

No guarantee against prosecution

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The Companies Act, 1956 requires every company registered under the Act to file various returns and forms with the Registrar of Companies (RoC), from time to time.

Irrespective of the size and type of a company — private or public, listed or unlisted, profit- or loss-making — it has to file a minimum of two returns every year with the RoC — annual accounts and annual return.

Filing of other returns/forms depends upon the happening of an event, such as appointment or cessation of a director, creation of charge, shifting of registered office and allotment of shares. All such returns or forms have to be filed within the period prescribed in the Act.

The period could vary from 30 to 60 days and, in some cases, it could be even three months. Any filing made beyond the prescribed period is classified as delayed.

NOT TAKEN ON RECORD

Not very long ago the returns/forms filed after the prescribed period, though accepted by the RoC, were not taken on record. Instead, letters seeking explanation for delayed filing would be sent to the company and only after the RoC is satisfied would that the form be taken on record.

As a result, over the years, at any given time, there used to be thousands of such documents pending to be taken on record for want of explanation from the companies concerned.

In many cases, delayed filings used to result in prosecution of the

companies and their directors. However, even prosecution was not a quick solution as the same got mired in judicial procedures.

To effect some pragmatic changes in the situation, the Department of Company Affairs (now Ministry of Corporate Affairs), in June 1994, liberalised the procedure by standardising the payment of additional fees payable on late filing of forms by companies having authorised share capital of up to Rs 1 crore and for a certain period of delay.

The liberalised procedure worked well and so the Government decided to extend the same. Therefore, as per the recommendations of the Review Committee set up by the Department, the standardisation of additional fee was extended to all the companies irrespective of their authorised share capital and the period of delay.

ADDITIONAL FEE

Accordingly, with effect from May 1, 1995, the Department decided to levy fixed rates of additional fee depending on the delay in filing the documents concerned. The system continues to this day with delayed filing of documents being accepted on the payment of additional fees ranging from double to nine times the filing fees.

Only in respect of filing of Form 5 in respect of increase in authorised capital, the additional fees payable for delayed filing is *ad-valorem*, ranging from 2 per cent to 2.5 per cent per month of the fees payable.

Today, it is a normal practice for companies to file returns and forms after the expiry of the prescribed date by paying the applicable addi-

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tional fees to the RoC. A question that needs consideration in this context is: Does the payment of additional fees to the RoC by a company in respect of delayed filing absolve the company and its directors of all the liabilities under the Act?

Before answering this, reference may be made to Section 611(2) of the Act, which, *inter alia*, states the RoC can accept the delayed document on payment of the specified fee, "without prejudice to any other liability."

In other words, what the provision implies is that, while the RoC would accept the document filed with late fees, it reserves the right to proceed against the company and its directors.

KERALA HC CASE

Recently, a case on this issue came up before the Kerala High Court. The RoC, in this case, had filed complaints against a company and its six directors, all initiated under the Companies Act.

The complaints were in respect

of failure to file annual returns and balance-sheets within the stipulated time.

The petitioners moved the High Court with a prayer that the proceedings against them in those six cases may be quashed by invoking the powers under Section 482, Code of Criminal Procedure, 1973 (*Bell House Associates (P) Ltd vs Registrar of Companies — 2007 76 SCL 425 Kerala*).

In the *Bell* case (supra) the petitioners claimed that they were to take benefit of the Simplified Exit Scheme, which was in force at the relevant time and as such could not have been prosecuted by the RoC. However, the petitioner failed to avail of the exit scheme. Hence, the ground failed before the High Court.

The other contention of the petitioners was that they had already paid all the amounts (late fees), payable under Section 611(2). According to the petitioners, the maximum amount payable was only Rs. 33,000, while actually Rs 50,000 had been paid.

This, according to the petitioners, was more than the maximum leviable under the said Section 611(2). In other words, Rs 17,000 was collected by the RoC in excess of the maximum amount payable by the petitioners. Hence, the counsel for the petitioners urged the proceedings be quashed.

The High Court opined that the language of Section 611(2) was very clear that the payment of the amounts under that section was without prejudice to any other liability of the defaulter.

In the view of the court, the defaulter exposed himself to the liability to be prosecuted for breach of

the stipulation in respect of filing of annual return and the balance sheet, as stated in Sections 159 and 220(3) read with Section 162 of the Act.

In the same case, the court further held that mere payment of additional fees under Section 611(2) of the Act by itself cannot absolve the petitioners of the liability to be prosecuted in the said six proceedings. So far as the payment of excess amount was concerned, the court held that if it was true, then the petitioner could press his claim for reduction of liability for penalty/punishment as may be awarded by the trial court in the said proceedings.

CRIMINAL PROCEEDINGS

Consequently, the High Court refused to quash the criminal proceedings and instead directed the petitioners to face the prosecution launched by the RoC.

Hence, the fact that a return or form has been accepted by the RoC after payment of additional fees for delayed filing by itself does not mean that the company and its directors have been absolved of any other liability under the Act.

Directors should not be under the illusion that in case of delayed filing, once the documents are filed with late fees, the matter comes to an end so far as their liability is concerned.

In fact, the directors will have to be wary till the period of limitation is over, as the RoC has power to launch prosecution against a company during that period for delayed filing of returns.

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