JUD/*2019*VCC1516 -

IN THE COUNTY COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL DIVISION
GENERAL LIST

Revised
Not Restricted
Suitable for Publication

Case No. CI-17-04907

DEPUTY COMMISSIONER OF TAXATION — Plaintiff

v

MWB ACCOUNTANTS PTY LTD (ACN 147 545 180) — Defendant

JUDGE:	HER HONOUR JUDGE MARKS
WHERE HELD:	Melbourne
DATE OF HEARING:	11, 12, 13 June 2019; further written submissions filed on 24 June and 10 July 2019
DATE OF JUDGMENT:	20 September 2019
CASE MAY BE CITED AS:	DCT v MWB
MEDIUM NEUTRAL CITATION:	[2019] VCC 1516

REASONS FOR JUDGMENT

TAXATION – meaning of 'administrative overpayment' in s8AAZN of the of the *Taxation Administration Act 1953* (Cth) – the defendant or its director was the tax agent for another entity – the defendant's bank account was nominated as the bank account for payments to that other entity – as a result of BASs lodged by the defendant purportedly on behalf of the other entity, the Commissioner made payments to the defendant's bank account, intending to pay refunds to the other entity – the other entity subsequently advised the Commissioner that it had not authorised those lodged BASs or received the refunds – subsequently the Commissioner allocated the amounts of those payments to the defendant's Running Balance Account (RBA) describing each as an 'administrative overpayment' – whether those payments were administrative overpayments made by the Commissioner to the defendant.

Sections 8AAZN(1), s8AAZN(3) of the *Taxation Administration Act 1953* (Cth)

APPEARANCES:	Counsel	Solicitors
For the plaintiff	Mr S Linden	ATO Review and Dispute Resolution
For the defendant	Mr J Glover	Flinter & Company

HER HONOUR:

Introduction

1 The plaintiff (**the Commissioner**) claims $223,221.23 from MWB Accountants Pty Ltd (**the defendant**).

2 The Commissioner's claim centres on the interpretation of 'administrative overpayment' in s8AAZN of the *Taxation Administration Act 1953* (Cth) (**the TAA**). More particularly, the issue is whether nine payments (**the nine payments**) made by the Commissioner in 2013 to 2016 totalling $228,711.67 were properly characterised as administrative overpayments made to the defendant.

3 For the reasons set out below, I find that they were not administrative overpayments to the defendant, and I will dismiss the claim.

4 The counterclaim for $47,465 arises because, based on the disputed characterisation of the payments, the Commissioner garnisheed that sum from the defendant's bank account. However, as discussed below, I will dismiss the counterclaim because that claim cannot be brought against the Commissioner.

Facts

5 The defendant is an accounting firm. The defendant, or its director Mr Michael Burhala, was the registered tax agent for a company called BIT MB Pty Ltd (**BIT**) for some years prior to 2016.

6 Between 2013 and 2016 the defendant prepared and sent various draft business activity statements (**BASs**) to BIT. These draft BASs recorded amounts as owing by BIT to the Commissioner for the quarters ending 31

December 2012, 31 March 2013, 31 December 2014, 31 March 2015 and 31 December 2015 (**the relevant quarters**). BIT paid the Commissioner amounts which appeared from the draft BASs to be owing by it.

7 However, having sent out drafts BASs to BIT, the defendant then lodged different BASs (and amended BASs) on behalf of BIT, for the relevant quarters.

8 Agents are able to sign BASs on behalf of their clients, and lodge them electronically. It seems that this is how BASs were lodged by the defendant.

9 The Commissioner says that BIT did not know that BASs were lodged that were different to the draft BASs sent to BIT. Unlike the draft BASs (which showed BIT owing money to the Commissioner) the lodged BASs showed amounts owing by the Commissioner to BIT – that is, they indicated that BIT was entitled to GST refunds.

10 The Commissioner maintained a running balance account (**RBA**) for BIT (as he does generally for taxpayers). As a result of the lodged BASs, which indicated that the Commissioner owed BIT money, the Commissioner made credit entries on BIT's RBA. This led to BIT's RBA being in credit – that is, to there being various 'RBA surpluses' recorded on BIT's RBA. Under the TAA, the Commissioner was obliged to pay RBA surpluses to BIT.

11 As a result of those RBA surpluses on BIT's RBA, between May 2013 and February 2016, the Commissioner made the nine payments to the defendant's bank account, and recorded each transaction on BIT's RBA as an '*EFT refund*'.

12 The Commissioner made the nine payments, which he intended to be paid to BIT, to the defendant's bank account because BIT had previously nominated the defendant's bank account as the account to which it wanted any payments made to it by the Commissioner to be paid.

13 Sometime in 2016, BIT went to a new tax agent. CGD Partners sent a letter to the Commissioner on 22 August 2016, advising of its appointment as BIT's registered tax agent. The letter stated:

> After reviewing the BAS lodged and the Xero accounting system for these entities, we note the following:
>
> 1. Our client has engaged Mr Michael Burhala (whilst at Douglas Clark Associates) and subsequently at MWB Accountants ("MWB"), since the commencement of business in 2006, until our appointment in June 2016. There was a large amount of trust placed on the relationship with the previous accountant.
>
> 2. Our client did not sign any BAS prepared by the external accountant and relied on the external accountant to undertake all lodgement obligations of the trading entity (BIT MB Pty Ltd) without significant oversight. Mr Michael Burhala provided BIT MB and … with copies of BAS statements that were different from the BAS submitted to ATO.
>
> …
>
> 4. We were engaged as external accountants only once our client was contacted by the ATO due to late lodgement of income tax returns and BAS.
>
> <u>Bit MB Pty Ltd - GST incorrectly declared</u>
>
> 1. From the 31 December 2012 BAS, a total of $228,712 in GST refunds were processed and paid to the cheque account for MWB Accountants Pty Ltd by EFT by the ATO, I wish to confirm that our client did not sign any business activity statements, the refunds were not paid to a trust account, and were paid directly to the cheque account of the accountant. None of these refunds were forwarded to BIT MB.
>
> 2. The previous accountant retained all refunds, and when we queried the situation, we were advised that errors have been made and that MWB did receive the refunds but money was misplaced and they will review the files to correct this situation.
>
> …
>
> 5. We acknowledge that the Xero system is maintained on a cash basis, whilst GST is reported on Accruals. We have reviewed the GST position from 1 July 2012, ensuring that we are satisfied that as at 30 June 2016 we are comfortable with the accrued position, and believe that to 30 June 2016 GST has been under reported by $319,738. A total of $228,712 has been misappropriated by the previous accountant. BIT MB was never aware of any under reported GST and believed in good faith the GST situation with ATO for BIT MB was up to date and paid in full.

14 After making further investigations, the Commissioner accepted BIT's claims that it had not known of the lodged BASs, nor had it received any of the nine

payments the Commissioner made to the defendant's bank account intended as refunds to BIT.

15 The Commissioner set about making changes to both BIT's RBA and the defendant's RBA to reflect this view.

16 The Commissioner decided that, in the circumstances, the payments he thought he had made to BIT (by paying them into the defendant's bank account) had in fact been paid to the defendant.

