

Tax Chamber
First-tier Tribunal for Scotland



[2019] FTSTC 13

Ref: FTS/TC/AP/19/0012

***Land and Buildings Transaction Tax – Additional Dwelling Supplement
(ADS) – Buyers not cohabited in both properties – Repayment – No – Limits
of jurisdiction – Fairness – Appeal dismissed***

DECISION NOTICE

IN THE CASE OF

Mr John William Wallace and Ms Laura Anne Avril Hogg

Appellant

- and -

Revenue Scotland

Respondent

TRIBUNAL: ANNE SCOTT

The Tribunal determined the appeal on 26 November 2019 without a hearing under the provisions of Rule 27 of The First-tier Tribunal for Scotland Tax Chamber (Procedure) Regulations 2017 having first read the Notice of Appeal, and attachments, dated 27 May 2019 and Revenue Scotland's Statement of Case, and attachments, received by the Tribunal on 25 July 2019.

DECISION

1. This is an appeal against a decision by Revenue Scotland to refuse a claim for repayment of Additional Dwelling Supplement (“ADS”) charged under Section 26A and Schedule 2A of the Land and Buildings Transaction Tax (Scotland) Act 2013 (“LBTTA”).

Preliminary issue

2. The Notice of Appeal in this matter, which is accepted by the Tribunal as being validly made, was lodged with the Tribunal by the Appellants’ representative. That Notice of Appeal indicated that the Appellants wished an oral hearing. However, on 11 November 2019, the Appellants’ representative intimated to the Tribunal that the appeal should proceed on the basis of the available papers.

3. Revenue Scotland confirmed to the Tribunal on 12 November 2019 that they too were happy for the matter to proceed on the basis of the available papers.

4. I had regard to Rule 30 of the First-tier Tribunal for Scotland Tax Chamber (Procedure) Regulations 2017 (“the Rules”) and decided that the appeal should proceed on that basis.

Findings in Fact

5. The facts in this matter are not in dispute.

6. The Appellants jointly purchased a property (“the second property”) with an effective date of 25 September 2017.

7. The electronic Land and Buildings Transaction Tax (“LBTT”) return for the transaction was received by Revenue Scotland the following day.

8. On the effective date the first Appellant also owned another property (“the first property”).

9. The electronic LBTT return for the second property correctly showed ADS chargeable of £9,450. That was paid timeously.

10. The first property had previously been the only or main residence of the first Appellant. The second Appellant has never resided in the first property.

11. The first property was sold with an effective date of 28 September 2018.

12. The Appellants’ representative submitted a claim for repayment of ADS dated 15 October 2018 which was later amended following further correspondence.

13. That claim was made under Section 107 Revenue Scotland Tax and Powers Act 2014 (“RSTPA”). Revenue Scotland’s decision not to make the repayment was upheld on review and the Appellant duly appealed to the Tribunal.

The Appellants' Grounds of Appeal

14. It was conceded in the Notice of Appeal that because the first Appellant already owned the first property then ADS was payable on the purchase of the second property. That was stated to be on the understanding that if the first property was sold within 18 months there would be a repayment of ADS. The first property was sold within the 18 month period.

15. The Appellants argue that the failure to make a repayment is clearly unjust.

16. It was also argued that although it had been conceded that ADS was payable on the purchase of the second property, nevertheless it would be fair and reasonable and just if either

- a) It was agreed by Revenue Scotland that ADS had been paid in error and should therefore be repaid on grounds equivalent to unjustified enrichment, or
- b) In all the circumstances of the case it would be fair and reasonable for the repayment to be made.

17. In correspondence, the Appellants' representative argued that

- a) Revenue Scotland's forms are deficient and, in that context, advanced an argument that one should consider separately "only" and "main residence" and that "only residence" applied where a taxpayer owns one property.
- b) Revenue Scotland's interpretation of the legislation was discriminatory in that it required both parties to have cohabited in order to receive a repayment.

