

Renu Tharani Vs DCIT

ITA No 2333/Mum/2018

Order dated 16th July, 2020

A Y 2006-07

CA Nilesh M Kapadia

31st July 2020

Meaning of 'Trust'

A trust is a relationship in which :

- ❖ a person or entity (the trustee) holds legal title
- ❖ to certain property (the trust property or trust corpus), but is bound by a fiduciary duty to exercise that legal control
- ❖ for the benefit of one or more individuals or organizations (the beneficiary), who hold 'beneficial' or 'equitable' title.
- ❖ The trust is governed by the terms of the (usually) written trust agreement and local law.
- ❖ The entity (one or more individuals, a partnership or a corporation) that creates the trust is called the settlor.

Types of Trusts

❖ Bare Trust

A trust where the beneficiary is absolutely entitled to the assets, and the trustee is obliged simply to pay them over to the beneficiary. 'Resulting' and 'Constructive' trusts are usually bare trusts. Bare trusts generally do not continue for any length of time, unless they arise out of protracted litigation, or the beneficiaries are minors (in which case the bare trust must continue till they reach majority)

❖ Constructive Trust

It is imposed by law as an equitable remedy. It generally occurs due to some wrong doing, where the wrong doer has acquired legal title to some property and cannot in good conscience be allowed to benefit from it.

❖ Resulting Trust

It is a form of implied trust which occurs where a trust fails, wholly or in part, as a result of which the settlor becomes entitled to the assets.

Types of Trusts

❖ Discretionary Trust

It is 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, so long as the decision is made based on the beneficiaries best interests. The purpose of such a trust is that no individual can claim to be entitled to any specific interest in the trustee's assets, which often has tax advantages or asset protection advantages.

❖ Fixed Trust

the entitlement of the beneficiaries is fixed by the settlor. The trustee has little or no discretion. E.g.

- ✓ a trust for a minor (to X if she attains 21)
- ✓ a life interest (to pay the income to X for her lifetime)

Types of Trusts

❖ Hybrid Trust

It combines elements of both fixed and discretionary trusts. The trustee must pay a certain amount of the trust property to each or certain beneficiary fixed by the settlor. But the trustee has the discretion as to how any remaining trust property, once these fixed amounts have been paid out, is to be paid to the beneficiaries.

❖ Express Trust

It arises where a settlor deliberately and consciously decides to create a trust, over his or her assets, either now or upon his death. In these case this will be achieved by signing a trust instrument which will either be a will or a trust deed.

❖ Implied Trust

It is created where some of the legal requirements for an express trust are not met, but an intention on behalf of the parties to create a trust can be presumed to exist.

Types of Trusts

❖ Intervivos Trust

A settlor who is living at the time the trust is established creates an intervivos trust.

❖ Testamentary Trust

A trust created in an individual's will.

❖ Irrevocable Trust

It is the one that will not come to an end until the terms of the trust have been fulfilled.

❖ Revocable Trust

A trust of this kind can be revoked (cancelled) by its settlor at any time.

Private Trusts

- ❖ Private trust may be created *inter vivos* or by will.
- ❖ Private trusts are governed by the provisions of the Indian Trust Act 1882
- ❖ It has one or more particular individuals as its beneficiary.
- ❖ Where immovable properties worth more than Rs. 100 are transferred, trust will not be operated unless it is registered (Gostha Behari Gose Vs. University of Calcutta, AIR 1972 Cal 61). Trust created by will does not require any stamp
- ❖ Private trusts are void for perpetuity – i.e. need a predefined life span- generally 18 years

Legislation in India Governing Trusts

- ❖ THE INDIAN TRUSTS ACT, 1882
“An Act to define and amend the law relating to Private Trusts and Trustees.”
- ❖ The Indian Trusts Act was passed in 1882 to define law relating to private trusts and trustees.

This Act obviously cannot apply to Trusts set up outside India, as this Act has jurisdiction only in India

Provisions in the Income Tax Act, 1961 impacting Trusts- Brief overview

❖ Section 161-164

Deals with liability in special cases i.e. of representative assessee, which includes taxation of private discretionary trusts.

