

# INDIA

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## 1. Trust law

### (a) What is the legal basis on which trusts are recognized and enforced?

Trusts, in general, under Indian law have a statutory basis, namely the Indian Trusts Act, 1882. Generally, there are two types of trusts in India: private trusts and public trusts. The Indian Trusts Act, 1882 governs the private trusts. Public trusts are classified into charitable and religious trusts. The Charitable and Religious Trusts Act, 1920, the Religious Endowments Act, 1863, the Charitable Endowments Act, 1890, the Societies Registration Act, 1860, and the Bombay Public Trust Act, 1950 are the relevant legislations for the recognition and enforceability of public trusts. **17.01**

Furthermore, trusts can also be used as pooling vehicles for investments, such as mutual funds and venture capital funds. These trusts are governed by a separate set of regulations: the Securities and Exchange Board of India (Mutual Funds) Regulations and Securities and Exchange Board of India (Venture Capital Funds) Regulations. **17.02**

### (b) What new legislation/regulations concerning trusts, or of interest to trustees, have appeared recently, eg in the last twelve months?

There have been no new legislations/regulations that have been passed in the last twelve months in relation to private and public/charitable and religious trusts. **17.03**

The existing mutual funds regulations, ie the Securities and Exchange Board of India (Mutual Funds) Regulations, 1996, were amended and these regulations will now be called the SEBI (Mutual Funds) Amendment Regulations, 2009. **17.04**

The amendments can be summarized as below.

- A distinction between the open-ended and close-ended schemes has been introduced. Listing has been made mandatory for all close-ended schemes except for equity-linked savings schemes. De-listing provisions have been provided.

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- The asset management company, in addition to other permissions, shall also have to obtain prior in-principle approval from the recognized stock exchange where the units are proposed to be listed.
- The asset management company can now repurchase or reissue the repurchased units of a close-ended scheme only at the end of the maturity period.
- The time period for issuing of unit certificates/statement of accounts was six weeks, which has now been changed to thirty days with an option to receive the units in a dematerialized form, if so desired by the applicant, to enable trading of such units.
- The net asset value of a close-ended scheme, other than that of equity-linked savings schemes, shall be calculated on a daily basis and published in at least two daily newspapers having circulation all over India for close-end schemes.

**(c) What new legislation/regulations (if any) are expected or are under discussion for introduction in the future?**

- 17.05** No new legislations/regulations are expected or are under discussion for introduction in the future

**(d) What key case decisions concerning trusts, or of interest to trustees, have appeared recently, eg in the last twelve months?**

- 17.06** No key case decisions concerning trusts, or of interest to trustees have appeared in the last twelve months.

**(e) What new case decisions (if any) are expected to be made in the future?**

- 17.07** No pending trust decisions are expected.

**2. Maintenance/mechanics of trusts****(a) How long does a trust take to set up?**

- 17.08** Establishing a private trust or a charitable trust requires a suitable trust document to be drafted. Therefore, the time it takes to set up such a trust would depend solely on the time taken to draft the trust document and transfer the assets to the trustees. Needless to say, proper advice should be taken from a lawyer and tax considerations also need to be taken into account when setting up a trust.
- 17.09** Venture capital funds need to be registered with the Securities and Exchange Board of India ('SEBI') under the SEBI (Venture Capital Funds) Regulations, 1996, in accordance with a set procedure. Every application is dealt with on a case-to-case basis and so no general timelines are provided. Mutual funds also have to be registered with SEBI under the SEBI (Mutual Funds) Regulations. Every application is dealt with on a case-by-case basis with no general timelines.
- 17.10** For registration formalities for all the above trusts, see question 2(b) below.



