

# HIGH COURT OF AUSTRALIA

KIEFEL CJ,  
GAGELER, KEANE, GORDON AND EDELMAN JJ

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THE COMMISSIONER OF TAXATION OF THE  
COMMONWEALTH OF AUSTRALIA

APPELLANT

AND

TRAVELEX LIMITED

RESPONDENT

*Federal Commissioner of Taxation v Travelex Limited*  
[2021] HCA 8  
*Date of Hearing: 2 December 2020*  
*Date of Judgment: 10 March 2021*  
S116/2020

## ORDER

1. *Appeal allowed.*
2. *Set aside the orders of the Full Court of the Federal Court of Australia made on 14 February 2020 and, in their place, order that:*
  - (a) *the appeal be allowed;*
  - (b) *orders 1 and 2 of the orders made by Wigney J on 12 July 2018 be set aside and, in their place, a declaration be made in the following terms:*



2.

*It is declared that in the circumstances no RBA surplus has arisen in relation to the tax period (within the meaning of A New Tax System (Goods and Services Tax) Act 1999 (Cth)) of Travelex Limited for the month of November 2009 and no interest is presently payable by the Commissioner of Taxation of the Commonwealth of Australia to Travelex Limited under the provisions of the Taxation (Interest on Overpayments and Early Payments) Act 1983 (Cth) in respect of that tax period; and*

(c) *Travelex Limited pay the Commissioner of Taxation of the Commonwealth of Australia's costs of the appeal.*

3. *The appellant pay the respondent's costs of the appeal to this Court.*

On appeal from the Federal Court of Australia

### **Representation**

N J Williams SC and M J O'Meara SC with C M Sievers for the appellant  
(instructed by Balazs Lazanas & Welch LLP)

J O Hmelnitsky SC with L McBride and D P Hume for the respondent  
(instructed by MinterEllison)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.



## CATCHWORDS

### **Federal Commissioner of Taxation v Travelex Limited**

Taxation – Administration – Goods and services tax – Taxable supply – Running Balance Accounts ("RBA") – Commissioner's obligation to pay interest – Where Commissioner lacked statutory authority to amend taxpayer's GST return – Where net amount in GST return calculated in error – Where Commissioner purported to amend taxpayer's GST return and credited taxpayer's RBA – Whether mistaken balance in an RBA is efficacious in law to constitute an RBA surplus within meaning of Pt IIB of *Taxation Administration Act 1953* (Cth) – Whether Commissioner obliged to pay interest under *Taxation (Interest on Overpayments and Early Payments) Act 1983* (Cth).

Words and phrases – "administration", "allocation", "amounts due to the Commonwealth under taxation laws", "erroneous balances", "goods and services tax", "interest", "RBA", "RBA deficit debt", "RBA surplus", "refund", "running balance account", "taxation administration".

*A New Tax System (Goods and Services Tax) Act 1999* (Cth), ss 17-5, 17-15, 33-5, 35-5, Pt 2-1 of Ch 2.

*Taxation Administration Act 1953* (Cth), ss 8AAZA, 8AAZC(1), 8AAZD(1), 8AAZH, 8AAZI, 8AAZL(1), 8AAZLF; Sch 1, ss 105-5, 105-20, 105-100.

*Taxation (Interest on Overpayments and Early Payments) Act 1983* (Cth), s 12AA.



1 KIEFEL CJ, GAGELER, KEANE, GORDON AND EDELMAN JJ. Part IIB of the *Taxation Administration Act 1953* (Cth) ("the TAA") enables the Commissioner of Taxation to establish a "Running Balance Account" ("RBA") for a taxpayer. The Commissioner can allocate to an RBA amounts due to the Commonwealth under taxation laws and must allocate to an RBA certain amounts that the Commissioner must pay to the taxpayer under taxation laws. The resulting balance can be either an "RBA deficit debt", which the taxpayer must pay to the Commonwealth, or an "RBA surplus", which the Commissioner must pay to the taxpayer.

2 The short question in this appeal is whether an RBA surplus can result from the Commissioner allocating to an RBA an amount that the Commissioner is not obliged to pay to a taxpayer under a taxation law. The answer is that it cannot.

