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VINOD KOTHARI & COMPANY

Some of the ways to Corporate Death

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This is a guidance note and a detailed analysis of some of the options available for putting an end to a company. However, the best option for the dissolution of a company is a matter of facts and circumstances and varies from company to company, case to case. Among the various options available to close down the affairs of a company, few are discussed herein below.

1. Fast Track Exit Mode:

To give an opportunity for fast track exit by a defunct company, for getting its name struck off from the register of companies, the Ministry has decided to modify the existing route through e-form – 61 and has prescribed the new Guidelines vide **General Circular No. 36/2011 dated 07.06.2011** called Fast Track Exit (FTE) effective from 3rd July, 2011. The exit mode is applicable to such companies which have:

- Nil assets and liabilities; AND
- Has not commenced any business activity since incorporation; or
- Is not carrying over any business activity for last one year before making application under this scheme

It has clearly been defined in the Guidelines that the following companies are not eligible to take the benefit of this Scheme

- Listed Companies
- Companies that have been de-listed
- Section 25 Companies
- Vanishing Companies – Companies registered under the Companies Act, 1956 and listed with Stock Exchange which, has failed to file its returns with Registrar

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of Companies and Stock Exchange for a consecutive period of two years, and is not maintaining its registered office at the address notified with the Registrar of Companies or Stock Exchange and none of its Directors are traceable.

- Companies where inspection or investigation is ordered and being carried out or yet to be taken up or where completed prosecutions arising out of such inspection or investigation are pending in the court
- Companies where order under section 234 of the Companies Act, 1956 has been issued by the Registrar and reply thereto is pending or where prosecution if any, is pending in the court
- Companies against which prosecution for a non-compoundable offence is pending in court;
- Companies 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 in respect of which filing of documents have been stayed by court or Company Law Board (CLB) or Central Government or any other competent authority
- 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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Procedure for making application under the scheme

- An application in form FTE is to be made electronically with fees of INR 5,000/- certified by Practicing Chartered Accountant or Practicing Company Secretary or Practicing Cost Accountant
- In case, the application in Form FTE, is not being digitally signed by any of the director or Manager or Secretary, a physical copy of the Form duly filled in, shall be signed manually by a director authorised by the Board of Directors of the company and shall be attached with the application Form at the time of its filing electronically; however, in all the cases, the form is required to be certified by a Chartered Accountant in whole time practice or Company Secretary in whole time practice or Cost Accountant in whole time practice
- In case, the applicant name is not available in the database of directors maintained by the Ministry, the application shall be accompanied by certificate from a Chartered Accountant in whole time practice or Company Secretary in whole time practice or Cost Accountant in whole time practice alongwith their membership number, certifying that the applicants are present directors of the company. In such cases, the applicants shall not be asked to file Form 32 and Form DIN 3
- The company shall disclose pending litigations if any, involving the company while applying under FTE and the Form FTE shall be accompanied by
 - an affidavit annexed at Annexure- A, which should be sworn by each of the existing director(s) of the company before a First Class Judicial Magistrate or Executive Magistrate or Oath Commissioner or Notary, to the effect that the company has not carried on any business since incorporation or that the company did some business for a period up to a date (which should be specified) and then discontinued its operations, as the case may be.
 - an Indemnity Bond, duly notarized, as annexed at Annexure B, to be given by every director individually or collectively, to the effect that any losses, claim and liabilities on the company, will be met in full by every director

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individually or collectively, even after the name of the company is struck off the register of Companies

- In case of foreign nationals and NRIs, Indemnity Bond and Affidavit shall be notarized as per their respective country's law
- a Statement of Account annexed at Annexure C, prepared as on date not prior to more than one month preceding the date of filing of application in Form FTE, duly certified by a statutory auditor or Chartered Accountant in whole time practice, as the case may be
- 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 authorized to enter his name and other details in Form FTE and in Annexure A, B and C in place of name and other details of the directors and also to sign the said documents before filing.
- The Registrar of Companies, on receipt of the application, shall examine the same and if found in order, shall give a notice to the company under section 560(3) giving thirty days time, stating that unless cause is shown to the contrary, its name be struck off from the Register and the company will be dissolved.
- The RoC shall put the name of applicant company and date of making the application under fast track exit mode on the MCA portal giving thirty days time for raising objection, if any, by the stakeholders to the concerned Registrar
- In case, the company is also governed by some other statute like RBI, SEBI etc, the RoC shall send intimation to these authorities and to the IT Department also giving 30 days time for their objection, if any.
- After passing of the above mentioned time of 30 days and on being satisfied that the case is otherwise in order, shall strike its name off the Register and publish the

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name of the company in the Official Gazette and the company shall stand dissolved from the date of publication of the notice in the Official Gazette

Time taken

A maximum of 2 months however, the decision of the Registrar of Companies in respect of striking off the name of company shall be final.

