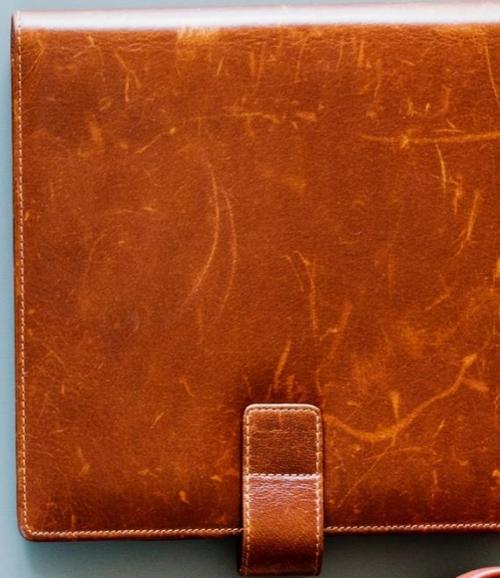


# Spotted & Reported

## The Companies (Amendment) Act, 2019

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## **FOREWORD**

With the introduction of the Companies (Amendment) Act, 2019, notified on **July 31<sup>st</sup>, 2019**, there have been major changes in the Companies Act 2013, especially many of the penalty provisions have been amended.

“Spotted and Reported” is one of the many other initiatives undertaken by SURESH & CO., Chartered Accountants, to enable its members, articled assistants, associates, clients, business partners, professionals and other trade/industry practitioners to be informed and updated about the new developments in the industry. Six reports on:

1. “CBDT Amends the Tax Audit Report (Form 3CD)”;
2. “Business Valuation”
3. “GST Audit”
4. “Companies (Amendment) Ordinance, 2018”
5. “Companies (Incorporation) Amendment Rules, 2019” and
6. “Major Changes in Income Tax Return (ITR) Forms”

have already been issued.

This 7<sup>th</sup> issue of Spotted and Reported is drafted with a view of giving its readers a quick understanding of the Companies (Amendment) Act, 2019. The report has been drafted in a manner covering the various amendments of the Companies (Amendment) Act, 2019.

The key focus of this report is on the responsibility of the directors of a Company due to the additional compliances brought in by this Act. This Act mainly focuses on the increasing penalties being imposed on non-compliance of the provisions of the Act.

The report does not deal with legal interpretations and rulings. This report is only meant for general awareness and should not be used as a basis for any decision-making.

### ➤ Background

The Companies (Amendment) Act, 2019 (“Act”) was enacted in order to review the existing provisions of the Companies Act, 2013 (Principal Act) dealing with the offences and to make recommendations to promote better corporate compliance.

The Companies (Amendment) Act, 2019 contains:

- i. All provisions introduced by The Companies (Amendment) Ordinance, 2018. (Dated: 02.11.2018)
- ii. All provisions introduced by The Companies (Amendment) Ordinance, 2019. (Dated: 12.01.2019)
- iii. All provisions introduced by The Companies (Amendment) Second Ordinance, 2019. (Dated: 21.02.2019)



### ➤ The major amendments enacted in the Companies (Amendment) Act, 2019 are:

- Increase in power of Registrar of Companies and Regional Director as the word tribunal has been replaced by the word Central Government.
- Unspent amount of CSR to be transferred to PM's Fund.
- Greater accountability and documentation related to creation, modification and satisfaction of charges;
- Filing declarations before commencement of business.
- Dematerialization of Shares of Private Companies.

### The summary of the Companies (Amendment) Act, 2019 are as follows;

#### 1. Approval for allowing different financial year:

Now any Indian company which is a holding company or a subsidiary or associate company of a company incorporated outside India and is required to follow a different financial year for consolidation of its accounts outside India, an application can be made by that company to Central Government to allow any period as its financial year, whether or not that period is a year.

Earlier the approval power was vested with NCLT.

#### Effect of Amendment:

This move definitely reduces the over burden of NCLT and it can now concentrate more on core litigations. Also, it is very easy for management to approach central government (Ministry will notify the appropriate authority) and it saves time.

#### 2. Filing declaration is mandatory:

A company having a share capital shall not commence any business or exercise any borrowing powers unless a declaration is filed by a director within a period of 180 days of the date of incorporation of the company with below points:

- a. That every subscriber to the memorandum has paid the value of the shares agreed to be taken by him/her.
- b. That the company has filed with the Registrar a verification of its registered office through Form No. INC. 22.

#### Effect of Amendment:

Objective behind this amendment is to curb the malpractice of avoiding transfer of subscription money to Company's Bank account and also make sure that the company is maintaining a Registered Office of the Company pursuant to Section 12.

### 3. Inspection of Registered Office of a Company:

If the Registrar has reasonable cause to believe that the company is not carrying on any business or operations, he may cause a physical verification of the registered office of the company and if any, default is found to be made, he can initiate action for the removal of the name of the company from the register of companies.

### 4. Dematerialization of securities:

Now all the unlisted companies including Private Limited Companies, has to mandatorily hold or transfer the securities only in dematerialized form only. However, rules yet to be prescribed on this.

