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# The Legal 500 Country Comparative Guides

## India

### PRIVATE CLIENT

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This country-specific Q&A provides an overview of private client laws and regulations applicable in India.

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# INDIA

## PRIVATE CLIENT



### 1. Which factors bring an individual within the scope of tax on income and capital gains?

#### **Income Tax**

The Income Tax Act, 1961 (**ITA**) governs direct taxation in India. The ITA follows source and residence-based scheme of taxation whereby residents, both Indian citizens and foreign nationals, are taxed in India on their worldwide income and non-residents (**NRs**) are taxed only on their India-sourced income.

An individual is considered an Indian resident in a financial year commencing on April 1 through March 31 (**FY**), if the individual satisfies any of the following conditions:

- The individual is present in India in that FY for 182 days or more; or
- The individual is present in India for 60 days or more in that FY and 365 days or more during 4 years preceding that FY.

However, the ITA provides for instances wherein the 60 days threshold is increased to 182 days. This relaxation is available to (i) an Indian citizen who leaves India for the purpose of obtaining employment outside India, in the FY in which he / she leaves India; and (ii) an Indian citizen/Person of Indian Origin (**PIO**), who resides outside India and visits India in any FY. An individual is treated as a PIO if he held at any time an Indian passport; or he or either of his parents / grandparents / great grandparents was born in undivided India or if he is a spouse of a citizen of India or a PIO.

**Additional condition for tax residency:** If an Indian citizen/PIO stays in India for 120 days or more but less than 182 days and his Indian sourced income exceeds Indian Rupees (**INR**) 1.5 million, then such individual would be considered a resident but not ordinarily resident (**RNOR**). RNORs are taxed like residents, except that income which accrues or arises outside India is taxable in India only if derived from a business controlled, or a profession set up in India.

In addition to the above, an individual will be RNOR in India if he has been NR in 9 out of the 10 preceding FYs or has been in India for a period of, or periods amounting in all to 729 days or less during the 7 previous FYs.

Generally, domicile and citizenship are not relevant for determining tax liability in India. However, pursuant to key changes undertaken in the recent past, an Indian citizen shall be deemed to be RNOR in a FY if such individual is not 'liable to tax' in any other country or jurisdiction by reason of his domicile or residence or any other criteria of similar nature, and has India sourced income exceeding INR 1.5 million during the FY in question.

An individual who is neither (i) a resident, nor (ii) RNOR, would be NR for the purpose of the ITA.

#### **Capital Gains Tax (CGT)**

Under the ITA, any profit that is earned by an individual from transfer of a capital asset during the FY is taxable as "capital gains". The requirement to pay CGT also depends on the residential status of the individual as outlined above. These gains are classified as short-term capital gains (**STCG**) and long-term capital gains (**LTCG**) (depending on the nature of the asset and the time period for which the capital asset was held by the individual). There are certain transfers which are exempted from CGT such as capital asset received by an individual through an inheritance or by way of a gift from a relative.

### 2. What are the taxes and rates of tax to which an individual is subject in respect of income and capital gains and, in relation to those taxes, when does the tax year start and end, and when must tax returns be submitted and tax paid?

The FY or official tax year in India commences on 1 April and ends on 31 March of the following calendar year. In any given FY, tax is assessed for the income accrued or

received in the relevant FY. The deadline for an individual to file their income tax returns is generally 31 July of the immediately succeeding FY, unless extended by the Indian Government.

The ITA levies a progressive tax on individual taxpayers on a slab basis ie, different rates are prescribed for different ranges of income. The income tax slabs normally change every year based on the annual financial budget of the Indian Government. The income tax slabs and rates for FY 2023-24 under the old regime and new regime (at the option of the individual) are as below.

Individuals			
Income Range	Old regime	Income Range	New regime
Up to INR 2,50,000*	-	Up to INR 3,00,000	-
INR 2,50,001** to INR 5,00,000	5%	INR 3,00,001 to INR 6,00,000	5%
INR 5,00,001 to 10,00,000	20%	INR 6,00,001 to INR 9,00,000	10%
Above INR 10,00,000	30%	INR 9,00,001 to INR 12,00,000	15%
		INR 12,00,001 to INR 15,00,000	20%
		Above INR 15,00,000	30%

\* INR 3,00,000 for senior citizens ie, individuals aged 60 years or more but less than 80 years old. For individuals aged 80 years or more this limit is increased to INR 5,00,000.

