Part-1
Articles on OPC

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One Person Company – Need For Granting Exemptions and Removing Limitations

Though the introduction of the concept of one person company by the Companies Act, 2013 is indeed welcome, the law needs to be amended to make it popular and workable .This article brings to focus some such aspects and how to address them.

INTRODUCTION

In an interview of a candidate who was freshly qualified and brimming with confidence, the question was whether one person company [OPC] could have a Board of Directors with a strength of 15 directors. The candidate spontaneously answered that it is not possible because an OPC can have only one director. Despite the Act defining the expression "One Person Company", the candidate candidly admitted that an OPC can have any number of members not exceeding 200 because it is a private company but it can have only one director. There are a number of questions in relation to an OPC. It is a new concept to India. It is part of comprehensive company law unlike a limited liability partnership [LLP] that has everything in a single exclusive law and without any different types of LLPs.

OPCs AND CORPORATE SOCIAL RESPONSIBILITY

In the era of corporate social responsibility, the head of an enterprise came up and asked if he could have an OPC registered under Section 8 of the Companies Act, 2013 [the Act]. I said that an OPC can never be able to get itself registered under Section 8 of the Act, not only because a single person cannot be an association, whether for profit or not, but also because it is specifically prohibited under the Rules. I added that an OPC cannot even be part of the club of companies that are required to contribute a small portion of their profits towards their corporate social responsibility. Quite amused, the business head asked me in such a case how could a single person form a company though there would only be a single owner of all the shares of an OPC. The law that creates limited liability by a legal fiction can also add any number of such imaginary things such as the creation of a new form of organization styled as an OPC constituted by a single shareholder.

> One of positive features of an OPC is that there must be a person named by the single member even at the time of incorporation itself as to who would be entitled to hold his shares in the OPC in the event of the death or incapacity of the single member and such nominee should also be an Indian citizen.

LIMITS ON CAPITAL AND TURNOVER

However he would not leave me without my answering why do I say that an OPC can never be part of the CSR club even though it is a limited liability company incorporated under the Act. I readily answered that an OPC can never have a paid up capital beyond Rs.50 Lakhs and its average annual turnover in a period of three years could never cross Rs.200 Lakhs. Being a shrewd businessman, he would immediately ask me what if he could keep a higher amount of capital by issuing shares at a premium. I had no answer except to tell that it is technically possible though the concept of premium of shares was introduced to off set the accretion to share price due to the timing difference between any two investors bringing capital to the same firm. Further he asked what would happen if a windfall happens and an OPC achieves a turnover in the very first year itself which is of the order of Rs.1000 Lakhs. I had to quote the rules and say that by operation of law an OPC cannot remain as such a company and it must convert itself into a private company or public company if it crosses the threshold. But I could not answer as precisely as I could for his previous question when he said that this automatic provision cannot really affect an OPC achieving a huge turnover in its very first year itself. In fact, the Rules state that an OPC cannot voluntarily convert into any other type of company during the first two years of its incorporation unless its capital or turnover increases beyond the threshold limit during the relevant period. If one has to see if there is any increase in the capital or turnover during a relevant period, it must first be checked only after the expiry of relevant period which refers to a period of three consecutive financial years.

Moreover he was lamenting that for a paid up capital of Rs.50 Lakhs, a turnover of Rs.200 Lakhs is really not a match and no businessman would put so much of capital only to achieve so little a turnover as turnover indicates gross receipts. It should have been not less than Rs.500 Lakhs so as to match and operate as a challenge to the entrepreneur to achieve a turnover of ten times the capital employed.

SINGLE PERSON - SINGLE OPC

OPCs are not meant for those who would like to double. When a person wanted to have two OPCs, I had to offer him only a sorry as it was further surprising to note that the rules would say that a single person can form only one OPC. He cannot have different OPCs for different lines of business. If he wants to run a hotel as well as a boutique, he cannot have two OPCs for each of those two lines. He can however be satisfied by naming his hotel, a boutique hotel!

OPCS AND FOREIGN DIRECT INVESTMENT [FDI]

When a foreign national wanted to invest in India, he was happy to hear that the new company law in India has created an avenue for OPCs to be formed and registered because he need not look out for any other person to join him in a private or public company. He was aware that FDI is not possible under the automatic route in terms of the FDI policy of the Government of India unless the recipient is a company. His happiness was short lived when I explained that the single shareholder must not only be an Indian Citizen but also be a resident in India. In order to be resident in India, he must clock not less than 182 days in a year in India during the immediately preceding calendar year. When he was asking as long as a resident director is available, why such restrictive rule has been inserted, I was as clueless as he was as Rules had brought in several conditions, restrictions and limitations which are not even remotely indicated in the substantive law.

OPC AND NOMINEE

One of the positive features of an OPC is that there must be a person named by the single member even at the time of incorporation itself as to who would be entitled to hold his shares in the OPC in the event of the death or incapacity of the single member and such nominee should also be an Indian citizen. But the foreigner had a problem as he cannot make his wife a nominee as she does not qualify to be an Indian Citizen and she would not be eligible to be treated as a resident in India. I had to tell him to find a suitable person who

is a resident in India. He was asking can there be a nominee to a nominee because naming any other person as a nominee would make his wife surely angry. There was apparently no reason why the nominee should also be subject to such conditions when in the case of a private company such restrictions are not there for nominees. I had to clarify that neither of his children too, irrespective of their citizenship, could be appointed as his nominee because a minor is not entitled to become the nominee of the single member of an OPC.

OPC CANNOT BE THE WHOLLY OWNED SUBSIDIARY

Another question which the chairman of a reputed group had asked was why I say that he cannot get his wholly owned subsidiaries converted into OPCs. In fact he was showing me records of forming an OPC in a free trade zone in Sharjah in which his main Indian company was the single shareholder. As in an OPC, only an individual, natural person, could be the single member, the question of any "body corporate" or other form of organizations being the single member does not arise. Ideally the Act should have paved way for formation of wholly owned subsidiaries as OPCs. In such companies only for the purpose of being a private or public company nominees of the holding company are added as ostensible owners. In addition, in order to be useful, the rules relating to maximum capital and turnover must also be relaxed. He was wondering why there should be such limitations so long as an OPC complies with all applicable law.

OPC CANNOT UNDERTAKE NBFC ACTIVITY

A local money lender wanted to know if he can take up his lending and investment activities through an OPC, I had to show him the Rules that block his thoughts on that line as an OPC cannot take up the activities of a non-banking finance companies [NBFC].

LEVEL OF COMPLIANCES

Everyone who was consulting me was concerned with the level of compliances that an OPC must ensure. When I have explained the requirements, the opinion was that a sole proprietor would not mind limited liability as a cost rather than having to reckon with so many provisions.

GENERAL COMPLIANCES

- Have a registered office. Furnish in the prescribed manner by one person company to the Registrar of Companies.
- Mention the words "One Person Company" in brackets below the name of such company, wherever its name is printed / affixed / engraved.
- Paint Name Board with the name and address of the One Person Company outside the Registered Office and also its offices including in the local language.
- Ensure that its name, address of registered office, Corporate Identity Number, Telephone Number, Fax Number, email ID, Website ID are printed in all its business letters, billheads, letter papers and in all its notices and other official publications.
- Print its name on hundies, promissory notes, bills of exchange and such other documents as may be prescribed.
- Have a common seal with its name engraved therein.
- Publish also the authorised, subscribed and paid up capital, if any notice, advertisement or other official publication, or any business letter, billhead or letter paper of a company contains a statement of the amount of the authorised capital of the company.

BOARD MEETINGS AND DIRECTORS

1. Where there is only one director of an OPC, in the case of anything requiring Board Resolution, it shall be sufficient if the resolution is prepared, entered in the minutes book dated and signed and such date shall be deemed to be the date of the meeting of the Board.

2. Chapter XII with respect to meeting of Board will also apply, subject to what has been stated in Section 122 of the Act.

3. It is important to note that OPC, Small Company and Dormant Company shall be deemed to have complied with Section 173 relating to meeting of Board of Directors, if at least one meeting of the Board of Directors has been conducted in each half of a calendar year and the gap between the two meetings is not less than 90 days. It is really not possible to understand why the gap should not be less than 90 days.

4. Once a board meeting is called and held, it seems the law does not want the OPC to have another board meeting within the next 90 days and holding a board meeting within the next 90 days after a board meeting seems to be an offence.

5. Chapter XI with respect to Appointment and qualifications of directors will apply *mutatis mutandis.*

6. There must be at least 1 director. He should be a resident in India for not less than 182 days in the preceding calendar year.

7. Provisions relating to appointment of Woman Director, Independent Director and small share holder director do not apply.

8. Section 161 relating to appointment of additional director, alternate director will apply.

9. Section 164 applies to One Person Company as it pertains to disqualification of directors and number of directorship specified under section 165 will include directorships of One Person Company also.

> Like any other company, even an OPC must file its annual return with the Registrar of Companies. As an OPC need not call and hold an AGM, there seems to be lacuna with respect to the time within which the annual return must be filed with the Registrar of Companies. However there is indeed a weird provision that says, the annual return of an OPC could be signed by its company secretary.

10. Section 166 regarding Duties of Directors and Section 167 on vacation of office of directors and the other provisions of Chapter XI will apply.

11. Chapter XIII on Appointment of Managerial Personnel can apply. The question of overall maximum remuneration which applies to only Public Company under Section 197 of the Act would not apply to One Person Company as it is a private company.

12. Provisions relating to mandatory need for appointing Key Managerial Personnel including the need for appointment of a company secretary or the need for a mandatory Secretarial Audit will not apply.

13. The need to constitute the audit committee or any other committees and vigil mechanism will not apply.

14. Provisions relating to contracts and disclosures of interests will apply.

CONTRACTS

In case of contract with OPC, Section 193 says :

"Where One Person Company limited by shares or by guarantee enters into a contract with the sole member of the Company who is also the director of the Company, the company shall, unless the contract is in writing, ensure that the terms of the contract of offer are contained in a memorandum or are recorded in the minutes of the first meeting of the Board of directors of the company held next after entering into contract".

First of all, the contract must be between the OPC and its single member who must also be its director. Secondly if the contract is not in writing, the terms of the contract must be duly recorded in the minutes of the Board Meeting held next after the date of entering into the contract. However these provisions do not apply if the contract is entered into in the ordinary course of its business. From this provision itself it can be understood that there was no intention to introduce any limit on the turnover of an OPC because if it had be known to the legislature beforehand, such complicated provisions would not have been brought into the statute. Section 193 is an exclusive law crafted for OPCs alone. Incidentally this provision makes it clear than an OPC could be a company limited by guarantee.

SHARE TRANSFERS

If the single member wants to transfer his entire shares in the company to another individual, all the provisions with respect transfer of shares will also apply. In case the transfer is not approved by the Board, the transferee has the statutory right to apply for a rectification of register of members of the OPC. Change in nominee may also arise. In some cases, the nominee may be the transferee.

GENERAL MEETINGS

1. Provisions relating to the need for holding Annual General Meetings do not apply to OPCs.

2. Sections 100 to 111 shall not apply to OPCs. As a result provisions such as approaching the NCTL for calling a General Meeting, a shareholder submitting a requisition to call an Extra-Ordinary General Meeting, notice of General Meetings, statement annexed to notice of General Meeting, quorum for meetings, chairman of meetings, proxies, restrictions on voting rights, method of voting demand for poll, postal ballot, circulation of members' resolution do not apply.

3. It may be noted that the provisions such as ordinary and special resolution and resolution passed at an adjourned general meeting do not apply. As there is only a single member, all resolutions are subject to the consent of the single member. Though under Section 106(3) of the Act, on a poll a member need not cast all his votes in the same way. In an OPC such questions do not arise even if assuming there is a poll. The single member cannot create an absurdity of sorts by casting some of his votes in one way and remaining votes the other way.

4. Section 117 of the Companies Act, 2013 requires every resolution in respect of which explanatory statement should be given and every special resolution and every resolution agreed to all the members of the Company are all required to be filed with the Registrar of Companies.

5. For instance, if the OPC wants to change its name or objects, a special resolution is necessary and under Section 114 of the Act, the intention to pass the resolution as a special resolution must be specifically stated in the notice of the meeting.

6. Sub-section (8) of Section 13 that prohibits a company from changing its objects if it has unutilized money out of the money raised from public, will not apply to an OPC because the question of raising money from public through prospectus by an OPC does not arise at all.

7. Section 122 of the Act states that for the purposes of section 114, any business which is required to be transacted at an annual general meeting or other general meeting of a company by means of an ordinary or special resolution, it shall be sufficient if, in case of an OPC, the resolution is communicated by the member to the company and entered in the minutes-book required to be maintained under Section 118 and signed and dated by the member and such date shall be deemed to be the date of the meeting for all the purposes under this Act.

8. Section 122 of the Act further states that notwithstanding anything in this Act, where there is only one director on the Board of Directors of an OPC, any business which is required to be transacted at the meeting of the Board of Directors of a company, it shall be sufficient if, in case of such OPC, the resolution by such director is entered in the minutes-book required to be maintained under Section 118 and signed and dated by such director and such date shall be deemed to be the date of the meeting of the Board of Directors for all the purposes under this Act.

ANNUAL RETURN

Like any other company, even an OPC must file its annual return with the Registrar of Companies. As an OPC need not call and hold an AGM, there seems to be lacuna with respect to the time within which the annual return must be filed with the Registrar of Companies. However there is indeed a weird provision that says, the annual return of an OPC could be signed by its company secretary. Only if there is no company secretary, it should be signed by its director.

Applicability of certain other provisions and chapters of the Act:

1. Sections 23 to 41 relating to public offer and Section 42 with respect to private placement would not apply.

2. Section 48 with respect to variation of share holders rights, calls on shares and such provisions do not apply. Being a One Person Company, there is no meaning in issuing shares at premium or at discount and the question of sweat equity shares.

3. Section 61 is also possible with respect to increase in the share capital etc.

4. Section 62 with respect to rights issue and further issue of shares will not apply.

5. Section 63 with respect to bonus shares will apply.

6. Section 64 with respect to filing of notice to be given to ROC will apply.

7. Section 65 can apply. Section 66 with respect to reduction of share capital will apply.

8. Section 67, 68, 69, 70 do not seem to be have any big advantage though nothing stops the One Person Company to buy back its own shares.

9. Section 71 with respect to issue of debentures may not be of any big use in view of the CAP on the turnover.

10. Section 72 does not apply because it is compulsory for the single share holder to appoint nominee.

11. Sections 73 may apply as an OPC can accept deposits from its single shareholder.

12. An OPC may accept loans from its directors subject to necessary declaration.

13. Section 74 will not apply as there was no OPC under the earlier Act and consequently Section 75 of the Act too will not apply.

14. Section 76 does not apply to an OPC as it applies only to public companies.

15. Chapter VI – Registration of charges and Chapter VII - relating to Management and administration will apply.

16. With respect to Chapter VIII – Declaration and payment of dividend will apply.

17. Chapter IX – Accounts of Companies will apply.

18. Chapter X – Audit and Auditors will apply. It is very clear that the provision for rotation of auditors will not apply. Cash flow statement is not required to be given under section 129 for One Person Company. In the case of One Person Company, the Boards' Report means a report containing explanations or comments by the Board on every qualification, reservation or adverse remark or disclaimer made by the auditor in his report. Section 148 relating to cost audit will not apply.

19. Chapter XIV – Inspection, inquiry and investigation, they may apply.

20. Chapter XV – Compromises, arrangements and amalgamations will apply, more particularly the simple procedure under Section 233 can be applied.

21. Chapter XVI – relating to prevention of oppression and mismanagement will not apply. Section 245 relating to Class action will not apply.

22. Chapter XVII – Registered Valuers may apply with respect to valuation.

23. Chapter XVIII - Removal of names of Companies from the Register of Companies will apply with respect to defunct One Person Company.

24. Chapter XIX – Revival and Rehabilitation of sick companies do not have any value in the case of a One Person Company which is going to be a very small company.

25. Chapter XX – with respect to winding up will apply between Section 270 to Section 365.

26. Chapter XXI will not apply with respect to Companies Authorised to Register under this Act including provisions of Part II of Chapter XXI relating to winding up of unregistered companies.

27. Chapter XXII – Companies Incorporated outside India will not apply.

28. Chapter XXIII – with respect to Government Companies may not apply even thought if Government of India or any State Government wants to float a company and hold its capital in the name of the President or Governor, as the case may be in view of the fact that the President or Governor will be holding the shares for the beneficial interests of the Government concerned. In the case of an OPC, only a natural person can be the single member. Moreover the size of capital and turnover prescribed for OPCs is very small, smaller than the maximum limits for a small company.

29. Chapter XXIV – relating to Registration offices and fees and Chapter XXV – with respect to companies to furnish information or statistics will apply.

30. Chapter XXVI – relating to Nidhi's will not apply because in order to be a Nidhi company, the number of members of a Nidhi cannot be less than 7.

31. Chapter XXVII – relating to National Company Law Tribunal and Appellate Tribunal will apply.

32. Section 407 to Section 434 may apply to One Person Company literally only with respect to winding up of One Person Company.

33. Chapter XXVIII – with respect to Special Courts will apply.

34. Chapter XXIX – Miscellaneous will apply.

APPLICABILITY OF SCHEDULES:

35. Schedule I:

    a. Table – A – Memorandum of Association of a Company Limited by shares will apply.
    b. Table – B - Memorandum of Association of a Company Limited by guarantee and not having a share capital will apply.
    c. Table – C - Memorandum of Association of a Company Limited by guarantee and having a share capital will apply.
    d. Table – D - Memorandum of Association of an unlimited Company and not having share capital will apply.
    e. Table – E - Memorandum of Association of an unlimited company and having share capital will apply.
    f. Table – F – Articles of Association of a company limited by shares will apply.
    g. Table – G – Articles of Association of a company limited by guarantee and having a share capital will apply.
    h. Table – H – Articles of Association of a company limited by guarantee and not having share capital will apply.
    i. Table – I – Articles of association of an unlimited company and having a share capital will apply.
    j. Table – J – Articles of association of an unlimited Company and not having share capital will apply.

36. Schedule II – Useful lives to compute depreciation will apply.

37. Schedule III – General Instructions for preparation of Balance sheet and Statement of Profit and Loss of a company will apply.

38. Schedule IV – Code for Independent Directors will not apply.

39. Schedule V – Conditions to be fulfilled for the appointment of a Managing or Whole time Director or a manager without the approval of the Central Government will apply.

40. Schedule VI – Infrastructural Projects may apply.

41. Schedule VII – Corporate Social Responsibility will not apply.

CONCLUSION

The specific form for incorporation of an OPC contains reference to such terms as industrial activity and entrenchment all of which would be useful only if there is scope of increasing the size of business. There are so many limitations and restrictions which could be removed or relaxed in order to make OPCs popular. Section 462 should also be applied to grant specific exemptions to OPCs from several provisions. It may be noted that the Secretarial Standards Board is bringing out a guidance note on OPCs. A lot of provisions could have been made inapplicable such as Debentures, Charges, inspection, investigation, and winding up. It would have been possible to do away with the concept of forming several types of OPCs by limiting the facility to an OPC limited by shares. CS

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One Person Companies: Indian Law in a Global Perspective

While juxtaposing the Indian concept of OPCs with that in several other jurisdictions, particularly in the context of the recently proposed European Union directive to Member States, it is noted that the Indian OPC suffers from several limitations as compared to the global counterpart. Given the acclaimed purpose of the law namely to encourage entrepreneurs to corporatize, the question as to whether there is enough regulatory liberty in the law to promote corporatisation has been examined.

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

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

The concept of One Person Companies ('OPC') has been introduced in India by the Companies Act, 2013 and it is hyped as one of the major highlights of the new law.. The concept may be new to India but not elsewhere. Called by various names, single shareholder companies have been a common vehicle in corporate laws of many countries. Hence, the introduction of OPC in Indian corporate law was only a step towards harmonisation of the Indian Companies Act with the rest of the world. Having been enforced effective from 1st April 2014, there has been a significant pick up in the level of activity on incorporation of OPCs in India. According to data available on MCA's website, in the month of June, 2014, 68 OPCs had been incorporated. This is more than 7 times the number of OPCs incorporated in the month of May, 2014. This enthusiastic response is despite several limitations contained in the law on the concept. In this article,

we juxtapose the Indian concept of OPCs with that in several other jurisdictions, particularly in the context of the recently proposed European Union directive to Member States. We note that the Indian OPC suffers from several limitations as compared to the global counterpart, and given the acclaimed purpose of the law, viz., to encourage entrepreneurs to corporatize, we discuss whether there is enough regulatory liberty in the law to promote corporatisation.

CONCEPT OF OPCs AROUND THE WORLD

According to data available[1], Liechtenstein was the country to have acknowledged the legal position of OPCs by statute law and this concept has been replicated in other countries as well. United Kingdom, Singapore, United States of America, China are some such countries which have by statute allowed incorporation of OPCs. In most such countries the rationale behind allowing incorporation of OPCs was to ensure that sole proprietorship firms get a corporate cloak.

