HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY AND CALLINAN JJ

DEPUTY COMMISSIONER OF TAXATION OF
THE COMMONWEALTH OF AUSTRALIA APPELLANT

AND

BRUCE DRUMMOND WOODHAMS RESPONDENT

Deputy Commissioner of Taxation v Woodhams [2000] HCA 10
2 March 2000
M58/1999

ORDER

1. *Appeal allowed.*

2. *Special leave to cross-appeal refused.*

3. *Appellant to pay the costs of the respondent in this Court.*

4. *Set aside the orders of the Court of Appeal of Victoria made on 4 December 1998 and in place thereof order that:*

   i) *the appeal to the Court of Appeal of Victoria be allowed;*

   ii) *the order of the County Court of Victoria made on 30 June 1998 be set aside; and*

   iii) *there be judgment for the appellant in the sum of $41,699.22.*

On appeal from the Supreme Court of Victoria

Representation:

C M Maxwell QC with P M Tate for the appellant (instructed by Australian Government Solicitor)

J W de Wijn QC with E J Power for the respondent (instructed by Woodhams O'Keefe & Co)

CATCHWORDS

Deputy Commissioner of Taxation v Woodhams

Income tax – Remittance of tax payable by employees deducted by employer – Penalty notices sent to director – Form of notices – Whether notices invalid due to absence of due dates for remittance of deductions – Whether notices misleading.

Income Tax Assessment Act 1936 (Cth), ss 222ANA, 222AOC, 222AOE, 222APE.

1 GLEESON CJ, McHUGH, GUMMOW, KIRBY AND CALLINAN JJ. The issue in this appeal concerns the validity of notices given to the respondent by the appellant under ss 222AOE and 222APE of the *Income Tax Assessment Act* 1936 (Cth), as amended in 1993, ("the Act"), which are said to have contained insufficient information to satisfy a statutory requirement that they set out "details" of certain matters.

2 A requirement, whether in a statute or elsewhere, to provide "details", or "particulars", without further specification, may give rise to uncertainty as to the nature and extent of the information to be furnished. The resolution of such uncertainty calls for a consideration of the context in which the requirement is made, and the purpose for which it exists. In the present case, this involves an examination of the legislative scheme of which ss 222AOE and 222APE form part[1].

3 Before undertaking that examination, it is necessary to give a brief account of the way in which the issue has arisen.

The claim for penalties

4 The provisions of the Act concerning collection by instalments of tax payable by employees require employers to make regular deductions from the salaries and wages of employees on account of income tax payable by those employees, and to remit the amounts to the revenue authorities on a monthly basis. The provisions are contained in Div 2 of Pt VI of the Act. Group certificates are provided to employees. The Commissioner of Taxation ("the Commissioner") must credit, against the tax payable by an employee, the amount which a certificate shows to have been deducted (s 221H). Therefore the revenue needs to be protected against the case where an employer has made deductions from salaries or wages, but has failed to remit the amount of such deductions. That might occur as a result of insolvency, or for some other reason.

5 Before 1993, the revenue enjoyed a statutory priority in the event of insolvency, which gave a measure of protection. That changed in 1993. The *Insolvency (Tax Priorities) Legislation Amendment Act* 1993 (Cth) introduced a different scheme, involving, amongst other things, the imposition of penalties

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1 Compare *Arthur H Stephens (Queensland) Pty Ltd v Council of the Town of Dalby* [1969] Qd R 306 (Full Court of the Supreme Court of Queensland) at 317 per Lucas J (Hanger and Hoare JJ agreeing) in which the more ample expressions "full detailed particulars of each claim, dispute or question", "under distinct and separate headings" and "specifying the amount if any claimed under each head" in a building contract fell to be construed.

upon directors of corporate employers which failed to remit amounts deducted from salaries and wages on account of income tax.

