Casenotes

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PAY NOW, AUDIT LATER

The decision handed down in the recent Full Federal Court case of *Commissioner of Taxation v Multiflex Pty Ltd*[1] has theoretically brought an abrupt end to the Commissioner's common practice of withholding "suspicious" GST refunds claimed by taxpayers in business activity statements (BASs) while he audits the claims. The taxpayer sought and successfully obtained an order for mandamus, requiring the Commissioner of Taxation to pay a refund that had been withheld by the Commissioner while he investigated the integrity of the claim. The Commissioner argued that he had compelling reasons to suspect that the BASs were fraudulent and – notwithstanding the statutory provision requiring him to pay the refund as no time is specified by the statute in which to do so, there is an implied reasonable period of time (arising from the "legislative scheme as a whole") that allows him to investigate refunds prior to paying them.

Jessup J of the Federal Court held that to the extent a reasonable time is allowed to the Commissioner by implication, it is a reasonable time to administer the payment of the refund to the taxpayer and does not extend to undertaking an audit or investigation.[2] The Full Federal Court upheld this finding and the Commissioner was also refused leave to appeal to the High Court.[3] The Commissioner has since confirmed in his Decision Impact Statement[4] that he will pay withheld GST refunds in accordance with the decision of the Full Federal Court signalling a victory for taxpayers who have suffered financial strain and uncertainty as a result of the Commissioner's decision to withhold.

While the consequences of the decision in *Multiflex* are significant, the outcome of the case itself is profoundly simple: when *A New Tax System (Goods and Services Tax) Act 1999* (GST Act) imposes an obligation on the Commissioner to pay a refund to a taxpayer, the Commissioner must do so. As no time period is expressly stipulated, it is implied the Commissioner must do so within a reasonable time; that is, within a reasonable time to carry out the obligation to pay the refund to the taxpayer as required by the GST Act.

The decision gives rise to a revenue exposure in that, unless the Commissioner issues an assessment within a very short period after the taxpayer files its BAS, he is required to pay refunds claimed even in circumstances where there is a strong suspicion that the information provided by the taxpayer is fraudulent and, as is often the case in respect of recalcitrant taxpayers, the amount paid (including any interest and penalties) may not be recoverable if and when an assessment is issued at a later time; for example, because the taxpayer can no longer be located or, the taxpayer is insolvent.

In the future, that exposure will likely be dealt with by amendments to the *Taxation Administration Act 1953* (*TA Act*). Alternatively, it remains open to the Commissioner to issue assessments that deny taxpayers their input tax credit entitlement and thereby remove the requirement for the Commissioner to pay prior to concluding a comprehensive investigation of the taxpayer's affairs. It may therefore be the case that, going forward, the issuing of assessments or amended assessments based on estimates of taxpayers' liabilities and in the absence of an audit may occur more regularly. Undoubtedly, if the Commissioner adopts that precarious path, there is likely to be more litigation to test the Commissioner's powers.

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

[2] *Multiflex Pty Ltd v Commissioner of Taxation* [2011] FCA 1112.

[3] *Commissioner of Taxation of the Commonwealth of Australia v Multiflex Pty Ltd* [2011] HCATrans 344.

[4] Australian Taxation Office, ATO Decision Impact Statement: *Commissioner of Taxation v Multiflex Pty Ltd* (12 December 2011). Under the heading "ATO View of Decision", it is stated that "It follows from the Full Court's decision that the Commissioner must perform duties under section 35-5 of the GST Act within the reasonable time for administrative processing of a refund or credit." Not surprisingly, the Commissioner also states that he "will continue to conduct analysis, profiling, reviews and audits of GST and Business Activity Statements".

To taxpayers and practitioners, the outcome in *Multiflex* may have seemed fairly obvious and it may be difficult to understand the Commissioner's perceived prospects of success – whatever they may have been, they were certainly not bolstered by the drafting of the relevant legislation which unambiguously requires the Commissioner to pay the GST refund. However, it is clear that there was, and is, a great deal at stake for the Commissioner, and he was tenacious in fighting this case to the bitter end.[5]

This article will canvass the issues dealt with in *Multiflex*, why the Commissioner fought so hard to win this upward battle, and what the consequences may be now that special leave to appeal to the High Court has been refused.

BACKGROUND

The taxpayer carried on a business of buying electronic goods from Australian suppliers and exporting them overseas. The taxpayer did not remit any GST as all of its supplies were GST-free exports. It did, however, claim input tax credits on its acquisitions. The Commissioner suspected that the tax invoices used to substantiate the taxpayer's input tax credit claims were fraudulent.

The Commissioner's view was based on the historical activities of three companies in the same group as Multiflex that he suspected of having engaged in "missing trader intra-community fraud" in the period leading up to June 2009. The Commissioner concluded his audit of these entities in June 2009 and subsequently issued GST assessments and related shortfall penalty notices amounting to $26 million.

