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# Cross-border trust planning: More certainty for wealthy Indian families

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A recent decision of the Mumbai tax tribunal(1) provides further certainty for overseas trust structures established to hold assets outside India. This will encourage more wealthy Indian families to explore overseas trust and company structures to hold both financial investments and business assets.

**Background on the tax case**

The case before the tribunal involved certain wealth tax claims against an Indian resident who was a discretionary beneficiary of a Guernsey trust. Indian tax authorities received details of the overseas assets through the 'exchange of information' process under various treaties. They asserted that the beneficiary was the owner of the overseas assets since he exercised ultimate control through his power to appoint or remove the trustee. They also relied on various bank account forms which referred to the individual as the 'beneficial owner' of the assets.

The tax tribunal noted that the overseas trust was irrevocably settled by a non-resident and provided the trustee with absolute discretion on distributions. It was held that the trust and its trustee could not be disregarded merely because the resident beneficiary had the power to change the trustee. The assets of the trust would continue to be held by the trustee and not the beneficiary. The tribunal also noted that such trusts are legally accepted arrangements in the international community.

This decision came up in the context of wealth tax which was discontinued in India after 2015. However, the principles highlighted by the tribunal are also relevant while examining the Indian income tax implications of overseas trusts.(2)

**Implications for wealthy families**

Trusts have become an important planning tool to achieve objectives such as succession planning, protection from third party risks and liabilities, asset management, and confidentiality. Certain trusts also allow for deferral of tax liability until distribution of income to beneficiaries. The fear of re-introduction of inheritance tax in India has also motivated such planning.

Wealthy Indian families have found significant benefit in establishing overseas trust structures to hold assets or generate wealth outside India. They are also getting increasingly comfortable with more sophisticated trust governance strategies including private trust company structures. Indian entrepreneurs often use single or multiple overseas trusts and companies to hold financial investments and interests in operating businesses.

The tax tribunal decision provides useful guidance in trust structures where Indian resident individuals (e.g. the settlor, beneficiary or protector) have certain rights including the power to change a trustee. A few years back, the Indian Supreme Court(3) held (in the wealth tax context) that an Indian resident beneficiary of an overseas discretionary trust could be taxed only once the trustee made a distribution. Both these cases lend support to the validity of trust planning for Indian families.

The tribunal case also highlights the importance of careful planning while implementing trust and asset holding structures in a transparent world where information is automatically exchanged between countries. It is possible that certain documents such as account opening forms may be misconstrued including those identifying individuals as 'beneficial owners' or 'controlling persons'. Clear and contemporaneous documentation with relevant clarifications can reduce this risk. One should also document the non-tax drivers for establishing the trust. India's general anti-avoidance rules empower tax authorities to disregard structures that are primarily tax driven.

The governance and control of holding companies under the trust is also key to the tax planning. In several cases, overseas single or multi family offices have enhanced control and economic substance of holding companies outside India. Family offices also help in internalizing reporting functions under the exchange of information framework. Singapore continues to be an attractive base for such structures due to its reputation, proximity to India and attractive tax regime including tax exemptions for certain family office structures.

The need for establishing robust trust and holding structures was accelerated after changes to India's residency rules in the 2020 Budget and the COVID lockdowns which forced many non-residents to spend significant time in India. The 2021 Budget will be announced on February 1 and one can only wait to see whether there will be further impact on cross-border structures.

If you have any queries, please contact Mahesh Kumar.

(1) Yash Birla v. DCWT, W.T.A. No. 02 to 08/Mum/2020.
(2) There is another case pending before the Bombay High Court involving the same individual which is likely to comment on the income tax related aspects of the overseas trust structure.
(3) CWT v. Estate of Late HMM Vikramsinhji of Gondal, TS-258-SC-2014.

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