

# WINDING-UP

## MEANING OF WINDING-UP

- It means the process of bringing an end to the operations of the company.
- It is a process by which the life of a company is ended and its property is administered for the benefits of its creditors and members.
- It involves realization of assets, payment of liabilities and distribution of surplus, if any, amongst the members of the company.
- Winding-up and dissolution are two different terms

Winding-up	Dissolution
Process	Event/ End-result
Precedes dissolution	Subsequent to winding-up
On its commencement, the corporate status and powers of the company continue	On dissolution, the name of the company is struck off the register of company and it ceases to exist

Please note that the artificial entity like company can only be brought to an end by law only and that process is known as winding-up. Dissolution as a term means that the company is no longer in existence whereas winding up simply means that the process of its dissolution has started but the company is still in existence though not operational.

## MODES OF WINDING-UP

As per Section 2(94A) of the Companies Act, 2013, “winding up” means winding up under this Act or liquidation under the Insolvency and Bankruptcy Code, 2016 as applicable. Thus winding up can be done in following ways:

1. Compulsory winding-up by Tribunal (Sec 271 of the Companies Act, 2013)
2. Winding-up (or liquidation) under the Insolvency and Bankruptcy Code, 2016
  - (a) In case of default by the company under Sec 6
  - (b) Voluntary winding-up when there is no default by the company under Sec 59

### 1. Compulsory winding-up by Tribunal (Sec 271 of the Companies Act, 2013)

Circumstances covered under this are:

- a) Company decides in a meeting by passing a **special resolution** that the company be wound up by the Tribunal
- b) When the company has **acted against the interest of the sovereignty and integrity of India**, its friendly relations with foreign state, against public order and morality
- c) **On an application** made by registrar or any other authorized person to the Tribunal and it is of the opinion that the company has been formed for or has been conducted in a fraudulent manner or the

persons involved in its formation and management have been guilty of fraud, misfeasance or misconduct

- d) If the company makes defaults in filing with ROC its financial statements or annual returns for immediately preceding 5 consecutive financial years
- e) On just and equitable grounds:
- i. Where the sub-stratum (main object or purpose) of the company is lost- (Re) German Date Coffee Co. (1882) where the company could not procure the German patent for which it was formed and it was held to wind up the company on a petition filed by two shareholders.
  - ii. Oppression of minority- as happened in the case of Loch v. John Blackwood Ltd (1924) where the directors holding the majority of shares coerced the minority shareholders into selling their shares to them at an under value.
  - iii. Deadlock in management- where board of directors is divided into two dissenting groups such that it becomes impossible to take any decision in the company. In the case of Radharamanan v. Chandershekhar Raja (2008), the compatibility issues between parties were so severe that it made impossible for them to pull on together and hence concluded a deadlock situation.
  - iv. Illegality of objects or fraud- where the company is incorporated with an illegal object or its object has become illegal because of a change in law.

## Who can file petition to the Tribunal for winding up of the company?

As per Sec 272 of the Companies Act, 2013, the following persons can file petition for winding up of the company

- a) The **company**- petition to be accompanied by a statement of affairs in such form and in such manner as may be prescribed.
- b) Any **contributory** or contributors- person liable to contribute towards the assets of a company in the event of winding-up. The holder of fully-paid up share shall also be considered as contributory for this purpose because he has the right to share in the surplus (whether the company has any surplus or not) of the company. However, it is important that shares must have been allotted to him or have been held by him and registered in his name for at least 6 months during the 18 months preceding the winding up or have devolved upon him through the death of former holder.
- c) All or any of the persons specified in clause (a) and (b)
- d) The **Registrar**- only with the prior approval of the Central Government
- e) Any person authorized by the **Central Government** in that behalf
- f) In a case falling under Sec 271(b) by the Central Government or a State Government

A copy of the petition made shall also be filed with the **Registrar**, who shall without prejudice to any other provisions, **submit his views to the Tribunal within 60 days** of receipt of such petition.

