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CONCEPT OF HINDU UNDIVIDED FAMILY IN TAX LAWS

Hindu Joint family is a unique characteristic of Indian society. It is a group of relatives, tied together by kinship, marriage and descend from common ancestor. It comprises of children, children's children and spouses.

The joint families are the most important institutions that hold the social and cultural fabric of the society. Even from the economic perspective, it plays a very crucial role in jointly handling the economic resources of the family. Hence, a pioneering Indian Sociologist I P Desai rightly said "We call that household a joint family which has greater generation depth than individual family and the members of which are related to one another by property, income and mutual rights and obligations."

Holding the property jointly and generating income out of it is one of the major activity of the joint family in India apart from fulfilling other socio-cultural obligations like marriage, kinship etc. This dual characteristic of the Hindu Undivided family is very much important to keep the members of the family intact.

This unique economic aspect of the Hindu Undivided Family is duly recognized by the Indian Taxation system and sanction of separate legal entity is given to HUF right from the inception of the Income Tax Act 1922.

The Income Tax Act uses the term Hindu Undivided Family instead of Hindu Joint family which is used in common parlance. Though both seems to be one and the same and frequently used interchangeably, in reality there are differences between the two. From the taxation angle, it is very pertinent to understand the difference between the two.

1. First and foremost, Hindu joint family derives its roots from Hindu law, whereas the HUF is created for the purpose of taxation

2. As per Hindu law, every Hindu family is assumed to be Hindu joint family unless contrary is proved. Whereas no such assumptions are made in taxation

laws. Until and unless the HUF is explicitly created, the income cannot be offered under the HUF

3. Under Hindu law, owning the joint family property is not a precondition for the existence of Hindu joint family. Whereas the HUF without any joint property is meaningless from the taxation point of view

4. According to Hindu law, the son in the womb in many aspects is treated as son in existence. But, no such privileges are given under taxation

5. The creation of the joint family is automatic and continuous where as HUF requires to be explicitly created

In this context, the question that arises is when HUF is a group of individuals coming together and doing business, why can't they be subsumed under the entity "Body of Individual" (BOI) instead of giving it separate recognition under the Income Tax Act.

The distinction between BOI and HUF is that, in the former, group of unrelated individuals come together with an intention of earning income. Whereas in the later, individuals come together due to the rights and obligations they have towards their other family members. Hence, the economic, social and cultural obligations are intertwined in HUF, unlike BOI whose main focus is to earn profit.

MEANING OF HUF

(i) Income Tax Act provides a special status to HUF under the Act and covers it in the definition of person u/s 2(31) of the Act. The Hindu Undivided Family (HUF) has not been defined under Income Tax Act, 1961, however, as per Hindu Law A **Hindu Undivided Family (HUF)** is ordinarily joint not only in estate but in food and worship. The members of a Hindu Family live in a state of union, unless the contrary is established. HUF is a creation of law and cannot be created by the act of parties, except in the case of adoption by member of HUF. HUF is a separate legal entity as per section 2(31) of the Income Tax Act and therefore, as long as the HUF is in existence, no individual member can be separately assessed in respect of its income. **[ITO vs. Bachu Lal Kapoor (1966) 60 ITR 74 (SC)].** Even if the family is reduced to sole – surviving coparcener (male or

female) with other family members, income tax is leviable on the joint family and not on male members as individual.

The HUF includes those persons who, by birth, acquire an interest in some joint family property. It also includes all lineal descendants of these persons, and their wives, and children, both sons and daughters. Even married daughters can remain a part of the HUF, while being a member of her spouse's family HUF.

(ii) The Expression "Hindu Undivided Family" has not been defined under the Income-tax Act or in any other statue. When we dissect – essentials are (I) Should be Hindu, (Jain, Sikh and Buddhist are treated as Hindus but not Musalman or Christian); (ii) A family i.e. group of persons – more than one; and (iii) should be undivided i.e. living jointly and having commonness amongst them. All the three essentials are cumulative. It is a body consisting of persons lineally descended upto three generations or three degrees from a common ancestor and include their wives, children and adopted child. By the Hindu Succession (Amendment) Act, 2005 w.e.f. 9th September, 2005, daughter, even after marriage, would be a co-parcener, of which her father is a co-parcener and in addition, on her marriage, shall become a member of her husband's joint Hindu Undivided Family. Her rights in the parental family would remain intact as that of a son. Discrimination on account of gender stands abolished for good, though belated..

(iii) The Hindu Undivided Family (HUF) is a special feature of Hindu society. Hindu Undivided Family is defined as consisting of a common ancestor and all his lineal male descendants together with their wives and unmarried daughters. Therefore a Hindu Undivided Family consists of males and females.

The Hindu Undivided Family can best be defined as a family that consists of a common ancestor and all his lineal male descendants and their wives and unmarried daughters. The Hindu Undivided Family (HUF) cannot be created by acts of any party. The only exceptions are in the case of an adoption or a marriage when a stranger may become a HUF member. An undivided family, which is a normal condition of Hindu society, is ordinarily joint, not only in estate but also in food and worship.

A HUF is a separate entity for taxation under the provisions of S.2 (31) of the Income Tax Act, 1961. This is in addition to an individual as a separate taxable entity. This indicates that a person may be assessed in two different capacities- as an individual and as a Karta of his HUF.

What is an HUF?

As the name suggests, an HUF is a family of Hindus. However, even Buddhists, Jains and Sikhs are regarded as Hindus, and can, therefore, set up HUFs. The concept of an HUF has basically evolved from ancient Hindu law. There are two schools of law governing HUFs in India-Mitakshara and Dayabhaga-and there are quite a few differences in the rights and obligations of HUF members in each of these schools. However, since the Dayabhaga school is largely confined to Bengal, i shall, only consider the provisions of the Mitakshara school, which are applicable to the rest of India.

Daughters born in the family are its members till their marriage and women married into the family are equally members of the undivided family. On the other hand at any given point of time a coparcenary is limited to only members in the four degrees of the common male ancestor.

2. Hindu : In this term are included all the persons who are Hindus by religion. Section 2 of the Hindu Succession Act, 1956, elaborately declares that it applies to any person, who is a Hindu by religion in any of its forms or developments, including a Virashaiva, a Lingayat or a follower of Brahmo, Prathana or Arya Samaj, a Buddist, Jain or Sikh. In CWT. Smt. Champa Kumari Singh (1972) 83 ITR 720, the Supreme Court held that the HUF includes Jain Undivided Family.

3. Hindu Undivided Family (HUF) is a legal expression which has been employed in taxation laws as a separate taxable entity. It is the same thing as “Joint Hindu Family”. It has not been defined under the Income Tax Act, as it has a well defined connotation under Hindu Law.

4. A Hindu Undivided Family (HUF) is a separate entity for taxation under the provisions of sec. 2(31) of the Income Tax Act, 1961. This is in addition to an individual as a separate taxable entity, it means that the same person can be assessed in two different capacities viz. as an individual and as Karta of his HUF.

HOW HUF COMES INTO EXISTENCE

A Hindu male with his wife and children automatically constitutes the HUF. The HUF is a creature of Hindu Law. It cannot be created by acts of any party save in so far as by adoption or marriage, a stranger may be affiliated as a member thereof. An Undivided Family which is a normal condition of the Hindu society is ordinarily joint not only in estate but in food and worship. The joint family being the result of birth, possession of joint property is only an adjunct of the Joint Family and is not necessary for its constitution.

BASIC REQUIREMENTS FOR THE EXISTENCE OF AN HUF

(i) Only one co-parcener or member cannot form an HUF Family is a group of people related by blood or marriage. A single person, male or female, does not constitute a family. However the property held by a single co-parcener does not lose its character of Joint Family property solely for the reason that there is no other male or female member at a particular point of time. Once the co-parcener marries, an HUF comes into existence as he alongwith his wife constitutes a Joint Hindu Family as held in the case of Prem Kumar v. CIT , 121 ITR 347 (All.)

(ii) Joint Family continues even in the hands of females after the death of sole male member :

Even after the death of the sole male member so long as the original property of the Joint Family remains in the hands of the widows of the members of the family and the same is not divided amongst them; the Joint Hindu Family continues to exist. CIT v. Veerapa Chettiar, 76 ITR 467(SC)

(iii) An HUF need not consist of two male members- even one male member is enough :

The plea that there must be at least two male members to form an HUF as a taxable entity, has no force. – Gauli Buddanna v. CIT, 60 ITR 347 (SC); C. Krishna Prasad v. CIT 97 ITR 493 (SC) and Surjit Lal Chhabda v. CIT, 101 ITR 776 (SC)

A father and his unmarried daughters can also form an HUF, CIT v. Harshavadan Mangladas, 194 ITR 136 (Guj.)

Further on partition of an HUF a family consisting of a co-parcener and female members is to be assessed in the status of an HUF.

NUCLEUS OF HUF

It is many times argued that existence of nucleus or joint family property is necessary to recognize the claim of HUF status in respect of any property or income of an HUF. It has been established now that since the HUF is a creature of Hindu Law, it can exist even without any nucleus or ancestral joint family property.

MANAGER OF HUF OR KARTA

The person who manages the affairs of the family is known as Karta. Normally the senior most male member of the family acts as Karta. However a junior male member can also act as Karta with the consent of the other member. Narendrakumar J. Modi v. Seth Govindram Sugar Mills 57 ITR 510 (SC). However in view of the present social mores and needs of the modern progressive society this decision of the Supreme Court needs to be revised / reviewed.

Besides the same person can be taxed as both individual and Karta of an HUF . The individual and the HUF are two different units of taxation i.e. two different assesses CIT v. Rameshwarlal Sanwarmal 82 ITR 628 (SC).

JOINT FAMILY PROPERTY

The following types of properties are generally accepted as joint family property :

(i) Ancestral property;

(ii) Property allotted on partition;

(iii) Property acquired with the aid of joint family property;

(iv) Separate property of a co-parcener blended with or thrown into a common family hotchpot. The provisions of sec. 64 (2) of the Income Tax Act, 1961 have superseded the principles of Hindu Law, in a case where a co-parcener impresses his property with the character of joint family property.

A female member cannot blend her separate property with joint family property but she can make a gift of it to the HUF. Pushpadevi v. CIT 109 ITR 730 (SC). A female member can also bequeath her property to the HUF, CIT v. G.D. Mukim, 118 ITR 930 (P & H).

ANCESTRAL PROPERTY

All property inherited by a male Hindu from his father, father's father or father's father's father, is ancestral property. The essential feature of ancestral property according to Mitakshara Law is that the sons, grandsons and great-grandsons of the person who inherits it, acquire an interest, and the rights attached to such property at the moment of their birth. Thus, if 'A' inherits property, whether movable or immovable, from his father or father's father, or father's father's father, it is ancestral property, as regards his male issue. (AIR 1936 Orissa 331). A person inheriting property from his three immediate paternal ancestors holds it, and must hold it, in coparcenary with his sons, son's sons, and son's son's sons. Dipo v. Wassan Singh – AIR 1983 SC 846 at 847-48; Arjun Singh v. Pingle Devi – AIR 1993 HP 34; Om Prakash v. Sarvjit Singh – AIR 1995 HP. 92. The share, which a coparcener obtains on partition of ancestral property, is ancestral property as regards his male issue. They take an interest in it by birth (Lal Bahadur v. Kanhaiya Lal, (1907) 29 All 244: 34 IA 65; Chatturbhooj v. Dharamsi, (1885) 5 Bom HCOCJ 128: Rulla Ram v. Amar Singh, AIR 1994 HP 102 relying on AIR 1987 SC 558 and AIR 1986 Pat 1753).

Accumulations of income of ancestral property, property purchased or acquired out of income or with assistance of ancestral property, the proceeds of sale of ancestral property, and property purchased out of such proceeds, or obtained in lieu of such property, are ancestral property. (Maya Ram v. Satnam Singh, AIR 1967 Punj 353). It is well established that sons, grandsons and great-grandsons acquire a vested interest not only in the income and accretions of ancestral property, which accrued after their birth, but also in the income and accretions, which accrued prior to their birth. (Isree Persad V. Nasif Koover – AIR 10 Cal 1017 at 1021; Jagmohan Das v. Mangal Das) 11 Mad 246.

According to the Mitakshara School of Hindu Law all the property of a Hindu joint family is held in collective ownership by all the coparceners in a quasi-corporate capacity. The textual authority of the Mitakshara lays down in express terms that the joint family property is held in trust for the joint family members then living and thereafter to be born (See Mitakshara, Chapter 1.1-27). The

incidents of co-parcenership under the Mitakshara law are : first, the lineal male descendants of a person up to the third generation, acquire on birth ownership in the ancestral properties of such person; secondly that such descendants can at any time work out their rights by asking for partition; thirdly, that till partition each member has got ownership extending over the entire property conjointly with the rest; fourthly, that as a result of such co-ownership the possession and enjoyment of the properties is common; fifthly, that no alienation of the property is possible unless it be for necessity, without the concurrence of the coparceners, and sixthly, that the interest of a deceased member lapses on his death to the survivors. A coparcenery under the Mitakshara School is a creature of law and cannot arise by act of parties except in so far that on adoption the adopted son becomes a co-parcener with his adoptive father as regards the ancestral properties of the latter." State Bank of India v. Ghamandi Ram – AIR 1969 SC 1330.

BRANCHES OF HUF

An HUF can have several branches or sub-branches. For example, if a person has his wife and sons, they constitute an HUF. If the sons have wives and children, they also constitute smaller HUFs. If the grandsons also have wives and children, then even they will also constitute still smaller or sub-branch HUFs. As stated above, the HUF is a creature of Hindu Law and these entities are HUFs alongwith the bigger HUF of the father or the grandfather. It is immaterial whether these smaller HUFs possess any property or not. Property can be acquired by any mode; by partition of bigger HUF or by gifts from any member of the family or even by a stranger or by will with unequivocal intention of the donor or the testator that the said gift or bequest will form the joint family property of the donee or the testatee.

An HUF can be composed of a large number of branch families, each of the branch itself being an HUF and so also the sub-branches of more branches. CIT v. M.M.Khanna 49 ITR 232 (Bom).

PARTITION OF HUF

Partition

To divide and distribute assets / property amongst the members of the family is called partition. Now it has to be total and by metes and bounds. It can be oral. However, if in writing would attract stamp duty. (Refer Bhanwari Devi v. Arvind Kumar & Anr. – AIR 2016 Rajasthan – 198). It can be unequal and not

in accordance with share of each member. It need be recognised under Section 171 of the Income-tax Act for those which have been hythertofore assessed.

Section 171 of the Income Tax Act, 1961 deals with assessment of an HUF, after partition. Clauses (a) of the explanation to sec.171 defines “Partition” of an HUF. Where the property admits of a physical division, then a physical division of the property thereof, but, where the property does not admit of a physical division then such division as the property admits of, will be deemed to be a “partition”.

`Partition need not be by Metes & bountes, if separate enjoyment can, otherwise the secured and such division is effective so as to bind the members. Cherandas Waridas, 39 ITR 202 (SC).

However the members of an HUF can live separately and such an act would not automatically amount to partition of the HUF. Shiv Narain Choudhary v. CWT 108 ITR 104 (All.)

A finding of partition by the assessing officer u/s. 171 of the Income Tax Act, 1961 is necessary.

Partial partition of an HUF has been derecognised by the provisions of sec. 171(9) & moreover, according to sec. 171(9), any partial partition effected after 31.12.78, is not recognized.

Motive or need for partition cannot be questioned by the Income Tax Department. T. G. Sulakhe v. CIT, 39 ITR 394 (AP).

HUF is a Joint Hindu Family consisting of:-

Male members lineally descended from a common male ancestor, together with their-

– Mothers.

– Wives.

– Unmarried daughters and

– The Hindu coparcenary * **[CGT v. B.K. Sampangiram (1986) 160 ITR 188 (Karn.)]**

Note: STRANGER can be introduced in HUF only by adoption **[CIT vs. M.M. Khanna (1963) 49 ITR 232 (Bom)].**

DISTINCTION – CO-PARCENER AND A MEMBER

A HUF, as such, can consist of a very large number of members including female members as well as distant blood relatives in the male line.

However, out of this, coparceners are only those males & females who are within 4 degrees in lineal descendent from the common male ancestor. The relevance of concept of coparcener is that **only coparceners can ask for partition.** The other family members; i.e., other than coparceners in a HUF, have no direct claim over HUF property, but can claim only through the coparceners.

RIGHTS AND LIABILITIES OF MEMBERS OF HUF

As specified under the Hindu law and the codified law, various members of the family are entitled to rights, etc., as given below:

The coparceners of the HUF are entitled to demand partition. Besides the coparceners, the Hindu widows under the Hindu Women's Right to Property Act, 1937, are also entitled to demand partition just as her husband could have done. However, wife of a coparcener cannot claim for partition.

2. The members of the HUF which include male and female members, daughters and children of the male members are entitled to maintenance. Maintenance includes food, shelter, clothing, education, medical aid and marriage.

3. A members of the HUF is entitled to own and possess his separate property besides his interest in the HUF property.

4. The widow and children of a deceased coparcener have the right to be maintained out of the HUF property and are also entitled to demand partition.

5. If a coparcener or other member converts himself into any other religion like Islam or Christianity, he ceases to be a member of family and he cannot enjoy joint status along with other members.

6. A coparcener or member may enter into partnership with Karta of HUF by bringing his capital or even without bringing any capital but contributing his skill and labour only.

WHEN IS AN HUF RECOGNISED?

Let us answer another question before this: if you don't have an HUF, as a male Hindu, how do you "create" an HUF? The phrase "creating an HUF" is really quite misleading because an HUF comes into existence the moment you give birth to a son (or a daughter, if she is regarded as a coparcener in the state where most of your property is located). However, even though you may already have an HUF, it may not really exist from the tax point of view unless your HUF has assets and is deriving income from those assets. Put another way, in order for an HUF to exist on tax records, it needs to have income.

RIGHTS OF THE MEMBERS OF HUF

The difference between a coparcener and a member is that a coparcener can demand partition of an HUF. This is by way of distribution of HUF property among the coparceners. While each coparcener would then be entitled to a share of the property, the members would be entitled to receive maintenance from the HUF. The karta generally manages the family property, which is regarded as the joint property of all the coparceners.

