

Decision impact statement

Pintarich v Deputy Commissioner of Taxation

Court citation:	[2018] FCAFC 79 [2018] HCASL 322
Venue:	Full Federal Court
Venue reference no:	TAD 41 of 2017 H3/2018
Judge names:	Kerr, Moshinsky and Derrington JJ Gaegler and Keane JJ
Judgment date:	25 May 2018 Special leave refused on 17 October 2018
Appeals on foot:	No
Decision outcome:	Favourable to the Commissioner

Impacted advice



This decision has no impact on any related advice or guidance.

Précis

Outlines the ATO's response to this case which concerns whether, in circumstances where there has been no mental process of reaching a conclusion as to whether to remit general interest charge (GIC) by an ATO officer, can the terms of a letter issued to the taxpayer nonetheless manifest the making of a decision?

Brief summary of facts

The taxpayer is a property developer.

The taxpayer failed to lodge his income tax returns for the years ended 30 June 2010, 30 June 2011, 30 June 2012 and 30 June 2013 (the relevant income tax years) by the required due dates.

On 11 August 2014, the ATO issued a final notice demanding the lodgment of returns for the relevant income tax years (the relevant returns). On 23 October 2014 an officer from the ATO contacted the taxpayer's tax agent advising of the ATO's intention to prosecute the taxpayer for the non-lodgment of the relevant returns. The taxpayer lodged the relevant returns on 27 October 2014.

On 4 November 2014, notices of assessment for the income tax years ended 30 June 2010, 30 June 2011 and 30 June 2012 issued to the taxpayer. These assessments were for the amounts of \$807,797.95, \$3,264.40 and \$7,703.25 respectively.

On 10 November 2014, a notice of assessment for the income tax year ended 30 June 2013 issued to the taxpayer for an amount of \$2,474.15.

On 10 November 2014, the ATO issued a statement of account to the taxpayer showing that the taxpayer owed \$1,156,787.72 in respect of assessments for the relevant income tax years together with accrued GIC thereon as a result of the failure to pay income tax for these years by the relevant due dates.

On 24 November 2014, the taxpayer's tax agent wrote to the ATO seeking a full remission of the GIC.

On 2 December 2014, the ATO and the taxpayer's tax agent had a number of exchanges by telephone and email. During those exchanges the ATO sought further information about the taxpayer's circumstances that were relevant to the ATO's consideration of the GIC remission request.

On 4 December 2014, the taxpayer's tax agent responded to the ATO's enquiries by email.

On 5 December 2014, the ATO and the taxpayer reached an agreement whereby the taxpayer would pay the primary tax debt of \$821,762.75 by 30 January 2015 whilst the ATO considered a full remission of the GIC (approximately \$344,000) under section 8AAG of the *Taxation Administration Act 1953* (TAA). An ATO officer made a contemporaneous file note of the discussion with the taxpayer on 5 December 2014 as follows:

We put forward that we require the primary tax of \$821,762.75 paid in full whilst we consider the remission of general interest charge currently \$344,216.13.

The same ATO officer similarly recorded his subsequent conversation with the tax agent later on 5 December 2014 as follows:

Discussed with Drew the recent conversation with Joe Pintarich and discussions around obtaining payment in full of the primary tax component of \$821,762.75 whilst we reviewed the request for remission of GIC.

In response to the request by the taxpayer's agent for a lump sum arrangement and payment slips, an ATO officer caused a letter dated 8 December 2014 to issue to the taxpayer part of which was in the following terms:

Payment Arrangement for your Income Tax Account

... Thank you for your recent promise to pay your outstanding account. We agree to accept a lump sum payment of \$839,115.43 on or before 30 January 2015.

This payout figure is inclusive of an estimated general interest charge (GIC) amount calculated to 30 January 2015...

The letter was prepared by a process under which the ATO officer entered specific variables relevant to the agreed payment arrangement – however the system generated letter did not allow the officer to customise either the text or the GIC calculation imputed in the letter, nor otherwise view or alter the letter before it issued.

The reference to GIC in the 8 December 2014 letter was to GIC accruing on the primary tax debt of \$821,762.75 from the date of the letter to the expected date of payment of that primary tax amount on 30 January 2015. It was not a reference to GIC that had accrued prior to 8 December 2014 which was the subject of the GIC remission request. The taxpayer paid the amount specified in the letter on 30 January 2015.

