Guide to Fast Track Closure of the Companies in India

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Comprehensive provisions have been made in the Companies Act, 2013 (hereinafter referred to as '**Act**') with regard to the removal of names of companies from the register of companies. **This is popularly known as Fast Track Exit/Closure or Strike-off of a company's name from the register of companies, maintained by the Registrar having the effect of dissolving the company.**

A Company comes into existence by way of incorporation and enjoys abundant rights under the status of an artificial person given to it by the Law. When a company is registered on incorporation, logically, there should be a provision for its deregistration or closure other than by way of winding up, for reasons such as discontinuation of business in order to dissolve the company.

Provisions of Section 248 of the Act provide for the removal of the name of the company from the register of companies, allowing a company to deregister itself otherwise than by way of winding up. Provision for deregistration by way of removal of the name has been in existence for a long time since Companies Act, 1913 and continued to remain so under the Act under Section 248. The difference between provisions of Companies Act, 1913 and 1956 vis-à-vis the Act is albeit under erstwhile Acts only the Registrar had the powers to remove the name of a company if he was convinced that the company had not been in operation or had not been carrying on the business.

Unlike erstwhile Companies Act, where only the Registrar had *suo-moto* powers to remove the name of a company from the register of companies, Section 248 of the Act authorizes a company to apply by themselves for removal of the name. Therefore, this provides an opportunity to the defunct or non-operational companies to get their names struck off from the records without having to follow the extensive procedure of winding up.

Things to know about Fast Track Closure

In the below para, we are discussing various aspects of Strike Off or Fast Track Exit or Closure of a Company

The Registrar has the *suo-moto* powers to remove the name of a company if,

- **It has not been carrying on the business for two immediately preceding financial years and has not applied for treating it as a dormant company;**

  or

- **It has failed to commence business within one year of incorporation.**

However, before doing so, Registrar needs to send a notice to the company of his intention to remove the name of the company within a period of 30 days from the date of the notice. The Registrar has recently taken this rigorous step in a massive clean up of inactive companies to curb the black money menace.

Right of a company to apply for removal of name

As per Section 248(2) of the Act, a company can also file an application before the Registrar for removal of its name from the register on the grounds specified above. However, **for doing so, it has to establish that it has no liability and has obtained the approval of shareholders by way of a special resolution.** On receipt of such application, the Registrar shall cause to publish the public notice to that effect. Certain companies, however, are prohibited from making an application for removal of the name as specified in Section 249 of the Act.

Dissolution of the company

On expiry of 30 days of the public notice issued as aforesaid unless the contrary is shown by the company, the Registrar will remove the name of the company from the register and publish the notice in the official gazette to that effect. **On such publication by the Registrar, the company shall stand dissolved.** The effect of dissolution is that the company shall cease to operate as a company and certificate of incorporation is deemed to have been canceled except for the purpose of realizing the amount due to the company and for the payment or discharge of the liabilities or obligations of the company. The effect of dissolution under this section can be understood in view of a couple of judicial pronouncement wherein it was held that there was no use to continue the criminal proceedings against the company as struck-off from

register *[Khushi Exports P Ltd. Vs. State of Gujarat, (2006) 130 Com Cases 457:(2006) 68 SCL 266 (Guj).]*; where proceedings are commenced by a company which has been struck off the register, the proper procedure for the court to follow is to stay the proceedings pending an application to have the company restored to the register *[Steans Fashions Ltd. Vs. Legal and General Assurance Society Ltd. (1995) 1 BCLC 332 (CA)]*.

Discharge of liabilities

The provisions in Section 248(6) of the Act seeks to ensure that the liabilities and obligations of the company are met and that notwithstanding the removal of the name of the company, the assets, etc. are made available for meeting the liabilities of the company. Having said that, the procedure being followed by the Registrar seems contrary to the provision of Section 248(6) of the Act as Registrar mandates to file a statement of account showing no assets and liabilities on the balance sheet. However, the statutory provision as provided in Section 248(6) of the Act is explicit which envisage that there could be assets and liabilities in respect of the company even after removal of the name from the register.

Personal liability of directors, etc.

Section 248 of the Act further provides that the personal liability, if any, of every director, manager or another officer who was exercising the power of management and every member of the company shall continue and may be enforced as if the company has not been dissolved. It appears from the literal reading of the provision that it is the personal liability of the aforesaid persons towards outsiders, which can be enforced against them. To this effect, the rules made under the section seeks to obtain an indemnity bond from all the directors of the company.

