SEMINAR ON

Succession Planning –through different ways

7th December,2015

At

Kolkata

Organised by

Views Exchange

1.1 Life after death- what is the meaning of this phrase?

Life after death is essentially an eternal wish of mankind that everything that we have will continue forever as it is and the zeal and wish to see that whatever we possess continues with us. It also signifies we are remembered after our death. The generation that is born into prosperity thinks that this is permanent. Death is sure. Death takes us along while life leaves us at some point of time.

1.2 Succession Planning

With this eternal wish of Life after death- the question of succession planning comes. In western countries, Succession planning is also known as "*Estate Planning*". With the increase in competition, increasing stress and tensions due to the fast lifestyles, world over the Succession planning is now gaining ground.

Succession planning is essentially a way to achieve the objective of transferring the wealth that is earned during one's lifetime to one's desire in a smooth manner as well as eternal wish that person is remembered even after death.

1.3 Why do need Succession Planning?

Succession planning is needed at various levels like:-

a) In a family

Generally it has been seen that in a family run business, the wealth does not pass beyond 3rd or 4th generation due to improper succession planning. There are reasons for this. It is not possible to single out all the reasons, but some fundamental aspects can be looked into to gauge the reasons for this which are dealt herein below.

b) In a business organisation

Generally in a business environment which is professionally driven, there are lesser succession issues. However, in case of family runs enterprise, succession planning issues gain ground because the promoters want their siblings to take over whether or not they are capable and thus there arises a need for proper succession planning in a business environment.

Succession Planning & Indian Inc.

- The succession planning at Indian companies remain mostly poor and a large number of them being family-owned or family-run enterprises make it even more difficult. There is a need to develop succession planning in the organisation as a constant rather than a reactive process. Family-run businesses in India are most likely to hire a "number two" person to help their family-nominated CEO.

- India needs to improve substantially in terms of putting an orderly succession planning process in place. Succession planning is not the job of the CEO. It is the board's job. If the board is passive and is not looking at the shareholders' interest, then there is a problem.

- At professionally managed companies abroad, succession planning is done very carefully, but in Indian promoter-driven companies, it is almost given that the successor would be a family member.

- In the recent past some companies were left without a CEO all of a sudden largely owing to accidents and health related issues. Karl Slym of Tata Motors, Raghu Pillai of Future Retail and Ranjan Das of SAP India are some of such cases.

Companies Act and Succession Planning

The Securities and Exchange Board of India (SEBI) revised the Code of Corporate Governance for listed companies significantly to bring it in line with the Companies Act 2013. SEBI has mandated the need for a succession policy via Circular dated 17.04.2014 and listed succession planning as key function of the Board of Directors. This is one of the most significant attempts to ensure that investors do not suffer due to sudden or unplanned gaps in leadership, it is a mandate for boards of all listed companies to develop an action plan for successful transition. However, it mandates succession of only management position such as CEO or CFO.

Succession Planning & Foreign Cos.

When it comes to foreign companies it is seen that succession planning in such companies are planned very carefully. One of the famous examples is of global fast food giant McDonald's as it shows how a good succession planning should look like. It helped the company come out of a crisis situation not once, but twice, in the past decade. The first time was when its popular CEO Jim Cantalupo died of a heart attack in 2004, and the second occurred a year later when Cantalupo's successor Charlie Bell was diagnosed with cancer. McDonald's succession planning program ensured that it took the company less than six hours to name Bell the successor after Cantalupo's death, and appointed Jim Skinner as the CEO shortly after Bell informed the company of his ailment. If McDonald's can do it, why can't Indian organizations?

c) In a charitable organisation or a social organisation.

There are succession issues in charitable organisation as well and leads to deterioration or even closure of activities of the organisation. Succession Planning is required in organisation like Views exchange as well..

1.4 What are the Statutes in this regard?

With respect to succession in family, the following laws essentially merit attention:-

a) Hindu Succession Act,1956-

Hindu Succession Act was enacted in the year 1956 as a law to govern the manner of succession among the Hindus. The law therefore governs only Hindus including Jains, Sikhs, Buddhists and etc. However, all others are governed by Indian Succession Act, 1925. Again for testamentary succession, for both Hindus and Muslims, the Indian Succession Act, 1925 applies.

The following terms are important in relation to succession:-

Section 3(1) (g) "intestate" -a person is deemed to die intestate in respect of property of which he or she has not made a testamentary disposition capable of taking effect.

Section 8 -General rules of succession in the case of males

The property of a male Hindu dying intestate shall devolve according to the provisions of this Chapter-

(a) firstly, upon the heirs, being the relatives specified in class I of the Schedule;

(b) secondly, if there is no heir of class I, then upon the heirs, being the relatives specified in class II of the Schedule;

(c) thirdly, if there is no heir of any of the two classes, then upon the agnates of the deceased; and

(d) lastly, if there is no agnate, then upon the cognates of the deceased.

Section 9-Order of succession among heirs in the Schedule

Among the heirs specified in the Schedule, those in class I shall take simultaneously and to the exclusion of all other heirs; those in the first entry in class II shall be preferred to those in the second entry; those in the second entry shall be preferred to those in the third entry; and so on in succession

Heirs in Class I and Class II

Class I-

Son; daughter; widow; mother; son of a pre-deceased son; daughter of a pre-deceased son; son of a pre-deceased daughter; daughter of a pre-deceased daughter; widow of it pre-deceased son; son of a pre-deceased son of a pre-deceased son; daughter of a pre-deceased son of a pre-deceased son; widow of a pre-deceased son of a pre-deceased son, son of a pre-deceased daughter of a pre-deceased daughter; daughter of a pre-deceased daughter of a pre-deceased daughter; daughter of a pre-deceased son of a pre-deceased daughter; daughter of a pre-deceased daughter of a pre-deceased son.

Class II-

I. Father.
II. Son's daughter's son, (2) son's daughter's daughter, (3) brother, (4) sister.
III. Daughter's son's son, (2) daughter's son's daughter, (3) daughter's daughter's son, (4) daughter's daughter's daughter.
IV. Brother's son, (2) sister's son, (3) brother's daughter, (4) sister's daughter.
V. Father's father; father's mother.
VI. Father's widow; brother's widow
VII. Father's brother; father's sister.
VIII. Mother's father; mother's mother.
IX. Mother's brother; mother's sister.

b) Indian Succession Act,1925

Section 2(b) "codicil" means an instrument made in relation to a will, and explaining, altering or adding to its dispositions, and shall be deemed to form part of the will.

Section 2(f) "probate" means the copy of a will certified under the seal of a Court of competent jurisdiction with a grant of administration to the estate of the testator;

Section 2 (h) "will" means the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death.

PART V- INTESTATE SUCCESSION

Section 29- Application of Part- This part shall not apply to any intestacy occurring before the first day of January, 1866, or to the property of any Hindu, Muhammadan, Buddhist, Sikh or Jaina.

Section 30- As to what property deceased considered to have died intestate.

