INHERITANCE TAX ON SETTLED PROPERTY: "SAME-DAY ADDITIONS"

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Summary

The changes made to the inheritance tax taxation of "relevant property" settlements by Finance Act No 2 2015 Schedule 1 are incompetent.

On the one hand, they allow multiple inheritance tax-free settlements still to be created by well-advised taxpayers, albeit by different means.

On the other hand, they engage in an enormous amount of overkill, creating unjustly increased charges to tax, even where there has been no tax planning motive involved.

The worst feature of the provisions is that they are probably retroactive, i.e. future charges to tax on settled property will now for the first time take into account events which happened before the changes were even contemplated, perhaps decades before.

As a general rule, the same settlor should not create or fund more than one settlement on the same day.

A settlor should make an addition to a settlement he created or funded before December 14th 2014 only after taking specialist advice on the effect of Schedule 1.

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1 History

1.1 Estate Duty

Imposing gift and estate charges on settled property presents problems. When Estate Duty was introduced, by Finance Act 1894, beneficial interests to which a person was entitled on his death,[2] in general "passed" on his death, and were thus dutiable, at their market value. It was perceived from the beginning, that this would be inadequate where property was held in a strict settlement, usually on trust for successive life interests as a life interest would be worth nothing on the death of the tenant for life. Hence, a rule was introduced in effect deeming a tenant for life[3] to be entitled to the settled property itself so that it became potentially chargeable on his death.

When Estate duty was introduced, wide discretionary trusts were most uncommon. They became more and more common in the post-war period. No beneficiary had any interest of any value and no beneficiary was entitled for an interest in possession. Although attempts were made in the last days of estate duty to introduce a supplementary charge on discretionary trusts, by deeming a person who had received benefits from the trust during the last seven years of his life to be entitled on his death to a fraction of the settled property, they did not work well from the Revenue's point of view.

1.2 Capital Transfer Tax

When Old Labour replaced estate duty capital transfer tax,[4] it was designed as a combined gifts and estate tax. Taxation of settled property was dealt with in two ways. Firstly, where an interest in possession subsisted in the settled property, the person beneficially entitled to it was deemed to own the settled property so that it was dutiable on his death. If he ceased to be so entitled during his life, he was deemed to make a transfer of value. Capital transfer tax was fairer than estate duty in that reversionary interests in settled property were in general "excluded property" and thus fell outside the charge to the tax.[5]

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2 or was in effect deemed to be so entitled by virtue of rules corresponding roughly to those affecting potentially exempt transfers and gifts with reservation of benefit which are to be found in the current inheritance tax code.

3 of other person entitled for an interest in possession.

4 The original legislation was contained in Finance Act 1975.

5 There was, and remains, a question as to whether it is possible for there to exist an interest of some value which is neither an interest in possession or a reversionary interest. That, however, is outside the scope of this article.

For the first time, a special regime was introduced for taxing settled property in which no interest in possession subsisted.[6] The rules were very complicated and the potential charges to tax were on the whole unfairly high, although this was to some extent tempered by transitional relief which was available until 1980 and was designed to encourage discretionary trusts to be

In 1981, a Conservative government re-wrote the rules for charging inheritance tax on discretionary trusts. The rules were not entirely dissimilar to the previous rules but were fairer in that they took into account the length of time settled property had been held on discretionary trusts since the last occasion of charge on that property. Although there have been minor modifications, what was established in 1981 is the current regime. The re-naming of capital transfer tax as "inheritance tax" and the introduction of potentially exempt transfers and gifts with reservation of benefit provisions by Finance Act 1986 had hardly any effect on the regime.

1.3 Finance Act 2006

Finance Act 2006 introduced widespread changes to inheritance tax by reducing the number of interests in possession which was accorded the same treatment as under estate duty and capital transfer tax. I call such interests in possession "recognised interests in possession", although that is not a term to be found in the legislation. Existing interests in possession were unaffected, yet the number of new interests in possession which would be a recognised interest in possession was enormously reduced.

Where there was an interest in possession but it was not a recognised interest in possession, the property fell to be taxed in the same way as if the trusts were discretionary. Technically, the settled property is known as "relevant property". As a sop, an interest in possession in relevant property is in general not deemed to form part of a person's estate for inheritance tax purposes. That both creates problems yet provides opportunities.

While nothing important has changed since 1981 in the taxation of settled property which is relevant property, the relevant property charging provisions are becoming more and more important in practice, on account of the Finance Act 2006 changes.

6 There were, as now, exceptions for certain privileged types of trust, such as charitable trusts.

2 The Perceived Mischief

2.1 Importance of the Settlor's inheritance tax "Clock"

There were, and remain, three different sets of charging provisions:

(a) charge at ten-year anniversary - see Inheritance Tax Act 1984 sections 64 and 66

(b) charge before the first ten-year anniversary - see Inheritance Tax Act 1984 sections 65 and 68 and

(c) charge at other times - see Inheritance Tax Act 1984 sections 65 and 69.

What they all have in common, however, is that they are based on a hypothetical transfer of value which takes into account the settlor's history of chargeable transfers of value in the period of seven years ending with the day on which the settlement was made,[7] but, crucially, excluding transfers of value made on that day.

Where the settlor creates only one settlement in any seven-year period, the rules work tolerably well from the Revenue's point of view. Although in taxing the settled property itself in future, one ignores any chargeable transfer of value he made in creating the settlement, in general, the value transferred by it will be reflected in the value of the settled property itself, which is also taken into account in calculating the rate of charge.

Of course, the rules work in an arbitrary fashion in that the order in which a settlor makes gifts in settlement and gifts not in settlement can affect future charges on the property comprised in the gift in settlement. The general rule is that such gifts should be made first.

2.2 Simple Examples

I shall assume for the sake of simplicity, that a settlor who wishes to create settlements has no history of chargeable transfer of value made in the preceding seven years. I shall assume that he wishes to create only two settlements and that

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7 While there are special rules which can apply when a settlor makes an addition to property comprised in a settlement, contained in 67 (Added property, etc) they similarly ignore transfers of value made on the day of addition.

he wishes to gift £325,000 to each settlement by means of a chargeable transfer of value of that amount.

If he makes Settlement A on Day 1, the rate of charge to tax on the settled property in future will take into account a nil history of chargeable transfers of value made by him. Provided the settled property is never worth more than the upper limit of the nil rate-band for inheritance tax, all charges to inheritance tax under the relevant property regime will be at a nil rate.

If he makes Settlement B on Day 2, the rate of charge to tax on the settled property in future will take into account a history of chargeable transfers of value of £325,000 made by him (by virtue of funding Settlement A). Assuming that there is no charge to inheritance tax before the first ten-year anniversary, that on that anniversary the settled property is all relevant property of a value equal to the upper limit of the nil rate-band for inheritance tax and the law has not changed, the charge to inheritance tax on the anniversary will be at a rate of 3%. Thus the average rate of charge on the property contained in the two settlements will be 1.5%.

2.3 Related Settlements

The draughtsman of Finance Act 1981 was reasonably astute. He readily appreciated that if one made two or more settlements on the same day, the settled property in each could be taxed at a rate lower than the Revenue might have wished. Unless he had included some special rule, the settlor in the above example could have created both settlements on the same day and the rate of charge to tax on the settled property contained in each would, provided the property contained in each were never worth more than the upper limit of the nil rate-band for inheritance tax, have been nil.

He therefore introduced the concept of a "related settlement", which is now contained in Inheritance Tax Act 1984 section 62 (Related settlements):

> "(1) For the purposes of this Chapter two settlements are related if and only if-
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> (a) the settlor is the same in each case, and
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> (b) they commenced on the same day,
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> but subject to subsection (2) below.

> "(2) Two settlements are not related for the purposes of this Chapter if all the property comprised in one or both of them was immediately after the settlement commenced held for charitable purposes only without limit of time (defined by a date or otherwise)."

In charging inheritance tax on the settled property contained in one related settlement, one takes into account the initial value of the settled property contained in any other related settlements. In general (but not always) the initial value will correspond to the transfer of value made by the settlor in creating each related settlement. Hence, it might be thought that the position is, in general, the same as if the settlor had created Settlement A on Day 1 and Settlement B and Day 2.

That view would be wrong. The draughtsman was, as is so often the case, concerned, not to achieve fairness as between taxpayers, but to ensure that the Revenue could not be prejudiced.

I have set out, in section 2.2 above, the consequences of creating two settlements on separate days. Let us assume the facts of those examples to be the same but the settlements to be created the same day, and thus to be related settlements. Let us further assume that the first charge on each is on the first ten-year anniversary, that the settled property contained in each is then worth an amount equal to the upper limit of the nil-rate band and that in the ten years since their creation, that nil rate band had remained constant.

