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# One Person Company in india

by

**Adv. Neha Yati, LLM Student, Dr.Kailasanat College, Ratlam, M.P.**

&

**Adv. Krusch. P A, Head-Legal, SFL, Coimbatore, TN.**

**UNIVERSAL MULTIDISCIPLINARY RESEARCH INSTITUTE PVT LTD**

## ABSTRACT

One Person Company (OPC) is a hybrid of sole proprietor and company form of business; and the Limited liability being the precious legal invention in the legal history, the introduction of OPC in the Indian legal system is considered as the appropriate legislation to unleash the entrepreneurial talent of the emerging Indian businessmen, especially to the start-up ventures.

The article proposed dig into the emergence and development of the OPC world over as well as in India, and examines the concept of OPC which is set to organise the unorganised sector of proprietorship firms and other entities which will be convenient to regulate and manage with the emerging concept of OPC.

The article further intends to explore what is an OPC, the salient features of OPC, the privileges of OPC, who and how can an OPC get incorporated in India.

The pros and cons of OPC and its impact in Indian entrepreneurship along with a comparative analysis with sole proprietorship and private companies being analysed.

The last portion of the article examines the OPC from a critical analysis with its shortcomings and ambiguities.

Finally the article concludes with a balanced view, and end with a positive note as OPC is expected to be a big boon for small and medium entrepreneurs in India.

# “To unleash the entrepreneurial talent of the people in the information and technology driven environment, law should recognize One Person Company (OPC)”

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Irani Committee Report, para 3.2 of Chapter I, May 31, 2005

# INDEX

# CHAPTER 1

## 1.0 INTRODUCTION

Limited liability, usually regarded as the most significant feature of corporate enterprise, has received extravagant praise. Among those who have paid verbal homage to the concept of limited liability are two former university presidents who cut a large figure in the intellectual manners of the nation during the last half century. President Eliot of Harvard regarded limited liability as "the corporation's most precious characteristic" and "by far the most effective legal invention made in the nineteenth century.[1]

President Nicholas Murray Butler of Columbia made the pronouncement in 1911: "I weigh my words when I say that in my judgment the limited liability corporation is the greatest single discovery of modern times.... Even steam and electricity are far less important than the limited liability corporation, and they would be reduced to comparative impotence without it .[2]

The introduction of OPC in the legal system is a move that would encourage corporatization of micro businesses and entrepreneurship with a simpler legal regime so that the small entrepreneur is not compelled to devote considerable time, energy and resources on complex legal compliances. This will not only enable individual capabilities to contribute economic growth, but also generate employment opportunity.[3]

One Person Company, as the name suggests, means a company which has only one person as a member and where legal and financial liability is restricted to the company only and not to that person.[4]

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1.Quoted in Cook, "Watered Stock"--Commissions---"Blue Skay Laws"-Stock Without Par Value, 19 MiCH. L. REv. 583 n. 4 (1921).

2.'Quoted in I WILLIAm M. FLETCHER, CYCLOPEDIA Os THE LAw or CoRpoRAIoNs §21 (1917). See Berl, The Vanishing Distinction Between Creditors and Stockholders, 76 U. os PA. L. REv. 814, 81 (1928). See also Dodd, The Evolution of Limited Liability in American Industry: Massachusetts, 6 H-Iv. L. REv. 1351 (1948). a It is not intended to pursue

3.https://www.icsi.edu/Docs/Webmodules/ONE%20PERSON%20COMPANY.pdf;june 2014

4 http://www.caclubindia.com/articles/one-person-company-a-new-business-ownership-concept-20452.asp

One Person Company of sole-proprietor and company form of business has been provided with concessional /relaxed requirements under the Companies Act, 2013. With the implementation of the Companies Act, 2013, a single national person can constitute a Company, under the One Person Company (OPC) concept.[5]

With increasing use of information technology and computers, emergence of the service sector, it is time that the entrepreneurial capabilities of the people are given an outlet for participation in economic activity. Such economic activity may take place through the creation of an economic person in the form of a company. Yet it would not be reasonable to expect that every entrepreneur who is capable of developing his ideas and participating in the market place should do it through an association of persons. We feel that it is possible for individuals to operate in the economic domain and contribute effectively. To facilitate this, the Committee recommends that the law should recognize the formation of a single person economic entity in the form of 'One Person Company'. Such an entity may be provided with a simpler regime through exemptions so that the single entrepreneur is not compelled to fritter away his time, energy and resources on procedural matters.[6]

Single member company emerged and developed rapidly in recent years, for the reason of their strong economic, political and legal theoretical basis. As a result, we can dig into their emergence and development from a social and historical point of view. It is helpful to encourage investment, develop economy and facilitate employment. Compared with ordinary types of companies, Single Member Companies' legal characters lie in the singularity of shareholder and the particularity of its corporate governance structure. Thus it increases the possibility for the single shareholder to abuse the rights and damage the interests of companies' creditors. In order to protect the company's creditors, it is necessary to regulate single member company strictly and set up integrated creditors protection rules. [7]

5https://www.icsi.edu/Docs/Webmodules/ONE%20PERSON%20COMPANY.pdf;june 2014

6 Irani committee report chapter 3 ,paragraph 6,may 31 20057

7Journal of Politics and Law, para 1, Vol. 5, No. 3; 2012, www.ccsenet.org/jpl

Therefore, the legal status for Single Person Companies should be authorized and as well positively standardized in order to seek advantages and avoid disadvantages.[8]

The concept of 'One Person Company' may be introduced in the Act with following characteristics:-

a) OPC may be registered as a private Company with one member and may also have at least one director;

b) Adequate safeguards in case of death/disability of the sole person should be provided through appointment of another individual as Nominee Director. On the demise of the original director, the nominee director will manage the affairs of the company till the date of transmission of shares to legal heirs of the demised member.

