

CHAMBER OF TAX CONSULTANTS

Webinar on Taxation of Private Trusts/ family trusts, and Estate planning with the help of private trusts



Taxability of Trust – Domestic and International Tax Issues

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Overview of Presentation

- Concept of Trust – Types & Purposes
- Application and uses of trust for Estate Planning
- Trust & Taxation: Onshore & Offshore
- Connecting factors and events for taxation (Domestic & International)
- Taxation of Onshore & Offshore Trust
- Taxation of Trust under ITA, 1961
- Case Study – Onshore Trust
- Case Study – Offshore Trust under various scenarios
- Anti avoidance provisions
- Trust & Treaty
- Conclusion - Issues



Concept of Trust

Definition of Trust

- Trust is an equitable obligation binding a person to deal with property over which he has control for the benefits of the persons of whom he may himself be one and any one of whom may enforce the obligation.
- Briefly this led to the concept of “Equity’s interference with common law rights in pursuit of justice”
- As per Indian Trust Act, 1882; A Trust is an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another, or of another & the owner.



Purposes of Trust

- Evolution of Trust
- Use of Assets vs. Transfer of Assets
- Protection of Purposes
- Succession Planning
- Ownership succession
- Venture Capital Fund
- Private Equity
- Special Purposes
- Wealth Management
- Taxation
- Types of Trust is a consequence of above purposes



Use of Trust for Estate Planning

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



Use of Trust for Estate Planning (con't)

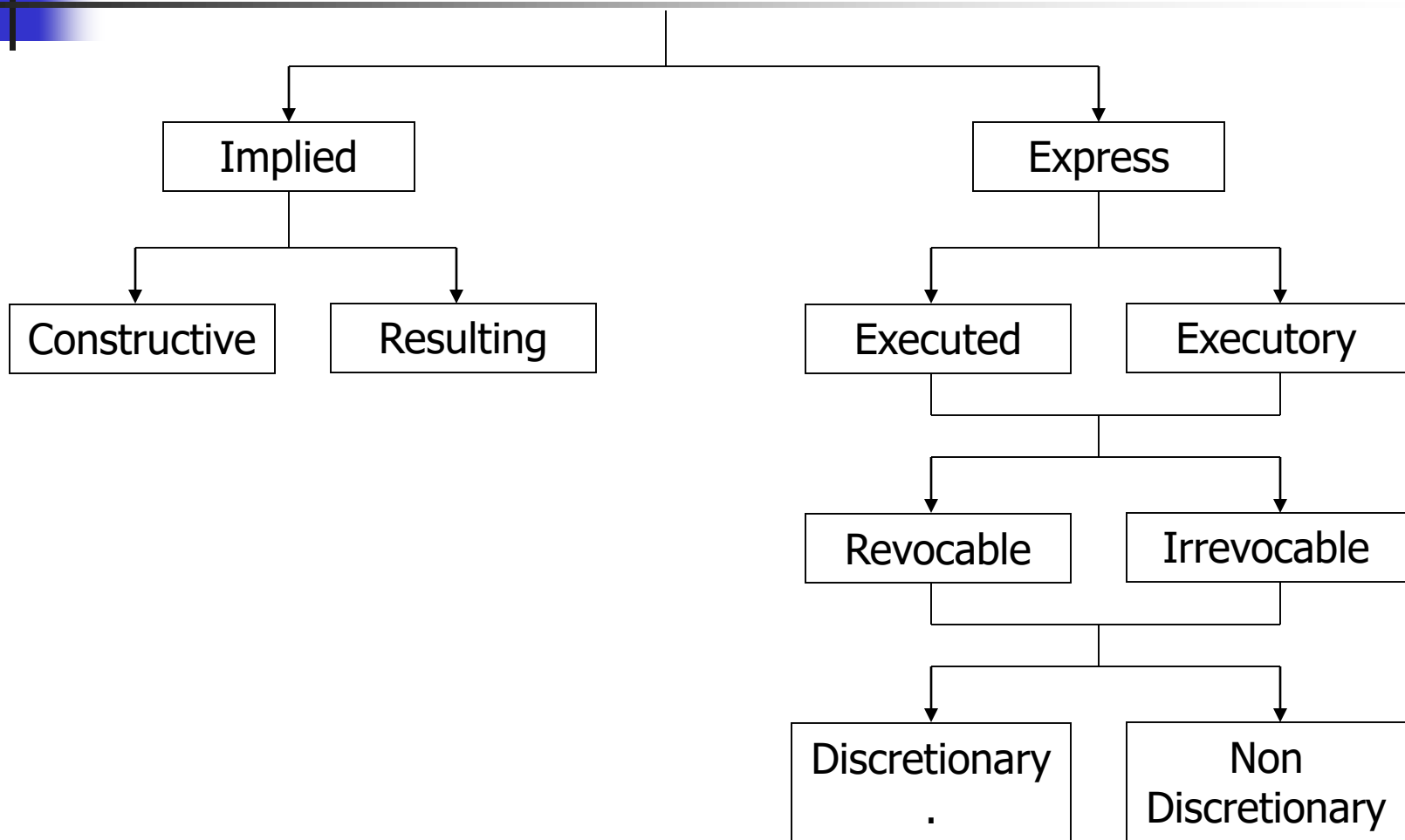
- Other Advantages of Trusts:
 - Trust can serve as protection in case of a bankruptcy by protecting assets from creditor's (actual and potential) claims, provided the assets have been transferred two years prior to the bankruptcy being declared
 - Settlor can direct the managing and advisory committees, to monitor and advise the trustees on application and management of the trust assets there by enabling a relatively large pool of assets/ investments to be managed under one umbrella
 - Trust can help exploiting offshore business opportunities, acquisition of interests and cross-border movement of family members



