

Tax Chamber
First-tier Tribunal for Scotland



[2022] FTSTC 3

Ref: FTS/TC/AP/21/0001

Land and Buildings Transaction Tax – Joint buyers who had not previously cohabited and both had their own main residence – one buyer sold that residence within 18 months of the chargeable transaction – the other sold on the day of the chargeable transaction – whether repayment of ADS – no – purposive statutory construction required? – no – unambiguous legislation – appeal dismissed

DECISION NOTICE

IN THE CASE OF

Dr C Ewan H Crawford

Appellants

- and -

Revenue Scotland

Respondent

**TRIBUNAL: ANNE SCOTT
CHARLOTTE BARBOUR**

The hearing took place on Tuesday 25 January 2022 via WEBEX

Having heard David D Anderson, Advocate, for the Appellants; and Kevin Graham, Solicitor for Revenue Scotland, for the Respondent

DECISION

1. This is an appeal against Revenue Scotland's decision to amend to NIL the Appellants' claim for repayment of the Additional Dwelling Supplement ("ADS") in the sum of £12,200. That ADS had been charged under Section 26A and Schedule 2A of the Land and Buildings Transaction Tax (Scotland) Act 2013 ("the Act"). The Appellants sought the payment in terms of Section 107 of Revenue Scotland Tax and Powers Act 2014 ("RSTPA").

Decision

2. For all the reasons set out below the appeal is dismissed.

Factual background

3. On 17 December 2019, Dr Crawford and Ms Scott (hereinafter together "the Appellants") purchased a property in Edinburgh ("the chargeable property").

4. Prior to that purchase the Appellants both owned their own properties. Dr Crawford owned property in Edinburgh ("the first property") and Ms Scott owned a property in Crieff ("the second property"). Prior to the purchase of the chargeable property, the Appellants both resided in their own properties. They were not cohabitants including *inter alia* for the purposes of paragraph 8A Schedule 2A of the Act.

5. On the date of the purchase of the chargeable property, Dr Crawford sold the first property. The purchase of the chargeable property was a notifiable transaction and the Appellants made a Land and Buildings Transaction Tax ("LBTT") return and paid the LBTT including the ADS.

6. Ms Scott sold the second property on 5 February 2021 which was within the period of 18 months from the date of purchase of the chargeable property. The Appellants' agent made a claim for repayment of the ADS dated 22 February 2021.

7. On 5 March 2021, Revenue Scotland rejected that claim for repayment on the basis that where there were two buyers, then all of the repayment conditions must be met by all of the buyers and the second property had never been the main residence of Dr Crawford.

8. The Appellants' agent responded that day pointing to Revenue Scotland's website which contained "example 71" being a worked example of a hypothetical factual situation where a repayment of ADS would be made. Example 71 was headed:-

"Example 71: reclaiming ADS paid after all joint buyers sell main residences".

9. Revenue Scotland replied that day pointing out that in the worked example, neither main residence was sold at the time of purchase. The example was predicated on the purchasers buying a new property whilst still retaining both of their separate main residences. Only when both premises were sold thereafter were they entitled to the repayment.

10. On 1 April 2021, the Appellants' agent sought a review of Revenue Scotland's decision on the basis *inter alia* that:-

- (a) It was accepted that the Appellants' position was different to that in the worked example as Dr Crawford had sold his previous main residence before the chargeable property was purchased.
- (b) The claim for repayment fell squarely within the policy intention of the legislation. The use of the word "buyer" in paragraph 8(1)(b) Schedule 2A of the Act can, and should, only refer to any buyer who has failed to meet the requisite conditions at the time of purchase because paragraph 8 does not reference joint buyers.

11. On 29 April 2021, Revenue Scotland issued their view of the matter and upheld the decision rejecting the repayment claim pointing out that paragraph 8 should be read in the context of paragraph 8A which was inserted by the Land and Buildings Transaction Tax (Additional Amount – Second Homes Main Residence Relief) (Scotland) Order 2017.

12. The Appellants' agent responded on 12 May 2021 pointing out that the Appellants had never cohabited so paragraph 8A was not in point. It was the second property that had triggered the ADS and it had now been sold and a purposive interpretation should be applied to the legislation to produce a common sense result.

