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Travelex: Understanding the aftermath

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Overview

The recent decision of the High Court in *Travelex* has brought to an end the latest chapter in one of Australia's longest running series of GST litigation.[1] The case itself concerned the date from which delayed refund interest was payable. However, resolving that issue required a consideration of fundamental areas of the indirect tax law, together with the Commissioner's long-standing administrative practice of revising Business Activity Statements ('BASs') under the former self-actuating regime.

Delayed refund interest can arise in a number of ways and the way in which it arose in *Travelex* was in respect of the payment of a GST refund. This paper therefore commences with a discussion of the earlier decision of the Full Court in *Multiflex*,[2] which set the scene for the Commissioner's obligation to refund GST. The paper then discusses the *Travelex* litigation journey in some detail before exploring the aftermath of the High Court's decision. In particular, the paper discusses what difference it would make if the GST refund arose from the making of an assessment. Finally, the paper explores whether the Commissioner is engaging in unlawful administrative practices which should bear closer scrutiny.

Multiflex

The underlying policy tension – a delicate balance

There is an underlying policy tension relating to GST refunds that permeates the legislation and cases.

On the one hand, the operation of an invoice-credit based GST is such that it is critical that legitimate businesses be paid GST refunds by the Commissioner in a timely manner. As the Inspector-General of Taxation observed in its March 2018 review of GST Refunds:

> The prompt processing and issuing of net GST refunds is critical in alleviating cash flow pressures, particularly for small businesses or those businesses operating in industries with low margins.[3]

On the other hand, the Commissioner needs time to deal with suspected fraudulent refund claims, and needs to undertake a refund verification process. How, then, to strike the right balance?

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[1] *Commissioner of Taxation v Travelex Limited* [2021] HCA 8.

[2] *Commissioner of Taxation v Multiflex Pty Ltd* (2011) 197 FCR 580.

[3] Inspector-General of Taxation, GST Refunds, March 2018, paragraph 2.15.

The early days of GST – the balance was wrong

The Commissioner's practice of retaining GST refunds for verification in the early days of GST was called into question in the *Multiflex* litigation.[4]

The Commissioner had retained Multliflex's GST refunds while conducting a review into refunds that were suspected to be part of a fraudulent scheme. The Court decided that the 'reasonable time' referred to in former section 35-5 of the GST Act is the period that the Commissioner takes to facilitate the payment of a GST refund and does not include the time taken to conduct an investigation into the accuracy of the claims. The Commissioner was ordered to pay the GST refunds before the audit was finalised. The Court's decision was recently described by the High Court in the following terms:

> . . . the Full Court of the Federal Court interpreted the GST Act in its applicable form 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, 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.[5]

Unsurprisingly, the Commissioner sought special leave to appeal to the High Court from the decision of the Full Court. In refusing special leave, French CJ stated:

> It may be that there is a statutory lacuna which gives rise to inconvenience and to risk to the revenue. If statutory change is necessary, and it has, in fact, been foreshadowed, that is a matter for the Parliament. . . the decision of the Full Federal Court is not attended with sufficient doubt to warrant the grant of special leave.[6]

There was indeed a statutory lacuna and the balance was plainly wrong. The Commissioner was effectively left with no ability to verify potentially fraudulent refund claims before having to pay the refund.

Apart from the statutory amendment which followed the *Multiflex* decision, which is discussed below, the decision of the Full Court remains good law. A recent attempt by Travelex in the High Court to overturn the decision failed:

> *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

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[4] See *Multiflex Pty Ltd v Commissioner of Taxation* (2011) 81 ATR 347 (Federal Court) and, on appeal, *Commissioner of Taxation v Multiflex Pty Ltd* (2011) 197 FCR 580 (Full Federal Court).

[5] *Federal Commissioner of Taxation v Travelex Limited* [2021] HCA 8 at [6] (footnotes omitted).

[6] *The Commissioner of Taxation v Multiflex Pty Ltd* [2011] HCATrans 344, 9 December 2011 per French CJ and Gummow J.

> provisions as applicable to the November 2009 tax period now to be usefully re-explored by this Court.[7]

Section 8AAZLGA – a shift in the balance

The law was quickly changed by introducing section 8AAZLGA into the *Taxation Administration Act 1953* ('TAA').[8] In broad terms, the Commissioner may now retain a refund if it would be reasonable to require verification of information contained in a notification, such as a BAS.[9]

In making the decision to retain, the Commissioner must have regard to all relevant matters, including a number of specified matters such as: the likely accuracy of the notified information; the likelihood that the notified information was affected by fraud or evasion; the impact of retaining the amount on the entity's financial position; whether retaining the amount is necessary for the protection of the revenue; and any complexity that would be involved in verifying the notified information.[10]

As noted in the Explanatory Memorandum which accompanied the Bill introducing section 8AAZLGA, the Commissioner cannot use this power to withhold a refund simply because he disagrees with a taxpayer's technical analysis:

> It is not intended that the Commissioner use this discretion to withhold a refund merely where the Commissioner and the taxpayer disagree about how the law applies to the facts. The appropriate course of action for the Commissioner in these circumstances is to issue an assessment to reflect his or her view of the law.[11]

The Commissioner must inform the taxpayer that he has retained the amount and must typically do so within 14 days of an RBA surplus arising, or within 30 days of the taxpayer giving the notification to the Commissioner.[12] He may request information that will be required for the purposes of verifying the information.[13]