However, in February 2011 the companies were put into liquidation and the amounts were never recovered. New companies were set up, including Multiflex, which took over the employees and payees and purchased the assets and the business of the liquidated companies. The director of the liquidated companies (who resigned from those companies in December 2010) became the director of Multiflex and the other new companies.[6]

It was accepted by Jessup J that the matters being investigated were complex and difficult and that the Commissioner was conducting the investigation with all due expedition.[7]

THE RELIEF SOUGHT

The taxpayer sought relief by way of mandamus under s 39B(1) of the *Judiciary Act 1903* against an officer of the Commonwealth, namely the Federal Commissioner of Taxation. Multiflex also claimed relief in debt and damages. The parties later agreed that, if the Federal Court was to find for the taxpayer, granting relief by way of mandamus would be the appropriate course and this was the relief ultimately granted.

It is relevant to note that when the Federal Court is asked to exercise its s 39B powers to grant relief by way of mandamus, it may refuse to do so on discretionary grounds, even if an unperformed statutory duty is identified. In this regard, Jessup J stated:

> The position, in my view, is this. If a court reaches a conclusion that a mandatory, unqualified, statutory duty remains unperformed, mandamus should go on the application of a party with an appropriate interest. The remedy may, however, be refused in a proper case. The situations in which the remedy may be refused have never been the subject of exhaustive catalogue, but, generally, it would seem to lie upon the statutory office holder in default of his or her obligations to bring forward some circumstance

[5] Besides the Federal Court first decision of Jessup J in *Multiflex Pty Ltd v Commissioner of Taxation* [2011] FCA 1112, the Full Court's judgment in *Commissioner of Taxation v Multiflex Pty Ltd* (2011) 197 FCR 580, and the High Court's decision on the application for special leave to appeal to the High Court, there were several other related hearings in relation to this matter. These included an application for an expedited hearing in the Federal Court in *Multiflex Pty Ltd v Commissioner of Taxation* [2011] FCA 789, an application for a stay of the orders of the Federal Court pending the application for special leave to appeal in *Commissioner of Taxation v Multiflex Pty Ltd* [2011] FCA 1316 and an application for an expedited special leave application to appeal to the High Court in *Commissioner of Taxation of the Commonwealth of Australia v Multiflex Pty Ltd* [2011] HCATrans 320.

[6] Facts as set out in *Commissioner of Taxation v Multiflex Pty Ltd* [2011] FCAFC 142 at [11].

[7] *Multiflex Pty Ltd v Commissioner of Taxation* [2011] FCA 1112 at [27].

> or justification which would make mandamus inappropriate, unnecessary, futile or the like. None of those conventional propositions has any obvious application to the facts of the present case.[8]

It is an interesting facet of the decision that suggestions of fraudulent activity on the part of the taxpayer did not warrant the exercise of the Court's discretion to refuse granting relief by way of mandamus (discussed below).

THE SMALL MATTER OF WHAT THE LAW ACTUALLY SAYS

The GST Act requires the Commissioner to do two things with respect to refunds, both of which were put into contention by the Commissioner:

1. to treat the amount worked out in the approved form (in this case, the BAS) as determinative of the net amount; and
2. where the net amount as worked out on the BAS is a negative amount, to pay the taxpayer the amount of the negative net amount.

The following is a summary of the relevant provisions in the GST Act and the TA Act.

Section 17-5 of the GST Act

Section 17-5 defines the "net amount" for a tax period as the sum of the GST for which you are liable, less the input tax credits to which you are entitled (subject to any increasing or decreasing adjustments for the tax period).

Section 17-15(1) of the GST Act

Section 17-15(1) of the GST Act states:

> You may choose to work out your net amount for a tax period in the way specified in an approved form if you use the form to notify the Commissioner of that net amount. *The amount so worked out is treated as your net amount for the tax period* [emphasis added].

A BAS is such an approved form.

Section 17-15(2) goes on to state that the section "*has effect despite s 17-5*" [emphasis added].

On the plainest reading of the text of s 17-15 (which, it is noted, was not the Commissioner's reading, discussed below), the amount a taxpayer works out using its BAS being the approved form will be treated as the taxpayer's net amount for a period, despite the fact that the actual net amount, under s 17-5, may be something different.

Sections 35-5 and 35-10 of the GST Act

Section 35-5 states:

> If the net amount for a tax period is less than zero, the Commissioner must, on behalf of the Commonwealth, pay that amount (expressed as a positive amount) to you.

Section 35-10 then states:

> *Your entitlement to be paid an amount under section 35-5 arises when you give the Commissioner a GST return.* [emphasis added]

This is where "GST return" is defined in s 195-1 of the GST Act to relevantly mean a return of the kind referred to in Div 31, which complies with all the requirements of ss 31-15 and 31-25 of the GST Act. Section 31-15 of the GST Act in turn states that a GST return must be in the approved form and s 31-25 specifies when GST returns must be given to the Commissioner electronically.

Section 8AAZLF of the TA Act

Section 8AAZLF provides that the Commissioner must refund to an entity so much of a running balance account surplus or credit as the Commissioner does not otherwise allocate or apply against a debt.

[8] *Multiflex Pty Ltd v Commissioner of Taxation* [2011] FCA 1112 at [31].

