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DIVIDEND

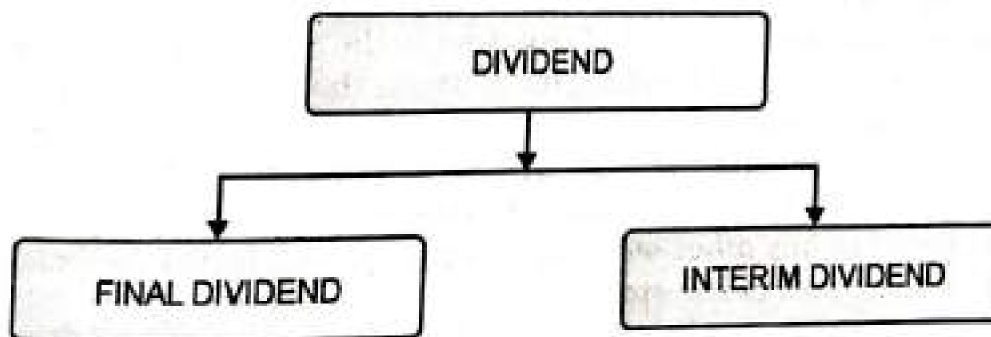
MEANING

When a company earns a surplus, the money can be put to two uses :

- It can be re-invested in the business as retained earnings; or
- It can be paid to the shareholders in the form of dividend.

Many corporations retain a portion of their earnings and distribute the remainder as Dividend. Receiving a dividend is good for investors because they get a guaranteed return on their investment, in addition to any potential stock appreciation.

"Dividend" means the profit of a company, which is not retained in the business and is distributed among the shareholders in proportion to the amount paid-up on the shares held by them. Dividends are usually payable for a financial year after the final accounts are ready and the amount of distributable profits is available. No special authority either in memorandum or in the articles is necessary to enable a company to pay dividends. The power is implied.



Dividend for a financial year of the company (which is called 'final dividend') is payable only if it is declared by the company at its annual general meeting on the recommendation of the Board of Directors. Sometimes dividends are also paid by the Board of Directors between two annual general meetings without declaring them at an annual general meeting (which is called 'interim dividend').

The companies having license under Section 8 of the Act are prohibited by their constitution from paying any dividend to its members. They apply their profits in promoting the objects of the company.

DEFINITION

Section 2(35) of the Companies Act, 2013 states that 'Dividend *includes* Interim Dividend'.

All the provisions which are applicable to final dividend are equally applicable to interim dividend.

The payment of dividend is bound by two fundamental principles :
Firstly, the dividends must never be paid out of capital.
Secondly, the dividends shall be paid only out of profits.

INTERIM DIVIDEND

As per the Companies Act, 2013, the Board of Directors of a company may if permitted by the articles, declare interim dividend during any financial year out of the surplus in the Profit and Loss Account and out of profits of the financial year in which such interim dividend is sought to be declared. *[The Companies (Amendment) Act, 2017]*

However, in case the company has incurred loss during the current financial year up to the end of the quarter immediately preceding the date of declaration of interim dividend, such interim dividend shall not be declared **at a rate higher than the average dividends declared by the company during the immediately preceding three financial years.**

Features applicable to Interim Dividend :

- All other provisions of dividend shall apply mutatis mutandis to interim dividend.
- Interim dividend is declared before the preparation of financial statements.

Like final dividend, interim dividend once declared cannot be revoked.

DIFFERENCE BETWEEN INTERIM AND FINAL DIVIDEND

Final Dividend	*Interim Dividend*
Final Dividend is declared by Shareholders in AGM.	Interim Dividend is declared by Board of Directors in Board Meeting.
Final Dividend is proposed by Board of Directors.	Interim Dividend is also proposed by Board of Directors.
It is proposed and declared after preparation of final accounts.	It is proposed and declared before finalization of final accounts.
Final Dividend is declared in AGM.	Interim Dividend is declared between two AGM.

PROCEDURE OF PAYMENT OF FINAL DIVIDEND

(1) ***Board Meeting*** : A meeting of the Board of Directors will be convened.

(2) ***Agenda of the meeting*** shall mention, amongst others, the following : (a) Approval of Annual Accounts (Balance Sheet and Statement of Profit and Loss of the Company for the year ended); (b) Recommendation of Payment of Dividend to the shareholders at the proposed rate at the forthcoming Annual General Meeting; (c) To decide the Book Closure period/Record Date to determine the eligible holders of shares for the purposes of declaration of Dividend; (d) Approving the date, time, place of AGM and draft Notice of AGM, including authorizing Company Secretary or where no Company Secretary is appointed or available then the Chairman of the Board or any other authorized person as the Board feel competent, to issue Notice on behalf of the Board of Directors.

(3) ***Director's Report*** : As per Section 134(3)(k) the Director's Report should mention the amount proposed to be declared as Dividend. However, if no dividend is proposed for declaration then a statement to that effect shall be mentioned.

(4) ***Annual General Meeting*** : Conduct the AGM at the scheduled time and place. Required quorum must be present at the meeting. Shareholders has the right to reschedule the amount of dividend as proposed by the Board of Directors. However, the Shareholders has no right to increase the rate of Dividend as originally proposed by the Directors. They can only reduce the same. Shareholders shall pass Ordinary Resolution for approving the Dividend.

(5) ***Opening of Special Account*** : Immediately on approving of Dividend by the Shareholders a Special Account with scheduled bank will be opened for depositing the total amount of Dividend.

(6) ***Credit of Total Amount Payable to Dividend Account*** : Within 5 days of declaration of Dividend, total amount of Dividend payable shall be credited in the special bank account opened for distribution of Dividend to eligible shareholders.

(7) ***Distribution of Dividend*** : Prepare a list of eligible shareholders and statement of dividend thereon. Dividend must be distributed within 30 days of declaration. Necessary arrangement with Bank should be made for payment of Dividend.

(8) ***Dividend Tax*** : Ensure that the dividend tax is paid to the tax authorities within the prescribed time.

(9) Additional Compliances for Listed Companies while distribution of Dividend (Final/Interim) under SEBI (ICDR) 2015 :

(a) ***AGM*** : Intimation to Stock Exchange of annual general meeting or extraordinary general meeting or postal ballot that is proposed to be held shall be given.

(b) ***Record Date*** : The listed entity shall give notice in advance of record date specifying the purpose of the record date, at least seven working days (excluding the date of intimation and the record date) to stock exchange(s). The listed entity shall recommend or declare all dividend and/or cash bonuses at least five working days (excluding the date of intimation and the record date) before the record date fixed for the purpose.

(c) ***Dividend*** : The listed entity shall declare and disclose the dividend on per share basis only.

LEGAL PROVISIONS RELATING TO DIVIDEND

The following are the various legal provisions relating to Dividend under the Companies Act, 2013 :

(1) ***Sources for declaration of dividend*** (*Section* 123) : No dividend shall be declared or paid by a company for any financial year *except* :

(a) *Out of the profits of the company for current year* arrived at after providing for depreciation or

(b) *Out of the profits of the company for any previous financial year* arrived at after providing for depreciation in accordance with the provisions of that sub-section and remaining undistributed, or

(c) *Out of both* (Current year Profits + Past years undistributed profits)

"Provided that in computing profits, any amount representing unrealized gains, notional gains or revaluation of assets and any change in carrying amount of an asset or a liability at fair value shall be excluded." or

(d) *Out of money provided by the Central Government or a State Government* for the payment of dividend by the company in pursuance of a guarantee given by that Government (*Government Grants*).

However, before the declaration of any dividend in any financial year, a company may transfer such percentage of its profits for that financial year *as it may consider appropriate* to the reserves of company. Further, where, owing to inadequacy or absence of profits in any financial year, any company proposes to declare dividend out of the accumulated profits earned by it in previous years and transferred by the company to the free reserves, such, declaration of dividend shall not be made except in accordance with such rules as may be prescribed in this behalf. Also, a company shall not declare or pay dividend from its reserves other than free reserves. Furthermore, no company shall declare dividend unless carried over previous losses and depreciation not provided in previous year or years are set off against profit of the company for the current year.

Ascertainment of divisible profits and dividend out of current year's profit :

Calculation of divisible profits :

Profits (as per result of P&L A/c)			xxx
Less :	(a) Current year's depreciation (if not provided)	xx	
	(b) Loss of P.Y. (or) Dep. of P.Y. (whichever is less)	xx	
	(c) Amount to be transferred to reserves	xx	
	Total (a) + (b) + (c)	xx	xx
Divisible profits (such amount can be declared as dividend)			xxx

(2) ***Depositing Dividend*** : The amount of the dividend, including interim dividend, shall be deposited in a scheduled bank in a separate account within 5 days from the date of declaration of such dividend.

(3) ***Dividend Payable in Cash only*** : As per Section 123(5) of the Companies Act, 2013 Dividend shall always be payable in cash. Payable in cash include paid by cheque or warrant or any electronic mode. If the amount is transferable to the Bank account of the shareholders by electronic mode, proper consent and accounts details should be obtained from the shareholders.

(4) ***Payment of dividend only to the registered shareholder*** : No dividend shall be paid by a company in respect of any share therein except to the registered shareholder of such share or to his order or to his banker and shall not be payable except in cash.

However, this provision shall not be deemed to prohibit the capitalization of profits or reserves of a company for the purpose of issuing fully paid up bonus shares or paying up any amount for the time being unpaid on any shares held by the members of the company. Further, any dividend payable in cash may be paid by cheque or warrant or in any electronic mode to the shareholder entitled to the payment of the dividend.

(5) ***No declaration of Dividend in certain cases*** : A company which fails to comply with the provisions of Sections 73 and 74 (relating to deposits) shall not declare any dividend on **its equity shares, so long as such** failure continues.

- Section 73 provides for prohibition on acceptance of deposits from public.
- Section 74 provides for repayment of deposits etc. accepted before commencement of the Act.

(6) ***Disclosures*** : The following disclosures will be made with respect to Interim and Final Dividend :

(a) The Balance Sheet of the company should disclose under the head 'current liabilities and provisions', the amount lying in the Unpaid Dividend Account together with interest accrued thereon, if any.

(b) The Annual Report of the company should disclose the total amount lying in the Unpaid Dividend Account of the company in respect of the last seven years. The amount of Dividend, if any, transferred by the company to the Investor Education and Protection Fund during the year should also be disclosed. The amounts lying in the Unpaid Dividend Account and the amounts transferred to the Investor Education and Protection Fund should also be disclosed in the Directors' Report.

(c) The Annual Return of the company should mention that the amount of Dividend remaining unpaid or unclaimed for a period of seven years from the date such Dividend became payable by the company, together with interest accrued thereon, if any, has been credited to the Investor Education and Protection Fund.

(7) ***Dividend and other rights in case of transfer of shares*** (*Sec.* 126) : Where any instrument of transfer has been delivered to the company for registration and such registration is still pending then not withstanding anything contained in any other provision of the Act, it shall :

(a) Be transferred to 'unpaid dividend account' unless there is a written authorization from the registered holder to pay the dividend in the name of transferee mentioned in the document of transfer.

