

MCA'S TWO NEW SCHEMES – A GOLDEN OPPORTUNITY FOR DEFAULTING COMPANIES

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1. Introduction

It is well-known that numerous companies do not file their documents in a timely manner with the Registrar of Companies ("ROC"). This delay has an adverse effect on those who are engaged in the process of upgrading the electronic records. A natural corollary of such practice is that the so-called "public documents" are not available for inspection by the public who cannot access the records. Taking unprecedented initiative, the Ministry of Corporate Affairs has announced two new schemes aimed at assisting defaulting companies and providing them with an opportunity to make good their defaults in statutory filings with the ROC.

The first of these schemes is the **"Company Law Settlement Scheme 2010"** which would, essentially, condone the delay of filing of statutory documents by a defaulting company and allow them to rectify their default by filing belated documents. Clearly, that will save such companies from potential legal action by the regulators. The second scheme titled **"Easy Exit Scheme 2010"** would facilitate an easy exit for unlisted companies willing to wind-up their defunct business, and will give an opportunity to defunct companies for getting their names struck off with the ROC.

2. Company Law Settlement Scheme, 2010 ("Settlement Scheme")

The MCA issued a circular on May 26, 2010 with a limited effect for a period of three months, i.e. from May 30, 2010 until August 31, 2010. The circular is applicable to all companies, including foreign companies described under section 591 of the Companies Act, 1956 ("**Act**"). The Settlement Scheme will allow companies who have not increased their paid-up capital up to the threshold limit – INR 100,000 for private companies and INR 500,000 for public companies – to do so as a first step, and then take other steps to file other documents where there is a delay. In sections 3(3) and 3(4), the Act provides that every private and public company, in existence on December 13, 2000, with a paid-up capital below the statutory limit has an obligation to enhance its subscribed capital within a period of two years to the prescribed limits, mentioned above. Often times, various reasons prevent promoters from infusing equity in a company after it is incorporated. This also happens when the intent is to create a company, but the project(s) for which it is formed in the first place are shelved. So, the subscribers are reluctant to pump in money without any returns, and progressively such dormant companies become non-compliant. The Settlement Scheme now provides an opportunity to all such companies who have not increased their paid-up capital to the prescribed limits to do so, and then file the other documents as well.

The companies availing this scheme will be granted immunity from any prosecution provided they pay an additional fee of “25% of the actual additional fee payable” that is payable on the date of filing for each belated document.

2.1 Process

A defaulting company that wants to take benefit of the Settlement Scheme needs to follow the following process, described briefly. **(1)** Ensure that its paid-up capital is as per law – INR 100,000 for private and INR 500,000 for public companies; **(2)** If that is not the case, enhance the capital first; **(3)** Then, take steps for filing other statutory documents upon payment of the additional fee; **(4)** Withdraw the appeal (if any) filed against any notice issued or complaint filed before the competent court for violation of the provisions under the Act in respect of which the application is made under the Settlement Scheme; **(5)** ROC will scrutinise the filed documents and verify that the required fees are paid; **(6)** An electronic application, in the prescribed format, must be made for seeking immunity which must be made either when the documents have been taken on file, or on record, or approved, as the case may be. It is important that such application must be made within a period of six months from the date of closure of the Scheme; **(7)** ROC must be satisfied by the application filed by the company to avail the Settlement Scheme, and will grant an immunity certificate accordingly; and **(8)** After granting the immunity certificate, the ROC shall withdraw the prosecution(s) pending (if any) before the concerned authorities.

2.2. Exclusions

It is important to note that certain types of documents are outside the purview of the Settlement Scheme. These are documents **(a)** for incorporation or establishment of place of business in India, or **(b)** where a specific order for condonation of delay or prior approval under the provisions of the Act is to be obtained from the Company Law Board, or the Central Government, or a court or any other competent authority. Additionally, the Settlement Scheme shall not apply to defunct companies against whom the ROC has initiated appropriate action for striking-off the name of the company from the register pursuant to section 560(5) of the Act. The Settlement Scheme is a golden opportunity for dormant, and companies slow on compliance to ensure that they avail this chance and ensure they become compliant. If such defaulting companies continue to be non-compliant, the ROC is empowered to take necessary actions against them under the Act once the scheme concludes.

