|LAW AUDIENCE JOURNAL®|

|VOLUME 2 & ISSUE 1|

|JAN 2020|

|ISSN (O): 2581-6705|

EDITED BY:

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|LAW AUDIENCE JOURNAL|
|VOLUME 2|ISSUE 1|JAN 2020|ISSN (O): 2581-6705|
|INDEXED JOURNAL|IPI VALUE (2018): 2.06|IMPACT FACTOR (2018): 2.527|

"ONE PERSON COMPANY: THE ENTREPRENEURIAL BOOST TO INDIA."

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I. ABSTRACT:

One Person Company (OPC) is an amalgam between the two umbrella forms of organization, that is the sole proprietorship and company and with limited liability becoming an important development in the field of law, OPCs have become the best advocate of new start-up ventures and entrepreneurship in the current era. The Companies Act, 2013 unleashed these opportunities for people in India to utilize the benefits that a company provides and avoid the cons of a sole proprietorship, especially in the field of liability.

This article analyses the history of OPCs and how the concept got introduced to India and the basic laws surrounding OPCs and tries to find the reason for its popularity by comparing it to its alternative, i.e., sole proprietorship, ease of conversion from and to OPCs and finally, its suitability and rise in India. The article concludes with seeing the shortcomings and possible issues with the concept of OPCs.

Keywords: OPC, Company, India, Sole Proprietorship, Conversion, Limited Liability, Taxation, Perpetual Succession, Compliances.

II. HISTORICAL DEVELOPMENT OF THE CONCEPT OF OPCS:

With the new movement in the business of incorporation worldwide, companies, both Private and Public Companies, the need for a single person incorporating a company by themselves started rising. Thus, the concept of OPCs, first originated in the House of Lords, in 1897. The doctrine of separate legal entity originated in this landmark judgement of ***Salomon v. Salomon & Co. Ltd***.[1], establishing that the company is separate from the shareholders of that company. In other words, in law, the company will be treated as a different legal person in the eyes of law. While this principle existed before this judgement in essence,[2] the concept of an OPC originated from this judgement itself. Lord MacNaghten noted that "*it does not matter whether the power to control the company is within the only the hands of one person as long as the shares are fully paid up*".[3] In India, the concept of OPC was first recommended in the Dr. JJ Irani Committee Report, by providing a category for OPC under their division of types of companies based on the number of members.

The Committee noted an increase in the use of information technology and the emergence of the tertiary sector of the economy (services) and the consequential demand for better entrepreneur opportunities. These entrepreneurial opportunities would boost the economy and would require the creation of the concept of the corporate veil that would create a legal person out of a company. This would especially, according to the committee, also be required in the field of single person organizations as not everyone may be capable of finding the right association of persons to enhance ideas and run administrations.

The committee believed that such organizations run by single persons would be imminent, owing to the recent Indian economy changes. The committee thus recommended that there should be requisite laws to recognize OPCs as a single person run economic entities. They recommended a simpler procedure to form such organizations by providing them with exemptions to avoid the burden of procedural matters on the single person running the company. In terms of direct legislation recommendations, the committee firstly suggested

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[1] [1896] UKHL 1, [1897] AC 22.
[2] Salmon v. The Hamborough Co., (1671) 1 CH CAS 204.
[3] *supra* note 1.

that OPCs should be private companies with one member and minimum of one director. Secondly, the committee suggested requisite safeguards to continue the OPC post the death or disability of the single member, in the form of an appointed nominee during the incorporation of such an OPC. Thirdly, and lastly, the committee recommended the letters 'OPC' as serve as mandatory suffixes to the name of the OPCs to distinguish them from other forms of such companies.[4]

III. BASIC CONCEPT UNDER THE COMPANIES ACT, 2013:

Thus, eventually, the Companies Act, 2013 defined "One Person Company" as: *"One Person Company" means a company which has only one person as a member*. [5] The Companies Act of 2013 also identified OPCs as a Private Company, with certain expressly mentioned exceptions. [6] A person must be a natural person, who is an Indian citizen residing in India and not a minor to be a member of an OPC. A person can incorporate only 1 OPC and also be a nominee in only 1 OPC. [7] The name of any OPC would also include the words "One Person Company" in brackets below the name of the company, wherever it is so mentioned.[8]