### **Factual and procedural context**

3 The context in which the question arises is a long-running dispute between Travelex Ltd and the Commissioner, the parameters of which have evolved in the course of litigation. The dispute began roughly a decade ago as a dispute about from when the Commissioner was obliged to pay interest to Travelex under the *Taxation (Interest on Overpayments and Early Payments) Act 1983* (Cth) ("the TIOEP Act") on an amount which the Commissioner in fact treated as an RBA surplus and in fact paid to Travelex in the aftermath of the decision of this Court in *Travelex Ltd v Federal Commissioner of Taxation* ("*Travelex [No 1]*")<sup>1</sup>. In the course of litigation, the dispute has evolved into a dispute about whether the amount which the Commissioner in fact treated as an RBA surplus was in law an RBA surplus and, in consequence, about whether the Commissioner was obliged to pay interest at all.

4 *Travelex [No 1]* established that certain supplies made by Travelex were GST free. The consequence was that Travelex was entitled under the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) ("the GST Act") to input tax credits for associated creditable acquisitions. The applicable form of the GST Act and of associated provisions concerning collection and administration in Ch 3 of Sch 1 to the TAA is as those Acts stood before the *Indirect Tax Laws Amendment*

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1 (2010) 241 CLR 510.

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(Assessment) Act 2012 (Cth) introduced the current system of self-assessment on 1 July 2012.

5 Central to the scheme of the GST Act, then as now, is that a taxpayer has a "net amount" for a "tax period"<sup>2</sup>. The net amount is worked out by deducting from the GST for which the taxpayer is liable on taxable supplies attributable to that period input tax credits to which the taxpayer is entitled for creditable acquisitions and creditable importations attributable to the same period<sup>3</sup>. If the net amount for the tax period is greater than zero, the taxpayer is obliged to pay that positive net amount to the Commissioner<sup>4</sup>. If the net amount for the tax period is less than zero, the Commissioner is obliged to refund that negative net amount to the taxpayer<sup>5</sup>.

6 In *Federal Commissioner of Taxation v Multiflex Pty Ltd* ("Multiflex")<sup>6</sup>, the Full Court of the Federal Court interpreted the GST Act in its applicable form<sup>7</sup> as operating to fix the net amount of a taxpayer for a tax period as the amount that was in fact worked out by the taxpayer and notified to the Commissioner in the approved form of the GST return of the taxpayer for that period. The Full Court held that the net amount was fixed upon notification to the Commissioner in the approved form even if the net amount had been worked out by the taxpayer in error. The mechanism for the correction of error in an amount notified in an approved form was explained to lie in the ability of the Commissioner to "supersede" that amount by making an assessment under the TAA<sup>8</sup>, notice of which was conclusive evidence (except for the purpose of proceedings under Pt IVC of the TAA on a review or appeal relating to the assessment) that the amounts and particulars in the assessment are correct<sup>9</sup>.

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2 See Pt 2-1 of Ch 2 of the GST Act.

3 Section 17-5 of the GST Act.

4 Section 33-5 of the GST Act.

5 Section 35-5 of the GST Act.

6 (2011) 197 FCR 580 at 589 [25]-[27].

7 Then s 17-15 of the GST Act.

8 Section 105-5 of Sch 1 to the TAA.

9 Section 105-100 of Sch 1 to the TAA.

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7        *Travelex [No 1]* was decided in September 2010. Before *Travelex [No 1]* was decided, Travelex had on 16 December 2009 notified the Commissioner in a GST return forming part of its Business Activity Statement for its November 2009 tax period of a positive net amount for that period of \$37,751. That positive net amount was worked out by Travelex in the approved form by deducting input tax credits for creditable acquisitions from GST on taxable supplies. Travelex had soon afterwards paid that positive net amount to the Commissioner.

8        After *Travelex [No 1]* was decided, Travelex eventually wrote to the Commissioner in June 2012 requesting the Commissioner to amend Travelex's GST return for the November 2009 tax period to increase the amount claimed for input tax credits for creditable acquisitions by \$149,020.

