

BORIVALI (CENTRAL) CPE STUDY CIRCLE OF WIRC, ICAI

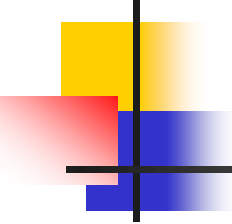
Navigating Family Dynamics with a well designed Family charter, Business Succession – Tax & Regulatory Aspects & Legal Issues in Business & Wealth Succession



Business Succession – Tax & Regulatory Aspects

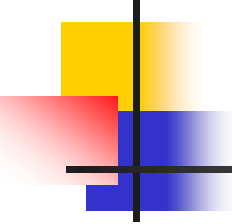
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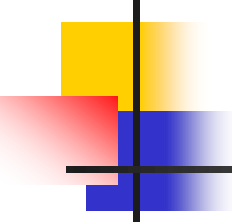
Overview of Presentation

- Objectives of Succession Planning
- Issues involved in Succession Planning
- Methods / Structures for Succession Planning
- Taxation of Legal Representative & Executor
- Brief on various structures for succession planning
- Concept of Trust – Types & Purposes
- Overview of the Indian Trust Act, 1882
- Application and uses of trust for Estate Planning
- Trust & Taxation: Onshore & Offshore
- Connecting factors and tax events (Domestic & International)
- Taxation of Onshore & Offshore Trust



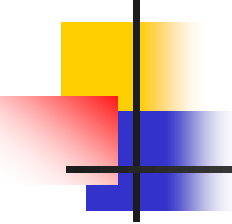
Overview of Presentation

- Status of a Trust
- Taxation of Trust under ITA, 1961
- Judicial Precedents
- Anti avoidance provisions
- Life cycle of a Trust
- Other provisions Pertaining to Trust
- Case Study – Offshore Trust
- MLI's Position on Trusts
- FEMA Aspects of a Trust



Succession Planning - Objectives

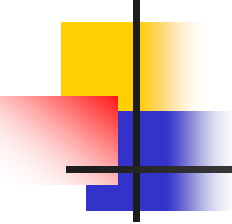
- Objectives of having a proper succession plan -
 - Continue family legacy by passing accumulated wealth and established family business to the next generation;
 - Estate protection (e.g. ensuring protection against bankruptcy/Creditors Attack etc for beneficiaries);
 - Protects inheritance if the relationship fails such as Failed Marriage Etc
 - Minimises the risk of any claims against your estate;
 - Ensures I. no unforeseen tax consequences; II Incapacity by POA
 - Transfer of Business to Next Generation who are capable and has interest



Vexing issues requiring Succession Planning

- Problems & Issues -

- Dilemma on how to share and in what Proportion
- What about succession of Business entities? Should it go only to the son/s?
- Ensure that Wife , aged father / mother are protected
- What if a son / daughter is incapable of handling or managing his / her affairs /
- In case of Business entities / assets, approach?
- Charity
- Lastly, reduced dependency on the whims of your children?



Methods / Structures / Instruments for Succession Planning

- Varied methods of Implementing Succession Plan
 - WILL & NOMINATION
 - GIFT DEED
 - HUF
 - PARTNERSHIP FIRM or LLP
 - FAMILY ARRANGEMENT
 - PRIVATE TRUST



Methods and Types of Assets

- Different kinds / types of assets -
 - Co-ownership
 - Family business
 - Joint Bank accounts
 - Nomination
 - Joint business in individual names only
- This arrangement is carried out through –
 - Will vs Partnership Firm
 - Will vs Company's shares
- Laws governing such instruments –
 - Company Law, LLP Act, etc.

Taxation of Legal Representative vs Executor

Section 159-Legal Rep

Legal Representative is liable for the deceased income up to the date of death

Where a person dies, his legal representative shall be liable to pay any sum which the deceased would have been liable to pay if he had not died, in the like manner and to the same extent as the deceased.

Section 159(2)(a) provides for continuation of proceedings against the legal representatives when initiated against the assessee when he was alive.

Sub-section 3 of Section 159 provides that the legal representative of the deceased shall for the purpose of the Act be deemed to be an assessee.

Section 168-Executors

Executor is liable to tax on the income of the estate of the deceased i.e. from the date of death to the date of distribution

Income from deceased person's estate will be Taxed in hands of executor NOT as representative but in his own right from the date of death to the date of complete distribution of the estate to the beneficiaries

If one Executor: Taxed as an individual
More than one Executor: Taxed as an AOP/BOI
Residential status of the Executor will be based on the residential status of the deceased in the year of death.

Assessment of an Executor will be treated separately from assessment made on his personal income. Separate Income Tax Returns will have to be filed by the executor, one in the capacity of executor and other in personal capacity



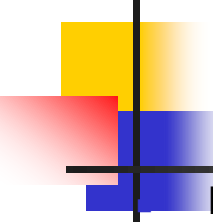
S.159 :Legal Rep-Judicial Precedents

- The liability of the legal representative is limited to the estate of the deceased which has come into his possession, if any, and is not personal - *Union of India v. Mrs. Sarojini Rajah* [1974] 97 ITR 37 (Madras HC), *Hasmukhlal v. ITO* [2001] 251 ITR 511 (MP HC)
- Non-service of notice for assessment on all legal representatives of the deceased assessee is a mere irregularity and therefore will not lead to cancellation of assessment proceedings - *CIT v. Jai Prakash Singh* [1996] 219 ITR 737 (SC)
- A notice for reassessment cannot be issued on the legal representative in respect of previous year subsequent to the death of the deceased - *ITO v. Maramreddy Sulochanamma* [1971] 79 ITR 1(SC), *Lal Chand Verma v. Union of India* [2025]170 taxmann.com 825 (Delhi HC)
- An assessment cannot be made on a dead person and, if so made, would amount to nullity - *CIT v. Amarchand N Shroff* [1963] 48 ITR 59 (SC), *Amjad Ahmed Shaikh v. ITO* [WP 744 of 2025] (Bombay HC)
- Recovery and penalty proceedings can be taken against the legal representatives - *ITO v. E. Alfred* [1962] 44 ITR 442 (SC), *ITO v. T.M.K. Abdul Kassim* [1962] 46 ITR 149 (SC)



S.168 : Executors-Judicial Precedents

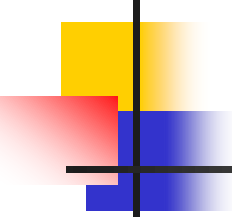
- Section 168 of the Act is applicable only in testamentary succession (succession as per instructions outlined in will) and not in intestate succession (succession where a person dies without leaving a last will or testament) - *CIT v. Smt. Dhanalakshmi [1995] 215 ITR 662 (Madras HC), CIT v. P. Manonmani [2000] 245 ITR 48 (Madras).*
- Losses of earlier years carried forward in the hands of the deceased person can be set off against the income of the estate - *CIT v. G.B.J. Seth [1981] 133 ITR 192 (Madras HC)*
- Legal Heirs are assessable only after distribution, executors would be assessed till distribution - *CIT v. Mrs. A. Ghosh [1986] 159 ITR 124 (Calcutta HC)*
- Capacity of the executor to represent estate derived under Will does not depend on whether probate is obtained - *ITO v. Suseela Sadanandan [1965] 57 ITR 168 (SC)*



Succession Planning-Nomination

Nomination of assets in India is a legal facility allowing an owner to appoint a person (nominee) to receive their financial assets primarily covering bank accounts, securities, mutual funds, insurance policies, and co-operative society shares upon their death.

- As per Section 72 of the Companies Act, 2013 every holder of securities of a company may, at any time, nominate, in the prescribed manner, any person to whom his securities shall vest in the event of his death.
- As per Section 72(3) of the Companies Act, 2013 Notwithstanding anything contained in any other law for the time being in force or in any disposition, whether testamentary or otherwise, in respect of the securities of a company, where a nomination made in the prescribed manner purports to confer on any person the right to vest the securities of the company, the nominee shall, on the death of the holder of securities or, as the case may be, on the death of the joint holders, become entitled to all the rights in the securities, of the holder or, as the case may be, of all the joint holders, in relation to such securities, to the exclusion of all other persons, unless the nomination is varied or cancelled in the prescribed manner.
- Nomination ensures that your investments go directly to the chosen individual(s), reducing delays and legal hurdles. Avoids court intervention.



Succession by Nomination

NOMINATION VS TESTAMENTARY SUCCESSION-Merely a Trustee for beneficiary

- Whether rights in shares, debentures would pass on death of holder to nominee of such shares or to legal heirs of deceased - Held that rights of heirs override those of a nominee. A nominee is only a convenience to enable the company or bank or insurance company to discharge its obligation. However, the nominee can only hold the proceeds as a trustee for the rightful heirs of the deceased whether under intestate law or under a valid Will - *Shakti Yezdani & Anr. v. Jayanand Jayant Salgaonkar & Ors. [Civil Appeal No. 7107 of 2017] (SC)*
- ***Nominee is under obligation to Legal heirs or the beneficiaries of the will***

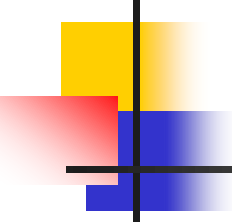
Tax on Income on assets held by nominee

- Nominee- Mere trustee of estate / legal heirs.
- Income belongs to estate / legal heirs.
- Nomination under co's Act only refers to ownership for himself or another behalf but does not decide as to Succession and Legal representative ,nor it is the Act to decide the heirship



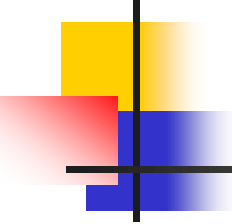
Nominee vs Legal Representative vs Executor

	Nominee	Legal representative	Executor
Meaning	A person appointed to receive assets on behalf of the Legal heirs after death	A person legally recognized to represent the deceased's estate	A person named in a will to carry out the deceased's wishes
Appointed by	The asset holder (during lifetime, e.g., bank account, insurance)	Court or by law (based on succession laws)	The deceased (through a valid will)
Role	Acts as a trustee/custodian of the asset	Handles legal matters of the estate as the owner	Executes instructions in the will
Ownership rights	Does not become the final owner (unless also legal heir)	Represents estate but distributes to legal heirs	Distributes assets as per will
Key Function	Temporary holder of assets	Legal handler of estate. Liable for the deceased income up to the date of death	Implementer of will. liable to tax on the income of the estate of the deceased i.e. from the date of death to the date of distribution.



Issues – Nominee, Executor, Joint Holder

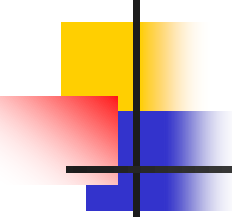
- What is the Liability of a Nominee when an Executor is appointed as different Person in the will? Who will be responsible for distribution of the assets?
- In case of a Nominee what is the status of a joint holder- who will receive the asset?



Succession Planning

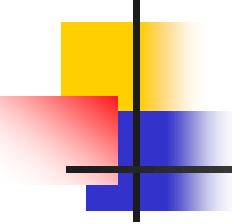
– A WILL

- Succession after a death of a person, under a Will is called testamentary succession
- Succession without a Will is called intestate succession-Personal law Applies
- Will is prepared during the lifetime of a testator and conveys wishes of Transfer of assets
- Succession through a Will may be appropriate in a situation where the family structure is simple and less risk of Litigation
- In case of Multiple wills – the same can be challenged in the court of law



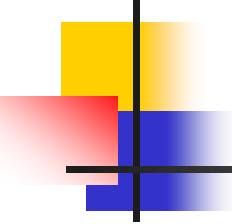
Tax Effects - Will

Issue	Relevant Provision under Income Tax Act, 1961
Whether transfer of a capital asset under a Will is a taxable transfer liable to capital gains tax?	Transfer of a capital asset is not regarded as a transfer u/s. 47(iii) of the Income-tax Act, 1961(Section 70 of the ITA, 2025). Not liable to Capital gains Tax
Whether any sum/asset received by an individual under a Will is chargeable to tax?	Inheritance is not “income” in general terms No, Clause III of proviso to S. 56(2)(x) of ITA, 1961 (Section 92 of the ITA, 2025) specifically excludes any sum / property received under a Will or inheritance
Whether the expenses incurred on obtaining probate or other expenses in relation to the same are allowable expenditure under the Act?	No, they are not allowable. Refer: <i>P.C. Mullick v. CIT [1938] 6 ITR 206 (Privy Council)</i> <i>V. Ramaswamy Ayyangar v. CIT [1943] 11 ITR 597 (Madras HC)</i>



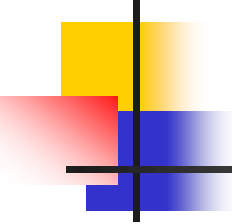
Succession Planning – GIFT DEED

- Gift Vs Will
- Gift of Moveable and Immovable Property
- During the Life time so immediate Transfer and hence ensures litigation free Transfer
- Transfer to Non Relative could Result in Taxes
- Gift of shares , Partners hip Share etc requires Special attention
- Partnership deed as well as Governing Law consideration
- Generally, the legal heir of a deceased partner is not entitled to be admitted to the partnership firm



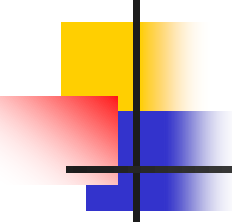
Succession Planning –Family Arrangement

- complex holding of family property and its division.
- The family arrangement settling avoids disputes, provide for fair distribution
- Family arrangements are well recognized by Indian courts and judiciary
- Liberal view on the validity of such family arrangements / settlements.
- Family settlement agreements require mandatory registration if they create/relinquish a right of a bona fide party in the family assets.
- Oral family settlement-Memorandum of settlement, doesn't require registration & stamp duty.



