One Japanese case on taxation surrounding foreign trust

SUZUKI, Yuya, Mr. Dr.*

Abstract

Taxation surrounding trust at cross-border situation is paid attention to by worldwide basis. Japan is not exception. According to recent Japanese jurisprudence, where a trust had been established in accordance with State law of New Jersey, the U.S., it was disputed whether or not the act settling that trust fell within "*shintaku koui* (an act of trust)" and one of the related members, who had been a minor child at that time, fell within "*jyueki sha* (beneficiary)" under Japanese Inheritance Tax Act. Lower courts faced complete opposite sides, and the final judgment at the Supreme Court is eagerly awaited for.

Currently this is the first and only Japanese case on taxation in connection with foreign trust, but the meaning of that case is not limited to that point. Japan is now struggling with a series of tax cases concerning Limited Partnerships. Here we, as tax lawyers, must formulate the way of approaching the problem, i.e. how to interpret and apply Japanese national tax legislation with regard to "foreign" elements. Based on the classical way of tax law interpretation in relation to private law, is it appropriate only to look at Japanese law? Or should we also have to consider foreign laws?

Now is the time to introduce and to consider that Japanese case in the light of the above-mentioned view and to share the view with international tax community on "worldwide basis".

Keywords: foreign trust, Inheritance Tax Act, Gift Tax, conflict of laws

1 Introduction

In these days there have been some reputations on cases which involve the international taxation surrounding trust[1]. These cases are gathering public concerns on international tax planning[2], but are not limited to that matter. That is because these cases occasionally have something to do with the situation between different legal jurisdictions, i.e. civil law ones and common law ones[3]. And as will be discussed later, these cases also raise the problem of how to interpret and to apply the national tax legislations in connection with cross-border matters, especially with private law

principle of foreign countries.

Recently Japan has faced one case, which mainly concerns the interpretation and application of the term "*shintaku koui* (act of trust)" and "*jyueki sha* (beneficiary)" in the light of Japanese Gift Tax. As will be discussed later, this case can be situated amid the trend mentioned above. Latest judgment on lower court was publicized on April 2013[4], and the trial is now under way at Supreme Court[5]. The results of trials were totally divided between lower courts, so a lot of Japanese specialists are paying attentions to the movement of Supreme Court[6].

Below is an inquiry into one of the issues relating to international tax law through introduction and an analyses of that Japanese case[7], aiming at attracting those who are interested in the situation of Japanese international tax law but cannot understand Japanese language, and sharing the problem with specialists in other countries[8].

2　Relevant information on Gift Tax in Japan[9]

2.1　Overview

Japanese taxation on national wealth transfer consists of two ones, i.e. *Sozoku Zei* (Inheritance Tax) and *Zouyo Zei* (Gift Tax) mentioned above[10], both of which are governed by the same Act, i.e. *Sozoku Zei Hou* (Inheritance Tax Act)[11]. The latter tax has the character of a supplement of the former one[12].

What is subject to Gift Tax is exempted from what to income tax[13]. That exemption is true to those covered by "*Minashi Zouyo* (Constructive Gift)" addressed later.

2.2　Legislative structure

2.2.1　Taxpayer

To whom Gift Tax is subject is *kojin* (an individual) who received *zaisan* (property) as *Zouyo* (Gift)[14]. Liability to pay it is established when he or she receives that property as gift[15]. These legislations mean that Gift Tax is levied on a donee of relevant properties rather than on properties themselves[16].

On the taxpayer of Gift Tax, i.e. an individual, no specific limitation related to his or her age is incorporated in the relevant provisions. So in the case discussed later, even the minor child is subject to the liability of Gift Tax in satisfying the requirement of ACT and is obliged to file a final return on it[17]. However, according to Civil Code, "(*a*) minor must obtain the consent of his or her statutory agent to perform any juristic act (*in Japanese, houritsu koui*)"[18]. So, in legal terms, he or she, as a minor child, has to file their return with the consent of their statutory agents, who are generally their parents[19].

And on "gift", ACT doesn't have a definition, so the Civil Code should be referred to in deciding the meaning of it[20]. Under Civil Code," (*g*)ifts shall become effective by the manifestation by one of the parties (*i.e. donor*) of his or her intention to give his or her property to the other party (*i.e. donee*) gratuitously, and the acceptance of the other party thereof "[21] . And, also here, as for a minor

child, “the consent of his or her statutory agent” mentioned above is necessary. But the same provision of Civil Code stipulates that “this shall not apply to an act merely intended to acquire a right or to be relieved of a duty”[22].

2.2.2 Geographical Scope of Tax Liability

Tax liability of Gift Tax in geographical sense varies on whether or not an individual as a donee had *jusho* (domicile) in Japan when he or she received property as gift[23]. Some individuals who have domicile in Japan[24] are subject to Gift Tax on all of the properties received as gift wherever located[25]. Others who don't[26] are to Gift Tax only on ones located in Japan[27].

In addition, when an individual as a donee owns Japanese nationality and when that individual or the donor relevant to gift had domicile in Japan within five years before that gift, that individual is subject to Gift Tax as if he or she had domicile in Japan[28]. In the case discussed later, an individual as a taxpayer owns only the U. S. nationality. The parties concerned seemed to have paid attention to that rule in view of tax planning[29].

2.2.3 Constructive Gifts

As mentioned earlier, Gift Tax is levied on an individual as a donee. But in some cases where an individual didn't receive property as gift, ACT deems that he or she received it as gift from anyone as a donor. Followings are approximate descriptions of those cases;

1) When insurance premiums have been paid by someone who is not the recipient of the proceeds of insurance, the latter as donee is deemed to have received some portion of that proceeds from the former as donor as gift[30].

2) When premiums on periodical payment have been paid by someone who is not the recipient of that payment, the latter as donee is deemed to have received some portion of that payment from the former as donor as gift[31].

3) When someone received property from other person at a price far less than the market value at the time of that reception, the former as donee is deemed to have received from the latter as donor as gift the difference between that price and that market value[32].

4) When someone received benefits via discharge of indebtedness by creditor without payments, the former as donee is deemed to have received from the latter as donor as gift the amount corresponding to that indebtedness discharged. The amount of payment to the donor, if any, is considered. This is also true to the case of the debt assumption and the payment to the third party[33].

5) When someone received benefits other than those set forth in the above items from other person without payment, the former as donee is deemed to have received from the latter as donor as gift the amount corresponding to that benefits. The amount of payment to the donor, if any, is considered[34].

Gift Tax treatment, which is main concern at the case discussed later, is in line with such *Minashi*

Zouyo (Constructive Gifts). The relevant provision, i.e. ACT, art. 4 (1), is as follows;

"When, with regard to [⋯] benefits of *shintaku* (trust) [⋯] in connection with *shintaku koui* (an act of trust), a person falls within j*yueki sha* (beneficiary) and is not *itaku sha* (grantor or settlor), the former shall be deemed to have received rights to accept benefits of *shintaku* [⋯] from the latter as gift as of that *shintaku koui*".

On the application of that provision, *itaku sha* is donor and *jyueki sha* donee[35]. Originally this provision was introduced on 1922[36]. At that time, timing of taxation was when *itaku sha* had given someone rights of *shintaku*[37]. After the amendment on 1938, that was changed into when *jyueki sha* actually had received benefits of *shintaku*. But along with the amendment on 1947, that was changed into as of *shintaku koui*[38]. This change was also maintained at the amendment on 1950[39] and has been existed till the time of the case discussed below.

The meaning of two terms thereof was mainly disputed in the following case, i.e. "*shintaku koui*" and "*jyueki sha*"[40].

3 Case Summary

3.1 Facts found[41]

In November 2013, A, with her husband, B, had visited the U. S. and gave birth to X, a boy[42]. A and B own Japanese nationality. On the other hand X doesn't and only owns the U. S. citizenship[43].

On August 4 of next year, i.e. 2004, C, father of B and grandfather of X, concluded the contract with D to settle T, a trust, in accordance with State Law of New Jersey, the U. S. Under that contract C is settlor and D trustee. On 26th of the same month, as a trust property, C transferred to D the financing bills issued by the U. S. Department of the Treasury, whose face value was five million U. S. dollars[44]. Next month D concluded life insurance contracts with some relevant companies, under which B was the insured[45]. And D paid four million four hundred thousand dollars out of the trust property mentioned above, which were appropriated for lump sum insurance premium.

According to a written contract to settle T, following features can be understood;

1) X is beneficiary.

2) D can exercise its authority with reasonable discretions. And at its discretion, as long as X is alive, D continues to pay appropriate amount for education, living, health maintenance, consolation and well-being of X out of principal and income.

3) On the other hand B preserves the rights to elect beneficiary as well as direct D to maintain, administer and distribute the property.

4) Settlor believes that the appropriate investment to meet the requirement of T is that in life insurance.

5) When B, the insured, dies, D collects the insurance.

