there has been an assessment is a question of substance.

12. Here, the Commissioner assessed. He received a claim for a credit. He decided that Travelex was entitled to the credit. He gave concrete application to that determination by allocating the credit to Travelex’s BAS.

13. He also gave notice of the new net amount. Even if the 3 July letter was not a notice of assessment, the Commissioner can assess under the TAA without issuing a notice of assessment: cf *Batagol v FCT* (1963) 109 CLR 243 at 252.

Notice of Contention: the Commissioner has not established that there was no “substantive and legitimate entitlement”: RS [75]-[88]

14. In respect of the November 2009 tax period, Travelex had input tax credits arising from creditable acquisitions. It is common ground that they were attributable to that period.

15. Travelex had an entitlement to those credits under the GST Act: s 11-20; s 7-5, s 7-15.

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