PART XXXIII

OFFENCES

Chapter 1

Officer in Default

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Important Provisions at a Glance

Sl. No.	*Sections*	*Matters dealt with*	*Form Nos.*
1.	2(30)	Meaning of "officer".	
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1. Meaning of 'officer'

Section 2(30) of the Companies Act, 1956, provides that officer includes any director, manager, secretary or any person in accordance with whose directions or instructions the Board of directors or any one or more of the director is or are accustomed to act. Therefore, it refers only to the officers of the company and not subordinate staff.

Definition of the term 'officer' is to be read in the context provided and not independently thereof. [*Haryana Seeds Development Corpn. Ltd.* v *J.K. Aggarwal* (1989) 65 Comp Cas 95 (P&H)].

The definition of 'officer' cannot be taken as exhaustive or conclusive and, therefore, Secretary, Assistant Secretary, accountant and cashier of a bank are all officers of bank. [*Hanuman Bank Ltd., In re* (1964) 34 Comp Cas 640 (Mad.), *Official Liquidator, Golcha Properties* (*P.*) *Ltd.* v *P.C. Dhadda* (1980) 50 Comp Cas 175 (Raj)].

2. Meaning of 'officer who is in default'

The Companies Act, 1956 in number of sections uses the term 'officer in default' when affixing a person with liability for offences, *i.e.* if default is made in complying with a section, the company and every officer of the company who is in default shall be guilty of an offence under that section. This is followed by the specified penalty consisting of fine or fine and imprisonment in certain cases.

Section 5 of the Companies Act, provides that, for the purpose of any provisions in this Act which enacts that an officer of the company who is in default shall be liable to any punishment or penalty, whether by way of imprisonment, fine or otherwise, the expression 'officer who is in default' means all the following officer of the company, namely:—

(*a*) the managing director or managing directors;

(*b*) the whole-time director or whole-time directors;

(*c*) the manager;

(*d*) the secretary;

(*e*) any person in accordance with whose directions or instructions the Board of directors of the company are accustomed to act;

(*f*) any person charged by the Board with the responsibility of complying with that provisions:

Provided that the person so charged has given his consent in this behalf to the Board;

(*g*) where any company does not have any of the officers specified in clauses (*a*) to (*c*), any director or directors who may be specified by the Board in this behalf or where no director is so specified, all the directors:

Provided that where the Board exercises any power under clause (*f*) or clause (*g*), it shall within 30 days of the exercise of such powers, file with the Registrar a return in the prescribed form.

Therefore, all the above said seven specified categories of officers of the company would be deemed to be an officer who is in default irrespective of whether they were party to the default or not. It would be enough to show that a statutory provision has not been complied with in order to bring them under the mischief of the section. However, section 5 applies only to those provisions of the Act, which uses the expression 'officer who is in default'.

A close analysis of section 5 reveals the following:—

(a) Liability as officer in default is fastened on all the officers specified in clauses (*a*) to (*g*) collectively.

(b) Liquidator is an officer of the company. [*Official Liquidators, Baroda Batteries Ltd.* v *Registrar of Companies* (1978) 48 Comp Cas 120 (Guj.), *Prahallad Bai Lath* v *Registrar of Companies* (1979) 49 Comp Cas 317 (Ori)].

(c) If company have any of the officers specified in clauses (*a*) to (*c*), the other directors will not be held as officers in default.

(d) A company, which does not have any of the officers, specified in clauses (*a*) to (*c*), any director or directors specified by the Board will be held as officers in default.

(e) If there is no officer as mentioned in clauses (*a*) to (*c*) and also the Board has not specified any of them, then all the directors will be held as officer in default, it may include employee directors, part-time directors and nominee directors as in default. Nominee directors of creditors, institutions, government, joint venture partners etc, generally, do not enjoy any special immunity. Financial institution nominee directors, however, get immunity under the State Financial Corporation Act

but it has to be established that the accused person has acted in good faith. [*Geethanjali Mills Ltd.* v *Thiruvengadathan* (1989) 1 Comp LJ].

(f) When the directors on the Board of a company are in fact dummy persons and other person who remain behind the scene control the act of directors, such a person may perhaps include a company or firm, in which case the directors of that company or partners of that firm would be treated as persons in accordance with whose directions or instructions the Board of directors of the other company are accustomed to act.

(g) The expression 'any person charged by the Board' refers only to officers of the company and not to sub-ordinate staff. Further, the Board should charge a person with the responsibility of complying with any specific responsibility by passing a resolution (*see* Appendix 1) and the person so charged is required to give consent in Form 1AB (*see* Appendix 3). Thus, where a company has not obtained consent of the person as prescribed, he cannot be charged by the Board.

(h) The consent of the person as mentioned in clause (*f*) shall be filed electronically with the Registrar within 30 days in an e-Form 1AA (*see* Appendix 2) with the filing fee enclosed with Form 1AB.

3. Liability of all the directors' u/s 5(*g*)

All the Directors of the company will be officers in default within the meaning of section 5 only when there is no Managing Director, Whole Time Director, Manager, Secretary, a person, charged by the board with the responsibility of complying with the provisions of the Act and the director/directors specified by the Board under clause (*g*) of section 5. [*Vijay Kumar Gupta* v *Registrar of Companies* (2003) CLC 777 (HP)]

4. What prosecution has to prove?

The Karnataka High Court in the case of *Nucor Wires* v *HMT* (1998) 30 ClA, 319, (Kar) had laid down certain parameters in respect of launching prosecution against directors, which briefly are as follows:

(*a*) There must be specific allegation by the prosecution against the director and vague submissions are liable to be set aside by the Court.

(*b*) The prosecution must conclusively prove that:

- Accused was in charge of the company.
- He was responsible for the conduct of business.
- Offence was committed with his knowledge.
- He did not exercise due diligence to prevent commission of the offence which will mean that there was an element of negligence on his part.

(*c*) The prosecution must also:

- Prove that the director knowingly, willfully, and with connivance has committed, authorized, or permitted the offence. This is not very important in case of "Officer-in-default" where guilty mind is not to be proved.
- Bring in material in the indictment, which will indicate that the accused actually held the post on the date of occurrence of the offence. [*Sivalingam Chettiar* v *Labour Officer* (1986) 59 Comp Cas.701].

Significantly, it may be noted that mere allegation by prosecution that that the accused is director will not be sufficient. The court had held in a case of *A S Dalela, Food Corporation of India* v *State of Haryana* (1995) 1 Comp LJ 546 that in a complaint it must be disclosed specifically as to how the offence was committed and how the particular accused was responsible.

5. What defence the director has?

On initiation of prosecution against him, the director needs to defend his case. Some indicative defenses, gathered from various judgments of courts, are list below:

(a) Director has to prove that he does not fall under the ambit of "Officer-in-default" u/s 5 of the Companies Act.

(b) He was not in charge or control of the day-to-day affairs of the company, and hence, not responsible. It was held by Supreme Court that to be in charge would mean that the person should be in overall control of the day-to-day business of the company.

(c) Offence in question was committed without his consent/knowledge/connivance and he was not negligent in ensuring that laws are complied.

(d) Allegation is vague and not specific.

(e) The company has not been prosecuted along with the director. In the case of *U.P. Pollution Control Board* v *Modi Distillary* AIR 1988 SC 1128 the Supreme Court had held that there can be no vicarious liability of the director or officer for the acts of the company unless the company is also prosecuted along with the accused.

(f) The offence was committed after his tenure and he cannot be held responsible for any thing happening after his resignation/retirement. [*Chokkalingam Chettiar* v *Official Liquidator* (1943) 13 Comp Cas 263 (Mad)]. In the case of *Anita Chadha* v *Registrar of Companies* (1998) 31 CLA 60 (Del), it was held by Delhi High Court that, for a continuing offence committed during his tenure, a director may not be held liable after his resignation /retirement, if he can prove that he had no access to the records of the company and also no connection.

(g) Under section 633(1) of the Companies Act, the director can seek relief from the court by proving that he has exercised all due diligence to prevent the commission of the offence, acted honestly, reasonably and having regard to all circumstances ought to be fairly excused.

(h) When it is held that the petitioner is not an officer in default as per section 5 the question whether such alleged default was wilful or not does not arise. [*C.V. Siva Prasad* v *Registrar of Companies* (1997) 2 Comp LJ 205 (AP)].

