

BUSINESS TAX CENTRE LIMITED



GUIDANCE ON CA2006 – VOLUNTARY STRIKE OFF, DISSOLUTION AND ADMINISTRATIVE RESTORATION

Introduction

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Introduction

We have been used to in the past, removing unwanted companies from the register by filing Companies House Form 652a and paying the appropriate fee. The 2006 Act does to a large extent continue the practice under s652, bringing in applications under s1003 with applications being filed on the new form DS01 – ‘Striking Off Application By A Company’.

The Companies Act has codified directors’ duties and we should bear in mind s172 when advising clients of the procedures for strike off. Coupled with the increased powers of the Registrar to ensure information is correct and of the right quality, deliberately incorrect applications may attract an unlimited fine, a custodial sentence and up to 15 years disqualification from being a director.

The increase in the Registrars powers to ensure the register is fit for purpose will undoubtedly lead to an increase in the Registrar acting on his own initiative more often, and removing what he perceives as unwanted companies. This may lead to many instances of strike off of companies to some of your clients who may be less diligent in their affairs than others.

The Act does recognise that there is a case for simplifying the procedures for restoration to the register when the Registrar has carried out these ‘administrative’ strike offs. S1024 does provide simplified procedures for restoration in these circumstances.

This guide explains the simpler processes of strike off and restoration, how you can remove your company from, and restore it to, the register of companies. It deals with the following topics;

- Voluntary strike off and Dissolution - how you can ask the registrar to remove your company from the register.
- Companies no longer carrying on business or in operation - how the registrar may remove your company from the register if it is no longer carrying on business.
- Administrative Restoration – how a former director or member may apply to the registrar to have the company restored

Section 1 - Voluntary strike off and dissolution

The circumstances a company can apply to be struck off the register.

A company may apply to the registrar to be struck off the register and dissolved. The company can do this if it is no longer needed. For example, the directors may wish to retire and there is no one to take over from them; or it is a subsidiary whose name is no longer needed; or it was set up to exploit an idea that turned out not to be feasible.

This procedure is not an alternative to formal insolvency proceedings where these are appropriate. Even if the company is struck off and dissolved, creditors and others could apply for the company to be restored to the register, if they can show just cause.

When you cannot apply to strike a company off the register.

An application for voluntary striking off can only be made by the company, and must be made on the company's behalf by its directors or a majority of them.

Sections 1004 and 1005 of the Companies Act 2006 set out the circumstances in which the company may not apply to be struck off. For example, the company may not make an application for voluntary strike off if, at any time in the last 3 months, it has:

- Traded or otherwise carried on business;
- Changed its name;
- Made a disposal for value of property or rights that, immediately before ceasing to trade or otherwise carry on business, it held for the purpose of disposal for gain in the normal course of trading or otherwise carrying on business. For example, a company in business to sell apples could not continue selling apples during that 3 month period but it could sell the truck it once used to deliver the apples or the warehouse where they were stored;
- Engaged in any other activity except one which is necessary or expedient for the purpose of:
 - (a) making an application for strike off or deciding whether to do so (for example, a company may seek professional advice on the application and pay the costs of submitting the 'Striking off application by a company, Form DS01);
 - (b) concluding the affairs of the company;
 - (c) complying with any statutory requirement.

A company cannot apply to be struck off if it is the subject, or proposed subject, of:

- Any insolvency proceedings (such as liquidation, including where a petition has been presented but has not yet been dealt with); or
- A section 895 scheme (that is a compromise or arrangement between a company and its creditors or members).

However, a company can apply for strike off if it has settled trading or business debts in the previous three months.

What should be done before applying?

There are safeguards for those who are likely to be affected by a company's dissolution. If the company has creditors, members etc, you should warn all the relevant people, before applying, as any of them may object to the company being struck off. You should deal with any loose ends, such as closing the company's bank account, the transfer of any domain names - **before an application is made.**

From the date of dissolution, any assets of a dissolved company will belong to the Crown. The company's bank account will be frozen and any credit balance in the account will pass to the Crown.

The directors' may notify any other organisation or party who may have an interest in the company's affairs, otherwise they might later object to the application. Examples include Her Majesty's Revenue and Customs, local authorities, especially if the company is under any obligation involving planning permission or health and safety issues, training and enterprise councils and government agencies.

How do you apply to the Registrar?

You must complete a 'Striking off application by a company, Form DS01'. The form must be signed and dated by:

- The sole director, if there is only one;
- By both, if there are two; or
- By all, or the majority of directors, if there are more than 2.

It will help Companies House if the name, address, and telephone number a person who could be contacted was included, if they have any queries about the application. Please note though, this information will appear on the company's public record when the form is registered.

Who must be informed of the application?

