

# LATEST AMENDMENTS IN COMPANIES ACT, 2013

23/02/2019

By **CS Makarand Joshi**

# Amendments – Companies Act, 2013

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- Series of amendments to the Company Law
- From 1<sup>st</sup> April, 2018 to 22<sup>nd</sup> February, 2019 – 84 amendments

# Coverage

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- Companies (Incorporation) Amendment Rules, 2019
- Specified Companies (Furnishing of information about payment to micro and small enterprises suppliers) Order, 2019 (MSME Order)
- Amendment in Deposit rules
- Amendment in SBO rules
- Companies Amendment (Ordinance), 2019

# **Companies (Incorporation) Amendment Rules, 2019**

# Companies Incorporation Amendment Rules

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- Effective date – 25<sup>th</sup> February, 2019
- Applicable to – Every Company incorporated on or before 31<sup>st</sup> December, 2017, except following companies
  - ▣ Under process of striking off/ have been struck off
  - ▣ under process of liquidation
  - ▣ Dissolved
  - ▣ Amalgamated
- Following Co.'s are not able to file this return
  - ▣ Defaulted in Annual Filing (AOC-4 and/or MGT-7)
    - exception – Co.'s under Mgt. dispute and ROC has recorded the same in register

# Filing of Return – KYC of Company

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- Filing of return – Active Company Tagging Identities and Verification (e- form ACTIVE (INC-22A))
- Due date – On or before 25<sup>th</sup> April, 2019
- Particulars if Company and Regd. Office and KMP
  - Latitude and Longitude details (Geo-tagging)
  - E-mail ID of Company and **verification by OTP**
  - Details of Statutory Auditor/Cost Auditor
  - Details of Annual filing
  - Details of Directors and their DIN Status
  - Photograph of Regd. Office (both Exterior and Interior) along with KMP/Director who is affixing DSC
- No filing fees if filed before due date

# Professional Certification

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- Professional need to certify following –
  1. He has been engaged for this work
  2. He has perused original document about address
  3. Attachment completely are legibly attached
  4. E-mail belong to the Company
  5. I have kept copies of form and attachment in my records
  6. Awareness about Section 448

# Consequences of non-filing

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- ❑ Late fees of ₹ 10,000
- ❑ Marked as ACTIVE – Non compliant
- ❑ Liable for action under Sec. 12(9) – Physical verification of Regd. Office
- ❑ Filing of following e-forms will be barred
  - ❑ SH-7 (Change in Authorised Capital)
  - ❑ PAS-3 (Change in paid up capital)
  - ❑ DIR-12 (Change in Director except cessation)
  - ❑ INC-22 (Change in Regd. office)
  - ❑ INC-28 (Amalgamation/Demerger)



# MSME

# Concept of Specified Company

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“Specified Companies” means:-

- ❑ all companies who get supplies of goods or services from micro and small enterprises

AND

- ❑ whose payments to micro and small enterprises suppliers exceeds forty-five days from the **date of acceptance** or **date of deemed acceptance** of goods or services

# Definitions under MSME Act, 2006

- ❑ “Date of acceptance” means day of actual delivery of goods or rendering of services or where any objection is made in writing by the buyer regarding acceptance of goods or services within 15 days from the day of delivery of goods or rendering of services, the day on which objection is removed by supplier.
- ❑ “Date of deemed acceptance” means where no objection is made in writing by the buyer regarding acceptance of goods or services within 15 days from the day of the delivery of goods or the rendering of services, the day of the actual delivery of goods or the rendering of services  
(Expl: 2(b) of MSME Act.)

# Initial and Half yearly Return Filing

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Details of all payments outstanding to Micro and Small Enterprises alongwith reason for delay in payments

**Initial return** – e-form MSME-I - within 30 days of notification [22 January 2019] , i.e., by 21st Feb 2019

[?]

**Regular half yearly return-** e-Form MSME-I

- for the period April to September – By 31 October
- for the period October to March – By 30<sup>th</sup> April

# Question

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- ❑ In Initial Return, whether only those outstanding dues to Micro and Small suppliers need to be disclosed which are outstanding beyond 45 days, as on 22nd January 2019

OR

- ❑ all outstanding dues to Micro or small enterprises suppliers existing on 22nd January 2019 are to be disclosed?

# Implications of delay in payment

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As per Section 16 of MSMED Act 2006:-

- The buyer is liable to pay compound interest with the monthly rests to the supplier on the amount at the **3 X of bank rate notified by RBI** in case he does not make payment to the supplier for his supplies of goods or services within 45 days of the acceptance of the goods/service rendered.