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**(b) Are there procedures for registration formalities and annual maintenance and, if so, what is the extent of the information in relation to trusts (if any) which is publicly available?**

There are no set procedures with respect to annual maintenance of trusts. **17.11**

A private trust which has movable property only does not need to be registered. However, a private trust with immovable property needs to be registered under the Registration Act, 1908. **17.12**

Information on private trusts is not publicly available, unless such trusts have been registered. **17.13**

All public trusts, irrespective of which state they are settled in, have to be registered under the Registration Act, 1908. However, there is a state-specific legislation for public trusts in certain states in India. In such a case, the public trusts have to register under the state-specific legislation as well as the Indian Registration Act, 1908 in that order. For example, a public state registered in states of Gujarat and Maharashtra needs to be registered under the Bombay Public Trusts Act, 1950. Under this Act, a public trust must apply for registration within three months from the date of creation. **17.14**

- **Registration under the Registration Act, 1908:** the trustee of every public trust is required to send a memorandum in the prescribed form containing the particulars, including the name and description of the public trust and the immovable property of such a public trust, to the Sub-Registrar of the sub-district appointed under the Registration Act, 1908, in which such immovable property is situated for the purpose of filing in Book No. I as prescribed under section 89 of the Registration Act, 1908.
- **The Bombay Public Trusts Act, 1950 (registration requirements for a charitable trust):** the following documents are required to be filed in order to register a charitable trust with the charity commissioner's office:
  - a covering letter;
  - an application form in Form–Schedule II under rule 6 duly notarized;
  - a court fee stamp of Rs. 2/- to be affixed on the application form;
  - a certified copy of the trust document;
  - a consent letter of trustees.
- **Registration under the Income Tax Act, 1961:** charitable or religious trusts, societies, and companies claiming exemption under sections 11 and 12 of the Income Tax Act, 1961 are required to obtain registration under this Act. Private/family trusts are neither allowed such exemption nor required to seek registration under the Income Tax Act. The detailed registration procedure is set out in section 12AA of the Income Tax Act.
- **Registration under the Foreign Contribution (Regulation) Act, 1976 ('the FCRA'):** any charitable trust desirous of receiving foreign contributions from foreign sources is required to obtain registration under section 6(1) of the FCRA. Any such trust which is not registered or which has been denied registration, can receive foreign contributions only after obtaining prior permission from the home ministry of the central government under section 6(1A) of the FCRA. In order to obtain registration under the FCRA, the applicant association should preferably be incorporated as a legal entity, ie as a charitable



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trust and should have been working for a period of at least three years. The association must not have received any foreign contributions previously without prior permission of the government.

- 17.15** All the trusts have to apply for a permanent account number, which enables the trustees to pay tax on behalf of the beneficiaries at the trust level itself.

**(c) What, approximately, are the basic annual costs of maintaining a trust?**

- 17.16** The basic annual cost of maintaining a trust would vary depending on the type and nature of the trust.

**3. Anti-money laundering**

**(a) What reporting or other requirements (if any) are imposed on trustees under anti-money laundering regulation when:**

**(i) Accepting appointments to a new trust?**

**(ii) Administering an existing trust?**

- 17.17** There are no anti-money laundering regulations that apply specifically to trusts. However, the general rules would apply.

- 17.18** There are no reporting or other requirements imposed on trustees under anti-money laundering regulations when accepting appointments to a new trust or while administering an existing trust.

- 17.19** Under the Prevention of Money-laundering Act, 2002, and the rules framed thereunder, every banking company, financial institution, and intermediary (which would include trustees) is required to maintain a record of prescribed transactions, furnish information of transactions to the specified authority (the Director appointed by the central government), and verify and maintain records of the identity of all the clients in a prescribed manner.

- 17.20** There are detailed guidelines provided for know-your-customer ('KYC') and 'client acceptance procedures' ('CAP'). These are provided under the under the foreign exchange rules prescribed by the Reserve Bank of India and communicated to the banks from time to time.

