GAAR ADVISORY PANEL

Anonymised and sub-Panel approved version of the Opinion Notice issued on 2 March 2020

Subject Matter: Sidestepping a charge to Inheritance Tax. Reducing estate's value via subscription for shares in a new company and gifting shares to an employee succession trust.

Taxes: Inheritance Tax

Relevant Tax Provisions: Section 28 Inheritance Tax Act 1984.

Opinion: the entering into of the tax arrangements is not a reasonable course of action in relation to the relevant tax provisions; and the carrying out of the tax arrangements is not a reasonable course of action in relation to the relevant tax provisions

Opinion Notice

This opinion notice is given pursuant to paragraph 11 of Schedule 43 to the Finance Act 2013 ("FA 2013") by a sub-panel consisting of three members of the GAAR Advisory Panel (the "Panel") in the referral by HMRC dated 28 October 2019 relating to taxpayer Mr B in his capacity as executor of the deceased Mrs A.

The sub-panel received written material from HMRC under paragraphs 7 and 10 Schedule 43 FA 2013 and representations from Mr B under paragraphs 4 and 9 Schedule 43 FA 2013.

1. Reminder of what the sub-Panel's opinion notice is to cover

"An opinion notice is a notice which states that in the opinion of the members of the sub-panel, or one or more of those members—

(a) the entering into and carrying out of the tax arrangements is a reasonable course of action in relation to the relevant tax provisions—

(i) having regard to all the circumstances (including the matters mentioned in subsections (2)(a) to (c) and (3) of section 207), and

(ii) taking account of subsections (4) to (6) of that section, or

(b) the entering into or carrying out of the tax arrangements is not a reasonable course of action in relation to the relevant tax provisions having regard to those circumstances and taking account of those subsections, or

(c) it is not possible, on the information available, to reach a view on that matter,

and the reasons for that opinion.” (paragraph 11(3) Schedule 43 FA 2013)

“For the purposes of the giving of an opinion under this paragraph, the arrangements are to be assumed to be tax arrangements.” (paragraph 11(4) Schedule 43 FA 2013)

2. Terms used in this opinion and parties to the arrangements

2.1 This case relates to the deceased Mrs A and the executor of her estate Mr B (the Taxpayer). Mr B is Mrs A’s son.

2.2 In addition to the above this case also involves:

a) Mr C. Mr C is Mrs A’s other son and Mr B’s brother
b) Mrs B. Mrs B is Mr B’s wife
c) The Trust (called the X Investments Limited Employee Succession Trust)
d) The Company (X Investments Limited).

2.3 “Gifted Shares” means the £1 ordinary shares in the Company.

2.4 “Permitted Payment” is as defined in the Trust Deed meaning “*a payment which is the income of any person for the purposes of United Kingdom income tax, or would be the income for any of those purposes of a person not resident in the United Kingdom if he were so resident”.*

2.5 “Retained Shares” means the £1 ‘A’ ordinary shares in the Company.

2.6 When we refer to “Guidance” we mean the GAAR Guidance approved by the Panel with effect from 15 April 2013 and 30 January 2015, and statutory references without a statute are to the Inheritance Tax Act 1984.

2.7 Example D29 of the Guidance (Bypassing the charge on death with an Employee Benefit Trust) was referred to by HMRC in its written material and by Mr B in his representations. This Example is for ease of reference appended to this opinion and is referred to in this opinion as Example D29.

3. Background to the arrangements

3.1 Mrs A died in her late 70s in April 2015.

3.2 Four months before Mrs A died, she set up the Company of which she and Mr B were the directors and funded it by way of share capital with a little over £700,000.

3.3 The Company set up and funded the Trust with £100 and Mrs A then gave away the bulk of the share capital in the Company (about £700,000 in value) to the Trust, dying two months later.

3.4 The Company bought one commercial investment property before the gift in section 3.3 and used the remaining cash after her death to buy some equities and further properties.