A person is deemed to die intestate in respect of all property of which he has not made a testamentary disposition which is capable of taking effect.

Illustrations

i. A has left no will. He has died intestate in respect of the whole of his property.
ii. A has left a will, whereby he has appointed B his executor; but the will contains no other provision. A has died intestate in respect of the distribution of his property.
iii. A has bequeathed his whole property for an illegal purpose. A has died intestate in respect of the distribution of his property.
iv. A has bequeathed 1,000 rupees to B and 1,000 rupees to the eldest son of C, and has made no other bequest; and has died leaving the sum of 2,000 rupees and no other property. C died before A without having ever had a son. A has died intestate in respect of the distribution of 1,000 rupees.

Rules in cases of Intestates other than Parsis

Section 31-Chapter not to apply to Parsis.-Nothing in this Chapter shall apply to Parsis.

Section 32-Devolution of such property.-The property of an intestate devolves upon the wife or husband, or upon those who are of the kindred of the deceased, in the order and according to the rules hereinafter contained in this Chapter.
Explanation.--A widow is not entitled to the provision hereby made for her if, by a valid contract made before her marriage, she has been excluded from her distributive share of her husband's estate.

Section 59-Person capable of making wills. -Every person of sound mind not being a minor may dispose of his property by will.

Explanation 1.--A married woman may dispose by will of any property which she could alienate by her own act during her life.

Explanation 2.--Persons who are deaf or dumb or blind are not thereby incapacitated for making a will if they are able to know what they do by it.

Explanation 3.--A person who is ordinarily insane may make a will during interval in which he is of sound mind.

Explanation 4.--No person can make a will while he is in such a state of mind, whether arising from intoxication or from illness or from any other cause that he does not know what he is doing.

Illustrations

i) A can perceive what is going on in his immediate neighbourhood, and can answer familiar questions, but has not a competent understanding as to the nature of his property, or the persons who are of kindred to him, or in whose favour it would be proper that he should make his will. A cannot make a valid will.
ii) A executes an instrument purporting to be his will, but he does not understand the nature of the instrument, nor the effect of its provisions. This instrument is not a valid will.
iii) A, being very feeble and debilitated, but capable of exercising a judgment as to the proper mode of disposing of his property, makes a will. This is a valid will.

Section 62. Will may be revoked or altered. -A will is liable to be revoked or altered by the maker of it at any time when he is competent to dispose of his property by will.

Traditionally the eldest child was the successor under the rule of primogeniture. However, this rule is no longer

1.5 Famous cases of family feud

A study revealed that the family feuds are highest in India. Day in and out we see family feuds on televisions, films and real life. Real life feuds are on the rise these days. One must not forget that the epics Ramayana and Mahabharata were essentially family feuds

only. Various families have ruined themselves simply fighting and the last scene is usually performed in a Court of law.

Some of the famous family feuds are:-

1. Dispute over Rs 20,000 crore property in Vadodara Royal family

A two-decade long battle for inheritance of property worth more than Rs.20,000 crore in one of India's most famous royal families was ended in a Gujarat court on 23.10.2013.Estranged members of the royal Gaekwad family of the former princely state of Vadodara are Maharaja Samarjitsinh Gaekwad and his uncle Sangramsinh. According to the settlement deal, the majestic Laxmi Vilas Palace and the 600 acres of land around it in Vadodara will be retained by Samarjitsinh and his family. The Maharaja will also control the museum at the palace with its paintings, diamonds and other precious possessions. His uncle, Sangramsinh Gaekwad, and his family will get control of the Indumati Mahal in Vadodara and a few properties owned by the Gaekwads in the city. Sangramsinh will also retain one of the Mumbai properties of the royal family while the other properties in the city will be split between the four Gaekwad sisters. Sangramsinh also got control over the private limited companies floated by the family earlier. This acrimonious litigations on the Rs. 20,000 crore property, turns out to be one of the largest settlements in independent India.

2. Yes Bank caught in family feud

Yes Bank, India's fourth largest private sector bank, is caught in a raging family feud. *Madhu Kapur, widow of bank's founder promoter Ashok Kapur, has alleged that she and her children are being denied their rightful place in the bank's management.* Madhu had sought that the decisions taken at one of the AGM should not be executed as the names of the three new directors were not discussed with her. She has alleged that after Ashok's demise, all his shares in the bank were transferred in the names of his three immediate family members, which entitled them to be included in the definition of the 'Indian Partners' along with Rana Kapoor. The bank's Articles of Association acknowledge Ashok Kapur and Rana Kapoor together as the 'Indian Partners' of the bank and an internal share holder's agreement recognises their successors as well. She has filed a suit in the Bombay High Court alleging that Rana Kapoor, the chief executive officer and managing director and Ashok's brother-in-law, is attempting to deprive her and her children their rightful place in the bank's management.

3. Ambani vs. Ambani – The anatomy of dispute

The matter upto the Apex Court and the Apex Court held that-

"Both the parties to renegotiate to sort out the differences but within the government's policy of Gas Utilization Policy and the egoism decisions"

1.6 Famous succession planning cases issues in general

1. The **Reliance Group** was founded by Dhirubhai Ambani and was the richest group in India. The Reliance group invested in refineries, hotels, textiles, telecommunications, gas, petroleum, mining, insurance, hospitals, education, cinemas, retail and film production.

   In spite of being one of the richest persons in India, Mr Ambani did not make a will and this led to a power struggle between his sons to control his companies after his death in 2002. This struggle lasted two years and wiped close to USD 2 billion from the group's market share. Finally a settlement was reached in 2005 as the two Ambani brothers agreed on a legal segregation of assets. Anil Ambani took over the telecom, infrastructure, media and power businesses, while elder brother Mukesh Ambani took charge of Reliance Industries, which operates in petrochemicals, oil and gas exploration, refining and textiles.

   This dispute was a shock to the world business community and many questioned how such a powerful Indian businessman had not thought of defining a succession plan.

2. **Dabur** is India's largest Ayurvedic medicine manufacturer. Dabur was founded by Dr SK Burman, a physician in West Bengal. It is the fourth largest FMCG company in India with revenues of over approximately USD 1 billion and market capitalisation of USD 5 billon. Over the years, the Burmans have understood the demands of incorporating a professional management team that would be able to launch Dabur onto a high growth path. It had roped in professionals and chalked out a plan for gradual withdrawal of the family from day-to-day running of the business. As a result, all the six members of the fourth generation Burmans have their independent businesses unencumbered by the flagship company.

3. **K.K Birla vs. R. S Lodha & Cos (2008) 4 SCC 300**

   In this famous case of dispute relating to will of Late Priyamvada Birla where assets relating to M. P Birla Group were subject matter of succession , the Apex Court declined to interfere re petitions filed by other Birla family members on the pretext that "the doctrine of larger circle of caveators as being members of Birla family and to protect the spiritual interest does not convert a non- existent interest into a caveatable interest. Again the court held that "why an owner of the property executes a will in favour of another is a matter of his/ her choice. One may by will deprive his/her close family members including son and daughters. One has a right to do so. The court is concerned with genuineness of will. If it is found to be valid, any further question as to why did he/ she do so would be completely out of domain. A will may be executed even for the benefit of other including animals.

