

HIGH COURT OF AUSTRALIA

GAGELER CJ,
GORDON, EDELMAN, STEWARD AND JAGOT JJ

GODOLPHIN AUSTRALIA PTY LTD

APPELLANT

AND

CHIEF COMMISSIONER OF STATE REVENUE

RESPONDENT

Godolphin Australia Pty Ltd v Chief Commissioner of State Revenue

[2024] HCA 20

Date of Hearing: 5 March 2024

Date of Judgment: 5 June 2024

S130/2023

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of New South Wales

Representation

B W Walker SC with J S Emmett SC and D Levi for the appellant (instructed by Johnson Winter Slattery)

J T Gleeson SC with S Kanagaratnam and C G Winnett for the respondent (instructed by Crown Solicitor (NSW))

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Godolphin Australia Pty Ltd v Chief Commissioner of State Revenue

Land tax – Exemption – Statutory construction – Primary production exemption – Where s 10AA(1) of *Land Tax Management Act 1956* (NSW) ("Land Tax Act") exempts from land tax rural land if used for primary production – Where s 10AA(3)(b) provides "land used for primary production" means land dominant use of which is for maintenance of animals for purpose of selling them or their natural increase or bodily produce – Whether requirement of "dominant use" of land applied both to "maintenance of animals" and also to "purpose of sale" in s 10AA(3)(b) of Land Tax Act – Whether "dominant" confined to required use of land only or "dominant" qualifies composite "use-for-a-purpose" phrase.

Words and phrases – "dominant", "dominant purpose", "dominant use", "exempt from taxation", "exemption", "integrated business", "land tax", "multiple purposes", "primary production", "significant use", "tax", "use-for-a-purpose", "use-for-the-identified-purpose", "use-for-the-purpose", "use of land".

Land Tax Management Act 1956 (NSW), ss 7, 9, 10, 10AA, 10A.

1 GAGELER CJ. Together with the other members of this Court, I consider that
the "dominant use-for-the-identified-purpose" construction of s 10AA(3)(b) of the
Land Tax Management Act 1956 (NSW) adopted by Kirk JA and Simpson A-JA
in the Court of Appeal of the Supreme Court of New South Wales is correct and
that the appeal should therefore be dismissed with costs.

2 The appellant advanced three arguments against that construction. The first
and second were textual and contextual. The third drew on legislative history.

3 I agree with the analysis of prior cases considering the concept of "use for
a purpose" undertaken by Jagot J and with her Honour's statement of the principles
to be distilled from those cases.¹ Her Honour shows that the legislative history
pertaining to the introduction of s 10AA is consistent with legislative cognisance
of those principles.²

4 Against that background, I agree with the reasons given by Gordon,
Edelman and Steward JJ,³ as well as with those given by Jagot J,⁴ for rejecting the
appellant's arguments.

1 At [49]-[67].

2 At [71]-[72].

3 At [28]-[33].

4 At [77]-[80].

- 5 GORDON, EDELMAN AND STEWARD JJ. In New South Wales land tax is payable on the taxable value of all land situated in that State owned by a taxpayer unless the land is exempt from taxation under the *Land Tax Management Act 1956* (NSW) ("the Land Tax Act").⁵ For the 2014-2019 years, the Chief Commissioner of State Revenue ("the Commissioner") assessed the appellant as liable for land tax in respect of two properties known as "Kelvinside" and "Woodlands". Both properties were used by the appellant in a business which comprised the breeding and sale of horses (and their natural increase and bodily produce) as well as the racing of horses. The appellant claims that certain parcels of each property are exempt from land tax because each parcel is rural land "used for primary production"⁶ on the basis that the "dominant use" of each parcel was for "the maintenance of animals ... for the purpose of selling them or their natural increase or bodily produce". The Commissioner contends that this exemption is not applicable to those parcels of land. He accepted that the relevant parcels at Kelvinside and Woodlands were being used to maintain horses; he did not accept, however, that the dominant purpose of that use was for the sale of the horses, their progeny or their bodily produce. This appeal concerns the proper construction of s 10AA(3)(b) of the Land Tax Act. For the reasons that follow, the Commissioner's contention is correct.

The Land Tax Act

- 6 Section 10AA of the Land Tax Act exempts from land tax land used for primary production that is either "rural land" or not "rural land". Rural land is exempt from land tax "if it is land used for primary production".⁷ Section 10AA(3) contains a definition of "land used for primary production". It provides:

"For the purposes of this section, ***land used for primary production*** means land the dominant use of which is for –

- (a) cultivation, for the purpose of selling the produce of the cultivation, or
- (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

5 Sections 7 and 9(1) of the Land Tax Act.

6 Section 10AA(3)(b) of the Land Tax Act.

7 Section 10AA(1) of the Land Tax Act.

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- (c) commercial fishing (including preparation for that fishing and the storage or preparation of fish or fishing gear) or the commercial farming of fish, molluscs, crustaceans or other aquatic animals, or
- (d) the keeping of bees, for the purpose of selling their honey, or
- (e) a commercial plant nursery, but not a nursery at which the principal cultivation is the maintenance of plants pending their sale to the general public, or
- (f) the propagation for sale of mushrooms, orchids or flowers."

7 The exemption for land that is not rural land is the same as that for rural land, save that the qualifying use of the land must also have a significant and substantial commercial purpose or character and be engaged in for the purpose of profit on a continuous or repetitive basis (whether or not a profit is actually made).⁸

8 Section 10AA replaced former s 10(1)(p) of the Land Tax Act in 2005.⁹ The previous definition of "Land used for primary production" used the word "primarily" rather than "dominant" to describe the required use of land.¹⁰

9 Section 10 of the Land Tax Act provides for other types of land to be exempt from land tax. Some exemptions turn on whether land is occupied "solely" by a particular organisation;¹¹ is used "solely" for a given purpose;¹² is used "primarily and principally" for a given purpose;¹³ or is not used for some defined purposes, such as a "commercial purpose".¹⁴ In this matter, the appellant stressed that the reference to a necessary "purpose of selling" in s 10AA(3)(b) is not directly

8 Section 10AA(2) of the Land Tax Act.

9 Items 5 and 8 of Sch 4 to the *State Revenue Legislation Further Amendment Act 2005* (NSW).

10 Section 3(1) of the *Land Tax Management Act 1956* (NSW) as at 31 December 2004.

11 For example, s 10(1)(f) of the Land Tax Act.

12 For example, s 10(1)(g) of the Land Tax Act.

13 For example, s 10(1)(h) of the Land Tax Act.

14 For example, s 10(1)(l) of the Land Tax Act.

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qualified with similar language, such as the word "solely" or the words "primarily and principally".

10 Section 10A of the Land Tax Act, which was the subject of argument, should also be set out. It provides:

- "(1) If land is used for more than one purpose and each of those purposes is an exempt purpose, the land is exempt from taxation.
- (2) A purpose for which land is used is an *exempt purpose* if land used solely for that purpose would be exempt from taxation because of its use for that purpose."

11 It was not in dispute that Kelvinside and Woodlands are rural lands. It was also not in dispute that the relevant parcels on these lands would only be exempt from land tax if, for the purposes of s 10AA(3)(b), the "dominant use" of each was "for ... the maintenance of animals (including birds), whether wild or domesticated, for the purpose of selling them or their natural increase or bodily produce".

The appellant's use of land

12 The facts about use, as distinct from their characterisation, are not in dispute. The appellant undertakes an integrated "thoroughbred breeding and racing operation" reflected in its slogan "breed to race, race to breed". This business involves two operations. One is the breeding of thoroughbred horses, the sale of horses, and the covering of mares (often owned by third parties) by the appellant's stallions (for which it is paid nomination fees). The appellant sells approximately 70% of the thoroughbred horses it breeds,¹⁵ mostly when they reach three or four years old.¹⁶ In the years in issue, the appellant's primary sources of income were from these sales and from nomination fees. Indeed, the stallion operations were run at a net profit and its breeding assets across its business were valued significantly more highly than its racing assets.¹⁷ The appellant relied upon this use of the land to claim its exemption from land tax.

15 *Godolphin Australia Pty Ltd v Chief Commissioner of State Revenue* (2022) 114 ATR 597 at 620 [127].

16 *Godolphin Australia Pty Ltd v Chief Commissioner of State Revenue* (2022) 114 ATR 597 at 620 [129].

17 *Chief Commissioner of State Revenue v Godolphin Australia Pty Ltd* (2023) 115 ATR 490 at 507-508 [95].