MODES OF CREATION OF HUF

A Hindu Undivided Family can be created by following ways

1. Blending of individual property with the family Hotchpot

2. Receipts of Gifts

3. Doing Joint labour for the benefit of HUF

4. Inheritance through a specific bequest under a Will

5. Partition of a larger Hindu Undivided Family

6. Reunion of separated co-parceners

CREATION OF HUF CORPUS BY BLENDING

Blending means transfer of one's individual property in the common hotchpot and make it a part of the common property of the HUF. There must be an

intention to throw the separate property into the common stock and it is necessary to waive all separate rights in respect of the property, which must be clearly established through a declaration. Only the coparcener is entitled to throw in HUF's common property.

a. Blending can be utilized for creating smaller HUF. HUF can be created by impressing one's self acquired property with the character of HUF property by bringing in to existence an HUF comprising the person himself, his wife & children.

b. Applicability of Section 64(2) of I. T. Act, 1961- Transfer of individual property in the common hotchpot is deemed to be a gift and income from the transferred asset is deemed to be the income of individual under Section 64(2) of the Income Tax Act, 1961. As per section 64(2) of the Income Tax Act, if any property has been transferred by the individual, directly or indirectly, to the family otherwise than for adequate consideration then the income derived from such property shall be deemed to arise to the individual and not to the family and where the converted property or any part thereof is received by the spouse of that individual on partition the provisions of sub-section (1) shall apply. Similarly provision was inserted in the Wealth Tax Act, 1957under section 4(1A).

c. Rights of members of HUF do not get enlarged on throwing property into family hotchpot, income from said property had to be treated as assessee's individual income only. The property can change its legal incidents on the birth of son.

d. Partition of HUF after blending

This is for achieving distribution of immovable property among members because giving it in any other manner will require registration for effective transfer.

Each division is entitle to claim exemption under Sec 5 (vi) of the Wealth Tax Act.

CREATION OF HUF BY RECEIPTS OF GIFTS

HUF is a creation of law and cannot be created by the act of parties, therefore, HUF cannot be created for the first time by a gift from the stranger. If HUF already exists, gift can be made by a stranger to such HUF.

The gifted property will be HUF property if the gift is made to HUF.

Intention of donor & the character of the gifted property will depend on the construction of the gift deed.

Precautions to be taken by family while accepting gifts

– Clear declaration of intention through affidavit. {C.N. Arunachala Mudaliar Vs C.A. Muruganatha Mudaliar & Anr. AIR 1953 SC 495: (1954) SCR 243 (SC)}

– Gift to be valid & genuine.

No specific bar to a gift by the father to the HUF of his son, his wife & minor children. However, for avoiding the clutches of sec 64 (1)(vi) such gifts better be avoided.{CIT Vs Smt. T. Suryamani Kothavalasala (2003) 263 ITR 271 also see CIT Vs S.N. Malhotra (1989) 178 ITR 380 (Cal)}

– HUF can accept gifts from relative who may not be the member of the family.

CREATION OF HUF BY DOING JOINT LABOUR FOR THE BENEFIT OF HUF

Property acquired in the course of some business carried on by the persons constituting a joint Hindu family, takes the characteristic of joint family property.

As per Hindu law, in case of properties not acquired with the aid of joint family property, it is presumed that property acquired by coparceners by working together is joint family property unless the persons concerned desire to hold it as co-owners. This is valid if the coparceners are carrying on work together and belong to the same line of ancestors.

The income from such property is out of the purview of section 64(2) of the Income Tax Act, 1961 and section 4(1 A) of the Wealth Tax Act, 1957.

In the cases of properties acquired with the aid of joint family property is also the joint family property.

CREATION OF HUF BY INHERITANCE THROUGH A SPECIFIC BEQUEST UNDER A WILL

A HUF can also be created by will of a person provided the will is valid and there is a specific bequest in favour of the HUF as held by Punjab & Haryana High Court in CIT vs. Ghansham Dass Mukim (1979) 118 ITR 930. Moreover, HUF need not be in existence at the time of execution of will. Even a stranger can bring a HUF into existence by making a will in the favour of HUF of a person.

CREATION BY WILL

– No existence of HUF at the time of execution of will.

– Valid will should be there. {CIT Vs Ghanshyam Das Mukim (1979) 118 ITR 930 (Punj & Har)}

– An HUF is created if there exist a valid will.

CREATION OF HUF BY PARTITION OF A LARGER HINDU UNDIVIDED FAMILY

Partition of an existing HUF can also result in creation of many smaller HUFs. As per Hindu Law, the property does not change its character on partition. Property received by a coparcener having a family, continues to have characteristic of HUF. An unmarried coparcener receiving any property will own the property in the status of HUF until he acquires the status of HUF. In case of married coparceners who have no child, the property will continue with the status of HUF as held by High Court of Madhya Pradesh in CIT vs. Krishna Kumar (1982) 10 Taxman 292 (MP).

However, the partition has to be total partition because the law does not recognize partial partition as per section 171(9) of the Income Tax Act, 1961.

CREATION OF HUF BY REUNION OF SEPARATED COPARCENERS

Even after partition of HUF, members may re-unite to form a new HUF. However, there are certain conditions to make such reunion valid in the eyes of law. Reunion can take place only when there was in existence a HUF and there was total partition of such HUF. It can take place only between persons who were parties to the original partition and to support such reunion, there must be an agreement between the parties. To constitute a reunion there must be an

intention of the parties to reunite in estate & interest and such intention is evident. As per Mitkarsha, Dayabhaga and SmritiChandrika, a member of a joint family once separated can reunite only with his

father,

brother or

paternal uncle but not with any other relation.

GEMS OF JUDICIARY

1. Paramanand L. Bajaj Vs CIT (1982) 135 ITR 673(Kar)-

Under the Hindu Law:

It is possible among persons who were on earlier date, members of HUF.

There must have been a partition in fact.

Reunion must be effected by the parties or some of them who had made their partition.

Must be a junction of estate & reunion of the property

Further, share of property of reunited members got at an earlier partition &

its possession at the reunion

becomes the property of the joint family.

2. CIT Vs A.M. Vaiyapuri Chettiar & Anr. (1995) 215 ITR 836 (Mad)-

It is not necessary that all the property

Belong to HUF should be brought back

in to the re-united joint family

This reunion is said to be VALID

3. CIT Vs Rupchand Routhmall (1963) 50 ITR 295 (Cal) –

The minor cannot be a part of reunion neither by self nor by someone on behalf of such minor.

4. Madhuri Doulatram Choitram Vs Lachmandas Tulsiram Nayar (HUF) (Bombay High Court)

In Absence of Karta, Any Family member may be permitted to Prosecute Suit

5. Gyanchand M. Bardia Vs. ITO (ITAT Ahmedabad)

Section 56(2)(vii) HUF can't be treated as a 'Donor' of Gift

6. Subodh Gupta (HUF) Vs Pr CIT (ITAT Delhi)

ITAT explains Meaning of term "relative" in context of HUF

7. Shri. Deen Dayal Kothari Vs Income Tax Officer, (ITAT Chennai)

Assessment of Individual cannot be done by issuing notice on HUF

8. Mrs. Sujata Sharma Vs Shri Manu Gupta (Delhi High Court)

Women can be Karta of HUF

HINDU SUCCESSION (AMENDMENT) ACT, 2005- RIGHTS & LIABILITIES OF A DAUGHTER MEMBER

In the year 2005 there is a one of the most important amendment has taken place in Hindu Succession Act with respect of rights & liabilities of a daughter member. But no one knows the exact consequences of this amendments and what are the exact rights and liabilities allotted to the females in Hindu Undivided Family. Hence, I have tried to cover this.

Consequence of Amendment made by Hindu Succession (Amendment) Act, 2005 – rights & liabilities of a daughter member

- Daughter shall be a Coparcener of Hindu Family Property.
- If a Hindu dies, the coparcener property shall be allotted to the daughter as is allotted to sons.
- If a female coparcener dies before partition, then children of such coparcener would eligible for allotment assuming a partition had taken place immediately before her demise.
- No recovery is made for ancestors dues from son, grandson, or great grandson by applying doctrine of pious obligation.

- A female member can also seek partition of the dwelling house where the family resides.
- A widow of a pre-deceased son even though remarried is now eligible for share in property as legal heir of the pre-deceased son of the family.
- A female can also dispose of her share in coparcenery property at her own will.

HINDU SUCCESSION (AMENDMENT) ACT, 2005 (39 OF 2005)

This Act comes into force from 9th September, 2005. The Government of India has issued notification to this effect. The Hindu Succession (Amendment) Act is to remove gender discriminatory provisions in the Hindu Succession Act, 1956 and gives the following rights to daughters under Section 6:

- The daughter of a coparcener cell by birth become a coparcener in her own right in the same manner as the son;
- The daughter has the same rights in the coparcenary property as she would have had if she had been a son;
- The daughter shall be subject to the same liability in the said coparcenary property as that of a son; and any reference to a Hindu Mitakshara coparceners shall be deemed to include a reference to a daughter of a coparcener;
- The daughter is allotted the same share as is allotted to a son;
- The share of the pre-deceased son or a pre-deceased daughter shall be allotted to the surviving child of such pre-deceased son or of such pre-deceased daughter;
- The share of the pre-deceased child of a pre-deceased son or of a pre-deceased daughter shall be allotted to the child of such pre-deceased child of the pre-deceased son or a pre-deceased daughter.

After the commencement of the Hindu Succession (Amendment) Act, 2005, no court shall recognize any right to proceed against a son, grandson or great-grandson for the recovery of any debt due from his father, grandfather or great-grandfather solely on the ground of the pious obligation under the Hindu law, of such son, grandson or great-grandson to discharge any such debt.

As decided in case of Mohanlal K. Shah, HUF v. ITO (2005) SOT 316(Mumbai) in order to be acceptable or recognizable partition under section 171, a partition should be complete partition with respect to all members of HUF and in respect to all properties of HUF and also there should be actual division of property as per defined/specified shares allotted to each individual member of HUF property.

ITO v. P. Shankaraiah Yadav (92004) 91 ITD 288(HYD) the court has decided that setting apart certain assets of an HUF in favour of certain coparceners on the conditions that they will not made any claim in the property of the HUF is a partial division of properties of HUF and assessing officer may ignore the partition according to the provisions of Section 171(9) of the Income Tax Act, 1961.

EXPENSES INCURRED ON MARRIAGE OF A DAUGHTER BY HUF

Even daughter has become coparcener after Amendment of Hindu Succession Act, 1956, but marriage of daughter still an obligation of the Family under Hindu law.

Thus, reasonable amount of gift given on her marriage should not objected by the male coparcener.

DEVOLUTION OF INTEREST IN CO-PARCENARY PROPERTY

Section 6 as substituted by the Hindu Succession (Amendment) Act, 2005.

Section 6(1) provides that w.e.f. 06/09/2005, in a joint Hindu family governed by the Mitakshara law, the daughter of coparcener shall by birth become a coparcener in her own right in the same manner as the son. She shall have the same rights in the coparcenery property as she would have had if she had been a son and she shall be subject to the same liabilities in respect of the said coparcenary property as that of a son.

Section 6(2) of the new post amendment section 6 provides that any property to which a female Hindu becomes entitled by virtue of sub section (1) shall be held by her with the incidents of coparcenary ownership. And property is capable of being disposed of by her by testamentary disposition.

Section 6(3) provides that

– Where a Hindu dies after the commencement of Hindu Succession Act 2005, his interest in the property of joint family, Shall devolve by testamentary of intestate succession.

– As the case may be, under this Act and not by survivorship, & the coparcenary property shall be deemed to have been divided as if a partition has taken place and, daughter is allotted the same share as son.

– The share of the pre-deceased son or a pre-deceased daughter, as they would have got had they been alive at the time of partition, shall be allotted to the surviving child of such pre-deceased son or of such predeceased daughter. [—-do — with the predeceased child of pre-deceased son or a pre-deceased daughter].

Section 6(4) provides that no court shall recognize any right to proceed against a son, grandson, or great grandson for the recovery of any debt due from his father, grand father or great grand father.

Explanation to Section 6(5) provides that partition for the purposes of this section means any partition made by execution of a deed of partition duly registered under the Registration Act, 1908 (16 of 1908) or partition effected by a decree of a court.

Section 6(6) provides that nothing contained in this section shall apply to a partition, which has been effected before the 20-12-2004.

APPLICABILITY OF I. T. ACT IN CASE OF DEEMED PARTITION UNDER SECTION 6 OF HINDU SUCCESSION ACT

For the purpose of partition of HUF, Sec. 6 of Hindu Succession Act would govern the right of the parties, however, so far as the Income Tax Law is concerned, the matter has to be governed by Section 171(1). **{CIT Vs Maharani Raj Laxmi Devi (1997) 224 ITR 582 (SC)}**

General Rule of Succession – Section 8

The property of male Hindu dying intestate shall devolve as per the provisions given below:-

- Firstly amongst the heirs specified in **Class I** of the schedule.
- If no heirs of class I exists than amongst the heirs of **Class II.**

- If no heirs in both classes then amongst **agnates** of the deceased.
- Lastly, if no agnates then amongst the **cognates** of the deceased.

Class I heir

– Son
– Son of Predeceased son.
– Son of Predeceased son of Predeceased son.
– Widow
– Widow of Predeceased son
– Widow of Predeceased son of Predeceased son
– Mother
– Daughter
– Son of Predeceased Daughter.
– Daughter of Predeceased Daughter.
– Daughter of Predeceased Son
– Daughter of Predeceased Son of Predeceased Son.
– Son of Predeceased Daughter of Predeceased Daughter.
– Daughter of Predeceased Daughter of Predeceased Daughter.
– Daughter of Predeceased Son of Predeceased Daughter.
– Daughter of Predeceased Daughter of Predeceased Son.

Class II heir

– Father
– Son's Daughter's Son.
– Son's Daughter's Daughter.
– Brother.
– Sister.
– Daughter's Son's Son.
– Daughter's Son's Daughter.
– Daughter's Daughter's Son.
– Daughter's Daughter's Daughter.
– Brothers Son.
– Sister's Son.
– Brothers Daughter.
– Sister's Daughter.
– Father's Father, Father's Mother.

– Father's Widow.
– Brothers Widow.
– Father's Brother.
– Father's Sister.
– Mothers Father.
– Mothers Mother.
– Mother's Brother.
– Mothers Sister.

AGNATES

Agnates of the deceased are relatives from the parental side. 'A Person is said to be an agnate of another if the two are related to blood or adoption wholly through males'.

COGNATES

Cognates of the deceased are relatives through maternal side. 'A person is said to be cognate of the deceased if the two are relative by blood and adoption not wholly through the males'.

APPLICABILITY OF SECTION 8

Section 8 is applicable to the property of a male Hindu dying intestate.

The initial part of section 6 permits coparcenary property to devolve on heirs by survivorship, and hence where this part of section 6 applies, section 8 will have no application. In such a case section 8 applies and the divided son will get by succession as if it were the separate property of the deceased.

DISTRIBUTION OF PROPERTY ON SUCCESSION – SECTION 10

Following are the rules provided for the distribution of property among class I heirs:-

Rule 1- Intestate's widow – one share [if he had more than 1 widow then also 1 share in total]

Rule 2 – Surviving sons, daughters & mother of deceased –one share each

Rule 3- The heirs in the branch of each predeceased son or each predeceased daughter of the intestate shall take between them one share.

Rule 4- The distribution of the share referred to in rule 3 –

– Amongst the heirs in the **branch of the predeceased son** shall be so made that his widow (or widows) together and his surviving sons and daughter get equal portions; and the branch of his predeceased son gets the same portion;

– Amongst the heir in the **branch of predeceased daughter** shall so made that the surviving sons and daughter get equal portions.

CONCEPT OF COPARCENER

A HUF, as such, can consist of a very large number of members including female members (w.e.f. 9th September, 2005, whether married or unmarried) as well as distant blood relatives in the male line. However, out of this, coparceners are only those males who are within 4 degrees in lineal descendent from the common male ancestor and including the common ancestor and the daughter of the common ancestor.

The relevance of concept of coparcener is that only coparceners can ask for partition. The other male family members; i.e, other than coparceners in a HUF, have no direct claim over HUF property, but can claim only through the coparceners. The coparcener must be a member of the family but a member of the family need not be a coparcener.

ASSESSMENT AND TAXABILITY OF HINDU UNDIVIDED FAMILY (HUF)

Key points in creation of HUF and format of deed for creation of HUF

1. Under the Income Tax Act, an HUF is a separate entity for the purpose of income tax return.

2. The same tax slabs are applicable to HUF as to individual assessee.

3. You can not transfer your own assets/money into HUF.

4. If you have ancestral property and earning some income from this property, then it is better to transfer this asset to HUF and save tax up to exemption limit applicable to individual.

5. You can transfer the money received on sale of ancestral property /assets into your HUF.

6. The income from property of HUF can be further invested in instruments such as shares, mutual funds, etc. and will be assessed under HUF.

7. Existence of property or multiple members is not a pre-requisite to create HUF. A family which does not own any property may still have the character of Hindu joint family. This jointness is understood in terms of faith and food. This is because as a Hindu is born as a member of the joint family.

8. Any gifts received by the members of HUF (birthday, marriage, etc.) can be treated as assets of HUF.

9. The HUF is taxable as separate person under income tax hence one can save tax from basic exemption of Rs. 2.5 lakh. HUF will also gain from the tax slab structure of computing income tax.

10. Apart from basic exemption of Rs. 2.50 lakh, deduction under chapter-VIA section 80C to 80U is also available. (selected sections)

Note: An HUF is liable to pay **Alternate Minimum Tax** if the tax payable is less than 18.5 per cent (including cess and surcharge) of "Adjusted Total Income" subject to prescribed conditions.

11. The following incomes are not taxed as income of HUF:-

- If a member has converted or transferred without adequate consideration his self-acquired property into join family property, income from such property is not taxable in hands of the family.
- Income of impartible estate (though it belongs to family) is taxable in the hands of holder of estate and not in hands of HUF.
- Personal income of the members cannot be treated as income of HUF.
- "Stridhan" is absolute property of a woman, hence income arising therefrom is not taxable as income of HUF.
- Income from individual property of daughter is not taxable in hands of HUF even if such property is vested into HUF by daughter.

12. An HUF is recognized as a separate assessable entity under the Act. Its income may be assessed if following two conditions are satisfied:

- There should be a coparcenership. In this connection, it is worthwhile to mention that once a joint family income is assessed as that of HUF, it continues to be assessed as such in subsequent assessment years till partition is claimed by coparceners.
- There should be a joint family property which consists of ancestral property, property acquired with the aid of ancestral property and property transferred by its members.

13. Please note that Property obtained by daughter from joint family property would be her absolute property. Any income therefrom is chargeable to tax in her hands in the individual status only. This will also apply to any legal heir obtaining property in the capacity of a descendent.

TAXABILITY OF HUF:-

In order to compute the income of an HUF, one has to first ascertain its income under the different heads of income (ignoring incomes exempted under sections 10 to 13A of the Act). The following points should be keep in mind while computing income:

■ If funds of an HUF are invested in a company or a firm, fees or remuneration received by the member as a director or a partner in the company or firm may be treated as income of the family (if fees or remuneration is earned essentially as a result of investment of funds).

