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PROFESSIONAL EXCELLENCE

C.V.O.CA'S NEWS & VIEWS

FOR MEMBERS / SUBSCRIBERS / VOL. 25 - NO. 11 JUNE 2022

From President's Desk...

Dear Professional Colleagues and Readers,

As this is my last communications as a president to all, I don't want to lose opportunity to share my feelings, experiences of amazing year with our prestigious CVOCA organisation. I am very grateful and feeling proud for being associated with organisation from my journey as a Committee member to President. I am sure this feeling will not be end here, it will be with me for lifelong as a past president.

I want to thank each and every one of you for giving me this opportunity. This has been an amazing year with mix of online and offline events. It was great learning experience of planning, organising, arranging, making it successful. I have always tried to give my best while performing to give justice to you all for keeping trust on me.

"Every Beginning has End and Every End has New Beginning". Our Association is entering into Golden year of 50s. Association has set new Milestones every year & has achieved its motto of Professional Excellence."

Events in Retrospect

With objective to guide people on various alternative investment options available with its risk, Program Committee has organised Public Programme on Alternate Investment options on 7th May, 2022 at Yogi Sabhagruh. It got overwhelming participation of more than 400 audience.

With increasing complexities in GST Law, Publication & Training Committee has planned 2nd GST Course, in which more than 70 participants are enrolled for training with experienced Members of our Association.

Upcoming Programme

Students RRC

Students are future of our profession. Student Committee has planned two days RRC for Students at Tithal, Valsad. All CVOCA firms are requested to register their article Students to make them part of learning & networking experience.

Annual General Meeting

Flagship event of AGM of the Association is planned on 18th June 2022 at Chichpokli Wadi followed by entertainment programme and Self contributory Dinner. All members are requested to participate and make event memorable with your presence.

The Passion to Unlock Potential was our motto for the year 2021-22. I feel that we have achieved this goal with support of seniors & committee members. Also I sincerely place on record my gratitude to everyone who have contributed directly or indirectly to my successful journey as a President of the Association.

It's now time to pass on the legacy to my successor. I wish new team a very successful and eventful year.

Stay healthy, Stay safe.

Thank you all..... Always in Gratitude

CA Rahul Nagda

June 1, 2022

Trusts, Estates and Succession Planning

HEAT WAVE

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FROM THE DESK OF CHAIRMAN

Heat wave is a condition of air temperature which becomes fatal to human body when exposed. It is defined based on the temperature thresholds over a region in terms of actual temperature or its departure from normal.

Heat wave is considered if Maximum temperature of a station reaches at least 40C or more for Plains and at least 30C or more for Hilly regions. The occurring of Heat Wave in India is mainly during March to June and in some rare cases even in July. The Peak month of the heat wave over India is May.

The criterion for describing Heat wave forcoastal area is when maximum temperature departure is 4.5C or more from normal,Heat wave may be described provided actual maximum temperature is 37C or more

The Heat wave in India is monitored by India Meteorological Department (IMD) , It has a big network of surface observatories covering entire country to measure various metrological parameters like Temperature, Relative humidity, pressure, wind speed and direction etc,. IMD predicts heat wave based on synoptic analysis of various meteorological parameters and from the consensus guidance from various regional & global numerical prediction,there are favorableconditions for Heat Wave like

i) Prevalence of hot dry air over a region,

ii) Absence of moisture in the upper atmosphere

iii) The Sky should be practically cloudless and

iv) Large amplitude anti-cyclonic flow over the area,. The Heat wave is determined by Heat Index which is the combination of air temperature and relative humidity,

India Meteorological Department also issues Colour code Impact warning like

i) GREEN :Where no action is required,
YELLOW ALERT i.e. Heat alert suggesting forAvoiding of heat exposure, wearing light coloured, loose, cotton clothes and covering our head usingcloth, hat or umbrella

ii) ORANGE ALERT: Severe Heat suggesting heat exposure, Keep cool, Avoid dehydration, Drink sufficient water–even if not thirsty, Use of ORS, or drinks like lassi, lemon water, buttermilk, etc,.

iii) RED ALERT: Extreme Heat Extreme care needed for vulnerable people,.

The Impacts of Heat waves typically involve dehydration,(i) Heat cramps,(ii) Heat exhaustion and / or (iii) Heat stroke the signs and symptoms are as follows:

(i) Heatcramps:swelling, Fainting, Generally accompanied by Fever below 102 F

(ii) Heat exhaustion: Fatigue, weakness, dizziness, headache, nausea, vomiting, muscle cramps and sweating.

(iii) Heat stroke: Body temperature of 104*F or more along with delirium, seizures or coma. This is a potential fatal condition.

Following measures one should take to minimize the impact during the heat wave

i) Avoid going out in the sun, especially between 12.00 noon and 3.00 P.M.

ii) Drink sufficient water and as often as possible , even if not thirsty

iii) Wear light weight, Light coloured, loose and porous cotton clothes. Use protective goggles, umbrella/hat, shoes or chappal while going out in sun

iv) Avoid strenuous activities when the outside temperature is high. Avoid working outside between 12 non and 3 P.M.

v) While travelling , carry water with you

vi) Avoid alcohol, tea, coffee and carbonated soft drinks, It dehydrates the body.

vii) Avoid high-protein food and do not eat stale food

viii) Do not leave children or pets in parked vehicle

ix) If you feel faint or ill, see a doctor immediately

x) Use ORS, homemade drinks like lassi Torani (rice water) lemon water buttermilk etc,. which helps to re-hydrate the body

xi) Keep animals in shade and give them plenty of water to drink,

xii) Keep your home cool, use curtains, shutters , and open windows at night.

xiii) Use Fans, damp clothing and take bath in cold water frequently

xiv) Provide Cool drinking water near work place

xv) Caution works to avoid direct sunlight

xvi) Schedule strenuous jobs to cooler time of the day

xvii) Increasing the frequency and length of rest breaks for outdoor activities

TREAT OTHER THEY WAY YOU WANT TO BE TREATED
REMEMBER!!! THE SOUL IS ON JOURNEY

Thank you all..... Always in Gratitude

CA Dinesh Shah

OVERVIEW OF THE INDIAN SUCCESSION ACT, 1925

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A. BACKGROUND

India with its huge population is country with people coming from various communities. It predominantly has 2 major class of communities being the Hindus and the Muslims. There are various other communities, to name a few being Christians, Jews, Parsis etc. Before the enactment of the Indian Succession Act, 1925 (ISA), the Hindus and the Muslims were governed by their respective personal laws for the purpose of inheritance and succession.

However there were a lot of uncertainties in respect of inheritance and succession in case of other religions. Various different laws were enacted to cater to the needs of the different sects and different situations. To fill in the gaps under various acts, Indian Succession Act was executed in 1865. However the said Act did not serve its purpose and was completed repealed. There were a variety of Act like The Succession (Property Protection) Act, The Parsi Intestate Succession Act, The Hindu Wills Act, The Probate and Administration Act etc. which addressed to different scenarios of inheritance and succession. With a multiple laws to look into while dealing with the inheritance and succession issues, a need was felt to bring in uniformity. Accordingly all of these acts were consolidated under one Act, the Indian Succession Act, 1925 as we see it today.

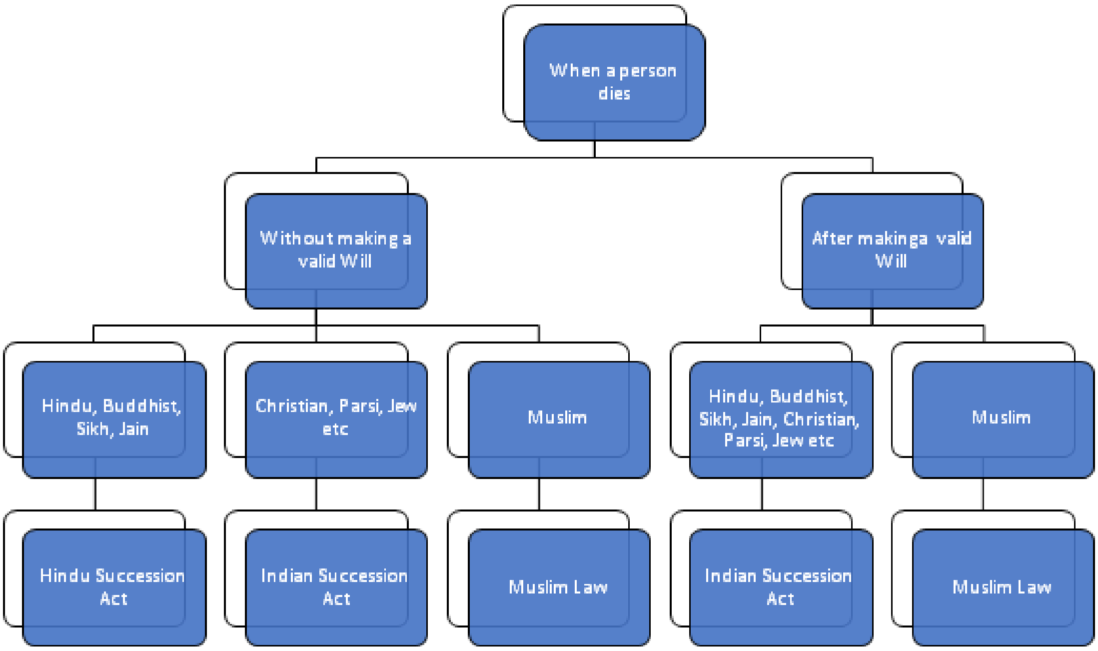
The very meaning of the word "Succession" means inheritance of the property – moveable and immovable, the rights and the obligations of a person after his death. Succession can be of 2 types

a. Intestate succession i.e. succession by operation of law

b. Testamentary succession i.e. succession by way of will

The Hindus in case of Intestate succession are governed by Hindu Succession Act, 1956 and in case of testamentary succession are governed by Indian Succession Act, 1925. The Muslims in case of both intestate or testamentary succession are governed by the Muslim Law. The other communities are governed by the Indian Succession Act, 1925 both for intestate and testamentary succession.

An illustration of the above position for better understanding is as follows:



B. DOMICILE

a. The Dictionary meaning of the word "Domicile" means the country that a person treats as their permanent home, or lives in and has a substantial connection with. Domicile of a person becomes relevant to decide which country's succession law applies to the property of the deceased. The provisions of the Domicile under ISA are as follows:

Applicability	As per the ISA, the domicile of the deceased person at the time of his death shall be relevant to decide as to which country's succession law shall apply to the property of the deceased person. The said provision of domicile **shall not apply** to Hindu, Muhammadan, Buddhist, Sikhs and Jains
Exception to the domicile Rule	**Succession of Immovable Property**. If a deceased person owned an immovable property in India, the provisions of ISA shall apply irrespective of the domicile of the deceased person at the time of his death.
Succession of Moveable Property	Succession in case of moveable property, shall be governed by the country in which the deceased person was domiciled at the time of his / her death.

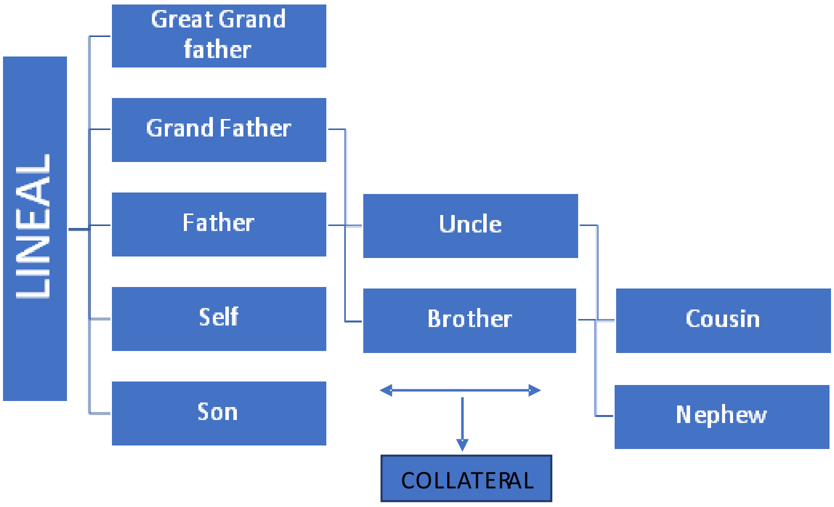
Domicile of origin	A domicile of origin of every **legitimate birth** shall be the country in which his / her father was domiciled at the time of his / her birth or if a child is born after his father death, than the domicile of the father at the time of his death. A domicile of origin of every **illegitimate birth** shall be the country in which his / her mother was domiciled at the time of his / her birth A domicile of origin shall continue till the time a new domicile is acquired.
Acquisition of new domicile	A person can acquire a new domicile other than a domicile of his / her origin if he / she changes his / her fixed habitation / permanent home. If a person wants to acquire his domicile in India, he / she has to give a declaration to the concerned authorities in writing of his / her desire to acquire such domicile and he / she further has to satisfy that he / she was a resident in India for at least 1 immediate year preceding the date of his / her declaration. However a person residing in India for the purpose of their profession / service shall not be said to be domiciled in India. Eg : Persons of another country working in the embassy / consulate / as a representative along with the family members and servant shall not be said to be domiciled in India.
Minor's domicile	Minor's domicile shall be the domicile of origin and shall not change with that of his parents.
Domicile of woman on marriage	A woman on marriage shall acquire the domicile of her husband. Even during her marriage, her domicile follows her husbands domicile. **Exception** : If the wife is legally separated then, her domicile does not follow that of her husband
In the absence of proof of domicile	If there is no proof of the domicile of a deceased person at the time of his death, then the succession of his / her moveable property in India shall be regulated by succession laws of India.

C. CONSANGUINITY

Consanguinity is the relation with a person descended from the common ancestors. Kindred is the term used alternatively to consanguinity.

Applicability	The said Consanguinity does not apply to a. Will made or Intestate occurring <u>before</u> 1st January, 1866 b. Intestate or will made by Hindu, Muhammadan, Buddhist, Sikhs and Jains
Lineal Consanguinity	Lineal Consanguinity is a. one person who has descended in direct line from the common ancestor i.e. a man and his father, grandfather, great grandfather and so on upwards b. one person who has ascended in direct line from the common ancestor i.e. a man and his son, grandson , great grandson and so on downwards Every generation ascending or descending is a degree. So a father and a son to a man are 1st degree kindred. Likewise a grandfather and grandson to a man are 2nd degree kindred and so on
Collateral Consanguinity	Collateral Consanguinity is a person connected to descending or ascending individuals from a common ancestor but not connected from a direct line. For eg : A person's father's brother's son i.e. his / her cousin is a collateral consanguinity as the person and his / her cousin are connected not by a direct line of descendant or ascendant, however the person's father and the cousins father have descended from a common ancestor i.e. their grandfather.
No distinction between certain relations	No Distinction has been made between the following persons under the ISA provisions a. Between persons related <u>through father</u> and persons related <u>through mother</u> b. Between persons related through <u>full blood</u> and <u>half blood</u>(one parent in common) c. Between persons born in the lifetime of deceased person or conceived in the womb at the time of his death (**Exception** being persons born subsequently)

The Consanguinity is better understood in the form of an illustration which is as below



D. INTESTATE SUCCESSION (for Indian Christians)

Indian Christians as defined under the ISA means a native of India who is, or in good faith claims to be, of unmixed Asiatic descent and who professes any form of the Christian religion. The rules of distribution for succession of property of the Indian Christians who die intestate are as follows.

