Federal Court of Australia

Commissioner of Taxation v Auctus Resources Pty Ltd [2021] FCAFC 39

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| Appeal from: | *Auctus Resources Pty Ltd v Commissioner of Taxation* [2020] FCA 1096 |
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| File number: |  |
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| Judgment of: | **MCKERRACHER, DAVIES AND THAWLEY JJ** |
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| Date of judgment: | 19 March 2021 |
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| Catchwords: | **TAXATION** – administrative overpayment made by the Commissioner of Taxation under taxation laws – construction of s 8AAZN of the *Taxation Administration Act 1953* (Cth) – assessment power of Commissioner of Taxation – taxpayer “self-assessed” activities as capable of being registered as research and development (“R&D”) activities – taxpayer claimed R&D tax offset refund – Innovation and Science Australia subsequently found taxpayer not engaged in R&D activities – taxpayer deemed never to have been registered for R&D activities and therefore not entitled to R&D tax offset refund – Commissioner of Taxation claimed tax offset refund was an administrative overpayment because the overpaid amount was paid by mistake – tax offset refund paid by mistake within meaning of s 8AAZN(3) of the *Taxation Administration Act 1953* (Cth) and general law – appeal allowed |
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| Legislation: | *Income Tax Assessment Act 1936* (Cth) ss 6(1), 8, 166, 166A, 170, 170B, 172A, 175A, 177  *Income Tax Assessment Act 1997* (Cth) ss 1-7, 355-20, 355-25, 355-30, 355-35, 355-100, 355-105, 355-205, 355-705, 355-710, 355-715,  *Income Tax (Transitional Provisions) Act 1997* (Cth) subdivision 67-L  *Industry Research and Development Act 1986* (Cth) ss 27A, 27B, 27J, 27L  *Product Grants and Benefits Administration Act 2000* (Cth) s 35  *Tax and Superannuation Laws Amendment (2013 Measures No 1) Act 2013* (Cth)  *Tax and Superannuation Laws Amendment (2014 Measures No 2) Act 2014* (Cth)  *Tax Laws Amendment (Research and Development) Act* *2011* (Cth)  *Taxation Administration Act 1953* (Cth) ss 3A, 8AAZA, 8AAZH, 8AAZM, 8AAZN; ss 250-10, 255-5, 350-10, 356-5 of Sch 1; Pt IVC  *Taxation Laws Amendment Act (No 3) 1999* (Cth)  *Treasury Laws Amendment (2018 Measures No 4) Act 2019* (Cth) |
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| Cases cited: | *Auctus Resources Pty Ltd v Commissioner of Taxation* [2020] FCA 1096  *Barangaroo Delivery Authority v Lend Lease (Millers Point) Pty Ltd* [2014] NSWCA 279  *BWP Management Ltd v Ipswich City Council* [2020] QCA 104  *Campbell v Hall* (1774) 98 ER 1045  *Carter Capner Law v Clift* [2020] QCA 125  *Certain Lloyd’s Underwriters v Cross* (2012) 248 CLR 378  *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101  *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd* (1994) 182 CLR 51  *Commissioner of Taxation v**Consolidated Media Holdings Ltd* (2012) 250 CLR 503  *Commissioner of Taxation v Fortunatow* [2020] FCAFC 139  *Commissioner of Taxation v* *Travelex Limited* [2021] HCA 8  *Commonwealth v Davis Samuel Pty Ltd (No 7)* (2013) 282 FLR 1  *David Securities* *Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353  *Deputy Commissioner of Taxation v Rennie Produce (Aust) Pty Ltd (in liq)* (2018) 260 FCR 272  *Esso Australia Resources Pty Ltd v Federal Commissioner of Taxation* (2011) 199 FCR 226  *Independent Commission Against Corruption v Cunneen* (2015) 256 CLR 1  *Kelly v R* (2004) 218 CLR 216  *Lacey**v Attorney-General (Qld)* (2011) 242 CLR 573  *Minister for Immigration and Border Protection v WZAPN* (2015) 254 CLR 610  *Nurdin & Peacock PLC v DB Ramsden & Co Ltd* [1999] 1 WLR 1249  *Owners of the Ship “Shin Kobe Maru” v Empire Shipping Company Inc* (1994) 181 CLR 404  *PMT Partners Pty Ltd (in liq) v Australian National Parks and Wildlife Service* (1995) 184 CLR 301  *Singh v Lynch* [2020] NSWCA 152  *State Bank of New South Wales v Commissioner of Taxation* (1995) 62 FCR 371  *Steele v Williams* (1853) 155 ER 1502  *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362  *SZTVU v Minister for Home Affairs* (2019) 268 FCR 497  *Thomas v State of New South Wales* (2008) 74 NSWLR 34  *Tovir Investments Pty Ltd v Waverley Council* [2014] NSWCA 379  *Wacal Developments Pty Ltd v Realty Developments Pty Ltd* (1978) 140 CLR 503  *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70 |
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| Division: |  |
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| National Practice Area: |  |
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| Number of paragraphs: | 101 |
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| Date of hearing: | 18 February 2021 |
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| Counsel for the Appellant: | Mr AJ Musikanth SC with Mr PA Walker |
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| Solicitor for the Appellant: | Australian Government Solicitor |
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| Counsel for the Respondent: | Ms CM Pierce |
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| Solicitor for the Respondent: | DLA Piper Australia |

ORDERS

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|  | | WAD 205 of 2020 |
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| BETWEEN: | COMMISSIONER OF TAXATION OF THE COMMONWEALTH OF AUSTRALIA  Appellant | |
| AND: | AUCTUS RESOURCES PTY LTD (SUBJECT TO DEED OF COMPANY ARRANGEMENT) ACN 136 606 338  Respondent | |

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| order made by: | MCKERRACHER, DAVIES AND THAWLEY JJ |
| DATE OF ORDER: | 19 MARCH 2021 |

THE COURT ORDERS THAT:

1. The appeal be allowed with costs.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

MCKERRACHER J:

1. I have had the benefit of reading the draft reasons of Justices Davies and Thawley. For the reasons given by their Honours I agree that the appeal should be allowed with costs.

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| I certify that the preceding one (1) numbered paragraphs is a true copy of the Reasons for Judgment of the Honourable Justice McKerracher. |

Associate:

Dated: 19 March 2021

REASONS FOR JUDGMENT

DAVIES J:

1. I have had the benefit of reading the draft judgment of Thawley J. I agree with his Honour for the reasons given that the Research & Development (**R&D**) tax offset which the Commissioner refunded to the taxpayer was “paid by the Commissioner … by mistake” for the purposes of s 8AAZN of the *Taxation Administration Act 1953* (Cth) (***TAA****)*. I also agree with his Honour that the mistaken payment was an “administrative overpayment”, within the defined sense of that expression as used in s 8AAZN(3) and that it was open to the Commissioner to use the procedure provided for by s 8AAZN in order to recover the amount of the mistaken payment from the taxpayer.
2. Textually, the availability of the s 8AAZN recovery process does not turn on the nature of the tax debt sought to be recovered, other than to fit the description of an “administrative overpayment” in the defined sense. Furthermore, the context of s 8AAZN does not indicate that the section was intended to have a confined operation or that its scope be limited, where otherwise the section would apply on its terms, as it does here. Section 8AAZN was enacted in 1999 and is contained in Part IIB of the *TAA*. Part IIB is headed “Running account balances, application of payments and credits and related matters” and is comprised of four divisions. Division 4 is headed “Miscellaneous provisions about tax debts” and s 8AAZN is headed “Overpayments made by the Commissioner under taxation laws”. Section 8AAZN was enacted at the same time as the introduction of the Running Balance Account system (**RBAs**), as one of the consequential measures supporting that system, which also included making outstanding tax debts subject to the general interest charge. The purpose of s 8AAZN, as explained in the explanatory memorandum to the *Taxation Laws Amendment Bill (No. 5) 1998*(Cth) at para 1.3, was to have debts that arose as a result of administrative overpayments by the Commissioner registered as tax debts and also subject to the new general interest charge as debts due to the Commonwealth and recoverable by the Commissioner. The context reinforces that the section is intended to apply on its terms without limitation and there is nothing either in the context of s 8AAZN or its purpose to suggest that s 8AAZN was not intended to apply to the mistaken payment of the tax offset in this case.
3. I also do not think that either the enactment of sub‑div 67-L of the *Income Tax (Transitional Provisions) Act 1997* (Cth)(now repealed)or the enactment of s 172A of the *Income Tax Assessment Act 1936* (Cth)(applying from the 2014 income year) have any bearing on the availability of s 8AAZN in the present case. There is nothing in the extrinsic material to indicate that the introduction of those provisions had anything to do with any deficiency in the Commissioner’s recovery power of incorrectly paid amounts of refundable tax offsets. Rather, those provisions were enacted as part of a series of measures designed to bring tax offsets into the assessment process. It is important to bear in mind that under the law as it then was in respect of the 2013 and preceding income years, there was no assessment mechanism that could have founded an entitlement to the refundable tax offset under Division 335, as the Commissioner did not have power to make an assessment of a taxpayer’s tax offset refunds. Also, under the law as it then was, there was no other statutory mechanism, apart from s 8AAZN, by which the Commissioner could recover a refunded tax offset to which the taxpayer had no entitlement. That has since changed with the amendment of the statutory scheme to bring the calculation of the amount of a taxpayer’s refunds arising from refundable tax offsets into the assessment regime. However, the changed scheme, which did not apply to the 2013 income year, is no warrant to read down the operation of s 8AAZN in relation to the 2013 income year with respect to the recovery of incorrectly paid tax offsets.
4. For these reasons, I would allow the appeal.

