

COMPOUNDING UNDER THE COMPANIES ACT, 2013

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What is compounding?

- In today's Corporate world, good governance means to comply with all the applicable provisions of corporate laws. Non-compliance of law results into offences by Company or officer in default.
- Compounding of offence is a process whereby the person/company committing default files an application before the compounding authority accepting that it has committed an offence under the provisions of the Companies Act, 2013 ("the Act") and that the same should be compounded and is willing to pay the compounding fees prescribed by the Compounding authorities.
- Section 441 of the Act has clearly laid down the mechanism and the forum for compounding.

Why should a company go for compounding?

- No further prosecution
- Compounding fees cannot be more than the maximum fine provided under the relevant provision
- Less time consuming process
- Short cut method to avoid litigation

What is an Offence?

- Section 3(38) of General Clauses Act 1897 defines 'offence' as 'any act or omission made punishable by any law for the time being in force'.
- Act or omission under the Act are classified into civil and criminal offences. Further, an offence may be "Compoundable" or "Non-Compoundable".

OFFENCES

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graph TD; A[OFFENCES] --> B[COMPOUNDABLE]; A --> C[NON-COMPOUNDABLE]; B --> B1[1. Offences punishable with "fine only"]; B --> B2[2. Offences punishable with "fine or imprisonment"]; B --> B3[3. Offences punishable with "fine or imprisonment or both"]; C --> C1[1. Offences punishable with "imprisonment only"]; C --> C2[2. Offences punishable with "imprisonment and also fine"];
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COMPOUNDABLE

1. Offences punishable with "fine only"
2. Offences punishable with "fine or imprisonment"
3. Offences punishable with "fine or imprisonment or both"

NON-COMPOUNDABLE

1. Offences punishable with "imprisonment only"
2. Offences punishable with "imprisonment and also fine"

When compounding is not possible?

- ❑ Where any investigation against the company has been initiated or is pending under this Act.
- ❑ In case similar offence committed has been compounded and period of three years has not expired. It may be noted that any second or subsequent offence committed after the expiry of a period of three years from the date on which the offence was previously compounded, shall be deemed to be a first offence and is eligible to be compounded.

Who are the compounding authorities?

MAXIMUM AMOUNT OF FINE

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graph TD; A[MAXIMUM AMOUNT OF FINE] --> B[Does not exceed Rs. 25 Lakhs]; A --> C[In all other cases]; B --> D[Regional Director (RD) or any officer authorized by the Central Government]; C --> E[National Company Law Tribunal (NCLT)];
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Does not exceed Rs. 25
Lakhs

Regional Director (RD) or
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the Central Government

In all other cases

National Company Law
Tribunal (NCLT)

Example of Compounding of an offence:

Annual General Meeting:

As per Section 96 of the companies Act, 2013 every company other than a One Person Company shall hold its annual general meeting within 6 months from the closure of financial year and not more than 15 months shall elapse between two annual general meetings.

And As per section 99: If any default is made in holding an annual general meeting of the company in accordance with section 96 or in complying with any directions of the Tribunal, the company and every officer of the company who is in default shall be punishable with fine which may extend to one lakh rupees and in the case of a continuing default, with a further fine which may extend to five thousand rupees for every day during which such default continues.

Firstly, company is required to conduct its annual general meeting.

Secondly, due to non-compliance of section 96, ROC can impose fine on officer in default and the company as well and may send show cause notice as to why the prosecution should not be instituted against the company.

Whether making good the default before filing a compounding application is mandatory?

- ❑ In the matter of **RSPL Limited**, the petitioner company defaulted in filing of cost audit report for the year ended March 31, 2012 within the prescribed time limit. The petitioner company filed the concerned audit report on December 05, 2016 thereby making the default good. The Tribunal in the concerned matter quoted that “since the applicant company showed its bona fide effort to make good of the alleged violation by subsequent filing of its cost audit report though belatedly, the present application should be allowed.”
- ❑ Further, in the matter of **General Produce Company Limited. (CLB)**, Company Law Board dismissed the applications for compounding the offences under Sections 159 (now section 137) and 220 (now section 92) of the Companies Act, 1956 (now the Companies Act, 2013) as the defaults arising out of a failure to file the balance sheet and annual return of the company with the Registrar of Companies had not yet been made good by the company.

PROCEDURE:

1.

- Hold a Board Meeting to decide on compounding

2.

- Make application in e-form. GNL-1 to ROC for the Compounding of offence along with the requisite documents and fees.

3.

- The e-form and the supporting documents would be forwarded to the NCLT or the Regional Director as the case may be by the ROC.

4.

- The company's official or authorized representative will attend the hearing and explain the reasons for committing the offence.

5.

- Order by the compounding authority and payment of compounding fees

6.

