

SBO Rules for Companies & LLPs

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- Vinod Kothari and Company, company secretaries, is a firm with over 35 years of vintage
- Based out of Kolkata, Mumbai, New Delhi and Bengaluru.
- We are a team of qualified company secretaries, chartered accountants, lawyers and managers.

Our Organization's Credo:

Focus on capabilities; opportunities follow

Learning objective: Snapshot

A. For Companies:

1. Concept of SBO
 - a. What is SBO?
 - i. Determination of direct holding
 - ii. Determination of indirect holding
 - b. Why was the concept of SBO introduced?
2. Global image in relation to SBO provisions
3. Difference b/w BO u/s 89 and SBO u/s 90 - Designated person
4. Case studies to understand the concept
5. Compliances under SBO Rules
 - a. Identification of SBO
 - b. Declaration of SBO
 - c. Return of SBO
 - d. Register of SBO
 - e. Notice Seeking Information from members
 - f. Application to Tribunal
6. Non-applicability of the SBO Rules in certain cases
7. Penal provisions

B. For LLPs:

1. Provisions of SBO under CA, 2013 made applicable to LLPs pursuant to MCA notification dated 11th February, 2023
 - a. There were certain concerns in relation to the same because the Companies (SBO) Rules were not made applicable to LLPs
 - b. LLP (Significant Beneficial Owners) Rules, 2023 notified on 9th November, 2023 clarifies the concerns that arose out of the application of 11th February, 2023 Notification on LLPs
2. Identification of SBO in case of LLPs
3. Obligations under LLP SBO Rules
 - a. Same as in case of companies
4. Non-applicability of the SBO Rules in certain cases



Concept of SBO



Intent behind introducing SBO provisions

- Section 90 has been enacted to identify such individual, who directly or indirectly, holds beneficial interest over the company.
- Steps taken to identify natural persons is the realization that artificial legal entities continue to proliferate; while these entities are owned by natural persons at end of the spectrum.
- The entities are owned through a complex web of holdings and cross holdings, such that in most cases, the ownership of the entities is opaque.
- Artificial legal entities are often used for illicit purposes including global crime.
- It is important to identify individuals behind companies so as to keep tab on the individuals and hold them accountable.

ROC advisory notice (Extracts)

BY EMAIL ONLY



**GOVERNMENT OF INDIA
MINISTRY OF CORPORATE AFFAIRS
Office of the Registrar of Companies, Central Scrutiny Centre**

Plot No. 6, 7, 8, Sector 5,
IMT Manesar,
District Gurgaon (Haryana),
Pin Code- 122 050
Dated: 2023-10-13 20:04:18

File No. 03/704/2019/CL-II(DGCOA)-Part(1)

To,

Sub: Advisory for compliance of provisions of section 90 of Companies Act, 2013 read with Companies (Significant Beneficial Owners) Rules, 2018

Dear Sir/Madam,

As per Section 90 (1) of the Companies Act 2013, read with Rule 2(h) and 3 of Companies (Significant Beneficial Owners) Rules, 2018, every individual, who acting alone or together, or through one or more persons or trust, including a trust and persons resident outside India, holds beneficial interests, of not less than ten percent, in shares of a company or the right to exercise, or the actual exercising of significant influence or control as defined in clause (27) of section 2, over the company, shall make a declaration to the company in e-form BEN-1, specifying the nature of his interest and other particulars, within 90 days from commencement of Companies (Significant Beneficial Owners) Rules, 2018 and for subsequent acquisition of Significant Beneficial Ownership in a company or any change in his Significant Beneficial Ownership in a company within Thirty days of acquiring such significant beneficial ownership or any change therein.

It is further explained that where an individual becomes a significant beneficial owner, or where his significant beneficial ownership undergoes any change, within ninety days of the commencement of the Companies (Significant Beneficial Owners) Amendment Rules, 2019, it shall be deemed that such individual became the significant beneficial owner or any change therein happened on the date of expiry of ninety days from the date of commencement of said rules, and the period of thirty days for filing will be reckoned accordingly.

For this purpose, as per Rule 2(h) of Companies (Significant Beneficial Owners) Rules, 2018, Significant Beneficial Owner in relation to a reporting company means an individual referred in Section 90(1) of Companies Act, 2013 who

Meaning of SBO: Section 90 read with rule 2(h) of SBO Rules, 2018

Section 90 of Companies Act, 2013

Every individual-

- who acting alone or together, or
- through one or more persons or trust, including a trust and persons resident outside India,
- holds beneficial interests, of not less than 25% . or such other percentage as may be prescribed,

in shares of a company or the right to exercise, or the actual exercising of significant influence or control as defined in clause (27) of section 2 of the Act.

Rule 2(h) of the Companies (SBO) Rules, 2018

SBO in relation to a reporting co. means an individual referred to in sub-section (1) of section 90, who acting alone or, together, or through one or more persons or trust, who possesses one or more of the following rights or entitlements in such co., namely:-

- Holds indirectly, or together with any direct holdings, not less than 10% of the shares;
- Holds indirectly, or together with any direct holdings, not less than 10% of the voting rights in the shares;
- Has right to receive or participate in not less than 10% of the total distributable dividend, or any other distribution, in a financial year through indirect holdings alone, or together with any direct holdings;
- Has right to exercise or actually exercises, directly or indirectly, significant influence or control, in any manner other than through direct holdings alone.



Global image in relation to SBO provisions



Global image in relation to SBO provisions (1/2)

Country	Term used	Name of governing regulation	Definition of BO
United Kingdom	Person with significant control	Companies Act, 2006	Designated 'person with significant control' (PSC) defined as individual who holds directly or indirectly more than 25% of shares/voting rights in company; has right to appoint or remove majority of board of directors; or has right to exercise/actually exercises significant influence or control over company/trust/firm.
United States	Beneficial Owner	FinCEN's Beneficial Ownership Rules	Any individual who, directly or indirectly, owns 25 percent or more of the legal entity customer; and One individual who has "significant responsibility to control, manage, or direct the legal entity.

Global image in relation to SBO provisions (2/2)

Country	Term used	Name of governing regulation	Definition of BO
Brazil	Final beneficiary	The Brazilian Federal Revenue's Normative Instruction	An individual that holds control or significantly influences the legal person to be registered, which occurs when the individual (i) holds, directly or indirectly, percentage superior to 25% of the corporate capital of such person or (ii) holds or exercises great influence, directly or indirectly, on the corporate deliberations and has the power to appoint the majority of the managers of the legal entity, even without controlling it.
European Union	Beneficial Owner	European Commissions Anti Money Directive	Any natural person who ultimately owns or controls customer, and/or natural person on whose behalf transaction or activity is conducted.



Difference between beneficial owner u/s 88 and significant
beneficial owner u/s 90



Difference b/w scope and applicability of sec 89 and sec 90 (1/2)

Basis of Distinction	Section 89	Section 90
Intent	To take cognition of cases where legal ownership is not backed by beneficial ownership, or vice versa.	To recognize significant beneficial owner, being a natural person, responsible for driving the vehicle.
History	Provision was there in the 1956 Act, as also the 2013 Act prior to amendment by the Companies (Amendment) Act, 2017	Section introduced by the Companies (Amendment) Act, 2017.
Stress on natural persons	Section is not limited to natural persons.	Section is limited to identification of natural persons only.
Stress on beneficial ownership	Section arises where there is a dissociation of legal and beneficial interest in the shares.	The section focuses on beneficial ownership only. For computing the significant level of beneficial holding under the section, it does not matter whether the person is beneficial owner only, or nominal as well as beneficial owner. However, a pure nominal owner, not being beneficial owner, is not intended to be covered by the section.

Difference b/w scope and applicability of sec 89 and sec 90 (2/2)

Basis of Distinction	Section 89	Section 90
Stress on magnitude	The section is not related to any particular magnitude of beneficial holding. Even one share held, where the conditions of the section apply, will trigger the section.	The section is concerned with significant beneficial holding only.
Indirect ownership	The section is not concerned with indirect ownership. Even though the definition of sub-section (10) refers to indirect holding, but operative provisions in subsection (1) and (2) do not consider indirect holdings	The section is concerned with both direct and indirect holdings
Relevance to preference shares	Section applies to preference shares as well	Section is applicable only in case of compulsorily convertible preference shares
Inter-relationship between the two sections	If a person is identified as the beneficial owner u/s 89, it automatically moves to section 90 to see whether the beneficial holding is significant	If a person is identified as the SBO, it nowhere implies the person is also covered by sec 89. Section 89 applies only where beneficial ownership lacks legal ownership



Concept of designated person in relation to BO identification




Concept of designated person in relation to BO identification

MCA vide its [Notification](#) dated 27th October, 2023 has notified the requirement for the “Designated Persons” to reveal beneficial owners. Below we discuss the summary of the Notification:

- **Applicable provisions:** Section 89 of CA, 2013 read with rule 9 of MGT Rules, 2014
- **Applicability:** Provisions applies immediately
- **Intent:**
 - As per FATF/PMLA rules, every artificial entity must identify a natural person as SBO
 - Where no SBO identified, the KMP will be deemed SBO
 - Several cos in view of (a) either direct holding by natural persons, or (b) diverse holding base, did not identify SBOs. MCA has been expressing concerns
 - If this was the trigger, it seems a misfired shot
 - The provision has been placed u/s 89, which operates in a very different field
- **Disclosure requirements:** Details of DP to be disclosed in annual return.
- **Functions of designated persons:** There is no clarity on the role/obligations of the DP, except that he will furnish information about “beneficial interest”. Unlike in sec. 90, the beneficial interest u/s 89 is not ultimate interest; it is the first level of holding only
- **Actionables for cos:**
 - Cos shall identify a DP for “furnishing information” on beneficial interest.
 - DP shall be any director, or KMP or the CS (where required)
 - Until done, every director, KMP or CS shall be deemed DP
- **What if there is change in DP at any time?**
 - Intimate to ROC in e-form GNL-2

Determination of direct holding [Explanation II to rule 2(h)]



the shares in the reporting co. representing such right or entitlement are held in the name of the individual

the individual holds or acquires a beneficial interest in the share of the reporting co. u/s 89(2), and has made a declaration in this regard to the reporting co.