(i) When a director of a company submits his resignation from directorship of a company by giving one month's notice and Articles of Association of that company provides that a director may retire from his office upon giving one month's notice in writing to the company of his intention to do so, then such resignation will take effect upon the expiration of such notice or its earlier acceptance by the company and the company is bound to intimate such resignation of director to Registrar of companies by sending e-Form 32, and the said director is absolved from his liabilities for future transactions, even if Form 32 has not been sent to the Registrar. In the mean time if such companies go in liquidation, official liquidator is under duty to send Form 32, with the leave of the winding up court. **[***V. Thangavel vs. Associated Business Credits Ltd. & Ors*. (2006) 65 (I) CC (Comp. Sec.) 409 (Rep.) (CLB-HC)]

6. Directors where held as officer in default

The combined effect of clause (30) of section 2 and section 5 is that all the directors of the company cannot at all be construed as 'officers in default', unless each of the directors is an 'officer in default' within the meaning of section 5. Service of notice is a crucial factor for determining the question as to whether an accused could be construed as an 'officer in default'. [*Sivandhi Adityan* v *Additional Registrar of Companies* (1995) 83 Comp Cas 616 (Mad)].

If a person is shown as director in return, he is officer of the company. [*H.H. Marthanda Varma* v *Registrar of Companies* (1988) 64 Comp Cas 125 (Kar)].

In case of an offence under Minimum Wages Act, each director is liable. [*Hari Charan Singh Dugal* v *State of Bihar* (1989) 66 Comp Cas 449 (Pat)].

Where Registrar has issued notice to all directors in respect of default committed by a company under sections 161 and 220, but gets no response from any of them, prosecution may be launched against all of them as 'officers' in default. [*Asstt. Registrar of Companies* v *Southern Machinery Works Ltd*. (1986) 59 Comp Cas 670 (Mad)].

Only those officers who are knowingly and intentionally guilty of the offence can be punished. [*Consolidated Pneumatic Tool Co.* (*I*) *Ltd.* v *Addl. Registrar of Companies* (1989) 65 Comp Cas 259

(Bom)].

7. Directors, where not held as officers in default

Where the company had accepted excess deposits in contravention of section 58A, the director, who was neither a managing or whole- time director, not even a shareholder nor was he involved in day-to-day affairs of the company could not be said to be 'an officer in default'. [*H. Nanjundiah* v *Govindan, Registrar of Companies* (1986) 59 Comp Cas 356 (Bom)].

Where the managing director of a company was prosecuted for an offence under the Payment of Bonus Act, but there was no allegation in the complaint filed by the Labour Officer that the managing director was responsible for the conduct of the company's business, it was held that without an allegation that the person was in charge of and was responsible for the conduct of the company's business, the complaint could not be maintained. [*V.B. Sivalingam Chettiar* v *Labour Officer* (1986) 59 Comp Cas 701 (AP)].

Even after retirement, a director would come under definition of an officer in default. [*Anita Chadha* v *ROC* (1998) 8 SCL 304 (Del)].

Where complainant purchased debentures from open market and lodged same for registration of transfer but part of debentures were returned without registration for want of clearance as to payment of call money and despite representation company did not do needful, Chairman and director would fall within purview of 'officer in default' under section 5 and Trial Court would be justified in taking cognizance of complaint. [*Hindustan Development Corpn. Ltd.* v *Kushan Chand Bader* (1998) 15 SCL 1/94 Comp Cas 384 (Raj)].

When in complaint, accused were not shown as 'officer in default' they could not be held responsible merely because they were directors. [*Rameshchandra Manilal Kotla* v *State of Gujarat* (1998) 30 CLA 313 (Guj)].

For offences committed prior to appointment of petitioner as managing director, he cannot be held as officer in default u/s 5. [*C.V. Siva Prasad* v *Registrar of Companies* (1997) 88 Comp Cas 420 (AP)].

8. Apprehension of prosecution

A director may fear prosecution in case of his negligence, default, breach of duty, misfeasance or breach trust, and wants to take preventive action. He is permitted to make an application to the High Court, u/s 633(2) of the Companies Act seeking grant of relief. In the case *of Keni Tamiya, in re*, (1990) 68 Comp Cas 142, a Court had allowed relief in advance to Japanese directors who were not involved with day-to-day activities of an Indian company.

For defaults under the Income-tax Act whether 'directors' are 'principal officers' or 'agents' can only be determined on evidence. [*Shyam Sundar Jalan* v *State* (1977) 47 Comp Cas 61 (Cal)].

If a person is shown as director in return, he is officer of company. [*H.H. Marthanda Varma* v *Registrar of Companies* (1988) 64 Comp Cas 125 (Kar)].

9. Officer in default u/s 73(2A) must be understood with reference to section 2(31)

A 'director of a company who is an officer in default' appearing in section 73(2A) must be understood with reference to the definition of 'an officer who is in default' contained in section 2(31) read with section 5. This definition includes the managing director or a whole-time director of a company. So understood, the liability imposed u/s 73(2A) on a director of the company falls only upon a director who is 'an officer in default', as defined under section 2(31) read with section 5, and not upon any other director. The nominees of the Government or financial institutions on the board of directors of the company, but not directly in charge of its administration as full time directors are exempted from personal liability. [*Raymond Synthetics Ltd.* v *Union of India* (1992) 73 Comp Cas 762 (SC)].

10. Whether officer in default can be prosecuted as 'officer in default' where the Company has a managing director?

Section 5 make it clear that criminal liability of ordinary directors would arise only in respect of a company which has no managing director or whole-time director or manager and where particular directors are not specified by the company to be liable. [*Smt. G. Vijayalakshmi* v *SEBI* (2000) 25 SCI 183 (AP)].

In case of Managing Director, courts have usually held that he is, prima facie, deemed to be in charge and responsible for the conduct of business and management of the company and therefore liable for defaults. [*Garda Chemical Pvt. Ltd.* v *R. Parthasarthy, Asst. Collector Central Excise* (1984) 2 ECC 384 (Bom)].

11. Revocation or withdrawal of consent by a person who has been charged for the compliance of the provisions of the Companies Act, 1956

Although section 5 of the Act is silent about revocation or withdrawal of consent, rule 4BB(3) of the Companies (Central Government's) General Rules and Forms, 1956 provides that where the consent given pursuant to the proviso to clause (*f*) of section 5 has been revoked or withdrawn, the company shall within 30 days of such revocation or withdrawal file electronically with the Registrar, a return in an Form 1AC.

12. Interpretation of "person in accordance with whose directions or instructions directors are accustomed to Act"

Section 7 provides that except, where the Companies Act expressly provides otherwise, a person shall not be deemed to be, within the meaning of any provisions in this Act, a person in accordance with whose directions or instructions the Board of directors of a company is accustomed to act, by reason only that the Board acts on the advice given by him in a professional capacity.

Therefore, the professional advisors, auditors, debenture trustees, bankers, are not covered under the officers who are in default.

The directors who are in the Board by virtue of their technical skill and professional competence are no different from other directors. [*Madan Gopal Dey and Another* v *State*]

Appendix 1

Specimen of Board resolution for charging responsibility

RESOLVED THAT Shri CDE, the General Manager (Finance & Legal) of the Company be and is hereby directed to comply with all the requirements of the provisions of the Companies Act, 1956 and that his consent as received by the Board in Form 1AB be filed with the Registrar of Companies as required under the Companies Act, 1956.

RESOLVED FURTHER THAT the Company Secretary of the Company be and is hereby authorized to file return in prescribed e-Form 1AA with the Registrar of Companies, …………. in respect of the aforesaid resolution

Appendix 2

Specimen of e-Form 1AA

Particulars of person(s) or director(s) charged or specified for the purpose of clause (*f*) or (*g*) of section 5

[Pursuant to section 5(*g*) of the Companies Act, 1956]

Note.—All fields marked in * are to be mandatorily filled.