13. On 21 May 2021 the review conclusion letter was issued by Revenue Scotland upholding the decision and pointing out that the criteria for imposing the ADS and for repayment were different.

14. On 18 June 2021, the Appellants appealed to the Tribunal and lodged a 19 page Note of Argument from Mr Anderson.

The Law

15. The relevant provisions are as follows:

"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.

5 Joint buyers

(1) This paragraph applies to a chargeable transaction which satisfies the conditions in paragraph 2(1)(a) and (b) or 3(1)(a) and (b) if there are two or more buyers who are or will be jointly entitled to ownership of the dwelling.

(2) The conditions set out in paragraph 2(1)(c) and (d) or, as the case may be, 3(1)(c) are satisfied if they are satisfied in relation to any one of, or more than one of, the buyers.

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).

8A Repayment of additional amount: spouses, civil partners and cohabitants replacing main residence

(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.

Summary of the Appellants' arguments

16. As Revenue Scotland say on their website, the purpose of the ADS legislation is to address the lack of opportunities for first time buyers caused (in part) by the purchase of second homes and buy to let properties.

17. Revenue Scotland's refusal to repay the ADS is due to an incorrect and erroneous interpretation of paragraph 8 of Schedule 2A of the Act. The proper construction of the Act should be to interpret the word "buyer" to mean "the buyer whose ownership of an additional dwelling gave rise to liability for the ADS when read in conjunction with Section 48 of the Act".

18. The Appellants argue that Revenue Scotland's interpretation of the criteria for repayment is "absurd, illogical, unreasonable, and wrong in law".

Summary of Revenue Scotland's arguments

19. Revenue Scotland argue that their interpretation is correct, particularly when paragraph 8 of Schedule 2A is read in the context of the whole legislative scheme. Both buyers must have resided in the property as a main residence.

Discussion

20. Mr Anderson addressed us at some considerable length on statutory interpretation relying on *Bennion On Statutory Interpretation* (8th edition), *Proven Properties (Scotland) Ltd v Upper Tribunal for Scotland*¹, *R v Central Valuation Office*² and *R v Cool & Another*³.

21. By contrast Mr Graham relied on the Tribunal's decision in *Goudie and Sheldon v Revenue Scotland*⁴ ("Goudie").

22. As we are a differently constituted Tribunal, we are not bound by the decision in *Goudie* but we agree with the reasoning both on statutory interpretation and policy. We do not propose to rehearse that again here but simply adopt it.

23. As the Tribunal pointed out in *Goudie* the charging provisions in Schedule 2A of the Act were introduced by the Land and Buildings Transaction Tax (Amendment) (Scotland) Act 2016 and it provides for additional LBTT, being the ADS, to be paid by those buying **second** homes.⁵ We have highlighted the word **second** because that is the focus of the ADS legislation. It means a second home, wherever situated in the world.

24. The following year the Land and Buildings Transaction Tax (Additional Amount – Second Homes Main Residence Relief) (Scotland) Order 2017 further amended Schedule 2A by the introduction of paragraphs 8A and 9A.

¹ 2020 CSIH 22

² 2003 UK HL 20

³ 2018 1 WLR 2431

⁴ 2018 FTSTC 3

⁵ Paragraph 18

25. As the Tribunal pointed out at paragraph 31 of *Goudie* the Policy Note made clear the Policy Objectives when it stated:-

“It is necessary to bring forward an amending instrument as the legislation as currently drafted does not give full effect to this policy attention. It has emerged that the ADS legislation has been too tightly drawn in certain specific circumstances.”

Clearly it was intended to be tightly drawn.

26. In 2018, the Land and Buildings Transaction Tax (Relief from Additional Amount) (Scotland) Act 2018 made the provisions to the 2017 Order retrospective.

27. Whilst it is accepted by both parties that paragraph 8A has no application to the facts in this case, it is relevant when looking at what the legislative intention had been. Mr Anderson correctly argued that when interpreting statute, one should identify the intention of Parliament as to the meaning of the words used and the guiding factor is the mischief to be remedied.