The annual return of an OPC is signed by the Company Secretary and where there is no Company Secretary, such assent is required from the Director of the Company.[9] The company shall cease to be an OPC is the paid-up share capital exceeds Rs. 50 Lacs or when the average annual turnover exceeds Rs. 2 Crores during the relevant period.[10] The OPC should have at least 1 Director. [11] The individual member in an OPC shall be deemed to be the First Director of the OPC unless a Director is duly appointed by the member.[12] Many provisions that apply to other forms of companies do not apply to One Person Companies, for

[4] JJ Irani Committee, Chapter 3, *Classification and Registration of Companies* (2005) http://www.primedirectors.com/pdf/JJ%20Irani%20Report-MCA.pdf.
[5] Companies Act, 2013, Section 2(62).
[6] Companies Act, 2013, Section 3(1)(c).
[7] Companies (Incorporation) Rules, 2014, Rule 3.
[8] Companies Act, 2013, Section 12(3).
[9] Companies Act, 2013, Section 92(1).
[10] Companies (Incorporation) Rules, 2014, Rule 6.
[11] Companies Act, 2013, Section 149(1)(a).
[12] Companies Act, 2013, Section 152(1).

example, annual general meetings [13] and various other provisions including Section 98 and Sections 100 to 111. [14]

IV. OPCS OR SOLE PROPRIETORSHIP:

It was not that a single person could not run and own a business single-handedly before the concept of OPCs. The concept of sole proprietorship allowed an entity to be run and owned by only 1 individual. So, why was there a need for the concept of OPCs separately? It is because a concept of OPC would provide certain advantages that a sole proprietorship would not be able to. Here are certain such advantages:

IV.I LIMITED LIABILITY:

The essential difference between an OPC and a sole proprietorship is the concept of liability attached to either. The liability of an OPC is limited, as it is recognized as a Private Company [15], making it a separate legal entity from the person running it. The Bombay High Court clarified the position of law on OPCs in regard to its independent corporate existence stating that "*Under the law, an incorporated company is a different entity, and although the entire share maybe practically controlled by one person, in law a company is a distinct entity*". [16] The liability of the shareholder in the OPC, owing to this independent existence as a company, will be limited to the value of invested shares by the person. In simple words, the personal assets of a person running the OPC are not attached and are protected. [17] However, in a sole proprietorship, the owner of the firm is alone and fully liable for the claims against the business the owner is in. All the assets of the individual running a sole proprietorship are attached and the liability is not limited, unlike in an OPC. [18]

IV.II PERPETUAL SUCCESSION:

The OPC requires for there to be a nominee designated by the member, and such a person, on the death or disability of the member of the OPC, becomes the sole member of the OPC to

[13] Companies Act, 2013, Section 96.
[14] Companies Act, 2013, Section 122.
[15] Companies Act, 2013, Section 3(1)(c).
[16] T.R. Pratt v. E.D. Sasoon & Co. Ltd., AIR 1965 Bom 62.
[17] Bernard F. Cataldo, *Limited Liability with One Man Companies and Subsidiary Corporations*, Law and Contemporary Problems (1953).
[18] Jocelyn West Brittin, *Selecting the Legal Structure for Your Business*, U.S. Small Business Administration (1991).

run it. The business essentially does not die with the death of its member in an OPC. A proprietorship dies with the death of the true owner, unless certain other considerations including testamentary successions exist. [19] However, there are certain disadvantages, some due to its status as a company and other cons that come with an OPC. Here are a few:

IV.III TAXATION:

The concept of OPC derives its authority from the Companies Act, 2013, but the same does not have different taxation laws. It is because of this lack of differentiation that OPC is treated as every other private company from a taxation perspective and thus, is taxed accordingly. But, in a sole proprietorship, since there is no difference between the person and the business, the income tax is the sole taxation associated to the profits of the business levied on the person running the proprietorship. Persons running sole proprietorship can also claim tax deductions under the Income Tax Act, 1961. [20]