\*\* INR 3,00,001 for senior citizens. For super senior citizens, ie, individuals aged 80 years or more, this slab is not applicable.

As the annual budget is generally presented on 1 February of every year, the applicable slab rates for FY 2024-25 are not known currently.

As previously mentioned, the CGT applicable in India depends on the period of holding and the type of asset sold, as mentioned below:

Nature of asset	Period of holding	
	Long Term Capital Asset	Short Term Capital Asset
Listed shares/securities (other than units), units of Equity Oriented Fund, Zero Coupon Bond, etc.	> 12 months	≤ 12 months
Immovable property: Land or building, Equity shares (unlisted)	> 24 months	≤ 24 months
General rule for other assets (excluding virtual digital assets, which has been discussed later)	> 36 months	≤ 36 months

The capital gains tax rates would be as under:

Nature of asset	Tax rate (for residents) (exclusive of surcharge and cess)	
	Long Term Capital Gains	Short Term Capital Gains
Transfer of listed shares/securities (other than units), units of Equity Oriented Fund, Zero Coupon Bond, etc. - STT is paid	10% (on gains exceeding INR 1,00,000) without indexation	15%
Transfer of listed securities (other than a unit) through recognized stock exchange - STT is paid	20% with indexation or 10% without indexation	At applicable slab rates
General rate of taxation	20%	At applicable slab rates

There is also a securities transaction tax (STT) that is levied on the value of securities transacted through a recognised domestic stock exchange.

### 3. Are withholding taxes relevant to individuals and, if so, how, in what circumstances and at what rates do they apply?

Yes, withholding taxes, more commonly known in India as 'taxes deductible at source' (TDS) are relevant to individuals in specific circumstances. Please see below an illustrative list of important TDS rates in a scenario where payment is made to individuals (for both residents and NRs).

Payee	Nature of Income	Withholding Rate
Resident individual	Salaries (including benefits and perquisites)	As per the applicable slab rates to individuals
	Dividend	10%
	Interest	10%
	Fee for Technical services	2%
	Fees for Professional services	10%
	Purchase of goods	0.1%
	Benefit or perquisite in the course of business	10%
NR individual	Salaries (including benefits and perquisites)	As per the applicable slab rates to individuals
	Dividend	20%
	Fee for Technical Services	10%

Further, as per Indian tax laws, individuals are also

required to comply with withholding tax regulations. A few common instances include:

Nature of income	Withholding rate
Rent above INR 50,000	5%
Benefit or perquisite in the course of business*	10%
Payment of any income to NR	As per the applicable tax rates
Payment to contractors*	1%
Fee for Technical services*	2%
Fees for Professional services*	10%

\*Applicable only where the total sales/gross receipt or turnover from business or profession of the individual making payment exceeds INR 10 million in case of business and INR 5 million in case of profession in the immediately preceding financial year.

A payor is required to withhold tax from the payment and deposit the same with the Indian Government directly. For all payments made to NRs, a reduced rate under a tax treaty may be applicable for withholding taxes upon furnishing of a tax residency certificate and Form 10F and on the fulfilment of requisite conditions contained in the tax treaty and the domestic tax laws (including compliance with anti-avoidance rules). For both resident and NR taxpayers, there is an obligation to submit PAN details to the payor, in the absence of which TDS would be deducted at higher rates. Please note that the above is not an exhaustive list of payments where tax is required to be withheld and paid and there are certain qualifiers and exceptions to the withholding tax requirements, detailed in the domestic tax laws.

#### 4. How does the jurisdiction approach the elimination of double taxation for individuals who would otherwise be taxed in the jurisdiction and in another jurisdiction?

The ITA enables India to enter into treaties to avoid double taxation, promote mutual economic relations, and exchange information. India has entered into more than 120 Double Taxation Avoidance Agreements (DTAAs).

Where India has entered into a DTAA, the provisions of the ITA shall apply to the extent they are more beneficial to the taxpayer. Unilateral relief as available under the ITA is available in India from double taxation where there is no agreement.

India has also ratified the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI). Currently, most of India's DTAAs are subject to MLI. Separately, limitation of benefits ("LOB") conditions under the MLI do not apply to any tax treaty India has entered into, however, India has the flexibility to adopt them in future. At present (and until the time of such adoption) the principle purpose test applies to the tax treaties covered by the MLI and the simplified LOB applies to very few tax treaties such as Russia and Colombia.

