

## **Winding up of companies under the companies Act, 2013**

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### **Abstract**

Winding up of a company is the process of closing or finishing the business activities of the company permanently. The management of its affairs is taken out of the hands of the directors, shareholders, and members. An Administrator called a liquidator is appointed who will be in charge of the company until the company is wound up. He is the one who works out the assets, pays off the loans, and dispenses the surplus which is left over to the members according to their rights. Thus, in the end, the company has no assets or liabilities. Winding up is different from dissolution, if Winding up is the starting point to enter a tunnel the endpoint of this tunnel will be the dissolution. During the process of winding up, the company is still legally recognized, after dissolution the company loses its legal entity and thus, becomes a dead company. This article briefly talks about the meaning and definition of winding up: Gower and Pennington, etc. The article also talks about the difference between winding up and dissolution, the meaning of the term dissolution, and what signifies it. The next part of the article talks about the types and modes of winding up: winding up by the court, what are the circumstances for winding up under section 271 Companies Act, who can file a petition for winding up under section 272 the Companies Act, what are compulsory and voluntary winding up and how they are differentiated, what is voluntary winding up by the creditors and members. The article also discusses steps and procedures for winding up: how a liquidator is appointed, what is his role in winding up and how he conducts meetings and how he distributes the assets of the company among the creditors, how he pays off the debts, etc. The procedure explains the whole process of winding up. At last, the article explores the reasons for winding up, who is a liquidator, and what are his powers and duties under section 290 of the Companies Act, 2013.

**Keywords:** winding up, companies act, 2013, business activities

### **Introduction**

Winding up is a process of liquidating the assets of a corporation, firm or other legal entity in order to pay its creditors and make a distribution of assets to its partners or shareholders upon dissolution. Generally, winding up is done when it is ordered by the tribunal or when it is decided by the creditors or members. There are many reasons for winding up by a company or business i.e., insolvency or bankruptcy, death of promoters, or mutual agreement among stakeholders.

According to Halsbury's Laws of England, "Winding up is a proceeding by means of which the dissolution of a company is brought about & in the course of which its assets are collected and realised; and applied in payment of its debts; and when these are satisfied, the remaining amount is applied for returning to its members the sums which they have contributed to the company in accordance with Articles of the Company". Winding up is a legal process <sup>[1]</sup>.

### **Meaning and Definition of Winding up**

Winding up is a process in which the company is dissolved by clearing all the debts or liabilities, dissolution of its assets is collected, and other important items are returned to the creditors and if any contributions are made by the members they are also returned. In simple terms winding up is a process of putting an end to the life of a company. If the company has any surplus left then, it is distributed among the members in accordance to their rights. Winding up is also called liquidation.

According to Gower, "Winding up of a company is a process whereby its life is ended and its property

administered for the benefit of its creditors and members. An Administrator, called liquidator is named and he assumes responsibility for the organization, gathers its assets, pays its obligations, and lastly disperses the excess among the individuals in accordance with their rights" <sup>[2]</sup>.

According to Pennington, "Winding up is a process by which the administration of an organization's issues is removed from its chiefs' hands, its assets are acknowledged by a liquidator, and its debts are paid out of the proceeds of realisation and any balance remaining is returned to its members. At the of the winding up the organization will have no assets or liabilities, and will therefore be simply a formal step for it to be dissolved, that is, for its legal personality as a corporation be brought to an end".

"According to Section 2(94A) of the Companies Act, 2013 or Insolvency and Bankruptcy Code, 2016, "Winding up" means winding up under this Act or liquidation under the Insolvency and Bankruptcy Code, 2016, as applicable" <sup>[3]</sup>.

Chapter XX Section 270-378 of the Companies Act, 2013 deals with winding up and other aspects of it.

### **Winding up and Dissolution**

The terms winding up and dissolution are not and the same, they two differ in many ways. The whole strategy for achieving a legal finish to the existence of an organization is partitioned into two phases- winding up and dissolution. Winding up is the first stage in the process where the assets are realised, liabilities are paid off and the surplus is distributed among the members. Dissolution is the final stage whereby the existence of the company is withdrawn by the law.

The liquidator appointed by the company or court carries out the winding up proceedings but the order for dissolution is passed by the court only. Winding up in all cases doesn't finish in dissolution, even after paying all the creditors there may, in any case, be a surplus, the company may acquire benefits or profits during the course of winding up, there may be a scheme of compromise with the creditors and at last, the company can go back to the shareholders or old management of the company. A dissolution is an act of putting the end to the life of a company lawfully.