Heirs	a. Wife or Husband b. Lineal Descendants c. Kindred (Distribution to be in the order given above)
Distribution where the deceased is survived by a widow and lineal descendants	a. 1/3rd share to the Widow b. 2/3rd share to the Lineal descendants 2/3rd share of the Lineal descendants shall be divided among them equally.
Distribution where the deceased is survived by a widow and kindred but there are no lineal descendants	a. ½ to the Widow b. ½ to the Kindred The distribution among the Kindreds would be as under: i. Surviving Kindred in the nearest degree shall be entitled to the ½ share, all the kindreds in the same degree shall have equal share. ii. If the kindred in the nearest degree is dead and is survived by his / her children or grandchildren, they shall be take their parents share which their parents would have been entitled to if they were alive. iii. If the kindred in the nearest degree is dead and is not survived by any child or grandchild, then the Kindreds of the next degree would be entitled to the above share

	iv. The order of the Kindred shall be as follows: a. Father of the deceased b. Mother and brothers and sisters of the deceased c. Kindreds in the nearest degrees
Distribution where the deceased is survived by a widow but there are no lineal descendants nor any kindred	The whole of the property shall belong to the Widow
Distribution where the deceased is survived by neither a widow nor any lineal descendants nor any kindred	In a situation where a person dies intestate and is not survived by widow, lineal descendants, kindreds then his estate shall revert to the State.

E. INTESTATE SUCCESSION (for Parsis)

The rules of distribution for succession of property of the Parsis who die intestate are as follows.

General Rules	a. If a child predeceases a Parsi intestate then his share shall not be taken into consideration if he does not leave behind i. A widow or widower nor ii. Any lineal descendant nor iii. Any widow or widower of lineal descendant b. A widow or widower of any relative of a deceased person, who has remarried in the lifetime of the deceased person, shall not be entitled to a share of the deceased person who has died intestate.
Distribution where the deceased is survived by a widow or widower and children	The widow or the widower and the children shall receive equal share
Distribution where the deceased is survived by children and not a widow or widower	Each child shall receive equal share
Distribution where the deceased is survived by parents, widow or widower and children	Widow or widower and children shall get equal share and each of the parent shall get half the share of each child.
Predeceased son of the intestate having lineal descendants	Widow and children of the predeceased son shall take share as if the son had died immediately after intestate's death

Predeceased daughter of the intestate having lineal descendants	Predeceased daughter's share shall be divided among her children equally
Child of deceased child has died before the intestate	The share of the child of the deceased child shall be computed in similar manner as computed in the case of the predeceased son / daughter
Remote lineal descendant has died before the intestate	The share of the remote lineal descendant shall be computed in similar manner as computed in the case of the predeceased son / daughter
Intestate survived by widow or widower but no lineal descendant or their respective widow or widower	Widow or Widower shall receive half share and the residue shall be given to relatives as mentioned in PART I of Schedule II of ISA (given below)
Survived by only 1 widow or widower of the lineal descendant	Widow or Widower of the lineal descendant shall receive 1/3rd share and the residue shall be given to relatives as mentioned in PART I of Schedule II of ISA (given below)
Survived by more than 1 widow or widower of the lineal descendant	Widows or Widowers of the lineal descendant shall receive 2/3rd share, divided equally among them and the residue shall be given to relatives as mentioned PART I in Schedule II of ISA (given below)
No relative entitled to residue	Whole shall be distributed in proportion to the shares specified among the persons entitled to receive shares under this section.
Intestate survived neither by the widow or widower nor lineal descendant or their respective widow or widower	Relatives as mentioned in PART II of Schedule II of ISA (given below) in the order given, where 1st in the order shall be preferred to the 2nd, 2nd to 3rd and son on. Relatives in one order shall be entitled to equal shares
Not survived by any relative as defined	Relative who are in the nearest degree of kindred to him shall be entitled to equal share

Relative as mentioned in Schedule II of ISA

PART I

a. Father and mother.

b. Brothers and sisters (other than half brothers and sisters) and lineal descendants of such of them as shall have predeceased the intestate.

c. Paternal and maternal grandparents.

d. Children of paternal and maternal grandparents and the lineal descendants of such of them as have predeceased the intestate.

e. Paternal and maternal grandparents' parents.

f. Paternal and maternal grandparents' parents' children and the lineal descendants of such of them as have predeceased the intestate.

PART II

a. Father and mother.

b. Brothers and sisters (other than half brothers and sisters) and lineal descendants of such o fthem as shall have predeceased the intestate.

c. Paternal and maternal grandparents.

d. Children of paternal and maternal grandparents and the lineal descendants of such of them as have predeceased the intestate.

e. Paternal and maternal grandparents' parents.

f. Paternal and maternal grandparent's parent's children and the lineal descendants of such of them as have predeceased the intestate.

g. Half brothers and sisters and the lineal descendants of such of them as have predeceased the intestate.

h. Widows of brothers or half brother's and widowers of sisters or half sisters.

i. Paternal or maternal grandparent's children's widows or widowers.

j. Widows or widowers of deceased lineal descendants of the intestate who have not married again before the death of the intestate.

F. CONCLUSION

The other provisions of ISA pertaining to Testamentary Succession i.e. Succession by way of will shall be covered under the next Article in detail and accordingly is not covered in here. As seen every community has different order of hierarchy to whom the properties shall succeed in case of intestate succession and hence it becomes very important to determine the community to which the person belongs and know the applicable laws before commencing his / her estate planning.

ESSENTIAL FEATURES OF A WILL

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A person works hard all his life and amasses wealth for himself and his family in the hope that even in his absence, his family will be able to live a secured and dignified life with the financial security that he leaves behind. However, most people are reluctant to go the last mile by making their WILL.There are innumerable instances of family disputes to the extent of legal battles where the head of the family has left without making a WILL.

The reluctance in making a WILL is mainly on account of the myths and misconceptions around WILL. In this article the attempt is to bust some of the myths and also explain some of the important aspects of a WILL. The article covers provisions applicable to Hindus, Sikhs, Jains and Buddhists. Muslims and Parsis are governed by their personal laws.

WILLs and its advantages

A person making a WILL is under the fear of losing control or ownership of the asset during. However, the fact is that the ownership of the asset passes only after the demise of the person making the WILL and not during his lifetime. Also it is important to understand that a person can amend or revoke his WILL as many times as he desires and it is the last made WILL which prevails and the distribution of assets will happen as per the last made WILL.

If there is no WILL in place, the bequest of assets will happen as per the Hindu Succession Laws which may not be the manner in which it is intended. So, if a male married Hindu desires that all his assets should go to his wife if she survives him, he should make a WILL stating so. In the absence of a WILL, the assets will be distributed equally between his Mother, Wife and children. Also, if a person desires to provide for charity, a needy relative, loyal domestic help or even disproportionately amongst his legal heirs, he has to provide for it in his WILL.

Another hurdle in making of a WILL is a person believes he is too young to make a WILL. Life is too uncertain and the correct thought process is that anyone who owns valuable assets and is an adult should make his WILL. Of course, with the change in facts and circumstances, the WILL also needs to be reviewed and if required, revised at reasonable intervals.

For example, a person who has made his Will when he was unmarried may need to review his WILL after marriage or after few years of marriage. Similarly, if the person to whom the major assets of the testator were to be bequeath dies before the testator, the Will needs to be revised. Similarly, for any major change in asset classes held by the testator etc.

A WILL is perceived to be a complex legal document which is not true. A WILL can be handwritten by a person where he can mention whom his assets are to be distributed after his demise and has to be attested by two witnesses. There is no need for payment of any stamp duty, there is no need for registration and it can be written on a plain sheet of paper.

Codicil

Codicil is a supplementary document to the WILL which is prepared to alter or amend a WILL. Normally for making small changes, instead of remaking the whole WILL, a Codicil is prepared. A Codicil also needs to be executed in the same manner as a WILL. A Codicil can also be revoked just like a WILL by making another Codicil. If any substantive amendments are to be made in a WILL, it is advisable to make new WILL instead of making a Codicil.

Having understood the importance of making a WILL and having busted some common myths around making a WILL we shall now discuss some important aspects of making a WILL.

Who can make a WILL

Every adult who is of sound mind can make a WILL in respect of assets belonging to him, including women and physically disabled.

The WILL has to be made by the person of his own free WILL in a sound state of mind. If it is proved that the WILL has been made under threat or coercion or in unstable state of mind For eg; when heavily intoxicated or when not in his senses, than it will not be considered as a valid WILL.

What assets can be WILL by the testator

- A testator can only provide for distribution of all those assets which are legally owned by him and which are transferable. Thus, a husband cannot make provision for assets held by his wife.
- Bequest for all assets like shares and securities, immovable properties, gold ornaments and bullion, artifacts, personal belongings like watches and pens, banks balances etc. including assets owned out of India can be provided for in a WILL.
- The WILL can only be in respect of the testators share in a property. Thus, if a property is jointly held by the testator along with some other person, he can provide for only to the extent of his share in the property.
- In case the testator is a tenant in a property, the local Rent Control Regulations provide for transfer of tenancy rights on demise of the tenant and they shall prevail. For Eg; Under the Maharashtra Rent Control Act, 1999 on the death of a tenant, the premises passes to his family members who;

    a. In case of a residential property, were residing with him at the time of his demise

    b. In case of a commercial property, were using the premises with him at the time of his demise.

    Thus, in case of tenanted premises, the Rent control laws supersede the Succession laws and also the intention of the testator.
- A person can also provide for disposition of his share in HUF property in his WILL.
- There can be one single Will for all the properties or separate Will can be made for different properties. However, it is advisable to make one single Will.

There are Four parties in a WILL;

1. The Testator – The person whose WILL is being made is the Testator. A woman is known as a Testatrix

2. Beneficiary / Legatee - are the persons whom the property of the Testator will devolve upon or pass on to after the demise of the Testator. Anybody can be made a beneficiary in a WILL including charitable entities, non-relatives, partnership firms, and even pets.

3. Executors – The person or persons whom the Testator appoints to administer the WILL are the Executors. The executor carries out the distribution of the assets in the manner as provided in the WILL. Generally, the Executors should be younger in age to the Testator. Even professionals like Trusteeship companies and Banks can be appointed as Executors of the WILL.

4. Witnesses – They are the persons who are witnesses to the signing of the WILL by the Testator. Witness are not required to know the content of the WILL and merely witness the signing of the WILL. There have to be minimum two witnesses to a WILL.

   Persons who are beneficiaries under the WILL should not be made Witnesses to the WILL. If the testator is aged or unwell, it is advisable that a Doctor is one of the witness in the WILL.

Who should be made executors of the WILL :

After the demise of the testator, the property of the testator immediately vests in the executors of the WILL till the time they are distributed in accordance with the directions of the WILL to the beneficiaries.

Hence, it is advisable that the executor should be a person known not only to the testator but also to the family members and who is trusted and respected by all as he may also have to play the role of mediator in case of disputes amongst the family members over the bequest. The executor should preferably be younger to the testator.

As an onerous responsibility is cast on the person who is made executor of the WILL it is advisable that his permission is sought before he is made the executor. A person who is named as executor can refuse to take up such appointment. However, courts have held that once a person agrees to become an executor of a Will he cannot refuse it subsequently without the permission of the Court.

If no person is named as executor in the WILL or if the person refuses to act as executor, then the Court shall appoint an executor.

Who should be a Witness :

Normally, one witness should be preferably a professional like Doctors, lawyer or Chartered Accountant who is known to the testator. This will help mitigate any allegation that the testator was not in stable state of mind and not under influence of any substance. Witness must be persons of repute as when the Will is challenged, the first allegation is that the witness are lying or bought out. If witness are people of repute, making such allegations would be difficult. Just like the executors, even the witnesses should preferably be younger than the testator.

Life Interest in Property :

There are circumstances when the testator wishes to give a particular immovable property to one family member but also wants to provide for housing security of another dependent family member. This objective can be achieved by giving life-interest in the property.

For eg; If the testator has a married son and an unmarried son, he wishes to give the residential house to the married son and his family. However, he also wishes to ensure security of a home for the unmarried son. In this situation, the testator can give life-interest in the property to the unmarried son. By providing in this manner, the married son will not be able to deal with the property in a manner which will affect the right of residency of the unmarried son. At the same time, it is ensured that the unmarried son does not get a right to deal with the property in any manner other than a right to reside.

How should the WILL be drafted

1. The WILL is going to be read and interpreted when its maker, the testator, is not around. Hence, the first pre-requisite is that the language of the WILL should be clear, simple and unambiguous.
2. All the assets owned by the Testator should be clearly listed out and described by the Testator- Eg; mention the bank accounts held along with the name of the branch and account number, depository name and demat account number, details of where the bank locker keys are generally kept, complete details of the immovable properties etc.
3. The distribution of assets to the various beneficiaries should be in clear and unambiguous terms.
4. If any disproportionately high bequest is made to any family member or any family member is being excluded or given disproportionately less as compared to the other beneficiaries, the reasons for doing so should be clearly mentioned in the WILL.
5. If security of house or regular income from property is intended to be given to any person during his lifetime without making him the ultimate owner of the property, life interest in the property can be given to such person and also ultimate beneficiary should be mentioned.
6. If the asset has to be bequeath with any attached obligation, it should be clearly mentioned. Eg; If it is intended that the outstanding housing loan on the house should be paid by the son whom the house is bequeath, it should be clearly mentioned in the WILL.
7. So far as possible provision should be made for two levels of beneficiaries. For eg; " I bequeath my residential property to my wife and if my wife predeceases me than the property shall devolve upon my elder Son."
8. There should be a residuary clause to provide for assets which are not listed out or mentioned in the WILL but which may be owned by the testator at the time of his demise. If there is no such residual clause than the assets not specifically dealt with in the WILL shall be bequeath in accordance with the Succession Law applicable to the testator.
9. The WILL has to be dated. Mentioning the date on which the WILL was signed helps determine the time when it was made and whether it is the last made WILL of the testator.
10. The testator must sign the WILL in presence of two witnesses. While it is not mandatory to sign on each and every page of the WILL it is advisable to sign on each and every page so that the pages cannot be changed/replaced.
11. Will should be made in a calm state of mind without being overly influenced by immediate events and happenings.

Registration of WILL

A question that is often asked is whether the WILL should be registered.

Under law there is no need for registration of the WILL and an unregistered WILL is as valid as an unregistered WILL. However, in certain circumstances it is advisable to get it registered. A WILL when registered, its genuiness is generally not doubted. Because the testator and Witnesses have signed the WILL in presence of the sub-registrar of assurances, it is less likely to be challenged on grounds of having been made under coercion or threat.

So in circumstances where;

a. There are disputes amongst the family members, or

b. Where the bequest is being done in a disproportionate manner in favour of some of the legal heirs in exclusion to others and the WILL is likely to be challenged.

It is advisable to register the WILL in order to avoid litigation.

If the testator made another Will after making the first Will which is registered, and it is proved that the subsequent Will made is the last Will, then it will supersede the registered Will. It is not necessary that the subsequent WILL must also be registered.

How can a Will be revoked :

A Will can be revoked by making a categorical statement about its revocation. So, if a new Will is made it should clearly mention that all the earlier Wills and Codicils shall stand revoked. Also a Will can be revoked by burning or tearing or destroying it in any other manner. Once a Will is revoked it cannot be revived and a new Will needs to be executed.

Preferably, all earlier Wills and Codicils must be destroyed if new Will or codicil is made to avoid any future dispute about the last valid Will.

Probate of WILL

Probate means copy of WILL which is certified by the seal of a Court. It conclusively proves the genuiness of the WILL and once a probate has been granted, no claim can be raised about the genuiness or otherwise of the Will.

A Probate is compulsory only for a Will made by a Hindu executed in the areas under the jurisdiction of the High Courts of Bombay, Madras or Calcutta or if it relates to any immovable property of the Hindu situated in above three cities.

However, practically banks, financial institutions and companies insist on a Probated WILL before acting upon it and hence it has become advisable and necessary in all cases.

In Mumbai, it takes around six to nine months to get a WILL probated by the High Court.

To conclude, the procedure of making of a Will is simple and uncomplicated. The transition of assets from the deceased to the family members becomes hassle-free and fast if there is a valid Will in place. It also, to some extent, ensures harmony amongst the family members. As Chartered Accountants we are placed in an influential position and we may take it upon ourselves to educate our clients about the importance of making a Will, and also make one ourselves.

