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AMENDMENT OF TRUST DEED

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OVERVIEW

1.01 It is extremely difficult to amend a trust deed since a trust by its inherent nature is irrevocable. Therefore, it is important to provide the amendment clauses in the trust deed itself. However, if the amendment clauses provided in the trust deed are too wide, then the trust may not be treated as irrevocable. In the trust deed where there is no mention about amendment, the amendment has to be done with the permission of a civil court. Even the Civil Courts do not have unlimited powers of amendment. The Civil Courts permit amendment under the doctrine of *Cy pres*, which means the original intent of the settlor should prevail.

Therefore, only such amendments should be made which are in line with the original intent of the settlor. It may further be noted that even the settlor does not have powers to amend the trust deed.

AMENDMENT OF THE TRUST DEED BY TRUSTEES

2.01 It is a generally a settled principle of trust law that once a trust is created with certain objects, no one has the power to delete any of the original objects. This

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was also affirmed by the Madras High Court in *Sakthi Charities v. CIT* [1984] 149 ITR 624/19 Taxman 100, where a deed of rectification deleting certain original objects of a trust deed was held to be invalid. The landmark decision on this issue was given by the Supreme Court in *CIT v. Palghat Shadi Mahal Trust* [2002] 254 ITR 212/120 Taxman 889 (SC) where a trust was constituted for the educational, social and economic advancement of backward class Muslims. A general body resolution extended these objects to all communities irrespective of religion or creed. The Supreme Court held that this amendment would be invalid because it implied alteration in the object of the trust deed which was not contemplated by the settlor.

THE SETTLOR OR FOUNDER HAS NO POWER TO REVOKE

3.01 The Madras High Court in *Thanthi Trust v. ITO* [1973] 91 ITR 261 observed, it is well established that the subsequent acts and conduct of the founder of trust cannot affect the trust if there has been already a complete dedication (complete handover of the property). If a valid and complete dedication has taken place, there would be no power left in the founder to revoke and no assertion on his part or the subsequent conduct of himself or his descendants contrary to such dedication would have the effect of nullifying it. If the trust has been really and validly created, any deviation by the founder of the trust or the trustees from the declared purposes would amount only to a breach of trust and would not detract from the declaration of trust. In this regard the Supreme Court ruling in the case *Sri Agasthyar Trust v. CIT* [1999] 236 ITR 23 (SC) is also relevant.

3.02 *It should be kept in mind that the trustees inherently do not possess any*

The Supreme Court held this amendment to be invalid because it implied alteration in the object of the trust deed which was not contemplated by the settlor.

power to amend the trust deed, for that matter even the settlor does not have the power of any subsequent amendment. The power to amend shall be limited to the extent provided in the trust deed itself. Therefore, drafting of trust deed becomes very important and suitable clauses should be kept for future need of changes and contingencies. Further, care should be taken to ensure that the amendment clauses are not too wide or discretionary in nature which may render the trust invalid and revocable.

LIMITED POWER OF RECTIFICATION BY CIVIL COURT

4.01 A civil court has been conferred with the power to amend a trust deed and the Income Tax Officer has to take notice of such amendment. In the case *CIT v. Kamla Town Trust* [1996] 217 ITR 699 (SC), [1996] 84 Taxman 248 (SC), the Hon'ble Supreme Court held that any change in Trust Deed is not possible unless the deed itself provides for such change. Approaching the registrar or a Court of law shall only be relevant if a change is legally permissible.

4.02 The Civil Courts have power to direct changes in the trust deed in the spirit of

the *Doctrine of Cy pres* which implies that the original intent of the settlor should not fail. However once a civil court has allowed amendment, it is not open on the part of the Income Tax Officer or any other person to challenge such rectification.

SECTION 26 OF SPECIFIC RELIEF ACT IS THE REMEDY AND NOT SECTION 34 OF TRUST ACT

5.01 In the above *Kamla Town case (supra)*, the Supreme Court observed that the Section 34 of the Indian Trust Act, 1882 was not applicable as far as amendment of Trust deed was concerned. It may be noted that Section 34 of the Indian Trust Act, 1882 provides the right to apply to court for opinion in management of Trust property. The apex court was of the opinion that section 34 was confined only to management of trust property and could not be invoked for amendment in the deed and objects. It was also observed that the right legal provision was section 26 of the Specific Relief Act, 1963 under which an application for amendment to trust deed could be made.

