

# Closure and Scaling Down of Business

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# ABOUT US



36

years of vintage



7

partners of the firm



10+

years of average association of each partner



35+

Total team strength, comprising of 10 qualifieds



1

time Best PCS award conferred by the ICSI



2

times Best Secretarial Audit Report award conferred by the ICSI



4

operating from all major cities – Kolkata, Mumbai, New Delhi, Bengaluru

***Our Organization's Credo:***

***Focus on capabilities; opportunities follow***

# Agenda

- Scaling down of business

- Demerger
- Slump Sale
- Buyback of Shares
- Reduction of Capital

- Closure of business

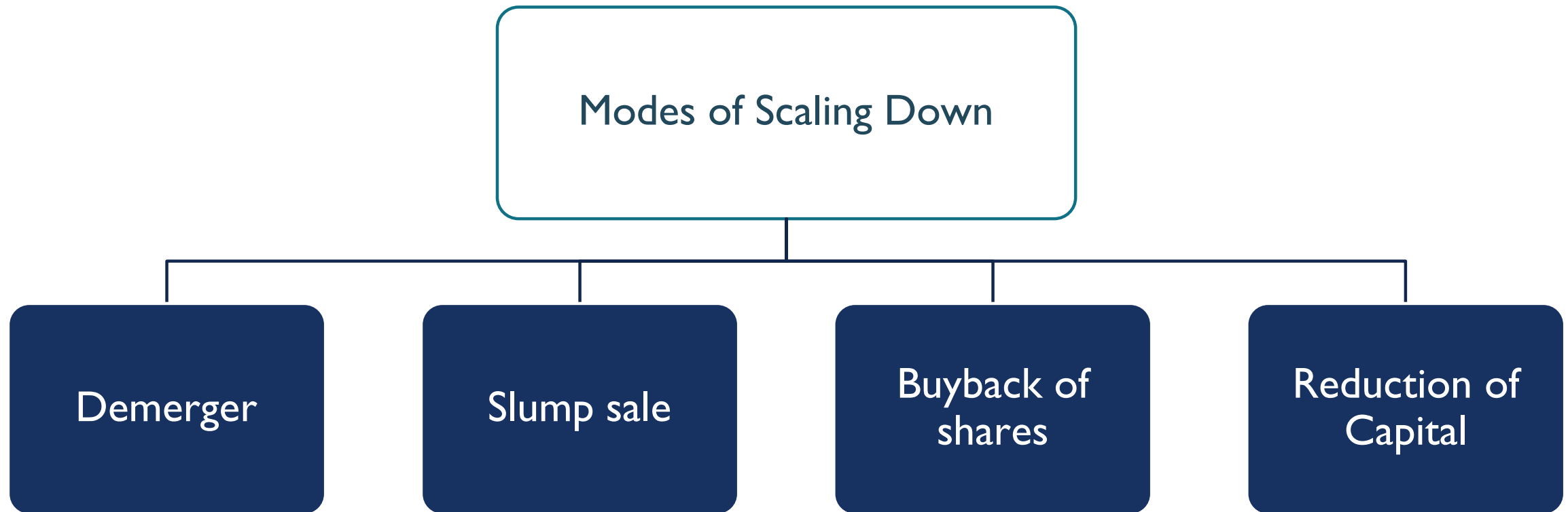
- Striking off
- Dormant status
- Merger
- Liquidation
- Voluntary Liquidation



# SCALING DOWN OF BUSINESS

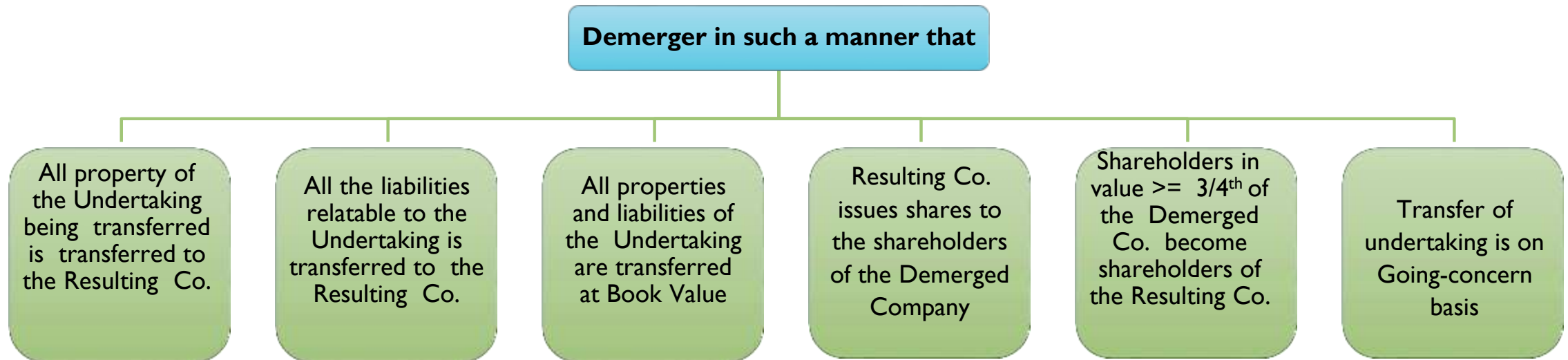


# Modes of Scaling Down



# Definition of Demerger

- As per Section 2(19AA) of the Income Tax Act, 1961 “demerger”, in relation to **companies**, means the transfer by a demerged company of its one or more undertakings to any resulting company