c) Letters 'OPC' to be suffixed with the name of One Person Companies to distinguish it from other companies

Many entrepreneurs would choose to be self-employed in an OPC as a change from traditional based small companies with employees and increasing management responsibilities. Being unemployed after another wave of recession or global slowdown also triggers desire among people to be self-employed especially in OPC.[9]

5https://www.icsi.edu/Docs/Webmodules/ONE%20PERSON%20COMPANY.pdf;june 2014

6 irani committee report chapter 3 ,paragraph 6,may 31 2005

8Journal of Politics and Law, para 1, Vol. 5, No. 3; 2012, www.ccsenet.org/jpl

9 irani committee report chapter 3 ,paragraph 6.1 ,may 31 2005

## 1.1 GENESIS AND GLOBAL DEVELOPMENT

One person companies are in existence in certain countries. England was the first country which paved the way for the development of this concept through its decision in **Salomon v. Salomon & Co. Ltd**. Finally in 1925 England gave statutory status to the concept of One Person Company thereby, becoming an innovator. In India this concept has been mooted by the Ministry of Corporate Affairs by allowing One Person Companies in India in line with UK, China, USA, Australia, Singapore, Qatar, Pakistan European union, Serbia and several other countries. It is a right thinking in right direction by the Ministry of Corporate Affairs. One Person Companies have been in existence in UK for several years now. China allowed formation of OPCs as recent as in 2005. A few other countries have also given the legal status for OPCs.[10]

**United Kingdom**

Historically, United Kingdom is the first one, which paved the way to the one man company through a precedent set in its famous case Salomon v. Salomon & Co. (1897) AC 22.Section 7 of the UK Companies Act, 2006 deals with method of forming company. It provides that - (1) a company is formed under this Act by one or more persons— (a) subscribing their names to a memorandum of association (see section 8), and (b) complying with the requirements of this Act as to registration (see sections 9 to 13). (2) A company may not be so formed for an unlawful purpose.11

**United States of America**

In USA several States permit the formation of a single member Limited Liability Company (LLC).

10 https://www.icsi.edu/Docs/Webmodules/ONE%20PERSON%20COMPANY.pdf

11 https://www.icsi.edu/Docs/Webmodules/ONE%20PERSON%20COMPANY.pdf

## Singapore

Singapore permits One Person Company under Companies Amendment Act of 2004.

## China

China introduced One Person Company in 2005. China recognized the legal status and adopted the single member company by legislation when new Company Law took effect on January 1st 2006 which is a significant legislative progress in the legislation history of China. Yet the legislation is to be improved.[12]

## UAE

United Arab Emirates recognizes the concept of One Person Company.

## Turkey

According to Turkish Commercial Code since 2012 a joint stock company or limited liability company may be established with one or more shareholders. The code also sets forth certain obligations and conditions for such companies. In addition, limited liability companies and joint stock companies can have a board of directors that consists of only one board member. Pakistan Single Member Companies Rules, 2003 of Pakistan provide for incorporation of single member company.

**Pakistan :-** Single Member Companies Rules, 2003 of Pakistan provide for incorporation of single member company. The amended law of Pakistan permits one person to form a single member company by filing with registrar, at the time of incorporation, a nomination in the prescribed form indicating at least two individuals to act as nominee director and alternate nominee director.

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12 Journal of Politics and Law, para 1, Vol. 5, No. 3; 2012, www.ccsenet.org/jpl

## European Union

In December 1989 the Council adopted the Twelfth Company Law Directive in order to introduce a single-member company throughout the Community. As the main task of the Directive could be defined creating a legal instrument which allows the limitation of liability of the individual entrepreneur in all the member states at the same way. The Directive should achieve a high level of harmonization .

In May 2001 the Commission adopted a recommendation on the recognition, measurement and disclosure of environmental issues in the annual accounts and annual reports of companies. This recommendation clarifies the accounting rules applicable and indicates how to improve the quality, transparency and comparability of environmental data in annual company accounts and reports. The recommendation helps and encourages companies to improve the environmental information made available to regulating authorities, investors, financial analysts and the general public. It is applicable to the accounting directives on certain forms of company (fourth and seventh directives), banks and insurance companies. It also takes into account the provisions requiring companies quoted on the stock exchange to apply the international accounting standards (I.A.S) as of 2005.[13]

## SERBIAN COMPANY LAW

According to the provisions not only of the former Enterprise Law but also of the current Company Law, it is possible to establish a single economic organization in the form of an organization with limited liability and in the form of a joint-stock company. The Serbian Company Law is to a great extent already harmonized with the main principles of EC regulations on the company law.[14]

13 Twelfth Council Company Law Directive 89/667/EEC of 21 December 1989 on single-member private limited-liability companies Official Journal L 395, 30/12/1989 p. 0040 – 0042; deadline for implementation of the legislation in the member states was 01.01.1992, FACTA UNIVERSITATIS Series: Economics and Organization Vol. 2, No 3, 2005, pp. 209 – 219

14 Company Law, Official Gazette of Republic of Serbia, 125/04

## 1.2 Origin of the concept in India

The concept of OPC was mooted, in the report of Dr. J.J. Irani Committee. The Irani Committee briefly referred to OPC in its report. In Chapter III titled "Classification and Registration of Companies" the committee suggested multiple classification of companies as given hereunder

This classification which included OPCs was:

i. On the basis of size

a. Small companies

b. Other Companies

ii. On the basis of number of members:

a. One person company

b. Private companies

c. Public companies One Person Company (OPC)

3 iii. On the basis of control

a. Holding companies

b. Subsidiary companies

c. Associate companies

iv. On the basis of liability:

a. Limited

I. by shares; and

II by guarantee (with or without share capital)[15]

