

# An Analytical Study of Winding Up of a Company

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*There are various ways in which Companies existence comes to an end. One way is the liquidation and winding up of companies. Another way is the striking off the name of the company from the register of companies maintained by Registrar under the provision of section 560 of the Companies Act, 1956. Few companies became vanishing companies where either the directors of Company are not traceable or the company is not conducting any business at the registered office as per the records of the Registrar. In either case the company becomes vanishing company that ultimately results in the closure of the companies. Winding up is a legal process to dissolve the business of a company. The term “Winding Up” and “liquidation” are used interchangeably.*

## Provisions of Winding up

Section 425 to Section 520 of the Companies Act, 1956 (Act, 1956) (corresponds to Section 270 to Section 365 of the Companies Act, 2013) read with Companies Court Rule, 1959 (hereinafter referred to as CCR, 1959), deals with the provisions of winding up. Since the provisions of the Companies Act, 2013 has not yet come into force, the provisions of the Act, 1956 still governs the proceedings of winding up.

Part VII consisting of Sections 425 to 560 of the Companies Act, 1956 makes provisions deals with modes of winding up, cases in which the company may be wound up by the Court, consequences of winding up order appointment, powers, duties and functions of the Official Liquidators, committee of inspection, voluntary winding up of a company, a members winding up, a creditors winding up, winding up subject to the

supervision of the Court, effect on winding up of antecedent and other transactions, etc.

- If Company is unable to pay its debt – discretionary power with Court to wind up the company [sec 433]
- If Company having become a “sick company” – mandatory reference to BIFR [SICA, proposed to be replaced by sec. 424A of Companies (second amendment )Act 2002]
- If Default in terms of repayment of debentures: appointment of receiver.
- Compromise and arrangement with creditors and members – sec 391-4 of Companies Act 1956: Apart from the lengthy and time consuming winding up procedure, all the companies liable to be wound up under the Companies Act may resort

to the alternative of compromise or arrangement. The Court may make orders to enforce these remedies and where a meeting of creditors or class of creditors or members or any class of members is called upon, certain disclosures shall be made. The orders passed by the Courts include transfer of property to another company and to facilitate amalgamation, merger and demergers.

- Reduction of capital –sec 100. Even reduction of capital to the extent that the capital is lost, or capital is in surplus is permitted.
- Striking off the name of a defunct company – sec. 560

### **Modes of Winding Up**

The Act, 1956 provides for the following three types of winding up:

1. Winding up by the order of the Tribunal or Compulsory winding up; (Sec 433 to Sec 483)
2. Voluntary winding up; (Sec 484 to Sec 520)
3. Subject to the supervision of the Court.

Also a company may be dissolved in the process of amalgamation or reconstruction under section 394 of the Companies Act. In such case the transferor Company get dissolved without going through the process of winding up. Beside this a company can also be dissolved when it is defunct and its name is removed from the register of the company by the registrar in pursuant to section 560 of the Companies Act.

### **Winding up by the Court**

A company may be wound up by the Court in following situations.

- If the company itself, has passed a special resolution in the general meeting to wound up its affairs.

- If there is a default, in holding the statutory meeting or in delivering the statutory report to the Registrar.
- If the company fails to commence its business within one year from the date of its incorporation, or suspends its business for a whole year.
- If the number of members, in a public company is reduced to less than seven, and in case of private company less than two.
- If the company is unable to pay its debts
- If the Court, itself is of the opinion that the company should be wound up.
- If the Company has made a default in filing with the Registrar its balance sheet & profit and loss account or annual return for any 5 consecutive financial years.
- If the company has acted against the sovereignty, integrity of India, the Security of State, friendly relations with foreign state, public order, decency and morality.
- If the Court considers that the Company should be wound up u/s 424 (G).

### **Who can apply to Court for Winding Up (Sec. 439)**

Following persons can apply to the Court for winding up:

- The company, in case of passing a special resolution for winding up.
- A creditor, in case of a company's inability to pay debts.
- A contributory or contributories, in case of a failure to hold a statutory meeting or to file a statutory report or in case of reduction of members below the statutory minimum.

- The Registrar, on any ground provided prior approval of the Central Government has been obtained.
- A person authorised by the Central Government, in case of investigation into the business of the company where it appears from the report of the inspector that the affairs of the company have been conducted with intent to defraud its creditors, members or any other.
- By Central or State Government, if the company has acted against the sovereignty, integrity of India, the Security of State, friendly relations with foreign state, public order, decency and morality

**The Orders the Court may pass (Sec.443)**

The Court may pass any one of the following orders on hearing the winding up petition.

