CHAMBER OF TAX CONSULTANTS
Webinar on Private Trusts – Tax & regulatory issues

Presented by:

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Overview of Presentation

- Overview of the Indian Trust Act, 1882
- Concept of Trust – Types & Purposes
- Application and uses of trust for Estate Planning
- Trust & Taxation: Onshore & Offshore
- Connecting factors and events tax Event (Domestic & International)
- Taxation of Onshore & Offshore Trust
- Status of a Trust
- Taxation of Trust under ITA, 1961
- Judicial Precedents
- Anti avoidance provisions
- Life cycle of a Trust
- Other provisions Pertaining to Trust
- Case Study – Offshore Trust
- FEMA Aspects of a Trust
- Trends affecting Offshore Trusts and TIEA

Overview of the Indian Trust Act, 1882

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

Concept of Trust

Definition of Trust

- Trust is an **equitable obligation** binding a person to deal with property over which he has control for the benefits of the persons of whom he may himself be one and any one of whom may enforce the obligation.
- Briefly this led to the concept of "Equity's interference with common law rights in pursuit of justice"
- As per Indian Trust Act, 1882; A Trust 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 & the owner.

Purposes of Trust

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

Advantages of Use of Trust for Estate Planning

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

Advantages of Use of Trust for Estate Planning (con’t)

- Trust can serve as protection in case of a bankruptcy by protecting assets from creditor’s (actual and potential) claims, provided the assets have been transferred two years prior to the bankruptcy being declared

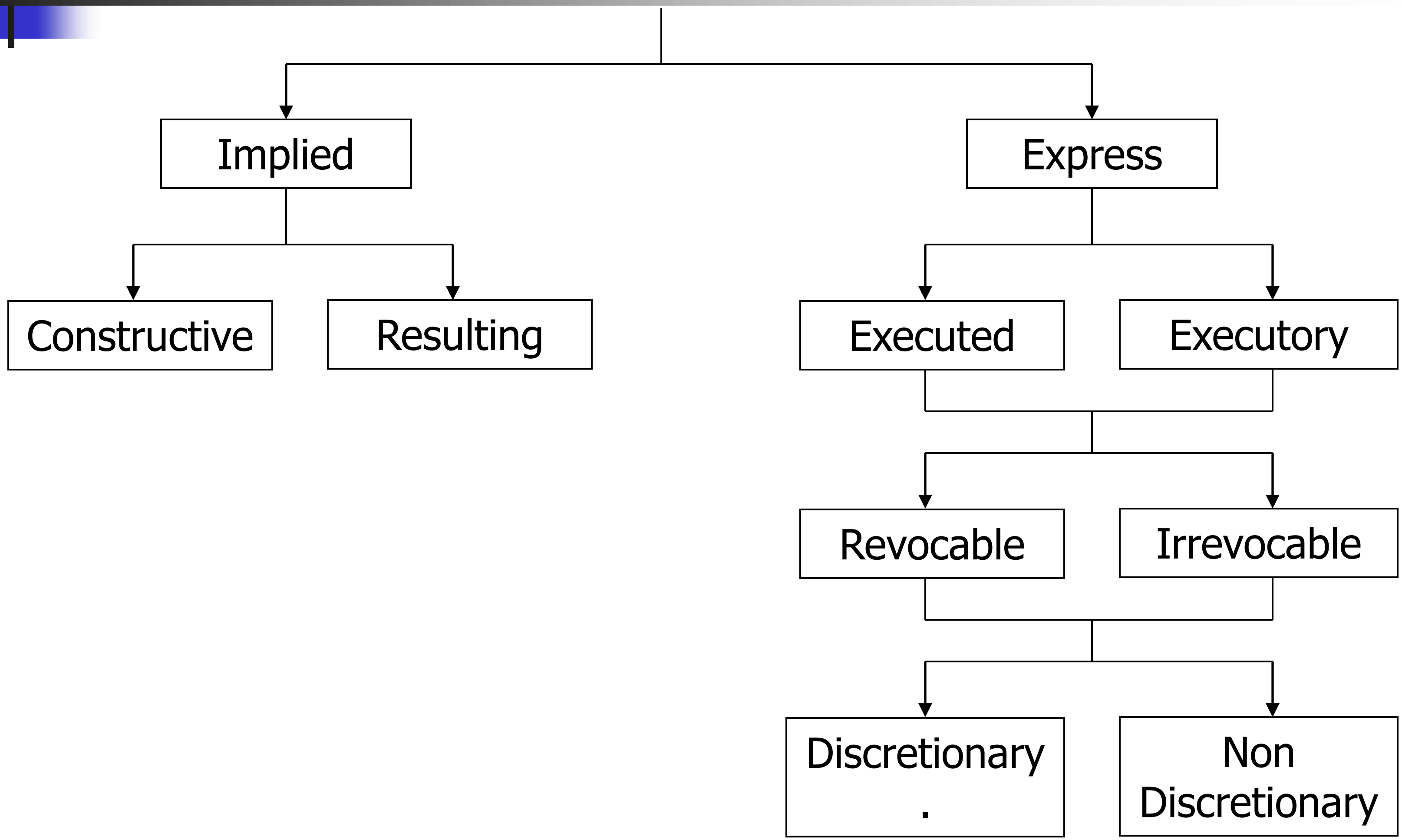
- Settlor can direct the managing and advisory committees, to monitor and advise the trustees on application and management of the trust assets there by enabling a relatively large pool of assets/ investments to be managed under one umbrella

- Trust can help exploiting offshore business opportunities, acquisition of interests and cross-border movement of family members

