

REPORTING ON STRUCK DOWN COMPANIES REVIVED BY NCLT

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CURRENT STATUS

- As of January 2019, total companies registered with ROC - 18.50 lakhs
- Out of these 66% to 67% were active.
- Out of these 2.26 lakhs were struck off for non filing of annual returns or financials for >2 years and action contemplated for another 2.25 lakh companies during the year.
- ❖ As per various sources on web:

INTRODUCTION

The Ministry of Corporate Affairs ("**MCA**") vide Notification dated 26.12.2016 notified Section 248 to 252 of the Companies Act, 2013 ("**Act**") revising procedures and provisions under section 560 of the erstwhile Companies Act 1956 and revised the process of striking off the name of the company from the register of companies maintained by the Registrar of Companies ("**ROC**").

In addition to the provisions of the Act relating to Strike Off, MCA has also issued the Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016 ("**Rules**") to be effective from the same date i.e. 26.12.2016 in order to provide procedural aspect of Strike Off under the Act.

Unlike the erstwhile Companies Act 1956 where only the Registrar had *suo moto* powers to remove the name of the company from the register of companies on account of its not carrying on business, the Companies Act 2013 authorises companies themselves to apply for the removal of their names from the register of members.

PROCEDURES FOR STRIKE OFF

SEC 248 (1): POWER OF REGISTRAR TO REMOVE NAME OF COMPANY FROM ROC

Section 248(1) of the Act provides that, "where the ROC has reasonable cause to believe that:

- a company has failed to commence its business within one year of its incorporation; [or]
- a company is not carrying on any business or operation for a period of two immediately preceding financial years and
- has not made any application within such period for obtaining the status of a dormant company under section 455.

The Registrar shall send a notice to the company and all its directors, of his intention to remove the name of the company from the register of companies and requesting them to send their representations.

PROCEDURES FOR STRIKE OFF

SEC 248 (1): POWER OF REGISTRAR TO REMOVE NAME OF COMPANY FROM ROC

Procedure to be followed by ROC for strike off by its own motion:

- ▶ ROC shall send a notice in writing in Form STK - 1 to all the directors of the company. The notice shall:
 - contain the reasons on which the name of the company is to be removed; and
 - seek representations, if any, against the proposed action from the company and its Directors along with the copies of relevant documents, if any, within a period of thirty days from the date of the notice.
- ▶ If the ROC is not satisfied with the representation made by the company and its directors, it may proceed further for the strike off the name of company.
- ▶ The notice for removal of name under section 248 (1) shall be in Form STK 5 and the same be –
 - placed on the official website of the MCA on a separate link established on such website in this regard;
 - published in the Official Gazette;
 - published in English language in a leading English newspaper and at least once in vernacular language in a leading vernacular language newspaper, both having wide circulation in the State in which the registered office of the company is situated.

PROCEDURES FOR STRIKE OFF

SEC 248 (1): POWER OF REGISTRAR TO REMOVE NAME OF COMPANY FROM ROC

- ▶ Intimation to regulatory authorities regulating the company, viz, the Income-tax authorities, central excise authorities and service-tax authorities having jurisdiction over the company, about the proposed action of removal or striking off the names of such companies and seek objections, if any, to be furnished within 30 days of notice.
- ▶ In accordance with section 248 (5), the ROC may, at the expiry of the time mentioned in the notice, unless cause to the contrary is shown by the company, strike off its name from the register of companies, and publish notice thereof in the Official Gazette. The company shall stand dissolved on the publication of this notice in the Official Gazette.
- ▶ ROC, before striking off, shall satisfy itself that sufficient provision has been made for realization of all amounts due to the company and for the payment or discharging of its liabilities.

COMPANIES EXCLUDED FROM APPLICABILITY

■ Rule 3 of the Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016 provides that the ROC may remove the name of a company from the register of companies in terms of section 248 (1) of the Act, provided that following categories of companies shall not be removed from the register of companies under this rule and rule 4, namely:-

- i. listed companies;
- ii. companies that have been delisted due to non-compliance of listing regulations or listing agreement or any other statutory laws;
- iii. vanishing companies*;
- iv. companies where inspection or investigation is ordered and being carried out or actions on such order are yet to be taken up or were completed but prosecutions arising out of such inspection or investigation are pending in the Court;

** Vanishing companies are listed on stock exchanges that have failed to file its return with ROC and stock exchange for a consecutive period of two years and are not maintaining registered office at the address with ROC and none of their directors are traceable.*

