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**NAAC ACCREDITED 'A' GRADE**



**Topic: one person co, small co, dormant co, and associate company**

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**Name of the department: COMMERCE**

## **SEM-II COMPANY LAW**

### **One Person Company**

*DR SARBAPRIYA RAY*

**Today's lecture note comprises of several aspects (definition, formation features, advantages etc) of one Person Company, dormant company, small company, and associate company.**

The Companies Act, 2013 completely revolutionized corporate laws in India by introducing several new concepts that did not exist previously. On such game-changer was the introduction of One Person Company concept. This led to the recognition of a completely new way of starting businesses that accorded flexibility which a company form of entity can offer, while also providing the protection of limited liability that sole proprietorship or partnerships lacked.

Several other countries had already recognized the ability of individuals forming a company before the enactment of the new Companies Act in 2013. These included the likes of China, Singapore, UK, Australia, and the USA.

**Section 2(62) of Companies Act defines a one-person company as a company that has only one person as to its member. Furthermore, members of a company are nothing but subscribers to its memorandum of association, or its shareholders. So, an OPC is effectively a company that has only one shareholder as its member.**

It shall also be important to note that Section 3 classifies OPC as a Private Company for all the legal purposes with only one member. All the provisions related to the private company are applicable to an OPC, unless otherwise expressly excluded.

Such companies are generally created when there is only one founder/promoter for the business. Entrepreneurs whose businesses lie in early stages prefer to create OPCs instead of sole proprietorship business because of the several advantages that OPCs offer.

### One person companies located in India and involved in agriculture, hunting and forestry

CIN	Company	Status
U01100MH2019OPC331096	BEETROOT AGRO (OPC) PRIVATE LIMITED	Active
U01100MH2019OPC332402	VEGME INDIA MARKETING (OPC) PRIVATE LIMITED	Active
U01100MN2019OPC013857	LAMAN AGRO AND MILCH (OPC) PRIVATE LIMITED	Active

### Difference between OPCs and Sole Proprietorships

A sole proprietorship form of business might seem very similar to one-person companies because they both involve a single person owning the business, but they're actually exist some differences between them.

The main difference between the two is the nature of the liabilities they carry. Since an OPC is a separate legal entity distinguished from its promoter, it has its own assets and liabilities. The promoter is not personally liable to repay the debts of the company.

On the other hand, sole proprietorships and their proprietors are the same persons. So, the law allows attachment and sale of promoter's own assets in case of non-fulfilment of the business' liabilities.

### Features of a One Person Company

Here are some general features of a one-person company:

- a. **Private company:** Section 3(1)(c) of the Companies Act says that a single person can form a company for any lawful purpose. It further describes OPCs as private companies.
- b. **Single-member:** OPCs can have only one member or shareholder, unlike other private companies.
- c. **Nominee:** A unique feature of OPCs that separates it from other kinds of companies is that the sole member of the company has to mention a nominee while registering the company.
- d. **No perpetual succession:** Since there is only one member in an OPC, his death will result in the nominee choosing or rejecting to become its sole member. This does not happen in other companies as they follow the concept of perpetual succession.
- e. **Minimum one director:** OPCs need to have minimum one person (the member) as director. They can have a maximum of 15 directors.
- f. **No minimum paid-up share capital:** Companies Act, 2013 has not prescribed any amount as minimum paid-up capital for OPCs.
- g. **Special privileges:** OPCs enjoy several privileges and exemptions under the Companies Act that other kinds of companies do not possess.

### **Formation of One Person Companies**

A single person can form an OPC by subscribing his name to the memorandum of association and fulfilling other requirements prescribed by the Companies Act, 2013. Such memorandum must state details of a nominee who shall become the company's sole member in case the original member dies or becomes incapable of entering into contractual relations.

This memorandum and the nominee's consent to his nomination should be filed to the Registrar of Companies along with an application of registration. Such nominee can withdraw his name at any point in time by submission of requisite applications to the Registrar. His nomination can also later be canceled by the member.

### **Membership in One Person Companies**

Only natural persons who are Indian citizens and residents are eligible to form a one-person company in India. The same condition applies to nominees of OPCs. Further, such a natural person cannot be a member or nominee of more than one OPC at any point in time.

It is important to note that only natural persons can become members of OPCs. This does not happen in the case of companies wherein companies themselves can own shares and be members. Further, the law prohibits minors from being members or nominees of OPCs.

### **Conversion of OPCs into other Companies**

Rules regulating the formation of one-person companies expressly restrict the conversion of OPCs into Section 8 companies, i.e. companies that have charitable objectives. OPCs also cannot voluntarily convert into other kinds of companies until the expiry of two years from the date of their incorporation.