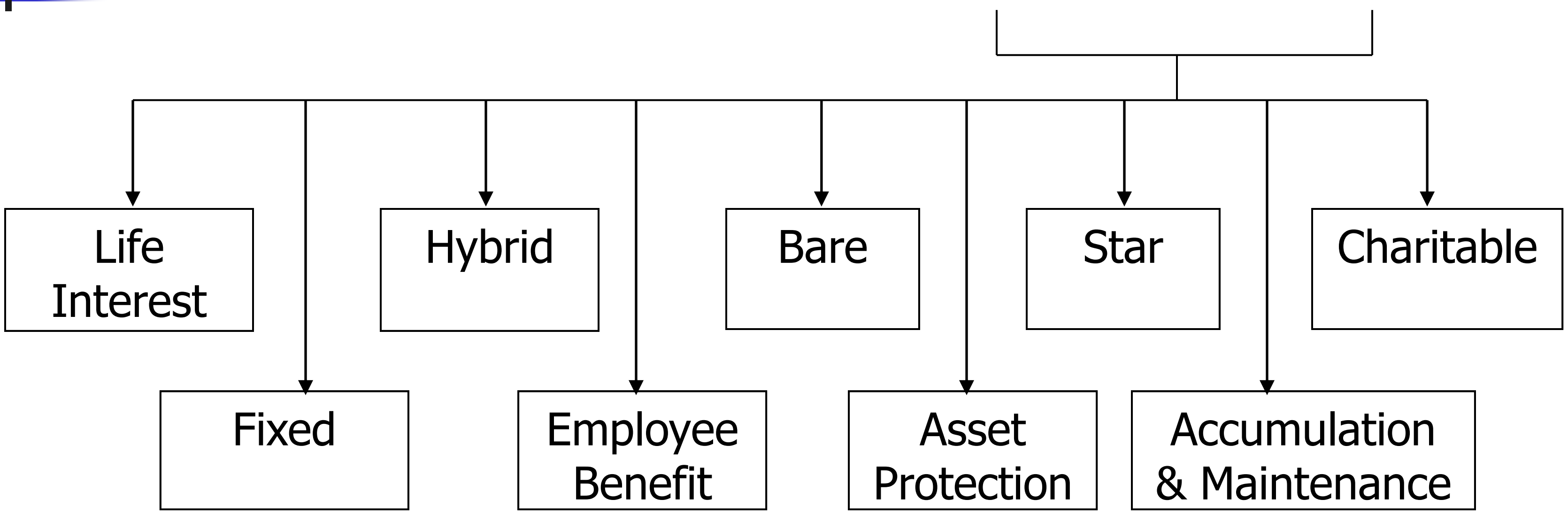
Trust VS Will for Estate Planning

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

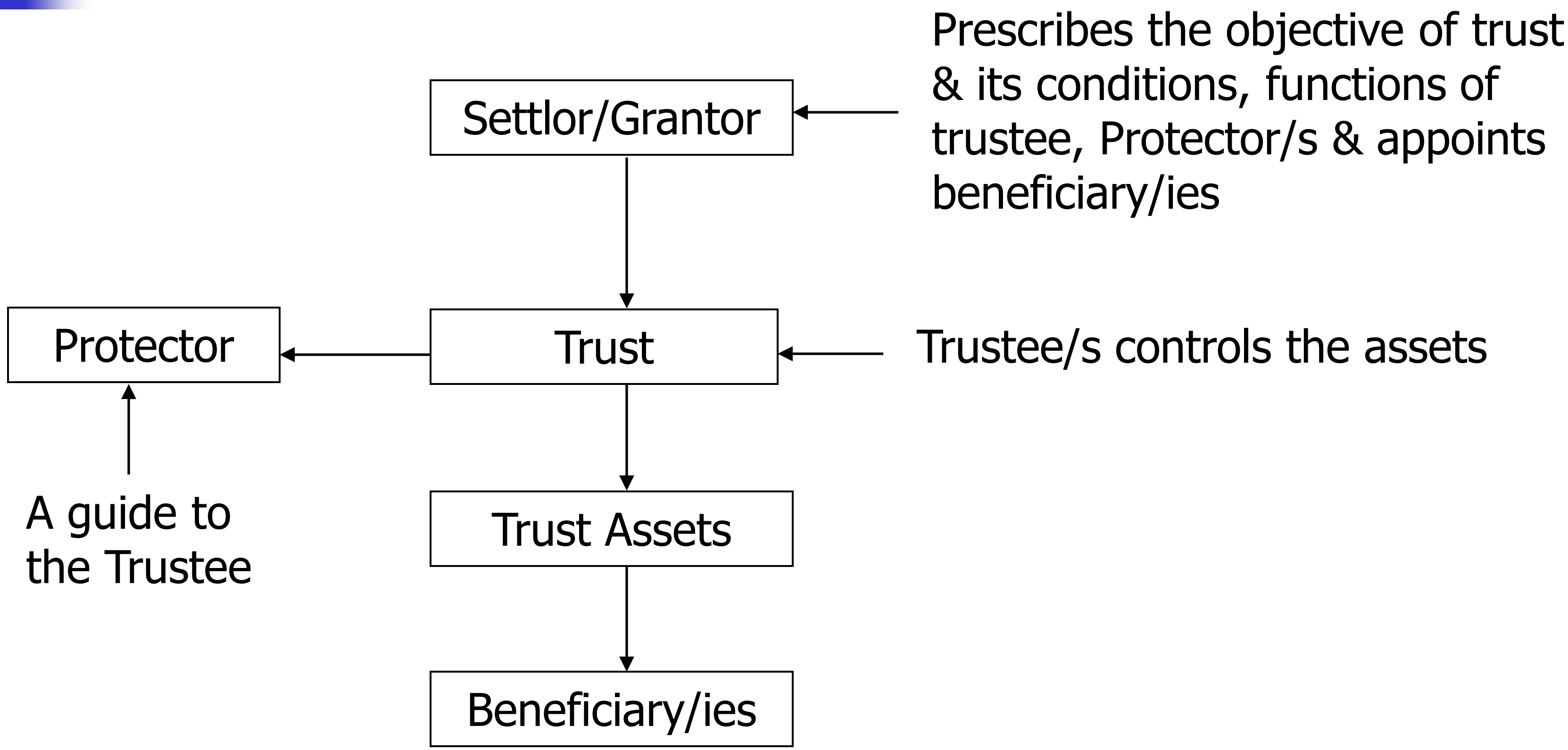
Types of Trust



Types of Trust



Trust, A Typical Structure



Trust, A Typical Structure and Documents

Dual Ownership

- Legal Ownership decides control, management & possession
- Beneficial Ownership involves benefit, use & enjoyment of asset
- Trust deed, Letter of Wishes, Appointment of Protector or the Advisor to the Trustees if any.
- Resolution for Appointment of Asset, the Beneficiaries or the distribution

Taxation of Trust

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

Taxation of Trusts-Onshore & Offshore

Onshore Trust

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

Offshore Trust

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

Selection of Trust - Criterions

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

Basis of taxation - Domestic Tax System

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

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

Domestic Tax System-Is it a Taxable Unit

- Jurisdiction of Taxation for a trust
  Normally, where Trust is treated as "Resident" under the tax law of the State /system
- Residential Status
  - Place of management/Administration
  - Place where settlor is Resident
  - Place where beneficiary/ies are Resident
  - Location of the Assets

- Taxation connecting Factor could be Settlor Driven or a Trustee Driven or the Beneficiary Driven
  - ITA connects the tax liability on the basis of the Resident beneficiaries

Trust under Income Tax Act, 1961

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

Trust under Income Tax Act, 1961

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

Trust under ITA,1961 Cont'd…

Residential Status

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

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

Status of a Private Trust – Specific Trust

- Section 2(31) of the Act defines person.

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

Status of a Private Trust – Specific Trust

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

- Thus, the status of the trustee would depend upon the status of the beneficiaries. The above applies in case of a determinate trust.

