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On the fast track for exit: MCA paves the way out for defunct companies

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Many things are easier to get into than out of. Companies are in that list – it is easy to form them, but difficult to demolish. It is quite common for entities to form companies that were formed for a once-conceived business, but that never took off and therefore, the company remains unused. Or it may be that the business ceased quite some time back and the company is lying like a shell entity over the years. This is what is known as “defunct company”. Defunct companies may either be taken into winding up or may be written off as defunct by the Registrar u/s 560 of the Companies Act, 1956.

Ministry has come up with various schemes for such inoperative companies. It had lately come up with an Easy Exit Scheme for the first time in the year 2010. The same was re-launched by the Ministry in 2011 on huge demand by corporates who could not avail of EES 2010. Ministry has felt the need of prompt administration and a mechanism to bring down the level of these non-operative companies and reduce the burden of the dormant names lying in the country’s list of companies. Vide a General Circular no. 36/2011 dated 7th June, 2011¹ Ministry has laid down guidelines for “fast track exit (FTE) mode” of defunct companies, effective from 3rd July, 2011. It seems that the FTE now becomes a regular part of company law administration and is not a time bound scheme.

Little bit of statistics:

In the year 2009-2010 50.52%² the applications (i.e. 45,969) received by the Ministry were under section 560 of the Act for striking off the names in the Register maintained by RoC. Out of the total applications received, 49.36% were disposed off. The number of application pending as on 31.03.2010 were 23276 and applications received since 31.3.2010 to 31.12.2010 was 10536³. Out of these pending applications 42.1% applications were disposed off. Total 8,72,740 companies limited by shares were at work in the country as on 31.12.2010. These figures indicate that though the scheme is introduced for speedy exit but Ministry also needs to get a move on for a faster disposal rather than keeping the applications pending.

¹ http://www.mca.gov.in/Ministry/pdf/Circular_36-2011_07jun2011.pdf

² Source- 54th Annual Report of Working group of MCA

³ Source- MCA Annual report 2010-2011

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The Scheme:

The existing route:

Any company desirous of getting its name struck off from the Register of the RoC had to apply in e-Form 61 along with all the pending statutory returns. This process was quite a tedious task for companies, as the companies which did not file their returns for a good number of years had to first prepare the same, file it and then undergo the process of getting the name struck off. The process was nevertheless time consuming, expensive and including lot of paper work both on part of the company and the Ministry.

The precondition is that the company must be defunct. What is a defunct company is dealt with in the below paragraph. However, as per section 560 of the Companies Act, 1956 provisions for strike off of a defunct company is-

- (1) Where the Registrar has reasonable cause to believe that a company is not carrying on business or in operation, he shall send to the company by post a letter inquiring whether the company is carrying on business or in operation.
- (2) If the Registrar does not within one month of sending the letter receive any answer thereto, he shall, within fourteen days of the expiry of the month, send to the company by post a registered letter referring to the first letter, and stating that no answer thereto has been received and that, if an answer is not received to the second letter within one month from the date thereof, a notice will be published in the Official Gazette with a view to striking the name of the company off the Register.
- (3) XXX
- (4) XXX
- (5) At the expiry of the time mentioned in the notice referred to in sub-section (3) or (4), the Registrar may, unless cause to the contrary is previously shown by the company, strike its name off the Register, and shall publish notice thereof in the Official Gazette; and on the publication in the Official Gazette of this notice, the company shall stand dissolved:

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The new scheme:

Applicability

The scheme is applicable for a “defunct company”. For the purpose of the scheme “defunct company” shall mean a company which has-

