CHAPTER IV

TAXATION OF PRIVATE TRUSTS

DEFINITION

Though the law of trusts has developed its own specialised vocabulary the exact and comprehensive definition of a trust has always offered special difficulties to legal writers. There are many definitions to be found, some by writers of eminence, but of the more modern definitions, that of Sir Arthur Underhill seems to meet with most general approval. According to Underhill, "a trust is - an equitable obligation, binding a person (who is called a trustee)
to deal with property over which he has control (which is called the trust property), for the benefit of persons (who are called the beneficiaries or cestui que trust), of which he may himself be one, and any one of whom he may enforce the obligation". This definition was adopted by Cohen J., in *Re Marshall's Will Trusts* and by Romer, L.J. in *Green v. Russell.*

This definition is not free from objections. The objections to this definition are that it will not include Charitable Trusts, nor again trusts which, though good, are unenforceable, e.g. a trust for maintenance of a tomb in a churchyard or for the support of dogs and horses, provided it is limited to the period permitted by the perpetuity rule.

The American Law Institute, in its *Restatement of the Law of Trusts* adopts a substantially similar definition as --

"A trust ....... when not qualified by the word "Charitable", "resulting" or "constructive", is a fiduciary relationship with respect to property, subjecting the person by whom the property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it."

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6 (1945) Ch. 217; (1945) 1 All. E.R. 550.
7 (1959) 2 Q.B. 226; (1959) 2 All. E.R. 525 C.A.
It will be noticed that three important types of trusts are excluded from this definition. In the United States, however, the conception of a constructive trust has been developed much further than it has been in England, and in consequence it requires separate treatment. Charitable trusts also are treated separately by the American Law Institute, although there seems to be no reason why charitable trust should not be included within the definition offered by them.  

The term "trust" has also been defined as that relation between two persons by virtue of which one of them holds property for the benefit of the other, or as an equitable right, title or interest in property, real or personal, distinct from the legal ownership thereof.

According to Halsbury's Laws of England, "when a person has property or rights which he holds or is bound to exercise for or on behalf of another or others, or for the accomplishment of some particular purpose or particular purposes, he is said to hold the property or rights in trust for that other or those others, or for that purpose or those purposes, and he is called a trustee. A trust is purely equitable obligation and is enforceable only in court in which equity is administered."

Section 3 of the Indian Trusts Act, 1882 defines as "a 'trust' is an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner or declared and accepted by him, for the benefit of another, or of another and the owner."
The person who reposes or declares the confidence is called the "author of the trust"; the person who accepts the confidence is called the "trustee"; the person for whose benefit the confidence is accepted is called the "beneficiary"; the subject matter of the trust is called "trust-property" or "trust money"; the "beneficial interest" or "interest" of the beneficiary is his right against the trustee as owner of the trust property; and the instrument, if any, by which the trust is declared is called the "instrument of trust".14

A breach of any duty imposed on a trustee, as such by any law for the time being in force, is called a "breach of trust".15 A trustee holds the trust property for the benefit of the beneficiaries but he does not hold it on their behalf.16

Though Indian Trusts Act, 1882 governs the working of the private trusts only (and not public trusts), most of the rules17 applicable to private trusts have applications to public trusts as well.18

14 Section 3 of Indian Trusts Act, 1882, para 2.
15 Section 3 of Indian Trusts Act, 1882, para 3.
17 Sections 5 and 6 of the Indian Trusts Act, 1882 are applicable to private and public trusts as well.
18 CIT v. Kalechand Moti Ram (1949) 17 ITR 304;.
FORMALITIES

Section 5 deals with the formalities of trust as:

No trust in relation to immovable property is valid unless declared by a non-testamentary instrument in writing and signed by the author of the trust or the trustee and registered or by the will of the author of the trust or of the trustee.

No trust in relation to movable property is valid unless declared as aforesaid or unless the ownership of the property is transferred to the trustee.

In those cases, where certain instruments need not be registered under the Indian Registration Act, 1908, but such an instrument is used for making a trust, then registration of such document is mandatory under section 5 of the Indian Trusts Act. No registration is necessary if the Memorandum of Agreement is to operate merely as a contract.

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19 Section 17(1)(b) of the Indian Registration Act, 1908 provides that a composition deed so far as it purports or operate to create, declare, assign, limit or extinguish... any right, title or interest... of the value of Rs.100/- and upwards to or in immovable property will not require registration; but it does not say that any composition deed if it purports to do or operates to do anything else will not require registration either.

20 Govind Ram and others v. Madan Gopal and others AIR 1945 PC 74; Chandrashankar Pranshankar v. Bai Magan AIR 1914 Bom. 55 overruled)

21 B. Rajagoria v. Central Bank of India 76 CWN 807.
A trust may be created by any language sufficient to show the intention and no technical words are necessary. In case of charitable and religious trusts, no formal document or other writing is necessary, it can be established even by the conduct of the parties, but a mere resolution passed by a trading association that the profit should be held in trust could not be regarded as an instrument in writing creating a trust. If an obligation is actually annexed to the ownership of the land that should be clear by the terms of grant or will. The trustees can accept gifts from third parties for the purposes of furthering the objectives of the trust, so long as the trust deed did not prohibit them. A trust may conduct a business or a trustee may enter into a partnership on behalf of the trust. An unborn person can validly be a beneficiary under a trust.  

22 All India Spinners' Association v. CIT (1944) 12 ITR 482 (PC); Trustees of Shri Cutchi Lohana Panchade Mahajan Trust (1975) 98 ITR 448 at p. 451; S. Devaraj v. CWT (1973) 90 ITR 400 at p. 405.  
23 Joint Committee of Action, B Group Merchants, Bombay v. CIT (1963) 48 ITR 427.  
28 Unborn persons like Schools, Hospitals and other Charitable institutions.  
CREATION OF TRUST

According to Section 4--

A trust may be created for any lawful purpose. The purpose of a trust is lawful unless it is (a) forbidden by law, or (b) is of such a nature that if permitted, it would defeat the provisions of any law\(^\text{30}\) or (c) is fraudulent, or (d) involves or implies injury to the person or property of another, or (e) the Court regards it as immoral or opposed to public policy.\(^\text{31}\)

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\(^{30}\) Illustration (c) to Section 4 of Indian Trusts Act, 1882- (c) A, while in insolvent circumstances, transfers property to B in trust for A during his life, and after his death to B. A is declared an insolvent. The trust for A is invalid as against his creditors. See also Zafniul Hasan v. Farid-ud-Din AIR 1946 PC 117 - A Wakfnama made to defeat or delay creditors; Har Prasad v. Mohammad Usman Husain AIR 1943 All.2.

\(^{31}\) Re, Sand Brook, Noel v. Sandbrook (1912) 2 Ch. 212 - deterring the parent from performing his parental duties, held contrary to public policy; In Boulter, Capital and Counties Bank v. Boulter (1922) 1 Ch. 75 - Any condition to a gift under a Will which tends to separate a child from its parent is void as being against public policy; See also Re. Piper, Dodd v. Piper (1946) 2 All. ER 503; Re Lovell, Sparks v. Southhall (1920) 1 Ch. 122 - where an object of the bequest was not to induce a person to continue to live apart from her husband and not to remarry but to maintain her until she returned to her husband or remarried, held not void; Re Whiting's Settlement, Whiting v. De Rutzen (1905) 1 Ch. 96 - a condition providing for the forfeiture of interests, given by a settlement to a daughter of the settlor and her children, upon the marriage of the daughter at any time without the consent of named persons, is valid and enforceable if it be accompanied by a gift over of the fund on marriage without the required consent.
Every trust of which the purpose is unlawful is void. And where a trust is created for two purposes, of which one is lawful and the other unlawful, and the two purposes cannot be separated, the whole trust is void.

Explanation: In this section the expression "law" includes, where the trust property is immovable and situated in a foreign country, the law of such country.

A trust can be created inter vivos or through a will. When a trust is created by a will, it is necessary that the testamentary instrument complies with the formal requirements of the Will laid down in the Indian Succession Act, 1925. These essential formalities are: the instrument should be made in writing, signed or marked by the testator; attested by two or more persons; When a trust is created by a living persons, the requirements provided under section 6 are to be complied with.

32 means between living persons.

Section 63 : Execution of Unprivileged Wills - Every testator, not being a soldier employed in an expedition or engaged in actual warfare, or an airman so employed or engaged, or a mariner at sea, shall execute his will according to the rules.

Section 63(a) - 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. Section 63(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.

These requirements are commonly known as the "three certainties" required in a trust have been laid down by Lord Langolale MR in Knight v. Knight (1840) 3 Beav 148 at p.173. These requirements are covered in Section 6 of the Indian Trusts Act, 1882. The three certainties are:-(1) The words used must be so couched that, taken as a whole, they may be deemed to be imperative ; (1) The words used must be so couched that, taken as a whole, they may be deemed to be imperative ;

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Section 6 runs:

"6. Subject to the provisions of Section 5, a trust is created when the author of the trust indicates with reasonable certainty by any words or acts (a) an intention on his part to create thereby a trust, (b) the purpose of the trust, (c) the beneficiary, and (d) the trust-property and (unless the trust is declared by will or the author of the trust is himself to be the trustee) transfers the trust-property to the trustee."

(1) Certainty of words

Since Equity looks at the interest rather than at the form, no special form of words is necessary for the creation of a valid trust, and if an intention to create a trust may unmistakably be construed from the expressions which the settlor has used, the Court will give effect to that intention. The use of the word "trust" is not essential, though, of course, highly desirable.

Under English Law, in earlier decisions the tendency of the Court of Chancery was to raise a trust in cases where the testator employed words precatory or recommendatory or expressing a belief. Thus the employment of the words "hope", "desire", "recommend", "in full confidence" and similar expressions have been held to constitute a trust. The Court, in short, was ready to imply a trust from

36 Zafar Hussain v. Mian Mohamad Ghias-Ud-Din AIR 1937 Lah. 552.; Radhasoami Satsang v. CIT (1992) 193 ITR 321 (SC);
37 Supra note 2 p.93
39 By precatory words we mean words indicating a desire, hope, request, confidence and the like, as to disposal of the property concerned.
expressions not ordinarily regarded as imperative. During the
nineteenth century the change took place. Words such as desire, wish, Will, hope, direct, in confidence, in full confidence, specially desire, request, feeling confident, on behalf of, for the purpose of, heartily beseech, well know, appoint, give and bequeath, for the benefit

41  Supra note 38 p.61
42  CIT v. Manilal Dhanji (1962) 44 ITR 876 (SC); AIR 1963 SC 433;
43  Ram Ran Vijay Prasad Singh v. Province of Bihar AIR 1942 Pat. 435; Re Hamilton (1895) 2 Ch. 370.
45  CIT v. Manilal Dhanji (1962) 44 ITR 876 (SC); AIR 1963 SC 433;
46  Ram Ran Vijay Prasad Singh v. Province of Bihar AIR 1942 Pat. 435.
47  Comiskey v. Bowring-Hanbury (1905) AC 84; Lambe v. Eames (1871) LR 6. Ch. 597; Hill v. Hill (1897) 1 Q.B. 483; Re Adms and Kensington Vestry (1884) 27 Ch.D 394; Re Hutchinson and Tenant (1878) 8 Ch.D 540; comiskey v. Browning Hanbury (1905) AC 84.
48  Re Williams (1897) 2 Ch. 12.
49  Re Connolly (1910) 1 Ch. 219.
50  Re Johnson, Public Trustee v. Calvert (1939) 2 All. ER 458; Re Steele's Will Trusts (1948) Ch.603.
53  Re Endacott (1960) Ch.232.
54  Meredith v. Heneage 1 Sim 542 at p.554; White v. Briggs 15 Sim.33.
55  Bardswell v. Bardswell 9 Sim 319;
56  CIT V, Mrs. Jayalakshmi Duraiswamy (1964) 53 ITR 525;
57  Comiskey v. Bowring Hanbury (1905) AC 84.

