



Neutral Citation: [2024] UKFTT 00403 (TC)

Case Number: TC09170

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

London Tax Tribunal Centre

Appeal reference: TC/2021/01595

CAPITAL GAINS TAX – claim for overpayment relief – appropriate calculation of allowable costs – qualifying period for private residence relief – appeal dismissed

Heard on: 27 November 2023

Judgment date: 9 May 2024

Before

**TRIBUNAL JUDGE ANNE FAIRPO
JANE SHILLAKER**

Between

ELIZABETH ROOKE

Appellant

and

**THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS
Respondents**

Representation:

The Appellant appeared in person.

For the Respondents: Mrs Levy, litigator of HM Revenue and Customs’ Solicitor’s Office

DECISION

Introduction

1. This is an appeal against HMRC's refusal of a claim for overpayment relief in respect of capital gains tax paid on the disposal of a flat ("the flat") in London in June 2015. The flat was owned by the appellant (Mrs Rooke) and her brother.
2. Mrs Rooke's brother had purchased the flat some time before October 1999; Mrs Rooke had (as set out below) acquired an interest in the flat from her brother in October 1999 in exchange for a transfer to him of £90,000. She increased her ownership share in the flat in 2003. Until 2013, the flat was let (or available to let) to tenants. Mrs Rooke then occupied the flat for a period of time before it was sold in 2015.
3. Having submitted her tax return with a calculation of the gain for the 2015-16 tax year, Mrs Rooke subsequently claimed overpayment relief as she had come to believe that she had understated the proportion of the flat which she had acquired. HMRC refused that claim.

Matters arising in correspondence and the hearing

4. There were some issues which arose in correspondence and in the hearing which we consider should be addressed with at the outset, before considering the substantive matter under appeal.
5. Mrs Rooke stated at various times that she should be treated as having an ownership interest in her brother's home ("the family home") instead of the flat. The reasons for this varied; in some explanations, Mrs Rooke stated that she did not believe that there was enough value in the flat in October 1999 to support her having an interest of £90,000 and that, as her brother had used the funds as a deposit for the family home, she was entitled to an ownership interest in the family home either instead or in addition to her ownership interest in the flat.
6. Mrs Rooke also stated that she should have been treated as acquiring an interest in the family home in exchange for the £90,000 which she transferred to her brother, as she considered that she could have purchased the family home (acquired for £385,000 by her brother) with the £90,000 which she provided to him.
7. Mrs Rooke also separately stated in correspondence that, because her brother used money which he had received from her to pay the deposit on the family home, she therefore had a beneficial interest in the family home. She accepted in the hearing that she knew that the funds were to be used by her brother on a deposit on the family home.
8. Mrs Rooke made reference to tracing her funds into the family home, as she considered that there was some form of fraud involved which was aimed at preventing her from owning the entirety of the flat, and that her brother's obtaining of a gain on sale of the flat was as the result of lender fraud as his interest in the flat was entirely funded by his mortgage.
9. In respect of this, as we have set out below, we find that Mrs Rooke acquired a beneficial interest in the flat in exchange for the funds transferred to her brother. The effect of that transaction was that Mrs Rooke no longer had any interest in the £90,000 money; her interest in that money had been replaced by an interest in the flat.
10. There was no evidence provided to us that suggested that Mrs Rooke's brother's subsequent use of those funds gave any additional or alternative beneficial interest in another property to Mrs Rooke.
11. Accordingly, we find that none of Mrs Rooke's allegations with regard to the family home are relevant to the capital gains tax liability on the flat which is the subject of this appeal. We also note that Mrs Rooke did not at any time suggest that she should not have

received any proceeds of sale in respect of the flat, which would be the logical consequence of a belief that she should have a beneficial interest in a different property instead of the flat.

12. Mrs Rooke also made extensive allegations to the effect that the lawyers involved in the transactions, the bank and HMRC processes had been manipulated to work against her in some manner which she considered to amount to fraud. She stated that she had been trying to find the perpetrator and had been unable to do so as the police and regulators refuse to become involved.

13. These allegations were extensive and, in many places, inconsistent: in summary, she appears to believe that the banks, directly and via others, had acted to enrich her brother by preventing her from owning the flat outright and that the provisions of TCGA 1992 had been used against her as part of this. Mrs Rooke considers that there was a concerted effort over years on the part of the banks, estate agents, lawyers and eventually HMRC to defraud her to her brother's benefit, apparently in order to ensure that the banks met their capital adequacy regulatory requirements.

14. In the hearing we reminded Mrs Rooke that this Tribunal's powers are limited by statute. We had no remit to consider wide-ranging allegations of fraud generally; in this context our decision would be limited to the question of whether or not she had overpaid capital gains tax in respect of the sale of the flat. Whilst we would, as we have done below, consider the circumstances of the relevant events, this would be in connection with the tax question before us.

15. Given the confusion and contradictions in these allegations and Mrs Rooke's contentions and submissions we have been unable to regard Mrs Rooke's assertions as reliable. On the balance of probabilities, we consider that the contemporaneous documentation in the bundle provides a more accurate history of events.

