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ONE PERSON COMPANY IN INDIA & ITS COMPARATIVE ANALYSIS WITH THE UNITED KINGDOM (U.K)

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ABSTRACT

The article shall focus on the concept of OPC (One Person Company) comprising of only one member. Under the Act a person can individually form a company by subscribing his name in the Memorandum of Association and by further compliance of various provisions under the Act. This concept was first recommended in the J J Irani Committee report. This concept was adopted in the companies Bill of 2009 that was later took the shape of the companies bill of 2011. Further it was this bill that had got the ascent of the parliament and was enacted as the Companies Act, 2013. The article will focus on the difference between the One Person Company and Sole Proprietorship. Further, it will focus on the exemptions, restrictions and compliances on the OPC. The advantages of OPC and how the conversion will take place from a company To OPC. Lastly, the article will compare the OPC in India with OPC in UK.

Key words: Exemption, Restriction, Conversion, Committee Report, Sole Proprietor

INTRODUCTION:

With the enactment of the new Companies Act, 2013, various new concepts have been introduced into the Indian corporate world that was earlier absent in the Companies Act, 1956. One such inclusion was 'One Person Company' (OPC). An OPC is a company comprising of only one member.¹ Under the Act a person can individually form a company by subscribing his name in the Memorandum of Association² and by further compliance of various provisions under the Act. This concept was first recommended in the J J Irani Committee report.³ This concept was adopted in the companies Bill of 2009 that was later took the shape of the companies bill of 2011. Further

¹ Section 2 (62) of Companies Act, 2013.

² Section 3(1)(c) of Companies Act, 2013.

³ *Committee Report*. [online] Available at: <http://www.primedirectors.com/pdf/JJ%20Irani%20Report-MCA.pdf> [Accessed 1 Oct. 2018]

it was this bill that had got the ascent of the parliament and was enacted as the Companies Act, 2013.⁴

The concept of OPC might be relatively new in India but it is a very successful model of business in the United Kingdom (UK) and various other European countries from a long time. However in this project the author tends to focus only on the laws relating to OPC in the UK and its analysis with the Indian laws.

This concept is a new structure of business added in the family of Sole Proprietorship, partnerships, Limited liability Partnerships (LPP), etc and aims to not only focus on individuals to enter in to the corporate world but also tends to enable new employment opportunities in the corporate world.

One Person Company (OPC) Vis A Vis Sole Proprietorship:

In the concept of OPC it is a single person who runs the limited by share whereas in case of sole proprietorship, it is owned and run by an individual where there is no distinction between the personal identity and that of the business. However there are certain other distinctions between both the models of business. They are as follows:

- Limited Liability - Prima Facie the basic principal difference in both the business models is with regard to the liability each person responsible shares⁵. OPC is different from Sole Proprietorship because under the law it is treated as a separate corporate entity. The liability of the shareholder will be limited to the unpaid subscription money in his name. However in case of a sole proprietorship the owner is solely responsible for all the claims made against the business.
- Tax bracket – As the concept of OPC is relatively new, there doesn't exist any special provision with regard to the OPC in the Tax Laws yet. The OPC tends to fall under the same slab rate as that of Private companies⁶.
- Succession – In OPC there is provision for a nominee designated by the member. In the event of the death of the member, the nominee may take charge of the company and it's

⁴ Gazette of India, August 30, 2013.

⁵ *One Person Company- A Concept For New Age Business Ownership - Corporate/Commercial Law - India.* [online] Available at:

<http://www.mondaq.com/india/x/278154/Corporate%2BCommercial%2BLaw/One%2BPerson%2BCompany%2BA%2BConcept%2BFor%2BNew%2BAge%2BBusiness%2BOwnership> [Accessed 1 Oct. 2018].

⁶ The Income Tax Act, 1961. (1961).

functioning. Whereas in case of sole proprietorship succession may be possible only by execution of WILL. However there are high possibilities of the WILL being challenged before the court of law.

- Compliance - In India, the law mandates for an OPC to file annual returns in a similar manner as that of a private company and also prescribes for its audit in a similar manner. Whereas in case of sole proprietorship its only needs an audit⁷ once its turnover has crossed a certain threshold.

Incorporation Of One Person Company

One Person Company (OPC) may be formed by an individual for a lawful purpose⁸. Under the law, OPC falls in the category of a private company. Therefore the incorporation procedure of OPC is moreover the same as that of any private company but with certain distinctions.

The Companies (Incorporation) Rules, 2014 lays down various rules relating to incorporation of OPC. It lays down that only a natural person, that too citizen of India and resident of India shall be able to incorporate OPC by subscribing his name to memorandum of association.⁹ The resident in India is a person who has stayed in India for not less than one hundred and eighty two days in the preceding calendar year. The OPC like any other company carries the characteristic of perpetual succession, that is, members may come members may go but the company goes on forever. This feature is present in OPC despite of the fact that there is only one member as Companies (Incorporation) Rules, 2014 lays down provision for nomination by single member constituting OPC. The person who is nominated becomes member if in case there is death or incapacity of the original member. The nominee must be an Indian individual and is required to give written consent of his nomination. Such consent is required to be filed with the registrar of companies.¹⁰

Exemptions, Restrictions And Compliances For OPC

One person Company has many distinctive exemptions, restrictions and compliance requirements as they have only member governing the working of the company. As only one person is the

⁷ Section 44AB of *Income Tax act, 1961*.

