

[2022] 140 taxmann.com 305 (Article)

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**Diligent Professional - Stakeholders' Saviour -
(Analysis of provisions relating to Beneficial
Interest and SBO)**



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"The Company Secretary is the Secretary of the Company; he is not the secretary of the shareholders..... He is THE (emphasis needed) watchdog of protecting the principles of Corporate Governance as well as the collective interest of all the stakeholders so also the Company; of course, he is not a bloodhound.", two-member bench lead by S. Ramathilagam Member (Judicial) and Anil Kumar, Member (Technical) of the Chennai Bench of the National Company Law Tribunal (NCLT) quipped while dismissing an Interlocutory Application filed before it¹. The order passed by the Tribunal in this case not only highlights the functions of the Company Secretary but also lauds the action taken by a professional to ensure compliance of the mandatory provisions² by moving a petition to the Tribunal.

Professional in the instant case has filed a petition before NCLT to ensure mandatory compliances to be done by a company under the provisions of Section 90 of the Companies Act.

Section 89 and 90 of the Companies Act, 2013 (CoA) deal with declarations to be given in respect of a beneficial interest in the Company and register of Beneficial Interest. An attempt is made to discuss these provisions in detail in this article.

Section 89 - Declaration in respect of beneficial interest in any share

According to the provisions of section 89(1) and (2) of CoA, every person whose name is registered as a member of a company but not holding beneficial interest in such shares and every person having a beneficial interest in shares but not registered as a member of a company, have to inform about his interest within 30 days of entering such a name in the register of members of the company. Similarly, any change in this status also needs to be informed to the company within 30 days.

In *Pueblo Holdings Ltd. v. Emirates Trading Agency LLC* ([2022] 136 taxmann.com 301 (Madras)), the petitioner was the award holder and he sought to enforce an award by way of an execution petition against the ostensible beneficial owner, who was also an award debtor in this case. It was held that Section 89 prescribes that the obligation to declare a beneficial interest in shares is imposed on three persons viz. the person in whose name the shares are held, the person in whose favour beneficial interest is created, and the company concerned. The court before relegating the matter to the trial court ordered for attachment of shares in question.

As per subsection (5), failure to make a declaration may attract penalties of Rs. 50,000 and Rs. 1000 per day, in case of continuing failure.

Beneficial interest refers to a right to income or use of assets in a trust. It is the right of a party to some profit, distribution, or benefit from a contract or trust. A beneficial interest is distinguished from the rights of a trustee or nominee or such other person who has the responsibility to perform and hold title to the assets. However, such persons do not have any share in the benefits. People with a beneficial interest do not own title to the property, but they have some right to benefit from the property. As per subsection (10), beneficial interest in a share includes any right or entitlement of a person to (i) exercise all or any of the

rights attached to shares; or (ii) receive any dividend or other distribution with respect to such shares. Such rights or entitlement can be assigned through any contract or arrangement or by any other means.

Para 4, Table F- Schedule I of CoA, currently prohibits a company, from recognizing a person holding any share upon a trust. Interestingly report of the Company Law Committee constituted by the Ministry of Corporate Affairs in March 2022, has recommended for insertion of a provision corresponding to Section 153 of the Companies Act 1956 that expressly prohibits companies from entering notice of any trust, express, implied, or constructive on their register of members or of debenture holders. This would provide more clarity on the inclusion of taking a notice of third-party rights in the register of members.

Subsection (6) of the said section mandates the company to file a return within 30 days of receipt of information with the registrar. Non-filing of this return with the registrar may result in a penalty of Rs. 1000 per day on the company as well as the officer in default subject to an outer limit of a maximum amount of Rs. 5 lacs in case of company and Rs. 2 lacs in case of an officer in default.

It is pertinent to note that apart from the penalty provisions mentioned above, the delinquent beneficial owner will also be ineligible to enforce his rights with respect to such shares. It was held in *Pueblo Holdings Ltd. v. Emirates Trading Agency LLC* - [2022] 136 taxmann.com 301 (Mad.) that this prohibition does not restrain the award holder or a third person from claiming his interest in the property. It means the beneficial owner cannot be benefited from his wrong by not disclosing his interest in the shares³.

