

## R U MOVING TOWARD COPOUNDING?



### PROVISION OF SECTION 180(1) OF COMPANIES ACT 2013

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Let's Start with Example of Section 180(1) (c) of the Companies Act, 2013 corresponds to section 293 of the companies Act, 1956 and the said section has been brought into effect from 12<sup>th</sup> September 2013.

Section 293 of the Companies Act, 1956 Was Applicable Only To Public Companies i.e. Private Limited Companies Were Exempted from this requirement and therefore Private Limited Companies could borrow any sums of money upto any limit without the need of seeking any approval from the members of the company.

\*Now Section 180 is Applicable To All Companies i.e. public as well as private. So w.e.f. 12<sup>th</sup> September, 2013 onwards even private companies have to seek the approval of their members if they are intending to borrow monies in excess of their paid up share capital and free reserves.

### THE RELEVANT SECTION 180(1) (C) STATES AS FOLLOWS:

180. (1) The Board of Directors of a company shall exercise the following powers only with the consent of the **Company by A Special Resolution**, namely:—

(c) To Borrow Money, where the money to be borrowed, together with the money already borrowed by the company will exceed aggregate of its paid-up share capital and free reserves, apart from temporary loans obtained from the company's bankers in the ordinary course of business:

**Explanation:** For the purposes of this clause, the expression "temporary loans" means loans repayable on demand or within six months from the date of the loan such as short-term, cash credit arrangements, the discounting of bills and the issue of other short-term loans of a seasonal character, but does not include loans raised for the purpose of financial expenditure of a capital nature;

So after reading of the above section implies that it has become Mandatory for private Companies to obtain approval of their members by way of Special Resolution passed at

the general meeting that the company is allowed to borrow monies in excess of the paid up share capital and free reserves of the company, specifying thereby the maximum amount upto which monies could be borrowed by the company.

Since the section has been made effective from 12<sup>th</sup> September 2013, it would be imperative for private companies to get such special resolution passed at the earliest, since sub-section (5) above clearly stipulates that the onus of complying the provisions of this section is upon the private company since the lender can claim that he has acted in good faith.

### **ARE U MOVING TOWARD COMPOUNDING?**

The Main Reason behind writing this article is “Are We Moving Towards Compounding?”

### **REQUIREMENT TO FILE SPECIAL RESOLUTION WITH MCA:**

**As per Section-117 of Companies Act, 2013:**

Sub- Section 1 of Section- 117: A **Copy Of Every Resolution** or any agreement, in respect of matters specified in sub-section (3) \*\*\* together with the explanatory statement under section 102, if any, annexed to the notice calling the meeting in which the resolution is proposed, **Shall Be Filed With The Registrar Within Thirty Days Of The Passing** or making thereof in such manner and with such Fees As May Be Prescribed Within The Time Specified Under Section 403:

**\*\*\*Sub- Section 3 of Section-117 includes: Every SPECIAL RESOLUTION**

### **CONSEQUENCES OF NOT FILING:**

#### **A. ADDITIONAL FEES:**

**As per Section 117(3) Every Special Resolution is required to file with ROC in e-form MGT-14. If the Company failed to file Special Resolution in e-form MGT-14 within 30 days of passing of resolution. Then additional fee will be applicable as per table given below: As per Section 403(1)**

Table of **Additional fees** which shall be applicable for delays in filing of the forms other than for increase in Nominal Share Capital

| Period of Delays                                                                                   | Forms including charge documents |
|----------------------------------------------------------------------------------------------------|----------------------------------|
| Up to 15 days (sections 93, 139 and 157)                                                           | One time                         |
| More than 15 days and upto 30 days (Sections 93, 139 and 157) and upto 30 days in remaining forms. | 2 times of normal filing fees    |
| More than 30 days and upto 60 days                                                                 | 4 times of normal filing fees    |
| More than 60 days and upto 90 days                                                                 | 6 times of normal filing fees    |
| More than 90 days and upto 180 days                                                                | 10 times of normal filing fees   |
| More than 180 days and upto 270 days                                                               | 12 times of normal filing fees   |

- ✓ Delay beyond 270 days, the second proviso of section 403(1) of the Act may be referred.