### Types or Modes of Winding up

A company comes into existence when it gets registered by the Registrar of companies (ROC) and obtains the certificate of incorporation by the ROC. It will come into existence even if an appointment is made in the form of a receiver or manager by the court or debenture holder, or the approval of a scheme of arrangement by the court. The existence of a company is lost when the company completes two stages; the first being winding up and the second being Dissolution. There are only 2 major types or modes of winding up which are:

1. Compulsory Winding Up by the Court.
  2. Voluntary Winding Up.
1. Compulsory winding up takes place when a company becomes insolvent or bankrupt. The creditor if the said company asks the court for a wind up. If the company goes into liquidation, the court of law appoints a liquidator to complete the process of liquidation. Section 270 of the Companies Act, 2013 deals with winding up by the Tribunal. Section 271 of the same act deals with circumstances in which a company may be wound up by the Tribunal;
    1. A company may, on a petition under section 272, be wound up by the Tribunal:
      - A. if the company is unable to pay its debts;
      - B. if the company has, by special resolution, resolved that the company be wound up by the Tribunal;
      - C. if the company has acted against the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality;
      - D. if the Tribunal has ordered the winding up of the company under Chapter XIX;
      - E. if on an application made by the Registrar or any other person authorised by the Central Government by notification under this Act, the Tribunal is of the opinion that the affairs of the company have been conducted in a fraudulent manner or the company was formed for fraudulent and unlawful purpose or the persons concerned in the formation or management of its affairs have been guilty of fraud, misfeasance or misconduct in connection therewith and that it is proper that the company be wound up;
      - F. if the company has made a default in filing with the Registrar its financial statements or annual returns for immediately preceding five consecutive financial years; or
      - G. if the Tribunal is of the opinion that it is just and equitable that the company should be wound up.
    2. A company shall be deemed to be unable to pay its debts:

- A. if a creditor, by assignment or otherwise, to whom the company is indebted for an amount exceeding one lakh rupees then due, has served on the company, by causing it to be delivered at its registered office, by registered post or otherwise, a demand requiring the company to pay the amount so due and the company has failed to pay the sum within twenty-one days after the receipt of such demand or to provide adequate security or re-structure or compound the debt to the reasonable satisfaction of the creditor;
- B. if any execution or other process issued on a decree or order of any court or tribunal in favour of a creditor of the company is returned unsatisfied in whole or in Part; or
- C. if it is proved to the satisfaction of the Tribunal that the company is unable to pay its debts, and, in determining whether a company is unable to pay its debts, the Tribunal shall take into account the contingent and prospective liabilities of the Company <sup>[4]</sup>.

Once the Tribunal is satisfied that the company has become insolvent or bankrupt then it orders the company to wind up and also orders the company to file a petition under section 272 of the Companies Act, 2013. The following are the ones who can file a petition in the court for winding up of a company:

- A. the company,
  - B. any contributor or contributories,
  - C. all or any of the persons specified in clauses (a) and (b),
  - D. the Registrar,
  - E. any person authorised by the Central Government in that behalf, or
  - F. in case falling under section 271(b), by the Central Government or State Government <sup>[5]</sup>.
2. A voluntary winding up takes place without the intervention of the court or tribunal. In a voluntary winding up the creditors and company agree mutually to wind up the company.

This mode generally takes place

- a. When the company expires its prefixed duration or, due to the occurrence of certain events whereby the company has to be dissolved, and if the company adopts and passes an ordinary resolution for winding up.
- b. If the company passes a special resolution to wind up the company.

Voluntary winding up is again divided into two parts:

1. Members' voluntary winding up.
  2. Creditors' voluntary winding up.
1. Members' voluntary winding up: This type of winding up occurs when the company is solvent. The company needs to declare its solvency at the Board of Directors meeting. This declaration must be the directors' opinion that the company has no loans or debts or it will pay the whole debts within three years of winding up. A general meeting is conducted wherein a liquidation is appointed and remuneration is fixed thereby. With his appointment, all the powers of the board, Managing Director, or Manager ceases to exist, until and unless a

General Meeting sanctions it otherwise. The liquidator must annually call a General Meeting to lay the procedure for winding up and to lay the accounts of his dealings.