4. **Paternity suit re Mr N. D Tiwari – Ex Chief Minister of Uttarakhand.**

This case is probably the first of its kind involving a prominent political figure in the country. Mr N. D Tiwari married Sushila Sanwal, with whom he has two daughters, unfortunately his wife died in 1993. The congress leader and four-time chief minister Narain Dutt Tiwari was recently battling a paternity suit filed by Rohit Shekhar.

In 2008, Rohit Shekhar filed a Paternity suit claiming Tiwari to be his biological father. The court ordered that DNA mapping of Tiwari be done, which the court successfully compelled compliance with on 29 May 2012.On 27 July 2012, the Delhi High Court, citing a need to end the controversy, rejected a request from Tiwari's lawyers to keep his paternity test result a secret. The DNA test results released by the court on Friday, 27 July 2012 established that Tiwari is the biological father of Rohit Shekhar, and that Ujjwala Sharma is the biological mother Tiwari urged the media to respect his privacy, saying "I have every right to live my life my way. No one has the right to look into my private life."On 3 March 2014 Tiwari accepted that Rohit was his son. He said "I have accepted that Rohit Shekhar is my son. The DNA test also proved he is my biological son,"

5. Infosys is one of the largest IT Company in India. Narayana Murthy, is an Indian IT industrialist and the co-founder of Infosys, a multinational corporation providing business consulting, technology, engineering, and outsourcing services. Murthy has been listed among the 12 greatest entrepreneurs of by Fortune magazine. He has been described as Father of Indian IT sector by Time magazine due to his contribution to outsourcing in India. Murthy has also been honoured with the Padma Vibhushan and Padma Shri awards. The company had to hunt for his successor – a candidate who not only should have deep understanding of the IT Industry but also should possess his 'personal style of leadership'. This is one of the most overwhelming challenges faced by the organisation in India and across the globe. Nandan Nilekani became the Chief Executive Officer of Infosys in March 2002 and served as CEO of the company through April 2007, when he relinquished his position to his colleague Kris Gopalakrishnan and became co-chairman of the board of directors. Infosys has also appointed KV Kamath as chairman in place of its iconic founder NR Narayana Murthy, will now draw up a succession plan for the eventual exit of all founders and the appointment of young professionals to run the company. Recently, in month of June, Dr. Vishal Sikka has been appointed as the Chief Executive Officer and Managing Director (CEO & MD) of the company. Dr. Sikka will be inducted as a whole-time director of the Board and CEO & MD.

1.7 What is subject matter of Succession Planning?

a) Assets both movable and immovable both in the Country and outside Country.
b) Structured succession planning for Business asset and family asset
c) Charitable entities.
d) Succession Planning of Position

1.8 How succession Planning can be achieved through AOP, HUF and Trust?

There are various ways in which succession planning can be done. Prior to doing any kind of succession planning, there are certain essential conditions and issues which need to be identified and thereafter a proper succession planning can be done. These are:-

a) Need for succession planning –identification like people, family obligations etc.
b) Management of succession by taking care of all major issues
c) Periodical review of succession planning.
d) Documentation in relation to succession planning.
e) Fair and judicious distribution of one's wealth.

Prior to venturing into the route for succession planning, it must be understood that upon death of any person, how his estate is succeeded. Under the Indian laws, every person can write a will and decide the manner in which his assets are to be distributed upon his death. This is called testamentary succession. However, if a person does not write any will and in such a case his assets are distributed as per law and it known as "Intestate succession" and in this case the assets are distributed as per Hindu Succession Act, 1956. Rules regarding the distribution of property of male and female are given in Hindu Succession Act , 1956 and Indian Succession, Act, 1925.

1.8.1 Succession planning through HUF & AOP-

Succession Planning through HUF and AOP can be done by identifying properly the constitution of the family, the rights of individual members and coparceners on the family and thereafter trying to unlock the family assets to see that they are divided taking into all aspects which generally tend to create disputes. In the scenarios of Hindus, where huge amount is spent on weddings and particularly after the passage of Hindu Succession (Amendment)Act, 2005 lot of planning is required to take into account interest of daughters who get married or who are in the family. It has been seen the prima reason for the disputes remain the unequal distribution of wealth in the family. The disputes overtake relations and it has been seen very often that there is a quarrel between the father and son, father and daughter, husband and wife and what not. The reason for dispute is also extra marital affair. One more reason is dowry and harassment of daughters in laws by in laws. Family arrangement/ settlement in such a case take the driver's seat and can be utilised as a potential tax planning tool.

1.8.1.1 Family arrangement/settlement

Meaning of 'Family'

The word "*family*" as per Oxford's Dictionary means a set of parents and children, or of relations, living together or not.

The Supreme Court in the case of *Ramachandran Das Vs. Girja Nandhini Devi* reported in AIR 1966 SC 323 held that a group of persons who are recognized in Law as having a right of succession or having a claim to a share in the property in dispute.

The parties should be related to one another in some way and have a possible claim or a semblance of a claim on some ground, as say affection.

Meaning of Family Arrangement-

When a joint Hindu family is separated or partitioned or its assets and properties are divided and distributed in such a way that members of a Hindu family make a separation of their ancestral assets and businesses and family settlement is reached. A family settlement/arrangement can be oral and need not be in writing to avoid stamp duty. However in order to avoid disputes, it is better to record the family settlement /arrangement in writing. A family arrangement/settlement is always between members of the family and is for the benefit of the family and in order to settle and close disputes between them, it should be bonafide and voluntary. The Gujarat High Court in the case of Arvind Chandulal vs CIT (1983) 140 ITR 241 has defined a family settlement as under:

"A family arrangement is an agreement between members of the same family intended to be generally and reasonably for the benefit of the family either by compromising doubtful or disputed rights or by preserving the family property or the peace and security of the family by avoiding litigation"

Halsbury's Laws of England would define family arrangement as:

"A family arrangement is an agreement between members of the same family, intended to be generally and reasonably for the benefit of the family, either by compromising doubtful or disputed rights or by preserving the family property or the peace and security of the family by avoiding litigation or by saving its honour"

Registration of Family Arrangement

A family arrangement can be made orally. It need not be necessarily reduced to writing. If it is implemented in oral form, the question of stamping or registration does not arise. It is legally valid and recognised.

A family arrangement requires to be duly stamped and registered - This depends on the manner in which the document is made. Generally, if it is a memorandum recording a past transaction or is a record or a chit or a list merely reducing the earlier oral family arrangement, then there may not be any necessity for payment of stamp duty and registration charges as this is not a document of title. Otherwise, if it is intended to be a document of title containing declarations of rights of parties, then it has to be properly stamped and registered.