SBO identification: Case studies for direct holding



Assumptions

In all the illustrations, unless otherwise specified:

- T is the target company with reference to which determination of beneficial ownership is being done;
- H1, H2 etc are companies holding shares in T;
- P1, P2, P3 etc are individuals holding direct or indirect shareholdings in T;
- B1, B2, etc are foreign bodies corporate holding shares in T;
- Reference to shares, unless otherwise specified, is to equity shares.

Case studies: Direct and indirect holding (1/7)

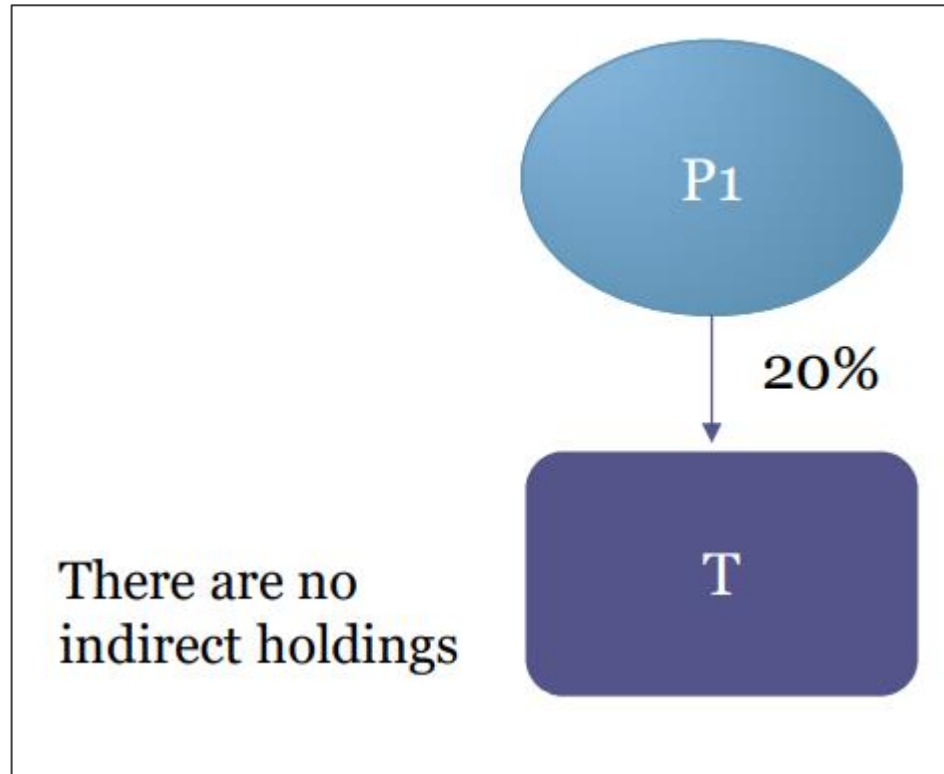


Illustration 1

No SBO declaration required;

- Unless there are indirect holdings, there is no case for SBO declaration – Exp 1 to R 2(1)(h). Even though P1 has significant influence over T, significant influence for the purpose of SBO Rules is relevant only if it is other than through direct holdings – see Rule 2 (1)(h)(iv).

Case studies: Direct and indirect holding (2/7)

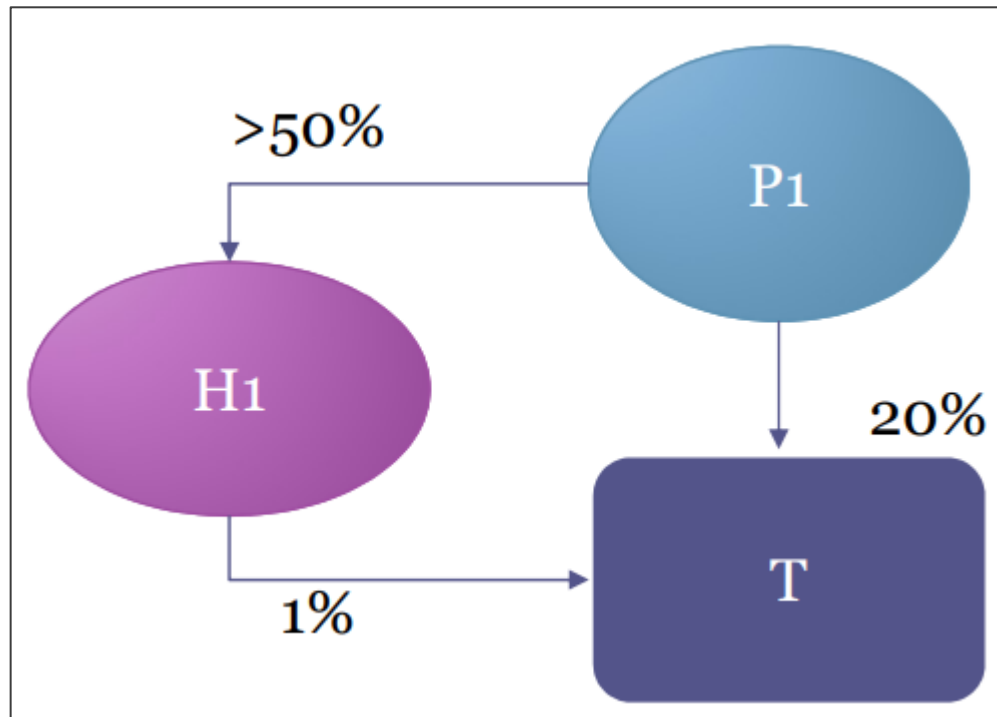


Illustration 2

SBO declaration required;

- Though P1 is a substantial shareholder, there are indirect holdings too. Exp I to R 2(1)(h) is not applicable since there are indirect holdings. The indirect holdings of P1 along with direct holdings are 10% or more.

Case studies: Direct and indirect holding (3/7)

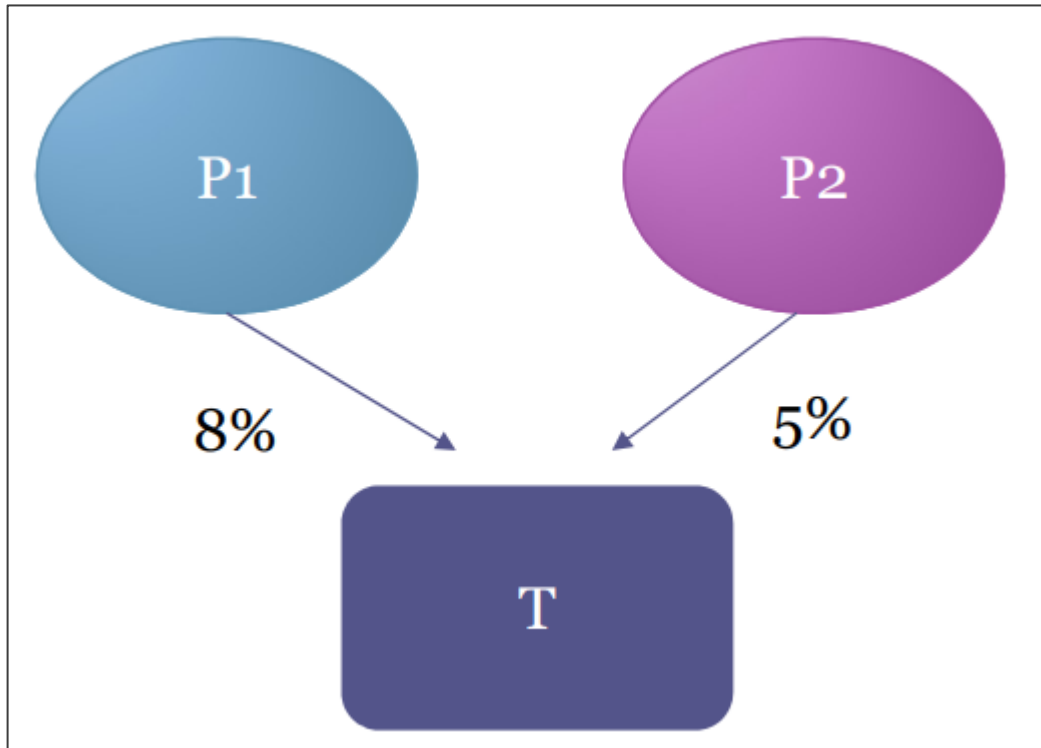


Illustration 3

No SBO declaration required;

- Unless there are indirect holdings, there is no case for SBO declaration – Exp I to R 2(1)(h).
- While the holdings of P1 or P2 are individually less than 10%, but togetherness makes the same more than 10%, however, in view of the language of Exp I, no disclosure seems required.

Case studies: Direct and indirect holding (4/7)

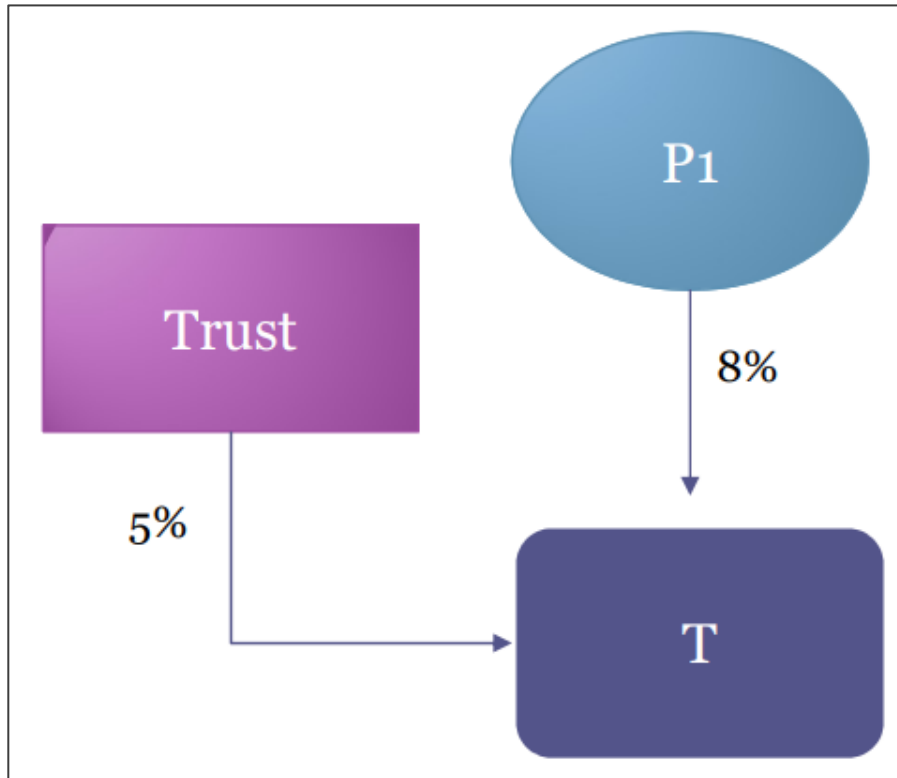


Illustration 4

No SBO declaration required;

- Where declaration of beneficial holdings in the name of the individual has been done, the individual is regarded as direct owner [Exp II to R2(I)(h)].
- Since the holding as beneficiary is not regarded as indirect holding, and there is no other indirect holding, there is no case for declaration.