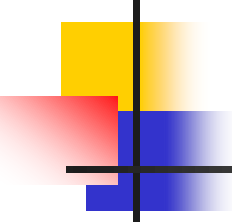
Succession Planning –Family Arrangement

- “Family” construed in a wide sense to include other branches on either side - Krishna Biharilal & Gulabchand and others (AIR 1971 SC 1041)(SC)
- Receipts under Family arrangement - implications u/s 56(2) of the ITA,1961 (Section 92 of the ITA, 2025)?
- Receipt from HUF – implications u/s 56(2) of the ITA,1961 (Section 92 of the ITA, 2025)?
- Can a company/ firm be a party to family settlement?



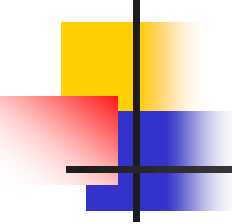
Succession Planning and HUF

- Its constituents are – Karta, Coparcener & members
 - Karta – eldest male family members; Certain judgements have ruled that eldest female members can be Karta (*Manu Gupta Vs Sujata Sharma [2023-Delhi High Court]*)
 - Coparcener – any person who acquires by birth an interest in joint family property & has right to enforce partition
 - Members – Other than Coparceners. Thus, all coparceners are members, but all members are not coparceners
- The family lives under the benevolent head of the family called 'the Karta'.
- There are two main schools of Hindu law prevailing in India, the Mitakshara and Dayabhaga schools.
- Mitakshra-Coparcenary is a narrower body of the HUF.
- Amendment of the Hindu Succession Act, 1956, by the Amendment Act, 2005, a daughter has also been conferred with the status of a coparcener.
- A daughter is a coparcener of her father's HUF and becomes the member of her husband's joint family after her marriage.



Succession Planning and HUF (cont'd)

- Share of Coparceners is generally defined. Under the Mitakshara law, which governs the HUF, coparceners have an equal share in the property of the HUF,
- Members (non-coparcener) have the right of maintenance (during subsistence of HUF) and on partition have right to receive reasonable assets.
- Wife of Karta or widowed mother of Karta, have equal share in the property of HUF
- HUF also enjoys major tax benefits including separate slab structure and other incentives
- Thus, HUF is a natural tool for estate planning for Hindus.
- However, disadvantage include lack of flexibility unlike other entity Structure
- Amendment to S.6 of Hindu Succession Act ,1956



Succession Planning

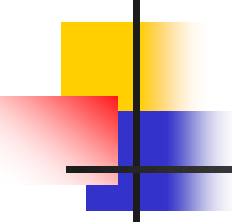
– Stamp Duty and other aspects

- Stamp duty may be based on several criterion -
 - Gift Deed (Article 34 of Schedule I of Maharashtra Stamp Act, 1958)
 - Settlement (Article 55 of Schedule I of Maharashtra Stamp Act, 1958)
 - Settlement Deed vs Memorandum of Settlement
 - Trust (Article 61 of Schedule I of Maharashtra Stamp Act, 1958)
- In case of Immovable Property, stamp duty on Conveyance will apply
- ITA :Settlement is also distinguished from Gift under ITA S.47(iii), Proviso to S.48,S .56,S.62,S 64.
- Company Act:Beneficial owner under Co Act 2013, S.... 89. SEBI Takeover Code.. Reg 10
- Settlement is a contract to transfer or to enjoy the assets upon fulfilling the condition either during the life time or after Vs Absolute transfer either during the life time known as Gift or after the life time known as Will



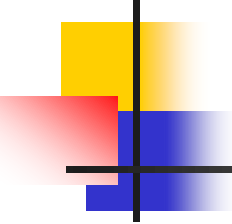
Succession Planning through Private Family Trust

- Private Family Trust is the most preferred structure for succession planning
- The Trust structure is the most amenable one, out of all the aforesaid methods / without losing control over the same.
- In addition to transfer of passive wealth, a Private Family Trust is also aptly suited for several flexibility
- Despite relinquishing ownership of the asset, the author of the Trust enjoys controlling Several Factors
- Trust is an **equitable obligation** binding a person to deal with property over which he has control for the benefits of the persons of whom he may himself be one and any one of whom may enforce the obligation.



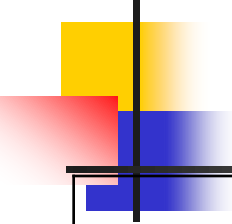
Purposes of Trust

- Evolution of Trust
- Use of Assets vs. Transfer of Assets
- Protection of Purposes
- Succession Planning
- Ownership succession
- Venture Capital Fund
- Private Equity
- Special Purposes
- Wealth Management
- Taxation
- Types of Trust-Normally the function of above



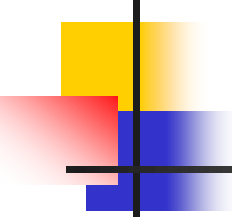
Advantages of Use of Trust for Estate Planning

- Efficient mode of managing and passing the family assets as it helps create a legal framework for the family assets
- Bypasses the Probate process which is susceptible to frivolous claims and delays in court process
- safe-guards interests of family members including maintenance of members with special needs/disabilities
- Possible to attach conditions to gifts such as on attaining a particular age or fulfillment of the settlor's wishes
- Avoids family disputes over the property
- Bankruptcy, Creditors Attack, Deferred Distribution can be achieved



Trust VS Will for Estate Planning

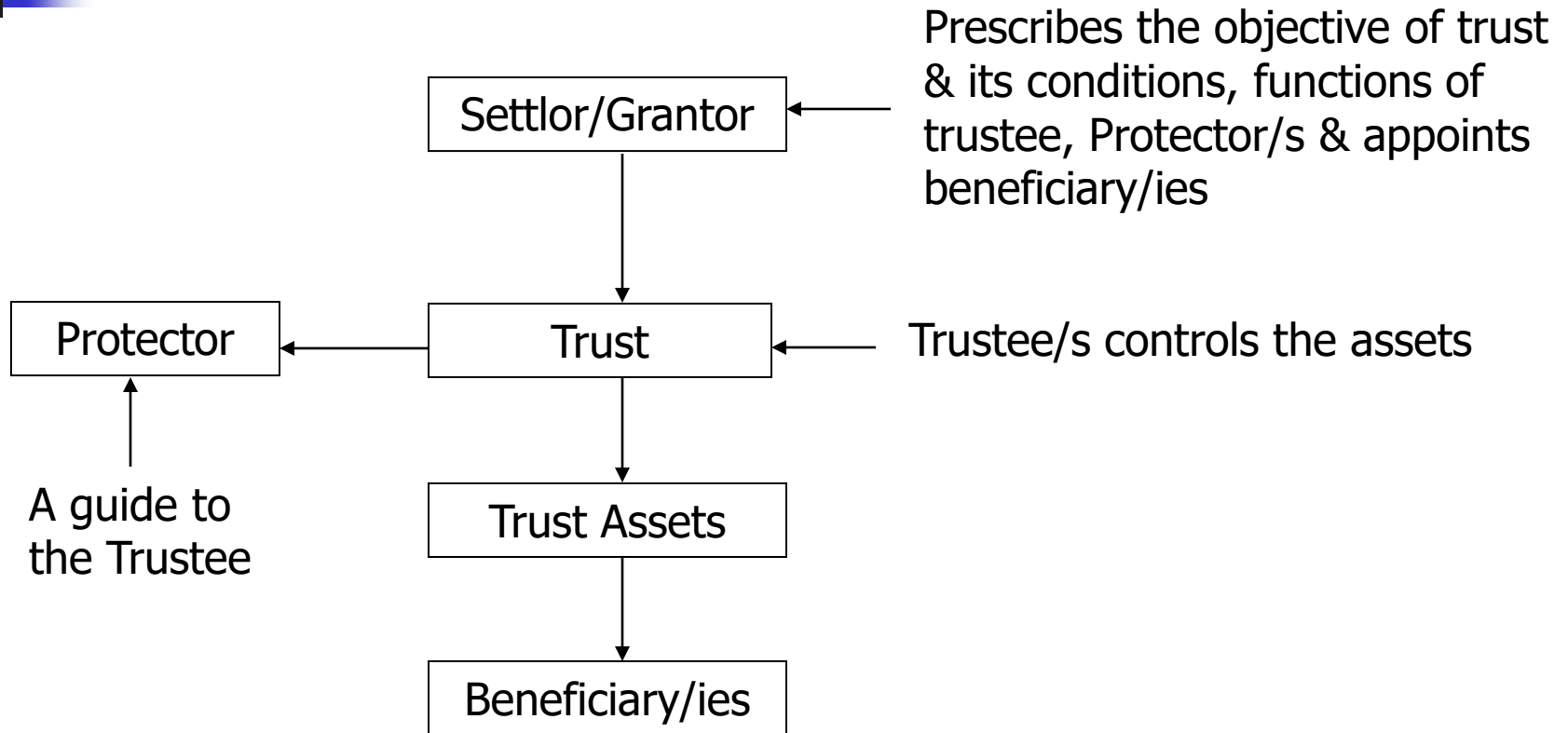
	Revocable Living Trusts	Wills
Name beneficiaries for property	✓	✓
Leave property to young children	✓	✓
Revise your document	✓	✓
Avoid probate, Now this amended	✓	
Keep privacy after death	✓	
Requires a notary public	✓	
Requires transfer of property	✓	
Protection from court challenges	✓	
Avoid a conservatorship	✓	
Name guardians for children		✓
Name property managers for children's property		✓
Name an executor		✓
Instruct how taxes and debts should be paid		✓
Simple to make		✓
Requires witnesses		✓
Reduce estate taxes	-	-

