Tax Chamber
First-tier Tribunal for Scotland

[2018] FTSTC 3

Ref: FTS/TC/AP/18/0001

LBTT - Additional Dwelling Supplement - effective date one of two joint buyers owned two properties - buyers not having cohabited in second property - repayment or relief - no - policy intent - compliance - absurdity - no - Pepper v Hart - no - limits of jurisdiction - fairness - appeal dismissed

DECISION NOTICE

IN THE CASE OF

DR COLIN GOUDIE & DR AMELIA SHELDON

Appellant

- and -

REVENUE SCOTLAND

Respondent

TRIBUNAL: ANNE SCOTT, President
KENNETH CAMPBELL, Legal Member

Sitting in public at George House, Edinburgh on 7 August 2018

Having heard Mr J Sheldon for the appellants

Mr B Heaney, Counsel, instructed by Legal Services, Revenue Scotland, for the respondents

DECISION

Introduction

1. This is an appeal against the respondents' decision to amend to NIL the appellants' claim for repayment of the Additional Dwelling Supplement ("ADS") in the sum of £11,640. That ADS had been charged under Section 26A and Schedule 2A of the Land and Buildings Transaction Tax (Scotland) Act 2013 ("the Act").

2. The appellants sought repayment in terms of Section 107 of Revenue Scotland Tax and Powers Act 2014 ("RSTPA") on the basis that the conditions in paragraph 8 of Schedule 2A of the Act were met.

3. At the heart of the appellants' appeal is the argument that the decision not to repay the ADS is patently unfair whether or not it was correct in law and that in any event the legislation as drafted results in absurdity.

The factual background

4. The underlying facts are not in dispute.

5. The first appellant had jointly owned a property in Edinburgh with his brother and a friend which they had purchased in October 2012 ("the first property"). The second appellant has never lived there.

6. The first appellant lived at the first property until 31 July 2015 when he and the second appellant moved into a rented flat where they lived until, on 29 April 2016, the appellants purchased a property in Edinburgh in joint names for £382,000 ("the new property").

7. The purchase of the new property was a notifiable transaction and on 4 May 2016 the appellants quite properly jointly made a Land and Buildings Transaction Tax ("LBTT") return and paid the LBTT including the ADS. In fact the return was originally submitted showing the first appellant's address as the rented flat and was amended later that day to show the address as being the first property.

8. Payment of the LBTT including the ADS was made in full in the sum of £23,010 on 11 May 2016.

9. On 28 June 2017, the first appellant disposed of his interest in the first property.

10. On 3 July 2017, the first appellant submitted an Additional Dwelling Supplement Repayment claim form that was received by Revenue Scotland on 10 July 2017. It sought repayment of £11,460 on the basis that a previous main residence had been sold.

11. On 24 July 2017 the respondent opened an Enquiry and, after correspondence and discussion, the Enquiry was closed by way of a Closure Notice which was issued on 3 November 2017. A review was requested and was completed on 31 January 2018. The review decision upheld the original decision that the ADS was not repayable.

Revenue Scotland's arguments

12. Shortly put Mr Heaney argues that:

a. The imposition of the ADS is satisfied where the four conditions in paragraph 2 of Schedule 2A of the Act are satisfied and in this case they were satisfied.

b. Where there are joint buyers, then under Section 48 of the Act any obligation or liability of a buyer under the Act is an obligation of both.

c. To qualify for repayment of the ADS both buyers had to meet the criteria in paragraph 8 Schedule 2A of the Act and the second appellant did not because the first property had never been her only or main residence and she never disposed on any interest in it as she had had none.

d. Since the effective date in this transaction, the Act has been amended[1] with retrospective effect but not in such a way that it assists the appellants.

e. The Tribunal has no discretion as to whether or not payment or repayment of the ADS is fair or reasonable.

f. The approach to interpretation of a statutory provision is to begin by giving the words their ordinary meaning in the light of their context in the statute as a whole and only in cases of true ambiguity will reference to materials beyond the statute be permissible. There is no ambiguity in this case.

