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Public Ruling Land Tax Act:

LAND USED FOR PRIMARY PRODUCTION

A public ruling, when issued, is the published view of the Commissioner of State Revenue (the Commissioner) on the particular topic to which it relates. It therefore replaces and overrides any existing private rulings, memoranda, manuals and advice provided by the Commissioner in respect of the issue(s) it addresses. Where a change in legislation or case law (the law) affects the content of a public ruling, the change in the law overrides the public ruling—that is, the Commissioner will determine the tax liability or eligibility for a concession, grant or exemption, as the case may be, in accordance with the law.

What this ruling is about

1. This public ruling clarifies the Commissioner's interpretation of s.53 of the *Land Tax Act 2010* (Land Tax Act) in relation to land used solely for the business of primary production.
2. Land tax is imposed each financial year¹ on the taxable value² of all taxable land.³ A liability for land tax for a financial year arises at midnight on 30 June immediately preceding the financial year.⁴ Land tax is payable by the owner of the taxable land.⁵
3. Section 53 of the Land Tax Act provides an exemption for land—or a part of land—that is used solely for the business of primary production, but only if the land or the part of land is used for an activity (prescribed by regulation) that is carried on for the business.
4. Under s.2 of the Land Tax Regulation 2021 (Land Tax Regulation), the following primary production activities are prescribed:
 - (a) maintaining animals for the purpose of selling the animals or their bodily produce, including their natural increase
 - (b) cultivating land for the purpose of selling produce

¹ Section 6 of the Land Tax Act

² See s.16 of the Land Tax Act.

³ See s.9 of the Land Tax Act.

⁴ Section 7 of the Land Tax Act

⁵ Section 8 of the Land Tax Act

- (c) propagating or cultivating plants or mushrooms, for the purpose of selling the plants or mushrooms or produce from the plants, whether the plants or mushrooms are grown:
 - (i) in sand, gravel or liquid, without soil and with added nutrients
 - or
 - (ii) in the ground or in pots, bags or containers
 - (d) planting or tending trees in a plantation or forest for the purpose of selling the trees or produce from the trees
 - (e) an activity, other than an activity mentioned in paragraph (a), (b), (c) or (d), that is agriculture, dairy farming or pasturage
 - (f) an activity that is:
 - (i) directly related to, and carried out to support, an activity mentioned in any of paragraphs (a) to (e)
 - and
 - (ii) carried on for the same business of primary production mentioned in section 53(1) of the Act.
5. The exemption may apply where the land is owned by any of the following:
- (a) an individual (other than a trustee or absentee)
 - (b) a trustee of a trust, if all beneficiaries⁶ of the trust are persons mentioned in paragraph (a), (c) or (d)
 - (c) a relevant proprietary company⁷
 - (d) a charitable institution.⁸
6. If a part of land is exempt, the Commissioner must apportion the taxable value of the land between use for a purpose mentioned in paragraph 3 of this ruling and use for any other purpose.⁹
7. The exemption contained in s.53 of the Land Tax Act does not apply to land owned by the manager of a time-sharing scheme.¹⁰

⁶ For the purposes of s.53, a beneficiary includes a beneficiary in the first instance and a beneficiary through a series of trusts: section 53(5) of the Land Tax Act.

⁷ Section 53(5) of the Land Tax Act

⁸ Section 53(2) of the Land Tax Act

⁹ Section 53(3) of the Land Tax Act

¹⁰ Section 53(4) of the Land Tax Act

Ruling and explanation

8. Land or a part of land will qualify for exemption under s.53 of the Land Tax Act if it is used solely for the business of primary production, but only if the land or the part of land is used for an activity prescribed by regulation that is carried on for the business.

Used for the business of primary production

9. For land or a part of land to be used for the business of primary production, it must be used for an activity (prescribed by s.2 of the Land Tax Regulation) that is carried on for the business.
10. A business of primary production is considered to end—and secondary production (i.e. the processing of the primary product) begins—when another process transforms the primary product into a derivative product.¹¹

Example 1

The growing of orange trees to produce oranges would be considered primary production. The processing of an orange to make juice or the processing of juice into concentrate are further steps in the productive process and constitute secondary production.

