



SURESH & CO.,
Chartered Accountants

**Spotted & Reported –
Companies
(Amendment)
Ordinance, 2018.**

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FOREWORD

With the introduction of Companies (Amendment) Ordinance, 2018, notified on November 2, 2018, there have been major changes in the Companies Act 2013, especially many of the penalty provisions have been amended.

“Spotted and Reported” is one of the many other initiatives undertaken by SURESH & CO., Chartered Accountants, to enable its members, articled assistants, associates, clients, business partners, professionals and other trade/industry practitioners to be informed and updated about the new developments in the industry. Three reports on:

1. “CBDT Amends the Tax Audit Report (Form 3CD)”;
2. “Business Valuation” and
3. “GST Audit”

have already been issued.

This 4th issue of Spotted and Reported is drafted with a view of giving its readers a quick understanding of Companies (Amendment) Ordinance, 2018. The report has been drafted in a manner covering the various amendments of Companies (Amendment) Ordinance, 2018.

The key focus of this report is on the responsibility of the directors of a Company due to the additional compliances brought in by this Ordinance. This Ordinance mainly focuses on the increasing penalties being imposed on non-compliance of the provisions of the Act.

The report does not deal with legal interpretations and rulings. This report is only meant for general awareness and should not be used as a basis for any decision-making.

The Companies Act, 2013 (Act) is subject to amendment as and when it is found appropriate to do so. The government promulgates an ordinance to make changes to the Companies Act with an aim to promote ease of doing business, ensure better corporate compliance and expedite insolvency proceedings.

The changes include easing of various penal provisions in the Act and introduction of measures to unclog National Company Law Tribunal (NCLT) and special courts.

The thrust of the changes is to decentralise power to regional directors and set up an in-house e-adjudication mechanism to deal with minor offences, which will free up the already overburdened NCLT and special courts.

The corporate affairs ministry is also seeking faster resolution in the IL&FS case and has suggested changes to the Act to empower the government-appointed IL&FS board of directors, an official said. “We have proposed that 16 out of the 81 compoundable offences should be dealt through the inhouse e-adjudication mechanism, instead of going to special courts,” a corporate affairs ministry official said.

The 16 minor offences include failure to file timely resolutions and other declarations, and various non-serious and clerical errors. “The companies won’t have to go to special courts but will pay a penalty online through in-house e-adjudication,” the official said.

The ministry has also favoured referring routine matters such as conversions to privately-held from publicly held companies to regional directors.

The major amendments proposed in the Companies Amendment Ordinance 2018 are: Increase in power of Registrar of Companies and Regional Director. As at many places the word Tribunal has been replaced by Central Government, Compounding Threshold for going to NCLT to be revised, alteration in relation to time period for charge registration and satisfaction and new ground for strike off of Company has been given to ROC.



¹ Source – The Economic Times

The main reforms undertaken through the Ordinance include the following;

1. Introduction of Section 10A

A company incorporated after the commencement of the Companies (Amendment) Ordinance, 2018 and having a share capital shall not commence any business or exercise any borrowing powers unless,

- a. A declaration is filed by a director within a period of 180 days of the date of incorporation of the company in such form and verified in such manner as may be prescribed, with the Registrar that every subscriber to the memorandum has paid the value of the shares agreed to be taken by him on the date of making of such declaration; and
- b. The company has filed with the Registrar a verification of its registered office through Form No. INC. 22

Penalty for non-compliance:

- a. The company shall be liable to a penalty of Rs.50,000/- and every officer who is in default shall be liable to a penalty of Rs.1000/- for each day during which such default continues but not exceeding an amount of one lakh rupees.
- b. Registrar has reasonable cause to believe that the company is not carrying on any business or operations and initiate action for the removal of the name of the company from the register of companies

2. Inspection of Registered Office of a Company:

As per Section 12 (9), if the Registrar has reasonable cause to believe that the company is not carrying on any business or operations, he may cause a physical verification of the

registered office of the company in such manner as may be prescribed and if any default is found to be made in complying with the requirements of this section, he may without prejudice to the provisions of sub-section (8) (which prescribes penalty for non-compliance), initiate action for the removal of the name of the company from the register of companies.

3. Extension of penalty for default in issuance of shares at discount:

Earlier if any company contravenes any of the provisions with relation to Issue of shares at discount, fine leviable upon company shall not be less than one lakh rupees but which may extend to five lakh rupees, the following proviso has been substituted vide Companies (Amendment) Ordinance, 2018.