NOMINATION UNDER VARIOUS LAWS & ITS EFFECTS

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"Nominee– A party who holds bare legal title for the benefit of others or who receives and distributes funds for the benefit of others."- Black's Law Dictionary

Nomination is often confused with transmission of ownership of property after demise. As there is no codified law relating to Nomination, different statutes governing the different asset classes provide for nomination and each of these laws uses different language which has given rise to litigations. In this article we shall look at nomination in respect of some of the important assets classes.

Share and ownership premises in Co-operative societies

A member of a co-operative housing society dies with a nominee in place for his shares in the housing society but also has legal heirs other than the person he has nominated. In such a situation, who is entitled to the shares and therefore, in turn, the apartment or the flat? There has been remarkable ambiguity in respect of legal rights of nominees vis-à-vis the legal heirs.

In this regard, the observations of Bombay High Court are worth noting as under:

In the matter of Ramdas Shivram Sattur v. Rameshchandra and others ((2009) 3 Bom CR 705), the Hon'ble Bombay High Court, clarifying the legality of the nominee, held that, Section 30 of The Maharashtra Co-operative Societies Act, 1960 which prescribes provision on transfer of interest on death of member, does not lay down any special rule of succession altering the rule of succession laid down under the personal law. It further stated that the role of the nominee who has been validly appointed under the provisions of the Act is only to represent the legal heirs of the deceased member while dealing with the society, and no interest in the property is created in favour of the nominee to the exclusion of those who in law are entitled to the estate of a deceased member.

The Act has since been amended by way of an Ordinance in 2019 later enacted as a part of the law through an amendment in the same year. As per the newly introduced Section 154B-13 of the Maharashtra Co-operative Societies Act, 1960 (which overrides section 30 mentioned above), a society can transfer the interest of a deceased member in the flat only when testamentary documents or succession certificate or heirship certificate or document of family arrangement has been produced by the legal heirs of the deceased member or person(s) entitled to the flat.

The amendment under this section further clarifies and clears the doubts that a nominee shall only be admitted as a provisional member in place of the deceased member till the time legal heirs or person(s) entitled to the flat are admitted as members

The concept of "provisional member" has been newly incorporated and the term has been defined under section 154B-1(18) as a person who is duly admitted as a member of a society temporarily after death of a member on the basis of nomination till the admission of legal heir(s) as the member of the society in place of deceased member.

In light of the recent Maharashtra Co-operative Societies (Amendment) Act, 2019 the long-standing controversy of nomination vs. succession has been put to rest once and for all. It can be concluded that the method of nomination in a co-operative housing society does not create any right, title and interest of the nominee in the property of the deceased person. The nominee merely performs the function of receiving and holding the property of the deceased person until the time the legal heir(s) of the deceased person is established and the property is transferred in favour of such legal heir(s).

The above view is supported by the Supreme Court in the case of *Indrani Wahi v. Registrar of Co-operative Societies and Others* (2016) 6 SCC 440). Indrani Wahi (being a married daughter) was made a nominee by her father. The Deputy Registrar of Co-operative Societies did not accept her membership on the ground that Indrani Wahi being a married daughter did not fall within the definition of 'family' under the West Bengal Co-operative Societies Act, 1983. The dispute travelled up to the Supreme court and the Hon'ble Supreme Court while allowing the transfer of share and interest of the father in the society in favour of Indrani Wahi as a nominee, also specifically observed in this regard that such a transfer in favour of a nominee would have no relevance to the issue of title between the inheritors or successors to the property of the deceased and it would be open to the other members of the family to pursue their case of succession or inheritance, in consonance with law.

Hence, while the issue has been set to rest in the state of Maharashtra by the amendment in law, in case of absence of similar clarifications in other state laws, reliance can be placed on the clarity provided by Hon'ble courts for related issues.

Securities

a. Held in Physical form

The Companies Act, 2013 read with rule 19 gives the power to holder of securities in a company to nominate any person to whom his securities shall vest in the event of his death. Nomination can be done by submitting Form SH-13. In case the shares are held by joint holders, they can together nominate one person as nominee.

In the event of demise of all the joint holders, the nominee can apply for transfer of the securities in his name by submitting the documents required or opt to sell the securities as the deceased holder could have done.

The nominee becomes entitled to the same dividends or interests and other advantages to which he would have been entitled to if he were the registered holder of the securities except that he cannot exercise his rights in respect of meetings of the company till the time he becomes a registered holder of those securities.

b. Held in dematerialized form:

If the securities are held in dematerialized form, the nomination is required to be recorded by Depository Participant (DP). In case of demat accounts, up to three persons can be made nominees to a single account. In case of multiple nominees, the account holder can inform the percentage ratio of each of the nominee. If no percentage is informed, it will be taken as equal entitlement of each of the nominees.

There was raging controversy whether, in case of shares, the nominee becomes the ultimate beneficiary and owner of the shares or holds the shares merely as a custodian and trustee to be handed over to the beneficiaries who are entitled to them as per the Will of the account holder or, in absence of a Will, as per the Succession laws governing the deceased.

This controversy was created by the decision of the single member Bench of the Bombay Court in case of Harsha Nitin Kokate Vs. The Saraswat Cooperative Bank Ltd. & Ors . wherein the Hon'ble Court had held that as the shares 'vest' in the nominee as per the Companies Act, the nominee becomes the ultimate owner. However, the division bench of the Bombay High Court has brought to rest the controversy in the case of Shakti Yezdani V. Jayanand Salagaonkar by holding that the decision in case of Harsha Kokate is incorrect. Relying on the several decisions of the Supreme court in matter of nomination versus succession, the Bombay HC held that the provisions of the Companies Act cannot be said to create a third mode of succession besides testamentary and non-testamentary succession. The court held that object of the provisions of the Companies Act is not to either provide a mode of succession or to deal with succession. The object of the Section 109A is to ensure that the deceased shareholder is represented by some-one as the value of the shares is subject to market forces. As regards company, various advantages keep on accruing to shareholders. For example, allotment of Bonus shares. General meetings held by the Companies in which a shareholder is required to be represented.

Nomination in Bank accounts, bank deposits and Safe deposit locker

Under the Banking Regulations Act, 1949, account holders can make nominations in respect of their savings account, bank deposit and a Safe deposit locker. This facility is not available for Current accounts, CC account and Overdraft account.

In case of joint accounts, all the account holders together have to make the nomination of one person.

In case of a safe deposit locker jointly held by more than one person, each of the joint holder can appoint a nominee and in such case there can be more than one nominee.

There is no restriction that only family members can be nominee.

Nomination in case of Mutual Funds

As per SEBI Mutual Funds Regulations, 1996, every mutual fund has to provide unit holders facility of nomination for the units held by them. In case of joint holders of unit, the joint holders have to jointly nominate the nominee. There is no restriction that only family members can be nominee.

Nomination in respect of Employees Provident fund

Under the Employees' Provident Funds Scheme, 1952, the amount standing to the credit of a deceased employee in his EPF account vests in the nominee. Employee can only nominate a family member as nominee. If the employee does not have a family at the time of making the nomination, he can appoint any other person as nominee but subsequently if the employee acquires a family than the earlier nomination becomes invalid and a fresh nomination form will have to be submitted.

"family" means— (i) in the case of a male member, his wife, his children, whether married or unmarried, his dependant parents and his deceased son's widow and children. It is furtherprovided that if a member proves that his wife has ceased, under the personal law governing him or the customary law of the community to which the spouses belong, to be entitled to maintenance she shall no longer be deemed to be a part of the member's family for the purpose of this Scheme, unless the member subsequently intimates by express notice in writing to the Commissioner that she shall continue to be so regarded;

and (ii) in the case of a female member, her husband, her children, whether married or unmarried, her dependant parents, her husband's dependant parents and her deceased son's widow and children

More than one family member can be made nominee and the percentage share of each can be specified.

Nomination in Public Provident Fund account (PPF)

In case of a PPF account opened under the Public Provident Fund Scheme, 1968, the account holder can nominate more than one person and also mention share of each of the nominees. It is important to note that a non-resident cannot be appointed as a nominee to a PPF account. Also no nomination can be done for PPF account of a minor.

Nomination for Gratuity

As per The Payment of Gratuity Act, 1972, an employee can nominate only family members to receive the Gratuity amount. Family members in case of a married male are defined to mean wife, children, dependent parents, dependent parents of his wife and widow and children of his deceased son.

Family members in case of a married female means husband, children whether married or unmarried, dependent parents, dependent parents of her husband and widow and children of her deceased son.

If at the time of making nomination, employee did not have a family, he can nominate any other person as nominee. But subsequently if he acquires a family, his earlier nomination becomes invalid and he will have to make a fresh nomination in favour of a family member.

More than one family member can be made nominee and percentage share of each can be specified.

LIC

Section 39 of the Insurance Act, 1938 provides that the holder of a Policy of Life Insurance on his own life may when effecting the policy, or at any time before the policy matures for payment, nominate the person or persons to whom the money secured by the policy shall be paid in the event of his death.

Facility of nomination is available only to holders of policies of life insurance.

Except in case of a wife appointed as Payee under a Policy of Life Insurance under Married Women's Property Act, 1937, the nominee under a Policy of insurance takes the amount on behalf of the assured or his estate and not beneficially and such amount becomes a part of the estate of the deceased - Sarbati Devi Vs. Usha Devi AIR 1984 SC 346.

To summarise;

Nomination is a facility or arrangement to ensure smooth transmission of asset of the deceased to a person identified by him during his lifetime. Once the payment is made or asset is handed over to the nominee, it discharges the concerned entities from any obligation vis-à-visthe legal heirs of the deceased. That is the reason why nomination is being made mandatory by various statutes.

There have been legal disputes about whether the nominee becomes the rightful owner of the asset or only holds the asset as trustee on behalf of the legal heirs of the deceased. Various decisions of the Supreme Court have set the controversy to rest and the position now is that nominee is merely trustee and holds the assets on behalf of the rightful legal heirs both in case of testamentary (where there is a WILL) as well as non-testamentary succession (where there is no WILL).

However, to avoid legal disputes between the legal heir and the nominee it is advisable that the Will and the nomination be in sync with each other and the persons whom you desire to ultimately give that asset is the beneficiary in WILL and also the nominee.

Nomination can be made in favour of a minor. In this case, the name of the person who will be guardian to the minor till he attains majority also needs to be declared. However, in respect of assets of a minor no nomination can be done by the Guardian. It is the privilege of the minor after becoming major to appoint a nominee.

Who can be made a nominee is dependent on the laws applicable to the different assets. As seen above, in case of EPF and Gratuity laws, only Family members can be nominated. Similarly, a non-resident cannot be made nominee in a PPF account. Hence, while filling up the nomination form, these rules need to be kept in mind.

Nomination once made can be revised by filing a fresh nomination form.

To conclude, Nomination is a convenient mode of ensuring smooth transition of your assets to your legal heirs in a timely manner. In the absence of a nomination, the transmission is hassle some and time consuming as it will entail demands for legal documents like probated Will or Succession certificate and NOCs of legal heirs etc which will be a time consuming and expensive proposition. Making a Will and ensuring appropriate nominations in all your assets is the most effective mode of ensuring a hassle fee transmission of hard earned wealth to your near and dear ones.

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TRUST AS A VEHICLE FOR SUCCESSION PLANNING AND TAX CONSEQUENCES OF THE SAME

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1. Background:

Family-run businesses continue to be the norm rather than the exception in India; with most progressing fast on the path to globalization, succession planning has never been as important as it is today. Trust structures have gained popularity over the years in India as vehicles for pooling of investments and for estate /succession planning by high net-worth individuals. However, the taxability of trusts in India remains a vexed issue due to a myriad of factors, primary among them being the nature of the trust itself. Thus, the article endeavors to explain the concept of the trust structure and why the same could beneficially be used as an effective succession planning tool for achieving flexibility and ease in control and management of family wealth. The article also examines the key facets of the Indian tax regime within which a trust thrives by evaluating the tax implications arising at various stages in case of a domestic trust.

2. Need for succession planning:

Succession planning is imperative in India, since the families are often large with multiple groups involved in the business. It is not uncommon for the Indian family run businesses to be passed onto the following generations, with the result that frequently individuals with different ideologies and varied visions are obligated to manage the business cohesively. A look back at the history of corporate India reveals the immense disruption due to improper or absent succession planning. Familial ties have been irreparably damaged, wealth accumulated over generations has been squandered, protracted and endless litigation between family members has taken up significant time and effort, draining valuable resources that could have been put to better use, and most importantly, once-leading business houses have taken a huge hit to their finances, glory and reputations.

Succession planning not only provides a method to ensure that legacies remain alive and keep up with changing times with minimum conflict or impact on business but also ensures that wealth is protected, preserved, and passed onto future generations in the intended manner. Thus, a well-planned structure, which can ease the issues surrounding family succession, is therefore the need of the hour.

3. Alternative tools for succession planning

Some of the popular tools used for succession planning are discussed as under:

3.1 Wills

A Will has been defined under the Indian Succession Act, 1925 as “the legal declaration of the intention of the testator, with respect to his property, which he desires to be carried into effect after his death.” Traditionally, a Will has been generally employed for succession. A Will in a common parlance is a legal declaration of a person's (testator) wishes regarding the disposal of his or her property after death. A Will takes effect after death of the testator (being the person who has created such Will). Will can be amended as many times as desired and per the law, the latest will of the testator would apply.

If a person dies without leaving a Will (i.e. intestate succession), rules under the laws of intestate succession as provided in Hindu Succession Act, 1925 are triggered under which the deceased's properties passes to legal heirs. These default rules will not apply with respect to the property bequeathed under a valid Will.

3.2 Family arrangements

A family arrangement is a tool that enables the adjustment of, actual or perceived, imbalance of the wealth among the family members. Such an agreement assumes that there was an antecedent title of the parties, and the agreementacknowledges and defines what title is or was. Every party to the family arrangement who takes benefit under it need not necessarily be shown to have a share in the property. All that is necessary to show is that the parties are related to each other in some other way and have a possible claim to the property, a claim or even a measure of a claim on some other ground.

However, a family arrangement may not prove to be an adequate tool for succession planning in all cases because the basic intent of succession planning is to ensure that family properties remain with the family members without any restriction on sale or disposal of the property by any family member. In case of a family arrangement, ownership is directly in the hands of each member, and it would not be possible to ensure continuity of the holding of property within the family, as there is no restriction on individual members not selling or disposing the property owned by him/her

3.3 Limited Liability Partnership

The Limited Liability Partnership (LLP) is viewed as an alternative succession planning vehicle that provides the benefits of limited liability but allows its members the flexibility of organizing their internal structure as a partnership based on a mutually arrived agreement. Since the assets are owned by the LLP and not by individual partners, it provides total control over the assets held by it and provides enough flexibility for distribution of property by reconstituting the deed.

However, since the reconstitution of the deed requires confirmation by all partners, and hence, it does not provide absolute flexibility, like a trust, where the terms of distribution, etc. are decided by the settlor and are part of the Trust Deed. Further, it only caters the need of succession planning for the current generation and not for succeeding generation as the terms of distribution covered in such deed may not be accepted by subsequently introduced partners.

3.4 Hindu Undivided Family ('HUF')

According to Hindu Law, 'Hindu Undivided Family' is a family which consists of all persons lineally descended from a common ancestor and includes their wives and unmarried daughters. A 'Hindu Undivided Family' is neither the creation of law nor of a contract but arises from status. Every person that has a share in HUF is called a coparcener, individuals become co-parceners through birth/marriages and accordingly acquire an equal right on the property held under the HUF.

Since succession in an HUF would be as per the Hindu Succession Act, it would be legally challenging to delineate identified properties for specified individuals and may pose difficulties in distribution. Further, certain key aspects of the structure such as right of the coparceners to enforce partition of HUF and right of creditor in case of insolvency to obligate the coparcener to enforce partition may not optimize family unity and perpetual succession of assets. Considering the challenges with respect to disposition of property, control on succession and beneficiaries on account of co-parcener share by birth / marriage, HUFs are not generally suggested for succession planning.

Consultation paper of the Law Commission of India released in August 2018 in fact suggested abolishing HUFs considering the archaic law and its use more as a tax planning tool through creation of an additional taxable entity.