In this regard, reference is made to Section 179 of the Income Tax Act, 1961, which imposes joint and several liabilities on every director of a private company for recovery of tax dues, should the same not be recoverable from the hands of the company. Upon the section becoming applicable, the directors would step into the shoes of the company as an Assessee for the purposes of payment of all taxes due under the Income Tax Act from the company. Section 179 was amended with effect from 1 October 1975 to include all companies and not just companies that are wound up. It has been held that the provisions of Section 179 of the Income Tax Act, 1961, cannot be liberally interpreted so as to include companies which have become defunct without being wound up (removal of name does not entail winding up of the company) *[G. Venkatasubbaiah Vs. Tax Recovery Officer, Vijaywada, 1973 Tax LR 702 (AP); Yeshwant Raghunath Bhide Vs. ITO, (1974) 44 Com Cases 290 (Mys)]*. Although this question remains ambiguous, in the wake of recent clean up exercise carried out by the Registrar under which lakhs of companies were removed from the register, the Income Tax Department issued a circular advising its officers to restore the company and initiate the tax recovery proceedings in case of any tax demands or issues. **In one of the cases, the Mumbai Bench of the National Company Law Tribunal (NCLT) has allowed restoration of the company, which purportedly rushed the application for removal of name to avoid reassessment proceedings, on the application made by the Income Tax Department.** The Hon'ble Tribunal allowed restoration to safeguard the interest of the Department. In view of the draconian tax recovery provision, one has to critically examine availing removal of name option as it fastens liability on the directors. *Pari materia* provisions are there under the Goods and Service Tax Act and Customs Act as well.

What happens to the assets of the Company

Another unsettled issue is about what happens to the assets of the company who ceased to carry on the business and prefers the application to the Registrar for removal of its name. The company either *suo-moto* removed by the Registrar or on an application made by the company at its volition may have any assets vested in it, and in that case how to deal with such assets. Winding up entails the distribution of assets whereas Section 352(2) and 352(7) of the Act provides for the distribution of unclaimed assets, but that is applicable only in case of winding up. Similar is the case under Insolvency and Bankruptcy Code, 2016. However, Chapter XVII for the removal of names of companies does not provide explicit provision in this regard. Unlike provisions under UK Companies Act, 2006 which provides distribution of assets up to a certain value in case of removal of the name of the company and remaining assets vested in the company shall become bona vacantia, and the Act has incorporated no such provision. But the laws of India provide that the property of an estate dying without leaving lawful heirs passes to the government by escheat or as bona vacantia. Whether it can be inferred that the property of a dissolved company shall also pass to the government by escheat or as bona vacantia? Although, the sections in aforesaid Chapter at various places indicate that the

company can remain with the assets which shall be made available for payment or discharge of liabilities and obligations even after the date of the order of removing the name or that the company deemed to be dissolved except for the purpose of realizing the amount due to it or payment of liability, the procedure with the Registrar does not seem in consonance with this provision as the Registrar requires balance sheet with no assets and liabilities duly certified by the chartered accountant affirmed by the majority directors.

It is worth to ponder why assets of the company cannot be distributed amongst the members after discharging all its liabilities as the removal of from the register has an effect of dissolution. It is further to be noted that since all the directors need to give indemnity bond for making the good in case of any future liability, then why should they not benefit from the assets of the company. In the absence of an explicit provision to this effect, this question remains unanswered.

What is the remedial action in case of a company whose name is removed from the register

Section 252 of the Act provides remedial measure in the form of making an appeal to the NCLT for the restoration of the Company. Accordingly, any person aggrieved by order of the Registrar notifying a company as dissolved under Section 248 can file an appeal to the NCLT within three years for restoration of the name of the company. If the NCLT thinks that removal of name is not justified or in the absence of any ground, may order for restoration of the name of the company. The company shall file the copy of the order with the Registrar who shall restore the name of the company and issue a fresh certificate of incorporation. It also empowers the NCLT to restore the company upon application made by the company, any member, or creditor before expiry of twenty years from removal of the company's name, and NCLT is satisfied that the company was carrying on business or was in operation or otherwise and it is just to restore the name of the company to the register.

The Registrar in *Highseas Mastics (India) P. Ltd. Vs. Registrar of Companies [2011] 161 Comp Cas 18 (Delhi)*, struck the company off for not filing certain documents and returns under the Act. Restoring the company to the register, the High Court held that the name of the company had been struck off for failure to file annual returns, etc., for 14 years; but the company was a running concern and not a defunct one. Hence the company was restored subject to payment of exemplary cost.