Whether land is ‘used’

11. For the purposes of s.53 of the Land Tax Act, the question of whether land is used when liability for land tax arises will be decided objectively based on the actual use of land and not on a notional or potential future or contemplated use.¹²
12. It is the present, actual and physical use of land for a purpose to derive benefit that is of relevance when considering whether land is used.¹³ There must be recurring physical activity present on the land, and the use of the land must be bona fide and genuine. There must be some degree of substance and intensity attached to it.¹⁴

Example 2

The owner of a large rural property intends to develop the land into a housing estate once council approval has been obtained. The land is presently leased to Sam who runs 1,000 head of cattle on the property because it has adequate pasture and water supply.

The present actual and physical use of the land by Sam for the maintenance of animals (cattle) would be the purpose for which the land is used, rather than the potential future or notional use of the land by the owner.

Once any earthworks or clearing of trees commenced on the land to develop the housing estate, the land would no longer be used solely for the business of primary production.

¹¹ *Caruana v. Chief Commissioner of State Revenue* [2011] NSWADT 183 at [44]

¹² *Greenville Pty Ltd v. Commissioner of Land Tax (NSW)* (1977) 7 ATR 278; *Leppington Pastoral Co Pty Ltd v. Chief Commissioner of State Revenue* [2017] NSWSC 9; see also *Saville v. Commissioner of Land Tax* (1980) 12 ATR 7; *Minister Administering the Crown Lands Act v. NSW Aboriginal Land Council* [2008] HCA 48; *New South Wales Aboriginal Land Council v. Minister Administering the Crown Lands Act* [2016] HCA 50 at [34]

¹³ *Chief Commissioner of State Revenue v. Metricon Qld Pty Ltd* [2017] NSWCA 11

¹⁴ *Carjulgar Industries Pty Ltd v. Commissioner of Land Tax* (1983) 9 QLCR 151

13. In some circumstances, inactivity on land will be considered a use of the land where the maintenance of a state of inactivity is deliberate and necessary for a specific purpose.¹⁵

Example 3

A large field left fallow as part of a crop-rotation cycle would be considered used for the cultivation of the land despite the current absence of activity on it. The deliberate maintenance of a state of inactivity is, of itself, the specific purpose for which the land is used—that is, the purpose of cultivation of the land, including allowing time for soil regeneration.

Meaning of ‘used solely’

14. Section 53 of the Land Tax Act requires land or a part of land to be used solely for the business of primary production. The term ‘used solely’ in relation to land requires that the land be used only or exclusively for a purpose.¹⁶
15. The word ‘solely’ confines the use of land for the business of primary production and prevents use of it for any purpose, however minor in importance, that is collateral or independent to the stipulated use.¹⁷
16. Where land is used for activities that are incidental to the business of primary production, land used for the incidental activities will be exempt from land tax if the activities are directly related to—and carried out to support—an activity in s.2(a) to (e) of the Land Tax Regulation, but only if it is carried on for the same primary production business.¹⁸

Example 4

The use of small quarters situated on a large sheep station to accommodate shearers employed on the station would be considered a use that was directly related to, and carried out to support, another activity in s.2(a) to (e) of the Land Tax Regulation—being maintaining animals (sheep)—and carried on for the same business of primary production.

17. In circumstances where land is used both for a business of primary production and for another purpose that is not otherwise incidental, the Commissioner will consider whether it is possible to clearly identify what part of the land is used for the other purpose.
18. Where part of the land can be identified as being used solely for the business of primary production and a separate part of the land for the other purpose, the Commissioner will apportion the taxable value of the land between use for the business of primary production and use for the other purpose.

Example 5

Where land is used as a vineyard for the growing of grapes and a separate part of the land contains a building used as a winery for the pressing and fermentation of the grape juice, the part of the land used as a vineyard will be eligible for exemption under s.53 of the Land Tax Act. The land used as a winery will be ineligible for exemption because it is not a primary production activity.

