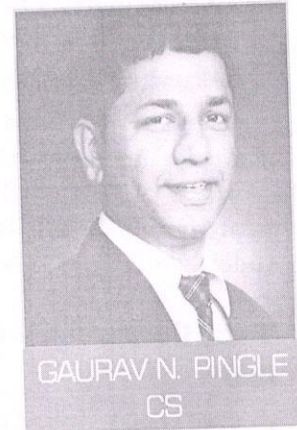


# Can LLP be a Holding Company under the Companies Act?



## Introduction

1. Discussed on a very pertinent issue - can an LLP be a subsidiary under the Companies Act? [[2019] 102 taxmann.com 159 (Article)]. After detailed discussion, it is opined that an LLP cannot be a subsidiary of a company under the Companies Act, 2013 as it does not satisfy any of these two prescribed conditions: (i) Controlling the composition of board of directors; or (ii) Exercising or controlling of more than one-half of the total voting power. Based on this background, let us discuss another important issue - Can an LLP be a Holding Company under the Companies Act?

## 'Holding company' under the Companies Act

2. Sub-section (46) of section 2 of the Act relates to the definition of a 'holding company'. It states that "holding company, in relation to one or more other companies means a company of which such companies are subsidiary companies." The *Explanation* to the said provision (as introduced by the Companies (Amendment) Act, 2017) states that for the purposes of this clause (i.e., sub-section (46) of section 2 of the Act),

the expression 'company' includes any body corporate. There are 3 important tests for a company to be a holding company:

- (i) Holding company is in relation to another company,
- (ii) Such other company is a subsidiary company,
- (iii) The expression 'company' includes any body corporate.

The Companies Law Committee had noted the suggestions of stakeholders that an *Explanation* similar to *Explanation (c)* to Section 2(87) of the Act (relating to the definition of 'subsidiary company') be included in Section 2(46) of the Act, so that a company incorporated outside India could be considered to be the holding company of another company, for the purposes of the Act. The Companies Law Committee noted that this was a minor anomaly, which could lead to uncertainties in ascertaining the status of a company, in case of a foreign holding company; also in determining the applicability of the Act to such a company. Based on this, the Committee recommended that an *Explanation* (on the lines of *Explanation (c)* to Section 2(87) of

the Act) be included in section 2(46) of the Act. Accordingly, sub-section (46) of section 2 of the Act was amended.

The *Explanation* to sub-section (46) of section 2 of the Act states that the expression 'company' includes any body corporate. The reference of 'any' in the said provision is of great significance. It means a body corporate under the Act or any other Act.

### **'Body Corporate' under the Companies Act**

3. Sub-section (11) of section 2 of the Act relates to the definition of '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 the Companies Act), which the Central Government may by notification specify in this behalf. Following are the 4 key points w.r.t. the definition of a 'body corporate':

- (i) It is an inclusive definition,
- (ii) Company incorporated outside India is a body corporate,
- (iii) Co-operative society registered under any law relating to co-operative societies is not a body corporate under the Companies Act,
- (iv) Any other body corporate which the Central Government may specify in this behalf as not a 'body corporate'.

'Body Corporate' means an artificial 'person' created by law; a corporation. Corporation means a body corporate legally authorised to act as a single individual; an artificial person created by royal charter, prescription, or legislative act, having the capacity of perpetual succession [The Shorter Oxford English Dictionary, Volume I, Page 429].

Body corporate means a corporation or a body of persons (in the case of a corporation

aggregate) or an office (in the case of a corporation sole) which is recognised by the law as having a personality which is distinct from the separate personalities of the members of the body corporate or the personality of the individual holder of the office in question [Halsbury's Laws of England, 4th edition, Volume 9, Paragraph 1201].

In *Vibank Housing Finance Ltd., In re* [2006] 130 Comp Cas 705 (Kar.) it was observed that the term 'body corporate' is wider than the expression 'company' and is used in several sections of the Companies Act to denote not only a company incorporated in India but also a foreign company. It includes a corporation formed under any special law of India or a foreign country, except as expressly excluded by the definition. However, it excludes a body corporate, which is not a company under the Companies Act and which is specified by the Central Government in the notification in the Official Gazette.

### **Whether LLP is a 'body corporate'?**

4. Section 3 of the LLP Act states that an LLP is a body corporate formed and incorporated under this Act and is a legal entity separate from that of its partners. An LLP shall have perpetual succession and any change in the partners of a LLP shall not affect the existence, rights or liabilities of the LLP. Section 4 of the LLP Act relates to 'non-applicability of the Indian Partnership Act, 1932'. It states that save as otherwise provided, the provisions of the Indian Partnership Act, 1932 shall not apply to an LLP.

### **Can an LLP be a Holding Company under the Companies Act?**

5. Taking into consideration the above discussion relating to important provisions (*i.e.*, section 2(46) of the Act relating to 'holding company', section 2(11) of the Act relating to 'body corporate' and section 3 of the LLP Act relating to LLP to be a body corporate), LLP can be a holding company under the Companies Act.