COMPANIES EXCLUDED FROM APPLICABILITY

- v. companies where notices under section 234 of the Companies Act, 1956 or section 206 or section 207 of the Act have been issued by the Registrar or Inspector and reply thereto is pending or report under section 208 has not yet been submitted or follow up of instructions on report under section 208 is pending or where any prosecution arising out of such inquiry or scrutiny, if any, is pending with the Court
- vi. companies against which any prosecution for an offence is pending in any court;
- vii. companies whose application for compounding is pending before the competent authority
- viii. companies, which have accepted public deposits which are either outstanding or the company is in default in repayment of the same;
- ix. companies having charges which are pending for satisfaction; and
- x. companies registered under section 25 of the Companies Act, 1956 or section 8 of the Act.

PROCEDURES FOR STRIKE OFF

SEC 248 (2): STRIKE OFF BY WAY OF FILING APPLICATION BY THE COMPANY

Grounds for filing application:

- without prejudice to the provisions of sub-section (1), a company may, after extinguishing all its liabilities, **by a special resolution or consent of seventy-five per cent. members in terms of paid-up share capital**, file an application in the prescribed manner to the Registrar for removing the name of the company from the register of companies on all or any of the grounds specified in sub-section (1) and
- the Registrar shall, on receipt of such application, cause a public notice to be issued in the prescribed manner, provided that in the case of a company regulated under a special Act, approval of the regulatory body constituted or established under that Act shall also be obtained and enclosed with the application.
- The application may be filed on all or any of the grounds as mentioned under section 248 (1) of the Act.

PROCEDURES FOR STRIKE OFF

SEC 248 (2): STRIKE OFF BY WAY OF FILING APPLICATION BY THE COMPANY

Process to followed for strike off on application of the company

- ▶ The Company to **hold a Board meeting** to pass Board Resolution for strike off the company subject to approval of the shareholders and authorizing the filing of this application with the ROC;
- ▶ The Company to **hold a general meeting** of members of the company to obtain Shareholder's approval by way of Special Resolution;
- ▶ In the case of a company regulated by statutory authorities including any other authority, approval of such authority shall also be required.
- ▶ Application in **Form STK- 2 to be filed** by the Company along with following documents:
 - Indemnity Bond duly notarized by every director in Form STK 3;
 - An affidavit in Form STK 4 by every director of the company;
 - a statement of accounts containing assets and liabilities of the company made up to a day, not more than thirty days before the date of application and certified by a Chartered Accountant;
 - a copy of the special resolution duly certified by each of the directors of the company or consent of seventy-five per cent of the members of the company in terms of paid up share capital as on the date of application;
 - a statement regarding pending litigations, if any, involving the company.

PROCEDURES FOR STRIKE OFF

SEC 248 (2): STRIKE OFF BY WAY OF FILING APPLICATION BY THE COMPANY

- ▶ After filing application for strike off by the company, the ROC shall publish a public notice in Form STK-6 inviting objections to the proposed Strike off, if any. The objections are to be sent to the respective ROC within thirty days from the date of publication.
- ▶ 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 registered office of the company is situated.
- ▶ The **ROC shall simultaneously intimate the concerned regulatory authorities** regulating the company, viz, the Income-tax authorities, central excise authorities and service-tax authorities having jurisdiction over the company, about the proposed action of removal or striking off the names of such companies and seek objections, if any.
- ▶ ROC, after having followed and dealt with the above steps, shall strike off the name and dissolve the Company and a Notice of striking off and its **dissolution to be published in the Official Gazette in Form STK 7.**
- ▶ On the publication in the Official Gazette of this notice, **the company shall stand dissolved with effect from the date mentioned therein.** The same shall also be placed on the official website of the MCA.

PROCEDURES FOR STRIKE OFF

SEC 248 : OTHER PROVISIONS

- ▶ Section 248(4) - A notice issued under sub-section (1) or sub-section (2) shall be published in the prescribed manner and also in the Official Gazette for the information of the general public.
- ▶ Section 248(5) - At the expiry of the time mentioned in the notice, the Registrar may, unless cause to the contrary is shown by the company, strike off its name from the register of companies, 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.
- ▶ Section 248(6) - The Registrar, before passing an order under sub-section (5), shall satisfy himself that sufficient provision has been made for the realisation of all amount due to the company and for the payment or discharge of its liabilities and obligations by the company within a reasonable time and, if necessary, obtain necessary undertakings from the managing director, director or other persons in charge of the management of the company,
- ▶ Provided that notwithstanding the undertakings referred to in this sub-section, the assets of the company shall be made available for the payment or discharge of all its liabilities and obligations even after the date of the order removing the name of the company from the register of companies.

