

Registered Owner V. Beneficial Owner – A Curtain raiser

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Background

In general parlance the concept of beneficial ownership refers to having a beneficial interest in any property, goods including securities. Beneficial interest may be referred to a "profit, benefit or advantage resulting from a contract, or the ownership of an estate as distinct from the legal ownership or control." A beneficial interest is different from the rights of someone like a trustee or an official who has the responsibility to perform and/or title to the assets but does not share in the benefits.

Until the Ministry of Corporate Affairs ('MCA') vide its corrigendum¹ dated 21st June, 2018 enforced the provisions of section 89 (10) of the Companies Act, 2013 ('Act, 2013'), the term 'beneficial interest' was not defined and referred to by various stakeholders for understanding the scope and intention of the said section.

This article deals with the concept of beneficial owner and registered owner of shares of a company.

But before moving forward we will throw a light on the meaning of the two words: Registered Owner and Beneficial Owner:

- a) **Registered owner** – A person whose name is registered in the Register of Members as the holder of shares in that company but who does not hold the beneficial interest in such shares is commonly called as the registered owner of the shares.
- b) **Beneficial/Legal owner** – Beneficial interest has been defined in the following manner for section 89 and 90 of the Act, 2013 as follows:

"(10) For the purposes of this section and section 90, beneficial interest in a share includes, directly or indirectly, through any contract, arrangement or otherwise, the right or entitlement of a person alone or together with any other person to—

- (i) exercise or cause to be exercised any or all of the rights attached to such share;*
- or*
- (ii) receive or participate in any dividend or other distribution in respect of such share."*

Under the Act, 2013

Section 89:

¹ http://www.mca.gov.in/Ministry/pdf/Notification2106_22062018.pdf

Under the Act, 2013, section 89 requires making of declaration in cases where the registered owner and the beneficial owner of shares in a company are two different persons.

- For acquiring membership by such entities (for example: partnership firm, Hindu Undivided Family ('HUFs'), etc) who are not allowed to hold shares directly of a company.

First proviso to section 187:

The first proviso of section 187 allows a holding company to hold the shares of its wholly-owned subsidiary in the name of nominees, other than in its own name for the purpose of meeting the minimum number of members as per the Act.

- To satisfy the requirement of minimum number of members (i.e.) 2 (Two) in case of a private limited company and 7 (Seven) in case of a public limited company
- To incorporate or to have a wholly owned subsidiary.

This write up endeavors to cover the issues related with the rights of a beneficial owner and registered owner.

