

**SIGNIFICANT BENEFICIAL OWNERSHIP
AND DEMATERIALIZATION OF SECURITIES UNDER THE COMPANIES ACT, 2013**



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Significant Beneficial Owner [S. 90]



To bring transparency to the manner in which shares of companies are held, and in compliance of India's obligations to align its regulatory framework with the recommendations of Financial Action Task Force, an intergovernmental organization constituted to formulate policies to combat money laundering and terror financing.

Significant Beneficial Owner [S. 90]

Reason behind SBO:

- ✓ Misuse of corporate vehicles for the purpose of evading tax or laundering money for corrupt or illegal purposes, including for terrorist activities has been a concern worldwide.
- ✓ Complex structures and chains of corporate vehicles are used to hide the real owner behind the transactions made using these structures.
- ✓ Realizing this, jurisdictions world over have been putting in place mechanisms to identify the natural person controlling a corporate entity.
- ✓ Changes have been made by many jurisdictions, for example Russian Union and UK in their laws to bring in transparency in company ownership and control.
- ✓ Regulatory concerns have been raised in India also, drawing on examples set by these jurisdictions. The Ministry of Finance has suggested to introduce a Register of Beneficial Owners by mandating it in the Companies Act.

Reason behind SBO:

Considering the recommendations of the Companies Law Committee, Ministry of Corporate Affairs, the Companies (Amendment) Act, 2017 has replaced original Section 90 of the Companies Act, 2013 with a new concept “Significant beneficial owners in a company” which inter alia provides that individual(s) holding significant beneficial ownership are required to make declaration to the company in a prescribed format and the company, thereafter, required to file the information with the Registrar of Companies.

Significant Beneficial Owner [S. 90]

Initiatives in overseas jurisdictions:

- ✓ EU'S Fourth Anti-Money Laundering Directive.
- ✓ Guernsey: Beneficial Ownership of Legal Persons (Guernsey) Law, 2017.
- ✓ UK: The Register of People with Significant Control Regulations 2016.
- ✓ The Beneficial Owner Register Act, 2018 (Wirtschaftliche Eigentümer Register Gesetz – WiEReG) by Austria.
- ✓ Ireland: European Union (Anti-Money Laundering: Beneficial Ownership of Corporate Entities) Regulations 2016.
- ✓ Financial Action Task Force Guidelines on international standards on combating money laundering and the financing of terrorism & proliferation.
- ✓ US Financial Crimes Enforcement Network (FinCEN) Regulations.

Few other initiatives in India:

- ✓ Rule 9 of the Prevention of Money-laundering (Maintenance of Records) Rules, 2005;
- ✓ SEBI under Guidelines on Identification of Beneficial Ownership [SEBI Circular CIR/MIRSD/2/2013 dated January 24, 2013];
- ✓ RBI under Reserve Bank of India (Know Your Customer (KYC) Directions, 2016;

Difference between Section 89 and Section 90

- Section 89 is corresponding to Section 187C of the Companies Act, 1956. Objective of Section 89 is to identify who is register owner and who is beneficial owner, may it be a Corporate Person or Individual.
- While objective of Section 90 is to determine the natural persons who hold 'ultimate' control over companies, *the SBO Rules have prescribed piercing through the veil of non-individual shareholders.*

Difference between Section 89 and Section 90

- Section 89 does not provide any threshold for disclosure. Even if a member is holding beneficial interest for 1 (One) share and he is not a registered owner, then a disclosure shall be made u/s 89. While Section 90 r/w SBO Rules provides a threshold of 10%.
- Section 89 casts duties on corporate persons as well as individual persons to make disclosure if registered owner and beneficial owner is not the same. While under Section 90 the obligation of disclosure of significant beneficial interest has been cast on **all natural persons** who hold such interest *directly and indirectly*, regardless of their domicile or residency status.
- Section 89 is applicable on every type of person whether natural or artificial; while Section 90 is applicable only on natural persons.

New Section 90: Register of significant beneficial owners in a company.

*(1) **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 twenty-five per cent. 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, over the company (herein referred to as "significant beneficial owner"), shall make a declaration to the company, specifying the nature of his interest and other particulars, in such manner and within such period of acquisition of the beneficial interest or rights and any change thereof, as may be prescribed:*

Provided that the Central Government may prescribe a class or classes of persons who shall not be required to make declaration under this sub-section.

Significant Beneficial Owner [S. 90]

New Section 90: Register of significant beneficial owners in a company.