Assumption: The trustee(P1) has made a declaration u/s 89 declaring P1 to be the beneficial owner.

Case studies: Direct and indirect holding (5/7)

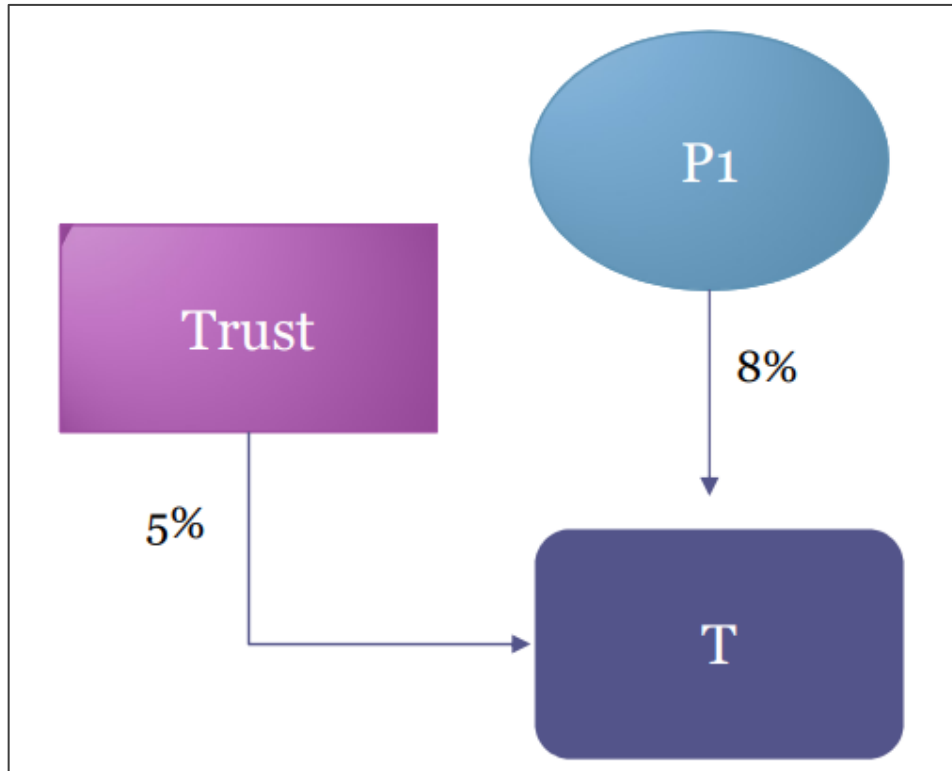


Illustration 5

No SBO declaration required;

- The fact that the beneficial holding is with P1 and P2 together does not make a difference. This is not a case of indirect holding. Hence, no declaration required. See previous answers too.

Assumption: The trustee/beneficiaries have declared that the shares are held for the benefit of P1 and P2.

Case studies: Direct and indirect holding (6/7)

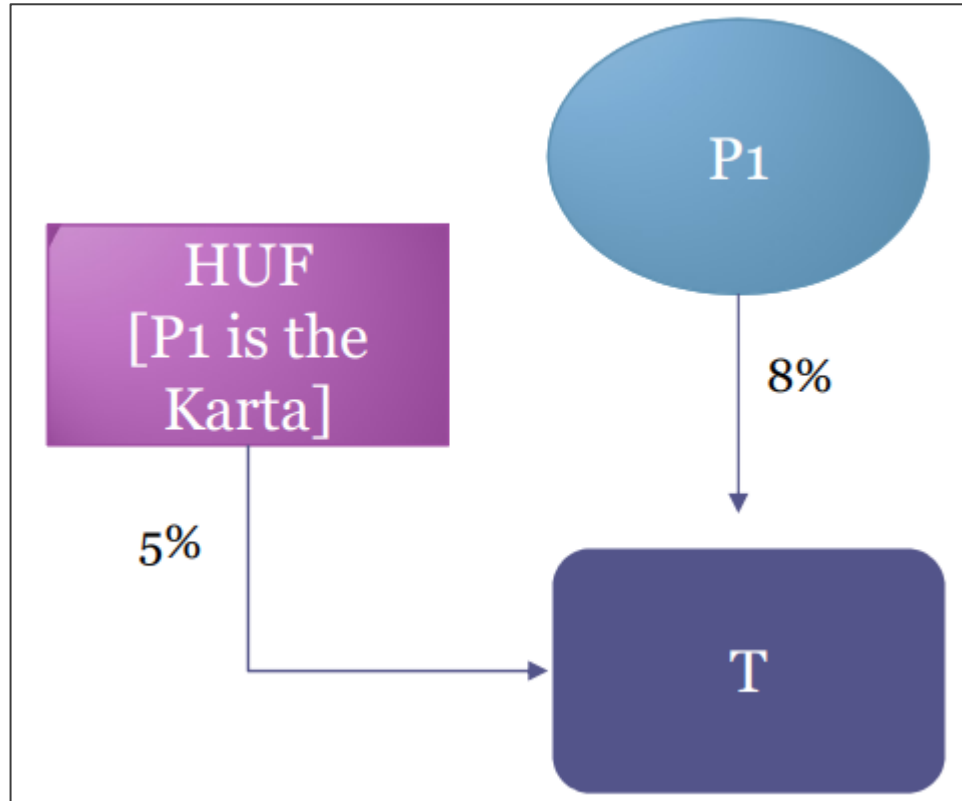


Illustration 6

SBO declaration required;

- The holding of shares in case of an HUF is regarded as indirect holding of the Karta – Exp III (ii) to R2(1)(h). The direct and indirect holdings are 10% or above.

Case studies: Direct and indirect holding (7/7)

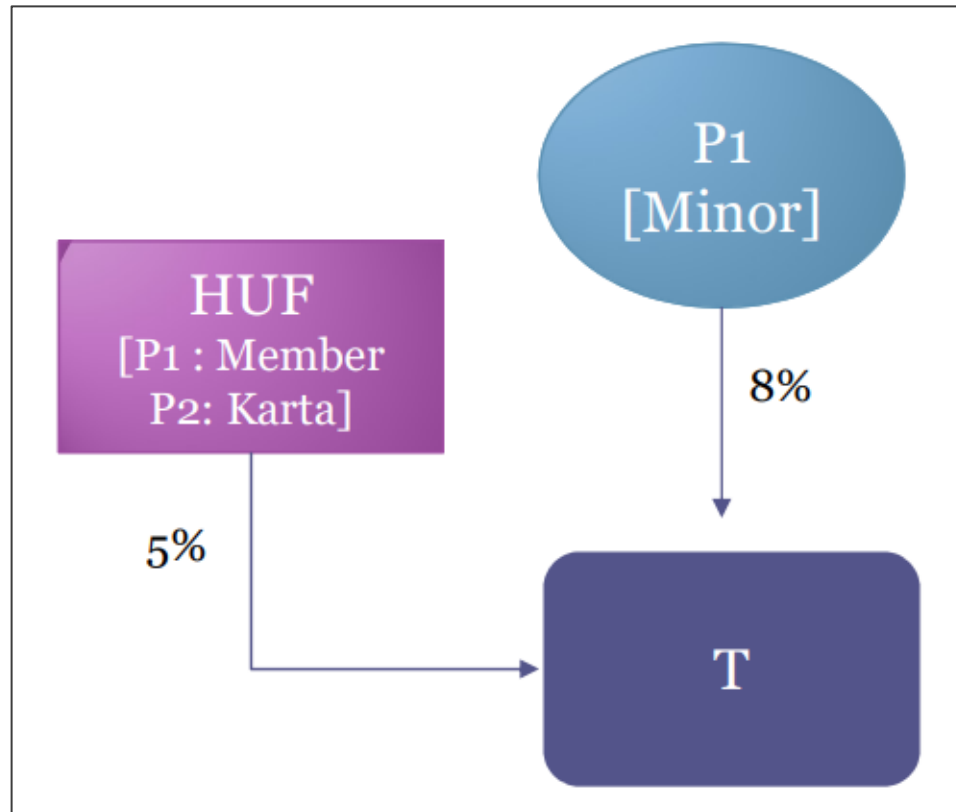


Illustration 7

SBO declaration required;

- The fact that P1 is a minor does not make any difference for the purpose of SBO declaration.
- P2 is the karta of the HUF – therefore, the holding of P2 is in the indirect holding in T1.
- Being members of the same HUF, P1 and P2 may be deemed to be acting together. Therefore, the direct holding of P1 and indirect holding of P2 need to be aggregated.

Determination of indirect holding [Explanation III to rule 2(h)] (1/2)

Member	SBO
Body corporate other than LLP	Individual- (a) holds majority stake in that member; or (b) holds majority stake in the ultimate holdco (whether incorporated or registered in India or abroad);
HUF	Karta of the HUF
Partnership entity (through itself or a partner)	Individual- (a) who is a partner; or (b) holds majority stake in the body corporate which is a partner of the partnership entity; or (c) holds majority stake in the ultimate holding company of the body corporate which is a partner of the partnership entity.
Trust (through trustee)	Individual who- (a) is a trustee in case of a discretionary trust or a charitable trust; (b) is a beneficiary in case of a specific trust; (c) is the author or settlor in case of a revocable trust.