Cost involved

- Filing fee of FTE Form, i.e. Rs. 5,000/-
- Professional fee for certifying the form and the statements as required
- Out of pocket expense, if any, for liasoning with the department

2. Conversion of existing company into LLP

Conditions for conversion:

- There is no security interest in its assets subsisting or in force at the time of conversion
- All shareholders becomes the partners of LLP

Procedure

- Filing of statement containing name, CIN and date of incorporation of the company
- Incorporation documents and statements required for incorporation are:
 - Filing of Form 1 for reservation of name
 - Filing of Form 2 for incorporation
 - Filing of Form 18 for conversion of a company into an LLP
 - Filing of Form 3 for registering the LLP Agreement and Form 4 for partners details within 30 days of incorporation
- Intimation of conversion to the RoC within 15 days of registration of the LLP in Form 14 of Central Government (General Rules and Forms)

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Time taken

Conversion process will take a maximum of 1 month's time; however the same is dependent on the RoC's approval of the forms

Cost involved

- Filing fee of various forms
- Out of pocket expense, if required for getting the forms approved

Dissolution:

After converting the company into an LLP, the same can be dissolved. However, an LLP may be dissolved voluntarily only when it has filed at least one balance sheet after its incorporation with the Registrar.

Procedure

The process of voluntary dissolution of an LLP is:

- A special resolution is to be passed by the partners for winding up and filing of the same within 30 days of passing of resolution in Form 1
- In case the LLP is having secured or unsecured creditors, consent of creditors also required to be obtained in a meeting of creditors and same shall be filed in Form 5 within 15 days
- A declaration of solvency duly affirmed by an affidavit will be given by the majority of the Designated Partners
- Filing of Declaration of solvency in Form 3 within 15 days along with an audited report on assets and liabilities of the LLP
- Publication of resolution for winding in one newspaper within 14 days of receipt of consent from creditors
- Appoint a LLP Liquidator (any practicing professional in the panel notified by the CG in this behalf) with a simple majority and fix remuneration within 30 days of
 - Passing of resolution if there is no creditor
 - Publication of notice if there are creditors
- LLP to file Form 7 within ten days intimating the Registrar about the appointment of LLP Liquidator

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- LLP Liquidator to file a quarterly report on the progress of the winding up proceedings
- On fully winding up the affairs of the LLP, the LLP liquidator shall prepare a report in Form 9 and circulate among all the partners and creditors, if any
- After considering the report of the liquidator, atleast two-third partners, on being satisfied, shall pass a resolution winding up the accounts
- Within 15 days of passing the resolution, the Liquidator shall file:
 - Form 10 with the Registrar
 - An application with the Tribunal
- Tribunal, on being satisfied, shall pass winding up order within 60 days of receipt of information
- Order copy is to be filed in Form 11 with the Registrar on receiving of which the Registrar shall publish in the Official Gazette that the LLP stands dissolved

Time taken

The whole proceedings may end up in 4-6 months

Cost involved:

- Liquidator fee
- Publication of resolution in one newspaper
- Normal filing fee of various forms
- Audit fee for getting the accounts of liquidator audited
- Out of pocket expense for moving the application before the tribunal
- Cost for getting certified order copies

Tax implications at the time of conversion of Company into LLP:

- 1) Exemption of Capital Gain in the hands of Company:

Capital Gain on transfer of assets (capital and intangible) is exempt under Section 47(xiiiib) of Income Tax Act, 1961, subject to following conditions.

- a. Conversion takes place in accordance with the provisions of Section 56 and 57 of LLP Act.