3.5 No one other than Mrs A, Mr B and Mrs B has at any time been a director or employee of the Company. As far as we are aware, no benefits or distributions of an income or capital nature have been provided to anyone by the Company or the Trust and no director has received any remuneration from the Company.

3.6 It is claimed by the Taxpayer that the transfer by Mrs A prior to her death is not chargeable to IHT being an exempt transfer under s28 IHTA. Mrs A's death within 7 years of the gift is irrelevant if s28 applies and would mean that the reservation of benefit rules do not apply either. Accordingly, it would not matter whether or not she was a beneficiary of the Trust (see s102(5) FA 1986). Furthermore, if the Trust qualifies as an employee trust under s86 IHTA it will continue to be free of IHT periodic and exit charges under the relevant property regime.

4. Outline of the arrangements

4.1 *Formation and funding of the Company*

a) The Company was incorporated in late 2014 with Mrs A as the sole shareholder.
b) The initial directors of the Company were Mrs A (the deceased) and Mr B (her son and eventually the executor and Taxpayer).
c) Between 22 January 2015 and 5 February 2015, Mrs A subscribed in aggregate about £750,000 for about 720,000 Gifted Shares and 30,000 Retained Shares.
d) The Gifted Shares and Retained Shares carried full voting rights and equal rights to dividends and capital.

4.2 *Establishment and settling of the Trust*

a) On 11 February 2015 Mrs A and Mr B as directors of the Company resolved to establish the Trust with an initial cash contribution of £100 from the Company and a gift by Mrs A to the Trust of her Gifted Shares. The Company minutes refer to the fact that the purpose is to hold the shares for the long term.
b) On 12 February 2015 the Trust was established with Mr B and Mr C as Protectors having the ability to appoint and remove the Trust's trustees. The trustees are UK resident solicitors. The purpose of the Trust was stated to be to allow the employees of the Company from time to time to share in the ownership of the Company.
c) The beneficiaries were defined as employees (which term was defined expressly to include executive directors) and former employees, and a class including their descendants.
d) The trustees have power to pay or apply income or capital to beneficiaries at their discretion.
e) Clause 5.1 of the Trust Deed expressly excludes the following from benefiting other than by means of a Permitted Payment namely: (i) participators and (ii) persons who at the time of conferring of any benefit are connected with such participators.
f) On 12 February 2015 Mrs A transferred her Gifted Shares to the Trust.

4.3 *Mrs A's death*

a) Mrs A died in April 2015, a little over two months after the gift to the Trust.

b) We understand Mrs A's Retained Shares passed to her sons (Mr B and Mr C) on her death. As far as we are aware from the Taxpayer's representations the Gifted Shares are still held by the Trust.

5. The Company's activities, directors and employees

5.1 *Company's activities*

a) The Company's accounts to 31 December 2015 showed total net assets of just over £700,000 made up of a property costing about £130,000, listed investments costing about £100,000 and cash of about £480,000. The listed investments were purchased after Mrs A's death. The accounts show rental income of about £9,000. At the time of Mrs A's death there was little active business.
b) The Company's accounts to 31 December 2016 showed total net assets of just over £700,000 and a turnover of about £13,000. Three further properties were acquired in 2016, funded in part by a loan of £300,000. A further commercial property was purchased by the Company in March 2018 with a loan from a director.

5.2 *Company's directors and employees*

a) Mrs A and Mr B were the Company's first directors.
b) Mr B was the Company's sole director between the date of Mrs A's death in April 2015 and May 2016 when Mrs B was appointed an additional director in the Company.
c) In short, as far as we are aware from the Taxpayer's representations for the entire period since incorporation the Company has had no directors other than (at various times) Mrs A, Mr B and Mrs B and has had no other employees. No director has received remuneration from the Company.
d) As far as we are aware from the Taxpayer's representations no distribution was made by the Company or by the Trust.