¹⁵ *Rainn Pty Ltd v. Commissioner of State Revenue* [2016] VSCA 338; *Chief Commissioner of State Revenue v. Metricon Qld Pty Ltd* [2017] NSWCA 11

¹⁶ *Alnot Pty Ltd v. Federal Commissioner of Taxation* [2013] AATA 140

¹⁷ *Lloyd v. Federal Commissioner of Taxation* (1955) 93 CLR 645; *Randwick Corporation v. Rutledge* [1959] HCA 63 at [37]

¹⁸ Section 2(f) of the Land Tax Regulation

The Commissioner will apportion the taxable value of the whole land between the part of the land used for the business of primary production (the vineyard) and the use of the part of the land for another purpose (winery).

19. In circumstances where land is used both for a business of primary production and for another purpose that is not otherwise incidental and it is not possible to clearly identify what part of the land is used solely for the business of primary production, the exemption under s.53 of the Land Tax Act will not be available.

Whether a business is being ‘conducted’

20. The conduct of a business involves a commercial enterprise in the nature of a going concern, consisting of activities engaged in for the purpose of profit on a continuous and repetitive basis.¹⁹
21. A business must be conducted in an organised and systematic manner rather than on an ad hoc or haphazard basis. A particular business should conform with established commercial principles for the operation of that type of business.²⁰
22. A business may be conducted notwithstanding the fact that the profit from the business is negligible or even where a loss is made. What is necessary is that the intention and purpose of the land use is to make a profit.²¹

Example 6

Gloria uses a property of 4,000 hectares in North Queensland to breed cattle. She has calculated from the average rainfall and productivity of the land that the land would support 500 head of cattle if they are rotated between paddocks and supplemented by feed crops grown on the property.

A severe drought affecting the property has necessitated the reduction of the herd to 300 and the regular purchase of feed to sustain them. The effects of the drought have meant that Gloria has been unable to make a profit for a number of years.

Despite the absence of a profit, Gloria will be considered to be conducting a business of primary production. This is because she is following established commercial principles for the breeding of cattle, and in normal circumstances would expect to make a profit from the sale of the cattle.

23. Where the other indicators of a business are present, the size and scale of an activity are not determinative factors of whether a business is being conducted.²²
24. The organisation of activities and use of a system or systems—as well as the keeping of books and records—are all indicators that a business is being conducted.²³
25. Activities conducted on land of a token or trivial nature without evidence of sales or a business plan will not be considered the conduct of a business.²⁴

¹⁹ *Hope v. The Council of the City of Bathurst* (1980) HCA 16; *Commissioner of Taxation (Cwlth) v. Murry* [1998] HCA 42

²⁰ *Newton v. Pyke* (1908) 25 TLR 127; *Ferguson v. Federal Commissioner of Taxation* [1979] FCA 29; *The Commissioners of Inland Revenue v. Livingston and Others* (1926) 11 TC 538

²¹ *Ferguson v. Federal Commissioner of Taxation* [1979] FCA 29; *Shanahan v. Commissioner of Land Tax (NSW)* 96 ATC 4320

²² *Thomas v. Federal Commissioner of Taxation* [1972] 3 ATR 165; *FCT v. Walker* 85 ATC 4179

²³ *Ferguson v. Federal Commissioner of Taxation* [1979] FCA 29

Example 7

Douglas is employed as a doctor in a small rural town. He owns a small property of 5 hectares just outside of town, with a mature grove of 80 oak trees that have been inoculated for the production of truffles.

The trees could produce about 1 kilogram of truffles each, which can retail for between \$1,500 and \$3,000 per kilogram.

Douglas spends most of his time working as a doctor, but each winter he digs for truffles primarily for use at home to season food. Any additional truffles he finds are sold to local chefs.

While the land has the potential to produce truffles in sufficient number to conduct a business and make a profit, Douglas is not extracting them in those quantities and has not established a sufficient market or system of extraction and storage for the activities to be considered commercial.

The production, use and sale of truffles are more indicative of a hobby or recreational activity than the conduct of a business.

26. It is recognised that every business must start at some point. In certain circumstances, isolated activities may be found to be the commencement of carrying on a business even though no income is generated during this period.²⁵ However, this will be dependent on the activities being of a significant commercial nature and more than for recreation or a hobby.²⁶
27. To constitute a business, the activities in the start-up period for the business must be more than the improvement of land to bring it to a condition where it might be used for a primary production business for which it was not yet suitable.²⁷

Example 8

Amelia intends to use heavily forested land as a fruit orchard. She commences land-clearing activities for its future use.