Following the issue of the 8 December 2014 letter, on 11 December 2014, 7 January 2015, 14 January 2015 and 5 February 2015 the taxpayer received

statements for his income tax account which showed that no amount of GIC had been remitted.

On 23 December 2014, an ATO officer contacted the taxpayer's tax agent and spoke to the receptionist. The receptionist advised that the taxpayer's tax agents were not available until 5 January 2015. The ATO officer requested that the tax agent call the ATO on their return and that the ATO still required further information regarding:

- reasons for outstanding Business Activity Statement due 28 October 2014
- why the taxpayer wasn't in a position to finalise his taxation obligations from the disposition of assets until only very recently
- reason for the late lodgment of the income tax returns for the income tax years ended 30 June 2010, 30 June 2011 and 30 June 2012
- to make sure that the payment under the payment arrangement would be paid on 30 January 2015 as agreed.

On 9 January 2015, the taxpayer's agent called the ATO seeking to ascertain the progress of the GIC remission request. As part of that conversation the ATO officer asked the tax agent a number of questions about the taxpayer's circumstances that were relevant to the ATO's ongoing consideration of the taxpayer's GIC remission request. Those matters included:

- why the taxpayer's September business activity statement, which was due to be lodged on 28 October 2014, had been lodged late
- why the taxpayer was unable to bring his taxation affairs up to date until recently
- why other creditors had been paid in preference to the ATO
- from which sources would the payment due on 30 January 2015 would come
- why the taxpayer had tax debts that were not paid promptly in the past.

The ATO officer continued to consider the remission request and on 15 May 2015 made a decision to not remit in full the GIC. Whilst reserving his position to maintain that a decision to remit GIC had occurred on 8 December 2014, the taxpayer lodged two subsequent GIC remission requests. On each occasion different ATO officers considered the taxpayer's circumstances and each determined that full remission of the taxpayer's GIC was not justified. The last such decision was communicated in a letter dated 13 May 2016.

On 10 June 2016, the taxpayer filed an application in the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977* seeking to set aside the 13 May 2016 decision on the basis that, by letter dated 8 December 2014, the ATO had already made a decision to remit the GIC and therefore any subsequent remission decisions were *ultra vires*, or beyond power, because the power to remit GIC had already been exercised and was spent.

The taxpayer's application was dismissed at first instance¹ (by Tracey J).

A further appeal was also dismissed by the majority of the Full Federal Court (Moshinsky & Derrington JJ with Kerr J in dissent).

¹ *Pintarich v Deputy Commissioner of Taxation* [2017] FCA 944.

On 17 October 2018, special leave was refused by the High Court (Gageler & Keane JJ) on the basis that the Full Court's decision was not attended with sufficient doubt to warrant the grant of special leave.

Issues decided by the court

The issue decided by the Court was whether the terms of the letter dated 8 December 2014 constituted or manifested a decision by the ATO under section 8AAG of the TAA to remit GIC, notwithstanding that the decision-maker had not undertaken any mental process of reaching a conclusion on whether to remit GIC.

The primary judge² and a majority of the Full Court resolved the issue in the negative, concluding that no decision had been made to remit GIC under section 8AAG of the TAA, because 'there needs to be both a mental process of reaching a conclusion and an objective manifestation of that conclusion'.³ In coming to that conclusion the majority noted the unchallenged finding of fact that no such mental process had been engaged in by the ATO decision-maker.

While the majority of the Full Court said that it would follow from 'the natural reading of the letter' that 'the letter communicated that a decision had been made to remit all GIC payable by the [appellant]'⁴, the majority also acknowledged that 'the letter did not expressly deal with the application to remit GIC and the letter is susceptible of more than one interpretation'.⁵

ATO view of decision

The majority's conclusion is consistent with long-standing authority.⁶ It confirms that for there to be a decision under section 8AAG of the TAA there needs to be both a mental process of reaching a conclusion on the application to remit GIC as well as an overt act communicating the decision. The High Court (Gageler & Keane JJ) held that the Full Court's decision was not attended with sufficient doubt to warrant the grant of special leave to appeal to the High Court.