6 The respondent was a director of Orrboroo Pty Ltd, which became insolvent, and went into liquidation. The appellant contends that, during a period of 11 calendar months, commencing on 1 February 1994 and ending on 31 December 1994, the company failed to remit deductions made by it from the salaries and wages of its employees. The total amount of such deductions was $32,999.22. In circumstances that will be explained below, the Act, as amended in 1993, is said to have made the respondent liable to penalties in that amount. Further, there are legislative provisions relating to estimation of unremitted deductions. In respect of each of three calendar months, commencing on 1 March 1995 and ending on 31 May 1995, the appellant estimated (under s 222AGA) that the company had become liable to remit, and had failed to remit, a total of $8,700. The appellant followed certain statutory procedures which he claims made the respondent liable to penalties in that amount also. It will be necessary to consider more closely the nature of the conduct which exposes a director to such penalties. For the present, it suffices to say that they are recoverable by civil action (s 221R), and that the appellant sued the respondent, in the County Court of Victoria, claiming a total of $41,699.22.

7 The appellant's Statement of Claim set out full particulars of the facts alleged to have given rise to the liability for penalties. In relation to the first part of the claim, it set out each of the relevant deduction periods, the amount of each deduction, and the due date for remitting each deduction. It alleged, and particularised, all the facts necessary to give rise to the penalties claimed, including the directorship of the respondent at each relevant time, the failure to make the remittances, and the failure to take other steps which would have meant that no penalty was incurred. In relation to the second part of the claim, concerning the estimated liabilities, the Statement of Claim alleged, and particularised, the estimation procedure that was followed and, again, recited the facts material to the imposition of the penalties.

8 No defence was filed, and a default judgment for the amount claimed was entered. There were proceedings to set aside the judgment. These ultimately came before the Court of Appeal of the Supreme Court of Victoria. As the case was originally argued, the defence relied upon was a challenge to the constitutional validity of the 1993 legislation which purported to impose the penalties. The Court of Appeal (Tadgell, Phillips and Batt JJA) rejected that

challenge and upheld the validity of the legislation[2]. An application for special leave to appeal to this Court was unsuccessful[3]. While the Court of Appeal's judgment was reserved, Graham A-J, in the Supreme Court of New South Wales, gave a decision in *Deputy Commissioner of Taxation v Gruber*[4] which, if correct, meant that the notice purportedly given under s 222AOE was defective, and that the notice purportedly given under s 222APE was possibly defective. In the result, the Court of Appeal set aside the judgment, and gave leave to defend, limited to an allegation that the notices did not comply with ss 222AOE and 222APE of the Act.

9 Subsequently, the decision of Graham A-J in *Gruber* was upheld by the New South Wales Court of Appeal[5]. Judge Shelton, in the County Court of Victoria, then held, in the present case, that the defence based upon defects in the notices was entitled to succeed. There was an appeal against that decision to the Victorian Court of Appeal[6]. That Court (Tadgell, Callaway and Chernov JJA), whilst expressing some reservations as to the correctness of *Gruber*, felt obliged to follow it, but only in relation to the point it actually decided, concerning the s 222AOE notice. It was held that the s 222AOE notice was defective, but the s 222APE notice was not. The present appeal is brought against the decision concerning the s 222AOE notice. The respondent seeks leave to cross-appeal. The appellant has undertaken to bear the costs of the appeal and, should they arise, the costs of any cross-appeal, and not to seek to disturb any order as to costs made in the courts below.

10 The penalties the subject of the appellant's action against the respondent are claimed to have been imposed by s 222AOC (as to the amount of $32,999.22) and s 222APC (as to the amount of $8,700). Those sections are in Div 9 of Pt VI of the Act. That Division is headed "Penalties for directors of non-remitting

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2 *Woodhams v Deputy Commissioner of Taxation* [1998] 4 VR 309.

3 *Woodhams v Deputy Commissioner of Taxation*, special leave to appeal from the Supreme Court of Victoria (Court of Appeal) refused, Gaudron and Gummow JJ, 19 May 1998.

4 (1997) 141 FLR 322; 97 ATC 4970; 37 ATR 539.

5 (1998) 43 NSWLR 271.

