

*Enforcement of Penalties under New Era of
E-Adjudication of Penalties and Compounding of Offenses under
the Companies Act 2013*

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Introduction

Background- CA 2013- Skeleton- 9 years passed

Company as Legal Entity- Run by natural persons

Emerging Economy- New Dynamics

Ease of Doing Business and Ease of Living

Decriminalization

Adjudication & Compounding

ESG

Offence

Offence – It is not defined under the CA 2013.

Under the General Clauses Act, 1897 - Section 3(38) defines the word offence as

“Offence” shall mean any act or omission made punishable by any law for the time being in force.”

The Macmillan Dictionary defines the term Offence as

“a crime or illegal activity for which there is a punishment”

In simple words anything punishable under the Act is an offence under the Act.

Penalty / Fine

Penalty has been used to indicate **civil offence**. Penalty can be imposed by adjudication i.e. an authority (like ROC, RD) for non compliance.

Fine has been used as **criminal offence**. As per CA 1956 all offenses were Criminal offence
Fine can be imposed only by a court of law (i.e. NCLT, High Court)

Adjudication, Compounding & Condonation

Such provisions are under various Acts

Companies Act

SEBI

FEMA

Chapter 28- Special Court- Section 435

The Central Government for the purpose of providing speedy trial of offences under the Act (except u/s 452) may establish or designate as many **Special Courts** as may be necessary.

Special Court shall consist of—

(a) a single judge holding office as **Session Judge** or Additional Session Judge, in case of offences punishable under this Act with imprisonment of two years or more; and

(b) a Metropolitan Magistrate or a Judicial Magistrate of the First Class, in the case of other offences,

who shall be appointed by the CG with the concurrence of the **Chief Justice of the High Court** within whose jurisdiction the judge to be appointed is working.

Chapter 28- Special Court-Section 435

Special Court may, if it thinks fit, try in a summary way any offence under this Act which is punishable with imprisonment for a term not exceeding three years:

Provided that in the case of any conviction in a summary trial, no sentence of imprisonment for a term exceeding one year shall be passed:

When it appears to the Special Court that the nature of the case is such that the sentence of imprisonment for a term exceeding one year may have to be passed or it may be undesirable to try the case summarily, the Special Court shall, after hearing the parties, record an order to that effect and thereafter recall any witnesses who may have been examined and proceed to hear or rehear the case in accordance with the procedure for the regular trial.

Section 439- Offences to be Non-Compoundable

Notwithstanding anything in the CRPC, every offence under the CA 2013 except the offences referred to in Section 212 (6) (which refers to section 447- Fraud) shall be deemed to be **non-cognizable** within the meaning of the said Code.

Exception

Section 212(6) – The offence covered under section 447 of this Act shall be **cognizable**

Cognizable and Non Cognizable offence

Cognizable Offence

Police Officer can make arrest **without warrant**, its of serious nature and its Nonailable

Non-Cognizable Offence as per section 2(l) of the CrPC means

An offence for which, a Police Officer has **no authority to arrest without a warrant**.

No **court shall take cognizance** of any offence under this Act except on the complaint in writing of the RoC,, a shareholder or a member of the company, or of a person authorised by the CG or by SEBI for the offences relating to issue and transfer of securities and non-payment of dividend

Officer – in -Default

Section 2 (60) of the CA 2013 defines Officer-in-Default

1. whole-time director;
2. key managerial personnel;
3. where no key managerial personnel - Directors who had consented or All directors
4. Other Persons charged with responsibility
5. Deeming Directors on whose directors Board is accustomed to act
6. Every Director who is aware of such contravention by virtue of the receipt of minutes or has participated or consented
7. In respect of the issue or transfer of any shares of a company RTA & Merchant Banker

Penalties

One Time

If a company makes any default in complying with the provisions of particular section, it shall be liable to a penalty of INR _____ for each default

Continuing

If any default is made in complying with the requirements of particular section, the company and every officer who is in default shall be liable to a penalty of INR _____ for every day during which the default continues but not exceeding INR _____

Range

If a company makes any default in complying with the provisions of particular section, the company shall be punishable with a penalty which shall not be less than INR _____ but which may extend to INR _____

Changing Dynamics

Decriminalization

Central Scrutiny Centre (CRC)