Every representative assessed is liable to tax under this section “in like manner and to the same extent” as the person beneficially entitled to the income. The Supreme Court laid down in *CWT v Nizam’s Family Trust* (108 ITR555, followed in 169 ITR 84)) that the words “in like manner and to the same extent” have three consequences.

First, there would have to be as many assessments on the trustee as there are beneficiaries with determinate and known shares, though, for the sake of convenience, there may be only one assessment order specifying separately the tax due in respect of the income of each beneficiary.

Secondly, the assessment of the trustee would have to be made in the **same status as that of the beneficiary** whose interest is sought to be taxed in the hands of the trustee

Thirdly, the amount of tax payable by the trustee would be the same as that payable by each beneficiary in respect of his beneficial interest if he were assessed directly. Since the liability of the trustee is co-extensive with that of the beneficiary, in the assessment on the trustee all such exemptions, deductions and abatements should be given as the beneficiary would have been entitled to in case of direct assessment (75 ITR 154 (SC)). The trustee is also entitled to claim a refund where the total income of the beneficiary justifies such claim (16TC 93 (HL)). The interposition of the trustee does not affect, generally speaking, the incidence of the tax on beneficiary.

Taxability of a Private trust

- ❖ Where shares of beneficiaries are determinate or known (Section 161)
 - ✓ Where income does not include business profits [Section 161(1)]
The trustee is assessable at the rates applicable to each beneficiary.
 - ✓ Where income includes profits from business [Section 161(1A)]
The whole of the income of the trust is taxable at maximum marginal rate.

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

Taxability of a Private trust

- ❖ Where shares of beneficiaries are indeterminate or unknown i.e. in case of discretionary trust [Section 164(1)]
 - ✓ Where income does not include profits from any business and if:
 - None of the beneficiaries has taxable income exceeding maximum amount not chargeable to tax or is a beneficiary in any other trust; or
 - The income is receivable under a trust declared by any person by will and such trust is the only trust so declared by him; or
 - The income is receivable under a non testamentary trust created before 1.03.1970 exclusively for the benefit of relatives of settlor, or member of HUF, who are mainly dependant upon settlor; or
 - The income is receivable by trustees on behalf of a provident fund, superannuation fund, gratuity fund, pension fund or any other bona fide fund created by the employer carrying on business or profession for the benefit of his employees,
- Then, income of the trust is taxable in the hands of trustees at the rates applicable to an AOP. In any other case, income is taxable at the maximum marginal rate.

Taxability of a Private trust

- ✓ Where shares of beneficiaries are indeterminate or unknown i.e. in case of discretionary trust [Section 164(1)]
- ✓ Where income includes business profits:

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

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

Remittance of Surplus to beneficiary

The Supreme Court has held in the case of Kamlini Khatau (209 ITR 101) that the department has the option to assess the trustees or the beneficiaries. This option is in respect of taxation of income. Hence if the trustees of a discretionary trust are not assessable to tax on their income due to the source of income being outside India, and hence not getting covered by section 5 or section 9, can the subsequent remittance of such income to the beneficiary in India be taxed here? It is felt that such accumulated income when distributed by the trustees is tantamount to redemption of capital of the beneficiary, and hence is not income at all, much less, income taxable in India. There is a view that such sum received by the beneficiary will get covered by section 56(2)(v), and hence assessable as income from other sources. However, one can argue that the payment contemplated is in the nature of a discharge of a legal obligation, and hence would not get covered by the mischief of the said section.

Concept of 'Corpus'

- ❖ There is **no judicial guidance** on the subject as to what amount in the funds of a trust will constitute its corpus.
- ❖ According to Black's Law Dictionary, it means “an aggregate or mass; physical substance, as distinguished from intellectual conception; **the principal sum or capital, as distinguished from interest or income**; the main body or principal of a trust.”
- ❖ The corpus ingredient constituted of the originally donated or settled capital amount in the form of money, movable property or immovable property (which might conveniently be termed as original corpus) plus any contribution received by the trust with a specific direction that it shall form part of the corpus of the trust.
- ❖ To claim a donation to be a corpus donation it is necessary that a written direction from donor is obtained.