4. Need for Trust structure

4.1 Considering the shortcomings of above modes, it becomes imperative to adopt a more robust structure which adequately addresses the desired objective of succession and wealth planning. A trust demonstrates family cohesiveness to the world and provides effective joint control of family wealth through the trust deed. Thus, a trust serves as a means of united control and effective participation of all members in the decision-making process, leading to mitigation of disputes and legal battles. With large business houses in India being family-owned and controlled, trusts are being used as tools to bring a relatively large pool of assets/ investments under one umbrella as well as facilitate smooth transfer of wealth over generations.

4.2 Thus, a trust provides all types of flexibility. It provides for contingencies and facilitates clear directions for income and wealth distribution, accumulates balance and allows ultimate succession, even separation, as planned.

5. Concept of Trust &benefits of trust structure

5.1 Meaning of Trust

5.1.1 The Indian Trusts Act, 1882 ('Trust Act') which came into force on 1 March 1882, codified the law relating to private trusts. Section 3 of the Trust Act defines trust as *"**an obligation annexed to the ownership of property, and arising out of a confidence reposed in or accepted by the owner, or declared and accepted by him, for the benefit of another, or of another and the owner**"*.

5.1.2 The trust is not a separate entity rather, it is an obligation. Acceptance of the obligation, therefore, is a necessary condition for a valid Trust to come into existence.

5.1.3 Unlike most common law jurisdictions, the Trust Act does not recognize duality of ownership viz., legal and equitable. The trustee is the legal owner of the trust property and hold the property in fiduciary capacity for the benefit of the beneficiaries. The beneficiaries have a 'beneficial interest' in such property. This is evident from the abovementioned definition of 'trust' under the Trust Act.

5.1.4 Trusts are created when the settlor of the property indicates with reasonable certainty by an act or words an intention to create the trust, its objects and purpose, the beneficiaries who stand to benefit from the trust and transfers an identifiable property to the trustee(s).

5.1.5 A private trust need not be registered except in case of trust having / owning immoveable property. Section 5 of the Trust Act provides that no trust in relation to immoveable property is valid unless declared by a non-testamentary instrument in writing signed by the author of the trust or the trustee and registered, or by the will of the author of the trust or of the trustee.

5.2 Key components of the trust

The Trust Act provides that the person who declares the trust is called the 'author of the trust' or 'the settlor'. The person who accepts the confidence is called the 'trustee' and the person for whose benefit the confidence is accepted is called the 'beneficiary'. The details of each of the parties/elements playing vital role in the trust structure is discussed below:

5.2.1 Settlor:

The "settlor or author" establishes the trust by placing a particular asset that s/he owns into the trust by way of transfer to the trustee. Section 3 of the Trust Act defines 'author' of the trust as a person who reposes or declares the confidence.The settlor's role is restricted to settlement of the trust and defining the framework within which the trust shall be governed by the trustees for the benefit of the beneficiaries.

Further, per Section 9 of the Trust Act every person capable of holding property can be beneficiary in the trust, thus the settlor can also be a beneficiary of the trust provided that s/he is not the sole beneficiary of the trust. The settlor can also be the trustee of a trust. Also, where the settlor is himself the trustee or beneficiary of a trust, it needs to be considered whether the same would result in the settlement becoming a 'revocable transfer' within the meaning under section 63 of the Income Tax Act, 1961('IT Act'). This aspect is dealt with under the taxability section.

5.2.2 Trustees:

Section 3 of the Trust Act provides that the person who accepts the confidence reposed by the settlor is a trustee. The trustee accepts and undertakes an obligation under the trust to administer and manage the trust property for the benefit of beneficiaries. The trustee holds the trust property in a fiduciary capacity. Thus, 'vesting of property in the trustee' by way of such fiduciary duty to so hold the property for the beneficiaries, does not give the trustee absolute ownership over the trust property and the trustee does not enjoy an unfettered right in the trust property as is ordinarily enjoyed by an owner in his or her own property.

As per section 10 of the Trust Act, every person capable of holding property may become trustee. However, in case of discretionary trust, only those persons who are competent to contract can become trustee. There is no restriction on number of maximum or minimum number of trustees, except that section 60 of the Trust Act provides that where the trust involves receipt and custody of money, there should be minimum two trustees. A trustee can be an individual, company, or any other entity. Further, a trustee may be a person resident or non-resident in India.

Acceptance of the obligation by the trustee is a primary condition for the creation of a trust. Further, a trustee is not bound to accept a trust. However, once the trust is accepted by the trustee, he can renounce the office of trustee only by virtue of special power granted under the trust deed. Further, a trustee cannot delegate his duties to a co-trustee or to a stranger unless the instrument of trust so provides, or the delegation is in the regular course of business, or the delegation is necessary or the beneficiaries consent to the delegation.

5.2.3 Beneficiary:

According to section 9 of Trust Act "Every person capable of holding property may be a beneficiary". Further, section 3 of the Trust Act provides that the person for whose benefit the confidence is accepted by the trustee is called the beneficiary. In simple words, beneficiary is the person for whose benefit the settlor has settled the Trust and holds the 'beneficial interest' in the trust property. The 'beneficial interest' of the beneficiary is his right against the trustee as owner of the trust property. It may be noted that the beneficial interest of a beneficiary is transferrable in nature, in which case the transferee would obtain same rights and liabilities as of the transferor beneficiary.

There is a possibility that a trust may also be created for the benefit of an 'unborn person' subject to compliance with the provisions of the Trust Act and Transfer of Property Act, 1882.

One interesting question which arises is whether the beneficiaries have the right to demand distribution of trust property from the trustees. Section 56 of the Trust Act confers on the beneficiaries, the right to have the intention of the author of the trust specifically executed to the extent of their beneficial interest. Further, a sole beneficiary or all the beneficiaries unanimously, may decide and enforce upon the trustees to transfer the property to them or to another person, as directed by them. Considering the provisions of section 56, where the beneficiaries have a vested beneficial interest in the trust, they may require the trustees to transfer possession of their interest in the trust property, if so unanimously agreed between the beneficiaries. However, whether such right to transfer of possession would operate where there is a possibility of further beneficiaries being added is something which is debatable.

5.2.4 Protector:

A 'protector' or 'advisor' may also be appointed in some cases, where such person oversees the decisions taken by the trustee. Protector is a person appointed under the trust deed to direct or restrain the trustees to ensure that the trustees exercise their administrative and dispositive powers in accordance with the intentions of the settlor. A protector may (even during the lifetime of the settlor) play a pivotal role in providing guidance and inputs to the trustee. In some instances, where the settlor would not like to reserve any powers vis-à-vis key decisions of the trust, the trust deed may provide for the trustee to seek the prior or simultaneous consultation of the protector prior to executing a decision. Generally, the role of the protector is advisory or recommendatory in nature and not binding on the trustees.

5.2.5 Trust property

Section 8 of the Trust Act states that the subject-matter of the trust must be transferable property. The term property is wide enough to cover assets of every kind, whether related to business or not. Accordingly, virtually all assets, whether personal or business related and whether movable or immovable, can be subject matter of trust property.

As per proviso to section 8 of the Trust Act, ***mere*** beneficial interest under a subsisting trust could not be treated as 'subject-matter' of trust. In other words, section 8 bars the creation of a trust (say 'sub-trust') with beneficial interest in another trust (say 'master-trust') being the only subject-matter of the trust viz. a trust cannot be settled through ***mere*** contribution of beneficial interest in another trust. If the sub-trust contains any other property other than the beneficial interest in the master trust, the same should be permitted under the Trust Act.

Accordingly, a sub-trust can be added as a beneficiary of master trust.The only requirement in such cases is that the trust property of the sub-trust should consist of some other property, apart from beneficial interest in the master-trust.

5.2.6 Trust deed

A trust deed, as an instrument, is similar to an agreement and contains clauses similar to an agreement between two parties, in this case, the settlor and trustee, however which would have implications for the beneficiaries. Therefore, like any other agreement, a trust deed usually provides for rules in relation to each of the three parties and is a complete code by itself for operating the relationship within them.

There are no formal rules regarding the format or the contents of the trust deed. A trust deed would usually cover the below mentioned illustrative aspects apart from information regarding the relevant parties and trust property:

- Defining trustee lineage – this is important so that the structure continues even when the original trustees cease to exist as well as rights, powers (and restrictions thereon), duties, liabilities and disabilities of trustees, including the procedure for their appointment, removal, resignation or replacement and minimum/maximum number of trustees
- Rights, obligations and disabilities of beneficiaries, including the powers and procedure for addition and/or removal of beneficiaries, including the person who would be entitled to exercise such powers
- Delegation of authority and the decision-making matrix – to provide for matters that are to be decided by majority/unanimous consent of the trustees
- Policy for the distribution of the corpus and the income from the trust
- Providing veto powers to identified trustees for specific decisions
- Providing directions with respect to non-compete clauses and exit conditionalities
- Providing distributions and support policies in the event of specific circumstances such as marriage, death, medical emergency, divorce, etc.
- Safeguarding the interests of specific family members, for instance, a spouse (after the demise of the head of the family)
- Specific policies regarding the discipline and behavior of the next generation
- Allocation of a certain portion of wealth for philanthropic purposes
- Terms of extinguishment of the Trust
- Alternative dispute resolution, etc.

Thus, the trust deed becomes a document of prime importance, since it lays out the essential framework for the governance, control, and management of family businesses and wealth across generations. It therefore needs to be drafted with the utmost care and caution. It would be preferable that a trust deed contains clear instructions, including the process and provisions for amendment thereof and adequately addresses the plausible scenarios that may take place in future such that it does not lead to deadlock in genuine cases.

5.2.7 Letter of wishes

A Letter of Wishes (the "Letter") is an informal way by which the settlor of a trust imparts his or her intentions/wishes to the trustees. The Letter is non-binding written guidance that conveys to the trustee the settlor's goals in creating the trust and his or her thoughts about the trustee's exercise of discretionary powers in management and administration of trust. The Letter is a separate writing read by the trustee in conjunction with the trust deed, however it is neither an amendment/substitute for the trust nor it forms part of such trust deed.

Because the Letter is non-binding, it does not limit a trustee's flexibility to adapt to circumstances that may change over time, however it effectively communicates settlor's instructions to trustees as to how the trust is to be administered particularly after settlor's death.

5.2.8 Extinguishment of trust

A trust is extinguished when its (i) purpose is completely fulfilled; (ii) purpose becomes unlawful;(iii) fulfilment of its purpose become impossible by destruction of the trust property or otherwise; or(iv) when the trust is a revocable trust, and it is expressly revoked[1].

5.3 **Benefits of trust structure**

5.3.1 A trust, as a means of succession planning, is not prone to extensive statutory framework and is easy to operate. Statutory formalities are limited. Being less regulated, it offers great flexibility in structuring the succession plan in a smooth manner.

5.3.2 A trust is created, nourished, and attains necessary maturity in the presence of the creator/settlor. The settlor, who may also be a trustee, can be a witness to the result of implementation of succession plan conceptualized by him during his lifetime. Requisite alterations to the succession plan so laid down can also be undertaken by the trustees if deemed necessary for ensuring that the objectives of the trust are met. It provides effective joint control of family wealth through a well-laid rulebook in the form of a well-documented trust deed.

5.3.3 A trust structure provides the opportunity for the family to pre-empt all possible scenarios, and to document the same in an orderly manner, in order to avoid potential family disputes thereby enabling efficient operation of the family business and preservation of family wealth.

5.3.4 A trust structure can thereby help to create an enduring family legacy, by keeping intact the predecessors' vision of the family business, although not at the expense of the dynamism and the adaptability that will be necessary for any required changes. A trust structure can also create a structured format for a family office and enable efficiency in the management and running of the office.

5.3.5 The information of private trusts is not publicly available unless registered and hence provide privacy to the settlor and family members.

5.3.6 Through the appointment of a professional trustee or by the appointment of advisors who may manage the property, the settlor can ensure that the trust funds are managed and deployed in an optimum manner.

[1]*section 77 of Trust Act*

5.3.7 Under the erstwhile estate duty law, property passing under will on death of a person was liable for estate duty. However, trust, if structured appropriately, could serve as an adequate mechanism for ring fencing against potential estate duty exposure (*if reintroduced*).

6. Types of trust

For the purpose of evaluating the regulatory and tax implications it is essential to classify or identify the nature of the private trust. The trusts are broadly classified in four major categories such as revocable/irrevocable, discretionary/specific, testamentary/non testamentary and offshore-onshore based on key parameters as discussed below:

6.1 Revocable and Irrevocable

- A **revocable trust** is a trust which can be terminated anytime till the author survives by retaining/resuming power over the trust property and income by the author. The key distinction is based on whether the settlor or creator of the Trust retains the power to control the assets held under the trust so as to benefit by re-transferring the assets or income thereof to himself. In case the settlor is also a beneficiary, the transfer of assets may be considered revocable to that extent. Even if the settlor is not a beneficiary but derives any direct or indirect benefit from the income or assets thereon, such a transfer would be regarded as revocable to that extent. A revocable trust may evolve into an irrevocable trust upon the death of the settlor/creator.

- A trust that is not a revocable trust is an **irrevocable trust**. An irrevocable trust is one which cannot be altered, changed, modified or revoked after its creation. Further the settlor does not have any right to re-assume any power over the trust property or income there from. In case of irrevocable trust, the settlor is devoid of any control over the trust assets or income of the trust as the settlor relinquishes legal ownership of the assets to the trustee for the benefit of beneficiaries. Once properties are transferred to such irrevocable trusts, it is certain that such assets at some time will be distributed to the beneficiaries, or such person as provided in the trust deed. It comes to an end only when the term /purpose of the trust has been fulfilled or the trustees mutually decide to dissolve the trust.

- Such categorization of trust is crucial from an Indian tax perspective wherein the tax implications vary depending on whether the trust is revocable or irrevocable.

6.2 Specific and Discretionary trust

- Specific trust is a trust in which the beneficial interests of the beneficiaries are determinate and specific in terms of trust deed. In case of a specific trust, it is possible to determine the beneficiaries of the trust and the quantum of share which each beneficiary is entitled to in the trust fund. Such trust is also popularly referred to as a 'determinate trust'. If beneficiaries and/or their shares are not specific/ determinate, the trust is known as discretionary / non-determinate Trust.

- Explanation 1 to section 164 of the IT Act provides that for a trust to be determinate, (i) the beneficiaries should be expressly stated and identifiable as on the date of the trust deed; and (ii) their individual shares should be expressly stated and as certainable as on the date of the trust dee.

- Explanation 1 to section 164 has created lot of controversy on the characterization of trust as 'specific' or 'discretionary', especially dealing with the issue whethe rthe name of beneficiary should be expressly stated in the trust deed or where the deed sets out the manner in which beneficiaries are to be ascertained, for a trust to be regarded as 'specific trust'. Judiciary[2] seem to be divided on the topic.

6.3 Testamentary and non-testamentary Trust

Trusts created under a will are called testamentary trusts. A person may specify in his will that the whole or part of his property should be settled for the benefit of specified persons. The actual trust is then executed by the executors of the will upon demise of the testator. The testator may provide the draft of the trust deed and identify the trustee in the will.

A trust settled and executed by a settlor during his lifetime is called a non-testamentary. In other words, the trust wherein the property passes from the settlor to the trustee during the lifetime of the settlor are called non-testamentary trusts.

6.4 Offshore trusts

- Offshore private trusts are trusts which are set-up and governed in jurisdiction outside India. Offshore private trusts are popular structures as a means for wealth protection, wealth accumulation abroad, confidentiality, succession planning and exploring tax efficiencies.

- This is because every country has a distinct regulatory framework for recognition, administration, management, and taxation of trusts and the same may be leveraged for maximum efficiency from asset protection, tax, and succession perspective.

- Typically, jurisdictions such as Jersey, Guernsey, Singapore, BVI, New Zealand and Cayman Islands are good jurisdictions for setting up an offshore trust-holding structure. The general criteria considered for selecting a trust jurisdiction include how robust the trust law regime is, asset protection, ease of setting up the structure and its administration, reputation of the jurisdiction, confidentiality, disclosure and exchange of information relating to the trusts, costs of setting up and administration of the trust, taxation of income and distributions from the offshore trust and impact of Indian exchange control regulations on the structure.