In 2007, the district director of the relevant tax office made kettei (Determination) on Gift Tax

return of X concerning on 2004[46]. The main argument of tax authority side is approximately as follows;

Settlement of T, falls within "shintaku koui" of ACT, art 4 (1), and X within "jyueki sha" thereof. Therefore, "as of... shintaku koui", X "shall be deemed to have received rights to accept benefits of" T from C "as gift." And beneficiary on principal is that on income, i.e. X. Hence when the financing bills as the trust property was transferred to D, X was subject to Gift Tax in the light of the whole amount of that trust property, i.e. five million dollars.

X filed an action for the revocation of that Determination[47]. Afterward, following two points disputed on the trials will be addressed;

α) Whether or not the settlement of T falls within *"shintaku koui"* of ACT, art. 4 (1)?

β) Whether or not X falls within *"jyueki sha"* thereof?

3.2 Judgment of the first trial court

α) was judged in favor of tax authority side as follows[48];

Ⅰ) The term "*shintaku koui*" should be interpreted in accordance with Trust Act because that term is used there. According to Trust Act, art. 1, *shintaku* is established by following steps, that is, *itaku sha*, by *shintaku koui*, attributes a trust property to *jyutau sha* (trustee or fiduciary) and binds him or her to administer or to dispose that property on behalf of *jyueki sha* in accordance with a certain purpose.

Ⅱ) In the present case, C as a settlor, by the settlement of T, attributes the financing bills as a trust property to D as a trustee, and binds D to administer or to dispose that property on behalf of X as a beneficiary. So the settlement of T falls within *shintaku koui* of ACT, art. 4 (1).

Ⅲ) It is true that B preserves the certain rights related to T under the contract, *e.g.* the right to elect beneficiary, but that doesn't deny the right of D to administer or to dispose the trust property.

On the other hand, β) was judged in favor of X side and the Determination was announced to be revoked as follows;

Ⅳ) In the light of the provisions on the Constructive Gifts and on the timing when the tax liability is established, the ability to pay it is recognized in connection with benefits which the donee owns via gift as of that gift, and those benefits are taxed within the framework of Gift Tax. Hence "*jyueki sha*" of ACT, art. 4 (1), means those who, by *shintaku koui,* owns benefits in connection with trust as of *shintaku koui*.

Ⅴ) T is the trust aiming at investment on life insurance. And the whole of four million four hundred thousand dollars out of the trust property, i.e. five million dollars, from which sixty hundred thousand dollars was subtracted as appropriated for the expense of T, was actually available to management and appropriated for lump sum insurance premium. The insurance is not available until B dies or the duration of insurance expires, and there is nothing attributable to beneficiary as of the settlement of T.

Ⅵ) It is true that X is nominated as beneficiary, but whether or not he can receive the insurance

depends on the discretions of T. And someone other than X can collect the distribution of benefits because B preserves the right to elect beneficiary.

3.3 Judgment of the second trial court

Tax authority side appealed against above judgment. Here on α), Ⅰ), Ⅱ) and Ⅲ) were fully cited and also in favor of tax authority side. In addition, β) was also judged in favor of tax authority side and the judgment of the first trial court was reversed as follows;

Ⅶ) Trust Act AFTER the amendment, art. 2 (6) defines the term "*jyueki sha*" as a person who holds *jyueki ken* (a beneficial interest) in *shintaku*, so *jyueki sha* of ACT, art. 4 (1) should be interpreted as the same way. This may be even true to the present case where Trust Act BEFORE the amendment is applicable even though it lacked the specific definition of *jyueki sha*. The essential component of *jyueki ken* is the right to receive benefits from the trust property. But in addition, *jyueki sha* is granted competence to secure his or her claim on trust property and on benefits thereof, so such a claim should also be included into the component of *jyueki ken*. That interpretation can be supported in the light of Trust Act AFTER the amendment, act.2 (7), which defines the term "*jyueki ken*". Hence, under ACT, art. 4 (1), as of *shintaku koui,* a person who holds *jyueki ken* which is composed of two elements stipulated above, i.e. receiving benefits and securing claim, is deemed to have received that *jyueki ken* from *itaku sha* as gift, and is subject to Gift Tax.

Ⅷ) In the present case, as of the settlement of T, it can be said that X holds the right to receive benefits from the property concerning T because according to the contract, as long as X is alive, D, at its discretion, has to pay appropriate amount for several occasions out of principal and income. And it also can be said that X holds the competence to secure his claim on the property concerning T because according to other clause[49] of the written contract, in response to the appropriate request by beneficiary, trustee has to provide that beneficiary with detailed information on T which is relevant to the claim of that beneficiary on property thereof and on benefits thereof, i.e. asset, debt, profit and loss. At the same time trustee has to make a financial report at least once a year.

Ⅸ) When someone falls within *jyueki sha* of ACT, art. 4 (1), it is not necessary for *jyueki ken* to be attributed to him or her definitely. So even if D owns some discretions on payment to X in accordance with the contract, that doesn't make any difference on the decision of whether or not X falls within *jyueki sha*. And under the same provision of ACT, Gift Tax is levied as of *shintaku koui*. It is true that, under the contract, B preserves the right to elect beneficiary. But since, in the present case, B doesn't elect beneficiary as of *shintaku koui*, the decision mentioned above is not affected by relevant clause of a written contract at all.

4 Analyses

4.1 Connecting factors with Japan

In the present case the controversies arise in the application of Japanese tax legislation, i.e. ACT, to the trust settled in accordance with foreign legislation, i.e. State Law of New Jersey[50]. This may indicate that the present case concerns the international aspect of taxation surrounding trust. But if that may be true, one crucial point should be addressed at the outset.

At the bottom, why can Japan exercise its jurisdiction to tax? In the present case Gift Tax liability in relation to trust, i.e. T, is the point of controversies. As mentioned above, Gift Tax liability varies in geographical sense depending on who received property as gift or on what was received as gift. Broadly speaking, X is subject to unlimited liability if he had domicile in Japan at the time of gift. Otherwise, X to limited liability.

That means that in some cases X may not be subject to any Gift Tax even if the settlement of T falls within "*shintaku koui*" of ACT, art. 4 (1) and X falls within "*jyueki sha*" thereof. In turn, the lower courts firstly addressed α), and secondly, β). After having judged affirmative on β), the second trial court admitted that X had had domicile at the time of gift[51]. On the other hand, the first trial court had upheld that X had not been subject to Gift Tax and didn't address the issue on the geographical scope of liability at all.

In this point, judgments of lower courts seem very odd from the view point of international tax law[52]. Again, in deciding Gift Tax liability in Japan, it is necessary to find some connecting factors there[53]. That is true to the situation of Constructive Gift in relation to *shintaku* like present case. Based on the premise of legislations applicable at the present case and of facts found that X doesn't own Japanese nationality, two factors should be considered at the time of "Gift". Firstly, whether or not X as donee had domicile in Japan. Secondly, whether or not the financing bills as property is located in Japan[54].

4.2 Japanese tax legislations in relation to international situations

4.2.1 Overview

In the present case the main arguments are concentrated on α) and β). Both points concerned the interpretation and the application of Japanese tax legislation in connection with international situations. In connection with this, two points should be premised as follows[55];

Firstly, Japanese tax legislations adopt, or in other words "borrow," a lot of terms originated in Japanese private laws. In interpreting such term, in general, references are made to those private laws[56]. This is especially true in relation to tax legislations lacking the relevant definitions. The point here is that the interpretations of national tax legislations have mainly domestic character[57].

Secondly, in the application of tax legislations, legal characterizations of objects to which those legislations applied may be necessary, which may be done by private laws[58]. Of course, this is not peculiar with regard to international situation. But especially in international one, it should be decided on which countries' characterizations are referred to at the outset, which is carried out by

so called conflict of laws[59]. Subsequently, there will be characterizations in accordance with the applicable rules decided as governing laws. In some cases foreign rules may be the governing ones and reference will be made to them, which will lead the situation to the international one.

These two premises indicate the relevant steps toward the appropriate interpretations and applications of national tax legislations in connection with international situations. So to speak, the first step is the decisions of "container" and the second one of "contents". Tax becomes legally liable when relevant events or matters as "contents" fit into some legal requirements as "container"[60], and this is the main concern of tax law regardless of domestic or international contexts[61]. Especially at international situations, "contents" may be viewed from so called its origin[62].

4.2.2 Common considerations on disputed points

In connection with the first point above, lower courts made reference to Japanese private law, i.e. Trust Law, in interpreting the terms "*shintaku koui*", because ACT itself doesn't have specific definitions of them[63]. Concerning on "*jyueki sha*", the second trial court adopted the similar principle as it did on "*shintaku koui*", but the first one didn't address Trust Law at all and mainly approached the problem in comparison with other provisions on Constructive Gift at ACT. This attitude may be considered as inappropriate in the light of first point[64].