Section 8AAZLG of the TA Act

Under s 8AAZLG, the Commissioner need not give to the taxpayer a refund that he would otherwise be required to give, if the taxpayer has not given the Commissioner the requisite notification. A GST return or BAS is a form of notification for this purpose.[9]

Section 105-5 of Sch 1 to the TA Act

Under s 105-5, the Commissioner may at any time make an assessment of a taxpayer's net amount, or any part of the net amount for a tax period. The Commissioner may make an assessment even if he has already made an assessment for the tax period.

Section 105-15 of Sch 1 to the TA Act

Section 105-15(1) broadly states that the taxpayer's liability to pay a net amount and the time by which a net amount must be paid, do not depend on and are not in any way affected by the making of an assessment. Similarly, the Commissioner's obligation to pay a net amount under s 35-5 of the GST Act and the time by which it must be paid, do not depend on, and are not in any way affected by the making of an assessment.

Section 105-100 of Sch 1 to the TA Act

This section relevantly provides that the production of a notice of assessment is conclusive evidence that the assessment was properly made and that, except in Pt IVC proceedings on a review or appeal relating to the assessment, the amounts and particulars in the assessment are correct.

With respect to the payment of the refund provisions in the GST Act, there is no obvious ambiguity in the drafting of these provisions, other than that there is no specific time period stated in which the Commissioner must make the relevant payment. It is noted that, when s 35-5 of the GST Act was originally enacted, it stated:

> If the net amount for a tax period is less than zero, the Commissioner must, on behalf of the Commonwealth, pay that amount (expressed as a positive amount) to you within 14 days after you give to the Commissioner, under Division 31, your GST return for that tax period.

This was repealed and the present section substituted prior to the introduction of the GST on 1 July 2000.[10]

Importantly, there was no suggestion in the explanatory memorandum that the removal of the 14 day time period was intended to provide the Commissioner with a longer period to pay the refund or to investigate the refund prior to it being paid. The explanatory memorandum to the Bill that included this amendment stated:

> Section 35-5 currently requires the Commissioner to refund a net amount for a tax period that is negative, (i.e. where input tax credits exceed the GST), to an entity within 14 days after the GST return is given under Division 31. This provision is being amended to subject the refund to the generic refund rules in subsection 8AAZLF(1) of the TAA 1953. Those rules allow the Commissioner to apply the amount owing as a credit against any other tax debt of the entity.[11]

The change was evidently for the purposes of streamlining the administrative processes associated with the payment of GST refunds.

It is also noted that the drafters of the Australian GST Act had the benefit of, and often drew upon, similar legislation in New Zealand. Section 46 of the *Goods and Services Tax Act 1985* (NZ) provides that the Commissioner of Inland Revenue must make a refund of GST within 15 days of receiving a GST return from a taxpayer, *unless* he gives notice of his intention to investigate the circumstances of the refund claim within 15 days of receiving the return. The Full Court raised queries in the appeal proceedings as to why, with the benefit of the New Zealand example and experience, similar steps were not taken to include in the Australian legislation a period of time to investigate a refund claim, if

[9] *Multiflex Pty Ltd v Commissioner of Taxation* [2011] FCA 1112 at [15].

[10] Substituted by *A New Tax System (Tax Administration) Act 1999*, s 3 and Sch 15 item 1, effective 1 July 2000.

[11] *Explanatory Memorandum to A New Tax System (Tax Administration) Bill 1999* at [7.51].

that was the legislature's intention. As their Honours state:

> [T]he need for the Commissioner's pressing for the drawing of such an implication would have been obviated had heed been taken of amendments long ago made to the legislation governing New Zealand's GST system. That country's GST system provided much inspiration in the drafting of the core concepts of Australian's GST concepts.[12]

In the appeal, the Commissioner responded to these assertions by saying that at the relevant point in time a large suite of law had been enacted in a very short period; however, as the Full Court pointed out, s 35-5 was amended at a later point of time after that pressure was alleviated.

THE ARGUMENTS AND OUTCOMES

The Approved Form – s 17-15 of the GST Act

Preliminary to the submissions made in respect of the "reasonable time" implication, the Commissioner put forward some interesting arguments in respect of the proper interpretation of s 17-15 of the GST Act and the interaction of that section with s 35-5. Specifically, the Commissioner considered that in order to "work out your net amount for a tax period in the way specified in an approved form", it is necessary not only to complete that form, but to ensure that every aspect of the form that goes to the calculation of the net amount is worked out correctly. Described in another way, if the form is completed incorrectly, it is not a notification in the "approved form" and, therefore, the net amount so calculated isn't required to be treated as the net amount for the tax period.

Queries were raised by the Full Federal Court as to how this could be reconciled with the statement in s 17-15(2): "This section has effect despite section 17-5." If s 17-5 describes the method of calculating the net amount with reference to *true* liabilities and *true* entitlements, then the statement at s 17-15(2) must suggest that under s 17-15(1) the net amount can be something other than the *correct* net amount as calculated under s 17-5 and the substantive provisions of the GST Act. In response, the Commissioner argued that s 17-15(2) was part of the fine tuning of the machinery of the indirect taxes regime, designed to treat an amount on a form that encompasses amounts for wine equalisation tax and luxury car tax as part of the net amount, where they would not otherwise be included under s 17-5.

