

MEMBERS' VOLUNTARY WINDING UP

29. Circumstances in which voluntary winding up may be made

A company may be wound up voluntarily, in case—

(i) where a company is formed for undertaking a fixed object and the articles provide that the company is to be dissolved on the completion of the object, the company may be dissolved voluntarily where an ordinary resolution is passed at a general meeting;

(ii) where the proposal is approved by a special resolution passed at the general meeting of the company.
(See Appendix 2)

30. Publication of the resolution of winding up

Section 485 provides that where a company has passed a resolution for voluntary winding up, notice of the resolution shall be given within 14 days of the passing of the same by advertisement in the Official Gazette and also in some newspaper circulating in the district where the registered office is situated.

31. Commencement of winding up

In terms of the provisions of section 486 of the Act, a voluntary winding up shall be deemed to commence at the time when the resolution for voluntary winding up is passed by the members.

32. Company may carry on business activities until the order for winding up is passed

In case of *Orkay Industries Ltd. v State of Maharashtra* (1999) 32 CLA 94 (Bom), it was held that it could not be said that on the presentation of petition for winding up, the affairs of a company would come to a standstill. Mere presentation of winding up petition would not prevent the company from continuing its business and its directors would not cease to be directors until an order of winding up is passed by the Court (now Tribunal) or a provisional liquidator had been appointed.

33. Declaration of solvency

Section 488 of the Act provides that in case of a members' voluntary winding up, within five weeks immediately preceding the date of the passing of the resolution a declaration shall be made by two directors or where there are more than two directors, by a majority of the directors, at a meeting of the Board of directors, to the effect that they have made a full enquiry into the affairs of the company and that, having done so, they have formed the opinion that the company has no debts or that it will be able to pay its debts in full within such period not exceeding three years from the commencement of the winding up as may be specified in the declaration.

The declaration should also be duly verified by an affidavit and it should be accompanied by a copy of the report of the auditors of the company or the profit and loss account from the date upto which the last such account was prepared and ending with a date on close to the date of declaration as possible and on the balance sheet as on that date. The declaration and the auditor's report shall be filed with the Registrar of Companies with the e-Form 62 before the date of the resolution.

In case where the declaration has not been so made and delivered, it will be treated as a creditors voluntary winding up. Therefore, requirement of section 488(2) is mandatory in nature in as much as not only a declaration is required to be made but the same is required to be delivered within the period as provided under clause (a) of sub-section (2) of section 488 of the Companies Act. [*Surat Dyes v Arya Silk Mills Pvt. Ltd.* (2005) 125 Comp Cas 212 (Guj)].

34. Appointment and remuneration of liquidator

Section 490 provides that in a members' voluntary winding up, the company in general meeting shall:—

(a) appoint one or more liquidators for the purpose of winding up the affairs and distributing the assets of the company; and

(b) fix the remuneration of the liquidator or liquidators.

Before the remuneration of the liquidator is fixed as aforesaid, he shall not take charge of his office. The remuneration of the liquidators cannot be increased in any case.

35. Notice of appointment of liquidator to the Registrar

Section 493 provides that the company shall within 10 days of the appointment of the liquidator or liquidators give notice of the appointment to the Registrar with the e-Form 62. Where any vacancy arises in the office of the liquidator, such vacancy shall be filled up by the company in general meeting and notice of the same shall be given to the Registrar.

36. Duties of the liquidator

Where the liquidator is of the opinion that the company will not be able to pay its debts in full within the period stated in the declaration as per section 488, or where that period has expired without the debts having been paid in full, he will call a meeting of the creditors and place before them a statement of the assets and liabilities of the company.

In the event of the winding up continuing for more than a year, the liquidator shall call a general meeting of the company within three months from the end of each year and place before the meeting full details of his acts and dealings and of the position of winding up.

37. Final meeting and dissolution

Section 497 says that where the assets are enough to pay the debts of the company, the liquidator shall call a general meeting and place before it an account of the winding up and how the property has been disposed off. The meeting shall be called by publishing a notice in the Official Gazette and also in some newspaper circulating in the district where the registered office of the company is situated.