■ However, if fees or remuneration is earned for services rendered by the member in his personal capacity, it will be treated as the personal income of the member.

■ If any remuneration is paid by the HUF to the karta or any other member for services rendered by him, remuneration is deductible from income of HUF if such payment is genuine and not excessive and paid under a valid and bona fide agreement.

WHO SHOULD FILE RETURN OF INCOME?

Every HUF has to file the return of income if his total income (including income of any other person in respect of which he is assessable) without giving effect to the provisions of section 10A, 10B or 10BA or Chapter VIA (i.e.,

deduction under section 80C to 80U), exceeds the maximum amount which is not chargeable to tax i.e. exceeds the exemption limit.

However, in case of a taxpayer who is required to furnish a report of audit under section 10(23C)(v),10(23C)(vi), 10(23C)(via), 10A,10AA, 12A(1)(b), 44AB, 44DA, 50B, 80-IA,80-IB,80-IC,80-ID, 80JJAA, 80LA,92E,115JB or 115VW shall furnish it electronically on or before the date of filing the return of income.

DUE DATES FOR FILING RETURNS OF INCOME/LOSS

The due dates for filing return of income are as follows:

PARTICULARS	DUE DATES
HUF whose accounts are to be audited	30th September
In all other cases	31st July

In case of an assessee having an international transaction or specified domestic transaction(s) who is required to furnish a report in Form No. 3CEB the due date is 30th November.

FILING A REVISED RETURN TO CORRECT A MISTAKE IN RETURN FILED EARLIER

Yes, provided the original return has been filed before the due date and the Department has not completed the assessment. It is expected that the mistake in the original return is of a genuine and bona fide nature and not rectification of any deliberate mistake. However, a belated return (being a return filed after the due date) cannot be revised.

Return can be revised within a period of one year from the end of the relevant assessment year or before completion of the assessment whichever is earlier.

CAN A RETURN BE FILED AFTER THE DUE DATE?

Yes, if one could not file the return of income on or before the prescribed due date, then he can file a belated return. A belated return can be filed till the end of the assessment year. Return filed after the prescribed due date is called as a belated return.

E.g., In case of income earned during FY 2019-20, the belated return can be filed up to 31st March, 2020. (Or within extended date)

Please note that, any return filed after due date till the end of assessment year has to pay some penalty u/s 234F as under:

DATE OF FILING INCOME TAX RETURN PENALTY UNDER SECTION 234F

If the return is furnished after the due date of filing but on or before the 31st day of December Rs. 5,000

In any other case i.e if file after 31st December Rs. 10,000/-.

Note: If the total income of the person does not exceed Rs. 5,00,000/-, the penalty payable under this section shall not exceed Rs. 1,000/-.

SCHOOL OF THOUGHTS UNDER HINDU LAW

There are two principle school of thoughts under Hindu Law, namely Mitakshara and Dayabhaga.

1. Mitakshara Scool:

- The Mitakshara School exists throughout India except in the State of Bengal and Assam. The Inheritance is based on the principle or propinquity i.e. the nearest in blood relationship will get the property.
- Sapinda relationship is of blood. The right to Hindu joint family property is by birth. So, a son immediately after birth gets a right to the property.
- The system of devolution of property is by survivorship. The share of co-parcener in the joint family property is not definite or ascertainable, as their shares are fluctuating with births and deaths of the coparceners. The coparcener has no absolute right to transfer his share in the joint family property, as his share is not definite or ascertainable.
- A woman could never become a coparcener. But, the amendment to Hindu Sucession Act of 2005 empowered the women to become a coparcener like a male in ancestral property. A major change enacted due to western influence.
- The widow of a deceased coparcener cannot enforce partition of her husband’s share against his brothers.
- There are four Sub-Schools under the Mitakshara School:

– Dravidian School of thought (Madras school)
– Maharashtra school (Bombay school of thought)
– Banaras school of thought:
– Mithila school of thought:

2. <u>Dayabhaga school:</u>

- It exists in Bengal and Assam only. It has no sub-school. It differs from Mistakshara School in many respects.
- Inheritance is based on the principle of spiritual benefit. It arises by pinda offering i.e. rice ball offering to deceased ancestors.
- Sapinda relation is by pinda offerings.
- The right to Hindu joint family property is not by birth but only on the death of the father.
- The system of devolution of property is by inheritance. The legal heirs (sons) have definite shares after the death of the father.
- Each brother has ownership over a definite fraction of the joint family property and so can transfer his share.
- The widow has a right to succeed to husband's share and enforce partition if there are no male descendants.
- On the death of the husband the widow becomes a coparcener with other brothers of the husband. She can enforce partition of her share.

<u>CHARACTERISTICS OF HUF</u>

1. The Karta can function in Dual capacity and can claim remuneration and other benefits from the HUF.

2. Hindu Undivided family may be composed of

– Large or
– Small or
– Nuclear Joint Families

3. Every above said families may hold the property in its own RIGHT, may be assessed for its income as a separate unit.

4. There need NOT be more than one MALE member to form HUF.

5. If the family is reduced to Sole – Surviving coparcener with other family members, income tax is leviable on the joint family and not on male members as individual.

6. There can be a HUF comprising only of FEMALE members.

7. A member of the family can carry on any other business individually, it will be his individual income not of family even if he borrows requisite capital from the joint family fund.

8. Mostly fees or salary earned by Karta as director or partner may be considered as his individual income.

9. Salary income of the individual will not be assessed as income of the HUF merely by the reason that the person having been educated, maintained, supported wholly by joint family funds.

CONCEPT OF CO-PARCENERY

The Hindu Coparcenary – a narrower body than Joint Family.

A Hindu joint family consists of the common ancestor and all his lineal male descendants upto any generation together with the wife/ wives (or widows) and unmarried daughters of the common ancestor and of the lineal male descendants. Whatever the skeptic may say about the future of the Hindu joint family, it has been and is still the fundamental aspect of the life of Hindus.

Whereas a co-parcenery is a narrow body of persons within a joint family. It exclusively consists of male members. A Hindu co-parcenery is a corporate entity, though not incorporated. A co-parcenery consists of four successive generations including the last male holder of the property. The last male holder of the property is the senior most member of the family.

HUF coparcenery is a limited body, a part of the HUF, smaller than the membership of HUF. It includes those persons who acquire interest in joint coparcenary property by BIRTH, namely:-

– Sons
– Grand Sons
– Great Grand Sons

Under the Mitakshara School of thoughts, a Coparcener is that member of HUF who acquires by birth an interest in the joint property of the family whether inherited or otherwise acquired by the family. The members of the family who are not Coparceners have no right to claim partition.

CHARACTERISTICS OF COPARCENERY

A Hindu coparcenery has following essential characteristics as under according to **CED v. Alladi Kuppuswamy (1977) 108 ITR 439 (SC):**

1. The male descendants as well as female descendants after the Succession (Amendment) Act, 2005, up to the third generation acquire an independent right of ownership by birth and not representing their ancestors. After the commencement of **Hindu Succession (Amendment) Act, 2005**, a daughter of a coparcener shall have the same right in the coparcenery as she would have had if she had been a son.

2. The members of the coparcenery have the right to work out their rights by demanding partition.

3. Until partition, each member has got ownership extending over the entire property co-jointly with the others and so long as no partition takes place, it is difficult for any coparcener to predict the share which he might receive.

4. As a result of such co-ownership, the possession and enjoyment of the property is common.

5. There can be no alienation of the property without the concurrence of the other co-parceners unless it is to be for legal necessity.

6. The interest of a deceased member lapses on his death and merges in the coparcenery property.

RIGHTS OF MISTAKSHARA COPARCENER

1. A Mitakshara Coparcener has right to claim partition of the family property and to separate himself from the family.

2. A coparcener has his/her right and interest by birth in the whole of the joint family property without having a definite share in that property. According to **Appovier v. Rama Subba Aiyan (1866) 11 MIA 75, 90,** no coparcener of an undivided family can predict in the joint and undivided property that he has a certain definite share.

3. Every coparcener has a right to be maintained out of the joint family fund. However, the extent of maintenance available to him is at Karta's sole discretion.

4. It was held in **Attorney General of Ceylon v. A.R.A Arunachalam Chettiar & Ors. (1958) 34 ITR (ED) 42 (PC),** that a coparcener can Initiate proceedings against the Karta to ensure recognition of his future maintenance rights where he is excluded entirely from the benefits of joint enjoyment of family property and income. He can also claim compensation for his earlier exclusion.

5. The coparceners are tied together with unity of interest and unity of possession between them.

6. Every coparcener has a right to challenge an improper alienation made by Karta, apart from those made for legal necessity, benefit of estate or indispensable duties or for legitimate acts of management.

7. As held in **State Bank of India v. Ghamandi Ram AIR 1969 SC 1330 and N.V.Narendra Nath v. CWT (1969) 74 ITR 190 (SC),** a Mitakshara coparcener has the right of survivorship meaning that he takes the joint family property by survivorship. However, w.e.f. 9-9-2005 as a consequence of commencement of Hindu Succession (Amendment) Act, 2005, the interest in Joint Hindu Family shall devolve by testamentary or intestate succession and not by survivorship.

RIGHT OF COPARCENERS UNDER DAYABHAGA SCHOOL

The right of the coparceners under Dayabaga and Mitakshara Schools have many things in common. There are, however, certain points of distinction which are as under:

1. Under the Dayabhaga school, no person has any interest or right by birth. The interest of each coparcener is a specified and fixed one.

2. A coparcener under the Dayabhaga schools, has the right to joint possession and enjoyment of the HUF properties.

ANCESTRAL PROPERTY:

Ancestral property may be defined as the property which a man inherits from any of his three immediate male ancestors, i.e. his father, grandfather and great grandfather. Therefore, property inherited from any other relation is not treated as ancestral property. Income from ancestral property held by following families is taxable as income of HUF:

(a) A family of widow mother and sons (may be minor or major) ;
(b) Family of husband and wife, having no child ;
(c) Family of two widows of deceased brothers ;
(d) Family of two or more brothers ;
(e) Family of uncle and nephew ;
(f) Family of mother, son and son's wife ;
(g) Family of a male and his late brother's wife.

Note: Property obtained by daughter from joint family property would be her absolute property. Any income therefrom is chargeable to tax in her hands in the individual status only. This will also apply to any legal heir obtaining property in the capacity of a descendent.

PARTITION OF HUF:

Partition means division of property. Where the property is capable of admitting a physical division, share of each member is determined by making physical division of the property. On the other hand, where the property is not capable of physical division, partition shall mean such division as the property may admit.

Though partition can be claimed only by coparceners, the following persons are also entitled to their share in the property:

(a) A son in the womb of mother at the time of partition;

(b) Mother (gets equal share if there is partition between sons after the death of father); and

(i) ASSESSMENT AFTER PARTITION (SECTION 171):

Once income of a joint family is assessed as income of a HUF, it will continue to be assessed as such until one or more coparceners claim partition. Such claim must be made before the relevant assessment year. The Assessing Officer, on the receipt of such claim, must make an enquiry after giving due notice to the members and record a finding whether there has been a partition and, if so, the date of partition.

Income of the family from the first date of the previous year till the date of partition is assessed as income of HUF and, thereafter, income from the property which was subject to partition is assessed as individual income of the recipient members. If, however, the recipient member forms another HUF along with his wife and son(s), income of the property which was subject to partition is chargeable to tax in the hands of new HUF.

(ii) PARTITION – TOTAL OR PARTIAL:

Under the Hindu law, an HUF is entitled to effect a partition which may be total or partial.

■ Total partition – where an HUF undergoes a total partition, the entire joint family property is divided amongst all coparceners and the family ceases to exist as an HUF.

■ Partial partition – A partial partition, on the other hand, may be partial as regards the persons constituting the joint family or as regards the properties belonging to the joint family or both.

(a) In a partial partition, as regards the persons constituting the family, one or more coparceners may separate from others and the remaining coparceners may continue to be joint.

(b) In a partial portion, as regards the property, a joint family may make a division and severance of interest in respect of a part of joint estate while retaining their status as a joint family and holding the rest of the properties as joint and undivided property.

(iii) EFFECT OF PARTIAL PARTITION [SECTION 171(9)]:

After the enactment of section 171(9), partial partition is not recognised under the Act. The provisions of section 171(9) is applicable on satisfaction of two conditions, firstly, the partial partition should have taken place after December 31, 1978 and secondly, such partition must have taken place in an HUF which was assessed as a HUF before.

■ If the above two conditions are satisfied, such family will continue to be assessed as if no such partial partition has taken place,i.e., the property or source of income will be deemed to be belonging to the HUF and no member will be deemed to have separated from the family.

■ Each member or group of members of such family immediately before such partial partition and the family will be jointly and severally liable for any tax, penalty, interest, fine or other sum payable under the act by such HUF, whether before or after such partial partition.

■ The several liability of any member or group members of such family will be computed according to the portion of the joint family property allotted to him on such partial partition.

METHODS OR DEVICES WHICH MAY PROVE USEFUL IN REDUCING TAX INCIDENCE IN CASE OF HUF

By increasing the number of assessable units through the device of partition of the HUF;

1. By creation of separate taxable units of HUF through will in favour of HUF or gift to HUF;
2. Through family settlement / arrangement;
3. By payment of remuneration to the Karta and other members of the HUF;
4. By use of loan from HUF to the members of the HUF;
5. Through gift by HUF to its members specially to the female members;
6. Through other methods / devices;

The aforesaid methods / devices are discussed in detail below as follows:

(I) PARTITION OF HUF

In the case of certain HUFs, the tax liability can be reduced by partition of the HUF. This can be easily done in a case where the partition results in separate independent taxable units. Suppose an HUF consists of father and two sons and there are two business establishments, a house property and other sources of income with the HUF. If the members of the HUF have no other sources of income then partition of the HUF can be done by giving one business establishment to each of the sons, house property to the father and dividing the other sources in such a manner so as to make the partition equitable. Such a partition of HUF will reduce the tax liability considerably.

The position may, however, be different in a case where the members of the HUF have got high individual incomes. In such a case it is not advisable to break or partition the HUF. The HUF should be allowed to continue as a separate taxable unit.

Then there may be a case where the HUF has got only one business establishment which does not admit of a physical division. For the sake of partition the business may be converted into a partnership firm or a company. At present, rate of firm's tax and the rate of tax in case of a company, is 30% flat, therefore conversion of HUF business into a partnership or a company is not advantageous. The incidence of , in such a case, can be better reduced by payment of remuneration to the members of the HUF.

Partial partition of HUF is also a very effective device for reducing its tax liability. Partial partition is recognized under the Hindu Law. However partial partition of an HUF has been de-recognised by the provisions of sec. 171(9) of the Income Tax Act, 1961 according to which any partial partition effected after 31.12.78, will not be recognized.

The provisions of sec. 171(9) have been declared ultra-vires by the Madras H.C. in the case of M.V.Valliappan v. ITO, 170 ITR 238. The Supreme Court has granted S.L.P. and stayed the operation of the above decision of Madras H.C. as reported in 171 ITR (St.) 52. The Gujrat H.C. has, however, held the ITAT justified in following the aforesaid decision of Madras H.C., CIT v. M. M. Panchal HUF, 210 ITR 580 (Guj.)

Notwithstanding the provisions of sec. 171(9) partial partition, can still be used as a device for tax planning in certain cases. An HUF not hitherto assessed as

undivided family can still be subjected to partial partition because it is recognized under the Hindu Law and such partial partition does not require recognition u/s. 171 of the Income Tax Act,1961. Thus a bigger HUF already assessed as such, can be partitioned into smaller HUFs and such smaller HUFs may further be partitioned partially before being assessed as HUFs. Besides any HUF not yet assessed to tax can be partitioned partially and thereafter assessed to tax.

The following legal aspects in respect of partition of HUF, should also be kept in mind while the partition of HUF which are as under :-

(i) Distribution of the assets of an HUF in the course of partition, would not attract any capital gains tax liability as it does not involve a transfer.

(ii) On the basis of the same reasoning distribution of assets in the course of partition would not attract any gift tax liability, and

(iii) There would be no clubbing of incomes u/s. 64 as it would not involve any direct or indirect transfer.

(II) CREATION OF HUFS AS SEPARATE TAXABLE UNITS BY WILL IN FAVOUR OF OR GIFT TO HUF :

It is now well settled law that there can be a gift or will for the benefit of a Joint Hindu Family . It is immaterial whether the giver is male or female, whether he or she is a member of the family or an outsider. What matters is the intention of the donor or testator that the property given is for the benefit of the family as a whole.

Suppose there is an HUF consisting of Karta, his wife, his two sons, daughter-in-law and grand children. A gift or will can be made for the benefit of the two smaller HUFs of the sons. The bigger HUF will continue as a separate taxable unit evenafter the death of the Karta.

There may also be a case where the father or mother has got self acquired properties. They have a son and his family but there is no ancestral property as a corpus of their family. Then, father & mother or both can leave their property for the benefit of their son’s family, through their will (s).

Similar result can be obtained by means of a gift for the benefit of a joint family. It may be pointed out here that an HUF cannot be created by act of

parties but a corpus can be created for an already existing HUF through the medium of a gift or will etc.

(III) THROUGH FAMILY SETTLEMENT / ARRANGEMENT :

Family settlements / arrangements are also effective devices for the distribution of ancestral property. The object of the family settlement should be broadly to settle existing or future disputes regarding property, amongst the members of the family. The consideration for a family settlement is the expectation that such settlement will result in establishing or ensuring amity and goodwill amongst the members of the family. Ram Charan Das v. G.N.Devi, AIR 1966 SC 323 and Krishna Beharilal v. Gulabchand, AIR 197 SC 1041. Such an agreement is intended to avoid future disputes and to bring about harmony amongst the members of the family . Sahu Madho Das v. Mukand Ram, AIR 1955 SC 481. Briefly stated though conflict of legal claims, present or future is generally a condition for the validity of family arrangement, it is not necessarily so. Even bonafide disputes, present or possible in future, which may not involve legal claims, will also suffice to effect a family arrangement.

As family arrangement does not involve a transfer, there would be no gift and capital gains tax liability or clubbing u/s. 64.

FAMILY SETTLEMENT

There is slight distinction in between a Family Arrangement discussed hereinabove and a Family Settlement. Where there is family settlement and relinquishment taking away shares of sisters, mother etc. in immovable property, such document needs registration and attracts stamp duty. If unregistered would be inadmissible for collateral purposes until same is impound as hold in Sita Ram Bhama v. Ramavtar Bhama – AIR 2018 S.C. 3057 – Kale and Others were explained and distinguished. Punjab and Haryana High Court in Hargurusharan Singh v. Lt. Col. Hargovind Singh – AIR 2017 P&H 3 held a family settlement deed as compulsorily registerable when there was no pre-existing right in property and there had been failure to establish genuineness.