The appellants' arguments

13. The appellants had put considerable time and effort into researching the position and lodged very detailed arguments. In summary the Notice of Appeal stated:

a. If Revenue Scotland's application of the legislation is correct, the scope of the legislation breaches and distorts the principles agreed by the Scottish Parliament.

b. Revenue Scotland's application of the legislation is incorrect.

c. If Revenue Scotland's application of the legislation is correct, the legislation is fundamentally defective, and

d. The legislation is unfair and discriminatory.

14. By email dated 17 April 2018 the appellants confirmed that the "core of our argument" was that there must be something fundamentally wrong with either the legislation or Revenue Scotland's interpretation of it and therefore the decision runs counter to ordinary notions of fairness and principle.

[1] Land and Buildings Transaction Tax (Additional Amount-Second Homes Main Residence Relief) (Scotland) Order 2017 SSI2017/233 and Land and Buildings Transaction Tax (Relief from Additional Amount) (Scotland) Act 2018

15. A lengthy Further Submission dated 12 July 2018 was lodged and focused extensively on the argument that the legislation produced an "absurd" result and goes beyond the legislative purpose it was intended to serve. Recovery of the ADS was logically impossible because the second appellant had never owned or occupied the first property; a condition that is logically incapable of satisfaction is not a condition, but a "sham" and that cannot have been the intention of Parliament.

16. The main thrust of the appellants' argument latterly was simply that the legislation as drafted is "absurd". Accordingly, the legislation should be construed purposively and the principles in *Pepper (Inspector of Taxes) v Hart*[2] ("Pepper v Hart") should be invoked (ie recourse to detail of Parliamentary debate).

Overview of Schedule 2A of the Act and the Legislative history

17. We annex at Appendix 1 the full text of paragraphs 2, 5, 6, 8 and 8A of Schedule 2A of the Act. As can readily be seen, these paragraphs are written in relatively clear uncomplicated language. That is not often seen in taxation legislation!

18. The charging provisions in Schedule 2A of the Act were introduced by the Land and Buildings Transaction Tax (Amendment) Act 2016. It provides for additional LBTT, the ADS, to be paid by those buying second homes.

19. The Explanatory Notes make it explicit at paragraphs 38 and 4, when explaining paragraphs 5 and 8, that both parties have to be able to sell any former residence.

20. Paragraph 38 reads:

> "The effect of paragraph 5 of schedule 2A is that the conditions in paragraph 2(1)(c) and (d) … will be met if they are met in relation to any one of the joint buyers, even though they may not be met in relation to others. So if two people, A and B, who each currently own a dwelling which they occupy as their main residences, jointly buy a dwelling while B retains his or her existing dwelling to rent out, the additional amount is payable on the joint purchase <u>because B is not replacing his or her main residence even though A is</u> …".

That is simply an example but logically if B did not have a main residence s(he) could not replace it.

21. Paragraph 47 states that a repayment may be claimed where "…the buyer is able to dispose of <u>their</u> former main residence…". We have underlined the use of the word "their" since it does not say, for example "a".

22. The starting point is paragraph 2 which has four conditions and all must be satisfied if the ADS is chargeable. The first two conditions relate to the transaction and provide that the ADS is chargeable where a new property is purchased for £40,000 or more. The third condition relates to the buyer and has effect where, at the effective date, the buyer owns more than one property. The last condition also relates to the buyer and is engaged where the buyer has not disposed of the previous only or main residence.

[2] [1993] 1 AC 593

23. However, one must then look at paragraph 6(1)(b) which clearly states that, in relation to the third condition, a cohabitant will be deemed to own a building if the other cohabitant owns it. Therefore, in this case, although the second appellant had never owned the first property, for the purposes of that sub-paragraph alone she is treated as having owned it on the effective date. It is a very precise and clear provision.