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15 https://www.icsi.edu/Docs/Webmodules/ONE%20PERSON%20COMPANY.pdf

b. Unlimited

On the basis of manner of access to capital:

a. Listed companies

b. Un-listed companies

The Committee expressed the view that the law should recognize the potential for diversity in the forms of companies and rather than seeking to regulate specific aspects of each form, seek to provide for principles that enable economic inter-action for wealth creation on the basis of clear and widely accepted principles.[16]

## CHAPTER 2

## 2.0 WHAT IS ONE PERSON COMPANY

Generally, a company is a form of business organization. In English law, and therefore in the Commonwealth realm[17], a company is a form of body corporate or corporation, generally registered under the Companies Acts or other similar legislation. It does not include a partnership or any other unincorporated group of persons.[18]

As per Section 2 (62) of the Companies Act, 2013 One Person Company is a company which has only person as a member. Chapter II of the Companies Act, 2013 section 3 allows one person to form a company for any lawful purpose. It also mentions that the memorandum shall indicate the name of the other person, with his prior consent, who will in the event of the subscriber's death or incapacity to contract become the member of the company and the same consent in written shall be filed with the registrar of

16.https://www.icsi.edu/Docs/Webmodules/ONE%20PERSON%20COMPANY.pdf

17. A Commonwealth realm is a sovereign state within the Commonwealth of Nations that has Elizabeth II as its monarch and head of state, "What is a Commonwealth Realm?" Royal Household. Retrieved October 6, 2009.

18 Journal of Politics and Law,2.1, Vol. 5, No. 3; 2012, www.ccsenet.org/jpl

companies at the time of Incorporation of the company along with the memorandum and articles. The minimum capital required to start up with One Person Company is Rs. 1,00,000/-

## 2.1 SALIENT FEATURES OF OPC

The salient features of OPC are:

• Desire for personal freedom that allows the Professional skilled person to adopt the business of his choice.

• Personality driven passion and implementation of a business plan.

• The desire of the entrepreneurial person to take extra risk and willingness to take additional responsibility.

• Personal commitment to the business which is a sole idea of the person and close to his heart.

• It is run by individuals yet OPCs are a separate legal entity similar to that of any registered corporate.18

• A One Person Company is incorporated as a private limited company.

• It must have only one member at any point of time and may have only one director.

• The member and nominee should be natural persons, Indian Citizens and resident in India. The term "resident in India" means a person who has stayed in India for a period of not less than 182 days during the immediately preceding one calendar year.

19 https://www.icsi.edu/Docs/Webmodules/ONE%20PERSON%20COMPANY.pdf

• One person cannot incorporate more than one OPC or become nominee in more than one OPC.

• If a member of OPC becomes a member in another OPC by virtue of his being nominee in that OPC then within 180 days he shall have to meet the eligibility criteria of being Member in one OPC.

• OPC to lose its status if paid up capital exceeds Rs. 50 lakhs or average annual turnover is more than 2 crores in three immediate preceding consecutive years.

• No minor shall become member or nominee of the One Person Company or hold share with beneficial interest.

• Such Company cannot be incorporated or converted into a company under section 8 of the Companies Act, 2013.

• Such Company cannot carry out Non- Banking Financial Investment activities including investment in securities of any body corporate.15

• No such company can convert voluntarily into any kind of company unless 2 years have expired from the date of incorporation, except in cases where capital or turnover threshold limits are reached.

• An existing private company other than a company registered under section 8 of the Act which has paid up share capital of Rs. 50 Lakhs or less or average annual turnover during the relevant.[20]

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20 https://www.icsi.edu/Docs/Webmodules/ONE%20PERSON%20COMPANY.pdf

• An existing private company other than a company registered under section 8 of the Act which has paid up share capital of Rs. 50 Lakhs or less or average annual turnover during the relevant period is Rs. 2 Crores or less may convert itself into one person company by passing a special resolution in the general meeting.

## 2.2 Privileges available to OPC

Some of the privileges and benefits identified with OPCs are:

• OPCs would provide the start-up entrepreneurs with new business idea.

• OPC provides an outlet for the entrepreneurial impulses among the professionals.

• The advantages of limited liability. The most significant reason for shareholders to incorporate the 'single-person company' is certainly the desire for the limited liability.

• OPCs are not proprietorship concerns; hence, they give a dual entity to the company as well as the individual, guarding the individual against any pitfalls of liabilities. This is the fundamental difference between OPC and sole proprietorship.

• Unlike a private limited or public limited company (listed or unlisted), OPCs need not bother too much about compliances.

• Businesses currently run under the proprietorship model could get converted into OPCs without any difficulty.

• OPCs require minimal capital to begin with. Being a recognized corporate, could well raise capital from others like venture capital

21 https://www.icsi.edu/Docs/Webmodules/ONE%20PERSON%20COMPANY.pdf

• Businesses currently run under the proprietorship model could get converted into OPCs without any difficulty.

• OPCs require minimal capital to begin with. Being a recognized corporate, could well raise capital from others like venture capital financial institutions etc., thus graduating to a private limited company.

• Mandatory rotation of auditor after expiry of maximum term is not applicable. 8 One Person Company (OPC)

• The annual return of a One Person Company shall be signed by the company secretary, or where there is no company secretary, by the director of the company.

• The provisions of Section 98 and Sections 100 to 111 (both inclusive), relating to holding of general meetings, shall not apply to a One Person Company.

• A One Person Company needs to have minimum of one director. It can have directors up to a maximum of 15 which can also be increased by passing a special resolution as in case of any other company.

• For the purposes of holding Board Meetings, in case of a one person Company which has only one director, it shall be sufficient compliance if all resolutions required to be passed by such a Company at a Board meeting, are entered in the minutes-book, signed and dated by the member and such date shall be deemed to be the date of the Board Meeting for all the purposes under this Act.[22]

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22 https://www.icsi.edu/Docs/Webmodules/ONE%20PERSON%20COMPANY.pdf

For other One Person Companies, at least one Board Meeting must be held in each half of the calendar year and the gap between the two meetings should not be less than 90 days.