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13 The other operation is that the appellant also races its horses for prizemoney. Yearlings undertake intensive training when they are 18 months old. Each year about 120 horses enter the appellant's racing regime nationally. The appellant only sells a horse after it has done some racing; and then only the less able racers are sold. Unsurprisingly, the appellant's horse racing business generates significant losses; it is the most expensive part of its business. More than half of the appellant's staff were involved in racing activities, which indicated to the Court of Appeal that it was "highly intensive and expensive".¹⁸ In addition, a series of paddocks at Kelvinside were used for "spelling" racehorses, that is, to rest them between races.¹⁹ Overall, the great majority of the land at both properties was used for purposes other than stallion covering, including the birthing and development of foals, the education and early training of yearlings, and the spelling of race horses.²⁰ Thus, for example, only about 10% of one of the four parcels of land which were in issue in Kelvinside was focussed on housing stallions and the covering areas.²¹ Using the land in the foregoing way as part of a horse racing business is not an exempt use of that land.

14 Notwithstanding profits derived from its activity of breeding and selling horses, and from covering mares, in each of the years in question the appellant's overall business made a loss. Nonetheless, the objective of the business was "to enhance the residual value of its bloodstock holdings by achieving success on the racetrack at the highest levels". The appellant considered that "[c]ontinued racetrack success" would enhance its "commercial programme and provide an opportunity to create an operation that is self sustainable".

15 It is unnecessary to set out the facts in any further detail. That is because neither party disputed the critical finding below that a "significant use of the two properties was animal maintenance for the purpose of selling animal produce and

18 *Chief Commissioner of State Revenue v Godolphin Australia Pty Ltd* (2023) 115 ATR 490 at 507 [90].

19 *Chief Commissioner of State Revenue v Godolphin Australia Pty Ltd* (2023) 115 ATR 490 at 505 [76].

20 *Chief Commissioner of State Revenue v Godolphin Australia Pty Ltd* (2023) 115 ATR 490 at 505 [79].

21 *Chief Commissioner of State Revenue v Godolphin Australia Pty Ltd* (2023) 115 ATR 490 at 505 [77].

progeny".²² The appellant accepted that it could not establish that this was also the dominant use of the land. Thus, it was on the basis of this finding of significant use, and no other, that the appellant contended before this Court that each of the relevant parcels of Kelvinside and Woodlands met the requirements for exemption from land tax.

Proceedings below in the Supreme Court of New South Wales

16 The primary judge decided that, given the integrated nature of the appellant's business, it could not be said that there were two distinct purposes for the activities carried on at Kelvinside and Woodlands; it was therefore unnecessary to decide whether use for any one such purpose was the dominant use of each property. Her Honour was of the view that the objectives of winning races and the pursuit of stallion excellence were part of the overall objective of increasing the value of the appellant's stud operations through the sale of stallions' semen and the broodmares' progeny.²³ In contrast, it could not be said that the dominant purpose of this integrated operation was to generate prizemoney from racing; that "[did] not make sense from an economic point of view".²⁴ It followed that the dominant purpose of the "stud operations [was] just that – to run a thoroughbred stud".²⁵ Accordingly, both the relevant parcels at Kelvinside and Woodlands were lands used for primary production and exempt from land tax.

17 A majority of the Court of Appeal of the Supreme Court of New South Wales reached a different conclusion. Kirk JA first considered the concepts of "uses" and "purposes" in the context of land²⁶ given that each of the paragraphs in s 10AA(3) identifies such a use and such a purpose.²⁷ Use, it was said, is "what is

22 *Chief Commissioner of State Revenue v Godolphin Australia Pty Ltd* (2023) 115 ATR 490 at 512 [125]; see also at 518 [160].

23 *Godolphin Australia Pty Ltd v Chief Commissioner of State Revenue* (2022) 114 ATR 597 at 637-638 [270].

24 *Godolphin Australia Pty Ltd v Chief Commissioner of State Revenue* (2022) 114 ATR 597 at 636 [259].

25 *Godolphin Australia Pty Ltd v Chief Commissioner of State Revenue* (2022) 114 ATR 597 at 636 [259].

26 *Chief Commissioner of State Revenue v Godolphin Australia Pty Ltd* (2023) 115 ATR 490 at 497 [27].

27 *Chief Commissioner of State Revenue v Godolphin Australia Pty Ltd* (2023) 115 ATR 490 at 496 [21]-[22].

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done on the land".²⁸ When what is done on land is done by humans "it will be undertaken for some purpose or purposes".²⁹ Kirk JA accepted that different uses might also exhibit the same purpose, and that a single type of use might be undertaken for different purposes.³⁰ The maintenance of the horses at Kelvinside and Woodlands was an example of a use which served two purposes: breeding and horse racing. Kirk JA reasoned that whilst the word "dominant" qualified the word "use" in s 10AA(3), the phrase "dominant use" had to be a use "for something".³¹ It was thus wrong to separate out from each other the concepts of "use" and "purpose".³²

18 It followed that the question to be asked was not whether the dominant use of the properties was the maintenance of horses, but rather whether the dominant use of the properties was the maintenance of horses for the purpose of selling them.³³ In other words, the correct test required the word "dominant" to qualify the "use-for-a-purpose" in s 10AA(3)(b).³⁴

19 After carefully reviewing the facts, Kirk JA accepted that a "significant use" of the relevant parcels of land was the maintenance of horses for the required selling purpose. But this activity also served the business of horse racing; not only could it not be said that the racing purpose was "merely incidental and subservient to the sales purpose", but the better view was that in fact the activities in pursuit of

28 *Chief Commissioner of State Revenue v Godolphin Australia Pty Ltd* (2023) 115 ATR 490 at 497 [27].

29 *Chief Commissioner of State Revenue v Godolphin Australia Pty Ltd* (2023) 115 ATR 490 at 497 [27].

30 *Chief Commissioner of State Revenue v Godolphin Australia Pty Ltd* (2023) 115 ATR 490 at 497 [28]-[29].

31 *Chief Commissioner of State Revenue v Godolphin Australia Pty Ltd* (2023) 115 ATR 490 at 497 [31].

32 *Chief Commissioner of State Revenue v Godolphin Australia Pty Ltd* (2023) 115 ATR 490 at 497 [31].

33 *Chief Commissioner of State Revenue v Godolphin Australia Pty Ltd* (2023) 115 ATR 490 at 498 [32].

34 *Chief Commissioner of State Revenue v Godolphin Australia Pty Ltd* (2023) 115 ATR 490 at 496 [21].

the racing purpose constituted the dominant use of each property.³⁵ That was because of the greater resources directed to racing, the intensity of the activities involved in training horses to race, and the areas directed to those activities.³⁶ And that was so even though Kirk JA accepted that the purposes of breeding and horse racing each "aided the other to some extent".³⁷

20 With "some misgivings", Simpson A-JA accepted that s 10AA(3)(b) is directed at a single concept, being the "use-for-a-purpose".³⁸ This was largely because previous decisions of the Supreme Court of New South Wales had "steered away" from separating the concepts of "use" and "purpose".³⁹ Simpson A-JA accepted that the appellant pursued "dual goals" which, whilst "separate and distinct", were intertwined given that success at the races enhanced the stud operation.⁴⁰ However, Simpson A-JA was not satisfied that the appellant had shown that the selling purpose was the dominant purpose of the maintenance of animals on each property; on the material before her, she was "unable to distinguish either as dominant over the other".⁴¹

21 Griffiths A-JA decided that the primary judge did not err in setting aside the land tax assessments. Given that the appellant carried on an integrated business,

35 *Chief Commissioner of State Revenue v Godolphin Australia Pty Ltd* (2023) 115 ATR 490 at 512 [125].

36 *Chief Commissioner of State Revenue v Godolphin Australia Pty Ltd* (2023) 115 ATR 490 at 512 [125].

37 *Chief Commissioner of State Revenue v Godolphin Australia Pty Ltd* (2023) 115 ATR 490 at 512 [125].

38 *Chief Commissioner of State Revenue v Godolphin Australia Pty Ltd* (2023) 115 ATR 490 at 514 [132].

39 *Chief Commissioner of State Revenue v Godolphin Australia Pty Ltd* (2023) 115 ATR 490 at 514 [132]. The authorities were *Leda Manorstead Pty Ltd v Chief Commissioner of State Revenue* (2011) 85 ATR 775; *Chief Commissioner of State Revenue v Metricon Qld Pty Ltd* (2017) 105 ATR 11; and *Young v Chief Commissioner of State Revenue (NSW)* 2020 ATC ¶20-740.

40 *Chief Commissioner of State Revenue v Godolphin Australia Pty Ltd* (2023) 115 ATR 490 at 514 [133].