At times, it may only be stamped, but not registered in which case it can be looked into for collateral purposes. If it is required to be stamped and registered, but is not properly stamped and registered, it cannot be looked into for any purpose. Whether a purpose is collateral or not, is a matter which has to be gathered from the facts and circumstances concerned.

Family arrangement as such can be arrived orally or may be recorded in writing as memorandum of what had been agreed upon between the parties. The memorandum need

not be prepared for the purpose of being used as a document on which future title of the parties be founded. It is usually prepared as a record of what had been agreed upon so that there be no hazy notions about it in future. It is only when the parties reduce the family arrangement in writing with the purpose of using that writing as proof of what they had arranged and, where the arrangement is brought about by the document as such, that the document would require registration as it would amount to a document of title declaring for future what rights in what properties the parties possess.

Another aspect that attracts our attention is whether family arrangement, if recorded in a document, requires registration as per the provisions of section 17(1)(b) of the Indian Registration Act, 1908. Section 17(1)(b) lays down that a document for which registration is compulsory should, by its own force, operate or purport to create declare, assign, limit or extinguish either in present or in future any right, title or interest in immovable property. Thus if an instrument of family arrangement is recorded in writing and operates or purports to create or extinguish rights, it has to be compulsorily registered. But where a document, merely records the terms and recital of the family arrangement after the family arrangement had already been made which per se does not create or extinguish any right in immovable properties, such document does not fall within the ambit of section 17(1)(b) of the Act and so it does not require registration.

According to the Supreme Court in Roshan Singh v. Zile Singh AIR 1988 SC 881, the true principle that emerges can be stated thus 'If the arrangement, of compromise is one under which a person having an absolute title to the property transfers his title in some of the items thereof to others, the formalities prescribed by law have to be complied with, since the transferees derive their respective title through the transferor. If, on the other hand, the parties set up competing titles and the differences are resolved by the compromise, then, there is no question of one deriving title from the other and therefore, the arrangement does not fall within the mischief of section 17 (1) (b) it read with section 49 of the Registration Act as no interest in property is created or declared by the document for the first time.

Advantages of Family Arrangement

1. The transaction is not treated as Transfer hence Capital Gains Tax will not arise.
2. It is not treated as Gift.
3. Clubbing Provision will not be applicable.
4. Stamp Duty is not applicable.
5. Protection to the family from long drawn litigation or perpetual strifes, which mar the unity and the solidarity of the family and create hatred and bad blood between the various members of the family.
6. Equitable distribution of the wealth instead of concentrating the same in the hands of a few.
7. Establishing or ensuring a calmness and Goodwill amongst the members of the family

Whether tax planning by way of family arrangement / settlement is better than partition?

When a partition is effected between the coparceners / members of a joint Hindu Family, the partition deed attracts stamp duty under the State Law. However, it can be avoided by arriving at a family settlement or family arrangement in between the members. The family settlement / arrangement may be even oral. If the terms of the family arrangement are reduced to writing; as expressed by the Supreme Court in Kale and others vs Dy. Director of Consolidation and Others, AIR 1976 SC 807, a distinction should be made between a document containing the terms and recitals of a family arrangement made under the document and a mere memorandum prepared after the family arrangement had already been made, either for the purpose of the record or for information of the Court for making necessary mutation. It has been held that in such a case the memorandum, itself, does not create or extinguish any rights in immovable property and is, therefore, not compulsorily registrable. (Refer Tek Bahadur Bhujil – AIR 1966 SC 292; Sahu Madho Das vs Mukund Ram – AIR 1955 SC 481; Vijay Kumar vs Sanjay Kumar – AIR 2003 Delhi 168; Digambhar Adhar Patil vs Devram Girdhar Patel – AIR 1995 SC 1728.

The family arrangement must be a bona fide one so as to resolve family disputes and rival claims by a fair and equitable division or allotment of properties between the various members of the family; (2) It must be voluntary and should not be induced by fraud, coercion or undue influence; (3) The family arrangement may be even oral in which case no registration is necessary; (4) It is well settled that registration would be necessary only if the terms of the family arrangement are reduced into writing. Here also, a distinction should be made between a document containing the terms and recitals of a family arrangement made under the document and a mere memorandum prepared after the family arrangement had already been made either for the purpose of the record or for information of the court for making necessary mutation. In such a case the memorandum itself does not create or extinguish any rights in immovable properties and, therefore, does not fall within the mischief of section 17(1)(b) of the Registration Act and is, therefore, not compulsorily registrable; (5) The members who may be parties to the family arrangement must have some antecedent title, claim or interest even a possible claim in the property which is acknowledged by the parties to the settlement. Even if one of the parties to the arrangement has no title but under the arrangement the other party relinquishes all its claims or titles in favour of such a person and acknowledges him to be the sole owner, then the antecedent title must be assumed and the family arrangement will be upheld and the courts will find no difficulty in giving assent to the same; (6) Even if bona fide disputes, present or possible, which may not involve legal claims are settled by a bona fide family arrangement which is fair and equitable, the family arrangement is final and binding on the parties to the settlement. (Refer Kale vs Deputy Director of consolidation : AIR 1976 SC 807; Lakshmi Ammal vs Chaprovahthi – AIR 1999 SC 336; C.G.T. vs D. Nagrirathinam (2004) 266-ITR-342 (Madras).

Like partition, family arrangement is not a transfer. A family arrangement, on the contrary, is a transaction between members of the same family for the benefit of the family so as to preserve the family property, the peace and security of the family, avoidance of family dispute and litigation and also for saving the honour of the family. Such an arrangement is based on the assumption that there was an antecedent title in the parties and the agreement acknowledges and defines what that title is. It is for this reason that a family arrangement by which each party takes a share in the property has been held

as not amounting to a conveyance of property from a person who has title to it to a person who has no title. (Refer : S.K. Sattar SK Mohd. Choudhari vs Gundappa Amabadas Bukate (1966) 6 SCC 373; C.I.T. vs A.L. Ramnathan (2000) 245-ITR-494 (Madras.)

Even a Memorandum of Understanding can be arrived at by and between the parties. It would not attract any stamp duty in the above circumstances. The MoU cannot be said as a bogus document on account of Mr. Mamaji being a stranger or allotted more than 40% of the total properties of the family if it is established that he had some semblance of interest and disputes have cropped up between the said persons. Memorandum of Understanding actuated to resolve disputes can be treated as family settlement (Refer Ramdev Food Products Pvt. Ltd. vs. Arvindbhai Rambhai Patel & Others AIR 2006 SC 3302). It is settled law that when parties enter into a family arrangement, the validity of the family arrangement is not to be judged with reference to whether the parties who raised disputes or rights or claimed rights in certain properties had in law any such right or not. C.I.T. vs Ponnammal (R.) (1987) 164-ITR-706 (Mad.); CIT vs Ramanathan (AL) (2000) 245-ITR-494 (Mad.); Kele vs Deputy Director of Consolidation (1976) AIR 1976 SC 807 and Maturi Pullaiah vs Maturi Narasimham (1966) SC 1936 relied on in C.I.T. vs Kay Arr Enterprises and Others (2008) 299-ITR-348 (Madras).