PROCEDURES FOR STRIKE OFF

SEC 248 : OTHER PROVISIONS

- ▶ Section 248(7) - The liability, if any, of every director, manager or other officer who was exercising any power of management, and of every member of the company dissolved under sub-section (5), shall continue and may be enforced as if the company had not been dissolved.

- ▶ Section 248(8) - Nothing in this section shall affect the power of the Tribunal to wind up a company the name of which has been struck off from the register of companies.

SEC 249: RESTRICTION ON MAKING APPLICATION

In additions to the companies which are excluded from applicability of provisions of strike off in accordance with rule 3(1) of the Rules and listed in slide 8 & 9, a company, is not eligible to make an application for strike off under section 248(2) of the Act if, at any time in the previous three months:

- the name of the company changed or registered office has been shifted from one state to another by the company;
- the company has made a disposal for value of property or rights held by it, immediately before cesser of trade or otherwise carrying on of business, for the purpose of disposal of gain in the normal course of trading or otherwise carrying on of business;
- the company has engaged in any other activity except the for one which is mandatory or expedient for the purpose of making an application under that section, or deciding whether to do so or concluding the affairs of the company or complying with any statutory requirement;
- an application has been made by the company to the National Company Law Tribunal ("Tribunal") for the sanctioning of a compromise or arrangement and the matter has not been finally concluded; or
- the company is being wound up under Chapter XX voluntarily or by the Tribunal.

SEC 250: EFFECT OF THE COMPANIES BEING STRUCK OFF

▶ Where a company stands dissolved under section 248

- it shall on and from the date mentioned in the notice under section 248 (5) cease to operate as a company and
- the Certificate of Incorporation issued to it shall be deemed to have been cancelled and the company ceases to operate
- However, realisation of amounts due to company and for payment /discharge of liabilities/ obligations immediately before the dissolution not effected
- The liability of every director, officers of the company exercising power of management to continue.
- Under section 164[2] of the Act, disqualification of the directors except that in case of this section it is triggered only if financials or annual returns are not filed for 3 consecutive years.
- Proceedings by the defunct companies are stayed till company is restored to the register.
- Continuation of business, operation of bank accounts etc not possible once co is dissolved, unless its restored.

PENALTIES

■ In case application is filed in violation of section 248(1):

- ▶ In pursuance of Section 249(2) that if a company files an application in violation of Section 248(1) it shall be punishable with fine which may extend to Rs. 1 lakh.

■ In case application is filed with the intention to defraud:

- ▶ Section 251(1) provides that where it is found that an **application by a company has been made with the object of evading the liabilities of the company** or with the **intention to deceive the creditors** or to **defraud any other persons, the persons in charge of the management of the company** shall, notwithstanding that the company has been notified as dissolved,
 - be jointly and severally liable to any person or persons 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 Section 247.
- ▶ ROC may also recommend prosecution of the persons responsible for the filing of an application under Section 248(2).

RESTORATION UNDER SECTION 252 OF THE ACT 2013

▶ On appeal filed by any person:

- Any person aggrieved by the order of the ROC may file an appeal before the Tribunal within 3 years of the order passed by ROC
- if the Tribunal is of the opinion that the removal of name of company is not justified it may pass an order for restoration of the name of the company in the register of companies

▶ On application filed by ROC:

- The ROC may, within a period of 3 years from the date of passing of the order dissolving the company under section 248, file an application before the Tribunal seeking restoration of name of such company **if it is satisfied that the name of the company has been struck off from the register of companies either inadvertently or on the basis of incorrect information furnished** by the company or its directors.

RESTORATION UNDER SECTION 252 OF THE ACT 2013

▶ **On application filed by Company or any member or creditor or workmen:**

- The Tribunal, on an application made by the company, member, creditor or workman before the expiry of 20 years from the publication in the Official Gazette of the notice of dissolution of the company, if satisfied that:
 - the company was, at the time of its name being struck off, carrying on business or in operation; or
 - otherwise it is just that the name of the company be restored to the register of companies,may order the name of the company to be restored to the register of companies.

- Further, the Tribunal may also pass an order and give such other directions and make such provisions as deemed just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off from the register of companies.

