

Tax Chamber
First-tier Tribunal for Scotland



[2019] FTSTC 12

Ref: FTS/TC/AP/19/0007

***Land and Buildings Transaction Tax (LBTT) – Claim for Repayment of LBTT
– whether payment exempt – no – whether different approach by HMRC
relevant – no – whether Tribunal can consider fairness of legislation – no –
appeal dismissed***

DECISION NOTICE

IN THE CASE OF

Mr Edward Grotlin

Appellant

- and -

Revenue Scotland

Respondent

**TRIBUNAL: ANNE SCOTT, President
KATRINA LUMSDAINE, Legal Member**

Sitting in public at George House, Edinburgh on Thursday 24 October 2019

Mr Edward Grotlin, the appellant

Mrs Ailsa Garland, Officer of Revenue Scotland, for the respondent

DECISION

Introduction

1. This is an appeal against a decision by Revenue Scotland to refuse a claim for repayment of Land and Buildings Transaction Tax (“LBTT”).

The facts

2. The facts are not in dispute.

3. The Appellant purchased a property called Kittlegairy View (“the Property”) with an effective date of 27 November 2015. The electronic LBTT return was appropriately received on 7 December 2015 and tax of £5,850 was paid in respect of a consideration of £325,000.

4. The Appellant was unsatisfied with the quality of the construction of the Property and ultimately the vendors, Taylor Wimpey bought back the Property from the Appellant on 1 December 2017 for a consideration of £375,000.

5. The Appellant then purchased a new property on which LBTT was again paid. In September 2018 the Appellant contacted Revenue Scotland seeking a refund of the LBTT paid on the Property. Revenue Scotland treated that as a claim for repayment of LBTT in terms of Section 107 Revenue Scotland Tax and Powers Act 2014 (“RSTPA”) a copy of which is annexed at Appendix 1.

6. On 18 December 2018, Revenue Scotland wrote to the Appellant confirming that the LBTT had been correctly charged in respect of the purchase of the property and the claim for repayment was refused.

7. On 17 January 2019, the Appellant’s partner requested a review of that decision and Revenue Scotland replied on 27 March 2019 upholding the original decision.

8. On 26 April 2019, the Appellant lodged a Notice of Appeal with the Tribunal.

The Appellant’s Grounds of Appeal

9. The Appellant explained significant adverse effects that the refusal by Revenue Scotland to repay the LBTT had had on him and his family. He then argued that the LBTT should be repaid because:-

- (a) His neighbours had been successful in claiming back their stamp duty land tax and it was unfair that the devolved legislation did not appear to allow for repayment.
- (b) These were exceptional circumstances, since he and his family had had no intention of moving from the property.
- (c) Common sense should be applied.

Revenue Scotland's argument

10. Revenue Scotland argued that the law has been correctly applied and there is no provision for repayment in current circumstances. It was for the Appellant to recoup the LBTT from Taylor Wimpey.

11. Revenue Scotland further argued that this Tribunal does not have any supervisory jurisdiction to consider fairness or otherwise.

12. Finally, Revenue Scotland argued that it was irrelevant whether there would have been the possibility of a different outcome in the rest of the UK.

Discussion

13. . The issue before us is a matter of law, namely whether the rules for repayment of LBTT provide for repayment in the current circumstances.

Can repayment be made?

14. We begin with the legislation.

15. Section 107 RSTPA provides for relief for overpayment of LBTT. This includes relief where a person has paid an amount by way of tax, but believes the tax was not chargeable. Schedule 1 of the Land and Buildings Transaction Tax (Scotland) Act 2013 ("LBTTA") sets out transactions which are exempt from payment of LBTT. None of those exemptions apply to the Appellant's circumstances. In particular, neither RSTPA nor LBTTA provide for an exemption where a property is found to be defective and is purchased back by the original seller.