### **Privileges of One Person Companies**

OPC enjoy the following privileges and exemptions under the Companies Act:

- They do not have to hold annual general meetings u/s 96(1)
- Their financial statements need not include cash flow statements u/s 2(40).
- A company secretary is not required to sign annual returns; directors can also do so.
- Provisions relating to independent directors do not apply to them.
- Their articles can provide for additional grounds for vacation of a director's office.
- Several provisions relating to meetings and quorum do not apply to them u/s 98-111.
- They can pay more remuneration to directors than compared to other companies.

### **Solved Example on One Person Company**

Question: Which of the following statements are true for OPCs?

- a. Follows the principle of perpetual succession.

- b. Has a distinct legal identity.
- c. Minimum paid-up capital of Rs 1 lakh is required.
- d. It must hold an annual general meeting within a year of incorporation.
- e. Sole member must name a nominee.
- f. A company can be its sole member.
- g. Was recognized under the Companies Act, 1956.

Answer:

- a. FALSE: It can come to an end with its sole member's death.
- b. TRUE: OPCs and their sole members have distinct identities.
- c. FALSE: The law has not prescribed any minimum capital amount.
- d. FALSE: It need not hold any AGMs as only one shareholder exists.
- e. TRUE: a Sole member must name a nominee during registration.
- f. FALSE: Only natural persons or firms can be members.
- g. FALSE: Companies Act, 2013 introduced the concept of OPCs.

## **DORMANT COMPANY**

### **1. What is a Dormant Company under Indian Laws?**

**As per Section 455 (1) of the Companies Act, 2013**

***“Where a company is formed and registered under this Act for a future project or to hold an asset or intellectual property and has no significant accounting transaction, such a company or an inactive company may make an application to the Registrar in such manner as may be prescribed for obtaining the status of a dormant company.***

Explanation.—For the purposes of this section,—

- i. **“inactive company”** means a company which has not been carrying on any business or operation, or has not made any significant accounting transaction during the last two financial years, or has not filed financial statements and annual returns during the last two financial years;

- ii. **“Significant accounting transaction”** means any transaction other than—
  - a. Payment of fees by a company to the Registrar;
  - b. Payments made by it to fulfil the requirements of this Act or any other law;
  - c. Allotment of shares to fulfil the requirements of this Act; and
  - d. Payments for maintenance of its office and records.

## **2. How to obtain status of Dormant Company?**

- i. A Company in its general meeting is required to pass a special resolution with consent of at least  $\frac{3}{4}$ th of the majority in value.
- ii. After satisfying the conditions mentioned in the section 455 and rule 3 and 6, the company may apply for obtaining the status (Certificate) of dormant company. The application to obtain dormant status shall be filed with the Registrar in Form MSC-1.
- iii. the registrar after being satisfied shall provide the certificate in Form **MSC-2** allowing the status of a Dormant Company to the applicant.

## **3. What are the compliances for a Dormant Company?**

- i. **No. of Board Meetings:** As per Section 173(5) Dormant Company shall be deemed to have complied with the provisions of this section if at least one meeting of the Board of Directors has been conducted in each half of a calendar year and the gap between the two meetings is not less than ninety days.
- ii. **Minimum number of Directors:** The Dormant Company shall maintain minimum no. of Directors, i.e. 3 in case of public company, 2 in case of private company and 1 in case of One Person Company (OPC).
- iii. **Annual Return:** *In comparison with the conventional annual filing where the active companies are required to file two detailed forms annually*, a Dormant Company is required to file one simple form annually indicating financial position

duly audited by a Chartered Accountant in practice in Form MSC-3 *within a period of thirty days from the end of each financial year.*

- iv. **Other Compliances:** Further, the Company also needs to file requisite returns under Income Tax Act, 1961 and Goods and Services Tax, 2017.

*Most of compliances under Companies Act, 2013 are event based and other compliances are to be fulfilled on regular intervals. A dormant company would have no/ very less compliances as it would have no/ fewer event based activities.*

**4. Can a Dormant company make allotment of shares? Also, can there be a change in Directors of such Company?**

Yes, pursuant to Rule 7 of The Companies (Miscellaneous) Rules, 2014, a Dormant Company can make allotment of shares and effect a change in directorship as well. The Company shall report with ROC on such allotment or change in Directorship in a timely manner.

**5. Can application for Dormant Status be filed by a company carrying on business which has not filed Financial Statement and Annual returns?**

Section 455 (1) of the Companies Act, 2013:

*“Where a company is formed and registered under this Act for a future project or to hold an asset or intellectual property and has no significant accounting transaction, such a company or an inactive company may make an application to the Registrar in such manner as may be prescribed for obtaining the status of a dormant company.*

**Brief analysis:** “such a company or an inactive company” may make an application for obtaining the status of a dormant company.