17 By 9 March 2017, the Commissioner had cancelled the BASs lodged for BIT by the defendant for the relevant quarters between 2013 and 2016. The Commissioner accepted replacement BASs for BIT for the relevant quarters, prepared by CGD Partners, on the basis these were the correct assessments of BIT's liabilities. The replacement BASs indicated that BIT owed money to the Commissioner for the relevant quarters, and BIT then made corresponding payments to the Commissioner to satisfy those liabilities.

18 On 15 March 2017, the Commissioner made nine credit entries on BIT's RBA, each described as '*Reimbursement of fraudulently negotiated refund cheque*'. The entries credited BIT's RBA with the amounts that had been debited to BIT's RBA when the Commissioner made the nine payments.

19 The Commissioner then allocated the amounts of the nine payments to the defendant's RBA. On 28 March 2017, the Commissioner made nine debit entries on the defendant's RBA, one corresponding to each of the nine payments. The nine entries on the defendant's RBA were each recorded as being an '*administrative overpayment*', 'effective 3 May 2017'. The effect was that, according to the defendant's RBA, the recorded amounts were now owing by the defendant to the Commissioner.

20 A total of $228,711.67 was debited to the defendant's RBA as a result of those nine entries. This gave rise to the defendant having an RBA deficit debt. RBA deficit debts are payable by taxpayers to the Commissioner, and the Commissioner's claim in this case arises because of that RBA deficit debt.

21 Having allocated the nine administrative overpayments to the defendant's RBA, the Commissioner issued a notice of liability of administrative overpayment to the defendant that same day (28 March 2017). The notice stated relevantly:

> **Incorrect payments to your financial institution account**
>
> Dear Sir/Madam
>
> As a result of an administrative error, multiple electronic fund transfers totalling $228,711.67 and detailed in the attached notice were incorrectly deposited into your account.
>
> We apologise for the inconvenience. However as you are not entitled to these funds you will need to repay them. …

22 On 20 March 2017 – eight days before recording the nine 'administrative overpayment' entries on the defendant's RBA – the Commissioner issued a garnishee notice to Macquarie Bank in relation to the defendant's bank accounts with that bank. In the next few months, $47,465 was garnisheed from the defendant's Macquarie Bank accounts in partial satisfaction of the defendant's RBA deficit debt.

23 The defendant's counterclaim is for that garnisheed amount.

24 The defendant sought information from the Commissioner about the basis on which the alleged 'administrative overpayments' had been allocated to its RBA, but it was told that, due to privacy concerns, that information could not be disclosed. The privacy concern was that information related to a different taxpayer.

25 Six months after the nine 'administrative overpayment' entries totalling $228,711.67 were allocated to the defendant's RBA, the defendant was finally informed by the Commissioner specifically what – and who – the allocation related to. This was contained in an affidavit filed by the Commissioner in a related Supreme Court proceeding. The affidavit of Aris Zafiriou dated 16 October 2017, made clear that the claimed administrative overpayments arose from GST refunds the Commissioner had intended to pay BIT. (The Supreme Court proceeding arose because the Commissioner had issued a statutory demand against the defendant claiming the balance of the RBA deficit debt – after deducting the garnisheed amount. The defendant challenged the validity of the statutory demand in the Supreme Court. The statutory demand was set aside by consent on the day it was listed for hearing.)

Evidence

26 Most of the facts underlying this unusual dispute were agreed. An agreed table of facts was handed up.

27 Mr George Khoury gave evidence for the Commissioner. He is a senior technical leader in the Debt (Significant Debt Management) section of the Australian Taxation Office. An affidavit he swore on 27 May 2019 was in evidence, and he gave oral evidence.

28 Mr Michael Burhala, the sole director and shareholder of the defendant, gave evidence for the defendant. Part of an affidavit he had sworn was in evidence, and he gave further oral evidence. Although at the commencement of the trial the defendant sought to rely on further affidavit material, in circumstances where that material had not been filed and an adjournment would have been required if it were allowed so that the Commissioner could respond, the defendant decided to proceed without it, for costs reasons.

29 The Commissioner needed to satisfy the Court, on the balance of probabilities, that the payments were administrative overpayments made to the defendant under s8AAZN(3). The Commissioner bears the overall burden of proof. (Although there are other sections of the TAA which reverse the onus of proof where the taxpayer challenges assessments made by the Commissioner, they do not apply to this case. They relate to applications for review of a reviewable decision and appeals: s14ZZK and s14ZZO of the TAA.)

30 The Commissioner sought to establish his case by relying on a certificate as evidence of the amount he says is due as the defendant's RBA deficit debt, under s8AAZJ(1)(d). That section provides:

> (1) In proceedings for recovery of an RBA deficit debt, a Commissioner's certificate stating any of the following matters in respect of a specified RBA is prima facie evidence …:
>
> …
>
> (d) that a specified amount was the RBA deficit debt on the date of the certificate.

31 The certificate is *prima facie* evidence of the amount of the RBA deficit debt. However, I am satisfied that the defendant has displaced the *prima facie* evidence that the debt is due in this case by raising a legal challenge to the basis on which that alleged debt is said to have come into existence. As submitted by the defendant:

> the *prima facie* characteristic of an RBA deficit debt in this case defers to the more substantial question of whether the Commissioner was entitled to raise the debt in the circumstances.

32 The parties agreed that the characterisation issue is at the heart of the dispute in this case: were the payments administrative overpayments under s8AAZN?

Central issue

33 The Commissioner made the nine payments because there were RBA surpluses in BIT's RBA, after entries were made in the RBA by the Commissioner as a result of the information in the lodged BASs.

34 Section 8AAZA sets out that an:

> ***RBA surplus***, in relation to an RBA of an entity, means a balance in favour of the entity, based on:
>
> (a) primary tax debts that have been allocated to the RBA; and
>
> (b) payments made in respect of current or anticipated primary tax debts of the entity, and credits to which the entity is entitled under a taxation law, that have been allocated to the RBA.

35 Section 8AAZLF provides that where an RBA has a surplus, the Commissioner is required to refund the amount of that surplus to the taxpayer.

36 Section 8AAZLH deals with how refunds of RBA surpluses are payable. It sets out:

> **How refunds are made**
>
> (1) This section applies to refunds payable to an entity of RBA surpluses, or excess non-RBA credits that relate to an RBA, if primary tax debts arising under:
>
> (a) any of the BAS provisions (as defined in subsection 995-1(1) of the *Income Tax Assessment Act 1997*); …
>
> …
>
> have been allocated to that RBA.
>
> (2) The Commissioner must pay those refunds to the credit of a financial institution account nominated in the approved form by the entity. …
>
> (2A) The account must be one held by:
>
> (a) the entity, or the entity and some other entity; or
>
> (b) the entity's registered tax agent or BAS agent; or
>
> (c) a legal practitioner as trustee or executor for the entity.
>
> …

(5) If the Commissioner pays a refund to the credit of an account nominated by an entity, the Commissioner is taken to have paid the refund to the entity.