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- b. All assets and liabilities of the company immediately before the conversion should become the assets and liabilities of LLP at the time of conversion.
 - c. All the shareholders of the company immediately before the conversion should become the partners of the LLP and proportion of profit and capital contribution will be same as before the conversion.
 - d. No consideration would be paid by LLP to the company and Shareholders of the company do not receive any consideration other than by way of share in profit and capital contribution in the LLP.
 - e. The aggregate of the profits sharing ratio of the shareholders of the predecessor company in the LLP shall not be less than 50% immediately after conversion and at any time during the period of five years from the date of conversion.
 - f. The total sales, turnover or gross receipts in business of the company in any of the three previous years preceding the year in which conversion takes place should not be more than Rs. 60 lakhs.
 - g. No amount is paid to any partner out of balance of accumulated profit standing in the accounts of the company on the date of conversion for a period of three years from the date of conversion.
- 2) Exemption of Capital Gain in the hands of shareholders:

Capital Gain on transfer of shares held by a shareholder in the company is exempt under Section 47(xiii b) of Income Tax Act, 1961 provided above seven conditions are complied with.

- 3) Carry forward of losses

Accumulated loss and depreciation of the company will become accumulated loss and depreciation of the LLP of the previous year in which conversion takes place.

- 4) Mat credit

Any unutilised MAT credit in the hands of the company would not be available to the LLP.

- 5) Cost of Assets in the hands of LLP

The actual cost of the block of assets in the case of the limited liability partnership shall be the written down value of the block of assets as in the case of the said

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company on the date of conversion of the company into the limited liability partnership.

6) Cost of partnership in the hands of partners

Where the capital asset being rights of a partner become the property of the assessee on conversion as referred to in clause (xiiib) of section 47, the cost of acquisition of the asset shall be deemed to be the cost of acquisition to him of the share or shares in the company immediately before its conversion.

Tax Implications if the above conditions are not complied with:

Capital Gain will be taxable in the hands of LLP

Capital Gain on transfer of assets (capital and intangible), as exempted under Section 47(xiiib), shall be deemed to be the capital gain, in the hands of successor limited liability partnership, of the previous year in which above conditions are not complied with.

Capital Gain will be taxable in the hands of partners

Capital Gain on transfer of shares hold by him, as exempted under Section 47(xiiib), shall be deemed to be the capital gain of the previous year in which above conditions are not complied with.

No incremental tax burden is involved in the above procedure. Normal tax provisions as are applicable on dissolution of a firm will apply in case of dissolution of LLP.

3. Voluntary winding up under the Companies Act

On company's part

S. No.	Particulars	Time taken
1.	Convening a board meeting and making a declaration of winding up, accompanied by a Declaration of Solvency(in Form 149 of Companies Court Rules)	X days
2.	Filing of Declaration along with: <ul style="list-style-type: none"> Audited balance sheet for the 	Atleast 5 weeks prior to the general meeting

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	<p>period ending practicable date before the date of declaration along with the auditor's report</p> <ul style="list-style-type: none"> • A statement of assets and liabilities and auditor's report thereon 	
3.	Issue of notice calling general meeting	X days + 23 days
4.	Passing of SR for winding up at the general meeting and OR for appointing the and fixing remuneration of liquidator	On the day of general meeting (on x+23 day)
5.	Intimating RoC about the appointment of liquidator	Within (X+23)+10 days
6.	Filing of Form 23	Within (X+23)+30 days
7.	Submit to the liquidator a statement on company's affair in Form 57 duly verified by affidavit in Form 58	Within (X+23)+21 days
8.	Advertisement in official gazette and in 2 newspapers	Within (X+23)+14 days

On Liquidator's part

Sr. No.	Particulars	Time taken
1.	Liquidator to publish the notice of his appointment in official gazette and to intimate the RoC, concerned IT officer	within 14 days of appointment
2.	If with the time specified in the Declaration of Solvency, debts are not repaid in full or the time has expired, liquidator to call a meeting of	Within 3 months of the end of the FY

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	creditors	
3.	If winding up continues for more than one year, general meeting to be called	Within 3 months of the end of the FY
4.	Liquidator to file statements in prescribed format together with audit report twice in a year if liquidation not completed in one year	
5.	Realising of all assets and paying of all debts and distributing the surpluses, if any, among the members	
6.	As soon as the affairs are fully wound up, liquidator to prepare the accounts in specified format and get the same audited	
7.	Liquidator to call the final general meeting by publishing notice in official gazette and a newspaper	Notice to be published not less than one month before the meeting
8.	Passing of SR at the meeting for disposal of books and papers and filing of SR with the RoC	Within 30 days of passing of resolution

Cost Involved

- Filing fee of forms
- Publication of notice of general meeting in 2 newspapers and publication of notice of final general meeting for disposal of accounts
- Liquidator's remuneration
- Audit fee for getting the statements of assets and liabilities audited
- Out of pocket expense incurred, if any