India: cross-border administration of estate

Bijal Ajinkya and Ipshita Bhuwania examine issues arising from administration of estates in Indian law


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When it comes to the cross-border management of Indian assets, families with a nexus to India face substantial difficulties. While India's inheritance laws pose no hurdles, exchange controls and procedural compliances create major roadblocks.

At this juncture, it is useful to remember that:

- Under Indian inheritance laws, an heir (whether through testamentary or intestate succession) can be of any nationality or residence, since inheritance is seen as a carte blanche exemption from capital controls.
- There are no forced heirship rules under Indian personal laws barring Islamic personal law; consequently, individuals may bequeath or gift off the entirety of their estate.
- There is currently no estate duty, death tax or inheritance tax in India. However, there is speculation about the reintroduction of estate duty in the near future and families have begun to plan accordingly.
- Indian exchange controls regulate the inflow and outflow of currency from India. There are strict rules on how much a person can repatriate from or bring into the country.

In respect of exchange controls, the most concerning issue is that of repatriation of funds.

RESTRICTIONS FOR NON-RESIDENTS

Non-residents (NRs) cannot hold ordinary resident rupee accounts and must hold a non-resident ordinary rupee account account (NRO account) for their Indian receipts. A NRO account is permitted to receive funds from an Indian estate, transfers from rupees accounts and other legitimate dues of the account-holder. Only up to US$1m out of the balance in the NRO account or sale proceeds of assets (including assets acquired by way of inheritance) can be repatriated every financial year (FY). However, current income (rent, dividend, interest income etc) is freely repatriable. Thus, if a NR is anticipating inheriting sizeable bequests from an Indian estate, they should remember that they can only repatriate US$1m every FY. It goes without saying that if there are multiple NRO accounts, the threshold would be applicable for every NR and not for every account.

It is important to note that only an individual may open an NRO account and an entity (including a foreign trust) cannot. Therefore, even though a foreign trust can technically be a beneficiary under an Indian will or in an Indian trust, it cannot practically repatriate funds from India. An individual trustee is also not permitted to hold an NRO account in a representative or nominee capacity. This is a real obstacle to cross-border planning because NRs who have set up succession-planning structures like offshore trusts in their country of residence would surely prefer to use these structures to receive their Indian assets.

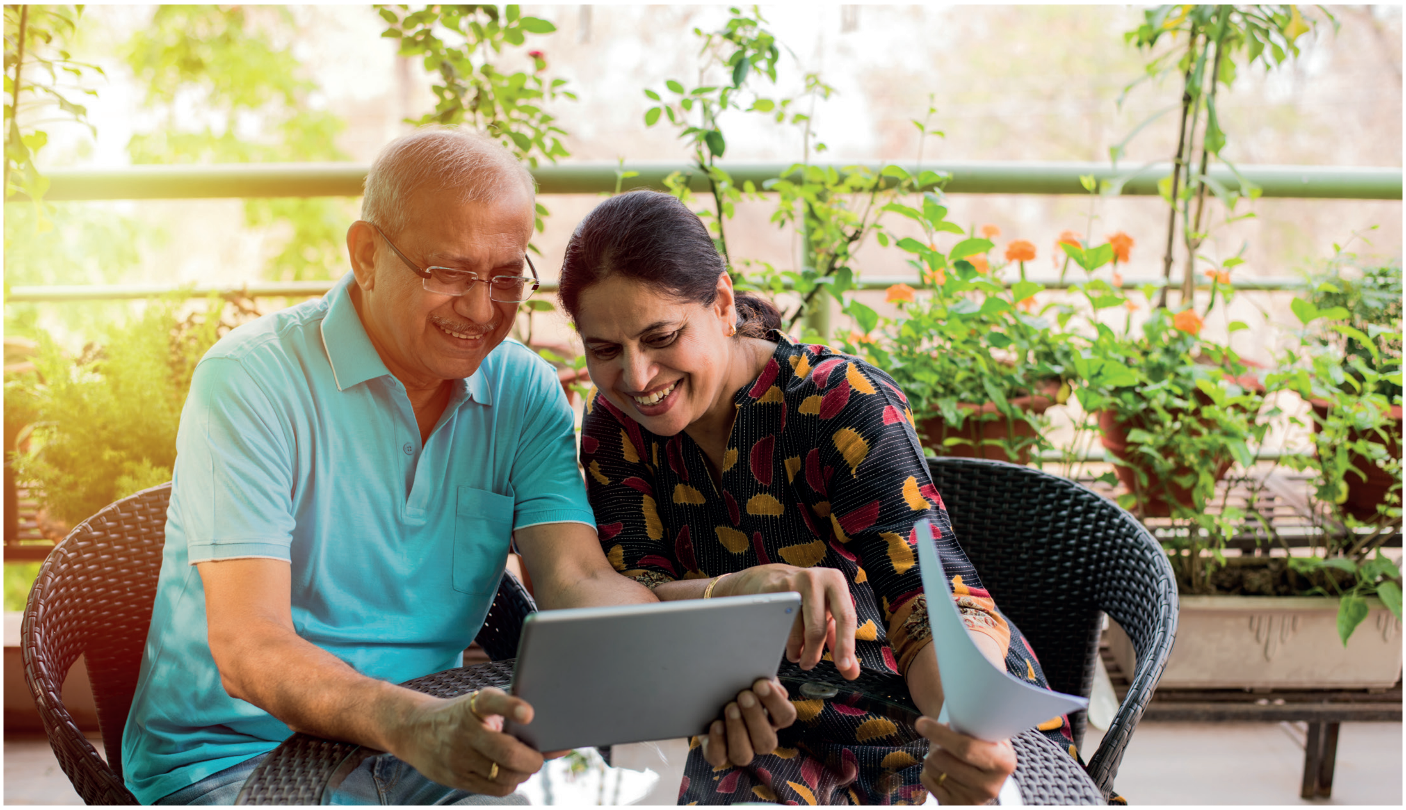
NRs who are resident in countries like US and UK with a sizeable inheritance tax have a further set of worries. The implication of inheriting a substantial estate in India is that the NR would add a large inheritance to a presumably sizeable estate in their country of residence. This will certainly take them closer to exceeding their lifetime estate and gift tax exemption.

