

**Tax Chamber**  
**First-tier Tribunal for Scotland**

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[2023] FTSTC 2

Ref: FTS/TC/AP/22/0013

***Land and Buildings Transaction Tax – Additional Dwelling Supplement  
("ADS") – no – as not lived in property in relevant period – appeal  
dismissed***

**DECISION NOTICE**

IN THE CASE OF

**Mr Alexander Joseph Duran**

Appellant

- and -

**Revenue Scotland**

Respondent

**TRIBUNAL: LOUISE CARLIN  
ANNE SCOTT**

**The hearing took place at George House, 126 George Street, Edinburgh on  
Thursday 22 June 2023**

**For the appellant: Mr Alexander Duran**

**For Revenue Scotland: Mr Kevin Graham**

## DECISION

1. This is an appeal against Revenue Scotland's decision to refuse the appellant's claim for repayment of the Additional Dwelling Supplement ("ADS") in the sum of £12,348. That ADS had been charged under section 26A and Schedule 2A of the Land and Buildings Transaction Tax (Scotland) Act 2013 ("the Act").

2. The appellant sought repayment of the ADS in terms of section 107 of Revenue Scotland and Tax Powers Act 2014 ("RSTPA"), the material parts of which read:-

### **"107 Claim for relief for overpaid tax etc**

(1) This section applies where —

(a) A person has paid an amount by way of tax but believes the tax was not chargeable, ....

(2) The person may make a claim to Revenue Scotland for the amount to be repaid or discharged.

(3) Where this section applies, Revenue Scotland is not liable to give relief, except as provided in this part, or by or under any other provision of this Act."

### **Factual background**

3. The underlying facts are not in dispute.

4. In 2008, the appellant purchased a home in Edinburgh ("the First Property") jointly with his now ex-wife. The appellant left that property in April 2015 and did not return to live there.

5. The appellant purchased another property in Edinburgh ("the Second Property") with an effective date of 29 August 2019.

6. The electronic Land and Buildings Transaction Tax ("LBTT") return for the purchase of the Second Property, as amended on 2 September 2019, reflected the ADS chargeable in the sum of £12,348 and that was paid.

7. On 5 November 2021, the appellant transferred his interest in the First Property to his ex-wife for the payment of a capital sum.

8. On 9 August 2022, the appellant submitted a claim for repayment of the ADS.

9. On 17 August 2022, Revenue Scotland wrote to the appellant, intimating that the conditions for repayment of the ADS had not been met and therefore the claim for repayment was refused. In particular, the appellant had not satisfied the condition which requires that the dwelling disposed of, the First Property, was his only or main residence at any time in the 18 month period ending with the effective date of the purchase of the Second Property.

10. On 15 September 2022, the appellant's agent requested a review of the decision of Revenue Scotland to refuse the claim for repayment of the ADS. The basis for that was that, for reasons which are not necessary to narrate here, the appellant could not live in the First Property from April 2015 but that it had remained his main residence until he purchased the Second Property on 29 August 2019.

11. On 14 October 2022, Revenue Scotland issued its view of the matter letter to the appellant upholding the original decision of 17 August 2022. This was because the appellant had moved out of the First Property into temporary accommodation in April 2015 and the First Property had not been his main residence at any point during the 18 month period prior to the purchase of the Second Property.

12. In an email to Revenue Scotland of 25 October 2022, the appellant's agent indicated that, if the accommodation into which the appellant moved in April 2015 was temporary, then the First Property remained the appellant's main residence. As the appellant had no permanent accommodation until the purchase of the Second Property, his agent's view was that that transaction met the criteria for the repayment of the ADS.

13. On 24 November 2022, Revenue Scotland issued its Review Conclusion letter to the appellant which confirmed that the original decision to refuse the appellant's claim for the repayment of the ADS was upheld and for the same reason.

14. On 22 December 2022, the appellant appealed to the Tribunal.

## **The law**

15. The relevant provisions of Schedule 2A of the Act are set out at Appendix 1.

## **Discussion**

16. The appellant highlighted what he described as a degree of ambiguity in the Guidance of Revenue Scotland which states that "it is highly unlikely a property can be viewed as your only or main residence if you have spent no time there in the 18 month period...".<sup>1</sup> This suggests that it is possible, if highly unlikely, that a property could be viewed as a main residence even if no time had been spent there in the relevant period.

17. The appellant also indicated that he had met some of the criteria set out in the Guidance of Revenue Scotland which could support his claim that the First Property was his main residence in the relevant period. For example, the First Property is where the appellant's children live and where he has been registered for certain purposes.

18. The Tribunal has sympathy for the position of the appellant and appreciates the measured, clear way in which he put forward his case for the repayment of the ADS.

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<sup>1</sup> <https://revenue.scot/taxes/land-buildings-transaction-tax/lbtt-legislation-guidance/additional-dwelling-supplement-ads-technical/ads-legislation-key-terms#LBTT10020>

19. However, it is a matter of agreed fact that the appellant did not live in the First Property at any time in the period of 18 months ending with the effective date of the transaction to purchase the Second Property.

