

Tax Chamber
First-tier Tribunal for Scotland



[2019] FTSTC 11

Ref: FTS/TC/AP/19/0008

Land and Buildings Transaction Tax – LBTT - Additional Dwelling Supplement - effective date one of two joint buyers owned two properties - buyers not having cohabited in first property - repayment or relief - no - policy intent - compliance - absurdity - no - limits of jurisdiction - fairness - appeal dismissed.

DECISION NOTICE

IN THE CASE OF

Mr William Ross

Appellant

- and -

Revenue Scotland

Respondent

TRIBUNAL: Kenneth Campbell QC
Charlotte Barbour

Sitting in public at George House, Edinburgh on Tuesday 1 October 2019

Having heard Mr W Ross, the appellant, in person

Mrs Garland, Officer of Revenue Scotland, for the respondent

DECISION

Introduction

1. This is an appeal against the respondent's decision to amend to NIL the appellant's claim for repayment of the Additional Dwelling Supplement ("ADS") in the sum of £6,450. 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 appellant sought repayment in terms of Section 107 of Revenue Scotland Tax and Powers Act 2014 ("RSTPA") on the basis that the conditions in paragraphs 8 and 8A of Schedule 2A of the Act were met.

3. At the heart of the appeal is the appellant's contention that the decision not to repay the ADS is "ludicrous", which we take to mean patently unfair, and also that in any event the legislative conditions for claiming ADS relief are unclear, unfair and unreasonable.

The factual background

4. The underlying facts are not in dispute.

5. The appellant co-habited with his ex-wife at an address in Dumbarton (referred to hereafter as "the First Property"), until January 2017. The appellant and his partner, Ms Grummett, entered into a transaction for a residential purchase of a property in Portincaple (referred to hereafter as "the Second Property"), with an effective date of 29 June 2017. The electronic LBTT return for the transaction was received on 30 June 2017. On the effective date the appellant also jointly owned the First Property and therefore the electronic LBTT return for the Second Property reflected ADS chargeable of £6,450.

6. Agents for the appellant and Ms Grummett submitted a claim for repayment of ADS dated 12 December 2018. This claim was made under Section 107 of RSTPA and was on the basis that the appellant had transferred his interest in the First Property to his ex-wife on 11 December 2018. Following a request for further information, the respondent wrote to the appellant and Ms Grummett on 11 January 2019 to confirm that the conditions for repayment of ADS had not been met and so the claim for repayment was refused.

7. The appellant and Ms Grummett wrote to the respondent on 18 January 2019, which letter was treated as a Notice of Review. A review was carried out and the respondent wrote with the conclusion of its review on 4 April 2019 to the effect that the original decision to refuse repayment of ADS would be upheld.

8. On 29 April 2019 the FTTS received a Notice of Appeal submitted by the appellant.

Revenue Scotland's submissions

9. We invited the respondent's solicitor to outline the legislation at the outset, and to set out the respondent's submissions in order that the appellant, who was not legally represented, would have clear notice of the points being taken against him in the appeal. The appellant, Mr Ross, was content with that course.

10. The respondent submitted that the relevant criteria for repayment of ADS are as set out in paragraph 8(1) of Schedule 2A of the Act as read with paragraph 8A of that Schedule. These include a requirement for the dwelling disposed of to have 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 (paragraph 8(1)(b)). In cases such as the appellant's, paragraph 8A(2)(b) provides for paragraph 8 to have effect as if the reference to the buyer (in paragraph 8(1)(b)) were a reference to both of the buyers together. Therefore the requirement, as applied to this case, is that the First Property (the dwelling disposed of) was the only or main residence of both the appellant and Ms Grummett at any time during the period of 18 months ending with the effective date of the purchase of the Second Property (29 June 2017). While the appellant meets this requirement, Ms Grummett does not. Accordingly, ADS was not repayable.

11. In response to the appellant's contention that the legislation surrounding ADS is "very unclear and extremely confusing" and that the "conditions for claiming ADS relief are unfair and unreasonable", the respondent's position is that there is no ambiguity in this case and the legislation has been applied according to its terms. The respondent says it applied the provisions correctly to the appellant's circumstances because the statutory conditions for payment of ADS were met and those for repayment were not. It is not for the respondent to decide which parts of the statutory scheme to enforce and which to ignore.