Within one week of the meeting, the liquidator shall send to the Registrar and the official liquidator a copy each of the account and make a return to each of them. Where the meeting could not be held for want of quorum, even then the liquidator shall send a return to the above officers within one week of the date of the meeting.

The Official Liquidator shall scrutinise the books and papers of the company and make a report to the Court/Tribunal whether the affairs of the company have not been conducted in a manner prejudicial to the interests of its members or to the public interest and make an order that the company shall be deemed to be dissolved from the date of the report to the Court/Tribunal.

Where the report of the Official Liquidator states that the affairs of the company have been conducted in a manner prejudicial to the interests of its members or to public interest, the Court/Tribunal shall direct the Official Liquidator to make a further investigation. On receipt of the further report of the Official Liquidator, the Court/Tribunal may either make an order that the company shall stand dissolved from the date specified by the Court/Tribunal or make such other order as the circumstances of the case demand.

38. Procedure for members' voluntary winding up

The company which proposes to proceed for voluntary winding up its affairs is required to comply with the following procedure for effective voluntary winding up:—

1. Convene a Board meeting by issuing notice to all the directors of the company as per provisions of section 286.
2. Within five weeks, immediately preceding the date of resolution for winding up, make sure that the company can pay its debts in full within a period of three years, if the company is put to liquidation and make a declaration therein to this effect in Form 149 prescribed under rule 313 of the Companies (Court) Rules, 1959. The declaration should also be verified by an affidavit.
3. Ensure that the aforesaid declaration is accompanied by:—
 - (i) the audited balance sheet and the profit and loss account ending on the latest practicable date before the date of declaration;
 - (ii) a statement of the company's assets and liabilities as at that date; and
 - (iii) a copy of the report of the auditors of the company on the above two documents. [Section 488(2)]
4. Approve in the said Board meeting the draft of the resolution for putting the company into members' voluntary winding up, appointing liquidator(s) and fixing his/their remuneration and it should also fix the date, time, place and agenda of the general meeting. [Sections 484 and 490]
5. If the winding up takes place as per the period or event determined in the articles of association, then the resolution required will be an ordinary resolution, otherwise a special resolution will be required. [Section 484(1)]
6. Confirm that a body corporate is not appointed as a liquidator. [Section 513]
7. The declaration mentioned in Item No. 2 above should be duly verified by an affidavit before a Judicial Magistrate and deliver the same with the concerned Registrar, with the e-Form 62 before the general meeting is held for passing the resolution for winding up. [Section 488(2)(a)]
8. Issue notices for the general meeting (not less than 21 days before the meeting) in writing proposing the ordinary or special resolution, as the case may be, with suitable explanatory statement. [Section 484(1)(a) and (b)] (Appendix 2)
9. Hold the general meeting and pass the ordinary resolution by ordinary majority or special resolution by 3/4th majority for winding up as the case may be.
10. It should be noted carefully that the winding up shall commence from the date and time of passing the requisite resolution by the members at their meeting.
11. In case of the listed company, forward promptly to all the stock exchanges in which the company is listed, 6 copies of notice and a copy of the proceedings of the general meeting.

