

**VOLUNTARY WINDING UP OF COMPANIES IN INDIA – A  
COMPARATIVE ANALYSIS OF OLD REGIME AND NEW PROCESS  
INTRODUCED BY INSOLVENCY AND BANKRUPTCY CODE, 2016**

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A company is an artificial person having a separate legal entity, perpetual succession and common seal. In general parlance nothing is immortal so is the life of company which may come to end by way of winding up and dissolution. Under Indian law the process of winding up of company and dissolution has been vividly elaborated. The winding up of the company brings end to the life of a company and administer the power to pay back its liabilities, appropriates its assets and surplus. Whereas dissolution is the final step to end the existence of the company. Under winding up process the company is being represented by the liquidator appointed under law. The liquidator takes charge of all the assets, liabilities and other managerial functions of companies. Indian Companies law both under the act of 1956 and thereafter under the act of 2013 laid down the exhaustive provisions regarding the process of winding up of the Companies. The winding up of the companies under Companies Act, 1956 is done by three modes i.e. winding up by court, voluntary winding up and winding up subject to the supervision of the court. Likewise, under the new Companies Act, 2013 the company can be wind-up either by Tribunal or voluntary.

**This article elaborately studies the voluntary winding up of the companies in India under the Act of 1956 and 2013. Unfolding the Companies act, 1956 under section 484 to 489 the circumstances and process of voluntary winding up of companies has been elucidated. Following are the steps need to be followed when a company wind up voluntarily.**

- Circumstances for voluntary winding up of the Companies –

Section 484 laid down the conditions under which a company may be wind up voluntarily-

1. On the expiration of fixed period mentioned under articles or on occurrence of any event mentioned in its constitutional documents or on passing of resolution in its general meeting.
  2. If the special resolution passed by company that the company needs to be wind up voluntarily.
- The resolution passed by the company for voluntary winding up need to be publish within 14 days of passing of resolution in an advertisement in the official gazette and

also in local newspaper of the district where the registered office of the company is situated<sup>1</sup>.

- The winding up process commence on the day the resolution is passed by the company<sup>2</sup>.
- The business of the company going for voluntary wind up process ceases on the day the resolution is been passed except the corporate state and corporate powers of the company which remains till the dissolution<sup>3</sup>.
- Certain Declarations need to be made when company proposes to wind –up voluntarily-
  1. When company is wind up voluntarily, its directors or in case more than two directors, the majority of directors at the meeting of board make a declaration verified with affidavit that they know about affairs of company and company if winds up able to pay back its debts within three years of commencement of winding up or it does not have any debts.
  2. The declaration made by directors has to be made within 5 weeks from the date of passing such resolution and needs to be submit to the registrar of companies. Further such declaration has to be accompanied by a report by auditor analysing the financial position of the company.

Furthermore penalty provisions will attract if directors made some faulty declaration or no declaration.<sup>4</sup> **The new Companies Act, 2013 under its genesis has laid down the exclusive provisions under chapter XX titled winding up.** Section 270 lays down the modes of winding up which reads that company may be wind up either by tribunal or voluntary. The new companies act however lays down the process of voluntary winding up of companies almost in consonance with the provisions of old act however, the new act divided the passing of winding up order either by declaring the solvency or not. Section 304 to 309 laid down the provisions regarding voluntary winding up of the companies.

- Circumstances in which company may be wound up voluntarily –
  1. **Passing of general resolution** – if in General meeting company (i.e. its members) passed a resolution that as a result of expiry of any event or as per the date fixed by

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<sup>1</sup> Section 485, The Companies Act, 1956

<sup>2</sup> Section 486, The Companies Act, 1956

<sup>3</sup> Section 487, The Companies Act, 1956

<sup>4</sup> Section 488 (3) &(4), The Companies Act, 1956

the constitutional documents<sup>5</sup> of the company, that the company should be dissolved.

2. **Special Resolution** – if the members of company pass a special resolution that a company needs to be dissolved voluntarily.
  - The resolution passed by the company for voluntary winding up need to be publish within 14 days of passing of resolution in an advertisement in the official gazette and also in local newspaper of the district where the registered office of the company is situated.<sup>6</sup>
  - The proceedings for voluntary winding up starts on the day of passing of resolution.<sup>7</sup>
  - Procedure for voluntary winding up of the companies-
    1. A meeting of board comprising of two directors or more directors if any have to be conducted where they have made a declaration that company if wound up voluntary will be able to pay its debt from the proceeds of sale of its assets or no debt is pending against such company.
    2. A notice of calling general meeting constituting all creditors and other members for purpose of passing resolution for voluntary winding up of the company.
    3. The Board of Directors of the company in the general meeting present a full statement stating the affairs of the company, list of creditors, estimated amounts of claims, if any.
    4. The Directors have to make declaration regarding the solvency of the company and its affairs, such declaration has be made within five weeks immediately preceding the date of the passing of resolution for winding up and has to be delivered to Registrar before that date<sup>8</sup>.
    5. The above mentioned declaration also mention that company is not being wound up to defraud any persons and must accompanied with the copy of report of auditors, Profit & loss account, balance sheet etc. of the company.
    6. The resolution for passing order that company needs to be wound up voluntarily must be passed by majority and decision must be sent to creditors.