9        Proceeding on the assumption that it was then permissible to amend a GST return, the Commissioner complied with Travelex's request. On 28 June 2012, the Commissioner credited the RBA he had established for Travelex by an amount of \$149,020 by reference to a "transaction" described in an entry made that day in the RBA as "amended self-assessed amount for the period ended 30 Nov 09". The date assigned to the entry then made in the RBA was 16 December 2009. On 3 July 2012, the Commissioner sent Travelex a document entitled "Confirmation of revised activity statement for the period 01/11/2009 to 30/11/2009". The document stated that "the total amount of your activity statement has been changed from \$37751Dr to \$111269Cr". Three days later, the Commissioner paid an amount of \$149,020 to Travelex by electronic funds transfer.

10       Having treated the amount of \$149,020 so paid as RBA surplus which he was obliged to pay and did pay to Travelex under the TAA, the Commissioner did not initially dispute that he was obliged to pay interest on the amount under the TIOEP Act<sup>10</sup>. The scope of the dispute between the Commissioner and Travelex was initially limited to the date from which that commonly assumed obligation to pay interest arose. The Commissioner took the view that interest was payable from 17 July 2012. Travelex took the view that interest was payable from 1 January 2010.

11       Travelex commenced a proceeding against the Commissioner in the original jurisdiction conferred on the Federal Court by s 39B(1) of the *Judiciary Act 1903* (Cth) seeking declaratory and injunctive relief to resolve the dispute about the date from which the commonly assumed obligation to pay interest under the TIOEP Act arose. The Commissioner and Travelex agreed on a Statement of

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10    Section 12AA of the TIOEP Act.

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Agreed Facts ("SOAF") in the proceeding. The SOAF stated as a "fact" that the Commissioner had on 28 June 2012 allocated the amount of \$149,020 to Travelex's RBA with an "effective date" of 16 December 2009. The SOAF also stated as a "fact" that the amount of \$149,020 so allocated constituted an RBA surplus.

12 The proceeding was heard and determined at first instance by Wigney J<sup>11</sup>. His Honour resolved the dispute about the commencement date for the payment of interest in favour of Travelex, granting a declaration and an injunction having the effect of requiring the Commissioner to pay interest on the amount of \$149,020 to Travelex under the TIOEP Act from 31 December 2009. In reasoning to that result, however, Wigney J held that neither the GST Act nor the associated provisions concerning collection and administration in Ch 3 of Sch 1 to the TAA as they stood before 1 July 2012 gave a taxpayer or the Commissioner authority to amend a GST return<sup>12</sup>.

13 The Commissioner appealed to the Full Court of the Federal Court. The Commissioner's grounds of appeal included that the holding that Travelex and the Commissioner lacked statutory authority to amend a GST return ought to have led Wigney J to reject the agreed "fact" in the SOAF that the amount of \$149,020 which the Commissioner had on 28 June 2012 allocated to Travelex's RBA constituted an RBA surplus, with the consequence that his Honour erred in concluding that the Commissioner was obliged to pay interest on that amount to Travelex under the TIOEP Act at all.

14 The Full Court was constituted for the hearing of the appeal by Kenny, Derrington and Steward JJ. The Full Court was unanimous in accepting as correct the holding of Wigney J that neither Travelex nor the Commissioner had statutory authority to amend Travelex's GST return for the November 2009 tax period. The correctness of the holding is no longer in dispute. The Full Court divided as to the consequence of that lack of authority.

15 Derrington J accepted that the lack of statutory authority to amend the GST return had the consequence for which the Commissioner contended. Because the amount then allocated failed to reflect any underlying entitlement of Travelex to a refund of a net amount under the GST Act, the allocation by the Commissioner of

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11 *Travelex Ltd v Federal Commissioner of Taxation* (2018) 108 ATR 278.

12 (2018) 108 ATR 278 at 292 [89].

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the negative amount of \$149,020 to Travelex's RBA on 28 June 2012 was incapable of resulting in an RBA surplus<sup>13</sup>. The net amount for the November 2009 tax period remained in law the positive amount of \$37,751 of which Travelex had notified the Commissioner in its GST return on 16 December 2009 and which it had paid<sup>14</sup>. The agreed "fact" in the SOAF that the amount constituted an RBA surplus ought to have been rejected because it constituted an agreement between the parties about a matter of legal characterisation as to which the parties had been legally mistaken in framing the SOAF<sup>15</sup>. On that basis, his Honour would have allowed the appeal, substituting for the orders of Wigney J a declaration to the effect that the Commissioner had no obligation to pay interest to Travelex under the TIOEP Act.

