

Handbook on Taxation of Private Trust of Income-tax Act, 1961



Direct Taxes Committee
The Institute of Chartered Accountants of India
(Set up by an Act of Parliament)
New Delhi

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Foreword

The Direct Taxes Committee (DTC) of the Institute of Chartered Accountants of India (ICAI) is one of the important Committees of the ICAI which is engaged in the matters related to direct taxes and makes representations to the Government, Central Board of Direct Taxes and at other appropriate forums from time to time on various legislative amendments and issues concerning direct taxes. One of the main activities of the Committee is to disseminate knowledge and honing skills of the membership in the area of direct taxation.

A Private Trust is a useful entity created by a Settlor in favour of certain beneficiaries, normally relatives or persons who are either affectionately, economically or socially connected with it. A separate tax entity being a trust created which gets governed by provisions of section 161 to 164 of the Income tax Act 1961. This entity while providing benefits of the trust to the beneficiaries, retains the control of the asset in the hands of the Trustees. In the matter of taxation of such trusts, it is necessary to understand the law addressing taxation of its income. I am pleased to note that the Direct Taxes Committee of ICAI has come out with this publication namely “**Handbook on Taxation of Private Trust of Income-tax Act, 1961**” to guide the members in discharging their obligations relating to taxation and related matters in a timely and effective manner

I appreciate the efforts of CA. Chandrashekhar V. Chitale, Chairman, Direct Taxes Committee, CA. Raj Chawla, Vice-Chairman, Direct Taxes Committee and all other members of the Committee who have worked sincerely for bringing out this handbook in a timely manner. I am confident that this publication will be a useful resource for the members.

Date: 06.02.2023

Place: New Delhi

CA. (Dr.) Debashis Mitra

President, ICAI

Preface

Taxation is one of the pre-dominant area of engagements for chartered accountants. Especially, these days, provisions pertaining to trusts and the like assesses is constantly attracting attention of shareholder. Updated information is need of the hour leading to comfort in complying with the provisions.

Trusts are generally of two kinds, namely public and private trusts. A public trusts is constituted for the benefit of public at large. Private trust further classified as specific trusts, family trusts, business trusts. Section 161 to 164 of the Income-tax Act, 1961 deal with the subject of private trust. A Private Trust is a very simple entity created by a Settlor in favour of some beneficiaries, normally relatives or persons who are either economically or socially connected with it.

Private Trusts are becoming more popular as a vehicle to take care of family members and family businesses. Taxation of trusts is governed by a separate set of law.

In order to assist the members in complying their professional commitments relating to taxation and related matters effectively, this handbook would prove to be very useful. We hope, it would enable the members to better understand the said provisions.

The Direct Taxes Committee thought it appropriate to bring out this useful publication namely “**Handbook on Taxation of Private Trust of Income-tax Act, 1961**” as a handy tool to assist the fraternity to make proper compliance of the provisions and procedures in more objective manner

We are sincerely thankful to CA. (Dr.) Debashis Mitra, President, ICAI and CA. Aniket Sunil Talati, Vice-President, ICAI for being guiding force behind all initiatives being taken by the Committee.

We are extremely thankful and appreciate the efforts of our CA. Chunauti H. Dholakia, CA. Kusai Goawala, CA. R.N.Maharwal who provided valuable inputs for this publication. We are pleased to place on record our sincere gratitude for the involvements and contributions by all the Committee members and our dear Council Colleagues of ICAI. We are sure that this

effort of DTC of ICAI would go a long way in assisting our members in making utmost compliance of the provisions.

CA. Raj Chawla

Vice-Chairman,
Direct Taxes Committee, ICAI

CA. Chandrashekhar V. Chitale

Chairman,
Direct Taxes Committee, ICAI

Date: 06.02.2023

Place: New Delhi

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Formation of private trusts and family trusts

1. Introduction

As per section 3 of the Indian Trust Act, trust is defined as “an obligation annexed to the possession of the property and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the advantage of another or of another and also the owner”. In other words, it's merely a transfer of property by one person (the Settlor) to a different (the “trustee”) who manages that property for the benefit of somebody else (the “beneficiary”). The Settlor should de jure transfer ownership of the assets to the trustee of the Trust. In India, Trust is the second-hottest style of registration. In private Trusts, the beneficial interest is vested absolutely in one or more individuals who are, or within a certain time, may be definitely ascertained. Subject matter of the trust is trust property.

Trusts are established to provide legal protection to properties of settlor of the trust, to make sure that assets are distributed to beneficiaries according to wishes of the settlor. A trust can be used to determine how a person's properties should be managed while that person is alive, or after his death.

In past, purpose of setting trust was very limited and trust property was mainly real estate. Trusts and their uses have undergone a sea change over the years. In present times, purpose and type of trust property is very vast and varied. Apart from use of trusts for corporate reorganization and fund formations, trusts today hold a sacred position and becoming increasingly important in the sphere of individual tax and succession planning.

2. Meaning of private trusts

A private trust may be a trust established for the advantage of a person's family members, relatives, friends etc. and are enforceable by the beneficiaries. The formation of private trusts gives the transactions a legal form. It ensures that assets or properties are employed just for the benefit of appointed beneficiaries, and the trustee needs it to be handled within the approach.

The trust constituted for the benefit of particular individuals who are, or within given time may be definitely ascertained is called as private trust. Thus, in a

private trust, beneficiaries are specific individuals such as family members, friends, and relatives etc. and capable of being ascertained. The formation of private trust gives this transaction a legal form and guarantees that money is used only for the benefit of his/her family and in the way the trustees wishes it to be handled.

Mainly there are two types of private trusts i.e. specific trusts and discretionary trusts. The private trust may be religious but cannot be charitable. A private trust which provides for charitable purpose may turn public when the private beneficiaries renounce their rights. The private trusts are governed by provisions of Indian Trust Act, 1882. However, section 1 of the Indian Trust Act, 1882 specifies that said Act will not affect the rules of Mohammedan Law as to Wakf or the mutual relations of the members of the undivided family as determined by any customary or personal law or applies to public religious or charitable endowments.

A private trust can be formed by executing trust deed or by will. A private trust formed by trust deed can also be called as “inter-vivos trust” and the trust formed by will can also be called as “testamentary trusts”. A private trust can be formed by will also. If the private trust is created by will, such trust is governed by Indian Succession Act also.

3. Meaning of family trusts

Family trusts are a common type of trusts used to hold assets to run a family business. A family trust is an inter vivos discretionary trust, meaning thereby, it is established by any person during his lifetime to manage certain assets or investments and support beneficiaries, such as family members. Generally in trust is created for family members or relatives of the settlor. Here, the notable point is that a trust created for family deity does not become “public” merely because arrangements have been made for feeding the poor or celebrating some festivals to maintaining a hospital.

Beneficiaries of family trust are mostly individual. This is called as single trust structure. But in some cases dual trust structure is also implemented, wherein sub-trust is beneficiary of the master trust. This sub-trust works as per the provisions contained in the trust-deed of the master trust for the benefit of individual beneficiaries.

A family trust is a vehicle independent of the author or the beneficiaries and therefore enjoys a relatively permanent nature and greater flexibility in terms

of managing the assets held in the trust in terms of investing, acquiring, disposing and otherwise dealing with the assets of the trust. A family trust can also be utilized to provide for specific needs of the family and in itself act as a vehicle which holds assets only for that specific purpose, multiplying, safeguarding, managing and securing them for that outlined purpose.

Any individual having sound mind and who have attained the age of majority can create his own trust for self and family anytime during his lifetime. It does not require any formalities with the Charity Commissioner. The family trust can even be created after demise by writing a will and by annexing draft trust deed.

4. Distinction between public trusts and private trusts

Key distinction between public trust and private trust is class of beneficiary. In the public trust, the class of beneficiary is public at large and generally they are uncertain and not confined to any specific individuals, but in private trusts, the class of beneficiary is sure and known. In private trust, beneficiary is definite people or selected group of public. In case of public charitable trust, benefit of activities of trust is available to a substantial segment of public, but in case of private trusts, public element is lacking.

Other distinctions between public trusts and private trusts are as under:

- Public Trust is more permanent than a private trust and cannot be dissolved, whereas generally private trusts are not permanent trusts. They can be dissolved in specific circumstances. If the private trust is created by execution of trust deed, it can be dissolved in the manner specified in the trust deed. If the trust is created through will, it can be revoked at any time during the lifetime of settlor of the trust. However, such trust cannot be revoked after death of the settlor.
- Public Charitable trust has legal status because it can be registered in a state while in most cases private trust is not required to be registered, other than when there is a transfer of immovable property, a certain amount of equity etc.
- Private trusts can be charitable or religious, while private trust can be religious, but cannot be charitable.
- Public charitable trust have the option of amalgamation//merging with another public charitable trust having similar objects subject to prior

permission of the respective authority as per applicable State Laws where as private trusts cannot merge with another public trust.

- In case of public trust, there is board of trustees to manage the trust, whereas in case of private trust, solely the managing trustee or some authorized trustees manages the trust.
- Generally public trusts are governed by the Acts passed by the State Governments, whereas private trusts are governed by the Indian Trust Act, 1882.

5. Benefits of private and family trusts

Private trusts and family trusts are incredible and convenient. Prime benefit of setting up private trust and family trust is wealth protection, family succession planning and asset transfer for the benefit of family members both during after the settlor's lifetime. The formation of private trust gives a guarantee to the settlor that money is used only for the benefit of his/her family members. The property of the private trust is managed as per the trust deed. The settlor can specifically mention objectives of the trust, name of beneficiaries, name of assets and manner of distribution of assets to beneficiaries.

Family trust allows the settlor of the trust to have complete control over the trust and freedom to pass on the assets unto the beneficiaries, which can be set out in the trust deed by the settlor. There is greater flexibility for appointment of trustees for managing, maintaining and holding the assets of the trust for the benefit of the beneficiaries. The trustee may be appointed from any beneficiary, family member, relatives or from professional trustees.

Family trust safeguards the interest of family members who are the beneficiaries by specifying the management, investment of monies in the trust and by dealing with assets, distribution of assets among beneficiaries. For minor child, the family trust is a good tool when both parents die simultaneously at young age.

6. Types of private trusts

Main type of private trusts is specific trust and discretionary trust. Private trusts can be further classified into following types:

- **Non-discretionary trust or specific trust**

Non-discretionary trust can be irrevocable or revocable. In the irrevocable non-discretionary trust, the trustee does not have full authority over distributing or paying out the trust assets. Settlor cannot withdraw the assets, but the settlor has complete control over trust norms as he/she can decide which beneficiary will receive which assets and how much. For example, the settlor may decide proportion of benefit to be received to his each child. Similarly, the trust may be formed for a physically challenged child to ensure that he or she is properly cared for if the parents or guardians of the child die. If the settlor is the primary beneficiary, he or she will be taxed at the slab rate. It is advisable to create this type of trust when beneficiaries are of sound mind and can make accurate decision.

In the revocable trust, the settlor can easily alter or terminate after its formation. It does not protect properties, because they can be taken away from this kind of trust. Here properties are not considered to be given away so they are taxed at the slab rate by the settler's side. It is merely an alternative of a will.

- **Discretionary trust**

In this type of trust, the settlor decides the list of beneficiaries alone. In other words, the beneficiaries alone will be disclosed by the settlor and not their proportion. The proportion of assets to be given to each beneficiary will be decided by the trustee. A well-drafted discretionary trust allows the trustee to include or exclude beneficiaries from the class, allowing the trustee greater flexibility to take decisions according to the circumstances. The beneficiaries have no control over any of the assets held in the trust or how they have distributed. The beneficiaries cannot compel or influence the trustee to use any of the property for their benefit. It is advisable to create this type of family trust when beneficiaries are minor.

Here, the notable point is that irrespective of type of trust, beneficiaries should be determinate and known. The trust created for indeterminate and unknown beneficiaries is void and the trust property becomes reinvested on the settlor as a beneficial owner. Some judicial decisions directs that so long as the trust deed gives the details of

beneficiaries and the description of the person who is to be benefitted, the beneficiaries cannot be said to be uncertain, merely because wife/children cannot be known until the marriage and begetting of children by the beneficiary. Hence “would be spouse” or “unborn child” can be considered as known beneficiary even if they are not existed at the time of execution of trust deed.