• The financial statements of a one person company can be signed by one director alone. Cash Flow Statement is not a mandatory part of financial statements for a One Person Company. Financial statements of a one person company need to be filed with the Registrar, after they are duly adopted by the member, within 180 days of closure of financial year along with all necessary documents.

• Board's report to be annexed to financial statements may only contain explanations or comments by the Board on every qualification, reservation or adverse remark or disclaimer made by the auditor in his report.[23]

## CHAPTER 3

### 3.0 Who and how can incorporate One Person Company

A natural person who is Citizen of India and resident in India is eligible to incorporate a One Person Company, i.e., a person who has stayed in India for a period of not less than one hundred and eighty two days during the immediately preceding one calendar year shall be eligible to incorporate a One Person Company and a nominee for the sole member of a One Person Company.[24]

It shall be noted that no person is eligible to incorporate more than one OPC or nominee in more than one such company.

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23 https://www.icsi.edu/Docs/Webmodules/ONE%20PERSON%20COMPANY.pdf

24 One Person Company (Rule 3 of Companies (Incorporation) Rules, 2014)

The process of incorporating One Person Company is far easier as compared to Private limited and public limited company. There are many relaxations in terms of legal complexities as involved in incorporation of other companies under the Companies Act, 2013.

Process of Incorporation of One Person Company (OPC)

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Obtain Digital Signature Certificate [DSC] for the proposed Director(s)

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Obtain Director Identification Number [DIN] for the proposed director(s)

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Select suitable Company Name, and make an application to the Ministry of Corporate Affairs for availability of name

↓

Draft Memorandum of Association and Articles of Association [MOA & AOA]

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Sign and file various documents including MOA & AOA with the Registrar of Companies electronically

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Payment of Requisite fee to Ministry of Corporate Affairs and also Stamp Duty

↓

Scrutiny of documents at Registrar of Companies [ROC]

↓

Receipt of Certificate of Registration/Incorporation from ROC

## 3.1 Reservation of name

NC.1 along with the fee as provided in the Companies (Registration offices and fees) Rules, 2014. Where the articles contain the provisions for entrenchment, the company shall give notice to the Registrar of such provisions in Form No.INC.2 along with the fee as provided in the Companies (Registration offices and fees) Rules, 2014 at the time of incorporation of the company or in case of existing companies, the same shall be filed in Form No.MGT.14 within thirty days from the date of entrenchment of the articles, as the case may be, along with the fee as provided in the Companies (Registration offices and fees) Rules, 2014

The model articles as prescribed in Table F, G, H, I and J of Schedule I may be adopted by a company as may be applicable to the case of the company, either in totality or otherwise

## 3.2 Application for incorporation of companies

An application shall be filed, with the Registrar within whose jurisdiction the registered office of the company is proposed to be situated, in Form No.INC.2 along with the fee as provided in the Companies (Registration offices and fees) Rules, 2014 for registration of a company:

## 3.3 Signing of Memorandum and Articles of Association

The memorandum and articles of association of the company shall be signed by each subscriber to the memorandum, who shall add his name, address, description and occupation, if any, in the presence of at least one witness who shall attest the signature and shall likewise sign and add his name, address, description

23 https://www.icsi.edu/Docs/Webmodules/ONE%20PERSON%20COMPANY.pdf

and occupation, if any and the witness shall state that "I witness to subscriber/subscriber(s), who has/have subscribed and signed in my presence (date and place to be given); further I have verified his or their Identity Details (ID) for their identification and satisfied myself of his/her/their identification particulars as filled in".

### 3.4 Affidavit of Subscriber and first directors

The affidavit shall be submitted by each of the subscribers to the memorandum and each of the first directors named in the articles in Form No.INC.9

### 3.5 Particulars of Subscriber

Particulars of every subscriber to be filed with the Registrar at the time of incorporation Nomination by the subscriber or member

(1) The subscriber to the memorandum of a One Person Company shall nominate a person, after obtaining prior written consent of such person, who shall, in the event of the subscriber's death or his incapacity to contract, become the member of that One Person Company.

The name of the person nominated shall be mentioned in the memorandum of One Person Company and such nomination in Form No INC.2 along with consent of such nominee obtained in Form No INC.3 and fee as provided in the Companies (Registration offices and fees) Rules, 2014 shall be filed with the Registrar at the time of incorporation of the company along with its memorandum and article

24.supra at 23

INC-stands for incorporated. This means a firm or company that has been formed into a legal corporation by completing the legal requirements.

## 3.6 Declaration by professionals

The declaration by an advocate, a Chartered Accountant, Cost accountant or Company Secretary in practice shall be in Form No. INC.8.

*Important Instructions*

- filing of e-form for Incorporation

— User is required to file eForm INC-2 for incorporation of One Person Company.

— It is suggested that eForm DIR-12 should be filed together at the time of filing of eForm INC-2 if the member is not the sole director of the company.

— In case the address for correspondence is not the address of the registered office of the Company, user is required to file INC-22 within 30 days of its incorporation.

— Stamp duty on eForm INC-2, Memorandum of Association (MoA) and Articles of Association (AoA) can be paid electronically through the MCA portal.

— Payment of stamp duty electronically through MCA portal is mandatory in respect of the States which have authorized the Central Government to collect stamp duty on their behalf. Now eStamp duty payment is to be done online through MCA portal for all the states.

— Refund of stamp duty, if any, will be processed by the respective state or union territory government in accordance with

25.https://www.icsi.edu/Docs/Webmodules/ONE%20PERSON%20COMPANY.pdf

the rules and procedures as per the state or union territory stamp Act.

— User is required to scan the photograph of every subscriber with MOA and AOA.

