



Administrative Decisions Tribunal  
New South Wales

## Land Tax Decision Summaries

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# Tribunal Decision Summaries

## *Primary Production Land*

### [Caruana v Chief Commissioner of State Revenue \[2011\] NSWADT 183](#)

**Date of Decision:** 02 August 2011

**Decision:** The applicants sought a review of the decision of the Chief Commissioner of State Revenue ("Chief Commissioner") to disallow their objection to land tax assessments issued for the 2004 – 2009 land tax years pursuant to the *Land Tax Management Act 1956* ("the LTMA") in respect of the applicants' properties at Sutherland Road, Londonderry ("the Londonderry property") and Hume Highway, Lansvale ("the Lansvale property"). At issue in these proceedings was whether the primary production exemption under s. 10(1)(p) of the LTMA (for the 2004 and 2005 land tax years) and under s. 10AA of the LTMA (for the 2006 to 2009 land tax years) should have applied in respect of the Londonderry property and the Lansvale property.

The Tribunal affirmed the decision of the Chief Commissioner that the primary production exemption was not available in respect of the Londonderry property and the Lansvale property in the relevant tax years.

*Catchwords:-*

Primary production exemption - meaning of "use" - whether intention is sufficient - meaning of "maintenance of animals" exemption- relevance of ownership of other land .

*Select this hyperlink to go to the summary:-*

[Caruana v Chief Commissioner of State Revenue \[2011\] NSWADT 183](#)

### [Ashleigh Developments Pty Ltd v Chief Commissioner of State Revenue \[2011\] NSWADT 250](#)

**Date of Decision:** 02 November 2011

**Decision:** Assessments of land tax for 2007, 2008, 2009 and 2010 confirmed.

As a preliminary matter, Judicial Member Frost determined that:

- the commerciality and profit tests in s 10AA(2) should be determined by reference to the entirety of the farmer's farming land, that is, **including** the additional 280 hectares used in conjunction with "the Land"; and
- the dominant use test in s 10AA(3) should be determined by reference to the Land only, that is, **excluding** the additional 280 hectares used in conjunction with "the Land".

Judicial Member Frost concluded that while the use of the Land satisfied the commerciality and profit tests, the dominant use test was not satisfied.

*Catchwords:-*

Land tax - primary production use of land - "dominant use" of land - physical activity on the land undertaken by a person other than the owner of the land - whether "dominant use" is measured only by reference to physical activities conducted "on" the land - whether the primary production use of the land has a "significant and substantial commercial purpose or character" - whether the

primary production use of the land is engaged in "for the purpose of profit on a continuous or repetitive basis"

Select this hyperlink to go to the summary:-

[Ashleigh Developments Pty Ltd v Chief Commissioner of State Revenue \[2011\] NSWADT 250](#)

## **Hoxede Pty Ltd ATF the Starr Family Trust v Chief Commissioner of State Revenue [2011] NSWADT 251**

**Date of decision:** 4 November 2011

**Decision:** The applicant sought a review of the decision of the Chief Commissioner of State Revenue ("Chief Commissioner") to disallow their objection to an assessment for land tax for the 2007 to 2009 land tax years in respect of a property situated in Spring Farm ("the subject property").

At issue in these proceedings was whether the primary production exemption under s 10AA of the *Land Tax Management Act 1956* ("the Act") should have applied in respect of the subject property. Judicial Member Block affirmed the decision of the Chief Commissioner that the primary production exemption was not available during the relevant tax years.

*Catchwords:-*

Land Tax – Primary Production Exemption – Rural Land – Dominant Use Test – Significant and Substantial Purpose test – Zoning

Select this hyperlink to go to the summary:-

[Hoxede Pty Ltd as trustee of the Starr Family Trust v Chief Commissioner of State Revenue \[2011\] NSWADT 251](#)

## **Glenworth Valley Pastoral Company Pty Limited v Chief Commissioner of State Revenue [2011] NSWADT 272**

**Date of Decision:** 17 November 2011

**Decision:** Excepting only that the amount assessed must be reduced by the amount assessed for the 2006 land tax year the decision under review is affirmed

### *The agistment issue*

The taxpayer submitted that the agistment of horses on the subject property fell within s.10AA(3)(a) of the LTMA and title to the produce of the cultivation (ie the pasture) passed to the owners of the agisted horses when those horses consumed the pasture on the subject property, meaning that the produce of the cultivation was sold to the owners of the horses within s.10AA(3)(a) of the LTMA.