#### 5. Is there a wealth tax and, if so, which factors bring an individual within the scope of that tax, at what rate or rates is it charged, and when must tax returns be submitted and tax paid?

No, there is no wealth tax leviable in India. The erstwhile wealth tax legislation was abolished from FY 2015-16. However, with effect from 2015, a surcharge is levied on the amount of income tax paid at the first instance if the total income of an individual taxpayer exceeds specified caps. This is also charged basis a slab system, ranging from 10% at the lower end up to 37% of the tax amount. The higher rate of surcharge of 37% applies only if the taxpayer opts for old tax regime and his/her taxable income exceeds INR 50 million.

#### 6. Is tax charged on death or on gifts by individuals and, if so, which factors cause the tax to apply, when must a tax return be submitted, and at what rate, by whom and when must the tax be paid?

India does not levy any estate duty, death taxes, or inheritance tax. The Estate Duty Act, 1953 levied 'estate duty' on the properties which passed upon the demise of a person but was subsequently abolished.

Gifts were taxable under the Gift Tax Act, 1958 which was repealed in 1998. However, a deemed 'gift tax' was introduced as a part of the ITA in 2004 mainly to curb tax avoidance. As per the provisions of the ITA, gifts received by an individual are taxable as part of income tax in the hands of the recipient, and there is no tax levied on the donor. This deemed 'gift tax' is levied on receipt of money / specified assets exceeding INR 50,000 in value unless expressly exempt, as further detailed in our response to query 7 below.

Further, gift received by NR or a foreign company from an Indian tax resident is deemed to accrue in India. The recipient / donee is required to report such gift in his

annual tax return and pay applicable tax thereon calculated as per the income tax slab rate of the donee, as mentioned in our response to query 2 above.

**7. Are tax reliefs available on gifts (either during the donor's lifetime or on death) to a spouse, civil partner, or to any other relation, or of particular kinds of assets (eg business or agricultural assets), and how do any such reliefs apply?**

Yes, tax reliefs on gifts are available in certain specified circumstances. Gifts received from prescribed 'relatives' are not chargeable to tax under the ITA. The 'relatives' in relation to the individual are as follows:

a) Spouse; b) Brother or sister; c) Brother or sister of the spouse; d) Brother or sister of either of the parents; e) Any lineal ascendant or descendent of the individual or their spouse; or f) Spouse of the persons referred to in (b) to (e).

Additionally, there are certain events where the gifts received are exempt such as on the occasion of a marriage, or in contemplation of the death of the donor, gifts received from an individual by a trust set up exclusively for the benefit of an individual's relatives, gifts received from a registered charitable trust etc.

**8. Do the tax laws encourage gifts (either during the donor's lifetime or on death) to a charity, public foundation or similar entity, and how do the relevant tax rules apply?**

Yes, contributions made to certain public relief funds and registered charitable institutions can be claimed as a deduction (50 to 100%) under the ITA subject to certain thresholds linked to individual's taxable income. All donations, however, are not eligible for deductions under the ITA, but contributions to registered charities shall be eligible for a deduction.

**9. How is real property situated in the jurisdiction taxed, in particular where it is owned by an individual who has no connection with the jurisdiction other than ownership of property there?**

The ability of an individual to acquire, hold and transfer immovable property in India depends on his residency status under the Indian foreign exchange control regime.

Please note that the determination of residency under the Indian foreign exchange control regime is different from that employed under the ITA. Under the Indian foreign exchange control regime it not only considers the number of days an individual was physically present in the country, but also attempts to determine residency basis the intent to establish substantial ties abroad such as residing abroad permanently with family, employment taken up, buying property, visa type etc, with exceptions for a non-resident Indian (**NRI**), who is an Indian citizen but is a resident outside India and a PIO, for example.

As a general rule, only Indian residents are permitted to acquire immovable property in India. However, NRI and PIO individuals are also allowed to acquire immovable property in India, excluding agricultural land, farmhouses or plantation property. They may also receive property through an inheritance.

An individual can earn the following types of income from immovable property in India: (a) income from renting of immovable property; and (b) gains from sale of immovable property. Income from renting and gains from sale of immovable property situated in India taxable in India for both resident as well as NR individuals. Income from renting and gains from sale of immovable property situated outside India should be taxable in India only for resident taxpayers. Any tax paid by such resident taxpayer outside India should be available as credit against the taxpayer's Indian tax liability on the same income.