1. (*a*) *Corporate identity number (CIN) of company	XXXXXXXXXXXXXXXX
(*b*) Global location number (GLN) of company	
2. (*a*) Name of the company	ABC CONSULTANTS LTD
(*b*) Address of the registered office of the company	4TH FLOOR, SILVER ARK PLAZA 20A, NEW PALASIYA, INDORE (M.P.) 452001

3. *Number of persons charged: 1

4. Particulars of persons charged

(*i*) *Whether consent is accepted or withdrawn
☑ Acceptance
○ Withdrawal or revocation

*Director Identification number (DIN) or Income-tax permanent account number (PAN): 0001666

*Name	KAUSHAL AMETA
*Designation	COMPANY SECRETARY
*Date of birth	12/03/1980 (DD/MM/YYYY)
* Qualification	ACS
*Nationality	Indian
Income-tax PAN	XXXXXXX

* ☑ Father's name ☐ Husband's name | P. V. AMETA

Permanent residential address Line I | GANDHI CHOWK

Line II |

*City | PRATAPGAD | State | RAJASTHAN

*Country | IN | *Pin code | 300120

Phone | 1234567 | Fax |

e-mail ID | abcs@rediffmail.com

Whether present residential address is same as the permanent residential address

◉ Yes ○ No

*Present residential address Line I | GANDHI CHOWK

Line II |

*City | PRATAPGAD | State | RAJASTHAN

Country | INDIA | Pin code | 300120

Phone | 1234567 | Fax |

*Date of consent or revocation given under provisions of clause (*f*) of section 5 (DD/MM/YYYY)

*Provisions(s) of the Companies Act to which the consent relates |

(*ii*) *Whether consent is accepted or withdrawn ○ Acceptance ○ Withdrawal or revocation

DIN or income-tax PAN |

*Name |

*Designation |

*Date of birth | (DD/MM/YYYY) * Qualification |

*Nationality | Income-tax PAN |

* ☐ Father's name ☐ Husband's name |

*Permanent residential address Line I |

Line II |

*City | State |

Country | Pin code |

Phone | Fax |

e-mail ID |

Whether present residential address is same as the permanent residential address

○ Yes ○ No

*Present residential address Line I |

Line II |

*City | State |

Country | Pin code |

Phone | Fax |

*Date of consent or revocation given under provisions of clause (*f*) of section 5

(DD/MM/YYYY)

*Provisions(s) of the Companies Act to which the consent relates

(*iii*) *Whether consent is accepted or withdrawn ○ Acceptance

DIN or income-tax PAN ○ Withdrawal or revocation

*Name

*Designation

*Date of birth (DD/MM/YYYY) * Qualification

*Nationality Income-tax PAN

* ☐ Father's name ☐ Husband's name

*Permanent residential address Line I

Line II

*City State

Country Pin code

Phone Fax

e-mail ID

Whether present residential address is same as the permanent residential address

○ Yes ○ No

*Present residential address Line I

Line II

*City State

Country Pin code

Phone Fax

* Date of consent or revocation given under provisions of clause (*f*) of section 5

(DD/MM/YYYY)

* Provisions(s) of the Companies Act to which the consent relates

5. *Date of Board resolution 31/03/2006 (DD/MM/YYY

Attachments

1.	Copy of the Board resolution.	Attach	
2.	Copy of the consent to accept the responsibility.	Attach	
3.	Optional attachment(s) - if any.		

Declaration

To the best of our knowledge and belief, the information given in this form and its attachments is correct and complete.

I or we have been authorised by the board of directors' resolution dated * (DD/MM/YYYY) to sign and submit this form. 31/03/2006

To be digitally signed by

1. The person charged | KAUSHAL AMETA | | |

Managing director or director or manager or secretary of the company | ABC

For office use only

This e-Form is hereby registered

Digital signature of the authorising officer

Appendix 3

Specimen of Form 1AB

The Companies Act, 1956

Consent of the person charged by the Board with the responsibility of complying with the provisions of the Act

[Pursuant to section 5(f)]

To

The Board of directors,
ABC Limited

I, AJ D/o of Shri GJ hereby give my consent for being charged by the Board of directors of the Company, above named with the responsibility of complying with all the provisions of sections 58A and 220 of the Companies Act, 1956.

Dated 25th September, 2005

Signature:

Name of the person: AJ

Chapter 2

Compounding of Offences

Synopsis

Important Provisions at a Glance

1. Classification of offences
2. Offences against the Act to be cognizable only on complaint by the Registrar, shareholder or the Government
3. Where prohibition contained in section 621 was held to be no bar to file complaint
4. Composition of certain offences
5. Offences compoundable u/s 621A are continuing offences
6. Limitation of period for filing complaint in criminal cases

Compounding of offences

7. Reason for preference for compounding the offence
8. Advantages of compounding
9. Show cause notice by the Registrar for an offence
10. Only company or its officer may apply for compounding of an offence
11. Powers to compound the offence by Central Government
12. Additional fee paid by company is deductible from the amount ordered on compounding of the offence
13. Second offence is compoundable subject to certain conditions
14. Procedure for making an application for compounding of an offence
15. Separate application shall be filed for compounding of offences
16. Enclosures
17. Fee on application and mode of payment
18. Central Government will provide an opportunity to hear the applicant
19. Payment of compounding fees
20. Company's duty to intimate the Registrar about compounding
21. Intimation by the Registrar to the Court in case if the prosecution is pending before the Court
22. Offence can be compounded before launching prosecution
23. Central Government can direct companies to file pending documents, returns, etc.
24. Power to compound offences is discretionary
25. Compounding of offences with Court's permission
26. Compounding of offence in case of a company under liquidation
27. Difference in procedural requirement for compounding an offence between the Companies Act and Criminal Procedure Code
    - 27.1. Procedure under the Companies Act
    - 27.2. Procedure under Criminal Procedure Code
28. Effect of compounding of an offence
29. Who is liable to pay compounding fee?
30. Jurisdiction to try offences
31. Certain offences triable summarily in Presidency towns
32. Offences to be non-cognizable
33. Whether technical offences committed should be tried by Special Court for economic offences?
34. Penalty for false statements
35. Penalty for false evidence
36. Penalty in case where no specific penalty is provided elsewhere in the Act

37. Power of the Court to grant relief in certain cases
38. Company itself does not fall within definition of an 'officer' of company and could not be exempted from prosecution in terms of section 633
39. Circumstances where relief could be granted
40. Circumstances where relief could not be granted
41 Enforcement of orders of the Courts
42. Enforcement of orders of the Company Law Board
43. Condonation of delays in certain cases
Appendix 1 Specimen of e-Form 61
Appendix 2 Specimen of resolution for authorising to make application for compounding of an offence

Important Provisions at a Glance

Sl. No.	*Sections*	*Matters dealt with*	*E-Form Nos.*
1.	621	Offences against the Act to be cognizable only on complaint by the Registrar, shareholder or the Central Government.	
2.	621A	Compounding of certain offences by the Central Government.	61
3.	622	Jurisdiction to try offences.	
4.	628	Penalty for false statements.	
5.	629	Penalty for false evidence.	
6.	29A	Penalty where no specific penalty is provided elsewhere in the Act.	
7.	633	Power of the Court to grant relief.	
8.	634, 634A	Enforcement of orders of Court/Tribunal.	
9.	637	Delegation of powers by the Central Government.	
10.	637B	Power of the Central Government to condone delay.	

1. Classification of offences

According to the nature of punishment provided in the Act, the offences under various sections of the Companies Act, 1956 can be broadly classified into the following 5 categories:—

(*a*) Offences punishable with fine only;

(*b*) Offences punishable with fine or imprisonment;

(*c*) Offences punishable with fine or imprisonment or both;

(*d*) Offences punishable with imprisonment only;

(*e*) Offences punishable with imprisonment and also with fine.

2. Offences against the Act to be cognizable only on complaint by the Registrar, shareholder or the Government

Section 621 provides that:—

(1) No court shall take cognizance of any offence against this Act which is alleged to have been committed by any company or any officer thereof, except on the complaint in writing of the Registrar, or of a shareholder of the company, or of a person authorised by the Central Government in that behalf:

Provided that nothing in this sub-section shall apply to a prosecution by a company of any of its officers:

Provided further that the court may take cognizance of offence relating to issue and transfer of securities and non-payment of dividend on a complaint in writing by a person authorised by the Securities and Exchange Board of India.

(1A) Notwithstanding anything contained in the Code of Criminal Procedure, 1898, where the complainant under sub-section (1) is the Registrar or a person authorised by the Central Government, the personal attendance of the complainant before the Court trying the offence shall not be necessary unless the Court for reasons to be recorded in writing requires his personal attendance at the trial.

(2) Sub-section (1) shall not apply to any action taken by the liquidator of a company in respect of any offence alleged to have been committed in respect of any of the matters included in Part VII (sections 425 to 560) or in any other provisions of this Act relating to the winding up of the companies.

(3) A liquidator of a company shall not be deemed to be an officer of the company, within the meaning of sub-section (1).

Where a person who was not a shareholder of the company was aggrieved of any act of the company the only remedy open to him was to approach the Registrar who shall file the complaint in a Court of Law. [*S.C. Bhatia* v *P.C. Wadhawa* (1998) 92 Comp Cas 511 (P&H)].