## Powers of Tribunal on receipt of petition for winding up (Sec 273)

- The Tribunal may pass any of the following orders:

- a) **Dismiss** it, with or without costs
  - b) Make any **interim order** as it thinks fit
  - c) **Appoint a provisional liquidator** of the company till the making of a winding up order- after giving a notice to the company and afford a reasonable opportunity to make its representation
  - d) Make an **order for the winding up** of the company with or without costs
  - e) Any other order as it thinks fit.
- **Order to be passed by Tribunal within 90 days** from the date of presentation of petition
  - Where petition has been presented on 'just and equitable' ground, the Tribunal may refuse to make winding-up order if it feels there is some other remedy available and the request for winding-up is unreasonable.

## **2. Winding-up (or liquidation) under the Insolvency and Bankruptcy Code, 2016**

### **(A) In case of default by the company under Sec 6**

As per Sec 6 of the new bankruptcy law i.e. Insolvency and Bankruptcy Code, 2016 if a **company commits default in paying its financial debts or operational debts of Rs. 1 lakh or more\***, then financial creditors or operational creditors or the company itself **may apply to NCLT** (i.e. Adjudicating Authority (AA) for the insolvency resolution process.

*\*As the outbreak of the coronavirus pandemic and the lockdowns across cities create large-scale economic disruption, Sitharaman announced that the threshold of loan default that could trigger insolvency proceedings has been raised to Rs 1 crore from the existing Rs 1 lakh now (Source: Economic Times dated March 24, 2020).*

### **Application for Corporate Insolvency Resolution Process may be filed by:**

- (i) **Financial Creditors**- any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to, for example banks, financial institutions, home buyers etc.
- (ii) **Operational Creditors**- any person to whom operational debt is owed includes a person to whom such debt has been legally assigned or transferred to, for example suppliers, workmen etc.
- (iii) **Corporate Applicants**- means and includes
  - Corporate debtor (company itself)
  - Member of corporate debtor who has the authority in this regard
  - An individual in charge of managing the operations and resources of corporate debtor
  - A person having the control and supervision of financial affairs of corporate debtor.

### **Acceptance or rejection of application by NCLT within 14 days**

## Steps in the process of liquidation as per Insolvency and Bankruptcy Code, 2016

- i. Company commits default in paying debt of Rs. 1 lakh\* (see explanation above) or more
- ii. Financial or operational creditor or corporate debtor (the company itself) to file an application for initiating the insolvency resolution process with Adjudicating Authority (AA) i.e. NCLT
- iii. NCLT to accept or reject the application within 14 days
- iv. If application is accepted then within 180 days or extended maximum by 90 days (maximum of 330 days in any case), following needs to be done:
  - a) Interim Resolution Professional (IRP) to appointed
  - b) Formation of Committee of Creditors (CoC)
  - c) Appointment of RP to be confirmed within 7 days of formation of CoC
  - d) Resolution Professional to prepare memorandum containing relevant information for formulating resolution plan
  - e) Resolution plan to be approved by 66% of creditors at the meeting of CoC
  - f) Resolution plan to be submitted to AA (i.e. NCLT)
    - If resolution plan is approved by AA- Company shall be restructured and revived
    - Otherwise, NCLT shall pass order for liquidation of the company in following circumstances:

- 1) Rejection of resolution plan by NCLT on technical grounds
- 2) If CoC does not approve the resolution plan
- 3) If an adversely affected person makes an application to NCLT for liquidation of company
- 4) On failure of CoC to approve the resolution plan in time bound manner

**(B) Voluntary winding-up when there is no default by the company under Sec 59 of the IBC**

Regulations 2017 issued by Insolvency and Bankruptcy Board of India (IBBI) w.e.f. April 01, 2017 to be followed which are as under:

