



HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 05 Mar 2024 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 27F - Respondent's Outline of oral argument
Filing party: Respondent
Date filed: 05 Mar 2024

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**

No. S130 of 2023

BETWEEN

Godolphin Australia Pty Ltd ACN 093921021

Appellant

and

Chief Commissioner of State Revenue

Respondent

10

**OUTLINE OF ORAL SUBMISSIONS OF THE RESPONDENT
(COMMISSIONER)**

Part I: Certification

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

Part II: Outline of propositions

The facts (RS [13]-[22])

1. ***Use of the 2 Woodlands parcels:*** Breeding mares are kept on Woodlands. Foals are born, weaned, trained, and commence their education and development there. Foals grow to yearlings and move to Kelvinside. There are very few sales of foals or yearlings as such: J[29]-[32], [35]; CA[72]-[74]; [BFM pp 5, 48]
- 10 2. ***Use of the 4 Kelvinside parcels:*** The education and preliminary training of yearlings (including by use of a sand racetrack and wide practice barriers) occurs on Kelvinside. Racehorses are ‘spelled’ between races and yearlings between training rotations; approximately 85% of the appellant’s horses spelling in NSW do so at Kelvinside. Stallions are stabled and mares covered by stallions on 10% of one parcel of land. Most stallions are not homebred: J[22], [36], [261]; CA[64]-[65], [75]-[77], [79]; BFM pp4, 32, 48, 53.
3. ***Sales:*** Nomination fees reflect sale of bodily produce. Otherwise, sales tend to occur only after racing potential has been assessed, and are sales of “surplus” horses. Better racing horses are kept, reflecting racing and breeding imperatives: J[127]-[129], [263]-
20 [264]; CA[57]-[62], [71]; BFM pp 29, 34, 57, 58.
4. ***The accounts:*** While only one factor in the task, Kirk JA’s analysis of the appellant’s financial records at CA[82]-[106] is compelling; cf Griffiths AJA at CA[195]-[222].

Construction of s 10AA of the LTMA – Notice of Appeal grounds 2 and 3

5. ***Onus of proof*** (RS[27],[32]): The taxpayer bears the onus of proving that the exemption is satisfied for a given land tax year, on a parcel by parcel basis, in respect to both the establishment of primary facts and the ultimate characterisation exercise of whether the land was “used for primary production” within ss 10AA(1) and (3).
6. ***“Use”*** (RS [29]-[30], [36]-[37]): Assessing “use” requires close factual attention to the activities actually and deliberately being conducted (or not conducted) on the land, ie
30 the current tangible and physical deployment of the land for some purpose: *Royal Newcastle Hospital* at 508 (3 JBA p231); *Minister v NSWALC* at [69] (3 JBA pp296-297); *Christie* at 533 (4 JBA p695); *Metricon* at [45]-[46], [49], [61], [63] (4 JBA pp667, 668, 671); *Abret* at [51] (4 JBA p600); CA[24].