7. Tax implications in case of various kinds of trust

7.1 Taxability of revocable trust

7.1.1 Section 61 of the IT Act provides that income arising to any person by virtue of revocable transfer of assets shall be taxed in the hands of the transferor / settlor. Thus, all income arising by virtue of a revocable transfer of assets shall be clubbed and chargeable to tax as income of the 'transferor' and included in his total income. Section 63 of the IT Act provides that a transfer shall be deemed to be revocable if –

– it contains any provision for the re-transfer directly or indirectly of the whole or any part of the income or assets to the transferor, or

[2] *Some prominent judicial precedents which have thrown light on the issue include the decision of Atreya Trust 193 ITR 716 (Calcutta HC)(1990), Trustees of Keshav Mohta Family Trust 232 ITR 875 (Calcutta HC)(1998), AAR in case of Companies Incorporated in Mauritius, In Re 224 ITR 473 (1997), DLJMB Mauritius Investment Co. 89 Taxman 125 (AAR) (1996), India Advantage Fund-VII [2017] 392 ITR 209 (Karnataka HC), and TVS Shriram Growth Fund [2020] 121 taxmann.com 238 (Madras HC). Also, interesting to note are CBDT Circular explaining Finance (No. 2) Act, 1980 and CBDT Circular No. 13/2014, dated 28-7-2014*

– 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

7.1.2 Further, in case wherein the transfer of an asset to a trust is not revocable during the lifetime of the beneficiaries then the taxability during the lifetime of the beneficiary shall be governed per the provisions of section 161 to section 164 of the IT Act as discussed in detail in ensuing paragraphs.

7.1.3 It is pertinent to note that the obligation to determine whether a transfer is revocable or not is cast on the income tax officer given that Section 63 of the IT Act is essentially an *anti-abuse* provision.

Considering the aforementioned discussions, it could be noted that from income tax perspective, generally it would not be comparatively advantageous if the trust is settled by way of a revocable transfer of assets, subject to commercial considerations or the circumstances otherwise require. Thus, tax implications considering the nature of trust as revocable, are not discussed further in greater detail.

7.2 <u>Taxability of irrevocable trust</u>

The provisions are contained in section 160 to 166 of the IT Act lay down important aspects in respect of taxability of private trusts. The structure of irrevocable private trust gives rise to the situation wherein the settlor contributes/settles any asset/property in the hands of trustees, for the benefit of beneficiaries who are the real owners of the income arising there from. The provisions of IT Act provide mechanism for taxation of such irrevocable trust based on further classification as follows:

7.2.1 <u>Taxability of irrevocable specific trust</u>

- Section 160 of the IT Act treats trustees as **'representative assessee'** in respect of the income earned or received on behalf or for the benefit of the beneficiaries. Section 161 of the IT Act provides manner of taxing income in the hands of 'representative assessee' and provides that, the income earned or received by the trustee in representative capacity shall be taxed in **'like manner and to the same extent'** as the tax would be leviable upon and recoverable from the person represented by him.

- Further, section 166 of the IT Act provides the assessing officer with an option to directly assess the beneficiaries in respect of the income received or earned by trustees on behalf of beneficiaries.

- **In simple words, the assessment of the trustee (as a 'representative assessee' of the beneficiaries) would have to be made in the same manner, as that of the beneficiary whose interest is sought to be taxed in the hands of the trustee and 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.**

- While section 161 does not specifically provide the rate of tax at which the representative assessee would be charged for income (other than business income) earned on behalf of the beneficiaries, however, considering the provisions of the section 161 and the usage of the phrase 'like manner and to the same extent', it is clear that assessment on trustee is nothing but an assessment on the beneficiary and therefore, the rate of tax and slab benefits respectively applicable qua each beneficiary shall be applicable for the trustee as well.

- In case of CWT vs. Trustees of H. E. H. Nizam's Family (Remainder Wealth) Trust (1977) 108 ITR 555 (SC), the Supreme Court held that the department has two modes of assessment i.e., assessment in the hands of the trustee in a representative capacity or assessment directly in the hands of the beneficiary. The same view has been upheld by Supreme Court in case of Commissioner of Income-tax v. Smt. Kamalini Khatau [1994] 74 Taxman 392.However, once the option under section 166 is exercised by the assessing officer, recourse to section 161(1) cannot be invoked.

- As per section 161(1A) of the IT Act, where income of the trust comprises of profits and gains arising from business, whole income of the Trust shall be taxed at maximum marginal rate. However, an exception is carved out for trust settled through testamentary instrument. Accordingly, where the trust is created through testamentary instrument, exclusively for the benefit of relative dependent for support and maintenance and such trust is the only trust so declared, the income of the trust would be taxed at the same amount of tax payable by each beneficiary in respect of their beneficial interest, if he were assessed directly, irrespective whether the income of the trust comprises of any income from business or not.

7.2.2 <u>Taxability of irrevocable discretionary trust</u>

- The charge of income-tax under section 4 of the IT Act is on total income of a person. Section 2(31) of the IT Act defines the term 'person' as under:

  “person" includes —

  (i) an individual,

  (ii) a Hindu undivided family,

  (iii) a company,

  (iv) a firm,

  (v) an association of persons or a body of individuals, whether incorporated or not,

  (vi) a local authority, and

  (vii) every artificial juridical person, not falling within any of the preceding sub-clauses

  Based on the above definition, it can be noted that section 2(31) of the IT Act does not specifically include “Trust” within its ambit. As certainment of the status of trust under the IT Act as 'individual' or 'association of persons' or 'body of individuals' is a vexed issue.

- As against the specific trust wherein trust is to be taxed considering the status of its beneficiaries, in case of discretionary trust, income is taxed in the hands of representative assessee at the highest applicable rate without any benefit of slab(s).

- As per section 164 of the IT Act, income of the discretionary Trust shall be taxable **at the maximum marginal rate of tax**(other than special rates income) without any benefit of any slab(s). Maximum marginal rate of tax, considering the highest surcharge and cess rate currently applicable for resident assessees, would be 42.744%.

- However, in following scenarios, income received by the discretionary Trust will be taxed at the rate of tax as applicable to association of persons:

- Where none of the beneficiaries have income exceeding basic exemption limit;
- Where income of the Trust created through testamentary instrument does not include any income from business and such Trust is only Trust so declared by him; or
- Where income of the Trust created through testamentary instrument for the benefit of relative dependents includes income from business and such Trust is only Trust so declared by him; or
- Where the income is received/receivable by the trustee on behalf of 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.

• Supreme Court in case of CIT vs Smt. Kamalini Khatau [1994] 74 Taxman 392 is a landmark judgement which deals with taxability of discretionary trust. The key takeaways from the Supreme Court ruling are discussed in separate section.

7.3 <u>Special rate of tax or maximum marginal rate of tax</u>

7.3.1 Section 2(29C) of the IT Act defines the term maximum marginal rate ('MMR') to mean the rate of income-tax (including surcharge on income-tax, if any<u>) applicable in relation to the highest slab of income in the case of individual</u>, as specified in the Finance Act of the relevant year. Thus, MMR, for the purpose of the IT Act is such tax rate which is applicable in respect of income in the highest slab in the case of an individual.

<u>Rate of tax applicable to discretionary trust in case of income from capital gains, etc.(special rates)</u>

7.3.2 Where private discretionary trust earns income otherwise taxable at specific rate of tax (say for instance, long term capital gain chargeable to tax at 10% under section 112A of the IT Act or 20% under section 112 of the IT Act or 15% under section 111A), the question would arise whether the trust would be liable to pay tax at 10% (i.e. special rate of tax) or at maximum marginal rate of tax as specified in section 164?

7.3.3 As per Section 2(3) of the Finance Act, in case where the provisions of Chapter XII (which includes section 112) or section 164 apply, the tax chargeable shall be determined as provided in that chapter or that section. Accordingly, the provisions of chapter XII and section 164 (which provides for MMR in case of an indeterminate trust) are both placed on an equal footing and none specifically, overrides the other. Further, while section 164 is more specific to the *category of person* (i.e. a discretionary trust) to whom it would be applicable, section 111A, section 112, etc. are more specific to the *category/nature of income* to whom it would be applicable.

7.3.4 The concessional rate of tax stipulated under section 111A or section 112 or section 112A of the IT Act is applicable to all persons assessed under the IT Act and as such there is no legislative intent to recover taxes at a rate higher than the rate of tax prescribed under section 111A or section 112 or section 112A of the IT Act. **This rate is considered as the maximum rate of tax for income arising on transfer of such specified assets**. There is nothing in the scheme of the taxation of trusts where under discrimination is sought to be created between trusts on the one hand and other taxpayers on the other hand. The purpose of section 164 is to supply the computation machinery rather than creation of a charge or levy. Considering the same, it can be contended that the legislative purpose will be well served by applying uniform concessional rate in relation to income taxable at special rates under section 111A, section 112 or section 112A.

7.3.5 As held by SC in the case of CIT v. Kamalini Khatau (1994) (209 ITR 101) and as confirmed by the SC in the case of CIT v. Moti Trust, [1999] 236 ITR 37 (SC) in a case where income of a discretionary trust is actually distributed during the very same year to the beneficiaries, the beneficiaries can be directly assessed to tax. Now, assuming such is the situation, as per one view, the beneficiary who is directly assessed will bear tax @10% or 20% on such income from capital gains. Having regard to the option theory, an arguable view of the matter could be that the legislature wanted to control the mischief of a beneficiary trying to alter his tax liability base through the medium of multiple discretionary trusts. Given that the assessment on trustees is, in effect, an assessment on beneficiaries, arguably, the intent may not be to substitute MMR in lieu of a flat rate which is prescribed in respect of a specific source of income across all assesses. Accordingly, as between two specific rates, it may be possible to consider MMR to be a general rate whereas rate specific to long term capital gains income may be considered as being more specific to a given stream of income.

7.3.6 The said issue of rate of tax on special income earned by discretionary trust, was examined by the Mumbai Tribunal in the case of Jamsetji Tata Trust[3] wherein it was held that where the short-term capital gains chargeable to STT are chargeable to tax at MMR as per section 164 of the IT Act, such rate cannot exceed the maximum rate as provided under the provisions of the IT Act, i.e. under section 111A of the IT Act. Placing reliance on the decision of Jamsetji Tata Trust (supra), the Mumbai Tribunal, in the case of Mahindra and Mahindra Employees' stock option Trust[4] also held a similar view that in the case of a trust, long-term capital gains is chargeable to tax at MMR which cannot exceed the rate as provided under section 112 of the IT Act.

7.3.7 However, the AAR in the case of AIG (1997) (224 ITR 473) has, on the specific issue of applicability of tax rates between section 112 and section 164, upheld applicability of section 164 in preference to section 112. According to AAR, the correct solution would be to give weight age to section 164 which is designed to meet the issue of liability in special cases and to counter a strategy of tax avoidance – thus priority is given to section 164 over section 112.Similarly, in the case of India Cements Educational Society [2016] 67 taxmann.com 236 (Chennai - Trib.), it was held that where capital gain earned by assessee-trust became non-exempt under section 11 due to contravention of section 13(1)(c), such capital gain would be taxed at maximum marginal rate in terms of section 164(2) and benefit of section 112 could not be given to it.

7.4 <u>Rate of tax applicable to **dividend income** earned/ received by a discretionary trust</u>

7.4.1 In respect of tax rates applicable on dividend income in the hands of individuals/ HUFs/ AOP/ BOI, the Finance Act, 2020 imposed a cap on the surcharge rate at 15%. Thus, a question would arise whether this capped surcharge benefit of 15% will be available in respect of dividend income received by a discretionary trust having resident individual beneficiaries or the same will be subject to highest rate of surcharge i.e., 37% per section 2(29C) of the IT Act. **Succession planning structures through discretionary trusts generally comprise of investments in shares of group companies (whether listed or unlisted)and hence this issue could be of significant relevance.**

7.4.2 In this regard, it may be noted that section 164 does not provide the rate at which the dividend income received by a discretionary trust is taxable, but instead specifies that the income will be taxable at the maximum marginal rate ('MMR'). MMR is defined in section 2(29C) of the Act. The definition of MMR under section 2(29C) provides that rate should be seen in relation to the highest slab of 'income' and not 'total income'. Further, it does not provide for any specific tax rate but directs one to refer to the Finance Act. Further, section 2(3) and 2(9) of the Finance Act, though do make a carve out for section 164, but then fail to specify the applicable rate of surcharge. Similarly, the opening paragraph of Part III to First Schedule carves out section 164 but does not specify the surcharge rate applicable to a discretionary trust.

[3] *[2014] 44 taxmann.com 447 (Mumbai – Trib.)*
[4] *2015 (11) TMI 69 – Mumbai Tribunal*

7.4.3 It can also be argued that the intent of law is to tax discretionary trusts at the highest applicable tax rates for individuals (including surcharge). If the surcharge on the underlying dividend income is capped at 15%, a case may persist that surcharge on such dividend income earned by discretionary trust should also not exceed 15%.Accordingly, it could be construed that the purpose of MMR is to apply such rate of income-tax to income earned by an assessee which is maximum applicable rate of income-tax vis-à-vis that source of income.

8. Tax implications in case of specific transactions of domestic irrevocable discretionary trust

8.1 Tax implications on contribution/transfer of assets to the trust by the settlor/ transferor

In case of contribution of assets by the settlor or transferor to a private trust, one needs to examine the tax implications under the IT Act.

Taxation in hands of settlor/ transferor - capital gain tax implications under the IT Act

8.1.1 Section 45 of the IT Act levies gains arising upon transfer of capital assets to capital gains tax. Thus, where the settlor transfers his assets into the trust, it is relevant to evaluate if settlement of assets into a trust will constitute a 'transfer' and hence be chargeable as capital gains under section 45 of the IT Act.

8.1.2 Section 47 of the IT Act provides certain transactions which will not be regarded as a transfer for the purpose of section 45 of the IT Act. It inter alia provides that any transfer of a capital asset *under* a gift or will or an irrevocable trust is exempt from any capital gains taxation.

8.1.3 Based on the above provisions of section 47, it seems clear that no capital gains tax implications should arise under the IT Act on (a) initial contribution of capital assets into the irrevocable trust by settlor/transferor or (b) subsequent transfer by way of gift by any person (whether settlor or otherwise) to such trust.

Implications under section 56(2)(x) of the IT Act – in the hands of trustee / beneficiary

8.1.4 As per section 56(2)(x) of the IT Act, any sum of money received by any person without consideration, the aggregate value of which exceeds Rs.50,000, is taxable in the hands of recipient as income from other sources. Further, where any property [as defined under Explanation to section 56(2)(vii)] is received by any person without consideration or for inadequate consideration, the excess of fair market value of the property computed in the prescribed manner over consideration paid is taxable as income from other sources in the hands of the recipient.

8.1.5 Thus, section 56(2)(x) of the IT Act is a deeming fiction which postulates following three conditions for taxability of deemed income in the hands of recipient:

- The assesses is in receipt of the property;
- The assessee has received the property without consideration or for inadequate consideration; and
- The receipt is not covered specifically under exclusions prescribed under proviso to section 56(2)(x) of the IT Act.

8.1.6 Clause (x) of proviso to section 56(2)(x) of the IT Act provides express exemption for receipt of property by trust from an individual if such trust is created or established solely for the benefit of relatives of such individual. There is also a generic exemption under clause (I) of the proviso for receipt of property by an individual from any relative. While evaluating exemption under proviso (I), it needs to be tested whether recipient is a relative of donor. However, while evaluating exemption under clause (x) for trusts, the relationship needs to be tested from donor's perspective and not from recipient's perspective, i.e. it needs to be tested if the donor is a relative of the beneficiaries for whose benefit the trust has been settled.

