

COMPOUNDING OF OFFENCES UNDER COMPANIES ACT, 2013

BACKGROUND

The provisions relating to the compounding of offences are one of the most significant provisions under the Companies Act, 2013 (the Act) because a large number of defaults under the Act are of technical nature and arise out of ignorance on account of bewildering complexities of the provisions under the Act. Therefore, it is necessary that leniency is shown in the administration of the provisions of the Act particularly penalty provisions and settlement mechanism is provided for bona fide, inadvertent and technical defaults. This was with this intent that the provisions relating to the compounding of offences were introduced first time in the old act (the Companies Act, 1956) on the recommendations of Sachar Committee by insertion of Section 621A vide the Companies Amendment Act, 1988. Section 441 of the Act provides provisions relating to the compounding of offences and is corresponding to section 621A of the old Act.

OFFENCE

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.

Corporate Offences: In today's Corporate world, good governance means to comply with all the provisions of corporate laws, which are mainly the provisions of the Companies Act and the rules/regulations made there under. As the Companies Act, 2013 (the Act) and its allied rules/regulations are the main corporate laws governing the companies (which are the major form of organized business entity), the non compliance or default in compliance of its provisions will result in to penalties or penalties with imprisonment. The violations of the provisions of the Act and its allied rules/regulations form the major chunk of corporate offences which can be classified into civil and criminal offences. Those offences are further classified as Compoundable and Non compoundable offences.

WHAT IS COMPOUNDING

The word "compounding of offence" is not defined under the Act, nor was the same defined under the old Act.

Compounding is defined in Black's Law Dictionary, Seventh Edition, as "Compounding a crime - The offence of either agreeing not to prosecute a crime that one knows has been committed or agreeing to hamper the prosecution."

In Law Lexicon, (3rd reprint - Second Edition) of Sri. P. Ramanatha Aiyer, compounding is defined as "the offence of taking a reward for forbearing to prosecute a felony; as where the party robbed takes his goods again, or other amends upon an agreement not to prosecute."

As per the online oxford dictionary the legal meaning of word 'compound' is to "forbear from prosecuting (a felony) in exchange for money or other consideration".

From the above definitions it is clear that the concept of compounding is a mechanism of settlement. A settlement by paying the penalty in lieu of facing the prosecution for the offence committed.

COMPOUNDABLE AND NON-COMPOUNDABLE OFFENCES UNDER THE ACT

The penal provisions of the Act provide for different kinds of punishments for variety of offences and can be categorised as follows:

- i) Offences punishable with fine only,
- ii) Offences punishable with fine or imprisonment,
- iii) Offences punishable with fine or imprisonment or both
- iv) Offences punishable with imprisonment only,
- v) Offences punishable with fine and imprisonment,

Here it is important to note that the nature of offences falling under category *ii)* and *iii)* is such that it is not necessary that an accused charged with the offence falling in those categories has to be visited with imprisonment or imprisonment and also fine but may be let off by imposition of fine only.

However, not all the offences provided in the Act are compoundable as stated above, some of them, which understandably are of serious nature, have been kept out of the purview of the compounding and are called non-compoundable offences. Section 441 of the Act provides provisions relating to the compounding of offences, which is reproduced below for better understanding:

S. 441 of The Companies Act 2013

Compounding of certain offences:

(1) *Notwithstanding anything contained in the Code of Criminal Procedure, 1973, any offence punishable under this Act (whether committed by a company or any officer thereof) with fine only, may, either before or after the institution of any prosecution, be compounded by—*

(a) *the Tribunal; or*

(b) *where the maximum amount of fine which may be imposed for such offence does not exceed five lakh rupees, by the Regional Director or any officer authorised by the Central Government, on payment or*

credit, by the company or, as the case may be, the officer, to the Central Government of such sum as that Tribunal or the Regional Director or any officer authorised by the Central Government, as the case may be, may specify:

Provided that the sum so specified 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 specifying 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 403 shall be taken into account:

Provided also that any offence covered under this sub-section by any company or its officer shall not be compounded if the investigation against such company has been initiated or is pending under this Act.