The charge on Settlement A will be at the rate of 3% but the charge on Settlement B will also be at the rate of 3%. Thus the average rate is doubled. Why does the anomaly arise? In order to counteract the tax planning, all that is necessary is that the initial value of the property in the first settlement created is taken into account in calculating the rate of charge to tax on the property contained in the second settlement created. While that is done, there is a large element of overkill in that the initial value of the property contained in the second settlement is taken into account in calculating the rate of charge on the property contained in the first settlement.

The moral was thus, and remains, never to create two settlements on the same day.

2.4 Planning Strategies

There were two planning strategies which I first lectured on and discussed in print over twenty-five years ago. They were the revocable settlement strategy and the added property strategy. Each allowed one to create and fund as many settlements as one liked by ensuring that the charge on the settled property contained in each was calculating without reference to the value of the property contained in any other, initially or at any later stage.

The revocable settlement strategy was accidentally stopped by changes made to the inheritance tax by Finance Act 2002 - in an attempt to prevent settlors obtaining holdover relief from capital gains tax on gifts in settlement!

The added property strategy remained viable until the enactment of Finance (No 2) Act 2015.[8] It was unsuccessfully challenged by the Revenue in *Rysaffe Trustee Co (CI) Ltd v Inland Revenue Commissioners* [2003] EWCA Civ 356 [2003] STC 536.[9] The technique was to create a number of settlements on separate days (so they were not related settlements) usually with a modest amount of cash. After all the settlements had been created, a large addition was made to each on the same day, to which I shall refer as "A Day".

The transfers of value made on "A Day" were not taken into account in applying the basic charging provisions as they were not made in the period of seven years ending on the day before any of the settlements were created.

The Inheritance Tax Act 1984 does contain a special rule dealing with additions to settlements, section 67 (Added property, etc) applies in terms to the ten-year charge under section 66. It can apply only where after the settlement commenced…[10] but before the anniversary concerned, the settlor made a chargeable transfer as a result of which the value of the property comprised in the settlement was increased. The meat is in subsection (3).[11] In effect, in calculating the rate of the ten-year charge under section 66, one takes the greater of

(a) the aggregate of the values transferred made by the settlor in the seven years ending with the day on which the settlement commenced and

8 I consider in section 5 the extent to which that Act may have retrospective effect on added property strategies entered into before the day it became law.

9 The judgment does not explain, as it did not need to, precisely how the strategy worked.

10 and after 8th March 1982

11 There are special rules which apply in relation to a settlement which commenced before 27th March 1974.

(b) the aggregate of the values transferred by any chargeable transfers made by the settlor in the period of seven years ending with the day on which the chargeable transfer resulting in the addition was made.

but excluding in either case transfers of value made on the last day of the period.

As the rate of exit charge following a ten-year anniversary depends on the rate of the ten-year charge on that anniversary, this has a knock-on effect on such charges too.

The crucial point, however, is that one still ignores transfers of value made on the last day of the seven-year period, i.e. the day of addition. Hence, it was possible to create multiple nil-rate band settlements within a short period of each other. Each settlement might last two hundred years and could in principle not be liable to ten-year or exit charges provided the value of the settled property combined in it never exceeded the upper limit of the nil-rate band from time to time (and provided the law remained unchanged).

It was to combat this perceived mischief that Finance (No 2) Act 2015 Schedule 1 was enacted.

3. Finance (No 2) Act 2015 Changes to Inheritance Tax Act 1984

3.1 Overview

The changes enacted by Schedule 1 to Finance (No 2) Act 2015 work by requiring one to take into account the value of any "same-day addition" in relation to a settlement in calculating the ten-year and normal exit charges on the settled property.

The changes are characteristic of much modern fiscal legislation.

First, they catch and penalise many innocent arrangements where the perceived mischief would not otherwise have been present.

Second, they do more than negative any benefit, intended or otherwise, which might have resulted from the perceived mischief and are thus penal in their effect.

Third, they are defective in that the well-advised can, in my view, still continue to create multiple nil-rate relevant property settlements. They will simply have to resort to a different strategy. Moreover, the fact that the possibility of creating multiple nil-rate band trusts has been in the public domain since at least the *Rysaffe* litigation, well over a decade ago, strongly indicates that failure by HMRC to prevent multiple nil-rate relevant property settlements except by the use of the added property strategy is an acceptance that creating them cannot begin to be caught by the GAAR.

3.2 Same-Day Additions: the Statutory Definition

The amended Inheritance Tax Act 1984 relies on a key concept of a "same-day addition. This is defined in 62A (Same-day additions), which provides:

"(1) For the purposes of this Chapter, there is a "same-day addition", in relation to a settlement ("settlement A"), if—

(a) there is a transfer of value by a person as a result of which the value immediately afterwards of the property comprised in settlement A is greater than the value immediately before,

(b) as a result of the same transfer of value, or as a result of another transfer of value made by that person on the same day, the value immediately afterwards of the property comprised in another settlement ("settlement B") is greater than the value immediately before,

(c) that person is the settlor of settlement A and settlement B,

(d) at any point in the relevant period, all or any part of the property comprised in settlement A was relevant property,

and

(e) at that point, or at any other point in the relevant period, all or any part of the property comprised in settlement B was relevant property.

For exceptions, see section 62B.

"(2) Where there is a same-day addition, references in this Chapter to its value are to the difference between the two values mentioned in subsection (1)(b).

(3) "The relevant period" means—

(a) in the case of settlement A, the period beginning with the commencement of settlement A and ending immediately after the

transfer of value mentioned in subsection (1)(a), and (b) in the case of settlement B, the period beginning with the commencement of settlement B and ending immediately after the transfer of value mentioned in subsection (1)(b)).

(4) The transfer or transfers of value mentioned in subsection (1) include a transfer or transfers of value as a result of which property first becomes comprised in settlement A or settlement B; but not if settlements A and B are related settlements.

(5) For the purposes of subsection (1) above, it is immaterial whether the amount of the property comprised in settlement A or settlement B (or neither) was increased as a result of the transfer or transfers of value mentioned in that subsection."

3.3 Requirement for Transfer of Value

3.3.1 Exempt Transfers of Value and Potentially Exempt Transfers of Value

While there must be at least one transfer of value, there is no need for it to be a chargeable transfer of value. It could thus be an exempt transfer of value. It could in principle also be a potentially exempt transfer which finishes up being definitively exempt, although under current law that will be comparatively rare.

There is absolutely no reason why exempt transfers of value (or potentially exempt transfers which do not turn out to be chargeable transfers of value) should be taken into account. They do not increase the total of chargeable transfers of value made by the settlor in any seven-year period. Thus, the legislation starts with a gross overkill. The draughtsman of the pre-existing Inheritance Tax Act 1984 section 67, discussed at 2.4 above, did not fall into such an error. Section 67 can apply only where there is a *chargeable* transfer of value.

3.3.2 Non-Transfers of Value

There must, however, be a transfer of value. There is a number of situations in which the value of property comprised in settlement can be increased without their being a corresponding transfer of value, even if there is a reduction in the value of the estate of the person responsible. In that case either or both of section 62A(1)(a) and (b) could fail to be satisfied with the result that there is no same-day addition.

Whether a person makes an exempt transfer of value or no transfer of value at all will not normally matter. Each will have no effect for inheritance tax purposes. Because of the defective drafting of section 62A, the difference could, bizarrely, be crucial in deciding whether there is a same-day addition.

3.3.3 No Value Transferred

Suppose a person, P, prima facie makes a transfer of value in that he makes[12] a disposition as a result of which the value of his estate is immediately reduced:[13] see Inheritance Tax Act 1984 section 3. However, the value transferred, being the amount of the diminution in his estate,[14] is reduced to nil by virtue of the availability of 100% business property relief or agricultural property relief. Has, then, P made a transfer of value at all?

I can see arguments each way. Were Schedule 1 more intelligently drafted and were judges as keen to adopt purposive canons of construction when that advantaged the taxpayer as they are when to do so would advantage HMRC, I would have no doubt. If as a result of the disposition the settlor's "clock" of cumulative transfers of value made in the preceding seven years is not increased, there is absolutely no reason for the schedule to apply. In technical terms, if the assumption that there is a transfer of value leads to the deemed conclusion that there is no value transferred, and thus no transfer of value, it is the deeming provision which prevails.[15]

While it is not my function to provide arguments for HMRC, their starting point in arguing the opposite could be that the Schedule is already so nonsensical and unfair

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12 or is deemed to make

13 and no other provision of the inheritance tax legislation prevents it from being a transfer of value.