The European Union recently considered a proposal for a directive for member States to permit single shareholder companies[2]. The discussion paper attached thereto gives details of single shareholder company legislation in 28 European countries. The concept of single shareholder companies exists in corporate laws of many countries in different forms. Prior to the 2014 proposals, there has been a 1989 Directive of the European Union (See Directive no 89/667/EEC[3]) pursuant to which most European countries permitted single shareholder companies.

Hereunder we discuss the position of single shareholder companies in some significant jurisdictions.

UNITED KINGDOM

United Kingdom enacted the Companies (Single-Member Private Limited Companies) Regulations, 1992 which came into effect from July 14, 1992. Under this law, a single member company would be a private limited company, whether limited by shares or guarantee. These Regulations required such companies to also maintain a minute book and hold meetings with the singular member being reckoned as quorum. Amendments were made to the Companies Act, 1985 and Insolvency Act, 1986 to incorporate provisions pertaining to single member companies. Further amendments to the concept of incorporation of single member companies were incorporated in the Companies Act, 2006 in keeping with the Twelfth Council Company Law Directive[4] on September 16, 2009. It is with this that single member companies in United Kingdom could be incorporated as a public company also.

Section 123 of the UK Act, 2006 provides for formation of single member companies. A multi person company may reduce the number of members to one, by filing a statement with the Registrar. Thus, there is a full fungibility between multi-person company and a single-member company. Other than a filing requirement, there are no special limitations or disabilities for single member companies.

EU PROPOSAL OF 2014

On April 9, 2014, the European Commission had put forward a proposal for a directive for establishment of European Private Company Statute. With this Directive the aim was to ask Member States to make available a national company law form for single-member private limited liability companies. This initiative is in line with the recommendations of Report of the Reflection Group on the Future of EU Company Law issued on April 5, 2011[5]. Some of the proposed changes are uniform template for articles of association, minimum capital requirement of € 1. Apart from these, the single-member private limited liability companies shall be known by the common name SocietasUnius Personae. According to the press release of European Commission, European small and medium-sized enterprises (SMEs) were the backbone of the EU economy since 20.7 million SMEs produce 58% of EU GDP and account for 67% of all jobs in the private sector. Since, such SMEs could not set up subsidiaries in other Member States due to legal, administrative or linguistic constraints, the need was felt to harmonise laws on single member companies in all the member states of EU[6]. Further, the framework of a single member company is also such that issues which usually plague any company like minority protection, conflicts of interest and conflict resolution procedures including buy-outs, squeeze outs and exit rights would not arise at all. Thus, the need to initiate such a directive was similar to the need expressed in JJ Irani Committee's report.

Although, the move to adopt a common statute across Member States is novel, yet critics feel that this will act as an encouragement to set up 'letterbox companies'. Letterbox companies are companies which are set up in tax haven countries. Since, under the common statute, there would be a liberty to set up single member private limited liability companies in any Member State and the process of registration of such companies is also proposed to be simplified, the urgent need for EU is to solve the problem of letter box companies established for the purpose of fiscal optimisation[7].

SINGAPORE

In Singapore, the concept of one-person companies was introduced by the Companies (Amendment) Act, 2004. Section 19 of the Companies Act permits any person to form a company. The shareholder may be a natural or a corporate person. However,

1 Taken from '*A Comparative Study of Legal Framework for Single Member Company in European Union and China*' by Beihui Miao published on August 21, 2012
2 Read the proposal at : http://ec.europa.eu/internal_market/company/modern/index_en.htm
3 Read the directive at : http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:31989L0667
4 Read the Directive at : http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:258:0020:0025:EN:PDF
5 Read the entire report at : http://ec.europa.eu/internal_market/company/docs/modern/reflectiongroup_report_en.pdf
6 Extracts taken from http://europa.eu/rapid/press-release_MEMO-14-274_en.ht
7 Extract taken from : http://www.etuc.org/documents/etuc-position-single-member-private-limited-liability-companies#.U8jMb_mSzX0

Although, the intention behind introducing OPCs in India is novel, yet in their attempt to harmonise the concept with that in other countries, what has been presented to us is a watered down version of the same. Going by the figures provided earlier, it is clear that the concept has caught on like a forest fire in India, however, the real question remains if doing business in India in corporate form has actually been made any easier than before.

section 145 of the Companies Act requires a director of all companies to be a national of Singapore.

HONG KONG

Amendments were introduced by the Hong Kong Companies (Amendment) Ordinance 2003 to enable formation of single member companies. These amendments largely follow the UK law which merely requires filing of a notice on the registrar that the number of members has been reduced to one.

DELAWARE

In Delaware, the Limited Liability Company Act allows the incorporation of a company with a single member. Under this Act, the member can be a natural person or a corporation or even a limited liability partnership. What is also notable is that the member need not be a citizen of Delaware. Also, the single member itself can execute the Limited Liability Company Agreement and its enforceability shall not be questioned on the grounds that there is only one party to the agreement.

One of the most striking features of a single member limited liability company is that it can be regarded as a disregarded entity for the purpose of federal taxes. According to the Internal Revenue Code, if a single-member LLC does not elect to be treated as a corporation, the LLC is a "disregarded entity," and the LLC's activities should be reflected on its owner's federal tax return.

CHINA

In China, the concept of one-person limited liability companies was introduced in the year 2006. The major highlights are:

1. Such companies can be set up with a minimum of RMB 100, 000 Yuan and the shareholder has to pay the entire amount.
2. The single member can either be a natural person or a legal person.
3. Any individual cannot set up more than one one-person limited liability company.
4. The formulation of the articles of association is at the complete discretion of the shareholder
5. The requirement to hold a general meeting has been dispensed with. However, the member has to ensure minuting for any decisions taken as listed down in Article 38 which pertains to 'decisions which can be taken in a general meeting', proper minutes is maintained.
6. The concept of a separate legal entity also comes with a twist wherein if the single member is not able to distinguish the property of the company as different from that of his, then he shall bear joint liabilities of debt of the company.

THE INDIAN SCENARIO

The JJ Irani Committee Report had suggested a few characteristics of OPCs in India. As is typical with the general drafting style of law makers in case of Companies Act, 2013, a major part of the law applicable to OPCs have been introduced by way of rules. The provisions applicable to OPCs have been majorly drawn from the provisions applicable to OPCs in other parts of the world.

Although, the intention behind introducing OPCs in India is novel, yet in their attempt to harmonise the concept with that in other countries, what has been presented to us is a watered down version of the same. Going by the figures provided earlier, it is clear that the concept has caught on like a forest fire in India, however, the real question remains if doing business in India in corporate form has actually been made any easier than before.

NATURAL PERSON AS MEMBER OF OPC

This is probably one of the major setbacks for those desirous of setting up OPCs. With the introduction of single member companies in Singapore, United Kingdom, etc., these became a favoured vehicle for doing business. In particular, wholly owned subsidiary companies are formed as sole member companies. Of international jurisdictions, it is difficult to find a parallel in any other country which has limited single member companies. It is not that the Indian law does not recognise wholly-owned subsidiaries – these have been recognised for decades, with nominees introduced just to raise the number of members to the legal minimum.

It was expected that the concept of OPCs would provide a statutory recognition to wholly-owned subsidiaries. The text of the Act, 2013 in sec. 2 (62) defines an OPC as a company with one person as a member. The word "person", as commonly understood under General Clauses Act, 1897 would include an artificial person.

> If the admitted purpose of permitting OPCs was to encourage small businesses to corporatize, is it logical to expect a small business to remain small, if it has chosen to adopt the OPC vehicle? Sure enough, any entrepreneur choosing the OPC form will like to leverage on his own capital and borrow thereon, taking advantage of limited liability.

However, the Rules inserted a restriction that the "person" behind an OPC could only be a natural person.

It is difficult to understand what potential abuse of the device of OPC was in the mind of the rule maker, so as to impose the restriction that only a natural person can own an OPC. If the potential abuse of land-ceiling law was an issue, even currently, shell companies are being formed to bifurcate land holdings in the names of various companies. There is no "lifting or piercing of corporate veil" there so as to look through the facade of the company and recognise the entity of the shareholder.

Being limited only to natural persons, the existing practice of having wholly-owned subsidiary companies with nominee holdings will still continue. Hence, Indian law will be far different from global law in permitting companies to have a single shareholder.

Further, the Rules also do not allow a natural person to incorporate more than one OPC, leading to a forced lifting or piercing of corporate veil there. That is to say, the law necessarily recognises the name of the single member behind the company, whose name is entered in the Memorandum of Association itself. The 'one-person-one-company' rule equates the persona of the natural person to that of the company, since having formed one company, the natural person is deprived of his ability to form another. The key feature of corporate law is the artificial separation of entities, which seems to have been disregarded in this case. It will not be surprising, if at some point of time, courts tear through the corporate veil and even deprive the company of the benefit of its limited liability, treating the company as nothing but the extended personality of the natural person behind it.

Further, not only does the person have to be a citizen of India, he also has to be resident of India.

PRINCIPLE OF PERPETUAL SUCCESSION CONTINUES

The Rules have however ensured that the principle of perpetual succession remains intact in case of OPCs by requiring the subscriber to nominate a person who shall become the member of the OPC in case of the subscriber's death. In fact such a lacuna exists in Alabama LLC Act which provides that the affairs of the LLC can be wound up if there is no existing member unless the holders of all the financial rights in the limited liability company agree in writing, within 90 days after the cessation of membership of the last member, to continue the legal existence and business of the limited liability company and to appoint one or more new members. It is due to the oversight regarding the limited time available to avoid the dissolution of OPC if the single member dies that the Alabama court had to order the company to be wound up in the case of *L.B. Whitfield, III Family LLC* v. *Whitfield*[8].

NARROW LIMIT ON TURNOVER TO STOP BUSINESSES FROM GROWING BIG

Even if one were to understand the natural person rule as limiting the concept of OPCs to encouraging small businesses to corporatise, the limit of Rs. 2.00 crores set for turnover is a strong deterrent. Turnover is different for different businesses – for a consulting firm, reaching a turnover of Rs. 2.00 crores is a dream-come-true, but for a trader working on small margins, a Rs. 2.00 crore turnover may mean nothing. A share trader may be reaching this turnover in a day!

If the admitted purpose of permitting OPCs was to encourage small businesses to corporatize, is it logical to expect a small business to remain small, if it has chosen to adopt the OPC vehicle? Sure enough, any entrepreneur choosing the OPC form will like to leverage on his own capital and borrow thereon, taking advantage of limited liability. Assuming an entrepreneur starts with a capital of Rs. 50.00 lacs (maximum permitted by the Rules), and borrows equal to that, he has a resource base of Rs. 1.00 crore. Even if he turns this over twice in a year, he would have hit the turnover limit. It will be really interesting to see if businesses can actually afford to have this limitation on turnover, and still feel the motive to corporatize.

8 Read the entire text of the ruling at: http://www.llclawmonitor.com/uploads/file/Whitfield%20case.pdf

FATE OF COMPANIES INCORPORATED UNDER ACT, 1956

The Companies Act, 2013 has brought within itself an element of positivity by allowing existing private companies to be converted into OPCs on reaching a certain threshold. This should come as good news for such companies which are looking to move towards a less regimented way of doing business. Although, the Act, 2013 does not talk about conversion of a public company into an OPC, there is seemingly nothing which stops a public company from converting into an OPC by way of application of section 18 of Act, 2013.

EXEMPTIONS FROM CERTAIN PROVISIONS

The Act has ensured minimum regularisation of OPCs by exempting OPCs from a number of provisions. Notably, the provisions relating to convening of annual general meeting have been exempted with the only requirement being to maintain minutes. Similar provisions exist for board meeting also where the OPC has only one director.

CAN SOLE SHAREHOLDER COMPANIES BENEFIT FROM LIMITED LIABILITY?

The age-old company in *Solomon* v. *Solomon and Company* was, virtually, a single shareholder company. The issue, discussed decades back, was whether the company is distinct from its shareholder? The question quite importantly arises to consider limited liability – an individual has unlimited liability for what he does or owes, but a company is liable only to lose its capital at the maximum. Thus, can single shareholders claim that their companies are different from their own personalities, to have the benefit of limited liability?

The concept of 'piercing the corporate veil' is an oft discussed topic wherein the general guiding principle is that the corporate cloak of any company can be only pierced if it has been used to induce fraud. This was held in the recent case of *Prest* v. *Petrodel Resources Limited and others*[9] wherein Lord Sumption stated that corporate veil can be pierced only to prevent the abuse of corporate legal personality. Although, in an OPC, the member is the sole controller, yet the fact that any OPC is a separate legal entity cannot be undermined or forgotten.

In the USA, there have been several rulings where lifting or piercing of corporate veil has been attempted in case of LLCs, which are essentially single shareholder companies. It was held by the Kentucky Supreme Court in the case of *Turner* v. *Andrew*[10] that:

"Moreover, an LLC is not a legal coat that one slips on to protect the owner from liability but then discards or ignores altogether when it is time to pursue a damage claim."

Similar view was also expressed in the Twelfth Council Company Law Directive which stated that the very purpose behind setting up a single member company was to allow genuine individual entrepreneur to limit his liability. However, this power should not be misused as a vehicle to do fraud.

Thus, any assumption that the member can be taken to be a proper party to a legal proceeding by or against the company solely by reason of being a member was not profound. Hence, the concept of the sole member being an 'alter ego' of the OPC cannot be the sole reason to pierce the corporate veil in case of OPCs. This was discussed by the Court of Appeals in the case of *Hildreth* v. *Tidewater*[11] wherein it indicated that the alter ego rule should be applied only with great caution and in exceptional circumstances, and that the "evasion of a legal obligation" grounds will not apply if the party seeking to pierce the corporate veil has dealt with the corporation in the course of its business on a corporate basis. The concept of piercing the corporate veil was further discussed in the case of *Serio* v. *Baystate Props., LLC*[12] wherein the Maryland Court of Special Appeals refused to pierce the corporate veil of Serio Investments, LLC since there was adequate evidence to show that it had entered into a contract with Baystate Properties, LLC in its own capacity and there was no evidence of co-mingling of its funds with that of Serio, the sole member of Serio Investments, LLC or that an attempt to evade Serio Investments' legal obligations or of disregard of the entity status of Serio Investments.

CONCLUSION

Looking at the sudden rush to incorporate OPCs in India, critics may pass off the current trend as a fad. In fact in European Commissions which as discussed above is proposing to set up a separate regime for single member limited liability private companies, the figures are dismally low. In the UK, for instance, there are around 1.2 million single member companies out of around 2.5 million of all limited liability companies[13]. In India, although corporates may not have enough reason to cheer, individuals have been presented with another vehicle to do business. Further, mere incorporation of an OPC is not sufficient to do business. It remains to be seen if banks will also be comfortable providing finance. However, this does not mean that the doors are closed for companies to incorporate OPCs in India. As has been stated in the Standing Parliamentary Committee Report of 2009 that should the concept of OPC grow in India, further modifications may be considered to the existing provisions pertaining to membership of OPCs. We strongly recommend doing away with the turnover limit, and the restriction that only a natural person can be the member of an OPCs. CS

9 Read the entire text of the ruling at : http://www.bailii.org/uk/cases/UKSC/2013/34.html
10 Read the entire text of the ruling at: http://www.llclawmonitor.com/uploads/file/Kentucky%20 2011-SC-000614-DG.pdf
11 838 A.2d 1204 Md. 2006
12 Read the entire text of the ruling at: http://mdcourts.gov/opinions/cosa/2013/1441s09.pdf
13 Taken from : http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52014SC0124

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An Overview Of The Law And Practice Pertaining To One Person Company (OPC) Under The Companies Act, 2013

The immediate requirement from the Government is to suitably devise a tax structure that complements the OPC entity. Concomitant changes to other laws also need to be brought in. How successful the OPC regime will be is indeed a million dollar question.

INTRODUCTION

Among the several new concepts in the Companies Act, 2013 (hereinafter referred to as the Act),a notable one is that of One Person Company (OPC), a concept that has its origins in the United Kingdom, as do all other good things in our country. The genesis of OPC in India can be traced to 2004-05 when the expert committee on company law reform chaired by Dr. JJ Irani first mooted the concept of OPC in the Indian context. The Committee succinctly and aptly summarized the need for OPC and at para 6 of its report, it observed thus: "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."

> In keeping with the cardinal principles of 'separate legal entity' and 'perpetual succession' that are germane to the corporate legislation inherited from the United Kingdom, the Act has mandated the requirement of nomination in case of OPC.

The Institute of Company Secretaries of India (ICSI) in its backgrounder on the Act has buttressed the need for OPCs. It states:

"OPCs are imperative because they would give entrepreneurial capabilities of people an outlet for participation in economic activity and such economic activity may take place through the creation of an economic person in the form of a company."

Quite appropriately, the then Minister of Corporate Affairs remarked at a media interaction that the OPC concept was quite revolutionary and would give the individual entrepreneurs all the benefits of a company, which means they would get credit, bank loans, access to market, limited liability, and legal protection that are available to the companies. He added that rather than the middlemen conjuring profits, the OPC will have direct access to the market and the wholesale retailers. He was sanguine that the new concept would also boost the confidence of small entrepreneurs.

PROVISIONS IN THE ACT AND ANALYSIS

As per section 2 (62) of the Act, OPC is defined as a company which has only one person as a member.

Section 3 (1) (c) of the Act enables the formation of a new entity as an OPC. It reads as follows:

"3. (1) A company may be formed for any lawful purpose by—

(c) one person, where the company to be formed is to be One Person Company that is to say, a private company, by subscribing their names or his name to a memorandum and complying with the requirements of this Act in respect of registration:

Provided that the memorandum of One Person Company shall indicate the name of the other person, with his prior written consent in the prescribed form, who shall, in the event of the subscriber's death or his incapacity to contract become the member of the company and the written consent of such person shall also be filed with the Registrar at the time of incorporation of the One Person Company along with its memorandum and articles:

Provided further that such other person may withdraw his consent in such manner as may be prescribed:

Provided also that the member of One Person Company may at any time change the name of such other person by giving notice in such manner as may be prescribed:

Provided also that it shall be the duty of the member of One Person Company to intimate the company the change, if any, in the name of the other person nominated by him by indicating in the memorandum or otherwise within such time and in such manner as may be prescribed, and the company shall intimate the Registrar any such change within such time and in such manner as may be prescribed:

Provided also that any such change in the name of the person shall not be deemed to be an alteration of the memorandum"

In many ways, this section is the heart and soul of OPC in the Act.

OPC - ELIGIBILITY CRITERIA/ REQUIREMENTS

Rule 3 (1) of the Companies (Incorporation) Rules, 2014 provides that only a natural person who is an Indian citizen and resident in India shall be eligible to incorporate an OPC. Further, it is also provided that only such a person can be the nominee of the sole member of the OPC. The Rule also provides for some restrictions on OPC:

- No person shall be eligible to incorporate more than one OPC or become nominee in more than one such company
- Where a natural person, being member in an OPC becomes a member in another such Company by virtue of his being a nominee in that OPC, such person shall meet the eligibility criteria specified in the Rules within a period of one hundred and eighty days
- No minor shall become member or nominee of the OPC or can hold share with beneficial interest
- OPC cannot be incorporated or converted into a company under section 8 of the Act
- OPC cannot carry on Non-Banking Financial Investment activities including investment in securities of any bodies corporate

LIABILITY OF THE MEMBER OF THE OPC

Section 3 (2) of the Act provides that an OPC formed under the Act may be either a company limited by shares, or limited by guarantee or an unlimited company.

The liability of the member of the OPC may be either limited or unlimited and the same shall be stated appropriately in the Memorandum of Association of the OPC. In the case of an OPC having a share capital, the Memorandum of Association shall

state the amount of share capital with which the company is to be registered and the division thereof into shares of fixed amount and the number of shares which the subscriber to the memorandum agrees to take which shall not be less than one share. It is also provided that the memorandum of association of the OPC shall indicate the name of the person who, in the event of death of the subscriber, shall become the member of the company. The restrictions contained in section 4 (2) of the Act with regard to names of company shall also apply to OPC, mutatis mutandis, as do the provisions pertaining to application for reservation of name by the OPC and the eventual reservation of name by the Registrar of Companies concerned. The memorandum of association of the OPC, depending on whether it is limited, and if so, by shares or by guarantee, or unlimited, shall be in the formats prescribed under Table A, B, C, D and E, in Schedule I as may be applicable to such OPC.

REQUIREMENT OF NOMINATION AND RELATED MATTERS

In keeping with the cardinal principles of 'separate legal entity' and 'perpetual succession' that are germane to the corporate legislation inherited from the United Kingdom, the Act has mandated the requirement of nomination in case of OPC. It has been provided that in the memorandum of the OPC, the subscriber shall nominate and indicate the name of the person, with his prior written consent in Form INC3, who shall, in the event of death or other contractual incapacity, become the member of the company to accept all the obligations and responsibilities of the OPC. The OPC shall in turn, file the same with the Registrar of Companies in Form INC2 along with the Memorandum and Articles of Association at the time of incorporation.