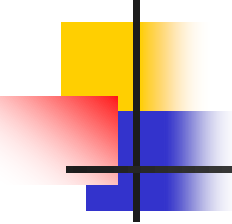


Overview of the Indian Trust Act, 1882

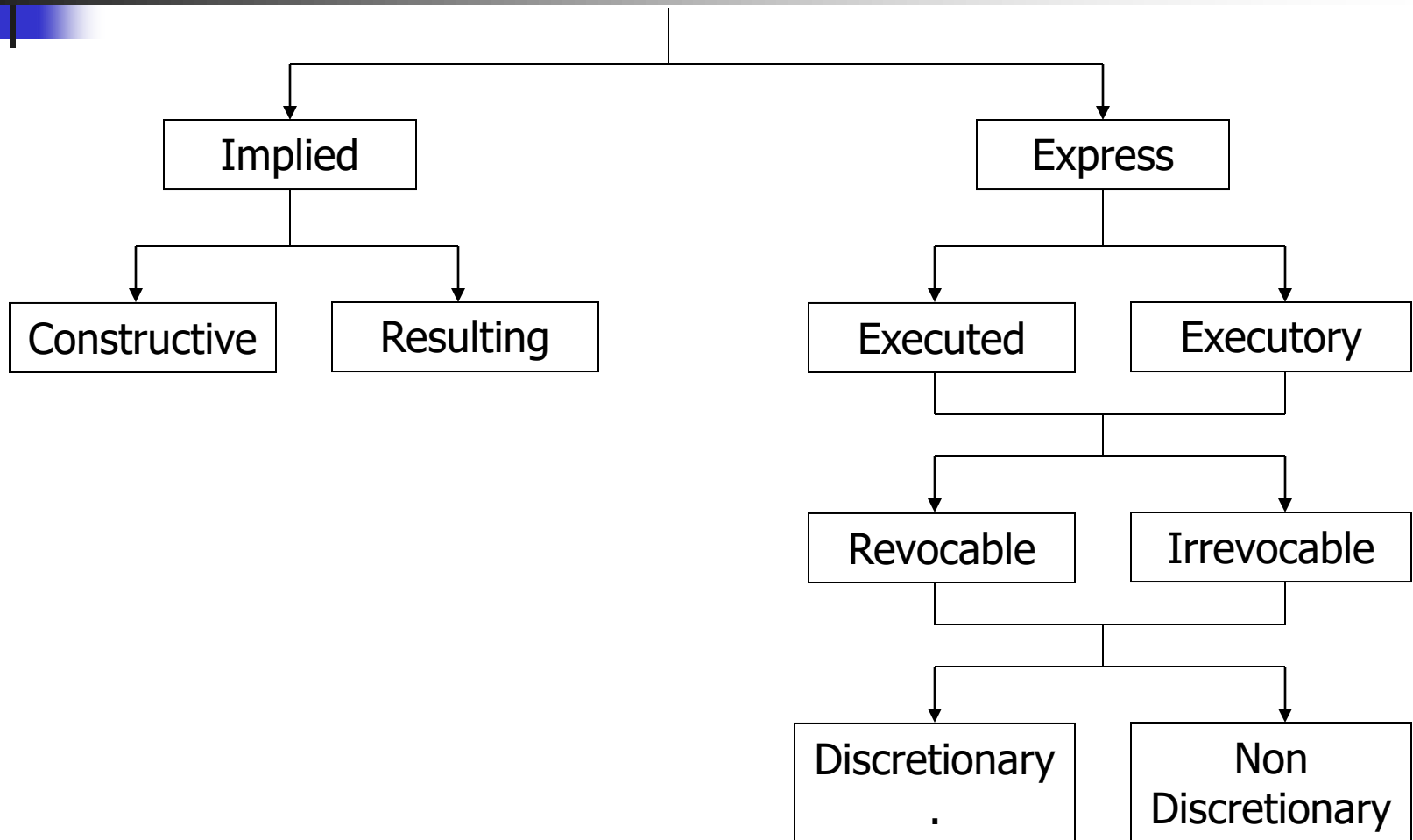
Section	Particulars
1 to 3	Preliminary & Title and Definitions
4 to 10	Creation of Trust – Conditions
11to 30	Duties and Liabilities of Trustees
31 to 45	Rights & Powers of Trustees
46 to 54	Disabilities of Trustees
55 to 69	Rights and Liabilities of Beneficiaries
70 to 76	Vacating the office of Trustees
77 to 79	Cessation of Trust
80 to 96	Certain Obligations- A Trust

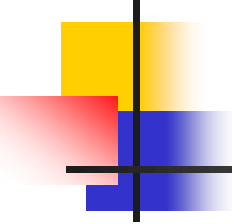
Trust, A Typical Structure



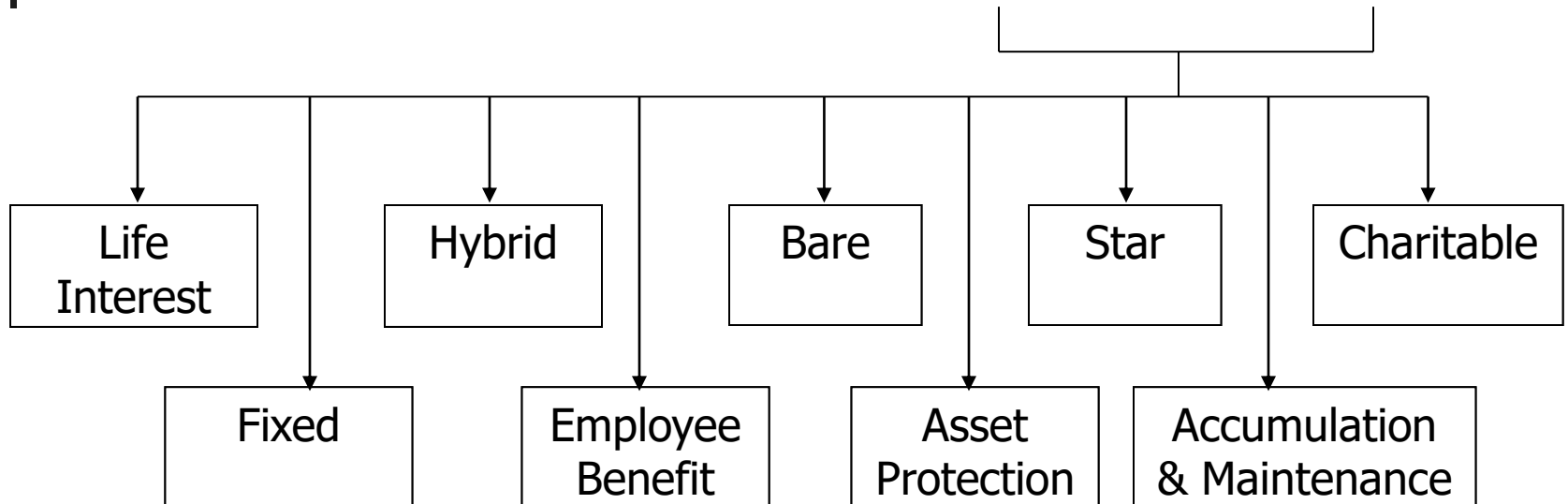


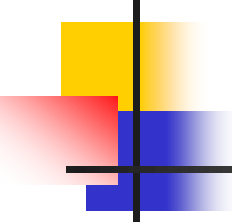
Types of Trust





Types of Trust





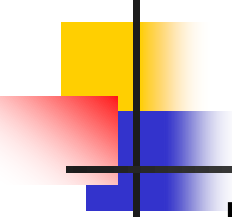
Trust, A Typical Structure and Documents

Dual Ownership

- Legal Ownership decides control, management & possession
- Beneficial Ownership involves benefit, use & enjoyment of asset
- Trust deed, Letter of Wishes, Appointment of Protector or the Advisor to the Trustees if any.
- Resolution for Appointment of Asset, the Beneficiaries or the distribution
- Trust deeds are legally binding documents that list the name of the trust, the trustee, the settlor, beneficiaries, specifications of how to administer the trust, and sometimes the assets to be held in trust

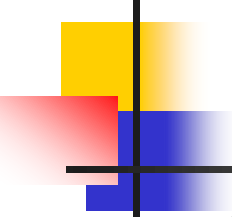
Trust & Company Law / SEBI

- Co. Law Section 89/SEBI – Master Circular on Takeover Regulations
- Trust Documents



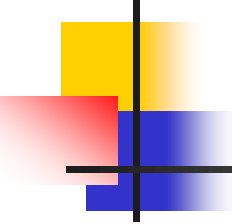
Hague Convention

- Hague Trust Convention is a multilateral treaty developed by the Hague Conference on Private International Law on the Law Applicable to Trusts. It concluded on 1 July 1985, entered into force 1 January 1992. The Hague Convention aims to “establish common provisions on the law applicable to trusts and to deal with the most important issues concerning the recognition of trusts.
- “The term ‘trust’ refers to the legal relationships created – inter vivos or on death – by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose.



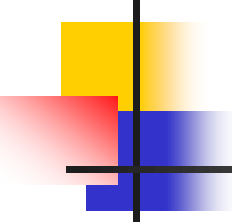
Hague Convention

- A trust has the following characteristics –
 - (a) the assets constitute a separate fund and are not a part of the trustee's own estate;
 - (b) title to the trust assets stands in the name of the trustee or in the name of another person on behalf of the trustee;
 - (c) the trustee has the power and the duty, in respect of which he is accountable, to manage, employ or dispose of the assets in accordance with the terms of the trust and the special duties imposed upon him by law.
- The reservation by the settlor of certain rights and powers, and the fact that the trustee may himself have rights as a beneficiary, are not necessarily inconsistent with the existence of a trust.
- Even though India is not a signatory to the Hague Convention (or ratified it), most of the principles provided in the Hague Convention are already covered in the Indian Trusts Act, 1882.



Taxation of Trust

- Onshore Trust
- Offshore Trust
- Selection as to type of trust is normally decided on the basis of purpose to which it is put and jurisdiction is decided on the basis of taxation and other regulatory features of the Jurisdiction's Trust Law
- Domestic Tax Laws
- International Tax issues



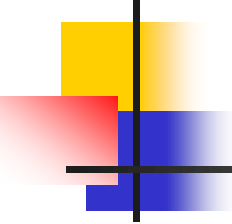
Taxation of Trusts-Onshore & Offshore

Onshore Trust

- Normally situated in tax neutral / High tax jurisdiction
- Settlor normally a non resident, can be resident also
- Normally Non resident beneficiary/ies and could be resident also

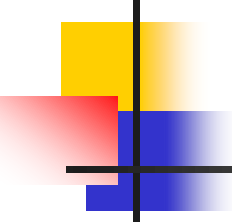
Offshore Trust

- A word “offshore” indicates “off the shore”, outside the place.
- Normally a jurisdiction with low tax or no tax
- Formed by Non Resident settlor and Non resident beneficiary/ies



Selection of Trust - Criteria

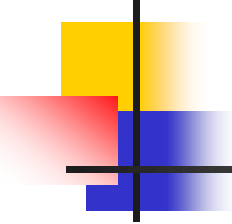
- General purpose or Special purpose
- Jurisdiction offering the ease to accomplish the General purpose or Special purpose may be surveyed for concluding the place of formation of the Trust
- Taxation
 - Domestic Tax system/factors
 - International Factors



Basis of taxation - Domestic Tax System

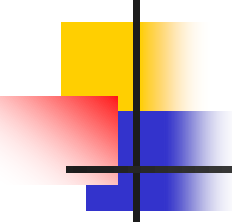
Generally under Domestic tax laws, basis could be one of the following

- Entity level taxation - Trust itself is taxed on its income and beneficiary is either exempt from taxation or credit of taxes are given to the beneficiary/ies
- Beneficiaries are only taxed, and trust is not taxed
- Beneficiaries pay taxes on the distributed amount and Trust pays on the undistributed amount of income
- Settlor is Taxed and beneficiaries are exempt or credit of taxes are given to them



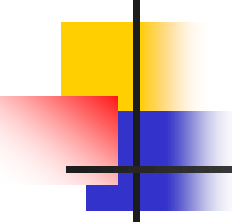
Domestic Tax System-Is it a Taxable Unit

- Jurisdiction of Taxation for a trust
Normally, where Trust is treated as “Resident” under the tax law of the State /system
- Residential Status
 - Place of management/Administration
 - Place where settlor is Resident
 - Place where beneficiary/ies are Resident
 - Location of the Assets
- Taxation connecting Factor could be Settlor Driven or a Trustee Driven or the Beneficiary Driven
 - ITA connects the tax liability on the basis of the Resident beneficiaries



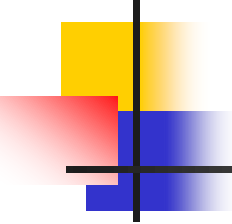
Trust under Income Tax Act, 1961

- Private Trust- Is Trust a Person Sec 2(31) (Section 2 of the ITA, 2025)
- Relevant Provisions
 - Section 2(15) (Section 2 of the ITA, 2025)
Defines a charitable objective
 - Section 10(23C) (Section 11 of the ITA, 2025)
Provides exemption to educational, medical, charitable and public religious institutions, existing not for the purposes of profit
 - Section 11-13 (Section 12 of the ITA, 2025)
Provides for tax treatment in case of charitable trusts
 - Section 60-63 (Section 96-98 of the ITA, 2025)
Revocable Trust
 - Section 64 (Section 99 of the ITA, 2025)
Provisions of clubbing



Trust under Income Tax Act, 1961

- Relevant Provisions (con't)
 - Section 139(1) & (4A) to 139(4F), 139(5) to 139(8)
(Section 263 of the ITA, 2025)
Tax Return
 - Section 139A(1)(i) & (iii) (Section 262 of the ITA, 2025)
PAN Number
 - Section 140-140A (Section 265-266 of the ITA, 2025)
Self-assessment Tax
 - Section 160-167 (Section 303-304 of the ITA, 2025)
Deals with liability in special cases i.e. of representative assessee, which includes taxation of private discretionary trusts.
 - Section 167B (Section 311 of the ITA, 2025)
Taxation of AOP

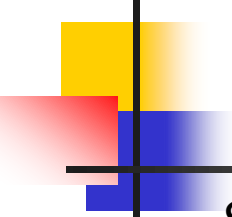


Trust under ITA, 1961 Cont'd...

Residential Status (Section 6 of the ITA, 2025)

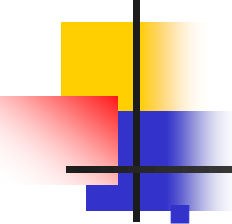
S.6(2) A Hindu undivided family, firm or other association of persons is said to be resident in India in any previous year in every case except where during that year the control and management of its affairs is situated wholly outside India.

S.6(4) Every other person is said to be resident in India in any previous year in every case, except where during that year the control and management of his affairs is situated wholly outside India.



