

AMENDMENTS IN COMPANIES ACT BY AN ORDINANCE
(CA P. N. SHAH)

The Companies Act, 2013, (Act) came into force on 1.4.2014. There are 470 sections in this Act as compared to more than 650 sections in the previous Companies Act, 1956. Various sections of the present Act were brought into force in a phased manner. This Act was amended by the Companies (Amendment) Act, 2015 and again by the Companies (Amendment) Act, 2017. These amendments were brought into force in a phased manner. Now, some important amendments are made in the Act by the Companies (Amendment) Ordinance, 2018, which has been promulgated by the Hon'ble President on 2nd November, 2018. These amendments have come into force on 2nd November, 2018. Some of the important amendments made by the Ordinance are discussed in this Article.

2. Financial Year - Section 2(41)

(i) The term "Financial Year" is defined in section 2(41) of the Act. This section provides that the Financial Year of a Company or a Body Corporate shall end on 31st March, every year. However, a company or a body a company which is holding, subsidiary or associate of a Foreign Company which is required to prepare financial statements with different Financial Year for submission of consolidated accounts outside India, according to the law of that country, can have a different Financial Year if the National Company Law Tribunal (Tribunal), on application by such company or body corporate, permits the same. In this case such company or body corporate can have a different financial year for the purpose of consolidation of accounts.

(ii) By amendment of this section it is now provided that on and after 2.11.2018 such application will have to be made to the Central Government in the prescribed form. In other words, power to grant this permission is now transferred from the Tribunal to the Central Government. All pending applications as on 2.11.2018 before the Tribunal can be disposed of by the Tribunal.

3. Commencement of Business by a Company – (New Section 10A and Section12)

(i) At present there is no provision for giving intimation about commencement of business by a company. A new Section 10A is now inserted to provide that a company incorporated on or after 2.11.2018 and having a share capital shall not commence any business or exercise any borrowing powers without complying with the following procedure.

(a) A declaration in the prescribed form should be filed by a Director of the company within 180 days of the date of incorporation with the ROC. In this declaration it should be stated

and verified that every subscriber to the Memorandum of Association has paid the value of the shares agreed to be taken by him on the date of making such declaration.

(b) Further, it is to be stated in the declaration that the company has filed a verification of its Registered Office u/s 12(2) with the ROC.

(ii) If the above declaration is not filed the company will be liable to penalty of ₹50,000/-. Further, every officer who is in default will be liable to pay penalty of ₹1,000/- per day during which the default continuous subject to a maximum of ₹1 Lakh.

(iii) Further, if the above declaration is not filed within 180 days of the date of incorporation and the ROC is satisfied that the company is not carrying on any business or operations, he can remove the name of the company from the Register of Companies as provided in Chapter XVIII of the Act.

(iv) It may be noted that Sub –Section (9) is added in Section 12 to provide that if the ROC is satisfied that a company is not carrying on any business or operations, he can make physical verification of the Registered Office of the Company in the prescribed manner. If the ROC is satisfied that no such Registered Office is maintained by the company and no business or operations are carried on by the company, he can remove the name of the company from the Register of Companies as provided in the Chapter XVIII of the Act.

(v) It may be noted that consequential amendment is made in section 248 dealing with power of ROC to remove the name of the company from the Register of Companies. It may further be noted that similar provision existed in this section when enacted in 2013. However, this was omitted by the Companies (Amendment) Act, 2015, w.e.f. 29.05.2015. The same provision is now brought back w.e.f. 2.11.2018 by amendment of section 248. Further, this power to remove the name of the company for the above default applies to a Private or a small company having share capital.

(vi) The above power appears to have been given to the ROC to weed out some bogus or in operative companies which are formed by some unscrupulous persons for money laundering and other anti-social activities.

4. Conversion of Public Company into Private Company – (Section 14)

At present section 14(1) provides that a Public Company can be converted into a Private Company with approval of the Tribunal. This section is now amended to provide that such conversion can be made only after approval by the Central Government. For this purpose

application should be made to the Central Government in the prescribed form. It is also provided that all pending applications before the Tribunal shall be disposed of by the Tribunal.

5. **Prohibition on Issue of Shares at Discount – (Section 53)**

(i) At present the punishment for non-compliance with the section is fine between ₹1 Lakh to ₹5 Lakhs payable by the company and imprisonment of officer in default for a period upto six months or Fine between ₹1Lakh and ₹5 Lakhs or with both.

(ii) This section is now amended to provide that in the event of non-compliance with the provisions of the section, the company and every officer in default shall be liable to Penalty upto an amount equal to the amount raised through issue of shares at a discount or ₹5 Lakhs whichever is less.

