iComply

Editorial

June was a month of joy and happiness for us at CimplyFive as we achieved a few significant milestones.

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Interview with CS V Ramachandran, Company Secretary United Spirits



1. Compounding of Offences is a relatively less discussed topic in Company Law. Given this, how do you see compounding of Offences as a professional and what moral or ethical implications does compounding have among your corporate peers?

Read more…

Compliance calendar



Due dates for Income tax, Professional tax, Service tax, Companies Act, 2013 among others has been captured for your ready reference.

View the list…

Gist of Regulatory Changes in Companies Act, 2013 and Insolvency & Bankruptcy Code, 2016 in the month of June, 2017

Ten Regulatory changes in Companies Act, 2013 and Insolvency & Bankruptcy Code, 2016 was made in the month of June.
View the list…

Compounding of Offences: Examining the Origin and Rationale for this practice



By Shankar Jaganathan

Law is distinct from all other aspects of regulations, as its breech involves punishment. This punishment may be either a monetary penalty or loss of personal freedom for specific duration and in some extreme cases, loss of the human life itself. Read more…

Releasing this month 'CimplyFive's Report on 'Policy for Related Party Transactions



Editorial

June was a month of joy and happiness for us at CimplyFive as we achieved a few significant milestones. To name the top 3:

1. June saw the largest number of customer acquisition till date. A sign of **BLISS**'s growing acceptance
2. We signed a Joint Business Relationship agreement with PwC for promoting **BLISS** to large corporates in India. A relationship that should yield results in the near future.
3. CAIRR, our free to use website for Company Law averaged more than 3000 page views per day and in June alone crossed 100,000 page views, a sign of its increasing utility to our profession.

Among all these positives, I regret to inform you that we missed our deadline for releasing **CimplyFive's Report on the Policy for Dealing with Related Party Transactions** in June. The process of validating our findings in the report has taken much longer than what we had planned for as is still ongoing. Hopefully the longer time taken to validate our report should make it better. We plan to release this report in the first half of July 2017.

Turning to this issue of iComply, we have interviewed **CS V Ramachandran**, Company Secretary United Spirits, on the issues involved in compounding offences under the Companies Act, 2013. In line with the interview, our monthly article also looks at the origin and rationale for introducing the practice of compounding of offences. Our other regular features – Gist of changes in the Companies Act and the statutory calendar is also included in this issue.

Please feel free to share your feedback with us at contact@cimplyfive.com. We look forward to your feedback with interest as ever strive to improve the quality of everything we do.

Happy reading,

Shankar Jaganathan
Editor of iComply
July 5, 2017

Interview with CS V Ramachandran, Company Secretary United Spirits

1. **Compounding of Offences is a relatively less discussed topic in Company Law. Given this, how do you see compounding of Offences as a professional and what moral or ethical implications does compounding have among your corporate peers?**

   The compounding process under Section 441 of the Companies Act, 2013 involves the Company and its Key Managerial Personnel ('KMPs') and in certain cases Directors of the Company to agree to 'buy peace' and not litigate or challenge a non-compliance with the provisions of the Companies Act. This will require a certain sum to be paid as 'compounding fee' to the compounding authorities namely the Regional Director or the Company Law Board. Compounding of offence is a much-needed provision in Indian corporate law. If such a provision had not existed in law then every conceivable minor and major violation will get into litigation involving management time and effort and legal costs as well. Moreover, no company is perfect and there will always be gaps in procedure to be followed on various aspects of the Act as well as multiple views being possible on a particular issue. Compounding comes to the rescue in both the cases where there is a violation as well as a situation where there is an issue of interpretation. In both situations, one can prevent the possibility of prosecution by settling the matter through the process of compounding.

   There are certain misconceptions in the minds of certain professionals that compounding reflects poorly on the company's compliance levels. It is not always the case. There are times in a company's history where there could be gaps like not being able to induct independent directors in time or not having enough women directors or KMPs etc. Such situations could be beyond the control of the company. Compounding is the only solution in such cases. Company and the KMPs will be able to prevent the possibility of prosecution by going for compounding. While a preventive measure could be the robust compliance mechanism an organisation can put in place, compounding is a cure if that mechanism fails or leaks in certain areas. A non-compliance which is not compounded carries a bigger risk.

2. How should a company evaluate a proposal for compounding? What are the major elements of costs and benefits should one consider in evaluating it?

