Nishith Desai Associates
LEGAL AND TAX COUNSELING WORLDWIDE

MUMBAI SILICON VALLEY BANGALORE SINGAPORE MUMBAI BKC NEW DELHI MUNICH NEW YORK

Succession & Wealth Planning

Indian & International Perspectives

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1. Introduction

India has witnessed a steady growth in its high net worth population as a consequence of increasing globalization not only by families and individuals in Tier I cities but also from Tier II and Tier III cities. Although economically the Indian HNI may be a mirror of his/her counterpart in the developed nations, culturally there appears to be a difference in approach. The Financial Times had reported in 2013 that Asian families in particular suffered from a cultural reluctance to discuss succession. The report stressed on the need for greater awareness for succession planning since a lot of wealth was locked up in family businesses which needed to be effectively devolved to the next generation.

This observation certainly echoes in India where the majority of businesses today are family-run but most Indian businesses families do not have succession plans in place for personal and/or business wealth. After the liberalization of India, a new breed of mobile, highly-skilled, entrepreneurial high net-worth individuals has emerged. Changing social relationships now pose emerging issues such as inter-family relationships between people spread over multiple countries. Businesses have grown across jurisdictions at an astronomical pace but also faltered where accompanied by leadership crises. There are growing risks in a shrinking world where the legal systems of various countries increasingly overlap.

Effective estate and wealth planning ensures that families retain control over their businesses and a smooth transition of leadership of businesses between generations of families. It balances the needs of businesses with the interests of family members. Effective planning of the wealth of high net-worth individuals can prevent long and expensive legal disputes between heirs based in multiple jurisdictions. Various structures provide different degrees of control over the purpose for which the wealth can be used and the manner in which it may be used. For instance, the setting up of a trust to manage wealth offers several advantages such as bypassing the probate process, giving heirs the benefit of property without losing control of it and creating a large pool of funds for making investments.

Court systems, legal frameworks and tax laws do not always keep up with socio-economic aspirations and this gap poses challenges to managing the wealth of business families and high net-worth individuals. Future amendments to tax laws may spread the net of wealth tax wider, which could achieve part of the objective behind levying an inheritance tax. The increase of such a tax could lead to increase of investments abroad in jurisdictions with more favourable tax laws. Laws are also changing to keep pace with new forms of assets such as intellectual property rights. With the growth of technology, intellectual property rights are becoming increasingly valuable and complex and need to be devolved carefully to maximize their value for future generations.

Some challenges that are usually encountered in estate and wealth planning include restrictions imposed by community specific laws, limits on transfer of wealth abroad, ensuring tax efficiency and flexibility for beneficiaries located in various jurisdictions and overcoming compliance issues. In the light of these complexities in estate and wealth planning, building governance models for management of family businesses and wealth of high net-worth individuals assumes great importance.

Keeping in mind the above concerns, this research publication, a compilation of select issues, aims to outline legal and tax considerations on cross-border wealth and succession planning.

2. Residence and Domicile: India, USA and UK

Generally, determination of 'residence' and 'domicile' forms an important first-step in succession and wealth planning. In everyday usage, both these terms are often mistaken to mean the same thing. However, they are two separate factors on the basis of which a jurisdiction exercises the authority to impose its laws on persons. A third factor is citizenship which is a political concept and is linked to the immigration laws of a country. Eritrea and the US are two countries which tax individuals solely on the basis of citizenship, amongst other bases.

In most countries, residence is relevant for the purposes of determining liability to income tax whereas domicile is relevant in the context of other taxes (such as estate duty or inheritance tax) and in the context of non-tax considerations such as applicability of succession laws (particularly, in case of movable property).

In very broad terms, residence refers to physical presence or stay of an individual within the territorial limits of a jurisdiction. In the context of non-natural persons, residence is usually linked to either place of establishment/incorporation or of control and management, or both. Laws of most jurisdictions specify a minimum number of days stay which, once met, subjects the individual to that jurisdiction's laws. Those who do not meet that day-count test are either completely/ partially out of the purview of those laws.

Domicile on the other hand is a concept that incorporates both physical stay and mental element of intention to stay within the territorial limits of a jurisdiction. To that extent, it is more difficult to determine or prove compared to residence. Determination of domicile involves wide ranging factors such as lifestyle, tastes, habits etc. which must all indicate where the relevant individual intended to stay long enough such that it would justify imposing the laws of a particular jurisdiction on him/her.

Here, we discuss 'residence' under the laws of India, the United States [1] (**"US"**) and the United Kingdom1 (**"UK"**). The next section will discuss 'domicile' for the above three countries.

I. Residence in India

In India, the basis for imposing Indian tax and exchange control regulations is the residence of an individual as opposed to domicile or citizenship. Domicile is important in cases of succession, whether testamentary (i.e. under a will) or intestate (i.e. where the person dies without leaving a will).

A. Residence for tax purposes

Under the Income Tax Act, 1961 (**"ITA"**), persons who meet the test of residence in India are taxed on their worldwide income whereas non-residents are taxed only on income that is sourced in India. These rules vary depending on the entity involved and different residence criteria apply to individuals, companies and unincorporated entities. Residence is determined vis-à-vis a financial year (**"FY"**), i.e., April 1 to March 31, which is the tax year in India.

i. Individuals

Resident: Generally, an individual is considered a tax resident of India for a FY in two cases:

i. If he spends an aggregate of 182 days or more in India during the relevant FY; or

ii. If he spends an aggregate of 60 days or more in India during the relevant FY and an aggregate of 365 days or more during the four FYs preceding the relevant FY.

However the test outlined in (ii) above is effectively not applicable in cases where a citizen of India or a 'person of Indian origin' (i.e., any person who was

1. We are qualified to advise on Indian law only. Any statement with respect to laws of other jurisdiction should be confirmed by the local counsels of the respective jurisdictions and should not be considered as legal advice.

himself/herself born in India or his/her parents or grandparents were born in India) comes to India for visits, but not for permanent stay.

An Indian resident individual would be taxed on income at progressive tax rates of either 10%, 20% or 30% depending on the relevant slab of income under which he/she falls. An Indian resident is taxable on his worldwide income, i.e., income: (i) which is received in India; (ii) which accrues or arises in or outside India; and (iii) which is deemed under the ITA to be received or to accrue or arise in India.

Resident but not ordinarily resident: In a FY, a resident individual is considered 'resident but not ordinarily resident' in India if he has been a non-resident for 9 out of 10 FYs preceding the relevant FY (as per the criteria indicated above) or if he has spent an aggregate of 729 days or less in India during the preceding 7 FYs. A person who is 'not ordinarily resident' is liable to tax as a resident with one important difference - income received or accrued outside India is not taxable unless it is derived from a business controlled or set up in India.

Non-resident: In every other case, an individual would be considered a non-resident for Indian tax purposes. A non-resident is taxed only on income that is sourced in India, i.e., income received, accrued or arisen in India and income which is deemed under the ITA to be received, accrue or arise in India.

ii. Companies

A company is to be considered a tax resident of India in a FY if one of two criteria is met:

i. a company that is formed and registered under the Companies Act, 1956; or

ii. its place of effective management (POEM) in that FY, is in India.

Thus, if an offshore company has its POEM in India, it qualifies as an Indian tax resident, taxable on worldwide income. POEM has been defined to mean "a place where key management and commercial decisions that are necessary for the conduct of the business of an entity as a whole are, in substance made". POEM as a criteria for determining residence of an offshore company is applicable with effect from FY 2016-17. In order to provide some clarity on how to determine the POEM of a company, the Government released guidelines on January 24, 2017. Due to the uncertainty surrounding the implementation of POEM, the Finance Act, 2016 introduced a transition mechanism for an offshore company which qualifies as a resident in India for the first time under the POEM test. For such companies, the provisions of the ITA relating to computation of income, treatment of unabsorbed depreciation, setoff or carry forward of losses, special provisions relating to avoidance of tax and collection and recovery of taxes are to apply with exceptions, modifications and adaptations as notified by the government.

iii. Unincorporated Entities

Hindu Undivided Families (**"HUFs"**), partnership firms, or any association of persons under the ITA would be considered Indian tax resident if even a part of their control and management is situated within India. This will also apply to trusts. Therefore in a situation where an offshore trust is even partly managed from within India, there is the risk of it being considered resident in India.

Thus, in respect of all such entities, even a minor element of management or control could lead to them being considered Indian tax residents.

B. Residence for Exchange Control Purposes

The Foreign Exchange Management Act, 1999 (**"FEMA"**) regulates inbound and outbound transactions involving movement of foreign exchange into and out of India. FEMA extends to the whole of India and applies to all branches, offices and agencies outside India owned or controlled by a person who is a resident of India and also to any contravention committed outside India by any person to whom this Act applies.

The expression, 'person resident in India' is defined under FEMA as follows:

"i. a person residing in India for more than 182 days during the course of the preceding financial year but does not include:

A. a person who has gone out of India or who stays outside India,

a. for or on taking up employment outside India, or

b. for carrying on a business or vocation outside India, or

c. for any other purpose, in such circumstances as would indicate his intention to stay outside India for an uncertain period;

B. a person who has come to or stays in India, otherwise than—

a. for or on taking up employment in India, or

b. for carrying on a business or vocation in India, or

c. for any other purpose, in such circumstances as would indicate his intention to stay in India for an uncertain period;

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."

Thus, an individual is generally considered a resident of India under the FEMA if he has been residing in India for more than 182 days in the course of the preceding FY. However, in addition to this primary test, it is also necessary to consider the intention of such person to stay in India for an uncertain period. As clarified by the Government in a Press Release, dated February 1, 2009:

"To be treated as a person resident in India under FEMA, a person has not only to satisfy the condition of the period of stay (being more than 182 days during the course of preceding financial year) but also his purpose of stay as well as the type of Indian visa granted to him to *clearly indicate the intention to stay in India for an uncertain period.* In this regard, to be eligible, the intention to stay has to be unambiguously established with supporting documentation including visa."

From a reading of the scheme of FEMA including its objects and purposes, it is possible to take the view that even if an individual is in India for a few hours, it should be treated as a day for the purpose of determining whether the 182 day period threshold is satisfied. However, as explained above it will be necessary to also establish that the individual intends to stay in India for an uncertain period.

C. Interplay between ITA and FEMA

The difference between the residence tests for tax and for exchange control purposes is that for tax, the duration of stay matters, not purpose. However, for exchange control purposes, both duration and purpose of stay matters. So, it may happen that an individual may be resident in India for tax purposes but not for exchange control purposes and vice-versa.

II. Residence in the United States

A. Residence for tax purposes[2]

i. Individuals

Any person who is not a US citizen or a US national is considered an alien as per US law. An alien can be of two types for tax purposes: resident alien and non-resident alien. All resident aliens have the same tax treatment as US citizens and are taxed on their

2. Overview of US tax law has been sourced and summarized from information publicly available on the website of the US IRS: http://www.irs.gov/Individuals/International-Taxpayers/Introduction-to-Residency-Under-U.S.-Tax-Law

worldwide income. Any person who is not a US citizen and not a resident alien is a non-resident alien and is taxed only on US sourced income.

An individual is considered a resident alien if he/she meets one of the following two tests for the calendar year, which is the FY followed in the US: (i) the green card test; (ii) the substantial presence test or (iii) the first year choice

a). The green card test

'Green card' holder is the term commonly used in everyday language to mean a person who is a lawful 'permanent resident' of the US. If an individual was, at any time during the calendar year, a lawful permanent resident of the United States according to immigration laws, and this status has not been rescinded by him/her or revoked by the administration or by a Court, he/she is considered to have met the green card test.

A green card can be obtained through family, job, refugee status etc. Anyone who wishes to become an immigrant based on an employment or a job offer may apply for permanent residence or green card, as per availability, according to the following employment based preferences:

The '183 day requirement' is fulfilled by counting the following days:

i. All days of physical presence during the FY in question;

ii. One-third of the days of physical presence during the previous year; and

iii. One-sixth of the days of physical presence during the year prior to the previous year

Certain days and types of visit do not qualify to be counted for the purpose of this test, particularly:

i. Days the individual is in the US for less than 24 hours, while in transit,

ii. Days spent in the US because of a medical condition or problem that prevented the individual from leaving the US on the planned date; and

iii. Days for which the individual is an exempt individual. An exempt individual refers to:

- An individual temporarily present in the United States as a foreign government-related individual;

Order of Preference	Category
First	Priority Workers, including aliens with extraordinary abilities, outstanding professors and researchers, and certain multinational executives and managers
Second	Members of professions holding an advanced degree or persons of exceptional ability (including individuals seeking a National Interest Waiver)
Third	Skilled Workers, professionals and other qualified workers
Fourth	Certain special immigrants including those in religious vocations
Fifth	Employment creation immigrants (investors or entrepreneurs)

b). The substantial presence test

To meet this test, an individual must have been physically present in the United States for:

i. at least 31 days during the current year, and

ii. 183 days during the 3 year period that includes the current year and the 2 years immediately before.

- A teacher or trainee temporarily present in the United States with a J or Q visa who substantially complies with the requirements of the visa;

- A student temporarily present in the United States with an F, J, M, or Q visa who substantially complies with the requirements of the visa; or

- A professional athlete temporarily present to compete in a charitable sports event.

The substantial presence test can be disregarded if the individual is present in the US for less than 183 days in that year, is a tax resident of another country and has a closer connection to that other country during such year.

c). The First Year Choice Test

If an individual does not meet either the green card test or the substantial presence test for 2 years preceding the current FY[3] , but he meets the substantial presence test for the present FY, he may choose to be treated as a US resident for part of the previous year. To make this choice, he must:

i. Have been present in the US for at least 31 days in a row in the preceding year, and

ii. Have been present in the US for at least 75% of the number of days beginning with the first day of the 31-day period and ending with the last day of the preceding year.[4]

The exceptions to the day count as contained in the substantial presence test would be applicable for the first-year choice test as well while counting days.

ii. Non-natural persons

There is no concept of ascribing residence to entities in the US based on control and management. As far as corporations and partnerships are concerned, in order for them to be considered domestic entities, they must be organized in the US or under US laws or any state within.[5] However, specific definitions have been ascribed to the terms 'foreign estate' and 'foreign trust' and any estate/trust that does not fall within these definitions would be considered a domestic estate/trust in the US.

A foreign estate is defined under the Internal Revenue Code (**"IRC"**) as an estate, the income of which is:

i. From sources outside the US;

ii. Not effectively connected to the conduct of a trade of business in the US;

iii. Not includible within gross total income as computed under the IRC.

A foreign trust is defined as all trusts that do not fall within the definition of 'US Person' as under the IRC. A trust is considered a US Person only if:

i. A US Court has primary supervision over the administration of the trust;

ii. US person(s) have the authority to control all substantial decisions in relation to the trust

In 1997, owing to the failure of previous methods used for classification of unincorporated entities, the 'check-the-box regulations' were introduced as part of the US Treasury Regulations. The check-the-box system is a simple and innovative system by which unincorporated business entities, (such as a partnership, limited partnership or an LLP), and incorporated entities (other than certain domestic and foreign-incorporated entities that are deemed to be corporations for US tax purposes) can elect to be taxed as a corporation or as a partnership for tax purposes. Therefore, LLCs or LLPs became attractive business vehicles for investors since they gave them both limited liability and pass-through status on election. Once such an entity elects to be treated as a pass-through entity, several substance requirements are to be fulfilled with regard to allocation of income to partners. [6]

3. And if no similar choice was made for the second preceding year.
4. For purposes of this 75% requirement, one may treat up to 5 days of absence from the United States as days of presence in the United States.
5. Including the District of Columbia.
6. The 'substantial economic effect' rules found in Treasury Regulation Section 1.704-1.

III. Residence in the United Kingdom

A. Residence for tax purposes[7]

i. Individuals

Tax residence in the UK is different from residence as per Immigration laws and depends on the satisfaction of certain conditions. Up to 5 April 2013, the concept of a person being 'ordinarily resident in the UK' existed in UK tax law. However, from 6 April 2013, the new 'Statutory Residence Test' has been added to UK tax law by which the concept of ordinary residence has largely been abolished. As per the present regime, there are automatic tests provided for both establishing tax residence in the UK and for being excluded from residency for tax purposes.

There are three automatic tests by which a person is automatically considered to be a 'non-resident' for the relevant fiscal year (6 April to 5 April). These are as follows:

i. If one is a resident in the UK for one or more of the three tax years preceding the relevant FY, and one spends fewer than 16 days in the UK in the relevant FY [8]; or

ii. If one were resident in the UK for none of the three tax years preceding the relevant fiscal year year, and one spends fewer than 46 days in the UK in the relevant FY; or

iii. If one works full-time overseas over the tax year, without significant breaks during the relevant FY, and [9]:

- one spends fewer than 91 days in the UK in the relevant FY;
- the number of days in the relevant FY on which one works for more than three hours in the UK is less than 31.

If the conditions mentioned in any of the above 3 automatic tests are met, then the person is automatically considered a non-resident for tax purposes. However, if none of these tests are met, there are 3 automatic residency tests that need to be looked at to determine whether the person would be considered a tax resident. These are as follows:

i. If one spends 183 days or more in the UK in relevant FY;

ii. If one has a home in the UK for a consecutive period of 91 days (out of which 30 days are in the relevant FY) and one is present in this home for 30 days or more in the relevant FY and has no overseas home where he spends over 30 days in the relevant FY;

iii. If one works full-time in the UK for any period of 365 days, with no significant break and:

- all or part of that 365-day period falls within the relevant FY;
- more than 75% of the total number of days in the 365-day period when one does more than three hours of work are days spent in the UK doing such work; and
- at least one day which is both in the 365-day period and in the relevant FY is a day on which one does more than three hours of work in the UK.

Where an individual meets none of the automatic UK tests and none of the automatic overseas tests, he will be treated as UK resident if he has "sufficient ties" to the United Kingdom. If the individual was UK resident for one or more of the 3 years preceding the relevant tax year, the UK ties required are as follows:

7. Overview of UK tax law has been sourced and summarized from information publicly available on the website of HMRC. See the HMRC Guidance note for the 'Statutory Residence Test', available at: http://www.hmrc.gov.uk/international/rdr3.pdf; HMRC guidance on Company residence, available at: http://www.hmrc.gov.uk/manuals/intmanual/INTM120030.htm

8. There are additional tests prescribed for an individual who dies in the relevant fiscal year.

9. This test will not apply if one is involved in a relevant job on board a ship, aircraft or vehicle and if at least six of the cross-border business trips taken by one begin/end or begin and end in the UK.

Days spent in the UK (present at midnight)	Number of UK ties required
16-45	At least 4
46-90	At least 3
91-120	At least 2
>120	At least 1

However, if one has not been a tax resident for any of the preceding three years, the number of UK ties required are as follows:

Days spent in the UK (present at midnight)	Number of UK ties required
46-90	At least 4
91-120	At least 3
>120	At least 2

One is said to have a 'UK Tie' if one has any one of the following:

i. a family tie i.e. husband/wife/partner/child in the UK;

ii. an accommodation tie i.e. a place to live in the UK that is available for a continuous period during the relevant FY and you spend one or more night there during the relevant FY[10];

iii. a work tie i.e. if you work in the UK for 3 hours or more a day at least 40 days in the relevant FY;

iv. a 90 day tie i.e. if one spends 90 days in the UK for either or both of the previous two FYs;

v. a country tie i.e. if the country in which one was present most number of times in the FY at midnight was the UK

Apart from the above, there are other tests involving return to the UK for temporary residence which may create certain tax implications, although it does not create tax residency as such.

b) Non-natural persons

A resident company in the UK would be subject to corporation tax on the whole of its worldwide income, while non-resident companies are subject to tax in the UK only if they conduct business in the UK through a permanent establishment or have UK- sourced income.

A company is said to be resident of the UK if:

i. It is incorporated in the UK (except in cases where such company has migrated with special consent of the Treasury); or

ii. The place of central management and control of the business is in the UK.