Determination of indirect holding [Explanation III to rule 2(h)] (2/2)

Member	SBO
(a) a pooled investment vehicle; or (b) an entity controlled by the pooled investment vehicle, based in member State of the FATF on Money Laundering and the regulator of the securities market in such member State is a member of the IOSCO	Individual in relation to the pooled investment vehicle,- (A) is a general partner; or (B) is an investment manager; or (C) is a Chief Executive Officer where the investment manager of such pooled vehicle is a body corporate or a partnership entity.

Note: Where the member of a reporting company is,

- (i) a pooled investment vehicle; or
- (ii) an entity controlled by the pooled investment vehicle,

based in a jurisdiction which does not fulfil the requirements specified, the provisions w.r.t. body corporate, HUF, partnership, trust, as the case may be, shall apply

Understanding the meaning of important terms

Majority stake	Acting together	Shares
<p>Majority stake means:</p> <ul style="list-style-type: none">• holding more than one-half of<ul style="list-style-type: none">• the equity share capital in the body corporate; or• the voting rights in the body corporate; or• having the right to receive or participate in more than one-half of the distributable dividend or any other distribution by the body corporate.	<p>If any individual, or individuals acting through any person or trust, act with a:</p> <ul style="list-style-type: none">• common intent; or• purpose of exercising any rights or entitlements; or• exercising control; or• significant influence, <p>over a reporting company, pursuant to an agreement or understanding, formal or informal, such individual, or individuals, acting through any person or trust, as the case may be, shall be deemed to be 'acting together'.</p>	<p>Shares means:</p> <ul style="list-style-type: none">• Equity shares;• CCPs;• CCDs;• GDR.



Case studies: Manner of computing indirect holding



Case studies: Manner of computing indirect holding (1/6)

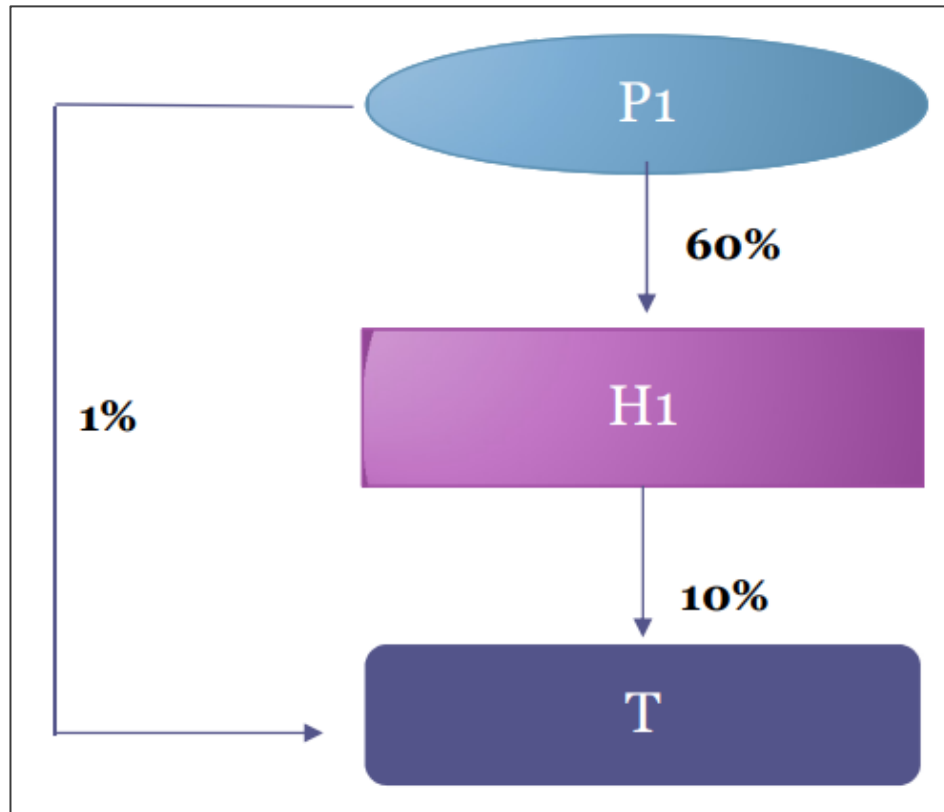


Illustration 8

SBO declaration required;

- Since P1 holds majority stake in H1, the holding of H1 in T is regarded as the indirect holding of P1. The entire holding of H1 in T will be attributed to P1. Hence, P1's indirect holding in T is 10%, and his direct holding is 1%, aggregating to 11%

Case studies: Manner of computing indirect holding (2/6)

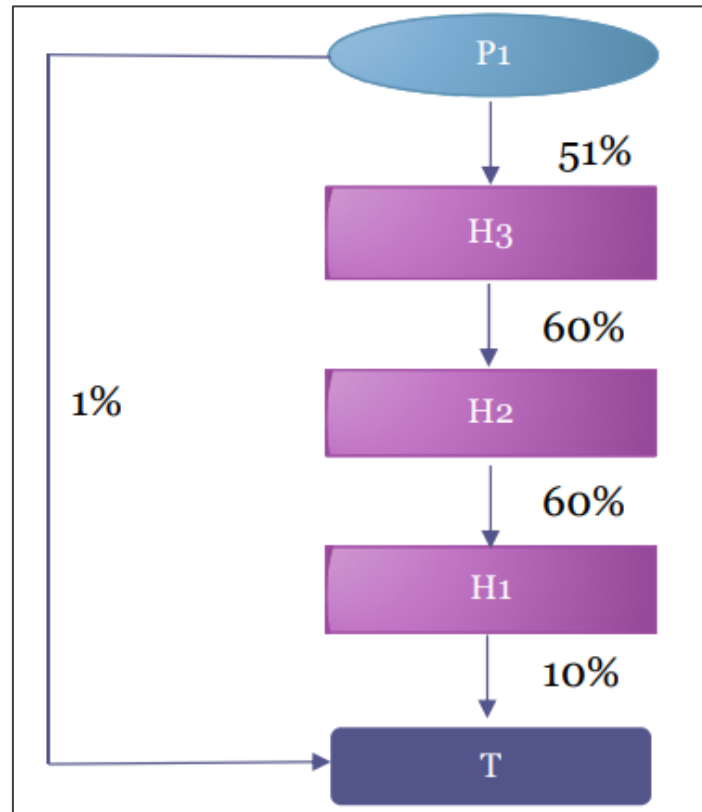


Illustration 9

SBO declaration required;

- The holding of H1 in T (10%) will be regarded as indirect holding of P1, because P1 is holding majority stake in the ultimate holding company of H1 (that is, H3). The indirect holding of P1 in T will be the entire holding of H1 in T, that is, 10%. Hence, together with the direct holding of 1%, the threshold condition is satisfied.

Case studies: Manner of computing indirect holding (3/6)

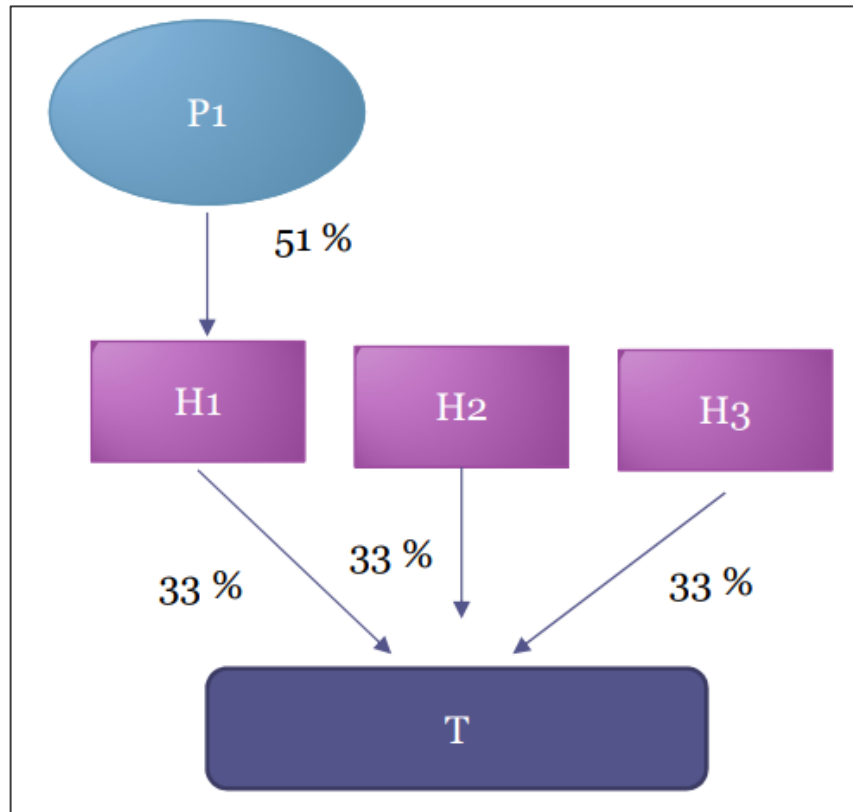


Illustration 10

SBO declaration required;

- PI holds majority stake in HI. Therefore, the holding of HI in T will be regarded as the indirect holding of PI. That holding is 10% or more.