Status of a Private Trust – Discretionary

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

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

Status of a Private Trust - Discretionary

- <u>In case where all the beneficiaries are individuals, the status of the trust would be that of an individual Refer</u>

  -CIT vs Deepak Family Trusts (1993) – Gujarat High Court

  -CIT vs Shree Krishna Bandar Trust (1992) – Calcutta High Court

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

- <u>In case where all the beneficiaries are non individuals, say only corporates, the status of the trust would be considered as a company</u>

Status of a Private Trust - Discretionary

- All the benefits, deductions or allowances which an individual beneficiary could have obtained are also available to the trustees assessed in representative capacity– for instance benefit u/s 54 of the Act. (See 237 ITR 82 (Bom) Mrs. Amy P. Cama, Trustee of the Estate of Late M. R. Adenwalla v. CIT)

- In case of a Specific Trust with one of the beneficiary as Company then Company will be entitled to deduction U/S 80 M, It may pose some difficulty in case of discretionary trust however it may be possible to claim such deduction at the time of distribution

Taxability of Private Trust - ITA

Taxability of Private trusts

- Shares of beneficiaries are determinate [Section 161]
  - Where income does not include business profits → The trustee is assessable at the rates applicable to each beneficiary → Threshold available to each beneficiary
  - Where income includes business profits → The whole of the income of the trust is taxable at Maximum Marginal Rate
- Shares of beneficiaries are indeterminate [Section 164(1)]
  - Where income does not include business profits** → The income of the trust is Taxable in the hands of trustees at the rates Applicable to an AOP → Impact on threshold deduction
  - Where income includes business profits → The whole of the income of the trust is taxable at Maximum Marginal Rate

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

Taxability of Private Trust - ITA

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

Taxability of Private Trust - ITA

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

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

Taxability of Private Trust - ITA

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

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

  However, if such profits from business are receivable under a trust declared by any person by 'will' exclusively for the benefit of any relative, dependant on him for support and maintenance and such trust is the only trust so declared by him, then, the trustees shall be assessable only at the rates applicable to an AOP.
- Taxation of Charitable / Religious Trust not registered u/s. 12A [Section 164(2)]:

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

Taxation of Trust-MF,Business Trust VCF, Investment Trust,REIT etc

- As per Section 115UA (2) of the Act, the total income (other than incomes to be passed through to unit holders) of a Business Trust is taxable at a maximum marginal rate (MMR) of 42.744%. However, the capital gains of Business Trust which are only covered under Section 111A and Section 112 are taxable at the rates specified under the said sections respectively. Section 111A provides for a concessional tax rate of 15% (excluding surcharge and cess) in respect of short-term capital gain arising from the transfer of listed equity shares, equity-oriented units or units of a business trust. Whereas, section 112 provides for a concessional tax rate of 20% (excluding surcharge and cess) in case of long-term capital gain (LTCG).

- Hence, the provisions of Section 115UA(2) have provided concessional rates to tax only the gains covered under Section 111A and 112, and not the gains covered under Section 112A. In the absence of insertion of Section 112A along with Section 111A and Section 112, LTCG arising from transfer of listed equity shares, equity-oriented units or units of a business trust which are covered under Section 112A are also getting taxed at MMR in the hands of Business Trust.

Mutual Fund -Sec 115R

- Notwithstanding anything contained in any other provision of this Act, any amount of income distributed by the specified company or a Mutual Fund to its unit holders 92[on or before the 31st day of March, 2020] shall be chargeable to tax and such specified company or Mutual Fund shall be liable to pay additional income-tax on such distributed income at the rate of—
- (i) twenty-five per cent on income distributed to any person being an individual or a Hindu undivided family by a money market mutual fund or a liquid fund;
- (ii) thirty per cent on income distributed to any other person by a money market mutual fund or a liquid fund;
- (iii) ten per cent on income distributed to any person by an equity oriented fund;
- (iv) twenty-five per cent on income distributed to any person being an individual or a Hindu undivided family by a fund other than a money market mutual fund or a liquid fund or an equity oriented fund; and
- (v) thirty per cent on income distributed to any other person by a fund other than a money market mutual fund or a liquid fund or an equity oriented fund

- However, from 31st March, 2020, Mutual Funds will not be liable to pay tax on distributed income and the tax on distribution of income will be borne by the unit holders

Judicial Precedents

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

- the assesse, a beneficiary in a "discretionary" trust set up in Liechtenstein can form the basis of assessment of undisclosed income in the assessee's hands and argument that the trust is discretionary was not acceptable and reassessment was sought to be initiated
- deposit made in bank account of trust represented assessee's black money assessable under section 69 as same was not disclosed by assessee in his respective return in India

- **In case of Commissioner of Wealth Tax, Rajkot vs. Estate of Late HMM Vikramsinhji of Gondal [2014] the Supreme court reiterates**
  - That the principle that income of a discretionary trust cannot be taxed in the hands of a beneficiary unless distributed to the beneficiary
  - That discretionary trust is one which gives a beneficiary no right to any part of income of trust property, but vests in trustees a discretionary power to pay him, or apply for his benefit, such part of income as they think fit

Judicial Precedents

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

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

Anti Avoidance under ITA, 1961

- **<u>Revocable & irrevocable transfer</u>**
  - **Sec.60 Transfer of income where there is no transfer of assets.**

    All income arising to any person by virtue of a transfer whether revocable or not and whether effected before or after the commencement of this Act shall, where there is no transfer of the assets from which the income arises, be chargeable to income-tax as the income of the transferor and shall be included in his total income.
  - **Sec.61 Revocable transfer of assets.**

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

Anti Avoidance under ITA, 1961

- **Sec.62 Transfer irrevocable for a specified period.**

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

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

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

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

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

Anti Avoidance under ITA, 1961

- **Sec.63 "Transfer" and "revocable transfer" defined.**
  For the purposes of sections 60, 61 and 62 and of this section,—
  (a) a transfer shall be deemed to be revocable if—
    (i) it contains any provision for the re-transfer directly or indirectly of the whole or any part of the income or assets to the transferor, or
    (ii) it, in any way, gives the transferor a right to re-assume power directly or indirectly over the whole or any part of the income or assets ;
  (b) "transfer" includes any settlement, trust, covenant, agreement or arrangement.

Life Cycle of Trust ITA, 1961

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

Settlement of Assets considered Transfer?

<u>Not regarded as transfer</u>

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

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

Stock Option Sec.48

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

Applicability of Sec 56(2)(X)

- Taxabilty in the hands of Trustee

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

- Taxability in the hands of beneficiaries

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

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

Applicability of Sec 56(2)(X)

.Taxability in the hands of beneficiaries

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

- Taxability On Distribution of Income/Corpus

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

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

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

Tax Return s.139(1)

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

Cross Border / International issues

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

Cross Border Taxation of Trust

S_1	T_1	B_1
S_2	T_2	B_2
S_3	T_3	B_3

In above chart
S: Location of Assets
T: Location of Trustee
B: Location of Beneficiary
No OECD guidance on the subject

Attribution of income to a “Person”

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

Australia- Papua New Guinea DTA

- A Resident of one of the Contracting States is beneficially or presently entitled directly or indirectly to a share of a business profits of an enterprise carried on in the other Contracting State by a trustee of a trust estate and Trustee has a PE under Article 5 in that other State, in such a case Resident beneficiary is deemed to be carrying on business in the Other State through the PE and its share of profits is attributed to that PE