(b) Be kept in abeyance the offer of bonus shares and right shares, until the matter is finally disposed of.

(8) ***Declared Dividend a statutory debt*** : Once a dividend is declared, it becomes a statutory debt from the company to its shareholders. A dividend which has been declared, but not paid or credited, may be revoked with the consent of shareholders.

(9) ***Punishment for the failure to distribute the Dividend*** (*Sec.* 127) : If dividend is not paid after declaration and warrant in respect thereof has not been posted within 30 days to the entitled shareholders then :

(a) every director of the company shall, if he is knowingly a party to the default, be with imprisonment which may **extend to 2 years** and with fine which shall not be less than ₹ 1,000 per day during which such default continues and

(b) The company shall be liable to pay simple interest at the rate of 18% p.a. during the period for which such default continues.

	Imprisonment	***Fine***
Liability of Company	NA	Interest @ 18% p.a. for the period of default
Every director of Company	May extend to 2 years	₹ 1,000/- for every day, during which such failure continues.

***Exceptions to Sec.* 127** : In the following cases, dividend need not be paid within 30 days of declaration :

- where the Dividend could not be paid by reason of the operation of any law.
- where a shareholder has given directions to the company regarding the payment of dividend and these directions cannot be complied with;
- where there is dispute regarding the right to receive the dividend;
- where the Dividend has been lawfully adjusted by the company against any sum due to it from the shareholder;
- where for any other reason for failure to pay the dividend or to post the warrant within 30 days from the date of declaration of the Dividend, was not due to any default on the part of the company.

DIFFERENCE BETWEEN DIVIDEND AND INTEREST

Dividend	*Interest*
It is paid on preference and equity shares	Interest is paid on debentures and long and short-term loans/borrowings including fixed deposits.
Dividend cannot be paid out of the assets of the company	Interest is a debt which like all debts is paid out of the company's assets generally.
It is an appropriation of profits	It is a charge against profits
Right to claim dividend arises only when it is declared by the company in General meeting and until and unless it is so declared, the shareholder has no claim against the company in respect of it.	Right to claim interest arises as it becomes due.
It becomes a debt only after it has been declared by the company.	It becomes a debt when it becomes due.

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BOOKS OF ACCOUNTS

(Including NFRA, Secretarial Audit and XBRL)

DEFINITION OF BOOKS OF ACCOUNT

[*Section* 2(13)]

"Books of Account" includes records maintained in respect of :

(i) All sums of money received and expended by a company and matters in relation to which the receipts and expenditure take place;
(ii) All sales and purchases of goods and Services by the company;
(iii) The assets and liabilities of the company; and
(iv) The items of cost as may be prescribed under section 148 in the case of a company which belongs to any class of companies specified under that section.

Applicable Rules (*Section* 128 to 138) : Companies (Accounts) Rules, 2014.

PLACE TO KEEP THE BOOKS

[*Section* 128(1)]

Every company shall prepare and keep its books of account and other relevant papers and financial statements on the basis of double entry and on accrual basis at :

(a) At registered office of the company or may be kept in e-form in the manner prescribed.
(b) Can be kept at some other place in India by passing SR.
(c) Intimation to ROC in writing within 7 days about other place from the date of SR.

If books are maintained in electric form [The Companies (Accounts) Rules, 2014].

(1) The maintenance of books of account and other books and papers in electronic mode is permitted and is optional. Such books of accounts or other relevant books or papers maintained in electronic made shall remain accessible in India so as to be usable for subsequent use [the Companies (Accounts) Rules, 2014 hereinafter referred in this Chapter as Rule) (Rule 3(1)].
(2) The information contained in the records shall be retained completely :
   - In the format in which they were originally generated, sent or received, or
   - In a format which shall present accurately the information generated, sent or received and
   - The information contained in the electronic records shall remain complete and unaltered [Rule 3(2)].
(3) The information received from branch offices shall not be altered and shall be kept in a manner where it shall depict what was originally received from the branches [Rule 3(3)].
(4) The information in the electronic record of the document shall be capable of being displayed in a legible form [Rule 3(4)].
(5) There shall be a proper system for storage, retrieval, display or printout of the electronic records as the Audit Committee, if any, or the Board may deem appropriate and such records shall not be disposed of or rendered unusable, unless permitted by law :
   - Provided that the back-up of the books of account and other books and papers of the company maintained in electronic mode, including at a place outside India, if

any shall be kept in servers physically located in India on a periodic basis [Rule 3(5)].

(6) The company shall intimate to the register on an annual basis at the time of filing of financial statement :

(a) The name of the service provider;

(b) The internet protocol address of service provider;

(c) The location of the service provider (wherever applicable);

(d) Where the books of account and other books and papers are maintained on cloud, such address as provided by the service provider [Rule 3(6)].

If company has branch office [Sec. 128(2)] : Whether inside or outside India, the company shall be deemed to comply with the provisions of the Sub-section (1) if :

- Proper books of accounts are maintained by the branch and
- Proper summarized returns within regular intervals shall be sent at company's RO or another place.

Inspection by director [Sec. 128(3)] :

Timing : Any director can inspect the books of accounts and other books and papers of the company during business hours.

Which type of directors may inspect : The company is, therefore, required to make available the aforesaid books and papers for inspection by any directors, such inspection may be done by any type of director - nominee, independent, promoter or whole time.

Accounts of subsidiary company : The provision to Sub-section 3 provides that a director of the company can inspect the books of accounts of the subsidiary, only on authorization by way of the resolution of Board of Directors.

Financial information maintained outside India : Where any other financial information maintained outside the country is required by a director, the director shall furnish a request to the company setting out the full details of the financial information sought and the period for which such information is sought [Rule 4(2)]. The said information shall be provided to director within 15 days of receipt of request [Rule 4(3)].

Seeking information through agent etc. : The director can seek the information only individually and not by or through his attorney holder or agent or representative [Rule 4(4)].

The right to inspect books of account and other books and papers under this section has been provided to the directors only.

The expression "Books and Papers" has been defined in Section 2(12) which includes books of accounts, deeds, vouchers, writings and document.

2(36) "Document" includes summons, notice, requisition, order, declaration, form and register. Whether issued, sent or kept in pursuance not this Act or under any other law for the time being in force or otherwise, maintained on paper or in electronic form;

By Members — Not Allowed

By Director — Yes, but not allowed through agent, etc.

By ROC — Allowed

By NCLT — Allowed

By CG — Allowed.

PRESERVATION OF BOOKS OF ACCOUNTS

- The books of accounts, together with vouchers relevant to any entry in such books, are required to be preserved in good order by the company *for a period of not less than 8 years immediately preceding the relevant financial year*.
- In case g of a company incorporated less than eight years before the financial year, the books of accounts for the entire period preceding the financial year together with the

vouchers shall be so preserved. The provisions of income tax act shall also be complied with in this regard.

- As per proviso to Sub-section 5, where an investigation has been ordered in respect of a company under chapter xiv of the act related to inspection, inquiry or investigation, the Central Government may direct that the books of account may be kept for such period longer than 8 years, as it may deem fit and give directions to that effect.

PENALTY FOR NON-COMPLIANCE OF ABOVE PROVISIONS

Who may responsible : MD, WTD in charge of finance, CFO or any other person authorized by Board for complying with the above provisions.

Penalty : Punishable

- With minimum fine of ₹ 50,000 which may extend to ₹ 5 lakhs

[*Companies (Amendment) Act,* 2020]

AUDITORS

Section 139 as amended by Companies (Amendment) Act, 2017 lays down the following provisions for the appointment of an auditor :

Appointment of Auditor in a Non-governmental Company

First Auditor : To be appointed by Board of directors within 30 days of incorporation, if Board of directors fails to do so then appointed by Shareholders in GM within 90 days of incorporation.

Subsequent Auditor : To be appointed in first AGM who shall hold office till the conclusion of its 6th AGM and thereafter till the conclusion of every 6th AGM but subject to ratification by members of company in every AGM.

Casual vacancy : Casual Vacancy arisen due to Death/Insolvency/Insanity, are to be filled by Board but in case of resignation, vacancy will be filled by Board but subject to ratification by shareholders in General Meeting within 30 days of appointment.

Term of the Auditor : Listed or some specified companies shall not appoint or re-appoint an individual as auditor for more than one term of 5 consecutive years; and an audit firm as auditor for more than two terms of 5 consecutive years. These auditors (either individual/audit firm) can be re-appointed after cooling off period of 5 years.

No audit firm shall be appointed as auditor of the company for a period of 5 years, if same firm presently having a common partner(s) to the previous audit firm, whose tenure has expired in a company, immediately preceeding the financial year.

Notice to the Registrar : Notice of appointment shall be given to Registrar within 15 days of meeting in which the auditor is appointed.

Reappointment of Auditor : An auditor shall not be reappointed under the following circumstances :

(a) He is not qualified for re-appointment

(b) He has given the company a notice in writing of his unwillingness to be re-appointed;

(c) A special resolution has been passed at that meeting appointing somebody else instead of him or providing expressly that retiring auditor shall not be re-appointed.

If no auditor is appointed on re-appointed at any AGM, the existing auditor shall continue to be the auditor of the company. [*Sec*. 139(70)]

Appointment of an Auditor in a Government Company

First Auditor : First Auditor shall be appointed by CAG within 60 days of incorporation if CAG fails to appoint then auditor shall be appointed by BOD within next 30 days but if BOD also fails to do then members shall be informed who shall appoint the auditor within 60 days in EGM. [*Sec*. 139(5)]

Subsequent Auditor : CAG shall appoint subsequent auditor within 180 days from the commencement of financial year who shall hold office till the conclusion of AGM. [*Sec*. 139(5)]

Casual Vacancy : Casual Vacancy of any kind will be filled by CAG within 30 days of vacation but if CAG fails to do then BOD shall fill the vacancy within next 30 days.

Remenuration of Auditor [*Sec*. 142]

First auditor : shall be fixed by BOD.

Subsequent auditor : shall be fixed in GM or manner of fixation shall be determined there.

The remuneration includes out of pocket expenditure : The Remuneration shall include the expenses, if any, incurred by the auditor in connection with the audit of the company and any facility extended to him but does not include any remuneration paid to him for any other service rendered by him at the request of the company.

Specified numbers of Audit which an Auditor can perform : An auditor can audit maximum 20 companies and limit of 20 companies includes :

(a) Public Companies

(b) Private Companies having paid-up capital of ₹ 100 crores or more but this excludes :

(i) Small Companies

(ii) Dormant Companies

(iii) One Person Companies

(iv) Private Companies with capital less than ₹ 100 crores.

[Rule 7]

Removal of Auditor [Section 140 (1) and (5) read with Rule 7]

Removal by Company : The auditor appointed under Section 139 may be removed from his office before the expiry of the term only by :

(i) Prior approval of the CG is obtained by filling in application in Form ADT-2 within 30 days of resolution passed by the Board;

(ii) The company shall hold the GM within 60 days of receipt of approval of the Central Government for passing the special resolution.

(iii) The auditor concerned shall be given a reasonable opportunity of being heard.

