

Tax Chamber
First-tier Tribunal for Scotland



[2024] FTSTC 2

Ref: FTS/TC/AP/23/0018

***Land and Buildings Transaction Tax – Additional Dwelling Supplement
("ADS") – no – has not lived in property as only or main residence in
relevant period – property not sold within 18 months – appeal dismissed***

DECISION NOTICE

IN THE CASE OF

Mr Alisdair MacQuarrie

Appellant

- and -

Revenue Scotland

Respondent

**TRIBUNAL: ANNE SCOTT
CHARLOTTE BARBOUR**

**An in-person hearing took place at George House, Edinburgh on Thursday
22 February 2024**

The appellant in person

Kevin Graham, Solicitor, for Revenue Scotland

DECISION

Introduction

1. This is an appeal against a decision dated 14 September 2023 by Revenue Scotland refusing Mr MacQuarrie's application for repayment of Additional Dwelling Supplement ("ADS"). That ADS had been charged under section 26A and Schedule 2A of the Land and Buildings Transaction Act 2013 ("the Act").
2. Mr MacQuarrie sought repayment in terms of section 107 of Revenue Scotland and Tax Powers Act 2014 ("RSTPA") on the basis that the conditions in paragraph 8 of Schedule 2A of the Act were met.
3. Paragraph 8(1) Schedule 2A of the RSTPA reads:-

"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 had been occupied as the buyer's only or main residence."
4. The appellant owned a property in Glasgow "the First Property" which was his only or main residence. His now partner co-owned another property which was sold on 10 December 2021.
5. The appellant and his partner purchased another property in Glasgow ("the Second Property") with an effective date of 13 December 2021.
6. On 21 December 2021, the electronic Land and Buildings Transaction Tax ("LBTT") return was submitted by their solicitor. That return properly reflected the fact that there was ADS chargeable in the amount of £29,400 and that was paid.
7. On 30 August 2023, the appellant's solicitors submitted an online claim for the repayment of the ADS. The reason given for that claim was the sale of the First Property. The effective date for that sale was 6 July 2023.
8. Revenue Scotland sought further information supporting the claim. In particular, they sought evidence that the First Property had been the appellant's partner's only or main residence at any time during the 18 months prior to the effective date of the purchase of the Second Property.

9. On 1 September 2023, the new agent confirmed that the partner had not lived in the First Property.

10. On 14 September 2023, Revenue Scotland wrote to Mr MacQuarrie to confirm that the conditions for repayment of the ADS had not been met and that therefore the claim for repayment was refused. The basis of that decision was that the First Property had not been sold within the period of 18 months beginning with the day after the effective date of the purchase of the Second Property and the First Property had never been the appellant's partner's own or main residence.

11. On 11 October 2023, the Notice of Appeal was lodged by the appellant.

The appellant's Grounds of Appeal

12. The appellant explained that unfortunately the First Property had cladding issues which required remedial action before the necessary documentation could be processed. That caused a considerable delay in being able to market the property and indeed conclude the sale. It was not a matter that was within the control of the appellant.

13. The appellant and his partner had both stayed in the First Property from 10 December 2021 until they moved into the Second Property, approximately 10 days later.

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 and the appellant has not complied with the provisions of either paragraphs 8(1)(a) or (b) of Schedule 2A of the Act.

Discussion

15. In order to have complied with the 18 month condition, the First Property would have had to have been disposed of by no later than 13 June 2023. It was only sold more than three weeks later.

16. It is not in dispute that in the first instance, Mr MacQuarrie and his partner were liable for both the Land and Buildings Transaction Tax and the ADS. If the First Property had been Mr MacQuarrie's partner's only or main residence, it would also not be in dispute that if Mr MacQuarrie had sold the First Property before 13 June 2023, they would have qualified for repayment of the ADS.

17. The simple fact is that it was not sold within the relevant timescale. Mr MacQuarrie argues that that is quite simply unfair and there should not be "Black and White deadlines where external factors outwith the control of the Seller negatively impact their ability to comply with the condition".

18. Unfortunately for Mr MacQuarrie, the wording of the legislation makes it explicit that it was the Scottish Parliament's intention that the ADS is only repayable in the very

limited circumstances set out in paragraph 8(1)(a) of Schedule 2A of the Act. All three conditions must be met. The simple fact is that the first condition is not met.

19. It is indeed the case that Revenue Scotland do not have any discretion and nor does the Tribunal. The Tribunal was created by statute and has only the powers given to it by statute and must apply the law as enacted.

20. It is also well established law that the Tribunal cannot take into account whether or not it considers the law with which it is dealing to be fair or not and the basis for that is the Upper Tribunal decision in *HMRC v Hok* [2012] UKUT 363 (TCC).

21. On that basis alone the appeal cannot succeed.

22. The position in regard to the appellant's partner's occupation of the First Property is less clear cut. Mr MacQuarrie argues that Revenue Scotland's guidance states that she would have had to have occupied the First Property "at some point" and she did so.

23. Revenue Scotland's guidance is simply their interpretation of the law and it does not have the force of law (as is the case with HMRC's guidance unless it states, as it sometimes does, that it has the force of law).

24. We must look at the actual law and as can be seen the First Property would have had to have been the appellant's partner's "only or main residence at any time ...".

25. Certainly it is the case that she did live in the property for a number of days.

26. Revenue Scotland have correctly argued that "only or main residence" is not defined in the Act. A recent decision of the First-tier Tribunal for Scotland Tax Chamber in *Peter Crawley v Revenue Scotland* [2023] FTSTC 1 set out at some length the detail of a number of cases on the concept of only or main residence. We do not propose to rehearse that again here but we would highlight what Lord Justice Millett said in *Goodwin v Curtis* (1998) 70 TC 478 which is one of the cases upon which Revenue Scotland relies, namely:

"Temporary occupation at an address does not make a man resident there. The question whether the occupation is sufficient to make him resident is one of fact and degree for the Commissioners to decide.

The substance of the Commissioners' finding taken as a whole, in my judgment, is that the nature, quality, length and circumstances of the taxpayer's occupation of the [property] did not make his occupation qualify as residence... He manifestly did live there but I do not consider that the Commissioners can be faulted for having reached the conclusion that he did not at any stage reside there ...

The taxpayer's occupation was manifestly a stop gap measure pending the completion of his purchase of somewhere else to live".

27. That is precisely the case here. It was indeed a stop gap measure and if there had not been a delay in actually moving into the Second Property because of carpets and flooring being fitted etc, it would only have been a matter of three days.

28. In all these circumstances we find that the appellant's partner's occupation of the First Property was temporary and it was therefore not her only or main residence.

Decision

29. Accordingly, for all of these reasons, the appeal is dismissed.

30. 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: 22 February 2024