Case Study - Offshore Trust & taxation

Background

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

Case Study

Question

- Participants of today's deliberation are posed with following question

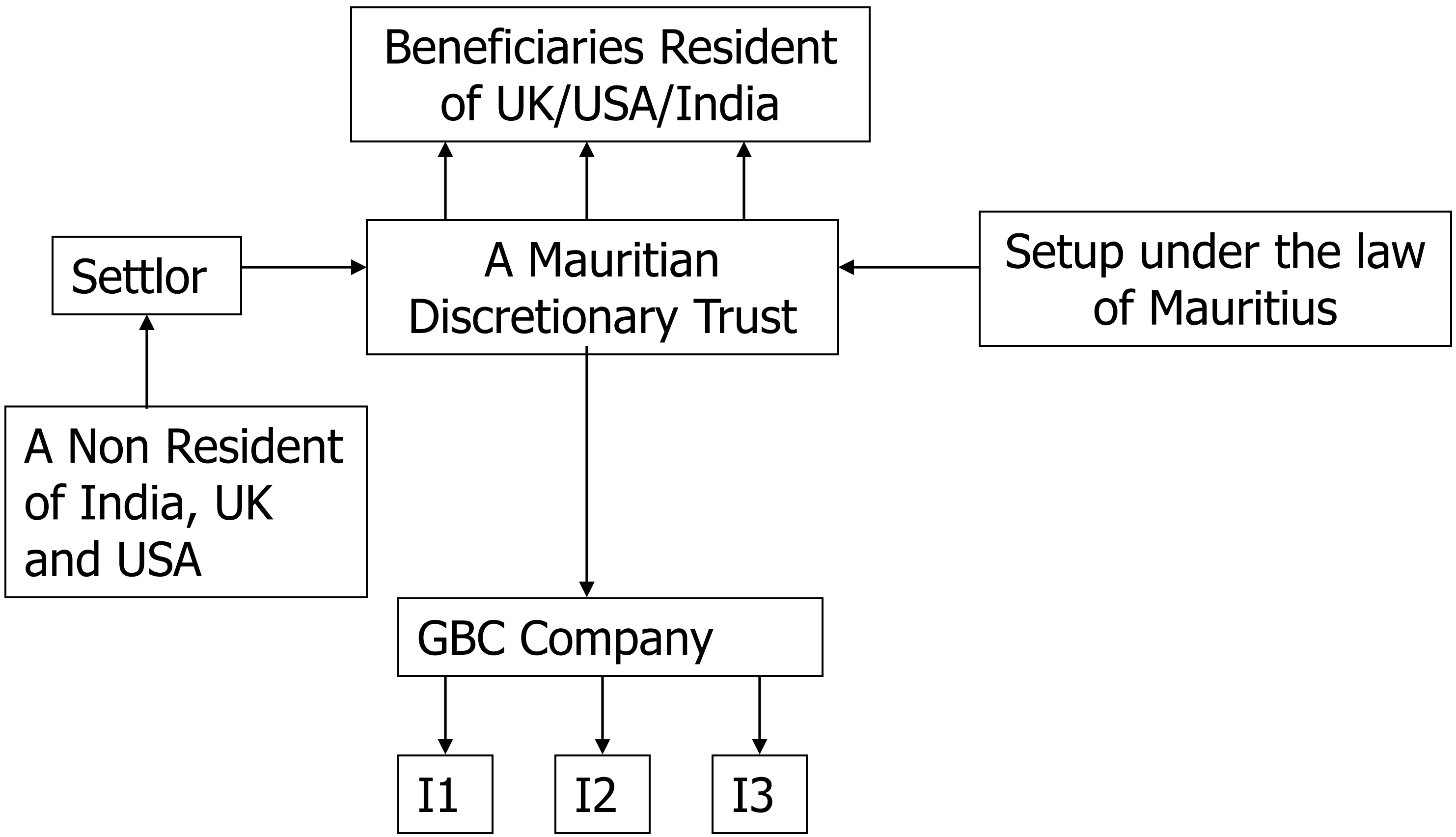
  What is the taxability of the income in the form of interest, dividend and capital gains from investment in the GBC companies, if the trustees of the Trust are

  a) Resident of Mauritius

  b) Resident in UK

  c) Resident in India

Case Study - Structure



Tax Issues in India

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

Analysis of Case Study

- **Scope of total income Section 5**

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

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

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

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

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

Analysis of Case Study

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

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

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

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

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

Analysis of Case Study - Representative Assessee

- Section 160(1)(iv): A meaning of "Representative Assessee"

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

Analysis of Case Study - Representative Assessee

- Section 161(1): Liability of representative assessee

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

Analysis of Case Study - Representative Assessee

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

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

Analysis of Case Study

- Who could be taxed in India?

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

In a case when Trustee is Resident of India

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

The test to be applied

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

Case Study - Conclusion

- Taxation of Trust in India

  a) When Trustee is Resident in Mauritius - No

  b) When Trustee is Resident in UK - No

  c) When Trustee is Resident in India –No/Yes
- Taxation of Indian beneficiaries in a case when there is no distribution

  a) No

  b) No

  c) No/Yes, Charge can not be quantified
- In case of distribution, Indian beneficiary are liable to taxation in all three cases

Case Study - Conclusion

- Taxability for Non Resident beneficiary/ies

  a) When there is no distribution

  - UK Resident beneficiary / US Resident beneficiary not liable to tax unless it is received in India (S. 5 of the ITA)

  b) In case of distribution

  - Not liable to tax in India (S. 5 of the ITA)
  - India-UK DTAA / India US Tax treaty. Not liable to taxation unless assets are located in India subject to Characterisation of income from such Assets

Case Study - Conclusion

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

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

Offshore Trust & S.93 of ITA, 1961

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

Conclusion & issues

- Key consideration
- Is Trust a person ?
- Trust and Article 4(1) of the Treaty
- Beneficial owner under Article 10, 11 and 12
- Alienator under Article 13
- PE & Trust
- Computation under ITA
- Characterisation of income or it be treated as other income
- OECD Guidance/A.3(1) of the MLI, efforts of countries to remove mismatch Res Status of the Trust post MLI
- Commentary by leading Author/s

FEMA ASPECTS OF TRUST

FEMA aspects of Trusts - Overview

- Residential Status of Trust / Transacting Parties
- Nature of the transaction – Capital account or Current account
- Whether transaction is generally permissible or whether specific permission required under relevant FEMA Notification / Regulation

FEMA – Relevant definitions

- S. 2(e) – Capital Account transaction
  - means a transaction which alters the assets or liabilities, including contingent liabilities, outside India of persons resident in India or assets or liabilities in India of persons resident outside India, and includes transactions referred to in sub-section (3) of Section 6

    (Alteration in assets or liabilities in India of PROI;
    Alteration in assets or liabilities outside India of PRII)

- S. 2(j) – Current Account transaction
  - means a transaction other than a capital account transaction and without prejudice to the generality of the foregoing such transaction includes –
    - payments due in connection with foreign trade, other current business, services and short-term banking and credit facilities in ordinary course of business
    - payments due as interest on loans and as net income from investments
    - remittances for living expenses of parents, spouse and children residing abroad, and
    - expenses in connection with foreign travel, education and medical care of parents, spouse and children

FEMA – Relevant definitions

- S. 2(u) – Person
  - includes – (i) an individual, (ii) a Hindu Undivided Family, (iii) a company, (iv) a firm, (v) an AOP / BOI whether incorporated or not, (vi) every artificial juridical person, not falling within any of the preceding sub-clauses, and (vii) any agency, office or branch owned or controlled by such person
- S. 2(v) – Person resident in India
  - (i) person residing in India for more than 182 days during preceding financial year but does not include ……….*(omitted as applicable to individuals only),*
  - (ii) any person or body corporate registered or incorporated in India,
  - (iii) an office, branch or agency in India owned or controlled by a person resident outside India,
  - (iv) an office, branch or agency outside India owned or controlled by a person resident in India