[*Sec.* 140(5)]

Removal by National Company Law Tribunal (NCLT)

(i) NCLT can either *suo moto* or an application received from CG or an application from any other person concerned, order or direct the company to change its auditors if it is satisfied that the auditor of a company has, whether directly or indirectly, *acted in a fraudulent manner* or abetted or colluded in any fraud by, or in relation to, the company or its directors or officers.

(ii) Where application is made by CG and Tribunal is satisfied that change of auditor is required, it shall within 15 days of receipt of such application, make an order that he shall not function as an auditor and the Central Government may appoint another auditor in his place.

(iii) Auditor whether individual or firm, against whom final order has been passed by the Tribunal under this section shall not be eligible to be appointed as an auditor of company for a period of 5 years from the date of passing of the order and the auditor shall also be liable for action under Section 447.

[*Sec.* 141(1) and (2)]

Qualifications of the Auditor

Qualification of an Auditor :

- Must be a member of ICAI holding certificate of practice *i.e.*, a practicing C.A :
- A firm of chartered accountants with majority of partners practicing in India :
- A LLP but only CAs are allowed to act or sign as auditors.

[*Sec.* 143(1)]

Powers and Duties of Auditor

Every auditor of a company shall have a right of access to the books of account and vouchers of the company (including all its subsidiaries for the purpose of consolidation) at all times, wherever kept and shall be entitled to seek such information and explanation from the officers of the company as he may consider necessary for the performance of his duties as auditor and it his duty to report the adverse features if he finds some during enquiry.

[*Sec.* 141(3) read with rule 10]

Disqualification of an Auditor

Following persons are not eligible to be an auditor :

- A body corporate, except LLP;
- An officer or employee of the company :
- Any partner/employee of officer or employee of company;
- A person who himself or his relative/partner is holding any security or interest in the company, or any company which its holding is, subsidiary associate;
- A person who or whose relative or partner is indebted to the company or its subsidiary or its holding or associate company or a subsidiary of such holding company, in excess of ₹ 5 lacs shall not be eligible for appointment;
- A person who or whose relative or partner has given a guarantee or provided any security in connection with the indebtedness of any third person to the company, or its

subsidiary, or its holding or associate company or a subsidiary of such holding company, in excess of ₹ 1 lac shall not eligible for appointment;

- A person or a firm who, whether directly or indirectly, has "business relationship" with the company or its subsidiary, or its holding or associate company;
- A person whose relative is a director or is in the employment of the company as a director or key managerial personnel;
- A person who is in full time employment elsewhere;
- Person who is auditor of more than 20 companies;
- A person who has been convicted by a court of an offence involving fraud and a period of 10 years has not elapsed from the date of such conviction;
- Any person whose subsidiary or associate company or any other form of entity, is engaged as on the date of appointment in consulting and specialized services as provided in Section 144.

Auditor's Report

(Sec. 143)

The auditor shall make a report to the members of the company,

- On the accounts and on every B/S and P & L A/c and every other document decided by this act to be part of or annexed to B/S and P & L A/c.
- Which are laid before the company in GM during his tenure of office auditor report shall state : whether, in his opinion and to the best of his information and according to the explanation given to him, the B/S and P & L A/c give :
  - The information required by the act; and
  - A true and fair view of the state of the affairs of the company.

Auditors report shall also state : *(Sec. 143)*

(a) Whether he has obtained all the information and explanation;
(b) Whether, in his opinion, proper books of account have been kept;
(c) Whether the report of branch auditor has been forwarded to him and how he has dealt with the same in preparing his audit report;
(d) Whether the B/S and P & L A/c are in agreement with the books and returns;
(e) Whether AS have been complied with;
(f) The observations or comments of the auditors which have any adverse effect on the statements on the functioning of the company in thick type or in italics;
(g) Whether any director is disqualified from being appointed as director u/s 164.
(h) Auditors report shall also include views and comments on following matters.
  - whether the company has disclosed the impact, if any, of pending litigations on its financial position in its financial statement;
  - whether the company has made provision, as required under any law or accounting standards, for material foreseeable losses, if any, or long-term contracts including derivative contracts;
  - whether there has been any delay in transferring amounts, required to be transferred, to the IEPF by the company.

Section 143(11) of the Act stipulates that the Central Government may order for the inclusion of statement on specified matter in the Auditor's report for specified class of companies. Accordingly CARO 2020 is issued in pursuance of Section 143(11) of the Companies Act, 2013 for inclusion of the matters specified in Auditor's report. Hence, CARO 2020 should be complied by the statutory auditor of every company on which it applies.

(Sec. 144)

Auditor not to provide certain services :

Auditor's services in any case shall not include following services not directly or indirectly even to its subsidiary or holding company.

(a) Accounting and book keeping services;

(b) Internal audit;
(c) Design and implementation of any financial information system;
(d) Actuarial services;
(e) Investment advisory services;
(f) Investment banking services;
(g) Rendering of outsourced financial services;
(h) Management services; and
(i) Any other kind of services as may be prescribed.

(Sec. 145)

Signature on Audit Report :

Auditor shall sign the auditor's report of the company. Any qualifications, observations or comments on financial transactions matters, which have any adverse effect on the functioning of the company mentioned in the auditor's report shall be read before the company in general meeting and shall be open to inspection by any member of the company.

(Section 146)

Right of the auditor to attend the GM :

Auditor has the right to :

- Receive every notice of GM.
- Attend the GM either in person or through his representative who shall also be qualified to be an auditor.
- Speak at the meeting on any matter which concerns him as an auditor.

(Sec. 147)

Penalty for non-compliance or contravention :

If any of the provisions of Sections 139 to 146 (both inclusive) is contravened,

- the company shall be punishable with fine and which shall not be less ₹ 25,000 but which may extend to ₹ 5 lakh rupees and
- every officer of the company who is in default shall be punishable with fine which shall not be less than 10,000 rupees but which may extend to 1 lakh rupees.
- If an auditor of a company contravenes any of the provisions of Section 139, Section 144 or Section 145, the auditor shall be punishable with fine which shall not be less than 25,000 rupees but which may extend to 5 lakh rupees.

[Companies (Amendment) Act, 2020]

SECRETARIAL AUDIT

(Section 204)

"Secretarial Audit" is introduced by the Companies Act, 2013. It is a process to check compliances made by the Company under Corporate Law and other laws, rules, regulations, procedures etc. It is a mechanism to monitor compliance with the requirements of stated laws and processes. Periodically examination of work is necessary to point out errors and mistakes and to make a robust compliance mechanism system in an organization.

Every company needs to comply hundreds of laws, rules and regulations. Periodically inspecting the records of company gives exact information whether, and if so, to what extent company has complied with the laws applicable to the company.

Secretarial Audit gives comfort to the regulators, stakeholders and management that company has disciplined approach to evaluate and improve effectiveness of risk management, control, and governance processes.

To which Companies Secretarial Audit is Mandatory?

As per Section 204 of the Companies Act, 2013 read with Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014, following companies are required to obtain "Secretarial Audit Report" form independent practicing company secretary;

(1) Every listed company
(2) Every public company having
    (i) a paid-up share capital of Fifty Crore rupees or more; or
    (ii) a turnover of Two Hundred Fifty Crore rupees or more.

Secretarial Audit is also mandatory to a private company which is a subsidiary of a public company, and which falls under the prescribed class of companies.

Who can be Appointed as Secretarial Auditor?

Only a member of the Institute of Company Secretaries of India holding certificate of practice (company secretary in practice) can conduct Secretarial Audit and furnish the Secretarial Audit Report to the company.

Appointment of Secretarial Auditor

As per Rule 8 of the Companies (Meetings of Board and its powers) Rules, 2014, Secretarial Auditor is required to be appointed by means of resolution passed at a duly convened Board meeting and resolution for appointment shall be filed with Registrar of Companies within 30 days in E-form MGT-14.

Scope of Secretarial Audit

A secretarial auditor has to check compliances by the company under the following laws and rules made thereunder :

(i) The Companies Act, 2013 (the Act) and the rules made there-under;

(ii) The Securities Contracts (Regulation) Act, 1956 ('SCRA') and the rules made there-under;

(iii) The Depositories Act, 1996 and the Regulations and Bye-laws framed there-under;

(iv) Foreign Exchange Management Act, 1999 and the rules and regulations made there-under to the extent of Foreign Direct Investment, Overseas Direct Investment and External Commercial Borrowings;

(v) The Securities and Exchange Board of India Act, 1992 ('SEBI Act');

(vi) Secretarial Standards issued by The Institute of Company Secretaries of India.

(vii) The Listing Agreements entered into by the company with Stock Exchange(s), if applicable;

(viii) Other laws as may be applicable specifically to the company.

***Format of Secretarial Audit Report also requires reporting on whether* :**

- The Board of Directors of the company is duly constituted with proper balance of Executive Directors, Non-Executive Directors and Independent Directors.
- The changes in the composition of the Board of Directors that took place during the period under review were carried out in compliance with the provisions of the Act.
- Adequate notice is given to all directors to schedule the Board Meetings, agenda and detailed notes on agenda were sent at least seven days in advance.
- Majority decision is carried through while the dissenting members views are captured and recorded as part of the minutes.
- There are adequate systems and processes in the company commensurate with the size and operations of the company to monitor and ensure compliance with applicable laws, rules, regulations and guidelines.

Powers of Secretarial Auditor

The Companies Act, 2013 has empowered secretarial auditor and has given him all rights and powers as given to statutory auditor. As per section 204 of the Companies Act, 2013, the secretarial auditor company shall be entitled to require from the officers of the company such information and explanation as he may consider necessary for the performance of his duties as auditor.

Punishment for Default [*Section* 204(4)]

If a company or any officer of the company or the company secretary in practice, contravenes the provisions of Section 204 of the Act, the company, every officer of the company or the company secretary in practice, who is in default, shall be liable to a penalty of ₹ 2 lakhs.

[*Companies (Amendment) Act,* 2020]

SECRETARIAL STANDARDS

The **Institute of Company Secretaries of India has announced that the Secretarial Standards** on Meetings of the Board of Directors (SS-1) and General Meetings (SS-2) have been revised and the revised **Secretarial Standards have received approval from the Central Government.** The revised **Secretarial Standards** shall be applicable for compliance by Companies (except the exempted class of companies[1]) from October 1, 2017[2].

History of Secretarial Standards

The Secretarial Standards are formulated by the Institute of Company Secretaries of India (hereinafter referred to as "ICSI") which was constituted under Section 3 of the Company Secretaries Act, 1980. The Secretarial Standards once formulated are then approved by the Central Government through the Ministry of Corporate Affairs. Earlier, the Companies Act, 1956 provided that the Secretarial Standards were "recommendatory" in nature but the enactment of the Companies Act, 2013 made implementation of the Secretarial Standards in a Company "mandatory".

The Secretarial Standards are developed to be in conformity with the provision of the Companies Act, 2013 and in case any amendment in the Companies Act, 2013 leads to a Secretarial Standard to be inconsistent with the provisions of the revised Act, then the provisions of the revised Act shall prevail.