41 *Chief Commissioner of State Revenue v Godolphin Australia Pty Ltd* (2023) 115 ATR 490 at 515 [139].

he formed the view that the approach taken by Kirk JA was "excessively binary".⁴² Griffiths A-JA relied upon an "aide memoire", which had been prepared based upon financial reports and management accounts for the period from 1 January 2013 to 31 December 2019 and which related to the appellant's operations as a whole in Australia.⁴³ It contained three tables.⁴⁴ The first set out the revenue from "stallion covering", from "prizemoney" and from the "sale of horses". The second set out the "net income" from those three activities. The third set out the value of two classes of "biological assets", namely "bloodstock" and "racing stock" in each year. In each case the revenue and net revenue from horse racing was less than that derived from stallion covering and from the sale of horses. In addition, the values attributed to stallion interests and broodmares far outweighed the values attributed to racing horses.⁴⁵ Each table thus indicated the predominance of the stud operations. In that respect, the fact that horse racing involved more staff was not a significant factor given the integrated nature of the appellant's business. It followed that Griffiths A-JA was satisfied that the dominant use of each of Kelvinside and Woodlands was horse breeding for the overall purpose of sale.⁴⁶

The appeal

22 The appellant's grounds of appeal concerned the correct construction of s 10AA(3)(b). The principal appeal ground concerned whether the requirement of "dominant use" of land, referred to in the chapeau to s 10AA(3), applied both to "the maintenance of animals" and also to the purpose of sale in s 10AA(3)(b). The appellant's construction was crucial to its appeal because it did not seek a finding that the maintenance of animals on the land for the purpose of selling animals, or their natural increase or bodily produce, was the dominant use of that land.

23 For the appellant to succeed, it was accepted that this Court would need to reject the "use-for-a-purpose" construction of s 10AA(3)(b) favoured by Kirk JA. The construction which the appellant instead urged this Court to accept was to

42 *Chief Commissioner of State Revenue v Godolphin Australia Pty Ltd* (2023) 115 ATR 490 at 518-519 [165]-[166].

43 Land tax is assessed on a calendar year basis: s 8 of the Land Tax Act.

44 *Chief Commissioner of State Revenue v Godolphin Australia Pty Ltd* (2023) 115 ATR 490 at 525 [200]-[201].

45 *Chief Commissioner of State Revenue v Godolphin Australia Pty Ltd* (2023) 115 ATR 490 at 525-529 [203]-[220].

46 *Chief Commissioner of State Revenue v Godolphin Australia Pty Ltd* (2023) 115 ATR 490 at 530 [223].

confine the work done by the word "dominant" to the required use of the land and no more. On this basis it was sufficient for the appellant to rely upon Kirk JA's finding that a "significant" use of the two properties was animal maintenance for the purpose of selling animal produce and progeny.

24 The appellant's construction of s 10AA(3)(b) was said to be supported in three ways. First, it relied upon the structure of the words used to delimit the exemption. In particular, it emphasised the location of the word "dominant" before the word "use". This, it was said, was the means of describing how much the land must be used for the maintenance of animals in order to secure exemption. It did not also describe the quality of any purpose of selling animals. If Parliament had intended that the purpose of selling must also be a dominant purpose it could easily have said so. But it did not. As a result, once a taxpayer had established the required dominant use, being the maintenance of animals, it would then satisfy s 10AA(3)(b) if it could show that this maintenance was "for" selling those animals. That was simply a matter of characterising the activity of maintenance; maintenance of animals could be "for" selling animals if this was a significant or real purpose of that maintenance. That was satisfied here because of the finding made by Kirk JA. The fact that the maintenance of animals might be for another significant purpose, namely here horse racing, did not also deny the correctness of a characterisation of that use by reference to another significant purpose, namely here breeding.

25 Secondly, this constructional approach was said to be supported by the statutory context. In particular, where in s 10 Parliament had wanted an exemption to turn upon the predominance of a particular purpose as a criterion for exemption it had done so expressly. An example was said to be s 10(1)(h), referred to above. In contrast, none of the exemptions in s 10AA(3) used adjectival language to describe any particular purpose. For example, s 10AA(3)(d) refers to the "keeping of bees, for the purpose of selling their honey".

26 Thirdly, this construction of s 10AA(3)(b) was said to be supported by its purpose as revealed by the available extrinsic material. When s 10AA(3)(b) was introduced into the Land Tax Act (by the *State Revenue Legislation Further Amendment Act 2005* (NSW)), the Minister for Finance, speaking in reply, explained that the government was closing a "loophole" that had emerged whereby developers claimed an exemption from primary production by ensuring that their

land was fenced and that "some farm animals" were run on it.⁴⁷ The land would then be subdivided in stages. The Minister said:⁴⁸

"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 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."

- 27 The appellant submitted that its construction of s 10AA(3)(b) – which requires that the purpose of selling be significant (or "significant and substantial" to use the language of the Minister's reply) – satisfied the need to close the loophole in the way intended by Parliament. In contrast, the construction preferred by Kirk JA, and by the Commissioner, went too far, it was said, and would deny exemption for land that is substantially devoted to primary production.

A composite term

- 28 The appellant's case turned upon what work should be given to the word "dominant" in s 10AA(3)(b). For the reasons which follow, it should not be accepted that this word *only* qualifies the phrase "use of which is for ... the maintenance of animals" and no more. Instead, when the text of s 10AA(3) is read in its immediate statutory context and in light of broader statutory and extrinsic context, the word qualifies one composite phrase, namely (and relevantly) "use of which is for ... the maintenance of animals ... for the purpose of selling them ...". The "use-for-a-purpose" construction is thus correct.

- 29 The "use-for-a-purpose" construction is supported by the presence of the word "for", which is the last word in the chapeau. As Kirk JA correctly observed, the provision requires that the dominant use be for *something*. That something is, relevantly here, all of para (b) of s 10AA(3). That paragraph uses a composite phrase that combines an identified use of the land as well as a specified purpose for that use.

47 New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 29 November 2005 at 20063.

48 New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 29 November 2005 at 20064.

30 Further, the structure of a number of exemptions for primary production in s 10AA(3) follows the same pattern: each paragraph sets out first the genus for the exemption followed by a particular species, delineated by reference to a purpose, which must also be satisfied. Thus, in the case of s 10AA(3)(a), the genus is "cultivation"; this is then qualified by a more specific species, namely "for the purpose of selling the produce of the cultivation". In the case of s 10AA(3)(d), the genus is "the keeping of bees"; the species is "for the purpose of selling their honey". In each case, both the genus and its species must be satisfied. And the word "dominant", appearing as it does in the chapeau to s 10AA(3), qualifies both.

31 The same observation can be made about s 10AA(3)(b). The genus is land being used for the maintenance of animals; the species of that genus is that the maintenance is "for" the purpose of selling those animals or their natural increase or bodily produce. Once again, the word "dominant" qualifies both. That a "significant" use of the land was for breeding horses falls short of demonstrating that the "dominant" use of the land was the maintenance of horses for the purpose of selling them or their natural increase or bodily produce. In that respect, the word "dominant" should be given its natural meaning; it refers to that which is "ruling, prevailing, or most influential".⁴⁹

32 The broader statutory context also supports the Commissioner's construction. Section 10A(1) operates where land is used for multiple purposes each of which is exempt; without having to show which use is "dominant" the whole of the land is exempt from taxation. The premise of this provision assumes, relevantly in the case of s 10AA, that a "dominant" purpose would otherwise need to be demonstrated.

33 Nor did introduction of a new exemption for primary production in 2005, and the substitution of the word "primarily" with the word "dominant", support the appellant's construction. As the Commissioner correctly submitted, case law prior to the change did not support the appellant's position. Particular reliance was placed upon a 1976 decision of the New South Wales Supreme Court in *Sonter v Commissioner of Land Tax (NSW)*.⁵⁰ In that case land was used for breeding and selling cattle, horses and foxhounds. It was also used as a riding school on weekends and public holidays. In considering the predecessor to s 10AA, Rath J stated the test to be "whether the use of the land is primarily for the one purpose

49 *Federal Commissioner of Taxation v Spotless Services Ltd* (1996) 186 CLR 404 at 416.

50 (1976) 7 ATR 30.

or the other".⁵¹ On the evidence before him, Rath J was not able to be satisfied that the primary use of the land was for the defined exempt purposes.⁵² There is no suggestion that the introduction of new s 10AA in 2005 was intended to alter in some way the approach previously adopted by the New South Wales Supreme Court.

