

Trust through Will by Resident Testator and Non - Resident Indian

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All sections mentioned in the following article are from Income Tax Act, 1961. There is no change in these provisions under Income Tax Act, 2025. The sections under the new Act have been stated in the brackets, [], in bold letters.

Q.1. What is meant by “Trust through Will”?

A Will is a testamentary document executed by a resident testator, which not only governs the devolution of his estate upon death but may also create a testamentary trust, under which designated trustees hold and administer the estate for the benefit of identified beneficiaries.

A trust can be created by a will which comes into existence only upon the death of the testator. This is called testamentary trust. A testamentary trust is a mechanism by which the testator directs that his estate, or a specified part thereof, should not devolve absolutely and directly upon the beneficiaries immediately after his death, but should instead vest in trustees, who are required to hold, manage, protect, and distribute the estate in accordance with the terms of the will.

Q.2. Who are the entities involved in creating a trust through Will?

Testator

The testator is the person whose intention governs the trust arrangement.

Trustees of the Trust

The trustees are the persons appointed to administer the trust property.

The beneficiaries of the Trust

The beneficiaries are the persons for whose benefit the trust is created.

Q.3. What different type of trust can be created through Will?

There are two types of trust:

- (a) Specific or determinate trust:
 - a. In this type of trust, the beneficiaries are named and clearly identifiable.
 - b. Their shares are fixed or determinable from the will.

- (b) Discretionary or indeterminate trust
 - a. In this type of trusts either the beneficiaries or beneficiaries' shares are not fixed
 - b. trustees have discretion as to:
 - i. which beneficiary receives income,
 - ii. how much,
 - iii. when, or
 - iv. in what proportion.

Q.4. When does a specific trust become discretionary of visa – versa?

Jurisprudence on legality:

- A trust for an unborn child is a valid trust
 - **CIT vs. Rakesh Mohan (2007) 289 ITR 308 (All HC)**
- Specific trust becoming discretionary and vice versa
 - if the shares are specified later the specific trust from the date of the specification
 - **CIT vs. Devshi Trust (2005) 299 ITR 519 (Bom HC)**
 - Similarly determinate may become discretionary
 - **CIT vs. Mani Enterprises (2004) 267 ITR 157 (Guj HC)**

Q. 5. What important points to be consider while drafting trust deed?

- a. Succession of trustees – In case of defined trustee leaving or dies.

- b. Don't mix charity- Since the Income Tax Act has separate mechanism to assess charitable trusts, even if a part of activities of testamentary trust are charitable dispute may arise under Income Tax Act.
- c. Some limited power to amend the trust- In testamentary trusts since the testator is not alive, limited power to amend the terms may be given to the trustee to smoothly run the trust.
- d. Excluded person- some persons may be provided to exclude being beneficiary. E.G. in case the spouse of a beneficiary is also added as beneficiary, it may be provided that in case of divorce such spouse would not remain the beneficiary.
- e. Add specifically children with disability

Q.6. Is the rule of perpetuity applicable to trust?

Rule of Perpetuity

A testamentary trust cannot last forever. It must end no later than the lifetime of someone who is already alive at the time the trust is created (or shortly after). This is done to prevent people from tying up property for infinite generations.

Escheat

Article 296 of Indian Constitution – Escheat

The property is reverted to the state, or (in feudal law) to a lord, on the owner's dying without legal heirs.

Q.7. How is the residential status of a trust be defined as per Income Tax Act, 1961?

Since trust has not been recognised by the Income tax Act as a separate person, there are no specific guidelines for determining its residential status. It is to be determined on the basis of facts of each case. It may be decided as the status of settlor or trustee or beneficiary or citation of assets.

Q.8. Operational aspects?

- ❖ Who has to file the return of income in case of the trust by Will and who can be assessed on behalf of the trust.

The statutory filer is ordinarily the trustee (Sec 160,161,164), [Sections 303,304 and 307] not the trust as an independent natural person. The return is usually filed in the PAN of the estate/trust, but legally the assessment is in the hands of the executor/trustee in a representative capacity.