#### Objective behind the amendment:

With an aim to maintain transparency in share allotment and share transfer and Investor protection for better corporate governance.

### 5. Extension of penalty for default in issuance of shares at discount:

Earlier if any company contravenes any of the provisions with relation to Issue of shares at discount, fine was between 1 lakh to 5 lakhs.

Now it is revised to **an amount equal to the amount raised through the issue of shares at a discount or 5 lakh rupees**, whichever is less, and the company shall also be liable to refund all monies received with interest at the rate of 12% per annum from the date of issue of such shares to the persons to whom such shares have been issued.”

### 6. Amendment in time for reporting creation of charge:

Earlier, the Company had 30 days to intimate MCA of the creation of charge. Further 270 days was allowed with additional fee. After the expiry of 300 days of the creation of charge, the charge could still be registered through “condonation of delay” by making an application to the Central Government.

Now, the Company has a period of 30 days to report the creation of charge. Further 30 days could be allowed on payment of additional fees. After the expiry of 60 days from creation of charge, the Company will be required to make an application to the Central Government for further extension of 60 days with ‘Advalorem fees.’

Important to note is that after the expiry of 120 days of the creation of charge, the Company will not be able to register the charge as the Central Government no more has the power to condone the delay as per section 87. Yet the Central Government can allow condonation as per section 460.

### 7. Section 90: Significant Beneficial Owner:

Every company shall take necessary steps to identify an individual who is a significant beneficial owner (SBO) in relation to the company and require him to comply with the provisions of this section.

SBO's not filing Form BEN-1 would be imposed a fine ranging between INR 1,00,000 to INR 10,00,000 lakhs and for a continuing offence, an additional fine of INR 1000 would be imposed for every day of default.

### 8. Corporate Social Responsibility (CSR):

Earlier, if the company fails to spend on CSR policy, then the Board of directors should specify the reasons in their report for not spending the amount in its report.

Now the amendment act has put a rigour on CSR spending, in case the unspent amount **does not relate to any ongoing project**, unspent amounts to be transferred to a Fund specified under Schedule VII within a period of 6 months of the expiry of the financial year;

In case the unspent amount relates to **any ongoing project** subject to fulfilling of prescribed conditions, unspent amounts to be transferred by the company within a period of 30 days from the end of the financial year to a special account to be opened by the company in that behalf for that financial year in any scheduled bank to be called the Unspent CSR Account.

#### Effect of Amendment:

To make the applicable companies responsible to spend the portion of their profits for CSR activities mandatorily.

#### 9. Amendment to Section 447:

Earlier, any person guilty of fraud involves an amount less than ten lakh rupees or one per cent. of the turnover of the company, shall be punishable with imprisonment for a term which may extend to 5 years or with fine which may extend to **25 lakh rupees** or with both to imprisonment for a term of 5 years or fine which may extend to **50 Lakhs Rupees**.

#### Effect of Amendment:

The objective behind amendment is to control the guilty of fraud by increasing the fine by 25 lakhs.

#### 10. Extension of powers of NFRA

Earlier, where professional or other misconduct is proved on the part of the member or the firm of Chartered Accountants(CAs), then the power of debarring the member or the firm from engaging himself or itself from practice as member of the ICAI for a minimum period of 6 months or for such higher period not exceeding 10 years as may be decided by the NFRA.

Now, in case a professional or other misconduct is proved on the part of the member or the firm of CAs, then the NFRA will have the power to make order for debarring the member or the firm from-

a. being appointed as an auditor or internal auditor or undertaking any audit in respect of financial statements or internal audit of the functions and activities of any company or body corporate; or

b. performing any valuation as provided under section 247,

for a minimum period of 6 months or such higher period not exceeding 10 years as may be determined by the NFRA.

#### Annexure: Re-categorizing of offences

The list of offences which are re-categorised as defaults carrying civil liabilities which would be subject to an in-house adjudication mechanism:

Sl. No.	Section	Nature of default	Pre-Amendment	Post-Amendment
1	Section 64(2)	Fails to give notice to registrar for alteration of share capital	Fine which may extend to Rs. 1000 for each day during which such default continues, or Rs. 5 lakhs, whichever is less.	Penalty which may extend to Rs.1000 for each day during which such default continues, or Rs. 5 lakhs, whichever is less.
2	Section 92(5) Annual return	Failure/delay in filing annual return	Fine or imprisonment or both	Non-compliance with sub-section (4) of Section 92 shall result in:

