

Tax Chamber
First-tier Tribunal for Scotland



[2020] FTSTC 3

Ref: FTS/TC/AP/20/0001

Land and Buildings Transaction Tax – Additional Dwelling Supplement (ADS) – disposal of dwelling that was the subject matter of the chargeable transaction and which was not the buyers only or main residence at any time during the period of 18 months ending with the effective date of the transaction – whether ADS repayable – no – appeal dismissed

DECISION NOTICE

IN THE CASE OF

Miss Rona Jane Yard

Appellant

- and -

Revenue Scotland

Respondent

TRIBUNAL: MRS ANNE SCOTT

Hearing by video conference on 17 September 2020

Rona Jane Yard, the Appellant

Kevin Graham, Solicitor, Revenue Scotland

DECISION

Introduction

1. This is an appeal against the decision dated 4 February 2020 by Revenue Scotland refusing Miss Yard's application for repayment of Additional Dwelling Supplement ("ADS"). Miss Yard's application was in terms of paragraph 8 of Schedule 2A to the Land and Buildings Transaction Tax (Scotland) Act 2013 ("LBTTA").
2. Prior to 28 September 2018, Miss Yard had owned a property in Fort William ("the First Property") which was her only or main residence.
3. On 28 September 2018, Miss Yard purchased another property in Perthshire ("the Second Property").
4. The effective date of the transaction for the purposes of Land and Buildings Transaction Tax ("LBTT") was 28 September 2018. A LBTT tax return was submitted to Revenue Scotland that day and, as she owned two properties, she quite properly paid ADS on the second property. The ADS on the second property amounted to £8,970.
5. Miss Yard had planned to sell the First Property. She moved to, and lived in, the Second Property from 28 September 2018 until 1 November 2019. However, due to her mother's death and other traumatic circumstances, she had to sell the Second Property and move back to the First Property which had not yet been sold although negotiations to do so were in place. The Second Property was sold on 13 December 2019.
6. However, as her son was still at school in Perthshire, she leased temporary accommodation in Perthshire until she returned to the First Property on 28 March 2020 and it then became her main residence
7. On 15 January 2020, Miss Yard submitted the claim for repayment of the ADS which is the subject matter of this appeal. That claim was refused by Revenue Scotland by letter dated 4 February 2020.
8. That letter pointed out that Miss Yard had a statutory right to ask Revenue Scotland to review the decision or alternatively she could appeal direct to the Scottish Tribunals.
9. Having spoken with Revenue Scotland, Miss Yard did not seek a review and duly lodged with the Tribunal a Notice of Appeal dated 7 March 2020.

The Appellant's Grounds of Appeal

10. In summary, Miss Yard argues that, when introducing ADS, it was the intention of the Scottish Parliament to tax those who bought second homes or buy-to-let properties and she has never fallen into either category. She has only ever wanted to own one property and when she bought the Second Property she was replacing her main residence and indeed she moved into it. It is only as a result of circumstances that could not have been foreseen that she was placed in the position of moving back to the First Property. She still currently owns only the First Property.

Revenue Scotland's argument

11. Shortly put Revenue Scotland state that they must apply the law and they have no discretion. There is no ambiguity in the clear words of the statute and the appellant had not complied with the provisions of either paragraphs 8(1)(a) or (b) of Schedule 2A LBTTA.

Discussion

12. Firstly, as I pointed out at paragraph 51i of the decision in *Dr Colin Goudie and Dr Amelia Sheldon v Revenue Scotland*¹ ("Sheldon"), the policy intention was as Miss Yard argues. However, that policy statement has to be read in context. Paragraph 51i of *Sheldon* reads:

"i. Although, for the reasons that we outline below, we do not consider that recourse to Parliamentary debate is either required or appropriate in this case, we record the detail of that paragraph and it reads:

"The Land and Buildings Transaction Tax (Amendment) (Scotland) Bill introduces a 3 per cent land and buildings transaction tax supplement payable on the purchase of additional dwellings, such as buy-to-let or second homes. Subject to parliamentary approval, that means that, from 1 April 2016, **anyone buying** a residential property in Scotland of £40,000 and above who already owns a residential property, here or anywhere in the world, will pay an additional 3 per cent land and buildings transaction tax on the whole purchase price of the property, **unless they are simply replacing their existing main residence.**"

We have highlighted in bold the fact that the Cabinet Secretary referred to any buyer and the need for that buyer to be replacing their existing main residence."

13. I accept that at the time of the purchase of the Second Property Miss Yard fully intended to replace her existing main residence.

14. However, the legislation² that was enacted to implement that policy reads:

"Repayment of additional amount in certain cases

8 (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."

15. I have highlighted in bold the key words.

¹ 2018 FTSTC 3

² paragraph 8(1) Schedule 2A LBTTA

16. It is not in dispute that in the first instance Miss Yard was liable for both the LBTT and the ADS. It is also not in dispute that had she sold the First Property then she would have qualified for repayment of the ADS.

17. The problem for her is that she simply does not comply with either paragraphs 8(1)(a) or 8(1)(b) Schedule 2A LBTTA.

18. Since it is the Second Property which triggered the payment of ADS, it is the Second Property which formed the subject-matter of the chargeable transaction. Therefore, in order to obtain repayment the disposal must be of a property *other* than the Second Property in order to meet the first condition. Thus, the disposal of the Second Property cannot result in repayment of the ADS. Therefore, the condition in paragraph 8(1)(a) is not met.

19. Of course, Miss Yard agrees that the Second Property was not her only or main residence at any time in the 18 months prior to 28 September 2018 which is the effective date of the transaction. That would have been impossible. Therefore, the condition in paragraph 8(1)(b) is also not met.

20. From the wording of the legislation, it is clear that it was the Scottish Parliament's intention that ADS is only repayable in the limited circumstances set out in paragraph 8(1) of Schedule 2A LBTTA. All three conditions in paragraph 8(1) of that Schedule must be met for the ADS to be repayable. As neither of the conditions in paragraph 8(1)(a) or 8(1)(b) of Schedule 2A LBTTA are met in this case, the ADS cannot be repayable.

21. I unhesitatingly accept that Miss Yard found herself in the very unfortunate position where she had to move back to the First Property which had not yet been sold. That was not in any sense her fault. Indeed, I have considerable sympathy for her.

22. It is evident that when this legislation was drafted, and amended more than once, it was the clear intention of the Scottish Parliament to permit repayment of the ADS in only very limited circumstances. Sadly for Miss Yard she simply does not fit within those.

23. This Tribunal has no discretion and must apply the law as it has been enacted by the Scottish Parliament. Only the Scottish Parliament can alter the terms of the legislation.

24. Lastly, in their Skeleton Argument, Revenue Scotland are correct to quote *Sheldon* at paragraph 67 where, having quoted from the Upper Tribunal in *HMRC v Hok*³, I stated "This Tribunal does not have jurisdiction to consider...fairness." It does not.

Decision

25. For the reasons set out above, I find that Revenue Scotland's interpretation of the legislation and its application to the undisputed facts is entirely correct and the decision is upheld.

26. 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)

³ [2012] UKUT 363 (TCC)

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.

MRS ANNE SCOTT

President

RELEASE DATE: 23 September 2020