⁸ Legalservicesindia.com. (2018). *One Person Company under Companies Act 2013*. [online] Available at: <http://www.legalservicesindia.com/article/1758/One-Person-Company-under-Companies-Act-2013.html> [Accessed 1 Oct. 2018].

⁹ Rule 3 of *Companies (Incorporation) Rules, 2014*.

¹⁰ Rule 4 of *Companies (Incorporation) Rules, 2014*.

master of the company various responsibilities are bestowed upon him such as passing of any resolution and further communicating it, entering the same in the minute book, etc. The advantage here is that there is no requirement of any type of simple or special resolution to be passed unlike other types of companies. Also, there is no requirement for any annual general meeting in case of OPC¹¹.

The board of directors in OPC must constitute of atleast one resident director. The criterion is that he should be that particular person should have stayed in India for one hundred and eighty two or more days. Also, in OPC mandate of women directors and Independent directors are exempted¹². However if OPC wishes to have a women director, they are permitted to have.

The OPC is required to hold a meeting of the board in six months or twice a year. However the gap in between two meeting cannot be less than ninety days.¹³

The provision regarding qualification of director is to be followed in case of OPC and the director must qualify under the Act. The duties of director under OPC are similar to that of other models under the Act.¹⁴

However there are certain restrictions relating to the membership and nominee in OPC. Under the Act, only a natural person is permitted to be a nominee under the act. Also, there is a restriction under the act on the total number of companies to which a person may be permitted to be nominee. The number is restricted one (1). Further even the minor below the age of eighteen (18) years of age are not allowed to be a member or a nominee under the Act.

Further, there is a restriction on OPC, as an OPC cannot be incorporated for the purpose of social charity.¹⁵ Also, there is a restriction on the capital that is permitted. An OPC is permitted to have a capital of only fifty lakhs only and its turnover cannot be above Rs. Two Crore.¹⁶ However in case such an event takes place, the OPC is provided to convert itself to private company or a

¹¹ Section 96 of *the Companies Act, 2013*. (2018). At Chapter Xi.

¹² *Id* at 10

¹³ Section 173 of *the Companies Act, 2013*.

¹⁴ Section 92 of *the Companies Act, 2013*.

¹⁵ Section 8 of *the Companies Act, 2013*.

¹⁶ Corporate Law Reporter. (2018). *An Analysis of One Person Company under Companies Act 2013 – by Karandeep Makkar*. [online] Available at: <http://corporatelawreporter.com/2013/10/17/analysis-one-person-company-companies-act-2013-karandeep-makkar/?s=one%20person%20company> [Accessed 1 Oct. 2018].

public company.

Advantages And Disadvantages Of OPC

Each model of business comes with its own set of merits and demerits. As this business model is comparatively new there are high chances of the corporate world thinking only about the advantages of this set of model and not being aware of its merits and demerit.

The OPC just like any other company has the advantage of Independent existence, Limited liability, Transferability of shares, Separate property.¹⁷ Even the sole proprietorship business model that provides for a similar mechanism of business and control lacks the above features.

In case of private limited and public limited company where there are similar types of advantages the numerous Paperwork make it a difficult task to execute for companies having small capital.

Therefore, OPC is an ideal Business model and an appropriate vehicle for companies having small capital¹⁸.

The owner of OPC model of business enjoys a privilege to take quick decisions, as he has no one to consult and is his own master so also there doesn't lie any chances of deadlock in opinion as in cases of other companies which makes decision making process an extremely complicated process.

However along with this the OPC has several disadvantages also. Few of them are:

Various research scholars have highlighted the tax issue prevalent in OPC due to its differential surcharge rate on domestic companies. In case of OPC a flat rate of 30.9 percentage taxation is prevalent which is higher to that of a sole proprietorship model as OPC being a company falls under the corporate tax slab rating¹⁹.

Also, In case of OPC the chances of fraud are higher than that of any other business model as there is no mechanism of check and balances. The power is bestowed in the hands of one person

¹⁷ Delep Goswami and Anirrud Goswami, "One Person Company – Boon In Pursuit Of Professional Excellence", *Chartered Secretary*, August 2014, pp. 32-35, at p. 33.

¹⁸ K. C. Goel, 2014, at p. 48.

¹⁹ Ibid.

who acts as a member as well as a director. For instance, under the law, a person may lawfully incorporate as many as four OPCs and continue transferring the assets from one OPC to the other to avoid liabilities and to evade tax²⁰.

Another issue with OPC is the liability of director. In this business model as it is only one person who is in charge and acts in the capacity of director, it becomes very easy to make him criminally liable even incases where he might not be personally liable, the burden tends to be bestowed upon him as he is the master of roaster.