Relevant Provisions of the Companies Act, 2013

- ***Section 118 of Companies Act, 2013***
  (10) Every company shall observe secretarial standards with respect to general and Board meetings specified by the Institute of Company Secretaries of India constituted under section 3 of the Company Secretaries Act, 1980, and approved as such by the Central Government.
- ***Section 205 of Companies Act, 2013***
  (1) The functions of the company secretary shall include: (b) to ensure that the company complies with the applicable secretarial standards; Explanation- For the purpose of this section, "secretarial standards" means secretarial standards issued by the Institute of Company Secretaries of India constituted under section 3 of the Company Secretaries Act, 1980 and approved by the Central Government.

Original Notification for Implementation of SS-1 and SS-2[3]

The Secretarial Standards on Meetings of the Board of Directors (SS-1) and General Meetings (SS-2) were approved by the Central Government under Section 118(10) of the Companies Act, 2013 on April 10, 2015 vide letter No. 1/3/2014-CI/I[4] and were published in the Official Gazette on April 23, 2015 vide ICSI Notification No. (1) SS of 2015. Companies were required to use the Secretarial Standards with effect from July 1, 2015.

What is Secretarial Standards on Meetings of the Board of Directors (SS-1)

This Standard prescribes a set of principles for convening and conducting Meetings of the Board of Directors and matters connected to the convening and conduct of the Meetings. This Standard is also applicable on Meetings of the Committees of a Company's Board, unless stipulated otherwise. The Standard is applicable to all Companies incorporated under the Companies Act, 2013 except One Person Company in which there is only one Director on its Board.

What is Secretarial Standards on General Meetings (SS-2)

This Standard prescribes a set of principles for convening and conducting General Meetings of the Company and matters connected to the convening and conduct of the Meetings. The Standard also deals with the conduct of e-voting and postal ballot. SS-2 is applicable to all types of General Meetings of all companies incorporated under the Act except One Person Company (OPC) and class or classes of companies which are exempted by the Central Government through notification.

Why are Secretarial Standards Required

Companies follow diverse secretarial practices which have evolved over time through varied usages and as a response to differing business cultures. For example, the Companies Act, 2013, does not specifically provide for when Agenda and Notes on Agenda for a Board Meeting should be sent to members of the Board. SS-1 provides that the Agenda & Notes on Agenda for a Board Meeting must be sent at least 7 days prior to the Board Meeting thereby giving the Directors sufficient time to prepare and arrive at informed decisions. The Secretarial Standards help to integrate, harmonize and standardize such corporate governance practices across all Companies providing better monitoring of compliances and strengthening the Board processes.

ONLINE FILING OF DOCUMENTS

Online filing is **the electronic** submission of information that is required by **law**. It is up to the regulating agency to decide the criteria for what types of information must be filed **electronically** and what types of information can be submitted in hard copy form.

Companies can do Online Filing in three different ways :

1. The Company representative can upload the e-Forms on the MCA portal through the 'Annual Filing Corner' link (after registering oneself as a user of the portal) at his convenience from his office/home. This is the most convenient way of e-Filing.
2. The Company representative can prepare the e-Forms as per guidelines, get them digitally signed by the authorized signatory, copy them in a CD or a pen drive and visit the nearest "Registrar's Front Office" (RFO). RFO staff will assist in uploading of e-Forms on MCA portal
3. The Company representative can also contact any of the Certified Filing Centers (CFCs) for the Annual Filing of e-Forms by paying the service charges to the CFCs.

Points to be taken care of while annual online filing

Every company is required to file the annual accounts and annual return as per The Companies Act, 2013 within 30 days and 60 days respectively from the conclusion of the Annual General Meeting. The ROC filing of annual accounts is governed under Section 129(3), 137, of **The Companies Act, 2013** read with Rule 12 of the Company (Accounts) Rules, 2014 and annual return is **governed under Section 92** of the Companies Act, 2013 read with Rule 11 of the **Companies (Management and Administration) Rules, 2014.**

1. Balance Sheet and Profit & Loss Accounts are to be filed as two separate documents with different e-Forms.
2. Each e-Form along with the relevant attachment(s) should be less than 2.5 MB.
3. The Balance Sheet, Profit & Loss Account and Annual Return are filed as attachments to the respective e-Forms.
4. The MCA database in respect of Authorised Capital and Paid-up Capital needs to be verified by the respective Companies, as it may not be correct. The Companies are requested to apply for correction of Master Data, should they find any discrepancies. In the meantime, the Companies can declare the correct amount of Authorised Capital and Paid-up Capital in the respective annual filing Forms.
5. The company shall prepare its books of accounts and keep at its registered office. If the company chooses to place at any other place, then the company will have to file AOC-5 by passing a board resolution.
6. While uploading the forms, care should be taken that the form is the latest version as provided on the MCA.

PROCEDURE OF ONLINE FILING

The procedure of ROC filing the annual return and annual accounts can be easily understood by the following process :

(i) Hold a Board Meeting to : • Authorize the auditor for the preparation of financial statements as per Schedule III of the Companies Act, 2013. • Authorize the Director or Company Secretary for preparation of Board Report and Annual Return as per the Companies Act, 2013.

(ii) Hold another Board Meeting for approving the draft financial statements, Board Report and Annual Return by the directors of the company.

(iii) Conduct the Annual General meeting of the Company and pass the necessary resolutions. Please note that the financial statements are considered final only when the same is approved by the shareholders at the General Meeting.

E-FORMS TO BE FILED FOR ROC FILING RETURN

Name of E-form	*Purpose of E-form*	*Attachments*	*Due date of filing*	*Applicability on Company*
Form ADT-1	Appoint-ment of Auditor	Appointment Letter, Confirmation Letter from Company	15 days from the conclusion of AGM.	Private Company, Public Limited Companies, Listed Company, One Person Company
Form AOC-4 and Form AOC-4 CFS (in case of Consolidated financial statements)	Filing of Annual Accounts	Board Report along with annexures: MGT-9, AOC-2, CSR Report, Corporate Governance Report, Secretarial Audit Report etc. as per the nature of Company and fin-ancial statements	30 days from the conclusion of the AGM (In case of OPC within 180 days from the close of financial year)	Private Company, Public Limited Companies, One Person Company
Form AOC-4 (XBRL)	Filing of Annual Accounts in XBRL mode	XML document of financials of the Company	30 days from the conclusion of the AGM	Listed companies in India and their Indian subsidiaries (or) a public company With paid-up capital >= 5 crores (or) With turnover=100 crores
Form MGT-7	Filing of Annual Return	List of shareholders, debenture holders, Share Transfer, MGT-8	60 days from the conclusion of AGM.	Private Company, Public Limited Companies, Listed Company, One Person Company
Form CRA-4	Filing of Cost Audit Report	XML of Cost Audit	30 days from the receipt of Cost Audit Report	Companies prescribed as per The Companies (Cost records and Audit Rules), 2014 amended from time to time.
Form MGT-14	Filing of resolutions with MCA regarding Board Report and Annual Accounts	Certified true copy of the resolution.	30 days from the date of Board Meeting	Public Companies and Listed Companies (Exemp- ted for private companies)

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WINDING UP OF COMPANIES

MEANING AND DEFINITION OF WINDING UP

The winding up is the process of putting an end the legal personality of company as a corporate body. During this process the company ceases to carry on its normal business, the assets of the company are sold and the proceeds are utilised in paying off the debts and liabilities. If any surplus is left, it is paid back to the members in proportion to their contribution to the capital of the company. An administrator, called an official liquidator, is appointed and he takes control of the company collects its assets, pays its debts and distributes the surplus, if any, among the members.

According to *Professor Gower*, "Winding up of a company is the process whereby the life of a company is ended and its property is administered for the benefit of its members and creditors. An administrator, called a liquidator is appointed and he takes control of the company, collect its assets, pay its assets, pay its debts and finally distributes any surplus among the members in accordance with their rights."

DIFFERENCE BETWEEN WINDING UP AND DISSOLUTION

Winding up and dissolution of the company is not the same thing. A company is not dissolved immediately, on the commencement of winding up proceedings. Winding up is the prior stage and dissolution is the next.

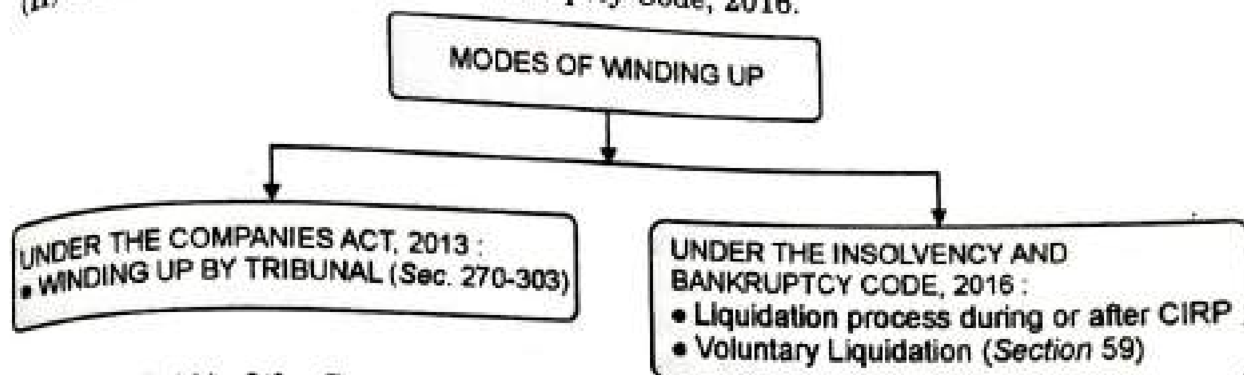
On dissolution, the name of the company is struck off by the Registrar from the Register of Companies *i.e.*, it ceases to exist. While on winding up, the companies' name is not struck off from the register. The legal entity of a company remains even after the commencement of winding up and it can be sued in a court of law. Dissolution is the final stage of the company's winding up process. But a company can be dissolved without winding up under certain circumstances such as when it merges with another company.

The main points of difference between winding up and dissolution are as follows :

Basis	*Winding Up*	*Dissolution*
Meaning	In winding up the assets of the company are sold and the proceeds are utilised in paying off the debts and other liabilities of the company.	The legal existence of company is brought to an end by dissolution.
Stage	It is the first stage of terminating the life of a company. Winding up precedes dissolution.	It is the final stage where the existence of the company is put to an end by Court.
Role of liquidators	The winding up proceedings are carried out by an official liquidator of the company.	In case of dissolution, no such proceedings are carried out by the liquidator. The order of dissolution is made by the Court.
Role of creditors	Creditors can prove their debts in the winding up.	Creditors cannot prove their debts in the dissolution of the company.
Intervention of Court	The order of the court is not necessary in case of winding up of the company.	Dissolution essentially requires order of the court.
Struck off of name	In winding up, the company's name is not struck off from the register. The legal entity of a company remains even after the commencement of winding up.	On dissolution, the name of the company is struck off by the Registrar from the Register of Companies *i.e.*, it ceases to exist.

MODES OF WINDING UP

The winding up of a company may be either :
(I) Under the Companies Act, 2013
(II) Under the Insolvency and Bankruptcy Code, 2016.