37 Having made the nine payments because BIT's RBA showed BIT had RBA surpluses of those amounts, the Commissioner now claims those amounts against the defendant, because he says that the nine payments were in fact 'administrative overpayments' made to the defendant.

38 There is no dispute that an administrative overpayment under s8AAZN(1) is a primary tax debt that may be allocated to a taxpayer's RBA: *DCT v Price* (2010) 79 ATR 137 at 142 [19]-[25]. The dispute here is whether the nine payments are properly characterised as administrative overpayments to the defendant.

39 Both an administrative overpayment (under s8AAZN), and an RBA deficit debt (under s8AAZH(1)), are debts due to the Commonwealth, which are payable to the Commissioner and may be recovered in a Court of competent jurisdiction (including a State Court) by the Commissioner, or by a Deputy Commissioner, suing in his or her official name.

40 The defendant takes issue with the Commissioner's allegation that the lodged BASs were not authorised by BIT, and with the allegation that BIT did not receive the benefit of the payments made to the defendant's bank account. Whilst the defendant agrees it did not physically pass on to BIT any of the nine payments received into its account, it says that BIT owed the defendant money as a result of an assignment of another party's debt, and that the nine payments into the defendant's bank account were applied against that debt. Details of the alleged assignment were included in the defence filed, and some limited oral evidence given about it by Mr Burhala. Mr Burhala also gave oral evidence as to why draft BASs (showing amounts owing by BIT) were initially sent to BIT, and then different BASs were lodged for the relevant quarters (showing amounts due to BIT by the Commissioner).

41 However, the defendant says that even if the relevant BASs were *not* authorised by BIT, and even if BIT did *not* receive the benefit of the payments, the Commissioner's claim in this case must fail because the use of s8AAZN is an inapplicable procedure to recover the payments.

42 I agree.

43 The defendant never became the recipient of the alleged administrative overpayment within the meaning of s8AAZN(1)(a), and the allocation of the administrative overpayments to the defendant's RBA pursuant to s8AAZD(1) was an error, and ineffective.

44 BIT was the taxpayer the Commissioner intended to pay, and BIT – not the defendant – was the recipient of the nine payments under the scheme of the TAA. The money was paid to the defendant's bank account simply because that was the nominated bank account for payments to BIT.

45 I therefore do not need to consider whether as a matter of fact the lodged BASs were authorised by BIT, or BIT received the benefit of the nine payments.

Analysis

Section 8AAZN

46 Section 8AAZN relevantly provides:

> (1) An administrative overpayment (the ***overpaid amount***):
>
> (a) is a debt due to the Commonwealth by the person to whom the overpayment was made (the ***recipient***); …
>
> …
>
> (3) In this section:

> ***administrative overpayment*** means an amount that the Commissioner has paid to a person by mistake, being an amount to which the person is not entitled.

47 Section 8AAZN refers to 'administrative overpayment'. There is no definition in the TAA of either of the words in this phrase.

48 I consider that the reference in s8AAZN to 'overpayment' is a reference to circumstances where the Commissioner pays, in the course of administering the TAA, more tax than is lawfully payable to a taxpayer.

49 The adjective 'administrative' comes from the noun 'administration'. The Macquarie Dictionary (online at 6 August 2019) defines 'administration' relevantly as:

> …
>
> 4. the duty or duties of an administrator.

50 The Macquarie Dictionary (online at 30 July 2019) defines the verb 'overpay' and its corresponding noun 'overpayment' as:

> 1. to pay more than (an amount due).
> 2. to pay in excess.

51 In *Chippendale v Commissioner of Taxation* 62 FCR 347, at 357, Tamberlin J, discussing circumstances where sales tax was overpaid, stated:

> Overpayment means the payment of a greater amount of tax than was lawfully payable.

52 His Honour was dealing with overpayment in a different context. However, it is analogous. A person with no entitlement to be paid is *paid* something, not *overpaid*.

53 The word *recipient* is not defined in s8AAZN. However it is also used in ss15B and 15C of the TAA. These sections also deal with the Commissioner being able to recover, as debts due to him, certain payments he has made. A *recipient* for the purposes of ss15B and 15C can only be a taxpayer in

relation to payments that taxpayer 'is entitled to', or 'may become entitled to', 'under a taxation law'.

54 Under s15B(1), in respect of recoverable advances made by the Commissioner, reference is made to payments made:

> to a person (the ***recipient)*** on account of an amount to which the recipient may become entitled under a taxation law.

55 Under s15C(1), in respect of recoverable repayments made by the Commissioner, reference is made to payments made:

> to a person (the ***recipient)*** purportedly as an amount to which the recipient is entitled under a taxation law, …

56 My view that ss15B and 15C are relevant in construing s8AAZN is strengthened by the fact that s15C(8)(a) specifically refers to s8AAZN, in providing that s8AAZN is a 'designated recovery provision' for the purposes of s15C. Section 15C(5) provides that any sum recovered under a designated recovery provision cannot be recovered under s15C(2) or (3); s15C(6) provides that any sums recovered under ss15C(2) or (3) cannot be recovered under a designated recovery provision.

57 Section 15C(8) refers to provisions of other Acts as also being designated recovery provisions for the purposes of the section. It provides:

> For the purposes of this section, each of the following provisions is a ***designated recovery provision***:
>
> (a) section 8AAZN of this Act;
>
> (b) section 70 of the *Superannuation Guarantee (Administration) Act 1992*;
>
> (d) section 24 of the *Superannuation Government Co-contribution for Low Income Earners Act 2003*;
>
> (e) a similar provision of a taxation law.

58 Section 70 of the *Superannuation Guarantee (Administration) Act 1992* (Cth) is referred to, as a designated recovery provision, in s15C(8)(b) of the TAA. Section 70 provides:

The amount of any excess payment referred to in section 69 may be recovered by the Commonwealth as a debt due to the Commonwealth.

59 Section 69 (referred to in section 70) provides:

> If an amount paid by the Commissioner under a provision of this Part (other than paragraph 65(1)(c)) exceeds the amount properly payable by the Commissioner under that provision, the party to whom the payment has been made is liable to repay to the Commonwealth the amount of the excess.

60 Section 24 of the *Superannuation Government Co-contribution for Low Income Earners Act 2003* (Cth) is referred to as a designated recovery provision in s15C(8)(d) of the TAA. Section 24 provides:

> **24 Recovery of overpayment of Government co-contribution in respect of a person**
>
> (1) This section applies if:
>
> (a) the Commissioner pays an amount by way of Government co-contribution in respect of a person for an income year; and
>
> (b) either:
>
> (i) the co-contribution was not payable in respect of the person for the income year; or
>
> (ii) the amount paid is more than the correct amount of the co-contribution.
>
> (2) The ***amount overpaid*** is:
>
> (a) the whole of the amount referred to in paragraph (1)(a) if the co-contribution was not payable in respect of the person for the income year; or
>
> (b) the amount by which the amount paid exceeds the correct amount if the amount paid is more than the correct amount of the co-contribution.
>
> (3) The Commissioner may take action to recover the amount overpaid under one or more of the items in the following table but may only take action under an item if the conditions (if any) specified for that item are satisfied:
>
> …

61 The table which follows (within the section) records that one of the actions the Commissioner might take to recover an amount overpaid is that:

> The Commissioner may recover the whole or a part of the amount overpaid from the person (or the person's legal personal representative) as a debt due by the person.

