

18/07; [2007] VSC 81

SUPREME COURT OF VICTORIA

DCT v GUASTALEGNAME

Williams J

19, 27 March 2007 — (2007) ATC 4400

TAXATION – DIRECTOR'S FINANCIAL PENALTY IMPOSED UNDER THE *INCOME TAX ASSESSMENT ACT 1936* – NOTICE OF PENALTY SENT TO DIRECTOR'S "PREFERRED ADDRESS FOR SERVICE" – SUCH ADDRESS BELONGING TO DIRECTOR'S TAX AGENT – NAME OF TAX AGENT OMITTED FROM NOTICE – WHETHER NOTICE SENT TO "PREFERRED ADDRESS FOR SERVICE" – WHETHER STRICT COMPLIANCE WITH REGULATION REQUIRED – FINDING BY MAGISTRATE THAT AGENT'S NAME WAS AN ESSENTIAL ELEMENT OF THE ADDRESS – CHARGE DISMISSED – WHETHER MAGISTRATE IN ERROR: *INCOME TAX ASSESSMENT ACT 1936*, SS222AOC, AOE; *INCOME TAX REGULATIONS 1936*, R40.

1. Strict compliance is required when the Commissioner of Taxation relies on the Regulations to effect service of notices.

2. Where a notice sent by the Commissioner failed to include the tax agent's company name, it was open to a magistrate to find that such name was an essential element of the preferred address for service provided by a taxpayer, that the requisite notice had not been given and accordingly, dismiss the Commissioner's claim against the taxpayer.

WILLIAMS J:

1. The appellant ("the Commissioner") brings this appeal from the orders of the Magistrates' Court at Broadmeadows:

(a) on 19 June 2006, dismissing the Commissioner's claim against the respondent ("Mr Guastalegname") for payment of a director's penalty of \$33,905.00 under s222AOC and, or s222AOD of the *Income Tax Assessment Act 1936* ("the Act"); and

(b) on 30 June 2006, requiring the Commissioner to pay Mr Guastalegname's costs of the proceeding.

2. The learned Magistrate concluded that the Commissioner had failed to give Mr Guastalegname a notice which was required by s222AOE of the Act before she would be entitled to recover the penalty sought. The Commissioner had maintained that she had complied with s222AOE by sending a copy of the requisite notice to what she contended was Mr Guastalegname's "preferred address for service" in accordance with the provisions of reg 40(1)(b) of the *Income Tax Regulations 1936* (Cth) ("the Regulations"). The Magistrate held that the notice had not been sent to his "preferred address for service" as defined in reg 36(1)(ii) of the Regulations. The Commissioner now submits that his Honour erred in law as that finding was not open to him on the evidence.

The facts

3. The Magistrate made the following non-contentious findings of fact:

(a) Mr Guastalegname had been a director of Bonneville Automotive Pty Ltd ("the company") from 1 October 2000 to 30 June 2002.

(b) The Commissioner had sent a notice, dated 14 March 2003, addressed as follows:
Frank Guastalegname 376 Blackshaws Road Altona North VIC 3025.

(c) The notice was relevantly in the following terms:
Dear Director

PENALTY NOTICE: AMOUNTS WITHHELD

Please find enclosed a notice of your liability to pay a penalty equal to the amount(s) unpaid to the Commissioner by the company BONNEVILLE AUTOMOTIVE PTY LTD, ACN 051 730 333 of which

you were a director at relevant times as referred to in Section 222AOC and/or Section 222AOD of the *Income Tax Assessment Act 1936* (ITAA 1936). You automatically became liable to the penalty when the company failed to remit the amount(s) set out in the notice by the due date(s)

(d) The amount of the penalty claimed by the Commissioner had been properly calculated in accordance with the relevant provisions of the Act and the Regulations and had related to amounts withheld by the company between 1 October 2000 and 30 June 2002.

(e) Mr Guastalegname had not been a director of Bonneville Automotive Pty Ltd on 14 March 2003 or within seven days before that date.

