One Person Company in Companies Bill, 2012

The game-changing Companies Bill, 2012 ('Bill') which was passed by the Lok Sabha in December 2012, viewed holistically, is a mixed bouquet of proposals. Whilst it incorporates creditable efforts towards streamlining existing provisions and weeding-out obsolete provisions, it also introduces a few interesting new-age concepts. One such concept which is presented in this article is that of One Person Company ('OPC'). Captured all-in-the-name, it relates to a corporate entity which has just one shareholder. An accepted concept internationally, OPCs are an option in many developed and developing jurisdictions, namely China, United Kingdom, Australia, Singapore, etc. Several states in the United States of America allow the formation of single member limited liability companies. In India, a country where entrepreneurship culture is ingrained from generations and with more than 95% of the commercial and business enterprises being sole-proprietorships, it is a step in the right direction to introduce the OPC vehicle.

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The benefits of limited liability can now be reaped by the largest section of the enterprising class. Though a lot of dots remain to be joined in this endeavour, especially in relation to taxation, conversion of existing proprietorships, banking recognition, FDI, government companies, etc. the ball is now in motion for a fresh change.

This new vehicle called One Person Company (OPC) will provide an opportunity to Indian entrepreneurs, to enter into the corporate framework along with enjoying the benefits of limited liability. The question of 'perpetual succession of a company' has also been appropriately addressed in the Bill.

Definitions and Concept:

Presently the Companies Act, 1956 *('56 Act')* requires at least two persons to register a company under the '56 Act'. The passage of Bill will pave the way for entities that have just a single shareholder.

Clause 2(62) of the Bill defines OPC as *"One Person Company"* that means a company which has only one person as a member.

OPC can be formed by a single person subscribing the name of such one person to the memorandum and complying with the requirements of the Bill in respect of registration. As regards the name of an OPC, the Bill provides that the words 'One Person Company' shall be mentioned in brackets below the name of such company, wherever its name is printed, affixed or engraved.

The word person would normally mean and deem to include a company also. Hence, a company should also be able to form an OPC which would be its 100% subsidiary. Unless specified, the word person would deem to mean and include a 'natural person' and a 'legal person'. This fact though needs to be seen in conjunction with the rules which would be issued by the Ministry of Corporate Affairs.

OPC shall be a private limited company in all respect except OPC can be formed by a single subscriber to the MOA. The memorandum of OPC 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.

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.

Subscriber can also change the nominee by giving prescribed notice. Upon changing the nominee, member shall give intimation to company and company in turn shall inform to registrar within time limit, to be prescribed by rules made in this behalf.

The Chinese company law regulations, interestingly, bar a person from opening more than one OPC. The Bill has no such provisions.

Whether the OPC will have a separate status under the provisions pertaining to taxation of the OPC remains unclear as of now. In various developed jurisdictions, the OPC, if formed by a natural person would not be considered as a separate person for taxation purposes.

Types of Companies formed as OPC:

Other than specifically provided or exempted for under the Bill, all provisions as applicable to a Private Limited Company shall be applicable to an OPC. Three types of companies can be formed as an OPC:

1. Company limited by shares
2. Company limited by guarantee
3. Unlimited company

Requirements of Directors:

A minimum of one director is required in an OPC. However, there is no bar on appointment of more than one director. The Member and the Director can be the same individual. Until director(s) are appointed, the individual being member shall be deemed director of the company.

In the case of an OPC having only one director, the compliance with provisions of conducting of Board Meeting would merely be a formality and be frustrated for all practical purposes, hence the Bill does not mandate Board Meeting requirements for an OPC having a single director. The business which is required to be transacted at board meeting shall be sufficiently transacted if the resolution is entered into the minute book, signed and dated. Such date shall be deemed to be the date of meeting of board of directors for the purposes of the Bill. Ancillary provisions with relation to minimum number of board meetings shall also not apply to such an OPC.