Hon. Supreme Court in case of Commissioner of Wealth Tax vs. Trustees of H.E.H. Nizam’s Family, 1977 AIR 2103 had observed that an arrangement where the trust, being a discretionary trust, the trustee may choose, from time to time, who among the beneficiaries is to benefit from the trust, and to the extent of such benefit, such trust cannot be considered to be indeterminate. As long as one is able to know the beneficiaries on the valuation date, the trust was held to be determinate. The trustees must exercise their discretion as and when the income becomes available, but if they to distribute in due time, the power is not extinguished so that they can distribute later. They have no power to bind themselves for the future. The beneficiaries thus have no more than a hope that the discretion will be exercised in his favour.

As directed in many judicial rulings, trust has to be certain as to its beneficiary. Where it is for the benefit of an individual, it is expected that an alternative beneficiary should be provided in case of pre-decease of such individual before maturity of the trust. Where a trust is created for the two minors provided for the contingency of pre-decease of either of them, but not for the contingency of both, the AO held the trust to be invalid on grounds of uncertainty as regards the beneficiaries. In such a case section 77 of the Indian Trust Act would provide for extinguishment of the trust, so that it will revert back to settlor.

Further, the type of trust as specified in the trust deed cannot be changed. Hence any private trust cannot pass a resolution or cannot adopt any course so as to change type of the trust. However, some judicial rulings direct that resolution can be passed to define share of beneficiaries.

7. Modifications

Once the Settlor has settled the Trust, its role is over and limited. The Trustees take over the management of the Trust.

However, in future if some modifications are required in the Trust Deed to meet with the new legislation or commercial requirements, the Trustees can modify as per the provisions contained in the Trust Deed.

In absence of the provisions in the Trust Deed, one can resort to the provisions of the Indian Trust Act.

As per provisions of the Indian Trust Act, the Trustees can modify the provisions of the Trust Deed provided consent is obtained from all adult beneficiaries of the Trust. In case the Trust has minor beneficiaries, the Trust Deed cannot be modified if it impacts the interest of the beneficiaries adversely.

The modifications can be carried out by way of Supplementary Deed or by way of a Resolution in the meeting of the Board of Trustees of the Trust.

The said resolutions to be attached as part of the Original Trust Deed.

8. Restrictions on Private Trust

A Trust cannot carry on any activities prohibited specifically by the Trust Deed.

Under Income tax Act, if a Trust carries on any business then the income such Trust will be taxable at MMR (Maximum Marginal Rate).

A Trust cannot transfer any asset to the Trustees or use any assets for the benefit of any Trustee unless they are also beneficiaries of the Trust.

Trust cannot allow Trustee to make personal profit out of the funds of the Trust. However, as provided in the Trust Deed, a Trustee can be entitled to some management fees for the efforts it is making for the Trust.

9. Procedure of creation and registration of private trusts under the Indian Trusts Act

The private trust can be formed by trust deed or will. A Private Trust is very easy to create. It requires three parties – Settlor, Trustee and Beneficiaries. Settlor gives a gift to the Private Trust of any amount to start with as Corpus

of the Trust (It can be even Rs.5001). A Trust Deed is drawn up. In the said Trust Deed, the Settlor states that it is settling a Private Trust for the benefit of certain class of persons. Settlor appoints trustees any numbers – could be even one sole Trustee.

Based on this Trust Deed, the Trust is created and can apply for PAN and open Bank Account in the name of the Trust.

All investments by Trust will be in the name of the Trustees as nominee of the Trust and suitable declaration is required to be given by the Trustees to the Investee to record such beneficial interest.

A Private Trust can be for a specific period or perpetual.

A Trust can also be created by a WILL where the estate is transferred to a Private Trust settled for the benefit of the family members. The transfer so contemplated under WILL is not taxable u/s 56(2)(x) of the Income tax Act in view of the exceptions.

After creation of trust, application for registration of private trust or family trust, in writing should be submitted to the office of local registrar, where the trustee has an office for administration of the trust or where the trust properties or substantial portion of the trust properties are situated, as the case may be. Such application should be filed within prescribed time of creation of trust and should be filed with the fees prescribed depending upon value of trust properties. The form for registration of trust and details of applicable fees can be obtained from office of the local registrar.

List of documents required for registration of private trusts are as under:

- (1) Request letter to register the trust
- (2) Trust deed on stamp paper of requisite value.
- (3) One passport size photograph and self-attested copy of proof of identity of the settlor.
- (4) One passport size photograph and self-attested copy of proof of identity of each trustee.
- (5) Self-attested copy of PAN card of all settlor and trustees.
- (6) Proof of registered office of the trust.
- (7) If the office premises is rented, No objection letter of the land owner.

- (8) Signature of settlor on each page of trust deed.
- (9) Signature of two witnesses on the trust deed.

Every application should be signed and verified in the prescribed manner by the trustee or his agent authorized by him in this behalf.

In the case of the private trust which is created by a will, the executor of such will shall within one month from the date on which the probate of the will is granted or within six months from the date of the testator's death which- ever is earlier make an application for the registration in the manner provided and the provisions of this Act shall mutatis mutandis apply to the registration of such trusts.

If any part of the property of any private trust is situate within the limits of more than one region or sub-region, the registrar of the region or sub-region within the limits of which the trust is registered, shall forward a copy of the entries to the registrar in charge of the region or sub-region within the limits of which such part of the trust property is situate. The registrar in charge of such region or sub-region shall make an entry in such book as may be prescribed for the purpose. A copy of such entry shall also be sent by the registrar, as the case may be, to the Sub-Registrar appointed under the Indian Registration Act, 1908, of the sub-district within the limits of which such property or part thereof is situate.

- Inquiry for registration

On receipt of application, the application is processed by the Registrar, which usually taken a week. After processing the application, the Registrar makes an inquiry for the purpose of ascertaining:

- (1) Whether a trust exists and whether such trust is a private trust.
- (2) Whether any property is the property of such trust
- (3) Whether the whole or substantial portion of the subject matter of the trust is situated within his jurisdiction.
- (4) The names and address of trustees and manager of such trust.
- (5) Mode of succession to the office of the trustee of such trust.
- (6) The amount of gross average annual income and expenditure of such trust.

(7) Any other particulars as may be prescribed under the Act.

The Registrar shall proceed with an inquiry in regard to any private trust which has been already registered in any other region or sub-region.

- **Registration certificate**

After making inquiry the Registrar makes an entry in the register and issues registration certificate containing official seal and registration number of the trust. In case of loss or damage to original registration certificate, duplicate registration certificate can be obtained by making an application and with payment nominal fees.

9.1 Trust deed

The trust deed is an instrument in writing executed by a settlor used to constitute a trust. Functions of the written trust deed are as under:

- A written trust deed is prima facie evidence of existence of a trust.
- It facilitates devolution of trust property to the trust.
- It clearly specifies the trust objects.
- It helps to control, regulate and manage operations of the trust.
- It lays down the procedure for appointment and removal of trustees, their powers, rights and duties etc.
- It describes the course of action to be followed under any eventuality including dissolution of the trust.

There is no specific format for the trust deed. A trust may be created by any language sufficient to show the intention and no technical words are necessary in the deed. The trust deed should contain following provisions.

- (1) Intention and objects for creation of trust.
- (2) The name of beneficiary/ beneficiaries of the private trust
- (3) List of trust property and manner of transfer of property to the trust.
- (4) Manner of distribution of trust property to beneficiaries.
- (5) Type of trust- Discretionary, non discretionary, revocable etc.

- (6) In the event of the trust not being able to function in fulfillment of its objects, manner of dissolution of trust should be mentioned.

General format of the trust deed is as under:

(1) Name of the trust:

This clause should contain name of the trust. It should be self-evident to disclose primary object of creation of the trust.

(2) Name of settlor, first trustees and beneficiaries:

This clause should contain name of settlor of the trust, amount of contribution (if any) given to the trust by the settlor, name, address and occupation of first trustees and name of beneficiaries if they are definite.

(3) Working area of the trust:

This clause should contain details for area of operation for which trust will carry out its activities. It may be specific city, village or state or may be whole India. Clause for provision for changes in working area in future should be added considering future requirements. Generally a trust registered anywhere in India has a national status. However, for more clarity, specific working area should be mentioned in the trust deed.

(4) Objects:

Main clause of the trust deed is object clause. All the objects should be clearly mentioned in the trust deed. Nature of trust is decided with reference to objects for which the trust is came into existence. Hence extreme care should be taken while formation of objects clause. Generally private trusts are created with the object for well-being of family members or other relatives who are relying on the settlor of the trust. It can also be created to provide medical or educational assistance to the author or to any child of family.

Both primary and general objects can be included in the object clause. But such objects should be co-related with each other and should not be unlawful. As per the Indian Trust Act, the purpose is considered as lawful unless it is (a) forbidden by law, or (b) is of such a nature that, if permitted, it would defeat the provisions of any law, or (c) is fraudulent, or (d) involves or implies injury to the person or property of another, or (e) the court regards it as immoral or opposed to public policy.

Every trust of which the purpose is unlawful is void. And where a trust is created for two purposes, of which one is lawful and the other unlawful, and the two purposes, cannot be separated, the whole trust is void. For example, if A while in insolvent circumstances, transfers property to B in trust for A during his life after his death for B, A is declared insolvent. The trust for A is invalid as against his creditors.

(5) Duties and Powers of Managing trustees:

This clause should contain details related to managing trustees such as number of minimum and maximum managing trustees, manner of filling of vacant seats of managing trustees, rights and duties of managing trustees etc. It should be noted that there should not be any clause to give powers to trustees to open bank account or to make investments of the trust in the name of trustees.

Any person competent to contract and not insolvent, minor or insane can be appointed as trustee. Generally trustee or managing trustees of family trust are family member or relatives of the settlor. Such trustee or managing trustees must consent to make it a valid trust.

A trustee is bound to deal with the trust-property as carefully as a man of ordinary prudence would deal with such property if it were his own; and, in the absence of a contract to the contrary, a trustee so dealing is not responsible for the loss, destruction or deterioration of the trust-property.

The trust deed should contain clause for manner for appointment of new trustees in case of death, resignation, insolvency etc. of any of existing trustee. Generally, in family trusts, family members are appointed as trustees. But if there is no such member in the family, who are able and willing to act, if the settlor is alive and competent to contract or the surviving trustee or continuing trustee or trustees or legal representative of last surviving trustee or continuing trustee can continue the trust.

On the death or discharge of one of several co-trustees, the trust survives and the trust-property passes to the others, unless the instrument of trust expressly declares otherwise.

(6) Residuary clause:

In residuary clause, details not covered above, such as details about trust properties given by the settlor, charge created on trust property, if any,

source of income of the trust, details about financial year of the trust, provisions related to amalgamation of trust in future in case of necessity, any other remark etc. should be mentioned.

(7) Dissolution

Private trusts are revocable and can be dissolved. Generally, private trusts are formed for specific object. They can be dissolved on fulfillment/ completion of the specific object. A trust created by will may be revoked at the pleasure of the testator. Other circumstances for revocation of private trust are as under:

- (1) Expiry of the specific period mentioned in the trust document.
- (2) The purpose for which such trust was created becomes unlawful after introduction of new legislation.
- (3) All trust properties are destroyed.
- (4) Trust properties are not used for the purpose for which trust was created.
- (5) Trust is expressly revoked by the settlor with the consent of beneficiaries.
- (6) If the settlor has created the trust for the purpose of repayment of his debt and if this is not informed to the creditors, settlor can revoke the trust.

A private trust can be revoked only by the consent of all the beneficiaries, where all the beneficiaries are competent to contract.

Primary condition for dissolution of trust is that power of revocation should expressly be referred in the trust deed. Hence it is necessary to mention details about power and manner of revocation or dissolution of trust.

Settlor can revoke the trust if a provision is made in the trust deed reserving the power for the settlor to revoke the trust at any point in time by way of a registered deed of revocation. Unless such provision is made, he cannot revoke the trust. Beneficiaries may at their wish relinquish their rights in the trust property by signing a document. By doing so, they give up all their rights to the trust property and the trust gets dissolved transferring the property again to the settlor.

In case of dissolution of trust, transfer of trust properties should not be revocable transfer. Moreover, in case of dissolution of trust, ownership of trust properties should also be transferred. If the trust properties are transferred without transferring ownership of such properties, section 60 to 63 of the Income Tax Act, 1961 will be applicable and income will be clubbed in the hands of settlor of the trust as his personal income.