The Commissioner may only retain the amount until it would no longer be reasonable to require verification of the information, or the Commissioner makes or amends an assessment relating to the amount.[14]

The taxpayer may object to a decision of the Commissioner to retain an amount in the manner set out in Part IVC of the TAA. The objection period effectively starts 60 days from the last date on which the

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[7] *Federal Commissioner of Taxation v Travelex Limited* [2021] HCA 8 at [35].
[8] For a detailed discussion, see Sievers, Refunds, limitation periods and GST administration – an unfortunate history and an uncertain future? Taxation Institute 2018 National GST Intensive Conference.
[9] *Taxation Administration Act 1953*, paragraph 8AAZLGA(1)(a).
[10] *Taxation Administration Act 1953*, subsection 8AAZLGA(2).
[11] Explanatory Memorandum accompanying the Tax and Superannuation Laws Amendment (2012 Measures No. 1) Bill 2012, paragraph 7.29.
[12] *Taxation Administration Act 1953*, subsection 8AAZLGA(3).
[13] *Taxation Administration Act 1953*, subsection 8AAZLGA(4).
[14] *Taxation Administration Act 1953*, subsection 8AAZLGA(5).

Commissioner was required to notify the entity that the refund was being retained.[15] However, this period stops if the Commissioner requests information from the taxpayer.[16] and the Commissioner may do this more than once.

The right of objection may therefore not be of practical utility if the taxpayer's viability is at risk because a significant refund has been withheld. The objection and appeal process in Part IVC of the TAA simply takes too long in this context and any hearing is likely to be superseded by prior events, such as an assessment,[17] or insolvency. In these circumstances, a taxpayer may need to consider an urgent application for judicial review of the Commissioner's decision to withhold. In that event, the Commissioner may seek to argue that relief by way of judicial review should not be granted while Part IVC rights are available, and would refer to the decision of the High Court in *Futuris*.[18] That is perhaps a discussion for another day but it may be sufficient for present purposes to note that a Court may be willing to distinguish the *Futuris* decision in the context of section 8AAZLGA.

Does section 8AAZLGA strike the right balance? The Inspector-General of Taxation conducted a review of the ATO's administration of GST refunds in 2018 and concluded as follows:

> Overall, the IGT has found that the ATO's administration of GST refunds operated efficiently with the vast majority of refunds released without being stopped for verification. Moreover, where refunds are stopped, the majority were processed and released within 14 or 28 days.[19]

The Inspector-General noted that, of the 2.4 million BASs lodged claiming GST refunds annually, the ATO's case selection process stopped less than 1 per cent for verification, which represented less than 6 per cent of GST refund amounts claimed.[20] He also noted that the ATO's automated risk assessment tools had been achieving a strike rate of only 26.7 per cent, which the ATO acknowledged to be no better than random selection for at least part of the risk assessment systems.[21] Accordingly, the Inspector-General recommended that the ATO develop a formal framework of continuous improvement for its risk assessment tools. The ATO has recently indicated that 'models for GST high risk refunds' will be fully operational by mid-2023.[22]

It is the author's opinion that while the terms of section 8AAZLGA strike the right balance between paying refunds on a timely basis, and withholding those refunds for verification in appropriate circumstances, the lack of meaningful review rights severely disadvantages taxpayers.

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[15] *Taxation Administration Act 1953*, subsection 8AAZLGA(6).

[16] *Taxation Administration Act 1953*, subsection 14ZW(4).

[17] See, for example, *Sanctuary Australasia Pty Ltd and Commissioner of Taxation* [2013] AATA 371.

[18] *Commissioner of Taxation v Futuris Corporation Limited* [2008] HCA 32.

[19] Inspector-General of Taxation, GST Refunds, March 2018, page vii.

[20] Inspector-General of Taxation, GST Refunds, March 2018, paragraph 3.4.

[21] Inspector-General of Taxation, GST Refunds, March 2018, paragraph 3.57.

[22] GST administration annual performance report 2019-2020, February 2021, available online at ato.gov.au.

Travelex

Background

The Travelex litigation concerned the entitlement of Travelex to delayed refund interest under section 12AA of the *Taxation (Interest on Overpayments and Early Payments) Act 1983* ('IOP Act').

Travelex had become entitled to GST refunds following earlier proceedings which were ultimately resolved in Travelex's favour by the High Court.[23] There was no dispute that the Commissioner was required to pay interest under the IOP Act on the overpayment amount represented by the GST refunds. The question before the Court initially concerned the period for which interest was payable; specifically, the day on which the period commenced.

The case proceeded by way of a statement of agreed facts and concerned only the November 2009 tax period. That is significant because this tax period was governed by the law as it stood before the introduction of the self-assessment regime on 1 July 2012. Under this regime, the lodgement of a BAS is deemed to be an assessment made by the Commissioner.[24]

Before 1 July 2012, there existed a 'self-actuating' regime for GST which did not rely on assessments being made. Taxpayers simply lodged BASs and the net amount shown on the BAS was, as held in *Multiflex*, deemed to be the correct net amount for the relevant tax period. The Commissioner was always at liberty to make an assessment (and subsequent amended assessment) but did not need to do so. In practice, refunds were sometimes dealt with by revising the BAS for a tax period and sometimes dealt with by the Commissioner making an assessment for a tax period.