Microsoft Word  
Document

# Important Points - MSME

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- ❑ Any business enterprise which is **Manufacturing or Services** are covered as 'Enterprise'
- ❑ **Traders are not** covered under MSME Act
- ❑ Depending on investments in plant machinery – micro/ small / medium enterprise
- ❑ Except manufacturing cos of I Schedule of IDRA, filing of memorandum is NOT Mandatory [Registration?]
- ❑ ANY registered MSME or Entity which procures from MSME is called **SUPPLIER**
- ❑ Every Supplier is eligible for protection u/s 16
- ❑ MSME Notification + MCA notification uses word 'micro, small or medium enterprise supplier'

# Deposit



# Amendment in Deposits Rules

- Amendment in Deposits Rules dated 22nd January 2019
- Additional exclusion – Any amount received from Real Estate Investment Trusts (REIT) regd. With SEBI

# Return Filing – DPT-3

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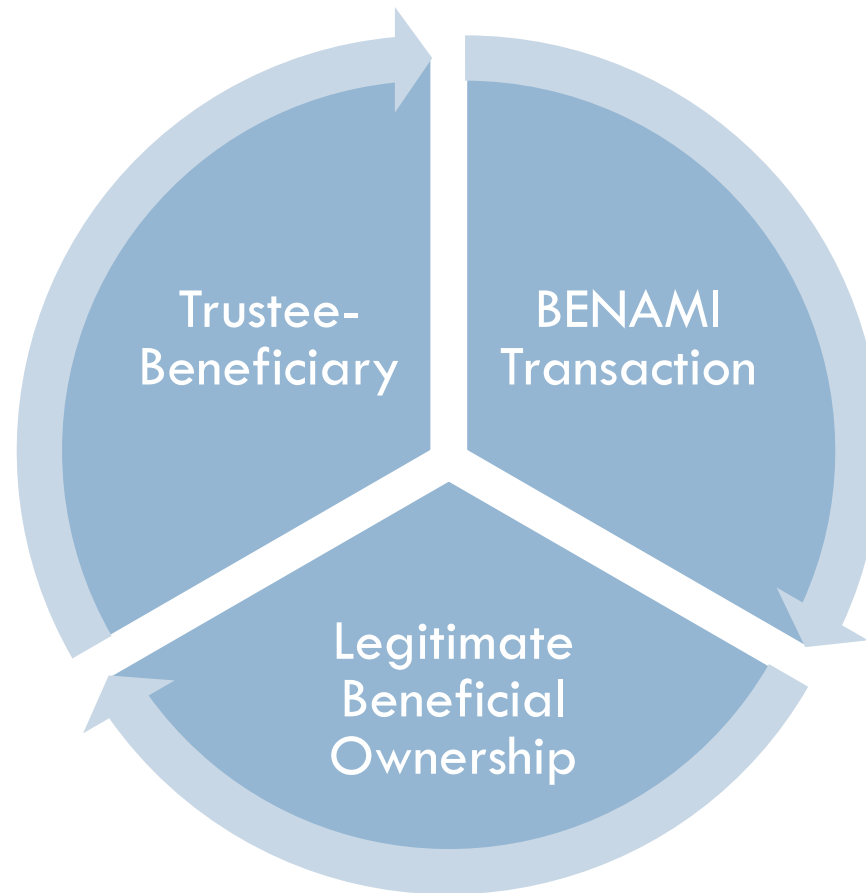
Disclosures to be given in e-Form DPT-3 about Outstanding Receipt of money or loan by a Company but not considered as Deposits, in terms of Rule 2(1)(c) of Chapter V

DPT-3	For the period	Applicability	Due date
One Time Return	From 1 <sup>st</sup> April, 2014- 22 <sup>nd</sup> January, 2019	Every Company other than Govt. Company	21 <sup>st</sup> April, 2019
Annually	Information as on the 31 <sup>st</sup> day of March of that year	Every Company other than Govt. Company	30 <sup>th</sup> June every year

# SBO

# Trust Vs Benami Vs Beneficial Interest

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# What is Beneficial Interest?

# Beneficial Interest Section -89(10)

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- Inclusive Definition
- Beneficial interest in a share **includes, direct 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."**

Person may be  
an Individual  
or a Non  
Individual

# **Concept of Significant Beneficial Owner (SBO)**

## Section 90: Investigation of beneficial ownership of shares in certain cases

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- **Concept of Significant beneficial Owner Introduced**
- **Every individual, who** acting alone or together, or **through one or more persons** or **trust**, including a trust and persons resident outside India, holds **[1]beneficial interests**, of not less than **25%** or such other percentage as may be prescribed, **[10%]** in **shares** of a company or the right to exercise, or the actual exercising of **[2] significant influence or [3]control** as defined in clause (27) of section 2, over the company



# SBO - Definition

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- **Individual** acting [1]alone or [2]together or [3]through one or more persons or trust possess **one or more** the following rights/entitlements in reporting company
  - i. Holds indirectly or together with direct holding **10 %** or more **shares**
  - ii. Holds indirectly or together with direct holding **10%** or more **voting rights** of the shares
  - iii. Right to receive or participate in **distributable dividend or other distributable – 10% or more in a financial year** indirectly or together with direct holding
  - iv. Exercises or has Right to exercise **significant influence** or **control** in any manner other than direct holdings alone