Revenue Scotland's arguments

18. Shortly put, Revenue Scotland argue that the legislation is clear and that both buyers of the second property have to establish, for the purposes of reclaiming ADS, that the property that is disposed of had been their only or main residence in the previous 18 months. The first Appellant did dispose of his only or main such residence but the second Appellant did not dispose of any dwelling. Furthermore she had not resided with the first Appellant in the first property during the 18 months prior to the effective date.

19. The Tribunal has no jurisdiction in relation to whether legislation is fair or not.

Discussion

20. This Tribunal has set out in full an analysis of the legislation, its history and the policy objectives at paragraphs 17 to 36 of the decision in *Dr Colin Goudie and Dr Amelia Sheldon v Revenue Scotland*¹ ("Sheldon"). It also set out at paragraphs 64 and 66-68 the reasons why the Tribunal has no jurisdiction to consider arguments based on fairness or discrimination. I annex at Appendix 1 a copy thereof.

21. In order to succeed the Appellant would have to satisfy the Tribunal that the criteria set out in paragraphs 8 and 8A of Schedule 2A of the Land and Buildings Transaction Tax

¹ 2018 FTSTC 3

(Scotland) Act 2013 (“the Act”) were met. I annex the full text of the relevant provisions of the Act at Appendix 2.

22. The first point I make is that, as can be seen from *Sheldon*, Revenue Scotland are entirely correct in stating that the Tribunal’s jurisdiction does not extend as far as the exercise of a discretion about whether it is fair or reasonable that ADS should be paid, or repaid.

23. I do understand why the Appellants would consider that the legislation is unfair but as was pointed out in *Sheldon*, and in other cases, the Tribunal simply does not have jurisdiction to consider whether the law is fair. It can only apply the law.

24. There is no doubt that, as was properly conceded in the Notice of Appeal, both Appellants were liable for both the LBTT and the ADS on the purchase of the second property.

25. It is not in dispute that if the first Appellant had been the only buyer of the second property, then he would have qualified for repayment of the ADS.

26. The problem is that, given the clear terms of the legislation, it would have been impossible for the second Appellant ever to have qualified for repayment of the ADS because she had neither owned nor lived in the first property. She has not disposed of any property.

27. Unfortunately for the Appellants, it is plain that the Scottish Parliament intended that the additional relief offered by the amending legislation in 2016 and 2017 should be restricted to the situation where both parties had lived in the previous residence, and not just one of them had done so.

28. It was undoubtedly the case that the Scottish Parliament intended to extend the exemption offered under the legislation to a very limited range of circumstances and that legislation is wholly unambiguous.

29. In summary, since the first property was never the only or main residence of both Appellants at any time during the period of 18 months ending with the effective date of the purchase of the second property, ADS simply cannot be repaid.

30. The Tribunal is entirely independent of Revenue Scotland and the content and layout of their forms is entirely a matter for them.

31. In any event the argument outlined in paragraph 17 above is misconceived. The use of the words “only or main residence” first occurs in paragraphs 2(1)(d) and 2(2) of Schedule 2A. That cannot be divorced from the provisions of paragraph 2(1)(c) which is the condition that, at the effective date of the transaction, the buyer owns more than one dwelling.

Conclusion

32. Revenue Scotland has applied the legislation correctly. Therefore the appeal must be dismissed and Revenue Scotland’s view of the matter upheld.

33. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has the right to apply for permission to appeal on a point of law pursuant to Rule 38 of the First-tier Tribunal for Scotland Tax Chamber (Procedure) Regulations 2017. In terms of Regulation 2(1) of the Scottish Tribunals (Time Limits) Regulations 2016, any such application must be received by this Tribunal within 30 days from the date this decision is sent to that party.

ANNE SCOTT
President

RELEASE DATE: 27 November 2019

Overview of Schedule 2A of the Act and the Legislative history

17. We annex at Appendix 1 the full text of paragraphs 2, 5, 6, 8 and 8A of Schedule 2A of the Act. As can readily be seen, these paragraphs are written in relatively clear uncomplicated language. That is not often seen in taxation legislation!

18. The charging provisions in Schedule 2A of the Act were introduced by the Land and Buildings Transaction Tax (Amendment) Act 2016. It provides for additional LBTT, the ADS, to be paid by those buying second homes.