### **LLP as holding company - Applicability and non-applicability of certain provisions of the Companies Act, 2013**

6. Based on the above conclusion that LLP can be a holding company under the Companies Act, following analysis relates to the applicability and non-applicability of certain provisions of the Companies Act to the LLP as a holding company:

- (1) Section 2(76) of the Act relates to 'related party'. Related party with reference to a company means any body corporate which is: (A) Holding, subsidiary or an associate company of such company, (B) Subsidiary of a holding company to which it is also a subsidiary; or (C) Investing company or the venturer of the company. LLP (as a holding company) will be a 'related party' to another company;
- (2) Section 19 of the Act relates to 'Subsidiary company not to hold shares in its holding company'. According to the provisions of the Act no company shall, either by itself or through its nominees, hold any shares in its holding company. It further states that no holding company shall allot or transfer its shares to any of its subsidiary companies and any such allotment or transfer of shares of a company to its subsidiary company shall be void. Since the LLP does not have shares, LLP's subsidiary company can hold contribution in the LLP (as holding company);
- (3) Section 141 of the Act relates to the 'Eligibility, qualifications and disqualifications of auditors'. According to the provisions of the Act, certain persons shall not be eligible for appointment auditors of a company. This includes:
  - (i) A person who, or his relative or partner is holding any security of or interest in the company or its subsidiary, or of its holding or associate company or a subsidiary of such holding company;
  - (ii) A person who, or his relative or partner is indebted to the company, or its subsidiary, or its holding or associate company or a subsidiary of such holding company, in excess of such amount as may be prescribed; or
  - (iii) A person who, or his relative or partner has given a guarantee or provided any security in connection with the indebtedness of any third person to the company, or its subsidiary, or its holding or associate company or a subsidiary of such holding company, for such amount as may be prescribed. The criteria w.r.t. the eligibility, qualifications and disqualifications of auditors (as prescribed in section 141 of the Act) are applicable to the LLP (as holding company).
- (4) Section 149(6) of the Act relates to eligibility criteria of independent director. According to the provisions, an independent director in relation to a company, means a director other than a managing director or a whole-time director or a nominee director who, in the opinion of the board of directors, is a person of integrity and possesses relevant expertise and experience. Such director who is or was not a promoter of the company or its holding, subsidiary or associate company. Such director who is not related to promoters or directors in the company, its holding, subsidiary or associate company. Such director who has or had no pecuniary relationship, other than remuneration as such director with the company, its holding, subsidiary or associate company, or their promoters, or directors, during the two immediately preceding financial years or during the current financial year. Each and every criteria is to be assessed independently where LLP is a holding company.
- (5) Section 170 of the Act relates to 'Register of directors and key managerial per-

sonnel and their shareholding'. According to the provisions every company shall keep at its registered office a register containing such particulars of its directors and KMP as may be prescribed, which shall include the details of securities held by each of them in the company or its holding, subsidiary, subsidiary of company's holding company or associate companies. Since there are no securities in LLP, such provision is not applicable to LLP (as holding company).

- (6) Section 188 of the Act relates to 'Related Party Transactions'. The consent of the board of directors shall be required for any contract of arrangement by the company with its related party. The contract or arrangement, in the case of a company having a paid-up share capital of not less than such amount, or transactions not exceeding such sums, as may be prescribed, shall not be entered into except with the prior approval of the company by an ordinary resolution. However, such ordinary resolution shall not be applicable for transactions entered into between a holding company and its wholly owned subsidiary whose accounts are consolidated with such holding company and placed before the shareholders at the general meeting for approval. For claiming an exemption of the ordinary resolution, two conditions are to be fulfilled: (i) Consolidation of financial statements, and (ii) Placing before the shareholders at the general meeting for their approval. In case of an LLP, there is no specific provision of shareholders approval at the general meeting, therefore, such exemption for LLP (as a holding company) is not applicable.

- (7) Section 185 of the Act relates to 'Loans to directors'. The company shall not, directly or indirectly, advance any loan, including any loan represented by a book debt to, or give any guarantee or provide any security in connection with any loan taken by any director of company, or of a company which is its holding company or any partner or relative of any such director. In case of an LLP, there is no specific provision of director, therefore, such prohibition (*i.e.*, under section 185(1) of the Act) is not applicable to an LLP (as a holding company).

- (8) Section 144 of the Act relates to 'Auditor not to render certain services'. According to the provisions an auditor appointed under the Act shall provide to the company only such other services as are approved by the board of directors or the audit committee, as the case may be, which shall not include certain services (whether such services are rendered directly or indirectly to the company or its holding company or subsidiary company). Such restriction on rendering certain services by the auditor shall be applicable in the case of an LLP (as a holding company).

### Concluding remarks

7. The amendment to the definition of the holding company by the Companies (Amendment) Act, 2017 had a significant impact on the group entities (companies & LLP), and their shareholding structure. The amendment re-defined the relationships between the group entities and more specifically the compliances w.r.t. the related party transactions. The provisions relating to holding company should be reviewed independently for determining its applicability or non-applicability under the Companies Act.

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1. Under section 2(87) of Companies Act, 2013.