Status of a Private Trust – Specific Trust

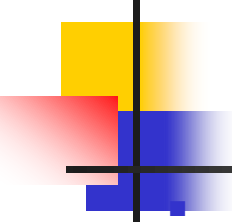
- Section 2(31) of the Act defines person.
- Trust vs AOP [(1960) 39ITR546 (SC) CIT vs Indira Balkrishna] followed consistently
- Under the definition of the term person, the trust can possibly be qualified as individual, AOP, BOI or artificial juridical person.
- Trust is not a juristic person and therefore, cannot be considered as an artificial juridical person – 178 ITR 1(Mad) Thanti Trust v. WTO
- Trust cannot be considered as a Body of Individuals – 188 ITR 253(Bom) Lalchand Tikamdas Makhija & Anr. v. CIT
- Private trust is not an AOP – CWT v. Trustees of H. E. H. Nizam's Family (Remainder Wealth) Trust (1977) 108 ITR 555 (SC). Also see 188 ITR 224(Bom) CIT v. Marsons Beneficiary Trust.
- There are contrary judgments to the effect that the Trust would constitute an AOP – CIT v. Smt. Pushpawati 327 ITR 490 (Del) but it is generally accepted that it is not an AOP



Status of a Private Trust – Specific Trust

As per section 161(1) of the Act, 1961 (Section 304 of the ITA, 2025), **tax shall be levied upon and recovered from the trustee in like manner and to the same extent as it would be leviable upon and recoverable from the person represented by him.** The Hon'ble Supreme Court in case of Nizam (supra) has interpreted the above provision to state that "the assessment of the trustee would have to be made in the same status as that of the beneficiary whose interest is sought to be taxed in the hands of the trustee"

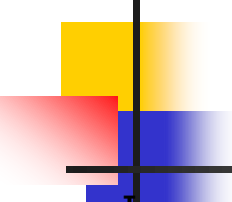
- Beneficiaries of the trust could be all individuals or variety of Persons. Trustee could be representative of individuals or HUF or Company or in any of the combinations of "Person".
- Thus, the status of the trustee would depend upon the status of the beneficiaries. The above applies in case of a determinate trust.



Status of a Private Trust – Discretionary

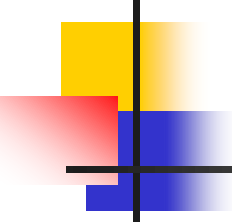
Courts have held that the trustees constitute an assessable unit and were liable to be taxed as an Individual – See 88 ITR 47(SC) Trustees of Gordhandas Govindram Family Charity Trust vs CIT, CWT v. Trustees of H. E. H. Nizam's Family (Remainder Wealth) Trust (1977) 108 ITR 555 (SC), 221 ITR 649 (Mad), 263 ITR 428(Mad), 201 ITR 989(Cal) etc.

- CBDT has accepted that the private discretionary trust is assessable as an Individual – Circular No. 6/2012, dt. 3rd August, 2012 reported in 346 ITR (St) 96.
- The status of the Trust as an individual is also true in case of a discretionary trust, where the income cannot be attributed to any beneficiary.
- A Combination of Individual and corporate as beneficiary may lead to complexities but S. 161(1) (Section 304 of the ITA, 2025) is unambiguous.
- In case of discretionary Trust, status is straight & simple.



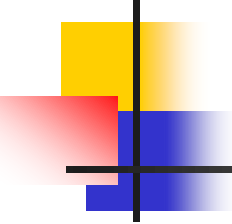
Status of a Private Trust - Discretionary

- In case where all the beneficiaries are individuals, the status of the trust would be that of an individual Refer
 - CIT vs Deepak Family Trusts (1993) – Gujarat High Court
 - CIT vs Shree Krishna Bandar Trust (1992) – Calcutta High Court
- In case where 2 or more beneficiaries some of whom are individuals and the others are non individuals:
 - Private trust is not an AOP –In the case of CIT vs. Indira Balkishan, the Honourable Supreme Court stated held that the word Association means to join in any purpose or join in any action. Therefore, 'association of persons' as used in section 2(31)(v) of the Income-tax Act, 1961, means an association in which two or more persons join in a common purpose or common action. The association must be one the object of which is to produce income, profits or gains. In the case of a discretionary trust, neither the trustees nor the beneficiaries can be considered as having come together with the common purpose of earning income. The beneficiaries have not set up the trust. The trustees derive their authority under the terms of the trust deed. Neither the trustees nor the beneficiaries come together for a common purpose. They are merely in receipt of income. The mere fact that the beneficiaries or the trustees, being representative assessee, are more than one, cannot lead to the conclusion that they constitute 'an association of persons
- In case where all the beneficiaries are non individuals, say only corporates, the status of the trust would be considered as a company

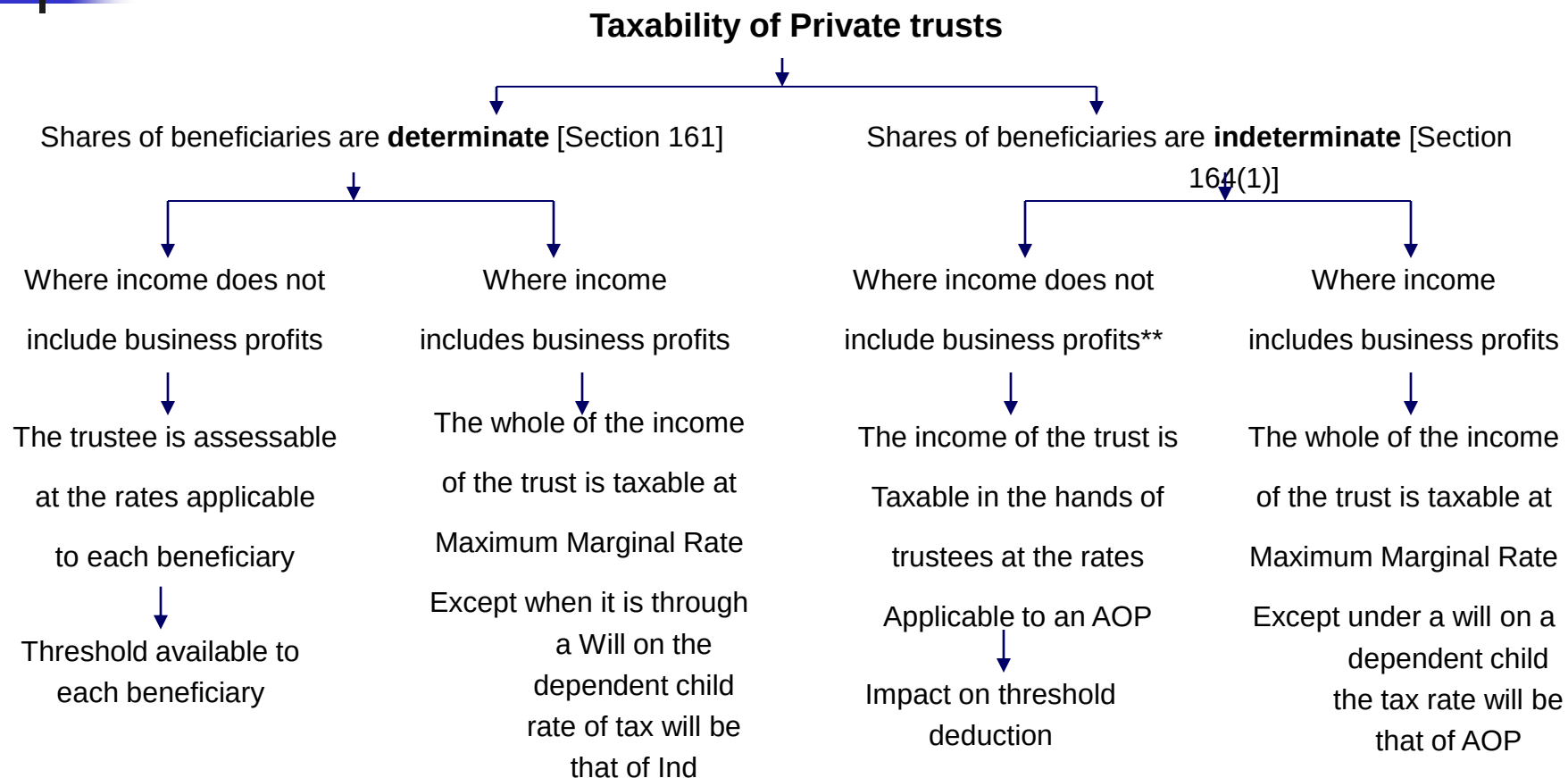


Status of a Private Trust - Discretionary

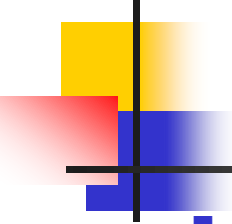
- All the benefits, deductions or allowances which an individual beneficiary could have obtained are also available to the trustees assessed in representative capacity– for instance benefit u/s 54 of the Act. (See 237 ITR 82 (Bom) Mrs. Amy P. Cama, Trustee of the Estate of Late M. R. Adenwalla v. CIT)
- In case of a Specific Trust with one of the beneficiary as Company then Company will be entitled to deduction U/S 80 M (Section 148 of the ITA, 2025), It may pose some difficulty in case of discretionary trust however it may be possible to claim such deduction at the time of distribution



Taxability of Private Trust - ITA

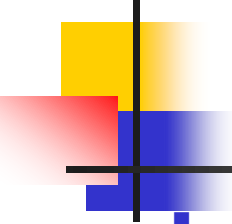


**** Note:** Subject to conditions as specified in the following slides



Taxability of Private Trust - ITA

- Where shares of beneficiaries are **determinate** or known (Sec.161) (Section 304 of the ITA, 2025)
 - Where income does not include business profits [Sec.161(1)]
 - The trustee is assessable at the rates applicable to each beneficiary.
 - Where income includes profits from business [Sec.161(1A)]
 - The whole of the income of the trust is taxable at maximum marginal rate.
- However, if such profits from business are receivable under a trust declared by any person by 'will' exclusively for the benefit of any relative, dependant on him for support and maintenance and such trust is the only trust so declared by him, then, the trustees shall be assessable at the rates applicable to each beneficiary.



Taxability of Private Trust - ITA

■ Where shares of beneficiaries are **indeterminate** or unknown i.e. in case of discretionary trust [Section 164(1)] (Section 307 of the ITA, 2025) then following four cases arise -

- Where income does not include profits from any business and if:
 - None of the beneficiaries has taxable income exceeding maximum amount not chargeable to tax or is a beneficiary in any other trust; or
 - The income is receivable under a trust declared by any person by will and such trust is the only trust so declared by him; or
 - The income is receivable under a non testamentary trust created before 1.03.1970 exclusively for the benefit of relatives of settlor, or member of HUF, who are mainly dependant upon settlor; or
 - The income is receivable by trustees on behalf of a provident fund, superannuation fund, gratuity fund, pension fund or any other bona fide fund created by the employer carrying on business or profession for the benefit of his employees,

Then, income of the trust is taxable in the hands of trustees at the rates applicable to an **AOP**. In any other case, income is taxable at the maximum marginal rate.



Taxability of Private Trust - ITA

Where shares of beneficiaries are indeterminate or unknown i.e. in case of discretionary trust [Section 164(1)]

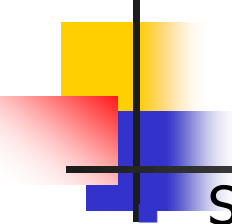
- Where income includes business profits:

The whole of the income of the trust is taxable at the maximum marginal rate.

However, if such profits from business are receivable under a trust declared by any person by 'will' exclusively for the benefit of any relative, dependant on him for support and maintenance and such trust is the only trust so declared by him, then, the trustees shall be assessable only at the rates applicable to an AOP.

