The Private Wealth and Private Client Review

Tenth Edition

Editor
John Riches

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THE

Private Wealth and Private Client Review

Tenth Edition

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John Riches

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PREFACE

After the past unprecedented 24 months, it is now time to look forward to the post-pandemic world and consider the developments that will likely affect high-net-worth individuals. While (at the time of writing) life begins to resume, the after-effects of the pandemic will reach into the next decade and possibly beyond. The main political question of the day is 'Who will pay for the costs of the pandemic?' As the retail and hospitality industries were forced to close, there was a severe reduction in capacity in construction and manufacturing and high unemployment rates threatened, and governments intervened to provide stimulus packages to all areas of the economy.

The latest reports indicate that the pandemic had cost the UK government £372 billion as at 31 March 2021. [1]To put this in perspective, the total tax revenue that the UK government collected for tax year 2019–2020 was £636.7 billion.[2] Therefore, the Covid-19 bill constitutes almost 60 per cent of total tax revenue, or almost 14 per cent of the UK's GDP for 2019, and there are likely to be more costs to come.

On the other side of the Atlantic, Harvard economists David Cutler and Lawrence Summers estimate the pandemic will cost the United States at least US$16 trillion if the pandemic is largely over by autumn 2021.[3] That would comprise roughly 75 per cent of the nation's 2019 GDP, which was £21.43 trillion. Over in Europe, Germany's government estimated, in December 2020, that the pandemic would cost the country €1.3 trillion, almost 33 per cent of the country's 2019 GDP.[4]

For the rest of the 2020s, the aim for governments will be to generate higher revenues to pay off this borrowing, while continuing to stimulate the economy through fiscal interventions such as keeping interest rates low and government spending. Generating higher revenues will pose a challenge, as the pandemic has worsened inequality and had the greatest impact on individuals with low incomes.[5] Meanwhile, many high-net-worth individuals have benefited financially from the pandemic.[6] Not since the end of the Second World War have the tongues of rumour wagged so much or so loudly on the subject of wealth taxes.

1 https://www.nao.org.uk/covid-19/cost-tracker/.
2 https://www.nao.org.uk/work-in-progress/the-management-of-debt-owed-to-hmrc/
3 https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7604733/.
4 https://www.dw.com/en/coronavirus-germany-faces-13-trillion-covid-bill/a-56103251.
5 https://www.ft.com/content/cd075d91-fafa-47c8-a295-85bbd7a36b50.
6 https://www.ft.com/content/747a76dd-f018-4d0d-a9f3-4069bf2f5a93.

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As the introduction to the UK's Wealth Tax Commission[7] Report[8] points out, the concept of a one-off levy during a time of financial crisis is not a novel one in many countries, including the UK. In 1981, during recession, Conservative Prime Minister Margaret Thatcher's government introduced a tax on banks, which raised about £400 million. In 1997, Labour Prime Minister Tony Blair's government imposed a tax on privatised utility companies, and raised £5 billion.

The OECD report on Wealth Taxes notes that in 1990, 12 countries had wealth taxes, but since then many countries have repealed the tax and now only four countries currently tax the net wealth of their residents annually.[9] Only three European countries currently have a general wealth tax, being Norway, Spain and Switzerland. The Norwegian tax is on net wealth where a resident owns more than 5 million kroner in worldwide assets. The Swiss tax is levied on worldwide assets, with the exception of immovable property abroad. The tax rates vary from canton to canton. The Spanish wealth tax progresses from 0.2 to 3.75 per cent where the individual holds assets above €700,000. Individuals living in Madrid are exempt from the tax.

Argentina was the first country to implement a wealth tax in response to the pandemic at the end of 2020 in the Solidarity and Extraordinary Contribution of Great Fortunes Law. The levy is a one-off, payable by those whose assets total 200 million pesos. The rate of the tax is progressive, with Argentinian assets taxed up to 3.5 per cent and worldwide assets taxed up to 5.25 per cent. The tax has raised roughly 223 billion pesos. This amounts to about half a per cent of Argentina's GDP[10] and 75 per cent of the government's target amount of the tax to be raised.

All taxes are wealth taxes to some degree, be they income tax, capital gains tax, value added tax, inheritance tax or corporation tax. However, these taxes are taxes on transfers of wealth, on dispositions of wealth and on accumulations of wealth rather than a tax on all the assets an individual holds on a particular date.

So if governments are to bring in wealth taxes, what might they look like? The UK Wealth Tax Report advocates a one-off wealth tax as being more effective than an annual one.[11] A one-off wealth tax is much harder for taxpayers to avoid as the date of assessment of the individual's wealth can be announced at the same time as the tax itself. Furthermore, a one-off tax does not distort taxpayers' behaviour or disincentivise taxpayers from working, investing or even being resident in the country. The report recommends that it should be possible to pay the tax in instalments to assist those who hold mainly illiquid assets, such as residential property, from having to sell in order to pay the tax. It also recommends that the tax should be levied on individuals' net wealth, that is, after deduction of debts and liabilities, and that jointly held assets should be apportioned between owners. The report then goes on to estimate that such a tax on the net assets of UK residents above £500,000 could, at 1 per cent per annum for five years, raise £260 billion. If levied on net assets above £2 million, it could raise £80 billion.

7 Although the title makes the Commission sound official, it was not a government report but rather one in which the London School of Economics played a central role.