24. In any event, paragraph 5 applies to joint purchasers of a dwelling and specifies that the conditions in the main charging paragraph, which is paragraph 2, will be met even if only one of the buyers owns more than one dwelling and therefore one of the buyers is not replacing their only or main residence with that new purchase. The impact of paragraph 5 is that even if they had not been cohabiting, as though married to each other, since they were joint buyers because the first two conditions were met, the second appellant would have been deemed to have satisfied the third condition because the first appellant did so.

25. The intention of Parliament is abundantly clear that they wished the ADS to bite where any one of joint buyers, whether in a relationship or not, purchased a property and one of the joint buyers already owned a property.

26. Accordingly, there is no doubt that in the first instance ADS was due and payable and, indeed, it was paid.

27. In any event, had the second appellant not accepted that she was liable in terms of those paragraphs, nevertheless, in terms of Section 48 of the Act, the terms of which are set out at Appendix 2, any obligation or liability of either buyer in terms of the Act is an obligation of them both.

28. Therefore, although there would have been no ADS if the second appellant alone had purchased the new property, where there is a joint purchase the ADS is triggered, and also the liability to pay it.

29. In summary, paragraph 8 of Schedule 2A provides that the ADS will be repayable on the basis that the chargeable transaction triggered by paragraph 2 will be treated as exempt from ADS if certain conditions are met. Those are, that the first property is sold within 18 months from the effective date, and had been the buyer's only or main residence at any period in the 18 months prior to the effective date and that the new property has been occupied as the buyer's only or main residence.

30. Having been amended in 2016 in the way described, 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. These respectively extend the paragraph 8 right to repayment of the ADS from the buyers themselves to spouses, civil partners and cohabitants living together as though married to one another.

31. The Policy Note makes clear the Policy Objectives including:-

> "Additionally, the policy intention is that ADS can be reclaimed when a main residence is being replaced and the sale of the former main residence happens within 18 months of the purchase of

what becomes the current main residence. 'Replacing' in the context of the ADS legislation means selling the previous main residence and buying a new main residence.

It is necessary to bring forward an amending instrument as the legislation as currently drafted does not give full effect to this policy intention. It has emerged that the ADS legislation has been too tightly drawn in certain specific circumstances - - i.e. where:

- the title to the former main residence is in the sole name of one of the married couple, civil partnership, cohabitants who both live in the property; and
- the couple then jointly buy a new main residence prior to selling their current main residence."

32. We have underlined the crucial wording. It is clear that it was never intended that the exemption would be extended to apply to a situation such as that with which we are concerned.

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

34. The policy objective of both the 2017 Order and the retrospective provisions in the 2018 Act was to ensure that where the title to the former main residence of a taxpayer is in the sole name of one of a married couple, civil partnership, or cohabitants who both lived in that property and the couple then jointly buy a new main residence prior to selling the then current main residence, then the ADS can be repaid and relief given.

35. Lastly, in regard to the scheme of legislation, the appellants argue that paragraph 5, in their view, disapplies Section 48 of the Act, and because it does that then it should equally be disapplied in relation to paragraph 8.

36. Section 48 of the Act is a general provision in relation to application of the Act in regard to obligations and liabilities under the Act, and in particular in relation to the filing of a return and indeed payment of tax. It is not disapplied by paragraph 5. From its terms, it is clear that paragraph 5 simply qualifies paragraphs 2 and 3. Paragraph 5 has no application in relation to paragraph 8.

How does that legislation apply to the facts in this case?

37. It is not disputed by the parties that for the purposes of Section 63 of the Act, the effective date for the chargeable transaction was 29 April 2016. As a result of the provisions of paragraph 2 the effective date of a transaction for ADS is the date that a buyer owns more than one dwelling and is not replacing that buyer's only or main residence.

