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ESTATE PLANNING SERIES

Frequently Asked Questions on Trusts

IN INDIA

Creation, registration, administration and taxation of private trusts in succession planning

JULY 2026 EDITION

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A Trust is an efficient tool for estate planning and managing property, and ensuring the smooth transfer of wealth from one generation to another. A Trust is a legal arrangement where one or more persons (settlor/author) transfers property, movable (cash, shares, jewellery and other valuable items) or immovable, to another person called trustee, to hold and manage the property, for the benefit of a third party (beneficiary). There are three main parties to a Trust: (i) settlor(s), (ii) trustee(s), and (iii) beneficiary(ies).

Depending on the particular purpose, proposed beneficiary(ies) and tax considerations, the Trusts in India are broadly categorised into Public Trust and Private Trust.

1. What is a Public Trust?

A Trust created for charitable, educational, social welfare, or religious purposes etc. for the benefit of the public or a section of it. Depending on the purpose of the Public Trust, it is governed by the Charitable and Religious Trusts Act, 1920 or the Religious Endowments Act, 1863 or specific State legislations. Registered Charitable and Religious Trusts have tax benefits/exemptions under taxation laws in India. Public Trusts fall outside the purview of the Indian Trusts Act, 1882.

2. What is a Private Trust?

A Trust created for the benefit of specific, ascertained beneficiaries, typically family members. It is governed by the Indian Trusts Act, 1882 (the "Act").

FAQs regarding Private Trusts in India

1. Why constitute a Private Trust for your family?

A Private Trust for family is an effective tool for estate management where the settlor wishes the arrangement to operate during his lifetime and to continue post his death. It is particularly useful for protecting and maintaining the interests of minor children, special needs dependants or elderly parents; and also for ensuring smooth transition and/or succession of family owned businesses.

2. What are the types of Private Trust?

- Testamentary Trust: Created through settlor's Will and takes effect only after the settlor's death.
- Lifetime Trust/Inter Vivos Trust: Created and made effective during the settlor's lifetime.
- Revocable Trust: Can be revoked or altered by the settlor after creation, during his lifetime. A Revocable Trust under certain circumstances can be revoked after the demise of the settlor as provided in the Act.
- Irrevocable Trust: Cannot be revoked or altered by the settlor once created, except under certain circumstances as provided in the Act.
- Specific/Determinate Trust: Each beneficiary's share is predetermined/fixed in the Trust deed.
- Discretionary/Indeterminate Trust: Each beneficiary's share is not pre-determined/fixed in the Trust deed. The trustees have the discretion to decide the quantum and the timing of disbursement of the Trust property to the beneficiaries.

3. How is a Private Trust created?

A Private Trust is created when the settlor indicates with reasonable certainty his intention to create a Trust, the purpose of the Trust, the particulars of the trustees, the specific beneficiary or beneficiaries and the Trust property, and transfers the property to the trustees (except where the settlor is himself a trustee, or where the Trust is declared by Will).

4. What are the essentials of a Private Trust deed?

A valid Trust deed should set out the name and objects of the Trust, the particulars of the settlor, trustees and beneficiaries, and a schedule describing the Trust property with certainty. Amongst others, it must identify the beneficiaries or the class to which they belong, specify the powers, duties and remuneration of the trustees, the mode of appointment, removal and succession of trustees. The Trust deed should specify whether the Trust is revocable or irrevocable.

5. What is the minimum number of trustees?

The Act does not prescribe a minimum number of trustees, and a Private Trust may validly be constituted with a sole trustee. However, where the administration of the Trust involves the receipt and custody of money, the Act provides that the minimum number of trustees should be at least two. Since most Private Trusts involve the collection of income, the operation of a bank account and the making of disbursements towards the purpose of the Trust for the benefit of the beneficiaries, the appointment of at least two trustees is necessary.

6. What is the role of a trustee in a Trust?

The trustee has various roles in a Trust and primarily a fiduciary duty to fulfil the Trust's purpose, protect and prudently manage the Trust property for the benefit of the beneficiaries, keep accounts and inform beneficiaries, act impartially, not delegate his office, and not profit from his position.

7. Who can be a beneficiary of a Private Trust?

Every person capable of holding property may be a beneficiary including a minor.

8. Who is eligible to be appointed a trustee?

Every person capable of holding property may be appointed a trustee; however, where the Trust involves the exercise of discretion, the trustee must also be competent to contract.

9. What types of property can be settled into a Private Trust?

Both movable and immovable property may be settled into a Private Trust. Movable property includes cash, bank accounts, shares and securities, mutual funds, insurance policies, jewellery, artworks and intellectual property.

10. Can a Private Trust be revoked?

A Testamentary Trust can be revoked at any time by the settlor at his pleasure.

A Lifetime/Inter Vivos Trust is generally irrevocable except in limited circumstances: (i) where power of revocation is expressly reserved by the settlor, (ii) with the consent of all beneficiaries competent to contract, (iii) payment of the debts of the settlor of the Trust as per the Act.

11. Is registration of a Private Trust mandatory?

Registration of a Private Trust depends on the nature of the Trust property. Where immovable property is settled onto the Trust as Trust property, registration is mandatory. In case the Trust property comprises only movable property, registration is optional. However, it is recommended to also register a Trust of movable property as it ensures that the beneficiary is protected and prevents any mismanagement of the Trust property.

12. Can a person domiciled abroad be appointed a settlor?

A person domiciled abroad can be a settlor of a Trust.

13. Can a person domiciled abroad be appointed a trustee?

A person domiciled abroad is not regarded as a 'proper person' to act as a trustee under the Act. Such an appointment of a trustee domiciled abroad is not void, however the Act permits the beneficiary/beneficiaries to object to such appointment, subject to the terms of the Trust deed. Accordingly, the appointment of a person domiciled abroad as a trustee is not the prudent course.

14. Does a Trust require a permanent account number, and can it open a bank account before the deed is registered?

A Trust is a separate assessee under the income tax act and must obtain a permanent account number in its own name to open a bank account and file its returns; the application may be made as soon as the Trust deed is executed. Registration is mandatory when immovable property is settled. A movable property Trust is validly constituted on execution of the Trust deed and is optionally registrable. Practically, most banks insist on a registered Trust deed before opening an account in the name of the Trust.

15. Which authority registers a Trust Deed?

A Trust deed is registered before the sub-registrar having jurisdiction over where the immovable property transferred onto the Trust is situate. In case of movable property, a Trust deed is registered before the sub-registrar having jurisdiction over where the registered office of the Trust is situate.

Taxation of Private Trusts

Type of Trust	Who is assessed?	On whose behalf?	Who ultimately bears the tax?
Revocable Trust	Settlor/Author of the Trust.	The income arising out of the Trust property is clubbed with income of the Settlor.	Settlor, at the applicable rate.
Irrevocable Trust – Specific/Determinate (beneficiaries or their shares are ascertained; trustees have no discretion)	Trustee, as representative assessee of the Trust.	Beneficiary/Beneficiaries.	Beneficiaries, each at the applicable rate proportionate to their share in the income arising out of the Trust property.
Irrevocable Trust – Discretionary/Indeterminate (beneficiaries or their shares not ascertained; trustees have discretion)	Trustee, as a representative assessee of the Trust.	Beneficiary/Beneficiaries.	The Trust property, the tax being borne out of income from the Trust property at the maximum marginal rate.

1. Can a coparcener settle his share in the coparcenary property onto the Trust?

A coparcener may settle his ascertained share in the coparcenary property, pursuant to a partition determining and fixing his share.