6. The terms of the Trust Deed

6.1 As noted in section 4.2.(e) above, clause 5.1 of the Trust Deed excludes participators and persons connected to them at the time the benefit is conferred from benefiting other than by way of Permitted Payment. This limitation is necessary in order to comply with the conditions of s28 IHTA. We call this for ease of reference the "capital distribution restriction".

6.2 There is a potential dispute over the interpretation of section 28(4) IHTA and whether the Trust Deed satisfies the requirements of s28. In particular whether it is permitted under s28 for those who were connected with any participator prior to death to benefit other than by way of income payments from the Trust after her death. And if it is not so permitted whether the Trust Deed breaches this requirement and therefore s28 relief is not available anyway. The interpretation of s28 was considered in *Barker v Baxendale Walker Solicitors* [2017] EWCA Civ 2066.

6.3 For the purposes of this opinion we adopt the position that the terms of the Trust Deed meet the requirements of section 28(4) IHTA.

6.4 The remaining interpretation issue is in essence whether for the purposes of the "capital distribution restriction" under the Trust Deed, the connection giving rise to

the restriction in section 28 between Mrs A and her family ceases at the time of her death or not, and if it does cease at the time of her death whether it ceases only in relation to persons connected with Mrs A at the time of her death (in other words are future generations free or not free from the "capital distribution restriction").

6.5 For the purposes of this opinion we adopt the interpretation suggested in the Taxpayer's representations, that those connected with Mrs A immediately before her death remain subject to the "capital distribution restriction" and can only benefit by way of Permitted Payment and that those not connected with Mrs A at her death (eg unborn family members) are free from the "capital distribution restriction".

7. Summary of substantive result of the arrangements

7.1 Cash held by an elderly settlor in poor health (Mrs A) is subscribed by way of share capital shortly before her death into a newly established wholly owned company (the Company) with about 95% of the shares in the Company shortly afterwards being gifted to an employee trust (the Trust) thus reducing the value of Mrs A's estate by about £700,000.

7.2 That cash is invested by the Company and available for the long-term benefit of the settlor's (Mrs A's) family as beneficiaries of the Trust (albeit those connected with her prior to her death can only benefit by way of Permitted Payment).

8. The tax advantage

8.1 About £700,000 is moved into, invested and the investments held in an IHT free wrapper with no IHT on death of the settlor (Mrs A) or on transfer by Mrs A of the shares in the Company to the Trust (even though she dies within 7 years and is not excluded from the Trust). Assuming s86 is satisfied there is continuing protection from the usual IHT ten-year charges and exit charges under the relevant property regime in the future.

8.2 The value of Mrs A's estate for IHT purposes has been reduced by about £700,000 without any IHT being paid and a largely IHT free family investment company with assets of just over £700,000 has been established.

8.3 While the Trust qualifies for s86 (trusts for the benefit of employees) status it will not be subject to periodic charges and exit charges occur only in limited circumstances. The Trust Fund can therefore grow in value tax free and remain out of any family member's estate for IHT purposes.

8.4 There is no gifts with reservation charge on the death of Mrs A even if she continued after her gift to the Trust to be able to benefit by way of Permitted Payment from the Trust. This is due to the protection from the reservation of benefit provisions conferred if s28 applies (see s102(5)(i) FA 1986).

9. Tax results argued for by the taxpayer

9.1 This is a straightforward use of a tax relief offered by Parliament and legitimately allows her to access the longstanding and generous relief from IHT offered by section 28 IHTA and for her family and any other person taken on as an executive director or employee to see the value of the Trust Fund grow free of IHT in the future while the assets remain in trust.

9.2 The arrangement is tax mitigation not tax avoidance. The purpose of s28 IHTA is to permit the owner of a company to transfer ownership to a trust for the benefit of employees of that company (both present, past and future). The requirement that the trustees hold the majority of the shares in the company suggests that it is directed at close companies under the control of relatively few people. As such, it is in no part of the purpose to deny the exemption to owners of small companies.

