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 27F - Outline of oral argument
Filing party:	Appellant
Date filed:	02 Dec 2020

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S116 of 2020

BETWEEN:

THE COMMISSIONER OF TAXATION OF THE COMMONWEALTH OF AUSTRALIA
Appellant

and

TRAVELEX LIMITED
Respondent

APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

No refundable RBA surplus and right to interest for the November 2009 tax period:

1. **Facts:** CAB50 FC[13]-[17], [19], [21] "under claimed input tax credits", FC[22], [24]-[25].

2. **Net amount:** GST return establishes entity's net amount for a tax period which (if positive) creates an obligation to pay that amount to the Commissioner (s17-5, s17-15, s33-5, GST Act; JBA 2/p150) If negative creates an entitlement to a refund (s35-5, GST Act).

3. Now common ground there is no power to alter a net amount by amending a GST return: PJ [89], [38]-[43]; CAB16, 26; FC[48]-[51], [95], [157]. Corrections to a net amount in a GST return can be made:

   (a) by a superseding assessment under s105-5 of Schedule 1, TAA, JBA5/28/p813, *FC of T v Multiflex Pty Limited* (2011) 197 FCR 580 (***Multiflex***) at [25]-[27];

   (b) by determinations under s17-20, GST Act (PJ[39]; CAB16); or

   (c) by adjustment events in subsequent tax periods under Div 19, GST Act (PJ[41]; CAB16); or by claiming unclaimed input tax credits in a GST return in future tax periods under s29-10(4), GST Act (FC[84]; CAB66).

4. None of those occurred here (PJ[40], [43], [98]; CAB16; FC[22], [84]-[85]; CAB 52). Travelex's net amount for the November 2009 tax period remains that in its GST return as lodged - $37,751 (PJ[97], FC [86]; CAB28, 67).

5. The Commissioner only has power to allocate to an RBA a credit to which an entity is "entitled under a taxation law" (s8AAZL(1)(b) TAA, JBA 1/4/p92). Only such a credit can reveal an "RBA surplus" (s8AAZA, JBA 1/4/pp87-88).

6. Only an RBA surplus (as defined) can engage the obligation to refund under s8AAZLF(1) TAA (JBA 1/4/p95). An entitlement to interest under s12AA of the Overpayments Act requires that obligation (JBA 1/3/p46). It was not engaged here (FC[102], [106], [108], [111]; CAB71).

7. The "historical fact" of the allocation of a credit amount to an RBA cannot reveal an "RBA surplus" where the taxpayer was not 'entitled to' a credit under a taxation law (FC[165]; CAB90). That is contrary to the text and the context of Part IIB of the TAA and GST Act (AS[25]-[33]; AR [6]-[7]). The power to establish an RBA on "any basis" (s8AAZC(4) TAA) does not permit the allocation of "credits" which do not arise under a taxation law (cf., RS [47]-[48]; AR[8]-[9]).

8. This does not undermine the RBA system, but fulfills it (cf., FC [165]; CAB90). An RBA is *prima facie* (CAB91 [169]; cf 61 [64]) an *alternative* presentation of an entity's tax debts creating *parallel* and auxiliary rights and obligations; not an *independent* and potentially *divergent* source of tax obligations and entitlements (AS[34]-[37]). The balance in an RBA has "legal efficacy" (cf., FC[165]), if constituted by things which can properly be allocated to it (s8AAZD and s8AAZL(1)) TAA, JBA1/4/pp89, 92 to generate a recoverable "RBA deficit debt" (s8AAZH) or a refundable "RBA surplus" (s8AAZLF).

9. The principles relating to Parliamentary control over the dispersal of public funds and recovery of unauthorised outlays reinforce this construction (FC[109], AS[39]-[43]; *Auckland Harbour Board v R* [1924] AC 318, JBA5/26/p753; s8AAZN, TAA, JBA1/4/p98); as do those against creating uncertain and arbitrary taxation obligations (AS [38]).