There is also an additional municipal tax which is payable to the local municipal body under whose jurisdiction the property is located. Accordingly, the rate varies depending on the exact location of the property.

**10. Does your jurisdiction have any specific rules in relation to the taxation of digital assets?**

With effect from 1 April 2022, the Indian government has introduced a special regime for taxation on incomes arising from the transfer of "virtual digital assets"; Section 115BBH of the ITA lays down provisions in this respect.

The term "virtual digital asset" (**VDA**) has been defined in a broad manner to, inter alia, include any information, code, number or token (not being any currency, Indian or foreign) that has been generated through cryptographic means (or otherwise), which squarely includes within its ambit, cryptocurrencies of all kinds, among other things; even non-fungible tokens have expressly been included in the meaning of a VDA.

Section 115BBH of the ITA levies a flat tax rate of 30% (plus the applicable surcharge and cess) on incomes / gains arising from the transfer of a VDA, regardless of period for which such VDA has been held by the transferor. Any loss arising from transfer of a VDA is neither allowed to be set-off against any other incomes (including income from another VDA), nor is it allowed to be carried forward to future years.

Additionally, any person (whether resident or non-resident) who pays / is responsible for paying any consideration to a resident in respect of a transfer of VDA, is required to withhold tax at the rate of 1% on the consideration amount, provided the consideration amount exceeds certain specified (nominal) monetary thresholds.

### **11. Are taxes other than those described above imposed on individuals and, if so, how do they apply?**

Individual taxpayers must pay a health and education cess levied at a rate of 4% on the amount of income tax plus surcharge payable.

Individuals are also required to pay stamp duty on any instruments of transfer employed by them such as on the transfer of real estate and shares and on gifting. These stamp rates depend on the location and value of the property and the location at which the instrument is executed. Separately, an individual may be required to pay several indirect taxes on specified transactions.

### **12. Is there an advantageous tax regime for individuals who have recently arrived in or are only partially connected with the jurisdiction?**

The Indian tax regime is residence and source based. Please refer to our response to queries 1,2 and 4 above. Further, there is a "short stay exemption" available on salary income earned by individuals staying in India for a short duration (90 days or the period mentioned in the relevant tax treaty, whichever is favourable) subject to fulfilment of the conditions in Indian tax laws and the applicable tax treaty, if any.

### **13. What steps might an individual be advised to consider before establishing residence in (or becoming otherwise connected for tax purposes with) the**

### **jurisdiction?**

It is important to consider that India is an exchange-controlled economy ie, there are certain limitations on the inflow and outflow of currency placed by the Indian Government. The ability of an individual to repatriate and remit money abroad, hold, transfer and invest in foreign currencies, securities and immovable property and the opening of certain kinds of bank accounts is dependent on their residency status under the Indian foreign exchange control regime as detailed in our response to query 9 above and is regulated by the Reserve Bank of India.

Typically, on becoming an Indian resident, the immigrating individual would not be subject to Indian exchange control or tax implications on any assets and investments acquired and held by an individual while he was a NR of India since the assets / source of income are situated outside India. Accordingly, it is common to create an offshore capital base through offshore trusts or plan and establish asset holding structures outside India prior to a person taking up residency / citizenship in India. Succession planning exercises are also undertaken for offshore assets prior to taking up residency / citizenship in India.

### **14. What are the main rules of succession, and what are the scope and effect of any rules of forced heirship?**

In India, succession is either intestate or testamentary in nature. Intestate succession is governed by the personal faith / religion of that person. On the other hand, testamentary succession is mainly governed by the Indian Succession Act, 1925 (ISA) except for State of Goa which has a separate regime on account of it being a Portuguese colony in the past.

There are no forced heirship rules in India except for Muslims and residents of the State of Goa. Muslims, under Islamic law cannot dispose of more than one third of their estate after payment of funeral expenses and debts, till the consent of the heirs have been obtained. For example, if the testator's estate comprises of assets valued at INR 1000, and the liabilities amount to INR 100, the testator cannot bequeath by way of a Will assets over and above INR 300 unless the consent of the legal heirs has been obtained. Whereas Goa residents are limited to testamentary disposition of only half of their estate, and the other half is transferred to prescribed heirs.

### 15. Is there a special regime for matrimonial property or the property of a civil partnership, and how does that regime affect succession?

