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Date: 5th May, 2022

To,
The Secretary,
Ministry of Corporate Affairs,
Shashtri Bhawan, New Delhi

Dear Sir,

Sub: - Technical Challenges faced while complying provisions of Companies Act, 2013 which are made applicable to LLP as per provisions of Sec. 67 of LLP Act, 2008

The Chamber of Tax Consultants, established in 1926, is one of the oldest non-profit organizations of tax practitioners, having Advocates, Chartered Accountants and Tax Practitioners as its members spread across Pan India. Many senior tax professionals who regularly appear before ITAT, High Courts and the Supreme Court are its Past Presidents. It has from time to time made various representations to different Government Authorities drawing their attention to pressing issues.

The Ministry of Corporate Affairs (MCA) had, vide notification dated 11th February, 2022 made certain sections of Companies Act, 2013 applicable to LLP.

Further LLP (Amendment) Act, 2021 prescribed amendments in provisions of LLP Act, 2008. The major part of this Amendment Act is w.r.t. decriminalisation of offences and other concepts like Small LLP, applicability of Accounting and Auditing standards were also introduced, which came in effect from 1st April, 2022.

This is a very welcome step and will help a lot in improving the transparency and public disclosure with regard to LLPs. However, the structure and compliance applicable to a 'company' cannot be equated with 'LLP' as the fundamentals of functioning of both entities are totally different. The manner of accounting of 'capital' and incidental matters in case of company is much different to the manner of accounting and incidental matters relating to 'contribution' in LLP.

There are certain challenges faced by LLPs while trying to comply with some of the sections which are listed out below:

Section	Challenges faced
<p>Sec. 34A Accounting and Auditing Standards</p>	<p>Section 129 of Companies Act, 2013 states about the format in which financial statements to be prepared for companies, i.e., in the format prescribed in Schedule III. Similar provision is given under Section 34(2) of LLP Act, 2008 about the format for preparation of Statement of Account and Solvency. This format is to be prescribed in the Rules, but it is not yet prescribed. The LLP Rules 2009 mention about the form in which this Statement of Account and Solvency is to be filed with ROC, i.e., Form 8. However, there is no standardisation in the format and manner in which Statement of Account and Solvency is to be prepared by LLPs.</p> <p>Further Section 133 of Companies Act, 2013 mandates companies to follow Accounting Standards prescribed by Central Government for different classes of Companies. The LLP Amendment Act, 2021 has introduced Section 34A in LLP Act, 2008 which empowers Central Government to prescribe accounting standards and auditing standards for certain class of LLPs too. However, the same standards of accounting as are applicable for companies cannot be made applicable to LLPs because of the basic difference between both the structures. Further as mentioned above, there is no standard format in LLPs for preparation of Statement of Account and Solvency. Unless this format of Statement of Account and Solvency is standardised, it will practically be very difficult for companies to follow the accounting standards.</p> <p>Similarly, Section 143(3) of Companies Act, 2013 states about the contents which auditors report of companies shall include and Section 143(9) mandates every auditor to follow auditing standards. Section 143(11) empowers Central Government to direct, in case of some class of companies, the auditors to include an additional CARO Report as part of their auditor's report. Unless a similar section is included in the LLP Act, 2008 to prescribe the contents on which auditor needs to comment upon</p>

	<p>while doing audit, it will be very difficult for auditors to comply with auditing standards for LLPs. Further the same standards of auditing or the same format of CARO report as are applicable for companies cannot be made applicable to LLPs because of the basic difference between both the structures and difference in applicability of various provisions of respective Acts to companies and to LLPs.</p> <p>Therefore, it is necessary to insert provisions related to above-mentioned subject in LLP Act, 2008 before making accounting standards and auditing standards applicable to LLPs.</p>
<p>Concept of DP and Director</p>	<p>As per notification dated 11th February, 2022, while making Section 164 and Section 167 of Companies Act, 2013 applicable to LLPs, certain modifications were done in respect of LLPs. One such change was that the word “Director” used in these sections to be replaced with “Designated partner (DP)” in the context of LLPs.</p> <p>The said wordings indicate that the position of Designated Partner in LLP is equated with the position of Director of Company in the context of Section 164 and 167 of Companies Act, 2013.</p> <p>If we compare position of Director vis-a-vis DP, it can be seen:</p> <p>(a) DP should necessarily be partner and exception is only provided in case of body corporate being the partner of LLP.</p> <p>Whereas in case of company, the shareholders and directors are two different concepts. The director(s) must not necessarily be a shareholder for being a director.</p> <p>(b) DP is a partner who is additionally made responsible to take care of compliance part. He need not be a decision-making partner.</p>