**(b) What are your most recent anti-money laundering measures and have there been any anti-money laundering prosecutions in connection with a trust?**

- 17.21** Amendments have been proposed to the Prevention of Money-laundering Act, 2002 under the Prevention of Money-laundering (Amendment) Act, 2009. New definitions of 'offence of cross border implications', 'payment system', and 'payment system operator' and the scope of the term 'overseas principal' have been provided, and are now law.

- 17.22** There have been no recent anti-money laundering prosecutions in connection with a trust.



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**4. Trustee requirements****(a) Is there a requirement for at least one of the trustees to be a licensed resident trustee or merely a resident trustee? If not, are there any other restrictions as to who may act as a trustee?**

There is no requirement for an Indian resident trust to have a licensed trustee. **17.23**

Explanation 1 to section 60 of the Indian Trusts Act provides, inter alia, that a person domiciled abroad or an alien enemy, ie a person not domiciled/resident in India or a person belonging to a state which is at war with India, are not proper persons to be trustees and they are not permitted to be trustees of Indian resident trusts. **17.24**

Indian courts have held that a non-resident cannot be a trustee of an Indian resident trust unless he is domiciled in India. The principle behind this is that the trustee at all times must be within the reach of Indian courts in order to ensure the enforcement of the terms of the trust. However, if an Indian trust does not have a resident trustee, then a court application would have to be made in order to invalidate the trust. **17.25**

Further, section 73 of the Indian Trusts Act provides that where a person appointed as a trustee is absent for a continuous period of six months, leaves India for a continuous period of six months, or leaves India for the purpose of residing abroad, a new trustee may be appointed in his place by the person nominated in the trust document for that purpose, if any and in the absence of such person, by the settlor of the trust, if alive and competent to contract or the surviving/continuing trustee, if any, or the retiring trustee himself with the consent of the court. **17.26**

Under the Indian exchange control regime, it is not possible for a trust holding immovable property to have a non-resident trustee. **17.27**

**(b) Are there any restrictions on having non-resident trustees?**

See question 4(a) above. **17.28**

**(c) How (if at all) are professional trustees regulated? Is there any legislation or guidance on the regulation of professional trustees? (Please provide details of any useful websites.)**

Professional trustees are not regulated in India. Guidance is provided under the Indian Trusts Act, 1882 on the matters of care required by the trustee under section 15 and with respect to obligations on the trustee under sections 13, 16, 18, and 20. Further, other restrictions such as self-dealing, etc also have to be laid out in the Trusts Act. **17.29**

**(d) What standards of care are laid down in law to measure the performance of trustees?**

The Indian Trusts Act, 1882 requires the trustees to act in accordance with the directions provided in the trust document provided that this would not be unlawful. **17.30**



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- 17.31** Section 15 of the Indian Trusts Act, 1882 provides that unless it has been specifically provided for in the trust document either universally for the entire trust corpus or with respect to certain specific properties, the trustee cannot be held liable for any loss, destruction, or deterioration caused to the trust property unless the act through which the loss is caused is not bona fide.
- 17.32** The trustee is put on the same level as that of a reasonable person and is expected to exercise reasonable care. Therefore, if the trust fund suffers loss as a result of the trustee's actions, the trustee shall not be expected to make good such loss unless the loss has been caused by behaviour which is not bona fide.
- 17.33** Certain standards of care with respect to the trust property have been laid down under the Indian Trusts Act, 1882, which can be broadly summarized as follows:
- a trustee must inform himself about the state of the trust property;
  - a trustee must ensure that title to trust property is protected;
  - a trustee cannot deal with trust property in a manner which may jeopardize the final transfer of the property to the ultimate beneficiary of such property;
  - a trustee must act with reasonable care
  - a trustee may not deal with property of a wasting nature with a future or reversionary interest unless contrary intention has been expressed in the trust document;
  - where there is more than one beneficiary, the trustee must be impartial when exercising its discretions and powers;
  - where the trust property is in the possession of one of several beneficiaries, if such a beneficiary threatens to destroy the property, the trustee is bound to take measures to prevent such an act;
  - a trustee must invest trust funds consisting of money and manage them prudently;
  - trustees must act jointly and unanimously, unless the trust document permits otherwise.