10. What are the principles of the relevant legislation and its policy objectives?

10.1 The relevant legislation is s28 IHTA. S28 provides (subject to certain conditions being met) that a transfer by an individual of shares in a company is exempt from IHT if the transfer is to a trust for the benefit of employees.

10.2 This legislation was central to Example D29. Quoting from that Example:

"*The principle behind [the s28 exemption] is clear in that it is intended to facilitate the future development and succession of a business by providing benefits and incentives for its employees without the overhead of an IHT charge" (D29.1.1 final sentence)*

"*A transfer of shares in a company to a trust for the benefit of all or most of the employees of that company may be exempt under s28, provided that a number of conditions are met, primarily that the trustees hold at least 50% of the shares and the terms of the trust do not allow the settled property to be applied for the benefit of participators, former participators or their families. The intention of the legislation is to provide an incentive to diversify share ownership or at least the benefits of share ownership among a wider group of people who are then motivated to run the company profitably*." (D29.5.1 second paragraph)

"*Incorporating a company and establishing an EBT in this way where the only people who are ever likely to benefit from the trust property are [the settlor's] children is plainly against the principles behind the legislation which is to give favoured treatment to trusts for employees of a genuine business. In this case there is no genuine business that is set to continue and no genuine employees*." (D29.5.1 fourth paragraph)

10.3 This approach is confirmed in the Hansard reports documenting the proceedings in the House of Commons in June 1978 where it was noted that the restrictions on distributions to shareholders and persons connected with them were imposed to ensure that an employee trust was not used "*as a tax-free money box in which the family's fortune could build up tax free over the generations and ultimately be paid out to its members instead of being applied for the benefit of the employees*."

11. Does what was done involve contrived or abnormal steps (section 207(2)(b) FA 2013)?

11.1 It is not, in itself, contrived or abnormal to establish an investment company.

11.2 It is contrived and abnormal to transfer shares into a trust for the benefit of employees at a time when the business does not have and does not need employees.

11.3 If this had been a long standing family company with a long standing workforce (whether or not including family members), gifting shares into the Trust might

have had the legitimate aim of ensuring employees were incentivised to continue the business after the settlor's death and of diversifying share ownership or the benefits of share ownership. In this case there was no incentive as there were no such employees and no such business. The only people who could potentially benefit from the Trust at the settlor's death were her issue (albeit the issue alive at her death were precluded from benefiting from the Trust otherwise than by way of Permitted Payment).

11.4 The most obvious comparable transaction is the transfer of cash to a family investment company and the transfer of shares of that investment company to a trust for the benefit of family members. The wrapper of using a trust dressed up as being for the benefit of employees where the only beneficiaries are and are likely to be family members (including where there are restrictions on how certain family members could benefit) is in this context contrived.

12. Is what was done consistent with the principles on which the relevant legislation is based and the policy objectives of that legislation (section 207(2)(a) FA 2013)?

12.1 We are of the view that the arrangements in this case are not consistent with the policy objectives referred to in section 10 above.

12.2 It might be possible to make a qualifying gift under s28 (even just before someone died) where the only or main beneficiaries were employee family members on the basis of an ongoing substantive and active business with employees happening to be family members.

12.3 However, in this case the Trust looks and operates like a private family investment trust which owns a company holding investments but using the camouflage of a trust purporting to be a trust for the benefit of employees. There is no substantive and active undertaking at the date of the gift; why would a settlor want to benefit unknown persons who may happen to be employees in the future of a currently passive business?

12.4 If s28 is available here then every family could set up a money box company, appoint relatives as directors and then let the company make investments. No other employee need be involved. It is clear from the Hansard extract in section 10.3 above that money box companies with no real employees should not qualify for s28 relief.

12.5 Our approach is consistent with the legislation as it does not exclude small companies where most of the employees are family provided there is a genuine business and a genuine intention to motivate employees and widen the benefits of share ownership. Both elements are lacking here.

12.6 This is not in any real sense a trust set up for the benefit of <u>employees</u> as there is no underlying business that has had or has required or, looking forward as an investment vehicle, requires employees doing something substantive.