GIC serves to compensate the Australian Government for the impact of late payment of taxes and is imposed to deny the minority of late payers an advantage over those who pay on time.⁷ In the present case the ATO considered on three separate occasions whether the taxpayer's circumstances warranted an exercise of the discretion in section 8AAG of the TAA to grant a full remission of the GIC. On each of those three occasions different ATO officers considered the taxpayer's circumstances and each determined that full remission of the taxpayer's GIC was not warranted.

² *Pintarich v Deputy Commissioner of Taxation* [2017] FCA 944, paragraph 44 (per Tracey J).

³ *Pintarich v Deputy Commissioner of Taxation* [2018] FCAFC 79, paragraph 140 (per Moshinsky and Derrington JJ).

⁴ *Ibid*, paragraphs 136 and 140.

⁵ *Ibid*, paragraph 152.

⁶ *Semunigus v Minister for Immigration and Multicultural Affairs* [1999] FCA 422, paragraph 19; *Semunigus v Minister for Immigration and Multicultural Affairs* [2000] FCA 240, paragraph 11 (per Spender J), paragraph 55 (per Higgins J), paragraph 101 (per Madgwick J); *Minister for Immigration and Citizenship v SZQOY* [2012] FCAFC 131, paragraphs 29, 33, and 50; *He v Minister for Immigration and Border Protection* [2017] FCAFC 206, paragraph 79; *Dunstan v Higham* [2016] ACTCA 20, paragraphs 72-74 (per Murrell CJ, Penfold and Rangiah JJ). See also *Comcare v Moon* [2003] FCA 569, paragraph 58 (per Mansfield J).

⁷ The ATO Annual report for 2017–18 notes that 89.5% of tax is paid by the due date.

It is accepted that a taxpayer should be able to rely on the accuracy and clarity of any communication with the ATO, whether written or verbal. The ATO issues vast numbers of correspondence each year and has even more verbal interactions with taxpayers. The particular template used by the ATO officer in this case was used 82,217 times in the 12 months to October 2018. In those circumstances, there will be some instances where a communication from the ATO might not have been as clear as it could be. The template used by the ATO officer in this matter is an example of such a communication which could have been more clearly expressed.

Nonetheless, the ATO remains committed to continually improving the clarity and useability of all its standard correspondence. As part of an ongoing continuous improvement process, and to reduce the likelihood of similar issues arising in the future, the ATO has removed the unclear language in the specific template used in this matter, and replaced it with language that is more appropriate for all circumstances when this template is issued. Additionally, the ATO has reviewed its procedures and communication to staff in relation to the entering of payment arrangements to ensure appropriate letters are used. In the longer term the ATO will undertake a complete review of all payment plan letters with a view to expanding the range of scenarios incorporated in its automatically generated letters.

However, documents and other forms of communications should be interpreted within the context in which they were made as measured against the objective facts and evidence. Whether a particular document evidences a decision is not a task left to the interpretation of the terms of such a document in isolation. Ultimately the meaning of a document will turn on the particular facts. The present case is an example of situations where it is necessary to make a more fulsome survey of all of the facts and evidence.

In the present case the surrounding facts, both before and after the issue of the letter, demonstrate why it was neither open, nor reasonable, for the taxpayer to maintain that a decision to remit GIC had occurred on 8 December 2014. This is particularly so, where, as the majority recognised, that the 8 December 2014 letter⁸

... did not expressly deal with the application to remit GIC and the letter was susceptible of more than one interpretation.

In fact, at first instance the primary judge considered that only a '*strained reading*' of the 8 December 2014 letter would support the taxpayer's contentions.⁹

The 8 December 2014 letter issued following discussions between the ATO officer, the taxpayer and his tax agent on 5 December 2014. The ATO officer who prepared the 8 December 2014 letter did so in response to the tax agent's specific request for a lump sum arrangement and payment slips to facilitate payment of the taxpayer's primary tax debt. At first instance, the primary judge accepted the ATO officer's evidence that those conversations were to the effect that the taxpayer should pay the primary tax debt by 30 January 2015 whilst the ATO considered the remission of the GIC.