16. The legislation does not provide for repayment of LBTT in the circumstances of this case.

HMRC's repayment of Stamp Duty Land Tax

17. The Appellant produced evidence that his former neighbour at the Property had received a repayment from HMRC of the Stamp Duty Land Tax ("SDLT") paid by him under the UK legislation. We had no reason to doubt that HMRC have made this repayment, albeit we have no information as to why. The Appellant did explain to us that his neighbour had purchased his property at an earlier date than the Appellant. Thus, the neighbour's purchase was taxable under SDLT, which was then replaced in Scotland by LBTT. Since the Appellant purchased the Property at a later date he was therefore liable to pay LBTT to Revenue Scotland under the devolved Scottish legislation.

18. We agree with the Tribunal in *Dr Colin Goudie and Dr Amelia Sheldon v Revenue Scotland*¹ ("Goudie and Sheldon"), a case on which Revenue Scotland rely, and which considered the relevance of a potentially different outcome under the UK legislation. It held that:

¹[2018] FTSTC 3

“Finally, the appellant’s contention that the same outcome would not obtain in the rest of the UK, and the reference to UK legislation, is irrelevant. This is a devolved tax and stands alone albeit in interpreting the relevant provisions we have regard to UK jurisprudence where appropriate. Only the Scottish Parliament can alter the terms of the legislation.”

19. Any repayment of SDLT made by HRMC to the Appellant’s neighbour under the UK legislation is not relevant to consideration of repayment of LBTT by Revenue Scotland under the Scottish legislation.

Fairness

20. Finally, the Appellant argues that it was not fair that Revenue Scotland would not repay the LBTT.

21. The jurisdiction of this Tribunal is limited. The Tribunal in *Goudie and Sheldon* had looked at the question of whether the First-tier Tribunal had the power to consider whether legislation was fair and relied on the decision of the Upper Tribunal in *HMRC v Hok Ltd*² (“Hok”) which makes it clear that this Tribunal has no inherent or general “supervisory” jurisdiction to consider taxpayer’s claims based on public law concepts such as fairness. We set out in full in Appendix 2 the relevant paragraphs from *Goudie and Sheldon* and which include a quotation from *Hok*.

22. Whilst we have sympathy for the Appellant’s position, it is clear that it is not within our power to consider the fairness of the legislation.

23. We therefore cannot do anything other than uphold Revenue Scotland’s decision.

24. For all these reasons the appeal is dismissed.

25. 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 October 2019

² [2012] UKUT 363 (TCC)

Revenue Scotland and Tax Powers Act 2014

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.

Excerpt from *Goudie and Sheldon v Revenue Scotland*

“Fairness

59. As far as fairness is concerned, the appellants had argued from the outset that they consider that it is fundamentally unfair that on the face of it the legislation allows reimbursement of the ADS to joint buyers of a property on which ADS has been paid where there has been a sale of a property which had been the only or main residence of both of them but denies it where that had been the case for only one of them.

60. In Directions issued prior to the hearing the appellants’ attention was drawn to *Hok* and at the hearing Mr Sheldon recognised that the Tribunal’s jurisdiction does not extend to questions of fairness. However, for the avoidance of doubt we record our reasoning in that regard.

61. In *Hok* at paragraphs 56 to 58 the 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.’

59. Although, of course this case is not concerned with penalties and whether they are fair, the principle is the same. The Tribunal does not have jurisdiction to consider either fairness or Revenue Scotland’s conduct.

60. For the same reasons we cannot consider any argument based on discrimination. In fact that was not advanced in any discernible fashion. No protected characteristic was identified and nor was any discriminatory conduct on the part of Revenue Scotland notwithstanding the fact that Mr Heaney raised those points at paragraph 20 of the Note of Argument. In any event there are many, many other couples in the same position as the appellants.

61. In summary, whilst this Tribunal has a wide jurisdiction it is confined to the powers conferred by statute. Accordingly, we make it explicit that we cannot accept the appellants’ request that, if we find that Revenue Scotland’s decision is correct in law, as indeed we do, then as part of our decision we should ‘...also include recommendations to the Scottish

Government for how the legislation should be retrospectively amended to ensure that it operates fairly and equitably.' That is quite simply outwith our jurisdiction and is a matter, if so wished, for another forum."