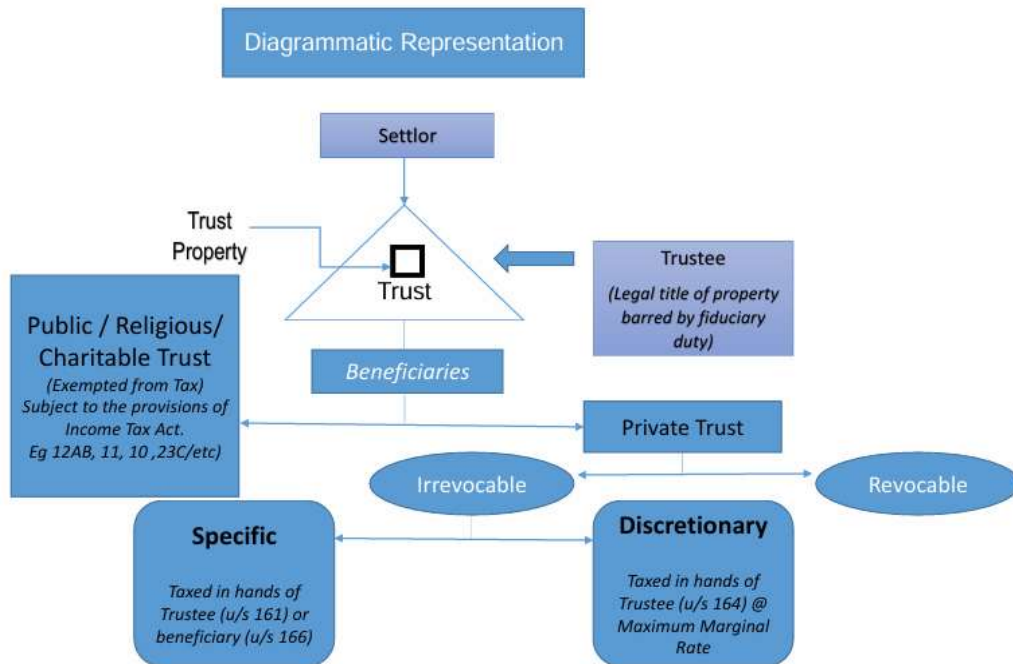
❖ What are the various relevant ITR Forms?

ITR 5 – In respect of unregistered trust which is considered to be an AOP.

❖ If trustee has paid tax, do beneficiary still need to show the trust income?

It has to be seen that if the trustee has already paid the taxes on the income and then distributed the income to the beneficiaries, in such cases the disclosure should be made in the computation of income. It has to be maintained that no duplicate taxes are paid.

Q.9. In whose hands the income of testamentary trust is taxed, under which section of income tax and how?



Relevant Income Tax Provisions to understand the taxation:

It is important to understand that the trustees of a testamentary trust are generally assessed only in their representative capacity, and not as owners of the trust income in their personal right. In law, they are merely a conduit through whom the income is assessed and taxes recovered.

Reference Section 160(1), clause(iv) **[section 303(1)(d)]**–

“160. (1) For the purposes of this Act, "representative assessee" means-

.....

(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 valid under the Mussalman Wakf Validating Act, 1913 (6 of 1913),] receives or is entitled to receive on behalf or for the benefit of any person, such trustee or trustees;”

Further to understand the taxation clauses on the trustee on behalf of the beneficiaries:

Type of Trust	Specific or Determinate Trust	Discretionary or Indeterminate Trust
Relevant section of Income Tax Act,1961	161(1) [section 304(1)]	164(1) [section 304(1)]
Relevant Extract of the Sections under Income Tax Act, 1961	161 [section 304] <i>(1) Every representative assessee, as regards the income in respect of which he is a representative assessee, shall be subject to the same duties, responsibilities and liabilities as if the income were income received by or accruing to or in favour of him beneficially, and shall be liable to assessment in his own name in respect of that</i>	164 [section 304] <i>(1) Subject to the provisions of sub-sections (2) and (3), where any income in respect of which the persons mentioned in clauses (iii) and (iv) of sub-section (1) of section 160 are liable as representative assesseees or any part thereof is not specifically receivable on behalf or for the benefit of any one person or where the individual shares of the persons</i>