Evidence, submissions and discussion

16. There were a number of transactions and events involved in Mrs Rooke's part-ownership of the flat which gave rise to the capital gains tax which this the subject of this appeal. We have set out the evidence and submissions in respect of these, and our conclusions in respect of them, in chronological order below.

1999: initial transaction

17. Mrs Rooke's evidence was that she had sold an investment property sometime before October 1999 and had received £70,000 from that sale. Around October 1999, her brother had said that he was considering selling the flat. He had acquired the flat a few years earlier, using mortgage funds. He was considering selling the flat in order to raise funds to buy the family home. Estate agents had confirmed in a letter of 27 August 1999 that a third party had agreed to purchase the flat for £255,000.

18. Mrs Rooke said that she had asked to buy the flat from her brother but that he had told her that, although he had made enquiries of the bank, they had advised that they would not be able to make the relevant arrangements in time.

19. Mrs Rooke transferred £90,000 to her brother in October 1999, in tranches of £38,500 on 7 October 1999 and £31,500 on 18 October 1999 and a further tranche of £20,000. The date of payment of this last tranche is uncertain but Mrs Rooke agreed that it was paid in October 1999. Her evidence in the hearing was that she did this to assist him with funds for the deposit on the family home.

20. Also on 18 October 1999 Mrs Rooke's brother's solicitors wrote to Mrs Rooke's solicitors providing documents for them to prepare a charge over the flat for £90,000. In a

mediation statement prepared on behalf of Mrs Rooke in 2014 she stated that she had originally intended to lend the money to her brother, secured by a charge, but before this was done she had (in November 1999) agreed with her brother that she would buy a share in the flat instead.

21. A letter from Mrs Rooke to her solicitor at the beginning of November 1999 similarly states that, rather than lending the money to her brother as initially contemplated, she had agreed that the money would purchase a part-interest in the flat from her brother. The mediation statement document states that she had agreed to purchase a 90/255 share of the flat.

22. A letter sent by Mrs Rooke to her solicitors in November 2000 shows that the initial proportions of the beneficial interest owned by Mrs Rooke and her brother were stated to be 90/255 and 165/255 respectively, being based on Mrs Rooke's payment of £90,000 to her brother and the stated value of the flat (which was not disputed at the time) as £255,000. Mrs Rooke has since stated that she believes this value to be incorrect, as discussed below.

23. Mrs Rooke's evidence was that her brother had continued to pay the whole of the outstanding mortgage on the flat following Mrs Rooke's acquisition of a beneficial interest in the flat in late 1999.

24. In correspondence with HMRC at the time of her 2015/16 tax return, Mrs Rooke provided a copy of a capital gains tax calculation apparently provided to her by her brother (stated to have been prepared by his accountants) which indicated that he had declared for tax a part-disposal of 35.29% (that is, 90/255) of his interest in the flat to Mrs Rooke as at 1 November 1999.

25. Considering the evidence, we find that Mrs Rooke acquired a part-interest in the beneficial ownership of the flat in October 1999. Although she was not recorded as having a legal interest in the flat until May 2001, we consider that the agreement reached means that her brother was holding part of the beneficial interest as bare trustee for Mrs Rooke from that date. They therefore owned the flat as unequal tenants in common from that date. Mrs Rooke has stated that there was no need for him to be a bare trustee as she did not lack capacity. We note that the term "bare trustee" does not indicate any lack of capacity: it indicates only that, although Mrs Rooke's brother still had sole legal ownership of the flat, he held part of the beneficial ownership on behalf of Mrs Rooke.

Value of the flat in October 1999

26. It is not disputed that Mrs Rooke gave her brother £90,000. However, Mrs Rooke does dispute the value of the flat at that time as she now does not believe that it was worth £255,000. She states that at the relevant time she accepted the price which her brother stated had been offered. In the hearing she stated that she had since undertaken research and she contended that Land Registry data showed that the average value of comparable properties in the area at the time was £202,000 and might have been £189,000 depending on the comparable area taken. On this basis, she argues that her share of the flat when she first acquired her beneficial ownership should be regarded as larger than 90/255.

27. We note that a valuation obtained a year later, in December 2000, for the purposes of re-mortgaging the flat set out the value of the flat at that time as £240,000. However, we also note in the bundle (within documents sent by Mrs Rooke to HMRC) that there is a letter from an estate agent dated 27 August 1999 to Mrs Rooke's brother confirming that a named third party had agreed to buy the flat for £255,000. There is subsequent correspondence indicating that the sale process had commenced and then had been stopped when Mrs Rooke agreed to acquire an interest in the flat.

28. Having considered the evidence before us, we conclude on the balance of probabilities that the market value of the flat was £255,000 in October 1999.

29. Although the sale referred to in the estate agent letter obviously did not go ahead we consider that it is clear evidence that a third party was willing to pay that price at a date close to the transactions in question. On balance, we consider that a contemporaneous open market offer from a third party is more likely to reflect the relevant value of the flat than a mortgage estimated valuation made a year later and Land Registry extracted data produced over two decades later.