# Some Principles corrected in new Rules

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- Earlier Rules were going beyond the definition of “Beneficial interest” defined in Sec 89(10) – Now, definition of SBO is in **sync with Sec 89(10)**
- Earlier only Indirect Holdings were considered for determining SBO – As per new Rules, **Direct + Indirect** holdings both will be considered

# Explanations in definition of SBO

- **Explanation I** – If no Indirect interest = no SBO
- **Explanation II** – meaning of **directly holding in reporting company**
- **Explanation III** – explanation of term holding rights or entitlements **indirectly** in reporting company
- **Explanation IV** – Situation where member is a **pooled investment vehicle**
- **Explanation V** – Situation where individual members will be considered as “**acting together**”
- **Explanation VI** – share includes **GDR, CCP, CCD**

# **What is the relevance of Explanation in Interpretation of Statutes?**

# Explanation – Interpretation of Statut

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- An explanation added to a statutory provision is not a substantive provision in any sense of the term **but as the plain meaning of the word** itself shows it is merely meant to explain or **clarify certain ambiguities** which may have crept in the statutory provision
- Explanation cannot change the enactment
- Explanation cannot take away any right

[Sundaram Pillai Vs. VR Pattabiraman (AIR)1985SC 582]

# Rule Based SBO Guidelines...

## **Explanation I**

# Explanation I

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- ▣ If an individual does not hold any right or entitlement **indirectly** under (i), (ii) or (iii), he will not be considered as SBO
  - ▣ Means – if Individual is holding rights / entitlements **Directly**
- OR
- ▣ is **not holding** rights / entitmenet

# Explanation II



# Explanation II

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- An individual shall be considered to hold a right or entitlement directly in the reporting company, if he satisfies any of the following criteria
  - ▣ Shares are held in the name of individual
  - ▣ Individual holds beneficial interest in the share u/s 89(2) and the declaration has been made

# Can there be a situation where an individual is holding beneficial interest in the share and has made declaration under Section 89(2)?

- Exemptions covered in Benami Transactions Prohibition Act:-  
Section 2 (9)
  - (iii) any person being an individual in the **name of his spouse** or in the name **of any child** of such individual and the **consideration** for such property has been provided or **paid out of the known sources of the individual**
  - (iv) any person in the name of his **brother or sister or lineal ascendant or descendant**, where the names of brother or sister or lineal ascendant or descendant and the individual appear as joint-owners in any document, and the **consideration** for such property has been provided or **paid out of the known sources of the individual**

# Explanation V

# Explanation V

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- **Acting together –**
  - Individual or individuals acting through any person or trust,
  - With common intent or purpose of
  - Exercising any rights or entitlements, or exercising control or significant influence, over reporting entity
  - Pursuant to an agreement or understanding, formal or informal
  - Such individuals shall be considered to be **“acting together”**

# Explanation V -Acting Together

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- What all situations can be covered in “acting together”?
  - For determining the situations of “acting together”, can we take references from the definition of “Persons acting in concert (**PAC**)” from SEBI Takeover Regulations, 2011?



# Explanation VI

For the purpose of this clause, Instruments in form of GDR, CCP, CCD will be considered as “**shares**”

- Non-Individual holding CCP/CCD – Individuals behind such non-individuals need to be evaluated for determining “Indirect Holding”
- Even if CCP / CCD holding may be small in number, it is important to evaluate whether they have participation rights, and hence significant influence?

# Principles to be followed



# Principles to be observed

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- While analyzing whether an individual is SBO or not, there can be 2 approaches – **Rule based** approach and **Principle based** approach
- The principles of “significant influence”, “control” and “acting together”, “acting through” must be checked over and above Rule based approach
- In case of holding by LLP / partnership entity, all individual partners can be said to be “**acting together**”
- In case of body corporate entity, the holding of majority stake by **PAC** can be the deciding factor for identifying SBO

# Exemptions from SBO Rules

# Exemptions from the compliance requirements under SBO Rules

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- IEPF Authority constituted under section 125(5) of the Companies Act, 2013;
- **Holding reporting company - The details of such holding reporting company shall be reported in Form No. BEN-2.**
- the Central Government, State Government or any local Authority;
- (i) a reporting company, or  
(ii) a body corporate, or  
(iii) an entity,  
controlled by the Central Government or by any State Government or Governments, or partly by the Central Government and partly by one or more State Governments;
- SEBI registered Investment Vehicles **such as** mutual funds, alternative investment funds (AIF), Real Estate Investment Trusts (REITs), Infrastructure Investment Trust (InVITs) regulated by SEBI,
- **Investment Vehicles regulated by RBI**, or IRDA, or Pension Fund Regulatory and Development Authority

# Explanation III

# Explanation III

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- Holding of right / entitlement **indirectly**
- Where member is a **body corporate member** (whether incorporated or registered in India or abroad) excluding LLP:-
  - individual holding **majority stake** in that member
  - individual holding majority stake in **ultimate holding company** (whether incorporated or registered in India or abroad) of that member