In *Sanjeev Mahajan v. Aries Travels (P.) Ltd.* - [2020] 120 taxmann.com 275/162 SCL 671 (Delhi), it was iterated that Unless the beneficial owner ensures public declaration of his beneficial ownership in shares, by the filing of return with the ROC, no such beneficial ownership can be enforced in court and held that the non-compliance of the statutory provisions which bar the plaintiff from claiming any rights.

Central Government notification may exempt classes or certain classes of persons from compliance of this section⁴ and accordingly provisions of this section are made not applicable to Government Companies.

Register of significant beneficial owners in a company

The completely refurbished Section 90 of the Act deals with register of significant beneficial owners in a company. Every individual, singly or collectively, through any trust or persons, resident or otherwise, holding over 25% rights in shares of a company shall make a declaration of his interest in the prescribed form BEN 1 within 30 days. Every company, on receiving such information, shall maintain a register in form BEN 3, which will be available for inspection on payment of fees. The company is also required to file a return in form BEN 2 with the registrar within 30 days of receipt of such a declaration.

According to sub-section (4A) of Section 90, every company shall take necessary steps to identify an individual holding significant beneficial owner in relation to the company and require him to comply with provisions of the law. In case a person has not disclosed his significant beneficial ownership, the company is required to give notice in the prescribed format to:-

- (i) a person holding SBO, or
- (ii) a person having knowledge of the identity of the person holding significant beneficial ownership, or
- (iii) a person holding significant beneficial ownership in the last three years.

The person receiving such notice is required to file his reply with the company within 30 days from the date of receipt of such notice.

According to subsection (7), the company shall approach National Company Law Tribunal within 15 days of non receipt of any reply or on receipt of an unsatisfactory reply seeking directions to restrict transfer, suspension of rights, etc. with respect to shares in question. The tribunal may pass such orders within 60 days of receipt of the application.

Any person aggrieved by the order or the company may approach the tribunal for relaxation of such order within one year from the date of the order. The company shall transfer the shares in question to IEPF after one year from the date of the order if no such application is made. It must be noted that provisions of subsection (9) give the tribunal power to revise its own order. This revision shall be in the form of relaxing or lifting restrictions earlier imposed by the tribunal with

respect to such shares in question.

Any person making a default with respect to declaring significant beneficial ownership or a company making a default with respect to its obligations under the section shall be penalized. Also, a person furnishing false or incorrect information shall be liable for action under section 447.

Conclusion

Compliance with sections 89 and 90 of the CoA are important provisions to be complied by every company and; if need be, professionals must tread that extra mile to ensure compliance with these mandatory provisions lest it is the duty of the Board of Directors, and Key Managerial Personnel, especially the Company Secretary⁵, to devise and put in place a proper system to ensure compliance with all the applicable laws, and such system must be adequate and operate effectively⁶.



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1. Interlocutory Application No. 2 of 2021 in *Mayank Agarwal v. Technology Frontiers (India) Private Limited* (The main petition is yet to be decided).
 2. Provisions of section 90 of CoA in this case.
 3. Legal maxim "Commodum ex injuria sua nemo habere debet" mean no party can take undue advantage of his own wrong
 4. Except provisions of subsection (10) of Section 89, which states as follows, "for the purposes of this section and section 90, beneficial interest in a share includes, directly or indirectly, through any contract, arrangement or otherwise, the right or entitlement of a person alone or together with any other person to—
 - (i) exercise or cause to be exercised any or all of the rights attached to such share; or
 - (ii) receive or participate in any dividend or other distribution in respect of such share."

5. As demonstrated by the CS in Interlocutory Application No. 2 of 2021 in *Mayank Agarwal v. Technology Frontiers (India) Private Limited*.
6. According to Section 134 (5)
 - (f) the directors had devised proper systems to ensure compliance with the provisions of all applicable laws and that such systems were adequate and operating effectively.