Proportion acquired

30. Mrs Rooke made varying submissions at different times throughout this matter as to the initial ownership share that should be attributed to her in respect of the flat.

31. In a letter to HMRC which accompanied her 2015-16 tax return she stated that she should have been treated as owning 67.92% of the flat, as the free equity in the flat at the date that she transferred money to her brother had been £132,492 (on the basis of a valuation of £255,000 and a mortgage of £122,508) and so she should have been entitled to an ownership share of 90,000/132,492.

32. That is, Mrs Rooke at that time contended that the respective interests in the flat in October 1999 should have been determined by reference to the available un-mortgaged element of the value of the flat at the time, rather than by reference to the overall value of the flat. She contended that her brother's liability for and payment of the mortgage should not have entitled him to any beneficial interest in the flat.

33. In the hearing, Mrs Rooke stated she did not believe that her brother had any equitable interest in the flat because the £90,000 which she had paid to him had exceeded the free equity in the flat in October 1999. There is a clear inconsistency with the information provided by Mrs Rooke in 2017 to HMRC in the letter accompanying the 2015-16 tax return (see above), which describes the free equity in October 1999 as being £132,492. We consider that this latter figure is supported by the other documentation provided in the bundle.

34. In her 2017 letter to HMRC, Mrs Rooke stated that she believed that the mortgage on the flat should have been transferred into joint names when she acquired her interest in the flat but confirmed that it was not so transferred until the TR1 was completed in 2001, with its reference to the obligations under the mortgage being joint and several (see below).

35. In other correspondence, Mrs Rooke stated that she believed that any debt involved in an asset should be shared in the same proportion as the free equity in that asset, indicating that she believed that she should have been regarded as owning a larger proportion of the flat because a proportion of the value covered by the mortgage should have been allocated to her in addition to the amount relating to the money which she lent to her brother.

36. Given the varying statements, and considering the information in the bundle, we consider that there is no evidence that Mrs Rooke had agreed to take on any responsibility for the mortgage in October 1999. The contemporary correspondence states that her brother retained responsibility for paying the mortgage at that time and Mrs Rooke confirmed in the hearing that her brother had continued to pay the mortgage in full at that time.

37. With regard to Mrs Rooke's contentions as to the ownership proportions for the flat, specifically her contention that she should be regarded as having had a beneficial interest in the entirety of any gain on sale of the flat from the outset, we consider that there would need to have been a specific agreement in writing to confirm that. We find that there is nothing in the contemporary documentation, including correspondence sent by Mrs Rooke at the time, which suggests that there was any such agreement in place.

38. It would also be an unusual approach to property ownership. Mrs Rooke describes her brother's entitlement to a gain to be lender fraud, as he was benefiting from the gain by way of a mortgage whereas she had contributed her own funds to the flat. She stated in the hearing that she did not believe that borrowed money could give any entitlement to a gain on the sale of the asset. We do not agree that this arrangement must amount to fraud; we note that leveraged purchases are a standard way of acquiring assets including real estate.

39. We find that the contemporary documentation, including correspondence from Mrs Rooke, is clear that in October 1999 she acquired a proportion of the overall beneficial ownership of the flat and not a proportion of the unencumbered equity. We also find that Mrs Rooke paid £90,000 for this. For the reasons set out below, we find that she did not take on any responsibility for the existing mortgage at this date and, as such, the entire consideration paid by Mrs Rooke in October 1999 was £90,000.

40. We therefore find that Mrs Rooke's transfer of £90,000 to her brother was made in consideration for a part-interest in a flat which was worth £255,000.

41. We consider that there is no evidence to support the contention that in October 1999 Mrs Rooke acquired a greater share of the value of the overall beneficial interest in the flat than that which was proportional to the consideration paid and that the market value of the part-interest acquired was therefore £90,000.

42. We therefore find that Mrs Rooke acquired a 90/255 (35.29%) interest in the beneficial ownership of the flat in October 1999 for consideration of £90,000.

43. The provisions of s18 (and s17) TCGA 1992 mean that, as a transaction between siblings, the transfer of a part-interest in the beneficial ownership from her brother to Mrs Rooke is treated as taking place at market value (regardless of actual consideration paid) for tax purposes. HMRC accepted that the price paid by Mrs Rooke should be regarded as the market value of the share for the purposes of determining the acquisition cost. Given the evidence before us and summarised above, we do not see any reason to treat the market value of the share acquired as anything other than £90,000.

44. We therefore find that the market value of the beneficial interest acquired by Mrs Rooke in October 1999 was £90,000.

2001: additional borrowing and transfer of part-ownership, with trust deed

45. Some of the figures in this section are approximate; the mortgage figures in the documents provided were subject to the deduction of bank fees and also calculated by reference to daily interest between payment dates such that the specific amounts varied slightly depending on when they were calculated.