19. The Explanatory Notes make it explicit at paragraphs 38 and 4, when explaining paragraphs 5 and 8, that both parties have to be able to sell any former residence.

20. Paragraph 38 reads:

“The effect of paragraph 5 of schedule 2A is that the conditions in paragraph 2(1)(c) and (d) ... will be met if they are met in relation to any one of the joint buyers, even though they may not be met in relation to others. So if two people, A and B, who each currently own a dwelling which they occupy as their main residences, jointly buy a dwelling while B retains his or her existing dwelling to rent out, the additional amount is payable on the joint purchase because B is not replacing his or her main residence even though A is ...”.

That is simply an example but logically if B did not have a main residence s(he) could not replace it.

21. Paragraph 47 states that a repayment may be claimed where “...the buyer is able to dispose of their former main residence...”. We have underlined the use of the word “their” since it does not say, for example “a”.

22. The starting point is paragraph 2 which has four conditions and all must be satisfied if the ADS is chargeable. The first two conditions relate to the transaction and provide that the ADS is chargeable where a new property is purchased for £40,000 or more. The third condition relates to the buyer and has effect where, at the effective date, the buyer owns more than one property. The last condition also relates to the buyer and is engaged where the buyer has not disposed of the previous only or main residence.

23. However, one must then look at paragraph 6(1)(b) which clearly states that, in relation to the third condition, a cohabitant will be deemed to own a building if the other cohabitant owns it. Therefore, in this case, although the second appellant had never owned the first property, for the purposes of that sub-paragraph alone she is treated as having owned it on the effective date. It is a very precise and clear provision.

24. In any event, paragraph 5 applies to joint purchasers of a dwelling and specifies that the conditions in the main charging paragraph, which is paragraph 2, will be met even if only one of the buyers owns more than one dwelling and therefore one of the buyers is not replacing their only or main residence with that new purchase. The impact of paragraph 5 is that even if they had not been cohabiting, as though married to each other, since they were joint buyers because the first two conditions were met, the second appellant would have been deemed to have satisfied the third condition because the first appellant did so.

25. The intention of Parliament is abundantly clear that they wished the ADS to bite where any one of joint buyers, whether in a relationship or not, purchased a property and one of the joint buyers already owned a property.

26. Accordingly, there is no doubt that in the first instance ADS was due and payable and, indeed, it was paid.

27. In any event, had the second appellant not accepted that she was liable in terms of those paragraphs, nevertheless, in terms of Section 48 of the Act, the terms of which are set out at Appendix 2, any obligation or liability of either buyer in terms of the Act is an obligation of them both.

28. Therefore, although there would have been no ADS if the second appellant alone had purchased the new property, where there is a joint purchase the ADS is triggered, and also the liability to pay it.

29. In summary, paragraph 8 of Schedule 2A provides that the ADS will be repayable on the basis that the chargeable transaction triggered by paragraph 2 will be treated as exempt from ADS if certain conditions are met. Those are, that the first property is sold within 18 months from the effective date, and had been the buyer's only or main residence at any period in the 18 months prior to the effective date and that the new property has been occupied as the buyer's only or main residence.

30. Having been amended in 2016 in the way described, the following year the Land and Buildings Transaction Tax (Additional Amount – Second Homes Main Residence Relief) (Scotland) Order 2017 further amended Schedule 2A by the introduction of paragraphs 8A and 9A. These respectively extend the paragraph 8 right to repayment of the ADS from the buyers themselves to spouses, civil partners and cohabitants living together as though married to one another.

31. The Policy Note makes clear the Policy Objectives including:-

“Additionally, the policy intention is that ADS can be reclaimed when a main residence is being replaced and the sale of the former main residence happens within 18 months of the purchase of what becomes the current main residence. ‘Replacing’ in the context of the ADS legislation means selling the previous main residence and buying a new main residence.

It is necessary to bring forward an amending instrument as the legislation as currently drafted does not give full effect to this policy intention. It has emerged that the ADS legislation has been too tightly drawn in certain specific circumstances - - i.e. where:

- the title to the former main residence is in the sole name of one of the married couple, civil partnership, cohabitants who both live in the property; and
- the couple then jointly buy a new main residence prior to selling their current main residence.”