The Full Federal Court rejected this interpretation of s 17-15 and found that an amount calculated using a BAS is to be treated as the net amount, even in circumstances where the Commissioner knows it to be wrong. Their Honours stated:

> Consideration of context does not favour acceptance of the Commissioner's submission. Not only does s 17-15(1) provide that the amount "worked out" on the approved form is treated as the entity's net amount for a period but s 17-15(2) also underscores the primacy of the amount so worked out by providing that the section has effect despite s 17-5. Further, though s 105-15(1) of Schedule 1 to the TAA makes it plain that the incidence of a GST liability does not depend on the making of an assessment by the Commissioner, s 105-15(2) in that schedule makes it equally plain that the obligation which s 35-5 creates for the Commissioner to refund a net amount does not in any way depend on his having first made an assessment. *Each of these provisions, s 17-15 and s 35-5 of the* TAA *[sic] and s 105-15 of Schedule 1 to the* TAA *operate harmoniously so as to provide for a system of taxation in which, generally speaking and in the first instance, the duty of assessing ("working out") the liability to make a payment or, as the case may be, the entitlement to receive a refund is placed on the entity concerned, not on the Commissioner.*[13] [emphasis added].

With respect, the Full Federal Court's finding is eminently sensible and relieves taxpayers of the need to grapple with the Commissioner's obfuscated reading of s 17-15. Indeed, one suspects the Commissioner himself would struggle to process the vast number of BASs lodged with the ATO in circumstances where every error, no matter how minute, would subvert the status of the amount disclosed on the form as the "net amount", requiring the taxpayer to re-lodge its BAS, or the Commissioner to issue an assessment, in every case where such an error is identified. Clearly, even in

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

[13] *Commissioner of Taxation v Multiflex Pty Ltd* (2011) 197 FCR 580 at [25].

a self-actuating system, the taxpayer is entitled to have treated as the "net amount" the amount disclosed in its BAS subject to the Commissioner's review. The Commissioner can then exercise his wide powers to make an assessment if he considers that an adjustment to the net amount is necessary.

Reasonable Time – to do what?

The GST Act doesn't specify a time frame for the payment of a refund to a taxpayer. It was agreed between the parties in *Multiflex*, with reference to case law, that in the absence of an express time limit, a reasonable time should be allowed to the Commissioner to carry out the statutory duty of paying the refund. What is a "reasonable time" is a question that must be answered taking into account all the relevant facts and circumstances. The issue before the courts in relation to the implied "reasonable time" was: *a reasonable time to do what*?

The taxpayer argued that it is a reasonable time to do the very thing that s 35-5 of the GST requires; that is, pay the refund. The Commissioner, however, argued that he must be allowed a reasonable time to investigate suspicious refund claims. This, he argued, is implied, not by s 35-5 or the other sections mentioned above, but by the "legislative scheme as a whole". The generality of the Commissioner's repeated references to the importance of looking at implications arising out of the "legislative scheme as a whole" was a fairly obvious indicator that the precise language of the relevant statute was somewhat infelicitous to the Commissioner's position.

The primary difficulty with the Commissioner's argument was that it focused on what the outcome would be if the implication of a reasonable time to investigate was not drawn. It may be true that the construction contended by the taxpayer will result in an exposure to the revenue in the form of reckless or fraudulent BASs being lodged by recalcitrant taxpayers for the purposes of obtaining refunds, but as French CJ of the High Court noted in the special leave application, "The consequences are obvious enough but the question is whether they inform the construction".[14] Yet the Commissioner refused to concede that the duties imposed on him by the relevant statute should have the dominant bearing on how the GST Act is to be applied and administered, regardless of the inconvenience to him or the revenue exposure that may arise as a consequence. No viable alternative construction was provided by the Commissioner, other than this implication to be drawn from the "legislative scheme as a whole" such an implication being demonstrably at odds with the specific and unambiguous requirements of s 35-5 of the GST Act and s 8AAZLF of the TA Act.

Consequently, the Commissioner's arguments failed in the Federal Court at first instance and unanimously in the Full Federal Court. The conclusion of Jessup J, affirmed by the Full Federal Court, referred to the reciprocity between the Commissioner and the taxpayer in respect of payments of positive net amounts and refunds of negative net amounts:

> In short, once a net amount has been calculated under s 17-15 of the GST Act, a positive sum must be paid to the Commissioner, or a negative sum must be refunded by the Commissioner, regardless of the underlying correctness, as it were, of that calculation. Neither the entity nor the Commissioner may retain its or his money pending ascertainment of the true figure which represents the difference between the GST and input tax credits.[15]

This view was endorsed by the Full Federal Court as follows:

> It may readily be accepted that the imperative language of s 35-5 of the GST Act as to the making of a refund is at least attended with the implication that the refund must be made within a time which is reasonable in the circumstances. However, those circumstances must attend what is necessary to discharge the duty concerned, which is to make the refund, not to undertake an investigation which may or may not result in the raising of a GST assessment by the Commissioner. The trial judge was correct to reject any such wider implication as to what were circumstances relevant to the ascertainment of a reasonable time.[16]

At first instance, Jessup J dealt with the Commissioner's extensive arguments as to the

[14] *Commissioner of Taxation of the Commonwealth of Australia v Multiflex Pty Ltd* [2011] HCATrans 344 at lines 159-160.