MCA V3- AI and ML

Compliant Directors- Disqualified are debarred

Active Company- Geo-Tagging of Regd Off

Compliant Company

Up to 01 November 2018,
81 - criminal offences



The Companies (Amendment) Ordinance,
2018 decriminalised 16 offences
w.e.f. 02 November 2018



The Companies (Amendment) Act, 2020 had
decriminalisation of many offences &
removed 5 offences. In 12 cases
imprisonment is removed



Fraud u/s 447 shall only remain Criminal

Introduction

The **Companies (Amendment) Ordinance, 2018** had substituted Section 454 (3) in the Companies Act, 2013
(effective from 2nd Nov 2018)

The Ministry of Corporate Affairs had substituted Rule 3 in
the Companies (Adjudication of Penalties) Amendment Rules, 2019 vide its Notification
(Dated 19th February, 2019)

Section 454 Adjudication of Penalties and Rule 3 of Companies (Adjudication of Penalties) Rules, 2014

Section 454(1)

Central Government (CG) may, by an order published in the Official Gazette, appoint as many officers of the CG not below the rank of Registrar, as adjudicating officers for adjudging penalty under the provisions of this Act in the manner as per the Companies (Adjudication of Penalties) Rules, 2014.

Section 452 (2)

CG shall specify the jurisdiction of appointed adjudicating officers in the order.

Section 454 (3) – Substituted 02.11.2018

If there is any **non-compliance or default under** the relevant provisions of the CA,2013 then adjudicating officer may, by an order –

- a) **Impose penalty** on the Company, the officer who is in default, or any other person, as the case may be; and
- b) direct them **to rectify the default**, wherever he considers fit.

Section 454 (4) Opportunity of Being heard and Companies (Adjudication of Penalties) Rules, 2014

Section 454 (4)

The adjudicating officer before imposing any penalty shall give a **reasonable opportunity of being heard** and issue a written notice in the specified manner to such Company and the officer who is in default

Rule 3 (2) reads that

The adjudicating officer shall issue a written notice in the specified manner to the Company and the officer in default **or any other person**, as the case may be, **to show cause**, within such period as may be specified in the notice (which is not <15 days and > 30 days) why the penalty should not be imposed on it or him.

Mention of Specific Non-Compliance

Rule 3 (3)

The **Notice** issued shall clearly **specify the nature of non-compliance** or **default** have been committed or made by such Company and the officer who is in default or any other person, as the case may be and also **draw attention to the relevant penal provisions** of the act and the maximum penalty which can be imposed on it and him.

Reply in Time

Rule 3 (4)

The Company and the officer who is in default or any other person has **to reply to such notice shall be filed in electronic mode** only within time specified in notice.

However Adjudicating Officer (AO) may **grant extension of further period not exceeding 15 days** if Company and the officer who is in default or any other person satisfies that

- a) it or he has **sufficient cause for not responding** to the notice within the stipulated period or
- b) the adjudicating officer has reason to believe that the company or the officer or the person has received a shorter notice and **did not have reasonable time to give reply.**

Appearance

Rule 3(5)

If in the opinion of AO physical appearance is required, he may issue **notice within a period of 10 days from** the date of reply and fix a date for appearance.

Provided that if any person, to whom a notice is issued under sub-rule (2), **desires to make an oral representation**, whether personally or through his authorised representative **and has indicated the same** while submitting his reply in electronic mode, the AO **shall allow** such person to make such representation after fixing a date of appearance

Order

Rule 3 (6)

On the date fixed for hearing and after giving a reasonable opportunity of being heard, the AO may **pass any order in writing** as he thinks fit including an order of adjournment.

Provided that after hearing AO may require the concerned person **to submit his reply in writing** on certain other issues related to the notice relevant for determination of the default.

Appearance

Rule 3 (7)

AO may pass an order:-

- In case **physical appearance not required** – within **30 days** after the expiry of the period given for reply (15 to 30 days or such extended period)
- In case **physical appearance required** – within **90 days** from the date of issue of appearance

If due to some reason there is delay in order passed then such order shall not be considered to be invalid, however AO to record the reason for such delay.

Order

Rule 3 (8)

Every **order** given by AO shall be **duly dated and signed by him** and shall clearly **state the reason** for requiring the physical appearance

Rule 3 (9)

Copy of the order by AO shall be sent to

- a) the concerned Company, Officer who is in default or any other person or all of them;
- b) Central Government ; and
- c) Uploaded on website.

