HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 01 Dec 2023 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	S130/2023
File Title:	Godolphin Australia Pty Ltd ACN 093921021 v. Chief Commi
Registry:	Sydney
Document filed:	Form 27A - Appellant's submissions
Filing party:	Appellant
Date filed:	01 Dec 2023

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

ON APPEAL FROM THE COURT OF APPEAL OF THE SUPREME COURT OF NEW SOUTH WALES

BETWEEN: GODOLPHIN AUSTRALIA PTY LTD ACN 093921021
Appellant

and

CHIEF COMMISSIONER OF STATE REVENUE
Respondent

APPELLANT'S SUBMISSIONS

Part I: Certification

1. These submissions are in a form suitable for publication on the internet.

Part II: Issue

2. The issue in this appeal is whether s 10AA(3)(b) of the *Land Tax Management Act 1956* (NSW) (**the Act**) requires the taxpayer to demonstrate that the exempt purpose (that is, the purpose of selling animals, their natural increase or bodily produce) was the dominant purpose of the dominant use.

3. The Appellant contends that where the dominant use of the land involves the maintenance of animals for two or more related or complementary purposes, one of which is an exempt purpose which satisfies s 10AA(3)(b) of the Act, it is unnecessary to demonstrate separately that the exempt purpose is the dominant purpose.

Part III: Section 78B Notice

4. The Appellant considers that no s 78B notice is required in this proceeding.

Part IV: Citation

5. This is an appeal from the decision of the Court of Appeal of the Supreme Court of New South Wales (Kirk JA, Simpson AJA and Griffiths AJA) in *Chief Commissioner of State Revenue v Godolphin Australia Pty Ltd* [2023] NSWCA 44 (**CA**), overturning the judgment of the Supreme Court of New South Wales (Ward CJ in Eq as Her Honour then was) in *Godolphin Australia Pty Ltd v Chief Commissioner of State Revenue* [2022] NSWSC 430 (**J**).

Part V: Facts

6. The facts are set out at CA[49] - [82][1] (Kirk JA) and J[9] - [41].[2]

7. The Appellant operates a thoroughbred stud and racehorse breeding business on the relevant land, which involves breeding thoroughbred horses, raising them as racehorses, and selling thoroughbred horses, their natural increase or bodily produce (i.e., semen). The Appellant also engages in associated agricultural activities on the land such as raising cattle for sale and growing lucerne on certain parcels of land. The Appellant's thoroughbred racehorse business also involves training and racing thoroughbred horses. The relationship between these different aspects of the business is explained below.

The land

8. The Respondent assessed the Appellant for land tax for the 2014-2019 tax years in respect of two properties, known as "Kelvinside" and "Woodlands", which are used by the Appellant to conduct its business. Each of the properties consists of a number of parcels of land identified by lot, deposited plan and parcel identification number. It was not disputed that each parcel of land is rural land within the meaning of s 10AA(4) of the Act: CA[18].[3]

9. Woodlands is located at Jerry Plains in the Hunter Valley and is some 2,420 hectares. Kelvinside is located in the upper Hunter Valley and is some 907 hectares. The Appellant also operates two other properties, known as "Crown Lodge" and "Osborne Park" for which it did not claim the primary production exemption to land

[1] CAB 103-111 [49]-[82].
[2] CAB 9-17 [9]-[41].
[3] CAB 94 [18].

tax. The facilities at Crown Lodge and Osborne Park are tailored to the race training of horses and the resting (or "spelling") of those horses.

10. On Kelvinside, the Appellant maintains a thoroughbred stud operation in which stallions inseminate (or "cover") mares for fees. The Appellant also uses substantial parts of Kelvinside to maintain cattle for sale, and to rest or spell horses, as well as for the raising and education of yearlings. The raising and educating of yearlings includes a process traditionally described as "breaking in" horses, which includes use of a sand training track that allows a horse to get used to a rider and become familiar with the look and feel of a racetrack, being a step in their development to domesticated adulthood as expected racehorses regardless of whether they will be sold, used for racing, used for breeding or some combination: J[31], [111].[4]

11. Woodlands consists of four separate but contiguous parcels of land. On Woodlands, the Appellant maintains broodmares and their offspring. Foals are born, weaned and commence their education at Woodlands. The Appellant maintains other horses on Woodlands which are used in the education of the offspring such as "nanny mares" or "hacks" which are used to keep young horses calm. The Appellant also uses parts of Woodlands to maintain cattle for sale and uses some particular parts to grow lucerne.