FAMILY ARRANGEMENT

When a partition is effected between the co-parceners / members of a joint Hindu Family, the partition deed attracts stamp duty under the State Law. However, it can be avoided by arriving at a family arrangement in between the

members. The family arrangement may be even oral. If the terms of the family arrangement are reduced to writing; a distinction should be made between a document containing the terms and recitals of a family arrangement made under the document and a mere memorandum prepared after the family arrangement had already been made, either for the purpose of the record or for information of the Court for making necessary mutation. It has been held that in such a case the memorandum, itself, does not create or extinguish any rights in immovable property and is, therefore, not compulsorily registrable. (Refer Tek Bahadur Bhujil – AIR 1966 SC 292; Sahu Madho Das v. Mukund Ram – AIR 1955 SC 481; Vijay Kumar v. Sanjay Kumar – AIR 2003 Delhi 168; Digambhar Adhar Patil v. Deoram Girdhar Patel – AIR 1995 SC 1728, AIR 1973 Allahabad 158, AIR 1988 AP 147; AIR 1966 SC 1836; AIR 1966 (SC) 252; AIR 1997 (Raj.) 211; AIR 1998 (Raj.) 348 and Kale and others v. Dy. Director of Consolidation and Others, AIR 1976 SC 807. Thimma Reddy v. Chandrashekhar Reddy – AIR 2018 Karnataka 54; Priya Ranjan Bhagat v. Saroj Bhagat – AIR 2016 Jharkhand 22; Subraya M.N. v. Vittala M. N. – air 2016 s.c. 3236

The family arrangement must be a bona fide one so as to resolve family disputes and rival claims by a fair and equitable division or allotment of properties between the various members of the family; (2) It must be voluntary and should not be induced by fraud, coercion or undue influence; (3) The family arrangement may be oral in which case no registration is necessary; (4) It is well settled that registration would be necessary only if the terms of the family arrangement are reduced into writing. Which create or extinguish any rights in immovable properties and would fall within the mischief of section 17(1)(b) of the Registration Act; (5) The members who may be parties to the family arrangement must have some antecedent title, claim or interest even a possible claim in the property which is acknowledged by the parties to the settlement. Even if one of the parties to the arrangement has no title but under the arrangement the other party relinquishes all its claims or titles in favour of such a person and acknowledges him to be the sole owner, then the antecedent title must be assumed and the family arrangement will be upheld and the courts will find no difficulty in giving assent to the same; (6) Even if bona fide disputes, present or possible, which may not involve legal claims are settled by a bona fide family arrangement which is fair and equitable, the family arrangement is final and binding on the parties to the settlement. (Refer Kale v. Deputy Director : AIR 1976 SC 807; Lakshmi Ammal v. Chaprovahthi – AIR 1999 SC 336; C.G.T. v. D. Nagrirathinam (2004) 266-ITR-342 (Madras).

Like partition, family arrangement is not a transfer. A family arrangement, on the contrary, is a transaction between members of the same family for the benefit of the family so as to preserve the family property, the peace and security of the family, avoidance of family dispute and litigation and also for saving the honour of the family. Such an arrangement is based on the assumption that there was an antecedent title in the parties and the agreement acknowledges and defines what that title is. It is for this reason that a family arrangement by which each party takes a share in the property has been held as not amounting to a conveyance of property from a person who has title to it to a person who has no title. (Refer : S.K. Sattar SK Mohd. Choudhari v. Gundappa Amabadas Bukate (1966) 6 SCC 373; CIT. v. A.L. Ramnathan (2000) 245-ITR-494 (Madras.)

A Memorandum of Understanding cannot be said as a bogus document on account of one being a stranger or allotted more than his share, if it is established that he had some semblance of interest and disputes have cropped up between the said persons. Memorandum of Understanding actuated to resolve disputes can be treated as family settlement (Refer Ramdev Food Products Pvt. Ltd. v. Arvindbhai Rambhai Patel & Others AIR 2006 S.C. 3302). It is settled law that when parties enter into a family arrangement, the validity of the family arrangement is not to be judged with reference to whether the parties who raised disputes or rights or claimed rights in certain properties had in law any such right or not. CIT. v. Ponnammal (R.) (1987) 164-ITR-706 (Mad.); CIT v. Ramanathan (AL) (2000) 245-ITR-494 (Mad.); Kele V. Deputy Director of Consolidation (1976) AIR 1976 SC 807 and Maturi Pullaiah v. Maturi Narasimham (1966) SC 1936 relied on in C.I.T. v. Kay Arr Enterprises and Others (2008) 299-ITR-348 (Madras)

Transfer of shares in Companies can be possibly made by way of family arrangement between the family members as held in CIT v. Kay Arr Enterprises (2008) 299-ITR-348 (Madras). Mrs. P. Sheela v. I.T.O. (2009) 308-ITR-(AT) 350 (Bangalore). The Apex Court in Hari Shanker Singhania & Ors. v. Gaur Hari Singhania & Ors. AIR 2006 SC 2488 held that family settlement or arrangement is to be treated differently from any other formal commercial settlement and technicalities of limitation etc. should not come in the way of implementation for maintaining peace and harmony in a family. However as a matter of caution in such cases there may be long drawn litigation and for one or other lapse it may be a faulty proposition. It should be the last resort.

A family arrangement must be entered into by all parties thereto. The concept of family arrangement has now been accepted in our country and the Supreme Court has generally taken a broad view of the matter and leaned heavily in favour of upholding any such arrangement. The enjoyment of properties by different members of the joint family, who have been put into possession pursuant to a family arrangement, operates as an estoppel against such member and cannot be jeopardized by a member resiling from the arrangement, more particularly when the arrangement had been entered into a considerable time ago. (AIR 2002 Bombay 129). There is thin difference between joint family property and joint property. If the property is acquired with the contributions of the coparceners and the income or savings from joint family fund or from the ancestral property, that property will be a joint family property in which each and every coparcener has a right to claim. A joint property is being created by investment made by individuals from their independent earning. Priya Ranjan Bhagat v. Saroj Bhagat – AIR 2016 Jharkhand 22 at 34. There was f family arrangement by a dead among the children of R and S. Each of the members held apart from personal properties, family properties and shared in business concerns and each of the family businesses was independently managed by one of the parties. Disputes arose between the parties. The disputes were referred to an arbitrator. The arbitrator suggested a settlement to which the parties agreed. In terms of the settlement, the assessee had to resign from KB, a firm and transfer his interest to NR for a consideration of ₹ 35,000/- being the capital balance of the firm. Accordingly, the assessee transferred the shares. NR transferred the shares held by him in favour of the assessee. The assessee claimed that there was no transfer which gave rise to any capital gains. However, the assessing authority held that there was a transfer, there was a capital gain and, therefore, the assessee was liable to pay the tax. The Commissioner(Appeals) confirmed the order. The Tribunal held that there was no transfer and it was only a family arrangement. Therefore, the assessee was not liable to pay tax on capital gains. On appeal to the High Court It was held : “A partition is not a transfer. What is recorded in a family settlement is nothing but a partition. Every member has an enterior title to the property which is the subject-matter of a transaction, that is partition or a family arrangement. So there is adjustment of shares, crystallization of the respective rights in family properties and, therefore, it cannot be construed as a transfer in the eye of law. When there is no transfer there is no capital gains and consequently no tax on

capital gains is liable to be paid". CIT v. R. Nagaraja Rao (2013) 352-ITR-565 (Karnataka) at 566.

Family arrangement / settlement though not registered can be used as piece of evidence. Subraya M.N. v. Vitalla M.N. & Others – AIR 2016 S.C. 3236. An oral partition of joint family property amongst members of a HUF is permissible : AIR 1958 S.C. 706; AIR 1988 S.C. 881; 259-ITR-265 (S.C.)

(IV) BY PAYMENT OF REMUNERATION TO THE KARTA AND / OR OTHER MEMBERS OF THE FAMILY :

The other important measure of tax planning for an HUF is to pay remuneration to the Karta and / or other members of the HUF for services rendered by them to the family business. The remuneration so paid would be allowed as a deduction from the income of the HUF and thereby tax liability of the HUF would be reduced, provided the remuneration is reasonable and its payment is bonafide. There is no legal bar against payment of remuneration to the Karta or other members of HUF for services rendered to the family in carrying on the business of the family or looking after the interests of the family in a partnership business. Jugal Kishore Baldeo Sahai v. CIT 63 ITR 238 (SC). The payment must be for service to the family for commercial or business expediency. Jitmal Bhuramal v. CIT 44 ITR 887(SC). Remuneration paid to the Karta or other members of the HUF should be under a valid agreement. The agreement must be valid, bonafide, on behalf of all the members of the HUF and in the interest of and expedient for the family business. Further the payment must be genuine and not excessive. J. K. B. Sahai v. CIT, 63 ITR 238 (SC).

AGREEMENT WITH WHOM TO BE ENTERED:

The agreement should be between the Karta and other members of the family. The agreement need not always be in writing. An agreement to pay salary / remuneration can also be inferred from the conduct of the parties. CIT v. Raghunandan Saran, 108 ITR 818 (All.). However, it would be better if the agreement to pay remuneration is reduced in writing.

The distinction between ordinary and specified HUF's has been done away w.e.f. 1.4.1997 i.e. A.Y. 1997-98. For Assessment Year 2007-08 the rate of tax on all HUF's would be the same as in the case of an individual. This change in the rates of tax has brought a lot of relief to specified HUF's i.e. the HUF's with one or more members having taxable income. After the aforesaid amendment

whereby the concept of specified HUF's has been done away with, w.e.f. A.Y. 1997-98 this method of tax planning will be much easier and it will bring more tax relief to the HUF's.

(V) BY LOAN TO THE MEMBERS FROM THE HUF:

If the business, capital or investment of the HUF is expanding then such expansion can be done in the individual names of the members of HUF by giving loans to the members from the HUF. The HUF may or may not charge interest on the loans given.

Where property was purchased by members of HUF with loan from the HUF, which was later on repaid the income from such property would be assessable as individual income of the members

L. Bansidhar and Sons v. CIT 123 ITR 58 (Delhi).

Where after partition of an HUF, two members became partners in three firms on behalf of their respective HUFs and they also became partners in a fourth firm, the funds were obtained by means of loans from other three firms, the share incomes of the members from the fourth firm was assessable as their individual income only.

CIT v. Champaklal Dalsukhbhai, 81 ITR 293 (Bom.).

(VI) BY GIFT OF MOVABLE ASSETS OF THE HUF TO ITS FEMALE MEMBERS:

The Karta of an HUF cannot gift or alienate HUF property but for legal necessity, for pious purposes or in favour of female members

of the family. Gift of immovable property within reasonable limits, can be made by a Karta to his wife, daughter, daughter-in-law or even to a son out of natural love and affection. Gift of immovable property within reasonable limits can be made only for pious purpose e.g. marriage of a daughter.

Therefore, if the HUF has excess funds or property, then, the Karta can make gift of movable assets to his wife, daughter or daughter-in-law at one go or over a period of time. However, it may be noted that with effect from 1.10.98, the applicability of Gift Tax is no more in force. Therefore, no Gift Tax will be payable by a person making the gift from on or after 1.10.98. However, w.e.f. 01.04.2017 Gift received from other than relatives exceeds Rs. 50,000/- then

that amount is liable to Income Tax u/s. 56 of Income Tax Act, 1961. It may be remembered that gift for marriage or maintenance of daughter(s) is not liable to Gift Tax. Further clubbing provisions of sec. 64 would not be applicable if the gift in validly made in accordance with the rules of Hindu Law. Besides, if a gift made to the minor daughter of the Karta is valid then the provisions of sec. 60 of the Income Tax Act would not be attracted. CIT v. G. N. Rao, 173 ITR 593 (AP). Whereby, section 60 relates to transfer of income where there is no transfer of assets.

(VII) THROUGH OTHER METHODS / DEVICES :

There are other methods / devices which may be used to reduce the incidence of taxation in the case of an HUF, e.g. :

(i) Vesting of individual or self-acquired property in a family hotchpots.

(ii) Family reunion after partition.

(iii) Through inheritance by succession – Bequests by Will, now recognized by sec. 30 of Hindu Succession Act, can also be utilized for tax-planning.

- **Properties received under a Will**

The status of the property would be the same as is analysed in the case of properties received by way of gifts as discussed above, that is to say, that the properties will be regarded as the properties of the Hindu Undivided Family only, if the recipient has a son.

- **Properties inherited from an ancestor on the ancestor dying intestate**

As held by the Supreme Court in the case of CWT v. Chander Sen (161 ITR 370) the person inheriting the property from his ancestor, even if he has a wife and son would receive the property absolutely in his own right and his son would not have any interest in that property.

- **Unequal Distribution on partition**

The Supreme Court in the case of Commissioner of Gift-Tax v. N. S. Getti Chettiar, 82 ITR 599 held that there is no liability to Gift Tax if there is an unequal distribution of assets amongst members of the family on partition.

- **Reunion**

The conditions for a valid reunion are brought out in the case of CIT v. A. M. Vaiyapuri Chettiar and another 215 ITR 836

The condition precedent for a valid reunion under the Hindu Law are : (1) There must have been a previous state of union. Reunion is possible only among the persons who were on an earlier date members of a Hindu Undivided family ; (2) There must have been a partition in fact ; (3) The Reunion must be effected by the parties or some of them who had made the partition; and (4) There must be a junction of estate and reunion of property because, reunion is not merely an agreement to live together as tenants in common. Reunion is intended to bring about a fusion in the interest and in the estate among the divided member of an erstwhile Hindu Undivided Family, so as to restore to them the status of an HUF once again and therefore, reunion creates a right in all the reuniting coparcener, in the joint family properties which was the subject matter of partition among them, to the extent they were not dissipated before the reunion.

The reunion effected by the assessee under the deed of reunion was valid. The entire properties of the erstwhile joint family prior to the partition would be the properties of the reunited joint family. The Income Tax Officer might have the option to assess the income arising from the entire properties belonging to the erstwhile joint family prior to the partition in the hands of the reunited, Hindu Undivided Family.

- **Representative of HUF in a Partnership Firm**

An HUF cannot become a partner in a firm. The Karta or a member of the HUF can represent the HUF in a firm. A female member can also represent HUF in a partnership firm, CIT v. Banaik Industries 119 ITR 282 (Pat.)

REMUNERATION TO KARTA OR MEMBER FROM FIRM :

Where remuneration was received by a member of HUF from a firm, where he was partner on behalf of HUF for managing firms business such remuneration was his individual income, CIT v. G. V. Dhakappa 72 ITR 192 (SC); Premnath v. CIT 78 ITR 319 (SC).

However, income received by a member of HUF from a firm or company is taxable as the income of the HUF, if it is earned detriment to or with the aid of

family funds, otherwise it is taxable as the separate income of the member, P.N. Krishna v. CIT 73 ITR 539 (SC).

- Ramlaxman Sugar Mills vs. CIT (1967) 66 ITR 613
- Brijmohan vs. CIT (1993) 201 ITR 831 (SC)
- Lachmandas Bhatia & Sons vs. CIT (2007) 162 Taxmann 118 (Delhi)
- ITO vs. Bharat Enterprises (2006) 103 TTJ 280 (Pune)
- P. Gautam & Co. vs. JCIT (2011) 14 Taxmann.com 79 (Ahd.)
- CIT vs. Jugalkishor & Sons (2011) 10 Taxmann.com 82 (All.)
- Kolaram & Co. vs. ITO (133) Taxmann.com 75 (Amritsar)
- CIT vs. Central Scientific Instruments Corporation (2010) 1 DTL online 149 (All.)
- CIT vs. Rajgopal (2003) 132 Taxmann 39 (Mad.)
- Subhashchand Sood (HUF) vs. ITO ITA No. 123 / CHD / 2012
- Coal India Limited vs. Quantinental & Eastern Agency (RFA)(OS)37/2003

- **HUF AND FIRM :**

Members of HUF can constitute Partnership without effecting a partition or without disturbing the status of joint family. Ratanchand Darbarilal v. CIT 15 ITR 720 (SC). However , on viewing at the present rate of firms tax, conversion of HUF business into partnership is not advantageous.

Only an individual or body corporate may be a partner in a limited liability partnership. A HUF cannot be treated as a body corporate for the purpose of LLP Act, 2008. Therefore, HUF / its Karta cannot become partner in LLP. (MCA Circular No. 13 / 2013, Rasiklal & Co. vs. CIT 229 ITR 458.

LANDMARK DECISIONS ON THE SUBJECT OF HUF

(i) Krishna Prasad v. CIT, 97 ITR 493 (SC)

On partition between father and sons, the shares which sons obtained on partition of the HUF with their father, is the ancestral property. As regards his male issues who take interest in the said property on birth. Therefore one of the sons who was not married at the time of partition will receive the property as his HUF property, however income therefrom will be taxed as the HUF income from the date of his marriage.

(ii) A.G. v. A.R. Arunachalam Chettiar, 34 ITR 421 (PC)

A Mitakshara joint family consisted of father and son. On death of a son the father and the widow of the son constitute the HUF.

(iii) Gowli Buddanna v. CIT, 60 ITR 293 (SC)

A Joint family may consist of a single male member with his wife and daughter/ s and it is not necessary that there should be two male members to constitute a joint family.

(iv) N.V. Narendranath v. CWT, 74 ITR 190 (SC)

The property received by a coparcener on partition of the HUF is the HUF property in his hands vis-à-vis the members of his branch i.e. with his wife and a daughter.

(v) L. Hirday Narain v. ITO, 78 ITR 26 (SC)

After the partition between the father and his sons, the father and his wife constitute a Hindu Undivided Family which gets enlarged on the birth of a son.

(vi) CIT v. Veerappa Chettiar, 76 ITR 467 (SC)

Even when a joint family is reduced to female members only it continues to be a HUF.

(vii) CIT v. Sandhya Rani Dutta, 248 ITR 201 (SC)

Female members cannot create or form an HUF by their acts even under the Dayabhaga School of Hindu Law.

(viii) Pushpa Devi v. CIT, 109 ITR 730 (SC)

The right to blend the self-acquired property with HUF property is restricted to a coparcener (male member of HUF) and not available to a female member. However, there is no restriction on a female member gifting her property to the HUF of her son.

(ix) Surjit Lal Chhabda v. CIT, 101 ITR 776 (SC)

The property which was thrown into the common hotchpot was not an asset of a pre-existing joint family of which the assessee was a member. It became an item of joint family property for the first time when the assessee threw what was his

separate property into the common family hotchpot. Therefore, the property may change its legal incidence on the birth of the son, but until that event happens, the property, in the eye of Hindu Law, is really the property of the assessee.