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| I certify that the preceding four (4) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Davies. |

Associate:

Dated: 19 March 2021

REASONS FOR JUDGMENT

THAWLEY J:

# INTRODUCTION

1. This appeal concerns the proper construction of s 8AAZN of the *Taxation Administration Act 1953* (Cth) (**TAA**). The two critical subsections of s 8AAZN around which the appeal revolves are as follows:

**Overpayments made by the Commissioner under taxation laws**

(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***); and

(b) is payable to the Commissioner; and

(c) may be recovered in a court of competent jurisdiction by the Commissioner, or by a Deputy Commissioner, suing in his or her official name.

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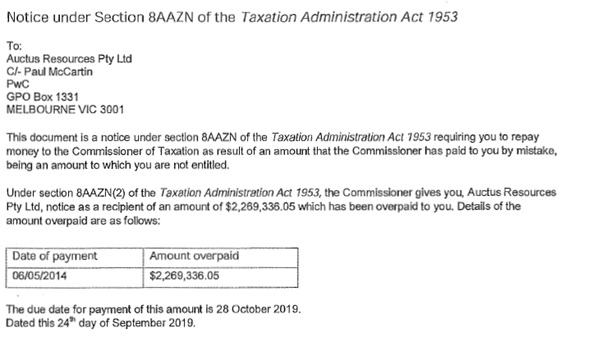
(3) In this section:

***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.

1. In 2013, the ascertainment of the amount of a tax offset refund to which a taxpayer was entitled was not a part of the formal assessment process as it now is, even though the tax offset refund was claimed in the tax return. In its 2013 return, the respondent taxpayer “self-assessed” a loss of $6,615,895 and that it was entitled to an R&D tax offset refund of $2,269,336.05. The losses were carried forward. The tax offset refund of $2,269,336.05 was paid to the taxpayer. There was no dispute at trial or on appeal that, on a correct application of the law to the true facts, the taxpayer was not entitled to the tax offset or the consequent refund.
2. The question at trial and on appeal was whether the payment of the tax offset refund to the taxpayer is an “administrative overpayment”, namely “an amount that the Commissioner has paid to a person by mistake, being an amount to which the person is not entitled”: s 8AAZN(3).
3. The primary judge concluded:
4. first, that the payment of the refund was not “paid … by mistake” within the meaning of s 8AAZN(3) because it was paid automatically under the self-assessment regime without the Commissioner making any assumption such that there was no “mistake which [was] the activating cause of the overpayment”: *Auctus Resources Pty Ltd v Commissioner of Taxation* [2020] FCA 1096 at [49] and [65] (hereafter “**J**”); and
5. secondly, that s 8AAZN was not in any event intended to apply in relation to mistaken payments of tax offset refunds even at a time when such refunds did not form part of the process of assessment; it was not ever intended to apply to an incorrect claim made in a return about a deduction, assessable income or tax offset refund: J[67].
6. As to the primary judge’s first conclusion, for the reasons given below, the tax offset refund (to which the taxpayer was admittedly not entitled) was paid by mistake within the meaning of the general law and within the meaning of s 8AAZN(3). Objectively assessed and irrespective of the fact that the payment was effected through automated processes, the payment was made on a misunderstanding that the taxpayer was in fact entitled to the refund. This was sufficient for it to be “paid… by mistake” within the meaning of s 8AAZN(3).
7. As to the primary judge’s second conclusion, the mistaken payment falls within the terms of s 8AAZN(3), read literally in accordance with its natural and ordinary meaning. The primary judge’s conclusion requires s 8AAZN(3) to be read in a way which is narrower than the ordinary meaning of the words. It has been said to be “of fundamental importance” that the language of a definition be accorded its “natural and ordinary meaning unless some other course is clearly required”: *PMT Partners Pty Ltd (in liq) v Australian National Parks and Wildlife Service* (1995) 184 CLR 301 at 310; *Independent Commission Against Corruption v* ***Cunneen***(2015) 256 CLR 1 at [76]. Whilst there are matters which favour reading the subsection more narrowly than the ordinary meaning of the words, I have ultimately concluded that the words should not be read down to exclude the mistaken payment of the tax offset refund in this case.
8. After setting out the relevant factual background, these reasons are structured as follows:
9. The assessment power – to explain the parties’ agreed position that the payment of the tax offset refund did not form a part of the process of assessment in 2013 when the relevant events occurred or in 1999 when s 8AAZN was introduced.
10. The R&D tax incentive – to explain in summary the legislative provisions under which the taxpayer claimed the R&D tax offset refund and the fact that both Innovation and Science Australia (the **Board**) and the Australian Taxation Office administer the R&D tax incentive.
11. The tax offset refund was paid by mistake – the reasons for concluding that the tax offset refund was “paid to a person [the taxpayer] by mistake” within the meaning of the general law and s 8AAZN(3).
12. The mistaken payment was an “administrative overpayment” – the reasons for concluding that s 8AAZN(3) should not be read down so as not to cover the tax offset refund.

# FACTUAL BACKGROUND

1. The taxpayer registered certain activities with the Board under s 27A of the *Industry Research and Development Act 1986* (Cth) (**IRD Act**). As will be explained in more detail below, registration of activities as “R&D activities” is one of several requirements which must be satisfied in order to be entitled to the research and development (**R&D**) tax offset refund. The taxpayer in the present case “self-assessed” its activities as ones capable of being registered as R&D activities and secured registration under s 27A without the Board making any pre-registration findings about the activities.
2. The taxpayer self-assessed a tax offset refund of $2,269,336.05 in its tax return for the 2013 year. The Commissioner paid the sum of $2,269,336.05 through automated processes, described in more detail below.
3. On 8 December 2014, the Board commenced a review of the taxpayer’s purported R&D project. On 7 October 2016, the Board issued a “Certificate of Finding” under s 27J of the IRD Act, informing the taxpayer that none of the activities that comprised the purported R&D project for the 2013 year constituted R&D activities. The consequence of this finding was that the taxpayer was deemed never to have been registered for its R&D activities and therefore not eligible or entitled to the tax offset refund: s 27L of the IRD Act. The taxpayer unsuccessfully sought internal review of the Board’s decision. The taxpayer then sought review in the Administrative Appeals Tribunal. The application for review was discontinued by the taxpayer on 19 July 2019.
4. On 12 September 2019, the Commissioner issued the taxpayer with reasons for issuing a notice under s 8AAZN requiring the taxpayer to repay the tax refund for the 2013 year of income. The foreshadowed notice was issued by the Commissioner on 25 September 2019. It was in the following form:



1. The Commissioner then offset against the tax debt said to have been created by the notice under s 8AAZN certain GST and fuel tax credits the Commissioner owed the taxpayer, as claimed by the taxpayer in its September to December 2019 Business Activity Statements. This mechanism effected repayment of the tax refund. General interest charge was also imposed.