(8) Signature of trustees and witness

At the end of the trust deed, details about name and address of settlor and trustees each trustee should be mentioned and all trustees and settlor should sign the trust deed after giving consent to become the settlor or trustee of the trust. Moreover, trustees should signify their assent to act as trustees of the trust. The witnesses, in whose presence the trustees have put their signature should also sign the trust deed.

At last, it should be mentioned that the trust is hereby expressly declared to be a private trust from date (mention relevant date) and all provisions of this deed are to be constituted accordingly.

The trust deed so prepared should be get notarized. Sample trust deeds are given at the Annexure.

9.2 Trust creation through will

Private trust created through will document can also be called as Testamentary trust or will trust. These trusts are recognized internationally as favored vehicles for estate and succession planning. This type of trust is effective upon death of the testator and may address all or any of the portions of the estate. Since it does not take effect during the settlor's lifetime, he or she is free to make changes any time to the trust until death. The changes in the will can be made through a document called as "codicil" or by executing a new will. At the time of death the testamentary trust becomes irrevocable and the last will made by the testator before his death becomes effective.

Generally, testamentary trusts are created for young children, relatives with disabilities or others who may inherit a large sum of money that enters the estate upon the death of the testator. Since minor children are not able to manage the substantial property effectively, a testamentary trust allows the settlor to leave estate to them and also name a trusted guardian as the

trustee. The trustee manages the trust until minor becomes old enough to manage the property him or herself. Generally, the will documents indicates a certain event such as when the child becomes graduate or attains the age of majority, at which point the trustee expires and the beneficiary can take control of the trust property.

A testamentary trust is provided in the last will by the “settlor”, who appoints a trustee to manage the funds of the trust until the beneficiary or beneficiaries or person receiving the money takes over. As per the Indian Succession Act, 1925, a person of sound mind, who has attained the age of majority, may make a valid will in writing and in the presence of two attesting witnesses. It is also necessary that a will for creation of trust is made in exercise of testator’s free agency, and not under the influence of fraud or coercion. It is not mandatory to register the will, but it is advisable to do so to avoid any future disputes.

As the trust is created through will, following details is required to be incorporated in the will.

(1) Intention:

Intention for creation of the trust must be clearly mentioned in the will. It must be “expressed” and not “inferred” circumstantially. Hence there must not be ambiguity in the language used to create the trust in the will.

(2) Object

The object for creation of trust should be clearly expressed in the will. Object may be for maintenance of family of the settlor or for meeting the educational expenses of his children. While executing the terms of the trust, the trustees are bound to fulfill the objects of the trust.

(3) Beneficiaries

The will must identify with reasonable certainty the beneficiaries, i.e. the persons for whose benefit the trust is created. A private trust must exist for ascertainable beneficiaries, it cannot exist merely for an object or purpose. It is not necessary that beneficiaries are named individuals, so long as a class or criteria of beneficiaries is described to enable the trustees to identify with reasonable certainty whether a person satisfies the criteria to fit within the class of beneficiaries.

(4) Trust property

Trust property is a subject matter of the trust. The property for which the trust is created and which are transferrable to beneficiary must be described and it must be identifiable with reasonable certainty. Trust property can be investments, cash or other movable assets. The settlor can choose to transfer some property owned by him to the trust. The notable point here is that settlor can transfer only those properties to the trust, which are owned by him and not the ancestral property.

The executors of the trust can be appointed as trustees of the testamentary trust. However, it is not necessary that the trustees appointed for testamentary trust must be the same persons who are appointed as executors under will. The terms of testamentary trust may also provide for fees to be paid to trustees and it can be deducted from trust fund.

This trust comes into existence at the completion of probate process. An executor will probate the will and create the trust in the process.

There are many benefits for creation of private trust through will. Key benefit of creation of testamentary trust is that In case of the testamentary trust, the trustees may distribute capital and income to any nominated beneficiary at any time and in any proportion. A testamentary trust gives the beneficiary both flexibility and control over when and how they take their inheritance. Another benefit is that the assets form part of the trust and therefore they cannot be taken out of the trust without the trustees agreeing to distribute them to the beneficiaries. None of the assets are legally owned by the beneficiaries, which may protect the assets of the trust from some circumstances such as divorce/breakdown in relation of a beneficiary, protection from creditors, high risk beneficiaries etc.

Key difference between trust created through trust deed (inter-vivos trust) and a trust created through will (testamentary trust) is that in a testamentary trust, the settlor exercises continued ownership and control over his property during his lifetime, as the property transfers and becomes effective only upon his death. In an inter-vivos trust, the property of the settlor is transferred to the trust during his lifetime and the settlor cedes control and control of the ownership of the property

when it is transferred. Another difference is that the settlor of an inter-vivos trust may exercise some degree of control over the property by providing in the trust deed that the trustees must mandatorily take his consent consult him before undertaking certain specified actions, whereas in a testamentary trust, the settlor is unable to exercise any control over the functioning of the trust. Moreover, a testamentary trust may be revoked by the testator's wish by simply amending or destroying the will during his lifetime. However, an inter-vivos trust, once created may only be revoked if it is a revocable trust as per the terms of the trust.

10. Power and Role of Trustees

The Trustees appointed by Settlor have a fiduciary duty towards the beneficiaries and are required to work in the best interest to protect the assets and income of the Trust.

If they act in fraudulent manner where the Trust assets or income is misappropriated, the Trustees can face legal consequences.

They have powers to manage the assets of the Trust ie acquire, sell, alienate in any manner they deem fit in their wisdom.

They will accrue all the income of the Trust and spend on the expenditure required to earn such income for the Trust including administrative expenses and make an account for the same. The remaining income of the Trust may at their discretion be distributed to the beneficiaries or retained in the Trust for future investment.

The Trustees will make regular accounts and comply with the provisions of applicable laws.

In cases where there are multiple Trustees, the Trust deed can lay down, how new Trustees can be appointed or existing Trustee can be removed

11. Major provisions of Indian Trust Act, 1882

- **Duties of trustees regarding trust property**

As per section 12 of the Indian Trust Act, A trustee is bound to acquaint himself, as soon as possible, with the nature and circumstances of the trust-property; to obtain, where necessary, a transfer of the trust-property to himself; and (subject to the provisions

of the instrument of trust) to get in trust-moneys invested on insufficient or hazardous security.

Moreover, section 13 of the Indian Trust Act requires the trustees to maintain and defend all such suits, and (subject to the provisions of the instrument of trust) to take such other steps as, regard being had to the nature and amount or value of the trust-property, may be reasonably requisite for the preservation of the trust-property and the assertion or protection of the title thereto. As specified under section 14 of the Indian Trust Act, The trustee must not for himself or another set-up or aid any title to the trust-property adverse to the interest of the beneficiary.

- **Other duties of trustees**

As provided under section 18 of the Indian Trust Act, where the trust is created for the benefit of several persons in succession and one of them is in possession of the trust-property, if he commits, or threatens to commit, any act which is destructive or permanently injurious thereto, the trustee is bound to take measures to prevent such act.

Section 20 of the Indian Trust Act provides the manner of investment of trust money. Where the trust-property consists of money and cannot be applied immediately or at an early date to the purposes of the trust, the trustee is bound (subject to any direction contained in the instrument of trust) to invest the money on the following securities, and on no others:—

- (a) in promissory notes, debentures, stock or other securities ¹ [of any State Government or] of the Central Government, or of the United Kingdom of Great Britain and Ireland:

Provided that securities, both the principal whereof and the interest whereon shall have been fully and unconditionally guaranteed by any such Government, shall be deemed, for the purposes of this clause, to be securities of such Government;]

- (b) in bonds, debentures and annuities [charged or secured by the [Parliament of the United Kingdom] [before the fifteenth day of August, 1947] on the revenues of India or of the [Governor General in Council] or of any Province]:

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[Provided that, after the fifteenth day of February, 1916, no money shall be invested in any such annuity being a terminable annuity unless a sinking fund has been established in connection with such annuity; but nothing in this proviso shall apply to investments made before the date aforesaid;]

- [(bb) in India three and a half per cent. stock, India three per cent. stock, India two and a half per cent. stock or any other capital stock [which before the 15th day of August, 1947, was] issued by the Secretary of State for India in Council under the authority of an Act of Parliament [of the United Kingdom] and charged on the revenues of India] [or which [was] issued by the Secretary of State on behalf of the Governor-General in Council under the provisions of Part XIII of the Government of India Act, 1935];
- (c) in stock or debentures of, or shares in, Railway or other Companies the interest whereon shall have been guaranteed by the Secretary of State for India in Council [or by the Central Government] [or in debentures of the Bombay [Provincial] Co-operative Bank, Limited, the interest whereon shall have been guaranteed, by the Secretary of State for India in Council] [or the State Government of Bombay];
- [(d) in debentures or other securities for money issued, under the authority of [any Central Act or [Provincial] Act or State Act], by or on behalf of any municipal body, port trust or city improvement trust in any presidency-town or in Rangoon Town, or by or on behalf of the trustees of the port of Karachi;]

[Provided that after the 31st day of March, 1948, no money shall be invested in any securities issued by or on behalf of a municipal body, port trust or city improvement trust in Rangoon Town, or by or on behalf of the trustees of the port of Karachi;]

- (e) on a first mortgage of immoveable property situate in [any part of the territories to which this Act extends]: Provided that the property is not a leasehold for a term of years and that the value of the property exceeds by one-third, or, if consisting of buildings, exceeds by one-half, the mortgage-money;

- [(ee) in units issued by the Unit Trust of India under any unit scheme made under section 21 of the Unit Trust of India Act, 1963 (52 of 1963); or]
- (j) on any other security expressly authorised by the instrument of trust, [or by the Central Government by notification in the Official Gazette,] or by any rule which the High Court may from time to time prescribe in this behalf:

Provided that, where there is a person competent to contract and entitled in possession to receive the income of the trust-property for his life, or for any greater estate, no investment on any security mentioned or referred to in clauses (d), (e) and (f) shall be made without his consent in writing.

As provided under section 83 of the Indian Trust Act, where a trust is incapable of being executed, or where the trust is completely executed without exhausting the trust-property, the trustee, in the absence of a direction to the contrary, must hold the trust-property, or so much thereof as is unexhausted, for the benefit of the author of the trust or his legal representative.

- **Liability of trustee for breach of trust**

As specified under section 23 of the Indian Trust Act, where the trustee commits a breach of trust, he is liable to make good the loss which the trust-property or the beneficiary has thereby sustained, unless the beneficiary has by fraud induced the trustee to commit the breach, or the beneficiary, being competent to contract, has himself, without coercion or undue influence having been brought to bear on him, concurred in the breach, or subsequently acquiesced therein, with full knowledge of the facts of the case and of his rights as against the trustee.

A trustee committing a breach of trust is not liable to pay interest except in the following cases:—

- (a) where he has actually received interest;
- (b) where the breach consists in unreasonable delay in paying trust-money to the beneficiary;

- (c) where the trustee ought to have received interest, but has not done so;
- (d) where he may be fairly presumed to have received interest;
He is liable, in case (a), to account for the interest actually received, and, in cases (b), (c) and (d), to account for simple interest at the rate of six per cent. per annum, unless the Court otherwise directs.
- (e) where the breach consists in failure to invest trust-money and to accumulate the interest or dividends thereon, he is liable to account for compound interest (with half-yearly rests) at the same rate;
- (f) where the breach consists in the employment of trust-property or the proceeds thereof in trade or business, he is liable to account, at the option of the beneficiary, either for compound interest (with half-yearly rests) at the same rate, or for the net profits made by such employment.

Moreover, a trustee who is liable for a loss occasioned by a breach of trust in respect of one portion of the trust-property cannot set-off against his liability a gain which has accrued to another portion of the trust-property through another and distinct breach of trust.

However, where a trustee succeeds another, he is not, as such, liable for the acts or defaults of his predecessor

As provided under section 26 of the Indian Trust Act, one trustee is not, as such, liable for a breach of trust committed by his co-trustee:

Provided that, in the absence of an express declaration to the contrary in the instrument of trust, a trustee is so liable—

- (a) where he has delivered trust-property to his co-trustee without seeing to its proper application;
- (b) where he allows his co-trustee to receive trust-property and fails to make due enquiry as to the co-trustee's dealings therewith, or allows him to retain it longer than the circumstances of the case reasonably require;

- (c) where he becomes aware of a breach of trust committed or intended by his co-trustee, and either actively conceals it or does not within a reasonable time take proper steps to protect the beneficiary's interest.

A co-trustee who joins in signing a receipt for trust-property and proves that he has not received the same is not answerable, by reason of such signature only, for loss or misapplication of the property by his co-trustee.