38. As indicated above both appellants were jointly and severally liable for the LBTT and the ADS. The interaction of Section 48 of the Act and paragraph 2 of Schedule 2 means that although, even if one disregards the deeming provisions, it was only the first appellant who had triggered the liability to ADS because of his ownership of the two properties, nevertheless they had a joint and several liability to pay the LBTT, including, ADS at that juncture. Of course one cannot disregard any of the provisions!

39. On 28 June 2017, which was 14 months after the new property had been purchased, the first appellant sold his interest in the first property and that was 17

months after he had moved out of the first property. Had he been the only buyer he would therefore have qualified to seek repayment in terms of paragraph 8.

40. The key point is whether the second appellant qualified since she had been liable for the ADS. There are no deeming provisions for either paragraph 8 or 8A. She has never resided in the first property.

41. Mr Sheldon argues that the legislation, as enacted is absurd, because it would have been impossible for the second appellant ever to have qualified.

42. He has expended considerable time and effort, to say nothing of ingenious thinking, in order to find a means of repayment. He was correct to do so since the tax having been due and payable it is for the appellants to prove that they fit within the exemption offered by paragraphs 8 and 8A.

43. He referred us extensively to *Bennion on Statutory Interpretation* (6th ed). He had argued that the drafting, and therefore the legislation, was defective. His primary argument was that the legislation produced an absurd result. Section 312 of *Bennion on Statutory Interpretation* (6th ed) provides as follows:-

> Section 312 Presumption that "absurd" result not intended
>
> (1) The court seeks to avoid a construction that produces an absurd result, since this is unlikely to have been intended by Parliament. Here the courts give a very wide meaning to the concept of "absurdity", using it to include virtually any result which is unworkable or impracticable, inconvenient, anomalous or illogical, futile or pointless, artificial, or productive of a disproportionate counter-mischief.
>
> (2) In rare cases there are overriding reasons for applying a construction that produces an absurd result, for example, where it appears that Parliament really intended it or the literal meaning is too strong."

44. In effect, Mr Sheldon was submitting that the alleged absurdity justified recourse to Parliamentary debates under the Rule in *Pepper v Hart.*

45. Before addressing *Pepper v Hart*, we must first consider the primary principles of statutory interpretation. We were not referred to it but we had in the Bundle the well-known case of *Barclays Mercantile Business Finance Ltd v Mawson*[3] ("*Mawson*") where the House of Lords held that a taxing statute is to be applied by reference to the ordinary principles of statutory construction, ie by giving the provision a purposive construction in order to identify its requirements and then deciding whether the actual transaction answers to the statutory description. The question is always whether the relevant provision of the statute, upon its true construction, applies to the facts as found.

46. Another case to which we were not referred but which is relevant is *Inco Europe and Others v First Choice*[4] in which Lord Nicholls of Birkenhead referred to the court's role in correcting obvious drafting errors in discharging its interpretative function but he made it clear that the power was strictly confined "…to plain cases of drafting mistakes":

[3] [2004] UKHL 51, [2005] 1 AC 684
[4] [2000] 1 WLR 586

> "The courts are ever mindful that their constitutional role in this field is interpretative. They must abstain from any course which might have the appearance of judicial legislation. A statute is expressed in language approved and enacted by the legislature. So the courts exercise considerable caution before adding or omitting or substituting words. Before interpreting a statute in this way the court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed. The third of these conditions is of crucial importance. Otherwise any attempt to determine the meaning of the enactment would cross the boundary between construction and legislation …".

47. Lord Nicholls went on to say that even where these three conditions were met the court may find itself inhibited from interpreting the statutory provision in accordance with what it is satisfied was the underlying intention of Parliament.

48. We have underlined, what are to us, the crucial words. We were referred to no drafting mistakes as such but, rather to the assertion that if it suffices that the first appellant had cohabited for the purposes of the imposition of ADS then clearly that should be relevant for the conditions for repayment ie an implicit drafting mistake. Although this quotation relates to drafting mistakes, the principles hold good for statutory interpretation generally.

