

Tax Chamber
First-tier Tribunal for Scotland



[2019] FTSTC 7

Ref: FTS/TC/AP/19/0011

Land and Buildings Transaction Tax – Claim for repayment of ADS – outwith time limit – no discretion – appeal dismissed

DECISION NOTICE

IN THE CASE OF

Mr Niven Macadam Hunter

Appellant

- and -

Revenue Scotland

Respondent

TRIBUNAL: ANNE SCOTT, President

The Tribunal determined the appeal on 23 August 2019 without a hearing under the provisions of Rule 27 of The First-tier Tribunal for Scotland Tax Chamber (Procedure) Regulations 2017 (Default Paper case) having first read the Notice of Appeal, and attachments, dated 21 May 2019, Revenue Scotland's Statement of Case, acknowledged by the Tribunal on 25 July 2019 and the Appellant's response thereto dated 16 August 2019.

DECISION

Introduction

1. This is an appeal against a decision by Revenue Scotland wherein the claim for repayment of Additional Dwelling Supplement (“ADS”) charged under Section 26A and Schedule 2A of the Land and Buildings Transaction Tax (Scotland) Act 2013 (“LBTTA”) was refused.

The facts

2. The facts are not in dispute.

3. The appellant and his wife entered into a transaction for the purchase of a property (“the Second Property”) with an effective date of 16 September 2016. The electronic Land and Buildings Transaction Tax (“LBTT”) return for the transaction was received on 22 September 2016.

4. On the effective date the appellant and his wife still owned their original home (“the First Property”) and therefore the electronic LBTT return for the Second Property reflected ADS which was chargeable in the sum of £18,300. It was paid timeously.

5. At the time of the purchase of the Second Property the First Property was on the market and indeed an offer for that property had been received on 12 June 2016. It was accepted by the appellant but unfortunately the deal fell through.

6. Over a period the appellants reduced the price but the next offer for the property also fell through. The price was reduced yet again and three more offers were received, two of which did not proceed.

7. Eventually the First Property was sold on 11 January 2019.

8. On the same day the claim for repayment of ADS in terms of Section 107 Revenue Scotland Tax and Powers Act 2014 (“RSTPA”) was lodged with Revenue Scotland.

9. Revenue Scotland wrote to the appellant and his wife on 28 January 2019 confirming that the conditions for repayment of ADS had not been met and so the claim was refused. The reason for the refusal was because the First Property had been sold outwith the 18 month period set out in the legislation.

10. On 2 February 2019, the appellant wrote requesting a review of that decision.

11. Revenue Scotland responded with the conclusion of its review on 26 April 2019 and upheld the original decision.

12. The appellant submitted a Notice of Appeal to the Tribunal dated 21 May 2019.

The appellant's arguments

13. In summary the appellant's appeal was on the basis that the sale of the First Property had taken a lot longer than they had anticipated. Furthermore

- (a) They were *bona fide* home sellers.
- (b) The 18 month rule was arbitrary.
- (c) It could not have been the intention of the legislation to penalise those whose homes took longer to sell.
- (d) The appellant and his wife had been at the mercy of the market and that was outwith their control.
- (e) Rigid application of the 18 month rule was unfair.
- (f) They are "victims of unintended consequences of a flawed statute".

The Law

13. The relevant legislation is to be found at paragraph 8(1) Schedule 2A LBTTA and reads as follows:-

"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."

Discussion

14. There is no dispute that the disposal of the First Property was more than 27 months after the effective date of the purchase of the Second Property.

15. I unhesitatingly accept that the appellant and his wife found themselves in a very unfortunate position where the First Property simply did not sell for a long time. That was not in any sense their fault. Indeed, I have considerable sympathy for them.

16. At the heart of the appellant's case is the argument that the legislation is completely unfair.

17. However, the jurisdiction of this Tribunal is limited. In the penultimate paragraph of their Statement of Case, Revenue Scotland referred to the decision in *Dr Colin Goudie and Dr Amelia Sheldon v Revenue Scotland*¹ ("Goudie & Sheldon"). That Tribunal had looked at the question as to whether the Tribunal had the power to consider whether legislation was fair.

¹[2018] FTSTC 3

18. In doing so, it looked at another decision of the Tribunal, *Straid Farms Limited v Revenue Scotland*² (“Straid”), which had made it explicit that the Tribunal was created by statute and therefore can only do what the statute permits. At paragraph 34 of *Straid*, the Tribunal stated:

“34. The Tribunal has no inherent or general “supervisory” jurisdiction to consider taxpayer’s claims based on public law concepts such as fairness or inappropriate conduct by Revenue Scotland. The Upper Tribunal in *HMRC v Abdul Noor*³ makes it clear at paragraph 31 that the absence of a supervisory jurisdiction does not preclude public law rights being considered, and given effect to, but whether that can happen or not depends on the statutory construction of the provision conferring jurisdiction.”

17. They said that because they had looked at the Upper Tribunal decision in *HMRC v Hok*⁴ (“Hok”) and quoted the following paragraphs:

“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.”

18. Although, of course this case is not concerned with penalties and whether they are fair, the principle is the same. In summary, whilst this Tribunal has a wide jurisdiction, it is confined to the powers conferred by statute and this Tribunal cannot decide that legislation should not be applied because it is thought to be flawed.

19. It is evident that when this legislation was drafted, and amended more than once, it was the clear intention of the Scottish Parliament to offer a “window” of 18 months and it is inflexible. They did not, but they could have provided for a period of, say, “18 months or such other period as is reasonable in the circumstances”. LBTTA and the subsequent amendments reiterated the strict deadline of 18 months.

20. 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.

² [2017] FTSTC 2

³ [2013] UKUT 071 (TCC)

⁴ [2012] UKUT 363 (TCC)

21. As far as fairness is concerned, Revenue Scotland are correct to quote *Goudie & Sheldon* at paragraph 67. This Tribunal does not have jurisdiction to consider fairness.

22. It is very clear, that this Tribunal can only find the facts, as I have done above, and then apply the law. The relevant legislation has conferred no supervisory jurisdiction. I am restricted to deciding whether or not Revenue Scotland's interpretation of the legislation is correct, or not, and, if not, to what extent I disagree.

23. Unfortunately for the appellant the legislation is written in wholly unambiguous terms and since the sale of the First Property was more than 18 months after the effective date for the Second Property no repayment can be made.

Decision

24. For the reasons set out above, I find that Revenue Scotland's interpretation of the legislation and its application to the undisputed facts is entirely correct and the decision is upheld.

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: 26 August 2019