Case studies: Manner of computing indirect holding (4/6)

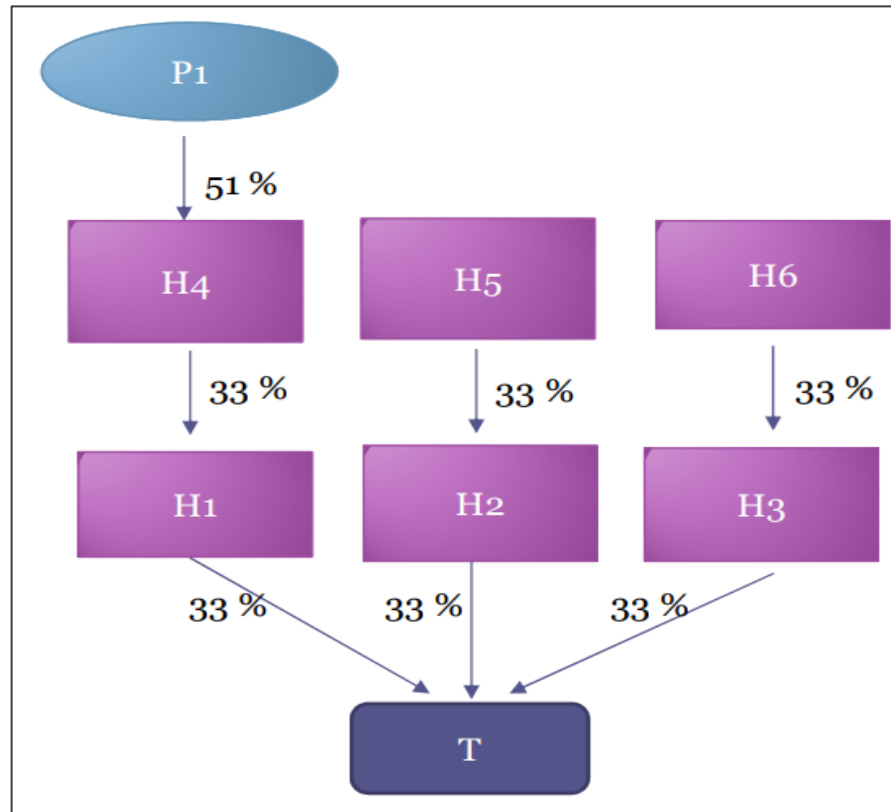


Illustration I I

No SBO declaration required;

- As per the language of Exp III (i) (b), the holding of an individual is regarded as indirect holding only if the individual either holds majority in the first layer holding company, or the ultimate holding company of the first layer holding company.
- In this case, none of the second layer entities (H4, H5 and H6) can be regarded as the holding companies of first layer.
- Hence, the holding of PI at the second layer will not be regarded as indirect holding of PI.

Case studies: Manner of computing indirect holding (5/6)

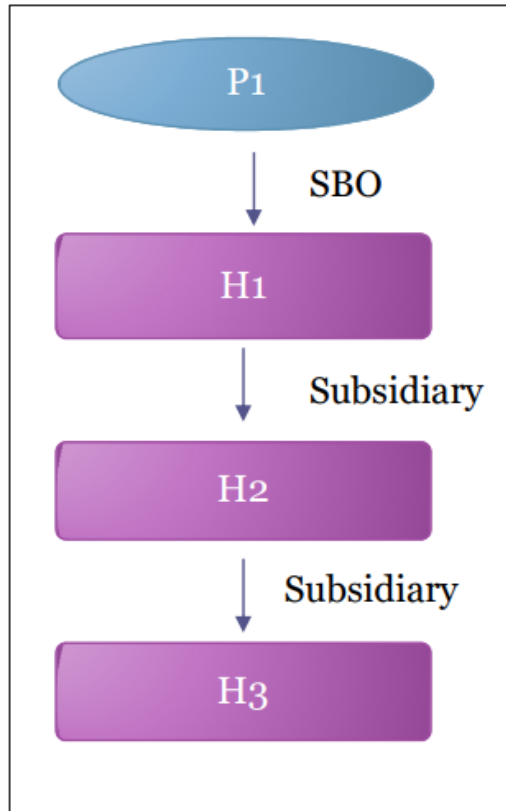


Illustration 12

SBO declaration not required for H2 and H3;

- P1 is already a declared SBO for H1. Rule 8 (b) provides that the shares held by the holding reporting company shall be excluded from the Rules, provided the SBO has been declared at the holding company level.
- However, BEN-2 form is required to be filed at the level of H2 & H3

Case studies: Manner of computing indirect holding (6/6)

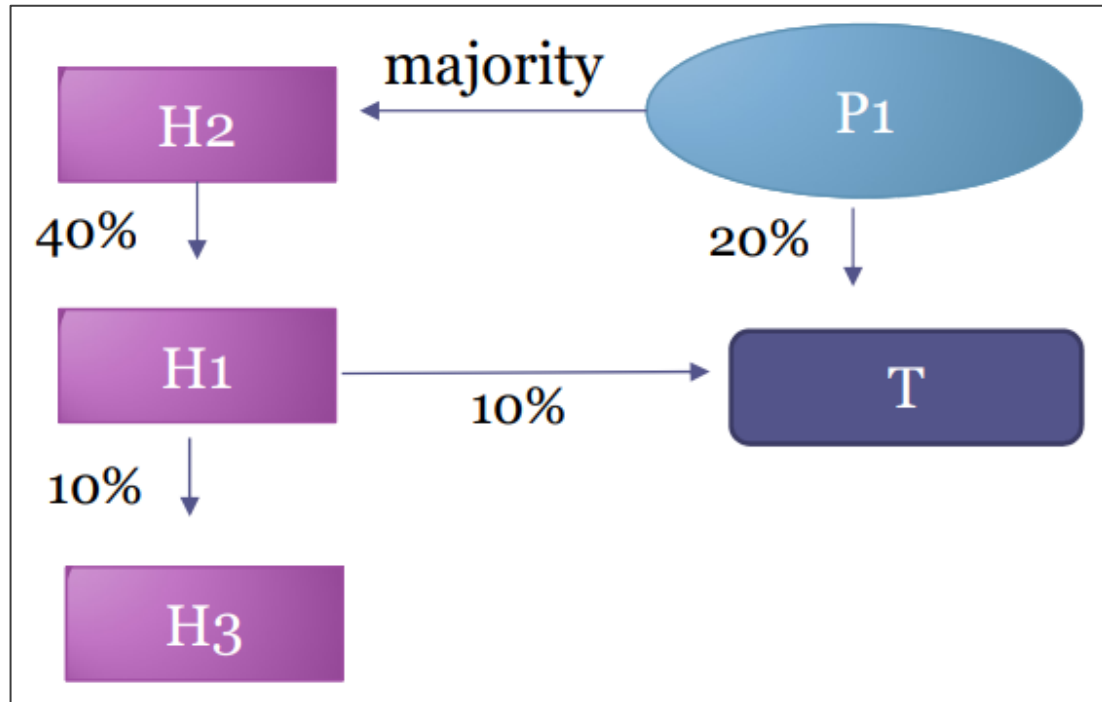


Illustration 13

SBO declaration not required for T. Will be required at H1, not required for H2 and H3.

- As for T, the position is simple: since P1 is not holding majority either at H1, or ultimate holding company of H1 (note H2, though majority owned by P1, is not the holding company of H1), the holding of H1 will not matter.
- At H1 level, the holding of H2 is the indirect holding of P1. Hence, P1 is the SBO for H1.
- In case of H2, it is direct holding entirely – hence, no SBO declaration. In case of H3, there is no majority holding of P1 in H1; H1 does not have any ultimate holding co.



Case studies: Bringing trusts into picture



Case studies: Bringing trusts into picture (I/4)

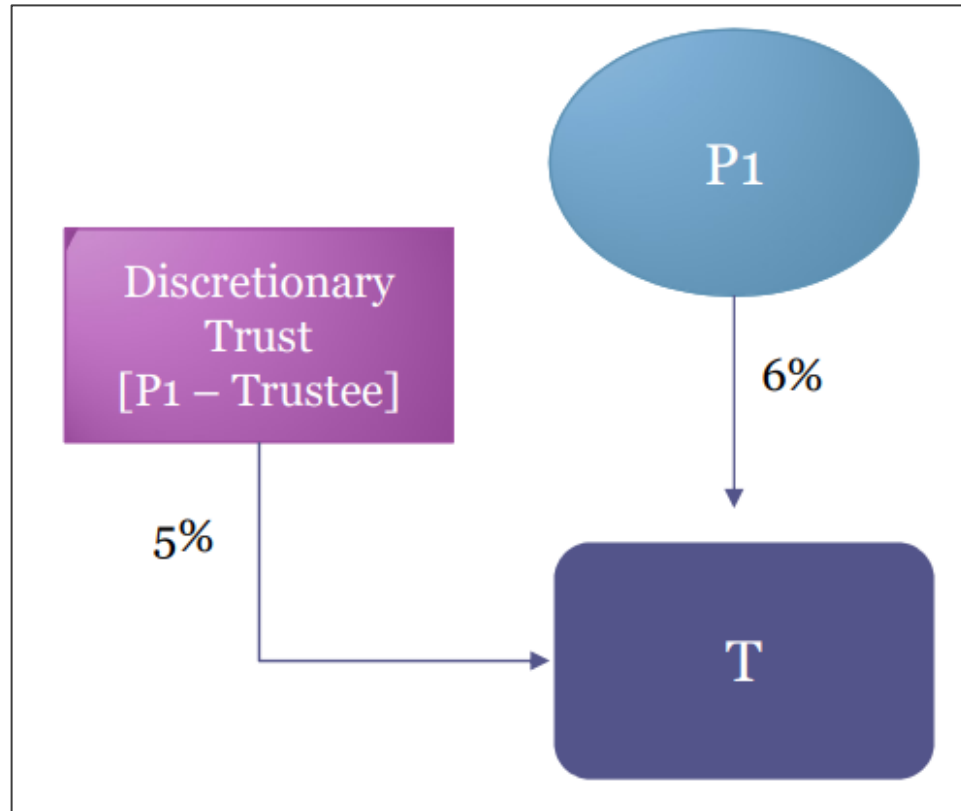


Illustration I4

SBO declaration required;

- In case of discretionary trust, the holding of the trust is regarded as indirect holding of the trustee. See Exp III (iv) (a). Hence, the entire holding of trust will be regarded as indirect holding of P1. Along with his direct holding, P1's holding is 10% or more.

