NSA LEGAL

Ahmedabad | Delhi | Jodhpur | Mumbai

WINDING UP: PRACTICE,PROCEDURE & PROVISIONS

Adv. Nipun Singhvi

Founding Partner

B.Com.(Hons.), LLB, LLM(Corporate Laws),CS, FCA, Certified M&A (IIM-Ahmedabad), Certified IFRS- Forensic Accountant (ICAI), Certified Con. Bank Aud, Qualified Independent Director (MCA)-IP (IBBI)

Winding up: Definition:

Section 2(94A) of Companies Act 2013:

- "**Winding up**" means winding up under **Companies Act** or liquidation under the **Insolvency and Bankruptcy Code,2016**,(IBC)as applicable.
- Definition of "Liquidation" not provided under IBC"

Insolvency

- CIRP

Liquidation

- Sale of Assets

Dissolution

- Closure

Prior to 15.12.2016 under Companies Act 2013
i,.e before Substituted by IBC

- Modes of winding up:

(1)Winding up by the Tribunal or

(2) Voluntary Winding up

After 15.12.2016 ,Voluntary winding up as mode of winding up is deleted.

(i.e Section 270 is deleted under Companies Act 2013)

Prior to 15.12.2016

Circumstances in which Company may be wound up:

(a) **Inability to pay debts**

(b) Special resolution passed by the Company that the Company be wound up by the Tribunal

(c) Company has acted against the interest of sovereignty and integrity of India.

(d) **If the Tribunal has ordered for winding up under Chapter IX**

(e) On an application made by ROC, Tribunal is of the opinion that the affairs of the Company have been conducted in fraudulent manner

(f) Default in filing financial statements or annual returns for immediate preceding five consecutive financial years

(g) Tribunal is of the opinion that it is just and equitable that the Company be wound up.

After 15.12.2016 clause (a) and (d) is deleted

Chapter-XX, Part-I&III-Winding up by Tribunal
Section 271 to 303;Section 324 to 358
Companies(Winding up) Rules 2020 enforced on 1st April 2020

- Section-271-Circumstances in which Company may be wound up by Tribunal

Circumstances	BY
Special resolution passed by the Company that the Company be wound up by the Tribunal	By Company
Company has acted against the interest of sovereignty and integrity of India.	Registrar, Central or state Govt.
On an application made by ROC, Tribunal is of the opinion that the affairs of the Company have been conducted in fraudulent manner.	Registrar,Any person authorized by Central or State Govt.
Default in filing financial statements or annual returns for immediate preceding five consecutive financial years	Registrar
Tribunal is of the opinion that it is just and equitable that the Company be wound up.	Any party

Who can file Petition for winding up?

a.The Company

b.Any contributory/contributories

All or any persons specified in (a) &(b)

Registrar

(Registrar shall be entitled however previous sanction of RD to be taken by him).

Any person authorized by the Central or State Government

By the Central or State Government

Procedure for Winding up by the Company.

- Petition to be filed with NCLT in **Form WIN-1** for admission and direction for advertisement regarding Petition
- Advertisement to be published not less than 14 days before the date of hearing.
- Objection to the Petition for winding up to be made within 30 days of the order
- Reply to the objection to the petition to be filed not less than seven days before the day fixed for hearing.
- Order for winding up by Tribunal , Appointment of Company Liquidator (CL) & Stay of suits etc. except with leave of Tribunal.
- Advisement regarding Final order passed by the Tribunal regarding winding up within 14 days of the date of order
- CL to take charge of the assets, books and papers.First report by the CL to be submitted to Tribunal within 60 days, within 7 days of the receipt of same, Tribunal may fix the date of hearing for consideration of same and pass order as required
- Creditors to prove debts/claim
- Provisional list of Settlement of contributories to be prepared by CL not less than 21 days from order. Hearing and objection in this regard shall also be done by the Tribunal and final list be certified

Within 3 weeksof order,application for constitution of Winding up Committee.

Tribunal may direct for formation of advisory Committee-consisting of certain contributories and creditorsMeeting of creditors and contributories details to be filed with Registry of Tribunal

Sale by CL-No assets can be sold of the Company without prior approval of Tribunal

When the affairs of Company are fully wound up, Company Liquidator shall file an application for dissolution of Company. Upon application filled, the Tribunal orders for dissolution

Winding up is concluded on the day the order is filled with ROC

Companies Act, 2013

Section 280 :

Jurisdiction of Tribunal

Overriding section to decide the claims, suits

Any question of priority or any other questions

Similar to Section 60 (5)(c)

Section 429 :

Power to seek assistance of CMM

District collector etc.

