

## **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.

In the words of Prof. L.C.B. 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 liquidator is appointed, and he takes control of the company, collects its debts and finally distributes any surplus among the members in accordance with their rights.”*

Thus in the words of Pennington, *“Winding up or liquidation is the process by which the management of a company’s affairs is taken out of its director’s hand, its assets are realized by a liquidator, and its debts and liabilities are discharged out of the proceeds of realization, and any surplus of assets remaining is returned to its members or shareholders. At the end of winding up the company will have no assets or liabilities, and will therefore be simply a formal step for it to be dissolved, that is its legal personality as a corporation to be brought to an end.”*

### **Procedure for Winding up by Tribunal**

By the virtue of a notification of the Ministry of Corporate Affairs, many sections of the Companies Act 2013 have been recently notified by the Central Government vide notification no. S.O. 3677(E) dated 07.12.2016 and were enforced from 15<sup>th</sup> December, 2016.

Sections : 270 – 288, 290 – 303, 324, 326 – 365, which deal with the Winding up by a Tribunal have been put into effect by the government.

A detailed procedure of winding up of a company by a tribunal has been drafted hereunder. The procedure deals with the abovementioned sections of the Companies Act, 2013 read with the National Company Law Tribunal Rules, 2016.

### **PROCEDURE:**

According to section 270 of the Companies Act, 2013 (further referred as The Act), there are two ways in which a company can be wound up : either by the tribunal or voluntarily. The sections pertaining to Winding up by the Tribunal have been notified and put into force. The procedure for the same is given hereunder:

1. According to the circumstances in which a company can be wound up under section 271 of The Act , a petition has to be filed by the creditor to the tribunal for the winding up of a company **under Section 272** of the Act. The petition can be presented by any company , creditor, contributory , registrar , any person authorized by Central Government or in cases of national security and integrity, the State or Central Government itself.

Every petition , application or reference shall be filed in form as provided in Form No. NCLT. 1. Any attachments have to be accompanied in Form No. NCLT. 2. Every petition , application or reference has to be verified by an affidavit in Form No. NCLT. 6. **(Rule 34)**

2. The tribunal on receipt of such petition for winding up shall pass an order under **section 273** of The Act within 90 days from the date of presentation of the petition. The tribunal can dismiss it, make an interim order, appoint a provisional liquidator, make an order for winding up or make any other order in its regard.

3. Under the same section, the tribunal shall give notice to the opposite party before appointing a provisional liquidator and give them opportunity to make their representations. Such notice has to be provided in Form No. NCLT. 5. (**Rule 34**)

4. If the tribunal is satisfied that it is a prima facie case for winding up, the tribunal may, under **section 274** of The Act, by order, direct the company which is bound to be wound up, to file its objections along with a statement of affairs within 30 days of the order. The tribunal may grant extension of 30 days in special circumstances.

5. If an order for winding up has been passed by the tribunal under section 273 (1) (d), then under **section 274** of The Act, the directors and other officers of the company have to submit the completed and audited books of accounts of the company within 30 days of such order being passed by the tribunal to the provisional liquidator. If the requirement is contravened, the director or officer shall be liable for fine and imprisonment under section 274 (4).

6. The tribunal shall appoint a provisional liquidator or a company liquidator at the time of passing an order for winding up of the company. On appointment of such provisional or company liquidator under **section 275** of the act, such liquidator shall file a declaration within 7 days from the date of appointment about any conflict of interest or lack of independence in respect of his appointment.

The tribunal may appoint the provisional liquidator as the company liquidator for the conduct of proceedings for the winding up of a company.

The liquidator so appointed can also be removed and replaced under **section 276** for reasons of misconduct or fraud or misfeasance or professional incompetence etc.

7. After the tribunal appoints a provisional liquidator or passes an order for winding up, the tribunal within 7 days from the date of passing such order, intimate the same to the liquidator and the registrar.

Then the registrar shall endorse the same and notify about the order in the official gazette under **section 277**. If the company is a listed company the registrar has to notify the same in the stock exchange where the securities of the company being wound up are listed.

Within 3 weeks of such order of winding up, the Company liquidator shall make an application to the tribunal to constitute a Winding Up Committee to assist and monitor the process of liquidation. The convener of meeting conducted by such committee will be the Company Liquidator. He has to place before the tribunal a report about the meeting on monthly basis. He shall prepare a draft final report for approval of the committee and the final approved report will be submitted by the Company liquidator to the tribunal to pass dissolution order for the company.

8. No other legal suit or proceeding can commence against the company once an order for winding up has been passed by the tribunal. (**section 279**)

9. The tribunal shall have jurisdiction under **section 280** of the act to either dispose or entertain certain suits or proceedings or claims against the company.

10. The next step is that the Company liquidator, under **section 281** of the act, has to submit a report to the tribunal within 60 days of passing of order of winding up. The report must consist of particulars as mentioned in the section. The liquidator may also have to make a report on the viability of the business of the company and any further reports as he deems fit.

11. After properly scrutinizing the report by the company liquidator, the tribunal, under **section 282** of the act, shall fix a time within which the entire proceedings shall be completed and the company shall be dissolved.

12. The tribunal may also order sale of the company. For the same a sale committee under **section 282** of the act may be appointed to assist the company liquidator in this matter.

13. If the report of the liquidator speaks of fraud in respect of the company, the tribunal will conduct an investigation and order the company liquidator to file a criminal complaint against persons involved in that fraud, under **section 282(3)** of the act.