46. In a joint letter, signed by both Mrs Rooke and her brother, addressed to her solicitors and dated 5 November 2000, Mrs Rooke confirmed that she had purchased a 90/255 share of the flat and that, following the completion of the mortgage (given the date, we consider that this refers to the extra borrowing set out below) she and her brother would be liable for debts and have rights to capital and income in respect of the flat in their ownership proportions. The letter confirmed that, although there would be joint and several liability for the mortgage, the liability would actually follow the ownership proportions.

47. In an undated letter, which has a receipt printed date of 30 November 2000, Mrs Rooke provided documents to an "Extra Borrowing Dept" to "complete the extra borrowing and to join me as a mortgager". This appears to have been in response to an application dated 30 October 2000.

48. As part of the mortgage process, a valuation report was provided to NatWest Mortgage Services on 7 December 2000, which stated that the open market value of the flat at that date was £240,000.

49. NatWest issued a mortgage offer dated 11 December 2000 to Mrs Rooke and her brother for the requested advance of £66,423. The purpose is stated to be “buy in”. The term of the mortgage was 22 years and 1 month and repayment was to be by an endowment policy. This offer was subject to the existing first charge over the flat.

50. In early February 2001 Mrs Rooke advised her solicitors by email that “Regarding the deed of trust”, there was to be a new mortgage amount of £189,330. The mortgage would be shared by Mrs Rooke and her brother. The same email asked the solicitors to correct the “Transfer of Title” (presumably the TR1) to reflect her brother’s correct address.

51. A TR1 was completed, dated 22 March 2001, transferring the flat from the sole name of Mrs Rooke’s brother to the joint names of Mrs Rooke and her brother. The flat was described as held on trust for themselves as tenants in common, which we note is the default position recorded by the Land Registry where there are joint owners of a property who do not specify how the property should be owned. Mrs Rooke and her brother were stated to hold the flat in unequal shares although the specific shares are not stated (and are not required to be stated) in the TR1. The TR1 stated that the transfer is not for money or anything which has a monetary value. We consider that this was an error as Mrs Rooke had clearly previously paid £90,000 and was now taking on some responsibility for the additional borrowing mortgage.

52. The flat is described in the TR1 as subject to a charge in respect of a mortgage, dated 19 January 1998, between Mrs Rooke’s brother and National Westminster Homeloans Limited (NatWest), and that NatWest have consented to the transfer. The amount stated to be outstanding (capital and interest) on that mortgage at the date of the TR1 was £122,508. There was a covenant by Mrs Rooke and her brother to be jointly and severally liable for all money payable in respect of the mortgage and the performance and observance of all obligations of the borrower under the mortgage.

53. Mrs Rooke contended that the TR1 mortgage information meant that she took on an equal share of the mortgage and so should be regarded as having an equal interest in the flat. However, we consider that this document needs to be read in conjunction with the trust deed entered into at around the same time (as set out below), which sets out the revised mortgage total following the extra borrowing and sets out specific responsibilities, notably that Mrs Rooke would be responsible for borrowing of £66,822.55, being 90/255 of the mortgage, after the additional borrowing had been drawn down (this figure appears to include fees as well as the extra borrowing).

54. We consider that the effect of this is that, to the extent that the bank might have had a claim against Mrs Rooke for a proportion of the mortgage, she would also have had a claim against her brother for any liability in excess of that set out in the trust deed. Her liability was therefore limited by the trust deed to her ownership proportion of the flat.

55. Mrs Rooke was recorded as an owner of the flat on the Land Registry records in May 2001.

56. Stamp duty was paid on the transfer the basis that Mrs Rooke had assumed responsibility for a proportion of that mortgage and had therefore given consideration for the transfer to her of a proportion of the value of the flat.

57. At the same time as the TR1 was completed, a trust deed was entered into setting out the relative interests in the flat, as reflected in Mrs Rooke’s correspondence with her solicitor referred to above. The beneficial interests were set out in this deed as Mrs Rooke being

entitled to 90/255 (35.29%) of the net proceeds of sale and her brother being entitled to the remaining 165/255 (64.71%).

58. In a draft of the deed, which is undated but contains manuscript amendments signed by Mrs Rooke and her brother, handwritten signed notes provide the following figures next to the share information: 90/255ths = £66,822.55 and 165/255ths = £122,508.00. The deed states that the flat was now subject to a mortgage taken out by Mrs Rooke and her brother. A signed handwritten amount of £189,330.55 was inserted as the mortgage figure which we note is the sum of the original mortgage and the additional borrowing. The original typewritten figure included in error was the total amount repayable on the additional borrowing of £66,423, not the total amount of the combined mortgages (per a letter from Nat West of 3 January 2001). Mrs Rooke also confirmed the correct amount in an email to her solicitor in February 2001, advising him that the amount stated in the deed of trust should be £189,330.

59. Mrs Rooke contends that, as stamp duty was paid in respect of the TR1 in the basis that the mortgage had been transferred into joint and several liability, she should therefore be regarded as having acquired a larger share of the flat. We find that the effect of the trust deed was that Mrs Rooke did not take on half of the liability for the total mortgage as her liability under the trust deed was for 90/255 of a mortgage of £189,330 (ie: she was responsible for £66,822 of the overall mortgage).