# THE ASSESSMENT POWER

1. The parties agreed that, in respect of the 2013 year (and in 1999 when s 8AAZN was introduced), the Commissioner’s assessment power in s 166 of the *Income Tax Assessment Act 1936* (Cth) (**ITAA 1936**) did not include the power to assess tax offset refunds; the assessment power was then confined to taxable income and tax payable thereon. The word “assessment” was defined in s 6(1) of the ITAA 1936. Paragraph (a) of the definition was:

***assessment*** means:

(a) the ascertainment of the amount of taxable income (or that there is no taxable income) and of the tax payable on that taxable income (or that no tax is payable); or

Note 1: A taxpayer does not have a taxable income if the taxpayer’s deductions equal or exceed the taxpayer’s assessable income: see subsection 4-15(1) of the *Income Tax Assessment Act 1997*.

Note 2: A taxpayer may have no tax payable on an amount of taxable income if that income is below the tax-free threshold or if the taxpayer’s tax offsets reduce the taxpayer’s basic income tax liability to nil.

1. Neither paragraph (a) nor any other paragraph of the definition included a reference to the ascertainment of the amount of a tax offset refund.
2. In 2013 (and in 1999), the assessment power in s 166 of the ITAA 1936 also made no reference to an assessment of the amount of a taxpayer’s refundable tax offsets. Section 166 was then in the following terms:

From the returns, and from any other information in the Commissioner’s possession, or from any one or more of these sources, the Commissioner shall make an assessment of the amount of the taxable income (or that there is no taxable income) of any taxpayer, and the tax payable thereon (or that no tax is payable).

1. The Commissioner did not have the power in 1999, or in respect of the 2013 year, to assess under s 166, or to issue an amended assessment, to reverse a tax offset refund paid to a taxpayer not entitled to the refund. It is relevant to note that there were (and are) a number of available tax offsets apart from the R&D tax offset.
2. The situation altered with respect to years after the 2013 year. The *Tax and Superannuation Laws Amendment (2013 Measures No 1) Act 2013* (Cth) (**2013 Amending Act**) introduced a new s 166 which now required assessment of taxable income, tax payable and the total of the taxpayer’s offset refunds. It provided (emphasis added):

**Assessment**

From the returns, and from any other information in the Commissioner’s possession, or from any one or more of these sources, the Commissioner must make an assessment of:

(a) the amount of the taxable income (or that there is no taxable income) of any taxpayer; and

(b) the amount of the tax payable thereon (or that no tax is payable); and

(c) **the total of the taxpayer’s tax offset refunds (or that the taxpayer can get no such refunds).**

1. The 2013 Amending Act also repealed, amongst other things, paragraph (a) of the definition of “assessment” in s 6(1) of the ITAA 1936, substituting it with the following (emphasis added):

(a) the ascertainment:

(i) of the amount of taxable income (or that there is no taxable income); and

(ii) of the tax payable on that taxable income (or that no tax is payable); and

(iii) **of the total of a taxpayer’s tax offset refunds for a year of income (or that the taxpayer can get no such refunds for the year of income);** or

Note 1: A taxpayer does not have a taxable income if the taxpayer’s deductions equal or exceed the taxpayer’s assessable income: see subsection 4-15(1) of the *Income Tax Assessment Act 1997*.

Note 2: A taxpayer may have no tax payable on an amount of taxable income if that income is below the tax-free threshold or if the taxpayer’s tax offsets reduce the taxpayer’s basic income tax liability to nil.

1. It follows that, whilst the ascertainment of the total of a taxpayer’s tax offset refunds now forms a formal part of the process of assessment, it did not before 1 July 2014. As is explained further below, the Commissioner would not now rely on s 8AAZN to recover a tax offset refund which should not have been paid, but that fact should not cloud the position in 1999 when s 8AAZN was introduced or the position in respect of the 2013 year.

# THE R&D TAX INCENTIVE

1. The R&D incentive scheme as it now exists was introduced by the *Tax Laws Amendment (Research and Development) Act* *2011* (Cth) (**2011 R&D Act**). The 2011 R&D Act introduced a new Div 355 of the *Income Tax Assessment Act 1997* (Cth) (**ITAA 1997**) and a new Part III to theIRD Act.
2. To be entitled to the R&D tax offset, an “R&D entity” (defined in s 355-35) must be registered for R&D activities under Part III of the IRD Act. “R&D activities” are either “core R&D activities” or “supporting R&D activities”: ss 355-20, 355-25, 355-30. The entitlement to the offset is created by s 355‑100 of the ITAA 1997.
3. The legislative machinery is complicated but, taking a simple case by way of example and cutting out complexity for the sake of explanation, an R&D entity can obtain a tax offset calculated as a percentage of the amount it can notionally deduct as R&D expenditure: s 355-100(1)(a); s 355-105; s 355-205. The percentage varies according to various criteria, largely aggregated turnover, but a current example is 43.5%: s 355-100(1) (Item 1). Where an entity can notionally deduct the R&D expenditure under s 355-205, it cannot deduct the R&D expenditure under another provision of the tax law: s 355-715(1).
4. An R&D entity is not eligible to claim the R&D tax offset unless its R&D activities are registered with the Board under s 27A of the IRD Act. That provision relevantly provides:

**Registering R&D entities for R&D activities**

(1) The Board must, on application by an R&D entity, decide whether to register or refuse to register the entity for either or both of the following for an income year:

(a) one or more specified activities as core R&D activities conducted during the income year;

(b) one or more specified activities as supporting R&D activities conducted during the income year.

1. The Board may make “findings” when considering an entity’s application for the purposes of s 27A(1): s 27B. The Board may also make findings about an entity’s registration under s 27J after registration. Section 27J provides:

**Findings about a registration**

(1) The Board may make one or more findings to the following effect about an R&D entity’s registration under section 27A for an income year (the ***registration year***):

(a) that all or part of a registered activity was a core R&D activity conducted during the registration year;

(b) that all or part of a registered activity was not an activity of a kind covered by paragraph (a);

(c) that all or part of a registered activity was a supporting R&D activity conducted during the registration year and in relation to:

(i) one or more specified registered core R&D activities; or

(ii) one or more specified core R&D activities for which the entity has been registered in an earlier income year; or

(iii) one or more specified core R&D activities yet to be conducted for which the entity could be registered in the registration year if those activities were conducted during the registration year; or

(iv) several specified core R&D activities, each covered by subparagraph (i), (ii) or (iii);

(d) that all or part of a registered activity was not an activity of a kind covered by paragraph (c).

Note 1: A finding is reviewable (see Division 5).

Note 2: The Board could make a finding under paragraph (b) if, for example, the Board has insufficient information to make a finding under paragraph (a). Similarly, the Board could make a finding under paragraph (d) if it has insufficient information to make a finding under paragraph (c).

(2) If the Board makes a finding under subsection (1) in relation to the R&D entity’s registration, the Board may specify in the finding the times to which the finding relates.

Example: A finding under paragraph (1)(a) could specify the times during the registration year that a registered activity was a core R&D activity.

(3) This section has effect subject to section 32B (findings cannot be inconsistent with any earlier findings).

1. Section 27L operates to deem, including retrospectively, a registration to have always conformed to any finding whilst that finding is in force:

**Automatic variations so registration is consistent with findings**

If an R&D entity is registered under section 27A for an income year, then while a finding is in force:

(a) under subsection 27B(1) in relation to the application for the registration; or

(b) under subsection 27J(1) in relation to the registration;

the registration is taken always to have existed in a form consistent with the finding.

1. A certificate given to the Commissioner under the IRD Act that sets out the Board’s “findings” is binding on the Commissioner for the purposes of assessments of the R&D entity for the relevant income year: s 355-705(1) of the ITAA 1997. There will not always be a certificate and the Board will not always make findings. The system relies heavily on self-assessment. This is explained in the explanatory memorandum to the 2011 R&D Act, which included:

[5.8] In order to claim a tax offset for R&D activities conducted in Australia or the external Territories, R&D entities will need to register their activities with the Board. While registration is a precondition of eligibility for the tax offset, registration does not, by itself, render the activities that are the subject of the registration of eligible R&D activities.

[5.9] The R&D tax incentive operates on a self assessment basis; that is, an R&D entity will assess for itself whether the activities conducted in an income year are eligible R&D activities as defined under new Division 355 of the ITAA 1997. As part of this process, R&D entities will be required to separately identify core and supporting R&D activities. However, the Board is able to make findings about activities that confirm or reject an R&D entity’s self assessment of its activities. Board findings about whether activities are R&D activities can arise in three ways:

* the Board may make findings about an application for registration, or activities that have been registered, of its own accord;
* the Board must examine and make findings on activities that have been registered if it is requested to do so by the Commissioner; and
* the Board may make findings on whether registered activities are R&D activities upon application by an R&D entity.

