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LEGAL UPDATE

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Trust - Key To Effective Estate Planning

Protection of personal and business wealth of new breed of entrepreneurial high net worth individuals by forming a trust.

In today's global economic conditions, there appears to be an increasing need to ring fence and have succession plans in place for the protection of the personal and/or business wealth of not only the wealth of families developed and grown over the decades but also the new breed of entrepreneurial high net worth individuals. This can be achieved by forming a private trust constituted under the Indian Trusts Act, 1882. It can be set up for any lawful purpose such as for the benefit of one or more individuals wherein such beneficiaries have a steady money flow for their needs and requirements i.e. education, business, marriage, care in old age, medical expenses, etc.

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Forming a Trust

A Trust is formed during the lifetime of an individual, who in legal terms is called a Settlor or the Grantor, in favour of the beneficiaries of the Trust. A Trust therefore comes into operation during the lifetime of the Settlor and allows the Settlor to have control over his assets. Depending upon the need of the Settlor or family various Trust structures are prevalent which include discretionary, non-discretionary, revocable, irrevocable or a combination. Under the laws applicable in India, a private Trust can be set up either through a written Trust Deed executed by the person or persons, usually referred to as the “Settlor/s” or the “Grantor/s”, desirous of setting up the Trust for their beneficiaries or through a Will i.e. a testamentary Trust.

Trustees to a Trust

At the time of the formation of the Trust, a Settlor appoints Trustees to carry out the objectives of the Trust. Trustees can be appointed and removed from the Trust during the lifetime of the Settlor. The rights and duties of the Trustees can be specified and altered at any time during the lifetime of the Settlor. It is increasingly important to ensure that the Trust deed provides proper guidelines and clear operating procedures to be followed by the Trustees to ensure transparency in the utilisation of the Trust fund and/or the assets of the Trust.

Beneficiaries to a Trust

Typically a private Trust is established for the benefit and upkeep of a minor till such age as may be specifically stated by the Settlor of the Trust and to ensure that the wealth and assets are utilised in a manner that ensures the maintenance of lifestyle and fulfilment of important life events and purposes of the beneficiaries such as health, education, marriage etc. However, a Trust can also be set up for the benefit of any one, be it a minor, a person of unsound mind, an elderly person, etc. The beneficiary can be anyone whether he/she is or is not an Indian national /does not reside in India.

It is prudent that the Settlor is precise and clear of his / her intentions in the Trust deed so as to avoid ambiguity as regards the rights and duties of the Trustees and benefits to be granted to the beneficiary. Laws pertaining to Trusts are required to be looked into in order to overcome any legal impediments later on. For instance, in a private Trust, one has to be conscious to address the rule against perpetuity as provided for by Indian laws, which imposes a time limit on the age of the Trust i.e. the Trust has to be dissolved on the happening of a certain event or on the beneficiary reaching a certain age and the assets will vest in the beneficiary for his / her use without any restrictions whatsoever.

Subject matter of a Trust

Assets can be introduced at any time i.e. at the time of formation of the Trust or at any time after the formation of the Trust. Further, there is no restriction on the nature of the assets that can be introduced into a Trust i.e. both movable and immovable properties can be introduced into a Trust provided that such assets are transferable in nature and can be transferred in favour of the beneficiary at the time of dissolution of the Trust. For example, it could not only include immovable residential or commercial properties but also movable properties such as mutual funds, bank accounts, fixed deposits, etc. Also, effective planning of their wealth in the form of a private Trust allows high net worth individuals to include properties situated in India or abroad.

India not only acknowledges the concept of a Trust, but also recognises Trusts governed by other jurisdictions. In recent times, family members are located across the globe posing some unique challenges with respect to distribution or transferring the assets abroad. Long and expensive legal disputes between heirs based in multiple jurisdictions and tax regimes can be sufficiently avoided by forming a Trust structure from a multi-jurisdictional perspective, keeping in mind the laws governing these issues.

Stamp duty and registration

The amount of stamp duty payable on a Trust instrument and its registration with the Sub-Registrar of Assurances is subjective. Stamp duty payable on a Trust instrument is generally calculated under the provisions of the Stamp Act applicable to the state in which the Trust instrument is being executed and may not require registration.

However, if immovable assets are being transferred in favour of the Trust then the stamp duty payable on such a Trust Deed will be calculated on case to case basis depending on where the assets is situated and such an instrument may have to be sent for adjudicated by the office of the Collector of Stamps of such state for calculation of stamp duty payable. Such a Trust instrument will have to be registered with the Sub-Registrar of Assurances.

> *While drafting a Trust deed one must ensure that the clauses of the Trust deed are unambiguous and in compliance of the laws governing the formation of Trusts.*

Conclusion

Succession planning has now become even more of a necessity and a matter of urgency in the present times to ensure a comfortable and peaceful future for all family members. However, due to families living in different cities and the concept of nuclear families becoming even more prevalent, succession planning has also become complicated. A private Trust can potentially resolve a lot of these problems as it ensures the maintenance and safekeeping of assets both in India and abroad in a relatively tax efficient manner and also ensures that as and when a Trust is dissolved and the beneficiary is given control of his/her assets, the assets are substantial and have not depleted.

In order to safeguard the interests of the beneficiaries and enable the Trustees to achieve the objects of a Trust it is imperative that a Settlor of the Trust expresses his/her intentions in a Trust deed. While drafting a Trust deed one must ensure that the clauses of the Trust deed are unambiguous and in compliance of the laws governing the formation of Trusts.

Sherman Parikh (Associate Partner) and Kanika Mistry (Associate)
Editor: Trupti Daphtary (Knowledge Management)