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<sup>5</sup> Memorandum of association and articles of association are generally called as constitutional documents of the company

<sup>6</sup> Section 307, The Companies Act, 2013

<sup>7</sup> Section 308, The Companies Act, 2013

<sup>8</sup> Section 305, The Companies Act, 2013

7. The majority of creditors (two-third in value of creditors) when upheld the decision of board that company need to be wind up and it is in interest of parties.
8. The notice of any resolution whether upholding the resolution or negating the resolution may file with registrar within ten days of such passing of resolution.
9. Within fourteen days of such resolution publish such resolution in official gazette and in any local newspaper.
10. Prepare final books of account and further make liquidators account, conduct a general meeting and file certified copies of resolution with Tribunal along with final books of account.
11. Tribunal if find that all books are in order and resolution for wind up has been passed as per legal requisites and in consonance with the policies of company, may pass an order for dissolving such company within 60 days of such application to Tribunal<sup>9</sup>.
12. The appointed Liquidator then file such order of Tribunal with Registrar and Registrar after verifying publishes in official gazette that company is being dissolved<sup>10</sup>.

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### CHANGES IN THE PROCESS OF VOLUNTARY WINDING UP AFTER THE BANKRUPTCY AND INSOLVENCY CODE, 2016

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The recent Bankruptcy and Insolvency code 2016 consolidates the laws related to insolvency of all legal entities comprising of corporate debtor, partnership firm and individuals. After the MCA wide notification no. S.O. 3453 E of November 15<sup>th</sup>, 2016, section 255 of Insolvency & Bankruptcy Code, 2016 amended following sections of the Companies Act, 2013. In the definition of Winding up, new insertion was made which makes it as winding up means winding up under this Act or liquidation under the Insolvency & Bankruptcy Code, 2016 as applicable.

Section 270 of the Companies Act, 2013 regarding the Modes of winding up, has been deleted after the enforcement of this Code. It has been substituted by Winding up by Tribunal.<sup>11</sup> Furthermore, the Bankruptcy and Insolvency Board of India in March, 2017

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<sup>9</sup> Goel, Mansi, "All about Winding up under The Companies Act, 2013" <https://taxguru.in/company-law/winding-company-ca-2013.html> last assessed on 5<sup>th</sup>.january.2018

<sup>10</sup> ibid

<sup>11</sup> Punjabi, Harshita, "A comparative analysis of winding up of a company – Companies Act, 1956, Companies Act, 2013 and the Insolvency and Bankruptcy Code, 2016" <https://blog.ipleaders.in/comparative-analysis-winding-company-companies-act-1956-companies-act-2013-insolvency-bankruptcy-code-2016/> last assessed on 5<sup>th</sup>.January.2018

issued the Bankruptcy and Insolvency Board of India (Voluntary Liquidation Process) Regulation, 2017. As prior to that voluntary winding up process was governed by Companies Act, 2013 (as discussed above) but such provisions have never been notified. Moreover, with issue of recent regulations by Bankruptcy board regarding voluntary liquidation process have repealed the existing provisions in the companies act, 2013.

Under the code 2016, under section 59 the concept and process of voluntary winding up has been enunciated. Under this section the process is initiated by the corporate person not committed any default and further certain declaration and compliances has to be fulfilled to initiate such process which are prescribed by the board. Likewise, these compliances are to be fulfilled to initiate the process -

- Declaration made Directors that they are well versed with affairs of the company and company has no debt or will able to repay the debts from the proceeds of sale of its assets.
- Company is not being liquidated with intention to defraud any person.
- Financial reports authored by auditors of the company have to be attached with declaration made by directors.
- A special resolution passed in general meeting of the members agreeing to winding up of the company voluntarily and appointment of insolvency professional as liquidator.
- Further where company has any debt due the creditors owning two-third value of such debt due has to sanction the resolution passed for winding up within 7 days of such resolution.
- Company has to notify the Registrar along with sanction of creditors about the resolution within seven days of approval.
- When the affairs of the company wound up completely, the liquidator has to file the application to Adjudicating authority for dissolving such company.
- The order of Adjudicating authority within 14 days has to be submitted to Registrar and needs to be published that the entity has been dissolved.

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## CONCLUSION

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We have analysed the process of voluntary winding up of the companies in the old and new companies act but with new Bankruptcy and Insolvency Code, 2016 previous provisions are stand repealed. The new provisions have pave a way for more time bound and fast disposal of winding up cases stacked in courts by providing the time frame for disposal of such applications. New provisions have paved way more comprehensive procedure paving way for filing an application for voluntary liquidation by company or its creditors or its contributories or Registrar; furthermore, more power is given to NCLT which was previously given to High Courts in 1956 Act. Likewise, the new code mandates

the approval of two-third creditors for the scheme of voluntary liquidation unlike the old regime in 1956 act where approval of creditors was not mandatory. The time limit for the whole process also narrows down to four weeks as previously was five weeks in older provisions. Moreover, appointment of insolvency professionals as liquidators leads for efficient way of winding up as the insolvency professional must be qualified and possess knowledge about the nitty-gritty of the structures of the companies, which helps to dissolve the companies in a transparent manner. Likewise, it will be appreciable if this new code reduces the burden of courts (or company tribunal) by providing the time bound process under existing company laws.