12. At first instance, the Primary Judge found that the dominant use of the land involved the maintenance of animals for the purposes of sale (J[272]).[5] On appeal, Simpson AJA and Griffiths AJA also agreed that the dominant use of the land involved the maintenance of animals as part of one business operation (CA[131], [133], [195]-[196]).[6] Kirk JA did not disagree with that position.

13. Notwithstanding that there are different activities occurring in respect of different groups of horses on different parts of the land, the physical activities on the land overwhelmingly involve the maintenance of animals. To the extent that the Appellant also engages in associated agricultural activities such as raising cattle for sale and growing lucerne, it was common ground between the parties that the maintenance of horses dominated over any other use of the land: CA[29].[7] Moreover, the cattle were

---

[4] CAB 15 [31], CAB 38 [111].
[5] CAB 73 [272].
[6] CAB 124[131], CAB 124-125 [133], CAB 140-141 [195]-[196].
[7] CAB 97 [29].

maintained for sale, and the lucerne for feed, and so formed part of the animal maintenance activities on the land.

The business

14. The nature of the Appellant's commercial operation is reflected in its central and oft-repeated slogan "breed to race, race to breed". The Appellant initially entered the thoroughbred stud market operating a breeding stud. Importantly, the market for selling thoroughbred horses, their progeny or their semen is heavily influenced by the racing career of those horses and of other horses related to them: J[265], [269]-[270];[8] CA[66]-[67], [195].[9] The economic evidence was reinforced by evidence from the Appellant's customers and the Appellant's own marketing materials which refer to stallion bloodlines and the stallion's own success as well as the success of progeny and related horses: J[66], [105].[10] Any business involved in raising thoroughbred racehorses with a view to selling them, their progeny or their semen must necessarily focus on the racing success of those horses and of horses related to them.

15. One of the aims of the Appellant's business model is to produce a "one in 100" high quality sire, the consequence of which in terms of revenue would be "enormous": J[115].[11] Sires may command a wide range of prices per cover, (up to $132,000 per cover), and may cover 100-150 mares per season, with a period of productivity of around 15 years.

16. In the relevant tax years, the Appellant's primary source of revenue and income from the land was the sale of horses, their progeny or their semen: J[167], [254];[12] CA[85], [211].[13] The Appellant sells some 70% of the thoroughbred horses that it breeds: CA[60].[14] Most of the thoroughbred horses that are not sold are used as part of the Appellant's breeding program, either as stallions or as broodmares. If horses are retained as broodmares or breeding stallions, they are likely to spend the majority of their lifetime breeding – typically 70% of their lifetime for broodmares and 75% of

---

[8] CAB 72 [265], CAB 73 [269]-[270].
[9] CAB 107-108 [66]-[67], CAB 140-141 [195].
[10] CAB 24 [66], CAB 36 [105].
[11] CAB 39 [115].
[12] CAB51 [167], CAB 70 [254].
[13] CAB 111-112 [85], CAB 147 [211].
[14] CAB 106 [60].

their lifetime for stallions: J[131].[15] Consistently with those facts and findings, there was no dispute that the Appellant's activities and use of the land involved substantial commercial operations including the sale of most of the thoroughbred horses it breeds (CA[60])[16] and stallion covering operations, the latter being described as the largest revenue earner or the key revenue driver for the business: J[255],[17] CA[96], CA[209].[18]

17. Consistently with the foregoing, the Primary Judge (with whom Griffiths AJA agreed at CA[195]-[196]),[19] made a number of factual findings in support of the conclusion that the Appellant conducts an integrated commercial operation including that:

a. the description of the activities on the land and the rationale for those activities makes sense and in broad terms supports the conclusion that this is an integrated thoroughbred stud operation: J[269];[20]

b. success in racing increases the value of the Appellant's horses (including progeny) and semen: J[272],[21] CA[133];[22]

c. marketing material statements included the objective of enhancing the residual value of its bloodstock holdings by achieving success on the racetracks: J[266];[23] and

d. the timing of the majority of sales was consistent with the Appellant operating an integrated thoroughbred stud operation: J[262].[24]

18. Having considered the physical activities on the land and the business consequences of those activities, both the Primary Judge (J[258])[25] and Griffiths AJA in the Court of Appeal (CA[223])[26] found that the breeding purpose was dominant. Kirk JA in the Court of Appeal found that the racing purpose was dominant (CA[125]),[27] although

---

[15] CAB 42-43 [131].
[16] CAB 106 [60].
[17] CAB 70 [255].
[18] CAB 114 [96], CAB 147 [209].
[19] CAB 140-141 [195]-[196].
[20] CAB 73 [269].
[21] CAB 73 [272].
[22] CAB 124-125 [133].
[23] CAB 72 [266].
[24] CAB 72 [262].
[25] CAB 71 [258].
[26] CAB 151 [223].
[27] CAB 122 [125].