62 These designated recovery sections relate to payments made by the Commissioner to particular taxpayers in the course of the Commissioner's administration of Acts, where the Commissioner is subsequently of the view that those particular taxpayers have been overpaid. They then allow the Commissioner to recover the amount of the overpayment as a debt from that taxpayer.

63 There are other uses of *recipient* in Schedule 1 to the TAA. They are expressly said to have no effect outside the Schedule. However, as noted by the defendant:

> the several uses of *recipient* in the Schedule are consistent with an interpretation which restricts the word to persons whose entitlement under a taxation law are in issue. See also s170B of the ITAA97.

64 Section 8AAZN(1)(a) provides that the debt referred to in s8AAZN(1) is due by the person to whom the overpayment was made. I agree with the defendant that the person who is the intended object of the payment is identified by those words, and named the recipient.

65 At no time in the present case did the Commissioner 'overpay' an amount he had mistakenly assessed as being lawfully payable to the defendant as a result of the defendant's tax assessments. The Commissioner overpaid BIT an amount he had mistakenly assessed as being lawfully payable to BIT.

66 The defendant was not the *recipient* (in the sense contemplated by s8AAZN) of the payments at the time they were made – or at any time. The recipient of the overpayments was the taxpayer the Commissioner intended to pay as a result of its entitlement under a taxation law: in this case, BIT.

67 Counsel for the Commissioner had difficulty enunciating the facts he relied on as establishing that the defendant (not BIT) was the recipient of the funds. I discuss this further below.

Legislative history

68 The legislative history of the sections are relevant in construing them.

69 Parts IIA and IIB (including s8AAZN) were inserted into the TAA by the *Taxation Laws Amendment Act (No 3) 1999* (Cth). The Second Reading Speech, on 10 December 1998, by Joe Hockey MP, was brief. Relevantly, the Minister referred to the Bill as introducing amendments 'to support a system of running balance accounts', to provide for 'simpler tax accounting and collection arrangements'.

70 In the Explanatory Memorandum, s8AAZN is referred to as part of the consequential amendments necessary to support the introduction of a system of 'running balance style accounts to account for and administer debts' arising under various taxes. At [1.3] the following is stated about 'administrative overpayments':

> … Debts which currently arise as a result of administrative overpayments by the Commissioner of taxation will become tax debts and will be subject to the new general interest charge. This amendment is necessary to ensure the new running balance accounts will register debts payable to the Commissioner of taxation. All debts on the running balance account will be subject to the general interest charge when they become overdue.

71 At [1.78] the Explanatory Memorandum says:

> as well as introducing specific provisions necessary to establish the GIC, FTN, LRS and RBA, other amendments are necessary to supplement their introduction as well as provide other specific features in their application. Table 7 summaries these other amendments.

72 The reference in Table 7 to s8AAZN in the Explanatory Memorandum is simply:

introduce tax debts for administrative errors by the Commissioner

73 The Explanatory Memorandum at [1.3] says that 'debts which currently arise as a result of administrative overpayments by the Commissioner will become tax debts and will be subject to the new general interest charge'.

74 The Commissioner submits:

> [110] In *Australia and New Zealand Banking Group Limited v Westpac Banking Corporation* (1988) 164 CLR 662, the High Court considered that Westpac was the 'payee' of a mistaken payment, notwithstanding that it had received the payment as an agent. The Court said at 673-4:
>
> > The prima facie liability to make restitution is imposed by the law on the person who has been unjustly enriched. In the ordinary case of a payment of money, that person will be the payee. However, when the person to whom the payment is directly made receives it as an intermediary (e.g., as agent for a designated principal), there may be uncertainty about the identity of the actual recipient of the benefit at the moment of payment. If the circumstances are such that the intermediary is to be seen as being himself the initial recipient of the benefit, his prima facie liability will ordinarily be displaced when he has handed the money received on to the person for whom he received it. In such a case he has, in the event, not retained "the benefit of the windfall" but been "a mere conduit-pipe" (see per Collins M.R., Continental Caoutchouc & Gutta Percha Co v. Kleinwort, Sons & Co.) and "the only remedy is to go against the principal": per Greene M.R., Gowers v. Lloyds and National Provincial Foreign Bank Ltd. A more difficult case arises where the intermediary has not made a physical payment of money to, or on behalf of, the person for whom the payment was received but has made a credit entry in his books in favour of that person. In such cases, the question will arise whether the benefit of the payment made under fundamental mistake has been wholly or partly retained by the intermediary or effectively passed on to the third person: Continental Caoutchouc. In answering that question, the courts will pay regard to the substance rather than to the form of what has occurred. Thus, the cases indicate that a mere book entry which has not been communicated to the third party or which can be reversed without affecting the substance of transactions or relationships will ordinarily not suffice: see, e.g., Buller v. Harrison; Cox v. Prentice; Colonial Bank v. Exchange Bank of Yarmouth, Nova Scotia. It must appear that the third party has effectively received the benefit of the payment with the consequence that the prima facie liability to make restitution has become his.
> >
> > [footnotes omitted]
>
> [111] The 'recipient' referred to in s 8AAZN(1)(a) of the TAA is the person who actually received the payment, described as the 'payee' in *ANZ v Westpac*, not the person to whom the payment might be traced in the equitable or proprietary sense.

75 The Commissioner submits that the defendant was the recipient of the nine payments in the sense discussed in *David Securities Pty Ltd v Commonwealth of Australia* (1992) 175 CLR 353, per Mason CJ, Deane, Dawson, Toohey and McHugh JJ. However, *David Securities* discussed the concept of a 'recipient' or payee of a payment under a mistake at common law. As submitted by the defendant, recipients in restitutionary and equitable contexts will often have different characteristics to 'recipient' under s8AAZN. The recipient of a mistaken payment in *David Securities* was not 'overpaid' and may not have been the intended object of any payment.

76 As pointed out by the defendant, if 'recipient' in the context of s8AAZN could encompass a person who physically receives a payment, then Macquarie Bank was also a 'recipient' of the nine payments in that sense.

77 Mr Khoury was asked about that by Mr Glover, Counsel for the defendant:

> The payment the Commissioner believed, the Commissioner intended that the payment go to BIT MB? --- Yes, that's correct. ….
>
> So BIT MP were the recipient wasn't it --- no. The recipient is the party who actually receipted the funds, MWB.
>
> You'd have to agree, Mr Khoury, the recipient really was the Macquarie Bank?--- The bank operates accounts on behalf of its client base.
>
> And so does the defendant. What's the difference? --- …The client did not authorise the alterations of the business activity statements that gave rise to the apparent credits and consequential refund.
>
> Mr Khoury, you're confusing the difference between the making of the payment and the legal characteristics of its receipt. I'm talking to you about the making of the payment. The tax office made the payment to BIT MB didn't it?... -- Care of its taxation [*sic*], yes.
>
> Certainly, and via the bank, which was its agent, another agent --- to whomever MWB has its banking facilities with.