8 https://www.wealthandpolicy.com/wp/WealthTaxFinalReport.pdf.

9 https://www.oecd.org/tax/tax-policy/role-and-design-of-net-wealth-taxes-in-the-OECD-summary.pdf.

10 https://www.bloomberg.com/news/articles/2021-05-03/argentina-wealth-tax-fought-by-millionaires-raises-2-4-billion.

11 https://www.wealthandpolicy.com/wp/WealthTaxFinalReport.pdf.

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Meanwhile, a European study developed in partnership with the Karl Renner Institute and the Austrian Federal Chamber of Labour advocates a pan-European wealth tax as well.[12] The argument for a pan-European tax is that it would be much harder for individuals to avoid, unless they became resident outside of Europe altogether. Within the 22 European countries, the richest 1 per cent of individuals hold 32 per cent of European wealth whereas the poorest 50 per cent of individuals hold 4.5 per cent between them. The report finds that a 2 per cent tax on individuals who hold net assets above €1 million would only tax 3 per cent of the population and would likely raise revenues in the region of €192 billion, accounting for some evasion. A very progressive tax rate with a rate of 10 per cent above assets of €500 million could raise in the region of €357 billion, which equates to 3 per cent of European GDP.

In the United States, there is a similar wealth disparity. The richest 10 per cent of Americans hold just under 70 per cent of US wealth.[13] The *Financial Times* reported in February 2021 that a one-off 5 per cent tax on the richest 10 per cent would raise US$4 trillion, amounting to 19 per cent of the US's GDP. Democrat Elizabeth Warren advocates for an 'ultra-millionaire tax' at 2 per cent above US$50 million and 6 per cent above US$1 billion. It is estimated that this would bring in revenues of US$3.75 trillion over 10 years.[14]

As well as introducing a new wealth tax, there are also calls for changes to existing taxes. The OECD recently published a study on inheritance taxation in OECD countries, which notes that the inheritance tax bases in many countries have been narrowed due to exemptions and reliefs.[15] Making estate and gift taxes more rigorous would not only raise revenue but also reduce wealth inequality through intra-generational transfers. The report also notes that, with many countries having ageing populations, there is a disparity between wealthy older generations and poorer younger generations. On average, inheritance tax revenues equate to only 0.5 per cent of the total tax revenues in most OECD countries, with only Belgium, France, Japan and South Korea collecting 1 per cent of total tax revenues from inheritance taxes.[16]

Within the 38 member countries of the OECD, 24 tax assets that are passed on the death of the owner. Interestingly, the majority of these countries tax on the basis of the value the recipient receives. Only four countries, being the US, the UK, South Korea and Denmark, tax on the basis of the value of the deceased's estate. US President Biden is attempting to push through a reduction in the lifetime gift and estate allowance from US$11.7 million to US $3.5 million, as well as to increase the top tax rate to 45 per cent up from 40 per cent.

The UK has no tax on outright lifetime gifts between individuals, but the threshold for gifts the deceased makes in the last seven years of life and through his or her estate is £325,000. However, many individuals can circumvent this through making lifetime gifts outside the seven-year window with no tax implications. However, the OECD report suggests that capturing lifetime gifts in the tax base, as well as reducing exemptions and reliefs, would make inheritance taxes more effective as well.

12 https://www.feps-europe.eu/attachments/publications/a%20european%20wealth%20tax_policy%20study.pdf.

13 https://www.ft.com/content/0952761a-f565-46be-a515-12659551169a.

14 https://elizabethwarren.com/plans/ultra-millionaire-tax,

15 OECD (2021), Inheritance Taxation in OECD Countries, OECD Tax Policy Studies, OECD Publishing, Paris, https://doi.org/10.1787/e2879a7d-en.

16 ibid, p. 5.

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One separate non-pandemic rationale that has been advanced in the UK to support estate and gift tax reform is the theme of 'inter-generational fairness'. A report published by the All – Parliamentary Group in early 2020[17] advocated replacing the current UK donor-based tax regime with one based on a donee-based tax where every donee was given a lifetime exemption. Gifts in excess of that exemption would attract a 10 per cent flat tax rate. The preference for a donor-based system was in part fuelled by a desire to encourage donors to make gifts to their grandchildren as well as their children. It is unclear whether this approach will find favour with the government.

Meanwhile, despite the pandemic, transparency and automatic information exchange initiatives, which formed the main subject of my forewords in earlier years, have been progressing apace. Where high-net-worth individuals are taking advantage of technological advancements and easier remote working, and spending more time in different countries, they may become tax resident in multiple jurisdictions and, if not, at least reportable under measures such as those of the Financial Action Task Force, the Common Reporting Standard (CRS) and the sixth version of the EU Directive on administrative cooperation (DAC6). Indeed, the CRS FAQs were updated to advise financial institutions that where an individual's interests are split between multiple jurisdictions, the account can be 'reported to all Reportable jurisdictions where there is a residence address'.[18] In this case, the individual will be reported to more tax authorities and perhaps subject to a higher degree of scrutiny than before.

Individuals are already facing enquiries from tax authorities as a result of the information exchanged between different countries. Currently, many enquiries are merely requesting further information, but it may be that in the near future countries will begin to adapt and modulate taxation regimes on the strength of this information. The introduction of the DAC6 legislation across the European Union will also provide a plethora of information to tax authorities and governments about arrangements that are not currently caught by the CRS.