Further, such other person who has been so nominated and has consented to accept the obligation of the OPC in the event of death or other contractual incapacity of the subscriber of the OPC may withdraw his consent by giving a notice in writing to the sole member and the OPC. The sole member shall be bound to nominate another person as the nominee with a period of 15 days of the receipt of the notice of withdrawal as aforesaid and shall send an intimation in writing to the company along with the written consent of such other person so nominated in Form INC3.

The OPC shall, within 30 days of receipt of the notice of withdrawal of consent, file with the Registrar of Companies, a notice of such withdrawal of consent and the intimation of the name of another person nominated by the sole member in Form INC 4. The written consent in Form INC3 shall also be attached to the Form INC4.

It has also been provided that the subscriber or sole member of the OPC may also at any time change the name of the person nominated by him by giving a suitable notice to the Registrar of Companies. The sole member must intimate the change of nominee in writing to the OPC and nominate any other person in his place. Such intimation must also be in Form INC3.

Where the sole member of the OPC ceases to be a member of the OPC either by death or other contractual incapacity, then the nominee becomes the member of the OPC. The nominee shall within 15 days of becoming a member nominate a person who shall, in the event of his death or other contractual incapacity, become the member of the company to accept all the obligations and responsibilities of the OPC.

It has been clarified that change in the name of the nominee in the Memorandum of Association shall not be deemed to be an alteration therein.

CONTRACTS BY OPC

As per section 193 of the Act, where a one person company limited by shares or by guarantee enters into a contract with the sole member of the company who is also its director, the company shall, unless the contract is in writing, ensure that the terms of the contract or offer are contained in the memorandum or are recorded in the minutes of the first Board meeting held after entering into the contract. The company shall inform the Registrar about every contract entered into by the company and recorded in the minutes.

PRIVILEGES AND EXEMPTIONS OF THE OPC

The *raison de etre* of OPC is to facilitate business for small entrepreneurs by providing it a corporate cloak and at the same time saving it of the compliance requirements. Therefore, it is imperative to provide all possible privileges and exemptions under the Act. These are listed and analyzed as follows:

- The board of an OPC will have only one director. The member who is an individual will be deemed to be the first director until any other director is appointed by the member
- If would be sufficient for any business which is required to be transacted at the meeting of the board of the OPC if such resolution is entered in the minutes book required to be maintained under the law and signed and dated as such
- The financial statements including, consolidated financials, if any, shall be approved by one director for submission to the auditor for his report thereon. The report of the board of directors of an OPC to be attached to the financial statements shall mean the report containing explanations or comments by the board on every qualification, reservation, adverse remark or disclaimer made by the auditor in his report
- The financial statements of an OPC may not include cash flow statement
- An OPC is required to file a copy of its financial statements duly adopted by its member, along with relevant annexures and attachments, within a period of 180 days from the closure of the financial year

- An OPC needs to conduct at least one meeting of the board in each half of a calendar year and the gap between any two meetings shall not be less than 90 days. The provisions of quorum for a board meeting shall also not apply to an OPC
- The annual return of the OPC will have to be signed by the company secretary or in his absence, by the director of the company
- It is not mandatory for an OPC to hold the annual general meeting
- For businesses that are required to be transacted at an annual general meeting, whether by means of ordinary resolution or special resolution
- The words "One Person Company" shall be mentioned in brackets below the name of such company, wherever its name is printed, affixed or engraved.

OPC – CONVERSION AND RELATED MATTERS

Where the paid up share capital of an OPC exceeds fifty lakh rupees or its average annual turnover during the relevant period exceeds two crore rupees, it shall cease to be entitled to continue as a OPC. Such OPC shall be required to convert itself, within six months of the date on which its paid up share capital is increased beyond fifty lakh rupees or the last day of the relevant period during which its average annual turnover exceeds two crore rupees as the case may be, into either a private company with minimum of two members and two directors or a public company with at least seven members and three directors in accordance with the provisions of section 18 of the Act.

The OPC shall be required to alter its memorandum and articles by passing a resolution in accordance with sub-section (3) of section 122 of the Act to give effect to the conversion and to make necessary changes incidental thereto. The OPC shall within a period of sixty days from the date, give a notice to the Registrar in Form No. INC.5 informing that it has ceased to be a OPC and that it is now required to convert itself into a private company or a public company by virtue of its paid up share capital or average annual turnover, having exceeded the threshold limit laid down in the Rules.

An OPC can also get itself converted into a Private or Public company after increasing the minimum number of members and directors to two or minimum of seven members and three directors as the case may be, and by maintaining the minimum paid-up capital as per requirements of the Act for such class of company and by making due compliance of section 18 of the Act for conversion.

A private company other than a company registered under section 8 of the Act having paid up share capital of fifty lakh rupees or less or average annual turnover during the relevant period is two crore rupees or less may also convert itself into OPC by passing a special resolution in the general meeting. Prior to passing such resolution, the company shall obtain 'No objection' in writing from members and creditors. The OPC shall be required to file a copy of the special resolution with the Registrar of Companies within thirty days from the date of passing such resolution in Form MGT14.

The company shall file an application in Form INC.6 for its conversion into OPC along with fees as provided in the Companies (Registration Offices and Fees) Rules, 2014, by attaching the following documents, namely:-

(i) 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 lakh rupees or less or average annual turnover is less than two crore rupees, as the case may be;

(ii) the list of members and list of creditors;

(iii) the latest Audited Balance Sheet and the Profit and Loss Account; and

(iv) the copy of No Objection letter of secured creditors.

ADVANTAGES OF THE OPC

(1) OPCs would surely be a boon for small and tiny entrepreneurs who may have the business wherewithal and ideas and may not yet be ready for the big corporate league. As such, it enables the small time businessman to enter the 'corporate sector' by incorporating OPC.

(2) The major advantage that he would enjoy is that of a separate legal entity. The OPC having an existence of its own, distinct from the sole member.

(3) The liability of the sole member would be restricted to the amount unpaid on the shares held by him.

(4) In keeping with the salutary recommendations of the Irani Committee, the process of setting up an OPC and indeed, administering and running it also seem to be fairly easy and

There is little doubt that any OPC would require the services of a qualified professional to prepare the minutes of the meetings and complete the necessary statutory filings as discerned above. From that perspective, company secretaries have a constricted role to play in the OPC realm. It is vital that the company secretaries gear up to render advisory services to OPC in a manner that is palatable to them – service oriented, comfortable and with ease of use and more importantly, soft on the pocket.

comfortable. There have been a lot of exemptions provided to OPCs as listed above and it would enable the entrepreneur focus on the business rather than on compliance and process oriented matters.

(5) Introduction of OPC is a measure that would provide a fillip to the corporatization of small businesses run by entrepreneurs. The fact that the businessman can do it by himself and not scout for another person to implement his ideas and options, is a huge boon.

(6) Conceptually, OPCs will aid individuals who are in the less organized and unorganized sectors (small and medium sized traders, weavers, artisans, mechanics, carpenters, designers and other skill dependent professions and vocations).

(7) Mandatory rotation of auditor after expiry of maximum term is not applicable.

DISADVANTAGES OF THE OPC

(1) The Act prohibits any foreign participation in the OPC.

(2) The success of this new OPC concept can be clearly gauged only after its implementation. For instance, Limited liability partnerships (LLPs) which were introduced with much ado and fanfare in 2006 did not actually take off and live up to the magnitude of its expectations.

(3) From a taxation perspective, the concept of OPC may not appeal to smaller proprietorships (to convert themselves in OPCs) since the base rate of tax of a company is quite high (30% approx.) and may result in a higher incidence of taxation for them. Conversely, the OPC may also be used by unscrupulous individual entrepreneurs to siphon off funds and evade tax liability. Adequate safeguards must be put in place in appropriate legislations to tide over these issues. The provisions of the UK Companies Act, 2006 are a case in point.

(4) Further, some more grey areas emerge and need to be tackled. For instance, what would be the perspective of lenders, financial institutions and bankers to such companies – would they treat them as a normal company? Or as a special category of company? In terms of reconstruction and liquidation of OPCs, would there be any leeway?

(5) Limited liability being one of the biggest benefits of a corporate form of organization, OPC will have to also compete with LLPs for they too offer the same benefit. However, the latter involves more than one person and as such might lead to a compromise on confidentiality. In all such cases, the OPC alternative would be the preferred vehicle.

(6) It is also unfortunate that while doing away with procedural requirements, the Act has nonetheless not granted any relief to OPCs from the provisions of accounts and audit. This would be a burden and the MCA must look at means to provide relief forthwith on this score by at least exempting them from audit.

ROLE OF COMPANY SECRETARIES

Statutorily, the Act has laid down that the annual return of the OPC will have to be signed by the company secretary or in his absence, by the director of the company. It is almost certain that no OPC will have a company secretary and therefore, this is a toothless provision. Be that as it may, there is little doubt that any OPC would require the services of a qualified professional to prepare the minutes of the meetings and complete the necessary statutory filings as discerned above. From that perspective, company secretaries have a constricted role to play in the OPC realm. It is vital that the company secretaries gear up to render advisory services to OPC in a manner that is palatable to them – service oriented, comfortable and with ease of use and more importantly, soft on the pocket. The fact that OPCs are small entities with comparatively limited means, it offers an opening to company secretaries to offer multifarious services to them. In addition to putting in place the documentation and complying with the norms, they could also assist in business advisory and administration.

CONCLUSION

OPCs are a class of companies distinct from private and public companies. Admittedly, the concept is at a nascent stage; an enabler that facilitates small businesses to dream and give a concrete shape to their dreams. It provides a solid platform for such entities to emerge bigger and stronger. As the business grows, they will have the option and opportunity to move from a fledgling to a full-fledged company. The immediate requirement from the government is to suitably devise a tax structure that complements the OPC entity. Concomitant changes to other laws also maybe brought in. How successful the OPC regime will be is a million dollar question . CS

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Why a One Person Company?

With Limited Partnership Act in place ,there is really no indication as to why it was necessary to provide for the one person company form. There is also no evidence that there was any demand for this form of company which for want of a specific legislation could have posed some problem in carrying on any business activity.

INTRODUCTION

The concept of a `One Person Company' ["OPC"] was first introduced through the Companies Bill, 2009, which was later considered, as the Companies Bill 2011, and ultimately passed by Parliament and became the Companies Act, 2013. The Statement of objects and reasons of the Companies Bill 2009 described the OPC as : "a new entity in the form of One Person Company (OPC), empowering the Government to provide for a simpler compliance regime for OPC and small companies and retention of the concept of Producer companies, while providing a more stringent regime for companies with charitable objects to check misuse."[1]

The notes on clauses of the Companies Bill, 2011 states: "Clause 3. — This clause corresponds to section 12 of the Companies Act, 1956 and seeks to provide minimum number of persons to form a public or private (including One Person Company) (OPC) for any lawful purpose, by subscribing their names to the memorandum. Memorandum of OPC shall indicate the name of a person who shall become member, in the event of death of the single member. However, the other person whose name would reflect in the Memorandum of OPC shall be required to give prior written consent in this regard. He shall have the right to withdraw his consent. It shall be duty of the member of the OPC to intimate the Registrar any change in name of person already mentioned in Memorandum. The companies formed under this clause may be limited by shares or limited by guarantee or an unlimited company."

It may be noted that clause 3 is the present section 3 of the 2013 Act, dealing with formation of companies.

1 Paragraph 7[iv]

There is no indication as to why it was determined that it was necessary to provide for this form of a company. There is no evidence that there was any demand for this one person company which for want of a specific legislation could have posed some problem in carrying on any business activity. The Limited Liability Partnership Act, 2008 enables an association of the members of the three Institutes to form a limited liability partnership, which was not possible under the Indian Partnership Act, 1932.

RELEVANT PROVISIONS

The Companies Act, 2013 ["the Act"] has defined the OPC as: "One person company" means a company which has only one person as a member[2]. Section 3 of the Act provides for the formation of a company. Where the company to be formed is an OPC, it has to be a private company. The one person who will be the only member of the one person company should sign the memorandum, by subscribing his name to the memorandum. In the case of a one person company, the memorandum should state the name of another person who shall, in the event of the subscriber's death or his incapacity to contract, become the member of the company. This statement should be made with the prior written consent of that other person. The prior written consent, in the prescribed form, of this other person who will step into the shoes of the original subscriber to the memorandum of the OPC, shall be filed with the Registrar at the time of the incorporation of the OPC, along with that company's memorandum and articles. The other person may withdraw his consent in such manner as may be prescribed. Also, the member of one person company may at any time change the name of such other person by giving notice in such manner as may be prescribed. It is the duty of the member of the one person company to intimate to the company, the change in the name of the other person nominated by him, by indicating in the memorandum or otherwise, within such time and in such manner as may be prescribed. The company shall intimate the Registrar any such change, within such time and in such manner as may be prescribed.

A company formed under section 3[1] may be either a company limited by shares or a company limited by guarantee or an unlimited company.[3]

2 S 2[62]
3 S 3[2]

Section 96[1] of the Act requiring the holding of annual general meetings does not apply to a one person company. It runs as follows: ` Every company other than a one person company shall in each year hold in addition to any other meetings, a general meeting as its annual general meeting …..'

Section 193 dealing with a contract by one person company is as follows: "(1) Where one person company limited by shares or by guarantee enters into a contract with the sole member of the company who is also the director of the company, the company shall, unless the contract is in writing, ensure that the terms of the contract or offer are contained in a memorandum or are recorded in the minutes of the first meeting of the board of directors of the company held next after entering into contract : Provided that nothing in this sub-section shall apply to contracts entered into by the company in the ordinary course of its business. (2) The company shall inform the Registrar about every contract entered into by the company and recorded in the minutes of the meeting of its board of directors under sub-section (1) within a period of fifteen days of the date of approval by the board of directors".

Section 193 dealing with a contract by a one person company is unsatisfactory from the point of an outsider proposing to deal with the company, for example a lender, if one could be found willing to lend to the one person company. An agreement may meet a statutory requirement, but an outsider will not be willing to spend his time in due diligence, as it is well known that, even in the case of large companies, with provision for disclosure of the interest of a director, the records of a company available for inspection are not up-to-date and a series of meetings and checking of records in the company as well as the office of the Registrar will be necessary to ascertain the latest position on such contracts and their effect in so far as they may be of concern to the outsider seeking information.. A `contract in the ordinary course of business' is a vague term and could lead to contentions. It may be in the interests of everyone, if the certificate of Registration that will be issued by the Registrar states `XYZ Ltd. [One person company]'.

WHAT IS THE GENESIS?

There is no indication as to why it was determined that it was necessary to provide for this form of a company. There is no evidence that there was any demand for this one person company which for want of a specific legislation could have posed some problem in carrying on any business activity. The Limited Liability Partnership Act, 2008 enables an association of the members of the three Institutes to form a limited liability partnership, which was not possible under the Indian Partnership Act, 1932. So much for the purpose of creating this form of a company.

The concept of one person company does not sail well with the principle of incorporation of companies, more so with the idea of incorporating companies for carrying on business activities on a large scale. Leaving aside the one person company, incorporation

> The basic question is whether it is necessary to provide for such a chain of nominations. What are they intended to achieve, when a nominee may withdraw his consent? Is a nomination the only answer or should the subscriber to the memorandum of a one person company be asked to make a more stable arrangement?

of a company, though it requires a minimum of two or seven members, is followed by the next stage of issuing capital which in turn is followed by dispersal of the business activities of a company throughout the country and in some cases outside India also. This is how incorporation has been demonstrated, throughout the world, as a dynamic vehicle for spiralling through companies, industrial growth beyond one's imagination.

What could be the objects clause of a one person company, and how would they be achieved if there is only one member, though he may state that he agrees to take all the shares in the capital of the company[4]. The memorandum of a company shall be in respective forms specified in Tables A, B, C, D and E in Schedule I as may be applicable to such company.[5] (6) The articles of a company shall be in respective forms specified in Tables, F, G, H, I and J in Schedule I as may be applicable to such company.[6]

THE COMPANIES [INCORPORATION] RULES, 2014

Rule 3 of the Companies (Incorporation) Rules, 2014 dealing with incorporation of a one person company has prescribed that only a natural person who is an Indian citizen and resident in India, shall be eligible to incorporate a one person company and only such a person may be a nominee for the sole member of a one person company. The Explanation to this Rule states that for the purposes of this rule "resident in India" means 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.

It is not clear as to how such a test would meet the purpose in the context of obtaining incorporation of a one person company. Where the only person is the sole member and if he is away for a greater part of the year, who would deal with the public and queries from the Registrar of Companies? In matters of company management, there should always be someone with sufficient authority to represent the company available at the registered office of the company to act for the company and provide information which the company may be bound to give to public authorities. Maybe this qualification would not cause much practical problems in tax matters, in companies where there are other directors, including a managing director.

No person shall be eligible to incorporate more than a one person company or become a nominee in more than one such company. Where a natural person, being a member in a one person company in accordance with Rule 3, becomes a member in another one person company as a nominee in that other company, he shall meet the eligibility criteria, stated in sub-rule 2, which is that he should not be a nominee in more than one such company. A minor is not eligible to become a member or nominee of a one person company, nor can he hold shares with beneficial interest.

A one person company cannot be incorporated or converted into a company under section 8 of the Act, which deals with formation of a company with charitable objects etc. A one person Company cannot carry out Non-Banking Financial Investment activities including investment in securities of any body corporates. Nor can a one person company convert voluntarily into any kind of company unless two years has expired from the date of incorporation of one person company, except threshold limit (paid up share capital) is increased beyond fifty lakh rupees or its average annual turnover during the relevant period exceeds two crore rupees.

It appears to be a theoretical situation that a minor would join the incorporation of any company, much less a one person company. Where there is only one member, would he be in a position to bring in the amount of capital that would be necessary to carry on non-banking financial investment activities? And would one consider the risk worth taking? The point is that these appear to be provisions for situations that may never arise in practice.

Rule 4 deals with nomination by the subscriber to the memorandum of a one person company. This is to comply with the first proviso to section 3[1] of the Act. The nomination is made by the subscriber to the memorandum of a one person company of another person to become a member of the one person company, in the event of the death or incapacity of the subscriber to act. The nomination can be made only after obtaining the prior written consent of the person thus nominated. The nomination, the written consent and other papers are to be filed with the Registrar at the time of the incorporation of the company along with the memorandum and articles.

The person nominated by the subscriber or member of a one person company may withdraw his consent by giving a notice in writing to such sole member and to the one person company. The sole member shall nominate another person as nominee within fifteen days of the receipt of the notice of withdrawal and shall send an intimation of such nomination in writing to the Company, along with the written consent of such other person so nominated in the prescribed form. The company shall, within

4 Schedule I of the Act, Table A, item 7, in the case of a one person company
5 S 4[6]
6 S 5[6]

thirty days of the receipt of the notice of withdrawal of consent, file with the Registrar, notice of withdrawal of consent and the intimation of the name of another person nominated by the sole member in the prescribed form. Rule 4[5] is a general authority to the subscriber or a member of a one person company, to write to the company, intimating the change of the name of the nominee, at any time and for any reason and also nominate another person after obtaining his prior written consent. The company shall file with the Registrar the notice of the change within the prescribed period in the prescribed form.

Where the sole member of One Person Company ceases to be the member in the event of death or incapacity to contract and his nominee becomes the member of such one person company, such new member shall nominate within fifteen days of becoming member, a person who shall in the event of his death or his incapacity to contract become the member of such company, and the company shall file with the Registrar an intimation of such cessation and nomination in the prescribed form within the prescribed period.

The basic question is whether it is necessary to provide for such a chain of nominations. What are they intended to achieve, when a nominee may withdraw his consent? Is a nomination the only answer or should the subscriber to the memorandum of a one person company be asked to make a more stable arrangement?

Will the nominee pay for the shares? What can be shown, by the company, as the consideration for which the nominee became the owner of the shares. If they are not fully paid, will the nominee be willing to pay the balance amount? Rule 4[3] provides for the withdrawal by the nominee of his consent. Should he not be required to state the reason for his withdrawal of consent so that an arrangement for a certain period can be assured?

Article 27 of Table F of Schedule I of the Act relating to a company limited by shares states that in the case of a one person company: (i) on the death of the sole member, the person nominated by such member shall be the person recognised by the company as having title to all the shares of the member; (ii) the nominee on becoming entitled to such shares in case of the member's death shall be informed of such event by the Board of the company; (iii) such nominee shall be entitled to the same dividends and other rights and liabilities to which such sole member of the company was entitled or liable; (iv) on becoming member, such nominee shall nominate any other person with the prior written consent of such person who, shall in the event of the death of the member, become the member of the company.