Travelex lodged its November 2009 BAS on 16 December 2009. On 8 June 2012, after the earlier decision of the High Court, Travelex wrote to the Commissioner setting out the amount of the refund for the November 2009 tax period. That letter was received by the Commissioner on 12 June 2012 and, in that letter, Travelex stated that it was entitled to a refund of $149,020 for the November 2009 tax period, as well as amounts for other tax periods. The letter then stated: '[w]e ask that you please amend the BAS returns for the periods 1 January 2008 to 31 December 2009 in accordance with appendix A'.

On 28 June 2012, the Commissioner allocated the amount of $149,020 to Travelex's integrated client account, which is a type of running balance account, as a credit amount. The 'effective date' of the allocation of the November 2009 amount was 16 December 2009. One of the Commissioner's business records included the following notation in relation to that allocation: 'Amended self assessed amount(s) for the period ended 28 Feb 09'. On 6 July 2012, the Commissioner paid Travelex an amount equal to the November 2009 Amount.[25]

Significantly, it was an agreed fact between the parties to the litigation that the amount of $149,020 allocated by the Commissioner constituted an RBA surplus.

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[23] *Travelex Ltd v Federal Commissioner of Taxation* (2010) 241 CLR 510.

[24] *Taxation Administration Act 1953*, Schedule 1, subsection 155-15(1).

[25] *Taxation Administration Act 1953*, subsection 8AAZLF(1).

Relevant legislation

The source of the Commissioner's obligation to pay interest on overpayments is section 12AA of the IOP Act, which relevantly provides as follows:

> If:
>
> (a) the Commissioner has allocated a BAS amount to an RBA of an entity; and
>
> (b) . . .; and
>
> (c) under subsection 8AAZLF(1) of the *Taxation Administration Act 1953*, the Commissioner is required to refund to the entity the whole or part of an RBA surplus for that RBA; and
>
> (d) the refund takes place after the RBA interest day;
>
> then interest is payable by the Commissioner to the entity on the amount refunded.

In relation to paragraph (d), the 'RBA interest day' is relevantly defined in section 12AF of the IOP Act in the following terms:

> ***RBA interest day*** for an RBA surplus means the 14th day after the latest of the following days:
>
> (a) either:
>
> (i) if section 12AA applies—the day on which the surplus arises;
>
> (ii) …
>
> (b) if, by the day applicable under paragraph (a), the person has not given the Commissioner a notification that is required for the refund under section 8AAZLG of the *Taxation Administration Act 1953* and that is accurate so far as it relates to the refund—the day on which that notification is given to the Commissioner;
>
> (c) …

This definition was critical to the resolution of the dispute between Travelex and the Commissioner. That is because the period during which interest is payable, as provided in section 12AD of the IOP Act, hinges on the ascertainment of the RBA interest day. Section 12AD provides as follows:

> Interest under this Part is payable for the period from the end of the RBA interest day until the end of the day on which the refund takes place.

The final relevant provision to note is section 8AAZLG of the TAA, which specifies the circumstances in which the Commissioner may retain an amount that he or she would otherwise have to refund under section 8AAZLF. Section 8AAZLG provides:

> (1) The Commissioner may retain an amount that he or she otherwise would have to refund to an entity under section 8AAZLF, if the entity has not given the Commissioner a notification:

(a) that affects or may affect the amount that the Commissioner refunds to the entity; and

(b) that the entity is required to give the Commissioner under any of the BAS provisions (as defined in subsection 995-1(1) of the *Income Tax Assessment Act 1997*).

(2) The Commissioner may retain the amount until the entity has given the Commissioner that notification or the Commissioner makes or amends an assessment of the amount, whichever happens first.

The terms of section 8AAZLG and, in particular, the apparent requirement, by reason of subparagraph (b) that the notification be one that the entity is required to give the Commissioner 'under any of the BAS provisions', was also critical to the resolution of the dispute.

Thus, the question was whether, for the purposes of paragraph (b) of the definition of 'RBA interest day' in section 12AF of the IOP, a 'notification … [was] required for the refund under section 8AAZLG' of the TAA. If no such notification was required, paragraph (b) of the definition did not apply and the RBA interest day was the day ascertained by reference to subparagraph (a)(i) of the definition. That day was 30 December 2009, being 14 days after the date on which the RBA surplus arose (16 December 2009). If such a notification was required, paragraph (b) of the definition was engaged, and the RBA interest day was 14 days after the day on which the notification was given to the Commissioner.

The parties' submissions

Travelex contended that paragraph (b) of the definition of 'RBA interest day' was not engaged. In its submission, it was not required by any of the BAS provisions to give the Commissioner any notification of the refund. It should be noted here that although section 105-55 of Schedule 1 to the TAA provided for a notification of a GST refund to preserve entitlements beyond the statutory time limits, this was not a notification 'required' by any of the BAS provisions.

The Commissioner contended that the RBA interest day was 26 June 2012, being 14 days after Travelex's letter dated 8 June 2012 was received by the Commissioner. In that letter, Travelex notified the Commissioner of the amount of the refund. In the Commissioner's submission, that notification was required under the GST Act to revise or amend the BAS which was initially lodged by Travelex in respect of the November 2009 tax period. The Commissioner contended that, without the notification, there would have been no overpayment, no RBA surplus, and Travelex would not have been entitled to a refund under section 8AAZLF of the TAA. That was because the net amount would have remained the amount initially reported or worked out by Travelex in the November 2009 BAS.