Hence, any offence under the Companies Act may only be tried by a court, on the complaint of the relevant Registrar of Companies or of a shareholder in the company or person authorised by the Central Government in this behalf. Consequently, even for a technical default, e.g. non-filing of a document required to be filed under the Companies Act, the Registrar of Company is required to file a complaint with the court.

Where complainant was not a shareholder of the company, in view of clear prohibition contained in section 621 no cognizance of complaint should have been taken and criminal proceedings were, therefore, liable to be quashed. [*Ashok Rao* (*S*.) v *State of A.P.* (2001) 33 SCL 262 (AP)].

3. Where prohibition contained in section 621 was held to be no bar to file complaint

Where by an order, civil court rendered a finding that respondent, who was one of promoters of company in question, was entitled to protect his right in said company as a depositor and borrower along with his wife's right and interest of general public, it was held that merely because there is prohibition under section 621, respondent, whose right had been recognized by civil court, should not be debarred from approaching Magistrate by way of a complaint against mismanagement in company. [*D. Ganesh* v *A. Natarajan* (2006) 67 SCL 310 (Mad)].

4. Composition of certain offences

Section 621A as substituted by the Companies (Second Amendment) Act, 2002 states that:—

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), any offence punishable under this Act (whether committed by a company or any officer thereof), not being an offence punishable with imprisonment only, or with imprisonment and also with fine, may, either before or after the institution of any prosecution, be compounded by the Central Government on payment or credit, by the company or the officer, as the case may be, to the Central Government of such sum as that the Government may prescribe:

Provided that the sum prescribed shall not, in any case, exceed the maximum amount of the fine which may be imposed for the offence so compounded:

Provided further that in prescribing the sum required to be paid or credited for the compounding of an offence under this sub-section, the sum, if any, paid by way of additional fee under sub-section (2) of section 611 shall be taken into account.

(2) Nothing in sub-section (1) shall apply to 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.

Explanation.—For the purposes of this section, 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.

(3)(*a*) Every application for the compounding of an offence shall be made in the e-Form 61 Registrar electronically as prescribed by the Notification No. GSR 56(E) dated 10th Feb., 2006 (previously no Form was prescribed for that purpose) who shall forward the same, together with his comments thereon to the Central Government. (Appendix 1)

(*b*) Where any offence is compounded under this section, whether before or after the institution of any prosecution, intimation thereof shall be given by the company to the Registrar within seven days from the date on which the offence is so compounded.

(*c*) Where any offence is compounded before the institution of any prosecution, no prosecution shall be instituted in relation to such offence, either by the Registrar or by any shareholder of the company or by person authorised by the Central Government against the offender in relation to whom the offence is so compounded.

(*d*) Where the composition of any offence is made after the institution of any prosecution, such composition shall be brought by the Registrar in writing, to the notice of the Court in which the prosecution is pending and on such notice of the composition of the offence being given, the company or its officer in relation to whom the offence is so compounded shall be discharged.

(4) The Central Government while dealing with a proposal for the compounding of an offence for a default in compliance with any provision of this Act which requires a company or its officer to file or register with, or deliver or send to, the Registrar any return, account or other document, may, direct, by order, if it or he thinks fit to do so, any officer or other employee of the company to file or register with, or on payment of the fee, and the additional fee, required to be paid under section 611, such return, account or other document within such time as may be specified in the order.

(5) Any officer or other employee of the company who fails to comply with any order made by the Central Government under sub-section (4) shall be punishable with imprisonment for a term which may extend to six months, or with fine not exceeding fifty thousand rupees or with both.

(6) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)—

(*a*) any offence which is punishable under this Act with imprisonment or with fine, or with both, shall be compoundable with the permission of the Court, in accordance with the procedure laid down in that Act for compounding of offences;

(*b*) any offence which is punishable under this Act with imprisonment only or with imprisonment and also with fine shall not be compoundable.

(7) No offence specified in this section shall be compounded except under and in accordance with the provisions of this section.

[*Powers of Company Law Board u/s 621A has been vested with the Central Government by substitution of section 621A vide the Companies* (*Second Amendment*) *Act, 2002, necessary notification for implementation of same is still awaited*]

5. Offences compoundable u/s 621A are continuing offences

In the case of *State of Bihar* v *Deokaran Nenshi* (1973) 1 SCR 1004, the Supreme Court held that continuous offence is one which is suspected of continuance and is distinguishable from the one which is committed once and for all. It is one of those offences, which arise out of a failure to obey or comply with a rule or its requirement involves a penalty, the liability for which continuous until the rule or its requirement is obeyed or complied with. On every occasion that such disobedience or non –compliance occurs and recurs, there is the offence committed.

The Supreme Court in *Bhagirath Kanoria* (AIR 1984 SC 1688) case has laid down a guideline to determine the question, whether a particular offence is a continuance offence. It has been stated that the nature of the offence whether it is continuing must be determined from the following:—

(a) language of the statute which create the offence;

(b) nature of the offence;

(c) purpose which is intended to be achieved by constituting a particular act as an offence.

6. Limitation of period for filing complaint in criminal cases

Any complaint for violation of the provisions of the Act should be filed in the Criminal Court having jurisdiction to try the offence within the limitation period in section 468 of the Code. The period of limitation is:—

(*a*) 6 months if the offence is punishable with fine only;

(*b*) 1 year if the offence is punishable with imprisonment not exceeding one year;

(*c*) 3 years if the offence is punishable with imprisonment not exceeding 3 years.

No period of limitation is prescribed for the cases punishable with imprisonment for more than 3 years.

The period of limitation, in relation to an offence shall commence:—

(*a*) on the date of the offence; or

(*b*) where the commission of the offence was not known to the person aggrieved by the offence, the first day on which such offence comes to the knowledge of such person, whichever is earlier.

In computing the period of limitation, the day from which such period is to be computed is to be excluded.

COMPOUNDING OF OFFENCES

7. Reason for preference for compounding the offence

Companies and their officer in default, like to compound the offences rather than to face prosecution in a Criminal Court mostly for the following reasons:—

(1) The delinquent officers of the company have to appear before the Magistrate at every hearing. They have to get permission from the Magistrate by making an application u/s 205 of the Criminal Procedure Code, for dispensing with personal attendance at every hearing and permit them to appear by their pleaders.

(2) Companies have to engage an advocate for appearing before the Criminal Court.

(3) In case the accused is a Managing Director, his re-appointment requires approval of the Central Government, if he is levied a fine of more than Rs. 1,000 by the Criminal Court.

(4) Court proceedings are generally expensive and time consuming.

(5) Even if the accused gets acquittal, the Central Government may file an appeal against the order exercising its powers under section 624B of the Act.

(6) Quick relief can be obtained from the Central Government.

(7) The delinquent officer will be examined by the company prosecutor in the open Court.

8. Advantages of compounding

The advantage of compounding under section 320 of the Criminal Procedure Code is that the accused gets an acquittal whereas he will get only a discharge, if he compounds an offence by making an application to Central Government. As stated in section 621A of the Act, compounding can be done under section 320 of the Criminal Procedure Code at any stage of the trial but before the sentence is pronounced by the Magistrate on the complaint. Therefore, compounding is possible under the Code at any stage of the proceeding even when the matter is in appeal.

9. Show cause notice by the Registrar for an offence

When an offence is committed by a company or its officers, the Registrar issues a show cause notice to the delinquent company/its officers and calls for explanation. Even in the show cause notice itself the Registrar states that the offence may be compounded as provided in section 621A.

10. Only company or its officer may apply for compounding of an offence

Section 621A(1) states that a company or an officer thereof who has committed or who is alleged to have committed an offence can apply for compounding the offence. Therefore, any offence under the Act committed by a person other than its officers like trustees, liquidators, contributories are not compoundable under section 621A.

11. Powers to compound the offence by Central Government

Central Government can compound any of the compoundable offences irrespective of quantum of fine involved.

12. Additional fee paid by company is deductible from the amount ordered on compounding of the offence

The maximum amount that may be specified by the Central Government to be paid or credited to the Central Government for compounding of an offence, cannot exceed the maximum amount of the fine that may be imposed for the offence under the relevant section of the Act. Section 621A(1) further provides that in prescribing the sum required to be paid or credited to the Central Government for compounding an offence, the sum, if any, paid by way of additional fee under section 611(2) shall be taken into account and the additional fee is to be deducted from the amount specified for compounding the offence.

13. Second offence is compoundable subject to certain conditions

If a person has already compounded an offence, he is not eligible to apply for compounding a similar offence for a period of 3 years from the date of compounding the first offence. The 3 years period is to be reckoned from the date of compounding and not from the date on which the offence was committed. However, the *Explanation* to section 621A(2) states that any second or subsequent offence committed after the expiry of a period of 3 years from the date on which the offence was previously compounded shall be deemed to be a first offence.