- **Demerged Co. [Sec. 2(19AAA)]-** company whose undertaking is transferred, pursuant to a demerger, to a resulting company
- **Resulting Co. [Sec. 2(41A)]-** company (including a WoS) to which the undertaking of the Demerged Co. is transferred in a demerger and, the Resulting Co. in consideration of such transfer of undertaking, issues shares to the shareholders of the demerged company

# Meaning of Undertaking

## Explanation I- Meaning

It includes

any part of an undertaking; or

a unit or division of an undertaking; or

a business activity taken as a whole

### But does not include

Individual assets or liabilities

Or any combination thereof

Not constituting a business activity.

## Key Considerations

Can assets and liabilities be cherry picked?

What does “going-concern” mean?

What is business activity?

## Cherry-picking of Assets & Liabilities

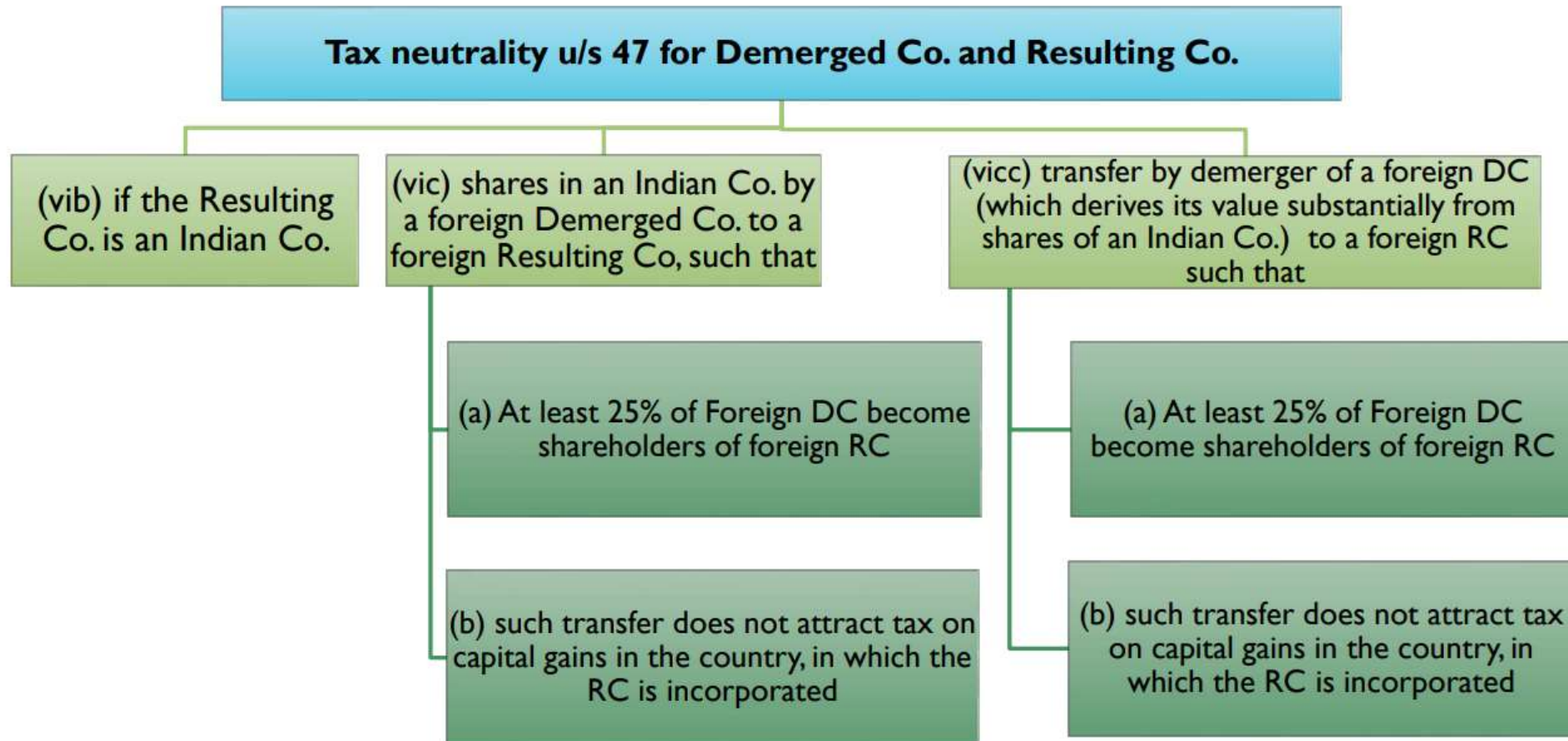
- The Hon'ble Delhi High Court *vide* its judgement in Indo Rama Textile Ltd [Co. Petition No. 4 of 2003, Co. Appl. No 762 of 2009, July 23, 2012], held that-