The activity of clearing the land in preparation for its use as a fruit orchard would not be considered the conduct of a business of primary production.

Evidence land is being used solely for prescribed activities of a primary production business

28. The Commissioner will determine whether land is being used solely for prescribed activities of a primary production business based on the 'large or general impression gained'²⁸ from looking at all the relevant indicators²⁹ and all the available evidence.
29. In cases where the conduct of prescribed activities of a primary production business are not easily identified, the owner of the land may be required to provide the Commissioner with supporting evidence to substantiate the use of the land at the liability date for land tax.

²⁴ *Greenville Pty Ltd v. Commissioner of Land Tax (NSW)* (1977) 7 ATR 278

²⁵ *Ferguson v. Federal Commissioner of Taxation* [1979] FCA 29; *Thomas v. Federal Commissioner of Taxation* [1972] 3 ATR 165

²⁶ *Thomas v. Federal Commissioner of Taxation* [1972] 3 ATR 165

²⁷ *Thomas v. Federal Commissioner of Taxation* [1972] 3 ATR 165; *Southern Estates Pty Ltd v. FCT* (1967) 117 C.L.R. 481

²⁸ *Martin v. Commissioner of Taxation (CTH)* (1953) HCA 100

²⁹ See paragraphs 20–27.

30. The Commissioner may look at evidence of the use of land for a reasonable period, before or after the liability date for land tax, to determine whether the land is being used solely for prescribed activities of a primary production business.³⁰
31. Evidence that land is being used solely for prescribed activities of a primary production business may include:
- (a) evidence from the Australian Taxation Office that the person has received tax concessions or deductions as a primary producer
 - (b) financial statements for the business
 - (c) business plans, work journals or other evidence of the activities or intentions concerning the business
 - (d) stock details (e.g. movement records, purchase and sales receipts)
 - (e) asset registers, including fixed assets
 - (f) maps, photos or other evidence of the specified area of land used
 - (g) leases, licences or other agreements with third parties
 - (h) any other relevant evidence.
32. The relevance and weight given to the evidence will depend on the circumstances of each case. Any number of the above items of evidence may not be sufficient to conclude that land is being used solely for prescribed activities of a primary production business. The Commissioner may require other evidence.

Example 9

Kim and Evon are owners of a 5-hectare block of rural residential land that they use to conduct a nursery business involving the sale of decorative plants.

The decorative plants are planted from seeds or seedlings in pots and bags, sized according to their stage of development. The plants are watered and fertilised, and in some cases kept in hot houses to promote their growth.

Once the plants have reached a sufficient age and bloomed or otherwise achieved a saleable condition, they are tended under shade cloth and protected from harsh weather pending delivery to retailers.

Kim and Evon apply to the Commissioner for exemption from land tax. In support of their application, they provide:

- photos and a plan of the property to demonstrate its size, nature of improvements and the number of trees on the land
- a business plan to evidence the commercial, repetitive and organised nature of the activities relating to the growth and continued care of the plants
- financial statements to indicate the business is substantial and profitable

³⁰ *Favello Pty Ltd & Ors v. Chief Commissioner of State Revenue* [2014] NSWCATAD 47; *Longford Investments Pty Ltd v. Commissioner of Land Tax (NSW)* 78 ATC 4264

- asset registers to indicate seeds, pots, bags and fertiliser are used in the business, which demonstrate the planting, growth and continued care of plants.

The evidence provided supports the decision that the land is being used solely for the business of primary production involving the prescribed activity of cultivating or propagating plants for the purpose of selling the plants.

Date of effect

33. This public ruling takes effect from the date of issue.

Mark Jackson
Commissioner of State Revenue
Date of issue: 20 April 2021

References

| Public Ruling | Issued | Dates of effect | |
|---------------|---------------|-----------------|---------------|
| | | From | To |
| LTA053.1.3 | 20 April 2021 | 20 April 2021 | Current |
| LTA053.1.2 | 29 June 2018 | 30 June 2018 | 19 April 2021 |
| LTA053.1.1 | 30 June 2010 | 30 June 2010 | 29 June 2018 |