A question of characterisation

34 Whether land is being used for the dominant purpose of maintaining animals for their sale or the sale of their natural increase or bodily produce is a question of characterisation of the use or uses to which the land is put.⁵³ The proper approach is to consider the amount of land used for any purpose, the nature and extent and intensity of the various uses which are taking place, and the time and labour and resources spent in using the land.⁵⁴ In some cases, the financial gain from a given activity may be an indicator of predominance.⁵⁵ And in all cases one should not ignore the conclusion reached by an objective observer who is viewing the land as a whole.⁵⁶

35 Where land has more than one use, for a given use to be dominant it must exhibit such predominance as to impart to the whole of the land the necessary exempting character. Thus, in *Abbott v Commissioner of Land Tax*, 83 out of 209

51 (1976) 7 ATR 30 at 34.

52 (1976) 7 ATR 30 at 34. See also *Greenville Pty Ltd v Commissioner of Land Tax (NSW)* (1977) 7 ATR 278; *Brown v Commissioner of Land Tax (NSW)* (1977) 7 ATR 642; *Longford Investments Pty Ltd v Commissioner of Land Tax (NSW)* (1978) 8 ATR 656; *Clarke v Commissioner of Land Tax (NSW)* (1980) 11 ATR 794; *Jones v Commissioner of Land Tax (NSW)* (1980) 11 ATR 98.

53 *Council of the City of Newcastle v Royal Newcastle Hospital* (1957) 96 CLR 493 at 515; *Abbott v Commissioner of Land Tax* [1985] VR 164 at 164-165, 165-166, 169-170; *CDPV Pty Ltd v Commissioner of State Revenue* 2017 ATC ¶20-616 at 19,662-19,663 [51].

54 *Chief Commissioner of State Revenue v Metricon Qld Pty Ltd* (2017) 105 ATR 11 at 27 [52], citing *Thomason v Chief Executive, Department of Lands* (1995) 15 QLCR 286 at 303.

55 *Sonter v Commissioner of Land Tax (NSW)* (1976) 7 ATR 30 at 34.

56 *Chief Commissioner of State Revenue v Metricon Qld Pty Ltd* (2017) 105 ATR 11 at 27 [52], citing *Thomason v Chief Executive, Department of Lands* (1995) 15 QLCR 286 at 303.

acres of land were leased to a golf club; the balance of the land was used for grazing and raising animals for sale.⁵⁷ Section 3 of the *Land Tax Act 1958* (Vic) relevantly defined, at that time, lands used for primary production as meaning lands "used primarily for ... the maintenance of animals ... for the purpose of selling them or their natural increase or bodily produce". Lush J observed that in construing the word "primarily" in its application to land which is used partly for an exempt purpose and partly for other purposes it was to be remembered "that the question is whether the whole of the parcel is primarily used for the exempt purpose".⁵⁸ In that respect, it was not sufficient merely to inquire into whether some difference could be discerned between the different uses in order to justify classifying one as the main or predominant use; the "predominance must be of such a degree as to impart a character to the parcel as a whole".⁵⁹ In the case before Lush J there were two substantial activities conducted "side by side".⁶⁰ It followed that it could not be said that the land was being used "primarily" for farming.⁶¹

36 The foregoing analysis applies equally to an application of s 10AA(3)(b) in the case of a parcel of land which is being used for multiple purposes and where there is a need to determine the "dominant" use of the whole parcel.

37 The appellant succeeded in showing that a significant use of the land was animal maintenance for the purpose of selling animals and their produce and progeny. But it did not thereby demonstrate that this was the dominant use of the land – that is, so predominant a use as to impart an exempting character of this

57 [1979] VR 297.

58 *Abbott v Commissioner of Land Tax* [1979] VR 297 at 302.

59 *Abbott v Commissioner of Land Tax* [1979] VR 297 at 302.

60 *Abbott v Commissioner of Land Tax* [1979] VR 297 at 303. See also *Greenville Pty Ltd v Commissioner of Land Tax (NSW)* (1977) 7 ATR 278; *Jones v Commissioner of Land Tax (NSW)* (1980) 11 ATR 98 at 101; *CDPV Pty Ltd v Commissioner of State Revenue* 2017 ATC ¶20-616 at 19,662-19,663 [51]; *Annat Pty Ltd v Commissioner of State Revenue* [2020] VSC 108 at [103]; *Australian Investment & Development Pty Ltd v Commissioner of State Revenue* [2023] VSC 741. To similar effect see *Sonter v Commissioner of Land Tax (NSW)* (1976) 7 ATR 30 at 34-35.

61 The decision of Lush J was upheld by the Full Court of the Supreme Court of Victoria: *Abbott v Commissioner of Land Tax* [1985] VR 164.

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type to the land as a whole. Because the appellant's construction of s 10AA(3)(b) was not to be preferred, the appellant had thus failed to prove its case.⁶²

Disposition

38 For the foregoing reasons the appeal to this Court must be dismissed with costs. It is therefore unnecessary to consider the Commissioner's Notice of Contention, which contended that there were distinct uses of the parcels in issue, and that the dominant use of each parcel was to maintain horses for the purpose of racing.

62 See s 100(3) of the *Taxation Administration Act 1996* (NSW).

39 JAGOT J. Did the Court of Appeal of the Supreme Court of New South Wales (Kirk JA and Simpson A-JA, Griffiths A-JA dissenting) err when it held that two properties owned by the appellant, Godolphin Australia Pty Ltd ("Godolphin"), were not exempt from land tax under s 10AA(3)(b) of the *Land Tax Management Act 1956* (NSW) ("the Act")?⁶³ The answer, explained below, is "no".

40 Section 10AA(3)(b) relevantly provides that "[f]or the purposes of this section, **land used for primary production** means land the dominant use of which is for ... (b) the maintenance of animals ... for the purpose of selling them or their natural increase or bodily produce", with s 10AA(1) providing that "[l]and that is rural land is exempt from taxation if it is land used for primary production".

41 Godolphin contends that Kirk JA and Simpson A-JA erred in construing s 10AA(3)(b) by wrongly applying the requirement of "dominant" to both the use of the land and the purpose for which the land was being used. As Godolphin put it, in s 10AA(3)(b), the relevant use of land is "use ... for ... the maintenance of animals" and the relevant purpose of that use is "for the purpose of selling them or their natural increase or bodily produce" and it is only the use (the maintenance of animals) which must be the dominant use. The purpose (selling animals or their natural increase or bodily produce) need not be dominant. The purpose need only be a purpose, in the sense of a real or material or non-trivial purpose, for the exemption to be engaged.

42 Godolphin's construction should not be accepted. It does not accord with the text or context of the provision or the apparent legislative intention.

Statutory provisions

43 Section 7 of the Act provides that land tax "is to be levied and paid on the taxable value of all land situated in New South Wales which is owned by taxpayers (other than land which is exempt from taxation under this Act)". By s 8, land tax is charged on land as owned at midnight on 31 December in the year preceding the year in which the tax is levied. By s 9, land tax is payable by the owner of land on the taxable value of all the land owned by that owner which is not exempt from taxation under the Act.

44 Section 10(1) identifies land exempted from taxation. It does so by identifying the land that is exempt by reference, variously, to: (a) the identity of the legal or beneficial owner of the land (eg, "land owned by any marketing board ..." (s 10(1)(b)) and "land owned by or in trust for a public health organisation ..." (s 10(1)(c))); (b) the use and occupation of the land by an identified entity (eg, "land owned by or in trust for, and used and occupied solely

63 *Chief Commissioner of State Revenue v Godolphin Australia Pty Ltd* (2023) 115 ATR 490.

by ... an association of employers or employees registered as an organisation ..." (s 10(1)(f)(i)); (c) the use of land for a specified purpose (eg, "land owned by, or in trust for, any club or body of persons, and used primarily and principally for the purposes of any game or sport and not used for the pecuniary profit of the members of that club or body" (s 10(1)(h))); and (d) land that is the subject of certain agreements (eg, "land that is the subject of a conservation agreement ..." (s 10(1)(p1))). When it refers to occupation or use of land, s 10(1) also refers to the descriptive concepts of "solely" (eg, s 10(1)(f)) and "primarily and principally" (eg, s 10(1)(h)).

45 Section 10AA(1) and (2) deal with rural land and land that is not rural land (namely, non-rural land) respectively, with rural land being defined in s 10AA(4) by reference to the zoning of the land, or land not within a zone but which the Chief Commissioner of State Revenue is satisfied is rural land.