- Taxation of Charitable / Religious Trust not registered u/s. 12A [Section 164(2)]:

Income is taxed at a rate applicable to AOP and MMR will not apply



Taxability of Private Trust - ITA

Summary - Rates of taxation for different types / features of Trusts:

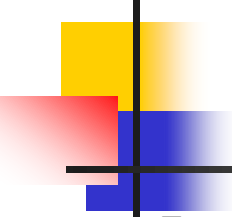
Type / features	Rates of taxation
Determinate Trust with no business income	At a rate & slab at which beneficiaries are taxed
Indeterminate Trust with no business income and (i) no beneficiary with income over threshold or (ii) only trust created by a will or (iii) non-Will trust created before 01.03.1970 for benefit of relatives or (iv) income of Provident / Gratuity / Pension fund, etc.	At a rate at which AOP is taxed
Determinate & Indeterminate Trust with business income	Maximum marginal rate of tax
Indeterminate Trust with business income under Only trust declared by Will for benefit of relatives	At a rate at which AOP is taxed



Judicial Precedents

In case of Mohan Manoj Dhupelia vs. DCIT (ITAT Mumbai) [2014] it was held:

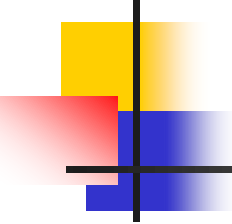
- the assessee, a beneficiary in a "discretionary" trust set up in Liechtenstein can form the basis of assessment of undisclosed income in the assessee's hands and argument that the trust is discretionary was not acceptable and reassessment was sought to be initiated
- deposit made in bank account of trust represented assessee's black money assessable under section 69 (Section 103 of the ITA, 2025) as same was not disclosed by assessee in his respective return in India
- **In case of Commissioner of Wealth Tax, Rajkot vs. Estate of Late HMM Vikramsinhji of Gondal [2014] the Supreme court reiterates**
 - That the principle that income of a discretionary trust cannot be taxed in the hands of a beneficiary unless distributed to the beneficiary
 - That discretionary trust is one which gives a beneficiary no right to any part of income of trust property, but vests in trustees a discretionary power to pay him, or apply for his benefit, such part of income as they think fit



Judicial Precedents

- **In case of Renu T Tharani Vs DCIT (ITAT Mumbai) [2020]**

- Assessee failed to disclose deposits held in HSBC Geneva bank account. The bank account was held by the underlying holding company of the family trust of which the assessee was the sole beneficiary.
- DCIT held the assessee as the beneficiary of the foreign bank account in HSBC Private Bank (Suisse) SA, Geneva ('HSBC Bank, Geneva') which held INR 1,96,46,79,146/- (equivalent to USD 3,97 38,122/-), at a relevant point of time during Financial Year ('FY') 2005-06.
- The ITAT upheld the validity of reassessment proceedings initiated under section 147 of the Income-tax Act, 1961 ('Act') (Section 279 of the ITA, 2025) observing that the credible information about existence of the assessee's account with HSBC Bank, Geneva, with a peak credit of around INR 200 Crores in the relevant FY, is far disproportionate to her reported annual taxable income and which is not taken into account in her return of income, is good enough for sustaining the prima facie view that income has escaped assessment in the hands of the assessee.
- Further, the ITAT remarked that "The assessee is not a public personality like Mother Theresa that some unknown person, with complete anonymity, will settle a trust to give her US\$4 million, and in any case, Cayman Islands is not known for philanthropists operating from there; if Cayman Islands is known for anything relevant, it is known for an atmosphere conducive to hiding unaccounted wealth and money laundering, and that does not advance the case of the assessee."



Anti Avoidance under ITA, 1961

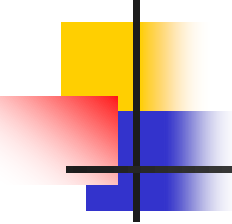
- **Revocable & irrevocable transfer**

- **Sec.60 (Section 96 of the ITA, 2025) Transfer of income where there is no transfer of assets.**

All income arising to any person by virtue of a transfer whether revocable or not and whether effected before or after the commencement of this Act shall, where there is no transfer of the assets from which the income arises, be chargeable to income-tax as the income of the transferor and shall be included in his total income.

- **Sec.61 (Section 97 of the ITA, 2025) Revocable transfer of assets.**

All income arising to any person by virtue of a revocable transfer of assets shall be chargeable to income-tax as the income of the transferor and shall be included in his total income.



Anti Avoidance under ITA, 1961

➤ **Sec.62** (Section 97 of the ITA, 2025) **Transfer irrevocable for a specified period.**

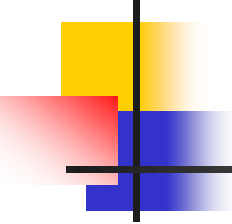
(1) The provisions of section 61 shall not apply to any income arising to any person by virtue of a transfer—

(i) by way of trust which is not revocable during the lifetime of the beneficiary, and, in the case of any other transfer, which is not revocable during the lifetime of the transferee ; or

(ii) made before the 1st day of April, 1961, which is not revocable for a period exceeding six years :

Provided that the transferor derives no direct or indirect benefit from such income in either case.

(2) Notwithstanding anything contained in sub-section (1), all income arising to any person by virtue of any such transfer shall be chargeable to income-tax as the income of the transferor as and when the power to revoke the transfer arises, and shall then be included in his total income.

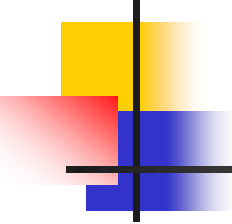


Anti Avoidance under ITA, 1961

➤ **Sec.63** (Section 98 of the ITA, 2025) **“Transfer” and “revocable transfer” defined.**

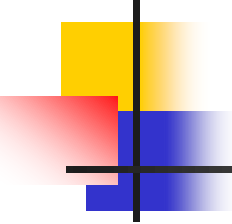
For the purposes of sections 60, 61 and 62 and of this section,—

- (a) a transfer shall be deemed to be revocable if—
 - (i) it contains any provision for the re-transfer directly or indirectly of the whole or any part of the income or assets to the transferor, or
 - (ii) it, in any way, gives the transferor a right to re-assume power directly or indirectly over the whole or any part of the income or assets ;
- (b) “transfer” includes any settlement, trust, covenant, agreement or arrangement.



Life Cycle of Trust ITA, 1961

- Settlement to Trust & ITA, S. 47 (Section 70 of the ITA, 2025)
- Distribution from Trust & S. 56(2) (Section 92 of the ITA, 2025)
- Computation of Taxable Income
- Overseas Trust-Settled by Resident
- Change of Residential Status
- Return Of Income
- Application & context of Section 93 (Section 174 of the ITA, 2025)



Settlement of Assets considered Transfer?

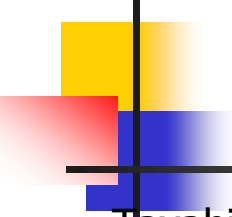
Not regarded as transfer

Sec.47 (iii) any transfer of a capital asset under a gift or will or an irrevocable trust :

Provided that this clause shall not apply to transfer under a gift or an irrevocable trust of a capital asset being shares, debentures or warrants allotted by a company directly or indirectly to its employees under any Employees' Stock Option Plan or Scheme of the company offered to such employees in accordance with the guidelines issued by the Central Government in this behalf

Stock Option Sec.48 (Section 72 of the ITA, 2025)

Provided also that where shares, debentures or warrants referred to in the proviso to clause (iii) of section 47 are transferred under a gift or an irrevocable trust, the market value on the date of such transfer shall be deemed to be the full value of consideration received or accruing as a result of transfer for the purposes of this section



Applicability of Sec 56(2)(X)

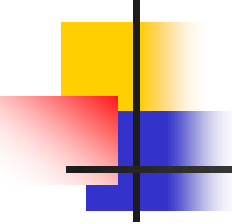
- Taxability in the hands of Trustee

While Introducing asset in trust – When settlor transfers it to trustee / to trust- not taxable as (a) transfer to trustee is for an obligation (b) trustee receives it in fiduciary capacity for the benefit of the beneficiaries. Reference in this regard can be made to the judgment of the Apex Court in case of Nizam, wherein the Court held that “the very concept of a trust connotes that though the legal title vests in the trustee, he does not own or hold the trust properties for his personal benefit but he holds the same for the benefit of others, whether individuals or purposes.”

- Taxability in the hands of beneficiaries

In case of **Determinate Trusts** - Property is received by the trustee on behalf of and for the benefit of the beneficiary. Such receipt of the property by the beneficiary direct would have attracted the provisions of section 56(2)(x) of the Act (Section 92 of the ITA, 2025) and therefore, the term “in the like manner and to the same extent” would bring such income within the ambit of section 56(2)(x).

However, the above view is subject to the conditions mentioned in the trust deed in this regard. The Madras High Court in case of CIT vs. Muthukrishnan 260 ITR 526(Mad), held that where the specific sum of amount was required to be credited to the corpus of the trust and the same was to be distributed to the beneficiaries only in the year of termination of the trust, such amount cannot be taxed in the hands of the beneficiaries. Similarly there may be a case where the beneficiary of income may be one person and beneficiary of corpus may be another person or that the beneficiary is only life tenant. In such case, one has to look into the trust deed to consider the tax treatment u/s 56(2)(x).



Applicability of Sec 56(2)(X)

- Taxability in the hands of beneficiaries

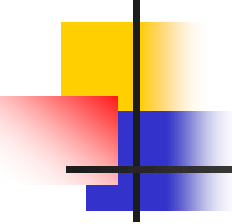
Indeterminate Trusts -In case of an indeterminate trust, on settlement, the trustee is granted the power and discretion to decide the beneficiary who is supposed to receive the property of the trust. The Supreme Court has held in case of CWT v. Estate of HMM Vikramsinhji of Gondal – 268 CTR 232 (SC), that in case of a discretionary trust, the beneficiary acquires nothing more than a hope that the discretion would be exercised in his favour. In such a case, there is no question of taxability in the hands of the beneficiary.

- Taxability On Distribution of Income/Corpus

When the receipt of the sum of money/ property/ accrual of any income has already been subject matter of tax in the hands of the trustee or beneficiary, then on distribution of such income/ property, no taxable event arises in the hands of the beneficiary.

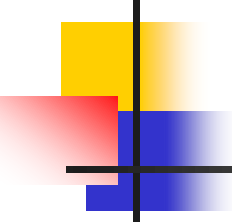
If on the receipt of any sum of money/ property on behalf of the trust, no tax was paid by the beneficiary or by the trustee on behalf of the beneficiary, then in such cases a taxable event arises on receipt of such property or sum of money by the beneficiary on distribution. One may argue that this is not without any consideration.

Another view in this regard is that receipt by beneficiaries on the distribution of the corpus of trust or otherwise cannot be termed to be an amount received 'without consideration' as such amount would be on extinguishment of beneficial right in the property. Such an argument would not be helpful in case of a discretionary trust, as already discussed above, in such cases, the beneficiary does not acquire any right but only a hope.



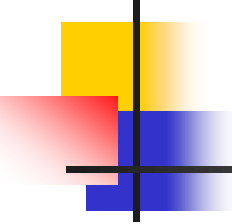
Tax Return s.139(1)

- Representative Assessee is required to file Tax return on income of other Person S.139(1)(b) (Section 263 of the ITA, 2025)
- Beneficial Owner (Exp 4) or the Beneficiary (Exp 5) both are required to file their Tax return even if there is no Income, 4th and 5th Proviso to S.139(1)



Cross Border / International issues

- System of civil law or common law operating in the jurisdiction
- Pass through approach
- Who can be regarded as taxpayer, trustee or beneficiary, Article 3(1)(a) and Article 4(3) of the DTC
- Maximum tax rate for income of trust, particularly for Discretionary Trust
- Characterisation of distribution to beneficiaries and that of income of the trust
- Who can be regarded as beneficiary under article 10, 11, 12 and 23 of the DTC
- Who can be considered as alienator under article 13 of the DTC



Cross Border Taxation of Trust

S_1

T_1

B_1

S_2

T_2

B_2

S_3

T_3

B_3

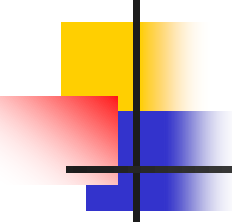
In above chart

S: Location of Assets

T: Location of Trustee

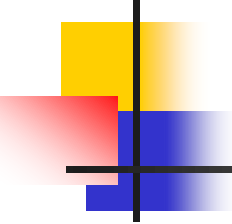
B: Location of Beneficiary

No OECD guidance on the subject



Attribution of income to a “Person”

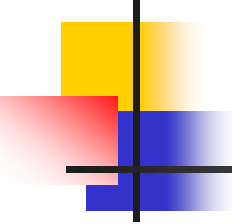
- Person to whom income is attributed
- DTA benefits to Person who is taxpayer and Resident
- Special rules in the DTA to incorporate conflict of attri ,Partnership Report,2009.
- A new Article 1(2) in to the OECD Model Tax Convention 2017 is introduced and replicated as Article 3(1) of the MLI to remove the Hybrid mismatch- India has maintained status quo



Case Study - Offshore Trust & taxation

Background

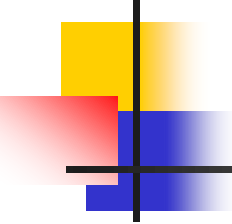
- A Non Resident of India is contemplating setting up the Discretionary Offshore Trust in Mauritius
- Beneficiaries of the Trust are Resident of India, UK and USA
- Trust is also planning to incorporate underlying GBC company for holding investment and earning regular income.
- Although trust is “Resident” under law of Mauritius its income is exempt in Mauritius because all the beneficiaries are Non Resident of Mauritius.