In turn, in connection with the second point above, the attitudes of lower courts are not so clear, but as will be mentioned later, lower courts seem to be unconscious on this point[65]. In connection with trust settled in accordance with foreign rules[66], under Act on General Rules for Application of Laws[67], art. 7 (1), the formation and effect of a juridical act shall be governed by the law of the country decided by the intentions of the parties. Facts found indicates that T was settled in accordance with State Law of New Jersey, so legal situations surrounding T should be viewed and characterized from that State Law[68]. Lower courts didn't specify that Law concretely. And even if a written contract may be drafted in "English" wording, lower courts seem to use the relevant terms in "Japanese" wording unconsciously[69].

4.2.3 *shintaku koui*

At the outset, lower courts interpreted the term "*shintaku koui*" in relation to the definition of the term "*shintaku*" of Trust Act, art. 1. That Act doesn't have definition of the term "*shintaku koui*" itself, but do that of the term "*shintaku*", which mentions how shintaku will be settled. Ⅰ) implies that lower courts understood the term "*shintaku koui*" to mean the series of acts concerning the settlement of *shintaku*[70].

In relation to that article, Ⅰ) mentioned the three parties concerned at *shintaku*, i.e. *itaku sha*, *jyutau sha* and *jyueki sha*. Ⅱ) following Ⅰ) applied such understanding to the present case. In turn, according to that article, *shintaku* is approximately settled by following two steps, i.e. transferring property rights to someone and binding that person to administer that property[71]. Strictly speaking,

the essential components readable through that article are two steps necessary to settle *shintaku*, and in particular in relation to Ⅱ), foreign elements should be considered.

As was mentioned earlier, T was settled in accordance with State Law of New Jersey. According to relevant Restatement, a trust means "a fiduciary relationship with respect to property, arising from a manifestation of intention to create that relationship and subjecting the person who holds title to the property to duties to deal with it for the benefit of charity or for one or more persons, at least one of whom is not the sole trustee"[72]. Generally under Anglo-Saxon law principle, essential element constituting trust is the relationship of the party concerned[73] and trust is settled by vesting property in someone who is under an obligation to handle it[74].

Under facts found and a written contract to settle T, the financing bills as a trust property was transferred to D, and D was under a direction to administer that property. It is true that the obligation of D to administer the trust property originates in the direction of B, but as Ⅲ) stipulates, the situation that D is under an obligation to handle that property is not changed[75].

Based on them, T is trust in the meaning of relevant Restatement, and the settlement of T can be viewed as that of *shintaku*, i.e. *shintaku koui*, of ACT, art. 4 (1).

4.2.4 *jyueki sha*

Similar approach can be true to the meaning of the term "*jyueki sha* ". As mentioned earlier, Ⅶ) referred Trust Act there. That may be more appropriate than Ⅳ), which mainly focused on comparison of other provisions on Constructive Gift[76].

According to the interpretation appearing at Ⅶ), *jyueki sha* is those who hold *jyueki ken* in *shintaku*. Afterwards Ⅶ) mentioned that *jyueki ken* consisted of two essential elements, i.e. the right to receive benefits from the trust property, and the competence to secure claim on trust property and on benefits thereof. In reaching such interpretation and understanding, Ⅶ) referred Trust Act AFTER the amendment[77] and adopted the view that the result was true to the present case to which Trust Act BEFORE the amendment applied. Strictly speaking, Trust Act BEFORE the amendment also contains the provision on *jyueki sha*, i.e. art. 7[78]. That provision stipulates that those who were nominated as *jyueki sha* by *shintaku koui* intrinsically enjoy benefits of *shintaku*. According to that provision, *jyueki sha* enjoys benefits of *shintaku*, and those benefits have comprehensive character, which can be readable thorough the term "benefits of *shintaku*"[79].

In turn, in relation to the governing law at present case, the term "beneficiary" includes "a person who has any present or future interest, vested or contingent"[80]. Here "a person" can be "beneficiary" in relation not only to "present…interest" but also to "future interest". And under Anglo-Saxon law principle of trust, in transfer of property to trustee, legal rights of different characters on that property will be vested to trustee and beneficiary each other[81]. Trustee is thought of holding that property based on legal title thereof, which is originated in common law. On the other hand, beneficiary is thought of owning that one based on beneficiary interest thereof, which is originated in equity[82].

In the present case, X was nominated as beneficiary by a written contract to settle T. So in accordance with Anglo-Saxon law principle of trust, equitable interest in relation to trust property, i.e. the financing bills, will be attributed to X. Under such legal circumstances, X can be viewed as *jyueki sha* of ACT, art. 4 (1), which may be interpreted in the light of Trust Act BEFORE the amendment[83].

The remained issue is whether or not the position of X as *jyueki sha* can be affected by the discretions of D on payments and the right preserved by B to elect beneficiary. On this point Ⅸ) can be said to have reached approximately appropriate conclusions as follows[84];

Firstly, in relation to discretions of D, trustee should exercise his or her discretions for the benefit of beneficiary and must not harm the right thereof [85].

Secondly, in relation to the right preserved by B, it seems that the definiteness of beneficiary cannot be said to be absolute requirement at current Anglo-Saxon law principle of trust[86].

4.3 Amendments of relevant legislations

By the amendments of relevant legislations, legal rules governing currently are different from those having governed the present case. Below are brief introduction and analyses of those amendments[87] in connection with the present case.

4.3.1 Amendments on 2007

On 2007, the provision on Constructive Gift in ACT, which is relevant to the taxation surrounding *shintaku*, was amended along with coming into effect of Trust Act AFTER the amendment[88]. Even under the provision of that ACT[89], i.e. art. 9-2 (1), basic structure of taxation at issue is approximately the same as the one as of the present case[90]. But the following two points should be mentioned;

Firstly, on the timing of taxation, the criteria "*shintaku koui*" was substituted for by "as of coming into effect of *shintaku*". The aim of this substitution was to make the requirement more concrete and the principle of taxation as of *shintaku koui* is the same[91]. And Trust Act AFTER the amendment says that *shintaku* shall become effective when agreement on *shintaku* is concluded between the person who is to be *itaku sha* and another person who is to be *jyutaku sha*[92].

Secondly, on the meaning of the term "*jyueki sha*", "those who own the rights as *jyueki sha* currently" was provided as *jyueki sha*. According to that provision, those who are nominated as so by *shintaku koui* and those who own the rights currently fall within *jyueki sha*[93]. In connection with that, Trust Act AFTER the amendment says that *jyueki sha* is a person who holds *jyueki ken*[94].

These amendments are those on "container" mentioned above. According to the above analyses, the conclusion was that X would be liable to Gift Tax even before in the situation of the old "container", i.e. ACT BEFORE the amendment. That conclusion may be true to the situation of the new "container"[95].

On the other hand, based on analyses above, one problem may still remain in relevant tax system. X as *jyueki sha* would be liable to Gift Tax within the framework of Constructive Gift, under which X would be deemed to have received rights concerning T[96]. Concerning on those rights, as mentioned above, evaluation is necessary based on trust property, i.e. the financing bills.

In turn, in the light of Anglo-Saxon law principle of trust mentioned above, X would be thought of owning that trust property based on beneficiary interest. Such interest is considered to be "short of the simple idea of ownership", because, on the other hand, "the title is vested in the trustee"[97].

Again, under Japanese tax treatment at issue, *jyueki sha* would be ultimately liable to Gift Tax based on the evaluation of trust property. Such a tax treatment may not reflect the "limited or contingent" characteristics of beneficiary interest[98], because value of beneficiary interest evaluated properly may be lower than that one evaluated in accordance with trust property itself[99]. Such a problem inherent in Japanese tax system will become tangible in relation to taxation surrounding trust like the present case[100].

4.3.2 Amendment on 2013

On 2013, the provision of ACT on geographical scope of tax liability was amended. Under new provision added to ACT, art. 1-4 (ii), an individual as a donee who doesn't own Japanese nationality is subject to Gift Tax as if he or she had domicile in Japan when the donor relevant to that gift had domicile in Japan as of that gift.

That rule may affect tax liability that X, as a donee, owning only the U. S. citizenship may be subject to in Japan in relation to trust property, i.e. the financing bills[101]. The application of this amendment depends on whether or not C, as a donor, had domicile in Japan as of that gift[102].

5 Final Remark

Above are introduction and analyses of Japanese recent case on taxation surrounding trust settled by foreign rules, aiming at achieving inquiry in relation to international tax law.

As mentioned above, the information of case laws relative to issue which is shared with worldwide basis should be shared with worldwide, leading to more propounding the area of international tax law. And in considering domestic tax rules in relation to foreign matters, inherent faults which may be overlooked in concentrating on domestic situations can be noticed. Hitherto was one effort to accomplish them by one Japanese[103]. *[End of Texts]*

【Endnotes, including information of publications cited.】

* Lecturer, Graduate Institute for Entrepreneurial Studies.
This contribution is based on preceding publication of the Author, i.e. *Japanese Taxation of Trusts*, 68 BULL. FOR INT'L TAX'N 384 (2014).