[15] *Multiflex Pty Ltd v Commissioner of Taxation* [2011] FCA 1112 at [20].

[16] *Commissioner of Taxation v Multiflex Pty Ltd* (2011) 197 FCR 580 at [40].

undesirable consequences of such a construction, stating:

> If the present question related only to the length of what should be regarded as a reasonable period for the conduct of an investigation into the applicant's GST returns, I would have no reason not to accept the Commissioner's estimate… However, that question would arise only if the relevant provisions of the GST Act and the Administration Act, on their proper construction, contemplated the withholding of a payment under s 35-5 of the GST Act pending the ascertainment, by the Commissioner, of the true state of affairs with respect to GST and input tax credits… I do not accept that the relevant provisions can wear any such construction. *For me to take account of the obviously difficult position in which the Commissioner now finds himself as a basis for impressing such a construction on these provisions would be to give currency to the old truism that hard cases make bad law. It is not a course which I propose to follow.*[17] (emphasis added).

The Commissioner was not at all assisted by the fact that the absence of a "reasonable time to investigate" was an obvious and, seemingly, deliberate omission. Also dealing with the potential for abuse, the Full Federal Court relevantly commented that the legislature did not take up the provisions found in the New Zealand legislation which might have avoided such an outcome:

> Such potential as there may be for the abuse by an entity of an obligation to make a refund promptly… did not lead our Parliament to subject that obligation to the express qualification found in the New Zealand legislation. In the face of the express terms of the scheme of taxation as found in the GST Act and the TAA it is not, for the reasons given, open to find any qualification of that kind by implication.[18]

The Importance of Promptness in Business

Importantly for taxpayers, both Jessup J at first instance and the Full Federal Court took into account the importance to businesses (to whom, the Full Federal Court notes the provisions apply[19]) of the prompt receipt of GST refunds legitimately owing. In this respect, Jessup J stated:

> The scheme of the sections to which I have referred is such as to give predictability and immediacy to the short-term cash flow obligations and entitlements of registered businesses. It would make it possible for a business which was in control of its own transactions and accounts to factor those obligations and entitlements into its cash flow predictions, and provisions, in respect of a particular period. Thus a business which operates by reference to monthly periods should have a firm expectation that it will, by the 21st day of each month, make payment to the Commissioner of a positive net amount as disclosed on its GST return. Likewise, such a business should legitimately expect to receive from the Commissioner the payment of any negative net amount which is disclosed in its GST return in respect of a completed tax period, and to do so without having to wait the making of the detailed and possibly complex calculations that might be necessary to ascertain the true figure yielded by the subtraction referred to in s 17-5 of the GST Act.[20]

The Full Federal Court reiterated this contextual consideration stating that the GST legislation must "operate in a business environment with consequential ramifications for its construction"[21] and then referred to "the importance of a prompt refund, as calculated by an entity, being made by the Commissioner".[22] These comments reflect the commercial reality that many taxpayers rely upon the prompt payment of refunds to support their cash flows, to ensure their solvency and to secure continued financing. Taxpayers have faced considerable hardship in circumstances where refunds have been withheld for months (notably, in *Multiflex* the period was almost six months) often with little or no information from the Commissioner as to why the amounts have been withheld or what mischief he suspects. To allow the Commissioner an indefinite period in which to conduct investigations would undoubtedly put some businesses in danger of insolvency.

Further, there would be no avenue by which the taxpayer could seek review of whether the period of withholding of the refund was in fact reasonable in the circumstances, without being put to the cost

[17] *Multiflex Pty Ltd v Commissioner of Taxation* [2011] FCA 1112 at [28].

[18] *Commissioner of Taxation v Multiflex Pty Ltd* (2011) 197 FCR 580 at [41].

[19] *Commissioner of Taxation v Multiflex Pty Ltd* (2011) 197 FCR 580 at [38].

[20] *Multiflex Pty Ltd v Commissioner of Taxation* [2011] FCA 1112 at [22].

[21] *Commissioner of Taxation v Multiflex Pty Ltd* (2011) 197 FCR 580 at [37].

[22] *Commissioner of Taxation v Multiflex Pty Ltd* (2011) 197 FCR 580 at [38].

of commencing proceedings in the Federal Court in order to seek relief. For these reasons, the conclusions reached by the Federal Court and the Full Federal Court are, with respect, apt and appropriate and will relieve taxpayers of considerable uncertainty concerning their refund entitlements.