12. The respondent submitted that the Tribunal only has the powers given to it by statute. It does not have a general supervisory power, nor is it empowered to consider fairness of the respondent's decisions.

Mr Ross's submissions

13. The appellant presented his submission clearly and in a focused way. After reminding us about the factual background, he told us that he accepted that he and his partner were required to pay LBTT in respect of the Second Property, but the ADS amounted to being taxed on something he was not using and getting no benefit from, namely the First Property, after the date on which he moved out of that house.

14. The appellant took us through a number of the points made in his letter to the respondent dated 18 January 2019, which he told us summarised his position:

(a) The ADS legislation was enacted to ensure that persons or companies who were buying more than one property to make profit from that property either through rental or selling on were paying the appropriate tax. By contrast, he and his partner were being required to pay tax on a property that neither of them had access to nor had any personal property within (meaning, the First Property).

(b) The LBTTA contained seven types of transaction which are exempt from ADS, one of which is transactions in connection with a divorce. His letter referred to the respondent's Guidance Note LBTT3006.

(c) Not only was the First Property not his main residence, it was not any residence or concern of his since 3 January 2017.

(d) He had signed a Minute of Agreement with his ex-wife to regulate matters in connection with the divorce. He described this as a judicial separation.

(e) The appellant's partner, Ms Grummett, had been unfairly penalised because she was jointly liable to pay the ADS even though she did not have an additional property.

(f) The appellant had been obliged to compromise settlement of his finances in the divorce negotiations with his ex-wife. He had been under considerable stress as a result of the combination of that and the refusal of repayment of ADS.

15. The appellant told us that paragraphs 8 and 8A of Schedule 2A to the LBTTA could be read to support his position, though his argument on this point turned on what he argued was the policy of the legislation rather than the words used. The appellant told us that, in his view, the decision of the Tribunal in *Dr Colin Goudie and Dr Amelia Sheldon v Revenue Scotland*¹ ("Goudie & Sheldon") was wrong. It was, he said, only case law, and, in any event, the circumstances in that case were not exactly the same as this case.

Schedule 2A of the Act, and Additional Dwelling Supplement

16. We annex at Appendix 1 the full text of paragraphs 2, 5, 6, 8 and 8A of Schedule 2A to the Act. Schedule 2A was introduced by the Land and Buildings Transaction Tax (Amendment) Act 2016. It provides liability for additional LBTT, namely the ADS, to be paid by those buying second (and subsequent) residential property.

17. Because they are central to this appeal, it is convenient to set out the text of paragraphs 8 and 8A here.

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—

¹ [2018] FTSTC 3

- (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.

18. In the case of *Goudie & Sheldon*, the Tribunal discussed the policy background to Schedule 2A in detail at paragraphs 19-29, and we adopt that analysis. The law relating to ADS was amended again in 2017 by the Land and Buildings Transaction Tax (Additional Amount – Second Homes Main Residence Relief) (Scotland) Order 2017, which further amended Schedule 2A by the introduction of paragraphs 8A and 9A. These 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.

19. Although it was not discussed in argument before us, the Tribunal in *Goudie & Sheldon* had before it the Policy Note which accompanied the 2017 amendment (see

paragraphs 31-34). That makes clear the Scottish Government's policy aim when introducing those changes. We quote from the Tribunal's reference to the Policy Note in its decision at paragraph 31:

"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."

20. The words underlined are those which the Tribunal in *Goudie & Sheldon* considered crucial. We agree. The Tribunal considered that the policy objective of the 2017 Order 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. We agree.

The appeal

21. Although the appellant did not live in the First Property after January 2017, he remained joint owner of that property until 11 December 2018. He and his partner Ms Grummett bought the Second Property with an effective date of 29 June 2017. Ms Grummett at no time had a property interest in the First Property, nor did she ever live there.