The expression of 'similar offence' used in section 621A(2) need not be the same offence. It can be an identical offence. It need not necessarily be an offence falling under the same section. The expression 'similar offence' has not been defined in the Criminal Procedure Code. The Code uses the expression 'offences of the same kind'. Section 219(2) of the Code provides that offences are of the same kind when they are punishable with the same amount of punishment under the same section of Indian Penal Code or of any special or local law. Therefore, the expression 'similar offence' and 'offence of the same kind' are two different expressions.

14. Procedure for making an application for compounding of an offence

The company or the officers thereof desirous for compounding of an offence should make an application to the Registrar of Companies in new e-Form 61 as prescribed by the Notification No. GSR 56(E) dated 10th Feb., 2006 (previously no Form was prescribed for that purpose). The following essential information should be furnished in the application:—

1. company's name, registration no. and date of its incorporation;
2. status of the company such as whether, it is a public company or a private company or a section 25 company;
3. status of the applicant;
4. capital structure of the company with the details of the authorised, issued, subscribed and paid up capital;
5. address of the company's registered office;
6. nature of the offence and background of the alleged offence/violation/default;
7. situation or circumstances leading to the alleged offence;
8. pleading absence of *mens rea*;
9. the date on which or the period during which the offence was committed;
10. admitting the commission of offence;
11. whether the default or violation was made good before or at the time of making the compounding application;
12. confirmation that the alleged offence is a first offence and it is not a second offence in 3 years;
13. requirement for passing of the Board resolution for making application for compounding of offence; (Specimen has been given in Appendix 2)

14. prayer for compounding the offence;
15. request for reducing the fine.

15. Separate application shall be filed for compounding of offences

In case of more than one officer of the company desirous to compounding of an offence, separate application in the e-Form 61 has to be filed by each person even for compounding of the same offence.

16. Enclosures

For compounding of offences, e-Form 61 shall be attached with the following documents:

(1) Power of attorney for memorandum of appearance as per Form 5 of Company Law Board Regulations, 1991 if the application is filed for compounding of offence.

(2) Affidavit verifying the content of application if the application is filed for compounding of offence.

(3) The detailed application will be as per Company Law Board Regulations, 1991.

(4) Certified copy of the Memorandum and Articles of Association

(5) Certified copy of the Balance Sheet and Profit and Loss Accounts of the Company.

(6) Any other information can be provided as an optional attachment.

17. Fee on application and mode of payment

The application shall be submitted together with the filing fee as per Companies (Fees on Application) Rules, 1999.

18. Central Government will provide an opportunity to hear the applicant

The Central Government will follow the principles of natural justice before deciding the application for compounding. An opportunity of oral hearing to the applicant company, its officer in default, the Registrar or any other complainant should be provided by the compounding authority. It would be appropriate for the accused to ascertain from the Registrar about the comments/recommendations made to the compounding authority before making any personal representation at the time of hearing. After hearing all the parties, Central Government shall pass an order specifying the amount to be credited to the Central Government account for compounding the offence.

19. Payment of compounding fees

After the order for compounding is passed the accused has to pay the composition fees together with the e-Form 21 which will be specified in the compounding order.

20. Company's duty to intimate the Registrar about compounding

Section 621A(3)(*b*) provides that where an offence is compounded under section 621A, whether before or after the institution of any prosecution, the company should give thereof an intimation to the Registrar within 7 days from the date on which the offence is so compounded. The notice should be given electronically to the Registrar in e-Form 21 alongwith a copy of the order and resolution passed by the Board of directors of the company.

21. Intimation by the Registrar to the Court in case if the prosecution is pending before the Court

Section 621A(3)(*d*) provides that where the order for composition of any offence is made after the institution of any prosecution, such composition shall be brought by the Registrar of Companies in writing, to the notice of the Court in which the prosecution is pending and on such notice of the composition of offence is being given, the company or its officer in relation to whom the offence is so compounded shall be discharged by the Court.

No permission of the Trial Court is required for compounding of the offence by Central Government even though the criminal complaint is pending in the Trial Court.

22. Offence can be compounded before launching prosecution

If the company or the officer in default apprehends that it/he has committed an offence, it/he can make an application for compounding of offence to the Registrar of Companies even before a show cause notice is received and the offence can be compounded by the Central Government, even before launching any prosecution. If the offence is compounded, the Registrar should not file any prosecution for the offence.

23. Central Government can direct companies to file pending documents, returns, etc.

Section 621A(4) provides that Central Government while dealing with an application for compounding an offence for a default in compliance with any provisions of the Act, which require a company or its officer to file or register with or deliver or send to the Registrar any return, account or other document, may also direct by order in writing if it or he thinks fit to do so to any officer or other employee of the company to file or register without or on payment of the fee and the additional fee required to be paid under section 611, such return, account or other document within such time as may be specified in the order.

24. Power to compound offences is discretionary

The power of compounding the offences given by section 621A of the Act to Central Government is discretionary as the expression used in sub-section (1) is "may". The compounding authority can reject an application for compounding the offence if the default is not made good [*General Produce Company Ltd. Re* (1994) 81 Comp Cas 570 CLB: (1994) 4 Comp LJ 99]. If a company has violated section 383A of the Act by not appointing a qualified company secretary, the compounding authority will reject the application for compounding the offence if the company has not appointed a company secretary at the time of making the application for compounding, as the default continues.

25. Compounding of offences with Court's permission

Section 621A(6)(*a*) of the Act provides that offence which is punishable under this Act with imprisonment or fine, or with both, shall be compoundable with the permission of the Court, in accordance with the procedure laid down in the Criminal Procedure Code for compounding of offences. Central Government has expressed the view that the exercise of powers by it under section 621A(1) is independent of exercise of powers by the Court under sub-section (6) and so it has got concurrent jurisdiction to compound offences which are punishable with fine or imprisonment or both and Central Government would follow the procedure laid down in the Companies Act, 1956. The court will follow the procedure laid down in the Criminal Procedure Code.

Section 621A(7) gives the criminal court a parallel power but the court can exercise it only after the institution of criminal proceedings. The composition by the court will be done in accordance with the provisions of the Criminal Procedure Code. [*VLS Finance Ltd. vs Union of India* ORS (2004) 58 CLA 105 (Del)]

26. Compounding of offence in case of a company under liquidation

The Department of Company Affairs has clarified *vide* General Circular No. 2/6/2002-CL-V No. 23/75/96-CL.II, dated 6-3-2002 in the matter of compounding of offence under section 621A of the Companies Act, 1956, in case of a company under liquidation as under:—

1. A point has been raised in one of the inspection follow-up files as to whether the offences committed by directors of a company can be compounded under section 621A of the Act, when the company in which they were directors is under liquidation without obtaining the leave of the company court under section 446 of the Act.
2. The issue has been examined in the Department in consultation with the Ministry of Law and it is hereby clarified that in the light of the provisions of section 446 read with section 621A of the Companies Act, there is no legal bar for composition of an offence under section 621A of the Act, provided the conditions specified in the section and guidelines, if any, are fulfilled. It is also further clarified that the provisions of section 446 of the Companies Act, 1956, does not bar criminal proceedings against the directors of the company for any offences committed under the Companies Act and the offences are compoundable under section 621A of the Act.
3. Where the penal provisions provide for proceedings against the companies also and if the offences are compoundable under section 621A of the Companies Act, 1956, compounding will not be permissible against the company in view of the provisions of section 446 of the Companies Act.

27. Difference in procedural requirement for compounding an offence between the Companies Act and Criminal Procedure Code

The procedure for compounding an offence under section 621A of the Act and the procedure for compounding an offence under the Criminal Procedure Code differs on the following aspects:

27.1. Procedure under the Companies Act

1. A person who commits an offence has to apply to the Central Government for the offence through the Registrar;
2. He can apply before or after the prosecution is launched;
3. The quantum of amount for compounding the offence is decided by the Central Government having regard to the maximum fine that can be levied for the offence under the Act. The additional fee, if any, paid by the company is taken into consideration in deciding the amount payable for compounding the offence;
4. The accused gets discharge from the court;
5. The accused need not appear before the Central Government;
6. There is no need to engage an advocate since the accused need not appear before the compounding authority. If the accused wants to represent his case, he can authorise a practising chartered accountant or cost and works accountant or a company secretary or an advocate to represent him. If the accused is a director, he can authorise another director to represent him. A director can represent the company by filing a Board resolution authorising him to represent the company before the compounding authority;
7. There is no need to get permission from the compounding authority for compounding the offence.

