SUPREME COURT OF QUEENSLAND

CITATION:	*Deputy Commissioner of Taxation v McArdle* [2003] QCA 282
PARTIES:	**DEPUTY COMMISSIONER OF TAXATION** (plaintiff/respondent) v **BRENT ROGER McARDLE** (defendant/appellant)
FILE NO/S:	Appeal No 516 of 2003 DC No 3605 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	11 July 2003
DELIVERED AT:	Brisbane
HEARING DATE:	30 June 2003
JUDGES:	Davies, Williams and Jerrard JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs**
CATCHWORDS:	TAXES AND DUTIES - INCOME TAX AND RELATED LEGISLATION - ASCERTAINMENT OF ASSESSABLE INCOME - PARTICULAR CLASSES OF TAX PAYERS - COMPANIES - PRIVATE COMPANIES - IN GENERAL - where appellant sole director of company - where company made deductions under relevant legislation - where company failed to pay to the Commissioner the amount of these deductions on or before the due date - where Commissioner sent to the company a notice purportedly setting out the amounts owed, as required by the *Income Tax Assessment Act* 1936 (Cth) - where notice omitted some of unpaid amounts of company's liability - where amounts in notice were therefore less than actual liability of company - whether notice complied with the requirements in the *Income Tax Assessment Act* 1936 (Cth) *Income Tax Assessment Act* 1936 (Cth) s 220AAM, s 220AAOA, s 222AOB, s 222AOC, s 222AOE, s 222AOM *Deputy Federal Commissioner of Taxation v Woodhams* (2000) 199 CLR 370, applied

COUNSEL: C A Wilkins for the appellant
P E Hack SC for the respondent

SOLICITORS: Tucker & Cowen for the appellant
Australian Taxation Office Legal Practice for the respondent

[1] **DAVIES JA:** This is an appeal against part of a summary judgment obtained by the Deputy Commissioner of Taxation ("the Commissioner") against the appellant, that part being for $81,941.69[1] being the balance after payments of an amount claimed to be by way of penalty pursuant to s 222AOC of the *Income Tax Assessment Act* 1936 (Cth) ("the Act"). The principal question in issue before the learned primary judge and the question in issue in this Court is whether the Commissioner gave to the appellant a notice complying with s 222AOE of the Act. If she did not, she was not entitled to recover the penalty for which the appellant was liable. The question arose in the following way.

[2] The appellant was at all relevant times sole director of Bicon Management Pty Ltd ("Bicon").[2] From time to time Bicon became liable to pay amounts to the Commissioner pursuant to s 220AAM. That section provides:

> "(1) A person who is a medium remitter in relation to a month must pay to the Commissioner the amount of any deductions that the medium remitter makes under Division … 2 … in that month by the end of the 21st day after the end of the month.
> …"

The obligation which this section imposes is to pay to the Commissioner the actual amount of deductions made.

[3] It is common ground that Bicon was at all relevant times a medium remitter within the meaning of that section. It is also common ground that for the months of August 1999 to June 2000 Bicon made deductions under Division 2 and that it failed to pay to the Commissioner the amount of these deductions by the end of the 21st day after the end of each of those months.[3]

[4] Bicon was also obliged to notify the Commissioner of the amounts which it was obliged to pay under s 220AAM. Section 220AAOA relevantly provides:

> "(1) A medium remitter that must pay an amount to the Commissioner under section 220AAM must notify the Commissioner of the amount on or before the day on which the amount is due to be paid (regardless of whether it is paid).
> … "

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1 See [10].

2 Formerly called Logicworld Pty Ltd. The appellant swore that he was appointed sole director on 3 August 1999. This was before the due date, within the meaning of s 222AOC, for payment to the Commissioner of the amount deducted for the period 1 August 1999 to 31 August 1999. See s 222AFB(1), (s 222AMB(1)), s 220AAM(1). He remained sole director at all relevant times thereafter.

3 The scheme of the Act by which a director may be made liable to pay penalties in circumstances such as this was explained by the High Court in *Deputy Federal Commissioner of Taxation v Woodhams* (2000) 199 CLR 370 at 374 - 378. It is unnecessary to repeat that explanation here, except to the extent that it is necessary to explain the appellant's argument and these reasons.

