

Tax Chamber
First-tier Tribunal for Scotland



[2024] FTSTC 7

Ref: FTS/TC/AP/24/0015

***Land and Buildings Transaction Tax – Additional Dwelling Supplement
("ADS") – property not sold within 18 months – appeal dismissed***

DECISION NOTICE

IN THE CASE OF

JOSEPH ANTHONY WHITE

Appellant

- and -

Revenue Scotland

Respondent

**TRIBUNAL: PAUL DOYLE and
CHARLOTTE BARBOUR**

An in-person hearing took place at George House, Edinburgh on 7 November 2024

The appellant in person

Mrs J Alcock, Solicitor, for Revenue Scotland

DECISION

1. This is an appeal against a decision dated 4 March 2024 by Revenue Scotland refusing the application made by the Appellant (and his wife) 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. The Appellant asks for repayment in terms of section 107 of Revenue Scotland and Tax Powers Act 2014 (“RSTPA”) on a discretionary basis because the conditions in paragraph 8 of Schedule 2A of the Act are almost met.

3. Paragraph 8(1) Schedule 2A of the Act read (at the date of the decision appealed against):-

“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.”

Findings in Fact

4. The Appellant and his wife jointly purchased a dwellinghouse in Edinburgh (“the second property”), at a purchase price of £355,000 and with an effective date of 11 February 2022. On the effective date, the Appellant and his wife still owned their dwellinghouse in Edinburgh (“the first property”). The LBTT return for the second property reflected total LBTT of £23,050, including ADS (at the then prevailing rate of 4% of the purchase price) in the amount of £14,200. The ADS was paid by the Appellant and his wife on 11 February 2022. In their LBTT return, the Appellant’s response to the question, “*Does the buyer intend to sell their main residence within 18 months?*”, was “Yes”.

5. The Appellant and his wife marketed the first property for sale. Because of market conditions, the sale of that property did not complete until 25 August 2023. Between February 2022 and 25 August 2023, the Appellant and his wife made every effort to sell the first property. Having finally agreed a sale, they also tried to bring the date of entry forward so that it would be within the relevant 18 month period but were unable to do so.

6. The relevant 18 month period ended on 12 August 2023.

7. In July 2023, before the sale of the first property completed, the Appellant contacted the Respondent to explain that the first property would be sold on 18 August 2023 and asked how to claim repayment of the ADS. In correspondence between the Appellant and the Respondent, the Appellant acknowledged that the sale of the first property was due to take place more than 18 months after the effective date of the purchase of the second property.

8. The Respondent told the Appellant that a claim for repayment could not be made until the first property had been sold. The first property was finally sold on 25 August 2023, which was 13 days after the relevant 18 month period ended.

9. On 11 February 2024 the Appellant submitted a claim for repayment of the ADS under section 107 RSTPA. The reason given for the claim was the sale or disposal of a previous main residence. The Appellant said “*we tried our utmost to achieve a sale within the deadline.*”

10. On 13 February 2024 the Respondent sent a Notice of Enquiry to the Appellant and his wife. The Appellant acknowledged that the sale of the first property fell outwith the 18 month time limit but said that payment of ADS was “*an unjust imposition in our case*”.

11. On 4 March 2024 the Respondent issued an Enquiry Closure Notice rejecting the repayment claim on the basis that the statutory criteria for repayment of ADS had not been met. The effect of the Enquiry Closure Notice was to amend the Appellant’s claim to nil.

12. On 10 March 2024 the Appellant asked for a review of the Respondent’s Enquiry Closure Notice. He said “*I don’t think my grounds for seeking an appeal have ever really been addressed. I believe the legislation, as it stands, can be perceived to be unfair under certain circumstances.*”

13. On 31 May 2024, the Respondent issued its Review Conclusion Letter to the Appellant under section 239 of RSTPA. The Respondent adhered to the original decision to refuse repayment of the ADS but acknowledged that Schedule 2A to the LBTTA has now been amended, but those changes only apply to transactions taking place after 1 April 2024. The Review Conclusion Letter gives rise to this appeal.