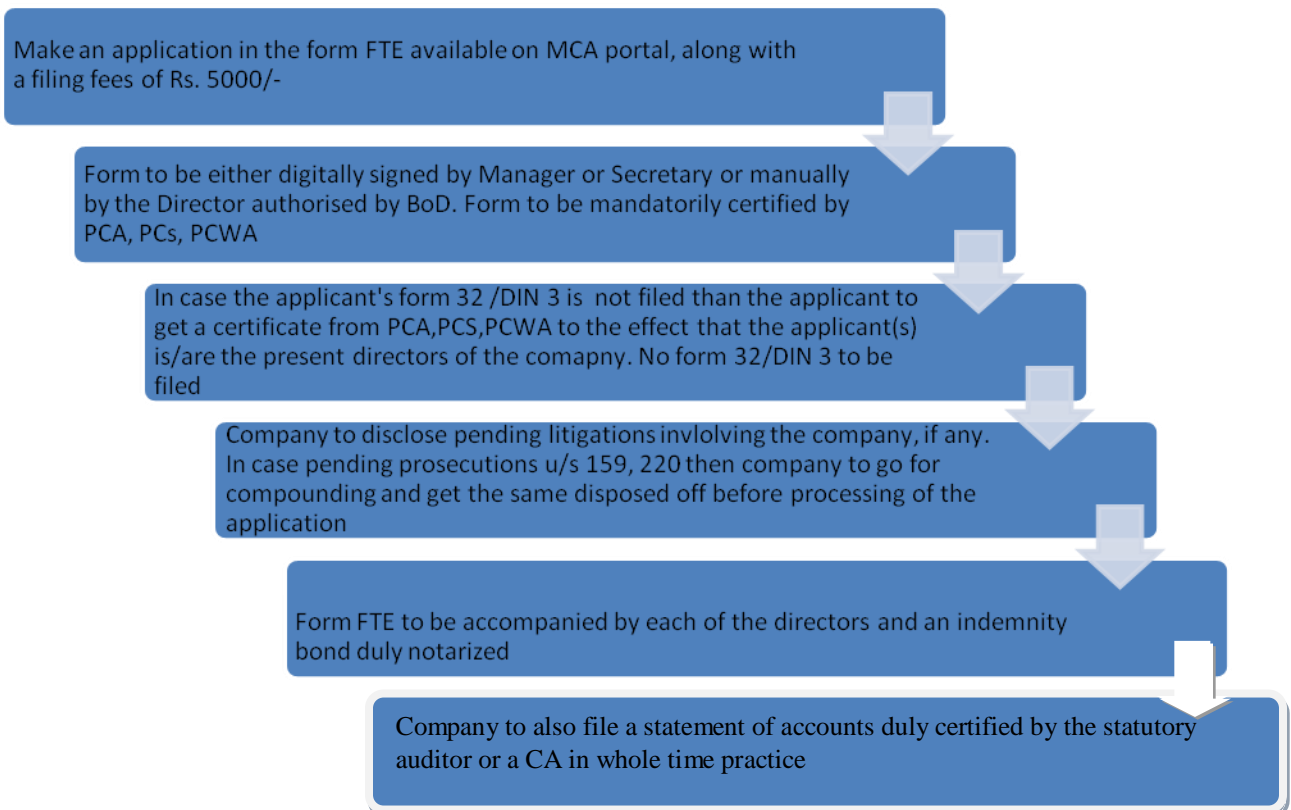
- Nil asset and nil liability
- Not commenced any business or activity since incorporation
- Not been carrying any business operation since last one year before making an application under Fast Track Exit Scheme

Any defunct company which has active status or identified as dormant by the Ministry of Corporate Affairs, may apply for getting its name struck off from the Register of Companies.

Effective date

The scheme is effective from 3rd July, 2011. There is no time limit for the scheme – from which it appears that the scheme may be continuing.

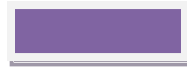
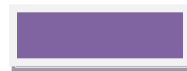
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Relevant process and steps to be taken by the concerned Registrar of Companies



**Name of the company being struck off
from the Register of companies and
the company shall stand dissolved
from the date of publication in
Official Gazette**

Few Checkpoints

- Any defunct company which is a Government company is to submit a 'No Objection Certificate' issued by concerned administrative Ministry or Department or State Government along with the application.
- In case of foreign nationals and NRIs, indemnity bond and affidavit may be notarized as per the respective country's law.
- In the case of 100% Government companies, if no board is in existence, an officer not below the rank of Deputy Secretary of the concerned administrative Ministry may be authorised to enter his name and other details in Form FTE and in Annexure A, B and C in place and other details of the directors and also to sign the said documents before filing.



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Who cannot avail?

Since the idea of FTE is to have defunct companies having zero asset liabilities, therefore, companies with subsisting loans, public deposits, pending prosecutions, statutory dues are restrained from FTE.

Few type of companies are kept out of the purview of availing the FTE:

- Listed Companies
- Section 25 registered companies
- Vanishing Companies

There are also certain categories of companies against which either a court case is pending or may be against which investigation is pending. The same are also out of the purview of FTE.

