

Article



Compounding of offences- now in NCLT's hand

Megha Saraf

Corporate Law Services Group

megha@vinodkothari.com

corplaw@vinodkothari.com

16th June, 2016

Check at:

<http://india-financing.com/staff-publications.html>

for more write ups.

Copyright:

This document is the property of Vinod Kothari & Company and no part of it can be copied, reproduced or distributed in any manner.

Disclaimer:

This document is intended to initiate academic debate on a pertinent question. It is not intended to be a professional advice and should not be relied upon for real life facts.

Background

Ministry of Companies Affairs (“MCA”) vide its notification dated June 1, 2016¹ (“Notification”) has enforced 29 sections of the Companies Act, 2013 (“Act, 2013”) with immediate effect i.e from 1st June, 2016. The Notification has made effective some vital provisions introduced / improvised in the Act, 2013 - from class action suits to compounding of offences, from mergers to winding up of companies etc. Further, the provisions relating to the constitution of National Company Law Tribunal (“NCLT”) and National Company Law Appellate Tribunal (“NCLAT”) has also been made effective vide the said Notification. NCLT shall replace the existing Company Law Board (“CLB”).

Amongst other important sections of the Act, 2013 being brought into force vide the said Notification, Section 441 dealing with “**Compounding of certain offences**” has also been notified. As regards the corresponding rules of Section 441, while the draft rules² of the Section were placed on the MCA website for public comments on January 28, 2016, the same are yet to be notified.

The following article is an attempt to clear some of the major questions regarding compounding of offences.

What is Compounding?

The concept of compounding of offences is not new. Similar provisions were also present in Section 621A of the Companies Act, 1956 (“Act, 1956”).

While there is no definition of the word “compounding” provided either in the Act 1956 or the Act 2013, however, the legal meaning of compounding is “doing good the default/non-compliance”. It is nothing but a “settlement” for the offence committed by any company or any officer thereof.

As per the Black’s Law Dictionary, “Compound” means “*to settle a matter by a money payment, in lieu of other liability*”. To put it simple, compounding of an offence is a settlement mechanism, by which, the offender is given an option to pay money in lieu of his prosecution, thereby avoiding a prolonged litigation.

Why Compounding?

There is a 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. An example, is the decision in ***Bradford Investments Plc.*** (No.2), Re, 1991

¹ <http://egazette.nic.in/WriteReadData/2016/169935.pdf>

² http://www.mca.gov.in/Ministry/pdf/Notice_28012016.pdf



BCLC 688. In this case, four persons transferred their business to a company which allotted to them shares in consideration of the price. They did not know that Section 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 though they had relied on the advice of their solicitors, practitioners and the company's accountants.

Thus, the need of compounding was felt for reducing the burden of punishment on the defaulter and also for speedy recovery of cases.

History of Compounding

The era of the Act, 2013, has faced a substantial change in the powers of the authorities as per the size of the offences. The table below explains the history of compounding of offences from the Act, 1956 to the Act, 2013:

Acts	Maximum amount of fine imposed	Concerned Authority for handling such case
Act,1956	--	CLB/RD/CG authorized person
Companies (Amendment) Act, 1988	Rs. 5,000	i. Less than Rs. 5000-RD ii. More than Rs. 5000-CLB
Companies (Amendment) Act, 2000	Rs. 50,000	i. Less than Rs. 50,000-RD ii. More than Rs. 50,000-CLB
Companies (Second Amendment) Act, 2002	Rs. 50,000	i. Less than Rs. 50,000-RD ii. More than Rs. 50,000-CLB
Act, 2013	Rs. 5,00,000	i. Less than Rs. 5,00,000-RD/CG authorized person ii. More than Rs. 5,00,000-NCLT

Difference in the provision of the Act, 1956 and the Act, 2013

While the provisions of Section 441 of Act, 2013 remains broadly similar to that of Section 621A of Act, 1956, the major developments / changes brought by Section 441 is:



1. For offences punishable with imprisonment or fine or imprisonment or fine or both, the same can now be compounded with permission of Special Court instead of High Court as provided in the Act, 1956. The provision of establishment of Special Court is provided under Section 435 of Act, 2013 which is not yet notified. .
2. Now, any offence punishable with fine only, cannot be compounded if the investigation against such company has been initiated or is pending under Act, 2013.

Which offences can be compounded and by whom?

