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LIQUIDATION PROCESS UNDER INSOLVENCY AND BANKRUPTCY CODE

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Abstract

This Article is written by Shanti Gupta, a student of Indian Institute of Legal Studies, Siliguri. This article provides insights into what are the applicable laws that governs the voluntarily liquidation process, what are the pre-requisites for opting the voluntarily liquidation process, who can be the liquidator, what will be the process flow, what are the taxation aspect also discussed in this article. Starting a company seems to be easy today, there are a lots of start-ups norms favouring, the new business ventures. Some of them have already been implemented even, but the way one can start a company so easily, it is equally important that one knows the activity involved in the winding up process as well. This paper is an attempt to discuss in brief the liquidation process. It tries to take an overview of the Liquidation process under insolvency and Bankruptcy Code

Various modes of Exit in India

Mergers and Amalgamations- Under Section 230-232 of the Companies Act, the transferor company dissolves without any explicit exit application.

Voluntary Liquidation- Under Section 59 of the Insolvency and a Bankruptcy Code, 2016, Insolvent Liquidation under Section 33 of the Code (only after insolvency resolution process has failed),

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Winding-Up by NCLT- Under Section 271 of the Companies Act, 2013 Winding-Up by National Company Law Tribunal (NCLT) in cases other than default.

Summary Liquidation-Under Section 361 of the Companies Act, 2013 National Company Law Tribunal (NCLT) is replaced by the Regional Director. or,

Striking off- Under Section 248 of the Companies Act, it also known as fast track exit route for cos., having MIL assets and liabilities.

Most convenient method which strikes to our mind, is that what will be the most convenient method in a particular circumstance to close the business affairs of the company. As a parameter to determine the same are

- Pre-requisite
- Process
- Cost involved
- Time taken
- Barriers on exist due to the status of the company.

As the status of the company varies from cases to cases, here comes the role of the professional, suggesting the most suitable mode of closing the affairs of the company, examining the various factors involved.

Voluntarily Liquidation

Voluntarily Liquidation means closing the affairs of a solvent company. Solvency means the capability of a company to pay off all its debt. So the company which is capable enough to meet all its liabilities, can be called solvent company and that company if intends to exist can opt for voluntarily liquidation process.

Provisions dealings with voluntarily liquidation

Section 59 of Insolvency and Bankruptcy Code deals with the Voluntarily liquidation process and the detailed process are provided in the IBBI (Voluntarily Liquidation Process) Regulations, 2017.

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The Voluntarily liquidation process were governed by the provision of 1956 Act, and the company's codes, rules as well. Though there were provision in Act 2013, as well as regarding the Voluntarily liquidation process, however the same never came into effect. In the earlier Act there were two methods prescribed for voluntarily liquidation

- Member's voluntarily Winding-Up and,
- Creditor's voluntarily Winding-Up.

However no, such differentiation is provided in the code. Earlier any professional, would have acted as a liquidator of the company but now only the insolvency professional can act as a liquidator. Earlier the adjudicating authority was High Court but now is National Company Law Tribunal (NCLT). Earlier, there were a role of Official Liquidator but now there is no role of official liquidator, insolvency professional can directly report to the NCLT after completion of the process.

Who can be a liquidator?

- Under Insolvency and Bankruptcy Code, only an insolvency professional can be appointed as a liquidator. Earlier any professional could be appointed as a liquidator and role of professional liquidator can be come to the end of the process. Now under Insolvency and Bankruptcy Code, only an insolvency professional can be appointed as a liquidator. Further, the eligibility criteria have also been provided, like the insolvency professional must be independent.
- It should be eligible to be appointed as an independent director of the Company.
- It should not be the related party of the company.
- He has not been appointed as employee or proprietor of partner.

So the liquidator, whenever he comes to the knowledge of any pecuniary relationship, he has to disclose that relationship to the board and to the registrar.

Mode of Appointment

This is same as that of the provision of Act 1956, earlier the board of directors of the company were responsible to appoint the liquidator and subject to the approval of shareholders. Under the report, this method is same, the board of directors of the company select insolvency professional

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to take of the matter, to whom should be responsible to close the affairs of the company for the beneficial liquidation of the company and that will be used as the subject of approval of shareholder. Once approved by the shareholder, the role of liquidators starts from the date of passing of special resolution itself.

