HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: GODOLPHIN AUSTRALIA PTY LTD ACN 093921021

Appellant

and

CHIEF COMMISSIONER OF STATE REVENUE

Respondent

APPELLANT'S REPLY

Part I: Certification

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

Part II: Argument

Use and Purpose

2. At the heart of the Respondent's Submissions (**RS**) is a contention that the "dominant" limitation attaches to purpose because use cannot be divorced from purpose. Accepting that the concepts of "use" and "purpose" are related in that the use of the land often reveals the purpose of the use, they are nonetheless distinct matters.[1] It is common ground that the use is the deliberate physical deployment of the land (RS [28]), and neither the ordinary language of the statute nor the relationship between "use" and "purpose" support reading a reference to "dominant use" as though it were a reference to "use for a dominant purpose".

3. Given the proper acknowledgment at RS [37] of the need to address the particular statutory setting, the analysis at RS [35]-[37] provides limited assistance to this Court. Further, RS [38]-[44], even if correct, would simply affirm that the purpose of sale is a necessary aspect of the provision. So much is clear from the statutory text. It does not justify the less coherent conclusion that the "narrowed" (per RS [41]) purpose of sale must be assessed as dominant vis-à-vis other overlapping or

[1] *CDPV Pty Ltd v Chief Commissioner of State Revenue* [2017] VSCA 89, [59]-[62].

complementary purposes attendant upon the physical deployment of the land in question.

4. As to RS [65]-[66], the purpose for which the Appellant contends resides primarily in the text, which requires a dominant use but does not require a dominant purpose. The extrinsic materials simply reinforce that purpose. By contrast, the "evident purpose" for which the Respondent contends ("to encourage farming (primary production) activities undertaken for commercial gain") is at such a level of generality that it does not assist in relation to the constructional choice at issue in this appeal. Clearly, there must be a purpose or object of sale, but neither the text nor the context suggests that the purpose must be dominant where there are other overlapping or complementary purposes for the same dominant use. Moreover, the purpose advanced by the Respondent leaves no coherent work for s 10AA(2) of the *Land Tax Management Act* 1956 (NSW) (the **Act**) to do (as addressed in the Appellant's Submissions at [42]).

Appellant's business

5. The Primary Judge, with whom Griffiths AJA and Simpson AJA agreed, found that the dominant use of the land was the maintenance of animals as part of one business operation and not for two distinct purposes. An important part of the reasoning of both the Primary Judge and Griffiths AJA were the financial considerations and the economic reality of the Appellant's business operations.

6. The Respondent makes several factual assertions which fail to take proper account of critical aspects of the Appellant's business:

   a. First, as to the Respondent's submission (at RS [22]) that there are non-financial benefits associated with horse racing, the same can be said of many primary production activities. The farmer who takes pride in winning first prize at the Royal Easter Show for their prize bull is not denied the benefit of the exemption where the only use of the land is the maintenance of animals for sale.

   b. Second, the Respondent refers to the gelding of male racehorses, who are plainly not capable of becoming a stallion sire. However, that overlooks the fact that the Appellant also sells high quality geldings for prices up to $1.3 million: J[238], CAB 64-65.

   c. Third, the Respondent submits that the Appellant retains the overwhelming majority of foals (at RS [15]). However, that submission overlooks the fact that the majority of the thoroughbred horses that the Appellant breeds are sold or used

as part of its breeding program: CA[6], J[131], CAB 91, 42-43. Section 10AA(3)(b) of the Act does not prescribe at what age the horses must be sold, nor does it prescribe the quality of the horses which must be sold by the Appellant. At first instance, the Appellant led compelling evidence of the commercial rationale underpinning those business decisions and the Primary Judge concluded that the timing of the sales was consistent with the Appellant operating an integrated thoroughbred stud operation: J[129], [149], [262], CAB 42, 46-47, 72. In this respect, while it is not controversial that the *use* is the present physical use (here, the maintenance of thoroughbred horses), this is not negated by the expectation that the sale may be some time in the future, after the horses have been used for an interim revenue-making activity.[2]

d. Fourth, related to this, the attempt at RS [8] to separate the "racing purpose" from the "sale purpose" is divorced from the commercial reality. When it is recognised that the horses are commercial assets being maintained as thoroughbred racehorses, each of breeding, educating, training and spelling between races can be seen as part of the business by which revenue is sought to be derived from the sale of those horses, or horses related to them, or the bodily produce of horses related to them. That is not to deny that racing is a significant aspect of the business – albeit an unprofitable one if viewed in isolation – but it highlights why those activities are entirely consistent with the purpose of sale either dominating (as the Primary Judge and Griffiths AJA accepted) or being of equal significance (as Simpson AJA accepted).

e. Fifth, the Respondent submits that the Appellant kept the best racers and that most of the Appellant's stallion roster had not been bred or raced by the Appellant. That is not surprising: a professed aim of the Appellant's business model is to produce a "one in 100" high quality sire and the associated revenue stream, with the Primary Judge concluding that there was "an objective intention to increase the value of the thoroughbred stud": J[245], [260], CAB 67,71.