FAMILY ARRANGEMENT

It is arrangement between member of a family descending from a common ancestor or near relation trying to sink their differences and disputes, settle and solve their conflicting claims once and for all to buy peace of mind and bring about harmony and goodwill in the family by an equitable distribution or allotment of assets and properties amongst member of the family.

Family In A Family Arrangement has A Wider Meaning

The Supreme Court in Ram Charan Das v. Girja Nandini Devi (AIR 1996 SC 323, 329) held that : " Court give effect to a family settlement upon the broad and general ground that it's object is to settle existing or future disputes regarding property amongst members of a family. The word 'family' in this context is not to be understood in the narrow sense of being a group of person who are recongnised in law as having a right of succession or having a claim to a share in the property in dispute." While it is necessary that there should be some common tie between the parties to such family arrangement, it need not be between persons who are commonly understood as constituting a Hindu Family or for that matter, a family in any restricted sense. It is not necessary that there should be a strictly legal claim as member of the same family. It is enough if there is a possible claim or if they are related, a semblance of a claim (Krishna Beharilal v. Gulabchand AIR 1971 SC 1041, 1045).

A family arrangement wherein an adopted son was a party was held to be valid though he turned out to be a stranger as the adoption was subsequently held to be invalid in the case of Shivamurteppa Gurappa Ganiger v. Fakirapaa Basangauda Channappagaudar (AIR 1954 Bom. 430) C.G.T. v. Smt. Gollapude Saritammn (116 ITR 930, 936 AP.)

It is possible that married daughters or sisters who are not treated as members of the family of a parent/ brother on their marriage may still be considered as members of the family for purposes of a family arrangement.

Essentials of A Family Arrangement

(i) The family arrangement should be for the benefit of the family in general.

(ii) The family arrangement must be bonafide, honest, voluntary and it should not be induced by fraud, coercion or undue influence.

(iii) The purpose of the family arrangement should be to resolve present or possible family dispute and rival claims not necessarily legal claims by a fair and equitable division of the property amongst various members.

(iv) The parties to the family arrangement must have antecedent title, claim or interest. Even if a possible claim in the property which is acknowledged by the parties to the settlement will be sufficient.

(v) The consideration for entering into family arrangement should be preservation of family property, preservation of peace and honour of the family and avoidance of litigation. Kale v. Deputy Director of Consolidation (AIR 1976 SC 807)

(vi) Family peace is sufficient consideration

A question arises as to what is the consideration for allotment of property under a family settlement. It is said that a family settlement is arrived at between the members of the family with a view to compromise doubtful and disputed right. It, therefore, follows that the allotment of shares under a family settlement is not what a person is legally entitled to since some of the members can be allotted a much lesser share of asset than what they are entitled to under the law, while others a much larger share than what they are entitled to , yet some others may get a share to which are not legally entitled to since the main consideration is surely and certainly purchase of peace and amity amongst the family members and such a consideration cannot be deemed as being without consideration.

ANTECEDENT TITLE, CLAIM OR INTEREST OR EVEN A POSSIBLE CLAIM :

The members who may be parties to the family arrangement must have some antecedent title, claim or interest or even a possible claim in the property which is acknowledged by the parties to the settlement. Even if one of the parties to the settlement has no title but under the arrangement the other party relinquishes all its claims or titles in favour of such a person and acknowledges him to be the

sole owner, then the antecedent title must be assumed and the family arrangement will be upheld and the Court will find no difficulty in giving assent to the same. Kale v. Deputy Director of Consolidation (AIR 1976 SC 807).

But where the person, in whose favour certain properties have been transferred under the guise of a family arrangement, has no and cannot have any claim or possible claim against the transferor, & therefore, the same cannot be regarded as a family arrangement.

CED v. Chandra Kala Garg 148 ITR 737 (All.)

CIT v. R.Ponnammal 164 ITR 706 (Mad.)

In the case of **Roshan Singh v. Zile Singh (AIR 1988 SC 881**) the Supreme Court held that the parties to family arrangement set up competing to the properties and there was an adjustment of the rights of the parties. By family arrangement it was intended to set at rest competing claims amongst various members of the family to secure peace and amity. The compromise was on the footing that there was an antecedent title of the parties to the properties and the settlement acknowledged and defined title of each of the parties.

1. A family settlement is considered as a pious arrangement by all those who are concerned and also by those who administer law. A family settlement is not within the exclusive domain of the Hindu Law but equality applies to all families governed by other religions as well. Thus, it shall apply to Muslims, Christians, Jews, Parsees and other faiths equally.

2. The concept of family arrangement is an age old one. It is not only applicable to Hindus but also to other communities in which there is a common unit, common mess and joint living. In the case of **Bibijan Begum v. Income Tax Officer (34 TTJ 557),** the Gauhati Bench of the Appellate Tribunal in a very elaborate judgement held that there is no bar for Mohammedans to effect a family arrangement. In that case the assessee had an absolute right over her Mehr property and in exchange of that land the assessee received another land over which a multi-storeyed building was to be constructed. The assessee's two daughters and two sons had antecedent right to the properties in the capacity as her heirs though their shares were not specified. The Tribunal held that by a family arrangement the rights of those children had been specified. The family

arrangement by which the assessee and her four children received 1/5th share each in the multi-storeyed building was, therefore, valid. The Tribunal therefore, held that the assessee lady could not be assessed in respect of that share of house property which was given to her children pursuant to the family arrangement.

3. Three parties to the settlement of a dispute concerning the property of a deceased person comprised his widow, her brother and her son-in-law. The latter two could not under the Hindu Law be regarded as the heirs of the deceased, yet, bearing in mind their near relationship to the widow, the settlement of the dispute was very properly regarded as a settlement of a family dispute – Ram Charan Das v. Girija Nandini Devi AIR 1996 SC 323 at page 329.

4. A family arrangement differs from partition in as much as in a family settlement there can be a division of income without the distribution of assets and there is no bar to a partial partition. The provision of section 271 of the Act, which places restriction on a partial positions do not apply to a family settlement.

5. The Gauhati High Court in the case of Ziauddin Ahmed v. CGT, 102 ITR 253 held that the family arrangement amongst the members of Mohammedan family is valid and therefore, the shares given by a father to his sons at less than market value in order to preserve the family peace is not liable to gift tax.

WHETHER DOCUMENT OR REGISTRATION IS REQUIRED FOR EFFECTING FAMILY ARRANGEMENT

1. Family arrangement as such can be arrived orally or may be recorded in writing as memorandum of what had been agreed upon between the parties. The memorandum need not be prepared for the purpose of being used as a document on which future title of the parties be founded. It is usually prepared as a record of what had been agreed upon so that there are no hazy notions about it in future. It is only when the parties reduce the family arrangement in writing with the purpose of using that writing as proof of what they had arranged and, where the arrangement is brought about by the document as such, that the document would require registration as it would amount to a document of title declaring for future what rights in what properties the parties possess. Tek Bhadur Bhuji v. Debi Singh AIR 1966 SC 292 . Also see Awadh Narain Singh v. Narian

Mishra, AIR 1962 pat. 400; Mythili Nalini v. Kowmari, AIR 1991 Ker 266; Klae v. Dy Director of Consolidation AIR 1976 SC 807.

2. Another aspect that attracts our attention is whether family arrangement, if recorded in a document, requires registration as per the provisions of **section 17(1)(b)** of the Indian Registration Act, 1908. Section 17(1)(b) lays down that a document for which registration is compulsory should, by its own force, operate or purport to create declare, assign, limit or extinguish either in present or in future any right, title or interest in immovable property. Thus if an instrument of family arrangement is recorded in writing and operates or purports to create or extinguish rights, it has to be compulsorily registered. But where a document, merely records the terms and recital of the family arrangement after the family arrangement had already been made which **per se** does not create or extinguish any right in immovable properties, such document does not fall within the ambit of section 17(1)(b) of the Act and so it does not require registration.

3. According to the Supreme Court in Roshan Singh v. Zile Singh AIR 1988 SC 881, the true principle that emerges can be stated thus 'If the arrangement, of compromise is one under which a person having an absolute title to the property transfers his title in some of the items thereof to others, the formalities prescribed by law have to be complied with, since the transferees derive their respective title through the transferor. If, on the other hand, the parties set up competing titles and the differences are resolved by the compromise, then, there is no question of one deriving title from the other and therefore, the arrangement does not fall within the mischief of section 17 (1) (b) it read with section 49 of the Registration Act as no interest in property is created or declared by the document for the first time.

4. Family Arrangement does not amount to transfer: The transaction of a family settlement entered into by the parties bonafide for the purpose of putting an end to the dispute among family members, does not amount to a transfer Hiran Bibi v. Sohan Bibi, AIR 1914 PC 44, approving, Khunni Lal v. Govind Krishna Narain, (1911) ILR 33 All 356 (PC). It is not also the creation of an interest. For, as pointed out by the Privy Council in Hiran Bibi's case AIR 1914 PC 44, in a family settlement each party takes a share in the property by virtue of the independent title which is admitted to that extent by the other party. It is not necessary, as would appear from the decision in Rangaswami Gounden v. Nachiappa Gounden AIR 1918 PC 196, that every party taking benefit under a family settlement must necessarily be shown to have, under the law, a claim to a

share in the property. All that is necessary is that the parties must be related to one another in some way and have a possible claim to the property or a claim or even a resemblance of a claim on some other ground as say, affection. Ram Charan Das v. Girija Nandini Devi, AIR 1966 SC 323.

5. It is well settled that registration would be necessary only if the terms of the family arrangement are reduced into writing. Here also, a distinction should be made between a document containing the terms and recitals of a family arrangement made under the document and a mere memorandum prepared after the family arrangement had already been made either for the purpose of the record or for information of the court for making necessary mutation. In such a case memorandum itself does not create or extinguish any rights in immovable properties and therefore does not fall within the mischief of section 17 of the Registration Act and is, therefore not compulsorily registrable –Kale v. Dy. Director AIR 1976 SC 807.

6. The family arrangement will need registration only if it creates any interest in immoveable property in present in favour of the party mentioned therein. In case however no such interest is created, the document will be valid despite its non-registration and will not be hit by section 17 of the Indian Registration Act, 1908. Maturi Pullaih v. Maturi Narasimhan AIR 1966 SC 1836.

7. Even a family arrangement, which was registrable but not registered, can be used for a collateral purpose, namely, for the purpose of showing the nature and character of possession of the parties .In pursuance of the family settlement. Kale v. Director of Consolidation AIR 1976 SC 807, (1976) 3 SCC 119.

8. To record a family arrangement arrived at orally, a memorandum of family arrangement-cum-compromise is required to be drawn up wherein the properties and assets belonging to the parties to the family arrangement are required to be specified. Thereafter the fact of arriving at family arrangement some time in the past with the help of well-wishers and family friends is required to be mentioned. In the operative portion of the Memorandum of Family Arrangement-cum-Compromise the properties and business which have been allotted to different parties are required to be specified.

In addition to the Memorandum of Family Arrangement –cum-Compromise, other documents like affidavits of each of the parties to the Family Arrangement are required to be obtained wherein each of the parties confirms on oath that he has received a particular asset and the family arrangement is arrived to his total

satisfaction and it is binding on him. In such an affidavit the party giving up his right in other properties which are allotted to other parties to the Family Arrangement states that the said other properties may be transferred in the records of the registering authorities without notice to him. On the basis of the affidavit which is required to be executed before a Notary Public; mutation entries can be made by the concerned authorities.

In order to enable the member of the family to whom a particular property is allotted on arriving at a family arrangement, a power of attorney is required to be given by a member in whose name the said property was standing prior to the family arrangement to enable the party receiving the property to deal with the property as his own. Depending on the facts of each case, various other documents may be required to be drawn up to effect a proper and binding family arrangement.

9. Family arrangement is arrived at for a consideration namely, to resolve the dispute amongst the parties, to preserve the family peace and harmony and to avoid litigation and therefore, the provisions of Gift Tax Act are not attracted.

G.T.O. v. Bhupati Veerbhsadra Rao (9 ITD 618)
C.G. T. v. Pappathi Anni (123 ITR 655, Mad)
Ziauddin Ahmed v. CGT (102 ITR 253 Gau.)

10. In the case of N. Durgaiah v. C.G.T. 99 ITR 477 (AP), the assessee executed a registered deed of settlement on March 26, 1962, conveying certain immovable properties to his five sons and two daughters out of whom one of the sons was a minor in whose favour a house worth Rs. 64,800/- was settled. The assessee contended before the G.T.O. that the transaction was in the nature of a family arrangement which does not amount to a taxable gift under the G.T.Act. The G.T.O. A.A.C. and the Tribunal rejected the contention of the Assessee.

When the matter reached the High Court, the Andhra Pradesh High Court held that in order to constitute a family arrangement, there must be an agreement or arrangement amongst the members of the joint family who wish to avoid any plausible or possible disputes and secure peace and harmony amongst the members. Where one of the parties executes a document styled as settlement deed where under some of the properties exclusively belonging to him as his self acquired properties are settled in favour of the other members of the family,

the terms of such document do not amount to a family arrangement. There is no family arrangement as the same is only a unilateral act.

Hence a purely voluntary act of giving up one's right in property without compelling circumstances indicating an existing or a possible dispute resulting in a compromise may well constitute a conveyance by way of gift and not valid family arrangement. It is, therefore, necessary that the preamble to the family arrangement should advert to the existence of difference which are likely to escalate to possible litigation and cause lack of peace and harmony in the family and likely to bring dishonor to the family name and prestige.

In the case of Ram Charan Das v. Girja Nandini Devi (Supra), the Supreme Court held that a compromise by way of family settlement is in no sense alienation by a limited owner of the family property and since it is not an alienation it cannot amount to a creation of interest.

The definition of the term "transfer" contained in section 2(47) of the Income Tax Act, 1961 prior to its amendment by the Finance Act, 1987 with effect from 1.4.1988 has been considered by the Supreme Court in the case of Dewas Cine Corporation (68 ITR 240), Bankey Lal Vaidya (79 ITR 594) & Malbar Fisheries Co. (120 ITR 49) wherein the High Court, was called upon to consider whether on dissolution of a firm there is a transfer of assets amongst the partners. The Supreme Court in all the decisions unequivocally held that on dissolution of a firm there is a mutual adjustment of rights amongst the partners and therefore, there is no transfer of assets by sale, exchange, relinquishment of the asset or extinguishments of any rights therein.

Their Lordships of the Supreme Court in the case of Sunil Siddharthabhi v. CIT (156 ITR 509) after considering the decisions of their Court in the case of Dewas Cine Corporations, Bankey Lal Vaidya & Malbar Fisheries Co. and the Gujarat High Court decision in the case of Mohanbhai Pamabhai (91 ITR 393) held, that when a partner retires or the partnership is dissolved, what the partner receives is his share in the partnership. What is contemplated here is a share of the partner qua the net assets of the partnership firm. On evaluation, that share in a particular case may be realized by the receipt of only one of all the assets. What happens here is that a shared interest in all the assets of the firm is replaced by an exclusive interest in an asset of equal value. That is why it has been held that there is no transfer. It is the realization of a pre-existing right.

With effect from 1.4.1988 sub-clause (v) is added to the definition of the term "transfer" in **section 2(47)** of the Income Tax Act which provides that any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a contract amounts to a transfer. Sub-clause (vi) which is added to the definition of the term transfer provides that transaction which has the effect of transferring or enabling the enjoyment of any immovable property amounts to a transfer for the purpose of Income Tax Act.

Whether distribution of assets amongst the members of the family amounts to transfer pursuant to the amended definition of the term transfer?

In the case of Ramgowda Annagowda Patil v. Bhausaheb (AIR 1927 PC 227), the family settlement was between parties which included the brother and son-in-law of a widow of the deceased. Though the widow was a necessary party, her brother and son-in-law were not, but they had been allotted shares in the properties which formed the subject-matter of the family arrangement. It was held that in view of the closeness of the relationship between the persons who were disputing the right over the property with one another, the arrangement between them was legal and enforceable (Mehdi Hasan v. Ram Ker AIR 1982 All. 92).

MINIMUM NUMBER OF COPARCENERS NEEDED IN HUF:

An HUF can consist of just two members, one of whom is a coparcener. However, for tax purposes, the income of such an entity would not be taxed in the hands of the HUF; it would be taxed in the hands of the sole coparcener. For an entity to be taxed as an HUF, it should have at least two coparceners. Thus, the income of an HUF consisting of a husband and wife would not be taxed in the hands of the HUF, except in cases where the husband has received funds on the partition of a larger HUF.

HOW SETTING UP AN HUF CAN MINIMISE YOUR FAMILY'S TAX LIABILITY:

Have you ever wondered whether you can lower your tax liability by setting up a separate entity, a Hindu Undivided Family (HUF)? If you have, here are few pointers to help you decide whether you can, how you can, and in respect of which income you can file separate tax returns for an HUF, and lower your tax incidence.

WHAT INCOME IS TAXABLE AS HUF INCOME?

Any income that arises on the investment of HUF funds (like interest earned on loans given by an HUF) or on the utilisation of HUF assets (like rent earned on letting out HUF property) would be regarded as HUF income. It is important that the income be earned using HUF funds or property only. If the income arises on account of the personal exertions of the karta or any other member and not on investment of HUF funds, such income would generally be regarded as the individual income of the karta or the member.

If an HUF contributes funds to the capital of a partnership firm, profit and interest received (from the firm) by a partner who represents the HUF is regarded as HUF income. This is because the income in the partner's hands arises on investment of the HUF's funds. However, if the karta is also paid a salary by the firm for efforts put in by him, such funds would be regarded as the karta's individual income. Speculative profit can be regarded as the income of an HUF, particularly in cases where the HUF has paid margin money or deposits for such transactions.

ASSETS OF AN HUF:

This brings us to another important question: what kind of assets can be regarded as the assets of an HUF as opposed to the assets of an individual? Assets received in the following situations would be regarded as the assets of an HUF:

- Assets received on the partition of a larger HUF of which the coparcener was a member (like an HUF in which the coparcener's father or grandfather was the karta).
- Assets received as gifts by the HUF. Such gifts could be received from close relatives or close friends.
- Assets bequeathed by a will that specifically favours the HUF. In the absence of a will, assets received on the death of a benefactor after 1956 (when the Hindu Succession Act came into force) would not be regarded as HUF property, but as individual property even though such assets have been inherited.

Although it is possible for a member of the HUF to transfer his or her individual assets to the HUF, such a transfer isn't beneficial from the tax point of view.