7. **Purpose** (RS [34]-[40]): Any use of land will be undertaken for (and cannot rationally be separated from) one or more purposes. Different uses may have the same purpose. The same use may have different purposes: CA[25]-[29].
8. **“Dominant” use** (RS [31], [44], [55], [58]): Where there is more than one activity conducted on the land, one must ask whether this amounts to multiple “uses”. If there is only one use, that use is tested against the purposes identified in (a)-(f) of s 10AA(3).
9. If there are multiple uses, one of which falls within paras (a)-(f), the court must compare that use, in a qualitative and quantitative sense, with the other, non-exempt, uses: *Leda FFC* at [24] (4 JBA p748); *Metricon* at [48] (4 JBA p668). The use falling within paras (a)-(f) must be “dominant”, ie a ruling, governing or commanding use.
10. The characterisation exercise requires weighing the nature and intensity of those competing uses, the physical areas over which they are conducted, the time and labour spent in conducting them, the money or assets deployed in each use and the value derived or to be derived from it: *Leppington* at [156], [158] (4 JBA p783); CA[34]-[37].
11. The one set of activities may be geared to two different purposes and may generate two independent uses, even if the uses are mutually supporting: CA [38], [115]; *Sonter* at 34 (4 JBA p877), a case which also usefully demonstrates the onus at work.
12. **Section 10AA(3)(b)** (RS [41]-[44]): This paragraph contains a double purpose requirement: “dominant use ... for ... the maintenance of animals ... for the purpose of selling them [etc]”. The first purpose (maintenance of animals) is the genus. The second purpose (sale) is the species. Both must be satisfied. To amount to the second purpose, sale must be the purpose, not just a purpose: CA[31]-[32]; [157]-[159]. The appellant’s notice of contention below (grounds 2 and 3 of the appeal here) must be rejected.
13. **Context and history:** Section 10A confirms that, where land is used for multiple purposes, the fact that one of those purposes is an exempt purpose is insufficient to qualify for the exemption (RS [48]-[51]). The history of s 10AA, from pre-2005 authorities (notably inconsistent with the appellant’s interpretation) to the 2005 enactment of s 10AA, supports the Commissioner’s construction (RS [52]-[64]).
14. **Other flaws in the appellant’s arguments** (RS [45]-[51], [65]-[68]): The appellant’s construction of s 10AA(3)(b) is uncertain; represents a rewriting of the provision; and, as regards statutory purpose, does not advance the evident policy objectives of s 10AA(3): to encourage commercial farming (primary production) activities.

Application to facts – Notice of Appeal ground 4 (RS [67], [70]-[72])

15. **Primary judge:** The primary judge reasoned that there was a single use of all the land, being an integrated operation, in which (i) the maintenance of horses was conducted in pursuit of both the racing purpose and the sale purpose, but (ii) the racing purpose was ancillary to, and subsumed by, the sale purpose: PJ[258], [270]; CA[41]-[42], [92]-[93].
16. **The notice of appeal below:** Kirk JA posed the question correctly at CA[40]: was the use of the land for the racing purpose (**Racing Use**) properly characterised as ancillary and subservient to the use of the land for the sale purpose (**Sale Use**), or was it an independent use? If the latter, had the appellant proved that the Sale Use dominated over the Racing Use, having regard to all relevant factors? Simpson JA’s methodology aligned with this as, for her Honour, the answer was the same “[w]hether the question is framed in terms of ‘dominant use for the purpose’ or ‘dominant purpose’”: CA[156].
17. **Errors made at trial:** Kirk JA correctly found that the primary judge gave undue weight to some factors and insufficient weight to others. Properly understood, the Racing Use was independent from, and not merely ancillary to, the Sale Use: CA[121],[125]. The appellant failed to establish that the latter use dominated over the former, which was enough for the Commissioner to succeed: CA[160]-[161] (Simpson JA). Kirk JA went further than was strictly necessary by finding that the Racing Use dominated over the Sale Use: CA[125].
- 20 **Notice of Contention** (RS [73]-[81])
18. Griffiths AJA (at CA[164], [195], [223]), and Simpson AJA (less clearly so at CA [140]), by emphasising the integrated nature of the appellant’s operation, appeared to identify a single, dominant, use of the land, albeit for dual purposes.
19. If there was but a single use, the appellant failed for reasons given by Kirk JA culminating in CA[125] (no single use in which racing was merely subordinate to the sale purpose) and Simpson AJA at CA[160]-[161] (no proof that the sale purpose predominated in the single use).
20. However, the alternative characterisation, adopting the fuller analysis of Kirk JA at CA[40], [92]-[93], [109]-[110], [115], [117]-[118], [125], is that there were two uses of the land, and the appellant failed because it could not prove that the Sale Use was the predominant use.



5 March 2024

Justin Gleeson SC