3. Easy Exit Scheme, 2010 (“EES”)

There are massive numbers of companies who are simply lying dormant, and not engaged in any activity. There are also companies that have become dormant after having conducted business activity. Regardless of the cause, there are several such companies who lie in a state of flux, and progressively become more and more non-compliant. The EES is again a novel initiative of the MCA to permit an easy exit to eligible unlisted companies who are willing to wind-up their defunct, dormant business. This scheme will give such entities an ideal opportunity to get their names struck-off from the ROC provided they fulfill the criteria of the EES. Like the Settlement Scheme, the EES will run during the same three-month period i.e. May 30, 2010 until August 31, 2010.

3.1 Process

Section 560 of the Act empowers the Registrar to strike off the defunct companies from its register. However, numerous companies fail to seek any recourse under it. One possible cause for lack of utilizing this section could be that as per the existing policy, companies are required to give various details and get no-objection certificates from different authorities and regulators for winding up their businesses. Pursuant to the EES and until August 31, 2010 the procedure is outlined below: **(1)** Any defunct company that wants its name struck-off can apply electronically to the ROC in Form EES, 2010 – Interestingly, there is no fee payable with this application; **(2)** The application has to be supported with an affidavit sworn by each of the directors affirming that the company has not carried out any business since incorporation, or that the company did business for a specified period and then discontinued, and has not done any business since April 1, 2008; **(3)** In addition, the application must be accompanied with an indemnity bond to be given by every director (individually or collectively), stating that any losses, claim and liabilities on the company will be met in full by every director individually or collectively, even after the name of the company is struck-off the register of companies; **(4)** The company must also provide a certified account statement, duly certified by the statutory auditor or a chartered accountant in whole-time practice. This statement must be dated within a month preceding the date of the application, and not before; **(5)** Where the applicant company is a Non-Banking Financial Company(s), or a Collective Investment Management Company(s), the ROC shall, on a weekly basis notify such companies availing EES, 2010 during that period to the concerned regulator(s) i.e. the Reserve Bank of India, and Securities Exchange Board of India, respectively; **(6)** The ROC shall also notify the office of the Income Tax Department giving thirty days time for their objection, if any; in respect of all companies availing EES, 2010; **(7)** The ROC shall review the application, and if satisfied, shall notify the company that unless cause is shown to the contrary, its name shall be struck-off from the register. Given that the EES relies on volitional applications there appears to be no rationale for giving the defunct company yet another chance to change its mind and not be struck-off from the register! **(8)** The name of the company shall be struck-off with effect from the date of publication of the notice in the official gazette. If a company files it during the duration of the EES, they will not have to go through the rigors of strenuous procedure, nor will it have to give any explanations. This is a huge incentive for companies to come forth, and seize the chance to square-off. According to media reports, about 70,000 entities are apparently defunct – about 10% of the 700,000 companies registered with different ROCs across India.

3.2 Exclusions

The EES does not apply to the following types of entities:

- > listed corporations;
- > section 25 companies (non-governmental organizations and societies);
- > vanishing companies;
- > those under investigation or prosecution;
- > companies against which prosecution for a non-compoundable offence is pending in court,
- > companies having outstanding public deposits or where the company is in default of repayment;

- > companies having secured loan or dues towards income-tax, sales tax, or central excise or banks and financial institutions or any other government departments – at the central/state levels or any local authority;
- > companies having management dispute; or
- > companies in respect of which filing of documents have been stayed by court or Company Law Board or Central Government or any other competent authority.

The MCA needs to be lauded for this unique initiative to provide defaulting and defunct companies to set their house in order. It now remains to be seen whether corporate India will take advantage of these schemes and ensure (a) they become compliant with law; or (b) have their name struck-off from the register and get dissolved. Time will tell.

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