

COMPOUNDING UNDER COMPANIES ACT- 2013

Series- 120

Compounding of offences is yet regularized by Section 621A of Companies Act, 1956 as new section 441 under Companies Act, 2013 is not yet notified..

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BRIEF BACKGROUND:

The compounding provision in the Act were inserted by the Companies Amendment Act, 1988 on the recommendation of the ¹*SACHAR COMMITTEE* as amended by the Companies (Amendment) Act, 2000. It was felt that leniency is required in the administration of the provisions of the Act particularly penalty provisions because a large number of defaults are of technical nature and arise out of ignorance on account of bewildering complexity of the provisions².

The concept of compounding of offences was incorporated as a measure to avoid the long drawn process of prosecution, which would save both cost and time in exchange of payment of a penalty to the aggrieved. In criminal law, the power to compound the offence is at the discretion of the victim. The perpetrator cannot demand for compounding of the offence. But in corporate law, compounding is at the discretion of the offender/offending company.

When compounding is done, the prosecution is converted into fine i.e. condonation of prosecution by imposing penalty. It enables the offender company and the director / officer-in-default to avail peace and honorable discharge and avoid cumbersome trial

¹ Sachar Committee had suggested substitution of the existing provisions for realization of fines through Court proceedings by a system of penalty as provided in the Income-tax Act, and also the Registrar, and the Company Law Board, including the Regional Benches, should be clothed with power of a court so as to empower them to take cognizance of and to impose penalties for any infraction of certain specified provisions of the Act.

² An example is the decision *in Bradford Investments Plc. (No.2)*, Re, 1991 BCLC 688. In this case, four persons transferred their business to a company which allotted them shares in consideration of the price. They did not know that sec 103 of 1985 Act required an independent report on the value of the business. For this statutory violation they become liable to pay a fine of more than 1 Million Euro though they had relied on the advice of their solicitors, practitioners and the Company's accountants.

BENEFITS:

<i>Prosecution</i>	<i>Compounding</i>
In case of prosecution for an offence in a criminal court, the accused has to appear before the Magistrate at every hearing and an advocate needs to be engaged for appearing before the criminal court. Further court proceedings are time consuming and expensive.	in case of compounding under the Companies Act, the accused need not appear personally and can be discharged on payment of composition fee which cannot be more than the maximum fine leviable under the relevant provision.

MEANING OF COMPOUNDING:

What is Compounding?

As per the Black's Law Dictionary, to "Compound" means "to settle a matter by a money payment, in lieu of other liability." This definition thoughtfully represents the concept of Compounding as a *Settlement Mechanism*, a settlement by paying the penalty in lieu of facing the prosecution for the offence committed.

The meaning of word compounding of offence is not defined under Companies Act, 1956/2013. However if we try to analyze the section 621A, we can draw one clear interpretation i.e. "It's nothing but admission of guilt" In the process of compounding, the person may either Suo Moto or on receipt of notice of default/initiation of prosecution, admits the commission of default and make an application for compounding of the concern offence. The defaulters agree to pay penalty which may be ordered by the Central Government.

Compounding is essentially a compromise or arrangement between administrator of the enactment and person committing an offence. Compounding crime consists of receipt of some consideration (termed as compounding fees) in return for an agreement not to prosecute one who has committed an offence³.

⁴COMPOUNDING OF ⁵OFFENCE UNDER COMPANIES ACT:

³ - Reliance Industries, in re-(1997) 24 CLA 214 (CLB)

⁴ In today's Corporate world, good governance means to comply with all the provisions of Corporate laws. Non compliance will result in penalties or penalties with imprisonment. Corporate offences are classified into civil and criminal offences. Further it has been classified as Compoundable and Non compoundable offence.

An accused committing an offence is liable to be prosecuted as per relevant provisions of law. Compounding is a settlement process by which the accused pays compounding charges in lieu of undergoing consequences of lengthy prosecution



There is great need of leniency in the administration of the Act particularly its penalty provisions not only because a large number of defaults are of technical nature but also because they arise out of ignorance of the lengthy and bewildering complexity of the provisions of the Act.

