RESEARCH REPORT

PRACTICAL ANALYSIS OF ONE PERSON COMPANY VIS-À-VIS ITS ADVANTAGES AND DISADVANTAGES

SUBMITTED BY-

ISHAAN SINGH KUSHWAHA

(INTERN)

06/06/2022-30/06/2022

TABLE OF INDEX

INTRODUCTION 3

ANALYSIS OF ONE PERSON COMPANY 3

"Nominee" Under One Person Company 3

Relaxations available to OPCs 3

Eligibility Criteria under OPC 4

Mandatory compliance under One person Company 4

PROCESS OF INCORPORATION OF OPC 5

Application for opc through SPICe form (Without filling Registered Unique Name) 5

Application for OPC through SPICe form (With Registered Unique Name) 5

ANALYSIS OF ONE PERSON COMPANY VIS-À-VIS ITS ADVANTAGES AND DISADVANTAGES 6

Advantages of OPC 6

Disadvantages of OPC 6

TAX REGIME IN INDIA FOR ONE PERSON COMPANY 7

RAISING CAPITAL THROUGH OPC 7

COMPARATIVE ANALYSIS BETWEEN LIMITED LIABILITY PARTNERSHIP & ONE PERSON COMPANY 8

CONVERSION OF LLP INTO OPC 9

CONCLUSION 9

REFERENCES 12

INTRODUCTION

The Companies Act, 2013 has, for the first time, allowed formation of a limited liability company by just one person. Such a company is described under section 3(1)(c) as a private company. 'One Person Company' is a one shareholder corporate entity, where legal and financial liability is limited to the company only. In India, the J.J. Irani Expert Committee recommended the formation of One-person company (OPC).

The provisions relating to OPC are strewn all across the Companies Act, 2013. Section 2(62) of the Companies Act, 2013 defines 'One Person Company' to mean a company with only one person as its member. Section 3(1)(c) provides that a company may be formed for any lawful purpose by one person, where the company to be formed is to be One Person Company, that is to say, a private company by subscribing his name to a memorandum and complying with the requirements of the Act in respect of registration. An OPC may be registered as 'limited by shares' or 'limited by guarantee'. However, the memorandum of One Person Company shall indicate the name of the other person, with his prior written consent in the prescribed form (Form No. INC.3), 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.

ANALYSIS OF ONE PERSON COMPANY

The Companies Act, 2013 brought several new concepts with its implementation. One of these several new concepts included formation of a limited liability company by just one person.

One Person Company herein referred to as OPC has been defined under section 2 (62) of the Companies Act, 2013 as a company which has only one person as a member/shareholder/subscriber. One person company is registered as a private company [Section 3(1)(c)]. An OPC is a one shareholder corporate entity, where legal and financial liability is limited to the company only.

"NOMINEE" UNDER ONE PERSON COMPANY

A Memorandum of Association under The Companies Act, 2013 has 6 clauses for a private company. However, a One Person Company has 7 clauses under The Companies Act, 2013. The additional clause in the OPC is the Nominee clause. A nominee clause ensures perpetual succession of the company. Where the sole member of the company dies, the nominee shall become the member of the OPC and would be entitled to all the shares, rights and liabilities which the sole member was entitled to have.

The memorandum of One Person Company shall indicate the name of the other person, with his prior written consent in the prescribed form (Form No. INC.3).

RELAXATIONS AVAILABLE TO OPCS

The distinctive feature of the OPC is the relaxations that have been provided to OPCs with respect to private companies. The following are relaxations provided to OPCs-

1. The financial statements of a one-person company can be signed by one director alone. Cash Flow Statement is not a mandatory part of financial statements for a One Person Company. Financial statements of a one-person company need to be filed with the Registrar, after they are duly adopted by the member, within 180 days of closure of financial year along with all necessary documents. [Section 2(40)].
2. The annual return can be signed by the Director and not necessarily a Company Secretary (Section 92). The Central Government may prescribe an abridged annual return for OPC.
3. There is no necessity for an Annual General Meeting (AGM) to be held (Section 96).
4. Specific provisions related to general meetings and extraordinary general meetings would not apply (Sections 100 to 111).
5. It would suffice if one director signs the audited financial statements (Section 134).
6. For the purposes of holding Board Meetings, in case of a one person Company which has only one director, it shall be sufficient compliance if all resolutions required to be passed by such a Company at a Board meeting, are entered in the minutes-book, signed and dated by the member and such date shall be deemed to be the date of the Board Meeting for all the purposes under this Act.
7. An OPC needs to hold only one meeting of the Board of Directors in each half of a calendar year and the gap between the two meetings should not be less than ninety days (Section 173).
8. OPCs are not proprietorship concerns; hence, they give a dual entity to the company as well as the individual, guarding the individual against any pitfalls of liabilities. This is the fundamental difference between OPC and sole proprietorship
9. Unlike a private limited or public limited company (listed or unlisted), OPCs need not bother too much about compliances.