Kirk JA also stated that the breeding purpose was significant [CA[125]).[28] Simpson AJA found that neither the racing purpose nor the breeding purpose had been shown to predominate over the other (CA[147]).[29]

Part VI: Argument

A. SUMMARY

19. Section 10AA(1) of the Act provides that rural land is exempt from taxation if it is used for primary production. Relevantly, s 10AA(3)(b) of the Act provides:

> *For the purposes of this section, "land used for primary production"" means land the dominant use of which is for—*
>
> *...*
>
> *(b) the maintenance of animals (including birds), whether wild or domesticated, for the purpose of selling them or their natural increase or bodily produce, or*
>
> *...*

20. The question for this appeal is whether it is necessary that the "purpose of selling [the animals] or their natural increase or bodily produce" must be the dominant *purpose* for which the land is used, or whether it suffices that the dominant *use* (i.e., the physical activities on the land) is the maintenance of animals, where that use can be characterised as "for the purpose of selling [etc]".

21. For the reasons that follow, the Court of Appeal erred in its construction of s 10AA(3) of the Act. In particular, the test postulated by the Court of Appeal (Kirk JA and Simpson AJA) misdirects from the focus of the primary production exemption in s 10AA(3)(b) of the Act.

22. The majority erred when they imported what was described as a "use-for-a-purpose" investigation, which has the effect of shifting the enquiry away from the use of the land – "use" being the physical deployment of land by a taxpayer. The purpose and structure of s 10AA(3)(b), in the context in which it is found and assessed against its history, shows that the Court of Appeal's departure from the text alters "the mischief

---

[28] CAB 122 [125].
[29] CAB 128 [147].

which… one may discern the statute was intended to remedy"[30] – namely the exploitation of the exemption by taxpayers engaging in unrelated, non-exempt *uses* of the land.

23. The effect of this judicial gloss by the Court of Appeal is that it imposes limitations not apparent in the words chosen by Parliament, relevantly that the Appellant must demonstrate that animals are maintained for a dominant *purpose* of sale. Those limitations create the risk of incoherent outcomes having regard to integrated nature of many primary production businesses,[31] the multiplicity of overlapping purposes or objectives for which animals might be maintained (or other protected uses engaged in, from cultivation to the propagation of flowers) and the interconnectedness of the activities conducted on the land.

B. STATUTORY TEXT

24. The plain and ordinary meaning of s 10AA(3)(b) of the Act is that the maintenance of animals must be "for the purpose of sale" and that this *use* must dominate over any other use. The effect is that where there are overlapping purposes for an integrated composite use, it is not necessary to prove that one purpose dominates over any other to fall within the primary production exemption.

25. The legislation explicitly contemplates use for multiple purposes in s 10A of the Act. So much has been accepted by the authorities including by the Supreme Court of New South Wales in *Young v Chief Commissioner of State Revenue* [2020] NSWSC 330 at [144]. In the absence of anything in the text to suggest otherwise there is no reason why purpose should be construed to require dominant purpose where Parliament has not itself provided a gloss on what kind of purpose will suffice.

26. There are distinct concepts which emerge from the text, namely the purpose for which the animals are maintained, and the use of the land (i.e., the physical activities). The purpose is the end, or the objective or the goal in the furtherance of which the land is used. The use is something that the taxpayer does on the land. By conflating use and purpose in the formulation 'use-for-a-purpose', the majority

---

[30] *CIC Insurance Ltd v Bankstown Football Club* (1997) 187 CLR 384 at 408 (Brennan CJ, Dawson, Toohey and Gummow JJ).
[31] See *llawarra Meat Co v Commissioner of Land Tax* [1979] 1 NSWLR 188.

decision in the Court of Appeal leads to anomalous outcomes where there is only one use of the land for two or more related purposes.