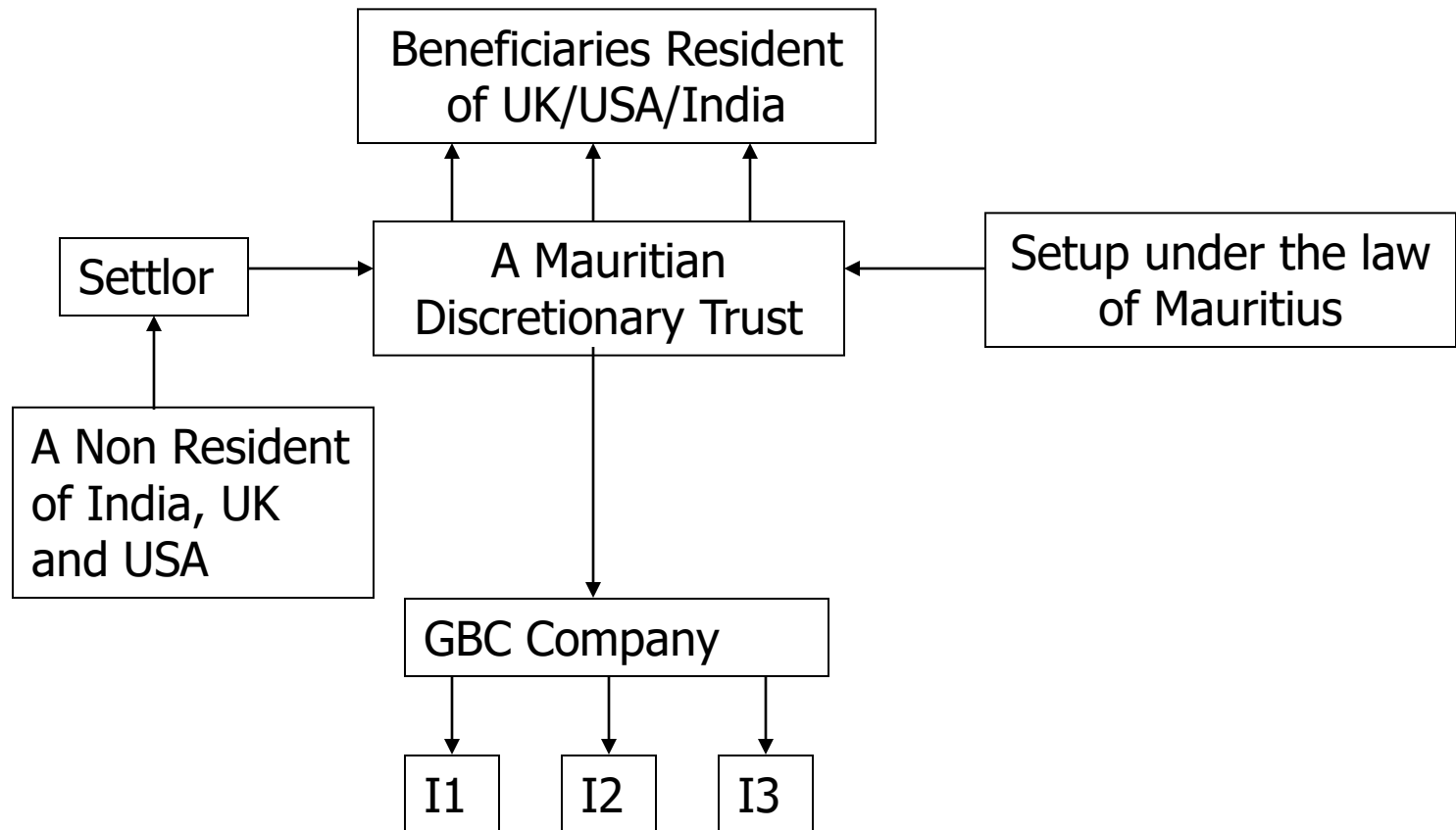
Case Study

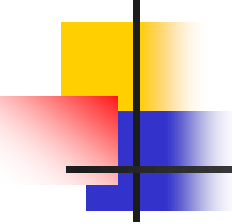
Question

- Participants of today's deliberation are posed with following question
What is the taxability of the income in the form of interest, dividend and capital gains from investment in the GBC companies, if the trustees of the Trust are
 - a) Resident of Mauritius
 - b) Resident in UK
 - c) Resident in India



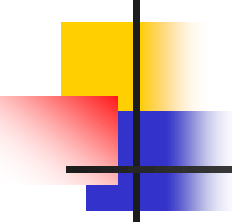
Case Study - Structure





Tax Issues in India

- Whether Trust will be liable to Tax in India in any of the alternatives when Trustee is a person Resident of Mauritius or UK or of India
- Taxation of Income in India for Resident beneficiary when
 - Income is not distributed
 - When income is distributed
- In case tax is payable in India by Indian Resident beneficiary, whether there is any possibility of tax credit?



Analysis of Case Study

- **Scope of total income Section 5 of the ITA, 1961 & 2025**

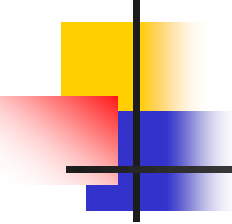
5 (1) Subject to the provisions of this Act, the total income of any previous year of a person who is a resident includes all income from whatever source derived which—

(a) is received or is deemed to be received in India in such year by or on behalf of such person; or

(b) accrues or arises or is deemed to accrue or arise to him in India during such year; or

(c) accrues or arises to him outside India during such year:

Provided that, in the case of a person not ordinarily resident in India within the meaning of sub-section (6) of section 6, the income which accrues or arises to him outside India shall not be so included unless it is derived from a business controlled in or a profession set up in India.



Analysis of Case Study

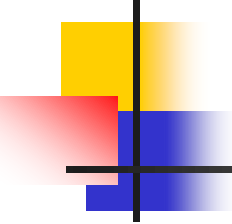
S. 5 (2) Subject to the provisions of this Act, the total income of any previous year of a person who is a non-resident includes all income from whatever source derived which—

(a) is received or is deemed to be received in India in such year by or on behalf of such person ; or

(b) accrues or arises or is deemed to accrue or arise to him in India during such year.

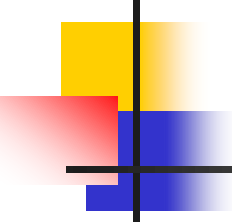
Explanation 1.—Income accruing or arising outside India shall not be deemed to be received in India within the meaning of this section by reason only of the fact that it is taken into account in a balance sheet prepared in India.

Explanation 2.—For the removal of doubts, it is hereby declared that income which has been included in the total income of a person on the basis that it has accrued or arisen or is deemed to have accrued or arisen to him shall not again be so included on the basis that it is received or deemed to be received by him in India.



Analysis of Case Study - Representative Assessee

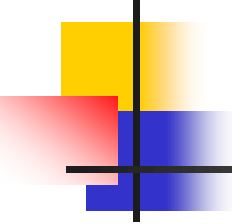
- Section 160(1)(iv): A meaning of “Representative Assessee”
in respect of income which a trustee appointed under a trust declared by a duly executed instrument in writing whether testamentary or otherwise [including any wakf deed which is valid under the Mussalman Wakf Validating Act, 1913 (6 of 1913),] receives or is entitled to receive on behalf or for the benefit of any person, such trustee or trustees;



Analysis of Case Study - Representative Assessee

- Section 161(1): Liability of representative assessee

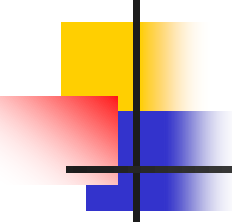
Every representative assessee, as regards the income in respect of which he is a representative assessee, shall be subject to the same duties, responsibilities and liabilities as if the income were income received by or accruing to or in favour of him beneficially, and shall be liable to assessment in his own name in respect of that income; but any such assessment shall be deemed to be made upon him in his representative capacity only, and the tax shall, subject to the other provisions contained in this Chapter, be levied upon and recovered from him in like manner and to the same extent as it would be leviable upon and recoverable from the person represented by him.



Analysis of Case Study - Representative Assessee

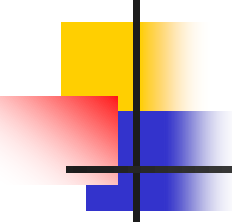
Section 164(1): Charging provision in case shares of beneficiaries are not known

Subject to the provisions of sub-sections (2) and (3), where any income in respect of which the persons mentioned in clauses (iii) and (iv) of sub-section (1) of section 160 are liable as representative assesseees or any part thereof is not specifically receivable on behalf or for the benefit of any one person or where the individual shares of the persons on whose behalf or for whose benefit such income or such part thereof is receivable are indeterminate or unknown (such income, such part of the income and such persons being hereafter in this section referred to as "relevant income", "part of relevant income" and "beneficiaries", respectively), tax shall be charged on the relevant income or part of relevant income at the maximum marginal rate



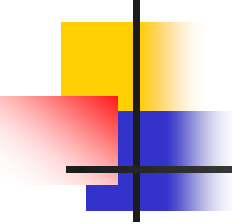
Analysis of Case Study

- Who could be taxed in India?
Beneficiaries or the trustees as representative of beneficiaries?
 - S.164(1) vis-à-vis 166
 - (1994) 269 ITR 101 (SC) in case of Kamalini Khatau's case decides as to when either of them can be assessed to tax in India?
 - Consider scope of total Income u/s 5 for Indian Resident as well as non Resident beneficiaries, in the background of Sec.160(1)(iv)...A representative assessee.



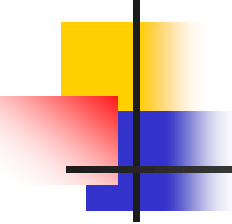
In a case when Trustee is Resident of India

- Trustee as representative assessee is liable to tax if income is received by him or entitle to receive on behalf of the beneficiaries
- Computation of Income for which tax is payable, is the aggregate of Income of the beneficiary/ies under the trust [Refer 81 ITR 310 (SC), 126 ITR 233 (AP)]
- No distribution is made to any of the beneficiary either in UK or in USA or in India
- What is the liability for Trustee as representative assessee?



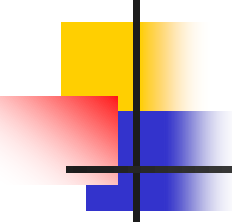
The test to be applied

- If scope of total income does not cover the income of the beneficiaries who are non-resident or resident, whether income can still be chargeable to tax in the hands of resident or non-resident trustee u/s 164(1).
- How to compute?
- Difficult to quantify
- Whether Charge Fails in case of inability to compute
- Protective Assessment and it's nature



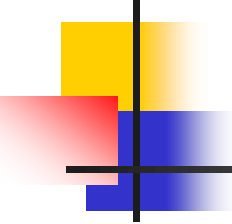
Case Study - Conclusion

- Taxation of Trust in India
 - a) When Trustee is Resident in Mauritius - No
 - b) When Trustee is Resident in UK - No
 - c) When Trustee is Resident in India –No/Yes
- Taxation of Indian beneficiaries in a case when there is no distribution
 - a) No
 - b) No
 - c) No/Yes, Charge can not be quantified
- In case of distribution, Indian beneficiary are liable to taxation in all three cases



Case Study - Conclusion

- Taxability for Non Resident beneficiary/ies
 - a) When there is no distribution
 - UK Resident beneficiary / US Resident beneficiary not liable to tax unless it is received in India (S. 5 of the ITA)
 - b) In case of distribution
 - Not liable to tax in India (S. 5 of the ITA)
 - India-UK DTAA / India US Tax treaty. Not liable to taxation unless assets are located in India subject to Characterisation of income from such Assets

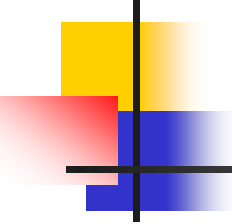


Case Study - Conclusion

- Taxability of Indian beneficiary in UK/USA. Normally “No”, subject to UK/USA domestic tax law.
- Tax Credit Issues

Tax paid by discretionary Trust outside India is the taxes on the Income of the Trust

 - ITA-Computation is for income of beneficiary, can taxes paid by Trust be available as Credit?
 - Whether unilateral relief under ITA is available only in absence of tax treaty?
- Provisions of Sec.93 of the ITA Act (Section 174 of the ITA, 2025)
 - What happens to the settlement by a non resident, in case he receives/enjoy the income after he becomes resident?



Offshore Trust & S.93 of ITA, 1961

- In a case whenever there is a transfer of assets
 - Leading to the payment of income to the non resident
 - Leading to acquisition of rights by the assessee which enables him to enjoy the income of the non resident
- Such income would have been chargeable to tax, had it been the income of the assessee, then
- Income shall be deemed to be that of the assessee, subject to exemption for bonafide transaction to the satisfaction of the assessing officer



Are Tax Treaties Applicable to Trust?