Not all offences under Act, 2013 can be compounded. Only the following offences as mentioned below can be compounded under Section 441 of Act, 2013.

1. Offence punishable with “fine only”- by NCLT/ RD /any officer authorised by Central Government, as the case may be;
2. Offence punishable with “fine or imprisonment or both” or “fine or imprisonment” - by Special Court.

No compounding shall be done in the following cases:

1. Offence punishable with “imprisonment only”; or
2. Offence punishable with “imprisonment and fine”; or
3. Where investigation has been initiated or is pending against the company;
4. Where similar offence has been compounded within last three years.

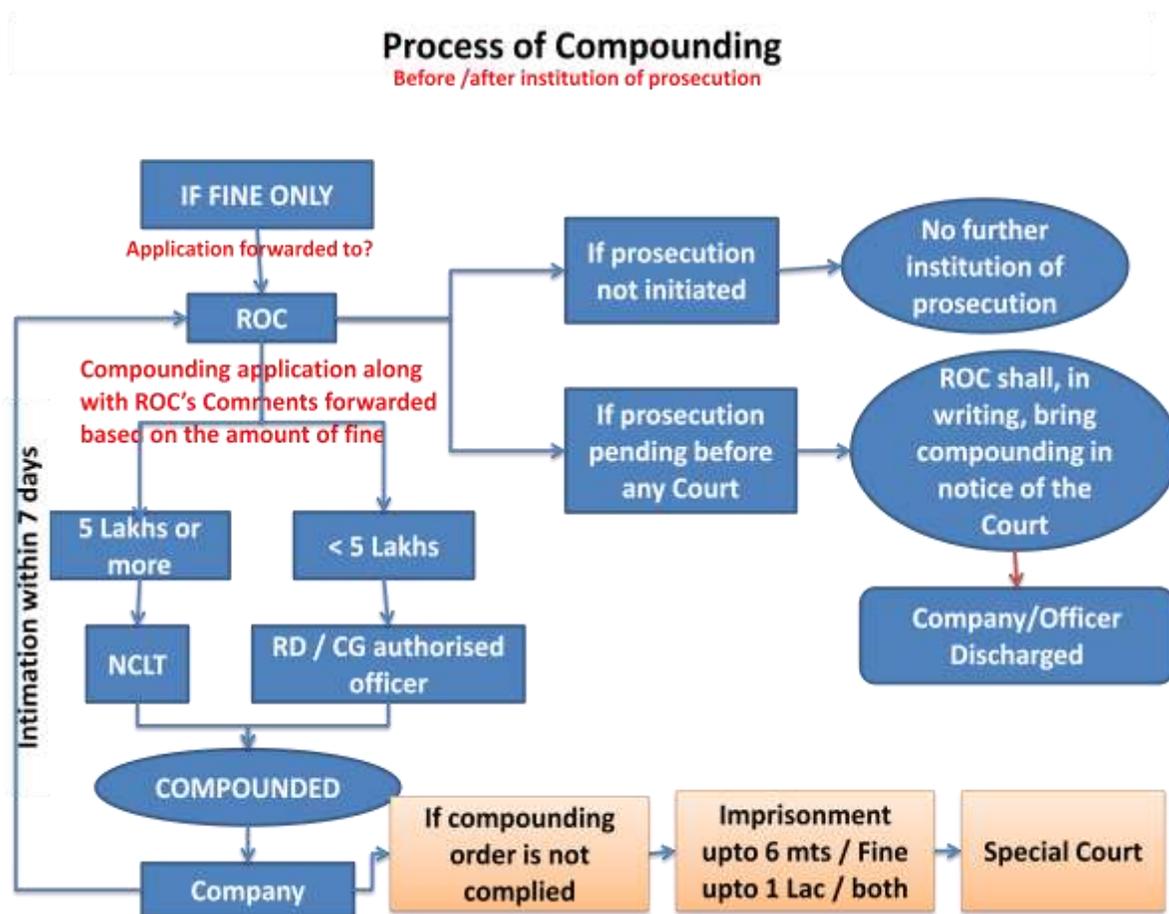
The following figure explains the above:



Procedure for compounding of offences under the Act, 2013

As per Section 403 read with Rule 12 of Companies (Registration Offices and Fees) Rules, 2014, the compounding application has to be made to ROC by filing e-Form GNL-1.