Anti Avoidance Measure

- Provisions of Section 93 have been summarized by the Supreme Court in 60 ITR 28, as follows.
 - There must be a transfer of assets;
 - By reason of such transfer, the income traceable to such assets becomes payable to a non resident;
 - The resident, by means of the transfer, or in conjunction with associated operations, acquires a right to enjoy such income;
 - The income from the said assets, if it was the income of the resident, would be chargeable to tax; and
 - In such an event, the income of the non resident would be deemed to be the income of the resident for the purposes of the Act.

Maharaja of Godal Case (SC)

- The Supreme Court observed that a discretionary trust is one where the specific shares of the beneficiaries are not known. That is, the trustee has the discretion to decide, from time to time, who (if anyone) among the beneficiaries is to benefit from the trust, and to what extent. In a determinate trust, the entitlement of the beneficiaries is fixed by the settlor, the trustees having no discretion in determining the amount of distributions to be made to the beneficiaries.

Maharaja of Gondal Case (SC)

(2014) 45 taxmann.com 552 (SC)

- As per the Income Tax Act, 1961, the income of a discretionary trust is taxed in the hands of the trustee while the income of a determinate trust may be taxed either in the hands of the beneficiary or of the trustee in his capacity as the representative assessee. If it is the latter, 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. That is, the trustee would generally be able to avail all the benefits/deductions, etc. available to the beneficiary with respect to that beneficiary's share of income.

Maharaja of Gondal Case (SC)

- Income of discretionary trust was included in Settlor's income during his lifetime, and later in the income of his son.
- Later, son excluded such income, and contended that the trust's was discretionary and hence its income was not to be included in his hands. There was no distribution of income by the trust to any beneficiary.
- There was dispute about whether trust is discretionary or not, but SC agreed that the trust was indeed discretionary. The trusts' income should not be includible in the Taxpayer's income for levying income tax since the trusts' income was retained in the trusts and not disbursed to the beneficiaries;

Shri Mohan Manoj Dhupelia & Ors.

– Mumbai ITAT (ITA No.3544/MUM/2011)

- Facts almost similar to Gondal Maharaj case.
- Case was in relation to a Lichtenstein based trust, the Ambrunova Trust and Merlyn Management SA (the “Trust”). The Trust was found to have a corpus of USD 24,06,605.90, which was not declared by the Taxpayers in their returns. The revenue authorities considered this amount as the “undisclosed income” of the Taxpayers and taxed it accordingly.

Shri Mohan Manoj Dhupelia & Ors.

– Mumbai ITAT (ITA No.3544/MUM/2011)

- Taxpayer argued that the Trust was discretionary in nature, and that they were not named in the list of beneficiaries, nor did they receive any distributions from the Trust. Therefore, it was argued that the corpus of the Trust could not be taxable in the hands of the Taxpayers. The Taxpayers simultaneously denied having knowledge of the Trust and claimed no connection with the Trust during assessment proceedings.

Shri Mohan Manoj Dhupelia & Ors.

– Mumbai ITAT (ITA No.3544/MUM/2011)

- The revenue submitted factual proof that the Taxpayers were beneficiaries of the Trust, based on trustee records and other records, which were obtained through a Tax Evasion Petition (TEP) filed with Lichtenstein.
- While the Taxpayers do not appear to have been specifically named in the trust deed itself, the revenue authorities relied upon the beneficiary allocation contained in trustee filings, to add the corpus amounts as the “undisclosed income” of the Taxpayers.