12. Within 10 days of the passing of the resolution, file a notice with the e-Form 62 electronically with the concerned Registrar for the appointment of liquidator after paying a requisite fee as prescribed under Schedule X to the Companies Act, 1956 in the prescribed manner.
13. Submit to the liquidator a statement on the company's affairs in the prescribed form in duplicate, duly verified in e-Form 58 within 21 days from the commencement of winding up.
14. File the certified copies of the special or ordinary resolution as the case may be for winding up alongwith the explanatory statement with the concerned Registrar within 30 days of its passing in e-Form 23 with the requisite fees as per Schedule X of the Act.
15. Within 14 days of passing of the resolution for voluntary winding up, give a notice of the resolution in the Official Gazette and also advertise at least in two newspapers, one in English and one in local language circulating in the district where the registered office of the company is situated. [Section 485(1)]
16. In case of a listed company, forward promptly to the stock exchange with which the company is listed, 6 copies of the resolution advertised as above.
17. Confirm that the liquidator files a notice of his appointment with the concerned Registrar together with the e-Form 62 in Form 152 of the Companies (Court) Rules, 1959, and publish the same in the Official Gazette in Form 151 of the said rules within 30 days of his appointment. [Section 516 and rule 315 of Companies (Court) Rules, 1959]
18. Also confirm that the liquidator gives notice of his appointment to the Income Tax Commissioner having jurisdiction on the company within 30 days of his appointment. [Section 178 of the Income-tax Act, 1961]
19. If vacancy occurs by death, resignation or otherwise in the office of the liquidator, call a general meeting to fill up the vacancy and also inform to the concerned Registrar about the vacancy and repeat the formalities as in items 12, 15 and 17 hereof.
20. If the liquidator at any time form an opinion that the company will not be able to pay its debts in full within the period stated in the declaration of solvency or that the period has expired without the debts having been paid in full, he has to summon forthwith a meeting of the creditors, and lay before the meeting a statement of the assets and liabilities of the company in Form 150 of the Companies (Court) Rules, 1959. [Section 495 and rule 314 of the Companies (Court) Rules, 1959]
21. In case if the process of winding up continues for more than a year, liquidator shall call a general meeting within 3 months from the end of every year from the date of commencement of winding up, or within such longer period as the Central Government may allow and lay before the meeting thethe account of his acts and dealings together with the statements in Form 153 of the Companies (Court) Rules, 1959, and duly verified in Form 154 of the said Rules. [Section 496]
22. Where the case falls under item 21, the meeting of creditors is also required to be like wisely called except, in case of the meeting at the end of the first year where the same shall not be required to be called unless the meeting held under item 20 hereof has been held more than 3 months before the end of the year. [Rule 328 of the Companies (Court) Rules, 1959 and section 498]
23. If the winding up is not concluded within a year after its commencement then the liquidator shall file a statement with the concerned with the e-Form 62 electronically Registrar twice in every year. [Rule 327 of the Companies (Court) Rules, 1959]
24. The first year's statement should be duly audited for the full year, that is the period commencing from the appointment of the liquidator to the end of twelve months, from the commencement of winding up and thereafter subsequent statement in every 6 months. [Form 153 of the Companies (Court) Rules, 1959]
25. The aforesaid 2 statements should be duly verified in Form 154 of the said Rules and file the same with the concerned Registrar, electronically with the e-Form 62 within 12 months from the end of the year. [Rule 327 of the Companies (Court) Rules, 1959 and section 551]
26. The auditor's report should be in the form as agreed to between the Government and the Institute of Chartered Accountants of India, a draft of which may be taken from the concerned Registrar.
27. Even where there is no receipt and payment, the aforesaid statement is required to be filed stating this fact.
28. Complete the winding up by realising all assets and paying of all liabilities and returning the share capital and surplus, if any.
29. The provisions of sections 426 to 432, 452, 487, 491, 511, 511A, 512, 514, 515, 517 to 520, 528 to 549 and 553 to 556 and the prescribed forms and Rules of the Companies (Court) Rules, 1959, should also be noted in this respect.

30. As soon as affairs of the company are fully wound up, prepare the liquidators account of the winding up in Form 156 of the Companies (Court) Rules, 1959 and get the same audited as stated in Item No. 20 above. [Section 497]

31. Call the final general meeting by giving notice in Form 155 of the Companies (Court) Rules, 1959. The notice has to be given not less than 1 month before the meeting in the Official Gazette and should also give advertisement in some newspaper circulating in the district where the Registered Office of the company is situated. [Section 497]

32. If the case falls in Item No. 20 hereof then call the creditors meeting also. [Section 498]

33. The company should also pass the special resolution for disposal of the books and papers of the company when the affairs of the company are completely wound up and it is about to be dissolved. [Section 550]

34. Within a week of the final meeting (and where the case falls within item 16 then within a week of members' meeting or the creditors' meeting, whichever is held later), file a copy of the above account with the concerned Registrar with the e-Form 62 electronically as well as with the Official Liquidator and file a return to each of them in Form 157 of the Companies (Court) Rules, 1959.