[1] In general, the term "trust" is used to mean both so called the trust itself and the properties concerned. For the avoidance of confusion, below are made distinction in using the term "trust" to mention the former, and "trust property" to the latter in the light of the terminology adopted in current Japanese relevant legislation. *See infra* note 9.

[2] As for international tax planning using trust, *see* Masui, *Shintaku to kokusai kazei (Trust and international taxation)*, 62 NICHIZEIKEN RONSYU (BULLETIN FOR JAPAN TAX RESEARCH INSTITUTE) 227, 227-28 (2011).

[3] In recent years, Canada has confronted three tax cases involving dispositions of shares in relation to non-resident trusts. *See* Duff, *Canada: Capital Gains Realized by an Austrian Private Foundation: Sommerer v. The Queen,* in TAX TREATY CASE LAW AROUND THE GLOBE 2013 at 241, 243 (M. Lang, J. Owens, P. Pistone, J. Schuch, C. Staringer, A. Storck , P. Essers, E. Kemmeren and D. Smit ed. 2014).

[4] Judgment of Apr. 3, 2013, Nagoya High Court, available at http://www.courts.go.jp/search/jhsp0010?action_id=first&hanreiSrchKbn=01, *rev'd,* Judgment of Mar. 24, 2011, Nagoya District Court, available at http://www.courts.go.jp/search/jhsp0010?action_id=first&hanreiSrchKbn=01.
In the precedent case stipulated at *supra* note 3, the main concern is how to address the foundation of civil law jurisdiction from the view point of common law one. So the fact pattern is diametric opposite in comparison with the case discussed later.

[5] http://www.tabisland.ne.jp/news/news1.nsf/b6c131437f3cfe4a49256619000ed3d6/556d62afd691a20f49257b77007a82ee?OpenDocument.

[6] As for documents other than mentioned below, *see* Ida, *Case Introduction of the judgments of the first trial court,* ZEIRI vol. 54 no. 9 at 126 (2011); Iwasaki, *Case Introduction of the judgments of the first trial court,* ZEIKEN (JAPAN TAX RESEARCH INSTITUTE) vol. 27 no.1 at 73 (2011); Sugano, *Kokugai eno sisaniten no shippai (Failure to transfer properties to outside Japan),* ZEIMU KOUHOU vol. 60 no.7 at 46 (2012); Izumi, *Sozeihou jou no shintaku no igi: shintaku ruiji no houritsu kankei / gaikoku shintaku heno shintaku kazei kankei kitei no tekiyou kanousei mo siya ni (The meaning of Shintaku at tax law: including the applicability of relevant rules to legal relationships similar to shintaku, and foreign trust),* ZEIMU JIREI vol. 44 no.1 at 35 (2012); Tanaka, *Case Review on the judgments of the second trial court,* 1460 JURIST 8 (2013); Fukada, *Gaikoku no shintaku kaisha ni yoru shintaku no hikiuke ga atta baai no zouyo zei (Gift Tax in relation to contract with foreign trust company),* 130 ZEIMU Q&A 48 (2013);

[7] Currently this is the only one Japanese tax case on this matter. *See* Urabe, *infra* note 76, at 190; Sato, *infra* note 76, at 113.
Hereinafter, unless otherwise specified, the relevant legislations are ones which are applicable to this case. Significant amendments to those will be mentioned later.
This case has the great meaning even after those amendments. In relation to the judgments of the first trial court, *see id.* And attention should be paid on a series of Japanese tax cases concerning Limited Partnerships. As the most recent case, Judgment of Feb. 5, 2014, Tokyo High Court, available at http://www.courts.go.jp/app/hanrei_jp/detail5?id=84434.

[8] As for other cases on the similar issues on worldwide, *See* Asatsuma, *Shintaku zeisei no kokusaiteki sokumen (Taxation of Trusts and International Issues),* 37 SHINTAKU HOU KENKYU (STUDIES OF THE LAW OF TRUST) 83 (2012).

[9] Titles and legal terms of Japanese laws, unless otherwise specified, follow the indication of http://www.japaneselawtranslation.go.jp/?re=02.

[10] As for the English explanations of Japanese tax system, *e.g.* M. OTSUKA, I. OTSUKA AND E. NAKATANI, TAX LAW IN JAPAN 72 (2nd ed. 2006) [hereinafter cited as TAX LAW IN JAPAN]. And explanations of Japanese Gift Tax are mainly referred to *Id*. at 72-89.

[11] No. 73 of March 1950, hereinafter referred to as “ACT”.

[12] TAX LAW IN JAPAN,*supra* note 10, at 73. Separate progressive rate schedules are applied to both taxes. Current ACT, art.16 on Inheritance tax and art. 21-7 on Gift tax. Generally the tax burden of the latter is higher than that of the former to prevent the avoidance of the former by making a gift of property during the decedent' s lifetime. TAX LAW IN JAPAN, *supra* note 10, at 72.

As for the worldwide trend of property taxes, *See* OECD, OECD TAX POLICY STUDIES: TAX POLICY REFORM AND ECONOMIC GROWTH 32-33 (2010). As for recently published article on Japanese Gift Tax, Fuchi, *Zouyo zei no Ichizuke (The standpoint of gift tax),* ZEIKEN (JAPAN TAX RESEARCH INSTITUTE) vol. 29 no. 3 at 26 (2013).

[13] Income Tax Act [ITA] (No. 33 of March 1965), art. 9 (1) (xvi).

[14] ACT, art. 1-4. On the gift to *houjin* (corporation), Corporation Tax Act [CTA](No. 34 of March 1965), art. 22 (2) stipulates that ”gratuitous acquisition of assets” should be included in gross revenue in computing taxable income of that corporation. As the English translation of this Act, *see* 2014 CORPORATION TAX ACT OF JAPAN: INCLUDING CHAPTER III OF SPECIAL TAXATION MEASURES ACT as of April 1, 2014 (Y. Gomi and T. Honjou ed. 2014), available at http://www.sozeishiryokan.or.jp/corporation_tax/corporation_tax2014e.html [hereinafter the English translation used in this book is used in reference to this Act]. *See also* Kawabata, *Corporate Income Taxation in Japan: General Introduction,* 61 BULL. FOR INT'L TAX'N 387 (2007).

And if the gratuitous transfers of assets are carried out between an individual and a corporation, that transfer shall be deemed to be done at the fair market value at the time of that transfer and that individual must calculate his or her income, i.e. capital gain, based on that fair market value. ITA, art. 59 (1) (i). *See* TAX LAW IN JAPAN, *supra* note 10, at 34.

[15] Act on General Rules for National Taxes [GRNT] (No. 66 of April 1962), art. 15 (2)(v). And “*Kazei kakaku* (taxable amount)” is calculated on a calendar year basis. *See* ACT, art. 21-2 and *relevant tsutatu* (circular notice).

[16] *See* TAX LAW IN JAPAN, *supra* note 10, at 73.

[17] ACT, art. 28 (1).

[18] Civil Code (No. 89 of April 1896), art. 5 (1). This is one of the peculiar characteristics of the case discussed below, so concerns a lot of aspects of the case. *See also* Trust Act (No. 62 of April 1922) (amended by Trust Act (No. 108 of December 2006)) , art. 10.

[19] Civil Code, art. 818 (1).

[20] This is one of the governing principles on interpretation of tax legislations in Japan. *See* Kaneko, *Sozeihou to Shihou (Tax Law and Private Law),* 6 SOZEIHOU KENKYU (JAPAN TAX LAW REVIEW) 1 (1978). And the same point will be discussed in connection with case analyses later.

[21] Civil Code, art. 549.

[22] So if a minor child is liable to tax liability, i.e. not right but obligation as a result of gift, the consent of his or her parents may be necessary here.

[23] *Compare* ITA, art. 2 (1) (iii) , art.5 (1) and art. (2)(i), which distinguish the scope of income tax liability based on the existence of *jusho* (domicile) OR *kyosho* (residence).

According to Civil Code, art. 22, “domicile” was defined as “(t)he principal place wherein a person lives”. Several factors are relevant in connection with this provision.

On the decision of domicile in relation to Gift Tax, *see* the case mentioned at *infra* note 28.

[24] ACT, art. 1-4 (i). And concerning on the peculiar situation in connection with a minor child like the case discussed later, *see* the later.

[25] ACT, art. 2-2 (1).

[26] ACT, art. 1-4 (iii).

[27] ACT, art. 2-2 (2).

[28] ACT, art. 1-4 (ii) and art. 2-2 (1). As for the legislative history, 1 DHC COMMENTARY : INHERITANCE TAX ACT (DAI ICHI HOKI) 625-26 (Revised at Oct. 30, 2013)[hereinafter cited as DHC].

