

Article Information

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Service: Taxation

Sector: Agriculture & Food

Fiscal Watch - Land Tax - Land Banking

It is not uncommon for developers to acquire tracts of farming land for future residential development. There is an exemption from land tax for land used for primary production.

In a recent case a developer had acquired large tracts of farming land for future residential development. It was common ground that the land was, at all material times, used for the maintenance of cattle for the purpose of selling them or their natural increase or bodily produce.

However the Chief Commissioner disputed that the dominant use of the land was primary production but submitted that the dominant use of the land banking or land development use. The Chief Commissioner pointed out that there had been substantial expenditure of money and other resources by the developer on planning residential development of the land. He submitted that such expenditure did not occur in a vacuum but was obviously and intimately connected with the land. Such expenditure occurred in connection with the land and would not have been incurred but for the developer's ownership of the land and its intention to subdivide and sell in due course.

The NSW Court of Appeal, in dismissing the Chief Commissioner's appeal against an order setting aside the land tax assessments, said that the concept of "use" relevant to question of whether the land was "used" for primary production is one of physical deployment pursuant to particular purpose, objectively ascertained, of obtaining a present benefit or advantage from it. This includes not only activity but also inactivity deliberately adopted as a means of obtaining such actual and present advantage from the land. This does not require that there be an immediate productive return as long as some benefit or advantage accrues.

The Court held that just because the developer incurred expenditure and acquired the services of planners and other consultants to formulate and progress a scheme of residential subdivision it did not follow that the use of the land was not for primary production. Although the developer may have had a purpose of obtaining a benefit and advantage from the land by subdivision and sale in employing the consultants and to incurring the expenditure, the actuating benefit and advantage were, at that point, projected or anticipated only; and pursuit of them at that point did not require or involve any deployment of the land as such i.e. the use of the land was not for those purposes.

Therefore the land was exempt from land tax because it was used for primary production. It was not used for land development by subdivision and sale.

This was a victory for the taxpayer. Nevertheless care needs to be taken to ensure that the use of the land is for primary production within the meaning as described by the NSW Court of Appeal.