35. If required quorum is not present, in the aforesaid meeting, file a return in Form 158 of the Companies (Court) Rules, 1959. [Rule 331 of the Companies (Court) Rules, 1959]

36. The Registrar, on receiving the account and either the return mentioned in sub-section (3) of section 497, or the return mentioned in sub-section (4) of section 497, shall forthwith register them. [Section 497(5)]

37. The Official Liquidator, on receiving the account and either the return mentioned in sub-section (3) of section 497, or the return mentioned in sub-section (4) of section 497, shall as soon as may be, be, make a scrutiny of books and papers of the company and the liquidator and all officers, past or present, of the company shall give the Official Liquidator all reasonable facilities to do so.

38. If on such scrutiny the Official Liquidator makes a report to the Court/Tribunal that the affairs of the company have not been conducted in a manner prejudicial to the interest of its members or to the public interest, then, from the date of the submission of the report to the Court/Tribunal, the company shall be deemed to be dissolved. [Section 497(6)]

39. If on such scrutiny the Official Liquidator makes a report to the Court/Tribunal that the affairs of the company have been conducted in a manner prejudicial, as aforesaid, the Court/Tribunal shall by an order direct to the Official Liquidator to make further investigations of the affairs of the company and for that purpose shall vest him with all such powers as the Court/Tribunal may deem fit. [Section 497(6A)]

40. On receipt of the report of the Official Liquidator on such further investigation, the Court/Tribunal may either make an order that the company shall stand dissolved with effect from the date to be specified by the Court/Tribunal therein or make such other order as per the circumstances of the case brought out in the report. [Section 497(6B)]

41. File the special resolution mentioned in item 32 with the concerned Registrar within thirty days of passing in the e-Form 23 electronically after paying the requisite fee prescribed under Schedule X to the Companies Act, 1956 in the prescribed manner.

42. The Court/Tribunal may in a fit case declare the dissolution void within two years of the date of dissolution on application by the liquidator of the company or by any other person who appears to the Court/Tribunal to be interested.

43. A person who obtains the said order of the Court/Tribunal shall file the certified copy of the Court/Tribunal's order with the Registrar in the e-Form 21 electronically within 30 days or such further time as may be allowed by the Court/Tribunal after paying the requisite fee prescribed under Schedule X to of the Companies Act, 1956 in the prescribed manner.

39. Authority to dispose of property after commencement of winding up

In case of *Orkay Industries Ltd. v State of Maharashtra* (1999) 32 CLA 94 (Bom), it was held that section 536(2) would come into play and there could be no disposition of property after issuance of order for winding up or appointment of provisional liquidator by the Court (now Tribunal) and transaction relating to payment to creditors would not be wide immediately on presentation of petition for winding up.

40. Disposition made during interregnum not null and void

It is difficult to lay down that all disposition of property made by a company during the interregnum between the presentation of a petition for winding up and the passing of the order for winding up would be null and void. If such a view is taken the business of the company would be paralyzed for, the company may have to deal with very many day-to-day transactions, make payments of salary to the staff and meet

urgent contingencies. If any such view is adopted, a fraudulent company may deceive any *bona fide* person transacting business with the company by stage-managing a petition to be presented for winding up in order to defeat such *bona fide* customers.

41. Cheque issued after presentation of winding up petition do not amounts to disposition of the company's property

When once it is held that payment is not void *ab initio* the company cannot contend that it is legally forbidden from making payment of the cheque amount when the payee regarding dishonor of the cheque issued notice. A cheque can be an order on the banker to pay the amount to the holder thereof and no disposition of property would take place until the banker makes the payment pursuant thereto. At the most drawing of a cheque can be considered as a step towards disposition of property but that is insufficient to amount to disposition of property. [*Pankaj Mishra v State of Maharashtra* (2000) 36 CLA 316 (SC)].