This is because there is no transfer of the tax liability on the income from such assets. The income would continue to be taxed in the hands of the individual who has transferred the assets, due to the tax provisions governing the clubbing of such income with the income of the transferor.

HOW DO YOU BOOST YOUR HUF'S FUNDS?

Given the tax provisions governing clubbing of income, how does one enhance the capital of an HUF? One way is by ensuring that gifts or inheritances meant for the benefit of all the members of a family are gifted specifically to the HUF, instead of separately to individual members of the family. In the absence of gift tax and estate duty, neither the benefactor nor the recipient would attract tax on such a transfer.

One can also enhance an HUF's capital by borrowing funds from people who are not members of the HUF. Such funds should then be invested in the HUF's name. This is important, as is borrowing money specifically in the HUF's name. The income arising on such investments would then be regarded as the income of the HUF.

Another way of enhancing capital without adverse tax implications is to transfer individual funds to the HUF. These funds should then be invested in tax-free instruments, like the Reserve Bank of India's relief bonds, and units of mutual funds, in the HUF's name. Since the income from such investments is tax-free, it will not be clubbed with the individual's income. What's more, the income arising on the reinvestment of such tax-free income (which may be in taxable income-yielding assets) will not be clubbed, since only income arising on transferred amounts is clubbed.

CONSIDER THIS RIDER:

As with all other tax planning, a word of caution: HUF funds are joint funds of a family and cannot be equated with individual funds. Although as karta you may have control over the HUF's funds, in the event of a dispute with a family member, the member would be justified in demanding partition of the HUF and a share of its assets.

HUF AND THE JOINT FAMILY PROPERTY

Often, it has been argued that the existence of nucleus or joint family property is necessary to recognize the claim of HUF status. However, it has been

established since that as the HUF is a creature of Hindu law, it can exist even without any nucleus or ancestral joint property.

PROPERTIES WHICH ARE GENERALLY ACCEPTED AS JOINT FAMILY PROPERTY:

1. Ancestral property;

2. Property allotted on partition;

3. Property acquired with the aid of joint family property;

4. Separate property of a co-parcener, blended with the family property. The provisions of S.64 (2) of the I.T. Act have superseded the principles of Hindu Law, in a case where the co-parcener impresses his property with the character of joint family property.

Please note that a female member cannot blend her property with the joint family property. However, she can make a gift of it to the HUF as was held in Puspadevi vs. CIT 109 I.T.R. p. 730 (SC). A female member may also bequeath her property to an HUF– C.I.T. vs. G.D. Mukim, 118 I.T.R. P. 930 (P&H).

BRANCHES OF HUFS

An HUF may have several branches. Let us take the example of an HUF with two sons. When the sons marry and they have their own families they will form a branch of the HUF. Likewise, when the grandsons have families, they too will be sub-branches of the HUF. As said before, it is immaterial if they possess any property or not.

ELEMENTS OF PARTITION OF HUF

Having understood the essential aspects of the Hindu Undivided Family, it would be useful to consider the various means by which tax incidence with regard to HUF may be reduced. The most often-used device is to increase the number of assessable units through the device of partition of the HUF.

This can be easily done where the partition results in separate independent taxable units. For instance, this will be very useful in the case of an HUF consisting of a father and two sons, who own two factories, a house property and with other income besides this. On the other hand, if the members of an

HUF have high individual incomes, partition may not be beneficial. In such a case, it would be wiser for the HUF to continue as a separate taxable entity.

It may happen that an HUF has only one business establishment that does not lend itself to any physical division. In such a case, the business may be converted into a partnership firm. However, it must be noted that the tax applicable to a company or a firm is 25 / 30 %. Thus, it becomes clear that it will not be advantageous to convert an HUF business into a partnership company. Instead, it would be better to reduce taxes by paying remuneration to the members of the HUF.

Partial partition of HUF is also a device to reduce tax-liability. However, it has been derecognized by the provisions of S.171 (9) of the I.T. Act, according to which any partial partition, affected after 31.12.78, will not be recognized.

In spite of the provisions of S.179 (9), partial partition can still be used as a device for tax planning in certain cases.

An HUF that has not been assessed as undivided family can still be subjected to partial partition because it is recognized under the Hindu Law. Such partial partition does not require recognition u/s 171 of the I.T. Act. Consequently, a large HUF, which has already been assessed, can be partitioned into smaller HUFs. These smaller HUFs may further be partitioned partially before being assessed as HUFs. It is essential to clearly understand the legal implications of partition of the assets of an HUF before it is undertaken. Only then, can the true benefits of such a step gauged.

PARTITION OF HUF UNDER INCOME TAX ACT, 1961 AND ITS ASSESSMENT AFTER PARTITION.

The Partition of HUF should be recognized as per the Income Tax Act and not as per the Hindu Law. Section 6 of the Hindu Succession Act would govern the rights of the parties but insofar as income-tax law is concerned, the matter has to be governed by section 171(1) of the Income Tax Act, 1961 [Add. CIT v. Maharani Raj Laxmi Devi [1997] 091 Taxman 020 (SC)]. The Hindu Law does not require that the property in every case be partitioned by metes and bound or physically into different portions to complete a partition. But the Income Tax

Law introduced certain additional conditions of its own to give effect to the partition u/s 171.

Section 171 of the Income Tax Act, 1961 defines the partition of HUF and deals with the provisions of assessment after its partition. Thus a transaction may be treated as severance of status under Hindu Law but not a partition under 1961 Act as physical division of property is necessary under 1961 Act [CIT v. Smt. Meera Prem Sundar (HUF) [2005] 147 TAXMAN 535 (ALL.)].

The various practical aspects related to partition of HUF are discussed as under:

Q1. What is the Partition of HUF?

• The Partition of HUF can be categorized as under:-

Partial Partition –

Partial partition means a partition which is partial as regards the persons constituting the HUF, or the properties belonging to the HUF, or both.

2. Total or Complete Partition –

Assets of HUF are physically divided. As per explanation to section 171 of the Income Tax Act,

'Partition' means

(i) where the property admits of a physical division, a physical division of the property, but a physical division of the income without a physical division of the property producing the income shall not be deemed to be a partition; or

(ii) where the property does not admit of a physical division, then such division as the property admits of, but a mere severance of status shall not be deemed to be a partition.

Therefore a transaction can be recorded as a partition u/s 171 only if, where the property admits of a physical division, such division has actually taken place. [Kalloomal Tapeshwari Prasad (HUF) v. CIT [1 982] 133 ITR 690 (SC)]

Q2. What is the tax implication of Partial Partition of HUF?

A Partial partition taken place after 31-12-1 978 is not recognized the Income Tax Act, 1961 (Sub-section 9 of section 179. Therefore even after the Partial partition, the income of the HUF shall be liable to be assessed under the Income-Tax Act as if no partition had taken place.

Q3. What is the tax Implication of Full Partition of HUF?

After the Partition, the assessment of HUF shall be made as per the provisions of Section 171 of the Income Tax Act and order to be passed by the Assessing Officer.

Q4. What is the procedure of partition and assessment after partition of HUF under Income Tax Act

The following procedure u/s 171 is prescribed under the Income Tax Act regarding partition and assessment after partition of HUF:

The HUF hitherto assessed as undivided shall be deemed for the purposes of this Act to continue to be a Hindu undivided family, except where and in so far as a finding of partition has been given under this section in respect of the HUF.

Where, at the time of making an assessment u/s 143 or u/s 144, it is claimed by or on behalf of any member of a Hindu family assessed as undivided that a partition, whether total or partial, has taken place among the members of such family, the AO shall make an inquiry thereinto after giving notice of the inquiry to all the members of the family.

On the completion of the inquiry, the AO shall record a finding as to whether there has been a total or partial partition of the joint family property, and, if there has been such a partition, the date on which it has taken place.

Where a finding of total or partial partition has been recorded by the AO and the partition took place during the previous year,—

(i) the total income of the joint family in respect of the period up to the date of partition shall be assessed as if no partition had taken place; and

(ii) each member or group of members shall, in addition to any tax for which he or it may be separately liable and notwithstanding anything contained in

clause (2) of section 10, be jointly and severally liable for the tax on the income so assessed.

Where a finding of total or partial partition has been recorded by the AO and the partition took place after the expiry of the previous year, the total income of the previous year of the joint family shall be assessed as if no partition had taken place; and each member of group of members shall be jointly and severally liable for the tax on the income so assessed.

Notwithstanding anything contained in this section, if the AO finds after completion of the assessment of a Hindu undivided family that the family has already effected a partition, whether total or partial, the AO shall proceed to recover the tax from every person who was a member of the family before the partition, and every such person shall be jointly and severally liable for the tax on the income so assessed.

For the purposes of this section, the several liability of any member or group of members thereunder shall be computed according to the portion of the joint family property allotted to him or it at the partition, whether total or partial.

The above provisions shall, so far as may be, apply in relation to the levy and collection of any penalty, interest, fine or other sum in respect of any period up to date of the partition, whether total or partial, of a HUF as they apply in relation to the levy and collection of tax in respect of any such period.

Q5. Whether the sum received by a member as and towards his share as coparcener of HUF, on its partition is taxable as income?

The sum received by a member as and towards his share as coparcener of HUF, on its partition cannot be brought to tax as income [Smt. Sudha V. Iyer v. ITO 15 taxmann.com 234 (ITAT-Mum.) [2011]

Q6. Whether setting apart of certain assets of HUF in favour of certain coparceners on a condition that no further claim in properties will be made by them, is a partition under Income Tax Act?

Setting apart of certain assets of HUF in favour of certain coparceners on the condition that no further claim in properties will be made by them, is nothing but a partial partition and not a family arrangement and not recognised in view of section 171(9) of the Act. [ITO v. P. Shankaraiah Yadav 91 ITD 228 (2004) (ITAT-Hyd.)].

Q7. Whether there is an ipso facto partition of joint family properties immediately after the death of a male coparcener having coparcenary interest in coparcenary property?

The gist of the various pronouncements of the Hon'ble Supreme Court is that there is no ipso facto partition of joint Hindu family properties immediately after the death of a male coparcener of the Mitakshara school having coparcenary interest in the coparcenary property. The fiction given by Explanation 1 to section 6 of 1956 Act has nothing to do with the actual disruption of the status of a HUF. It freezes or quantifies the share of a female heir in the coparcenary property on account of the death of a coparcener at the relevant point of time.

Therefore, there was no partition and disruption of the HUF as per Explanation 1 to section 6 of the 1956 Act, in the instant case. [CIT vs. Charan Dass (HUF) [2006]153Taxman 307(All.)]

Residential Status of HUF

Q1 What is the residential status of the HUF under Income Tax Act?

Section 6(2) of the Income-tax Act, 1961, clearly contemplates a situation where a HUF can be non-resident also. In fact, HUF can also be Not Ordinarily Resident.

HUF will be considered to be resident in India unless, during the previous year, the control and management of its affairs is situated wholly outside India. In such a case, it will be treated as non-resident HUF.

Section 6(6)(b) of the Income-tax Act, 1961 further provides that, in case of a HUF whose manager has not been resident in India in nine out of ten previous years preceding the previous year or has, during the seven previous years preceding that year, been in India for a total 729 days or less, such HUF is to be regarded as not-ordinarily resident within the meaning of the Income-tax Act, 1961. As such, it is not necessary for a HUF to be resident in India.

Q2. How the residential status of the HUF can be determined in case of change of Karta of HUF during the relevant year?

In case of change of Karta of HUF during the year, the residential status of HUF can be determined by considering the period of stay in India of both Karta of HUF i.e. previous Karta and successive Karta.

Q3. Whether different residential status for HUF is possible for different years?

Under the Income Tax Act the residential status is determined with reference to the previous year relevant to a particular assessment year. Therefore the residential status of HUF may also be different for different assessment years considering the facts of relevant previous year.

Q4. Whether the non-residential status of Karta would alter the residential status of HUF?

As discussed in the earlier answer, the test is not where the Karta resides; the test is where the control and management of the affairs of HUF is situated. Even if a part of control and management is situated in India, such HUF will be treated as resident in India.

Though, generally, Karta is supposed to manage the affairs of HUF, it is not an absolute rule and, by consent, the power of control and management may be delegated to other members of the family, either fully or partially.

The relevant factor for determining the status is where the control and management of HUF is situated (even in part). Therefore the HUF may be resident even where the Karta was residing outside India for whole of the year.

Q5. Whether the income received by members from HUF is taxable?

As per Section 10(2) of the Income-tax Act, 1961, any sum received by an individual from Hindu Undivided Family of which he is member is exempt from tax.

But the amount received not as a member of Joint Family but in pursuance of some statutory provision, etc. would not be exempted in this section. Also the position of member of joint family in law to claim the right u/s 10(2) does not get affected only with the reason that they are living apart from the other members of the family.

TAXABILITY OF INCOME FROM HOUSE PROPERTY IN THE NAME OF HUF

1. Self occupied one Residential House & the tax gain specially by way of Interest on Loan & Repayment of Loan

2. Special 30% deduction on Rental Income also to HUF.

3. Exemption from Wealth-tax the real estate of HUF – One House Wealth Tax Free (Commercial / Rented Residential)

Q1. Whether the Property purchased with the joint fund is assessed in the hands of HUF only?

Property purchased with the aid of joint family funds, howsoever small that may be, still the property would be HUF income and cannot be income of the individual with major portion of purchase price.

The Hon'ble Madras High Court has held in the case of S. Periannan v. CIT (1991) 191 ITR 278, that

"When once the estate had become the property of the assessee-Hindu undivided family on its coming into existence, there could be no change in its character by reason of the fact that, subsequently, in the books of the assessee-Hindu undivided family, the account of Sathappa Chettiar was debited with the amount which have been drawn for the purchase of the estate. In these circumstances. The Tribunal rightly held that the Grove Estate should be considered as belonging to the assessee-Hindu undivided family."

Q2. Whether the Income from House property to be charged in the hands of HUF only where property is purchased in the name of HUF?

In the case of ACIT vs. Rakesh S. Agrawal [2010] 36 SOT 148 (AHD.) it was held that:

AO found that the assessee had purchased a house property from 'A'. The assessee's case was that since the investment was made in the name of HUF, it was not declared in his individual return. The AO, however, took a view that the funds for acquiring the property in question were met from the personal sources of the assessee. He thus determined annual letting value of the property resulting in certain addition to the assessee's income. On appeal, the

Commissioner (Appeals) directed the AO to consider the annual letting value of the property in the hands of HUF and deleted the impugned addition.

D. Proprietorship and Partnership by HUF

Q1. Whether HUF can do a business in its own name?

HUF can be a Proprietor of one or more than one Business concerns.

Separate name can be kept of HUF business entity.

No tax Audit of HUF business if Turnover within Rs. 2 crore

Business Income Computation @ 8% / 6% without books of account in case turnover is upto Rs. 2 crore – The Presumptive Basis

Q2. Can a Karta of HUF become partner in a firm?

The Hon'ble Supreme Court in Ram Laxman Sugar Mills vs. CIT [1967] 66 ITR 613 observed that a HUF is undoubtedly a "Person" with in the meaning of section 2(31), it is however not a juristic person for all purposes and cannot enter in to an agreement of partnership either with another HUF or Individual. It is open to the manager of a Joint Hindu family, as representing the family, to agree to become a partner with another person. And therefore any remuneration received by Karta would be the personal income of Karta and not the income of the HUF as there is no real connection between the investment of the assets of HUF and remuneration received by Karta.

Q3. Whether the amount received by Karta from partnership firm as remuneration is assessed in the hands of HUF?

The remuneration received by Karta as representative of HUF cannot be treated as income of the HUF. Remuneration will be income of HUF only when there is direct nexus between family funds and remuneration paid.

In Brij Mohan vs. CIT 201 ITR 831 (1993), the Supreme Court held that where the receipt is a compensation made for the services rendered and not for the return of investment, it is to be treated as individual income of the partner.

However, where members of HUF become the partners in a firm by investment of family funds & not because of any Special Services rendered by them, then

the income will belong to HUF. {Lachman Das Bhatia & Sons vs. Commissioner of Income-tax [2007] 162 Taxman 118 (Delhi)} {D.N. Bhandarkar v. CIT 158 ITR 724 Kar (1986)}

Once the character of an individual has been treated differently than H UF for the purposes of interest, there is no reason as to why that would not extend to the salary and bonus paid to such partners on account of their personal services rendered to the firm in contra-distinction to their capacity as representatives of HUF .

Therefore, the same reasoning would apply to the cases where payment in the form of salary and bonus has been made to a partner in his individual capacity in contra-distinction to his representative character of the HUF. [CIT v. Unimax Laboratories [2007] 164 Taxman 373 (P & H)].

Q4. Whether deduction is available to partnership firm u/s 40(b) in respect of salary or commission paid to a partner who was a partner in representative capacity of HUF.

As per Section 40(b)(i)

“in the case of any firm assessable as such,—

any payment of salary, bonus, commission or remuneration, by whatever name called (hereinafter referred to as “remuneration”) to any partner who is not a working partner”

Partner of a firm is an individual even if he is partner as a representative of HUF

Where assessee-firm paid salary to a partner who was actively engaged in conducting affairs of business of firm, it was to be held that requirement of Explanation 4 to Section 40(b) stood complied with, and, thus, assessee-firm would be entitled to deduction in respect of salary paid to said partner even though he was a partner in representative capacity of HUF. [P. Gautam & Co. vs. JCIT [2011] 14 taxmann.com 79 (Ahd.)]

Salary paid to working partner even though as Karta of HUF, is received as individual and as working partner, hence allowable as deduction while computing income of firm. [CIT vs. Jugal Kishor & Sons [2011] 10 taxmann.com 82 (All.)]

It is individuals of HUF who indirectly become partner in firm in which HUF is said to be partner and therefore provisions of Section 40(b) that prohibits deduction of payments of commission to any partner who is not a working partner, in computing income under the head PGBP, will not be applicable. Therefore deduction of any commission payable to any individual of HUF shall be allowable. [CIT v. Central Scientific Instrument Corporation [2010] 1 DTLONLINE 149 (All.)]

Q5. Whether the Salary income of wife of Karta is club in the Income of HUF?

Where a person is a partner in a partnership firm not in his individual capacity but as the karta of the Hindu undivided family, the income accruing to his wife on account of her being a partner in the same partnership firm cannot be included in the total income of such person in an individual assessment or in the assessment of the Hindu undivided family. [CIT v. Om Prakash [1996] 217 ITR 785 (SC) See also CIT v. Ram Krishna Tekriwal [2005] 274 ITR 266 , Satish Chand Gupta v. CIT [2007] 160 Taxman 224 (All.)].