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of and so on received fresh consideration. The courts, in many cases held that the use of precatory words are imperative to raise a binding trust, but the intention to create the trust has to be established upon a construction of the instrument which made for an artificial certainty where no certainty existed. Therefore, the term precatory only has reference to forms of expressions. Not only in Wills but in daily life an expression may be imperative in its real meaning although couched in language which is not imperative in form. Thus, to take one of many cases in The Mussoorie Bank Ltd. v. Albert Charles Raynor the Privy Council held that where the testator gave all his real and personal property to his widow "feeling confident that she will act justly to our children in dividing the same when no longer required by her", it was held that the widow took an absolute interest and there was no trust for children. In considering whether a precatory trust is attached to any

58 Re Hill (1923) 2 Ch. 259.

59 According to Lewin, the current of authority was turned in the opposite direction by the decision in Lambe v. Eames (1871) LR 6 ch. 597 where the testator gave the property to his widow "to be at her disposal in any way she may think best for the benefit of herself and family". - Lewin on Trusts Sweet and Maxwell Ltd., London (1950) 15th Ed. pp.80-81.

60 Such as Lambe v. Eames (1871) LR 6 ch. 597; Re Adams and the Kensington Vestry (1884) 27 Ch.D. 394; Re Williams (1897) 2 Ch.12; Hill v. Hill (1897) 1 Q.B. 483; Re Hanbury (1904) 1 Ch. 415; Re Conolly (1910) 1 Ch. 219; Re Hill (1923) 2 Ch. 259; Re Hamilton (1895) 2 Ch. 370; Re Diggles (1888) 39 Ch.D. 253; Re Booth (1894) 2 Ch. 284; Comiskey v. Bowring Hanbury (1905) A.C. 84; Re Hutchinson and Tenant (1878) 8 Ch.D. 540;


62 Re Williams (1897) 2 Ch. 12.

63 (1882) 7 App. Cas. 321.

64 A similar decision was given in Re Adams and the Kensington Vestry (1884) 27 Ch.D 394; These decisions have been followed with slight variations of fact, in Hill v. Hill (1897) 1 Q.B. 483; Re Williams (1897) 2 Ch.12; Re Hanbury (1904) 1 Ch.415; Re Conolly (1910) 1 Ch. 219; Re Hill (1923) 2 Ch. 259;
legacy, the Court will be guided by the intention of the testator apparent in the will, and not by any particular words in which the wishes of the testator are expressed.65

The modern rule in English law is that no technical words are required to constitute one, if the intention is clearly expressed. The testator's intention is, therefore, the paramount consideration, and the court must discover it. It will not presume that he intended to create a trust. That must be proved. If any element of discretion is left to the donee, there is no trust.66

Re Keyford Ltd.67 is a good illustration of some interest, where money in advance is being paid to a company in return for the further supply of goods or services. Oral arrangement made by the company to pay the money in a trust account namely "Customers Trust Deposit Account". The whole purpose of what had been done had been to ensure that the money sent remained in the beneficial ownership of those who had sent them. Although payment into a separate banking account was useful indication of an intention to create a trust, there was nothing to prevent the Company from binding itself by a trust. Held, the Company had manifested a clear intention to create a trust.

The courts in India are following the English decisions. According to the Courts, the intention to create a trust must be indicated by words, or acts with reasonable certainty.68 The purpose of the trust, the trust property and the beneficiaries must be indicated in such a way that the trust could be administered by

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65 Re Hamilton (1895) 2 Ch. 370; See also Re Adams and Kensington Vestry (1884) 27 Ch.D. 394; Re Diggles (1888) 39 Ch.D 253.
67 (1975) 1 WLR 279; (1975) 1 All. ER 604.
68 In Chambers v. Chambers AIR 1944 P.C. 78; the Privy Council held that where the words used in the instrument do not indicate with certainty an intention to create a trust, no trust can come into existence; Jang Bahadur v. Rana Uma Nath AIR 1937 Oudh 99; CIT v. P. Bhandari (1984) 147 ITR 500; Dalim Kumar Sen v. Smt. Nandarani Darsi AIR 1983 Cal.196;
the courts if the occasion arose. Where the intention clearly appears that a trust is
to be created, the law does not require that the words used should be identical with
those occurring in the statute. A trust deed, barely creating a trust for charities
without specifying any charities at all, is valid. But a clear intention of owner to
dedicate definitely and permanently must be established.

If by mistake an instrument creating trust does not express the intention of the
disposer, it can be cancelled or rectified according to the true intention of the disposer
Where there was merely a pious wish of the testator that those following him
should carry on the charitable and religious work which he had been and was actually
doing. No trust property was indicated with reasonable certainty at all and that being so
it could not be said that the will created a binding trust. If the property is left to a person
in confidence that he will dispose of it in a particular way as to which there is no ambiguity,
such words are amply sufficient to impose an obligation.

Gifts to parents with a direction as to the maintenance, etc. of children

In CIT v. Manilal Dhanji, the testator created a trust for the benefit of
his four sons. The assessee, being one of the trustees were to hold the trust funds upon

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70 Krishnamurthy v. Anjaya AIR 1936 Mad. 635;
71 CIT, West Bengal v. Sardar Bahadur Sardar Indra Singh Trust AIR 1956 Cal. 164.
72 Zafar Hussain v. Mian Mohammad Chias-Ud-Din AIR 1937 Lah. 552; See also Krishan
  Kishore v. Din Mohammad AIR 1929 Lah. 684; Birendra Keshri Prasad v. Babuna Sarawati
  Kuer AIR 1934 Pat. 612.
74 Ram Ran Vijay Prasad Singh v. Province of Bihar. AIR 1942 Pat.435. See also Bhabhoot Mal v. Mool
  Chand AIR 1943 Nag.266; Smt. Krishana Kumari v. Board of Revenue M.P. AIR 1971 MP 201.
75 Re Williams (1897) 2 Ch. 12.
76 (1962) 44 ITR 876 (SC) AIR 1963 SC 433; CIT v Mrs. Jayalakshmi Duraiswamy (1964) 53 ITR
  525; Re Booth (1894) 2 Ch. 282; See also Raikes v. Ward (1942) 66 ER 1106; Woods v. Woods

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trust to pay the net interest and income thereof "for the maintenance of himself and his wife and for the maintenance of education and benefit of all his children till his death". The Supreme Court held that trust was not indicative of a mere desire or hope but to impose a binding and obligatory trust.

**Certainty of subject matter**

To create a trust, the subject matter on which the trust is to operate must be certain. Where there is no ascertained and appropriated trust property or no trust property is indicated with reasonable certainty at all, it could not be said that there is any certainty about the subject matter. If a trust deed providing for another property of the same quality and profit, in case of failure to give certain property, then there is no uncertainty regarding subject matter of trust.

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(1836) 40 ER 429; Lewin in his book "Lewin on Trusts" Sweet and Maxwell Ltd., London (1950) 15th Ed. p.85, refers to the following instances as creating a trust:- Instances of the creation of a trust are, where property is given "that she may dispose thereof for the benefit of herself and our children", or "at her sole and entire disposal for the maintenance of herself and her children" or "for her own use and benefit, and for the maintenance and education of my dear children," or "at the disposal of the legatee for herself and her children", or all "overflush to my wife towards her support and her family", or to A "for the education and advancing in life of her children" or to the testator's wife "for her use and benefit, and for the maintenance and education of his children" or to A "and the said tenement I leave to the disposal of her, with a view that the said tenement may disposed of as she may think proper for the maintenance and education of my two daughters" ..........

77 Bhaidas Shivdas v. Bhai Gulab AIR 1922 PC 193.
78 Chambers v. Chambers AIR 1944 PC 78.
79 Ram Ran Vijay Prasad Singh v. Province of Bihar AIR 1942 Pat. 435.

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In a case where the author of the trust appoints someone else as trustee, it is necessary that he should transfer the trust property to the trustee before a trust in respect of that property could come into existence, and he should divest himself from its ownership. Trust of an immovable property should be declared by a non-testamentary instrument in writing, signed by the author or by will and registered in the name of trustee for a complete transfer of ownership. In a trust-deed, the executant had effective control over the affairs of his estate and there was no real transfer of ownership to the trustee who was under the deed put in charge of the property, it was held, the executant really intended not to appoint trustees but to appoint managers and deed was not a trust-deed. But where the author, after

81 CGT v. Maharaja Pateshwari Prasad Singh (1971) 82 ITR 654; Re Sabnis Goregaonkar & Senjit AIR 1937 Bom 374; There is no trust without a transfer of ownership: Birendra Keshri Prasad and another v. Bhauria Saraswati Kuer AIR 1934 Pat. 612.

82 A clause in a trust-deed authorising the author to alter regulations and to add new regulations in relation to trust-property is retention of power over the trust property which may be against the divestiture which is required: The Allahabad Bank Ltd. v. CIT West Bengal (1953) 24 ITR 519.


84 Trust is not complete unless trust property is vested in trustee for benefit of Cessui que trust: Re Sabins Goregaonkar & Senjit AIR 1937 Bom. 374.

85 Section 5 of the Indian Trusts Act, 1882; If the trust relates to immovable property, the transfer or declaration must be by a document registered according to the law of Registration. According to law of Registration, if the value of an immovable property exceeds Rs.100/-, registration is necessary: Smt. Pankumari Kochar v. Controller of Estate Duty (1969) 73 ITR 373 at p.379; Anant Ram v. Ishri Prasad AIR 1925 Oudh 202; Jang Bahadur v. Rana Uma Nath Bakhsh Singh AIR 1937 Oudh 99 at p.103; Kesheo v. Shri Laxminarayan Sausthan AIR 1926 Nag. 86.

86 Ram Huzur Ara Begam v. Deputy Commissioner, Gonda AIR 1941 Oudh 529.
effecting the registered deed, renounced the world by taking sanyas but remained in
management of the trust property not as owner but as a manager, it was held, there
was sufficient divesting of the property. What the law requires is an unmistakable
intention to dedicate and an overt act carrying that intention into execution. Only
real dedication whereby the owner divests himself of ownership and not mere unex­
pressed intention to dedicate, can invalidate subsequent transfer of property to third
person.

If the declarer of the trust is himself the trustee also, there is no need that
he must transfer the property to himself as trustee; but the law implies that such a
transfer has been made by him, and no overt act except a declaration of trust is
necessary.