Noting that these discussions with the taxpayer and his agent occurred on a Friday and the 8 December 2014 letter issued on a Monday, the primary judge noted that it seemed unlikely that the ATO officer would have proceeded to make a decision to remit GIC over the weekend. Nor was the ATO officer's subsequent conduct consistent with him having made such a decision.¹⁰

⁸ *Pintarich v Deputy Commissioner of Taxation* [2018] FCAFC 79, paragraph 152 (per Moshinsky and Derrington JJ).

⁹ *Pintarich v Deputy Commissioner of Taxation* [2017] FCA 944, paragraph 47 (per Tracey J).

¹⁰ *Pintarich v Deputy Commissioner of Taxation* [2017] FCA 944, paragraph 46 (per Tracey J).

Whilst on appeal maintaining his challenge to the primary judge's conclusion that the 8 December 2014 letter did not constitute or manifest a decision to remit GIC, the taxpayer did not challenge any of the primary judge's findings of fact.¹¹

Subsequent to the issue of the 8 December 2014 letter, the written and verbal interactions between the ATO, the taxpayer and his tax agent were inconsistent with the taxpayer's claimed reliance on the letter as being a decision to remit all of the GIC. Those interactions included:

- the issue of three separate statements of account to the taxpayer on 11 December 2014, 7 January 2015 and 14 January 2015 which each showed that no amount of GIC had been remitted
- the telephone conversation on 23 December 2014 where the ATO officer left a request with the tax agent's receptionist for the tax agent call the ATO and indicated that there was some further information that the ATO still required, and
- the telephone conversation on 9 January 2015, initiated by the taxpayer's tax agent and seeking to ascertain the progress of the GIC remission request. As part of that conversation, the ATO officer asked the tax agent a number of questions regarding the taxpayer's affairs that were clearly relevant and directed to the ATO's ongoing consideration of the taxpayer's GIC remission request.

Whilst concerns about the fairness of the majority's conclusion were expressed in the judgment of Kerr J in dissent¹², the majority's decision did no more than express what has long been the proper operation of the law. Nor did the facts involve the use of automated 'intelligent' decision-making systems such as to lay down the application of some wider legal principle to such systems. In this matter the decision-making responsibility rested with an individual ATO officer to properly consider the facts of the case and determine, in the exercise of the discretion in section 8AAG of the TAA, whether to remit any part of the GIC.

The facts demonstrate that no such decision was made on 8 December 2014 and a more fulsome survey of all of the facts and evidence explains why the ATO took the position it did in response to the taxpayer's application.

Implications for impacted advice or guidance

None

¹¹ *Pintarich v Deputy Commissioner of Taxation* [2018] FCAFC 79, paragraph 83 (per Moshinsky and Derrington JJ).

¹² *Pintarich v Deputy Commissioner of Taxation* [2018] FCAFC 79, paragraphs 55, 65, 75 and 77 (per Kerr J).

Comments

We invite you to advise us if you feel this decision has consequences we have not identified. Please forward your comments to the contact officer.

Date issued:	4 April 2019
Due date:	3 May 2019
Contact officer:	Contact officer details have been removed as the comments period has expired.

Legislative references

Taxation Administration Act 1953
8AAG
Administrative Decisions (Judicial Review) Act 1977

Case references

Comcare v Moon [2003] FCA 569; (2003) 75 ALD 160
Dunstan v Higham [2016] ACTCA 20; (2016) 310 FLR 58; [2016] ALMD 5062; [2016] ALMD 5088
Minister for Immigration and Citizenship v SZQOY [2012] FCAFC 131; (2012) 206 FCR 25; [2013] ALMD 1869; (2012) 132 ALD 1; (2012) 294 ALR 84
He v Minister for Immigration and Border Protection [2017] FCAFC 206; (2017) 255 FCR 41; [2018] ALMD 3545
Pintarich v Deputy Commissioner of Taxation [2017] FCA 944
Pintarich v Deputy Commissioner of Taxation [2018] FCAFC 79; 2108 ATC 20-657
Semunigus v Minister for Immigration and Multicultural Affairs [1999] FCA 422
Semunigus v Minister for Immigration and Multicultural Affairs [2000] FCA 240; (2000) 96 FCR 533; (2000) 60 ALD 383

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