



INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS

Open Access, Refereed Journal Multi Disciplinary
Peer Reviewed Edition :

www.ijlra.com

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INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS

ISSN

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PROCESS OF VOLUNTARY WINDING UP UNDER COMPANIES ACT 2013

AUTHORED BY - AKSHITA KAUSHIK

Process of winding up –

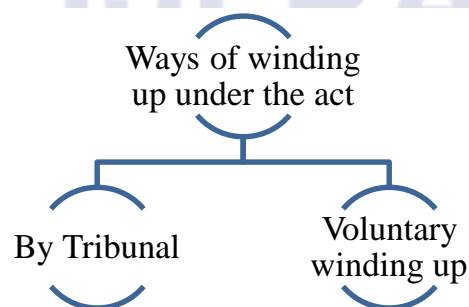
Winding up of any company is the last or final stage of its existence. There may be different reasons for winding up like bankruptcy, the financial loss of the company, mutual agreement from the stakeholders, death of the promoters, etc. It is a process where a company ceases to exist and gets dissolved.

Reasons for winding up-

The potential reasons for winding up can be –

- 1) Closure of business
- 2) Loss,
- 3) Bankruptcy
- 4) Passing away of promoters etc

According to the companies act 2013, there are two ways in which a company could be wound up:



In terms of **Section 271**, a winding-up proceeding may still be initiated under the Act against a company on the following grounds:

1. The company has, **by special resolution**, resolved that the company be wound up by the Tribunal;

2. If the company has acted against the interests of the sovereignty or integrity of India, national security, friendly relations with foreign States, public order, decency or morality;
3. If on an application made by the Registrar of Companies or such person authorised by the Central Government to do so, the Tribunal is of the opinion that affairs of the company are being conducted in fraudulent manner, that the company was formed for a fraudulent purpose or the management of the company has been guilty of fraud, misfeasance or misconduct, and the Tribunal believes it proper that the company be wound up;
4. If the company has defaulted in filing its annual returns with the Registrar of Companies for the preceding five consecutive years;
5. Or if the Tribunal is of the opinion that it is just and equitable that the company be wound up.

Process of winding up of company by a Tribunal–

- 1) The petition of winding up of a company is admitted before the tribunal if it is accompanied by the statement of affairs as prescribed in the form
- 2) The creditors require the permission of the tribunal before making a petition for the winding up .The tribunal may not admit the petition of winding up of the company unless there is a prima facie reason for company's liquidation
- 3) The copy of the petition also has to be filled before the registrar and then the registrar and then the registrar has to submit his opinion before the tribunal within 60 days of admission of the petition in tribunal under section 272
- 4) The petition is filled as prescribed in form NCLT 1 and attachments in form NCLT 2 along with the affidavit of verification in form NCLT 6 according to rule 34
- 5) The tribunal shall pass an order of winding up under s.273 within 90 days of the presentation of the petition and can make an interim order for the appointment of a liquidator
- 6) **Section 274** – if the tribunal has prima facie reason to pass an order for winding up of the company then it can do so and further the objection can be raised within 30 days of the order
- 7) The official liquidator has right to file a declaration under s.275 within 7 days in case of conflict of interest regarding his appointment .The same liquidator can also be removed in case of misconduct , fraud , misfeasance or professional incompetence under section 276
- 8) The registrar under section 277 shall notify the official gazette about the company being wound up .The official liquidator within **3 weeks** shall make an application to the tribunal for the constitution of the winding up committee which provides the report on monthly basis

- 9) After winding up, no suit / legal proceedings can be entertained against the company as suggested under **section 279**. The tribunal has jurisdiction to dispose of the pending cases of company under **section 280**

Voluntary Winding Up–

Is a legal process in which a company decides to cease its operations and wind up its affairs voluntarily.

This process is **initiated by the shareholders or members** of the company when they feel that the company is no longer viable or profitable.

The procedure for voluntary winding up in India is governed by:-

- a) the Companies Act, 2013 (earlier dealt with under sections 304-323 of the companies act)
- b) the Insolvency and Bankruptcy Code, 2016.

There was a **shift from companies act 2013 to Insolvency and Bankruptcy code 2016-**

Some of the differences as compared to earlier regimes are-

- Shifting of Powers from Official Liquidator to Insolvency Professional.
- Jurisdictional Authority has been shifted from High Court to National Company Law Tribunal (NCLT)
- Governing sections and corresponding rules and regulations for Member's Voluntary Winding is now shifted to Section 59 of the Insolvency and Bankruptcy Code, 2016 (IBC) read with Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) Regulation, 2017.
- Timeline for carrying out the Voluntary Winding up process under the IBC is of 12 months, however in the event of Liquidation process continuing for more than 12 months, the Liquidator has to submit Annual Status Report indicating the progress of such Liquidation.

Types of Voluntary Winding Up-

1. Members Voluntary Winding Up–

It takes place only when the company is solvent i.e., they can pay its debts and creditors approval is not required. A declaration of solvency is filed by company in this case.

