

Intensive Study Course on Companies Act, 2013

Session I

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Topics to be covered:

Structuring Options for a Company — Reason and Rationale

1. One Person Company

2. Private Companies — DOs, DON'Ts and Exemptions

3. Role of Independent Directors

One Person Company

*'One Person Company
means a company which has
only one member'*

▣ *Section 2(62) of Companies Act, 2013*

One Person Company

- ▣ **Only 1 MEMBER**
- ▣ **Only 1 NOMINEE**
- ▣ **DIRECTOR(S) \geq 1**
- ▣ **1 person: 1 OPC**
- ▣ **Only incorporated only by an **Indian Resident and Citizen****

One
Company

Person

- ~~NBFC~~
- ~~Company with charitable objects~~
- ~~Conversion to and from a Section 8 company~~
- ~~Preferable for Startups~~
- An OPC cannot voluntarily convert itself into a Private Limited Company. **However**, if the paid up share capital exceeds Rs 50 lakhs⁵

One Person Company

ORIGIN and INTENT OF OPC

- **Dr. J.J. Irani Committee** in the year **2005**
- To provide a **legal identity** to solely run proprietorship businesses
- To encourage **entrepreneurship**
- For increased **flexibility** and **simplicity**

One Person Company

Criteria	Sole-Proprietorship	OPC
Charter Documents	No charter documents, unless specified under specific laws	MOA, AOA, COI
Liability	The liability in a sole proprietorship concern, the person or the owner or the proprietor is alone liable for the claims which will be made against the business. As a result of this, the liability of the proprietor, in case of a proprietorship concern extends to his personal assets and is not limited, as such.	One Person Company is a completely separate entity and there is distinction between the promoter and the company. The liability of the share holder stands limited to the unpaid subscription money in his name.

One Person Company

Criteria	Sole-Proprietorship	OPC
Compliances	A sole proprietorship would only need to get its accounts audited under the provisions of Section 44 AB of the Income Tax Act, 1961 once its turnover crosses the certain threshold as prescribed in the act as amended by the Finance Act in force.	Annual returns; annual accounts, etc. just like a normal private limited company and would also need to get its accounts audited in the same manner.
Debt	Debt taken by the proprietorship is the sole responsibility of the proprietor or the owner	The debt procured or taken by a company, shall be the responsibility of the company and not of the director.
Succession	As per will of the proprietor, his legal heirs	As per details of nominee filed by the member.

One Person Company

Criteria	Sole-Proprietorship	OPC
Finance	Track record of the proprietor shall be checked and taken into consideration	The track record of the company shall be considered. The background of the promoters shall be considered, but the financial background, repaying capacity, turnover, CIBIL and other considerations pertaining to the OPC shall be of prime importance.
Taxation	It is put to taxation as per the slab applicable to the particular individual or the proprietor.	Shall be put to tax as a normal private limited company.

Who cannot be a member of a One Person Company ?

A minor – A minor cannot hold shares in beneficial interest and therefore, a minor cannot be a member of One Person Company. Moreover, a minor can also not be a nominee to an existing shareholder in a one person company.

A foreign citizen - Only a natural person who is an India citizen and resident in India shall be eligible to incorporate a One Person Company. The same shall apply for a nominee.

A person incompetent to contract –The Companies Act, 2013 or The Companies (Incorporation) Rules, 2014 do not directly exclude a person incompetent to contract from the purview of a member or a nominee, but the same can be inferred applying the rationale of Section 10 of the Indian Contract Act, 1872.

Persons other than natural person - This category may include Companies, existing OPCs, Association of Persons, Body of Individuals, Societies to name a few.

Privileges and Exemptions

Proviso to Clause 40 of Section 2:

Section 2 Clause 40 deals with the financial statements. The proviso to the section, however, exempts a One Person Company, from inclusion of Cash Flow Statement as a part of its financial statements. The Clause reads "*Provided that the financial statement, with respect to One Person Company, small company and dormant company, may not include the cash flow statement*".