[5] Section 222AOB then relevantly provides:

> "(1) The persons who are directors of the company from time to time on or after the first deduction day must cause the company to do at least one of the following on or before the due date:
>
> (a) comply with its obligations in relation to deductions … whose due date is the same as the due date;
>
> (b) make an agreement with the Commissioner under section 222ALA in relation to the company's liability under a remittance provision in respect of such deductions … ;
>
> (c) appoint an administrator of the company under section 436A of the *Corporations Act 2001*;
>
> (d) begin to be wound up within the meaning of that Act."

It is common ground that this section was not complied with on or before the due date in respect of any of the amounts the subject of the claim.[4]

[6] Section 222AOC relevantly provides:

> "(1) If section 222AOB is not complied with on or before the due date, each person who was a director of the company at any time during the period beginning on the first deduction day and ending on the due date is liable to pay to the Commissioner, by way of penalty, an amount equal to the unpaid amount of the company's liability under a remittance provision in respect of deductions or amounts withheld:
>
> (a) that the company has deducted for the purposes of Division 1AAA … of this Act … ; and
>
> (b) whose due date is the same as the due date.
>
> … "

Section 220AAM is a remittance provision within the meaning of the above section[5] and the appellant was such a director. The obligation which this section imposes is to pay a penalty in an amount equal to the actual amount of deductions made under Division 2.

[7] Section 222AOE then requires notice before action for recovery of that penalty. It is in the following terms:

> "The Commissioner is not entitled to recover from a person a penalty payable under this Subdivision until the end of 14 days after the Commissioner gives to the person a notice that:
>
> (a) sets out details of the unpaid amount of the liability referred to in subsection 222AOC(1) … ; and
>
> (b) states that the person is liable to pay to the Commissioner, by way of penalty, an amount equal to that unpaid amount, but that the penalty will be remitted if, at the end of 14 days after the notice is given:
>
> (i) the liability has been discharged; or

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4 Amended Statement of Claim par 5; Defence of the appellant par 5.

5 Section 222AFB(1), definition of "remittance provision" par (a).

(ii) an agreement relating to the liability is in force under section 222ALA; or

(iii) the company is under administration within the meaning of the *Corporations Act 2001*; or

(iv) the company is being wound up."

[8] The notice upon which the Commissioner relied was one dated 14 July 2000. The relevant part of it for the purpose of this appeal is that contained in a table contained in it. That table was in the following form:

"

Column 1 **Particular deduction period**	**Column 2** **Due Date**	**Column 3** **Amount of deductions** **$**	**Column 4** **Unpaid amount of company's liability** **$**
1 July 1999 to 31 July 1999	21 August 1999	8,897.97	8,897.97
1 August 1999 to 31 August 1999	21 September 1999	8,925.39	8,925.39
1 September 1999 to 30 September 1999	21 October 1999	9,293.18	9,293.18
1 October 1999 to 31 October 1999	21 November 1999	8,951.66	8,951.66
1 November 1999 to 30 November 1999	21 December 1999	9,216.16	9,216.16
1 December 1999 to 31 December 1999	21 January 2000	10,655.94	10,655.94
1 January 2000 to 31 January 2000	21 February 2000	9,616.40	9,616.40
1 February 2000 to 29 February 2000	21 March 2000	6,408.65	6,408.65
1 March 2000 to 31 March 2000	21 April 2000	6,655.01	6,655.01
1 April 2000 to 30 April 2000	21 May 2000	8,009.21	8,009.21
1 May 2000 to 31 May 2000	21 June 2000	7,713.83	7,713.83
Total amount you will become liable to pay by way of penalty			**$94,343.40** "

[9] It may be inferred that the amounts stated in Column 3, and consequently in Column 4, were the amounts notified by Bicon to the Commissioner in purported compliance with s 220AAOA.[6] It was the appellant who, on behalf of Bicon, notified the Commissioner on each occasion.

[10] In a schedule contained in par 4 of her statement of claim the Commissioner, in giving details of Bicon's deductions under s 220AAM, for the purpose of calculating the amount of her claim, omitted the first of the amounts contained in column 4 of the above table, that is the amount of $8,897.97 in respect of the deduction period 1 July 1999 to 31 July 1999. However she added a sum of $4,925.72 in respect of the deduction period from 1 June 2000 to 30 June 2000, the subject of a separate and admittedly valid notice under s 222AOE, thereby making the total of Bicon's liabilities under s 222AAM, as alleged, $90,371.15. It then alleged that Bicon made payments to the Commissioner totalling $4,403.74 leaving a balance after payments of $85,967.41. It was against that part of the judgment, less the sum of $4,925.72 admittedly due, that the appellant appeals, that is $81,941.69.