Section 2(94A) of the Companies Act, 2013 provides that "Winding-up" means winding up under this Act or liquidation under the Insolvency and Bankruptcy Code, 2016, as applicable.

WINDING UP UNDER THE COMPANIES ACT, 2013

Compulsory Winding-up by the National Company Law Tribunal

The winding up of a company by an order of the Tribunal is called the compulsory winding up. Section 270 of the Company's Act contains the cases in which the company may be wound by the Tribunal. The Tribunal will make an order for winding up of a company.

(i) *Suo motu* or (ii) on an application of the company or any person specified in Section 272.

Grounds for Compulsory Winding-up (*Section* 271)

The company may be wound up by the Tribunal under the following circumstances :

(a) if the company has, by special resolution resolved that the company be wound up by the Tribunal;

(b) if the Tribunal is of opinion that it is just and equitable that the company should be wound up;

(c) 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;

(d) 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;

(e) if the Tribunal is of the opinion that the affairs of the company have been conducted in a fraudulent manner or company was formed for 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 is proper that the company be wound up;

(f) if a company is unable to pay its debts.

1. ***Special Resolution by Members*** : Sometimes, the company passes a special resolution to the effect that the company is wound up by the Tribunal. Generally, shareholders have full freedom to decide the course of action a company should adopt. They are best judge of the future of the company. Hence they can pass a special resolution (at least 75% of members attending and voting) for winding up. On passing of such resolution, company or contributors can file a winding up petition.

However, the Tribunal is not bound to order the winding up of the company. This power is discretionary and may not be exercised where winding up would be opposed to the public or company's interests.

The company has to call general body meeting and pass a special resolution including the explanatory statement u/s 102 appended there to as to why such winding of the company is called for.

2. ***Just and Equitable*** : Where the Tribunal is of the opinion that it is just and equitable that the company should be wound up, it may order the winding up of the company. The Tribunal is given a very wide discretionary power to order the winding up whenever it appears desirable.

Under the 'just and equitable' clause, the Tribunal will not order for *winding up*, if the petitioner has alternative remedy, for instance by making an application under Section 241/242. Parallel adjudication of the two proceedings has to be avoided to conserve judicial time and to avoid conflicting orders being passed by two forums.

Where minority shareholders filed winding up petition on just and equitable clause based on allegations of lack of probity, oppression and mismanagements, the court held after finding that no grievances were brought before the Board or the general meeting and there were alternative remedy available under Section 241/242 and the company has been running in profit and thus the said petition was dismissed.

[In re, *Kiran Sandhu* v. *Saraya Sugar Mills Ltd. & Other* (1998) 91 Comp. Case, 146 (All)]

To invoke "just and equitable" clause there must be material to show that it is just and equitable not only to petitioner but also to company and all its shareholders. Thus where only allegation was that in some year company's production had fallen, this could be no ground for winding up particularly when the company was continuously giving bonus to its shareholders—*Prem Seth* v. *National Industrial Corporation. Ltd.* (2002) 35 SCL 636 (Delhi).

Some of the instances where the court (now Tribunal) has ordered winding up on the ground of being just and equitable are as under.

(i) ***Compete deadlock*** : In the event of total deadlock in management of a company where meetings of directors are not possible, although powers of Board can be exercised by the members in general meeting, shareholders are also not on talking terms and there is no relationship of trust and confidence. The only remedy would be to make a winding up order.

(ii) ***When the Substratum of a company is gone*** : The substratum of a company would be deemed to be gone when (a) the subject matter of the company is gone, or (b) the object for which it was formed has substantially failed, or (c) it is impossible to carry on the business of company except at a loss. Where a company sold its undertaking but there is some business with it which could be carried on it cannot be said that the substratum has disappeared. The substratum of a business may be said to have gone where the main purpose has become impossible. A company was formed for the purpose of manufacturing coffee from dates under a patent which was to be granted by the Government of Germany. The German patent was never granted. On a petition of a shareholder it was held that the substratum of the company had failed and it was impossible to carry on the objects for which it was formed and therefore it was an equitable that the company should be wound up.

[*Res. German Date Coffee Company* (1982) 20 Ch. 169]

Where a company kept on deferring payment of the principal and interest dues in spite of demands and vacated its registered premises; and the managing director was not available to carry on day-to-day administration of the company—*Industrial Development Corporation of Orissa Ltd.* v. *Hira Steels & Alloys Ltd.* (1982) 52 Comp. Case. 377 (Ori).

(iii) ***Oppression of Minority*** : When shareholders holding majority voting power adopt an oppressive attitude towards minority shareholders, it is just and equitable to wind up the company.

(iv) ***Fraudulent Purpose*** : When the object for which the company was formed is fraudulent or illegal or it becomes illegal subsequently.

Universal Mutual Aid and *Poor Houses Association* v. *Thoppa Naidu*, A.I.R. (1933) Mad. 16. The main object of the company in this case was to conduct a lottery. Some of its other objects were charitable. Held, the company is wound up as being one formed for an illegal purpose.

(v) ***Losses*** : When the business cannot be carried on except at a loss, *i.e.*, where there is no reasonable hope of running business at profit.

These are only illustrative grounds under this clause and not exhaustive.

It may, however, be noted that relief under just and equitable clause is in the nature of last resort when other remedies are not effective enough to protect the general interest by the company. In *Kiritbhai R Patel* v. *Lavinza Construction*, it was held that winding up will not be ordered for charges of mismanagement, when remedy u/s 241 and 242 is available :

The Tribunal will decide the petition on question of winding up on the facts existed at the time of hearing the petition and not merely on the date of the petition. If the facts which existed at the time of presenting the petition had subsequently melted away, that would be a case for not ordering winding up.

3. ***Failure to File Financial Statements or Annual Returns with the Registrar*** [*Section* 271] : The Tribunal may order winding up if the company has made a default in filing with the Registrar a balance sheet and profit and loss account or annual return for any five consecutive financial years. It means if default is less than consecutive 5 years, the winding up order shall not be passed.

4. ***When Company Acted against the Interest of Sovereignty and Integrity of India*** [*Section* 271] : A company may be wound up if it has acted against the interests of sovereignty and integrity of India, the security of the state friendly relations with foreign states, public order, decency or morality. [*Section* 271]

But the Tribunal shall make an order for winding up of a company on application made by the Central Government or a State Government.

5. ***Fraudulent conduct of affairs*** : The tribunal is of the opinion that the affairs of the company have been conducted in a manner or the company was formed for fraudulent or unlawful purpose or the persons concerned in its formation or management of its affairs have been guilty of fraud, misfeasance or misconduct in those connections and that is proper that the company be wound up. This clause can be activated by an application by the Registrar or by any other person authorized by Central Government by notification.

6. ***Unable to pay its debts*** : A company shall be deemed to be unable to pay its debts : (a) If the creditor, by assignment or otherwise, to whom the company is indebted for an amount exceeding ₹ 1,00,000 then due, has served on the company, by registered post or otherwise, a demand to pay the due amount and the company has failed to pay the sum within 21 days after the receipt of demand or to provide adequate security or re-structure or compound the debt to the reasonable satisfaction of the creditor; (b) If any execution or other process issued on a decree or order of any court or Tribunal in favour of a creditor of the company is returned unsatisfied in whole or in part; or (c) If it is proved to the satisfaction of the Tribunal that the company is unable to pay its debts.

PETITION FOR WINDING UP (*Section* 272)

According to *Section* 272, a petition to NCLT (National Company Law Tribunal) for the

Winding up of a company shall be presented by : (a) the company; (b) any creditor or creditors, including any contingent or prospective creditor or creditors; (c) any contributory or contributories; (d) all or any of the prior parties whether taken together or separately; (e) the Registrar; (f) any person authorised by the Central Government in that behalf; or (g) in a case falling under clause (c) of sub-section (1) of section 271, by the Central Government or a State Government.

The above provisions are discussed as follows :

1. ***Petition by the Company*** [*Section* 272(1)(a)] : A company may present a petition for winding up by the directors provided the members of the company have passes the special resolution authorizing the directors to do so.

2. ***Petition by any Creditor or Creditors*** [*Section* 272(1)(b)] : Every person who has a pecuniary claim against the company whether actual or contingent is a creditor and such person is competent to file a petition for winding up by the Tribunal. Before this petition, the leave of the Tribunal shall be obtained for the admission of the petition and such leave shall not be granted, unless in the opinion of the Tribunal there is *a primafacie case* for the winding up of the company and until such security for costs has been given as the Tribunal thinks reasonable.

A creditor who is proceeding against the company on the ground of company's inability to pay its debts has to proceed under the Insolvency and Bankruptcy Code, 2016. His petition under the Companies Act is not going to be entertained. A creditor's petition can be entertained under this section only if it is based upon any of the grounds now available under this section.

3. ***Petition by the Contributory*** : A contributory means a person liable to contribute towards the assets of the company at the time of winding up and includes the holder of fully paid up shares. He shall be entitled to present a petition for the winding up of a company, in spite of the fact that he may be the holder of fully paid-up shares, or that the company may have no assets left for distribution among the shareholders after the satisfaction of its liabilities.

4. ***Petition by all or any of the persons*** specified in the above three clauses.

5. ***Petition by the Registrar*** [*Section* 272(1)(e)] : The Registrar of the Companies shall be entitled to present a petition for winding up on any of the grounds of winding up by the Tribunal, except where the company has passed a special resolution. But he shall not present a petition on the ground of the company's inability to pay its debts, unless it appears to him either from the financial condition of the company as disclosed in the balance sheet or from the report of the Inspector.

Provided further that the Registrar shall obtain the previous sanction of the Central Government to the presentation of a petition and the Central Government shall not accord its sanction unless the company has been given a reasonable opportunity of making representations.

POWERS OF NATIONAL COMPANY LAW TRIBUNAL [*Section* 273]

Section 273 lays the following powers of Tribunal in relation to the petition for winding up :

1. ***Making Up of an order by Tribunal*** : The Tribunal may, on receipt of a petition for winding up under section 272 pass any of the following orders, namely : (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; or (e) any other order as it thinks fit. Provided that an order under this sub-section shall be made within ninety days from the date of presentation of the petition.

2. ***Refusal By Tribunal*** : Where a petition is presented on the ground that it is just and equitable that the company should be wound up, the Tribunal may refuse to make an order of winding up, if it is of the opinion that some other remedy is available to the petitioners and that they are acting unreasonably in seeking to have the company wound up instead of pursuing the other remedy.

PROCEEDURE FOR WINDING UP BY TRIBUNAL

The procedure for winding up by the Tribunal is as under :

1. ***Filing Up of Petition*** [*Section* 272] : A petition has to be filed to the Tribunal for the winding up of a company under Section 272 of the Act. The petition can be presented by any company, creditor, contributory, registrar, any person authorized by Central Government or in cases of national security and integrity, the State or Central Government itself. Every petition, application or reference shall be filed in form as provided in Form No. NCLT-1.