46 As noted, by s 10AA(1), "[l]and that is rural land is exempt from taxation if it is land used for primary production". In contrast, by s 10AA(2), land that is not rural land is exempt from taxation if it is land used for primary production and that use of the land: (a) "has a significant and substantial commercial purpose or character"; and (b) "is engaged in for the purpose of profit on a continuous or repetitive basis (whether or not a profit is actually made)".

47 Section 10AA(3) should be identified in full. It provides that:

"For the purposes of this section, ***land used for primary production*** means land the dominant use of which is for –

- (a) cultivation, for the purpose of selling the produce of the cultivation, or
- (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
- (c) commercial fishing (including preparation for that fishing and the storage or preparation of fish or fishing gear) or the commercial farming of fish, molluscs, crustaceans or other aquatic animals, or
- (d) the keeping of bees, for the purpose of selling their honey, or
- (e) a commercial plant nursery, but not a nursery at which the principal cultivation is the maintenance of plants pending their sale to the general public, or
- (f) the propagation for sale of mushrooms, orchids or flowers."

48 Section 10A provides that:

- "(1) If land is used for more than one purpose and each of those purposes is an exempt purpose, the land is exempt from taxation.
- (2) A purpose for which land is used is an *exempt purpose* if land used solely for that purpose would be exempt from taxation because of its use for that purpose."

The concept of use for a purpose

The cases

49 It has rightly been said that "[t]he question whether land is exempt from tax will depend not only upon the particular facts of the case, but also upon the specific wording of the exemption where even subtle changes may spell the difference between exemption and non-exemption".⁶⁴

50 The text and context of s 10AA indicate that, when enacting s 10AA(3), the legislature assumed that "use" of land for a "purpose" was a known concept. That is a correct assumption.

51 The law has dealt with the concept of "use" for a "purpose" over many decades in the context of revenue legislation, including rating and taxing statutes, as well as town planning legislation. The legislative objects of revenue legislation, however, are different from those of town planning legislation. As town planning legislation is concerned with regulating the impacts of the use of land, some caution is appropriate in applying principles from that area of discourse to a revenue statute.

52 In the revenue context, in *Herald & Weekly Times Ltd v Federal Commissioner of Taxation*, Gavan Duffy CJ and Dixon J considered that "[t]he question whether money is expended in and for the production of assessable income cannot be determined by considering only the immediate reason for making a payment and ignoring the purpose with which the liability was incurred".⁶⁵ Starke J also considered that the test was to be answered by the purpose of the payment.⁶⁶ Evatt J said that the relation expressed by the word "for"

⁶⁴ *Leda Manorstead Pty Ltd v Chief Commissioner of State Revenue* (2010) 79 NSWLR 724 at 728 [27].

⁶⁵ (1932) 48 CLR 113 at 118.

⁶⁶ (1932) 48 CLR 113 at 122.

(the production of assessable income) is "indicative of the object or purpose of the taxpayer in incurring the expenses claimed by [them] as a deduction".⁶⁷

53 In *Council of the City of Newcastle v Royal Newcastle Hospital*, a rating case, Kitto J (in dissent) described a use of land as "physical acts by which the land is made to serve some purpose".⁶⁸ Fullagar J (also in dissent⁶⁹) agreed with Kitto J, rejecting the "fallacy" of equating the use of land with the deriving of advantage from land.⁷⁰ Taylor J said:⁷¹

"The word 'used' is, of course, a word of wide import and its meaning in any particular case will depend to a great extent upon the context in which it is employed. The uses to which property of any description may be put are manifold and what will constitute 'use' will depend to a great extent upon the purpose for which it has been acquired or created."

54 In *Randwick Corporation v Rutledge*,⁷² Windeyer J (with whom Dixon CJ and Kitto J agreed⁷³) considered a rating exemption for land used for a public reserve. His Honour referred to the observation of Dixon J in an analogous context that the focus must be "the actual use ... of the land".⁷⁴ Windeyer J also observed that:⁷⁵

"The words 'exclusively' and 'solely' are familiar in fiscal and rating law. Where an exemption from rating depends upon the use of land exclusively for a particular stated purpose, then the use must be for that purpose only. The question arises, for example, when part of the subject land is used for

67 (1932) 48 CLR 113 at 123.

68 (1957) 96 CLR 493 at 508.

69 Subsequently approved in *Minister Administering the Crown Lands Act v NSW Aboriginal Land Council* (2008) 237 CLR 285 at 307 [75].

70 (1957) 96 CLR 493 at 506.

71 (1957) 96 CLR 493 at 515. See also *Ryde Municipal Council v Macquarie University* (1978) 139 CLR 633 at 637.

72 (1959) 102 CLR 54.

73 (1959) 102 CLR 54 at 61.

74 *Stephen v Federal Commissioner of Land Tax* (1930) 45 CLR 122 at 140, quoted in *Randwick Corporation v Rutledge* (1959) 102 CLR 54 at 88.

75 (1959) 102 CLR 54 at 93-94 (citations omitted).

the relevant purpose and another part for a different purpose. The presence of 'exclusively', 'solely', or 'only' always adds emphasis; and is not to be disregarded. When such words are present, it is a question of fact whether the land is being used for any purpose outside the stipulated purpose ... [S]uch words confine the use of the property to the purpose stipulated and prevent any use of it for any purpose, however minor in importance, which is collateral or independent, as distinguished from incidental to the stipulated use. Even without such words, an exemption from rating based upon use or occupation for a particular purpose or in a particular manner can only apply when the property is so used that it can properly be described as used for that purpose or in that manner, any other user being merely incidental, or at least not inconsistent with such main user."

55 In *Commissioner of Land Tax v Christie*,⁷⁶ Bowen JA (with whom Jacobs P agreed⁷⁷) said that "'[u]se' has regard to the purpose to which the land is put".⁷⁸ A person can "use land by keeping it in its virgin state for [their] own special purposes".⁷⁹

56 In *Sonter v Commissioner of Land Tax (NSW)*,⁸⁰ Rath J considered a predecessor provision to s 10AA. The predecessor provision provided an exemption for land used for primary production, which was defined as "land used primarily for", relevantly, "the maintenance of animals ... for the purpose of selling them or their natural increase or bodily produce". While his Honour was satisfied that "a substantial use is made of the ... property for horse and cattle breeding, and for the maintenance of horses and cattle for sale of them and their progeny", the land was also used for a riding school and the maintaining and breeding of horses. The horses bought and sold or used for breeding were also the horses used in the riding school.

57 Rath J explained the case as one of "mixed uses", "not only in the sense of distinct uses on the same land, such as horse and cattle breeding, but also in the sense of the maintenance of the same animals for different purposes, some of which are purposes of primary production and some are not".⁸¹ His Honour

76 [1973] 2 NSWLR 526.

77 [1973] 2 NSWLR 526 at 528.

78 [1973] 2 NSWLR 526 at 533.

79 [1973] 2 NSWLR 526 at 538, citing *Council of the City of Newcastle v Royal Newcastle Hospital* (1959) 100 CLR 1 at 4; [1959] AC 248 at 255.

80 (1976) 7 ATR 30.

81 (1976) 7 ATR 30 at 34.

accepted that financial considerations were relevant to the question of whether the land was used primarily for primary production. He concluded that "[a]ll of those uses that fall within the description of 'the maintenance of animals ... for the purpose of selling them or their natural increase' must be together compared with the uses that do not fall within that description".⁸² On that basis, his Honour considered that the taxpayer had failed to discharge his onus of proof that the exemption applied. In so concluding, Rath J distinguished the facts before him (multiple uses of one parcel of land) from cases where "different parts of land are differently used, or where the use claimed to attract the exemption is of a minor character (as might be the case where land was substantially not used at all)".⁸³ His Honour said that:⁸⁴

"[T]he land is plainly used in a number of ways, and all the uses are substantial. The word 'primarily', as applied to the case, means that those uses are to be weighed and evaluated. There is no particular touchstone that can be used; all circumstances bearing on the degree, extent and intensity of the uses as land uses are to be considered. The question is one of fact and degree, and one to be approached on a broad, commonsense basis."

58 Next, in *Greenville Pty Ltd v Commissioner of Land Tax (NSW)*, Helsham CJ in Eq, in considering the predecessor provision to s 10AA(3)(a), said that "whether land is being used for primary production within the meaning of the definition must be decided by an objective test – the inquiry is an inquiry into actual land use; it is not to be tested by the intention of the owner".⁸⁵ His Honour called for "a broad approach and a commonsense one", saying that to claim an exemption under the Act (which then referred to "land used for primary production" as, relevantly, "land used primarily for ... the cultivation thereof for the purpose of selling the produce of such cultivation") the "owner must be able to point to an activity being conducted on the land that will give the land the character of being mainly used for that activity, or that will enable a person having to decide the matter to say that the land is, in substance and looked at as a whole, being used for an activity that gives rise to an exemption".⁸⁶

82 (1976) 7 ATR 30 at 34.