The following figure explains the process:



Can the Compounding Application be rejected?

No, neither of the NCLT or the RD has been authorized with discretionary power to reject a compounding application without due consideration. An example is the case of *Amadhi Investments Ltd. re.* (2009) 95 SCL 255: (2009) 149 Com Cases 617 (CLB), The petitioner company's records and books of account were inspected under section 209-A of the Act, 1956, and certain contraventions came to notice. The company and its officers in default filed a *suo motu* application before ROC for compounding of offences. The ROC forwarded the application to CLB alongwith his report. It was stated in the report that show-cause notices were issued to three directors. But the compounding application was signed and submitted by three others. ROC opposed compounding. It was held that a compounding application by persons who were not officers in default was to be rejected. If the offences

were to be compounded, the ROC should call upon the actual officers in default to make the application.

Compoundable offences under Act, 2013

The Act, 2013 contains a number of sections, the punishment on default of which are compoundable. A tabular list of the sections for the same is detailed below:

Sl. No.	Section No.	Provisions	Notified/Not Notified	Remarks	Concerned Authority
1.	8(11)	Formation of companies with charitable objects, etc.	Notified	Offence compoundable for both company and any officers	RD/NCLT
2.	16(3)	Rectification of name of company	Notified	Offence compoundable for both company and any officers	RD/NCLT
3.	26(9)	Matters to be stated in prospectus	Notified	Offence compoundable for both company and any officers	RD/NCLT
4.	40(5)	Securities to be dealt in with in stock exchanges	Notified	Offence compoundable for both company and any officers	RD/NCLT
5.	46(5)	Certificate of shares	Notified	Offence compoundable for both company and any officers	RD/NCLT
6.	48(5)	Variation of shareholders' rights	Not Notified	Offence compoundable for both company and any officers	RD
7.	53(3)	Prohibition on issue of shares at discount	Notified	Offence compoundable for both	RD

Sl. No.	Section No.	Provisions	Notified/Not Notified	Remarks	Concerned Authority
				company and any officers	
8.	56(6)	Transfer and transmission of securities	Notified	Offence compoundable for both company and any officers	RD
9.	59(5)	Rectification of register of members	Notified	Offence compoundable for both company and any officers	RD
10.	64(2)	Notice to be given to Registrar for alteration of share capital	Notified	Offence compoundable for both company and any officers	RD
11.	66(11)	Reduction of share capital	Not notified	Offence compoundable for both company and any officers	RD/NCLT
12.	67(5)	Restrictions on purchase by company or giving of loans by it for purchase of its shares	Notified	Offence compoundable for company only	RD/NCLT
13.	68(11)	Power of company to purchase its own securities	Notified	Offence compoundable for both company and any officers	RD
14.	71(11)	Debentures	Notified	Offence compoundable for company	RD
15.	74(3)	Repayment of deposits, etc., accepted before commencement of this Act	Notified	Offence compoundable for both company and any officers	RD/NCLT
16.	76(A)	Punishment for	Notified	Offence	RD/NCLT

Sl. No.	Section No.	Provisions	Notified/Not Notified	Remarks	Concerned Authority
		contravention of section 73 or section 76		compoundable for both company and any officers	
17.	86	Punishment for contravention of provisions from section 77 to 87 under chapter VI	Notified	Offence compoundable for both company and any officers	RD/NCLT
18.	88(5)	Register of members etc.	Notified	Offence compoundable for both company and any officers	RD/NCLT
19.	89(5) and (7)	Declaration in respect of beneficiary interest in any share	Notified	Offence compoundable for company and any officers	RD/NCLT
20.	92(5)	Annual Return	Notified	Offence compoundable for company and any officers	RD
21.	99	Punishment for default in complying with provisions of sections 96 to 98	Notified	Offence compoundable for company and any officers	RD/NCLT
22.	102(5)	Statement to be annexed to notice	Notified	Offences compoundable for officers	RD/NCLT
23.	105(3)and (5)	Proxies	Notified	Offence compoundable for officers	RD
24.	117(2)	Resolutions and agreements to be filed	Notified	Offence compoundable for company and any officers	<ul style="list-style-type: none"> •RD/NCLT- for Company •RD- for officers
25.	121(3)	Report on Annual General Meeting	Notified	Offence compoundable for company and officers	RD

