

Tax Chamber
First-tier Tribunal for Scotland



[2022] FTSTC 10

Ref: FTS/TC/AP/22/0004

***Land and Buildings Transaction Tax – Additional Dwellings Supplement
(ADS) – whether main residence – no – appeal dismissed***

DECISION NOTICE

IN THE CASE OF

Ms Meng Choo Tan

Appellant

- and -

Revenue Scotland

Respondent

**TRIBUNAL: ANNE SCOTT
CHARLOTTE BARBOUR**

**The hearing took place at George House, 126 George Street, Edinburgh on
Wednesday 7 December 2022**

For the appellant: Mr Raymond G Fairgrieve SSC

For Revenue Scotland: Mr Kevin Graham

DECISION

Introduction

1. This is an appeal against Revenue Scotland's decision to refuse the appellant's claim for repayment of the Additional Dwelling Supplement ("ADS") in the sum of £8,000. 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 and Tax Powers Act 2014 ("RSTPA"), the material parts of which read:-

"107 Claim for relief for overpaid tax etc

(1) This section applies where —

(a) A person has paid an amount by way of tax but believes the tax was not chargeable,

(2) The person may make a claim to Revenue Scotland for the amount to be repaid or discharged.

(3) Where this section applies, Revenue Scotland is not liable to give relief, except as provided in this part, or by or under any other provision of this Act."

3. At the heart of the appellant's appeal is the argument that given her extenuating circumstances and the impact of Covid-19, the decision not to repay the ADS is patently unjust and unreasonable whether or not it was correct in law.

Factual background

4. The underlying facts are not in dispute.

5. The appellant owned a home in Edinburgh ("the First Property") and for reasons that it is not necessary to narrate here, she decided to move to a smaller property. She purchased that smaller property ("the Second Property") with an effective date of 6 March 2020.

6. The electronic Land and Buildings Transaction ("LBTT") return for the purchase of the Second Property quite properly reflected the ADS chargeable in the sum of £8,000 and that was paid.

7. Unfortunately Covid-19 took hold and she was unable to renovate and redecorate the Second Property as planned. She never took occupation of it.

8. In early 2021, the appellant instructed the renovation and redecoration of the Second Property. She then decided to sell both the First and Second Properties in order to purchase a third property.

9. On 11 October 2021, the appellant sold the First Property and purchased the Third Property.
10. On 22 October 2021 she sold the Second Property.
11. On 8 November 2021, the appellant submitted a claim for repayment of the ADS. It was argued for her that she had no intention of owning two properties for more than 18 months but the delay had been caused by Covid-19.
12. On 11 November 2020, Revenue Scotland wrote to the appellant's agent confirming that the conditions for repayment of the ADS had not been met and thus the claim for repayment was refused. In particular, the appellant had not satisfied the repayment condition which required that the dwelling that was or formed part of the subject matter of the transaction (the Second Property) had been occupied as the appellant's only or main residence. She had never occupied it.
13. On 12 November 2021, the appellant requested a review of the decision and on 10 December 2021, Revenue Scotland issued its view of the matter letter to the appellant.
14. The letter intimated that the original decision of 11 November 2021 was upheld on the basis that the appellant's claim did not satisfy condition (c) of paragraph 8(1) Schedule 2A of the Act.
15. On 21 January 2022, Revenue Scotland issued its Review Conclusion letter upholding that decision.
16. On 18 February 2022, the appellant appealed to the Tribunal.

The law

17. We have set out at Appendix 1 the relevant provisions of Schedule 2A of the Act.

Discussion

18. Mr Graham, very appropriately, said that Revenue Scotland recognised that this was a very unfortunate case but that Revenue Scotland had to apply the law, as enacted by the Scottish Parliament, and had no discretion.
19. 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.
20. 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.”

21. We do understand that the appellant had never intended to own a second property from which she could derive any type of profit. She did not want two properties. For very good reasons she simply wanted to buy the smaller Second Property, renovate it and sell the First Property as quickly as possible thereafter.

22. We also accept that the reason that the appellant did not move into the Second Property was partly because of the delays occasioned by Covid-19. Having experienced those delays it made sense, in the changed circumstances in which she found herself, to sell both properties and buy the Third Property.

23. The problem in this appeal is quite simply that, although Covid-19 was responsible for the delay in both selling the First Property and renovating the Second Property, the appellant has never lived in the Second Property as her only or main residence. Indeed she has never lived there at all.

24. As can be seen from the Appendix, paragraph 8 of Schedule 2A makes it explicit that repayment is only possible where the property in question has been the only or main residence.

25. This Tribunal must apply the law.

26. There are no provisions in the legislation for considering extenuating or special circumstances or a reasonable excuse in this scenario.

27. Whilst we understand that the appellant considers that the law is not fair, nevertheless we must take account of the Upper Tribunal in *HMRC v Hok Ltd* [2012] UKUT 363 (TCC) where the Tribunal stated at paragraphs 56 to 58:-

“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.” (emphasis added)

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 2007 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.”

28. Although, of course this case is not concerned with penalties and whether they are fair, the principle is the same. Whilst we understand that the appellant feels that the tax system has treated her very harshly in circumstances where she never wanted two properties for any length of time, the Tribunal does not have jurisdiction to consider fairness.

29. Lastly, as can be seen from the words that we have highlighted we cannot ignore the clear words of the statute.

Decision

30. For all these reasons the appeal is dismissed and the decision of Revenue Scotland is upheld.

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.

ANNE SCOTT

President

RELEASE DATE: 8 December 2022

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.

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.