- Section- 441(1) of Companies Act, 2013:
Power of Compounding of offence is with NCLT/ Regional Director/ Person authorized by Central Government.

Permission of Special Court

- Section- 441(6) of Companies Act, 2013: Any offence which is punishable under this Act, with imprisonment or fine, or with imprisonment or fine or **with both**, shall be compoundable with the permission of the Special Court, in accordance with the procedure laid down in that Act for compounding of offence.

Note:

At present, Section 441 of Companies Act, 2013 and provision relating to Special courts are not effective. *Thus, Compounding can be done as per Section 621A of Companies Act, 1956.*

COMPOUNDABLE AND NONCOMPOUNDABLE OFFENCES: Compoundable offences are such offences in which the complainant would be at liberty to compound the matter with the accused as a matter of right and such right is not available in case of non-compoundable offences. A compoundable offence is always a lesser degree offence punishable with a shorter jail term or fine. When an offence is compounded, the party, who has been aggrieved by the offence, is compensated for his grievance.

The compounded amount shall not exceed the maximum amount of fine. Only the aggrieved party can compound an offence. Not even the public prosecutor has the power to compound an offence. Generally, the compounding of offences is permitted in case of procedural violations which are not prejudicial to the interests of the company or public.

JURISDICTION FOR COMPOUNDING OF OFFENCE:

UNDER COMPANIES ACT, 2013: SECTION 441(1) (B)

Power of Regional Director:

⁵ As per section 3(38) of General Clauses Act, 1897 "Offence" shall mean any act or omission made punishable by any law for the time being in force. Section 2(n) of Criminal Procedure Code 1973 ('CrPC') also defines 'offence' similarly.



Where the maximum amount of fine which may be imposed for such offences doesn't exceed Rupees Five Lac (Rs. 500,000).

Power of NCLT:

Where the amount of fine which may be imposed for such offences doesn't below Rupees Five Lac (Rs. 500,000).

UNDER COMPANIES ACT, 1956: SECTION 621A

Power of Regional Director:

Where the maximum amount of fine which may be imposed for such offences doesn't exceed Rupees Fifty Thousand (Rs. 50,000).

Power of CLB:

Where the amount of fine which may be imposed for such offences doesn't below Rupees Fifty Thousand (Rs. 50,000).

SOME IMPORTANT PROVISIONS:

❖ ⁶Maximum Amount of Penalty:

Sum so specified in order shall not, in any case, exceed the maximum amount of the fine which may be imposed for the offence so compounded.

❖ Interval between Two Same Offences for Compounding:

⁷Any second or subsequent offence **committed after the expiry of a period of Three year** from the date on which the same offence was previously compounded, shall be deemed to be a first offence. section 441(2)

(In other words if any offence committed by a company or its officers within a period of three years from the date on which a similar offence committed by company or officer was compounded under this section, Then Provision of this Section will not be applicable and company & officer **will not be eligible for compounding**).

In other words, similar offence can be compounded only once in three years. A dissimilar offence i.e. under different provision of law, can be compounded within 3 years of previous offence, which was not similar.

⁶ Amount of Order can't be exceeding the maximum amount of penalty given under particular section for which application for compounding is made.

⁷ After the expiry of three years from the date of compounding of offence, if the second or subsequent offence had been committed, the same shall be treated as the first offence.

List of Offences which Can't be Compounded:

The third proviso of Section 441 provide that following offences can't be compounded by the Company or its officer:

- (a) In case either the investigation has been initiated or is pending.
- (b) In case similar offence committed by it has been compounded and period of three years has not expired.
- (c) Any offence which is punishable under this Act with imprisonment only or with imprisonment and also with the fine; cannot be compounded;

Under Companies Act, 1956: Offences are divided under three categories:-

- Offences punishable with fine only.
- Offences punishable with imprisonment or with fine, or with both, (compounded with the permission of court)
- Offences punishable with imprisonment only can't be compounded.