16           Steward J agreed with Derrington J save in one respect. The respect in which Steward J differed from Derrington J was that Steward J took the view that the fact that the Commissioner on 28 June 2012 allocated the amount of \$149,020 to Travelex's RBA with an effective date of 16 December 2009 was enough to result in the amount having the legal status of an RBA surplus as at 16 December 2009. The foundation for that view was an understanding that Pt IIB of the TAA operated to give "the balance recorded in an RBA legal efficacy, even though the balance may be mistaken"<sup>16</sup>.

17           Kenny J agreed with Steward J. In the result, the appeal was dismissed.

### **The appeal**

18           By special leave granted on the papers by Bell and Nettle JJ<sup>17</sup>, the Commissioner appeals to this Court. The sole ground of appeal takes up the one respect in which the Full Court divided. The ground is that Kenny and Steward JJ

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13   (2020) 275 FCR 239 at 249-250 [59], 254 [80]-[82].

14   (2020) 275 FCR 239 at 255 [86].

15   (2020) 275 FCR 239 at 255-256 [87]-[89], applying *Damberg v Damberg* (2001) 52 NSWLR 492 at 522 [160]. To similar effect, see *Holdway v Arcuri Lawyers* [2009] 2 Qd R 18 at 45.

16   (2020) 275 FCR 239 at 273 [165].

17   [2020] HCATrans 089.

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erred in concluding that a mistaken balance in an RBA is efficacious in law to constitute an RBA surplus and ought to have found, as did Derrington J, that the purported allocation by the Commissioner of the amount of \$149,020 to Travelex's RBA did not result in an RBA surplus with the consequence that the Commissioner had no obligation to pay interest under the TIOEP Act.

19 Without going so far as to seek revocation of the grant of special leave to appeal, Travelex argues that the Commissioner should not have "leave" to advance the ground of appeal given that the ground contradicts the position adopted by the Commissioner at first instance as reflected in the SOAF. The argument is procedurally misconceived. *Evda Nominees Pty Ltd v Victoria*<sup>18</sup> established the "procedural convention" of requiring a party seeking to contend that a previous decision of this Court was wrongly decided to obtain the leave of the Court before being permitted to present full argument<sup>19</sup>. Except in relation to a ground of appeal to which that procedural convention has application, an unrevoked grant of special leave to appeal entitles an appellant to advance any ground of appeal on which special leave has been granted unless precluded by operation of law such as by waiver or estoppel. Whether or not an appellant should be permitted to advance an argument that goes beyond, or is inconsistent with, a position taken at an earlier stage of litigation is a factor considered in the grant or withholding or revocation of special leave to appeal. Once special leave is granted, no further leave is required.

20 The sole ground of appeal on which there is an extant grant of special leave to appeal gives rise to a discrete question of statutory construction to which an authoritative answer must now be given. The answer accords with that given by Derrington J.

21 Part IIB was introduced into the TAA in anticipation of the GST Act<sup>20</sup>. The objective was "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". "The introduction of running balance accounts"

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18 (1984) 154 CLR 311.

19 See *Allders International Pty Ltd v Commissioner of State Revenue (Vict)* (1996) 186 CLR 630 at 673.

20 *Taxation Laws Amendment Act (No 3) 1999* (Cth); *A New Tax System (Pay As You Go) Act 1999* (Cth).

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was designed to "provide for simpler tax accounting and collection arrangements."<sup>21</sup>

22 Part of the simplified accounting and collection arrangements was described at the time of the introduction of Pt IIB in terms of allocation of a primary tax debt to an RBA establishing a "parallel liability" which would "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"<sup>22</sup>. Travelex seizes on that language but strains it in suggesting that the description of allocation of a primary tax debt to an RBA establishing a "parallel liability" supports the notion that allocation gives rise to a liability that has an existence wholly independent of the primary tax debt allocated. As will be seen, the separate liability that can result from allocation is "parallel" to a primary tax debt in the sense that it is a separately enforceable liability to pay the amount of the tax debt.