**(e) If a trustee fails to take a relevant matter into account in administering the trust can an appeal be made to the court to put matters right, such as under the *Hastings-Bass* doctrine in England?**

- 17.34** A civil suit for enforcement of the beneficiary's rights against the trustees or their legal representatives or for enforcement of trustees' duties can be instituted in the event that the trustee fails to take a relevant matter into account in administering the trust. The beneficiaries have a right to demand a copy of the trust document as well as the accounts of the trust from the trustees. In the event of or non-compliance with any of the provisions of the trust document or discrepancy in accounts or fraud, etc, the beneficiaries can appeal to the court for the trustees to correct the matter.



*17. India***(f) Does the court have power to release a trustee from liability for breach of trust?**

The courts in India do not have the power to release a trustee from liability for breach of trust, except under the following circumstances: **17.35**

- the beneficiary has by fraud induced the trustee to commit the breach;
- the beneficiary, being competent to contract, has himself concurred in the breach without coercion or undue influence having been brought to bear on him;
- the beneficiary, being competent to contract, has himself subsequently acquiesced in the breach.

In all of the above circumstances the concurrence of or the acquiescence by the beneficiary must be 'with full knowledge of the facts of the case and of his rights as against the trustees'.

**(g) Have there been any recent court cases against professional trustees which deal with their conduct, eg in relation to excessive trustee remuneration?**

There have been no recent court cases against professional trustees which deal with their conduct. **17.36**

**5. Trustee investment powers****(a) Do trustees have complete freedom to invest the trust fund at their discretion in the absence of specific instructions in the trust document?**

The Indian Trusts Act, 1882 laid down guidelines for trustees making investments in the absence of specific instructions in the trust document. **17.37**

Section 20 of the Indian Trusts Act lays down the guidelines, which states that where the trust property consists of money and cannot be applied immediately or at an early date for the purposes of the trust (if provided), the trustee is bound (subject to any direction contained in the trust document) to invest the money in the following assets: **17.38**

- securities such as promissory notes, debentures, stock, or other securities of the central government by notification in the Official Gazette;
- units issued by the Unit Trust of India under any unit scheme made under section 21 of the Unit Trust of India Act, 1963;
- immovable property situated in India provided that the property is not a leasehold and that the value of the property exceeds by one-third, or, if consisting of buildings, exceeds by one-half any of the mortgage secured over the property.

**(b) To what extent are trust investments regulated?**

Trust investments are not regulated by any formal authorities. The only exception is in the states of Maharashtra and Gujarat, where specific legislation has been enacted to regulate **17.39**



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public trusts, including the investments of such trusts. Such trusts are required to file their annual activity reports and returns with the respective state charity commissioner or such appropriate authority as may have been specified in the respective trusts Act.

### **6. Trusts holding shares in trading entities**

**(a) What precautions should be taken by trustees of trusts which hold entities that trade directly to prevent them from incurring personal liability in relation to the trading entities?**

- 17.40** The Indian Trusts Act, 1882 states that trust assets and liabilities must be segregated from the personal assets and liabilities of the trustees. If the trustees hold entities that trade directly, any action taken in respect of these assets which causes loss to the trust fund will not be held against the trustee unless the actions are not bona fide.

**(b) What duties do trustees have in relation to shares in a trading company where the trustees themselves are not involved in the management of the company? Are there any cases similar to the *Bartlett v Barclays Bank* case in England?**

- 17.41** There are no similar cases under Indian law.
- 17.42** The trustee is put on the same level as that of a reasonable person and is expected to exercise reasonable care.