Refusal to exercise discretion to refuse mandamus

As noted above, the remedy sought by the taxpayer was subject to the discretion of the court[23] and could be denied to the taxpayer, even in circumstances where a statutory requirement to pay the refund was identified. The Commissioner argued that, in the circumstances, given the Commissioner's ongoing investigation of the integrity of the returns, the court should exercise its discretion to refuse mandamus. Jessup J rejected these submissions in the following way:

> Having found, as I do, that [s 35-5 of the GST Act and s 8AAZLF of the TA Act] give rise to an obligation to make a payment which is not qualified in the way proposed by the Commissioner, I consider that it would be antagonistic to the purpose and objects of them to excuse, in effect, a failure to perform that obligation upon the ground that an investigation is being conducted, however powerful be the other circumstances which give rise to the suspicion that the applicant's GST returns may not have been correct. Put another way, *when mandamus is available to compel the performance of a particular statutory duty, such discretion as there is to decline the remedy should not be exercised in such a way, or by reference to such considerations, as would be antagonistic to the terms, object or purposes of the sections under which the obligation arises.*[24] (emphasis added).

The Full Federal Court adopted this and also added in its judgment some insightful comments as to when a discretionary refusal to grant mandamus might occur:

> Respect for the rule of law by officers of the Commonwealth dictates that, though the remedy is discretionary, it should ordinarily be granted where an officer of the Commonwealth is refusing or neglecting to comply with an obligation to which he is subject: *Re Refugee Review Tribunal; Ex Parte Aala* (2000) 204 CLR 82 at [55] per Gaudron and Gummow JJ, Gleeson CJ at [5] agreeing. The remedy may be refused on discretionary grounds where an applicant has engaged in behaviour which is inconsistent with the granting of that relief (for example, undue delay, bad faith in relation to the transaction out of which the public duty arises or in its dealings with the court or absence of clean hands) or where there would be no injustice by a discretionary refusal (for example, absence of any different outcome even if the public duty had been performed or the existence of an adequate alternative remedy).[25]

It follows that the exercising of the Federal Court's discretion to deny mandamus in circumstances where the Commissioner has failed to meet his statutory duty to pay a GST refund would be exercised only in extraordinary circumstances, perhaps another salient lesson for the Commissioner.

THE KNIFE CUTS BOTH WAYS

It is interesting to note that the controversy as to whether an amount on a form or notification can be "conclusive" as to an amount payable or refundable only arises, at least insofar as the Commissioner is concerned, to amounts payable by him to a taxpayer. There is never any question that the effect of s 17-15 where the amount disclosed is a positive net amount is to give rise to an amount due and payable by the taxpayer, regardless of whether the amount is correct and perhaps even in circumstances where the amount is excessive.

One of the most curious and fundamental characteristics of Australia's indirect (and indeed, direct) tax laws is the power and significance with which a form or notice can be imbued. An example taxpayers are all too familiar with is that provided by s 105-100 of Sch 1 to the TA Act, which states the production of an assessment by the Commissioner is "conclusive evidence" the "assessment was

[23] See *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at 157-158.

[24] *Multiflex Pty Ltd v Commissioner of Taxation* [2011] FCA 1112 at [34].

[25] *Commissioner of Taxation v Multiflex Pty Ltd* (2011) 197 FCR 580 at [42].

properly made", unless the taxpayer is able to prove otherwise in Pt IVC proceedings.[26] The section allows the Commissioner a wide scope for guessing, estimating, making mistakes and, if the taxpayer does not have the evidence to show the assessment is excessive,[27] it will stand, provided the Commissioner meets, what could fairly be described as, *less than onerous* standards of acting in good faith.[28]

Indeed, while a taxpayer is challenging the assessment under Pt IVC of the TA Act, an amount owed to the Commissioner will be a debt due and payable and the Commissioner can wind up or bankrupt a taxpayer while the Pt IVC proceedings are on foot in an effort to recoup the monies owed to him.[29] The Commissioner has a record of doing so, even where the taxpayer has reasonable prospects of success in the Pt IVC proceedings and the winding up or bankruptcy of the taxpayer is likely to come at an irrecoverable and devastating cost to the taxpayer and the creditors,[30] regardless of the outcome of the substantive dispute.

While the Commissioner has taken his own vast powers in his stride, it is clear from his submissions in *Multiflex* that he struggles greatly with any level of reciprocation, in terms of what predominance can be afforded to a notice that is furnished not by the Commissioner but by a taxpayer. It is interesting to note against the backdrop of the Commissioner's assessment powers that he made the following observations in his special leave application before the High Court:

> In 17-5, according to the primary judge, and the same approach was taken in the Full Court, a negative sum must be refunded, if that is what is shown, regardless of the underlying correctness of the amount…
>
> Now, if that be correct and if this indeed does create a debt then the mere unilateral act of lodging a return with some numbers written on it will give rise to an obligation on the part of the Commissioner to pay forthwith.[31]

The Commissioner's incredulity at this outcome, an outcome which, he went so far as to argue in the Full Federal Court appeal, should be precluded by the "rule of absurdity", seems somewhat inflated in circumstances where those words could be used to sometimes describe his own process of making an assessment. One fundamental difference is, of course, that all the Commissioner needs to do to defeat a GST refund claim is issue an assessment and he can do so without any supporting evidence and without ever having to prove the assessment is accurate or properly made, whereas for a taxpayer to challenge an assessment made by the Commissioner the taxpayer bears the onus, and the financial and psychological burden, of proving it is excessive.