…

[5.28] As the new R&D tax incentive is a self assessment regime, the majority of applications to the Board will be registered without formal examination in relation to the activities conducted in the income year in question. Therefore, registration of activities does not, by itself, render the activities that are the subject of the registration eligible R&D activities.

1. Registration by an R&D entity of particular activities as being “core R&D activities” or “supporting R&D activities” under s 27A of the IRD Act, whilst a necessary requirement to be eligible for the tax offset refund, is not conclusive of such activities having the character of being “R&D activities”. Either the Commissioner or the Board might conclude that they are not. The Board might do so by making findings under ss 27B or 27J. If the Board has not made findings (which is often the case), the Commissioner might form his own views about whether a taxpayer’s activities are R&D activities. As the legislation currently stands (tax offset refunds being part of the process of assessment), if the Commissioner took the view that particular activities were not R&D activities and there was no binding finding about that, then the Commissioner would have to act on his view in performing his assessment obligation under s 166 of the ITAA 1936. In fulfilling his duty, the Commissioner is bound by a finding made by the Board if one happens to exist (s 355-705), but is otherwise responsible for administering the tax laws according to their terms. The Commissioner is not bound by the taxpayer’s self-assessed view that their activities are “R&D activities”. If it were otherwise, the taxpayer’s opinion about their activities constituting R&D activities would, in the absence of a finding by the Board, be determinative of this aspect of the taxpayer’s eligibility to the tax offset refund.
2. Further, eligibility to claim the R&D tax offset refund through registration of the R&D activities is not the same as an entitlement to the R&D tax offset refund. It is just one criterion of entitlement to the tax offset refund. There may be other reasons for denying a self-assessed claim to an R&D tax offset refund quite apart from whether the activities are properly registered as R&D activities. Many of these could not or would not be the subject of a finding by the Board binding on the Commissioner. If the Commissioner formed the view that the taxpayer was not entitled to the tax offset refund for some reason apart from the issue about whether the activities were R&D activities, he would appropriately act on that view rather than the taxpayer’s self-assessed position. The Commissioner might, for example, take the view that, although the activities were properly registered R&D activities (or there was a binding finding to that effect), the expenditure founding the notional deduction upon which the offset refund was calculated was not “incurred” on one of the registered R&D activities – see: s 355-205(1)(a). Or, again by way of example, the Commissioner might take the view that the expenditure was overstated.
3. Ultimately, the Board and the Australian Taxation Office jointly administer the R&D tax incentive.
4. The Board does not and never did assess entitlement to the offset. The Board has always had the duty to decide whether to register under s 27A and the power to make the specific findings provided for by the IRD Act, including under ss 27B and 27J about registration of activities and under Division 3, but the Board does not, and has never had the power to, determine a taxpayer’s entitlement to be paid a claimed tax offset refund. A taxpayer has never been entitled to the tax offset refund merely by securing registration of its activities with the Board.
5. A taxpayer’s entitlement to a tax offset refund is now a formal part of the process of assessment. The Commissioner’s duties include a duty to make an assessment and a duty to pursue the recovery of tax-related liabilities: *Deputy Commissioner of Taxation v Rennie Produce (Aust) Pty Ltd (in liq)* (2018) 260 FCR 272 at [20]. If the Commissioner formed the view today that a taxpayer was not entitled to the tax offset refund which the taxpayer had self-assessed in a return, he would ordinarily assess the taxpayer in accordance with his view: s 166 of the ITAA 1936. As explained in more detail below, the Commissioner would not rely on s 8AAZN.
6. Before 2014, when ascertainment of tax offset refunds did not form a part of the process of assessment, the Commissioner would not pay an offset refund claimed in a return if he considered a taxpayer was not entitled to the offset refund. Whilst the ascertainment of tax offset refunds was not a part of the formal assessment process before 2014, the Commissioner was responsible for the general administration of the tax laws: s 8 of the ITAA 1936; ss 1-7 of the ITAA 1997; s 3A of the TAA; s 356-5 of Sch 1 to the TAA. The general administration of the tax laws includes and included taking into account the effect of tax offsets in determining the amount payable to the Commissioner or payable by him. The Commissioner could not responsibly pay a tax offset refund to a person if he held the view that the person was not entitled to the refund. If the Commissioner erroneously paid the refund, he would seek to recover the incorrectly paid refund by some appropriate mechanism outside of the assessment process.
7. The question in this appeal is whether s 8AAZN was appropriately relied upon to recover the refund which the Commissioner paid in administering the tax laws in this case. This involves two issues: first, whether the refund was “paid … by mistake” within the meaning of s 8AAZN(3); and, secondly, if the refund was paid by mistake, whether s 8AAZN(1) applied because the amount was an “administrative overpayment” within the meaning of s 8AAZN.

# THE TAX OFFSET REFUND WAS PAID BY MISTAKE

1. The primary judge concluded that the payment of the tax offset refund to the taxpayer was not “paid … by mistake” within the meaning of s 8AAZN(3) at the time that the payment was made: J[49] and [65]. The primary judge held further, that this position was not altered by the retrospective operation of s 27L: J[80]. The Commissioner contended that both conclusions were incorrect. That submission must be accepted.
2. Before explaining why that is so, an observation should be made concerning a concession made by the taxpayer at trial. The taxpayer conceded before the primary judge that it had no legal entitlement to the refund. There was a dispute between the Commissioner and the taxpayer as to the scope of the concession. The taxpayer says its concession was recorded too broadly in the reasons of the primary judge. The taxpayer submitted that the concession was limited to one of it having no entitlement to the refund because of the operation of s 27L of the IRD Act, but not that it had no entitlement to the refund when it was received. The Commissioner, and the primary judge, considered the concession was broader. That question does not need to be resolved. Whatever the scope of the concession, the refund was paid by mistake:
3. the refund was “paid by mistake” at the time the refund was paid; and
4. even if the refund was not “paid by mistake” at the time the refund was made, the effect of s 27L was that the taxpayer was retrospectively taken never to have been entitled to the refund and the refund was one “paid to a person by mistake” as soon as the Board made its finding under s 27J on 7 October 2016.

## The meaning of “paid … by mistake” in s 8AAZN(3)

1. The primary judge concluded that the phrase “by mistake” in s 8AAZN(3) “requires the presence of a mistake which is the activating cause of the overpayment for it to be an ‘administrative overpayment’ as defined” and that it must be a mistake made by or imputed to the Commissioner: J[65].
2. The primary judge accepted that the refund was not paid by mistake, because it was not based upon any mistaken assumption; rather, the Commissioner had made no assumption and the payment was made automatically under the self-assessment regime: J[49].
3. The word “mistake” in s 8AAZN(3) is not defined and nor is the phrase “paid … by mistake”. However, the concept of mistaken payments has a well understood meaning at general law and there is nothing about s 8AAZN or the TAA more generally which suggests “paid … by mistake” should be taken to have some special or different meaning. Indeed, the terms of s 8AAZN(3) suggest a consciousness of the general law relating to mistaken payments.
4. The general law provides an action for recovery of payments made in the mistaken belief that the payer (here the Commissioner) was under a legal obligation to make the payment: ***David Securities*** *Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353. The general law recognises that an erroneous belief or assumption may constitute a mistake. A “mistake” may include “a positive belief in the existence of something which does not exist but also may include ‘sheer ignorance of something relevant to the transaction in hand’”: *David Securities* at 369. It is not necessary to establish mistake that a person make some positive assumption which causes the transaction to occur or an error to be made. The identification of “mistake” in an action for money had and received is for the purpose of preventing unjust enrichment in circumstances of sufficient error or misunderstanding; the law regards a payment as involuntary, or mistaken, if the transaction was materially different to that which the payer objectively intended even where the payer had no actual intention. The general law concept of mistake is not entirely concerned with the subjective thought processes or actions of the person making the mistaken payment, albeit subjective intention might be of significance in a particular case. In other words, it is not necessary for a mistake at general law for a person to turn his or her mind to a question and consciously make a mistake – see: *Commonwealth v Davis Samuel Pty Ltd (No 7)* (2013) 282 FLR 1 at [1707] (unauthorised payments out of consolidated revenue); *Nurdin & Peacock PLC v DB Ramsden & Co Ltd* [1999] 1 WLR 1249 (rent overpaid through a payment system that would automatically pay invoices passed to the accounts department unless the department received a positive instruction not to pay); see also the second last sentence in the quote at [48] below.