6 *Deputy Commissioner of Taxation v Woodhams* (1998) 99 ATC 4062; 41 ATR 204.

companies". Its provisions are to be understood in the light of Div 2 of Pt VI, concerning collection of tax instalments, and Div 8 which, relevantly, concerns recovery, through estimates, of amounts not remitted under Div 2.

11 For present purposes, it is sufficient to say of Div 2 that, leaving aside the provisions as to "early remitters", group employers are obliged both to make tax deductions from salaries and wages of their employees at the prescribed rate (s 221C), and to remit to the Commissioner the amount of such deductions not later than the seventh day of the month next succeeding the month in which the deductions were made (s 221F(5)). Such an amount is a debt due to the Commonwealth (s 221R).

12 Division 8 enables the Commissioner to take action to recover amounts not remitted under Div 2 by empowering the Commissioner to make an estimate of the amounts, and to recover the amount of the estimate (s 222AFA). The estimate creates a liability distinct from the underlying liability to remit amounts, but there are provisions to ensure against double payment (s 222AFA(3)). If the Commissioner has reason to suspect that a person has become liable under a remittance provision to pay to the Commissioner amounts equal to deductions made during a period, the Commissioner may make a reasonable estimate of the unpaid amount of that liability (s 222AGA). In that event, the Commissioner must send a notice to the person liable, identifying the liability to which the estimate relates, specifying the day at which the estimate is made, setting out the amount of the estimate, and stating that the amount of the estimate is due and payable. The unpaid amount of such an estimate is recoverable as a debt due to the Commonwealth (s 221R).

13 The provisions so far considered relate to the liability of employers in respect of amounts deducted from salary and wages on account of the tax liabilities of employees. As was pointed out by Phillips JA in *Woodhams v Deputy Commissioner of Taxation*[7], this is not a liability to pay tax. It concerns a responsibility to collect tax, and an obligation to remit the amounts collected. The relevant taxpayers are the employees. Division 9 seeks to protect the revenue by the imposition of penalties upon directors of non-remitting corporate employers.

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7 [1998] 4 VR 309 at 317.

14 The purpose of Div 9 is stated in s 222ANA:

> "(1) The purpose of this Division is to ensure that a company either meets its obligations under Division 2 … or goes promptly into voluntary administration under Part 5.3A of the Corporations Law or into liquidation.
>
> (2) [This] Division imposes a duty on the directors to cause the company to do so. The duty is enforced by penalties. However, a penalty can be recovered only if the Commissioner gives written notice to the person concerned. The penalty is automatically remitted if the company meets its obligations, or goes into voluntary administration or liquidation, within 14 days after the notice is given.
>
> (3) A penalty recovered under this Division is applied towards meeting the company's obligations under the relevant Division. Conversely, amounts paid by the company reduce the amount of a penalty.
>
> (4) Sections 220AY, 221R, 221YHN, 221YHZJ and 221YR provide for the recovery of amounts payable under this Division."

15 Subdivision B of Div 9 relevantly applies if a company has made, for the purposes of Div 2, one or more deductions having a particular due date. Section 222AOB obliges the persons who are directors of the company from time to time on or after the first deduction day (which is the earliest day on which the company made a deduction that has the due date) to cause the company, on or before the due date, either to comply with Div 2 in relation to each deduction (ie pay the amount) or to make an agreement with the Commissioner concerning the liability or to appoint an administrator under the Corporations Law or to begin to be wound up. In the event of failure to comply with s 222AOB 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 made for the purposes of Div 2, whose due date is the same as the due date (s 222AOC).

16 Such a penalty is recoverable as a debt (s 221R(1AA)(d)). There is a requirement for a notice before action. That requirement, which is central to the present appeal, is in the following terms:

"222AOE 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 section 222AOC; 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

(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 Law; or

(iv) the company is being wound up."