(iii) Further, the company will have to refund all monies received from the persons who have subscribed to such shares with interest at the rate of 12% P. A. from the date of receipt to the date of refund .

(iv) It may be noted that the punishment by way of imprisonment of defaulting officers is now done away with.

6. **Notice to be given to ROC for alteration of Share Capital – (Section 64)**

Under the existing section 64(2) the Company and every officer in default has to pay Fine of ₹1,000/- per day during which the default continues subject to maximum of ₹5 Lakhs. The amendment to this section provides that the amount shall be payable as Penalty for contravention of the section.

7. **Duty to Register Charges – (Section 77)**

(i) Section 77 provides that any charge created by the company shall be registered with ROC within 30 days of such creation. If this is not done, the charge can be registered within 300 days of creation of the charge on payment of the prescribed additional fees. If the charge is not registered within this period of 300 days, the company can apply for extension of time to the Central Government as provided in Section 87.

(ii) This provision for extension of time beyond 30 days is now amended by amendment of section 77 as under:

(a) The ROC may allow, on application by the company, to register charges created before 2.11.2018 and the same can be filed within 300 days of the date of creation, if not filed within 30 days, on payment of prescribed additional fees

(b) If charge created before 2.11.2018 which has not been filed within 300 days, the same can be filed within 6 months from 2.11.2018 on payment of such prescribed additional fees and different fees may be prescribed for different classes of companies.

(c) The ROC may allow, on application by the company, to register charges created on or after 2.11.2018, if not filed within 30 days, and the same can now be filed with 60 days of creation on payment of the prescribed additional fees. It may be noted that existing period of 300 days is now reduced to 60 days.

(d) In the case of a charge created on or after 2.11.2018, if the charge is not filed within 60 days, the ROC, on application made by the company, may allow registration of charge within a further period of 60 days after payment of such *advalorem* fees as may be prescribed. This will mean that the fees payable for the delay will be calculated as a percentage of the amount of the charge.

(iii) Existing section 86 provides for punishment to the company and its officers in default for contravention of sections 77 to 85. In addition to this punishment, this section is now amended to provide that if any person willfully furnishes any false or incorrect information or knowingly suppresses any material information required to be registered under Section 77, he shall be liable for action under section 447. Under Section 447 there is provision for levy of Fine as well imprisonment of the defaulting officer for specified period.

8. Rectification by Central Government in Register of Charges – (Section 87)

The existing section 87 is replaced by a new section 87 which provides as under:

(i) The section provides for a situation in which there is omission to give intimation to ROC of payment or satisfaction of a charge within the stipulated time limit. It also deals with the omission or misstatement of any particulars with respect to any such charge or modification or with respect to any memorandum of satisfaction or other entries made as provided under Section 82 or 83.

(ii) With respect to the above, if the Central Government is satisfied that such omission or misstatement was accidental or due to inadvertence or some other sufficient cause or it is not prejudicial to the position of creditors or shareholders, it may, give the following relief.

- (a) Extend time for giving intimation of payment or satisfaction of debt.
- (b) Direct that the omission or misstatement be rectified in the Register of Charges.

9. **Register of Significant Beneficial Owners in a Company – (Section 90)**

(i) A very comprehensive new section 90 was introduced by the Companies (Amendment) Act, 2017. Under this section a person having beneficial interest of not less than 25% or, such percentage as may be prescribed in the Shares of the Company or has right to exercise significant influence or control as defined in Section 2(27) has to give a declaration in the prescribed manner. Section 90(9) provides that the company or the person aggrieved by the order of the Tribunal passed u/s 90(8) can make an application to the Tribunal for relaxation or lifting of the restriction placed under section 90(8).

(ii) Section 90(9) has now been amended to provide that the above application can be made within one year from the date of the order u/s 90(8). Further, if no such application is made within one year, such shares as referred to in Section 90 shall be transferred to the authority constituted under Section 125(5), in such manner as may be prescribed. In other words, in the event of delay in filing the declaration under this section, the shares may be transferred to Investor Education and Protection Fund set up u/s 125.

(iii) Section 90(10) provides for punishment for contravention of the provisions of section 90. This section is amended to provide that the person who fails to make the declaration of significant beneficial ownership in the company under Section 90 shall be punishable with imprisonment for a term upto one year or with minimum fine of ₹1 Lakh which may extend to ₹10 Lakh or with both. If the default continues, a further fine upto ₹1,000/- per day will be payable for the period of default.