## When the payment was made it was “paid … by mistake”

1. The primary judge accepted that there was no mistake made by the Commissioner because the tax offset refund was paid automatically through the relevant administrative arrangements and automated systems, meaning that there was no “mistake which [was] the activating cause of the overpayment”: J[49], [65]. These conclusions were based on the evidence of Ms King, a senior officer in the Australian Taxation Office, which the primary judge summarised at J[27] in the following way:

(a) in order to obtain a refundable tax offset an entity must “self-assess” whether they are eligible to make that claim. What is then disclosed in the entity’s tax return is initially accepted by the ATO usually without query or checking;

(b) as part of that self-assessment regime, an R & D claim is automatically processed in the tax system, unless something arises to trigger an alert;

(c) the ATO maintains a computer database which includes the ATO Integrated System (the “**AIS**”) and the Integrated Core Processing System (the “**ICP**”). These were described by Ms King in the following way:

(i) AIS contains records of credit and debit account postings for taxpayers’ Activity Statement and Franking Deficit Tax Accounts including payments that were posted to the accounts up to and including 23 December 2019.

(ii) ICP contains records of all liabilities, payments and credits for taxpayers’ Income Tax accounts. As a matter of practice within the ATO, the information recorded on ICP is input into the system either manually by employees of the ATO, based on information furnished to the ATO by a taxpayer through tax returns, or automatically if the taxpayer lodged returns electronically. Since 24 December 2019, the Activity Statement and Franking Deficit Tax accounts in AIS have been transitioned into ICP, so that all account postings including credit and debit postings in AIS are now in ICP.

(d) the ATO’s system contained no record that any of the taxpayer’s R & D claims for the 2013 year (or the 2014 year) of income had been queried by the Commissioner when the tax return for that year (or the 2014 year) was submitted [by] the taxpayer.

1. The taxpayer did not adduce evidence that, at the time of the payment of the tax offset refund, it was engaged in R&D activities or that the operation of the relevant legislation to the facts that existed at the time gave rise to any entitlement to payment of the tax offset refund. The evidence did not provide any basis for such a conclusion. The taxpayer had discontinued its application for review in the Administrative Appeals Tribunal. Irrespective of the extent of any concession made by the taxpayer, the only conclusion open was that, at the time the payment was made, an entitlement to the refund did not exist as a matter of the application of the relevant taxation laws to the facts. The necessary conclusion was that the refund was “paid to a person by mistake” for the purposes of the general law and for the purposes of s 8AAZN(3).

## The consequences of the retrospective effect of s 27L of the IRD Act

1. As soon as the Board made its finding under s 27J of the IRD Act on 7 October 2016 that none of the taxpayer’s activities constituted supporting or core R&D activities, the taxpayer’s “registration [was] taken always to have existed in a form consistent with the finding”: s 27L of the IRD Act.
2. Accordingly, even if the taxpayer was in fact entitled to the refund before 7 October 2016 (which – for the reasons just given – it was not), the taxpayer was retrospectively taken never to have been entitled to the refund. In *Commissioner of State Revenue (Vic) v* ***Royal Insurance*** *Australia Ltd* (1994) 182 CLR 51 at 66-68, Mason CJ said (footnotes omitted; emphasis added):

We begin with the proposition, accepted in *David Securities*, that mistake of law is no bar to recovery, and in this case there is no question but that Royal made the relevant payments in the mistaken belief that in law it was bound to do so. **In one respect, Royal’s belief at the time of payment was not mistaken: in the case of the cost-plus policies, payments were made when there was a legal liability to pay them. Only subsequently and retrospectively was an exemption granted. But the retrospective operation of s 2(4) of the 1987 Act enables one to say that, in the light of the law as it was enacted with retrospective effect in 1987, the payments of duty were made under a mistake as to the legal liability to pay them**. In *David Securities* it was accepted that: “the payer will be entitled prima facie to recover moneys paid under a mistake if it appears that the moneys were paid by the payer in the mistaken belief that he or she was under a legal obligation to pay the moneys or that the payee was legally entitled to payment of the moneys. Such a mistake would be causative of the payment.” And, prima facie, that is all that is required where, as here, the recipient has no legal entitlement to receive or retain the moneys. The recipient has been unjustly enriched. Indeed, it is perhaps possible that the absence of any legitimate basis for retention of the money by the Commissioner might itself ground a claim for unjust enrichment without the need to show any causative mistake on the part of Royal. But there is no occasion to pursue this aspect of the case further.

1. The emphasised sentences, whilst written in the context of a mistaken payment of tax rather than mistaken payment of a refund, is appropriately adapted to capture the circumstances involved in the present case.

## Conclusion as to mistake

1. The tax offset refund was “paid … by mistake” within the meaning of s 8AAZN(3) at the time of payment. It does not matter that the Commissioner did not actively make any assumption at the time of the refund or that the refund was made by automated electronic processes and did not involve a person actively turning his or her mind to whether or not payment of the refund should be made. As is explained in more detail below, s 8AAZN(3) was introduced at the least to address errors likely to occur in the context of various automated processes used in administering the running balance account.
2. Further, the consequence of s 27L was that, if the payment was not paid by mistake at the time of payment, the refund became a payment which was “paid to a person by mistake” within the meaning of s 8AAZN(3).

# THE MISTAKEN PAYMENT WAS AN “ADMINISTRATIVE OVERPAYMENT”

1. Having concluded that the payment of the tax offset refund to the taxpayer was “paid … by mistake” within the meaning of s 8AAZN(3), the dispositive question is whether this mistaken payment was an “administrative overpayment” within the meaning of s 8AAZN.
2. The task of statutory construction must begin and end with a consideration of the text itself and the provision is to be construed in its context which includes legislative history and extrinsic material: *Commissioner of Taxation v* ***Consolidated Media Holdings*** *Ltd* (2012) 250 CLR 503 at [39]; ***SZTAL*** *v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at [14].
3. As mentioned, there is no question that s 8AAZN(3), read literally according to its ordinary meaning, is apt to cover the mistaken payment. The question is whether the text construed in context “clearly” requires the words of the definition to be read down – *Cunneen* at [76]. There are two possibilities which might afford the opportunity to read the words down. First, if it is permissible to use a defined term to affect the meaning of the definition, the defined term “administrative overpayment” might suggest something narrower than the ordinary meaning of the definition. Secondly, the context – structure and legislative history – might suggest that the legislature should not be taken as having intended the words to bear their ordinary meaning.
4. Although, in the interests of clarity, the reasons below address separately the text, structure, extrinsic material and legislative history, it should be recognised that context is considered in construing the text and not at some later stage: *SZTAL* at [14].

## Text and structure

1. As a general rule, one reads a definition into the primary provision in order to construe the substantive provision: *Kelly v R* (2004) 218 CLR 216 at [103]. An “administrative overpayment” (the defined term referred to in s 8AAZN(1)) is “an amount that the Commissioner has paid to a person by mistake, being an amount to which the person is not entitled” (the definition in s 8AAZN(3)).
2. It should immediately be noticed that the substance of the definition is only directed to what constitutes an “overpayment”. The definition does little if anything to distinguish an “administrative” overpayment from an overpayment which is not “administrative”. Rather, the definition, read literally and according to its ordinary meaning, means that any amount the Commissioner has paid to a person by mistake, to which a person is not entitled, is an administrative overpayment.
3. In reaching a conclusion that s 8AAZN(3) was narrower than its ordinary meaning, the primary judge noted that he had not been influenced by the choice of the word “administrative” in the defined term “administrative overpayment”: J[74] One might think it permissible to take into account the word “administrative” in determining what the legislature should be taken to have intended by adopting the words used in the defined term and the definition. That is because the words chosen, read in context, might indicate that the defined term was intended to reflect an aspect of the intended meaning. However, a number of authorities indicate that it is not permissible to construe the definition by reference to the defined term, although for the reasons which follow I do not understand that to be an inflexible rule of statutory construction.
4. Using the defined term “administrative overpayment” in s 8AAZN(1) or the word “administrative” to interpret the definition supplied by s 8AAZN(3) involves a process of reasoning which is necessarily circular. In *Owners of the Ship “****Shin Kobe Maru****” v Empire Shipping Company Inc* (1994) 181 CLR 404 at 419 the High Court observed (footnote omitted):

The Act’s description of a claim falling within s 4(2) as a “proprietary maritime claim” is of no assistance in construing the expression “a claim ... relating to ... ownership”. The use of the word “proprietary” in the term to be defined does not colour the meaning to be given to the definition which follows it. It would be quite circular to construe the words of a definition by reference to the term defined.

