Tax Chamber
First-tier Tribunal for Scotland

[2023] FTSTC 4

Ref: FTS/TC/AP/23/0002

Land and Buildings Transaction Tax ("LBTT") – Additional Dwelling Supplement ("ADS") – whether a property was an only or main residence for LBTT purposes – no – appeal dismissed

DECISION NOTICE

IN THE CASE OF

Mr Alan Blue

Appellant

- and -

Revenue Scotland

Respondent

TRIBUNAL: LOUISE CARLIN
ANNE SCOTT

An in-person hearing was due to take place at George House, 126 George Street, Edinburgh on Thursday 20 July 2023.

With reference to Rules 2, 5 and 30 of The First-tier Tribunal for Scotland Tax Chamber (Procedure) Regulations 2017, on 20 July 2023 the Tribunal granted the unopposed application of the Appellant to postpone the in-person hearing of the appeal and granted the Appellant's request to proceed without either an in-person hearing or a video hearing and to proceed on the basis of written submissions.

The Tribunal determined the appeal without a hearing having first read the Notice of Appeal, and attachments, dated 30 January 2023; Revenue Scotland's Statement of Case, and attachments, dated 31 March 2023; the written submissions of the Appellant dated 17 August and 1 October 2023; and the written submissions of Revenue Scotland dated 13 September 2023.

DECISION

1. This is an appeal against Revenue Scotland's decision to refuse Mr Blue's claim for repayment of the Additional Dwelling Supplement ("ADS"). ADS had been charged under section 26A and Schedule 2A of the Land and Buildings Transaction Tax (Scotland) Act 2013 ("LBTTA") and it had been paid.

2. Neither the facts nor the law are now in dispute.

Factual background

3. On 12 July 2019, Mr Blue sold a residential property in Hamilton ("the First Property") to his son and his wife.

4. Mr Blue jointly purchased, with Mrs Patricia Miller, a residential property in Lanark ("the Second Property") with an effective date of 30 July 2019.

5. As at 30 July 2019, Mrs Miller also co-owned a property in Glasgow ("the Third Property") which was sold on 12 July 2022.

6. Mr Blue lived in the Third Property with Mrs Miller for a period of 18 days from the date of vacating the First Property to the date of entry for the Second Property, of 30 July 2019.

7. The electronic Land and Buildings Transaction Tax ("LBTT") return, dated 1 August 2019, for the purchase of the Second Property stated a nil consideration for ADS and that the main residence to be sold was the First Property.

8. That LBTT return was amended on 2 August 2019 and stated that ADS was chargeable in the sum of £12,700 and that was paid. It stated that the main residence to be sold was the Third Property.

9. On 12 August 2022, Mrs Miller's agent submitted a claim to Revenue Scotland for a full repayment of the ADS. The previous main residence was stated as being the Third Property.

10. On 15 August 2022, Revenue Scotland wrote to the agent seeking information in support of Mr Blue's repayment claim including:

> "…documentary evidence that ALL BUYERS LIVED in this property as their main residence at some point during the 18 month period PRIOR to buying their new dwelling on Effective Date 30/7/19 (i.e. a copy of official letter-headed utility or other bills clearly addressed to your clients at this property & prior to effective date)".

11. In response, the agent indicated that it "was never the case" that Mrs Miller and Mr Blue had both lived in the Third Property as their main residence and that he could not see where in the legislation that that was a requirement for the repayment of ADS.

12. On 15 September 2022, Revenue Scotland wrote to the agent refusing the repayment claim on the basis that the Third Property had not been occupied by both buyers.

13. On 21 September 2022, the agent requested a review of that decision, stating that Mr Blue had "never stayed" in the Third Property.

14. Correspondence ensued.

15. On 3 November 2022, Revenue Scotland sent their View of the Matter letters to both Mr Blue and Mrs Miller with copies to the agent. Those stated that "The dwelling disposed of was not the main residence of **all the** buyers at some point during the 18 month period prior to the transaction" and "that the decision to reject the ADS repayment claim should be **upheld**".

16. On 9 November 2022, Mr Blue wrote to Revenue Scotland indicating that he had not previously seen the facts and grounds for review presented by his agent which had contained "a number of errors". Mr Blue confirmed that he had resided with Mrs Miller at the Third Property from the date of the sale of the First Property on 12 July 2019 until the entry date for the Second Property on 30 July 2019.