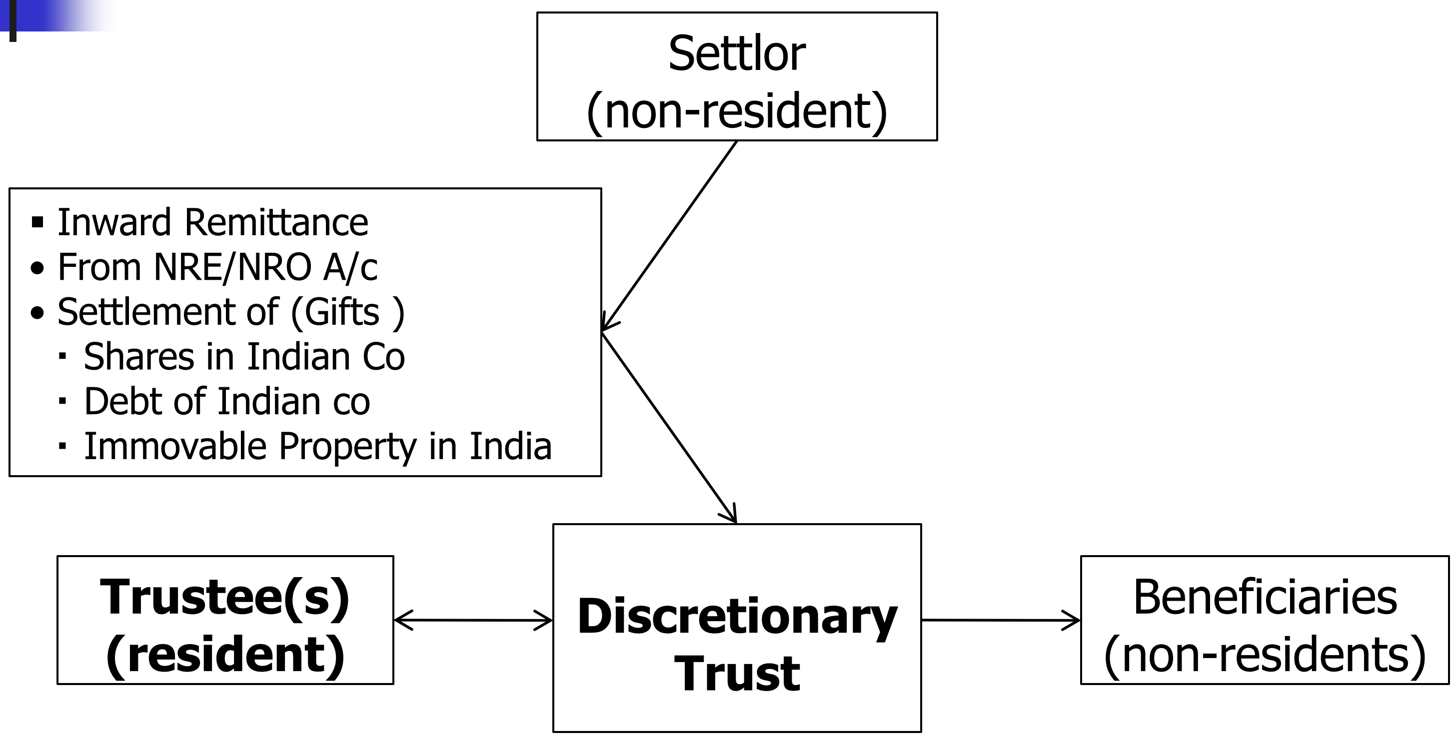
FEMA aspects of Trusts – Residential status of Trust

- What is the Residential Status of Trust
  - Is Trust a 'Person' as defined under FEMA?
  - Can FEMA definition of 'Person resident in India' or 'Person resident outside India' apply to Trust?
- If not, how to determine Residential Status of Trust
  - Is it Place where management / operations of Trust is located i.e. where Trustee is Resident?
  - Is it Place where settlor is Resident?
  - Is it Place where beneficiary/ies are Resident?
  - Is it the Location of the Assets under trust?

Residential status of Trusts – Connecting Factors

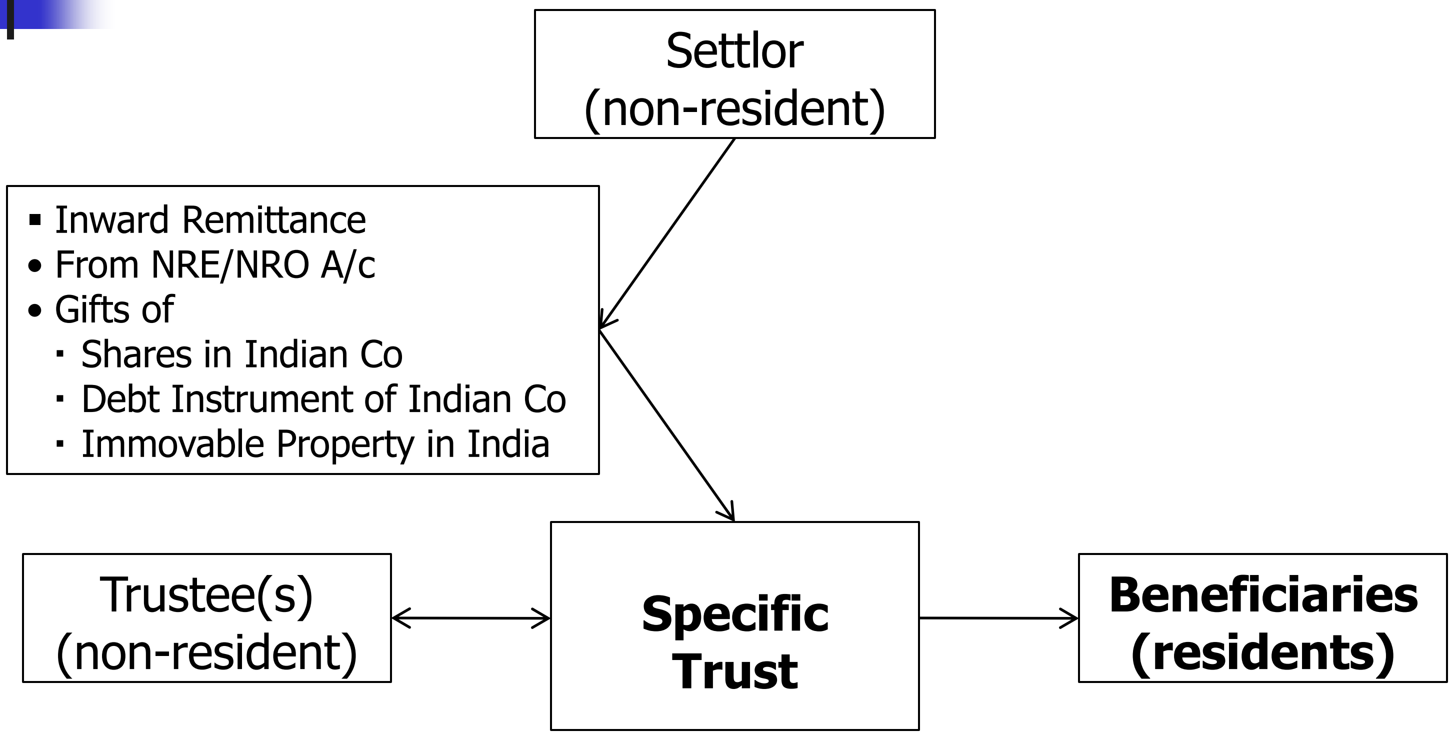
Type of Trust	Residential status	Rationale
Discretionary	That of Trustee(s)	• Beneficiaries shares are indeterminate and have no Equitable interest or ownership in Trust income or assets • Trustee has complete discretion and control over assets & income
Specific (Non - discretionary)	That of Beneficiary (s)	• Beneficiaries shares clearly defined • Beneficiaries have Equitable interest or ownership in Trust assets and income