(2) Every company shall maintain a register of the interest declared by individuals under sub-section (1) and changes therein which shall include the name of individual, his date of birth, address, details of ownership in the company and such other details as may be prescribed.

(3) The register maintained under sub-section (2) shall be open to inspection by any member of the company on payment of such fees as may be prescribed.

(4) Every company shall file a return of significant beneficial owners of the company and changes therein with the Registrar containing names, addresses and other details as may be prescribed within such time, in such form and manner as may be prescribed.

Significant Beneficial Owner [S. 90]

New Section 90: Register of significant beneficial owners in a company.

(5) A company shall give notice, in the prescribed manner, to any person (whether or not a member of the company) whom the company knows or has reasonable cause to believe—

- (a) to be a significant beneficial owner of the company;*
- (b) to be having knowledge of the identity of a significant beneficial owner or another person likely to have such knowledge; or*
- (c) to have been a significant beneficial owner 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 a significant beneficial owner with the company as required under this section.*

(6) The information required by the notice under sub-section (5) shall be given by the concerned person within a period not exceeding thirty days of the date of the notice.

Significant Beneficial Owner [S. 90]

New Section 90: Register of significant beneficial owners in a company.

(7) The company shall,—

(a) where that person fails to give the company the information required by the notice within the time specified therein; or

(b) where the information given is not satisfactory, apply to the Tribunal within a period of fifteen days of the expiry of the period specified in the notice, for an order directing that the shares in question be subject to restrictions with regard to transfer of interest, suspension of all rights attached to the shares and such other matters as may be prescribed.

Significant Beneficial Owner [S. 90]

New Section 90: Register of significant beneficial owners in a company.

(8) On any application made under sub-section (7), 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 of receipt of application or such other period as may be prescribed.

(9) 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 under sub-section (8).

(10) If any person fails to make a declaration as required under sub-section (1), he shall be punishable with fine which shall not be less than one lakh rupees but which may extend to ten lakh rupees and where the failure is a continuing one, with a further fine which may extend to one thousand rupees for every day after the first during which the failure continues.

Significant Beneficial Owner [S. 90]

New Section 90: Register of significant beneficial owners in a company.

(11) If a company, required to maintain register under sub-section (2) and file the information under sub-section (4), fails to do so or denies inspection as provided therein, the company and every officer of the company who is in default shall be punishable with fine which shall not be less than ten lakh rupees but which may extend to fifty lakh rupees and where the failure is a continuing one, with a further fine which may extend to one thousand rupees for every day after the first during which the failure continues.

(12) 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.

Significant Beneficial Owner [S. 90]

The Companies (Significant Beneficial Owners) Rules, 2018.

Rule 2(1)(e) "significant beneficial owner" means an individual referred to in sub-section (1) of section 90 (holding ultimate beneficial interest of not less than ten per cent.) read with sub-section [10] of section 89, but whose name is not entered in the register of members of a company as the holder of such shares, and the term 'significant beneficial ownership' shall be construed accordingly;

Significant Beneficial Owner [S. 90]

The Companies (Significant Beneficial Owners) Rules, 2018.

Explanation I. - For the purpose of this clause, the significant beneficial ownership, in case of persons other than individuals or natural persons, shall be determined as under-

(i) where the member is a company, the significant beneficial owner is the natural person, who, whether acting alone or together with other natural persons, or through one or more other persons or trusts, holds not less than ten per cent. share capital of the company or who exercises significant influence or control in the company through other means;

(ii) where the member is a partnership firm, the significant beneficial owner is the natural person, who, whether acting alone or together with other natural persons, or through one or more other persons or trusts, holds not less than ten per cent. of capital or has entitlement of not less than ten per cent. of profits of the partnership;

(iii) where no natural person is identified under (i) or (ii), the significant beneficial owner is the relevant natural person who holds the position of senior managing official;

(iv) where the member is a trust (through trustee), the identification of beneficial owner(s) shall include identification of the author of the trust, the trustee, the beneficiaries with not less than ten per cent. interest in the trust and any other natural person exercising ultimate effective control over the trust through a chain of control or ownership;

Explanation II. It is hereby clarified that instruments in the form of global depository receipts, compulsorily convertible preference shares or compulsorily convertible debentures shall be treated as shares' for the purpose of this clause;

The Companies (Significant Beneficial Owners) Rules, 2018.

3. Declaration of significant beneficial ownership in shares under section 90

(1) Every significant beneficial owner shall file a declaration in Form No. BEN-I to the company in which he holds the significant beneficial ownership on the date of commencement of these rules within ninety days from such commencement and within thirty days in case of any change in his significant beneficial ownership.