ELIGIBILITY CRITERIA UNDER OPC

1. Only a natural person who is an Indian citizen who may be a resident in India or a non-Resident shall be eligible to act as a member and nominee of an OPC (amended in 2021).
2. The term resident here denotes a person who has stayed in India for a period not less than 120 during the immediately preceding financial year (amended in 2021).
3. No Minor or a foreign citizen can become member or nominee of the One Person Company.
4. A person can be a member in only one OPC and he can also be a nominee of only one OPC.

MANDATORY COMPLIANCE UNDER ONE PERSON COMPANY

The basic mandatory compliance are:

1. Maintenance of proper books of accounts

2. Statutory audit of Financial Statements
3. Filing of Income tax return every year before 30th Sep
4. Filing Annual return to RoC which includes form MGT-7 - Statement of Disclosure of Share-Holders and Directors.

PROCESS OF INCORPORATION OF OPC

APPLICATION FOR OPC THROUGH SPICE FORM (WITHOUT FILLING REGISTERED UNIQUE NAME)

Before making an application for a One-Person Company, the respected individual first needs to obtain-

1. Digital signature certificate (DSC) for all the proposed directors.
2. Every director should also obtain Director Identification Number (DIN) through MCA.
3. Draft the Memorandum of Association along with the Articles of Association.

The MCA has completely turned the incorporation of an OPC as an online procedure. Stakeholders can avail of 5 different services (Name Reservation, Allotment of Director Identification number (DIN), Incorporation of New Company, Allotment of PAN and Allotment of TAN) in one form by applying for Incorporation of a new company through SPICe form (INC-32) - Simplified Proforma for Incorporating Company electronically (SPICe) - with eMoA (INC-33), eAOA (INC-34). In case eMoA, eAoA are not applicable, users are required to attach the pdf attachments of MoA and AoA. There is no need for reserving a name separately before filing SPICe. One name for the proposed company can be applied through SPICe (INC-32).

Stamp duty charges are imposed by the state in which the registered office is proposed to be located.

APPLICATION FOR OPC THROUGH SPICE FORM (WITH REGISTERED UNIQUE NAME)

Incorporate OPC: After name approval through RUN, form SPICe shall be filed for incorporation of the OPC within 20 days from the data of approval of RUN. The company shall file form INC-22 within 30 days once form SPICe is registered in case the address of correspondence and registered office address are not same.

ANALYSIS OF ONE PERSON COMPANY VIS-À-VIS ITS ADVANTAGES AND DISADVANTAGES

The concept of OPC in India is relatively a new concept and restrictive in nature. The OPC concept brought in India variably differs from the OPC models present in Singapore & the US. One of the motives to bring OPC in India was to bring the unorganized sector to the organized and structured sector of the corporate world thereby opening the opportunities for more favorable banking facilities, and limited liability, separate entity.

The eligibility criteria clearly indicates that OPC was brought by the government for the interests of small sole proprietors who wanted absolute control over the company with benefits that were provided to a private or public company. An OPC can be formed only through a natural Indian citizen which in itself restricts domestic and international artificial entities to form an OPC in India. The concept could have been a game changer if the government would have allowed foreign entities to form OPCs which would have led to greater flow of foreign investments in India.

ADVANTAGES OF OPC

1. The major advantage an OPC provides is the status of a separate legal entity which is distinct from the member of the company. This concept restricts the liability of the company to the assets owned by the company, the member of the company is not personally liable for the OPC whereas in sole proprietorship the proprietor is personally liable for the actions undertaken through proprietorship.
2. An OPC has been granted relaxations for filing documents which are mandatory for any other form of company. (The relaxations have been enumerated above)
3. An OPC has more transparency due to some mandatory compliances for filing in MCA, thus an OPC is favorable to gain some capital from investors or venture capitalists.

DISADVANTAGES OF OPC

1. A person shall not be eligible to incorporate more than a One Person Company or become nominee in more than one such company. This restricts them to carry more than one business whereas being just a non-corporate businessman, they can carry any no. of activities with a single name.
2. The concept says that the member will have to nominate any person. But restriction has been imposed with regard to Minor i.e. Minor cannot become member or nominee of the One Person Company or can hold shares with beneficial interest. This restricts those non-corporate businessmen who do not have any nominee other than their legal representatives as minor.
3. In case the company needs funds, it cannot raise money through issue of shares because of the condition of only one person as members and will have to convert itself into a private limited company. Even if the person thinks of converting itself into the Private limited company, law imposes a restriction that no OPC can be converted into private limited

company unless two years have expired from the date of incorporation or specified limit has been achieved by the OPC.