78 There is nothing in the way s8AAZN(3) was introduced to suggest that it was intended to be a statutory way of encapsulating the whole of the common law doctrine of mistake (including fraud), simply by defining administrative overpayments as 'payments made by mistake'. If s8AAZN incorporated the

whole of the common law of mistake, it might then extend to many different scenarios involving third parties who physically receive money which the Commissioner intends to pay a different taxpayer. Tax agents and banks are obvious examples. One would expect there to have been some discussion before such an extensive – and far reaching – change to the law was introduced.

Authorities

79 It was common ground that there is no judicial authority for the way the Commissioner has used s8AAZN to recover as an 'overpayment' an amount paid initially in relation to someone else's tax affairs.

80 Section 8AAZN is a relatively new section, which the Commissioner says can be applied to the facts of this case.

81 In the other cases relating to s8AAZN, taxpayers have initially been credited with an amount, about which the Commissioner later takes a view that the credit should not have occurred and claims that sum from that taxpayer as an administrative overpayment. The effect of the administrative overpayment is thus to reduce the credit previously posted to the relevant RBA.

82 In *DCT v De Angelis* [2008] SADC 103, the Commissioner reviewed and disallowed tax credits claimed by the taxpayer; the Commissioner issued notices of assessment revising the balance from a total credit of $77,018 to a nil balance; then claimed $77,018 as an administrative overpayment, allocating it to his RBA (see *De Angelis* at [15]). Shaw J stated, at [120]:

> In my view, the taxpayer's liability to repay moneys under s8AAZN of the TAA is limited to overpayments made by mistake.

83 *Deputy Commissioner of Taxation v Li* [2010] VCC 409 involved input credits claimed by the taxpayer which resulted in $96,619.16 in refunds paid to the

taxpayer. The Commissioner then assessed the GST net amount for the relevant periods and debited the RBA for amounts including an 'administrative overpayment' of that sum of $96,619.16.

84 In *Re Swanbat Pty Ltd v Federal Commissioner of Taxation* [2013] AATA 891, the Commissioner paid a taxpayer an amount in respect of excess GST paid by the taxpayer. The Commissioner then issued an amended assessment, treating the refund amount as GST for which the taxpayer was liable. Member S. Webb considered if the amount was an administrative overpayment under s8AAZN. She said at [98] that:

> If the Commissioner's payment was in excess of the company's entitlement under that section, it would follow, objectively, that payment of an amount over the company's entitlement might be a mistake.

85 The existence of an administrative overpayment under s8AAZN was not squarely before the AAT. However Member S. Webb said, by way of *dicta*, that the payment of a refund may well have been a mistake by the Commissioner and within the meaning of an 'administrative overpayment' as defined in s8AAZN(3) of the TAA:

> [95] The word 'mistake' in s 8AAZN(3) is given no special meaning. I see no reason why the ordinary meaning of the word should not apply. In submissions, the Company leaned heavily on what the majority said in *Deputy Commissioner of Taxation v Broadbeach Properties Pty Ltd* in respect of RBA deficit debts specified in statutory demand notices –
>
> > "37. As to (iii), the administrative overpayments represent amounts paid by the Commissioner to Neutral Bay and Howard Racing as input tax credits. The Commissioner treats as debts due by the taxpayers and payable under the Administration Act moneys being in respect of amounts paid by the Commissioner by mistake (s 8AAZN(3)). The mistaken nature of the payments depends upon the correctness of the GST assessments and declarations."[1]
>
> [96] Relying on this passage, the Company asserts that the Commissioner's payment of a refund cannot be characterised as a mistake, as it recognises that the correct GST assessment for the June 2008 quarter is zero.

---

[1] [2008] HCA 41.

> [97] The flaw in this argument is that the Company was not entitled to the payment.
>
> [98] It may be assumed, contrary to the Company's submission, that the purpose of lodging a revised GST return was to obtain a refund. In that regard it was apparently successful. It is probable that the 2 November 2012 payment of $32,098 was made under s 35-5(1) of the GST Act or s 8AAZLF of the TAA. The Commissioner maintains that s 93-5 of the GST Act is not applicable in the circumstances. I agree. Entitlement to a refund under these sections is subject to a four year time limit by operation of s 105-55 of Schedule 1 to the TAA. If the Commissioner's payment was in excess of the Company's entitlement under that section, it would follow, objectively, that payment of an amount over the Company's entitlement might be a mistake.
>
> [99] The Company additionally asserts that s 8AAZN(3) cannot be construed relative to the limit of entitlement imposed by s 105-55 of Schedule 1 to the TAA.
>
> [100] The word 'entitled' in s 105-55 is not defined or given particular meaning. It refers to a taxpayer's entitlement to a refund in respect of a net amount or an amount of indirect tax paid in excess of liability for a tax period. The same word is used negatively – 'not entitled' - in the definition of an administrative overpayment under s 8AAZN(3) of the TAA. Once again, it is not defined or given particular meaning. In this context, it is probable that the word refers to a taxpayer's entitlement to an 'overpaid amount' by the Commissioner. It is not correct to say that lack of entitlement under s 105-55 is not relevant to the test of entitlement in respect of an administrative overpayment for the purposes of s 8AAZN. Arguing that the definitional limit imposed by s 3AA of the TAA on Schedule 1, such that definitions in Schedule 1 do not apply to the rest of the TAA, does not assist.
>
> [101] For these reasons, even though it is not for me to decide, the payment of a refund to the Company on 2 November 2012 may well be a mistake and within the meaning of an 'administrative overpayment', as defined in s 8AAZN(3) of the TAA.

86 In *DCT v Price* (2010) 79 ATR 137, the taxpayer provided BASs in respect of which he claimed tax credits. An assessment was made, resulting in a notice of assessment recording a credit. Later it was considered that the taxpayer was not entitled to the credits or the payments made to him. The Commissioner treated the payments made as administrative overpayments and allocated them to the taxpayer's RBA. Lyons J said, at [18], that in those circumstances:

> each of those payments [were] made by mistake to a person not entitled to them; and each is an administrative overpayment for the purposes of s8AAZN.

87 In *DCT v Citech Research Pty Ltd* [2009] SADC 140 and *In the matter of Citadel Financial Corporation Pty Ltd* [2019] NSWSC 65 the alleged overpayments related to the relevant taxpayers' own affairs.

BASs lodged

88 The Commissioner conceded that either the defendant or Mr Burhala was the registered tax agent which acted for BIT for some years before, and during, the period of the relevant transactions. Mr Burhala gave evidence that he was the registered tax agent, but that work was also done for BIT by others at his firm.

89 The Commissioner submits:

> There is no evidence that BIT made the declaration required by s 388-65(1) that, inter alia, it had authorised Mr Burhala and/or the Defendant to give any of the BAS's for the Relevant Quarters to the Commissioner. Mr Burhala and/or the Defendant contravened s 388-65(5) by lodging each of the BAS's without receiving the declaration from BIT. Mr Burhala and the Defendant did not have the authority from BIT that was mandated by the legislation
>
> …
>
> Given that the Defendant did not have authority to lodge any of the BAS's that it lodged for the Relevant Quarters, none of the 'refunds' paid by the Commissioner on the faith of those BAS's were actual refunds of net amounts claimed by BIT. They were amounts that the Defendant had no authority from BIT to claim from the Commissioner.