The Tribunal found that the agistment contracts did not constitute a sale of the cultivated pasture, as the agistment contracts in this case involved more than the mere feeding of the horse. The Tribunal found that the agistment contracts involved other considerations, such as a fee for allowing the horse to be on the land and monitoring its health and well-being. The Tribunal determined that there was no sale of pasture to the owners of the agisted horses as the agistment fees payable by the owners were in no way related to the quantity of pasture consumed by each agisted horse.

The Tribunal considered the decisions in *Jones v Commissioner of Land Tax* 80 ATC 4539 and *Shanahan v Commissioner of Land Tax* 80 ATC 4320 and found that the agistment of horses does not fall within s. 10AA(3)(a) of the LTMA.

The Tribunal concluded that the applicant could not succeed in this case because the actual use of the land for the agistment of horses did not satisfy the test of being the use of land for primary production.

#### The dominant use issue

Based largely on the content on the taxpayer's website, the Tribunal formed the view that an independent observer would conclude that the subject property is used as a holiday resort with numerous recreational facilities, including horse riding tours, camping, kayaking and abseiling.

In relation to the horse riding activities, Judicial Member Block found that it was irrelevant that part of the horse riding activities took place on other land, as horses were made available at the subject property and the horse rides used the services of employees based at the subject property. Therefore, there was no basis for excluding part of the revenue generated from the horse riding activities in determining the dominant use of the subject property.

In relation to the dominant use issue, the Tribunal ultimately found the recreational use was the dominant use of the subject property, and in the alternative, that the taxpayer had failed to discharge the onus of proof.

#### The unusability issue

In relation to the significance of 79% of the land not being unusable for any purpose, Judicial Member Block noted that the decision of Rath J in *Brown v Commissioner of Land Tax* (1977) 7 ATR 642 provided "some measure of support" for the taxpayer's contention that the subject property will have a dominant use of primary production if primary production occurs on a significant, albeit not a major, area of the subject property. However, Judicial Member Block did not consider it necessary to make a finding on the unusability issue.

#### *Catchwords:-*

Land tax – Availability of primary production exemption - Nature of agistment - whether agistment falls within section 10AA of the relevant Act - dominant purpose - whether agricultural purpose dominant - whether land has a dominant purpose where a substantial part is unusable.

*Select this hyperlink to go to the case:-*

[Glenworth Valley Pastoral Company Pty Limited v Chief Commissioner of State Revenue \[2011\] NSWADT 272](#)

## ***Principal Place of Residence***

### **[Kolln v Chief Commissioner of State Revenue \[2011\] NSWADT 127](#)**

**Date of Decision:** 16 May 2011

**Decision:** The applicants sought a review of the decision of the Chief Commissioner of State Revenue ("Chief Commissioner") to disallow their objection to an assessment for

land tax for the land tax years 2005 to 2009 in respect of land situated in Greenpoint Road, Oyster Bay, New South Wales ("the Greenpoint Road property").

At issue in these proceedings was whether the Greenpoint Road property was exempt from land tax in the relevant years under the concession for unoccupied land intended to be the owner's principal place of residence, pursuant to clause 6 of Schedule 1A to the LTMA. Judicial Member Verick upheld the Chief Commissioner's decision that the concession did not apply.

*Catchwords:-*

Land Tax Management Act – principal place of residence – whether property was exempt from land tax in the land tax years under the "concession for unoccupied land intended to be owner's principal place of residence" pursuant to clause 6 of Schedule 1A to the *Land Tax Management Act 1956*

*Select this hyperlink to go to the summary:-*

[Kolln v Chief Commissioner of State Revenue \[2011\] NSWADT 127](#)

## **[Carcary v Chief Commissioner of State Revenue \[2011\] NSWADT 244](#)**

**Date of decision:** 28 October 2011

**Decision:** The applicant sought a review of the decision of the Chief Commissioner of State Revenue ("Chief Commissioner") to disallow her objection to an assessment for land tax for the 2011 land tax year in respect of a property situated in Mayfield, Newcastle ("the Mayfield property").