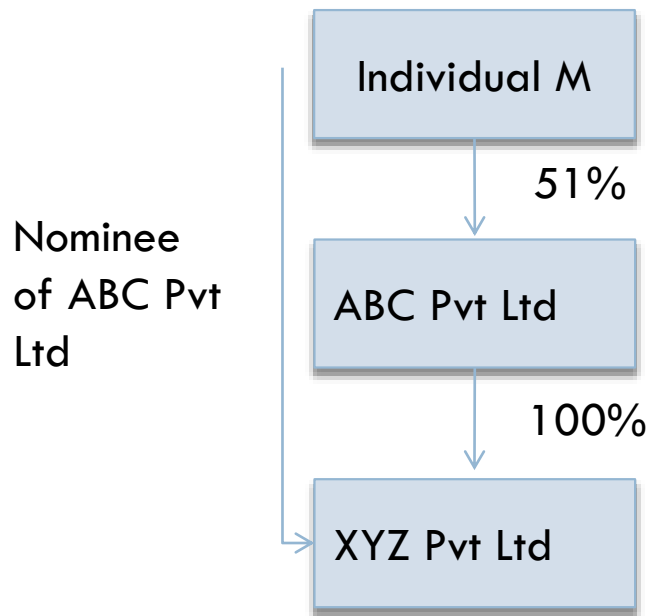
# Definition of Majority Stake

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- **Majority stake –**
  - more than  $\frac{1}{2}$  of equity share capital OR
  - more than  $\frac{1}{2}$  of voting rights OR
  - right to receive/ participate in more than  $\frac{1}{2}$  of distributable dividend

If individual holding majority stake in member company is an SBO in reporting company, then whether mathematical formula is to be used for calculation of SBO?

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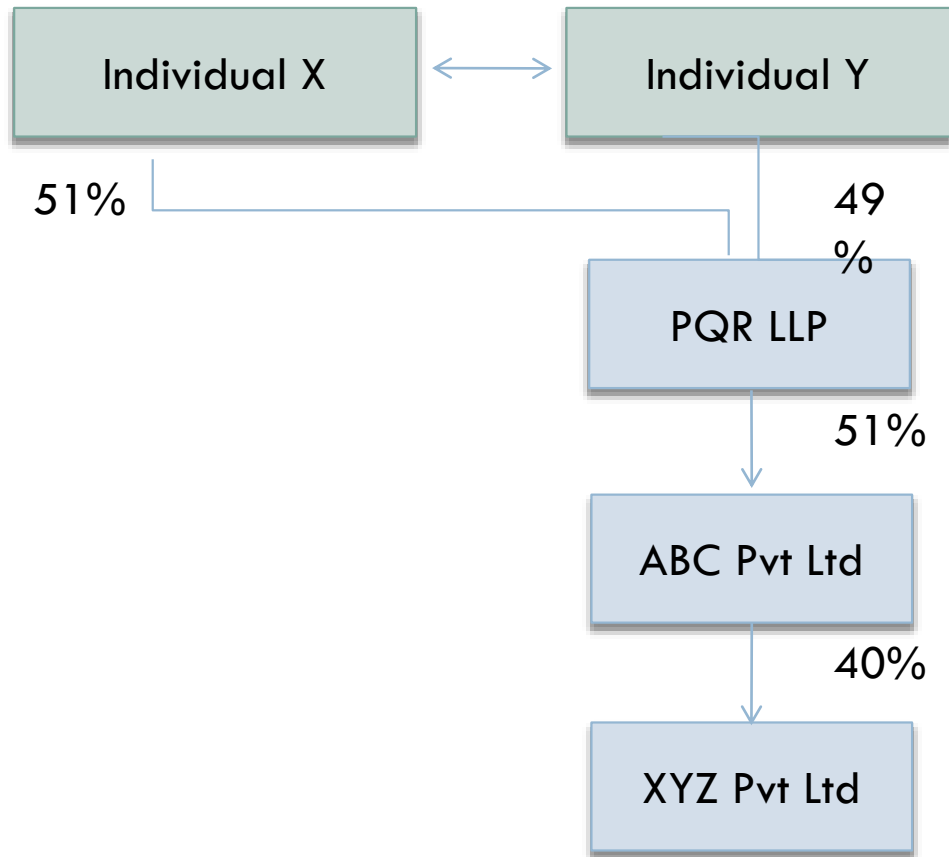


- Whether M will be SBO for XYZ Pvt Ltd ?
- If yes, What will be the quantum of Beneficial Interest of M in XYZ Private Limited

Whether LLP will be covered under the term “ultimate holding company” (second layer of holding in reporting company)?