(f) The Commissioner had had in her possession personal income tax returns, submitted by Mr Guastalegname through his tax agent, Income Tax Network Pty Ltd, which bore the following information on their face:

Your current postal address:

INCOME TAX NETWORK PTY LTD 376 Blackshaws Road Altona North VIC 3025

Has postal address changed since last tax return lodged? N

Your home address:

372 BLACKSHAW ROAD ALTONA NORTH VIC 3025.

The statutory scheme

4. A company is required, by certain dates, to remit to the Commissioner instalments of tax deducted from the entitlements of employees under Division 12 of Schedule 1 of the *Income Tax Administration Act 1953* (Cth). Section 222AOB of the Act obliges directors of the company to cause it to remit the amounts withheld or to make an agreement with the Commissioner concerning the liability or to appoint an administrator under the *Corporations Act 2001* (Cth) or to begin to be wound up. Any director who fails to comply with s222AOB on or before a prescribed date for compliance is liable, under s222AOC and, or s222 AOD, to a penalty equal to the unpaid amount of the company's liability.

5. However, before the Commissioner is entitled to recover the penalty she must give a notice to the director under s222AOE of the Act, setting out the amount of the unpaid liability under s222AOC and stating that the director must pay the penalty unless, at the end of 14 days, the liability has been discharged, the company has entered into a s222ALA agreement, an administrator has been appointed or the company is being wound up.

6. Section 222AOF of the Act provides the Commissioner with a means for giving notice to a person who was a director of the company within seven days of the date of the notice.

7. In the case of a director who is not able to be served under s222AOF, or otherwise, reg 40 of the Regulations provides the Commissioner with the following alternative means of serving or "giving" a notice:

40 Service of documents

(1) The Commissioner may serve a document upon a person for the purposes of the Act and these Regulations by:

(a) if the person has given a preferred address for service that is a physical address – leaving a copy of the document at that address; or

(b) if the person has given a preferred address for service that is a postal address – posting a copy of the document to that address; ...

8. Regulation 36 describes a "preferred address for service" as follows:

36 Preferred address for service

(1) An address in Australia used by or associated with a person is a *preferred address for service* of the person if:

(a) it is of one of the following kinds of address:

(i) a physical address;

(ii) a postal address;

(iii) an electronic address; and

Note 1 An address may be both a physical address and a postal address (eg. a street address).

Note 2 The following are examples of an electronic address:

(a) an e-mail address;

(b) a secure website that the person can access to obtain a document.

(b) the person has given it to the Commissioner as an address for the service of documents by the Commissioner under the Act or these Regulations; and

(c) the designation of the address or other circumstances indicate that the person wishes the address to be used by the Commissioner in preference to other addresses of the person, whether generally or in specific circumstances.

(2) The designation of an address in a form or correspondence as an 'address for service', a 'preferred address', an 'address for correspondence' or similar term satisfies paragraph (1)(c).

The Magistrate's reasons

9. The issue before the learned Magistrate was as to whether, in the circumstances, the Commissioner had given a notice to Mr Guastalegname, as required by s222AOE of the Act.

10. His Honour concluded that Mr Guastalegname had given a postal address in his personal income tax return as an address for the service of documents; he had designated that address as the one he wished the Commissioner to use for the service of documents "in preference to other addresses", within the terms of reg 36.

11. The Magistrate then went on to consider Mr Guastalegname's submission that the omission of the tax agent's name from the address to which the documents were posted meant that the Commissioner had not served him by posting copies of the documents to his "preferred address for service" under reg 36(1).

12. The Magistrate stated the view that it was necessary that there be strict compliance with the Regulations. His Honour said:

The fact is that the address to which the notice was sent was not in fact the address provided to the Commissioner by [Mr Guastalegname] in that while the street location corresponded, the address did not include the name of the tax agent which name properly formed part of the address as given to the Commissioner ... The personal return furnished by [Mr Guastalegname] was noted as being a return furnished, by a tax agent, and in my opinion, the named tax agent is a necessary and integral part of the preferred address to which any notice or correspondence should be sent. The fact that in this case it may be thought highly unlikely that a notice or letter omitting that part of the address would fail to reach the intended recipient does not, in my opinion, lessen in any way the requirement for strict compliance with the regulations. In these circumstances, I am compelled to conclude that service of the notice was ineffective, and that these proceedings by the Commissioner cannot therefore, be maintained.

Submissions

13. The Commissioner submits that the learned Magistrate's finding of fact that the address to which the notice was posted was not the "preferred address for service" under reg 36 was not open to him on the evidence.