- MLI and India's position

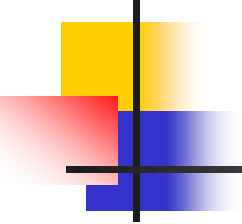
The provisions of paragraph 1 of Article 3 mark the culmination of the OECD's study of the application of the OECD Model Tax Convention ("Model Convention") to transparent entities such as partnerships, trusts and other non-corporate entities. Paragraph 1 is intended to give effect to the recommendation in the Action 2 Report (Neutralising the Effect of Hybrid Mismatches). The MLI Provision on Transparent Entities is as under:

- Paragraph 1 of Article 3 provides that income derived by or through an entity or arrangement that is treated as wholly or partly fiscally transparent under the laws of either contracting jurisdiction to a bilateral tax treaty shall be considered to be income of a resident of either jurisdiction only to the extent that such jurisdiction treats the income as the income a resident of such jurisdiction.

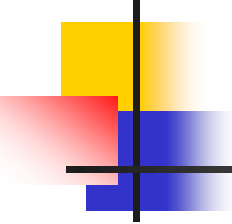
- India's MLI Position:

- India has reserved the right for the entirety of Article 3 to not apply to its CTAs. Accordingly, regardless of the positions adopted by India's bilateral tax treaty partners, Article 3 will not result in any amendments or modifications to India's bilateral tax treaties.

- WHY?

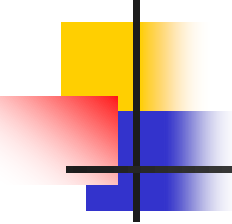


FEMA ASPECTS OF TRUST



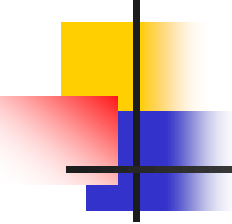
FEMA aspects of Trusts - Overview

- Residential Status of Trust / Transacting Parties - Settlor, Trustees & Beneficiaries
- Nature of the transaction – Capital account or Current account
- Whether transaction is generally permissible or whether specific permission required under relevant FEMA Notification / Regulation
- Transaction of Currency, Securities and Immovable Properties



FEMA – Relevant definitions

- S. 2(e) – Capital Account transaction
 - means a transaction which alters the assets or liabilities, including contingent liabilities, outside India of persons resident in India or assets or liabilities in India of persons resident outside India, and includes transactions referred to in sub-section (3) of Section 6
(Alteration in assets or liabilities in India of PROI;
Alteration in assets or liabilities outside India of PRII)
- S. 2(j) – Current Account transaction
 - means a transaction other than a capital account transaction and without prejudice to the generality of the foregoing such transaction includes –
 - payments due in connection with foreign trade, other current business, services and short-term banking and credit facilities in ordinary course of business
 - payments due as interest on loans and as net income from investments
 - remittances for living expenses of parents, spouse and children residing abroad, and
 - expenses in connection with foreign travel, education and medical care of parents, spouse and children



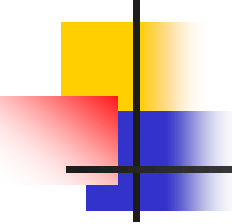
FEMA – Relevant definitions

- S. 2(u) – Person

- includes – (i) an individual, (ii) a Hindu Undivided Family, (iii) a company, (iv) a firm, (v) an AOP / BOI whether incorporated or not, (vi) every artificial juridical person, not falling within any of the preceding sub-clauses, and (vii) any agency, office or branch owned or controlled by such person

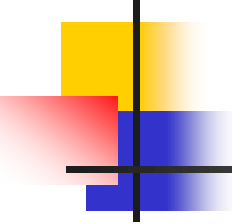
- S. 2(v) – Person resident in India

- (i) person residing in India for more than 182 days during preceding financial year but does not include(*omitted as applicable to individuals only*),
- (ii) any person or body corporate registered or incorporated in India,
- (iii) an office, branch or agency in India owned or controlled by a person resident outside India,
- (iv) an office, branch or agency outside India owned or controlled by a person resident in India



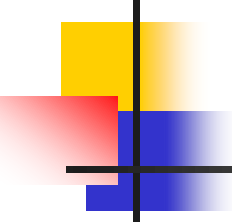
WEALTH & SUCCESSION PLANNING UNDER FEMA

- Wealth in India –
 - Planning by Resident or Non-Resident in favour of Non-Resident
 - Non-Resident to Non-Resident – Transfer of assets held on repatriation and non-repatriation basis
- Wealth outside India –
 - Planning by Resident in favour of Non-Resident
- Generally lower threshold of regulatory oversight in case of settlement or transfer
 - from Non-Resident to Resident of assets in India or outside India
 - from Resident to Resident of assets in India or outside India



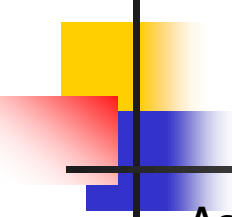
Non-Resident's assets in India

- Bank Accounts in India
- Immovable Property in India
- Debt & non-debt instruments in India
- Assets held under Section 6(5) of FEMA



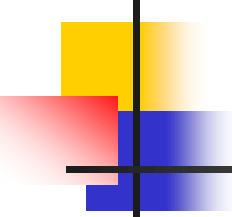
Assets outside India of Residents

- Assets held under Section 6(4) of FEMA – currency, securities, property
- LRS scheme remittances
- Gift and Inheritance obtained
- All other assets are treated as Personal effects, like Jewelry etc.



Modes of Transfer & Instruments

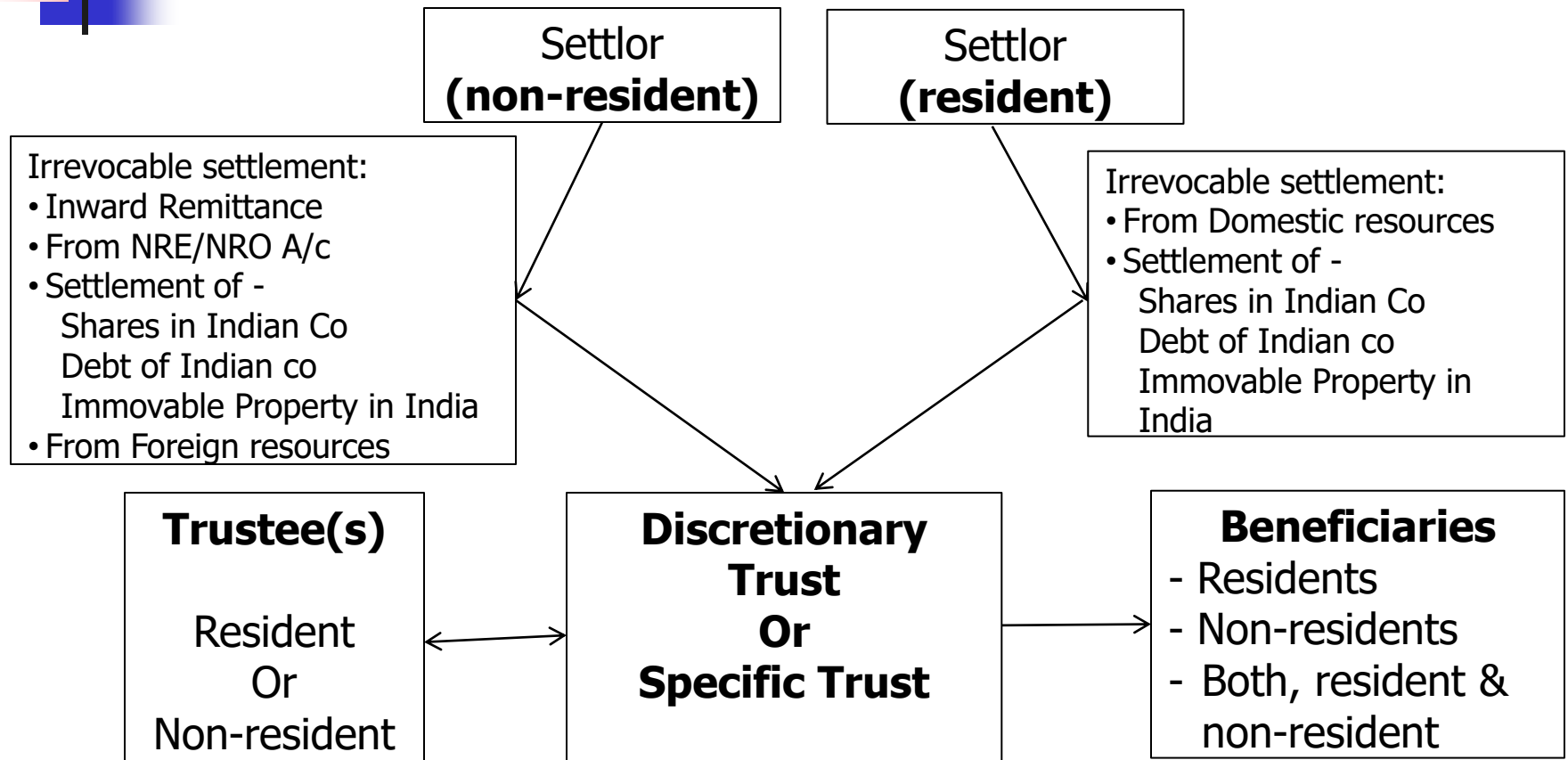
- Assignment, Gifts, Settlement, Sale
- Joint Accounts, Nominations
- Admission to Partnership / LLP, Provision of admission of the kin upon death
- Transfer of Equity / Debt instruments by Gift or Inheritance
- Will or Trust
- HUF
- Factors affecting modes of transfer –
 - Intention of Donor, manner of Holding structure, Repatriation or non-repatriation basis



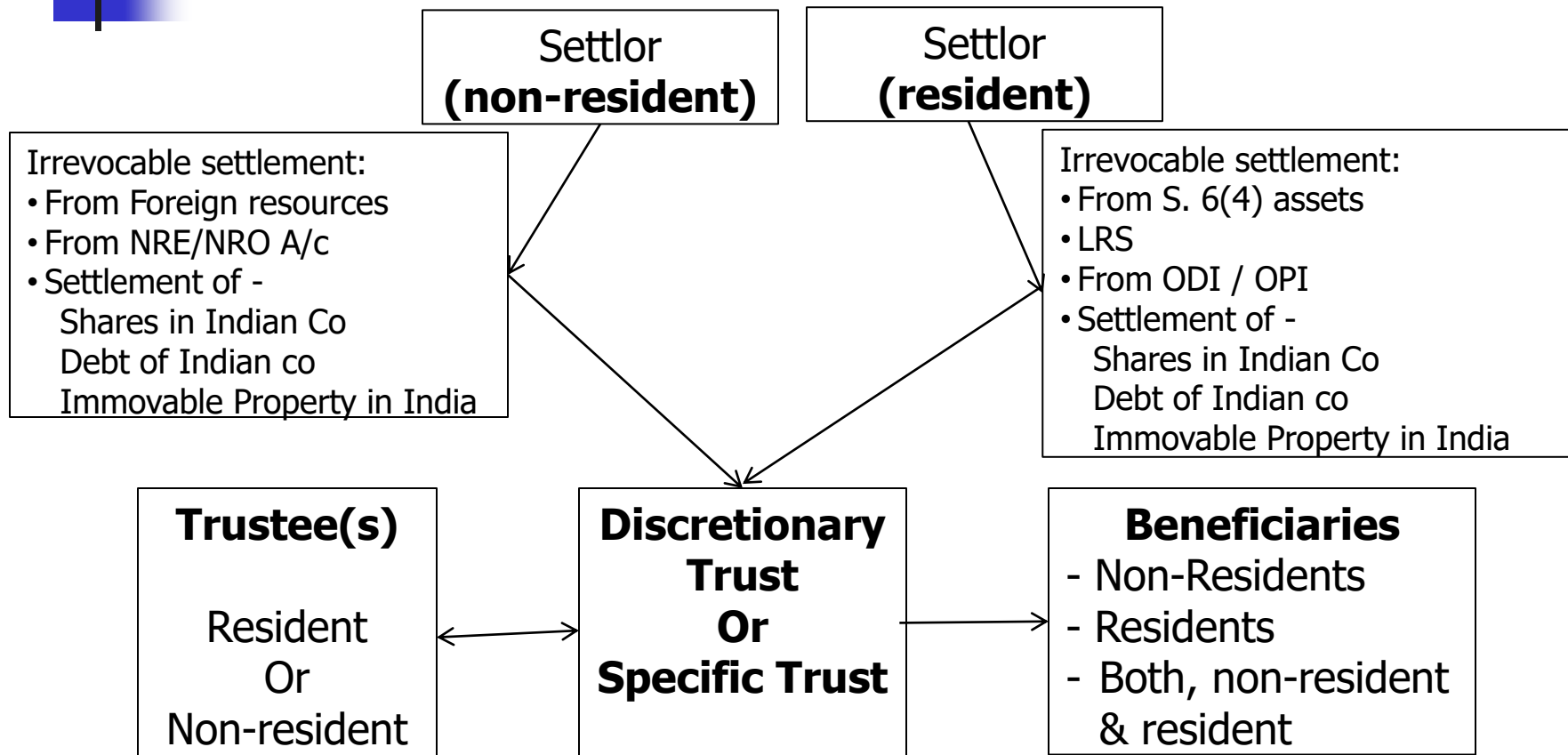
Estate Planning - Trust

- Estate Planning for PRIIs having overseas assets and PROIs having Indian assets:
 - i. General Permission has been given to a PRII to inherit assets outside India from a PROI as per Section 6(4) of FEMA and Rule 21 of OI Rules and to PROI to bequeath assets in India to PRII as per Section 6(5) of FEMA and Rule 24 of NDI Rules
 - ii. Assets can be bequeathed by way of Will or a Trust
- A trust is not included within the definition of Person, as provided under FEMA. Under the Indian trust law, a trust is a contract / arrangement. Accordingly, it becomes difficult to accord any residential status to the trust since it does not fall within the definition of Person
- For Indian tax purposes, a trust is not considered as an entity. Under the tax law, a trustee is taxed as representative assessee of the Beneficiary/ies. Once the trustees are taxed no tax is levied on the beneficiary/ies