Trusts – Resident Trust example



Notes: (i) Settlor could be resident or Beneficiaries could be resident
(ii) If Trustee is non-resident, Can a Trust be treated as Non-resident

Trusts – Resident Trust example



Notes: (i) Settlor could be resident or Trustee could be resident

(ii) If Beneficiaries are non-resident, Trust may be treated as Non-resident

Residential Status of Trust under FEMA

Trust
"Person"
2(u)

AOP / BOI
2(u)(v)

"Resident"
2(v)

"Any Person"
…. in India
2(v)(ii)

Place where Trust is set up

Trust is not a Person

Residential Status of Trustees

Legal Owners of Trust Property
Trusts Act
Section 3

Transaction is carried out for others

Residential Status of Beneficiaries

Beneficial Owners
Substantive Rights
Trusts Act
Sections: 3,11,55,56,58

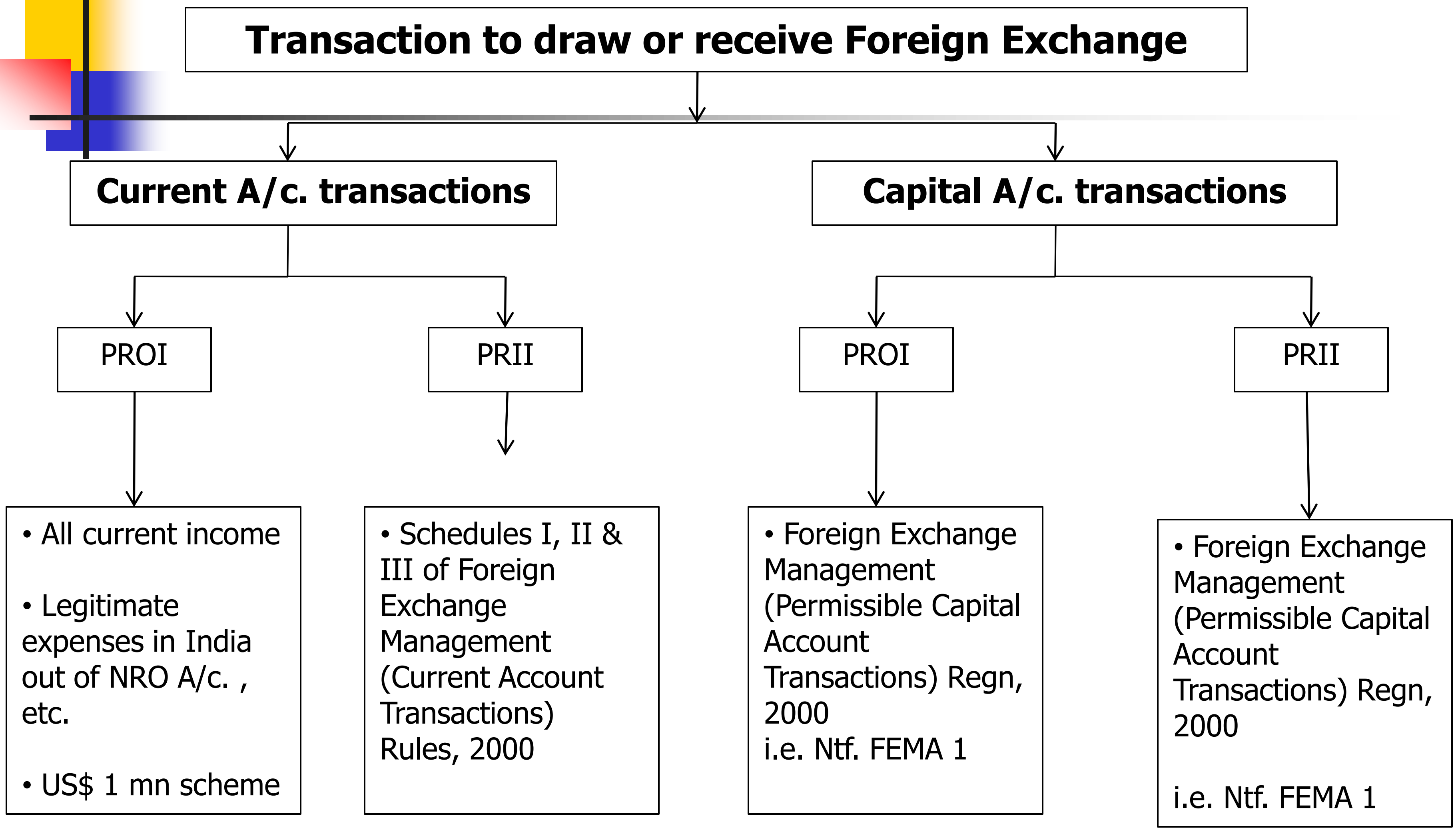
Not the legal owners of the assets; right to execute the Trust only; cannot deal on their own

<u>Two Views</u>:

- **FEMA provisions applicable to Non-Residents are applicable to Trust having non-resident beneficiaries, since a Trust is mere pass-through entity**

- **Cannot determine Residential Status in a straight manner**

Basic Rules of Transactions under FEMA



Basic Rules of Transactions under FEMA (con't)

Transaction to draw or receive Foreign Exchange

- **Current A/c. transactions**
  - PROOI
    - Notification 5 (R)- Bonafide Transact ion.
  - PRII
    - US$ 250K Scheme
    - Hospitability to PROI.
    - Credit card payments.
    - Section 6(4)
    - RFC A/c
- **Capital A/c. transactions**
  - PROI
    - Schedule II to Capital account transactions.
    - Section 6(5)
    - US$ 1 mn scheme
  - PRII
    - Schedule I to Capital account transactions.
    - Section 6(4)
    - US$ 250K Scheme

Trusts – Transactions & applicable FEMA Rules / Notifications

Nature of Transaction	FEMA Rule / Notification applicable
Gift / Donation, purchase of shares / immovable property, etc. by resident individuals	Liberalized Remittance Scheme [A.P. (Dir Series) Circular No. 64 dt. 4th Feb. 2004
Capital account transactions	Notification No. FEMA 1/2000-RB dt. 3rd May 2000
Deposits & Bank Accounts	Notification No. FEMA 5(R)/2016-RB dated April 1,2016
Acquisition & Transfer of Immovable Property outside India	Notification No. FEMA 7(R)/ 2015-RB dated January 21, 2016
Realisation, Repatriation & Surrender of Foreign Exchange	Notification No. FEMA 9 (R)/2015-RB dated December 29, 2015

Trusts – Transactions & applicable FEMA Rules / Notifications (con't)

Nature of Transaction	FEMA Rule / Notification applicable
Remittance outside India of assets in India	Notification No. FEMA 13 (R)/2016-RB, Date : April 01, 2016
Investments in India under FDI / Portfolio Investment Scheme / Non – repatriation basis	Foreign Exchange Management (Non-debt Instruments) Rules, 2019
Acquisition & Transfer of Immovable Property in India	
Investment in Firm or Proprietary concern in India	

Resident Discretionary / Fixed Trust

- Can any transaction specifically not permitted under FDI Policy be done indirectly?

