

## M2K Alert – Company Law Update Series (Part III) Companies' Fresh Start Scheme 2020

### BACKGROUND

In order to facilitate the companies registered in India to complete their pending statutory filings with the Registrar of Companies (RoC) under the Companies' Act 2013 ("the Act") or the Companies' Act 1956 ("1956 Act") without being subject to a higher additional fees on account of any delay, the Ministry of Corporate Affairs (MCA) has introduced a Scheme viz; "**Companies Fresh Start Scheme 2020 (CFSS-2020)**". The Scheme benefits the defaulting companies by not charging additional fees and granting of immunity from launching of prosecution or proceedings for imposing penalty on account of such delay.

In the Part III of our Company Law Update Series, we seek to deal with the nuances of the aforesaid scheme.

### KEY TAKEAWAYS OF THE SCHEME

#### 1. Applicability and Duration of the Scheme

A Company which has made a default in filing of any of the documents, statement, returns, etc. including annual statutory documents to the Registrar (hereinafter referred to as 'defaulting company') is permitted to file all its belated documents which were earlier not filed on its due date without any additional fee / penalty being levied under any relevant section upon filing of such documents (except as stated in Point No. 6 below w.r.t Form No. SH-7 and charge related forms). The document / form can be relating to any period from incorporation of the company.

The Scheme shall come into force w.e.f 1 April 2020 and shall remain force till 30 September 2020 (both days inclusive).

#### 2. Application and grant of immunity

The application for seeking immunity under the scheme shall be made electronically in **Form CFSS-2020** after closure of the scheme and after the document(s) or forms are taken on file / on record / approved by the designated authority, within a period of 6 months from the date of closure of the scheme. Thus, the last date for filing the form is **31 March 2021**. No fee shall be payable on filing Form CFSS-2020.

Based on the declaration made by the defaulting company, an immunity certificate in respect of the documents / forms filed under this Scheme shall be issued by the designated authority.

After granting the immunity, the designated authority concerned shall withdraw the pending proceedings before Courts or Adjudicating officer (AO) u/s 454 of the Act after which the immunity granted shall be deemed to have been completed without any further action on part of the designated authority.

### 3. Withdrawal of appeal filed, if any, by the Company

Where a Company intends to avail the benefit under this scheme, the Company or its officer in default shall withdraw any appeal filed against any notice issued or an order passed by the court / any AO for any violation under the Act or 1956 Act, in respect of which an application is made under this scheme, then such applicant before filing such application for immunity under this scheme, shall withdraw the appeal and furnish a proof of withdrawal along with the application made under this scheme.

### 4. Measures for cases where the order of adjudicating authority was passed but the appeal could not be filed

In cases where in penalty has been imposed by AO for delayed filing of documents / return etc. and no appeal has been initiated by the company or its officer before the Regional Director (RD) as on 1 April 2020, (i.e date of commencement of the scheme), then the following would apply -

- Where the last day of filing the appeal falls between 1 March 2020 to 31 May 2020 (both days included) an additional period of 120 days shall be allowed from such last date to all companies and their officers for filing appeal before the concerned RD.
- During such additional period as stated above, prosecution for non-compliance of the order of adjudicating authority shall not be initiated against such companies or their officers.

### 5. Immunity not to be provided in certain cases

The immunity shall not be provided on the following –

- Any matter of appeal or management disputes pending before the court of law or tribunal.
- Any matter on which court has ordered conviction or an order imposing penalty passed by an AO and no appeal has been preferred against such order before this scheme has come into force.