12.7 Furthermore there is no reason given as to why Mrs A would want to benefit non-family members particularly in relation to a business that at her death was little more than a company holding passive investments; if her intention was to benefit family members then this could have been done in a much less contrived way by a family trust for the benefit of future generations.

12.8 We accept the Taxpayer's statement that the intention was for the Trust to hold the shares in the Company for the long term. Holding for the long term facilitates the provision of benefits to future generations with the Trust being kept indefinitely outside of the IHT net (and in particular outside the relevant property regime).

12.9 Example D29 highlights not (as the taxpayer contends) that the Trust has to come to an end in the short term for GAAR to apply but rather that where there is no intention to benefit genuine employees of a substantive business GAAR can apply.

12.10 We agree that s28 exemption is not restricted to a particular type of business such as a trading venture and does not prescribe a minimum level of business. Nevertheless, it is expected that there should be some reasonable level of business enterprise activity and most importantly activity which relies on the involvement of employees.

12.11 The Trust is in effect a very convenient vehicle in which to gift Mrs A's surplus funds and allow them to grow in an IHT free environment while still ensuring that the only people who benefit (whether as to capital or income does not matter) are family members.

13. Is there a shortcoming in the relevant legislation that was being exploited (section 207(2)(c) FA 2013)?

13.1 The legislation is ambiguous or at least unclear as to the requirements of section 28 and in particular:

(a) whether it is possible for s28 to provide relief in a case where family members who were connected with participators may receive benefits otherwise than through a Permitted Payment after they cease to be so connected with such participators – this depends on the interpretation given to s28(4).
(b) whether it matters that there are no other employees other than family members and where family members perform minimal duties.

13.2 It is accepted that the legislation prescribes no minimum level of business activity or minimum number of employees but the intention of s28 is nevertheless clearly for the exempt trust to be "for the benefit of employees". That requires a cadre of people genuinely working in a genuine business. As with the money box referred to in Hansard (see section 10.3 above) a passive investment vehicle whether or not intended only for the benefit of family members is unlikely to be intended to be covered by the exemption.

14. Was what was done consistent with established practice and had HMRC indicated its acceptance of that practice (section 207(5) FA 2013)?

We have not been directed to any specific evidence of such established practice or acceptance of such practice. S28 has been in force for 35 years. The Taxpayer has suggested it is inherently unlikely that HMRC has not during that period approved similar arrangements. We do not accept that inherent unlikeliness is, of itself, an indicator of established practice.

15. *Does the planning result in:-*

(i) an amount of income, profits or gains for tax purposes which is significantly less than the amount for economic purposes, or

(ii) deductions or losses for tax purposes which are significantly greater than the amount for economic purposes, or

(iii) a claim for the repayment or crediting of tax which has not been and is unlikely to be paid

and, if so, is it reasonable to assume that such a result was not the intended result when the relevant tax provisions were enacted (section 207(4) FA 2013)?

The above provisions in s207(4) FA 2013 are not relevant here to the IHT provisions of s28 but are illustrative only.

16. Discussion

16.1 We ask ourselves the question "why was the Trust established?" And go on to ask ourselves "was the Trust established to benefit employees?" In our view the motivation in establishing the Trust was not to benefit employees, there were no full time or part time employees at the time of the Trust's establishment or at the time of Mrs A's gift to the Trust. At those times the only directors of the Company were Mrs A and Mr B neither of whom was remunerated. It seems to us far-fetched to suggest the motivation was to benefit future employees.

16.2 We have taken into account in looking at the activities and employees of the Company not only the position at the time of Mrs A's gift but also the information provided to us by the Taxpayer which covered the position up until June 2019.

16.3 The activity of the Company at the date of the gift and, as far as we are aware from the Taxpayer's representations, since then has been essentially passive in nature and very far removed from the activities that would benefit from incentivising employees, developing the business or diversifying the benefits of share ownership.