Case studies: Bringing trusts into picture (2/4)

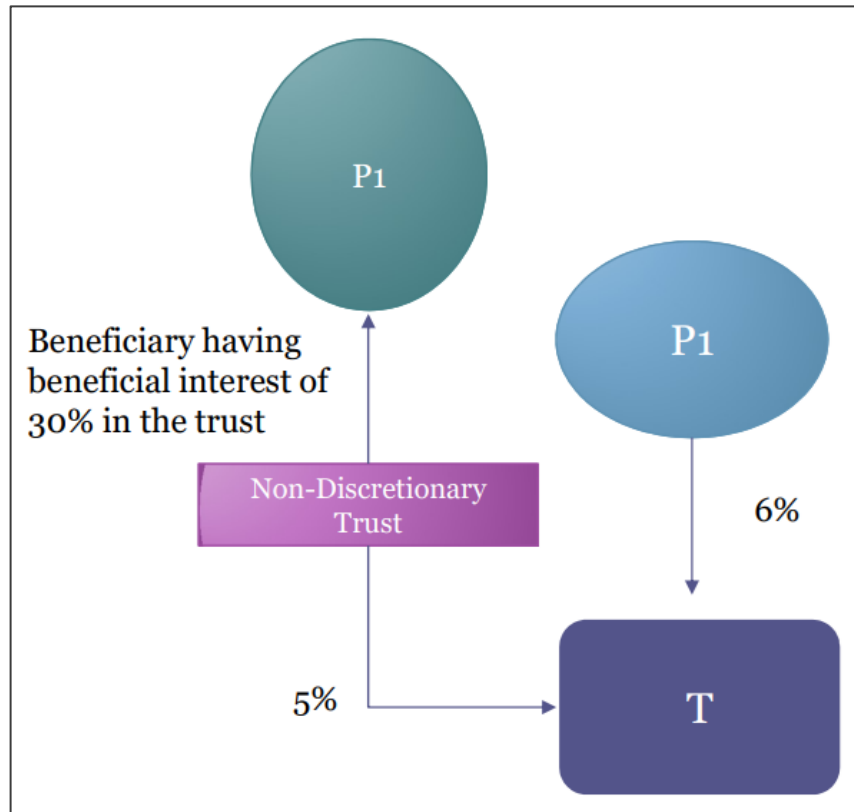


Illustration 15

SBO declaration required;

- In case of non-discretionary trust, the holding of the trust is regarded as indirect holding of the beneficiary. It **does not matter how much is the beneficial interest of the beneficiary**. See Exp III (iv) (b). Hence, the entire holding of trust will be regarded as indirect holding of P1. Along with his direct holding, P1's holding is 10% or more.

Case studies: Bringing trusts into picture (3/4)

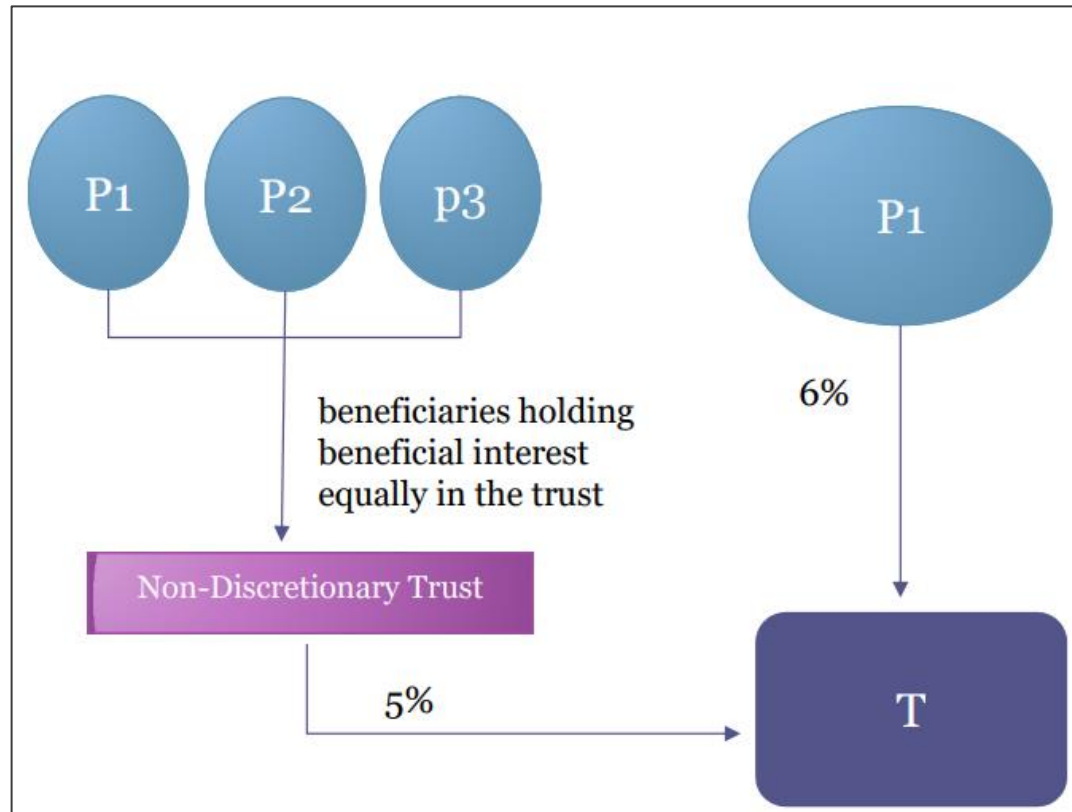


Illustration 16

SBO declaration required by P1, may be required for P2 and P3

- The holding of the trust in T is regarded by indirect holding of each of P1, P2 and P3. Additionally, it may be contended that P1, P2 and P3 are acting together. Since P1 has a direct holding too, the answer is clear in case of P1. In case of P2 and P3, declaration may be required based on their direct holdings.

Case studies: Bringing trusts into picture (4/4)

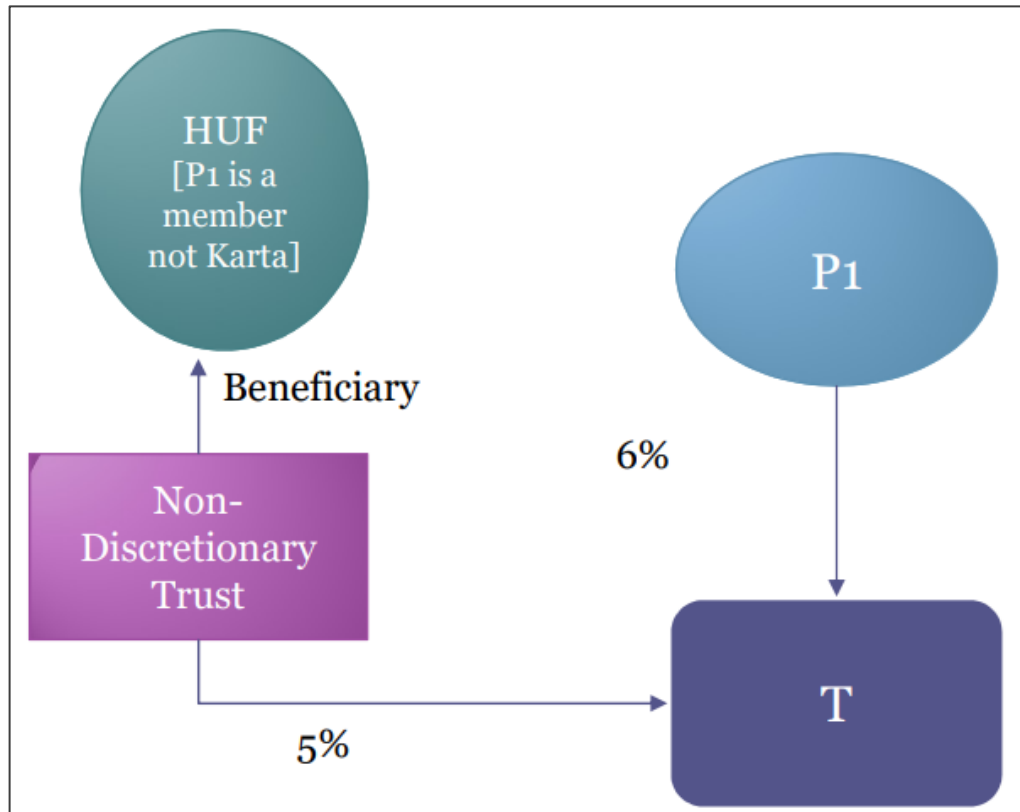


Illustration 17

No SBO declaration required

- Since the beneficiary of the trust is the HUF, the holding of the trust in T is regarded as indirect holding of HUF. However, in case of HUF, the holding is attributed to the individual only if he is Karta. P1 is not the Karta.



Case studies: Investment Vehicles



Case studies: Investment Vehicles

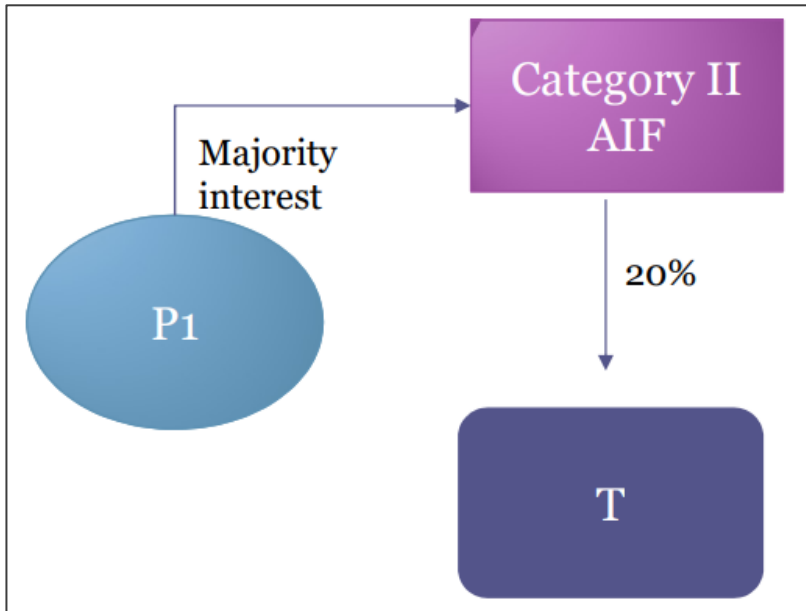


Illustration 18

SBO declaration not required

As per Rule 8, the extent of shares held by RBI-regulated investment vehicles are not to be considered.