Provisions of Section 89 and Section 187

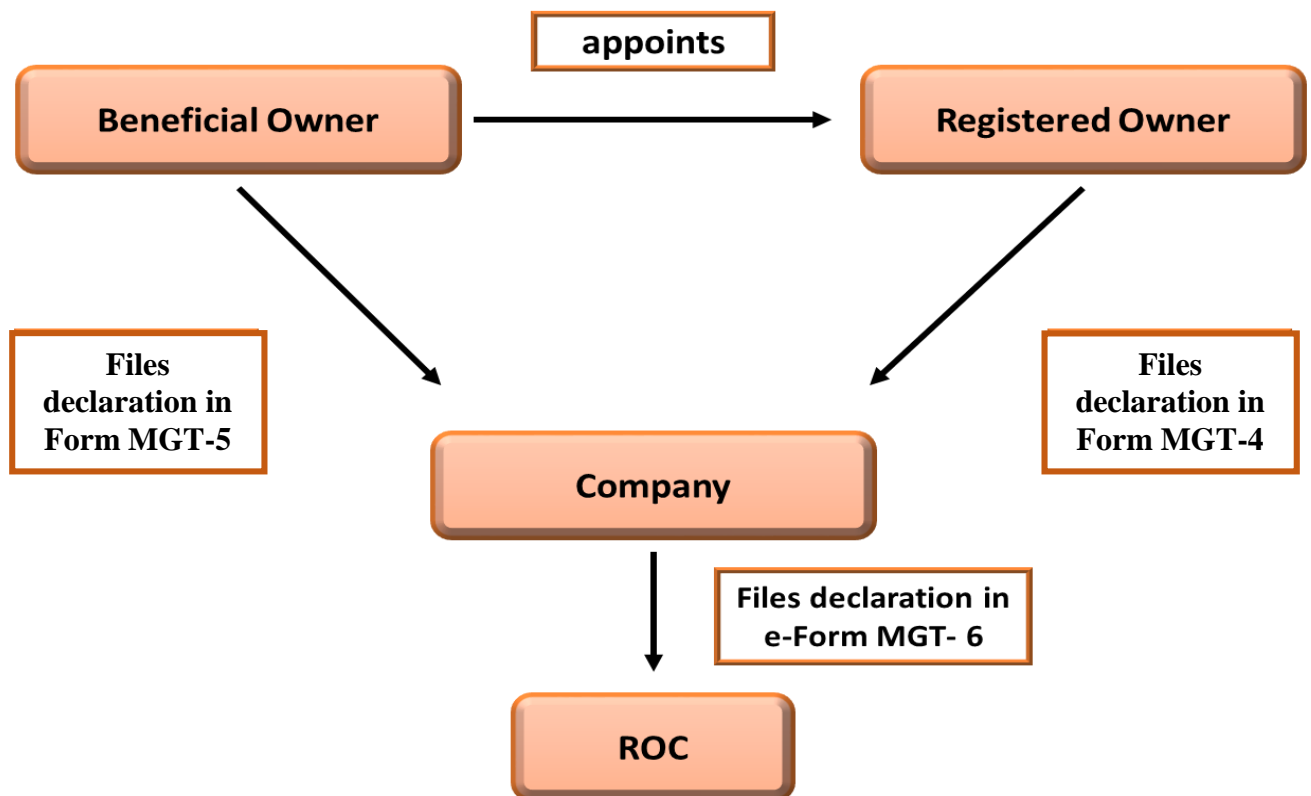
Section 89

Mandatory declarations to be made:

Section 89 read with rule 9 of the Companies (Management and Administration) Rules, 2014 deals with declaration of beneficial interest in the shares held. It generally includes three following steps:

- The person or the company (as the case may be), whose name is to be entered into the register of members of the company shall submit the declaration in Form MGT 4 within thirty days from the date of acquisition or change in beneficial interest to the company
- The person or a company (as the case may be), who holds the beneficial interest in any share shall submit the declaration in Form MGT 5 along with the covering or request letter to the company in which they hold the beneficial interest within thirty days from the date of acquisition or change in beneficial interest.
- On receipt of declaration in Form MGT 4 & 5 by the company, the same shall be placed before the board for approval. The company shall also intimate the Registrar of Companies ('ROC') in e-Form MGT 6 within thirty days from the date of receipt of declaration in Form MGT 4 & 5.

The basic intent behind the above section is to reveal the identity of the beneficial owner who is unknown to the company.



Significant Beneficial Owner and how is it different from declaration under section 89

Pursuant to the provisions of section 90 of the Companies (Amendment) Act, 2017 ('Amendment Act'), the said section is revamped completely. Prior to the Amendment Act, the section merely gave power to Central Government to investigate beneficial ownership in suspicious cases. However, post amendment, the section has the following features in broad:

- Significant beneficial ownership has been defined;
- Declaration to be given by the significant beneficial owners about the nature of their interest within a period of 90 days from the enforcement of the said section i.e. 13th June, 2018;
- Register is to be kept for recording the declarations given under this section;
- Power of companies to seek information from members and believed to be beneficial owners;
- Power of companies to approach the Tribunal in case of non-receipt or inadequate response from the members and non-members; and
- Increased penal provisions for non-compliances and the person may also be prosecuted under section 447 of the Act.

Section 89 and 90 work in two different fields altogether. While section 89 talks about disclosure of nominal and beneficial interest thereby providing duality / dichotomy of ownership, section 90 indicates to the magnitude of holding.