The Federal Court decision

Wigney J remarked that to find an answer to the question it was 'necessary to embark on a somewhat tortuous journey through a labyrinth of obscure provisions in the GST Act, the Overpayments Act, the

Taxation Administration Act 1953 (Cth) . . . and the *Income Tax Assessment Act 1997* (Cth) . . .'.[26] In considering the competing submissions, his Honour observed:

> 'The fundamental problem for the Commissioner is that he was unable to point to any provision in the GST Act, the Administration Act, or any other relevant Act, which clearly or expressly required Travelex to give the Commissioner a notification of the refund amount.'[27]

As part of the reasoning process, his Honour considered whether there was a statutory basis for an amended BAS. In a finding significant for the course of subsequent appeals, he concluded that there was not:

> 'It would appear that the Commissioner had a long-standing administrative practice of allowing entities to lodge documents purporting to be amended or revised GST returns or BAS, and an equally long-standing administrative practice of 'processing' such documents as if they amended the net amounts reported in the GST returns lodged pursuant to s 31-5 of the GST Act. It was common ground that that is what occurred here.'[28]

Wigney J acknowledged that it was open to the Commissioner to have made an assessment at any time rather than to have revised activity statements:

> '. . . to the extent that there were any practical or administrative issues in relation to the payment of the refund to Travelex, they could have been overcome by the Commissioner making an assessment pursuant to s 105-5 of the Administration Act, as opposed to processing a purported amendment of Travelex's BAS . . .'[29]

His Honour stated that 'had the Commissioner made an assessment, instead of administratively processing the refund as arising from an amended GST return, the position in relation to interest would undoubtedly have been different.'[30] That is a point to which we shall return below. Following detailed analysis, his Honour concluded:

> . . . that 'the letter dated 8 June 2012 from Travelex's accountants to the Commissioner was not an amended BAS and was not a notification that Travelex was required to give the Commissioner under s 31-5 of the GST Act or any of the other BAS provisions. It follows that the letter was not a notification that was required for the refund under s 8AAZLG of the Administration Act, and that paragraph (b) of the definition of 'RBA interest day' in s 12AF of the Overpayments Act was therefore not engaged. The result is that the RBA interest day was the fourteenth day after the day on which the relevant surplus arose. It was common ground that the surplus arose on 16 December 2009. The RBA interest day was accordingly 30 December 2009. . . The result is that, by reason of s 12AD of the Overpayments Act, interest was payable for the period 31 December 2009 to 6 July 2012, being the day the refund took place.'[31]

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[26] *Travelex Limited v Commissioner of Taxation* [2018] FCA 1051 at paragraph [3].
[27] *Travelex Limited v Commissioner of Taxation* [2018] FCA 1051 at paragraph [68].
[28] *Travelex Limited v Commissioner of Taxation* [2018] FCA 1051 at paragraph [86].
[29] *Travelex Limited v Commissioner of Taxation* [2018] FCA 1051 at paragraph [98].
[30] *Travelex Limited v Commissioner of Taxation* [2018] FCA 1051 at paragraph [98].
[31] *Travelex Limited v Commissioner of Taxation* [2018] FCA 1051 at paragraphs [109]-[110].

Travelex therefore obtained the declaratory relief it sought.

The Full Federal Court Decision

It will be recalled that it was an agreed fact between the parties that the amount of $149,020 allocated by the Commissioner constituted an RBA surplus. On appeal, the Commissioner did not contest that he had no power to revise a BAS. Instead, he contended for the first time that what he had done was legally misconceived. He orally submitted that the facts were agreed upon a false legal assumption and thus the Court ought not be bound by them.[32] It followed that no interest was payable because Travelex's entitlement to a refund had never crystallised, even though the Commissioner had paid Travelex a substantial amount representing the amount of the refund.[33]

Steward J, with whom Kenny J agreed, considered the historical fact of allocation determinative:

> '. . . what triggers the existence of an RBA surplus is the historical fact of the allocation of amounts, whether correctly or not, as debits and credits to an RBA by the Commissioner. That is because the scheme established under Div 3 of Pt IIB gives the balance recorded in an RBA legal efficacy, even though the balance may be mistaken. Any other conclusion would seriously undermine the effectiveness of the RBA system. If a mistaken entry is made to an RBA it will then be a matter for either the taxpayer or the Commissioner to correct that balance by the filing of a GST return, or by the issue of an assessment.'[34]

Derrington J disagreed, stating:

> 'No RBA surplus arose merely because the Commissioner made an unauthorised allocation to the RBA in June 2012. On appeal this Court is not bound to act upon mistakenly agreed statements of law or law and fact or, indeed, of fact.'[35]

As to whether the historical fact of allocation is determinative, his Honour continued:

> 'The effect of Travelex's submission was that, regardless of the legality of the entitlement to the amount of allocation, the fact of allocation created the liability. That, of course, is not correct. As previously explained, the RBA is, as is said in s 8AAZC of the TAA, a system of accounting for primary tax debts. There is not the slightest suggestion in Part IIB that an RBA, of itself, gives rise to substantive rights and liabilities.[36]

By majority, therefore, the Full Court dismissed the Commissioner's appeal.