2. ***Order by the Tribunal*** [*Section* 273] : The tribunal on receipt of such petition for winding up shall pass an order under section 273 of the Act within 90 days from the date of presentation of the petition. The tribunal can dismiss it, make an interim order, appoint a provisional liquidator, make an order for winding up or make any other order in its regard. The tribunal shall give notice to the opposite party before appointing a provisional liquidator and give them opportunity to make their representations. Such notice has to be provided in Form No. NCLT-5.

3. ***Directions for filing Statement of Affairs*** [*Section* 274] : If an order for winding up has been passed by the tribunal under section 273, then under section 274 of the Act, the directors and other officers of the company have to submit the completed and audited books of accounts of the company within 30 days of such order being passed by the tribunal to the provisional liquidator. If the requirement is contravened, the director or officer shall be liable for fine and imprisonment under section 274(4).

4. ***Appoint Company Liquidators*** [*Section* 275] : The Tribunal shall appoint a provisional liquidator or a company liquidator at the time of passing an order for winding up of the company. On appointment of such provisional or company liquidator under section 275 of the act, such liquidator shall file a declaration within 7 days from the date of appointment about any conflict of interest or lack of independence in respect of his appointment.

If the company is a listed company the registrar has to notify the same in the stock exchange where the securities of the company being wound up are listed. Within 3 weeks of such order of winding up, the company liquidator shall make an application to the tribunal to constitute a Winding up Committee to assist and monitor the process of liquidation. The convener of meeting conducted by such committee will be the Company Liquidator. He has to place before the tribunal a report about the meeting on monthly basis. He shall prepare a draft final report for approval of the committee and the final approved report will be submitted by the Company liquidator to the tribunal to pass dissolution order for the company.

5. ***Stay of Suits etc, on Winding up order*** [*Section* 279] : No other legal suit or proceeding can commence against the company once an order for winding up has been passed by the tribunal. (*Section* 279)

6. ***Jurisdiction of Tribunal*** [*Section* 280] : The tribunal shall have jurisdiction under section 280 of the act to either dispose or entertain certain suits or proceedings or claims against the company.

7. ***Submission of Report by Company Liquidator*** [*Section* 281] : The company liquidator, under section 281 of the act, has to submit a report to the Tribunal within 60 days of passing of order of winding up. The report must consist of particulars as mentioned in the section. The liquidator may also have to make a report on the viability of the business of the company and any further reports as he deems fit.

8. ***Directions of Tribunal on Report of Company Liquidator*** [*Section* 282] : After properly scrutinizing the report by the company liquidator, the tribunal, under section 282 of the act, shall fix a time within which the entire proceedings shall be completed and the company shall be dissolved. The tribunal may also order sale of the company. For the same a sale committee under section 282 of the act may be appointed to assist the company liquidator in this matter. If the report of the liquidator speaks of fraud in respect of the company, the tribunal will conduct an investigation and order the company liquidator to file a criminal complaint against persons involved in that fraud, under section 282(3) of the act.

9. ***Custody of Company's Properties*** [*Section* 283] : When the order for winding up has been passed, the company liquidator, under section 283 of the act, on the order of the tribunal, shall take into his custody and control all the property, effects or actionable claims to which the company is entitled. The liquidator may call upon any person specified to give any papers, books, assets or money in their possession to the liquidator.

10. ***Settlement of List of Contributions and applications of Assets*** [*Section* 285] : Further, the Tribunal under section 285 of the act, settle a list of contributories, cause rectification where needed and cause the assets of the company to be applied for discharge of its liabilities.

11. ***Advisory Committee*** [*Section* 287] : While passing the order of winding up, the Tribunal shall pass an order to set up an advisory committee under section 287 of the act, to advise the liquidator and report to the tribunal as directed. It shall consist of 12 members being members, creditors or contributories of the company.
The company liquidator shall convene a meeting of creditors and contributories of the company within 30 days from the date of order of winding up so that the tribunal can decide the composition of the committee. The committee shall be chaired by the Company Liquidator.

12. ***Submission of Periodical Reports to Tribunal*** [*Section* 288] : The Company Liquidator under section 288 of the act is liable to make periodical reports to the Tribunal to update about the progress of winding up.

13. ***Powers and Duties of Company Liquidator*** [*Section* 290] : Powers and duties of a company liquidator have been given under section 290 of the Act.

WINDING UP UNDER THE INSOLVENCY AND BANKRUPTCY CODE, 2016

VOLUNTARY WINDING UP

The Process of Voluntary Winding up of solvent company is now shifted from the Companies Act, 2013 to Insolvency and Bankruptcy Code, 2016 *w.e.f.* 1st April, 2017.

Some of the major differences as compared to earlier regime are as follows :

- Shifting of Powers from Official Liquidator to Insolvency Professional.

The Section 275 of Winding up of a company under the Companies Act, 2013 for the appointment of Company Liquidators have been replaced by Insolvency Professionals, who are appointed and governed by the Tribunal as per Insolvency and Bankruptcy Code, 2016.

- Jurisdictional Authority has been shifted from High Court to National Company Law Tribunal (NCLT).
- Governing sections and corresponding rules and regulations for Member's Voluntary Winding is now shifted to Section 59 of the Insolvency and Bankruptcy Code, 2016 (IBC).
- Timeline for carrying out the Voluntary Winding up process under the IBC is of 12 months, however in the event of Liquidation process continuing for more than 12 months, the Liquidator has to submit Annual Status Report indicating the progress of such Liquidation.
- The shifting of Jurisdictional Authority from High Court to NCLT will result into faster execution and settlement of cases since Insolvency Professionals have been bestowed upon with powers for completing the winding up process and reporting to NCLT.
- The corporate person shall from the liquidation commencement date cease to carry on its business except as far as required for the beneficial winding up of its business.
- The liquidator shall preserve a physical or an electronic copy of the reports, registers and books of account referred to in Regulations 8 and 10 for at least eight years after the dissolution of the corporate person, either with himself or with an information utility.

The provisions concerning to Voluntary Winding up of company was specified in section 304-325 of the Companies Act, 2013. As the IBC got the President assent on 28/05/2016 as per section 255 and schedule XI of IBC the sections of Voluntary winding up were 'Omitted' from the Companies Act, 2013.

VIA Notification No. IBBI/2016-17/GN/REG010 dated 31st March, 2017 IBBI has notified the Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) Regulations, 2017. The same has been published in the official gazette. As a result of the same *w.e.f.* 1st April, 2017 voluntary winding up shall be conducted under Insolvency and Bankruptcy Code, 2016 (hereafter referred as "IBC").

Process of Voluntary Winding Up

The Winding up of a Company can also be done voluntarily by the members of the company, if :

(a) If the company passes a Special Resolution in the General Meeting for winding up of the company.

(b) The company in general meeting passes a resolution requiring the company to be wound up voluntarily as a result of the expiry of the period of its duration, if any, fixed by its articles of association or on the occurrence of any event in respect of which the articles of association provide that the company should be dissolved.

The Voluntary winding up process applies where the directors and shareholders decide to cease trading of their solvent limited company.

(1) ***Convene a Board Meeting with two Directors or by a majority of Directors*** :

- Pass a resolution for proposal of Voluntary Liquidation of the company.
- Prepare a declaration from majority of the directors of the company verified by an affidavit stating that :
  - they have made a full inquiry into the affairs of the company and they have formed an opinion that either the company has no debt or that it will be able to pay its debts in full from the proceeds of assets to be sold in the voluntary winding up and
  - The company is not being liquidated to defraud any person - section 59(3)(a) of Insolvency Code, 2016.
- File the declaration with ROC in e-form GNL-2.
- There should be an Attachment to Declaration :
  - audited financial statements and record of business operations of the corporate person for the previous two years or for the period since its incorporation, whichever is later;
  - a report of the valuation of the assets of the corporate person, if any, prepared by a registered valuer.

(2) ***Convene a General Meeting***:

Within 4 weeks of passing of above said declaration hold the meeting of shareholders for the following purposes :

- Pass a Special Resolution for approving the proposal of Voluntary Liquidation of the company.
- Appoint an insolvency professional to act as the liquidator. Resolution should contain the terms and conditions of the appointment of the insolvency professional, including the remuneration due to him.
- File the special resolution with ROC in e-form MGT-14.

(3) ***Approval of Creditors if Company owes debt*** :

- If the company owes any debt to any person, creditors representing two-thirds in value of the debt of the company shall approve the resolution passed above by the shareholders within seven days of passing of such special resolution.
- Approval can be by holding of Meeting, by Consent of 2/3 of creditors in writing etc. company will place the copy of resolutions before the creditors for their approval.
- A voluntary liquidation for a corporate person shall be deemed to have commenced from the date of passing of the resolution.

(4) ***Public Announcement by the Liquidator*** :

- The liquidator shall make a public announcement in Form A of Schedule I within five days from his appointment.
- The public announcement shall • Call upon stakeholders to submit their claims as on the liquidation commencement date; and • Provide the last date for submission of claim, which shall be thirty days from the liquidation commencement date.

- The announcement shall be published :
  - In one English and one regional language newspaper with wide circulation at the location of the registered office and principal office, if any, of the corporate person and any other location where in the opinion of the liquidator, the corporate person conducts material business operations;
  - On the website, if any, of the corporate person; and
  - On the website, if any, designated by the Board for this purpose.

(5) ***Proceedings by Liquidator*** :

- The liquidator shall submit a Preliminary Report to the company within 45 days from the liquidation commencement date. The liquidator shall preserve a physical as well as an electronic copy of the reports for eight years after the dissolution of the corporate person.
- The liquidator shall maintain the registers and books as may be applicable, in relation to the voluntary liquidation of the corporate person, and shall preserve them for a period of eight years after the dissolution of the corporate person.
- Where the books of account of the corporate person are incomplete on the liquidation commencement date, the liquidator shall have them completed and brought up-to date, with all convenient speed.
- The liquidator shall keep receipts for all payments made or expenses incurred by him.
- The liquidator may call for such other evidence or clarification as he deems fit from a Claimant for substantiating the whole or part of its claim.
- The liquidator shall verify the claims submitted within thirty days from the last date for receipt of claims and may either admit or reject the claim, in whole or in part, as the case may be, as per section 40 of the Code.
- A creditor may appeal to the Adjudicating Authority against the decision of the liquidator as per section 42 of the Code.
- The liquidator shall prepare the list of stakeholders within forty-five days from the last date for receipt of claims with following details : • The amounts of claim admitted, if applicable, • The extent to which the debts or dues are secured or unsecured, if applicable, • The details of the stakeholders, and • The proofs admitted or rejected in part, and the proofs wholly rejected.
- The liquidator shall open a bank account in the name of the corporate person followed by the words 'in voluntary liquidation', in a scheduled bank, for the receipt of all moneys due to the corporate person.
- All payments out of the account by the liquidator above five thousand rupees shall be made by cheques drawn or online banking transactions against the bank account.
- The liquidator shall distribute the proceeds from realization within six months from the receipt of the amount to the stakeholders.