49. We take the view that normal rules of statutory interpretation apply. In the first instance, words should be given their everyday meaning insofar as consistent with Parliament's discernible intent. The recent case of *UBS AG v HMRC*[5] makes it clear that the ultimate question is whether the relevant statutory provision, viewed purposively, was intended to apply to the transaction, viewed realistically.

50. 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."

51. We summarise our findings on the legislative position, as it applies in this case, as follows:

a. Parliament enacted legislation which stipulated that an ADS would be chargeable where a purchaser of a property owned another property. That is the case whether or not the purchaser purchases alone or with others. In this case the first appellant did own two properties on the effective date, thereby triggering the liability in his own right.
b. Quite apart from the joint and several liability derived from Section 48 of the Act, Parliament introduced deeming provisions whereby the second appellant would be treated as the owner of the property at the effective date for the purposes of the imposition of the ADS. That imposed the tax on both of the purchasers.

[5] [2016] UKSC 13
[6] [2015] UKFTT 0660 (TC)
[7] [1926] AC 37, at p 52

c. Deeming provisions are by no means uncommon in taxation legislation but operate only to the extent specified by the relevant legislation.

d. In the first instance, Parliament introduced at paragraph 8 a limited right to potential repayment by rendering a transaction exempt from the ADS if the first property had been the buyer's only or main residence and was sold timeously. There is no qualification or deeming provision relating to that. In order to render the chargeable transaction exempt, the first property must have been the buyer's only or main residence. The exemption must by claimed by the buyer.

e. The buyer is defined in section 7 of the Act as "…the person who acquires the subject-matter of the transaction." In this case that means both appellants.

f. As the Policy Note identifies, Parliament recognised that the legislation as then enacted was too restrictive to give effect to the intended policy.

g. It was therefore amended to extend the right to an exemption "…in certain specific circumstances". Clearly at that point Parliament looked carefully at how the legislation could be brought into line with policy.

h. Mr Sheldon relied heavily on Parliamentary debate and, in particular, he placed significant emphasis on the Cabinet Secretary's statement at 17.46 on 19 October 2017 at the third paragraph arguing that that should be a "consistent thread through the legislation".

i. Although, for the reasons that we outline below, we do not consider that recourse to Parliamentary debate is either required or appropriate in this case, we record the detail of that paragraph and it reads:

> "The Land and Buildings Transaction Tax (Amendment) (Scotland) Bill introduces a 3 per cent land and buildings transaction tax supplement payable on the purchase of additional dwellings, such as buy-to-let or second homes. Subject to parliamentary approval, that means that, from 1 April 2016, **anyone buying** a residential property in Scotland of £40,000 and above who already owns a residential property, here or anywhere in the world, will pay an additional 3 per cent land and buildings transaction tax on the whole purchase price of the property, **unless they are simply replacing their existing main residence**."

We have highlighted in bold the fact that the Cabinet Secretary referred to any buyer and the need for that buyer to be replacing their existing main residence.

j. That is entirely consistent with the legislation as drafted and the limited extension of the exemption to include couples where the title of the home in which they had resided was not in both names provided that they had both resided in the first property.

k. The second appellant, as a result of the legislation has been deemed to have owned the first property on the effective date only for the purposes of paragraph 2(1)(c) and she has never replaced a property.

52. The previous ADS regime denied exemption (or relief) from ADS to cohabitants. In our view, it is plain that the Scottish Parliament intended that the additional relief offered by paragraph 8A should be restricted to the situation where both parties had lived in the previous residence, and not just one of them had done so.

53. The relief in paragraphs8 and 8A is clearly workable, and certainly not pointless, an in the context of a scheme which Parliament recognised was strict in any event.

54. It follows from the foregoing analysis of the scheme of the legislation, that we reject Mr Sheldon's submission that the interpretation adopted by Revenue Scotland is absurd in the sense of being anomalous or illogical. The worst criticism that could be levelled at the legislative provisions is that they operate harshly in circumstances where, as in this case, the second appellant had never occupied the first property. However, as has often been said, equitable principles do not apply when construing tax statutes.

