

HOW THE COMPANIES (AMENDMENT) BILL, 2020 SEEKS TO DECRIMINALISE VARIOUS OFFENCES UNDER THE COMPANIES ACT, 2013

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ABSTRACT

When the country is in midst of a pandemic and businesses are dealing with the aftereffects of the lockdown, The Ministry of Corporate Affairs introduced the Company Amendment Act 2020, which received the assent of the President on 28th September 2020, and is one of the key amendments in the Companies Act primarily focusing on increasing the ease of doing business in India. The Act decriminalises various non-compoundable offences which were considered procedural and technical in nature, (but not offences involving frauds) and alters many penalties. It proposes to insert four more sections and amends sixty-one of the existing ones.

Keywords: Companies Act 2013, Companies Amendment Act 2020, Decriminalisation

TEST OF OBJECTIVITY VERSUS SUBJECTIVITY

The Law Report Committee, which serves as the basis for the amendment, limits the decriminalisation to compoundable offences and doesn't take into account the offences related to public affairs, serious frauds and non-compoundable offences. A test determining the objectivity versus subjectivity of the offences was used to determine whether the wrong was a civil one or a criminal one. The offences which were objective in nature, were declared to be civil, and didn't conflict with the public interest and were not fraudulent. These offences had no mal-intention i.e. no element of 'mens rea'. Therefore, it was proposed that offences that relate to a violation of a well enunciated the legal principle that can be assessed by a *prima facie* objective be recategorized as civil offences (rather than being criminal acts) under the Act, under which the wrongdoers will be penalised instead of being imprisoned. Lengthy adjudication in such matters put an unnecessary burden on courts and delayed justice. After this Amendment, twenty-three compoundable offences were made non-punishable by imprisonment and instead of a criminal 'fine', a civil 'penalty' will be levied. The pecuniary value of many penalties has been reduced by half. The amount of penalty in three offences was increased keeping in mind the gravity of these offences, which include the offences related to non-compliances with provisions relating to contributing towards the CSR (Corporate Social Responsibility) fund, related party transactions, and defaults in the submission of material data or statistics to the central government.

CHANGES IN MONETARY PENALTIES

The monetary penalty payable has been reduced to a great extent by this amendment, which mainly aims at matters related to the maintenance of records by the companies. Prior to the changes made by the amendment, if a company failed to file a notice with the registrar informing it of alter in share capital, the company and the officer of the company were to be punished with a fine of one thousand rupees for each day during which such default continues, or five lakh rupees, whichever is lesser. Now after the amendment, in cases of default, the company cannot be charged with a penalty of more than five lakh rupees and officer of the company can't be charged more than one lakh rupees. According to the 2013 act, in case of

default or anything is done in contravention of section 56 (1) to 56 (5), which laid down the procedure of transfer of a share, the liability imposed on the company ranged from twenty-five thousand to five lakhs rupees and for the officers- from ten thousand to one lakh rupees. But after the amendment, only a penalty up to fifty thousand rupees can be imposed.

Before the 2020 amendment, if a company did not maintain a register of members or debenture-holders or other security holders or fails to maintain them, the company and every officer of the company who was in default was punishable with a fine ranging from fifty thousand to three lakhs and if such default continued, further, a fine could be imposed which extended from one thousand rupees daily till the time the situation is not corrected. However, after the amendment, the quantum of penalty has been reduced to three lakhs rupees for the company and fifty thousand rupees for the officer of the company. If there is noncompliance in the filing of annual return, the amended act levies only a penalty of ten thousand rupees and two lakh rupees for the company, as opposed to the fifty thousand for the officer and five lakhs for the company.

As per Section 117 of the Act, every resolution or agreement shall be filed with the registrar within thirty days, if not, the company was liable to pay a fine of twenty-five lakhs and every officer in default could be made liable to pay from one lakh to five lakhs. After the amendment, the value of the fines has been reduced drastically as the defaulting officer of the company can now be made liable only up to fifty thousand rupees and the company cannot be fined beyond two lakhs rupees even if the default persists. Hence, rigorous fines have been reduced to more than half of the original amount in numerous cases. Such mitigation of fines reduced the monetary burden on the companies and aided officers to work relatively freely- from statutory compulsions and cumbersome procedures, which helped them operate in a much more efficient manner.