(iv) The above amendment appears to have been made to deal with cases of benami shareholders in companies.

10. **Annual Return – (Section 92)**

(i) The existing section 92(5) provides for punishment for delay in filing Annual Return within the time specified in section 92(4). This punishment is by way of Fine payable by the company and by way of imprisonment of officers in default or with fine or both.

(ii) The above provision for punishment is now modified by amendment of section 92(5) as under:

(a) The company and every officer in default will be liable to pay penalty of ₹50,000/-.

(b) In case of continuing default, further penalty of ₹100/- per day subject to maximum of ₹5 Lakhs is also payable.

It may be noted that the provision for prosecution of the officer in default is now deleted.

11. **Statement to be Annexed to Special Notice of General Meeting – (Section 102) and Provision for Proxies – (Section 105)**

In both the sections 102 and 105 there is provision for punishment for contravention of the provisions of the sections in the form of monetary payment by way of Fine. By amendment of these sections it is now provided the same monetary amount shall be payable as Penalty.

12. **Resolutions and Agreements to be filed with ROC – (Section 117)**

The existing section 117 (2) provides for levy of Fine if the specified Resolutions and Agreements to be filed with ROC are not filed within the specified time. The monetary limits of Fine is reduced and it is now provided that the following Penalty shall be payable for the default.

(i) The company shall be liable to pay Penalty of ₹1 Lakh and, in case of continuing default, further penalty of ₹500/- per day of default, subject to maximum of ₹25 Lakhs.

(ii) Further, every officer in default (including the Liquidator, if any) shall be liable to pay Penalty of ₹50,000/- and, in case of continuing default, he shall be liable to pay a further penalty of ₹500/- per day, subject to maximum of ₹5 Lakh.

13. **Report on AGM to be filed with ROC – (Section 121)**

Under Section 121 Report on Annual General Meeting held by a listed public company is to be filed by such company within the time provided in the section. Under Section 121(3) the company and every officer in default is required to pay Fine for non-compliance with the requirement of the section. This provision is now amended and it is provided that Penalty for this default will be payable as under:

(i) The company will have to pay Penalty of ₹1 Lakh and, in case of continuing default, further penalty of ₹500/- per day of default subject to maximum of ₹5 Lakhs will be payable.

(ii) Further, every officer in default shall be liable to pay penalty of ₹25,000/- and, in case of continuing default, a further penalty of ₹500/- per day of default, subject to a maximum of ₹1 Lakh will be payable.

14. **Copy of Financial Statements to be filed with ROC – (Section 137)**

Under section 137(3) the company and the officers in default, as specified in the section, are liable to pay Fine of specified amount for non-compliance with the requirements of the section. There is also provision for prosecution of the officers in default. These provisions are amended and it is now provided for payment of Penalty as under:

(i) The company shall be liable to pay Penalty of ₹1,000/- per day during the period of default subject to a maximum of ₹10 Lakhs.

(ii) Every officer in default, as specified in the section, shall be liable to pay Penalty of ₹1 Lakh and, in case of continuing default, further penalty of ₹100/- per day of default shall be payable subject to a maximum of ₹5 Lakhs. It may be noted that the existing provision for imprisonment of the officer in default for a specified period is now deleted from this section.

15. **Removal and Resignation of Auditor – (Section 140)**

Section 140 (2) provides that an Auditor of a company has to file with ROC and the Company (C & AG, if applicable) a Statement in the prescribed form (ADT-3) within 30 days about details of his resignation as Auditor. Section 140 (3) provides that in the event of failure to comply with this requirement the Auditor will have to pay Fine of ₹50,000/- which may extend to ₹5 Lakhs.

Section 140(3) is now amended to provide that the Auditor will have to pay for non-compliance with the provisions of section 140(2) Penalty of ₹50,000/- or an amount equal to his remuneration as Auditor, whichever is less. Further, in case of continuing default, a further penalty of ₹500/- per day of default subject a maximum of ₹5 Lakhs will be payable.

16. **Company to inform DIN to ROC – (Section 157)**

Section 157(1) provides for furnishing information about Director Identification Number (DIN) to ROC and other prescribed authorities within the specified time. In the event of default in complying with this requirement the company and the officers in default have to pay Fine as

stated in section 157 (2). The provisions of Section 157(2) have now been amended to provide for payment of Penalty as under:

(i) The Company shall be liable to pay penalty of ₹ 25,000/-. Further, in case of continuing default, a further penalty of ₹100/- per day of default subject to maximum of ₹1 Lakh shall be payable.