However, if a company is tax resident in the UK under these tests, but is also considered resident of another country under a tax treaty, Her Majesty's Revenue and Customs (**"HMRC"**) will respect the tie-breaker rule provided for in the tax treaty.

As far as classification of other entities is concerned, every other entity such as a trust, partnership etc. is considered fiscally transparent for UK tax purposes. The HMRC has released a list of foreign entities and has provided clarification as to their classification.[11] If the foreign entity does not fall within this list, the six tests laid down by the Court of Appeal in *Memec PLC v. CIR*[12] become applicable. Any entity that:

i. issues share capital;

ii. is the recipient of profits/gains;

iii. has legal existence;

iv. carries on business;

10. If such place is the home of one's parents/grandparents/brother/sister/adult child or grandchild, the requirement is that 16 nights or more must be spent there.

11. Available at: http://www.hmrc.gov.uk/manuals/intmanual/INTM180030.htm

12. 71 TC 77.

v. is responsible for its own debts; and

vi. beneficially owns its assets;

is fiscally opaque, falling under the definition of 'company' for UK tax purposes. As laid down in *Swift v. HMRC* [13], the tests are still applicable and if the entity (a US LLC in this case) hasn't issued share capital and if the profits belong to the members, it is considered fiscally transparent and the profits are taxed in the hands of their hands. Thus, the first two conditions are considered paramount for this determination. Guidelines for classification of an entity as transparent or opaque have been provided by the HMRC subsequent to *Memec*.[14]

IV. Domicile in India

In India, domicile becomes important in the context of succession laws (particularly, in case of movable property). Domicile usually is determined by the place of birth of individuals; and may subsequently be changed by a conscious act of the individual. Indian law lays down a specific test for "domicile of origin", and domicile of origin may not necessarily be the same as the place of birth.

The Indian Succession Act, 1925 lays down some general principles as to domicile. It provides that the "domicile of origin" of every legitimate child is the country where the father was domiciled at the time of birth of the individual. It also provides that the domicile of origin prevails until a new domicile is acquired and a new domicile is acquired by "taking up... fixed habitation" in a country other than the domicile of origin.

"Fixed habitation" in this context does not mean merely a fixed place of residence. The intention to acquire a new domicile, and the intention of residing in that fixed habitation permanently (and not merely by way of employment etc.) is also relevant.

In *Central Bank v. Ram Narain* [15], the Hon'ble Supreme Court of India held that the domicile of origin adheres to an individual even if the individual leaves the country with the intention of never returning till the person acquires domicile elsewhere. In *Yogesh Bharadwaj v. State of Uttar Pradesh* [16], the Court held that domicile of origin is not easily shaken off: domicile of origin may be transmitted through several generation even if no member of the succeeding generation has ever resided in the country of origin. Unless a definite intention to permanently reside elsewhere is demonstrated (and mere factual residence would not be sufficient for this purpose), the domicile of origin continues.

One could thus say that there is a strong presumption that the domicile of origin continues to be the current domicile of an individual; unless it is clearly shown that the individual has given up the domicile by residing abroad with the intention of permanently settling abroad and with the intention of never returning. Whether such a new domicile (domicile of choice) is acquired or not is a mixed question of law and fact. The burden of proof of establishing that a person has acquired a domicile of choice (giving up the domicile of origin) is on the person who asserts that a domicile of choice has been acquired.[17]

Domicile of choice is a combination of residence and intention. The intention must be to "reside permanently" or for an unlimited time. In determining such intentions, particularly when one is concerned with the domicile of a deceased person, "it must be ascertained whether at some period in his life, (the deceased) had formed and retained a foxed and settled intention of residence in a given country. One has to consider the tastes, habit, conduct, actions, ambition, health, hopes and projects of a person, because they are all considered to be keys to his intention to make a permanent home in a place...".[18]

Thus, the first step is to ascertain the domicile of origin by the rules in the Indian Succession Act, 1925. The second step is to determine whether such domicile of origin is overriden by a domicile of choice. There is a strong presumption in favour of

13. (2010) UK FTT00399.
14. Available at: http://www.hmrc.gov.uk/manuals/intmanual/intm180010.htm
15. AIR 1955 SC 36
16. AIR 1991 SC 356
17. *Kedar Pandey v. Narain Sinha*, AIR 1966 SC 10.
18. Sankaran Govindan v. Lakshmi Bharathi, AIR 1974 SC 1764

the domicile of origin. For establishing domicile of choice, evidence is required of residence coupled with an intention to reside permanently. The mere fact that there is a business established in the country does not establish the necessary intention of permanently residing. The fact that there are family or economic ties to persons or properties in the country of origin may strengthen the presumption in favour of origin, and would militate against an establishment of a domicile of choice outside.

However, the concept of domicile is hardly relevant for tax law purposes as a 'residence' based test is applicable for residence under the ITA and India does not impose estate or gift taxes. However, since the Government has recently proposed the re-introduction of estate duty in India, the concept of 'domicile' based on the above principles may be of relevance.

V. Domicile in the United States

Transfer taxes such as federal estate and gift taxes is based on 'domicile'. A person is considered domiciled in the US for the purpose of federal estate and gift taxes if he is living in the US and shows no active intention to leave the US. The concept of domicile depends on the facts and circumstances in each case. Some of the important factors that have been considered by the Internal Revenue Service and Courts in the US are:

i. Statements made by the person through legal documents such as tax returns, testamentary documents etc. [19]

ii. Time-spent in the US as compared to time-spent abroad and frequency of travel[20] ;

iii. Place where business/professional links are closer[21];

iv. Location of personal property [22];

v. Place where personal relations are present.[23]

19. Fokker Est. v. Commissioner., 10 T.C. 1225 (1948).

20. *Paquette Est. v. Commissioner*, T.C. Memo. 1983-571.

21. Supra, Note 6.

22. Farmers' Loan & Trust Co. v. US, 157 U.S. 429 (1895).

23. Nienhuys Est. v. Commissioner, 17 T.C. 1149 (1952).

VI. Domicile in the United Kingdom

The concept of 'domicile' is significant from both an income tax and an inheritance tax perspective. If a person is resident in the UK and is domiciled in the UK, then he/she is taxed on the 'arising basis'. This means he is taxed on both UK and foreign sourced income and capital gains. If one is considered a resident of the UK and is not domiciled in the UK and has foreign income and/or gains then he is taxed on UK sourced income and capital gains, but has a choice to pay foreign sourced income and capital gains on 'remittance basis' i.e. when money is brought back to the UK or on all of his/her worldwide income.

Liability to inheritance tax in the UK also depends on domicile status at the time of transmission. The different types of 'domicile' that are provided for in the context of inheritance tax are:

i. Domicile of origin i.e. affinity to location acquired from one's father at birth;

ii. Domicile of dependency i.e. affinity to location owing to domicile of the person who one is legally dependent on;

iii. Domicile of choice i.e. affinity to location if one settles in a country and shows intention to live there permanently/indefinitely.

For inheritance tax purposes, there is also a concept of 'deemed domicile' where one is deemed to be domiciled in the UK at the time of transmission if:

i. One was domiciled in the UK within the three years immediately preceding the transmission, or

ii. One was tax resident in the UK in at least 17 out of the 20 FYs ending with the year of transmission

The determination of 'domicile' is very subjective and depends on the facts and circumstances of each case. The HMRC has provided that all facts relevant to an individual's background, lifestyle and habits shall be examined on a case by case basis for the determination of domicile.

Proposals regarding "deemed domicile" for income tax and inheritance tax purposes

During the Summer Budget 2015, the government announced its proposal to introduce reform in relation to taxation of individuals who are resident in the UK with a foreign domicile (commonly referred to as non-doms). Pursuant to such announcement, in September 2015 and August 2016, the HMRC lunched consultation papers with details of the proposals. Subsequently, the draft Finance Bill 2017 was placed for public comments and on March 20, 2017, the 2017 Finance Bill was published.

Key proposals, which are expected to come into force with effect from 6 April 2017, include:

- non-doms who have been tax resident in the UK in 15 out of the last 20 tax years will be treated as UK domiciled for all tax purposes and therefore, will be subject to UK tax on their worldwide income and gains on an 'arising basis' and to UK inheritance tax on their worldwide assets;

- a deemed domiciled individual with less than £2,000 unremitted income and gains will continue to be automatically entitled to the 'remittance basis' of taxation;

- a non-dom who has become deemed domiciled will have to be non-UK resident for 3 complete tax years to lose his deemed domiciled status for income tax and capital gains tax purposes and for four years for inheritance tax purposes;

- existing UK tax rules which tax UK resident individuals on benefits received from offshore trusts are to be adapted to apply to deemed domiciled individuals; however, offshore trusts set up by a non-dom before becoming deemed domiciled will enjoy some limited protections;

- a non-dom, who was born in the UK with a UK domicile of origin, will be treated as UK domiciled for all tax purposes during any period when he is UK resident;

- non-doms who become UK deemed domiciled on 6 April 2017 under the 15/20 test will be able elect to re-base foreign assets held directly on July 8, 2015, to their market value so that they will only pay capital gains tax on any increase in the value of the asset from 6 April 2017 to the date of sale; It will not apply to those who were born in the UK with a UK domicile of origin;

- non-doms will be given two tax years (from 6 April 2017 to 5 April 2019) to re-arrange offshore mixed funds (i.e, funds which contain both capital and unsegregated foreign income and gains) to separate out those funds into their constituent parts. [24]

24. Available at: https://www.gov.uk/government/consultations/reforms-to-the-taxation-of-non-domiciles/reforms-to-the-taxation-of-non-domiciles and https://www.gov.uk/government/consultations/reforms-to-the-taxation-of-non-domiciles-further-consultation/reforms-to-the-taxation-of-non-domiciles-further-consultation.

3. Select Wealth and Succession Planning Techniques

I. Indian Law on Wills & Probate

If an individual desires to leave his property to certain persons/relations, he can do so by means of a Will. A Will gives effect to the wishes of the individual on his death, once the Will is proved in a court of law in accordance with law.

If a person dies without leaving a Will (i.e. intestate), this triggers rules under the laws of intestate succession under which the deceased's properties pass to relations specified under the laws. However, these default rules will not apply[25] with respect to the property bequeathed under a valid Will.

A Will has been defined under the Indian Succession Act, 1925 (**"ISA"**) as "the legal declaration of the intention of the testator, with respect to his property, which he desires to be carried into effect after his death." In other words, a Will or a Testament means a document made by a person whereby he disposes of his property (such individual is called a testator), but the disposal comes into effect only after his death. Persons to whom property is bequeathed under a will are called legatees.

There are two types of laws which become relevant in the context of wills – the law governing substantive rights and the law governing procedural aspects In India, the law governing substantive rights in relation to wills is tied to the religion of the individual. Therefore, the respective personal law will apply based on the religion of the testator. Personal laws may be wholly codified (i.e. enacted into statutory law) or partly codified and partly customary. However, for wills made by Christians, Parsis, persons married under the Special Marriage Act, 1954 or under the Foreign Marriage Act, 1969, the provisions of the Indian Succession Act, 1925 will apply. Testamentary succession in respect of moveable properties is governed by the law of the domicile of the owner while succession to immoveable properties is governed by the law where the immovable property is situated.

Procedural aspects (such as probate) are governed by provisions of the Indian Succession Act, 1925 (with some exceptions in case of Muslims). We discuss below certain considerations for drafting a will followed by the process governing probate and letters of administration.

A. Who can make a Will?

Every individual who is major, of sound mind and with free consent is capable of making a will. Under the Indian Majority Act, 1875 majority is attained at the age of 18 years (21 years, if a guardian is appointed by the Court). Under Muslim personal law, majority is attained at the age of 15 years but the provisions of the Indian Majority Act will apply for the purpose of legal capacity to make a will.

Sound mind refers to such a mind and memory as would enable a person to understand the elements of which the will is composed and the disposition of his property in simple forms.[26] Courts have considered factors such as history of mental illness, testimony of medical witness, relations with family members, state of sobriety etc. in determining whether a person could be said to be of sound mind. An ordinarily insane person can make a will during an interval in which he is of sound mind. A will made with fraud, coercion or importunity is void.

25. An exception to this principle is forced heirship. Forced heirship refers to laws which specify a share of property that mandatorily must pass on the deceased's heirs and cannot be disposed by free will of the individual.

26. '*Banks v. Goodfellow* 180 LR 5 QB 549', in Subramani & Kannan, *The Indian Succession Act* (Lexisnexis Butterworths, New Delhi) 9th ed, 1995.

B. Who can Inherit Property under a Will?

Under Muslim personal law, any person who is capable of holding property may be made a legatee. A bequest may be made for the benefit of an institution or for a charitable object. A bequest in favour of an unborn person is void but if the child is born within six months (Sunni law) or ten months (Shia law) of the date of making the will, then the bequest is valid.

For non-Muslim testators, a will can be made in favour of a person or a class of persons. It cannot be made in favour of an unborn (i.e. not born at the date of testator's death), subject to certain exceptions. A bequest in which the vesting of the property is delayed beyond the lifetime of persons alive at the time of the testator's death is not valid. However, charitable bequests are an exception to this rule.

C. What Property May be Disposed off?

A Hindu (includes Jains, Buddhists and Sikhs) may dispose of by will or other testamentary disposition any property (including his share in undivided coparcenary/joint family property), which is capable of being disposed of by him. Muslim law has forced heirship rules under which Muslims are permitted to dispose only one-third of their estate under a will. However, more than one-third may be bequeathed if all heirs agree to such disposal either before the testator's death (under Shia law) or after the testator's death (under Sunni and Shia law). Sharia-compliant trusts may be used to sidestep the limitation on testamentary disposition unless the settlement is made in anticipation of death. India does not have forced heirship rules except under customary Muslim law (as explained above) and under Goan community law.

Regardless of the religion of the deceased, the residents of Goa are subject to forced heirship and community property laws. The rule of forced heirship in the Portuguese Civil Code is as follows depending on the persons who are alive at the time of the intestate's death : (i) Spouse only (one-half of estate); (ii) descendants and spouse (two-thirds); (iii) descendants only (one-half or two-thirds, depending on number of descendants), (iv) ascendants and spouse (two-thirds); (v) parents only (one-half); and (vi) other ascendants only (one-third). The remainder is freely disposable.

D. What are the Formalities for Making a Will?

Wills made by persons of all religions including those who marry under the Special Marriage Act, 1954 (except Muslims who marry under customary law) must meet the procedures prescribed under ISA, including that the Will must be attested by two or more persons.

The will should clearly set out the properties intended to be transferred and should also set out that the document has been bequeathed / document has been executed without coercion or undue influence. Case law has held that where one of the natural heirs is to be disinherited, the testator must set out clear reasons as to why the testator wishes to disinherit such individual.

Registration of a will is optional under the provisions of Indian Registration Act and no adverse inference can be drawn against the will in case of non-registration.[27]

E. Procedural Aspects

When a person dies, there must be somebody to deal with or administer the estate of the deceased, e.g. sell property, collect debts, repay debts, close bank accounts etc. Estate and succession laws provide for administrative procedures so that actions taken in relation to the matters of an individual after his death are legally effective. Legal systems broadly divide estate administration procedures into two situations:

1. Where a person has died leaving a will; and

2. Where a person has died without leaving a will, i.e. intestate.

27. MSP Rajesh v. MSP Raja (1994) 1 Mad LJ 216.

A person named in the will to administer the estate is called an executor(s). An executor derives the authority to act from the will but this authority must be confirmed by a legal procedure called probate which establishes the genuineness of the will. Where a person has died intestate, the court (on an application by an interested party) appoints a person called the administrator. An administrator is also appointed (upon application) where the will is invalid or an executor is not named in the will or the executor is unable or unwilling to act. Unlike an executor, an administrator's authority to administer the estate is both conferred by and confirmed under the court-issued document called Letters of Administration (**"LoA"**). Executors or administrators are treated as personal representatives of the deceased. A third document important for estate administration is called the Succession Certificate which has limited application.

Approximately it takes about 8-10 months to obtain a grant of probate from the court if it is uncontested or between 6-9 years if it is contested. The time limit also depends on whether the matter is before the district court or the High Court. The process for obtaining an LoA or a Succession Certificate is estimated to take between 6-9 months if it is uncontested.
If it is contested, the number and location of other parties will also have to be considered. The process may then extend to between 2 to 5 years (or even more).

F. Probate

Probate is mandatory where the testator is a Hindu, Sikh, Jain, Buddhist or Parsi and the will is: (i) executed in certain specified territories; or (ii) is executed outside those territories but relates to immoveable property located within such territories. These territories are the cities of Calcutta, Chennai and Mumbai. Probate is not mandatory where the testator is a Muslim or Indian Christian even if conditions (i) and (ii) above are satisfied.

Probate is essential because no right as executor or legatee can be established in any court unless the relevant court has granted probate of the will under which the right is claimed.[28] However, a person who claims under a will which does not mandatorily have to be probated (as per the conditions above) can establish his right as legatee without obtaining a probate. In such a case, obtaining of probate is optional. If a person applies for a grant of probate, then the court must determine the genuineness of the will. It cannot refuse to grant probate only on the ground that the will does not fall within the categories of wills that require to be mandatorily probated.[29]

G. To whom can a Probate be Granted?

Probate can only be granted to an executor appointed by will either expressly or by implication. When there is more than one executor, probate must be granted to all those persons, unless those who do not apply renounce their right as an executor. Probate will not be granted to minors, persons of unsound mind, or to any association of individuals unless it is a company, which satisfies the rules prescribed by the State Government to be an executor.

H. Procedure for grant of a Probate

On receipt of an application for grant of probate along with the prescribed documents, the court issues notices to the next of kin of the deceased to file their objections, if any, to the grant of probate. A general public notice is also given in a newspaper. The executor is thereafter asked to establish the (a) proof of death of the testator; (b) proof that the Will has been validly executed by the testator; and (c) proof that the Will is the last will and testament of the deceased.

In order to assess as to whether the Will has been validly executed and is a genuine document, it must be shown that that the Will was signed by the testator and that he had put his signatures to the testament of his own free will; that he was at the relevant time in a sound disposing state of mind and understood the nature and effect of the dispositions and that the testator had signed it in the presence of two witnesses who attested it in his presence and in the presence of each other.[30] There may, however, be cases in which the execution

28. Bhaiyaji v. Jageshwar Dayal Bajpai, AIR 1978 All 268; Bhaiyalal v Kashi Bai; 2001(1)MPLJ429

29. Vidhayaram v Devlal, MP High Court, 1981 JLJ 203;

30. Daulat Ram and Ors. v. Sodha and Ors.; (2005)1SCC40

of the will may be surrounded by suspicious circumstances. In such cases the court would see that all legitimate suspicions are completely removed before the document is accepted as the last will of the testator. Some of these circumstances include[31]

- The alleged signature of the testator may be very shaky and doubtful and evidence in support of the argument that the signature is the signature of the testator may not remove the doubt created by the appearance of the signature;
- the condition of the testator's mind may appear to be very feeble and debilitated; and evidence adduced may not succeed in removing the legitimate doubt as to the mental capacity of the testator;
- the dispositions made in the will may appear to be unnatural, improbable or unfair in the light of relevant circumstances; or,
- the will may otherwise indicate that the dispositions may not be the result of the testator's free will and mind.

I. Revocation of a Probate

The grant of probate can be revoked or annulled for just cause. A just cause shall be deemed to exist where:

- the proceedings to obtain the grant was defective in substance; or
- the grant was obtained fraudulently by making a false suggestion, or by concealing from the Court something material to the case; or
- the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant, though such allegation was made in ignorance or inadvertently; or
- the grant has become useless and inoperative through circumstances; or
- the person to whom the grant was made has willfully and without reasonable cause omitted to exhibit an inventory or account or has exhibited an inventory or account which is untrue in a material respect.

