



Whether private company, subsidiary of a company incorporated outside India, is a subsidiary of a public company?

Sub-section (46) of section 2 of the Companies Act, 2013 defines 'holding company' in relation to one or more other companies, as a company of which such companies are subsidiaries. The *Explanation* to the sub-section (46) of section 2 of the Act has been inserted by the Companies (Amendment) Act, 2017 which states that "For the purposes of this clause, the expression "company" includes any body corporate". Sub-section (11) of section 2 of the Act defines 'body corporate'. Body Corporate or Corporation includes a company incorporated outside India, but does not include: (i) Co-operative society registered under any law relating to co-operative societies; and (ii) any other body corporate (not being a company as defined in this Act), which the Central Government may, by notification, specify in this behalf. Therefore, holding company can be a company incorporated in India and outside India. However, co-operative society registered under any law relating to co-operative societies cannot be a holding

(Contributed by CS Gaurav Pingle)

company. Section 4 of the Companies Act, 1956 defined 'subsidiary company'. Sub-section (7) of section 4 of the Companies Act, 1956 related to subsidiary of a company incorporated in India that determined the status of private company which was a subsidiary of body corporate. However, in the Companies Act, 2013, there is no corresponding provision of sub-section (7) of section 4 of the Companies Act, 1956. Taking into consideration the above discussion, under the Companies Act, 2013 private company subsidiary of a company incorporated outside India continues to be a private company under the provisions of the Act. Also, MCA had issued a Circular in this regard (Circular No. 23/2014 [F.NO.1/13/2013-CL-V], dated June 25, 2014). MCA clarified that there is no bar in the Companies Act, 2013 for a company incorporated outside India to incorporate a subsidiary either as a public company or as a private company. It has been further clarified that an existing company, being a subsidiary of a company incorporated outside India, registered under the Companies Act, 1956, either as private company or as a public company by virtue of section 4(7) of that Act, will continue as

a private company or public company, as the case may be, without any change in the incorporation status of such company.

Can the Articles of Association of a private company which is subsidiary of a public company include restriction on transfer of shares?

Private Company has been defined in sub-section (68) of section 2 of the Act. It means a company which by its Articles of Association: (i) Restricts the right to transfer its shares, (ii) Limits the number of its members to 200, (iii) Prohibits any invitation to the public to subscribe to any securities of the company. A private company shall have all such conditions included in its Articles of Association. In order to understand the status of a private company which is a subsidiary of a public company it is necessary to refer to sub-section (71) of section 2 of the Act that defines 'public company'. Public Company means a company which: (a) Is not a private company, and (b) Has a minimum paid-up share capital as may be prescribed. With reference to the poser-question, it is necessary to refer to proviso to sub-section (71) of section 2 of the Act. The proviso to the said sub-section states that a company which is a subsidiary of a company, not being a private company, shall be deemed to be public company for the purposes of this Act even where such subsidiary company continues to be a private company in its

Articles of Association. By the combined reading of sub-section (68) and sub-section (71) of section 2 of the Act, the Articles of Association of a private company which is subsidiary of a public company shall include restriction on transfer of shares, along with limit on number of members of 200 and prohibition on any invitation to the public to subscribe to any securities of the company.

Can private company which is subsidiary of a public company take benefits of the exemptions exclusively provided to private companies?

Sub-section (71) of section 2 defines 'public company'. The proviso to sub-section (71) of section 2 of the Act states that a company which is a subsidiary of a company, not being a private company, shall be deemed to be public company for the purposes of this Act even where such subsidiary company continues to be a private company in its Articles of Association. Therefore, it can be said that a private company which is a subsidiary of a public company shall be deemed to be public company for the purposes of the Companies Act. Since such company is a public company, the exemptions provided by MCA Notification¹ or any other exemption under the Act is not applicable to a private company which is a subsidiary of a public company.

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1. Notification No. GSR 464(E) [F.NO.1/1/2014-CL-V], dated June 5, 2015 and as amended by Notification No. GSR 583(E) [F.No.1/2/2014-CL-V], dated June 13, 2017.