(2) Every individual, who, after the commencement of these rules, acquires significant beneficial ownership in a company. shall file a declaration in Form No. BEN-I to the company, within thirty days of acquiring such significant beneficial ownership or in case of any change in such ownership.

The Companies (Significant Beneficial Owners) Rules, 2018.

4. Return of significant beneficial owners in shares.

*Where any declaration under rule 3 is received by the company, it shall file a return in *Form No. BEN-2 with the Registrar in respect of such declaration, within a period of thirty days from the date of receipt of declaration by it, along with the fees as prescribed in companies (Registration offices and fees) Rules, 2014.*

The Companies (Significant Beneficial Owners) Rules, 2018.

5. Register of significant beneficial owners

(1) The company shall maintain a register of significant beneficial owners in Form No. BEN-3.

(2) 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.

The Companies (Significant Beneficial Owners) Rules, 2018.

6. Notice seeking information about significant beneficial owners.-

A company shall give notice seeking information in accordance with under sub-section (5) of section 90, in Form No. BEN-4.

The Companies (Significant Beneficial Owners) Rules, 2018.

7. Application to the Tribunal

The company may apply to the Tribunal in accordance with sub-section (7) of section 90, for order directing that the shares in question be subject to restrictions, including –

- (a) restrictions on the transfer of interest attached to the shares in question;*
- (b) suspension of the right to receive dividend in relation to the shares in question;*
- (c) suspension of voting rights in relation to the shares in question;*
- (d) any other restriction on all or any of the rights attached with the shares in question*

The Companies (Significant Beneficial Owners) Rules, 2018.

8. Non-Applicability.

These rules are not made applicable to the holding of shares of companies/body corporates, in case of pooled investment vehicles/investment funds such as Mutual Funds, Alternative Investment Funds (AIFs), Real Estate Investment Trusts (REITs) and Infrastructure Investment Trusts (InvITs) regulated under SEBI Act.

Significant Beneficial Owner [S. 90]

Meaning of Significant Beneficial Owner [SBO]:

SBO means only such **INDIVIDUAL**:

- *who is holding ultimate beneficial interest of not less than ten per cent shares in a company; or*
- *has right to exercise significant influence or control over the Company; or*
- *is actual exercising significant influence or control over the Company; and*
- *such holding, significant influence or control of Individual may be through one or more persons or trust including a person resident outside India.*

Significant Beneficial Owner [S. 90]

Where the member is a company

- The natural person, who, whether acting alone or together with other natural persons, or through one or more other persons or trusts, holds not less than ten per cent. share capital of the company or who exercises significant influence or control in the company through other mean

Where the member is a partnership firm

- The natural person, who, whether acting alone or together with other natural persons, or through one or more other persons or trusts, holds not less than ten per cent. of capital or has entitlement of not less than ten per cent. of profits of the partnership

where the member is a trust

- The author of the trust, the trustee, the beneficiaries with not less than ten per cent. interest in the trust and any other natural person exercising ultimate effective control over the trust through a chain of control or ownership;

Significant Beneficial Owner [S. 90]

Every significant beneficial owner is required to file a declaration in Form No. BEN-1 to the company in which he holds the significant beneficial ownership:

- (a) on the date of commencement of the Final Rules within ninety days from such commencement;
- (b) Thereafter, *within thirty days in case of any change in his significant beneficial ownership.*

Further, every individual, who, after the commencement of these rules, acquires significant beneficial ownership in a company is also required to file a declaration in Form No. BEN-1 to the company, within thirty days of acquiring such significant beneficial ownership or in case of any change in such ownership.

The Compliances required on part of Company have been enumerated below:

The declaration of beneficial interest received by the company, is required to be filed in Form No. **BEN-2** with the Registrar in respect of such declaration, within a period of thirty days from the date of receipt of declaration by it, by the company.

Every company is required to maintain a register of SBOs in Form No. **BEN-3**.