Effects of Compounding: - Compounding has very significant impacts. They are as follows;

- i. Once the offence is compounded, no further prosecution shall be initiated either by registrar or shareholder or any other person in respect of that offence.
- ii. If the offence is committed for non filing of any return or document with registrar, then that return or documents needs to be filed with the registrar along with fees and additional fees as may be imposed under the order and within such time frame as may be stipulated under the order.
- iii. If any prosecution is going in any court in respect of the offence, then on successful compounding of the same, the person against whom the prosecution is going on shall be discharged.
- iv. Failure of compliance with the order of Compounding is an offence punishable with imprisonment of six months or fine not exceeding ` 100,000/- or with both.
- v. Once the offence is compounded, the intimation of compounding needs to be given to the Registrar within the period as mentioned in the order of compounding.

Compounding means acquittal:-

As per section 320 of Criminal Procedure Code, composition will have the effect of acquittal of accused. It is not mere by a discharge. Thus, if an offence is compounded, the person is deemed to be acquitted, and hence does become ineligible to be appointed as a director.

No penalty or prosecution after compounding:-



In P P Varkey V. STO (1999) 114 STC 224 (Bom HC DB), it was held that once an offence is compounded, penalty or prosecution proceeding cannot be taken for same offence.

In S Viswanathan V. State of Kerala (1993) 113 STC 182 (Ker HC DB), it was held that once the matter is compounded, neither department nor assessee can challenge the compounding order. Department cannot reopen the matter on the reason that actual suppression was much higher.

No appeal against order of composition:-

A person having agreed to the composition of offence is not entitled to challenge the said proceeding by filing an appeal. (S V Bagi v. State of Karnataka (1992) 87 STC 138).

No hearing necessary to reject application for compounding?:-

In M P Purusothaman v. ADIT (2003), it was held that authority can reject the application for compounding. It is not necessary to give personal hearing before rejecting application for compounding.

POWER OF SPECIAL COURT

Special Court can compound offence if offence punishable with imprisonment or fine or both:-

Any offence which is punishable under Companies Act with the permission or with fine, or with both, shall be compoundable with the permission of Special Court, in accordance with the procedure laid down in Code of Criminal Procedure for compounding of offences. However, any offence which is punishable under this Act with imprisonment only or with imprisonment and also with fine shall not be compoundable.

Special Court:

Special Court shall be established by Central Government under Section 435(1). Until a Special Court is established, **be tried by a Court** of Session exercising jurisdiction over the area, notwithstanding anything contained in the Code of Criminal Procedure.

PROCESS OF COMPOUNDING:

	In case of Application by Company
Calling of Board Meeting	Company will call the Board Meeting as per Companies Act, 2013 and SS-1.
Calculate the amount of offence	Board will calculate the amount of the penalty as per the relevant section.
Holding of Board Meeting	Pass a resolution to file application with authority for compounding of offence and authorize director of the Company and for preparation and signing of documents including application. Company will authorize any professional for follow up the matter with authority.



Preparation of Compounding Application	Company will prepare the application of compounding (The application is to be made on the lines of the procedure laid down in the CLB Regulations, 1991, duly accompanied by an affidavit by the Company or its officers making the application.) of offence along with the relevant documents.
Filling of Form with ROC	PROCEDURE FOR MAKING APPLICATION: As per sub-section 3(a) of Section 441, every application of compounding of offence shall be made to the Registrar of Companies, who, in turn, shall forward the same along with his comments to the NCLT or RD or any other officers, as may be authorized by the Central Government for the purpose of adjudication.
Filing of e-form with ROC	Application for compounding shall be submitted electronically in e-form GNL-1. This form will be forwarded by ROC to NCLT/Regional Director as applicable.
Hearing before Authority	There is no specific provision in the Act, normally, NCLT/Regional Director will give personal hearing and then pass a speaking order giving reasons. The hearing can be attended by Director/secretary/ officer of Company or by authorized representative like advocate or a practicing CA/ CMA/ CA.