(ii) Further, every officer in default will be liable to pay penalty of ₹25,000/- and a further penalty for continuing default shall be payable at ₹100/- per day of default subject to a maximum of ₹1 Lakh.

17. **Punishment for contravention of Sections 152, 155 and 156 – (Section 159)**

The existing section 159 providing for payment of Fine as well imprisonment of the individual or Director in default has been replaced by a new Section 159. This new Section 159 removes the provision for imprisonment of the Individual or Director in default and provides for levy of Penalty as under:

(i) Penalty which may extend upto ₹50,000/-

(ii) In case of continuing default, a further penalty which may extend upto ₹500/- per day during the period when the default continues.

The wording of the above section indicates that a penalty of less than ₹50,000/- or less than ₹500/- per day may be levied at the discretion of the concerned authority.

18. **Disqualifications for appointment of Director – (Section 164)**

Section 164 gives a list of circumstances under which a director may be disqualified for appointment as Director in any other company. The amendment of this section states that a person who has not complied with the provisions of section 165(1) will now be disqualified for appointment as Director of any other company. It may be noted that section 165(1) provides that a person will not be entitled to become director of more than specified number of Companies.

19. **Number of Directorships – (Section 165)**

Under section 165(6), if a person accepts an appointment as a director in contravention of the specified number of directorships stated in section 165(1), he is liable to pay Fine of specified amount. This provision is now modified by amendment of section 165(6). It is now provided that

such person will be liable to pay Penalty of ₹5,000/- for each day during which the default continues.

20. **Payment to Director for loss of office – (Section 191)**

Under section 191(1) no director can receive any compensation for loss of office under specified circumstances. If there is contravention of this provision, section 191(5) provides for payment of Fine by such Director of ₹25,000/- which may extend to ₹ 1 Lakh. This section is now amended to provide for payment of Penalty of ₹1 Lakh by such Director for contravention of the provisions of section 191.

21. **Maximum Remuneration payable to Managerial Personnel – (Section 197)**

(i) Section 197(7) provides that an Independent Director shall not be entitled to receive any stock option from the company. He can only receive sitting fees, commission and reimbursement of expenses. Now sub-section (7) of section 197 is omitted. Effect of this amendment will be that besides sitting fees, commission etc., an Independent Director can enjoy the benefit of Stock Option from the Company.

(ii) At present Section 197(15) provides for payment of Fine of specified amount by the person who contravenes the provisions of this section. By amendment of this section the Penalty of ₹1Lakh can be levied on the person who contravenes the provisions of section 197. Hitherto, no Fine was payable by the company. By this amendment it is provided that if the company has contravened the provisions of Section 197, it will have to pay penalty of ₹5 Lakhs.

22. **Appointment of Key Managerial Personnel – (Section 203)**

The monetary limits of Fine under section 203 (5) for non-compliance with section 203 have now been modified by amendment of section 203(5) as under:

(i) The company will be liable to pay Penalty of ₹5 Lakhs

(ii) Every Director and Key Managerial Personnel who is in default shall be liable to pay penalty of ₹50,000/-.

(iii) In case of continuing default, further penalty of ₹1,000/- per day of default subject to maximum of ₹5 Lakhs shall also be payable.

23. **Registration of Offer of schemes involving transfer of shares – (Section 238)**

Under section 238(3) the Director who is in default is liable to pay Fine between ₹25,000/- to ₹5 Lakhs. This is now changed to Penalty of ₹1Lakh by amendment of this section.

24. **Compounding of Certain Offences – (Section 441)**

(i) At present section 441(1)(b) provides that an offence punishable under the Act with Fine only which does not exceed ₹5 Lakhs can be compounded by the Regional Director. By amendment of this section this limit of ₹5 Lakhs is increased to ₹25 Lakhs. Therefore, the Regional Director can now compound any offence where the Fine is below the limit of ₹25 Lakhs. Under section on 441(1) (a) the Tribunal has power to compound an offence where the amount of Fine leviable is of any amount (i.e. even more than Rs.25 Lakhs).

(ii) Section 441(6) is now amended to provide that any offence which is punishable under the Act with imprisonment only or with imprisonment and also with Fine shall not be compoundable. In the existing section 441(6) it was provided in specified cases it was possible to compound the offence with the permission of Special Court. This concession is now not available.