The concept of civil partnerships is not legally recognised in India. Marriage is the only legally recognised matrimonial regime in India. Indian courts have held that any man and woman cohabiting for a long term will be presumed as legally married under the law unless proven otherwise.

In the case of matrimonial property, there is no special regime to govern its succession. Even in personal laws, there are no provisions that bestow a share of the matrimonial property with either spouse. In India, by and large, the distribution of assets between the spouses on divorce is based on the ownership title to an asset.

### 16. What factors cause the succession law of the jurisdiction to apply on the death of an individual?

Succession of immovable property in India is regulated by Indian law regardless of where the deceased was domiciled or had residence at the time of their death. However, for movable property, succession is regulated by the law of the country in which the deceased had domiciled at the time of their death.

Moreover, if the deceased bequeaths an immovable property located in one of the erstwhile presidency towns (Bombay, Madras and West Bengal) or if the Will was signed in one of the abovementioned presidency towns, then it is mandatory to obtain a probate for such Will from the relevant High Court.

### 17. How does the jurisdiction deal with conflict between its succession laws and those of another jurisdiction with which the deceased was connected or in which the deceased owned property?

Principles of private international law will be applicable where there is a conflict of laws between the jurisdiction in which the deceased held property and the jurisdiction in which the deceased was domiciled at the time of his demise. Please refer to our response to query 16 above which sets out the laws of succession as applicable to immovable and movable property.

### 18. In what circumstances should an individual make a Will, what are the consequences of dying without having made a Will, and what are the formal requirements for making a Will?

A Will is encouraged as it provides an individual the flexibility to determine the distribution of his estate to his heirs of choice in the proportion as desired. There is no prescribed threshold or value of assets for considering a Will. Moreover, a Will once prepared should be reviewed by the individual on the happening of a milestone event, for example, marriage, birth of children etc.

Where a person dies without a Will, i.e. dies intestate, his assets will be regulated by the personal laws of succession which prescribe the heirs and the portions in which they are entitled to receive the deceased's estate. For example, under the Hindu Succession Act, 1956, when a Hindu male dies intestate, his assets are to be divided equally among his class I heirs. The class I heirs, in the first instance, include the spouse of the deceased, the children and the mother of the deceased, who will each inherit an equal share to the deceased's estate.

Testamentary succession allows for passing of the property as stated in the Will. Any person who is of sound mind and is not a minor can make a will. The ISA governs the rules for making a Will, except for Muslim individuals. The following requirements are necessary to make a valid will under the act:

- Written (subject to certain exceptions)
- Legal declaration of the testator's intention
- Sound disposition of the testator's personal property
- Signed or marked by the testator; and
- Attested by at least two witnesses.

### 19. How is the estate of a deceased individual administered and who is responsible for collecting in assets, paying debts, and distributing to beneficiaries?

Where a person has died intestate, the court appoints an administrator to manage the estate of the deceased individual by granting letters of administration. If the deceased has left a Will, then the estate is administered through the grant of probate (where required) by the court to the executor appointed under the Will.

### 20. Do the laws of your jurisdiction allow

**individuals to create trusts, private foundations, family companies, family partnerships or similar structures to hold, administer and regulate succession to private family wealth and, if so, which structures are most commonly or advantageously used?**

Indian laws allow for the creation of trusts, both public and private. In the case of a private trusts, the beneficiaries are individuals/entities who are ascertained or capable of being ascertained, whereas public trusts are created for the benefit of the general public and are made usually for religious or charitable purposes. There is no concept of a foundation in India.

The most common/advantageous structures for management and succession of private family wealth are private trusts where the administration and succession of the estate can be carried out in the lifetime of the individual.

**21. How are these structures constituted and what are the main rules that govern them?**

The private trusts in India are governed by the Indian Trust Act, 1882 ("**Trusts Act**"). On the failure to meet the principles guiding the formation of trusts in the legislation, the validity of the trust can be questioned.

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. It is an essential condition of trust that the property must vest in the trustee. In case the property settled in the trust structure is immoveable property, it must be declared by the will of the settlor or by a non-testamentary instrument in writing that is signed by the settlor or trustee and duly registered.

Under Indian law, every person competent to contract is eligible to create a trust. A trust can be created for any purpose that has not been declared unlawful, illegal, and immoral or against public policy.

