

Tax Chamber
First-tier Tribunal for Scotland



[2020] FTSTC 4

Ref: FTS/TC/AP/20/0003

Land and Buildings Transaction Tax – Additional Dwelling Supplement (“ADS”) – disposal of dwelling that was the subject matter of the chargeable transaction and which was not the buyers 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 Lachlan and Catherine Joan Macdonald

Appellant

- and -

Revenue Scotland

Respondent

TRIBUNAL: Mrs Anne Scott

The Tribunal determined the appeal on Tuesday 3 November 2020 by video conference.

The Appellants, Mr and Mrs Macdonald

Kevin Graham, Solicitor, Revenue Scotland

DECISION

Introduction

1. This is an appeal against the decision dated 23 April 2020 by Revenue Scotland refusing the appellants application for repayment of Additional Dwelling Supplement (“ADS”). The appellants’ application was in terms of paragraph 8 of Schedule 2A to the Land and Buildings Transaction Tax (Scotland) Act 2013 (“LBTTA”).
2. Prior to 30 November 2018, the appellants owned a property in Inverness (“the First Property”) which was their only or main residence.
3. On 30 November 2018, the appellants purchased another property in Inverness (“the Second Property”).
4. The effective date of the transaction for the purposes of Land and Buildings Transaction Tax (“LBTT”) was 30 November 2018. A LBTT tax return was submitted to Revenue Scotland on 6 December 2018 and, as the appellants owned two properties, they quite properly paid ADS on the second property. The ADS on the second property amounted to £7,470.
5. The appellants had intended to sell the First Property which was a large detached house and move in to the Second Property which was a retirement bungalow. In order to purchase the Second Property they had negotiated a bridging loan at a monthly cost of £1,000 per month with a maximum 12 month term. Unfortunately they were unable to sell the First Property and so after the elapse of 10 months both properties were put on the market and the Second Property sold immediately. That sale enabled the appellants to repay the bridging loan timeously.
6. The Second Property was sold on 27 November 2019.
7. On 17 January 2020, the appellants submitted the claim for repayment of the ADS which is the subject matter of this appeal. That claim was refused by Revenue Scotland by letter dated 3 February 2020.
8. On 17 February 2020, the appellants requested a review of the decision to refuse repayment.
9. Revenue Scotland’s review conclusion letter of 23 April 2020 confirmed that the original decision to refuse the repayment claim was upheld. On 21 May 2020, the appellants lodged a Notice of Appeal with the Tribunal.

The appellants Grounds of Appeal

10. In summary the appellants Ground of Appeal was that they never intended to own a second property and the Second Property was at all times intended to be their principal private residence. Unfortunately they were never able to move into the Second Property notwithstanding the fact that they had incurred substantial expenditure on it.

Revenue Scotland's argument

11. 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 and the appellants had not complied with the provisions of either paragraphs 8(1)(a) or (b) of Schedule 2A LBTTA.

12. I unequivocally accept that at the time of the purchase of the Second Property, the appellants fully intended to replace their existing main residence.

13. The Tribunal was created by the Scottish Parliament and is therefore a creature of statute. What that means is that its powers are only those that are given to it expressly by statute. Any decision that the Tribunal makes must be based on the relevant law. In this case that is paragraph 8(1) Schedule 2A LBTTA which reads:-

“Repayment of additional amount in certain cases

- 8 (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.”

14. I have highlighted in bold the key words.

15. It is not in dispute that in the first instance Mr and Mrs Macdonald were liable for both the LBTT and the ADS. It is also not in dispute that if they had sold the First Property then they would have qualified for repayment of the ADS.

16. The problem for them is that they simply did not comply with either paragraphs 8(1)(a) or 8(1)(b) Schedule 2A LBTTA.

17. Since it is the Second Property which triggered the payment of ADS, it is the Second Property which formed the subject-matter of the chargeable transaction. Therefore, in order to obtain repayment the disposal must be of a property *other* than the Second Property in order to meet the first condition. Thus, the disposal of the Second Property cannot result in repayment of the ADS. Therefore, the condition in paragraph 8(1)(a) is not met.

18. Of course, Mr and Mrs Macdonald agree that the Second Property was not their only or main residence at any time in the 18 months prior to 30 November 2018 which is the effective date of the transaction. That would have been impossible. Therefore, the condition in paragraph 8(1)(b) is also not met.

19. From the wording of the legislation, it is clear that it was the Scottish Parliament's intention that ADS is only repayable in the limited circumstances set out in paragraph 8(1) of Schedule 2A LBTTA. All three conditions in paragraph 8(1) of that Schedule must be

met for the ADS to be repayable. As neither of the conditions in paragraph 8(1)(a) or 8(1)(b) of Schedule 2A LBT TA are met in this case, the ADS cannot be repayable.

20. I unhesitatingly accept that Mr and Mrs Macdonald found themselves in the very unfortunate position where they were unable to move out of the First Property which they were not able to sell. That was not in any sense their fault. Indeed, I have considerable sympathy for them.

21. 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 limited circumstances. Sadly for Mr and Mrs Macdonald they simply do not fit within those.

22. 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.

23. Lastly, in their Skeleton Argument, Revenue Scotland are correct to quote *Dr Goudie and Dr Sheldon v Revenue Scotland*¹ at paragraph 67 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

24. 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.

25. 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.

Mrs Anne Scott
President

RELEASE DATE: 3 November 2020

¹ 2018 FTSTC 3

² [2012] UKUT 363 (TCC)