ONE PERSON COMPANY – A NEW FORM OF BUSINESS

By

Col Sharadchandra S Patil (AFV)
B.Sc., LL.B., D.T.L., D.L.L. & L.W., M.B.A., F.C.S.
Company Secretary in Practice

Introduction

Companies Bill, 2012 (the Bill) has been passed in the Lokasabha on 18th December, 2012. Soon it is likely to be passed in Rajyasabha and will become a law. This law is intended to replace the erstwhile Companies Act, 1956. Because of various factors – including globalization, development of new technologies and liberalization of Indian Economy – this was warranted. In fact, the process started with Companies Bill, 2002; but has lingered on because of various reasons. In the mean time, number of events happened, that churned the industrial environment of the world. The downfall of Enron & Worldcom followed by emphasis on good corporate governance in most countries, the Satyam Scam, the failure of banking system all over the world and the depression that followed; they all contributed to changing the face of the Bill in India.

One important part of the Companies Bill is the concept of One Person Company (OPC). Although it is in existence, in one form or other, in about 39 countries in the world; the concept is totally new in the Indian Business environment. In the instant article, we are going to discuss this concept and compare it with other forms of business.

The Concept of OPC as per Companies Bill, 2012

As per the present law, minimum two members are required to form a private company and minimum seven members required for public company. This is a barrier in forming private limited company by businessmen who do not want any interference in their manner of doing business. It has been a common practice to allot minimum shares to someone in the family or friend and run the company virtually alone. Now, with introduction of OPC, it will be possible to incorporate a company with only one member. OPC provides benefit of both forms of business- Proprietorship and Company. With OPC, business can be run in the same way as proprietorship and also the liability of the member is kept limited by share or guarantee, as the case may be. At the same time, it has added respectability as company and not just another form of proprietorship business. Since public interest involved in OPC is very little, many relaxations have been granted to OPC in compliances and procedural aspects. It will enable them to attain natural growth.

Provisions regarding OPC in the Bill.

1. OPC shall be a private limited company in all respect except that an OPC can be formed by single subscriber to the Memorandum of Articles (MOA) and signatory to Articles of Association (AoA). The basic characteristic of any company is 'perpetual succession'; hence, provision has been made in the law to appoint nominee of original subscriber.

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

2. Three types of companies can be formed as OPC

   a) Company limited by shares.
   b) Company limited by guarantee.
   c) Unlimited company.

3. Minimum one director is required in OPC. However there is NO bar on appointment of more than one director. Individual being member shall be deemed director if no director is appointed.

4. OPC are exempted from holding Annual General Meeting.

5. If any business is required to be transacted only at a general meeting, member of the company shall communicate the resolution to the company by entering it into minute book, signing and putting the date. Meeting shall be deemed to have been held on the date so entered.

6. In the case of OPC having only one director, compliance with provisions of conducting of Board meeting is impracticable, hence it is made not applicable. In that case, if any business is required to be transacted at board meeting; it shall be sufficient if resolution is entered in to the minute book, signed and dated. Such date shall be deemed to be the date of meeting of board of directors.

7. In the case of OPC, Directors' report shall include only explanation on qualification, reservation, disclaimers or adverse remarks of the auditors if any.

8. OPCs have been excused from preparing cash flow statement and they have to prepare profit and loss account, balance sheet and explanatory notes only. Financial statement is required to be signed by only one director and submitted to the auditor for his report thereon.

9. In case an OPC has more than one director, it shall conduct at least one board meeting in each half year and time gap between two such meetings should be minimum 90 days.

10. When OPC enters into a contract with its member who is also director of OPC which is not entered into in ordinary course of business, 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 minute book. Such minutes should be adopted in next board meeting.

Comparison with Other Forms of Business

Presently, we have following forms of business entities in India:-

1. Sole Proprietary firms (SPF).
2. General Partnership Firms (GPF).
3. Limited Liability Partnership (LLP).
4. Private Limited Companies (PLC).
5. Hindu Undivided Family (HUF).
6. Co-operative Societies.
7. Trusts.
8. Public Limited Companies.

Out of these forms of business entities, the manner of working, legal position and financial transactions of the last three are totally different from the OPC; hence we shall not consider them for comparison. However, we can definitely compare OPC with other business entities. Also, We shall consider only OPC limited by shares, because OPC having unlimited liability will clearly be not favoured by many entrepreneurs and OPC limited by guarantee will not differ much from OPC limited by shares except for the amount of guarantee.

Business Name: SPF, GPF and HUF do not need any permission to take up a business name; however, they must see that no copy right or trademark is infringed. LLP, PLC and OPC need prior permission from the Registrar of Companies. The process becomes easier if done through professionals like Company Secretary or Chartered Accountant or Cost Accountant. These professionals have been given powers to search and attest that the name being adopted does not infringe any of the existing laws or regulations.

Registration: SPF, GPF and HUF do not need any registration. Although registration of GPF is not mandatory, partners can get a number of privileges if the GPF is registered. Hence, many partnership firms prefer to get themselves registered. All businesses need to take licenses regarding the business that they wish to adopt and run. LLP, PLC and OPC can not start any business unless the incorporation process is completed. It is proposed in the Bill that in case of companies having share capital, business can not be started till the address is registered and till the entire capital as promised by signatories of MOA is received by the company.

Separate Legal Existence: SPF, GPF and HUF do not have any separate legal existence from their members / partners. However, GPF can have separate legal existence (for limited purpose) on registration. Similarly, Karta being the manager of HUF is liable for HUF. The liability of other members of HUF is limited to their shares in the HUF.

