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Organised By: WIRC Of ICAI
Subject: (1) Tax Planning through HUF and Family Arrangement
(2) Preparation of WILL and Documentation in relation to HUF and Family Arrangement
Date & Day : 06.08.2016 (Saturday)
Time: 10.00 am to 01.00 pm
Venue: J. S. Lodha Auditorium, ICAI Bhawan, Cuffe Parade, Colaba, Mumbai – 400 005

- By CA VIMAL PUNMIYA

HUF- HINDU UNDIVIDED FAMILY

1. **INTRODUCTION :**

I. The Hindu Undivided Family (HUF) is a special feature of Hindu society. Hindu Undivided Family is defined as consisting of a common ancestor and all his lineal male descendants together with their wives and daughters. Therefore a Hindu Undivided Family consists of males and females. Daughters born in the family are coparcener and women married into the family are equally members of the undivided family. On the other hand at any given point of time a coparcenary is limited to only members in the four degrees of the common male ancestor and daughter.

II. Hindu: In this term are included all the persons who are Hindus by religion. Section 2 of the Hindu Succession Act, 1956, elaborately declares that it applies to any person, who is a Hindu by religion in any of its forms or developments, including a Virashaiva, a Lingayat or a follower of Brahmo, Prathana or Arya Samaj, a Buddist, Jain or Sikh. In *CWT. Smt. Champa Kumari Singh (1972) 83 ITR 720, the Supreme Court* held that the HUF includes Jain Undivided Family.

III. Hindu Undivided Family (HUF) is a legal expression which has been employed in taxation laws as a separate taxable entity. It is the same thing as "Joint Hindu Family". It has not been defined under the Income Tax Act, as it has a well defined connotation under Hindu Law.

IV. A Hindu Undivided Family (HUF) is a separate entity for taxation under the provisions of sec. 2(31) of the Income Tax Act, 1961. This is in addition to an individual as a separate taxable entity , it means that the same person can be assessed in two different capacities viz. as an individual and as Karta of his HUF.

B. **HOW HUF COMES INTO EXISTENCE :**

A Hindu male with his wife and children automatically constitutes the HUF. The HUF is a creature of Hindu Law. It cannot be created by acts of any party save in so far as by adoption or marriage, a stranger may be affiliated as a member thereof. An Undivided Family which is a

normal condition of the Hindu society is ordinarily joint not only in estate but in food and worship. The joint family being the result of birth, possession of joint property is only an adjunct of the Joint Family and is not necessary for its constitution.

C. BASIC REQUIREMENTS FOR THE EXISTENCE OF AN HUF ARE AS FOLLOWS :

(i) Only one co-parcener or member cannot form an HUF

Family is a group of people related by blood or marriage. A single person, male or female, does not constitute a family.

The Hon'ble Supreme Court held in C. Krishna Prashad V/s CIT (1974) 97 ITR 493 (SC) that the word "Family" always signifies a group. Plurality of persons is an essential attribute of a Family. A Single person, male or female, doesn't constitute a family.

However the property held by a single co-parcener does not lose its character of Joint Family property solely for the reason that there is no other male or female member at a particular point of time. Once the co-parcener marries, an HUF comes into existence as he alongwith his wife constitutes a Joint Hindu Family as held in the case of *Prem Kumar v. CIT , 121 ITR 347 (All.)*

(ii) Joint Family continues even in the hands of females after the death of sole male member :

Even after the death of the sole male member so long as the original property of the Joint Family remains in the hands of the widows of the members of the family and the same is not divided amongst them; the Joint Hindu Family continues to exist. *CIT v. Veerapa Chettiar, 76 ITR 467(SC)*

(iii) An HUF need not consist of two male members- even one male member is enough :

The plea that there must be at least two male members to form an HUF as a taxable entity, has no force. – *Gauli Buddanna v. CIT, 60 ITR 347 (SC); C. Krishna Prasad v. CIT 97 ITR 493 (SC) and Surjit Lal Chhabda v. CIT, 101 ITR 776 (SC)*

A father and his unmarried daughters can also form an HUF, *CIT v. Harshavadan Mangladas, 194 ITR 136 (Guj.)*

Further on partition of an HUF a family consisting of a co-parcener and female members is to be assessed in the status of an HUF.

D. NUCLEUS OF HUF :

It is many times argued that existence of nucleus or joint family property is necessary to recognize the claim of HUF status in respect of any property or income of an HUF. It has been established now that since the HUF is a creature of Hindu Law, it can exist even without any nucleus or ancestral joint family property.

E. MANAGER OF HUF OR KARTA :

The person who manages the affairs of the family is known as Karta. Normally the senior most male member of the family acts as Karta. However a junior male member can also act as Karta with the consent of the other member. *Narendrakumar J. Modi v. Seth Govindram Sugar Mills 57 ITR 510 (SC).*

A Wife cannot become KARTA in normal circumstances. However, in Sushila Devi Rampuria V/s ITO (1960) 38 ITR 316 (Cal), it was held that if Co-parceners are incapable, wife can act as KARTA.

Besides the same person can be taxed as both individual and Karta of an HUF. The individual and the HUF are two different units of taxation i.e. two different assesses *CIT v. Rameshwarlal Sanwarmal 82 ITR 628 (SC).*

F. JOINT FAMILY PROPERTY :

The following types of properties are generally accepted as joint family property:

(i) Ancestral property;

(ii) Property allotted on partition;

(iii) Property acquired with the aid of joint family property;

(iv) Separate property of a co-parcener blended with or thrown into a common family hotchpot. The provisions of sec. 64 (2) of the Income Tax Act, 1961 have superseded the principles of Hindu Law, in a case where a co-parcener impresses his property with the character of joint family property.

A female member cannot blend her separate property with joint family property but she can make a gift of it to the HUF. *Pushpadevi v. CIT 109 ITR 730 (SC).* A female member can also bequeath her property to the HUF, *CIT v. G.D. Mukim, 118 ITR 930 (P & H).*

G. BRANCHES OF HUF :

An HUF can have several branches or sub-branches. For example, if a person has his wife and sons, they constitute an HUF. If the sons have wives and children, they also constitute smaller HUFs. If the grandsons also have wives and children, then even they will also constitute still smaller or sub-branch HUFs. As stated above, the HUF is a creature of Hindu Law and these entities are HUFs alongwith the bigger HUF of the father or the grandfather. It is immaterial whether these smaller HUFs possess any property or not. Property can be acquired by any mode; by partition of bigger HUF or by gifts from any member of the family or even by a stranger or by will with unequivocal intention of the donor or the testator that the said gift or bequest will form the joint family property of the donee or the testate or Re-union of HUF.

An HUF can be composed of a large number of branch families, each of the branch itself being an HUF and so also the sub-branches of more branches. *CIT v. M.M.Khanna 49 ITR 232 (Bom).*

H. RIGHT OF MEMBERS :

HUF is not a natural body. It does not have physical existence as such. It is composed of members. Those members are classified in two categories, viz (i) Coparceners, and (ii) Non-Coparceners.

Coparcener means a member who has a right to demand partition. Non-Coparcener means a member who doesn't have a right to demand partition. AS per Current scenario RIGHT TO DEMAND PARTITION is vested in male member and daughter only.

Every Co-parcener is Member, but every Member is not Co-parcener. Rights of Members are-

Provision	Coparcener	NON-Coparcener
Before Partition of	• Right of Maintenance	Right of Maintenance

HUF	• Right to demand partition	
On partition of HUF	Right to receive equal share	• Right to receive reasonable assets • However, (i) Wife of KARTA or (ii) Widowed mother has right to receive share equal to one Co-parcener

I. PARTITION OF HUF :

"Partition" Means a process of separation of assets/ members. Partitions can be of two types' viz. (1) total partition, and (2) partial partition. In total partition, all members get separated and all assets are divided. In partial partition, some of the members get separation, or some of assets are separated.

The rights/entitlements of the members on partition of HUF are governed by Hindu Law. The tax laws do not have any otherwise provision.

Although the partition must be fair, yet the law does not require that the partition must be equal. The Hon'ble Supreme court in the case of N.S. Getti Chettiar (1971) 82 ITR 599 (SC) held that an unequal partition is also possible and it is very common in the country.

Member may accept a smaller/larger share on partition or he may renounce his right fully. But Income Tax Department has no right to avoid partition on the ground of inequality. M.S.M. Meyappa Chettiar V/s CIT 18 ITR 586 (Madras)

Section 171 of the Income Tax Act, 1961 deals with assessment of an HUF, after partition. Clauses (a) of the explanation to sec.171 defines "Partition" of an HUF. Where the property admits of a physical division, then a physical division of the property thereof, but, where the property does not admit of a physical division then such division as the property admits of, will be deemed to be a "partition".

`Partition need not be by Metes & bounds, if separate enjoyment can, otherwise the secured and such division is effective so as to bind the members. *Cherandas Waridas, 39 ITR 202 (SC).*

However, the members of an HUF can live separately and such an act would not automatically amount to partition of the HUF. *Shiv Narain Choudhary v. CWT 108 ITR 104 (All.)*

A finding of partition by the assessing officer u/s. 171 of the Income Tax Act, 1961 is necessary.

Under Hindu law both types of partitions, i.e. total or partial, are valied however, under income tax act, partial partition of an HUF's "***hitherto assessed"*** is prohibited/derecognized by the provisions of sec. 171(9) & moreover, according to sec. 171(9), any partial partition effected after 31.12.1978, is not recognized. Same is the position in Wealth-tax act, 1957. It may be noted that the use of words "***hitherto assessed"*** *in the language of section 171(9) has persuaded the Hon'ble Gujrat High Court in the case of CIT V/s Kanti lal Amba Lal HUF (1991) 59 Taxman 232 (Guj.) to conclude that the section 171(9) is not applicable to a HUF which has never been assessed under Income Tax Act,1961.*

Motive or need for partition cannot be questioned by the Income Tax Department. *T. G. Sulakhe v. CIT, 39 ITR 394 (AP).*

J. **FOLLOWING METHODS OR DEVICES MAY PROVE USEFUL IN REDUCING THE TAX INCIDENCE IN THE CASE OF HUF :**

(i) By increasing the number of assessable units through the device of partition of the HUF;

(ii) By creation of separate taxable units of HUF through will in favour of HUF or gift to HUF;

(iii) Through family settlement / arrangement;

(iv) By payment of remuneration to the Karta and other members of the HUF;

(v) By use of loan from HUF to the members of the HUF;

(vi) Through gift by HUF to its members specially to the female members;

(vii) Through other methods / devices;

The aforesaid methods / devices are discussed in detail below as follows :

a. **PARTITION OF HUF**

In the case of certain HUFs, the tax liability can be reduced by partition of the HUF. This can be easily done in a case where the partition results in separate independent taxable units. Suppose an HUF consists of father and two sons and there are two business establishments, a house property and other sources of income with the HUF. If the members of the HUF have no other sources of income then partition of the HUF can be done by giving one business establishment to each of the sons, house property to the father and dividing the other sources in such a manner so as to make the partition equitable. Such a partition of HUF will reduce the tax liability considerably.