J. Validity of Foreign Wills and Foreign Grants of Probate

The ISA provides for the grant of an ancillary probate, i.e., the resealing of probate granted by a foreign court. If a foreign will has already been proved and deposited in a competent court abroad, an Indian court is permitted to grant letters of administration (**"LoA"**) with a copy of the will annexed, this does away with the necessity of proof of the original will. Where a foreign will has not been proved, the Indian court is required to take evidence as to the due execution of the will according to the applicable law. The applicable law will depend on whether the will relates to moveable or immoveable property.

Further, a judgment stated to be a probate granted by a foreign Court would come within the purview of the Code of Civil Procedure as any other foreign judgment. Under this Code,
a foreign judgment is conclusive except:

1. where it has not been pronounced by a Court of competent jurisdiction;
2. where it has not been given on the merits of the case;
3. where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognize the law of India in cases in which such law is applicable;
4. where the proceedings in which the judgment was obtained are opposed to natural justice;
5. where it has been obtained by fraud;
6. where it sustains a claim founded on a breach of any law in force in India.

31. Surendra Pal and Ors. v. Dr. (Mrs.) Saraswati Arora and Anr. [1975]1SCR687; Smt. Guro v. Atma Singh and Ors [1992]2SCR30; Meenakshiammal (Dead) Through and Ors. v. Chandrasekaran and Anr. AIR2005SC52

K. Practical Issues to Keep in Mind

The executor must within six months of the grant of probate or letter of administration exhibit inventory and accounts relating to and containing the full and true estimate of all the property in possession and all the credits related to it and also all debts that are owed to the executor in his character. The accounts exhibited must show the assets that have come under the executor's hands and must also depict the manner in which they have been applied or disposed of.

Keeping in mind compliances that must be adhered to by an executor, it would be advisable if the executor was an Indian resident.

Probate also being a court process at times requires the deposit of a portion of the property with the court. For this reason, legatees avail the remedy of creating a trust structure prior to their deaths in order to reduce the hassles relating to administration upon death and execution of the testament. However, there is stamp duty cost for setting up a trust [32] and therefore, setting up a trust is often not recommended when immovable property is involved.

L. Letters of Administration

Where an individual governed by the ISA dies intestate, a person must be appointed to administer his estate. A person who has an interest in the property of the deceased must apply to the relevant court for the grant of letters of administration. Grant of an LoA establishes the administrator as the legal representative of the deceased. A grant of an LoA does not decide any question of title, it only decides the right to administer.

However, the above provisions are not mandatory where the deceased intestate is a Hindu.

M. Procedure to apply for an LoA

A petition must be filed before the relevant court (depending on the value of the estate) in the format prescribed for such a petition. The relevant court is the court within whose jurisdiction the deceased ordinarily resided at the time of his death or (as in this case), within whose jurisdiction any part of the property of the deceased may be found.

The court would issue a public notice or place an advertisement in newspapers (in English and the local language, for a period of about 30-45 days) to which a person may respond if he has any objection to the grant of the LoA to the applicant. The court may refuse grant of an LoA for any of the following reasons:

i. the applicant is not the right person to the grant;

ii. the deceased had no property to which grant could be given;

iii. the deceased did not reside or did not have property in the court's jurisdiction, or

iv. the estate has been fully administered and grant of an LoA will be nugatory.

Therefore, it would be advisable to support the petition with documents to address each of the possible grounds of opposition above. The applicant would be required to be present in person to be examined by the court.

If the LoA is granted to the petitioner, the petitioner must furnish a bond to the court with one or more surety/sureties. The bond is to be given before the grant and not after. Any person above 18 years of ages may act as surety. The bond is to be given for the amount as specified by the court for which grant is received except where an insurance or other approved class of company is accepted as surety.

N. Succession Certificate

The Succession Certificate has limited effect. The certificate does not give any general powers of administration of the estate of the deceased. The certificate is limited to the collection of debts which were in existence at the lifetime of the deceased and enables the applicant to have shares transferred in his name if he is otherwise entitled to it.

Further, the grant of a certificate does not establish the title of the grantee as the heir of the deceased. It only confers on the grantee authority to collect debts and allows debtors to make payments to the grantee. That

32. Article 64 of Schedule I of Indian Stamp Act, 1899.

said, a succession certificate (together with the death certificate) is usually requested by authorities when a change in title records has to be carried out. Therefore, in terms of practical use, a succession certificate serves as a supporting document and would be a useful document to have. If the certificate granted is with respect to debt or securities for which previously an LOA has been granted and such grant is in force, the certificate granted after it shall be invalid.

O. Procedure to Apply for a Succession Certificate

The petitioner must file a petition before the relevant court (depending on the value of the estate) in the format prescribed for such a petition. The relevant court is the court within whose jurisdiction the deceased ordinarily resided at the time of his death or (as in this case), within whose jurisdiction any part of the property of the deceased may be found.

Upon application, the judge may extend the certificate to any debt or security not specifically covered under the original application. The extension shall also cover any power to receive interest or dividends or negotiation of transfer. The judge may require additional bond or security to be furnished for such extension.

If the court is satisfied with the application it fixes a date of hearing of the application. The court would issue a public notice or place an advertisement in newspapers (in English and the local language, for a period of about 30-45 days) to which a person may respond if he has any objection to the grant of certificate. If no one contests the petition, the applicant must lead evidence to support the relationship of the deceased and the applicant to the assets. After this examination, the court may order a succession certificate to be issued. If there is a person who raises any objection, the applicant will be given the opportunity to counteract the allegations of the person objecting. After the parties are examined, the court would then decide if the applicant has proved his case.

II. Trusts in India

Trusts originated at the end of the middle ages as a means of transferring wealth within the family and have remained the characteristic device employed for organizing intergenerational wealth transmission in situations where the transferor has substantial assets or complex family affairs.[33] Modern day private trusts are used to carry out this function in India. Public trusts, on the other hand, may be used to contribute property towards religious and charitable purposes.

The first attempt to regulate the management and administration of trusts was made by British Government in 1810 by passing a regulation, followed by many such regulations. Currently, the legislations governing trusts in India are, among others: The Indian Trusts Act, 1882, The Charitable and Religious Trusts Act, 1920, The Religious Endowments Act, 1863, The Charitable Endowments Act, 1890 and The Societies Registration Act, 1860. [34]

A. Reasons For Setting Up A Trust

- Providing for family and protecting, in particular, the interests of very young children and adults with special needs;
- Attaching certain conditions to gifts;
- Bypassing the probate process while ensuring succession from one generation to another;
- Giving children the benefits of family wealth without losing control over key assets;
- Having flexibility for providing appropriate benefits to different family members at different points in time, taking into account changing necessities, opportunities, etc., and contributions made by such members for the well-being of the family;

33. John H Langbcm, *"The Contractarian Basis of tire Law of Trusts"*, 105 YALE L.J 625. 632-43 (1995) cited in The John H Langbcm *"Secret Life of the Trust: The Trust as an Instrument of Commerce"* Available at: http://www.law.yale.edu/documents/pdf/Faculty/Langbein_Secret_Life_of_Trust.pdf ›
34. Indian Trusts Act, 1882; Commentary by H.C. Johari

- Creating a mechanism for effective succession of family businesses to second and subsequent generations, balancing merit and family control;
- Creating a legal framework and a tax effective structure for the family assets which will last for a long time;
- Protecting these assets against actual and potential creditors;
- Allowing administrative, investment and record-keeping functions and possibly also property management functions to be centralised &handled more efficiently and at a lower cost;
- Having flexibility to have an unbiased independent person for taking decisions on distribution of wealth to various family members and others;
- Managing tax risks that may arise on the devolution of property;
- Creating a systematic mechanism for the charitable objectives of the family.

B.The Indian Trusts Act

Trusts in India are governed by the provisions of the Indian Trust Act, 1882 (**"Trust Act"**). A Trust as per the Trust Act is *"an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him for the benefit of another, or of another and the owner"*

The person who reposes or declares the confidence is called the "author of the trust" (commonly referred to as a 'settlor'). The person who accepts the confidence is called the "trustee". The person for whose benefit the confidence is accepted is called the "beneficiary". The subject matter of the trust is called "trust property". The "beneficial interest" or "interest" of the beneficiary is the right against the trustee as owner of the trust property. The instrument, if any, by which the trust is declared is called the "instrument of trust" (commonly known as the 'trust deed' or 'indenture of trust').

The property in case of a trust is not transferred directly to the transferee but is put in control of the trustee for the benefit of the transferee. The trustee depending upon the nature of the trust either transfers the property or its earnings to the transferee at the happening of certain events or applies the property and /or its gains for the benefit of such a transferee.

C.How To Create A Trust

Four essential conditions are necessary to bring into being a valid trust.[35]

- The person who creates a trust (settlor) should make an unequivocal declaration of an intention on his part to create a trust. In order to create a trust, the settlor must property manifest his intention by an external expression of it (by written or spoken words or by conduct) as opposed to an undisclosed intention.
- The settlor must clearly define and specify the objects. Since the purpose has to be accomplished by a trustee, who may not always be the author himself, it is necessary that the purpose is clearly declared so that the trustee can faithfully accomplish the author's purpose, for which the author has reposed confidence in the trustee.
- The settlor must specify the beneficiaries. Where there is no transfer of ownership, there is no trust.[36] The settlor gives up the ownership of the property thus resulting in transfer of legal ownership of the property to the trustee and transfer of beneficial ownership to the beneficiaries of the trust.

  The concept of ownership in the case of a trust is different under Indian and English Law. India does not recognize duality of ownership in the case of a trust, i.e. it recognizes only legal ownership and not equitable ownership as is provided for under English law which recognizes duality of ownership *i.e.* legal and equitable. Under Indian law, the trustee is both the legal and beneficial owner of trust property.

35. Section 5 of Indian Trust Act, 1882.
36. *Nadir Shaw v. Times of India*, AIR 1931 Bom 300

- The settlor must transfer an identifiable property under irrevocable arrangement and totally divest himself of the ownership and the beneficial enjoyment of the income from the property.

D.Types of Trusts

As discussed, trust may be private or public:

i. Private Trust

A private trust is created for the benefit of specific individuals i.e., individuals who are defined and ascertained individuals or who within a definite time can be definitely ascertained.

A private trust does not work in perpetuity and essentially gets terminated at the expiry of purpose of the trust or happening of an event or at any rate eighteen years after the death of the last transferee living at the time of the creation of the trust.

Private trusts are governed by the Trust Act. This Act is applicable to the whole of India except the State of Jammu and Kashmir and the Andaman and Nicobar Islands. That apart the Trust Act is not applicable to the following:

i. Waqf;

ii. Property of a Hindu Undivided Family;

iii. Public or private religious as charitable endowments; and

A person can be settlor of a private trust if he has attained majority (i.e., has completed 18 years of age or in case of a minor, for whom a guardian is appointed by the court or of whose property the superintendence has been assumed by the court of wards the age of majority is 21 years) and is of sound mind, and is not disqualified by any law.

But a trust can also be created by or on behalf of a minor with the permission of a principal civil court of original jurisdiction. Apart from an individual, a company, firm, society or association of persons is also capable of creating a trust.

A family trust set up to benefit members of a family is the most common purpose for a private trust. The purpose of the family trust is for the settlor to progressively transfer his assets to the trust, so that legally the settlor owns no assets himself, but through the trust, beneficiaries get the benefit of these assets. A family trust can be set up either while one is still alive (by a declaration of trust contained in a trust deed) or post death, in terms of a will.

Family (private) trusts may be set up either inter vivos i.e. during a person's lifetime or under a will i.e. testamentary trust, either orally or under a written instrument, except where the subject matter of the trust is immovable property, the trust would need to be declared by a registered written instrument.

A trust can be set up either as:

i. Revocable: A trust that can be revoked (cancelled) by its settlor at any time during this life;

ii. Irrevocable: A trust will not come to an end until the term / purpose of the trust has been fulfilled;

iii. Discretionary: An arrangement where the trustee may choose, from time to time, who (if anyone) among the beneficiaries is to benefit from the trust, and to what extent;

iv. Determinate: The entitlement of the beneficiaries is fixed by the settlor at the time of settlement or by way of a formula, the trustees having little or no discretion; or

v. Combination Trusts namely: of (i) - (iii)/(iv), (ii)-(iii)/(iv)

Private Trusts may also be used as a collective investment pooling vehicles such as mutual funds and real estate investment trusts.

Foreign Trusts set up by Indian residents:

The Foreign Exchange Management Act, 1999 (**"FEMA"**) of India has granted general permission to a person resident in India to hold, own, transfer or invest in foreign currency, foreign security or any immovable property situated outside India if such 'Foreign Currency Assets' have been acquired, held or owned by such person when he was resident outside

India or inherited from a person who was resident outside India. Such person may set up a trust in such jurisdiction or any other jurisdiction to which he could contribute the Foreign Currency Assets.

However, a trust receiving foreign contribution in India would need approval under the Foreign Contributions Regulations Act 1976, which is administered by the Ministry of Home Affairs in India. However, such trust can only be a trust, the objects of which are dedicated to cultural, economic, educational, religious or social purposes.

ii. Public, Charitable or Religious Trust

A public trust is created for the benefit of an uncertain and fluctuating body of persons who cannot be ascertained any point of time, for instance; the public at large or a section of the public following a particular religion, profession or faith. A public trust is normally permanent or at least indefinite in duration.

As regards the public trusts, there is no Central Act governing formation and administration of such trusts.. But various states such as Bihar, Maharashtra, Madhya Pradesh Orissa, etc., have enacted their own legislations prescribing conditions and procedures for the administration of public trusts. These Acts are more or less similar in nature though there may be certain variations.

A public trust is generally a non-profit venture with charitable purposes and in such cases it is also referred to as the charitable trust.

A trust created for religious purposes is termed a religious trust and it can be either a private or a public trust. A religious endowment made via trustees to a specified person is a private trust and the one to the general public or a section thereof is a public trust. The creation of religious charitable trusts is governed by the personal laws of the religion. The administration of these religious trusts can either be left to the trustees as per the dictates of the religious names or it can be regulated to a greater or lesser degree by statute such as the Maharashtra Public Trusts Act, 1950. In case of Hindus, the personal law provisions regulating the religious trusts have not been codified and are found dispersed in various religious books.

There are four essential requirements for creating a valid religious or charitable trust under Hindu Law, which are as follows:

i. valid religious as charitable purpose of the trust as per the norms of Hindu Law;
ii. capability of the author of the trust to create such a trust;

iii. the purpose and property of the trust must be indicated with sufficient precision; and

iv. the trust must not violate any law of the country.

E. Taxation of Trusts

Income tax in India is governed by the Income Tax Act, 1961 (**"ITA"**), which lays down provisions with respect to chargeability to tax, determination of residence, computation of income, transfer pricing, etc. Residents are ordinarily subjected to tax on their worldwide income, whereas non-residents are taxed only on their Indian source income, i.e. income that accrues or arises to them in India.

i. Private Trust

For the purpose of Indian taxes, a private trust is not regarded as a separate taxable unit. However, a trustee under the ITA acquires the status of the beneficiaries and is taxed in the role of the beneficiaries in a representative capacity. The provisions relating to taxation of trusts are laid out in Section 161-164 of the ITA.

(1) Irrevocable Determinate (Specific) trust

In such a trust, the beneficiaries are identifiable and their shares are determinate, a trustee can be assessed as a representative assessee and tax is levied and recovered from him in a like manner and to the same extent as it would be leviable upon and recoverable from the person represented by him (i.e. the beneficiary). The tax authorities can alternatively raise an assessment on the beneficiaries directly, but in no case can tax be collected twice. While the income tax officer is free to levy tax either on the beneficiary or on a trustee in his capacity as representative assessee, the taxation in the hands of a trustee must be in the same manner and to the same extent that it would have been levied on the beneficiary, i.e., qua the beneficiaries. Thus, in a case where a trustee is assessed as a representative assessee, he would generally be able to avail all the benefits / deductions, etc. available to the beneficiary, with respect to that beneficiary's share of income. There is no further tax in the hands of the beneficiary on the distribution of income from a trust.

In relation to assets settled / gifted into an irrevocable trust (both determinate and discretionary), such contribution should not be taxable in the hands of the transferor. This is because such settlement / gift is specifically excluded from the ambit of "transfer" for the purposes of levy of capital gains tax. However, there has been conflicting views in relation to taxation in the hands of the trustee, i.e., the transferee, especially, where one / more beneficiaries of the trust are not "relatives" (as defined) of the transferor.

Up to FY 2016-17, receipt of fund / any property by any "individual" without consideration or for a value less than the fair market value of the property was taxable in the hands of the transferee individual, except where the transferors were "relatives" of the transferee. In the context of certain facts, some rulings have held that income of trust should be taxed as the income of an "individual". However, it may be possible that trust income is not taxed as income of an "individual" depending on the facts and circumstances. Further, considering that 'trust' is "an obligation annexed to ownership of property", it is questionable as to whether settlement of property into a trust can be treated as transfer of property without consideration.

Based on recent amendments, from FY 2017-18, the provisions have been expanded such that they are applicable to all transferees and not only individuals. This expansion has been coupled with a specific exclusion for settlement into trusts set up solely for the benefit of "relatives" of the transferor. Therefore, it appears that settlements in other circumstances could be taxable in the hands of the transferee trustee. Having said that, the primary issue it is still unsettled, i.e., as to whether settlement of property into a trust can be treated as transfer of property without consideration.

(2) Irrevocable Discretionary trust

A trust is regarded as a discretionary trust when a trustee has the power to distribute the income of a trust at its discretion amongst the set of beneficiaries.

In case of an onshore discretionary trust, with both resident and non-resident beneficiaries, a trustee will be regarded as the representative assessee of the beneficiaries and subject to tax at the maximum marginal rate i.e. 30%.

In case of an offshore discretionary trust with both resident and non-resident beneficiaries (including offshore charitable organisations), a trustee should not be subject to Indian taxes or reporting obligations. However, if all the beneficiaries of such discretionary trust are Indian residents, then a trustee may be regarded as the representative assessee of the beneficiaries and can be subject to Indian taxes (on behalf of the beneficiaries) at the maximum marginal rate i.e. 30%.

(3) Revocable trust

Under the ITA, a transfer shall be deemed to be revocable if 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 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. Thus, where a settlement is made in a manner that a settlor is entitled to recover the contributions over a specified period, and is entitled to the income from the contributions, the trust is disregarded for the purposes of tax, and the income thereof taxed as though it had directly arisen to the settlor. Alternatively, even in a situation where a settlor has the power to re-assume power over the assets of a trust, the trust is disregarded and the income is taxed in the hands of the settlor. In the case of a revocable trust, income shall be chargeable to tax only in the hands of the settlor. If there are joint settlors to a revocable trust, the income of the trust will be taxed in the hands of each settlor to the extent of assets settled by them in the trust.

This arrangement is not specifically required to be recorded in a trust deed.

ii. Taxation of Public Trusts

Subject to conditions, income from property held in trust or other legal obligation, for a religious or charitable purpose is tax exempt.[37]

"Charitable purpose" as defined in S. 2(15) of the Income Tax Act includes relief of the poor, education, medical relief, Preservation of environment and preservation of monuments or places or objects of artistic or historic interest, and the advancement of any other object of general public utility.

However, the advancement of any other object of general public utility is not regarded as a charitable purpose, if it involves the carrying on of any activity in the nature of trade, commerce or business, or any activity of rendering any service in relation to any trade, commerce or business, for a cess or fee or any other consideration, unless: (i) such activity is undertaken in the course of actual carrying out of such advancement of any other object of general public utility; and (ii) the aggregate receipts from such activity or activities during the relevant financial year do not exceed 20% of the total receipts.[38]

The above mentioned exemptions are allowed only to the trusts which are registered in accordance with the provisions given in the ITA.[39] The ITA also provides certain grounds on which the exemption to the income of such trusts is not allowed

III. Trusts in Singapore: An Overview

Over the last 8-10 years, the Singapore Government, principally through the sponsorship of the Monetary Authority of Singapore (**"MAS"**) has pursued a series of policies intended to make Singapore a key international private banking and investment management centre and a base for private client wealth planning. The most common method of wealth planning is by setting up a trust so that the individual can keep aside part of the wealth for the benefit of his dependents during his lifetime and after. Over the years, Singapore has positioned itself as a major global centre for the administration of international trusts, whether established under Singapore law or the law of other trust jurisdictions. The tax laws of Singapore make the Singapore foreign trust an attractive planning vehicle for the international private client to achieve tax effective wealth preservation, estate planning, and succession planning objectives.