Sl. No.	Section No.	Provisions	Notified/Not Notified	Remarks	Concerned Authority
26.	124(7)	Unpaid Dividend Account	Not Notified	Offence compoundable for company and officers	<ul style="list-style-type: none"> •RD/NCLT- for Company •RD- for officers
27.	128(6)	Books of accounts, etc., to be kept by company	Notified	Offence compoundable for officers	RD
28.	129(7)	Financial statement	Notified	Offence compoundable for officers	RD
29.	134(8)	Financial statement, Board's Report	Notified	Offence compoundable for company and officers	<ul style="list-style-type: none"> •RD/NCLT- for Company •RD- for officers
30.	137(3)	Copy of financial statement to be filed with Registrar	Notified	Offence compoundable for company and officers	<ul style="list-style-type: none"> •RD/NCLT- for Company •RD- for officers
31.	140(3)	Removal, resignation of auditor and giving of special notice	Notified	Offence compoundable for officers	RD
32.	143(15)	Powers and duties of auditors and auditing standards	Notified	Offence compoundable for officers	RD/NCLT
33.	147(1)	Punishment for contravention of provisions of section 139 to 146	Notified	Offence compoundable for company and officers	RD
34.	157(2)	Company to inform Director Identification Number	Notified	Offence compoundable for company and officers	RD
35.	159	Punishment for contravention of	Notified	Offence compoundable	RD/NCLT

Sl. No.	Section No.	Provisions	Notified/Not Notified	Remarks	Concerned Authority
		provisions of section 152,155 and 156		for company and officers	
36.	165(6)	Number of directorships	Notified	Offence compoundable for officers	RD/NCLT
37.	166(7)	Duties of directors	Notified	Offence compoundable for officers	RD
38.	167(2)	Vacation of officer or director	Notified	Offence compoundable for officers	RD
39.	172	Punishment for contravention of provisions from section 149 to 172	Notified	Offence compoundable for company and officers	RD
40.	178(8)	Nomination and Remuneration Committee and Stakeholders and Relationship Committee	Notified	Offence compoundable for company and officers	RD
41.	182(4)	Prohibitions and restrictions regarding political contribution	Notified	Offence compoundable for company	RD/NCLT
42.	184(4)	Disclosure of interest by director	Notified	Offence compoundable for officers	RD
43.	185(2)	Loan to directors, etc.	Notified	Offence compoundable for company and officers	RD/NCLT
44.	186(13)	Loan and investment by company	Notified	Offence compoundable for company only	RD
45.	187(4)	Investments of company to be held in its own name	Notified	Offence compoundable for company and officers	<ul style="list-style-type: none"> •RD/NCLT- for Company •RD- for

Sl. No.	Section No.	Provisions	Notified/Not Notified	Remarks	Concerned Authority
					officers
46.	188(5)	Related party transactions	Notified	Offence compoundable for company and officers	RD
47.	191(5)	Payment to director for loss of office ,etc., in connection with transfer of undertaking, property or shares	Notified	Offence compoundable for officers only	RD
48.	194(2)	Prohibition on forward dealings in securities of company by director or key managerial personnel	Notified	Offence compoundable for company and officers	RD
49.	195(2)	Prohibition on insider trading of securities	Notified	Offence compoundable for officers only	RD/NCLT
50.	197(15)	Overall maximum managerial remuneration and managerial remuneration in case of absence or inadequacy of profits	Notified	Offence compoundable for officers only	RD
51.	203(5)	Appointment of key managerial personnel	Notified	Offence compoundable for company and officers	<ul style="list-style-type: none"> •RD- for company •RD/NCLT- for officers
52.	204(4)	Secretarial audit for bigger companies	Notified	Offence compoundable for company and officers	RD
53.	206(7)	Power to call for information, inspect books	Notified	Offence compoundable for company and	RD/NCLT