Finally, the US is currently pursuing a global minimum corporation tax rate, which was pitched at 21 per cent before dropping to 15 per cent. Given high budget deficits and the need for increased revenue, governments are going to be even more reluctant to allow multinational corporations to avoid paying taxes in the countries in which they achieved their revenue. The oft-maligned Amazon, for example, made a record €44 billion in Europe in 2020, and yet paid no tax as the Luxembourg headquarters made a €1.2 billion loss.[19]

However governments end up dealing with the large debts that have been created, the rate of change, be it to tax rules or to disclosure obligations, continues to increase exponentially. What is clear is the need to keep a clear view of the road ahead so that our high-net-worth individual clients and their structures can adapt to the changing landscape.

John Riches
RMW Law LLP
London
August 2021

17 https://www.step.org/system/files/media/files/2020-05/STEPReform_of_inheritance_tax_report_012020.pdf.

18 https://www.oecd.org/tax/exchange-of-tax-information/CRS-related-FAQs.pdf, Sections II-VII: Due Diligence Requirements, FAQ 3.

19 https://www.theguardian.com/technology/2021/may/04/amazon-sales-income-europe-corporation-tax-luxembourg.

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Chapter 18

INDIA

Radhika Gaggar and Shaishavi Kadakia[1]

I INTRODUCTION

2021 marks 30 years of the watershed event in India's recent economic history: the liberalisation of the economy in 1991.

1991 represented a significant philosophical departure from the traditional ideals of Nehruvian socialism and protectionism, paving the way towards a greater embrace of the free market. The erstwhile partially closed economy has since been opened gradually through steady reforms undertaken by successive governments. As though a magic wand had been waved on the Indian economy, it has boomed post-liberalisation, witnessing significant wealth development in only a couple of generations. India now possesses the sixth-largest economy in the world, the world's third-highest number of billionaires and the world's 12th highest number of millionaires.[2] While the covid-19 pandemic has impaired the growth of GDP, it has made the super-rich wealthier.

Notably, most of India's wealthiest people are promoters of family businesses who have benefited from post-1991 reforms. Many of these are now at the cusp of succession, with considerable wealth expected to transition to the next generation in the coming decade.

It is not only old money that is propelling the Indian economy, however. The new wave is being led by a mushrooming of startups, incubated within India's burgeoning tech ecosystem. It is estimated that there are over 100 unicorns and soonicorns, with combined valuations far exceeding US$100 billion, making India their third-largest hub after the US and China.[3]

As a direct consequence of this evolution of wealth, wealth planning and the use of trusts has grown steadily in terms of size, number, complexity and sophistication.

1 Radhika Gaggar and Shaishavi Kadakia are partners at Cyril Amarchand Mangaldas. The authors were assisted by Arvind Velu, senior associate and Pratyush Khanna, associate, at Cyril Amarchand Mangaldas.

2 'India to become fifth-largest economy in 2025: think tank', *The Hindu*, 27 December 2020, available at https://www.thehindu.com/business/Economy/india-to-become-fifth-largest-economy-in-2025-think-tank/article33426843.ece (last accessed on 22 June 2021); 'India has world's 3rd highest number of billionaires, says Forbes report', *The Hindu*, 7 April 2021, available at https://www.thehindu.com/business/india-has-worlds-3rd-highest-number-of-billionaires-says-forbes-report/article34261374.ece (last accessed on 22 June 2021); 'Ranked: The 19 countries with the most millionaires', *Business Insider India*, available at https://www.businessinsider.in/finance/ranked-the-19-countries-with-the-most-millionaires/slidelist/53281526.cms (last accessed on 22 June 2021).

3 'India home to 100 unicorns with a combined m-cap of $240bn: Credit Suisse', *Business Standard*, 23 March 2021, available at https://www.business-standard.com/article/markets/india-home-to-100-unicorns-with-a-combined-m-cap-of-240bn-credit-suisse-121032300380_1.html (last accessed on 22 June 2021).

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On the other hand, while migration from India has been a steady phenomenon over many decades now, the pandemic has also escalated the departure of high-net-worth individuals on account of various socioeconomic reasons. As India does not offer dual citizenship, many Indians moving abroad have surrendered their passport and obtained foreign citizenship – a figure that has exceeded half a million since 2015.[4] Owing to this, the wealth industry in India has seen the rise of a special class of clients: the 'global Indian'. By some estimates, the Indian diaspora comprises 18 million individuals worldwide, an incredible figure that eclipses the population of over 150 jurisdictions.[5] That said, India's complex tax and exchange control regulations remain a roadblock for free cross-border movement, and advising clients on navigating these rules remains a vital part of the Indian private client adviser's role.

II TAX

i Taxation principles

In India, the personal taxation regime is governed by the Income-tax Act, 1961 (ITA). Generally, the principle adopted is that Indian residents, including both Indian citizens and foreign nationals, are taxed on their worldwide income. In contrast, non-resident individuals are taxed only on such income that accrues, arises, is received, or is deemed to be so, in India. Under the ITA, residence-based as well as source-based approaches are followed to tax individuals.