– Mumbai ITAT (ITA No.3544/MUM/2011)

- The Tribunal does not appear to have provided adequate basis for why, or under which provision of law, the Trust assets were added on as the undisclosed income of the Taxpayers. While section 68 of the Income Tax Act, 1961 does allow for addition of “unexplained cash credits” as income, its requirements would not be satisfied in a situation where no payments are credited to a taxpayers account, as in this case. Similarly, although there is a reference to the Trust corpus being taxed as an “undisclosed investment” of the Taxpayers, it isn't quite clear if the Taxpayers contributed the Trust corpus. Besides, in this case there was no dispute as to whether the trust was specific or discretionary, as was the case before the Supreme Court. Takeaways

Renu Tharani case- Facts

- Filed return showing status as “resident” with a Bangalore address, declaring income of Rs. 1.70 lakhs
- No scrutiny, and was accepted till reopened by Mumbai AO, after order u/s 127.

Renu Tharani case- Facts

- Reason for reopening :

The case of THARANI RENU TIKAMDAS was centralized with the undersigned vide order u/s 127 of the IT Act- 1961 bearing No. 45/Centralization/CIT-IV/2013-14 dated 20.12.2013. Information has been received in respect of her from .the office of DIT(Inv.), Bangalore." The information pertains to her having a bank account with HSBC Bank, Geneva bearing a number BUP_SIFIC_PER_ID-5090178411. From the said bank statement, it is seen that she is having a peak balance of USD 39738122 in the said account during the period 2005-06. The records of this office show that this amount has not been considered by her in her return of income and this income therefore has escaped assessment. This evidence has come into the possession of the undersigned; therefore, I have reason to believe that the income to the extent of at least USD 3,97,38,122 has escaped assessment within the meaning of para (d) to the Explanation 2 below section 147 of the Act. In light of this, notice u/s 148 of the Income Tax Act, 1961 is issued.

Renu Tharani case- Facts

- Assessee's response:
 1. The account mentioned was not in her name
 2. She was actually a non resident staying in USA, and copies of passport to prove that were submitted.
 3. As she was a non resident, her foreign income was not taxable u/s 9(1).
 4. She had left India since 23rd March, 2004, i.e. even before the beginning of relevant previous year for AY 2006-07.
 5. Base note relied upon was in respect of account of GWU Investments Ltd., and what was relied upon is not a bank statement, but a statement of investments.

Renu Tharani case- Facts

Gave an affidavit stating that –

- (a) the assessee never had any bank account with HSBC Private Bank, Geneva;
- (b) that the assessee has never been signatory to any bank account with HSBC Private Bank, Geneva;
- (c) that the assessee is neither a director or a shareholder of GWU Investment Limited; and
- (d) that source of deposits made in Geneva has no source in India.

It was reiterated time and again that the assessee is a non-resident, that the alleged income, even if any, cannot be taxed in India in the hands of a non-resident, that the assessee did not have any bank account with HSBC Geneva and that the assessee is not a shareholder or director in GWU Investment Limited which is admittedly settlor of the Tharani Family Trust and which has given all the funds for the same.

Other arguments

- No material was brought on record to show that funds were diverted by assessee from India to source deposits found in foreign bank account, impugned additions were unjustified. **DCIT Vs Hemant Mansukhlal Pandya [(2019) 174 ITD 101 (MUM)**
- **Reopening for mere verification of cash credit not permitted.** **Sunrise Education Trust Vs Income Tax Officer [(2018) 92 taxmann.com 74]** ; **Krupesh Ghanshyambhai Thakkar Vs DCIT [(2017) 77 taxmann.com 293]** ; **PCIT Vs Manzil Dinesh Kumar Shah (406 ITR 326)**
- Reassessment proceedings only to for his AO's own verification and to clear his doubts cannot be sustained in law. **Mukesh Modi Vs DCIT [(2014) 366 ITR 418 (Raj)**

Revenue's arguments

- Claim of the assessee being non-resident was made only after the reopening of assessment was initiated.
- Obviously, huge income of US \$ 3,97,38,122 could not have been earned by the assessee in the US, where she was resident, in one year .
- Assessee was holding an account in HSBC Private Bank Geneva, with BUP Code as 5090178411, and this account was created on 28th July 2004, and the assessee was beneficial owner of the said amount.

