INCORPORATION OF ENTITIES IN INDIA

Formation of Company under Companies Act, 2013 (CA 2013) :

A company may be formed for any lawful purpose under CA 2013 by—

- **Public company**-- with minimum 7 persons (Unlimited maximum);
- **Private company–** with minimum 2 persons (200 maximum)
- **One Person Company (OPC) –** with only one person

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ONE PERSON COMPANY (OPC)

(A new concept under Companies Act, 2013)

- Till recently, if you wanted to set up a private company, you needed at least one other person because the law mandated a minimum of two shareholders.
- If a person wanting to venture alone, the **only option was proprietorship**, an onerous task since it is not legally recognised as a separate entity.
- Though this concept of OPC is new in India, it has been **very popular abroad**, including in Singapore, USA, even Europe.
- Professionals feels that "A one person company is a **paradigm shift** in the Indian corporate regime, bringing it at par with global standards." The report also states that it will provide a significant fillip to **micro and small-scale businesses**.

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HOW TO SET UP AN OPC

- The process of setting up an OPC is the same as that for a private limited company.
- To begin with, check with the Registrar of Companies (ROC) for the **availability of name**. The name will carry a suffix, **'OPC',** similar to the manner in which a private company uses the suffix 'Pvt Ltd'.
- **Obtain a DIN** "Director Identification Number' for each director and apply for their digital signatures.
- **Draft the Memorandum of Association and Articles of Association** embodying the objectives of the OPC and file it with ROC.
- **Nominate a person** with his prior written consent to become the member of OPC in the event of death or incapacity of the original member and intimate to ROC.
- After completion of paper work, the **Certificate of Incorporation** will be issued by ROC.

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SOLE PROPRIETORSHIP

- A sole proprietorship also known as "Proprietorship" is the oldest and the most common form of business. A person who does business for himself is engaged in the operation of a Sole Proprietorship. Anyone who does business **without formally creating a business organization** is a Sole Proprietor.

- ***Key Attributes of a Sole Proprietorship:***

  - No formalities for creating a sole Proprietorship.
  - Owner may use all profits and losses for business.
  - Owner faces **unlimited personal liability**.
  - All capital of the sole proprietorship shall be obtained by the owner or through loans based on owner's creditworthiness.
  - Usually, the sole Proprietorship shall dissolve on the disability, retirement or death of owner.

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- There is **no transfer of ownership** and the assets may be sold in entirety or in part.
- Owner manages and controls the business.
- The tax is to be paid by the owner only and not the entity.

❑ ***Advantages of Sole Proprietorship:***

- Sole Proprietor has **complete control** and decision making power over the business.
- Sale and transfer can take place the discretion of the sole proprietor.
- **No corporate tax** payments.
- **Minimal legal costs** to form a sole proprietorship.
- Few formal business requirements.

Disadvantages of Sole Proprietorship:

- The sole proprietor of the business will be held **personally liable for the debts** and obligations of the business. Additionally, this risk extends to any liabilities incurred as a result of acts committed by employees of the business.
- All **responsibilities** and business decisions fall on the shoulders of the sole proprietor.
- Not **an Investor friendly entity** as they won't usually invest in sole proprietorships.
- The sole proprietorship has **no legal existence separate from its owner**.
- A foreign national cannot start a sole proprietorship firm. In case of sole proprietorship firm the **liability of proprietor is unlimited** and Indian law cannot create any charge on his personal assets outside India.

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PARTNERSHIP FIRM

- Partnership is a relationship between persons who have agreed to share profits of the business carried on by all or any of them acting for all.

- ***Key Attributes of a Partnership:***

  - Except for the time and the **legal cost of drafting a partnership agreement**, it is easy to establish.
  - Its **registration is also not essential**. However, if the firm is not registered, it will be deprived of certain legal benefits.
  - The **minimum number of partners must be two**, while the maximum number can be 10 in case of banking business and 20 in all other types of business.
  - The **firm has no separate legal existence** of its own i.e., the firm and the partners are one and the same in the eyes of law.