Taxation based on residence

The residential status of a person in India is determined on the basis of his or her physical presence in the country. Under the ITA, individuals are deemed to be a resident in India if they were present in India for at least 182 days during a financial year, or at least 60 days during a financial year and at least 365 days during the previous four financial years.

The period of 60 days in the residency test above will be regarded as 182 days in the case of a citizen of India who leaves India for employment outside India; or a citizen of India or a person of Indian origin (PIO) residing abroad who visits India. However, where the total income (excluding foreign source income) of such Indian citizen or PIO exceeds 1.5 million rupees, then a period of 120 days will apply instead of the 60 or 182-day periods.

There is also an intermediate category of individuals who are resident but not ordinarily resident (RNOR). RNOR are taxed akin to residents, except that their income that accrues or arises outside India is only taxable in India if derived from a business controlled, or a profession set up, in India. A resident individual may qualify as RNOR if he or she satisfies certain residency period tests as set out in the ITA.

Domicile and citizenship are not relevant for determining tax liability in India. However, vide an amendment introduced in the ITA through the Finance Act, 2020, an Indian citizen would be deemed to be an Indian tax resident if such individual is not liable

4 'Over 6.76 lakh Indians gave up Indian citizenship in 5 years', *Economic Times*, 9 February 2021, available at https://economictimes.indiatimes.com/news/politics-and-nation/over-6-76-lakh-indians-gave-up-indian-citizenship-in-5-years/articleshow/80770630.cms?from=mdr (last accessed on 22 June 2021).

5 'At 18 million, India has the world's largest diaspora population', *The Economic Times*, 15 January 2021, available at https://economictimes.indiatimes.com/nri/migrate/at-18-million-india-has-the-worlds-largest-diaspora-population/articleshow/80290768.cms?from=mdr (last accessed on 21 June 2021); https://data.worldbank.org/indicator/SP .POP .TOTL?most_recent_value_desc=false.

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to tax in any other country or territory by reason of his or her domicile or residency or any other criteria of similar nature, irrespective of whether the tests of residence as set out above are met. These deemed residency provisions apply only to those Indian citizens whose total income (excluding foreign source income) exceeds 1.5 million rupees. Further, vide a subsequent amendment,[6] the said provision of deemed tax residence was made inapplicable to an individual who was an Indian resident in the previous year.

Taxation based on source of income

The taxation regime in India is also dependent on the place where the income originates or is deemed to have originated. In this regard, the guiding rule followed is that the income that directly or indirectly accrues or arises in India is taxable in India.

Relaxations on account of the pandemic

To provide relief to taxpayers who had to extend their stay in India as a consequence of the covid-19 pandemic, the Central Board for Direct Taxes (CBDT) issued a circular on 8 May 2020 exempting certain days of the financial year ending 31 March 2020 (as set out in the circular) to determine a taxpayer's residential status.[7] Although sought and expected, no other tax residency relaxations due to the pandemic have been announced. Instead, on 3 March 2021 the CBDT released another circular stating that in view of the provisions of the domestic income tax law read with double taxation avoidance agreements (DTAAs), there does not appear a possibility of double taxation of the income for previous year 2020–21 (for this, the CBDT relied on the OECD's Policy Responses to Coronavirus (Covid-19) dated 3 April 2020);[8] however, if any individual was facing double taxation for an extended stay in India owing to covid-19 restrictions, then they may submit the requisite information to have the residency rules relaxed at the discretion of the tax authorities based on the information furnished.[9] Thus, relaxation would be offered on a case-by-case basis.

ii Developments: gift and succession tax

Succession tax

Before its repeal in 1985, estate duty was charged in India under the Estate Duty Act, 1953. India does not currently impose a succession or inheritance tax or estate duty; nor is there an official proposal under consideration to introduce it.

Gift tax

Gift tax was imposed under the Gift Tax Act, 1958 but abolished in 1998. That said, a form of gift tax was introduced as part of the income tax regime in the ITA in 2004. In its present form, this deemed gift tax is levied on receipt of a sum of money or certain types of property, either without consideration or at an undervalue. The difference between the fair value of the property and the consideration, if any, is subject to income tax in the hands of the recipient.

6 Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act, 2020.
7 Circular No. 11/2020 issued on 8 May 2020.
8 OECD Secretariat analysis of tax treaties and the impact of COVID-19 crisis, OECD, 3 April 2020, available at https://www.oecd.org/coronavirus/policy-responses/oecd-secretariat-analysis-of-tax-treaties-and-the-impact-of-the-covid-19-crisis-947dcb01/ (last accessed on 21 June 2021).
9 Circular No. 2/2021 issued on 3 March 2021.

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However, transfers in specific situations are exempt – including a gift to an individual from a specified relative, under a will, or on marriage. As regards trusts, an exception is available for transfers made to trusts created solely for the benefit of specified relatives.

In an order passed in December 2020, the Madras High Court has held that a contribution received by the trustees of a private discretionary trust without consideration, for the benefit of individual beneficiaries (in that case, employees and officers of the settlor company), is taxable under the above gift tax provision.[10] Notably, this ruling was rendered in the context of the provision applicable prior to 2016–17, which provided for taxation in the hands of only individuals and Hindu undivided families (HUFs); the High Court held that the status of trustees would be determined with reference to the status of beneficiaries and therefore – in the facts of that case – the trustee would be taxed as an individual.

iii Issues relating to cross-border structuring

India's tax treaties and agreements

India has an expansive network of tax treaties entered into with various jurisdictions. In June 2019, the government ratified the multilateral instrument to implement tax treaty related measures to prevent base erosion and profit shifting (MLI). While the general applicability of the MLI for India's tax treaties commenced from 1 April 2020, tax treaties with certain jurisdictions, including the US, Germany and Mauritius, are not currently impacted by the MLI.