90 However, an agent's electronic signature is sufficient for the document to be lodged under s388-75(3) of Schedule 1 of the TAA – even if it is lodged without the required declaration from the client having been obtained.

91 BIT was required to give the Commissioner a GST return for each relevant period, under s31(5) of the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) (**the GST Act**).

92 A 'GST return' is defined in s195-1 of the GST Act as meaning:

a return of the kind referred to in Division 31, that complies with all the requirements of sections 31-15 and 31-25 of this Act and section 388-75 in Schedule 1 to the Taxation Administration Act 1953, and includes a return given in accordance with section 58-50 of this Act.

93 Section 31-15 of the GST Act relevantly provides that a GST return for a tax period must be in the approved form. 'Approved form' is defined in s195-1 of the GST Act as having the meaning given by s388-50 in Schedule 1 to the TAA. Subsection 388-50(1) of Schedule 1 to the TAA provides:

> A return, notice, statement, application or other document under a *taxation law is in the ***approved form*** if, and only if:
>
> (a) it is in the form approved in writing by the Commissioner for that kind of return, notice, statement, application or other document; and
>
> (b) it contains a declaration signed by a person or persons as the form requires (see section 388-75); and
>
> (c) it contains the information that the form requires, and any further information, statement or document as the Commissioner requires, whether in the form or otherwise; and
>
> (d) for a return, notice, statement, application or document that is required to be given to the Commissioner--it is given in the manner that the Commissioner requires (which may include electronically).

94 Section 388-60 of Schedule 1 of the TAA states:

> **Declaration by entity**
>
> If you give a return, notice, statement, application or other document to the Commissioner in the *approved form, you must make a declaration in the approved form that any information in the document is true and correct.

95 Section 388-65 of Schedule 1 of the TAA states:

> **Declaration by entity where agent gives document**
>
> (1) If a return, notice, statement, application or other document of yours is to be given to the Commissioner in the *approved form by an agent on your behalf, you must make a declaration in writing:
>
> (a) stating that you have authorised the agent to give the document to the Commissioner; and
>
> (b) declaring that any information you provided to the agent for the preparation of the document is true and correct.

(2) You must give the declaration to the agent.

…

96 Section 388-70 of Schedule 1 of the TAA states:

> If an agent gives a return, notice, statement, application or other document to the Commissioner in the *approved form on behalf of another entity, the agent must, if the document so requires, make a declaration in the approved form stating that:
>
> (a) the document has been prepared in accordance with the information supplied by the other entity; and
>
> (b) the agent has received a declaration from the other entity stating that the information provided to the agent is true and correct; and
>
> (c) the agent is authorised by the other entity to give the document to the Commissioner.

97 Section 388-75 of Schedule 1 states:

> **Signing declarations**
>
> (1) You must sign a declaration in a return, notice, statement, application or other document you give to the Commissioner in paper form.
>
> (2) If your agent gives a return, notice, statement, application or other document to the Commissioner on your behalf in paper form, the document must contain:
>
> (a) if the document so requires—a declaration made by you with your signature; and
>
> (b) if the document so requires—a declaration made by your agent with the agent's signature.
>
> (3) Any return, notice, statement, application or other document of yours that is *lodged electronically:
>
> (a) if you give it to the Commissioner—must contain your declaration (see section 388-60) with your *electronic signature; or
>
> (b) if your agent gives it to the Commissioner—must contain the agent's declaration (see section 388-70) with the agent's electronic signature.

The payments

98 The Commissioner made the nine payments into the defendant's bank account because it was the bank account nominated by BIT for that purpose.

99 Each payment was made because there was a RBA surplus in BIT's account and the Commissioner had an obligation to refund that surplus to BIT. Section 8AAZLF states:

> (1) The Commissioner must refund to an entity so much of:
>
> (a) an RBA surplus of the entity; or
>
> (b) a credit (including an excess non-RBA credit) in the entity's favour;
>
> as the Commissioner does not allocate or apply under Division 3.

100 Section 8AAZLH sets out how the Commissioner is to make any refunds payable to an entity where it has RBA surpluses. The Commissioner must pay the refunds to the credit of a financial institution account nominated in the approved form by the entity: s8AAZZLH(2). Subsection 8AAZLH(2A) provides that:

> The account must be one held by:
>
> (a) the entity, or the entity and some other entity; or
>
> (b) the entity's registered tax agent or BAS agent; or
>
> (c) a legal practitioner as trustee or executor for the entity.

101 Section 8AAZLH(5) of the TAA provides:

> If the Commissioner pays a refund to the credit of an account nominated by an entity, the Commissioner is taken to have paid the refund to the entity.

102 There was no evidence as to how the defendant's bank account came to be nominated to receive amounts the Commissioner intended to pay to the credit of BIT. Counsel for the Commissioner advised that he was instructed that 'it was a single nomination that's made, not with every BAS that's made', which he said was made 'at some earlier point in time'. Counsel for the defendant said that 'the bank account is nominated in a tax return, which is an annual document'. He said:

> the Commissioner paid MWB because BIT MB had in its tax return completed … the annual nomination of a tax agent. That's why the tax agent was paid, because BIT MB had nominated that tax agent.… Probably some months or years before pursuant to s388-65 MWB was nominated as the person as to who should receive refunds on the taxpayers behalf.

103 I was not addressed as to the effect of s8AAZLH(5). However, it seems to me to support the conclusion that the Commissioner paid the payments to BIT. The Commissioner paid RBA surpluses he considered were due to BIT, to an account nominated by BIT and so it is taken under s8AAZLH(5) to have paid them to BIT – not to the defendant.

The facts relied on by the Commissioner to say that the payments were made to the defendant under s8AAZN(3)

104 Counsel for the Commissioner had difficulty in pinning down precisely what facts gave rise to the claim that the nine payments intended as refunds to BIT were in fact payments made by mistake to the defendant, from the outset. These understandable difficulties arose, in my view, because s8AAZN is not designed to involve claims against entities other than the taxpayer whose RBA surplus led to the credit paid.

105 The statement of claim pleads:

> 3. For the purposes of section 8AAZC of the TAA 1953, the Commissioner established a Running Balance Account ("the RBA") in respect of primary tax debts due by the defendant under the BAS provisions, as defined in subsection 995-1(1) of the *Income Tax Assessment Act 1997* ("the ITAA 1997"), primary tax debts due by the defendant as administrative overpayments due under section 8AAZN of the TAA 1953 and primary tax debts due by the defendant as administrative penalties under Part 4-25 of Schedule 1 of the TAA 1953 ("the primary tax debts").
>
> 4. The Commissioner allocated the primary tax debts to the RBA, pursuant to section 8AAZD of the TAA 1953.
>
> 5. The Commissioner allocated to the RBA any payments and other credits pursuant to Division 3 of Part IIB of the TAA 1953.

