One Man Army

Dr S Chandrasekaran lays downs the intricacies of setting up a One-Person Company

The new Companies Act has introduced a number of new concepts, including that of a One Person Company (OPC) – an idea first discussed and recommended by the JJ Irani Committee in 2005. Several other countries, including the UK, Mauritius, Pakistan, Singapore, China, and certain states in the US, have modified their laws in recent years to permit such structures. The Act defines an OPC as having only one member, who by definition has 100 per cent shareholding. In contrast, such entities as Limited Liability Partnerships, Private Limited Companies, and Limited Companies, all require two or more people to partner. The Companies (Incorporation) Rules, 2014 ('the Rules') provide that only an individual, who is both a resident and a citizen of India, can form an OPC. This means that companies, societies, or other corporate entities cannot form such a company, and cannot be its shareholder; nor can non-resident Indians or foreigners. Further, the rules specify that an individual can be a shareholder in only one OPC at any given time – which means that he or she cannot have two different OPCs in his or her name at once.

The nuts and bolts...

One major difference between a sole proprietorship and an OPC is the extent of liability involved. If an OPC fails, the shareholder's liability is limited to the business assets, but with a proprietorship, it is unlimited, and creditors can even go after personal assets. In terms of governance, an OPC may have only a single director, but it may also – depending on the owner's preference – have up to 15 directors.

Another important element is that the owner of an OPC is permitted – indeed required – to appoint a nominee who, in the event of his or her death or disability, shall come forward and take over the reins of the company. However, only a permanent resident with Indian citizenship can be a nominee. If the nominee who takes over an OPC is

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already a member of another OPC, he or she must decide within 6 months which of the two positions to relinquish. Upon the death of the sole member, the nominee shall be recognised by the company as being entitled to the same shares, dividends and other rights and liabilities as the original owner. The new member is also required to appoint a nominee.

Compliance requirements

OPCs need not comply with many requirements – specifically, Sections 96, 98 and 100 through 111 of the Act – that apply to private limited companies. An OPC does not, for instance, have to hold annual or extraordinary general meetings. A resolution that is communicated by the sole member and entered in the minutes book, with the person's signature and the date, is deemed to be the 'date' of the 'meeting'. Similarly, to meet the formal requirements of passing a resolution, a single-director OPC can simply make an entry in the books with the date and his or her signature. Further OPCs do not have to prepare cash-flow statements for their annual financial statements, and a single director, rather than a Company Secretary, can sign the annual returns. Finally, the newly-introduced Secretarial Standards are not applicable to an OPC if it has only one director on its Board.

Converting from an OPC to a private limited – or vice versa

The Act requires an OPC to be converted into a private limited company when it reaches a paid-up capital level of Rs 50 lakhs or more, or when its average turnover is Rs 2 crores or more for a period of 3 years. The company then needs to make the necessary changes in the memorandum and articles of association, and to comply with all the requirements of a private limited company. Conversely, a private limited company whose paid-up capital or 3-year-average turnover fall below these thresholds can convert itself into an OPC and enjoy the benefits that come with the territory. However, at the time of conversion, it must comply with the various conditions – having a single shareholder who is a citizen and resident of India, appointing a nominee, and so on – of being an OPC.

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Conclusion

For several reasons, OPCs are yet to fully take off as a viable alternative to more traditional corporate structures. While it is said that only one person is required to form an OPC, effectively – since a nominee is required at the time of incorporation, and thereafter – it requires two people. Further, restrictions on foreign ownership, and the mandatory conversion to a private limited company once certain thresholds are breached, tend to discourage entrepreneurs. From a taxation angle, the fact that tax is levied on the company's entire profits, rather than on an individual's income, is another dis-advantage – at least at this point in time. Lenders, finally, are unlikely to extend credit to an OPC without collateral security. This means that the liability is actually unlimited if the business runs into rough weather. Given that the Companies Act is being fine-tuned, now is the right time to address these limitations, and thereby give a boost to the concept of OPCs. ■

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