### **7. Taxation**

**(a) Are trustees of a trust resident in your country liable to tax?**

- 17.43** Private trusts in India are fiscally transparent entities and the income of the trust is effectively taxed in the hands of its beneficiaries. However, as envisaged under Chapter XV of the Income Tax Act, 1961, the obligation to pay tax is on the trustee who does so in the capacity of a representative assessee. The scope of this obligation extends to all income received by the trustee for the benefit of or on behalf of the beneficiaries of the trusts.
- 17.44** The trustee would be assessed to tax to the same extent that would be recoverable and levied upon the beneficiary. Hence, the aggregate liability of the trustee cannot be greater than the aggregate liability of the beneficiaries. At the same time, the trustee is entitled to recover the tax amount from the beneficiary.
- 17.45** The income received by the trustee is taxed as if such income was directly received by the beneficiary. Therefore, the applicable rate of tax would depend on the type of income received on behalf of the beneficiary as well as the legal status of the beneficiary. If the beneficiaries are individuals, then the income received by the trustee would be taxed in accordance with the prescribed rates of income tax, if any. But, if the beneficiary is a company, then such income would be taxed at the fixed rate applicable to companies.



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If the income of the trust includes profits and gains of a business or profession, then such income would be taxed in the hands of the trustee at the maximum marginal rate. Likewise, any income received by a trustee under an oral trust (as opposed to a written trust) would also be taxed at the maximum marginal rate. However, if the income arises from property contributed by the beneficiaries through a revocable transfer, such income would be taxable in the hands of the beneficiaries. **17.46**

Under section 161 of the Indian Income Tax Act, a trustee of an Indian trust may be taxed qua, ie on behalf of the beneficiaries of the trust. **17.47**

Income of charitable trusts is exempted for payment of any taxes, subject to fulfilment of conditions as provided by the Income Tax Act. **17.48**

**(b) In what circumstances (if any) would a person resident in your country be liable to local taxation on the transfer of assets to a trust or on the receipt of assets from a trust, whether or not this trust is administered in your country?**

No tax consequences arise when an individual transfers assets to a trust. **17.49**

Stamp duty may be payable on the nominal sum used to establish the trust. Stamp duty is a state-specific legislation. Different states in India have different stamp duty levies on assets transferred to a trust. **17.50**

**Trusts resident in India:** taxation will depend on the nature of the trust. If the trust is a determinate trust, where the names and the shares of the beneficiaries have been specified, then the income of such a trust will be taxable either in the hands of the trustee or the beneficiaries. The tax treatment would be determined based on the nature of the income and would be taxed in a manner as if such income was directly received by the beneficiary. If the trust is revocable, the income will be taxable in the hands of the settlor. In the case of discretionary trusts, where the income received by the trustee does not accrue to the benefit of a specific person or where the shares of the beneficiaries are indeterminate, such income would be taxable at the maximum marginal rate. However, this is subject to certain exceptions, for instance in the case of discretionary trusts declared by the last Will of a testator, the income would be taxable as if it accrued to an association of persons. Therefore while the manner in which the trust is organized would determine the applicable rates of tax, a trust, as such, is a pass-through entity. Regardless of the income generated through the trust being taxable in the hands of the trustee or the beneficiaries, the burden of tax is effectively borne by the beneficiaries.

**Trusts resident outside India:** in terms of a trust resident outside India, the distribution by the trust to an Indian resident beneficiary, whether it is an individual/company, will be taxed at applicable rates under the Income Tax Act, 1961. If the distribution by the trust qualifies as a distribution of capital, then it may not be subject to tax. Relief may also be available under a relevant double tax treaty.

*World Trust Survey***8. Asset protection****(a) What measures are there to combat the abuse of trusts procured to conceal assets in relation to:****(i) Civil concealment from creditors, estranged spouses, tax authorities, etc?**

- 17.51** A trust can be created only for a lawful purpose. If the purpose of trust is such that if permitted it would defeat the provisions of any law then the purpose cannot be regarded as a lawful purpose.
- 17.52** Every transfer of immovable property made with intent to defeat or delay creditors of the transferor is voidable at the option of the creditors. A period of two years for claims has been laid down in the Indian Insolvency Act.
- 17.53** There are no provisions with respect to estranged spouses.