83 (1976) 7 ATR 30 at 34-35.

84 (1976) 7 ATR 30 at 35.

85 (1977) 7 ATR 278 at 280, quoted with approval in *Ferella v Chief Commissioner of State Revenue* (2014) 96 ATR 875 at 885 [49].

86 (1977) 7 ATR 278 at 279-280.

59 In *Ryde Municipal Council v Macquarie University*,⁸⁷ Gibbs A-CJ explained the concept of a use for a purpose in a rating statute. His Honour said:⁸⁸

"[I]t is now well settled that when an exemption from rates or taxes is given in respect of land used for the purposes of a charity, the exemption is not confined to land used for those purposes the pursuit of which make the body a charity, ie, which give it its character as such. If the land is used for purposes which are 'merely a means to the fulfilment' of the charitable purposes and 'incidental thereto' it is within the exemption. In other words, if the use which the charity makes of the land is 'wholly ancillary to', or 'directly facilitates', the carrying out of its charitable objects, that is sufficient to satisfy the requirements that the premises are used for charitable purposes. If, on the other hand, the use is only 'collateral' or 'additional' to the purposes which give the charity its character as such, the land will not be used for the purposes of the charity."

60 Stephen J also reasoned by reference to the question whether there was any "collateral or independent purpose present".⁸⁹

61 In *Magna Alloys and Research Pty Ltd v Federal Commissioner of Taxation*,⁹⁰ Brennan J considered a provision of the *Income Tax Assessment Act 1936* (Cth) enabling deductions for expenditure, relevantly, "necessarily incurred in carrying on a business for the purpose of gaining or producing [the assessable] income". In that context, his Honour said that "'purpose' is susceptible of ambiguity".⁹¹ It may mean the subjective end the taxpayer wishes to achieve or the objectively determined object the incurring of the expenditure "is apt to achieve".⁹² On this basis, "motive and subjective purpose are states of mind and they are to be distinguished from objective purpose, which is an attribute of a transaction".⁹³ Further, an "objective purpose is attributed to a transaction by reference to all the known circumstances; whereas subjective purpose and motive, being states of mind, are susceptible of proof not by inference alone but also by direct evidence, for a state of mind may be proved by the testimony of [the person] whose state of

87 (1978) 139 CLR 633.

88 (1978) 139 CLR 633 at 643 (citations omitted).

89 (1978) 139 CLR 633 at 651.

90 (1980) 33 ALR 213.

91 (1980) 33 ALR 213 at 215.

92 (1980) 33 ALR 213 at 215.

93 (1980) 33 ALR 213 at 215.

mind is relevant to a fact in issue".⁹⁴ While the legislation takes "the result of a taxpayer's activities as it finds them",⁹⁵ it is the objective purpose of the expenditure which is relevant, albeit that evidence of a person's state of mind might be relevant to the ascertainment of that objective purpose.⁹⁶

62 In *Minister Administering the Crown Lands Act v NSW Aboriginal Land Council*,⁹⁷ Hayne, Heydon, Crennan and Kiefel JJ considered the question whether land was being "lawfully used" in a non-revenue context. Referring to the reasoning of each of Kitto J and Fullagar J in *Royal Newcastle Hospital*, their Honours said that "recurring physical acts on ... land, by which the land is made to serve some purpose, will usually constitute a use of the land"⁹⁸ and the question required to be asked was "what are the acts, facts, matters and circumstances which are said to show that the land is being used?".⁹⁹

63 In *Leda Manorstead Pty Ltd v Chief Commissioner of State Revenue*,¹⁰⁰ Gzell J, considering s 10AA(2) and (3) of the Act, said that "[d]ominant in its ordinary meaning connotes ruling, prevailing, or most influential. The statute's reference to a dominant use presupposes that land may be used for more than one purpose and requires a determination of which use of the land is the main, chief or paramount use."¹⁰¹ In determining that question, his Honour applied the approach of the Land Appeal Court of Queensland in *Thomason v Chief Executive, Department of Lands*, namely that "the proper approach to be taken when ascertaining the dominant use of land is to consider such matters as the amount of land actually used for any purpose, the nature and extent and intensity of the various uses of the land, the extent to which land is used for activities which are incidental to a common business or industry of a type specified ... the extent to

94 (1980) 33 ALR 213 at 215.

95 *Tweddle v Federal Commissioner of Taxation* (1942) 180 CLR 1 at 7. See also *Magna Alloys and Research Pty Ltd v Federal Commissioner of Taxation* (1980) 33 ALR 213 at 222.

96 (1980) 33 ALR 213 at 224-225. See also at 236-237.

97 (2008) 237 CLR 285.

98 (2008) 237 CLR 285 at 306 [69] (footnote omitted).

99 (2008) 237 CLR 285 at 307 [75].

100 (2010) 79 NSWLR 724.

101 (2010) 79 NSWLR 724 at 734 [69]. See also *Federal Commissioner of Taxation v Spotless Services Ltd* (1996) 186 CLR 404 at 416, 423; *Leppington Pastoral Co Pty Ltd v Chief Commissioner of State Revenue* (2017) 104 ATR 820 at 849 [152]-[153].

which land is used for purposes which are unrelated to each other, and the time and labour and resources spent in using the land for each purpose. When undertaking this exercise, one cannot ignore the conclusion that an objective observer would reach from viewing the land as a whole."¹⁰²

64 In the appeal from Gzell J, in *Leda Manorstead Pty Ltd v Chief Commissioner of State Revenue*,¹⁰³ Allsop P (with whom Campbell and Whealy JJA agreed¹⁰⁴) found nothing in the extrinsic material relevant to the insertion of s 10AA into the Act as justifying approaching the provision "in some beneficial fashion striving to expand the reach of the exemption or to narrow the taxing operation of the section according to strict language. More particularly, there is nothing in the purpose of the legislation, drawn from its words and context or from the secondary material insofar as that addresses mischief to require used 'for' to be limited to use of land which is producing beneficial or commercial return".¹⁰⁵

65 In *Leppington Pastoral Co Pty Ltd v Chief Commissioner of State Revenue*,¹⁰⁶ White J considered the application of s 10AA(3) to land used for multiple purposes. White J said that:¹⁰⁷

"In this case, three competing uses are to be considered. The question is not simply whether the primary production use is the chief use, being of a greater scale, intensity, character or importance than either of the other two competing uses, but whether having regard to both competing uses, it is the use that dominates.

Section 10AA(3) requires weighing the nature and intensity of the competing uses, the physical areas over which they are conducted, the time and labour spent in conducting the different uses, the money spent or assets deployed in each use and the value derived or to be derived from it."

102 (2010) 79 NSWLR 724 at 735 [76], quoting (1995) 15 QLCR 286 at 303.

103 (2011) 85 ATR 775.

104 (2011) 85 ATR 775 at 788 [47], [52].

105 (2011) 85 ATR 775 at 785 [28].

106 (2017) 104 ATR 820.

107 (2017) 104 ATR 820 at 850 [157]-[158].

66 In *Chief Commissioner of State Revenue v Metricon Qld Pty Ltd*,¹⁰⁸ Barrett A-JA (with whom Macfarlan and Ward JJA agreed¹⁰⁹) reviewed these and other cases. Having done so, Barrett A-JA made these points: (a) "[e]xamination of 'activities undertaken upon the land in question' is thus central to identification of 'use'";¹¹⁰ (b) "s 10AA is concerned with 'use' at large rather than 'use' by any particular person";¹¹¹ (c) "[t]he expression 'dominant use' [in s 10AA(3)] has regard to quantification of uses within paras (a) to (f) as against uses that are not within those paragraphs";¹¹² and, (d) the context surrounding s 10AA(3) points to the "physical concept of land" as relevant to the provision, rather than "land" meaning estates or interests in land as defined in s 21 of the *Interpretation Act 1987* (NSW).¹¹³

The principles

67 Several propositions emerge from these cases which should be accepted as the foundation for the contemporary incarnation of the exemptions in the Act. First, close attention to the precise terms of the exempting provision is required. Second, the accepted orthodoxy in which the Act was enacted and has been amended is that use of land is for a purpose. Third, in the ordinary case, the question is one of identifying the physical acts conducted on the land by which the land is made to serve some purpose. Fourth, the question of the use of land for a purpose is one of objective fact to be determined in all relevant circumstances, but particularly the degree, extent and intensity of the physical activities on the land. Fifth, as an objective fact, determined in all relevant circumstances, the same land may be used for more than one purpose. Sixth, in determining the objective fact whether the same land is being used for more than one purpose it may be necessary to consider if the various physical activities conducted on the land, on the one hand, are wholly ancillary to or directly facilitative of a single purpose or, on the other hand, serve an additional, independent or collateral purpose. If the former, the correct characterisation will be that the land is being used for one purpose. If the latter, the correct characterisation will be that the land is being used for more than one

108 (2017) 105 ATR 11.