1. The footnote to the final sentence of that passage referred to *Wacal Developments Pty Ltd v Realty Developments Pty Ltd* (1978) 140 CLR 503 at 507 (Gibbs J) in which the Court rejected the use of an adjective in the defined term – namely “instalment contract” – to read down a definition which otherwise widened the ordinary meaning of “instalment contract”. In response to a submission that a word in a defined term coloured the meaning of the definition, Gibbs J stated:

With all respect it is impermissible to construe a definition by reference to the term defined. The expression is given by the statute a special meaning which must be applied whether or not it accords with the ordinary meaning.

1. The primary judge recorded at J[75] that the Full Court of this Court in ***Esso*** *Australia Resources Pty Ltd v Federal Commissioner of Taxation* (2011) 199 FCR 226 (Keane CJ, Edmonds and Perram JJ) accepted that *Shin Kobe Maru* established a principle that it is not permissible to have any regard to the words selected in a composite expression to resolve any ambiguity in the definition. As can be seen from what the Full Court said in *Esso* from [100] to [107], the Full Court was somewhat reluctant in reaching this conclusion.
2. The *Shin Kobe Maru* principle was confirmed by the High Court in *Minister for Immigration and Border Protection v WZAPN* (2015) 254 CLR 610 at [48].
3. The circularity in reasoning inherent in using a defined term to ascertain the meaning of the definition was adverted to by French CJ, Hayne, Kiefel and Nettle JJ in *Cunneen* at [33]. Nevertheless, as the respected authors of *Statutory Interpretation Principles* (2nd ed, Thomson Reuters, 2021), P Hertzfeld SC and T Prince, note at [3.50], their Honours took into account the ordinary meaning of the expression “corrupt conduct” in construing a definition of that term: at [3], [38], [54].
4. The *Shin Kobe Maru* principle was applied by the Full Court of this Court in *SZTVU v Minister for Home Affairs* (2019) 268 FCR 497 (Perry, Derrington and Wheelahan JJ) and by the Queensland Court of Appeal: *BWP Management Ltd v Ipswich City Council* [2020] QCA 104 at [42]-[51], *Carter Capner Law v Clift* [2020] QCA 125 at [14].
5. The authorities are not all one way. In *Tovir Investments Pty Ltd v Waverley Council* [2014] NSWCA 379 at [20]-[21], Basten JA (with whom Mcfarlan and Leeming JJA agreed) considered that there was scope for the principle not to apply depending on the context. That case involved the construction of a Local Environmental Plan.
6. The universal application of the principle to the construction of commercial contracts has been doubted. In *Barangaroo Delivery Authority v Lend Lease (Millers Point) Pty Ltd* [2014] NSWCA 279 at [11], Leeming JA (with whom Beazley P and Tobias AJA agreed) referred to *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101, where Lord Hoffman was required to construe defined terms in a building contract. His Lordship said at [17]:

[T]he contract does not use algebraic symbols. It uses labels. The words used as labels are seldom arbitrary. They are usually chosen as a distillation of the meaning or purpose of a concept intended to be more precisely stated in the definition.

1. Leeming JA observed at [11]:

… In my view, the first step is to seek to identify how (if at all) the complex language chosen by the parties results in a concept which they chose to label “Current Market Value”. In saying this, I am conscious of the criticism expressed, in the context of a statutory definition, in *Owners of the Ship “Shin Kobe Maru” v Empire Shipping Co Inc* (1994) 181 CLR 404 at 419, against using the defined words to construe the definition. I respectfully doubt that that can be universally true (a doubt shared by the Victorian Court of Appeal in *Hardy Wine Company Ltd v Janevruss Pty Ltd* [2006] VSCA 28 at [5] even prior to *Chartbrook*).

1. I do not think that the principle in *Shin Kobe Maru* was intended to lay down an inflexible rule of statutory construction. The observation made by Gibbs J in *Wacal* that the defined term should not be used to read down the definition reflected a conclusion, reached from an examination of the statute as a whole, that the defined term was not intended to limit the definition; it was clear that the term “instalment contract” was not intended to have its ordinary meaning but was intended to have the special meaning given by the definition. That will not always be the answer reached through the iterative process required in construing a statute, even if it typically is. The end object of the process of statutory construction is to give the words of the particular statute the meaning which the legislature is taken to have intended them to have: ***Lacey*** *v Attorney-General (Qld)* (2011) 242 CLR 573 at [43]; *Certain Lloyd’s Underwriters v Cross* (2012) 248 CLR 378 at [25]-[26]. The preferred construction is reached through common law and statutory rules of construction, the application of which involves the identification of a statutory purpose from any express statement in the statute, or by inference from the text and structure of the statute and by appropriate reference to extrinsic materials: *Lacey* at [44]. If the *Shin Kobe Maru* principle was intended to set down an inflexible rule of statutory construction that it is never permissible to look at the language used in a defined term to construe a definition, then that would conflict with the principle that it is the text and structure as a whole, read in context, from which the meaning of the statute must be ascertained. The process of construction might reveal that the legislature should be taken to have selected the language that it did in the defined term, albeit defined elsewhere, because it was thought to reflect the essence or some important aspect of the intended meaning supplied by the definition. This is the process in fact employed by the plurality in *Cunneen*. Whilst this might involve circular reasoning, such reasoning is not illogical in this context or indeed inappropriate – see: *Thomas v State of New South Wales* (2008) 74 NSWLR 34 at [22]; *Singh v Lynch* [2020] NSWCA 152 at [128].
2. The real question is: what should the legislature be taken as having intended by using the words it did in both the defined term and the definition? The answer may well be that the legislature should be taken to have intended that the definition should not be confined by the terms of the defined term. That was the case in *Wacal* and *Shin Kobe Maru*. As a matter of principle, it will not always be the case that the defined term cannot affect the meaning of the definition.
3. Part IIB, which includes s 8AAZN, was introduced into the TAA by the *Taxation Laws Amendment Act (No 3) 1999* (Cth). Part IIB is entitled “Running balance accounts, application of payments and credits, and related matters”. As the High Court recently observed in *Commissioner of Taxation v* *Travelex Limited* [2021] HCA 8at [21] by reference to the Parliamentary Debate in the House of Representatives (*Hansard*, 10 December 1998 at 1898) (citation omitted):

The objective [of Part IIB] was “to establish a taxpayer accounting system under which the Australian Taxation Office can record and monitor all of a business’s different tax liabilities on a single account”. “The introduction of running balance accounts” was designed to “provide for simpler tax accounting and collection arrangements.”

1. Part IIB comprised four divisions:

* Division 1 is headed “Preliminary” (mostly containing definitions).
* Divisions 2 and 3 are headed “Running balance accounts (or RBAs)” and “Application of payments and credits against tax debts”, respectively. Divisions 2 and 3 were largely devoted to the creation and maintenance of RBAs.
* Division 4 is headed “Miscellaneous provisions about tax debts”. Division 4, at the time of its enactment, comprised only two sections, namely: s 8AAZM (addressing when payment of a “tax debt” is treated as having been received) and s 8AAZN.

1. Division 2 includes s 8AAZH(1). When introduced, it provided:

**Division 2-—Running balance accounts (or RBAs)**

…

**8AAZH Recovery of RBA deficit**

(1) An RBA deficit:

(a) is a debt due to the Commonwealth by the tax debtor; and

(b) is payable to the Commissioner; and

(c) may be recovered in a court of competent jurisdiction by the Commissioner, or by a Deputy Commissioner, suing in his or her official name.

1. Section 8AAZH(1) and relevant definitions in s 8AAZA have been amended over time. Read with the relevant definitions, it can be seen that s 8AAZH was (and remains) directed to imposing liability for a deficit in a running balance account. An RBA deficit debt is a balance in favour of the Commissioner calculated by reference to “primary tax debts” that have been allocated to the RBA after taking into account payments and credits to which the entity is entitled under a taxation law. A “primary tax debt” is, put simply, an amount due to the Commonwealth “directly under a taxation law”.
2. Subsection 8AAZN(1) and (3) were (and remain) in Division 4. When introduced, they provided:

**8AAZN Overpayments made by the Commissioner under taxation laws**

(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***); and

(b) is payable to the Commissioner; and

(c) may be recovered in a court of competent jurisdiction by the Commissioner, or by a Deputy Commissioner, suing in his or her official name.