22. Looking at those facts through the lens of paragraphs 8 and 8A of Schedule 2 to the Act, it will be apparent that the appellant meets paragraph 8(1)(a). However, the effect of paragraph 8A(2)(b) is that both the appellant and Ms Grummett have to meet paragraphs 8(1)(b) and 8(1)(c). They do not do so, because the First Property was never Ms Grummett's main or only residence.

23. We have already mentioned the case of *Goudie & Sheldon*. The circumstances in that case were slightly different in that the partner who already owned a share of a property was not exiting a marriage, however, the other key elements for the purposes of paragraphs 8 and 8A are similar. The applicable legal principles are the same.

24. The appellant pointed out that he had entered into a Minute of Agreement with his ex-wife, regulating matters following their separation. That is true; however the Minute of Agreement is not a decree of divorce, nullity or judicial separation, all of which involve an order of a court, rather it is a formal deed recording terms agreed between the parties to it. Because we are not presented with any of those types of decree, we say nothing further about their relationship with ADS.

25. It follows that the appeal must be refused because the appellant does not meet the legal test for repayment of ADS.

The Tribunal's jurisdiction

26. We turn to the appellant's broader challenge to the fairness of the respondent's decision.

27. It is clear both from the written grounds of appeal and from the appellant's oral argument that he feels strongly that the decision of the respondent is unfair and unjust.

28. Arguments about fairness and alleged unreasonableness of Revenue Scotland decisions have been considered by the Tribunal in a number of previous cases, including two which were referred to in argument before us. These were *Clark v Revenue Scotland*,² and *Goudie & Sheldon*.³ In addition, we would refer to the Tribunal's decision in *Straid Farms Ltd v Revenue Scotland*.⁴ We agree with the reasoning in these cases, which is, in summary, the Tribunal has wide powers within the jurisdiction conferred by statute, but that does not include a general, supervisory, jurisdiction.

29. We are therefore unable to consider arguments that the terms on which ADS may be reclaimed are unjust or unreasonable.

Decision

30. For the reasons set out above, we conclude that the respondent's interpretation of the Act, and its application to the facts, which are not disputed, is correct. The appeal must be refused.

31. 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.

KENNETH CAMPBELL, QC
Legal Member

RELEASE DATE: 4 October 2019

² [2018] FTSTC 4, at para 21.

³ at para 63.

⁴ [2017] FTSTC 2, at paras 33-36.

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)(c), 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.

(2) Sub-paragraphs (1)(a) and (1)(c)(ii) do not apply if the buyer and the buyer's spouse or civil partner have separated.

(3) For the purposes of sub-paragraph (2), the parties have separated if—

- (a) they no longer live together, and
- (b) they do not intend to live together again.

(4) For the purposes of sub-paragraphs (1)(b) and (1)(c)(iii), a person is the buyer's cohabitant if the two of them live together as though married to one another.

8 Repayment of additional amount in certain cases

(4) Sub-paragraph (2) applies in relation to a chargeable transaction to which this schedule applies by virtue of paragraph 2 if—

- (d) 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),
- (e) 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
- (f) 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—

- (c) the chargeable transaction is to be treated as having been exempt from the additional amount, and
- (d) 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).

(4) The steps are—

(c) within the period allowed for amendment of the land transaction return, amend the return accordingly, or

(d) 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.

(6) For the period allowed for amendment of returns, see section 83 of the Revenue Scotland and Tax Powers Act 2014.

(7) 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

(2) Sub-paragraph (2) applies in relation to a chargeable transaction to which this schedule applies by virtue of paragraph 2 if—

(c) there are only two buyers, and

(d) the buyers—

(iii) are (in relation to each other) spouses, civil partners or cohabitants, and

(iv) are or will be jointly entitled to ownership of the dwelling that is or forms part of the subject-matter of the transaction.

(5) Paragraph 8 has effect in relation to the transaction as if—

(c) the reference in sub-paragraph (10(a) of that paragraph to the buyer were a reference to either or both of the buyers, and

(d) the references in sub-paragraph (1)(b) and (c) of that paragraph to the buyer were references to both of the buyers together.

(6) 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).