- Companies delisted due to non-compliances
- Companies where inspection or investigation is ordered and being carried out or yet to be taken up or where prosecutions arising of inspection/investigation are pending;
- Companies where order u/s 234 is issues and the reply/prosecution is pending;
- Companies against which prosecution for a non-compoundable offence is pending in court;
- Companies against which prosecution for a non-compoundable offence is pending in court;
- Company in respect of which filing of documents have been stayed by court or CLB or Central Government or any other competent authority;

There are again certain categories of companies in which if at all any loan subsists or any deposits are outstanding which too cannot avail FTE:

- Companies having accepted public deposits which are either outstanding or the company is in default in repayment of the same;
- Company having secured loan;
- Company having management dispute;
- Company having dues towards income tax or sales tax or central excise or banks and financial institutions or any other Central Government or State Government Departments or authorities or any local authorities.

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Though the Ministry has come up with exit schemes in the past and the Fast Track Exit Scheme is only a replacement of the same, yet there are few noticeable differences between the fast track exit and the easy exit schemes. Below is a synopsis:

Particulars	Fast Track Exit (FTE)	Easy Exit Scheme (EES)	
		2011	2010
Eligibility	Being inoperative since incorporation or is not carrying any business activity since last one year prior to application under FTE	Being inoperative or not carrying any business since 1 st April, 2008	Being inoperative or not carrying any business for atleast 2years
Asset-Liability	Nil assets, nil liabilities	No requirement of nil asset, nil liability	Statement of accounts depicted that companies with assets and liabilities may apply under the scheme
Filing Fess	Rs. 5000/-	Rs. 3000/-	No Fees
Signing of Application	Application to be digitally signed by a director or manager or secretary; in case of manual application to be signed by a director authorised by BoD	Application to be digitally signed by one director; in case of manual application to be signed by one director	Application to be digitally signed by one director; in case of manual application to be signed by one director

Fast Track Exit would pave a way for the companies for easy dissolution rather than undergoing the tedious, strenuous and year long process of winding up. Winding up affairs in India is comparatively more time consuming and might take almost a life time for the companies to get it dissolved. Thus, for atleast the defunct companies the scheme is a boon. Though the Ministry is trying to gear up the winding up process but we might not expect the same to come into real force at the present moment.

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However, the scheme brings with it few thinkers:

Can the defaulting companies apply under FTE?

Defaulting companies are identified as companies which have not filed their statutory documents, i.e. balance sheet and annual return for any of the financial year 2006-07, 2007-08, 2009-10. Directors of such defaulting companies are debarred from filing any document until the default is made good. Such defaulting companies can apply under FTE.

Meaning of 'defunct' and distribution of assets

The present scheme only deals with defunct companies and it includes a condition that a defunct company is the one with- nil assets, nil liabilities. Therefore, under the present scheme even if a company is active can avail the scheme as long as it has zero asset-liabilities. Usually it use to hit the minds of people that how the assets and liabilities will be dealt with, under the past exit schemes. How will the assets be distributed etc. The present scheme seems to have done away with that weariness of all. There lies no question of distribution in the event of dissolving the company as the condition precedent is to have nil assets, nil liabilities. Therefore, no question of any distribution in the event of entering the exit route. For procedures and recent developments on winding up please refer the link below. ⁴

Can an inoperative company with assets and liabilities apply under FTE?

Unlike EES 2011 which was silent on asset-liability status, the present scheme talks about a defunct company to mean a company with nil asset and nil liability. Though proviso (a) to section 560 (5) states that liability, if any of the director shall continue, but the scheme deals with a defunct company with nil asset and nil liability. Does this mean that a company satisfying other condition of being defunct but that of asset and liability cannot apply for the scheme? This reflects that zero asset-liability is a condition precedent to the application under the present scheme.

Difference between 'FTE and 'winding up'

As we have come to know that FTE mode is only for companies which have nothing in hand and the purpose of such a company is to get its name struck off the register of companies maintained by the Ministry. Winding up on the other hand is all about wrapping up the affairs of the company and dissolving the same. Thus, in case of winding up the company is very much active and has an operative business with assets and liabilities of course. The time and cost involved in FTE is comparatively much lower than involved in winding up. Surely a company not having any operations has best option that of FTE to get its name struck off.

⁴ http://www.india-financing.com/Article_on_MCA's_initiative_to_speed_up_winding_up.pdf