

Tax Chamber
First-tier Tribunal for Scotland



[2022] FTSTC 2

Ref: FTS/TC/AP/21/0002

***Land and Buildings Transaction Tax – Additional Dwelling Supplement –
Armed Forces Covenant – Revenue Scotland Guidance LBTT 10020 –
Postings abroad so unable to reside in UK – whether ADS repayable – no***

DECISION NOTICE

IN THE CASE OF

Dr Andrew Christie

Appellant

- and -

Revenue Scotland

Respondent

**TRIBUNAL: PRESIDENT: ANNE SCOTT
MEMBER: CHARLOTTE BARBOUR**

The hearing took place on Wednesday 26 January 2022 via WEBEX

We heard Dr Andrew Christie, the Appellant, and Mr Kevin Graham, Solicitor for Revenue Scotland, for the Respondent

DECISION

Introduction

1. This is an appeal against Revenue Scotland's decision to amend to NIL, Dr Christie's claim for repayment of the Additional Dwelling Supplement ("ADS") in the sum of £22,000. That ADS had been charged under Section 26A and Schedule 2A of the Land and Buildings Transaction Tax (Scotland) Act 2013 ("the Act").
2. Dr Christie sought repayment in terms of Section 107 of Revenue Scotland and Tax Powers Act 2014 ("RSTPA") on the basis that the conditions in paragraph 8 of Schedule 2A of the Act were met.
3. Paragraph 8, Schedule 2A, of the Act is key because the conditions in it that need to be met for ADS to be repaid include that the previous property was the "only or main residence"; the issue in this case is whether or not that property was Dr Christie's only or main residence in the 18 months prior to the purchase of the property which gave rise to the ADS charge.
4. At the heart of Dr Christie's appeal is the argument that the decision not to repay the ADS is patently unfair because Revenue Scotland had:-
 - (a) Failed to consider the purpose of the ADS;
 - (b) Had incorrectly interpreted their own provisions in their guidance LBTT 10020; and
 - (c) Failed to consider the provisions of the Armed Forces Covenant.

Preliminary issue

5. The Notice of Appeal was lodged after the statutory time limit for reasons relating to Dr Christie's military service abroad. Revenue Scotland consent to the late lodgment of the appeal and it is admitted.

The Decision

6. The appeal is dismissed for the reasons set out below.

Factual background

7. The underlying facts are not in dispute.
8. Dr Christie is a doctor of the British Army holding the rank of Major. Whilst serving in Cyprus, Dr Christie's wife purchased a property ("the first property") with the intention of living there on the family's return to the UK. However, from August 2015 until December 2019, Dr Christie and his family were serving on an ordered overseas posting to an army unit in Canada where they lived in British Military provided accommodation. The first property was rented out. It contained some of their personal items including a limited amount of furniture, white goods and a cooker.

9. On completing the overseas posting, Dr Christie was ordered to be posted to Scotland, taking up post in January 2020.
10. In the knowledge of that posting, Dr Christie and his wife had purchased a property in Scotland (“the second property”) with a completion date of 20 September 2019.
11. The purchase of the second property was a notifiable transaction and on 26 September 2019 Dr Christie quite properly made a Land and Buildings Transaction Tax (“LBTT”) return and paid the LBTT including the ADS. The ADS was £22,000.
12. The first property was subsequently sold with an effective date of 19 February 2021 and Dr Christie submitted a claim online for repayment of the ADS on 25 February 2021. With that claim Dr Christie attached a letter dated 20 February 2021 intimating that it had been his and his wife’s intention to return to the first property when the posting overseas ended but that had proved to be impossible because of his posting to Scotland. The first property had been their only property and the only reason that they had been unable to reside in it was because of the posting overseas. He referenced the Revenue Scotland Guidance LBTT 10020.
13. On 12 March 2021, Revenue Scotland wrote to Dr Christie and his wife rejecting the repayment claim on the basis that they had not met the condition in paragraph 8(1)(b) of Schedule 2A Part 5 of the Act because the first property had not been their main residence at any point in the 18 months prior to purchasing the second property.
14. On 8 April 2021, Dr Christie and his wife wrote to Revenue Scotland requesting a review of the decision on the basis that they were being penalised as a result of Dr Christie’s military service. The review officer was requested to consider the purpose of the ADS, the proper interpretation of the guidance and the Armed Forces Covenant. In essence they argued that their repayment claim fell within the “spirit” of the legislation.
15. On 7 May 2021 Revenue Scotland wrote to Dr Christie and his wife confirming that:
 - (a) The first property had not been their only or main residence at any time during the period of 18 months ending with the effective date of the purchase of the second property.
 - (b) The guidance was there to help people determine what counted as a main residence but Dr Christie and his wife had not lived in the property at any time during the relevant period.
 - (c) The Armed Forces Covenant does not confer any legal rights on army personnel. Revenue Scotland have no legal obligation to disregard the repayment legislation in light of the Armed Forces Covenant and have no discretion when applying the repayment legislation.
16. On 28 May 2021, Dr Christie and his wife wrote to Revenue Scotland arguing that the first property should be classified as their main residence because it was the only property that they owned and arguing that the wording in the Revenue Scotland guidance stating that people may “spend less time in their main residence than in another

residence if you live away because of work commitments, for example, as a lorry driver, offshore worker or member of the armed forces,” indicates that the legislation recognises the impact of military service on residency considerations.