The directors who make the application must, within 7 days of sending the application to the registrar, send a copy to the following persons:

- **Members**, usually the shareholders;
- **Creditors**, including all contingent (existing) and prospective (likely) creditors such as banks, suppliers, former employees if the company owes them money, landlords, tenants (for example, where a bond is refundable), guarantors and personal injury claimants. Also, you must notify appropriate offices of Her Majesty's Revenue and Customs (HMRC) and Department of Work and Pensions (DWP) if there are outstanding, contingent or prospective liabilities;
- **Employees**;
- **Managers** or trustees of any employee pension fund; and
- **Any directors who have not signed the form.**

The company's directors must also send a copy of the application to any person who, after the application has been made, becomes a director, member, creditor or employee of the company, or a manager or trustee of any employee pension fund of the company. This must be done within 7 days of the person becoming one of these. They must also send a copy of the application to any person who becomes one of the above at any time after the day the company made the application for voluntary strike off. This obligation continues until the dissolution of the company or the withdrawal of the application.

Methods of informing the various parties

A copy of the 'Striking off application by a company' Form DS01 may be posted to, or left at:

- The last known address (if an individual);
- The principal / registered office (if a company or other body)

It is also permissible to make a creditor of the company aware of the application by leaving a copy of it at, or posting a copy of it to, the place of business with which the company has had dealings in relation to the current debts, for example, the branch from where goods were ordered from or which invoiced the company. However, if there is more than one such place of business, a copy of the application should be delivered to each of those places. It is advisable to keep proof of delivery or posting.

What happens when Companies House receives the application?

Companies House will examine the form and if it is acceptable they will register the information and put it on the company's public record. They will send an acknowledgement to the address shown on the form and will also notify the company at its registered office address to enable it to object if the application is bogus.

The registrar will publish notice of the proposed striking off in the Gazette to allow interested parties the opportunity to object.

A copy of this notice will be placed on the company's public record. If there is no reason to delay the registrar will strike the company off the register, but not less than 3 months after the date of the notice. The company will be dissolved on publication of a further notice stating this in the relevant Gazette.

What is the Gazette?

The Gazette is the official newspaper record in the United Kingdom. There are 3 of them: the London Gazette, for companies incorporated in England and Wales; the Edinburgh Gazette, for companies incorporated in Scotland; and the Belfast Gazette, for companies incorporated in Northern Ireland.

When the registrar publishes a notice to strike off or restore a company, the notice will appear in the Gazette for the part of the United Kingdom in which the company was formed. The gazettes are published weekly and further information can be found on the Gazette website.

What if the company ceases to be eligible or there is a change of mind?

Section 1009 of the Companies Act 2006 contains the full circumstances that mean an application for strike off must be withdrawn. In those circumstances the directors must withdraw the application by sending the 'Withdrawal of striking off application by a company', Form DS02 if they change their mind or the company ceases to be eligible for striking-off. This may be because, after applying to be struck off, the company:

- Trades or otherwise carries on business;
- Changes its name;
- For value, disposes of any property or rights except those it needed in order to make or proceed with the application (for example a company may continue the application if it disposes of a telephone which it kept to deal with enquiries about its application);

- Becomes subject to formal insolvency proceedings or makes a section 900 application (a compromise or arrangement between a company and its creditors);
- Engages in any other activity, unless it was necessary to
 - (a) make or proceed with a striking-off application
 - (b) conclude those of its affairs that are outstanding because of the need to make or proceed with an application (such as paying the costs of running office premises while concluding its affairs and then finally disposing of the office); and
 - (c) comply with a statutory requirement.

Any director of the company may complete and sign the 'Withdrawal of striking off application by a company', Form DS02' and send it to the registrar.

Who can object to dissolution?

Any interested party who was listed above, can object to the registrar.

How and why can they object?

Objections or complaints must be in writing and sent to the registrar with any supporting evidence, such as copies of invoices that may prove the company is trading. Reasons could include:

- If the company has broken any of the conditions of its application for example, it has traded, changed its name or become subject to insolvency proceedings during the three-month period before the application, or afterwards;
- If the directors have not informed interested parties;
- If any of the declarations on the form are false;
- If some form of action is being taken, or is pending, to recover any money owed (such as a winding-up petition or action in a small claims court);
- If other legal action is being taken against the company;
- If the directors have wrongfully traded or committed a tax fraud or some other offence.

Offences and penalties

It is an offence:

- To apply when the company is ineligible for striking-off;
- To provide false or misleading information in, or in support of, an application;
- Not to copy the application to all relevant parties within seven days;
- Not to withdraw application if the company becomes ineligible.

The offences attract a fine of up to a maximum of £5,000 on summary conviction (before a magistrates' court or Sheriff Court) or an unlimited fine on indictment (before a jury). If the directors breach the requirements to give a copy of the application to relevant parties and do so with the intention of concealing the application, they are also potentially liable to not only to a fine but also up to seven years imprisonment. Anyone convicted of these offences may also be disqualified from being a director for up to 15 years.

What is the current fee for application Form DS01?

A fee of £10 is payable to cover the cost of providing the service. Companies House will not refund the fee if the application is withdrawn after it has been registered or if they reject it. A further fee will be payable for a new application.

Section 2 - Companies no longer carrying on business or in operation.

The registrar striking a company off the register on his own initiative

The Registrar can strike a company off the register if it is neither carrying on business nor in operation. The registrar may take this view if, for example:

- He has not received documents from a company that should have sent them to him; or
- Mail that the registrar has sent to a company's registered office is returned undelivered; or
- The company has no directors.