LEGAL PRECEDENTS

Before ordering composition of the offence, the Regional Director or the Company Law Board is required to follow the rules of natural justice, by giving an opportunity of hearing to the company, the officer in-default, the Registrar or any other complainant, including any shareholder or SEBI or an officer of the Central Government who might have been authorized the Act.

Order by Authority/ Filling of Order with ROC	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 7 days from the date on which the offence is so compounded. Section 441(3)(b)
Payment of amount of order by Company	After the order, the compounding fees should be paid in appropriate account by way of challan and receipt challan should be produced to one compounding authority.

LIST OF OFFENCES COMPOUNDED BY RD/NCLT

Offences compoundable by Regional Director	Offences compoundable by the NCLT
11(2)- Failure complying with the requirements relating to Commencement of business.	8(11)- default in complying with the requirements relating to formation of companies with



	charitable objects etc.
16(3)- Default in complying with the directions issued under sub-section (1) relating to rectification of name of company	40(5)- Default in complying with the provisions of this section relation to securities to be dealt in the stock exchanges
26(9)- Contravention of provisions relating to issue of a prospectus	46(5)- Fraudulently issuing duplicate share certificates by a company
53(3)- Violation of provisions relating to issue of shares at discount	66(11)- Default in publishing the order of confirmation of the reduction of share capital by the Tribunal
56(6)- Failure to comply with the provision relating to transfer and transmission of securities under sub-section (1) to (5)	67(5)- Default in provisions relating to purchase by company or loans by company for purchase of its own shares
59(5)- Default in complying with the order of Tribunal relating to rectification of register of members	74(3)- Failure to repay the deposit or part thereof or any interest thereon within the time specified or such further time as may be allowed by the Tribunal
64(2)- Default in filing a notice related to alteration, increase or redemption of share capital along with the altered memorandum with the Registrar	117(2)- Failure in filing with the Registrar the copy of notice or agreement within stipulated time
67(5)- Contravening provisions relating to purchase by company or loans by company for purchase of its own shares	124(7)- Default in transfer of amount of accumulated profits to unpaid dividend account and violating other provisions of section 124
68(11)- Failure in complying with the provisions of this section or any regulation made by the Securities and Exchange Board relating	143(15)- Failure of auditor to intimate to Central Government regarding fraud against the company by officers or employees
86- Contravention of any provision relating to Registration of Charges (Chapter VI)	185(2)- Contravention of the provisions of sub-section (1) relating to loans, guarantee or security

88(5)-Failure to maintain register of members/debenture-holders/other security holders as prescribed	245(7)- Committing default in complying with the order of Tribunal under this section.
89(5)-Failure to file declaration not holding beneficial interest in any share	314(8)- Default in complying with the provisions of this Section except sub-section (5).
89(7)-Failure to file return relating to beneficial interest in any share before the expiry of the time specified UIS 403(1)(i) proviso	316(2) - Failure to send quarterly report on winding up and call meeting by company liquidator
92(6)- If a company secretary in practice certifies the annual return otherwise than in conformity with the requirements of this section or the rules made there under	
99-Default in holding a meeting of the company as u/s 96, I97, I98 or in complying with any directions of the Tribunal	
102(5)- Default in complying with the provisions of this section relating to statement to be annexed to notice	
105(3)- If default is made in complying with sub-section (2) relating to proxies	
105(5)- If invitations to appoint as proxy a person	
or one of a number of persons specified in the invitations are issued	
121(3)-Failure to file Report on annual General meeting.	
124(7)- Failure to transfer the amount of accumulated profits to unpaid dividend account and violating other provisions of section 124	
137(3)-Failure to file financial statements with the Registrar	
140(3)-Non-Compliance by auditor of sub-section (2) relating to filing of resignation information	
147(1)-Failure of company to comply with provisions of sections 139 to 146 with regard to auditors	
157(2)-Failure to furnish DIN to Registrar	
165(6)- Acting as a director of more than 20 companies	
166(7)- Default in complying with the provisions of this section	
relating to directors duties	
172- Contravention of then provisions of Chapter XI relating to appointment and qualifications of directors	