27. Accordingly, the Appellant submits that the majority in the Court of Appeal erred in introducing a dominant purpose test, or otherwise adding a gloss to "purpose" where the text does not do so.

28. At CA[21],[32] Kirk JA introduced a "use-for-a-purpose" formulation to describe the test in s 10AA(3) of the Act. Simpson AJA (agreeing with Kirk JA) at CA[132][33] expressed some misgivings with respect to that formulation and the conflation of use and purpose in the formulation "use-for-a-purpose". There are a number of reasons why this Court should not accept this judicial gloss.

29. First, the statutory text does not use that formulation and to do so distracts from the text.

30. Second, the formulation breaks down the coherence of s 10AA(3), where three of the six subsections do not use the word "purpose" at all, being s 10AA(3)(c), (e) and (f). It is difficult to translate Justice Kirk's "dominant use-for-a-purpose" approach to those other subparagraphs (for example, a dominant use of commercial fishing, or a dominant use of a commercial plant nursery).

31. Third, the majority's importation of a dominance test for purpose so as to avoid the unattractive result of construing "the purpose" to mean "a purpose" or "any purpose" is flawed.

32. At CA[159],[34] Simpson AJA appeared mindful of the unattractiveness of a construction which would involve discarding the definite article in paragraph (b) ("the purpose") and substituting the indefinite article ("a purpose"). The reasoning exposes the true concern, being that construing the text to permit "any purpose" would mean any purpose, no matter how insignificant in the overall use of the land, would attract the exemption. Thus, the Court of Appeal sought to use the statutory requirement for a "dominant use" to derive the conclusion that a taxpayer must also demonstrate a "dominant purpose" which is exempt under the legislation.

---

[32] CAB 95 [21].
[33] CAB 124 [132].
[34] CAB 130-131 [159].

33. Section 10AA(3) requires that one ask whether, as a matter of ordinary English and common-sense, the dominant use of the land can be characterised as "the maintenance of animals for the purpose of selling [etc]". That does not require the purpose to be dominant, nor does it mean that any purpose, however trifling, would suffice. In asking the question posed by the statutory text, the Court would bear in mind the general principle that the law does not concern itself with the immaterial, such that any trivial or insubstantial purpose would not attract the exemption. The Appellant accepted as much in the case of two of its properties at Crown Lodge and Osborne Park and did not claim the land tax exemption for either of those properties: J[17], [26], [27];[35] CA[81].[36]

34. Where the words of the statute have not expressly (or by necessary implication) sought to qualify purpose, the artifice of prescribing a qualitative or quantitative requirement (such as a percentage) to attract the exemption ought to be avoided. The artificiality of such an approach is perhaps best illustrated by the judgment of Simpson AJA, who found that both the sale and racing purposes were exactly evenly balanced (i.e. 50/50) and therefore neither dominated over the other: CA[160].[37] Many primary producers will likewise have two or more purposes, or indeed a range of intertwined or overlapping purposes in an integrated commercial operation. One can readily imagine any judicial gloss which departs from a determination based on the words of the statute leading to anomalous outcomes for those primary producers, based on the particular circumstances of their business.

35. Moreover, the Court would be reluctant to interpret the statute in a way that may lead to a focus on whether one source of revenue "dominates" in an integrated business – this distracts from the statutory focus on the actual activities on or physical deployment of the land, and creates the prospect of debates about accounting that could lead to the exemption fluctuating, being available in some years but not others depending on which arms of an integrated business happen to generate the most revenue in a given tax year. That is particularly artificial in the context of land which might be deployed in a way that generates low revenue in some years in the hope of higher revenue in the future (whether that be lean years during a drought, or a

[35] CAB 11 [17], CAB 14 [26], CAB 16 [37].
[36] CAB 110 [81].
[37] CAB 131 [160].

business model that generates substantial revenue from multiple sources while aiming for the "one in 100" stallion sire).

C. STATUTORY CONTEXT

36. It is necessary to have regard to the whole of the Act and to seek to achieve a construction that is harmonious with the rest of the Act.[38] Part 3 of the Act deals with liability to land tax, with ss 9 to 9E concerning the taxable value of the land and ss 10 to 10S setting out the relevant exemptions from liability.

37. As explained below, the Court of Appeal's construction is not coherent with a number of other provisions of the Act. The construction contended for by the Appellant is consistent with the principle that an Act is to be construed as a coherent whole and giving each provision work to do.[39]

38. First, the Act contains a number of references to purpose which demonstrate that where Parliament intended to qualify purpose or otherwise limit an exemption to land tax, it has done so plainly in the Act. So, in ss 3(1) and 3(2) concerning the definition of "residential unit", the Act posits a sole purpose test in the expression "for no other purpose".