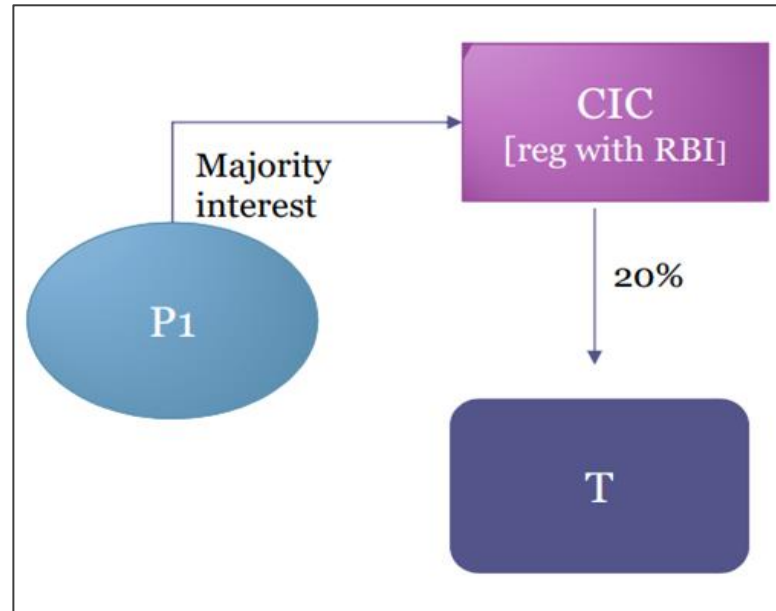


Illustration 19

SBO declaration not required

As per Rule 8, the extent of shares held by RBI-regulated investment vehicles are not to be considered.

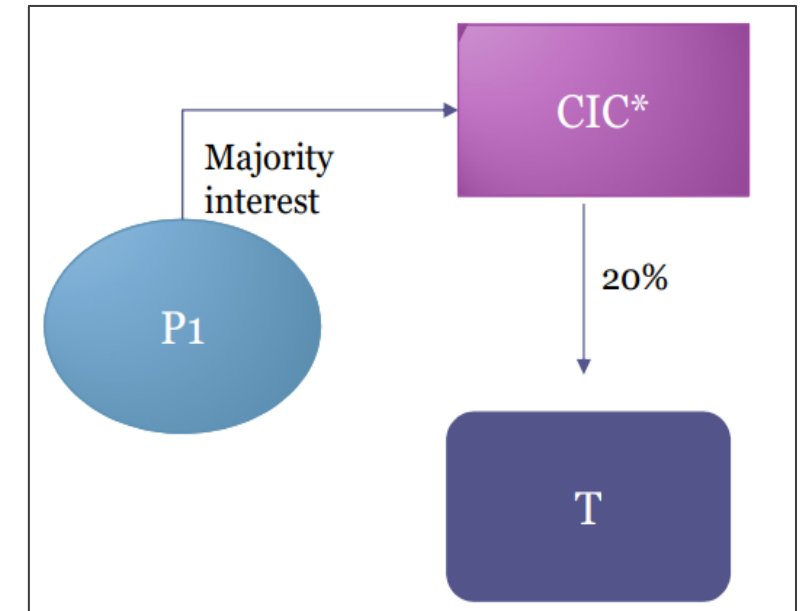


Illustration 20

SBO declaration required

The vehicle in question is not RBI regulated. Hence, the indirect holding rule will apply.

** In view of its public funds/ asset size, the CIC is exempt from registration requirements of the RBI.*



Compliances under the Companies (Significant Beneficial Owners) Rules, 2018



Duties of the reporting co. [Rule 2A & Sec 90(5)]

- **Reporting co. to take steps for SBO identification :**

- Reporting company shall take necessary steps to find out if there is any individual who is an SBO in relation to that reporting company, and
- if so, identify him and cause such individual to make a declaration in Form No. BEN-1

- **Reporting co. to give notice to members holding \geq 10% of:**

- shares, or
- voting rights, or
- right to receive or participate in the dividend or any other distribution payable in a financial year,

- Notice to be given in Form No. BEN-4

- **Sending of notice u/s 90(5)**

- Co. shall also give notice in Form BEN-4
- to any person (whether or not a member of the company) whom the company knows or has reasonable cause to believe:
 - to be an SBO of the company;
 - to be having knowledge of the identity of an SBO or another person likely to have such knowledge; or
 - to have been a SBO of the company at any time during the three years immediately preceding the date on which the notice is issued,
 - and who is not registered as an SBO with the company as required u/s 90.

- The information required by the notice shall be given by the concerned person within a period of 30 days of the date of the notice

SBO Declaration in case of companies

Who is to make the declaration?

- Every individual who qualifies as an SBO pursuant to rule 2(h) of Companies (SBO) Rules, 2018

Trigger for making declaration?

- Every individual, who subsequently becomes an SBO or where his significant beneficial ownership undergoes any change

Timeline for making the declaration?

- Declaration to be given within 30 days of acquiring such significant beneficial ownership or any change therein

Declaration to be given in which form?

- Every SBO shall file a declaration in Form No. BEN-I to the reporting company

Return & Register of SBO [Rule 4 & 5]

- **Return of significant beneficial owners in shares**

- Upon receipt of declaration in BEN-1, the reporting company shall file a return in Form No. BEN-2 with the Registrar in respect of such declaration
- BEN-2 to be filed
 - within 30 days from the date of receipt of BEN-1
 - along with the fees as prescribed in Companies (Registration offices and fees) Rules, 2014

- **Register of significant beneficial owners**

- Reporting company shall maintain a register of significant beneficial owners in Form No. BEN-3.
- The register shall be open for inspection during business hours
 - at such reasonable time of not less than two hours, on every working day as the board may decide
 - by any member of the company
 - on payment of such fee as may be specified by the company but not exceeding fifty rupees for each inspection.



Practical concerns in relation to BEN-2



Practical concerns in relation to BEN-2 (1/2)

☐ Limit on number of SBOs

- ☐ The form allows company to fill details of only 9 SBOs. Therefore, in cases where there are more than 9 SBOs, the Company has to either attach screenshot of form for other members in the optional attachment or can file a separate form.

☐ Limit on number of members through whom indirect holding or right in reporting company

- ☐ The form allows company to fill details of only 9 such members.

☐ Copy of agreement in case of control and significant influence

- ☐ Though, form suggest so, attaching of agreement is not compulsory considering the form allows to do check form without the same.

☐ In case of HUF, Trust and Partnership Firms

- ☐ The form requires CIN/Registration Number. The help kit provides for putting of any registration number. However, in case where no registration number is available, the Company has to enter '0' without prefilling.

☐ Majority stake

- ☐ In situation where the SBO is exercising control as well as significant influence in the reporting company but without having majority stake in the member entity, the form is still asking for majority stake in the member entity. The form does not allow to do check form if the respective radio button is not selected.

Practical concerns in relation to BEN-2 (2/2)

☐ The fate of BEN-2 when BEN-1 is disputed

- ☐ Even though the Rules cast upon the responsibility of filing BEN-2 in case of receipt BEN-1. However, in case BEN-1 is disputed, the Board of Directors may decide to not file BEN-2 considering that the declaration under BEN-1 is not maintainable.

☐ Date of entry of in register of members

- ☐ The date of entry in the register of members under section 88 should be the date of first entry made or when the SBO acquired the interest in such member of the reporting entity.

☐ Change in shareholding post providing BEN-1

- ☐ In case of change in holding of the SBO post providing BEN-1, he/she has to provide a new BEN-1 to the Company. Subsequently, the Company shall be required to file BEN-2 twice.



Application to the Tribunal



Application to Tribunal & order of the Tribunal

Application to the Tribunal [Sec 90(7) r/w rule 7]

- The reporting company shall apply to the Tribunal in the following scenarios:
 - where any person fails to give the information required by the notice in Form No. BEN-4, within the time specified therein; or
 - where the information given is not satisfactory, for order directing that the shares in question be subject to restrictions, including:
 - restrictions on the transfer of interest attached to the shares in question;
 - suspension of the right to receive dividend or any other distribution in relation to the shares in question;
 - suspension of voting rights in relation to the shares in question;
 - any other restriction on all or any of the rights attached with the shares in question

Order of the Tribunal [Sec 90(8) and (9)]

- The Tribunal may-
 - after giving an opportunity of being heard to the parties concerned, make such order restricting the rights attached with the shares
 - within a period of sixty days 60 days of receipt of application or such other period as may be prescribed
- The company or the person aggrieved by the order of the Tribunal may make an application to the Tribunal for relaxation or lifting of the restrictions placed by the Tribunal.
- If no such application has been filed within a period of one year from the date of the order, such shares shall be transferred, without any restrictions to IEPF



Non-applicability



Non-applicability of the Companies (SBO) Rules, 2018 (Rule 8)

The provisions of the Companies (SBO) Rules, 2018 shall not be made applicable to the extent the share of the reporting company is held by the following:

- The authority constituted u/s 125(5) for administration of the Investor Education and Protection Fund;
- Holding reporting company (details of such holding reporting company shall be reported in BEN-2);
- CG, SG or any local Authority;
- A reporting company, or a body corporate or an entity controlled by the CG or by any SG or Governments, or partly by the CG and partly by one or more SGs;
- SEBI registered investment vehicles such as mutual funds, alternative investment funds, Real Estate Investment Trusts, Infrastructure Investment Trust;
- Investment vehicles regulated by RBI or IRDAI or PFRDA.

The compliance with the SBO identification may be perfunctory in case of OPCs. It may also seem unnecessary in case of Sec 8 companies. However, the law does not seem to make any exception at all.



Penal provisions



Penal provisions [Sec 90(10), (11) & (12)]

SBO Declaration

- If any person fails to make an SBO declaration, he shall be liable to a penalty of **Rs. 50,000** and in case of continuing failure, with a further penalty of **Rs. 1,000 for each day** after the first during which such failure continues, subject to a maximum of **Rs. 2,00,000**

Obligation related

- If a company, required to maintain register and file return in BEN-2 or required to take necessary steps in relation to SBO identification, fails to do so or denies inspection as provided therein, the company shall be liable to a penalty of **Rs. 1,00,000** and in case of continuing failure, with a further penalty of **Rs. 5,000 for each day**, after the first during which such failure continues, subject to a maximum of **Rs. 5,00,000**
- every officer of the company who is in default shall be liable to a penalty of **Rs. 25,000** and in case of continuing failure, with a further penalty of **Rs. 200 for each day**, after the first during which such failure continues, subject to a maximum of **Rs. 1,00,000**.