55. Our analysis of the legislation demonstrates that it was the Scottish Parliament's intention to extend the exemption offered under paragraph 8 to a very limited range of circumstances. It has done so.

56. For the reasons given, in our view, the legislation does what it set out to achieve. Parliament revisited legislation that it considered too restrictive, widened the extent of an exemption to a limited extent and to the extent outlined in the Policy Note. The legislation is wholly unambiguous.

57. Accordingly, in our view there is no basis on which recourse to Parliamentary debate is justified under the Rule in *Pepper v Hart*.

58. For the avoidance of doubt, at all times, we have had in mind the Upper Tribunal decision in *Christianuyi Ltd & Others v HMRC*[8] which looked at the approach to construction of legislation and, in particular, looked at the circumstances in which *Pepper v Hart* might be deployed. At paragraph 25(3) the Court stated:

> "(3) When construing an Act of Parliament, the court will, of course, draw as necessary upon the presumptions and principles of construction that have evolved over time …, but it is of course necessary to bear in mind that the use of extraneous materials is but one element of the construction process.
>
> (4) With the exception of Parliamentary material – which is subject to the special rule in *Pepper (Inspector of Taxes) v Hart* – the courts are 'increasingly prepared to look at any material that is likely to be genuinely helpful in illuminating the context within which legislation is to be construed'. However, two cautionary notes must be sounded:
>
> (a) First, background material must not be allowed to take precedence over the clear meaning of the words used. The cardinal rule that legislation should be construed according to the intention expressed in the language used must not be lost sight of. In *Milton v DPP* [2007] EWHC 532 (Admin), Smith LJ stated at [24]:
>
> 'In my view, this case well illustrates the danger of referring to background material such as a White Paper as an aid to construction in circumstances in which that ought not to be done. When construing a statute, the court should first examine the words themselves. If the meaning is clear, there is no need to delve into the policy background. If the court is uncertain as to the meaning, it may well be helpful to consider background material in order to discover the 'mischief' at which the change in the law was aimed. However, this case illustrates the dangers of so doing. It is clear to me that the district judge was led into error by his reference to the White Paper'.
>
> (b) Secondly, a certain degree of care needs to be employed in ascertaining what material is helpful when construing an Act of Parliament … Clearly, the only material that ought to be used when construing an Act is that material reasonably available to the public in general…
>
> (5) Parliamentary material is not treated in the same way as other extrinsic material:

[8] [2018] UKUT 10 (TCC)

(a) Until the decision in *Pepper (Inspector of Taxes) v Hart,* 'it was generally accepted that statements of underlying policy intention on the part of the government could not be used by the courts for the purpose of construing legislation. The words enacted by Parliament were to be taken and interpreted at face value, to discover what Parliament in fact enacted not what it would probably have wanted to enact had it thought about the point at issue more carefully.'

(b) The effect of the decision of the House of Lords *Pepper (Inspector of Taxes) v Hart* is clearly stated in the speech of Lord Browne-Wilkinson [1993] 1 AC 593 at 640:

> 'I therefore reach the conclusion, subject to any question of Parliamentary privilege, that the exclusionary rule should be relaxed so as to permit reference to Parliamentary materials where: (a) the legislation is ambiguous or obscure, or leads to an absurdity; (b) the material relied upon consists of one or more statements by a Minister or other promoter of the Bill together if necessary with such other Parliamentary material as is necessary to understand such statements and their effect; (c) the statements relied upon are clear.'

(c) It is clear, therefore, that the circumstances in which Parliamentary material may be deployed as an aid to construction are rather narrower than those which pertain in relation to other forms of extraneous material. It is also clear that the courts have been astute to resist reference to Parliamentary material where the *Pepper (Inspector of Taxes) v Hart* criteria have not been met.