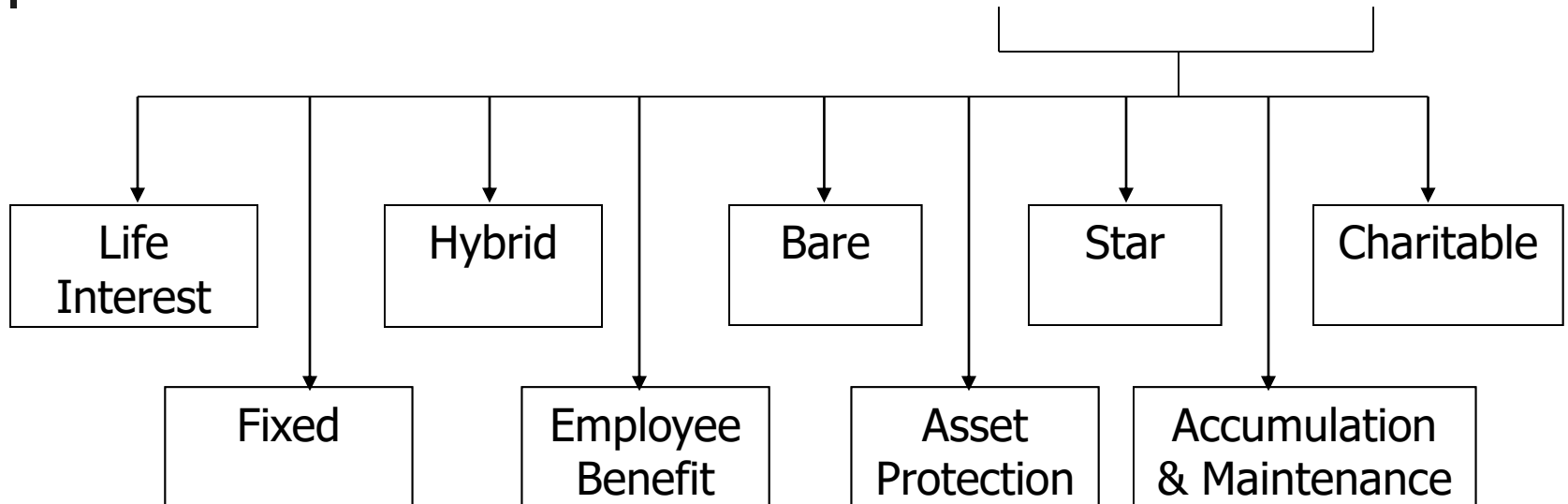
Trust VS Will for Estate Planning

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

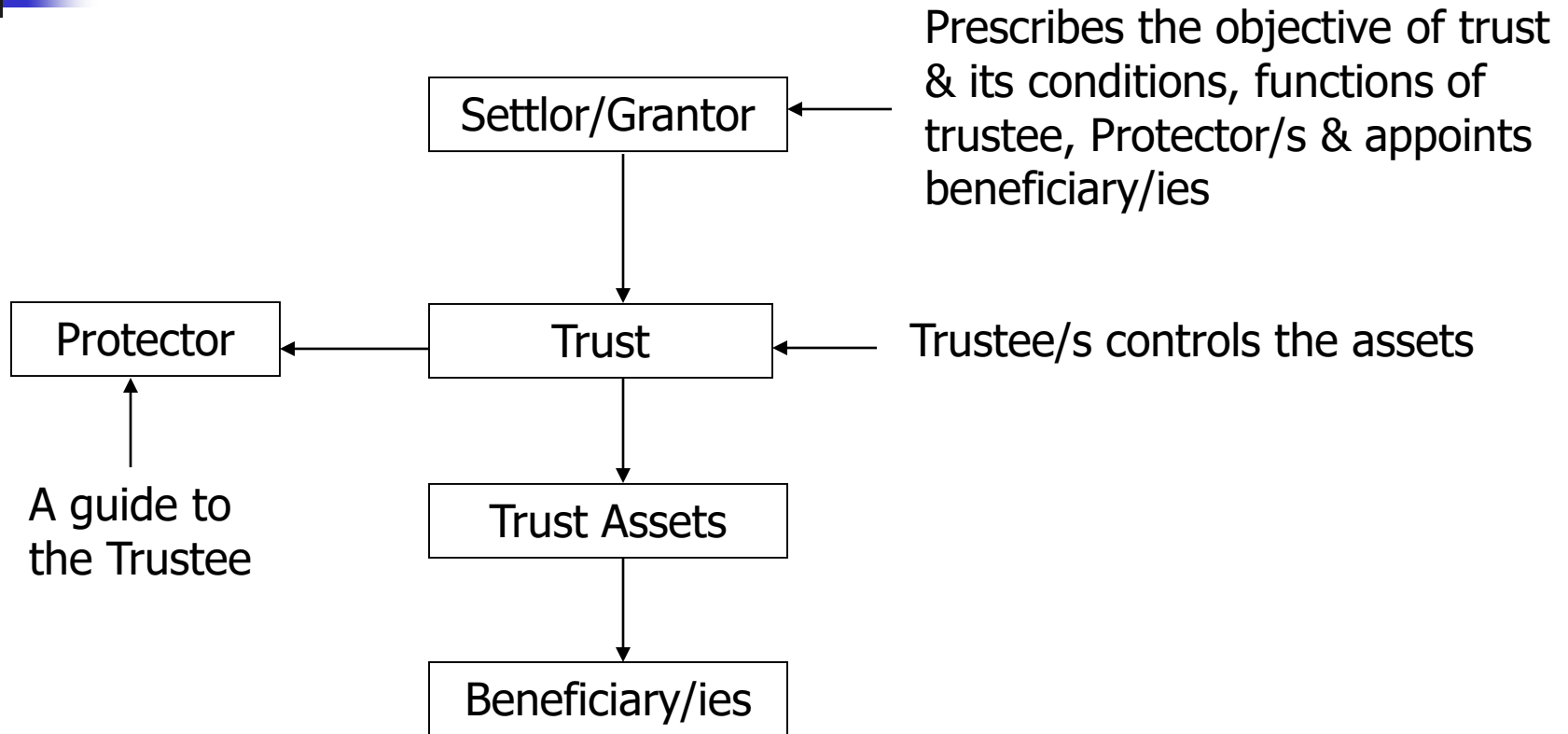
Types of Trust



Types of Trust



Trust, A Typical Structure





Trust, A Typical Structure

Dual Ownership

- Legal Ownership decides control, management & possession
- Beneficial Ownership involves benefit, use & enjoyment of asset