178(8)- Default in complying with the provisions of section 177 & of this section relating to Committees like Nomination, Remuneration and Stakeholders Relationship Committee	
188(5)(ii)- Related party transaction in case of other company	
186(13)- Contravention of the provisions of this section relating to loans and investment	
187(4)- Contravention of the provisions of this section relating to investment of company held in its name	
191(5)- Contravention of the provisions of this section relating to payment to director for loss of office in connection with transfer of property	
197(15)- Contravention of the provisions of this section relating to managerial remuneration in case of absence or inadequacy of profits.	
203(5)- Contravention of the provisions of this section relating to appointment of Key Managerial personnel	
204(4)- Contravention of the provisions of this section relating to Secretarial Audit for bigger companies.	
206(7)- Failure to furnish any information during inspection or inquiry	
221(2)- Any removal, transfer or disposal of funds, assets, or properties of the company in contravention of the order of the Tribunal under sub-section (1)	
222(2)- Securities in any company are issued/ transferred/acted upon in contravention of an order of the Tribunal under sub- section (1)	
232(8)- Contravention of the provisions by the transfer and transferee company in case of merger or amalgamation	
238(3)-Failure to register the offer of Schemes involving transfer of shares.	
242(8)- Contravention of the order of Tribunal relating to alterations in memorandum or articles	
247(3)(Proviso)- Contravention of the provisions of this section by the valuer	
249(2)- Filing of application in restricted cases for removal of name	



302(4)- default by official liquidator in forwarding a copy of the order of dissolution of company by tribunal within the period specified in sub-section (3)	
306(5)- Default in calling the meeting of the creditors; to prepare a statement of the position of the company's affairs along with a list of creditors, estimated amount of claim and filing the resolution with Registrar	
307(2)- Default in publication of resolution to wind up voluntarily	
312(2)- Failure to give notice of appointment of Company Liquidator to Registrar	
314(5)-Failure to prepare quarterly statement of accounts by company liquidator in voluntary winding up and file with the Registrar under sub-section (5).	
318(8)- Failure to complying with the provisions of this section relating to final meeting and dissolution of company	
342(6)- Failure or neglect to give assistance required under subsection (5)	
344(2)- Failure to give statement that the company is in liquidation	
348(6)- Contravention of the provisions of information as to pending liquidation	
356(2)- Failure to file certified copy of the order of Tribunal relating to dissolution of company void with the Registrar	
392- Contravention of the provisions of Chapter XXII by a foreign company	
405(4)- Failure to furnish information or statistics etc. by the companies required by the Central Government	
No specific penalty or punishment is provided in the Act	
Repeated default within 3 years	
452(1)- Punishment for wrongful withholding of property	
453- Improper use of the words "limited" and "private limited"	
454(8)- Failure to pay the penalty imposed by the adjudicating officer or Regional Director	
464(3)- Being a member of a company formed exceeding certain numbers	
469(3)- Contravention of the Rules framed by Central Government	

CASE STUDIES:

No Penalty or Prosecution after Compounding: In following Cases:

PP Varkey V. STO(1999) 114STC251(Ker HC),

It was held that once offence is compounded, penalty or prosecution proceedings can't be taken for same offence.

S Viswanathan V. State of Kerala(1999) 113 STC 182 (Ker HC DB)

It was held that once the matter is compounded, neither department nor assessee can challenge the compounding order. Department can't reopen the matter on the reason that actual suppression was much higher.

No appeal against order of composition:

S V Bagi V. State of Karnataka (199) 87 STC 138

A person having agreed to the composition of offence is not entitled to challenge the said proceeding by filing appeal.

Offence can be compounded only when there is no fraud:

Reliance Industries Ltd.(1997) 24 CLA 234 (CLB),

The Company issued duplicate share when, in fact, original shares were in its possession. The offence was compounded as it was not with intention to defraud.

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