17. On 14 December 2022, Revenue Scotland wrote to Mr Blue referring to their website and requesting supporting evidence stating that:

> "The repayment of ADS all hinges on you being able to provide evidence that you stayed at said property as co-habitants (sic), otherwise Ms Millar (sic) is deemed to be the only purchaser replacing their previous main residence (PMR). Did you update your Doctors (sic) records to the new address or your mobile phone bill for example?".

18. On 6 January 2023, Mr Blue emailed Revenue Scotland stating:-

> "… given the short period of time involved, I have, not surprisingly, been unable to find any documentation of my residence at [the Third Property]. In particular, there was no need for redirection of mail as the buyers of my house… were my son and his family, my mobile phone was registered to my workplace, any deliveries had been directed to my workplace for a number of years, health professionals remain unchanged, banking was done on-line, Glasgow City Council council tax department advised leaving unchanged given the short period of time and small sum of money involved".

19. He asked Revenue Scotland "… what evidence would be accepted by you in these circumstances, eg, statement by Mrs Miller?".

20. On the same day, Revenue Scotland sent their Review Conclusion letters to both Mr Blue and Mrs Miller with copies to the agent. Those letters upheld the decision refusing the repayment and stated that the Third Property was:

> "…not the main residence of all the buyers at some point during the 18 month period prior to the transaction. Mr Blue stated in his email dated 9 November 2022

that he stayed at this property from 12 July to 30 July 2019 until you moved to your new main residence…but he was unable to provide evidence to corroborate this."

21. What that letter did not do was refer to Mr Blue's email of the same date.

22. On 9 January 2023, the agent wrote to Revenue Scotland enquiring whether it would make a difference if Mr Blue provided written statements to the effect that he and Mrs Miller had both stayed at the Third Property "for that week in 2019".

23. On 10 January 2023, Mr Blue's son wrote to Revenue Scotland confirming that his father had lived in the Third Property from 12 July 2019 until the purchase of the Second Property was concluded. He had helped Mr Blue to move the "possessions that he needed in the short term" into the Third Property.

24. On 16 January 2023, Mr Blue sent to Revenue Scotland six signed letters stating that Mr Blue had stayed with Mrs Miller at the Third Property from 12 to 30 July 2019.

25. On 23 January 2023, Revenue Scotland emailed Mr Blue referring to the emails of 6 and 16 January 2023, enclosing a link to its guidance "How to claim a repayment of Additional Dwelling Supplement" and stating that:

> "The evidence that you have provided to show that you stayed at the [Third Property] during the period 12 July to 30 July 2019 cannot be accepted as it is not in the form as explained within the guidance, that would be deemed acceptable. Therefore, my decision to uphold the original decision to refuse the ADS repayment in my conclusion letter dated 6 January 2023 stands."

26. On 30 January 2023, Mr Blue appealed to the Tribunal enclosing the seven letters to which we refer at paragraphs 23 and 24 above, his email to Revenue Scotland dated 6 January 2023, Revenue Scotland's email to him dated 23 January 2023 and an extract from Revenue Scotland's guidance on repayment of ADS.

27. On 3 March 2023, Revenue Scotland emailed Mr Blue with a letter referring to the appeal to the Tribunal, Mr Blue's repayment claim, the decision letter and the Review Conclusion letter and stated:-

> "Revenue Scotland require evidence to be provided from an independent source to show occupancy of a previous main residence. Notwithstanding that, we do not believe that the [Third Property] was your main residence, as this was only a temporary measure before you took up residence at the new property that you had purchased with Mrs Miller.
>
> Even if we accept that you were in occupation at the [Third Property] (albeit for a period of less than three weeks) this is different from saying it was your only or main residence. Due to the nature of your short stay in that property it would point to the fact that your occupation there was a temporary one and it was never your intention to stay there permanently".

28. The letter went on to refer Mr Blue to *Cohen v HMRC* [2023] UKFTT 90 (TC) ("Cohen") on the basis that it bore similarities with this appeal. Revenue Scotland stated

that they were due to lodge their Statement of Case with the Tribunal by 3 April 2023 and wished to establish the factual position. They referred to the conflict between the agent's letter stating that Mr Blue had never stayed in the Third Property and the letters stating that he had and sought clarification.

29. On 3 March 2023, Mr Blue replied indicating that he was "… unable to account for the correspondence you received from [my agent] as I neither saw any of this nor was I asked to provide any information."

30. On 27 April 2023, the agent for Mr Blue and Mrs Miller wrote to the Tribunal confirming that it had been their error to have stated that Mr Blue had not lived in the Third Property; at the time they had not known that he had lived there "temporarily".