The Company should weigh the pros of cons of challenging the non-compliance or settling through the process of compounding. If the non-compliance issue raised by the authorities is a mere technical point it may be worthwhile to compound instead of incurring legal costs to further the dispute. However, if there is a sound legal view for the process followed by the company and the authorities are taking a contrary view it may make sense to contest than compound. Other points to be weighed before deciding to compound are-

a. A voluntary compounding by the Company suo-moto will be taken well by authorities than a discovery by the authority resulting in penalties and fines. So better to compound before it is discovered by external authorities.
b. Exposure in the form of show-cause notice from statutory authorities is high if offences are not compounded.
c. Management time saved vs costs involved in compounding

3. Based on your professional experience, what advice would you give a young professional who is undertaking compounding for the first time?

My suggestion would be to advise the company to first fix the non-compliance so that the same offence is not repeated. Once that is done the process of compounding should be attempted. Remember for the repeat offence of the same nature compounding process will not be available if such a repeat offence happens within a period of three years of the first offence.

4. Are there any Offences under the Companies Act, 2013 that are not compoundable? What are these and what precautions should one take in dealing with these matters?

There are four kinds of offences which are classified under Section 441 of the Companies Act, 2013. They are –

a) Offences which are liable to fine only.
b) Offences which are liable to either fine or imprisonment.
c) Offences which are liable to imprisonment only.
d) Offences which are liable to both fine and imprisonment.

Offences under category (a) are compoundable by Regional Director/ Company Law Tribunal, while those in category (b) are compoundable only with the previous approval of the Special Courts.

Offences falling under category (c) and (d) are not compoundable and prosecution is the only possible outcome. The company and its directors and officers will have to defend the non-compliance and, if found guilty, be ready to pay fine or face imprisonment.

Companies should be extra careful while dealing with the following activities that occur in the ordinary course of business like Sections 67 (company purchasing its own shares), 127 (failure to distribute dividends after declaring), 182 (contribution to political parties), 186 (inter corporate loans and investments), 207, 217 (disobeying the direction of the Inspecting authority), 245 (failure to comply with Tribunal's order in a Class Action suits), 338 (not keeping proper accounts of the Company).

Further, it is prudent to expect any company to avoid all actions that have traces of criminal intent like Sections 57 (impersonation as a shareholder), 58 (refusing to comply with tribunal's orders to rectify register of members), 118 (tampering with Minutes of meetings), 147 (willful contravention by auditor), 247 (contravention by a valuer with an intention to defraud), 267 (giving false evidence), 447 (allegations of fraud), 449 (furnishing false evidence), 453 (wrongful withholding of company's property), etc.

Awareness levels should be very high particularly with respect to the non-compoundable offences and the companies cannot afford to lower their guard on compliance with these sections if they have to prevent costly and time-consuming prosecutions later.

Note- The views expressed herein are personal and does not represent the views of any organisation.

Compounding of Offences: Origin and Rationale for this practice

By Shankar Jaganathan

Law is distinct from all other aspects of regulations, as its breach involves punishment. This punishment may be either a monetary penalty or loss of personal freedom for specific duration or both, and in some extreme cases, loss of the human life itself. Given that the punishment in itself is quite harsh and carries severe social strictures, the process of awarding the punishment is embedded with multiple safeguards to ensure that no innocent person is punished.

The system of administering justice built on the traditional wisdom that it is better to let a hundred accused escape punishment rather than have one innocent be punished, soon became so deeply ingrained in procedures that each trail and prosecution took years if not decades to conclude. Given this, there was a need to find a solution that protected the innocent but at the same time speeded up the process of justice delivery. Compounding of Offences was the answer to this challenge.

Black's Law Dictionary10 defines compounding as: "The process whereby the accused and the prosecutor in criminal case work out a mutually satisfactory disposition of the case Subject to the Court approval. It usually involves the accused pleading guilty to a lesser offence or to only one or some of the courts of a multi-count indictment in return for a lighter than that possible for the graver charge."

Compounding has some similarities with plea bargaining, but they are different. A defendant in a trial can make three types of pleas: Not guilty, Guilty, or *Nolo contendere*. For the purposes of punishment, a plea of *nolo contendere* is the same as the plea of guilty. The benefit that a defendant gets is that unlike a guilty plea, it cannot be used against a defendant as an admission of guilt in a subsequent civil or criminal case.

Plea bargaining can take three distinct forms –

1. Charge bargaining, i.e. dilution of charges or
2. Sentence bargaining, i.e. lesser punishment, or
3. Fact bargaining –accept certain evidence as fact in return for no other evidence to be produced further in the case

The distinction between compounding of offence and plea bargaining is that compounding is stigma free, whereas plea bargaining has some taint of guilt. Lesser punishment is awarded in plea bargaining for not fully contesting the case.