Transfer of shares in Companies can be possibly made by way of family arrangement between the family members as held in C.I.T. vs Kay Arr Enterprises (2008) 299-ITR-348 (Madras). Their Lordships S. H. Kapadia and B. Sudershan Reddy JJ. dismissed the Department's special leave petition against the judgment dated July 6, 2007 of the Madras High Court in T. C. (A) No. 521 of 2007 reported in 299 ITR 348 whereby the High Court dismissed the Department's appeal on the ground that no substantial question of law arose from the order of the Tribunal which had held that transfer of shares by way of family arrangement would not attract capital gains tax as the arrangement was to avoid possible litigation amongst family members and was made voluntarily and was not induced by fraud or coercion : CIT v. Ms. R. Jayanthi : S. L. P. (C) No. 18050 of 2008. [(2008) 306 ITR(St) 5]. Again the Apex Court in Hari Shanker Singhania & Ors. vs Gaur Hari Singhania & Ors. AIR 2006 SC 2488 held that family settlement or arrangement is to be treated differently from any other formal commercial settlement and technicalities of limitation etc. should not come in the way of implementation for maintaining peace and harmony in a family.

1.8.1.2 Creation of smaller HUFs and making partition of the property during the life time of the head of family;

1.8.1.3 Total partition of the family so as to identify ancestral and individual assets;

1.8.1.4 Making provision for interest of daughters who have already been married and/or are to be married.

1.8.1.5 Buying joint family assets in the name of joint family and not in individual name.

1.8.1.6 Equal distribution of family wealth and income so that there is no dispute in the family.

1.8.2 Advantages on testamentary succession

From the afforested discussion it can be seen that proper succession planning is always better for any family and Will plays an important role in this regard. Manifold benefits are inherent by making a Will. However, it has been noticed that very negligible few tax payers are taking advantage of the medium of Will. It can be a tool for further reducing the nominal rate of tax and expanding units of assessments with manifold advantages to regulate the members of family and relatives. Its importance need not be emphasized but is well known. It is highly desirable that every person, above the age of 60 years (though persons even below this age are also advised), make a Will to avoid and avert litigation amongst legal heirs and representatives and in order to reduce rate of tax in the hands of relatives and would be children, grand-children, daughters and sons-in-law and to create Hindu undivided family, to add more units. Such persons could be surely reminded: "Have you executed your Will, if so, please see that it is in a safe place and do inform your spouse about it. If not, please fix up the earliest appointment with the ever friendly lawyer next door! All the ladies should ask their husbands that there is a proper will duly executed by them and insist on seeing it and also to ensure that they (wife) is the sole beneficiary under that Will. The readers are advised to do so and to advice their clients to act expeditiously. Liability of tax after death of an individual can be better managed through Wills. It is high time to explore multifold benefits of WILL.

Some of the benefits of executing a Will are as follows:-

(i) It is easy to make. Can be executed on white sheet of paper with two witnesses. Registration is not compulsory. Can be lodged for registration with the Sub-Registrar, to be opened only after the death. Can be executed by the testator in any language. It is desirable to get it notarised by a Notary Public, which is easy.

(ii) More than one will can be executed in respect of different property in favour of different legatees but there should not be any contradiction and it should not be mentioned that it is the only Will. Each will can be handed over to the legatee.

(iii) Joint will can be executed by the spouse bequeathing property belonging to both in favour of the survivor. On the death of the deceased, property of the two would vest in the survivor. It can be stated as to how the residue estate after death of the two would stand bequeathed. Word of caution, it may be only a wish and the survivor having been vested with the entire estate on death of the other can subsequently change the bequeath or make another Will.

(iv) It is easy to cancel. Can be cancelled by executing another Will. Only last Will survives, not the earlier Will(s).

(v) One discretionary trust can be formed by Will and if such trust is the only trust so declared by him, shall not be liable to charge of tax at the maximum marginal rate on account of proviso (ii) to sub-sec. 1 of sec.164 of the Income-tax Act, 1961. Normally a family welfare trust can be declared by Will and by way of such trust the beneficiaries as well as distribution of the asset can be in-determinate or un-known.

(vi) Capital gain on transfer of a capital asset can be avoided because sec.47 (ii) of the Income-tax Act, 1961 mandates that any transfer of a capital asset under a Will shall not

be considered as a transfer u/s.45 of the Act. Where such capital asset becomes the property of the assessee under a Will, the cost of acquisition of the asset shall be deemed to be the cost, for which, the previous owner of the property acquired it, as provided u/s.49(1)(ii) of the Act.

(vii) Any sum of money or property given by way of a Will to any extent, is not treated as income from other sources of the beneficiary/legatee under newly inserted sec.56 (2) (vii) because of the clause (c) of the second proviso to the said section.

(viii) It can be made in favour of any person. It can also be made in favour of a Hindu undivided family, to enable to constitute nucleus for a Hindu undivided family.

(ix) Property bequeathed on the death of the testator vests in the executor. The executor has to distribute the bequeathed property in favour of the specified person(s). It can be done by mere declaration and handing over of the property/title deeds without any stamp duty or registration.

(x) A Will can be made in such a manner, whereby the distribution of the Estate is postponed and during such period an assessment of the deceased in the name of the Estate and through the Executor u/s. 168 would be made. Thereby a dead person can be assessed till distribution.

(xi) If an assessee (Hindu) dies without leaving Will, succession shall be governed by sec. 6 of the Hindu Succession Act, 1956 in respect of interest of the deceased in a Mitakshara coparcenary property, under sec. 8 for male and under sec. 15 for female in respect of individual and separate property. It shall devolve on the heirs of the deceased. Upto the date of death, income shall be assessed in the hands of the deceased through legal representatives u/s 159 of the Income-tax Act, 1961. From the date of death, the income shall be assessable in the hands of the legal heirs in accordance with their share in the estate. Succession does not remain in void or vaccum, it is instant and property vests immediately, statutorily and automatic. By making a Will succession in favour of unwanted legal heirs/representatives can be avoided and bequeath can be in favour of desired persons and to the desired extent.

1.8.3 Succession Planning through Trust-

Succession planning through trust can be achieved by creating family trust for taking care of succession for all persons. Private trust in this regard is most beneficial and the private trust can be again specific or discretionary trust. Some of the provisions relating to these trusts are discussed hereinbelow:

Tax Planning through Private Trust – domestic view

An Overview

Generally people are confronted with the issue as to whether private trust is at all a tax saving tool in the hands of tax payers. We are here dealing with all the related issue that is it at all worth creating a private trust- either specific or discretionary.

A private specific trust is a trust wherein the beneficiaries and/ or their shares in income and assets of the trust are specified in the trust deed.

