

Tax Chamber
First-tier Tribunal for Scotland



[2025] FTSTC 7

Ref: FTS/TC/AP/25/0004

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

DECISION NOTICE

IN THE CASE OF

Ryan James Holder and Samantha Louise Holder

Appellants

- and -

Revenue Scotland

Respondent

**TRIBUNAL: ANNE SCOTT
CHARLOTTE BARBOUR**

The Tribunal determined the appeal on 22 May 2025 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 7 February 2025 and Revenue Scotland's Statement of Case, and attachments, received by the Tribunal on 27 March 2025 and the Appellants' response thereto dated 6 May 2025.

DECISION

Introduction

1. This is an appeal against Revenue Scotland's decision to amend to NIL the appellants' claim for repayment of Additional Dwelling Supplement ("ADS") in the sum of £23,800. That ADS had been charged under section 26A and Schedule 2A of the Land and Buildings Transaction Tax (Scotland) Act 2013 ("the Act").

Preliminary issue

2. The Notice of Appeal which was received by the Tribunal on 11 February 2025 was in the name of Mr Holder only, albeit the Review Conclusion Letter and Closure Notice were addressed to both Mr Holder and his wife. Whilst section 247 RSTPA provides that an appeal may be brought by any of the "buyers" of a property and the decision of the Tribunal will bind all buyers where only one appeals, we had due regard to Rules 2 and 9 of the First-tier Tribunal for Scotland Tax Chamber (Procedure) Regulations 2017 ("the Rules") and decided to add Mrs Holder as a party.

3. The appellants sought repayment of the ADS in terms of section 107 of Revenue Scotland and Tax Powers Act 2014 ("RSTPA") on the basis that the appellants had sold their previous main residence in England ("the First Property").

4. A summary of the arguments advanced by the appellants are:

- (a) the decision not to repay the ADS is patently unfair,
- (b) the legislation was changed for transactions with an effective date on or after 1 April 2024 (whereby only one of the buyers would be required to meet the conditions in the legislation),
- (c) whilst it was conceded that the transaction in this appeal had an effective date before 1 April 2024 the claim for repayment and all correspondence with Revenue Scotland took place thereafter,
- (d) the change in the ADS legislation could and should be retrospectively applied. The changes "speak to ongoing efforts to create a more balanced and fair system for individuals like us",
- (e) the purchase of a property in Glasgow ("the Second Property") was never intended to be a second home and there was only an overlap of five months,
- (f) the refusal to repay the ADS was disproportionate and did not take into account the policy objectives of the ADS legislation,
- (g) the denial of the repayment had left the appellants in an unexpectedly poor situation which had caused "an immense amount of stress and concern for our future". They had been advised when paying the ADS (but we do not know by whom) that the repayment would be made.

Factual Background

5. The underlying facts regarding the purchase of the Second Property and the sale of the First Property are not in dispute.

6. The appellants jointly purchased a property in Scotland (“the Second Property”) with an effective date of 28 October 2022. The electronic LBTT return was submitted on 31 October 2022 and the ADS in the sum of £23,800 was paid on that date.

7. On 24 January 2024, the appellants made an ADS repayment claim under section 107 RSTPA.

8. On 29 January 2024, Revenue Scotland emailed the appellants setting out the conditions for repayment of ADS in terms of Schedule 2A of the Act and requested documentary evidence for the sale of the First Property, together with evidence that both buyers had resided at the First Property in the 18 months prior to the effective date.

9. On 14 February 2024, the appellants emailed Revenue Scotland explaining that due to the specialist nature of Mr Holder’s work he had been forced to take employment in Edinburgh and rent a property there. For that reason, the First Property continued to be leased to tenants who vacated the First Property in August 2022 before the completion of the sale of that property on 6 March 2023.

10. On 11 March 2024, Revenue Scotland issued a Notice of Enquiry under Schedule 3 paragraph 13 RSTPA. That letter explained the repayment conditions set out in paragraph 8 Schedule 2A of the Act. Revenue Scotland intimated that it would appear that the appellants did not meet the repayment condition (b) which is that the residence which has been disposed of was the buyer’s main residence in the 18 months prior to the new property being purchased. Revenue Scotland accepted that conditions (a) and (c) had been met, but the issue was that neither appellant had occupied the First Property as their main residence in the 18 months prior to the Second Property being purchased.

11. Correspondence ensued and on 1 October 2024, the appellants wrote to Revenue Scotland explaining that they had lived in the First Property from 2014 until 2017. However, they had spent 2017 to 2020 in Canada whilst Mrs Holder completed her Masters degree in History. When they returned from Canada in 2020 they moved to Scotland where Mr Holder had been offered employment. They rented a house in Scotland and fully expected to return to the First Property. They ultimately decided to buy a house in Scotland in June 2022 but as the tenants remained in the First Property they did not wish to sell the First Property prior to purchasing the Second Property.