	<p>Whereas a director is designated with all the power of taking decisions in case of company, although he may or may not a member or even related to the members.</p> <p>From the above, it can be inferred that position of DP cannot be equated with the Director and therefore applying similar concept of disqualification in case of DP may not a welcome and fair step.</p> <p>Therefore, applying Companies Act Provisions to LLP is not a welcome step.</p>
<p>Sec. 164 Disqualifications for Appointment of Director</p>	<ul style="list-style-type: none"> • As per amendment to Sec. 164 in Companies Act, 2013 in the context of LLPs, post 11th February 2022, any person who has incurred any disqualification mentioned under sec 164, shall not be eligible to become a designated partner (DP) of any LLP or to continue as designated partner in said LLP. • Further if we read proviso to Sec. 167 of Companies Act, 2013 which is also made applicable to LLPs, it states that such disqualified DP shall be vacated from all other LLPs other than defaulting LLP • So it can be seen that Sec 164 says that disqualified DP shall not be eligible to continue as DP in defaulting LLP whereas proviso to Sec 167 says disqualified DP shall not vacate from defaulting LLP. Hence there is a contradiction in drafting of Sec. 164 and proviso to Sec 167 made applicable to LLPs. If we interpret and go by literal interpretation of Sec. 164, then the proviso to Sec. 167(1) will become absurd. • Under Section 164(2) Companies Act, 2013, there is a requirement on directors to inform all companies where he is a director about his non-disqualification in Form DIR-8 before he gets appointed. If a similar provision is

	<p>not inserted in LLP Act, then it shall be very difficult to find out whether a person being appointed as a DP is disqualified?</p>
<p>Sec. 167 – Vacation of office of Director</p>	<ul style="list-style-type: none"> • Sec. 167(3) made applicable to LLPs says that where all the designated partners of limited liability partnership vacate their offices under any of the disqualifications specified in sub-section (1), the partners or, in their absence, the Central Government shall appoint the required number of designated partners who shall hold office till the designated partners are appointed by the limited liability partnership. • Sec. 7 states that Designated partners necessarily should be partners in case of Individual Partners and in case of Body Corporate members, nominee of said body corporates can act as DPs. <p>If partners of LLP are not willing to admit other person as DP as this will necessarily require them to become partners in that LLP OR in case there is dispute among partners and hence they are not willing to appoint any other partner, then it will lead to deadlock situation. Hence it is not clear whether the DP appointed by CG will be treated as good as nominee OR whether such LLP must necessarily admit him as a partner. What will be his terms of admission w.r.t. Contribution/Profit sharing and Voting rights is also not clear.</p> <p>As concept of Director in case of Company and Designated partner in case of LLP are different, simply making Section 164 and 167 of Companies Act, 2013 applicable to LLPs can lead to lot of ambiguities and clarity will be needed as to how to deal in case of disputed cases or deadlock situations.</p>
<p>Sec. 90 (1) to (11) Investigation of beneficial ownership of</p>	<p>Since no separate Rules for identification of significant beneficial owner (SBO) of LLP are prescribed, it appears that the Companies (Significant Beneficial Owners) Rules, 2018 (“SBO Rules”) which are applicable to Company will be applicable to LLP also.</p>

shares in certain cases

In case of companies, as per Section 90(1) read with the SBO Rules, every **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 LLP

- i. Holds indirectly or together with direct holding **10 %** or more in a **Contribution**
- 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 is the significant beneficial owner of a Company.

As per notification dated 11th February, 2022 while making Section 90 of Companies Act, 2013 applicable to LLP, the word 'shares' were substituted with the word 'contribution', i.e. the concept of 'capital' and 'contribution' are treated equally.

However, features of LLP are much different than a Company; as LLP has features where it is a partnership firm having limited liability. Therefore, the treatment w.r.t. withdrawal of contribution, dividend, voting is different in LLP as compared to a Company where all these factors are linked to capital only, except in case of shares carrying differential voting rights in a company, where voting rights may be different as compared to capital built-up.

As unlike 'capital' in company, the 'contribution' in LLP can be withdrawn by partners as per terms and conditions mentioned in agreement.

Therefore, considering above factors, for identification of SBO in LLP, rather than applying the same SBO provisions which are applicable to a company, it is recommended that separate set of provisions prescribed in case of LLP.

Further, when Section 90 was made effective in Companies Act, 2013, a transition period of 90 days were provided from the commencement of Companies (Significant Beneficial Owners) Amendment Rules, 2019 for identification of SBO as on the date of commencement of these Rules and for giving declaration in BEN-1 to the reporting company. Similar transition period be given in case of LLPs also for identification of SBO and giving declaration to the reporting LLP.

We appreciate the intention of MCA behind making critical provisions like Section 90, 164 and 167 of Companies Act 2013 applicable to LLPs, so as to curb the practices of showing malafide transactions through benami LLPs and to put a check on non-compliant LLPs which want to enjoy the benefit of limited liability but do not want to bear the bare minimum responsibility of public / regulatory disclosure of financial statements and list of partners on annual basis. However, we request you kindly clarify on the above-mentioned issues AND to draft separate provisions in LLP Act, 2018 rather than equating the provisions of Section 90, 164 and 167 of Companies Act 2013 as it is to LLP, so as to enable LLPs to comply with the provisions of law in true spirit.

Thanking you,

Yours Sincerely,

For **THE CHAMBER OF TAX CONSULTANTS**

Sd/-

Ketan Vajani
President

Sd/-

Mahendra Sanghvi
Chairman

Law & Representation Committee

Sd/-

Apurva Shah
Co-Chairman