Also, when any beneficiary's interest becomes vested in another person, and the trustee, not having notice of the vesting, pays or delivers trust-property to the person who would have been entitled thereto in the absence of such vesting, the trustee is not liable for the property so paid or delivered.

- **Rights of trustees**

As specified under section 32 of the Indian Trust Act, —Every trustee may reimburse himself, or pay or discharge out of the trust-property, all expenses properly incurred in or about the execution of the trust, or the realization, preservation or benefit of the trust-property, or the protection or support of the beneficiary.

If he pays such expenses out of his own pocket he has a first charge upon the trust-property for such expenses and interest thereon; but such charge (unless the expenses have been incurred with the sanction of a principal Civil Court of original jurisdiction) shall be enforced only by prohibiting and disposition of the trust-property without previous payment of such expenses and interest.

If the trust-property fail, the trustee is entitled to recover from the beneficiary personally on whose behalf he acted, and at whose request, expressed or implied, he made the payment, the amount of such expenses.

Moreover, section 33 specifies that a person other than a trustee who has gained an advantage from a breach of trust must indemnify the trustee to the extent of the amount actually received by such person under the breach; and where he is a beneficiary the trustee has a charge on his interest for such amount. Nothing in this section shall be

deemed to entitle a trustee to be indemnified who has, in committing the breach of trust, been guilty of fraud.

Section 41 of the Indian Trust Act provides powers to apply property of minor etc. for their maintenance. Where any property is held by a trustee in trust for a minor, such trustee may, at his discretion, pay to the guardians (if any) of such minor, or otherwise apply for or towards his maintenance or education or advancement in life, or the reasonable expenses of his religious worship, marriage or funeral, the whole or any part of the income to which he may be entitled in respect of such property; and such trustee shall accumulate all the residue of such income by way of compound interest, by investing the same and the resulting income thereof from time to time in any of the securities mentioned or referred to in section 20, for the benefit of the person who shall ultimately become entitled to the property from which such accumulations have arisen: Provided that such trustee may, at any time, if he thinks fit, apply the whole or any part of such accumulations as if the same were part of the income arising in the then current year.

Where the income of the trust-property is insufficient for the minor's maintenance or education or advancement in life, or the reasonable expenses of his religious worship, marriage or funeral, the trustee may, with the permission of a principal Civil Court of original jurisdiction, but not otherwise, apply the whole or any part of such property for or towards such maintenance, education, advancement or expenses. Nothing in this section shall be deemed to affect the provisions of any local law for the time being in force relating to the persons and property of minors.

- **Disabilities of the trustees**

As specified under section 46 and 47 of the Indian Trust Act, trustees who has accepted the trust cannot afterwards renounce it except (a) with the permission of a principal Civil Court of original jurisdiction, or (b) if the beneficiary is competent to contract, with his consent, or (c) by virtue of a special power in the instrument of trust. Moreover, trustee cannot delegate his office or any of his duties to a co-trustee or stranger unless (a) the instrument of trust so provides, or (b) the delegation is in the regular course of business, or (c) the delegation is necessary, or (d) the beneficiary, being competent to contract,

consents to the delegation. Moreover, co-trustee must not act singly, all trustees must join in execution of the trust, except where the instrument of the trust otherwise provides.

Moreover, as specified under section 51 of the Indian Trust Act, a trustee may not use or deal with the trust-property for his own profit or for any other purpose unconnected with the trust.

Also, a trustee or co-trustee whose duty it is to invest trust-money on mortgage or personal security must not invest it on a mortgage by, or on the personal security of, himself or one of his co-trustees.

- **Rights and liability of the beneficiary**

As provided under section 62 of the Indian Trust Act, Where a trustee has wrongfully bought trust-property, the beneficiary has a right to have the property declared subject to the trust or retransferred by the trustee, if it remains in his hands unsold, or, if it has been bought from him by any person with notice of the trust, by such person. But in such case the beneficiary must repay the purchase -money paid by the trustee, with interest, and such other expenses (if any) as he has properly incurred in the preservation of the property; and the trustee or purchaser must (a) account for the net profits of the property, (b) be charged with an occupation-rent, if he has been in actual possession of the property, and (c) allow the beneficiary to deduct a proportionate part of the purchase -money if the property has been deteriorated by the acts or omissions of the trustee or purchaser.

Nothing in this section—

- (a) impairs the rights of lessees and others who, before the institution of a suit to have the property declared subject to the trust or retransferred, have contracted in good faith with the trustee or purchaser; or
- (b) entitles the beneficiary to have the property declared subject to the trust or retransferred where he, being competent to contract, has himself, without coercion or undue influence having been brought to bear on him, ratified the sale to the trustee with full knowledge of the facts of the case and of his rights as against the trustee.

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Section 68 of the Indian Trust Act provides that where one of several beneficiaries—

- (a) joins in committing breach of trust, or
- (b) knowingly obtains any advantage therefrom, without the consent of the other beneficiaries, or
- (c) becomes aware of a breach of trust committed or intended to be committed, and either actually conceals it, or does not within a reasonable time take proper steps to protect the interests of the other beneficiaries, or
- (d) has deceived the trustee and thereby induced him to commit a breach of trust,

the other beneficiaries are entitled to have all his beneficial interest impounded as against him and all who claim under him (otherwise than as transferees for consideration without notice of the breach) until the loss caused by the breach has been compensated.

When property has been transferred or bequeathed for the benefit of a married woman, so that she shall not have power to deprive herself of her beneficial interest, nothing in this section applies to such property during her marriage.

12. Sample trust deeds

12.1 Sample trust deed of a private family trust

This deed of trust made on ____ day of ____ month of year ____ between _____ (*name of the Settlor*) residing at _____ (*address*) (hereinafter called as “the settlor”, which expression shall unless it is repugnant to the context or meaning thereof be deemed to include his heirs, executors and/or administrators) of the One part and And (1) _____ (*name of trustee*) residing at _____ (*address*) And (2) _____ (*name of trustee*) residing at _____ (*address*) And (3) _____ (*name of trustee*) residing at _____ (*address*) (hereinafter called as “the trustees” which expression shall unless it is repugnant to the context or meaning thereof be deemed to include the survivors of survivor of them and heirs, executors and/or administrators of

the last survivor and the trustees or trustee for the time being of these presents, their, his or her assigns) of the Other part.

Whereas, the Settlor is seized and absolutely possessed inter alia an amount of Rs. _____ (in figures) Rupees _____ only (in words) in cash.

Whereas, out of natural love and affection, which the settlor bears towards the beneficiaries (1) _____ (*name of beneficiary*) and (2) _____ (*name of beneficiary*) and (3) _____ (*name of beneficiary*), who are the _____ (*relationship*) of the Settlor, the Settlor is desirous of settling a sum of Rs. _____/- (Rupees _____ only) upon and subject to the trusts, powers, provisions, agreements and declarations hereinafter declared and contained of and concerning the same and the Settlor has requested the Trustees to act as the Trustees thereof, which the Trustees have consented to do.

AND WHEREAS in pursuance of the said desire the Settlor has, prior to the execution hereof, handed over cash of Rs. _____ (Rupees _____) and a cheque for Rs. _____/- (Rupees _____ only) to the Trustees and the Trustees have accepted and taken possession of the same and they shall hold the said amount upon the Trusts and with and subject to the powers and provisions hereinafter declared and contained.

NOW THIS DEED OF TRUST WITNESSETH as under:-

1. Name of the trust

The Trust shall be known as "....." (*name of the trust*).

2. Trust Property

The Settlor _____ has conveyed, transferred and assigned the Trustees said amount of Rs. _____ (Rupees _____ only) in cash and Rs. _____/- (Rupees _____ only) by cheque.

1. Duties of trustees

The Trustees hereby declare that they (the Trustees) shall hold and stand possessed of the said property which is referred to as "the Trust property" which expression shall also include cash and any other property and investments of any kind whatsoever into which the same

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or any part thereof might be converted, invested or varied from time to time or such as may be acquired by the Trustees or come to their hands by virtue of these presents or by operation of law or otherwise howsoever in relation to these presents, upon the Trusts and with and subject to the powers, provisions, agreements and declarations hereinafter declared and contained concerning the same.

It will be endeavor to take all decisions unanimously. However, in case of difference of opinion amongst the trustees, the opinion of the majority shall prevail.

The trustees will have to deal with the trust properties as carefully as if it is his own. However, the trustees will not be responsible for the accidental loss, destruction or deterioration of the trust property.

4. Objects of the trust

The Trustees shall hold and stand possessed of the Trust property upon the following trusts that is to say:-

- a. to manage the trust premises or Trust Fund and collect and receive the interest, dividend and other income thereof;
- b. to pay and discharge out of the income of the Trust Fund all costs, charges and expenses for collecting and receiving the income of the Trust Fund and all other assets, charges, expenses and outgoings of and incidental to the Trusts created by these presents and administration thereof;

4. Beneficiaries

The beneficiaries of the trust shall be _____ aged about _____ years, son/daughter of _____ residing at _____ and _____ aged about _____ years, son/daughter of _____ residing at _____ and son/daughter of _____ residing at _____ and lineal descendent of _____. Share of beneficiaries will be as under:

- (1) _____%
- (2) _____%
- (3) _____%

If either of the beneficiaries dies before the determination of this Trust his or her share and interest in the Trust shall devolve upon the survivor and in the event of the death of the survivor before the determination of the Trust it shall devolve upon his legal heirs.

- a. The income of the Trust shall be credited to the respective accounts of the beneficiaries.
- b. Any amount withdrawn by the beneficiaries or on their behalf shall be debited to the respective accounts of the beneficiaries.
- c. The Trustees shall also be entitled to spend any part of the corpus or of the amounts credited to the accounts of the beneficiaries for their maintenance, education and medical relief or for any other benefit of the beneficiary concerned and such amounts shall be debited to the respective accounts of the beneficiaries.
- d. The Trust shall be determined when the younger of the beneficiaries attains the age of . years or on such earlier date as the Trustees may in their absolute power decide. On the determination of the Trust the corpus of the Trust property shall be divided among the beneficiaries existing at the time according to their shares and if there is no existing beneficiary then to the legal heirs of the beneficiary who dies last.

5. Tenure of the trust

Tenure of this trust will be for a period of ten years from the date of execution of this trust. However, the trustees may put an end to these trust at any time or continue the trust beyond the period of ten years, whichever in their discretion is in the interest of the beneficiaries.

6. Rights and powers of trustees

1. It is hereby agreed and declared that the Trustees herein appointed or to be appointed in future as hereinafter provided shall manage the trust property and for this purpose they shall have full power at all times to sell, convert, transfer or alienate any one or more of the Trust properties and to convert the proceeds thereof in other properties, securities or investments as they may deem fit.

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2. The Trustees may receive and accept any donations, gifts or bequests from the Settlor or any other person or persons for the purpose of the Trust. The Trustees may also accept deposits or take loans from any person including the Settlor on such terms and conditions as they may deem fit. Without affecting the generality of the powers, provisions and authorities vested in the Trustees under these presents the Trustees' shall have in addition thereto and not in substitution thereof, the following powers and authorities and they shall be entitled to execute all acts, documents and things necessary, ancillary or incidental hereto, that is to say :-
 - a. To open banking accounts of the Trust in any bank or banks of repute in the of the Trustor in the name of any Trustee or Trustees and such bank account may be operated by any one of the Trustees individually.
 - b. To borrow monies or raise loans and funds required for any purpose, power or provision either directly or indirectly concerned with the objects of this Trust or incidental to these presents from any bank or other person or concern.
 - c. To draw, make, accept, endorse, discount, execute or issue promissory notes, bills of exchange and other negotiable instruments.
 - d. To purchase, take on lease or sub-lease, leave and license basis, co-operative schemes or any other arrangements or in exchange or hire movable or immovable property including residential flats or commercial units and any rights, benefits or privileges which the trustees may think necessary or convenient.
 - e. To construct, develop, maintain, erect, fabricate and alter any building, structures, industrial estates, factories and storage tanks or works of any nature whatsoever necessary or convenient or as the Trustees may think fit.
 - f. To sell, improve, manage, develop, exchange, lease, mortgage, pledge, hypothecate, dispose of or turn to account and deal with all or any part of the Trust Fund and premises hereby settled or any part or parts thereof.

- h. To purchase on ownership or take on rent or compensation residential flats, business premises, industrial sheds or factory premises, godowns or open plots of land and let out the same on leave and license or compensation or warehousing charges or storage charges.