In India, Section 3 (38) of the General Clauses Act, 1897 defines an Offence as 'any act or omission made punishable by law for the time being in force.' Further compounding of offences needs the three basic elements:

1. Knowledge of an Offence,
2. Receipt of consideration, and
3. Agreement not to prosecute that Offence

Given that the primary objective is to speed up and reduce the cost of justice delivery mechanism, compounding of Offences in India is not permitted in all cases. The Law Commission in its 41st report laid out the basis for it by stating "…The broad principle that forms the basis of the present scheme is that where the offence is essentially of a private nature and relatively not serious, it is compoundable".

In Indian company law compounding of Offences was introduced by Sachar Committee in 1988 as it noted that 'a large number of offences are defaults that were technical in nature or arising out of ignorance on account of bewildering complexity of the provisions.'

Given this legal framework, the Indian Companies Act, 2013 permits compounding only to a first time offender or a person who has not compounded the same Offence in the last three years. Further, Offences punishable by imprisonment, or fine and imprisonment are not compoundable under the Companies Act, 2013. In addition, where investigation has been initiated or is pending for any Offence against a company, that Offence would also not be compoundable.

Given this understanding, compounding of Offences under the Companies Act, 2013 does not have any ethical or moral taint and is a prudent commercial decision to save time, efforts and cost of running a business.

Compliance Calendar

July 5, Wednesday	Physical payment of Excise duty, Non-SSI for the month of June, 2017
	Physical payment of Service Tax.
July 6, Thursday	E-payment of Excise duty, Non-SSI for the month of June, 2017
	E-payment of Service Tax.
July 7, Friday	TDS return for June, 2017.
July 15, Saturday	Pay PF contribution for June, 2017
	Regulation 27 (2) - Corporate Governance
July 20, Thursday	Professional Tax payment
July 21, Friday	ESIC monthly deposit
	Regulation 13 (3) - Statement of Investor complaints
	Regulation 31 - Shareholding Pattern
July 25, Tuesday	PF Return for June, 2017

Gist of regulatory changes in Companies Ac, 2013 in the month of June, 2017

- **05.06.2017**

  Clarification regarding transmission of Securities by Operation of Law

  MCA clarifies that at the time of transferring the shares under section 124(6) of the Companies Act, 2013 to IEPF authority (i.e where dividend has not been claimed for a consecutive period of seven years or more) procedure similar to that of transmission of shares is to be followed. By virtue of this clarification companies need not pay stamp duty on these transfers.

- **13.06.2017**

  ➢ Amendments to the Exemptions provided to Private Company

1. Private Company that is recognized as a start-up company by the Department of Industrial Policy and Promotion need not include Cash Flow statement in their financial statements.
2. The exemption provided to Private companies for accepting Deposits has been expanded to include:
   (a) A start-up, for five years from the date of its incorporation
   (b) A Private Company that-
      i. Is not an associate or a subsidiary company of any other company.
      ii. Has borrowings from banks or financial institutions or any body corporate which is less than twice its paid up share capital or fifty crore rupees, whichever is lower.
      iii. Has not defaulted in the repayment of such borrowings subsisting at the time of accepting deposits.
3. Small Companies need to provide only aggregate amount of remuneration paid to their directors and key managerial personnel in their Annual Report.
4. The Annual Report of One Person Company, Small Company and Private Company can be signed by the company secretary, or where there is no company secretary, by the director of the company.
5. The Auditor need not comment on the Internal Financial Controls of the Company if:
      i. It is a one person company or a small company; or
      ii. which has turnover of less than rupees fifty crores as per latest audited financial statement or which has aggregate borrowings from banks or financial institutions or any body corporate at any point of time during the financial year less than rupees twenty five crore.
6. Private Company that is recognized as a start-up company by the Department of Industrial Policy and Promotion is required to conduct a minimum of one Board Meeting in each half of a calendar year and the gap between the two Board Meetings should not be less than 90 days.
7. An interested Director can also be counted for Quorum after they disclose their interest.
8. All exemptions provided to a Private Company stands withdrawn if they fail to file their financial statements or Annual Returns with the Registrar of Companies.

➢ Amendments to the Exemptions provided to Government Companies

1. Government Companies can hold Annual General Meeting at a place other than the registered office including places within the city, town or village in which the registered office of the company is situated, only after the Central Government approves it.
2. Directors retirement by rotation shall not apply to a Government Company if it is:
   i. Unlisted Company, and
   ii. Central or State Government hold more than 51% stake, or
   iii. Is a subsidiary of a Government Company which fulfils the above 2 mentioned points.