The aforesaid Point No. 4 and Point No. 5 can be understood with the help of below table: -

| Last day of filing appeal | Any Additional period of filing appeal                                  | Whether appeal filed against order passed on the Company within last day/ additional period | Whether eligible for grant of immunity   |
|---------------------------|---|---|--|
| 29-Feb-20                 | No, since last day of filing should fall between 1 March to 31 May 2020 | Yes   | Yes, Provided the Company withdraws the appeal filed as stated in Point No. 3 above    |
| 29-Feb-20                 | No, since last day of filing should fall between 1 March to 31 May 2020 | No  | No, since no appeal has been preferred against order passed, as per Point No. 5 above. |
| 31-Mar-20                 | 29-Jul-20<br>(120 days as per Point No. 4 above)                        | Yes   | Yes, Provided the Company withdraws the appeal filed as stated in Point No. 3 above    |
| 31-Mar-20                 | 29-Jul-20<br>(120 days as per Point No. 4 above)                        | No  | No, since no appeal has been preferred against order passed, as per Point No. 5 above. |

It may further be noted that this immunity is only attributable against delayed filings to the RoC and not against any substantive violation of law. For ex: every company is required to file a return of allotment in Form PAS-4 within 15 days from the date of allotment of shares. Such company is also mandated not to utilize money raised through private placement unless the return of allotment is filed with the Registrar. The immunity under the Scheme shall only be available in respect of the penalty to be imposed u/s 42(9) for delay in filing of Form PAS-4 amounting to Rs. 1,000 per day not exceeding Rs. 25 lakhs. However, the penalty which may be imposed u/s 42(10) equivalent to the amount raised through private placement or Rs. 2 crores whichever is lower, for utilizing the money before allotment, would not be protected under this scheme. In other words, any proceedings involving interests of any shareholder or any other person qua the company or its directors or Key Managerial Personnel would not be covered by such immunity.

## **6. Non-applicability of the Scheme for certain companies:**

The Scheme shall not apply to the following cases -

- Companies against which action for final notice for striking off the name from the RoC records has already been initiated by designated authority;
- Companies who have already filed an application for action of strike off the name from the RoC records;
- Companies which have amalgamated under the scheme of arrangement or compromise under the Act;
- Where application has been filed for obtaining Dormant status before this scheme;
- To vanishing companies
- Filing of Form SH-7 (for increase in authorised capital) and charge related documents (CHG-1, CHG-4, CHG-8, CHG-9). In other words, for filing SH-7 and charge related forms, additional fees would continue to be applicable and the relevant penal provisions could also be invoked.

## **7. Scheme for Inactive Companies:**

In addition to the above, the CFSS 2020 also gives an opportunity to inactive companies to declare themselves as "Dormant company" by filing a simple application at a normal fee. This essentially enables inactive companies to remain on the RoC records with minimal compliance requirements.

The defaulting inactive company while filing belated documents under this scheme can also -

- Apply to get themselves declared as 'dormant' by filing e-form MSC-1 at normal fee, or
- Apply for striking off the name of the company by filing e-form STK-2 by paying the regular fee payable on such form.

## **8. Points to Ponder**

While the scheme has been neatly drafted and self-explanatory, the usage of the term 'vanishing companies' seems to be unclear as to which companies are classified under this category. These can neither be interpreted as dormant companies nor companies which are in the verge of getting its name struck off from the RoC records since these are specifically mentioned in the scheme document. Neither the Act nor any of the Rules, have defined the said term in the context of Company Law. One has to wait for a clarification from the Ministry to understand the definition of such companies.

Further, the scheme seeks to grant immediate immunity to the defaulting companies from any proceedings in the Company Law due to such non-filing. However, one has to note that the directors of such defaulting companies which has not filed financial statements or annual returns for continuous period of 3 financial years **shall continue** to be disqualified from reappointment in such defaulting

company or fresh appointment in any other company for a period of 5 years from the date when such default arose.

## **M2K REMARKS**

The Ministry of Corporate Affairs, in pursuance of the Government of India's efforts to provide relief to law abiding companies in the wake of COVID 19, has introduced the "Companies Fresh Start Scheme, 2020" (CFSS-2020) to provide an opportunity to companies to make good any filing related defaults, irrespective of duration of default, and make a fresh start as a fully compliant entity. The Fresh Start scheme incentivizes compliance and reduce compliance burden / cost during the unprecedented public health situation caused by COVID-19. Further the scheme has been neatly drafted and is self-explanatory with very little scope for ambiguities and interpretational issues.

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