Take custody of assets or under control

Property, books of account or other docs

Arrest of person

Section 301 :

Restrain from foreign travel

Detainment

Books and papers, movable property

Difference between winding up under section 271 of Companies Act and under IBC

Particulars	Companies Act 2013	IBC-Section 7,9 or 10
Circumstances	As mentioned under Section 271	Inability to pay debt by the Company(minimum amount Rs 1crore)
Who can file Application for winding up?	The Company/Contributaries,Registrar/Central or State Government	By Financial or Operational Creditor or by the Company itself
Liquidation Stage	Direct process of liquidation	Company is first given opportunity for revival before Liquidation.
Time Limit	Time of completion of process decided by the Tribunal(282)	Time bound process,liquidation to be completed within a year
Liquidator	Appointed by Tribunal	Appointed by Tribunal ,however recommendation made by applicant under Section 7& 10
Priority of Payment of Debt	As per Section 326 & 327	As per Waterfall mechanism under Section 53

Particulars	Companies Act 2013	IBC
Position of Government dues	Government dues comes under preferential payment i.e after Workmen and secured creditors	Government dues are paid after financial debts to unsecured creditors also paid
Submission of claim and Time limit	14 days time for submitting proof of claim as per advertisement, if creditor not satisfied with decision of liquidator in respect of rejection of claim ,may within 21 days appeal to the Tribunal.Also if creditor fails to file proof within period mentioned in advertisement ,such creditor may apply within 15 days from time specified in advertisement and the Tribunal shall adjudicate upon the same.(Rule 112,116,123)	Liquidator to collect claims within 30 days from Liquidation commencement date,the creditor may appeal against the decision of rejecting the claim within 14 days of receipt of such decision.

Section 326 :-Overriding Preferential Payment.

Following debts to be paid in Priority of all other debts:

- (a)Workmen's dues; and
- (b)Where a **secured creditor** has realized a secured asset, so much of the debts due to such creditor as could not be realized by him or the amount of workmen's portion in his security, whichever is less, pari passu with the workmen's dues.
- Workmen's dues means all wages or salary ,all accrued holiday remuneration, PF, Pension, Gratuity or any other fund for welfare of workmen
- (a) & (b) payable for a period **of 2 years preceding** the winding up order

Section 327:Preferential payments

- Subject to Section 326,there shall be paid in priority of all other debts:
- (a) all revenues ,taxes ,cesses & rates due to Central or State Govt.or local authority at the relavent date and become due and payable within 12 months immediately before the date
- (b) all wages or salaries of employees and due for a period not exceeding 4 months within 12 months immediately before the relavent date
- (c) all accrued holiday remuneration payable to employee
- (d) Amount due in contribution payable during 12 months immediately preceeding the relavent date under ESI Act

Section 178 of Income-tax Act, 1961

178. (1) Every person—

(*a*) who is the liquidator of any company which is being wound up whether under the orders of a court or otherwise ; or

(*b*) who has been appointed the receiver of any assets of a company; (hereinafter referred to as the liquidator) shall, within thirty days after he has become such liquidator, give notice of his appointment as such to the Income-tax Officer who is entitled to assess the income of the company.

(2) The Income-tax Officer shall, after making such enquiries of calling for such information as he may deem fit, notify to the liquidator within three months from the date on which he receives notice of the appointment of the liquidator the amount which, in the opinion of the Income-tax Officer, would be sufficient to provide for any tax which is then, or is likely thereafter to become, payable by the company.

(3) The liquidator—

(*a*) shall not, without the leave of the Commissioner, part with any of the assets of the company or the properties in his hands until he has been notified by the Income-tax Officer under sub-section (2) ; and

(*b*) on being so notified, shall set aside an amount, equal to the amount notified and, until he so sets aside such amount, shall not part with any of the assets of the company or the properties in his hands :

- No NOC from the Income Tax Department by the Liquidator under IBC.

- As per the provisions of the Code and the Regulations read with Section 178 of the Income-tax Act, 1961, an Insolvency Professional handling voluntary liquidation process is not required to seek any NOC/NDC from the Income Tax Department as part of compliance in the said process.

IBBI CIRCULAR No. No. IBBI/LIQ/45/2021

HIGH COURT OF RAJASTHAN (JAIPUR BENCH)
Income-tax Officer v. Official Liquidator of Golcha Properties (P.) Ltd. (dt. 20.12.1977)
(S. B. COMPANY PETITION NO. 5 OF 1977)

- In Golcha Properties Pvt. Ltd. v. ITO [1974] 94 ITR 11 (Raj.), it was held that the ITO must take leave of the court before issuing notice under section 178 of the I.T. Act. Taking into consideration the ratio decidendi laid down in the above referred rulings, leave is hereby granted to the petitioner to issue notice in connection with the advance tax pertaining to the year 1978-79 (accounting year 1977-78). It would, however, be open to the court, after the tax liability has been quantified, to pass such orders as are deemed fit and proper to safeguard the interests of the company and its creditors.