WHY DIDN'T THE COMMISSIONER SIMPLY ASSESS?

The broad power to issue assessments is the most powerful weapon in the Commissioner's arsenal. As mentioned above, the Commissioner can issue an assessment at any time and can make multiple assessments in respect of the same tax period.[32] Further, under s 105-100 of Sch 1 to the TA Act, the production of the assessment is conclusive evidence that the assessment was properly made, regardless of whether the net amount assessed is correct or whether the Commissioner had all the necessary information to reach a definitive amount. It follows that, where the Commissioner suspects a BAS stating a negative net amount is fraudulent, arguably, all he need do is issue an assessment in respect

[26] See also *Income Tax Assessment Act 1936*, s 177(1).

[27] See *Taxation Administration Act 1953*, ss 14ZZK, 14ZZO.

[28] *Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146.

[29] See *Taxation Administration Act 1953*, ss 14ZZM, 14ZZR.

[30] *Deputy Commissioner of Taxation v Broadbeach Properties Pty Ltd* (2008) 237 CLR 473.

[31] *Commissioner of Taxation of the Commonwealth of Australia v Multiflex Pty Ltd* [2011] HCA Trans 344 at lines 147-150, 154-157.

[32] *Taxation Administration Act 1953*,s 105-5 of Sch 1. It is notable that assessment appears to take its ordinary meaning in this section and is not a defined term. See, however, s 3AA(2) of the *Taxation Administration Act 1953*, which states: "An expression has the same meaning in Schedule 1 as in the *Income Tax Assessment Act 1997*". That section is not expressed to be subject to any contrary intention.

of that tax period that adjusts the negative net amount accordingly and the refund will be effectively denied to the taxpayer, unless the taxpayer can show in Pt IVC proceedings that the Commissioner's assessment is excessive.

Curiously, the Commissioner maintained in *Multiflex* that he did not have sufficient information to make an assessment denying the taxpayer the refunds claimed and, consequently, further investigations were necessary. The argument was put forward in the special leave application:

> Now, with respect, the piece of paper that your Honours have seen at 68 to 69 [the relevant business activity statement] provides a scant basis for the exercise of the assessment power. If the Commissioner suspects fraud or suspects mistake investigation [sic] would usually, and, perhaps almost always, be required in order to provide a proper foundation for an assessment. It may be possible in some cases to estimate. It may be possible to infer fraud from other things the Commissioner has, but in the great run of cases where the Commissioner has the piece of paper at 68 to 69, he will have nothing upon which a straightforward answer can be given as to the amount that should be written into an assessment, if he is minded to issue one, because in many cases there will – one assumes that even in fraudulent cases – be some entitlement.[33]

However, in practice, it is not unusual for the Commissioner to issue assessments based on limited information including bank statements or estimates or otherwise on material that would not be considered a "proper foundation for an assessment". Indeed, while it is noble that in the present circumstances the Commissioner insisted he needed to conduct a thorough investigation of the proper basis for the assessment, clearly there is no statutory requirement for this. To the extent that the taxpayer has "some entitlement", the onus is on the taxpayer to prove this in Pt IVC proceedings.

Cases heard in the income tax context, where ss 175 and 177 of the *Income Tax Assessment Act 1936* provide similar protection to assessments made by the Commissioner to s 105-100 of Sch 1 to the TA Act, demonstrate how unlikely it would be for an assessment made by the Commissioner to be quashed on the basis it was improperly made. The High Court decision in *Commissioner of Taxation v Futuris Corporation Ltd*[34] is the prevailing authority; however, the precise parameters of its reach are unclear. The judgment states that in order for declaratory relief to be granted, there must be "conscious maladministration" on behalf of the decision-maker.[35] The High Court in *Futuris* refers to the decision of Hill J in *San Remo Macaroni Company Pty Ltd v FCT*, in which his Honour stated:

> It would be a very rare case where a taxpayer will be able to show that an assessment has, in the relevant sense, been made in bad faith, so that it should be set aside.[36]

The case of *Kordan Pty Ltd v Commissioner of Taxation* is also cited, in which Hill, Dowsett and Hely JJ state:

> The allegation that the Commissioner, or those exercising his powers by delegation, acted other than in good faith in assessing a taxpayer to income tax is a serious allegation and not one lightly to be made. It is, thus, not particularly surprising that applications directed at setting aside assessments on the basis of absence of good faith have generally been unsuccessful. Indeed one would hope that this was and would continue to be the case.[37]

In *Futuris*, the High Court found there was no conscious maladministration in respect of the issuing of an assessment to a taxpayer, notwithstanding that the Commissioner deliberately double counted some $20 million in the calculation of the assessment amount.[38] The decision makes it clear that there must be "deliberate failures to administer the law according to its terms".[39] This may occur

[33] *Commissioner of Taxation of the Commonwealth of Australia v Multiflex Pty Ltd* [2011] HCATrans 344 at lines 240-250.

[34] *Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146.

[35] *Commissioner of Taxation v Futuris Corporation Limited* (2008) 237 CLR 146 at [25].