LLP, PLC and OPC are created by law. They have legally separate existence from their members / partners. Hence, the liability of members / partners is only limited to the capital they are required to subscribe. In case of fraud, the corporate veil can be lifted and the directors / designated partners can be made liable for the company / LLP. However, while running the business with ordinary prudence, if some decision goes wrong, the liability will only be of the business entity and NOT of the decision making individual. This is the biggest advantage that an OPC has over SPF. In SPF also, only one person takes the decisions, but he is fully liable for any loss arising out of wrong decision taken. This is also a matter of criticism of an OPC. The limited marginal liability of a single individual who takes all the responsibility of management and suspected fraud which can be done when all affairs are handled and controlled by only one individual is feared by the stakeholders.

The life of SPF is till the death of the proprietor. HUF has a perpetual existence; the Karta and members keep changing. In case of GPF, it ends with the death of any one partner. Also, any partner can give notice and have the GPF dissolved. LLP, PLC and OPC can be dissolved only by a due process of law.

Requirement of Compliances: In case of SPF, the requirement of compliances is very low. There are some requirements under various tax laws, but presently, they have lost their teeth because of lack of adequate supervisory mechanism. Same is the case with HUF and GPF. LLP and OPC have some compliance requirements. They are low as compared to PLC; but they are definitely more than the SPF / HUF / GPF.

Creditworthiness: One must consider the fact that creditworthiness and perceived trust in the minds of stakeholders increases in direct proportion to the requirement of compliances. Also, independence of the business entity increases its creditworthiness. Thus, the OPC having obtained 'Corporate Status', having perpetual succession and having independence from the member director; definitely has more creditworthiness as compared to other unincorporated forms of business.

Tax Liability: The tax liability of SPF is that of the proprietor. Thus entire income of the proprietor, whether from the business of SPF or from any other source, is considered together. HUF is given a similar treatment to an individual as far as income tax is concerned. Also the share received by members from HUF is their tax-free income. GPF and LLP are taxed @ 30% but the share of profit after tax given to partners is tax free in the hands of the partners. PLC is also taxed @ 30%. Also, dividend given to the members is taxed @ 15% before distribution. The tax liability of OPC is not yet fixed. It is likely to be taxed @ 30% as PLC. If OPC is exempted from dividend distribution tax, it may become more tax effective for the member-director. This is because other legal liability is not there.

The comparison as discussed above is tabulated below:

Features	SPF	HUF	GPF	LLP	PLC	OPC
Registration	Not required	Not required	optional	Mandatory	Mandatory	Mandatory
Business Name	No approval required. Should not infringe trademark or copyright	No approval required. Should not infringe trademark or copyright	No approval required. Should not infringe trademark or copyright	Approval required	Approval required	Approval required
Legal Status	Not a legal entity, the Firm and Proprietor	Not a separate legal entity.	Not a separate legal entity, but	Separate legal entity	Separate legal entity	Separate legal entity

	are considered to be one and same.		partners can sue in the name of the Firm			
Foreign Nationals	Not allowed	Not Allowed	Not allowed	Allowed. Min 1 resident Designated partner needed	Allowed	Allowed
Repatriation	Not allowed	Not Allowed	Not allowed	Not allowed	Allowed	Position Not Clear
Persons	Min: 1, Max : 1	Only Hindu Undivided Family	Min: 2, Max: 20	Min : 2, Max: No Limit	Min: 2, Max: 50	Min:1, Max: 1
Charter Document	None	None	Partnership Deed	LLP Agreement	MoA and AoA	MoA and AoA
Validity	Till death of Owner	Perpetual Succession (till existence of family)	Dissolved on death of a partner. Can be dissolved at the will of all partners or even one partner can give notice for dissolving.	Perpetual succession	Perpetual succession	Perpetual succession
Registering Authority	None	None	Registrar of Firms	Registrar of Limited Liability Partnership , MCA	Registrar of Companies , MCA	Registrar of Companies , MCA
Governing Act	None	None	The Indian Partnership Act, 1932	The LLP Act, 2008	The Companies Act, 1956 or The Companies Act, 2013?	The Companies Act, 2013?
Compliance Requirements	Low	Low	Low	Moderate	High	High
Income Tax Rates	Individual rates	Individual Rates are applicable for HUF	30%	30%	30% plus Dividend Distribution Tax (DDT) 15%	30% (DDT not yet clear)

Profit Sharing	Taxable	Non taxable	Exempt from tax	Exempt from tax	Taxable	Taxable
Liability	Unlimited. Personal property is also covered	Liabilty of Karta is unlimited. Liability of other members is limited to their share	Unlimited. Personal property is also covered	Limited up to contribution in LLP (except in case of Fraud)	Limited up to extent of shares held (except in case of Fraud)	Limited up to extent of shares held (except in case of Fraud)
Capacity to Sue	Individual level	Karta can sue in the Name of Family	As a Firm (in case of registered firms). Individually/ Collectively (in case of not registered firms)	As a Firm	As a Company	As a Company
Market Reputation	Low	Low	Low	Moderate	High	High
Winding up/ Dissolution	Easy	Easy	Easy	Prescribed process to be followed	Prescribed process to be followed	Prescribed process to be followed

OPC has been criticized all over the world, mainly on the ground of tax evasion as such companies can be formed with the purpose of evasion of tax. However, this can be controlled by the mechanism of transfer pricing. OPC has almost all the benefits of a PLC such as limited liability, separate legal entity, minimum legal compliances, independent decision making and continuity of existence. Another advantage is that most government contracts are awarded only to corporate entities.

To conclude, I feel that OPC will be welcomed by the Indian business community because of the advantages that outweigh the disadvantages of the OPC in India.

(2300 words Approximately)

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