SECTION 92 OF CIVIL PROCEDURE CODE (CPC)

6.01 In *Kamla Town Trust v. CIT* [1982] 133 ITR 632 (All.), the question debated was whether the Civil Court had the power to rectify the trust deed under section 92. It was observed that Section 92 nowhere enables the Civil Court to alter or rectify the terms of a trust. It only enables the Civil Court in suitable cases to remove any trustee, appoint a new trustee, vesting any property in a trustee, directing any

The Income Tax Department or any other authority cannot decline to accept an amended deed only on the ground that they were not made party to such amendment.

ex-trustee to deliver possession of the trust property to the person entitled to the possession of such property, directing accounts and enquiries, declaring that portion of the trust property or interest therein shall be allotted to any particular objects of the trust or to settle a scheme. Thus, the court has got power to allocate the trust properties to any particular field of the trust. In this case the Civil Court had deleted from the trust deed certain objects so as to enable the trustees to claim the benefit of exemption under the Income Tax Act, 1961. It was held that section 92 of CPC was not the appropriate section / statute for amendment of Trust Deed. Under section 92 of CPC, the court can give a direction which is necessary for the administration of any trust. However, it can only exercise the powers expressly set out thereunder, and by exercising the power under section 92, it cannot alter the objects of the trust deed.

REVENUE NEED NOT BE A PARTY TO RECTIFICATION

7.01 The Income Tax Department or any other authority cannot decline to accept an amended deed only on the ground that they were not made party to such amendment. In the case *CIT v. Kamla Town*

Trust [1996] 217 ITR 699 (SC), [1996] 84 Taxman 248 (SC) one of the contentions of the revenue was that the rectification decree of the trust deed was *in personam* and not *in rem* to which the revenue was not a party and, therefore, it was not binding on the income-tax authorities. It was held that in such proceedings, the order granting rectification of such instrument of trust would certainly remain relevant. Consequently, it cannot be said that such rectification orders passed by Civil Courts permitting rectifications of trust deeds under the relevant provisions of the Specific Relief Act could not be relied upon by the assessee-trust in assessment proceedings before the Income Tax Officer (ITO) **even though the revenue or the ITO was not a party to such rectification proceedings**. The ITO has to consider the real scope and ambit of the trust deed as presented to him in rectified form with a view to finding out whether on the basis of such a rectified instrument, the assessee-trust had earned exemption from payment of income-tax under the relevant provisions.

7.02 In this context it is pertinent to note that a *judgment in rem* is a judgement pronounced on the status of some particular subject or property or thing (as opposed to one pronounced on persons). In the case of amendment of Trust Deed, though the rectification orders of the Civil Court is not judgments *in rem*, still it is binding in assessment proceedings before the ITO and will have to be given effect to for whatever they are worth.

THE EFFECT OF RECTIFICATION IS NOT RETROSPECTIVE

8.01 In the case *Bhriguraj Charity Trust v. CIT* [1997] 228 ITR 50 (Del.)(FB), the full bench of the Delhi High Court observed

that any rectification would have only prospective operation and would not affect the assessment years in question, which were prior to the date of the Civil Court's decree.

SUPPLEMENTARY TRUST DEEDS

9.01 In the case *Laxmi Narain Lath Trust v. CIT* [2000] 244 ITR 272 (Raj.), it was held that a supplementary trust deed permitted by appropriate civil court was legally valid and binding on the department. The court relied on the assessee's own case for the assessment year 1972-73 in *Laxminarain Lath Trust v. CIT* [1988] 170 ITR 375/[1987] 33 Taxman 194, where it had held that the supplementary deed bound the trustees who were parties to the said deed as well as future trustees of the assessee-trust and in view of the supplementary deed it was no longer permissible for the trustees of the assessee to use the trust funds.

SUM UP POINTS

- It is important to provide the amendment clause in the Trust Deed itself.
- If there is no amendment clause in the Trust Deed, any amendment has to be done with the permission of a Civil Court.
- Once the Civil Court has allowed permission for amendment, it is not open on the part of the Income Tax Officer or any other person to challenge such amendment.
- Amendments made should be in line with the original intention of the

Settlor and should not negate or deviate from the original intention of the Settlor.

- To form a valid trust the trust property has to be completely handed over, thereafter the founder or the Settlor do not have any powers to revoke or nullify the objects of the Trust.
- Section 26 of the Specific Relief Act, 1963 is the appropriate statutory provision under which an application for amendment to Trust Deed can be made. It may be noted that the Section 34 of the Indian Trust Act, 1882 only provides the right to apply to court for direction in the management/administration of the Trust.
- Similarly, a Civil Court cannot alter the objects of the Trust Deed by exercising its power under Section 92 of the Civil Procedure Code (CPC) under this provision it can only give direction for administration of any Trust.
- The Income Tax Department or any other authority cannot decline to accept an amended Trust Deed only on the ground that they were not made party to such amendment.
- The Assessee Trust for Income Tax purposes, can rely on the amended Trust Deed for availing Income Tax exemptions, even though the Income Tax Department was not party to the amendment carried out.
- The amendment to Trust Deed made with a Civil Court order, takes onward effect from the date of the Civil Court's decree and does not bind the operation of those assessment years which were prior to that date.
- Supplementary Trust Deed is also permitted by Civil Court. The Supplementary Trust Deed is also binding on the Trustees in the manner the original Trust Deed binds.

Reference Book : **Taxation of Trust and NGOs with FCRA and FEMA, 5th Edition 2010** by **Manoj Fogla**, published by TAXMANN Publications, New Delhi

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