17 When s 222AOE(a) speaks of "the unpaid amount of the liability referred to in section 222AOC", which is the subject of the requirement to furnish "details", it is speaking of what s 222AOC refers to as "the unpaid amount of the company's liability under a remittance provision in respect of deductions ... that the company has made for the purposes of Division 2 … and … whose due date is the same as the due date". It is failure to comply with s 222AOB on or before the due date that gives rise to the liability to a penalty.

18 If s 222AOB is complied with before a notice under s 222AOE has been given, or within 14 days after the giving of a notice, the penalty is remitted by force of s 222AOG. Further, s 222ALA empowers the Commissioner to make written agreements for the discharge of a liability under a remittance provision.

19 Section 222AOE does not itself impose a liability, or create a right of action. It is a requirement for a notice before action. As occurred in the present case, if an action is commenced for the recovery of a penalty, the plaintiff must comply with the rules as to pleadings and particulars which apply in the forum. Here, the appellant in the Statement of Claim set out all the facts and circumstances alleged to give rise to the penalties. It was open to the respondent to put all or any of these facts in issue.

20 Subdivision C of Div 9 concerns directors of companies which fail to pay estimates made under Div 8. A penalty is imposed by ss 222APC and 222APD for non-compliance with s 222APB, which provides:

> "(1) The persons who are directors of the company from time to time on and after the day when the Commissioner sent to the company notice of the estimate must cause the company to do at least one of the following within 14 days after that day:
>
> (a) pay to the Commissioner the amount of the estimate;
>
> (b) make an agreement with the Commissioner under section 222ALA in relation to the company's liability to pay the estimate;
>
> (c) appoint an administrator of the company under section 436A of the Corporations Law;
>
> (d) begin to be wound up within the meaning of that Law.
>
> (2) This section is complied with when:
>
> (a) the company's liability to pay the estimate is discharged; or
>
> (b) the company makes an agreement as mentioned in paragraph (1)(b); or
>
> (c) an administrator of the company is appointed under section 436A, 436B or 436C of the Corporations Law;
>
> (d) the company begins to be wound up within the meaning of that Law;
>
> whichever first happens, even if the directors did not cause the event to happen.
>
> (3) If this section is not complied with before the end of the 14 days, the persons who are directors of the company from time to time after the 14 days continue to be under the obligation imposed by subsection (1) until this section is complied with."

21 Such a penalty is recoverable as a debt (s 221R(1AA)(e)). Again, however, there is a requirement of notice before action, and if s 222APB is complied with

before notice is given or within 14 days of such a notice, the penalty is remitted (s 222APF). Section 222ALA authorises the making by the Commissioner of written agreements to discharge liabilities to pay an estimate. The requirement of notice before action is in s 222APE. This is in the following terms:

> "(1) 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 ('the penalty notice') that:
>
> (a) sets out details of the unpaid amount of the estimate; and
>
> (b) if the penalty notice is given within 14 days after the Commissioner sent to the company notice of the estimate – states that at the end of those 14 days the person will become liable to pay to the Commissioner, by way of penalty, an amount equal to that unpaid amount unless:
>
> (i) the company's liability to pay the estimate has been discharged; or
>
> (ii) an agreement relating to that liability is in force under section 222ALA; or
>
> (iii) the company is under administration within the meaning of the Corporations Law; or
>
> (iv) the company is being wound up; and
>
> (c) if the penalty notice is given more than 14 days after the Commissioner sent to the company notice of the estimate – states that the person is liable to pay to the Commissioner, by way of penalty, an amount equal to that unpaid amount; and
>
> (d) states that the penalty will be remitted if, at the end of 14 days after the penalty notice is given:
>
> (i) the company's liability to pay the estimate has been discharged; or
>
> (ii) an agreement relating to that liability is in force under section 222ALA; or

(iii) the company is under administration within the meaning of the Corporations Law; or

(iv) the company is being wound up.

(2) Section 222AOF applies to a notice under this section in the same way as to a notice under section 222AOE."