**Powers of Adjudicating Officer
under
Rule 3 (10)**

to **summon and enforce the attendance** of any person acquainted with the facts and circumstances of the case after recording reasons in writing;

to order **for evidence or to produce any document**, which in his opinion may be relevant to the subject matter.

Rule 3 (11)

Adjudicating Officer may pass an **order of imposing penalty** if any person fails to reply or neglects or refuses to appear before him.

Rule 3 (12) – Factors to be considered for adjudicating quantum of penalty (For compounding also)

- a) Size of the Company;
- b) Nature of business carried on by the company;
- c) injury to public interest;
- d) nature of the default;
- e) repetition of the default;
- f) the amount of disproportionate gain or unfair advantage, wherever quantifiable, made as a result of the default; and
- g) the amount of loss caused to an investor or group of investors or creditors as a result of the default.

Provided that, in no case, the penalty imposed shall be less than the minimum penalty prescribed, if any, under the relevant section of the Act.

Rule 3 (13)

In case a fixed sum of penalty is provided for default of a provision, the AO shall impose that fixed sum, in case of any default therein.

Rule 3 (14)

Penalty shall be paid through Ministry of Corporate Affairs portal only.

Rule 3 (15)

All sums realised by way of penalties under the Act shall be credited to the Consolidated Fund of India.

Explanation 1

“specified manner” shall mean service of documents as specified under section 20 of the Act and rules made thereunder and details in respect of address (including electronic mail ID) provided in the KYC documents filed in the registry shall be used for communication under this rule.

Explanation 2

Requirement of submission of replies in electronic mode is mandatory after the creation of the e-adjudication platform

Section 454(5) &(6)
Rule 4 of the Companies (Adjudicating Penalties) Rules, 2014

Any person aggrieved by an order made by AO may prefer an Appeal

To Regional Director (RD) in From ADJ

Within 60 days from the date of order
received by the aggrieved person

Rule 5 Registration of Appeal

On receipt of Appeal . RD shall endorse the date on such Appeal and sign such endorsement **and** if appeal **found in order** shall be duly **registered** and serially numbered.

Provided that appeal found to be **defective**, RD may **allow** not less than **14 days** time to appellant **to rectify** the defects.

Provided further that RD may grant extension of **further** period of **14 days** if appellant satisfies **sufficient cause** for **not rectifying** the defect within 14 days

If appellant **fails** to **rectify** the defect within 14 days, then **RD** may **refuse** to **register** such appeal **within 7 days** by order in writing after completion of period of 14 days.

Rule 6 Disposal of appeal by RD

Rule 6 (1) Serve copy of Appeal

RD shall serve copy of appeal to AO against whose order the Appeal is sought along with notice requiring such AO to file his reply thereto within a period of 21 days.

Provided that RD may extend the further period of 21 days if AO satisfies sufficient cause to not file within period of 21 days.

Rule 6 Disposal of appeal by RD

Rule 6 (2) Serve copy of reply

A copy of reply, application and written representation filed by AO before RD and he shall serve same copy to the Appellant.

Rule 6 Disposal of Appeal by RD

Rule 6 (3) Date of hearing

RD shall **notify** the **parties** date of hearing **before 30 days** from the date of hearing of the Appeal

Rule 6 Disposal of appeal by RD

Rule 6 (4) Adjournment

On the date fixed for hearing RD may, subject to the reason to be recorded in writing, pass any order as he thinks fit or order of adjournment of hearing to a future date

Rule 6 Disposal of appeal by RD

Rule 6 (5) Order of Ex-parte

In case the Appellant or AO does not appear on the date fix for hearing RD may dispose off the Appeal “Ex-parte”

However RD may set aside the ex-parte order and restore Appeal if Appellant appears afterwards and satisfies the RD that there was sufficient cause for his non-appearance.

As per Section 454(7) of CA 2013

Order of Regional Director



Regional Director may after giving the parties to the Appeal an opportunity of being heard, pass such order as he thinks fit, **confirming, modifying or setting aside the order** appealed against.