In the first place, it should be noted that Table F of Schedule I, like other forms is to be used by a company, as may be applicable to it, and that it is not a statement of the substantive law relating to the title of a person to the shares in the company and other consequential rights. In the absence of a specific provision as to the rights of a nominee in the text of the Act, why should anyone nominate another to take his place in the one person company?

Rule 6: Rule 6[1] states that where the paid up share capital of a one person company exceeds fifty lakh rupees or its average annual turnover during the relevant period exceeds two crore rupees, it shall cease to be entitled to continue as a One Person Company. The following sub-rules set out that the one person company, in that event, shall convert itself into either a private company or a public company and state the procedure for doing so.

In the first place, this requirement being a condition of incorporation should have been stated in the Act itself, so that a person arranging for incorporation of a one person company would be in a position to decide, at that stage, whether to go for incorporation of the one person company or straightaway form a private company pure and simple or a public company. Then the basis for requiring conversion has not been explained as to how the paid up capital or the turnover would be inconsistent with the principle of a one person company as determined under the Act".

THE COMPANIES ACT, 2006, UK

Section 123 of this Act deals with single member companies. The first sub-section is the relevant section. It is as follows: "(1)If a limited company is formed under this Act with only one member there shall be entered in the company´s register of members, with the name and address of the sole member, a statement that the company has only one member".

That Act does not contain any of the restrictions relating to the one person company as in the 2013 Act. Section 38 of the UK Act states that any enactment or rule of law applicable to companies formed by two or more persons or having two or more members applies with any necessary modification in relation to a company formed by one person or having only one person as a member. This would not arise under the 2013 Act as the legal status of a one person company has been stated with necessary conditions and qualifications in the Act and the Rules.

SUMMING UP

One should watch with interest, the graph of one person companies under the 2013 Act.It is still far from clear as to when a person would think of the one person company to meet his business needs when there are so many restrictions under the Act and the Rules,. Unless there is some advantage, like for example, tax benefits, why choose incorporation?

As for legislation, it is axiomatic that legislation should neither lag far behind when problems have become unmanageable nor should it be far ahead of the actual realities, when there is no urgent need for any legislation. CS

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One Person Company – Boon in Pursuit of Professional Excellence

Allowing practicing company secretaries to form OPC and render various corporate law related services is desirable as it will remove the nagging fear of unlimited liability of the PCS and would also give a moral boost to the PCS without the need to bother about as to who would succeed him, since the OPC will be treated as a separate legal entity with perpetual succession.

The Companies Act, 2013 (in short 'CA 2013' or 'the new Act') has introduced many innovative legislative provisions which have, *inter-alia*, brought about a significant change in the way business would be conducted in India. Keeping pace with the already-well established practice in the US and UK, the CA 2013 also now provides for one innovative mode of doing business through formation of 'one person company' (OPC), although the provisions in relation to the same are radical in themselves. While the professionals like the chartered accountants, company secretaries and the cost and works accountants are gearing up by upgrading their knowledge base as to how to cope with the new changes in the CA,2013, the stakeholders are generally happy that the new Act will usher in better corporate governance, prevent corporate frauds, improve transparency, enhance accountability and motivate self-regulation and will make the corporate sector socially responsible. The significant changes in

However, the flexibility and numerous benefits associated with formation and running of a OPC cannot be taken advantage of by the practising company secretaries (PCS) because the law as it stands at present does not afford any latitude.

the new Act about the clarity in defining the role and responsibility of the company directors and independent directors and appointment of woman directors in listed companies also augur well for the corporate sector.

Since OPC is a new concept and a gift from the new Act, it is important to understand some of its salient features and how best the professionals can expand their activities by forming OPC. Till now professionals have been more comfortable working either as sole-proprietorships or partnerships or by forming 'limited liability partnership' or often times, through an unwritten code of understanding and arrangement between the partners. However, the new structure of doing business through OPC has opened up vast opportunities before the professionals and other entrepreneurs. Broadly, the beneficial aspects of the OPC structure are its separate legal entity, perpetual succession, limited liability and freedom from complying with numerous formalities associated with doing business otherwise through the traditional limited liability structure.

As per Section 2(62) of the new Act "One Person Company" means a company which has only one person as a member. Thus, an individual can form an OPC and carry on his chosen business driven by his commitment and passion and such an individual gets personal freedom to develop his professional or entrepreneurial skills as he/she may deem fit and proper. Since the liability of a OPC promoter-director is limited to the extent of the paid up value of the shares held by him/her in the OPC, such a person is not unusually worried about the liability aspect as it may not endanger his/her personal assets. This is a significant relief and would prompt the professional or any enterprise-driven individual to get going without the need for complicated formalities.

As per Section 3 of the new Act, OPC can be formed as a private company by an individual by subscribing his/her name to a Memorandum of Association and by complying with the requirements of the new Act with regard to its registration. However, it is mandatory for the Memorandum of OPC to indicate the name of another person, with his/her prior written consent in the prescribed form, who shall, in the event of death of the subscriber or in the event of incapacity of such subscriber to contract, become the member of such OPC. Such written consent from the other person shall be filed with the Registrar of Companies (ROC) at the time of incorporation along with other prescribed documents. The law now prescribes that such other person can withdraw his consent in the prescribed manner or even the main subscriber to the Memorandum of such OPC can also change the name of such other person by fulfilling the prescribed formalities. The law prescribes that any such change in the name of the 'other person' will not be construed as alteration of the Memorandum of Association of an OPC. As per Section 7 of the new Act, the prescribed documents are to be filed with the ROC of the State where the company is being registered and such documents shall be accompanied by a declaration by an advocate, a chartered accountant, cost accountant or a company secretary in practice, who is engaged in the formation of the company and by the person named as Director of such a company that the requirements of the Act and the rules made thereunder in respect of registration and matters precedent or incidental thereto have been complied with. Furnishing any false or incorrect particulars of any information or suppressing material information with relation to the documents filed in connection with registration of the company, shall constitute commission of 'fraud' as defined in section 447 of the new Act.

In relation to an OPC, section 92 of the new Act stipulates that the Annual Return prepared by the company shall be signed by the company secretary or where there is no company secretary, by the director of the company. Further, section 96 of the new Act stipulates that every company, other than OPC, shall in each year holding in addition to any other meetings, a general meeting as its annual general meeting. Section 122 of the new Act talks of non-applicability of certain sections of the new Act to a OPC. The provisions of section 98 and 100 to 111 of the new Act shall not apply to an OPC. Where there is only one director on the Board of an OPC, for any business which is required to be transacted at the meeting of the Board of Directors of a company, it shall be sufficient if the resolution by such director is entered in the Minutes Book required to be maintained under Section 118 of the new Act and be signed and dated by such director and such date shall be deemed to be the date of the meeting of the Board of Directors for all the purposes under the new Act.

As stipulated in section 134 of the new Act, the financial statements

and the Board of Directors' Report shall be signed only by one director of the OPC. In case of OPC, the report of the Board of Directors to be attached to the financial statement under section 134 of the Act shall mean a report containing explanations or comments by the Board on any qualification, reservation or adverse remark or disclaimer made by the auditor in his report. With regard to filing of copy of the financial statement with the ROC as required under section 137 of the new Act, in the case of a OPC it shall file a copy of the financial statements duly adopted by its members along with all the documents which are required to be attached to such financial statements within one hundred eighty days from the closure of the financial year.

The requirement of the law regarding the company having a Board of Directors (section 149) stipulates, *inter-alia*, that every company shall have at least one director who has stayed in India for a total period of not less than one hundred and eightytwo days in the previous calendar year. With regard to the requirement of having meetings of the Board of Directors, as mandated in section 173 of the Act, it is stated that the OPC shall be deemed to have complied with the provisions of this section if at least one meeting of the Board of Directors has been conducted in each half of a calendar year and the gap between the two meetings is not less than ninety days; provided that nothing contained in section 173 and in section 174 shall apply to OPC in which there is only one director on its Board of Directors.

Further, section 193 of the new Act stipulates that where an OPC limited by shares or by guarantee, enters into a contract with the sole member of the company who is also the director of the company, the company shall, unless the contract is in writing, ensure that the terms of the contract or offer are contained in a memorandum or are recorded in the minutes of the first meeting of the Board of Directors of the company held next after entering into the contract; provided that nothing in the sub-section (1) of section 193 shall apply to contracts entered into by the company in the ordinary course of its business. The company shall inform the ROC about every contract entered into by the company and recorded in the Minutes of the meeting of its Board of Directors under sub-section (1) within a period of fifteen days of the date of approval by the Board of Directors.

However, the flexibility and numerous benefits associated with formation and running of a OPC cannot be taken advantage of by the practising company secretaries (PCS) because the law as it stands at present does not afford any latitude. For instance, Section 26 of the Company Secretaries Act, 1980 (in short 'CS Act,1980') clearly stipulates that "companies not to engage in Company Secretaryship and no company, whether incorporated in India or elsewhere, shall practice as Company Secretaries." The explanation to this section also makes it clear that 'for the removal of doubts, it is hereby declared that 'company' shall include any limited liability partnership which has company as its partner for the purposes of this section. Any company contravening the provisions of the sub-section (1) of section 26 shall be punishable on first conviction with fine, which may extend to one thousand rupees, and on any subsequent conviction with fine which may extend to five thousand rupees."

Further, section 2(24) of the new Act states "company secretary" or "secretary" means a 'company secretary' as defined in clause (c) of sub-section (1) of section 2 of the CS Act, 1980 who is appointed by a company to perform the functions of a company secretary under the new Act. Also, section 2(27) of the new Act stipulates that "company secretary in practice" means a company secretary who is deemed to be in practice under sub-section (2) of section 2 of the CS Act, 1980.

As per section 2(1)(c) of the CS Act, 1980, a 'company secretary' means a person who is a member of the Institute. Sub-section (2) of section 2 of CS Act, 1980 states that 'save as otherwise provided in this Act, a member of the Institute shall be deemed "to be in practice" when, individually or in partnership with one or more members of the Institute in practice or in partnership with members of such other recognised professions as may be prescribed, he in consideration of remuneration received or to be received –

a) engages himself in the practice of the profession of Company Secretaries to, or in relation to, any company ; or

(b) offers to perform or performs services in relation to the promotion, forming incorporation, amalgamation, reconstruction, reorganisation or winding up of companies; or

(c) offers to perform or performs such services as may be performed by—

(i) an authorised representative of a company with respect to , registering, presenting, attesting or verifying any documents (including forms, applications and returns) by or on behalf of the company,

(ii) a share transfer agent,
(iii) an issue house,
(iv) a share and stock broker,
(v) a secretarial auditor or consultant,
(vi) an adviser to a company on management, including any legal or procedural matter falling under the Capital Issues (Control) Act, 1947 (29 of 1947), the Industries (Development and Regulation) Act, 1951 (65 of 1951), the Companies Act, the Securities Contracts (Regulation) Act, 1956 (42 of 1956), any of the rules or bye-laws made by a recognised stock exchange, the Monopolies and Restrictive Trade Practices Act, 1969 (54 of 1969), the Foreign Exchange Regulation Act, 1973, (46 of 1973), or under any other law for the time being in force,
(vii) issuing certificates on behalf of, or for the purposes of, a company; or

(d) holds himself out to the public as a Company Secretary in practice; or

(e) renders professional services or assistance with respect to matters of principle or detail relating to the practice of the profession of Company Secretaries; or

(f) renders such other services as, in the opinion of the Council, are or may be rendered by a Company Secretary in practice;

and the words "to be in practice" with their grammatical variations and cognate expressions, shall be construed accordingly.

A perusal of the aforesaid provisions of the CS Act, 1980, as amended from time to time, reveals that the law recognizes that the practicing company secretary (PCS) can perform various functions and render valuable assistance to the companies in complying with the provisions of the Companies Act, but also with other Acts as enumerated in the said section of the CS Act, 1980. However, since the new Companies Act, 2013 is a significant departure from the way business was done hitherto-before by companies, and the new Act has introduced many innovative ways and means aimed towards good corporate governance and prevention of frauds, it is felt that the professionals, including the PCS can play significant role.Therefore, there is a serious need to relook and re-examine the provisions of the CS Act, 1980 and relax and remove some of the restrictions in the functioning of the PCS. This becomes all the more necessary because the new Act has opened new business structure like OPC which were not permitted earlier and could not have been considered while framing the CS Act, 1980. Further, since the definition of PCS in the CS Act, 1980 allows the PCS to perform important functions which have been enlarged/augmented by the new Act, allowing the PCS to form OPC and render various corporate law related services will be a welcome move. This will at least remove the nagging fear of unlimited liability of the PCS and would also give a moral boost to the PCS without the need to bother about as to who would succeed him, since the OPC will be treated as a separate legal entity with perpetual succession.

Of course, while recommending the opening up the new form of rendering professional services by the PCS by forming OPC, the Institute of Company Secretaries of India (ICSI) and the Ministry of Corporate Affairs can introduce suitable clauses which would not dilute the personal commitment and involvement of the PCS and continue to make the PCS amenable to the jurisdiction of the ICSI with regard to professional ethics and good conduct. Since there are over one million companies in the country who are the custodians of huge resources of the country, the PCS can play an important role in the operations of the companies to ensure that they comply with the laws and contribute to the prosperity of the economy and the society at large and balance the interests of various stakeholders.

CONCLUSION

The Companies Act, 2013 has opened the new form of doing business through formation of OPC and it is time that the PCS is also enabled to form OPC and increase his horizon of professional services by taking advantage of the OPC. More than 24 years have already elapsed since the enactment of the CS Act, 1980 and there is a need to relook and reexamine the various provisions governing the profession of company secretaries, keeping in view the expectations of the stakeholders from the professionals towards the growth and development of the economy. Views and opinions of all the professional bodies and the chamber of commerce and industry may also be sought and considered while advising suitable legislative changes in the CS Act, 1980. CS

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One Person Company – A Legal Fiction

In view of the fact that the OPC can command only limited resources, it is not suitable for business entities – particularly medium and large scale. This form of business organisation is suitable for professionals for pursing their profession. This will benefit them for it affords them security in the form of limited liability. If otherwise, the professional would be liable to an unlimited extent and even their personal assets would be in jeopardy.

Generally a company means an association of persons joined for a common objective, usually commercial, incorporated under the legislation regulating the affairs of companies, so that the liability of the members of the company is limited to the extent of the capital contributed by the members composing it. Such a company is managed by a body of persons known as directors who are elected by the members or appointed in terms of the provisions in its Articles of Association, which regulate the day to day working of the company. The Directors, unless power therefor is delegated to them by the Board, i.e. the collective body of directors, cannot act individually. They have to act through a meeting of the directors. Again the meeting of the Board is regulated by the enactment by which the company is incorporated.

The overall object of a company is fixed at the time of its incorporation and this object could be modified or varied by the members only under stated circumstances stipulated in the Act under which it is incorporated. Of course, the members cannot individually interfere in the day to day affairs of a company and in taking policy and major decisions for achieving the object of the company and they can act only through meetings, the conduct of which are also regulated by the enactment referred to earlier. What the term 'company' means in common parlance is adequately stated at page 380 of The Shorter Oxford Dictionary on Historical Principles (Third Edition) as 'a body of persons combined or incorporated for some common object; especially to carry on some commercial or industrial undertaking'. Thus general attributes of a company is that comprises of more then one person and is controlled by two organs – General Meeting and Board of Directors, and the liability of its members is limited and that the two

organs controlling the affairs of the company act through meetings and individual members comprised in the Board or in the general meeting have no powers and all the powers vest in them could be exercised collectively in the Board Meeting and general meeting. as the case may be. Because a company is an association of persons – in the case of giant companies the persons run into lacs – they are able to command wealth in the form of capital contributed by the members and consequent to this they are able to get loan capital to an appreciable extent to run the business for which the company is formed.

ESSENTIAL CHARACTERISTICS OF INCORPORATED COMPANIES

Thus the essential characteristics of a company incorporated under company legislation is:

> As the OPC would comprise of only one member it can safely be said it is in effect a sole proprietorship entity given the status of a company through a legal fiction. While the liability of sole proprietorship entity is unlimited, it is not the case with the entity owned by a 'One Person Company'. The ability of a OPC to attract loan capital is limited as the capital contributed by the sole member of an OPC would be small as compared to companies having more than one member – in some cases it runs into lacs.

a. The company comprises of many persons who are its members and contribute to its capital

b. The liability of its members is limited

c. It is managed by Board of directors, largely elected by the members or appointed by interests who have been conferred powers to nominate or appoint directors by its Articles of Association

d. Its policy decisions are set by the objects clause contained in its Memorandum of Association, which can be varied or modified by the company in general meeting only for achieving the stated purposes in the company legislation.

e. Being comprised of many members who have contributed to its capital it is able to get a good amount of loan capital in the form of loans from banks and financial institutions for meeting the fund requirements of its business.

ADVENT OF OPC IN INDIA

The aforesaid essentials have been given a go by, by the Companies Act, 2013 (the Act), which has given birth to one more form of a company, viz. One Person Company. (OPC) Sub-section (62) of section 2 of the Act defines an OPC to mean a company, which has only one person as a member. The term 'Company' has been defined in sub-section (20) of section 2 of the Act to mean a company incorporated under the Act or under any previous company law. There was no provision under the previous company laws for incorporation of a 'One Person Company'. As such the 'One Person Company' referred to in the Act can only be incorporated under the Act. As the OPC would comprise of only one member it can safely be said it is in effect a sole proprietorship entity given the status of a company through a legal fiction. While the liability of sole proprietorship entity is unlimited, it is not the case with the entity owned by a 'One Person Company'. The ability of a OPC to attract loan capital is limited as the capital contributed by the sole member of an OPC would be small as compared to companies having more than one member – in some cases it runs into lacs. In view of the fact that the OPC can command only limited resources, it is not suitable for business entities – particularly medium and large scale. This form of business organisation is suitable for professionals for pursing their profession. This will benefit them for it affords them security in the form of limited liability. If otherwise, the professional would be liable to an unlimited extent and even their personal assets would be in jeopardy.

IRANI COMMITTEE RECOMMENDATIONS

This form of business organisation has been given legal status in the Act, on the recommendation of an expert committee set up by the Ministry of Corporate Affairs, in December 2004 under the Chairmanship of Dr. J.J. Irani. The Committee submitted its report in May 2005 and recommended the introduction of the concept of OPC in the Act with the following characteristics: viz.:

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 nominated director will manage the affairs till the date of transmission of shares to legal heirs of the deceased member.

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

PROVISIONS IN THE COMPANIES ACT, 2013

In keeping with (a) above, section 3(1)(c) of the Act permits of the formation of an OPC by a resident individual by subscribing

his name to the Memorandum of Association of the OPC and complying with the other requirements in this regard spelt out in this Act. As recommended by the Irani Committee section 3(1)(c) further provides that an OPC can be incorporated as a private limited company. Consequently at the time of incorporation it should have a minimum paid up share capital of Rs.1 lac. The relevant period for this purpose would mean the immediately preceding three consecutive financial years. As the reference is to share capital, it would include preference capital also. It should, however, be noted that the Memorandum of an OPC shall indicate the name of a person with his written consent who shall in the event of subscriber's death or incapacity to contract become a member of the company. The member of an OPC after due intimation to the OPC can change his nominee. It needs no saying that the new nominee should give his consent to act as such nominee. The nominee, after giving notice to the company, can always withdraw his nomination. The incapacity generally arises out of insolvency. A minor cannot form an OPC nor he can be a nominee of the member of an OPC. The Act does not provide as to what would happen to the OPC if the member and his nominee simultaneously die. It has also not addressed the situation if in the case of death of the sole member of the OPC, he leaves behind more than one legal heirs. Which one of such legal heirs would step into his shoes in the OPC? These require addressing by the Ministry of Corporate Affairs at an early date so as to enable proper functioning of OPCs registered under the Act. A person can form only one OPC and the question of formation of an OPC by a company, which is an artificial person, would not arise.

TRANSACTION OF BUSINESS

As set out earlier two organs, viz. the Board of Directors and the General Meeting are vital in the functioning of companies. The Board of Directors is in charge of the day-to-day functions of companies. Majority of the Board of Directors have to be elected by the members. The company in general meeting has to approve major policy decisions of a company. All the decisions of the Board of Directors and of the general meeting are taken in meetings of the respective organs. Both these organs are combined in the case of an OPC in its sole member. Of course, the sole member could through appropriate provision in the Articles of Association of the OPC, reserve himself the right to nominate more than one director on the Board of Directors of the OPC. In the absence of such a provision in the Articles of the OPC the sole member would be its director, its Board. Composing of only one member in whom both the vital organs of a company are combined, it would be a farce to hold a meeting of the Board of Directors and of the General Meeting. For a meeting there should always be more than one person and one person cannot meet himself. Recognising this the Act in section 96(1) provides that an OPC need not hold an Annual General Meeting in each year. Like wise section 174 of the Act provides that if there is only one director in an OPC then it need not hold Board Meetings as stipulated in section 173 of the Act. That section further provides that in case an OPC has more than one director it would be enough for the purpose of meeting the requirements of that section if it holds board meeting in each half year and that the gap between two Board Meetings is not less than ninety days.

