

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



[2018] FTSTC 4

Ref: FTS/TC/AP/18/0003

*Land and Buildings Transaction Tax - Additional Dwelling Supplement (ADS) - Schedule 2A paragraphs 2 & 8 of Land and Buildings Transaction Tax (Scotland) Act 2013 - transaction comprising purchase of adjacent heritable subjects originally forming part of larger dwelling with subjects already owned by purchaser - whether reintegration of subjects to form one larger dwelling constituted a disposal - no - whether 'dispose' in paragraph 8 ambiguous - no - whether additional dwelling ceased to exist and tax charge unfair - no - whether ADS repayable - no - appeal refused*

**DECISION NOTICE**

IN THE CASE OF

**Mr Andrew John Edward Clark**

Appellant

- and -

**Revenue Scotland**

Respondent

**TRIBUNAL: KENNETH CAMPBELL QC  
KATRINA LUMSDAINE**

The Tribunal determined the appeal without a hearing under the provisions of Rule 27 of the First-tier Tribunal for Scotland Tax Chamber (Procedure) Regulations 2017 (default paper cases) having first read the Notice of Appeal, and attachments, dated 24 June 2018; and Revenue Scotland's Statement of Case, with attachments, dated 9 August 2018. The Appellant chose not to issue a response to the Statement of Case.

## DECISION

### Introduction

1. This is an appeal by Andrew Clark (“Mr Clark”). It is against refusal by Revenue Scotland (“RS”) of the application dated 19 November 2017 by Mr Clark and Mrs Melanie Claire Clark (“Mr & Mrs Clark”) for repayment of Additional Dwelling Supplement (“ADS”) in terms of paragraph 8 of Schedule 2A to the Land and Buildings Transaction Tax (Scotland) Act 2013 (“LBTTA”). RS issued a Closure Notice on 29 May 2018. The appeal was lodged with the Tribunal on 25 June 2018. The appeal raises an important point about the operation of that provision in circumstances where the owner of heritable property acquires adjacent heritable property and thereafter consolidates the titles.

### Factual background

2. Prior to the transaction in issue in this case, Mr & Mrs Clark were heritable proprietors of the house known as 8 Mortonhall Road, Edinburgh. On 30 November 2016, they acquired the house known as 8B Mortonhall Road, Edinburgh, which is part of the same building as 8 Mortonhall Road. They remained, and remain, owners of 8 Mortonhall Road. The houses named 8 and 8B Mortonhall Road originally formed one larger dwelling. That larger dwelling was subdivided into 8 and 8B Mortonhall Road in about 1970. Since the purchase of 8B Mortonhall Road, Mr & Mrs Clark have carried out work to reintegrate the two houses into one. They have also had their agents consolidate the heritable title on the Land Register, and to have the entries in the Council Tax Valuation List amended so that there is one larger dwelling listed at 8 Mortonhall Road, in place of previous separate entries.

3. The effective date of the transaction for the purposes of Land and Buildings Transaction Tax (“LBTT”) was 30 November 2016. An LBTT Tax Return was submitted to RS on 2 December 2016. LBTT of £39,000 was calculated as being due, including ADS of £15,150. The sum of £39,000 was paid to RS on 2 December 2016.

4. By letter dated 29 September 2017, solicitors acting for Mr & Mrs Clark intimated a claim for repayment of the ADS of £15,150. After narrating some of the background, the letter set out the following reasons for the claim:

“We accept that on the day of the purchase of 8B Mortonhall Road, our clients owned a second dwelling and therefore ADS was initially payable. However, the additional dwelling which was purchased no longer exists and our clients are occupying a single dwelling as their main residence. On this basis they therefore wish to reclaim the ADS which they had initially paid.

You will appreciate that this is a unique set of circumstances. Nevertheless, it would seem to us odd and certainly unfair if in these circumstances ADS was not able to be reclaimed. If our clients had sold their interest in 8 Mortonhall Road, for example, rather than include it as part of the conversion, then they would have been able to reclaim the ADS payable at the Effective Date as it was their main residence prior to the Effective Date. It cannot have been the intention of the legislature and Revenue Scotland to apply an Additional Dwelling

Supplement in situations where after a short period of time no additional dwelling actually exists.”

5. By letter dated 5 October 2017, RS replied to the solicitors indicating, *inter alia*, that:

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“On the basis of the information you have provided, it does not appear as if a repayment of ADS will be available as your clients have not disposed of their ownership of their previous main residence.”

10 6. By letter dated 19 November 2017, Mr & Mrs Clark wrote to RS in substantially the same terms as their solicitors’ letter of 29 September 2017, and making of new a claim for repayment of ADS. Mr & Mrs Clark thereafter sought to amend the Tax Return submitted for the transaction, and in the period between November 2017 - June 2018, there was a series of exchanges of correspondence between Mrs & Mrs Clark and RS, in the course of which the amount  
15 representing the ADS was repaid by RS to Mr & Mrs Clark, and repaid by them to RS following issue of a closure notice on 29 May 2018. Repayment was made by Mr Clark on 25 June 2018, and the present appeal was lodged on the same day.