A. Trusts in Singapore[40]

The principal statutes governing trusts that are most relevant to the private banking and wealth management industry are the Trust Companies Act [41] and the Trustees Act [42] Singapore's trust law is broadly based on English trust principles. Some of the trusts that are frequently used in Singapore are: (i) private family trusts; (ii) statutory trusts; (iii) charitable trusts; and (iv) collective investment trusts. While private family trusts are used by high net-worth individuals to plan their financial affairs, protect their assets and provide for the transfer of their wealth to future generations; statutory trusts are established for statutory compliance. For instance, a trust structured for insurance policy holders and their beneficiaries. Some benefits provided to trusts under the Singapore trust regime are:

i. Trustee Supervision

Singapore trusts allow the appointment of a protector who can supervise the activities of the trustees in certain areas.

ii. Registration and Confidentiality

Singapore trusts do not require formal registration. Singapore tax law does not require the disclosure

37. Sec 11 of ITA
38. Section 2(15) of ITA
39. Section 12A and Section 12AA of ITA
40. We are qualified to advise on Indian law only. Any statement with respect to laws of other jurisdiction should be confirmed by the local counsels of the respective jurisdictions and should not be considered as legal advice.
41. Chapter 336 of Singapore
42. Chapter 337 of Singapore

of the identity of the settlor nor the beneficiaries of a foreign trust. There is no requirement for the foreign trust to be registered, nor for the trust 'Deed of Settlement' to be filed with any Government authority. The trustee company of a foreign trust is required to file with the Controller of Income Tax in Singapore, an annual declaration confirming the tax exempt status of all foreign trusts administered by it.

iii. Investment of the Trust Fund

The Trustees Act sets out the powers that a trustee may delegate to an agent. These include the power of distribution from the trust, the power to decide whether distributions or payment of fees should be made out of income or capital; the power to appoint another person as a trustee and any other power permitted by the trust instrument to be delegated. Beneficiaries are, however, not allowed to act as agents of the Trustee.

iv. Perpetuity Period

The perpetuity period for a Singapore trust, i.e. the maximum period during which the trust can continue, is now 100 years. Further, the Civil Law Act also provides for a "wait and see"[43] period after 100 years to see whether the trust would be able to vest in a beneficiary after that time.

v. Forced Heirship

Forced heirship gives the surviving spouse, children and/or other relatives of a deceased person fixed shares of his estate. Under most forced hership regimes, such an entitlement is indefeasible and unavoidable in the sense that it trumps any contrary disposition that the deceased person may have made in his lifetime or under his will. The Administration of Muslim Law Act governs the issue of succession for Muslims in Singapore. Consequently, Islamic laws of forced heirship apply in Singapore. However, under the Singapore trust law regime, there is a specific provision which seeks to avoid an attack upon the trustees of a trust on the grounds of foreign rules of forced heirship. Forced heirship laws are not enforceable against a Singapore trust if the transfer of property is made in accordance with the provisions of Section 90[44] of the Trustee Act. It provides that at the time of the transfer of the property, the settlor must have the capacity under the law of either Singapore, his home jurisdiction or the jurisdiction in which the transfer was made, to effect such transfer. Accordingly, a non-Singapore citizen or a non-Singapore domicile is excluded from forced inheritance and succession rules, provided the trust is governed under Singapore law and the trustees must be resident in Singapore.

Singapore trust law also permits the use of a Private Trust Company (**"PTC"**) to act as trustee of a specific trust, or a group of related trusts. PTCs are popular with wealthy families who wish to retain control of the management of the assets within a trust. However, the PTC can only act as trustee of such a trust if each beneficiary of the trust is a 'connected person' to the settlor of that trust (a 'connected person' meaning a relationship established by blood, marriage or adoption). A PTC is exempt from licensing by the Monetary Authority of Singapore; but under anti-money laundering rules the PTC must engage the services of a licensed trust company to provide administration services.

43. Section 34 of the Civil Law Act

44. 90.(1) Subject to subsection (3), where a person creates a trust or transfers movable property to be held on an existing trust during his lifetime, he shall be deemed to have the capacity to so create the trust or transfer the property if he has capacity to do so under any of the following laws:
a) the law applicable in Singapore;
b) the law of his domicile or nationality; or
c) the proper law of the transfer.
(2) No rule relating to inheritance or succession shall affect the validity of a trust or the transfer of any property to be held on trust if the person creating the trust or transferring the property had the capacity to do so under subsection (1).
(3) Subsection (1) —
a) does not apply if, at the time of the creation of the trust or the transfer of the property to be held on trust, the person creating the trust or transfer- ring the property is a citizen of Singapore or is domiciled in Singapore; and
b) applies in relation to a trust only if the trust is expressed to be governed by Singapore law and the trustees are resident in Singapore.
(4) In subsection (1), the reference to "law" does not include any choice of law rules forming part of that law.
(5) No trust or settlement of any property on trust shall be invalid by reason only of the person creating the trust or making the settlement reserving to himself any or all powers of investment or asset management functions under the trust or settlement.

B.Tax Implications

The territorial principle of tax applies to the income of a trust; accordingly, tax is charged on income that is earned or received in Singapore. Such income is the statutory income of the trustee and is chargeable to tax at the trustee level at the rate of 17%; when distributed, this income is not subjected to further tax in the hands of the beneficiaries. However, it should be noted that tax treaty relief may only be claimed by persons who are residents and Singapore based trusts may face difficulties in claiming treaty relief since trusts in Singapore are considered to be fiscally transparent entities.

Trusts under the Singapore trust regime are accorded tax transparency treatment if : (i) they are resident in Singapore; and (ii) entitled to trust income under the trust. In such a case, tax is not applied at the trustee level but the beneficiaries are subject to tax on the distributions received. Further, they are also entitled to enjoy the concessions, exemptions and foreign credits that may be available to them. However, this treatment is not available in case of resident beneficiaries who are not entitled to the trust income. In a discretionary trust, beneficiaries are only 'entitled' when the trustee distributes the income. If the income of discretionary trusts is distributed, it is trust income in the hands of the beneficiaries.[45] If the income is accumulated, the trustee has to pay the tax. [46]

In case there are non-resident beneficiaries of a Singapore domestic trust, the trustee will have to pay tax on their shares of entitlement (vis-à-vis the income of the Trust that is earned or received in Singapore) at the prevailing trustee rate for the year of assessment.[47] The tax levied at the trustee level would be considered as final. Any distribution received by beneficiaries should be treated as capital in nature.

Exemption is also available on income of a foreign trust.[48] Under the Income Tax [Exemption of Income of Foreign Trusts] Regulations 1994 (**"Regulations"**)., specified income from specified investments derived by an eligible foreign trust, which is administered by a Singapore trustee company is exempt from tax.

It is also relevant to note that there is no capital gains tax in Singapore. Further, since estate duty was abolished in 2008, the distribution of capital from Singapore trusts is also exempt from tax and successors of a Singapore trust can be included as beneficiaries without any estate duty. However, distribution of income from the estate is taxable. There is also no exchange control which facilitates funds to be remitted freely to and from Singapore.

IV. Estate Planning Through Foundations in Switzerland and Liechtenstein

A foundation is a hybrid between a company and a trust, generally prevalent in civil law jurisdictions. Like a company, it is a body corporate with a separate legal entity, and owns assets in its own name. But, unlike companies, it does not have any members / shareholders.

Like a trust, it has a founder who has contributed the assets towards a specific purpose for the benefit of identifiable beneficiaries. But, unlike trusts, the founder is specifically permitted to reserve for himself or herself various powers – powers to revoke, powers to change the by-laws, powers to add or remove beneficiaries, powers to remove the management (the foundation council / board).

Foundations can be established for a fixed or indefinite period of time and can be used for charitable, commercial or for family purposes.

The duties of those managing the foundation are contractual – not fiduciary as in the case of trustees. Further, beneficiaries have contractual rights to enforce the operation of the foundation in accordance with its constitutive document – rather than proprietary rights in its assets. Therefore, most jurisdictions prescribe a degree of official control or scrutiny for foundations. Most jurisdictions alternatively or simultaneously also permit a

45. http://www.iras.gov.sg/irasHome/page04.aspx?id=2160
46. http://www.iras.gov.sg/irasHome/page04.aspx?id=2350
47. http://www.iras.gov.sg/irasHome/page04.aspx?id=2344
48. Section 113G of the Income Tax Act

protector, a guardian or an adviser to watch over the management of the foundation. The founder has the choice between having the foundation supervised by the beneficiaries and being subject to official supervision.[49]

The Interogo foundation in Liechtenstein and the Stichting INGKA foundation in Netherlands set up by Ingvar Kamprad, the founder of IKEA, are some prominent examples of the use of foundations.

A.Switzerland Stiftung

A private foundation (Stiftung) is an endowment for carrying out the wishes of the founder, as expressed at the time of devolution of assets. Normally the assets devoted cannot revert to the founder. The foundation has no members but only beneficiaries / consignees. There is no distribution of profits.

The purpose of the foundation cannot generally be modified after its formation. A foundation needs only a management structure (Stiftungsrat) to execute the founders' intention and a supervisor.

A foundation is supervised by cantonal or federal authorities to ensure that the assets and returns are properly used for the benefit of the beneficiaries.

Although a foundation should not have a commercial purpose, Swiss law does not prohibit devolution of an enterprise or a substantial shareholding in a company.

B.Liechtenstein Foundations

A stable political environment, a solid tax framework and superior quality of services make Liechtenstein an attractive location for financial planning. The following aspects of the tax regime of Liechtenstein foundations make them particularly attractive:

i. Tax on Devolution

The tax law, as recently revised in 2011, eliminates the levy of inheritance and gift taxes. Now, assets devolved while establishing a foundation require only a payment of a formation tax at 0.2% of the value of the assets originally devolved, up to a maximum capital value of CHF 1 million.

The transfer of assets into the foundation does not generally trigger any additional tax consequences for a foreign founder except where these assets constitute a Liechtenstein permanent establishment or Liechtenstein real estate.

ii. Tax on Income

Revocable and irrevocable foundations, being body corporates, are subject to corporate income tax. However, foundations not engaged in any active economic activity are only subject to a minimum corporate income tax of CHF 1,200 annually.

Economically active Liechtenstein foundations are subject to the regular corporate income tax rate of 12.5%. However, the effective tax rate is substantially reduced by a notional interest deduction of 4% of the foundation's average equity. Furthermore, the taxable basis for purposes of corporate income tax is lowered by a favourable holding regime, by which dividends and capital gains from domestic and foreign entities are fully tax-exempt in Liechtenstein. In addition, income from foreign permanent establishments and foreign real estate is not subject to tax in Liechtenstein. In case of income deriving from intellectual property rights, 80% is deductible as a notional expense.

iii. Taxation of Distributions

Distributions by a revocable foundation are treated as contributions directly made by the founder to the beneficiaries, which is not subject to tax in Liechtenstein as gift taxes have been eliminated. Distributions by irrevocable foundations paid to beneficiaries not domiciled or not having a habitual abode in Liechtenstein are also not subject to tax in Liechtenstein.

49. Philip Baker, Beneficiaries of Trusts and Foundations, GITC Review, Vol. VI No.2 (June 2007), accessible at http://www.taxbar.com/documents/Ben- eficiaries_of_Trusts_and_Foundations_PB.pdf.

iv. Wealth Tax

Wealth tax is imposed only on Liechtenstein residents. Therefore, in case of irrevocable foundations, it can be imposed only if the value of the beneficiary's privileges can be determined and the beneficiary is a resident. In case of revocable foundations, it is imposed on the founder.

v. Possible Concerns

Recently, Liechtenstein has adopted several bilateral tax information exchange agreements (**"TIEAs"**). Accordingly, on receiving a request to that effect, with regards to a foundation, Liechtenstein would be required to provide information on the founder, the members of the board and the beneficiaries.[50]

50. Roland A. Pfister and Patrick Knörzer, Taxation of Liechtenstein foundations, STEP Journal (April 2011).

4. General Considerations

I. Strategic Considerations

While considering wealth and succession options, the following are key strategic considerations that often play an important role:

- **Flexibility:** A trust or a foundation, especially a discretionary one, offers more flexibility as compared to a Will. For example, it allows flexibility to provide appropriate benefits to different family members at different points in time, taking into account changing necessities, opportunities, etc., and also taking into account contributions made by such members for the well-being of the family and for the growth of family businesses (if any); Further, in the context of business succession, it allows flexibility to take various factors into account in determining how change in management should be effected and how management responsibilities should be divided among family members and independent professionals (if contemplated).

- **Involving external and independent persons:** Considering the risk that any family member or friend may tend to become biased in favour of / against some family members, there may be a preference to appoint an unbiased independent person for acting as the executor (in case of a Will), as the trustee (in case of trust), etc. Over the last few years, there has been a steady growth in institutions providing such services. Depending on the nature of discretion required to be exercised by the executor, trustee, etc., and depending on cost-benefit analysis, one may consider appointing such institutional service providers.

- **Control:** The decision on whether or not and the extent to which one wants to exercise control over one's property is often an important factor. For persons who wish to retain absolute control over their property during their lifetime, a Will may be preferable and if appropriate, a trust structure may be created through a Will. In fact, quite often, even where a trust structure is set up during one's lifetime, immovable properties are contributed into the trust through a Will.

  For persons who are willing to part away with ownership while retaining the ability to exercise some level of control, they may consider the option of setting up a revocable trust or setting up an irrevocable trust where they or a private trust company (set up by the family) act as the trustee, etc.

  For persons who are willing to part with ownership and control subject to checks and balances, they may set up an irrevocable trust with an institutional trustee and with terms and conditions they consider appropriate. Institutional trustees often maintain close contract with the settlor to understand the intentions underlying the creation of the trust and exercise their discretion in a balanced fashion.

- **Dispute resolution:** Recently, the Supreme Court, in the case of *Vimal Shah*[51] held that disputes relating to trusts cannot be subject to arbitration. This ruling becomes important as there is often a preference both on the part of the family members and on the part of the trustee to resort to arbitration for various reasons, including, confidentiality vis-à-vis family disputes, timely resolution, ability to appoint arbitrators who understand nuances regarding the family and the role played by institutional trustees, etc.

  For trust disputes to be arbitrable in India, a statutory amendment to the Indian Trusts Act appears to be necessary in line with those found in jurisdictions like Jersey. In the interim, parties could consider mediation and conciliation of disputes as alternative remedies.

51. Civil Appeal No. 8164 of 2016

- **Costs:** Stamp duty implications, annual costs of having institutional trustees, etc., also play an important role. On account of stamp duty implications in India, often immovable properties are contributed into a trust through a Will.

II. Exchange Control Considerations

In India, exchange control laws are applicable to investment (equity / debt / otherwise) by non-residents (as defined for the purposes of such exchange control laws) in businesses and properties in India and vice versa (i.e., investment by residents in businesses and properties outside India). Exchange control laws also govern remittance of funds by residents and non-residents from India.

For example, in case of investment by non-residents in an Indian company, such investment is generally permitted only by way of equity instruments or hybrid instruments which are compulsorily convertible into equity. Further, there are sector-wise restrictions as well – in some sectors, foreign investment is completely prohibited; in some, approval may be required; in some, maximum cap (percentage) is prescribed; in some, conditions are attached to investment, etc. However, in case of non-residents who qualify as non-resident Indians (NRIs), many of these restrictions are relaxed if they make investment on a non-repatriation basis.

Debt investment has been liberalized significantly in the past few years; however, it is still permitted only subject to conditions prescribed, including conditions relating to the lender, the borrowed, end-use, coupon rate, etc., which differ depending on the nature of debt investment involved.

From a succession planning perspective, these considerations becomes critical where family members, businesses, properties, etc., are spread in different jurisdictions. For example, if an Indian resident is considering setting up an offshore trust, he may be able to contribute only up to USD 250,000 per financial year into the trust, unless he has any accumulated funds outside India (earned when he not an Indian resident) or if his family members or friends are also willing to make contributions into the trust, etc.

In case of persons who have been living outside India for a significant period of time and return back to India, they are generally allowed to retain funds outside India which they earned or acquired while they were non-resident. However, once they remit such funds to India, generally, limitations applicable to Indian residents in relation to remitting funds outside India get triggered.

Also, an Indian resident may not be able to contribute his movable or immovable assets in India into an offshore trust, except under his / her Will. Even where contribution is made under a Will, the offshore trust may have to obtain approval for remittance of funds / proceeds of sale outside India.

Further, even if someone (resident / non-resident) wishes to set up a trust in India, if the trust is proposed to have non-resident beneficiaries, from an exchange control perspective, to determine whether such trusts are permissible, it would be important to evaluate the nature of assets the trust is expected to hold (especially, investment in equity or in properties which are not permitted under the exchange control laws vis-à-vis such non-resident beneficiaries), type of trust (revocable or irrevocable; determinate or discretionary), the nature of benefits envisaged for the beneficiaries (in specie distribution of assets or only monetary distributions), etc., and the manner in which the non-resident beneficiaries may be able to utilize distributions received from the trust or remit the proceeds outside India.

Even in case of assets inherited under a Will, a non-resident (including non-resident Indians), can remit only up to USD 1 million per financial year in relation to assets inherited from residents individuals.

Therefore, to the extent succession planning objectives can be achieved, often, there is a preference to create separate succession planning structures - (i) for Indian assets with Indian residents as beneficiaries and (ii) for offshore assets with non-residents as beneficiaries, with both structures operating in parallel and in such a manner that effectively similar benefits are given to beneficiaries under both trusts.

III. Succession Law Considerations

A. Hindu Personal law and Hindu Undivided Family (HUF) property

Hindu succession laws comprises both codified and uncodified parts. The Hindu Succession Act, 1956 (**"HSA"**) reflects the codified law. Uncodified laws are different in case of different schools, the most predominant schools being Mitakshara (followed in most parts of the country) and Dhayabhaga (followed in the states of West Bengal and Assam). Even within these schools, there are sub-schools in different regions.

Broadly, under Mitakshara law, HUF property is property jointly owned by family members who constitute a coparcenary. The eldest coparcenar, referred to as the Karta has legal ownership of the HUF property, in his capacity as the Karta of the HUF. A Hindu coparcenary is a subset of the Hindu joint family. It only includes those persons who acquire an interest by birth in HUF property. In classical Hindu law, this meant three generations next to the last holder in unbroken male descent.[52] The HSA has modified this aspect to include female descendants as well. The interest of coparcenars fluctuates with birth of new family members, though coparceners can exercise their rights at any time by asking for partition. As per the HSA, a partition is deemed to have occurred on the death of a coparencar (vis-à-vis his / her share) and such share in HUF property passes on as per intestate or testamentary succession, as applicable.

Therefore, from an estate planning perspective, it is important to evaluate whether a particular property is self-acquired property or HUF property.

52. Satyajeet A Desai, Mulla Principles of Hindu Law (Butterworths India, New Delhi) 17th ed., 2000.

B. Muslim Personal Law

The Quran and the Sunnat are the primary sources of law for both sects of Islam, namely Sunnis and Shias. Having said that, the practical aspects regarding succession and property are largely different based on the sects and schools within the sects. The Sunnis are divided into the Hanafi, Maliki, Shafei and Hanbali schools and the Shias are divided into the Zaidya, Ismailya and Ithna Ashari schools. Therefore, the personal law governing Muslim families varies depending on the schools they are classified into.[53]

The rules and limits on testamentary succession by Muslims has been discussed above in the section "Indian Law on Wills and Probate" under "Select Estate Planning Techniques".