8.1.7 Further, as mentioned above, the proviso to Section 56(2)(x) of the IT Act reads as "from an individual by a trust *created or established solely* for the benefit of relative of the individual". The clause therefore requires trust to be established solely for the benefit of relative of individual contributing property to the trust. In such case, it needs to be considered as to what would be the implications if the contributor himself is also one of the beneficiaries along with his relatives. Whether the clause is to be read strictly so as to exclude the benefit of the proviso or whether in view of the same being an exemption provision, it needs to be construed liberally so as to allow the exemption as long as other beneficiaries are the relatives of the contributor. The following are certain other questions that arise in relation to interpretation of the exemption clause (x) of the proviso.

- Whether the trust deed at the time *of inception for the trust* itself should restrict the beneficiaries of the trust to relatives of the settlor or the beneficiaries of the trust as at the time *of contribution* by an individual to the trust need to be considered?

- What would be the implications if at the time of contribution, the contributor is the relative of the beneficiaries; but subsequently a non-relative is added as a beneficiary in the trust?

In addition to exemption provided under proviso to section 56(2)(x) as above, it would be imperative to evaluate based on first principles whether at all, there would be exposure /implications under section 56(2)(x) before resorting to any exemption or in a scenario where conditions of exemption are not satisfied. The said principles are discussed as under separately qua the beneficiary and qua the trustees.

Implications u/s 56(2)(x) in hands of beneficiaries

8.1.8 In the case of discretionary trusts, the share of beneficiaries is not ascertained unless distributed. One of the essential limbs to section 56(2)(x) of the IT Act is *the receipt of property*. A charge under section 56(2)(x) of the IT Act is created in the year of receipt of the asset by the trust. Thus, one may argue that in the case of a discretionary trust, where until the year in which the discretion vested on the trustee is exercised by the trust, it may not be possible to ascertain the actual recipient of the property, and hence, the charge under section 56(2)(x) of the IT Act ought not to be attracted in the year of settlement in the hands of the beneficiaries.

8.1.9 Since the section 56(2)(x) of the IT Act is a deeming provision charging a capital receipt to tax, the charge should be construed strictly, and its scope cannot be extended to cover a situation which does not get covered within the ambit of the section on strict interpretation of the provisions.

8.1.10 It can also be argued that the charge of section 56(2)(x) of the IT Act is created upon receipt of specified property and not merely a beneficial interest (which, also, in the case of discretionary trust is contingent in nature qua each beneficiary). 'Beneficial interest', which is defined in the Trust Act, received by the trust/ beneficiary does not fall within the meaning of specified property for the purpose of section 56(2)(x).

8.1.11 Thus one may contend that the provisions of section 56(2)(x) of the IT Act ought not to trigger in the hands of beneficiary at the time of settlement of assets into a discretionary trust or upon further contributions to such trust. However, considering that the provisions of section 56(2)(x) of the IT Act are relatively new provisions and the aforesaid arguments are untested and litigation in this regard cannot be ruled out, one needs to wait till jurisprudence on interpretation of the same gets evolved.

Implications u/s 56(2)(x) in hands of trustees

8.1.12 In the context of section 56(2)(x) when one speaks of property being 'received', it would mean received beneficially by the recipient with complete power of use and enjoyment. A perusal of definition of 'trust' under section 3 of Trust Act makes it clear that though the title in the trust property vests in the trustee, this is coupled with an obligation annexed to the trust property arising out of confidence placed in him by the settlor.

8.1.13 In a scenario where contribution of property to a trust does not qualify for exemption under clause (x) of proviso to section 56(2)(x) of the IT Act, it can be argued that the provisions of the aforesaid section 56(2)(x) ought not to apply to the Trustees, as a Trustee receives the property with an obligation to hold and administer it for the benefit of the beneficiaries. This obligation taken over ought to be good and sufficient consideration for receipt of properties by the Trustees, and therefore, the receipt of property cannot be said to be without/for inadequate consideration.

8.1.14 However, considering that the provisions of section 56(2)(x) of the IT Act are relatively new provisions and the aforesaid arguments are untested and litigation in this regard cannot be ruled out, one needs to wait till jurisprudence on interpretation of the same gets evolved.

8.2 Tax implications on distribution of annual income earned by the Trust

Distribution of income earned by the trust in the same year in which receipt/accrual

8.2.1 As per section 164 of the IT Act, income of the discretionary trust would be taxable in the hands of 'representative assessee' at the maximum marginal rate of tax. Supreme Court in case of CIT vs Smt. Kamalini Khatau [1994] 74 Taxman 392 (SC) unequivocally held that

– Section 164 of the IT Act is not a charging section, but a section which merely creates a special scheme for levy of tax.

– In case of discretionary trust, 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'. Accordingly, the income received on behalf of or for the benefit of the beneficiaries if taxed in the hands of trustees in representative capacity at MMR, cannot be said to have accrued once again in the hands of the beneficiary upon distribution in the same year. In other words, the trustees and beneficiaries both cannot be taxed in respect of the same income. It would lead to double taxation.

– Accordingly, once the tax has been discharged by the representative assessee at applicable rates in accordance with the provisions of section 164 and due assessment has been done thereof, assessment of same income cannot be again made in the hands of beneficiary

8.2.2 Section 166 of the IT Act provides the assessing officer ('AO') with an option to directly assess the beneficiaries in respect of the income received by trustees on his behalf. Having exercised his option once, it will not be open to the Income-tax Officer to assess the same income for that assessment year in the hands of the other person (i.e., the beneficiary or the trustee)[5].

8.2.3 An interesting issue arises for consideration is whether distributions from income of the current year can be taxed in the hands of the beneficiaries (as per section 166) or does mandate of section 164 of the IT Act require that assessment needs to be only in the hands of Trust/trustees at maximum marginal rate of tax.

8.2.4 In a scenario where income is earned by trust but not distributed to the beneficiary in the same year, the provisions of section 166 cannot be invoked by the department to assess the said income directly in the hands of beneficiary given that the share of beneficiary is not ascertainable until actual distribution of income. In such case, the only alternative available with the tax department is to levy tax in accordance with the provisions of section 164 in the hands of representative assessee at MMR.

8.2.5 However, in a scenario where income is earned by trust is distributed to the beneficiaries in the same year, there would be an option available to the tax department to levy/ assess such income either in the hands of the trust/trustee or in the hands of beneficiary. In order that there is no loss of revenue, the tax department at the time of raising the initial assessment either of the trust or the beneficiaries, generally adopts the course most beneficial to the revenue.

8.2.6 It can be inferred that where the income of a discretionary trust is distributed in the year of accrual, the revenue may seek to tax such income either in the hands of the trustee under section 164 of the IT Act or the beneficiaries under section 166 of the IT Act. Hence if the commercial considerations permit, one may explore to distribute the income to beneficiaries in the subsequent years. The implications in such scenario are discussed hereunder.

<u>Distribution of income in subsequent years</u>

8.2.7 In the case of a discretionary trust, given that the share of beneficiary is not ascertainable until actual distribution of income, where the income accruing during the relevant previous year remains undistributed until the end of the year, such income cannot be assessed in the hands of the beneficiary (in the year of accrual) as the share of beneficiaries in such income is contingent in nature. However, such income would have been assessed to tax in the hands of the Trustee (in its representative capacity) in accordance with the provisions of section 164 of the IT Act.

8.2.8 Even though the share of beneficiaries in such cases is not ascertained, the same belongs to the beneficiaries only. Thus, once such income is taxed under section 164 of the IT Act, taxing such income in the hands of the beneficiaries upon its distribution would tantamount to double taxation.

8.2.9 The Supreme Court in the case of Nizam Trust (supra) and Kamalini Khatau (supra) held that the income of a trust belongs to the beneficiaries and that the assessment on trust is effectively assessment on the beneficiaries who are in receipt of income through the hands of the trustees. An income, which has already been charged to tax at the trust level (through the trustee in his capacity as a representative assesse), cannot be charged once again in the hands of the beneficiaries.

[5] *CBDT Circular No. 157 [F.No. 228/8/73-IT (A-II)], dated 26-12-1974.*

8.2.10 The Mumbai ITAT ruling in case of JCIT v Shantaben Patel (ITA No 5000/Mum/2001) is directly on the proposition. In this case, ITAT affirmed the following conclusions of the CIT (Appeals) to support that distribution from accumulation represents capital receipt for the beneficiary.

– Amount received from past accumulations is capital sum and not receipt of income. Also, taxation under the IT Act has to be in respect of direct or first receipt and not on remittance.

– It is undisputed that income needs to be taxed only once either in the hands of the beneficiaries or in the hands of the trustee. Once the income is assessed as that of trust, there cannot be further assessment in the name of the beneficiary.

– Once the trust is assessed on accrual of income, the income gets transformed into the capital fund. Thus, for the beneficiary, the remittance in subsequent year is capital receipt.

8.2.11 If the trustee is taxed in the year of receipt and the beneficiaries again are taxed on the same income when they receive it in subsequent years, it would lead to double taxation of the same income. It would amount to treating the distribution of income by the trustee to the beneficiary as a separate passage of income which may not accord with the position of the status of the trustee as a "representative assessee" representing the beneficiary and paying tax on behalf of beneficiaries.

8.2.12 Given the aforesaid, it seems clear that distribution of past years' income of the trust assessed on the trustee should not be taxed once again, in the hands of the beneficiary in the subsequent year of distribution.

8.3 **Tax implications on renunciation of beneficial interest by a beneficiary in favor of other beneficiaries**

8.3.1 Where a beneficiary renounces its beneficial interest in favour of other beneficiaries, it is relevant to consider the implications under section 56(2)(x) of the IT Act upon such renunciation in the hands of the incoming beneficiaries.

8.3.2 As discussed above, where an individual or an HUF receives inter-alia, a sum of money exceeding INR 50,000 or any property (other than immovable property) for inadequate or nil consideration, it will be taxed in the hands of the recipient as Income from other sources.

8.3.3 For the purpose of section 56(2)(x) of the Act, the term property has been defined to mean capital assets of the assessee, viz. immovable property being land or building or both; shares and securities; jewellery; archaeological collections; drawings; paintings; sculptures; any work of art; bullion.

8.3.4 In the case of a discretionary Trust, the beneficial interest of each of the beneficiary is contingent in nature. What is contingent in nature cannot per se regarded as a 'receipt' in the hands of other person.

8.3.5 Further, the distribution of income/ corpus in the case of a discretionary trust is solely at the discretion of the trustee. Thus, a certain proportion of distribution towards a particular beneficiary(s) higher/ lower vis-à-vis other beneficiaries should not constitute renunciation of beneficial interest by the beneficiary in favour of other beneficiaries.

8.3.6 Accordingly, a better view would be that renunciation of beneficial interest by a beneficiary in favour of other beneficiaries ought not to trigger the provisions of section 56(2)(x) of the Act.

8.4 **Tax implications on distribution of corpus to beneficiaries from the Trust**

Tax implications in the hands of beneficiaries

8.4.1 Distribution of corpus(whether during lifetime of the trust or on dissolution) by the trust amongst the beneficiariescomprises of assets part of the initial settlement, contributions of the settlor and the accumulated income of the trust.

8.4.2 Section 56(2)(x) of the IT Act seeks to tax receipt of any property by any person without consideration or for inadequate consideration as 'income from other sources' in the hands of the recipient.

8.4.3 It can be argued that the sum received by the beneficiary always belonged to the beneficiaries. The distribution merely results in a change in legal title from the trustee to the beneficiaries whereas the economic/ beneficial title always vested in the beneficiaries. Accordingly, distribution of corpus should not result into a tax liability in the hands of the beneficiaries.

8.4.4 The trustees are never the real owners of the assets, they are only the legal owners. It is by fiction of law that the trustee is treated as the full owner of the property against third person but as between the trustees and beneficiaries, the property belongs to the latter and not to the former. The beneficial owner of such assets are the beneficiaries named in the trust deed by the settlor of the trust. Trustees only hold the assets in trust for the beneficiaries until the time of distribution. A trustee is obliged to hold, manage, dispose-off and utilize the trust property for a specific purpose and in accordance with the terms of the trust deed. The above understanding that trustee is a legal owner and beneficiaries are the real owners of trust property has been observed by certain judicial precedents[6]:

8.4.5 Basis the above judicial precedents, it can be contended that beneficiaries have pre-existing rights in the property of the trust. Hence, distribution is merely an adjustment of pre-existing rights of the beneficiaries. A property received by beneficiaries always belonged to them which was held by the trustees only in fiduciary capacity and accordingly distribution merely results in a change in legal title from the trustees to the beneficiaries, whereas the economic/ beneficial title always vested in the beneficiaries. Accordingly, receipt of one's own asset cannot be regarded as receipt without consideration within the scope of section 56(2)(x).

8.4.6 Another argument which is relevant to consider is that to enable trigger of section 56(2)(x) of the IT Act, the receipt is required to be for Nil or inadequate consideration. In the case of distribution of corpus by the Trust, there is no possibility for the beneficiary to pay any consideration.

8.4.7 Based on arguments as discussed above, the Mumbai ITAT, in the case of Ashok C Pratap[7] and Bangalore ITAT in case of Mrs. Sharon Nayak[8] held that the then prevailing provisions of section 56(2)(vi) of the IT Act (now section 56(2)(x) of the IT Act) do not apply in case of distribution of assets by the trust to the beneficiaries. Thus, analogy could be drawn from such judicial precedents to contend that the provisions of section 56(2)(x) of the IT Act do not apply in case of distribution of assets by the trust to the beneficiaries.

[6] *Yasmin Properties (P.) Ltd. v. ACIT[1993] 46 ITD 331 (Bom.); Abad Trust [2018] 171 ITD 50 (Cochin - Trib.)*

[7] *[2012] 23 taxmann.com 347 (Mum.)*

[8] *[2016] 159 ITD 143 (Bangalore – Trib.)*

8.4.8 Basis the above arguments it can be contended that the distribution of accumulated corpus / capital ought not to give rise to income under section 56(2)(x)in the hands of the beneficiaries.

8.4.9 However, given that the provisions of the IT Act do not capture this situation directly, litigation by the tax authorities, especially at the lower levels, cannot be ruled out.

<u>Tax implications in hands of trust/trustees</u>

8.4.10 As per the provisions of section 45 of the IT Act, any profits or gains arising from the transfer of a capital asset shall be chargeable to income tax under the head capital gains and shall be deemed to be the income of the year in which the transfer took place. Hence, income from *transfer* of a capital asset is taxable as capital gains in the hands of the transferor.

8.4.11 The term 'transfer' in relation to a capital asset has been defined under section 2(47) of the IT Act to inter alia include sale, exchange, relinquishment of an asset. The terms sale, exchange and relinquishment have not been defined under the IT Act. Based on the general meaning of the said terms, it appears that existence of two parties is essential for transfer.

8.4.12 As discussed above, the beneficiaries are the real owners of the trust property and trustees hold such property only in fiduciary capacity. Hence, it can be argued that passing of assets to beneficiaries which already belonged to them ought not to constitute a transfer as there are no distinct transferor and transferee. It is essentially nothing but handing over possession of assets to the actual owners on distribution. Further, a trust is an obligation created by a person (settlor / contributor) in favour of another person (trustee) for ownership of the property for the benefit of a third party or the person himself (beneficiaries) and mere discharging such obligation by way of distribution to beneficiary ought not to be treated as 'transfer'.

8.4.13 It is pertinent to note that in the context of family arrangements, Courtshave consistently held that there is no transfer since each person who is a party to the family arrangement is presumed to have a pre-existing title in the property which is the subject matter of family arrangement. Further, the Courts have consistently held that an event of dissolution of firm or an event of liquidation of company or an event of partition of HUF is an event of crystallizing the interest of the shares and did not, under general law, constitute a 'transfer'

Similar analogy can be imported to trust structures, wherein distribution merely results in working out of pre-existing rights of the beneficiaries of the trust, to conclude that there is no 'transfer'.

8.4.14 Without prejudice to the above proposition that there is no 'transfer' u/s 2(47), one may also explore additional arguments of (a) claiming exemption provided u/s 47 for any transfer of a capital asset *under* an irrevocable trust, and /or (b) absence of 'consideration' accruing to the trust on distribution of assets to beneficiaries.