A private discretionary trust is a trust wherein the beneficiaries and/or their shares in the income and assets of the trust are not specified in the trust deed. With a Discretionary Trust, the Grantor delegates most or limited discretion to the Trustee to decide when and how much income or property is to be distributed to a beneficiary. A Discretionary Trust deed normally provides the Trustee with general guidelines for administration of the Trust, but leaves the specifics of the Trust management to the discretion of the Trustee, giving him/her a great deal of leeway.

The trustees are liable to be assessed as representative assessee for the income of the trust not specifically receivable on behalf of or for the benefit of any one person or where the individual shares of the persons on whose behalf such income is receivable are indeterminate or unknown.

The provision of section 164(1) of the Income Tax Act, 1961 governs the taxability of a private discretionary trust to be taxed at 'Maximum Marginal Rate' subject to certain exceptions in lieu of which the tax shall be charged on the income of the trust as if it were the total income of an association of person.

Tax Rates for the Private Discretionary Trust - At a glance

Condition	*Tax Rate*
If income of the trust does not includes profit and gains of business **and** ➢ None of the beneficiaries has any other income chargeable under Income Tax Act exceeding the maximum amount not chargeable to tax or none of the beneficiary is a beneficiary under any other trust; **or** ➢ The income of the trust is receivable under a trust declared by any person by will and such trust is the only trust so declared by him; **or** ➢ The income of the trust is receivable under a trust created before the 1st day of March, 1970 exclusively for the benefit of dependent relatives; **or** ➢ The income of the trust is receivable by the trustees on behalf of a Provident Fund, Superannuation Fund, Gratuity Fund, Pension Fund or any other fund created exclusively for the benefit of his employees.	AOP
If income of the trust consists of or includes profits and gains of business **and** is receivable under a trust declared by any person by will and such trust is the only trust so declared by him	AOP
If income of the trust consists of or includes profits and gains of business in any other case	MMR
In any other case	MMR

Tax Rates for the Private Specific Trust- At a glance

Condition	*Tax Rate*
If the trust income consists of or includes Profits and gains from Business in general	MMR
If the trust income consists of or included Profits and gains from Business **and** ➢ The income of the trust is receivable under a trust declared by any person by will exclusively for the benefit of any relative dependent on him and such trust is the only trust so declared by him	Tax leviable on total income of

	each beneficiary
If the trust income does not consist of or includes Profits and gains from Business	Tax leviable on total income of each beneficiary

Nature and extent of the liability of the trustees as a representative assessee:

The primary liability for payment of tax is that of the beneficiary. The assessability of the representative was only a vicarious liability designed to facilitate collection, since the representative is the person ordinarily handling the income of the beneficiary. As such, the measure of tax liability in the hands of the representative should be same as in the hands of the beneficiary or beneficiaries. On such principle, where the income of any beneficiary is handled by a 'representative assessee' as defined in section 160, such income of whatever kind is to be exclusively assessable under the 'special liability' provisions of the I.T. Act, which drew no distinction between income arising from 'business or profession' and income arising from any other source. Therefore, the liability of the representative assessee is a vicarious liability and it is co-extensive with the liability of the person represented by him.

The amount of tax payable must also be same as that payable by each beneficiary in respect of his share of income from the trust, if he was assessed directly.

Direct assessment or recovery not barred

Assessment of discretionary trusts under section 164/166 - Correct procedure

CLARIFICATION 1

1. Attention is invited to Board's Instruction No. 45/78/66/ITJ(5), dated 24-2-1967 [printed here as *Clarification 2*] on the subject of assessment made under section 41(2) of the 1922 Act/section 166 of the 1961 Act. In spite of the clear instructions to the effect that neither section 41 which give an option to the department to tax either the representative assessee or the beneficial owner of the income nor the parallel provisions of the 1961 Act contemplated assessment of the same income both in the hands of the trustees and the beneficiaries, instances have come to the notice of the Board of such double assessment.

2. According to the Scheme of the 1961 Act, even as it was under the 1922 Act, the general principle is to charge all income only once. The Board desire to reiterate the earlier instructions in this regard. In order that there is no loss of revenue, the Income-tax Officer should keep this point in view at the time of raising the initial assessment either of the trust or the beneficiaries and adopt a course beneficial to the revenue. 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).
Circular: *No. 157 [F.No. 228/8/73-IT (A-II)], dated 26-12-1974.*

CLARIFICATION 2

1. Recently an interesting case came to the notice of the Board. The assessee was one of the beneficiaries in the trust. The shares of the beneficiaries were known and determinate. The Income-tax Officer raised an assessment on the trustees taxing the income of the trust in their hands at the appropriate rate and to the amount which would have been recoverable in the hands of the beneficiaries. While dealing with the case of one of the beneficiaries of the trust, the Income-tax Officer again included for rate purposes his share in the income of the trust. The reason advanced by him was that the amount of tax leviable should be the same whether the income from the trust is assessed in the hands of the trustees or in the hands of the beneficiaries and if the proportionate income from the trust is not included for rate purposes in the hands of the beneficiary, his income other than the income from the trust would be taxed at a rate lower than that which would have been applicable if the trust income were assessed directly in his hands.

2. The Board have been advised that the approach of the Income-tax Officer is not correct. Section 41 of the 1922 Act (corresponding to section 166 of the 1961 Act), gave an option to the department to tax either the representative assessee or the beneficial owner of the income. Once the choice is made by the department to tax either the trustee or the beneficiary, it is no more open to the department to go behind it and assess the other at the same time. The inclusion of the share income from the trust in the total income of the beneficiary for rate purposes would virtually amount to an assessment of the income which has already been assessed and subjected to tax. According to the scheme of the Act, if certain income is to be included for rate purposes in the total income, a specific provision in that behalf is made in the Act. In the absence of any such express provision, the general principle to charge all income only once would be applicable in such a case.

3. The position under the 1961 Act is also identical. In order that there is no loss to the revenue, the Income-tax Officers may keep this point in view while raising the initial assessment on the trust/beneficiaries.

Letter: *F. No. 45/78/66-ITJ (5), dated 24-2-1967- Circular no 157, dated 26/12/1974*