23 Part IIB fulfils its objective by providing for the establishment of a system of accounts accurately characterised by senior counsel for the Commissioner on the hearing of the appeal as a system for the allocation of legal entitlements under taxation laws as distinct from a system for the creation of legal entitlements by allocation. Indeed, the Part itself describes RBAs as "systems of accounts for primary tax debts"<sup>23</sup>, the definition of a "primary tax debt" being limited to an "amount due to the Commonwealth directly under a taxation law"<sup>24</sup>.

24 The scheme of Pt IIB both enables the Commissioner to allocate primary tax debts to an RBA that the Commissioner has created for an entity<sup>25</sup> and obliges the Commissioner to allocate and apply amounts of certain kinds according to one

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21 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 10 December 1998 at 1898.

22 Australia, House of Representatives, *A New Tax System (Taxation Laws Amendment) Bill (No 1) 1999*, Explanatory Memorandum at [3.18].

23 Section 8AAZC(1) of the TAA.

24 Section 8AAZA of the TAA.

25 Section 8AAZD(1) of the TAA.

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*Gordon* J  
*Edelman* J

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or other of two available methods each involving allocation to an RBA<sup>26</sup>. The kinds of amounts that must be so allocated and applied comprise "a payment the Commissioner receives in respect of a current or anticipated tax debt", a "credit" (including "an amount that the Commissioner must pay to a taxpayer under a taxation law"<sup>27</sup>), and an "RBA surplus".

25 An "RBA surplus", which the Commissioner must refund if not allocated or applied<sup>28</sup>, is defined to mean a balance in an RBA in favour of the entity that is "based on" two factors. On the debit side are "primary tax debts that have been allocated to the RBA". On the credit side are "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"<sup>29</sup>.

26 Correspondingly, an "RBA deficit debt", which a taxpayer liable for tax debts allocated to an RBA must pay to the Commissioner<sup>30</sup>, is defined to mean a balance in an RBA in favour of the Commissioner that is "based on" the same two factors<sup>31</sup>.

27 The statutory identification of the factors on which a balance in an RBA must be based in order to result in an RBA surplus or an RBA deficit debt is important. The efficacy of an allocation to result in an RBA surplus or an RBA deficit debt is not expressed to depend on the "belief" or "satisfaction" or "opinion" of the Commissioner. The efficacy of an allocation to result in an RBA surplus or an RBA deficit debt rather depends on the amount allocated answering the objective description of either an amount due to the Commonwealth under a taxation law, a payment made in respect of a current or anticipated amount due to the Commonwealth under a taxation law, or an amount that the Commissioner must pay to a taxpayer under a taxation law.

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26 Section 8AAZL(1) of the TAA.

27 Section 8AAZA of the TAA.

28 Section 8AAZLF of the TAA.

29 Section 8AAZA of the TAA.

30 Section 8AAZH of the TAA.

31 Section 8AAZA of the TAA.

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28 A balance recorded in an RBA can meet neither the definition of an RBA surplus nor the definition of an RBA deficit debt if the balance is not solely the product of netting two categories of amounts. On the debit side are amounts due to the Commonwealth under taxation laws that have been allocated to the RBA. On the credit side are payments made in respect of current or anticipated amounts due to the Commonwealth under taxation laws that have been allocated to the RBA. On the credit side also are amounts that the Commissioner must pay to a taxpayer under taxation laws that have been allocated to the RBA.

29 The overall result is that a balance recorded in an RBA must be refunded by the Commissioner as an RBA surplus or paid to the Commissioner as an RBA deficit debt only if the balance is the product of allocations of amounts which accurately reflect obligations of the Commissioner and of the taxpayer under taxation laws. An allocation that the Commissioner in fact makes to an RBA of an amount the Commissioner is not legally obliged to pay to a taxpayer under a taxation law cannot result in an RBA surplus any more than an allocation in fact of an amount not legally due to the Commonwealth under a taxation law can result in an RBA deficit debt.