Over the past few years, a notable development in India's treaty framework has been the amendment of the Singapore, Mauritius and Cyprus DTAAs to remove exemptions on taxation of capital gains arising from the sale of shares of Indian companies, except grandfathered acquisitions made prior to 1 April 2017 (under the Singapore and Mauritius agreements). The agreement with the Netherlands, which remains a key source of foreign investment in India, has however not been similarly amended.

Treatment of beneficial interest in overseas discretionary trusts

There has been an increasing interest in the creation of offshore trusts for assets located outside India by non-residents, with Indian residents as beneficiaries. These trusts are typically sought to be structured as discretionary trusts. Questions often arise regarding whether the income or corpus of such trusts would be taxed in India in the hands of the beneficiary.

In this connection, the Mumbai bench of the Income Tax Appellate Tribunal (ITAT) has recently passed a significant ruling.[11] The ITAT has held that the corpus of an offshore discretionary trust (in that case, a Guernsey trust) could not be considered as part of the beneficiary's wealth as, in a discretionary trust, the beneficiary had no vested right in the corpus but merely a hope of receiving his share if the trustee exercised its discretion in favour of the beneficiary. The ITAT also rejected the revenue authorities' contention that the beneficiary was the owner of the trust's assets since he exercised ultimate control by virtue of the power to appoint or remove the trustee. While rendered in the context of the Wealth Tax Act (now abolished), this ruling sets out general principles that ought to be relevant even in the context of the ITA.

10 *The Commissioner of Income Tax, Chennai v. Shriram Ownership Trust*, [2021] 430 ITR 356 (Mad).
11 *Yashovardhan Birla v. DCWT, WTA* No. 02 to 08/Mum/2020.

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iv Regulatory issues relevant to high-net-worth individuals

Some years ago, India enacted the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 (BM Act), a piece of legislation introduced to curb 'black money', that is, undisclosed foreign income and assets. The BM Act grants far-reaching powers to the authorities, both in terms of investigation and taking cognisance (including that of assets acquired decades ago that have now come to the notice of the tax authorities). It is understood that the Indian tax authorities have served over 400 notices to taxpayers under the BM Act to date and proceedings have commenced in some cases.[12] Many of these are on the basis of information acquired by tax authorities under automatic information exchange pacts with other jurisdictions. Private client practitioners and wealth advisers will follow these proceedings with interest, in particular to examine how the tax authorities interpret the BM Act in the context of undisclosed beneficial interests in offshore trusts.

v Issues impacting entrepreneurs as holders of active business interests

Super-rich surcharge

A surcharge is a form of a 'tax' levied on a 'tax'. Before 2019, a surcharge of 15 per cent was applicable for individuals earning more than 10 million rupees. In 2019, two additional surcharge rates of 25 and 37per cent were introduced for individuals earning in excess of 20 million rupees and 50 million rupees, respectively. This surcharge has also been referred to as a 'super-rich' surcharge and has resulted in taxation rates for individuals in the highest tax bracket reaching 42.74 per cent (other than in respect of capital gains).

Abolition of dividend distribution tax

Private trusts in India are often created by business families to hold and consolidate their holdings in their business entities. A key source of income of such trusts is dividends distributed by the underlying company. Prior to 1 April 2020, Indian companies were required to pay a total dividend distribution tax (DDT) of 20.56 per cent (including surcharge and cess) on the dividends it paid to its shareholders; this tax was levied at the company level and not that of the shareholders. However, with effect from 1 April 2020, DDT has been abolished such that the dividends paid by Indian companies are now taxable in the hands of their shareholders. Therefore, high-net-worth individuals and trusts who stand in the highest tax bracket (42.74 per cent, including surcharge and cess) have seen their tax liability on dividends increase substantially.

Amendments to stamp duty provisions

Stamp duty is levied in India on certain instruments. Prior to 2020, stamp duty was not payable on transfer of dematerialised securities (although it was payable on transfer of physical securities). Since 2020, the Indian Stamp Act, 1899 has been amended such that stamp duty is also now payable on transfer of dematerialised as well as physical securities (at a flat nominal rate of 0.015 per cent). However, no stamp duty is levied currently on transfer of securities by way of gift or inheritance.

12 'I-T Dept. has served notices in over 400 cases under anti-black money law', *The Hindu*, 3 March 2020, available at https://www.thehindu.com/news/national/i-t-dept-has-served-notices-in-over-400-cases-under-anti-black-money-law/article30965521.ece (last accessed on 21 June 2021).

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III SUCCESSION

i Introduction to succession law

Personal laws in India

India consists of a religiously diverse demographic with different religious practices deeply intertwined into law through either legal recognition of faith-specific practices or codification of religious practices. In some instances, jurisprudence has evolved through custom as well. As a result, there is a multitude of complex rules on personal matters applicable across the country; to determine what rules would apply to a person, one would typically have to examine not only his or her religion, but also his or her sect or sub-sect, gender and, in some cases, the religion of his or her spouse.