Taxation of Trust

- Onshore Trust
- Offshore Trust
- Selection as to type of trust is normally decided on the basis of purpose to which it is put and jurisdiction is decided on the basis of taxation and purposes
- Domestic Tax Laws
- International Tax issues



Taxation of Trusts-Onshore & Offshore

Onshore Trust

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

Offshore Trust

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



Selection of Trust - Criteria

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



Basis of taxation - Domestic Tax System

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

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



Domestic Tax System

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



Cross Border / International issues

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



Cross Border Taxation of Trust

S_1

T_1

B_1

S_2

T_2

B_2

S_3

T_3

B_3

In above chart

S: Location of Assets

T: Location of Trustee

B: Location of Beneficiary

No OECD guidance on the subject



Attribution of income to a “Person”

- Person to whom income is attributed
- DTA benefits to Person who is taxpayer and Resident
- Income attribution – Different in Source State and Resident State: Trustee v/s Beneficiary. Trustee pays the tax
- Special rules in the DTA to incorporate conflict of attribution



Australia- Papua New Guinea DTA

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



Trust under Income Tax Act, 1961

- Public Charitable Trust
- Private Trust
- Trust vs AOP [(1960) 39ITR546 (SC) CIT vs Indira Balkrishna] followed consistently
- Relevant Provisions
 - Section 2(15)
Defines a charitable objective
 - Section 10(23C)
Provides exemption to educational, medical, charitable and public religious institutions, existing not for the purposes of profit
 - Section 11-13
Provides for tax treatment in case of charitable trusts
 - Section 60-63
Revocable Trust



Trust under Income Tax Act, 1961

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



Trust under ITA, 1961 Cont'd...

Residential Status

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

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



Taxability of Public Trust - ITA

Section	Nature of income	Extent to which exemption allowed
11(1)(a)	Income derived from property held under trust wholly for charitable or religious purposes	To the extent income is applied to such charitable or religious purposes in India. Whereas such income is accumulated or set apart for such application, to the extent of 15% of the income from such property.
11(1)(c)	Income derived from property held under trust for a charitable purpose, which tends to promote international welfare in which India is interested	To the extent income is applied to such charitable or religious purposes outside India. Exemption is available only if the Board has directed such exemption.
11(1)(d)	Income in the form of voluntary contributions made with a specific direction that they shall form part of the corpus of the trust or institution.	100% exemption.

In computing the 15% of the income which may be accumulated or set apart, any such voluntary contributions as are referred to in Section 12 shall be deemed to be part of the income.



Taxability of Public Trust - ITA

Section	Nature & extent of income not exempt under Section 11
13(1)(a)	Income of private religious trust not used for public benefit.
13(1)(b)	Income of charitable trust created for benefit for particular religious community.
13(1)(c)	Income/ property of charitable or religious trust applied for direct or indirect benefit of person referred in 13(3)
13(1)(d)	Any income, is taxable if If any funds are invested other than in 11(5) Any funds invested earlier than 1983 remain invested thereafter Shares and company are held after 1983.
11(4A)	Income from business which is not incidental to the attainment of the objectives of the trust, or in respect of which separate books of accounts have not been maintained.
12(2)	Value of medical/ education services provided to specified persons by trust running hospital and educational institution shall be income of trust and will be chargeable in the year in which services are provided and chargeable to tax, despite section 11(1).