22 In this case, the requirement is that the notice set out "details of the unpaid amount of the estimate".

The notices

23 In the Court of Appeal the respondent argued that the notices before action given under ss 222AOE and 222APE failed to give the required details. In each case the missing details, whose absence was said to be fatal, related to the due dates for remittance of the deductions in question. The argument succeeded (following *Gruber*) in relation to the s 222AOE notice, and failed in relation to the s 222APE notice.

24 The s 222AOE notice was in the following terms:

"TO: Bruce Drummond Woodhams
47 Dunstan Parade
Garden City 3207

In exercise of the powers and functions conferred on me as a Deputy Commissioner of Taxation by delegation from the Commissioner of Taxation under the provisions of the Taxation Administration Act 1953, I give you notice under section 222AOE of the Income Tax Assessment Act 1936 (the Act) that you, as a director of the company, are liable to pay to the Commissioner by way of penalty an amount equal to the unpaid amount of each liability of Orrboroo Pty Ltd under section 221F (except subsection 221F(12)) of the Act in respect of deductions made by the company for the purposes of Division 2 of Part VI of the Act, details of which are set out in the following table:-

TABLE

Column 1 **Particular deduction Period**	**Column 2** **Amount of deductions**	**Column 3** **Unpaid Amount of company's liability $**
1 February 1994 to 28 February 1994	2,927.20	2,927.20
1 March 1994 to 31 March 1994	3,674.00	3,674.00
1 April 1994 to 30 April 1994	3,136.25	3,136.25
1 May 1994 to 31 May 1994	2,728.60	2,728.60
1 June 1994 to 30 June 1994	4,410.90	4,410.90
1 July 1994 to 31 July 1994	2,842.80	2,842.80
1 August 1994 to 31 August 1994	2,788.67	2,788.67
1 September 1994 to 30 September 1994	3,171.00	3,171.00
1 October 1994 to 31 October 1994	2,198.40	2,198.40
1 November 1994 to 30 November 1994	2,313.40	2,313.40
1 December 1994 to 31 December 1994	2,808.00	2,808.00

Total amount you are liable to pay by way of penalty $32,999.22

The penalty in respect of any unpaid amount will be remitted if, at the end of 14 days after this notice is given to you:-

(a) the company's liability in respect of that unpaid amount has been discharged; or

(b) an agreement relating to that unpaid amount is in force under Section 222ALA of the Act; or

(c) the company is under administration within the meaning of the Corporations Law; or

(d) the company is being wound up."

25 The s 222APE notice was in the following terms:

"TO: Bruce Drummond Woodhams
47 Dunstan Parade
Garden City 3207

In exercise of the powers and functions conferred on me as a Deputy Commissioner of Taxation by delegation from the Commissioner of Taxation under the provisions of the Taxation Administration Act 1953, I give you notice under section 222APE of the Income Tax Assessment Act 1936 (the Act) that you, as a director of Orrboroo Pty Ltd, are liable to pay to the Commissioner by way of penalty an amount equal to the unpaid amount of each estimate set out in the Table below in respect of deductions made by the company and for which it is liable under section 221F (except subsection 221F(12)) in Division 2 of Part VI of the Act.

The penalty in respect of any estimate will be remitted if, **at the end of 14 days after this notice is sent to you:-**

(a) the company's liability to pay that estimate has been discharged; or

(b) an agreement relating to that estimate is in force under Section 222ALA of the Act; or

(c) the company is under administration within the meaning of the Corporations Law; or

(d) the company is being wound up.

Details of the unpaid amount of each estimate is set out in the following table:-

TABLE

Column 1 **Deduction Period**	**Column 2** **Amount of estimate**	**Column 3** **Unpaid amount of the estimate** **$**
1 March 1995 to 31 March 1995	2,900.00	2,900.00
1 April 1995 to 30 April 1995	2,900.00	2,900.00
1 May 1995 to 31 May 1995	2,900.00	2,900.00

Total amount you are liable to pay by way of penalty $8,700.00"

26 The absence from the notices of the due dates is said to be critical.

The validity of the notices

27 The ground of defence upon which the respondent relied, in relation to each notice, was that the notice was invalid in that it failed to comply with the requirements of the Act. Both at first instance, and in the Court of Appeal, the sole respect in which there was said to have been a failure to comply with the requirements of the Act was that, by reason of the absence from each notice of information as to the due dates for remittance by the company to the Commissioner, the respective notices failed to give the required details. This was the point that had succeeded in *Gruber* in relation to a notice under s 222AOE, and it was argued that it applied with equal force to a notice under s 222APE. In this Court, some further points were argued, but it is convenient to deal first with the way in which the case was conducted at first instance, and in the Court of Appeal.