Conversion Of OPC

The OPC business model is made for individuals having small paid up capital. Thus, under the Companies Act 2013, an OPC will cease to be recognized as OPC when either the paid-up capital exceeds Rs.50 Lakhs or the average turnover exceeds Rs. Two (2) Crores²¹.

The remedy available for the company is that it will have to convert itself into a private limited or a public limited company.

OPC In The United Kingdom:

The concept of OPC might be comparatively new in India but in the United Kingdom it has been prevalent for years.²²

The concept of OPC in the United Kingdom lay down by a precedent in the case of Salomon v. Salomon²³ where the concept of One person company was acknowledged by the court.

This case relates to one Mr. Salomon who happens to be running his boot manufacturing business and decided to convert this business in to a private limited company. In order to fulfill this objective he sold his business to the newly formed company by the name of A Salomon & Co. Limited. With regard to payments he received payments in the form of shares and debentures of 10,000 Euro.²⁴

²⁰ ibid.

²¹ Supra Note 16.

²² Ierj.in. (2018). [online] Available at: <http://ierj.in/journal/index.php/ierj/article/viewFile/43/36> [Accessed 1 Oct. 2018].

²³ (1897) AC 22

²⁴ ibid

After few years, the company didn't happen to be performing well and therefore it went into liquidation. In this scenario Mr. Salomon claimed to be entitled to be paid first as a secured debenture holder. However the liquidators was in this favor as it was Mr. Salomon who ran the business and therefore he should not be the first to be paid. Therefore the matter went to the House of Lords and it held that the company was a different legal person from the shareholders and therefore Mr. Salomon was entitled to be repaid the debt as his happened to be the first secured creditor.²⁵

Thus in this case we see that Mr. Salomon happened to be the majority shareholder, the director, an employee as well as a creditor of the company that was created by him.

Therefore this case lay down that a company might be formed under the Act by One or more persons by complying with certain essential requisites. They are:

By subscribing their names to a memorandum of association²⁶,

By complying with the requirements of this Act as to registration²⁷,

Comparative Analysis Of OPC In India And UK

In India, the concept of OPC has been adopted from the United Kingdom. There are certain similarities and differences in both the laws permitting this business model.

In India, a minimum sum of Rs. 1 Lakh is required to incorporate an OPC but in case of U.K, under the UK Companies Act, 2006 there is no minimum sum required to incorporate an OPC.

In UK prior to 2006 only a private limited company could be established as an Single Member company (SMC) but after 2006 even a public company could be established as a SMC. However in India, only a private limited company could be established as OPC but it can be converted into a private limited or a public limited by following the due process of law under the Act.

Under the Indian laws it is required to mention a nominee who in the event of death would take over the affairs of the company. However in the UK there is no such concept of nominee.

²⁵ibid

²⁶ Section 8 of the *UK Companies Act, 2006*.

²⁷ Section 9 – 13 of the *UK Companies Act, 2006*.

With regard to the age of an individual incorporating OPC, under the UK laws the person incorporating SMC has to attain minimum age of sixteen (16) years. However in case of India, the person willing to establish an OPC has to attain majority (i.e. age of Minimum 18 Years). Until then he shall be regarded as a minor and shall not be allowed to form an OPC.

With regard to the director, under the UK laws, a natural person or a corporate person may be a director in an SMC but it is mandate for atleast one person to be a natural person. However in case of India, the Companies Act, 2013 prescribe for only natural person who is a resident of India to be a director.

With regard to Tax rate, under the UK laws, OPC is entitled to tax benefits, as the tax to be paid by these companies is only 19%. However in India no tax benefit is awarded to OPC and they pay the same tax as that of any other private company of 30%.

Apart from this, one similarity that exists between both the laws with regard to OPC is that both prescribe for a minimum of one shareholder for formation of Company.

Conclusion

The concept of OPC in India is a relatively new concept whereas in the United Kingdom it is already an established model to do business. As it is a new concept in India it tends to face a lot of obstructions and issues. However it is a great initiative as it allows the sole owners also to enter in to the corporate world, a privilege that was earlier available only the companies. The features such as perpetual succession, limited liability and being considered as an separate legal entity were earlier available only to the companies. But with the incorporation of the concept of One Person Company these privileges now will be available also to the Sole Owners.

In this stage the legislature as well as the executing agencies should work with an aim to promote and solidify the concept as well as encourage small size business to take up this model of business.

However it is essential to highlight certain obstructions that OPC faces. One of them being with regard to the limitation on the turnover and capital investment as it is essential for these to be removed. Also it is essential for the legislature to enact a suitable balanced tax regime which tend would tend to attract the small businesses into conversion into an OPC. On the other hand the

legislature should also focus that there is no loss of revenue.

Further in India, an individual can incorporate only one company as sole owners, the legislature should also consider this and as a mechanism to promote OPC it should allow sole owners to incorporate more than one company. As the concept has already been derived from the United Kingdom, the above stated measures as prevalent in the UK should also be adopted with an optimistic approach.