(6) ***Completion by Liquidator*** :

- The liquidator shall endeavor to wind up the affairs of the corporate person within one year from the voluntary liquidation commencement date.
- In the event of the voluntary liquidation continuing for more than one year, the liquidator shall :
  - call a meeting of the contributories of the corporate person within fifteen days from the end of the year in which he is appointed, and at the end of each succeeding year; and
  - Shall present a Status Report indicating progress in liquidation, including :

    (i) Settlement of list of stakeholders,

    (ii) Details of any property that remain to be sold and realized,

(iii) Distribution made to the stakeholders,

(iv) Distribution of unsold property made to the stakeholders,

(v) Developments in any material litigation, by or against the corporate person.

- The Status Report shall enclose an audited account of the voluntary liquidation showing the receipts and payments pertaining to liquidation since the liquidation commencement date.

(7) ***Preparation of Final Report*** :

- On completion of the liquidation process, the liquidator shall prepare the Final Report consisting of :
  - An audited account of the voluntary liquidation, showing the receipts and payments pertaining to liquidation since the liquidation commencement date; and
  - A statement demonstrating that :

    (i) the assets of the company has been disposed of;

    (ii) the debt of the company has been discharged to the satisfaction of the creditors;

    (iii) No litigation is pending against the company or sufficient provision has been made to meet the obligations arising from any pending litigation.
- Sale statement in respect of all assets containing :

  (i) the realized value;

  (ii) cost of realization, if any;

  (iii) the manner and mode of sale;

  (iv) an explanation for the shortfall, if the value realized is less than the value assigned by the registered valuer in the report of the valuation of assets

  (v) the person to whom the sale is made; and

  (vi) any other relevant details of the sale.

(8) ***Submission of Final Report/Application with NCLT*** :

- The liquidator shall send the Final Report to by registered post at their registered address and by electronic means :
  - The contributories of the corporate person;
  - The registrar; and
  - The board.
- Where the affairs of the company have been completely wound up, and its assets completely liquidated, the liquidator shall make an application to the NCLT in form NCLT-1 for the dissolution of such company.

(9) ***Order by NCLT*** :

The Tribunal shall fix a date for the hearing of the petition. Where the Tribunal is satisfied with the application, NCLT pass an order that the corporate debtor shall be dissolved from the date of that order and the corporate debtor shall be dissolved accordingly.

(10) ***Filing of Order with ROC*** :

The order of the Tribunal shall be filed with the Registrar by the company within a period of 14 days of the receipt of the copy of order, or such other time as may be fixed by the Tribunal.

Conclusion : *Suspension of Process of Liquidation* : If liquidator is of the opinion that the voluntary liquidation is being done to, defraud a person, he shall make an application to the Adjudicatory Authority to suspend the process of voluntary liquidation. Where the liquidator is of the opinion that the corporate person will not be able to pay its debts in full from the proceeds of assets to be sold in the voluntary liquidation, he shall make an application to the Adjudicating Authority to suspend the process of voluntary liquidation.

LIQUIDATOR

MEANING OF LIQUIDATOR

A liquidator is the officer appointed when a company goes into winding-up or liquidation who has responsibility for collecting in all of the assets under such circumstances of the company and settling all claims against the company before putting the company into dissolution. Liquidator is a person officially appointed to 'liquidate' a company or firm. Their duty is to ascertain and settle the liabilities of a company or a firm. If there are any surplus, then those are distributed to the contributories.

APPOINTMENT OF LIQUIDATOR

The resolution passed by the members or contributories shall contain the terms and conditions for appointment of the liquidator, including the remuneration payable to him. Regulation 6 sets out the eligibility requirement, which is similar to the eligibility requirement for appointment of a liquidator under the Liquidation Process Regulations. Primarily, it deals with the requirement of a liquidator to be "independent".

POWER AND DUTIES OF A LIQUIDATOR

Section 35 of the Insolvency and Bankruptcy Code, 2016, along with Chapter III of the Liquidation Process Regulations, 2016, deals with the powers and duties of a liquidator.

Section 35(1) states that subject to the directions of the Adjudicating Authority, the liquidator shall have the power and duty to, *inter alia*, verify claims of all the creditors, take into custody and control all the assets, property, and actionable claims of the Corporate Debtor, evaluate the assets and property of the Corporate Debtor in the manner as may be specified by the Insolvency and Bankruptcy Board of India, and prepare a report in this regard. The liquidator would be required to take measures to protect and preserve the assets and properties of the Corporate Debtor, carry on the business of the Corporate Debtor for its beneficial liquidation as he considers necessary, and conduct sale of the immovable and movable property and actionable claims of the Corporate Debtor by public auction or private contract (subject to section 52). The liquidator also has the power to transfer such property to any person or body corporate, or to sell the same in parcels in the manner specified. Further, in the name of, or on behalf of the Corporate Debtor, the liquidator can institute suits and defend the Corporate Debtor in any suit, prosecution, or other legal proceedings. The liquidator is also empowered to investigate the financial affairs of the Corporate Debtor to determine undervalued or preferential transactions.

Significantly, when section 29A was introduced in the Insolvency and Bankruptcy Code, 2016, section 34 was also amended to provide that the liquidator shall not sell immovable and movable property or actionable claims of the Corporate Debtor in liquidation to any person who is not eligible to be a Prospective Resolution Applicant. In other words, the disqualifications specified in section 29A of the Insolvency and Bankruptcy Code, 2016 with respect to a Prospective Resolution Applicant shall equally apply to prospective buyers of liquidation assets.

REMUNERATION OF THE LIQUIDATOR

Section 34(8) of the Insolvency and Bankruptcy Code, 2016 provides that the liquidator shall charge a fee for the conduct of the liquidation proceedings in proportion to the value of the liquidation estate assets, as may be specified by the Insolvency and Bankruptcy Board of India. Further, as per section 34(9), such fees shall be paid to the liquidator from the proceeds of the liquidation estate under section 53 of the Insolvency and Bankruptcy Code, 2016.

Regulation 4 of the Liquidation Process Regulations (as amended by way of notification dated July 25, 2019 (Liquidation Amendment Regulations) sets out the fee to be paid to the liquidator. It states that the fee payable to the liquidator shall be in accordance with the decision taken by the Committee of Creditors (CoC) under regulation 39D of the Corporate

Insolvency Resolution Process Regulations. As per this regulation, while approving a resolution plan or deciding to liquidate the Corporate Debtor, the Committee of Creditors (CoC) may, in consultation with the Resolution Professional, fix the fee payable to the liquidator, if an order for liquidation is passed under section 33, for :

(a) the period, if any, used for compromise or arrangement under section 230 of the Companies Act, 2013 (a "section 230 scheme");

(b) the period, if any, used for sale of the Corporate Debtor or its business as a going concern;

(c) the balance period of liquidation.

Hence, the Committee of Creditors (CoC) may fix the liquidator's fee during the Corporate Insolvency Resolution Process itself. If not decided by the Committee of Creditors (CoC), the liquidator is entitled to the following :

(a) a fee at the same rate as the Resolution Professional was entitled to during the Corporate Insolvency Resolution Process, for the period of the section 230 cheme; and

(b) a fee equal to a percentage of the amount realized, net of other liquidation costs, and of the amount distributed for the balance period of liquidation as per a prescribed table. Note that the liquidator is entitled to receive half the fee payable on realization, only after such realized amount is distributed.

REMOVAL OF LIQUIDATOR

Depending upon the type of the liquidation, the liquidator may be removed by the court, by a general meeting of the members or by a general meeting of the creditors.

The court may also remove a liquidator and appoint another if there is "cause shown" by the applicant for his removal. It is not normally necessary to demonstrate personal misconduct or unfitness for this purpose. However, it will be enough if the liquidator fails to display sufficient vigour in the discharge of his duties, for instance, by not establishing the current assets and recent trading of the company or in not attempting to secure favourable terms for the company in relation to the disposal of its assets.

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THE INSOLVENCY AND BANKRUPTCY CODE, 2016

PRINCIPAL FEATURES OF THE INSOLVENCY AND BANKRUPTCY CODE, 2016

For Corporate Debtors facing insolvency, the Code spells out two processes : insolvency resolution (Corporate Insolvency Resolution Process) and liquidation. When insolvency is triggered under the Insolvency and Bankruptcy Code, 2016, all attempts are made to resolve the insolvency in a time-bound manner. If the attempt fails, the company, or the Corporate Debtor, will be liquidated. This is a significant departure from the previous winding up regime, which did not provide for this two-stage time-bound process.

One of the key features of the Insolvency and Bankruptcy Code, 2016 is the early detection of insolvency. Hence, unlike previous regimes, insolvency is triggered under the Insolvency and Bankruptcy Code, 2016 by a simple payment default of one lakh rupees (₹ 1,00,000), as provided under section 4 of the Code. However, the Indian government (Central Government) is empowered to specify any other minimum default amount higher than one lakh rupees but not more than one crore rupees. By exercising this power, the Ministry of Corporate Affairs specified one crore rupees (₹ 1,00,00,000) as the minimum default amount for the purposes of section 4 of the Code with effect from March 24, 2020. The process of insolvency resolution starts with an admission order by the Adjudicating Authority (AA).

Another departure from earlier laws is the replacement of a "debtor in possession" approach with a "creditor in control" regime. Hence, once the process starts, the powers of the existing board of directors are suspended and, during the Corporate Insolvency Resolution Process, a creditor-approved Insolvency Professional is appointed to manage the Corporate Debtor as a going concern. The Insolvency Professional functions under the overall control and supervision of the Committee of Creditors (CoC, which generally comprises the financial creditors) of the Corporate Debtor.

The Insolvency and Bankruptcy Code, 2016 is a collective mechanism for maximizing the value of assets of a Corporate Debtor for the benefit of the creditors and all other stakeholders. Hence, it provides a moratorium protection or "calm period" against individual or collective legal actions against the Corporate Debtor during the Corporate Insolvency Resolution Process. Further, the Insolvency and Bankruptcy Code, 2016 also equips the Insolvency Professional

to apply for avoidance of certain transactions conducted by the Corporate Debtor prior to insolvency, to preserve and increase the pool of assets available for the collective benefit of the creditors.

Corporate insolvency resolution under the Insolvency and Bankruptcy Code, 2016 is achieved with a resolution plan, which may be proposed by any eligible person (not necessarily the debtor or the promoter) and which needs to be approved by the Committee of Creditors (CoC) and, thereafter, by the Adjudicating Authority. If the Corporate Insolvency Resolution Process fails, an order to liquidate the Corporate Debtor is passed by the Adjudicating Authority.

The Insolvency and Bankruptcy Code, 2016 also creates institutional infrastructure to help achieve its objectives.

The infrastructure comprises :

• Insolvency Professionals and insolvency professional agencies (IPAs) as bodies for enrolling and regulating the Insolvency Professionals and insolvency professional entities (IPEs) that conduct the Insolvency and Bankruptcy Code, 2016 processes;

• information utilities as repositories of information;

• Adjudicating Authorities, which are the National Company Law Tribunals (NCLTs), established under the Companies Act, 2013, and two appellate authorities : the National Company Law Appellate Tribunal (NCLAT) and the Supreme Court of India;

• the Insolvency and Bankruptcy Board of India (IBBI) as the regulator.