Immediately before the application of this rule, in Judgment of Feb. 18, 2011, Supreme Court, available at http://www.courts.go.jp/search/jhsp0010?action_id=first&hanreiSrchKbn=01, an individual, as a potential taxpayer of

Japanese Gif Tax, could successfully avoid that tax liability, having transferred his domicile outside of Japan, i.e. Hong Kong, and acquired the equity of company residing in Netherland.

[29] The first trial court recognized the case discussed later as one of the tax planning schemes in relation to that point. *See* also Hashimoto, *infra* note 76, at 8; Miyawaki, *infra* note 76, at 317-18; Nakatani and Tanaka, *infra* note 76, at 78-79; Okamoto, *infra* note 76, at 150; Takano, *infra* note 76, at 79; Asatsuma, *supra* note 8, at 89; Shinagawa, *infra* note 76, at 70. *Contra* Ushiro, *infra* note 76, at 200.

[30] ACT, art.5 (1).

[31] ACT, art.6 (1).

[32] ACT, art.7 (1).

[33] ACT, art.8 (1).

[34] ACT, art.9 (1).

[35] According to the wording of this provision, what *jyueki sha* "is deemed to have received" is "rights to accept benefits of *shintaku* "rather than the trust property itself. But in accordance with relevant circular notice, particularly like the case discussed later, where beneficiary on principal is that on income, "benefits of *shintaku*" is evaluated in the light of the value of trust property. In this point, *see* the discussion later.

Additionally, in relation to profits and expenses attributable to trust property, *jyueki sha* is deemed to own that trust property under income tax treatment. ITA, art. 13. That tax treatment is based on so called "conduit theory". *See* Sato, *Taeki shintaku to kazei (Taxation surrounding trust for others),* 38 ZEIMU JIREI KENKYU (RESEARCH ON TAX CASE) 19, 21-22 (1997).

[36] As for legislative history, *see* DHC, *supra* note 28, at 1085/4 to 1085/5. *See* also

Sato, *Shintaku zeisei no enkaku: heisei 19 nen kaisei zenshi (Legislative history of taxation surrounding shintaku: before the amendment on 2007),* 62 NICHIZEIKEN RONSYU (BULLETIN FOR JAPAN TAX RESEARCH INSTITUTE) 5 (2011).

[37] At that time Inheritance Tax, not Gift Tax, was levied.

[38] This amendment introduced Gift Tax in Japan. At that time taxpayer of Gift Tax was donor.

[39] According to that amendment, taxpayer of Gift Tax became donee.

[40] Among of the provisions on Constructive Gifts, the case discussed below may be the first one, which raised the controversies on the application of ACT, art. 4 (1).

In relation to this provision, the second trial court at the case discussed below stipulated that that provision aimed at preventing tax avoidance. But in the light of the published legislative purpose, such an aim is not necessary clear. *See also* Kita, *Case Review on the judgments of the second trial court (No. z18817009-00-130800944),* SHIN HANREI KAISETSU WATCH, listed on August 30, 2013, at 1, 3, available at http://www.tkclex.ne.jp/commentary/taxes.html. As for admitting that but trying to read intention of counteracting tax avoidance, *see* Sato, *supra* note 36, at 25.

Among other categories of Constructive Gift, 3) and 5) mentioned above are specifically aimed at preventing tax avoidance. *See* DHC, *supra* note 28, at 1002, 1032.

[41] Below is introduction of facts necessary to following analyses. In this case unless otherwise specified, the second trial court neither added nor amended the facts found at the first one.

[42] Plaintiff at the first trial court and Respondent at the second one.

[43] According to the Japanese relevant legislation, a child shall be a Japanese citizen if father or mother is a Japanese citizen at the time of birth. Nationality Act (No. 147 of May 1950), art. 2(i). On the other hand, in the U. S., a child shall be a U. S. citizen if he or she was born in the U. S. U. S. CONST. amend. XIV, sec. 1.

As usual, X, who was born in the U. S. and whose parents are Japanese, satisfies the both requirements above. But in the present case, X is not in the position of so called dual citizenships, and seems to have renounced Japanese nationality. Nationality Act, art. 13(1).

On the other hand, Nationality Act, art. 12 says that, "(a) Japanese citizen who acquired the nationality of a foreign country through birth and who was born abroad shall retroactively lose Japanese nationality to the time of birth unless he or she indicates an intention to reserve Japanese nationality". On that manifestation of intention, Family Register Act (No. 224 of December 1947), art. 104 says that manifestation "shall be made by a

person who may submit a notification of birth…within three months from the date of birth". According to Nakatani and Tanaka, *infra* note 76, at 74 n. 3, in the present case, such manifestation was not made. *See* also Takano, *infra* note 76, at 78.

By the way, facts found stipulate that X did alien registration in Japan in November 19, 2004.

[44] Afterward simply referred to as "dolloars".

[45] According to the facts found, C himself could not be the insured because C had experienced a heart transplant operation.

[46] As mentioned earlier, even a minor child like X, is subject to Gift Tax when he satisfies the requirements of ACT, and to the obligation to file a final return on it. Determination may be based on the reasoning that X should have submitted his tax return on his obligation to pay Gift Tax with the consent of his parents. There is also no specific limitation on the Determination related to the age of persons subject to, so that may be legal as long as valid at other points.

According to tax authority side, X had to file his tax return till March 15, 2005. ACT, art. 28 (1). Determination can be made before the day on which five years have elapsed from the statutory tax return due date for the national tax to which such determination pertains. GRNT, art. 70 (3).

[47] In the present case, X may perform any procedural acts with the consent of his parents. Code of Civil Procedure (No. 109 of June 1996), art. 31; Administrative Case Litigation Act (No. 139 of May 1962), art. 7.

[48] Roman numerals were added for the convenience of later analyses. Hereinafter in mentioning each judgment, only each numeral and parenthesis will be simply used.

[49] The first trial court didn't mention this clause.

[50] At the procedures on *Kokuzei Fufuku Shinpan-jyo* (National Tax Tribunal) before the trials at lower courts, whether or not, at the outset, Japanese tax legislation can be applied in connection with trust like T was one of the issues. The decision on Jul. 1, 2008 was affirmative because the fundamental features of T are approximately similar to those of *shintaku* in accordance with Japanese relevant legislations. http://www.kfs.go.jp/cgi-bin/sysrch/prj/web/pub/editCriteriaByKeyword. In relation to the legal situations before the amendment of relevant legislations, *see* Sato, supra note 35, at 31-32, which addresses the situation in connection with trust settled in accordance with State Law of the U.S. *See also* Masui, *supra* note 2, at 235-36, which stipulates that most of the relevant problems are now under subject to various interpretations.

[51] On this point, the detailed introduction was eliminated at the case summary above. At the present case, X is a minor child, so his parents will have significant effect on that point. Civil Code, art. 821. Relevant judgments of the second trial court are in line with that consideration.

According to the facts found at the second trial court, X, with his parents, made round trips several times between Japan and the U. S. during the year concerned.

[52] Shinagawa, infra note 76, at 70 says that tax planning at the present case consists of the following two elements, i.e. making obscure the parties concerned in connection with trust settled in accordance with foreign rules and manipulating nationality and domicile of taxpayer. According to some commentators, main focus of plaintiff side was on the latter. So the judgments of the first trial court, which focused on the former, may have astonished plaintiff side. *See* Nakatani and Tanaka, *infra* note 76, at 86 n. 36; Asatsuma, *supra* note 8, at 89.

[53] Sato, infra note 89, at 30c, which refers to "foreign trusts" as those "created or controlled in a foreign country", mentions two illustrative elements as connection with Japan in considering taxation of "foreign trust", i.e. "beneficiary is a Japanese resident" or "part of the trust property is situated in Japan".

[54] On the location of property, *see* ACT, art. 10.

In connection with that, tax authority consistently had adopted the position that X had had domicile in Japan at the time of gift. At the same time they argued that under relevant circular notice, *jyueki ken* that X was deemed to hold in connection with T is valued on the whole of the trust property. *See supra* note 35.

The original Determination reflected such an argument. But during the procedures before the trials at lower courts, that was partially revoked, and that amended Determination was judged as legal at the second trial court. That amendment itself was nominal in the light of discussions, but it should be noted that X was judged as "*jyueki sha*" of ACT, art. 4 (1) in connection with not only four million four hundred thousand dollars, which was

appropriated for lump sum insurance premium, but also with the rest of trust property, i.e. sixty hundred thousand dollars, which was appropriated for the expense relating to T.

[55] As for general comments concerned, *see* Urahigashi, *Zeihou ni oite siyou sareru hou gainen ni tuite: gaikokuhou no gainen ha fukumareru ka (On legal concepts used in tax law: are concepts of foreign law included?),* 536 ZEI-HO-GAKU (TAX JURISPRUDENCE) 3 (1996); Hironaka, *Wagakuni no sozei houki no kokusaitorihiki heno tekiyou ni kansuru iti siron (An inquiry into the application of Japanese tax law to international transactions),* in ,in GUROBARIZESYON NO NAKA NO NIHON HO (MOURING PUBLICATION FOR MR. T. NISHIMURA) 363 (2008); Hegawa, *Shakuyou gainen ni kansuru kokusaiteki kigyousozei jitsumu jou no syomondai (Several problems on tax practice of international enterprises: in relation to legal concepts originated in private laws),* in SOZEI HO NO HATTEN (DEVELOPMENTS OF TAX LAW) 354 (H. Kaneko ed. 2010).
In relation to taxation surrounding *shintaku*, Masui, *supra* note 2, at 239 gives similar mentions to the discussions immediate later. *See also infra* note 59.