If the inherited Indian estate includes immovable property, then NR heirs may face difficulties while disposing of the property. Real estate can only be sold or gifted to an Indian resident (IR), to a NR Indian or an overseas citizen of India (OCI). But if the property is agricultural in nature, then it cannot be transferred to any NR, even if they are of Indian nationality.

At a procedural level, NR children and grandchildren who are settled, working and married outside of India are unlikely to overly concern themselves with Indian assets, especially given that it involves a considerable amount of legwork to procure probate (or letters of administration in the lack of a will). In India, these processes can take anywhere between six months to one year and often longer. NRs are also likely to become frustrated by the process involved which usually requires them to be physically present in India. It is small wonder, then, that substantial Indian assets continue to sit in limbo, awaiting transmission.

TRUSTS AND WILLS AS SOLUTIONS

A straightforward solution to cross-border administration woes is to make an Indian trust. IRs can set up this trust in their lifetime and settle into it any Indian asset they want their family members (including NRs) to inherit. NRs can be made beneficiaries to



the Indian trust and receive distributions in their NRO accounts. They can repatriate this subject to the applicable thresholds. When current income like interest, dividend or rent generated by the trust is distributed to the beneficiary's NRO account, it retains the character of current income; an uncapped amount of current income can be repatriated, as noted above. The NR's entire family including spouse and children can be made beneficiaries, which means they can collectively repatriate a substantial amount. Minors too can open an NRO account (operated by the legal guardian) and this can be used to repatriate funds in a similar fashion.

Having such a trust structure means assets need not devolve through succession and NR heirs can avoid the tedious court processes of probate/letters of administrations. An Indian trust, being resident in India, is not subject to the same restrictions that NRs are in respect of onward sale of immovable property and can thus more easily sell and deal with real estate. The trust can be structured in a manner that is appropriate and tax-efficient for the country of residence as well as for India. For instance, an irrevocable discretionary trust structure works best for India and this can be tweaked to make it grantor for the US. A separate trust for each NR child and their family can be set up in a similar fashion.

Families who are keen to retain control over assets during their lifetime can also consider bequeathing their estate through their will to a testamentary Indian trust, ie a trust that comes into being upon demise. However, this does not do away with the requirement of probate nor give the assurance of setting up a trust to one's satisfaction in their lifetime.