60. Mrs Rooke contended that this trust deed (and the later trust deed described below) had been created simply to deprive her of the full equity in the flat which she contended that she should be entitled to. In the hearing she agreed that she had signed both trust deeds but submitted that she had not then been aware that the trust deeds were (as she had come to believe) intended to ensure that she did not have the rights of sole or majority equity provider that she contended that she should have had in the flat.

61. The additional mortgage borrowing (£66,423) was drawn down and (after deduction of fees) was paid to Mrs Rooke personally at around the time that the TR1 and the Trust Deed were entered into.

62. The result of these transactions was, therefore, that the overall mortgage on the flat increased to approximately £189,000 with the addition of the extra borrowing of approximately £66,400 taken on by Mrs Rooke. Her non-mortgage investment in the flat reduced from £90,000 to approximately £23,600 as a result of the payment to her of the additional mortgage borrowing. Her overall contribution to the flat therefore remained at £90,000 and her share of the beneficial interest in the flat remained at 90/255.

63. Mrs Rooke had, in correspondence, appeared to contend that these events gave her an increased share of the beneficial ownership of the flat. In one version of her capital gains tax calculation, she stated that she had made a "Further Equity purchase March 2001" of £24,000 and to a 14.71% purchase in January 2001. No support for these purported acquisitions was provided other than Mrs Rooke's contention that she had become equally responsible for the mortgage. As noted above, we find that she had not become responsible for the entire mortgage in equal shares. For reasons set out below, we find that she acquired a further 14.71% share in June 2003. We can find no support for any further equity purchase in March 2001 nor can we find any support for a figure of £24,000 being paid as consideration at any time.

64. Further, considering the evidence before us, we find that the trust deed (and the later deed in 2003) was properly executed and set out the ownership proportions for Mrs Rooke and her brother in respect of the flat. The deed was drawn up by a lawyer, instructed by Mrs Rooke. Case law (notably *Goodman v Gallant* [1986] FLR 106) makes it clear that the terms

of an express trust such as this will prevail even if there may be grounds for considering that a constructive trust in different shares should apply. As set out in this decision, we do not consider that there is any evidence to indicate that any such different shares might have applied in the absence of the trust deed.

65. From the evidence provided to us in the bundle, as set out above, we find that the overall respective ownership shares were unchanged by the extra borrowing and the trust deed in 2001. We find that Mrs Rooke paid no further consideration, nor were there any grounds to attribute additional consideration to her. The effect of the transactions was that Mrs Rooke replaced a proportion of her initial investment with borrowing; following the transactions, her ownership share was effectively funded by £23,600 cash investment (reduced from £90,000 in cash as £66,400 had been paid to her following the additional borrowing) and £66,400 mortgaged investment. We find that she continued to own a 90/255 of the ownership of the flat.

66. We note that the evidence provided to us does not clearly set out the date on which the trust deed was entered into, although correspondence (and an extract from a barrister's opinion received by Mrs Rooke in 2014 which was included in the bundle) makes it clear that the deed was properly executed. If there was a delay between the TR1 and the trust deed being entered into then it is possible that, for a brief period of time, there was an assumption of equal liability for the original mortgage and potentially a deemed acquisition of a further share of the beneficial ownership for deemed consideration at this time (as the TR1 does not set out the specific unequal ownership shares).

67. We note that the contemporaneous correspondence indicates that the TR1 and trust deed were linked together and the trust deed was anticipated to be completed as part of the process which saw the signing of the TR1. As such, we consider that it was unlikely that any such deemed acquisition could be regarded as having occurred.

68. However, if a deemed further acquisition might have occurred then we consider that such a deemed acquisition would have been reversed and that acquired part-share would also have been deemed to have been disposed of for the same deemed consideration shortly after acquisition when the trust deed was completed, as the trust deed clearly sets out the beneficial ownership shares and mortgage responsibilities.

69. As the evidence provided indicated that the trust deed was completed around the time of the TR1 and further that the TR1 was completed in anticipation that the trust deed would also be completed, we have concluded that, for the purposes of determining whether overpayment relief is available, any such potential deemed transactions (if they occurred) had no practical impact on the beneficial ownership shares that could affect the capital gains tax due on the eventual sale of the flat in 2015.

2003: change in ownership share, further trust deed

70. In March 2003 Mrs Rooke asked her solicitor to amend the trust deed to reflect the fact that she and her brother had agreed to change the ownership proportions of the flat so that it was owned 50/50. The email includes an email from Mrs Rooke to her brother offering £44,865.50 for a further 14.71% of the flat, made up of £18,000 in cash and the balance by Mrs Rooke taking responsibility for a further proportion of the mortgage so that the liability was shared equally. The email describes the flat as being worth £305,000. We note that 14.71% of £305,000 is £44,865.50. This information was repeated in the mediation statement prepared on Mrs Rooke's behalf in 2014. In a letter dated 20 May 2003, the cash element of the total consideration £44,865.50 was revised to £19,200.

