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WINDING UP

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WHAT IS WINDING UP?

Winding up of a company is defined as a process by which the life of a company is brought to an end and its property administered for the benefit of its members and creditors.

2. In words of Professor Gower, “Winding up of a company is the process whereby its life is ended and its Property is administered for the benefit of its members & creditors. 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 their rights.”

3: According to **Halsburry'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.

4: *Winding up does not necessarily mean that the company is insolvent. A perfectly solvent company may be wound up by the approval*

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of members in a general meeting.

5: There are differences between winding up and dissolution. 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.

WINDING UP UNDER THE COMPANIES ACT

6: CHAPTER XX of the Companies Act, 2013 (hereinafter referred as 'the 2013 Act') follows the structure and processes for winding up as adopted in Part VII of the Companies Act, 1956 (hereinafter referred as 'the 1956 Act'). Chapter XX of the 2013 Act has not yet been notified. The provisions of Part VII of the 1956 Act are still in force. Chapter XX of the 2013 Act contains the provisions for winding up of companies registered under the Act and under previous companies' laws. Section 270 of the 2013 Act is the introductory section to Chapter XX and sets out two modes of winding up, viz., winding up by the Tribunal and voluntary winding up. Winding up under the supervision of the court and the creditors' voluntary winding up as provided for in the 1956 Act are not incorporated in the 2013 Act.

- i) Part I of Chapter XX of the 2013 Act governs the processes for voluntary winding up by the Tribunal;
- ii) Part II governs the processes for voluntary winding up;
- iii) Part III contains provisions applicable to every mode of winding up.

- iv) Part IV of Chapter XX of the 2013 Act provides for a summary procedure for winding up for companies having assets of a book value not exceeding Rs. 1 crore.

WHAT'S DIFFERENT ?

7: It is needed to submit that certain provisions of the 1956 Act have not been incorporated in the 2013 Act. (however, these provisions of the 1956 Act will continue to remain in force until the provisions of Chapter XX of the 2013 Act are notified and made applicable). The provisions of the 1956 Act include :-

- Section 433 (b), (c) and (d) : winding up on grounds of default in filing statutory report or holding statutory meeting, non-commencement or suspension of business for one year, reduction in the number of members;
- Section 429 to 432 : liability of contributories;
- Section 440 : right to present winding up when company is being wound up voluntarily;
- Section 451 : general provisions as to liquidators;
- Section 453 : receiver not to be appointed of assets with liquidators;
- Section 473 : order on contributory to be conclusive evidence;
- Section 474 : power to exclude creditors not proving on time;
- Section 482 : order made in any court to be enforced by other courts;
- Section 513 : body corporate not to be appointed as liquidator;
- Section 515 : power of Tribunal to appoint & remove liquidator in voluntary winding up, etc.

8: With easier norms spelled out in the new companies law, the winding up time for over 4 lakh defunct, inactive and sick companies is

expected to come down to less than one year compared to 4-10 years or more at present.

9: Now an attempt is being made to enlighten the provisions of winding up under the Companies Act 2013.

MODES OF WINDING UP

Section 270 of Companies Act,2013 deals with Modes of winding up :

(1) The winding up of a company may be either—

(a) by the Tribunal; or

(b) voluntary.

(2) Notwithstanding anything contained in any other Act, the provisions of this Act with respect to winding up shall apply to the winding up of a company in any of the modes specified under sub-section (1).

WHATS NEW?

10: Section 425 of the 1956 Act, provided for three modes of winding up of companies: (i) by the court, (ii) voluntarily, or (iii) subject to the supervision of the court whereas, winding up under section 270 of the 2013 Act can be undertaken by two modes: (i) winding up by tribunal (ii) voluntary winding up. Needless to say, the judgements under Section 425 of the 1956 Act will continue to be relevant for the purposes of Section 270 of the 2013 Act, except insofar as they relate to winding up under the supervision of the court as this mode of winding up has been dispensed with under the 2013 Act.

WINDING UP BY THE TRIBUNAL

11: Section 271 of Companies Act,2013 deals with **circumstances in which company may be wound up by 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.

WHAT'S NEW ? As stated before, while retaining some of the grounds for winding up by the court, some of the grounds on which a company could be wound up under the 1956 Act [section 433(b), (c) and (d)] have been removed from 2013 Act.

Additional grounds have been incorporated under clauses (c), (d) and (e) of sub-section (1) of section 271 of the 2013 Act, under which a petition can be filed for winding up the company by the Tribunal.

Under clause (f) of section 271(1) of the 2013 Act, a winding up petition may be if the company has not filed its financial statements or annual returns for the immediately preceding five consecutive financial years.

13: The provisions of s. 434(2) of the 1956 Act have not been incorporated in Sec. 271 of the 2013 Act.

14: With the incorporation of the provisions relating to the revival and rehabilitation of sick industrial companies in Chapter XIX of the 2013 Act, the Tribunal can pass an order of winding up if it finds that a company cannot be revived under section 265(1) of the 2013 Act. Earlier, the Board for Industrial Finance and Reconstruction (BIFR)

would record and forward its opinion for the winding up of a sick industrial company to the concerned High Court under the provisions of section 20 of the Sick Industrial Companies (Special Provisions) Act 1985. Under the scheme of provisions in the 2013 Act, it would appear that the requirement of filing a petition under section 271(1), in terms of section 272, would be unnecessary in the case of clause (d) of sub-section (1) of section 271. Upon rejection of a scheme for revival and rehabilitation of a sick industrial company, the Tribunal can wind up the company after considering the report of the company administrator (appointed pursuant to section 259 of the 2013 Act).

Section 271(1)(e) of the 2013 Act is a new provision. The Central Government now has the power to petition for the winding up of a company if the company has been formed for fraudulent or unlawful purpose or its affairs are being conducted in a fraudulent manner, notwithstanding the apparent solvency of the company.

15: Under clause (f) of section 271(1) of the 2013 Act, a winding up petition may be filed only if the company has not filed its financial statements or annual returns for the *immediately preceding* five consecutive financial years. The corresponding section 433(g) of the 1956 Act provided that a winding up petition could be filed on the ground that the company had not filed its balance sheet and profit and loss account or annual return for any of the five consecutive financial years. The judgments of courts of law on this ground under section 433(g) of the 1956 Act would be relevant and may be relied upon.

16: Section 271 of the 2013 Act consolidates sections. 433 and 434 of the 1956 Act.

17: Sub-section (2) of section 271 of the 2013 Act elaborates three circumstances in which a company will be deemed to be unable to pay its debts for the purposes of section 271(1)(a). This substantially follows the provisions of the 1956 Act. Firstly, a creditor, who is owned a sum of more than rupees one lakh is required to issue a notice on the

company to pay the amount owed to the registered office of the company. If the sum demanded is not paid within 21 days from receipt of the notice, or if not adequately secured or restructured or compounded to the reasonable satisfaction of the creditor, the company is deemed to be unable to pay its debts. Secondly, if any execution or process issued on a decree or an order of a court or Tribunal in favour of the creditor of the company is returned unsatisfied in whole or part. Thirdly, if it is proved to the satisfaction of the Tribunal that the company is unable to pay its debts, by also taking into account the contingent and prospective liabilities of the company.