Rule 6 Disposal of appeal by RD

As per Rule 6(6) - the Order passed shall be dated and signed by RD

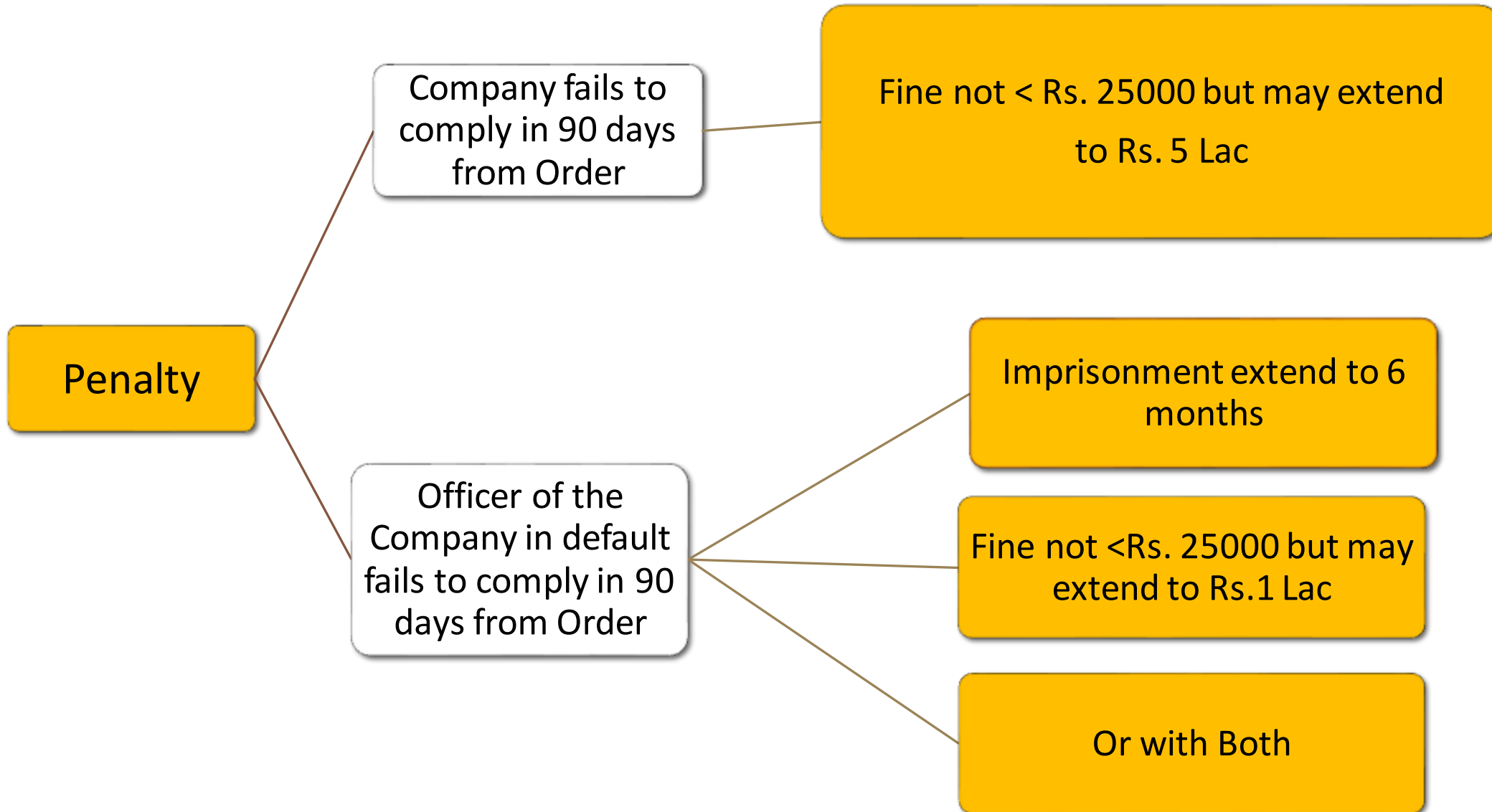
As per Rule 6(7) - Certified copy of every order shall be send to

AO

Appellant

Central
Government

Penalty u/s 454 (8)



Ease of Doing Business- Clear Data Base of RoC

If the default relates to non-compliance of Section 92 (4)- (**Filing of Annual Return with RoC**) or Section 137 (1) or (2) (**Filing of Balance Sheet with RoC**) and such default has been **rectified either prior to, or within 30 days of,** the issue of the notice by the AO,

No penalty shall be imposed in this regard and all proceedings under this section in respect of such default shall be deemed to be concluded.