In relation to intestate succession, in the case of death of a Muslim, members succeed individually as heirs and not as members of a family. Further, there is no right by birth under Muslim law.[54]

Blood relation or consanguinity is the primary principle on which succession is based. However, one of the fundamental principles of inheritance is that only a Muslim can inherit from a Muslim. This rule has been modified by the Caste Disabilities Removal Act, 1850 wherein inheritance rights of converts are given certain protections.[55]

It is also important, from an estate planning perspective, to evaluate the school of Muslim law applicable. Different schools prescribe different rules pertaining to classification of heirs and distribution among them, including ability and shares of daughters in inheritance, rights of adopted children and rights of illegitimate children.

53. Poonam Pradhan Saxena, Family Law Lectures – Family Law II (Lexisnexis Butterworths, New Delhi) 3rd ed, 2011.

54. A.B. Srivastava and S.I. Jafri, B.R. Verma's Commentaries on Mohammedan Law (Law Publishers (India) Private Limited, Allahabad) 9th ed, 2005.

55. Poonam Pradhan Saxena, Family Law Lectures – Family Law II (Lexisnexis Butterworths, New Delhi) 3rd ed, 2011.

C. Community Property Regime under Goan Civil Code

The rules and limits on succession applicable to persons residing in Goa has been discussed above in the section "Indian Law on Wills and Probate" under "Select Estate Planning Techniques".

Recently, the Goa Succession, Special Notaries and Inventory Proceeding Bill was unanimously passed by the Goa legislative assembly to replace age-old the Portuguese Civil Code on the subject of succession, inventory and notarial law to meet the present day requirements. The state of Goa was following the Portuguese Civil Code, enacted during the colonial era despite of being liberated from colonial rule over 54 years ago. Also, earlier, the provisions of the law relating to succession, notaries and inventory proceedings was scattered in the Civil Code, 1867, the Civil Procedure Code, 1939 and the Notarial law, 1952, which made the job of the courts extremely tedious and ultimately led to delay in disposal of cases. The new law also addresses areas such as rights associated with reduction of legacy, gift, accretion and collation.

D. Marriages under Special Marriage Act

Marriages between two persons practicing any religion can be solemnized under the Special Marriage Act, 1954 (**"SMA"**), subject to conditions prescribed. Solemnization of marriage under the SMA alters the personal law applicable to the parties to the marriage and their issue(s). When parties to the marriage have different personal laws, they can register their marriage under the SMA and therefore avail of greater certainty in terms of the applicable personal law.

In case of death of persons marrying under the SMA and their issue(s), succession to their property would be regulated by the general rules for intestate succession under the ISA, and not as per their personal laws.

Further, a marriage solemnized under the SMA of a person who belongs to an undivided family and professes Hindu, Sikh, Buddhist or Jain religions shall be deemed to sever such person from such family (from a succession law perspective).

However, both the above stipulations are not applicable to marriages between persons belonging to any of the four religions, i.e., Hindu, Sikh, Buddhist or Jain.

E. Proposal to introduce a Uniform Civil Code (UCC)

The introduction of a UCC is part of the Constitution's Directive Principles of State Policy, which are not enforceable, but are nevertheless fundamental in the governance of the country. A UCC aims to establish laws relating to marriage, divorce, succession, adoption, etc., that shall apply uniformly to all citizens, irrespective of their religious background. The primary objective of introducing a UCC was to address the lack of uniformity and coherence with regard to the principles that shall govern personal matters.

The Supreme Court as well, on numerous occasions, has urged the Parliament to frame a UCC. Recently, in February 2016, the Supreme Court sought the views of the government in introducing a UCC in India. Subsequently, the government sought the opinion of the Law Commission of India regarding the implementation and consequences of the UCC being enacted. The Law Commission, in October, 2016, invited public suggestions. Recently, in November 2016, the commission's chairman Justice B S Chauhan has indicated the commission's aim is not to recommend imposition of a UCC but look at reform of family laws across all religions, mainly with gender justice in mind. The report of the Law Commission of India is now awaited.

IV. Tax Considerations

A. Estate Duty in India: Re-introduction and Consequences

i. Background

Estate Duty in India was introduced in 1953 under the Estate Duty Act, 1953 (**"Act"**) with the object of imposing estate duty on property passing or deemed to pass on the death of a person. The Act provided for the imposition of estate duty at certain specified rates upon the principal value ascertained of property owned by each deceased person, whether or not such property was settled, including upon any agricultural land situated in certain territories in India.

The levy started at a threshold of INR 1 lakh with a rate of 7.5%. The maximum rate was 40% of the principal value of the estate in excess of INR 20 lakh. However, certain exemptions such as: (i) movable and immovable property owned and situated outside of India; (ii) delay on the imposition of estate duty on property jointly owned by spouses until the death of both spouses; (iii) property held by the deceased as a trustee for another person where the deceased person had made a bona fide disposition to a beneficiary at least two years prior to the deceased person's death. Further, exemption was also given to one residential house, subject to a limit of INR 1,00,000.

ii. Abolition of Estate Duty

Estate Duty was abolished on June 16, 1985. The government cited excessive administrative costs as against the actual tax yields (only about 20 crores) as the primary reason for abolishing estate duty. Consequently, estate duty was not payable in respect of the estate of a person who died after March 16, 1985.

At that time, the exemption limit was only INR 1,50,000 and the rate of estate duty was on a progressive basis, with a maximum rate of 85% for estate exceeding INR 20,00,000.

iii. Proposal for Re-Introduction & Consequences

It is anticipated that the government may consider re-introduction of estate duty in India, though there has been no formal announcement or other communication by the government in this regard. It is anticipated that the Government expects to raise a considerable amount of revenue than when the earlier Act was in force because of the immense amount of wealth generated after the removal of India's license raj in early 1990s. It also expected that by re-introducing estate duty, it will reduce income disparity and consequently bridge the widening gap between the 'possessed' and the 'dispossessed'.

Apart from the risk of India losing its momentum of investment generation (both domestic and foreign), the imposition of an estate tax in India could lead to a flight of entrepreneurs (and also their capital to more tax-friendly jurisdictions offshore.

The re-introduction of estate duty may also impact philanthropy. What happens if estate duty is levied when a large part of the wealth is left for charity? Would that mean that a significantly lower amount would go to charity?

iv. Concerns that the New Legislation Should Address

If estate duty is re-introduced, it should provide for appropriate exemptions for financial assets. Estate duty would cleary be a disincentive for investments in financial assets, the small quantum of which, in any case, is a worry for the Government. The rate at which estate duty is applicable should also be reasonable.

If shares/financial assets are included within the ambit of estate duty it could cause serious upheavals in shareholding structures and the running of companies. Notably, the earlier Act did contemplate that assets could be sold to pay estate duty and indeed, provided a set-off of capital gains against estate duty payments. The new legislation should aim to integrate estate duty, gift tax and the concept of exit tax. The Government should also carefully consider the time when estate duty should be re-introduced.

B. Gift Tax in India

i. An Introduction to Notional Income

Taxation, as a general rule, is on the accrual / receipt of income. However, with the objective of taxing incomes that would otherwise go untaxed, taxing statutes have evolved the concept of 'notional income'. Notional income is a legal fiction by which the law deems / presumes certain kinds of income to have accrued to the taxpayer (as it could have potentially accrued) although there is no actual accrual of income.[56] The tax legislation in India uses this legal fiction to tax certain gifts.

ii. History of Gift Tax in India

The Gift Tax Act was first introduced in 1958 and was subsequently repealed in 1998. Under the 1958 Act, gifts that were worth more than INR 25,000 were subject to tax. For the purpose of gift tax, cash, cheques and drafts received from someone who was not a blood relative were reckoned as gifts. The Finance Act (No. 2) 2004 introduced a tax on any sum of money exceeding INR 25,000 received without consideration under the head 'income from other sources'.

iii. Income from Other Sources

The Income Tax Act, 1961 (**"ITA"**) imposes tax under various heads, one of which is 'income from other sources' provided for under section 56. The Finance Act, 2009, introduced clause (vii) to section 56(2) with a view to check avoidance of tax on transfer of assets without consideration which was in respect of taxation of individuals and Hindu undivided family (**"HUF"**). Pursuant to amendments introduced by the recent Finance Act, 2017, the provisions have been expanded to cover receipt of assets without consideration by any person (i.e., not only individuals and HUFs.)

56. The constitutionality of bringing such notional income to tax has been upheld by the Supreme Court of India in Bhagwan Das Jain v. Union of India. (1981) 128 ITR 315

a. Money Consideration

Under the ITA, where a sum of money exceeding INR 50,000 is received without consideration, the entire sum of money is liable to tax in the hands of the recipient as income from other sources.

b. Immovable Property

In respect of immovable property, where an individual or HUF receives immovable property (having a stamp duty value exceeding INR 50,000) without consideration, the recipient would be taxed on the stamp duty value of the immovable property. The position in respect of immovable property was revised by Finance Act, 2013. As per the revised law, any immovable property that is received for a consideration that is less than the stamp duty value of the immovable property by an amount exceeding INR 50,000, the difference between the stamp duty value and the consideration would be taxed in the hands of the recipient.

In addition, while computing the capital gains liability of the transferor, the stamp duty value is treated as the sale consideration. Therefore, the difference between the stamp duty value and the sale consideration is subject to economic double taxation.

c. Movable Property

Similar rules are applicable to moveable property. Where an individual or HUF receives moveable property whose aggregate fair market value (**"FMV"**) exceeds INR 50,000 without consideration, the whole of the aggregate FMV of the moveable property will be taxed as income from other sources. Where moveable property is received for a consideration that falls short of the aggregate FMV by more than INR 50,000, the difference between the aggregate FMV and the consideration will be taxed as income from other sources.

d. Exemptions

There are certain exceptions to the application of Section 56(2)(vii). For instance, money or property that is received from specified relatives or on the occasion of marriage will not be taxed as income from other sources. Similarly, money or property that is received under a will or by inheritance or in contemplation of the death of the payer is exempt from tax under section 56(2)(vii). Further, money or property that is received from any local authority (as defined under section 10(20)) or from any fund / foundation / university or any trust / institution referred to in section 10(23C) or registered under section 12AA will not be taxed as income from other sources.

e. Relative

As mentioned above, money or property received from specified relatives will not be taxed as income from other sources. For the purpose of section 56(2)(vii), relatives are defined differently in the case of individuals and in the case of Hindu Undivided Family. In the case of individuals, relatives include spouse, brothers, sisters, parents, uncles, aunts, lineal ascendants or descendants among others. In the case of an HUF, relative includes any member of the HUF.

iv. Settlement of assets into a trust

Please refer to our comments in section titled "Taxation of Trust - Irrevocable Determinate (Specific) Trust" under the Chapter "Select Wealth and Succession Planning Techniques"

v. Distribution on Trust Dissolution Not Subject to Tax

In view of section 56(2)(vii) being designed to tax any income received by individuals/HUFs without consideration, there was some debate about whether distributions received by the beneficiary of a private discretionary trust could be taxed as income from other sources. In Ashok C. Pratap v Additional Commissioner of Income Tax, [57] the Income-Tax Appellate Tribunal held that any money received by a beneficiary on the dissolution of a trust would not be taxed as income from other sources. The Tribunal took the view that the distribution received by the beneficiary would constitute consideration for the dissolution of the trust and thus would not attract section 56. This however is not a settled position till date.

C. General Anti-Avoidance Rules

India currently follows the Westminster or "form over substance" principle based on judicial precedents. As per the Westminster principle, if a document or transaction is genuine, the court should not go behind it to some supposed underlying substance. Structures designed to mitigate tax liabilities within the four corners of law are legitimate and should not be considered evasion or avoidance of tax. In the absence of a sham or colorable device, the form of a transaction or structure should be respected. A transaction should not be treated as a sham transaction or colorable device purely on the basis that it also enables the taxpayer to avail of a tax benefit. A transaction could be considered a sham or colorable device if there is no commercial or business purpose achieved by such transaction and if the only objective of such transaction is the avoidance of tax.

The Finance Act, 2012 introduced the chapter on general anti-avoidance provision (**"GAAR"**) in the ITA, which has been amended thereafter, and which is slated to be effective from April 1, 2017.

GAAR empowers the tax authorities to investigate and declare any such arrangement as an "impermissible avoidance arrangement" and consequently, the authorities can disregard entities in a structure, reallocate income and expenditure between parties to the arrangement, alter the tax residence of such entities and the legal *situs* of assets involved, treat debt as equity and *vice versa*. The tax authorities may also deny benefits conferred under an applicable tax treaty. An 'impermissible avoidance arrangement' is an arrangement entered into with the main purpose of obtaining a tax benefit and satisfying one or more of the following: (a) non-arm's length dealings; (b) misuse or abuse of the

57. [2012] 139 ITD 533 (Mum). This decision sparked some discussion in view of the fact that a trust is not an independent taxable entity and income of the trust is effectively taxed in the hands of the trustee as a representative assessee or in the hands of the beneficiaries. Accordingly, once tax has already been paid on the income of the trust, any distribution to the beneficiaries should not be subject to further tax.

provisions of the domestic income tax provisions; (c) lack of commercial substance; and (d) arrangement employed for non-bona fide purposes.

Factors like period for which the arrangement had existed; the fact of payment of taxes; and the fact that an exit route was provided by the arrangement, would be relevant but not sufficient to determine whether the arrangement lacks commercial substance. Further, an arrangement shall also be deemed to be lacking commercial substance if any step in, or a part or whole of, any transaction, operation, scheme, agreement or understanding in relation to the arrangement does not have a significant effect upon the business risks, or net cash flows of any party to the arrangement apart from any effect attributable to the tax benefit that would be obtained.

Other important features of GAAR are as follows:

- Threshold: GAAR is applicable to any arrangement where the tax benefit arising to all parties to the arrangement exceeds INR 30 million in the relevant financial year.
- Grandfathering: GAAR shall not apply to any income accruing or arising to, or deemed to accrue or arise to, or received or deemed to be received by, any person from transfer of investments made before April 1, 2017. However, GAAR shall apply to any arrangement, irrespective of the date on which it has been entered into, in respect of the tax benefit obtained from the arrangement on or after April 1, 2017.

Therefore, going forward, it is important that succession planning objectives are accurately and consistently recorded across all relevant documents, websites, disclosures, etc.

D. Indian-origin US citizens and green card holders who have returned to India - Double taxation issues

As discussed in the sections "Residence in India" and "Residence in the United States" under "Introduction", in India, residence is primarily based on the period of stay in India and in the US, classification as a "US person", amongst other things, is based, on citizenship and green card. Therefore, in case of Indian origin persons who moved to the US, acquired US green card / US citizenship, if they later return back to India, they qualify as a tax resident in both countries.

Normally, in such circumstances involving dual tax residence, tax treaties provide tie-breaker rules to provide relief from double taxation. However, under the India-US tax treaty, in case of US citizens, if the tie breaks in favour of India, effectively no relief can be availed under the treaty. Therefore, the worldwide income of such individuals are taxable in both countries.

For India-sourced income (as defined under US domestic law), under the US domestic tax law, tax credit may be availed for taxes paid in India (to the extent permitted). However, in relation to certain types of income, such as capital gains from transfer of Indian securities, because of mismatch in the manner in which Indian and US tax laws are formulated, such relief may not be available, except where the US citizens have a tax home in India.

In relation to US source income as per the India-US tax treaty (except capital gains), relief may be available in India to the extent of taxes payable in the US in accordance with the India-US tax treaty. For example, under the treaty, interest income is subject to a cap of 15% tax in the source country. As a US citizen, an individual may be subject to around 40% tax in the US on such income. In India, he may be able to claim credit only up to 15% tax paid in the US.

In relation to income sourced from third countries, in both countries, relief may only be available to the extent of taxes paid in such third country.

E. Federal Estate Tax and Gift Tax in the US

Apart from income tax, the United States of America (**"US"**) also imposes certain transfer taxes at both federal and state level. Amongst these, the most significant are the estate tax and the gift tax. The US follows a unified federal estate and gift tax system by which tax at graduated rates apply to estate of a deceased individual and to gifts of property made by individuals.

i. Federal Estate Tax [58]

The US imposes estate tax on the gross total of assets held by individuals at the time of his/her death. Estate tax is made applicable on the 'taxable estate' of an individual which would comprise his/her gross estate less any deductions that may be applicable.[59] Federal estate tax in the US is applicable in two cases:

- **Where a person is a US citizen or domiciliary i.e. he has domicile in the US:**

  Any individual who is living in the US without displaying the intention to leave the US may be considered as having domicile in the US for estate and gift tax purposes. However, no litmus test has ever been laid down for determining domicile and several factors are taken into account for the determination of whether a person is domiciled in the US.[60]

  Where a person is a US citizen or considered to be a US domiciliary, estate tax is applicable on the fair market value of worldwide assets owned by such person at the time of death. Estate tax on US citizens or domicilaries range from 18% to 40% depending on gross value of assets. However, as of 2016, US citizens and residents are entitled to an estate tax exemption of USD 5.45 million (recalibrated annually from USD 5 million based on inflation).[61]

- **Where a non-US citizen or resident has US *situs* property at the time of death.**

  As far as non-US citizens/domiciliaries are concerned, estate tax is applicable on fair market value of US situs assets, which include primarily real and tangible personal property situated in the US (as determined under the Internal Revenue Code (**"IRC"**) read with applicable estate tax treaties) and shares of a US corporation. Estate tax in the case of non-US citizens/domiciliaries also extend from 18% to 40% depending on gross value of US *situs* assets and as of 2013, are entitled to an exemption of USD 60,000 (inflation benefits are not applicable).[62]

However, certain deductions may be made and exemptions may be availed on the gross total value of assets before determining the 'taxable assets', as below [63] :

- Deductions may be made for funeral and administrative expenses, debts, taxes and losses [64];
- Deductions may be made for the value of a property donated to a qualifying charitable institution anywhere in the world;
- All transmission of property to a US citizen spouse is exempt, while estate taxes payable on transmission to a non-US citizen spouse (including a US domiciliary) may be deferred till the death of such spouse if effected through a Qualified Domestic Trust mechanism.
- As mentioned above, an exemption from estate taxes upto USD 5.45 million is available for US citizens and domiciliaries while an exemption upto USD 60,000 is available for non-US citizens/ domiciliaries.

Further, under the IRC, certain assets, although transferred by the deceased person prior to death will be added to his 'taxable assets' on death. This would be applicable to revocable transfers (as in case of a grantor trust), transfers with retained life estate, gifts made within 3 years prior to death, transfers actuated after death etc.

All persons subject to federal estate tax must file a federal estate tax return in Form 706 (for US citizens/ domiciliaries) and Form 706-NA (for non-US citizens/

58. We are qualified to advise on Indian law only. Any statement with respect to laws of other jurisdiction should be confirmed by the local counsels of the respective jurisdictions and should not be considered as legal advice.
59. IRS guidance on estate tax, available at: http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Estate-Tax.
60. IRS FAQs on estate tax, available at: http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Frequently-Asked-Questions-on-Estate-Taxes
61. *Ibid*
62. CCH, US Master Estate and Gift Tax Guide, 2013, CCH Tax Law Editors.
63. *Ibid.*
64. Non US citizens/domicilaries may only claim deduction for the fraction applicable to US situs property.

domiciliaries) within 9 months from date of death of the deceased. [65]

ii. Federal Gift Tax

Similar to estate tax, gift tax is applicable to US citizens and domiciliaries, on any transfer of property without full consideration. Unless there is retention of intention on transfer, gift tax is applicable on the donor for transfer of any cash, shares, real estate or other tangible/intangible property.[66]

Like in the case of estate tax, gift tax is applicable as per the unified graduated rates ranging from 18% to 40% depending on the value of the gift. As of 2014, while the unified exemption of USD 5.45 million (recalibrated based on inflation) is applicable in case of all taxable gifts made during one's lifetime, a yearly exemption is also available for every calendar year. For the year 2016, the annual gift tax exemption is USD 14,000. [67]

However, certain gifts are not considered taxable gifts for the purpose of gift tax. These are[68] :

- Gifts to political organizations;
- Gifts to charitable organizations;
- Gifts made to US citizen spouse (Gifts made to a non-US citizen spouse are exempt only upto USD 145,000 in the year 2014);
- Medical or education expenditure incurred on behalf of someone and paid directly to the institution.