Before striking a company off the register, the registrar is required to write two formal letters and send notice to the company's registered office to inquire whether it is still carrying on business or in operation. If he is satisfied that it is not, he will publish a notice in the relevant Gazette stating his intention to strike the company off the register unless he is shown reason not to do so.

A copy of the notice will be placed on the company's public record. If the registrar sees no reason to do otherwise, he will strike off the company not less than three months after the date of the notice. The company will be dissolved on publication of a further notice stating this in the relevant Gazette.

How can a company avoid this action?

If the company does want to remain on the register, it must reply promptly to any formal inquiry letter from the registrar and deliver any outstanding documents. Failure to deliver the necessary documents may also result in the directors being prosecuted.

Can a company or other persons object?

The registrar will take into account representations from the company and other interested parties, for example, creditors. If there is good reason not to strike the company off the register, he may suspend the action until the objection is resolved.

What happens to the assets of a dissolved company?

From the date of dissolution, any assets of a dissolved company will be "bona vacantia". Bona vacantia literally means "vacant goods" and is the technical name for property that passes to the Crown because it does not have a legal owner. The company's bank account will be frozen and any credit balance in the account will be passed to the Crown.

Section 3 - Administrative Restoration

What is Administrative Restoration?

Under certain conditions, where a company was dissolved because it appeared to be no longer carrying on business or in operation, a former director or member may apply to the registrar to have the company restored. This is called 'administrative restoration'. If the registrar restores the company it is deemed to have continued in existence as if it had not been dissolved and struck off the register. This is done under Section 1025 of the Companies Act 2006

Who can apply to have a company restored to the register?

Only a former director or former member of the company, who was a director or member at the time the company was dissolved can apply.

Can an application for administrative restoration be made in respect of any company?

No. To be eligible for administrative restoration, the company must have been:

- Struck off the register under sections 1000 to 1002 of the Companies Act 2006, that is by the Registrar when fulfilling the criteria set out previously;
- Dissolved for no more than six years at the date the registrar receives your application for restoration.

If a company meets the above criteria, an application for restoration may be made if it meets the following conditions:

- It must have been carrying on business or in operation at the time it was struck off.
- If any property or rights belonging to the company became bona vacantia, the applicant must provide the registrar with a statement in writing from the relevant Crown Representative giving consent to the company's restoration.
- It has delivered all documents necessary to bring the company up to date and paid any outstanding late filing penalties.

How does a company apply for administrative restoration?

A company must send an 'Application for administrative restoration' (Form RT01) to the registrar together with a statement of compliance confirming that the applicant is legally entitled to make the application and that the conditions for restoration are met.

The form must be accompanied by the registrar's fee for processing the application which is currently £100.

What are the other costs or penalties involved in making an application for administrative restoration?

The applicant must meet the Crown representative's costs or expenses (if demanded). The company must pay any statutory penalties for late filing of accounts delivered to the registrar outside the period allowed for filing. The penalties that may be due are:

- Unpaid penalties outstanding on accounts delivered late before the company was dissolved; and
- Penalties due for accounts delivered on restoration, if the accounts were overdue at the date the company was dissolved.

You must also pay the appropriate filing fee on submission of any outstanding documents.

The level of any late filing penalty depends on how late the accounts are when Companies House receives them. In the case of accounts delivered on restoration, the registrar will normally disregard the period during which the company was dissolved. For example, a set of accounts that should have been delivered 2 months before a private company was dissolved are normally regarded as 2 months late if they are delivered upon restoration. The applicant must pay the relevant penalty before the restoration of the company.

The company is not liable for late filing penalties for accounts received on restoration but which became due while the company was dissolved.

What happens once the Registrar processes the application?

The registrar will give notice to the person who has applied for restoration of his decision.

If the registrar decides that he will restore the company to the register the restoration will take effect from the date he sends the notice. The notice will include the company's registered number and the name of the company. If the company is restored to the register under a different name or with the company number as its name, that name and its former name will appear on the notice.

If the registrar decides not to restore the company to the register, the applicant may apply to the Court for restoration within 28 days even if the period for restoration has expired.

Why would a company be restored with a different company name?

If at the date of restoration the company's former name is the same as another name on the registrar's index of company names, it will need to choose an alternative name, for example a newly incorporated company has adopted that name.

The application for restoration may state another name by which the company is to be restored. On restoration, Companies House will also issue a change of name certificate as if the company had changed its name.

Alternatively, Companies House could restore the company to the register as if its registered number is also its name. The company then has 14 days from the date of restoration in which to change the name of the company. Alternatively, the directors can pass a resolution to change the company name. The director's must deliver a copy of the resolution and notice Form NM05 of the change of name to Companies House including the appropriate fee (£10).

It is an offence if the company does not change its name within 14 days of the company being restored with the company number as its name. The change of name does not take effect until the certificate is issued.

What happens once the company has been restored?

When it has been restored, the general effect is that a company is deemed to have continued in existence as if it had not been dissolved or struck off the register. An application can be made to the Court for directions or provision required to put the company and all other persons in the same position as they were before the company was dissolved and struck off. Any such application to the Court must be made within 3 years of the company being restored