The position may, however, be different in a case where the members of the HUF have got high individual incomes. In such a case it is not advisable to break or partition the HUF. The HUF should be allowed to continue as a separate taxable unit.

Then there may be a case where the HUF has got only one business establishment which does not admit of a physical division. For the sake of partition the business may be converted into a partnership firm or a company. At present, rate of firm's tax and the rate of tax in case of a company, is 30% flat, therefore conversion of HUF business into a partnership or a company is not advantageous. The incidence of, in such a case, can be better reduced by payment of remuneration to the members of the HUF.

Partial partition of HUF is also a very effective device for reducing its tax liability. Partial partition is recognized under the Hindu Law. However partial partition of an HUF has been de-recognised by the provisions of sec. 171(9) of the Income Tax Act, 1961 according to which any partial partition effected after 31.12.1978, will not be recognized.

The provisions of sec. 171(9) have been declared ultra-vires by the Madras H.C. in the case of *M.V.Valliappan v. ITO, 170 ITR 238*. The Supreme Court has granted S.L.P. and stayed the operation of the above decision of Madras H.C. as reported in *171 ITR (St.) 52*. The Gujrat H.C. has, however, held the ITAT justified in following the aforesaid decision of *Madras H.C., CIT v. M. M. Panchal HUF, 210 ITR 580 (Guj.)*

Notwithstanding the provisions of sec. 171(9) partial partition, can still be used as a device for tax planning in certain cases. An HUF not hitherto assessed as undivided family can still be subjected to partial partition because it is recognized under the Hindu Law and such partial partition does not require recognition u/s. 171 of the Income Tax Act,1961. Thus a bigger HUF already assessed as such, can be partitioned into smaller HUFs and such smaller HUFs may further be partitioned partially before being assessed as HUFs. Besides any HUF not yet assessed to tax can be partitioned partially and thereafter assessed to tax.

The following legal aspects in respect of partition of HUF, should also be kept in mind while the partition of HUF which are as under:-

(i) Distribution of the assets of an HUF in the course of partition, would not attract any capital gains tax liability as it does not involve a transfer.

(ii) On the basis of the same reasoning distribution of assets in the course of partition would not attract any gift tax liability, and

(iii) There would be no clubbing of incomes u/s. 64 as it would not involve any direct or indirect transfer.

b. **CREATION OF HUFS AS SEPARATE TAXABLE UNITS BY WILL IN FAVOUR OF OR GIFT TO HUF :**

It is now well settled law that there can be a gift or will for the benefit of a Joint Hindu Family. It is immaterial whether the giver is male or female, whether he or she is a member of the family or an outsider.

The HUF can receive gifts from anybody i.e. from a coparcener, non-coparcener and even stranger. CIT V/s K Satyendra Kumar (1998) 232 ITR 360 (SC)

What matters is the intention of the donor or testator that the property given is for the benefit of the family as a whole. “Doner should clearly indicate that he is donating to the HUF. CIT V/s Maharaja Bahadur Singh & others (1986) 162 ITR 343 (SC).

Suppose there is an HUF consisting of Karta, his wife, his two sons, daughter-in-law and grandchildren. A gift or will can be made for the benefit of the two smaller HUFs of the sons. The bigger HUF will continue as a separate taxable unit even after the death of the Karta.

There may also be a case where the father or mother has got self-acquired properties. They have a son and his family but there is no ancestral property as a corpus of their family. Then, father & mother or both can leave their property for the benefit of their son’s family, through their will (s).

Similar result can be obtained by means of a gift for the benefit of a joint family. It may be pointed out here that an HUF cannot be created by act of parties but a corpus can be created for an already existing HUF through the medium of a gift or will etc.

c. **THROUGH FAMILY SETTLEMENT / ARRANGEMENT :**

Family settlements / arrangements are also effective devices for the distribution of ancestral property. The object of the family settlement should be broadly to settle existing or future disputes regarding property, amongst the members of the family. The consideration for a family

settlement is the expectation that such settlement will result in establishing or ensuring amity and goodwill amongst the members of the family. *Ram Charan Das v. G.N.Devi, AIR 1966 SC 323 and Krishna Beharilal v. Gulabchand, AIR 197 SC 1041*. Such an agreement is intended to avoid future disputes and to bring about harmony amongst the members of the family . *Sahu Madho Das v. Mukand Ram, AIR 1955 SC 481.* Briefly stated though conflict of legal claims, present or future is generally a condition for the validity of family arrangement, it is not necessarily so. Even bonafide disputes, present or possible in future, which may not involve legal claims, will also suffice to effect a family arrangement.

As family arrangement does not involve a transfer, there would be no gift and capital gains tax liability or clubbing u/s. 64.

By a family arrangement tax incidence is considerably reduced or it may even be nil. Suppose a family consists of Karta, his wife, two sons and their wives and children and its income is Rs. 12,00,000/-. The tax burden on the family will be quite heavy. If by family arrangement, income yielding property is settled on the Karta, his wife, his two sons and two daughter-in-law, then the income of each one of them would be Rs.200,000/- which would attract no tax & if the assessment year is 2013-14, then the tax liability would be reduced form Rs. 1,95,700/- to nil.

d. **By payment of remuneration to the Karta and / or other members of the family :**

The other important measure of tax planning for an HUF is to pay remuneration to the Karta and / or other members of the HUF for services rendered by them to the family business. The remuneration so paid would be allowed as a deduction from the income of the HUF and thereby tax liability of the HUF would be reduced, provided the remuneration is reasonable and its payment is bonafide. There is no legal bar against payment of remuneration to the Karta or other members of HUF for services rendered to the family in carrying on the business of the family or looking after the interests of the family in a partnership business. *Jugal Kishore Baldeo Sahai v. CIT 63 ITR 238 (SC).* The payment must be for service to the family for commercial or business expediency. *Jitmal Bhuramal v. CIT 44 ITR 887(SC).* Remuneration paid to the Karta or other members of the HUF should be under a valid agreement. The agreement must be valid, bonafide, on behalf of all the members of the HUF and in the interest of and expedient for the family business. Further the payment must be genuine and not excessive. *J. K. B. Sahai v. CIT, 63 ITR 238 (SC).*

Agreement with whom to be entered:

The agreement should be between the Karta and other members of the family. The agreement need not always be in writing. An agreement to pay salary / remuneration can also be inferred from the conduct of the parties. *CIT v. Raghunandan Saran, 108 ITR 818 (All.)*. However, it would be better if the agreement to pay remuneration is reduced in writing.

For A.Y. 2013-14, if the total income of an HUF is Rs. 10,00,000/- then income tax on HUF would be Rs.1,33,900/-. If salary is paid to four members @ Rs.2,00,000/- net income of HUF would be Rs. 10,00,000 - Rs.8,00,000 (4 x 2,00,000) = Rs.2,00,000/-, tax on it would be Rs. NIL. The income of each member would be Rs.2,00,000/-. Therefore tax on members would be NIL. Thus the tax saving would be of Rs.1,33,900/-.

The distinction between ordinary and specified HUF's has been done away w.e.f. 1.4.1997 i.e. A.Y. 1997-98. For Assessment Year 2013-14 the rate of tax on all HUF's would be the same as in the case of an individual. This change in the rates of tax has brought a lot of relief to specified HUF's i.e. the HUF's with one or more members having taxable income. After the aforesaid amendment whereby the concept of specified HUF's has been done away with, w.e.f. A.Y. 1997-98 this method of tax planning will be much easier and it will bring more tax relief to the HUF's.

e. **By loan to the members from the HUF :**

If the business, capital or investment of the HUF is expanding then such expansion can be done in the individual names of the members of HUF by giving loans to the members from the HUF. The HUF may or may not charge interest on the loans given.

Where property was purchased by members of HUF with loan from the HUF, which was later on repaid the income from such property would be assessable as individual income of the members ***L. Bansidhar and Sons v. CIT 123 ITR 58 (Delhi).***

Where after partition of an HUF, two members became partners in three firms on behalf of their respective HUFs and they also became partners in a fourth firm, the funds were obtained by means of loans from other three firms, the share incomes of the members from the fourth firm was assessable as their individual income only.
CIT v. Champaklal Dalsukhbhai, 81 ITR 293 (Bom.).

f. **By gift of movable assets of the HUF to its female members:**

The Karta of an HUF cannot gift or alienate HUF property but for legal necessity, for pious purposes or in favour of female members of the family. Gift of immovable property within reasonable limits, can be made by a Karta to his wife, daughter, daughter-in-law or even to a son out of natural love and affection.
Therefore, if the HUF has excess funds or property, then, the Karta can make gift of movable assets to his wife, daughter or daughter-in-law at one go or over a period of time.

HUF CAN GIVE GIFT	
TO A MEMBER (REASONABLE AMOUNT/ ASSET)	VALID IN LAW
TO A MEMBER (UNREASONABLE AMOUNT/ ASSET)	VOIDABLE IN LAW
TO A STRANGER	INVALID IN LAW

COMMISSIONER OF INCOME TAX VS. BANSHILAL NARSIDAS [2004 137 TAXMAN 358] MP HC

Section 5(1)(viii) of the Gift-tax Act, 1958 - Exemptions - Whether 'karta' of HUF can make out a gift within reasonable limits even without consent of other coparceners - Held, yes - ***Whether, therefore, gift made by a karta to his wife out of HUF's assets is entitled to exemption under section 5(1)(viii) - Held, yes***

JANA VEERA BHADRAYYA V. CGT [1966] 59 ITR 176 (AP HC)

CGT V. HARI CHAND [1974] 95 ITR 308 (P&H HC)

'Karta' of a Hindu undivided family can make a gift of certain joint family property to his wife and that there is no obstacle or impediment in the way of applicability of section 5(1)(viii) of the Act.