27.2. Procedure under Criminal Procedure Code

1. It is the complainant or the injured person who applies to the Trial Court;
2. There must be a prosecution pending before the Trial Court;
3. The parties themselves agree on the compounding amount and the Court has no say in the quantum of amount agreed by the parties;
4. The accused gets acquittal;
5. The accused should appear before the Trial Court;
6. The accused may have to engage an advocate;
7. Trial Court's permission should be taken for compounding the offence.

28. Effect of compounding of an offence

(1) Where such composition is done before the institution of any prosecution, no prosecution can be launched in relation to such offence under the Companies Act.

(2) Where the composition of the offence is made after the institution of any prosecution and such composition is brought by the Registrar in writing to the notice of the court in which the prosecution is pending, the company or its officer in relation to whom the offence is so compounded shall be discharged by the court.

(3) Where the offence falls within the purview of sub-section (6)(*a*) of section 621A, *i.e.*, offence which can be compounded only with the permission of the court, the composition thereof shall have the effect of an acquittal of the accused in the case as provided in section 320B(8) of the Code of Criminal Procedure, 1973.

(4) Compounding an offence does not amount to conviction by a Court of Law and the prohibition contained in paragraph (1)(*a*) of Schedule XIII to the Act does not apply. (Refer Circular No. 5/23: F. No. 16/1/92-CL.V, dated 28-4-1993 issued by the DCA)

29. Who is liable to pay compounding fee?

The DCA has clarified *vide* its Circular; dated 28-4-1993 that in the case of a company, the composition fee shall be paid from its funds. However, the directors/officers in default should pay the composition fee from their personal funds.

30. Jurisdiction to try offences

Section 622 of the Act provides that no Court inferior to that of a Presidency Magistrate or a Magistrate of the First Class shall try any offence against this Act.

31. Certain offences triable summarily in Presidency towns

Section 623 states that if any offence against this Act which is punishable with fine only is committed by any person within a Presidency town, such person may be tried summarily and punished by any Presidency Magistrate of that Presidency town.

32. Offences to be non-cognizable

Notwithstanding anything in the Code of Criminal Procedure, 1898, every offence against this Act shall be deemed to be non-cognizable within the meaning of the said Code.

33. Whether technical offences committed should be tried by Special Court for economic offences?

Money and money related offences are economic offences. But technical offences that do not relate to them but matters, which are intended to furnish statistical information to parties or to inform parties as to the status of those persons in relation to the company, cannot be regarded as economic offences.

The designation of Court as 'Special Court for economic offences' does not determine its jurisdiction. It is determined on the basis of provision conferring jurisdiction under various enactments. Companies Act is one such enactment. But merely because the Special Court tries offences under the Companies Act it does not follow that all offences tried by that Court are economic offences. [*I.J. Heredia* v *RoC* (2001) 32 SCC 175 (Kar)].

34. Penalty for false statements

Section 628 provides that if in any return, report, certificate, balance-sheet, prospectus, statement or other document required by or for the purposes of any of the provisions of this Act, any person makes a statement:—

(*a*) which is false in any material particular, knowing it to be false; or

(*b*) which omits any material fact knowing it to be material;

he shall, save as otherwise expressly provided in this Act, be punishable with imprisonment for a term which may extend to two years, and shall also be liable to fine.

Where wrong information was furnished by company to office of Registrar, only person, who gave wrong information, was liable to be prosecuted under section 628 and prosecution of other directors or managing director would be illegal. [*Vijay Kumar Gupta* v *Registrar of Companies* (2003) CLC 777 (HP)].

Offence if any committed by the agent cannot be passed on to the principal because such vicarious liability under criminal law does not arise between the agent and principal. [*Ramakrishna Raja* v *Registrar of Companies* (2005) 123 Comp Cas 319 (Mad)].

35. Penalty for false evidence

Section 629 provides if any person intentionally gives false evidence:—

(*a*) upon any examination upon oath or solemn affirmation, authorised under this Act; or

(*b*) in any affidavit, deposition or solemn affirmation, in or about the winding up of any company under this Act, or otherwise in or about any matter arising under this Act;

he shall be punishable with imprisonment for a term which may extend to seven years, and shall also be liable to fine.

36. Penalty in case where no specific penalty is provided elsewhere in the Act

If a company or any other person contravenes any provision of the Companies Act, for which no specific punishment is provided elsewhere in this Act or any condition, limitation or restriction subject to which any approval, sanction, consent, confirmation, recognition, direction or exemption in relation to any matter has been accorded, given or granted, the company and every officer of the company who is in default or such other person shall be punishable with fine which may extend to Rs. 5,000 and where the contravention is a continuing one, with a further fine, which may extend to Rs. 500 for every day after the first during which the contravention continues.

37. Power of the Court to grant relief in certain cases

Section 633 of the Act, gives the Court the power to relieve a director from any liability, which may incur under the law. For getting the relief the section provides that the court must be satisfied that the defaulting director acted honestly and reasonably and that having regard to all the circumstances of the case he ought to be excused. It has been stated under the section that:—

(1) If in any proceeding for negligence, default, breach of duty, misfeasance or breach of trust against an officer of a company, it appears to the Court hearing the case that he is or may be liable in respect of the negligence, default, breach of duty, misfeasance or breach of trust, but that he has acted honestly and reasonably the Court may relieve him either wholly or partly, from his liability on such terms as it may think fit, if it comes to the Court to the conclusion that he ought fairly to be excused having regard to all the circumstances of the case including his appointment. [Section 633(1)]

In case of criminal proceeding under this sub-section, the Court shall have no power to grant relief from any civil liability which may attach to an officer in respect of such negligence, default, breach of duty, misfeasance or breach of trust.

(2) For seeking anticipatory relief from the High Court, where any such officer has reason to apprehend that any proceeding will or might be brought against him in respect of any negligence, default, breach of duty, misfeasance or breach of trust, he may apply to the High Court for relief and the High Court on such application shall have the same power to relieve him as it would have had if it had been a court before which a proceeding against that officer for negligence, default, breach of duty, misfeasance or breach of trust had been brought under sub-section (1).

The section thus operates in two stages. The High Court can grant anticipatory relief and if a case actually initiated, only court before which the complaint or trial is going on can grant relief. [*Shrikrishna Prasad* v *Registrar of Companies* (1978) 48 Comp Cas 397 (Del)].

No Court shall grant any relief to any officer under sub-section (1) or sub-section (2) unless it has, by notice served in the manner specified by it, required the Registrar and such other person, if any, as it thinks necessary, to show cause why such relief should not be granted.

The section does not limit, restrict or confine its operation to a liability arising out of negligence, default, breach of duty, misfeasance or breach of trust with this Act alone.

(3) The granting of relief under section 633 is discretionary and it cannot be claimed as a matter of right. It may be partial or complete or on certain terms or unconditional. [*Ramkrishan Dalmia* v *Registrar of Joint Stock Companies, Delhi* (1962) 32 Comp Cas 341; *Farouk Irani* v *Board for Industrial & Financial Reconstruction* (2002) 38 SCL 95 (Mad)].

(4) The relief is intended to be given to an officer of a company defined u/s 2(30) and not to the company in respect of an offence.

(5) Section 633 does not make any distinction between whole-time and part-time directors, as liability for such acts is equal. However, part time directors are relieved from liability, where there is no evidence of their exercising control in any manner is brought forth. [*Jagjivan Hiralal Doshi* v *ROC* (1989) 65 Comp Cas 553 (1989) 2 Comp LJ 315, 320, 321 (Bom); *Madhavan Farouk Irani* v *Board for Industrial & Financial Reconstruction* (2002) 38 SCL 95 (Mad.); *Nambiar* v *Registrar of Companies* (2002) 108 Comp Cas 1 (Mad.)].

Two Japanese directors were relieved of their criminal liability on the ground that they were residents abroad and they were not connected with the day to day management of the company. [*Ken Taniya, Re* (1990) 68 Comp Cas 142 (Bom)].