False or incorrect information

- If any person wilfully furnishes any false or incorrect information or suppresses any material information of which he is aware in the declaration made under this section, he shall be liable to action under section 447



SBO in case of LLPs



SBO provisions in case of LLPs: Background

- Pursuant to the MCA Notification dated 11th February, 2022, certain specific sections of the Companies Act, 2013 (including section 90) were made applicable to the LLPs.
 - However, the corresponding rule to the sections specified were not explicitly made applicable.
 - And hence, the following concerns arose in relation to the compliance with the SBO provisions in case of LLPs:
-
- SBO to make a declaration regarding holding of beneficial interest of no less than 25% or such amount as may be prescribed
 - Pursuant to Rule 2(h), in case of companies, the limit of 10% is applicable.
 - In case of LLPs, what percentage should be considered for determining SBO?
 - LLP shall maintain a register of interest declared by SBOs along with any change thereof
 - In case of companies, as per Rule 5, register is maintained in form BEN-3
 - In case of LLPs, register shall be maintained in which format?
 - LLP shall file return of SBO and changes therein with the registrar
 - In case of companies, as per Rule 4, return to be filed within 30 days in form BEN-2
 - In case of LLPs, the same shall be filed within what time and in which format?
 - LLP shall give notice to the individuals whom the LLP knows or has reasons to believe to be an SBO or have knowledge of the identity of a SBO or have been an SBO anytime during 3 FYs.
 - In case of companies, as per Rule 6, notice is given in BEN-4.
 - In case of LLPs, notice shall be given in which format?

MCA Notification dated 9th November, 2023: LLP (SBO) Rules, 2023

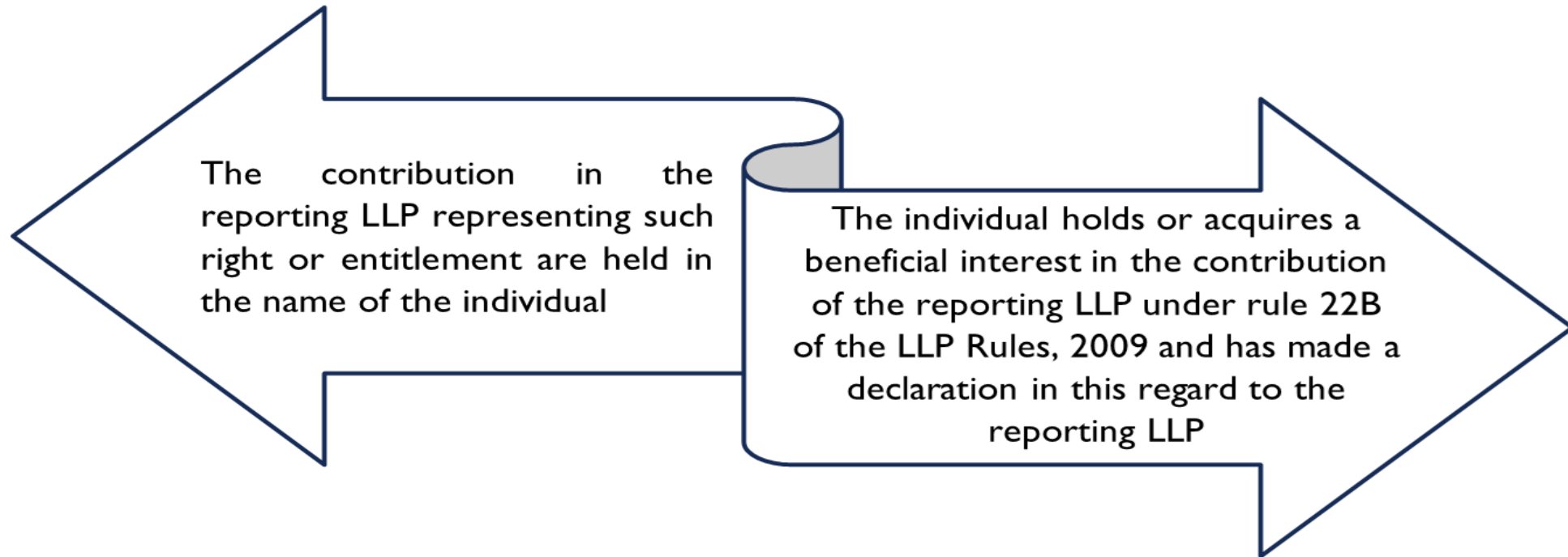
- ❖ MCA vide its Notification dated 9th November, 2023, notified the LLP (SBO) Rules, 2023.
 - The provisions notified are on similar lines with that of the Companies (SBO) Rules, 2018
- ❖ The said Notification clarifies the ambiguity that arose in relation to the Notification dated 11th February, 2022 pursuant to which Section 90 of the Companies Act, 2013 was made applicable to LLPs
- ❖ 9th November, 2023 is significant because-
 - Though the provisions wrt SBO was made applicable wef. 11th February, 2022
 - However, due to practical difficulties could not be applied effectively
- ❖ Timeline for compliance:
 - Within 90 days from the date of commencement i.e., 90 days from 9th November, 2023 which is 7th Feb, 2024
- ❖ LLP (SBO) Rules, 2023 clarifies the following:
 - The limit for SBO declaration is 10%;
 - SBO declaration to be given in Form No. LLP BEN-1;
 - Return of SBO to be filed in Form No. LLP BEN-2;
 - SBO register to be maintained in Form No. LLP BEN-3;
 - LLP shall give notice to the individuals whom the LLP knows or has reasons to believe to be an SBO or have knowledge of the identity of a SBO or have been an SBO anytime during 3 FYs in Form No. LLP BEN-4

Meaning of SBO in case of LLPs [Rule 3(k)]

SBO in relation to a reporting LLP, means an individual who acting alone or together or through one or more persons or trust, possesses one or more of the following rights or entitlements in such reporting LLP, namely:-

1. holds indirectly or together with any direct holdings, not less than 10% of the contribution;
2. holds indirectly or together with any direct holdings, not less than 10% of voting rights in respect of the management or policy decisions in such LLP;
3. has right to receive or participate in not less than 10% of the total distributable profits, or any other distribution, in a financial year through indirect holdings alone or together with any direct holdings;
4. has right to exercise or actually exercises, significant influence or control, in any manner other than through direct-holdings alone.

Determination of direct holding in case of LLPs



Determination of indirect holding in case of LLPs (I/2)

Partner	SBO	Remarks
Body corporate other than LLP	Individual- (a) holds majority stake in that partner; or (b) holds majority stake in the ultimate holdco (whether incorporated or registered in India or abroad) of that partner;	
HUF	Karta of the HUF	Pursuant to section 5 of the LLP Act, 2008, only an individual or a body corporate can become a partner in an LLP; Further, MCA General Circular No. 13/2013 read with General Circular No. 2/2016, neither an HUF nor its karta can become a partner/DP in an LLP
Partnership entity (through itself or a partner)	Individual who- (a) is a partner; or (b) holds majority stake in the body corporate which is a partner of the partnership entity; or (c) holds majority stake in the ultimate holding company of the body corporate which is a partner of the partnership entity.	

Determination of indirect holding in case of LLPs (2/2)

Partner	SBO	Remarks
Trust (through trustee)	Individual who- (a) is a trustee in case of a discretionary trust or a charitable trust; (b) is a beneficiary in case of a specific trust; (c) is the author or settlor in case of a revocable trust.	A trust is not a body corporate hence. cannot become a partner in an LLP
(a) a pooled investment vehicle; or (b) an entity controlled by the pooled investment vehicle, based in member State of the FATF on Money Laundering and the regulator of the securities market in such member State is a member of the IOSCO	Individual in relation to the pooled investment vehicle,- (A) is a general partner; or (B) is an investment manager; or (C) is a Chief Executive Officer where the investment manager of such pooled vehicle is a body corporate or a partnership entity.	

Note: Where the partner of a reporting LLP is,

- (i) a pooled investment vehicle; or
- (ii) an entity controlled by the pooled investment vehicle,

based in a jurisdiction which does not fulfil the requirements specified, the provisions w.r.t. body corporate, HUF, partnership, trust, as the case may be, shall apply

Understanding the meaning of important terms

Majority stake	Acting together
<p>Majority stake means:</p> <ul style="list-style-type: none">• holding more than one-half of the equity share capital in the body corporate; or• holding more than one-half of the contribution in a partnership entity; or• holding more than one-half of the voting rights in the body corporate; or• having the right to receive or participate in more than one-half of the distributable dividend or distributable profits or any other distribution by the body corporate including a partnership entity as the case may be	<p>If any individual, or individuals acting through any person or trust, act with</p> <ul style="list-style-type: none">• a common intent or• purpose of exercising any rights or entitlements, or• exercising control or• significant influence, <p>over a reporting limited liability partnership, pursuant to an agreement or understanding, formal or informal, such individual, or individuals, acting through any person or trust, as the case may be, shall be deemed to be “acting together”</p>



Application to the Tribunal



Application to Tribunal & order of the Tribunal [Sec 90(8) of CA, 2013 & Rule 9]

Application to the Tribunal

- The reporting LLP shall apply to the Tribunal in the following scenarios:
 - where any person fails to give the information required by the notice in Form No. LLP BEN-4, within the time specified therein; or
 - where the information given is not satisfactory, for order directing that the contribution in question be subject to restrictions, including:
 - restrictions on the transfer of interest attached to the contribution in question;
 - suspension of the right to receive dividend or any other distribution in relation to the contribution in question;
 - contribution of voting rights in relation to the shares in question;
 - any other restriction on all or any of the rights attached with the contribution in question

Order of the Tribunal [Sec 90(8)]

- The Tribunal may-
 - after giving an opportunity of being heard to the parties concerned, make such order restricting the rights attached with the shares
 - within a period of sixty days 60 days of receipt of application or such other period as may be prescribed
- The LLP or the person aggrieved by the order of the Tribunal may make an application to the Tribunal for relaxation or lifting of the restrictions placed by the Tribunal.
- If no such application has been filed within a period of one year from the date of the order, such shares shall be transferred, without any restrictions to IEPF



Non-applicability



Non-applicability of LLP (SBO) Rules, 2023 [Rule 10]

The provisions of LLP (SBO) Rules, 2023 shall not apply to the extent the contribution of the reporting LLP is held by:

- CG, SG or any local Authority;
- A reporting LLP, or a body corporate or an entity controlled by the CG or by any SG or Governments, or partly by the CG and partly by one or more SGs;
- SEBI registered investment vehicles such as mutual funds, alternative investment funds, Real Estate Investment Trusts, Infrastructure Investment Trust;
- Investment vehicles regulated by RBI or IRDAI or PFRDA.

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