Judicial Member Verick affirmed the decision of the Chief Commissioner that the principal place of residence ("PPR") exemption pursuant to s10(1)(r) of the *Land Tax Management Act 1956* ("the Act") was not available in respect of the Mayfield property.

*Catchwords:-*

Principal Place of Residence Exemption

*Select this hyperlink to go to the summary:-*

[Carcary v Chief Commissioner of State Revenue \[2011\] NSWADT 244](#)

## ***Trust Property***

### **[J.A.M. Investments Australia Pty Ltd ATF The Geokjian Unit Trust v Chief Commissioner of State Revenue \[2011\] NSWADT 75](#)**

**Date of Decision:** 13 April 2011

**Decision:** The applicant sought judicial review of the Chief Commissioner of State Revenue's (the "Chief Commissioner") decision to disallow its objection to land tax reassessments issued for the 2006, 2007, 2008, 2009 and 2010 land tax years (the "reassessments") pursuant to the *Land Tax Management Act 1956* ("the *LTMA*"). The reassessments were issued pursuant to a determination by the Chief Commissioner that the Geokjian Unit Trust was a "special trust" within s. 3A of the *LTMA*.

The Tribunal found that during the relevant period the unit holders in the Geokjian Unit Trust were not "presently entitled to the income of the Trust".

The Tribunal also found that there was no provision in the Trust Deed which "specifically provides that the beneficiaries of the trust ... are presently entitled to the capital of the trust" as required by s. 3A(3B)(a) of the *LTMA*. Rather, the Tribunal found that the Trust Deed provided for Income Units to be issued, and that the holders of Income Units did not have any entitlement to the capital of the trust.

By finding that the unit holders were not presently entitled to either the income or capital of the Geokjian Unit Trust, the Tribunal held that the land forming part of the Trust Fund was correctly reassessed by the Chief Commissioner as being subject to a "special trust".

The Tribunal determined that the Trust was a special trust, and affirmed the reassessments.

*Catchwords:-*

Land tax – Trust classified as a special trust or a fixed trust.

*Select this hyperlink to go to the summary:-*

[J.A.M. Investments Australia Pty Ltd ATF The Geokjian Unit Trust v Chief Commissioner of State Revenue \[2011\] NSWADT 75](#)

# Appeal Panel Decision Summaries

## Costs

### [Haddad v Chief Commissioner of State Revenue \(RD\) \[2011\] NSWADTAP 46](#)

**Date of Decision:** 10 October 2011

**Decision:** On 12 August 2011, the Administrative Decisions Tribunal Appeal Panel ("the Appeal Panel") delivered a judgement dismissing the application and affirming the decision at first instance to refuse the applicant an exemption from land tax for the 2004 – 2009 land tax years under the principal place of residence exemption in Schedule 1A of the *Land Tax Management Act 1956* ("the Act").

Both parties were invited to apply for their costs and both chose to do so. The appellant was ordered to pay the Chief Commissioner's costs of the appeal as agreed upon or assessed.

The Appeal Panel noted that the making of a costs order in the Administrative Decisions Tribunal is governed by s.88 of the *Administrative Decisions Tribunal Act 1997*.

The Appeal Panel held that as a matter of clear law, the appeal was bound to fail, a factor to be taken into account under s.88(1A)(c).

In light of s.88(1A)(c), the Appeal Panel was satisfied that it was fair to award costs of the appeal to the Chief Commissioner, either as agreed between the parties or (if agreement is not reached) as assessed.