In the case of Pratap H. Desai (HUF) v. ACIT [2009] 118 ITD 29 (Pat.) it was held that:

Assessee was a partner in a firm which was dissolved with effect from 1-1-1999 and its business was taken over by the assessee in the capacity of a HUF – the assessee sought to set-off loss of the said firm against the profit of his business as HUF

Section 78(2) prohibits carry forward and set-off of losses of one person by another person except when the other person receives the losses by inheritance. Section 78 shows that where succession to business is by inheritance, then loss will be allowed to be set-off and not otherwise.

Therefore, assessee was not entitled to set-off of losses of firm against his individual income

<u>Capital Gain Exemption available to HUF</u>

General provisions applicable to HUF:

Cost Inflation Index benefit available to Calculate Cost of the Asset.

Tax benefit of 20% Tax on Long-term Capital Gains.

Long-term Capital Gains Saving by investing in Residential Property u/s 54/ 54F.

Exemption on sale of Agricultural land u/s 54B.

Saving Tax on Long-term Capital Gain possible by investing in Capital Gains Bonds of NHAI / RECL u/s 54EC.

Exemption from tax on LTCG on transfer of residential property if invested in a manufacturing small or medium enterprise u/s 54GB (introduced vide Finance Act, 2012)

VARIOUS PRACTICAL ASPECTS OF TAXABILITY OF CAPITAL GAIN IN THE HANDS OF HUF ARE DISCUSSED AS UNDER:

Q1 To avail the benefit of adopting market value as on 01-04-2001, upto which date the capital asset should have become property of the previous owner?

Capital asset should have become property of previous owner before 1-4-2001 to make assessee entitled to benefit of adopting market value as on 1-4-2001.

but where construction of building was completed in 2008 and possession of flat was handed over to previous owner, i.e., HUF, it could not be said that flat itself became property of HUF prior to that date and, hence, assessees were not entitled to adopt market value of flat as on 01-04-2001. In view of specific provisions of Explanation (iii) to section 48, indexing had to be allowed of the financial year in which flat was held by assessee on partition of HUF. [DCIT v. Kishore Kanungo 102 ITD 437 (Mum.) [2006]].

Q2. Whether the benefit u/s 54 can be available on purchase of more than one residential house Properties?

A plain reading of section 54(1) discloses that when an individual assessee or an HUF assessee sells a residential building or land appurtenant thereto, he can invest capital gain for purchase of a residential building to seek exemption of the capital gain tax. The expression ‘a residential house’ should be understood in a sense that building should be residential in nature and ‘a’ should not be understood to indicate a singular number.

That when an HUF’s residential house is sold, the capital gain should be invested for the purchase of only one residential house, is an incorrect

proposition. After all, the property of the HUF is held by the members as joint tenants. If the members, keeping in view the future needs in event of separation, purchase more than one residential building, it cannot be said that the benefit of exemption is to be denied u/s 54(1).

[CIT v. D. Ananda Basappa 180 Taxman 4 (Kar.) [2009]]

Q3. Whether to claim benefit of section 54F, residential house which is purchased or constructed has to be of same assessee whose agricultural land is sold?

To claim benefit u/s 54F, residential house which is purchased or constructed has to be of same assessee whose agricultural land is sold.

The, it is written it same view is expressed by Delhi High Court in the case of Vipin Malik (HUF) Vs CIT 183 Taxman 296 (2009), It was held that:

"The agricultural land, which was sold was of the HUF of the assessee but the flat purchased in the co-operative society was not in the name of the HUF. The flat was in the individual name of the assessee along with his mother. To claim the benefit of section 54F, the residential house which is purchased or constructed has to be of the same assessee whose agricultural land is sold and it was not the case in the instant case. [Para 9]

Clearly, therefore, there was no question of applicability of section 54F in the aforesaid facts and circumstances."

Q4. Whether in terms of section 48, payment made by assessee for education, maintenance and marriage of his unmarried daughter, though under consent decree, could be said to be an expenditure wholly and exclusively incurred in connection with transfer of property?

Under section 48, any payment made by assessee for education, maintenance and marriage of his unmarried daughter, though under consent decree, could not be said to be an expenditure wholly and exclusively incurred in connection with transfer of property or could also not be considered as a cost of acquisition or cost of improvement.

[Krishnadas G. Parikh v. DCIT [2008] 114 ITD 362 (AHD)].

Q5. Whether the exemption u/s 54B of the IT Act is available to HUF?

Exemption under Section 54B is also available to HUF subject to the following condition:

If HUF transfer a land which is used for agricultural purposes by a HUF, the rollover relief u/s 54B is available to the HUF. The amendment is applicable on transfers made after 01-04-2013.

*Even before the amendment, exemption was being allowed to HUF.

Same view is expressed in K.S. Jain & Sons (HUF) v. ITO 173 Taxman 114 (Delhi) (Mag.) [2008], it was Held, AO was wrong in denying deduction u/s 54B to assessee on ground that assessee being an HUF was not entitled to deduction u/s 54B.

Q6. Whether exemption from Capital Gain u/s 54GB newly introduced vide Finance Act, 2012 is available to HUF?

Exemption from tax on LTCG on transfer of residential property if invested in a manufacturing small or medium enterprise.

Available to an Individual or HUF.

Transfer made on or before 31st March, 2017.

Amount is reinvested before due date of furnishing return of income u/s 139 (1)

In Equity of a new start up SME company in the manufacturing sector in which in hold more than 50% share capital or voting rights

Amount is utilized by the company for purchase of new plant & machinery

The share cannot be transferred within a period of 5 years

RETURN OF INCOME

HUF is required to furnish return in Form ITR-2 or ITR-3 or ITR-4S or ITR-4, as the case may be.

However, ITR-4S (Sugam) not applicable to residents HUFs

(i) having assets (including financial interest in any entity) located outside India; or

(ii)signing authority in any account located outside India. [Inserted vide Finance Act, 2012] In case of above HUFs, the return to be furnished

(i) electronically under digital signature, or

(ii) transmitting the data in the return electronically and thereafter submitting the verification of the return in Form ITR-V.

Note: E- filing is mandatory if total income exceeds Rs. 10 lakhs, (Inserted vide Finance Act, 2012).

HUFs to whom Section 44AB is applicable, shall furnish the return electronically in ITR-4 under digital signature.

I. Clubbing Provisions of Section 64(2) in case of HUF

Where any member of HUF converts any property belonging to it, in to the common property of HUF, then :

Individual shall be deemed to have transferred the property to the HUF i.e. to the members of the family for being held by them Jointly.

The Income from the property so transferred shall be taxable in the hands of Individual and not in the hands of HUF.

On partition amongst the members – the income derived from such property as is received by the spouse shall be taxable in the hands of spouse itself.

<u>Miscellaneous Issues</u>

Q1. Whether tax liability of an individual member of the HUF can be recovered in full extent from the HUF?

Demand against member of HUF can be recovered from HUF to the extent of its share in property of HUF. [Naresh B. Chheda v. JCIT [2011] 9 taxmann.com 86 (Bom.)]

"'N', a constituent of the HUF, would, therefore, have an undivided share in the amount lying in the bank account of the HUF. The Assessing Officer, therefore, would not be entitled to attach and appropriate entire amount which was in the account of the HUF for the liabilities of 'N' as an individual. It could attach and

appropriate the amount lying in the bank account of the HUF only to the extent falling to the share of the said 'N'."

Q2. What is the scope and effect of a reopening of assessment of HUF where the notice was issued to the individual member of HUF?

The Act recognizes status of HUF different from individual status of Karta of HUF and two are treated as different legal entities, it is necessary that notice u/s 148 should be sent in correct status because jurisdiction to make assessment is assumed by issuing valid notice and it cannot be conferred by consent of parties. After having issued notice u/s 148 to individual, AO had no jurisdiction to assess HUF of assessee and that defect of jurisdiction could not be cured by obtaining consent of assessee to assess him in status of HUF. [Suraj Mal, HUF v. ITO 109 ITD 327 (Delhi) (TM) [2007], also see CIT v. Rohtas 167 Taxman 233 (P & H) [2008]].

Q3. Whether the HUF property loses the character of HUF merely because one male member or coparcener at one point of time?

Bombay High Court held in the case of Dr. Prakash B. Sultane v. CIT [2005] 148 Taxman 353 that,

Joint family property does not lose its character merely because at one point of time there was only one male member or one coparcener.

An assessee who has received share on partition of HUF property but subsequently gets married is entitled to be assessed in respect of the said share in said property in status of HUF.

Q4. What are the relevant provisions for unreasonable payments made by HUF under the Income Tax Act?

According to the provisions of Section 40A(2)

"Where the assessee incurs any expenditure in respect of which payment has been or is to be made to any person referred to in clause (b) of this sub-sec., and the AO is of opinion that such expenditure is excessive or unreasonable having regard to the fair market value of the goods, services or facilities for which the payment is made or the legitimate needs of the business or profession of the assessee or the benefit derived by or accruing to him therefrom, so much of the

expenditure as is so considered by him to be excessive or unreasonable shall not be allowed as a deduction."

Note that the Expenditure must be unreasonable or excessive

Provision of Sec. 40A(2) has no application unless it is first held that the expenditure was excessive or unreasonable. [Upper India Publishing House (P) Ltd. v. CIT (1979) 117 ITR 569 (SC)].

For the purpose of Sec. 40A(2)(a) following persons are specified:

where the assessee is a HUF- any member of the family, or any relative of such member;

HUF having a substantial interest in the business or profession of the assessee or any member of such family, or any relative of such member;

a HUF of which a member, has a substantial interest in the business or profession of the assessee; or any member of such family or any relative of such member;

any person who carries on a business or profession, where the assessee being HUF or member of the family, or any relative of such member, has a substantial interest in the business or profession of that person.

Provisions related to stock market, mutual funds & HUF's

HUF can have a separate Demat Account.

Make money by investing in shares of companies:-

(a) Primary Market

(b) Secondary Market

Enjoy Tax Free Income for Long-term Capital Gains by holding shares for more than one year.

Enjoy lower tax rate of 15% on Short-term Capital Gains u/s 111A.

HUF can also invest in Mutual Fund.

Gift Vis-à-Vis HUF

– The gift made by the family of a sole coparcener to the wife of the Karta of the family is considered to be VALID. {M.S.P. Rajah Vs CGT (1982) 134 ITR 1 (Mad)}

– Gift by HUF to bride of male member in the form of jewellery at the time of marriage is valid. Obligation of Karta is towards marriage of both sons & daughters. {CIT Vs A.K. Daga & Sons (2008) 296 ITR 623 (Mad) also see CGT Vs Basant Kumar Aditya Vikram Birla (1982) 137 ITR 72 (Cal)}

– Gift of HUF Property By Father

Within reasonable limits

as a "gift of affection".

[Gift of affection can be made to a wife, daughter & son]

– Gift to stranger

Gift to Strangers void – Guramma v. Mallappa AIR 1964 SC 510

Karta is NOT entitled to give any gifts to strangers, EXCEPT for pious purposes. {Gangadhar Narsingda sAgarwal (HUF) Vs CIT (1986) 162 ITR 320 (Bom)}

A coparcener can dispose of his undivided interest in the coparcenary property by a will, BUT he CANNOT make a gift of such interest . It is said to be void. {Thamma Venkata Subbamma VsThamma Ratanamma & Ors. (1987) 168 ITR 760 (SC)}

Gift to a stranger of a joint family property by the manager of the family is void. Manager has NO absolute power of disposal over HUF property {Guramma Bharatar Chanbasappa Deshmukh Vs MallappaChanbasappa AIR 1964 SC 510}

Who is regarded as stranger?

The other persons may be related to the Karta or the coparceners in the contest of family. Other persons means excluding relatives not being members of HUF.

Gift to coparcener & members

The gift of family property by Karta of an HUF to coparceners or non¬coparceners is void ab initio & not merely voidable.{CGTVs TejNath (1972) 86 ITR 96 (P&H) (FB)}

– Gift to daughter

Hindu father can make a gift of ancestral property within reasonable limits at the time of marriage or even long after marriage. {R. Kuppayee Vs Raja Gounder (2004) 265 ITR 551 (SC)

– Gift to wife by Karta

The Karta is empowered to make gifts to his wife within reasonable limit of the movable assets. But the Karta CANNOT make gifts to his second wife. It is invalid.{Commissioner of Gift Tax VsBanshilalNarsidas (2004) 270 ITR 231 (MP)}

– Gift by Karta to nephew

Gift made by Karta to nephew & interest on the amount gifted was deposited in the firm. It was held that gift was void. Pranjivandas S. Patel Vs CIT (1994) 210 ITR 1047 (Mad)}

– Gift by Karta to minor children of family

Gift made by Karta from

– Natural love & Affection

– within reasonable limits

The gift was said to be Valid {CWT/CGT Vs Shanmugasundaram (1998) 232 ITR 354 (SC)]

– Some other relevant issues in respect of gift

Elementary proposition that Karta of HUF cannot gift or alienate property except to the extent recognized under the Hindu Law,namely necessity etc- CGT v. P. Hanumanthappa 68 ITR 363, K.P.Gupta v. CIT 233 ITR 456

Reasonable limits depends upon facts – CGT v. B.V. Narasimharaju 101 ITR 74.

Karta can make reasonable gifts to daughters – Sushil Kumar & Sons v. ITO 234 ITR 98

Gift on Marriage Occasion is valid – S. Lakshmamma v. Kotayya AIR 1936 Mad. 825.

Gift of immovable property should be for pious purpose – CIT v. Ram Gopal Rajgharia 123 ITR 693

Expenses incurred on Marriage of a Daughter by HUF.

Marriage of daughter still remains an obligation of the Family under Hindu law. Thus, reasonable amount of gift given on her marriage should not objected by the male coparcener.

Taxability of gift received in cash or in kind by HUF without consideration

1. If any sum of money exceeding Rs. 50,000 is received by the HUF without consideration then provisions of section 56(2)(vii) are applicable and the same is taxable in the hands of HUF.

2. Gift received in kind by HUF without consideration is also taxable subject to the provisions of s. 56(2)(vii).

The definition of relative provided under Explanation to Section 56(2) (vii) shall be amended by Finance Act, 2012. The amendment is as under:

The provisions of section 56 are amended so as to provide that any sum or property received without consideration or inadequate consideration by an HUF from its members would also be excluded from taxation [w.r.e.f. 1-10-2009].

For this purpose, clause (e) of the Explanation below section 56(2)(vii) is to be substituted to provide that in case of HUF, relative means members of the HUF.

After the amendment,

"(e) "relative" means,—

(i) in case of an individual—

(A) ******; and

(ii) in case of a Hindu undivided family, any member thereof."

The amendment as above is inspired by the decision of ITAT in Vineetkumar Raghavjibhai Bhalodia v. ITO 46 SOT 97 (Rajkot-ITAT) (2011) where it was held that Gift received from HUF is gift from relative.

Son's share in HUF will become property of son's HUF & father's share will come to son in his individual capacity

Case Name : **Adhiraj Pranay Shodhan HUF Vs ITO (ITAT Ahmedabad)**

Appeal Number : ITA No. 2368/Ahd/16/24.09.2019 (AY : 2012-13)

PARTIAL AND FULL PARTITION OF HINDU UNDIVIDED FAMILY (HUF) AND INCOME TAX PROVISIONS

Meaning of Partition: –

Partition is the severance of the status of Joint Hindu Family, known as Hindu Undivided Family under tax laws.

Under Hindu Law once the status of Hindu Family is put to an end, there is notional division of properties among the members and the joint ownership of property comes to an end. However, for an effective partition, it is not necessary to divide the properties in metes and bounds. But under tax laws for an effective partition division by metes and bounds is necessary.

Partition under Hindu Law, can be total or partial. In total partition all the members cease to be members of the HUF and all the properties cease to be properties belonging to the said HUF.

Partition could be partial also. It may be partial vis-a-vis members, where some of the members go out on partition and other members continue to be the members of the family. It may be partial vis-a-vis properties where, some of the properties, are divided among the members other properties continue to be HUF properties. Partial partition may be partial vis-a-vis properties and members both.

Difference between partition under the Hindu Law and that under the Income-tax Act: –

There is a difference between a partition under Hindu Law and a partition recognised under the Income-tax Act.

Though the concept of partition is the same under Hindu and tax laws, in two respects, recognition of partition under tax laws differs from that under Hindu Law.

For recognition of partition under Hindu Law division of properties by metes and bounds is not necessary. However, for recognition of partition under tax laws, division of properties by metes and bounds is necessary.

Again under Hindu Law partial partition is recognised. However, in view of provisions of S.171(9) of Income-tax Act, 1961, partial partitions will not be recognised for tax purposes.

Right to claim Partition: –

Under the Hindu law, any co-parcener can make a claim for partition.

Necessity of other co-parceners to agree in order to entitle a co-parcener to claim for a partition:-

It is not necessary that other co-parceners should agree to the partition sought by one of the coparceners.

But merely because one member severs his relations with others there is no severance between others. {CIT vs. Govindlal Mathurbhai Oza – [1982] 138 ITR 711 (Guj.)}

The other members continue to remain joint.

Partition on death of co-parcener:-

A partition is an act effected inter vivos between the parties agreeing to the partition. A death of partner cannot bring about an automatic partition and on such a death, the other surviving members continue to remain joint. However under the provisions of 56 of Hindu Succession Act, there is a deemed partition for a limited purpose of determining the share of the deceased co-parcener for the purpose of succession under the Act.

Right of minor to claim partition:-

A minor can claim partition through his guardian. A reference in the above regard can be made to the decision of the Supreme Court in the case of Apoorva Shantilal Shah vs. CIT as reported in [1983] 141 ITR 558 {SC}.

Eight of wife of Karta to claim partition :-

As per Hindu law, the ordinary rule is that a partition can be claimed only by a coparcener and wife not being a coparcener she cannot ask for partition.

Certain States including Maharashtra have brought amendment to the Hindu Succession Act, 1956, conferring co-parcenery rights to daughters and as such they can claim partition.

Validity of partition between widow-mother and sole surviving coparcener-son: –

A wife or mother has no right to claim partition, but if a partition is effected a mother or the wife gets a share equal to that of the son.

Equal distribution of Share among sons by Karta Father: –

A father in his right as patria potetas or otherwise can effect a partition between himself and his son of the joint family property of HUF. However, he has to allot equal shares to the sons.

The father is expected to act bona fide and only aggrieved party can seek relief by way of appropriate proceedings. However, till such a partition is held invalid by a competent court, it must be held as valid.

Apporva Shantilal Shah vs. CIT [1983] 141 ITR 558 (S. C.)

Ownership of Property received by a member on a total partition of HUF:

The property received by male member on total partition will retain its character as a joint family property. If he is single, it will be HUF property on the marriage.