Sl. No.	Section No.	Provisions	Notified/Not Notified	Remarks	Concerned Authority
		and conduct enquiries		officers	
54.	221(2)	Freezing of assets of company on inquiry and investigation	Notified	Offence compoundable for company and officers	<ul style="list-style-type: none"> •RD/NCLT- for Company •RD- for officers
55.	222(2)	Imposition of restrictions upon securities	Notified	Offence compoundable for company and officers	<ul style="list-style-type: none"> •RD/NCLT- for Company •RD- for officers
56.	232(8)	Merger and amalgamations of companies	Not Notified	Offence compoundable for company and officers	<ul style="list-style-type: none"> •RD/NCLT- for Company •RD- for officers
57.	238(3)	Registration of offer of schemes involving transfer of shares	Not Notified	Offence compoundable for officers only	RD
58.	242(8)	Powers of tribunal	Notified	Offence compoundable for company and officers	<ul style="list-style-type: none"> •RD/NCLT- for Company •RD- for officers
59.	243(2)	Consequence of termination or modification of certain agreements	Notified	Offence compoundable for officers only	RD
60.	245(7)	Class action	Notified	Offence compoundable for company only	RD/NCLT
61.	247(3)	Valuation by registered valuers	Not Notified	Offence compoundable for officers only if not willful	RD
62.	249(2)	Restrictions on making application under section	Not Notified	Offence compoundable for company only	RD

Sl. No.	Section No.	Provisions	Notified/Not Notified	Remarks	Concerned Authority
		248 in certain situations			
63.	274(4)	Directions for filing statement of affairs	Not Notified	Offence compoundable for officers only if not willful	RD
64.	284(2)	Promoters, directors, etc. to cooperate with company liquidator	Not Notified	Offence compoundable for officers only	RD
65.	302(4)	Dissolution of Company by Tribunal	Not Notified	Offence compoundable for officers only	RD/NCLT
66.	305(4)	Declaration of solvency in case of proposal to wind up voluntarily	Not Notified	Offence compoundable for officers only	RD
67.	306(5)	Meeting of creditors	Not Notified	Offence compoundable for company and officers	RD
68.	307(2)	Publication of resolution to wind up voluntarily	Not Notified	Offence compoundable for company and officers	RD/NCLT
69.	312(2)	Notice of appointment of Company Liquidator to be given to Registrar	Not Notified	Offence compoundable for company and officers	RD/NCLT
70.	314(5) and (8)	Powers and duties of Company Liquidator in voluntary winding up	Not Notified	Offence compoundable for officers	RD/NCLT
71.	316(2)	Company Liquidator to submit report on progress of	Not Notified	Offence compoundable for officers	RD/NCLT

Sl. No.	Section No.	Provisions	Notified/Not Notified	Remarks	Concerned Authority
		winding up			
72.	318(8)	Final meeting and dissolution of company	Not Notified	Offence compoundable for officers	RD
73.	344(2)	Statement that company is in liquidation	Not Notified	Offence compoundable for company and officers	RD
74.	347(4)	Disposal of books and papers of company	Not Notified	Offence compoundable for officers	RD
75.	348(6) and (7)	Information as to pending liquidations	Not Notified	Offence compoundable for officers	<ul style="list-style-type: none"> • 348(6)-RD/NCLT • 348(7)-RD
76.	356(2)	Powers of Tribunal to declare dissolution of company void	Not Notified	Offence compoundable for officers	RD/NCLT
77.	392	Punishment for contravention of provisions from section 379 to 393 except section 391	Notified	Offence compoundable for officers	<ul style="list-style-type: none"> • RD/NCLT- for Company • RD- for officers
78.	405(4)	Power of Central Government to direct companies to furnish information or statistics	Notified	Offence compoundable for company and officers	RD
79.	450	Punishment where no specific penalty or punishment is provided	Notified	Offence compoundable for company and officers	RD/NCLT
80.	452(1)	Punishment for wrongful withholding of property	Notified	Offence compoundable for company and officers	RD
81.	453	Punishment for improper use of	Notified	Offence compoundable	RD/NCLT

Sl. No.	Section No.	Provisions	Notified/Not Notified	Remarks	Concerned Authority
		“Limited” or “Private Limited”		for officers	
82.	464(3)	Prohibition of association or partnership of persons exceeding certain number	Notified	Offence compoundable for officers	RD
83.	469(3)	Power of Central Government to make rules	Notified	Offence compoundable for officers	RD/NCLT

Conclusion

As evident from the table above, majority of the offence under Act, 2013 can be compounded by the Regional Director and few extreme cases by the NCLT. Some of the offences can be compounded by any of the concerned authorities as some of it involves the case of additional or further fine where there is no possibility of assumption on the maximum amount of fine as it depends on the period of default of the defaulter.

To read more about this subject: [click here](#)

To read more about our other resources: [click here](#)



Compounding of offences- now in NCLT's hand