14 See Inheritance Tax Act 1984 section 3(1).

15 A logician would find no inconsistency. If, starting from the premise that there is a transfer of value yields the result that there is no transfer of value, i.e. that there both is and is not a transfer of value, which is logically absurd, then the premise that there is a transfer of value must be wrong. Logicians for thousands of years used to call this method of reasoning *"reductio ad absurdum"*. Now that few are familiar with the Latin language, they may have adopted some other name.

that construing it so as to be even more nonsensical and unfair would be of no great consequence.

3.3.1.4 Value Transferred by Transfer of Value Less Than Increase in Value of Settled Property

There is no requirement that the value transferred by any transfer of value specified in section 62A(1)(a) and (b) be of any minimum amount or in any way commensurate with the increase in value specified in the relevant subsection. Thus, even a tiny transfer of value, provided it is not so small as to be ignored on the application of the de minimis principle, could result in a same-day addition.

It will be seen that there is an exception to section 62A in certain cases where the value by which the difference between the two values mentioned in section 62A(1)(a), i.e. the amount of the increase in the value of the settled property comprised in settlement A does not exceed £5,000. There is a similar exception as regards Settlement B. See section 62B(3), discussed at 3.12.5. However, there is no exception where the value transferred by either of the transfers of value mentioned in section 62A(1)(a) or (b) is less than a particular amount.

3.4 Need for Increase in Value of Property Comprised in Settlement A and Settlement B.

3.4.1 Basic Rule

Section 62A(1)(a) requires that there must be a transfer of value by a person as a result of which the value immediately afterwards of the property comprised in settlement A is greater than the value immediately before.

Similarly, section 62A(1)(b) requires that as a result of the same transfer of value, or as a result of another transfer of value made by the same person on the same day, the value immediately afterwards of the property comprised in another settlement ("settlement B") is greater than the value immediately before.

This requirement is fundamental. If either of these conditions is not satisfied, there will be no same-day addition.

3.4.2 Excluded Property

Particular care must be taken with excluded property. There is no rule requiring excluded property not to be taken into account in calculating the value of property comprised in a settlement.[16] Hence, a transfer of value increasing the amount or value of excluded property comprised in a settlement could be a same-day addition.

3.4.3 Non-Relevant Property

More generally, there is no requirement when considering section 62A(1)(a) or (b) that one looks only at "relevant property" comprised in the settlement. That is understandable. Otherwise, an addition could be made of property which did not constitute relevant property and it could then be converted into relevant property.

Where the settled property is not relevant property and never becomes relevant property, while there may technically be a same-day addition, that will be academic as the concept of a same-day addition is taking into account only in charging relevant property to inheritance tax.

Thus, in my view, it is entirely fair that section 62A(1)(a) and (b) do not require one to have regard only to "relevant property".

3.4.4 Section 62A(5)

Section 62A(5) provides:

> "(5) For the purposes of subsection (1) above, it is immaterial whether the amount of the property comprised in settlement A or settlement B (or neither) was increased as a result of the transfer or transfers of value mentioned in that subsection."

This echoes loosely the pre-existing Inheritance Tax Act 1984 section 67(2).

Normally in tax legislation, one finds references to "amount or value" of an asset or assets. "Amount" is relevant to an asset which is money or in the nature of money, whereas "value" is relevant to non-monetary assets.

In this context, however, as well as in section 67, the distinction being made is in my view a different one. "Amount" means something like " the number of items". "Value" bears its normal meaning.

16 Any more than there is (except as regards the transfer of value deemed to be made by a person immediately before his death) any rule requiring excluded property not to be taken into account in determining the value of the estate of an individual.

In my view, section 62A(5) is concerned with situations of the following type. The trustees of a settlement own a freehold subject to a valuable lease. The settlor surrenders the lease for no consideration. It could be said that there is still one item only comprised in the settlement; it is simply that it is no longer subject to a lease. However, the value of the settled property will have increased and that is quite sufficient.

Similarly, the trustees may own investments but may owe a debt to the settlor. The settlor may release the debt. The number of assets comprised in the settlement will be the same as before, as will their nature and value. However, the value of the settled property will have risen as there will no longer be a deductible debt.

In my view, section 62A(5) does no more than make explicit what would otherwise be obviously implicit.

3.4.5 Exceptions

As will be seen, section 62B provides exceptions from section 62A in certain cases. As regards lifetime transfers of value, these reflect, in different ways, the amount of the increase in value of each settlement A and settlement B. See below.

3.5 Additions Not Made by Original Settlor

It is quite clear from Inheritance Tax Act 1984 section 67 that the mere fact that the sole settlor of a settlement increases (by a chargeable transfer of value) the value of property comprised in a settlement does not mean that he has created a separate settlement.

Where, however, X adds property to a settlement created by Y, one needs to consider Inheritance Tax Act 1984 section 44 (Settlor), which provides:

> "(1) In this Act "settlor", in relation to a settlement, includes any person by whom the settlement was made directly or indirectly, and in particular (but without prejudice to the generality of the preceding words) includes any person who has provided funds directly or indirectly for the purpose of or in connection with the settlement or has made with any other person a reciprocal arrangement for that other person to make the settlement.
>
> (2) Where more than one person is a settlor in relation to a settlement

> and the circumstances so require, this Part of this Act (except section 48(4) to (6)[17]) shall have effect in relation to it as if the settled property were comprised in separate settlements."

While the wording in (1) would be wide enough to deem X to be an additional settlor of the settlement created by Y, in my view (2) will clearly override oust the application of (1) when it applies and will instead operate to deem X to be the settlor of a separate settlement.

When does subsection (2) apply? That depends on the meaning of "and the circumstances so require". My own view is that there fall to be treated as many settlements as there are settlors in every case where it would make a difference in terms of liability to inheritance tax. On that view, the words are inserted simply to remind us that there is no point applying this deeming provision if to do so would make no difference. While I appreciate that this does not give very much effect to the words "and the circumstances so require", the problem with any other interpretation is that it is totally unclear what else they could mean, especially as no guidance is given as to their meaning either here or anywhere else in the inheritance tax legislation. However, I would be the first to accept that my view is only a view and I admit that the true meaning of the clause is uncomfortably obscure.

Thus, in most cases where X adds property to a settlement created by Y, he will be deemed for inheritance tax purposes to be adding property to a separate settlement from that created by Y. That does not mean that the addition cannot be a same-day addition. However, one must apply section 62A on the basis that there are for inheritance tax purposes two separate settlements.

3.6 The Same Settlor

The requirement contained in section 62A(1)(c), namely that

> (c) that person [i.e. the person who made the transfer of value or transfers of value referred to in (a) and (b)] is the settlor of settlement A and settlement B"

must be read in the light of section 44, set out at 3.2.3 above.

In my view, the result of section 44(1) is that any person who adds property to a settlement will be *a* settlor in relation to it. However, section 44(2), which can

17 RV NOTE: these are special rules concerning excluded property.

deem what is one settlement in reality to be two or more settlements, must be borne in mind. If my view is correct, that could mean that, in most cases, if section 62A(1)(a) and (b) are satisfied, then 62A(1)(c) is automatically satisfied.

It is unlikely, however, that section 62A(1)(c) was intended to be redundant. What is not clear, however, is what further limitation on the operation of the section it is intended to impose.

One possible case is that, because the reference is to "the" rather than "a" settlor, section 62A is to be excluded where there is more than one settlor. Of course, the scope for that situation to arise may be somewhat limited, depending on what view one takes of the interpretation of section 44(2). While that is certainly a literal interpretation, it is not a very rational one.

Another possibility is where the person who made the transfers of value did not intend the value of the property comprised in one or both of the settlements in question to be increased but that increase was fortuitous. In those circumstances, it would be more than arguable that he was not, *simply on account of the transfer of value in question,* "settlor" in relation to the relevant settlement(s).

3.7 Property First Becoming Comprised in a Settlement

Section 62A(4) provides:

> "(4) The transfer or transfers of value mentioned in subsection (1) include a transfer or transfers of value as a result of which property first becomes comprised in settlement A or settlement B; but not if settlements A and B are related settlements."

The concept of a settlement which has no property comprised in it is one beyond my understanding. It is not a settlement at all. Hence, but for subsection (4), the section would prima facie not apply to a situation where either settlement A or settled B was created as a result of a transfer of value in question. The effect of subsection (4), however, is in my view that the section can apply in such a situation. The definition of "relevant period" is such that it can apply to a newly created settlement, even though the relevant period will have lasted for only a scintilla temporis.

Where neither settlement existed before the transfers of value mentioned in paragraphs (a) and (b) of subsection 1, so that are both created on the same day, they will be related settlements and so subsection (4) will on any view not apply.

