

Tax Chamber
First-tier Tribunal for Scotland



[2023] FTSTC 3

Ref: FTS/TC/AP/23/0015

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

DECISION NOTICE

IN THE CASE OF

Mr Stephen McCarter

Appellant

- and -

Revenue Scotland

Respondent

**TRIBUNAL: LOUISE CARLIN
CHARLOTTE BARBOUR**

The Tribunal determined the appeal on 17 October 2023 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 31 July 2023 and Revenue Scotland's Statement of Case, and attachments, received by the Tribunal on 22 August 2023.

DECISION

Introduction and summary

1. In our view, Revenue Scotland has not issued a competent Closure Notice in this appeal.
2. The Tribunal will nevertheless deal with the matter in question on the assumption that a competent Closure Notice had been issued by Revenue Scotland.
3. This will enable the appellant's appeal to be determined proportionately, flexibly and without further delay.
4. The appellant properly paid Additional Dwelling Supplement ("ADS") as he owned a property in Bathgate at the time of completing his purchase of the property in Glasgow.
5. He did not occupy the property in Bathgate at any time in the period of 18 months ending with the date of the completion of the purchase of the property in Glasgow.
6. The appellant has not, therefore, met all of the statutory conditions required for the repayment of the ADS he paid.
7. Those statutory conditions are clear. There is no provision in the legislation for the Tribunal to consider extenuating circumstances in determining whether ADS should be repaid when any of those conditions have not been met.
8. More generally, the Tribunal only has the powers given to it by statute. It does not have jurisdiction to consider arguments of fairness or reasonableness in determining the matter in question in this appeal, being whether the ADS should be repaid.
9. Therefore, the ADS should not be repaid.

Factual background

10. The appellant purchased a residential property in Glasgow with an effective date of 30 March 2021 ("the First Property").
11. On 30 March 2021, the appellant owned a residential property in Bathgate ("the Second Property").
12. On 31 March 2021, the appellant's agent made an electronic Land and Buildings Transaction Tax ("LBTT") return for the purchase of the First Property, which stated ADS due of £6,840 ("the ADS"). That sum was duly paid on 8 April 2021.
13. On 22 July 2022, the appellant sold the Second Property.
14. On 7 October 2022, the appellant's agent made a claim to Revenue Scotland for the repayment of the ADS.

15. On 10 October 2022, Revenue Scotland sent a secure message to the appellant's agent requesting evidence to demonstrate that the conditions for the repayment of the ADS had been met.

16. On 17 October 2022, the appellant's agent made a further claim to Revenue Scotland for the repayment of the ADS.

17. On 17 October 2022, Revenue Scotland spoke to the appellant's agent by telephone.

18. No appealable decision was subsequently made by Revenue Scotland in respect of the appellant's repayment claims.

19. On 6 June 2023, Revenue Scotland issued correspondence to the appellant entitled "Closure notice under section 93 of the Revenue Scotland & Tax Powers Act 2014".

20. On 31 July 2023, the appellant appealed to the Tribunal.

The law

21. The relevant provisions of the Revenue Scotland and Tax Powers Act ("RSTPA") and Schedule 2A to the Land and Buildings Transactions Tax (Scotland) Act 2013 ("the Act") are set out in the Appendix.

Preliminary matters

22. Revenue Scotland submits in the Statement of Case that:-

"On 6 June 2023, the Respondent opened an enquiry. The Respondent's closure notice was issued on the same date and concluded that as the repayment conditions for ADS were not met, a repayment was not due. The closure notice amended the repayment claim to nil.

The current appeal relates to the closure notice of 6 June 2023."

23. The Tribunal has a copy of correspondence from Revenue Scotland to the appellant, dated 6 June 2023, which purports to be a Closure Notice issued under section 93 of RSTPA.

24. We have not received a copy of a Notice of Enquiry which must be issued to a person who made a return, or on whose behalf a return was made, under section 85 of RSTPA and to which a section 93 Closure Notice is relevant.

25. In terms of Chapter 4 of RSTPA (comprising sections 85 to 94), a Designated Officer of Revenue Scotland may enquire into a tax *return* made by or on behalf of a person.

26. In the present appeal, the Closure Notice states that it relates to an enquiry into the appellant's LBTT return of 31 March 2021.

27. It further states that the "purpose of the enquiry" is "to ensure that the correct amount of tax has been paid on your transaction" to purchase the First Property.

28. The Closure Notice suggests that the appellant had had an opportunity to provide information to the Designated Officer who undertook the enquiry into his LBTT return. The Notice variously states that "I am now contacting you to request further information" and "I asked that you provide further information to evidence that you have met the ADS repayment conditions".

29. However, if the Notice of Enquiry and Closure Notice were issued on the same date, we do not see how the appellant could have had any opportunity to provide information or representations to the Designated Officer conducting the enquiry into his LBTT return.