The law of succession is one such personal matter with a myriad set of rules. Broadly, the Hindu Succession Act, 1956 provides for intestate succession and related matters, and its applicability is limited to persons of the Hindu, Buddhist, Sikh and Jain faiths. Principles of ancient Hindu law continue to be relevant for some aspects relating to HUFs. Similarly, uncodified Muslim (shariah) laws and customs govern succession to the estate of persons practising Islam. The Indian Succession Act, 1925 (ISA) provides for intestate succession of all other persons including those professing Christianity and Zoroastranism. To add to the complexity, if a person's marriage is solemnised under the Special Marriage Act, 1954, then the ISA applies to the succession of such person's estate instead of personal laws. The ISA also covers testamentary succession for individuals of most religions.

The exception to the above is the state of Goa (an erstwhile Portuguese colony) in which the Portuguese Civil Code of 1867 applies to Goan domiciles.

HUF status

HUFs are institutions unique to Hindu jurisprudence, having their origins in ancient texts and writings. A HUF is a body of members (called coparceners) belonging to the same family line through which the family members jointly hold properties or conduct businesses. As HUFs often engage in various trading and business activities, they possess a legal entity status for taxation, separate from their members. However, over the years, the popularity of HUFs has declined. This is on account of families employing more formal corporate structures, the rigidity of HUFs and personal law reforms. In 2018, the Law Commission of India also recommended their abolition.[13] Despite their reduced popularity, HUFs remain relevant as they exist across the country and continue to hold considerable wealth.

ii Key changes affecting succession

The laws of succession have remained largely static in India over many years, except for certain significant changes to the regime applicable to HUFs (discussed below). The development of jurisprudence has occurred mainly through multiple landmark judgments of the Supreme Court and high courts over the years.

13 Consultation Paper on Reform of Family Law, Law Commission of India, 31 August 2018, at page 131.

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HUFs: daughters have equal rights

As per traditional Hindu law, only male heirs had a right in HUF, coparcenary or ancestral property. This position continued when the traditional law was codified under the Hindu Succession Act, 1956. In 2005, however, the law was amended prospectively to provide female heirs a right to a share in HUF or coparcenary property at birth, in the same manner as a male heir. Nevertheless, there was ambiguity with respect to the right of female heirs who were born, and whose father had passed away, before the said amendment. In 2020, in a landmark decision, the Supreme Court of India clarified and concluded that the right of female heirs as granted by the amendment was to be applied retrospectively, thereby ensuring that female heirs who were born pre-2005 enjoy the same rights to coparcenary property as their male counterparts, irrespective of whether their father was alive on such date or not.[14] Although relevant only to a small class of Hindu women born before 2005 with family interests in HUF assets, this judgment is significant in that it makes a strong statement in favour of female equality.

Digital wills: not yet

The covid-19 pandemic has led to multiple jurisdictions amending or relaxing laws on the execution of wills to permit digital execution or digital witnessing of wills. Unfortunately, no developments in this regard have been undertaken in India, and the regime as it stands today still requires execution of wills in physical format in the personal presence of witnesses.

iii Relevant cross-border developments

Succession

Indian exchange control regulations generally recognise succession in favour of non-resident persons, and typically the approach of the regulations as well as regulators has been favourable to cross-border inheritance of assets.

Exchange of information

India was one of the early adopters of the OECD Common Reporting Standard (CRS). India became a signatory to the Common Reporting Standard Multilateral Competent Authority Agreement (CRS MCAA) in 2015, and agreed to exchange prescribed information with CRS MCAA-compliant jurisdictions from September 2017 onwards. As of 2021, India has activated up to 96 exchange relationships with various jurisdictions including Switzerland, the United Kingdom, Singapore, the United Arab Emirates and Canada. The next set of information exchanges under the CRS MCAA are slated to take place in September 2021.[15]

India has also entered into an inter-government reciprocal agreement with the US to exchange financial information required under the Foreign Account Tax Compliance Act (FATCA), in 2015.

Adequate legislative amendments to the ITA have been passed to incorporate enabling provisions to honour exchange of information commitments under the CRS and FATCA.

14 *Vineeta Sharma v. Rakesh Sharma and Others*, [2020] 9 SCC 1.

15 Automatic Exchange of Information (AEOI), Income Tax Department, Government of India, available at https://www.incometaxindia.gov.in/Pages/eoi/automatic-exchange-of-information.aspx (last accessed on 22 June 2021).

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iv Applicable changes affecting personal property

Same-sex relationships

Prior to 2018, same-sex relationships were treated as criminal offences under the Indian Penal Code, 1860. In 2018, the Supreme Court held that certain aspects of this law were unconstitutional, thereby effectively decriminalising relationships between consenting adults.[16] While some have viewed this as the first step towards the recognition of same-sex marriages, no legislative steps in this regard have been taken yet. Therefore, persons in same-sex relationships, as with persons in heterosexual relationships outside marriage, do not yet enjoy any of the legal benefits, rights or support available to married spouses.

Pre-nuptial agreements

Indian laws do not expressly provide for pre-nuptial agreements, save for the Portuguese Civil Code applicable in Goa. Under Hindu personal laws, a marriage is viewed as a sacrament and not as a contract; this renders invalid the execution of a pre-nuptial agreement by persons marrying under Hindu laws.