Privileges and Exemptions

Proviso to Section 92:

Section 92 deals with Annual Returns to be filed with the Registrar of Companies every year. Proviso to Section 92 sub-section (1) states that “in relation to One Person Company and small company, the annual return shall be signed by the company secretary, or where there is no company secretary, by the director of the company.” Considering there is no mandatory requirement for appointment of a company secretary in a One Person Company, the director himself is eligible to sign and certify the

Privileges and Exemptions

Section 96:

Section 96 deals with Annual General Meetings. Sub-section (1) of Section 96 exempts a One Person Company from conduction of general meetings/ annual general meetings. The sub-section reads as follows:

"Every company other than a One Person Company shall in each year hold in addition to any other meetings, a general meeting as its annual general meeting and shall specify the meeting as such in the notices calling it, and not more than fifteen months shall elapse between the date of one annual general meeting of a company and that of the next:"

Privileges and Exemptions

One Person
Company

Auditor Rotation

Auditor rotation is not mandatory for a One Person Company.

One Person Company

Non-Applicability of the following:

Section 100: Calling of extra ordinary general meeting)

Section 101: Notice of meeting

Section 102: Statement to be annexed with the notice

Section 103: Quorum for meetings

Section 104(Chairman of meetings

Section 105: Proxies

Section 106: Restriction on voting rights

Section 107: Voting by show of hands

One
Company

Person

Penal Provisions

If One Person Company or any officer of such company contravenes the provisions of these rules,

One Person Company or any officer of the One Person Company shall be punishable with fine. Such fine may extend to ten thousand rupees and a further fine is also imposable, which may extend to one thousand rupees for every day after the first during which such contravention continues.

Private Companies — DOs, DON'Ts and Exemptions

Exemption Notification

In exercise of its powers u/s 462, the Central Government vide notification dated 5th June, 2015 has granted certain exemptions to private companies from the applicability of certain provisions of the CA, 2013.

It is intended to bring about ease in doing business and to provide a simpler and easier legal frame work for the Private Companies to function.

Private Companies — DOs, DON'Ts and Exemptions

Exemption Notification

The notification takes effect on and from 5th June, 2015.

The exemptions, exceptions, modifications and adaptations granted under the notification are prospective in nature.

Any transaction entered into by a private company prior to the date of enforcement of the notification will not be covered by the reliefs granted under the notification.

Private Companies — DOs, DON'Ts and Exemptions

Applicability

The notification applies to private companies as defined u/s 2(68) of the CA, 2013.

The notification does not apply to a private company which is a subsidiary of a public company as such a company is deemed to be a public company within the definition of “public company” u/s 2(71).

Private Companies — DOs, DON'Ts and Exemptions

Definition of “Related Party”

Sec. 2(76)(viii) provides that a “related party” with reference to a company means-

Any company which is-

- A. A holding, subsidiary or an associate company of such company; or
- B. a subsidiary of a holding company to which it is also a subsidiary;”

Section 2(76) (viii) shall not apply to a Private Company with respect to Sec.188

Private Companies — DOs, DON'Ts and Exemptions

Relaxation-1

1)With respect to Section 188, a private company shall not be deemed to be a related party of :-

- Its holding, subsidiary or an associate company;
- a subsidiary of a holding company to which the private company is also a subsidiary [subsidiaries of a common parent].

Private Companies — DOs, DON'Ts and Exemptions

Relaxation-1

Any contract or arrangement by a private company with:-

- its holding, subsidiary or an associate company; or
- a subsidiary of a holding company to which the private company is also a subsidiary

shall not be treated as a “related party transaction” and will not require approval u/s 188.

Private
Companies –
DOs, DON'Ts and
Exemptions

Related Party Transactions u/s 188

The second proviso to Section 188(1) which provides as under shall not apply to a private company.

“Provided further that no member of the company shall vote on such resolution to approve any contract or arrangement which may be entered into by the company, if such member is a related party:”

Private Companies — DOs, DON'Ts and Exemptions

Relaxation-2

One of the special features of general meeting approval in case of RPTs is that related parties are not allowed to vote on such a resolution. This provision shall not apply in case of private companies.

If a private company enters into any contract or arrangement with a related party requiring prior approval of the company, the related parties are now allowed to vote on such a resolution.

Private Companies — DOs, DON'Ts and Exemptions

Therefore,

Most of the contracts or arrangements by a private company with its other related parties like its directors, a firm in which its director is a partner, a private company in which its director is a member or director will still require either consent of the Board or a resolution of the general body depending upon the threshold of the transaction.

But related parties will be allowed to vote on such resolutions.

Private Companies — DOs, DON'Ts and Exemptions

Share Capital & Voting Rights

Section 43 deals with “Kinds of Share Capital”

- Section 47 deals with “Voting Rights”
- Sections 43 and 47 shall not apply to a private company where memorandum or articles of association of a private company so provides.