The recipient of a gift generally has no tax liability in the US. Although no gift tax is to be paid by the donee, gifts received by US citizens or domiciliaries from non-US citizens/domiciliaries in excess of USD 100,000 must be reported in Form 3520. Although gifts are generally not included in income for the determination of income tax payable, certain gifts such as gifts received in promotional events and gifts received from employers that are beneficial are taxable as income tax under the IRC.[69]

Every donor who has a taxable gift must file a gift tax return in Form 709 before the April 15th following the year where the gift was made.[70]

As of 2016, the graduated rates applicable for both Federal Estate tax and Federal Gift Tax (based on value of assets/property gifted) are provided in the below table. Rates specified have a graduated application such that each rate would apply to each strata and are then aggregated.

Value of 'taxable assets'/gifts in USD	Rate
0-10,000	18%
10,000-20,000	20%
20,000-40,000	22%
40,000-60,000	24%
60,000-80,000	26%
80,000-100,000	28%
100,000-150,000	30%
150,000-250,000	32%
250,000-500,000	34%
500,000-750,000	37%
750,000-1,000,000	39%
>1,000,000	40%

65. Which may be extended by 6 months upon request; See IRS guidance on Filing Estate and Gift Tax Returns, available at: http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Filing-Estate-and-Gift-Tax-Returns.
66. IRS FAQs on Gift tax, available at: http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Frequently-Asked-Questions-on-Gift-Taxes#2.
67. *Ibid*; CCH, US Master Estate and Gift Tax Guide, *Supra*, Note 4.
68. *Ibid.*
69. IRS Guidance on Gifts from a Foreign Person, available at: http://www.irs.gov/Businesses/Gifts-from-Foreign-Person.
70. *Supra*, Note 7.

F. Inheritance Tax in the UK

In addition to regular income tax, the United Kingdom (**"UK"**) also imposes inheritance tax. The UK inheritance tax is payable on the demise of an individual with respect to the estate owned by such individual. It is also payable on trusts or gifts made during someone's lifetime, if the cumulative value of such gifts and settlement into trusts in the immediately preceding 7 years exceeds the threshold applicable in case of estate passing on at the time of one's death.

i. Applicability

Inheritance Tax applicable to an individual's worldwide property if the individual is UK domiciled and deemed domiciled at the time of transfer of assets. Determination of domicile has been discussed in the section "Domicile in the United Kingdom" under "Introduction". With respect to other individuals, it is applicable only to the extent of their properties located in the UK. As part of reforms in relation to applicability of UK inheritance tax to UK residential property, as per the Finance Bill 2017, it is proposed that UK inheritance tax shall also apply in relation to various types of indirect interest in UK residential property. For details see section titled "Proposed reforms – Inheritance tax on UK residential property" under the chapter "Specific considerations".

ii. Computation

Inheritance tax is applicable on the estate of a deceased person valued at more than the prescribed threshold, which is revised from time to time (£325,000 in 2013-14). Inheritance tax is payable at 40% on the value of the estate in excess of such threshold or at 36% if the estate qualifies for a reduced rate as a result of a charitable donation.

An estate also includes the value of any assets held in trust.

Since October 2007, married couples and registered civil partners can effectively increase such threshold when the last of the two of them dies (to as much as £650,000 in 2013-140). The executors or personal representative of the spouse whose demise occurs first must transfer the unused inheritance tax threshold or 'nil rate band' to the other spouse or civil partner when they die.

In case of gifts and trusts, where they are subject to inheritance tax as described above (i.e. in excess of the £325,000 threshold), tax is liable to be paid at 20%. In case the settlor of the trust dies within 7 years of settling the trust, an additional 20% tax becomes payable from his estate.

Finance Act 2014 has introduced a measure that impacts individuals who are non-UK domiciled and non-UK resident who have deposited borrowed sums in UK bank accounts denominated in a foreign currency. Under the new measure, there will be no deduction allowed for the purposes of inheritance tax, from the value of an estate where the borrowed funds have been put into a foreign currency bank account, either directly or indirectly. [71]

iii. Important Exemptions

Even if one's estate is over the threshold, the individual can pass on assets without having to pay inheritance tax in the following circumstances:

- Spouse or civil partner exemption: There is generally no inheritance tax payable on any part of the estate passing on to one's spouse or civil partner who has his / her permanent home in the UK; the exemption is also applicable to gifts made during the individual's lifetime.
- Charity exemption: Any gifts made to a 'qualifying' charity either during one's lifetime or under one's will, will be exempt from inheritance tax.
- Wedding and civil partnership gifts: Gifts to someone getting married or registering a civil partnership are exempt up to a certain amount.
- Business, Woodland, Heritage and Farm Relief: If the deceased owned a business, farm, woodland or National Heritage property, some relief from inheritance tax may be available.

71. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/293805/TIIN_9002_inheritance_tax_liabilities_and_foreign_currency_bank_accounts.pdf

iv. Liability to Pay

Generally, the executor or personal representative pays the inheritance tax using funds from the deceased's estate. However, in case of inheritance arising from transfer of assets into a trust, the trustees usually pay inheritance tax on assets transferred into a trust.

v. Reporting

An inheritance tax form needs to be filled out as part of the probate process even if no inheritance tax is due. Different forms are to be filled out depending on where the deceased lived, and whether there is any inheritance tax to pay. Person/(s) claiming grant of probate must pay some or all of any inheritance tax due before being able to obtain grant of probate.

G. Prevention of Base Erosion and Profit Shifting (BEPS)

Over the last few years, globally, there has been an increasing momentum in bringing about measures that prevent abuse of benefits under tax treaties, double non-taxation in unintended circumstances, etc. OCED's BEPS initiative, in which more than 100 countries are articipating, is an important step in this regard. As part of the BEPS initiative, over 100 countries have successfully concluded negotiations on a multilateral instrument for implementation of BEPS on certain action points. This instrument is scheduled to be formally signed by countries in the week commencing June 5, 2017.

Amongst other things, the multilateral instrument seeks to empower countries to deny tax treaty benefits in one or more of the following circumstances:

a. One of the principal purposes of an arrangement or transaction is obtaining tax treaty benefits;

b. Not satisfying the "qualified person" test;

c. Not satisfying the active conduct of business test.

Therefore, going forward, it is important that succession planning objectives, particularly non-tax objectives, are accurately and consistently recorded across all relevant documents, websites, disclosures, etc.

IV. Reporting Considerations

A. Income Tax Returns & Black Money Act

The government, as part of its commitment to: (i) discourage taxpayers from evading their tax liability in India through accumulation / utilization of such evaded income in a foreign account / for acquiring foreign assets, and (ii) increase compliance with applicable reporting obligations in relation to foreign assets, introduced a law for the same. The Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 (the **"Black Money Act"**) was enacted with effect from July 1, 2015. Among other things, this law levies tax on (i) income earned by Indian residents from assets located outside India in circumstances where such income and/or assets were required to be reported in tax returns filed by such residents, but where the income was not reported or where tax returns were not filed (**"Undisclosed Offshore Income"**); and (ii) assets held outside India by residents in respect of which the source of funds for acquiring / set up such asset comprises income taxable in India (including any income taxable in India when the person was a non-resident), but on which taxes were not paid or in respect of which there is no satisfactory explanation regarding the source of investment in such asset (**"Undisclosed Offshore Asset"**).

In relation to classification as Undisclosed Offshore Income, the law also covers situations where a resident may not be the owner of the unreported asset, but still earns income from the asset. In relation to classification as Undisclosed Offshore Assets, the law also covers situations where a resident is the "beneficial owner" of assets located outside India, i.e., assets in respect of which the resident may not be the legal owner, but provided consideration for acquisition of the asset.

The Black Money Act imposes tax at the rate of 30% and penalty of up to 90% on the fair market value of Undisclosed Offshore Income and Undisclosed Offshore Assets of residents as on the date of which such income / assets come to the notice of the tax authorities.

The Black Money Act is primarily applicable only in case of Indian residents. In case of individuals, the law does not apply to residents who qualify as "not ordinarily resident". This classification is generally relevant in case of individuals who come / return to India after having stayed outside India during the immediately preceding 10 years or more. During the initial 2/3 years of residence in India upon such arrival/ return, they generally qualify as "not ordinarily resident"

Detailed rules have been prescribed for calculation of the 'fair market value' (**"FMV"**) for different assets such as gold, bank accounts and immovable properties.[72] With respect to Undisclosed Offshore Assets, if only part of the source of funds comprise tax evaded income, it is such proportionate FMV of the assets which are subject to taxes under the Black Money Act. In case of bank accounts, generally, the "fair market value" is to be computed by summing up all deposits made into the account minus deposits where the source of funds was not taxable in India and minus withdrawals for investing into assets which are subject to tax and penalty separately. While calculating tax liability under the Black Money law, no exemption, deduction, set off of carried forward losses or foreign tax credit is allowed.

In case of a capital asset on which tax is levied under the Black Money Act, step-up is provided and the fair market value on which the asset is taxed is to be taken as the cost of acquisition in case of a future transfer of such asset. As a corollary, the period of holding of the capital asset is computed from the date of declaration made under the Black Money Act. This can have implications on treatment of gains earned by the resident on the transfer of such asset are taxed as short term capital gains tax, which are normally taxed at regular tax rates (with the maximum marginal rate being 30%) or as long term capital gains tax, which are normally taxed at 20% (excluding surcharge and cess) with benefit of inflation indexation.[73]

Further, the following penalties could also be imposed under the Black Money Act:

a. Non-compliance in relation to obligation to report foreign assets in tax returns (applicable to residents): Penalty up to INR 1 million and additionally, in case of wilful non-compliance, rigorous imprisonment for a term between six months to seven years and fine;

b. Wilful evasion of tax, penalty or interest chargeable under the Black Money Act by residents: Rigorous imprisonment for a term between three to ten years and fine;

c. Wilful evasion of payment of tax, penalty or interest under the Black Money Act by any person: Rigorous imprisonment for a term between three months to three years and fine in case of others.

Further, the Black Money Act presumes that an accused taxpayer has the required culpable mental state for an offence under the Act. That is, it is presumed that the accused has the intention, motive or knowledge of a fact or belief in, or reason to believe, a fact to commit an act considered an offence. The onus to prove non-culpability beyond reasonable doubt is shifted to the accused. Considering that penal consequences are being imposed, it is a cause of concern that legislators have sought to shift the burden of proof on to the accused.

In relation to payment of tax and penalties under the Black Money Act, the law does not consider the liquidity situation of a taxpayer. The tax and penalties payable, which could collectively add up to 120% of the "fair market value" of all Undisclosed Foreign Income and Undisclosed Foreign Assets, can far exceed available liquid assets. Further, the Black

72. Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Rules, 2015

73. Circular No. 13 of 2015 issued by the Central Board of Direct Taxes (TPL Division) dated July 6, 2015.

Money Act imposes an additional penalty equal to amount of tax payable, if the taxes are not paid within the prescribed period (which is normally 30 days, unless extended or reduced) computed from the date of service of notice demanding payment of taxes.

Wilful attempt to evade any tax, penalty or interest under the Black Money Act is also an offence under prevention of money laundering law.

Hence, from a wealth and estate planning perspective, it is important that every asset or income located abroad can be explained. This holds true even in case of an inheritance. Hence, if property is inherited from a parent (upon such parent's death), and such parent had acquired such property from sources of investment which cannot be satisfactorily explained, such property should also be declared under the Black Money Act.[74]

The Black Money Act provided a brief compliance window ending September 2015 for taxpayers to declare their Undisclosed Offshore Assets, pay taxes at 30% and a reduced penalty equal to the tax amount. Upon such declaration and payment, subject to conditions prescribed, taxpayers were granted immunity from prosecution with regard to violation of laws relating to violations of laws relating to income tax, wealth tax, exchange control, companies or customs.

Subsequently, in 2016, under the income tax law, a compliance window was introduced for a limited duration of time from June 1, 2016 to September 30, 2016 on the lines of the compliance window introduced last year under the black money law. This window was open for income earned up to financial year 2015-16 except income chargeable to tax under the black money law (**"Undisclosed Domestic Income"**). The persons making a declaration under this window are required to pay tax, cess and penalty, effectively amounting to a total levy of 45% on the quantum of Undisclosed Income.

In November 2016, the government demonetized INR 500 and INR 1000 currency notes to tackle the issue black money. Further to such demonetization, a law to amend the income tax law and the black money law has been introduced and passed by the lower house of the Parliament. This amendment proposed to introduce another compliance window for tax payers to declare their undisclosed income, along with more stringent penalties and higher tax rates.

Under the compliance window, the declarant could declare his Undisclosed Domestic Income, pay a tax of 30% and penalty of 10% on the undisclosed income and a surcharge called 'Pradhan Mantri Garib Kalyan Cess' of 33% on the tax, all of which totals up to around 50%. In addition, the declarant had to deposit 25% of undisclosed income in a zero-interest deposit scheme called Pradhan Mantri Garib Kalyan Deposit Scheme, 2016. If a taxpayer with Undisclosed Domestic Income did not make such disclosure, it could be liable to tax, surcharge and education cess effectively amounting to the total levy of 77.25% and to penalty up to 60% of the Undisclosed Domestic Income.

B. FBAR and other key reporting obligations applicable to US persons

A "US person" including individuals, trusts, estates, and domestic entities, must file a Report on Foreign Bank and Financial Accounts (FBAR) on an annual basis if he/she/it has financial interest or signing authority over any financial account outside the US including a bank account, brokerage account, mutual fund, trust, or other type of financial account in that calendar year, and if the aggregate value of the accounts exceeds $10,000 at any time during the calendar year.

The FBAR has to be filed for a calendar year before June 30 of the next calendar year. Joint filing of FBAR with spouses is also possible. A US person may also not need to file FBAR in certain circumstances, including if he has signing authority but no financial interest in a foreign financial account.[75]

74. Circular No. 13 of 2015 issued by the Central Board of Direct Taxes (TPL Division) dated July 6, 2015.

75. https://www.irs.gov/businesses/small-businesses-self-employed/report-of-foreign-bank-and-financial-accounts-fbar

Those required to file an FBAR and failing to properly file a complete and correct FBAR may be subject to a civil penalty not to exceed USD 10,000 per violation for non-willful violations that are not due to reasonable cause. For willful violations, the penalty may be the greater of USD 100,000 or 50% of the balance in the account at the time of the violation, for each violation.

In addition to FBAR, Form 8938 is also required to be filed by specified individuals, especially, U.S. citizens, resident aliens, nonresident aliens who makes an election to be treated as resident alien for purposes of filing a joint income tax return in relation to securities and similar financial assets outside the US (exceeding USD 50,000 at the end of the year in aggregate, except where the aggregate value was more than USD 75,000 at any time during the year), particularly:

- Stock or securities;
- Note, bond or debenture;
- Interest rate swap, currency swap, basis swap, interest rate cap, interest rate floor, commodity swap, equity swap, equity index swap, credit default swap or similar agreement with a non-US counterpart;
- An option or other derivative instrument with respect to the above or with respect to any currency or commodity that is entered into with a non-US counterpart or issuer;
- A partnership interest;
- An interest in a retirement plan or deferred compensation plan;
- An interest in a non-US estate;
- Any interest in a non-US insurance contract or annuity with a cash-surrender value.

Form 8938 is required to be filed along with income tax returns. Taxpayers who are not required to file an income tax return are not required to file Form 8938.

For failure to disclose under Form 8938, penalties up to USD 10,000 and an additional USD 10,000 for each 30 days of non-filing after IRS notice of a failure to disclose (subject to maximum penalty of USD 60,000), along with criminal penalties may apply

i. Offshore Voluntary Disclosure Program

The IRS with this program reintroduced in 2012, offers taxpayers with undisclosed income from offshore accounts another opportunity to fulfill their tax and information reporting obligations. Although the program does not have a closing date, the IRS may end the program at any time.

ii. Filing delinquent FBAR

Taxpayers who have not filed a FBAR and are not under a civil examination or a criminal investigation by the IRS, and have not already been contacted by the IRS about a delinquent FBAR, should file delinquent FBARs and include a statement explaining why the filing is late. The IRS would not impose a penalty if income from the foreign financial accounts reported on the delinquent FBARs is properly reported and taxes are paid, and if the taxpayer has not previously been contacted regarding an income tax examination or a request for delinquent returns for the years for which the delinquent FBARs are submitted.

iii. Streamlined Filing Compliance Procedures

These are designed only for individual and estate holding taxpayers who are residing within US or outside.

The procedure are available to taxpayers to certify that their failure to report all income, pay all tax and submit all required information returns, including FBARs was due to non-willful conduct.

C. Information Exchange - CRS and FATCA

For administration and enforcement of the domestic tax laws, there are various systematic steps that have taken by tax authorities of each country to obtain information from other countries required. These include information exchange related provisions in Double Tax Avoidance Agreements (**"DTAAs"**), Tax Information Exchange Agreements (**"TIEAs"**) with countries if there is no DTAA, the US- India Inter-governmental Agreement (**"IGA"**) for implementation of the Foreign Account Tax Compliance Act (**"FATCA"**), etc., at a bilateral level and signing of the Multilateral Competent Authority Agreement for the Common Reporting Standard (**"MCAA-CRS"**) by over 100 countries at the multilateral level.

MCAA-CRS, to which India is also a signatory, mandates each signatory jurisdiction to obtain specified information (regarding tax residents of other signatory jurisdictions) from their financial institutions and automatically exchange that information with other jurisdictions on an annual basis starting September 2017 (for some countries) / September 2018 (for other countries),

FATCA forms part of the US tax-regulatory framework that subjects virtually any entity, even if: (i) remotely invested in the US market; or (ii) dealing with US citizens / green-card holders living outside the US; or (iii) subsidiary of a US person, to strict due diligence and reporting compliances with the US Internal Revenue Services (**"IRS"**). These compliance burdens could include the requirement to engage with and enter into an agreement with the IRS, undertaking additional due diligence to identify US taxpayers invested / proposed to be invested in the entity, periodically reporting to the IRS and setting in place documentation and verification processes to undertake any or all of the above. For effective implementation of FATCA, the US has entered into with IGA with several countries, including India.

The Indian government, for fulfilling obligations under the US-India IGA for FATCA and the MCAA-CRS, has amended its domestic tax laws for mandatory submission of prescribed information by financial institutions on an ongoing basis. These obligations are discussed in detail below in the section "Reporting obligations of financial institution, with special reference to NRIs and fund managers" under "Specific Considerations."