Also, this register shall be open to 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

Significant Beneficial Owner [S. 90]

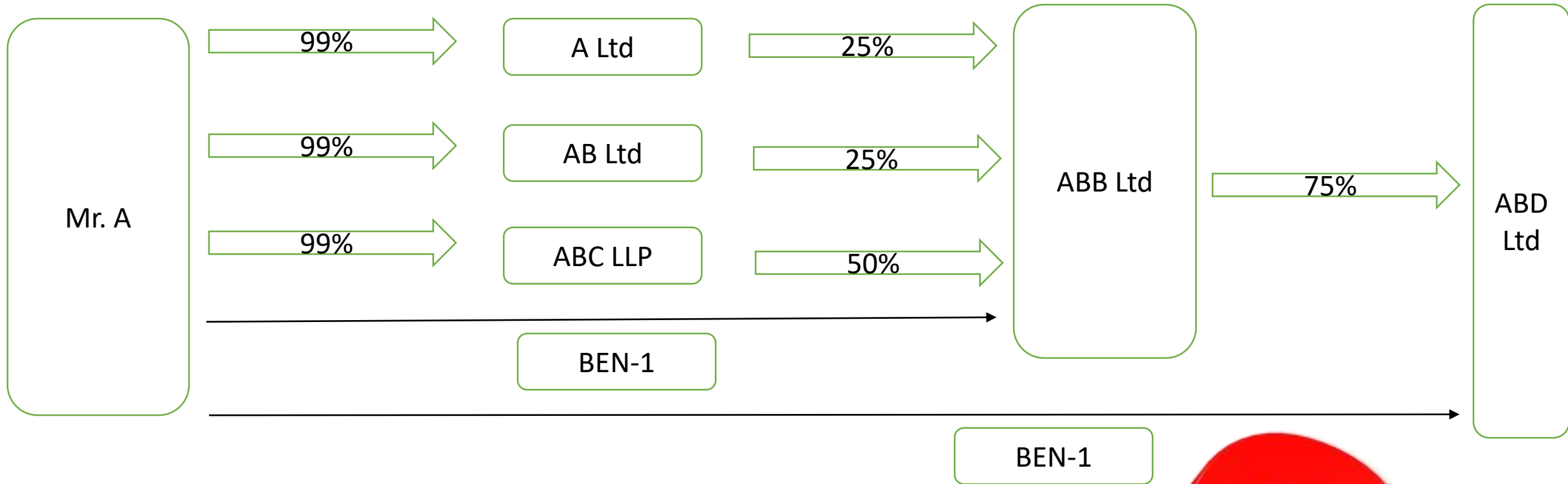
The Compliances required on part of Company have been enumerated below:

The company is made liable to send notice [**BEN-4**] for obtaining declaration from the SBO in case where suo motto declaration has not been received.

In case even after sending of notice, declaration from the SBO has not been received, then the company is mandatorily required to move an application to the **Tribunal (NCLT)**.

Any failure shall attract penalty of INR1million which may extent to INR 5million on the Company and every officer who is default. In addition to this, per day penalty of INR 1000 will also be applicable for each day of continuing default.

Significant Beneficial Owner [S. 90]

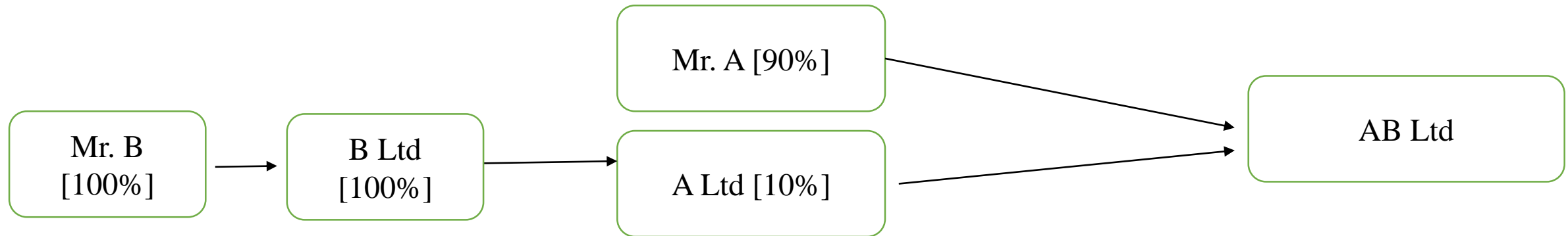


In the above example who shall be the SBO and give BEN-1.



