WINDING UP

Note:- Please refer this chapter only after study of Insolvency and Bankruptcy Code,2016

Introduction : In IBC we have learnt how a corporate debtor can get liquidated if CIRP results in negative on petition filed by

- Financial Creditor (FC)
- Operational Creditors (OC)
- And Corporate Debtor itself (CD)

But what if, Shareholders, ROC, Central government want to file petition for winding up of the Company to NCLT, hence circumstances other than circumstances covered by IBC, 2016, winding up will be governed by this Chapter XX of Companies Act 2013.

VARIOUS MODES OF WINDING UP

- Compulsory winding up under the Insolvency and Bankruptcy Code, 2016 (due to inability to pay debts)
- Compulsory winding up under section 271 of the Companies Act,2013 (reason other than inability to pay debts)
- Voluntary winding up under the Insolvency and Bankruptcy Code, 2016
- Voluntary winding up of companies not covered by the Insolvency and Bankruptcy Code, 2016
- Dissolution in a scheme of merger under section 230 to 240 of the Act, 2013
- Dissolution by striking off name of a defunct company under section of the Act, 2013
- Winding up of small companies
- Winding up of unregistered companies under section 375 to 378 of the Act, 2013
- Winding up of Indian business of foreign companies under section 270 to 303 of the Act, 2013

WINDING UP

Chapter XX of the Companies Act, 2013 consists of sections 270 to *365 related to winding up*
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Chapter XX of the Companies Act, 213 has been divided into 4 Parts, as follows:

I. Part I: Winding up by the Tribunal: Sections 270 to 303
II. Part II: Voluntary winding up: Sections 304 to 323 (All these sections have been omitted by the Insolvency and Bankruptcy Code, 2016)
III. Part III: Provisions applicable to every mode of Winding up: Sections 324 to 358
IV. Part IV: Official Liquidators: Sections 359 to 365.

The meaning:- `Winding up' means winding up under this Act or liquidation under the Insolvency and Bankruptcy Code, 2016, as applicable [Section2 (94A)].

The provisions of Part I of companies act shall apply to the winding up of a company by the Tribunal under this Act (ONE AA under 2 acts)

CIRCUMSTANCES FOR WINDING UP BY TRIBUNAL

According to Section 271 of Companies Act, 2013 a company may, on a petition under section 272, be wound up by the Tribunal,—

- if the company has, by special resolution, resolved that the company be wound up by the Tribunal;

- 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;

- 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;

- 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

- if the Tribunal is of the opinion that it is just and equitable that the company should be wound up.

WHO CAN FILE PETITION?

According to Section 272 a petition to the Tribunal for the winding up of a company shall be presented by—

- The company,
- Any contributory or contributories (the shares were originally allotted to him; or he has held his shares for at least 6 months during the 18 months immediately preceding the commencement of winding up; or the shares have been devolved on him by reason of the death of a member)

  A contributory shall be entitled to present a petition for the winding up of a company, notwithstanding that —
  - *i) he may be the holder of fully paid-up shares; or*
  - *ii) the company may have no assets at all; or*
  - *iii) the company may have no surplus assets left for distribution among the shareholders after the payment of its liabilities.*

- AII or any of the persons specified in clauses (a) and (b), The Registrar; with previous approval of CG (Company acting against the security of the country etc, Where the affairs of the company have been conducted fraudulently, Non-filing of financial statements or annual returns by the company)
- Any person authorized by the Central Government in that behalf; or In a case falling under clause (b) of section 271, by the Central Government or a State Government*(the sovereignty and integrity of India; or the security of the State; or, friendly relations with foreign States; or public order; or decency; or morality)*
- A copy of every petition made to the Tribunal for winding up of a company shall also be filed with the Registrar. The Registrar shall submit his views to the Tribunal within 60 days of receipt of such petition.

WHAT ARE THE POWERS OF THE TRIBUNAL (SECTION 273)

On receipt of a petition for winding up under section 272,NCLT can make Following orders:-

a) Dismiss it, with or without costs.

b) Make any interim order as it thinks fit.

c) Appoint a provisional liquidator of the company till the making of a winding up order.

d) Make an order for the winding up of the company with or without costs. The Tribunal shall not refuse to make a winding up order merely because of the reason that —

   a) the assets of the company have been mortgaged for an amount equal to or in excess of those assets; or
   b) the company has no assets.

e) Any other order as it thinks fit.

It is important to note that The Tribunal shall pass its order within 90 days from the date of presentation of the petition.

CONDITIONS TO APPOINT A PROVISIONAL LIQUIDATOR

Before appointing a provisional liquidator, the Tribunal shall —

- give notice to the company;
- grant to the company a reasonable opportunity to make its representations, if any.