That is not surprising, as section 62A is hardly needed in such a case as the inheritance tax ten-year and exit charges on the property comprised in each settlement will take into account the initial value of the property comprised in the other settlement, which will normally be roughly equal to the transfer of value as a result of which it was initially funded.

Where one of the settlements already existed but the other did not, subsection (4) is needed. Otherwise, a settlor could establish settlement A with £100 on Day 1 and on Day 2 could add, say, £300,000 to it and on the same day also establish and gift £300,000 to Settlement B and the gift to the other settlement made on that day would not have been taken into account in calculating the charge to tax on the settled property contained in the other.

What is the effect of the words "but not if settlements A and B are related settlements"? It is in my view tolerably clear that they do not prevent section 62A from applying simply because settlement A and settlement B are related settlements. If it were so prevented, that would provide an easy means of circumventing the effect of the Schedule. Their only effect, in my view, is that if the two settlements are related settlements, then subsection (4) does not apply.

3.8 Conditions (d) and (e)

Conditions (d) an (e) are similar. They require that at any point in the relevant period, all or any part of the property comprised in settlement A and Settlement B was relevant property.

The "relevant period" is defined by section 62A(3) to mean:

> (a) in the case of settlement A, the period beginning with the commencement of settlement A and ending immediately after the transfer of value mentioned in subsection (1)(a), and
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> (b) in the case of settlement B, the period beginning with the commencement of settlement B and ending immediately after the transfer of value mentioned in subsection (1)(b))."

The period in each case thus includes the moment at which the transfer of value was made. That is particularly relevant to the application of subsection (4). See above.

I have been unable fathom why these additional conditions have been included. Section 62A is not a charging section. It simply defines"same-day addition", a term used in certain other sections which are charging sections. Those other sections apply only to settled property which is relevant property at the time of the charge.

Whatever the draughtsman's intention, he has certainly provided two additional means of ensuring that there is no same-day addition on the grounds that one or other of these conditions is not satisfied.

3.9 Value of Same-Day Addition

Section 62A(2) provides:

> "(2) Where there is a same-day addition, references in this Chapter to its value are to the difference between the two values mentioned in subsection (1)(b)."

The same-day addition is in relation to settlement A. It is thus entirely logical that the value of the addition is the increase in value of the property comprised in Settlement B.

3.10 Reciprocal Effect and Overkill

Suppose a settlor makes Settlement 1 on Day 1 by gifting £100 and a Settlement 2 on Day 2 by gifting a further £100. On Day 3 he adds £300,000 cash to each by a transfer of value. Section 62A must be applied separately on the bases that

> Settlement 1 is settlement A (with Settlement 2 being settlement B) and
>
> Settlement 2 is settlement A (with Settlement 1 being settlement B).

The result is that there is a same-day addition of £300,000 in relation to Settlement 1 and a same-day addition of £300,000 in relation to Settlement 2.

This results in overkill. While I consider the position more fully below, the rate of, for example, on the first ten-year charge is determined by reference to a hypothetical settlor with a history of cumulative chargeable transfers of value (to which I shall refer as the settlor's "clock") which now include the amount of the same-day addition.

Let us assume that the settlor had made no other chargeable transfers of value than those mentioned but had exhausted his annual exemptions for the previous and current year. Let us assume that the settled property in each case remains in sterling cash and is on the ten-year anniversary worth the amount gifted.

If the settlor had simply gifted £300,100 to Settlement 1 on Day 1 and £300,100 to Settlement 2 on Day 2, then the rate of charge on the property comprised in Settlement 1 would be nil because the hypothetical settlor's clock would be nil and the value of the settled property would be less than the upper limit of the nil-rate band. By contrast, the rate of charge on the property comprised in Settlement 2 would be calculated by reference to a hypothetical transfer of value made by a settlor with £301,000 on his clock.

Prior to the coming into force of the Finance (No 20 Act 2015 amendments, the rate of the ten-year charge on each settlement would have been nil.

The result of the amendments is that there is now a charge to inheritance tax on the property comprised in both settlements equal to that which would have been charged on Settlement 2 had each settlement been made and fully funded on different days.

Thus, using the added property strategy can actually double the amount of inheritance tax payable!

3.11 More than Two Settlements Involved - More Overkill

It may be that additions are made on the same day to more than two settlements. In that case, each permutation must be considered separately. Suppose there are three settlements in involved, Settlement 1, Settlement 2 and Settlement 3. One must work out:

> the same-day addition in relation to Settlement 1 caused by the increase in value of Settlement 2 and
>
> the same-day addition in relation to Settlement 1 caused by the increase in value of Settlement 3

One must then take the value of both same-day additions into account in calculating the rate of charge to inheritance tax on Settlement 1.

One must perform corresponding exercises for each of Settlements 2 and 3.

Where additions are made to ten settlements on the same day, that means that there will be 90 separate same-day additions to be taken into account!

3.12 Same Day Additions: Exceptions

3.12.1 Section 62B(1)

Section 62B (Same day additions: exceptions) provides two sets of exceptions. The first set is contained in subsection (1), which provides:

> "(1) There is not a same-day addition for the purposes of this Chapter if any of the following conditions is met—
>
> (a) immediately after the transfer of value mentioned in section 62A(1)(a) all the property comprised in settlement A was held for charitable purposes only without limit of time (defined by a date or otherwise),
>
> (b) immediately after the transfer of value mentioned in section 62A(1)(b) all the property comprised in settlement B was so held,
>
> (c) either or each of settlement A and settlement B is a protected settlement (see section 62C), and
>
> (d) the transfer of value, or either or each of the transfers of value, mentioned in section 62A(1)(a) and (b)—
>
> (i) results from the payment of a premium under a contract of life insurance the terms of which provide for premiums to be due at regular intervals of one year or less throughout the contract term, or
>
> (ii) is made to fund such a payment."

3.12.2 Exclusively Charitable Settlements

The section 62B(1)(a) exception is bizarre. I can only explain it as a drafting error. The property comprised in an exclusively charitable settlement is not "relevant property" and it is difficult to see how it ever could become whilst remaining comprised in the settlement. Hence, whether or not there is a same-day addition in relation to that settlement will be academic.

By contrast, if there are additions to two settlements by the same settlor on the same day and one of them only is exclusively charitable then one would not expect there to be a same-day addition in relation to the other. The mischief at which the provisions are aimed is simply not present.[18] Thus, the section 62B(1)(b) condition is apt.[19]

3.12.3 Protected Settlements

The section 62B(1)(c) exception is in point where

> "(c) either or each of settlement A and settlement B is a protected settlement (see section 62(C)"

Section 62(C) (Protected settlements) provides:

"(1) For the purposes of this Chapter, a settlement is a "protected settlement" if it commenced before 10 December 2014 and either condition A or condition B is met.

(2) Condition A is met if there have been no transfers of value by the settlor on or after 10 December 2014 as a result of which the value of the property comprised in the settlement was increased.

(3) Condition B is met if—

> (a) there has been a transfer of value by the settlor on or after 10 December 2014 as a result of which the value of the property comprised in the settlement was increased, and
>
> (b) that transfer of value was the transfer of value under section 4 on the settlor's death before 6 April 2017 and it had the result mentioned by reason of a protected testamentary disposition.

(4) In subsection (3)(b) "protected testamentary disposition" means a disposition effected by provisions of the settlor's will that at the settlor's death are, in substance, the same as they were immediately before 10 December 2014."

It is crucial to determine when each settlement "commenced". In my view, there can be no settlement until there is settled property.[20] However, provided a

18 unless, perhaps, the transfer of value is made in highly exceptional circumstances such that it is not an exempt transfer of value by virtue of Inheritance Tax Act 1984 section 23.

19 I would in fact have expected section 62A(1)(a) and (b) to refer to chargeable transfers of value and not to transfers of value in general. See above. If that had been the case, neither section 62B(1)(a) nor (b) would have been necessary.

20 I have seen it suggested that a settlement can be created by settling a postage stamp. I am concerned that the *de minimis* rule might be applied to ignore settled property of trifling value.

settlement was created before 10th December 2014 it is potentially a protected settlement and will be if Condition A or Condition B is satisfied. In that regard, Inheritance Tax Act 1984 sections 44(2) and 67 need to be taken into account.

It is an interesting point whether the settlement must have remained in existence up to the time of the addition. Nothing is said expressly.

Condition A is that (2) "there have been no transfers of value by the settlor on or after 10 December 2014 as a result of which the value of the property comprised in the settlement was increased". It might be asked whether if relevant transfers of value are made after that date by someone who is not the settlor whether Condition A is still satisfied. Inheritance Tax Act 1984 section 44(2), set out at 3.5, will need to be considered.

Here again, even an exempt transfer of value will be a transfer of value.