5. Specific Considerations

I. Wealth Planning For Global Families

WEALTH PLANNING OBJECTIVES	CHALLENGES TO WEALTH PLANNING
BUSINESS SUCCESSION PLANNING	**COMMUNITY SPECIFIC SUCCESSION LAWS**
▪ Control: Retaining family control over business, managing overlap between family and business	▪ Hindu joint family property can be disposed only for family "benefit"
▪ Governance: Effective governance of family and business holdings	▪ Muslim law permits only 1/3 property to be bequeathed
▪ Value: Maintaining value of the business and individual shares of family members	**EXCHANGE CONTROL REGULATIONS**
▪ Conflict: Exit options and dispute resolution	▪ Only up to USD 250,000 p.a. per person may be remitted offshore for specific purposes.
SUCCESSION PLANNING FOR THE FAMILY	▪ Acquisition of offshore immoveable property is not a permitted purpose.
▪ Balancing personal wishes with bequeathals required by community specific succession laws	**LIMITED STRUCTURING VEHICLES**
▪ Maintenance obligations in a joint family	▪ Foundations and life insurance policies as asset holding vehicles not recognized in India
▪ Provision for and protection of dependents	▪ Foreign hybrid entities e.g. S Corps, LLCs, may not be recognised for pass-through taxation
▪ Religious and charitable endowments	**TAX AND COMPLIANCE BURDENS**
INCREASING GLOBAL ASPIRATIONS	▪ Separate disclosure of HNI's foreign and Indian assets, GAAR, possible CFC rules & estate taxes
▪ Governance model for multi-jurisdiction business	
▪ Achieving tax efficiency and flexibility from an Indian regulatory perspective with beneficiaries and assets across jurisdictions	

* Almost 90% of Indian businesses are family run

** More than 66% of business families in India do not have succession plans in place

GLOBAL FAMILIES: CONTROL, GOVERNANCE, VALUATION, CONFLICT

INTER-GENERATIONAL ISSUES

FIRST GENERATION

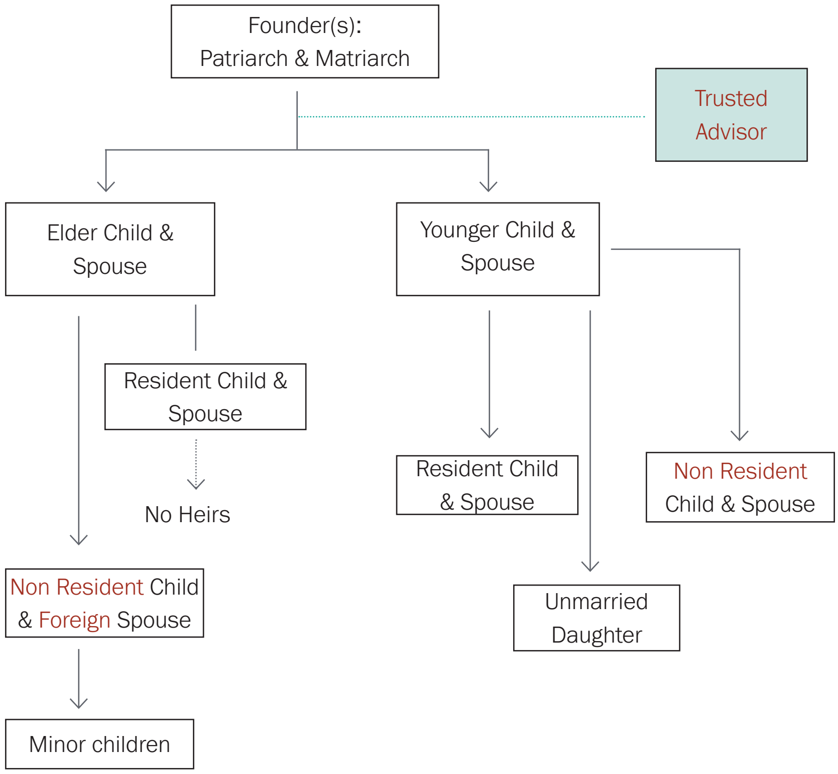
- Specific vision
- Certain values
- Sacrifices to set up business

SECOND GENERATION

- Different values/vision
- Sibling rivalry
- Challenges of growing established business

THIRD & LATER GENERATIONS

- Reducing shares
- Cousin rivalry
- Desire for independence
- Feeling of entitlement
- Incompetence
- Division into core and non-core family members
- Impact of foreign matrimonial property laws
- Maintenance of dependents



TYPICAL STRUCTURING OPTIONS

USE OF MIRROR TRUSTS

- Restrictions on settlement of Indian property into an offshore trust or offshore property into an Indian trust leading to parallel trust structures for Indian and non-Indian assets
- Mirror trusts require close thought to be paid to governance issues to ensure that the two trusts work in tandem to accomplish a single set of objectives
- Gradual acceptance of institutional trustees and protectorship structures

USE OF CORPORATE HOLDING STRUCTURES

- Option of having company shares held by a trust for flexible governance and optimal tax structure concerning possible introduction of CFC rules
- Greater certainty on Indian taxability of offshore companies as compared to offshore trusts

TOOLS

- **Family Constitution:** Document outlining business and family values
- **Family Meeting/Assembly/Council :** Governance structures as per needs of family size and spread, may also be a forum for conflict identification & resolution
- **Family employment policy:** One method to ensure competent family members manage the business
- **Dividend Policy:** Transparent policy to manage income expectations of core and non-core family members
- **Trusted Advisor:** May be an institution or family friend to advise the family
- **Family Office:** Company that manages investments for a single family

II. Intellectual Property and Succession Planning Under Indian Law

Intellectual property is today as important, if not more, as traditional physical assets for a number of reasons. To name but a few, these reasons would be increasing use of technology in personal and business activities, globalization, targeted investment in research and development and the proliferation of start-ups. As a consequence, intellectual property (**"IP"**) and rights in such IP have become precious sources of value and are being treated and managed like any other financial asset.

A. Need for succession planning in case of IP

IP is a generic term encompassing specific types of property, each with their special characteristics. For example, copyright, trademark, design, patent, each are different types of property. The nature of IP rights and the kinds of protection available for each such right are different across countries. This gives rise to the need for active vigilance and management to ensure that the IP rights are not infringed and to provide for remedies when infringed. Given that such varied property and rights are involved, it is important for creators and assignees of IP to plan in advance for the management of their IP after their demise. This will ensure that their hard work is preserved and available for their successors and heirs like other traditional forms of wealth. IP owners will need to consider issues such as the ability to monetize such intangible assets; accumulate value in them; pass on benefits in such assets to desired beneficiaries; protect such assets against third party claims; guard against external risks including privacy violation and identity dilution.

Death may actually cause a surge in an individual's popularity and the associated income from the licensing of their image or likeness. This phenomenon was most clearly illustrated with the estate of Michael Jackson, who received an intense amount of interest (and a large surge in income) following his death.[76] Michael Jackson leads the Forbes list of top-earning dead celebrities in 2013. [77]

Since IP rights are country-specific, it is imperative to understand the nature of protection afforded to IP rights in each jurisdiction to exploit and derive commercial gains out of an IP across the globe. For example, an 'image right' (i.e. right of a celebrity to protect the use and exploitation of one's name, brand, identity etc.) is protected under the laws of Guernsey. Even India appears to have taken steps towards the recognition of such rights. For instance, in the case of *DM Entertainment Pvt. Ltd. v. Baby Gift House* [78], where popular singer, Daler Mehndi alleged that the importation and sale of dolls resembling Daler Mehndi's likeness without his prior permission were an infringement of his right to control the commercial exploitation of his persona, the Delhi High Court recognized his "proprietary interest in the profitability of his public reputation or persona". However, this liberal stance taken by the Court was facilitated to a large extent by the fact that the celebrity had proactively taken steps to protect his interest in his personality. The plaintiff company was incorporated with the object of managing Daler Mehndi's career and all the rights, title and interest in his personality inherent in his rights of publicity along with the trademark "DALER MEHNDI" as well as the goodwill vested therein had been assigned to the plaintiff company. This might not always be the case. Since the jurisprudence on such issues is limited, Indian law in respect of such rights continues to remain in its nascent stage and the protections are not very extensive.

In case of certain kinds of IP (like patents), statutory protection is available only on registration of the IP with the relevant regulatory authorities. However, in case of other kinds of IP (like trademark and copyright), such registration is not mandatory and registration, if made, only leads to a rebuttable presumption with respect to rights on the IP in question. Further, in lieu of statutory reliefs, relief could also be claimed under the general principles of common law in case of certain IPs (like the relief with respect to passing off for trademark). Certain kinds of IP like trade secrets and know-how, for which there is no protection offered by any specific statutory law in India, are also protected under the common law (under the doctrine of breach of confidentiality).

Further, the nature of the rights, including aspects such as the duration for which rights are available, the persons entitled to such rights and the restrictions applicable to their exercise are also different across countries and across different kinds of IP. For example, in case of cinematographic films, both the producer are entitled to the copyright in the film; in case of lyricists, scriptwriters and composers, whose work is utilized in the making of the film, are also entitled to copyright in their work except when the work used for the purposes of the film; in case of trademarks, there is no upper limit on the period for which the protection is available; in case of patents, the protection is available for 20 years and is subject to compulsory licensing in certain circumstances.

B. Succession planning methods

There are various methods that could be used for succession planning. The most commonly used methods in India are bequeathing of properties under a Will or settlement into a trust.

Bequeathing property under a Will

In the case of a Will, the devolution takes effect on the death (and not before) of the person writing the Will and with respect to the properties of such person outlined in the Will. Wills could either directly confer properties on the persons named in the Will

76. http://www.srr.com/article/right-of-publicity-an-often-overlooked-asset-in-estate-planning

77. http://www.forbes.com/sites/dorothypomerantz/2013/10/23/michael-jackson-leads-our-list-of-the-top-earning-dead-celebrities/

78. MANU/DE/2043/2010

or provide for the named properties to be settled into a trust. Such a trust is called a testamentary trust.

In case of direct bequest of an IP right to more than one heir, it is important to note that in case of IP rights like copyright, in India, the rights therein can only be exercised jointly by heirs and/or others who co-own the rights, and not individually by each of them with respect to their proportionate share in the rights. This gives rise to the possibility of under-utilization of the IP rights on account of differences between the heirs and/ or others to whom it has been so bequeathed.

Settling property in a Trust

Instead of a testamentary trust, a trust could also be created during the lifetime of the IP owner with such person being the sole beneficiary of the trust during his lifetime and rights of other beneficiaries arising only upon the demise of such person.

Whether the trust is a testamentary trust or a non-testamentary trust, these mechanisms create an obligation on the trustee to manage the trust property (here the IP) in good faith and for the benefit of the beneficiaries. The creation of a trust separates the management of the IP rights from the heirs or others who are entitled to enjoy the benefit from the commercial exploitation of the IP rights. The role of the management of the IP rights is placed in the hands of the trustee named in the Will or trust deed who would be required to act in accordance with the terms and conditions prescribed in the Will or trust deed. This will help address the concern over the possibility of differences arising between such heirs and/or other beneficiaries. Further, trusts also offer the flexibility to ensure accumulation of income arising from the IP rights up to a certain specific point of time.

In case of appointment of trusts, either by way of a Will or directly, important considerations to be decided upon involve the choice of trustee – whether it should be a person known to the owner of the IP rights or whether it should be a professional trusts. The advantages of appointing a professional trustee are:

a. Minimising risk of bias towards any one/more beneficiaries to the exclusion of others;

b. Expertise in management of finances and maintenance of detailed paperwork required for being able to protect itself as a trustee against challenges by beneficiaries and for substantiating compliance with tax liabilities;

c. Experience in handling situations not envisaged by the settlors in the will or trust deed.

Keeping in mind the nature of the IP rights and the protection available thereof in different countries, it may be advantageous to have the ownership of the IP rights held by a trustee so as to be able to access the robust dispute protection mechanisms in place in such country or other important institutional framework put in place for comprehensive protection of IP rights.

It is also important to outline guidelines to be adhered to by the trustee in commercially exploiting the IP rights. For example, the primary mechanism to be utilized by the trust in exploiting the IP – whether it should be licensed for payment of royalty in return or whether it should leave the exploitation of the IP rights to a copyright society and merely collect royalties from them and distribute them to the beneficiaries; the circumstances in which the IP rights should/ could be disposed/ assigned to a specified person or third party; etc.

C. Digital inheritance

With the growth of electronic modes of communication, there is an increasing debate on the right to on-line accounts and other forms of digital property left behind by an individual post his/her demise. The concerns arising from conflict between privacy rights and inheritance rights are being increasing debated. Further, concerns such as preventing identity theft and preventing spam are also important considerations.

The battle by the parents of Benjamin Stassen to gain access to their deceased son's Facebook account shows that these issues have become a reality. Benjamin Stassen committed suicide in late 2010 without leaving a note. Just like most youngsters, much of his personal information and data was held online. His parents wanted to look through his accounts to try and find some explanation for his suicide. However, Facebook and Google refused to assist, citing client confidentiality. The parents of Benjamin Stassen obtained a court order in 2012 forcing Google and Facebook to allow them access to the accounts of their late son.[79]

Some states in the US[80] have enacted laws to address the above contingency. Connecticut, Idaho, Indiana, Oklahoma, and Rhode Island have enacted laws on the subject in the past few years. In Connecticut, Indiana, and Rhode Island, the law requires a death certificate and proof of an executor's appointment to allow a representative to see accounts, according to the National Conference of State Legislatures. Idaho gives the executor or a personal representative the right to control the deceased's social media, text messaging, and e–mail accounts. A will or formal order can open accounts in Oklahoma, while in Idaho, a will or court order can restrict access.[81]

Other than the above, there are no specific laws globally governing the rights associated with the digital property of an individual; they are predominantly only governed by the contracts that the individual enters into with the various digital service providers. In this light, it becomes important to explore the possibility of succession planning for such digital property (which includes listing out the digital assets one wants deleted), determining the best suited method thereof (Will/ trust/ trust created under a Will) and to be simultaneously mindful of the issues surrounding them such as ensuring secrecy with respect to handing over passwords, etc.

79. Nicola Plant, Test Case for Facebook and Digital Legacies, Pemberton Greenish (June 2012), available at: http://www.pglaw.co.uk/news/news-16-07-12.html

80. We are qualified to advise on Indian law only. Any statement with respect to laws of other jurisdiction should be confirmed by the local counsels of the respective jurisdictions and should not be considered as legal advice.

81. Sarah Kellogg, Managing Your Digital Afterlife: Cyber Footprint Ownership, and Access, DC Bar (January 2013), available at: http://www.dcbar.org/for_lawyers/resources/publications/washington_lawyer/january_2013/digital_afterlife.cfm

III. Reporting obligations of financial institutions with Special Reference to NRIs and Fund Managers

As indicated earlier, the Indian government, for fulfilling obligations under the US-India IGA for FATCA and the MCAA-CRS, has amended its domestic tax laws for mandatory submission of prescribed information by financial institutions on an ongoing basis.

A. Whose accounts are reported?

The reporting obligations are applicable in relation to financial accounts (as defined) held in India by persons who qualify as tax residents (or equivalent) in one or more foreign countries and estates of such persons. In case of US, citizens of the US are also considered "US persons" for tax purposes. In case of trusts, a trust will be considered to be resident of a country if the sole / one / more trustees are tax residents of that country.

Account held by certain types of persons such as corporation listed on a stock exchange, government entities, financial institutions, etc., are not required to the reported. Additionally, in case of "US persons", accounts held by real estate investment trusts (**"REITs"**), certain tax exempt trusts and retirement plans, regulated investment companies, registered dealer, brokers, etc., are also excluded.

The reporting obligations are also applicable in relation to entities controlled by individuals whose accounts are reportable (as indicated above). The control may be direct or through one / more non-natural persons. Different thresholds are prescribed for determining control. In case of companies, it includes ownership of more than 25% stake and right to appoint majority directors and right to control management and policy decisions. In case of partnership and unincorporated entities, it includes entitlement to more than 15% capital or profits. In case of trusts – the settlor, the trustee, the beneficiaries and the protector (if any) – all of them are treated as controlling persons.

In case of entities controlled by persons who are tax resident of countries other than the US, details of financial accounts of such entities are required to be reported only if such entities qualify as passive non-financial entity. Passive non-financial entities broadly comprise entities which do not qualify as financial institutions (as outlined in section below on "Who is required to report?") and satisfy at least one of the following criteria: (i) more 50% of gross income comprise passive income (such as dividends, interest, investment income, rents and royalties which are not derived from active conduct of a business, annuities, capital gains, etc.) or (ii) more than 50% of assets comprise assets which produce or are held for production of passive income.

B. What accounts are to be reported?

Financial accounts required to be reported include bank accounts (including current, saving, fixed or other types of deposits), demat and other similar custodial accounts held with custodian banks, brokers, depository participants, securities depositories (CSDL and NSDL), etc., equity and debt interest in investment entities (set up as companies, partnerships, trusts, etc.), insurance policies (including annuity contracts, but excluding term life insurance, property insurance, insurance against theft, personal injury, etc,)

However, accounts which have a low risk of being used to evade tax, such as term life insurance policies, listed securities with tax benefits, escrow accounts, retirement / pension accounts, etc., which satisfy prescribed conditions, are not required to be reported.

C. De Minimis thresholds

In case of financial accounts of individuals who are US citizens and residents, financial accounts who value is less than USD 50,000 are not required to be reported. In case of financial account of individuals who are tax residents of other foreign countries, no minimal threshold applies.

In case of taxable entities other than individual, both in case of US and other foreign countries, no minimal threshold is prescribed except in case of pre-existing accounts for which a minimal threshold of USD 250,000 has been prescribed. In case of US residents, June 30, 2014 is the cut-off date for qualifying as pre-existing accounts. In case of residents of other foreign countries, it is December 31, 2015.

D. What details are to be reported?

In relation to every financial account, the details are required to be reported include:

a. Name, address, taxpayer identification number (TIN) assigned in the country of residence and date and place of birth;

b. If an entity has one or more controlling persons that are reportable persons:

   i. Name and address of the entity, TIN assigned to the entity by the country of its residence; and

   ii. Name, address, date of birth and place of birth of each such controlling person and TIN assigned to such controlling person by the country of his residence;

c. Account number (or functional equivalent in the absence of an account number);

d. Account balance or value at the end of the relevant calendar year. In case of joint accounts, the entire balance is attributed to all holders of the account.

These details are required to be reported annually for every calendar year in the prescribed format by May 31st of the following year. In case of financial accounts relating to US residents and US citizens, the first calendar year for which the reporting obligation came into force is 2014 and the first report was to be submitted by September 10, 2015. In case of financial accounts relating to residents of other foreign countries, the first calendar year for which the reporting obligation has come into force is 2016 and the first report is to be submitted by May 31, 2017.

Failure to report could attract penalty of INR 100 (approx. USD 1.5) per day / INR 500 (approx. USD 7.5) per day after notice is served. In case inaccurate information is provided, penalty of INR 50,000 (approx. 750) may apply.

E. Who is required to report?

The reporting obligations are applicable on various types of financial institutions, including banks, non-banking financial companies (except NBFCs which are purely engaged in investments on their own account), entities providing trust / fiduciary services, collective investment vehicles such as mutual funds, private equity funds, venture capital funds, exchange traded funds and hedge funds, securities depositories (CSDL and NSDL), custodian banks, brokers, depository participants, portfolio management entities and insurance companies (except re-insurance companies and insurance companies which only provide general / term life insurance).

The reporting obligations are also applicable in case of branch in India set up by an overseas financial institution. Similarly, they are not applicable in relation to branches outside India, even if it set up an Indian resident entity.

Also, certain types of financial institutions are specifically excluded from the ambit of the reporting obligations, including certain retirement funds, gratuity fund, provident fund, financial institutions with a local client base (satisfying the conditions prescribed), government entities, etc.

F. Identification of financial accounts required to be reported

Financial institutions are required to follow prescribed due diligence procedures to identity reportable accounts. Different procedures are outlined for the following:

Pre-existing individual accounts less than USD 1 million: Electronic search is required to be carried out for possible nexus of financial accounts with a foreign country based on specified parameters. They are briefly described below:

i. tax residence in a foreign country (and place of birth in the US),

ii. residence / mailing address in a foreign country,

iii. telephone number of a foreign,

iv. standing instructions to transfer funds to a different account in a foreign country,

v. power of attorney to a person whose address is in a foreign country; and

vi. hold-mail instruction / in-care-of address in a foreign country.

If electronic search for all the above parameters is not possible, paper search is required to be carried out. If either type of search indicates possible tax residence in a foreign country, the financial accounts are required to be reported, except if the financial institution considers that the indication may be incorrect and obtains / has obtained self-certification, along with prescribed documentary evidence to support the same.

Pre-existing individual accounts more than USD 1 million: The due diligence process described above is also applicable to these accounts. Additionally, the financial institution is required to consider whether relationship manager associated with the financial account (if any) has actual knowledge that would identify the account holder as a person whose account is required to be reported.