1. Dismiss it, with or without costs
2. Adjourn the hearing conditionally or unconditionally,
3. Make any interim order, as it thinks fit, or
4. Pass an order for winding up of the company with or without costs.

**Consequences of Court passing an order for winding up**

If the Court is satisfied, that sufficient reasons exist in the petition for winding up, then it will pass a winding up order. Once the winding up order is passed, following consequences follows:

1. Court will send notice within 14 days to registrar and to an official liquidator, to take charge of the company. He shall carry out the process of winding up. (sec. 444)
2. The winding up order, shall be applicable on all the creditors and contributories,

whether they have filed the winding up petition or not.

3. The company shall relevant particulars, relating to assets, cash in hand, bank balance, liabilities, particulars of creditors etc to the official liquidator. (sec.454)

4. The official liquidator shall within six months, from the date of winding up order, submit a preliminary report to the Court regarding:

- Particulars of Capital
- Cash and negotiable securities
- Liabilities
- Movable and immovable properties
- Unpaid calls, and
- An opinion, whether further inquiry is required or not (Sec.455)

The Central Govt. shall keep a cognizance over the functioning of official liquidator, and may require him to answer any inquiry. (Sec.463)

**Stay Order**

Where, the Court has passed a winding up order, it may stay the proceedings of winding up, on an application filed by official liquidator, or creditor or any contributory. (Sec.466)

**Dissolution of Company (Sec.481)**

Finally the Court will order for dissolution of the company, when:

1. The affairs of the company are completely wound up, or
2. The official liquidator is unable to carry on the winding up procedure for want of funds.

**Appeal (Sec.483)**

An appeal from the decision of Court will lie before that Court, before whom, appeals lie from any order or decision of the former Court in cases within its ordinary jurisdiction.

**Voluntary Winding Up**

A company may, voluntarily wind up its affairs, if it is unable to carry on its business, or if it was formed only for a limited purpose, or if it is unable to meet its financial obligation, and etc. A company may voluntarily wind up itself, under any of the two modes:

Members voluntarily winding up

Creditors voluntarily winding up

A company may voluntarily wind up itself, either by passing:

An ordinary resolution, where the purpose for which the company was formed has completed, or the time limit for which the company was formed, has expired or by way of special resolution

Both types of resolution shall be passed in the general meeting of the company. (Sec.484)

Once the resolution of voluntarily winding up is passed, then the company may be wound up, either through:

- Members voluntarily winding up, or
- Creditors voluntarily winding up

The only difference between the two is that in case of members voluntarily winding up, Board of Directors has to make a declaration to the effect, that company has no debts. (Sec.488)

**Members Voluntarily Winding Up**

Directors of the company shall call for a Board of Directors Meeting, and make a declaration of winding up, accompanied by an Affidavit, stating that;

- The company has no debts to pay, or
- The company will repay its debts; if any, within 3 years from the commencement of winding up, as specified in declaration (Sec.488)

**Creditors Voluntarily Winding Up**

- Where the resolution for winding up has been passed, but the Board of Directors are not in a position to give a declaration on the liability of company, they may call a meeting of creditors, for the purpose of winding up. (Sec.500)

- It is the duty of Board of Directors, to present a full statement of company's affairs, and list of creditors along with their dues, before the meeting of creditors. [Sec.500 (3)]

Whatever resolution, the company passes in creditor's meeting, shall be given to the Registrar within ten days of its passing. (Sec.501)

**Winding up procedure**

Company in the general meeting in which resolution for winding up is passed and the creditors in their meeting appoint liquidator. They may either agree on one liquidator, or if two names are suggested, then liquidator appointed by creditor shall act. (Sec.502)

- Any director, member or creditor may approach the Court, for direction that;
  - Liquidator appointed in general meeting shall act, or
  - He shall act jointly with liquidator appointed by creditor, or
  - Appointing official liquidator, or
  - Some other person to be appointed as liquidator. [Sec.502 (2)]
- The remuneration of liquidator shall be fixed by the creditors, or by the Court. (Sec.504)
- On appointment of liquidator, all the power of Board of Directors shall cease. (Sec.505)
- In case, the winding up procedure, takes more than one year, then he will have to call a general meeting, and meeting of creditors, at the end of each year, and he shall present,

a complete account of the procedure, and the status / position of liquidation (Sec.505).

Once the company is fully wound up, and assets of the company sold or distributed, the proceedings collected are utilised to pay off the liabilities. The proceedings so collected shall be utilised to pay off the creditors in equal proportion. Thereafter any money or property left may be distributed among members according to their rights and interests in the company.