In *Mindtrac.com India P. Ltd. Vs. Registrar of Companies* [2011] 162 Comp Cas 570 (Delhi), the court ordered the restoration of the company which was struck off by the Registrar on failure to file annual returns for a period of 10 years. Ordering restoration of the company subject to payment of costs, the court held that a company is a socio-economic entity in which the public must have confidence. It must not only be transparent but also be accountable to the public at large. It was a statutory responsibility of the company and its directors to file the annual returns and balance-sheets in accordance with the mandate of the Companies Act, 1956. Based on the fact that it was a functioning company, the name of the company could be restored and its status is changed from inactive to active company, provided the company paid INR One lakh to the Registrar of Companies within a period of four weeks. Thereafter, the company was to file its statutory documents like annual returns and balance-sheets for the outstanding period along with the prescribed fees under Section 611 of the Companies Act.

Ratification of the acts done by the company post-restoration of name

It is settled a position that a company is an incorporated artificial person created by law; it has, therefore, to abide by its own rules and regulations, besides the law. As a general rule, the board of a company ought to function as a single body at duly convened and properly constituted board meeting and take decisions bypassing formal resolutions, except where its board is permitted to act via circular resolutions. However, in an unforeseen event of any act having been done by the company without authority from the board by a resolution, the board may resort to post-action ratification of the action.

The Act does not provide for regularization of an act not at all brought before the board or of an irregular resolution passed at a meeting, but the courts have evolved certain principles in this regard. In the context of law and practice of meeting, the term 'ratification' denotes the act of ratifying; confirmation; sanction. Ratification, thus, is confirmation of an act. In the context of a resolution passed at a meeting, ratification means a resolution of a meeting sanctioning some irregularity.

Thus, in the context of company struck-off by Registrar question arises whether the company can ratify the acts done by it after the restoration of the name by the Registrar. A school of thought subscribes to the aforesaid view.

Nuances of Application

In making an application to the Registrar for removal of the name of the company, there are certain critical aspects involved that need careful consideration which are enumerated below

1. **Statement of Accounts**
   Statement of accounts needs to be prepared as on date, not before 30 days preceding the date of filing of application duly certified by an Auditor or a Chartered Accountant. in whole-time practice.

2. **Indemnity Bond**
   - All the Directors of the company require to furnish indemnity stating that any losses, claim and liabilities, will be paid fully by all the Directors, even after the name of the Company is struck-off of the Register of Companies.
   - In case of foreign nationals and NRIs, Indemnity Bond shall be notarized as well as apostilled/consularized as per their respective country's law.
   - In case of an Indian resident, the same shall be notarized, and Stamp Duty is required to be paid as per the respective State Stamp Act.

3. **Affidavit**
   - It has to be sworn by all the Directors of the company stating that the company has not carried on any business operations since incorporation or that the company had some business operations for a period up to a specific date and subsequently discontinued the same and has not resumed business since the last two years or more, as the case may be.
   - In case of foreign nationals and NRIs, Affidavit shall be notarized as well as apostilled/consularized as per their respective country's law.
   - In case of an Indian resident, the same shall be notarized, and Stamp Duty is required to be paid as per the respective State Stamp Act.

4. **Copy of Board Resolution**
   The Company will require to conduct a Board Meeting for passing a Board resolution for the purpose of Striking off the name of the company and to authorize any director of the company to apply to Registrar of Companies.

5. **Shareholder's Approval**
   The Company will require to conduct a General Meeting for passing a special resolution duly signed by each of the Directors for approving the Striking-off the name of the company or take consent of 75% of the members of the company in terms of paid-up share capital as on the date of application for the same.

6. **Statement regarding pending litigations, if any**
   - The underlying intention is that a Company against which litigation is pending can apply under fast track closure. Mere disclosure of the litigation suffices the requirement in the application.
   - If the pending prosecutions are only for non-filing of Annual Returns under Section 92 and Balance Sheet under Section 137 of the Act, such application may be accepted, provided the applicant has already filed the compounding application. However, steps for the final strike of the name of the company will be taken only after the disposal of compounding application by the competent authority.

7. **No Objection Certificate (NOC) from appropriate authority**
   Certain companies are required to obtain NOC from specified governing authority or sectorial authorities such as Reserve Bank of India, Insurance Board, Securities, and Exchange Board of India, etc.

8. **Penalties for non-compliance under the Act**
   - In case an application is filed in violation of compulsory strike-off, it shall be punishable with fine which may extend to INR 1 lakh.
   - In case an application is filed with the intention to deceive the creditors or to defraud any other persons:
     - the persons in charge of the management of the dissolved company shall be jointly and severally liable to everybody who had incurred loss or damage as a result of the company being notified as dissolved; and;
     - be punishable for fraud in the manner as provided in the Act;
     - ROC may also recommend prosecution of the persons responsible.

