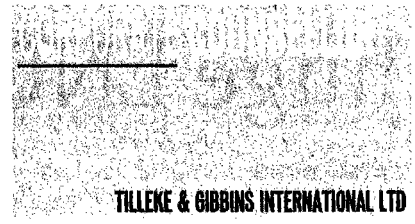
CLOSING A BUSINESS: LIQUIDATION OR BANKRUPTCY?

During these tough economic conditions, closing a business may seem to be the only option for a lot of companies. However, doing so is not as easy as removing the sign and closing the doors. A voluntary winding-up of a business is an invitation for employee claims, creditor suits and a tax audit. This article examines the two principal means by which a company may formally close its business.



Liquidation. Assuming that the business has sufficient assets to meet the liabilities, then a solvent liquidation is possible. Formal liquidation commences with the dissolution of the company. Dissolution proceeds with shareholders passing a special resolution to dissolve the company and its business, and appointing liquidator(s).

The company continues to exist until the liquidation process is complete. Liquidators must be directors of the company, unless otherwise provided by the regulations of the company or otherwise appointed by the court (in case the company does not appoint a liquidator).

The company is required to register the resolution and liquidators with the Ministry of Commerce (MoC) within 14 days of the shareholders' meeting. Once registered, the liquidation process begins and the dissolution process ends.

The MoC notifies the Revenue Department, which then proceeds with an extensive tax audit. The liquidators are required to notify the public of the company's dissolution by newspaper advertisement and to send a similar notice by registered mail to each creditor.

The employer must also give notice of termination in advance to employees and make severance payment in accordance with the Labour Protection Act. Employees have preferential rights on a par with claims of taxing authorities.

The time required to liquidate a business depends on how complicated it is to settle the affairs of the company, pay its debts, distribute its assets and — most importantly — settle its tax liability with the Revenue Department.

The tax audit used to be the most time-consuming process and, until recently, the MoC did not accept registration of liquidation until such tax audit was completed. Recently, however, the MoC has in practice allowed registration of a company's liquidation if, within six months of the MoC's notification of liquidation to the Revenue Department, the MoC does not receive an order from the Revenue Department to suspend the liquidation process.

A common practice to expedite the tax audit is putting companies dormant for at least two to five years, the maximum period over which the Revenue Department can order audits. After the five-year waiting period, the winding-up can proceed without many complications.

Bankruptcy. Where a company does not have sufficient assets to settle its liabilities, bankruptcy is the only option. However, under Thai law, bankruptcy is defined as an involuntary act instituted by a creditor owed at least 2 million baht.

The debtor must also be proven insolvent. Insolvency is principally assumed if a debtor declares inability to pay his debts, avoids the payment of his debts, or does not pay his debts after receiving at least two demand letters from his creditors at intervals of not less than 30 days. A company is deemed essentially insolvent when its book value of total liabilities exceeds the market value of its assets.

The court, based on the grounds stated by the creditor for the bankruptcy action, then issues a receivership order. Once a receivership order is made against the debtor, said debtor, by effect of the order, will lose control of his assets, which will then be vested on the official receiver. Unlike in the process of liquidation, the bankruptcy receiver is a court official, not a private individual.

A bankrupt may be discharged from bankruptcy by court order or by automatic discharge. The debtor may submit an application by way of a motion to the court asking for an order of discharge from bankruptcy. The discharge will be granted if at least 50% of the assets have been paid to creditors and the bankrupt is not deemed to be a dishonest person.

Such means of discharge, however, do not release from liability a person who is a partner with the bankrupt, who is jointly liable with the bankrupt, or who guarantees or is in the position of a guarantor of the bankrupt. Similarly, neither means of discharge will release tax debt, nor will they release those debts arising from dishonesty or fraud.

In the past, bankruptcy action was extremely time-consuming. At present, with the establishment of a specialised Bankruptcy Court, the process has been expedited. It is now possible for the Bankruptcy Court to issue an order for receivership within a few months from filing bankruptcy proceedings.

However, the most time-consuming and unpredictable stage of the process — the realisation and distribution of the assets — still remains unchanged. This stage could easily take many years if the assets are hard to locate and dispose of and if there are several creditors.

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