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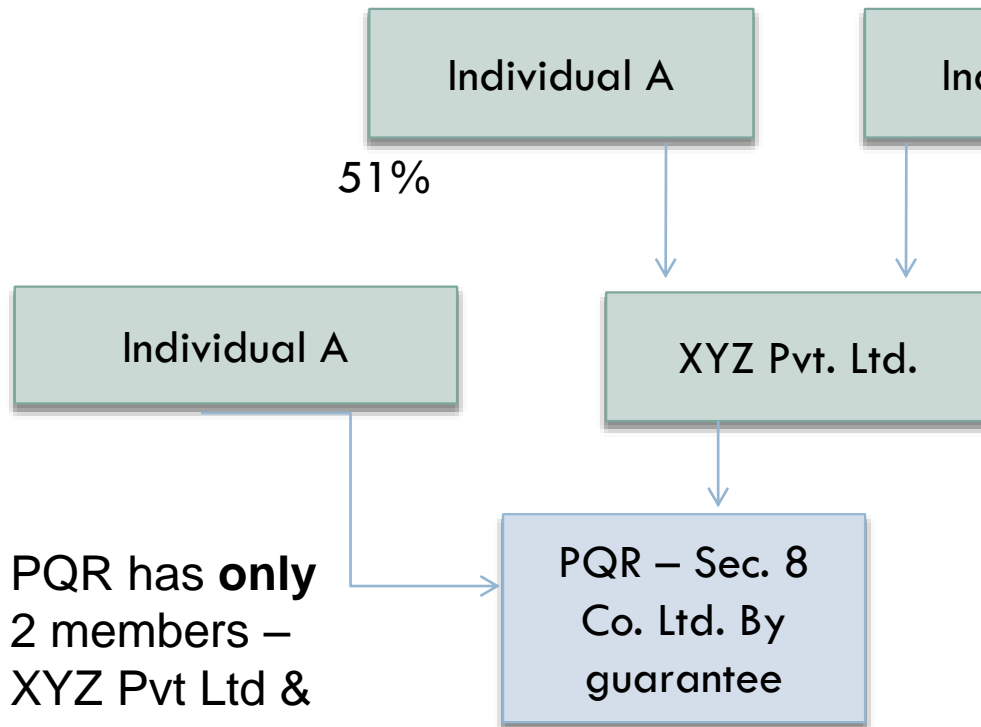
### X & Y are relatives



- Whether Individual X and Y will be considered as SBO for XYZ Company?
- Whether PQR LLP will fall in the term – ultimate Holding Company?
- Whether X and Y would be considered as Acting Together?



## What if the Company is limited by Guarantee?



PQR has **only** 2 members – XYZ Pvt Ltd & Individual A

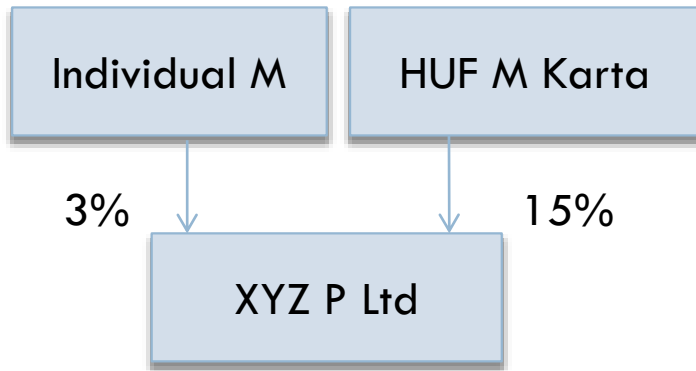
- Whether Individual A is SBO for PQR - Sec 8 Company?
- Whether Individual B is also an SBO?

## **Explanation III - HUF**

- Holding of right / entitlement **indirectly** - Where member is a **HUF**
- Karta can be said to be **indirectly holding** the rights or entitlements in the shares held by the HUF in reporting company
- Hence Karta can be said to be the SBO for the shares held by HUF in reporting company

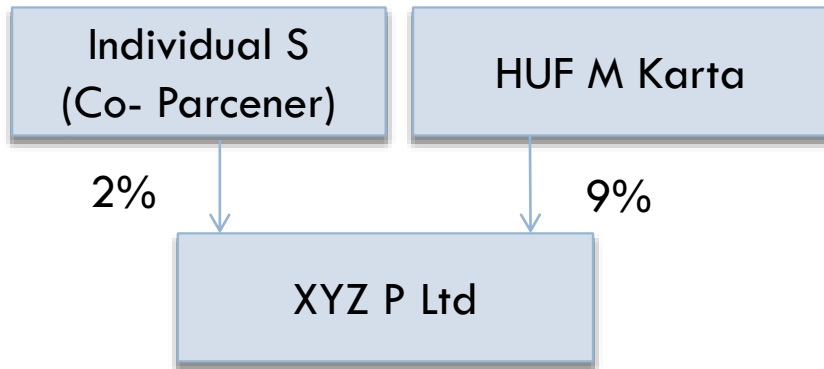
# HUF

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- Whether M is to be considered as SBO?

# HUF



- Whether S & M are acting together?
- Whether S and M are to be considered as SBO?