Significant Beneficial Owner [S. 90]

Case Study

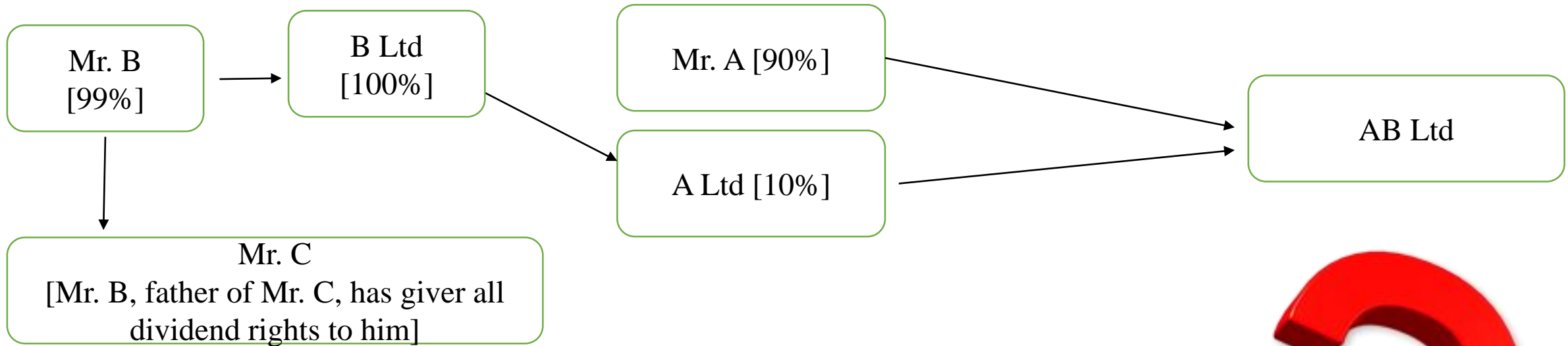


In the above example who shall be the SBO and give BEN-1.



Significant Beneficial Owner [S. 90]

Case Study

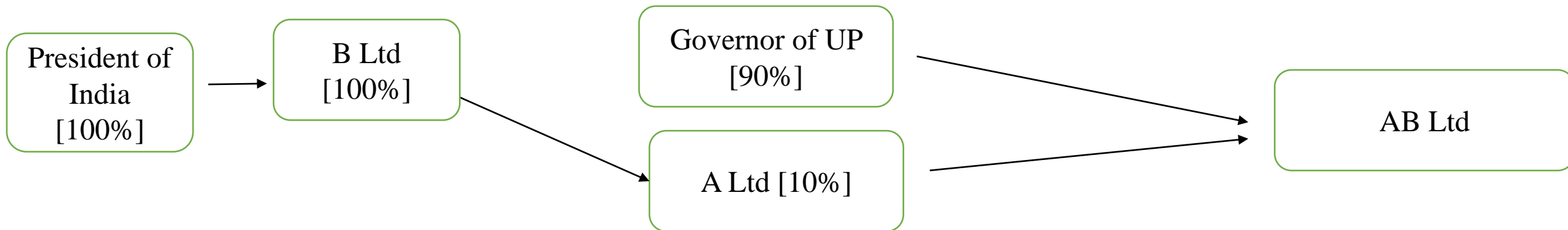


In the above example who shall be the SBO and give BEN-1.



Significant Beneficial Owner [S. 90]

Case Study

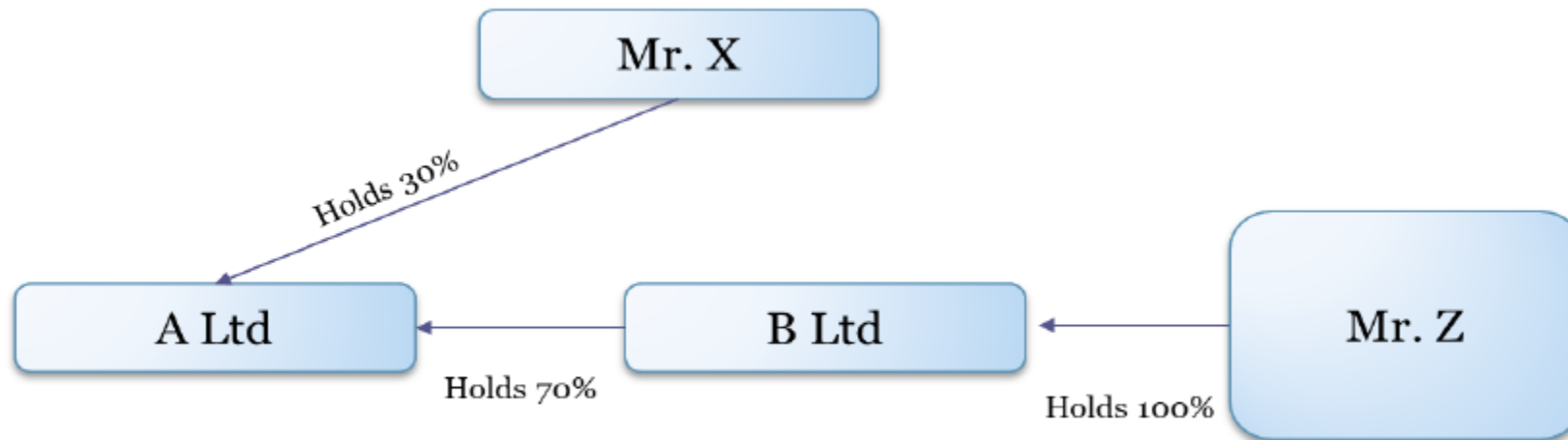


In the above example who shall be the SBO and give BEN-1.