Revenue's arguments

- Unaccounted monies are not deposited in the Swiss Banks in own names, but through a complex web of layering, nominee directors and trusts or companies, and, therefore, as long as an assessee is a beneficiary of the amounts held in trust by Banks in tax havens, that is a good reason to believe that, unless such amounts are found to be disclosed in assessee accounts or tax returns- which admittedly is the case here, these amounts represent income escaping assessment.
- There cannot be any reason for anyone, leave aside an entity of unknown people in a tax haven, leaving such a sum for her as a beneficiary.

ITAT analysis

- The residential status of the assessee as shown in the income tax return was “resident”, and definitely not “non-resident”, that the peak credit at her disposal in this Swiss Bank account was over 11,500 times of her annual income, and that the assessee had admittedly not taken into account this account in her return of income. The Assessing Officer has to record his satisfaction about income escaping assessment as on the basis of material in his possession and on record as on the time of recording the reasons for reopening the assessment. A subsequent claim, which was not on record at the time of the reasons being recorded, cannot affect the correctness of these reasons, even though once this claim is made in the assessment proceedings, it will have to be examined on merits and it will have to be adjudicated as such in the outcome of the assessment proceedings.

ITAT analysis

- The question is whether the Assessing Officer had reasons to believe income escaping the assessment, or not. It is also important to bear in mind the fact that at the stage of issuance of notice, the Assessing Officer is to only form a *prima facie* view.
- The Assessing Officer was perfectly justified in holding the view that the income has escaped assessment.

Discussion On Merits

- HSBC Private Bank confirmed that GWU Investments Ltd was holder of the account number 1414771, and, according to their records, GWU Investments Limited used to be an underlying company of Tharani Family Trust for which Mrs Renu Tharani was a discretionary beneficiary and that (t)he Tharani Family Trust was terminated and none of the assets deposited with them were distributed to Mrs Renu Tharani.

Discussion On Merits

- HSBC Private Bank (Suisse) SA in Zurich also confirms the fact that account number 1414771 which is started in your base note belongs to GWU Investments Ltd, having its address at Avalon Management Limited, Landmark Square, 1st floor, Earth Close 64, West Bet Beach South, Grand Cayman, (PO Box No 715, KY1-1107), and it does not belong to Mrs Renu Tikamdas Tharani. The bank further clarifies that as per their records GWU Investments Ltd used to be an underlying company of Tharani Family Trusts for Mrs Renu Tharani was a discretionary beneficiary.

Discussion On Merits

- The HSBC Bank in Geneva may have asked GWU Investments Ltd the proof of identity as well as proof of address of all the beneficiaries. The company may have provided passport as proof of her identity and proof of address. As the address mentioned in the passport is that of Mumbai, hence the base note showed the account of GWU Investments Ltd along-with Mumbai address.

Discussion On Merits

- As the assessee does not maintain any bank account with HSBC Private Bank (Suisse) SA in Switzerland, the question of explaining any source of deposit does not arise. Without prejudice to above, the HSBC Private Bank (Suisse) SA also confirms the fact, in their letter dated 5th January 2015, that according to their best of knowledge, Tharani Family Trust (GWU Investments Limited) has been terminated and none of the assets deposited with HSC Bank Private Bank (Suisse) SA were distributed to Mrs Renu Tharani
- Being discretionary beneficiary, reliance was placed on Maharaja of Gondal case.

Discussion On Merits

- AO mentions that no details of Trust provided other than that in base note itself.
- Underlying company of the Tharani Family Trust GWU Investments Ltd having address in the Cayman islands which is a tax haven and the account is maintained in HSBC, Geneva which is known for its banking secrecy laws and in recent times has faced investigation from various authorities in its role in facilitating tax evasion of its clients. Hence ITAT, Mumbai in the case of Mohan Manoj Dhupelia and other in ITA no. 3544/Mum/ 2011 etc, is directly applicable

Merits

- The only logical conclusion that can be inferred is that that the amounts deposited are unaccounted deposits sourced from India and therefore taxable in India. This presumption is as per the provisions of section 114 of The Indian Evidence Act, 1872 which reads as follows:
- The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particulars case. The Court may presume that evidence which could be and is not produced would, if produced be unfavourable to the person who withheld it.