## **Explanation III – Partnership Entity**

# Explanation III - Partnership Entity

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- Holding of right / entitlement **indirectly** where member is **Partnership firm / LLP** –
  - all individual partners
  - individuals holding **majority stake in body corporate** which is a **partner** in partnership entity
  - individuals holding **majority stake in ultimate holding company** of the body corporate which is a partner in partnership entity

# Explanation III - Partnership Entity

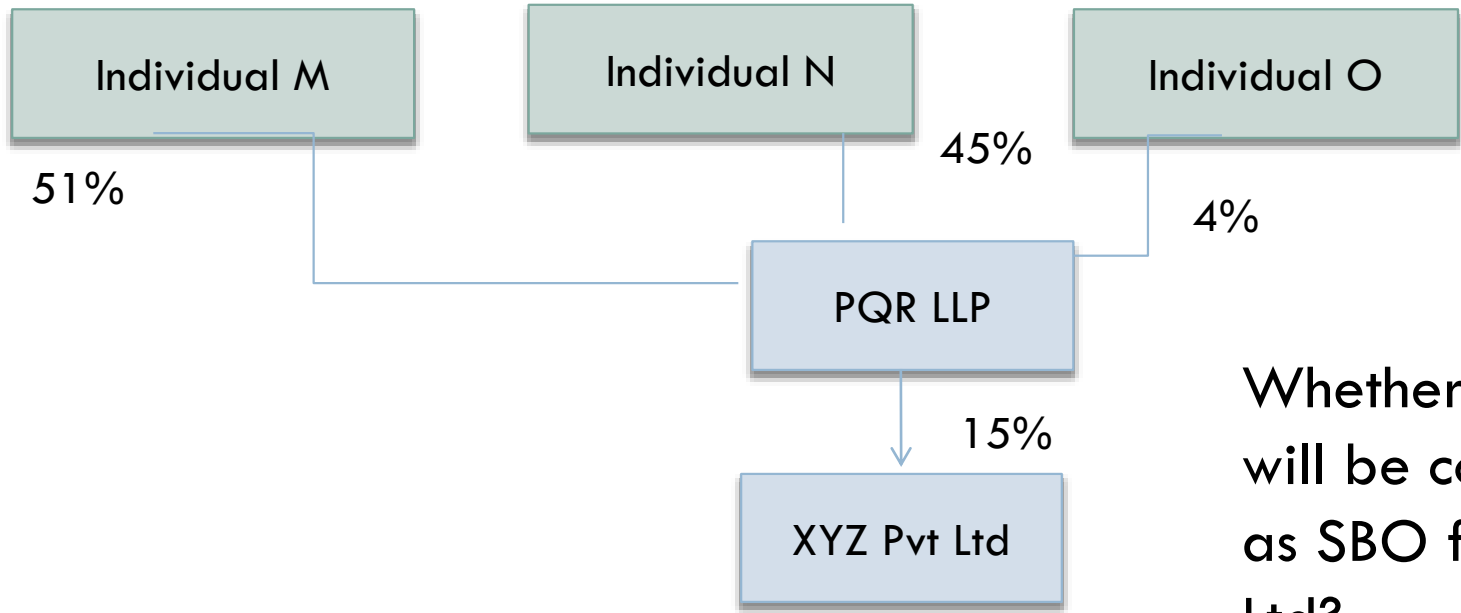
56

- Definition of “partnership entity” means partnership firm **registered** under Indian Partnership Act, 1932 or a limited liability partnership registered under Limited Liability Partnership Act, 2008.
- So, whether this clause(ii) of Explanation III will include only **registered** partnerships under Indian Partnership Act 1932 or is it to be read as any partnership **formed** under Indian Partnership Act 1932?



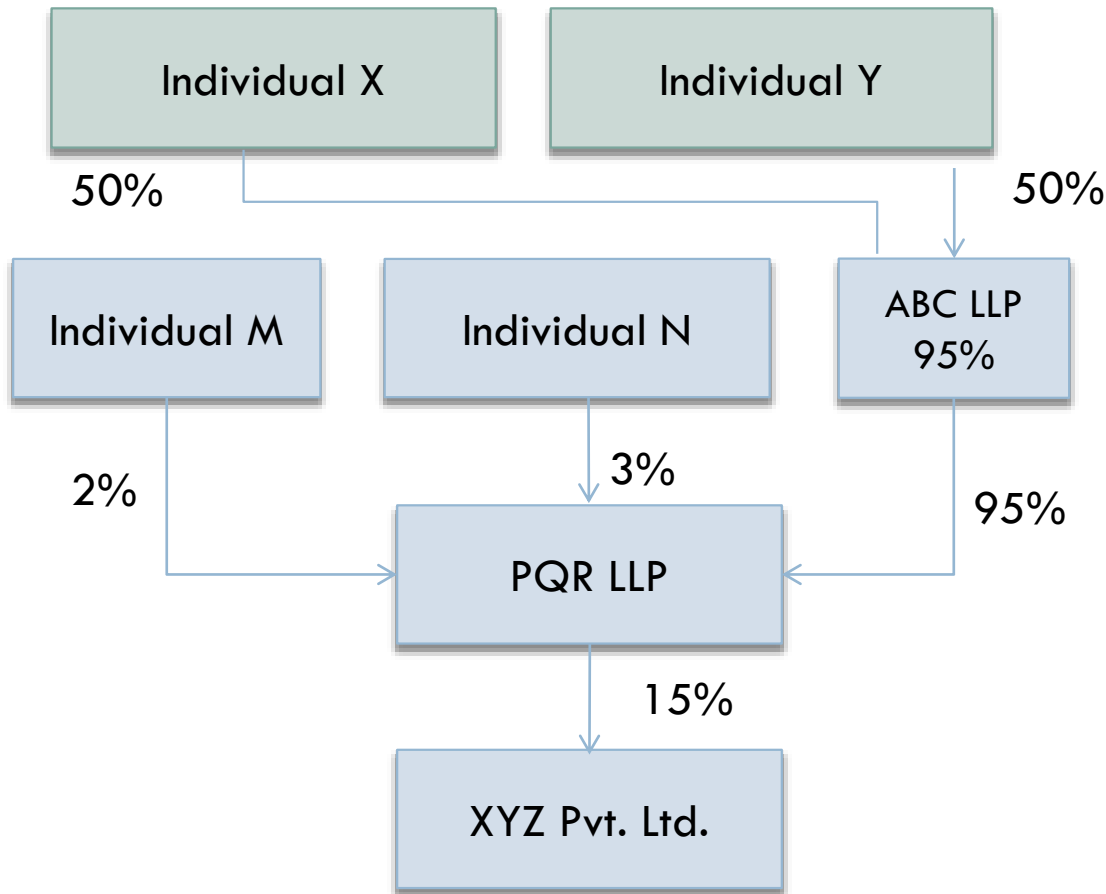
# Whether all partners of partnership entity will be considered as holding the right or entitlement in shares of reporting company indirectly

