

COMPANIES (EXEMPTION) (No. 2) ORDER 2020 – WHAT CHANGES DOES IT MAKE?

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The Companies (Exemption) Order 2020 (P.U. (A) 122) (hereinafter referred to as “**Order No.1**”) is a short lived one as it has now been revoked and replaced with the Companies (Exemption) (No. 2) Order 2020 (P.U. (A) 123), (hereinafter referred to as “**Order No.2**”).

By Order No. 1, the Minister exercised his powers under s. 615(1)¹ of the Companies Act to “*exempt the provision which determines that any company shall be deemed unable to pay its debt if the company neglect any notice of demand by any creditor to pay its debt or to secure its debt or compound of its debt to the satisfaction of the creditor within the period of twenty-one days after a notice of demand is being served on him*”. Effectively, the Minister had exercised his powers under s.615 to exempt the application of s.466(1)(a)² until 31 December 2020.

Although on a plain reading of Order No. 1 it appears that paragraph 2 of Order No. 1 complied with all the ingredient of s.615(1), the Minister must have realized now that s.615(1) only allows him **to exempt any person, corporation** or class of corporations from all or any of the provisions of the Act. Despite that, the Minister **exempted the application of s.466(1)(a)**. It is clear that the Minister had acted ultra vires when he exempted the application of s.466(1)(a) when he does not have the power to do so, hence the introduction of Order No. 2 to correct the mistake in Order No.1. Paragraph 3 of Order No. 2 now provides that “*The Minister exempts all companies from paragraph 466(1)(a) of the Act.....*”.

Paragraph 3 of Order No. 1 effectively changed the 21-days period for the companies to pay its debts under s.466(1)(a). However, there is no explanation as to the source of power under which the Minister made such Order. Paragraph 4 of Order No. 2 provides that

*“The exemption under paragraph 3 is subject to the condition that any company shall be deemed to be unable to pay its debts under paragraph 466(1)(a) of the Act if the company neglects any notice of demand by any creditor to pay its debt or to secure its debt or to compound its debt to the satisfaction of the creditors within a period of **six months** after the notice of demand is served on him”*. It has become clear that the Order in paragraph 4 was made pursuant to s.615(2)(c)³ of the Act which provides that “*In exercising his powers under this section, the Minister may; (c) impose any terms and conditions as he thinks fit*”.

However, paragraph 4 of Order No.2 is similar to paragraph 3 of Order No.1 (albeit with explanation that it is a condition). As stated in my previous article on Order No 1, this is in no way a condition attached to the exemption. It is effectively an amendment to s.466(1)(a). The 21-days period stipulated in s.466(1)(a) is a statutory provision and is not open to any ministerial discretion. Under s.466(1)(a), Minister can only exercise his discretion with regard to the threshold of debt as the debt threshold stipulated in the Act is “*a sum exceeding the amount as may be prescribed by the Minister*”. The Minister has no power to amend the period to pay or to secure or to compound for the debt. Any change which has the effect of amending the provisions of the Act would need to go through the normal amendment process, and cannot be introduced by way of an executive order. S.615 is not an all empowering provision which gives unfettered discretion to the minister to change the law without going through the normal amendment process. If this is allowed to happen, it would mean that the Act is at the behest of Minister as he can invoke s.615 to **exempt** all companies from any of the provisions of the Act, and replace it with a new law by introducing it as conditions attached to the exemption.

1. 615(1) The Minister may, upon the recommendation of the Commission, by order exempt any person, corporation or class of corporations from all or any of the provisions of this Act.

2. 466(1) A company shall be deemed to be unable to pay its debt if –

(a) The company is indebted in a sum exceeding the amount as may be prescribed by the Minister and a creditor by assignment or otherwise has served a notice in demand, by himself or his agent, requiring the company to pay the sum due by leaving the notice at the registered office of the company, and the company has for twenty-one days after the service of the demand neglected to pay the sum or to secure or to compound for it to the satisfaction of the creditor.

3. 615(2) In exercising his power under this section, the Minister may–

(a).....

(b).....

(c)impose any terms and conditions as he thinks fit.