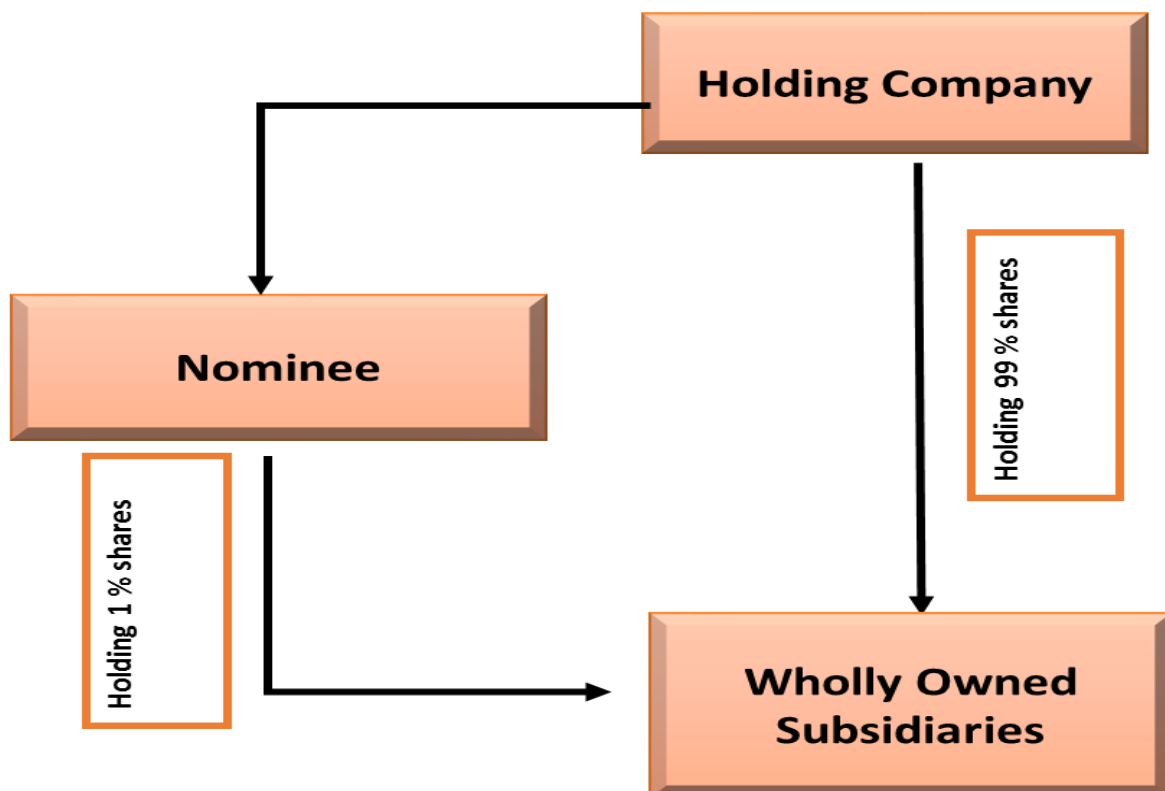
Further, section 89 does not require the disclosure only from individuals but bodies corporate as well. The same is not the case with section 90 which aims at revealing the individuals as significant beneficial owner.

Section 187

Section 187 of the Act corresponds to section 49 of the erstwhile Companies Act, 1956 which requires companies to hold all investments made or held by it in any property, security or other asset in its own name. However, the proviso to sub-section (1) grants exemption to holding companies in case of holding shares of its subsidiary companies.

The exemption allows holding companies to appoint nominees for itself to hold shares in the subsidiary/wholly-owned subsidiary companies in order to meet the statutory minimum limit of members in a company.

Given below is the diagram illustrating a situation of a holding company appointing a nominee to meet the statutory minimum limit of two members in a wholly-owned private subsidiary company.



Difference between the two sections: (Section 89 and First proviso to Section 187)

Basis of Difference	Section 89	First proviso to Section 187
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Consists of	It deals with making disclosures by the registered owner, beneficial owner and the company to the ROC	It deals with making and holding investment by a holding company in its subsidiary in the name of nominees.
Intention of law	To reveal the identity of the beneficial owner	To allow holding companies to become beneficial owner in case of subsidiaries through a nominee and at the same time comply with the minimum number of members requirement prescribed in the Act.
Mandatory Disclosure	Disclosure in Form MGT-4, MGT-5 and MGT-6 is mandatory	Disclosure in Form MGT-4, MGT-5 and MGT-6 is not required.
Share Certificates	Share certificates are generally issued in the name of the registered holder. However, in the case of trusts, HUFs, partnership firms holding shares in a company in the beneficial capacity, share certificate contains the name of the registered holder and the name of the trust, HUFs and partnership firms is written in brackets as beneficial owner.	Share certificates issued in the name of registered holder (nominee) but the name of the holding company is also mentioned along with the name of the nominee.