Food for Thought

- **Repatriation of funds**
  Unlike liquidation under the Insolvency and Bankruptcy Code, there is no provision for the company being struck off under the Act for repatriation of funds to the owners of the company viz. the shareholders. Additionally, the intending companies have to exhaust their funds and close down their bank account before applying for deregistration, leaving no scope of repatriation after the application for closure. Which means, the strike-off provision is not suitable for the companies having foreign shareholders to whom the funds have to be repatriated pursuant to the closure of business in India.

- **Companies with pending litigation**
  As it is mentioned above, the intending Companies can file closure application pending the litigations against it. No matter how berserk it may sound, this is a two-edged sword on the directors. Because wherein they can go for closure without any hindrances, they incur a risk of having a personal liability in the future due to the litigation outcome.

- **Indemnity Bond and Affidavit**
  The rules made under Section 248 expressly provides that, if the Director of the Company applying for striking off, is a foreign national or non-resident Indian, **the indemnity bond and affidavit shall be notarized or apostilled or consularized in the country of the foreign national.** However, practically, it is experienced that there is no standard procedure in this regard and the Registrar's office has a divergent view on attestation requirement in which some of the offices are insisting to legalize the board resolution, statement of account, etc. This does not seem to be in line with the rules prescribed. **The attestation should be done as per Hague Convention of 5 October 1961 abolishing the Requirement of Legalization for Foreign Public Documents.**

- **No NOC from various authorities**
  NOC is not required from Tax Authorities viz. Income Tax/ GST/VAT/Sales Tax/Central Excise/Customs. However, this is not a full-proof closure because these pending clearances from important authorities may come alive after the dissolution and will bear liabilities/penalties on directors. Hence it is imperative to study the registrations/approval/licenses obtained by the Company from various government authorities.

- **Bank Account closure certificate**
  This is not a mandatory requirement; however, the authorities tend to ask the same.

- **Timeline for completion of dissolution**
  It is experienced that generally it takes four-five months for removal of the name of the company from the register and further it depends upon issues involved in the company such as the surrender of registration, no objection, and discharge of liabilities and a clean up of financials and antecedent activities.

Brief Process

The high-level procedure for removal of name is set out below for ease of reference:

- Cleaning up of financials which may involve payment of dues to creditors or employees, collection of receivables, disposal of fixed assets, payment of other dues, etc.
- In case of any excess fund left post clean up, the same needs to be paid to the shareholders within the four corners of the Companies Act. Hence preparation of cash flow statement would be core to the process.
- Closure of its bank account
- The Company shall apply for strike-off to the ROC in Form STK-2 (FTE) along with the attachments given underneath in separate head,
- The Form STK – 2 should be filed electronically on the MCA portal and by making payment of INR 10,000/- as the ROC fees;
- The ROC shall examine the facts and documents mentioned in the application and if he deems that they are in order, shall publish a public notice inviting objections to the proposed Strike-off, if any.
- Further, the notice shall be placed on the website of MCA, published in the Official Gazette and published in a leading English newspaper and at least in one vernacular newspaper where the company's registered office is situated.
- The ROC shall simultaneously intimate the concerned regulatory authorities, regulating the company, e.g., the Income-tax authorities, Indirect-tax authorities having jurisdiction over the company, about the proposed striking off and seek objections, if any.
- After satisfying himself in all regards, the ROC shall strike-off the name of the Company from Register of Members.
- A Notice of striking off and its dissolution shall be published in the Official Gazette, and the company shall stand dissolved. The same shall also be placed on the official website of the MCA.

SKP's Comments

The authority to the company to file an application at its volition for removal of name is perhaps a welcome provision as under previous company law regime the Ministry of Corporate Affairs has allowed such process by way of circular. This allows companies to dissolve their business without undergoing the rigor of winding up and proving to be cost and time effective process. However, one will have to be mindful of the critical aspects involved in the process as it clearly fastens liability on the director, officer, or member concerned. The applicant company has to take a holistic view of its affairs to ensure it fits into the contours of the scheme of the Act envisaged or intended. Having said that, procedural aspects could have been improvised a bit more by providing clarity on certain issues deliberated above. Also, there should have been explicit provision for dealing with the assets vested in the company whose name is removed from the register, maybe in a similar line of winding up to distribute the same amongst contributories, etc.

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