Where the trust property is movable, transfer of its possession to the
trustee is sufficient to create a trust.

87 Kesheo v. Shri Laxminarayana Sausthan AIR 1926 Nag. 86
88 Ibid.
89 Birendra Keshri Prasad v. Bahuria Saraswati Kuer and others AIR 1934 Pat. 612.
90 Tulsidas Kilachand v. CIT (1961) 42 ITR 1 at p. 6; Smt. Pankumari Kochar v. Controller of
91 Mere transfer of possession coupled with the intention of the parties that such delivery of
possession should vest the property in the trustee is sufficient to create trust: Panchaiyappa
Chetti v. Sivakami Anmal AIR 1926 Mad. 109; Chambers v. Chambers AIR 1940 PC 78; Re
Rose (1952) 1 All. ER 1217
Certainty of objects or Cestui que trust

Certainty of objects implies two things: 92 (i) that the recipients should be identifiable with certainty; 93 (ii) that the interests they take should be discoverable. 94 The test of certainty is that the objects should be certain or capable of being rendered certain. 95 This test is propounded by the Court of Appeal in Inland Revenue Commissioners v. Broadway Cottages Trust 96 where the court held that a trust for such members of a given class of objects as the trustees shall select, is void for uncertainty unless the whole range of objects eligible for selection is ascertained or capable of ascertainment. A trust to distribute a fund can be valid only if it is possible to ascertain the members of the class with sufficient certainty. If the members of the class are not ascertainable, then the trust is invalid and void. The House of Lords in McPhail v. Doulton 97 overruled this test in regard to

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93 Mere transfer of possession coupled with the intention of the parties that such delivery of possession should vest the property in the trustee is sufficient to create a trust: Panchaiyappa Chetti v. Sivakami Ammal AIR 1926 Mad.109; Chambers v. Chambers AIR 1940 PC 78; Re Rose (1952) 1 All. ER 1217.


96 (1955) Ch.20; Re Sayer (1957) Ch. 423; Re Hain's Settlement (1961) 1 W.L.R. 440.

97 (1971) AC 424.
trust-power. The Court observed that the test to be applied in determining the validity of trust powers was that propounded in Re Gulbenkian's Settlement for powers, namely, that the trust was valid if it could be said with certainty that any given individual was or was not a member of the class.

The same position is under Indian Law. If the beneficiaries are not indicated with reasonable certainty or there is some vagueness as to the persons who are intended to be benefited and no obligation imposed on the trustees, no trust was created even though property had been transferred to the trustees. According to a deed the pension was to be transferred to the "heirs" of the original pensioners. The question before the Court was, whether "heirs" means "descendants"?

98 A trust power, or a power in the nature of a trust, although prima facie a power only and, therefore, not imperative, will sometimes be construed by the court as a trust, if from the trust instrument as a whole as intention can be gathered that the objects of the power are to benefit in any case.


100 In the case of powers the authorities establish that a power is sufficiently certain and, therefore, valid if the trustees are able to inform any postulent whether he is or is not qualified to receive bounty. This is the test propounded in Re Gestetner Settlement (1953) Ch.672 and approved by the House of Lords in Re Gulbenkian's Settlemets (1970) AC 508. On the other hand, a trust power contains a fatal flaw unless at the date of its inception it is possible for the trustees to make a list of all or of substantially all the beneficiaries: Mc Phail v. Doulton (1971) AC 424; See also Re Baden's Deed Trusts (No. 2) (1972) 2 All. ER 1304; Re Hain's Settlement (1961) 1 W.L.R. 440; Re Coates (1955) 1 Ch. 495; Re Park (1932) 1 Ch. 580.


102 Khursaidi Begum v. Secretary of State for India AIR 1926 Pat.321; Chambers v. Chambers AIR 1944 PC 78.

103 Allahabad Bank v. CIT AIR 1953 SC 476; where there is no devise of the estate to anybody, no valid trust is created: Amardas Mangaldas v. Harmanbhai Jethabhai AIR 1942 Bom. 291 at p.297.
It was contended that the terms "heirs" and "descendants" were used as convertible terms in describing the descent of certain trusteeship of the pension. The court held that it could not be assumed that donor intended the descent of the trusteeship and the descent of beneficial interest to be governed by the same rules. The court further held, the ambiguity of the language used on the one subject cannot control the clear and unambiguous words employed with regard to the other. Where an interest of an employee in Employee’s Death Benefit Fund, vested in the trustees of the Fund, is payable to children of an employee on death and the employee has no disposing power over it, is a valid trust. There is nothing illegal in a settlor authorising by the instrument of trust the trustee to invest the trust money in a business, whether the trustee’s own business, or some other business and providing that interest shall be paid for the use of the money so invested. The arrangement creates a valid trust.

The validity of a trust cannot be ignored merely because the beneficiary is not in existence at the time of creation of trust.

Following the English law of Equity, the Allahabad High Court observed in Mirza Hidayat Beg v. Seth Bihari Lal ...

"To determine uncertainty or indefiniteness in relation to trusts, one of the rules of the English Court of equity is that the court must be in a position to supervise the trust and administer it in case of a breach of trust or in case of any other circumstance arising in connection with it in which such a course becomes necessary

104 Haidar Hussain Khan v. Faghfur Mirza (1904-5) 9 CWN 817.
105 Nadirshaw J. Vachha v. Times of India Employees Death Benefit Fund AIR 1931 Bom.300.
107 Infra.
108 AIR 1941 All.225 at p.231
and where the court is not in a position to administer the trust by reason of vagueness of the object of trust, the trust is void." But in the case of a trust power, if the trustees do not exercise it, the court will do so in the manner best calculated to give effect to the settlor’s or testator’s intentions. No trust which the court can control and execute, or, in other words, no valid trust at all, is created for there can be no trust in favour of the unascertainable classes as a whole; no beneficial interest is conferred on any particular member or members of the class unless and until the trustees think fit to make some distribution to him or them, and the making or withholding of any such distribution rests on the uncontrolled discretion of the trustees, which the court can neither exercise nor compel to be exercised.

It is now well settled that there is no valid trust unless the objects thereof are specified, charitable trusts are an exception. With regard to charitable trusts, a great deal of latitude is permitted and the rule is that provided there is a clear intention to make a gift for charity, the trust is not allowed to fail for uncertainty. Indefiniteness as regards the specification of the objects is, therefore, regarded only as an indefiniteness in regard to the manner in which the trust will be administered and so if a clear intention to create a trust in favour of charity is discernible, defects in the mode prescribed or absence of any such prescription does not invalidate the trust. The

109 Mirza Hidayat Beg v. Seth Bihari Lal AIR 1941 All 225 at p.231.
111 Inland Revenue Commissioners v. Boradway Cottages Trust (1955) 1 Ch. 20 at p.32; See also Morice v. Bishop of Durham (1805) 10 Ves.522, 539, 540; Re Gestetner Settlement (1953) Ch. 672; Re Park (1932) 1 Ch. 580; Re Jones (1945) Ch. 105.
defect is taken attaching to a matter which is not essential. A trust for charitable purposes does not become invalid, if the choice of the specific charitable objects to be benefited is left to the trustees.\textsuperscript{112}

Where there is uncertainty about the persons to whom the charity is to be benefited, the donor is the best person to know the beneficiaries he had in his mind, moreover the same is identified by the document, therefore, trust is not void for uncertainty.\textsuperscript{113}

A trust for feeding the poor,\textsuperscript{114} for charity or benevolence of amelioration of human suffering or advancement of knowledge,\textsuperscript{115} for relief of poverty,\textsuperscript{116} for promotion of religious, social and physical well being of the persons\textsuperscript{117}, for national education, establishment of a school to impart such education, a boarding house, founding of scholarships for foreign education,\textsuperscript{118} for attainment of salvation,\textsuperscript{119} were held valid for an object which was certain.

\textsuperscript{112} \textit{CIT} v. \textit{Sardar Bahadur Sardar Indra Singh Trust} (1956) 29 ITR 781 at p.786-7.
\textsuperscript{113} \textit{Garib Das} v. \textit{Munshi Abdul Hamid} AIR 1970 SC 1035 at p.1038.
\textsuperscript{114} \textit{Muthusami Naidu} v. \textit{Rayalu Naidu} AIR 1925 Mad. 689 at p.690.
\textsuperscript{115} \textit{Re Bawden's Settlement} (1953) 2 All. ER 1235 at p.1237.
\textsuperscript{116} For "relief" connoted such need as for a home or for the means to provide some necessity or quasi necessity: \textit{Inland Revenue Commissioners} v. \textit{Baddeley} (1955) 1 All. ER 525 at p.528.
\textsuperscript{117} \textit{Inland Revenue Commissioners} v. \textit{Baddeley} (1955) 1 All ER 525 at p.528.
\textsuperscript{118} \textit{Mirza Hidayat Beg} v. \textit{Seth Behari Lal} AIR 1941 All 225 at p.226.
\textsuperscript{119} \textit{Jainambukanni Ammal} v. \textit{Ruthrapathy Pillai} AIR 1946 Mad 416.
In *Grimond v. Grimond*, a testator directed his trustees to divide a portion of the residue of his estate to and among such "charitable or religious institutions and societies" as they might select, the trust was held void for uncertainty. Where the trusts were not for the benefit of individuals but for a number of non-charitable purposes, held void for uncertainty.

In *Khursaidi Begum v. Secretary of State*, the property of a heirless Shia was devoted to the poor and indigent, according to the Shia Law. The court held, no trust was created as there is some vagueness about the persons who are intended to be benefited.

It is submitted that *Khursaidi Begam's* case does not hold liberal view because with regard to charitable trusts, the courts have shown liberal approach. The courts will not hold a charitable trust void for uncertainty of the object if there is clear intention to make a gift for charity.

**AUTHOR OF THE TRUST**

The person who reposes or declares the confidence is called the author of the trust. Under the law of trusts, a trust can be created by every person who is...

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120 (1905) AC 124.
121 *Re Astor's Settlement Trusts* (1952) 1 Ch. 534.
122 AIR 1926 Pat 321 at p.327-8.
123 *Ibid*.
124 *See CIT V. Sardar Bahadur Sardar Indra Singh Trust* (1956) 29 ITR 781.
125 *Section 3 of the Indian Trusts Act, 1882.*
A trust, by or on behalf of a minor, can be created with the permission of a principal civil court of original jurisdiction. A lunatic can not create a trust either testamentary or inter vivos. If a trust is validly created under the Law of Trusts, its existence cannot be assailed merely because of the absence of permission from the civil court. A group of individuals, an artificial person, an association of persons, institution or a Corporation can create a trust.

The subject matter of a trust must be transferable property, it precludes mere beneficial interest under a subsisting trust.

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126 The expression "competent to contract" is governed by Section 11 of the Indian Contract Act, 1872 which runs: "Every person is competent to contract, who is of the age of majority according to the law of which he is subject, and who is of sound mind and is not disqualified from contracting by any law to which he is subject."