14. Next, upon the order of winding up being passed, the company liquidator, under **section 283** of the act, on the order of the tribunal, shall take into his custody and control all the property, effects or actionable claims to which the company is entitled. The property of the company shall be deemed to be in the custody of the tribunal from the date of passing of winding up order. The liquidator may call upon any person specified to give any papers, books, assets or money in their possession to the liquidator.

15. Further, the tribunal under **section 285** of the Act, settle a list of contributories, cause rectification where needed and cause the assets of the company to be applied for discharge of its liabilities.

16. While passing the order of winding up, the tribunal shall pass an order to set up an advisory committee under **section 287** of the Act, to advise the liquidator and report to the tribunal as directed. It shall consist of 12 members being members, creditors or contributories of the company.

The company liquidator shall convene a meeting of creditors and contributories of the company within 30 days from the date of order of winding up so that the tribunal can decide the composition of the committee. The committee shall be chaired by the Company Liquidator.

17. The Company Liquidator under **section 288** of the act is liable to make periodical reports to the tribunal to update the tribunal about the progress of winding up.

18. Powers and duties of a company liquidator have been given under **section 290** of the act.

19. The company liquidator may appoint professionals to assist him in performance of his duties under **section 291**. The directions given by the creditors shall override the directions given by the advisory committee. The liquidator has to keep proper books of accounts at all times. (**section 293**)

20. Under **section 294** it is mandatory for the liquidator to present the tribunal with account of receipts and payments of the company. The tribunal shall cause the accounts to be audited. After that one copy of the audit has to be given to the tribunal and to the registrar by the company liquidator. Further the company liquidator will print the summary of the audit and post it to every creditor and every contributory.

21. Next, the contributories may be called upon to pay debt i.e. money payable to the estate by him personally. It may be set off. The tribunal under **section 296** may call the contributories to pay to the extent of their liabilities.

22. The tribunal has power under **Section 299** of the act to summon persons suspected of having company property , examine any officer or person summoned , reduce his answers to writing and require him to sign them. The tribunal can require the liquidator to file a report with respect to property of the company in possession of other persons.

23. The tribunal has power under **section 300** to examine the directors and promoters iif any fraud has been reported by the company liquidator.

24. Then when the affairs of the company have been completely wound up, the company liquidator shall make an application to the tribunal for dissolution of such company under **section 302** of the act.

The tribunal shall make an order that the company be dissolved from the date of the order and the company shall be dissolved accordingly.

Within 30 days, a copy of the order has to be sent to the registrar by the company liquidator. The registrar shall record the same in the register.

25. Under **section 324**, all debts of the company shall be admissible as evidence against the company.

The tribunal may also require the parties to give evidence – if any – by affidavit. Every affidavit filed before the tribunal shall be in Form No. NCLT. 7. **(Rule 39)**

26. Further any fraudulent preferences , transfers not in good faith, certain other transfers and floating charges shall be void as per the act. Transfers after commencement of winding up are also void. Any attachments or sale are void. Also the company liquidator shall disclaim any onerous property within 12 months after commencement of winding up. **(Sections 328-335)**

27. Offences and penalties for fraud by officers , liability for not maintaining proper books of accounts and personal liability of any member of company to defraud the creditors are punishable. Same has been given under sections 336 to 339 of the act.

28. Every invoice, order or business letter when the company is being wound up should contain a statement that the company is being wound up. (**section 344**)

29. The next step is that when the affairs of the company have been completely wound up , and it is about to be dissolved, its books and papers have to be completely disposed in the manner as the tribunal directs. This is a mandate under **section 347** of the act.

30. Official liquidator shall make payments into RBI, the company liquidator shall deposit money in scheduled bank. But under no circumstance can any liquidator deposit money in their private accounts. (**sections 349 – 351**)

31. The tribunal has power under **section 356** of the act to declare within 2 years of the dissolution, any dissolution void and then the proceedings will be undertaken in a way that the company has not been dissolved.

32. Official liquidator under **section 359** should be appointed by the tribunal who shall be a whole-time officer of the central government.

33. The official liquidator shall dispose all assets of the company within 60 days of his appointment. He shall serve a notice to the debtors of the company to deposit any amount payable within 30 days. The amount that he receives has to be deposited in RBI. (**section 362**). Within 30 days of his appointment the official liquidator shall call creditors to prove their claims. He shall prepare a list of claims. Each creditor shall be communicated in writing of their claims being accepted or rejected. (**section 363**)

34. Any aggrieved creditor can appeal to the central government within 30 days of such decision. The official liquidator shall make payment to those creditors whose claims have been accepted. (**section 364**)

35. Finally, if the official liquidator is satisfied that to company is wound up , he will submit a report to the central government and tribunal. On the receipt of such report , the central government or tribunal shall order the company to be dissolved. Upon such order , the registrar will strike off the name of the company from the register or companies and publish a notification to its effect. (**section 365**)

#### **OTHER IMPORTANT DETAILS:**

- Where the assets of the company do not exceed 1 crore rupees then the company may be wound up through summary procedure under **section 361** of the act.
- The winding up of a company by tribunal shall be deemed to commence at the time of the presentation of petition for winding up. (**section 357**)
- Notice to the respondent to show cause against the petition on hearing date, Form No. NCLT. 5 has to be filled. (**rule 37**)
- Every party may appear in front of the tribunal himself or through a representative. Authorized representative shall make an appearance through filing a vakalatnama or a Memorandum of Appearance in Form No. NCLT. 12. (**rule 45**)