Private Companies — DOs, DON'Ts and Exemptions

Relaxation-3

- The private companies can determine voting rights of its equity and preference shareholders in any manner it desires by incorporating suitable provision in its memorandum or articles of association.
- The exemption may boost investments as it gives freedom to private companies in case of joint venture or private equity funding to structure the capital and voting rights.

Private Companies — DOs, DON'Ts and Exemptions

Observations

CA, 2013 read with Rules restricted the ability of private companies in issuing shares with differential rights by prescribing conditions related to quantum, past performance and past compliance among others. While such conditions will continue to apply to public companies, after the Notification private companies need not comply with such conditions if permitted to do so by their memorandum or articles.

Private Companies — DOs, DON'Ts and Exemptions

Observations

This exemption will help in structuring investments in private companies through compulsorily convertible preference shares (CCPS) and compulsorily convertible debentures (CCDs). Private companies will be able provide additional rights (including voting rights) to holders of CCDs and CCPS by issuing some additional shares with differential rights to the investors.

Private Companies — DOs, DON'Ts and Exemptions

Observations

The exemption from Section 47 is subject to Section 106 of the CA, 2013 [Restriction on voting rights].

However, private companies are given an option to alter or omit provisions of Section 106 by making suitable provision in its articles of association.

Private Companies – DOs, DON'Ts and Exemptions

Time Period of Offer for Rights Issue

Section 62(1)(a)(i) provides that the time period of offer for rights issue shall not be less than 15 days and not more than 30 days from the date of offer within which the offer, if not accepted, shall be deemed to have been declined.

It has been modified to provide that in case 90% of the members of a private company have given their consent in writing or in electronic mode, the periods lesser than those specified in the said sub-clause or sub-section shall apply.

Private Companies — DOs, DON'Ts and Exemptions

Relaxation-4

A private company need not wait for minimum 15 days and may close its offer for rights issue in less than 15 days period [the period may be reduced to less than 15 days but can not be extended beyond 30 days].

The notice for making the rights offer may be despatched in less than 3 days period before opening of the issue.

A private company may now open and close its rights offer the same day.

Private Companies – DOs, DON'Ts and Exemptions

Rights offer to Employees under ESOP

Section 62(1)(b) provides that Rights Offer shall be made to employees under a scheme of employees' stock option by passing a special resolution.

In case of a Private Company, the requirement of passing a special resolution has been done away with and only a simple resolution is now sufficient.

Private Companies — DOs, DON'Ts and Exemptions

Relaxation-5

A Private Company can now make rights offer to its employees under a scheme of employees' stock option by passing only a simple resolution. The requirement of special resolution has been done away with.

Private
Companies –
DOs, DON'Ts and
Exemptions

Restrictions on a company for purchase of its own shares

Section 67 provides that no company limited by shares and having a share capital shall have power to buy its own shares unless the consequent reduction of share capital is effected under the provisions of the Act.

The above provision does not apply to a private company subject to certain conditions.

Private Companies – DOs, DON'Ts and Exemptions

Section 67 shall not apply to Private Companies:

- (a) in whose share capital no other body corporate has invested any money;
- (b) if the borrowings of such a company from Banks or FIs or any body corporate is less than twice its paid up share capital or ₹ 50 crores, whichever is lower;
- (c) such a company is not in default in repayment of such borrowings subsisting at the time of making transactions under this section.

Private Companies — DOs, DON'Ts and Exemptions

Relaxation-6

Section 67 does not apply to Private Companies and such companies may now buy its own shares [subject to certain conditions].

Private Companies – DOs, DON'Ts and Exemptions

Acceptance of Deposits from members u/s 73(2)

Conditions (a) to (e) of Sec 73(2) shall not apply to a Private Company:-

- Issuance of a circular to members;
- Filing a copy of circular with ROC in 30 days;
- Deposit 15% amount in a separate bank a/c;
- Providing deposit insurance;
- Certifying that company has not committed any default in repayment of deposits/interest;
- Securing deposits by creating charge.

Private Companies — DOs, DON'Ts and Exemptions

Relaxation-7

A Private Company may accept from its members deposits up to 100% of aggregate of the paid up share capital and free reserves without fulfilling conditions (a) to (e) u/s 73(2).

The Private Company shall file details of deposits so accepted to the Registrar.

Private Companies — DOs, DON'Ts and Exemptions

Observations

MCA may modify Rule 3(3) of the Companies (Acceptance of Deposits) Rules, 2014, which states that maximum amount of deposit that a company may accept from its members shall not exceed 25% of its paid-up share capital and free reserves. Also Rules 4,5,6,7 and 13 requires suitable modifications.