(6) The Court may relieve the directors from criminal liability under the Companies Act and possibly under the related statutes, but certainly not under unrelated legislations such as legislation imposing personal liability on directors for taxes payable by the company. [*Customs & Excise Commisioner* v *Hedon Alpha Ltd*. (1981) QB 815; (1981) 2 Alter 697] the offences under the Employees State Insurance Act and EPF, etc. are also outside the relief provision under the

Companies Act. The section applies to all legal proceedings civil, criminal or otherwise but not to proceedings under any Acts other than the Companies Act. [*Rabindra Chamaria* v *ROC* (1992) 73 Comp Cas 257; AIR 1992 SC 398]

(7) The Court has to examine applications at the appropriate stage. Though an application could be maintained even at the stage of apprehension of any criminal proceedings, yet the Court has to come to the conclusion that there is *prima facie* material that offence has been made out and a direction should be given. [*Farouk Irani* v *Board for Industrial & Financial Reconstruction* (2002) 38 SCL 95 (Mad)].

38. Company itself does not fall within definition of an 'officer' of company and could not be exempted from prosecution in terms of section 633

It is an officer of the company only who can be exempted from being relieved from being prosecuted in any proceedings for negligence, default, breach of duty, misfeasance or breach of trust and not the company. Company itself does not fall within the definition of an 'officer' of the company and could not be exempted from prosecution in terms of section 633. A plain reading of section 633, read with clause (*30*) of section 2, makes it abundantly clear that the statute does not provide for any exemption of the company from being prosecuted in terms of section 633. [*Sardar Satwant Singh* v *Registrar of Companies* (1995) 18 CLA 177 (P&H)].

39. Circumstances where relief could be granted

Directors who are either on board because of their special skills or expertise or are nominee-directors and are not directly involved in acts of omission complained of or have otherwise acted honestly and reasonably, should not be subjected to harassment of legal proceedings for breaches and defaults of company. [*Om Prakash Khaitan* v *Shree Keshariya Investment Ltd.* (1978) 48 Comp Cas 85 (Del)].

Where for *bona fide* reasons, company could not hold annual general meeting and could not comply with statutory requirements, directors were excused for such default. [*Tapan Kumar Chowdhury* v *Registrar of Companies* [2004] 50 SCL 283 (Cal)].

When company is practically defunct, and there is no response to notice of meeting, and liquidator does nothing thereafter, he can be granted relief u/s 633. [*V.P. Nanda* v *Registrar of Companies* (1978) 48 Comp Cas 552 (Del)].

Where the company was closed and was declared sick and winding up was ordered by the BIFR and pending appeal against the order in spite of police help the petitioners could not enter into the premises so as to prepare accounts and consequently the company was unable to comply with the requirements of sections 210 and 220, it was *held* that no prosecution might be launched against the directors under section 210/220 up to six months after the revival of the company. [*Sanjay Modi* v *Registrar of Companies* (1995) 82 Comp Cas 651 (Raj)].

Where it was found that the managing director was the person responsible for the failure to file the balance sheet and the profit and loss statement as he had in control the books of the company, prosecutions against the petitioner-directors who had already resigned was to be quashed. [*United India Insurance Co. Ltd.* v *Kamlesh Singh* (1995) 82 Comp Cas 682 (All)].

40. Circumstances where relief could not be granted

No relief can be given if person did not act reasonably, though he may have acted honestly. If a director without seeking legal advice does an act in which he is expected to seek legal advice, and causes loss to company, he does not act reasonably and cannot be excused.

Where business of company was continuing despite seizure of its books by police, failure of directors to comply with sections 210 and 220 on ground of seizure could not be ground for relief u/s 633. [*Ram Krishan Dalmia* v *Registrar, Joint Stock Companies* (1962) 32 Comp Cas 341 (Punj)].

Where there was loss of stock, which was under personal custody of managing director and nobody could have dealt with stock without his knowledge, relief under section 633 could not be granted to managing director, in suit against him for recovery of loss of stock.

Where director of company stood guarantor for loan taken by company and on failure to pay said loan, decree was passed against company, objection of director that decree was not executable against him did not fall under scope of section 633. [*Endra Kumar Kedawat* v *Apple Ceremics Ltd.* (2006) 129 Comp Cas 816 (Raj)].

41.Enforcement of orders of the Courts

According to the provisions of section 634 of the Act, any order may be enforced in the same manner as a decree made by the Court in a suit pending therein.

When a suit has been filed to frustrate order of Court having company jurisdiction petitioner cannot be debarred from making application in such suit to protect his interest either for enforcement of compromise made by them before Court having company jurisdiction or for any collateral purpose. [*Kal Electronic and Consultancy* (*P*.) *Ltd.* v *Hindustan Development Corporation* (2003) CLC 302 (Cal)].

42. Enforcement of orders of the Company Law Board

Any order made by the Company Law Board may be enforced by the Company Law Board in the same manner as if it were a decree made by a Court in a suit pending therein, and it shall be lawful for that Company Law Board to send, in the case of its inability to execute such order, to the Court within the local limits of whose jurisdiction,—

(*a*) in the case of an order against a company, the registered office of the company is situated, or

(*b*) in the case of an order against any other person, the person concerned voluntarily resides, or carries on business or personally works for gain:

Provided that the provisions of section 634A shall not apply on and after the commencement of the Companies (Second Amendment) Act, 2002.

43. Condonation of delays in certain cases

Under section 637B of the Act, the Central Government may for reasons to be recorded in writing, condone the delay where any document required to be filed with the Registrar under any provisions of the Act, is not filed within the time specified thereon.

Appendix 1

Specimen of e-Form 61

Form for filing an application with Registrar of Companies

[Pursuant to sections 166, 210, 394, 560, 621A of the Companies Act, 1956]

Note.—All fields marked in * are to be mandatorily filled.

1. (*a*) *Corporate identity number (CIN) of company	xxxxxxxxxxxxxxxxxx
(*b*) Global location number (GLN) of company	
2. (*a*) Name of the company	ABC INDUSTRIES LIMITED
(*b*) Address of the registered office of the company	4TH FLOOR, SILVER ARK PLAZA, 20A, NEW PALASIYA INDORE (M.P.) 452001

3. *Application filed for

☑ Compounding of offences

☐ Extension of period of annual general meeting by three months under section 166(1)

☐ Exemption from holding annual general meeting at the registered office under section 166(2)

☐ Extending the period of annual accounts up to eighteen months under section 210(4)

☐ Declaring a defunct company under section 560

☐ Amalgamation

☐ Others

4. If others, then specify

5. Whether application for compounding offence is filed by

☑ Company ○ Director ○ Manager or secretary ○ Other

6 Director identification number (DIN) or income-tax permanent account number (PAN)

7. Name of the applicant

8. (*a*) Service request number of Form 23

(*b*) Date of passing special or ordinary resolution (DD/MM/YYYY)

(*c*) Date of filing Form 23 (DD/MM/YYYY)

9. *Details of application

Application for compounding of offences committed under section 160 and 220 of the Companies Act, 1956.

Attachments

1.	Board resolution.	Attach	
2.	Scheme of amalgamation		
3.	Detailed application.	Attach	
4.	Optional attachment(s), if any. Power of attorney for memorandum of appearance. Affidavit verifying the content of application if the application is filed for compounding of offence.	Attach	

Declaration

To the best of my knowledge and belief, the information given in this application and its attachments is correct and complete. I have been authorised by the Board of directors' resolution dated 30/03/2006 (DD/MM/YYYY) to sign and submit this application.

To be digitally signed by

Managing director or director or manager or secretary of the company ISHAN JAIN

Chartered accountant or cost accountant or company secretary (in whole-time practice) D.K. JAIN

For office use only

Digital signature of the authorising officer

This e-Form is hereby approved

This e-Form is hereby rejected

Annexure 1 to Appendix 1

Specimen of application for Compounding of an Offence

BEFORE THE CENTRAL GOVERNMENT

Compounding application in the matter of a complaint pending before a Court under sections 160 and 220(3) of the Companies Act, 1956 on behalf of ABC Enterprises Limited

IN THE MATTER OF SECTION 621A OF THE COMPANIES ACT, 1956

ABC Enterprises Ltd., the Petitioners, a Company registered under the Companies Act, 1956 and having its registered office at xxxxxxxxxxxxx and its officers and directors most respectfully submit as under:—