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Whether M, N, O will be considered as SBO for XYZ Pvt Ltd?

Whether LLP will be covered under the term “body corporate” [which is a partner in the partnership entity] (second layer of holding in reporting company)?



- Whether M and N will be considered as SBO?
- Whether ABC LLP is body corporate?
- Whether X & Y will be SBO for XYZ Pvt. Ltd ? [None of them hold majority]

## **Explanation III – Trust**

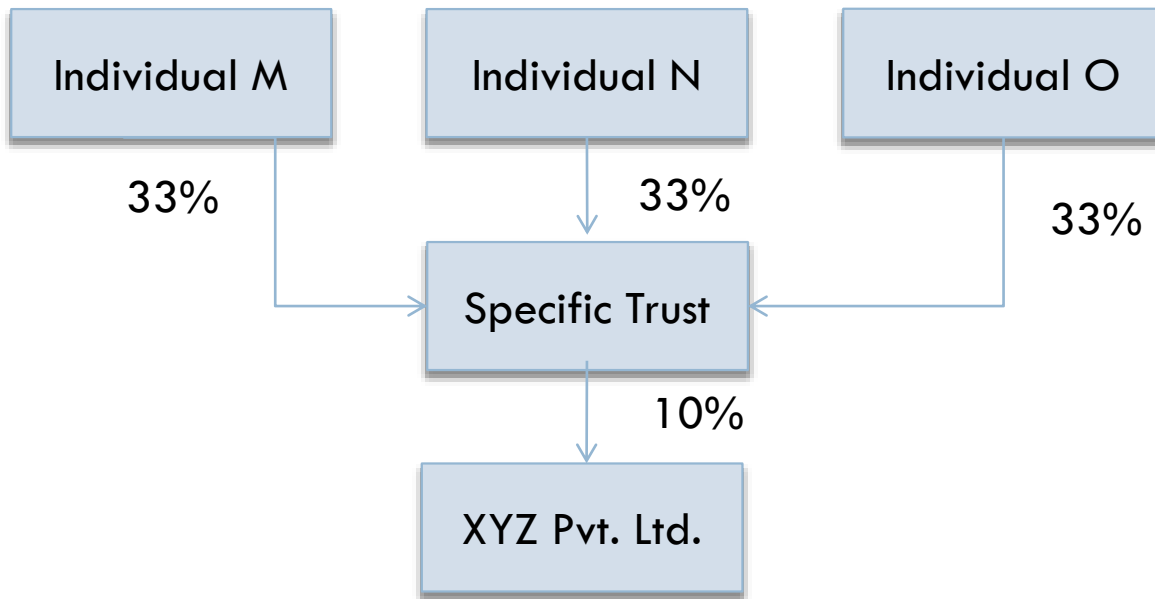
# Explanation III - Trust

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- Holding of right / entitlement **indirectly where member is trust**
  - Discretionary Trust – Trustee [All?]
  - Specific Trust – Beneficiary [All?]
  - Revocable Trust – Author / Settlor [All?]