[56] *See supra* note 20.

[57] Here the interpretation of Japanese tax legislation is achieved in relation to Japanese private laws. *See also* Taniguchi, *Shihou katei ni okeru sozei kaihi hinin no handann kouzou: gaikoku zeigaku koujo yoyu waku riyou jiken wo syutaru sozei to shite (The Structural Analysis of the Judicial Judgment in the Case of Tax Avoidance),* 32 SOZEIHOU KENKYU (JAPAN TAX LAW REVIEW) 53, 71 (2004).

[58] Such characterizations should not always be necessary. In some cases tax legislations also directly address something naked in the real world.

[59] On this point, *Contra* Masui, *supra* note 2, at 239.

[60] In German term, referred to as “Steuertatbestand”.

[61] As for Japanese treatise mainly concentrating on this issue, H. KANEKO, SOZEI HOU (TAX LAW)(19h ed. 2014).

[62] Similar controversy is shared with Judgment of Jan. 24, 2006, Supreme Court, available at http://www.courts.go.jp/search/jhsp0030?hanreiid=62609&hanreiKbn=02, remanded to, Judgment of Jan. 30, 2007, Tokyo District Court, available at http://www.courts.go.jp/search/jhsp0030?hanreiid=35123&hanreiKbn=05. As of this case, even as for shares used to provide capital to establish foreign corporations, the book value of those shares could be used to calculate capital gains in the hands of domestic corporations aiming at establishing those foreign corporations. In this case plaintiff as a domestic corporation established a wholly owned subsidiary A in Netherland in exchange for shares including substantial built-in profits. After that, plaintiff established another subsidiary B in Netherland which was also wholly owned by plaintiff. At the general meeting of shareholders of A, X resolved that A should increase capital, issue new shares, and transfer all of these new shares to B. As a result, X lost most of their interests in A. Tax authority side argued that B gratuitously acquired substantial part of property value represented by shares which had been issued by A and owned by X and that X should be subject to Corporation Tax on that property value under CTA, art. 22 (2). On that provision, *see supre* note 14.
In connection with the judgment of first trial court, Judgment of Nov. 9, 2001, Tokyo District Court, available at http://www.courts.go.jp/search/jhsp0010.action;jsessionid=219A5776107E3A9856ACA14C694B187C, Kawabata, 18 ZEIKEN (JAPAN TAX RESEARCH INSTITUTE) no.3 at 87, 90 (2002) stipulates that the act of increasing capital by A should be characterized in legal terms in accordance with relevant laws of Netherlands because A was established in accordance with laws thereof and thus governed by them in doing juristic acts.

[63] As mentioned earlier, the second trial court fully cited the Judgments of the first trial court on α).

[64] In relation to this point, *see infra* note 76.

[65] *See* Okamoto, *infra note* 76, at 155; Hashimoto, *Case Review on the judgments of the first trial court,* ZEIMU JIREI vol. 43 no.12 at 1, 6 (2011); Noishiki, *Gaikoku shintaku no settei to zouyo zei no kazei wo meguru mondaiten (Problems concerning on settlement of foreign trust and on taxation of Gift Tax),* ZEIRI vol. 56 no.9 at 104, 108-10 (2013).
In the context of taxation in relation to “foreign trust”, Sato, *infra* note 89, at 30d says that, “a foreign legal arrangement is examined from the viewpoint of the Japanese legal system.” The essential point of this statement is not so clear, but if it mentions the interpretation of Japanese tax legislations in relation to Japanese private laws, the common understanding exists here. As for the same understanding, Masui, *supra* note 2, at 238.

And Sato, *infra* note 89, at 30c bases its statement on "a corollary to the principle of following the legal framework", which is "tax relationship is determined following the legal framework which is adopted by the relevant persons." *Id.* at 30c. In combination with this statement, it may be the appropriate understanding that "tax relationship" should be "determined" in accordance with foreign laws if "the relevant persons" adopted a certain "legal framework" in accordance with foreign laws.

By the way, Japan recently has confronted some cases on whether or not the legal frameworks adopted by the parties concerned should be re-characterized from the view point of taxation. *E.g*. Judgment of Jun. 21, 2009, Tokyo High Court, available at http://www.courts.go.jp/search/jhsp0030?hanreiid=16052&hanreiKbn=05.

[66] As of now, Japan doesn't sign CONVENTION ON THE LAW APPLICABLE TO TRUSTS AND ON THEIR RECOGNITION, Jul. 1, 1985, available at http://www.hcch.net/index_en.php?act=conventions.text&cid=59. The U.S. signed it on 1988, but doesn't ratify it.

[67] (No. 10 of June 1898), *amended by* (No. 78 of June 2006).

[68] Under the conflict of laws in the U.S., in general, the governing law is legally decided by the intentions of the parties concerned. *See* W. RICHMAN AND W. REYNOLDS, AMERIKA TEISHOKU HOU; HOU SENTAKU / GAIKOKU HANKETSU (UNDERSTANDING CONFLICT OF LAWS; 3RD ed.) 184 (H. Matsuoka, E. Yoshikawa, N. Takasugi and N. Kitasaka trans. 2011). As for trust, *See Id*. at 193. *See also* RESTATEMENT OF THE LAW, SECOND, CONFLICT OF LAWS §187 (1) (1988). *See also* Shimada, *kokusai shintaku no seiritsu oyobi kouryoku no jyunkyo hou (1) (Laws governing validity and effects of international trusts (1)),* 10 KEIO HOUGAKU (KEIO LAW JOURNAL) 89, 105-07 (2008) [hereinafter cited as Shimada (1)].

As for inquiries into various doctrines on the legal characteristics of *shintaku*, especially in the viewpoint of the decision of governing laws, *see* Shimada, *kokusai shintaku no seiritsu oyobi kouryoku no jyunkyo hou (2) (Laws governing validity and effects of international trusts (2)),* 13 KEIO HOUGAKU (KEIO LAW JOURNAL) 21, 21-35 (2009), in which some thoughts BEFORE the amendment of Trust Act are also considered. As indicated there, there are various thoughts. But the controlling thought in this area doesn't necessary bind the scholarly activities in the tax law. For example, once in Japan, under a slogan of inquiries into taxation on various business entities, some conferences had been held. There, taxation surrounding *shintaku* was one of the arguments, which may indicate that *shintaku* can be categorized as one of the business entities. As one of the records of conferences at Kansai University, *see* KINYU TORIHIKI TO KOKUSAI KAZEI (FINANCIAL TRANSACTIONS AND INTERNATIONAL TAXATION) (2002). And the same trend can be seen in connection with taxation surrounding *kumiai* (partnership). *See* 30 SOZEIHOU KENKYU (JAPAN TAX LAW REVIEW) (2002).

As for conflicting of laws in relation to tax law, especially to tax avoidance, *see* Koyanagi, *Sozeihou to jyunnkyohou: kazei youken jijitu no nintei bamen ni okeru keiyaku jyunkyohou no kousatu (Tax law and governing law: an inquiry into governing law in fact-finding on taxation, especially in connection with the interpretation of contracts),* 39 ZEIMU DAIGAKKOU RONSOU (THE JOURNAL OF NATIONAL TAX COLLEGE) 75 (2002).

[69] The statements hitherto have reflected such a perspective, and in mentioning the terms in Japanese legislations, especially in relation to two disputed points, i.e. α) and β), easy recourses to the English wordings have been avoided.

Similar perspective may be shared with Judgment of Apr. 24, 2009, Osaka High Court, available at http://www.courts.go.jp/search/jhsp0030?hanreiid=38125&hanreiKbn=05. In this case, plaintiff as a domestic corporation concluded the contract with a foreign corporation on building and selling two ships, but that contract, which had been concluded in accordance with the governing laws of the U. K., was cancelled due to the late for deliveries on the side of plaintiff. On the case of cancellation like that, a written contract, which had been drafted in "English" wording, said that plaintiff as a seller should return an advance received and pay "interest" corresponding with it. Plaintiff did in accordance with that clause. Tax authority side argued that plaintiff should be obliged to pay tax on that "interest" because it falls within *rishi* (interest) provided in ITA, art. 161 (vi), which belongs to domestic source income. Under that and relevant articles, those who pay *rishi* to foreign corporations are obliged to withhold and pay tax with respect to that rishi if that *rishi* is paid "on a loan provided for a person who performs operations in Japan (including equivalents thereto), which pertains to the said operations". ITA, art. 6 and art. 212 (1).