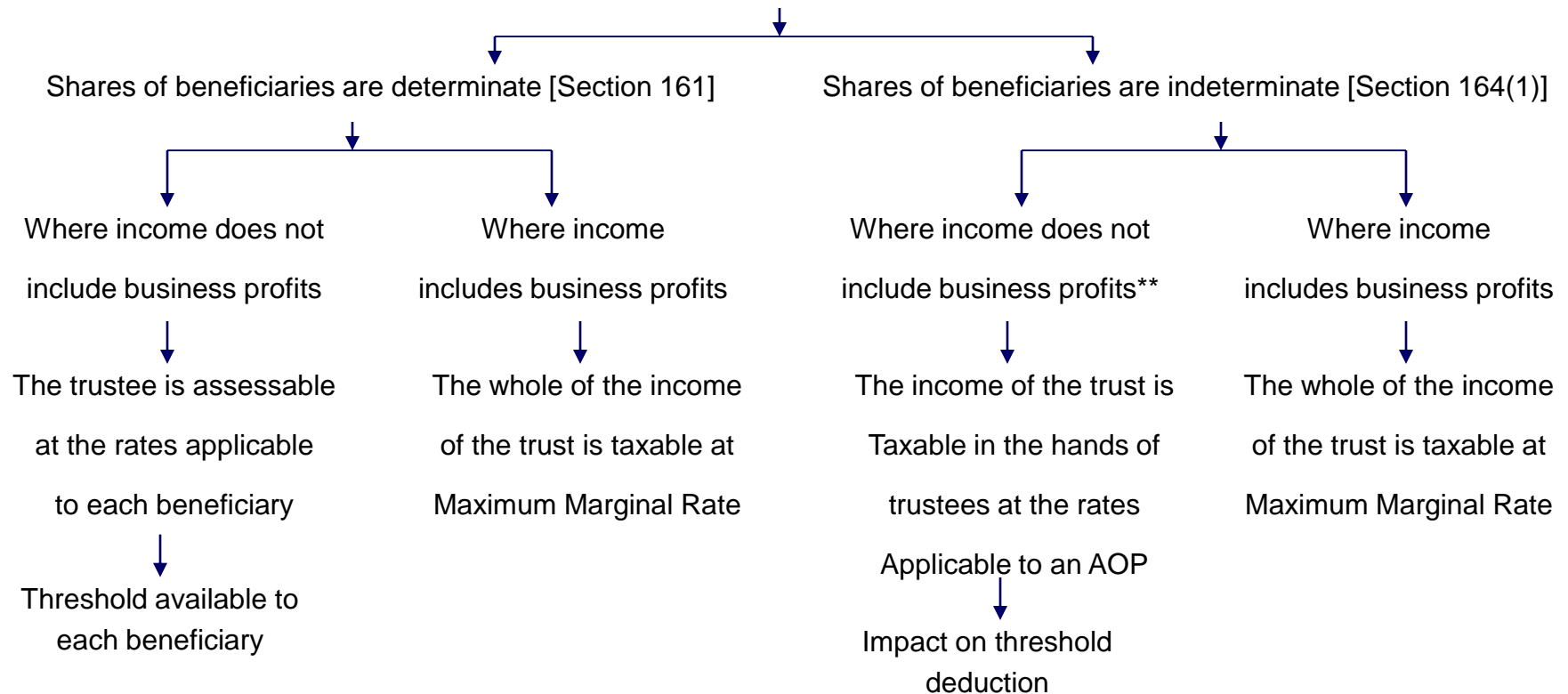


Taxability of Public Trust - ITA

Sources of Income	Under Section	Tax Rates
Voluntary Contributions (being corpus donations)	11(1)(d)	Exempt
Income not applied / accumulated to the extent > 15%	11(1)(a)	AOP Rate
Income received on 31st March carried forward to next year for utilization but not utilized in that next year [Explanation 2(b) to Section 11(1)(d)]	11(1B)	AOP Rate
Income accumulated u/s 11(2) is not invested / utilized / donated to another trust	11(3)	AOP Rate
Excess Business Income as assessed by the AO	11(4)	AOP Rate
Income derived u/s 13(1)(a) & 13(1)(b)		AOP Rate
Income derived u/s 13(1)(c) & 13 (1)(d) – Specified Persons		MMR
Anonymous Donations u/s 115BBC		30%

Taxability of Private Trust - ITA

Taxability of Private trusts



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



Taxability of Private Trust - ITA

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



Taxability of Private Trust - ITA

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



Taxability of Private Trust - ITA

Where shares of beneficiaries are indeterminate or unknown i.e. in case of discretionary trust [Section 164(1)]

- Where income includes business profits:

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

However, if such profits from business are receivable under a trust declared by any person by 'will' exclusively for the benefit of any relative, dependant on him for support and maintenance and such trust is the only trust so declared by him, then, the trustees shall be assessable only at the rates applicable to an AOP.