39. Similarly, in s 10(1)(e) the language of the Act expressly requires an organisation to have "solely" specified purposes. In contrast, s 10AA(3)(b) does not use any qualifying language in respect of "purpose". The use of different language suggests that Parliament intended a different meaning, namely that the purpose was not to be qualified in any sense other than by reference to the dominant use of the land. Where Parliament intended to qualify purpose in the Act, it has done so explicitly and has always done so.

40. Second, as explained below, s 10AA should be construed consistently with s 10(1) of the Act in circumstances where the primary production exemption was originally enacted in s 10(1) of the Act. Section 10 contains a number of provisions which qualify use rather than purpose. For instance, in ss 10(1)(h) and (i) of the Act land must be used "primarily and principally for" the purposes therein specified to attract

---

[38] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69]; *SZTAL v Minister for Immigration & Border Protection* (2017) 262 CLR 362 at 368 [14]; *SAS Trustee Corporation v Miles* (2018) 265 CLR 137 at 149 [20].
[39] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69].

an exemption. Both of these provisions focus attention on whether the land is used in particular ways and both are clearly concerned with similar kinds of activities, namely game or sport on the one hand and the holding of race meetings on the other. Similarly, the language of s 10AA(3)(b) focuses attention on the use of the land for the maintenance of animals.

41. Third, a contrast may be noted between s 10(1)(e), which posits a sole purpose test for a society's purposes, and s 10(1)(j), which simply requires that the society be established for "for the purpose of" holding agricultural shows. Related to this, there is a contrast between ss 10(1)(h) and (i), which require that land be used "primarily and principally" for the protected purpose and s 10(1)(j), which requires that the land be used "for the purpose of" holding agricultural shows. In the latter case, the society's purpose does not need to be solely (nor dominantly nor primarily) the holding of such shows nor does the land use need to be "principally and primarily" for the stated purpose, no doubt recognising that the nature of such shows is that they occur intermittently, and deployment of the land for other purposes during the intervening period is not intended to exclude the land, provided the other requirements for the exemption are met. There are yet further limits on the exemption in s 10(1)(j) by operation of s 10P of the Act. Accordingly, rather than resort to a "use-for-a-purpose" formulation, where the Act seeks to attach a quality to a given purpose, it does so in terms, and where an exemption is not intended to apply the Act imposes specific limits on the exemption.

42. Fourth and perhaps most tellingly, in s 10AA itself the Act imposes a quality on purpose with respect to non-rural land, in contrast to the primary production exemption for rural land: see s 10AA(2). The implication of s 10AA(2) of the Act is that so far as rural land is concerned, the purpose of sale does not *necessarily* involve a significant and substantial commercial purpose or the purpose of profit on a continuous or repetitive basis.

43. Finally, to the extent that s 10A refers to land used for several purposes and operates by reference to a defined "exempt purpose", it is important to understand the role and context of that provision. The inclusive rather than exclusive nature of s 10A is clear from its introduction in 2003, which was to permit multiple exempt purposes on the land. Both the Minister's speech in reply on the first reading of the Bill in the

Legislative Assembly and the Explanatory Note provide that "the amendments insert, by way of statute law revision, a new section 10A. The substituted section makes it clear that if land is used for more than one purpose and each of those purposes is an exempt purpose, the land is exempt from taxation."[40] Importantly for the present case, there is no suggestion in that extrinsic material that the section was intended to exclude or limit the operation or scope of the exemptions in Part 3 of the Act.

D. PURPOSE AND LEGISLATIVE HISTORY

44. The conclusion that Parliament did not intend for s10AA(3)(b) to exclude the primary production exemption for integrated operations is reinforced when the drafting history of the Act and the provision is closely considered.

45. The definition of "land used for primary production" when the Act commenced operation was in the following terms:

> *"Land used for primary production" means land used primarily for-*
>
> *(a) the cultivation thereof for the purpose of selling the produce of such cultivation;*
>
> *(b) the maintenance of animals or poultry thereon for the purpose of selling them or their natural increase or bodily produce; or*
>
> *(c) the keeping of bees thereon for the purpose of selling their honey,*
>
> *and includes all land owned by a society registered as a rural society under the Co-operation, Community Settlement, and Credit Act, 1923, as amended by subsequent Acts*.