FROM CRIMINAL FINES AND IMPRISONMENT TO CIVIL PENALTIES

The amendment proposes to omit the punishment of imprisonment prescribed under Sections 26(9) and 40(5) of the Act in relation to contravention of provisions relating to the public

offering of securities by a company, which include, *inter alia*, matters to be stated in the prospectus and separate treatment of application money received pursuant to a public offer. However, the quantum of the monetary penalty under each of these provisions remains unchanged. It is to be noted that the amendment proposed under the bill in this area does not dilute the risk of non-compliance in respect of the above-mentioned matters, in so far as they can be treated as fraud under the Act. In addition, the penalties prescribed under the rules and regulations framed by the Securities and Exchange Board of India (SEBI) for any non-compliance with the above-mentioned matters can also get attracted. The amendment also proposes to omit the punishment of imprisonment prescribed in Section 68(11) of the Act for non-compliance with the procedure for buy-back of shares as prescribed under Section 68 of the Act, the Rules framed thereunder and the SEBI (Buy-Back of Securities) Regulations, 2018. Both the defaulting company and the officer-in-default shall continue to remain liable for a monetary penalty between 1 lakh to 3 lakhs for any non-compliance in respect to the manner of conducting a buy-back.

Furthermore, Companies Amendment Act 2020 provides that CSR violations would not be treated as criminal offences and would be a civil liability instead. The imprisonment of up to 3 years, as prescribed in the previous acts, for officials of companies that fail to comply with the specified corporate social responsibility (CSR) expenditure has been rolled back. The Companies Amendment Act 2020 omitted such punishment of imprisonment. The CAA 2020 replaced the fixed monetary penalty with an ad-valorem penalty, the quantum of which is connected to the company's minimum CSR spend obligations. Therefore, a company's risk liability in this matter may either increase or decrease depending upon its profitability in a particular financial year.

The Act also lays down the provision for setting off the excess amount against the requirement to be spent under CSR activity for such number of succeeding financial years and in such manner, as may be prescribed. Section 21 of the Companies Amendment Act, 2019 provided for the punishment of imprisonment for a period up to three years if a company failed to meet its obligations under section 135(5) of the Companies Act. It further provided that unspent CSR funds by companies should be transferred into an escrow account called Unspent Corporate Social Responsibility Account. The transferred funds needed to be utilised within three years of the transfer. Any unspent annual CSR funds should have been transferred to one of the funds

under Schedule 7 of the Companies Act like Prime Minister's Relief Fund within six months of the financial year-end. However, after the amendment, where the amount to be spent by a company for CSR activity does not exceed fifty lakh rupees, the requirement for the constitution of the Corporate Social Responsibility Committee shall not be applicable and the functions of such Committee, in such cases, will be discharged by the Board of Directors of such company. Decriminalisation of CSR Violations will have various positive implications such as the freedom to corporations to think and employ their CSR funds in an effective way as they please and the ability to decide and choose the field of CSR related work.

CONCLUSION

One can argue that- even though Companies Amendment Act 2020, revised numerous provisions which put to an end to imprisoning the defaulting officers who are involved in compoundable offences, having done away entirely with the imprisonment provisions will prop up laxity among company officers who don't fear excessive penalties. Instead of entirely abolishing captivity for the defaulting officer, the term of imprisonment could have been reduced. Decriminalisation of certain offence under the act can promote the non-observance of the necessary compliance which can have unfavourable consequences. It can pave way for an unbridled culture of defaults on part of officers who can be swiftly done away with punishment by paying a hefty sum in form of penalty, which has also been substantially reduced via amendment in the main act. However, there is no adequate proof if criminalisation of corporate law is effective and efficient and, in some cases, it may prove to be counter-productive and lead to non-compliance. Offences that prejudice public interest and are fraudulent in nature, have retained their criminal nature for the greater national good.

The decriminalisation of various offences will help bring more business to India, which is all the more important in today's times when the country is combatting the Corona Virus. It will boost the confidence of both domestic and international entrants, which will help bring greater monetary and infrastructural investment to India, as well as reassuring the existing players. This is in line with the government's goal to boost foreign direct investments in the upcoming years. The decriminalisation also seeks to ensure that court proceedings become simpler and less time-consuming. It will allow the already over-burdened courts to pay more attention to

other serious crimes, mostly affecting the human body. Also, one can expect that it will yield significant benefits as the goodwill will of the company be safeguarded, that could otherwise get tainted by criminal sanctions being imposed for minor, technical or inadvertent lapses. As the Law Committee Report aptly observed, while criminal sanctions are more severe and enduring in nature, the cost of civil penalties may be absorbed as part of running a business in the ordinary course. Hence, decriminalisation is a necessary step taken in the right direction to incentivise the domestic as well as foreign investors, to invest in India post-COVID-19.