(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,

(a) 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;

(b) “Regional Director” means a person appointed by the Central Government as a Regional Director for the purposes of this Act.

(3) (a) Every application for the compounding of an offence shall be made to the Registrar who shall forward the same, together with his comments thereon, to the Tribunal or the Regional Director or any officer authorised by the Central Government, as the case may be.

(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 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.

(4) The Tribunal or the Regional Director or any officer authorised by the Central Government, as the case may be, 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 an 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 403, 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 Tribunal or the Regional Director or any officer authorised 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 one lakh rupees, or with both.

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

(a) 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 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.

From examination of section 441 it is clear that Section 441 (6) (b) specifically excluded those offences out of the purview of compounding which are punishable with imprisonment only; and which are punishable with imprisonment and also with fine. In other words the violations of provisions of the Act which carry the punishments categorized in **iv) and v)** above are non-compoundable. And all other violations/defaults of the provisions of the Act which carry any of the punishments categorized in **i) to iii)** above are compoundable except a second/subsequent similar offence committed within a period of 3 years of previous compounding.

AUTHORITIES FOR COMPOUNDING AND WHEN THE COMPOUNDING CAN BE SOUGHT/DONE

Now the next questions which arise for consideration are what are the authority(ies) competent to do compounding/accede to compounding, and when the compounding can be sought/done.

Section 441 provides three authorities for compounding:

- i) Tribunal i.e. NCLT - where offence is punishable with fine (only) exceeding Rs. 5 Lakhs
- ii) Regional Director/Authorised Officer – where offence is punishable with fine (only) not exceeding Rs. 5 Lakhs
- iii) Special Court (established under section 335 of Act) - offences punishable with fine or imprisonment or with both

If sub-sections (1) & (3) of the Section 441 are read together then following positions further seem to emerge that the compounding can be done either before initiation of the prosecution or after initiation of the prosecution however, compounding cannot be done when investigation regarding the offence in question has been initiated or is pending against the company or in other words compounding cannot be done unless the investigation relating to the violation/offence in question is complete, in cases where investigation has already been initiated before the steps for compounding are taken. Further, the application for compounding shall be processed through ROC. Where compounding is done before the launch of the prosecution the company shall intimate to the ROC (in prescribed form) and no prosecution shall be instituted in such cases. Where the compounding is done after the launch of prosecution, the ROC will intimate to the court seized of the

matter and the company or officers in default shall be discharged.

However, the moot questions here are whether all the compoundable offences can be compounded before the launch/institution of prosecution; and whether the NCLT like its predecessor Company Law Board (CLB) still enjoys the parallel powers to grant compounding of the violations/offences where punishments provided is imprisonment or fine or both, in view of the language used in sub-section (1) of section 441.

To examine both questions we have to go in little past and also examine the section 621A of the old act (which is corresponding to section 441 of the new act and used to deal with compounding), relevant provisions of which are also reproduced:

Section 621A of The Companies Act, 1956:

Composition of certain offences.

(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-

(a) the Company Law Board; or

(b) where the maximum amount of fine which may be imposed for such offence does not exceed five thousand rupees, by the Regional Director,

(7) 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.

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

It is apt to mention herein that while interpreting section 621A, the CLB, which is predecessor of NCLT, repeatedly expressed the view that exercise of powers by the CLB under 621A(1) is independent of exercise of powers by the court under sub-section (7) and all offences other than those which are punishable with imprisonment only or with imprisonment and also fine, can be compounded by CLB without any reference to sub-section (7), even in cases where prosecution is pending in a criminal court. This view of CLB was also affirmed by the

Hon'ble Supreme Court in **V.L.S. Finance Ltd vs Union Of India & Ors (2013) 6 SCC 278** wherein it was held:

“Sub-section (1) of Section 621A and sub-section (7) thereof are differently worded but on their close reading it is evident that both cover such offences depending upon the nature of punishment. Sub-section (1) of Section 621A excludes offence punishable with imprisonment only or with imprisonment and also fine and includes the residue offences which will obviously include offence punishable with imprisonment or with fine or with both whereas sub-section (7) specifically include those and excludes, like sub-section (1), offences punishable with imprisonment only or with imprisonment and also fine. Therefore, both cover similar nature of offences. Hence, the power for compounding can be exercised in relation to the same nature of offences by the Company Law Board or the court in seisin of the matter with the difference that the Company Law Board can proceed to compound such offence either before or after the institution of any prosecution.....