M.S.P.RAJAH V. CGT [1982] 134 ITR 1 1 (MAD. HC)

"It may be seen from the facts as found by the Tribunal that the jewellery, which were the subject-matter of gift, were owned by the HUF of which M.S.P. Rajah, the father, was the karta and he gifted them to his wife. The AAC held that having regard to the total wealth of the HUF, the value of the jewels gifted to the wife of the karta who was a member of the family was within reasonable limits and within the powers of the father-karta of an HUF. On these facts, therefore, the question for consideration is, whether the donor can be considered to be undivided Hindu family and not the father-coparcener in favour of his wife in his individual capacity.

However, it may be noted that with effect from 1.10.98, the applicability of Gift Tax is no more in force. Therefore, no Gift Tax will be payable by a person making the gift from on or after 1.10.98. However, w.e.f. 1.10.2009 Gift received from other than relatives exceeds Rs.50,000/- then that amount is liable to Income Tax u/s. 57 of Income Tax Act, 1961. It may be remembered that gift for marriage or maintenance of daughter(s) is not liable to Gift Tax. Further clubbing provisions of sec. 64 would not be applicable if the gift in validly made in accordance with the rules of Hindu Law. Besides, if a gift made to the minor daughter of the Karta is valid then the provisions of sec. 60 of the Income Tax Act would not be attracted. *CIT v. G. N. Rao, 173 ITR 593 (AP).* Whereby, section 60 relates to transfer of income where there is no transfer of assets.

HUF can give gift to his member within reasonable limit. Even though HUF is not covered under the meaning of 'relative' in definition of relative given in explanation (e) to Section 56(2)(vii) but also judicial authority considered that HUF is a plural form of relative and thus, the amount is not taxable in the hands of members in individual capacity.

Vineetkumar Raghavjibhai Bhalodia VS. ITO [2011 11 TAXMANN.COM 384]

"From a plain reading of Sec. 56(2)(vi) along with the application to that section and on understanding the intention of the legislature from the section, it could be seen that a gift received from "relative" irrespective of whether it is from an individual relative or from a group of relatives is exempt from tax under the provisions of section 56(2)(vi) as a group of relatives also falls within the Explanation to section 56(2)(vi). It is not expressly defined in the Explanation that the word "relative" represents a single person. And it is not always necessary that singular remains singular. Sometimes a singular can mean more than one, as in the case on hand. In the instant case the assessee received gift from his HUF. The word "Hindu Undivided Family" though sounds singular unit in its form and assessed as such for income tax purposes. Finally at the end a "Hindu Undivided Family" is made up of "a group of relatives" Thus, a singular word/words could be read as plural also according to the circumstance/situation.

Therefore, the "relative" explained in Explanation to section 56(2)(vi) includes "relatives" and as the assessee received the gift from his "HUF" which is a "group of relatives", the gift received by

the assessee from the HUF should be interpreted to mean that the gift was received from the "relatives", therefore the same was not taxable under section 56(2)(vi).

g. **Through other Methods / Devices :**

There are other methods / devices which may be used to reduce the incidence of taxation in the case of an HUF, e.g. :

a. Vesting of individual or self-acquired property in family hotchpots. But take care the provision of section 64.

b. Family reunion after partition.

c. Through inheritance by succession – Bequests by Will, now recognized by sec. 30 of Hindu Succession Act, can also be utilized for tax-planning.

K. **Properties received under a Will :**

The status of the property would be the same as is analyzed in the case of properties received by way of gifts as discussed above, that is to say, that the properties will be regarded as the properties of the Hindu Undivided Family only, if the recipient has a child.

L. **Properties inherited from an ancestor on the ancestor dying intestate :**

As held by the Supreme Court in the case of **CWT v. Chander Sen (161 ITR 370)** the person inheriting the property from his ancestor, even if he has a wife and son would receive the property absolutely in his own right and his son would not have any interest in that property.

M. **Unequal Distribution on partition :**

The **Supreme Court in the case of Commissioner of Gift-Tax v. N. S. Getti Chettiar, 82 ITR 599** held that there is no liability to Gift Tax if there is an unequal distribution of assets amongst members of the family on partition.

N. **Reunion : The conditions for a valid reunion are brought out in the case of CIT v. A. M. Vaiyapuri Chettiar and another 215 ITR 836**

The condition precedent for a valid reunion under the Hindu Law are : (1) There must have been a previous state of union. Reunion is possible only among the persons who were on an earlier date members of a Hindu Undivided family; (2) There must have been a partition in fact; (3) The Reunion must be effected by the parties or some of them who had made the partition; and (4) There must be a junction of estate and reunion of property because, reunion is not merely an agreement to live together as tenants in common. Reunion is intended to bring about a fusion in the interest and in the estate among the divided member of an erstwhile Hindu Undivided Family, so as to restore to them the status of an HUF once again and therefore, reunion creates a right in all the reuniting coparcener, in the joint family properties which was the subject matter of partition among them, to the extent they were not dissipated before the reunion.

The reunion affected by the assessee under the deed of reunion was valid. The entire properties of the erstwhile joint family prior to the partition would be the properties of the reunited joint family. The Income Tax Officer might have the option to assess the income arising from the

entire properties belonging to the erstwhile joint family prior to the partition in the hands of the reunited, Hindu Undivided Family.

Representative of HUF in a Partnership Firm :

An HUF cannot become a partner in a firm. The Karta or a member of the HUF can represent the HUF in a firm. A female member can also represent HUF in a partnership firm, CIT v. Banaik Industries 119 ITR 282 (Pat.)

Remuneration to Karta or Member from Firm :

Where remuneration was received by a member of HUF from a firm, where he was partner on behalf of HUF for managing firms business such remuneration was his individual income, CIT v. G. V. Dhakappa 72 ITR 192 (SC); Premnath v. CIT 78 ITR 319 (SC). However, income received by a member of HUF from a firm or company is taxable as the income of the HUF, if it is earned detriment to or with the aid of family funds, otherwise it is taxable as the separate income of the member, P.N. Krishna v. CIT 73 ITR 539 (SC).

HUF and Firm:

Members of HUF can constitute Partnership without effecting a partition or without disturbing the status of joint family. Ratanchand Darbarilal v. CIT 15 ITR 720 (SC). However , on viewing at the present rate of firms tax, conversion of HUF business into partnership is not advantageous.

AMENDMENT IN THE HINDU SUCCESSION ACT, 2005

WHETHER ANY OF THE MARRIED DAUGHTERS HAVE ANY RIGHT OR CAN CLAIM ANY RIGHT IN FUTURE IN HUF OF FATHER?

The Hindu Succession Act, 1956 has now been amended w.e.f. 06.09.2005. The effect of this amendment is that all daughters (whether married or unmarried) before or after 06.09.2005) and male members of the HUF are co-parceners of the HUF. Thus, the married daughter is a co-parcener of the HUF of father while she is a member of her husband's HUF but not co-parcener.

THE LANDMARK DECISIONS ON THE SUBJECT OF HUF ARE AS FOLLOWS:

(i) **Krishna Prasad v. CIT, 97 ITR 493 (SC)**

On partition between father and sons, the shares which sons obtained on partition of the HUF with their father, is the ancestral property. As regards his male issues who take interest in the said property on birth. Therefore one of the sons who were not married at the time of partition will receive the property as his HUF property; however income therefrom will be taxed as the HUF income from the date of his marriage.

(ii) **A.G. v. A.R. Arunachalam Chettiar, 34 ITR 421 (PC)**

A Mitakshara joint family consisted of father and son. On death of a son the father and the widow of the son constitute the HUF.

(iii) **Gowli Buddanna v. CIT, 60 ITR 293 (SC)**

A Joint family may consist of a single male member with his wife and daughter/ s and it is not necessary that there should be two male members to constitute a joint family.

(iv) **N.V. Narendranath v. CWT, 74 ITR 190 (SC)**

The property received by a coparcener on partition of the HUF is the HUF property in his hands vis-à-vis the members of his branch i.e. with his wife and a daughter.

(v) **L. Hirday Narain v. ITO, 78 ITR 26 (SC)**

After the partition between the father and his sons, the father and his wife constitute a Hindu Undivided Family which gets enlarged on the birth of a son.

(vi) **CIT v. Veerappa Chettiar, 76 ITR 467 (SC)**

Even when a joint family is reduced to female members only it continues to be a HUF.

(vii) **CIT v. Sandhya Rani Dutta, 248 ITR 201 (SC)**

Female members cannot create or form an HUF by their acts even under the Dayabhaga School of Hindu Law.

(viii) **Pushpa Devi v. CIT, 109 ITR 730 (SC)**

The right to blend the self-acquired property with HUF property is restricted to a coparcener (male member of HUF) and not available to a female member. However, there is no restriction on a female member gifting her property to the HUF of her son.

(ix) **Surjit Lal Chhabda v. CIT, 101 ITR 776 (SC)**

The property which was thrown into the common hotchpot was not an asset of a pre-existing joint family of which the assessee was a member. It became an item of joint family property for the first time when the assessee threw what was his separate property into the common family hotchpot. Therefore, the property may change its legal incidence on the birth of the son, but until that event happens, the property, in the eye of Hindu Law, is really the property of the assessee.

FAMILY ARRANGEMENT

1. It is arrangement between member of a family descending from a common ancestor or near relation trying to sink their differences and disputes, settle and solve their conflicting claims once and for all to buy peace of mind and bring about harmony and goodwill in the family by an equitable distribution or allotment of assets and properties amongst member of the family.

FAMILY IN A FAMILY ARRANGEMENT HAS A WIDER MEANING

2. The Supreme Court in *Ram Charan Das v. Girja Nandini Devi (AIR 1996 SC 323, 329)* held that : " Court give effect to a family settlement upon the broad and general ground that it's object is to settle existing or future disputes regarding property amongst members of a family. The word 'family' in this context is not to be understood in the narrow sense of being a group of person who are recongnised in law as having a right of succession or having a claim to a share in the property in dispute." While it is necessary that there should be some common tie between the parties to such family arrangement, it need not be between persons who are commonly understood as constituting a Hindu Family or for that matter, a family in any restricted sense. It is not necessary that there should be a strictly legal claim as member of the same family. It is enough if there is a possible claim or if they are related, a semblance of a claim *(Krishna Beharilal v. Gulabchand AIR 1971 SC 1041, 1045).*

A family arrangement wherein an adopted son was a party was held to be valid though he turned out to be a stranger as the adoption was subsequently held to be invalid in the case of Shivamurteppa Gurappa Ganiger v. Fakirapaa Basangauda Channappagaudar (AIR 1954 Bom. 430) C.G.T. v. Smt. Gollapude Saritammn (116 ITR 930, 936 AP.)

It is possible that married daughters or sisters who are not treated as members of the family of a parent/ brother on their marriage may still be considered as members of the family for purposes of a family arrangement.