127 A person is minor who is below eighteen years of age. According to Section 3 of the Indian Majority Act, 1875, the age of majority is generally eighteen except when a guardian of a minor’s person or property has been appointed by the Court, in which case it is twenty one. Under Section 59 of the Indian Succession Act. 1925, a minor cannot create a testamentary trust since he is competent to dispose of his property by will. Therefore, he can create a trust inter vivos. In the United Kingdom, a trust or settlement made by the minor is voidable, not void, that if he chose to repudiate it he must do so within a reasonable time after attaining full age otherwise he was bound by the settlement.


130 Trading Companies, incorporated under the Companies Acts, have implied power to borrow for the purposes of the Company's business. Very commonly this power is exercised by the Company by executing a trust deed: General Auction Estate Co. v. Smith (1891) 3 Ch. 432.

131 Section 8 of the Indian Trusts Act, 1882.
One or more trusts can be created by a single instrument.\textsuperscript{132} If any part of the deed of a charitable trust is for a private purpose, the whole trust is vitiated, forgetting that there are two distinct and separate trusts with two different endowments, though under the same deed.\textsuperscript{133}

**BENEFICIARY**

Every person capable of holding property may be beneficiary.\textsuperscript{134} There must be at least one beneficiary living at the time of creation of a trust.\textsuperscript{135} The validity of a trust cannot be ignored merely because the beneficiary is not in existence on the date of creation of trust.\textsuperscript{136} A trust is not void if some or all of the beneficiaries of the trust have not been specified in the trust with indication in regard to the share of each one, or the terms of the trust deed confer power on the trustees to determine the beneficiaries thereof and it cannot be said in such a case that the beneficiaries are unknown or uncertain.\textsuperscript{137}

\textsuperscript{132} See CWT \textit{v.} H.E.H. The Nizam’s Supplemental and Religious Endowment Trust (1973) 89 ITR 80; CIT \textit{v.} Manilal Dhanji (1962) 44 ITR 876 (SC); Dr. A.J. Kohiyar \textit{v.} CIT (1964) 51 ITR 221.

\textsuperscript{133} CWT \textit{v.} H.E.H. The Nizam’s Supplemental and Religious Endowment Trust (1973) 89 ITR 80 at p.84-85.

\textsuperscript{134} Section 9 of the Indian Trusts Act, 1882.

\textsuperscript{135} Section 5 of Transfer of Property Act, 1882 runs as:

\begin{quote}
\textbf{5. Transfer of Property defined.--} In the following sections 'transfer of property' means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself, or to himself and one or more other living persons, and "to transfer property" is to perform such act." Sopher \textit{v.} The Administrator General of Bengal (1944) 46 Bom. LR 865 PC;
\end{quote}

\textsuperscript{136} Section 13 of the Transfer of Property Act, 1882.

\textsuperscript{137} Corpus Juris Secundum Vol.89, p.788; Inland Revenue Commissioners \textit{v.} Broadway Cottages Trust (1955) Ch. 20; Re Sayer (1957) Ch.423; Re Hain’s Settlement (1961) 1 WLR 440; McPhail \textit{v.} Doulton (1971) AC 424; Re Gulbenkian’s Settlement (1970) AC 508; Re Gestetner Settlement (1953) Ch.672; Re Coates (1955) 1 Ch.495; Re Park (1932) 1 Ch. 580; Allahabad Bank \textit{v.} CIT AIR 1953 SC 476; Official Receiver of South Arcot \textit{v.} Kalaandaivelan Chettiar AIR 1946 Bom. 519; Khursaidi Begam \textit{v.} Secretary of State for India AIR 1926 Pat. 321; Chambers \textit{v.} Chambers AIR 1944 PC 78; Amardas Mangaldas \textit{v.} Harman-Bhai Jethabhai AIR 1942 Bom 291.
A corporation, minor, alien and a married woman can be beneficiaries. A trust to pay the income after the husband's death to the wife "if she shall survive the husband or until she shall marry again" is not determined by the re-marriage of the wife during the lifetime, of the husband after the dissolution of marriage, but where upon the construction of the instrument it is clear that the power or trust is for the benefit of a surviving husband or wife who fulfils that status at the date at which the trust or power takes effect, a divorced person is not entitled to benefit.

It is settled law that an unborn person could be a beneficiary under a trust, provided it satisfies the conditions laid down under section 13 of the

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141 See Section 10 of the Transfer of Property Act, 1882; The Married Woman's Property Act, 1874 was passed to establish the separate property of married women who were married before the 1st January 1866 with reference to their own wages and earnings. Section 7 of that Act says that a married woman may sue or be sued in her own name in respect of her separate property. Section 8 provides that a person entering into a contract with a married woman with reference to her separate property may sue and recover against her to the extent to that property. But decrees passed against a married woman under Section 8 cannot be executed by attachment or sale of property she is restrained from alienating during marriage; O.P. Aggarwala The Indian Trusts Act, 1882" Metropolitan Book Co. (Private) Ltd. (1970) 6th Ed., p.260.
142 Re Monro's Settlement (1933) Ch.82.
143 Re Williams' Settlement (1929) 2 Ch.361 distinguishing Marlborough v. Marlborough (1901) 1 Ch.165; T.C. Hornby v. E.T. Farmer AIR 1960 Cal 36; See also Lewin on Trusts (1950) 15th Ed. at p.256; Indian Molasses Co. Pvt.Ltd. v. CIT (1959) 37 ITR 66 (SC).
Transfer of Property Act,\textsuperscript{145} even though the coming into existence of such a beneficiary is uncertain.\textsuperscript{146} Where under a bequest,\textsuperscript{147} there is a possibility of the interest given to a beneficiary under the later bequest being defeated either by a contingency or by a clause of defeasance, such a beneficiary does not receive the interest bequeathed in the same unfettered form as that in which the testator held it, and the bequest to him does not, therefore, comprise the whole of the remaining interest of the testator in the thing bequeathed. When such a beneficiary is not in existence at the time of the testator’s death, the bequest to him is void.\textsuperscript{148} But a trust would not be void if the immediate limited interest is given to the existing beneficiary and an absolute interest is created for the unborn or non-existing beneficiary.\textsuperscript{149}

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\textit{Section 13}: Transfer for benefit of Unborn Person - Where, on a transfer of property, an interest therein is created for the benefit of a person not in existence at the date of the transfer, subject to a prior interest created by the same transfer, the interest created for the benefit of such person shall not take effect, unless it extends to the whole of the remaining interest of the transfer in the property.\textsuperscript{9}
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\textit{Section 113} of the Indian Succession Act, 1925: Bequest to person not in existence at testator’s death, subject to prior bequest - Where a bequest is made to a person not in existence at the time of the testator’s death, subject to a prior bequest contained in the Will, the later bequest shall be void unless it comprises the whole of the remaining interest of the testator in the thing bequeathed.
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A transfer of property by way of gift as also by creation of trust, settlement, etc., in favour of prospective spouse,150 would be daughter-in-law/son-in-law,151 grandchildren152 etc., of the settlor cannot be said to be invalid on the grounds of uncertainty or vagueness in regard to the object of the trust and/or the beneficiaries thereof nor can such a trust be regarded as being against the rule against perpetuity.153

Since the beneficiary is not a party to contract with the author of the trust, therefore, he can renounce his interest under the trust by a disclaimer addressed to the trustee or by setting up an inconsistent claim.154 If there are two trusts with the same beneficiaries on identical terms and same trustees, there coalescence is not barred,155 but the after-acquired legacies formed an accretion to the original funds and that the appointees of those funds could not share in the legacies without bringing the share appointed to them into hotchpot.156

The right of the beneficiary is the right to call upon the trust to administer the property so as to give the beneficiary his dues according to the provisions of the trust157 or in a proper case to convey the property to the beneficiary.158

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150 Indian Molasses Co. Pvt. Ltd. v. CIT (1959) 37 ITR 66 (SC); Sopher v. Administrative General of Bengal (1944) 46 Bom. LR 856.
153 Id.
154 Section 9 of the Indian Trusts Act, 1882.
155 Re Rydon (1955) 1 Ch. 1; Re Campbell’s Trusts (1922) 1 Ch. 551; Re Marke Wood (1913) 2 Ch. 574; Re Beaumont (1913) 1 Ch. 325; Re Eykyn (1877) 6 Ch. D 115; Hart (Inspector of Taxes) v. Briscoe (1978) 2 WLR 832; (1978) 1 All ER 791; Midland Bank Executor and Trustee Co. Ltd. v. Inland Revenue Commissioners (1959) 1 Ch. 277; Re Ball’s Settlement Trusts (1968) 1 WLR 899; (1968) 2 All. ER 438; Re Holt’s Settlement (1969) 1 Ch. 100.
156 Re Fraser (1913) 2 Ch. 224;
157 Section 55 of the Indian Trusts Act, 1882.
158 Section 56; Baisnab Das Sen v. Bholanath Sen AIR 1986 Cal 118.
Every person capable of holding property may be a trustee, but if the trust involves the exercise of discretion, a person not competent to contract cannot be a trustee. Therefore a government, corporation, bank, company, married woman, alien, can also be a trustee. A minor can be a trustee, if he is bare trustee, but not if he is required to exercise discretion. Executors are often appointed as trustees but a solicitor or legal adviser to a trust should not be appointed as trustee.

Under English Law, a bankrupt may be appointed a trustee, and if a trustee becomes bankrupt, the trust estate does not vest in his trustee in bankruptcy.

159 Section 10 of the Indian Trusts Act, 1882
160 Re Mason (1929) 1 Ch. 1 at p.12: Where the Crown has taken possession of the estate in the absence of any known next of kin and then has made ex-gratia grants to persons out of such estate to persons thought to have some moral claim to it, at the same time taking an indemnity in case next of kin should thereafter establish a legal claim to the estate against the Crown; Re Blake (1932) 1 Ch.54; Re Robinson (1911) 1 Ch.502.
161 Re Thompson's Settlement Trusts (1905) 1 Ch. 229.
162 Re Northcliffe's Settlement (1937) 3 All ER 804.
163 Re Thompson's Settlement Trusts (1905) 1 Ch. 229.
165 A trust deed is not unlawful simple because the trustees are of alien race and religion: Diwan Shiv Nath v. The Alliance Bank of Simla Ltd., Lahore (1914) 25 TC 480.
166 See Supra note 127.
167 Mohammad Nasim v. Muhammad Ahmed AIR 1914 Oudh 408.
168 Re Earl of Stamford (1896) 1 Ch. 288; Re Birchall (1889) 40 Ch.D. 436.
169 Keeton pp.54-55 citing Re Norris (1884) 27 Ch.D. 333; Re Earl of Stamford (1896) 1 Ch. 288; Re Marquis of Ailesbury (1893) 2 Ch. 345 at p.360.
170 Keeton cites Section 38 of Bankruptcy Act, 1914.
bankruptcy of a trustee, however, may be ground for removing a trustee, and appoint-
ing another trustee in his place.\textsuperscript{171}

Under Indian Law, when a trustee is declared insolvent, a new trustee may be appointed,\textsuperscript{172} because he is not fit to be a trustee.\textsuperscript{173} An insolvent being a necessitous man is more likely to be tempted to misappropriate trust funds than one who is wealthy; and besides a man who has not shown prudence in managing his own affairs is not likely to be successful in managing those of other people.\textsuperscript{174}