71. A new trust deed was entered into by Mrs Rooke and her brother on 26 September 2003. This recorded the mortgage over the flat at that date as being £189,000 plus interest. The trust deed sets out the ownership of the flat, and the responsibility for the mortgage, as being in equal shares. Mrs Rooke's interest in the flat therefore increased from 90/255 (35.29%) to 50%. That is, she acquired an additional 14.71% interest in the flat from her brother as set out in the email above. As noted above, these shares are set out in an express trust and we do not consider that there is any evidence to indicate that different shares might apply even if such an express trust had not been entered into.

72. The mediation statement indicates that the transfer of this 14.71% took place (as regards the beneficial interest at least) in May 2003, with the deed subsequently recording the transaction.

73. We find, from Mrs Rooke's email in March 2003 and the information in the mediation statement, that Mrs Rooke paid £44,865.50 for the acquisition of this further share in the flat.

74. The mediation statement notes that this consideration was paid as £19,200 in cash (£12,000 in June 2003 and the remainder in July 2005) and the balance by assumption by Mrs Rooke of part of her brother's remaining mortgage liability in the flat. The effect of this transaction was that Mrs Rooke and her brother became liable for the mortgage in equal shares and had contributed equal capital to the flat. The flat had been valued by estate agents at £305,000 at the time of the transfer.

75. HMRC did not suggest that the market value of the 14.71% share (and so Mrs Rooke's acquisition cost of this share, following s17 and s18 TCGA 1992) should be regarded as anything other than the consideration of £44,865.50 paid by Mrs Rooke.

76. In some of her CGT calculations, Mrs Rooke has included this acquisition as being in January 2001. For the reasons set out above, we find that her acquisition of this 14.71% additional share took place in May 2003. In some calculations she included the costs of acquisition as being £19,200 plus £44,865.

77. Given the information in the email and her meditation statement we consider that these amounts involve some duplication and find that the total consideration for the purchase of this 14.71% share was £44,865 (of which £19,200 was paid in cash).

2003: lease extension

78. In her calculations, Mrs Rooke included £23,924 as consideration for a lease extension which apparently took place in July 2003. No evidence of this lease extension was provided in the bundle; it is not referred to in the mediation statement prepared on behalf of Mrs Rooke. However, HMRC have accepted that this was an acquisition cost which should be taken into account in calculating the capital gains tax due on the sale of the flat. As they may have had information which was not provided to us, we have concluded that this amount should be included as an acquisition cost.

2013 to 2015: personal occupation of flat

79. The correspondence in the file shows that in October 2013, Mrs Rooke moved into the flat whilst working in London. Before this date, the flat had been let or available for letting to third party tenants throughout the period of Mrs Rooke's ownership. Mrs Rooke moved out of the flat in February 2015.

80. HMRC contended that Mrs Rooke was entitled to private residence relief of 21 months, being the 17 months of occupation between October 2013 and February 2015 together with the final four months of ownership between February 2015 and the sale in June 2015.

81. Mrs Rooke's calculations of private residence relief appear to double-count some of this period, as she adds 18 months to the period of owner occupation (presumably on the basis of being entitled to relief for the final 18 months of ownership) despite the fact that 14 months of this period had already been included in her period of actual occupation. She includes varying periods for actual occupation (between 12 and 24 months, in different calculations) with no explanation as to how these periods were arrived at.

82. On balance, we consider that HMRC's assessment of the period for which private residence relief is available is correct.

June 2015: sale of the flat

83. As a result of Mrs Rooke and her brother being in dispute over the ownership proportions of the flat, it was eventually sold in June 2015 for £940,000. The net proceeds of sale, after deduction of legal fees and estate agents fees, were £914,685.

84. It is not disputed that the net proceeds of sale were split in equal shares between Mrs Rooke and her brother, nor does Mrs Rooke contend that she should have had any different share in the net proceeds of sale.

2015-2017: tax return and claim for overpayment relief

Tax return

85. Mrs Rooke completed a paper tax return for the 2015-16 tax year, dated 25 October 2016. This included a capital gains tax summary sheet which stated that Mrs Rooke had made a total gain of £255,354 in that year. The attached calculation provided the following information:

- (1) disposal proceeds: £457,342 (half of the net proceeds of sale)
- (2) allowable costs: £201,989 (being £90,000 paid in October 1999; £24,000 paid in March 2001; £192,000 paid in January 2001; a "Further Equity purchase (now 50%)" of £44,865; lease extension costs incurred in July 2003 of £23,924)
- (3) main residence relief: £57,047 (claimed for 24+18 months of owner occupation, out of a total ownership period of 188 months)
- (4) letting relief: £40,000 (being the lower of the main residence exemption, the gain attributable to letting and £40,000)

86. After deduction of the annual exemption, the gain chargeable to tax was calculated by Mrs Rooke as £147,205. She calculated the amounts to be taxed as £31,785 at 18% and £115,421 at 28%. The total capital gains tax calculated and reported in respect of the return was £38,039.18.