IV.IV COMPLIANCES:

An OPC is required to file their annual returns in lieu with the same procedures as other private companies and thus, would require getting their accounts audited similarly. A sole proprietorship would require to get audited only when their turnover crosses a certain amount. [21]

V. CONVERSION OF OPCS:

Companies registered under a particular class can change their class of company after registration. OPCs can also change to a different class of companies and vice versa. [22]

V.I OPC TO PRIVATE/PUBLIC COMPANY:

If the paid-up share capital of an OPC crosses Rs. 50 Lacs or if the average yearly turnover crosses Rs. 2 Crore during the relevant period[23], which is the period immediately preceding 3 consecutive financial years[24], the OPC shall have to convert itself within 6 months, via a

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[19] Gower, Principles of Modern Company Law, 76 (3rd Ed. 1969).
[20] Income Tax Act, 1961, Section 80C.
[21] Income Tax Act, 1961, Section 44AB.
[22] Companies Act, 2013, Section 18.
[23] Companies (Incorporation) Rules, 2014, Rule 6(1).
[24] Companies (Incorporation) Rules, 2014, Rule 6(4), Explanation.

notice given to the Registrar in Form No. INC 5, into either a Private Company with at least 2 members and 2 directors or a Public Company with minimum 7 members and 3 directors as per Section 18 of the Companies Act, 2013. [25] The OPC will accordingly have to change its memorandum and Articles of Association via passing a resolution [26] to convert to either the Private or the Public Company. [27]

V.II PRIVATE COMPANY TO OPC:

Any Private Company, provided it is not registered under Section 8 of the Companies Act, 2013 and has a paid-up share capital of Rs. 50 Lacs or less or has an average yearly turnover during the relevant period, as explained before, can turn into an OPC. They can do so via a special resolution in their general meeting.[28] This special resolution would require a No Objection Certificate from all its members and creditors [29], along with Form No. MGT 14 [30] and Form No. INC 6 [31].

VI. IMPACT OF OPCS IN INDIA:

India has seen a more than decent start to the concept of OPCs, with about 13,927 registrations of OPCs by 30th September 2017 for a collective authorized capital of Rs. 358 Crore. Most numbers of OPCs were registered in Business Services (8,666). Other major sectors for registration in OPCs include Community, Personal & Social Services (1,515), followed by Manufacturing (1,100) and Trading (1,044). [32]

India is still new to the concept of OPCs and it will require time for the concept to fully reach its potential in India. OPCs have been used in serving as launchpads in the United Kingdom[33], Singapore[34], Turkey [35] and others, and with time, the same trend would spill onto India as well.

[25] Companies (Incorporation) Rules, 2014, Rule 6(2).
[26] Companies Act, 2013, Section 122(3).
[27] Companies (Incorporation) Rules, 2014, Rule 3.
[28] Companies (Incorporation) Rules, 2014, Rule 7(1).
[29] Companies (Incorporation) Rules, 2014, Rule 7(2).
[30] Companies (Incorporation) Rules, 2014, Rule 7(3).
[31] Companies (Incorporation) Rules, 2014, Rule 7(4).
[32] Ministry of Corporate Affairs, Monthly Information Bulletin on Corporate Sector, September 2017
[33] UK Companies Act, 2006, Section 7.
[34] Singaporean Companies Amendment Act, 2004.

VII. CONCLUSION:

There are still a number of ambiguities and issues, in my perspective, in relation to the concept of OPCs in India. For example, the requirement to be an Indian citizen to form an OPC would restrict foreign nationals to come to India and form such OPCs, which would bottleneck the growth possibilities of the economy. Also, many individuals look for opportunities to single-handedly own and run business to save themselves from the hassle of finding partners of the business, which is not a pure benefit of any OPC, as it requires naming a nominee during its very incorporation.

As observed above, taxation laws about OPCs do not exist separate from other Private Companies, which makes them equal to all other Private Companies from a tax perspective, which is troublesome vis-à-vis sole proprietorship. But these shortcomings are repairable and will not impact the major strides this concept in taking and will take in the Indian markets. OPCs are one of the most important new developments in the field of Corporate Law.

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