…

(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.

1. The primary judge concluded, from an examination of the text of the legislation, read in context (but without being influenced by the word “administrative”) that “administrative overpayments” would include “a payment to the wrong person; a payment arising from a misallocation of tax debts; or a payment arising from computer error”, but not mistaken payments arising from incorrect claims made in a return about assessable income, deductions or tax offset refunds: J[73]. His Honour stated at J[67]:

Where a taxpayer makes an incorrect claim for a deduction or offset, or fails to include an amount of assessable income in its return, the error is capable of correction by assessment and the Commissioner may collect the tax thereby arising by suing on that assessment or by relying upon s 8AAZH. In the case of an incorrectly paid refund arising from an excessive claim for a tax offset, there is now an express power conferred on the Commissioner to amend the taxpayer’s assessment and an express power, conferred by s 172A of the *1936 Act*, to recover the overpayment as a debt due to the Commonwealth. In that specific statutory context, and in my view, the type of “mistake” which s 8AAZN is directed at, is not an incorrect claim made in a return about a deduction, offset or amount of assessable income.

1. In my view, the running balance account provisions introduced in 1999, read as a whole, suggest it was intended that the Commissioner should be able to recover as a debt any deficit recorded in the running balance account (often being amounts arising through the formal assessment process): s 8AAZH; and payments to which a person was not entitled, mistakenly made under the Commissioner’s general administration of the taxation laws: s 8AAZN. Whilst there may be overlap between s 8AAZH and s 8AAZN, this objective is evident in the language of s 8AAZH (read with relevant definitions) and s 8AAZN.
2. A broader construction than that reached by the primary judge is also supported by the heading to s 8AAZN: “Overpayments made by the Commissioner under taxation laws”. The heading to s 8AAZN tells against a legislative intention to confine the meaning of “mistake” only to the kinds of errors identified by the primary judge, being essentially clerical errors made in the administration of RBAs.
3. Section 8AAZH, when enacted, concerned recovery of tax debts arising “directly under a taxation law” which were reflected in a deficit balance in a running balance account. These amounts would typically be the subject of assessments, challengeable in Part IVC proceedings. Other amounts might mistakenly be paid and arguably not constitute debts arising “directly under a taxation law”. The phrase “under taxation laws” in the heading to s 8AAZN suggests a more remote connection to a taxation law than the phrase “directly under a taxation law” used in the definitions relevant to s 8AAZH – see generally: *Commissioner of Taxation v Fortunatow* [2020] FCAFC 139 at [12], [15], [19].
4. The tax offset refund in the present case was one paid by the Commissioner in the general administration of the taxation laws, more specifically in his (joint) administration of the R&D tax incentive and as an adjunct to the process of assessment. As discussed below, there are aspects of the legislative structure and the extrinsic material which favour the primary judge’s conclusion that, despite the broad language used in s 8AAZN(3), the tax offset refund was not intended to be covered by the provision. However, I have ultimately concluded that s 8AAZN(3) does cover the mistaken payment of the tax offset refund in this case, made by the Commissioner in the discharge of his duty to administer the taxation laws.

## Secondary material

1. The *Explanatory Memorandum to the Taxation Laws Amendment Bill (No 5) 1998* (Cth) (**EM 1999**) explained at [1.1] that Schedule 1 to the Bill was directed to three objects, the last of which was the introduction of “a system of four running balance accounts to account for sales tax, PAYE, PPS and RPS debts for the year ending 30 June 2000”. The EM 1999 also related to the *General Interest Charge (Imposition Bill) 1998* (Cth). The EM 1999 at [1.2] explained that the new general interest charge for all outstanding tax debts is an essential feature in the establishment of running balance accounts.
2. The EM 1999 then explained that these “measures” required certain “consequential” amendments, stating at [1.3]:

Other consequential amendments are also necessary to support the above measures. For example, the new general interest charge will become tax deductible. Further, 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.

1. The EM 1999 explained at [1.122] (emphasis by underlining added):

***Consequential amendments to support the RBA***

1.122 Consequential amendments, in particular, in the application of payments and credits, are necessary to support the introduction of RBAs. **Table 8** summarises these consequential amendments.

**Table 8: Consequential amendments for the RBA legislation**

|  |  |
| --- | --- |
| **Amendment** | **Legislative references** |
| Introduction of tax debts for administrative errors by the Commissioner. | ***Item 351; new section 8AAZN*** of the TAA53 |
| Application by the Commissioner of credits and payments against tax debts. | ***Items 4, 28, 31, 32, 33, 34, 35, 36, 52, 76, 116, 122, 124, 125, 126, 129, 144, 145, 146, 147, 150, 154, 155, 159, 160, 176, 181, 182, 183, 184, 190, 205, 207, 208, 210, 219, 220, 230, 231, 244, 253, 279, 299, 300, 302, 321, 336, 342, 343, 353, 374 and 395*** |

1. The taxpayer emphasised that:
2. the amendment was described as one which was “consequential” to the introduction of the RBA and intended to “support” it;
3. the “new s 8AAZN” was described as being required for the “introduction of tax debts for administrative errors by the Commissioner”.
4. This material can be read as supporting the view that s 8AAZN was intended to capture the kinds of mistaken payments to which the primary judge referred at J[73] and I have no doubt that these were some of the types of errors which would have been contemplated as reasonably likely to occur. However, the material can also be read more broadly as intending to capture all mistaken payments made as a result of the general administration of the taxation laws, including those which come to be recorded in a running balance account. This latter understanding of the extrinsic material has some attraction. It is difficult to think of a good reason for imputing to the legislature an intention that the Commissioner should only be able to recover certain mistaken payments (mainly reflecting computer or human error) rather than all mistaken payments to which a taxpayer is not entitled. In any event, the question is the proper construction of the text of s 8AAZN, read in context, not of ascertaining the meaning of the extrinsic material and imputing that meaning to the statutory text: *Consolidated Media Holdings* at [39].

## Relevant legislative history

1. I have referred earlier to the fact that, from 2014, tax offset refunds became part of the formal process of assessment. These changes were effected by the 2013 Amending Act, which also introduced a new s 172A to the ITAA 1936 and Subdivision 67-L of the *Income Tax (Transitional Provisions) Act 1997* (Cth) (**ITTPA 1997**). Section 172A, which had effect from the 2014 year of income, makes any overpaid refundable tax offsets due and payable within 21 days of the issue of an amended assessment disallowing those offset refunds. The primary judge stated at J[12], that s 172A is an express power to do what the Commissioner submits he has always been able to achieve under s 8AAZN of the TAA. Section 172A provides:

**Consequences of amendment of assessments of tax offset refunds**

*Amendment increases total of tax offset refunds*

(1) If, by reason of an amendment of an assessment, the total of a person’s tax offset refunds is increased, the Commissioner must apply the amount of the increase in accordance with Divisions 3 and 3A of Part IIB of the *Taxation Administration Act 1953*.

Note: Interest on the amount of the increase may be payable under the *Taxation (Interest on Overpayments and Early Payments) Act 1983*.

*Amendment reduces total of tax offset refunds*

(2) If:

(a) by reason of an amendment of an assessment, the total of a person’s tax offset refunds is reduced; and

(b) as a result, an amount applied in accordance with Divisions 3 and 3A of Part IIB of the *Taxation Administration Act 1953* before the amendment was excessive;

the person is liable to pay to the Commonwealth the amount of the excess. The amount is due 21 days after the Commissioner gives the person notice of the amended assessment.

Note: For provisions about collection and recovery of the amount, see Part 4-15 in Schedule 1 to the *Taxation Administration Act 1953*.

(3) If any of the amount (the ***overpayment***) the person is liable to pay under subsection (2) remains unpaid after the time by which it is due to be paid, the person is liable to pay the general interest charge on the unpaid amount for each day in the period that:

(a) starts at the beginning of the day on which the overpayment was due to be paid; and

(b) finishes at the end of the last day on which, at the end of the day, any of the following remains unpaid:

(i) the overpayment;

(ii) general interest charge on any of the overpayment.

Note: The general interest charge is worked out under Part IIA of the *Taxation Administration Act 1953*.