There are number of provisions in the Act which stipulates that for doing certain things, the approval of the Board in a meeting and, as the case may be, the approval of the general meeting by special or ordinary resolution is required. To meet these requirements and also to give concrete measures to the legal fiction created by it, section 122 of the Act provides that if an OPC has only one director on its Board it would be enough if the resolution by such director is entered in the minutes book and signed and dated by such director and such date shall be deemed to be the date of the Board Meeting for all the purposes under the Act. For this purpose it would be advisable that the director communicates his decision in regard to the matter, which can be dealt with only at a meeting of the Board of Directors to the OPC formally and that his decision is duly written and signed in the minutes book. Likewise in the case of matters to be done only at a general meeting the member of the OPC would communicate his resolution which would be signed and dated by the member and such date shall be deemed to be date of the meeting for all the purposes under this Act. In other words, it has been provided in section 122 of the Act that there is no need to hold a formal meeting of the two organs for complying with the requirements of the Act and it would be enough if the member communicates his decision on the matter in the form of a resolution which should be entered and signed in the minutes book. Significantly both in regard to the Board Meetings and General Meetings it has not been expressly mentioned that these should be done before the act is performed with the result there is bound to be some shortcomings in this regard. At times the minutes would be prepared after the event. Of course the intention is that it should be done before the event but it would have been prudent to provide so in section 122 itself to avoid any confusion in the matter. Possibly the Ministry could come out with a clarification in this regard. Appropriately this section 122 of the Act exempts OPCs' from the provisions of section 98 and sections 100 to 111 (both inclusive) of the Act. These provisions relate to conduct of general meetings of companies.

The report of the Board of Directors in relation to an OPC under section 134(4) means a report containing explanations or comments by the Board (i.e. the sole member of the OPC) on every qualification, reservation or adverse remark or disclaimer made by the Auditor in his report. Such a report should appropriately be signed by the single director.

Instead of making those at the helm of affairs of a company to wade through the ocean of provisions in the Companies Act, 2013 to find out which of those provisions are applicable to them and need compliance by the OPC it would be ideal if a simple and comprehensive Act like the Limited Liability Partnership Act, 2008, is legislated in respect of OPCs. CS

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One Person Company (OPC) – New Opportunity to Start a Venture

OPC is like One Man Army. The compliance burden is very less and the liability of the members is very limited is an added advantage. OPC is expected to benefit people who are into self-employment and many small scale sectors. It is a remarkable feature of the Companies Act, 2013. "OPC should boost the confidence of small entrepreneurs"

INTRODUCTION

Individuals doing business as sole proprietors can avail the benefits of limited liability as the Companies Act, 2013 ("the Act") has introduced the concept of "One Person Company" (OPC). Under the prevalent law in India, minimum two members are required to form a private company and minimum seven members required for public company. This was looked upon as a barrier in forming private limited company by businessmen who do not want any other participant in their business.

BENEFITS

i. OPC provides benefit of both forms of business - Proprietorship And Company.

With OPC, business can be run same way as proprietorship, of course by complying with limited by share guarantee, as the case may be. At the same time it has casted responsibility on the society and market players to recognize OPC as a company and not another form of proprietorship business.

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 an 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 rinted 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.	Not Applicable.	Not Applicable as long as all the conditions of Private Company are complied

FORMATION

The procedure to form OPC has been described in Section 3(1) (c) of the Act.

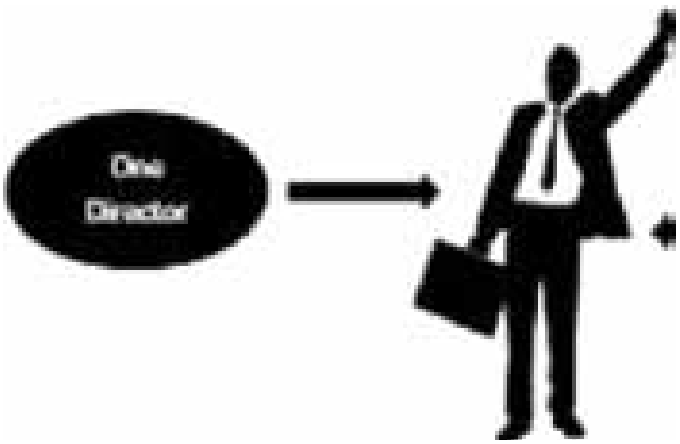
> Three types of companies can be formed as an OPC:
  - Company limited by shares
  - Company limited by guarantee
  - Unlimited company

> OPC shall be a Private limited company in all respects except that an OPC can be formed by a single subscriber to the MOA (Memorandum of Association).

> Minimum share capital shall be same as in the case of a private limited company - Rs. 1,00,000/- (Rupees One Lakh)

> To comply with the basic requirement of perpetual succession and the golden rule "members may come and go, but company must go on", provision has been made to appoint a nominee of original subscriber.

One Person Comply (OPC)



> The Company has to file with the Registrar in the prescribed form, consent of one other person (nominee) who shall become member of the company in the case of death or incapacity of the original subscriber of the company.

> Such nominee can withdraw his/ her consent by following the procedure which shall be prescribed in rules. At the same time, the subscriber can also change the nominee by giving prescribed notice. Upon changing the nominee, the company shall inform the registrar within 30 days in the prescribed form.

> No person shall be eligible to incorporate more than a OPC or become nominee in more than one such company.

> No minor shall become or nominee of OPC or can hold share (s) with beneficial interest.

> OPC cannot carry out Non Banking Financial Investment activities including investment in securities of any body corporate.

> Such company cannot be incorporated or converted into a company under Section 8 of the Act.

> No such company can convert voluntarily into any kind of company unless 2 years have expired from date of incorporation of OPC.

CONDITIONS FOR CESSATION OF OPC STATUS:

As per rule 6(1) of the Companies (Incorporation) Rules 2014, OPC shall cease to be entitled to continue as an OPC if:

1. Its paid - up capital exceeds Rs.50 Lacs; or
2. Its average annual turnover during the relevant period i.e. immediately preceding 3 consecutive financial years exceeds Rs.2 crores
3. Intimation for increase in threshold limit has to be filed.

COMPLIANCE PROCEDURES

1. Proviso to Section 12(3) requires that the words "One Person Company" shall be mentioned in brackets below the name of company.
2. As per Section 149(l)(a), minimum one director required in OPC. However there is no bar on appointment of more than one director. Until director(s) appointed, individual being member shall be deemed director of the company - Section 152(1).
3. Annual return shall be signed by the CS and if there is no CS, it shall be signed by a director of the company.
4. As per Section 96(1), an OPC is exempted from holding the AGM (Annual General Meeting).
5. As per section 122(1), provisions of section 98, 100 to 111 (both inclusive) pertaining to procedural aspects of general meetings and voting at general meetings are not applicable to an OPC.
6. In the case of an OPC having only one director, compliance with provisions of conducting of Board meeting is impracticable, hence it is made not applicable. In that case business which is required to be transacted at a Board Meeting/ General

Meeting, it shall be sufficient if the resolution is entered into the minutes book, signed and dated. Such date shall be deemed to be the date of meeting of board of directors.

7. Directors' report shall include only explanation on qualification, reservation, disclaimers or adverse remarks of the auditors, if any. All other information as required under Section (3) need not be given in directors' report of an OPC.

8. As per Section 2(68) OPCs have been granted relaxation from preparing Cash Flow Statement and they have to prepare profit and loss account, balance sheet and explanatory notes only. Moreover, as per Section 134, Financial Statements shall be signed by only one director and submitted to the auditor for his report thereon.

9. Time limit of 180 days from the closure of financial statements has been granted to OPC to file financial statement with Registrar.-proviso 3 to Section 137(1).

10. The 3rd proviso to Section 173(5) states that provisions related to minimum board meetings to be conducted during the year by a company and minimum quorum at board meetings shall not apply to OPC having only one director. In case OPC has more than one director, it shall conduct at least one board meeting in each half year and time gap between two meetings should be minimum 90 days.

11. When OPC enters into contract which is not entered into in ordinary course of business with its member who is also director of OPC, it should ensure that the contract is in writing. If such contract is not made in writing, OPC should ensure that terms of the contract are contained in memorandum or recorded in minutes books. Such Minutes should be adopted in the next board meeting - Section 193.

CONVERSION OF PRIVATE COMPANY INTO OPC

1. A Private company other than a company registered under Section 8 of the Act with paid up share capital of Rs.50 Lakhs or less or average annual turnover during the relevant period isRs.2 crores or less may convert itself into OPC by passing a Special Resolution in the General Meeting.

2. Before passing such resolution, the Company shall obtain No Objection Certificate in writing from members and creditors.

3. OPC shall file copy of the special resolution in prescribed form with the Registrar within 30 days from the date of passing of such resolution.

4. The Company shall file an application for its conversion into OPC along with the prescribed fees, by attaching the prescribed documents.

5. On being satisfied and complied with the requirements stated, ROC shall issue the Certificate upon conversion.

CONVERSION OF OPC INTO PRIVATE COMPANY

1. When the paid up share capital of an OPC exceeds Rs.50 lakhs or its average annual turnover during the immediately preceding three consecutive financial years exceeds Rs.2 crores, it shall not be treated as OPC.

2. OPC shall be given 6 months time period to implement the changes in constitution to become Private or Public Company and make necessary changes in MOA & AOA by passing resolution u/s 122 of the Act.

2. OPC will inform the Registrar within 60 days from the date of ceasing to be an OPC of the fact that it is no longer an OPC.

3. If an OPC or any officer thereof contravenes the provisions of these rules, the OPC/any officer shall be punishable with fine upto Rs. 10,000 (Rupees Ten Thousand) and with a further fine which may upto Rs. 1,000 (Rupees One Thousand) for everyday after the first during which such contravention continues.

4. If an OPC or any officer thereof contravenes the provisions of these rules, the OPC/any officer shall be punishable with fine upto Rs.10,000 (Rupees Ten Thousand) and with a further fine which may upto Rs. 1,000 (Rupees One Thousand) for everyday after the first during which such contravention continues.

FORMS FILING IN RESPECT OF OPC:

S. No.	Form No.	Purpose of e-form
1.	INC.I	Application for reservation of name
2.	INC.2	Application for Incorporation
3.	INC.3	Nominee - Consent Form
4.	INC.4	Change in Member/Nominee
5.	INC.5	Intimation of exceeding threshold - i.e. ceased to be OPC
6.	INC.6	OPC - Application for conversion

OPPORTUNITIES TO SMALL ENTREPRENEURS:

Small entrepreneurs can carry on their business in form of OPC with

status of separate legal entity. The concept is good for entrepreneurs with new ideas and ventures trying to explore the corporate world with minimum compliances and maximum benefits as exemptions. Various small and medium enterprises, doing business as sole proprietors, might enter into the corporate domain through OPC. The unorganized sector of the economy will find an outlet to show their entrepreneurial expertise. So the small entrepreneurs enjoy the benefit of OPC and can hence boost the economy of our country.

OPCs REGISTERED IN INDIA

As on date, **four (4)** OPCs have been registered in India.

- Corporate Identification Number (CIN) - U93000DL2014OPC267546 - Vijay Corporate Solutions OPC Private Limited incorporated on 28th April, 2014.
- Corporate Identification Number (CIN) - U29219GJ2014OPC079685 - Radhekrishna Fire Protection OPC Private Limited incorporated on 4th June, 2014.
- Corporate Identification Number (CIN) - U13200GJ2014OPC079764 - Rigveda Metals OPC Private Limited 12th June, 2014.
- Corporate Identification Number (CIN) - U17120DL2014OPC268066 -A.M. Fashions (India) OPC Private Limited incorporated on 18th June, 2014.

END NOTE

OPC is like ***One Man Army.***

The compliance burden is very less and the liability of the members is very limited is an added advantage.

OPC is expected to benefit people who are into self employment and many small scale sectors. It is a remarkable feature of the Companies Act, 2013. "OPC should boost the confidence of small entrepreneurs". CS

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One Person Company - A Mixed Blessing

Doing business under the One Person Company form of business ownership is a mixed blessing to the single entrepreneur. While it avoids frittering away his resources, time and energy by conferring on him certain exemptions/privileges on procedural matters , it results in higher tax liability. It remains to be seen whether the benefits outweigh the cost.

INTRODUCTION:

The object of this article is to discuss the nitty-gritty of the new concept of a'One Person Company' (OPC) which is the creation of the Companies Act, 2013. Various facets have been discussed with regard to the incorporation, operation, benefits, and limitations as also the legal compliance required under the Companies Act, 2013.

The idea of One Person Company was mooted by JJ Irani Committee. An OPC u/s 2(62) of the Indian Companies Act, 2013 means a company which has only one person as a member. The one person company is a private limited company. OPC is provided with a simpler regime through many exemptions so that a single entrepreneur is not compelled to fritter away time, energy and resources on the procedural matters.The Salient features of an OPC include the following:

An OPC can be formed under any of the following two categories :

- Company limited by guarantee.
- Company limited by shares

An OPC limited by shares shall comply with following requirements :

- Shall have minimum paid up capital of INR 1 Lac
- Restricts the right to transfer its shares
- Prohibits any invitations to public to subscribe for the securities of the company.

* Ex-Dean, CCS University, Meerut.

INCORPORATION OF A ONE PERSON COMPANY

Procedure of incorporating of an OPC is almost the same as for a Private Limited Company with some exceptions. These exceptions are as follows:

1. As per rule 3(1) of the Company (Incorporation) Rules, 2014, an OPC can be incorporated by a natural person.The natural person must be an Indian citizen and resident in India. As per explanation to the above rule, for the purposes of this rule, the term "resident in India" means a person who has stayed in India for a period of not less than 182 during the immediately preceding one calendar year.

2. The Memorandum of Association of an OPC must indicate the name of 'other person' with his written consent. Such 'other person' shall become the member of the company in the event of subscriber's death or incapacity to contract. However, such 'other person' may withdraw his consent in the prescribed manner.

3. The written consent of such another person shall also be filed with ROC at the time of its incorporation.

4. Letters 'OPC' to be suffixed with the name of an OPC to distinguish it from other company. As per section 12(3) proviso 2, the words 'One Person Company' must be mentioned in brackets below the name of such company everywhere where its name is printed, affixed or engraved.

5. An OPC needs at least one director [Section 149 (1) (a)]. Adequate safeguard has been provided in case of death / disability of sole persons where another individual is required to be nominated as director. The nominee director will manage the affairs of the company till the transmission of shares to the legal hires of the demised member.

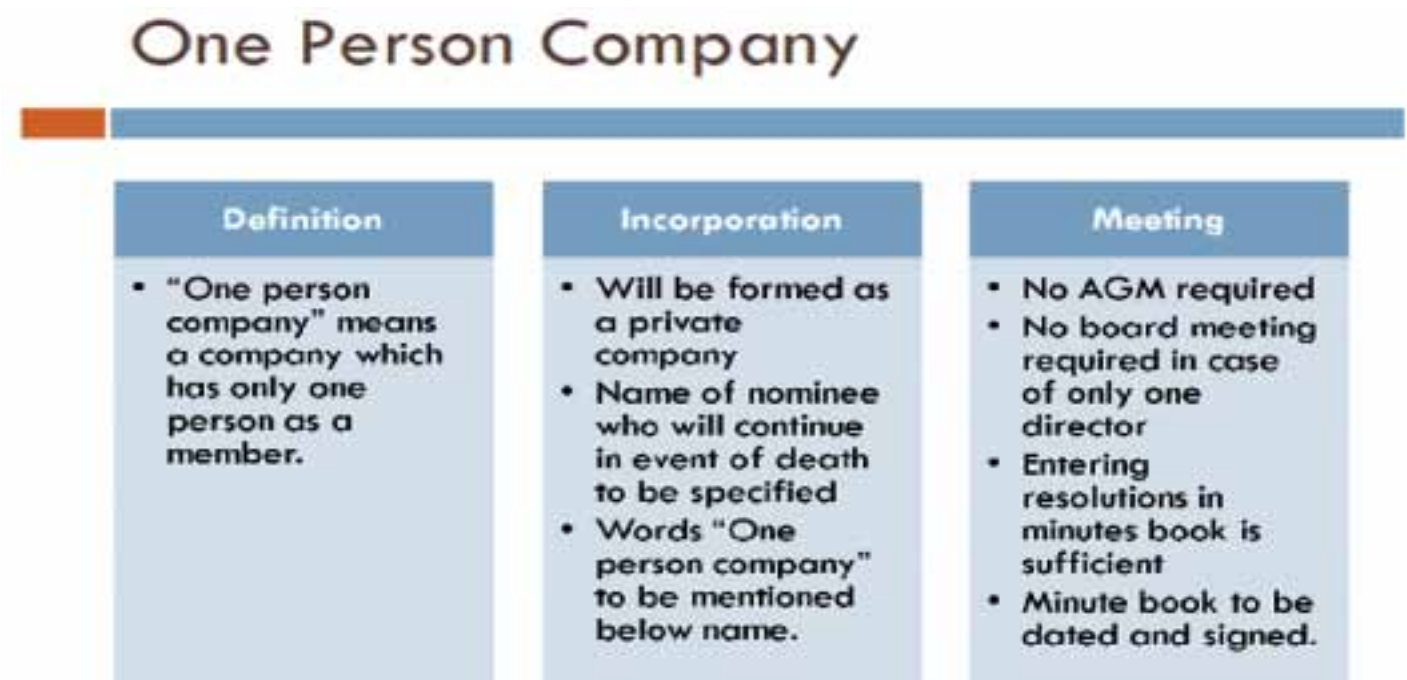
   Source : Saurabh Kalia, "New Concepts & Opportunitiesunder Companies, Act 2013"Presentation on Workshop of NIRC of ICSI, 21st September, 2013.

PRIVILEGES AVAILABLE TO AN OPC

The definition of 'private company' under section 2(68) of the Company Act, 2013 includes OPC. Thus, an OPC will be required to company with provisions applicable to private companies. However, OPCs have been provided with a number of exemptions and therefore have lesser compliance related burden. Such exemptions include:

1. Cash Flow Statement - An OPC need not prepare Cash Flow Statement as part of its Financial Statements under proviso to section 2(40).

2. Signing of Annual Return/Appointment of Company Secretary - As per proviso to section 92(1) One Person Company and a Small Company, the Annual Return shall be signed by the Company Secretary or where there is no Company Secretary by the Director of the Company.



As per section 139 (2) No listed company or a company belonging to such class or classes of companies as may be prescribed shall not appoint or reappoint (a) an individual as auditor for more than one term of five consecutive years and (b) the auditor firm for more than two terms of five consecutive years. However, as per rule 5 of Companies (Audit and Auditors) Rules, 2014 section 139 (2) does not apply to an OPC.

3. Annual General Meeting - An OPC is exempt from holding Annual General Meetingas per section 96(1).

4. Ordinary and Special Resolutions –For the purpose of Section 114, any business which is required to be transacted at an Annual General Meeting or other general meetings of a company by means of ordinary or special resolution,it shall be sufficient for an OPC if the resolution is communicated by the member of OPC and entered in the minute book required to be maintained under section 118 and signed and dated by the member. Such date shall be deemed to be the date of meeting for all the purposes of the Act [Section 122(3)].

5. Signing of Financial Statements - Under section 134(1), the Financial Statements of an OPC need be signed only by one director for submission to the auditors for their report thereon.

6. Non-Applicability of Select Sections - Some sections of the Companies Act, 1956 would not apply to an OPC: Section 186, 169, 172 to 173, 174, 175, 176, 181 to 183, 177 to 178, 179 to 185, 188 and 192A. The corresponding section in the Companies Act, 2013 are 98, 100, 101, 102, 103, 104, 105, 106, 107, 109, 110 and 111 respectively.

7. Board Meetings - Unlike other Public and Private Limited Companies, an OPC, Small Company and Dormant Company are required to hold a minimum of one Board Meeting in each half calendar year with a gap of at least 90 days between two meetings instead of four meetings in a calendar year as per section 173(5).

8. Loan to Directors – Henceforth, in the matter of loans to Directors etc., the Companies Act, 2013 does not distinguish between a Public and Private Company. An OPC being a private limited company, as per section 185 cannot grant a loan to any Director etc. However, in the following cases loan may be given:

(a) To a Managing or Whole Time Director as part of conditions and services extended by the company to all its employees or pursuant to any scheme approved by the members by a special resolution.

(b) A company may provide loans or give guarantee or securities for due repayment of any loan in the ordinary course of business and in respect of such loans an interest is charged not less than the bank rate declared by RBI.

9. Disclosure in Board's Report- The Board report of the OPC need not contain the detailed disclosures as are enumerated in section 134(3) but should contain explanations or comments on every qualification, reservation or adverse remark made by the auditor in his audit report.

