

SEMINAR- ICSI- HYD

20th May 2017

*“ Decipher The Obscure Areas of
Insolvency & Bankruptcy Code 2016*

*And
NCLT*

TOPIC

- *Compounding and Adjudication of Offences,*
- *Procedure and Case Studies and Focus*
- *On the Companies Amendment Bill-*
- *Impact Analysis*

CORPORATE GOVERNANCE-RELEVENCE

- OLD ADAGE- PREVENTION IS BETTER THAN CURE
- CORPORATE GOVERNANCE
- SYSTEMS AND PROCEDURES IN PLACE TO ENSURE
- COMPLIANCE OF LAW
- COMPLIANCE OFFICER
- SECRETARIAL AUDIT
- STATUTORY AUDIT
- INTERNAL CHECKS AND CONTROL

REMEDIES

- Adjudication – Section 454
- Compounding of Certain Offences –Section 441
- Mediation and Conciliation – Section 442
- Special Courts – Section 435
- Relief in Certain Cases -- 463

ADJUDICATION

- Central Govt. to appoint AO – Not below the rank of Registrar and specify jurisdiction
- Notification No. S.O 831 (E) Dated 24-03-2015 Roc Hyderabad appointed as AO for the States of AP & Telengana
 - AO shall adjudge **Penalty** under the provisions of CA 2013 e.g. section 136
 - AO by order impose **Penalty** on the **Company** and the **Officer who is in default** stating the non-compliance or default under the CA 2013 – Refer section 2 (60)
 - AO before imposing any Penalty **give an opportunity of being heard to the Company and officer who is in default**

CONTINUED----

- Procedure laid down in the Companies (Adjudication of Penalties) Rules 2014.
 - 15 to 45 days Notice specifying default calling why enquiry should not be held.
 - Notice period can be extended for another 15 days by AO
 - AO to decide whether enquiry to be held and fix date of hearing.
 - After hearing the parties AO to issue the order including adjournment order

CONTINUED--

- AO to send order duly signed and dated to company, concerned officer and Central Govt.
 - AO shall have the powers to –
 - a) summon and enforce the attendance of any person acquainted with facts of the case
 - b) order for evidence or to produce any document which in the opinion of the AO may be useful or relevant
 - If persons do not appear AO to proceed and decide

CONTINUED---

- While adjudging penalty AO to consider –
 - a) quantum of disproportionate gain or unfair advantage made as a result of default
 - b) amount of loss caused to the creditor or investor or investor group
 - c) repetitive nature of default
- All penalties realized shall be credited to CFI

CONTINUES--

- Appeal- aggrieved by the order of AO- appeal can be filed to RD having jurisdiction over AO within 60 days of receipt of the order
 - Appeal to be filed in Form ADJ setting forth grounds of Appeal and authorization
 - Appeal to be accompanied by fee prescribed in the Companies (Registration offices and Fees) Rules 2014

CONTINUED---

- If appeal is in order, it shall be registered and given a number
 - If appeal is defective RD shall give *not less than 14 days* to rectify the defects. RD may give another 14 days.
 - If defects not made good RD will reject the appeal within 7 days thereof
 - If appeal is admitted by RD, notice will be given to AO to submit reply within 21 days. RD may give another 21 days
 - AO shall serve copy of reply to Appellant

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- RD will fix hearing date with 30 days notice to concerned
- On the date RD will pass order including adjournment order.
The order may ***confirm or modify or set aside*** the order of AO
- If parties do not appear RD will pass ex-parte order
- RD may also set aside ex-parte order on sufficient grounds
- Every order duly passed by RD shall be served on all the parties and the Central Govt.
- If penalty is not paid, Company liable for fine 25000 to 5 lakhs and officer liable for imprisonment up to 6 months or fine 25000 to 1 lakh or both

SPECIAL COURTS

- Not to be viewed in isolation – Should be viewed in the context of:-
 - a) Establishment of SFIO
 - b) Establishment of CRC
 - c) Weeding out defunct Companies by Roc

CONTINUED-----

- Established for speedy trial of offences with imprisonment of two or more years
 - While trying an offense under the Act, SC may also try any other offense with which the accused is charged
 - SC may try an offense through summary trial, if the punishment does not exceed 3 years imprisonment and quantum of punishment ordered does not exceed 1 year
 - Summary trial can be restored to Regular Trial if required

CONTINUED---

- Appeal and Revision against the orders of Special Court (Session) lies with the HC (S437)
 - Offences punishable with imprisonment less than 2 years shall be tried by :-
 - a) Metropolitan Magistrate or
 - b) Judicial Magistrate of the First Class
- Special Courts for Telenganna :- (Notification. S.O. 945 (E) 23-3-17
- a) VIII Additional Metropolitan Sessions Judge Court, Hyderabad
 - b) XXII Additional Chief Judge City Civil Court, Hyderabad

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- Special Court for AP :-

- a) IV Additional District Judge Visakhapatnam

- b) II Additional Metropolitan Sessions Judge Visakhapatnam

Companies (Amendment) Bill 2016:-

- a) Section 446A- The Court or SC while deciding punishment should consider following factors

- i) Size of the Company, ii) Nature of business carried on by Company, iii) Injury to Public Interest, iv) Nature of default v) Repetition of Default.