14. Counsel for the Commissioner concedes that reg 40 is to be construed by reference to the ordinary meaning of the words "postal address". Essentially, he contends that the Magistrate erred in concluding that the notice had not been sent to the postal address because it omitted the tax agent company name from the address to which it was directed.

15. In support of his argument that the postal address does not necessarily include the tax agent company name, counsel for the Commissioner relies upon the following definitions to establish the ordinary meaning of the word "address":

(a) an *Oxford English Dictionary* definition of "address" as a noun:

7a. The direction or superscription of a letter, etc.; the name of the person and place to which it is addressed or directed; the name of the place to which any one's letters are directed;

(b) an *Oxford English Dictionary* definition of "address" as a verb:

7a. To send as a written message *to* (some one); to write (anything) expressly that it may reach and be read by some one; to destine, inscribe, dedicate, *to address a* letter to one. To write and send it; in modern usage also, *techn.* To write on the outside the name and residence of the person to whom it is addressed, to 'direct' it;

and

(c) a *Macquarie Dictionary* definition of "address" as a noun:

- 2.** a direction as to name and residence inscribed on a letter, etc.
- 3.** a place where a person lives or may be reached.

16. Counsel also refers to an *Oxford English Dictionary* definition of the adjective "postal" as "[o]f or pertaining to the post; relating to the carriage of mails". He further cites the definitions of the noun "post" meaning "Post Office" and the expression "by post".

17. Counsel for the Commissioner submits that the expression "postal address" means *the place* to which a letter or other postal matter can be delivered by post. In this case, he contends, it comprises the street address, the suburb, state and postcode and nothing more. He argues that the street address and the postcode are the "essential identifiers of *the place*" at which Mr Guastalegname could be reached. The name of the company "was not an essential element of the 'postal address', properly construed". It was not a "necessary and integral part of the preferred address" as found by the Magistrate and such a finding was not open.

18. Mr Guastalegname, on the other hand, supports the learned Magistrate's conclusion. The solicitor for Mr Guastalegname submits that the Magistrate's finding that the name of the company was an essential part of the preferred address for service was open on the evidence.

19. Further, he supports the learned Magistrate's insistence on strict compliance with the service provisions. These provisions give the Commissioner the benefit of being able to serve a penalty notice in circumstances in which personal service is not otherwise effected. Mr Guastalegname's solicitor cites Everett J's statements to that effect in *Deputy Commissioner of Taxation (Tas) v Naidoo*^[1]. He then notes Spender J's reference to *Naidoo* in *Sunrise Auto Limited v Deputy Commissioner of Taxation and Anor*^[2] and his Honour's observation that:

"No doubt strict compliance is required when the Commissioner relies on the regulations to effect service."

20. Counsel for the Commissioner does not take issue with his Honour's insistence on strict compliance with reg 40. His sole contention is that it was not open to the learned Magistrate to conclude that the name of the company was an essential element of the "preferred address".

21. The written submissions filed on behalf of the Commissioner reiterate her submission in different ways. They assert that there is no material difference between the postal addresses "Income Tax Network Pty Ltd, 376 Blackshaws Road, Altona North, VIC 3025" and "376 Blackshaws Road, Altona North, VIC 3025" and they state that the Commissioner did give a notice to Mr Guastalegname at the postal address, without the insertion of the company name.

Conclusion

22. I am not persuaded that the learned Magistrate erred. In my view, it was clearly open to him on the evidence to conclude that the tax agent company name was an essential element of the "preferred address for service" provided by Mr Guastalegname and that, in the circumstances, the Commissioner had not given him the requisite notice under s222AOE of the Act. I am not persuaded to the contrary by the dictionary definitions or the submissions relied upon by the Commissioner.

23. The only question for the Court is as to whether the Magistrate's finding was open. Nevertheless, I note my view that it would seem unsatisfactory that the Commissioner could become entitled to recover a penalty from an individual as a result of postal service upon that person at a street address, not provided as a residential or business address, but given *as part only* of what has been provided in response to a request for a description of a preferred address for service. Such a street address might well describe a location by reference to which one or more individuals or companies might be reached. The omission of the relevant name might result in material deemed to have been served not coming to the attention of the intended recipient in those circumstances.

24. The appeal should be dismissed.

^[1] 55 FLR 245; 12 ATR 348 at 356-7 *per* Everett J.

^[2] (1994) 124 ALR 425; 28 ATR 496.