				<p>(i) the company and every officer <b>are liable to penalty, instead of being punishable with fine.</b></p> <p>(ii) the company and every officer who is in default shall be liable to a penalty of <b>fifty thousand rupees</b> and in case of continuing failure, with further penalty of <b>one hundred rupees for each day</b> during which such failure continues, subject to a maximum of five lakh rupees.</p>
3	Section 102(5)	Default in complying with the statement to be annexed to Notice.	Fine only	Non-compliance with of Section 102, every promoter, director, manager or other KMP of the company who is in default <b>are liable to a penalty of fifty thousand rupees</b> or five times the amount of benefit accruing to the promoter, director, manager or other key managerial personnel or any of his relatives, whichever is higher.
4	Section 105(3)	Default in complying Section 105(2)	Fine only	Non-compliance with sub-section (2) of Section 105 every officer of the company who is in default <b>are liable to penalty of five thousand rupees.</b>
5	Section 117(2) Resolutions and Agreements to be filed	Failure/Delay in filing Certain resolutions	Fine only	Non-compliance with sub-section (1) of Section 117 shall result in the company and every officer in default including liquidator of a company, if any, <b>being liable to a penalty, instead of being punishable with fine.</b>
6	Section 203(5) Appointment of Key Managerial Personnel	Appointment of KMP's in certain class of companies	Fine only	Non-compliance with Section 203 shall result in the company, every director and key managerial personnel of the company who is in default <b>being liable to a penalty, instead of being punishable with fine.</b>
7	Section 137(3) Copy of financial statement to be filed with Registrar	Failure/Delay in filing financial statement	Fine only	<p>Non-compliance with sub-section (1) or (2) of Section 137 shall result the company <b>being liable to a penalty, instead of being punishable with fine.</b></p> <p>In the absence of the managing director and the Chief Financial Officer, any other director who is charged by the Board with the responsibility of complying with the provisions of this section, and, all the directors of the company, shall be shall be liable to a <b>penalty of one lakh rupees and in case of continuing failure, with further penalty of one hundred rupees</b></p>

				<b>for each day after the first during which such failure continues, subject to a maximum of five lakh rupees.</b>
8	Section 92(5) Annual return	Failure/delay in filing annual return	Fine or imprisonment or both	Non-compliance with sub-section (4) of Section 92 shall result in:  (i) the company and every officer <b>are liable to penalty, instead of being punishable with fine.</b>  (ii) the company and every officer who is in default shall be liable to a penalty of <b>fifty thousand rupees</b> and in case of continuing failure, with further penalty of <b>one hundred rupees for each day</b> during which such failure continues, subject to a maximum of five lakh rupees.
9	Section 121(3) Report on annual general meeting	Failure/Delay in filing Report on AGM by public listed company	Fine only	Non-compliance with sub-section (2) of Section 121 shall result in the company and every officer in default <b>being liable to a penalty, instead of being punishable with fine and further penalty of five hundred rupees for each day, in case the failure continues.</b>
10	Section 140(3) Removal, resignation of auditor and giving of special notice.	Failure/ Delay in filing statement by auditor after resignation	Fine only	Non-compliance with sub-section (2) of Section 140 shall result in auditor being liable to liable to a <b>penalty</b> of fifty thousand rupees or an amount equal to the remuneration of the auditor, <b>whichever is less</b> , and in case of continuing failure, with further penalty of five hundred rupees for each day after, subject to maximum five lakh rupees.
11	Section 157(2) Company to inform Director Identification Number to Registrar	Failure/ Delay by company in informing DIN of director	Fine only	Non-compliance with sub-section (1) of Section 157 shall result in the company and every officer in default <b>being liable to a penalty, instead of being punishable with fine and with further penalty of one hundred rupees for each day, in case the failure continues.</b>
12	Section 159	Default in complying with appointment of Director, DIN intimation	Fine or imprisonment	Every Individual or director of the company who is default are <b>liable to a penalty</b> which may extend to fifty thousand rupees and where the default is a continuing one, with a further penalty which may extend to five hundred rupees for each day after the first during which such default continues.

13	Section 165	Appointment of Director in contravention to maximum of number.	Fine only	Person in default shall be liable to a penalty of five thousand rupees for each day after the first during which such contravention continues.
14	Section 197(15)	Managerial remuneration	Fine only	If any person makes any default in complying with the provisions of this section, he shall be liable to a <b>penalty</b> of one lakh rupees and <b>where any default has been made by a company, the company shall be liable to a penalty of five lakh rupees.</b>
15	Section 191(5) Payment to Director for loss of Office, etc., in connection with transfer of undertaking, property or shares	Payment to Director for Loss of Office	Director in default shall be liable to pay fine of twenty-five thousand, subject to maximum of one lakh rupees.	If a director of the company makes any default in complying with the provisions of this section, such director shall be liable to a <b>penalty of one lakh rupees.</b>
16	Section 238(3)	Default in registration of offer of schemes involving transfer of shares.	Fine only	The director who is default are liable to a penalty of one lakh rupees <b>instead of being punishable with fine.</b>
17	Section 446B	Lesser penalties for One Person Companies or small companies	Fine only	Such company and officer who is in default are liable to a penalty which shall not be more than one half of the penalty specified in such sections.
18	Section 86(2)	Penalty levied for contravention of the provisions relating to registration of charges	New	If any person wilfully furnishes any false or incorrect information or knowingly suppresses any material information, required to be registered in accordance with the provisions of registration of charges, then  He/she shall be liable for action under section, where the fraud involves an <b>amount less than Rs.10,00,000/- or 1 % of the turnover</b> of the company, whichever is lower.
19	Section 454A	Penalty for repeated default	New	Penalty for second and subsequent default under the provisions of the Principal Act, has been prescribed as an amount equal to twice the amount of penalty provided for such default under the provisions of the Principal Act.

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