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[32] *Commissioner of Taxation v Travelex Limited* [2020] FCAFC 10 at paragraph [162].
[33] *Commissioner of Taxation v Travelex Limited* [2020] FCAFC 10 at paragraph [4].
[34] *Commissioner of Taxation v Travelex Limited* [2020] FCAFC 10 at paragraph [166].
[35] *Commissioner of Taxation v Travelex Limited* [2020] FCAFC 10 at paragraph [88].
[36] *Commissioner of Taxation v Travelex Limited* [2020] FCAFC 10 at paragraph [102].

The High Court Decision

The Commissioner sought special leave to appeal to the High Court and, on 25 June 2020, Bell and Nettle JJ granted leave 'on the papers'.[37]

In the High Court, Travelex maintained the argument that an RBA surplus arose from the fact of allocation, as held by Steward J and Kenny J in the Full Court. Travelex also filed a notice of contention arguing that the Commissioner had in fact made an 'assessment' which culminated in making a credit entry in Travelex's RBA. On this contention, it did not matter whether there was any power to revise a BAS. The Commissioner maintained his argument that there was no RBA surplus, and denied that an assessment had been made.

In a unanimous joint judgment, the High Court allowed the Commissioner's appeal which it characterised in the following terms: '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.'[38] Their Honours essentially agreed with the reasoning of Derrington J, who had dissented in the Full Court.

The Court observed that the running balance account provisions in the TAA fulfilled their 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.' (emphasis added)[39] Their Honours therefore concluded as follows:

> '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.'[40]

Finally, the Court rejected Travelex's contention that the Commissioner had made an 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.'[41]

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[37] *Commissioner of Taxation v Travelex Limited* [2020] HCATrans 089.

[38] *Commissioner of Taxation v Travelex Limited* [2021] HCA 8 at [2] per Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ.

[39] *Commissioner of Taxation v Travelex Limited* [2021] HCA 8 at [23].

[40] *Commissioner of Taxation v Travelex Limited* [2021] HCA 8 at [29].

[41] *Commissioner of Taxation v Travelex Limited* [2021] HCA 8 at [33].

The Commissioner ultimately prevailed in the litigation but many unanswered questions remain.

The self-actuating regime – unanswered questions

The Travelex litigation involved the 'self-actuating' regime which existed before the self-assessment regime commenced on 1 July 2012. It might be thought that tax periods of a decade ago would no longer be relevant given four-year limitation periods. However, one of the features of the former regime was that a taxpayer could give to the Commissioner notice of an entitlement to a refund and this would stop the clock running on limitation periods.[42] A number of such notices are still in existence and therefore entitlements in respect of earlier tax periods are very much alive.[43]

Travelex tells us that, under the self-actuating regime, and absent an assessment, the Commissioner had no power to revise or amend a GST return incorporated in a BAS. It is worth observing that under the self-actuating regime it was relatively rare for the Commissioner to make an assessment, and he usually did so only to increase a self-assessed liability following compliance activity.

What then are the consequences today of erroneous entries made by the Commissioner in a running balance account ten years ago?

This question might arise in different ways. For example, if a taxpayer made a voluntary disclosure of a GST liability in 2010, revised an earlier BAS, and made payment to the Commissioner, is the Commissioner now obligated to return the payment to the taxpayer? Conversely, if a taxpayer had claimed a GST refund in 2010, revised an earlier BAS, and received payment from the Commissioner, is the taxpayer now obligated to return the payment to the Commissioner?

In answering these questions, it is of course critical to understand what is happening behind the running balance account. As the High Court in *Travelex* reminds us: '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.'[44] In other words, you should look to the substantive liabilities and entitlements arising under primary taxation laws. It should also be remembered that, under the self-actuating regime, GST liabilities and entitlements did not depend on the Commissioner making an assessment.[45]

Thus, a taxpayer who made a voluntary disclosure of a substantive GST liability in 2010 would have no legal basis for the return of the payment and, if there were any doubt about that, the Commissioner could make an assessment at any time.[46]

Similarly, a taxpayer who claimed a substantive GST refund in 2010 would be under no obligation to return the payment to the Commissioner and again, if there were any doubt about that, could request the Commissioner to make an assessment.

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[42] *Taxation Administration Act 1953*, Schedule 1, section 105-55, repealed on 1 January 2017.
[43] A notice under section 105-55 only preserves an entitlement to an indirect tax refund, and so has no relevance to a claim for delayed refund interest. Travelex had therefore commenced proceedings seeking declaratory relief.
[44] *Commissioner of Taxation v Travelex Limited* [2021] HCA 8 at [29].
[45] *Taxation Administration Act 1953*, Schedule 1, section 105-15.
[46] *Taxation Administration Act 1953*, Schedule 1, section 105-25.