To carry on any business or businesses including that of import or export of any commodities, import and export and banking or enter into partnership or joint ventures or other arrangements with any other person, firm, body corporate, society, federation, association of individuals or otherwise howsoever for carrying on any business or businesses, industries or commercial activities for and on behalf of the Trust and to appoint anyone or more Trustees to be partners, representatives or nominees or nominee for and on behalf of the Trust to carry out or implement any such arrangements.
- j. The Trustees shall be entitled to determine whether any money or property shall for the purpose of this Trust be considered as capital or income and whether expenses, outgoing or loans ought to be paid or borne out of the corpus or income and any such determination of the Trustees shall be conclusive.
- k. The Trustees may deposit any documents of title or any other papers or documents or certificates held by them relating to any movable or immovable property or relating to the Trust under these presents with any bank or bankers or any other person, firm, or company whatsoever for safe custody and may pay any such charges payable in respect of such deposits.
- l. The Trustees instead of acting personally, may employ and pay any agents, person or representative including any bank or insurance company to transact any business or to do any act whatsoever in relation to the Trusts of these presents including the receipt and payment of moneys without being liable for loss and shall be entitled to be allowed and be paid all charges and expenses incurred hereby.
- m. The Trustees may from time to time appoint on such terms with or without remuneration as they may determine any immovable or movable property subject to the provisions of this Trust and the Trustees shall have powers to pay them salary, wages, emoluments, fees and remuneration.

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- n. In the event of the Trustees doing any business or starting an industry or undertaking either themselves in partnership with others or as joint venture and their incurring any losses thereby, they will be entitled to be reimbursed out of the Trust all losses incurred as well as all costs, charges and expenses incurred by them in starting or defending any proceedings.
- o. The Trustees shall have the power to make investments in movable or immovable property, to give loan on interest or otherwise to purchase shares, debentures and other securities, Government bonds etc and to make any other investments as the Trustees in their sole discretion may deem suitable.
 - 1. In the event of the Trustees purchasing an immovable property or properties out of moneys belonging to the Trust it shall be lawful for the Trustees to repair, pull down, or rebuild them or construct any other buildings or structures out of the corpus of the Trust Fund and to give such properties on lease or tenancy or leave and license or in any other manner on such terms at such rent or rents and upon such conditions as the Trustees may think fit and to make allowance with tenants and others and the Trustees shall also have the power to condone breaches of covenants and to accept surrender of lease or tenancy etc. and generally shall have all powers of management of such immovable property or properties as absolute owners without being responsible for loss or damage that may happen thereby and it shall be lawful for the Trustees at any time to sell such immovable properties or property or part or parts thereof or easements rights or privileges exercised or enjoyed in, over, for upon or under such immovable property or properties and upon any such exchange to give or receive moneys for equality or exchange.
 - 2. The Trustees may make any such sale as aforesaid either by public auction or private contract and may make or agree to any stipulations or provisions as to evidence to title or commencement of title or otherwise to any conditions of sale or contract for sale or exchange and may buy in at any sale by auction and rescind or carry any contract and enter into any new contract for any of the purposes aforesaid without being responsible for any loss. The Trustees may execute assurances and give effectual discharge for any such sale or exchange which they may think proper.

3. Any of the trustees may resign from the office of trustee on giving one month's notice in writing in advance to the other trustee or trustees and upon expiry of such notice the Trustee giving such notice shall cease to be a Trustee.
4. Any seat or seats of trustees vacant due to death or resignation of trustees or being incapable or unfit to act shall be filled by the continuing or surviving trustee or trustees from successors. If the Trustees so appointed or any of them or any future Trustee or Trustees hereof shall die or remain abroad for more than 2 years continuously or become bankrupt or insolvent or desire to be discharged or refuse or become unfit or incapable to act or if the Trustees shall be desirous of appointing any additional Trustees or Trustee along with them then in and every such case it shall be lawful for the Trustees or the surviving or continuing Trustees or Trustee for the time being and if there be no surviving or continuing Trustee or the refusing or retiring Trustees or Trustee if unwilling to act and failing them then the heirs, executors or administrators of the last surviving or continuing Trustee/Trustees becoming unfit or incapable to act to appoint a new Trustee or Trustees and upon any such appointment the number of Trustees of these trust shall at no time be less than two nor more than seven and upon every such appointment the Trust property and the Trust Fund thereof shall (if and so far as the nature thereof or the other circumstances so require or admit) be transferred so that the same may be vested in the Trustees or Trustee for the time being and every Trustee so appointed may as well before or after such transfer of the Trust property or funds act and/or assist in the execution of the Trusts and powers of these trust as fully and effectively as if he had been hereby originally constituted as a Trustee hereof. Acceptance in writing by the substituted or additional Trustee or Trustees shall be sufficient to vest the Trust Funds in such Trustees or Trustee.
5. Every one of the Trustees for himself doth hereby agree that in the event of his vacation of the office of the Trustee, he shall do all necessary acts, deeds and things for effectively transferring over unto the name/names of the additional Trustees or Trustee the Trust Fund and all costs attending such transfer shall be borne out of the income of the Trust Funds.

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6. The Trustee will from time to time decide questions arising with respect to the administration of the Trust and may keep a record by way of minutes of work done and resolutions arrived at by them at their meetings convened or by circular.
7. In case any Trustee whether present or future, happens to be a professional person he will be entitled to payment of professional fees for work done by him or by a firm in which he is a partner and he shall not be liable to account for any share of profits received by him from the firm.
8. And it is hereby further agreed and declared that the Trustees for the time being of these presents shall be respectively chargeable only for such Trust Funds and the income including moneys, stocks, funds, shares and securities as they shall respectively actually receive notwithstanding their responsibility and shall be answerable and accountable only for their own acts, receipts, neglects and/or defaults and not for those of the other or others of them nor any banker, broker, auctioneer or agents or any other person or persons into whose hands any Trust Funds or Trust income may be deposited or come nor for lending or any security without than marketable title nor for the insufficiency or deficiency of any stocks, funds, shares, securities nor any other loss unless the same shall happen through their own willful defaults or dishonesty respectively and also that the Trustees or Trustee for the time being of these presents may reimburse themselves or himself and pay and discharge out of the Trust Funds and property all expenses incurred in or about the execution of the Trust or powers of these presents.
9. The Trustees shall have power from time to time to make rules and bye-laws relating to their meetings and conduct of the business and otherwise as to the management of the Trust Fund and from time to time carry out, alter or add to such rules or bye-laws provided however that such rules or bye-laws are not inconsistent with the terms of these presents.
10. Notwithstanding anything contained in this deed, in the event of any of the beneficiary's requiring money in an emergency, the trustees may, in their discretion, distribute any portion of the trust property to the beneficiaries to meet any such emergencies.

7. Accounts of the trust

The trustees shall keep and maintain proper accounts of income, expenditure and investments of the trust and will get them audited every year with the auditor within the specified time limit. Financial year of the trust will be from 1st April to 31st March. The trustees shall

8. Trust Revocability

The Trust being established hereby shall be irrevocable and no part of the Trust Fund shall in any circumstances whatsoever be paid or lent to or be applied for the benefit of the Settlor. If the Trust fails or is held to be invalid for any reasons, there shall be no resulting trust in favour of the Settlor but the assets of the Trust shall be divided amongst the beneficiaries in the proportion mentioned in this deed.

IN WITNESS WHEREOF the parties hereto have hereunto set and subscribed their respective hands the day and year first hereinabove written.

That the trust is hereby expressly declared to be a private trust from date (mention relevant date) and all provisions of this deed are to be constituted accordingly subject to provisions of the Indian Trust Act, 1882.

SIGNED AND DELIVERED by the

Within named Settlor

Mr. _____)

in the presence of)

SIGNED AND DELIVERED by the

Within named Trustees)

(1) _____ and

(2) _____

in the presence of

(Name of witnesses)

(1) _____

(2) _____

Taxation of private trusts and family trusts

1. Introduction

The private trusts are mainly created for the benefit of one or more than one beneficiary. Main type of private trust is specific and discretionary. Section 2(31) of the Income Tax Act defines "person". Status of private trust is not defined under section 2(31) of the Income Tax Act. Trust is an obligation and not distinct legal person in the eyes of law. Private trusts are representative assessee acting on behalf of beneficiary. What is taxable is income of the beneficiary and not receipt by the trust on behalf of the beneficiary. Thus, a trust per se is not taxable. A pass through status is given to the trust because of the peculiar relationship between the trustee and the beneficiary. Moreover, the liability to pay tax in a representative capacity is on the trustee and not on the trust per se. But section 160(iv) of the Income Tax Act defines that "*representative assessee means 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 trustee.*"; Moreover,, it is clarified in section 161 of the Income Tax Act that "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 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 levied upon and recoverable from the person represented by him."

In some cases a claim made by certain bodies that they do not fall within any of the definition of person provided in section 2(31) due to the sole reason that they are not supposed to have income or profits and gain. To clarify the legal position, an explanation to section 2(31) through Finance Act, 2002 has been inserted so as to provide that "*an association of persons or a body of*

individuals or a local authority or an artificial juridical person shall be deemed to be a person, whether or not, such person or body or authority or juridical person, was formed or established or incorporated with the object of deriving income, profits or gains.”Earlier, CBDT issued press release dated 31.07.2012 and treated private discretionary trusts as “individual” due to difficulties in the e-filing software at that time. In fact, status of the trust is to be determined with reference to the status of beneficiaries. If the beneficiaries are individual, status of trust should be determined as “individual”. However, even after this explanation, and press release, the issue is unsolved as some judicial rulings directed to treat the private trust as “individual”, where as some are in favor to treat them as “AOP”.

Many judicial rulings direct the status of private discretionary trusts as an “individual”. Such judicial rulings held that the term “individual” does not mean only a human being, but it is wider enough to include group of persons forming a unit. In case of Commissioner of Income Tax vs. Shriram Ownership Trust 318 CTR 233, Hon. Madras High Court held that in case of a discretionary trust, trustees are appointed under a trust deed and neither the trustees nor the beneficiaries can be considered as having come together with the common purpose of earning income. They are merely in receipt of income. The mere fact that the beneficiaries or the trustees, being representative assessee, are more than one, cannot lead to the conclusion that they constitute an association of persons. The trustees of a discretionary trust have to be assessed in the status of an individual.

Manu judicial rulings direct that where there are two or more than two beneficiaries and all the beneficiaries are individual, status of such private discretionary trust would be that of individual. If some beneficiaries are individuals and some and non-individuals, status of trust would be individual and where all beneficiaries are non-individual, status of such private discretionary trust would be considered as “company”.

Here, the notable point is that status of trust fixed in the assessment proceedings cannot be changed for penal action. Hence if the income tax department has fixed status of the trust as an “individual”, it cannot change the status to AOP for the purpose of section 194A while distributing income to its members.

Moreover, the private trusts and family trusts cannot obtain benefit of exemption under section 11, 12, 13 of the Income Tax Act. Hence such trusts cannot obtain registration under section 12A of the Act.

2. Taxation of Private Trust

The taxation of Private Trust is governed by provisions of Section 160 to 164 of the Income tax act.

The taxation of Private Trust depends upon the type of the Trust and activities carried on by the Trust.

In case of Revocable Trust, the transfer is disregarded and the income is considered in the hands of the Settlor or Transferor. Hence, the entity Trust is not considered as a separate Tax Entity in case of Revocable Trust. (Section 60)

Only Irrevocable Trust are governed by the provisions of Section 160 to 164 of the Income tax Act.

Status of trustee and taxation

When the Income Tax Law says that the trustees will be representative assessee for income received on behalf of beneficiaries in trust arrangement then the question arise here that what will be status of the trustees. To find the answer of this question, the Income Tax law provides a provision in section 61(1)

“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”.

This sub-section has an important role to determine as to how the Income Tax return in trust arrangement will be filed, who will file, what will be the

income and how the tax liability will be determined. This section starts from the word: -

Representative assessee

As defined in section 160(1)(iv) & (v)

As regards the income in respect of which he is a representative assessee, only for the income, which is derived from the property held under trust. Accordingly, the personal income of the Trustee will be dealt separately for determining taxable income and filing of Income Tax Return. Even for his individual income the status may be different from representative assessee.