Private trusts can further be classified as (i) determinate, where the share of beneficiaries is defined or (ii) discretionary, where the share of beneficiaries has not been defined but is based on the trustee's discretion. In addition to this, a trust can either be (i) revocable, where the settlor is allowed to re-assume or re-transfer power

over the assets or income of the trust; or (ii) irrevocable, where the settlor is devoid of any control over the trust assets or income of the trust.

In relation to public trusts in India, there is no overarching legislation that deals with the same, except in relation to religious and charitable trusts which are governed by specific statutes such as the Religious Endowments Act 1863 and the Charitable and Religious Trusts Act 1920. Additionally, some states in India have their own specific statutes which govern charitable and religious trusts such as the Maharashtra Public Trusts Act, 1950, as applicable to the state of Maharashtra. Courts in India have often referred to the provisions of the Trusts Act to apply the principles contained therein to public trusts.

**22. What are the registration requirements for these structures and what information needs to be made available to the relevant authorities? To what extent is that information publicly available?**

Private trusts are not required to be registered in India. Information on private trusts is not publicly available even if such trusts have been registered. The Registration Act, 1908 specifies the circumstances under which registration of a document is compulsory. The said Act states that registration is compulsory only when the underlying document deals with immovable assets. Even in an instance where a private trust acquires immovable property it would be the relevant sale or transfer deed that would require registration and not the trust deed itself.

An exception is where the trust (through trustee) is a significant beneficial owner ("**SBO**") of a company ie, it holds more 10% in an Indian company (amongst other conditions like voting etc). In case a trust is an SBO, then the trustee/beneficiaries/settlor (depending upon whether the trust is determinate, discretionary or revocable) will have to make appropriate disclosures to the company which in turn will make such disclosures to the Registrar of Companies.

For public trusts, while the document will have to be mandatorily registered with the charity commissioner or the sub-registrar of the revenue department of the relevant state, as the case may be, the document will not be publicly available.

**23. How are such structures and their settlors, founders, trustees, directors and**



## beneficiaries treated for tax purposes?

In India, every 'person' is assessed to tax in accordance with the provisions of the ITA. Under Section 3 of the Trusts Act, a trust has been defined as "an obligation annexed to the ownership of property and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another, or of another and the owner." As per the definition above, a trust is not recognised as a separate legal entity in India and has not been separately categorised as a 'person' under the ITA.

However, the ITA specifies a special regime to tax trusts whereby a trustee is treated as a 'representative assessee' of the beneficiaries of a trust and is taxed in a representative capacity of the beneficiaries. The trustee is thus assessed in the same manner in which the beneficiaries (who he represents) would be assessed. Section 164 of the ITA incorporates specific provisions in order to tax the income of a trust where shares of the beneficiaries are not known. The income of a discretionary trust is taxed in the hands of the trustee (in a representative capacity being individuals) at the Maximum Marginal Rate ("MMR") i.e., 39% (this includes basic tax rate of 30% plus surcharge of 25% and education cess of 4%) under the default regime.

That said, incomes which are subject to special tax rates shall continue to be taxed at such special rates only such as capital gains on sale of listed shares. In case of a determinate trust, tax is charged in the hands of the trustees in the capacity of a representative assessee at such rates and in such a manner, as the income would have been taxed in hands of each beneficiary.

## 24. Are foreign trusts, private foundations, etc recognised?

Yes, foreign trusts are recognised in India. Indian law permits an Indian resident individual to create a trust with property situated in or outside India. The law also permits such trusts to have trustees who are resident in or outside India and beneficiaries resident in India. However, the structuring of the trusts, transfer of assets into the trust as well as the role and responsibilities of the parties of a trust must be carefully considered in light of the applicable laws under the Indian legal regime.

In recent times, certain jurisdictions such as Guernsey, Jersey, Singapore, etc. have become popular for establishing offshore trusts. These structures help in consolidation of offshore wealth.

Indian tax and reporting obligations would vary

depending upon the parties to the trust and their residency, for example, an Indian tax and reporting obligation may arise to the Indian resident beneficiary only at the time of distribution of property to such beneficiary.

There is no segregation of a trust as an 'offshore' or an 'onshore' trust from a taxation perspective. Please refer to our response to Question 23 above. If the trust is determined to be resident in India, the worldwide income of the trust may be subject to Indian tax along with such other filing and reporting obligations applicable to Indian residents. Further, the determinative factor to ascertain the tax residency of a trust would be the place of 'control and management' of the affairs of a trust. If the trust is controlled and managed through its trustee, who is situated outside India, then its control and management might be wholly outside India, and hence such a trust might qualify as a non-resident for the purposes of the ITA. This is further discussed in response to Question 25 below.