	<p><i>income; but any such assessment shall be deemed to be made upon him in his representative capacity only, and the tax shall, subject to the other provisions contained in this Chapter, be levied upon him and recovered from him in like manner and to the same extent as it would be leviable upon and recoverable from the person represented by him.</i></p>	<p><i>on whose behalf or for whose benefit such income or such part thereof is receivable are indeterminate or unknown (such income, such part of the income and such persons being hereafter in this section referred to as "relevant income", "part of relevant income" and "beneficiaries", respectively), tax shall be charged on the relevant income or part of relevant income at the maximum marginal rate</i></p>
Understanding	<p>The income is taxed in a representative manner in the hands of trustees corresponding to the beneficiaries' respective interests</p>	<p>The relevant income is taxed at the maximum marginal rate (MMR), subject to limited exceptions. Ref: First proviso to section 164(1) [section 304(1)]</p>
Examples	<p>Mr. X creates a testamentary trust through his will for the benefit of his two children A and B with each having equal beneficial share. The will clearly describes that the rental income be distributed among the two beneficiaries in an equal manner. Let the rental income be Rs. 12,00,000/-. Therefore, each child's share would be Rs. 6,00,000/-</p>	<p>Mr. X creates a testamentary trust through his will for the benefit of his three children A, B and C. The beneficiaries share is not mentioned and is left on the trustees to be decided on their own discretion to be utilized on all or any of the children at such time and in such proportion as may be deemed fit. Now if the trustee fetched the rental income of Rs.</p>

	<p>Therefore, tax would calculated in the following manner:</p> <p>For A's share: NIL -Rs. 3,00,000/- = NIL Remaining Rs. 3,00,000/-= 5%</p> <p>Therefore, Total Tax = Rs. 15,000/- Cess = 4% = Rs. 600/- Total tax payable = Rs. 15,600/-.</p> <p>For B's Share – same as A's Therefore, total tax payable by the trustee would be of Rs. 31,200/-.</p>	<p>12,00,000/- on behalf of the beneficiaries, the same would be taxable in the hands of the trustee at MMR.</p> <p>Therefore, the tax payable by the trustee would be of 12,00,000 * 30% * cess rate = Rs. 3,74,400/-</p>
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Q.10. What will be the status of trust if the beneficiary is an individual and at what rates it will be taxed?

CWT V. Nizam's Family (Remainder Wealth) Trust (Trustees of HEH)(SC) held that the words '*in like manner and to the same extent*' have to be construed that there would have to be as many assessments on the trustee as there are beneficiaries with determinate and known shares.

Q.11. How many assessments will be frames in case of multiple beneficiaries and at what rates it will be taxed?

There would have to be as many assessments on the trustees with determinate or known share.

If there are two beneficiaries say one being an individual and the other being a HUF, the trustee would be liable to tax with respect to the share of the individual beneficiary in the status of "individual" and with respect to the share of "HUF".

N.V. Shanmugham & Co's vs CIT (1970) 81 ITR 310 (SC)

Q.12. What is the jurisprudence with respect to taxability of discretionary trust?

CWT v. Estate of Late Vikramsinhji of Gondal (SC)

CIT v. Kamalini Khatau (1994) 209 ITR 101 (SC)

Q.13. Once the income is assessed in the hands of beneficiary can it be taxed in the hands of Trust or vice versa?

CIT v. Dr. David Joseph (214 ITR 658): Once the income is assessed in the hands of beneficiary it cannot be assessed in the hands of Trust and vice versa

Circular No. 157 dated 26.12.1974: assessment can be made either on trustee or on beneficiary, not both.

Q.14. Whether capital receipts of trust are also taxable?

Taxation of Income vs. Capital

While making the allocation by the trustee to the beneficiaries, the taxation would be impacted based on the nature of distribution/allocation. If the distribution is on account of:

(a) Income – Eg rental income: May be taxed through trustees or directly in beneficiary's hands as discussed in the above paragraphs and table.

(b) Corpus/Capital – This would generally be treated as capital receipt and would not be taxable either as income under (a) or as capital gain.

Also, Section 56(2)(x) **[Sec 92(2)(m)]** deals with the taxation of immovable property received without consideration, however it specifically excludes the transfer of property under a will or by way of inheritance.

Q.15. Is income of such testamentary trust taxable under section 56(2)(x) [Sec 92(2)(m)]

Relevant extract of section 56(2)(x) **[Sec 92(2)(m)]**

“56.....

(2) In particular, and without prejudice to the generality of the provisions of sub-section (1), the following incomes, shall be chargeable to income-tax under the head "Income from other sources", namely :-

(i).....

(ii)....

(x) where any person receives, in any previous year, from any person or persons on or after the 1st day of April, 2017,-

(a)

(b) any immovable property,-

(A) without consideration, the stamp duty value of which exceeds fifty thousand rupees, the stamp duty value of such property;

(B) for a consideration, the stamp duty value of such property as exceeds such consideration, if the amount of such excess is more than the higher of the following amounts, namely:—

(i) the amount of fifty thousand rupees; and

(ii) the amount equal to ten per cent. of the consideration:

.....
.....

Provided that this clause shall not apply to any sum of money or any property received-

(I) from any relative; or

(II) on the occasion of the marriage of the individual; or

(III) under a will or by way of inheritance; or

.....
.....