However, the Tribunal may not give such notice if it is of the opinion that there is some special reason because of which notice need not be given to the company. The Tribunal shall record in writing such special reasons

NCLT DUTY

According to Section 274 of the Companies Act, 2013

a) Where a petition for winding up is filed before the Tribunal by any person other than the company, the Tribunal shall, if it is satisfied that a prima facie case for winding up of the company is made out, by an order direct the company to file its objections along with a statement of its affairs within 30 days of the order in such form and in such manner as may be prescribed.

b) However, the Tribunal may allow a further period of 30 days in a situation of contingency or special circumstances.

c) The Tribunal may direct the petitioner to deposit such security for costs as it may consider reasonable as a precondition to issue directions to the company.

d) If a company fails to file the statement of affairs, then —

i. the company shall not have a right to oppose petition and

ii. a complaint may be filed in this behalf before the Special Court by Registrar, provisional liquidator, Company Liquidator or any person authorized by the Tribunal, and thereupon the directors and officers of the company liable for such non- compliance, shall be liable for imprisonment upto 6 months or with fine which shall not be less than Rs. 25000 but which may extend to Rs. 5 lakh, or with both.

It is also interesting note that when an order of winding up of a company is passed by the Tribunal, the directors and officers of the company shall, within 30, days, submit to the liquidator, the books of account of the company duly completed and audited upto the date of the order of the tribunal.

DUTY OF LIQUIDATOR

According to section 275(6) It is duty of provisional liquidator or liquidator to file a declaration of independence with tribunal within 7 days of appointment as provisional liquidator or Company Liquidator, he shall give a Declaration disclosing conflict of interest or lack of independence in respect of his, appointment, if any. Such obligation shall continue throughout the term of bus appointment

SPECIFIC REPORTING BY LIQUDATOR

1. About Promoters Fraud:-The Company Liquidator shall include in his report the manner in which the company was promoted or formed and whether in his opinion any fraud has been committed by any person in its promotion or formation or by any officer of the company in relation to the company since the formation thereof and any other matters which, in his opinion, it is desirable to bring to the notice of the Tribunal.

2. Report About viability of business :- a report on the viability of the business of the company or the steps which, in his opinion, are, necessary for maximizing the value of the assets of the company.

3. Any other matters which liquidator thinks fit to report

FRAUDULENT PREFERENCE

According to section 328 where a company has given preference to a person who is one of the creditors of the company or a surety or guarantor for any of the debts or other liabilities of the company, and the company does anything which has the effect of putting that person into a position which, in the event of the company going into liquidation, will be better than the position he would have been in, if that thing had not been done prior to 6 months of making winding up application, the Tribunal, if satisfied that, such transaction is a fraudulent preference may order as it may think fit for restoring the position to what it would have been if the company had not given that preference.

If the Tribunal is satisfied that there is a preference transfer of property, movable or immovable, or any delivery of goods, payment, execution made, taken or done by or against a company within 6 months before making winding up application, the Tribunal may make such order as it may think fit and may declare such transaction invalid and restore the position.

TRIBUNAL ACTION BASED ON LIQUIDATOR REPORT

1. Fixing time for completion of the Winding up process
2. Constitution of sale committee

3. Order of investigation and filing of criminal complaint in case fraud is reported
4. Order of Tribunal for protection or preservation of assets
5. The Tribunal may pass such other order or give such other directions as it may consider fit.

POWERS OF TRIBUNAL TO FORM ADVISORY COMMITTEE

Accordng to section 287 of the companies act the Tribunal may, while passing an order of winding up of a company, direct that there shall be an advisory committee to advise the Company Liquidator and to report to the Tribunal on such matters as the Tribunal may direct.

constitution, meeting , proceedings and rights of such Advisory Committee

Constitution:- The advisory committee appointed by the Tribunal shall consist of not more than 12 members, being creditors and contributories of the company or such other persons in such proportion as the Tribunal may, keeping in view the circumstances of the company under liquidation, direct.

Meetings:- The Company Liquidator shall convene a meeting of creditors and contributories, as ascertained from the books and documents of the company, within 30 days from the date of order of winding up, for enabling the Tribunal to determine the persons who may be Members of the advisory committee.

Rights :- The advisory committee shall have the right to inspect the books of account and other documents, assets and properties of the company under liquidation at a reasonable time.

Procedure for meetings :-The provisions relating to the convening of the meetings, the procedure to be followed thereat and other matters relating to conduct of business by the advisory committee shall be such as may be prescribed.

Important to note that the meeting of advisory committee shall be chaired by the Company Liquidator.

COMMON POINTS

- A copy of the dissolution order of tribunal shall, within 30 days from the date thereof, be forwarded by the Company Liquidator to the Registrar who shall record in the register relating to the company a minute of the dissolution of the company.

- when the accounts of the company have been audited, one copy thereof shall be filed by the Company Liquidator with the Tribunal, and the other copy shall be delivered to the Registrar which shall be open to inspection by any creditor, contributory or person Interested.

- any person describing himself in writing to be a creditor or a contributory of the company shall be entitled by himself or by his agent at all reasonable times to inspect the report of liquidator