Section 160 specifies that a Trustee of the Trust will be taxed as Representative Assessee (Section 160(1)(iv) and (v) – Trust created with a written instrument (160 (1) (iv) or Oral Trust [160 (1) (v)]

(a) Taxation where the shares of beneficiaries are known:

Section 161 provides that the Income tax will be levied in the same manner as would have been applied to the beneficiaries of the Trust [161(1)]. That means the tax will be computed as per slab rates applicable to the individual beneficiaries as it would have been applicable to them individually.

The term “Like manner and to the same extent” is interpreted in the landmark decision of Commissioner of Wealth Tax vs Trustees of H.E.H. Nizam's 108 ITR 555. It would be relevant here to re-produce the ratio of this judgment.

“It is also necessary to notice the consequences that seem to flow from the proposition laid down in section 21, sub-section (1) that the trustee is assessable 'in the like manner and to the same extent' as the beneficiary. The consequences are three-fold. In the first place it follows inevitably from this proposition that 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 wealth 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. This was recognised and laid down by this Court in Madras And lastly, 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. Vide Padmavati Jayakrishna Trust v. Commissioner of Wealth-Tax, Gujarat⁽²⁾ Trustees of Putlibai R.F. Mulla Trust v. Commissioner of Wealth-Tax.⁽³⁾ and Chintamani Ghosh v. Commissioner of Wealth-Tax

The consequences that flow from the proposition laid down in s. 21(1) of Wealth Tax Act by the Apex Court as given above that the trustee is assessable "in the like manner and to the same extent" as the beneficiary, are:

- (i) 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 wealth of each beneficiary;
- (ii) 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 hand of the trustee; and
- (iii) 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.

A Private Trust can either distribute/credit the Income to each beneficiaries who will offer their respective share as income in their respective returns or the Trust will offer the same as income of the Trust and once this second option is exercised, the beneficiary will not again be liable for tax on the same.

A new sub section (1A) was introduced with effect from 1.4.1985 wherein it was provided that in case the Trust had income from profits and gains of any business, the entire income of the Trust (including profits and gains from business) will be taxable at Maximum Marginal Rate (MMR). (Exception in case of a Trust settled under WILL for a relative for maintenance and this is the only Trust settled by the said settlor.) There can be situations where the AO can consider capital gains arising from several transactions of shares as business although the assessee would claim it to be that of Capital Gains. Even rentals from several properties are at times considered as Profits and gains from Business of renting and not under Income from House Property. This will lead to taxation at MMR.

Handbook on Taxation of Private Trust of Income-tax Act, 1961

The status of Trust for the purpose of Income tax will be Individual (CBDT Circular 6/2012 dated 3.8.2012).

It is understood that the Trust cannot be considered as an AOP since a Trustee cannot form any entity with a Beneficiary to do a business as is the criteria for the formation of AOP (more than one person coming together for business) Even if trustee are more than one, they will still not be considered as an AOP (Gujarat High Court)

[CIT v. Deepak Family Trust (1995) 211 ITR 575 : 119 CTR 150 (Guj)]

It has been held that a Trust cannot be considered as a Body of Individuals (Bombay High Court)

[Lalchand Tikamdas Makhija & Anr. v. CIT (1991) 188 ITR 253 : 54 TAXMAN 84 (Bom)]

As per Madras High Court a Trust is not a juristic person and therefore, cannot be considered as an artificial juridical person – [Thanti Trust v. WTO (1989) 178 ITR 1(Mad)]

(b) In case where shares of beneficiaries are not known

Section 164 of the Income tax Act provides that in case where shares of beneficiaries are not known ie in case of Discretionary Trust, the income of the Trust will be taxable at MMR.

However, in case of following conditions :

- (a) None of the beneficiaries have income exceeding limit liable to tax or are beneficiaries under any other trust
- (b) This income from the Trust is receivable under a Trust created under a WILL and this is only trust so created.
- (c) This is a Trust created before 1.3.1970 by Non Testamentary Instrument for a bonafide purpose
- (d) The settlor is a HUF for the benefit of the dependant member of the family

If the above conditions are satisfied, the income will be taxable as AOP.

Taxation of private trusts and family trusts

The conditions relating to Profits and Gains as applicable u/s 161(1A) applies in this case also in case the Trust income includes income from Profits and Gains.

As per provisions of Section 56(2)(x) of the Income tax Act, any amount of asset or money is gifted by a Settlor or Trustee to the Trust where the beneficiaries are relatives as defined in the said Section, then the amount of such gift is not considered as Income u/s 56(2)(x). However, in case of discretionary trust, where the beneficiaries can be added later, this exemption will not be available as the new beneficiary may or may not be a relative.

Example of various scenarios :

Scenario 1:

Trustee X – Beneficiaries A and B sharing equally.

Income of the Trust Rs.10 lacs – no business income.

Specific Trust.

Income will be allocated Rs.5 lacs each to the beneficiary. Either Mr.X can be taxed as representative assessee for A and B at the same rates and same manner as A and B would have been taxed considering their other income.

In the alternative, A and B can offer the same in their hands as their respective income.

Scenario 2:

The above trust has Rs.1 lac as Business Income out of Rs.10 lacs

The entire income of Rs. 10 lacs will be taxed at MMR.

Scenario 3:

In the above trust, the shares of beneficiaries are not defined.

None of the beneficiaries are below basic exemption limit.

The entire income of the Trust will be taxed at MMR.

Scenario 4:

All the beneficiaries under Scenario 3 are below maximum limit chargeable to tax, the income of the Trust will be taxable as AOP. It will not be at MMR but

at slab rates. One income for all beneficiaries put together, hence only one slab deductions will be allowed.

Clubbing Provisions u/s 64

Applicability of clubbing provisions (Section 64) in taxation of private family trust

- 1 In case where spouse is trustee when Individual is settlor.
Trustee/s don't receive the property for their on behalf of or their own benefit but are held for the benefit of the beneficiaries. Hence the income arising from the transferred property in trust arrangement in case of spouse as trustee do not attract the clubbing provisions.
- 2 In case where spouse is beneficiary.
Where the settlor settles the trust in which the spouse is beneficiary then the provision of clause (vii) of section 64(1) of the Income Tax Act, 1961 would be attracted. And the income arising out from the trust property in the hand of trustee for the benefit of spouse will be clubbed in the hands of settlor.
- 3 In case where son's wife is trustee when Individual is settlor.
Same as in case of 1 above. Does not attract Clubbing Provisions.
- 4 In case where spouse is beneficiary.
Where the settlor settles the trust in which the son's wife is beneficiary then the provision of clause (viii) of section 64(1) of the Income Tax Act, 1961 would be attracted. And the income arising out from the trust property in the hand of trustee for the benefit of son's wife will be clubbed in the hands of settlor.
- 5 In case where minor son or daughter is trustee when Individual is settlor.
Trustee should be capable of holding property where no discretion is left with them. In the case of trust arrangement, the trustee/s receive the property from settlor for the benefit of or on behalf of beneficiaries. Trustee/s don't receive the property for their on behalf of or their own benefit. Further, the property is received in consideration of doing something and which is not without consideration. That's why the

Taxation of private trusts and family trusts

income arising from the transferred property in trust arrangement in case of minor son as trustee don't attract the clubbing provisions.

- 6 In case where minor son or daughter is beneficiary.

Where the settlor settles the trust in which the minor son is beneficiary then whether, provision of section 64(1A) is attracted or not is the debatable question.

3. List of applicable sections of the Income Tax Act

Section No.	Heading of section
40A	Expenses or payments not deductible in certain circumstances
56	Income from other sources
60	Transfer of income where there is no transfer of assets
61	Revocable transfer of assets
62	Transfer irrevocable for a specified period
63	"Transfer" and "revocable transfer" defined.
64	Income of individual to include income of spouse, minor child etc.
160	Representative assessee
161	Liability of representative assessee
164	Charge of tax where share of beneficiaries unknown
166	Direct assessment or recovery not barred

4. Provisions in detail

4.1 Taxation of private specific trusts

Section 160(1)(iv) defines trustee as representative assessee. Hence assessment is made on trustee in his representative capacity.

Taxation of private trust is governed by section 161 to 167 of the Income Tax Act. Section 161 deals with taxation of private specific trusts and section 164 deals with taxation of private discretionary trusts.

Section 161(1) sets out the liability of a representative assessee. First part of this section makes him subject, as regards the income in respect of which he is representative assessee, to the same duties, responsibilities and liabilities as if income were received by or accruing to or in favor of him beneficially and he is made liable to assessment in his own name in respect thereof. The second part affords protection to the representative assessee; it states that such assessment shall be deemed to be made upon him only in his representative capacity and also that tax may be levied upon and recovered from him only in like manner and to the same extent as it would be leviable upon and recoverable from the person represented by him. Section 161(2) gives the representative assessee a further measure of protection by making it explicit that "he shall not in respect of that income be assessed under any other provisions of this Act".

For private specific (non-discretionary) trusts when share of individual beneficiaries are determinate, the shares of all beneficiaries are liable to be assessed either by trustees as representative assessee or directly in the hands of the beneficiary entitled to income.

In general cases, if income of such trust does not consist of profits and gains from business or profession, tax is leviable on total income of each beneficiary. If income of such trust consists of profits and gains from business or profession, tax is chargeable at maximum marginal rate. However, as provided under section 161(1A) of the Act, maximum marginal rate is not applicable where profits and gains are receivable under a trust declared by any person by will exclusively for the benefit of any relative dependent on him for support and maintenance and such trust is the only trust so declared by him.

For the taxation of revocable trusts, provisions of section 60, 61, 62 and 63 of the Act are material. Section 60 provides for transfer of income where there is no transfer of assets. It stipulates that all income arising to any person by virtue of a transfer whether revocable or not effected before or after the commencement of the Act would, where there was no transfer of the asset from which arose income chargeable to income-tax, such income of the transferor should be included in his total income. Section 61 provides for the inclusion of the income of the trust in the hands of the settlor in case the trust is a revocable one. Section 62 provides exceptions in certain cases to Section 61. This section provides that the provisions of Section 61 shall not

apply to any income arising to any person by virtue of a transfer 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. Provided that the transferor derives no direct or indirect benefit from such income. Section 63 makes a provision for cases wherein a transfer shall be deemed to be revocable.

In the case of revocable trust, assets can be withdrawn from the trust. Hence income of the trust is taxed in the hands of settlor at the slab rate. As provided under section 63 of the Income Tax Act, a transfer shall be deemed to be revocable if

- (i) it contains any provision for the re-transfer directly or indirectly for the whole or any part of 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.

Section 61 to 63 of the Act does not in any manner imply that right of revocation should be without condition. Hence if there is any condition in the trust deed for revocation of trust, it does not change manner of assessment of trust and the income of such revocable trust will be assessed in the hands of the settlor. Many judicial rulings pronounce that even if the transfer is conditionally revocable, the income still needs to be taxed in the hands of the transferor as long as transfer is revocable. Only due to power reserved in the trust deed for the settlor to reassume the trust property or any income that could make the trust revocable, it cannot be said that settlor is getting benefit of trust property or income therefrom and therefore, assessment cannot be made as per provisions of section 61, 62 and 63 of the Act. Moreover, mere transfer or enjoyment of any income or assets by transferor without there being any right to reassume by the act of transfer which is reserved in the transfer deed would not make it revocable under section 63 of the Act. The transfer deed would be revocable if the deed itself gives the transferor a right to reassume power, directly or indirectly, either over the whole or any part of the income or assets of the transferor. Therefore, resumption of power alone would not affect the position.

In the case of irrevocable non-discretionary trusts, assets cannot be withdrawn from the trust. In such type of trusts, settlor has full control over decisions regarding use of trust assets for beneficiaries. If the settlor is

primary beneficiary, income of the trust is taxed in the hands of settlor at the slab rate.

4.2 Taxation of private discretionary trusts

Section 164(1) of the Income Tax Act deals with taxability of the private discretionary trusts. It sets out how tax shall be charged in case of discretionary trust. This section provides that any income which is not specifically receivable on behalf of or for the benefit of any person or where the individual shares of the person or whose behalf or for whose benefit such income or such part thereof is receivable are indeterminate or unknown, the tax shall be charged at maximum marginal rate. Explanation to section 164(1) provides that

- (i) any income in respect of which the persons mentioned in clause (iii) and clause (iv) of sub-section (1) of section 160 are liable as representative assessee or any part thereof shall be deemed as being not specifically receivable on behalf or for the benefit of any one person unless the person on whose behalf or for whose benefit such income or such part thereof is receivable during the previous year is expressly stated in the order of the court or the instrument of trust or wakf deed, as the case may be, and is identifiable as such on the date of such order, instrument or deed ;
- (ii) the individual shares of the persons on whose behalf or for whose benefit such income or such part thereof is received shall be deemed to be indeterminate or unknown unless the individual shares of the persons on whose behalf or for whose benefit such income or such part thereof is receivable, are expressly stated in the order of the court or the instrument of trust or wakf deed, as the case may be, and are ascertainable as such on the date of such order, instrument or deed.