There is no concept of foundations under Indian law.

## 25. How are such foreign structures and their settlors, founders, trustees, directors and beneficiaries treated for tax purposes?

The residence of the beneficiaries and the location of the trust's 'control and management' are key elements to determine its tax residency. If the 'control and management' of the affairs of a trust through its trustee is situated wholly outside India, the offshore trust shall be regarded as a non-resident for the purposes of the ITA. It is important to note that if all the beneficiaries of the Trust shall be Indian tax residents, it is possible that the Indian tax authorities may perceive the Trust as entirely benefitting Indian resident individuals, and thereby treat such Trust as an Indian trust / tax resident for income tax purposes. Such an interpretation (basis the residency of the beneficiaries) may be taken by the Indian tax authorities considering the trust is not a legal entity, rather is an obligation annexed to the ownership of property, and the fact that the trustee is the legal owner of the property in a fiduciary capacity, holding the same for the benefit of the beneficiaries. So far, there is no judicial precedent on the Indian tax implications, if any, when all the discretionary beneficiaries of an offshore trust are Indian residents and whether the offshore trust partakes the nature of such beneficiaries.

If a trust is considered an Indian tax resident, in accordance with the provisions of the ITA, its worldwide income would be taxable in India at the level of the trust, in the hands of the trustee (in a representative capacity)

at the MMR. Given that the income is taxed in the hands of the trust, such income should not be taxed again in the hands of the beneficiaries.

Indian residents who are beneficiaries of offshore discretionary trusts are not liable to any tax or reporting till such time that they receive a distribution from the trust. In Commissioner of Wealth tax v Late HMM Vikramjinh [AIR 2014 SCW 2674], the Supreme Court held that Indian resident beneficiaries of an offshore discretionary trust shall not be subject to tax on the trust's income until the trustees or the 'discretion exercisers' exercise the discretion and make a distribution of income to the beneficiaries. This rule applies to an Indian discretionary trust as well.

Individuals who are ordinarily residents of India are required to mandatorily report their offshore assets (including financial interest in any entity) in their tax returns even if they do not have any taxable income but do not necessarily trigger tax implications. Schedule FA, included in the income tax return form, requires Indian resident taxpayers to disclose their 'financial interest' in foreign assets, which includes interest in an offshore trust. Thus, depending on which of the parties qualify as Indian residents and the nature of the trust, individuals must make the annual reporting.

## **26. To what extent can trusts, private foundations, etc be used to shelter assets from the creditors of a settlor or beneficiary of the structure?**

As a trust is not treated as a separate legal entity and nor does India recognise the duality of ownership vis-à-vis trust assets, the settlor in case of irrevocable trusts relinquishes legal ownership of the assets to the trustee. Therefore, the assets settled in the trust are ring fenced from any personal liability or creditor claims made on the settlor.

In case of insolvency, the Insolvency and Bankruptcy Code, 2016 specifically carves out an exemption which states that the property held by the insolvent in trust (i.e., as trustee) is not considered to be a part of the bankrupt's estate, subject to a look back period for fraudulent transfers to trusts. In a notable ruling of the Bombay High Court in the case of Rajesh T Shah [WP No. 1657 of 1998] it was held that property which had already been settled into a trust much before the initiation of recovery proceedings cannot be attached to recover personal tax dues of a trustee.

Similarly, a discretionary trust gives protection to beneficiaries from creditor claims as no beneficial

interest is held by any of the beneficiaries till the distributions are made. In case of discretionary trusts structured correctly and the specific facts, there are judicial precedents under both Indian jurisprudence and English common law which hold that if a person does not have beneficial interest in the trust property, then no enforcement actions should be taken by the lenders in any manner whatsoever against the trust property. Accordingly, creditor claims may not be enforceable against a discretionary beneficiary of the trust vis-à-vis the trust property.

However, the trust structure and the deed must not be drafted in a manner that abuses the provisions of the legal and regulatory framework, as Indian insolvency and property laws may render such arrangements / transfers void. The asset protection accorded by Indian trusts are a function of the trust structure, powers of trustee, nature of trust and the manner in which assets are transferred into the trust.