Discussion

31. The Tribunal was created by the Scottish Parliament and is therefore a creature of statute. What that means is that its powers are only those that are given to it expressly by statute. Any decision that the Tribunal makes must be based on the relevant law. In this case that is paragraph 8(1) Schedule 2A LBTTA which 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."

32. Paragraphs 8A and 8B of Schedule 2A LBTTA go onto provide that:-

> **"8A.— Repayment of additional amount: spouses, civil partners and co-habitants 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.

33. We have highlighted in bold the key words.

34. It is paragraph 8(1)(b) that is the substantive issue in this appeal. The question is whether the Third Property was the **only or main residence** of both Mr Blue and Mrs Miller at any time during the period of 18 months ending with the effective date of the purchase by Mr Blue and Mrs Miller of the Second Property.

35. There is no doubt that it had been Mrs Miller's only or main residence so the burden of proof is on Mr Blue to show that the spell of time when he lived in the property had made it his only or main residence for LBTT purposes.

36. The standard of proof is the ordinary civil standard, which is the balance of probabilities.

37. We had detailed written submissions from both parties.

38. The starting point is that we certainly do accept that Mr Blue did live in the Third Property for the latter part of July 2019 and that it was his home at that stage. He had no other home or residence.

39. We note Revenue Scotland's repeated requests for external evidence such as council tax and utility bills etc and their argument that the letters provided by Mr Blue were not acceptable because they were "not in the form explained within the guidance".

40. We do not accept those arguments. Mr Blue correctly points out, and Revenue Scotland accept, that Revenue Scotland's guidance does not have the force of law and nor do HMRC's guidance and manuals to which we were also referred. All of those are simply the relevant tax authority's view of law.

41. In general, when looking at the question of only or main residence, council tax bills etc can be very useful items of evidence. However, every case turns on its own individual facts and in this instance it is obvious that Mr Blue knew from the outset that, unless some unforeseen problem arose, he was only going to be living in the Third Property for less than three weeks; it would have been pointless to have changed his address with the authorities and in any event he had other systems in place.

42. Revenue Scotland should have accepted the seven letters as evidence and then advanced relevant arguments as to the weight to be given to them. We have done so and we find that they establish very clearly that Mr Blue was living in the Third Property for the latter part of July 2019.

43. Since the term “only or main residence” is not defined in the LBTT legislation, we must look at the relevant case law. The Explanatory Notes to RSTPA read:-

> “The effect of [the legislation] is that the jurisprudence concerning the proper bounds of the tax authority’s role is imported into the devolved tax system. This jurisprudence includes not only case law from the UK jurisdictions but other English-speaking jurisdictions.”

44. There are no Tribunal decisions on this point in relation to LBTT since it is comparatively new legislation. However, there are numerous cases in relation to this well-known term which is used in many United Kingdom taxes.

45. On the one hand, Mr Blue did quote and rely on some UK case law, but, on the other hand, at point 5 in his Supplementary Submissions, he argued that “There is no need to refer to any UK tax legislation or case law for guidance.” We are afraid that we cannot agree with him. We must, and do look to the extensive jurisprudence on the subject.

46. Mr Blue has focused on the fact that he had lived in the Third Property and in his earlier Submissions he argues that “… the only issues are whether I was resident at [the Third Property] and whether that can be proven.” That is not entirely the case and it is more complicated than that.

47. Firstly, we look at what being resident means. We were not referred to the case but in *Simpson v HMRC* [2019] UKFTT 704 (TC) (“Simpson”) Judge Sinfield reviewed the relevant case law as follows:-

> “CASE LAW ON RESIDENCE
>
> 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 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’.”
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> 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 [Principal Private Residence] 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."

48. We have highlighted some of the key words since they encapsulate some of the guidance to be found in earlier cases such as *Moore v Thompson (Inspector of Taxes)* [1986] STC 170 upon which Mr Blue relied for the proposition that "even occasional and short residence in a place can make that a residence".

49. Mr Blue also relied on *Yechiel v HMRC* [2018] UKFTT 683 (TC) ("Yechiel") arguing that the test of residence is "quality", not the length of time spent in a property, and in this case that should be determined by what he actually did in the Third Property.