Amendments

87. In 2017 Mrs Rooke wrote to HMRC to amend the calculation. The allowable costs were reduced to give a total gain of £268,722. The private residence relief was amended to claim £49,444.70 for a period of 13+18 months of owner occupation. The capital gain was accordingly revised to £168,177 with tax payable thereon of £43,911.14.

88. Mrs Rooke also included a further amendment calculation (titled "Attempt 2"). This included allowable costs of £133,124 and a total gain of £324,219. The same 13+18 months owner occupation period was used, giving private residence relief of £72,432. The taxable gain was calculated as £219,657 and the total tax as £58,325.44.

89. HMRC generated an assessment of £58,915.94 as they concluded that a slightly lower amount should be taxed at 18%, after adjustment of that band to reflect taxable income.

2020: Overpayment claim

90. On 6 March 2020 Mrs Rooke wrote to HMRC claiming overpayment relief in respect of the capital gains tax on the flat. She believed that she had overpaid capital gains tax by £18,881 as a result of mistakes made in the amendment.

91. Mrs Rooke considered that capital gains tax should be calculated on the basis that:

(1) firstly, she had originally acquired 76.6% of the flat, on the basis that she considered that the free equity in the flat in October 1999 was £117,500 and that her payment of £90,000 meant that she was entitled to 90,000/117,500 (76.6%) of the value of the whole flat. Her calculation of the free equity was based on the later mortgage valuation of £240,000 and her brother's mortgage of £122,500; and

(2) secondly, she should be treated as having acquired a further 14.71% of the flat in May 2003 at a cost of £44,865, on the basis that the flat was then valued at £305,000.

92. Private residence relief claimed continued to be based on 13+18 months; letting relief remained at £40,000 as set out in the earlier calculations.

93. Despite asserting that she should be regarded as having acquired over 91% of the value of the flat (76.6% + 14.71%), the sales proceeds attributable to her in the calculation remained at 50%. Mrs Rooke therefore considered that the correct capital gains tax should be £29,857.72 and that she had therefore overpaid by £18,881.14 (this is in comparison to a capital gains tax figure of £58,738.86 which is not quite the same as either the previous calculations or HMRC's assessment, and the origin of which is unclear).

94. On 20 May 2020 HMRC responded to confirm that the claim had been received and a credit applied to Mrs Rooke's self-assessment account.

2020: Return check

95. On 17 June 2020, HMRC opened a check into Mrs Rooke's tax return for the 2015-16 tax year.

96. Following correspondence, HMRC issued a letter on 20 November 2020. They concluded that the trust deeds showed that Mrs Rooke owned 50% of the flat and that only costs incurred, rather than a proportion of equity, could be claimed as allowable costs. A decision letter was issued on 1 December 2020, stating that no refund was due.

97. Mrs Rooke appealed to HMRC on 21 December 2020. A review decision letter was issued on 17 February 2021. This concluded that, as the trust deed showed that Mrs Rooke had a 50% interest in the flat, she was entitled to 50% of the gain. Comparisons of payments to equity did not alter that. The mortgage interest costs could not be deducted in calculating the gain, although Mrs Rooke contended that the mortgage should be considered to be a deductible expense.

98. Mrs Rooke requested an independent review; a review conclusion letter was issued on 31 March 2021. This letter concluded that the deductible acquisition costs were:

(1) £90,000 paid in October 1999;

(2) £44,865 paid in 2003;

(3) £23,924 lease extension costs

99. The total acquisition costs were calculated as £158,789. Given the 50% share of the sale proceeds, the gain before relief was £298,553. The private residence relief was recalculated to £49,230 on the basis of the 31 month period claimed by Mrs Rooke. Lettings

relief of £40,000 was agreed. The letter concluded that Mrs Rooke was entitled to overpayment relief of £6,001. The repayment was issued on 7 April 2021.

100. HMRC subsequently contended that the private residence relief had been incorrectly calculated. Mrs Rooke's use of a 31-month period for this relief had been incorrectly accepted, and it should have been 21 months (as discussed above). Officer McMenemy, for HMRC, gave evidence that the private residence relief should have been £33,349 accordingly and that the correct amount of capital gains tax was £59,046.40.

101. HMRC therefore submitted that no overpayment relief applied and that, including the repayment made in 2021, Mrs Rooke has an outstanding liability of £6,308.54 in respect of this capital gain.