But suppose there were a substantive GST liability, and a general interest charge ('GIC') was imposed and not remitted in full. Was the GIC lawfully imposed? Like delayed refund interest, the calculation of GIC is referable to the running balance account provisions and, specifically, to an 'RBA deficit'.[47] If there is an 'RBA deficit debt' at the end of a day, then general interest charge is payable by the tax debtor on that RBA deficit debt for that day.[48] Relevantly, an RBA deficit debt means a balance in favour of the Commissioner based on primary tax debts that have been allocated to the RBA and that are currently payable.[49]

In much the same way as there was an unauthorised allocation of a credit to Travelex's RBA, there would be an unauthorised allocation of a debt to the taxpayer's RBA following the voluntary disclosure and related purported BAS revision. There could be no RBA deficit debt and therefore no basis for imposing GIC. Perhaps the Commissioner could now make an assessment but, as in Travelex, difficult questions might arise about the date of allocation of the debt giving rise to the RBA deficit debt. As things stand, however, there has been a prima facie unlawful imposition of GIC.

An aggrieved taxpayer who now wishes to recover any GIC unlawfully imposed would face substantial hurdles if the Commissioner desires to retain the GIC paid. The taxpayer would need to commence proceedings against the Commissioner, whether by way of mandamus, declaration or debt recovery proceedings. In each case, the taxpayer would be met by an assessment and a debate about the allocation of the primary debt to the RBA. In each case, the Commissioner would almost certainly specifically plead limitation of actions as a defence.

The law on limitation of actions is complex and beyond the scope of this paper, but a few comments may suffice to make the point. In the case of public law remedies, such as mandamus, there is no time limit in commencing such proceedings, at least in the federal jurisdiction. However, the Commissioner may raise a defence of delay in bringing the proceedings. The grant of a remedy is discretionary, and this discretionary power is sufficient to allow the delay of a plaintiff to be measured against other statutory time limitations.[50]

What, then, would be the relevant statutory limitation period? As mentioned above, and as an alternative to proceedings for declaratory relief or mandamus, a taxpayer can bring an action in debt against the Commissioner.[51]

A taxpayer who commences proceedings to recover overpaid GIC in an action for debt would generally be subject to a six-year limitation period.[52] Although the action is to recover a purported debt under a federal statute, the relevant limitation periods will be found in State legislation.[53]

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[47] *Taxation Administration Act 1953*, section 8AAC.

[48] *Taxation Administration Act 1953*, subsection 8AAZF(1).

[49] *Taxation Administration Act 1953*, subsection 8AAZA.

[50] See generally *Tavitian v Commissioner of Highways* [2010] SASC 206.

[51] See, for example, *Pape v Commissioner of Taxation* (2009) 238 CLR 1, per French CJ at [38], Gummow, Crennan and Bell JJ at [140], and Heydon J at [452].

[52] See, for example, *Limitation Act 1969* (NSW), paragraph 14(1)(d) and subsection 14(3). Similar provisions can be found in other State and Territory legislation.

[53] *Judiciary Act 1903* (Cth), sections 64 and 79.

There are therefore unanswered questions relating to the implications arising from the unlawful allocation of amounts to an RBA, and specifically in relation to the imposition of GIC but, as suggested above, an aggrieved taxpayer would face substantial hurdles in now seeking to recover any GIC unlawfully imposed.

The assessment regime – an unanswered question

Would delayed refund interest have been available and, if so from when, had the Commissioner issued an assessment to Travelex for the relevant tax period? The question arises both under the former self-actuating regime and the current self-assessment regime.

As mentioned above, Wigney J at first instance in *Travelex* observed that '. . . had the Commissioner made an assessment, instead of administratively processing the refund as arising from an amended GST return, the position in relation to interest would undoubtedly have been different'.[54] While that statement was made by way of obiter dicta, it is nevertheless a strong and emphatic statement. But is it correct? The point was never really argued or tested.

The *Travelex* litigation concerned entitlement to interest under section 12AA of the IOP Act. However, entitlement may also arise under other provisions of the IOP. In particular, subsection 9(1) of the IOP Act provides for an entitlement to interest where:

> (a) an amount of relevant tax is paid by a person to the Commissioner (in this subsection referred to as the amount paid); and
>
> (b) as a result of a decision to which this Act applies, the whole or a part of the amount paid is overpaid by the person and is refunded to the person or applied against any liability of the person to the Commonwealth.

For the purposes of paragraph (a), GST assessed under the GST Act is a 'relevant tax'.[55]

For the purposes of paragraph (b), 'a decision to which this Act applies' means, relevantly, a decision on an objection.[56] It also applies to certain decisions of the Commissioner to amend an assessment which reduces the liability to the relevant tax.[57] However, 'a decision to which this Act applies' does not appear to cover a decision to amend an assessment of GST. Nor has it ever covered an original assessment of GST. Thus, for assessments of GST against which there is no objection, subsection 9(1) of the TIO has no application.

In these circumstances, might section 12AA of the IOP Act, the section litigated in *Travelex*, have any application to assessments of GST?

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[54] *Travelex Limited v Commissioner of Taxation* [2018] FCA 1051 at paragraph [98].

[55] *Taxation (Interest on Overpayments and Early Payments) Act 1983*, section 3C, Item 155.

[56] *Taxation (Interest on Overpayments and Early Payments) Act 1983*, subsection 3(1), paragraphs (a), (b) and (c) of the definition.

[57] *Taxation (Interest on Overpayments and Early Payments) Act 1983*, subsection 3(1), paragraphs (ca), (cb), and (d) of the definition.