Pre-existing entity accounts: The financial institution is required to review information maintained for regulatory and customer relationship purposes. If the information indicated that the account may be held by a tax resident of a foreign country, the financial account is required to be reported, except if the financial institution considers that the indication may be incorrect and obtains / has obtained self-certification or has information (in its possession / in the public domain) to support the same. Additionally, if an entity has a Global Intermediary Identification Number on the FFI list published by US IRS, the account is not required to be reported to the US.

In case of entities, additionally, it also has to be determined whether the entity's account is required to be reported on the basis of being controlled by persons whose accounts are required to be reported.

For identifying the controlling person, information collected for the purposes of anti-money laundering law may be relied on

For determining whether the controlling persons are reportable, if the account balance of the entity does not exceed USD 1 million, information collected for the purposes of anti-money laundering law may be relied on. If it exceeds USD 1 million, self-certification would have to be obtained from the entity / its controlling persons.

In the context of entities controlled by individuals who are resident of foreign countries other than the US, it also needs to be determined whether the entity is a passive non-financial entity (as discussed above under the section "Whose accounts are reported?"). For this purpose, self-certification is required to be obtained, unless the financial institution has information (in its possession / in the public domain) to reasonably determine that the entity is not a passive non-financial entity.

New individual accounts: Self-certification must be obtained and the financial institution should also confirm the reasonableness of the self-certification based on information collected in connection with the account opening process.

New entity accounts: Self-certification is required to be obtained, unless the financial institution has information (in its possession / in the public domain) to determine that the entity is not resident in foreign country. Where self-certification is obtained, the financial institution should also confirm the reasonableness of the self-certification based on information collected in connection with the account opening process.

Additionally, for determining whether the entity's account is required to be reported on the basis of being controlled by persons whose accounts are required to be reported, the same process indicated for pre-existing entity accounts applies, with one important difference – irrespective of whether the account balance of the entity does / does not exceed USD 1 million, self-certification would have to be obtained from the entity / its controlling persons.

G. Registration with the IRS

Financial institutions having financial accounts relating to US residents and US citizens need to register with the US IRS and obtain a Global Intermediary Identification Number (**"GIIN"**). If a financial institution fails to do so, US-source payments receivable by it may be subject to withhold tax at 30% in the US.

H.Important Considerations

i. NRI's Investment in India

Several high net worth NRIs have planned their wealth through several investments involving India and unless financial institutions (including funds or professional trustees) used for such purpose are compliant with their obligations under FATCA, all payments would be subject to heavy withholding tax of 30% owing to the income being US sourced. Additionally, if US citizens and US green card holders (particularly, those residing outside the US) have not complied with reporting obligations in relation to financial assets held outside the US, and if the US IRS obtain information under the FATCA regime in relation to such financial accounts held outside the US (including in India), they could face penalties for the same.

Moreover, banks in India are looking to alienate American residents and citizens in order to avoid involvement of US sourced payments.

Thus, NRIs will face difficulty in maintaining their accounts in India through which payments are routed.

ii. Impact on Banks

On an industry-wise approach, the banking industry in India will face a challenge in ensuring FATCA compliance. As of today, Indian banks have a Know-Your-Customer system established for verifying the identities of its customers. It has been opined that all processes related to opening of accounts and transactions as they are at present will have to be completely revamped by Indian banks to ensure compliance. The banks also need to ensure a continual system of monitoring US source payments and reporting of the same to ensure compliance. Apart from this, it is also important that all banks have a system in place to determine whether several accounts can be treated as one while calculating balance. In a situation involving several accounts, including joint accounts, as is seen in the case of several NRIs, this would be extremely difficult to implement.

iii. Impact on the Investment Funds Industry

The private equity and venture capital funds industry will also face a major brunt of the compliance burden imposed by FATCA. Therefore, all fund managers need to carry out preparatory work on their existing client base, client take-on procedures and on due diligence requirements under the FATCA. Since a lot of US sourced investments into India come through off-shore funds managed by Indian or Indian-affiliated fund managers, such entities need to ensure compliance to avoid the withholding tax.

IV. Non-Profit Entities in the USA

In India, charitable activities are carried out by three forms of entities namely trusts, societies and section 8 companies. These entities get regulatory relaxations and fiscal interventions in the form of tax exemptions from the State in recognition of the fact that the motive behind such operations are purely charitable and public benefit purposes. Principles governing structural governance of non-profit entities across the globe are more or less the same. In India, the Income-tax Act, 1961 governs taxation issues of non-profit entities. Similarly, in US the Internal Revenue Code (**"IRS"**) governs the taxation issues of such entities.

Under the IRS, only two forms of voluntary organizations are recognized, namely public charity and private foundation. The most common types of organizations that work in the field of non-profit sectors are charitable, educational and religious organisations. Internal Revenue Code 501(c)(3) (**"Code"**) provides that a corporation, community chest, fund or foundation may qualify for exemption if it is organized and operated exclusively for charitable purposes.

A. Basic Framework for United States "Non-profits"

For a charitable organization to be tax-exempt under 501(c), it must be organized and operated exclusively for the exempt purposes listed in 501(c)(3). 501(c)(3) states:

> "Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office."[82]

82. 26 U.S.C. 501(c)(3)

An entity must be organized as a corporation, trust, or association for IRS to recognize the entity's exemption,[83] however, a partnership will not be exempt. Most non-profits are organized in the form of corporations, as formation of an association involves almost the same formalities as formation of a corporation, a corporation will provide a more certain legal structure, and in many jurisdictions, an un-incorporated association does not shield its members from liability.[84]

All organizations that qualify for tax exemption under 501(c) are designated private foundations unless specifically excluded from the definition under 509(a)(1-4).[85] In effect, IRC 509 divides non-profits into two separate and distinct classes: "private foundations" and "public charities".[86] The latter class is favorable for tax purposes, since private foundations are subject to various reporting requirements and taxes on net investment income.[87] Unlike public charities, private foundations risk various excise taxes.[88] Under 509(a)(1-4), organizations considered public charities rather than private foundations (the default designation) include churches, educational organizations which maintain regular faculty and regular curriculum, hospitals or medical research facilities, and organizations which test for public safety. Further, public charities include organizations which have an active program of fundraising and receive contributions from many sources, including the general public, government agencies, corporations, private foundations or other public charities, or receive income from the conduct of activities in furtherance of the organization's exempt purposes or actively function in a supporting relationship to one or more existing public charities.[89] For such organizations to be considered public charities the aggregate of contributions should exceed 50% of a taxpayer's contribution base for the taxable year. [90]

Generally, public charities draw their support from a variety of sources, while private foundations typically "have a single major source of funding (usually gifts from one family or corporation rather than funding from many sources) and most have as their primary activity the making of grants to other charitable organizations and to individuals, rather than the direct operation of charitable programs." [91] If an organization is appropriately designated a private foundation, it is further classified as either a private operating foundation, an exempt operating foundation, or a grant-making foundation.

The private operating foundations are those which contribute the majority of their resources to the active conduct of exempt activities. Such foundations are subject to the same restrictions and risks as other forms of private foundations (including the tax on net investment income), except that private operating foundations are not subject to an excise tax for failure to distribute income. [92]

Further, contributions to private operating foundations described in Code section 4942(j)(3) are deductible by the donors to the extent of 50 percent of the donor's adjusted gross income, whereas contributions to all other private foundations are generally limited to 30 percent of the donor's adjusted gross income." [93] A private operating foundation is only classified as an exempt operating foundation—and thus not subject to the tax on net investment income subject to the condition that :(i) it has been publicly supported for 10 years; (ii) governing body consists of individuals less than 25 percent of whom are disqualified individuals and is broadly representative of the general public; and (iii) has no officer who is a disqualified individual during

83. IRS website, Life Cycle of a Private Foundation – Starting Out
84. 2E-2E:5 Lexis Tax Advisor – Federal Topic § 2E:5.03
85. A private foundation is also a charitable entity and described in the IRS by section 509. The IRS issues a 509(a) ruling to every organization with a 501(c)(3) tax-exempt ruling. Section 509(a) of IRS, which includes references to Section 170(b), is called both a public charity ruling and a private foundation ruling. While the 501(c)(3) ruling designates an organization's tax-exempt status, the 509(a) ruling further categorizes the organization as either a public charity or a private foundation. This designation is important to a potential grantor because it indicates whether the granting organization will be required to exercise expenditure responsibility for the organization's grant. IRS website, Private Foundations
86. Id.
87. Id.
88. Id.
89. IRS website, Public Charities
90. 26 U.S.C. § 170(b)(1)(A)(viii).
91. IRS.gov, Life Cycle of a Public Charity/Private Foundation
92. 26 U.S.C. § 4942(j)(3).
93. IRS.gov, Private Operating Foundations

the year.[94] In case private foundations that do not qualify as private operating foundations, they are generally referred to as grant-making foundations or private non-operating foundations.[95]

B. United States Regulation of International NGOs

A United States non-profit may conduct all or part of its charitable activities in a foreign country without jeopardizing its tax-exempt status [96] (subject to the laws and regulations of the country of origin). Further, an organization's tax-exempt status will remain unchanged even if it distributes funds to individuals or other organizations that are not charities, so long as the distribution is charitable and aimed at achieving the organization's purpose.[97]

Interestingly, the U.S. government does not interfere with how the NGO accomplishes its purposes. NGOs are free to recruit participants for their organizations as they wish, and need not provide notification to any government agency about its membership, activities, or outreach. Like other U.S. organizations and companies, U.S. NGOs must refrain from working with governments or individuals under U.S. sanctions, as well as with groups designated as foreign terrorist organizations, but otherwise, they are free to collaborate with foreign NGOs or foreign governments to achieve their purposes. There are no regulations that restrict U.S. NGOs from attending conferences abroad, finding donors overseas, or performing work internationally.[98]

Accordingly, United States non-profits may exercise significant flexibility in conducting affairs abroad without foregoing tax-exemption.

C. 501(c)(3) Entities Operating in India and Entitlement to Treaty benefits

Taxation of income in India is governed by the provisions of the Income Tax Act, 1961 (**"ITA"**). The ITA contains separate rules for the taxation of residents and non-residents. Residents are taxable on worldwide income, while non-residents are taxable only on Indian-source income (i.e. only and to the extent that such income accrues or arises, or is deemed to accrue or arise in India or is received or deemed received in India).

Such taxability of non-residents on their Indian-source income is however subject to the provisions of the applicable tax treaty to the extent they are more beneficial to the non-resident. In addition to the conditions prescribed under the relevant tax treaty regarding the applicability of such tax treaty, the ITA prescribes certain additional conditions for availing the benefit of a tax treaty entered into by India.[99]

The foremost requirement for the applicability of the India-US tax treaty (**"Treaty"**) to a charitable organization which is a tax exempt entity under the Code, is that it should qualify as a person as defined in the Treaty. Article 3.1(e) and 3.1(f) of the Treaty provides that the term "person" includes an individual, an estate, a trust, a partnership, a company, any other body of persons, or other taxable entity and the term "company" means, any body corporate or any entity which is treated as a company or body corporate for tax purposes respectively.

It is important to analyze the meaning of the terms 'taxable entity'. The term should not mean an entity actually taxed, but an entity that may be 'liable' to tax under the relevant domestic regime. To the extent that the tax free status of a charitable organization is derived from a specific exemption provision pursuant to a 501(c)(3) registration, we can assume that the

94. IRS.gov, Exempt Operating Foundations

95. IRS.gov, Grant Operating Foundations

96. IRS Memorandum (hereinafter "IRS Memo"), Office of Chief Counsel, 200504031 at p. 2 (28/01/2005) (citing Rev. Rul. 63-252, 1963-2 C.B. 101).

97. Id.

98. Fact Sheet: Non-Governmental Organizations (NGOs) in the United States, U.S. Dept. of State, http://www.humanrights.gov/2012/01/12/fact-sheet- non-governmental-organizations-ngos-in-the-united-states/

99. The non-resident should obtain a tax residency certificate (**"TRC"**) from the government of which he is a resident pertaining to the relevant period; the non-resident should furnish certain prescribed particulars to the extent they are not contained in the TRC; the non-resident should obtain a tax id in India (called the permanent account number); and the non-resident should file tax returns in India.

charitable organization would otherwise have been considered a taxable entity in the United States.

The next requirement for availing the benefit of the Treaty is that the charitable organization should be a resident of the US as defined in Article 4.1 of the Treaty.[100] In this context, the nature of the entity the charitable organization is set up as – body corporate, trust, foundation, etc becomes important. If the charitable organization is established as an entity (for example, a body corporate) which is not one of the entities referred to in Article 4.1(b), to qualify as a resident of the US for the purposes of the Treaty, it would have to satisfy only one test – it should be 'liable' to tax in the US as discussed Also, as already highlighted above, it should possess a tax residency certificate issued by the US government with respect to the period for which it proposes to claim Treaty relief.

However, if it is established as either of the entities referred to in Article 4.1(b), (particularly, a trust) it will also have to satisfy the additional test of being actually subject to tax in the US, either in the hands of the entity or its beneficiaries/partners etc. Therefore, given that its income is exempt from tax under Section 501 of the IRC, to satisfy the condition, its income should be subject to tax in the hands of its beneficiaries.

D.Concluding Comments

To avail of the tax-exemptions, a growing number of new ventures have elected to be non-profit organizations. Many of these ventures depend on federal tax exemption to scale-up their business and conduct charitable work at the same time. 501(c)(3) provision, besides being used for charitable activities, can also be used by entities to gain new forms of capitalization and business plans. However, the Code prescribes strict regulatory requirements and adherence to IRS Regulations. In addition, state- wise compliances are also required to be followed. Non-filing of paper work or mis-stating the records of funds may jeopardize the tax-exempt status. Moreover, all due care must be taken to ensure that no lobby is conducted in the name of charity and activities arising out of such charitable work does not benefit any private citizen.

V. Acquisition of Property in the UK: Impact of LRS and UK's New Tax Regime for Immovable Property

High-net worth individuals (**"HNIs"**) in India have often looked at acquiring immovable property abroad, and amongst various destinations such as Dubai, New York and Singapore; UK has remained to be a constant favorite. These acquisitions could be investment oriented (due to the expected price appreciation in the value of property) or luxury-oriented as the property serves as a holiday home for HNIs frequenting Europe on a regular basis.

Resident Indian individuals make use of the Liberalized Remittance Scheme (**"LRS"**) for remitting funds for acquiring this foreign property. Under the LRS, resident individuals are allowed to transfer up to USD 250,000 per person per financial year for permitted current and capital account transactions. Acquisition of immovable property outside India is one of the permitted capital account transaction.

Alternatively, funds may also be remitted under the LRS for making contributions into an offshore irrevocable trust. When such trusts make investment in property outside India, it may be able to acquire property worth much higher than USD 250,000, as the trust may be able to obtain leverage using the property as a collateral. Resident individuals are not allowed to

100. Article 4.1 of the Treaty, reads thus:
For the purposes of this Convention, the term "resident of a Contracting State" means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, citizenship, place of management, place of incorporation, or any other criterion of a similar nature, provided, however, that
(a) this term does not include any person who is liable to tax in that State in respect only of income from sources in that State; and
(b) in the case of income derived or paid by a partnership, estate, or trust, this term applies only to the extent that the income derived by such partner- ship, estate, or trust is subject to tax in that State as the income of a resident, either in its hands or in the hands of its partners or beneficiaries.

provide any personal guarantee for such loans unless specific approval is obtained for the same.

The most common route for acquisition of immovable property in UK earlier has been through setting up offshore company or trust structures in a tax friendly jurisdiction like Guernsey or Jersey.

However, changes in UK tax law had adversely affected the otherwise popular investment choice. In the context of UK residential property held through companies, particularly, several changes have been recently introduced, including introduction of annual tax on enveloped dwellings, increase in stamp duty land tax, applicability of capital gains tax and inheritance tax, etc. That said, the attraction of UK (especially London) properties for Indian HNIs has not diminished.

A. Acquisition of Immovable Property in UK

The use of holding company structures used to be a common practice for acquiring immovable property in UK. Apart from maintaining confidentiality of the holder of property, primary advantages of an offshore holding company structure include the mitigation of stamp duties, and inheritance tax in UK. However, this is no longer tax advantageous, owing to the recent changes in the UK tax regime that were made particularly to tackle such structures. Under the new regime, with effect from 1 April 2013, companies that own high value residential property must pay a tax called the the Annual Tax on Enveloped Dwellings (**"ATED"**).

The ATED applies to property valued at more than £500,000 as on 1 April 2012, or at acquisition if later.[101]

Further, a capital gains tax is also imposed on offshore companies on sale of immovable property on the increase in value of the property between 6 April 2013 and the date of sale. A punitive stamp duty of 15% is also levied on an offshore company, in case of any purchase of a residential property having a value of over £500,000

B. Proposed reforms - Inheritance tax on UK residential property

During the Summer Budget 2015, the government announced its proposal to introduce reform in relation to inheritance tax on UK residential property. Pursuant to such announcement, the draft 2017 Finance Bill was placed for public comments on November 23, 2016.

In case of persons not domiciled in the UK, it is proposed that UK inheritance tax shall extend to the following properties:

a. Interests held in closely held companies and partnerships which derive their value from UK residential property.

b. Assets comprising loans made to enable an individual, trust or partnership to acquire, maintain or improve UK residential property or to invest in a close company or a partnership which uses the money to acquire, maintain or improve UK residential property.

c. Assets used as collaterals for such loans.

d. Property derived from the sale of the UK property / sale of interest held in the non-UK entity / repayment of loan is also proposed to be subject to UK inheritance tax.

Such inheritance would apply in the following circumstances:

a. The death of the individual who holds any of the properties indicated above.

b. The death of the individual who is a settlor and beneficiary of a trust which holds UK residential property or any of the properties indicated above.

101. http://www.hmrc.gov.uk/ated/basics.htm

c. Lifetime gifts of any of the properties indicated above.

d. Ten year charges and exit charges for trusts which hold any of the properties indicated above.

C. Capital Control Measures in India

Indian exchange controls are a determinative factor in private wealth structuring and opening up of capital controls will provide much more flexibility in terms of global wealth planning for modern day HNIs who are likely to have multi-jurisdictional wealth. It is hoped that there may be further relaxation in the LRS limits with greater stability in macroeconomic conditions.

About NDA

Nishith Desai Associates (NDA) is a research based international law firm with offices in Mumbai, Bangalore, Palo Alto (Silicon Valley), Singapore, New Delhi, Munich and New York. We provide strategic legal, regulatory, and tax advice coupled with industry expertise in an integrated manner.

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We specialize in Globalization, International Tax, Fund Formation, Corporate & M&A, Private Equity & Venture Capital, Intellectual Property, International Litigation and Dispute Resolution; Employment and HR, Intellectual Property, International Commercial Law and Private Client. Our industry expertise spans Automotive, Funds, Financial Services, IT and Telecom, Pharma and Healthcare, Media and Entertainment, Real Estate, Infrastructure and Education. Our key clientele comprise marquee Fortune 500 corporations.

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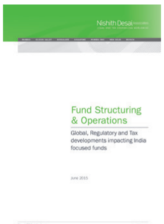

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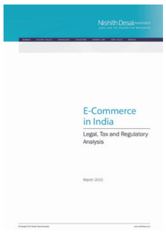

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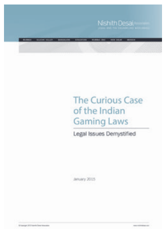

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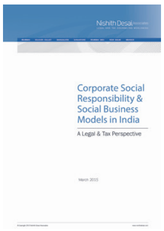

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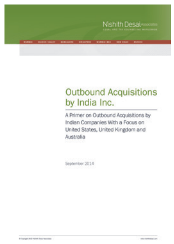

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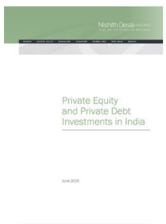

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