6. From time to time the balance of the RBA was in favour of the Commissioner and was accordingly an RBA deficit debt, as defined in section 8AAZA of the TAA 1953.

7. Pursuant to subsection 8AAZF(1) and Part IIA of the TAA 1953, the defendant became liable to pay the general interest charge for each day at the end of which there was an RBA deficit debt.

8. At the end of each day for which the general interest charge was payable under subsection 8AAZF(1) of the TAA 1953, the balance of the RBA was altered in the Commissioner's favour by the addition of the amount of the general interest charge payable for that day, pursuant to subsection 8AAZF(2) of the TAA 1953.

9. The defendant is liable to pay the amount of $197,034.37 to the Commonwealth of Australia pursuant to section 8AAZH of the TAA 1953 in respect of the RBA deficit debt, particulars of which are as follows.

PARTICULARS

The RBA Deficit Debt in respect of primary tax debts payable under the BAS provisions, as defined in subsection 995-1(1) of the ITAA 1997, primary tax debts payable as administrative overpayments due under section 8AAZN of the TAA 1953 and primary tax debts payable as administrative penalties due under Part 4-25 of Schedule 1 of the TAA 1953, together with the general interest charge

$ 197,034.37

The Commissioner established a Running Balance Account ("the RBA") in respect of the defendant's liabilities for administrative overpayments due under section 8AAZN of the TAA 1953, liabilities for administrative penalties due under Part 4-25 of Schedule 1 of the TAA 1953 and liabilities under the BAS provisions as defined in subsection 995- 1(1) of the ITAA 1997. BAS provisions include, generally: the goods and services tax provisions, the PAYG withholding provisions, the PAYG instalment provisions, the fringe benefits tax instalment provisions and the deferred company instalment provisions. The balance of the RBA as at 18 October 2017 is in favour of the Commissioner, and is accordingly an *RBA deficit debt* for the purposes of section 8AAZH of the TAA 1953.

The RBA Deficit Debt as at 18 October 2017	$197,034.37
TOTAL	$197,034.37

10. The plaintiff claims the sum of $197,034.37 which is due and unpaid together with:

    (a) further general interest charge pursuant to section 8AAZF and Part IIA of the TAA 1953 calculated upon an amount or amounts and for a period or periods, and at the rates provided in the TAA 1953 to payment or judgment; and

    (b) costs.

106 It will be seen that the statement of claim does not mention anything about the facts that gave rise to the Commissioner's allocation of the alleged administrative overpayments to the defendant's RBA. The Commissioner simply alleges that there was an RBA deficit debt of $197,034.37 and claims that amount.

107 The defendant filed a detailed defence challenging the allocation of the alleged administrative overpayments to the defendant's RBA.

108 A reply was then filed by the Commissioner. In summary, the Commissioner pleads that each of the payments was an administrative overpayment made to the defendant under s8AAZN of the TAA.

109 The Commissioner alleges in the reply that he made the payments to the defendant by mistake for two reasons:

- BASs lodged by the defendant – purportedly for BIT – were not authorised by BIT;
- The payments made by the Commissioner, as a result of those BASs being lodged, were paid to the defendant's bank account.

110 In the course of the trial, Counsel for the Commissioner added two further elements to the facts the Commissioner said he needed to establish to show that these were administrative overpayments to the defendant. The four facts he said he needed to establish were:

A. The BASs lodged by the defendant, purportedly for BIT, were not authorised by BIT.

B. The amounts in the lodged BASs were incorrect.

C. The nine payments were made to the defendant's bank account.

D. The defendant did not pay BIT, the intended recipient, the money paid into the defendant's bank account.

111 Initially at trial, the Commissioner submitted that only the points I have listed as points A and C above needed to be established. He submitted that point D (that the defendant did not *pay* BIT) was relevant only in supporting a finding that the payments were not *authorised* (point A). He said that the Court could be satisfied the claims were made without authority even if it was *not* satisfied the intended recipient did not receive the money from the defendant.

112 I then tested the proposition that a tax agent could personally be liable for an administrative overpayment if just points A and C were established. What if a tax agent mistakenly lodges a BAS for a client for a higher amount than they have been given authority to lodge by that client, and as a result the Commissioner then pays amounts to the tax agent's account, because it is the entity's nominated account? Would that, of itself, mean that the Commissioner would be entitled to claim that the overpaid amounts were paid as administrative overpayments to that tax agent, and allocate them to the tax agent's RBA? Counsel for the Commissioner answered yes – but then referred to BIT not receiving the payment as part of the reason why:

> if the client hasn't authorised the claim made by the tax agent then the Commissioner would not be able to claim that money back from the client because it didn't authorise it *and it didn't receive the payment.*
>
> [italics added for emphasis]

113 Counsel for the Commissioner then added point D above to the matters that need to be established, submitting:

> If there is an allegation that the entity received the payment then it would follow that the agent who lodged the claim did not receive it. Only one person can receive the payment.

114 In giving his evidence, Mr Khoury said:

> We cannot seek to recover a third person's tax debt from a taxpayer. What we are pursuing is an administrative overpayment which the defendant *received in its own right* into its own account based on its own alterations to a business account statement.

[italics added for emphasis].

115 Counsel for the defendant cross-examined Mr Khoury about this, leading to the following exchange:

> The administrative liabilities referred to in paragraph 23 were referred to in the defendant's RBA statement at GK2 followed an audit of BIT MB?---Yes.
>
> So the administrative overpayments had nothing to do with the defendant's tax affairs did they?---Yes, they do.
>
> How is that?---If a client wishes its tax agent to lodge a BAS for a particular amount and a tax agent then lodges a BAS for a different amount resulting in a refund it comes squarely under the administrative overpayments provisions.
>
> I put it to you, Mr Khoury, the defendant's tax affairs as an accountant have got nothing to do with an administrative overpayment made to a different tax payer?---The administrative overpayment was not made to BIT. The administrative overpayment was paid to MWB through the use of BIT's business activity statements.

116 Subsequently, Counsel for the Commissioner added the matter I have listed as point B, as also being part of the mistake the Commissioner said had occurred:

> The other part of the mistake is the actual correctness of the amounts claimed.

117 Counsel for the Commissioner conceded that the facts alleged here could have given rise to proceedings against the defendant under the common law: for example, claims of common law mistake, or fraud. Instead the claim was brought relying on s8AAZN. The Commissioner said that the section was a codification of the general law of payment under mistake. However, I am not satisfied that it is such a codification.

118 In my view, the Commissioner's right to recover administrative overpayments under s8AAZN(3) does not encompass recovery of payments made as a result of the facts claimed to have occurred in this case. The section does not encompass payments that may have been made under the common law's money paid under a mistake of fact claims. Recovery pursuant to the

principles of restitution, quasi-contract and unjust enrichment functions according to different criteria, as the defendant submits:

> For example, making the overpayments: Did the Commissioner make a causative mistake? Did the Commissioner make a mistake of fact or an irrecoverable mistake of law? Did [the defendant] change its position on the faith of the [Commissioner's] payment? See *Mason and Carter's Restitution Law in Australia* 2nd edn K Mason, JW Carter and GJ Tolhurst (LexisNexis, Sydney, 2008) at [433]-[436].