[11] On 2 May 2001 the appellant wrote to the Australian Taxation Office enclosing with his letter what he described as a full monthly final reconciliation up to 1 April 2000 of, in effect, the amounts of deductions which Bicon made under Division 2 and should have paid to the Commissioner pursuant to s 220AAM for the months of July 1999 to June 2000. This reconciliation showed that for each of the months of August 1999, October 1999, November 1999 and December 1999 the amounts of deductions made had been understated in previous notifications by Bicon to the Commissioner, and consequently in the notice of 14 July 2000, the correct amounts deducted in those months being:

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6 Appellant's affidavit par 5, par 7; affidavit of Debra Rose Roberts par 9.

August 1999	$ 9,107
October 1999	$ 9,518
November 1999	$ 9,800
December 1999	$15,711.[7]

[12] The appellant's argument was and is that, because the amounts stated in the notice dated 14 July 2000 for the months of August, October, November and December 1999 were, in each case, less than the amount of the actual liability referred to in s 222AOC, the notice was not a notice within the meaning of s 222AOE and consequently the Commissioner was not entitled to recover the amount or any part of the amount claimed in it. If that argument is correct then, as Mr Wilkins for the appellant frankly acknowledged, any discrepancy between an amount claimed in the notice under s 222AOE by way of penalty and the actual amount deducted by the company under Division 2, whenever discovered, would invalidate a notice notwithstanding that the notice was based on and in accordance with the company's notifications under s 220AAOA. But Mr Wilkins contended that this showed that there was a gap in the legislative scheme which this Court should not attempt to fill.

[13] Mr Wilkins also contended that a notice which claimed an amount by way of penalty, which amount was later shown to be incorrect, could reasonably mislead a recipient, who might have no knowledge of the amounts actually deducted, into paying a wrong amount. However, in my opinion, both of these contentions are based upon a misunderstanding of the true meaning of s 222AOE.

[14] Section 222AOE is a notice before action provision.[8] It has two purposes. The first is to inform the recipient of the unpaid amount of the company's liability under the remittance provision, as then known to the Commissioner. And the second is to inform the recipient of the alternative courses available, as set out in s 222AOE(b), which will result in remission of the penalty, the object being to encourage the recipient to take such steps as are necessary to bring about the result that one or other of these courses is followed.[9]

[15] I have taken this statement of the purposes of s 222AOE from the judgment of the High Court in *Deputy Federal Commissioner of Taxation v Woodhams*,[10] adding to the first of those purposes the words "as then known to the Commissioner". I think that is a permissible addition given that the Commissioner's only or, at least, usual source of this information is the notification which the company is obliged to give pursuant to s 220AAOA; that this purpose may also be accurately described as to adequately inform the recipient about the amount which, at the date of the notice, the Commissioner asserts is the recipient's liability;[11] and that the validity of the notice must be determined as at the time it was given.

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7 The reconciliation also showed that the amount deducted for July 1999 was $9,006, not $8,897.97 as stated in the notice dated 14 July 2000. However, as already mentioned, the amount deducted for that month was not claimed as penalty in the action.

8 *Deputy Federal Commissioner of Taxation v Woodhams* (2000) 199 CLR 370 at [19].

9 *Woodhams* at [36].

10 Ibid.

11 Ibid at [38].

[16] Construed with those purposes in mind, this notice did not fail to meet a requirement made essential by the Act.[12] The requirement that the notice "set out details of the unpaid amount … ", was satisfied by the Commissioner providing, as such details, those details of the amounts which, at the date the notice was given, had been notified by the company to the Commissioner in compliance or purported compliance with s 220AAOA and, consequently, were those amounts which the Commissioner then asserted were the recipient's liability.

[17] Nor could it reasonably have been misleading. The question here is not whether it could have misled some hypothetical person who might have no knowledge of the deductions which had been made. The question is whether it could reasonably have misled this recipient.[13] And plainly it could not have done so for it was the appellant, as sole director, who had notified the Commissioner of the amounts on which the notice was based.

[18] I would therefore dismiss the appeal with costs.

[19] **WILLIAMS JA:** I have had the advantage of reading the reasons for judgment of Davies JA. I agree with all that is said therein, and with the order proposed.

[20] **JERRARD JA:** I respectfully agree with the reasons for judgment of Davies JA and the order proposed.

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12 *Kleinwort Benson Australia Ltd v Crowl* (1988) 165 CLR 71 at 79; *Woodhams* supra at [40].

13 Ibid.