— The company can have its registered office from the date of incorporation or on and from the 15th day of its incorporation. Till the same is established and intimated to the RoC, company can have its correspondence address capable of receiving and acknowledging all communications and notices as may be addressed to it.

— Enter the details of registered office address of the company if the company is having its registered office from the date of its incorporation.

— Enter the valid email id of the company. Ensure that this email ID is valid as intimation regarding processing of the eForms, important communication from RoC office shall also be communicated electronically at the email ID being mentioned here.

— Enter the details of the address of the police station under whose jurisdiction the registered office of the company is to be situated.

— Enter the details of authorized and subscribed share capital break up in case of a company having share capital.

— Minimum authorized share capital required for One Person Company having share capital is Rs. 1,00,000/-.

26.https://www.icsi.edu/Docs/Webmodules/ONE%20PERSON%20COMPANY.pdf

— Minimum and maximum number of members for One Person Company is one only.

— The subscriber to the Memorandum shall ensure that the payment for the total amount of shares subscribed by him is made to the company upon incorporation.

— Enter the number of shares, total amount of shares and nominal amount per share for each type of share. At least one type of share capital (Equity/ Preference) should be greater than zero.

— In case company has shares of multiple nominal amounts per share, then enter multiple nominal values per share separated by comma in the field Nominal amount per share.

— Main division of industrial activity of the company.

— Enter the details of promoter.

— User is required to file eForm DIR-12 in case promoter and director are not the same persons.

— Enter either DIN or Income-tax PAN. In case DIN is entered it should be an approved DIN.

— For cases of PAN, name and address of the promoter is required to be entered. System shall verify the name of the promoter based on PAN entered.

— Enter surname or family name in the field Family Name.

27 https://www.icsi.edu/Docs/Webmodules/ONE%20PERSON%20COMPANY.pdf

— Enter all other relevant particulars of the promoter including duration of stay at present address. If duration of stay is less than a year at present address, enter the details of previous residence of the promoter. Ensure that Promoter of One Person company is always an Indian citizen and resident in India and promoter shall be eligible to incorporate only one OPC.

— Every One Person Company is required to indicate the name of other person as nominee to the sole member in the memorandum and nominee for the subscriber should be an individual who is an Indian citizen and resident in India.

— Enter the name of such nominee.

— Enter the details of nominee by entering approved DIN or valid Income-tax PAN. In case DIN is entered, the system shall automatically display the name, middle name, surname, father's name and gender of such person.

— Provide details of stamp duty already paid.

— Ensure the eForm is digitally signed by the same person whose designation is reflected in the declaration section of the eForm. 16 One Person Company (OPC)

— In case the person digitally signing the eForm is a Director - Enter the approved DIN. In case the person digitally signing the eForm is Company Secretary –

28. Supra at 27

Enter valid membership number. In case the person digitally signing the eForm is Manager - Enter approved DIN or valid income-tax PAN.

— It is mandatory to attach Memorandum of Association, Articles of Association, proof of identity of the member and the nominee, residential proof of the member and the nominee, copy of PAN card of member and nominee, consent of nominee in Form INC-3 along with enclosures, affidavit from the subscriber and first director to the memorandum in Form No. INC-9.

— It is mandatory to attach Specimen Signature in Form INC-10 in case company is 'Not having share capital'.

— It is mandatory to attach entrenched Articles of Association if any of the articles are entrenched.

— Proof of registered office address and copies of the utility bills not older than two months are required to be attached in case of address of correspondence is the address of registered office of the company.

— It is mandatory to attach proof that the company is permitted to use the address of the registered office of the company if the same is owned by director/any other entity/ Person (not taken on lease by company).

— It is mandatory to attach consent to act as a director in case subscriber and director are the same persons. — List of all the companies (specifying their CIN) having the same registered office address, if any.

29.https://www.icsi.edu/Docs/Webmodules/ONE%20PERSON%20COMPANY.pdf

# Chapter 4

## 4.0 Pros of One Person Company (OPC)

Limited Liability: The most significant reasons to incorporate One Person Company is that it provides limited liability to the entrepreneur.

The usual argument advanced by the courts is: Limited liability is a privilege held out by the corporation law of the state; one who organizes a one-man or family corporation, in compliance with the formalities of that law, for the purpose of attaining limited liability in a commercial venture, is merely taking advantage of a privilege conferred by law.'[30] One might well question both the logic and the historical realities in this judicially tailored reasoning. What is far more important, however, is that this and similar reasoning indicates clearly a judicial policy to sponsor the one-man company and the family corporation.' [31]

Mandatory rotation of auditor after expiry of maximum term is not applicable on One Person Company.

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**30"** Elenkrieg v. Siebrecht, **238** N. Y. 254, 144 ***N.*** E. **519 (1924);** Salomon v. Saloman & Co., Ltd.[1897] A. C. 22. See Inland Revenue Commissioners v. Sansom, **[i921]** 2 K. B. 492, **500, 125** L. T. R.37.

31 'In Inland Revenue Commissioners v. Sansom, **[1921]** 2 K. ***B.*** 492, 514, **i25** L. T. R. 37, Younger, L. J., said: "Now, speaking for myself, I do in the light of these considerations, deprecate in connection with what are called one-man companies, the too indiscriminate use of such words as simulacrum, sham, or cloak-the terms found in this case-or indeed any other term of polite invective. Not only do these companies exist under the sanction, even with the encouragement of the Legislature, but I have no reason whatever to doubt that the great majority of them are as bona fide and genuine as in a business sense they are convenient and suitable media for the provision and application of capital to industry. No doubt there are amongst such companies, as amongst any other kind of association, black sheep; but in my judgment such terms of reproach as I have alluded to should be strictly reserved for those of them and of their directors who are shown to deserve condemnation, and I am quite satisfied that the indiscriminate use of such terms has, not infrequently, led to results which are unfortunate and unjust, and in my judgment this is no case for their use."