Commissioner's Defence and Statement of Agreed Facts:

10. The Defence (FC[159]; CAB88; AFM45) and statement in the Statement of Agreed Facts (**SOAF**) (FC[158]) were based on the administrative practice upon which Travelex and the Commissioner had relied to give effect to the High Court decision (PJ[23]-[25]; CAB13). The plea and the SOAF proceeded on a false basis upon which the court below was not entitled to act: FC[88]-[89]; *Damberg v Damberg* (2001) 52 NSWLR 492 [148]-[160], JBA5/27/p789; *Holdway v Arcuri Lawyers* [2008] 2 Qd R 18 [64]-[65] 18 JBA 5/29/p845 L10-L35; AS[49].

11. The Commissioner's position before Wigney J was accurately summarised at CAB21 PJ[63]. Once the primary judge found that there was no power to amend a GST return (PJ[89]), that proposition was at the forefront of the appeal (CAB64, FC[76(b)]) and was substantively addressed by the Full Court - upheld by Derrington J (FC[112]), rejected by the majority (FC[164] and [1]). It is the ground of appeal on which special leave to appeal was granted. No further leave is required (cf., RS[17]).

12. Travelex positively asserted to the primary judge that "[n]o assessment was made in the present case" (AFM, p78, fn 10). The primary judge found there was no assessment (PJ[98]; CAB28). It was common ground in the Full Court that the Commissioner had made no assessment (FC[22]; CAB52). The principles in *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418 at 438, JBA4/23/p645 and *Water Board v Moustakas* (1988) 180 CLR 491 at 497 do not apply.

Travelex's notice of contention:

13. The concurrent findings of the primary judge and the Full Court were that the allocations to Travelex's RBA in June 2012 were made pursuant to the (unauthorised) administrative practice of amending GST returns and no assessment had been made (PJ[86], [98]; FC[85], [111]). An attempt to exercise another power cannot be treated as an assessment: *FCT v Wade* (1951) 84 CLR 105 at 116.

14. "Assessment" in s105-5(1) of Sch 1 of the TAA is undefined (JBA1/4/p121), but is an act in the law which is the whole of the process of ascertainment of tax culminating in the service of a notice of assessment: *Batagol v FCT* (1963) 109 CLR 243 at 253 (JBA3/15/p258). Section 105-20(1) of Schedule 1 of the TAA does not authorize unnotified assessments; it is not the equivalent of s40(2) of the *Income Tax Assessment Act 1922* (Cth) (JBA2/9/p185); cf., *Batagol* at 253.3.

15. The entries in an RBA on 28 June 2012, and the confirmatory letter of 3 July 2012 (AFM, p31), were not a notice of assessment because they did not bring to the attention of their recipient that they were an assessment to tax: *FCT v Prestige* (1994) 181 CLR 1 at 14 (JBA 3/19/p418).

16. Even if the Commissioner had made an assessment, the position in relation to interest would have been different (PJ[98]; CAB28).

17. The submissions at RS[75]-[88] repeat the submissions correctly rejected at FC[106]-[107], CAB72: **(1)** they confuse input tax credits under s11-20 of the GST Act with a "credit" within the meaning of s8AAZA of the TAA arising by reason of a negative "net amount" from s35-5(1) of the GST Act; **(2)** they neglect the holding in *Multiflex* at [25]-[26] that a "net amount" for a tax period is established by a GST return (even if it is wrong) subject to any superseding assessment; **(3)** they assert wrongly that this Court's decision in *Travelex Ltd v FCT* (2010) 241 CLR 510 bears directly on Travelex's net amount for November 2009 (FC[106]); and **(4)** they assert wrongly that anything in s105-55 of Schedule 1 of the TAA or [27] of *Multiflex* contemplates a right to a "credit" of negative net amount for a tax period established otherwise than by a negative net amount in a GST return or assessment.

Dated: 2 December 2020

Neil Williams
T: 02 9325 0156
E: njwilliams@sixthfloor.com.au

Michael O'Meara
T: 02 9221 0069
E: omeara@sixthfloor.com.au

Chris Sievers
T: 03 9225 6201
E: csievers@vicbar.com.au