HIGH COURT OF DELHI
Commission Commercial Tax, Govt. of Madhya Pradesh
v.
Official Liquidator.
(dt. 22.11.2012)
(CO.A (SB) NO. 22 OF 2008)

- Hon'ble court held that Provisions of Section 529-A of Companies Act (a Central legislation) have to be override the provisions of Section 53 of the M.P. Commercial Tax Act of 1994 (a State legislation). Even otherwise as noted supra Section 53 of the Act of 1994 (under which the appellant is claiming his right) clearly specifies that the tax liability will be subject to the provisions of Section 530 of the Companies Act; Section 530 of the Companies Act has to be read subject to the provisions of Section 529-A of the said Act. There appears to be no conflict between the State Act and the Central Act. That apart, even if there is a conflict between a State legislation and a Central legislation, the Central legislation must prevail.

HIGH COURT OF GUJARAT
Commissioner of Income-tax-II
v.
Official Liquidator of Gujarat Telephone Cables Ltd. (dt. 30.06.2014)
(CO. APPLICATION NOS. 245 OF 2012, 525 OF 2008, 286,295 OF 2011 AND 208, 209 & 210 OF 2013 CO. PETITION NO. 253 OF 2008)

- Hon'ble court held that : On examination and analysis of the said section 178 it emerges that throughout the section there is nothing in the said section which, apart from asking the liquidator to set aside assets sufficient to meet possible tax liabilities (or to set aside sufficient amount), commands the liquidator to pay the tax dues in preference over all other dues and it neither creates any special right nor does it confer preferential ranking or higher priority in favour of Government or the Department or tax dues, and it does not place tax dues or the dues of State / Department in a position higher or better than what is conferred by and what is available under Companies Act.
- Actually, the order of priority in matter of payment is prescribed by virtue of section 529A read with section 530 of the Companies Act and not in the Income Tax Act and the obligation which is created under section 178 of the Income Tax Act, does not override the right of priority and preference created by and under section 529A of the Companies act.

Para 26 : that (a) when the assets with load of mortgage rights of mortgagee / secured creditors are sold; and

(b) when the amounts / proceeds in the hands of liquidator are received from sale of such assets; and

(c) when the secured creditors allow such sale of mortgaged assets while reserving their "charge" (i.e. "first charge") over the assets in question; and (d) when the Official Liquidator has come forward with request for permission to disburse amounts to secured creditors and workmen covered within purview of section 529A; and (e) when the demand for payment of tax dues viz. capital gain tax, tax on income from Fixed Deposit, etc. is raised in respect of income and/or gain (if any) received after relevant date, the question of restraining the liquidator from discharging the dues of the secured creditors and workmen covered under section 529A of the Act does not arise and such claim and submission cannot be sustained. Therefore, the said submission should fail.

- Hon'ble court held that Once Income-tax is assessed, claim for recovery is subject to section 446(2)The liquidation Court would have full power to scrutinize the claim of the revenue after income-tax has been determined and its payment demanded from the liquidator. It would be open to the liquidation Court then to decide how far under the law the amount of income-tax determined by the department should be accepted as a lawful liability on the funds of the company in liquidation. At that stage the winding up Court can fully safeguard the interests of the company and its creditors under the Act.

Thus, once the income-tax is assessed, the claim for the recovery is subject to section 446(2).

HIGH COURT OF DELHI
Sales Tax Officer
v.
Byford Ltd. (dt. 06.05. 1982)
(COMPANY APPEAL NO. 3 OF 1981)

NCLAT
Rasiklal S. Mardia Vs Amar Dye Chem & Ors.
Company Appeal (AT) No.337 of 2018

- NCLAT held that the NCLT could not exercise jurisdiction for adjudicating the application for scheme of compromise/arrangement which had been moved by the Appellant, in liquidation proceeding on being divorced from the liquidation/winding up proceeding.
- We have no doubt that a scheme of compromise and arrangement can be filed even when liquidation proceeding is pending but if such application/petition is filed, it would be a proceeding relating to the winding up going on and the same has to be in the same forum

HIGH COURT OF GUJARAT
Lalitaben Govindbhai Patel & 2 Ors.
Vs
Gujarat State Financial Corp. & 8 Ors.
R/Letters Patent Appeal No. 2480 Of 2010 In R/Special Civil Application No. 12979 of 2009