A very important question is whether, in determining whether Condition A is satisfied, one takes into account the transfer of value referred to in section 62A(1)(a) or (b), as the case may be. This is bound up with whether the amendments are retrospective or, as HMRC would prefer to say, "retroactive". This is discussed in section 5 below. In summary, the courts have a choice between allowing a gap in this imperfectly drafted legislation or of declaring that it is retroactive and can catch arrangements made decades ago.

Condition B is in effect limited to cases where a testator had made testamentary dispositions before A Day which, when it took effect, would involve adding property to two or more settlements as a result of a transfer of value deemed to be made immediately before his death.[21] The testamentary dispositions must take effect, i.e. the testator must die, before April 6th 2017. They must be in substance the same as they were immediately before A Day.

21 Inheritance Tax Act 1984 section 4 (Transfers on death) provides:

> "(1) On the death of any person tax shall be charged as if, immediately before his death, he had made a transfer of value and the value transferred by it had been equal to the value of his estate immediately before his death."

It is possible to add value to a settlement on one's death otherwise than by virtue of this (deemed) transfer of value. In that case, it would not matter whether or not the settlement was a protected settlement.

Condition B is oddly drafted. One would expect it to read something like:

> "(3) Condition B is met if the only transfer of value by the settlor on or after 10 December 2014 as a result of which the value of the property comprised in the settlement was increased was the transfer of value under section 4 on the settlor's death before 6 April 2017 and it had the result mentioned by reason of a protected testamentary disposition."

If there has been a prior transfer of value post A Day during the settlor's lifetime, the position is less clear. HMRC would no doubt place enormous stress on the word (a) so that section 62B(3) was to be interpreted as follows:

3.12.4 Life Insurance

Section 62B(1) contains an exception the existence of which is no doubt a tribute to the effectiveness of the insurance company lobby.

> "(d) the transfer of value, or either or each of the transfers of value, mentioned in section 62A(1)(a) and (b)—
>
> > (i) results from the payment of a premium under a contract of life insurance the terms of which provide for premiums to be due at regular intervals of one year or less throughout the contract term, or
> >
> > (ii) is made to fund such a payment."

The words "the transfer of value … is made to fund such a payment at first blush looks odd but is not inept. A transfer of value is a special type of disposition: see Inheritance Tax Act 1984 section 3. In this context it will usually be a disposition consisting of the payment of money by the settlor. What makes section 62B(1)(d)(ii) look odd is the wording of section 62B((1)(d)(i), i.e. that the transfer of value in question "results from the payment of a premium under a contract of life insurance". The payment of the premium will be the transfer of value, rather than not result from it. A transfer of value will "result" from the payment only in the sense that the making of the payment will constitute a transfer of value only if certain other conditions are satisfied.

The thinking is no doubt that settlors often take out a whole of life policy of insurance on their own life which they then settle on trust while continuing to pay the premiums, which, if they are transfers of value at all,[22] may qualify for the normal expenditure out of income exemption. A variant would be for the settlor to gift the amount of the premium to the trustees and for them to pay it as owners of the policy, although why should a complex mechanism should be adopted is not clear.[23]

Many - probably most - of such transfers of value would (assuming them to be transfers of value at all) be exempt transfers of value on account of the normal expenditure out of income exemption. See Inheritance Tax Act 1984 section 21. However, that is of account in determining whether or not there is a same-day addition. See above.

The wording, however, does much wider than that and applies to every contract of life insurance where the insurance element is merely vestigial. Such policies, often referred to colloquially as "bonds", are in effect investment products with an insurance "wrapper". It applies even to offshore policies.

I would guess that what the draughtsman was trying to achieve was to require any transfer of value satisfying the conditions set out in section 62B(1)(2)(i) or (ii) to be ignored in determining whether there had been a same-day addition.

I was initially concerned that the wording "the transfer of value, or either or each of the transfers of value, mentioned in section 62A(1)(a) and (b)" was not altogether apt. It will be recalled that section 62A(1)(a) and (b) provide:

"(1) For the purposes of this Chapter, there is a "same-day addition", in relation to a settlement ("settlement A"), if—

(a) there is a transfer of value by a person as a result of which the

22 That is a rather wider question.

23 Given that the settlor will be liable under his contract with the insurer to pay the premiums, it is arguable that by simply discharging his contractual obligation he would not be making a transfer of value at all. By giving the amount of the premium to the trustees and allowing them to pay it, he is not only abandoning that argument but raising up other potential problems, by no means limited to inheritance tax, given that the trustees use of the money gifted to pay the premium would be a benefit to the settlor, in that it would discharge his contractual obligation. It might be suggested that the trustees might have taken out the policy themselves and that they would therefore be the appropriate persons to pay the premium. While that is possible in certain exceptional circumstances, the trustees would in general have no insurable interest in the life of the settlor, so they would not be able to take out a legally enforceable policy.

value immediately afterwards of the property comprised in settlement A is greater than the value immediately before,

(b) as a result of the same transfer of value, or as a result of another transfer of value made by that person on the same day, the value immediately afterwards of the property comprised in another settlement ("settlement B") is greater than the value immediately before,

…"

What did the draughtsman mean by "the transfer of value, or either or each of the transfers of value"? The words "the transfer of value" refer to the case where the transfer of value mentioned in section 62A(1)(b) is the same transfer of value as that mentioned in section 62A(1)(a). That is not problematic.

What of the words "either or each of the transfers of value"? Now there can be a maximum of two transfers of value involved. "Either" means "one of two". "Each" means "every one of two or more". Yet there cannot be more than two relevant transfers of value. So in this context "each" can only mean "both". It would have been clearer if the draughtsman had said so. Indeed, he could have simply said "either", rather than "either or each" or "either or both", as that would have had the same meaning.

It is for consideration whether the exemption might be more widely drafted than HMRC desired. Is it possible to make a transfer of value which falls within section 62B(1)(d) which either

(i) results *to some extent only* from the payment of a premium under a contract of life insurance etc. the terms of which provide for premiums to be due at regular intervals of one year or less throughout the contract term, or

(ii) is made *to some extent only* to fund such a payment?

In other words, can one add value to settlements without a same-day addition by piggy-backing onto the insurance premium exemption? While there are technical arguments to that effect, my instinct tells me that in the current judicial climate their chance of success is not high.

In order to defeat such an argument, the courts would have to construe section 62B(1)(d) (i) and (ii) as follows:

> "(i) results *only* from the payment of a premium under a contract of life insurance etc. the terms of which provide for premiums to be due at regular intervals of one year or less throughout the contract term, or
>
> (ii) is made *only* to fund such a payment"

That would mean that where, as part of a tax planning exercise or not, there was a transfer of value which only partly satisfied the conditions in either limb (i) or (ii), none of it would fall to be disregarded, even the part which, had it stood alone, would have been disregarded. That could be very important in considering whether the section 62B(2) exemption was in point. See the next section.

3.12.5 Lifetime Same-day Additions Below Threshold

3.12.5.1 Section 62B(2) and (3)

Section 62B(2) provide:

"(2) If the transfer of value, or each of the transfers of value, mentioned in section 62A(1) is not the transfer of value under section 4 on the settlor's death, there is a same-day addition for the purposes of this Chapter only if conditions A and B are met.

(3) Condition A is that—

(a) the difference between the two values mentioned in section 62A(1)(a) exceeds £5,000, or

(b) in a case where there has been more than one transfer of value within section 62A(1)(a) on the same day, the difference between—

(i) the value of the property comprised in settlement A immediately before the first of those transfers, and

(ii) the value of the property comprised in settlement A immediately after the last of those transfers, exceeds £5,000.

(4) Condition B is that—

(a) the difference between the two values mentioned in section 62A(1)(b) exceeds £5,000, or

(b) in a case where there has been more than one transfer of value within section 62A(1)(b), the difference between—

(i) the value of the property comprised in settlement B immediately before the first of those transfers, and

(ii) the value of the property comprised in settlement B immediately after the last of those transfers, exceeds £5,000."

3.12.5.2 General Comment on Section 62B(2).

Both of the transfers of value must be lifetime transfers.

Given the wording of section 62B(2), there is no same-day addition if either Condition A is not met or Condition B is not met.

Condition A refers to the settlement in question, settlement A, while condition B refers to the other settlement, settlement B. The two conditions are couched in identical terms, mutatis mutandis.

3.12.5.3 Condition A

Condition A is that

"(a) the difference between the two values mentioned in section 62A(1)(a) exceeds £5,000, or

(b) in a case where there has been more than one transfer of value within section 62A(1)(a) on the same day, the difference between—

(i) the value of the property comprised in settlement A immediately before the first of those transfers, and

(ii) the value of the property comprised in settlement A immediately after the last of those transfers, exceeds £5,000."