*Catchwords:-*

Costs - No question of principle

*Select this hyperlink to go to the summary:-*

[Haddad v Chief Commissioner of State Revenue \(RD\) \[2011\] NSWADTAP 46](#)

### [1 Rocky Point Pty Ltd \(No 4\) v Chief Commissioner of State Revenue \[2011\] NSWADTAP 52](#)

**Date of Decision:** 16 November 2011

**Decision:**

**Tribunal Decision (1 Rocky Point Pty Limited v Chief Commissioner of State Revenue (no 2) [2010] NSWADT 138)**

On the question of whether the taxpayer as bare trustee was the "owner" of the land, the Tribunal agreed with the Chief Commissioner and held that (applying *Chief Commissioner of Land Tax v Macary Manufacturing Pty Limited* (1999) 48 NSWLR 299 affirmed in *BBLT Pty Limited v Chief Commissioner of the Office of State Revenue* 2003 ATC 5063), a registered proprietor of land which holds it on trust, even on a bare trust, enjoys an estate in possession, and is entitled to the rents and profits of the land (as per both limbs of the meaning of "owner" under the *Act*).

The Tribunal concluded that the principle in *Chief Commissioner of Land Tax v Macary Manufacturing Pty Limited* applied to resulting trusts.

In terms of the construction of the Act, the Tribunal noted:

- Sch 1A cl.2(5) provides that the PPR is subject to the restrictions set out in Part 4 of the Schedule.
- The effect of Sch.1A Pt 4 cl.11(1)(a) is to preclude the PPR exemption from applying to land owned either wholly or in part by a company, and discloses Parliament's intention to do so, hence cl.2(3) has no operation (and therefore cl.11(6) cannot be engaged).
- In relation to the applicant's third argument, the Tribunal noted that there is nothing in Sch.1A cl.2(3) which has the effect of deeming NH to be the owner to the exclusion of the company. Rather Clause 2(3) cannot apply as the exemption was precluded by operation of cl.11(1)(a).

Accordingly, the Tribunal affirmed the decision of the Chief Commissioner to assess the taxpayer for land tax.

### **Appeal Panel Decisions (1 Rocky Point Pty Ltd (No 4) v Chief Commissioner of State Revenue [2011] NSWADTAP 52)**

#### **(a) The substantive issue**

The Appellant appealed from the decision of Judicial Member Perrignon, and the appeal was heard on 16 February 2011. Judgment was given *ex tempore* on that date. The Appeal Panel affirmed the decision of the Judicial Member and determined that the Court of Appeal decision in *Chief Commissioner of Land Tax v Macary Manufacturing Pty Limited* (1999) 48 NSWLR 299 (Macary) was fatal to the appeal. In the Court of Appeal decision, Spigelman CJ (at para 1) and Shellar JA (at para 94) agreed with Mason P's finding (at para 59), that:

"The registered proprietor of an estate in fee simple holds (at law) an estate in possession notwithstanding the imposition of a trust requiring the proprietor to hold that estate on behalf of beneficiaries. Nothing turns on whether the trust is active or bare."

#### **(b) Costs**

The Appeal Panel held that consideration of s88(1A) requires reaching satisfaction that it is "fair" to order costs having regard to a number of factors. In this case a significant issue was the relative strengths of parties' claims including whether a party has made a claim that has no tenable basis in fact or law".

The Appeal Panel determined that there was no basis of fact or law which would enable the Appellant to succeed. Further it was determined that the interlocutory decision by Judicial Member Verick was merely that the matter could proceed to a final hearing, and the findings of Judicial Member Verick were not binding on the Appeal Panel. When the meaning of "owner" in the *Land Tax Management Act 1956* and the Court of Appeal decision in *Macary* were reviewed, the appeal was bound to fail. The Appeal Panel determined that "there was indeed no basis of fact or law which would enable the applicant to succeed."

In examining the issue of fairness, the Appeal Panel held that the decision at first instance was clearly correct and as such the subsequent appeal was bound to fail. After the decision of the Tribunal below, the Appellant was on notice that *Macary* was adverse to its success and that proceeding to have a determination of an appeal in the circumstances was

"untenable". Therefore while it would not be "fair" to impose costs for the hearing at first instance, it was "fair" to impose the costs of the application before the Appeal Panel.