28 As has been noted, the Court of Appeal followed *Gruber* in relation to the s 222AOE notice. However, it held that there was no substance in the point in relation to the s 222APE notice. Whatever may be said about the relevance of the due date in connection with the penalty with which s 222AOE is concerned, the subject matter of the penalty with which s 222APE is concerned is significantly different. Subdivision C of Div 9 does not turn upon due dates. The persons who are liable as directors are the persons who are directors of the company from time to time on and after the day when the Commissioner sent to

the company the notice of the estimate (s 222APB). The notice under s 222APE is required to give "details of the unpaid amount of the estimate". The Court of Appeal was clearly correct in deciding that, whatever might be the position as to a s 222AOE notice, there is no necessity to refer to the due dates for remittance in a s 222APE notice. Indeed, in this Court, the respondent made only a faint attempt to contend otherwise.

29 The substantial argument concerned the s 222AOE notice, and the correctness of the decision in *Gruber*.

30 It is to be noted that, in *Gruber*, the point now under consideration was only one of a number of points in issue, and was dealt with quite briefly in the judgments. The s 222AOE notices that were served in *Gruber* contained a number of substantial errors, including miscalculation of the sums demanded. The errors were held to be such as to render the notices misleading[8]. The failure of the notices to specify the due dates was also relied upon. Graham A-J, at first instance, dealt with the point summarily. He said[9]:

> "In my opinion a valid notice will only set out details in accordance with section 222AOE(a) and section 222AOC if the relevant due date in respect of the unpaid amount of the company's liability is specified."

31 In the New South Wales Court of Appeal, Stein JA, with whom Powell JA and Sheppard A-JA agreed, said[10]:

> "The section does not define the 'details' required to be included in the notice. The details required by s 222AOE are the details of liability referred to in s 222AOC. They must obviously include, as agreed by the parties, the amount of the deductions, the fact of the deductions and the period in which the deductions were made. The question is whether the notice needs also to include the 'due date' of the payments.

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8 *Deputy Commissioner of Taxation v Gruber* (1998) 43 NSWLR 271 at 275.

9 *Deputy Commissioner of Taxation v Gruber* (1997) 141 FLR 322 at 332; 97 ATC 4970 at 4978; 37 ATR 539 at 548.

10 *Deputy Commissioner of Taxation v Gruber* (1998) 43 NSWLR 271 at 278.

> In my opinion, since the liability imposed by s 222AOC is dependent on payments not being made by the 'due date', the 'due dates' are a 'detail' of the unpaid amount of the company's liability under the Act which must be included in the notice. It is a relevant detail required to be included in the notice. Accordingly, I agree with his Honour's conclusion. Bearing in mind the potentially draconian effect of the provisions it is appropriate to construe 'detail' in a broad fashion. 'Detail' in the context of the relevant provisions of the Act seems to me to imply more than merely 'specify'."

32 The statement that the details required by s 222AOE are the details of the liability referred to in s 222AOC contains an ambiguity. Section 222AOC refers to two different liabilities. It refers to the director's liability to pay a penalty to the Commissioner, and it fixes as the amount of the penalty "an amount equal to the unpaid amount of the company's liability under a remittance provision in respect of deductions". It is the second liability, that is to say, the unpaid amount of that liability, of which details are required by s 222AOE(a).

33 It is the legislative purpose to be served by the giving of a s 222AOE notice that determines the nature and extent of the information necessary to satisfy the requirement to set out details of the unpaid amount of the company's liability under a remittance provision in respect of deductions. At this stage of the argument, the concern is with absence of information, rather than erroneous or misleading information. Absence of information will involve a failure to provide necessary details if, without such information, the notice will not fulfil the purpose for which it is required to be given.