- Taxation of Charitable / Religious Trust not registered u/s. 12A [Section 164(2)]:

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



Taxability of Private Trust - ITA

Not regarded as transfer

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

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

Sec.48

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



Anti Avoidance under ITA, 1961

- **Revocable & irrevocable transfer**

- **Sec.60 Transfer of income where there is no transfer of assets.**

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

- **Sec.61 Revocable transfer of assets.**

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



Anti Avoidance under ITA, 1961

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

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

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

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

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

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



Anti Avoidance under ITA, 1961

- **Sec.63 “Transfer” and “revocable transfer” defined.**

For the purposes of sections 60, 61 and 62 and of this section,—

 - (a) a transfer shall be deemed to be revocable if—
 - (i) it contains any provision for the re-transfer directly or indirectly of the whole or any part of the income or assets to the transferor, or
 - (ii) it, in any way, gives the transferor a right to re-assume power directly or indirectly over the whole or any part of the income or assets ;
 - (b) “transfer” includes any settlement, trust, covenant, agreement or arrangement.



Anti Avoidance under ITA, 1961

- Distribution from Trust & S.56(2)
- Settlement to Trust & ITA
- Application & context of Section 93



Provision of Section 93 of ITA, 1961

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



Case Study I - Offshore Trust & taxation

Background

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



Case Study I

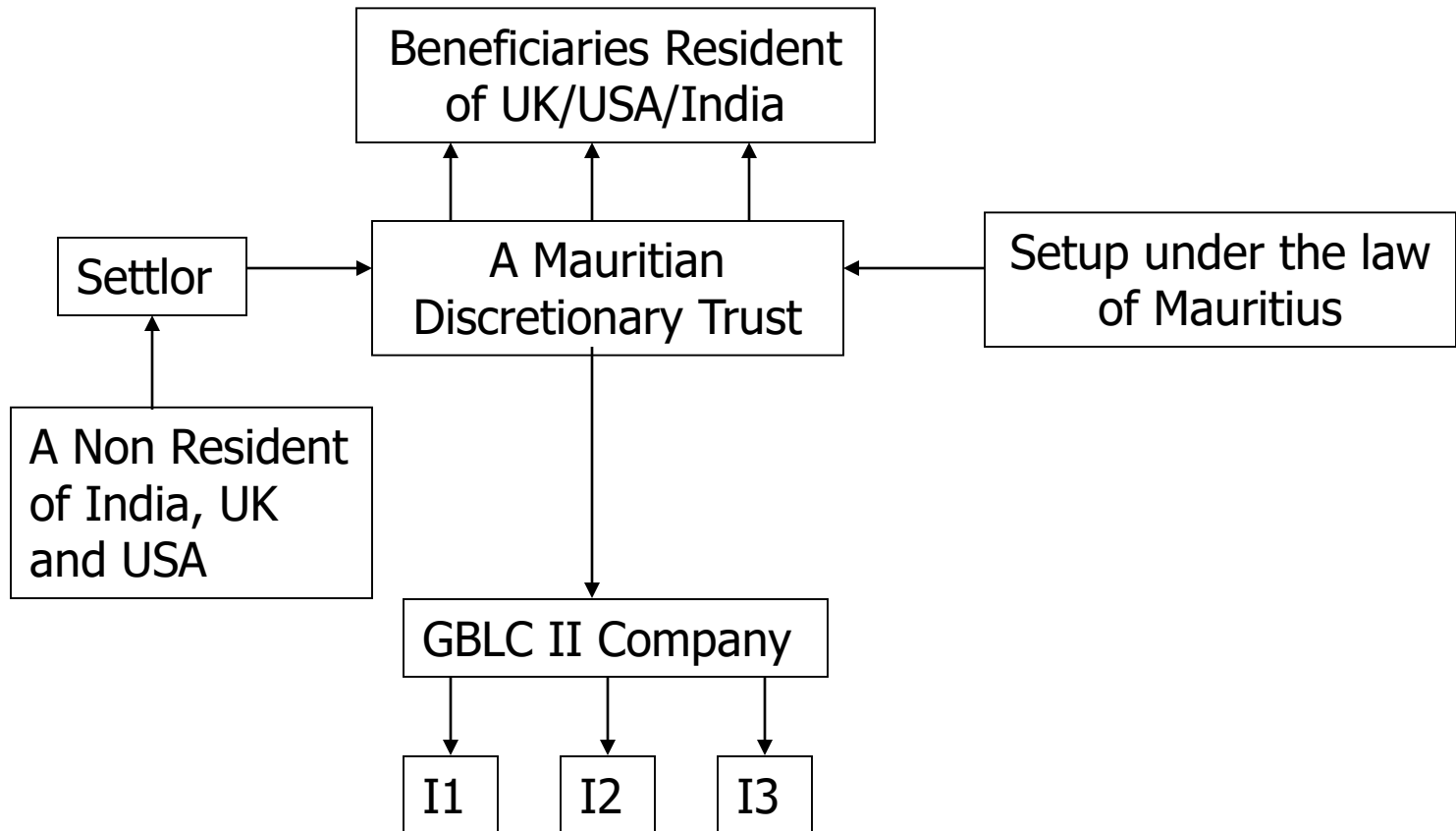
Question

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

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

- a) Resident of Mauritius
- b) Resident in UK
- c) Resident in India

Case Study I - Structure





Tax Issues in India

- Whether Trust will be liable to Tax in India in any of the alternatives when Trustee is a person Resident of Mauritius or UK or of India
- Taxation of Income in India for Resident beneficiary when
 - Income is not distributed
 - When income is distributed
- Taxation of income in India for Non Resident beneficiaries in above alternatives i.e. in case variations in trustees residential status vis-à-vis distribution or when there is no distribution?
- In case tax is payable in India by Indian Resident beneficiary, whether there is any possibility of tax credit?



Analysis of Case Study I

- **Scope of total income Section 5**

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

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

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

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

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



Analysis of Case Study I

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