(X) from an individual by a trust created or established solely for the benefit of relative of the individual.

From a plain reading, it is clear that such income may be taxable as per clause 9X) above.

Q.16. Whether the receipt of shares valued at Rs. xxxx by the trust is taxable under section 56(2)(x) [Sec 92(2)(m)] or exempt by proviso (X) [Sec 92(3)(h)] because the trust was created solely for the benefit of relatives?

VS Trust v. The ITO, NCW-3 (5), Chennai. ITA No. 2633/Chny/2025 (Chennai Tribunal) held that the same will be exempt under explanation (X) [Sec 92(3)(h)] because the trust was created solely for the benefit of relatives.

Relevant Findings:

“The beneficiaries set out in the above Clause comprises solely of the relatives of the settlor. There is no provision in the above Clause or in any of the other terms of the trust deed, by virtue of which any minority benefits could possible accrue to any non-relatives of the settlor. Rather, the assessee trust is found to be established solely for the benefit of the relatives of the settlor. As a corollary therefore, we find that the foundational basis of the lower authorities for making the impugned addition stood vacated. The case of the assessee is therefore found to be squarely covered by the exception set out in clause (X) of proviso to Section 56(2)(x)(c) of the Act, as the assessee trust is created only for the exclusive benefit of the relatives including the settlor himself. Accordingly, the addition of Rs. 15,78,40,401/- made by the AO u/s 56(2)(x) of the Act is held to be unjustified and is accordingly directed to be deleted. Thus, Ground Nos. 3 to 8 stands allowed”

Q.17. Will exemption of section 54F applicable on discretionary trust which is made u/s 161?

Yes: Merilina Foundation (2025) 178 Taxmann.com 355 Delhi- ITAT Delhi has dealt with the same issue and stated that:

“It is the fact that the assessee is a private trust and it was set up for some identified persons, the trust income is taxable in the event, it is the income of the beneficiary, it is not the case of the charitable trust. Further that a charitable trust is treated as AOP because of the reason that the beneficiary of the charitable trust are public at large. In fact, if the beneficiary of charitable trust is identified, the trust loses its character on being charitable. In this particular case the trust purchased certain land and sale of flat there on through collaboration, generated income from capital gains against which

residential house was purchased and exemption under Section 54F was claimed. In the event, the assessee trust was not in existence that the same transaction would have been carried out in the name of beneficiaries therein and the benefit would certainly be given to those beneficiaries under Section 54 of the Act as claimed. Therefore, the order passed by the Ld. CIT(A) in granting relief under Section 54F of the Act as claimed by the assessee under the facts and circumstances is found to be just and proper so as not to warrant interference.”

Q.18. Whether a trust being a determinate trust, interest income earned on bank deposit would be assessed in the hands of assessee or assessee’s beneficiary? CIT v. TVS Shriram Growth Funds [2020] 429 ITR 440 – Madras High Court held that Once the share of the beneficiaries are found to be determinable, the income is to be taxed in the hands of the beneficiaries and not in the hands of the trustees therefore the interest income earned on bank deposit would be assessed in the hands assessee’s beneficiary

Q.19. In the case of private discretionary trusts whose income is chargeable to tax at the maximum marginal rate, whether surcharge is chargeable at the highest applicable rate or at slab rates?

ITAT Mumbai in **Araadhya Jain Trust Versus Income Tax Officer - [2025] 126 ITR (Trib) 1** has considered this issue and stated that

“In our view, once the definition of ‘maximum marginal rate’ refers to the rate of income-tax and surcharge provided under the Finance Act of the relevant year, then the rates of income- tax and applicable rate of surcharge as provided under Paragraph A, Part (I) of First Schedule to the Finance Act-2023, would apply. Any other interpretation, in our view, would lead to undesirable consequences and would be discriminatory. In our view, the expression ‘including Surcharge on income-tax, if any’, within the bracketed portion of section 2(29C) of the Act, would mean the surcharge as provided in the computation mechanism under the heading ‘surcharge on income tax’ finding place in Paragraph A, Part (I) of First Schedule to the Finance Act-2023.