34 The primary source of guidance as to the statutory purpose of the notice before action required by s 222AOE is to be found in s 222ANA. Division 9 seeks to achieve the object that either the deducted amounts are remitted or paid to the Commissioner or the company is promptly taken out of the control of the directors and dealt with under the insolvency laws.

35 The notice in question is addressed to a director of the company. Such a person will ordinarily have access to information concerning the company's liabilities. The notice does not create a liability to pay a penalty, and if there is to be action to recover the penalty under s 221R it will be taken in the appropriate civil jurisdiction. In that event, the rules of court will require the elements of the cause of action to be pleaded and particularised in the ordinary way. A notice before action is not intended to serve the purpose of a Statement of Claim.

36 The first purpose of the notice is to inform the recipient of the unpaid amount of the company's liability under the remittance provisions, and of the

recipient's liability to a penalty in the same amount. The second purpose, consistently with s 222ANA, 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 those courses is followed.

37 In a number of respects, the due date for remittance of a deducted amount is relevant to a director's liability to pay a penalty, but that is not the liability to which s 222AOE is referring. The section does not require that the notice state details of the facts relevant to the director's liability. That is a function to be served by the pleadings and particulars, if and when action is taken to recover the penalty. Nor does the section require details of all facts relevant to the company's liability. It requires details of the unpaid amount of the company's liability. Once again, if there is an issue as to that liability, it will be litigated in the recovery action.

38 The notice in the present case contained all the information that was necessary to fulfil the statutory purpose to be served by the notice. It informed the recipient, in detail, of the unpaid amounts of the company's liability, and of the liability by way of penalty which the revenue authorities were asserting attached to him. It also informed him of the steps available to bring about a remission of that penalty. The statute fixed the due dates in respect of each deduction. Fulfilment of the purpose to be served by the notice before action did not necessitate informing the recipient of the operation of the statute in that respect.

39 The decision in *Gruber*, insofar as it held that a notice under s 222AOE is required to set out the due dates of amounts to be remitted, is erroneous and should be overruled.

40 In *Kleinwort Benson Australia Ltd v Crowl*[11] it was said that a bankruptcy notice is a nullity if it fails to meet a requirement made essential by the legislation, or if it could reasonably mislead a debtor as to what is necessary to comply with the notice. For the reasons given above, the notices in the present case did not fail to meet a requirement made essential by the Act. In this Court it was argued, for the first time, that they were misleading. In that connection reference was also made to a covering letter accompanying the notices.

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11 (1988) 165 CLR 71 at 79.

41 It was argued that the notices, and the letter, in asserting in a peremptory and summary fashion the recipient's liability to a penalty, incorrectly represented the true position. The existence of liability of the kind asserted depended upon a number of facts and circumstances which, at least in theory, might have been open to question or dispute. (In fact, they were not disputed in the subsequent recovery action.) This argument proceeds upon a false premise as to the purpose of the statutory notices. They were not intended to explain the legal basis of the asserted liability. They were notices before action; not pleadings. They were designed to serve a specific purpose, explained above.

42 It was also argued that the notices were misleading because they failed to inform the recipient of the statutory defences available under s 222AOJ, such as that the director, at material times, took no part in the management of the company as a result of illness or some other good reason. This argument involves a similar error.

43 The notices, whether read alone or in the light of the covering letters, were not misleading.

Conclusion and orders

44 The notices were valid.

45 The appeal should be allowed. Special leave to cross-appeal should be refused. In accordance with the undertaking referred to earlier, the appellant must pay the respondent's costs of the proceedings in this Court. The orders of the Court of Appeal of 4 December 1998 should be set aside. In place thereof, it should be ordered that the appeal to that Court be allowed; the order of the County Court of Victoria be set aside and in place thereof there be judgment for the appellant in the sum of $41,699.22.