Vide CAA 2020 wef 22 Jan 2021

450. Punishment where no specific penalty or punishment is provided.

If a Company or any Officer-in-Default or any other person contravenes any of the provisions of the CA 2013 or the rules made thereunder and for which no penalty or punishment is provided elsewhere in the CA 2013

It or they shall be liable to a penalty of INR 10,000/- and in case of continuing contravention with a further penalty of INR 1000/- for each day after the first during which the contravention continues

subject to a maximum of INR 2 Lakh in case of a company and INR 50,000/- in case of an officer who is in default or any other person

Fine to Penalty – CAA 2020

Section 446B-Lesser Penalties for certain companies

For **OPC / Small Company / Start-up Company / Producer Company**, or by any of its officer in default, or any other person in respect of such company,

Such company/ its Officer in Default or any other person, as the case may be, shall be liable to a penalty which shall not be more than **one-half of the penalty** specified in such provisions subject to a maximum of INR 2 Lakh in case of the company and INR 1 Lakh in case of the Officer-in Default or any other person, as the case may be.

Vide CAA 2017

Penalty for repeated default (S-454A)

Where a company or an officer of a company or any other person having already been subjected to penalty for default under any provisions of this Act,

Again commits such default within a period of three years from the date of order imposing such penalty passed by the AO or RD

It or he shall be liable for the second or subsequent defaults for an amount equal to twice the amount of penalty provided for such default under the relevant provisions of this Act

Penalty for Repeated Default (S-451)- Criminal Offence – Non Compoundable

If a company or an officer of a company commits an offence punishable either **with fine or with imprisonment** and where the same offence is committed for the second or subsequent occasions **within a period of three years,**

then,

The company and every officer thereof who is in default shall be punishable with **twice the amount of fine for such offence in addition to any imprisonment** provided for that offence.

Changes at a glance of CAA 2020

There were following changes for EoDB

- 15 Important changes in various sections
- 09 Powers of Central Government (MCA)
- 12 Punishment by way of Imprisonment removed, though offence remain criminal
- 05 Punishment removed for offence
- 26 -Decriminalization
- 07 Reduction in amount of Penalty

Impact of such change

1

- Scrutiny of forms, Inquiry, Show Cause Notices , Investigation, Professional misconduct

2

- Prosecution will be reduced and penalties will be imposed to settle the matter

3

- No Compounding possible in cases of civil offences and only Adjudication

Adjudicating Officer vs. Bhavesh Pabari dated 28th February, 2019

A **three member Bench of the SC** overruled its earlier decision in **Roofit Industries Ltd vs SEBI**, and provided a controlled discretion to the AO in fixing penalties for offences under the SEBI Act as well Securities Contract Regulation Act (SCRA) as a result of the ruling, the Adjudicating Officer **shall not be constrained by the minimum extent of penalty** laid in SEBI Act and may, where circumstances so warrant, **either waive off the penalty completely or may assign a penalty less than the so called minimum.**

Thus, the adjudication of penalties may be expected to be more commensurate with the gravity of the offence, than was so far possible primarily due to the position arising out of Roofit ruling

Compounding u/s 441 of the CA 2013

Compounding of Offence

Offences can be compoundable or non compoundable.

To compound means “to settle a matter by a money payment, in lieu of other liability.”

Compounding of Offences means to accept the mistake and establish a compromise between two parties, where the complainant agrees to have the charges dropped against the accused.

Compoundable Offence & Non Compoundable Offence

Compoundable offence

- Offences punishable with fine.
- Offences punishable with imprisonment **or** with fine.
- Offences punishable with imprisonment **or** with fine **or** with both.

Non-Compoundable offence

- Offences which are punishable with imprisonment only.
- Offences which are punishable with imprisonment **and** also with fine.

Compounding of Offence (S-441)

Acceptance of **mistake**

Settlement mechanism thereby avoiding a litigation.

Option given to **pay money** in lieu of prosecution

Compounding of Offence (S-441)

Only Criminal Offences can be compounded. This means offence punishable with fine, imprisonment or both can be compounded

Civil offences can be adjudicated. This means offences punishable with Penalty can not be Compounded

Compounding of Offences RD/NCLT has power to levy cost lesser than fine prescribed in the Act. However in case of Rule 3(13) and proviso to Rule 3(12) does not provide such discretion.