Firstly, lower courts interpreted the term "*rishi*" thereof in relation to the term "on a loan…including equivalents thereto" and said that *rishi* thereof should be paid on loan claim which fundamentally results from contracts to lend and to pay back money as well as on other similar claims, the essential component of which is an agreement that such money etc. should be necessary returned to the lenders in the future. Secondly, they considered the characterization of "interest" paid by plaintiff and said that that "interest" should not fall within "*rishi*" of ITA, art. 161 (vi) because in the light of traditional practice of the business circle it was rare for the contracts to be cancelled due to the late for deliveries as the case here.

The attitude of lower courts clearly appeared on the considerations of the second point above, in which lower courts referred to the "interest" paid by plaintiff as "interest" not "*rishi*" even if the statements are basically written in "Japanese" wording. This may indicate that lower courts were conscious that the written contract was drafted in "English" wording in accordance with the governing laws of the U. K.

[70] This understanding was considered as proper in the field of Trust Act. *See* K. SHINOMIYA, SHINTAKU HOU (TRUST ACT) 83 (new ed. 1989).

[71] Under that article, the term "*shintaku*" is defined "to make someone, by transferring property rights or by employing any of the methods, administer or dispose of property in accordance with a certain purpose."

[72] RESTATEMENT OF THE LAW, THIRD, TRUSTS §2 (2003). T was settled in accordance with State Law of New Jersey, but lower courts didn't mention the specific State Law of New Jersey. For the reference, *see* New Jersey Statutes, TITLE 3B: ADMINISTRATION OF ESTATES—DECEDENTS AND OTHERS (No.405 of May 1982), available at http://lis.njleg.state.nj.us/cgi-bin/om_isapi.dll?clientID=90588910&Depth=2&depth=2&expandheadings=on&headingswithhits=on&hitsperheading=on&infobase=statutes.nfo&record={1CBE}&softpage=Doc_Frame_PG42, at 1-1, 1-2. Under that, trust encompasses "any express trust, private or charitable, with additions thereto, wherever and however created."

And recent movement toward Uniform Trust Code, *see* https://www.govtrack.us/states/nj/bills/2012-2013/s80.

[73] F. UNABARA, EIBEI SHINTAKU-HOU GAIRON (OVERVIEW OF ANGLO-SAXON TRUST LAW) 4 (1998).

[74] S. GARDNER, AN INTRODUCTION TO THE LAW OF TRUSTS 6 (1990).

[75] On some rights preserved by B in connection with T, *see* also the following analyses on *jyueki sha*.

[76] Generally, the interpretation of the first trial court on *jyueki sha* is considered to be inappropriate and the same evaluation may be true to the following judgments, i.e. Ⅴ) and Ⅵ). *See* Miyatsuka, *Case Review on the judgments of the first trial court,* 1433 JURIST 52, 53 (2011); Miyawaki, *Sozoku zei/Zouyo zei no nouzeigimusha seido ni kansuru kenkyu (Study on the System of Judgement of Taxpayer Stipulated in Inheritance and Gift Tax Act)* 69 ZEIMU DAIGAKKOU RONSOU (THE JOURNAL OF NATIONAL TAX COLLEGE) 261, 356-58 (2011); Nakatani and Tanaka, *Kaigai no shintaku wo riyou shita sozeikeigen saku (Tax planning measure by using foreign trust; Judgment of Mar. 24, 2011, Nagoya District Court),* KOKUSAI ZEIMU (INTERNATIONAL TAXATION) vol. 31 no.9 at 74, 80-83 (2011); Okamoto, *Case Review on the judgments of the first trial court,* ZEIMU KOUHOU vol. 59 no.10 at 150, 156-57 (2011); Takano, *Gaikokuseki nomi wo yuushi kokugai ni jusho wo yuusuru mago wo jyueki sha tosuru shintaku keiyaku ga gaikokuhou ni jyunkyo shite teiketu sareta baai no kazei kannkei (Taxation in relation to concluding contract in accordance with foreign rules under which grandchild, who didn't own Japanese nationality and didn't own domicile in Japan, was nominated as beneficiary),* 124 ZEIMU JIREI KENKYU (RESEARCH ON TAX CASE) 59, 77 (2011); Sato, *Shintaku no "jyueki sya" to syotoku keisan ni tuite (On "beneficiary" and calculation of profit with regard to trust: in connection with Judgment of Mar. 24, 2011, Nagoya District Court),* in SOZEI NO FUKUGOU HOU TEKI KOUSEI (MEMORIAL PUBLICATION OF 77 YEARS OLD OF PROF. MURAI) 113, 116 (2012); Noishiki, *Souzoku zeihou ni okeru shintaku no jyueki sha no igi (The meaning of shintaku no jyuekisha on inheritance tax act),* in SOZEI NO FUKUGOU HOU TEKI KOUSEI (MEMORIAL PUBLICATION OF 77 YEARS OLD OF PROF. MURAI) 179, 194-95 (2012); Honjo, *Case Review on the judgments of the first trial court,* 1443 JURIST 122, 124-25 (2012); Shinagawa, *Case Review on the judgments of the first trial court,* ZEIKEN (JAPAN TAX RESEARCH INSTITUTE) vol. 27 no.4 at 68, 70-71 (2012); Oga, *Shintaku kazei ni okeru "jyueki sha" no igi (The meaning of the term "jyueki sha" in taxation surrounding shintaku),* 11 RITSUMEIKAN HOU/SEI RONSYU (BULLETIN FOR RITSUMEIKAN UNIVERSITY ON LAW AND POLITICS) 1, 35 (2013).

Contra Hashimoto, *Case Review on the judgments of the first trial court,* ZEIMU JIREI vol. 43 no.12 at 1, 8 (2011); Ushiro, *Shintaku no settei to minasi zouyo wo meguru zeimu ryuiten [Jyou] (Crucial points of tax practice on settlement of shintaku and Constructive Gift [1]),* ZEIRI vol. 54 no.11 at 197, 200 (2011); Urabe, *Case Review on the judgments of the first trial court (No. z18817009-00-130650809),* 12 SHIN HANREI KAISETSU WATCH 189, 191 (2013).

[77] Based on this point, Noishiki, *supra* note 65, at 108 stipulates that the judgment of the second trial court has significant meanings in relation to the situation after the amendments of relevant legislations.

[78] As for relying on this provision to interpret the term "*jyueki sha* " of ACT, *see* Okamoto, *supra note* 76 at 156; Miyawaki, *Sozoku zei/Zouyo zei no nouzeigimusha seido ni kansuru kenkyu (Study on the System of Judgement of Taxpayer Stipulated in Inheritance and Gift Tax Act)* 69 ZEIMU DAIGAKKOU RONSOU (THE JOURNAL OF NATIONAL TAX COLLEGE) 261, 356-57 (2011).

[79] *See* SHINOMIYA, *supra* note 70, at 311.

[80] *See* New Jersey Statutes, *supra* note 72. And relevant Restatement says, "(t)he person for whose benefit property is held in trust is the beneficiary." RESTATEMENT OF THE LAW, THIRD, TRUSTS §3 (2003).

[81] GARDNER, *supra* note 74, at 206.

[82] In this way, dual different legal rights exist surrounding trust property. This is one of the characteristics of Anglo-Saxon law principle of trust. *See also* UNABARA, *supra* note 73, at 122.
On the other hand, under Japanese civil code, ownership on property cannot be divided. Civil Code, art. 206 and art. 175.

[83] Even based on the interpretation and understanding of *jyueki sha* adopted at Ⅶ), same result can be reached. Looking through Ⅷ) aiming at the application of thesis developed at Ⅶ), *jyueki ken* of X was observed from the aspect of duties D was liable to. Trustee's duties and beneficiaries' rights are so called two sides of the same coin. Trustee is required to do his or her jobs for the benefit of beneficiary, and the beneficiary is entitled to have it done. *See* GARDNER, *supra* note 74, at 204. So the duty of D to pay some amount out of principal and income can be structured into the right of X to receive such payments. And the duty of D to provide some information on T can be structured into the right of X to secure claim on property relevant to T. *See also* Sato, supra note 76, at 122 .
By the way Ⅸ) adopted the same thoughts on the right preserved by B as on *id*. at 122-23.

[84] Strong line should be drawn between the question immediately mentioned below and that of legal characteristics of rights a person entitles over trust property as a qualification of *jyueki sha*. *See* the discussions later.
And on the timing of Gift Tax under ACT, art. 4(1), *see* the legislative history of that provision mentioned above.

[85] *See* GARDNER, *supra* note 74, at 204; UNABARA, *supra* note 73, at 119. The right of trustee on trust property has so called entire character in relation to third parties. On the other hand that right should always be subject to limitation because that is inferior to that of beneficiary. *See* id. at 122-23.
Relevant Restatement says, "(t)he trustee is under a duty to administer the trust solely in the interest of the beneficiaries." RESTATEMENT OF THE LAW, SECOND, TRUSTS §170 (1992). See also RESTATEMENT OF THE LAW, THIRD, TRUSTS §78 (1) (2007).
In the present case, discretion of D on payment to X can be classified as one of the discretions, which mainly related to the parties concerned of T at the discretionary trust. *See* UNABARA, *supra* note 73, at 170-71.