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- **Liability of the partners is unlimited**. Legally, the partners are said to be jointly and severally liable for the liabilities of the firm.
- Earnings are **distributed** according to the partnership agreement.
- The **firm has a limited span of life** i.e. legally, the firm must be dissolved on the retirement, lunacy, bankruptcy, or death of any partner.
- **Restrictions are there on the transfer of interest** i.e. none of the partners can transfer his interest in the firm to any person (except to the existing partners) without the unanimous consent of all other partners.

❑ ***Advantages of Partnership:***

- Except for the time and the legal cost of crafting a partnership agreement, it is **easy to establish**.
- As there are more than one owners, the entity has more than one pool of capital to **tap in financing** the business and its operations.

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- Profits from the business flow directly to the partners personal tax returns; they are **not subject to a second level of taxation**.
- The entity can draw on the judgment and management of more than one person. In the best cases, the partners will have complementary skills.

❑ ***Disadvantages of Partnership:***

- The major disadvantage of partnership is the **unlimited liability of partners** for the debts and liabilities of the firm. Any partner can bind the firm and the firm is liable for all liabilities incurred by any Partner on behalf of the firm.
- Partners are jointly and severally **liable for the actions of the other partners**. Thus, one partner can put other partners at risk without their knowledge or consent.
- Profits must be **shared** among the partners as per agreed ratio .

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- If property of partnership firm is insufficient to meet liabilities, personal property of any partner can be attached to pay the debts of the firm.

- Absence of ultimate authority, with two or more partners being privy to decisions, **decision making may be slower and more difficult** than in a sole proprietorship. Disputes can tie the partnership in knots.

- Depending on the partnership agreement, the partnership may have a **limited life**. Unless otherwise specified, it will end upon the withdrawal or death of any partner. The firm is not distinct legal entity.

ONE PERSON COMPANY (OPC)

❑ ***Key Attributes of an OPC:***

- An OPC means a Company which has only **one person as a member**.
- It shall be a Private Limited Company and is required to specifically mention the word **"One Person Company**" below its name wherever used.
- Minimum paid up share capital of One Person Company is **one lakh rupees** (Rs. 1,00,000)
- Only a **natural person** who is an **Indian Citizen** and a **Resident in India (stay in India for more than 182 days in Preceding calendar year)-**

  (a) shall be eligible to incorporate an OPC
  (b) shall be a nominee for the sole member of OPC.

- No person shall be eligible to incorporate more than 1 OPC or become nominee in more than 1 such Company.

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- OPC to have **minimum 1 Director** and can have **maximum 15 directors**.
- Memorandum of Association (MOA) of an OPC is required to indicate the name of the person who shall be a member in the event of death or incapacity of the sole member.
- A **minor cannot become a member or nominee** of an OPC nor can he hold shares with beneficial interest.
- The person nominated by the subscriber as a member have to give **prior written consent** and can also withdraw his consent by giving notice in writing after which the subscriber has to within 15 days of the receipt of such notice, appoint another nominee.
- If the original subscriber died and the nominee becomes the member, then within 15 days of becoming member, he shall appoint a **new nominee**.
- Any change In the name of the person as a nominee shall **not** be deemed to be alteration of the MOA.

- An OPC **cannot be incorporated or converted** into a Section 8 Company (i.e Company with Charitable objects) nor can it carry out Non-Banking Financial Investment activities including investment in securities of any Body Corporate.
- No such Company can convert voluntarily into any kind of Company **unless 2 years have expired** from the date of incorporation of OPC, except in the following cases:

  (a)paid up capital is increased beyond **Rs.50 Lac**

  OR

  (b) average annual turnover during the *****relevant period exceeds **Rs.2 crores**.

***Relevant period** means the period of immediately preceding 3 consecutive Financial years.

- Such **OPC can convert itself into either a Private company or Public company** within six months from the date of fulfillment of any of the above 2 conditions.

- A **Private company (other than Section 8 company) can also convert into an OPC** provided that:

(a) paid up share capital does not exceed **Rs. 50 Lac**

OR

(b)average annual turnover during the relevant period does not exceed **Rs.2 Crores**

- For effecting the aforesaid conversion, the company shall have to:

  (a) obtain No Objection from all its members and creditors

  (b) pass special resolution

  (c) file Form MGT.14 with ROC within 30 days of passing special resolution.