- File order of RD/NCLT with ROC in Form. INC-28 within a period of 7 days from the date on which an offence is so compounded and order is received.

Post compounding of an offence:

- ❑ In case the offence has been compounded **before the institution of any prosecution**, no prosecution shall be filed either by ROC or by any shareholder or by any person authorized by the Central Government.
- ❑ Where the compounding of any offence is made **after the institution of any prosecution**, such compounding shall be brought by the Registrar in writing, to the notice of the Court in which the prosecution is pending.

Disclosure Requirement:

All the companies, Public companies – listed or unlisted or Private companies are required to report in its extract of annual return annexed to the Boards' report, the details of compounding of offences under the headings "**Penalties/Punishment/Compounding of offences**" pursuant to Section 92(3) of the Companies Act, 2013 and Rule 12(1) of the Companies (Management and Administration) Rules, 2014.

Penalty for non-compliance of order:

- ❑ NCLT or RD, while dealing with a compounding application for an offence of non-filing with ROC of any return or other documents, may order any officer or other employees of the company to file or register such return or document.
- ❑ Any officer or other employee of the company who fails to comply with any order made by Tribunal/RD/Officer authorized by the Central Govt., the maximum amount of fine for the offence proposed to be compounded under this section shall be twice the amount provided in the corresponding section in which punishment for such offence is provided.

Factors to be taken into consideration while compounding any offence

Viavi Solutions India Private Limited v. Registrar of Companies: The Hon'ble NCLAT laid down the following factors to be taken into consideration while compounding any offence/s:

- The nature and gravity of the offence.
- Whether the act is intentional or unintentional.
- The period of default.
- The report of the ROC.
- The maximum punishment prescribed.
- Whether the defaulter has made good the default.
- The financial condition of the company and defaulters.
- Whether such an offence was committed previously.
- Whether petition for compounding is *suo moto* before or after notice from Registrar of Companies or after imposition of the punishment or during the pendency of a proceeding.
- Whether the act of the defaulter is prejudicial to the members, the public in general, or not.

Case law: Imposition of minimum fine not mandatory in compounding of offences

CASE SUMMARY:

UW International Training & Education Centre for Health Private Limited, the petitioner company filed a suo-motu application to Delhi NCLT with respect to delay in issue of share certificate to the subscribers of the Company, resulting in non-compliance of the time prescribed under Section 56(4)(a) of the Act i.e. two months.

The fine for the aforementioned non-compliance provided under Section 56(6) of the Act was a fine which shall not be less than twenty- five thousand rupees but which may extend to five lakh rupees and every officer of the company who is in default shall be punishable with fine not less than ten thousand rupees but which may extend to one lakh rupees.

The contention of the petitioner in this case was that the said delay was beyond their control and not on account of any malafide intentions. However, the amount of fine imposed by NCLT was lesser than that as prescribed under Section 56(6) mentioned above.

ISSUE RAISED:

The main issue raised in front of NCLT was:

Whether NCLT can levy a higher or lower fine in compounding cases than the fine as prescribed under the Act?

OBSERVATIONS/CONCLUSION:

- ❑ NCLT held that the sentencing or penalty provisions prescribed under the Act cannot be lowered or altered in cases of prosecution where the defaulter is guilty. However, principle of imposing minimum fine on compounding matters is not mandatory and that the compounding of offence can be accepted by a Court even by admonishing the defaulter or issuing a warning.
- ❑ NCLT further noted that the procedural delay of issuance of share certificates cannot be discounted and accordingly imposed a penalty of Rs. 10,000/- on company and defaulting officers as opposed to penalty prescribed under section 56(6) of the Act.
- ❑ Thus it can be concluded that, in suo motu compounding cases, NCLT may, impose a lower fine than as prescribed under the penalty provisions of the Act.

Decriminalizing offences under the Companies Act, 2013

Company Law Committee, 2019 constituted by MCA recommended for the decriminalization of the Companies Act, 2013, as the much needed change in today's corporate world.

The various aspects of Decriminalisation of offences under the Companies (Amendment) Act, 2020 are:

❑ **Re-categorization of Offences:**

The nature of the monetary levy for certain offences is changed from a criminal 'fine' to a civil 'penalty'.

❑ **Removing imprisonment and subjecting the offences to fine alone:**

The legislature has removed imprisonment for certain offences while retaining the criminal liability to payment of fine alone.

❑ **Alternate mechanism for certain offences:**

Certain penal provisions may be better dealt with an alternate framework.

Conclusion:

Though compounding acts as an efficient mechanism in ensuring the lesser graver offences committed are made good, it should be ensured that such offences are not committed in the first place as this may amount to abusing the very object of the legislation.

THANK YOU

KNOWLEDGE MANAGEMENT TEAM OF MEHTA & MEHTA

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