109 (2017) 105 ATR 11 at 14 [1], [2].

110 (2017) 105 ATR 11 at 25 [46].

111 (2017) 105 ATR 11 at 25 [47].

112 (2017) 105 ATR 11 at 26 [48].

113 (2017) 105 ATR 11 at 27 [55]. Section 21(1) of the *Interpretation Act 1987* (NSW) (now Sch 4) defined "land" as including "messuages, tenements and hereditaments, corporeal and incorporeal, of any tenure or description, and whatever may be the estate or interest therein".

purpose. Seventh, and finally, where the same land is being used for more than one purpose, the question whether the use of the land is "solely", "primarily and principally" or "dominantly" for the specified exempt matter requires a comparison between such uses (being for the specified statutory exemptions) and other uses (not being for the specified statutory exemptions) to ascertain whether the former is the main, chief or paramount use for purpose.

68 Other matters are also relevant to the construction of s 10AA of the Act.

69 Before the *State Revenue Legislation Further Amendment Act 2005* (NSW) was enacted, the Act did not contain s 10AA. The exemption from land tax for "land used for primary production", a term defined in s 3(1), was in s 10(1)(p). The definition referred to "land used primarily for" specified matters, one of which, in para (b) of the definition, was "the maintenance of animals (including birds), whether wild or domesticated, for the purpose of selling them or their natural increase or bodily produce". The *State Revenue Legislation Further Amendment Act* omitted this definition and s 10(1)(p), replacing them with s 10AA.¹¹⁴

70 As noted, s 10AA distinguishes between rural land and non-rural land. It imposes additional requirements for exemption on non-rural land in s 10AA(2). To be exempt, non-rural land must not only be land used for primary production but also satisfy the requirements of that use of land having "a significant and substantial commercial purpose or character" and being "engaged in for the purpose of profit on a continuous or repetitive basis (whether or not a profit is actually made)".

71 The Second Reading Speech for the *State Revenue Legislation Further Amendment Bill 2005* (NSW) explains the object sought to be achieved by the requirement for the "dominant use", the distinction between rural and non-rural land in s 10AA, and the additional requirements imposed on non-rural land for it to be exempt from land tax. The relevant Minister said:¹¹⁵

"Land tax for rural lands for genuine farm purposes is important. We are closing the loophole that has emerged. A developer buys a parcel of rural land from a genuine farmer and organises rezoning to allow subdivision for residential, commercial or industrial use. Under the current legislation all he or she has to do to retain the land tax exemption that applied previously to the land is to ensure that it is fenced, run some farm animals, periodically sell some of them and buy some replacements. The land is then subdivided

114 *State Revenue Legislation Further Amendment Act 2005* (NSW), Sch 4, items 1, 5, 8.

115 New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 29 November 2005 at 20063-20064.

in stages. Fences are moved back so that the remaining area of subdivided land can continue to be used for primary production. This process continues until all of the land is subdivided and sold.

The only parcels of land on which land tax is ever paid by the subdivider are the subdivided blocks created during the year that have not been sold on 31 December. 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 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."

72 Insofar as the concept of "dominant use" is concerned, this explanation accords precisely with the seventh proposition above – that where the same land is used for more than one purpose the question whether the dominant use of the land is for the specified exempt matter in s 10AA(3)(a) to (f) requires a comparison between such uses (for the specified exempt matter in s 10AA(3)(a) to (f)) and other uses (not being for the specified exempt matter in s 10AA(3)(a) to (f)) to ascertain whether the former is the main, chief or paramount use.

73 Further, it is apparent from s 10AA(2)(b) that land that is not rural land may be land used for primary production as identified in s 10AA(3) and satisfy the additional requirements of s 10AA(2)(a) and (b) ("whether or not a profit is actually made" from that use, that is, the use of primary production). The provision is not saying that the making of a profit or not, or other financial or economic considerations associated with the uses of the non-rural land, are immaterial. It is saying only that s 10AA(2) can be satisfied whether or not the use of the non-rural land for primary production is profitable. This necessarily indicates that rural land may also be land used for primary production as identified in s 10AA(3) whether or not a profit is made from that use. This accords precisely with the observation of Allsop P in *Leda Manorstead Pty Ltd v Chief Commissioner of State Revenue* that the *State Revenue Legislation Further Amendment Act* – seeking to address the mischief of sub-s (2) – did not involve limiting the exemption to land producing a commercial return.¹¹⁶

74 It is also relevant that s 10AA(1) and (2) create different regimes for rural and non-rural land. While many of the matters specified in s 10AA(3)(a) to (f)

116 (2011) 85 ATR 775 at 785 [28].

require the "selling" or "sale" of produce, for rural land it is not required that the use have a "significant and substantial commercial purpose or character" or that the use be "engaged in for the purpose of profit on a continuous or repetitive basis (whether or not a profit is actually made)". Those additional requirements apply only to non-rural land as specified in s 10AA(2). Again, however, the fact that rural land is not required to satisfy these additional requirements does not mean that the commercial significance or substantiality of the uses of the land, or their profitability, are irrelevant to and therefore prohibited from being taken into account for rural land under s 10AA(3).

75 Finally, s 10A, reflecting the discussion above, explicitly recognises that land may be used for more than one purpose. Section 10A provides an additional class of exemption. It makes clear in s 10A(1) 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. By s 10A(2), a purpose for which land is used is an exempt purpose if land used solely for that purpose would be exempt from taxation because of its use for that purpose. In other words, s 10A(2) directs that for the purpose of s 10A(1) it be asked (contrary to the fact) if the use would be exempt assuming the land was used solely for each of the purposes for which it is in fact used. If so, each such use of the land is then exempt. If applicable, s 10A operates on its own terms, irrespective of whether the land is in fact used "solely", "primarily and principally" or "dominantly" for one or other exempt purpose.

76 With these matters in mind, the proper construction of s 10AA(3) may be addressed.

Construction of s 10AA(3)

77 It is a mistake to proceed on the basis, as Godolphin did, that the relevant use of land (which must be the dominant use) is "the maintenance of animals" and that the relevant purpose of this use (which need not be a dominant purpose) is "the purpose of selling them or their natural increase or bodily produce". This approach fails to recognise that each of s 10AA(3)(a) to (f) is a composite phrase which is incapable of sensible disaggregation. As the discussion above exposes, the formulation of the exemptions reflects the long history of the legislation. Nothing can be drawn from the fact that, for example, each of s 10AA(3)(a), (b) and (d) uses a formula of "land the dominant use of which is for ... [specified matter], for the purpose of selling ..." whereas, in contrast, each of s 10AA(3)(c), (e) and (f) does not use the formula "for the purpose of selling ...". The differences in formulation are not to be understood as meaning that, for example, in s 10AA(3)(a), (b) and (d) the required dominant uses, respectively, are "cultivation", "the maintenance of animals (including birds)", and "the keeping of bees" and the required purposes are, respectively, "selling the produce of the cultivation", "selling them or their natural increase or bodily produce", or "selling their honey". No such distinction makes sense in the overall context of the provision.

78 Take s 10AA(3)(f) as an example. In context, it refers to "land the dominant use of which is for ... the propagation for sale of mushrooms, orchids or flowers". On Godolphin's approach, if this provision had said "land the dominant use of which is for ... the propagation of mushrooms, orchids or flowers, for the purpose of selling", its meaning would be radically different. On Godolphin's approach, s 10AA(3)(f), as enacted, means that the dominant use of the land must be for the propagation for sale of mushrooms, orchids or flowers, but if it were worded using the formula used in s 10AA(3)(a), (b) and (d) the exemption would apply if the dominant use of the land was for the propagation of mushrooms, orchids or flowers and a (non-dominant) purpose of that dominant use was sale of the mushrooms, orchids or flowers. There is no rational reason for such a different result. The different result can only arise by reason of a bifurcation of the use from the purpose of that use. That bifurcation is inconsistent with the long history of the legislation and its interpretation in which a use (be it sole, primary and principal, dominant or otherwise) is for a purpose.