### **Winding up subject to supervision of court**

Winding up subject to supervision of court, is different from "Winding up by court." Here the court only supervises the winding up procedure. Resolution for winding up is passed by members in the general meeting. It is only for some specific reasons, that court may supervise the winding up proceedings. The court may put up some special terms and conditions also.

However, liberty is granted to creditors, contributories or other to apply to court for some relief. (522)

The court may also appoint liquidators, in addition to already appointed, or remove any such liquidator. The court may also appoint the official liquidator, as a liquidator to fill up the vacancy.

- Liquidator is entitled to do all such things and acts, as he thinks best in the interest of company. He shall enjoy the same powers, as if the company is being wound-up voluntarily.
- The court also may exercise powers to enforce calls made by the liquidators, and such other powers, as if an order has been made for winding up the company altogether by court. (Sec.526)

### **Priority in disposing liabilities [Sec.529a & 530]**

When the company is wound up, by any mode, the liabilities shall be discharged in following priority.

- Workman's dues.
- Debts due to secured creditors, in case of insolvency.
- All , taxes, cesses and rates due from the company to the central government or a state govt.
- All wages and salary of any employee due within four months.
- All holiday remuneration becoming payable to any employee.

All such debts shall be paid in full. If assets are insufficient to meet them, they shall abate in equal proportions.

Money received by liquidator: (Sec.553)

Apart from an official liquidator, every liquidator appointed by company or court to carry on the winding up procedure, shall deposit the money is received by him in a scheduled bank, to the credit of a special bank account opened by him.

### **Winding up of companies other than Registered Companies**

Apart from a normal company, registered under the companies Act, 1956 there are other companies as well winding up procedure for these companies are bit different from a company registered under companies Act.

#### **1. Unregistered Companies: (Sec.583)**

In simple words, an unregistered company is a company which is not registered or covered under provisions of companies Act, 1956 (Sec.582)

#### **2. Foreign Company**

A foreign company is a company which is incorporated outside India, and having a place of business in India. Winding up of such companies is only limited to the extent of its assets in India. In respect of assets and



business carried outside India, Indian courts have no jurisdiction.

### 3. Government Company

A Govt. company means a company, in which 51% or more of, shares are held by a govt. company winding up procedure for a government company registered under the companies Act, 1956, is nearly similar to normal winding up procedure.

However, courts, take interest of public into consideration, and priority is given to them, as a govt. company's main function is to provide services to public.

### Winding up of companies under Companies Act, 2013

Currently the provisions of winding up are governed under section 433 to 560 of the Act, 1956. The provisions with relation to strike off of companies are governed by section 560 of the Act, 1956 and that of scheme of arrangements, i.e. mergers, demergers is governed under section 391-394 of the Companies Act, 1956. Further, the provisions of voluntary winding up under the ACT, 2013 have moved under the Insolvency and Bankruptcy Code, 2016 which has come into statutory force on 28th day of May, 2016. Accordingly, after the enforcement of Bankruptcy Code, dissolution of companies can be done using the following modes:

- a. Compulsory winding up under the Insolvency and Bankruptcy Code, 2016
- b. Compulsory winding up under section 271 of the Companies Act, 2013.
- c. Voluntary winding up under the Insolvency and Bankruptcy Code, 2016
- d. Voluntary winding up of companies not covered by the

Insolvency and Bankruptcy Code, 2016

- e. Dissolution in a scheme of merger under section 230 to 240 of the Act, 2013
- f. Dissolution by striking off name of a defunct company under section of the Act, 2013
- g. Winding up of small companies
- h. Winding up of unregistered companies under section 375 to 378 of the Act, 2013
- i. Winding up of Indian business of foreign companies under section 270 to 303 of the Act, 2013

### Conclusion

To expedite the process of voluntary winding up, Government had introduced New Regulations as the procedure of voluntary winding up under Companies Act, 1956 was time consuming and there was no prescribed qualification for liquidator. The Code mandates that insolvency professionals are to be appointed as Liquidators, such a move is welcome by corporates and professionals. To sum it up, now every company who proposes to wind up is required to follow Insolvency and Bankruptcy Code, 2016. The Code is quite comprehensive and wider as against Companies Act, 1956. It is expected that Code would help in overcoming delays and complexities involved in the process due to presence of four adjudicating authorities, High Court, Company Law Board, Board for Industrial and Financial Reconstruction and Debt Recovery Tribunal.

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