IV WEALTH STRUCTURING AND REGULATION

i Commonly used vehicles for wealth structuring

Companies and private trusts are the most popular vehicles for wealth structuring in India. Traditional forms such as partnership firms and HUFs are employed occasionally, but increasingly in fewer structures. Limited liability partnerships, a hybrid between a company and partnership firm, may also be used in certain structures. Foundations are not recognised in India.

ii Typical advantages and disadvantages to personal ownership or control

Companies are the most prevalent vehicles for both operating and holding entities, primarily because they offer all of the advantages of corporatisation including perpetual succession and limited liability. Increasingly, however, high-net-worth individuals and families are choosing to create private trusts to hold their shareholding in the underlying operating or holding company to avail of the multiple advantages that trusts offer over personal ownership, being, inter alia, consolidation and lack of fragmentation, the ability to create dynastic holdings, flexibility, limited ring-fencing, ease of transmission (no requirement for probate), confidentiality, and protection of minors and dependents.

The primary disadvantage of using a trust structure over personal ownership is renunciation of control, but elements of control and checks and balances may still be made available through protective mechanisms such as certain reserved powers or the appointment of a protector.

Unlike in the case of other entities, trust disputes are not arbitrable and must be adjudicated by court-based procedures (as per a ruling of the Supreme Court in 2016[17]).

16 *Navtej Singh Johar and others v. Union of India* [2018] 10 SCC 1.

17 *Shri Vimal Kishor Shah & Ors v. Mr Jayesh Dinesh Shah & Ors*, 2016 (8) SCALE 116.

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iii Legal treatment of trusts

Private trusts are governed by the Indian Trusts Act, 1882, a piece of legislation that has not been updated to adapt to developments in trust structures. Nonetheless, the lack of rigid legislation has meant that the Indian trust has evolved into a flexible and versatile structure. That said, the jurisprudence regarding trusts is still evolving, and given their ubiquity in contemporary commercial structures, it is expected that the regime will evolve at a much quicker pace than it has done over the past 130 years. Indian jurisprudence also permits principles of English common law to be used to fill gaps in the trust regime as 'rules of justice, equity and good conscience'.

Apart from the principles of trust law, exchange control regulations play a key role in trust structuring if a cross-border element is involved in the structure. This could be on account of a non-resident feature (settlor, trustee, beneficiary or protector) or offshore assets.

The exchange control regime is set out in the Foreign Exchange Management Act, 1999 (FEMA) and rules and regulations thereunder. While the FEMA regime does not expressly permit it, Indian residents may explore the creation of offshore structures by utilising the liberalised remittance scheme (LRS), which permits an Indian resident to remit up to US$250,000 outside India in every financial year. There have been no major changes to the LRS regime in recent years.

The policy for foreign direct investment (FDI) in India issued by the government expressly prohibits FDI in trusts. Owing to the general lack of clarity under FEMA with respect to trusts, each structure typically must be scrutinised, on a case-by-case basis, for compliance with FEMA.

iv Taxation of trusts

The taxation of trusts depends on their nature. The income of a revocable trust is taxed in the hands of the settlor at tax rates applicable to the settlor. If the trust is irrevocable and:

a determinate (i.e., the beneficiaries' shares are determinable from the trust deed), the share falling to each beneficiary will be assessed in the hands of trustee as a 'representative assessee' or in the hands of the beneficiary, and tax will be levied at the rate applicable to the total income of each beneficiary; or

b discretionary (i.e., shares of beneficiaries is not determinable), the income of the trust will be liable to tax in the hands of the trustee as a representative assessee at the maximum marginal rate (MMR).

If the income of the trust in either case includes business profits, the income of the trust is chargeable to tax at the MMR.

v Anti-money laundering regime

The anti-money laundering (AML) regime in India is governed by the Prevention of Money Laundering Act, 2002 (PMLA). The legislation vests wide-ranging powers on government authorities, including those pertaining to, inter alia, search, seizure, attachment and arrest. Under the Finance Act, 2019, various amendments were introduced to ensure stricter compliance with the provisions of PMLA. Some of the significant changes brought into effect include broadening the definition of proceeds of crime to include assets connected with offences outside PMLA, clarification on the status of offences under PMLA as continuous violations and increased reporting obligations for reporting entities.

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Pursuant to PMLA, the Securities Exchange Board of India (SEBI) has issued detailed guidelines on anti-money laundering standards that apply to intermediaries registered with SEBI (including portfolio managers and investment advisers), but not to unregulated service providers such as trustees. The Reserve Bank of India has also issued AML guidelines applicable to banks and financial institutions.

The BM Act discussed above is also a key piece of anti-money laundering legislation.

V OUTLOOK AND CONCLUSIONS

i Taxation

Over the past few years, there has been a general perception that, to meet socio-development goals, the government will introduce an additional taxation burden on the wealthy. A significant step in this direction was expected to be the introduction of an estate duty or inheritance tax (or, more accurately, the reintroduction of estate duty, which was abolished in 1985).

However, contrary to such belief, apart from an additional surcharge on the super-rich introduced in 2019, recent Indian budget announcements have not been unfriendly to the wealthy. Even in 2021, in spite of pandemic-related challenges, India's budget did not bear down upon the wealthy. It remains to be seen, however, whether this forbearance will extend to 2022, given that the government will be forced to mount a strong fiscal response against the carnage that the pandemic has wrought on the bottom of the pyramid. It would be an unenviable task, however, as – in balancing its books – the government cannot afford to jeopardise wealth creation that would lead to a greater flight of capital from India.