#### **Applicable legislation**

20 7. ADS forms part of the regime for charging LBTT. The operative provisions about ADS are found in Schedule 2A LBTTA. In particular, paragraphs 2 and 8 of Schedule 2A are relevant to the questions in this appeal, and we have set those paragraphs out in the Annex to this Decision.

#### **The Appellant’s Submissions**

25 8. Mr Clark’s Notice of Appeal was received by the Tribunal on 25 June 2018. It set out grounds of appeal discussed below. It was accompanied by (a) RS Closure Notice dated 29 May 2018; (b) copy entries from the Council Tax Valuation List for 8 Mortonhall Road, Edinburgh; (c) copy plan and invoice relating to works carried out at the premises; (d) copies of three photographs bearing to show works carried out at the premises. RS submitted a Statement of Case on  
30 9 August 2018. Mr Clark chose not to submit a formal response to that. The Tribunal determined that the appeal should, in the first instance, be treated as a default paper case in terms of rule 24 of the First-tier Tribunal for Scotland Tax Chamber (Procedure) Regulations 2017. Both parties agree that the Tribunal may deal with the appeal without the necessity of an oral hearing

35 9. In the Grounds of Appeal, Mr Clark advances three points. First, while he accepts that on the day of purchase of 8B Mortonhall Road, “we owned a second dwelling and therefore ADS was initially payable”, he goes on to argue that they have “disposed of our previous main residence (the old number 8), since it no longer exists as such”, and he refers to the Council Tax Valuation List and the Land Register consolidated title. Secondly, Mr Clark submits that because “the  
40 additional dwelling which was purchased no longer exists as such and we are occupying a single dwelling as our main residence” it is unfair in those circumstances that he should not be able to reclaim ADS, since they “now own a single property”. Thirdly, Mr Clark submits that paragraph 8(1)(a) is ambiguous, and is directed to “property speculators turning additional properties around quickly (within 18 months) and then reclaiming the ADS. It would not appear  
45 to us to relate to additional taxation for the restoration of a listed family home back into a single dwelling.”

### Revenue Scotland's Submissions

10. In its Statement of Case, RS argue that Mr & Mrs Clark do not meet the requirements of paragraph 8(1)(a) of Schedule 2A LBT TA because they did not dispose of the ownership of a dwelling within the period of 18 months beginning with the day after the effective date of the transaction. RS accepts that works were carried out at the premises after the effective date, and that the premises are now treated as one of the purposes of the Council Tax; however, they argue, "that does not equate to a disposal of ownership of a dwelling for the purposes of repayment of ADS." Secondly, even if the Keeper of the Land Register had decided to amalgamate the titles for 8 and 8B Mortonhall Road into one Title Sheet, that does not equate to a disposal of ownership of a dwelling for the purposes of ADS. Thirdly, paragraph 8 of Schedule 2A LBT TA is not ambiguous. The words "disposal of ownership" were clear and should be given their ordinary meaning. "There was nothing to suggest that Parliament had intended relief to apply where conversion works were carried out or alterations made to Council Tax lists or where there was an intention... to amalgamate title sheets." If that had been the intention, different words would have been used. Finally, in relation to Mr Clark's argument about unfairness, the statutory conditions for payment were met, and there is no scope for RS to decide which parts of the statutory scheme to enforce and which to ignore. In support of the last point, RS refer to the decision of the House of Lords in *R (Wilkinson) v IRC* [2003] 1 WLR 2683.

### Discussion

11. In this appeal, the facts are not in dispute, and the issue before us is a matter of law, namely the proper construction of the rules for repayment of ADS in Schedule 2A, paragraph 8 LBT TA.

12. We begin with the legislation. We have set out paragraphs 2 and 8 of Schedule 2A LBT TA in the Annex. Paragraph 8(1) contains three conditions, each of which must be met for ADS to be repayable. Paragraph 8(1)(a) is the provision which is at the heart of this appeal. It is in the following terms:

(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).

13. In order for this condition to be met, it is necessary for the buyer taxpayer (i) to dispose (ii) of ownership (iii) of a dwelling (iv) other than one that was or formed part of the subject matter of the chargeable transaction.

14. In our view, the meaning of each of those components is clear. Ownership is addressed at length in Part 6 of Schedule 2A LBT TA. In any event, Mr & Mrs Clark quite properly accept that on the day of purchase, they owned a second dwelling. "Dwelling" is not defined, and therefore should take its ordinary meaning. In any event, it is not in dispute in this case that before the transaction each of 8 and 8B Mortonhall Road were dwellings.

15. "Dispose" is not defined either. Again, it should take its ordinary meaning, and as a matter of language, "dispose" means:

- make over; deal out; dispense; distribute
- formally assign or hand over
- transfer into the hands of another by sale or bequest.