There would certainly now be no doubt that the Commissioner could lawfully allocate a BAS amount to the RBA of an entity and that, absent other liabilities, the Commissioner would be required to refund any RBA surplus to the entity.[58]

As in *Travelex*, therefore, we would quickly find ourselves back into the definition of 'RBA interest day' and, in particular, whether the entity had given to the Commissioner 'a notification that is required for the refund under section 8AAZLG of the *Taxation Administration Act 1953* and that is accurate so far as it relates to the refund.'[59] We have seen that this definition is critical because the period for which any interest is payable commences from the end of the RBA interest day.[60]

The argument for a taxpayer would presumably be that there is no notification required for the refund within the meaning of section 8AAZLG because even if a notice of assessment is a notification required for the refund, it is not a notification that the taxpayer is required to give.[61] On that contention, the result would be that the RBA interest day is the fourteenth day after the day on which the relevant surplus arose. That is certainly not how the Commissioner administers the current regime and he would no doubt disagree with that contention. In doing so he would undoubtedly focus attention on any notifications he considers might be required for the refund.

Despite the obiter dicta of Wigney J at first instance in *Travelex*, it remains an open question whether there exists an entitlement to delayed refund interest commencing 14 days from the day a surplus arises either on an amended assessment under the self-assessment regime, or an original assessment under the self-actuating regime, in circumstances where there is no objection.

This naturally raises many difficult issues which are beyond the scope of this paper but the fact there is an open question at all in these circumstances is problematic and ought to be resolved. We shall return to this below.

Unlawful administrative practices

Problems will inevitably arise when administrative practices are adopted by the Commissioner, even if those practices appear to benefit taxpayers. Such practices can unravel upon external scrutiny, often with unpredictable consequences. The administrative practice which unravelled in *Travelex* is a good example, but is it the only one? The short answer is 'no'. Here are two further examples.

Error correction limits

Where an error needs to be corrected in a tax period, and assuming the error does not give rise to an adjustment event, the error would usually need to be corrected in the tax period to which it relates. Under the self-assessment regime, this would typically be done by amending the assessment for that tax period.[62]

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[58] *Taxation Administration Act 1953*, subsection 8AAZLF(1).

[59] *Taxation (Interest on Overpayments and Early Payments) Act 1983*, section 12AF.

[60] *Taxation (Interest on Overpayments and Early Payments) Act 1983*, section 12AD.

[61] Compare *Travelex Limited v Commissioner of Taxation* [2018] FCA 1051 at paragraph [98] per Wigney J.

[62] *Taxation Administration Act 1953*, Schedule 1, subsection 155-35(1).

In the early days of GST, the Commissioner adopted an administrative practice of allowing error corrections to be made in later BASs. This practice was published in a 'Fact Sheet',[63] and it was a practice which clearly benefited taxpayers. However, there appeared to be no legislative basis for the practice. Indeed, there was a specific Determination making power relating to error corrections which was simply by-passed.[64]

Before 1 July 2012, the Commissioner could make a Determination about working out a net amount but that Determination was limited to the correction of errors from the immediately preceding tax period.[65] No doubt alive to the unlawful administrative practice, this limitation was removed by amendment for tax periods commencing 1 July 2012 such that error corrections could be made for earlier tax periods if they were in the four-year period of review.[66]

On 23 April 2013, and following the amendment to the Determination making power, the relevant Deputy Commissioner made a Determination relating to correcting GST errors which continues in force today.[67] The Fact Sheet was withdrawn from the date of the Determination and the Commissioner's hitherto unlawful administrative practice was placed on a sound legislative footing.

So why is that a problem today?

The Commissioner has entered into a number of Annual Compliance Arrangements ('ACAs') with large taxpayers. According to the Commissioner, this 'is an administrative arrangement developed to manage the compliance relationship with you in an open and transparent environment.'[68] That statement is slightly ironic given the lack of transparency surrounding such arrangements, but it is clear that they are 'administrative'. The ACAs often give concessional treatment to large taxpayers and, in particular, often provide more generous error correction limits than the Determination. This is squarely in the territory of an unlawful administrative practice as it goes beyond the lawfully made Determination.

Unintended consequences might flow from this. For example, a large corporate making an error correction in accordance with an ACA but outside the Determination, has not lawfully made a correction in the relevant tax period. This can therefore be open to further amendment with consequences for limitation periods, objection rights and so on. Should a contested issue arise, the Commissioner can, as in *Travelex*, simply resile from his unlawful administrative practice.

More importantly, perhaps, the Commissioner should always be seen to be acting lawfully and within the bounds of the legislation. It matters not that acting unlawfully benefits taxpayers.

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[63] Australian Taxation Office, Fact Sheet NAT 4700, *Correcting GST Mistakes*.
[64] *A New Tax System (Goods and Services Tax) Act 1999*, section 17-20.
[65] *A New Tax System (Goods and Services Tax) Act 1999*, former subsection 17-20(2).
[66] *A New Tax System (Goods and Services Tax) Act 1999*, subsection 17-20(2), and *Taxation Administration Act 1953*, Schedule 1, subsection 155-35(2).
[67] *Goods and Services Tax: Correcting GST Errors Determination 2013.*
[68] https://www.ato.gov.au/business/large-business/compliance-and-governance/annual-compliance-arrangement/

Voluntary return of JobKeeper payments

The voluntary return of JobKeeper payments by large corporates whose profitability recovered quickly through the COVID crisis has been the subject of considerable public interest and debate. It shall be assumed for present purposes that a corporate taxpayer was entitled to claim JobKeeper payments and was lawfully paid by the Commissioner.[69] Is there a lawful mechanism to return those monies to the Commissioner?