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

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

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

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



Analysis of Case Study I - Representative Assessee

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

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



Analysis of Case Study I - Representative Assessee

- Section 161(1): Liability of representative assessee
Every representative assessee, as regards the income in respect of which he is a representative assessee, shall be subject to the same duties, responsibilities and liabilities as if the income were income received by or accruing to or in favour of him beneficially, and shall be liable to assessment in his own name in respect of that income; but any such assessment shall be deemed to be made upon him in his representative capacity only, and the tax shall, subject to the other provisions contained in this Chapter, be levied upon and recovered from him in like manner and to the same extent as it would be leviable upon and recoverable from the person represented by him.



Analysis of Case Study I - Representative Assessee

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

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



Analysis of Case Study I

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



In a case when Trustee is Resident of India

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



The test to be applied

- If scope of total income does not cover the income of the beneficiaries who are non-resident or resident, whether income can still be chargeable to tax in the hands of resident or non-resident trustee u/s 164(1).
- How to compute?
- Difficult to quantify



Case Study I - Conclusion

- Taxation of Trust in India
 - a) When Trustee is Resident in Mauritius - No
 - b) When Trustee is Resident in UK - No
 - c) When Trustee is Resident in India - Quantification fails
- Taxation of Indian beneficiaries in a case when there is no distribution
 - a) No
 - b) No
 - c) Computation fails.
- In case of distribution, Indian beneficiary are liable to taxation in all three cases



Case Study I - Conclusion

- Taxability for Non Resident beneficiary/ies
 - a) When there is no distribution
 - UK Resident beneficiary / US Resident beneficiary not liable to tax unless it is received in India (S. 5 of the ITA)
 - b) In case of distribution
 - Not liable to taxable in India (S. 5 of the ITA)
 - India-UK DTAA / India US Tax treaty. Not liable to taxation unless assets are located in India subject to Characterisation of income from such Assets



Case Study I - Conclusion

- Taxability of Indian beneficiary in UK/USA. Normally “No”, subject to UK/USA domestic tax law.
- Tax Credit Issues
 - Tax paid by discretionary Trust outside India is the taxes on the Income of the Trust
 - ITA-Computation is for income of beneficiary, can taxes paid by Trust be available as Credit?
 - Whether unilateral relief under ITA is available only in absence of tax treaty?
- Provisions of Sec.93 of the ITA Act
 - What happens to the settlement by a non resident, in case he receives/enjoy the income after he becomes resident?