20. The Tribunal was created by an Act of the Scottish Parliament and is, therefore, a creature of statute. Its powers are only those which are given to it expressly by statute.

21. In the case of an appeal of an appealable decision, section 244(2) RSTPA provides that:-

“The Tribunal is to determine the matter in question and may conclude that Revenue Scotland’s view of the matter in question is to be:-

- (a) Upheld,
- (b) Varied, or
- (c) Cancelled.”

22. In determining the matter in question, the Tribunal must apply the law.

23. As can be seen from the Appendix, paragraph 8(1) of Schedule 2A to the Act provides that:-

“(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.”

24. The Act makes it explicit that the repayment of the ADS is contingent on the First Property having been the appellant’s only or main residence at any time during the period of 18 months ending with the effective date of the transaction to purchase the Second Property. There is no provision in the Act for considering extenuating or special circumstances nor a reasonable excuse as to why that was not the case.

25. While the term “main residence” is not defined in the Act, the UK case law on residence provides guidance.

26. In *Simpson v HMRC*<sup>2</sup> Judge Sinfield sets out, at paragraphs 9 to 13, the relevant case law as follows:-

“9. In *Fox v Stirk, Ricketts v Registration Officer for the City of Cambridge* [1970] 2 QB 463, the Court of Appeal considered whether students should be resident in the constituency of the University that they attended. In his judgment, Lord Denning MR

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<sup>2</sup> [2019] UKFTT 704 (TC)

cited a passage from the speech of Viscount Cave LC in *Levene v Inland Revenue Commissioners* [1928] AC 217:

“... the word ‘reside’ is a familiar English word and is defined in the Oxford English Dictionary as meaning ‘to dwell permanently or for a considerable time, to have one’s settled or usual abode, to live in or at a particular place’.”

10. Lord Denning went on to say:

“I derive three principles. The first is that a man can have two residences. He can have a flat in London and a house in the country. He is resident in both. The second principle is that temporary presence at an address does not make a man resident there. A guest who comes for the weekend is not resident. A short stay visitor is not resident. The third principle is that temporary absence does not deprive a person of his residence. If he happens to be away for a holiday or away for the weekend or in hospital, he does not lose his residence on that account.”

11. Further to this Lord Widgery commented:

“This conception of residence is of a place where a man is based or where he continues to live, the place where he sleeps and shelters and has his home. It is imperative to remember in this context that ‘residence’ implies a degree of permanence. In the words of the Oxford English Dictionary, it is concerned with something which will go on for a considerable time. Consequently a person is not entitled to claim to be a resident at a given town merely because he pays a short, temporary visit. Some assumption of permanence, some degree of continuity, some expectation of continuity, is a vital factor which turns simple occupation into residence.”

12. These comments are regarded as equally applicable to PPR relief and were relied on by the Court of Appeal in *Goodwin v Curtis* (1998) 70 TC 478. In that case, the taxpayer moved into the property in question as a stop-gap measure pending finding somewhere else to live. Millett LJ held in his judgment at 510:

“Temporary occupation at an address does not make a man resident there. The question whether the occupation is sufficient to make him resident is one of fact and degree for the Commissioners to decide.

The substance of the Commissioners’ finding taken as a whole, in my judgment, is that the nature, quality, length and circumstances of the taxpayer’s occupation of the [property] did not make his occupation qualify as residence.”

13. In the same case, Lord Justice Schiemann said at 510:

“... in order to qualify for the Relief a taxpayer must provide some evidence that his residence in the property showed some degree of permanence, some degree of continuity or some expectation of continuity.”

27. Applying the principles set out above, it is difficult to envisage a scenario in

which a property could be viewed as a main residence if, as a matter of fact, no time had been spent there in the relevant period, as is the case in the present appeal.

28. When that was put to him, Mr Graham, very properly, conceded that it would be impossible in those circumstances to view a property as a main residence.

29. Unfortunately, Revenue Scotland's Guidance leaves open that possibility.

30. The Tribunal also appreciates that the appellant may consider the law not to be fair.

31. However, we must take account of the Upper Tribunal in *HMRC v Hok Ltd*<sup>3</sup> in which it is stated, at paragraphs 56 to 58,:-

"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 2007 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."

32. While this appeal is not concerned with penalties and whether they are fair, the principle is the same and this Tribunal does not have jurisdiction to consider fairness in determining the matter in question.

## **Decision**

33. For all these reasons the appeal is dismissed and the decision of Revenue Scotland is upheld.

34. 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)

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<sup>3</sup> [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.

**LOUISE CARLIN**

**Legal Member**

**RELEASE DATE: 14 July 2023**

**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.

**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.

**8B Repayment of additional amount: period for disposing of ownership of dwelling**

(1) Sub-paragraph (2) applies in relation to a chargeable transaction to which this schedule applies by virtue of paragraph 2 if the effective date of the transaction falls within the period beginning with 24 September 2018 and ending with 24 March 2020.

(2) Paragraph 8(1)(a) has effect in relation to the transaction as if for “period of 18 months” there were substituted “period of 36 months”.