The JobKeeper Rules provide that, if the Commissioner is satisfied that an entity is entitled to a JobKeeper payment, the Commissioner 'must' pay the entity the JobKeeper payment.[70] This positive obligation on the Commissioner to make payment is consistent with the decision of the Full Court in *Multiflex*,[71] discussed above.

What should happen, then, if the taxpayer returns JobKeeper payments to the Commissioner? As discussed above in relation to *Travelex*, the amount returned should be allocated to the RBA as a 'credit', which would result in an 'RBA surplus' arising. Assuming there to be no other tax-related liabilities against which that surplus might be set-off, the Commissioner would be obligated to refund the surplus.[72] But this is not what he is doing. Instead, he is arguably engaging in an unlawful administrative practice of retaining the amounts repaid, no doubt because this benefits all concerned.

There is some sleight of hand in all of this. Presumably well aware of the difficulty an RBA surplus creates, the Commissioner states on his website: 'You must contact us before making a voluntary repayment.'[73] That is the first warning sign; the Commissioner wants to make sure you don't just return the money. He goes on to say that voluntary repayments 'are treated differently to other payment types made to us, cannot be made through usual ATO payment channels, and require a special Payment Reference Number (PRN).' These are the additional warning signs; the Commissioner is making doubly sure that you don't send money to your usual account. The Commissioner is therefore well aware that the taxpayer is seeking to return JobKeeper payments to which there is a lawful entitlement, but takes extraordinary steps not to recognise it as such. This is a triumph of form over substance, something which the Commissioner usually frowns upon.

Unintended consequences might again flow from this. The directors or officers of the company may be replaced. Adverse events could see liquidators, or receivers and managers, appointed. The controlling minds of the company may therefore change. What happens if they sue the Commissioner for the RBA surplus which ought to have arisen and been returned?

And again, more fundamentally, why should the Commissioner act unlawfully simply because it facilitates a desirable outcome?

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[69] *Coronavirus Economic Response Package (Payments and Benefits) Act 2020; and Coronavirus Economic Response Package (Payments and Benefits) Rules 2020*, subsection 6(1).

[70] *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020*, subsection 14(1).

[71] *Commissioner of Taxation v Multiflex Pty Ltd* (2011) 197 FCR 580.

[72] *Taxation Administration Act 1953*, section 8AAZLF.

[73] https://www.ato.gov.au/General/JobKeeper-Payment/Employers/JobKeeper-voluntary-repayments/

The need for reform

In a paper I delivered last year on GST administration I said that we have:

> . . . a legislative framework for GST administration which now resembles a patchwork quilt loosely knitted together by administrative fiat and litigation. That may well be a function of the way the provisions developed: limitations on claiming credits in 2008; a new rulings regime in 2010; a new self-assessment regime in 2012; and a new refunds regime in 2014. These provisions are overlaid on existing complex provisions in the GST Act and the Administration Act. It is an unsatisfactory state of affairs and when the provisions do not work well together the Commissioner now routinely resolves any difference against the taxpayer. These provisions are begging to be reformed into a coherent framework for GST.[74]

Subsequently, in the Full Court in *Travelex*, Steward J, before his elevation to the High Court, stated:

> . . . it was clear that the taxpayer had paid too much tax; a refund with interest, one might have thought, should have been the correct outcome. That has not occurred in large part because the applicable provisions are extremely difficult to follow, located as they are across three distinct Acts of Parliament. In my view, it should not be difficult to express clear rules concerning when the Commissioner owes a refund and when he should pay interest on it. No such rules may presently be found in the GST Act, the TAA or the Overpayments Act. What may be found is what the learned primary judge, with respect, correctly described as a "labyrinth of obscure provisions" through which the taxpayer must undertake a "tortuous journey". Applying those provisions should not be like being in a dark wood where the straight way is lost. The rules need clarity. The area needs reform.[75]

In this paper we have touched upon some of the issues that arise in the aftermath of the *Travelex* decision. In particular, the lawfulness of imposing GIC under the self-actuating regime, and the availability of delayed refund interest commencing 14 days from the day a surplus arises on an assessment not subject to objection.

We have also touched upon unlawful administrative practices apart from the BAS revisions discussed in *Travelex*. On this issue, I respectfully suggest that the Commissioner conduct an internal review of all his administrative practices and document the legislative basis for each, whether by reference to a specific statutory power or to the general power of administration.[76]

The need for reform of the administrative provisions relating to GST is abundantly clear. The Commissioner and taxpayers alike are spending considerable resources, both time and money, on unproductive debates on obscure provisions that lack clarity and coherence. *Travelex* has clarified one small but important issue, but many questions remain. It is an unsatisfactory state of affairs.

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[74] O'Rourke, *GST administration – a practitioner's perspective*, eJournal of Tax Research vol 18, no 1, 124 at 138.

[75] *Commissioner of Taxation v Travelex Limited* [2020] FCAFC 10 at paragraph [163].

[76] *Taxation Administration Act 1953*, Schedule 1, section 356-5.