## **27. What provision can be made to hold and manage assets for minor children and grandchildren?**

Minors can inherit and own property but cannot legally manage it. Thus, a legal guardian or one appointed by the court, manages the asset on the minor's behalf. To sell a minor's immovable property, the guardian would require permission of the court. In a trust structure with minor beneficiaries, the trust deed may contain provisions regarding reservation of the trust corpus such that it may not be distributed to beneficiaries and will be maintained till the time such minor attains majority or any other time period.

Further, the concept of a Hindu Undivided Family (**HUF**), is unique to Indian law and is regarded as a separate taxable entity under the ITA. An HUF comprises of all persons lineally descended from a common ancestor. The HUF and its assets are managed by the head of the family, known as the Karta and each of the individual family members are known as coparceners of the HUF. Every person in the family becomes a coparcener by birth. In such cases, the Karta is the person responsible for managing a minor coparcener's share in the HUF. However, important to note, that the HUF property is not segregated until a partition of the HUF takes place and no individual coparcener, including the minor coparcener, has a determined share or interest in the HUF prior to such partition.

## **28. Are individuals advised to create**

### **documents or take other steps in view of their possible mental incapacity and, if so, what are the main features of the advisable arrangements?**

The Supreme Court of India has in a recent judgement recognised the concept of a 'living will' or an 'advance directive' which enables a person to direct withdrawal or refusal of medical treatment when such person is mentally incapacitated and terminally ill with no hope of cure. Apart from this, the said document does not govern a person's financial aspects or investment decisions. Such documents such as a lasting power of attorney must be clearly distinguished from the advance directive.

However, a lasting power of attorney or an enduring power of attorney which is given effect to after the mental incapacity of the donor (the person granting the power of attorney) is not a document which is recognized under the Power of Attorney Act, 1882. The principles of agency as provided in the Indian Contract Act, 1882 apply to a power of attorney. The said Act states that an agency is terminated by either the principal or agent dying or becoming of unsound mind. Therefore, while the law is absolutely clear that a power of attorney granted by a person who has since become of unsound mind is invalid, there is a lack of clarity on the impact of a durability clause.

However, certain decisions of the Central Information Commissioner (CIC) have noted that "Under the common law, a power of attorney becomes ineffective if its grantor dies or becomes "incapacitated," meaning unable to grant such a power, because of physical injury or mental illness, for example, unless the grantor (or principal) specifies that the power of attorney will continue to be effective even if the grantor becomes incapacitated."

While the abovementioned observation does allude to the scope for inserting a durability clause, it must be noted that the CIC is only a Quasi-Judicial body, and its decisions shall not have a binding precedential value. There is no law which allows such a clause as such.

### **29. What forms of charitable trust, charitable company, or philanthropic foundation are commonly established by individuals, and how is this done?**

Ordinarily, charitable organisations in India are formed either by a trust, a society, or a company. If the charitable institution is formed as a public trust, society, or company, it will be formed under and governed by the Trusts Act or any relevant state acts, the Societies Registration Act, 1860 or the Companies Act, 2013 accordingly. Each legislation has specific requirements for its formation, management, and financial and reporting requirements.

The ITA provides for certain exemptions for the income of charitable organisations. Every organisation receiving foreign donations is required to submit its annual returns to the Central Government, including the details of the foreign contributions received, the source and manner in which they were received, the purpose for which they were received and how they were used.

### **30. What is the jurisdiction's approach to information sharing with other jurisdictions?**

India is one of the early adopters of the Common Reporting Standard (CRS) on Automatic Exchange of Information (AEOI) and has signed the Multilateral Competent Authority Agreement (MCAA) for exchanging information. India has activated AEOI relationships with over 90 jurisdictions and has also entered into an Inter-Governmental Agreement (IGA) with the USA which provides that specified Indian financial institutions will provide necessary information to the Indian tax authorities, which will then be transmitted to USA periodically.

Pursuant to India's commitment to implement the CRS on AEOI and also the IGA with the USA, and with a view to enable information exchange, necessary legislative changes have been made to the ITA to provide a legal basis for the reporting financial institutions to maintain and report relevant information.

### **31. What important legislative changes do you anticipate so far as they affect your advice to private clients?**

Speculation has been rife about the reintroduction of estate duty. The rate of estate duty can be expected to be similar to the highest individual tax rate (~39% including surcharge and cess).

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