ESSENTIALS OF A FAMILY ARRANGEMENT

(i) The family arrangement should be for the benefit of the family in general.

(ii) The family arrangement must be bonafide, honest, voluntary and it should not be induced by fraud, coercion or undue influence.

(iii) The purpose of the family arrangement should be to resolve present or possible family dispute and rival claims not necessarily legal claims by a fair and equitable division of the property amongst various members.

(iv) The parties to the family arrangement must have antecedent title, claim or interest. Even if a possible claim in the property which is acknowledged by the parties to the settlement will be sufficient.

(v) The consideration for entering into family arrangement should be preservation of family property, preservation of peace and honour of the family and avoidance of litigation. Kale v. Deputy Director of Consolidation (AIR 1976 SC 807)

(vi) **Family peace is sufficient consideration**

A question arises as to what is the consideration for allotment of property under a family settlement. It is said that a family settlement is arrived at between the members of the family with a view to compromise doubtful and disputed right. It, therefore, follows that the allotment of shares under a family settlement is not what a person is legally entitled to since some of the members can be allotted a much lesser share of asset than what they are entitled to under the law, while others a much larger share than what they are entitled to , yet some others may get a share to which are not legally entitled to since the main consideration is surely and certainly purchase of peace and amity amongst the family members and such a consideration cannot be deemed as being without consideration.

<u>Antecedent title, claim or interest or even a possible claim:</u>

The members who may be parties to the family arrangement must have some antecedent title, claim or interest or even a possible claim in the

property which is acknowledged by the parties to the settlement. Even if one of the parties to the settlement 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 Court will find no difficulty in giving assent to the same. Kale v. Deputy Director of Consolidation (AIR 1976 SC 807).

But where the person, in whose favour certain properties have been transferred under the guise of a family arrangement, has no and cannot have any claim or possible claim against the transferor, & therefore, the same cannot be regarded as a family arrangement.

- CED v. Chandra Kala Garg 148 ITR 737 (All.)
- CIT v. R.Ponnammal 164 ITR 706 (Mad.)

In the case of **Roshan Singh v. Zile Singh (AIR 1988 SC 881**) the Supreme Court held that the parties to family arrangement set up competing to the properties and there was an adjustment of the rights of the parties. By family arrangement it was intended to set at rest competing claims amongst various members of the family to secure peace and amity. The compromise was on the footing that there was an antecedent title of the parties to the properties and the settlement acknowledged and defined title of each of the parties.

1. A family settlement is considered as a pious arrangement by all those who are concerned and also by those who administer law. A family settlement is not within the exclusive domain of the Hindu Law but equality applies to all families governed by other religions as well. Thus, it shall apply to Muslims, Christians, Jews, Parsees and other faiths equally.
2. The concept of family arrangement is an age old one. It is not only applicable to Hindus but also to other communities in which there is a common unit, common mess and joint living. In the case of **Bibijan Begum v. Income Tax Officer (34 TTJ 557),** the Gauhati Bench of the Appellate Tribunal in a very elaborate judgement held that there is no bar for Mohammedans to effect a family arrangement. In that case the assessee had an absolute right over her Mehr property and in exchange of that land the assessee received another land over which a multi-storeyed building was to be constructed. The assessee's two daughters and two sons had antecedent right to the properties in the capacity as her heirs though their shares were not specified. The Tribunal held that by a family arrangement the rights of those children had been specified. The family arrangement by which the assessee and her four children received $1/5^{th}$ share each in the multi-storeyed building was, therefore, valid. The Tribunal therefore, held that the assessee lady could not be assessed in respect of that share of house property which was given to her children pursuant to the family arrangement.
3. Three parties to the settlement of a dispute concerning the property of a deceased person comprised his widow, her brother and her son-in-law. The latter two could not under the Hindu Law be regarded as the heirs of the deceased, yet, bearing in mind their near relationship to the widow, the settlement of the dispute was very properly regarded as a settlement of a family dispute – Ram Charan Das v. Girija Nandini Devi AIR 1996 SC 323 at page 329.
4. A family arrangement differs from partition in as much as in a family settlement there can be a division of income without the distribution of assets and there is no bar to a partial partition. The provision of section 271 of the Act, which places restriction on a partial positions do not apply to a family settlement.
5. The Gauhati High Court in the case of Ziauddin Ahmed v. CGT, 102 ITR 253 held that the family arrangement amongst the members of Mohammedan family is valid and therefore, the shares given by a father to his sons at less than market value in order to preserve the family peace is not liable to gift tax.

WHETHER REGISTRATION OF DOCUMENT IS REQUIRED FOR EFFECTING FAMILY ARRANGEMENT

1. 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. Tek Bhadur Bhuji v. Debi Singh AIR 1966 SC 292 . Also see Awadh Narain Singh v. Narian Mishra, AIR 1962 pat. 400; Mythili Nalini v. Kowmari, AIR 1991 Ker 266; Klae v. Dy Director of Consolidation AIR 1976 SC 807.

2. 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.

3. 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.

4. Family Arrangement does not amount to transfer : The transaction of a family settlement entered into by the parties bonafide for the purpose of putting an end to the dispute among family members, does not amount to a transfer Hiran Bibi v. Sohan Bibi, AIR 1914 PC 44, approving, Khunni Lal v. Govind Krishna Narain, (1911) ILR 33 All 356 (PC). It is not also the creation of an interest. For, as pointed out by the Privy Council in Hiran Bibi's case AIR 1914 PC 44, in a family settlement each party takes a share in the property by virtue of the independent title which is admitted to that extent by the other party. It is not necessary, as would appear from the decision in Rangaswami Gounden v. Nachiappa Gounden AIR 1918 PC 196, that every party taking benefit under a family settlement must necessarily be shown to have, under the law, a claim to a share in the property. All that is necessary is that the parties must be related to one another in some way and have a possible claim to the property or a claim or even a resemblance of a claim on some other ground as say, affection. Ram Charan Das v. Girija Nandini Devi, AIR 1966 SC 323.

5. 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 memorandum itself does not create or extinguish any rights in immovable properties and therefore does not fall within the mischief of section 17 of the Registration Act and is, therefore not compulsorily registrable –Kale v. Dy. Director AIR 1976 SC 807.

6. The family arrangement will need registration only if it creates any interest in immoveable property in present in favour of the party mentioned therein. In case however no such interest is created, the document will be valid despite its non-registration and will not be hit by section 17 of the Indian Registration Act, 1908. Maturi Pullaih v. Maturi Narasimhan AIR 1966 SC 1836.

7. Even a family arrangement, which was registrable but not registered, can be used for a collateral purpose, namely, for the purpose of showing the nature and character of possession of the parties .In pursuance of the family settlement. Kale v. Director of Consolidation AIR 1976 SC 807, (1976) 3 SCC 119.

8. To record a family arrangement arrived at orally, a memorandum of family arrangement-cum-compromise is required to be drawn up wherein the properties and assets belonging to the parties to the family arrangement are required to be specified. Thereafter the fact of arriving at family arrangement sometime in the past with the help of well-wishers and family friends is required to be mentioned. In the operative portion of the Memorandum of Family Arrangement-cum-Compromise the properties and business which have been allotted to different parties are required to be specified.

   In addition to the Memorandum of Family Arrangement –cum-Compromise, other documents like affidavits of each of the parties to the Family Arrangement are required to be obtained wherein each of the parties confirms on oath that he has received a particular asset and the family arrangement is arrived to his total satisfaction and it is binding on him. In such an affidavit the party giving up his right in other properties which are allotted to other parties to the Family Arrangement states that the said other properties may be transferred in the records of the registering authorities without notice to him. On the basis of the affidavit which is required to be executed before a Notary Public; mutation entries can be made by the concerned authorities.

   In order to enable the member of the family to whom a particular property is allotted on arriving at a family arrangement, a power of attorney is required to be given by a member in whose name the said property was standing prior to the family arrangement to enable the party receiving the property to deal with the property as his own. Depending on the facts of each case, various other documents may be required to be drawn up to effect a proper and binding family arrangement.

9. Family arrangement is arrived at for a consideration namely, to resolve the dispute amongst the parties, to preserve the family peace and harmony and to avoid litigation and therefore, the provisions of Gift Tax Act are not attracted.
   G.T.O. v. Bhupati Veerbhsadra Rao (9 ITD 618)

C.G. T. v. Pappathi Anni (123 ITR 655, Mad)
Ziauddin Ahmed v. CGT (102 ITR 253 Gau.)

In the case of N. Durgaiah v. C.G.T. 99 ITR 477 (AP), the assessee executed a registered deed of settlement on March 26, 1962, conveying certain immovable properties to his five sons and two daughters out of whom one of the sons was a minor in whose favour a house worth Rs. 64,800/- was settled. The assessee contended before the G.T.O. that the transaction was in the nature of a family arrangement which does not amount to a taxable gift under the G.T.Act. The G.T.O. A.A.C. and the Tribunal rejected the contention of the Assessee.

When the matter reached the High Court, the Andhra Pradesh High Court held that in order to constitute a family arrangement, there must be an agreement or arrangement amongst the members of the joint family who wish to avoid any plausible or possible disputes and secure peace and harmony amongst the members. Where one of the parties executes a document styled as settlement deed where under some of the properties exclusively belonging to him as his self-acquired properties are settled in favour of the other members of the family, the terms of such document do not amount to a family arrangement. There is no family arrangement as the same is only a unilateral act.

Hence a purely voluntary act of giving up one's right in property without compelling circumstances indicating an existing or a possible dispute resulting in a compromise may well constitute a conveyance by way of gift and not valid family arrangement. It is, therefore, necessary that the preamble to the family arrangement should advert to the existence of difference which are likely to escalate to possible litigation and cause lack of peace and harmony in the family and likely to bring dishonor to the family name and prestige.

In the case of Ram Charan Das v. Girja Nandini Devi (Supra), the Supreme Court held that a compromise by way of family settlement is in no sense an alienation by a limited owner of the family property and since it is not an alienation it cannot amount to a creation of interest.

The definition of the term "transfer" contained in section 2(47) of the Income Tax Act, 1961 prior to its amendment by the Finance Act, 1987 with effect from 1.4.1988 has been considered by the Supreme Court in the case of Dewas Cine Corporation (68 ITR 240), Bankey Lal Vaidya (79 ITR 594) & Malbar Fisheries Co. (120 ITR 49) wherein the High Court, was called upon to consider whether on dissolution of a firm there is a transfer of assets amongst the partners. The Supreme Court in all the decisions unequivocally held that on dissolution of a firm there is a mutual adjustment of rights amongst the partners and therefore, there is no transfer of assets by sale, exchange, relinquishment of the asset or extinguishments of any rights therein.