Case Study

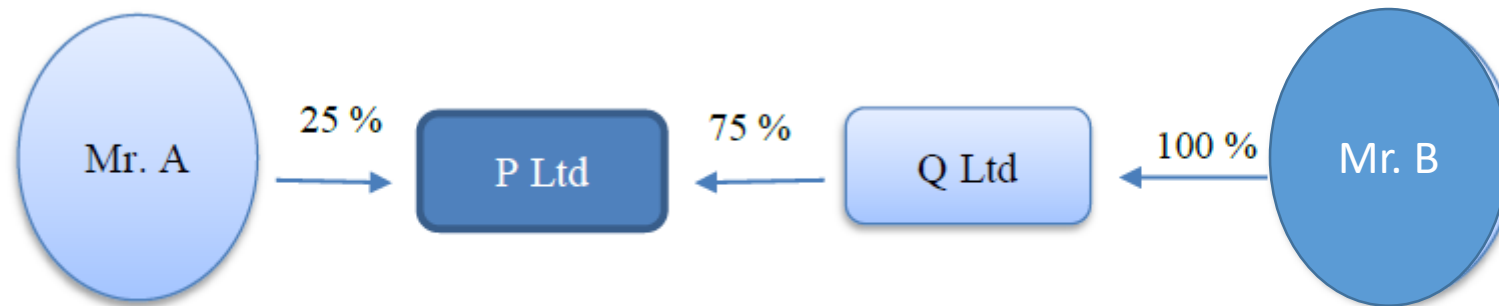
An illustration of simple indirect shareholding is as follows:



In the above example who shall be the SBO and give BEN-1.

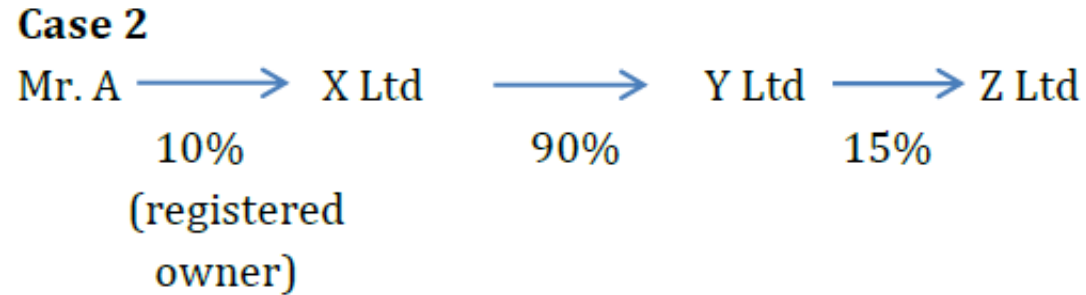
Case Study

An illustration of both direct and indirect shareholding is as follows:



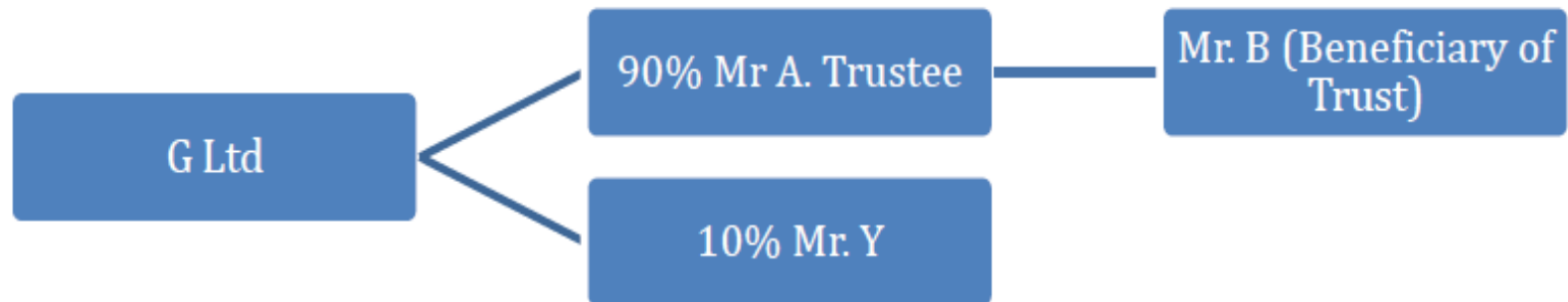
In this case, Who shall be SBO as per Section 90.