32. We have underlined the crucial wording. It is clear that it was never intended that the exemption would be extended to apply to a situation such as that with which we are concerned.

33. In 2018 the Land and Buildings Transaction Tax (Relief from Additional Amount) (Scotland) Act 2018 made the provisions of the 2017 Order retrospective.

34. The policy objective of both the 2017 Order and the retrospective provisions in the 2018 Act was to ensure that where the title to the former main residence of a taxpayer is in the sole name of one of a married couple, civil partnership, or cohabitants who both lived in that property and the couple then jointly buy a new main residence prior to selling the then current main residence, then the ADS can be repaid and relief given.

35. Lastly, in regard to the scheme of legislation, the appellants argue that paragraph 5, in their view, disapplies Section 48 of the Act, and because it does that then it should equally be disapplied in relation to paragraph 8.

36. Section 48 of the Act is a general provision in relation to application of the Act in regard to obligations and liabilities under the Act, and in particular in relation to the filing of a return and indeed payment of tax. It is not disapplied by paragraph 5. From its terms, it is clear that paragraph 5 simply qualifies paragraphs 2 and 3. Paragraph 5 has no application in relation to paragraph 8.

Fairness

64. As far as fairness is concerned, the appellants had argued from the outset that they consider that it is fundamentally unfair that, on the face of it, the legislation allows reimbursement of the ADS to joint buyers of a property on which ADS has been paid where there has been a sale of a property which had been the only or main residence of both of them but denies it where that had been the case for only one of them.

66. In *Hok* at paragraphs 56 to 58 the Tribunal stated:

“56. Once it is accepted, as for the reasons we have given it must be, that the First-tier Tribunal has only that jurisdiction which has been conferred on it by statute, and can go no further, it does not matter whether the Tribunal purports to exercise a judicial review function or instead claims to be applying common law principles; neither course is within its jurisdiction. As we explain at paras 36 and 43 above, the Act gave a restricted judicial review function to the Upper Tribunal, but limited the First-tier Tribunal’s jurisdiction to those functions conferred on it by statute. It is impossible to read the legislation in a way which extends its jurisdiction to include—whatever one chooses to call it—a power to override a statute or supervise HMRC’s conduct.

57. If that conclusion leaves “sound principles of the common law languishing outside the Tribunal room door”, as the judge rather colourfully put it, the remedy is not for the Tribunal to arrogate to itself a jurisdiction which Parliament has chosen not to confer on it. Parliament must be taken to have known, when passing the ... Act, of the difference between statutory, common law and judicial review jurisdictions. The clear inference is that it intended to leave supervision of the conduct of HMRC and similar public bodies where it was, that is in the High Court, save to the limited extent it was conferred on this Tribunal.

58. It follows that in purporting to discharge the penalties on the ground that their imposition was unfair the Tribunal was acting in excess of jurisdiction, and its decision must be quashed.”

67. Although, of course this case is not concerned with penalties and whether they are fair, the principle is the same. The Tribunal does not have jurisdiction to consider either fairness or Revenue Scotland’s conduct.

68. For the same reasons we cannot consider any argument based on discrimination. In fact that was not advanced in any discernible fashion. No protected characteristic was identified and nor was any discriminatory conduct on the part of Revenue Scotland

notwithstanding the fact that Mr Heaney raised those points at paragraph 20 of the Note of Argument. In any event there are many, many other couples in the same position as the appellants.

Lands and Buildings Transaction Tax (Scotland) Act 2013 – Schedule 2A

2 Transactions relating to second homes etc.

(1) This schedule applies to a chargeable transaction if the following conditions are satisfied—

- (a) the subject-matter of the transaction consists of or includes the acquisition of ownership of a dwelling,
- (b) the relevant consideration for the transaction is £40,000 or more,
- (c) at the end of the day that is the effective date of the transaction, the buyer owns more than one dwelling, and
- (d) either—
 - (i) the buyer is not replacing the buyer's only or main residence, or
 - (ii) the buyer is replacing the buyer's only or main residence but the subject-matter of the transaction also includes the acquisition of ownership of one or more other dwellings in addition to the one that the buyer intends to occupy as the buyer's only or main residence.