STEPS – REVIVAL OF STRUCK OFF COMPANY

As per Rule 87A : Appeal or application under section 252 (3) (1) of National Company Law Tribunal (Amendment) Rules, 2017:

1. An appeal under section 252 (3)(1), may be filed before the Tribunal in Form No. NCLT. 9
2. A copy of the appeal or application, shall be served on the Registrar and on such other persons as the Tribunal may direct, not less than 14 days before the date fixed for hearing of the appeal or application, as the case may be.
3. Upon hearing the appeal or the application or any adjourned hearing thereof, the Tribunal may pass appropriate order
4. Where the Tribunal makes an order restoring the name of a company in the register of companies, the order shall direct that:
 - a) the appellant or applicant shall deliver a certified copy to the ROC within 30 days from the date of the order;
 - b) on such delivery, the ROC do, in his official name and seal, publish the order in the Official Gazette;
 - c) the appellant or applicant do pay to the ROC his costs of, and occasioned by, the appeal or application, unless the Tribunal directs otherwise; and
 - d) the company shall file pending financial statements and annual returns with the Registrar and comply with the requirements of the Companies Act, 2013 and rules made thereunder within such time as may be directed by the Tribunal.
5. An application filed by the ROC for restoration of name of a company in the register of companies under second proviso to section 252 (1) shall be in Form No. NCLT 9 and upon hearing the application or any adjourned hearing thereof, the Tribunal may pass an appropriate order, as it deems fit.

EFFECT OF RESTORATION OF STRUCK OFF COMPANY

- In number of cases restoration is done in favourable circumstances such as change of management, ownership, favourable market conditions
- On restoration the effect is that as if its name had not been struck off. The object is to put the company and their parties in the same position as they would have occupied, had dissolution not taken place.
- The rights of parties would be as if there had been no cessation or interruption of its existence
- This is distinct from winding up by liquidator where company ceases to exist vs removal of the name by administrative act of ROC. In later case its not absolute or irrevocable.

Relevant case laws

#1 - Vats Association P. Ltd. v. ROC, (2010) 102 SCL 397 (Del)

Facts of the matter:

- The Registrar of Companies, struck the petitioner company's name off the Register due to defaults in statutory compliances, namely, failure to file balance-sheets and failure to file annual returns.
- The petitioners stated that the petitioner company has been active since incorporation, and has also been maintaining all the requisite documentation, as per the provisions of the Companies Act, 1956. In support of this statement, a copy of the balance sheet, the profit and loss account, and the income tax return was submitted.
- The petitioner contended that the accounts of the petitioner company were prepared and audited every year, and that the company engaged the consultants to perform the task of filing the returns with the office of the Registrar of Companies, but they were not filed and management was not aware of it.

Conclusion:

The restoration of the Company and its directors and members was ordered subject to the payment of costs, and the completion of other formalities, including payment of late fee or other charges.

Relevant case laws

#2 - Himalaya Packaging & Printing P. Ltd. v. ROC, (2010) 101 SCL 6 (Del)

Facts of the matter:

- The Registrar of Companies, i.e. the respondent herein, struck the petitioner name off the Register for defaults in statutory compliances, namely, failure to file balance-sheets.
- The petitioners stated that the company has been active since incorporation, and has also been maintaining all the requisite documentation, as per the provisions of the Companies Act, 1956 in support of this statement, the audited accounts of the company as well as auditor's reports in this regard were filed with this petition.
- It was alleged that the Annual Report of the petitioner company was prepared, but was not filed with the respondent due to a clerical mistake, and that the petitioners remained under the impression that the same had been filed.

Conclusion

Due to clerical negligence there was non-filing of returns/accounts. Restoration was ordered including that of directors and members, subject to fulfilment of applicable formalities.

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Relevant case laws

#3 – In another case, it was noted that object of section 560(6) of the Companies Act, 1956 is to give a chance to the company, its members and creditors to revive the company which has been struck off within a period of 20 years and to give an opportunity to run the business only if the judge is satisfied that restoration is necessary in the interest of justice.

#4 – In case of Ms. Sirius Transtech Pvt. Ltd. Vs. ROC Hyderabad, under section 252, NCLT ordered to restore original status of applicant as if Co. was not struck off. Changing status from strike off to active, to activate DIN Nos. and defreeze bank accounts. Order also asked the Co. to ensure all non compliance were corrected within 45 days of restoration of the name.

#5 – Other cases are - Mahabharat Builders & Developers Vs ROC Mumbai u/s 252(3) of the Companies Act 2013, Kasak Abasan Private Limited Vs ROC West Bengal u/s 252, Trans Housing Vs ROC u/s 252.