Revenue has taken a line of argument that the words 'if any' succeeding the words 'including surcharge on income tax' appearing in the definition of maximum marginal rate u/s. 2(29C) of the Act are only for the purpose that when levy of surcharge is specifically provided under the Finance Act of the relevant year, it would be included in income-tax computed at the highest rate, otherwise, not. Though, at first blush this argument of the department sounds attractive, however, on deeper analysis it is found to be superfluous

Though, in our view, there is no conflict between provisions contained u/s. 164/167B, 2(29C) of the Income Tax Act and section 2 of the Finance Act, however, even assuming that there are some conflicts, a harmonious construction has to be made to avoid absurdity and make the provisions workable. Thus, in our view, the expression 'if any' used in section 2(29C) has to be read not de hors but in conjunction with the computation mechanism provided under the heading 'surcharge on income tax' provided in section 2 of Finance Act. This view of ours is further fortified by the object for which levy of surcharge was introduced to the Finance Act - to augment the Revenue of the Union for developmental work by asking persons in the highest income bracket to contribute little more than the other citizens, for nation building.

Thus, in the ultimate analysis, we hold, in case of Private Discretionary Trusts, whose income is chargeable to tax at maximum marginal rate, surcharge has to be computed on the income tax having reference to the slab rates prescribed in the Finance Act under the heading 'surcharge on income tax' appearing in Paragraph A, Part 1, First Schedule, applicable to the relevant assessment year. Hence, reference is decided in favour of the assessee."

Q.20. Trust at-will with three named beneficiaries receiving only interest income. Should be taxed at maximum marginal rate u/s164 or not?

Where a discretionary "trust at will" had only three identifiable beneficiaries and its sole income comprised interest distributed to those beneficiaries, the ITAT held that the trust's income was not liable to be taxed at the maximum marginal rate under s. 164 [Sec 307], since the beneficiaries were determinate and the income was actually allocated among them. The AO was directed to assess the trust at the rate ordinarily applicable to an AOP rather than at the maximum marginal rate, and the appeal was

allowed. -**Shakuntala Balvantray Trust Versus The ITO, 2025 (4) TMI 1620 - ITAT AHMEDABAD**

Q.21. Discretionary trust income taxed at maximum rate under Section 164(1) but individual deductions allowed for beneficiaries?

The ITAT Ahmedabad held that a discretionary trust's income is taxable at maximum marginal rate under Section 164(1) [Sec 307(1)] as beneficiaries' shares were indeterminate in the will. However, the tribunal ruled that deductions under Sections 80C [Sec 123 and Schedule XV] and 80TTA [Sec 153] cannot be denied since all beneficiaries are individuals, and the deeming fiction for AOP taxation doesn't extend to denying individual deductions. - **Smt. Pashiben Prajapati Family Trust (DISC) 2024 (8) TMI 972 - ITAT AHMEDABAD**

Q.22. Where a trust deed provides that the author's granddaughter shall become entitled to trust income only upon attaining majority, can it be said that, prior to attaining majority, she is not a beneficiary under the trust? Consequently, where the distribution of income remains at the absolute discretion of the trustees, does this render the beneficiaries indeterminate or unknown, thereby making the trust income taxable at the maximum marginal rate?

Yes it will be taxed at MMR because minor child mentioned in the settlement deed had not attained majority as on the last date of the accounting year. According to the settlement deed specifically stated that the term 'beneficiary' or 'beneficiaries' should mean the said grand daughter, who would be entitled to the income from the trust with effect from the date when she attained majority.

During the accounting year, relevant to the assessment year under consideration, the said grand daughter was a minor. Therefore, she could not claim to be a beneficiary under the abovesaid settlement deed. In the matter of distribution of income from the trust no shares were determined for the beneficiaries. Payment of income from the trust was left to the absolute discretion of the trustees. Therefore, the shares were also not determinate in the instant case. Since both the conditions prescribed under section 164(1) were satisfied in the present case, the Tribunal was correct in holding

that the maximum rate of tax under section 164(1) was leviable. - **Anasuya Muthanna v. CIT - [1998] 232 ITR 561- HIGH COURT OF MADRAS**

Another case of **Madhya Pradesh HC - Rai Saheb Seth Ghisalal Modi Family Trust v. CIT [1984] 149 ITR 724** there was a trust created by one R and his mother for the benefit of his four grandsons, who were all minors at the relevant time. The property settled by R on trust was his individual property and not his ancestral property. Under the trust deed (i) the trust was to continue till the youngest beneficiary attained the age of majority and, thereafter, the property of the trust was directed to be equally distributed among the beneficiaries; (ii) the trustees were required to preserve the income and corpus of the trust and they were authorised to spend only so much out of the income of the trust as was necessary for meeting the essential requirements of the beneficiaries and for their overall advancement only; and (iii) the shares of the beneficiaries in the income of the trust were not specified in the trust deed.