The author of the trust can be a trustee\textsuperscript{175} and a trustee may also be a beneficiary in the trust.\textsuperscript{176} But a person cannot at one end at the same time be sole trustee and sole beneficiary of commensurate legal and equitable estates in proper-

There is nothing in the Indian Trusts Act, which provides that a beneficiary shall not be appointed a trustee. He is not, as such, incapacitated from being trustee for himself and for others; but, as a general rule, he is not altogether fit person for the

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  \item Keeton G.W., \textit{The Law of Trusts}, Sir Isaac Pitman and Sons Ltd. (London) (1968) 9th Ed. p.54.
  \item Section 73 of the Indian Trusts Act, 1882.
  \item \textit{T. Krishnajee Bhatt v. Sadasiva Tawker} AIR 1927 Mad 249.
  \item \textit{A. Ramanathan Chettiar v. Kanagasabapathy Chettiar} AIR 1926 Mad 500.
  \item Donor can constitute himself trustee, and though remaining in actual possession can transfer legal possession by declaring his possession as donee's: \textit{Mahomed Bi Bi v. N.P. Sulaiman Ahmed} AIR 1926 Mad 1110 at p.1112.
  \item \textit{Burguss v. Lamb} (1809) 16 Ves.174.
  \item \textit{Habargham v. Vincent} (1793) 2 Ves. 204, 210; A man cannot be a trustee for himself: \textit{Goodright v. Wells} (1781) 2 Dong. K.B. 771; \textit{Ashidbai v. Abdulla} ILR (1907) 31 Bom. 271.
\end{itemize}
office, in consequence of the probability of a conflict between his interest and his duty.\textsuperscript{178}

A trustee who has accepted the trust cannot renounce it except with the permission of the court or by obtaining the consent and with the unanimous concurrence of all the beneficiaries.\textsuperscript{179} A trustee is free to disclaim a trust,\textsuperscript{180} but disclaim must be made within reasonable time.\textsuperscript{181} However, it cannot be partial.\textsuperscript{182} A trustee can disclaim orally or by conduct.\textsuperscript{183}

\textsuperscript{178} \textit{Ashidbai v. Abdulla Haji Mohomed} ILR (1907) 31 Bom. 271 at p.289-290; Section 3 to the Indian Trusts Act emob dies a well known rule of the courts of Equity in England which is that "a person in a fiduciary position... is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict." See per Lord Herschell in \textit{Bray v. Ford} (1896) A.C. 44 at p.51; Citing \textit{Forster v. Abraham} L.R. 17 Eq 351, Lewis says "it has never been the rule that a \textit{cestui que trust} can never be appointed as trustee, as the Court itself under special circumstances will appoint \textit{cestui que trust} to be a trust: \textit{Lewin on Trusts}, 15th Ed. p.428.

\textsuperscript{179} Section 46 of the Indian Trusts Act, 1882; A person who has once undertaken an office of a co-trustee cannot escape liability by a mere subsequent renunciation, not in accordance with the conditions laid down in Section 46: \textit{Vrandavan Bhaichand Shah v. Parshottam Moti Chand Shah} AIR 1927 Bom. 75 at p.78; A trustee acting under a trust which he knows or subsequently discovers to be void or invalid, is not bound to surrender the possession of the trust property before he can be allowed to repudiate it by giving evidence to explain away his admissions arising from his conduct as a so-called trustee: \textit{Mt. Krishna Bai v. Dhando Ram Chandra} AIR 1924 Nag 129 at p.132; See also \textit{Krishnadas Govardhandas Madivale v. Ratnabai Gokuldas Laxmandas} AIR 1941 Bom. 41.

\textsuperscript{180} Section 10 of the Indian Trusts Act, 1882.

\textsuperscript{181} Section 10 of Indian Trusts Act, 1882; \textit{Re Benett} (1906) 1 Ch. 216.

\textsuperscript{182} \textit{Re Lord and Fullerton's Contract} (1896) 1 Ch. 228.

\textsuperscript{183} Trustee never prove the will of the testator. There was no proof that he ever acted as trustee: \textit{Re Birchali} (1889) 40 Ch.D. 436; From the length of time of 30 years, trustee did nothing in the trust. It is evident that he was never intended to be trustee: \textit{Re Clout and Frewer's Contract} (1924) 2 Ch. 230; See \textit{Re Gordon} (1877) 6 Ch.D. 531.
Duties and Liabilities of the Trustees

A trustee's duties and liabilities are burdensome. He is bound to fulfil the purpose of the trust and to obey the directions of the author of the trust given at the time of its creation except as modified by the consent of all the beneficiaries being competent to contract.\(^\text{184}\) The terms of the trust deed can be modified by the court if the beneficiaries are incompetent to contract.\(^\text{185}\) A trustee is bound to acquaint himself with the nature and circumstances of the trust property\(^\text{186}\) and to take all necessary actions for the preservation of the trust property, and the assertion or protection of the title.\(^\text{187}\) But he must not for himself or for another, set up or aid any title to the trust property adverse to the interest of the beneficiary.\(^\text{188}\) He has a duty to deal with the trust property as carefully as a man of ordinary prudence would deal if it were his own.\(^\text{189}\) Where there are more beneficiaries than one, the trust is bound to be impartial and must not execute the trust for the advantage of one at the expense of another.\(^\text{190}\) He should keep clear and accurate accounts of the trust\(^\text{191}\) and invest the money in securities prescribed subject to any direction contained in the instrument of trust.\(^\text{192}\) He is liable to make good the loss which the trust property has sustained due to a breach of trust committed by him.\(^\text{193}\)

\(^{184}\) Section 11 of the Indian Trusts Act, 1882.
\(^{185}\) Section 11; The Court has power to rearrange the beneficial interests under the trust instrument and to bind infants and unborn persons: Chapman v. Chapman (1954) A.C. 429.
\(^{186}\) Section 12 of the Indian Trusts Act, 1882.
\(^{187}\) Section 13 of the Indian Trusts Act, 1882.
\(^{188}\) Section 14 of the Indian Trusts Act, 1882.
\(^{189}\) Section 15 and 16; Lucking's Will Trusts v. Lucking (1967) 3 All. ER 726.
\(^{190}\) Section 17 and 18 of the Indian Trusts Act, 1882.
\(^{191}\) Section 19; A suit by a trustee against his co-trustees for rendition of accounts is maintainable: R.S. Shri Ram Pershad v. Smt. Chhano Devi AIR 1969 Del 75 at p.77; No trustee can get discharge unless he renders accounts of his management and his liability is irrespective of any question of negligence or wilful default: Sri Vedagiri Lakshmi Narasimha Swami Temple v. Induri Pattabhirami Reddi AIR 1967 SC 781 at p.784.
\(^{192}\) Section 20 to 22 of the Indian Trusts Act, 1882.
\(^{193}\) Section 23; Bartlett v. Barclay's Bank (1979) 1 All. ER 139.
Rights and Powers of the trustees

A trustee is entitled to the possession of title deeds and to examine or settle the accounts of the trust property. He can do all acts which are reasonable and proper for the realization, protection or support of the trust property. He is entitled to reimburse himself out of the trust property, all expenses incurred in execution of the trust or realisation, preservation or benefit of the trust property. If any other person gained an advantage from a breach of trust, he must indemnify the trustee to the extent of the amount actually received by such person under the breach. He has a right to apply to the court for its opinion, advice of direction on any matter regarding the management or administration of the trust property.

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194 Section 31 of the Indian Trusts Act, 1882.
195 Section 35 of the Indian Trusts Act, 1882.
196 Section 36; Where trust property is mortgaged for raising loan required for making repairs and adding constructions to the trust property, the court’s onus of proof of necessity is on the mortgagee: Dalim Kumar Sain v. Smt. Nandarani Dassi AIR 1970 Cal 292 at p.311; B. Rajarajeswara Sethupathi Avergal v. Kuppuzwami Aiyar AIR 1921 Mad 394.
197 Section 32 of the Indian Trusts Act, 1882.
198 Section 33 of the Indian Trusts Act, 1882.
200 Section 34; Any trustee and not all trustees, only can apply to the court by making the statement of facts in good faith. Applying to the court shall be deemed to have discharged his duty as trustee: Re Muhammad Hashim Gazdar AIR 1945 Sind 81 at p.89; The limitations governing the question to be asked namely, that should be "present" i.e. not future or contingent or hypothetical: Avoch Thevar v. Chummar AIR 1957 Ker 171 p.173.
Section 34 is for the benefit and protection of the trustee. If the trustee has ignored the advice of the court, the court can refuse to give opinion if he applies again.

When an authority to deal with the trust property is given to several trustees and one of them disclaims or dies, the authority may be exercised by the remaining trustees unless it is indicated no intention to the contrary.²⁰¹ Where the execution sought by one of the decree holders who is also a co-trustee, is to be regarded in the absence of any indication to the contrary as being for the benefit of the entire body of co-trustees.²⁰²

Disabilities of the trustees

A trustee who has once accepted the trust cannot renounce it except with the permission of the Court or with the consent of the beneficiaries or by authority of trust deed.²⁰³ He cannot delegate his office or any of his duties to any one else except in certain exceptional cases.²⁰⁴ If the trust did impose upon the trustees the obligation to sell the properties of the trust at the highest price and to distribute sale proceeds amongst creditors of the author of trust but the documents of sale leaving it to the purchasers to pay the debts of creditors, is a delegation of duty.²⁰⁵ A body of trustees can, by resolution, appoint anyone of them as the managing executive trustee.

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²⁰¹ Section 44 of the Indian Trusts Act, 1882.
²⁰² Sahadeo Prasad Verma v. Dr. Raja Ram AIR 1984 All 169; The position may be different in case of the co-trustees had proceeded, to make transfer of the trust property without joining other: Man Mohan Das v. Janki Prasad AIR 1945 PC 23; L.J. Iyer v. P.M.N. Iyer AIR 1962 SC 633.
Such appointment does not amount to delegation. But the managing trustee has no power to transfer the property without concurrence of other trustees. A suit filed by one of the co-trustees on the basis of resolution passed unanimously by all other trustees authorising that trustee to file a suit would not be maintainable. Therefore, where there are more trustees than one, all must join in the execution of the trust except where the trust instrument otherwise provides. If a trustee is not exercising his discretionary power reasonably and in good faith, such power can be controlled by the court. He cannot make use of trust property for his own benefit or,

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208 It is possible for some of the trustees to authorise the others to file a suit but this could only be done by the execution of a power of attorney. It cannot be done by resolution: Duli Chand v. M/s Mahabir Parshad Trilok Chand Charitable Trust, Delhi AIR 1984 Delhi 145; Term of settlement requiring two trustees to act under one is delegation: Shri Mahadeo Jew v. Bal Krishna Vyas AIR 1952 Cal 653; Atmaram Ranchhodbhai v. Gulamhusein Gulam Mohiyaddin AIR 1973 Guj 113.
210 The term "good faith" means "due care and attention" of a reasonable and prudent man: Fatima Fauzia v. Syed-Ul-Mulk AIR 1979 AP 229.
211 Section 49 of the Indian Trusts Act, 1882.
buy, lease or acquire any interest in the trust property. Where an offer made by third person for higher price was not considered and property sold to his son, trustee did not exercise his discretion reasonably and in good faith.