Let us first consider the simple position, which will be the most usual, that there has been only one transfer of value within section 62A(1) in relation to the settlement which is settlement A. Provided that the increase in value of the property comprised in settlement A is not greater than £5,000, then condition A will be satisfied so that there is no same-day addition as regards that settlement on that day. It should be borne in mind that what counts is the increase in value of the settled property, not the value transferred by the transfer of value. In many cases, they will no doubt the same. Yet they may not be. One can be greater than the other.

The second limb of Condition A caters for there being on the same day more than one transfer of value falling within section 62A(1)(a), in relation to settlement A. It logically and understandably requires us to look as at the day at the increase in the value of the property comprised in settlement A in consequence of the two or more transfers of value. It do not find it problematic.

It might be asked whether Condition A could be exploited so at to circumvent the Finance (No 2) Act 2015 changes by making additions of no more than £5,000 per settlement to several settlements on successive days. With ten settlements, one could gift over £18,000,000 p.a. in that way. I do not myself see this as being feasible, simply because any chargeable transfer of values made on previous days would be taken into account in calculating the rate of inheritance tax on any of the settlements.

It might be asked whether one could create, say, with a modest amount 60 settlements on successive days and then add £5,000 cash to each on some later day. While this is possible, prima facie the cost and administrative complexity could be considerable and could well be disproportionate to the tax saving. Some clever counsel might, of course, be able to find a way to combat this downside …

By contrast, there is some considerable scope for relying on Condition A in precisely those circumstances where the amendments result in overkill and are not needed in order to counteract the mischief at which they are aimed. Taxpayers might well consider that they are morally justified in engaging in such plan and might well feel confident that the chance of the GAAR being successfully invoked would, in such circumstances, be remote.

3.12.5.4 Condition B

Condition B is that

“(a) the difference between the two values mentioned in section 62A(1)(b) exceeds £5,000, or

(b) in a case where there has been more than one transfer of value within section 62A(1)(b), the difference between—

(i) the value of the property comprised in settlement B immediately before the first of those transfers, and

(ii) the value of the property comprised in settlement B immediately after the last of those transfers, exceeds £5,000."

This is identical, mutatis mutandis, to Condition A. The result should be that, where the two settlements referred to in section 62A are Settlement 1 and Settlement 2, if Condition A is satisfied as regards Settlement 1 then Condition B should be satisfied as regards Settlement 2 and if Condition A is satisfied as regards Settlement 2 then Condition B should be satisfied as regards Settlement 1. In other words, provided the settled property comprised in either settlement does not increase in value by more than £5,000 on the same day as a result of a relevant transfer of value, there will not, on that account, be a same-day addition in relation to either settlement.

3.12.5.5 Premiums on Policies of Life Insurance

Where a relevant transfer of value in part satisfies section 62B(1)(d) and in part does not, I am concerned that the Courts may hold that it does not satisfy section 62B(1)(d) at all. Worse still, one cannot in my view ignore the increase in the value of the settled property in so far as referable to the payment of the premium or the gift made to enable to premium to be paid. In particular it would be taken into account for section 62B(2) and (3) purposes.

3.12.5.6 Multiple Settlements

Where there are two or more settlements involved one must apply section 62A separately in relation to each settlement. Where there are three or more settlements involved, one must consider section 62A separately in relation to each particular settlement as being Settlement A but also in relation to each of the other settlements as being Settlement B.

The consequence is that when seeing if the section 62B(2) exemption is in point, the £5,000 limit is applied separately as regards each permutation.

4. Calculating the Rate of Inheritance Tax: Importance of Same-day Additions

4.1 Overview

There is a ten-year charge on settled property which is relevant property on each ten-year anniversary of a settlement. See Inheritance Tax Act 1984 section 64.

There is in general an "exit" charge to inheritance tax when relevant property comprised in a settlement ceases to be such or, in certain cases, when its value is reduced. See Inheritance Tax Act 1984 section 65. The exit charge is calculated in different ways depending on whether it is before or after the first ten-year anniversary.

The rate of charge is determined by Inheritance Tax Act 1984 sections 66, 68 and 60 respectively. Each of those has been amended by Finance (No 2) Act 2015.[24]

4.2 Charges on First Ten-Year Anniversary

Inheritance Tax Act 1984 section 66 (Rate of ten-yearly charge) now provides:[25]

"(1) Subject to subsection (2) below, the rate at which tax is charged under section 64 above at any time shall be three tenths of the effective rate (that is to say the rate found by expressing the tax chargeable as a percentage of the amount on which it is charged) at which tax would be charged on the value transferred by a chargeable transfer of the description specified in subsection (3) below.

(2) Where the whole or part of the value mentioned in section 64 above is attributable to property which was not relevant property, or was not comprised in the settlement, throughout the period of ten years ending immediately before the ten-year anniversary concerned, the rate at which tax is charged on that value or part shall be reduced by one-fortieth for each of the successive quarters in that period which expired before the property became, or last became, relevant property comprised in the settlement.

(2A) Subsection (2) above does not apply to property which is regarded as relevant property as a result of section 64(1A) (and accordingly that property is charged to tax at the rate given by subsection (1) above).

(3) The chargeable transfer postulated in subsection (1) above is one—

(a) the value transferred by which is equal to an amount determined in accordance with subsection (4) below;

24 Section 67 (Added property, etc) has not been amended. However, the changes made to the other sections can have a knock-on effect on the operation of this section.

25 I have italicised amendments and struck through deletions made, in each case by Finance (No 2) Act 2015.

(b) which is made immediately before the ten-year anniversary concerned by a transferor who has in the preceding seven years made chargeable transfers having an aggregate value determined in accordance with subsection (5) below; and

(c) on which tax is charged in accordance with section 7(2) of this Act.

"(4) The amount referred to in subsection (3)(a) above is equal to the aggregate of—

(a) the value on which tax is charged under section 64 above;

~~(b) the value immediately after it became comprised in the settlement of any property which was not then relevant property and has not subsequently become relevant property while remaining comprised in the settlement; and~~

(c) the value, immediately after a related settlement commenced, of the property then comprised in it;

(d) the value of any same-day addition; and

(e) where—

(i) an increase in the value of the property comprised in another settlement is represented by the value of a same-day addition aggregated under paragraph (d) above, and

(ii) that other settlement is not a related settlement,

the value immediately after that other settlement commenced of the relevant property then comprised in that other settlement;

but subject to subsection (6) below.

(5) The aggregate value referred to in subsection (3)(b) above is equal to the aggregate of—

(a) the values transferred by any chargeable transfers made by the settlor in the period of seven years ending with the day on which the settlement commenced, disregarding transfers made on that day or before 27th March 1974, and

(b) the amounts on which any charges to tax were imposed under section 65 above in respect of the settlement in the ten years before the anniversary concerned;

but subject to subsection (6) and section 67 below.

(6) [Applies only in relation to a settlement which commenced before 27th March 1974 and is not amended]"

The deletion of subsection (4)(b) has nothing to do with same-day additions and is a long-overdue simplification of the section.

The core change is thus in calculating the value transferred by the hypothetical transfer of value and in particular the addition of (4)(d) and (e) in calculating the amount of the value transferred. The greater the value transferred the greater the greater the rate of charge to inheritance tax on the hypothetical transfer of value until, of course, the rate of 20% (for a lifetime transfer made more than seven years before death) is reached. Hence, the maximum rate of the ten-year charge is still 6% of the value of the property brought in to charge.

The addition of (4)(d) means that one increases the value transferred by the hypothetical transferor by the amount of any same-day addition in relation to the settlement in question. It will be recalled that

Will subsection (4)(d) refers to "the value of *any* same-day addition", in my view it is most likely to be interpreted to mean "the value of any *and every* same-day addition" i.e. all same-day additions in relation to the settlement in question will be aggregated. It will be recalled that the value of a same-day addition is the increase in the value of the property comprised in some other settlement. Thus, the net effect is in general that the inheritance tax chargeable on the hypothetical transfer of value will be calculated on the basis that the value transferred by the transfer of value which gave rise to the increase in value of the property comprised in the other settlement is increased occurred at least one day before the day of the same-day addition (but within the period of seven years ending on that day), i.e. that it is, after all, taken into account in calculating the rate of inheritance tax on the settlement the property in which is being charged to inheritance tax.

As mentioned, that is not strictly accurate, as what is taken into account is not the value transferred by the transfer of value whereby the value of the other settlement was increased but the value of that increase, which may or may not be the same.

Overkill results from the facts that

(a) the transfer of value whereby the value of the settled property comprised in the other settlement was increased may not have been a chargeable transfer of value and / or

(b) when it comes to charging inheritance tax on relevant property comprised in the other settlement, the increase in value of the property comprised in the first settlement is also taken into account, thus in general increasing the overall amount of inheritance tax due as compared with the position if the transfers of value had been made on separate days.