It goes without saying that succession of trustees and maintaining control after demise of IRs should be carefully worked out while setting up the trust. India offers a number of reputed professional trusteeship companies who work in tandem with the family to provide seamless services and a measure of continuity post demise.

This apart, a well-drafted Indian will is an absolute must. An Indian will should govern only Indian assets and have at least one IR as executor and as witness for ease of administration. NRs should carefully consider the disadvantages of having only foreign wills to govern their Indian assets as a foreign will would need to in an acceptable form for the courts in India to grant probate. Besides, at the ground level, those who assist with transmission of assets can delay the process simply because they are unfamiliar with the language or format used in the foreign wills.

Therefore, a private Indian trust alongside an Indian will is a clear-cut and easy-to-implement solution for NR families with an Indian nexus and global spread of assets. This can, demonstrably, eliminate many of the troubles that plague Indian-offshore administration of estate and give NR families much-needed comfort and continuity. SJ

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Financial institutions and sanctions compliance

Angelika Hellweger considers a case that focused on a lack of due diligence and emphasises the importance of measures that ensure sanctions compliance

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Meaningful due diligence means knowing what questions to ask, who needs to be asking them and what to do with the responses

A Swiss court found four bankers from Gazprombank's Zurich branch guilty of failing to conduct proper due diligence checks into Russian cellist Sergei Roldugin, who has close links to President Vladimir Putin.

The four were given fines totalling 741,000 Swiss francs and suspended for two years for the lack of background checks made regarding the opening and maintaining of accounts for Rodulgin, who is regarded as one of "Putin's wallets".

The court said there was no doubt the musician, who is godfather to Putin's daughter, was not the genuine owner of the millions of Swiss francs held in the accounts between 2014 and 2016. Approximately 30 million Swiss francs were involved in the case – despite the fact that Rodulgin had no listed activity as a businessman. The court said the bankers should have asked questions about the source of the funds. Swiss law requires banks to reject or close accounts if there are doubts about the account holder's identity or the source of the money.

Roldugin first met Putin back in the 1970s and they have retained close ties. Since Putin and the network of oligarchs were sanctioned due to Russia's invasion of Ukraine, there has been an increased focus on how he has moved wealth around the world using a network of helpers.

Roldugin was exposed in the Panama Papers 2016 investigation that revealed his secret financial affairs and links to Putin. Another investigation revealed that the musician had laundered billions through what became known as the Troika Laundromat – a network of approximately 75 offshore companies – and received $70m for doing so.

The Panama Papers showed that in 2008, a Roldugin-owned, Panama-based company sold 70,000 shares in the Russian state energy company Rosneft for more than US$800,000. This was then paid into Roldugin's account at the Gazprombank Zurich branch. Roldugin has claimed the money was donations from Russian businessmen. But the revelations about him led to him being sanctioned by the European Union in March last year and by the United States last June.

DUE DILIGENCE

Conducting appropriate due diligence is key to a financial institution's sanctions compliance efforts. Meaningful due diligence means knowing what questions to ask, who needs to be asking them and what to do with the responses. It will only be as effective as the institution's ability to gather and assess information. An institution must adopt appropriate risk-based procedures for onboarding customers and conducting ongoing customer due diligence that, among other things, enables it to:

- Understand the nature of customer relationships for the purpose of developing a customer risk profile; and
- Conduct ongoing monitoring to identify and report suspicious transactions and, on a risk basis, to maintain and update customer information.

In the matter of Gazprombank, the financial institution would have been well advised to take the following into account when considering the risk associated with the customer's business or professional activity:

- Does the customer or beneficial owner have links to sectors that involve significant amounts of cash?
- Can the customer's or beneficial owner's source of wealth or funds be easily explained, for example through their professional activity, inheritance or investments?
- Is the customer's or the beneficial owner's background consistent with what the firm knows about their former, current or planned business activity, their business' turnover, the source of funds and their source of wealth?
- Does the customer have political connections? Are they, or is anyone publicly known to be closely associated with them, a politically exposed person?
- Are there adverse media reports or other relevant sources of information about the customer? For example, have there been any allegations of criminality (including money laundering, corruption, unexplained wealth or terrorism) made against the customer? If so, are these reliable and credible?

As well as this, investment in the training and development of employees regarding sanctions compliance procedures is essential. SJ