46. The Act when originally enacted did not provide an exemption from land tax for land used for primary production. Rather, the Act provided for a reduction in the taxable value of the land owned by a person where all, none or part of the land owned by a person was land used for primary production.[41] Thus, the original form of the Act dealt with the primary production concession in circumstances where taxpayers were engaging in unrelated, non-primary production uses of the land without the need for

---

[40] NSW Legislative Assembly, Parliamentary Debates (Hansard), 14 November 2003 at 5030; Explanatory Note of the *State Revenue Legislation Further Amendment Bill 2003* (NSW).
[41] See subsection 9(3) of the Act as originally enacted.

the selling purpose to have a particular quality (e.g. sole, dominant, primary, ancillary or incidental).

47. It should also be noted that the exemptions that were in the Act when originally enacted carefully prescribed the quality of the purpose that was necessary to attract an exemption from land tax.[42]

48. Prior to December 2005, the primary production exemption now contained in s 10AA sat alongside a series of other exemptions to land tax in s 10 of the Act. Section 10(1)(p) of the Act, read with the definition of "land used for primary production", provided an exemption from land tax for "land used primarily for…the maintenance of animals…for the purpose of selling them or their natural increase or bodily produce."

49. In December 2005, the primary production exemption was transferred to its own section, being s 10AA and the term "dominant" was introduced into the chapeau of s 10AA(3).[43] Importantly, the operative language of paragraph (b) of s 10AA(3) was not affected, as recognised by the Primary Judge in this case.[44] The Court of Appeal did not have regard to this legislative history or the origins of the exemption in s 10AA(3) of the Act.

50. The Minister's speech in reply on the second reading of the Bill in the Legislative Council provides valuable insight into the amendments. The Minister observed the emergence of a practice by which developers bought rural land from farmers, continued to run a few head of cattle and periodically sold them in order to attract the land tax exemption, whilst undertaking unrelated activities on the remainder of the parcel of land i.e., using rural land for rezoning, subdivision and ultimately sale of residential, commercial or industrial properties.

51. The Minister's speech in reply states that "the amendments will require that the ***dominant use*** of the land is primary production. This will allow the portion of the revenue generated from the land from sale of subdivided lots compared to the

---

[42] See paragraphs (d), (e) and (g) of subsection 10(1) of the Act as originally enacted and compare with paragraphs (h) and (j) of subsection 10(1) of the Act as originally enacted. In its current form, the Act is careful to prescribe the quality of purpose elsewhere, such as in paragraph (h) of subsection 10(1) of the present Act.
[43] *State Revenue Legislation Further Amendment Act 2005* (NSW).
[44] *Godolphin Australia Pty Ltd v Chief Commissioner of State Revenue* [2022] NSWSC 430 at [47].

revenue generated from the sale of animals to be taken into account. The primary production use of the land will have to have ***significant and substantial commercial purposes***, which must be engaged in for the purpose of a profit or on a continuous and repetitive basis. Running a few head of cattle or sheep to attract a land tax exemption rather than to make profits will no longer suffice." (emphasis added).[45] The Explanatory Note is to similar effect.[46]

52. There are a number of observations which may be made about the legislative intent. First, the Minister's speech in reply is plainly expressing concern with situations in which there are different uses (i.e., different physical activities on the land or different physical deployments of the land) as opposed to the same physical use for multiple purposes. Second, it serves to emphasise that s 10AA was introduced in order to ensure that the exemption for primary production use involves genuine commercial uses.

53. Commercial enterprises of their nature will have multiple different objectives and intended revenue streams. Similarly, primary production often involves a plurality of physical activities (such as those that occur every day on almost every farm), but all being undertaken and coordinated for one use, such as the maintenance of animals for sale. Individuals working rural land with a view to profit in such contexts may have a range of other purposes or benefits they hope to derive from their activities, including benefits referable to lifestyle or other non-financial benefits. Save that s 10A must be given effect according to its terms, there is nothing in the text or context of the legislation to suggest that a plurality of physical activities, or a plurality of purposes, was intended to deny a primary producer the benefit of the exemption.

54. Accordingly, the drafting history reinforces the conclusion that the test remains focused on the dominant use of the land by taxpayers.

---

[45] NSW Legislative Council, Parliamentary Debates (Hansard), 29 November 2005 at 20064.
[46] Explanatory Note of the *State Revenue Legislation Further Amendment Bill 2005* (NSW) at 5.