   Prior to the notification this exemption was given to companies where it was fully owned by either Central or State Government or was a subsidiary of a fully owned government company.
3. For Merger and Amalgamation of Government Companies, the power to approve the scheme has been transferred from the Tribunal to the Central Government.
4. All exemptions provided to a Government Company stands withdrawn if they fail to file their Financial Statements or Annual Returns with the Registrar.

➢ Amendments to the Exemptions provided to Section 8 Companies

1. Its clarified that only Individuals can be appointed as a Director to the Board of Section 8 Company. Further, Section 8 Company needs to have minimum of 3 directors in case of Public Company and 2 in case of Private Company.
2. Section 8 companies can provide loans at lower than the prevailing interest rates of one year, three year, five year or ten year Government Security which is closest to the tenor of the loan if-
   i. 26 % or more of the paid-up share capital is held by the Central Government or State Governments, and
   ii. Loan is provided for funding Industrial Research and Development projects in furtherance of the Objects as stated in its Memorandum of Association.
3. All exemptions provided to a Section 8 Company stands withdrawn if they fail to file their financial statements or Annual returns with the Registrar.

- **12.06.2017**

  Insolvency and Bankruptcy Board of India (Inspection and Investigation) Regulations, 2017

  The Ministry has notified Insolvency and Bankruptcy Board of India (Inspection and Investigation) Regulations, 2017.

- **14.06.2017**

  ➢ Fast Track Corporate Insolvency Resolution process

  1. MCA has announced 14th June, 2017 as the effective date from which provisions of section 55 to 58 containing 'Fast Track Corporate Insolvency Resolution Process' comes into force.
  2. Further the definition of Corporate Debtor is enlarged for Fast Track Corporate Insolvency Resolution by including:
     a. A small Company as defined in the section 2(85) of Companies Act,2013.
     b. A Start up, other than Partnership Firm.
     c. Unlisted company with total Asset not exceeding Rupees One Crore.

  ➢ **The Ministry has also notified** Insolvency and Bankruptcy Board of India (Fast Track Insolvency Resolution Process for Corporate Persons) Regulations, 2017

- **15.06.2017**

  Clarification as to who can render services as an IP

  IBBI has issued a Public Notice to clarify as to who can render services as an IP. The categories of professionals or persons possessing such qualifications to be eligible for registration as IPs is specified.

- **22.06.2017**

  Companies (Audit and Auditors) Second Amendment Rules, 2017

  MCA vide its notification has raised the limit of paid up capital from Rs. 20 Crores to Rs. 50 Crores for private companies that do not need to limit the term of Auditors appointed. With this notification companies with paid up capital between Rs. 20-50 Crores need not limit the term of their auditors.

- **29.06.2017**
  - Companies (Removal of Difficulties) Order, 2017
  - Companies (Transfer of Pending Proceedings) Second Amendment Rules, 2017

    MCA vide this notification has substituted the said rules, by virtue of which if a company had:

    1. Given notice for Voluntary winding up under Companies Act,1956 then the dissolution process shall be dealt with as per the provisions of the Companies Act 1956.
    2. Pending proceedings for winding up under the order of the court for its inability to pay debts the petitioner is required to submit all necessary information to the Tribunal within 15th July, 2017, failing which the petitions will stand abated and fresh applications are required to be filed. Also, the petitions pending with High Courts as on 15th December, 2016 shall not be transferred to the Tribunal.

About us

CimplyFive Corporate Secretarial Services Pvt Ltd

Vision:
Leverage research and technology to eliminate procedural non-compliance risk for entities regulated by the Indian Companies Act, 2013

Mission:

Provide a cost-effective, secure web-based, menu driven, subscription services that provides curated resolutions, timely alerts and informative dashboards to free the management bandwidth for pursuing business goals

BLISS
(Board Leaders Integrated Software Solution)

Our product BLISS (Board Leaders Integrated Software Solutions)

- A digital productivity tool for Compliance with the Companies Act,2013
- Provides comprehensive coverage of Board meetings, Shareholder meetings and Sub-committee meetings
- Rich bank of curated but editable resolutions
- Fully integrated modules- Agenda, Minutes, Registers and Returns
- Timely alerts and reminders
- Rich and real-time dashboard

www.ca2013.com: Company law at your fingertips. A free to use website, integrating Companies Act with Rules, Notification, Orders and Circulars that is real time and online

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CAIRR



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