8.4.15 Based on above discussion, it may be argued that the distribution of assets/ shares by trust to its beneficiaries should not be regarded as transfer under section 2(47) and therefore, there ought to be no implications under section 45 in such case. The issue, however, remains debatable and not free from litigation.

9. Concluding remarks:

Succession plan needs to be tax efficient and compliant with the regulatory scenario and at the same time it needs to ensure that the transition of a family's wealth and business over generations is conducted in a conducive manner, without frustrating the individual desires and wishes of the family members. This can be achieved by way of a suitable trust structure in place. Succession planning through trust structure has been in use in India since several generations and is not a new concept. However, with the various complications of business, the multitude of laws that today surround any kind of action, the glare that any business house comes under, and the uncertainty surrounding the reintroduction of inheritance tax, makes it an exciting subject. However, the taxation of trust remains a vexed issue and hence nuances would need to be considered before creation of trust structure so that the same serves as an effective succession planning tool thereby leading to preservation of family wealth and a serving as a tax efficient vehicle.

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INCOME-TAX IMPLICATIONS ON DEATH AND SUCCESSION

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"He said that there was death and taxes, and taxes was worse, because at least death didn't happen to you every year."

\- From the novel 'Reaper Man' by Terry Pratchett

Background

In India, income-tax is leviedon every person earning taxable income. Interestingly, death of an individual does not relinquish him from his income-tax liability. It is not only the physical properties but also the rights and obligations (including the obligation to discharge tax liabilities) of the deceased which pass on to some other living persons. This article attempts to explore several issues related to the chargeability of income-tax in respect of:

A. **Income of the deceased up to the date of death**

B. **Income of the deceased after the date of death**

C. **Income of the estate of the deceased subsequent to distribution to the legatees/legal heirs**

D. **Succession of property of a Hindu Undivided Family ('HUF')**

Before we deep-dive into the principles and provisions of the Income-tax Act, 1961 ('the IT Act') in relation to death and succession, it is important to revisit the two modes in which the succession of the property of a deceased person takes place in India:

- **Testamentary succession:**

  Succession as per the directions regarding the distribution of estate contained in the Will or any other testamentary document is known as 'testamentary succession'.The person executing it is referred to as the 'testator' and the person to whom the property is directed to be given is the 'legatee' or 'beneficiary'. The 'executor' is the individual named in the Will who is responsible for ensuring that the instructions given in the Will are carried out.

  The testamentary succession in India of followers of all religions other than Muslims is governed by the **Indian Succession Act, 1925**. Succession of the properties of Muslims (testamentary as well as non-testamentary) is governed by *Sharia law* based on the verses of Quran.

- **Intestate Succession/Non-testamentary succession:**

  When an individual dies without making any valid Will, succession of his property is governed by the laws of inheritance applicable to the deceased and the 'legal heirs' entitled under the applicable law take share in the property as a matter of right conferred on them by the applicable laws of inheritance.

Intestate succession of the properties of Hindus, Sikhs, Jains and Buddhists are governed by the **Hindu Succession Act, 1956 ('HSA')**. Succession of the properties of Christians, Parsis and followers of other religions (other than Muslims) is governed by the provisions of the **Indian Succession Act, 1925**. However, succession to the properties of Hindus whose marriages are solemnised under the **Special Marriage Act, 1954** is not governed by the **HSA** but by the **Indian Succession Act, 1925**[1].

A. Income of the deceased up to the date of death

Section 159 of the IT Act lays down that where a person dies, his legal representative(s) shall be liable to pay any sum which the deceased would have been liable to pay, if he had not died, in the like manner and to the same extent as the deceased. For the aforesaid purposes –

a) Any proceeding taken against the deceased before his death is deemed to be taken against the legal representative and may be continued against him from the stage at which it stood on the date of the death of the deceased;

b) Any proceeding which could have been taken against the deceased if he had survived may be taken against his legal representative;

c) All the provisions of the Act shall apply in relation to proceedings taken or continued against the legal representative.

Section 159 of the IT Act creates a legal fiction and provides the machinery provision for the assessment and recoveryof dues from the estate of a deceased person[2]. The legal representative shall be deemed to be an assessee for the purposes of this Act in respect of income received by, or accrued to, the deceased up to the death and in respect of all proceedings continued or taken against him which could have been taken on the deceased.

Meaning of 'legal representatives'

Section 2(29) of the IT Act adopts definition of the term 'legal representative' from Section 2(11) of the **Code of Civil Procedure, 1908**. It means a person who in law represents the estate of a deceased and includes any person who inter-meddles with the estate of the deceased and where a party sues or is sued in a representative character, the person on whom the estate devolves on the death of the party so suing or sued. The term legal representative has a much wider connotation and includes legal heirs, executors or administrators.

The capacity of the executor to represent estate derived under the Will does not depend on whether a probate is obtained.All the executors administering the estate may be held to be the legal representatives of the deceased and liable to the extent of the property taken possession of by them[3].

Liability of legal representatives

The liability of the legal representative under this section is restricted to the previous year in which the demise of the individual has taken place[4]. Furthermore, the liability is restricted up to the date of death and only in respect of income that has accrued to the deceased up to the date of death[5].

[1] *By virtue of section 21 of the Special Marriage Act, 1954*
[2] *Arvind Bhogilal v. CIT [1976] 105 ITR 764 (Bombay)*
[3] *First Addl. ITO v. Mrs. Suseela Sadanandan [1965] 57 ITR 168 (SC)*
[4] *CIT v. Hukumchand Mohanlal [1971] 82 ITR 624 (SC)*
[5] *Raghunathdas Kanani v. Addl. CIT [1979] 2 Taxman 584 (MP)*

The liability of the legal representative is limited to the extent of theestate of the deceased which isin the possession of the legal representative and is not a personal liability[6]. However, personal liability of the legal representative exists, where pending a tax liability, the legal representative disposes of or parts with any assets of the deceased.In any case, the arrears of tax liability of the deceased assessable in the hands of a legal representative cannot be adjusted against refund, if any, due to the legal representative in his individual capacity[7].

There is no provision under the IT Act obligating the legal representatives of the deceased to voluntarily inform the income-tax authorities about the death of an assessee[8]. However, with a view to avoid unnecessary complications, it would be prudent for the legal representative or the executor to register himself as 'Representative Assessee" on the income-tax e-filing portal.

Continuation of existing assessment/ re-assessment proceedings

An assessment on a dead person is not enforceable in law[9].The requirement of issuing a notice or order to a correct person and not a dead person is not merely a procedural requirement but an important pre-requisite for the validity of such notices/ orders. Accordingly, the notices / orders issued in the name of dead person is not protected by the provisions of Section 292B or Section 292BB of the IT Act(which provide that minor mistake / defect / omission does not invalidate the impugned proceedings) since it is fundamental to the proceedings[10].

If the assessee dies before the assessment proceedings are completed, the Assessing Officer (AO) is required to ensure compliance of Section 159(2) of the IT Act by bringing all legal representatives on record before passing any assessment order[11].A notice issued to the legal representative should clearly mention that it is served upon him in his capacity as a legal representative of the deceased and that the assessment proposed is that of the income of the deceased person[12]. An omission to serve or any defect in the service of notices provided by the procedural provisions may render the assessment order irregular (depending upon the nature of the provisions not complied with), but does not make the assessment void or illegal[13].

Penalty proceedings

The word "any sum" has been inserted in Section 159(1) of the IT Act in place of the words "any tax" which appeared in the provisions of section 24B of the erstwhile Income-tax Act, 1922[14] so as to also cover interest and penalty. Accordingly, a penalty already imposed on the deceased prior to his death may be demanded from the legal representative and collected out of the estate. The penalty proceedings for a default committed by the deceased can be started or continued against the legal representatives.

[6] *Union of India v. Mrs. Sarojini Rajah [1974] 97 ITR 37 (Madras)*
[7] *Hasmukhlal v. ITO [2011] 117 Taxman 231 (MP)*
[8] *Savita Kapila v. ACIT [2020] 426 ITR 502 (Delhi)*
[9] *CIT v. Amarchand N. Shroff [1963] 48 ITR 59 (SC)*
[10] *Mrs. Vanitha Gopal Shetty and Others v.ACIT (Writ Petition No. 19840/2019 (T-IT) beforethe Hon'ble Karnataka High Court; Sumit Balkrishna Gupta v. ACIT [2019] 414 ITR 292 (Bombay)*
[11] *CIT v. Dalumal Shyamumal [2005] 144 Taxman 151 (MP)*
[12] *CIT v. Sumantbhai C. Munshaw (deceased) [1981] 5Taxman27 (Gujarat)*
[13] *CIT v. Jai Prakash Singh [1996] 219 ITR 737 (SC)*
[14] *Pari materia to Section 159 of the IT Act*

Several courts[15] have held that there is no prohibition in law against initiation and levy of penalty on the legal representatives of the deceased person pursuant to provisions of Section 159(2) of the IT Act in case the same was initiated while the assessee was alive or initiated on the legal representatives after the death of the assessee by bringing all the legal representatives on record. However, there are several contrary judgements (i.e. in the favour of assessees). The **Delhi Bench of the Hon'ble Income Tax Appellate Tribunal ("Tribunal")**[16] has held, "*In section 159, there is no mention of penalty proceedings. It is amply clear that proceedings under section 159(2) do not include penalty proceedings*". Similarly, the **Madras Benchof the Hon'ble Tribunal**[17] has held that as per Section 271(1)(c) of the IT Act, penalty can be levied only on that person who has concealed the particulars of income or filed inaccurate particulars of income. The use of the words 'such person' in Section 271(1)(c) of the IT Act clearly mandates the authority to levy penalty only on the same person who has filed the return of income and concealed the particulars or filed inaccurate particulars in such return. Accordingly, it was held that if the return had been filed by the deceased assessee (against whom no penalty proceedings was initiated), penalty proceedings could not be now levied on the legal representatives who have not filed the return of income. While this ruling is in the context of the penalty provisions under the old regime, its principles can be applied even to the new penalty regime under Section 270A of the IT Act.

Appeals

After filing the appeal, if the assessee dies, his legal representatives may continue with the impugned appeal. An appeal filed by the income-tax authorities against a dead person is incompetent and a nullity[18].The name of the deceased person needs to be substituted with the names of the legal representatives to constitute a valid appeal. In case an appellate authority passes an order in the name of a dead person, then such a matter requires re-adjudication by the relevant appellate authority[19].

Prosecution

The provisions of Section 159(2) cannot be invoked to launch prosecution against the legal representatives in respect of any offences committed by the deceased assessee. The prosecution of any offence would abate with the death of the deceased.

B. Income of the deceased after the date of death

(i) In case the deceased passes away intestate

The property of the deceased person would automatically get devolved on the legal heirs immediately on death due to operation of laws of inheritance applicable to the deceased person. Hence each legal heir would be assessable on the income in respect of his share of estate from the date of death of the deceased person in addition to his personal income.

(ii) In case the deceased assessee passes away testate (i.e., after executing a valid Will)

The chargeability of tax in respect of the income for the period commencing on and from the date of death of a testate person till the complete distribution of his estate is dealt with in the provisions of Section 168 of the IT Act. These provisions make it obligatory on the income-tax authorities to tax the income from the estate of the deceased person in the hands of the 'executor' only.

[15] *Smt. Tapati Pal v. CIT [2002] 124 Taxman 123 (Cal.); Late Iqbal Hussain v. ITO [2007] 111 TTJ 717 (Allahabad Tribunal)*
[16] *ITO v. V.P. Sharma [2006] 154 Taxman 34 (Delhi Tribunal)*
[17] *CIT v. Dr. K.C.G. Verghese [2019] 416 ITR 155 (Madras)*
[18] *CIT v. Smt. Santosh Rani [1996] 88 Taxman 209 (MP)*
[19] *Ramesh M. Mehta v. ACIT [2014] 222 Taxman 142 (Madras)*

Meaning of 'executor'

For the purposes of this section, the term 'executor' has been defined to include an administrator or other person administering the estate of a deceased person. It is provided that if there is only one executor, he would be assessable in the status of an 'individual' but if there are more than one, they shall be assessed as an Association of Persons ('AOP'). Furthermore, the residential status of the executor for the purposes of assessment of income of the estate pending distribution shall the same as the residential status of the deceased person during the previous year in which the death occurred.

It should be noted that a court receiver appointed by a court to sell the properties of the deceased and distribute the sale proceeds amongst the creditorsis neither an executor appointed under the Will nor an administrator and therefore, is not an executor within the meaning of Section 168 of the IT Act[20].

Assessment in the hands of an Executor

The Executor is responsible for filing of the return of income and payment of taxes under the IT Act in respect of the estate of the deceased person. The executor shall be assessed in respect of the income of the estate separately from his personal income. The assessment of an executor under Section168 of the IT Act should be made separately from his personal assessment even if the executor is the sole beneficiary and has applied a part of the estate to his benefit[21]. Thus, a separate PAN would be required for filing the return of the estate of the deceased person. The executor will continue to be assessed until the estate is completely distributed among the beneficiaries. If the estate is not fully administered, the legal heirs cannot be charged to tax[22]. The executor who is assessed under Section 168 of the IT Act has the right of retention and reimbursement of tax paid or payable by him[23].

In a case where the deceased assessee left two Wills covering different properties situated in India and England wherein different and distinct set of executors were appointed for each Will, the income-tax authorities made a single assessment under Section 168 of the IT Act. In this regard, the **Hon'ble High Court of Gujarat**[24] held, "*the word 'estate' itself signifies the totality or entirety of the property of a deceased. The contention that there were two separate estates was thus not well-founded in law. A single assessment in the status of "AOP" in respect of the aggregate income from the two estates was, therefore, validly made under section 168.*"

In case the executors carry on the business of the deceased for some time in the course of winding-up the estate, the profits made by them in carrying out such business should be assessable under Section 28[25] of the IT Act. Similarly, the income of the discontinued business should also be taxed in the hands of the executors in the year of receipt as per the provisions of section 176(3A) and Section 176(4)[26] of the IT Act.

Set-off and carry forward of losses

Section 78(2) of the IT Act states that except in the case of succession through inheritance, a successor of a business or profession shall not carry forward the losses of the predecessor. Accordingly, a legatee or a legal heir should be able to carry forward and set-off the business losses of the deceased person. Furthermore, it has been held that notwithstanding the status of the executors being an AOP, they are entitled to claim set-off on account of the balance of brought forward losses incurred by the deceased person prior to his death[27].

[20] *ITO v. K. Krishnamachari [1985] 11 ITD 194 (Hyderabad Tribunal)*
[21] *CIT v. Bakshi Sampuran Singh[1982] 133 ITR 650 (Punjab & Haryana)*
[22] *Navnit Lal Sakarlal v. CIT [1992] 193 ITR 16 (SC)*
[23] *Section 169 r.w. Section 162 of the IT Act*
[24] *Maharani Vijaykunverba Saheb v. CIT [1982] 8 Taxman 60 (Gujarat)*
[25] *Profits and gains of business or profession*
[26] *Discontinued business*
[27] *CIT v. G.B.J. Seth [1981] 6 Taxman 318 (MP)*

Specific legacy

A specific legacy is one where a testator bequeaths to any person a specific part of his property, which is distinguishable from all other parts of his property. For example, bequest of a specific diamond ring, a certain piece of silk cloth, a certain amount of currency notes in an identified chest, etc. The significance of specific legacy lies in the fact that in case of deficiency of assets to pay legacies, the specific legacy is not liable to abate with the general legacies. The specific legacies always have priority in matters of devolution. In computing the total income of any previous year, any income of the estate distributed to or applied to the benefit of any specific legatee shall be excluded. The income so excluded should be included in the total income of the previous year of such specific legatee.

Costs,expenses and payments to beneficiaries/ legatees

Payment of the *addya sradh* expenses, cost of probate, death duties, other debts due to the state or the periodic payment to beneficiaries (other than specific legatees) out of the income of the estate in compliance with the obligatory directions of the testator, cannot be deducted in computing the executor's income chargeable to tax from the estate[28]. Since it is merely a case of application of income, it should not entitle the executors to claim any deduction in respect of the income so applied.