- There has been evolution and development of new law also in this regard in India also and not only the **Old Companies Act, 1956** stands substituted by the **New Companies Act, 2013** which too has been amended from time to time, but the **Insolvency and Bankruptcy Code, 2016** has also been enacted by the Parliament which repealed several such other laws like **SICA, 1985** etc. The **NCLT** has been empowered to undertake the insolvency resolution or winding-up of the corporate bodies under the **New Special Law viz. IBC, 2016**

- we have referred and relied upon the judgment of the Hon'ble Supreme Court only in the case of **Action Ispat and Power Private Limited Vs. Shyam Metalics and Energy Limited** rendered by the Hon'ble Supreme Court on 15.12.2020 by three Judges Bench (Judgment Authored by Hon'ble Mr. Justice Rohinton Fali Nariman. In which the Hon'ble Supreme Court has clearly laid down in Paragraph No.22 quoted above that *the winding up Court or the Company Court should transfer the windingup proceedings to NCLT, not only at the initial stage, but even in the mid stage of winding-up proceedings, unless the winding-up proceedings have reached a stage where it would be irreversible and making it impossible to set the clock back and then only that the Company Court must proceed with the winding-up, instead of transferring the proceedings to NCLT under IBC provision.*

Continue….

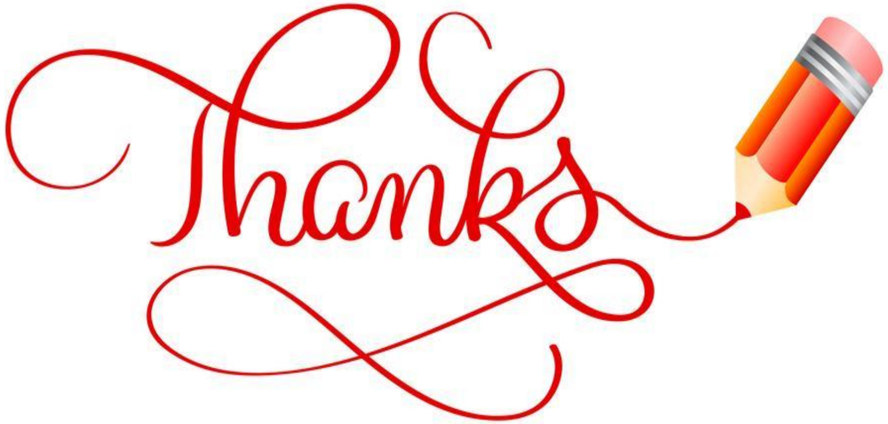
- We are therefore of the considered opinion that entire litigation of these two corporate bodies viz. **GPPML** and **SIL** deserves to be decided by the **NCLT** by examining the claims, counter-claims, defences and other relevant aspects of all the parties involved in the matter afresh in respect of both the corporate entities in question **GPPML** & **SIL**
- we make our aforesaid proposed order absolute now and dispose of this Letters Patent Appeal No.2480 of 2010 as well as Special Civil Application No.11116 of 2008 by requesting the learned Company Judge, who is seized of the winding-up proceedings of Company Petition No.**139 of 1985** to consider all the aforesaid relevant aspects of the matter and then take appropriate decision in the matter to transfer the winding-up proceedings to **NCLT, Ahmedabad Bench** which we strongly recommend

NCLT BENGALURU

Antrix Corporation Ltd. v. Devas Multimedia Pvt. Ltd. and Anr.

C.P.No.06/BB/2021

- Hon'ble NCLT Bengaluru ordered winding up of Devas Multimedia Pvt Ltd
- NCLT held that the facts clearly established that Devas was incorporated with fraudulent intention to grab a prestigious contract in collusion with a few corrupt officials of Antrix. In the present matter, the NCLT opined that it was not a dispute that Devas did not possess minimum experience even to qualify to participate in the process of awarding the Agreement, much less obtaining it.
- NCLT held that it was a settled position in law that the misdeeds and illegal acts committed by the corrupt officials of Antrix would not bind the State, and those actions being *void-ab-initio* would not result in any legal or civil consequences. It was observed that Devas devised the Agreement to bring foreign funds into India and then siphon off the same by diverting those funds into suspicious accounts.



NSA LEGAL

Ahmedabad | Delhi | Jodhpur | Mumbai

Nipun Singhvi

Advocate

B.Com.(Hons.), LLB, LLM(Corporate Laws),CS, FCA, Certified M&A (IIM-Ahmedabad), Certified IFRS- Forensic Accountant (ICAI), Certified Con. Bank Aud, Qualified Independent Director (MCA)-IP (IBBI)

+91 98290 31411
nipunsinghvi@yahoo.com
nipun@nsalegal.in