59. We find that the meaning of the words in the legislation is clear and that the only relevant extraneous materials are the Explanatory Notes and Policy Note. As indicated above, even if we had regard to the parliamentary debate, we do not find that it assists the appellants.

The appeal and the Tribunal's jurisdiction

60. The appeal to the Tribunal was timeously brought under paragraph 17(1) of Schedule 3 of RSTPA.

61. As the Tribunal indicated at paragraph 30 in *Straid Farms Limited v Revenue Scotland*[9] ("Straid*")*:

> "The explanatory notes to RSTPA state:
>
> "The effect of [the legislation] is that the jurisprudence concerning the proper bounds of the tax authority's role is imported into the devolved tax system. This jurisprudence includes not only case law from the UK jurisdictions but other English-speaking jurisdictions."

62. The Upper Tribunal in *HMRC v Hok Ltd*[10] ("Hok") made it explicit at paragraph 36 that:

> "It is important to bear in mind how the First-tier Tribunal came into being … It follows that its jurisdiction is derived wholly from Statute. The jurisdiction of this Tribunal, as also the FTT is derived wholly from Statute."

63. The Tribunal in *Straid* went on to state:

[9] [2017] FTSTC 2
[10] [2012] UKUT 363 (TCC)

"33. The jurisdiction of this Tribunal, as also the FTT, is derived wholly from statute.

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*[11] 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.

35. From 24 April 2017 the First-tier Tribunal for Scotland Tax Chamber took on the functions of the former Tax Tribunals for Scotland. Section 21 RSTPA states that the Tribunal "…is to exercise the functions conferred upon it by or under this Act".

36. In the case of an appeal of an appealable decision, Section 244(2) RSTPA provides that:

'The tribunal is to determine the matter in question and may conclude that Revenue Scotland's view of the matter in question is to be-

(a) upheld
(b) varied, or
(c) cancelled.

That is a wide jurisdiction."

We agree.

Fairness

64. 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.

65. 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.

66. 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

[11] [2013] UKUT 071 (TCC)

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."

67. 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.

68. 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.

69. 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.

70. In a similar vein, it is not for this Tribunal to decide that legislation should not be applied because it is thought to be defective when looked at in the light of debate in Parliament.

71. 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.

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

Decision

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

74. Accordingly the appeal is dismissed.

75. 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: 9 November 2018

APPENDIX 1

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.

6 Spouses, civil partners, cohabitants and children

(1) For the purposes of paragraph 2(10©, a dwelling which is owned by—

(a) the buyer's spouse or civil partner,
(b) the buyer's cohabitant,
(c) a person aged under 16 who is a child of—

(i) the buyer,
(ii) the buyer's spouse or civil partner, or
(iii) the buyer's cohabitant,

is to be treated as being owned by the buyer.

…

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 (10(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.

APPENDIX 2

Land and Buildings Transaction Tax (Scotland) Act 2013

48 Joint buyers

(1) This section applies to a land transaction where there are two or more buyers who are or will be jointly entitled to the interest acquired.

(2) The general rules are that—

(a) any obligation of the buyer under this Act in relation to the transaction is an obligation of the buyers jointly but may be discharged by any of them,

(b) anything required or authorised by this Act to be done in relation to the buyer must be done by or in relation to all of them, and

(c) any liability of the buyer under this Act in relation to the transaction (in particular, any liability arising by virtue of the failure to fulfil an obligation within paragraph (a)), is a joint and several liability of the buyers.

(3) The general rules are subject to the following provisions—

(a) if a return is required in relation to the transaction, a single return must be made,

(b) the declaration required by section 36(1) or (2)(a) (declaration that return is complete and correct) must be made by all the buyers.

(3A)See also section 247 of the Revenue Scotland and Tax Powers Act 2014 (asp 16) (reviews, appeals etc where joint buyers).

(4) This section has effect subject to—

(a) the provisions of schedule 17 (partnerships), and

(b) paragraphs 15 to 18 of schedule 18 (trusts).