Case Study



- **Whether Mr. A is an SBO for X Ltd?** No, as he is the registered owner and his name reflects in the register of members.
- **Whether Mr. A is the SBO for Z Ltd?** No. As per Para (i) of Explanation I of Rule 2 (e) of SBO Rules Mr. A holds 9% (10% of 90%) in Y Ltd which is the corporate shareholder of Z Ltd. At this level, we shall aggregate the cross holding of Mr. A in Y Ltd through X Ltd. As it aggregates to 9%, Mr. A will not be regarded as SBO for Z Ltd.
- **Whether Mr. A is the SBO for Y Ltd?** Interpretation issue of Rule 2(1)(e).

Case Studies



As per the definition of SBO in Rules, Mr. A and Mr. B will be the SBO.

Questions

Are non-residents Individuals also covered under Section 90?



Significant Beneficial Owner [S. 90]

If two or more natural persons are holding together 10% or more- whether all of them who together holding 10% shall file BEN-1 or only one person can file on behalf of others as well?



Questions

An Individual was holding 10% shares in a Company at the commencement of SBO Rules, however, before the due date of filing of BEN-1 the shareholding of such Individual reduces, then whether disclosure is required?



Questions

Whether the redeemable preference shares would be considered for the purpose of SBO?



Questions

The situation has been prescribed under the SBO Rule in case if a Company or firm is a member but no clarification has been given if members is a body corporate or LLP?



Questions

In case of differential voting rights shares, where holder is having shares less than 10% but the voting right more than 10%, in that case whether the holder will be a SBO & if yes, how BEN-1 to be filed-in?



Questions

In case of a person is exercising significant influence by virtue of any agreement, arrangement etc. or by higher voting rights & not by holding any share capital, then how BEN-1 to be filled-in?



Questions

There may be SBOs (on the basis of share capital) or on the basis of control or Significant influence as well, in that case whether all of them to file form BEN-1?



Questions

How the Author/Settlor and Trustee(s) of any trust could be a beneficial owner(s), as both are only holding the position as per by-laws of the trust deed? Then why they need to file BEN-1?



Questions

If the Beneficiaries of a trust are identified but the percentage are not defined (as in case of private discretionary family trusts), then whether all of them need to file BEN-1 or one can file on all behalf's?



Questions

Whether the reporting be done in the Form BEN -1, when the holding falls below 10% or whether the reporting is done for any quantum of change?



Questions

Whether the reporting be done in the Form BEN -1, even if there is no change in 10% shareholding but the change in control?



Questions

Will a SBO be treated as a related party in regard to the Company? if yes, then what would be the consequences in not disclosed as related party in the financial statements.



Questions

In case all the members are Individuals or 91% shares are held by individuals then whether any declaration shall be required?



Questions

Who would be the senior managing official mentioned under the SBO rules?



Questions

Whether an individual who has given disclosure under section 90 is also required to give disclosure under section 89?



Significant Beneficial Owner [S. 90]

Failure to make declaration in BEN-1:

Significant Beneficial Owner= Rs. 1 Lakh – 10 Lakhs. For continuing default: - Upto Rs. 1000 for every day after the first day of failure.

Failure to maintain register U/S 90(2) & file information U/S 90(4) and denial of inspection:

For company and every officer in default:- Rs. 10 Lakhs to Rs. 50 Lakhs. For Continuing default: - Upto Rs. 1000 for every day after first day of failure.

Furnishing of false and incorrect information or suppressing any material information

Person declaring Beneficial interest = **Section 447**.

As a part of its drive to lift the Corporate Veil and target benami entities, the Ministry of Corporate Affairs (“MCA”) has prescribed the requirements of dematerialization of securities by all the unlisted public companies.

In exercise of the powers conferred by Section 29(1)(b) read with Section 469 of the Companies Act, 2013, the MCA has inserted Rule 9A in the Companies (Prospectus and Allotment of Securities) Rules, 2014, which is effective from **October 02, 2018**.

Section 29.

(1) Notwithstanding anything contained in any other provisions of this Act,—

(a) every company making public offer and

(b) such other class or classes of public companies as may be prescribed, shall issue the securities only in dematerialised form by complying with the provisions of the Depositories Act, 1996 (22 of 1996) and the regulations made thereunder.