NATIONAL COMPANY LAW TRIBUNAL (NCLT)

The National Company Law Tribunal is *a quasi-judicial* body in India that adjudicates issues relating to Indian companies. The tribunal was established under the Companies Act, 2013 and was constituted on 1 June, 2016 by the government of India and is based on the recommendation of the V. Balakrishna Eradi committee on law relating to the insolvency and the winding up of companies.

All proceedings under the Companies Act, including proceedings relating to arbitration, compromise, arrangements, reconstructions and the winding up of companies shall be disposed off by the National Company Law Tribunal. The National Company Law Tribunal (NCLT) bench is chaired by a Judicial member who is supposed to be a retired or a serving High Court Judge and a Technical member who must be from the Indian Corporate Law Service, ICLS Cadre.

The National Company Law Tribunal is the adjudicating authority for the insolvency resolution process of companies and limited liability partnerships under the Insolvency and Bankruptcy Code, 2016.

No criminal court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Tribunal or the Appellate Tribunal is empowered to determine by or under this Act or any other law for the time being in force and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act or any other law for the time being in force, by the Tribunal or the Appellate Tribunal.

The tribunal has sixteen benches, six at New Delhi (one being the principal bench) and two at Ahmedabad, one at Allahabad, one at Bengaluru, one at Chandigarh, two at Chennai, one at Cuttack, one at Guwahati, three at Hyderabad of which one is at Amaravathi, one at Jaipur, one at Kochi, two at Kolkata and five at Mumbai. Of the two new benches approved to be set up, one each in Indore and Amaravathi, the Indore bench is yet to be notified. Except the Bench at Amaravathi, all the benches have been notified as division benches. Justice M.M.

Kumar, a retired Chief Justice of the Jammu & Kashmir High Court has been appointed president of the tribunal.

The National Company Law Tribunal has the power under the Companies Act to adjudicate proceedings :

1. Initiated before the Company Law Board under the previous act (the Companies Act 1956);

2. Pending before the Board for Industrial and Financial Reconstruction, including those pending under the Sick Industrial Companies (Special Provisions) Act, 1985;

3. Pending before the Appellate Authority for Industrial and Financial Reconstruction; and

4. Pertaining to claims of oppression and mismanagement of a company, winding up of companies and all other powers prescribed under the Companies Act.

Appeals

Decisions of the tribunal may be appealed to the National Company Law Appellate Tribunal, the decisions of which may further be appealed to the Supreme Court of India on a point of law. The Supreme Court of India has upheld the Insolvency and Bankruptcy Code in its entirety.

NATIONAL COMPANY LAW APPELLATE TRIBUNAL (NCLAT)

The Insolvency and Bankruptcy Code, 2016 provides for an authority, the National Company Law Appellate Tribunal, as well as a procedure for appealing against the decisions of Adjudicating Authorities. The National Company Law Appellate Tribunal was constituted under section 410 of the Companies Act, 2013, to hear appeals against orders of National Company Law Tribunal (NCLTs) with effect from June 1, 2016. As of December 1, 2016, the National Company Law Appellate Tribunal is also an appellate authority for appeals against orders passed by Adjudicating Authorities under the Insolvency and Bankruptcy Code, 2016, as well as appeals against orders of the Insolvency and Bankruptcy Board of India, under sections 202 and 211 of the Insolvency and Bankruptcy Code, 2016. The National Company Law Appellate Tribunal is also the appellate tribunal for appeals against orders passed by the Competition Commission of India.

At present, the National Company Law Appellate Tribunal has offices in Delhi and Chennai. Its principal bench is in New Delhi.

Section 61 of the Insolvency and Bankruptcy Code, 2016 enables any person aggrieved by an order of an Adjudicating Authority to appeal to the National Company Law Appellate Tribunal, provided the appeal is filed within 30 days of receiving the order. The National Company Law Appellate Tribunal can extend the time limit for a maximum of 15 days if it is satisfied that the appellant had genuine reasons for not being able to file within the prescribed 30 days. The section further specifies the grounds on which an appeal against an Adjudicating Authority order approving a resolution plan under section 31 of the Insolvency and Bankruptcy Code, 2016 may be filed. Such an appeal is allowed if it is felt that the resolution plan contravenes any provision of the Insolvency and Bankruptcy Code, 2016 or any other law, or if there has been any material irregularity or fraud by the Resolution Professional, while exercising his powers during the Corporate Insolvency Resolution Process or liquidation process.

SPECIAL COURTS
(UNDER THE COMPANIES ACT, 2013)

Introduction

Long periods of time taken in disposal of cases can defeat justice. Cases which require immediate relief are severely affected because of the tardy judicial process. Thus, to tackle this problem, Special Courts have been established to ensure effective and quick disposal of cases.

The definition of court under Section 2(29) the Companies Act, 2013, also includes a Special Court constituted under Section 435 of the Act. Chapter XXVIII of the Act deals with Special Courts.

In May, 2015, a provision was made under Section 435 of the Companies Act, 2013 enabling the Central Government to constitute or designate Special Courts through a notification in order to enable speedy trial of offences under the Act.

However, the Companies (Amendment) Act, 2020 has excluded offences under Section 452 (punishment provided for wrongful withholding of any property) of the Act to fall under the jurisdiction of Special Courts.

COMPOSITION AND STRUCTURE OF SPECIAL COURTS

The composition of Special Courts is bifurcated into two parts depending on the nature of offences to be dealt with by it. A Special Court shall consist of the following :

1. A single judge holding office as Session Judge or Additional Session Judge, in case of offences punishable under this Act with imprisonment of two years or more; and

2. A Metropolitan Magistrate or a Judicial Magistrate of the First Class, in the case of other offences.

The judge shall be appointed by the Central Government in consensus with the Chief Justice of the High Court within whose jurisdiction the judge to be appointed is working.

OFFENCES TRIABLE BY SPECIAL COURTS

Offences for which imprisonment of 2 years or more is prescribed shall be tried only by the Special Court constituted for the area in which the registered office of the company in relation to which the offence is committed. In case there more Special Courts than one for such area, by such one of them as may be stated in this behalf by the High Court concerned.

The offences that can be tried by the Special Court include but not limited to :

1. Contravention of provisions of Section 336 of the Act (offences committed by Officers of Companies in liquidation) can warrant an imprisonment for a minimum period of 3 years.

2. Commission of fraud within the meaning of Section 447 of the Act.

3. Intentionally providing false evidence under Section 449 of the Act.

POWERS AND DUTIES OF SPECIAL COURTS

Cases where an accused person is forwarded to the Special Court

In case any person accused of, or suspected of committing an offence under the Act, is forwarded to a Magistrate under Section 167(2) or Section 167(2A) of the Criminal Procedure Code, 1973, a detention may be authorised by the Magistrate of such person in custody.

The maximum period of such detention is : 1. 15 days if the Magistrate is a Judicial Magistrate, 2. 7 days if the Magistrate is an Executive Magistrate.

If, however, in the opinion of the Magistrate, detention of the aforesaid person upon or prior to the expiry of the detention period is not necessary, he shall pass an order for forwarding such person to the Special Court having jurisdiction.

As regards the person forwarded to it, the Special Court is vested with the same power as the Magistrate having jurisdiction to try a case under Section 167 of the Criminal Procedure Code may exercise in respect of an accused person forwarded to him.

Cognizance of offence by Special Court without the accused being committed to it for trial

The foremost step towards a trial is taking cognizance of an offence. Cognizance basically means taking a judicial or authoritative notice. However, Section 436 of the Act, allows the Special Court to discard this cardinal rule and proceed to take cognizance of an offence even without committing an accused to it for conducting a trial of the case on:

1. Scrutiny of the police report received after the conclusion of the investigation consisting of the facts establishing an offence under the Act, or

2. Receipt of a complaint in respect to the same.

Trial of other offences by the Special Court

The Special Court while trying offences under the Act, may also try any other offences committed under any other Acts, with which the accused may be charged at the same trial under the Criminal Procedure Code, 1973.

Summary trials by the Special Court

- The Special Court may, if it thinks necessary to do so, try any offence under the Act in a summary manner if the punishment for the same is imprisonment for a maximum period of 3 years.
- The Special Court can impose a sentence of imprisonment for a maximum period of 1 year for convictions in a summary trial.
- The summary trial may be transformed into a regular trial in any of the following cases:

1. At the beginning or during the course of the trial, the Special Court considers that the nature of the case is one which may require passing of a sentence of imprisonment for a period exceeding 1 year or;

2. If the Special Court considers the continuing of the summary trial to be undesirable.

Thereafter, the Special Court shall proceed to hear or rehear the case according to the procedure for the regular trial after hearing the parties, recording an order in respect of the same and recalling any witnesses whose examination have taken place.

Application of the Criminal Procedure Code, 1973 to proceedings before the Special Court

The provisions contained in the Code of Criminal Procedure, 1973 shall be applicable to the proceedings conducted before the Special Court. In purpose of the same, the Special Court shall be deemed to be a Sessions Court or the court of Metropolitan Magistrate or a Judicial Magistrate of the First Class accordingly. The person conducting proceedings before the Special Court shall be deemed to be a Public Prosecutor.

Offences under the Act to be Non-Cognizable

- Every offence under the Act shall be deemed to be non-cognizable except offences as specified under Section 212(6) of the Act. Section 212 of the Act dealing with investigation by the Serious Fraud Investigation Office provides under sub-section (6) that, offence envisaged under Section 447 of the Act shall be cognizable.
- A Court can take cognizance of an offence alleged to have been committed under the Act by any company or any officer only after receipt of a written complaint by the following persons;
  1. Registrar of Companies, or
  2. any shareholder of the company, or
  3. any member of the company, or
  4. any person authorized by the Central Government.

- A court can take cognizance of offences in relation to issue and transfer of securities and non-payment of dividend on receipt of a written complaint by any person authorized by the Securities and Exchange Board of India.

However, the aforesaid provisions shall not apply to any prosecution by a company of any its officers as well as any action that might be taken by the liquidator of a company with regards to any of the matters specified in Chapter XX or in any winding-up provisions contained in the Act.

Factors to be taken into consideration by a Special Court for determining the level of punishment

The Special Court shall keep in mind the following factors, while deciding the gravity of punishment :

1. Size of the particular company;
2. Nature and type of business undertaken by the company;
3. Injury capable of being caused to the public interest;
4. Nature and size of the default committed; and
5. Repetitive nature of the default.

Compounding of offences under the Act

The prior approval of Special Court was needed in order to compound certain offences under the Act. However, this provision was done away with by the Companies (Amendment) Ordinance, 2018.

At present, the offences can be compounded by the National Company Law Tribunal, Regional Director or any other officer authorised by the Central Government as the case may be depending on the quantum of punishment.

Appeals/Revisions from the orders of a Special Court

The High Court within the local limits of whose jurisdiction the Special Court exists, is conferred with the power of hearing cases of appeals/revisions from the orders of such Special Court. The special court is treated as a Court of Session in this scenario.

While presenting the Budget for 2021-22 on 1 February, 2021 the Finance Minister has proposed to set-up E-courts, strengthen National Company Law Tribunal (NCLT) process and introduce alternate methods of debt resolution and special framework for MSMEs to ensure faster resolution of cases. This will help the business community at large in carrying out their business.