E. CASES

55. Consistently with the observations of Griffiths AJA at CA[169],[47] there is only limited utility in considering the key phrase in other contexts given the differences between the statutory texts and their respective contexts.[48]

56. To the extent that a number of well-established principles and propositions to the dominant purpose test were distilled by Simpson AJA at CA[150]-[153],[49] the text of the legislation is patently different, referring explicitly to and requiring the claimant of privilege to prove a "dominant purpose". As Simpson AJA recognised at CA[148],[50] "dominant purpose" does not appear in the express terms of s 10AA(3) of the Act. Accordingly, the Appellant submits that there is little assistance to be gleaned from those legal privilege authorities where, as here, Parliament has not expressly sought to ascribe any qualitative or quantitative requirement to purpose.

57. Finally, two judges of the Court of Appeal (Simpson AJA at CA[132], [145][51] and Griffiths AJA at CA[170], [183]-[185])[52] expressed some reservations with previous authorities which considered the operation and scope of s 10AA(3) of the Act. In the case of *Young v Chief Commissioner of State Revenue* [2020] NSWSC 330, the evidence presented by the taxpayer did not provide the appropriate occasion to consider the questions raised in this appeal.

58. To the extent that the Court of Appeal considered the decisions in *Chief Commissioner of State Revenue v Metricon Qld Pty Ltd* (2017) 105 ATR 11 and *Leda Manorstead Pty Ltd v Chief Commissioner of State Revenue* [2011] NSWCA 366, those cases concerned characterising the use of land where there were two or more disparate uses or activities being conducted by the taxpayer, as envisaged in the Minister's speech. Similarly, the Victorian Court of Appeal in *CDPV Pty Ltd v Commissioner of State Revenue* [2017] VSCA 89 at [56] recognised that *Metricon*

---

[47] CAB 133 [169].
[48] In the context of other tax statutes, see *LeasePlan Australia Ltd v Deputy Federal Commissioner of Taxation* (2009) 74 ATR 33 where the acquisition of goods can be "for the purposes of sale or exchange" under the section even if there is another purpose. See also *John v Commissioner of Taxation (Cth)* (1989) 166 CLR 417; *R & D Holdings Pty Ltd v Deputy Commissioner of Taxation* (2006) 64 ATR 71.
[49] CAB 128-129 [150]-[153].
[50] CAB 128 [148].
[51] CAB 124[132], CAB 127-128 [145].
[52] CAB 133-134 [170], CAB 137-138 [183]-[185].

was not authority for the meaning of purpose but was concerned with the identification of use.

59. With respect, the Court of Appeal's misgivings or reservations with the foregoing authorities were well placed in the circumstances of Godolphin's use of the land and in other circumstances where there is a dominant *use* of the land for multiple overlapping or complementary purposes.

F. CONCLUSION

60. For the reasons outlined above, s 10AA(3)(b) of the Act should be construed as requiring a taxpayer to demonstrate that the dominant use of the land is for the maintenance of animals for the purpose of selling them or their natural increase or bodily produce.

61. The Appellant accepts that s 10AA(3) of the Act requires the Court to characterise both the use of the land and the purpose of that use. However, absent any clear intention to the contrary, a tax statute "must operate on the basis of the taxpayer's activities as it finds them."[53] In the case on appeal, the task of characterisation is relatively simple and straightforward. The land was plainly used by the Appellant for the maintenance of animals, primarily a population of thoroughbred horses maintained as part of an integrated business operation. That maintenance includes stabling, the provision of veterinary care, feeding, watering, and exercise including education and training, all of which are self-evidently important for the operation of a business of raising and maintaining thoroughbred racehorses as saleable assets.

62. The Appellant's purpose in maintaining the animals is also plain – to run a thoroughbred stud and racing operation in order to generate revenue from stallion covering services, sale of racehorses and racing success (with the revenue from the first two sources substantially outweighing the revenue from the third).

63. Accepting that the financial evidence will not be determinative, including because financial outcomes in any relevant year only tell part of the story for any business, there was considerable force to the economic evidence. It was not in dispute that revenue from sales (of both horses and semen) substantially exceeded revenue from racing, and that values attributed to breeding stock in the Appellant's financial

---

[53] *Tweddle v Federal Commissioner of Taxation* (1942) 180 CLR 1 at 7.

statements far outweighed the values attributed to racing stock. In light of the evidence and findings that racing success enhances the prospects of sale, there can be no doubt that the Appellant's integrated operation was for the purpose of selling the animals, their increase and bodily produce. Whether the Commissioner can point to other concurrent purposes is not to the point.