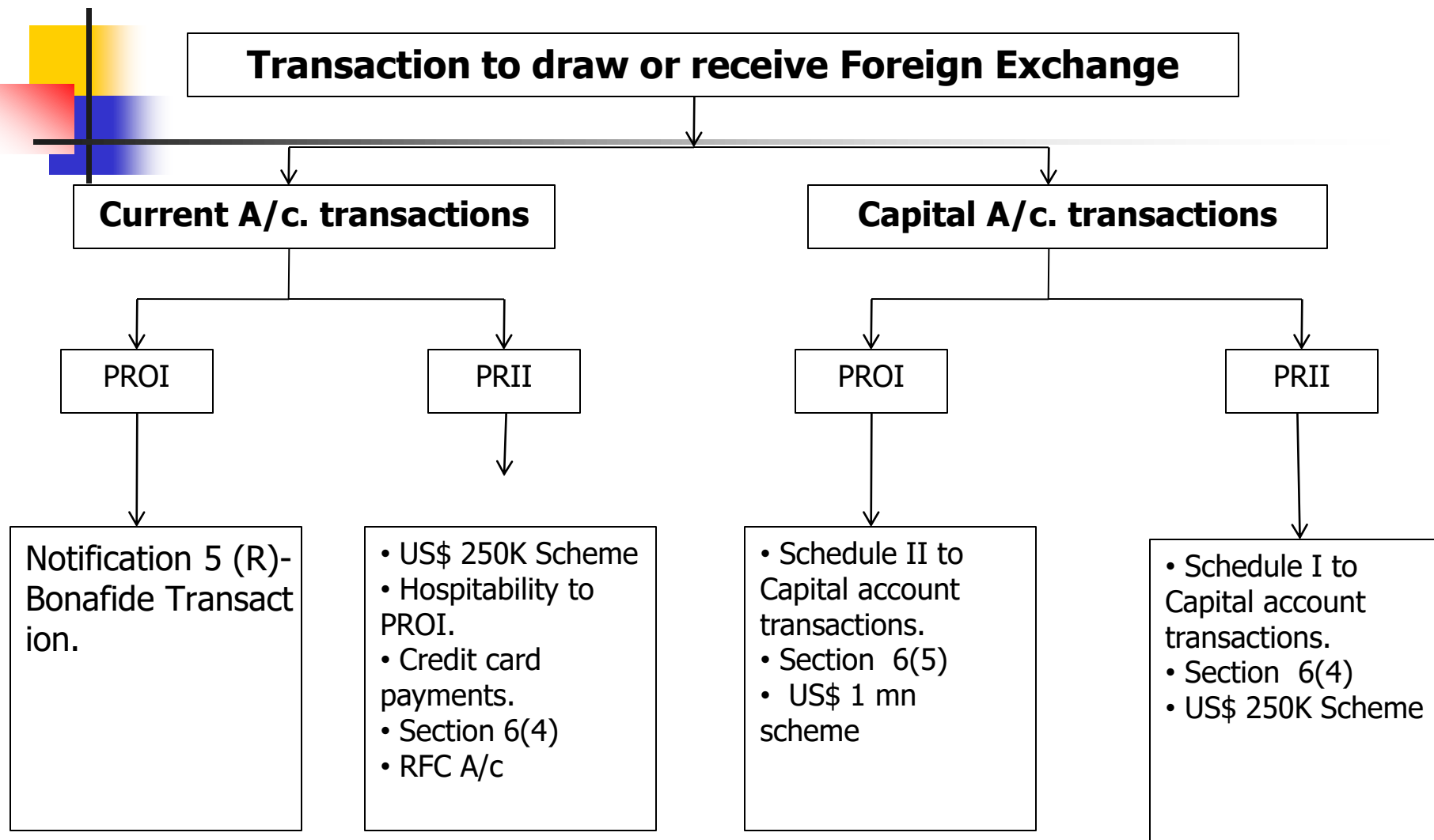
Trusts – Resident Trust (under Indian Trusts Act, 1882)

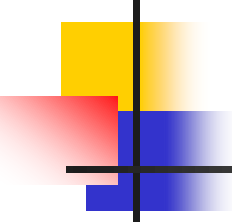


Trusts – Non-Resident Trust (under Foreign Trusts Law)



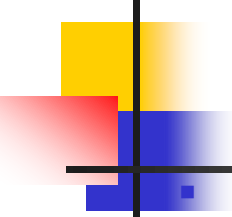
Basic Rules of Transactions under FEMA (con't)





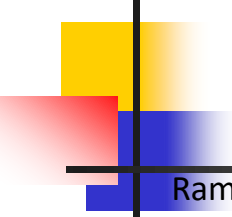
Analysis of the transactions of Trust

- Life cycle transaction
- Corpus by Non-Resident
- Investment by Trust
- Income earned by Trust
- Distribution by Trust



Trust – Gift / Settlement / Transfer

- Gift vs Settlement – A distinction, Section 47(iii) and Section 48 of I.T. Act
- If a Trust is regarded as Person, then settlement would be regarded as Transfer and various FEMA provisions based on asset-class will be triggered.
- If settlement is treated as Gift by regulatory agencies, then settlement in favour of a beneficiary will not trigger any requirement of approval provided Gift from Settlor to Beneficiary is permissible
- When Transfer as stated above of an asset to a Trust is on an Automatic basis, there may not be any issue on distribution
- If Transfer was not on Automatic basis, an approval at the time of distribution may suffice
- The provisions of Transfer by a Non-resident of an Indian asset to an Indian Trust and by a Resident to a Foreign Trust of an Indian or Foreign asset are discussed in subsequent slides
- Treating Settlement as Gift hence Transfer Vs treating Distribution as Transfer
- Contingent Interest in case of 'specified uncertain event'

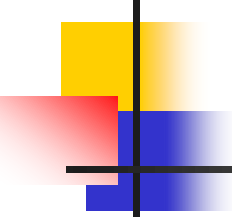


Trust – Gift / Settlement / Transfer

Ramchandra Reddy (dead) through Legal Representative Vs. Ramaluammal (dead) through Legal Representative – determining the nature of Agreement

“If settlement is with consideration, then consideration is received by the settlor, hence where is the question of Gift in any case”

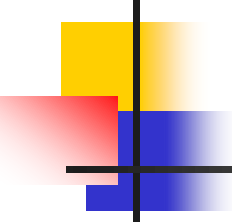
- Settlement could be from oneself to oneself
 - oneself to oneself and another
 - oneself to others
- There is a difference between consideration & adequate consideration and gift - *Tulsidas Kilachand vs CIT 1961*
- Life-tenant under a Trust is treated as Irrevocable Trust u/s. 61 of the ITA as also any other transfer not revocable during life-time of the transferee
- Mere hope in discretionary Trust unless distributed to the beneficiaries – Commissioner of Wealth Tax, Rajkot vs Estate of Lt. Vikramsinhji of Gondal (2014) 268 CTR 232 (SC)
- The concept of ‘like-manner and like-extent’ is an Income of the Beneficiary U/S Section 56(2)(x) as income of Fixed Trust really does not apply under FEMA if there is no distribution
- Settlement is not defined under TPA, 1882, but defined under Indian Stamp Act.



Transfer- Settlement Vs Gift

- Differences between Gift and Settlement

Gift	Settlement
Independent of any factors	Dependent of some factors
Consent of donee is required	Consent of donee is not required
Voluntary	Contractual transfer
Transfer cannot be challenged	Transfer can be challenged
Transferred to Donee directly	Transferred to Trustee for the benefits of Beneficiary/ies, whose right to receive is a contingent one
Defined under TPA 1882..Sec 122	Not defined under TPA but defined under Indian Stamp Act 1925 ..S 2(24)(b)...Levy of concessional Duty



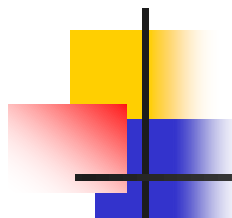
Settlement vs Distribution – Beneficiary's entitlement

- Excluded Person, Charities & contingencies
- Reversion of assets to Settlor if not distributed
- Actual transfer of assets only on distribution
- Settlement – When **Irrevocable**; a transfer only on distribution?
 - When **Revocable**; a transfer – certainty only on distribution

Trusts & FEMA Implications – Different Scenarios & Case-Study

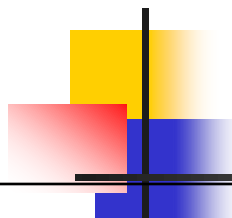
	I	II	III	IV	V	VI
SETTLOR	NRI	NRI	NRI	R	R	R
TRUSTEE	R	R	NRI	R	NRI	R
BENEFICIARY	R	NRI	R	NRI	NRI	R
LOCATION OF ASSETS	India	India	Outside India	India	Outside India	India
Application of FEMA:						
Creation of Corpus	- NRO –Applicable - Remittance from abroad - NA	- NRO –Applicable - Remittance from abroad - NA	NA	NA	- If 6(4) asset – NA - Other assets - Applicable	NA
Income generation	NA	NA	NA	NA	NA	NA
Distribution / Remittance of Income to Beneficiary	NA (Res. To Res.)	Applicable (Res. To NR)	Applicable (NR to Res.)	Applicable (Res. To NR)	NA	NA
Remittance of Corpus to Beneficiary	NA	Applicable	Applicable	Applicable	NA	NA
Taxation in the hands of Trustee (Note 1)	- AOP Rate - If there is Business Income then MMR	- AOP Rate - If there is Business Income then MMR	Taxable in India (Note 2)	- AOP Rate - If there is Business Income then MMR	Not taxable in India	- AOP Rate - If there is Business Income then MMR

- Note 1 - Taxation: if it is a non-discretionary trust, then tax will be determined with respect to each beneficiary as if Income is earned by the beneficiary irrespective of distribution; No tax at the time of distribution
- Note 2 – If only Resident is beneficiary, then he himself will be taxed. Trustee may not be taxed as he is non-resident. If there are mixed beneficiaries, computation mechanism fails



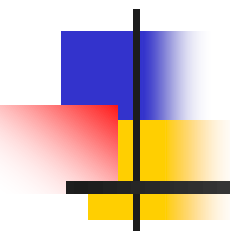
Trust in various Jurisdictions

	Mauritius	UK	Singapore	Jersey
Registration Requirement	No	No	No	No
Local resident Trustee required	Yes	No	No	No
Beneficiaries' right to remove trustee	Yes	Yes	No	Yes
Settlor Reserved Power Trust	No	No	Yes	Yes
Residential Status of Trust	if trust is administered in Mauritius and most of the Trustees are resident in Mauritius or Settlor was resident at the time of creating the trust	determined on the residential status of Trustees	determined on residential status of settlors and beneficiaries	determined on the residential status of Trustees



Trust in various Jurisdictions

	Mauritius	UK	Singapore	Jersey
Tax exemption available to Foreign Trusts	Previous exemption available when no beneficiaries were Mauritian resident has been revoked in FA 2021	Each trust is different and is treated separately depending on: whether it's a discretionary trust or an interest in possession trust the residence status of the settlors or beneficiaries	Tax exemption is available for specified income that is derived by Qualifying Foreign Trusts (QFTs)	If all beneficiaries are non-residents – Tax only on Jersey sourced income
Protection Against Creditors	2 years	2years/5years	No timeline	No specific asset protection provision
Taxation	Taxation of income @ 15%, with partial exemption	CIT – 19%	CIT – 17% Exemption of div and Capital gain	Standard rate of corporate tax – 0% with a few exceptions



Thank You
