



[2019] FTSTC 14

Ref: FTS/TC/AP/19/0016

***Land and Buildings Transaction Tax – Additional Dwelling Supplement (ADS) – Both buyers not having cohabited in both properties – Repayment – No – Limits of jurisdiction – Fairness – Appeal dismissed***

## **DECISION NOTICE**

IN THE CASE OF

**Mr Neil Doherty**

Appellant

- and -

**Revenue Scotland**

Respondent

**TRIBUNAL: ANNE SCOTT**

The Tribunal determined the appeal on 27 November 2019 without a hearing under the provisions of Rule 27 of The First-tier Tribunal for Scotland Tax Chamber (Procedure) Regulations 2017 having first read the Notice of Appeal, and attachments, dated 12 July 2019 and Revenue Scotland's Statement of Case, received by the Tribunal on 12 September 2019.

## DECISION

### Introduction

1. On 30 January and 11 February 2019, Revenue Scotland received a claim, as amended, for repayment of Additional Dwelling Supplement ("ADS") from the Appellant and his partner, Ms McKelvey.
2. This is an appeal against Revenue Scotland's decision dated 8 March 2019 to refuse to make the repayment of ADS as requested in that claim. That decision, which was upheld on review, confirmed that a repayment of ADS was not available on the basis that the first property (see paragraph 5 below) had not been the only or main residence of Ms McKelvey at any point.
3. Although the claim was submitted by both parties, in terms of the relevant legislation, an appeal may be brought by both or either of joint buyers<sup>1</sup>.

### The factual background

4. The underlying facts are not in dispute.
5. Until April 2016, with a gap between October 2013 and November 2015, the Appellant resided at his former marital home ("the first property") which he jointly owned with his now ex-wife.
6. On 21 July 2017, ("the effective date") the Appellant and his current partner Ms McKelvey purchased a house together ("the second property").
7. The electronic Land and Buildings Transaction Tax ("LBTT") return for the transaction was submitted to Revenue Scotland on 27 July 2017. That return quite properly disclosed that ADS in the sum of £4,398 was chargeable. It was paid on time.
8. Prior to the purchase of the second property, Ms McKelvey had never owned a property.
9. On 20 December 2018, the Appellant transferred his share of the first property to his ex-wife. That triggered the claim for repayment of the ADS.

### The Appellant's Grounds of Appeal

10. In summary, the Appellant argues that the decision is unfair because Ms McKelvey could never have been resident in the first property prior to the purchase of the second property.
11. The legislation had been introduced in order to minimise the impact of purchasers of Buy to Let properties and second home purchasers on first time buyers. Neither he nor his partner fitted either of these categories which are described in the Policy Memorandum which accompanied the amending legislation in 2016; indeed

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<sup>1</sup> Section 247(4)(a) Revenue Scotland Tax and Powers Act 2014 ("RSTPA")

Ms McKelvey was a first time buyer. The Appellant had not benefitted from the disposal of the first property so he argued that he was in effect a first time buyer too.

12. When they purchased the second property they were replacing their main residence which they had been renting. ADS does not apply if one is replacing a main residence.

13. The Guidance from Revenue Scotland is both contradictory and confusing.

### **Revenue Scotland's argument**

14. Shortly put, Revenue Scotland state that they must apply the law and they have no discretion. There is no ambiguity in the clear words of the statute. Further, the Policy Note attached to the amending legislation in 2017 stated that the policy intention was to extend the ability to claim a repayment to couples who had both lived in both properties but the title to the first main residence was in the name of one of the couple only.

### **Discussion**

15. This Tribunal has set out in full an analysis of the legislation, its history and the policy objectives at paragraphs 17 to 36 of the decision in *Dr Colin Goudie and Dr Amelia Sheldon v Revenue Scotland*<sup>2</sup> ("Sheldon"). I annex at Appendix 1 a copy thereof.

16. In order to succeed the Appellant would have to satisfy the Tribunal that the criteria set out in paragraphs 8 and 8A of Schedule 2A of the Land and Buildings Transaction Tax (Scotland) Act 2013 ("the Act") were met. I annex the full text of the relevant provisions of the Act at Appendix 2.

17. The first point is that the reference to a main residence in the legislation is to a residence that has been owned by at least one of the purchasers of a second property. Therefore the fact that the Appellant and Ms McKelvey had cohabited in a rented property prior to the purchase of the second property is not relevant and cannot alter the position.

18. There is no doubt that, because the Appellant still owned a share of the first property when he bought the second property then ADS was due and payable.

19. It is not in dispute in this case that if the Appellant had been the only buyer of the second property, then he would have qualified for repayment of ADS.

20. The problem is that, as was the case in *Sheldon*, it would have been impossible for Ms McKelvey ever to have qualified for repayment of the ADS.

21. Unfortunately for the Appellant, it is plain that the Scottish Parliament intended that the additional relief offered by the amending legislation in 2016 and 2017 should be restricted to the situation where both parties had lived in the previous residence, and not just one of them had done so.

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<sup>2</sup> 2018 FTSTC 3

22. It was undoubtedly the case that the Scottish Parliament intended to extend the exemption offered under the legislation to a very limited range of circumstances and that legislation is wholly unambiguous.

23. I do understand why the Appellant would consider that the legislation is unfair but as was pointed out in *Sheldon*<sup>3</sup>, and in other cases, the Tribunal does not have jurisdiction to consider whether the law is fair.

24. In summary, since the first property was never the only or main residence of both the Appellant and Ms McKelvey at any time during the period of 18 months ending with the effective date of the purchase of the second property, ADS simply cannot be repaid.

25. Lastly, the Tribunal is wholly independent of Revenue Scotland and therefore the Guidance issued by Revenue Scotland is a matter entirely for them. The Tribunal applies the law, not Revenue Scotland's interpretation of the law as set out in their Guidance.

26. However, I do understand why the Appellant might have found the reference in the guidance confusing. It reads: "Your main residence is usually where you live and spend most of your time. It does not matter whether you own or rent your main residence or lives (*sic*) in it free of charge."

27. That is only relevant in deciding whether or not a property is a main residence or not, as a taxpayer may own a property but also rent another property which is his or her main residence. ADS itself only applies in relation to the ownership of properties.

## **Conclusion**

28. Revenue Scotland has applied the legislation correctly. Therefore the appeal must be dismissed and Revenue Scotland's view of the matter upheld.

29. 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: 27 November 2019**

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<sup>3</sup> Paragraphs 64 and 66-67

## Appendix 1

### 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 because B is not replacing his or her main residence even though A is ...".

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 their 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.

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.

#### *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.

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 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.

**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(10C), 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 (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.