**B. PENALTY:**

**IF COMPANY FAILS TO FILE E-FORM WITHIN 30 DAYS + ADDITIONAL 270 DAYS (TOTAL 300 DAYS) THEN PROVISIONS OF SECTION- 403(2) WILL APPLICABLE.**

- (1) Any document, required is submitting, filing, registering or recording, or any fact or information required or authorized to be registered under this Act, shall be submitted, filed, registered or recorded within the time specified in the relevant provision on payment of such fee as may be prescribed:

Provided that any document, fact or information may be submitted, filed, registered or recorded, after the time specified in relevant provision for such submission, filing, registering or recording, within a period of two hundred and seventy days from the date by which it should have been submitted, filed, registered or recorded, as the case may be, on payment of such additional fee as may be prescribed:

**VIEW POINT:** As per Language of Section given above, if a company fails to file E-form within 300 days from the date of passing of resolution company have to pay to Fees 12 times of Original fees Plus Compounding of Offence as per 403(2).

**PENALTY WHICH CAN BE IMPOSED IS AS PER SECTION 403(2):-**

Where a company fails or commits any default to submit, file, register or record any document, fact or information under sub-section (1) before the expiry of the period specified in the first proviso to that sub-section with additional fee, the company and the officers of the company who are in default, shall, without prejudice to the liability for payment of fee and additional fee, be liable for the penalty or punishment provided under this Act for such failure or default.

**Penalty provided Under the Act For Such Default is Given In Section 117(2):-**

The Company Shall Be Punishable With Fine Which **Shall Not Be Less Than Five Lakh Rupees But Which May Extend To Twenty Five Lakh Rupees**

And

Every Office of the Company, who is in default, including liquidator of The Company, If Any, **Shall Be Punishable With Fine Which Shall Not Be Less Than One Lakh Rupees But Which May Extend To Five Lakh Rupees.**

**BUT THERE IS A WAY TO GET SAVE COMPANY FROM PENALTY OF RS.  
500,000/-**

**460. CONDONATION OF DELAY IN CERTAIN CASES.**

Notwithstanding anything contained in this Act,—

- (a) Where any application required to be made to the Central Government (MCA) under any provision of this Act in respect of any matter is not made within the time specified therein, that Government may, for reasons to be recorded in writing, condone the delay; and
- (b) Where any document required to be filed with the Registrar under any provision of this Act is not filed within the time specified therein, the

Hence if a Company has passed Special Resolution u/s 180(1)(c) but failed to file e-form MGT-14 in this respect beyond 300 days, it needs to file application for condonation of delay with Central Government (CLB), so that the **forms- CG-1** can be filed with Central Government.

**Question: 1:-**

If A private Limited Company Having Paid up capital of Rs. 1,00,000 (Mostly Private Companies in India Having Paid up Share Capital Rs. 1,00,000/-) and Free Reserve of Rs. ,00,00. Company Borrows Money on or after 1<sup>st</sup> April, 2014 (Assume on 14<sup>th</sup> September, 2013) of Rs. 3,50,000 (Which is More than Paid up share capital + Free Reserve), Company was not aware about provisions of Section- 180 and failed to file e-form MGT-14 along with Special Resolution. What will be the consequences and how company should file the form.

**Then what will be the treatment?**

**Solution:** : As per Section -180 if company borrows money on 1<sup>st</sup> April, 2014 more than its Paid-up Share Capital and Free Reserve there is need file MGT-14 by company for filling of Special Resolution. Today 14<sup>th</sup> February, 2015 Company come to know that there was needed to file same with ROC.

1. If the delay is less than 300 days, for E.g. the Company is filling MGT-14 before 26<sup>th</sup> January, 2015 then additional fees of 12 times of the normal fees need to be paid for the purpose of filling of MGT-14.
2. If the Company filed to file form beyond 26<sup>th</sup> January, 2015 then the Company has to apply for condonation of delay u/s 460 and the Condonation fees and additional fees needs to be paid with the e-form MGT-14.

**HENCE IT IS RECOMMENDED THAT THAT THE COMPANY SHOULD MAINTAIN CALENDER OF ALL THE RESOLUTIONS PASSED U/S 117 & 179(3) SO THAT THE DELAY SHOULD BE NEVE BE EXCEEDING 300 DAYS.**

**THERE ARE APPROX MORE THAN 50 NATURE OF TRANSACTIONS WHICH ARE COVERED U/S 117 AND 179(3).**

**CONCLUSION:** So As per Above Discussion it is clear that if company are ignoring or not aware from the filling of resolution in MGT-14 with ROC then WE ARE MOVING TOWARD CONDONATION/ COMPOUNDING.