A declaration of solvency made in members voluntary winding up has no effect unless-

- It is filed within 5 weeks immediately preceding the date of passing of resolution by the company and is submitted to registrar for registration before due date.
- The Declaration must accompany a statement of assets and liabilities of the company and an auditor's report on the financial affairs of the company for the period commencing from the date up to which the last date such account was prepared and ending the latest date immediately before making of declaration.
- If a default is made in filling declaration, directors on having no reasonable grounds for proving that the company be liable to pay off its debts, shall be punishable with imprisonment for a term which may extend to 6 months or fine which may extend to 5000, or with both.
- If the provisions are not complied in case of Members voluntary winding up, it will result in winding up as creditors voluntary winding up. In *SHAIENDRA KANH BEHARILAL vs SURAT DYES on 24 august,2004*. The court came up to a conclusion that provisions of the act are not complied with. Because of failure to comply with mandatory requirements, the members voluntary winding up will end up in winding up as a creditors voluntary winding up.

2. Creditors Voluntary winding up-

This type of Winding up cannot takes place without the approval of creditors. This kind of winding up comes in picture when company has defaulted in filling declaration of solvency. A meeting of members and creditors simultaneously must be called and conducted after passing of resolution of voluntary liquidation in board meeting, for taking approval on the same. The members must approve the scheme by passing special resolution. Then the creditors meeting will be held for their approval. The creditors will proceed with appointing a liquidator of their choice who will take charge of the winding up process. The liquidator will take in control of all the assets of the company and will settle the claims of the creditors.

According to recent amendments, Section 59 of Insolvency and bankruptcy code,2016 governs Voluntary winding up. The procedure is as follows-

- Board meeting is conducted in which voluntary winding up is proposed.
- A declaration is filed by majority of directors, that either company has no debts, or they will be able to pay debts in full by realizing its assets. The company does not aim to defraud any person along with the declaration, following attachments should be filed with ROC –
 1. Audited financial statements and record of business operations of the company for previous 2 years or for period since its incorporation whichever is later.

A report of valuation of assets of the company, prepared by a registered valuer.

- Within 4 weeks of passing of declaration by the directors, shareholders must approve the proposal scheme of voluntary winding up by passing a special resolution.
- Any debt is due to any person by the company, creditors holding 2/3rd in value of debt must approve such resolution. A voluntary winding up for a company deemed to begin on the date when resolution is passed.

Commencement of Winding Up of a Company-

- U/s 357, winding of a company takes place by the presentation of a petition
- The resolution that can be passed by the company for voluntary winding up and the commencement of winding up shall be deemed as soon as the resolution is passed
- If the tribunal has a reason to believe that no fraud or mistake has been made then the procedure of voluntary winding up is considered as valid as per the provisions
- In any other case, the winding up of a company is considered as soon as the presentation of petition before tribunal

Process of Voluntary Winding Up under Companies act –

STEP 1 –

Convene a board meeting with 2/3rd majority of directors. Pass a resolution with a declaration by the directors that they have made an enquiry into the affairs of the company and that, having done so, they have formed the opinion that the company has no debts or that it will be able to pay its debts in full from the proceeds of the assets sold in voluntary winding up of the company. Also, fix a date, place, and time agenda for a General Meeting of the Company after five weeks of this Board Meeting.

STEP 2 –

Issue notices in writing calling for a general meeting of the company proposing the resolutions , with suitable explanatory statements

STEP 3-

In the general meeting , pass an ordinary resolution of winding up by ordinary majority or special resolution by 3/4th majority .The winding up of the company shall commence from date of passing

of resolution

STEP 4 –

On the same day / next day of passing of resolution of winding up of the company , conduct a meeting of creditors . **If two thirds in value of creditors of the company are of the opinion that it is in the interest of all parties to wind up the company, then the company can be wound up voluntarily.** If the company cannot meet all its liabilities on winding up, then the Company must be wound up by a Tribunal.

STEP 5-

Within 10 days of passing of resolution for winding up of company, file a notice with the Registrar for appointment of liquidator. Step 6: Within 14 days of passing of resolution for winding up of company, give a notice of the resolution in the Official Gazette and also advertise in a newspaper with circulation in the district where the registered office is present.

STEP 6 –

Within 14 days of passing of resolution for winding up of company, give a notice of the resolution in the Official Gazette and also advertise in a newspaper with circulation in the district where the registered office is present.

STEP 7-

Within 30 days of General Meeting for winding up of company, file certified copies of the ordinary or special resolution passed in the General Meeting for winding up of the company.

STEP 8-

Wind up affairs of the company and prepare the liquidators account of the winding up of the company and get the same audited.

STEP 9-

Call for final General Meeting of the Company.

STEP 10-

Pass a special resolution for disposal of the books and papers of the company when the affairs of

the company are completely wound up and it is about to be dissolved.

STEP 11-

Within two weeks of final General Meeting of the Company, file a copy of the accounts and file an application to the Tribunal for passing an order for dissolution of the company.

STEP 12-

If the Tribunal is satisfied, the Tribunal shall pass an order dissolving the company within 60 days of receiving the application.

STEP 13-

The company liquidator would then file a copy of the order with the Registrar.

STEP 14-

The Registrar, on receiving the copy of the order passed by the Tribunal then publishes a notice in the Official Gazette that the company is dissolved.