.....From the conspectus of what we have observed above, it is more than clear that an offence committed by an accused under the Act, not being an offence punishable with imprisonment only or imprisonment and also with fine, is

permissible to be compounded by the Company Law Board either before or after the institution of any prosecution. In view of sub-section (7) of Section 621A, the criminal court also possesses similar power to compound an offence after institution of the prosecution.

Now the question is whether in the aforesaid circumstances the Company Law Board can compound offence punishable with fine or imprisonment or both without permission of the court. It is pointed out that when the prosecution has been laid, it is the criminal court which is in seisin of the matter and it is only the magistrate or the court in session of the matter that can accord permission to compound the offence. In any view of the matter, according to the learned counsel, the Company Law Board has to seek permission of the court and it cannot compound the offence without such permission. This line of reasoning does not commend us. Both sub-section (1) and sub-section (7) of Section 621A of the Act start with a non-obstante clause. As is well known, a non-obstante clause is used as a legislative device to give the enacting part of the section, in case of conflict, an overriding effect over the provisions of the Act mentioned in the non-obstante clause.

From what we have observed above, we are of the opinion that the power under sub-section (1) and sub-section (7) of Section 621A are parallel powers to be exercised by the Company Law Board or the authorities

mentioned therein and prior permission of Court is not necessary for compounding the offence, when power of compounding is exercised by the Company Law Board. In view of what we have observed above, the order impugned does not require any interference by this Court."

Thus, the position under the old Act was that the CLB, if so approached, could compound even those offences where prosecution was pending before criminal court and in such cases no prior permission of the Court was necessary.

However, a close examination of the provisions of sub sections (1) and (6) of section 441 and will reveal that the parallel powers of compounding in offences/violations where punishments provided is imprisonment or fine or both, which used to be exercised by CLB have not been conferred by the legislature on its successor i.e. NCLT. Not only this even some of the powers have been curtailed since 441(1) specifically uses the sentence/ phrase ".....any offence punishable under this Act (whether committed by a company or any officer thereof) with fine only, may, either before or after the institution of any prosecution, be compounded....." meaning thereby only and only offences which are punishable with fine only can be compounded by the NCLT (offences punishable with fine up to 5 Lakh rupees

are compoundable by RD). All other compoundable offences are compoundable with the permission of the special court only.

However, from the close scrutiny of 441 (1) especially sentence/ phrase “.....any offence punishable under this Act (whether committed by a company or any officer thereof) with fine only, may, either before or after the institution of any prosecution, be compounded.....” which uses words “with fine only” after bracket and before the word “may” one more position seems to emerge that only and only offences/violations which are punishable with fine only can be compounded before the launch of prosecution and for all other compoundable offences which are punishable with imprisonment or fine or with both and for which permission of the special court would be required, the company/officers in default have to wait for the launch/institution of the prosecution. In other words offences/violations which can be compounded by the NCLT or RD can be compounded before launch of prosecution while on the other hand the offences compoundable with the permission of the special court will have to wait for compounding for the launch/initiation of the prosecution.