**(ii) Criminal concealment from police, customs, courts, etc?**

- 17.54** As stated earlier, where the property, in respect of which the trust has been set up, has been acquired by fraud, such a trust is held to be unlawful and can be set aside. In such cases, applicable provisions of the criminal and customs legislations may be invoked in order to seize the trust property.

**(b) What is the position with the OECD and their treaty on Exchange of Information in relation to such trusts?**

- 17.55** India was granted an observer member status of the OECD in 2006.
- 17.56** The degree of confidentiality in relation to the identity and interest of a beneficiary of a trust will depend on the provisions of the Exchange of Information article in any bilateral treaty that India has entered into with another country. For example, such an article is included in the India–Mauritius Double Tax Avoidance Agreement.

**(c) Have there been any recent developments to limit the confidentiality of the identity and interests of beneficiaries of such trusts?**

- 17.57** There have been no recent developments to limit the confidentiality of the identity and interests of beneficiaries of trusts.

**(d) What measures are there to protect assets in a trust which is subject to your laws from claims by interested parties by, for example, specific asset protection legislation?**

- 17.58** There is no specific asset protection legislation in India.



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**(e) To what extent may asset protection trusts be set aside because of fraud by the settlor?**

As stated above, where the trust property is acquired by fraud, such a trust is held to be unlawful and liable to be set aside. Section 4 of the Indian Trusts Act, 1882 states that a trust may be created for a lawful purpose only and any purpose which is forbidden by law or is fraudulent or involves injury to others or property of others is void where the trust property is acquired by fraud, such a trust is held to be unlawful and liable to be set aside. **17.59**

The concept of 'illusory trusts' is recognized under Indian law. Illusory trusts are generally created with the motive of evading tax, or defrauding creditors. It has been held that it is the duty of the court to consider the motive of the settlor where the validity of a trust, particularly of a charitable trust, is challenged on the ground of any evil motive or that the trust was a mere guise to defeat the provisions of law. **17.60**

However, nothing shall impair the rights of a third party, which has acquired property from a trust in good faith and for consideration. **17.61**

**(f) Does the existence of 'fraud' constitute an exception to the rule relating to legal privilege on documents?**

Yes, the existence of 'fraud' does constitute an exception to the rule relating to legal privilege of documents, if such disclosure of privileged information is regarded to be in the public interest. **17.62**

Privilege communication means that the communication which takes place between a professional and his client in the ordinary course of business. **17.63**

A legal professional's right of privilege communication is codified under section 126 of the Indian Evidence Act, 1872. Section 126 provides that no advocate shall be permitted to disclose any communication made to him in the course and for the purpose of his employment by or on behalf of his client. **17.64**

However, such privileged communication is qualified and therefore the right to privilege may be waived if it is in the public interest. Section 126 of the Evidence Act, 1872 also carves out two exceptions to the general rule, which are: **17.65**

- any communication made in furtherance of any illegal purpose; and
- any fact observed by any barrister, pleader, or attorney, in the course of his employment showing that any crime or fraud has been committed.

**9. Attacking trusts****(a) When, if at all, can creditors attack the trust assets directly instead of taking personal action against the trustees?**

The ownership of the assets of the trust lies with the trustee. Therefore, if a creditor has a charge against the trust asset, he will have to file a suit or initiate proceedings against the trustee of such trust to retrieve that asset. The creditor cannot proceed to take custody of **17.66**



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the asset directly. The suit or proceedings will be filed in the trustee's name, as the trustee of the trust.

**(b) On what basis (if any) is it possible for a disgruntled beneficiary to make a claim against the directors of a corporate trust company?**

- 17.67** A disgruntled beneficiary can make a claim against the corporate trust company and add the directors of such trust company as defendants in such a claim/suit.
- 17.68** It should be further noted that the statute of limitation is not applicable to trusts and therefore a suit can be initiated at any time.