A trustee has no right to remuneration for services rendered to the trust unless the trust deed provides so or there is a contract with the beneficiary or the court sanctions it.

**ASSESSMENT OF PRIVATE TRUSTS**

Trust is a legal obligation and not a legal entity as such. Only the trustees are the legal entities and legal owners of the trust property. They are the

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213 Section 52; Alienations in favour of near relative of one of the trustees are bad: *L. Janakirama Iyer v. P.M. Nilakanta Iyer* AIR 1962 SC 633.

214 Section 54; *Supra*

215 Section 53. of the Indian Trusts Act, 1882.

216 *Ramasubbier v. Manicka Narasimachari* AIR 1979 SC 671 at pp.673-4; Absence of adequate publicity and no reasonable time or opportunity to the intending purchasers is misuse of discretion by a trustee: *Fatima Fauzia v. Syed-Ul-Mulk* AIR 1979 AP 229.

217 Section 50; Annuity paid to the trustee is income arising in respect of remuneration: *Dale v. Inland Revenue Commissioners* (1953) 2 All. ER 671; Annual sum paid to trustee of settlement as remuneration for services: *Baxendale v. Murphy* 9 TC 76; Dale v. Inland Revenue Commissioner 34 TC 468 (HL). Remuneration as director of the company run by Trust: *Re Mecadam* (1945) 2 All. ER 664; Share provided under a trust deed: *Bannister v. Bannister* (1948) 2 All. ER 133; *Protheroe v. Protheroe* (1968) 1 All. ER 1111.

218 Section 3 of the Indian Trusts Act, 1882;

219 *Duli Chand v. M/s Mahabil Pershad Trilok Chand Charitable Trust, Delhi* AIR 1984 Del. 145: A trust is not like a Corporation which has a legal existence of its own and, therefore, can appoint an agent;

persons who are liable to be assessed under tax laws for the income or wealth of trust, received on behalf of or for the benefit of the beneficiaries.\textsuperscript{221}

Special provisions relating to the taxation of private trusts are contained in sections 160 to 162, 164, 164A, 165 and 166 of the Income-tax Act, 1961.

**Assessment of Family Trusts**

Sections 161, 164 and 166 read with section 160 impose a special liability on the trustees, which is known as vicarious liability,\textsuperscript{222} designed to facilitate collection of taxes.

**Trustee as a representative assessee:**

Section 160 defines representative assessee\textsuperscript{223} and enumerates five categories of representative assessees, who are assessable in respect of

\textsuperscript{221} Section 160(1)(iv) of the Income-tax Act, 1961;

\textsuperscript{222} CIT v Balwant Rai Jetha Lal Vaidya (1958) 34 ITR 187 at p.194; CIT v. HEH Mir Osman Ali Bahadur (1966) 59 ITR 666;

\textsuperscript{223} Section 160 of the Income-tax Act reads:

160. Representative Assessee : (1) For the purposes of this Act, 'representative assessee' means :-

(i) in respect of the income of a non-resident specified in sub-section (1) of section 9, the agent of the non-resident, including a person who is treated as an agent under section 163.

(ii) in respect of the income of minor, lunatic or idiot, the guardian or manager who is entitled to receive or is in receipt of such income on behalf of such minor, lunatic or idiot;

(iii) in respect of income which the Court of Wards, the Administrator General, the Official Trustee or any receiver or manager (including any person, whatever his designation, who in fact manages property on behalf of another) appointed by or under any order of a court, receives or is entitled to receive, on behalf or for the benefit of any person, such Court of Wards. administrator- General, Official Trustee, receiver or manager;

(iv) in respect of income which a trustee appointed under a trust declared by a duly executed instrument in writing whether testamentary or otherwise (including any wakf deed which is
income which does not beneficially belongs to them but belongs beneficially to another.224 Out of five, two categories are related with private trusts in the Income-tax Act. One, the Court of Wards, the Administrator General, the Official trustee,225 or any person appointed by or under any order of the court226 and the other is, a trustee appointed under a duly executed trust instrument227 or a trustee appointed under an oral trust.228 Every representative assessee shall be deemed to be assessee for the purposes of this Act.229

Liabilities of representative assessee

Section 161, which imposes a substantive liability to assessment on the representative assessee230 expressly confines the liability to the

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224 Section 160(1)(iv) and Section 161; Section 161 imposes a substantive liability to assessment on the representative assessee: CIT v. Arvind Narottam (1969) 73 ITR 490 at 495;
225 Under the Official Trustees Act, 1913, a person may be appointed as the sole trustee, who have the prescribed minimum experience as an advocate or a member of the judicial service of the State, either by a court or by the author of a private trust other than a religious trust or any trust involving the management or carrying on of any business.
226 Section 160(1)(iii) of the Income-tax Act, 1961;
227 Section 160(1)(iv) of the Income-tax Act, 1961;
228 Section 160(1)(v) of the Income-tax Act, 1961;
229 Section 160(2) of the Income-tax Act, 1961;
230 CIT v. Arvind Narottam (1969) 73 ITR 490 at p.495;
income in respect of which he is a representative assessee." Section 166 makes it clear that sections 160 and 161 are enabling sections, which imposed no statutory obligation on the Revenue to proceed only against the trustee or only against the Revenue i.e. the Department has the option to make an assessment on the representative assessee or a direct assessment on the person beneficially entitled to the income. But once the Department has availed of its option in directly assessing the beneficiary it is not open to the authority to take assessment proceedings against the representative assessee, therefore, if an assessment is made on one there can be no assessment on the other. Such income already taxed in the hands of the beneficiary should not be taken into account and included in the income even for determining the rate at which the income was liable to be taxed.

231 Section 2(24)(iv-i) of the Income-tax Act, 1961 defines "income" as including "the value of any benefit or perquisite, whether convertible into money or not, obtained by any representative assessee mentioned in clause (iii) or clause (iv) of sub-section (1) of section 160 or by any person on whose behalf or for whose benefit any income is receivable by the representative assessee and any sum paid by the representative assessee in respect of any obligation which, but for such payment, would have been payable by the beneficiary."

232 Section 161 of the Income-tax Act, 1961;


235 CIT v. Trustees of Miss Gargiben Trust (No. 1) (1981) 130 ITR 479;
Section 166 clarifies that there may be a direct assessment or a direct recovery of tax from the persons beneficially entitled to the income even though the assessment has been made on the representative assessee. Section 167 enables the Department to have the same remedies against all properties of any kind vested in or under the control or management of any representative assessee as he would have against the property of any person liable to pay any tax, and in as full and ample manner, whether the demand is raised against the representative assessee or against the beneficiary direct. The exercise of these options by the Department is not in violation of any of the fundamental rights.

The language of section 161 is mandatory: If the Department chooses to assess a representative under which the income falls, the tax must be levied only on the basis contemplated by section 161, viz., in the like manner and to the same extent as it would be leviable upon and recoverable from the person represented by him.

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236 Section 166 of the Income-tax Act, 1961; Ganesh Chandra Dhar v. CIT (1959) 35 ITR 84 at p.87.
237 Section 167 of the Income Tax Act, 1961;
238 Bawa Satya Paul Singh v. ITO (1966) 62 ITR 147 at p.154; The power of the Department to tax either the principal or the agent did not offend Art. 14 of the Constitution: Abdul Azeez Dawood Marzook v. CIT (1958) 33 ITR 154;
239 CIT v. Balwantrai Jethalal Vaidya (1958) 34 ITR 187 at p.194;
Sections 160 and 161 are not charging sections but they are machinery sections for the recovery of tax. Sections merely providing a machinery for collection of a charge, which is imposed in general terms elsewhere, cannot restrict the attachment of the charge, being "in aid" and not in "derogation of it". These sections are making the trustees liable for beneficiaries in certain cases, where the beneficiaries are difficult or impossible to get at and where the trustee acts as a conduit-pipe for the conveyance of the income to the beneficiaries.

As Viscount Cave said in *Williams v. Singer*:

"The object of the Act is to secure for the State a proportion of the profits chargeable and this end is attained (speaking generally) by the simple and effective expedient of taxing the profits where they were found if the beneficiary receives them, he is liable to be assessed upon them. If a trustee receives and controls them, he is primarily so liable."

The above said principle is equally applicable in Indian cases.

In *Hotz Trust of Simla v. CIT* where the trustees were carrying on a business, the assessment in respect of business gains were held liable to be assessed in the hands of trustees as an association of persons and not on the beneficiaries. The

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242 Section 4 and 5 of the Income-tax Act. 1961 are the charging sections


244 *The Commissioners of Inland Revenue v. Countess of Longford* 13 TC 573 at p.620; *Tischler v. Apthorpe* 2 TC 89 at p.94; *Werle & Co. v. Colquhoun* (Surveyor of Taxes) 2 TC 402;

245 *Hotz Trust of Simla v. CIT AIR* 1930 Lah. 929 at p.933; *J.V. Saldhana v. CIT AIR* 1932 Mad. 378.

246 7 TC 387 at p.411 (HL);

247 AIR 1930 Lah 929.
court held that this is the only way that the profits and gains of the business carried on by the trustees can be taxed. The court further held, "For it is obvious that, if what goes to each beneficiary every year only can be taxed, much of the income acquired by the business will altogether escape taxation, and that the income received by the beneficiaries is not the true assessable income as many of the expenses incurred by the trustees, which would be paid out before the distribution takes place, would not be admissible under the Act."\(^{248}\)

The word "trustee" under Income-tax Act, 1961, has been used in the larger sense and would include the shebait of a Hindu deity,\(^{249}\) mutawallis appointed under a valid Wakf Deed,\(^{250}\) but they are assessable for holding the property for the benefit of the beneficiaries and not the Almighty.\(^{251}\)

**Liability of the Trustee - "In like manner and to the same extent" as the person represented by him**

Section 161 imposes a liability of tax on the trustee in respect of income returned by him, whether it is derived from property held by him\(^ {252}\) or from a business.