SEC 455: DORMANT COMPANY

- ▶ As per clause 455(1) a Dormant Company is defined as a company which is formed and registered under the Act for a future project or to hold an asset or intellectual property and has no significant accounting transaction, such a company or an inactive company may make an application to the Registrar in such manner as may be prescribed for obtaining the status of a dormant company.
- ▶ Section 455(4) states that in case of a company which has not filed financial statements or annual returns for two financial years consecutively, the Registrar shall issue a notice to that company and enter the name of such company in the register maintained for dormant companies.
- ▶ Section 455 (5) provides that a dormant company shall have comply with the following and pay such annual fee as may be prescribed to the Registrar to retain its dormant status in the register and may become an active company on an application made in this behalf accompanied by such documents and fee as may be prescribed.
 - Have minimum number of directors (three directors in case of a public company, two directors in case of a private company and one director in case of a One Person Company),
 - file such documents [Return of Dormant Company” annually, inter-alia, indicating financial position duly audited by a chartered accountant in practice in Form MSC-3 along with such annual fee as provided in the Companies (Registration Offices and Fees) Rules, 2014 within a period of thirty days from the end of each financial year.
- ▶ As per section 455(6) the Registrar shall strike off the name of a dormant company from the register of dormant companies, which has failed to comply with the requirements of this section.

Reporting in case of revival

In such circumstances, the following reporting requirements emerge:

1. In case of 'defunct company':

- Such company is required to file 'return of dormant company' annually indicating financial position duly audited by a chartered accountant in practice in 'Form MSC – 3'.
- Provisions of the Act in relation to rotation of auditors are not applicable to defunct companies.
- Also Accounting Standard 3 on Cash Flows under Accounting Standards Rules, 2006 is not applicable and any exemption that are available to Small and Medium Companies (SMC) would not be available.

2. In case of a company which wishes to restore name which was struck off, will have to complete all deficiencies in regulatory compliances including submission of pending audited financial statements retrospectively;

- Audit to be duly completed by existing statutory auditor / a chartered accountant in practice who will be appointed as the auditor of the Company.
- Company to pay all fees, penalties, etc imposed by NCLT for compounding of offences. It is suggested that proper note in notes to the accounts will be required to explain status of restoration and its consequential impact on the financial statements of the company.

Reporting in case of revival

- Auditor should draw reference in Emphasis of Matter paragraph to such note depending on the materiality & consequences under Standard on Auditing 706 (Revised) 'Emphasis of Matter Paragraphs and Other Matter Paragraphs in the Independent Auditor's Report'.
 - In all strike off cases directors have been disqualified and bank accounts are frozen.
3. And as such, the impact of strike off, to what period it was effective and its impact on the business and financial health of the Company will have to be assessed on Company's ability to continue as a going concern.
- Auditors will have to comply with Standards on Auditing 570 – Going Concern to come to a conclusion on Company's ability to continue as a going concern.
 - Its effect on the auditors reporting requirement are as below:
 - When use of going concern is inappropriate, auditors would express an adverse opinion
 - When use of going concern is appropriate but material uncertainty exists:
 - If adequately disclosed then auditor will explain the material uncertainty in audit report.
 - If disclosure is inadequate a qualified/ adverse opinion will be given.
 - In all these circumstances management is to make an assessment or extend its original assessment. If management refuses to do so, their auditor will have to consider its implications on audit report.

Reporting in case of revival

4. Auditors will also have to assess the reporting requirements u/s 164(2) regarding disqualification of directors. It appears that it is not permitted to give retrospective effect to directors disqualification.
 - Impact of above disqualification on decisions taken by such directors on behalf of the Company in the intervening period of strike off will have to be evaluated by the auditors.
5. Impairment in the value of assets as required under Ind AS 36, AS 28: To test impairment of tangible and intangible assets at asset or Cash Generating Unit (CUG) level.
6. Recognition of deferred tax asset under Ind AS 12. More stringent condition of virtual certainty under AS 22 towards carry forward losses, unabsorbed depreciation. Need to be reviewed based on careful analysis of the profitability.
7. Provision for impairment in value of investments, debtors/advances as per Expected Credit loss method under Ind AS 109. The aforesaid matter and impairment in the value of assets will also be based on valuation done by external valuers.
8. Non-current assets held for sale and discontinued operations under Ind AS 105 and AS 24 as disposal plan may involve disposal of assets, businesses etc.

Thank You