Compounding can be suo-moto where as in case of Adjudication no provision for suo-moto filing of an application for adjudication

Advantages of Compounding of Offence

- **No prosecution can be initiated** after an offence is compounded. If already initiated ROC intimates to concerned court and action closes
- **No personal appearance** for officer in default, as in case of prosecution for an offence in a criminal court.
- **Summary proceeding**, less time consuming
- Compounding **fee cannot be more than the maximum fine** levied under the relevant provision
- **No Appeal against order of Composition** as the Order is passed with the consent of the parties
- 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

Compounding Authority

National Company Law Tribunal (NCLT)

Or

Regional Director / or any officer authorized by the Central Government

(Where the maximum amount of fine which may be imposed for such offence does not exceed
Rs.25 Lakh)

Certain Offences cannot be compounded

Where any investigation has been initiated or is pending

Or

Where an offence has been committed by a company or its officer **within a period of 3 years** from the date on which a similar offence committed by the company or its officer was compounded.

Process for Compounding of Offence

1. Check the provisions under the Act , if such offence are compoundable or not
2. Make the default good
3. Make application and file with RoC in Form GNL-1 in 7 days
4. RoC forward its Report to the concerned authority (NCLT or RD)
5. Appearance before the Authority
6. Submission by the Applicant
7. Order by RD or NCLT as the case may be
8. Filing order in Form INC -28

Failure to pay the compounding fees

If any officer or other employee of the Company who fails to comply with any order made by the **Tribunal or the Regional Director or any officer authorised** by CG,

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.

Section 446A-Factors for determining level of punishment.

The Court or the Special Court, while deciding the amount of **fine or imprisonment** under this Act, shall have due regard to the following factors, namely:—

- (a) size of the company;
- (b) nature of business carried on by the company;
- (c) injury to public interest;
- (d) nature of the default; and
- (e) repetition of the default

This provision is inserted vide CAA 2017

Section 442- Mediation and Conciliation Panel.

- CG has maintained a panel of experts as the **Mediation and Conciliation Panel** for mediation between the parties during the pendency of any proceedings before CG / Tribunal or Appellate Tribunal under the CA 2013.
- Any of the parties to the proceedings may, at any time during the proceedings **apply for referring** the matter pertaining to such proceedings to the **Mediation and Conciliation Panel** and **the Central Government or the Tribunal or the Appellate Tribunal**, as the case may be, shall appoint one or more experts from the panel .
- The Mediation and Conciliation Panel shall follow the procedure and dispose of the matter referred to it within a **period of three months** from the date of such reference and forward its recommendations to the Central Government or the Tribunal or the Appellate Tribunal, as the case may be.

Compounding of Offence

Compounding of Offence (S-441)

Few Critical Issues

If NCLT can compound an offence where maximum fine prescribed is less than 25 lacs?

Yes.

NCLAT held that the Tribunal has the powers to compound all the offences irrespective of any pecuniary limit.

Pahuja Takii Seed Ltd. & Ors. Vs. The Registrar of Companies, NCT of Delhi & Haryana, Company Appeal (AT) No. 80 of 2018, NCLAT order dated 27.09.2018

Compounding of Offence

Compounding of Offence (S-441)

Few Critical Issues

Whether the Companies Act, 2013 bars filing of a joint application for compounding of offence by a defaulting company along with its officers in default and committed in different years ?

No bar.

MCA clarified vide letter dated 28th April, 1993 and further vide letter dated 31st January, 2018 that there is no bar under the Companies Act, 2013 in filing joint compounding applications.

**Pahuja Takii Seed Ltd. & Ors. Vs. The Registrar of Companies,
NCT of Delhi & Haryana, Company Appeal (AT) No. 80 of 2018,
NCLAT order dated 27.09.2018**

Compounding of Offence

Compounding of Offence (S-441)

Few Critical Issues

“Section 451. Punishment in case of repeated default-

If a company or an officer of a company commits an offence punishable either with fine or with imprisonment and where the same offence is committed for the second or subsequent occasion within a period of three years, then, that company and every officer thereof who is in default shall be punishable with twice the amount of fine for such offence in addition to any imprisonment provided for that offence.”

Whether an offence punishable under the relevant provisions of the Companies Act, 2013 with **‘imprisonment or fine’**, if repeated within a period of three years results into a mandatory imprisonment for the defaulters and whether the same can be compounded or not?

Whether an offence punishable under the relevant provisions of the Companies Act, 2013 with **‘only fine’**, if repeated within a period of three years results into a mandatory imprisonment for the defaulters and whether the same cannot be compounded?