**(c) What measures have been enacted to frustrate action by 'trustbusters'?**

- 17.69** None.

### **10. Tracing of trust assets**

**Can beneficiaries and others pursue a claim:**

**(a) When the assets of a trust are mixed with other assets held by the trustee?**

- 17.70** The mixing of trust property with other assets held by the trustee is per se a breach of duty.
- 17.71** Under section 66 of the Indian Trusts Act, 1882, where the trustee wrongfully mingles trust property with other assets held by him, the beneficiaries are entitled to a charge on the whole fund for the amount due to them. In such a case the onus lies heavily on the trustee to prove the extent of his property.

**(b) When the trust assets are mixed with assets not held by the trustee?**

- 17.72** In addition to the commentary in question 10(a) above, where trust property comes into the hands of a third person inconsistent with the terms of the trust, ie where the trustee sells the trust property to itself or his legal representatives and then subsequently selling such trust property to such third person, the beneficiary may:
- require such person to admit formally or may institute a suit for a declaration that the property is still comprised in the trust;
  - trace the money or other property received (for which the trust property has been exchanged) into the hands of the trustee or its legal representative or successor or legatee as the case may be.



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### 11. Shams

**(a) What protection is granted to defeat claims from outside the jurisdiction that a trust is a sham?**

There are no specific protection provisions enacted to defeat claims from outside the jurisdiction that a trust is a sham. **17.73**

**(b) What are the consequences of a trust being found to be a sham?**

A trust that is found/proven to be a sham may be regarded as void. **17.74**

It is important to note that there have been cases where the setting up of a trust for the avoidance of tax has been found to be a sham. A trust which is merely a medium for diverting the funds for evading tax which otherwise would have been taxable is regarded to be a sham trust. **17.75**

For example in *Concast (India) Educational Trust v Income Tax Officer* (1996) 56TTJ (Mumbai) 538, an Indian charitable trust was set up by the company, the directors of which were made the trustees, for the purpose of providing financial assistance to the dependant children of the employees of the company. The trust was registered as a charitable trust under the Income Tax Act, 1961 to avail the exemption from tax on its income. It was discovered that the funds were used to finance the education of the children of the directors/trustees of the trust, thus evading the tax which otherwise would have been payable by the beneficiaries, thus leading to such a trust being declared a sham. **17.76**

### 12. Forced heirship

**(a) Are there provisions which protect trust assets from forced heirship claims originating from a different jurisdiction, or to what extent are such claims recognized?**

No. **17.77**

**(b) Have there been any recent cases on forced heirship claims against trusts?**

No. **17.78**

### 13. Divorce

**(a) Are there provisions which protect trust assets from claims in foreign divorce proceedings?**

No. **17.79**

**(b) Have there been any recent cases on this?**

No. **17.80**



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**14. Trustees' obligations to disclose trust information****What are the obligations of trustees to provide beneficiaries and others with copies of the trust accounts, the trust document, and other documents from the trustees?**

- 17.81** Section 19 of the Indian Trusts Act, 1882 requires the trustees to keep clear and accurate accounts and furnish the same to the beneficiary on his request as to the amount and state of the trust property.
- 17.82** Furthermore, section 57 of the Indian Trust Act, 1882 gives a beneficiary who has knowledge of the trust the right to inspect and take copies of the trust document, the title documents relating to the trust property, the accounts and the respective supporting vouchers, and the cases submitted and opinions taken by the trustee for his guidance in the discharge of his duty.
- 17.83** It should be noted that in the case of a discretionary trust, the trustees are under no obligation to disclose their reasons for making decisions to the beneficiaries.

**15. Protectors****(a) What specific rules are there relating to protectors? If none, how does general law treat them?**

- 17.84** The concept of protectors is not covered by the Indian Trusts Act, 1882. However, this Act has sufficient flexibility to allow a protector to be appointed.