And explanation to Section 455 (1) states that

**“inactive company”** means a company which has not been carrying on any business or operation, or has not made any significant accounting transaction during the last two financial years, **or has not filed Financial Statements and Annual Returns during the last two financial years.**

So, an inactive company is one which has not filed Financial Statement and Annual Returns for last two financial years and therefore, can apply for Dormant status.

Though technically, the application for Dormant status can be filed by a company carrying on business but has not filed Financial Statement and Annual Returns for last two financial years but it also depends on the satisfaction of the jurisdictional RoC. The grounds should justify the allowability and the applications are decided on merits.

*Question for the readers: In such a case, if application made under this criterion, whether the ROC would require filing of financial statements and annual returns for past period? For the very fact that the annual filings were not done for past period, the applicant was eligible to make application under this criteria?*

#### **6. How long can a company stay Dormant?**

As per Rule 8 of The Companies (Miscellaneous) Rules, 2014, a Company can remain “Dormant” only for a period of *consecutive five years* thereafter the ROC shall initiate the process of striking off the name of the Company.

#### **7. Can a Dormant company apply for strike off?**

As per Section 248(1)(C), a Company which has made an application to ROC for obtaining ‘Dormant’ status **cannot apply** for strike off. The company needs to obtain ‘Active’ status first to apply for strike off.

#### **8. How to obtain Active status?**

The application shall be made in e-form **MSC-4** along with return in e-form **MSC-3** in respect of the Financial Year in which the application for obtaining the status of ‘active’ company is being filed.

**Conclusion:** The option of obtaining ‘Dormant’ status is a tool to be utilized by inactive companies who don’t want to go for strike off and want to wait for their ideas to flourish eventually with minimal statutory compliances.

### **Companies Act- Section 2(85) -Small Company**

#### **Definition of Small Company**

**Section 2 Sub section (85) ‘‘small company’’ means a company, other than a public company,—**

**(i) paid-up share capital of which does not exceed fifty lakh rupees or such higher amount as may be prescribed which shall not be more than five crore rupees; or**

**(ii) turnover of which as per its last profit and loss account does not exceed two crore rupees or such higher amount as may be prescribed which shall not be more than twenty crore rupees:**

Provided that nothing in this clause shall apply to—

(A) a holding company or a subsidiary company;

(B) a company registered under section 8; or

(C) a company or body corporate governed by any special Act;

### **My review on 2(85)**

This is a new step towards the de-regulation of entities which are smaller in size and operations. Even though it is a welcome move to de regulate (rather less regulate) certain companies certain areas are ambiguous.

1. All public Companies are excluded from the scope of the definition. Hence all public companies are required to have all compliance required for a Big sized company.
2. The paid up capital limit fixed as on date for demarcating a small company is Rs. 50 lakhs. But the section is clear that at any point of time the same can be enhanced to Rs. 5 Crs by issuing a notification
3. The Turn over limit fixed as on the date for demarcating a small company is Rs 2 Cr per annum but the same can be enhanced to rs. 20 Cr by a notification.
4. The extra room kept for enhancing the limit is a welcome move but at the same time a company which matches any of the said 2 conditions will fall with in the ambit of the said section. For ex:- A company having a paid up capital of Rs. 49 Lakhs and turn over of Rs. 100 cr will remain as a Small Company. Likewise a company having 100Cr Capital and Rs. 1.99 Cr turnover will also remain as a Small Company . It is better to cure that defect by replacing the word " OR" with "AND" in the said section.

### **ASSOCIATE COMPANY U/S 2(6)**

## *Companies Act- Section 2(6)- Associate Company*

### **Review of the definition - Associate Company**

**Section 2 Subsection (6) “associate company”, in relation to another company, means a company in which that other company has a significant influence, but which is not a subsidiary company of the company having such influence and includes a joint venture company.**

**Explanation.**—For the purposes of this clause, “significant influence” means control of at least twenty per cent. of total share capital, or of business decisions under an agreement;

### **My review on 2(6)**

On careful reading of the said section, we can clearly draw that the coverage of the sections and its applicability has becoming wider by inserting the term " Associate company" . When we are studying the said sections following important aspects will pop up to our attention

A company will be treated as an Associate company of another company, if the former is having

(1) atleast 20% of the total share capital of the later ;

OR

(2) having influence over the later's decision making process under and agreement

OR

(3) Both are Joint venture companies

By inserting this section many of the sections will become applicable for transactions with Associate companies also and care should be taken by the management/board of directors while having transactions with such companies.

### **Foreign company u/s 2(42)**

“Foreign company” means any company or body corporate incorporated outside India which,—

(a) has a place of business in India whether by itself or through an agent, physically or through electronic mode;

(b) conducts any business activity in India in any other manner.

Therefore, a **foreign company** is any **company** or body corporate incorporated outside India which, has a place of business in India whether by itself or through an agent, physically or through electronic mode; and. conducts any business activity in India in any other manner.

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