Where any company fails to comply with the provisions of this section, such company and every officer who is in default shall be liable to a penalty which may extend to an amount equal to the amount raised through the issue of shares at a discount or five lakh rupees, whichever is less, and the company shall also be liable to refund all monies received with interest at the rate of twelve per cent. per annum from the date of issue of such shares to the persons to whom such shares have been issued.”

4. Amendment in time for reporting creation of charge:

Earlier, the Company had 30 days to intimate MCA of the creation of charge. Further 270 days was allowed with additional fee. After the expiry of 300 days of the creation of charge, the charge could still be registered through

“condonation of delay” by making an application to the Central Government.

But now the same has been amended. Now, the Company has a period of 30 days to report the creation of charge. Further 30 days could be allowed on payment of additional fees. After the expiry of 60 days from creation of charge, the Company will be required to make an application to the Central Government for further extension of 60 days with ‘Advalorem fees’.

Important to note is that after the expiry of 120 days of the creation of charge, the Company will not be able to register the charge as the Central Government no more has the power to condone the delay as per section 87. Yet the Central Government can allow condonation as per section 460.

5. Rectification by the Central Government in Register of Charges.

This amendment has revoked the power of the Central Government to condone the delay. But section 460 still gives the power to the Central Government for condonation of delay.

6. Penalty levied for contravention of the provisions relating to registration of charges of the principal Act, 2013 the following provision for sub-section 2 shall be inserted, vide Companies (Amendment) Ordinance, 2018.

If any person willfully furnishes any false or incorrect information or knowingly suppresses any material information, required to be registered in accordance with the provisions of registration of charges, then he/she shall be liable for action under section where the fraud involves an amount less than Rs.10,00,000/- or 1 % of the turnover of the company, whichever

is lower, and does not involve public interest, any person guilty of such fraud shall be punishable with imprisonment for a term which may extend to five years or with fine which may extend to [fifty lakh rupees] or with both pursuant to Section 447 of the Principal Act.

7. Section 454A: Penalty for repeated default

A new section has been inserted to provide where a penalty in relation to a default has been imposed on a person under the provisions of Act, and the person commits the same default within a period of three years from the date of order imposing such penalty, passed by the adjudicating officer or RD as the case may be, it or he shall be liable for the second and every subsequent defaults for an amount equal to twice the amount provided for such default under the relevant provision of Act.

8. Delegation of powers from NCLT to Central Government

- a. A company or body corporate, which is a Holding company or a Subsidiary or Associate company of a company incorporated outside India, shall make an application for change of financial year to Central Government which was earlier with NCLT.
- b. The power to approve the conversion of Public company into a Private Company has been vested with the Central Government on an application made in form INC-27.

9. Re-categorising of offences:

The list of offences which are re-categorised as defaults carrying civil liabilities which would be subject to an in-house adjudication mechanism:

Sl. No	Section	Nature of default	Pre-Companies (Amendment) Ordinance, 2018	Post (Amendment) Companies Ordinance, 2018
1	Section 117(2) Resolutions and Agreements to be filed	Failure/ Delay in filing Certain resolutions	Fine only	Non-compliance with sub-section (1) of Section 117 shall result in the company and every officer in default including liquidator of a company, if any, being liable to a penalty, instead of being punishable with fine.
2	Section 203(5) Appointment of Key Managerial Personnel	Appointment of KMPs in certain class of companies	Fine only	Non-compliance with Section 203 shall result in the company, every director and key managerial personnel of the company who is in default being liable to a penalty, instead of being punishable with fine.
3	Section 137(3) Copy of financial statement to be filed with Registrar	Failure/ Delay in filing financial statement	Fine only	Non-compliance with sub-section (1) or (2) of Section 137 shall result the company being liable to a penalty, instead of being punishable with fine. In the absence of the managing director and the Chief Financial Officer, any other director who is charged by the Board with the responsibility of complying with the provisions of this section, and, all the directors of the company, shall be shall be liable to a penalty of one lakh rupees and in case of continuing failure, with further penalty of one hundred rupees for each day after the first during which such failure continues, subject to a maximum of five lakh rupees.
4	Section 92(5) Annual return	Failure/delay in filing annual return	Fine or imprisonment or both	Non-compliance with sub-section (4) of Section 92 shall result in: (i) the company being liable to a penalty, instead of being