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\(^{248}\) *Ibid.*


\(^{250}\) *Khan Bahadur M. Habibur Rehman v. CIT* (1945) 13 ITR 189; where the shares of the beneficiaries are determinate, the mutawalli should be taxed on the basis of profits falling to the share of each beneficiary and not on the footing of all the beneficiaries constituting an association of persons: *CIT v. Jamal Mohammad* (1941) 9 ITR 375 (FB); *AIR 1941 Mad. 535;*

\(^{251}\) *CIT v. Puthiya Ponmanichintakam Wakf* (1962) 44 ITR 172; *CWT v. Puthiya Ponmanichintakam Wakf* (1967) 63 ITR 787;

carried on by him or from the ownership of shares and investment in securities, which he holds on behalf of the beneficiaries. Every representative assessee is liable to pay tax in like manner and to the same extent as it would be leviable upon and recoverable from the person represented by him. The Supreme Court in *CWT v. Trustees of H.E.H. Nizam’s Family*, laid down three-fold consequences of the proposition "in like manner to the same extent." The court held, "In the first place, it follows inevitably from this proposition that there would have to be as many assessments on the trustee as there are beneficiaries with determinate and known shares, though for the sake of convenience, there may be only one assessment order specifying separately the tax due in respect of the wealth of each beneficiary. Secondly, the assessment of the trustee would have to be made in the same status as that of the beneficiary whose interest is sought to be taxed in the hands of the trustee. This was recognised and laid down by this court in *N.V. Shanmugham and Co. v. CIT*, Madras. And lastly, the amount of tax payable by the trustee would be the same as that payable by each beneficiary in respect of his beneficial interest, if he were assessed directly."
Since the liability of trustees to tax is co-extensive with that of the beneficiaries and cannot in any case by a larger or wider liability, therefore, the trustee is entitled to claim all such exemptions, deductions and abatements or entitled to claim refund or credit of advance payment of tax so paid by the beneficiary.

The trustee will not be liable to tax, if any share or part arises or accrues to a beneficiary in whose hands it is not liable to tax. Where the beneficiary is a non-resident, his trustees, who are resident, held shares in a foreign company in books of which they are registered as the owners of the shares. The dividends paid direct to the account of the beneficiary abroad. Since such income is not taxable in the hands of beneficiary, the trustees would not be chargeable either in respect thereof.

The trustee receives income pertaining to the beneficiary under an obligation to pass on that income to the beneficiary. However, in most cases, administration charges and expenses have to be met out of the trust's income and it is only the net income which reaches the beneficiary. If the income had passed directly to the

260 CIT v. Balwantrai Jethalal Vaidya (1958) 34 ITR 187;
262 IR v. John C. Dewar 16 TC 84 at p.93 (HL);
263 Vakil's Trustees v. CIT (1958) 33 ITR 517;
264 IR v. Reid's Trustees 14 TC 512 at 525; Kelly v. Rogers 19 TC 692 at p.713 (CA);
265 Williams v. Singer 7 TC 387 (HL); See also Archer-shee v. Baker 11 TC 749 (HL);
beneficiary and not under the trust through a trustee, the beneficiary would have equally to meet those outgoings, leaving a net income in his hands which for the purposes of the Income-tax Act would have been computed after reducing the gross income by the deductions admissible under the Act. It is not the income shown in the books of account of the trust as actually paid to the beneficiary after deduction of the outgoings from the income received in the hands of the trust but the real income of the trust that has to be included in the total income of the beneficiary after taking into consideration the different items of permissible deductions under the Act in relation to that income.  

Where a trust does not give the beneficiary any present beneficial right to receive the income but is wholly contingent on future events, it was held, no tax can be charged on the beneficiary as no part of such income can be the income of the beneficiary, only the trustees would be chargeable in respect of trust income.

When more than one person are beneficiaries: Status of trustees:

In *N.V. Shanmugham and Co. v. CIT*  the receivers were appointed by the court to carry on business of a dissolved firm. The erstwhile partners were acquiescing in carrying on of business by receivers and receiving from them their

266 *Mrs. Arundhati Balkrishna v. CIT* (1989) 177 ITR 275 at p.279; *IR v. John C. Dewar* 16 TC 84 at p.94 (HL); *Reid's trustees v. IR* 14 TC 306; *Hotz Trust of Simla v. CIT* AIR 1930 Lah. 929;

267 *IR v. John C. Dewar* 16 TC 84 (HL); *IR v. Blackwell* 10 TC 235;

268 *AIR 1970 SC 1707*; (1971) 81 ITR 310; (1971) 1 SCR 340;
shares of the profits earned. The real point of controversy was whether the profits earned in the business should be considered as profits earned by an "association of persons" or whether it should be considered as having been earned by individuals. The court held that "The receivers appointed by the court were merely the representatives of the real owners i.e. the erstwhile partners of the firm. The primary liability to pay the tax due was that of the real owners. The fact that there were three receivers jointly represented the real owners. The circumstance that there were three receivers was wholly irrelevant for the purpose of the assessment. There was no question of assessing the receivers as "association of persons". 269

In this case the Supreme Court establishes the important principle that the mere fact that there are joint representative assesses - e.g. co-trustees or co-receivers - will not make them assessable as an association of persons. Representative assesses take their status from the beneficiaries they represent and it is wholly immaterial whether there is one representative assesse or there are two or more of them representing the same beneficial interest or interests. 270 For instance, co-trustees would be assessable in the status of "individual" where they represent beneficiaries who are assessable separately in the status of "individual"; and, likewise, they would be assessable in the status of "association of persons" where they represent beneficiaries who constitute an association of persons. 271

269 Ibid.


271 Palkhivala, N.A. and Palkhivala B.A. The Law and Practice of Income Tax N.M. Tripathi Pvt. Ltd., Bombay, (1990) 8th ed. p.1274; Contrast; Section 168(1)(b) says "If there are more executors than one, then, as if the executors were an association of persons".
Since the liability of trustees to tax is co-extensive with that of the beneficiaries, in a case where the beneficiaries do not constitute an association of persons, joined together in producing income through their trustees, the assessment on the trustees should be made at the individual rates of tax applicable to the total income of each beneficiary in like manner and to the same extent as it would be leviable separately upon them according to their specified shares.\textsuperscript{272} However where the beneficiaries constitute an association of persons, this principle would not apply.\textsuperscript{273} Similarly, this principle is applicable where the receiver has been appointed by an order of the court,\textsuperscript{274} or where the business is carried on by the \textit{mutawalli} of a \textit{Wakf} comprising several beneficiaries.\textsuperscript{275} To constitute an association of persons\textsuperscript{276} two or more persons must join voluntarily in a common purpose or common action with the object to produce income, profits and gains.\textsuperscript{277}


\textsuperscript{273} \textit{J.N.A. Hobbs v. Deputy C.Ag. IT} (1963) 49 ITR 811; See also \textit{Kanga and Palkhivala’s The Law and Practice of Income Tax} N.M. Tripathi Pvt.Ltd., (1990) 8th ed. p.1274;


\textsuperscript{275} \textit{Khan Bahadur M. Habibur Rehman v. CIT} (1945) 13 ITR 189;

\textsuperscript{276} Section 2(31) deals with the definition of "Person".

\textsuperscript{277} \textit{CIT v. Lakshmidas Devidas} (1937) 5 ITR 548; as per Beaumont C.J. at p.589; \textit{Re Dwarakanath Harischandra Pitale} (1937) 5 ITR 716; \textit{Re B.N. Elias} (1935) 3 ITR 408; \textit{CIT v. Indira Balkrishna} (1960) 30 ITR 546 at p.551;
In *CIT v. Mrs. Moktar Begum*, a Muslim who carried on business as a sole proprietor died leaving behind his widow and seven minor children. The widow continued the business in the same name and style, on behalf of herself and of her minor children as their guardian or trustee. It was held, the widow was in receipt of income on behalf of her minor children to the extent of their shares. She will be deemed to be the representative assessee liable to be assessed as such, and hence, not in the status of an association of persons. The business profits should be assessed on the basis of the portion of assessable profits falling to the share of each beneficiary and at the individual rates of tax applicable separately to the total income of each beneficiary.

If the guardians are carrying on business inherited by the minor children, the guardians should be taxed in the same way as if the minors were being taxed in respect of their respective shares of profits. Where the income was received by the trustees on behalf of the general body of creditors, the tax should be levied on the

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278 (1986) 162 ITR 402; Decision to contrary in *CIT v. J.V. Saldhana* AIR 1932 Mad. 378: where the widow as guardian carrying on business on behalf of herself and her children from property descending to them. The Widow alone assessed for total business; *Khan Bahadur M. Habibur Rehman v. CIT* (1945) 13 ITR 189; *Executors of the Estate of Lala Shankar Shah v. CIT* (1945) 13 ITR 500; *Syed Shah Gulam Ghouse Mohiuddin v. Syed Shah Ahmad Mohiuddin Kamisul Qadri AIR 1971 SC 2184; Deccan Wine and General Stores v. CIT* (1977) 106 ITR 111 and *Harivadan Tribhovandas v. CIT* (1977) 106 ITR 494 and *Meera & Co. v. CIT* (1979) 120 ITR 564: All the three cases are wrongly decided by the courts and later on distinguished in *Pannabai v. CIT* (1985) 153 ITR 608 at pp.611, 614, 624 (FB) but left open the question of correctness of the decisions:

279 Ibid.

trustees representing for the general body of creditors.\textsuperscript{281} It is open to a settlor to constitute two or more distinct trusts by a single document. Though the corpus of the trust fund vested in the same trustees, they nonetheless held distinct and severable portions of the corpus under separate trusts, even though the division of the original corpus might be notional.\textsuperscript{282}

\textbf{Where trustee carries on business of trust}

When there was a power in the trust deed enabling the trustees to carry on business, the business so done must be taken to be the business of the trust and the business itself would be properly held under trust.\textsuperscript{283}

To supersede the tax effect of this judgement section 161(1A) was introduced by the Finance Act, 1984 to be effective from April 1, 1985. Under section 161(1A) where any income, in respect of which the trustee is liable as representative assessee, consists of, or includes, profits and gains of business, tax shall be charged on the whole of income in respect of which such person is so liable at the maximum marginal rate.\textsuperscript{284}

The only exception provided in the proviso to section 161(1A) is only in respect of a trust which fulfils the three conditions, (i) it is declared by will, (ii) it has been created exclusively for the benefit of any relative of the settlor who is dependent on the settlor for support and maintenance, (iii) it is the only trust so declared by the settlor.\textsuperscript{285}

\begin{itemize}
\item \textsuperscript{281} \textit{CIT v. Dutt's Trust, Calicut} (1942) 10 ITR 477;
\item \textsuperscript{282} \textit{CIT v. Trustees of H.E.H. The Nizam's Family Trust} (1986) 162 ITR 286;
\item \textsuperscript{283} \textit{K.T. Doctor v. CIT} (1980) 124 ITR 501;
\item \textsuperscript{284} The term "maximum marginal rate" is defined in section 2(29C) of the Income-tax Act, 1961 to mean and refer to the rate of income-tax (including surcharge of income-tax, if any) applicable in relation to the highest slab of income in case of an individual as specified in the Finance Act of the relevant year.
\item \textsuperscript{285} \textit{Proviso to Section 161(1A) of the Income-tax Act}, 1961
\end{itemize}

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According to sub-section 2 of section 161, where any person is, in respect of any income, assessable as representative assessee, he shall not, in respect of that income, be assessed under any provision of this Act.

According to section 161 (i) the representative assessee has a right to recover the entire taxes paid by him from the person whom he represents, (ii) such a representative assessee shall also have a right to retain out of any amounts payable by him to the person whom he represents an equivalent amount of the estimated tax liability. In case of any dispute as to the ascertainment of the tax liability, the same can be resolved by obtaining a certificate from the Assessing Officer who shall issue a certificate stating the amount to be retained.

