

OVERVIEW ON CONCEPT OF VOLUNTARY LIQUIDATION

Meaning

Winding up is a means by which the dissolution of a company is brought about and its assets realized and applied for payment of its debts, wherein after satisfaction of the debts the balance if any, is paid back to the members in proportion to the contribution made by them to the capital of the company.

At the end of Winding up, the company will have no assets or liabilities. When the affairs of a company are completely wound up, the dissolution of the company takes place. On dissolution, the company's name is struck off the register of the companies and its legal personality as a corporation comes to an end.

Legal Position in India

Companies Act, 1956

Part VII of the Act mentions about winding up. Nowhere in the Act is "winding up" defined, but the provisions under the above mentioned part tries to describe the process of winding up and a conclusion can be drawn that, it is process that leads to bringing an end to the company's existence.

As regards methods of winding up, the Companies Act, 1956 followed the provision of UK Companies Act, 1948 in distinguishing between 3 modes of winding up:

- a) Compulsory winding up by the court;
- b) Voluntary winding up, further classified into :
 - i) Member's Voluntary winding up;
 - ii) Creditor's Voluntary winding up;
- c) Winding up subject to supervision of court.

The last of these, winding up subject to supervision of court, had long back become antiquated and dysfunctional; this resort was used by the creditors or members by approaching the court to execute the winding up subject to supervision of court, presumably to secure justice. The purpose was, for providing more creditor protection as they may feel insecure in a member's voluntary winding up also, the Eradi Committee has in their report commented that this method has become redundant.

Position of Law w.r.t. winding up initiated under the provisions of Companies Act 1956 applicable as on date:

- a) All the proceedings pending before the High Court for winding up on grounds of inability to pay debts u/s 433(1)(e) of the Act on 15th December, 2016 and the notice of which have been served on the respondent, shall continue to be dealt with by the High Court in accordance with the provisions of 1956 Act.

Further, that any party or parties to the petitions shall, after the 15th July, 2017 be eligible to file fresh applications under sections 7 or 8 or 9 of the Code, as the case may be, in accordance with the provisions of the Code.

Also, where a petition relating to winding up of a company is not transferred to the Tribunal under this rule and remains in the High Court and where there is another petition under clause

(e) of section 433 of the Act for winding up against the same company pending as on 15th December, 2016 such other petition shall not be transferred to the Tribunal, even if the petition has not been served on the respondent.

- b) All the proceedings pending before the High Court for winding up on any grounds other than inability to pay debts under clause (a) and (f) of Section 433 of the Act as on 15th December, 2016 and the notice of which have been served on the respondent, shall continue to be dealt with by the High Court in accordance with the provisions of 1956 Act.
- c) All the proceedings pending before the High Court relating to voluntary winding up till April 1, 2017 where notice of the resolution by advertisement has been given under sub-section (1) of section 485 of the Act but the company has not been dissolved before the 1st day of April, 2017 shall continue to be dealt with in accordance with provisions of the Act.

Companies Act, 2013

The provisions for winding up are provided in Chapter XX of the 2013 Act and are divided into four parts:

- i) Part I dealing with the provisions for the winding up by the National Company Law Tribunal
- ii) Part II (Sections 304-323) dealing with the provisions for voluntary winding up
- iii) Part III dealing with provisions applicable to every mode of winding up and
- iv) Part IV dealing with appointment of official liquidator

The Companies Act, 2013 has eliminated distinction between Member's Voluntary winding up and Creditor's voluntary winding up by making creditor's approval necessary in all cases.

Position of Law w.r.t. winding up under the provisions of Companies Act 2013 as applicable on the date:

- a) Vide Notification No. S.O. 3543(E) dated 15th November, 2016***, Section 255 of the Code became effective, as provided therein; Schedule XI of the Code amended Companies Act, 2013 wherein the Provision of ***Voluntary Winding up*** (Section 304 to 323) and ***Winding up by National Company Law Tribunal on account of inability to pay debts*** {(Clause (a) of Sub Section (1) of Section (271)} have been omitted from the Companies Act, 2013.

Prior to 15th November, 2016, winding up through any mode i.e. voluntary winding up and winding up by tribunal, was governed by the provisions of 1956 Act.

- b) Vide Notification No. S.O. 3677(E) dated 7th December, 2016***, Section 270 to 288; Section 290 to 303, Section 324 and Section 326 to 365 of Chapter XX of Companies Act, 2013 i.e. Winding Up under aforesaid sections became effective from 15th December, 2016. All these provisions under Companies Act, 2013 are related to the ***Winding up by the National Company Law tribunal on ground other than inability to pay debts***.

Accordingly, Winding up by tribunal on any ground other than inability to pay debts shall be governed by the provisions of Companies Act, 2013

Position of Law w.r.t. winding up initiated under the provisions of Companies Act 1956 but dealt with as per provisions of Companies Act 2013:

- a) All the proceedings pending before the High Court for winding up on any grounds other than inability to pay debts under clause (a) and (f) of Section 433 of the Companies Act, 1956 as on 15th December, 2016 and the notice of which have not been served on the respondent, shall be transferred to the respective bench of the National Company Law Tribunal exercising territorial jurisdiction over the concerned state and shall be dealt in accordance with the Provisions of Companies Act, 2013.

Insolvency and Bankruptcy Code, 2016:

Insolvency Code is one of the most important economic reform to be implemented recently. The Insolvency Code aims to provide a single comprehensive bankruptcy and insolvency law for all legal entities and natural persons. Insolvency Code governs the provisions relating to Liquidation of Insolvent Companies and Voluntary Liquidation.

‘Winding – up’ was neither defined under the Companies Act, 1956 not under the Companies Act, 2013. With the notification of section 255 of the Insolvency and Bankruptcy Code, 2016 from 15th November, 2016, the Companies Act, 2013 stands amended in accordance with Schedule XI of the Code.

The aforesaid schedule XI defines the term ‘winding up’ by introducing a new clause (a) under sub section (94) of Section 2 of the Companies Act, 2013 as **“winding up under this Act or Liquidation under the Insolvency and Bankruptcy Code, 2016, as applicable.”**

Position of Law w.r.t. Winding up under the provisions of Insolvency and Bankruptcy Code, 2016 applicable as on date:

- a) **Vide Notification No. S.O. 3687(E) dated 9th December, 2016**, Provisions of Section 33 to Section 54 of Chapter III of Code i.e. Liquidation Process became effective from 15th December, 2016.
- b) **Vide Notification No. S.O. 1005(E) dated 30th March, 2017**, Section 59 of Chapter V of Code i.e. Voluntary Liquidation of Corporate Persons became effective from 1st April, 2017.
- c) **Vide Notification No. S.O. 1910(E) dated 14th June, 2017**, provisions of section 55 to 58 of Chapter IV of the Code i.e. Fast Track Insolvency Resolution Process for Corporate Persons became effective from 14th June, 2017.

Accordingly, Voluntary Winding Up and Winding-up on grounds of inability to pay debts shall be governed by the Provisions of Insolvency and Bankruptcy Code, 2016

Position of Law w.r.t. winding up initiated under the provisions of Companies Act 1956 but dealt with as per provisions of Insolvency and Bankruptcy Code, 2016:

- a) All the proceedings pending before the High Court on grounds of inability to pay debts u/s 433(1)(e) of the Companies Act, 1956 on 15th December, 2016 and the notice of which have not been served on the respondent, shall be transferred to the respective bench of the National Company Law Tribunal exercising territorial jurisdiction over the concerned state and shall be dealt in accordance with the Provisions of the Insolvency and Bankruptcy Code, 2016.