[36] *San Remo Macaroni Company Pty Ltd v FCT* (1999) 43 ATR at 71.

[37] *Kordan Pty Ltd v Commissioner of Taxation* (2000) 46 ATR 191 at [4].

[38] *Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146 at [58].

[39] *Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146 at [55].

where the decision-maker has exercised its powers for ulterior or improper purposes[40] or where there has been recklessness on the part of the decision-maker.[41]

In *Multiflex*, the Commissioner's examination of the taxpayer's BASs had been in progress for some months. It seems doubtful that the Commissioner could not have, within that time, met the standards required by the High Court in *Futuris* and issued an assessment in a manner that could not be considered "conscious maladministration" or "reckless".

The Federal Court and Full Federal Court clearly rejected the Commissioner's assertions that, in the circumstances, he was unable to issue an assessment. The Full Federal Court stated:

> The answer which the legislation provides to the Commissioner's disquiet as to being obliged to make a refund based on a claimed net amount in a business activity statement which he knows to be wrong is straightforward. In such circumstances, he is entitled at any time to make an assessment of that net amount: s 105-5 of Sch 1 to the TAA. The net amount so assessed by the Commissioner supersedes whatever amount the entity earlier worked out on its approved form, if indeed it lodged such a form. The Commissioner's ability to assess is not conditioned on an entity's having lodged a business activity statement in respect of the period in question. Subject to the outcome of any subsequent object or later appeal or review proceeding, the entity's net amount will be the amount as assessed by the Commissioner.[42]

In the *Multiflex* Decision Impact Statement, the Commissioner states that he "accepts the finding that, if he considers that an amount stated in a GST return is not correct, he can raise an assessment to which conclusive evidence provisions would then apply".[43] This seems to be not so much a finding as a statement of the obvious, and the Commissioner's assessment powers must always be at the forefront of his mind. It will be interesting to see whether the Commissioner exercises his assessment powers more frequently in circumstances where a comprehensive investigation has not concluded, particularly where this will prevent a taxpayer from requiring him to pay out questionable refunds. Indeed it will be interesting to also see how taxpayers and practitioners will respond to such assessments.

As to the Commissioner's real reasons for not issuing an assessment in the present circumstances, this remains a mystery. One might speculate the Commissioner was of a mind to seek clarity as to his powers to withhold, or the breadth of his assessment powers, or even to demonstrate to Treasury that his powers were not sufficient to preserve the interests of the revenue and legislative amendments were justified in the circumstances.

THE EXPOSURE AND PROPOSED AMENDMENTS

In his submissions to the Full Federal Court, and to the High Court in his special leave application, the Commissioner emphasised the dangers of opening the floodgates to astronomical refunds that might be claimed and obtained by taxpayers fraudulently completing BASs. Both the Full Federal Court and the High Court concluded that if this be the case, it is the role of the legislature and not the judiciary to deal with this exposure.[44]

On 15 February 2012, the Treasury released exposure draft legislation to address this issue, proposing the insertion of new s 8AAZLGA into the TA Act.[45] This is a provision that would give the Commissioner a broad power to withhold refunds payable to taxpayers under any tax laws he administers. The power would essentially enable the Commissioner to refuse to pay any tax refund in

[40] *Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146 at [11].

[41] *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2003] 2AC 1 at 192, 228, 231.

[42] *Commissioner of Taxation v Multiflex Pty Ltd* (2011) 197 FCR 580 at [26].

[43] Australian Taxation Office, n 3.

[44] *Commissioner of Taxation v Multiflex Pty Ltd* (2011) 197 FCR 580 at [1] and *Commissioner of Taxation of the Commonwealth of Australia v Multiflex Pty Ltd* [2011] HCATrans 344 at lines 681-684.

[45] A previous iteration of this draft section was released under *Exposure Draft of Tax Laws Amendment (2011 Measures No 8) Bill 2011* (dated 22 August 2011) and would have applied only to refunds arising under indirect taxes. This draft section has now been abandoned.

circumstances where he has formed the view that it would be reasonable to verify the information provided by the taxpayer in an notification, where that notification affects the amount of the refund. It is proposed that the draft section will take effect from the date of royal assent.

The proposed amendment in its current form reaches far beyond the power that the Commissioner claimed was implied in the legislation prior to *Multiflex* and will, in fact, put all refunds at risk of being refused for at least 74 days (as automatically extended by the time taxpayers take in responding to information requests), regardless of whether it is suspect that the taxpayer is engaging in culpable behaviour. Further, if enacted, the Commissioner would have the power to withhold the taxpayer's refund indefinitely, unless the taxpayer is successful in challenging the Commissioner's decision to withhold under Pt IVC of the TA Act by proving that the Commissioner was not satisfied that it was reasonable to verify the information in the notification. This is a process that could only be taken once the initial 74 day retention period expired and would further require that the taxpayer lodge an objection and wait at least 60 days for an objection decision before commencing proceedings in the Administrative Appeals Tribunal or Federal Court.

In the very short consultation period allowed (6 days) a number of professional bodies consulted with the Treasury, voicing their strong opposition to the tabling of the provision in its current form.

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