



Defaulting Private Companies are not entitled to avail certain Exemptions and Modifications that apply to Private Companies

Business Entity Formation requires consideration of several present and future aspects and prospects. Except certain sectors such as insurance, business promoters prefer to carrying on their business by incorporating private companies so much so that we can safely say that private company form of organization is one of the most popular choices for carrying on business. The Companies Act, 2013 ("Act") enables the formation of even one person companies, which are basically private companies. A proper private company would require just two persons (either natural persons or artificial) as subscribers / directors.

One of the major advantages available to private companies is that the compliance requirements under the Act are considerably less. However, in certain situations, private companies will not be entitled to enjoy those exemptions. It is our endeavour to explain those situations and state that there is resolute need to ensure proper and on time compliances.

When compared the compliance requirements applicable to public companies, Private Companies enjoy a host of privileges and exemptions under the Act. Following are major privileges extended to Private Companies, to name a few:

- Appointment of Independent Directors is not applicable to a Private Company.
- Appointment of Woman Directors is not applicable to a Private Company.
- Constitution of Board committees like Audit Committee, Nomination and Remuneration Committee is not applicable to Private Company.
- It is not mandatory for private companies to issue / transfer shares only in dematerialized form.

Unlike the erstwhile Companies Act, 1956, the Act is drafted in a neutral format to apply to all classes of companies, save and except a couple of provisions, such as Sections 190 (Contract of Employment with managing or whole-time directors, or Section 197 (total managerial remuneration). Hence, it would be necessary to look at the notifications issued by the Ministry of Corporate Affairs (MCA) under Section 462 of the Act to understand the privileges, exemptions, and modifications to and from the applicability of several provisions of the Act. Notification dated 5th June 2015, read with Notifications dated 13th June 2017 and 13th July 2017 make available to private companies a variety of exemptions and relaxations from several compliance requirements.

For instance, on the basis of the above Notifications, the following advantages accrue to directors and shareholders of private companies:

- It is not necessary for directors of private companies to disclose their interests and abstain from participating in the meetings while a transaction in which they are interested or concerned is being considered by the Board.



- Where approval of members at a general meeting is required to be obtained in relation to any related party transaction, the shareholders who are related parties are not disentitled to exercising their votes.
- A private company, if supported by its Articles of Association, would be able to call a general meeting by giving "less than 21 days" notice to its members.

However, such exemptions, relaxations and modifications are available to private companies provided they have not committed a default in filing its financial statements under Section 137 of the Act or annual return under Section 92 of the Act with the Registrar of Companies ("Registrar"). While Section 137 makes it mandatory for filing of the adopted financial statements at an Annual General Meeting ("AGM") within 30 days thereof, Section 92 of the Act requires a company to file with the registrar a copy of the annual return within 60 days from the date on which the AGM is held.

Since, the Notifications state that the exemptions etc., shall be applicable to a private company which has not committed a default in filing of its financial statements under Section 137 of the Act and its annual return under Section 92 of the Act. Any provision for levy of additional fee or imposing penalties in adjudication proceedings against a company for delayed filing is different from the fact that there is removal of default. What are the two important dates that are crucial here. The date of commencement of default in complying with the requirements under Section 137, or, Section 92 and the date of actual compliance of those provisions.

Therefore, directors and officers of private companies shall ensure that their company has not committed any such defaults that would disentitle their company to avail any of those exemptions and modifications that are available to private companies in pursuance of those Notifications issued under Section 462 of the Act.

In case, there is any default, remedy the same by proper compliance, at the earliest, so as to be entitled to invoking the benefit of exemptions and modifications. In short, keep your private company in good compliance status in order to continue to be entitled to availing those exemptions and modifications.

Let us consider an illustration:

ABC Private Limited held its Annual General Meeting ("AGM") on 30th September, 2022. The said company in terms of Section 137 must file its annual financial statements on or before 30th October, 2022 and the annual return in terms of Section 92 on or before 29th November, 2022. The said company filed the annual financial statement on 20th October, 2022, however it failed to submit its annual return within the prescribed due date and filed belatedly on 10th December, 2022.

Now the question is till what period the disentanglement to exemptions and modifications could be said to be continuing. The default in not filing annual return within the prescribed time has commenced from the 61st day from the date of AGM and is said to continue till 10th December 2022, being the date on which the company has complied with the requirements under Section 137 as well as Section 92. Both defaults must be made good to be entitled to avail the benefits of exemptions.



Therefore, in order to continue to be entitled to those exemptions and relaxations that are applicable to private companies, directors must strive hard to ensure on time compliances.

It may be useful to note that Section 403(1) of the Companies Act provides that if the annual return required to be filed under Section 92 of the Act or the annual financial statement required to be filed under Section 137 of the Act, is not filed within the time prescribed, such companies not only become disentitled to avail the exemptions and relaxations as per those Notifications but also, they are liable to pay an additional fee of Rs.100 per day for the period of delay. In addition, Section 403(2) of the Act further states that notwithstanding the belated filing of the documents, the company and its officers who are in default are, without prejudice to the liability for the payment of filing fee and additional fee, also liable for the penalty or punishment as provided under the relevant sections under default.

Thus, being a private company brings a host of advantages provided compliance status remain good. Compliance management is an important aspect of governance and we strive to help our clients to ensure to keep compliance status good. Compliances under Section 137 or 92 are calendar items and therefore it would not be difficult to complete the such compliances on time or even before time.
