

BEFORE THE ADJUDICATING OFFICER
REGISTRAR OF COMPANIES KERALA AND LAKSHADWEEP

ADJUDICATION ORDER NO. ROC/S-454/10A/ 693 /2020

Dated. 19-02-2020

ADJUDICATION OF PENALTY UNDER SECTION 454 FOR DEFAULT IN COMPLIANCE WITH THE REQUIREMENTS OF SECTION 10A OF THE COMPANIES ACT, 2013 READ WITH THE COMPANIES (ADJUDICATION OF PENALTIES) RULES, 2014.

IN THE MATTER OF: M/s. ESSENTIAL FOOD SERVICES(TEFCO) PRIVATE LIMITED.

1. THE COMPANY: -

The company was incorporated on **29-05-2019** bearing Corporate Identity Number (CIN): **U55209KL2019PTC058203** having share capital and the subscriber/s to the memorandum of association has agreed to take the shares for a total value of Rs. **1,00,000/-** in the share capital, called as the paid-up capital of the Company to be contributed by all the subscribers to the Memorandum of Association.

2. DEFAULT COMMITTED BY THE COMPANY: -

The captioned Company was incorporated on **29-05-2019**. Under the mandate contained in section 10-A of the Companies Act, 2013, the prescribed e- form i.e. INC-20A duly verified by a Company Secretary or a Chartered Accountant or a Cost Accountant in practice was required to be filed by the company within a period of 180 days of the date of incorporation i.e. latest by **25-11-2019** (herein after referred to be the “**last due date**”). The company has filed the e-form INC-20A bearing SRN- **R17726746** on **28-11-2019** with a delay of **3** days commencing from the last due date and therefore, default has occurred in complying with the aforesaid statutory provisions by non-filing of the declaration of commencement of business (INC-20A) within the prescribed statutory period and for such default the Company and every officer who is in default are liable for penalty under Section 10A of the Act.

Show cause Notice dated 20-12-2019 was issued to the Company and Director duly authorized by the Board of Directors of the Company vide resolution number: **4** dated **12-11-2019** to sign this e-form to declare that all the requirements of Companies Act, 2013 and the rules made thereunder in respect of the subject matter of this form and matters incidental thereto have been complied with (herein referred to as “**Officer in default**”) by e-mail dated **23-12-2019**, **at the e-mail Ids of Company and Officer in default registered with e-registry of MCA**, calling upon to show cause within 15 days, as to why the penalty should not be imposed on the Company and every Officer of the Company who is in default, for non-compliance of Section 10A of the Companies Act, 2013. The company and the Officer in default were also requested to serve a copy of show cause notice to all the directors of the company and it goes without saying that the Company and Officer in default are also obliged to serve the show cause notice on every director of the company. The said show cause notice sent by e-mail is liable to be treated as deemed to have been served on the Company and every officer of the company in terms of Section 20 of the Companies Act, 2013.

3. APPOINTMENT OF ADJUDICATING OFFICER

Vide Notification bearing No. S.O. 831. (E) dated 24th March 2015 the Govt. of India Ministry of Corporate Affairs has appointed the Registrar of Companies, Ernakulam as Adjudicating Officer under the Companies Act, 2013 (18 of 2013) read with the Companies (Adjudication of Penalties) Rules, 2014 with respect to all companies having its registered office within the State of Kerala

and Union territory of Lakshadweep Islands. Therefore, I am vested with jurisdiction and empowered to adjudicate the penalty for the default occurred in compliance of the provisions of Companies Act, 2013.

4. ISSUES FOR CONSIDERATION: -

The issues that arise for consideration are:

- 1.) Whether the adjudicating authority is empowered to condone the delay in filing resulting the waiver of penalty?
- 2.) Who are liable for default and how to calculate the defaulting days entailing penalty?
- 3.) What would be the quantum of monetary penalty that can be imposed?

5. FINDINGS: -

I have carefully examined the legal provisions and applicable rules and reply furnished by the Company and hereby proceed to adjudicate the penalty on merit and record my findings as hereunder:

Issue 1: Whether the adjudicating authority is empowered to condone the delay in filing resulting the waiver of penalty?

Section 10-A was inserted by The Companies (Amendment) Act, 2019 w. e. f. 2nd November 2018 and the objective of the Amendment was to re-categorizes the certain offences as **civil defaults and the term fine has been replaced by penalty**, where the adjudicating officers (appointed by the central government) may levy penalties under the mechanism of in-house adjudication.

The compliance of section 10-A is a statutory obligation on the Company and every officer of the Company. The penal liability arises as soon as provisions under the Act are not complied with. It is also relevant to mention here that the penalty under the statute is for breach of civil obligation and is mandatory and either the mens rea or mala fide is not an essential element for establishing default and imposing the penalty. Further the intention of the wrong doers likewise the delay in filing caused was not due to any mala fide intention or due to inadvertent omission, unawareness of the provisions introduced recently and no proper guidance from their consultant, financial difficulties or paucity of fund due to adverse market, situation of uncertainty to start the operation e.t.c. shall not be a ground to run-away from the leviable penalty and becomes wholly irrelevant for civil wrongs, and the default can be rectified by payment of penalty only. The law is well settled that that the ignorance of law has no excuse. Under the provisions of section 454 and 10A read with adjudication rule, the adjudicating authority is not vested with power to extend the statutory limit of 180 days for filing or to condone the delay in filing resulting the waiver of prescribed penalty.