[86] *See* UNABARA, *supra* note 73, at 74. In relation to so called directory trust, under which other person will make direction to trustee on management of trust property, that "other person" can encompass the third parties without directly anything to do with trust, like B. *See id*. at 124.

[87] As for general explanations, *see* Kawaguchi, *Shintaku Hou kaisei to Sozoku Zei / Zouyo Zei no syomondai (Revision of trust law and related issues of inheritance/gift tax),* 57 ZEIMU DAIGAKKOU RONSOU (THE JOURNAL OF NATIONAL TAX COLLEGE) 245 (2008). *See also Takano, Kokka kankatsuken to kokusai sozei no kankei: sisanzei no sokumen karano kisoteki kousatu (National Jurisdiction and International Tax Law: A Fundamental Study from the Perspective of Estate Taxation),* 42 SOZEIHOU KENKYU (JAPAN TAX LAW REVIEW) 79 (2014).

[88] DHC, *supra* note 28, at 1085/5. As for general information on current Trust Act, *see* M. ARAI, SHINTAKU HOU (TRUST ACT) (4th ed. 2014).

[89] As for general explanations readable in English on taxation surrounding *shintaku* after the amendment of

relevant legislations, *see* Sato, *JAPAN*, in THE INTERNATIONAL GUITDE TO THE TAXATION OF TRUSTS (IBFD) 1 (Nov. 2007); Especially on "sequential beneficiary trusts", *see* Okamura, *Taxation and Trusts in the United States and Japan,* Proceedings from the 2009 Sho Sato Conference on Tax Law, Social Policy, and the Economy, available at http://www.law.berkeley.edu/8364.htm. And on the treatment of income tax, *see Miyazaki, Classification Issues regarding Foreign Trusts under Japan's income Tax Law and Overhaul of the Trust Law,* 61 BULL. FOR INT'L TAX'N 418 (2007).

[90] *See also* Ushiro, *supra* note 76, at 197-98;

[91] DHC, *supra* note 28, at 1085/21.

[92] Art. 4 (1).

[93] DHC, *supra* note 28, at 1085/7. Additionally, the amended provision specifically limited *jyueki sha* to those who become *jyueki sha* without proper payments. The aim of that amendment was to confirm that those who had bought the position as *jyueki sha* were excluded. *Id.*

On interpretation of this wording, see Sato, *Shin shintaku hou no seitei to 19 nen shintaku zeisei kaisei no igi (The enactment of new Trust Act and the meaning of tax reformation surrounding shintaku on 2007),* 62 NICHIZEIKEN RONSYU (BULLETIN FOR JAPAN TAX RESEARCH INSTITUTE) 37, 49 (2011).

[94] Art. 2 (6). And on the term "*jyueki ken*", *see* art. 2 (7). *See also* Ⅶ) above. Hence "those who own the rights as *jyueki sha* currently" are those who can exercise *jyueki ken* currently. DHC, *supra* note 28, at 1085/9.

[95] In connection with the amendment of ACT, tax treatment surrounding foreign trust may have been one of the key issues. Especially on whether or not a person falls within *jyueki sha* in relation to foreign trust, the common thoughts may have been that relevant rules on which that foreign trust had been settled should be referred to. DHC, *supr*a note 28, at 1085/9.

According to Sato, *supra* note 89, at 30d, "trust" in most other countries would be treated as *shintaku* for the purposes of Japanese legislations relevant to that one because the definition of *shintaku* in Japan is almost the same as that in CONVENTION ON THE LAW APPLICABLE TO TRUSTS AND ON THEIR RECOGNITION. On this convention, *see supra* note 66.

Art. 2 of that convention is as follows; "For the purposes of this Convention, the term "trust" refers to the legal relationships created - *inter vivos* or on death - by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose. A trust has the following characteristics –

a) the assets constitute a separate fund and are not a part of the trustee's own estate;

b) title to the trust assets stands in the name of the trustee or in the name of another person on behalf of the trustee;

c) the trustee has the power and the duty, in respect of which he is accountable, to manage, employ or dispose of the assets in accordance with the terms of the trust and the special duties imposed upon him by law.

The reservation by the settlor of certain rights and powers, and the fact that the trustee may himself have rights as a beneficiary, are not necessarily inconsistent with the existence of a trust."

By the way, according to Trust Act AFTER the amendment, art. 2 (1), the term "*shintaku*" is defined as "an arrangement in which a specific person...administers or disposes of property in accordance with a certain purpose…and conducts any other acts that are necessary to achieve such purpose." In connection with the draft of Trust Act AFTER the amendment, *see* UNABARA, *supra* note 73, at 4-5, which says that that draft entirely adopted the thoughts and systems adopted in Anglo-Saxon law principle of trust.

Additionally it should be noted that specific provisions were not inserted in relation to trust in amending Act on General Rules for Application of Laws. *See* Shimada (1), *supra* note 68, at 92.

[96] After the amendments, *jyueki sha* is deemed to have received "rights in connection with *shintaku*" instead of "rights to accept benefits of *shintaku*", which was applied as of the present case. The term "rights in connection with *shintaku*" means all the rights which entails some profits or others from *shintaku*, and encompasses *jyueki ken* provided by Trust Act AFTER the amendment. DHC, *supra* note 28, at 1085/10.

[97] GARDNER, *supra* note 74, at 206.

[98] *Id*. at 207. Again, the problem here and the question of whether or not a person falls within *jyueki sha* in relation

to discretions or rights of others are totally different. *See supra* note 84.

[99] Under relevant rules, some adjustments would be added. But those don't have anything to do with the nature of beneficiary interests.

[100] Relevant rules mainly provided by circular notice don't change BEFORE and AFTER the amendments of relevant legislations. *See* DHC, *supra* note 28, at 1085/22.

In relation to the problem of evaluation on *jyueki ken* under the situation after the amendments, *see* Sato, *supra* note 93, at 64. In relation to the judgment of the first trial court, *see* Shinagawa, *Case Review on the judgments of the first trial court,* TKC ZEIKEN JYOUHOU vol. 20 no.6 at 59,70 (2011); Hashimoto, *supra* note 76, at 8; Ushiro, *supra* note 76, at 200-01. *See also* Kimura, *Case Review on the judgments of the second trial court,* ZEIKEN (JAPAN TAX RESEARCH INSTITUTE) vol. 30 no.4 at 191, 193 (2014).

[101] According to published explanation, the aim of this amendment is to counteract "the avoidance of Gift Tax, for example, by gift of properties situated foreign jurisdictions to grandchildren who had born in foreign jurisdictions and didn't own Japanese nationality". DHC, *supra* note 28, at 626.

[102] Lower courts didn't find fact on the domicile of C.

[103] Hypothetically if X would not be liable to Gift Tax in connection with trust property, i.e. the financing bills, as the case may be, so called CFC (Controlled Foreign Corporations) regime may be applicable in relation to income tax. The relevant legislation is Act on Special Measures Concerning Taxation (No. 26 of March 1957), art. 40-4 and Order for Enforcement of SMCT (No. 43 of March 1957), art. 25-19(1)(ii). In the present case, under a written contract to settle T, D receives the insurance when B died, and D can decide the amount payable to X at its discretion. So there may be some possibility of manipulation that D preserve some amount or decide the amount payable in the light of personal deduction of Japanese income tax. Concerning on that, Sato, *supra* note 93, at 52 stipulates the problem of reserved profit in relation to *shintaku* under the situation after the amendments. And it suggests the taxation in the hand of *jyutaku sha. Id*. at 53 n. 25. As the application of CFC regime in relation to income tax, Judgment of Dec. 4, 2009, Supreme Court, available at http://www.courts.go.jp/search/jhsp0030?hanreiid=38223&hanreiKbn=02, which concerns the taxation of Japanese individual resident who holds the 60 percent of shares issued by company residing in Singapore, which was not relevant to taxation surrounding *shintaku*.

By the way Norway seems to be confronting the similar situation. In relation to trust settled in Liechtenstein, Norway tried to tax beneficiary of that trust under CFC regime. The main issue is whether or not such taxation contradicts EEA agreement. Judgment at EFTA court is available at http://www.eftacourt.int/cases/detail/?tx_nvcases_pi1[case_id]=211&cHash=bce3fe8b8d15b60c73fc9e74e5ea4c1b. See Furuseth, Case E-3/13 and E-20/13 Fred. Olson, in ECJ-RECENT DEVELOPMENTS IN DIRECT TAXATION 2013 at 177 (M. Lang, J. P. Pistone, J. Schuch, C. Staringer, A. Storck ed. 2014).