1. A significant purpose behind the amendments made by the 2013 Amending Act which altered the definition of “assessment” in s 6(1) of the ITAA 1936 and the assessment power in s 166 of the ITAA 1936 and introduced s 172A of the ITAA 1936 and Subdivision 67-L of the ITTPA 1997, was to permit a corporate tax entity which had paid tax in the past, but was in a tax loss position, to carry their loss back to those past years so as to obtain a refund of some of the tax previously paid, through the mechanism of a refundable tax offset.
2. It is evident from the *Explanatory Memorandum to the 2013 Amending Act* (**2013 Explanatory Memorandum**) that it was considered that an entity claiming a loss carry-back offset refund should also be able to object to the amount of any refund arising from the offset in accordance with Part IVC of the TAA. This was achieved by extending the definition of “assessment” to include the amount of a refund arising from a taxpayer’s refundable tax offsets. A number of amendments were necessary, including creating a liability to repay the amount of any reduction of a person’s tax offset refunds in consequence of an amendment to an assessment. The Commissioner submitted that, because it was recognised that the changes contemplated by these amendments would take time to implement, the regime contemplated by Subdivision 67-L was introduced to apply only to assessments for the 2013 income year.
3. The Commissioner observed, correctly, that there is no suggestion in the 2013 Explanatory Memorandum that any of the amendments were introduced in recognition of a deficiency in the law with respect to the recovery of incorrectly paid tax offset refunds generally and that there was no reference to s 8AAZN at all in either the 2013 Explanatory Memorandum or in the Bill introducing Subdivision 67-L.
4. Neither Subdivision 67-L of the ITTPA 1997, nor s 172A of the ITAA 1936, were enacted to address anything specifically to do with the R&D tax concession or with the fact that the Board could make findings under ss 27B or 27J.
5. The Commissioner also submitted that, contrary to the conclusion of the primary judge, Subdivision 67-L did not permit recovery of the tax offset refund paid in the present case. It does not advance the present matter to determine whether the primary judge erred in his understanding of Subdivision 67-L and nor does it assist more generally given the subdivision only applied to the 2013 year and that it was repealed in April 2019 by the *Treasury Laws Amendment (2018 Measures No 4) Act 2019* (Cth).
6. The following is, however, significant:
7. The new definition of “assessment” in s 6(1), the new assessment power in s 166 and the new s 172A, albeit introduced in the specific context of the then new loss carry back offset, brought tax offset refunds generally into the assessment process. From that time, they have been dealt with by way of assessment and then objection and review rights under Part IVC of the TAA. Under the current law, a tax offset refund cannot be paid without an assessment which entitles the taxpayer to the relevant amount.
8. As explained in more detail below, these changes have the result that s 8AAZN could not now be used to recover a tax offset refund paid in years from 2014 in circumstances otherwise equivalent to those of the present case.
9. However, the mere fact that tax offset refunds have now been brought into the formal assessment process and could not now be recovered in the way the Commissioner proceeded in the present case, does not answer the question whether the Commissioner could recover a tax offset under s 8AAZN when tax offset refunds did not form a part of the assessment process.
10. By way of explanation of the observation made at (2) above, if the relevant events had occurred today:

* The taxpayer would have made the claim to the tax offset refund in its return (as it did) and the Commissioner is under an obligation to make, and would have been taken on lodgement of the return to have made, an assessment of the taxpayer’s tax offset refunds: s 166(c); s 166A(3)(c)(iii) of the ITAA 1936.
* The tax offset refund would have formed a part of the assessment.
* On forming the view that the assessment was not correct, the Commissioner would then have issued an amended assessment. He would have done so to give effect to the subsequent finding of the Board made under s 27J of the IRD Act: s 355-710 of the ITAA 1997. He could also have done so if he took the view that the amount should not have been paid because the taxpayer was, for some other reason, not entitled to it: s 170 of the ITAA 1936. Albeit in part overlapping, s 170 of the ITAA 1936 has a distinct area of operation to s 355-710 of the ITAA 1997, the latter only applying in relation to amendments consequent upon a finding by the Board.
* The Commissioner would have had the usual statutory powers of recovery of the debt resulting from the issue of the amended assessment, expressly created by s 172A of the ITAA 1936. The tax offset refund of $2,269,336.05 the subject of the amended assessment would have been a “tax-related liability” recoverable under Division 255 of Schedule 1 to the TAA as a debt due and payable to the Commonwealth: s 250-10(1) (Item 70); s 255-5(1). The Commissioner might also have recovered any “RBA deficit debt” under s 8AAZH.
* The Commissioner would not rely on s 8AAZN because s 350-10 (Item 2) of Schedule 1 to the TAA (which replaced s 177(1) of the ITAA 1936) would have protected the assessment (which includes the tax offset refund) except in Part IVC proceedings. Production of the notice of assessment would have been conclusive evidence that the amounts and particulars of the assessment were correct such that the Commissioner would not have been able to establish that the taxpayer was not “entitled” to the payment within the meaning of s 8AAZN(3).
* The taxpayer would have had the usual rights of objection to the amended assessment and review of the resulting objection decision in accordance with Part IVC of the TAA – see: s 175A of the ITAA 1936, in particular s 175A(3).

1. None of this means that s 8AAZN did not apply when the mistaken payment was made. Entitlement to the refund was self-assessed and the incorrect claim to the refund in the taxpayer’s return resulted in the payment being made. The mistaken payment in the present case was made by the Commissioner in the general administration of the taxation laws even though it did not form part of the assessment.
2. It is also perhaps worth mentioning two further provisions to which the primary judge was not taken and which were not mentioned on appeal. First, the *Product Grants and Benefits Administration Act 2000* (Cth) was introduced on 19 June 2000. Section 8AAZN was referred to in the Note to subsection 35(4), and states that s 8AAZN permits recovery of an “overpayment debt”, within the meaning of that Act, suggesting an operation of s 8AAZN broader than that indicated by the primary judge.
3. The second provision to mention is s 170B of the ITAA 1936 which was introduced in 2014 by the *Tax and Superannuation Laws Amendment (2014 Measures No 2) Act 2014* (Cth). The provision was introduced to protect taxpayers who had relied on government announcements about changes to tax laws, but which ultimately did not proceed due to a change in government. The provision operated to prevent the Commissioner amending an assessment of a taxpayer who had relied on an announcement and also by expressly switching off s 8AAZN by deeming the taxpayer to be “entitled” to the relevant amount notwithstanding the taxpayer was in fact not so entitled: s 170B(2). This provision indicates an understanding of the operation of s 8AAZN broader than that reached by the primary judge because the mistaken payment in such a case would arise in the context of an incorrect claim in a return about assessable income or deductions.
4. The ultimate point is that, to the limited extent legislative provisions introduced after s 8AAZN are of assistance, that legislative history does not all point in the direction of a narrow construction of s 8AAZN(3).

# Conclusion

1. Although not addressed by the parties, it should be acknowledged that, whether or not s 8AAZN applied, the Commissioner had a good action for money had and received just as a taxpayer has in relation to taxes or duties paid in the mistaken belief that the taxpayer was under a legal obligation to pay the tax or duty: *David Securities*; *Campbell v Hall* (1774) 98 ER 1045; *Steele v Williams* (1853) 155 ER 1502 at 1505; *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70 at 166, 197-8, 201-2; *State Bank of New South Wales v Commissioner of Taxation* (1995) 62 FCR 371; *Royal Insurance* at 66-8.
2. If the Commissioner had sought recovery of the refund in the present case in an action for money had and received, the former s 177(1) of the ITAA 1936 would not have afforded the taxpayer any protection. An assessment issued in respect of the 2013 year, which referred to the tax offset refund, would not have been protected by s 177(1) because the definition of “assessment” did not then include (as it now does) “the total of a taxpayer’s tax offset refunds for a year of income (or that the taxpayer can get no such refunds for the year of income)”. Leaving aside defences such as change of position, the taxpayer would not have been entitled, at general law, to retain a windfall gain in circumstances where the taxpayer was not entitled to the refund as a matter of the correct application of the taxation laws to the true facts – cf: J[62]; J[73].
3. None of this means that s 8AAZN(3) should be narrowly construed. Indeed, the text of s 8AAZN(3) might be thought to have been intended to enact statutory rights in relation to mistaken payments to which the principles in *David Securities* might also apply.
4. Section 8AAZN(3) should not be construed, more narrowly than the ordinary meaning of the words of the provision, so as not to cover the mistaken payment of the tax offset refund in the present case.
5. It follows that my view is that the appeal should be allowed with costs.

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| I certify that the preceding ninety-six (96) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Thawley. |

Associate:

Dated: 19 March 2021