Judicial precedents

- In the case of Sumati Dayal Vs. Commissioner of Income Tax (1995) 214 ITR 801 (SC) held that income tax proceedings are civil proceedings and the degree of proof required is to be judged by preponderance of probabilities.
- Also refer CIT v Durga Prasad More [1971] 82 ITR 540 (SC) - Science has not yet invented any instrument to test the reliability of the evidence placed before a court or tribunal. Therefore, the courts and tribunals have to judge the evidence before them by applying the test of human probabilities.
- In cases like this it is only the circumstantial evidence which will be available. No direct evidence can be expected.....“Smt. Vasantibai Shah 213 ITR 805 (Bom)

Judicial precedents

- In case of JS Parker 94 ITR 616 (Bom) it was held that the tax liability under the Income tax Act is of civil nature. To fasten a tax payer with such a liability it is not necessary that the evidence should be in the nature of "beyond doubt" as is required to fix a criminal liability. Tax liability can be fastened on the basis of preponderance of probabilities.

CIT (A) reasons

- The Assessing officer has also not brought any material to show and demonstrate that any money has been deposited by the assessee.
- Another claim is full co-operation which is unacceptable
- When appellant had to opportunity to cooperate with provision of law by filing consent waiver, by with authentic information would have come, the appellant furnishes letters purportedly by HSBC Bank, Geneva to her and HSBC Bank, Zurich to her son Shri Mahesh Tharani. The documents cannot be relied upon as to is merely letters addressed to persons and lacks statutory backing.
- Letters from HSBC held to be private letters – also why one letter from Zurich branch and another from Geneva branch.

CIT (A) reasons

- Additional documents obtained showed settlor (father of Renu) was from India – same as that of assessee.
- Letter addressed to HSBC Trust Services (Suisse) AG by HSBC International Trustee Limited as Trustee of the Tharani Family Settlement which reads as under: We, HSBC International Trustee Limited confirm that we hold issued shares of GWU Investments Limited as Trustee of the Tharani Family Settlement.
- **Renu was sole beneficiary**
- *In the normal course of human conduct if a person has nothing to hide and serious allegations/questions are being raised about the funds a person would make available the documents which would put to rest all questions which seem to arise in the mind of the Authorities. (Kothari Vs DCIT WP(Mum) No 3177 of 2015)*

CIT (A) reasons – Unanswered questions

- If Renu denies ownership / connection with the account, has any communication been sent by her to HSBC Geneva?
- Was the income reported by the trust, or any other person – at least after account was found?
- Is the account active now? What is the status? Who received the funds?
- Who operates the account? Who had the authority to operate or authorise transactions in the account?
- Why consent was not given to AO. (It was offered to CIT(A), but he disregarded it as being before wrong authority and at inappropriate time)

Addition confirmed, and Renu went to ITAT

SUBMISSIONS BEFORE ITAT

- AR relied heavily on Gondal case, i.e. for discretionary trust there can be no taxation without distribution, and also pointwise rebutted earlier orders.
- DR relies on – (i) Specific information received by Government through official channels; (ii) Genuineness of the impugned account not challenged by assessee; (iii) It is inconceivable that a rank outsider will be generous enough to put that kind of huge money at her disposal or for her benefit, but, as a beneficiary, she is expected to know the related facts to which she alone knows. (iv) monies received within months of her becoming a NR; (v) no evidence of tax having been paid in any country on the large amount so received; (vi) technicalities relied upon by assessee of no use when large sums are stashed outside India, and such people deserve no leniency

Analysis

- History of HSBC Geneva Bank scandal of 2006 ; discussed in detail – employee named Herve Faliciani stole data of thousands of accounts (106,000 accounts, including 1200 from India) and flew to France, and shared it with the French government, which shared with, inter alia, India. SIT was set up under chairmanship of H’ble Justice M B Shah to investigate the data so received.
- BBC report on Faliciani also reproduced by ITAT, highlighting his connections in Israel, Lebanon, Spain, etc. Swiss govt filed case against him for qualified industrial espionage. Faliciani says “ **there must be some people who must speak the truth and point our systematic problems... assisting in tax evasion and money laundering.**”
- HSBC Bank agreed to pay penalty of \$ 192.35 million to USA