Thus, unless undertaken under specialist advice, same-day additions can now be positively pernicious, even where there was no tax planning motive involved.

I find the new subsection (4)(e) bizarre beyond measure:

> "(e) where—
>
> (i) an increase in the value of the property comprised in another settlement is represented by the value of a same-day addition aggregated under paragraph (d) above, and
>
> (ii) that other settlement is not a related settlement,[26]
>
> the value immediately after that other settlement commenced of the relevant property then comprised in that other settlement;"

I cannot see any rhyme or reason in this.

If settlement B was made at before Settlement A, then any chargeable transfer of value involved in the initial funding of Settlement B will in any case have been taken into account in determining the rate of inheritance tax on relevant property contained in Settlement A. If any chargeable transfer of value involved on the creation of Settlement B were not taken into account, e.g. because made more than seven years before the creation of Settlement A, then I do not see why it should be taken into account by subsection (4)(e). If and to the extent that Settlement B was initially funded otherwise than by a transfer of value which was or turned out to be a chargeable transfer of value, again, there is no reason why the initial value of property comprised in Settlement B should be taken into account in taxing Settlement A.

If settlement B was made after Settlement A, then I do not see why any chargeable transfer of value involved in the initial funding of Settlement B should be taken

26 If it were a related settlement, i.e. made on the same, then the initial value of the settled property comprised in it would in event be taken into account. See subsection (4)(c). That was always unjust and a trap which any astute practitioner would have been careful to avoid, which, like so many tax traps, could be done easily, provided one was aware of it.

into account in determining the rate of inheritance tax on relevant property contained in Settlement A.

The moral is thus again that, unless undertaken under specialist advice, same-day additions can now be positively pernicious, even where there was no tax planning motive involved.

4.3 Exit Charge Following First Ten-Year Anniversary

Inheritance Tax Act 1984 section 69 (Rate between ten-year anniversaries) has been substantially amended by Finance (No 2) Act 2015, although the amendments are not quite as substantial as they might at first blush appear. It now reads:[27]

"(1) Subject to subsection (2) below, the rate at which tax is charged under section 65 above on an occasion following one or more ten-year anniversaries after the settlement's commencement shall be the appropriate fraction of the rate at which it was last charged under section 64 (or would have been charged apart from section 66(2)).

~~(2) If at any time before the occasion of the charge under section 65 and on or after the most recent ten-year anniversary—~~

~~(a) property has become comprised in the settlement, or~~

~~(b) property which was comprised in the settlement immediately before the anniversary, but was not then relevant property, has become relevant property,~~

~~then, whether or not the property has remained comprised in the settlement or has remained relevant property, the rate at which tax is charged under section 65 shall be the appropriate fraction of the rate at which it would last have been charged under section 64 (apart from section 66(2)) if immediately before that anniversary the property had been relevant property comprised in the settlement with a value determined in accordance with subsection (3) below.~~

(2) Subsection (2A) below applies—

(a) if, at any time in the period beginning with the most recent ten-year anniversary and ending immediately before the occasion of the charge under section 65 above (the "relevant period"), property has become comprised in the settlement which was relevant property immediately after it became so comprised, or

27 text deleted is ~~struck through~~ and text added is *italicised*.

(b) if—

(i) at any time in the relevant period, property has become comprised in the settlement which was not relevant property immediately after it became so comprised, and

(ii) at a later time in the relevant period, that property has become relevant property, or

(c) if property which was comprised in the settlement immediately before the relevant period, but was not then relevant property, has at any time during the relevant period become relevant property.

(2A) Whether or not all of the property within any of paragraphs (a) to (c) of subsection (2) above has remained relevant property comprised in the settlement, the rate at which tax is charged under section 65 is to be the appropriate fraction of the rate at which it would last have been charged under section 64 above (apart from section 66(2) above) if—

(a) immediately before the most recent ten-year anniversary, all of that property had been relevant property comprised in the settlement with a value determined in accordance with subsection (3) below, and

(b) any same-day addition made on or after the most recent ten-year anniversary had been made immediately before that anniversary.

(3) In the case of property within subsection (2)(*a*) above ~~which either—~~

~~(a) was relevant property immediately after it became comprised in the settlement, or~~

~~(b) was not then relevant property and has not subsequently become relevant property while remaining comprised in the settlement,~~

the value to be attributed to it for the purposes of subsection (2*A*) above is its value immediately after it became comprised in the settlement; and in any other case the value to be so attributed is the value of the property when it became (or last became) relevant property.

(4) For the purposes of this section the appropriate fraction is so many fortieths as there are complete successive quarters in the period beginning with the most recent ten-year anniversary and ending with the day before the occasion of the charge; but subsection (3) of section 68 above shall have effect for the purposes of this subsection as it has effect for the purposes of subsection (2) of that section."

It will be seen that the starting point is the rate of charge at the last ten-year anniversary. Any same-day additions made before (and, possibly, on) that date will normally have been taken into account in calculating that rate of charge.

There appears, however, to be a very significant loophole which could continue to be operative for several years. Where the last ten-year anniversary occurred before the day the Finance (No 2) Act 2015 became law, no same-day addition occurring before that day will have been so taken into account. By contrast, same-day additions made after the last ten-year anniversary will, as will be seen, be taken into account, even if made before Finance (No 2) Act 2015 became law.

Under the pre-Finance (No 2) Act 2015 law, an adjustment was made where there had been a material change since the last ten-year anniversary. If property had, during that period, become relevant property, whether by being added to the settlement or by being converted from non-relevant property, then its value at that time was taken into account. The ten-year charge was re-calculated (for the purpose only of determining the rate of the exit charge) by deeming settled property of that value to have been comprised in the settlement immediately before the anniversary, thus potentially increasing the rate of charge.

Post Finance (No 2) Act 2015 there is still an adjustment but it computed in a slightly different way. There are now two sets of adjustments. The first set is similar to the old except that property which was added to the settlement since the last ten-year anniversary which has never been relevant property is now to be ignored.

The second set of adjustments concerns same-day additions. For the purpose only of calculating the rate of the exit charge following a ten-year anniversary, any same-day addition made on or after that anniversary is deemed to have been made before it. While the position is not entirely clear, it is probable that this does not affect the value of the same-day addition. Suppose, for example, that a lottery ticket is worth £1 immediately before the ten-year anniversary but a week later turns out to be the winning ticket and worth £1,000,000. Before it is cashed in, it is contributed to another settlement under circumstances such that it is a same-day addition in relation to the settlement in question. In my view, the deeming provision operates to deem the settled property to have been worth £1,000,000, not £1, more immediately before the last ten-year anniversary.

4.4 Exit Charge Before First Ten-Year Anniversary

The rate of the exit-charge before the first ten-year anniversary is determined by Inheritance Tax Act 1984 section 68 (Rate before first ten-year anniversary) which provides, as amended by Finance Act No 2 2015:

"(1) The rate at which tax is charged under section 65 above on an occasion preceding the first ten-year anniversary after the settlement's commencement shall be the appropriate fraction of the effective rate at which tax would be charged on the value transferred by a chargeable transfer of the description specified in subsection (4) below (but subject to subsection (6) below).

(2) For the purposes of this section the appropriate fraction is three tenths multiplied by so many fortieths as there are complete successive quarters in the period beginning with the day on which the settlement commenced and ending with the day before the occasion of the charge, but subject to subsection (3) below.

(3) Where the whole or part of the amount on which tax is charged is attributable to property which was not relevant property, or was not comprised in the settlement, throughout the period referred to in subsection (2) above, then in determining the appropriate fraction in relation to that amount or part—

(a) no quarter which expired before the day on which the property became, or last became, relevant property comprised in the settlement shall be counted, but

(b) if that day fell in the same quarter as that in which the period ends, that quarter shall be counted whether complete or not.

