



Précis Paper

The Primary Production Exemption to Land Tax in NSW

This presentation discusses the test for attracting the primary production exemption to land tax in NSW and the recent case of *Bellbird Ridge Pty Ltd as trustee for Bellbird Ridge Unit Trust v Chief Commissioner of State Revenue* [2016] NSWSC 1637.

Discussion Includes

- Background and material facts
- Land tax scheme and primary production exemption
- The dominant purpose test
- Significant and substantial commercial purpose
- Factual considerations
- Costs

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The Primary Production Exemption to Land Tax in NSW

1. In this edition of BenchTV, Elliot Hyde (Barrister, Banco Chambers, Sydney) and Ian Benson (Solicitor, AR Conolly and Company) discuss the recent decision of *Bellbird Ridge Pty Ltd as trustee for Bellbird Ridge Unit Trust v Chief Commissioner of State Revenue* [2016] NSWSC 1637 and the primary production exemption for land tax.

Background and Material Facts

2. Bellbird Ridge, a property developer, purchased a large tract of rural land outside of Cessnock in the Hunter Valley in NSW. Bellbird bought the land with the intention of redeveloping it for residential housing in the future. However in the meantime, the land was used by a farmer, Mr Bailey, for the grazing and breeding of cattle, pursuant to an agistment agreement with Bellbird Ridge.
3. The issue in the case was whether the use of the land attracted the primary production exemption from land tax. For 2011, the only issue was whether that use of the land for the grazing of cattle was the dominant use of the land. If so, it attracted the operation of s 10AA(1) of the *Land Tax Management Act 1956* (NSW) and was considered land used for primary production.
4. For 2012-2015, Bellbird Ridge also had to satisfy the requirements of s 10AA(2) of the Act. Under that provision, it had to show not only that the primary production use was the dominant use of the land, but also that that use had a significant and substantial commercial purpose or character, and was engaged in for the purpose of profit on a continuous or repetitive basis.

Land Tax Scheme and Primary Production Exemption

5. The NSW land tax scheme, set out in the *Land Tax Management Act 1956* (NSW), provides an exemption from land tax for primary production, so that farmers who truly are undertaking farming activities are exempt. There are a number of threshold tests that must be established by the taxpayer in order to meet the exemption. Specifically, if the dominant use of the land is primary production, and that dominant use has a significant and substantial commercial purpose, then the land will be exempt from the land tax provisions.
6. The second requirement, that the use of the land have a significant and substantial commercial purpose, represents a narrowing of the exemption. It requires the taxpayer to

show that the primary production is more than just a hobby farm or an interest, but has a potential to make a profit on an ongoing basis.

Arguments and Determination

7. In this case, the Commissioner argued that the dominant purpose of the land was in fact residential subdivision. There was also consideration of whether the activities were sufficiently significant and substantial to come within the exemption. The Commissioner focused heavily on how much time and money had been spent on seeking to obtain the redevelopment and planning permissions, as well as the revenue that was being earned by the farmer.
8. Relevant considerations in this case also included the farmer's financial activities, the number of cattle, the return from the cattle, and the use of the land by the farmer.
9. Applying his previous decision in *Metricon Qld Pty Ltd v Chief Commissioner of State Revenue* (No. 2) [2016] NSWSC 332, White J found that, as in *Metricon*, when analysed on a year-by-year basis, the dominant use of the land was primary production activities. However, White J was not satisfied that the primary production activities of Mr Bailey were significant and substantial.
10. In determining what is the dominant use, it is a matter of looking at the competing uses and determining which use is dominant. Here, although some consultants had visited the land and conducted surveys, the overwhelming evidence was that the dominant use of the land was for primary production, as it was being used for farming every day. White J looked at the factual evidence as to how much time and effort was spent on primary production, and contrasted this with the amount of time and effort spent on the subdivision.
11. Ultimately, Bellbird was successful in establishing the exemption for the 2011 year, where all that was required was to establish the dominant use of the land. However, for 2012 onwards, where it was necessary to show that the dominant use had a significant and substantial commercial purpose, Bellbird was unsuccessful. In making the latter determination, White J looked at the financial returns of Mr Bailey and determined the profits were not large or sufficient to become substantial and significant. He also looked at the state of the property, whether the pastures had been improved by Mr Bailey, and the breeding program.
12. These determinations are fact-based and each case will be judged according to its specific circumstances. It is therefore difficult to predict future cases based upon the facts of this case as the considerations involved entail a subjective analysis.

13. The parties in this case reached an agreement whereby Bellbird would pay 60 percent of the costs of the Commissioner. This took into account the fact that Bellbird was successful in establishing the exemption for 2011, and also that it had established that the dominant use was for primary production.
14. Mr Hyde advised practitioners to look at the farming activities that are being undertaken, and have particular regard to the financial returns to the farmer in question. If a taxpayer is seeking to obtain the benefit of the exemption, they must show that the farming activities are either profitable or have the ability to become profitable in the short to medium term.

BIOGRAPHY

Elliot Hyde

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Elliot Hyde was admitted as a solicitor in 1997 before being called to the NSW Bar in 2005. Elliot previously worked as a Senior Associated in commercial litigation at both Minter Ellison and Deacons (now Norton Rose Fulbright). He has extensive experience in corporations, property, trade practices and commercial law generally, as well as in equity and class actions. Elliot has also served for a number of years on the Bar Association's bar examination working committee.

Ian Benson

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Ian Benson is a solicitor at AR Conolly & Company and holds a First Class Honours degree in law.

BIBLIOGRAPHY

Focus Case

Bellbird Ridge Pty Ltd as trustee for Bellbird Ridge Unit Trust v Chief Commissioner of State Revenue [2016] NSWSC 1637

Benchmark Link

https://benchmarkinc.com.au/benchmark/banking/benchmark_24-11-2016_banking.pdf

Judgment Link

<https://www.caselaw.nsw.gov.au/decision/5832280be4b058596cba193a>

Cases

Metricon Qld Pty Ltd v Chief Commissioner of State Revenue (No. 2) [2016] NSWSC 332

Legislation

Land Tax Management Act 1956 (NSW)