In case OPC has more than one director, the Bill provides for a relaxed requirement that, it shall conduct at least one board meeting in each half year and time gap between the two meetings should be minimum 90 days.

Relaxations & Exemptions:

Conceptualised and tailor-made for the sole-proprietor entrepreneur, the Bill proposes some relaxations and

exemptions to OPCs. Some of them are as under:

1) OPCs have been given the option to dispense with the requirement of holding a General Body Meeting including Annual General Meeting. All such requirements which pertain to shareholder consents and meetings have been dispensed with e.g. Notice of meeting, quorum, proxies, postal ballot, etc.
2) In the case of a company other than OPC, Annual Return should be signed by the Company Secretary (CS) appointed by the company. If not then, it should be signed by Company Secretary in Practice (PCS). In case of OPC, Annual return should be signed by Company Secretary (CS) appointed by the company, if not, then it should be signed by Director.
3) The financial statement, including consolidated financial statement of an OPC can be signed by one director.
4) The Bill requires companies to mandatorily prepare a cash-flow statement as a part of their financial statements. An OPC is specifically exempted from the requirement of preparation of a cash-flow statement. Relaxations given to an OPC are that there is no need to prepare a cash-flow statement.

Perpetual Succession and Nomination:

Every person incorporating an OPC needs to mandatorily appoint a person as his nominee. The person has to nominate a name with that person's written consent as a nominee to the OPC. This person will be the default and ad hoc member in case of the existing sole member's death or disability. This provision will ensure perpetuity and continuity to the life of the Company.

The model Articles of Association that form a part as a schedule to the Bill state that on the death of the member of an OPC, the person nominated by such member shall be the person recognised by the company as having title to all the shares of the member and shall be entitled to the same dividends and other rights and liabilities to which such sole member of the company was entitled or liable.

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 contract.

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 section 193(2) sub-section (1) within a period of fifteen days of the date of approval by the Board of Directors.

Experts feel the key challenge for such a company will be to ensure that supporting legislations also recognise such a company as an entity and not just an extension of a sole proprietorship.

Whether the OPC will have a separate status under the provisions pertaining to taxation of the OPC remains unclear as of now. In various developed jurisdictions, the OPC, if formed by a natural person would not be considered as a separate person for taxation purposes. It needs to be seen how the finance minister clarifies the position under the Income Tax Act, 1961 for taxation of OPCs. If the provisions of dividend distribution tax and others continue to apply to OPCs, the same would be a big dampener in large-scale adoption of OPCs.

As per the provisions on financial statement, it may not include the cash flow statement as stated in Clause 2(40). Further, the annual return has to be signed by the company secretary, or where there is no company secretary, by the director of the company. The Clause 134(1) provides that the financial statement, including consolidated financial statement, if any, has to be approved by the Board of Directors before they are signed on behalf of the Board only by one director, for submission to the auditor for his report thereon.

Financial Statements

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The Clause 134(4) says that the report of the Board of Directors has to be attached to the financial statement under this section shall, in case of a OPC, mean 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.

The provisions relating to migration to other forms of companies from an OPC, transferability of shares of an OPC, merger & acquisition provisions, winding-up provisions, ancillary procedures, etc. will also be clear once the rules are issued under the New Act. Though in the current form there seems no express restriction for any of these provisions.

Having provisions for OPC in a major Bill looks good, but that's about the only thing that one can expect from it now, till collateral legislation embraces the concept. ■

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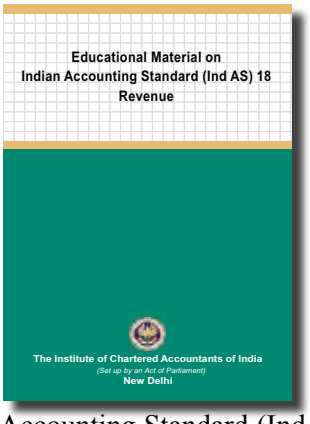

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