Analysis

- The bench noted that even today HSBC website boasts of trust services and explain how settlor can transfer trust assets to them, who will act as trustees for beneficiaries who can be settlor or his family; they have an army of accountants, lawyers, bankers, trust specialists, et al.
- Renu's conduct summarized as “**running with the hare, and hunting with the hound**”.
- She did not sign consent waiver form
- Kothari's case of Bombay HC reiterated – if she had nothing to hide, why she did not sign it. Not having signed, she cannot claim department has not proved facts conclusively. AO justified in drawing adverse inference.
- Individual profile part of base note reproduced, and noted that GWU Investments is common thread, and no data about source of money provided, and it is impossible to find names of beneficial owners of a Cayman Islands company.
- After information was shared with India, the account was closed, and GWU investments' name was struck off the records of ROC in Cayman.

Analysis

- Renu has admitted to being a beneficiary of the trust, and has not shared any data about the trust structure, source of funds, and who operated the trust.
- Reiterate that HSBC even today advises trust structure for transferring own wealth to a trust where beneficiaries could be self or family.
- Renu is not a public personality like Mother Teresa for whom an unknown person with anonymity will settle a trust.
- Cayman Islands has a population of 65,000, and double that number as companies incorporated there, obviously for benefits of anonymity, secrecy and liberal tax laws.
- Adverse inference is justified by her refusal to sign the consent waiver form, as she would definitely be aware of who is managing the funds.
- Letters shared by HSBC do not throw any light on details Trust, deed not shared. – only half truths or technical truths mentioned.
- No denial of fact that she was beneficiary, and refusal to sign consent waiver does not permit her to decline correctness of data received by India.

Analysis

- Maharaja of Gondal case distinguished – no trust deed available. Claim that Renu was only a discretionary beneficiary *simplicitor* is just an assumption, and far from truth.
- Addition confirmed.
- Caveat – The decision is not an authority for all names on HSBC Geneva list. Mere fact that account was in HSBC Geneva cannot mean that money is unaccounted, illegitimate or illegal. Conduct of assessee and surrounding circumstances need to be examined in each case. No one size fits all concept.

Takeaways

- Kamlini Khatau not cited / discussed.
- Same queries as in [Dhupelia case](#)
- S 93 not relied upon by revenue.
- Was it wise to refuse consent waiver?
- “Human probabilities” principle may be extended in other cases as well, say when loan confirmations not produced due to bonafide reasons
- Department and judiciary both are very active – AO viewing area claimed to be agricultural land on Google maps to negate claim of agricultural income.

Shri Mohan Manoj Dhupelia & Ors.
– Mumbai ITAT (ITA No.3544/MUM/2011)

- The Tribunal does not appear to have provided adequate basis for why, or under which provision of law, the Trust assets were added on as the undisclosed income of the Taxpayers. While section 68 of the Income Tax Act, 1961 does allow for addition of “unexplained cash credits” as income, its requirements would not be satisfied in a situation where no payments are credited to a taxpayers account, as in this case. Similarly, although there is a reference to the Trust corpus being taxed as an “undisclosed investment” of the Taxpayers, it isn't quite clear if the Taxpayers contributed the Trust corpus. Besides, in this case there was no dispute as to whether the trust was specific or discretionary, as was the case before the Supreme Court. [Takeaway](#)

31 Jul 20 CA Nilesh M Kapadia July 2020 29

Thank You

nilesh@nmkca.com

This presentation of slides is intended as a guide for general information only, and the application of its contents to specific situations will depend on the particular circumstances involved. Accordingly, users should seek appropriate professional advice regarding any particular problem that they encounter, and this presentation should not be relied on as a substitute for this advice. While all reasonable attempts have been made to ensure that the information contained in this presentation is accurate, we accept no responsibility for any errors or omissions it may contain, whether caused by negligence or otherwise, or for any losses, however caused, sustained by any person that relies on it.