Therefore, the reply with request for condonation of delay in filing, irrespective of any explanation and motive behind the delay in filing, is not tenable and I hold the issue in negative.

Issue 2: Who are liable for default and how to calculate the defaulting days entailing penalty?

Section 10A (1)(a) plainly conveys that the companies incorporated after the commencement of the Companies (Amendment) Act, 2019 w.e.f. 2nd November 2019, and 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 **one hundred and eighty days** of the date of incorporation of the company in such form and verified in such manner as may be prescribed, with the Registrar that every subscriber to the memorandum has paid the value of the shares agreed to be taken by him on the **date of making of such declaration**.

R.23A of the Companies (Incorporation) Rules, 2014 conveys that the declaration under section 10A by a director shall be in e-Form namely INC-20A and shall be filed with the e-registry on payment of such fee as provided in the Companies (Registration Offices and Fees) Rules, 2014

and the contents of the said form shall be verified by a company Secretary or a chartered Accountant or a cost Accountant in practice.

Section 10A (2) conveys that If any default is made in complying with the requirements of this section, the **company and every officer who is in default** shall be liable to a penalty.

The word “**Officer**” has been defined under Section 2(59) and includes any directors. The question arises for attention that whether all the directors of the company can be held defaulter liable for penalty? The term “**officer who is in default**” as defined under section 2(60) means any person who, under the immediate **authority of the Board** or any key managerial personnel, **is charged with any responsibility** including maintenance, **filing** or distribution of accounts or **records**, authorises, actively participates in, knowingly permits, or knowingly fails to take active steps to prevent, any default.

On textual reading of the aforesaid provisions the emerging matrix for default operation may be settled as below: -

1. The director duly authorized by the Board resolution to sign INC-20A and to declare that all the requirements of Companies Act, 2013 and the rules made thereunder in respect of the subject matter of this form and matters incidental thereto have been complied with, shall be the “**officer in default**” under section 2(60) of the Act.
2. In case, where the INC-20A has been filed **within 180 days of date of incorporation** of company, there will be **no default either against the Company or Directors of the company. It means that the last due date of filing of INC-20A shall be 180th day commencing from the incorporation date of Company.**
3. In case, where the INC-20A has **not** been filed **on or before the last due date of filing, default begins against the Company and all Directors commencing from the last due date of filing. Default is terminated against all other directors on the date of** authorization of a Director by the Board resolution to sign INC-20A (designation of Officer in Default). **Default is terminated against** the officer in default and Company on the date of filing.
4. In case, where the INC-20A has been filed with a delay up to **99 days commencing from the last due date of filing** and any one of the Director of the company was authorized by the Board resolution passed **prior to the last due date of filing**, only the officer in default shall be liable for per day penalty @ Rs. 1,000/- and **Company** shall be liable for fixed penalty of Rs. 50,000/-.
5. In case, where the INC-20A has been filed **with the delay of 100 days or more commencing from the last due date of filing** and any one of the Director of the company was authorized by the Board resolution passed **prior to the last due date of filing**, only the officer in default shall be liable for the maximum penalty of Rs. 1,00,000/- and **Company** shall be liable for fixed penalty of Rs. 50,000/-.
6. In case, where the INC-20A has been filed **after the last due date of filing but within 99 days commencing from the last due date** of filing and any one of the Director of the company was authorized by the Board resolution passed **after the last due date but within 99 days commencing from the last due date**, other directors shall be liable for per day penalty @ Rs. 1,000/- till the date of passing resolution. The officer in default shall be liable for per day penalty @ Rs. 1,000/- till the filing date and **Company** shall be liable for fixed penalty of Rs. 50,000/-.
7. In case, where the INC-20A has been filed **with the delay of 100 days or more commencing from the last due date** of filing and any one of the Director of the company was authorized by the Board resolution passed **within 99 days commencing from the last due date of filing**, **other directors** shall be liable for per day penalty @ Rs. 1,000/- **till the date of passing**

resolution. The **officer in default** shall be liable for maximum penalty of Rs. 1,00,000/- and **Company** shall be liable for fixed penalty of Rs. 50,000/-.

8. In case, where the INC-20A has been filed **with the delay of 100 days or more commencing from the last due date** of filing and any one of the Director of the company was authorized by the Board resolution passed **with the delay of 100 days or more commencing from the last due date of filing**, all directors (including the officer in default) shall be severally liable for maximum penalty of Rs. 1,00,000/- and **Company** shall be liable for fixed penalty of Rs. 50,000/-.
9. Additional fees paid for delayed filing prescribed under the Companies (The Registered offices and Fees) Rules, 2014 is only a fees paid by Company for filing of form as the cost of facility of delayed filing and it is neither Fine nor Penalty specified under the Act. Fine is “a sum of money exacted as a penalty by a court of law for the criminal liability” and Penalty is “a sum of money imposed for breaking a law, rule, or contract in the nature of civil default” by an authority prescribed under the law other than the Courts of Justice. Therefore, payment of additional fee does not absolve the defaulting company and directors from payment of Penalty as prescribed under the Act.