1. That a complaint under sections 162, 168, 210(5) and 220(3) of the Companies Act, 1956 is purported to have been filed before the Hon'ble Court of IIIrd Chief Judicial Magistrate, Court No. 26, at Indore (M.P.) *inter aila*, charging the Company for non-compliance of sections 159, 166, 210 and 220(3) which is punishable with a fine.
2. That a show cause notice was issued to the company and its directors by the Registrar of Companies, Delhi and Haryana *vide* No. XXXX/XXX, dated XX.X.XXXX and a legitimate reply of which was furnished by the Company *vide* letter 23rd February, 2005 refuting the alleged violation of the provisions of sections 159, 166, 210 and 220 of the Companies Act, 1956 to the Registrar of Companies, Delhi and Haryana and obtained their acknowledgement on 24th February, 2005. However, it appears that without embarking upon any proper inquiry into the matter with the Registrar of Companies, Madhya Pradesh, in which jurisdiction the Registered Office was shifted in accordance with the confirmation of the Company Law Board (N.R.) Delhi on 15th November, 2001, resulted in miscarriage of justice.
3. That the Company has not committed any defaults under sections 168 and 210(5) of the Companies Act, 1956 since it has laid before the members at their annual general meeting, the audited balance-sheet and profit and loss accounts within the time-limit prescribed under the Act and also held the annual general meetings for the years 2001-02, 2002-03 and 2003-04 within the stipulated time period allowed under the Act, details of the date of annual general meetings and the date on which the accounts were laid before the meeting and adopted by the members being enclosed as Annexure 1.
4. That the Company has prepared and filed the balance-sheet and profit and loss accounts for the years 2001-02, 2002-03 and 2003-04 together with the directors' and auditor's report thereon and the annual return on the date of respective annual general meetings as details given in Annexure 2.
5. That without entering into merits and demerits of the assertions and counter-assertions the applicants does not want that the matter may be subjected to weary litigation involving time and expenditure and desires that the matter be amicably compromised and compounded. The applicants are ready and willing to pay such nominal amount by way of compounding charges as may be determined by this Hon'ble Authority.
6. That since a technical breach of the provisions of sections 159 and 220(3) is stated to have been committed on account of delayed filing of the audited and duly adopted accounts by the members for the years 2001-02, 2002-03 and 2003-04 and also delay in filing of the annual return for the years 2002-03 and 2003-04, the applicant wants that this technical breach, if any, may be condoned/compounded to avoid hardship on the following amongst other grounds:

GROUNDS

(*a*) That the Registrar of Companies, Delhi and Haryana, who was having jurisdiction on the Company only before the year November, 2001 when the Registered Office was situated in the State of Delhi has instituted the case against the Company, whereas the Company has shifted its

Registered Office from the State of Delhi to the State of Madhya Pradesh, at Pithampur, Dist. Dhar (M.P.). which is under the jurisdiction of the Registrar of Companies, Madhya Pradesh.

(*b*) That the Company has filed all the required documents with the office of the Registrar of Companies, Madhya Pradesh, at Gwalior, who was having legal jurisdiction over the Company after filing of Form 21 with the order of the Hon'ble Company Law Board (N.R.) Delhi, dated 15th November, 1995. Copy of the CLB Order and Form 21 annexed as Annexure 5.

(*c*) That since the Company has properly held annual general meetings for the above said years and laid before the annual general meetings the audited balance sheet and profit and loss account, together with the directors' and the auditor's report thereon, which was also adopted by the members, the Company has not committed any default under sections 166 and 210 of the Companies Act, 1956 and the case instituted by the Registrar of Companies under sections 168 and 210(5) of the Companies Act, 1956 is not maintainable at all.

(*d*) That the Company or its officers/directors has not intentionally, deliberately and willfully committed any offense under sections 159 and 220(3) of the Companies Act, 1956 and that there was only some delay in filing of the audited accounts for the years 2001-02, 2002-03 and 2003-04 and annual return for the years 2002-03 and 2003-04 with the Registrar of Companies, Madhya Pradesh at Gwalior, which was only and administrative/procedural default which have already been regularised by the Company.

(*e*) That if, there is any, violation of the provision of sections 159 and 220(3) the same is punishable with fine of Rs. 5,000 per day for the period of default, which may be compounded by the Hon'ble authority and the case may be withdrawn from the Hon'ble Court of Chief Judicial Magistrate at Indore (M.P.) at any time within the postulates of section 621A of the Companies Act, 1956 and it is, therefore, expedient that the Hon'ble Authority may kindly invoke the provisions of the said section and compound the defaults.

PRAYER

1. It is, therefore, prayed that the Hon'ble Authority may be pleased to compound the Company/its directors under sections 162 and 220(3) of the Companies Act, 1956 which is pending before the Hon'ble Court of the Chief Judicial Magistrate, at Indore (M.P) on such reasonable terms and conditions as the Hon'ble Authority may determine for which act of kindness the petitioners shall remain grateful.
2. The prosecution instituted before the Hon'ble Chief Judicial Magistrate Court at Indore (M.P) be directed to be withdrawn by the Registrar of Companies.
3. That the directions be issued for withdrawal of case for prosecution launched against the Company and its officers/directors under sections 168 and 210, which is not maintainable.

Annexure 1 to Application

Statement of the Annual General Meetings held by the Company and the accounts laid before the Annual General Meeting which were adopted by the members on the date of Annual General Meetings

Accounting year ended on	*Date of the annual general meeting being held*	*Date of adoption of accounts by the members*
31st March, 2002	27th July, 2002	27th July, 2002
31st March, 2003	29th September, 2003	29th September, 2003
30th June, 2004	28th December, 2004	28th December, 2004

Annexure 2 to Application

Statement of the filing of balance-sheet and annual return to the Registrar of Companies, Madhya Pradesh

Name of Document	*Date of A.G.M.*	*Date of Filing*	*M.R. No. & Date RoC*	*Date of taking on record by*	*Doc. No. of ROC.*	*Remarks*
Annual Return 2002	27-7-2002	24-9-2002 24-09-2002	XXXXX dated	25-10-2002	10	Filed to ROC M.P.
Annual Return 2003	29-9-2003	29-12-2003 29-12-2003	XXXXX dated	25-10-2003	11	Filed to ROC M.P.
Annual Return 2004	28-12-2004	16-8-2004 16-8-2004	XXXXX dated	25-10-2004	13	Finan. yr extended to 30-6-2004
Balance Sheet as at 31-3-2005	27-7-2005	24-9-2005 24-9-2005	XXXXX dated	19-11-2005	15	Filed to ROC M.P.
Balance Sheet as at 31-3-2003	29-9-2003	29-12-2003 31-12-2003	XXXXX dated	25-10-2003	12	Filed to ROC M.P.
Balance Sheet as at 30-6-2004	28-12-2004	16-8-2005	XXXXX dated 16-8-2005	25-10-2005	14	Finan. yr extended to 30-6-2004

Annexure 2 to Appendix 1

(HEADING AS PER APPLICATION)

Specimen of Affidavit

(Affidavit verifying application)

I, Ishan Jain S/o Shri D.K. Jain, aged about 45 years, resident of 204 Bijali Nagar, Indore (MP), by occupation business do solemnly affirm and say as follows:

I am the Managing Director of the Company M/s ABC Industries Ltd. The applicant in the petition above mentioned and am fully authorised by the Board of directors to make this affidavit on its behalf.

The statement made in paragraph 1 to … are based on information derived from the records of the company and I believe them to be true and statement made are true with the best of my knowledge and belief.

I, solemnly affirm that this declaration is true; that it conceals nothing and that no party of it is false.

ISHAN JAIN

MANAGING DIRECTOR

Solemnly affirmed before me this day of ...., of ………… of this year ……

(PUBLIC NOTARY)

Annexure 3 to Appendix 1

(Heading as per Application)

Specimen of Memorandum of Appearance

Dear Sir,

Please take note that we are duly authorised to enter appearance and do hereby enter appearance on behalf of ABC Industries Ltd, applicant in the above mentioned application.

A copy of the resolution passed by the Board of directors at their meeting held on xx.xx.xxxx authorising us to act for every purpose connected with the proceeding for the said party is enclosed, duly signed by me for identification.

Ishan Jain

This …..day of …………

Appendix 2

Specimen of resolution for authorising to make application for compounding of an offence

RESOLVED THAT an application be made to the Registrar of Companies pursuant to clause (*a*) of sub-section (4) of section 621A of the Companies Act, 1956 for compounding the offence for which prosecution has been filed with the request to forward the same to the Central Government for necessary action.

RESOLVED FURTHER THAT Mr. Ishan Jain, the Managing Director of the Company be and is hereby authorised to file/move/present before appropriate Court, Central Government and/or such other judicial/quasi judicial and/or administrative authority(ies) as may be deemed appropriate and advised to by the legal counsels such petitions/application including any application for compounding on behalf of the Company, in connection with the show cause notice issued by the Registrar of Companies for violation of provisions of the Companies Act, 1956 and any penal proceedings/ complaint initiated or may be initiated against the Company and/or directors/officials of the Company, and further verify, sign, affirm, submit the said petitions/applications including affidavits and other statements forming part of such petitions/applications.