- Atleast **one Board Meeting** to be conducted in **each half of a calendar year** and the gap between the two meetings is not less than ninety days.

- **Minutes book** to be maintained by OPC recording any business transactions or passing any resolution at the AGM or any other General Meeting or Board meeting. Sole member of OPC communicates it to the Company
- The Annual Return of an OPC shall be signed by the Company Secretary, or where there is no Company Secretary, by the Director of the company.

❑ ***Relaxations provided to OPC:***

- Cash flow statement is not required to be filed with ROC with financials.
- Annual Return can be signed by a Company Secretary (CS) or by one Director if there is no CS.
- Minimum one Director required.
- OPC need not hold Annual General Meeting (AGM).
- Financial statements can be signed only by one Director.

- The following provisions shall **not apply to OPC**:
  - Calling of Extraordinary General Meeting
  - Issue of Notice of meeting and the statement to be annexed to notice
  - Quorum for meetings
  - Chairman of meetings
  - Proxies
  - Restriction on voting rights
  - Voting by show of hands or through electronic means
  - Demand for poll
  - Postal ballot
  - Circulation of members' resolution

- If OPC or any officer of OPC **contravenes** the applicable provisions they shall be punishable with **fine** which may extend to **Rs.10,000/-** and with a further fine which may extend to **Rs.1000/- for every day** after the first during which such contravention continues.

HOW IS AN OPC DIFFERENT FROM SOLE PROPRIETORSHIP

OPC allows a single person to run a company limited by shares, and Sole proprietorship means an entity where it is run and owned by one individual and where there is no distinction between the owner and the business.

The distinction between both the structures is as follows:

- **Limited Liability** - Fundamentally the basic difference between a sole proprietorship and an OPC is the way and manner in which the liability is treated in an OPC. OPC is different from sole proprietorship because it is a completely separate entity and that is the distinction between the promoter and the company. **The liability of the share holder will be limited** to the unpaid subscription money in his name. On the other hand the liability in a sole proprietorship, the person/owner is alone liable for the claims which will be made against the business.

HOW IS AN OPC DIFFERENT FROM SOLE PROPRIETORSHIP (continue)

- **Tax Bracket** - Though the concept of an OPC has been incorporated in the Companies Act, 2013 but the concept of same does not exist in tax laws as yet, as a result an OPC can be put in the same bracket of taxation as other private companies.

According to Income TA,1961 a private limited company is under the **bracket of 30%** on total income with an additional surcharge of 5% if the income exceeds 10 million with an addition to 3% of education cess.

- **Succession** - In an OPC there is a nominee designated by the member. The nominee which will be a natural born citizen of India and who resides in India. **The nominee shall in the event of death of the member become a member** of the company and will be responsible for the running of the company. But in the case of sole proprietorship this can only happen through an execution of WILL which may or may not be challenged in the court of law.

HOW IS AN OPC DIFFERENT FROM SOLE PROPRIETORSHIP (continue)

- **Compliances** - A One Person Company has to file annual returns etc just like a normal company and would also need to get its accounts audited in the same manner. On the other hand a sole proprietorship would only need to get audited under the provisions of Section 44 AB of the Income Tax Act, 1961 once its turnover crosses the certain threshold.

COMPARISON OF BUSINESS FORMS

Criteria	Proprietorship	Partnership	One Person Company (OPC)	Limited Company
Minimum Number of Members	1 Person (either natural or artificial)	2 Persons (either natural or artificial)	1 Person (only natural person)	2 in case of Private Limited Company and 7 in case of Public Limited Company
Maximum Number of Members	1 Person	20 except in case of banking business. 10 in case of banking business	1 member. However, it can be increased by converting into Private or Public Company	200 in case of Private Limited and unlimited in case of Public Limited Company

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Criteria	Proprietorship	Partnership	One Person Company (OPC)	Limited Company
Cost of Registration	As there is no registration required, No Statutory fees is payable	The cost of registration is negligible	The cost of Registration, mainly the statutory filling fees depends on the proposed Authorized Capital	The cost of Registration, mainly the statutory filling fees depends on the proposed Authorized Capital
Legal Entity	Proprietorship does not have legal entity as the Proprietor and the firm are same persons	Partnership does not have Separate Legal Entity	OPC has separate Legal entity other than its shareholders and Directors and can operate like a legal person	Company has separate Legal entity other than its shareholders and Directors and can operate like a legal person