30. The conclusion of the enquiry into the appellant's return is stated in the Closure Notice as that "ADS of £6,840 was correctly paid on your transaction... and the effect of this closure notice is to amend your *claim* to £0."¹

31. Therefore, the Closure Notice issued by the Designated Officer under section 93 of RSTPA purports to amend the appellant's claim, not his LBTT return.

32. We assume that Revenue Scotland considers the appellant's LBTT return made on 31 March 2021, which states ADS due of £6,840, to be correct and that it sought to enquire into and amend his claims for the repayment of that ADS.

33. If so, it appears to the Tribunal that Revenue Scotland has not followed the correct statutory procedure.

34. On 7 and 17 October 2022, the appellant's agent made repayment claims to Revenue Scotland. We have not been provided with copies of those repayment claims and assume that they each seek repayment of the ADS.

35. For present purposes, we will treat the claims made by the appellant's agent as one claim for the repayment of the ADS paid in the sum of £6,840.

36. The repayment claim was made by the appellant's agent approximately 19 months after the LBTT return was made.

37. An amendment of the LBTT return at that time would not have been competent in terms of section 83 of RSTPA, which requires an amendment to be made within 12 months.

38. Therefore, the appellant's agent made claims for the repayment of ADS under section 107 of RSTPA, the material parts of which read:-

¹ Emphasis added

“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.”

39. The procedure for making a repayment claim under section 107 of RSTPA is set out in Schedule 3 to that Act.

40. In terms of paragraphs 13 and 14 of Schedule 3 to RSTPA, Revenue Scotland may enquire into a person’s claim and, on the completion of an enquiry, amend the claim.

41. However, Revenue Scotland apparently did not follow the procedure set out in Schedule 3 for reasons which are not clear to us nor which appear to have been explained to the appellant.

42. As a consequence, the appellant’s repayment claim has not been amended and he has been deprived of the opportunity to advance an appeal against an “appealable decision” in terms of section 233 of RSTPA.

43. Despite that, we do not think that it would be fair or proportionate for the appellant to endure any further procedure in seeking a determination of his repayment claim, given our view on the substantive issue, which is discussed below.

44. The overriding objective of the Rules of Procedure of the Tribunal is to enable it to deal with cases fairly and justly as provided for in Rule 2 of the First-tier Tribunal for Scotland Tax Chamber (Procedure) Regulations 2017.

45. In line with that objective and for the benefit of the appellant, we will deal with the substantive issue in his appeal in a fair, proportionate and flexible way on the hypothesis that a competent Closure Notice had been issued by Revenue Scotland.

Substantive issue: claim for repayment of ADS

46. Revenue Scotland has sought to refuse the appellant’s claim for the repayment of the ADS.

47. That ADS had been charged under section 26A and Schedule 2A of the Act.

48. The appellant asks the Tribunal to “waive the strict adherence” to one of the statutory conditions which he has to meet in order to reclaim the ADS.

49. That condition is that the Second Property must have been his only or main residence at any time during the period of 18 months ending with the effective date of the transaction to purchase the First Property.

50. The appellant concedes that he did not occupy the Second Property at all in that 18 month period but asks the Tribunal to consider “extenuating circumstances” which led to him not being able to live there.

51. Revenue Scotland’s position is that, as the appellant has not met all of the relevant statutory conditions, he is not entitled to a repayment of the ADS paid.

52. Revenue Scotland also submits that the Tribunal only has the powers given by statute and does not have a general power to determine whether it is fair or reasonable that ADS should be paid, or not repaid, in circumstances in which the statutory conditions for repayment have not been met.

Discussion

53. The FTTS 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.

54. 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.”

55. In determining the matter in question, the FTTS must apply the law.

56. The conditions required for the repayment of ADS are set out at paragraph 8(1) of Schedule 2A to the Act, as follows:-

“(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.”

57. The Act makes it explicit that the repayment of the ADS paid is contingent on the Second Property having been the only or main residence of the appellant at any time

during the period of 18 months ending with the effective date of the transaction to purchase the First Property.

58. While the term “only or main residence” is not defined in the Act, relevant UK case law is applicable in determining the matter in question.²

59. In *Simpson v HMRC* Judge Sinfield in the UK First-tier Tribunal (“UKFTT”) sets out 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 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

² 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.”

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.”³

60. In *Simpson v HMRC*, the appeal was advanced on the ground that the gain on the disposal of the property in question was not chargeable to capital gains tax because it was the taxpayer’s “only or main residence” throughout her period of ownership and, therefore, qualified for private residence relief.

61. The UKFTT in *Simpson v HMRC* dismissed the appeal and concluded that there was a complete absence of evidence to show that the taxpayer had occupied the property in question at all.

62. Applying the principles elaborated by the Court of Appeal in *Goodwin v Curtis*, as set out above, it appears impossible to envisage a scenario in which a property could be viewed as a taxpayer’s only or main residence if, as a matter of fact, no time had been spent there at all.

63. In the present appeal, the appellant concedes that he did not occupy the Second Property at all during the period of 18 months ending with the effective date of the transaction to purchase the First Property. He had lived in other places throughout that entire time, while the Second Property was let to tenants.