# Trust

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Whether M, N, O will  
be SBO for XYZ Pvt Ltd

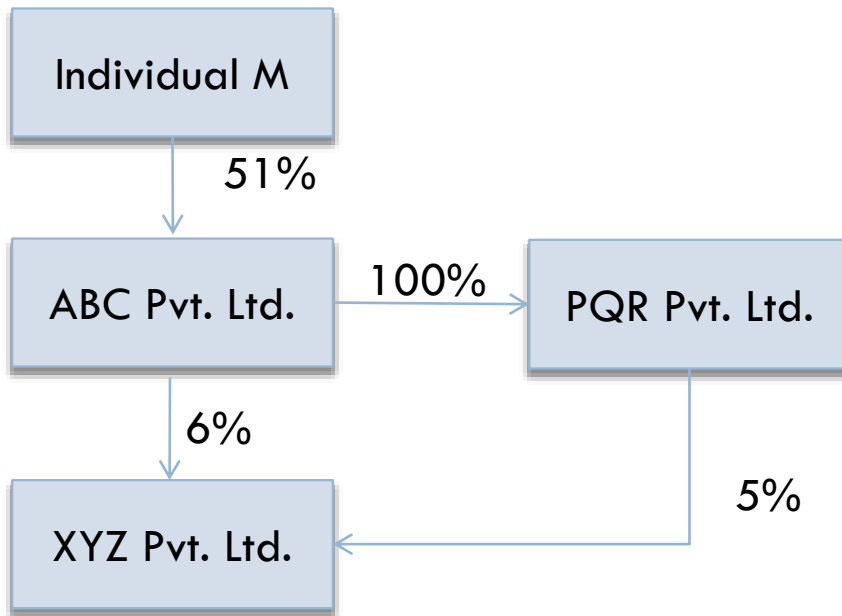
# Explanation V

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- **Acting together –**
  - Individual or individuals acting through any person or trust,
  - With common intent or purpose of
  - Exercising any rights or entitlements, or exercising control or significant influence, over reporting entity
  - Pursuant to an agreement or understanding, formal or informal
  - Such individuals shall be considered to be **“acting together”**

# What can be situations of “acting through one or more person”?

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- Whether individual M is SBO for PQR Pvt. Ltd.?
- Whether individual M is SBO for XYZ Pvt. Ltd.?
- Exemption of Holding Reporting company can be availed in such case?

## Significant Influence

- ❑ power to participate
- ❑ directly or indirectly,
- ❑ in the financial and operating policy decisions of reporting entity
- ❑ but is not control or joint control of those policies



# Explanation V - Questions

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- Whether MD / CFO / CS who are participating in financial and operating policy decisions will also be said to have “significant influence”?

# Actionables under SBO

# Actionable on part of SBO

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- ❑ To submit BEN-1 with Reporting Company within 90 days of amendment (by 9<sup>th</sup> May 2019)
- ❑ To monitor any changes in Significant Beneficial Ownership & submit BEN-1 with Reporting Company within 30 days of change
- ❑ For changes, if any, between 8<sup>th</sup> Feb 2019 to 9<sup>th</sup> May 2019, additional time period of 30 days will be provided for submitting BEN-1 for the change occurred
- ❑ If any non individual holding more than 10% (does not disclose) Company needs to send BEN 4
- ❑ If he does not reply or reply not satisfactory – NCLT
- ❑ NCLT may after hearing pass necessary order

- Aggrieved by the order of the Tribunal - make an application to the Tribunal for relaxation or lifting of the restrictions placed within a period of one year from the date of such order (Ordinance)
- 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 (Ordinance)
- The CG may Prescribed rules for the manner of transfer to IEPF (Proposed Amendment)

# **Companies Amendment (Ordinance) 2019**

# Highlights of Ordinance

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- ❑ Conditions for commencement of business
- ❑ Powers of NCLT to CG [Financial Year, Public to Private]
- ❑ ROC has power to inspect Registered Office
- ❑ Additional Grounds for Strike off
- ❑ Strict time line for charge registration
- ❑ Change in norms for disqualification of Directorship
- ❑ De criminalisation of 16 offences [Fine to Penalty]

# Summary

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Sr. No	Form No	Effective date of Notification	Due Date of form	Availability on MCA
1	INC-20A Commencement of business	2 November, 2018	-	Available
2	FORM NO.RD-1	2 November, 2018	-	Revised form not available
3	CHG-1	2 November, 2018	-	Revised form not available
4	NFRA-1*	13 November, 2018	12 December, 2019	Not available

\* Time limit for filing form NFRA-1 will be 30 days from the date of deployment of form on website of MCA/NFRA (MCA Circular dated 13th Dec, 2018)

# Summary

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Sr. No	Form No	Effective date of Notification	Due Date of form	Availability on MCA
5	MSME – 1* (Initial Return)	22 Jan, 2019	21 Feb, 2019	Not available
6	One time return - DPT -3	22 Jan, 2019	21 April, 2019	Not available
7	MSME – 1 – Half yearly return	22 Jan, 2019	30 April, 2019	Not available
8	BEN-2	8 February, 2019	8 June, 2019	Not available
9	Annual return - DPT -3	22 January, 2019	30 June, 2019	Not available

\* Time limit for filing form MSME-1 will be 30 days from the date of deployment of form on website of MCA (MCA Circular dated 21st Feb, 2018)



**THANK YOU**  
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