



## **ADJUDICATION OF PENALTIES – AVOIDABLE LIABILITY**

The Companies Act, 2013 (the Act) vide Section 454 provides for adjudication mechanism for imposing penalties for non-compliance of provisions of the Act. Accordingly, the Companies (Adjudication of Penalties) Rules, 2014 (the Adjudication Rules) was also notified. The difference between prosecution and adjudication is that the former is required to be handled by a court of judicature, whereas the later is slated to be handled by the bureaucracy. The Ministry of Corporate Affairs (MCA) is empowered to appoint officers not below the rank of Registrar of Companies (RoC) to function as adjudication officers. A fine for default under provisions of the Act can be imposed only by a Court of law whereas a penalty can be imposed by the executive. Hence the Act has enabled certain offences to be handled directly by the bureaucracy thereby technically evicting the judicial process or quasi-judicial process hitherto in place under the company law administration. Thus, it can be stated that the Act has carved out certain sections which have been brought under adjudication process in respect of which the process compounding of offences under Section 441 will not apply. While one can debate on the backdoor enablement of usurpation of powers of the judiciary by the bureaucracy, the focus of this write-up is to provide awareness as to the stringency of the provisions in place.

The Companies (Amendment) Ordinance, 2018 (the Ordinance) has brought a major shift in the nature of dealing with belated filing of various e-forms and returns under the Companies Act, 2013. Considering the mounting burden on the National Company Law Tribunals (NCLT) due to matters under Insolvency and Bankruptcy Code, 2016, the Ordinance was promulgated on 02<sup>nd</sup> November, 2018 to de-clog the NCLT from matters pertaining to compounding of offences in respect of non-

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## I-CUBE NEWSLETTER

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compliance of certain specified provisions of the Act. Further the Ordinance has also amended the provisions of Section 454 to add clarity to the process and has inserted a new Section 454A which provides for doubling of penalties for repeat offences.

The pre-cursor to the streamlining the adjudication process started with the amendments vide the Companies (Amendment) Act, 2017 to Section 403 of the Act, whereby, the protection provided against liability by way of prosecution for belated filings within 270 days from the expiry of due date of filing of the return or e-form (with applicable additional fee) was removed. The said Section 403 was amended to provide for imposition of an additional fee of Rs.100/- for every day of delay beyond the statutory period in filing annual return and annual financial statements was introduced. Further, the amendment categorically states that the payment of additional fee will be without any prejudice to any other legal action or liability for such belated filing.

### Major provisions subject to adjudication

The following are the some of the key provisions amongst the provisions which have been brought under adjudication:

Section 42 – Private placement of securities

Section 92 – Filing of Annual Return

Section 117 – Filing of certain resolutions / agreements

Section 137 – Filing of financial statements

Section 159 – Default in complying with Sections 152, 155, 156 (Appointment of directors and DIN related provisions)

Section 197 – Payment of remuneration to Managing Director / Whole-time Director / Manager due to absence or inadequacy of profits

Section 203 – Appointment of Key Managerial Personnel

By virtue of amendments brought in vide the Ordinance, offences arising out of non-compliance or belated compliance of the aforesaid provisions will attract adjudication proceedings in terms of Adjudication Rules. The Adjudication Rules have also been amended vide Notification dated 19<sup>th</sup> February, 2019 providing for an elaborate process.

### Process in brief under adjudication of penalties

- a) RoC will issue a written notice clearly indicating the nature of compliance or default to the company and every officer(s) in default (as defined under Section 2(60) of the Act) to show cause within a period of not less than 15 days and not more than 30 days from the date of service as to why penalty should not be levied. Extension of time to show cause is possible up to a maximum of 15 days.
- b) The company and the officer(s) in default should reply within the stated time through electronic mode. Appearance in person through an authorized person is enabled and is required to be mentioned in the reply, if so preferred.
- c) The RoC after considering the reply, may require physical appearance for which a period of 10 days is provided. Power to adjourn hearings is provided to RoC.

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- d) Upon hearing the persons concerned, the RoC may require further written submissions and thereafter will pass an order in writing on adjudication of penalties.
- e) RoC is provided a time period of 30 days, where physical appearance is not preferred or 90 days in case of physical hearing is conducted, from the last date of submission of reply for passing adjudication orders. RoC is empowered to pass order beyond the stated periods provided reasons for delay is recorded in writing.
- f) A copy of the order is required to be sent to MCA and also uploaded on its website.
- g) Non-representation will result in RoC passing orders in absentia.

### **Minimum Penalty**

The Adjudication Rules provides that in no case penalty imposed by the RoC shall be less than the minimum penalty prescribed under the Act. Further where a fixed sum is prescribed as penalty, the RoC has to impose the fixed sum as penalty. Thus, the RoC has no leeway to consider any reduction of penalties falling under the aforesaid categories

### **Mitigating factors**

While adjudicating penalties where the penalty prescribed provides for payment of fixed sum as penalty for each day of default, the RoC shall have due regard for the following factors which can act as mitigating factors while fixing the penalty:

- a) Size of the company;
- b) Nature of business carried on by the company;
- c) Injury to the public interest;
- d) Nature of the default;
- e) Repetition of the default;
- f) Amount of disproportionate gain or unfair advantage, wherever quantifiable, made as a result of the default; and
- g) The amount of loss caused to an investor or group of investors or creditors as a result of the default.

### **Appeal**

The company or officer(s) in default aggrieved by the order of the RoC can appeal before the jurisdictional Regional Director vide prescribed Form No. ADJ with in a period of 60 days from the date of adjudication order. A process for disposal of the appeal is provided in the Adjudication Rules.

### **Compliance of Adjudication Order**

The company and the respective officer(s) in default have to comply with the order of RoC or RD within 90 days of the date of the order. Any failure to comply with the adjudication order will expose the company to a punishment by way of fine not less than Rs.25,000 which may extend to Rs.5,00,000/-. As regards an officer(s) in default such failure will result in punishment of imprisonment which may extend to six months or fine which shall not be less than Rs.25,000/- but



may extend to Rs.1,00,000/- or both. The only saving grace here is that the offence of non-compliance is a compoundable offence before NCLT under Section 441 of the Act.

### Illustration of monetary penalty under adjudication process

Let us assume that a company has filed belatedly (with applicable additional fee) say e-form MGT-14 (under Section 117) in respect of resolution of its board of directors for borrowing loan from a bank. Let us assume the delay to file is by 30 days. Let us assume that the company has two directors and none of them are managing director or whole-time director and the company is not required to appoint any Key Managerial Personnel (KMP). The adjudication process will result in

- a) The company liable for a minimum penalty of Rs.1,00,000/- plus Rs.500/- for every day of default which will work out to Rs.15,000/-. Thus, the total penalty on the company will be Rs.1,15,000/-.
- b) Each director will be liable for a minimum penalty of Rs.50,000/- plus Rs.500/- for every day of default which will work out to Rs.15,000/-. Thus, the total penalty on each director will be Rs.65,000/-. Hence for two directors it will be Rs.1,30,000/-.

Thus, it can be seen that for a belated filing of e-form MGT-14 by 30 days, the company and its two directors have to shell out Rs.2,45,000/- as penalties.

### Real time compliance

Compliance of provisions of the Act on real time basis is the only manner by which the adjudication process and payment of penalties can be avoided. While the Act provides for adequate time for compliance and filing of e-forms and returns, the directors, KMPs and professionals associated with the company have to have stringent internal controls to effect compliance of the provisions of the Act in a time bound manner such that no delays are caused. Further, such officers have to understand that paying additional fee for belated filing does not tantamount to condonation of delay.

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