(4) The chargeable transfer postulated in subsection (1) above is one—

(a) the value transferred by which is equal to an amount determined in accordance with subsection (5) below;

(b) which is made at the time of the charge to tax under section 65 by a transferor who has in the period of seven years ending with the day of the occasion of the charge made chargeable transfers having an aggregate value equal to that of any chargeable transfers made by the settlor in the period of seven years ending with the day on which the settlement commenced, disregarding transfers made on that day or before 27th March 1974; and

(c) on which tax is charged in accordance with section 7(2) of this Act.]1

(5) The amount referred to in subsection (4)(a) above is equal to the aggregate of—

(a) the value, immediately after the settlement commenced, of the *relevant* property then comprised in it;

(b) the value, immediately after a related settlement commenced, of the "relevant" property then comprised in it; and

~~(c) the value, immediately after it became comprised in the settlement, of any property which became so comprised after the settlement commenced and before the occasion of the charge under section 65 (whether or not it has remained so comprised).~~

(c) the value, immediately after it became comprised in the settlement, of property which—

(i) became comprised in the settlement after the settlement commenced and before the occasion of the charge under section 65 above,

and

(ii) was relevant property immediately after it became so comprised,

whether or not the property has remained relevant property comprised in the settlement:

(d) the value, at the time it became (or last became) relevant property, of property which—

(i) was comprised in the settlement immediately after the settlement commenced and was not then relevant property but became relevant property before the occasion of the charge under section 65 above, or

(ii) became comprised in the settlement after the settlement commenced and before the occasion of the charge under section 65 above, and was not relevant property immediately after it became comprised in the settlement, but became relevant property before the occasion of the charge under that section,

whether or not the property has remained relevant property comprised in the settlement;

(e) *the value of any same-day addition; and*

(f) *where—*

(i) *an increase in the value of the property comprised in another settlement is represented by the value of a same-day addition aggregated under paragraph (e) above, and*

(ii) *that other settlement is not a related settlement,*

the value immediately after that other settlement commenced of the relevant property then comprised in that other settlement.

(6) [Applies only where the settlement commenced before 27th March 1974. It was not amended by Finance Act No 2 2015]"

The rate is again based on a hypothetical transfer of value. Before Finance Act No 2 2015, the value transferred was simply the initial value of the property comprised in the settlement and related settlement plus the value when it became comprised in the settlement of any property later added to the settlement.

The net effect of the replacement of the former section 68(5)(c) and the new section 68(5)((c)and (d) is that property, whether originally comprised in the settlement or a related settlement or added to the settlement after it was created, is no longer taken into account if it has at no stage been relevant property. If it has, then one takes its value into account as at the time it (first) became relevant property. That change, taken by itself, can thus result in reduction in the rate of exit charge.

It is the new paragraphs (e) and (f) which relate to same-day additions. (e) requires one to take into account the value of any same-day addition. That corresponds to the amendments made to the calculation of ten-year anniversary charge and an exit charge following a ten-year anniversary. See above.

(f) corresponds to the amendment made to the calculation of a ten-year anniversary charge (and, by way of knock-on effect, to an exit charge following a ten-year anniversary). It is as bizarre, capricious and unfair in this context as it is in that. See my comments above.

5 Retrospective Effect of Finance (No 2) Act 2015 Amendments?

A most important question is whether the Finance (No 2) Act 2015 changes made to Inheritance Tax Act 1984 Part III are retrospective. They are not, of course, retrospective in the strict sense as they do not affect or impose charges on settled property on or as at a date before that Act was passed. See Schedule 1 paragraph 7:

> "7 The amendments made by this Schedule have effect in relation to occasions on which tax falls to be charged under Chapter 3 of Part 3 of IHTA 1984 on or after the day on which this Act is passed."

The vital question is whether the amendments are what might be termed retroactive in that they apply to same-day additions made before - possibly decades before - the Act was passed. While that would not be "cricket", it is entirely within the competence of Parliament. And as for a Human Rights Act challenge, any one of any sense will have realised by now that the Act, and the Convention it incorporates, exist principally for the benefit of criminals, fraudsters, spongers, scroungers and others seeking benefits out of public funds. For the economically productive taxpayer, it offers only scant protection against the potentially oppressive organs of the State.

I fear that there is a substantial risk that Schedule 1 of Finance Act No 2 2015 will be interpreted as being retroactive. In essence, the reasoning would be that the provisions relating to protected settlements (see 3.12.13 above) presuppose that it is and offer only limited relief where the settlement is a protected settlement.

The Schedule is clearly intended in all cases to apply to same-day additions made on or after 10th December 2014, to which I shall refer as "A Day". No doubt the thinking is that the proposals were sufficiently advanced by them to justify choosing that as the relevant date from which they are fully operative.

Condition B is not relevant to the present discussion as it applies only where there is a same-day addition on or after A Day.

It is Condition A which is important in the present context. It is contained in section 62C(2) and provides:

> "(2) Condition A is met if there have been no transfers of value by the settlor on or after 10 December 2014 as a result of which the value of the property comprised in the settlement was increased."

There are two possible interpretations of this. The first is the ordinary and natural meaning. Suppose a settlor set up ten pilot trusts with £100 each on ten separate days in 2013. In 2015, he adds £300,000 cash to each on the same day. The words "there have been" use the perfect tense of the verb "to be" and require one to ask at the relevant point, namely the time when one is considering whether there is a same-day addition, whether there has, before that addition, been a relevant transfer of value on or after A Day.

HMRC would no doubt argue that the problem with the ordinary and natural meaning is that it enables taxpayers still to engage in the planning which the Schedule is intended to render ineffective. They can in general do it only once in relation to each settlement, but that will usually be quite enough. They may happen to be prevented from implementing the strategy if, by sheer accident, they have made some other relevant transfer of value on or after A Day, but such cases would be rare and fortuitous. HMRC would therefore argue that the construction in accordance with the ordinary and natural meaning of the words is one which Parliament cannot have intended and that the Courts should assume that the wording is attributable to the incompetence of those in HMRC responsible for proposing it and the Parliamentary draughtsman who signed off on it.
HMRC would then need to offer an alternative construction of Condition A. I imagine the argument would proceed in something like the following fashion.

> "One asks whether a settlement is a "protected settlement" at the time it is relevant to ascertain whether there is a same-day addition in respect of it, e.g. on the occasion of a ten-year anniversary of the settlement when there is relevant property comprised in it. One asks the question whether there "have been no transfers of value by the settlor on or after 10 December 2014 as a result of which the value of the property comprised in [a relevant] settlement was increased" as at that date. One does not ask the question whether there has been such a transfer of value on the day the conditions contained in section 62A(1) are satisfied in respect of it. Hence, the use of the perfect tense is entirely appropriate and allows one to take into account a transfer of value which itself gave rise to a same-day addition."

HMRC would also have to accept - no doubt they would be delighted to do so - that a same-day addition could be made before the Finance (No 2) Act 2015 came into force and before A Day. For otherwise, on their view the concept of a protected settlement would be redundant, as there could never be a situation where there had been a same-day addition on or after A Day but the settlement was a protected settlement.

The result of this argument would thus be that the Act would be retroactive.

HMRC's view is not without problems. It would follow that whether or not there had been a same-day addition in relation to a settlement on a particular day could not be determined at the end of that day but only later and could change over a period of time. For example, if there had been no relevant transfer of value occurring after A Day and on or before a ten-year anniversary on, say, December 1st 2015, but there had been one after that date and before December 1st 2025, the settlement would be a protected settlement on December 1st 2015 but would not be a protected settlement on December 1st 2025, so that a same-day addition made, say, in 1990 could be taken into account in calculating the rate of tax on the latter charge but not on the former.

The problem with this consequence is that it does considerable violence to the opening words of both section 62A(1) and section 62B(1), each of which uses the present tense "there is" and not words indicating or including a previous event such "there is or has been or is deemed to have been". It also introduces a "wait-and-see" test without any express language indicating that it is doing so.

Whether or not the provisions will be held to be retroactive will thus depend on the extent to which the courts will be prepared to do violence to the ordinary and natural meaning of the words in order to ensure that the provisions are as effective as they would have been had they been competently drafted, even if that means that they catch planning which was perfectly effective when entered into, perhaps decades ago.

6. Conclusions

6.1 General Nature of Advice

In this section, I lay down general rules. It may be possible in certain cases to depart from them. Indeed, is specialist advice has been taken as to tax-efficient funding of settlements, it may even be necessary to depart from them. My advice, however, that there should be departure from these general rules only if those involved know exactly what they are doing.

6.2 The General Rules

General Rule 1: the creation of more than one settlement (for inheritance tax purposes) by the same settlor on the same day is to be avoided.

General Rule 2: an addition should not be made to more than one settlement (for inheritance tax purposes) by the same settlor on the same day.

6.3 Vanilla Planning

Making a relevant property settlement by each settlor not more than once every seven years can be inheritance tax efficient.

6.4 Sophisticated Planning

Because the provisions are defectively drafted, it is possible, with the aid of specialist advice, to continue to make an unlimited number of multiple settlements, the charge to inheritance tax on each on which should be at a nil rate throughout their lifetime.

In particular, provided appropriate steps are taken during the lifetime of a person, the transfers of value he makes which are referable to the funding of multiple settlements can be made only on his death. That is particularly appropriate if he would in any event be making a chargeable transfer of value on his death (e.g. the spouse exemption is not in point).