Many judicial rulings have held that a Trust would be determinate trust even if the Trust Deed only provides for manner of computation of beneficial interest of each beneficiary (e.g. equally, among all living family members or a case where the beneficial interest in the Trust would vary due to birth and demise of family members) and may not state the interest of each beneficiary in absolute terms. For identification of beneficiaries, it is not necessary that the beneficiary in the relevant previous year should be actually named in the order or the instrument of trust or wakf deed, all that necessary is that the

beneficiary should be identifiable with reference to the order or the instrument of trust or wakf deed on the date of such order, instrument or deed.

Moreover, it is not requirement of the law that the trust deed should actually prescribe the percentage share of beneficiary in order for the trust to be determinate. It is enough if the shares are capable of being determined based on the provisions of the trust deed. Hence if the trust deed sets out expressly the manner in which the beneficiaries are to be ascertained and the share to which each of them would be entitled without ambiguity, then it cannot be said that the trust deed does not name the beneficiaries or that their shares are indeterminate. The persons as well as the shares must be capable of being definitely pin-pointed and ascertained on the date of the trust deed itself without leaving these to be decided on a future date by a person other than the settlor either at his discretion or in a manner not envisaged in the trust deed. Even if the trust deed authorizes addition to initial contributors, the same would not make the beneficiaries unknown or their shares indeterminate. Even if the scheme of computation of income of beneficiaries is complicated, it is not possible to say that the share income of the beneficiaries cannot be determined or known from the trust deed. The real test is whether shares are determinable even after the trust is formed or may be in future when the trust is in existence.

The rate of tax payable by trustees upon the income of a discretionary trust is that which would be paid upon such income by an association of persons. Some discretionary trusts insert a clause in a trust deed that they are free to pay income to the any or all of beneficiary at their discretion and in such proportion as they thinks fit. In such cases, there may be issue that whether tax should be recovered from trustee or from beneficiary by invoking provisions of section 164. In case of CIT vs. Kamalini Khatau (1994) AIR 2759 (SC) and in case of Moti Trust vs. CIT (1999) 236 ITR 37 (SC), Hon. Supreme Court held that where, such income or a part thereof is actually received by a beneficiary, tax shall be charged thereon at the rate applicable to the total income of the beneficiary. Section 166 of the Act states that nothing in Section 160 to 166 shall prevent the direct assessment of the person, on whose behalf or for whose benefit, income therein referred to is receivable or the recovery from such person of the tax payable in respect thereof. The word "receivable" in the context in which it occurred in Section

164 indicated that it was the trust deed that one had to look at and not the actual exercise of discretion by the trustees in the course of the year. Section 164 does not make the trustee of a discretionary trust liable to assessment or recovery of tax on the income of the trust. Hence it cannot be

contended that beneficiary of a discretionary trust, even he has received income in the accounting year cannot be taxed thereon, as section 164 does not provide for such contingency. When a trustee is assessed to tax upon the income of the trust it is really the beneficiaries who are sought to be assessed in respect of their interest in the trust properties through the trustee. Hence in such cases revenue has option to assess and recover tax from either the trustees or the beneficiaries of a discretionary trust in respect of such income thereof as has been distributed and received by the beneficiaries in the course of the accounting year.

Hon. Calcutta High Court in case of Commissioner of Income Tax vs. Shri Krishna Bandar Trust, 1993 201 ITR 989 Cal observed that Section 164(1) of the Act only lays down the rate of tax applicable to discretionary trust. It is not concerned with manner of computation of total income.

If the income of the trust having profit and gains from business or profession, whole income is taxable in the hands of trustees at maximum marginal rate, except when the trust declared exclusively for the benefit of a relative dependant and if the trust is only trust declared by him. When share of individual beneficiaries are indeterminate, trustees are liable to tax as a representative assessee.

However, maximum marginal rate is not applicable in the following cases and income will be chargeable as if it were income of Association of Person (AOP):

- (1) Where none of beneficiaries have any other income chargeable to tax under the Income Tax Act and none of the beneficiaries is a beneficiary under any other trust or
- (2) Where the relevant income or part of relevant income is receivable under a trust declared by any person by will and such trust is the only trust so declared by him or
- (3) Where the trust is a non-testamentary trust created before March 1, 1970 for the exclusive benefit of relatives of the settlor mainly

dependent on him for their supporter maintenance or, where settlor is a Hindu undivided family, for the exclusive benefit of its members so dependent upon it or

- (4) Where the trust is created on behalf of a provident fund, superannuation fund, gratuity fund, pension fund or any other fund created bona fide by a person carrying on a business or profession exclusively for the benefit of persons employed in such business or profession.

The rationale behind charging business income of trust at maximum marginal rate is explained in CBDT circular No. 387 dated 06/07/1984 by stating that

“Trustees of a trust are ordinarily not expected to carry on any business, because implicit in the nature of business is the possibility of incurring loss and no prudent trustee would like to risk the trust’s property in business venture. However, increasingly it has been seen that taxpayers are conducting business through the medium of trusts and the arrangements are mainly entered for the purpose of tax avoidance, the main object being to avoid payment of the tax firm tax which would become payable if the business is carried on in partnership”

Here, the notable point is that if the private discretionary trust has income from capital gain, it is chargeable at the rate specified under section 112, 112A and 111A of the Act and not at the maximum marginal rate. The rate of tax on capital gain should be at par at the rate applicable to the underlying individual beneficiaries.

Moreover, where a settlor irrevocably transfers any asset by way of a trust to a trustee, and if such an asset is held as capital asset in his hands, then such transfer would be exempt from taxation as per section 47(iii) of the Act. Accordingly, the recipient i.e. the beneficiary/ trustee will get the cost of acquisition of the previous owner as per section 49(1) and even the period of holding would include the period for which such asset was held by the previous owner. In case, if the settlor holds the asset as stock in trade, then business loss would be booked in his case. Correspondingly, the recipient would not get the advantage of extended period of holding and cost to the previous owner

Trust created for the sole benefit of an individual has to be assessed as an “individual” and not as an “AOP”. Consequently, a trust is eligible for deduction under section 54F of the Act.

Moreover, if the family trust is created for the beneficiaries not existed at the time of executing trust deed for example would be spouse, unborn child, would be son in law or would be daughter in law, but their share are determinate, provisions of section (1) are not attracted and the trust cannot be assessed at maximum marginal rate. However, some judicial rulings direct that when “would be wife” and “unborn child” is included as beneficiary in the private specific trust, though the beneficiaries are known and the shares of beneficiaries are determinate apparently, but they are fluctuating depending upon the contingencies such getting married, begetting children and number of beneficiaries will change during the year, if such contingencies will happen. Hence in such cases, beneficiaries cannot be regarded as unknown. As pronounced by many judicial rulings, share of beneficiaries can be said to be indeterminate if at the relevant time the share cannot be determined but merely because the number of beneficiaries vary from time to time, one cannot say that it is indeterminate.’

Further, any private trust cannot pass a resolution or cannot adopt any course so as to change type of the trust. Hence even if any discretionary trust has passed resolution during the year to make it a specific trust, the trust is liable to pay tax as per provisions of section 164, which is applicable to discretionary trust.

4.3 Applicability of clubbing provisions to family trusts

In family trusts, settlor of the trust transfers his property for the benefit of his spouse, minor child or other relatives. Section 64(1)(vii) provides that when income arises directly or indirectly to any association of persons from assets transferred directly or indirectly otherwise than for adequate consideration to the association of person by such individual, to the extent to which the income from such assets is for the immediate or deferred benefit of his or her spouse, such income will be included in total income of that individual. Similarly, section 64(1)(viii) provides to club income from assets for the immediate benefit of son’s wife and section 64(1A) provides to club income of minor children. Hence, if the settlor has transferred his property by forming his family trust and indicated in the trust deed to give share of income from trust to his minor child, provisions of section 64(A) will be applicable and

such income will be taxable in the hands of the settlor. But if it is provided in the trust deed to give income from trust to minor child when he or she attains majority and till that time, such income of the trust will be accumulated or will be transferred to corpus fund, such income will not be clubbed with the income of the settlor as at the time of receiving or enjoying benefit out of transferred property, child is not minor.

4.4 Applicability of section 56(2)(x) to private and family trusts:

Any property received by any private trust for inadequate consideration or without consideration in excess of Rs.50000/- will be taxable as per section 56(2)(x) under the head "income from other sources" in the hands of recipient trust. However it is pertinent to note that section 56(2)(x) is not applicable to any sum of money or property received-

- (1) From any fund or foundation or university or other educational institution or hospital or other medical institution or any trust or institution referred to in clause (23C) of section 10.
- (2) From or by any trust or institution registered u/s. 12A or 12AA.
- (3) By any fund or trust or any university or other education institution or any hospital or other medical institution referred to in sub-clause (iv) or sub-clause (v) or sub-clause (vi) or sub-clause (via) of clause (23C) of section 10.
- (4) From an individual by a trust created or established solely for the benefit of relative of the individual.

If the private trust or family trust has received amount of money without consideration for more than Rs.50000/- or immovable property, whose stamp duty exceeds Rs.50000/- or for a consideration, which is less than the stamp duty value by an amount exceeding Rs.50000/-, it will be taxable.

Also, section 56(2)(x) will be applicable in case settlement of any sum of money or any property by the settlor on the trustee to be used for the benefit of the beneficiaries or any subsequent donation by any person. Section 56(2)(x) levies tax on receipt of property without consideration or for inadequate consideration. When a settlor settles a property on the trustee, there is an obligation on the trustee to use the property for the object of the trust and for the benefit of the beneficiaries. It can therefore, be said that on settlement of Trust, when the Trustee is receiving the property, there is an

obligation accepted by the Trustee and acceptance of such obligation would be an adequate consideration for the receipt of property, thereby ousting the applicability of section 56(2)(x). However, in case of determinate trust, beneficiaries cannot taxable under section 56(2)(x). As pronounced by Hon. Supreme Court in case of W.O. Holdsworth vs. The State of Uttar Pradesh (1958) 33 ITR 472 (SC), *"The trustee is the legal owner of the trust property and the property vests in him as such. He no doubt holds the trust property for the benefit of the beneficiaries but he does not hold it on their behalf. The expression "for the benefit of" and "on behalf of" are not synonymous with each other."* Thus, the rights which the beneficiary get is a limited one and such right in the property is not covered within the definition of term property as covered by section 56(2)(x) and therefore no tax would be leviable. The other view is that the 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 attract 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, this view is subject to the conditions mentioned in the trust deed in this regard..

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. Accordingly, neither the trustee can be taxed in a representative capacity nor the beneficiary. This is because, there can be no double taxation of the same income. If on the receipt of any sum of money/ property, no tax was paid by the beneficiary or by the trustee on behalf of the beneficiary, in such cases a taxable event arises on receipt of such property or sum of money by the beneficiary on distribution. Such sum of money/ property would be taxable as the same can be stated to be received without consideration. Hence in case of a discretionary trust, where the receipt of property on settlement is held to be not taxable, then on distribution to the beneficiary, it can be held to be taxable under section 56(2)(x) of the Act,

As per proviso to section 56(2)(x) of the Income Tax Act, if any such sum is received from an individual by a trust created or established solely for the benefit of the relative of the individual, it will not be taxable under this section. Hence if family trust created solely for the benefit of relatives of the settlor has received any gift or any immovable property without consideration

from any person, it will not be taxable in the hands of such family trust. If the trust is determinate trust and only some of the beneficiaries are relatives of the settlor, then to the extent of their share, section 56(2)(x) is not applicable. In case of a discretionary trust, the benefit of exemption under this section can be taken only when all the beneficiaries are relative of the settlor. Similarly, receipt of property on the occasion of the marriage of beneficiary cannot be taxed.

Meaning of the term “relative” as given in the explanation to section 56 is as under:

- (i) Spouse of the individual
- (ii) Brother or sister of the individual
- (iii) Brother or sister of spouse of the individual
- (iv) Brother or sister of either of the parents of the individual
- (v) Any lineal ascendant or descendant of the individual
- (vi) Any lineal ascendant or descendant of the spouse of the individual
- (vii) Spouse of the person referred to in clauses (ii) to (vi).