No.

Offence must be compounded and then only there is restriction on Compounding if same offence is committed within 3 years and the provisions of Section 451 also becomes applicable.

Compounding of Offence

Compounding of Offence (S-441)

Few Critical Issues

A Limited defaulted in the compliance of Section 135(5) of the Companies Act, 2013.

Penalty is twice the amount required to be transferred by the Company to the Fund specified in Schedule VII or the Unspent Corporate Social Responsibility Account, as the case may be, or one crore rupees, whichever is less, and every officer of the Company who is in default shall be liable to a penalty of one-tenth of the amount required to be transferred by the Company to such Fund specified in Schedule VII , or the Unspent Corporate Social Responsibility Account, as the case may be, or Rs.2 Lakh whichever is less.]**Officer in default files a Compounding application. Can it be compounded by RD?**

Legally Yes. But Company runs with huge risk of prosecution as its now in knowledge of MCA.

Compounding of Offence

Compounding of Offence (S-441)

Few Critical Issues

Who shall be compounding authority where maximum fine on Company is below 25 lacs and maximum fine on each Officer in default is below 25 lacs, but aggregate maximum fine is beyond 25 lacs?

Maximum fine is calculated for Company and each officer in default separately and on that basis the Compounding authority is decided.

Compounding of Offence

Compounding of Offence (S-441)

Few Critical Issues

The Company committed a compoundable offence during the financial year 2015-16, 2016-17 & 2017-18. On application of the Company the offence was compounded for the year 2015-16 vide order dated 31st March 2019. The Company has committed same offence during 2018-19 also and wants to go for compounding of the same.

Can the Company get the offence compounded for the Year 2016-17, 2017-18 & 2018-19?

Yes, all three years offence can be compounded as these offences were committed prior to compounding order. If same offence is repeated during 2019-20 that can not be compounded.

Section 441(2) provides that an offence committed by a company or its officer **within a period of three years** from the date on which a similar offence committed by it or him was compounded under this section, can not be compounded.

Compounding of Offence

Compounding of Offence (S-441)

Few Critical Issues

Whether an officer in default, which has got an offence compounded, can get the same offence compounded in another company within three years from the last compounding?

Whether the second offence is to be seen from the point of view same company or the default is to be seen individually whether company or officer?

No.

The offences committed either by the company or its officers have to be determined on individual basis.

The company and its officer are not bound by the consequence of other's action since the liability of the offence is personal in nature and cannot be tagged along with others.

Compounding of Offence

Compounding of Offence (S-441)

Few Critical Issues

Whether compounding authority has discretion to reject the Compounding application?

The Compounding application cannot be rejected without due consideration.

The Company Law Board (now NCLT) in the case of **Amadhi Investments Ltd.**, held that **neither** of the CLB or the Regional Director has been authorized with discretionary power to reject a compounding application without due consideration.

Compounding of Offence

Compounding of Offence (S-441)

Few Critical Issues

Whether NCLT has powers to review its own decision?

The NCLAT in the case APC Credit Rating Private Limited Vs. Registrar of Companies, NCT of Delhi and Haryana, [2018] 143 CLA 166 (NCLAT) held that;

“it is clear that there is **no inherent power to review**, as is under Order 47 Rule 11 of the Code of Civil Procedure, 1980 but the Tribunal has power conferred by sub-section (2) of Section 420 of the Act, 2013 to **rectify any mistake apparent** from the record and to amend the order accordingly.”

It is clear that inherent powers under Rule 11 of the NCLT Rules can't be said to be empowering NCLT with a power to review.

Compounding of Offence

Compounding of Offence (S-441)

Few Critical Issues

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

The Act does not contain any provision which requires a company to make good the default before filing compounding application.

However, section 441 (4) states that NCLT or RD, while dealing with the proposal of compounding of an offence relating to default in compliance with any provision of the Act, is of the opinion that the same is necessary then **it may direct the defaulting party to comply with the provision**, the contravention of which is being requested for compounding.

RD/Tribunal generally insist that the defaulting entity/person has made good the default before filing the application.

Compounding of Offence

Compounding of Offence (S-441)

Few Critical Issues

Certain non compliances trigger consequential actions viz vacation. Whether compounding amounts to relief from other consequences?