  - Company with step down subsidiary/ies as operating company in sector with cap – only with Govt approval

  - Partnership Firm with step down companies, etc. – No FDI is permitted through Partnership Firms

  - Immovable Property:
    - Only NRI / OCI (individuals) are permitted

Analysis of the transactions of Trust

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

FEMA Implication – Resident Discretionary Trust

SETTLOR (NRI) CONTRIBUTION TO TRUST BY INWARD REMITTANCE

↓

No Alteration of NRI's Assets or Liabilities in India

↓

Not a Capital Account transaction

↓

Current Account transaction

↓

Sale of Foreign Exchange

↓

No FEMA implication

FEMA Implication – Resident Discretionary Trust

SETTLOR (NRI) CONTRIBUTION TO TRUST FROM NRE / NRO ACCOUNT

↓

Alteration of NRI's Assets in India

↓

Capital Account transaction

↓

FEMA 5 (R): NRE / NRO Scheme

↓

General permission for 'local disbursements' / 'local payments'

FEMA Implication – Resident Discretionary Trust

SETTLOR (NRI) GIFTS SHARES IN INDIAN CO. TO TRUST

↓

Alteration of NRI's Assets in India

↓

Capital Account transaction

↓

FEM Non Debt (Instruments) Rules, 2019

↓

General permission:

Regn. 9(2)

FEMA Implication – Resident Discretionary Trust

SETTLOR (NRI) GIFTS DEBT INSTRUMENTS IN INDIAN CO. TO TRUST

↓

Alteration of NRI's Assets in India

↓

Capital Account transaction

↓

FEM Debt (Instruments) Rules, 2019

↓

No General permission for gift of Debt instruments

↓

Specific permission required

FEMA Implication – Resident Discretionary Trust

SETTLOR (NRI) GIFTS IMMOVABLE PROPERTY IN INDIA TO TRUST

↓

Alteration of NRI's Assets in India

↓

Capital Account transaction

↓

FEM Non Debt (Instruments) Rules, 2019

↓

General permission for transfer to residents:

- by NRI/OCI: Regn. 24(d)

FEMA Implication – Resident Discretionary Trust

INVESTMENT OF TRUST ASSETS IN SHARES, REAL ESTATE, DERIVATIVE CONTRACTS, ETC.

↓

No Alteration of Resident's Assets outside India

↓

No Alteration of NRI's Assets in India

↓

No Capital or Current account transactions under FEMA

↓

No Foreign Exchange involved

No FEMA implication

FEMA Implication – Resident Discretionary Trust

COLLECTION OF TRUST INCOME BY RESIDENT TRUSTEE

↓

No Alteration of Resident's Assets outside India

↓

No Alteration of NRI's Assets in India

↓

No Capital or Current account transactions under FEMA

↓

Collection of Income is:

- under Settlor's direction
- not by order of or on behalf of NRI beneficiaries

No FEMA implication

FEMA Implication – Resident Discretionary Trust

DISTRIBUTION & REMITTANCE OF CURRENT INCOME & ACCUMULATED INCOME

- Distribution to NRI beneficiary
  - Alteration of NRI's Assets in India
  - Capital account transaction under FEMA
  - FEMA 5(R) – NRO A/c.

    General permission to credit legitimate dues
- Remittance of current income received by NRI beneficiary
  - Alteration of NRI's Assets in India
  - Capital account transaction under FEMA
  - FEMA 5(R) – NRO A/c.

    General permission to remit current income
- Remittance of accumulated income received by NRI beneficiary
  - Alteration of NRI's Assets in India
  - Capital account transaction under FEMA if not clear
  - FEMA 13(R)

    General permission to remit under million $ scheme

FEMA Implication – Resident Discretionary Trust

DISTRIBUTION & REMITTANCE OF CORPUS OF THE TRUST

Distribution to NRI beneficiary
↓
Alteration of NRI's Assets in India
↓
Capital account transaction under FEMA
↓
FEMA 5(R) – NRO A/c.
General permission to credit legitimate dues

Remittance of Corpus received by NRI beneficiary
↓
Alteration of NRI's Assets in India
↓
Capital account transaction under FEMA
↓
FEMA 13(R)

General permission to remit under1 million $ scheme

FEMA Implication – Domestic Trust

- **IRREVOCABLE**
  - **Discretionary (Like a Company)**
    - **Beneficiaries**
      - **NRI / OCI (all present or potential)**
        - may be treated:
          as NRI / OCI
          Non Debt Rules,2019(NDR)
          Immovable Prop…NDR
          FD/NRE/NRO A/c -Ntf. 5(R)
          - Approval may be granted
      - **Foreigners**
        - Non Debt Rules,2019 (NDR)
          Approval may be granted
          - Immovable Prop…NDR
            FD…………………Ntf. 5(R)

            Approval will not be granted
  - **Fixed (Like a co-owners)**
    - Trustee is legal owner
      - Resident or Non-Resident Foreigner
        - Advisable to take approval
- **REVOCABLE**
  - Status of Settlor is important
    - If non-resident, Sections 6(4) or 6(5) will apply
      - No application is required if settlor is resident

FEMA Implication – Offshore Discretionary Trust

FUNDING OF OFFSHORE DISCRETIONARY TRUST BY RESIDENT SETTLOR – AN EXAMPLE

Direct remittance to settle Offshore Trust

No alteration of Resident's Assets outside India

Not a Capital account transaction under FEMA

Gift / Donation under LRS

Current A/c. transaction

Transfer to Offshore Trust from overseas bank a/c opened by using LRS

Alteration of Resident's Assets outside India

Capital account transaction under FEMA

FEMA 1 – Schedule 1

Not specified as permissible transaction

Loan by Resident to Offshore Trust

Alteration of Resident's Assets outside India

Capital account transaction under FEMA

FEMA 1 – Schedule 1

Permissible transaction

Trusts & FEMA Implications – Different Scenarios & Case-Study

	I	II	III	IV	V	VI
SETTLOR	Non - Resident	Non - Resident	Non - Resident	Resident	Resident	Resident
TRUSTEE	Resident	Resident	Non - Resident	Resident	Non - Resident	Non - Resident
BENEFICIARY	Resident	Non - Resident	Resident	Non - Resident	Non - Resident	Resident
Application of FEMA to:						
• Creation of Corpus						
• Income generation						
• Distribution / Remittance of Income to Beneficiary						
• Remittance of Corpus to Beneficiary						

Trends affecting Offshore Trusts

- Renewed vigor internationally towards information exchange

- G20 declaration in London, April, 2009:
  "to take action against non-cooperative jurisdictions, including tax havens. We stand ready to deploy sanctions to protect our public finances and financial systems. The era of banking secrecy is over"

- Indian Govt. taking major steps to trace black money stashed overseas

- Movement towards increased transparency that started in 2000 now gaining traction

- India is Vice-Chair of peer review group of
  - The Global Forum on Transparency and Exchange of Information for Tax purposes, and
  - Financial Action Task Force

Trends affecting Offshore Trusts (con't)