64. Against that analysis, three of the four judges (Ward CJ in Eq, Simpson AJA and Griffiths AJA) accepted that the activities on the land formed part of an integrated thoroughbred breeding and racing operation i.e., that the Appellant had two related or "intertwined" purposes: J[272],[54] CA[133], [165]-[166].[55] Kirk J also accepted that the Appellant did "in a sense" have an integrated operation: CA[107], [122].[56] In those circumstances, as identified by Griffiths AJA at CA[166],[57] a binary assessment is to be eschewed to the extent that it focuses on separate limbs of the same business, or separate parts of the whole. Put another way, the Appellant did not maintain different horses for different purposes but rather the activities involved the maintenance of horses for a single business enterprise for overlapping purposes.

65. Further, two of the four judges also found that the sale purpose dominated over the racing purpose, although the Appellant accepts that this did not find favour with a majority of the Court of Appeal. The ordinary commercial operations of the Appellant's business involved the sale of most of the horses by the Appellant (CA[60])[58] with racing success enhancing the value of those sales (J[272], CA[133]).[59]

66. Three of the four judges below were satsifed that the racing purpose did not dominate over the sale purpose. Although Kirk JA did not agree about this, his Honour accepted that the sale purpose was "significant". It cannot be characterised as trivial or immaterial.

67. If this Court accepts the Appellant's construction and rejects that adopted by the majority in the Court of Appeal, then this Court should also conclude that the

---

[54] CAB 73 [272].
[55] CAB 124 [133], CAB 132 [165]-[166].
[56] CAB 117 [107], CAB 121-122 [122].
[57] CAB 132 [166].
[58] CAB 106 [60].
[59] CAB 73 [272], CAB 124-125 [133].

Appellant is entitled to the relief sought in its Notice of Appeal. The Appellant embraces the factual findings of the Court of Appeal including the finding of Kirk JA that a significant use of the land was the maintenance of animals for the purpose of sale (CA[125])[60] and the finding of Simpson AJA that the purpose of sale and the purpose of racing are "evenly balanced" (CA[160]).[61] Applying those findings to the construction of the statutory exemption contended for by the Appellant, the Appellant is entitled to the relief sought since the exempt purpose (i.e., the sale purpose) is certainly not immaterial.

Part VII: Orders sought

68. The Appellant seeks the orders set out in the Notice of Appeal.

Part VIII: Time estimate

69. The Appellant estimates that 2 hours will be required for its oral argument.

Dated: 1 December 2023

Counsel for the Appellant

Bret Walker
02 8257 2527
caroline.davoren@stjames.net.au

James Emmett
02 9231 4470
james.emmett@banco.net.au

Dana Levi
02 9230 3266
dana.levi@wentworthchambers.com.au

[60] CAB 122 [125].
[61] CAB 131 [160].

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

ON APPEAL FROM THE COURT OF APPEAL OF THE SUPREME COURT OF NEW SOUTH WALES

BETWEEN: GODOLPHIN AUSTRALIA PTY LTD ACN 093921021
Appellant

and

CHIEF COMMISSIONER OF STATE REVENUE
Respondent

ANNEXURE
LIST OF STATUTES AND PROVISIONS REFERRED TO IN THE APPELLANT'S SUBMISSIONS

1. *Land Tax Management Act 1956* (NSW), ss 9 and 10 (as at 31 October 1956).
2. *Land Tax Management Act 1956* (NSW), s 10 (as at 6 December 2005).
3. *Land Tax Management Act 1956* (NSW), ss 10, 10AA, 10A (as at 31 December 2013).
4. *Land Tax Management Act 1956* (NSW), ss 10, 10AA, 10A (as at 31 December 2014).
5. *Land Tax Management Act 1956* (NSW), ss 10, 10AA, 10A (as at 31 December 2015).
6. *Land Tax Management Act 1956* (NSW), ss 10, 10AA, 10A (as at 31 December 2016).
7. *Land Tax Management Act 1956* (NSW), ss 10, 10AA, 10A (as at 31 December 2017).
8. *Land Tax Management Act 1956* (NSW), ss 10, 10AA, 10A (as at 31 December 2018).