16.4 In our view the arrangements in this case have been adopted solely to benefit family members. The arrangements have been structured in a way to sidestep charges to IHT including the charge to IHT on gifts where the donor does not survive for 7 years following the gift.

16.5 Example D29 gives the Panel's view in relation to an arrangement seeking to exploit s28. While the facts in this case may differ, and in particular in relation to the intended duration of the holding of the trust assets, the reasoning in that Example is clearly applicable to this case. The arrangements here also clearly fall into the category of "*tax-free money box in which the family's fortune could build up tax free over the generations"* identified in Hansard as falling outside the spirit of the legislation (see section 10.3 above).

16.6 We acknowledge there are differing interpretations of s28 and the provisions of the Trust Deed (see section 6 above). Even if it is the case that connected family members can only ever benefit by means of a Permitted Payment our conclusion would not be different.

16.7 In the light of the material we have received from the parties (including the Taxpayer's representations concerning the circumstances in which certain property was acquired) we have considered all the circumstances. The particular circumstances set out in section 207(2)(a) and (b) FA 2013 point towards both the entering into and the carrying out of the arrangements as not amounting to a reasonable course of action in relation to the relevant IHT provisions. The

substantive results of the steps taken are not consistent with the principles and policy objectives on which s28 is based. The means of achieving the intended result relies on an abnormal and contrived use of an exemption intended for the benefit of genuine employees of a genuine business. The circumstances set out in section 207(2)(c) and in section 207(4) and 207(5) do not point towards the carrying out of the arrangements as amounting to a reasonable course of action in relation to the relevant IHT provisions.

17. Comment

In our view the most likely comparable transaction is to treat this as a lifetime gift to a family trust that is not within s28. The result is that there is a 40% charge to IHT given Mrs A died within three years. As Mrs A is also a beneficiary of the Trust at least as to income on a discretionary basis it would appear that the trust fund is also potentially subject to tax on Mrs A's death under the so-called gifts with reservation legislation in s102 FA 1986, although double charges relief should presumably be in point here under the 1987 Double Charges Regulations and it is unlikely to make any material difference to the overall tax.

18. Conclusion

Each of the sub-Panel members is of the view, having regard to all the circumstances (including the matters mentioned in subsections 207(2)(a), 207(2)(b), 207(2)(c) and 207(3) FA 2013) and taking account of subsections 207(4), 207(5) and 207(6) FA 2013, that:

a) the entering into of the tax arrangements is **not** a reasonable course of action in relation to the relevant tax provisions; and
b) the carrying out of the tax arrangements is **not** a reasonable course of action in relation to the relevant tax provisions.

Example D29 from Part D of the GAAR Guidance published on 30 January 2015

D29 Bypassing the charge on death with an Employee Benefit Trust

This example illustrates arrangements which are demonstrably contrary to the spirit of the legislation.

D29.1 **Background**

D29.1.1 IHT is charged when an individual makes a transfer of assets – either whilst the individual is alive or on death. A number of exemptions and reliefs can reduce that charge, sometimes to nil. Transfers of business assets and unlisted shares may qualify for business property relief. Transfers of shares to a trust for the benefit of employees may also qualify for exemption under s28 IHTA 1984. Such a trust is excluded from the relevant property trust regime and gifts to it are not subject to reservation of benefit. The principle behind this part of the legislation is clear in that it is intended to facilitate the future development and succession of a business by providing benefits and incentives for its employees without the overhead of an IHT charge.

D29.2 **The arrangements**

D29.2.1 S (a widow) wants to minimise her estate's exposure to IHT on her death. She could alter the spread in her investment portfolio by investing in AIM shares, but does not want to take the commercial risk and given her poor health is unlikely to survive 2 years. So she arranges for a private company, ABC Ltd, to be incorporated with an authorised share capital of 20,000 £1 shares. Her advisers initially subscribe for one share each at par. S and her advisers are the only three employees of the company. S then subscribes for 19,990 shares at a premium of £100 per share. The company does not trade, but holds the money on deposit. The directors of ABC Ltd establish an employee benefit trust ("EBT") for the benefit of the employees of the company and their families, whilst at the same time participators, former participators and members of their families are expressly excluded from benefiting from the trust, other than in a way that would give to an income tax charge. S transfers her 19,990 shares to the trustees. S dies.