12. The appellants argued that “the spirit of the LBTT Rules are not intended to punish home owners for simply moving from one house to another”. They believed that they were morally entitled to the repayment.

13. On 9 October 2024, Revenue Scotland issued an Enquiry Closure Notice to the appellants confirming that repayment condition (b) had not been met since the property had been leased to tenants throughout the 18 months prior to the purchase of the Second Property.

14. On 23 October 2024, the appellants' MSP's aide emailed Revenue Scotland with what was described as a letter of support from that MSP dated 22 October 2024. The letter argued that the appellants did not "fall within the intended purpose of the ADS, and thus far have only been denied a refund due to what appears to be a technicality".

15. On 30 October 2024, the appellants requested that the decision be reviewed and reiterated their previous arguments.

16. On 26 November 2024, Revenue Scotland issued their View of the Matter letter which was followed on 9 January 2025 with the Review Conclusion letter. Both upheld the original decision to refuse repayment of the ADS. That letter stated that:-

(a) Paragraph 8 Schedule 2A of the Act sets out the conditions of repayment of ADS and the appellants had not met condition (b) because the First Property had not been occupied by both buyers as their previous main residence within the 18 month period.

(b) Revenue Scotland did not have the authority to consider special circumstances or fairness of legislation.

17. On 7 February 2025, Mr Holder appealed to the Tribunal.

18. The appellants' Response to Revenue Scotland's Statement of Case argued that:

(a) "the ADS regulations were put in place to protect people by discouraging multiple home ownership, not to punish people for a short overlap of homes during the selling and buying process".

(b) they had not benefitted in any way from the brief period of overlap.

(c) the refusal to refund the ADS is unjustified.

Discussion

19. 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.

20. In the case of an appeal of an appealable decision, section 244(2) of 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."

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

22. In this case, that includes paragraph 8(1) of Schedule 2A to the Act, the material parts of which read:-

“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.

23. Paragraph 8A of Schedule 2A to the Act, which is the relevant legislation for any transaction that has an effective date before 1 April 2024, goes on to provide:-

“Repayment of additional amount: spouses, civil partners and co-habitants replacing main residence

- 8A(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.”

24. We have highlighted in bold the key words.

25. This appeal concerns the condition, in paragraph 8(1)(b) of Schedule 2A, for the repayment of ADS.

26. The question is whether the First Property was the only or main residence of both the appellants at any time during the period of 18 months ending with the effective date of the transaction to purchase the Second Property.

27. The burden of proof rests on the appellants and the standard of proof is the ordinary civil standard, which is the balance of probabilities.

28. The central problem in this appeal is that it was the tenants who resided in the First Property at all material times. Neither of the appellants had lived there since 2017.

29. The implied argument for the appellants is that there is no requirement in the Act for actual occupation of an “only or main residence”.

30. The term “only or main residence” is not defined in the Act and there is no case law on this point beyond that of the First-tier Tribunal for Scotland; LBTT being a comparatively new tax.

31. In their Statement of Case Revenue Scotland relied on the decision of the Tribunal in *Crawley v Revenue Scotland* [2024] FTTS 1 where the relevant UK jurisprudence was reviewed. Although we are not bound by that decision and it was made by a differently constituted Tribunal, we agree with its findings. At paragraph 69 the Tribunal found that occupation of a property will not even suffice alone to establish residence and

“...there requires to be occupation, the nature, quality, length and circumstances of which are relevant factors in determining whether such occupation qualifies as residence. That is a question of fact and degree.”

32. In this case there was not even the one night of occupation which was relied upon in *Crawley*.

33. Simply put, whilst the appellants owned the First Property they were not residing or living in it during the relevant period.

34. Even if this transaction had happened after 1 April 2024, the changes in the law could not have assisted the appellants.

35. The Tribunal cannot consider the “spirit of the legislation” but must apply the law as enacted by the Scottish Parliament; that is not a technicality.

36. We find that the intention of the Scottish Parliament in respect of the repayment of ADS is clear from the words of the Act; that ADS is only repayable in the limited circumstances set out in paragraph 8(1) of Schedule 2A to the Act.

37. Unfortunately for the appellants they simply do not fall within the limited circumstances within which the Scottish Parliament intended to permit the repayment of ADS.

38. The legislation contains no provisions giving Revenue Scotland, or the Tribunal, the power to extend those circumstances.

39. We understand why the appellants might consider the law to be unfair.

40. However, in its Statement of Case, Revenue Scotland is correct to quote *Dr Goudie and Dr Sheldon v Revenue Scotland* [2018] FTTSC 3 in which, having quoted from the

Upper Tribunal in *HMRC v Hok* [2012] UKUT 363 (TCC), it is stated [at 67] “This Tribunal does not have jurisdiction to consider...fairness.”

41. It does not.

Decision

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

43. 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: 29 May 2025