2. Creditors' voluntary winding up: This type of winding up occurs when there is a declaration of solvency by the company i.e., when the company is insolvent. Hence, it acts empowers the creditors of the company to dominate over the members so that they don't protest against them. It requires the company to hold a meeting with the creditors and the board and make a full statement of the company's affairs with a detailed list of creditors including their estimated claims.

Both the creditors and members at their respective meetings appoint a liquidator, if at all there is a disagreement, then the creditors will appoint the liquidator at their discretion. The liquidator holds a meeting not only with the members but also with the creditors to lay the procedure for winding up and to lay the accounts of his dealings. The liquidator at last calls for a general meeting where he winds up the company [6].

### Steps and Procedure for Winding up

The following are the basic steps which are to be taken by the company during winding up:

- An Administrator, called a liquidator, is appointed in the context of liquidation or winding up of a company.
- The liquidator takes control over the company, and starts the process of liquidation, he assembles the assets, pays debts of the company, and distributes surplus, if any left, amongst the members according to their rights and liabilities.
- The company should not have any assets or liabilities at the end of winding up and once all the assets or liabilities are settled, the process of dissolution starts.
- In the context of winding up the name of the company is struck off from the MCA portal and also from the list of companies. The company loses the identity of a separate legal entity.
- If the company is unable to pay off its debts or if the debts taken by the company are more than the value of its assets and there is a settlement with the creditors, then the company is considered insolvent and it should compulsorily wind up the company.
- If a company owes a natural person and is unable to pay, then the said person can approach the court and asks the court to make a compulsory winding up order against the company.
- On the notice given by the court, the order is informed by the court to the official receiver, who eventually becomes the liquidator.
- If the official receiver believes that the company can pay the debts which it owns to the creditors, then the official receiver will seek an appointment of an insolvency practitioner as a liquidator.
- The liquidator is appointed either by the creditors by calling a creditors' meeting and elect through the voting system or by requesting the secretary of the State to make an appointment.
- If there are no assets, then the official receiver will become the liquidator.
- The procedure of winding up differs according to the registration status of the company i.e., if the company is

a registered company or if it is an unregistered company [7].

The following is the procedure mentioned under the Companies Act for winding up:

- The order has to be made within 90 days from the date of filing of the petition. The Tribunal directs the company and the opposition before appointing a provisional liquidator and allows them to make their representations and allows them to file any objections in Form No. NCLT. 5.
- Since the powers of the Tribunal are discretionary, and it is satisfied that a prima facie evidence exists for the company to wind up, then it orders the company which is bound to wound up and also file the Statement of Affairs under section 274 of the Companies Act, 2013 within 30 days from the date of passing of the order by the Tribunal. The tribunal also appoints a provisional liquidator at the time of passing an order for the winding up of the company. Such a liquidator appointed under section 275 of the act, shall file a declaration within 7 days from the date of appointment if he has any conflicting interests with the appointment.
- If an order of winding up is passed by the tribunal under section 273 (1) (d), then the directors are obliged by the law under section 286 of the Companies Act, 2013, to submit the complete (up to date) audited books of the accounts of the company within 30 days of such order passed by the Tribunal to the provisional liquidator. If the company fails to do so then the directors are personally liable to penalties and punishments under the act.
- After the tribunal appoints the provisional liquidator or passes the order for winding up, the tribunal within 7 days shall inform/intimate about the same to the registrar and liquidator. Now the registrar must publish or notify about the information in the official gazette. If the company is a listed company then the registrar should notify it in the stock exchange where its shares and securities are listed. The liquidator shall file a report to the tribunal within 60 days of passing of the winding up order, which should consist of the valuation of the assets, particulars, names, amount of capital issues, etc.
- While passing the order of winding up, the tribunal shall pass an order to set up an Advisory Committee under section 287 of the Companies Act, 2013, which will advise the liquidator and report to the tribunal as and when required. The Advisory Committee should consist of 12 members who are the shareholders, contributors, and creditors of the company. The company liquidator shall conduct a meeting within 30 days from the date of order of winding up so that the tribunal can decide the quantum of the committee. The company liquidator will be the Head of this committee.
- The liquidator within 3 weeks of the order passed by the tribunal shall request or make an application to the tribunal to appoint a winding up committee in order to assist and monitor the process of liquidation. The final report will be submitted to the tribunal by the liquidator based on which the tribunal gives the judgment for the dissolution of the company.
- The tribunal after scrutiny of the report submitted by the company liquidator shall fix a time and during this

time the company will be completely dissolved. The property of the company is deemed to be in the custody of the tribunal from the date of passing of the winding up order.