*Shorter Oxford English Dictionary*

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16. It seems to us clear that considering the facts set out above against the ordinary understanding of the word “dispose”, Mr & Mrs Clark did not dispose of ownership of a dwelling at the effective date, nor have they done so subsequently. They accept that they owned two dwellings at the end of 30 November 2016. They have subsequently reversed an earlier subdivision, but they still own the physical embodiment of the two dwellings. They have consolidated the Council Tax registration and the title in the Land Register. Each of those steps has important consequences for the purposes of Council Tax and heritable title respectively. However, neither of those acts disposes of ownership of the dwelling in the ordinary meaning of the word. Accordingly we reject the primary argument advanced by Mr Clark.

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17. Even if we had accepted that Mr & Mrs Clark had disposed of ownership of the dwelling, we would have required to have been satisfied that the dwelling of which ownership was disposed was one “other than one that was **or formed part** of the subject matter of the chargeable transaction” (our emphasis added). Were we to have accepted that Mr & Mrs Clark had “disposed” of number 8 Mortonhall Road, this could only be due to its amalgamation with number 8B Mortonhall Road. Number 8 would then have formed part of the number 8B Mortonhall Road. Number 8B Mortonhall Road was the subject matter of the chargeable transaction. As such, any “disposal” of number 8 would have meant disposal of ownership of a dwelling which formed part of the subject matter of the chargeable transaction. As such, even if we were satisfied that there had been disposal of ownership of a dwelling, the dwelling would necessarily have formed part of the subject matter of the chargeable transaction. Accordingly, on any analysis, the conditions in paragraph 8(1)(a) of Schedule 2A of LBTT have not been met.

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18. We also reject the argument that paragraph 8(1) of Schedule 2A is ambiguous, and that the purpose of the provision is not directed to this situation. As will be apparent from the discussion above, reading paragraph 8 as a whole, we do not consider that “dispose” is ambiguous. Further, we consider that if it had been the intention of the Scottish Parliament to provide relief for transactions of this kind, it would have done so by express words. Despite the assertion in the correspondence and the Grounds of Appeal that the transaction in this case is unique, it is possible to anticipate that there may be other heritable property where exactly the same sort of situation might arise. It is also a relevant consideration in this context that Schedule 2A has been amended twice since enactment, and neither amendment has dealt with the type of circumstances in this case.

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19. Finally, we turn to the argument that the refusal to repay the ADS is in some sense unfair because the additional dwelling which was purchased no longer exists as such and Mr & Mrs Clark are occupying a single dwelling as their main residence. As RS submit in its Statement of Case, if the statutory conditions for payment were met (and we have held that they were), there is no scope for it to decide which parts of the statutory scheme to enforce and which to ignore.

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20. In support of its argument about this point, RS refer to the decision of the House of Lords in *R (Wilkinson) v IRC* [2003] 1 WLR 2683. Decisions in cases relating to UK taxation are not binding on this tribunal, but where they are about equivalent matters, they are persuasive and in the case of the House of Lords, highly persuasive. In that case, Lord Hoffmann made it clear that while HMRC may have the power to grant extra-statutory concessions, they do not have power to grant an allowance which Parliament could have granted but did not (see paras 20-22). In our view, that principle is equally applicable to RS, and is certainly applicable in this case. Accordingly, we reject the argument based on the assertion of unfairness, and the implication that RS should waive application of the statutory scheme.

21. There is a further reason why we cannot entertain the argument that we should allow the appeal because RS's decision is in some sense unfair. That is because the scope of the Tribunal's jurisdiction is entirely determined by statute. This broad question has been considered by the UK Upper Tribunal Tax & Chancery Chamber in *HMRC v Hok Ltd* [2012] UKUT 363 (TCC). In *Hok* at paragraphs 56 to 58 the Upper Tribunal stated:

"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 ... 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."

Although, of course this case is not concerned with penalties and whether they are fair, the principle is exactly the same. In short, the Tribunal does not have jurisdiction to consider either fairness or RS's conduct.

**Decision**

22. It follows that for all of the reasons set out above, we refuse the appeal.

5 23. 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.

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**Kenneth Campbell QC**  
**Katrina Lumsdaine**  
Legal Members of the Tribunal

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**RELEASE DATE: 9 November 2018**

## Annex - applicable legislation

### Provisions of LBTTA relevant to this appeal:

5 Schedule 2A

*Transactions relating to second homes etc.*

2(1) This schedule applies to a chargeable transaction if the following conditions are satisfied —

- 10 (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  
15 (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  
20 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—

- 25 (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.  
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*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—

- 35 (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  
40 (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—

- 45 (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—

- 5 (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.

10 (4) For the period allowed for amendment of returns, see section 83 of the Revenue Scotland and Tax Powers Act 2014.

15 (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).