4. A person who is a member of an OPC cannot become a member of any other OPC.
5. This concept was brought specifically for non-corporate business men. But these Non-Corporate Businessmen think that incorporating a company will bring them under preview of one more department i.e. Registrar of Companies unnecessarily. Hence, they hesitate to do business under corporate culture. Moreover, after the enactment of Companies act, 2013, which has brought down strict provisions, penalties for non-compliance, the Professionals even are not suggesting their clients for incorporating the companies.
6. An OPC is treated as a private company under the income tax act,1961. Thus its tax rate is flat 30%, also other taxable provisions such as MAT and DDT (Dividend Distribution Tax) are applicable to it.
7. One Person company cannot carry out Non – Banking Financial Investment activities including investment in securities of anybody corporates.

TAX REGIME IN INDIA FOR ONE PERSON COMPANY

1. The Income Tax Act, 1961 does not recognize any special tax regime for One Person Company. An OPC is treated as a Private company under the Income Tax Act, 1961 and the same provisions are applied to it.
2. There is no specific tax advantage to an OPC over any other form. The tax rate is flat 30%, other tax provisions like MAT & Dividend Distribution Tax applies as they apply to any other form of company.
3. One Major disadvantage of an OPC is that the tax payable is significantly higher than that of a sole proprietary. The OPC is charged at a base tax rate of 30% along with other applicable taxes such as Dividend Distribution Tax & MAT. He then also will be liable to pay tax on his personal income from the company. This can prove to be a major deterrent for prospective entrepreneurs who are thinking of setting up an OPC even after seeking the relief given by Section 47(xiv) of the Income Tax Act, 1961 against capital gains. A sole proprietor is only required to pay tax that is applicable to individuals in accordance with their income.

RAISING CAPITAL THROUGH OPC

An OPC cannot issue shares due to its limitation that it can only have a sole member in the company. Since, it cannot increase the number of members, thus it is prohibited from issuing any kind of share including ESOP, further, an OPC cannot issue fully or partly convertible debentures. An OPC can raise capital through issuing loans from banks, financial institutions or by issuing non-convertible debentures.

COMPARATIVE ANALYSIS BETWEEN LIMITED LIABILITY PARTNERSHIP & ONE PERSON COMPANY

CATEGORY FOR COMPARISON	ONE PERSON COMPANY	LIMITED LIABILITY PARTNERSHIP
Governing Act	Companies Act, 2013	Limited Liability Partnership Act, 2008
Minimum Share Capital	No Such Requirement	No Such Requirement
Minimum number of members	Only one member can form an OPC. An OPC is prohibited to have more than one member.	Required to have at least two designated partners. There is no cap for maximum limit.
Nominee Clause	An OPC is required to have a Nominee.	No such Requirement
Directors	An OPC has at least one director and it cannot have more than 15 directors.	No Such Requirement. LLP needs to have at least 2 partners. Upon failure the liability would become unlimited for the sole designated partner.
Filings with RoC	Statutory audit is mandatory for OPC along with filing of Annual returns and financial statements to the RoC. An OPC can be formed by a natural person who is a resident of India (120 days) and not a minor or a foreign Citizen.	Annual accounts and Annual returns to be filed with RoC
FDI	OPC is not Eligible for Foreign Direct Investment.	Eligible for FDI
Board Meeting	One meeting in each half of the year	No Such Requirement
Company Name	Should end with (OPC) Pvt. Ltd./ (OPC) Ltd.	Should end with LLP
Suitability	For Sole individuals who seek limited liability while having complete control	Individuals providing Services such as lawyers and CA

Profits	Profits solely belong to the member of OPC	Profits and losses are divided between the partners or as decided in the Agreement.
Taxability	Taxed at 30% with SC, Dividend Distribution Tax, MAT	Taxed at 30% with SC, AMT

OPC is a valid choice for those individuals who are entrepreneurs or sole proprietors who seek to take benefits of a company such as limited liability, whereas a LLP is good option for those individuals who provide services in the market, they do not high investment needs but they seek to create a synergy through partnership to bring in profit.

CONVERSION OF LLP INTO OPC

The Limited Liability Partnership act, 2008 is mum about conversion of an LLP to an OPC, however the vice versa is not true. Section 366 of the Companies Act, 2013 along with Companies (Authorised to Register) Amendment Rules, 2016 allows and LLP to convert into an OPC. The LLP needs to follow through the given procedure in the amendment rules and fill Form URN-1.