SPECIFIC TRUST

BENEFICIARIES		**Tax Compliances**	**Case Laws**
Minor	Sole	If income accumulated- not accrue to minor– will get after attaining majority- clubbing not applicable- to the same extent taxable and assessed in the hands of trust If not accumulated- received by the minor- assessed in the hands of minor- relevant clubbing provision applicable- if minor have taxable income of his own- taxable in their hands. Section 166 applicable	211 ITR 1 [1995] R.Doshi
	Multiple	If income accumulated- not accrue to minors – will get after attaining majority- clubbing not applicable- to the same extent taxable and assessed in the hands of trust If not accumulated- received by the minor-	211 ITR 1 [1995] R.Doshi

		assessed in the hands of minor- relevant clubbing provision applicable- if minor have taxable income of their own- taxable in their hands. Section 166 applicable	
Major	Sole	Representative assessee is liable to be assessed in the like manner and to the same extent – on the share of the income received from trust – separate assessment on the beneficiary can also be made directly- income assessable should be same- if income supposed to be distributed to beneficiary- to be assessed in the hands of beneficiary	1.228 ITR 195 [1997] Oswal Traders 2.228 ITR 200 [1997] Bhilai Machine
	Multiple	Representative assessee is liable to be assessed in the like manner and to the same extent – on the share of the income received from trust – separate assessment on the beneficiary can also be made directly- income assessable should be same- if income supposed to be distributed to beneficiary- to be assessed in the hands of beneficiary- according to their respective shares of income from trust.	1.228 ITR 195 [1997] Oswal Traders 2.228 ITR 200 [1997] Bhilai Machine
Combination of minor and major		Separate assessment of all beneficiaries- rate of tax applicable according to their shares of income from trust- representative assessee to be assessed- alternatively beneficiary can also be assessed- assessed income should be same- if income not distributed but accumulate for a specific period- trustees to be assessed.	1.228 ITR 195 [1997] Oswal Traders 2.108 ITR 555 [1977] SC H.E.H. Nizam's Family Trust
Where the beneficiary/ beneficiaries are known and their shares are determinate and the total income of the trust included income from profit and gains from business, tax at the MMR had to be charged in the hands of trustees only in respect of the whole of the income of each beneficiary and not on the aggregate income of all beneficiaries.			[1992] 40 ITD 1 Mohammed Omar Family Trust

DISCRETIONERY TRUST

BENEFICIARIES		**Tax Compliances**	**Case Laws**
Minor	Sole	Not applicable- sole beneficiary- identity and shares known	1. 238 ITR 34 [2006] Saroja Raman and Others 2. 282 ITR 129 [2006] Poonam Trust.
	Multiple	Trustees to be assessed at MMR- if fall under exceptions- to be assessed as AOP	

Major	Sole	Not applicable- sole beneficiary- identity and shares known	1. 238 ITR 34 [2006] Saroja Raman and Others 2. 282 ITR 129 [2006] Poonam Trust
	Multiple	Trustees to be assessed at MMR- if fall under exceptions- to be assessed as AOP- if beneficiary will actually receive the shares- beneficiaries are to be assessed for the respective shares- section 166 applicable	1. 209 ITR 101 SC [1994] Smt. Kamalini Khatau
Combination of minor and major		Trustees to be assessed at MMR- if fall under exceptions- to be assessed as AOP- if beneficiary receives their shares- to be assessed according to their respective shares- section 166 applicable	209 ITR 101 SC [1994] Smt. Kamalini Khatau

1.9 Why family dispute arise which could have been avoided if planning was done?

Some of the reasons which are attributable for family dispute are discussed below:-

1.9.1 Legal issues-

a) Illogical provisions in Hindu Succession Act, 1956
   (i) Inclusion of daughter as co- parceners and not recognising the rights of daughter- in- law.
   (ii) Father being included in Class II and not class
b) Indian judicial system of delay

1.9.2 General Issues-

a) Individual ownership of Joint family property
b) Historical Indian Culture preference to a male child over a female child.
c) Including daughters in succession plan
d) Issues relating to marriages

1.10 Overview of FOREIGN EXCHANGHE MANAGEMENT ACT, 1999 on transfer of immovable property in India and Outside India.

As per section 2(ze) of FEMA, 1999, "*transfer"* includes sale, purchase, exchange, mortgage, pledge, gift, loan or any form of transfer of right, title, possession. Hence, whether a person receives any property in India out outside India on succession the same would be considered as transfer for the purpose of FEMA regulations. We shall discuss major regulations issued by RBI on the same:-

1. Foreign Exchange Management (Acquisition and transfer of Immovable Property outside India), Regulation,2000

Reg 5 (1)A person resident In India may acquire Immovable property outside India-
(a) By way of gift or inheritance from person referred in section 6(4) or Reg 4(b)
(b) By way of purchase out of foreign exchange held in RFC account

For the purpose of the above Regulation, person referred in 6(4) of the Act are those person who are resident in India and had acquired, held or owned any immovable property outside India when he was resident outside India or inherited from a person who was resident outside India.

2. Foreign Exchange Management (Acquisition and transfer of Immovable Property in India), Regulation ,2000

Reg3-A person resident outside India who is a citizen of India may –

(b)Transfer of any immovable property in India to a person resident in India, and
(c)Transfer any immovable property other than an agricultural or plantation property or farm house to a person resident outside India who is a citizen of India or to a person of India origin resident outside India.

1.10 "I am not there" test-

Every individual once in his life should try "I am not there" test. The test is that one should not be connected with his family for some time say for example a week or a month and switch off all its mode of communication and find out how much his family is dependent on him, how much they require him and how much his friends have tried contacting him. The result will show the value of the person in his family and friend circle. This is because the presence of anything with us and its availability have not been given much importance, besides we did not find its value. If once its absence was experienced, we would have been irked and recognized the importance of absented. We don't appreciate what we have. We don't realize how important is something to us until we actually lose it or is temporarily deprived by it; and the day we realize the importance of simple things in life like family, home, friends, water, light, eyesight we would claim we are satisfied and will be able to live a happy life till we die.

1.12 Book of legacy

The word legacy implies an amount of money or property bequeathed to another by will. It is recommended to the every individual to record a book of legacy .A book of legacy can includes details like:-

(a) Personal information –Name, Place and Date of Birth, Nationality, Spouse name, Children name and etc.
(b) Parental information- Father's name , Mother's name and their date of birth.
(c) Personal advisors- Chartered Accountants, Stock broker, Family doctor, Lawyer.
(d) Record Locator- Safe Deposit locker number, Birth Certificates, Marriage certificates, Tax records, Power of Attorney and other various records.

(e) Will – Whether any will is executed or not. If, yes, then date of will, Location of original copies of will, executors name and address,

(f) Trust- Whether any trust is formed, if yes, then details like name , address, location, PAN no of the trust.

(g) Financials accounts- Name of Bank, Account no., Location of cheques book, pass book, Debit/ Credit cards, Mutual funds, Pension/ Annuities, Fixed Deposit, Post Office MIS, Saving Bonds, Personal loans, Car loans, Mortgages and etc.

(h) Insurance- Details of Life Insurance, Medical Insurance, Travel Insurance like name of company, policy number, Sum assured, Fund value.

1.13 General important points regarding succession

1. Difference between gift and will

The basic and fundamental difference between a testamentary / will and a settlement/ gift was discussed by Hon'ble Supreme Court in case of Mathai Samuel and Others vs. Eapen Eapen (Dead) by LRS. And Others reported in (2012) 13 SCC 80 as here under :-

Will is an instrument where under a person makes a disposition of his properties to take effect after his death and which is in its own nature ambulatory and revocable during his lifetime. It has three essentials:

1) It must be a legal declaration of the testator's intention;
2) That declaration must be with respect to his property; and
3) The desire of the testator that the said declaration should be effectuated after his death.

The essential quality of a testamentary disposition is ambulatoriness of revocability during the executant's lifetime. Such a document is dependent upon executant's death for its vigour and effect.