The captioned Company was incorporated on **29-05-2019** and the e- form INC-20A was required to be filed on or before the last due date **25-11-2019** (i.e. within a period of 180 days of the date of incorporation) however it was filed on **28-11-2019** with a delay of **3** days commencing from the last due date of filing. On perusal of the said e-form it is also noticed that one of the Director namely Mr./Mrs./Miss. **Santhosh Abraham** having DIN: **8466298** was duly authorized vide resolution number: **4** dated **12-11-2019** prior to the last due date (i.e. **within 180 days** of date of incorporation) to sign this form and declare that all the requirements of Companies Act, 2013 and the rules made thereunder in respect of the subject matter of this form and matters incidental thereto have been complied with. The default occurred is fitting under the **matrix no-4** settled above and therefore, only the “**Officer in Default**” namely **Santhosh Abraham** and **Company** shall be liable for penalty.

Issue 3: What would be the quantum of monetary penalty that can be imposed?

While determining the quantum of penalty under sections 10A, it is important to consider the Rule – 3 (13) of the **Companies (Adjudication of Penalties) Rules, 2014, Section 10A (2) and 446-B of the Act**, which reads as under: -

Rule - 3(13): - In case a fixed sum of penalty is provided for default of a provision of the Act, the adjudicating officer shall impose that fixed sum, in case of any default therein.

Section 10A (2): - If any default is made in complying with the requirements of this section, the **company** shall be liable to a penalty of **fifty thousand** rupees and **every officer who is in default** shall be liable to a penalty of **one thousand rupees for each day** during which such **default continues** but not exceeding an amount of one lakh rupees.

Section 446-B: Lesser penalty for one person company (OPC) or small Companies:

Notwithstanding anything contained in this Act, if a One Person Company or a small Company fails to comply with the provisions of sub section (5) of Section 92, clause (c) of sub section (2) of Section 117, sub section (3) of Section 137, such company and officer in default of such company shall be liable to a penalty which shall not be more than one half of the penalty specified in such sections.

It may be remarkable to note that provisions of lesser penalty is not applicable for default in complying with the requirement of Section 10A of the Companies Act, 2013 and further that such rebate is not extendable to Section 8 companies and or Producer Companies.

Considering the aforesaid provisions of R.3 (13), Section 10A (2) and 446-B, I hold that the adjudicatory authority has no option to levy penalty less than what is legally and statutorily

leviable and therefore the quantum of penalty shall be same as enumerated therein the Act read with rule irrespective of any explanation and motive causing delay in filing.

6. ORDER

In exercise of the powers conferred on me vide Notification bearing No. S.O. 831. (E) dated 24th March 2015 the Govt. of India Ministry of Corporate Affairs read with Rule 3 of the Adjudication Rules, and in view of the facts and finding detailed above I hereby impose the penalty of **Rs. 50,000/- (Rupees fifty thousand)** upon the **Company** and the penalty of **Rs. 3,000/-** upon the **director namely Mr. /Mrs. /Miss. Santhosh Abraham (being the Officer in default) @ of 1,000/ per day** for the total defaulting days of **3** days commencing from the last due date of filing, for the default occurred in compliance of the provision of section 10A of the Act.

7. Penalty shall be paid through Ministry of Corporate Affairs, portal only along with the filing of Form INC-28.
8. Appeal, if any, against the order may be filed with the Regional Director Southern Region, Ministry of Corporate Affairs, Chennai, within a period of sixty days from the date of receipt of the order.
9. For penal consequences of non-payment of penalty within the prescribed time limit, please refer **Section 454(8) of the Companies Act, 2013.**

Dated this 19th day of February 2020



(G. C. YADAV)

(Adjudicating Officer)
Registrar of Companies
Kerala and Lakshadweep

To,

M/s. ESSENTIAL FOOD SERVICES(TEFCO) PRIVATE LIMITED,

Santhosh Abraham, Spw 129, Akkallor House Thaikattukara PO,
Thaikattukara Ernakulam IN 683106 KL

(By Registered Post and by e-mail: **santhoshabe29@gmail.com** with a request to serve a copy of order on all the Directors of the Company.)

Copy to: -

1. Mr./Mrs./Miss. **Santhosh Abraham** by email: **santhoshabe29@gmail.com** only, with a request to serve the copy of order on all other Directors of the Company
2. **Joint Director Legal**, Ministry of Corporate Affairs, in compliance to Rule-3(9) of The Companies (Adjudication of Penalties) Rules, 2014.
3. **Office Copy.**
4. E-mail to **Content Manager** for Publication on ministry's website with a **copy to RD SR Chennai.**