28. We do not accept that the mischief identified by Mr Anderson as being required to be remedied is the lack of opportunity for first time buyers in the housing market. Firstly, the fact that the other property can be anywhere in the world suggests that that would be only one factor.

29. Secondly, whilst we accept that the Revenue Scotland website states that ADS is designed to ensure that “...opportunities for first time buyers in the housing market are as strong as they could possibly be...” that, in itself, does not assist the Appellants.

30. The Scottish Government’s position is clear and is set out in the Call for evidence and views on the ADS consultation paper which requests a response by 11 March 2022. We were not referred to it but this is a specialist Tribunal and are aware of it.

31. Paragraph 3.7 in the Chapter headed “Claiming a repayment of the ADS” reads:-

“For **joint buyers**, in determining whether a repayment of the ADS can be claimed, the provisions in Section 48 of the Act discussed at 2.20 are again relevant. They mean that all buyers have to satisfy the three conditions in order for the ADS to be repaid, unless specific provisions applying to spouses, civil partners or cohabitants in paragraph 8A of Schedule 2A apply.”

32. The following paragraph includes two worked examples, one of which is the example 71 cited at paragraph 8 above. The footnote in the consultation paper describes that worked example as being “Reclaiming ADS paid after all joint buyers sell main residences”. The use of the word “all” is significant.

33. Section 7 of the Act defines “buyer” as a person who has given consideration for or is a party to the transaction. There is no doubt that Dr Crawford is a buyer.

34. We do not accept Mr Anderson’s assertion that paragraph 8, Schedule 2A, is a “mirror image” of the provisions relating to liability for ADS. It simply is not and that can be seen from the provisions of paragraph 5 of Schedule 2A which means that there will

be a liability to ADS if only one of the buyers satisfies the conditions in paragraph 2(1)(c) and (d), ie owning more than one dwelling and is not replacing an only or main residence.

35. If Parliament had wished to have mirrored that in regard to repayment then they would have provided for that to have extended to paragraph 8. It did not. Further when paragraph 8A was introduced Parliament had the opportunity to extend the relaxation in 8A to other joint buyers. They did not. Revenue Scotland are correct in stating that the criteria for liability to ADS and repayment of ADS are different.

36. At paragraph 50 of *Goudie* the Tribunal said:

“We were not referred to the case, but we agree with Judge Gammie at paragraphs 63 and 64 in *Bloomsbury Verlag GmbH v HMRC*⁶ (“Bloomsbury”) where at paragraph 63 he cites with approval Lord Dunedin in *Whitney v HMRC*⁷:

“63. ... A statute is designed to be workable, and the interpretation thereof by a Court should be to secure that object, unless crucial omission or clear direction makes that end unattainable.”

The ADS legislation is workable and is delivering what Parliament intended, albeit the Appellants do not like it or think it fair. Of course, it is trite law that the Tribunal has no jurisdiction to consider whether legislation is fair.

37. At paragraph 46 in *Goudie* the Tribunal quoted Lord Nicholls of Birkenhead where he said in *Inco Europe and Others v First Choice*⁸ that “The courts...must abstain from any course which might have the appearance of judicial legislation”. If we were to adopt the interpretation urged upon us by Mr Anderson in a context where the Scottish Government is consulting on possible changes to repayment of ADS involving joint buyers that would have every appearance of judicial legislation.

38. We accept that had Dr Crawford sold the first property the day after the effective date or if the parties had cohabited the ADS would have been repaid. That is because the provisions are indeed tightly drawn and the exemption and repayment possibilities limited. That does not make them absurd, illogical or unreasonable. There are many other cases of joint buyers who do not qualify for repayment; hence the call for evidence.

39. We have not rehearsed all of Mr Anderson’s argument on statutory interpretation or the cases to which he referred in that regard since we are satisfied that the legislation, as currently enacted, is unambiguous and the meaning is clear. Dr Crawford was a buyer and he did not sell an only or main residence in the relevant period.

40. For all these reasons we uphold Revenue Scotland’s decision.

41. 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

⁶ [2015] UKFTT 0660 (TC)

⁷ [1926] AC 37, at p 52

⁸ [2000] 1 WLR 586

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: 31 January 2022