10. Quorum of Meetings of Board of Directors - Section 174 is regarding quorum of meetings of Board of Directors. This section will not apply to an OPC which has only one Director in its Board of Directors.

11. Appointment of Auditors : As per section 139 (2) No listed company or a company belonging to such class or classes of companies as may be prescribed shall not appoint or reappoint (a) an individual as auditor for more than one term of five consecutive years and (b) the auditor firm for more than two terms of five consecutive years. However, this section 139 (2) does not apply to an OPC as per rule 5 of Companies (Audit and Auditors) Rules, 2014.

Source : Saurabh Kalia, "New Concepts & Opportunitiesunder Companies, Act 2013"Presentation on Workshop of NIRC of ICSI, 21st September, 2013.

ADDITIONAL COMPLIANCES BY OPCs

1. Any contract, other than in the ordinary course of business or other than in writing, entered into by an OPC with its Sole Member Director, the Company shall ensure that terms of the contract or offer are contained in its Memorandum of Association or are recorded in the minutes of the next Board Meeting held after entering into contract. An OPC should inform the Registrar of Companies about every such contract with a period of 15 days of the date of approval by the Board of Directors as per section 193(1).

2. The Memorandum of Association of an OPC must indicate the name of another person with his written consent. 'Such other person' shall become the member of the company in the event of subscriber's death or incapacity to contract. However, 'such other person' may withdraw his consent in the prescribed manner. The written consent of such another person shall also be filed with ROC at the time of its incorporation. The member of One Person Company may at any time change the name of 'such other person' in the prescribed manner. This change of 'such other person' shall not be deemed to be an alteration in Memorandum of Association.

As per section 139 (2) No listed company or a company belonging to such class or classes of companies as may be prescribed shall not appoint or reappoint (a) an individual as auditor for more than one term of five consecutive years and (b) the auditor firm for more than two terms of five consecutive years. However, as per rule 5 of Companies (Audit and Auditors) Rules, 2014 section 139 (2) does not apply to an OPC.

CONVERSION OF OPC INTO A PRIVATE OR PUBLIC LIMITED COMPANY

Voluntary Conversion

1. An OPC can convert itself into a private or public limited company aftera period of two years from the date of its incorporation by increasing the minimum number of members to two or seven as the case may be. The number of directors would also be increased to two or three respectively. Also the paid-up capital would have to be increased to Rs. 5 Lakhs in case of an OPC is to be converted in a public limited company. However, An OPC cannot convert itself voluntarily into any kind of company for a period of two years from the date of its incorporation unless within that period its paid up share capital increases to more than Rs.50 lakhs OR average annual turnover during the relevant period exceeds Rs.2 crores.

Mandatory Conversion

2. As per Rule 6 of the Company (Incorporation) Rules, 2014, if the paid up share capital of an OPC exceeds Rs. 50 Lakhs or its average annual turnover during the period of immediately preceeding three consecutive financial years exceeds Rs. 2 crores, the OPC is required to convert itself into either a private company or a public company in accordance with section 18 of the Companies Act, 2013:

   (a) within six months of the date on which its share capital exceeds Rs. 50 Lakhs, or

   (b) The last day of the relevant period during which its average annual turnover exceeds Rs. 2 crore. "Relevant period" means the period of immediately preceding 3 consecutive financial years.

   The OPC will have to alter its Memorandum of Association and Articles of Association by passing an ordinary or special resolution in accordance with 114 read with section 122(3) of the Companies Act, 2013 to give effect to the conversion and make necessary changes incidental thereto.

CONVERSION OF PRIVATE COMPANY INTO OPC

1. An existing private company other than a section 8 company (i.e. not for profit company) having paid up share capital of Rs.50 lakhs or less OR average annual turnover during the relevant period of Rs.2 crores or less can convert itself into an OPC by passing a special resolution in the General Meeting;

2. Before passing such special resolution, the private company should obtain No Objection to conversion in writing from members and creditors;

3. The private company can then start the procedure for conversion by submitting the relevant documents to the ROC.

4. A public limited company cannot obviously convert itself into an OPC.

INCAPABILITIES OF AN OPC

Rule 3 of Companies (Incorporation) Rules, 2014 provide that:

1. Body corporates, foreigners cannot incorporate an OPC;

2. A person cannot incorporate more than one OPC or become a nominee in more than one OPC; (But he can be a member of one OPC and nominee of another OPC)

3. Where a member of an OPC becomes a member of another OPC by virtue of his nomination in that second OPC, he shall opt out of either one within a period of 180 days;

4. A minor cannot become a member or nominee of OPC or holds shares with beneficial interest

5. An OPC cannot be incorporated or converted into a company under section 8 of the Act, which is the erstwhile section 25 companies or not for profit companies;

6. An OPC cannot carry out NBFC activities including investment in securities of any body corporate;

BENEFITS AVAILABLE TO OPCS

Small Entrepreneurs can setup OPC to directly access target markets rather than being forced to share their profits to middlemen. Small entrepreneurs will grow in Indian entrepreneurship, be it weaver, traders, artisans, small to mid level entrepreneurs, OPC is a bright future for them to grow and to get a recognition globally. Foreign Investors will be dealing with one member to establish a corporate relationship and not with a score of shareholders/ directors where there are more chances for disparity in ideas, concepts etc. for a business to grow. Any foreign company who wishes to establish in India through an Investment, through a merger or through a Joint venture will have to just lock the deal with the member of an OPC, and the venture will be expected to start sooner with more effective results. In upcoming years the impact of an OPC will be remarkable and it is a promising future for Indian Entrepreneurship. Expectedly, there will be good Foreign

Investments, Joint Ventures, and Mergers etc. An OPC is doing well in European Countries, In United States, Australia the same is resulting in strengthening the economy of the countries.The benefits may be counted such as :

1. Perpetual succession
2. Limited Liability
3. Separate legal entity
4. Easiness in obtaining capital
5. Lesser burden of legal compliance
6. Taxation: From the assessment year 2014-15 surcharge on income tax is leviable. It is interesting to note that rate of surcharge on Income Tax, if the total income ranges between Rs. 1 Crore to Rs. 10 Crore is 10% for individuals, HUF, AOP, BOI and Artificial Juridical Person whereas the same is 5% in case of domestic companies. However, if the total income is above Rs. 10 crores the rate of surcharge on income tax is 10% for both the categories. The indifference point of total income for tax liability purpose is Rs. 128.333 Lakhs including surcharge and cess. However, beyond this total income limit of Rs. 128.333 the tax liability would be lower for a domestic company compared with Individuals, HUF, BOI and Artificial Juridical Person.

DISADVANTAGES TO OPCs

OPC when compared with sole proprietary business has some disadvantages :

1. Compulsory Audit –Audit of accounts of an OPC is compulsory regardless of its turnover or sales revenue.

2. Filing of Financial Statements - One Person Company shall file a copy of Financial Statements, Balance Sheet and Profit and Loss Account separately, duly adopted by its member within 180 days from the close of the financial year as per third proviso to section 137(1).

3. Filing of Annual Return – Under section 92 every OPC shall file with the Registrar of Companies a copy of Annual Return duly signed in prescribed form within the prescribed period.

4. Income Tax Liability – OPC's income will be taxable at a flat rate which is as at present 30.9% of the taxable income. In other words the slabs of tax rates prescribed for an individual will not be applicable of OPC.

5. Dividend Distribution Tax – If an OPC declares dividend it will have to pay dividend distribution tax @ 16.995% (15% + 10% surcharge + 3 % Cess) apart from income tax @ 30.9% whereas for individual assesses only income tax is payable and that too on slab basis.

6. Deemed Dividend – If a sole proprietor makes any drawings from any business, the same is not treated as deemed dividend notwithstanding that the proprietorship business has profits. However, when the director of an OPC takes a loan and the OPC has distributable income, the loan availed by the director is treated as deemed dividend to the extent of accumulated profits by a closely held company under section 2(22)(e) of the Income Tax Act.

   It will not be out of place to say that an OPC being a very very closely held company is more prone to be used as a corporate veil. Thus, it is suggested that what a person cannot do directly can also not do indirectly. In other words it is feared that corporate veil may be used as a shell or a cloak for personal benefit. In that case the corporate veil may be pierced.

CONCLUSION

Doing business under the One Person Company form of business ownership is a mixed blessing to the single entrepreneur. While it avoids frittering away his resources, time and energy by confessing on him certain exemptions/privileges on procedural matters but at the same time results in higher tax liability. It remains to be seen whether the benefits outweigh the cost.

As of now the introduction of One Person Company seems to be a flash in the pan. Where, there are a multiple of advantages flowing to an OPC there are some dark spots also, specially with regard to tax liability. To make the OPC concept workable and acceptable corresponding changes in the Income Tax Act are also required. All that glitters is not gold!

References:

1. Taxmann's Companies Act, 2013, August, 2013, Taxmann Publications Pvt. Ltd., New Delhi.
2. Corporate Laws, 25th Edition, July, 2013,Bharat Law House Limited, New Delhi.
3. Singhania V.K. and Singhania Kapil, "Taxmann's Direct Taxes, Law and Practice", Taxmann Publications Pvt. Ltd., New Delhi, 51st Edition, 2013.
4. http://www.mondaq.com/india/x/278154/Corporate+Commercial+Law/One+Person+Company+A+Concept+For+New+Age+Business+Ownership
5. www.mca.gov.in
6. Official Gazatte, Government of India. Companies (Audit and Auditors) Rules, 2014.
7. Official Gazatte, Government of India. Company (Incorporation) Rules, 2014.
8. Saurabh Kalia, "New Concepts & Opportunities under Companies, Act 2013"Presentation on Workshop of NIRC of ICSI, 21st September, 2013.

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One Person Company Prerequisite, Exemptions and Restrictions

The concept of one person company incorporated in the Companies Act, 2013 has distinct advantages as compared to a sole proprietary concern. This Article elaborates the prerequisite, exemptions and restrictions that are available to OPC.

BACKGROUND

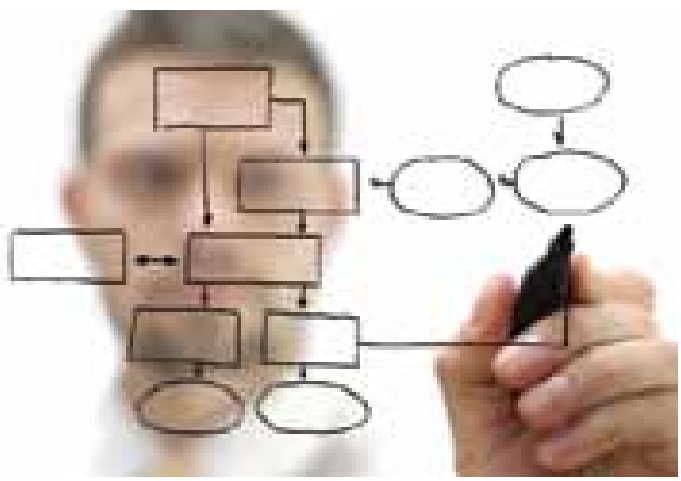
The Companies Act, 2013 ('the Act'), constitution for governance for about a million companies in India, has many new revolutionary concepts. One such concept is introduction of formation of legal vehicle named as One Person Company ('OPC'). OPC can be formed only by a natural person who is an Indian resident citizen. This new form of legal vehicle gives an opportunity to first generation Indian entrepreneur to form an OPC instead of carrying on the business as a Sole-Proprietor . The concept is expected to shift from Sole-Proprietor form of business to OPC as it will have benefits of private limited company e.g., access to bank loan, limited liability with relaxed compliance requirements under the Act. At present, an Indian entrepreneur has to look for another person to implement his / her skills to incorporate a company. The concept of OPC is already in existence in UK, Australia, Singapore, Pakistan etc.

PREREQUISITE

The prerequisite at the time formation and during continuation of OPC are enumerated below:-

At the time of formation of OPC

- OPC, that is to say, a private company, can be formed by one person by subscribing his name to Memorandum of Association ('Memorandum') of the Company.
- The said person should be a natural person who is an Indian resident citizen.



*The views expressed in this article are solely the views of the author and do not reflect in any way the views of the Company/or the Group where he is employed.

> On the death of the sole member, the person nominated by such member shall be the person as having title to all the shares of the member and the nominee on becoming entitled to such shares need to be informed of such event by the Board of OPC. Nominee shall be entitled to the same dividends and other rights and liabilities to which such sole member was entitled or liable.

- Memorandum of OPC to indicate the name of the other person, with his prior written consent in the prescribed form INC.3, who shall, in the event of the subscriber's death or his incapacity to contract become the member of OPC.
- Written consent of such nominated person shall be filed in prescribed Form INC.2 at the time of incorporation of OPC along with its Memorandum and Articles ('MOA') with Ministry of Corporate Affairs ('MCA').
- Articles of Association ('Article') of OPC to contain the following provisions:-

TRANSMISSION OF SHARES

On the death of the sole member, the person nominated by such member shall be the person as having title to all the shares of the member and the nominee on becoming entitled to such shares need to be informed of such event by the Board of OPC. Nominee shall be entitled to the same dividends and other rights and liabilities to which such sole member was entitled or liable.

Further, on becoming member, such nominee shall nominate any other person with the prior written consent of such person who, shall in the event of the death of the member, become the member of OPC.

PROCEEDINGS AT GENERAL MEETINGS

The resolution required to be passed at the general meetings shall be deemed to have been passed if the resolution is agreed upon by the sole member; communicated to OPC; entered in the minutes book; and signed & dated by the member. The resolution shall become effective from the date of signing minutes by the sole member.

PROCEEDINGS OF THE BOARD MEETINGS

In case of only one director, all the businesses to be transacted at the Board meeting shall be entered into minutes book signed and dated by the director. The resolution shall become effective from the date of signing such minutes by the director.

DURING CONTINUATION OF OPC

- Wherever name of OPC is printed, affixed or engraved, the words 'One Person Company' shall be mentioned in brackets below the name [Section 12].
- Member of OPC may at any time change, for any reason, the name of person nominated and nominate another person after obtaining prior consent of such another person in Form INC 3. Within 30 days, OPC need to file notice of withdrawal of consent and intimation of another nominated person by the sole member in prescribed Form INC 4.
- The person nominated by subscriber or member of OPC may also withdraw his consent by giving a notice in writing to sole member and OPC.
- Nevertheless, the sole member to nominate another person as nominee within 15 days of the receipt of the notice of withdrawal and shall send an intimation of such nomination in writing to OPC, along with the written consent of such other person so nominated in Form INC.3.
- In case thesole member of OPC ceases to be the member in the event of death or incapacity to contract, his nominee becomes the member of OPC. Such new member shall nominate within fifteen days of becoming member, a person who shall in the event of his death or his incapacity to contract become the member of such company, and the company shall file with MCA an intimation of such cessation and nomination in Form INC.4.
- Any such change in the name of the person shall not be

> If an OPC limited by shares or by guarantee enters into a contract with the sole member who is also the director, OPC shall, unless the contract is in writing, ensure that the terms of the contract or offer are contained in a memorandum or recorded in the minutes of the first meeting of the Board of Directors of the company held next after entering into contract.

deemed to be an alteration of the memorandum.

If an OPC limited by shares or by guarantee enters into a contract with the sole member who is also the director, OPC shall, unless the contract is in writing, ensure that the terms of the contract or offer are contained in a memorandum or recorded in the minutes of the first meeting of the Board of Directors of the company held next after entering into contract. Further, every such contract entered into by an OPC and recorded in minutes of the Board meeting shall be filed with MCA within 15 days of the date of approval by the Board [Section 193].

- Where the paid up share capital of an OPC exceeds Rs.50 lakhs or its average annual turnover during preceding three consecutive financial years exceeds Rs.2 crores, it shall cease to continue as an OPC.

Such OPC shall be required to convert itself, within 6 months of the date on which its paid up share capital is increased beyond Rs.50 lakhs or the last day of the relevant period during which its average annual turnover exceeds Rs.2 crores as the case may be, into either a private company with minimum of two members and two directors or a public company with at least of seven members and three directors in accordance with the provisions of section 18 of the Act. Further, OPC shall alter its memorandum and articles by passing a resolution to give effect to the conversion and to make necessary changes incidental thereto.

Ensure to file copy of financial statement with MCA within 180 days from the closure of financial year i.e. by 30th September [Section 137]. Companies other than OPC can file their financial statement with MCA within 30 days from the adoption by the members at the Annual General Meeting ('AGM').

EXEMPTIONS/ PRIVILEGES

Apart from the benefits of private limited company, the following exemptions/ privileges attracts the person to form OPC:-

- Financial Statement of OPC may not include cash flow statement. [Section 2(40].
- OPC can have only one director as against minimum number of three directors in the case of a public company and two directors in the case of a private company [Section 149].
- If there is no provision made in the articles for the appointment of the first director, an individual, being subscriber member, shall be the first director in OPC until the director(s) is duly appointed by the member [Section 152].
- There is no requirement to hold minimum four Board meetings and gap between two consecutive meetings may exceeds 120 days. Further, it would be sufficient if at least one Board meeting is conducted in each half of a calendar year and the gap between the two meetings is not less than 90 days.
- The provisions relating to sending of notice atleast 7 days before the Board meeting, participation though video conferencing or other audio visual means, quorum does not apply to OPC if there is only one director on its Board of Directors.
- Company Secretary ('CS') alone can sign the Annual Return of OPC. However, if there is no CS, Director of OPC need to sign the Annual Return. Whereas in case of companies other than OPC, Annual Return need to be signed by a director and the CS, or where there is no CS, by a company secretary in practice.
- Financial statement, Board's report, etc., of OPC can be signed by one director, for submission to the auditors for their report thereon. The Board's reports of OPC means a report containing explanations or comments by the Board on every

qualification, reservation or adverse remark or disclaimer made by the auditor in his report [Section 134].

- OPC need not to hold AGM. [Section 96].
- The provision of Postal ballot, Circulation of members' resolution, Power of Tribunal to call meetings of members, etc. does not apply to OPC.
- Any business which is required to be transacted at general meeting by means of an ordinary or special resolution, it shall be sufficient if the resolution is communicated by the member to the company and entered in the minutes-book required to be maintained under section 118 of the Act and signed and dated by the member and such date shall be the date of the meeting.
- The provision relating to appointment of an individual as an auditor for more than one term of five consecutive years; and an audit firm as an auditor for more than two terms of five consecutive years shall not apply to OPC.
- As per the Companies (Share Capital and Debentures) Rules, 2014, share certificate need to be issued under the seal of OPC, which shall be signed by one director or a person authorized by the Board of OPC and CS or any other person authorized by the Board for the purpose. Whereas, in case of companies other than OPC, share certificate shall be issued under the seal of the Company and signed by two directors, one of whom shall be the Managing Director or Whole-time Director; and CS, if there is one or any other person authorised by the Board.

Nevertheless, section 118 of the Act states that every company to observe secretarial standards ('SS') with respect to Board meeting specified by the Institute of Company Secretaries of India. As OPC may not have engaged CS or other expert of company laws, it might find difficulty in ensuring the compliances of such SS. Hence, it would be apt to exempt OPC from observing SS.

RESTRICTIONS RELATING TO OPC

Despite the apparent ease in formation and exemption/ privileges, there are following resections relating to OPC:-

- No person can incorporate more than one OPC or become nominee in more than one such OPC.
- Minor shall not become member or nominee of OPC or can hold share with beneficial interest.
- OPC cannot be incorporated or converted into a section 8 of Act company (i.e., charitable objects etc.).
- OPC cannot carry out Non-Banking Financial Investment activities including investment in securities of any body corporates.
- No OPC can convert voluntarily into any kind of company unless two years is expired from the date of incorporation, except if the paid up share capital is increased beyond Rs.50 lakhs or its average annual turnover during three preceding financial years exceeds Rs.2 crores.

CONCLUSION

The introduction of then concept of OPC in the Act is certainly laudable which will induce first generation entrepreneur to shift from sole proprietorship form of business to OPC so that it can have access to bank loan and legal protection as well etc.

Nevertheless, the success of any new concept primarily depends upon its simplicity and exemption available. As the Act intends to improve corporate governance, there is a thrust on prompt disclosures and compliances.

As far as exemptions are concerned, there are enough available for OPC. However, OPC, being smaller set up, might find difficulty in ensuring the enormous disclosures / compliances, envisaged in the Act and voluminous Rules, which certainly require assistance of expert like Company Secretaries and/ or Chartered Accountants.

Further, it would have been apt if there would have been separate chapter in the Act relating to OPC for ease of reference and compliance.

Disclaimer: The views expressed in this article are solely the views of the authors and are not connected in any way with the views of the Company/ or the Group where the authors are employed.

Part-2
Other Articles

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A Concise Analysis of Section 185 of Companies Act 2013

In the case of private companies section 185 is acting as an unduly harsh and impractical statutory prohibition and would have the effect of stifling business growth in the country since it is unavoidable that a company funds a new project undertaken by an independent company incorporated as an associate company and banks are not ready to provide funds unless a corporate guarantee or security is provided by a parent or group company. The misgivings of interpretation of section 185 and that of section 186 have all been explained in this article.