Section 161(1) prescribe that tax shall be levied upon the representative assessee in like manner and to the same extent as it would be leviable upon the person represented by him.\textsuperscript{286} Section 164 mentions two exceptional cases where the above said principle is not applicable, these are :-

(i) Where the trustee does not receive income of the trust or a part thereof for the benefit of any beneficiary.\textsuperscript{287}

\textsuperscript{286} CIT v. Arvind Narrotam (1969) 73 ITR 490 at p.496;  
\textsuperscript{287} Trustees of Sahebzadas of Sarf-e-Khas Trust v. CIT (1962) 44 ITR 332; Pallavi S. Mayor v. CIT (1981) 127 ITR 701; CIT v. Hemant Mafatlal (1982) 135 ITR 768;
(ii) Where in respect of income of the trust or part thereof, the shares of
the beneficiaries are not known or are not determinate.288

In such cases, the tax is to be charged at the maximum marginal rate.289
However, tax shall be charged on the relevant income or part of relevant income as if
it were the total income of an association of persons, where -

(i) none of the beneficiaries has any other income chargeable under this
Act exceeding the maximum amount not chargeable to tax in the case of an association
of persons or is a beneficiary under any other trust; or

(ii) the relevant income or part of relevant income is receivable under the
trust declared by any person by will and such trust is the only trust so declared by him;
or

(iii) the relevant income or part of relevant income is receivable under a
trust created before the 1st day of March, 1970, by a non-testamentary instrument and
the Assessing Officer is satisfied, having regard to all the circumstances existing at the
relevant time, that the trust was created bonafide exclusively for the benefit of the

288 CIT v. Puthoya Poonmani Chintakam Wakf (1962) 44 ITR 172; Trustees of Sahibzadas of
Saraf-e-Khas Trust v. CIT (1962) 44 ITR 332; Shamsuddin Khan v. CIT (1958) 33 ITR 733;
Mahalaxmiwala v. CIT (1954) 26 ITR 177; Official Trustees of West Bengal v. CIT (1954) 26
ITR 410; Rajamannar v. CIT (1964) 51 ITR 339; CIT v. Ratanbai Mathuradas (1968) 67 ITR
504; Santimojee Bose v. CIT (1969) 74 ITR 133; Nirmala Bala Sarkar v. CIT (1969) 74 ITR
268; CIT v. Indu Bala Sen Trust (1975) 101 ITR 561; Savitabai Maganlal v. CIT (1978) 113
ITR 246; Piarelal Sakseria Family Trust v. CIT (1982) 136 ITR 583; Pramod Chand Soni Trust
ITR 367; Re The Lokamanya Tilak Jubilee National Trust Fund (1942) 10 ITR 27 (Bom.);
94 ITR 361; D.V. Anir v. CIT (1945) 13 ITR 465;

289 Section 2(29C) of the Income-tax Act, 1961 defines, "maximum marginal rate", as the rate of
income-tax (including surcharge or income-tax, if any) applicable in relation to the highest
slab of income in the case of an individual as specified in the Finance Act of the relevant year;
relatives of the settlor,\(^{290}\) or where the settlor is a Hindu Undivided Family, exclusively for the benefit of the members of such family, in circumstances where such relatives or members were mainly dependent on the settlor for their support and maintenance; or

(iv) the relevant income is receivable by the trustees on behalf of a provident fund, superannuation fund, gratuity fund, pension fund or any other fund created \textit{bonafide} by a person carrying on a business or profession exclusively for the benefit of persons employed in such business or profession.\(^{291}\)

(v) In the case of relevant income which is derived from property held under trust wholly for charitable or religious purposes or which is of the nature referred to in sub-section (4A) of section 11, tax shall be charged on such of the relevant income as is not exempt under section 11 or section 12, as if the relevant income not so exempt were the income of an association of persons.\(^{292}\)

But in a case where the whole or any part of the relevant income is not exempt under section 11 or section 12 by virtue of the provisions contained in clause (c) or clause (d) of sub-section (1) of section 13, tax shall be charged on the relevant income or part of the relevant income at the maximum marginal rate.\(^{293}\)

\(^{290}\) \textit{CIT v. Chunnilal Raichand Trust (1991) 189 ITR 631};

\(^{291}\) Proviso to Section 164(1) of the Income-tax Act, 1961

\(^{292}\) Sub-section 2 of section 164 of the Income-tax Act, 1961

\(^{293}\) Proviso to Section 164(2), where the trust is partly for charitable or religious purposes and partly for other purposes is dealt with by sub-section 3 of section 164. Inserted by the Finance Act 1984 w.e.f. 1.4.1985.
Where any income in respect of which the person is liable as representative assesse consists of, or includes, profits and gains of business, relief from the maximum marginal rate is available from the assessment year 1985-86, only if such profit and gains are receivable under a trust declared by any person by will exclusively for the benefit of any relative dependent on him for support and maintenance, and such trust is the only trust so declared by him.\textsuperscript{294}

In \textit{CIT v. Kamalini Khatau}, \textsuperscript{295} the Gujarat High Court in majority judgement observed that the income under a discretionary trust is only assessable in the hands of the representative assessee as if it were the total income of a fictional association of persons. It is not assessable in the hands of the beneficiary even if the amount is paid to the beneficiary. In the event of any part of the income of the discretionary trust being paid to the beneficiary the option is only as regards the rate at which the tax shall be charged and that too in the hands of the representative assessee only.\textsuperscript{296} It is submitted that the dissenting view expressed by Justice P.D. Desai represents the correct law.\textsuperscript{297}

\textsuperscript{294} Second Proviso to section 164(1). of the Income-tax Act, 1961
\textsuperscript{295} (1978) 112 ITR 652;
\textsuperscript{297} According to Justice P.D. Desai, the beneficiary would always be assessable in respect of income receivable or received by the trustee on his behalf, since such income must be taken to have accrued to him and would form part of his total income.
Prior to the assessment year 1971-72, in cases covered by this section, the Department had to assess the trustees at the appropriate rate or at the rate applicable to the total income of the beneficiary who actually received the trust income, whichever course resulted in a benefit to the revenue. Where a beneficiary directly assessed on a part of income, the balance of income which is not given to the beneficiary, was taxable in the hands of trustees at the rate of tax applicable to such balance. The first proviso to section 41 of the Act of 1922 provided for the maximum rate of income-tax and also for super tax at the appropriate rate in such cases. For the Assessment Years 1971-72 to 1979-80 the tax was to be charged as if the income were the total income of an association of persons, or at the rate of 65 per cent, whichever course was more beneficial to the revenue.

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300 *Official Trustee of West Bengal v. CIT* (1954) 26 ITR 410; *Vakil v. CIT* (1946) 14 ITR 298; *D.V. Arur v. CIT* (1945) 13 ITR 465; *Shamsuddin Khan v. CIT* (1958) 33 ITR 733;

Tax is liable to be imposed under section 164 where the income is receivable by the trustee on behalf of several persons who are specified but whose individual shares in the income are indeterminate or unknown. This section is not applicable where shares in the income are determinate and known.  

Section 164 is applicable in those cases where the shares of the beneficiaries are indeterminate and unknown. For instance, when no particular share is provided in the trust deed for the beneficiaries and when the entire disbursement is in the absolute discretion of the trustee, the share of the individual on whose behalf the income is received is indeterminate and unknown.

302 Official Trustee of West Bengal v. CIT (1954) 26 ITR 410; Trustees of Shebzadas of Saraf-e-Khas Trust v. CIT (1962) 44 ITR 332.

Where the trust deed is permitting the Shebait that he has discretion to alter the shares of the deities in the income from the dedicated properties, the shares of the beneficiaries would be indetermined.\(^{304}\)

If a trust was created transferring certain properties in favour of certain family deities whose shares were not defined in the deed. It was held that the deities were the owners of the properties, though the shares were not defined in the deed they were well defined in law and therefore, the income of the trust property is liable to be assessed at the rate applicable to the individual income of each of the deities.\(^{305}\) If the beneficiaries and their shares are known and determinate in the relevant year, section 164 would not apply, merely because the class of beneficiaries may vary in different years\(^{306}\) or a dispute regarding title is pending in the court.\(^{307}\)

These cases have to be read subject to Explanation I introduced in section 164 by the Finance (No. 2) Act, 1980 with effect from Assessment Year 1980-81, under which:

(i) any income in respect of which the persons mentioned in clause (iii) and clause (iv) of sub-section of section 160 are liable as representative assessee or

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\(^{304}\) *Panchanandas v. CIT* (1946) 20 ITR 57;  
\(^{307}\) *Mahamaya Darsi v. CIT* (1980) 126 ITR 748;
any part thereof shall be deemed as being not specifically receivable on behalf or for
the benefit of any one person unless the person on whose behalf or for whose benefit
such income or such part thereof is receivable during the previous year is expressly
stated in the order of the court or the instrument of trust or Wakf deed, as the case
may be, and is identifiable as such on the date of such order, instrument or deed;

(ii) the individual shares of the persons on whose behalf or for whose
benefit such income or such part thereof is received shall be deemed to be indeter-
minate or unknown unless the individual shares of the persons on whose behalf or for
whose benefit such income or such part thereof is receivable, are expressly stated in
the order of the Court or the instrument of trust or Wakf deed, as the case may be,
and are ascertainable as such on the date of such order, instrument or deed.

Assessment of Oral Trusts

An oral trust may be defined to be a trust which is not declared by a duly
executed instrument in writing (including any Wakf deed which is valid under the
Mussalman Wakf Validating Act, 1913), and which is not deemed to be a trust
declared by a duly executed instrument in writing. An oral trust is liable to be taxed
on its income at the maximum marginal rate.

But in certain circumstances, such a trust will be deemed to have ceased to be an oral trust. This happens when the trustee or trustees make out a statement in writing setting out therein the purpose or purposes of the trust, the particulars as to the trustee or trustees, the beneficiaries and forward the said statement to the concerned Assessing Officer. The last date of such intimation is 3 months from the date of declaration of the trust.

It will still be worthwhile to have private trusts having no business income, as the maximum marginal rates of taxation are not attracted. Trust is the best form for making future provision for the welfare of children, other close relatives and friends.

Further, it is submitted that in spite of the changes brought about in the provisions relating to taxation of private trusts carrying on business, such trusts still have following advantages over partnership firms\(^3\) carrying on business.

(1) Interest paid on loans given by beneficiaries will not be added back as in the case of a partner of a firm.

(2) Similarly, if a beneficiary works as an employee of the trust and is paid salary commensurate with his services, such salary will not be added back as in the case of a partnership firm. Further on such salary being received by the beneficiary from a trust, he will be entitled to all tax deductions which is not available to a partner receiving similar salary.

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\(^3\) The Position of firms before 1.4.1992.
(3) As the business income of a trust will be normally assessed at the maximum marginal rate, in respect of the share/incomes of beneficiaries who are minors, spouses, etc., the clubbing provisions of section 64 will/have any effect on such incomes.

(4) The risks of a partnership like joint and several responsibilities of each partner and the problems arising out of mutual agency will not affect a private trust carrying on a business under able and stable leadership of Trustees. Further, such trustees can be controlled through proper safeguards provided in the trust deed.

Hence, under certain circumstances it can still be rewarding to have private trusts.