There are many provisions of the Companies Act, 2013 that are not applicable for the One Person Company. The following provisions are not applicable of the Companies Act, 2013

a) Section 98: Power of Tribunal to call for meetings of the members.

b) Section 100: Calling for Extraordinary General Meeting

c) Section 101: Notice of meeting

d) Section 102: Statement to be annexed with the notice

e) Section 103: Quorum for meetings

f) Section 104: Chairman of meetings

g) Section 105: Proxies

h) Section 106: Restrictions on voting rights

i) Section 107: Voting by show of hands

j) Section 108: Voting through electronic means

k) Section 109: Demand Poll

l) Section 110: Postal Ballot

m) Section 111: Circulation of members resolution

- The financial statement of One Person Company is not to include the Cash Flow Statements.
- Alternative to AGM, EGM and other general meetings– The Act provides that any business which is required to be transacted at an AGM or any other general meeting of the company by means of ordinary or special resolution, it shall be sufficient if, in case of one person company,

32.http://taxguru.in/company-law/person-companyenterpreneurs-support.html#sthash.bvn2lcqp.dpuf

the resolution is communicated by the sole member to the company and entered in the minutes book and signed and dated by the sole member

- Section 173 (Frequency of board meetings): A minimum of four board meetings of the board of the directors in each year is required to be held in such a manner that not more than 120 days shall intervene between two consecutive meetings of the board.
- In case of One Person Company, if there is only one director, there is no such compulsion to conduct such board meetings so as to comply with section 173.

And if there are more than 1 director in an OPC then this section is deemed to have been complied with if at least one board meeting has been conducted in each half of a calendar year and gap in between two meetings is minimum 90 days.33

• The annual return of a One Person Company shall be signed by the company secretary, or where there is no company secretary, by the director of the company.

• The provisions of Section 98 and Sections 100 to 111 (both inclusive), relating to holding of general meetings, shall not apply to a One Person Company.

• A One Person Company needs to have minimum of one director. It can have directors up to a maximum of 15 which can also be increased by passing a special resolution as in case of any other company.[33]

• For the purposes of holding Board Meetings, in case of a one person Company which has only one director, it shall be sufficient compliance if all resolutions required to be passed by such a Company at a Board meeting, are entered in the minutes-book, signed and dated by the member and such date shall be deemed to be the date of the Board Meeting for all the purposes under this Act. For other One Person Companies, at least one

33.https://www.icsi.edu/Docs/Webmodules/ONE%20PERSON%20COMPANY.pdf

Board Meeting must be held in each half of the calendar year and the gap between the two meetings should not be less than 90 days.

• The financial statements of a one person company can be signed by one director alone. Cash Flow Statement is not a mandatory part of financial statements for a One Person Company. Financial statements of a one person company need to be filed with the Registrar, after they are duly adopted by the member, within 180 days of closure of financial year along with all necessary documents.

• Board's report to be annexed to financial statements may only contain explanations or comments by the Board on every qualification, reservation or adverse remark or disclaimer made by the auditor in his report.[34]

## 4.1 Cons of One Person Company

- Sole Owner is not eligible to incorporate more than 1 one person company & become nominee in more than 1 one person company.
- OPC cannot carry non banking financial activities including investing in shares of another body corporate.
- OPC cannot convert into section 8 Companies. Section 8 companies are those companies that have been registered as Non Profit Company under section 8 of Companies Act, 2013.
- Section 193(2): OPC shall inform the registrar of company about every contract entered into by the company & recorded in the minutes of meeting of its board of directors within 15 days from the date of approval by the board.
- One person company must be converted to a private limited company if the turnover exceeds Rs. 2 crore or paid up share capital of the OPC is increased beyond 50 Lakhs.
- Intimation regarding exceeding the threshold limit shall be given in e-form INC-5. [35]

34 https://www.icsi.edu/Docs/Webmodules/ONE%20PERSON%20COMPANY.pdf

35http://taxguru.in/company-law/person-companyentrepreneurs-support.html#sthash.bVn2LcqP.dpuf

## 4.2 Types of OPC (Section 3(2))

• a company limited by shares; or

• a company limited by guarantee; or

• an unlimited company[36]

## 4.3 Impact of OPC in Indian Entrepreneurship

The concept of OPC is still in its nascent stages in India and would require some more time to mature and to be fully accepted by the business world.

With passage of time, the OPC mode of business organisation is all set to become the most preferred form of business organization specially for small entrepreneurs. The benefits emanating from this concept are many, to name a few –

• Minimal paper work and compliances

• Ability to form a separate legal entity with just one member [37]

• Provision for conversion to other types of legal entities by induction of more members and amendment in the Memorandum of Association. The One Person Company concept holds a bright future for small traders, entrepreneurs with low risk taking capacity, artisans and other service providers

• Provision for conversion to other types of legal entities by induction of more members and amendment in the Memorandum of Association. The One Person Company concept holds a bright future for small traders, entrepreneurs with low risk taking capacity, artisans and other service providers. The OPC would act as a launch pad for such entrepreneurs to showcase their capabilities in the global arena. The counterparts of Indian OPCs in Europe, United States and Australia have resulted in further

36.companies act 2013,section 3(2)

37.supra at 34

Strengthening of the economies in the respective countries. OPCs in India are aimed at structured, organized business units, having a separate legal entity ultimately playing a crucial role in further strengthening of the Indian economy.

## Conversion of Private Company into One Person Company:

(i) A private company other than a company registered under section 8 of the Act having paid up share capital of **fifty lac rupees** or less or average annual turnover during the relevant period (the period of immediately preceding three consecutive financial years) is **two crore rupees** or less may convert itself into one person company by passing a special resolution in the general meeting.

(ii) Before passing such resolution, the company shall obtain **No objection in writing** from members and creditors.