Let's say a director has violated the provisions of Sec 184 regarding disclosure of interest or Sec. 165 regarding the number of directorships and on application the offence is compounded. If this compounding gives relief from consequence of vacation under section 167.

Answer is **BIG NO**

Compounding of Offence

Compounding of Offence (S-441)

Few Critical Issues

Under FEMA all offences are civil in nature, but still law enables compounding of the same

Whether offences punishable with penalty can be compounded?

Section 441(1) of the Act provides that any offence punishable under this Act (whether committed by a company or any officer thereof) not being an offence punishable with imprisonment only, or punishable with imprisonment and also with fine can be compounded.

Compounding is settlement for preventing unwarranted criminal trial by doing the offence good and paying cost.

In case of an offences punishable with Penalty there is no criminal trial, but there is civil adjudication as per Section 454.

Compounding of Offence

Compounding of Offence (S-441)

Few Critical Issues

Whether compounding Authority can levy cost less than minimum prescribed under respective section ?

NCLAT order dated 28.02.2016 in the matter of **Viavi Solutions India Private Limited in Company Appeal (AT) No. 49-53 of 2016**

Yes

However, Two member bench of NCLAT vide order dated 12.09.2018 in the matter of ROC, Jaipur Vs. **Gyan Chand Agarwal in Company Appeal (AT) No. 249 of 2018** levied minimum fine prescribed under section 165 of the Act

Three members bench of NCLAT order dated 24.06.2020 in the matter of **ROC, Kolkata Vs. Sabyasachi Bagchi** in Company Appeal (AT) No. 12 of 2019 despite acknowledging the judgement of **Hon'ble Supreme Court in the matter of Bhavesh Pabari of 2019 viewed for levy of minimum fine prescribed in section 165**, while compounding of an offence)

No

Adjudication of Penalties

Adjudication of Penalties (S-454)

Few Critical Issues

Whether a Company can file an application for adjudication of penalties or this is a discretion of Adjudicating Officer?

Section 454 does not provide any such power to the Company or its officer, however we have seen many Adjudication Orders where application has been made by Company/officers.

Suo moto is possible

Adjudication of Penalties

Adjudication of Penalties (S-454)

Few Critical Issues

There is a restriction on Compounding of offence, if same offence is committed within 3 years.

Whether similar restriction applies on adjudication of second offence within three years?

No, restriction under Section 454 of the Companies Act, 2013, however Section 454A provides where a company or an officer of a company or any other person having already been subjected to penalty for default under any provisions of this Act, again commits such default within a period of three years from the date of order imposing such penalty passed by the adjudicating officer or the Regional Director, as the case may be, it or he shall be liable for the **second or subsequent defaults for an amount equal to twice the amount of penalty** provided for such default under the relevant provisions of this Act.

Adjudication of Penalties

Adjudication of Penalties (S-454)

Few Critical Issues

Whether an offence can be compounded, which at the time of commission was criminal & compoundable but at the time of filing of compounding application got decriminalised, ie. subjected to adjudication of Penalties ?

Section 454 does not provide any such power to the Company or its officer, however we have seen many Adjudication Orders where application has been made by Company/officers.

RoC is directing to file Compounding Application

Adjudication of Penalties

Adjudication of Penalties (S-454)

Case Studies

Adjudication Order dated 19.02.2020
in the matter of non compliance of
Section 12(3)(c) by World First
Payment Gateways (India) Private
Limited

The Company used letter head without contact no, so was liable to penalty as per the provisions of Section 12(8) of the Companies Act, 2013, which provide for a penalty of Rs.1000 for every day during which the default continues subject to maximum of Rs.1 Lakh

Company and its three directors were directed to pay a Penalty of Rs. 7500/- each.

Recent Order of RoC across India

Gujarat RoC Order for non certification of MGT 7 Annual Return by PCS- Parag Sheth , Liquidator of Maxroth Impex Private Limited – Order dt 17 Jan 2022

Chennai RD Order reducing penalty to 1/10th imposed by RoC Chennai in the matter of Marjan Motors Private Limited for delay in appointment of CS beyond 6 months Order dt 06 Jan 2022

Bangalore HC passed penalty order in violation of Section 117 (1) for not filing FormMGT 14 with in 300 days.

Banaglore RoC Order for penalty of Rs.2 Crores imposed u/s 42 Private Placement

Thank you

Amita Desai & Co.

Company Secretaries

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