



[2022] FTSTC 4

Ref: FTS/TC/AP/21/0004

Land and Buildings Transaction Tax – Additional Dwelling Supplement (“ADS”) – disposal of dwelling that had not been the buyer’s only or main residence at any time during the period of 18 months ending with the effective date of the transaction – whether ADS repayable – no – appeal dismissed

DECISION NOTICE

IN THE CASE OF

Mr Elvis Ricardo Anthony Mohammed

Appellant

- and -

Revenue Scotland

Respondent

TRIBUNAL: ANNE SCOTT

The Tribunal determined the appeal on Thursday 17 February 2022 via WEBEX

Having heard Mr Elvis R A Mohammed, the Appellant in person and Ms Rhona McLean, Solicitor for Revenue Scotland, for the Respondent

DECISION

Introduction

1. This is an appeal against a decision dated 4 August 2021 by Revenue Scotland refusing Mr Mohammed's application for repayment of Additional Dwelling Supplement ("ADS"). Mr Mohammed's application was in terms of paragraph 8 of Schedule 2A to the Land and Buildings Transaction Act (Scotland) Act 2013 ("LBTTA").
2. Prior to being deployed in Brazil by his employer for approximately four years, Mr Mohammed had owned a property in England ("the First Property") where he lived with his family. On his return to the UK he was deployed in Scotland and occupied a property in terms of a lease which commenced on or around 2 February 2015. In 2019 his landlord decided to sell the property and, on or around 22 January 2019, served him with a Notice to Quit. He was required to quit the premises by 2 April 2019.
3. On 29 March 2019, Mr Mohammed purchased that property in Scotland ("the Second Property").
4. The effective date of the transaction for the purposes of Land and Buildings Transaction Tax ("LBTT") was 29 March 2019. A LBTT tax return was submitted to Revenue Scotland and received on 1 April 2019. As Mr Mohammed owned two properties he quite properly paid ADS on the Second Property. That ADS amounted to £14,120.
5. He decided to sell the First Property, his family having settled in Scotland. It had been his main residence at one time and he believed that if he sold it within 18 months he could reclaim the ADS.
6. The First Property was ultimately sold with a completion date of 13 November 2020. Mr Mohammed submitted a claim for repayment of the ADS on 3 March 2021 on the basis that he had sold his previous main residence.
7. Correspondence ensued with Revenue Scotland seeking proof that the First Property had been Mr Mohammed's main residence. Revenue Scotland referred to its guidance LBTT 10020.
8. On 1 May 2021, Mr Mohammed wrote to Revenue Scotland explaining that he had rented the Second Property and lived there with his family due to his employment and therefore was "unable to live in the house" in England as he would have been unable to commute. He conceded that that meant that his main residence had been in Scotland because of his employment and that it was impossible for him to have lived in the First Property in the 18 months prior to the purchase of the Second Property.
9. On 14 May 2021, Revenue Scotland wrote to Mr Mohammed advising that the conditions for repayment of ADS had not been satisfied and that the claim was refused.
10. On 8 June 2021, Mr Mohammed requested a review of that decision and provided further documentation in support of his claim.

11. Following the review of that decision and the conclusion that the decision of 14 May 2021 should be upheld, Mr Mohammed appealed to the Tribunal on 19 August 2021.

12. His Grounds of Appeal are:-

(a) It would have been impossible to fulfil the requirement to have resided in the First Property for 18 months prior to the purchase of the Second Property and therefore the law was very unfair.

(b) Lending institutions take a different view of the meaning of “main residence”.

(c) The purchase of the Second Property would not have impacted on the first time buyers in Scotland and he had contributed to the rental market for more than three years.

(d) Lack of familiarity with the process for ADS and LBTTA had left him unaware of the 18 months main residence rule. His lawyer had given him little information on ADS and LBTT and he probably would not have sold the First Property had he known.

(e) The First Property had been owned on a shared equity basis and he has sustained a loss.

(f) He is now employed in England, not far from the First Property, but the family are living in the Second Property; remote working has meant less commuting than would have been the case pre-Covid.

Revenue Scotland’s argument

13. Shortly put, Revenue Scotland states that they must apply the law and they have no discretion. There is no ambiguity in the clear words of the statute and the appellant had not complied with the provisions of sub-paragraph 8(1)(b) of Schedule 2A LBTTA. Whether a property is a person’s only or main residence is a question of fact and the fact is that it was not his main residence in the 18 months prior to the purchase of the Second Property.

Discussion

14. It is not in dispute that in the first instance Mr Mohammed was liable for both the LBTT and the ADS. Unfortunately, since it is also not in dispute that at no time in the 18 months prior to his purchase of the Second Property, had he occupied the First Property as his main residence, he simply cannot qualify for repayment of the ADS.

15. From the wording of the legislation, a copy of which I annex as an Appendix, it is clear that it was the Scottish Parliament’s intention that the ADS is only repayable in the limited circumstances set out in paragraph 8(1) of Schedule 2A LBTTA. It is evident that when this legislation was drafted, and amended more than once, it was the clear intention of the Scottish Parliament to permit repayment of the ADS in only very few circumstances. Sadly for Mr Mohammed he simply does not fit within those.

16. 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.

17. I have sympathy with Mr Mohammed and I understand why Mr Mohammed feels that the law is unfair since his inability to return to live in the First Property was not in his control. However, in their Skeleton Argument, Revenue Scotland were correct to quote from *Dr Colin Goudie and Dr Amelia Sheldon v Revenue Scotland*¹ where, having quoted from the Upper Tribunal in *HMRC v Hok*² I stated “This Tribunal does not have jurisdiction to consider ... fairness”. It does not.

Decision

18. 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.

19. 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: 17 February 2022

¹ 2018 FTSTC 3

² [2012] UKUT 363 (TCC)

Lands and Buildings Transaction Tax (Scotland) Act 2013 – Schedule 2A

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).