Pre-2005 amendments

7. First, as to the submission that s 10A of the Act provides contextual support for the Respondent's construction of s 10AA(3)(b) (at RS [48]-[51]), it ought to be borne in mind that s 10A predates the amendments in 2005 which introduced s 10AA of the

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[2] *Illawarra Meat Co Pty. Ltd. v Commissioner of Land Tax* [1979] 1 NSWLR 188.

Act. The Appellant accepts that the effect of s 10A is that where there are multiple purposes that each fall within s 10AA(3), the exemption will apply. That is the work which s 10A seeks to perform, both in relation to s 10 (which at the time of the introduction of s 10A contained all of the relevant exemptions) and now in relation to both s 10 and s 10AA. However, that analysis simply does not bear on the central question in this appeal, namely whether the dominance test applies to purpose where there are exempt and non-exempt purposes associated with one use of the land.

8. Second, the Respondent submits that claims for the primary production exemption by other "integrated operations" have been dismissed under the pre-2005 statutory regime. By that submission the Respondent fails to properly engage with the cases referred to at RS [54]–[59], including the particular facts of those cases as considered further below at [9]-[11], as well as the overarching focus in those cases on use rather than purpose which dominated the earlier case law.

9. For example, in the case of *Sonter v Commissioner of Land Tax (NSW)* (1976) 7 ATR 30, the Court was concerned with two properties on which the taxpayer conducted a riding school and also maintained animals for sale. The Court considered that it was dealing with mixed uses, in the sense of distinct uses and also in the sense of maintenance of animals for different purposes, concluding that in those circumstances the financials are a non-decisive indicator of the intensity of the activities or use of the land. The Court correctly identified that it was a question of fact and degree to be approached on a broad, commonsense basis that ultimately found that there was insufficient evidence to displace the assessments.

10. In *Clarke v Commssioner of Land Tax (NSW)* (1980) 11 ATR 794 the "integration" asserted by the taxpayer was the establishment of a picnic area to promote the sale of horses. Putting to one side that the witnesses were held to be unreliable by the Court, the taxpayer's assertion plainly does not withstand the commonsense approach which was espoused by his Honour Chief Justice Helsham in *Greenville Pty Ltd v Commissioner of Land Tax (NSW)* (1977) 7 ATR 278 (at 280) and cited with approval in *Clarke* (at 803), as well as *Sonter* (at 35). On a broad and commonsense approach, it is indeed difficult to understand how a picnic area could be said to promote the sale of horses.

11. Finally, in *Jones v Commissioner of Land Tax (NSW)* (1980) 11 ATR 98, the horse-breeding was described as relatively small scale, both in terms of the use of land and financial considerations including that no income had been derived from breeding as

opposed to racing or agistment fees. The Court emphasised (at 100-1) that it is the use of the land which has to be considered, in the sense of present use of the land.

12. In contrast to the foregoing cases, three of the four judges in the present case accepted (and Kirk JA did not disagree) that the Appellant runs an integrated thoroughbred stud operation. That finding placed due weight on evidence (which was accepted by the Primary Judge) that racing results directly affect the value of sales of thoroughbred horses, their progeny and their bodily produce.

13. Applying the broad and commonsense approach in *Greenville* and taking account of the financial evidence on which the Primary Judge and Griffiths AJA placed considerable weight along with the finding of Kirk JA that a significant use of the land was the maintenance of animals for the purpose of sale, the Appellant is entitled to the exemption.

Notice of Contention

14. It appears that the notice of contention is not supported by either party's primary position in this appeal (RS [74]). The simple answer to it is that none of the physical activities (i.e., the use) on the relevant land can be sensibly characterised as being solely for the racing purpose. Once it is appreciated that the horses being bred, raised and maintained on the land are commercial assets, being thoroughbred racehorses, all of the activities on Woodlands and Kelvinside (breeding, educating, spelling and covering) are directed towards maintaining those horses in a manner which increases the prospects of sale of those horses or of horses related to them, or of the bodily produce of them or their related horses. The position on Crown Lodge and Osborne Park is different – at least some activities on that land are referable solely to the racing purpose (see J[113], CAB 38) – but the appellant has not sought exemption for that land and it is unnecessary to consider it further.

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