Accordingly, the Appeal Panel's decision was that the costs of the appeal and of the application for costs be paid on the ordinary basis by the Appellant. The Appeal Panel declined to make a costs order for the matter at first instance.

*Catchwords:-*

Land tax - principal place of residence exemption - land held on trust by company for natural person - beneficiary occupied it as his principal place of residence - whether trustee an owner of land - whether trustee immune from assessment to land tax

Costs - "untenable in fact or law" - whether fair to order costs

*Select this hyperlink to go to the case:-*

[1 Rocky Point Pty Ltd \(No 4\) v Chief Commissioner of State Revenue \[2011\] NSWADTAP 52](#)

## ***Primary Production Land***

### **Lease A Leaf Property Pty Limited (RD) [2011] NSWADTAP 41**

**Date of Decision:** 15 September 2011

**Decision:** On 3 December 2010, the Administrative Decisions Tribunal ("the Tribunal") affirmed the decision of the Chief Commissioner of State Revenue (the "Chief Commissioner") that the applicant's property located at Terrey Hills (the "property") was liable for land tax for the 2005 to 2009 land tax years. The property was used to conduct a business of leasing indoor plants. The Tribunal ruled that the dominant use of the land was not primary production, and refused the applicant an exemption from land tax under the "land used for primary production exemption" in the *Land Tax Management Act 1956* ("the Act"). The Tribunal also declined to remit the market rate interest included in the land tax assessment. The Applicant appealed to the Appeal Panel of the Tribunal.

On 15 September 2011, the Appeal Panel dismissed the appeal and affirmed the decision of the Tribunal.

The appeal panel held that only exceptional circumstances would justify any remission of market rate interest and refused to vary the Tribunal's order to not remit the market rate interest.

*Catchwords:-*

Land used for primary production – whether land used for a commercial plant nursery

*Select this hyperlink to go to the summary:-*

[Lease A Leaf Property Pty Limited \(RD\) \[2011\] NSWADTAP 41](#)

## ***Principal Place of Residence***

### **1 Rocky Point Pty Ltd (No 4) v Chief Commissioner of State Revenue [2011] NSWADTAP 52**

**Date of Decision:** 16 November 2011

**Decision:**

#### **Tribunal Decision (1 Rocky Point Pty Limited v Chief Commissioner of State Revenue (no 2) [2010] NSWADT 138)**

On the question of whether the taxpayer as bare trustee was the "owner" of the land, the Tribunal agreed with the Chief Commissioner and held that (applying *Chief Commissioner of Land Tax v Macary Manufacturing Pty Limited* (1999) 48 NSWLR 299 affirmed in *BBLT Pty Limited v Chief Commissioner of the Office of State Revenue* 2003 ATC 5063), a registered proprietor of land which holds it on trust, even on a bare trust, enjoys an estate in possession, and is entitled to the rents and profits of the land (as per both limbs of the meaning of "owner" under the Act).

The Tribunal concluded that the principle in *Chief Commissioner of Land Tax v Macary Manufacturing Pty Limited* applied to resulting trusts.

In terms of the construction of the Act, the Tribunal noted:

- Sch 1A cl.2(5) provides that the PPR is subject to the restrictions set out in Part 4 of the Schedule.
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Accordingly, the Tribunal affirmed the decision of the Chief Commissioner to assess the taxpayer for land tax.

#### **Appeal Panel Decisions (1 Rocky Point Pty Ltd (No 4) v Chief Commissioner of State Revenue [2011] NSWADTAP 52)**

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The Appellant appealed from the decision of Judicial Member Perrignon, and the appeal was heard on 16 February 2011. Judgment was given *ex tempore* on that date. The Appeal Panel affirmed the decision of the Judicial Member and determined that the Court of Appeal decision in *Chief Commissioner of Land Tax v Macary Manufacturing Pty Limited* (1999) 48 NSWLR 299 (Macary) was fatal to the appeal. In the Court of Appeal decision, Spigelman CJ (at para 1) and Shellar JA (at para 94) agreed with Mason P's finding (at para 59), that:

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