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C. Income of the estate of the deceased subsequent to distribution to the legatees/legal heirs

Once the share of estate of the deceased becomes the property of the legatee on distribution in terms of the Will, the respective legatee becomes chargeable to tax in respect of income arising from the assets received by him in his individual capacity, which accrues from the period commencing from the date of distribution of the assets by the executor/ administrator. The income is computed under the respective heads of income in accordance with the normal provisions of the IT Act. However, as discussed earlier, a legal heir of an intestate deceased person would be assessable on the income in respect of his share of estate from the date of death of the deceased person itself, since the property devolves onto them immediately by operation of the applicable laws of inheritance.

[28] *P.C. Mullick v. CIT [1938] 6 ITR 206 (Privy Council)*

If the bequest under the Will is in favour of more than one person jointly, the income from such bequest is assessed as income of the AOP (which shall be required to obtain a separate PAN and file its income-tax returns). In case the Will creates a testamentary trust and a bequest is in favour of such a trust, it is assessable as trust's income in accordance with the provisions of Section 160 to 166 of the IT Act.

Section 47(iii) of the IT Act specifically excludes any transfer of a capital asset under a Will from being subjected to capital gains tax in the hands of the deceased transferor. A legatee/ legal heir receives his share of estate as a 'capital receipt', not liable to tax. Receipt of any property under a Will or by way of inheritance is also not subject to deemed gift tax in the hands of the legatee/ legal heir as per the provisions of Section 56(2)(x) of the IT Act.

An interesting issue came up before the **Mumbai Bench of the Hon'ble Tribunal**[29] where in the income-tax authorities alleged that sum received by the assessee from legal heirs for giving up his rights to contest the Will of a close relative was a casual receipt earned by the assessee without any consideration and therefore chargeable to tax under the provisions of Section 56(2)(v) of the IT Act. It was held that 'consideration' referred to in the provisions of section 56(2)(v) of the IT Act has to be understood as per the definition of consideration given under Section 2(d) of the **Indian Contract Act, 1872**. The assessee has abstained from contesting the Will and such an act constitutes a valid consideration for receipt of sum of money from the legal heirs. Thus, the amount received by the assessee cannot be said to be without any consideration and is accordingly not taxable under the deemed gift tax provisions of Section 56(2)(v) of the IT Act. The decision of the **Mumbai Bench of the Hon'ble Tribunal** should be applicable even with respect to the new deemed gift tax provisions contained in Section 56(2)(x) of the IT Act.

In case, the legatee / legal heir disposes of any capital asset acquired by him in succession, income from the transfer of such capital asset shall be subject to tax under the head capital gains. Section 49(1) of the IT Act provides that where the capital asset became the property of the assessee under a Will or by succession or inheritance or devolution, the cost of acquisition of the asset shall be deemed to be the cost in the hands of previous owner for the purposes of computing capital gains. Similarly, Section 2(42A) of the IT Act states that for the capital asset which becomes the property of the assessee in the aforesaid circumstances, the period of holding of the previous owner shall also be considered as the period of holding of the assessee for determining whether the capital asset is short term or long term. Furthermore, the courts have held that it is the year of acquisition of the previous owner that is relevant for the purpose of indexation of the cost of acquisition and not the year when the assessee received it under a Will or by succession or inheritance or devolution[30].

D. Succession of property of an HUF

An HUF is a body consisting of persons (sons as well as daughters[31]) lineally descended from a common ancestor and include their spouses living together. Income arising from the assets of the family is assessed as income of HUF distinct from the individual income of each coparcener. It continues to be so assessed till a partition is effected and a finding of partition is given by the income-tax authorities. HUF is a legal entity and not a natural person who can die and hence cannot be regarded as a 'deceased person'. Section 159 and Section 168 of the IT Act are applicable only to a natural person. Furthermore, on the death of the Karta of the HUF, the HUF continues to be in existence.

[29] *Purvez A. Poonawalla v. ITO [2011] 138 TTJ 673 (Mumbai Tribunal)*

[30] *CIT v. Manjula J. Shah [2013] 355 ITR 474 (Bombay)*

[31] *Pursuant to The Hindu Succession (Amendment) Act, 2005, a daughter is now vested with all rights equal to son including the right to become coparcener by birth or seek partition of the HUF property.*

Partition of the property of the HUF

As per Explanation to Section 171 of the IT Act, partition means:

(i) *Where the property admits of a physical division, a physical division of the property, but a physical division of the income without a physical division of the property producing the income shall not be deemed to be a partition; or*

(ii) *Where the property does not admit of a physical division, then such division as the property admits of, but a mere severance of status shall not be deemed to be a partition.*

Although, as per the Hindu law, partial partition of the HUF either as regards its assets or as regards members is fully valid, the income-tax laws do not recognise such a 'partial partition'. The income-tax laws require that partition of HUF should be full as regards all the assets as well as in respect of all the members. So, unless there is total partition of the HUF, the income arising in respect of the partly distributed assets shall be continued to be taxed in the hands of the HUF. After a finding as regards total partition is recorded as per the provisions of Section 171 of the IT Act, the HUF as an entity is assessed up to the date of partition and thereafter each member or group of members (referred to in common parlance as smaller HUFs of descendants of the Karta) is individually subjected to tax in respect of income from assets falling to their share.

Devolution of interest in the HUF property

Prior to the amendments introduced by the Hindu Succession (Amendments) Act, 2005 ('2005 Amendments), Section 6 of the HSA provided that on the death of a Hindu, his interest in the coparcenary property would devolve by ruleo f survivorship, upon the surviving members of the coparcenary and not in accordance with the provisions related to intestate succession of the HSA.

However, the 2005 Amendments have abrogated the rule of survivorship. The replaced Section 6 of the HSA states that when a Hindu dies, his interest in the property of HUF governed by the Mitakshara law, shall devolve by testamentary or intestate succession, as the case may be, and not by survivorship and the coparcenary property shall be deemed to have been divided as if a partition had taken place.

In a recent judgement, the **Hon'ble Supreme Court**[32] has clarified that the partition referred to in the replaced Section 6 of the HSA is notional and for the limited purpose of ascertaining the share of the deceased coparcener which he would have been entitled to, if a partition had actually taken place immediately before his death. Fiction is only for ascertaining share of a deceased coparcener which would be allotted to him (and which would devolve by testamentary or intestate succession on his death to the legatees / legal heirs) as and when the actual partition takes place.

Disposal of interest in the HUF by way of a Will

As per the provisions of Section 30 of the HSA, any Hindu can dispose of by Will, any property which is capable of being so disposed of by him. The Explanation to the said section clarifies that the interest of a Hindu in a Mitakshara coparcenary property is a property capable of being disposed of by such Hindu and is accordingly capable of being transferred by testamentary disposition.

The issue for consideration here is that when a bequest is made of the interest of the testator in an HUF property, whether the legatee being the member of the family takes it (i) for himself as his 'individual' asset; or (ii) for and on behalf of the HUF headed by himself (i.e. smaller HUF). In the former case, income from such property after distribution is assessable in his individual assessment and in the latter case, as income of the smaller HUF represented by him.

[32] *Vineeta Sharma v. Rakesh Sharma and Others [2020] 9 SCC 1*

It was well a settled position in Mitakshara law that all property of a father or grandfather (self-acquired or ancestral) descends on the sons or grandsons is taken by them as their ancestral property. Their male issue would derive an interest by birth in such property. The position however has become debatable with the HSA under which the son takes it not under the rule of survivorship but in the manner of testate or intestate property.

In the context of a testamentary disposition of the interest in an HUF, the **Hon'ble Supreme Court**[33] has considered the issue in detail. It held that there should be no presumption one way or the other and that the question was primarily one of intention of the donor / testator to be gathered from the gift deed / Will along with the surrounding circumstances in each case. The desire of the donor that the donee should take the property in his own absolute individual capacity or as head of a coparcenary to which he belongs, is a matter to be determined on the basis of donor's / testator's intention regarding the kind of interest which the donees / legatees were to take in the properties devised to them.

Conclusion

Tax implications in respect of the income of the deceased person are summarised as follows:

Upto the date of death	After the date of death till distribution	After distribution
Assessed in the hands of legal representatives under Section 159 of the IT Act	Testate demise Assessed in the hands of executors of the estate under Section 168 of the IT Act Intestate demise Assessed in the hands of legal heirs in respect of their share of the estate	Assessed in the hands of the legatees / legal heirs in their individual capacity. In case a bequest under the Will is in favour of more than one person jointly - then assessed as income of AOP

In recent years, many of us have experienced sudden deaths of our near and dear ones on account of the COVID-19 pandemic. These tragic incidents have resulted in complex situations, especially when tax considerations were overlooked. It is therefore imperative that a careful evaluation from tax and legal perspectives are analysed before an individual executes his Will or undertakes any succession planning measures to ensure that a greater part of the estate is available to the intended legatees / legal heirs instead of being squandered away in discharging income-tax liabilities.

It is essential that the duties and liabilities imposed upon legal representatives / executors under the IT Act are carried out diligently. It includes obtaining and collating the details about all the legatees / legal heirs and the entire estate of the deceased person, the herculean task of filing appropriate return of income and payment of correct amount of taxes, defending the estate of the deceased person in any pending tax litigation, closing the bank and demat accounts of the deceased after transferring the assets and finally surrendering the PAN by writing an application the AO under whose jurisdiction the PAN is registered. If you are a legal representative or an executor of the Will of a deceased person, know that – "*with great power comes great responsibility*".

Disclaimer: The material / opinion expressed is exclusively my own and does not express the views of Cyril Amarchand Mangaldas.

[33] *Arunachala v. Muruganatha AIR 1953 SC 495*

"DREAMZZ UNLIMITED": STORIES THAT INSPIRE

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I express my hearty gratitude to CVOCA to give me this opportunity for penning down my professional journey for the professional aspirants of our community. This helps a lot to the personal in initial phase as person who has travelled the path knows the pitfalls and can share their wisdom to dodge few pitfalls.

I'll not only provide the journey from my perspective but will be covering entire experience which I have gained from the experience of others too. This will help in getting deeper insights. As they say individually it's a 20-25 or say 30 years of experience but as a groupwe can percolate the learnings of may be 2000 years or may be 10000 years too!

Being from the humble background, it was a ground up journey for me and in hindsight it gives a sense of satisfaction.

Now let me list down the earnings of learnings from experience which you can and surely will implement in your professional journey. The list is not in any order of preference but just a normal listing and all are equally important:

- **Attitude of gratitude:-** During the course life (personal or professional), one comes across various people who may be working with us, providing service, helping us, working below us so on and so forth. These can be driver (incl auto/taxi driver), your librarian, your newspaper vendor, your friends/colleagues (whether junior or senior) etc. Express your gratitude to them on a continual basis. It is possible that you may also have some bitter experiences from few of them but that should not make difference to one's attitude of gratitude. It helps a lot and it also leaves a mark in life of youracquaintance. And of course gratitude to your parents, family & relative's whose blessings and good wishes have seen you grow over the period.

- **Either you win or you learn:**–It's not always that one wins, however the otherwise also helpsshaping the individual as a person. Though in most of the readings around, there is over emphasis on winning, being on top/ being first in everything one does etc. however in life there are instances when it doesn't happen as such. Not even best players have won always so why does one take stress if the results are not favorable. If you have put in the efforts, you have won and there is no second thought to it. Being practical always keeps you calm and composed. You may surely get some comments around you which may not suit your thoughts but never mind!

- **Net 'works':**–I just want to emphasis on the multiplier effect and power of having a good networking and to be in touch. There are lot of meetings you have regularly with various people - you remember few and you forget few. However the opportunity is to just keep in touch with them though it may not be possible to do it regularly. The opportunities arise when one's network is leveraged. To support this point now you have multiple professional social media platforms also available. Just add them, nudge them during their birthday or work anniversary etc. These small relation building efforts can give you strong platform in future which you wont be able to envisage at the time of making these efforts.

- **Knowl'EDGE':-**In the world of knowledge' one who knows has the edge. We are in a dynamic environment and world is changing on daily basis. In these situations, you have to continually update your knowledge and it is not necessary that you seekinformation of domain in which you are a expert. A general knowledge of the other subject would also help you and aid in your development. Never ridicule someone for lack of knowledge in one subject/skill, they may be expert in other subject which may not be relevant today but can become the topic of the future. The organizations which have not upgraded itself on the latest trends, have fallen flat and new organizations have flourished quickly. Currently it is indeed very exciting timewhich we are going through.

- **Have a mentor:-**It is always very prudent to have a mentor who acts as your friend, philosopher or guide. You will surely have your friend/family support but they may not necessarily be aware of the topic/queries which have been going on in your mind. Invest your time and resources in having fruitful conversations with your mentor. Conversations can be casual / topic oriented, corporate related, work/life related etc and subject does not make any difference but support does. Your mentor would not answer all your queries but will guide you on how to approach the problem to find the solution. This can be really helpful in some situations when you are facing dilemma.

- **Decision maker:-**In our life we continually learn to get the capabilities to decide among various alternatives available i.e., which school to select for kid, which stream should we choose, which car / property / dress / holiday should be buy/ which stock to buy, should the audit report be qualified so on and so forth. So as a human our biggest capacity is to assess various alternatives and decide. And as a professional we have gone through the tough course to sharpen our decision makingskills. Noone is 100% perfect in all the decisions and as a normal rule if decision is taken withoutany assessmentit has 50% chance to be right. With our knowledge, academic achievements, experience and support, we are just enhancing our skills to improve our decision making and if we are not able to decide within timelines, we may miss the bus.Responsible decision making is valued!

- **De-stress:-**Easy said than done but each one of us is going through some stress which may not be felt apparently. Whether a professional person or family member at home, everyone has some stress. Acknowledge the same and it no use shying away from it. However at the same time you ought to find alternatives to de-stress yourself. Spending time with family/friends and withown self to go through relaxing moments and keep your mind free. Do yoga, spend time on spiritual activities, exercise, enjoy your holidays/movie or play you love and its never to late to start it if you have not yet initiated. This support system will sustain you for long term. Your body is your fixed asset and can depreciate very fast if you don't maintain it well!

Care to help others, and your good deeds will bounce back on you in a way which may be pleasantly surprising for you.

Last and not the least, I have not numbered the above points as it would be unfair for me to do that as there is so much more to share. Happy to help anyone in their journeys too!

EVENTS IN RETROSPECT

Day & Date	Committee	Program Name	Speaker	Attendance / Views
25th April 2022 to 29th April 2022	Publication, Representation and Training	CVOCA GST Online Beginners' Course Batch 3	CA Chintan Saiya, CA Deep Chheda, CA Bhavik Chandariya, CA Mihir Shah, CA Henik Shah, CA Grishma Chheda	73
2nd May 2022 to 7th May 2022	Publication, Representation and Training Committee	CVOCA GST Online Learners' Course Batch 3	CA Henik Shah, CA Akash Gogri, CA Chintan Rambhia, CA Nihar Dharod	67
7th May 2022, Saturday	Program Committee	Alternate Investment Options	CA Vijay Mantri and CA Naushad Panjwani	400 + (Physical meeting)
9th May 2022 to 14th May 2022	Publication, Representat-ion and Training Committee	CVOCA GST Online Advanced Course Batch 3	CA Nihar Dharod, CA Chintan Saiya, CA Mihir Shah, CA Chintan Rambhia, CA Deep Chheda	56

EVENTS IN RETROSPECT

Day & Date	Committee	Program Name	Speaker	Attendance / Views
7th May 2022, Saturday	Program Committee	Alternate Investment Options	CA Vijay Mantri and CA Naushad Panjwani	400 + (Physical meeting)

EVENTS IN RETROSPECT

Day & Date	Committee	Program Name	Speaker	Attendance / Views
28th February, 2022	Capital market Committee	Impact of Macro Economic Factors on Indian Economy and Commodity	Mr. Saurabh Bhatia, Head – Macro Strategy & Fixed Income at Sapient Wealth Advisors	459 *