4.5 Disallowance of cash expenditure by Charitable trust exceeding Rs.10000/-

As per Budget 2018, expenditure by private and family trusts governed by section 10(23C), 11 and 12 for which cash payment exceeding Rs.10000/- is made in a day, deduction for such expenses will not be allowable. Hence section 40A(3), 40A(3A) and 40A(ia) are applicable to private and family trusts also. Moreover, non deduction of TDS will also attract disallowance in the hands of such trusts. Hence 30% of total expenses on which TDS is not deducted or deducted but not paid to the Government before due date of filing return of income specified u/s.139(1) shall not be treated as application of income u/s.11(1) of the Income Tax Act.

5. Applicability of filing of income tax return and audit

If income of the private trust exceeds the basic exemption limit, audit of private trust is mandatory as per the Income Tax Act and audit report in Form No.10B is required to be uploaded one month prior to the due date of furnishing the return of income under the Income Tax Act.

If the gross total income of the private trust or family trust is in excess of the basic exemption limit, the trust is required to file ITR-5. In case the trust is required to file income tax return mandatorily under section 139(4A) or 139(4B) or 139(4C) or 139(4D) or 139(4F) of the Income Tax Act, nITR-7 is required to be filed by such trust.

If the trust is required to get its accounts audited, due date of filing return of income is 31st October and if the trust is not required to get its accounts audited, due date is 30 July of the assessment year.

6. Summary of important judgments applicable to private trusts and family trusts

- **Commissioner of Income Tax vs. Shriram Ownership Trust 318 CTR 233**

Assessee was a private discretionary trust. AO treated amount of corpus as income from other sources by invoking provisions under section 56(2)(viii) of the Act treating the trust as an individual. Madras High Court held that as the trust in the status of representative assessee has received income on behalf of individual beneficiaries, status of trust shall be “individual” and the contribution received without any reciprocation shall be taxable as “income from other sources” as per provisions of section 56(2)(vii) of the Act.

- **Commissioner of Income Tax vs. India Advantage Fuund-VII (2017) 392 ITR 209 (Kar. HC)**

Issue before Hon. Karnataka High Court was whether trust shall not be assessed as AOP even if the requirement of section 164(1) were not met in as much as the shares of beneficiaries were indeterminate /unknown. AO invoked provisions of section 164(1) on the ground that name of beneficiaries were not mentioned in the trust deed. Hon. Karnataka High Court held that for identification of beneficiaries, it is not necessary that the beneficiary in the relevant previous year should be actually named in the order or the instrument of trust or wakf deed, all that necessary is that the beneficiary should be identifiable with reference to the order or the instrument of trust or wakf deed on the date of such order, instrument or deed. Hence in such case, provisions of section 164(1) cannot be applied.

- **Balgopal Trust vs. ACIT (ITAT Mumbai) , ITA No. 5661/Mum/2016**

Assessee trust was private specific (non-discretionary) trust incorporated for

the benefit of a sole beneficiary, who was an individual. The trust sold unquoted equity shares to the company and the company agreed to give some consideration by way of a flat. The trust claimed deduction under section 54F, which was rejected by AO on the ground that deduction under said section is available only to individual and HUF and assessee trust being AOP not entitled to this deduction. ITAT Mumbai held that section 161 of the Act does not intend to charge tax upon the persons other than beneficial owner of income. Whatever benefits the beneficiary will get in a particular assessment must be made available to the trustee while assessing him under section 161. Consequently, a trust is eligible for deduction under section 54F of the Act.

- **Commissioner of Income Tax vs. M. R. Doshi (Dead) (1995) 211 ITR 1 (SC)**

Trust deed provided to accumulate income of the trust until the children attains majority. Issue before Hon. Supreme Court was whether income of the trust could be included in total income of the transferor (settlor) under the provisions of section 64 of the Act? Hon. Supreme Court held that section 64 provides that immediate or deferred benefit should be for the benefit of minor child. The deferment of the benefit is beyond the period of minority of the children. Hence provisions of section 64 cannot be invoked.

- **Commissioner of Income Tax vs. Sri Abhayananda Rath Family (2002) 255 ITR 436**

It was incorporated in the trust deed that every minor children would get equal benefit after attaining the age of majority. AO clubbed income of the trust in the hands of the settlor by applying provisions of section 64(1)(vii) of the Act. Hon. Orissa High Court held that for an artificial fiction to be created under the said provision for computing the total income of an individual under Section 64(1)(vii) of the Act, the benefit should accrue to the beneficiary during the period of his/her minority. If the benefits/assets are to be received by the beneficiaries when they attain majority, the said provision will not be attracted.

- **Commissioner of Income Tax vs. M. K. Kannan Marriage Benefit (1999) 240 ITR 785 (Mad.)**

Assessee was four trusts, out of which two trusts were created for the benefit of would be son-in-law of the settlor and other two trusts were created for the

benefit of would-be-daughter in law. It was provided in the trust deed that if the intended marriage did not take place within a period of 20 years for any unforeseen reason from the date of the deed, the trust property would become reinvested in the settlor as a beneficial owner. Revenue assessed the trust at maximum marginal rate by applying section 164(1) of the Act. Hon. Madras High Court held that because the person was non-existent at the time of the execution of the trust deed, it cannot be taken that the beneficiary was not known. Since the beneficiaries were known under the relevant terms of the deed of trust, the provisions of section 164(1) of the Act are not applicable.

- **M/s. A.K.K. Specific Family Trust vs. The Commissioner of Income Tax TCA No. 302 to 304/2010**

Issue before Hon. Madras High Court was whether provisions of section 164(1) can be applicable when reference of “would be spouse” or “would be child” as beneficiaries is made in the trust deed. Hon. Madras High Court held that mere reference to “would be spouse” or “future child” by itself would not result in rejecting the claim of the trust and assessing it as a trust. So long as the trust deed gives the details of beneficiaries and the description of the person who is to be benefitted, the beneficiaries cannot be said to be uncertain, merely because wife/children cannot be known until the marriage and begetting of children by the beneficiary.

- **Commissioner of Income Tax vs. P. Sekar Trust (2010) 321 ITR 305**

Shares of all beneficiaries in the assessee trust were equal. But after marriage of two beneficiaries they become HUF and on birth of their child, such children also become beneficiaries. Hence with the increase in number of beneficiaries, share of each person gets reduced. AO treated the trust as representative assessee and framed the assessment under section 164 of the Act. Assessee trust contended that shares of each beneficiary can be considered as determinate and therefore assessment of trust cannot be done by invoking provisions of section 164 of the Act. Hon. Madras High Court held that right of beneficiaries to get the income from the trust comes into future date at the time of happening of future contingencies. Hence provisions of section 164 are not attracted.

- **CIT vs. Kamalini Khatau (1994) SCC (4) 308**

Issue before Hon. Supreme Court was whether the revenue has an option to assess and recover tax from either the trustees or the beneficiaries of a discretionary trust when the income thereof is distributed and received by beneficiaries in the accounting year? Assessee was sole beneficiaries of three trusts and one of the beneficiaries for other six trusts. Assessee contended that as payment of income under said six trusts to any one or more beneficiaries thereof were indeterminate and unknown, income of the trust should be taxable in the hands of trustees as per provisions of section 164 of the Income Tax Act. Hon. Supreme Court directed that Section 164 does not make the trustee of a discretionary trust liable to assessment or recovery of tax on the income of the trust. Hence it cannot be contended that beneficiary of a discretionary trust, even he has received income in the accounting year cannot be taxed thereon, as section 164 does not provide for such contingency. When a trustee is assessed to tax upon the income of the trust it is really the beneficiaries who are sought to be assessed in respect of their interest in the trust properties through the trustee. Hence, in such cases revenue has option to assess and recover tax from either the trustees or the beneficiaries of a discretionary trust in respect of such income thereof as has been distributed and received by the beneficiaries in the course of the accounting year.

- **CIT vs. Ambala Sarabhai D. Trust (2004) 187 CTR Guj.**

Assessee was discretionary trust. The trust passed resolution to make it as specific trust. Entire income of the trust for the previous year was paid to one of the beneficiary and filed ITR showing total income as "Nil". Revenue invoked provisions of section 164 of the Act and made the income liable to be taxed in the hands of the trust. Hon. Gujarat High Court held that it is not open to the trust to pass any resolution or to adopt any course so as to make it a specific trust. Hence the trust is liable to pay tax as per provisions of section 164 of the Act.

- **CIT vs. Devshi Trust (2005) 199 CTR Bom. 600**

Issue before Hon. Bombay High Court was whether provisions of section 164 can be invoked when type of trust changed by passing resolution to define share of beneficiaries. Assessee trust was assessed as an AOP. During the financial year a resolution was passed to define name and share of

beneficiaries and computed the income of the trust as Nil. As share of beneficiaries were not known when the trust came into existence, AO assessed the trust as discretionary trust and taxed income of the trust as per provisions of section 164 at maximum marginal rate. It was held by Hon. Bombay High Court that even if initially the trust was discretionary trust, as specific share of beneficiaries were defined there after by passing resolution by trustees, the definite trust came into existence. Hence provisions of section 164 cannot be invoked.

- **Income Tax Officer vs. Arihant Trust and Others (1995) 214 ITR 306 Mad.**

Assessee trust was private trust and paid the interest amount without deducting income tax as per provisions of section 194A of the Act. Income Tax officer filed complaints under section 276B read with section 278B of the Act. Assessee contended that as the trust was assessed as “individual” in assessment proceedings, provisions of section 194A is not applicable. Hon. Madras High Court held that as the trust was assessed as individual while receiving income of its business on behalf of its beneficiaries, there is no necessity to change its status while it was distributing its income to its beneficiaries and there is no law to alter its status for other purposes. Hence the trust cannot be prosecuted for failure to deduct the tax at source.

- **ITO vs. ARCIL SBPS 024 I Trust , ITA No. 376/Mum/2021**

Assessee trust was a private trust created by Assets Reconstruction Company (India) Ltd. (ARCIL) for the purpose of liquidating /recovering/realizing the Non-Performing Assets (NPA) taken over by ARCIL-SDPS024-I. Revenue treated the trust as an AOP and taxed the income in the hands of the trust on the ground that contributors were beneficiaries themselves and each of the beneficiary had entered into contribution arrangement. Assessee trust contended that as the trust is revocable trust, income of the trust should be assessed in the hands of the transferor. ITAT Mumbai held that there is no prohibition in the Trust Act on the settlor becoming beneficiary. Moreover, section 61 to 63 of the Act does not in any manner imply that the right of revocation should be without conditions. Hence assessee is revocable trust and not AOP and income of the trust shall be taxable in the hands of the contributors.

- **Mrs. Leela Nath vs. Commissioner of Income Tax (1982) 134 ITR 507 (Cal.)**

Assessee trust had provided in the trust deed that if at any time there be no beneficiary to income or property of the trust and there be no will of the founder, the corpus of the trust and all income of the same will be transferred to another trust. AO assessed income of the trust as per provisions of section 62(1) of the Act holding the trust as revocable trust. Hon. Calcutta High Court held that assessee did not derive income from the trust property by withdrawing the amount free of interest. Only due to power reserved in the trust deed for the settlor to reassume the trust property or any income that could make the trust revocable, it cannot be said that settlor is getting benefit of trust property or income therefrom and therefore, assessment cannot be made as per provisions of section 63 of the Act.

- **Commissioner of Income Tax vs. Muthukrishnan (2003) 181 CTR Mad. 129**

Trust deed of the assessee trust provided that the corpus of the trust shall not be divided or distributed among the beneficiaries until the duration of the trust (for a period of fifteen years), or sooner, if all the beneficiaries unanimously agreed to terminate the trust even before the expiry of fifteen years. Out of the interest income of the trust, the beneficiaries were to receive only one-third and the balance was to be accumulated. The trustees were also empowered to carry on business and invest the funds of the trust and loss, if any, was to be deducted from the corpus. AO assessed entire income in the hands of trustees and taxed in the status of AOP. Hon. Madras High Court held that the trustees assumed no higher liability than the beneficiaries themselves were required to bear under the law. If the beneficiary was not to be taxed, that tax could not be levied on the trustee who only represented the beneficiary and no more, in cases where the identity of the beneficiary was known and the share of the beneficiary was determinate. Hence such income cannot be taxed in the hands of trustees.



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