79 Accordingly, the majority in the Court of Appeal did not err in their construction of s 10AA(3). Kirk JA was correct to say that:¹¹⁷

"The word 'dominant' comes before 'use'. But the phrase refers to dominant use *for* something. What then follows in each of the six paragraphs is identification of both a use and a purpose. The dominant use must be for one of the identified purposes. It is not appropriate to separate out the notions of use and purpose in the manner suggested by Godolphin ...

Thus the question here is not simply whether the use of maintenance of animals – which both sides accept to be the dominant use of the properties – can then be characterised as for *a* purpose of sale. Rather, the question is whether that use of the properties can be characterised as having the character of a dominant use for the purpose of selling animals, progeny and produce".

80 Simpson A-JA was also correct to reject Godolphin's approach to s 10AA(3) and to "proceed on the basis that s 10AA(3)(b) is directed to a single concept, expressed by Kirk JA as 'use-for-the-purpose'".¹¹⁸

117 *Chief Commissioner of State Revenue v Godolphin Australia Pty Ltd* (2023) 115 ATR 490 at 497-498 [31]-[32] (emphasis in original).

118 *Chief Commissioner of State Revenue v Godolphin Australia Pty Ltd* (2023) 115 ATR 490 at 514 [132].

Other matters

81 While this is sufficient to dispose of Godolphin's appeal – Godolphin having accepted in oral argument that if it did not succeed on the construction issue (ground one of its appeal) it could not succeed on the characterisation of use issue (ground two of its appeal) – it is appropriate to make a few further observations.

82 The fact that Godolphin subjectively operated on the basis that it bred horses to race and raced horses to breed – describing its business as "a 'breed to race, race to breed' enterprise where the breeding arm supply the stock for the racing stable, the stable then proves them on the track that creates the supply of high end bloodstock assets of stallions and breeding females" – does not mean that, for s 10AA(3), it was using the land for one integrated purpose. The necessary focus is not Godolphin's conception of its business model, but rather the objective features of the physical activities being conducted on the two properties.¹¹⁹

83 Woodlands, a property of about 2420 hectares, was the location in which breeding mares were kept, foals were born, and foals, as well as some yearlings, were kept. Foals born on Woodlands, when yearlings, were mostly transferred to Kelvinside.

84 Kelvinside, a property of about 907 hectares, had 20 stallion boxes and a stallion covering area. During the breeding season, Godolphin generally had 10 to 14 stallions located on Kelvinside, all of which had completed their racing career. These stallion-related activities occupied only about 10% of one of the four parcels comprised in Kelvinside. Otherwise, Kelvinside had areas and facilities used for educating the yearlings, and to enable them to undertake some preliminary training for racing, including a practice racecourse. In addition, a series of paddocks on Kelvinside were used for "spelling" racehorses, that is, resting them after periods of racing.

85 The horses Godolphin sold tended to be less successful in their first year of racing, as necessary to maintain the "horse count and quality" for racing purposes. The primary judge found that "much of the use of the Land [Woodlands and Kelvinside] is devoted to breeding, training and preparation of the horses for racing".¹²⁰ The average revenue from the sale of covering services and sale of

119 eg, *Greenville Pty Ltd v Commissioner of Land Tax (NSW)* (1977) 7 ATR 278 at 279-280. See also *Abbott v Commissioner of Land Tax* [1979] VR 297 at 300; *Abbott v Commissioner of Land Tax* [1985] VR 164 at 170.

120 *Godolphin Australia Pty Ltd v Chief Commissioner of State Revenue* (2022) 114 ATR 597 at 636 [258].

horses was about \$34.9 million. The average from racing prizemoney was about \$19.6 million.

86 It is the terms of the statutory exemptions which determine the relevant use for purpose, and it is the objective features of the physical activities on the land which determine the character of the actual use for purpose being conducted on the land. If the objective features of the physical activities on the land do not constitute an exempt use for purpose, then the subjective intentions of the taxpayer as to its mode of operation are not to the point. In this case, for example, there is no exempt use for purpose of integrated racehorse breeding for sale and stallion coverage and racing. In the context of the statutory exemption, Godolphin's mode of operation could never be characterised as a single use for the purpose of the maintenance of animals for the purpose of selling them or their natural increase or bodily produce. On the facts, the breeding for racing purpose could never be described as "merely a means to the fulfilment" of or merely "incidental" or "wholly ancillary" to the exempt purpose. The maintenance of the horses for racing purposes was manifestly its own use for its own purpose and it could not be said that the exempt use for purpose was dominant compared to that use.

87 While Kirk JA found that the activities in pursuit of the racing purpose – not the sale purpose – constituted the dominant use of the land at Kelvinside and Woodlands in the relevant tax years,¹²¹ Simpson A-JA determined the matter on the basis that Godolphin had not discharged its onus of proving that the dominant use of the land was the exempt purpose of sale as opposed to the non-exempt purpose of racing.¹²² Both conclusions are within the reasonable evaluative range and neither conclusion involves error. What cannot be accepted is Godolphin's case as to the proper construction of s 10AA(3) or, to the extent it might have been raised as a separate argument, that, as there was a single use of the land for an exempt and a non-exempt purpose, it was not necessary for Godolphin to prove that the exempt use for purpose was the dominant use for purpose compared to the non-exempt use for purpose.

88 It is also not necessary to embrace the respondent's argument that the word "for" in the opening part of s 10AA(3) ("land the dominant use of which is for") means "purpose" so that s 10AA(3)(b) should be understood to mean "***land used for primary production*** means land the dominant use of which is for ... the purpose of the maintenance of animals ... for the purpose of selling them or their natural increase or bodily produce". The respondent described this as a "double purpose requirement" with the required dominant use being for the purpose of the genus

121 *Chief Commissioner of State Revenue v Godolphin Australia Pty Ltd* (2023) 115 ATR 490 at 512 [125].

122 *Chief Commissioner of State Revenue v Godolphin Australia Pty Ltd* (2023) 115 ATR 490 at 516 [147].

"the maintenance of animals" and the purpose of the species "for the purpose of selling them or their natural increase or bodily produce".

89 This conception of the one use for the one purpose, incorporating a genus and a species of purpose, is not inaccurate, but may be an unnecessary and inutile distraction. The genus/species distinction was created for the purpose of determining the limits on the continuation of an "existing use" in planning law, being a use previously permissible but now prohibited.¹²³ As Kirk JA noted in the present matter, planning law cases have been accepted to "throw some light on construction of s 10AA(3) of the Act, although it must of course be borne in mind that the words used must be understood in their particular context".¹²⁴ That caution is necessary. The genus/species distinction in planning law facilitates analysis of the question whether a use, once permissible and now prohibited, remains an "existing use" protected by typical provisions in planning laws enabling such uses to continue but not to transform over time into something new. The distinction is founded on the notion that, provided the physical activities being conducted on the land remain within the overall genus of the use for purpose, that use for purpose is continuing and thus lawful even if the species of the use for purpose might have changed over time. As McHugh JA explained:¹²⁵

"Because 'existing use' provisions are incompatible with the main objects of the legislation of which they form part, the courts have had to develop principles which reconcile the right of owners to have the full benefit of the existing use of land with the right of the local authority to enforce the conflicting objectives of town planning legislation. The courts have done so by refusing to categorise an 'existing use' so narrowly that natural changes in the method of using the land or carrying on a business or industry will render an existing use right valueless. At the same time, the courts have been concerned not to categorise the purpose of an existing use so widely that the land or premises could be used for a prohibited purpose which was not part of its use at the commencement of the legislation."

90 The necessity for such a resolution is foreign to revenue legislation, including the Act. Irrespective of the linguistic formula used in s 10AA(3)(b) (but not, as has been pointed out, in s 10AA(3)(f), for example) it is legitimate to

123 See *Royal Agricultural Society of New South Wales v Sydney City Council* (1987) 61 LGRA 305 at 310; *North Sydney Municipal Council v Boyts Radio & Electrical Pty Ltd* (1989) 16 NSWLR 50 at 59.

124 *Chief Commissioner of State Revenue v Godolphin Australia Pty Ltd* (2023) 115 ATR 490 at 496 [23].

125 *Royal Agricultural Society of New South Wales v Sydney City Council* (1987) 61 LGRA 305 at 309-310.

33.

conceive of s 10AA(3)(b) as creating a single exempt use for purpose, being the purpose of the maintenance of animals to sell them, their natural increase, or their bodily produce, provided that single exempt use for purpose is the dominant one compared to other, non-exempt, use for purposes of the same land. Godolphin's use of its land was not within that single exempt use for purpose in the relevant taxing years.

91 For these reasons, the appeal should be dismissed with costs.