Looking to find a solution to address fiscal deficit without raising taxes, the government is being forced to consider selling or monetising its 'crown jewels'. The government's budgetary proposal for financial year 2022 is to raise 1.75 trillion rupees through disinvestments or strategic sales of its assets that are public sector undertakings, including the national carrier Air India.[18] If this proposal is effected as planned, then considerable public wealth will transition to private hands, and may well see some more individuals added to the 'billionaires list'.

ii Regulatory impasse

The pandemic's other impact has been felt in the regulatory impasse at some levels. The lockdown in the first wave, and the brutal health impact of the second wave, ensured that regulatory reforms have remained largely stagnant. It is telling that the regulatory development that was most debated in the previous year was – as some have observed – a backdoor introduction of an 'indirect tax', being the transition of the statutorily embedded corporate social responsibility (CSR) regime from comply or explain to mandatory. While implementation issues continue to plague the CSR regime, the fast tracking of the mandatory provisions is evidence that the government has been forced to usher the corporate sector in to supplement its own battle against the pandemic. Interestingly, India is the only country in the world to introduce mandatory CSR in its company law regime.

18 'Budget 2021: Govt sets lower divestment target of Rs 1.75 lakh crore for FY22', *Business Today*, 1 February 2021, available at https://www.businesstoday.in/union-budget-2021/news/budget-2021-govt-sets-lower-disinvestment-target-of-rs-175-lakh-crore-for-fy22/story/429864.html (last accessed on 22 June 2021).

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While encouraging domestic CSR, however, the government has sought to tighten private charitable contributions to India from overseas in recent years. The Foreign Contribution (Regulation) Act, 2010, which regulates foreign contributions into the non-profit sector into India, was amended in 2020, and there has been greater scrutiny over entities accepting foreign funds, with over 1,800 such entities being debarred from receiving foreign funds from 2018 to date.[19]

iii Developments impacting promoters

India's economy remains largely dependent on promoter-led family businesses. There have been two key recent developments affecting promoters that are likely to impact the manner in which they plan their business affairs.

The first is the notification of certain provisions of the Insolvency and Bankruptcy Code (IBC) applicable to personal guarantors to corporate debtors. In May 2021, the Supreme Court upheld the constitutional validity of these provisions while holding that approval of a bankruptcy resolution plan relating to a corporate debtor does not discharge the liabilities of personal guarantors (to corporate debtors), as a guarantee is an independent contract.[20] Since a majority of Indian promoters would have issued personal guarantees (and will continue to have to do so) in respect of borrowings by their companies, this judgment is likely to cause promoters to re-examine their current asset holding structures and will also have a bearing on the design and implementation of such structures going forward.

The second development is the proposal by the securities market regulator, SEBI, to shift from the concept of 'promoter' to person in control or controlling shareholders in a consultation paper issued in May 2021. The concept of promoter is unique to India, and finds mention across the corporate and securities law framework in India. Historically, companies and enterprises in India have been founded and largely managed by families, making the identification and regulation of promoters highly relevant in India. The tag of promoter remains with the controlling shareholders for the life of the business entity, unless reclassification as a non-promoter is specifically approved as per regulatory process, leading to the quip 'once a promoter, always a promoter'. However, with the growing sophistication of the Indian economy and the entry of institutional investors and professional management, the relevance of the concept of a promoter is being questioned. If SEBI follows through with the shift away from the promoter regime, it will have far-reaching consequences for the ownership and governance of family businesses.

iv Future trends

Consistent with the global drive for transparency, the significant beneficial ownership (SBO) regime for identification of the ultimate beneficial owner of Indian companies, introduced in India in 2019–20, will continue to remain relevant and inform the manner of structure creation by aligning the need for transparency with families' desire for confidentiality. That said, questions remain on how SBO disclosures are to be made for certain classes of trusts – for example, discretionary trusts with corporate trustees.

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19 'Registration certificates of over 20,000 NGOs cancelled in last 10 years', *Business Today*, 11 February 2021, available at https://www.businesstoday.in/current/economy-politics/registration-certificate-of-over-20000-ngos-cancelled-in-last-10-years/story/431009.html (last accessed on 22 June 2021).

20 *Lalit Kumar Jain v. Union of India & Ors*, Transfer Case (Civil) No. 245/2020.

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Proceedings under the BM Act are likely to give rise to several assessments in the next few years; it will be interesting to note the trend of rulings, especially in connection with offshore discretionary trusts.

As discussed earlier, given that the IBC regime now extends to personal guarantors to corporate debtors, it is expected that the lens through which estate planning structures are viewed may undergo a change. The jurisprudence of asset protection structures in India, particularly in the context of trusts, is still evolving, but it may not be too far in the future that the Indian judiciary is called upon to opine on their sanctity.

All in all, India continues to be an interesting jurisdiction for private client advisers and observers owing to the unique juxtaposition between an elephantine economy, a reformist governmental policy, a complex tax regime and a singular exchange control framework. India's wealth ecosystem has shown itself to be intricate, involved and yet irresistible time and again.

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Appendix 1

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