50. We accept that, as he says, he

> "…did not live out of a suitcase, all meals were taken in the house, all laundry was done in the house, my car was kept on the driveway, we were visited by my daughter from London who stayed with us at [the Third Property] whilst in Scotland for a wedding and it was the case that should the purchase of [the Second Property] fall through then I would continue to stay at [the Third Property] until we found another property.".

We agree with his conclusion that the "quality" of his occupation was "as a home" and that it was unrestricted.

51. Mr Blue argued that as the Third Property was his home for the 18 days that he lived there, the word “home” can, and should be used interchangeably with the word “residence”. Whilst we accept that it was his home and used as such, we cannot accept that the words are interchangeable.

52. At page 510 in *Goodwin v Curtis* (one of the cases to which Judge Sinfield referred in the quotation at paragraph 47 above at 12 and 13) Lord Justice Millett said that:

> “I do not regard it as helpful to substitute other words as glosses on statutory language by asking whether the [property] was his home or whether he lived there since he had nowhere else to live. He manifestly did live there but I do not consider that the Commissioners can be faulted for having reached the conclusion that he did not at any stage reside there…. The taxpayer's occupation was manifestly a stop gap measure pending the completion of his purchase of somewhere else to live.”

53. We agree with the principle that we must look at the statutory language and the words are not interchangeable. We also find that that last sentence is a very apt description of what happened here. The Third Property was a stop-gap arrangement.

54. In *Yechiel*, the UKFTT observed at paragraph 37 that, since the judgment of the Court of Appeal in *Goodwin v Curtis*:-

> “…cases have paid a significant amount of attention to the intentions of the taxpayer when they moved into the property. There have been a number of cases where short periods of residence (shorter than in this case) have, by virtue of the 'quality' of the residence, been held to have qualified the property as an 'only or main residence'.” (emphasis added)

55. That was the point that HMRC were making when they referred Mr Blue to *Cohen.* The Tribunal in that case was considering a very short period of occupation and found that the key deciding factors were that (a) Mr Cohen had purchased the property with the intention that it should be his only or main residence, and (b) by the time that he had moved into the property he knew that his occupation would only be temporary because he had decided to purchase another property.

56. When Mr Blue moved into the Third Property he intended to move into the Second Property in less than three weeks. As his agent said latterly, he lived there “temporarily”. As his son said, he moved only the possessions that he needed “in the short term”. He did not intend to stay there with any degree of permanence. He did not expect to stay there for any length of time.

57. The facts are that whilst it was his home and he did live there for 18 days, it was always intended to be a stop-gap arrangement until they moved into the Second Property or, if that fell through, some other property (see paragraph 50 above).

58. We find that the nature, quality, length and circumstances of Mr Blue’s occupation of the Third Property did not amount to it being his only or main residence at any time during the requisite period of 18 months.

59. Therefore, the condition in paragraph 8(1)(b) LBTTA for the repayment of ADS has not been met.

60. Lastly, Mr Blue argues that it is "…quite nonsensical and illogical that ADS should be due simply because we have bought jointly after the sale of my house".

61. As this Tribunal said at paragraph 38 in *Crawford v Revenue Scotland* [2022] FTSTC 3, a case upon which Revenue Scotland rely

> "We accept that had Dr Crawford sold the first property the day after the effective date or if the parties had cohabited the ADS would have been repaid. That is because the provisions are indeed tightly drawn and the exemption and repayment possibilities limited. That does not make them absurd, illogical or unreasonable."

62. 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 the condition in paragraph 8(1)(b) of Schedule 2A LBTTA is not met in this case, the ADS cannot be repayable.

63. We cannot agree with Mr Blue's assertion that "it is much more likely that the legislators intended for the layman's broader understanding of residence to be adopted" and that residence was equivalent to living or residing in a property.

64. 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 Mr Blue, he simply does not fit within those. The legislation contains no provisions giving Revenue Scotland, or the Tribunal, the power to extend those circumstances.

65. 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.

66. We can understand why Mr Blue might consider the law to be unfair.

67. However, in their Statement of Case, Revenue Scotland are correct to quote *Dr Goudie and Dr Sheldon v Revenue Scotland* [2018] FTTSC 3 at paragraph 67 where, having quoted from the Upper Tribunal in *HMRC v Hok* {2012] UKUT 363 (TCC), the Tribunal stated "This Tribunal does not have jurisdiction to consider…fairness." It does not.

Decision

68. For all these reasons, the appeal is dismissed and the substantive issue that the ADS should not be repaid is upheld.

69. 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.

LOUISE CARLIN

Legal Member

RELEASE DATE: 21 December 2023