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Winding Up of a Company

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ABSTRACT

Winding up of a company is the process whereby its life is ended, and its property administered for the benefit of its creditors and members. By the process of winding up, a company's business operations are dissolved, and it starts selling of its assets to meet its liabilities. Winding up can be done either voluntarily by the company by passing a Special Resolution or by an outside party, such as a creditor or members of the company. A liquidator is appointed who takes control of the assets and discharge the liabilities. Winding up can be due to many reasons such as the company unable to pay off it's debts or continue its operations. In this Research Paper, we will be covering a detailed analysis of situations in which a company can be wound up and various modes of winding up and declaration of solvency.

I. INTRODUCTION

A company is an artificial person. A company cannot die, it comes to an end by the mode of winding up. It is worthwhile to give light on the concept of Perpetual succession. It is a legal seal of a company which denotes that the company's longevity is unrelated to the financial status of its members and is a distinguishing feature of a corporation. Even if all the members of the corporation file for bankruptcy or pass away, the corporation will not dissolve on its own until it is forced to do so for the reasons mentioned in the respective act.

In the words of Professor Gower: "winding up of a company is the process whereby its life is ended, and its property administered for the benefit of its creditors and members. An administrator, called a liquidator, is appointed and he takes control of the company, collects its assets, pays its debts, and finally distributes any surplus among the members in accordance with the rights. By the process of winding up, a company's business operations are dissolved, and it starts selling of its assets to meet its liabilities. A liquidator is appointed who takes control of the company assets, pays debts, and finally distributes the surplus among the members as per their respective rights. Winding up can be done either voluntarily by the company by passing a Special Resolution or by an outside party, such as a creditor or members of the company. An application in this regard can be made to National Company Law Tribunal by the party

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aggrieved.

Winding up is the first stage in which the assets are realized, liabilities are paid off and the surplus if any is distributed among the members in the ratio of their contribution to the company as stated in Memorandum of Association (MOA) and Article of Association (AOA). However, the company still has existence and corporate power until it is dissolved.

Following are some of the situations in which the company is wound up:

1. If the company decides to wind up voluntarily,
2. If a company fails to start operating within a year after incorporation,
3. If the corporate veil lifts.
4. Suspends activities for a period equal to or greater than a year,
5. If it is unable to pay its debts, or
6. If the court determines that winding up the business is just and equitable.

II. MODES OF WINDING UP

1. Compulsory Winding Up
2. Voluntary Winding Up
 - a) Member's voluntary winding up
 - b) Creditor's voluntary winding up

Voluntary Winding up happens inside the company when its directors or shareholders elects to do so due to various reasons such as loss of possibility or inability to meet its liabilities. On the other hand, compulsory winding up happens on an application made by an outside party to the Tribunal.

Voluntarily Winding up of Company

The shareholders may choose to dissolve the company voluntarily due to various reasons such as inability to continue operating or non-achievement of its goals. Regardless of whether there are employees, secured or unsecured creditors, or both and all unpaid bills must be settled. After obligations are settled, all business bank accounts must be closed. The GST registration must be cancelled as well if the Company is dissolved. The process of winding up is governed by the Companies Act, 2013.

The company can declare voluntary winding-up either by ordinary resolution or special resolution:

1. **By Ordinary Resolution:** The company can pass ordinary resolution either on the completion of the period of the company as mentioned in its articles of incorporation, or upon the occurrence of a specific event for the purpose of dissolution.
2. **By Special Resolution (271 (b)):** As per Section 271(b) of the Companies Act, 2013 a corporation may voluntarily dissolve itself after receiving a 75% majority vote from its shareholders and board of directors through special resolution. The special resolution must be published in the district's or city's top newspapers as well as the Official Gazette within 14 days of its approval.

Compulsory Winding up of Company

Compulsory winding up is frequently done through a tribunal and is started by an outside party, such as a creditor. The National Corporation Law Tribunal (NCLT) may dissolve a corporation either suo moto or on an application made by an outside party. Section 271 of the Companies Act, 2013 specifies the circumstances under which a company may be shut down by the Tribunal. They consist of the following:

1. If the company has passed a special resolution for winding up by the Tribunal.
2. If the company has acted against the interests of the sovereignty and integrity of India, the security of the state or friendly relations with the foreign states.
3. If on an application made by the Registrar or any person authorised by the Central Government, the Tribunal is of the opinion that either the company was formed for fraudulent purpose or acted in a fraudulent manner, or the persons involved in its management have been guilty of fraud or misconduct.
4. If the company has made default in filing its financial statements or annual returns with the Registrar for previous five consecutive years.
5. If the business is either suspended for a year or does not start operating within a year of formation.
6. If the business is not able to pay off its debts.
7. If the Tribunal determines that winding up would be just and equitable in public interest.
8. The tribunal may order winding up of sick units if their revival and rebirth seems to be unlikely.

The following parties may file a winding-up petition with the Tribunal:

1. The company, by passing a special resolution for winding up.

2. A creditor if the business is unable to pay its debts.
3. A contributory or contributories, if a required meeting is not held, a required report is not filed, or the number of members fall below the required minimum.
4. The Registrar, on any justification, with prior consent of Central Government.
5. When the inspector's report as authorised by the Central Government indicates that the company's affairs have been conducted with the intention to cheat its creditors, members, or anyone else.
6. If the corporation breached India's sovereignty, integrity, or security, or acted unethically in relation to morality, public order, or decency.

On receipt of application for Winding up, Tribunal can:

1. Dismiss the order
2. Make any interim order
3. Appoint a provisional liquidator till winding up order
4. Make an order for winding up
5. Any other order as it thinks fit

The Tribunal on receipt of application for winding up shall pass an order within ninety days from the date of receipt of application which shall be in favour of creditors and all the contributories. After passing of order, the Tribunal shall:

- Settle a list of contributories
- Cause rectification of register of members where rectification is required
- Using assets of the company to discharge its liabilities
- Settle a list of contributories

III. DECLARATION OF SOLVENCY

The declaration of solvency is made at a meeting of the Directors of the company which is to be accompanied by an affidavit as well. It should state the following mentioned points by the members: -

- They must attest that they will be able to pay off all their debts by liquidating their assets; or that they are debt-free.
- The declaration should be registered at least five weeks prior to the resolution date.

- It must state that the company does not intend to deceive anyone in the winding up process.
- The declaration must also specify the date of payment of any outstanding debts.

A registered liquidator is required to prepare the valuation report of the assets of the company to pay off its debts. Thereafter, a committee of creditors will be formed, and a meeting of the creditors will be called by the liquidator.