25. **Lesser Penalties for one Person and Smaller Companies – (Section 446B)**

Section 446 B was enacted by the Companies (Amendment) Act, 2017. It came into force on 9.2.2018. This section provided that if a One Person Company or a Small Company fails to comply with provisions of section 92(5), 117(2) or 137(3), such company or any officer in default shall be punishable with Fine or Imprisonment, such Fine or Imprisonment shall not be more than half of the Fine or half of the period of Imprisonment specified in the above sections. Now this section is amended to provide that, if the company or the officer in default is liable to penalty, the same shall not be more than half of the penalty specified in the above sections. This amendment is made as in the above sections the punishment in the form of Fine and Imprisonment is now replaced by the specified amount of penalty.

26. **Punishment for Fraud – (Section 447)**

The second proviso to section 447 provides that if fraud involves an amount of less than ₹10 Lakhs or one percent of the turnover of the company, whichever is less, and does not involve public interest, such person may be awarded punishment by way of imprisonment upto 5 years. Further, fine upto 20 Lakhs can be levied. By amendment of this section the amount of the fine is now increased upto ₹50 Lakhs.

27. **Adjudication of Penalties –(Section 454)**

Section 454 provides for appointment of adjudicating officer for adjudging penalty under the provisions of the Act in such manner as may be prescribed. As per section 454(3) the adjudicating officer may, by an order, impose a penalty on the company and the officer in default. Now, sub section (3) is substituted by another sub section (3) granting power to adjudicating officer to impose penalty on any other person in addition to company and officer in default. Further, it is also provided that adjudicating officer may direct such company or officer in default or any other person to rectify the default wherever he considers fit.

28. **Penalty for Repeated Default – (New Section 454 A)**

This new section provides for levy of Penalty for repeated defaults. It provides for levy of additional penalty on the company, any officer in default or any other person in whose case any penalty is levied under any provision of the Act, again commits such default within 3 years from the date on which such penalty order is passed by the Adjudicating Officer or the Regional Director. In such a case for a second or subsequent default, the amount of the Penalty shall be an amount equal to twice the amount of penalty provided for such default in the relevant section. From the wording of the section it appears that if penalty is once levied for non-compliance of section 64, double the amount of penalty can be levied for subsequent default for non-compliance of Section 64 only and not for default under any other section. This new section is on the same lines as section 451 which provides for levy of double the amount of Fine for second or subsequent default.

29. **Fine V/s Penalty**

From some of the amendments made by the above Ordinance it will be noticed that in some sections, which provided for levy of Fine, the word “Fine” is replaced by the word “Penalty”. The distinction between the expression “Fine” and “Penalty” can be explained as under;

(i) Chapter XXVIII (Sections 435 to 446A) deals with appointment of Special Courts and their powers. If we read these provisions it will be seen that where the Act provides for punishment for contravention of any provision by way of levy of Fine on the company or levy of Fine and or Imprisonment of any defaulting officer, the same can be done by the Special Court only. It is also provided in Section 441 that where only Fine can be levied, the same can be compounded by the Regional Director or the Tribunal. This is a time consuming procedure.

(ii) As compared to the above, where there is a provision for levy of Penalty for default in complying with a particular provision of Act, section 454 Provides that such Penalty can be levied by an Adjudicating Officer appointed by the Central Government. By a separate Notification, some Registrars of Companies (ROC) are appointed as Adjudication Officers. Thus, penalty leviable under different sections can be levied by ROC. Any company or officer in default aggrieved by levy of penalty by ROC can file appeal before Regional Director u/s 454(5). This procedure will be less time consuming.

30. **To Sum Up**

(i) The above amendments in the Companies Act, 2013, have been made by an Ordinance promulgated by the Hon'ble President on 02.11.2018 on the basis of the recommendations of the expert panel appointed by the Ministry of Corporate Affairs. This Panel was headed by the Corporate Affairs Secretary, Shri Srinivas. The Ordinance covers only some of the suggestions made by the Panel which the Government considered to be of urgent nature. There are some more recommendations by the Panel which are under consideration of the Government. It appears that some more amendments may be made in the Companies Act during the coming months.

(ii) It may be noticed from the amendments made in some of the sections that punishment to officers in default by way of imprisonment for specified period has been done away with. These sections deal with procedural lapses. In some of the sections the provision for Fine has been replaced by Penalty. Since the Fine can be levied by a Court and Penalty can be levied by ROC, the administration of the provision for levy of penalty will be less time consuming.

(iii) Some of the amendments made by this Ordinance are of procedural nature. Taking an overall view, the amendments by this Ordinance are Welcome. One area in which major amendments are required relates to provisions applicable to private limited companies. As these Companies experience difficulties in complying with some of the stringent provisions of the Act, which apply to all companies, there is need to make relaxation in these provisions so that there is ease of doing business for small and medium size industries and traders and their compliance burden is reduced.