Private Companies – DOs, DON'Ts and Exemptions

General Meetings of Private Companies

AOA can have specific provisions regarding:-

- Notice of general meeting (u/s 101)
- Statement to be annexed to notice (u/s 102)
- Quorum for meetings (u/s 103)
- Chairman of meetings (u/s 104)
- Proxies (u/s 105)
- Restriction on voting rights (u/s 106)
- Voting by show of hands (u/s 107)
- Demand for poll (u/s 109).

Private Companies — DOs, DON'Ts and Exemptions

Relaxation-8

Private Companies now have the option to provide for their own regulations with respect to notice of general meeting, statement to be annexed to notice, quorum for meetings, chairman of meetings, proxies, restriction on voting rights, voting by show of hands and demand for poll to the exclusion of the corresponding provisions of the CA, 2013

It will provide substantial relaxation in administration of general meetings.

Private Companies – DOs, DON'Ts and Exemptions

Filing of Resolutions u/s 117(3)(g)

Section 117(1) provides that a copy of every resolution in respect of matters specified in sub-section (3) shall be filed with ROC within 30 days of passing of the resolution.

Section 117(3)(g) specifies “ resolutions passed in pursuance of sub-section (3) of section 179”

Private Companies – DOs, DON'Ts and Exemptions

Filing of Resolutions u/s 117(3)(g)

Section 179(3) provides that Board shall exercise certain powers by means of a resolution passed at meeting of the Board;-

- Make calls on the shareholders
- Issue securities
- Borrow monies
- Invest funds of the company
- Approve financial statements
- Approve merger, amalgamation

Private Companies — DOs, DON'Ts and Exemptions

Relaxation-9

Notification provides that section 117(3)(g) shall not apply to a private company

The requirement of filing Form No. MGT. 14 for resolutions passed by the Board in exercise of its powers u/s. 179(3) is no longer applicable to a private company.

It reduces the compliance requirements for a private company.

Private Companies — DOs, DON'Ts and Exemptions

Observation

A private company will be required to file Form No. MGT.14 in respect of other matters specified u/s 117(3) of the CA, 2013.

Private Companies – DOs, DON'Ts and Exemptions

Number of Audits by an Auditor u/s 141(3)(g)

Section 141(3) deals with conditions for eligibility for appointment as an auditor of a company.

Section 143(3)(g) limits the number of audits by an auditor to twenty companies.

One person companies, dormant companies, small companies and private companies having paid-up share capital of less than Rs 100 crores are excluded from this limit.

Private Companies — DOs, DON'Ts and Exemptions

Relaxation-10

A Private Company having paid-up share capital of less than Rs 100 crores may appoint its Auditor irrespective of the limit of 20 audits provided u/s 141(3)(g).

It provides flexibility to a private company in appointment of its auditor.

Private
Companies –
DOs, DON'Ts and
Exemptions

Directorship for persons other than retiring directors u/s 160

Section 160 deals with right of persons other than retiring directors to stand for directorship.

It requires 14 days notice in writing before the meeting along with the deposit of Rs. one lac.

Section 160 is now not applicable to private limited companies.

Private Companies — DOs, DON'Ts and Exemptions

Relaxation-11

Private companies are free to include suitable provision in their AOA for eligibility of a person (other than retiring director) to be appointed as director of the company.

Persons other than retiring directors may now stand for directorships in such companies:-

- without leaving a written notice, 14 days before the meeting; and
- without deposit of Rs. one lac.

Private Companies — DOs, DON'Ts and Exemptions

Relaxation-12

- Section 162 deals with appointment of directors to be voted individually.
- Private Companies are exempted from Section 162 and can now move a motion at its general meeting for appointment of two or more persons as directors of the company by a single resolution.

Private Companies – DOs, DON'Ts and Exemptions

Restrictions on powers of Board u/s 180

Section 180 provides that the Board shall exercise certain powers only with the consent of the company by a special resolution:

- To sell, lease or dispose of the undertaking;
- To invest otherwise in trust securities the compensation for merger or amalgamation;
- To borrow money in excess of its paid up share capital + free reserves;
- To give time for repayment of any debt due from a director.

Private Companies — DOs, DON'Ts and Exemptions

Relaxation-13

Section 180 is not applicable to a private company.

Thus, the Board of Directors of a private company may exercise these powers without restrictions u/s 180 i.e., without obtaining the consent of the company by a special resolution.