CONCLUSION

One Person company is still a novel concept in India. It has its own pros and cons. In India, OPC is considered to be a Private limited company [Section 3(1)(C)]. It has less compliances when compared to a private company, but lacks ease of business that proprietorship provides. However, an OPC does provide a separate legal entity which creates a limited liability. an OPC provides a substantial amount of relaxations when compared with a private company, thus any individual who aspires to have sole control, limited liability and transparency then they can opt for an OPC.

However, OPC has failed to attract the public at large. This is due to the reason that an OPC is taxed as a private company under the Income Tax Act, 1961 along with some other applicable taxes such as Dividend distribution tax and MAT, to further add to the pain, the individual who owns the OPC is also liable to pay personal Income tax. When compared to sole proprietorship, a proprietor is liable to pay his taxes on his total income and not on proprietary separately.

One more serious issue an OPC faces is that it cannot raise capital by issue of its share as it can only have a single member. An OPC is required to make a nominee and that person cannot be a minor, thus individuals who only have minor heirs are hesitant to form an OPC. An OPC also requires paid up capital of Rs. 1,00,000/- due to which people are hesitant to form an OPC.

Hence, the concept of OPC in India is not seen as a favorable one over sole proprietorship due to difference in taxation and increased compliances when compared to sole proprietorship. If an individual wants to claim benefits of limited liability and separate legal entity then they may opt to form an OPC, but a better option would be to form a company, in that way they would be able to raise capital through issuing share.

SUMMARY

A One Person Company is a novel concept in India. To put into simple terms, it is a Private limited company [Section 3(1)(C)] with some restrictions, limitations and relaxations. Initially concept of OPC was brought in India to bring businesses from unorganized sectors to organized sectors without going through hassles and complications for incorporating a private company. A One Person Company has a single member [Section 2(62)] who is the sole owner and the deemed director [Section 152(1)]. An OPC is not required to present cash flow statement [2(39) Proviso], conduct AGM or follow provisions under section 100-111 of Companies Act.

An OPC is very alluring to sole proprietors who seek to control entire decisions whilst also gaining limited liability. However, an OPC also lacks the ability to issue share or convertible debentures due to its limitation on number of shareholders [Section 2(62)], thus it becomes very difficult to raise capital which is only available through non-convertible debentures and loans by banks and other financial institutions. Further, an OPC can only be incorporated by a Natural citizen or NRI which excludes corporations, minors and foreign citizens[1]. An OPC is also taxed like a private company at 30% with Surcharge, Dividend Distribution Tax and MAT.

OPC has not been very popular among small businessmen since they fear that incorporation of a company would bring them into purview of government agencies and non-compliance could lead to heavy penalty which is not an issue in sole proprietorship.

A comparative analysis between a Limited Liability Partnership and OPC provide us that both have limited liability for members/partners and there is no requirement for initial share capital.[2] An OPC is solely controlled by one individual who has absolute control over the company, he can also appoint directors for an effective management, but an LLP on the other side is riddled with fewer compliances and has no need for directors or board meetings while also being eligible for FDIs. Section 366 of the Companies act allow an LLP to be converted into a Private limited company to which OPC is no exception.

A closer look between the two clearly establishes that an OPC was meant for individuals who had little requirement for investments and who wanted to enjoy complete control over decision making process while also having limited liability, whereas an LLP is preferable for those people who do not have a requirement for a board and who seek to provide services to the market and add profits by rendering their services and sharing profits between each other unlike the shareholders in a private company. However, every profit earned by the OPC belongs to a single member. An OPC is a better option for those individuals who seek to keep all the profits of the company while being able to protect his assets from unlimited liability.

[1] Companies (Amendment) Act, 2021
[2] Companies (Amendment) Act, 2015

REFERENCES

Books Referred

- (2019) 24th Edition, G.K Kapoor, Sanjay Dhamija, *Taxmann's Company Law and Practice*.

Journals Referred

- 2014, *One Person Company*, Institute of Company Secretaries of India

Websites Referred

- Jain, R., 2022. *One Person Company (OPC) And Various Provisions Related to it*. [online] TaxGuru. https://taxguru.in/company-law/person-company-opc-provisions-related.html [Accessed 24 June 2022].
- Faceless Compliance. 2022. *Advantages & Disadvantages of One Person Company (OPC) Archives - Faceless Compliance*. [online] Available at: https://facelesscompliance.com/tag/advantages-disadvantages-of-one-person-company-opc [Accessed 24 June 2022].