The area of dispute

The Appellant’s position

14. In his Notice of Appeal, the Appellant says:

“I submitted a claim to Revenue Scotland for payment of ADS of £14,200 to be repaid to us. This claim was rejected because we had not met all the conditions for repayment. We had sold outwith the 18 month period allowed for this. I did not agree with the strict application of the legislation in our case.

I then requested a review from Revenue Scotland and I was informed that the review had upheld the original decision to dismiss my claim.

I am further appealing to First-Tier Scotland on these grounds:

- a) We tried our very best to achieve a sale and comply with the LBTT legislation. Unfortunately, we fell short by a few days.
- b) The principle of; should we be penalised for a failing that was ultimately out of our direct control? You cannot make a sale if you do not have a buyer.
- c) I question why legislation was ever allowed to pass that denied a right of meaningful appeal against the imposition of such severe penalties.

We were open to come to a compromise solution with Revenue Scotland with regards to the ADS penalty payment, but this was not possible.

We have looked at other previous appeals and are aware of the severity of the legislation. Therefore, we are realistic about our prospects of any favourable outcome, nevertheless, we have our reasons for pursuing this matter.”

Revenue Scotland's argument

15. Revenue Scotland argue 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 cannot meet the requirements of paragraph 8(1)(a) of Schedule 2A of the Act.

The Law

16. Appendix 1 contains the relevant provisions of Schedule 2A of the Act.

Analysis

17. There is no dispute about the facts of the case. The Appellant and his wife did not want to own two properties. They purchased their new home before selling their existing home, and market forces prevented them from selling their existing home for 18 months and 13 days.

18. We have to determine what can be done about the period from 12 August 2023 to 25 August 2023 and whether the ADS can be repaid to the Appellant.

19. The Appellant acknowledges the terms of paragraph 8(1) of Schedule 2A of the Act but says that the law is unfair. 'Insult is added to injury' because the law changed on 1 April 2024. If the law at today's date applies, the Respondent would have been refunded £14,200. The Appellant also wants to know who is entitled to the interest £14,200 could have earned since it was paid to the Respondent.

20. The Appellant's principal argument is that the law is unfair and inflexible. He wants the Tribunal to exercise discretion in his favour, but there is no discretion for this Tribunal to exercise.

21. The Tribunal was created by the Scottish Parliament and is therefore a creature of statute. What that means is that its jurisdiction and powers are only those that are given to it expressly by statute.

22. 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.”

23. Neither the Appellant nor his wife ever intended to own a second property. The Appellant and his wife were caught out by market forces. They did not want two properties and did everything they could to secure a quick sale of the first property.

24. Unfortunately, for the Appellant, the reason for having two properties is not a relevant consideration. For a refund of ADS, all three conditions in paragraph 8(1) of Schedule 2A of the Act must be met. The Appellant meets two of the conditions, but he cannot meet the first condition in paragraph 8(1) of Schedule 2A of the Act because he continued to own the first property between 12 August 2023 and 25 August 2023.

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

26. It is not a surprise that the Appellant considers the law to be unfair, but it is 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. In *HMRC v Hok* [2012] UKUT 363 (TCC) the Upper Tribunal reiterated that the First-tier Tribunal’s jurisdiction is limited to those functions conferred on it by statute. At [56] of that decision the Upper Tribunal said:

“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.”

27. We understand that the Appellant believes that the Respondent has retained his money and treated him harshly (owning two properties for any length of time was not what he wanted) but the Tribunal does not have jurisdiction to consider fairness.

28. We cannot ignore the clear words of the statute.

29. An agreed fact is that the first property was not sold within the relevant 18 month period. 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) of Schedule 2A of the Act. All three conditions must be met. The first condition is not met.

Decision

30. The appeal is dismissed

Right of Appeal

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.

PAUL DOYLE
Legal Member

RELEASE DATE: 21 November 2024

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).