119 The payments made were not administrative overpayments made to the defendant under s8AAZN.

120 That section is designed to deal with payments made to the entity associated with a particular RBA, where it transpires that too much has been paid. It is a clawback provision to make it easy for the Commissioner to pursue those claims as tax debts.
It is not a way of recovering payments administratively allocated to one entity that are intercepted by another.

Other considerations

121 In this case, for six months after the payments were raised, the defendant was unable to get information about the basis on which the administrative overpayments were raised to its RBA because it was told it was not its tax debt. The details related to a different taxpayer: BIT.

122 The defendant argues that the Commissioner's interpretation of s8AAZN is contrary to public policy. If the Commissioner's interpretation were correct, then taxation debts could arise and be allocated to RBAs of persons who have no right to view or understand the underlying assessment which gave rise to the administrative overpayment; no right to object to or seek review of the relevant assessment; and no fair hearing about their involvement in the transaction.

123 Counsel for the defendant, referring to the defendant's position, said:

> It's an invidious position to be in, to be hit with a tax debt and you can't find out anything about it. And at the same time your access to finance would be closed down because your account would be garnished and the like, and you wouldn't be able to function any more, but you can't find out anything about this debt. This can't be allowed in this civilised community.

124 I will dismiss the claim.

Counterclaim

125 The garnishee notice to the defendant was issued by the Commissioner on 20 March 2017. It was issued under s260-5 of Schedule 1 to the TAA, to Macquarie Bank Limited, Macquarie Investment Management Limited and Macquarie Group Ltd.

126 Between 20 March and 20 June 2017, pursuant to the garnishee notice, $47,465 was paid to the Commissioner from the defendant's Macquarie Bank accounts. It has counterclaimed for the return of that sum.

127 The defendant pleads as follows:

> 15. By reason of the matters set out at paragraphs 10(a)-(h) the Garnishee Notice was improperly issued by the Plaintiff.
>
> 16. Moreover, by reason of the matters set out at paragraphs 10(i)-(l), (n)-(v), (y)-(z), and 11 to 13, section 8AAZN of the TAA 1953 does not give rise to a taxation liability of the Defendant in relation to the Claimed Overpayments.
>
> 17. In the premises, the amount of $47,464.95, garnisheed from the Bank Account pursuant to the Garnishee Notice issued in relation to the Claimed Overpayments, was improperly garnisheed and is a debt owing to the Defendant by the Plaintiff.

128 The Commissioner has conceded that:

> If the Court makes a finding within jurisdiction in relation to the [Commissioner]'s liability for the Administrative Overpayments…the [Commissioner] would be bound to give effect to such a finding in applying the provisions of Part IIB of the TAA.

129 Given my findings about the defendant not being liable for the administrative overpayments, the Commissioner will be bound – as he has stated – to give effect to that finding in applying the provisions of Part IIB of the TAA. The administrative overpayments debited to the defendant's RBA will need to be reversed. Since the Commissioner has already received $47,465, it follows that, in applying the provisions of Part IIB of the TAA, the Commissioner will need to credit the defendant's RBA to that extent. If there is then an RBA credit, the Commissioner is required to refund that credit under s8AAZLF.

130 However, the claims in the counterclaim cannot succeed.

131 The Commissioner argues that the Court does not have jurisdiction to review the validity of the garnishee notice by reason of s9 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (**ADJR Act**).

132 Section 9 of the ADJR Act provides:

> (1) Notwithstanding anything contained in any Act other than this Act, a court of a State does not have jurisdiction to review:
>
> (a) a decision to which this section applies that is made after the commencement of this Act;
>
> (b) conduct that has been, is being, or is proposed to be, engaged in for the purpose of making a decision to which this section applies;
>
> (c) a failure to make a decision to which this section applies; or
>
> (d) any other decision given, or any order made, by an officer of the Commonwealth or any other conduct that has been, is being, or is proposed to be, engaged in by an officer of the Commonwealth, including a decision, order or conduct given, made or engaged in, as the case may be, in the exercise of judicial power.
>
> Note: This subsection has effect subject to the *Jurisdiction of Courts (Cross-vesting) Act 1987* and to subsection 1337B(3) of the *Corporations Act 2001*.
>
> (2) In this section:
>
> ***decision to which this section applies*** means:
>
> (a) a decision that is a decision to which this Act applies; or

(b) a decision of an administrative character that is included in any of the classes of decisions set out in Schedule 1.

review means review by way of:

(a) the grant of an injunction;

(b) the grant of a prerogative or statutory writ (other than a writ of *habeas corpus*) or the making of any order of the same nature or having the same effect as, or of a similar nature or having a similar effect to, any such writ; or

(c) the making of a declaratory order.

(4) This section does not affect:

(b) the jurisdiction conferred on the Supreme Court of a State by section 32A of the *Federal Court of Australia Act 1976*; or

(c) the jurisdiction of a court of a State in respect of any matter that is pending before it at the commencement of this Act.

133 Under s3(1) of the ADJR Act:

decision to which this Act applies means a decision of an administrative character made, proposed to be made, or required to be made (whether in the exercise of a discretion or not and whether before or after the commencement of this definition):

(a) under an enactment referred to in paragraph (a), (b), (c) or (d) of the definition of enactment; or

(b) by a Commonwealth authority or an officer of the Commonwealth under an enactment referred to in paragraph (ca) or (cb) of the definition of enactment;

…

enactment means [relevantly]:

(a) an Act, other than:

(i) the *Commonwealth Places (Application of Laws) Act 1970*; or

(ii) the *Northern Territory (Self-Government) Act 1978*; or

(iii) an Act or part of an Act that is not an enactment because of section 3A (certain legislation relating to the ACT); …

134 I am satisfied that the decision to issue the garnishee notice was a decision of an administrative character made by the Commissioner (a Commonwealth authority) under the TAA (a relevant enactment).

135 However, in my view, although the counterclaim refers to the invalidity of the garnishee notice, it does not seek to set aside the decision to issue it (which would need to have been the subject of an order to review under the ADJR Act). Rather, although it is not as clearly pleaded as it could have been, it seeks to claim $47,465 as a debt due by the Commissioner to the defendant.

136 The difficulty is that a claim for debt under the general law cannot be brought against the Commissioner. Any such claim would need to be brought against the Commonwealth of Australia: see the discussion – in the context of the *Income Tax and Social Services Contribution Assessment Act 1936-1953* – in *Commissioner of Taxation v Official Receiver* (1956) 95 CLR 300 at 310-312 per Williams J and 324 per Fullagar J, Dixon CJ concurring with those reasons.

Orders

137 I will make orders dismissing the claim, and the counterclaim.

138 If consent orders are not agreed, the parties must file submissions as to proposed costs orders by 4.00pm on 26 September 2019. If necessary, the matter will be listed for a costs hearing.

Certificate

I certify that these 33 pages are a true copy of the reasons for decision of her Honour Judge Marks, delivered on 20 September 2019 and revised on 25 September 2019.

Dated: 25 September 2019

Samantha Marinic
Associate to Her Honour Judge Marks