Private Companies — DOs, DON'Ts and Exemptions

Relaxation-14

Section 184 deals with disclosure of interest by director. Section 184(2) prohibits interested director from participating in the Board meeting.

Now it is provided that in a private company an interested director may participate in aboard meeting after disclosing his interest.

Private Companies — DOs, DON'Ts and Exemptions

Observation

Although such an interested director may participate in a Board meeting of a private limited company after disclosure of his interest but he can not be counted for the purpose of ascertaining quorum u/s 174(3).

Private
Companies —
DOs, DON'Ts and
Exemptions

Loan to Directors u/s 185

Section 185 provides that no company shall advance any loan to any of its directors or to any other person in whom the director is interested.

The section, however, provides certain exceptions.

Private Companies — DOs, DON'Ts and Exemptions

Notification

Section 185 shall not apply to a private company if the following conditions are fulfilled:

- (a) in whose share capital no other body corporate has invested any money;
- (b) if the borrowings of such a company from banks or FIs is less than twice of its paid up share capital or Rs. 50 crores, whichever is lower;
- (c) such a company has no default in repayment of such borrowings subsisting at the time of making transactions u/s 185.

Private Companies — DOs, DON'Ts and Exemptions

Relaxation-15

Now, private companies fulfilling specified conditions can advance loan to any of its directors or to any other person in whom the director is interested.

It can also give guarantee or provide any security in connection with any loan taken by any of its directors or to any other person in whom the director is interested.

Private Companies – DOs, DON'Ts and Exemptions

Appointment of MD & WTD u/s 196(4)

Subject to the provisions of Section 197 [managerial remuneration] and Schedule V, a MD or WTD shall be appointed and the terms and conditions of such appointment and remuneration payable be approved by the Board at its meeting which shall be subject to approval by a resolution at the next general meeting and by the central government in case such appointment is at variance to the conditions specified in Schedule V

Private Companies — DOs, DON'Ts and Exemptions

Relaxation-16

Private companies are now exempted from the provisions of sub-sections (4) & (5) of Section 196.

In case of a private company, appointment of a managing director, whole-time director or manager and the terms and conditions of such appointment and remuneration payable need not be approved by the Board of Directors at its meeting.

Private Companies — DOs, DON'Ts and Exemptions

Relaxation-16

And such appointment and remuneration payable shall not require approval of members by a resolution at the next general meeting of the company and shall not be subject to section 197(overall managerial remuneration) and Schedule V(conditions to be fulfilled for appointment of MD/WTD without approval of the Central Government).

Consequently, even approval of Central Government would not be required.

Private Companies – DOs, DON'Ts and Exemptions

Ease in Doing Business for Private Companies

The objective of the changes appears to be to allow private companies to regulate their own affairs and do their business with ease and flexibility.

The notification has come later than sooner but move is certainly something that would be applauded by industry, corporates as well as professionals like company secretaries, chartered accountants and legal professionals.

Role of Independent Directors

Who is an Independent Director ???

- 'Outside Director'
- Who is not a promoter, executive director or managing director;
- Who is not related to the above;
- Who is not related to the holding, subsidiary or associate companies of the above;
- Who does not hold more than 2% of the total voting power;
- Who is not an employee, partner or proprietor of a firm of chartered accountants, company secretaries or cost accountants, or a legal consulting firm, in the 3 immediately preceding financial years;
- Who does not have a pecuniary relationship with the company;
- Where relatives do not hold more than 2% or more of the Gross Turnover or total income of 50 lakhs or higher as prescribed, whichever is lower; during the 2 immediately preceding financial years.

Role of Independent Directors

Mandatory Requirement of Having Independent Directors

- In LISTED companies, at least 1/3rd of the board has to be independent
- In Public Limited companies, independent directors are required to be appointed, where the following criteria are satisfied:

Criteria Basis	Applicability Threshold
Turnover	≥ 10 crore
Paid Up Share Capital	≥ 100 crore
Outstanding Loans, Debentures and Deposits taken together	≥ 50 crore

Role of Independent Directors

Your role is defined by your
acts, guidelines, duties,
responsibilities, functions and
evaluation mechanism.

Role of Independent Directors

Compliance in letter and Spirit
with the **Code of Conduct**
(**Schedule IV**) assures
discharge of the duties as per
the role assigned.

Role of Independent Directors

Role of Independent Directors

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Role of Independent Directors

Role of Independent Directors

THANK
YOU!