Their Lordships of the Supreme Court in the case of Sunil Siddharthabhi v. CIT (156 ITR 509) after considering the decisions of their Court in the case of Dewas Cine Corporations, Bankey Lal Vaidya & Malbar Fisheries Co. and the Gujarat High Court decision in the case of Mohanbhai Pamabhai (91 ITR 393) held, that when a partner retires or the partnership is dissolved, what the partner receives is his share in the partnership. What is contemplated here is a share of the partner qua the net assets of the partnership firm. On evaluation, that share in a particular case

may be realized by the receipt of only one of all the assets. What happens here is that a shared interest in all the assets of the firm is replaced by an exclusive interest in an asset of equal value. That is why it has been held that there is no transfer. It is the realization of a pre-existing right.

With effect from 1.4.1988 sub-clause (v) is added to the definition of the term "transfer" in section 2(47) of the Income Tax Act which provides that any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a contract amounts to a transfer. Sub-clause (vi) which is added to the definition of the term transfer provides that transaction which has the effect of transferring or enabling the enjoyment of any immovable property amounts to a transfer for the purpose of Income Tax Act.

Whether distribution of assets amongst the members of the family amounts to transfer pursuant to the amended definition of the term transfer ?

In the case of Ramgowda Annagowda Patil v. Bhausaheb (AIR 1927 PC 227), the family settlement was between parties which included the brother and son-in-law of a widow of the deceased. Though the widow was a necessary party, her brother and son-in-law were not, but they had been allotted shares in the properties which formed the subject-matter of the family arrangement. It was held that in view of the closeness of the relationship between the persons who were disputing the right over the property with one another, the arrangement between them was legal and enforceable (Mehdi Hasan v. Ram Ker AIR 1982 All. 92).

LIKELY QUERIES:

1) **WHETHER HUF CAN RECEIVE GIFTS?**

HUF can receive gifts from member as well as outsiders. However, gifts from outsiders above the limit is taxable as per Section 56(2)(vii) and gift from member can be covered under the clubbing provisions of Section 64(2).

2) **WHETHER HUF CAN GIVE GIFTS?**

HUF can give gifts to his members within reasonable limits.

3) **CASE:**

Property was in the name of the HUF. By Court order (Probate), it was transferred in the name of Wife. HUF is filing the return showing Income from House property till AY 2012-2013. The property was sold in 2013-2014 and consideration was received by Wife by executing documents in her name.

Who is liable to pay capital gains tax?

Section 6 of the Hindu Succession Act, 1956, as amended by the Hindu Succession (Amendment) Act, 2005, states that a coparcener is entitled to bequeath his share in a joint Hindu family property by testamentary disposition (by executing a will) or intestate succession. Thus, a coparcener can bequeath only his share in the joint Hindu family property and not the entire property of the HUF, as the entire property doesn't belong to him and he is entitled to only a particular share in the said property.

He can bequeath his share in the joint Hindu family property to any person of his choice by executing a will. In the event that he does not execute any will, the property will devolve as per the rules of intestate succession applicable to Hindus under the Hindu Succession Act, 1956—his share in the joint Hindu

family property shall devolve upon his Class I heirs (being his wife and all his children, including his daughters).

Legally, a probate is given by the Court only after the Will is made by a person before his death and the same executed by the Executor. An HUF cannot make a Will. Hence, the question of probate transferring the property in the name of the wife does not arise. Hence, the capital gains tax shall arise to the HUF.

ASSESSMENT OF TRUSTS

MEANING OF TRUST:

The term "Trust" has not been defined in the Income Tax Act, 1961. The dictionary meaning of the word "trust" is an arrangement by which property is handed over to or vested in a person, to use or dispose it off for some particular purpose(s). The Indian Trust Act, 1882 defines a trust as an obligation annexed to the ownership of the property and arising out of the confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another/ himself / another and himself. The person who creates trust is known as "Settler" or "Author" of trust. The person for whose benefit the trust is created is known as the "beneficiary". The person who accepts the responsibility is known as the "Trustee". There can be more than one settlers, beneficiaries or trustees.

CLASSIFICATION OF TRUSTS.

The trusts can be classified under several categories according to the evidence of the trust, beneficiaries, activities and objects. We should carefully understand these classifications because the tax treatment would depend, to a large extent, on such classifications.

CLASSIFICATION ACCORDING TO THE EVIDENCE OF TRUST – WRITTEN OR ORAL:

a.i. "Written Trust" means a trust which is created by a duly executed instrument in writing. Such instrument can be testamentary (ie. Created under a will) or non-testamentary.

a.ii. "Oral Trust" means a trust which is not supported by a written instrument.

a.iii. "Deemed Written Trust": Explanation 1 to Section 160 provides that an oral trust shall be deemed to be a written trust if a statement in writing, signed by the trustees, is submitted to the Assessing Officer within 3 months from the date of declaration of trust. Such statement should give following details:

a) The details of purpose of trust
b) The particulars of trustees
c) The particulars of beneficiaries
d) The particulars of trust property

For all purposes, a "deemed written trust" shall be similar to a "written trust".

CLASSIFICATION ACCORDING TO THE BENEFICIARIES – PUBLIC TRUST, PRIVATE TRUST AND COMBINED TRUST:

a.i. "Public Trust" means a trust for the benefit of the public or some considerable portion of the public.

a.ii. "Private Trust" means a trust for the benefit of some limited persons such as individuals, families, etc. A private trust can be classified under two categories:

a.iii. Private Specific Trust (PST) means a trust where shares of beneficiaries are determinate/known.

a.iv. Private Discretionary Trust (PDT) means a trust where shares of beneficiaries are not determinate/known.

a.v. "Combined Trust/ Public-cum-Private Trust" means a trust whose beneficiaries are both public as well as specific persons.

CIT Vs. KASTURBAI WALCHAND TRUST (1967) 63IT 656 (SC)

A public-cum-private trust becomes a public trust if the private beneficiaries renounce their rights in favour of public.

CLASSIFICATION ACCORDING TO THE ACTIVITIES – BUSINESS TRUST OR NON-BUSINESS TRUST

a.v.1.a.i. "Business Trust (BT)" means a trust which carries on business whether with or without other activities.

a.v.1.a.ii. "Non-Business Trust" means a trust which does not carry on business.

CLASSIFICATION ACCORDING TO THE OBJECTS – CHARITABLE, RELIGIOUS AND OTHER:

The object of trust could be charitable, religious or otherwise.

MEANING OF "CHARITABLE PURPOSE"-

According to Section 2(15) of the Income Tax Act, 1961 "Charitable Purpose" includes:

- Relief of poor,
- Education,
- Medical Relief,
- Preservation of environment (including watersheds, forests and wildlife),
- Preservation of monuments or places or objects of artistic or historic interest , and
- Advancement of any other object of general public utility.

It may be noted that "the advancement of any other object of general public utility" is not considered as a charitable purpose, if it involves the carrying on of any activity in the nature of trade, commerce, or business, or any activity of rendering any service in relation to any trade, commerce or business, for a Cess or fee or any other consideration, irrespective of the nature of the use or application, or retention, of the income from such activity.

CIT Vs. ANDHRA CHAMBER OF COMMERCE (1965) 55 ITR 722 (SC)

Definition of the term "Charitable Purpose" is inclusive and not exhaustive. The expression is not restricted to the objects beneficial to whole mankind. An object which is beneficial to a section of the public is also a charitable object.

CIT Vs. BAR COUNCIL OF MAHARASHTRA (1981) 130ITR 28 (SC)

The expression "advancement of general public utility" includes any object beneficial to the public or a section of the public as distinguished from an individual or a group of individuals.

CBDT CIRCULAR NO.395 DATED 24/09/1984:

Promotion of sports and games is a Charitable Purpose.

MEANING OF "RELIGIOUS PURPOSE":

The word "Religious purpose" is not defined in the Act. However, as per the common parlance "religious" means worship of God.

PROVISIONS UNDER THE INCOME TAX ACT:

STATUS

Section 4 of the Income Tax Act creates a charge of tax on every "person". The term person has been defined in Section 2(31). It may be noted that Section 2(31) does not make any reference to "Trust". Hence, there has been a great litigation in the courts as to what is the status of a trust. Basically, the dispute arises as to whether a trust is an individual or AOP. Sometimes, trust has been treated an AOP and sometimes an Individual.

In **CIT Vs. DEEPAK FAMILY TRUST (NO.1) (1995) 211 ITR (GUJ.) / CIT Vs. VENU SURESH SANJAY TRUST(1996) 221 ITR 649 (MAD.),**it was held that a trust is an individual for the purpose of the Income-tax law.

RESIDENTIAL STATUS

The residential status of a trust shall depend upon its status.

WHO WILL BE ASSESSED BY DEPARTMENT?

Section 2(31) does not make any reference of "trust". Hence, one typical question would arise – who will be assessed by the department in relation to the income derived by a trust? Whether the trust itself or the trustees or the beneficiaries.This question is answered by Section 160 and 166.

Section 160 prescribes that the trustees of a trust shall be deemed to be representative of trust and they shall be assessed by the department. However, such assessment shall be made in representative capacity only. It shall not be merged with the personal assessment of trustees.

Thereafter, Section 166 provides an additional protection to the department in two ways – i)The department can make a direct assessment on the beneficiaries ,or ii) even if the department has made assessment on the trustees in a representative capacity u/s 160, it can make recovery from the beneficiaries.

EXEMPTION UNDER SECTION 11 AND 12 OF THE INCOME TAX ACT, 1961 GRANTED TO CHARITABLE TRUST.

The normal procedure relating to the computation of taxable income under various heads, Gross Total Income and Total Income is applicable to all types of trusts – whether oral/written/deemed written/public/private etc. The only special provision to be kept in mind is the allowability or non-allowability of exemption u/s 11/12, which is as under:

Type of Trust	**Exemption u/s 11/12 of the Income Tax Act, 1961**
Oral Trust	Exemption u/s 11/12 is not allowed

Private Trust	Exemption u/s 11/12 is not allowed
Public Charitable Trust/Public Religious Trust	Exemption u/s 11/12 is allowable subject to fulfillment of prescribed conditions
Combined Trust (ie. Public-cum-Private Trust)	Exemption u/s 11/12 is allowable in relation to public portion, subject to fulfillment of prescribed conditions.