D29.2.2 Although S established the EBT prior to her death, the same result could have been achieved by including the terms of the EBT in her Will, or the beneficiaries of her estate could have executed a Deed of Variation to establish the trust.

D29.3 **The relevant tax provisions**

Sections 3, 28, 72 and 86 IHTA 1984.

D29.4 **The taxpayer's tax analysis**

D29.4.1 When S subscribes for the 19,990 shares, there is no loss to her estate. The terms of the EBT are such that it satisfies the provisions of s86 and does not infringe the provisions of s28, so the transfer of the shares to the trust is exempt under s28. There is no requirement for S to have held the shares for any qualifying period of time or for her to survive 7 years after the gift.

D29.4.2 Following her death, the family are no longer connected to a former participator, so they can now benefit from the trust by way of capital distributions like any other beneficiary. There is a small charge to tax when there is a payment out of the settled property that ceases to be held on an EBT but considerably less than the 40% that would otherwise have been due on S's death. S's investment in ABC Ltd has enabled a significant sum to pass to her children largely free of IHT.

D29.5 **What is the GAAR analysis under s207(2) of FA 2013?**

D29.5.1 *Are the substantive results of the arrangements consistent with any principles on which the relevant tax provisions are based (whether express or implied) and the policy objectives of those provisions?*

A transfer of shares in a company to a trust for the benefit of all or most of the employees of that company may be exempt under s28, provided that a number of conditions are met, primarily that the trustees hold at least 50% of the shares and the terms of the trust do not allow the settled property to be applied for the benefit of participators, former participators or their families. The intention of the legislation is to provide an incentive to diversify share ownership or at least the benefits of share ownership among a wider group of people who are then incentivised to run the company profitably.

The company has not traded and the only 3 employees of the company are S and her advisers. As a participator, S cannot benefit under the trust (other than receiving income) and she does not intend that her advisers should benefit to any substantial extent. Whilst S is alive, therefore, the trust serves little purpose, other than to provide an income to S. However, on her death, her children are no longer connected to a former participator in the company. Provided that they are employees or otherwise within the permitted class of beneficiaries set out in s86, there is then nothing to prevent the trustees from distributing the trust assets to them with only minimal IHT under s72 IHTA.

Incorporating a company and establishing an EBT in this way where the only people who are ever likely to benefit from the trust property are S's children is plainly contrary to the principles behind the legislation which is to give favoured treatment to trusts for employees of a genuine business. In this case, there is no genuine business that is set to continue and no genuine employees.

D29.5.2 *Do the means of achieving the substantive tax results involve one or more contrived or abnormal steps?*

The scheme as a whole is contrived, serving no real purpose other than to allow wealth to pass from S to her children without an IHT charge on her death.

D29.5.3 *Are the arrangements intended to exploit any shortcomings in the relevant tax provisions?*

Although the definition of "connected persons" is extended for IHT purposes by s270, the normal interpretation, which breaks a connection with someone who has died, continues to apply. S28 does not limit the exemption to employee trusts with a minimum number of unrelated employees.

D29.5.4 *Do the tax arrangements accord with established practice and has HMRC indicated its acceptance of that practice?*

HMRC has not indicated its acceptance of this practice.

D29.6 **Conclusion**

D29.6.1 On the facts given, the arrangements are abusive arrangements to which HMRC would seek to apply the GAAR.

D29.7 **Proposed counteraction**

D29.7.1 The likely counteraction would be to ignore the fact that the trust qualified as an EBT and impose an immediate entry charge on S in respect of the settlement of the shares on the basis that it is a relevant property settlement and a further charge if she died within 7 years.