

COMPOUNDING OF OFFENCE WHEN PROSECUTION IS INITIATED

BACKGROUND:

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

Situation:

If there is any prosecution is pending or running against the Company for such offence (like: Non appointment of KMP, Women Director, Independent Director, wrong information in Director Report etc) then whether company can apply for compounding of such offence.

If we say yes Company can apply for compounding of offence in such situation then there are two questions arise:

- Whether Company can apply while prosecution is still pending against the Company
- Whether Company can apply after completion of the prosecution.

Statutory Provisions Contained Under the Act:

Section 441 of the Companies Act 2013 as amended (the "Companies Act") has the provision for filing application for the offences to be compounded. As per section 441 any offence punishable under this Act with fine only, may, either before or after the institution of any prosecution, be compounded by Tribunal or Regional Director as per limits.

As per subsection 3 of Section 441

(b) Where any offence is compounded under this section, whether before or after the



institution of any prosecution, an 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 any person authorised by the Central Government against the offender in relation to whom the offence is so compounded.
- (d) Where the compounding of any offence is made after the institution of any prosecution, such compounding 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 compounding of the offence being given, the company or its officer in relation to whom the offence is so compounded shall be discharged.

Interpretation Note:

It is clear from the provisions of Section 441 even if the prosecution is going on or prosecution is completed against company for any offence company can go for compounding of such offence with NCLT.

There is some latest ruling of NCLT bench regarding compounding of offences against which prosecution was launched by ROC.

NATIONAL COMPANY LAW TRIBUNAL, BANGALORE BENCH **Tejas Networks Ltd., In re**

Section 149, read with section 172 and section 441, of the Companies Act, 2013 and rule 3 of the Companies (Appointment of Directors) Rules, 2014 - Directors - Number of - Applicant-company was required to appoint a woman Director on board by 31-03-2015 –

Company was unable to identify a suitable person to be appointed as woman Director due to specialized nature of business of company.

ROC instituted prosecution against applicants company and its officers who were in default before Special Court for Economic Offence for said violation –

Applicant company however, appointed woman director belatedly on 16-2-2016 - It was stated by applicants that violation was neither wilful nor an act of negligence - Subsequently, instant suo-motu application was filed for compounding said violation.



This Application was filed before the Company Law Board, Southern Region, Chennai under Section 621A of the Companies Act, 1956 for compounding of offence for violation under section 149(1) of the Companies Act, 2013 which is punishable under section 172 of the Companies Act, 2013.

The NCLT give decisions that the violation can be compounded even after prosecution is launched against the Applicants which is pending before the Special Court for Economic Offence at Bangalore.

NATIONAL COMPANY LAW TRIBUNAL, HYDERABAD BENCH
Cambridge Technology Enterprises Ltd., In re

Section 441, read with section 134 of the Companies Act, 2013/Section 621A, read with section 217 of the Companies Act, 1956 – Offences against Act to be cognizable only on complaint by Registrar, Shareholder or Government –

Pursuant to inspection of books of account and other records of applicant-company it was alleged by Regional Director that applicant-company did not follow AS-9 relating to revenue recognition, AS-26 relating to intangible assets; AS-13 relating to Accounting for Investment; and AS-20 relating to earning per share in preparation of annual accounts as stated in Director's Responsibility statement,

hence, Board's Report attached to Annual Report for financial years 2004 to 2009 were not in tune with provision of section 217(2AA) and thus, alleged to have contravened provision of section 217(2AA) –

Company submitted that violation was not intentional and, in any case, would not cause any prejudice to interest of members or other creditors –

It was further submitted by company that new management of company had taken action and implemented policies designed to prevent any further default –

The company has filed the present application suo-moto by praying the Tribunal to allow them to compound the offence alleged to have been committed under section 217(2AA), on reasonable terms and conditions, as it may deem fit and just.

In the light of the facts and circumstances of the case and, also in the interest of Justice, NCLT inclined to allow the present application by exercising the powers conferred under Section 621A of the Companies Act, 1956, however, subject to payment of compounding fees for the alleged offence committed U/s. 217(2AA) of the Companies Act, 1956.

Benefits 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 (S.Vishwanath vs State of Kerela)
- No appeal against order of composition (S V Bagi v. State of Karnataka)
- Avoid harassment due to appearance before adjudicating officer or special court.
- Compounding application can be moved even before start of prosecution proceeding which can otherwise be public whereas the compounding can be under wrap.
- Fine paid in compounding can be claimed as expenses whereas penalties shall be added to your income on assessment by tax officials

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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