Sections 185 and 186 are the hottest topics in the corporate sector today and there are a few misgivings about their interpretation.

Section 185 of the Companies Act 2013 ('2013 Act'), whichreads as follows:

185. LOAN TO DIRECTORS, ETC

(1) Save as otherwise provided in this Act, no company shall, directly or indirectly, advance any loan, including any loan represented by a book debt, to any of its directors or to any other person in whom the director is interested or give any guarantee or provide any security in connection with any loan taken by him or such other person:

Provided that nothing contained in this sub-section shall apply to—

(a) the giving of any loan to a managing or whole-time director—

(*i*) as a part of the conditions of service extended by the company to all its employees; or

(*ii*) pursuant to any scheme approved by the members by a special resolution; or

(*b*) a company which in the ordinary course of its business provides loans or gives guarantees or securities for the due repayment of any loan and in respect of such loans an interest is charged at a rate not less than the bank rate declared by

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the Reserve Bank of India.

Explanation.—For the purposes of this section, the expression "to any other person in whom director is interested" means—

(*a*) any director of the lending company, or of a company which is its holding company or any partner or relative of any such director;

(*b*) any firm in which any such director or relative is a partner;

(*c*) any private company of which any such director is a director or member;

(d) any body corporate at a general meeting of which not less than twenty-five per cent of the total voting power may be exercised or controlled by any such director, or by two or more such directors, together; or

(*e*) any body corporate, the Board of directors, managing director or manager, whereof is accustomed to act in accordance with the directions or instructions of the Board, or of any director or directors, of the lending company."

PROHIBITORY PROVISION

Section 185 is a prohibitory provision and is mandatory in character, which is evident from the negative words 'no company shall'. It is well settled that when a statute is couched in negative language it is ordinarily regarded as peremptory and mandatory in nature.[1] As stated by Crawford "Prohibitive or negative words can rarely, if ever, be directory. And this is so even though the statute provides no penalty for disobedience."[2] In *Mannalal Khetan* v. *Kedar Nath Khetan* (1977) 47 Comp Cas 185 (SC), the Supreme Court has held (concerning s. 108 of Companies Act 1956) that the words "shall not …" are mandatory in character. Negative, prohibitory and exclusive words are indicative of the legislative intent when the statute is mandatory. Negative words are clearly prohibitory and are ordinarily used as a legislative device to make a statutory provision imperative. The words "shall not register" (in section 108 of the Companies Act) are mandatory in character. The mandatory character is strengthened by the negative form of the language.

Section 185 applies only when any company (public or private) proposes to give a loan to any of the parties mentioned in the Explanation appended to that section, or when a company proposes to provide a guarantee or security in connection with a loan, on behalf of any of the parties mentioned in the said Explanation. The section completely prohibits such loans, guarantees and securities and no company can give such loans and provide such securities even with the approval of members of the company or the Central Government.

As noted before, subsection (1) prohibits any company, directly or indirectly advancing a loan or providing any guarantee or security in connection with any loan, to any of its directors or to any other person in whom the director is interested or give any taken by him or such other person. The expression 'to any other person in whom director is interested' is defined in the Explanation below subsection (1).

Accordingly, the prohibition contained in subsection (1) will apply to a loan/guarantee/security give by a company ('the lending company') to any of the following parties and, therefore, a company cannot give any loan/guarantee/security to any of these parties, despite that the lending company may be able to give loan/guarantee/security to any of these parties under section 186 since, as will be noted below, this section shall prevail over section 186:

(1) any director of the lending company;

(2) any director of the holding company of the lending company;

(3) any partner of any director of the lending company;

(4) any partner of any director of the holding company

(5) any relative of any director of the lending company;

(6) any relative of any director of the holding company;

(7) any firm in which any director of the lending company is a partner

(8) any firm in which any director of the holding company of the lending company is a partner;

(9) any firm in which any relative of a director of the lending company is a partner

(10) any firm in which any relative of a director of the holding company of the lending company is a partner

(11) any private company of which any director of the lending company is director;

(12) any private company of which any director of the lending company is a member;

(13) any private company of which any director of the holding company of the lending company is director

(14) any private company of which any director of the holding company of the lending company is a member;

(15) any body corporate at a general meeting of which 25% of more of the total voting power is exercised or controlled by any director of the lending company;

(16) any body corporate at a general meeting of which 25% of more of the total voting power is exercised or controlled by two or more such directors of the lending company, together

(17) any body corporate at a general meeting of which 25% of more of the total voting power is exercised or controlled by any director of the holding company of the lending company;

(18) any body corporate at a general meeting of which 25% of more of the total voting power is exercised or controlled by two or more directors of the holding company of the lending company, together;

(19) any body corporate, the Board of directors, managing director

1 Principle Of Statutory Interpretation by justice G. P. Singh 11th edition, 2008 pages 390 to 392.

2 Vijay Narayan Thatte v. State of Maharashtra 2009 AIR SCW 53153

or manager, whereof is accustomed to act in accordance with the directions or instructions of the Board, or of any director or directors, of the lending company.[3]

EFFECT OF THE EXPRESSION 'SAVE AS OTHERWISE PROVIDED IN THIS ACT'

So far as the saving clause 'Save as otherwise provided in this Act', at the beginning of subsection (1), is concerned, the word 'save' here means except, other than or excluding or not including. The phrase 'save as otherwise provided in this Act' is employed in statutory drafting when a section using this phrase seeks to exclude the operation some other section or sections which contains a similar provision.

The saving clause, which would seem to have the effect of protecting any other provision of the Act which permits giving loans, guarantees or securities such as section 186 and section 67, does not seem to be suitable in this provision. This saving clause has been copied from the predecessor of this section i.e. section 295 of the 1956 Act; however, there it was used to exclude the operation of subsection (1) by reason of the exemption provided for in subsection (2) and that is why it stated: 'Save as otherwise provided in sub-section (2)'. In section 185, the proviso to subsection (1) contains the exemptions and hence there was no need to say ''Save as otherwise provided in this Act'. So, this is clearly a drafting. Indeed, the section should have had a non-obstante clause 'Notwithstanding anything contained in any other provision of this Act'.

Be that as it may, the said saving clause has to be interpreted not by the rule literal construction but by applying the rules of purposive construction and harmonious construction, because if it interpreted by applying the rule of literal construction, it would have the effect of wiping out section 185 since loans, guarantees and securities that this section prohibits are permitted under section 186. In particular, section 186 of the 2013 Act applies to loans to be given to any person or body corporate. If the expression 'save as otherwise provided in this Act' in section 185 is interpreted by the rule of literal construction, to mean that a company may give loans, guarantees and securities to any of the parties falling within the ambit of section 185 (as specified in the Explanation), by resorting to section 186, despite the prohibition under subsection (1), that would render the this section redundant and superfluous and useless, which could not have been the intention of the Legislature. It is a well-settled principle of statutory interpretation that construction which has the effect of rendering any provision of the statute meaningless or ineffective should be avoided; all the parts of the statute must be read together so as to make as far as possible a consistent enactment of the whole statute giving full meaning and effect to every part and not rendering any part meaningless or superfluous.[4]

While this section opens with the saving clause 'Save as otherwise provided in this Act', section 186 opens with the phrase 'Without prejudice to the provisions contained in this Act'. But this phrase qualifies only subsection (1) of section 186, and not its subsection (2). Accordingly, as stated in the preceding paragraph, the phrase 'Save as otherwise provided in this Act' has to be interpreted without rendering the provisions of section 185 otiose and the rule of interpretation that special provision in an enactment prevails vis-à-vis general provision should prevail inasmuch as section 186 is a general provision, whereas section 185 is a special provision on the same subject; hence section 185 overrides section 186 to the extent of the transactions covered in both.

Needless to say, every loan/guarantee/security to any of the parties mentioned in the Explanation appended to section 185 would attract section 186 because, according to subsection (2) of section 186, No company shall directly or indirectly—

(a) give any loan to any person or other body corporate;

(b) give any guarantee or provide security in connection with a loan to any other body corporate or person; and

(c) acquire by way of subscription, purchase or otherwise, the securities of any other body corporate,

exceeding sixty per cent of its paid-up share capital, free reserves and securities premium account or one hundred per cent of its free reserves and securities premium account, whichever is more, and according to subsection (3), where the giving of any loan or guarantee or providing any security or the acquisition under sub-section (2) exceeds the limits specified in that sub-section, prior approval by means of a special resolution passed at a general meeting shall be necessary.

Thus, a loan to any 'person' or 'body corporate' (indeed 'person' included body corporate) attracts section 186 and guarantees and securities in connection with loans on behalf of any person or body corporate also attracts section 186 and these transactions attract section 185 as well since all the parties mentioned in the Explanation are either persons or bodies corporate.

CLAUSE (C) OF EXPLANATION

According to clause (c) of the Explanation, if a company gives loan or provides a guarantee/security, to any private company of which any director of the lending company is a director or member. This clause does not apply if the borrowing company is not a private company. If a loan is to be given to a subsidiary of a public company, clause (c) will not get attracted since a private company which is a subsidiary of a public company is not a private company;

3 For a detailed discussion on this, refer to the COMMENTARY under section 2(60).

4 Juvansinhji Balusinhji and others v. Balbhadrasinhji Indrasinhji [1962] 32 Comp Cas 1162 (Guj). For more discussion, refer to Essential Rules of Statutory Interpretation at the beginning of this volume.

it is a public company. Therefore when a public company gives loan to its subsidiary (even if they have common director(s) or any director of the lending company is a member of the subsidiary), clause (c) will not get attracted and hence section 185(1) will not apply (unless some other clause of the Explanation is attracted).

CLAUSE (D) OF EXPLANATION

According to clause (d) of the Explanation, if a company gives loan or provides a guarantee/security, to any body corporate at a general meeting of which not less than 25% of the total voting power may be exercised or controlled by any such director, or by two or more such directors, together, section 185 will apply. This clause clearly states that twenty-five percent or more voting power must be held by director or two or more directors of the company. The voting power held by relatives of a director is not to be considered for the purpose of clause (d) because that will amount to rewriting of the statute. Therefore, unless 25% more of the total voting power of the borrowing company is held by one or more directors themselves, in their own name(s), clause (d) will not be attracted.

CLAUSE (E) OF EXPLANATION

According to clause (*e*) of the Explanation, if a loan/guarantee/security is to be given to any body corporate, the Board of directors, managing director or manager, whereof is accustomed to act in accordance with the directions or instructions of the Board, or of any director or directors, of the lending company. Simply put, clause (e) will get attracted if the Board of directors, managing director or manager, of S Ltd is accustomed to act in accordance with the directions or instructions of the Board, or of any director or directors, of H Ltd. The situation mentioned here does not seem to be a possibility as S Ltd is a subsidiary of H Ltd and it is inconceivable that the board of directors or managing director or the manager of the subsidiary company is accustomed to act in accordance with the directions or instructions of the board of the holding company or its director(s), unless the S Ltd., has given any right or power to give instructions or directions to the Board of H Ltd.

Since the companies to which loan is to be given or on whose behalf guarantee/security is to be provided are distinct entities with their own independent boards which exercise powers in relation to the affairs of the companies according to law and articles of association and since there is no document indicating that the board of directors of the subsidiary company has been given any right or power to give instructions or directions to the boards of H Ltd, clause (e) of Explanation to section 185 is not applicable and hence section 185 does not apply to the proposed transaction of loan or guarantee.

The expression "accustomed to" means customary; usual; habitual: habituated; acclimated; be used to; being in the habit or custom. The use of this phrase clearly indicates that there must be a regular or usual practice of issuing directions or instructions by the board or a director(s) of one company to the board of another company and the board of the latter following them and acting in accordance with them. This is a question of fact and there cannot be a presumption in any case, like holding company and subsidiary, even if the subsidiary is a wholly-owned subsidiary or one or more of the directors of the holding company are directors of the subsidiary or one or more employees of the holding company are directors of the subsidiary. Both the requirements of clause (e) will have to be established, namely: (1) that there have been directors or instructions issued by the Board, or of any director or directors, of the lending company regularly; and (2)the Board of directors, managing director or manager, of the borrowing company acting act in accordance with the directions or instructions There has to be evidence of the board or a director(s) issuing directions and instructions and the board of the other company regularly acting according to them.

Thus, to hold that the Board of a company is accustomed to act in accordance with directions or instructions of the board, or of any director or directors of another company, it has to be established that there have been a series of events in which the Board may have acted in accordance with such instructions and a single isolated event or two would not be sufficient. In this regard where service rules provided for disciplinary action against the persons habitually absent, the Supreme Court held that a single instance of absence was not sufficient to fall within the teeth of requirement of habitual absence.[5]

INDIAN CASE LAW

Section 538 of the Companies Act 1956 made laible past and present officers of a company which was being wound-up and subsection (3) of that section provided that "For the purposes of this section, the expression "officer" shall include any person in accordance with whose directions or instructions the directors of the company have been accustomed to act." The definition of 'officer' in section 2(30) of the Act also provided that officer included any person in accordance with whose directions or instructions the Board of directors or any one or more of the director is or are accustomed to act. In Official Liquidator, Golcha Properties P. Ltd. (In Liquidation) v P. C. Dhadda[1980] 50 Comp Cas 175 (Raj) the question before the court was whether the secretary, chief accountant and cashier of the company which was in winding-up were 'officers' of the company are not. Answering that question in the affirmative, the court held that,

"The present definition of the word "officer" is wide enough and would include anybody on whose instructions the board or any of the directors of the company is accustomed to act. This is designed to counter the treat whereby dummy directors are appointed on boards of companies to implements policies of a dubious nature, while masterminds mainly instrumented in evolving those policies remain in the background. According to Stroud's Judicial Dictionary

5 *Malkiat Singh* v *State of Punjab* (1996) 7 SCC 634.

"office" means a person under a contract of service; a servant of special status holding an appointment to an office which carries with it an authority to give directions to other servants. Shri P. C. Dhadda was the secretary, Shri . L. Jain, accountant, and Shri K. C. Jain, cashier, in the relevant year 1965, in M/s. GolchaProperties (P.) Ltd. The voucher No. 320 dated 25th August, 1965, was prepared by these persons. Shri P. C. Dhadda signed it as secretary, Shri G. L. Jain signed it as chief accountant and Shri K. C. Jain prepared the same as cashier. From the above discussion, it is apparent that during the relevant period, non-petitioners Nos. 2 and 3 were the officers of the said company as defined in sub-s. (30) of s. 2 of the Indian Companies Act."

Section 2(g)(viii) of the Monopolies and Restrictive Trade Practices Act 1969 defined the expression "inter-connected undertaking" and according to clause (ix) of the Explanation appended to that definition, two bodies corporate, shall be deemed to be under the same management if the directors of the one such body corporate are accustomed to act in accordance with the directions or instructions of one or more of the directors of the other, or if the directors of both the bodies corporate are accustomed to act in accordance with the directions or instructions of an individual, whether belonging to a group or not.

In Swastika Textile Mills Ltd In re [1985] 57 Comp Cas 766 (Bom), Mr M was the chief executive of company L and a director of company A and it was contended that it must be presumed that in his capacity as a director of company A he was acting in accordance with the directions or instructions given to him by the directors of company L. The court, however, held that whether certain persons are accustomed to act in a particular manner or not is something which can be shown by instances of past behaviour or other material facts and not by mere presumptions. Since not a single instance had been given of a person having acted in his capacity as a director of a company pursuant to the directions given to him by the directors of another company, it could not be said that he was accustomed to act in accordance with such directions given by the directors of that other company and therefore, the contention must be rejected.

Section 545 of the Companies Act 1956 empowers the court to direct the liquidator either himself to prosecute any past or present officer, or any member, of the company has been guilty of any offence in relation to the company, if it appears to the Court in the course of a winding up that he has been guilty of any offence in relation to the company. In Official Liquidator v T. Sudarshan [2003] 116 Comp Cas 88 (Mad), two persons (eighth and ninth respondents) were group vice president and chairman but no directors of the company and they were also promoters of the company. It was found that they were de facto in charge of the affairs of the company. They had not placed themselves as directors in order to avoid any statutory liability. The person who was the group president and issued directions to the board of directors of a company who were employees of the company and the so-called group president in a letter had accepted the fact that they were responsible for all the affairs of the company and they were the persons in accordance with whose directions or instructions, the board is accustomed to act, it was held that the group president was liable for prosecution under section 545 of the Companies Act (any past or present officer of the company in liquidation has been guilty of any offence in relation to the company, as an officer of the company.

UK CASE LAW

Section 741 of the UK Companies Act 1985 defined 'shadow director as a person in accordance with whose directions or instructions the directors of the company are accustomed to act. However a person is not to be regarded as a shadow director by reason only that the directors act on advice given by him in a professional capacity. Section 251 of the UK Companies Act 2006 gives the same definition.

In Hydrodan(Corby) Ltd, In re (1994) BCC 161 the Chancery Court pointed out distinction between de facto director and shadow director. The court held that de facto and shadow directors were very similar, that their roles overlapped, and that it might not be possible to determine in any given case whether a particular person was a de facto or a shadow director. The terms did not overlap. They were alternatives, and in most and perhaps all cases were mutually exclusive. It was held:

"A shadow director … does not claim or purport to act as a director. On the contrary, he claims not to be a director. He lurks in the shadows, sheltering behind others who, he claims, are the only directors of the company to the exclusion of himself. He is not held out as a director by the company. To establish that a defendant is a shadow director of a company it is necessary to allege and prove: (1) who are the directors of the company, whether de facto or de jure; (2) that the defendant directed those directors how to act in relation to the company or that he was one of the persons who did so; (3) that those directors acted in accordance with such directions; and (4) that they were accustomed so to act. What is needed is, first, a board of directors claiming and purporting to act as such; and, secondly, a pattern of behaviour in which the board did not exercise any discretion or judgment of its own, but acted in accordance with the directions of others."

In Re Unisoft Group Ltd (No. 3) (1994) 1 BCC 609; 1994 BCC 766,

Harman J. explained the definition of 'shadow director' in section 741 of the UK Companies Act 1985,

"In my view, those words can only mean … that the shadow director must be, in effect, the puppet master controlling the actions of the board. The directors must be (to use a different phrase) the 'cat's paw' of the shadow director. They must bepeople who act on the directions or instructions of the shadow director as a matter of regular practice. That last requirement follows from the reference in the subsection to the directors being 'accustomed to act'. That must refer to acts not on one individual occasion but over a period of time and as a regular course of conduct. In my view, there can be no way in which the acts of any one of several directors of a company in complying with the directions of an outsider could constitute that outsider a shadow director of that company. Of course, if the board of the company be one person only and that person is a 'cat's paw' for an outsider, the outsider may be the shadow director of that company. But in a case such as this, with a multi-member board, unless the whole of the board, or at the very least a governing majority of it - in my belief the whole, but I need not exclude a governing majority are accustomed to act on the directions of an outsider, such an outsider cannot be a shadow director, Further, there must be, as I say, more than one act and a course of conduct."

Section 22(5) of the Directors Disqualification Act 1986 (UK) defines the expression 'shadow director' as

'… a person in accordance with whose directions or instructions the directors of the company are accustomed to act (but so that a person is not deemed a shadow director by reason only that the directors act on advice given by him in a professional capacity).'

In Secretary of State for Trade and Industry v Deverell and another[2000] 2 All ER 365, it has been held that, for the purposes of s 22(5) of the 1986 Act, the question whether a particular communication constituted a direction or instruction had to be answered in the light of all the evidence, and it was not necessary to prove the understanding or expectation of either giver or receiver. Evidence of such an understanding or expectation might be relevant, but it could not be conclusive. Furthermore, non-professional advice could fall within s 22(5). Such a conclusion appeared to be assumed by the proviso excepting advice given in a professional capacity, and in any event the concepts of 'direction' and 'instruction' did not exclude the concept of 'advice' since all three shared the common feature of 'guidance'. Moreover, although it would be sufficient to show that properly appointed directors had cast themselves in a subservient role or surrendered their discretions in the face of 'directions or instructions' from the alleged shadow director, it would not always be necessary to do so. Such instructions or directions did not have to extend over all or most of the corporate activities of the company, and it was not necessary to demonstrate a degree of compulsion in excess of that implicit in the fact that the board was accustomed to act inaccordance with them. Moreover, it was not necessary for the shadow director to lurk in the shadows, although he might frequently do so.

The use of the phrase 'accustomed to' also indicates that there must be regularity in the directions or instructions being followed by the board and no presumption can be drawn based on some relationship between two companies such as holding-subsidiary or where the boards of the two companies have one or more common directors.