- Set-off is the next stage called and is conducted whereby the contributors are called upon to pay off the debts. The tribunal orders the contributors to pay their debts to the extent of their liabilities. If any person has any of the property belonging to the company, then it shall be informed to the liquidator.
- At last, an Official Liquidator is appointed under section 359 of the Companies Act, 2013 by the Tribunal who within 60 days of his appointment shall dispose of all the assets of the company. He shall serve a notice to all the debtors to pay the amount which they are liable to pay. The amount received by him has to be deposited in the Reserve Bank of India (RBI). Within 30 days of his appointment, he shall call the creditors to prove their claims. The official liquidator shall make a list of creditors who should receive the amount and sends that list to each creditor whether they have been accepted or not. An aggrieved creditor can appeal to the Central Government. The remaining creditors whose names are on the list are paid by the official liquidator. The official liquidator after the completion of the above formalities shall order of Dissolution of the company under section 365 of the Companies Act, 2013.

After completing all the above formalities, the life of the company comes to an end and the company is now completely and legally dissolved<sup>[8]</sup>.

#### Reasons for Winding up by a Company

- Company has ceased the Business activities.
- Company has become insolvent and bankrupt.
- Due to oppression.
- Breach of statutory provisions.
- Company acting beyond its powers (Ultra Vires).
- Management deadlock. Etc.

#### Who is a liquidator and What the Powers and Duties of a Liquidator?

##### Liquidator Meaning

A liquidator or an official receiver manages the entire process of liquidation or winding up. He/she is appointed when the company goes into liquidation or is wound up by the court, when it orders a compulsory winding up process, which is brought by the creditors. A liquidator is a person or entity that liquidates something—generally assets. When assets are liquidated, they are sold to private persons or in public auctions. A liquidator is an officer who is specially appointed for the purpose to take care of the affairs of winding up when the company is closing—typically when the company becomes bankrupt or insolvent. In some jurisdictions, a liquidator may also be referred to as a trustee, such as a bankruptcy trustee<sup>[9]</sup>.

##### Powers and Duties of Liquidator

Section 290 of the Companies Act, 2013 deals with the Powers and Duties of the Liquidator. According to the directions given by the tribunal, the company liquidator, in a winding up of a company by the Tribunal, shall have the Following powers and duties

- To carry on the business of the company so far as may be necessary for the beneficial winding up of the company;
- To execute and do all acts in the name and on behalf of the company, all deeds, receipts, and other documents, and for that purpose, to use, when necessary, the company's seal;
- To sell the properties of the company i.e., movable or immovable and actionable claims of the company by public auction or private contract, with the power to transfer them to a natural person or a body corporate, or sell them in parcels;
- To sell the whole of the undertakings of the company as a going concern;
- To raise money by selling the assets or securities of the company;
- To defend or institute the company from any suit, prosecution or other legal proceedings, civil or criminal, in the name of the company;
- To invite and settle claims of the creditors or any other claimants and also to distribute sale proceeds in accordance with priorities established under this act;
- To inspect the records and returns of the company on the files of the Registrar or any other authority;
- To prove rank and claim in the insolvency of any contributory for any balance against his estate, and to receive dividends in the insolvency;
- To draw, accept, or make and endorse any Negotiable Instruments including cheque, bills of exchange, hundi, or promissory note in the name or on behalf of the company;
- To take out, in his official name where he has act Suo motto and to obtain money from any of the contributor or his estate which cannot be done in the name of the company;
- To obtain any professional assistance from any person or committee, in the discharge of his duties, obligations, and responsibilities and for the protection of the assets of the company;
- To take all such steps, signatures, verifying and executing any paper, document, petition, etc as may be necessary:
  1. for winding up of the company
  2. for distribution of assets
  3. in discharge of his duties and obligations and functions as company liquidator

To make application to the tribunal for orders or directions as may be necessary for winding up of the company<sup>[10]</sup>.

##### Conclusion

The procedure for winding up is a very lengthy and time taking process. The process of winding-up of a company is not very simple, it includes within it many complexities and technicalities. The Ministry of Corporate Affairs through amendments made the process of formation of company easy and fast through online, the same ministry shall bring changes and add new formats for winding up, so that it will be easy for the companies to wound up. Earlier there was only the Companies Act, 2013, which represented this zone, anyways with the order of the Insolvency and Bankruptcy Code, 2016, it has gotten more difficult to apply these rules and provisions simultaneously and to choose the priority.

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