**(b) Are protectors regarded as fiduciaries and thereby liable to beneficiaries if proper care is not exercised by them?**

- 17.85** There is no statutory duty of care that needs to be exercised by a protector. However, provisions can be made in the trust document to make the protector liable to the beneficiaries in the event that his actions are dishonest, fraudulent, or negligent.

**16. Conflict of law****(a) What rules relate to the migration of trusts and changes in the proper law?**

- 17.86** There are no specific provisions which deal with migration of trusts and changes in the proper law under the Indian Trusts Act, 1882.

**(b) Has the Hague Convention been ratified and have there been any cases in which the Hague Convention has featured?**

- 17.87** The Indian government is a member of the Hague Conference on Private International law but it has not ratified the Hague Convention on trusts.



17. *India***17. Trusts as Wills**

**If an inter vivos trust is used as an alternative to a Will, what precautions must be observed to prevent the trust document being regarded as an invalid Will and defeating the trust?**

Inter vivos has been defined in section 5 of the Transfer of Property Act as ‘an act by which a living person conveys property in present or in future, to one or more other living persons or to himself or to himself and one or more other living persons, and to transfer property is to perform such act’. **17.88**

The trust must satisfy all of the following conditions of a valid trust as well as a Will in order to prevent the trust document being regarded as an invalid Will and defeating the trust: **17.89**

- the trust document must be in writing and registered under the Registration Act, 1908;
- it must be signed by the settlor/author of the trust in the presence of two witnesses and accepted and executed by the trustee(s), who will act as the executor(s);
- the purpose/object of the trust must be lawful;
- there must be a positive act of conveying the property to the trustee, ie the settlor/author of the trust must divest himself of the ownership of the property and convey the same to the settler;
- the beneficiaries must be identified/identifiable/ascertainable;
- it should not violate the rules against perpetuity, as may be laid down in the Indian Succession Act, 1925 or in the respective personal (succession) laws, as may be applicable.

**18. Purpose trusts**

**(a) Can non-charitable purpose trusts be set up?**

No. **17.90**

**(b) What rules exist to ensure that the purpose of the trust is fulfilled?**

Purpose trusts in India are mostly classified as public trusts set up with either a public charitable or religious purpose. **17.91**

The Charitable and Religious Trusts Act, 1920 provides for more effectual control over the administration of charitable and religious trusts and enables the trustees of such trusts to obtain the directions of a court on certain matter, vide section 7. The public religious and charitable trusts set up in the states of Maharashtra and Gujarat are subject to regulation by the charity commissioner appointed under the Bombay Public Trusts Act, 1950. **17.92**

**(c) Does an enforcer owe fiduciary duties to the beneficiaries?**

Not applicable. **17.93**



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**(d) If purpose trusts are not allowed, are there any particular types of trust which overcome this situation?**

**17.94** No.

**19. Alternative to trusts**

**Are there any types of structure in your country which are sometimes considered as alternatives to trusts such as partnerships or foundations?**

**17.95** The legislation relating to limited liability partnerships ('LLP's) was passed in 2009. LLPs are being viewed as a vehicle which will replace the use of trusts for venture capital funds as many of the tax consequences of venture capital funds are not relevant LLPs.

**20. Useful sources/websites for further information**

The Income Tax Act, 1961 and the Indian Trusts Act at <<http://www.vakilno1.com/bareacts/indiantrustsact/indiantrustsact.html>>.

The Bombay Public Trusts Act at <<http://www.indiacorporateadvisor.com/laws/content.asp?catid=10000000&zscatid=1000004&destinationid=101162&destination=content>>.

SEBI Regulations at <[http://www.sebi.gov.in/Index.jsp?contentDisp=Section&sec\\_id=1](http://www.sebi.gov.in/Index.jsp?contentDisp=Section&sec_id=1)>.