(2) Any company, other than a company mentioned in sub-section (1), may convert its securities into dematerialised form or issue its securities in physical form in accordance with the provisions of this Act or in dematerialised form in accordance with the provisions of the Depositories Act, 1996 (22 of 1996) and the regulations made thereunder.

9A. Issue of securities in dematerialised form by unlisted public companies

(1) Every unlisted public company shall –

(a) Issue the securities only in dematerialised form; and

(b) Facilitate dematerialisation of all its existing securities in accordance with provisions of the Depositories Act, 1996 and regulations made there under

9A. Issue of securities in dematerialised form by unlisted public companies

(2) Every unlisted public company making any offer for issue of any securities or buyback of securities or issue of bonus shares or rights offer shall ensure that before making such offer, entire holding of securities of its promoters, directors, key managerial personnel has been dematerialized in accordance with provisions of the Depositories Act, 1996 and regulations made there under.

(3) Every holder of securities of an unlisted public company,:

(a) who intends to transfer such securities on or after 2nd October, 2018, shall get such securities dematerialised before the transfer; or

(b) who subscribes to any securities of an unlisted public company (whether by way of private placement or bonus shares or rights offer) on or after 2nd October, 2018 shall ensure that all his existing securities are held in dematerialized form before such subscription.

9A. Issue of securities in dematerialised form by unlisted public companies

*(4) Every unlisted public company shall facilitate dematerialisation of all its existing securities by making necessary application to a depository as defined in clause (e) of sub-section (1) of section 2 of the Depositories Act, 1996 and shall secure **International security Identification Number (ISIN)** for each type of security and shall inform all its existing security holders about such facility.*

(5) Every unlisted public company shall ensure that _

(a) it makes timely payment of fees (admission as well as annual) to the depository and registrar to an issue and share transfer agent in accordance with the agreement executed between the parties;

*(b) it **maintains security deposit at all times**, of not less than two years, fees with the depository and registrar to an issue and share transfer agent in such form as may be agreed between the parties; and*

(c) it complies with the regulations or directions or guidelines or circulars, if any, issued by the securities and Exchange Board or Depository from time to time with respect to dematerialisation of shares of unlisted public companies and matters incidental or related thereto.

9A. Issue of securities in dematerialised form by unlisted public companies

(6) No unlisted public company which has defaulted in sub-rule (5) shall make offer of any securities or buyback its securities or issue any bonus or right shares till the payments to depositories or registrar to an issue and share transfer agent are made.

(7) Except as provided in sub-rule (s), the provisions of the Depositories Act 1996 the securities and Exchange Board of India (Depositories and participants) Regulations, 1996 and the securities and Exchange Board of India (Registrars to an Issue and share Transfer Agents) Regulations, 1993 shall apply mutatis mutandis to dematerialisation of securities of unlisted public companies.

(8) The audit report provided under regulation 55A of the securities and Exchange Board of India (Depositories and participants) Regulations, 1996 shall be submitted by the unlisted public company on a half-yearly basis to the Registrar under whose jurisdiction the registered office of the company is situated.

9A. Issue of securities in dematerialised form by unlisted public companies

(9) The grievances, if any, of security holders of unlisted public companies under this rule shall be filed before the Investor Education and protection Fund Authority.

(10) The Investor Education and protection Fund Authority shall initiate any action against a depository or participant or registrar to an issue and share transfer agent after prior consultation with the securities and Exchange Board of India]

Question

Whether every securities i.e. shares, debentures or warrants, issued by the Company needs to be in dematerialized form.



Question

Whether a private Companies which is subsidiary of a public company is also required to get all its securities in dematerialized form?



Question

The Company has three type of securities as under:

- ✓ Equity Shares = in demat form
 - ✓ Preference Share = in physical form
 - ✓ Debentures = in physical form
1. In the above situation whether the Company can issue its equity shares?
 2. In the above situation whether the Company can issue its preference shares?
 3. In the above situation whether the Company can issue debentures?



Question

The Company has 100 equity shareholders out of them 80 are holding in demat form and 20 in physical form and the Company proposes to issue preference Shares or debentures.

In the above situation, whether the Company can issue preference shares or debentures to 20 equity shareholder?



Question

What would be the consequences if the Companies will not dematerialize there securities?



THANK YOU

For any further clarifications, please contact: Satwinder Singh, Partner, Vaish Associates Advocates (satwinder@vaishlaw.com).

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