Preliminary Requirement of Voluntarily Liquidation

If, I want to close my company can I choose voluntarily liquidation method and can I, take an exist. The answer lies in the section 59 of the code, which says a corporate person who intends to liquidate itself voluntarily and has not committed any default may initiate voluntarily liquidation proceeding under the provision of the chapter. Further regulation (3) of the voluntarily liquidation process, regulation also provides that without prejudice to section 59 sub-section 2 of liquidation proceeding of a corporate person shall meet the following conditions:

Declaration of solvency, from majority of directors of the company in case of Limited Liability Partnership it is require to obtain from the DPS of the company and that should be verified by an affidavit, that they have made the inquiries into the affairs of the company and have formed the opinion that either the corporate person has nodded or it will able to pay that in full from the proceeds of the assets to be sold by the liquidators. And the corporate person is not paying liquidated to defraud any person. This declaration has to be accompanied by audited financial statement and the report from the register value regarding the access of the company and the company have fixed assets. Thus, the pre-requisite for obtaining the voluntarily liquidation process are

- The company should be solvent. It means the assets of the company are sufficient to meet it liabilities and therefore we take a declaration of solvency from majority of the directors of the company. This declaration say's that the directors have made full inquiry into the affairs of the company and having made so, they have formed the opinion that the assets of the company are sufficient to meets it's liability. As per regulation this declaration shall be accompanied by the audited financial statement of the previous two years or from the incorporation whichever is later and by the valuation report from the registrar valuer if the company has fixed assets, then only it require to take valuation from the registrar valuer.
- It is not getting liquidated with the intent to defraud anyone.

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Process of Voluntarily liquidation

Voluntarily liquidation process commences from the date of passing of special resolution, so the process take the declaration of solvency from the directors of the company, pays the declaration of solvency at board meeting. The board of directors has to give their consent to the voluntarily liquidation process and to the appointment of the particular insolvency professional, as a liquidator then within 4 weeks of passing of board resolution, the company has to have a general meeting, where it's has to plays the declaration of insolvency and that to afford of the consent of at least 2/3rd of the total number of shareholders if at all the company has creditors, it has to take approval of the 2/3rd of creditors of the company. And the liquidation process commences from the date of passing of special resolution itself, in case the company has creditors then from the date of passing of creditor resolution. Once the liquidation commence the role of liquidator start, so the liquidator has to intimate insolvency and bankruptcy board of India (IBBI), ICSI, Registrars of company itself and all the governing authorities regarding the commencement of voluntarily liquidation as well as bank, where the company have it active bank account itself. And the liquidators has to made public announcement for inviting claims from stakeholders of the company. Claims can be filed by financial creditors, employee, operational creditors, workman or by any stakeholders. There are separate firms provided in the regulation itself. So there is 30 days of time within which these stakeholder are required to submit the claims, they can submit the claims after as well. The liquidator must intimate to the income tax authorities as per Section 178 and Section 176 of the income tax Act within 30 days of commencement of voluntarily liquidation process. Then the liquidator is required to submit preliminary reports within 45 days of commencement of voluntarily liquidation process. There 4 kinds of report that the liquidators are required to submit the entire process.

- Preliminary report,
- Annual status report,
- State holder's consultation report and,
- Final report.

The fees of the liquidator are determined by the at board level itself and the liquidators has the right to negotiate. Unlike the compulsory liquidator, the fees of the liquidator and the expense incurred during the entire process from the part of the liquidation cost only. If there are any

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uncalled capital then in that case the liquidator is required to call that uncalled capital, to send notice to the contributories to pay the same within 15 days. If not paid, no distribution shall be made to the said contributor. The liquidator is required to open the bank account. In the name of the corporate person following by the words involuntary liquidation or if there are existing bank account of the company the liquidator can opt for changing the existing name of the company. This account is being opened to receive all the money and to make payment of their all the dues during the liquidation process. Unlike compulsory liquidation process, there is no waterfall mechanism, that first the liquidator must pay the financial creditors then operational creditors as provided under Section 53. When the liquidator releases all the assets and pay off all its liabilities. He has to prepare a final report and has move to the NCLT for dissolution application, once confirmed by the NCLT after hearing, the company becomes dissolved and the order of the NCLT has to be filed with the registrar of companies within 14 days, in form INC 28.

Reference:

1. <http://www.legalserviceindia.com/legal/article-1059-liquidation-process-and-asset-distribution-under-ibc.html>.
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