REGISTRATION PROCEDURE

In order to claim exemptions under Section 11 and 12 of the Income Tax Act, 1961, a trust needs to be registered under Section 12AA of the Income Tax Act, 1961.Every trust shall make an application to the CIT or Director of Income Tax (Exemption) in the prescribed format and along with prescribed documents. The prescribed form is Form No. 10A. The documents which are required to be submitted in the normal course are listed as under:

a.v.1.a.ii.1. Form No.10A

a.v.1.a.ii.2. Copy of Registration Certificate under Public Trust Act

a.v.1.a.ii.3. Certified copy of Trust Deed

a.v.1.a.ii.4. Certified copy of Objects Clause

a.v.1.a.ii.5. List of names and addresses of all the trustees

a.v.1.a.ii.6. Copy of PAN of all trustees

a.v.1.a.ii.7. Audit Reports (maximum three years)

a.v.1.a.ii.8. Undertaking

a.v.1.a.ii.9. Affidavit of the Managing Trustee for utilization of the objects only.

WILL

WE ALL KNOW HOW TO CREATE WEALTH, HOW TO MANAGE WEALTH, NOW WE LEARN HOW TO DISTRIBUTE WEALTH!

We are born, and then death is certain. So before the death we can predetermine the disposal of our wealth by making A WILL.

Chapter 1:WILL

A Will is an important document which enables the individual /any living person to rightfully leave his assets and wealth to whoever he chooses to, after his death. In a way a person can ensure that his wishes with respect to his assets and property are followed after his death. There often arise complexities when a person dies without a Will. Some people execute writings, prepared by themselves or with the help and advice of well-meaning friends or relatives. The crux is that the absence of a will or the invalidity of a will or parts of a will often generates problems for the legal heirs and successors.After the death of a person, his property devolves in two ways:

- According to the respective law of succession, when no will is made- i.e. intestate
- By way of will i.e. testamentary

THE LAW APPLICABLE TO WILLS:–

India has a well developed system of succession laws that governs a person's property after his death. The Indian Succession Act 1925 applies expressly to wills and codicils made by Hindus, Buddhists, Sikhs, Jains, Parsis and Christians but not to Mohammedans as they are largely covered by Muslim Personal Law. The laws applicable are as under:

- Indian Registration Act, 1908
- Indian Succession Act, 1925
- Muslim Personal Laws
- Hindu Personal Laws

WHAT IS WILL?

A Will is a legal declaration made by a person during his lifetime with regard to disposal of his properties after his death. The Will does not take effect from the date of its execution. It speaks from the death of the testator. During the Testator's lifetime, the Will is an ambulatory document, revocable at any time and having no legal effect.

There are two essential characteristics of a Will:-

(i) It must be intended to come into effect after the death of the testator: A gift to take effect the life lime of the donor is a deed of settlement and not a Will.

And,

(ii) It must be revocable by the testator at any time. Although Wills are usually made for disposing property, they can also be made for appointing executors, for creating trusts and for appointing testamentary guardians of minor children. Section 63 of the Indian Succession Act, 1925 provides that 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.

WHO ARE THE PERSONS COMPETENT TO MAKE A WILL?

According to Section 59 of the Indian Succession Act,

The following persons cannot make a will:

1. A person who 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 i.e. Lunatics, insane persons.
2. Married woman, aliens and convicts are not debarred from making a will.
3. Minors i.e. below 18 years of age. In case a guardian is appointed to a minor, such minor reaches age of maturity only at the age of 21 years.
4. Corporate bodies, by their very nature, are incapable of making a will, though they may benefit under the will of an individual partner.

WHAT IS THE NEED OF A WILL ?

If one does not make a Will then his property will be inherited by legal heirs in accordance with the laws of inheritance applicable to him. However, most of the people would like to dispose of their property according to their own wishes. Thus, there arises the need for making one's Will. Apart from it there are certain distinct advantages of making a Will, they are as follows-

1. When a person dies without having made a Will, there is often confusion amongst the family members and relatives as to whether the deceased did make any Will prior to his death or not, but if a Will is available, the only question that needs to be ascertained is whether it is the last Will of the testator.
2. A Will be absolutely personal document. More than anything it is an expression of the relationship with the members of family or relatives, etc. The views, opinions and feelings, etc., are indicated in this document. A Will allows the devolution of property in a personalized manner rather than letting the impersonal rules of inheritance take effect.
3. By means of a Will, one can appoint in writing, a testamentary guardian for his infant children. A testamentary guardian is person, who is appointed b a testament or a Will. This point needs further clarification. In the event of the death of a parent the law would ordinarily uphold the right of surviving natural parent to be the guardian of the child.However, if there is no surviving parent, the law attaches great importance to the Will of a parent in deciding who to appoint as a guardian. This is a matter of great importance with regard to the future of the children and therefore, this issue must be discussed in details with the proposed guardian before appointing him testamentary guardian.
4. A Will provides more room inter se the laws of inheritance, which sometimes do not cater to the special needs and requirements of the members of a family. For instance, a father has two sons. One is healthy but the other is handicapped due to any chronic disease since childhood. The laws of inheritance would treat both these children on an equal footing. But by means of a Will one can have somewhat greater provision for a handicapped son, a widowed daughter or an invalid parent.
5. In the absence of a Will even the most unwanted son, who had left the house for disobedience, fraud, violence, etc. may turn up to claim his share of estate from his

father's property. Similarly, an adulterous wife might demand her share as per inheritance laws.

There are however, some disadvantages also in making a Will and they are mostly psychological. In many cases it has been observed that people lose all their interests in life and idem such before the time they would have lived.

If there is no Will, the property would be dealt with as per the laws of inheritance. For Hindus, Buddhists, *Jains* and Sikhs the laws of inheritance have been codified in theHindu Succession Act, 1956. For Christians the Indian Succession Act, 1925 will be applicable. Parsis have a different law of inheritance. Similarly, Muslims have their ownlaw. That has, however, not been codified in nay legislation but is based on their religious texts. There are two major sects of Muslims – Shias and Sunnis. Both of them havedifferent laws of inheritance.

HOW TO PREPARE A WILL?

1. Will must be in writing:

   All religions except Muslims, the will must be made in writing. The only exception provided under the law are the members of the armed forces employed in an expedition or engaged in actual warfare and mariner at seas who are permitted to make an oral will. Such will is known as "Privileged Will".

2. Muslims can make oral will:

   Muslims are permitted by their personal law to make a oral will.

3. No particular form of will:

   There is no particular form of will prescribed by law. The language employed should be as simple as possible and should be free from technical words.

4. Will need not be on Stamp Paper:

   It is wrong to say that a will has to be executed on a stamp paper as there is no such stipulation under the Indian Stamp Act.A will can therefore be made on any plain sheet of paper which must of course,be of durable quality.

5. Typing is not essential but desirable:

   A will need not be typed. It can be made in testator's own hand using a ball pen or fountain pen. A handwritten will is known as holograph and is valid in the eyes of law. However, n a handwritten will some confusion is bound to be caused by illegible handwriting of the testator. It is therefore advised that will should be neatly typed with margins on both sides of the pages.

6. Precaution In drafting a will:

   a) Prepare a list of all your assets and property which remain after taking into account all debts, liabilities and expenses to get a clear picture of how you wish to distribute the estate.

   b)The Will should be drafted in the language best understood by the testator so as to give the impression that the contents were fully understood by the testators wishes and intentions.

   c) In case the testator is illiterate the will should be executed in a language which the testator can comprehend. And the attesting witness or third attesting witnesses.

   d) Unusual characters of the will should be explained and clarified in the main body of the will itself. Thus where a testator bequeaths all his property to his daughter disinheriting and excluding his wife and other two sons or bequeaths his entire property to charity disinheriting his entire family it is desirable that in such circumstances reasons are clearly stated in the will itself.

WHAT ARE THE LEGAL REQUIREMENTS FOR MAKING A WILL?

Section 63 of the Indian Succession Act provides as under –

Every testator, not being a soldier employed in a expedition nor engaged in actual warfare, or an airman so employed or engaged or a mariner at sea, shall execute his will according to the following rules:

a) The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction.

b) The signature or mark of the testator, or the signature of the person signing for him shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will.

c) The will shall be attested by two or more witnesses,each of whom has seen the testator sign or affix his mark to the will or has seen some other personsign the will,in the presence of and by the direction of the testator, or has received from the testator a personal acknowledgement of his signature or mark,or of the signature of such other person; and each of the witnesses shall sign the will in the presence of the testator, but it shall not be necessary that more than one witnesses be present at the same time ,and no particular for of attestation shall be necessary"

WHAT ARE THE DIFFERENT KINDS OF WILL?

Privileged and Unprivileged Wills: Wills executed according to the provisions of section63 of the Indian Succession Act are called Unprivileged Wills and Wills executed under section 66 of the Act, by a soldier employed in an expedition or engaged in actual warfare, or by an airman so employed or engaged, or by mariner being at sea, are called Privileged Wills. As a matter of rule, the wills have to be made in writing. However, a soldier during his engagement in an actual warfare or an airman so engaged or a mariner being at sea, may pronounce his will by or of mouth before two witnesses. The will so pronounced by such persons are called privileged wills.
Conditional or Contingent Wills A Will may be expressed to take effect only in the event of the happening of some contingency or condition, and if the contingency does not happen or the condition fails, the Will is not be legally enforceable. Accordingly, where A executes a Will to be operative for a particular year, i.e., if he dies within that year. A lives for more years, after that years. Since A does not express an intention that the Will be subsisting even intestate. A Conditional Will is invalid if the condition imposed is invalid or contrary to law.
Joint Wills A Joint Will is a testamentary instrument whereby two or more persons agree to make a conjoint Will. Where a Will is joint and is intended to take effect after the death of both, it will not be enforceable during the life– time of either.
A Will executed by two or more testators as a single document duly executed by each testator disposing of his separate properties or his joint properties is not a single Will. It operates on the death of each and is in effect for two or more Wills. On the death of each testator, the legatee would become entitled to the properties of the testator who dies.
Mutual Wills A Will is mutual when two testators confer upon each other reciprocal benefits by either of them constituting the other his legatee. But when the legatees are distinct from the testators; there can be no position for Mutual Wills.
Duplicate Wills A testator, for the sake of safety, may make a Will in duplicate, one to be kept by him and the other to be deposited in the safe custody with a bank or executor or trustee. If the testator mutilates or destroys the one which is in his custody it is revocation of both.
Concurrent Wills Generally, a man should leave only one Will at the time of his death. However, for the sake of convenience a testator may dispose of some properties in one country by one Will and the other properties in another country by a separate will.
Sham Wills If a document is deliberately executed with all due formalities purporting to be a Will, it will still be nullity if it can be shown that the testator did not intend it to have nay testamentary operation, but was to have only some collaterally object. One thing must be born e in mind that the intention to make the Will is essential to the validity of a Will.
Holograph Wills Such Wills are written entirely in the handwriting of the testator.

