

Sub: Note on Members Voluntary Winding up and on de functioning of the Companies

Dear Sir,

With reference to the discussion, we further would like to throw light on the issues viz:
Members Voluntary Winding up and securing status of defunct Company.

Members Voluntary Winding up

Circumstances

- 1) If Company by Special Resolution has resolved that the Company be wound up.
- 2) Default of delivering statutory report to Registrar of Companies.
- 3) Non commencement of business for one year or more.
- 4) Number of members reduced below specified number.
- 5) Company unable to pay its debts.
- 6) If court is of opinion that it is just and equitable for Co. to be wound up.

Procedure For Members Voluntary Dissolution
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| <ol style="list-style-type: none">1. Convene the Board Meeting to consider broadly financial position of the Company to make necessary declaration Under Rule 313 of the Companies (Court) Rules, 1959, draft resolution for the members voluntary liquidation, appointment of Liquidator(s) etc.2. Pass the aforesaid resolutions as Special/Ordinary Resolution as the case may be.3. Within 10 days of passing the necessary resolution file the notice as prescribed with ROC and Special resolution within 30 days.4. Submit to the liquidator a statement on the company's affairs in Form no. 57 in duplicate duly verified by affidavit in Form No. 58 within 21days of the Commencement of winding up proceedings.(Section 454 read with section 511A and Rule 127 of the Companies (court) Rules 1959.5. Within 14 days of passing of the resolution for voluntary winding -up, give notice of the said resolution by advertisement in the Official Gazette and also in some local newspapers.6. Liquidators also required intimating his appointment to the ROC in Form No. 152 and publishing the same in the Official Gazette in Form No. 151.7. Liquidator so appointed have been assigned a number of duties, which he is |
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supposed to perform which inter-alia includes seeing the interest of creditors and acting accordingly.

8. Liquidator's supposed to complete the winding-up by realizing all assets and paying off all liabilities and returning share capital and surplus, if any.
9. As soon as the affairs of the Company are fully wound up, prepare the liquidator's account of the winding up in Form No. 156 and get the same audited.
10. Call the final General Meeting by giving notice in Form no. 155, by giving advertisement not less than one month before the meeting in Official Gazette and in some local newspapers.
11. Also pass the special resolution for the disposal of the Books of Account of the Company.
12. Within a week of the final meeting file the copy of the above accounts with the ROC (which shall register them) and Official Liquidator (who shall make a scrutiny) in prescribed form.
13. Then finally Official Liquidator is required to report to the High Court and accordingly the case is disposed off by the High Court on merit.

* Please note that the above check list conclude the provisions in brief and subject to no default on account of creditors and passing the resolutions with requisite quorum and majority, failure of which may require some more meeting and applicability of other provisions.

Defuncting of the Company (Sec. 560)

After a company is incorporated, irrespective of its activities, there are certain mandatory responsibilities and obligations which it is required to discharge. This includes preparation of annual accounts, getting them audited, filing income tax return, filing annual return with the Registrar of Companies (ROC) and so on. The directors of the company are responsible for discharging such duties and obligations of the company, failing which the company and its Directors are liable to be penalized.

Sometimes, the purpose for which the company was formed has already been achieved; or the purpose may never be achieved for some reason. Sometimes, no activities are being carried on in the company and the company for all practical companies is a defunct company. Since the winding up and dissolution of a company involves intervention of a court of law and is a time consuming process, many managements do not wish to dissolve a company. The company becomes defunct. Under these circumstances, it is advisable for the promoters/directors of such company to shut down

the company i.e. to remove the name of the company from the register of companies maintained by the ROC. The provisions of Section 560 of the Companies Act, 1956 (the Act) apply to such companies.

According to the provisions of section 560 of the Act, a company is **deemed to be a defunct company** if it does not carry any business or is not in any operation. Under such circumstances, the ROC has the power to strike out the name of the company from the register, after following the prescribed procedure.

PROCEDURE FOR DEFUNCTIONING OF THE COMPANY (By striking off of the name from Register of Companies)
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Majority of Directors should make a declaration of solvency (in Form 149)

- If a company is not carrying on any business and the directors have no intention of carrying on any business, it is better to close down by voluntary liquidation and in such situation, application has to be made to ROC for striking off the name. There is no prescribed format for application.
- Alongwith the application, an **Affidavit** from the managing director / whole time director or by two directors if there is no managing / whole time director is to be submitted to the effect that the Company has no assets or liabilities as on date and the company has not been carrying on any business during the last one year or more evidenced by the latest audited Balance Sheet and Profit & Loss Account of the Company must be filed.
- **Indemnity Bond from the aforesaid Managing / Whole-time Director of the company or by two Directors as the case may be, to the effect that the liabilities of the company, if any, shall be met up by them even after the name of the company is struck off from the Register must also be filed.**
- The latest available **audited balance-sheet must** be attached to the documents. The Balance Sheet should reflect that there were no business activities for at least one year and the company has no liabilities.
- A **notice** has to be issued to the concerned Income Tax Officer before striking off the name of the company indicating the date of incorporation, registered address and stipulating that if no reply/objection is received within 3 months from the date of notice, the name will be struck off.
- A **letter** will be send by ROC to the company by ordinary post to enquire

whether the company is carrying any business or is in operation.

- If the ROC does not within one month of sending the letter as referred above, receive any answer thereto he shall, after fourteen days (after the expiry of one month) send to the company a **registered post letter** referring to the first letter. This would mention that a letter has been sent to him and that no reply has been received. It will also mention that if no reply is received to the second letter within one month of the date of the letter, a notice will be published in the Official Gazette with a view to striking of the name of the company from the register.
- The ROC may get no response from the company or the company may reply saying that it is not carrying on any business or is not in any operation. On the other hand, there may not be any response from the company. In both situations, the ROC **may publish the aforesaid notice in Official Gazette** and send the notice to the company by registered post.
- After the expiry of 3 months from the above mentioned notice, the name of the company shall be struck off, unless sufficient cause shown to substantiate that the name of the company should not be struck off.

Effect of striking off

Even when the name of the company is struck off, the liability of directors, manager or any person exercising the powers of management shall continue and liability may be enforced as if the company has not been dissolved.