FAQs on beneficial ownership

Looking at the provisions above the following questions may be discussed:

Question:

In case the beneficial holder and registered holder are two different people, then who is entitled to receive dividend under section 123 of the Act?

Answer:

Section 123 (5) states “***No dividend shall be paid by a company in respect of any share therein except to the registered shareholder of such share or to his order or to his banker and shall not be payable except in cash.***” As stated prima facie the right to receive dividend lies with the registered holder of the shares.

Question:

Can the beneficial holder receive dividend by any chance?

Answer:

Yes, referring to the provision stated above the beneficial holder can receive dividend from the company by virtue of the order given by the registered holder. It is also worth mentioning that being the beneficial holder, the profits, benefits, and advantage shall be ultimately derived by the beneficial owner although the person receiving them at the first instance may be the registered holder.

Question:

In case the beneficial holder and registered holder are two different people, who is entitled to receive the bonus shares /right shares (if any) declared by the company?

Answer:

As per section 63 of the Act the members (i.e. registered holders are entitled to receive the bonus shares issued by the company. Similarly section 62 uses the word “**to the existing shareholders of the company**” which again signifies that the registered holder shall be entitled to receive the right shares offered by the company.

Question:

Can name of a trust be entered in the register of members of the company?

Answer:

Under the erstwhile Companies Act, 1956, section 153 specifically stated that trust cannot become a member of a company. However, under the Act a trust can become a member if there is a specific provision to the same effect in the articles of association of the company.

Question:

In case of transfer in abeyance, who is entitled to receive dividend?

Answer:

In case a transfer has not been registered in the books of a company, then the transferor shall be entitled to receive dividend if he is a registered holder as on the record date.

Case studies on giving declaration u/s 89 of the Act

- 1. Mr. X becomes the registered holder of shares of ABC Ltd whose beneficial holder is M/s XYZ Ltd, a Partnership Firm.**

Since a beneficial interest is created therefore, the declaration as prescribed u/s 89 of the Act shall be given by Mr. X and M/s XYZ Ltd and subsequently by ABC Ltd.

- 2. Mr. X is the registered owner of 500 shares of ABC Ltd whose beneficial holder is M/s XYZ Ltd, a Partnership Firm. Again Mr. Y is the registered owner of 1000**

shares of ABC Ltd whose beneficial holder is M/s XYZ Ltd, a Partnership Firm. Mr. X transfers 500 shares to Mr. Y.

The requirement to give declaration arises both in the case of change in registered as well as beneficial ownership. Therefore, in the above case declaration is required to be given. Further, since the registered owner of the shares is transferring the shares to another registered owner of the shares, therefore, the Share Transfer deed is to be executed and thereafter form SH-4 needs to be sent to the Company.

- 3. Mr. X is the registered owner of 500 shares of ABC Ltd whose beneficial holder is M/s XYZ Ltd, a Partnership Firm. Mr. X transfers 500 shares to Mr. B. There is no change in beneficial interest.**

Refer to the answer given in case study 2.

- 4. Mr. X is the registered owner of 500 shares of ABC Ltd whose beneficial holder is M/s XYZ Ltd, a Partnership Firm. Again Mr. Y is the registered owner of 1000 shares of ABC Ltd whose beneficial holder is M/s XYZ Ltd, a Partnership Firm. Mr. X transfers 400 shares to Mr. Y.**

Refer to the answer given in case study 2.

- 5. Mr. X is the registered owner of 500 shares of ABC Ltd whose beneficial holder is M/s XYZ Ltd, a Partnership Firm. Mr. X transfers 500 shares to Mr. B whose beneficial interest shall lie with M/s BBC Ltd, a Partnership Firm.**

In the instant case there is change in the beneficial interest of the shares held by Mr. X, therefore, declaration as prescribed u/s 89 shall be given by Mr. B and M/s BBC Ltd, a Partnership Firm and thereafter by ABC Ltd.