Section 2(h) of the Indian Succession Act says Will means the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death.

In the interpretation of Will in India, regard must be had to the rules of law and construction contained in Part VI of the Indian Succession Act and not the rules of the Interpretation of Statutes.

On the other hand , Gift/settlement is the transfer of existing property made voluntarily and without consideration by one person called the donor to another called the donee and accepted by or on behalf of the donee. Gift takes effect by a registered instrument signed by or on behalf of the donor and attested by at least two witnesses. Section 122 of the Transfer of Property Act defines the gift as a voluntary transfer of property in consideration of the natural love and affection to a living person.

Further, in the case of a Will, the crucial circumstance is the existence of a provision disposing of or distributing the property of the testator to take effect on his death. On the other hand, in case of a gift, the provision becomes operative immediately and a transfer *in praesenti (latin word which means that present debt is to be discharged in the future)* is intended and comes into effect. A Will is, therefore, revocable because no interest is intended to pass during the lifetime of the owner of the property. In the case of gift, it comes into operation immediately. The nomenclature given by the parties to the transaction in question, as we have already indicated, is not decisive. A Will need not be necessarily registered. The mere registration of a "Will" will not render the document a settlement. In other words, the real and the only reliable test for the purpose of finding out whether the document constitutes a Will or a gift is to find out as to what exactly is the disposition which the document has made, whether it has transferred any interest *in praesenti* in favour of the settlees or it intended to transfer interest in favour of the settlees only on the death of the settlors.

Composite Document:

A composite document is severable and in part clearly testamentary, such part may take effect as a Will and other part if it has the characteristics of a settlement and that part will take effect in that way. A document which operates to dispose of properly *in praesenti* in respect of few items of the properties is a settlement and in future in respect of few other items after the deeds of the executants, it is a testamentary disposition. That one part of the document has effect during the life time of the executant i.e. the gift and the other part disposing the property after the death of the executant is a Will. Reference may be made in this connection to the judgment of this Court in<u>Rev. Fr. M.S. Poulose v. Varghese and Others.</u> (1995) Supp 2 SCC 294.

2. <u>Gifts received in contemplation of death.</u>

Section 56(vi) of Income Act, 1961 deals with taxability of any sum of money received in excess of Rs 50,000 without any consideration by an individual or HUF, then the whole of the sum shall be taxable under the head "Income from other sources". However, the proviso (d) of Section 56 (vi) provides that the above clause shall not apply to any sum of money received in contemplation of death of the payer. It is to be noted that where any gift is received from non – relative, then also such gift is also exempted .

In this regard, it is necessary to place reliance in the judgement of Hon'ble Supreme Court in case of Commissioner of Gift Tax, Ernakulam vs. Abdul Karim Mohd. Reported in 1991 3 SCC 520 where it was held that :-

The requirements of a gift in contemplation of death as laid down by Section 191 are:

(i) the gift must be of movable property;

(ii) it must be made in contemplation of death;

(iii) the donor must be ill and he expects to die shortly of the illness;

(iv) possession of the property should be delivered to the done; and

(v) the gift does not effect if the donor recovers from the illness or the donee predeceases the donor. These requirements are similar to the constituent elements of a valid *donatio martis causa.*

The recitals in the deed of gift are not conclusive to determine the nature and validity of the gift. The party may produce evidence aliunde to prove that the donor gifted the property when he was seriously ill and contemplating his death with no hope of recovery. These factors in conjunction with the factum of death of the donor may be sufficient to infer that the gift was made in contemplation of death. It is implicit in such circumstances that the donee becomes the owner of the gifted property only if the donor dies of the illness and if the donor recovers from the illness, the recovery itself operates as a revocation of the gift.

It is not necessary to state in the gift deed that donee becomes owner of the property only upon the death of the donor. Nor it is necessary to specify that the gift is liable to be revoked upon the donor's recovery from the illness. The law acknowledges these conditions from the circumstances under which the gift is made.

Further, in case of Principles of Mohammedan Law, Marz-ul-maut (death-bed illness)-What is-Gift made during marz-ul-maut and Whether entitled to exemption under Gift Tax Act-Section 191, Indian Succession Act was also decided by the Hon'ble Bench and it was held that the gift made in marz-ul-maut could be regarded as gift made in contemplation of death, since it has all the requisites prescribed under Section 191 of the Indian Succession Act, 1925. The only limitation is that the disposition is restricted to a third on account of the right of the heirs.

3. Rights of a Nomination

A Nominee is the person selected by the person to receive the benefit in case of his/her death.The rights of nominee in case of Banking Regulation Act, 1949 , has been discussed by the Supreme Court in case of Ram Chander Talwar and Another vs Devendra Kumar Talwar And other in 2010 10 SCC 671 wherein a son was the nominee of his mother for her bank account .After her mother's death he has claimed full rights over the money lying in her account by excluding his brother (respondent in the case).

The Hon'ble Bench held that by virtue of Banking Regulation Act, 1949 ,Sections 45ZA and Banking Companies (Nomination) Rules, 1985 - Rule 2(1)-The money lying deposited in the account of the original depositor should be distributed among the claimants in accordance with the Succession Act of the respective community and the nominee cannot claim any absolute right over it. Section 45ZA(2) merely puts the nominee in the shoes of the depositor after his death and clothes him with the exclusive

right to receive the money lying in the account. It gives him all the rights of the depositor so far as the depositor's account is concerned. But it by no stretch of imagination makes the nominee the owner of the money lying in the account. It needs to be remembered that the Banking Regulation Act is enacted to consolidate and amend the law relating to banking. It is in no way concerned with the question of succession.

Another reference in this regard can be made to the decision of Hon'ble SC in case of Vishin N. Khanchandani and another vs. Vidya Lachmandas Khanchandani reported in 2000 6 SCC 724 where in right of a nominee in case of National Saving Certificates was considered. In this case, Lachmandas was the holder of NSC who died. In those certificates he mentioned his brother and step brother as his nominees. The petition was filed before the SC by L's widow and daughter under Section 370 of the Succession Act, 1925 claiming the amount of NSC.

The Hon'ble court held that –

Though under section 6 of the Government Savings Certificate Act, 1959, the nominee of the National Savings Certificates has a right to be paid the sum due on such savings certificates after the death of the holder, yet, in view of sub-section (2) of s.8 and the Statement of Objects and Reasons of the Act, he retains the said amount for the benefit of the persons who are entitled to it under the law of succession applicable in the case, however, subject to the exception of deductions mentioned in the sub-section.

There is no doubt that by non-obstante clause the Legislature devices means which are usually applied to give overriding effect to certain provisions over some contrary provisions that may be found either in the same enactment or some other statute. Such a clause is used to avoid the operation and effect of all contrary provisions. The phrase is equivalent to showing that the Act shall be no impediment to the measure intended. To attract the applicability of the phrase, the whole of the section, the scheme of the Act and the objects and reasons for which such an enactment is made has to be kept in mind.

Thanking You,

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