CONTINUED--

- Section 446B– In the case of OPC or a Small Company the quantum of punishment reduced to half in respect of following
 - a) Section 92- Annual Return
 - b) Section 117 – Filing of Resolutions and Agreements
 - c) Section 134 – Filing of Financial Statements
- Section 439 of CA 2013 amended regarding persons authorized to file complaint before court and added “...or a member....”
- All courts referred in section 435 are designated “Special Court”

COMPOUNDING

- Compoundable Offenses
 - a) Punishable with Fine only
 - b) Punishable with Imprisonment or Fine or Imprisonment or Fine or with Both (with permission of Special Court as per procedure laid down in Cr P C 1973)
- Non-Compoundable offense- Any offense punishable with Imprisonment ONLY or with Imprisonment and Fine (Companies Amendment Bill 2016 replaced words “Fine Only” by negative words “not being an offense punishable with imprisonment ONLY.....)

COMPOUNDING AUTHORITY

- Regional Director or Notified Specific Authority –
 - in respect of offenses punishable with Fine ONLY of an amount not exceeding 5 lakhs
- National Company Law Tribunal-
 - a) in respect of offenses punishable with Fine ONLY of an amount exceeding 5 lakhs
 - b) in respect of offenses punishable with Imprisonment or Fine or Both (with permission of Special Court)

COMPOUNDING PROCEDURE

- Every application for compounding shall be submitted to the Registrar having jurisdiction over the company
- Registrar shall forward the application with his comments to the concerned compounding Authority
- Compounding Authority shall compound the offense on payment to the credit of CG such sum as may be determined
- While deciding the amount Additional Fee if any paid shall be taken in to account. Determined sum shall not exceed the maximum Fine stated in the penal provision

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- No offense committed by Company or its Officer will be compounded, if Investigation against the company has been initiated or pending
- No offense will be compounded, if similar offense was earlier compounded against the company or its Officer within a period of 3 years preceding the date on which present offense was committed
- Company shall give intimation of offense compounded to the Registrar within 7 days
- Where offense compounded before prosecution, no prosecution will be filed. If filed, accused will be discharged on intimation by Roc.

THE COMPANIES (AMENDMENT) BILL 2016

- Introduced in Parliament on 15-03-2016
- OBJECTIVES –
 - a) Ease of doing business in order to promote growth with employment.
 - b) Harmonization with SEBI, RBI Acts and Regulations
 - c) Rectifying omissions and inconsistencies
 - d) Modify qualifications for Members of NCLT, NCALT as per Supreme Court order.

PROPOSALS

- Simplification of Private Placement Procedure, doing away with separate offer letter, reducing number of filings
- Unrestricted object clause in MOA dispensing detailed list of objects, self declaration accepted in the place of affidavit
- Provisions relating to Forward Dealing and Insider Trading omitted
- Requirement for CG approval for Managerial Remuneration beyond limit replaced by member approval through SR
- Loans to entities in which directors are interested permitted with member approval by SR subject to disclosures

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- Remove restrictions on layers of investment companies and further liberalization on inter corporate investments and loans
- Allow certain foreign companies from registration under the Act
- Align requirement of ID in Audit Committee and NRC
- Test of materiality for determining independence of ID
- Disclosure of particulars in Prospectus to be under the sole domain of SEBI in consultation with CG
- Removal of requirement of annual ratification of appointment of auditor

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- Amendment of CSR provisions for clarity regarding applicability “..any financial year..” replaced by “..immediately preceding financial year..’.
Areas of CSR activity broad based, ID requirement clarified
- RPT for private and closely held companies further liberalized.
Controversial definition of “ Interested Person” dropped

MEDIATION AND CONCILIATION

- OBJECTIVE – mediation between parties in any proceedings before a) Central Government b) NCLT and c) NCALT
- * SUBJECT MATTER – a) matters relating to proceedings in respect of inspection or investigation under Chapter XIV (b) Matters relating to default or offense for which application for compounding made (c) cases involving allegations of fraud, forgery, coercion and the like (d) Cases involving prosecution for non-compoundable offenses (e) Cases involving many persons who are not parties before CG or Tribunal

PROCEDURE

- a) Any of the parties during the proceedings before the Authorities mentioned above may apply
- b) Parties to choose a Mediator from the Panel maintained by MCA (Panel prepared by RD)
- c) If parties do not agree CG or Tribunal to appoint
- d) Mediation Fees including administrative expensed to be determined by CG or Tribunal
- e) If fees not paid mediation not to start

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- Hearing date to be fixed by Mediator in consultation with Parties
- Parties to furnish required information within 10 days
- Mediator may meet each Party separately
- If parties do not WILFULLY attend for two consecutive hearings, the mediation is deemed as failure and Mediator to report to CG or Tribunal
- Mediator not bound by Indian Evidence Act 1872 or Code of Civil Procedure 1908

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- Mediator is bound by principles of (a) Fairness (b) Natural Justice (c) Have regard to the rights and obligations of the Parties (d) Usage of Trade (e) Circumstances of the dispute
- Parties may be present personally or through Authorized Representative. Mediator can insist for personal attendance
- Parties may offer duly signed “without Prejudice” settlement during proceedings
- Mediator shall persuade voluntary resolution of dispute
- 3 months given for resolution- can be extended by 3 more months by CG or Tribunal

CONTINUED--

- Settlement agreement to be signed by all Parties including Counsel appearing for parties
- Mediator to forward settlement agreement to CG or Tribunal
- Within 14 days CG or Tribunal to fix hearing of the case and issue of order

THANK YOU