Discussion and decision summary

102. For the reasons set out above, and repeating the findings made above, we find the following in summary:

- (1) in 1999, Mrs Rooke acquired a 35.29% interest in the beneficial ownership of the flat. The acquisition cost was £90,000;
- (2) in 2001, extra borrowing was taken out which was paid to Mrs Rooke; she took on responsibility for the mortgage to the extent of this extra borrowing. This had no effect on her beneficial ownership share of the flat nor any effect on the acquisition cost share of that beneficial ownership share;
- (3) in 2003, Mrs Rooke acquired a further 14.71% interest in the beneficial ownership of the flat. Her total beneficial ownership share was now 50%. Her acquisition cost was £44,865.50 for this additional interest, in a mixture of cash and transfer of part of the existing mortgage responsibility;
- (4) also in 2003 there was a lease extension granted. Mrs Rooke contributed £23,924 towards this;
- (5) the flat was let to tenants, or available for letting, throughout the above period until October 2013;
- (6) Mrs Rooke occupied the flat as her residence between October 2013 and February 2015;
- (7) in June 2015 the flat was sold. The net proceeds of sale were £914,685 and these were split equally between Mrs Rooke and her brother (that is, £457,342.50 each).

103. The chargeable gain before relief was therefore:

Share of net proceeds	£457,342.50
Less	
- 1999 initial consideration	(£90,000)
- 2003 additional consideration	(£44,865.50)
- 2003 lease extension cost	<u>(£23,924)</u>
Total chargeable	£298,553

104. Mrs Rooke's occupation of the flat between October 2013 and February 2015 amounted to 17 months of occupation which qualified for private residence relief. Private residence relief was available (at that time) for the last 18 months of ownership of a property even if not occupied in that time. Mrs Rooke was therefore also entitled to a further four

months (February 2015 to June 2015) of private residence relief; the balancing 14 months of the “last 18 months” period was already included in the period of actual occupation.

105. We find that Mrs Rooke was therefore entitled to 21 months of private residence relief. HMRC accepted Mrs Rooke’s calculation that her total period of ownership was 188 months and we had no evidence that this was incorrect.

106. The private residence relief available is therefore 21/188 of the chargeable gain, which is £33,349. This is the amount set out in Officer McMenemy’s witness statement. In HMRC’s calculations in their Statement of Case, this appears as £33,349.11. It is not clear how HMRC have arrived at the additional 11p (possibly there has been a rounding error somewhere); we find that the private residence relief is £33,349.

107. We find that lettings relief was therefore also limited to £33,349, as this is set by statute as the lower of the private residence relief, the gain attributable to letting, and £40,000. In this case, the lowest figure is that for private residence relief. Mrs Rooke was also entitled to the capital gains annual allowance of £11,100 for 2015-16.

108. The taxable gain was therefore:

Total chargeable gain (as above)	£298,553
Less	
- private residence relief	(£33,349)
- lettings relief	(£33,349)
- annual allowance	<u>(£11,100)</u>
Total taxable gain	£220,755

109. This is again, slightly different to HMRC’s calculation in their Statement of Case which calculates the taxable gain as £220,755.39 as a result of the private residence relief small error noted above and also a typographical error in their calculation where the chargeable gain is incorrectly stated to be £298,553.50 rather than £298,553, despite having previously been calculated as £298,553.

110. Mrs Rooke had taxable income of £4,134 (after deduction of the personal allowance) for the 2015-16 tax year, as set out in her tax return for that year and accepted by HMRC.

111. The capital gains tax due on the taxable gain on the sale of the flat was therefore:

$(£31,785 - £4,134) = £27,651$	
£27,651 at 18%	£4,977.18
$(£220,755 - £27,651) = £193,104$	
£193,104 at 28%	<u>£54,069.12</u>
Total capital gains tax due	£59,046.30

112. The calculation in HMRC’s Statement of Case was £59,046.40. The 10p difference appears to arise as a result of the 11p error with regard to the private residence relief and the typographical error noted above. We find that the total capital gains tax due on the sale of Mrs Rooke’s interest in the flat was £59,046.30.

113. Officer McMenemy’s witness statement shows that Mrs Rooke has made payments for 2015-16 in respect of capital gains tax of £58,738.86. As Mrs Rooke also received an incorrect repayment of £6,001 (as set out above), a balance of £6,308.44 remains due to HMRC (together with interest).

114. There is a typographical error in the Statement of Case calculation and Officer McNenemy's witness statement, both of which state that the repayment was £6,100 and therefore show an incorrect amount remaining due to HMRC. The information in the bundle from HMRC's systems shows that the repayment made was £6,001.

115. We note that s50(7) Taxes Management Act 1970 provides that, on an appeal to the Tribunal, the Tribunal shall increase an assessment where the Tribunal decides that the appellant has been undercharged by an assessment.

116. In written submissions made after the hearing, HMRC acknowledged typographical errors and requested that the Tribunal find that the tax remaining due to HMRC is £6,308.54. We consider that a minor typographical error remains in HMRC's calculations, and we find that the amount to be assessed as remaining due to HMRC is £6,308.44 (10p less than the amount set out in HMRC's submissions) as established above.

Conclusion

117. As we have calculated that tax remains due to HMRC, Mrs Rook's claim for overpayment relief is refused and this appeal is dismissed. The amount to be assessed as remaining due to HMRC is £6,308.44.

Right to apply for permission to appeal

118. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

**ANNE FAIRPO
TRIBUNAL JUDGE**

Release date: 09th MAY 2024