(2) A buyer is replacing the buyer's only or main residence if—

- (a) during the period of 18 months ending with the effective date of the transaction, the buyer has disposed of the ownership of a dwelling,
- (b) that dwelling was the buyer's only or main residence at any time during the period of 18 months, and
- (c) on the effective date of the transaction, the buyer intends to occupy the dwelling that is or forms part of the subject-matter of the transaction as the buyer's only or main residence.

5 Joint buyers

(1) This paragraph applies to a chargeable transaction which satisfies the conditions in paragraph 2(1)(a) and (b) or 3(1)(a) and (b) if there are two or more buyers who are or will be jointly entitled to ownership of the dwelling.

(2) The conditions set out in paragraph 2(1)(c) and (d) or, as the case may be, 3(1)(c) are satisfied if they are satisfied in relation to any one of, or more than one of, the buyers.

6 Spouses, civil partners, cohabitants and children

(1) For the purposes of paragraph 2(10C), a dwelling which is owned by—

- (a) the buyer's spouse or civil partner,
- (b) the buyer's cohabitant,
- (c) a person aged under 16 who is a child of—
 - (i) the buyer,
 - (ii) the buyer's spouse or civil partner, or
 - (iii) the buyer's cohabitant,

is to be treated as being owned by the buyer.

...

8 Repayment of additional amount in certain cases

(1) Sub-paragraph (2) applies in relation to a chargeable transaction to which this schedule applies by virtue of paragraph 2 if—

- (a) within the period of 18 months beginning with the day after the effective date of the transaction, the buyer disposes of the ownership of a dwelling (other than one that was or formed part of the subject-matter of the chargeable transaction),
- (b) that dwelling was the buyer's only or main residence at any time during the period of 18 months ending with the effective date of the transaction, and
- (c) the dwelling that was or formed part of the subject-matter of the transaction has been occupied as the buyer's only or main residence.

(2) Where this sub-paragraph applies—

- (a) the chargeable transaction is to be treated as having been exempt from the additional amount, and
- (b) if the buyer has made a land transaction return in respect of the transaction, the buyer may take one of the steps mentioned in sub-paragraph (3).

(3) The steps are—

- (a) within the period allowed for amendment of the land transaction return, amend the return accordingly, or
- (b) after the end of that period (if the land transaction return is not so amended), make a claim to the Tax Authority under section 107 of the Revenue Scotland and Tax Powers Act 2014 for repayment of the amount overpaid.

(4) For the period allowed for amendment of returns, see section 83 of the Revenue Scotland and Tax Powers Act 2014.

(5) In the case of a chargeable transaction to which this schedule applies by virtue of paragraph 2(1)(d)(ii), sub-paragraph (2)(a) has effect only in relation to the additional amount applicable to so much of the relevant consideration for the transaction as is attributable, on a just and reasonable apportionment, to the acquisition of ownership of the dwelling (including any interest or right pertaining to ownership of the dwelling) referred to in sub-paragraph (1)(c).

8A Repayment of additional amount: spouses, civil partners and cohabitants replacing main residence

(1) Sub-paragraph (2) applies in relation to a chargeable transaction to which this schedule applies by virtue of paragraph 2 if—

(a) there are only two buyers, and

(b) the buyers—

(i) are (in relation to each other) spouses, civil partners or cohabitants, and

(ii) are or will be jointly entitled to ownership of the dwelling that is or forms part of the subject-matter of the transaction.

(2) Paragraph 8 has effect in relation to the transaction as if—

(a) the reference in sub-paragraph (1)(a) of that paragraph to the buyer were a reference to either or both of the buyers, and

(b) the references in sub-paragraph (1)(b) and (c) of that paragraph to the buyer were references to both of the buyers together.

(3) For the purposes of sub-paragraph (1)(b)(i), two buyers are cohabitants if they live together as though married to one another.