				<p>punishable with fine.</p> <p>(ii) every officer who is in default shall be liable to a penalty of fifty thousand rupees and in case of continuing failure, with further penalty of one hundred rupees for each day during which such failure continues, subject to a maximum of five lakh rupees.</p>
5	Section 121(3) Report on annual general meeting	Failure/Delay in filing Report on AGM by public listed company	Fine only	Non-compliance with sub-section (2) of Section 121 shall result in the company and every officer in default being liable to a penalty, instead of being punishable with fine and further penalty of five hundred rupees for each day, in case the failure continues.
6	Section 140(3) Removal, resignation of auditor and giving of special notice.	Failure/ Delay in filing statement by auditor after resignation	Fine only	Non-compliance with sub-section (2) of Section 140 shall result in auditor being liable to liable to a penalty of fifty thousand rupees or an amount equal to the remuneration of the auditor, whichever is less , and in case of continuing failure, with further penalty of five hundred rupees for each day after, subject to maximum five lakh rupees.
7	Section 157(2) Company to inform Director Identification Number to Registrar	Failure/ Delay by company in informing DIN of director	Fine only	Non-compliance with sub-section (1) of Section 157 shall result in the company and every officer in default being liable to a penalty, instead of being punishable with fine and with further penalty of one hundred rupees for each day, in case the failure continues.
8	Section 197(15) Overall maximum managerial remuneration and managerial	Managerial remuneration	Fine only	If any person makes any default in complying with the provisions of this section, he shall be liable to a penalty of one lakh rupees and where any default has been made by a company, the company shall be liable to a penalty of five lakh rupees.

	remuneration in case of absence or inadequacy of profits			
9	Section 191(5) Payment to Director for Loss of Office, etc., in connection with transfer of undertaking, property or shares	Payment to Director for Loss of Office	Director in default shall be liable to pay fine of twenty five thousand, subject to maximum of one lakh rupees.	If a director of the company makes any default in complying with the provisions of this section, such director shall be liable to a penalty of one lakh rupees.

FINE vs. PENALTY

One of the major highlights of the Companies (Amendment) Ordinance, 2018 (“CAO18”) is re-categorisation of certain ‘acts’ punishable as compoundable offences to ‘acts’ carrying civil liabilities i.e. **re-categorisation from Fine to Penalty.**

Why this amendment or re-categorisation from Fine to Penalty is a major change?

Let us first understand the basic meaning of Fine and Penalty and the difference, if any, between the two.

Fine	Penalty
Fines are amounts of money that the court can order a person to pay for an offence following a successful prosecution.	Penalties do not require court proceedings and are imposed for failing to comply with a provision of some Act of law. In general language a penalty is imposed by an appropriate authority when a person has not complied with the law.

This is a welcoming step from the government as it may reduce the burden of NCLT as after this re-categorisation, 24 offenses will not be looked after by NCLT. Hence for various non-compliances a Company may need not to go to NCLT with compounding applications.

Prior to this amendment, non-compliance was made good by going to NCLT and paying the fine either after the defaulting companies receive notice from the ROC/MCA or moving voluntarily to the NCLT. However, with re-categorisation of offence to penalty, ROC may start levying penalty immediately at the time of filing on MCA portal, which may be in addition to the additional fees, which Companies are liable to pay at the time of late filing.

Apart from the Companies (Amendment) Ordinance, 2018, the following notification grabs our attention.

Micro and Small Enterprises Transaction Reporting:

As per notification dated 2nd November 2018, the Central Government hereby directs that all the companies who get supplies of goods or services from micro and small enterprises and whose payments to micro and small enterprise suppliers exceed forty five days from the date of acceptance or the date of deemed acceptance of the goods or services as per the provisions of the Act, shall submit a half yearly return to the Ministry of Corporate Affairs stating the following:

- (a) The amount of payments due and;
- (b) The reasons of the delay.

The form for intimating MCA regarding the above is yet awaited.

Further, let's have a look on which enterprises are referred to as "MSME"

The MSMED Act, 2006 defines the Micro, Small and Medium Enterprises based (i) on the investment in plant and machinery for those engaged in manufacturing or production, processing or preservation of goods and (ii) on the investment in equipment for enterprises engaged in providing or rendering of Services.

Category	Engaged in Manufacture or production- Investment in Plant and Machinery	Engaged in providing or rendering Services- Investment in Equipment
Micro Enterprises	Investment does not exceed Rs. 25 lakhs.	Investment does not exceed Rs. 10 lakhs.
Small Enterprises	Investment exceeds Rs. 25 lakhs but does not exceed Rs. 5 crore.	Investment exceeds Rs. 10 lakhs but does not exceed Rs. 2 crore.

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