**Commencement of liquidation**

- a) **Declaration of insolvency** by majority of directors and majority of members verified by an affidavit stating that:
  - i. full enquiry in to the affairs suggests that either the company has no debt or it will be able to pay in full from the proceeds of assets sold in liquidation
  - ii. the liquidation is not to defraud creditors
- b) the declaration **to be accompanied by**
  - i. audited financial statements and record of business operations for previous 2 years or for the period since incorporation, whichever is later



- ii. report by registered valuer regarding valuation of the assets
- c) within 4 weeks of declaration of solvency, contributories' resolution to be passed as under:
- i. a special resolution to be passed in general meeting for voluntary liquidation and appointing the insolvency professional, **or**
  - ii. an ordinary resolution to be passed in general meeting requiring the company to be liquidated voluntarily on expiry of the period or occurrence of an event mentioned in its constitutional documents and appointing the insolvency professional, **and**
  - iii. approval of creditors representing two-thirds in value of the debt of the company must be obtained for the resolution passed within 7 days of such resolution
- d) Company to notify the Registrar and IBBI within 7 days of resolution or subsequent creditors' approval, as the case may be.
- e) Liquidation shall be deemed to have commenced from the date of passing of resolution subject to the approval of creditor

#### Effect of liquidation

- From the date of commencement of liquidation, the corporate person shall cease to carry on its business except as far as required for the beneficial winding-up of business.
- The corporate person shall continue to exist until it is dissolved

## Appointment and Remuneration of Liquidator

An insolvency professional shall be eligible to be appointed as a liquidator if he, is independent from the Company.

The remuneration payable to him shall be as per the terms mentioned in the resolution appointing him

## Powers and Functions of the Liquidator

### 1. Reporting

The liquidator shall prepare and submit:

- **Preliminary Report** to be submitted within 45 days from the commencement of the liquidation process to company
- **Annual Status Report**
- **Minutes** of consultations with the stakeholders
- **Final Report** in the manner specified under the regulation

### 2. Public Announcement by Liquidator

- The liquidator shall make a Public Announcement (PA) in Form A **within 5 days** from his appointment
- The announcement to be published in:
  - One English Newspaper and one Regional Language newspaper
  - Displayed on the website, of the Company; and
  - On the website as designated by IBBI for this purpose.
- The public announcement shall:

- Call upon the stakeholders to submit their claims as on liquidation commencement date
- Provide the last date for submission of claim being not later than 30 from the liquidation commencement date

### 3. Verification of claims and list of stakeholders

- A person who claims to be a stakeholder claiming for debt or dues to him including interest (if any) shall submit his claim with the liquidator. The claim can be made by:
  - Operational creditors
  - Financial creditors
  - Workmen and employees
  - Others stakeholders
  - Proving security interest by secured creditors
- The liquidator shall verify the claims submitted within 30 days and may either admit or reject the claim.
- The liquidator shall prepare list of stakeholders within 45 days from the last date for receipt of claims

### 4. Realisation of Assets and Distribution of Proceeds

- The liquidator may value and sell the assets in the manner approved by the corporate person
- The liquidator shall endeavor to recover and realize all assets of and dues to the corporate person in a time bound manner
- The liquidator to realize unpaid capital contribution

- All money to be paid in to Bank Account to be opened in the name of the company followed by the words 'in voluntary liquidation' in a scheduled bank by Liquidator.
- The liquidator shall distribute the proceeds within 6 months from the receipt of amount to the stakeholders. The liquidation costs shall be deducted before such distribution is made.

#### 5. Submission of final report

- The liquidator shall endeavour to complete the liquidation process within 12 months from the liquidation commencement date.
- If the liquidation process continues for more than 12 months, the liquidator shall present an annual status report of the progress made.
- On completion of the liquidation process, the liquidator shall prepare the final report and submit the same with corporate person, ROC, the IBBI and to NCLT along with application for dissolution.
- The liquidator to submit NCLT order of dissolution with ROC within 14 days of receipt of order.