It was held that

“From the admitted facts as recorded by the Tribunal, the property inherited by R was the individual property of his father and R had full disposing power over the property so inherited by him. As such the trust created by him in respect of the said property did not suffer from any infirmity and was a valid one. The ITO while assessing the beneficiaries very well knew that they had a share in the trust and that as the shares of the beneficiaries were not specified, the trust was liable to be assessed under section 164(1). In spite of this, the ITO assessed the beneficiaries individually by including their share of income in the trust. From the mere fact that the ITO stated in the assessment orders that they were subject to rectification, it could not be held that he did not exercise his option to assess the beneficiaries directly.

In order to attract the provisions of section 164(1), the specification of shares of the beneficiaries in the corpus of the trust is not relevant.’ What has to be seen is whether their shares in the income of the trust are determinate.

In the instant case, on a bare reading of the trust deed, it was clear that the shares of the beneficiaries in the income of the trust were not determinate ; the trustees were not required to spend equally on the beneficiaries but according to their needs. In the circumstances, the provisions of section 164(1) were attracted.”

Q.23. What will be the taxability of long term capital gain when the income of discretionary trust taxable at MMR?

SAE Office Trust [271 ITR 159 (Del)] - Taxability of long term capital gains @ 12.50%, at per the rate u/s 112 of the Act [**Sec 197**] - even when income of discretionary trust taxable at MMR.

Q.24. Whether the trustees are to be necessarily Indian?

The trustees of a trust can be Indian resident as well as Non resident, irrespective of whether the trust is formed in India or abroad.

Q.25. What other laws to be taken care of while forming Foreign trust?

While forming or while deciding the taxability of such trusts, one has to take care of provisions of FEMA, DTAA, inheritance tax in the other country, if any and the other country's FEMA like Act, if any.

Q.26. How is taxability decided in case of trusts in the hands of a non resident beneficiary?

Since in case of determinate Trusts, taxability happens in the hands of beneficiary, in case of resident beneficiary global income is taxable, while in case of a non resident beneficiary, it is the income, accrued, arose or deemed to have accrued or arisen in India is taxable.

Q.27. Can a non resident beneficiary get the benefit of DTAA?

Yes a non resident beneficiary can avail the benefit of DTAA, wherever applicable.

Q.28. How is the income of a foreign discretionary trust derived?

The income of a foreign trust which is not controlled and managed in India is not taxable in the hands of trustee of beneficiary who are residents of India. However the

same would be taxable in the hands of beneficiary once the trustees decide to distribute the said income.

Q.29. In general how and in what circumstances a non-resident trustee or a non-resident beneficiary is taxed for testamentary trust's income?

Such taxability largely depends on the nation of which they are residents and their incomes taxability there. However in general it can be said that the provision of Income Tax Act, as applicable to non residents are applicable on such incomes.

Must read income tax rulings.

- *CIT vs. Rakesh Mohan (2007) 289 ITR 308 (All HC)*
- *CIT vs. Devshi Trust (2005) 299 ITR 519 (Bom HC)*
- *CIT vs. Mani Enterprises (2004) 267 ITR 157 (Guj HC)*
- *CWT V. Nizam's Family (Remainder Wealth) Trust (Trustees of HEH)(SC)*
- *N.V. Shanmugham & Co's vs CIT (1970) 81 ITR 310 (SC)*
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- *CIT v. Kamalini Khatau (1994) 209 ITR 101 (SC)*
- *CIT v. Dr. David Joseph (214 ITR 658)*
- *Circular No. 157 dated 26.12.1974*
- *VS Trust v. The ITO, NCW-3 (5), Chennai. ITA No. 2633/Chny/2025*
- *CIT v. TVS Shriram Growth Funds [2020] 429 ITR 440 – Madras High Court*
- *Araadhya Jain Trust Versus Income Tax Officer - [2025] 126 ITR (Trib) 1*
- *Shakuntala Balvantray Trust Versus The ITO, 2025 (4) TMI 1620 - ITAT AHMEDABAD*
- *Smt. Pashiben Prajapati Family Trust (DISC) 2024 (8) TMI 972 - ITAT AHMEDABAD*
- *Anasuya Muthanna v. CIT - [1998] 232 ITR 561- HIGH COURT OF MADRAS*
- *Madhya Pradesh HC - Rai Saheb Seth Ghisalal Modi Family Trust v. CIT [1984] 149 ITR 724*
- *SAE Office Trust [271 ITR 159 (Del)]*