The authorities in this regard are :–

[a] CIT vs. Arun Kumar Jhunjhunwala and Sons [1997] 223 ITR 45.

A sole member can constitute a HUF on marriage.

[b] CIT vs. Radhe Shyam Agarwal [1998] 230 ITR 21 (Pat).

Position when the wife of the karta also been allotted a separate share of property:-

The property of the wife of the Karta will be her individual property. There is a difference of opinion among the Courts as to whether she continues to be a member of her husband's HUF after allotment of a share to her on partition.

Partition is not transfer:-

The Supreme Court in the case of CED vs. Kanhlal Trikamlal [1976] 105 ITR 92, 101 (S. C.) observed that partition is really a process in which and by which a joint enjoyment of the property is transformed into enjoyment in severalty. Each one of the sharers has an antecedent title and therefore, no conveyance is involved in the process, as confirmed of new title is not necessary. This decision is an authority for the proposition that no conveyance is required for a partition, but not for whether there is a transfer involved in a partition.

In the case of Kalooram Govindram vs. CIT [1965] 57 ITR 335 {S.C.), the Supreme Court did not give any opinion as to whether a partition constitutes a transfer within the meaning of Transfer of Property Act. But according to Andhra Pradesh High Court in the case of Dwarka Prasad vs. CED [1968] 67 ITR 281 (AP) the Supreme Court in 57 ITR 335 has given final authority that in partition there is no transfer.

Some practical Question

Question:-

Physical division of property by way of book entries not permissible :-

Where a property is capable of physical division, the partition must be made by physical division only. If the property of the HUF does not admit of physical division, the property must be so physically divided as much permits. For example, it is not expected that the utility of the property is lost by compelling a physical partition and in such a case, the property may be divided physically to the extent possible.

This is rule in section 179 to make a valid claim for recognising the partition for Income-tax purposes.

Basically, a partition can be made orally and there is no requirement in law that the partition must be evidenced by a written agreement. Even a partition of

immovable property of HUF can be through an oral agreement [Popatlal Devram vs. CIT [1970] 77 ITR 1073 (Orissa).]

Entries showing division of the property in books of account may be good evidence of a partition more particularly in cases where the property may not be capable of physical division.

For example, it has been held that a business cannot be partitioned by metes and bounds. [R.B. Bansidhar Dhandhania vs. CIT [1944] 12 ITR 126 (Patna)] Therefore, where a business of HUF was partitioned by well defined shares and partnership formed was held valid.

Therefore, where credit balances in capital account in books of firm in which assessee HUF was a partner is partitioned, it was held that there was a valid partition. [Motilal Shyam Sunder vs. CIT [1972] 849 ITR 186(All).]

In the case of CIT vs. K. G. Ramakrishnier [1963] 49 ITR 608 (Mad.), the Madras High Court held that an asset which is not capable of physical division can be partitioned by making entries in books. Here, entries relating partition were passed in books of HUF and not the partnership firm where HUF was a partner. The partition was held valid.

Procedures for recognition of partition:-

The HUF, which has been hitherto assessed, must make a claim to the assessing officer that the HUF properties have been subjected to total partition.

The Assessing Officer will make an inquiry in to the claim after giving notice to all members of the HUF and if he is satisfied that the claim is correct, he will record a finding that there was a total partition of the HUF and the date on which it has taken place.

Partition for conversion of family business into partnership:-

A business cannot be partitioned by metes and bounds. This is the observation of the Patna High Court in the case of R.B. Bansidhar Dhandhania vs. CIT [1944] 12 ITR 126 (Patna). Here, the business of HUF was partitioned by well defined shares and partnership formed was held valid.

It may however be noted that a partition can be effected orally. Subsequent entries in the books of account are good evidence of partition. The Bombay High Court in the case of CIT vs. Shiolingappa Shankarappa Mendse and Bros.

[1982] 135 ITR 375 (Bom.) had occasion to deal with a case where there was a partition of HUF and subsequent formation of a partnership firm by the erstwhile members of the HUF. Transaction of partition was evidenced by book entries. Partnership was held valid.

Where, however division of property (business) of HUF was not effected properly, the claim that business of HUF was converted into that of partnership firm was not upheld and the income from the business was held assessable in hands of the HUF itself. {Kaluram & Co. (HUF) vs. CIT [2002] 254 ITR 307 (Del.)]

Order u/s 171 not required where a HUF has not been assessed to tax:-

The wordings of section 171 show that the section has no application to a HUF, which has not been hitherto assessed. The authorities in support of this proposition are :–

CIT vs. Kantilal Ambalal (HUF) – [1991] 192 ITR 376 (Guj.)

Addl. CIT vs. Durgamma (P) – [1987] 166 ITR 776 (A.P.)

CIT vs. Hari Krishnan Gupta – [2001] 117 Taxman 214 (Del.)

Reference may also be made in this regard to the decision of the Supreme Court in the case of Roshan Di Hatti vs. ITO – [1968] 68 ITR (SC)/Sir Sunder Singh Majithia vs. CIT – [1942] 10 ITR 457 (PC).

Validity of Penalty on HUF after a total partition:

The provisions of section 171[8] gives the mandate to an assessing officer to levy penalty on a HUF disrupted after partition.

The levy of such penalty has also been upheld by the Allahabad High Court in the case of CIT vs. Raghuram Prasad [1983] 143 ITR 212 {All}.

Where a coparcener with only his widow as legal heir dies, could a partition be deemed as between the surviving coparcener and the widow on his death? :

Where a deceased dies issueless leaving a widow there is no question of a deemed partition u/s. 6 of the Hindu Succession Act. This is the finding of the Gujarat High Court in the case of Bhartiben S. Jhaveri vs. CED [1999] 238 ITR 995 (Guj). The reason being there is no coparcenery with only one male.

A similar ratio was held by the Allahabad High Court in the case of CED vs. Smt. S. Harish Chandra [1987] 167 ITR 230 {All} that proviso to section 6 of the Hindu Succession Act does not come into operation where there is no coparcenary in existence at the time of the death of the male member.

Responsibility to pay Tax After partition of an HUF up to the date of partition:-

As per section 171 [6], every member of the HUF before partition shall be jointly and severally liable for the tax on the income assessed of the HUF. The same section empowers the assessing officer to recover the tax due on completion of the assessment on the disrupted HUF from every person who was member of the HUF before partition.

Further, as per section 171[7], the several liability of the member shall be computed according to the portion of the joint family allotted to him at the time of the partition.

It may however be noted that joint liability of the member is personal and distinct from the personal and several liability as found by the Supreme Court in the case of Govindas vs. ITO [1976] 103 ITR 123, 132 {SC}. As such a member of a HUF before partition is not personally liable, after partition in respect the liability of HUF, ex-members liability is personal.

Also, unlike the several liability, the joint liability is not limited to the asset received by the member on partition as noticed by the Supreme Court in the case of Addl. ITO vs. A.S. Thinmaya [1965] 55 ITR 666, 671 {SC}.

Notional partition: –

Under the provisions of section 6 of the Hindu Succession Act, 1956, where a Hindu male dies intestate on or after 17th June 1956, having at the time of his death an interest in a Mitakshara coparcenary property leaving behind a female heir of the class I category, then his interest in the coparcenary property shall devolve by succession under that Act and not by survivorship. The interest of the deceased will be carved out for devolution as if a notional partition had taken place before the death of the deceased. This is the concept of notional partition.

Notional partition and destruction of the family:-

The notional partition only crystallises the share due to the female heir and does not disrupt the joint family.

A direct authority can be found in the decision of the Supreme Court in the case of State of Maharashtra vs. Narayan Rao Sham Rao Deshmukh, which is reported in [1987] 163 ITR 31 {SC}, wherein it was held that the purpose of section 6 is only for ascertainment of the share of the female heir and unless the share is given away, the same cannot be excluded from the assets of the HUF.

The Gujarat High Court in the case of CWT vs. Chandrasinhrao D. Gaikwad [1999] 237 ITR 875 came to the same conclusion without referring to the above decision of the Supreme Court.

In fact, the widow of a deceased coparcener is entitled to the share of the deceased in a Hindu individual family governed by Mitakshara Law according to section 6 of Hindu Succession Act, 1956 continues to be member of HUF until she files suit for partition.

[Gurupad Khandappa Magdum vs. Hirabhai Khandappa Magdum [1981] 129 ITR 440 (S.C.) followed in Kishandas vs. CWT [2000] 243 ITR 307 (A. P.)]

Notional partition exist under the Income-tax Act:-

In order that a claim for partition has to be recognised under the Income-tax Act, the claim for partition must fulfil the condition laid down in section 171.

A mere notional partition by operation of a statute like the Hindu Succession Act, 1956 is not sufficient for recognising a partition under the Income-tax Act.

This is the dictum of the Patna High Court in the case of CIT vs. R.B. Tunki Sah Baidyanath Prasad [1991] 189 ITR 351 {Patna] approved on facts by the Supreme Court in 212 ITR 632 {SC}.

In the case of P. Shankaraiah Yadav 91 ITD 228, Honorable ITAT held that, setting apart certain assets of HUF in favor of certain coparceners on the condition that no further claim in properties will be made by them is nothing but a partial partition and cannot be construed as total partition u/s 171(9) of the Income Tax Act.

This section covers only those transactions, wherein members of HUF are donors and gift to HUF, whereas HUF giving gift to the members of HUF is not covered under this section. Hence, any individual receiving gift from HUF, is fully taxable.

This was clearly brought out in the judgment of Ahmedabad bench of ITAT in the case of Shri Gyanchand M Bardia V/s ITO. In this case, appellant Shri Gyanchand M Bardia had received gift of Rs. 1, 02, 00, 000/- from his own HUF i.e Gyanchand M Bardia(HUF) in which he was karta. The Assessing Officer rejected the assessee's plea that it is exempt from tax since it is received from relative and brought to tax under "Income from Other Sources" of the appellant.

Gyanchand M. Baradia vs. ITO (2018) 93 Taxmann.com 144 Ahmedabad Tribunal.

Assessment made by the Assessing Officer was upheld by the tribunal which opined that HUF receiving gift from its members is acceptable but not vice versa. Karta gifting the corpus of HUF to himself is the grave injustice committed towards other members of HUF, who do not have any control in managing the affairs of the HUF.

Point to Ponder: Whether Women can be Karta of HUF

India being a patriarchal society, Karta is the senior-most male coparcener of the HUF. Junior male member of the family can become Karta if all members of the family agree. If the family is survived by women, and her minor son and daughters, then son would be Karta acting through his natural guardian i.e minor's mother. However, women did not have any right to become Karta of the HUF when there were male members in the family.

This disparity of denying the right of becoming Karta to women was removed in the year 2016, by the landmark judgment of Honorable Delhi High Court in the case of Mrs Sujata Sharma V/s Shri Manu Gupta and others.

Brief background of the case: Prior to **Hindu Succession (Amendment Act) 2005**, coparcenary property of a Hindu male dying interstate devolve upon his sons, as they were the coparceners and not upon daughters. With the amendment to the said Act, this discrimination against daughters was removed, and held that, daughter of coparcener (i.e Father) shall by birth become a

coparcener in the same manner as a son and entitled to the coparcenary property in the same manner as a son.

In the instant case, the karta of HUF D.R. Gupta & Sons (HUF) was D.R. Gupta, who had five sons. After his death, eldest son Mr Kishan Mohan Gupta becomes Karta of the HUF. After, the death of Mr Kishan Mohan Gupta and his four brothers, Mr Manu Gupta, the son of deceased youngest brother becomes Karta. This act of Mr Manu Gupta was challenged by Mrs Sujata Sharma, eldest daughter of Mr Kishan Mohan Gupta, on the ground that, she is the senior most member of the family after the death of her father and uncles.

She argued that she is entitled to be Karta of the HUF being the eldest member of the family. Her contention was, since daughter is coparcener in the HUF consequent to amendment to section 6 of Hindu Succession Act 2005, all rights of a coparcener including the right to act as Karta of the HUF should be bestowed on the daughter too.

However, defendant Mr Manu Gupta objected to this line of argument, stating amendment to Hindu Succession Act 2005 is restricted only for daughter to become coparcener and does not extend to granting her right to manage HUF property. He also contended that, since Mrs Sujata Sharma has been married, she cannot be integral part of HUF.

In this case, Honorable High Court passed landmark judgement stating, after the amendment of Hindu Succession Act 1956 in the year 2005, women have equal right to the HUF property. Accordingly, they should also have right to manage that property in the capacity of Karta. Hence, there should not be any restrictions in making female member of the family as Karta provided she is the eldest member in the family.

Now the legal position is after the death of father who is Karta of the HUF, even daughter can become Karta having mother and siblings (younger sisters and brothers) as members of the HUF. Also, there is no restriction on married daughters from becoming the Karta of their parents HUF.

This judgement has ushered in equal economic and legal right to women by rightly entitling her to manage the affairs of HUF. This should enable more and more women to come forward and take up the responsibility of Karta and handling the affairs of HUF.

HUF WITH ONLY FEMALE MEMBERS AND HUF WITHOUT FEMALES

HUF with only Female Members – A Hindu widow being the sole surviving member, cannot constitute a HUF. Gangamma Vs. Agl. ITO (1991) 188 ITR 1 (Ker.). After the Amendment in the Hindu Succession Act, in 2005, a Hindu Widow and her unmarried daughter can constitute a HUF, even when the widow had not adopted a son since, daughter is also a coparcener.

Question:- Whether a person with wife and two daughters only can have HUF?

Answer:- Whether only one male member is suffice to form an HUF is now legally well settled as per decision of Supreme Court in case of Gowli Buddana vs CIT (1966) 60 ITR 293 . An HUF is no different than a joint property. The concept of HUF is very simple codified in Hindu law .A Hindu joint family consists of lineally descended persons -like Great Grand father, Grand father ,father, uncle, son etc. All these persons have right over common ancestral property by birth. The dictum that once Hindu undivided family always Hindu undivided family" has been accepted all along.

The expression 'Hindu undivided family' in the Income-tax Act is same as a joint family which may consist of a single male member and widows of deceased male members. In Dr Prakash B Sultane v CIT ([2005] 148 Taxman 353) the Bombay High Court held that that the property does not lose its character merely because at one point of time there was only one male member or one co-parcener.

In this case , the assessee was a doctor by profession assessable in his hands as an individual. The assessee was a member of a bigger Hindu undivided family which was partitioned on January 1, 1972. At the time of partition and right up to January 22, 1980 the assessee was a bachelor. During these years, the income from assets on partition was assessed in his hands as his individual income.

When the assessee got married on January 22, 1980, he claimed that the income from assets received on partition is assessable in status of the Hindu undivided family consisting of himself and his wife.

The Assessing Officer observed that the decisions referred to by the assessee were considered in the judgment of the Madhya Pradesh High Court in CIT v. Vishnukumar Bhaiya (142 I.T.R. 357). Relying upon this judgment, he rejected

the application of the assessee and continued to assess his income from the Hindu undivided family property in his individual capacity. In the above case also, the assessee had obtained his share on partition before his marriage and, on his marriage, had claimed the status of Hindu undivided family. His claim was rejected on the ground that "until a son is born the status of the assessee would continue to be that of an individual. However, the High Court ruled otherwise and upheld the contention of the assessee that once HUF property always HUF property"

HUF without Females –A Single male coparcener without a female member does not constitute a HUF. The only way by which a single coparcener can constitute a HUF is to marry a woman. He and his wifewould constitute a HUF. Premkumar Vs. CIT (1980) 121 ITR 347 (All.)

Wife in a HUF: For Example, Mr.A / Mrs.A / Mr.B (Son) / Mr.C Daughter of a HUF, then Mrs. A wife of Mr.A is called a member only and not a coparcener. Hence, she cannot ask for partition but when the property is partitioned, she will get an equal share as that of a coparcener. Wife, not being a coparcener obviously cannot become a karta .

Widow in a HUF – With the passing of the HIndu Succession Act, 1956, widow has been designated as class I heir to male HIndu dying intestate. In case of sole surviving coparcener having only a wife but no issue the widow is entitled to succeed to the entire estate of her deceased husband, if he died intestate. The entire interest of the deceased in coparcenery will be part of the estate passing on the death of such person. Bhariben S. Jhaveri Vs. CED (1999) 238 ITR 995 (Guj.). When a Hindu Widow adopts a male heir, the HUF would be constituted by the Hindu widow along with the adopted son. C. Krishnaprasad Vs. CIT (1974) 97 ITR 493 (SC). After the Hindu Succession Act's amendment in 2005, even widows of predeceased sons are now legally entitled for inheriting the deceased's property even if they had remarried.

Females and Gift:A Female member (Wife) can gift her property so as to constitute it as HUF Property. CIT Vs. M. Balasubramanian (1990) 182 ITR 117 (Mad.)Daughters are now coparceners. Hence, now, they can throw their individual assets into Family Hotch Potch subject to the provisions of Sec.64(2).

Create HUF to save tax & Format of HUF Creation Deed

FORMAT-I

DECLARATION

I, _____ son Of _____ Residing at _____ aged ___Adult do hereby declare-

1. That I am Karta of _____

2. That I received on behalf of the H U F gift of Rs. _____ by way of CASH/CHEAUE from my FATHER _____(name of relative of karta of HUF) on dt. _____ this formed the corpus of the HUF.

3. That the HUF at present is consisting of the followings members-

I) Shri _____, Adult, Residing at _____, DOB_____

II) Smt. _____, Adult, Residing at _____, DOB_____

III) Miss_____, Adult /Minor, Residing at _____,DOB_____

IV) Master_____,Adult / Minor, Residing at_____,DOB_____

4. That the above statements are true to the best of my knowledge & belief. Declare this on _____

WITNESS: Signature

1. _____- _____

2. _____- _____

FORMAT- II

DECLARATION OF GIFT MADE BY _____

TO THE HINDU UNDIVIDED FAMILY OF _____

I, _____, residing at _____ _____, do hereby declare and affirm as under:

1. That out of natural love and affection borne by me towards the Hindu Undivided Family of _____, I have made a gift of Rs._____ (Rupees _____ only) as per the following details:

By Cheque No._____, dated _____, drawn on Bank _____, _____ Branch, in favour of _____ HUF.

2. The above Gift has been duly accepted by _____, as Karta of his Hindu Undivided Family and has been duly acknowledged hereunder.

3. This Declaration of Gift is made to record the fact that I have made this Gift in favour of the Donee as above, who now has the absolute right, title and interest in the gifted amount.

Date: _____, 2020

(Signature of the Donor)

ACKNOWLEDGEMENT OF GIFT

I, _____, hereby acknowledge having received the above gift made to my Hindu Undivided Family by _____.

Date:_____,2020

_____

(Signature of the Donee
as Karta of his HUF)