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Public Ruling Land Tax Act:

GOVERNMENT LAND EXEMPTION— MEANING OF ‘PUBLIC AUTHORITY’

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 explains how the Commissioner will determine whether an owner of land is a public authority for the purposes of s.52 of the *Land Tax Act 2010* (Land Tax Act).
2. Section 52(2) of the Land Tax Act provides that land owned by a local government or public authority is exempt land unless the entity is subject to state taxation under an Act of the Commonwealth or a state.¹

Ruling and explanation

3. The term ‘public authority’ is not defined in the Land Tax Act. Whether the owner of land is a public authority is a question of fact to be determined in the circumstances of each case.²
4. To be a public authority, it is necessary for the owner of land to:
 - (a) have public functions
 - (b) have governmental authority
 - (c) not have inconsistent features that prevent it being a public authority.³

¹ Even if the land is exempt, the local government or public authority may be subject to the local government tax equivalents regime.

² This ruling summarises judicial interpretation of the term ‘public authority’ in a similar context, namely Commonwealth taxation legislation.

³ *Renmark Hotel Inc v Federal Commissioner of Taxation* (1949) 79 CLR 10 (*Renmark Hotel*); *Western Australian Turf Club v Federal Commissioner of Taxation* (1978) 139 CLR 288 (*WA Turf Club*)

5. The following characteristics should be considered in determining if the owner of land has **public functions**:
- (a) Whether the owner acts on behalf of the public or government.⁴
 - (b) Whether the owner is effectively an ‘agent or instrument’ of government⁵ (it is not necessary for the owner to be incorporated by legislation⁶).
 - (c) Whether the owner performs a traditional or basic function of government (for example, railways or public health).⁷
 - (d) Whether the owner carries on (under governmental authority) some undertaking of a public nature for the benefit of the community or a part of it.⁸

Example 1—No public function

The state government puts out a tender for an entity to build and maintain a toll road; and passes legislation setting standards for the road, the levy of tolls and the resumption of land. A public company limited by shares is successful in the tender and completes construction and commences offering its road for public use. Despite the entity being a public company, offering services to the public and holding certain statutory powers, the entity would not be considered a public authority because it operates for private benefit rather than the public interest.

6. The following characteristics should be considered in determining if the owner of land has **governmental authority**:
- (a) Whether the owner has statutory authority or powers (coercive powers are not necessary but would more strongly support the presence of governmental authority).⁹
 - (b) Whether the owner exercises control, power or command for the public advantage.¹⁰
 - (c) Whether the owner can do something that an ordinary member of the public could not do (i.e. whether the owner has been given statutory authority to act and exercise powers in relation to the public that would otherwise be unauthorised¹¹—this is not essential but is a distinguishing characteristic of a public authority).¹²

Example 2—No governmental authority

A local government incorporates a company to conduct a ‘beneficial enterprise’ under the *Local Government Act 2009*. The company is wholly owned and managed by the local government. It develops land for sale and uses any profits for initiatives that benefit the community. The company would not be a public authority for the purposes of the exemption in s.52(2) of the Land Tax Act. Although it may have

⁴ *The Incorporated Council of Law Reporting for the State of Queensland v FCT* (1924) 34 CLR 580, 585

⁵ *Federal Commissioner of Taxation v Silverton Tramway Co Ltd* (1953) 88 CLR 559, 565 (*Silverton*); *Committee of Direction of Fruit Marketing v Australian Postal Commission* (1980) 144 CLR 577, 595 (*Fruit Marketing*); *WA Turf Club* 304

⁶ *Renmark Hotel* 19; *WA Turf Club* 293

⁷ *Renmark Hotel* 16; *General Steel Industries Inc. v Commissioner of Railways (NSW)* (1964) 112 CLR 125, 134; *Re Anti-Cancer Council of Victoria*; *Ex Partee State Public Services Federation* (1992) 175 CLR 442, 450-1

⁸ *Renmark Hotel* 18

⁹ *Renmark Hotel* 18; see also *CoINVEST Ltd v Citywide Service Solutions Pty Ltd* (2020) 62 VR 337, 356

¹⁰ *Silverton* 565, 567; *Fruit Marketing* 580

¹¹ *Renmark Hotel* 18; *FCT v Bank of Western Australia* (1995) 61 FCR 407; *CoINVEST Ltd v Citywide Service Solutions Pty Ltd* (2020) 62 VR 337, 356

¹² *WA Turf Club* 293

public functions, it does not have governmental authority; it cannot do anything beyond what a private land developer could do.

7. Even if the owner has public functions and governmental authority, the owner may also have features inconsistent with being a public authority. This may prevent the owner being a public authority, depending on the nature and extent of such features.¹³ Whether the existence of inconsistent features prevents the owner being a public authority is considered on a case-by-case basis.
8. The following factors may help in determining the nature and extent of any **inconsistent features**:
 - (a) Whether the owner also carries on activities not characteristic of a public authority.
 - (i) If so, the extent and importance of those activities in the context of all the owner's activities will be relevant.
 - (ii) In addition, consideration should be given to whether the owner's public functions are secondary to its private functions.¹⁴
 - (b) Whether the owner is able to distribute profit or assets to private individuals or entities (if so, it is almost certainly not a public authority).¹⁵

Example 3—Inconsistent features that prevent the owner being a public authority

The state government decides to develop a small waterside recreational area open to the public. The only food outlet will be a privately-owned restaurant already existing on the restaurant owner's neighbouring land. To ensure enjoyment of the recreational area, it is necessary to regulate alcohol consumption inside the area and issue fines for littering there. In exchange for the restaurant's monopoly, legislation is passed requiring and empowering the restaurant owner to perform these roles. The restaurant owner would not be a public authority for the purposes of the exemption in s.52(2) of the Land Tax Act. Although it may have public functions and governmental authority, these are outweighed by inconsistent features that are extensive and important. Its public functions are secondary to its private function of operating a restaurant, and it distributes profit to its private owners.

9. The relevance and weight of each characteristic or factor listed in paragraphs 5 to 8 will depend on the circumstances of each particular case. The presence or absence of any one or more factors is not necessarily conclusive of whether the owner is a public authority. In considering such factors, it is relevant to bear in mind the statutory context—that is, a conditional exemption from land tax for land held by local governments and public authorities.
10. The exemption does not contain any condition relating to the use of the land. However, the way in which the owner uses the land will be relevant in considering the above factors and characteristics.

Example 4—Public authority

The state government introduces new legislation regulating the use of river water by primary producers. The Clear River Board is established by regulation under that legislation. The board's only functions are to deliver river water for irrigation and to implement measures to minimise flooding. The board owns

¹³ *WA Turf Club*

¹⁴ *WA Turf Club 313; Silvertown 568*

¹⁵ *Renmark Hotel 18*

land including the office building from which it operates. The legislation empowers the board to take ownership of land by compulsory acquisition for installing pump stations. It also empowers the board's officers to enter private property to undertake earthworks to prevent flooding. The board may do so without the owner's consent if the owner has not responded to notices or a flood is imminent. The board would be a public authority for the purposes of the exemption in s.52(2) of the Land Tax Act. It has public functions and governmental authority and has no features inconsistent with being a public authority. The way the board uses its land is consistent with this.

Date of effect

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

Mark Jackson
Commissioner of State Revenue
Date of issue: 26 November 2021

References

| Public Ruling | Issued | Dates of effect | |
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