- Dedicated computerized cell for exchange of information being created in CBDT's Foreign Tax and Tax Research (FT & TR) Division

- **Role of FT & TR Division:**

  - All policy issues relating to International Taxation and Transfer Pricing
  - Negotiations of DTAAs, TIEAs and Multilateral Conventions
  - Mutual Agreement Procedure (MAP)
  - Exchange of Information – Inbound and Outbound
  - Building international consensus for effective administrative assistance in tax matters in Global Forum on Transparency and Exchange of Information for Tax purposes, G20, OECD, UN etc.
  - Issues related to Black Money

Trends affecting Offshore Trusts (con’t)

- India is renegotiating its existing DTAAs, with special focus on having clauses for exchange of banking information either by way of protocols to existing DTAAs or new DTAAs
- India has signed 88 DTAAs with 86 in force
- India signed the MLI in 2017, currently MLI provisions have entered into effect for 23 Indian bilateral tax treaties (Austria, Australia, Belgium, Finland, France, Georgia, Ireland, Israel, Japan, Lithuania, Luxembourg, Malta, Netherlands, New Zealand Poland, Russia, Serbia, Singapore, Slovak Republic Slovenia, Sweden, United Kingdom and UAE)effective from 1st April,2020.

Trends affecting Offshore Trusts (con't)

- India is also entering into agreements with several tax havens for exchange of information pertaining to tax matters (TIEA)
- TIEAs with 21 jurisdictions
  - 21 TIEAs signed (Argentina, Bahamas, Bahrain, Belize, Bermuda, British Virgin Islands, Brunei Darussalam Cayman Islands, Gibraltar, Isle of Man, Jersey, Guernsey, Liberia, Maldives, MACAO SAR, Liechtenstein, Marshall Islands, Monaco, San Marino, Seychelles, Saint Kitts and Nevis)
- New jurisdictions for TIEAs identified
- India has one of the largest networks of DTAAs and TIEAs

Trends affecting Offshore Trusts (con't)

- Exchange of Information under DTAAs/TIEAs and Multilateral Convention
  - Exchange of Information on request
  - Spontaneous information exchange
  - Automatic exchange of information
  - Industry-wise exchange of information
  - Simultaneous tax examinations
  - Tax examination abroad

Trends affecting Offshore Trusts (con't) – EOI CELL

- Inbound Exchange of Information on request
  - Enquires conducted by Assessment/Investigation Wing
- Outbound Exchange of Information
  - Number likely to increase significantly with new Instruments for EOI and with increased awareness amongst tax officers
- Inbound Automatic Exchange of Information
  - Information about Indians earning income abroad

Trends affecting Offshore Trusts (con't) – EOI CELL

- Complete database of in-bound and outbound EOI
- Storing and transmitting the data on a secured platform with competent authorities of other countries
- Handling large data received and sent under the "Automatic Exchange of Information" and use of STF (Standard Transmission Format) for the automatic exchange of information - recommended by OECD
- Risk analysis of large number of data received
- Feedback mechanism

Offshore measures – I.T. Act

- Section 94-A was inserted into the Income-tax Act, 1961 w.e.f. 1/6/2011, empowering the Government to notify any territory outside India, having regard to lack of effective exchange of information, as a notified jurisdictional area.

  Simply put, transactions with residents of territories not providing crucial information would be subject to higher more stringent tax and transfer pricing regulations

  This provision was applied by India in past to India – Cyprus tax treaty which is now restored

Salient features of India – Bahamas TIEA

- Scope:

  Competent authorities of the Contracting Parties to provide assistance through exchange of information that is foreseeably relevant to the administration and enforcement of the domestic laws of the Contracting Parties concerning taxes
- Jurisdiction:

  Information shall be exchanged without regard to whether the person to whom the information relates is, or whether the information is held by, a resident of a Contracting Party
- Taxes covered:

  All taxes covered, including identical or substantially similar taxes imposed in future either in addition to or in place of existing taxes

Salient features of India – Bahamas TIEA (con't)

- Person:

  includes an individual, a company, a body of persons and any other entity which is treated as a taxable unit under the taxation laws in force in the respective Contracting Parties

- Information:

  means any fact, statement, document or record in whatever form

- Information gathering measures:

  means laws and administrative or judicial procedures that enable a Contracting Party to obtain and provide the requested information

Salient features of India – Bahamas TIEA (con't)

- Exchange of Information:
  - Information shall be exchanged without regard to whether the requested Party needs such information for its own tax purposes or whether the conduct being investigated would constitute a crime under the laws of the requested Party if such conduct occurred in the requested Party
  - Information, to the extent allowable under its domestic laws, shall be in the form of depositions of witnesses and authenticated copies of original records
  - Competent authority to provide information held by banks, other financial institutions, and any person, including nominees and trustees, acting in an agency or fiduciary capacity

Salient features of India – Bahamas TIEA (con’t)

- Exchange of Information:
  - Competent authority to provide information regarding the legal and beneficial ownership of companies, partnerships, collective investment funds or schemes, trusts, foundations, including ownership information on all such persons in an ownership chain
  - In the case of trusts, information on settlors, trustees and beneficiaries to be provided
  - However, no obligation on the Contracting Parties to obtain or provide ownership information with respect to publicly traded companies or public collective investment funds or schemes unless such information can be obtained without giving rise to disproportionate difficulties

Salient features of India – Bahamas TIEA (con’t)

- When requesting information, Competent authority to provide, inter alia:
  - Identity of person(s), period and tax purpose for which information is sought
  - Grounds for believing that such information is present in the requested Party or is in the possession or control of a person within the jurisdiction of the requested Party
  - The legal provision under which the examination, assessment or investigation is carried out, and a statement that the request is in conformity with the laws and administrative practices of the requesting Party
  - A statement that the requesting Party has pursued all means available in its own territory to obtain the information, except those that would give rise to disproportionate difficulties

Salient features of India – Bahamas TIEA (con't)

- If requested party unable to provide information within 90 days, it shall immediately inform the requesting Party, explaining the reason for its inability, the nature of the obstacles or the reasons for its refusal

- Tax examinations abroad:

  The requested Party may allow representatives of the competent authority of the requesting Party to enter the territory of the requested Party, to the extent permitted under its domestic laws, to interview individuals and examine records with the prior written consent of the individuals or other persons concerned

Salient features of India – Bahamas TIEA (con't)

- Declining a request for information:
  - Requested party may decline to assist, inter alia, where disclosure of the information would be contrary to public policy of the requested Party
  - A request for information shall not be refused on the ground that the tax claim giving rise to the request is disputed
  - Requested Party shall not be required to obtain and provide information which the requesting Party would be unable to obtain in similar circumstances under its own laws
  - Requested party may decline information which discriminates against a national of the requested Party as compared with a national of the applicant Party in the same circumstances

Salient features of India – Bahamas TIEA (con't)

- Confidentiality:
  - Any information received by a Contracting Party shall be treated as confidential and may be disclosed only to persons or authorities (including courts and administrative bodies) in the jurisdiction of the Contracting Party concerned with the assessment, collection or enforcement, prosecution or the determination of appeals in relation to the taxes covered by the TIEA
  - The information may not be disclosed to any other person or entity or authority or any other jurisdiction (including a foreign Government) without the express written consent of the competent authority of the requested Party

Thank You