

DISCUSSIONS ON SHELL COMPANIES, STRIKING OFF OF COMPANIES & DISQUALIFICATIONS OF DIRECTORS

Adv. Arun Saxena
Saxena & Saxena Law Chambers
Advocates & Attorneys
603-604, New Delhi House
27, Barakhamba Road,
New Delhi – 110 001.
Mob.: 9810037364
E-mail : advisor@sslclegal.in

DEFINITION

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- Shell company is Not defined anywhere in any Act in India.
 - **As per US Security Act**
 - A shell company means a company which has no or nominal operation and the assets
- Or
- Does not have active operation.

Shell Companies

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Questions:-

- Whether all shell companies are illegal companies?
- Whether all the shell companies are having illegal transactions?
- Whether all non-operating company can be termed as shell company?
- Whether all shell companies are non-operating companies?

Shell company can be defined as

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- Company incorporated to do illegal transactions and money laundering business.
- Companies incorporated to deceive public money.
- Company doing fraudulent transactions.

SEBI action against Shell Companies

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- 331 companies listed on NSE/BSE (14th August 2017).
- involving Approx. Rs.7000 crores of public fund.
- SEBI suspended Trading
- SAT set aside the order.

Action of ROC

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- Notices to non-operating/defunct companies
- Approx. 2.5 lac companies striked off
- Disqualified the Directors
- Bank accounts of companies freezed

DORMANT COMPANY (Section 455)

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- i) Where a company is formed and registered for a future project or
- ii) To hold an asset or intellectual property and
- iii) Company has no significant accounting transaction.
or
- iv) Any inactive company

can apply for obtaining status of Dormant Company.

Inactive Company means a company not carrying on any business or operation or has not made any significant accounting transaction during last 2 financial years or has not filed financial statement and Annual Returns during last 2 years.

DORMANT COMPANY

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Significant Accounting Transaction:

Any transaction **other than:**

- Payment of fee to Registrar.
- Payment to fulfill the requirement of this Act or any other law.
- Allotment of Shares to fulfill the requirement of this Act .
- Payment for maintenance of office or record.

DORMANT COMPANY

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Conditions Rule (3):

- Pass the special resolution.
- No inspection, inquiry or investigation (Pending)
- No prosecution (Pending)
- No public deposit outstanding in default.
- No secured or unsecured loan outstanding.
- No dispute in management.
- No statutory dues.
- No workman dues.
- Company is not listed company.
- Only for 5 years.

DORMANT COMPANY

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- v) ROC on application shall allow the status of dormant company and will issue a certificate (App MSC 1)
- vi) ROC may also **suo-moto** enter the name of any company in Register of Dormant Companies.
- vii) Dormant company shall have minimum no. of directors and

DORMANT COMPANY

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- viii) file return of dormant company duly audited in MSC 3 within 30 days from close of financial year, to retain its dormant status
- ix) Dormant company may become active company on an application filed by company (MSC 4).
- x) ROC shall strike the name of dormant company which has dormant status for more than 5 years.

Striking off of Companies (Section 248)

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Power of Registrar of Companies

Where the Registrar has reasonable cause to believe that:-

- a) A company has **failed to commence its business** within **one year** of its incorporation;
- b) The subscribers to the memorandum have **not paid the subscription** which they had undertaken to pay within a period of **180 days** from the date of incorporation of a company and a **declaration under sub-section (1) of section 11** to this effect has not been filed **within 180 days** of its incorporation; or

Striking off of Companies (Section 248)

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- c) 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.

ROC shall send the notice to the company and all the directors, asking directors to give their representation within 30 days.

Striking off of Companies (Section 248)

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ROC before striking of the name shall satisfy himself that sufficient provision has been made :-

- 1) For the realisation of all amount due to the company.
- 2) For payment and discharge of its liabilities and obligation.
- 3) Take necessary undertaking from directors, managing director or person in charge in the management (if necessary).

Striking off of Companies (Section 248)

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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 registrar of companies.

- **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.
- NCLT is power to winding up the company, name of which is strike off.

Striking off of Companies (Section 248)

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Suo-motto by Directors

- ❑ Special Resolution
- ❑ Consent of 75% members
- ❑ Apply to ROC along with approval of Regulatory Body(if any).
- ❑ ROC shall issue the public notice
- ❑ Publication in Official Gazette
- ❑ Striking of the name

Section 249 – Restriction on making suo-motto application

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Directors cannot make the application suo-moto u/s 248 subsection 2 if **at any time in the previous 3 months** the company

- ❑ has changed its **name** or **shifted its registered office** from **one state to other state**.
- ❑ has made the **disposal of property or rights** before cesser of trade or business as engaged in any other activity except one which is necessary for the purpose of making the application under this section.
- ❑ has made the **application to Tribunal** for sanctioning of the **scheme of compromise or arrangement** which is not finally concluded.
- ❑ company is **being wound up**.

Effect of company notified as dissolved (Section 250)

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- Ceased to operate.
- **Certificate of incorporation deemed to have been cancelled except for the purpose of releasing the amount due to the company or payment or dis-charge of the liability or application of the company.**

Fraudulent application for removal of name (Section 251)

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Application with an object of:

- a) evading liabilities or
- b) With an intention to deceive a creditor or any other person.

 Liable to pay penalty, damage, the loss incurred by such person,
 punishment u/s 447.

Appeal to Tribunal (Section 252)

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1. **Any person** aggrieved by order of registrar, may file appeal within period of **three years** justifying that order of ROC is not justified, NCLT may restore the name:-

2. **ROC is empowered** to restore the name within **3 years** if

Name of the company struck off

inadvertently or

On the basis of incorrect information furnished by company or its directors.

3. **If the company or member or creditor or workmen** aggrieved by order of ROC, application can be made before the expiry of **20 years** from the publication in Official Gazette.

Dis-qualification of Directors 164

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If he :-

- **Is of Unsound mind**
- **Is an un-discharged insolvent.**
- No person who is or has been the director of the company which:
 - ▣ Has applied for be adjudicated as insolvent and application is pending.
 - ▣ The order has been passed **by Tribunal** disqualifying him for appointment as Director.
 - ▣ If he **fails to pay calls** on the shareholder and 6 months have lapsed from the last date of payment of call.

Dis-Qualifications of Director 164

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Following additional dis-qualifications have been provided in the Act:-

- ❑ **Convicted for related party transaction** at any time during last 5 years.
- ❑ Convicted for any offence for imprisonment for 7 years or more.
- ❑ Convicted imprisonment for not less than 6 months or period of 5 years has not lapsed.

Dis-qualification of Directors 164

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- **NO person**
- who is or has been a director of a company which
 - Has not filed F/S & A/R for a period of continuous 3 F/yrs. Or
 - Has failed to repay deposit or interest thereon Or
 - Has failed to redeem debenture or interest thereon Or
 - Has failed to pay dividend declared
- and such failure Saxena & Saxena Law Chambers continues for one year

Dis-qualification of Directors 164

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**Shall be eligible to be reappointed as director of that company
or**

**appointed in other company for a period of 5 years from the date on
which said company fails to do so.**

- If he incurs any disqualification specified in Section 164.
- If fails to attend meetings for consecutive period of 12 months.

Important :- 1. Director has to vacate his office even if his leave of absence is granted to him or her.

2. Where all the directors vacate their offices under any disqualification under sub section of section 167(1), promotor or in his absence central government shall appoint req no. of directors



THANK YOU