Winding Up (Chart 10.1)

Difference between Winding Up & Dissolution

Winding Up

1) Process which may take 2-3 yrs
2) Co. still remains in existence
3) Assets realised & liabilities are paid by Liquidator, but Corporate Status of Co. continues
4) Liquidator is representative of Co.
5) Person may proceed against Co which is being wound up
6) Winding Up always precedes Dissolution

Dissolution

1) One day event
2) Co. is not in existence any more
3) Dissolution commences after liquidator has completed Winding Up
4) Liquidator cannot represent person not in existence
5) No proceedings can be started against Co which has been dissolved
6) Dissolution commences after Winding up

Section 433 - Circumstances in which Company may be Wound Up by Tribunal

1) By Special Resolution
2) Default in delivering Statutory Report
3) Does not commence its business within a year from its incorporation, or suspends its business for a whole year
4) No. of members is reduced below minimum
5) Co is unable to pay its debts
6) Just & equitable grounds
7) Default in filing with Registrar its B/S & P&L A/c or Annual Return for any 5 consecutive FY

Steps & procedure to be followed to put company into compulsory winding up

1) Petition for winding up of Co is to be filed in High Court
2) Petition should be filed along with an affidavit showing sufficient ground for appointment of provisional liquidator
3) Advertised within 14 days in newspaper in English language
4) Certified copy of winding up order passed by court should by filed with concerned ROC along with prescribed fees within 30 days
5) Winding up proceedings will be carried out by official liquidator till dissolution

Procedure of Member's Voluntary Winding Up

1) Where Co is Solvent, preferable course is to opt for Member's Voluntary Winding Up

2) Steps -

a) All directors or at least majority of directors have to make declaration, within 5 weeks preceding date of GM, that Co has no debts at all or it will be able to pay all its debts within 3 years from date of commencement of winding up proceedings

b) Declaration should be filed with ROC before date of GM along with Auditor report on P&L & B/S

c) One or more liquidators are to be appointed & their remuneration should be fixed

d) Notice of such resolution by advertisement within 14 days in Official Gazette & also in some newspaper

e) Notice of appointment of liquidator to ROC

f) Voluntary winding up commences at time when resolution for voluntary winding up is passed

Procedure of Creditor's Voluntary Winding Up

Winding up because of inability to meet its liabilities

1) Call creditors' meeting to at which resolution for voluntary winding-up is to be proposed
2) Send notice of meeting to creditors & also advertise notice in 2 newspapers
3) BOD has to cause full statement of position of Co's affairs & list of Co's creditors & estimated amount of claims
4) Notify resolution passed thereat to Registrar within 10 days
5) Creditors' nominee as Liquidator to call meeting of Co & of creditors at end of each year
6) Liquidator has to call final meeting for compliance

Section 529A - Overriding Preferential Payments

1) Workmen's dues &
2) Debts due to secured creditors (rank under pari passu)

shall be paid in full, unless assets are insufficient to meet them, in which case they shall abate in equal proportions

Section 530 - Preferential Payments

Subject to the Section 529A
*Shall be paid in priority to all other debts -

1) Revenues, taxes, cesses & rates due from Co to CG or SG or to LA (12 Months)
2) Wages or salary of any employee due for period not exceeding 4 months within 12 months next before relevant date, subject to limit of Rs. 20,000/-
3) Amounts due in respect of any compensation or liability for compensation
4) Sums due to employee from provident fund, pension fund, gratuity fund or other fund for welfare of employees
5) Expenses of any investigation

Order of Payment

a) Overriding preferential payments u/s 529A
b) Costs & Expenses of Winding Up
c) Preferential payments u/s 530
d) Creditors secured by floating charge
e) Unsecured Creditors

Winding Up (Chart 10.2)

Section 531 - Fraudulent Preference

1) Fraudulent Preference refers to giving unfair preference or favorable treatment for payment of liability to some specific creditors
2) Transaction is deemed to be Fraudulent Preference & shall be invalid if all following conditions are satisfied -
a) Transaction relates to transfer of property, movable or immovable, delivery of goods, payment, execution
b) Took place within 6 months before commencement
c) Entirely voluntary act & not made under any pressure
d) Dominant Motive was to give preference to creditor over other creditors

Section 531A - Avoidance of Voluntary Transfer

Any transfer of property, movable or immovable, or any delivery of goods be invalid unless
1) Transfer or delivery made in ordinary course of its business or
2) In good faith & for valuable consideration
(within one year before presentation of petition)

Section 533 - Liabilities & Rights of certain fraudulently preferred person

1) Person preferred shall be subject to same liabilities, & shall have same rights, as if he had undertaken to be personally liable as surety for debt, to extent of mortgage or charge on property or value of his interest, whichever is less
2) Creditor shall be liable to refund to liquidator amount paid by Co
3) Creditor shall be entitled to claim such amount from surety or guarantor
4) Winding Up Court shall be empowered to order that surety or guarantor shall make payment to creditor

Section 534 - Effect of Floating Charge

Floating charge on undertaking or property of Co created within 12 months immediately preceding commencement of winding up, shall be invalid, unless it is proved that
1) Co immediately after creation of charge was solvent or
2) Amount of any cash paid to Co at time of, or subsequently to creation of, & in consideration for, charge, together with interest on that amount @ 5 % p.a.

Section 535 - Disclaimer of Onerous Property in case of a Company which is being Wound Up

1) Where property of Co which is being wound up consists of -
a) land of any tenure, burdened with onerous covenants
b) shares or stock in Co
c) any other property which is unsalable or is not readily saleable
d) unprofitable contracts
2) Liquidator may, with leave of Tribunal within 12 months after commencement of winding up disclaim property
3) Tribunal may require such notices to be given to persons interested & make such other order in matter as Tribunal thinks just
4) Liquidator shall not be entitled to disclaim any property where an application in writing has been made to him by person interested in property requiring him to decide whether he will or will not disclaim, & liquidator has not, within 28 days after receipt of application
5) Any person injured by operation of disclaimer under this section shall be deemed to be creditor of Co

Section 536 - Avoidance of Transfers, etc. after commencement of Winding Up

1) Any transfer of shares in Co without sanction of liquidator made after commencement of winding up, shall be void
2) Any disposition of property of Co alteration in status of its members, made after commencement of winding up, shall, unless Tribunal otherwise orders, be void

Section 543 - Power of Tribunal to assess damages against Delinquent Directors

1) If it appears that person who has taken part in promotion or formation of Co, director, manager, liquidator or officer of Co -
a) Has misapplied, or retained, or become liable or accountable for, any money or property of Co or
b) Has been guilty of any misfeasance or breach of trust in relation to Co,
2) Tribunal may examine into conduct of person, director, manager, liquidator or officer & compel him to repay or restore money or property or any part thereof respectively with interest @ as Tribunal thinks just
3) Application shall be made within 5 years from date of order for winding up, or of first appointment of liquidator or of misapplication, retainer, misfeasance or breach of trust, whichever is longer

Section 555 - Unpaid dividends & undistributed assets to be paid into Companies Liquidation Account

1) If liquidator has in his hands or under his control any money representing
a) dividends payable to any creditor which had remained unpaid for 6 months after date on which they were declared, or
b) Assets refundable to any contributory which have remained undistributed for 6 months after date on which they became refundable,
into public account of India in RBI in separate account to be known as Companies Liquidation Account