64. While we can appreciate the rationale for the appellant not being able to occupy the Second Property, the fact that he did not do so means that the condition stipulated at paragraph 8(1)(b) of the Act for the repayment of ADS has not been met.

65. The appellant asks the Tribunal to “waive the strict adherence to condition (b)” in light of what are described as “extenuating circumstances”.

66. However, the relevant statutory provisions are tightly drawn and the exemption and repayment possibilities limited. As commented in a previous decision of the Tribunal “that does not make them absurd, illogical or unreasonable”⁴.

³ [2019] UKFTT 704 (TC), at paragraphs 9 to 13

⁴ *Crawford v Revenue Scotland* [2022] FTSTC 3, at paragraph 38

67. The statutory conditions for the repayment of ADS are clear and there is no provision in the Act which permits the Tribunal to consider extenuating circumstances or a reasonable excuse as to why any of the conditions have not been met.

68. More generally, the Tribunal only has the powers given to it by statute and does not have jurisdiction to consider issues of fairness in determining the matter in question, being whether the ADS should be repaid.

69. The scope of the Tribunal's jurisdiction was considered by the UK Upper Tribunal in *HMRC v Hok Ltd*. While the present appeal is not concerned with penalties and whether they are fair, the principle is the same as that set out by the Upper Tribunal, as follows:-

“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.”⁵

Decision

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

71. 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

⁵ *HMRC v Hok Ltd* [2012] UKUT 363 (TCC), at paragraphs 56 to 58

(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: 6 November 2023

Revenue Scotland and Tax Powers Act 2014

85 Notice of enquiry

- (1) A designated officer may enquire into a tax return if subsection (2) has been complied with.
- (2) Notice of the intention to make an enquiry must be given—
 - (a) to the person by whom or on whose behalf the return was made (“the relevant person”),
 - (b) before the end of the period of 3 years after the relevant date.
- (3) The relevant date is—
 - (a) the filing date, if the return was made on or before that date, or
 - (b) the date on which the return was made, if the return was made after the filing date.
- (4) A return that has been the subject of one notice under this section may not be the subject of another, except a notice given in consequence of an amendment of the return under section 83.
- (5) A notice under this section is referred to as a “notice of enquiry”.

93 Completion of enquiry

- (1) An enquiry under section 85 is completed—
 - (a) when a designated officer informs the relevant person by a notice (a “closure notice”) that the enquiry is complete and states the conclusions reached in the enquiry, or
 - (b) no closure notice having been given, 3 years after the relevant date.
- (2) A closure notice must be given no later than 3 years after the relevant date.
- (3) A closure notice must either—
 - (a) state that in the officer's opinion no amendment of the tax return is required, or
 - (b) make the amendments of the return required to give effect to the officer's conclusions.
- (4) Where a closure notice is given which makes amendments of a return as mentioned in subsection (3)(b), section 83 does not apply.
- (5) A closure notice takes effect when it is issued.
- (6) The taxpayer must pay any amount, or additional amount, of tax chargeable as a result of an amendment made by a closure notice before the end of the period of 30 days beginning with the day on which the notice is given.

(7) In subsections (1) and (2) “relevant date” has the same meaning as in section 85.

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, or

(b) a person has been assessed as chargeable to an amount of tax, or a determination has been made that a person is chargeable to an amount of tax, but the person believes the tax is 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.

(4) For the purposes of this section and sections 109 to 118, an amount paid by one person on behalf of another is treated as paid by the other person.

Schedule 3

“Notice of enquiry”

13 (1) Revenue Scotland may enquire into a person's claim or amendment of a claim if it gives the claimant notice of its intention to do so (“notice of enquiry”) before the end of the period of 3 years after the day on which the claim was made.

(2) A claim or amendment that has been the subject of one notice of enquiry may not be the subject of another.

Completion of enquiry

14(1) An enquiry under paragraph 13 is completed—

(a) when Revenue Scotland by notice (a “closure notice”) informs the claimant that it has completed its enquiries and states its conclusions, or

(b) no closure notice having been given, 3 years after the date on which the claim was made.

(2) A closure notice must be given no later than 3 years after the date on which the claim was made.

(3) A closure notice must either—

(a) state that in the opinion of Revenue Scotland no amendment of the claim is required, or

(b) if in Revenue Scotland's opinion the claim is insufficient or excessive, amend the claim so as to make good or eliminate the deficiency or excess.

(4) In the case of an enquiry into an amendment of a claim, sub-paragraph (3)(b) applies only so far as the deficiency or excess is attributable to the amendment.

(5) A closure notice takes effect when it is issued.

Giving effect to amendments under paragraph 14

16(1) Within 30 days after the date of issue of a notice under paragraph 14(3)(b) (closure notice that amends claim), Revenue Scotland must give effect to the amendment by making such adjustment as may be necessary, whether—

(a) by way of assessment on the claimant, or

(b) by discharge or repayment of tax.

(2) An assessment made under sub-paragraph (1) is not out of time if it is made within the time mentioned in that sub-paragraph.”

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).