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Criteria	Proprietorship	Partnership	One Person Company (OPC)	Limited Company
Ownership of Business	Ownership lies with Proprietor	Ownership lies with the partners	Ownership lies with the member	Ownership lies with members
Management	Managed by the proprietor	Managed by the Partners	Management by shareholder or director	Managed by the Directors elected / appointed by members of company
Ownership of Property	Ownership lies with Proprietor as the Proprietor and the firm are same persons	Ownership lies with the Partners	OPC can purchase Property in its own name	A Company purchases its Property in its own name

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Criteria	Proprietorship	Partnership	One Person Company (OPC)	Limited Company
Flexibility in Ownership	The entire business needs to be sold	Ownership is restrictive; any change in partnership requires the approval of other partners.	Ownership is flexible by transfer of shares to nominee	Ownership is easily changeable as shares of Company are freely transferable
Liability	The liability of the Owner is unlimited and extends to his personal assets	The liability of the Partners are unlimited an extends to personal property	The liability of member is Limited to the shares taken and does not extends to personal property	The liability of members are Limited to the shares taken and does not extends to personal property

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Criteria	Proprietorship	Partnership	One Person Company (OPC)	Limited Company
Creditworthiness	The creditworthiness of Proprietorship firms depends upon the goodwill and creditworthiness of its Proprietor	The creditworthiness of Partnership firms depends upon its goodwill and creditworthiness of its partners	OPC's own credit history is relevant for borrowing	Due to Stringent Compliances & disclosures under various laws, companies enjoys high degree of creditworthiness
Chances of individual fraud	NA	Very High, any act of individual partner will bind the firm	NA	Negligible, all the decisions are taken collectively by board of directors

Continue…

Criteria	Proprietorship	Partnership	One Person Company (OPC)	Limited Company
Business Durability	Death or Insolvency of Owner dissolves the Proprietorship	Death, resignation or Insolvency of Partner, dissolves the firm	OPC has Perpetual Succession, death or insolvency of members does not effect its existence	A Company has Perpetual Succession, death or insolvency of members does not effect its existence
Contractual Capacity	The contracts are entered into the name of Proprietor	The contracts are entered into the name of partner	OPC has a capacity to enter into any contract	A Company has a capacity to enter into any contract

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Criteria	Proprietorship	Partnership	One Person Company (OPC)	Limited Company
Dissolution/ Termination	A Proprietorship being a creation of will, can be terminated as per will	A Partnership being a creation of will, can be terminated as per will of partners	OPC being a creation of law, can be dissolved as per procedures laid down in Law	A Company being a creation of law, can be dissolved as per procedures laid down in Law
Legal Governance	They are not governed by any specific law	Management of partnership not governed by any specific law	It is governed by Companies Act, 2013	It is governed by Companies Act, 1956/2013

CONCLUSION

- This concept of OPC (One Person Company) is set to organize the unorganized sector of proprietorship firms and other entities which will be **convenient to regulate and manage** if the same is in the form of One Person Company.
- Company Law experts see **a rise in registrations of one-person companies** with the new Companies Act 2013 being effective.
- OPC will give **greater flexibility** to an individual or a professional to manage his business efficiently and at the same time enjoy the benefits of a company with **limited liability**.
- It will also be favourable for **boosting of foreign funding** from the investors who keen to expand their ventures in India. One Person company is next big thing in India, and it will be favourable for the economic conditions in India through its small to medium sized entrepreneurship.

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- The concept of OPC will also help many foreign companies, which need to appoint a minimum of two nominees now when they form a wholly-owned subsidiary.
- OPC will open the avenues for more **favourable banking facilities**, particularly loans, to such proprietors.
- Besides, the concept will boost **flow of foreign funds** in India as the requirement of nominee shareholder would be done away with .
- Key challenge for OPC will be to ensure that supporting legislations also recognise such a company as an entity and not just an extension of a sole proprietorship and FDI should be allowed in OPC.
- Second important factor for deciding OPC as structure will be the **Tax implication** on OPC vis a vis Individual proprietor .

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