Conclusion & issues

- Key consideration
- Is Trust a person ?
- Trust and Article 4(1) of the Treaty
- Beneficial owner under Article 10, 11 and 12
- Alienator under Article 13
- PE & Trust
- Trust & FEMA
- Computation under ITA
- Characterisation of income or it be treated as other income
- OECD Guidance
- Commentary by leading Author/s



Recent trends affecting Offshore Trusts

- Renewed vigor internationally towards information exchange
- G20 declaration in London, April, 2009:
“to take action against non-cooperative jurisdictions, including tax havens. We stand ready to deploy sanctions to protect our public finances and financial systems. The era of banking secrecy is over”
- Indian Govt. taking major steps to trace black money stashed overseas
- Movement towards increased transparency that started in 2000 now gaining traction
- India is Vice-Chair of peer review group of
 - The Global Forum on Transparency and Exchange of Information for Tax purposes, and
 - Financial Action Task Force



Recent trends affecting Offshore Trusts (con't)

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

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



Recent trends affecting Offshore Trusts (con't)

- India is renegotiating its existing DTAA's, with special focus on having clauses for exchange of banking information either by way of protocols to existing DTAA's or new DTAA's
- In the beginning of 2009, 78 DTAA's; now 88 are signed with 85 in force
- In 3 DTAA's Article 26 was as per International Standards
- Renegotiation started in other 75 DTAA's
 - Negotiation finalized in 26 cases
 - 7 signed, 4 entered into force
- Negotiation of 19 new DTAA's
 - New DTAA's – Article 26 as per International Standards
 - 9 signed, 4 entered into force



Recent trends affecting Offshore Trusts (con't)

- India is also entering into agreements with several tax havens for exchange of information pertaining to tax matters (TIEA)
- TIEAs with 22 priority jurisdictions
 - Negotiations completed with 19 countries / jurisdictions
 - 19 TIEAs signed (Argentina, Bahamas, Bahrain, Belize, Bermuda, British Virgin Islands, Cayman Islands, Gibraltar, Isle of Man, Jersey, Guernsey, Liberia, Maldives, MACAO SAR, Liechtenstein, Monaco, San Marino, Seychelles, Saint Kitts and Nevis)
- New jurisdictions for TIEAs identified
- India will have one of the largest networks of DTAA's and TIEAs



Recent trends affecting Offshore Trusts (con't)

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



Recent trends affecting Offshore Trusts (con't) – EOI CELL

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



Recent trends affecting Offshore Trusts (con't) – EOI CELL

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

Salient features of India – Bahamas

TIEA

- Scope:
Competent authorities of the Contracting Parties to provide assistance through exchange of information that is foreseeably relevant to the administration and enforcement of the domestic laws of the Contracting Parties concerning taxes
- Jurisdiction:
Information shall be exchanged without regard to whether the person to whom the information relates is, or whether the information is held by, a resident of a Contracting Party
- Taxes covered:
All taxes covered, including identical or substantially similar taxes imposed in future either in addition to or in place of existing taxes



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

- Person:
includes an individual, a company, a body of persons and any other entity which is treated as a taxable unit under the taxation laws in force in the respective Contracting Parties
- Information:
means any fact, statement, document or record in whatever form
- Information gathering measures:
means laws and administrative or judicial procedures that enable a Contracting Party to obtain and provide the requested information



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

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



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

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



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

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

Salient features of India – Bahamas

TIEA (con't)

- If requested party unable to provide information within 90 days, it shall immediately inform the requesting Party, explaining the reason for its inability, the nature of the obstacles or the reasons for its refusal
- Tax examinations abroad:
The requested Party may allow representatives of the competent authority of the requesting Party to enter the territory of the requested Party, to the extent permitted under its domestic laws, to interview individuals and examine records with the prior written consent of the individuals or other persons concerned



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

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



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

- Confidentiality:

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



Other regulatory measures – I.T. Act

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

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

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



Thank You