(iii) The one person company shall file copy of the **special resolution** with the Registrar of Companies **within thirty days** from the date of passing such resolution in **Form No MGT.14**.

(iv) The company shall file an application in **Form No INC.6** for its conversion into One Person Company along with fees as provided in the **Companies (Registration offices and fees) Rules, 2014**, by attaching the following documents, namely:-

(a) The directors of the company shall give a **declaration** by way of affidavit duly sworn in confirming that all members and creditors of the company have given their consent for conversion, the paid up share capital company is fifty lakhs rupees or less or average annual turnover is less than two crores rupees, as the case may be;

(b) The list of **members** and list of **creditors**;

(c) The **latest Audited Balance Sheet** and the **Profit and Loss Account**; and

38 http://taxguru.in/company-law/person-company-legal-provisions-comparison.html#sthash.VuLiKHxr.dpuf

(d) The copy of **No Objection letter** of secured creditors.

(v) On being satisfied and complied with requirements stated herein the Registrar shall issue the **Certificate**.

## Comparison of Provisions Applicable to OPC, Sole Proprietorship and Private Companies

| ***One Person Company*** | ***Sole Proprietorship*** | ***Private Company*** |
|---|---|---|
| ***1. Governing Law*** | | |
| Companies Act, 2013.Income Tax Act, 1961. | Income Tax Act, 1961. | Companies Act, 1956. Income Tax Act, 1961. |
| ***2. Liability*** | | |
| Limited to the extent of unpaid amount of shares held by the sole member. | Unlimited. Risk is higher as compared to OPC or Private Company. | Limited to the extent of unpaid amount of shares held by the member. |
| ***3. Registration*** | | |
| Mandatory. | Not applicable. | Mandatory. |
| ***4. Number of Members Required*** | | |
| Only one member is required to incorporate a OPC. | Only one person required to form a Sole Proprietorship. | At least two persons are required to incorporate a private company. |
| ***5. Number of Directors Required*** | | |

| | | |
|---|---|---|
| At least one director required. The sole member can be the director. | Not applicable. | At least two directors are required. |
| ***6. Separate Legal Entity*** | | |
| Separate Legal Status. Has an identity distinct from the members of the OPC. | No distinct entity. Owner and the Proprietorship are not distinguishable. | Separate Legal Status. Has an identity distinct from the members of the Private Company. |
| ***7. Perpetual Succession*** | | |
| Death of the sole member does not affect the OPC. The nominee becomes the member of the OPC in such an event. | Death of the owner amounts to death of the Sole Proprietorship. | Death of the members does not affect the Company. Members may come and go, a Company stays on. |
| ***8. Credibility*** | | |
| Credibility of a OPC can be evaluated on the basis of the past commitments of the OPC. | Credibility of Sole Proprietorship can be evaluated on the basis of the credibility of the Owner. | Credibility of a Company can be evaluated on the basis of the past commitments of the Company. |
| ***9. Annual Meetings*** | | |
| Holding of Annual Meeting is not mandatory. | Not applicable. | Holding of Annual Meetings is mandatory. |

| | | |
|---|---|---|
| ***10. Name Clause*** | | |
| The words "One Person Company" in brackets has to be mentioned below the name of the Company wherever it is printed or engraved. | Not applicable. | The name of the Company must end with "Private Limited". |
| ***11. Taxation*** | | |
| Base tax rate of 30% applicable. | Slab Rates as applicable to an individual. Benefit of Tax Deduction under Section 80C can be claimed. | Base tax rate of 30% applicable. |
| ***12. Mandatory Conversion*** | | |
| When the paid up Capital of the OPC exceeds the prescribed limit, it becomes mandatory for OPC to convert to Private or Public Company.39 | Not Applicable. | Not Applicable as long as all the conditions of Private Company are complied with |

39http://taxguru.in/company-law/person-company-legal-provisions-comparison.html#sthash.VuLiKHxr.dpuf
https://www.icsi.edu/Docs/Webmodules/ONE%20PERSON%20COMPANY.pdf

# Chapter 5

## 5.0 ADVANTAGES OF ONE PERSON COMPANY

a. Limited Liability: One Person company confers a separate legal identity upon single person business entities and thereby limits the liabilities of the entrepreneurs to the extent of paid subscription money only. Hence, by limiting the liabilities of the single shareholders this concept extends a protective cover and encourage their participation in the economy.

b. Perpetual Succession: A One Person Company being an incorporated entity shall be a perpetual entity and thereby unlike a sole proprietorship, the death or incapacity of the sole member would not dissolve the company. This would hence enable many successful ventures to run irrespective of the death or any incapacity of the proprietor to run the venture.[40]

c. Middlemen eliminated: One Person Companies enable small entrepreneurs to set up a company by allowing the shareholders to directly access the target market and avail credit facilities, bank loan rather than being forced to share their profits with middlemen . Thus, such companies will provide an opportunity to various small entrepreneurs like weavers, artisans etc. to start their own ventures with a formal business structure.[41]

d. Compliances: One Person Companies have been exempted from various procedural formalities not otherwise available to private companies such as conducting an AGM, General meeting or Extraordinary General Meeting (EGM) etc. thereby, making its operation very convenient and hassle free.

40 Refer Saloman v. Saloman& Co. Ltd 1987 AC 22 in order to understand the concept of independent corporate existence and perpetual succession .

41. One person companies to eliminate middlemen: Sachin Pilot, available at http://articles.economictimes.indiatimes.com/2013-09-08/news/41873696_1_sachin-pilot-corporate-affairs-minister-sachin-new-companies-act; Last accessed on 20th February, 2014

## 5.1 Criticisms:

Limited Liability Partnership Act, (LLP Act) 2008 was enacted on January 7, 2009. The LLP Act was introduced with the objective of providing limited liability for the partners in business, besides bringing the all small and medium enterprises in the unorganized sector into organized sector.