Thus, to hold that the board of one company is accustomed to act in accordance with directions or instructions of a person, it has to be established that there have been a series of events in which the board may have acted in accordance with such instructions and a single isolated event or two would not be sufficient. Moreover, there cannot a presumption, such as in the case of subsidiary company, that its board or managing director or any director is to be presumed to be accustomed to act in accordance with the directions or instructions of the Board, or of any director or directors, of the holding company; there has to be some evidence regarding instances of such acting. On the contrary, there is a presumption that board of every company acts independently in the interest of the company and every director acts in accordance with fiduciary duties and independent judgment uninfluenced by any external force, except when there is evidence that the contrary is true.

MCA'S CIRCULARS

Realising the utter uneasiness in the corporate sector about section 186, the Ministry of Corporate Affairs (MCA) has issued two circulars: Circular No. 18 of 2013 dated 19 November 2011 and Circular No. 3 of 2014 dated 14 February 2014. Both these circulars have, however, created a great deal of confusion everywhere. While no one is clear as to why the former circular was issued and what its purpose was and what it has achieved, the second one says something which the statutory provision enacted by the Legislature does not say, namely that section 185 prohibits guarantee given or security provided by a holding company in respect of any loan by its subsidiary company except in the ordinary course of business and that this 'clarification' will apply to cases where loans are exclusively utilized by the subsidiary for its principal business. Thus, this so-called 'clarification' not only confuses instead of clarifying, but it also rewrites the statue passed by the Legislature (and thereby encroaching upon the Legislature's prerogative).

CONCLUDING REMARK

Section 185 is acting as an unduly harsh and impractical statutory prohibition in the case of private companies and would have the effect of stifling business growth in the country since it is unavoidable that a company funds a new project undertaken by an independent company incorporated as an associate company and banks are not ready to provide funds unless a corporate guarantee or security is provided by a parent or group company. The MCA may exempt private companies from the impact of section 185 in exercise of its powers under section 462 of the Act. CS

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Performance of the Board, its Committees and Directors - An Appraisal & a Critique

The Companies Act 2013 has enjoined a novel duty on company boards to evaluate not only their own performance in the previous financial year but also that of their committees and individual directors. Instead of reporting the outcome of such evaluation, Section 134 (which has come into force on 1st April 2014) requires the board only to include in its Report (to be attached to the Financial Statement) the 'manner' in which such evaluation has been made. The author, based on certain international practices in this regard has outlined the course that Indian company boards may follow. It is hoped that the new mandate will improve the effectiveness of our boards.

"If the board is not as effective as it needs to be in today's fast changing and demanding environment, the company could well lose its way. However good your board it is, it can and must improve its effectiveness and adapt to meet the challenges of the future."

-John Harper in "Chairing the Board" 2000 Edn, Kogan Page.

THE NEW MANDATE

Sectiion134 of the Companies Act, 2013 ('the Act') has come into force on and from 1st April 2014 (vide MCA's Notification dated 26th March 2014) sub-section (3) of which read with Rule 8.4 of Companies (Accounts) Rules, requires every listed company and other public company with paid-up share capital of Rs. 25 crore or more to include in its board's report (to be attached to Financial Statement for the year ended 31st March 2014) a statement indicating the manner in which formal evaluation has been made by the Board of its own performance during the previous FY 2013-14 and that of its committees and individual directors. However, MCA has by its General Circular No. 8/2014 dated 4th April 2014, clarified that the 'Board's report in respect

of the financial year 2013-14 shall be governed by the Companies Act, 1956. The Board's report in respect of the FY 2014-15 will therefore need to include a statement regarding the performance of the Board, Committees and directors during 2014-15. It may nevertheless be beneficial for the Board if the exercise re: performance evaluation is undertaken voluntarily (as a rehearsal) in respect of the FY 2013-14 by way of rehearsal for the mandatory exercise during the next FY 2014-15."

1.1 'Statement' signifies a formal and factual declaration. 'Evaluation' means determination of value (efficacy or excellence) while 'Performance' means 'the act of carrying out duly, to act in fulfillment of, to carry into effect' (evidently, of tasks or functions designed to achieve pre-determined plans, programmes, objectives etc. Such functions or actions, in the case of a board, manifest themselves in the form of resolutions, approvals, directions and the like. If the company has to indicate the 'manner' or method of evaluation, it presupposes that its Board has indeed carried out the requisite evaluation. Further, the valuation has to be carried out by the Board which means that it cannot be totally outsourced. The Board may however take the help and assistance of an external agency like a management consultancy firm.

1.2 It is significant to note that Section 134 does not require the disclosure of the 'outcome of evaluation' but only the 'manner of evaluation' followed. It is not clear whether information regarding the 'manner of evaluation' (without letting known the outcome of the evaluation) will be of any interest or use to the readers of the Board's report. MCA may perhaps require disclosure of such 'outcome' by a notification under Sec. 134 (3) (q) unless such disclosure is considered to be given under the 'state of the company's affairs' or under the 'Directors' Responsibility Statement'.

1.3 As the new mandate marks a novel milestone in the progress of corporate governance in the country, and little is known of this exercise in the corporate circles so far, an attempt is made here to analyse briefly the implications of the new mandate to find out its content, contours and purpose in the light of the information, observations and suggestions provided on this subject abroad by Mr. John Harper, an accomplished Company Director and Past Professional Development Director at the Institute of Directors, in his said book adapted to our background and the provisions of the Companies Act 2013, especially Sec. 134 that deals with content and significance of Board's report , Sec.166 that lists the duties of directors, Sec. 143 that deals with Statutory Financial Audit, Sec. 149 that deals with the Board, its constitution etc., Secs 152 and 161 that deal with appointment of directors, Secs 177 and 178 that deal with the audit, nomination and remuneration committees of the Board, Sec. 204 that deals with Secretarial audit all of which contain the duties and other overall performance requirements. Responsibilities etc of directors, in one form or the other.

2.0 Purposes of the Board, and of its evaluation

Purpose of the Board and its achievement

2.1 Let us recall, at the outset, the purpose of a company's board. The overreaching purpose of a Board is to be exclusively responsible for the governance of the company, namely 'the accomplishment, manner or system of directing and controlling the affairs, policies, functions and actions of the company to ensure the continued well-being (prosperity) of the company while, at the same time, the company remains a good corporate citizen. It should 'focus on giving leadership, directing the organization's affairs and overseeing what is being done'. It shall however discharge its function and responsibilities within the overall framework of the law of the land, the company's own charters like the MoA and AoA and the other mandatory covenants like shareholders' or collaboration agreements.

2.2 The above purpose is achieved through the establishment of a vision, mission and values for the company and through exercise of its accountability to shareholders and discharge of its responsibility to the other relevant stakeholders. The Board which is the repository of all the company's powers save those reserved for the members must therefore delegate its powers suitably for the day to day management of the company led by the MD or the CEO, the whole time directors etc..

Purpose of evaluation by the Board

The performance of a Board has a significant impact on the performance of the company. Improving the effectiveness of the board is thus vitally important for the company's continued prosperity and growth. It therefore becomes necessary for the board to take a rigorous and objective look at itself annually with a view to assessing both the degree and extent of its

achievements, vis-avis the targets and standards that it has set for itself. The Board should likewise review the performance of its committees and performance of the MD and/or WTD all of whom form a team (as directors) for one and the same purpose. Such a review enables the Board to assess its own pertinence for the ongoing needs of the company and to make due changes within itself to meet the challenges of the future. The investors in the company get immensely benefited by the outcome of such a review or evaluation. The new mandate is thus set to raise the standard of board's effectiveness.

3.0 Manner of Evaluation

3.1 John Harper has provided two options. 'Comprehensive appraisal' and 'Active Review'-for evaluating the Board's performance while providing a single method – 'one-to-one method – for the assessment of the performance of the individual Directors. These are detailed below duly adapted to our Indian background including the laws applicable to Indian corporate sector:-

A: 'Comprehensive' appraisal for Board's performance:

"A comprehensive approach of the board to improving its performance starts with a fundamental review of the board's actions in the past financial year and the manner in which they took place. The review must be done from a strategic perspective, against the ever-changing background and likely needs of the company."

5.3.1 The 'Comprehensive' review covers broadly (a) the composition of the Board (b) the matters it addressed during the previous financial year (c) the style and processes it adopted or followed and (d) its focus. The Companies Act contains several Sections dealing with the Board's constitution, the manner of selection of independent directors, duties of directors, appointment of additional, alternate and nominee directors, disqualifications of directors, vacation of office of director, removal of directors etc. in additions to provisions regarding meetings of directors, constitution of audit and other committees, Board's general and specific powers including those in respect of loans, investments etc., restrictions on such powers, non-cash transactions involving directors, prohibition on forward dealings and on insider trading etc. The Board may have delegated some of its powers to directors and committees. Some or all of these subjects may have been attended to by the board during the previous financial year and some of them would have been reviewed by the auditors (financial, secretarial and cost) in their respective reports submitted to the board.

5.3.2 Likewise, the Board would have discharged its statutory duties and responsibilities pertaining to maintenance of accounts and records, institution of internal controls, compliances with accounting standards, audit of accounts, matters pertaining to profit and loss of its transactions during the year as also dealt with related party transactions or the presentation of 'true and fair' financial statements etc. to the auditors for their report thereon.

5.3.3 The Board may be considered to have the benefit of the contents of or disclosures in the Financial, Secretarial and Cost Audit reports while carrying out evaluation of its own performance and the performance of its committees and of its directors during the past financial year. The Board is enabled to narrow down its focus on the important aspects of these reports and of other highlights relating to corporate governance, legal and ethical compliances, enhancement of personal attributes of directors including the balancing of the board with diverse talents and exposures, high quality of its decisions (measured by the success achieved) effectiveness of communications with internal and external stakeholders, employment of analytical skills, strategic perception and business acumen in the various matters that the Board dealt with in the past financial year.

5.3.4 Style and process: While each Board is known for its own style of functioning and decision-making, it has to be an open (transparent) one. It is important to evaluate the team work displayed by the Chairman, the Managing and/or the Whole-time directors and the other key managerial personnel in helping the Board to function efficiently and effectively. The quality of the agenda may also be evaluated to ensure that subjects falling within the domain of general management have not been included in the board agenda. The efficacy of follow-up of board's and its committees' decisions as well as feed-back on them may also be examined.

5.3.5 Focusing on strategic issues: This would include anticipating the future while decision-making, preserving and promoting matters of established corporate culture and values, thinking and acting strategically on all major issues, considering effective risk management, promoting compliance culture and observance of business ethics.

5.4 The evaluation may be made keeping in view the above matters and the gist of its outcome may be reported to, and considered by, the board, while making a special note of ideas and options for improvement and change that emanate from such consideration by the Board.. The best way forward can then be agreed and plans made, followed by implementation and further review. The Chairman of the Board usually leads this review process

assisted by both the executive and non-executive directors. Independent directors among them can play a pivotal role in this regard.

B: Active review

6.0 This is a pragmatic method of appraisal – an alternative to the 'comprehensive appraisal'. The Active review is considered to be quicker though less thorough than a 'comprehensive appraisal'. The subjects to be considered include the extent to which the company's objects have been achieved during the past financial year, adequacy of 'information' made available to the board, quality and depth of discussions at the board and committee meetings, effectiveness with which board's tasks have been tackled, whether future prosperity of the company has been taken care of by the Board's actions, etc.

6.1. This helps to ascertain how effectively the board functioned during the year under review, what steps are needed to improve the board's performance in this regard, and the time span required to determine and allocate new responsibilities. Progress is then reported and a further review carried out to help ascertain what improvements have taken place and to see what new priorities there may be for improvement. The procedure here is led by the chairman and is carried out by the directors themselves, individually or as small groups depending upon the strength or size and composition of the board.

6.2 Each director is given a set of questions about the board and is asked to assess the board's effectiveness in each case by giving a mark, on a scale of 1 to 10. This must be done by each director without colluding with the other director(s). Copies are then given to the chairman, who will examine them for points of consensus and have the responses consolidated. The directors then meet to examine and discuss the results, agreeing and prioritizing which areas need improving and what action shall be taken, by whom and by when.

7.0 Assessing the performance of the individual directors

7.1 The performance of individual directors includes that of Chairman, MD, and WTD etc. in their capacity as directors. In other words, the evaluation of a person as Chairman, MD etc. is distinct from his evaluation as director of the company.

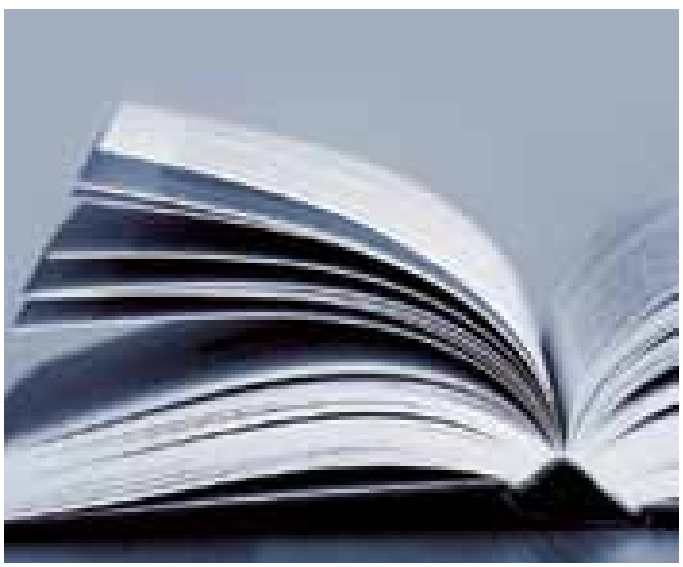
7.2 The Need: A director, as a member of a Board, should firstly know what specific responsibilities he has as a member of the Board and, next, endeavour to remain competent for the position held by him, always. Only then he can make his own contribution to elevating the overall level and quality of the board's performance and board's effectiveness. The structured learning methods include distance learning, video and audio recordings, open and in-house courses, seminars and workshops, conferences etc.

7.2 What is evaluated & by whom?: The review or evaluation of an individual director's performance consists, basically, of how well he/she has performed as a director, that is to say, as a member of the board against the backdrop of legal duties and self-assumed (agreed)responsibilities over a given period. Each director is expected to bring to the board his own "particular type of contribution and strength to provide the overall balance and range of attributes, skills and knowledge required." The evaluation may be carried out by the Director himself but it is better done by the Chairman with assistance and help from an external expert (who may have been an accomplished director himself for decades earlier).

7.2.1 John Harper has, in his book aforesaid, suggested such an evaluation of a director could be based on the Professional Code of Conduct for directors, issued by the Institute of Directors. However, we may base our evaluation of directors against its Indian counterpart of the Code, namely Sec. 166 of the Companies Act 2013 and the additional duties and responsibilities, if any, that the director has agreed to shoulder by virtue of an executive position he may be holding in the company. The IoD Code has thus been given below indicating, in brackets, its correspondence with Sec.166 :-

IoD's Professional Code of Conduct for directors with reference to our Sec.166

a. Exercise Leadership, enterprise and judgment in directing the company so as to achieve its continuing



prosperity and act in the best interests of the company as a whole and legitimate interests of its shareholders (S. 166 (2))

b. Follow the standards of good practice set out in the IoD's 'Good practice for Directors- Standards for the Board' and act accordingly and diligently (S.166 (3)

c. Exercise responsibilities to employees, customers, suppliers and other relevant stakeholders, including the wider community (Sec.166 (2))

d. Comply with relevant laws, regulations and codes of practice, refrain from anti-competitive practices, and honour obligations and commitments (Sec.134 (5) (f) &

e. At all times have a duty to respect the truth and act honestly in business dealings and in the exercise of all responsibilities as a director (Sec.166 (1))

f. Avoid conflict between personal interests, or interests of any associated company or person, and his or her duties to the company.(Sec.166 (4))

g. Not make improper use of information acquired as a director or disclose, or allow to be disclosed, information confidential to the company (Sec.166 (4))

h. Not recklessly or maliciously injure the professional reputation of another director and not engage in any practice, detrimental to the reputation and interests of the profession of director

i. Ensure that he keeps abreast of current good practice in directing (Sec.166 (3) & 134 (5))

j. Set high standards of keeping aware of and adhering to this code, both in the spirit and in the letter, and promoting it to other directors

k. Apply the principles of this Code appropriately when acting as a director of a non-commercial organization. (Secs. 166 & 134 (5))

METHODS/MANNER OF EVALUATION

7.3 Anticipatory Method or Positive Approach

The Chairman's evaluation here is on 'one-to-one basis.' While the past performance of the director is reviewed to ascertain areas that need improvement, focus is laid equally on the personal (additionally agreed) objectives – by way of improvement over the past year's performance - to be accomplished in the future. Says John Harper "This anticipatory method can help to reinforce any particular types of contribution and strength that each director would be expected to bring to the board to provide the overall balance and range of attributes, skills and knowledge required".

7.4 Peer review

This method consists of using a universal list of areas of director's responsibility that is drawn up as a result of a discussion on the subject by the whole board, under the chairman's guidance. Every director will have a copy of the said universal list for each colleague, on which an evaluation is made against each criterion, with brief supporting comments. They can be sent to the recipients anonymously or with the identity of the evaluator revealed, whichever is agreed beforehand. Security, discretion, respect and trust must all be evidenced for this process to be effective. Peer review is not discussed between the participating directors. At the end of the peer review, it is up to each individual director to act upon the views expressed by the peers as he considers fit. He is at liberty to bring up one or more of the matters pertaining to his review before the Board for a further debate or discussion. Alternatively, he may also discuss it with the chairman for elaboration.

8.0 Appraisal of Chairman's performance

8.1 It is not clear whether clause (p) of sub-section (3) of Sec. 134 includes evaluation of the chairman's role. Pending clarification by MCA, it is considerable advisable to include the evaluation of chairman's role for compliance with Sec. 134 (3) (p).

8.2 The Chairman's performance is a crucial one. It can be done in many ways including the peer review by the whole board (excluding the chairman). This peer review is different in the matter of content from the peer review as a director or member of the board carried out separately. The conducting methodology may however be the same as the other peer review. Other 'softer' options would be a feed-back from the MD & Whole-time directors (if the chairman is an executive chairman) or, if the chairman is not an executive chairman,

a feed back from the deputy/vice chairman if there is one, or an independent or separate review by a team of one or two non-executive directors (preferably independent directors) and an independent consultant to make observations, take soundings and give feed-back. "Where the chairman is also the chief executive/MD, a senior non-executive director should be the appraiser. The appraisal can be structured around the responsibility specified in the job description and list of powers delegated by the board" says John Harper.

8.3 The parameters for evaluation of the successful role of the Chairman would include (a) his having the personal qualities of head and heart (attributes) such as Personal integrity and authority without domination, decisiveness and an insistence to get things done, (b) his/her ability to ensure that the board properly addresses all the major strategic issues that will affect the company's prosperity, viability and reputation (c) having a proper focus on the board's key tasks, and ensuring that they are addressed (d) Successful steering the board in deciding on matters such as corporate vision/aims/mission/objectives etc.(e) acting as an effective mentor, sounding board and adviser to the MD/WTD (f) taking responsibility for the board's constitution and development, including succession matters (g) a sense of purpose with a set of priorities and objectives and skill in guiding the board to focus on the relevant issues (h) representing the company to shareholders and other stakeholders and (i) Securing the confidence and support of the directors.

9.0 Appraisal of the performance of MD or Whole-time Director

9.1 The evaluation of the performance of a Managing Director or a Whole-time director consists of two parts – one that of the executive (management) position held by him and the other as a director or member of the board. It is not clear whether clause (p) of Sec.134 (3) includes evaluation of both the roles.

9.2 Because the MD/WTD has a unique and special role, there are aspects of his or her appraisal that should be carried out in a particular way. Such an appraisal or review is often best carried out formally by the chairman, with or without the support of one or more non-executive directors. Where the chairman is also the MD, a senior non-executive director may act as the appraiser.

9.3 Since the MD/WTD is charged with carrying through decisions of the board, leading the organization's employees and managing the company day to day, a review of performance of such matters is called for. These embrace issues of company performance in relation to agreed plans and external benchmarks, as well as measures of the underlying health of the company.

9.4 There are certain mandatory duties under the Companies Act and other laws for the MD– for example, signing of the Financial Statement, Board's report etc or performing duties as Occupier under the Factories Act etc. The Board-fixed duties and responsibilities include the MD/WTD's responsibility to meet the targets under annual plans and budgets approved by the Board (of which he or she was also a part as a director), obligations under any contract between the company and the MD/WTD etc. The evaluation will be performed with reference to these targets, duties and responsibilities as well s the board's powers delegated to the MD/WTD. The awards or recognitions, if any received by the MD/WTD from outside bodies like the Management Association or the local Chamber of Commerce, State and/or Central Government etc will also count in this regard.

10.0 Tail piece

The new mandate of evaluation of the board performance along with that of its committees and individual directors will surely turn a new leaf in the onward march of corporate governance in the country to greater heights in the years to come. "The benefit will be a really dynamic board where the full weight of collective experience, intellect, wisdom, knowledge, inspiration, creativity and pragmatism come to bear on the company's affairs to shape its future". CS