17. On 7 June 2021, Revenue Scotland wrote to Dr Christie and his wife reiterating the arguments already advanced and confirming Revenue Scotland’s view that to disregard the repayment legislation because of the Armed Forces Covenant would be to treat military personnel differently than other taxpayers. It was suggested that if they so wished, Dr Christie and his wife could contact their MSP in order to raise concerns about the legislation.

Dr Christie’s arguments

18. Dr Christie has put considerable time and effort into researching the decision and has lodged detailed arguments.

19. In the Notice of Appeal, Dr Christie stated “The principal reason for appealing the decision of Revenue Scotland is that we believe Revenue Scotland have not applied their own guidance correctly in recognising that military service is a reason for not meeting the residency requirements for ADS repayment”.

20. Dr Christie went on to state that Revenue Scotland had not fairly applied the main residency provisions within their guidance LBTT 10020 and that they did not believe that the LBTT legislation intended that ADS be applied in the manner that Revenue Scotland had done.

21. As far as the guidance is concerned, Dr Christie again quoted from it (see paragraph 15 above) arguing that there is no clarity as to the meaning of spending “less” time in the main residence. Dr Christie argued that the guidance was intended to recognise that military personnel may not be able to reside in their main residence for the qualifying period.

22. On 17 October 2021, Dr Christie submitted a detailed amplification of the Grounds of Appeal. In summary the points he raised were:-

(a) “Only or main residence” is not a defined term within the legislation as is pointed out in the Supplementary Notes to the LBTT (Amendment) (Scotland) 2016. Therefore there may be ambiguity over the definition of main residence.

(b) The aim of the imposition of the ADS was described by the then Deputy First Minister and Cabinet Secretary for Finance Constitution and Economy as being a “3% land and buildings transaction tax supplement payable on the purchase of additional dwellings such as buy-to-let or second homes” with a view to maximising the opportunities for first time buyers. Their transactions did not fall into that category.

(c) He went on to reference the UK Capital Gains Tax and Stamp Duty Land Tax legislation where there is recognition of the impact of military service on the residency rules. On that basis he argued that the guidance LBTT 10020 must

surely have been intended to recognise that issue and should be read so as not to disadvantage military personnel.

(d) The Armed Forces Covenant states that serving personnel should “face no disadvantage” due to their military service and that the “taxation system may be adapted to reflect their circumstances”. He argued that Revenue Scotland did have an obligation to honor the Armed Forces Covenant.

23. He recognised that the Tribunal cannot make a judgement based on fairness but argued that it was unreasonable that he and his wife could not obtain a repayment of the ADS purely because of military service.

24. In the hearing he developed those arguments and in a brief written submission pointed out that when buying the second property he and his wife had relied on Revenue Scotland’s guidance having believed it have been informed by the Armed Forces Covenant.

The Law

25. Paragraph 8(1) Schedule 2A LBTTA reads:-

“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”.

Discussion

26. This is a very sad case and we have considerable sympathy for Dr Christie. As a serving officer he must follow orders and he had no choice about being posted abroad and immediately thereafter to Scotland. Consequently, he simply could not occupy his one and only home in the UK. Contrary to his expectation, it was not possible for the first property to be his only or main residence at any point. We accept his argument that he feels that he has been discriminated against. However, military service and employment are not protected characteristics in terms of the Equality Act 2010.

27. It is not in dispute that in the first instance Dr Christie was liable for both the LBTT and the ADS. The issue is simply whether the ADS is repayable. From the wording of the legislation it is clear that it was the Scottish Parliament’s intention that the ADS is only repayable in the limited circumstances set out in paragraph 8(1) of Schedule 2A. All three conditions must be met. It is not disputed that (a) and (c) are met.

28. Although the then Deputy First Minister did indeed describe the aim of the ADS as being in relation to buy to let or second homes, the fact that the legislation relating to repayment is expressed in such narrow terms shows that the policy relates to taxpayers who own two homes on the day after they purchase the second one. The Tribunal has explained the policy position in *Goudie and Sheldon v Revenue Scotland*¹.

29. The essence of the Armed Forces Covenant is that service personnel deserve fair treatment and should face no disadvantage compared with civilians. Clearly, Dr Christie has been disadvantaged but the Tribunal was created by statute and can only apply the law as it is enacted by Parliament. As can be seen from paragraph 8(1) the ADS can only be repaid in very limited circumstances. That paragraph is written in plain and unambiguous terms and there are no exceptions in the legislation for military personnel.

30. Mr Graham pointed out that whilst he had sympathy with Dr Christie, unless or until the law is changed, military personnel in similar circumstances to Dr Christie would not qualify for repayment of any ADS.

31. Revenue Scotland's guidance is simply their interpretation of the law and it does not have the force of law (as is the case with HMRC's guidance unless it states, as it sometimes does, that it has the force of law).

32. Lastly, it is well established law that the First-tier Tribunal cannot take into account whether or not it considers the law with which it is dealing to be fair or not.²

33. Therefore, we cannot do anything other than uphold Revenue Scotland's decision.

34. As a footnote, we observe that the Scottish Government has issued a call for evidence and views on the ADS because although they believe that the ADS operates well in most circumstances, taxpayers and stakeholder organisations have raised concerns about the way in which the legislation works in some specific circumstances. The consultation closes on 11 March 2022.

35. 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 January 2022

¹ [2018] FTSTC 3

² HMRC v Hok [2012] UKUT (TCC)