30 Consistently with the legislative design of having simplified accounting and collection arrangements, the obligations of the Commissioner to refund RBA surpluses and of the taxpayer to pay RBA deficit debts are secondary or auxiliary obligations discharge of which facilitates the efficient performance of the underlying primary payment obligations of the Commissioner and of the taxpayer under those taxation laws. Erroneous balances in RBAs simply do not engage those secondary or auxiliary obligations. Confirming that position, the TAA makes production by the Commissioner of an RBA statement no more than "prima facie evidence that the amounts and particulars in the statement are correct"<sup>32</sup>.

31 The Commissioner's sole ground of appeal is accordingly upheld. Subject only to Travelex's Notice of Contention, the appeal must therefore be allowed.

### **The Notice of Contention**

32 By Notice of Contention filed and served within the time prescribed by r 42.08.5 of the *High Court Rules 2004* (Cth), Travelex seeks to present an argument to the effect that the Full Court "erred in failing to find that the Commissioner had, on or around 28 June 2012, made an assessment that there was

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32 Section 8AAZI of the TAA.

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a negative net amount for the November 2009 tax period of \$111,269 (being \$149,020 less \$37,751) as at 16 December 2009".

33 The argument is a last-ditch attempt to put a wholly new legal complexion on a factual scenario about which there has previously been no dispute. The argument, in any event, is untenable. An "assessment" within the meaning of Ch 3 of Sch 1 to the TAA is a deliberative process directed to, and culminating in, the giving of a notice of assessment<sup>33</sup>, which constitutes conclusive evidence that the amounts and particulars in the assessment are correct except in so far as the assessment might be challenged on a review or appeal under Pt IVC of the TAA<sup>34</sup>. Neither the statutory requirement that the Commissioner must give notice of an assessment "as soon as practicable after the assessment is made" nor the statutory clarification that "failing to do so does not affect the validity of the assessment"<sup>35</sup> suggests otherwise. The statutory requirement is directed simply to the timing of the completion of the process of assessment. To admit of the possibility that a process of correspondence and calculation avowedly directed by the Commissioner, at the instigation of a taxpayer, to a different end might be re-characterised after the event as having the legal consequences of an assessment would result in nothing but confusion in the administration of taxation laws. To admit of the possibility would stifle co-operative interaction between the Commissioner and taxpayers.

34 By a proposed Amended Notice of Contention foreshadowed in its written submissions and annexed to an affidavit filed a week before the hearing of the appeal, Travelex seeks to raise the additional argument that the Full Court "erred in failing to find that, in respect of the November 2009 tax period, Travelex had a credit in an amount of \$149,020". By that argument, Travelex seeks to challenge the holding in *Multiflex* that the net amount for a tax period notified to the Commissioner in the approved form of the GST return was fixed upon notification even if worked out by the taxpayer in error. Travelex would have this Court hold instead that the GST Act in its applicable form was self-executing.

35 *Multiflex* has stood for too long for its authority now to be questioned without giving rise to the prospect of significant disruption. The GST Act has changed too much for the operation of its provisions as applicable to the November

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33 cf *Batagol v Federal Commissioner of Taxation* (1963) 109 CLR 243 at 251-253.

34 Section 105-100 of Sch 1 to the TAA.

35 Section 105-20 of Sch 1 to the TAA.

*Kiefel*      *CJ*  
*Gageler*     *J*  
*Keane*       *J*  
*Gordon*      *J*  
*Edelman*     *J*

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2009 tax period now to be usefully re-explored by this Court. Travelex should not be granted the enlargement of time it needs to file the Amended Notice of Contention.

## **Orders**

36            Travelex's application for leave to file an Amended Notice of Contention is to be refused. The Commissioner's appeal to this Court is to be allowed. The order of the Full Court dismissing the appeal from the judgment of Wigney J is to be set aside. In place of that order, the appeal to the Full Court is to be allowed, the declaration and injunction granted by Wigney J are to be set aside and in their place a declaration is to be made in the terms proposed by Derrington J<sup>36</sup>.

37            In accordance with the order as to costs sought by the Commissioner in his Notice of Appeal, the Commissioner is to pay Travelex's costs of the appeal to this Court.

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36    (2020) 275 FCR 239 at 270-271 [155].