The concept of LLP has not been successful and till date approximately only 10,000 entities are registered.

The LLP model of business is not fully encouraged even by professionals. The success of the very concept is doubtful to some extent due to some reasons which have been mentioned below:

1. The existing proprietors are free to raise funds from their relatives, friends and others when the need arises. On the other hand, an OPC, being a private limited company, is not permitted to borrow from others.

2. Several existing private limited companies may be as good as proprietorship firms but such private companies may consider and introduce several other shareholders, up to a limit of 200. On the other hand, the capital of the OPC is only to the extent of available funds of the person who owns OPC.

3. The concept of nomination is slowly being introduced in bank accounts, share trading etc., but has not come into the business enterprises. Normally, the existing proprietorship business assets are shared by the legal heirs which may be more than one. Conversion of existing proprietorship business into OPC requires providing one nominee which may not be acceptable to the other family members.

4. Foreign companies may not be able to incorporate their subsidiaries as OPC's as the subscriber has to be only an individual and that too, with a nomination of another individual. [42]

42.The limited liability partnership act,2008, also refer- www.llp.gov.in

The concept of subsidiary company is that the entire shares are held by the holding company and therefore, it is not possible for MNCs to incorporate their subsidiaries as OPCs.

5. The expectation that the bankers will provide funds easily to OPCs seems unrealistic. At present, bankers do insist on collateral and other securities for extending credit facilities to small individual business entrepreneurs. Since the OPC now allows the same individual proprietors to claim limited liability, the risk avenue is more to the bankers.

6. Above all, the requirement of filing documents with the Regulator may not encourage small business entrepreneurs to incorporate as or to switch over to OPCs.

## 5.2 SHORTCOMINGS AND AMBIGUITIES

a. Requirement to appoint a nominee for incorporating a One Person Company:

The very purpose behind introducing the concept of One Person Company is to enable even an individual to enter into a business venture with limited liability without wasting his time and energy looking for a partner. However, this entire objective has been overshadowed due to the legal mandate, which requires that the shareholder shall during the incorporation of a One Person Company mention the name of a nominee in the memorandum of the company who in the event of death of the subscriber or his incapacity to contract shall become the member of the company. Though this provision was introduced with the objective of preserving the basic characteristic of a company i.e. perpetual succession but at a practical level this mandate ultimately creates procedural hassle for such sole subscribers by compelling them to enter into the process of looking for a suitable nominee, obtaining his consent etc.[43]

43. Analysis to the Advantages and Disadvantages of One-man Company and the Legislation for One-man Company, China Civil and Commercial Law Website, available at http://www.civillaw.com.cn/article/default.asp?id=22452; last accessed on 1st March, 2014

Further, the freedom extended to the nominees to withdraw their consent to their nomination presents yet another challenge for the sole subscriber, requiring him to nominate another person within fifteen days from such withdrawal, intimating it to the company, amending the memorandum of the company and further communicating such fact to the registrar of the company. Thus, the concept of nominee though has a rationale objective but at a practical level it mars the entire objective of the concept through its procedural complications.

b. NRIs not allowed to incorporate One Person Company:

As per Rule 2.1 (1) of the Draft Rules under Companies Act, 2013 only a natural person who is an Indian citizen and resident in India shall be eligible to incorporate a One Person Company. This provision seems to be an irony, as the entire objective behind introducing the concept of One Person Company was to boost economic growth of the country by promoting entrepreneurship. This concept though encourages small entrepreneurs but on the other hand, discourages foreign direct investment by disallowing foreign companies and multinational companies to incorporate their subsidiaries in India as a One Person Company.

c. Procedural Complexities:

Though the Act extends slew of exemptions to a One Person company in terms of conducting AGM, EGM, Quorum of meetings, restriction on voting rights or filing its financial statements, yet the incorporation of such a company requires lots of paper work as compared to a sole proprietorship. These procedural complexities with respect to incorporation of One Person Company might make this concept less attractive for sole entrepreneurs.

d. Taxation of One Person company under the Indian Income Tax Act, 1961 (IT Act):

The concept of One Person Company is not a recognized concept under IT Act and hence such companies will be put in the same tax slab as other

43.supra at 42

private companies for taxation purposes. As per the Income Tax Act, 1961, private companies have been placed under the tax bracket of 30% on total income. On the other hand, sole proprietors are taxed at the rates applicable to individuals, which mean that different tax rates are applicable for different income slabs. Thus, from taxation point of view this concept seems to be a less lucrative concept as it imposes heavy financial burden as compared to a sole proprietorship.

e. Incompleteness in the provisions of the Act:

The Draft Rules under the Act do not deal with the status of a One Person Company incorporated in contravention of the maximum permissible limit i.e. five. Whether such corporate entity will have to be dissolved or its corporate personality shall be disregarded or it will be treated as a sole proprietorship has not been clarified.

## 5.3 CONCLUSION

The concept of One Person Company is advantageous both for the regulators and the market players. The conferment of the status of private limited company on a One Person company will not only limit the liability of sole entrepreneurs but also provide access to market players to various credit and loan facilities and hence would encourage entrepreneurship. However, this concept has been criticized on grounds of excessive procedural formalities and tax burden. Further, this concept is also being regarded as unnecessary as India already has a Limited Liability Partnership Act, 2008, which limits the liabilities of the members of a partnership.

The authors after critically analyzing the various provisions and rules related to One Person Companies and comparing it with that of other countries scheme has arrived at the conclusion, that though the concept might have certain grey areas but overall the Indian version of One Person Company is very sound and complete.

Freedom should always be regulated and hence the procedural requirements in incorporation and operation of a One Person Company are merely to check the abuse of liberty and immunity given to single person business entities. Hence, this concept, if implemented properly, will act as a big incentive for small entrepreneurs and thereby will boost the economic growth of the country.