WHO CAN BE THE EXECUTOR/WITNESS OF A WILL?

An executor is the person appointed ordinarily by the testator's by his will or codicil.

- To administer testator's property and

- To carry into effect the provision of the will

Casual selection of the witnesses to be will prove fatal in the event of the proof of the execution of the will at future date. It should be clearly understood that the attesting witness may on some future occasion be required to appear as a witness in court in order to prove the execution of Will.

WHAT IS A CODICIL AND HOW TO MAKE ALTERATIONSIN THE NAME OF THE EXECUTOR?

An instrument made in relation to a Will, Explaining, altering or adding to its dispositions, Itshall be deemed to form part of the Will. If the Testator wants to change the names of the Executors by adding some other names, in that case this could be done by making a Codicil in addition to the Will, as there may not be other changes required to be made in the main text of the Will. It may be that the Testator wants to change certain bequests by adding to the names of the legatees or subtracting some of them. It may be some Beneficiaries or Executor may be dead and the names are required to be removed. All these can be done by making a Codicil. The Codicil must be reduced to writing. It must be signed by the Testator and attested by two Witnesses.

WHAT ARE THE FORMS & FORMALITIES TO MAKE A WILL?

Form of a Will :

There is no prescribed form of a Will. In order for it to be effective, It needs to be properly signed and attested. The Will must be initialed by the testator at the end of every page and next to any correction and alteration.

Stamp Duty :

No stamp duty is required to be paid for executing a Will or a codicil.

A Will need not be made on stamp paper.

Attestation :

A Will must be attested by two witnesses who must witness the testator executing the Will. The witnesses should sign in the presence of each other and in the presence of the testator. However, according to Hindu Law, a witness can be a legatee. Under Parsi and Christian law, a witness cannot be an executor or legatee. A Muslim is not required to have his Will attested if it is in writing.

Registration:

Under section 18 of the Registration Act the registration of a will is not compulsory. It is strong legal evidence that the proper parties had appeared before the registering officers and the latter had attested the same after ascertaining their identity. A Will is to be registered with the registrar/sub-registrar with a nominal registration fee. The testator must be personally present at the registrar's office along with witnesses.

WHEN THE WILL MUST BE EXECUTED?

On the death of the testator, an executor of the will or an heir of the deceased testator can apply for probate.

The court will ask the other heirs of the deceased if they have any objections to the will. If there are no objections, the court will grant probate.

A probate is a copy of a will, certified by the court. A probate is to be treated as conclusive evidence of the genuineness of a will.

In case any objections are raised by any of the heirs, a citation has to be served, calling upon them to consent. This has to be displayed prominently in the court.

Thereafter, if no objection is received, the probate will be granted.

It is only after this that the will comes into effect.

***Chapter 2**: NOMINATION*

WHAT IS NOMINATION ?

Nominion means an act of nominating.To nominate means to appoint a person who will look after the property of the person after his death.eg:LIC/GIC,BANK etc.

WHO CAN NOMINATE?

Nomination can be done only by a Investor or Policyholder who is major holding account/investment certificate/policy Bond in his own Name. And the nomination facility is available only to individuals in their own capacity singly or jointly.

WHEN THE NOMINATION CAN BE DONE?

Nomination can be done at the time of investment and after that filing relevant form.

WHETHER CHANGE OF NOMINATION ALLOWED ANYTIME AND IF SO HOW MANY TIMES IT'S ALLOWED?

Yes, Old nomination can be cancelled and new nomination can be made without informing previous nominee.

TO WHOM THE NOMINATION FACILITIES ARE PROVIDED?

Nomination is available to Individual (Major, Minorcannot nominate).

1. HUF/Reg. Firm/Company can't nominate
2. Nominee can't nominate
3. Holding Assets on representative capacity (like Trustee, Liquidator, Treasurer, Manager of Bank of Baroda)

WHO CAN BE APPOINTED AS NOMINEE?

A nominee can be adult or a minor .If a minor is appointed as a nominee a guardian has to be appointed till the minor attains the age of majority and further the date of birth of the minor also should be mentioned, so that the actual date of attaining the majority could be easily ascertained.A nominee also can be relative or a friend or a well-wisher. It is not necessary that the nominee should be in a blood relative.

WHAT ARE THE RIGHTS OF A NOMINEE?

Under nomination, the nominee gets only the right to receive the policy moneys in the event of the death of the Policyholder. Nomination does not pass on the property in the policy. If the Nominee dies when the policyholder is still surviving then the nomination would be ineffective. Nomination has no effect if policyholder is surviving. If nominee dies after the death of the policyholder, but before receiving policy moneys, then also Nomination becomes ineffective and the money can be claimed only by the legal heirs of the policy Holder.

<u>NOMINATION IN CO. OP. SOCIETY</u>.

A) **WHAT IS PROCEDURE FOR NOMINATION?**

A member can file nomination in -

- Form no. 15A In case of a single Nominee.
- Form no. 15B More nominee-Were percentage of each nominee is required to be mentioned.

The Form is to be filed and signed by the party in presence of two witnesses.And 3 copies are to be filed,One as Acknowledge receipt, Second to be received by the party after necessary entry is recorded in the society's record and the original to be kept in society office.(entered within 7 days from meeting of managing committee).

B) **WHAT IS THE FEES FOR RECORDING THE NOMINATION?**

There is no charge for recording the nomination for the first time. However if the earlier nomination is revoked and new nomination is given to the society for each subsequent nomination Rs.5/- will be charged by the society.

C) **WHEN SOCIETY TRANSFER PROPERTY IN NAME OF NOMINEE?**

After death of person society can transfer property in name of nominee. Nominee will write to society along with copy of death-certificate and various forms (application, undertaking 500 sq. ft.), used for residence.

(i) Single nominee

(ii) More than one nominee (nominees will decide who will represent society).
Now after new modelBye-law, also allow Joint Ownership in society which was not permitted earlier. Earlier 1st person was treated as member and other were as associate members.

D) **If the nomination firm is not filed then**

for transfer purposes society may insist for probhate/succession certificate which involve lot of time & expenses.

i)once application is made society can invite objection in one month (notice board of society public notice in two newspapers).expenses to be born by legal heirs.

ii)Indemnity bond for future claim if any.

iii) more than one legal heir then who will be 1st who will represent in society.

E) **If nominee is not able to find share certificate then can apply to society for duplicate-**

Nominee take this steps

a) first file application to society,
b) second give advertise in two newspapers,
c) Indemnity Bond

then duplicate certificate can be issued and original will be treated as cancelled. like railway ticket –if duplicate is issued –original is of no use.

WHAT IS THE DIFFERENCE BETWEEN WILL & NOMINATION?

A nomination is not a will.

When there is a nomination already filed with the Society,the normal impression is that the Nominee on the death of the Member, automatically becomes a member by filing an application .However, The Supreme Court of India has ruled in 1984 that "a Nominee is a mere Trustee with whom society can initially deal with after the death of a member.All the legal heirs of the deceased Member have a right of succession to the property of the deceased member and a Nominee cannot exclude the other legal heirs".

Thus the nominee merely acts as the trustee. In some instances, the nominee and the beneficiary of the will is the same person. At all times, the provisions of the will prevail over the nomination. It is advisable to have the same person as the nominee and the beneficiary of the will, so as to prevent future disputes.

A nomination, in order to be effective, need not be executed as a will but must be in accordance with the formalities required by the particular provision applicable.

WHETHER WILL ALSO TO BE EXECUTED WHEN NOMINATION IS GIVEN TO THE SOCIETY?

Any transfer of interest of the deceased member in the Co-operative housing Society is governed by the section 30 of Maharashtra Co-operative Societies Act,1960. Section 30(1)" On the death of a member of a society,the society shall transfer the share or interest of the deceased member to a person or persons nominated in accordance with the rules or, If no has been nominated,to such person as may appear to the committee to be theheir or legal representative of the deceased member.

Provided that, such nominee, heir o legal representative, as the case may be, is duly admitted as a member of the society:

Provide further that nothing in this sub –section or in section 22, shall prevent aminor or person of unsound mind from acquiring by inheritance or otherwise, any share or interest of a deceased member in a society"

From interpretation of the above section we understand the following thing.

It is very clear on the plain reading of the section that the intention of the section is to provide for who has to deal with the society on the death of the member and not to create a new rule of secession .The purpose of the society has to deal and create interest in the nominee to the exclusion of those who n law will be entitled to the estate. The purpose is to avoid confusion in case there are dispute between the heir and legal representative and to obviate the necessary of obtaining legal representation and to avoid uncertainties as to with whom the society should deal to get proper discharge.

Society has no power, except provisionally and for a limited purpose to determine the disputes about who is the heir,or legal representatives.It,therefore, follows that the provisions for transferring a share and interest to a nominee or to the heiror legal representative as will be decided by the society is only meant to provide for interregnum between the death and the full administration of the estate and not for the purpose of conferring any permanent right of such person to a property forming part of the estate of the deceased. The idea of having this section is to provide for a proper discharge to the society without involving the society into unnecessary litigation which may take place as a result of dispute between the heirs.

Even when a person is nominated or even when a person is recognized as a heir or a legal representative of the deceased member, the rights of the persons who are entitled to the estate or the interest of the deceased member by virtue of law governing succession are not lost and the nominee or the heir or legal representative recognized by the society, as the case may be ,holds the share and interest of the deceased for the disposal of the same in accordance with the law. It is only as between the society and the nominee or heir or legal representative that the relationship of

the society and its member is created and this relationship continues and subsist only till the estate is administered either by the person entitled to administer the same or by the court or the rights of the heirs or persons entitled to the estate are decided in a court of law. Thereafter the society will be bound to follow such decision.(Gopal Vishnu Ghatnekar Vs. Madhukar Vishnu gatnekar).

The provisions of section 30 for transferring a share and interest into a nominee. The heir or legal representative as will be decided by the society, is meant to provide for interregnum between the death and the full administration of the estate, and no for the purpose of conferring any permanent right on such a person to a property discharge to the society without involving the society into unnecessary litigation which may take place as a result of dispute between the heirs, or uncertainty as to who are the legal heirs or representatives.

Even when a person is nominated, or a person is recognized as a heir or a legal representative of deceased member right of the person who are entitled to the estate of the interest of the deceased member by virtue of law governing succession are not lost, and the nominee or the heir or the legal representative recognized by the society, as the case may be, holds the share and interest of deceased for disposal of the same in accordance with law. (Gopal Vishnu GhatnekarVs. Madhukar Vishnu gatnekar).