This view is also fortified by the fact that while interpreting sub-section (7) of 621A of the old act which is corresponding to sub-section (6) of section 441 of the Act and is

similarly worded, the view taken by the judicial authorities was that criminal court can only accord the permission when the matter is pending before it. The reference again can be made to the observations of the Hon’ble Supreme Court in *V.L.S. Finance Ltd Vs Union Of India & Ors supra* wherein it was held:

“From the conspectus of what we have observed above, it is more than clear that an offence committed by an accused under the Act, not being an offence punishable with imprisonment only or imprisonment and also with fine, is permissible to be compounded by the Company Law Board either before or after the institution of any prosecution. In view of sub-section (7) of Section 621A, the criminal court also possesses similar power to compound an offence after institution of the prosecution.”

In addition sub section (6) of 441 further provides that the permission would be granted by the special court in accordance with the procedure laid down in the Code of Criminal Procedure, 1973 (Cr.P.C), meaning thereby relevant provisions of the Cr.P.C. *mutatis mutandis* would be applicable on special court while dealing with the application seeking permission to compound. The scheme of the relevant section i.e. section 320(2) of Cr. P.C also stipulates that offences compoundable with the permission of the court are to be

compounded with the permission of the court before which any prosecution for such offence is pending, which also means that the prosecution has already been launched/initiated and the court is seized of the matter.

Although the Companies Act 2013 is relatively a new act and any authoritative view from the Higher Judiciary is yet to come on the above view nonetheless, in view of the above discussion there are fair probabilities that the Special Courts coming across the applications seeking permission for compounding before institution of prosecution may refuse to entertain the same taking the above view expressed by author because of the observations of the Hon'ble Supreme Court in *V.L.S. Finance Ltd Vs Union Of India & Ors* supra under old Act. If this view is adopted by the Special Courts, the same may adversely hamper business activities especially the startup ecosystem which in turn may affect the economy adversely. Since the startups may face great predicament while raising funds as there may be a situation where the startup might have inadvertently and technically violated a provision of the Act which require permission of Special Court for compounding and investor may insist for compounding before infusing the funds while no prosecution has been launched/initiated till then.

The only solace can be found in some judicial pronouncements of some High Courts which while dealing with criminal cases punishable in I.P.C have held that the permissions for compounding under sub-section 2 of section 320 Cr.P.C. can be granted even before filing of the charge sheet (which can be regarded as first step towards launching/initiating of the prosecution). The reference can be made to the observations of Hon'ble Andhra Pradesh High Court in ***Komallapli Rama Venkata Vs State Of A.P. [2004 (1) ALD Cri 382]*** wherein it was held that there is nothing in Section 320 Cr.P.C. to show that compounding can be done only after filing of charge sheet. If the offence which requires permission of the Court to do so is to be compounded, the Court can examine the case and decide whether or not to accord permissions to compound. This view was further reaffirmed by the Hon'ble Division Bench of the same High Court in ***Public Prosecutor, High Court of A.P. Vs. Basireddy Verma Reddy (2009) Cri LJ 840(AP)*** wherein it was expressed that:

“ 38. When a compromise has been entered into by both the complainant and the accused and are willing to compound the offence, which is compoundable as per Section 320 Cr.P.C., the Court need not shun the responsibility to compound the offence because there is nothing in Section 320 Cr.P.C., to show that compounding can be done only in certain cases i.e., after

completion of investigation, filing of charge sheet etc.

39. If the Court feels that permission for compounding can be accorded, it can give the permission even when the charge sheet is not filed and the case is still under investigation. If the offence, which requires permission of the Court to do so, is to be compounded, the Court can examine the case and decide whether or not to accord permission to compound. If the Court finds that the person, with whose consent the offence can be compounded, has actually given the consent for compounding, it can compound the offence even when it is at the stage of investigation.”

However, the author could not come across any judgment of the Hon’ble Supreme Court to affirm or reject the view taken by the Hon’ble Andhra Pradesh High Court. Therefore, apprehensions expressed by the author that the Special Courts may refuse to entertain applications seeking permissions for compounding, if instituted, before launch of prosecution, may still hold good more so since it might be difficult to convince the Special Courts with the aforesaid judgments of Hon’ble Andhra Pradesh High Court because the same were not directly dealing with the issue under Companies Act, rather the same were dealing with normal criminal cases.

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