Chapter 3: FREQUENTLY ASKED QUESTIONS

Q.1 What is a Will and the benefits of making one?

Ans: A WILL is a written document in which you provide for:-

a. the administration of your estate/assets when you die; and
b. the distribution of your possessions in specific proportions to specific people whom you wish to have a share of your estate/assets;
c. appoint a person or persons of your choice to administer your estate; and
d. appoint a guardian or guardians for your infant children (if any).

In other words it a document where you direct, who is to receive your property upon your death. If you have any real property (land) or personal property (cars, jewelry, money) that you want to give to a specific person than you must have a will.

Q.2 Should everybody – working or non-working person, man or woman make a will? and What if you die without making a Will?

Ans: "Where there's a Will, there's a way….Where there is no Will, there will probably be family bitterness/family disputes…" If people die without a WILL, then the law will decide to whom the property of the deceased person should go to.

Thus, every person whether working or non working , man or women should make a will.

Q.3 When should people make a will? At what age on an average?

Ans: Every adult, no matter what age, should have a Will. Most preferably a person above the age 50 should have a will. And while making a Will a person must be of sound mind.

Q4 How do they make this will? Is there a process to making a will? What kind of paper is to be used? What language do they write it in? Do they need other people to witness the will?

Ans: No prescribed form for a Will; only needs to be signed and attested

- Can be in any language; no technical words need to be used
- Two witnesses must attest a Will; one preferably a doctor
- They should sign in the presence of each other and the person making the Will.
- In India, the registration of Wills is not compulsory
- The Will should provide for the appointment of executors, though not mandatory.
- No stamp duty is required to be paid for executing a Will.

Q.5 Where should they keep the will when they finish writing it? Should somebody in the family/or friends know where they have kept this paper/will?

Ans: Keep the original in a safe place where it may be found easily after your death. Leave a copy with the attorney who wrote it for you or with a copy with your family friend, CA or Advocate.

Q.6 Can a will be verbal like told to a person before death, or does it have to be written?

Ans: A Will has to be Written but a verbal will is permitted in Defence Personal. However, a verbal will is not valid if you have a valid, written will. If you have no written will, a verbal will can be valid with regard to any property you own, except land. Property that can be transferred under a verbal will includes stocks, bonds, cars, coin collections, jewelry and appliances. A verbal will is valid only if know you are dying and say what you want in your

will to two competent, disinterested witnesses. The witnesses must put the will in writing and sign the transcription within ten days.

Q.7 We see lots of problems in families when the head of a family passes away without leaving a will. Is that true? Would things be easier if there was a will?

Ans: If you die without leaving a valid legal Will, you are said to have died 'Intestate'. The law dictates who will inherit your Estate and in what proportions. The law also decides who will have responsibility for administering your Estate (your Personal Representatives). Such an decision may create a disputes and some family hurdles among the family members.

Q.8 Should you keep the contents of a will a secret? Or, can they be shared with people?

Ans: It is advisable to keep the contents of a will secret. However, it is not necessary to keep it secret, it depend upon person to person and case to case.

Q.9 A husband may leave a will should a wife also make a will? Or Can a Husband and Wife can make a Joint Wills?

Ans: No it is not possible to have a joint Will they must be individual Wills. However "Mirror Wills" are quite common. A mirror Will is when a spouse or partner make almost identical Wills, or even identical Wills, leaving for example, everything to each other respectively should one partner perish and if both perish together then direct to children. If they have no children then to a named beneficiary's. This is where major differences often occur say, for example, the husband could leaves his possessions and estate to his siblings and the wife leaves her possessions and estate to her siblings!!!.

Q.10 Supposing a person makes a will leaving his/her assets and money not to family but to an outsider or perhaps to a charity – is this will to be honored?

Ans: Yes, basically a Will is a document that states or directs the will of the person, as to whom he/she wants his/her property to be handled after their death. So the person in whose name the assets are transferred can be any person a outsider or even an charitable trust etc.

Q.11 Wills are often contested by people. Can you enumerate three of the most common grounds on which they are contested?

Ans: Yes, Wills are often contested by peoples. Some common grounds on which wills are contested are as follows-

a) That the person was of not sound mind.

b) The Testator lacked testamentary capacity to sign a will.

c) The person was unduly influenced into signing a will/ a will is made under pressure.

d) The will was procured by fraud.

e) The Will is not signed before two witnesses.

f) The name of family members is not mentioned in will.

Q.12 Wills often result in bitterness in families and fragmentation – maybe somebody thinks they have not quite got what they wanted or lesser than the other person.

Ans: Yes, it might happen in various situations. In order to prevent such happening it is advisable to consult a lawyer which will help you to draft the will in the manner and giving the proper statements as to why only certain assets are given to a particular member instead of others.

Q.13 Have there been cases in which a will has been deliberately tampered with? Or, when maybe mentally unsound people have been fooled into making wills?

Ans: There are very few cases where the will has been deliberately tampered with or when the mentally unsound people have been fooled into making Wills.

Q.14 Can a person change a will he has already made?

Ans: You can change your will any time you want to. However, make sure that when you make a new will, you mention that this will is the latest and supersedes all earlier wills. If you don't, it can complicate the situation, cause major confusion, make such matters go to the court of law and take several years before arriving at any final verdict

You can also make an additions to your will by signing a "codicil," with all the formalities of a will. The codicil must be in writing, dated and signed by you and two witnesses. You cannot change a properly executed will by writing revisions into the will, even if you initial

and date the changes. Such changes are valid only if they occur before the will is signed and witnessed. If major changes are needed, consider making a new will.

Q.15 What would you advise? Always make a will with a cool head, never in a rash or impulsive manner – what should be a person's state of mind when they make a will?

Ans: A person should make a Will in a sound mind and should have the will Registered with the Registrar of Sub Assurances in presence of two witnesses registrar will also ask for Indentify proof, Doctor Certificate, Residential proof of person who makes Will, Identity proof of witness expenses are very nominal.

Q.16 Should they take the help of a lawyer when making a will or can they make it on their own?

Ans: The procedure of making a Will is very simple, if assets are few than the help of lawyer is not necessary but in case if the Assets are many and the family is big and if there is a possibility of disputes than it is advisable to take the help of the lawyer. As "Do-it-yourself" wills often do not contain all the necessary components as required by law and many times ruled as invalid by courts (for example no signatures from witness or no witness at all). Many a time, it can happen that while creating the will, you use such ambiguous language that it results in lengthy legal battles ("My House should go to Sunita." Now if both mother and wife are called Sunita, which Sunita ought to get it?. Anyone who might benefit from the ambiguity of the will can jump in to claim a share! And if the courts decide in his/her favour, you won't like that situation (not that, you'll be around!).

Q.17 Does marriage / entering into a civil partnership affect my Will?

Ans: Yes, if you marry or enter into a civil partnership, your Will is revoked. This is because there is an assumption that you would wish to provide for your new spouse or civil partner. There is an exception to this rule if you have made your Will 'in anticipation of' marriage / entering a civil partnership. If you are in any doubt about this, consult your Solicitor for advice.

Q.18 Does divorce / dissolution of civil partnership affect my Will?

Ans: Yes, if you divorce or your civil partnership is dissolved, any Will you have made is revoked but only to the extent that your ex-spouse or ex-partner is referred to. For example, any appointment of your ex-spouse or ex-partner as an Executor or beneficiary is revoked. However, your Will may still be valid and, again, you should consult your Solicitor for advice.

Q. 19. Property will be inherited to nominee under nomination ?

Ans. No, Appointment of nominee is like appointing trustee .property will be inherited as per will/if no will then succession Act.

Reliance is placed on:

Ramdasshivramsattur Vs. Rameshchandra Bombay. High Court ,order delivered by Justice A.P.Deshpande, order dated 9/4/2009.

I. Tarabai wife of shivram was nominee sold property to builder.
II. Ramdas received property in 1976 family settlement (property not transferred in his name)
III. builder filed case against Tarabai for specific performance.
IV. Ramdas filed case against mother & builder that he is owner.
V. Court ordered that all legal heirs are owner .Tarabai can just manage affairs.

Q. 20. If member is not in the capacity to attend society meeting than what he can do?

Ans. He can file form to make associate member, who represent member in society meeting. Membership of associate member remain till membership of original member. In case of death of member, membership of associate member also come to end.

Chapter 4: FORMAT OF WILL

WILL

I …….. aged…..years, an male Indian Inhabitant, residing at…….. I Do hereby

revoke all my former will, codicils or other Testamentary dispositions and hereby declare this to be my last will and Testament made at Mumbai this……. day of ……., 2013.

1. I am maintaining good health and I am possessed of sound mind. This will is made by me of my own independent decision and free violation and in perfectly sound health and sound mind, I have not been influences, cajoled or coerced by any person.

2. My family consist of the following members:
i)_____.
ii)_____.
iii)_____.
iv)_____.
v)_____.

3. I have during my life time acquired properties and I am possessed of assets in the shape of Movable and Immovable Properties and chooses in action. Keeping in view the dissentions in the family and possible disputes, which may arise relating to inheritance opening out at my demise and in order to save the assets from unnecessary litigation amongst my relatives and others. I so hereby devise and declare all the estate which I am holding at present/or which I may acquire in future in the manner as mentioned herein below.

4. I hereby appoint my wife namely …… the Executor of this my Last will in case my wife…….. predeases me then my son …… will be executor of my this will.

5. I direct that the said Executor shall pay my funeral and other expenses for obsequies ceremonies, just debts, taxes and other liabilities, out of the property that I have at the time of my death and the balance of my total properties shall be bequeathed .

6. I devise and bequeath all my Immovable and Movable Properties to my Wife ……. and she will be owner for her life time and will be able to make her will as her desire.

7. In case my wife …….. predeceases me then all my Immovable and Movable property will bequeathed as follows :

(A) IMMOVABLE PROPERTIES
All my immovable property will be bequeathed to my son namely ……
(B) MOVABLE PROPERTIES
- i) Rs. …… to be given to my daughter namely……
- ii) Rs……. to given to my granddaughter i.e sons daughter.
- iii) Rs……. to be given to my grandson i.e my daughters son

And after above amounts are paid whatsoever left including any assets which I may acquire in future or I may dispose of Some Assets will be given to my son …….

Signed by the withinnamed Testatrix)
……..)
Acknowledged by her as her last will and)
Testament in the presence of each have)

WITNESSES:
1. …….
2. ……..