*“in a demerger, transfer of all common assets and/or liabilities relatable to undertaking being demerged is not required so long as the assets and liabilities transferred, by themselves, constitutes a running business and the business can be carried on uninterruptedly with such assets and liabilities alone”*

The Delhi High Court further held that-

- To ensure that the undertaking has been transferred as a going concern or not, while sanctioning a scheme of arrangement, **the Court can examine whether essential and integral assets like plant, machinery and manpower without which it would not be able to run as an independent unit have been transferred to the resulting company**
- ITAT Mumbai in the matter of Grasim Industries Ltd., Mumbai v Dy Cit, Central Circle-1(4)
  - spelled out that a ‘bonafide transaction’ involving demerger of financial services business, comprising primarily of shares held in group companies and other net assets relating to the investments and securities, along with employees, can qualify as an ‘undertaking’, provided such business can be run independently by the acquirer.

# Tax neutrality in case of demerger (1/2)





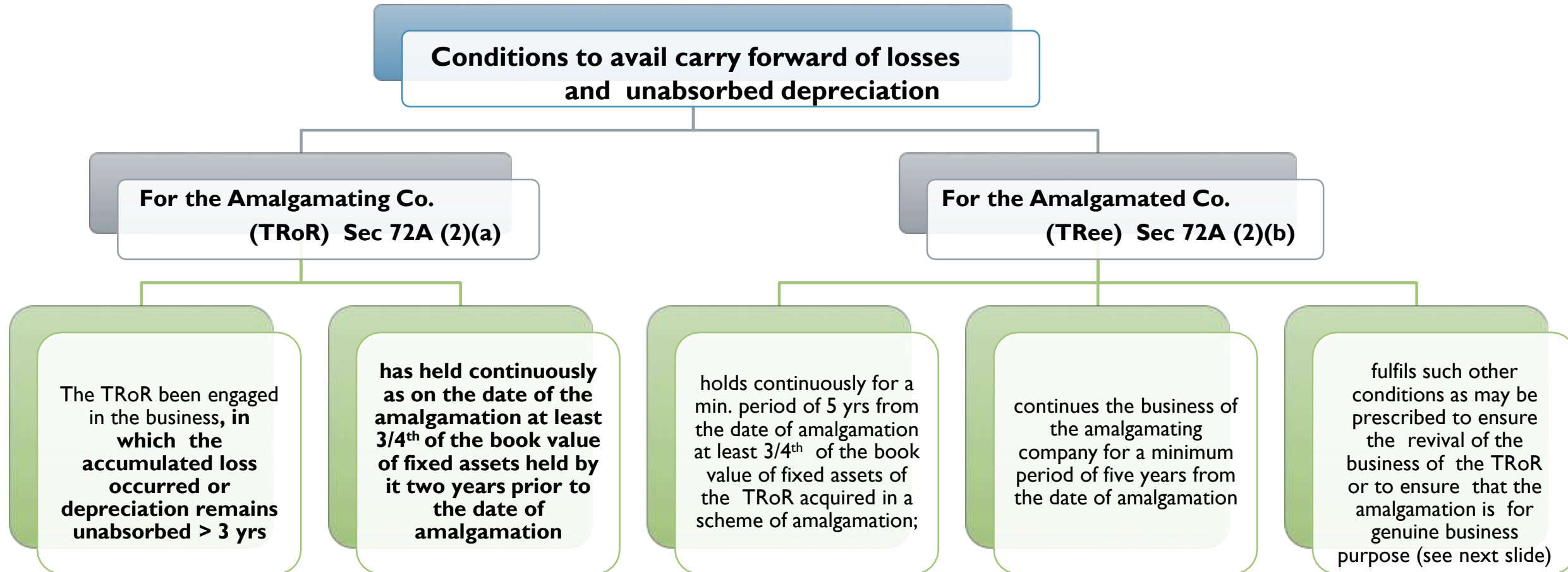
# Tax neutrality in case of demerger (2/2)

## Taxability in the hands of shareholder – Sec 47 (vid)

- ❑ any transfer or issue of shares by RC, to the shareholders of the DC if the transfer or issue is made in consideration of demerger of the undertaking
- ❑ In case of a demerger, the existing shareholders of the DC will hold:
  - (a) Shares in the resulting Co.; and
  - (b) Shares in the demerged co.

- ❑ **Cost of acquisition will be computed as under-**  
By virtue of Section 49(2D) the COA of shares in the Demerged Company shall be:
  - COA of original shares in the demerged company  
Less: COA of shares in the resulting company as calculated in section 49(2C)
- Cost u/s 49 (2C)=  
CoA of the shares held, in the same proportion as the Net Book Value : Net Worth of the DC

# Carry Forward of Losses and Unabsorbed Depreciation - Amalgamation(1/3)



# Carry Forward of Losses and Unabsorbed Depreciation - Amalgamation(2/3)

**Conditions for set-off, under Rule 9C [pursuant to sec 72A (2) (b) (iii)]**

The TRee (owning an industrial co.) shall:  
achieve  $\geq 50\%$  of the installed capacity before the end of 4 years; and maintain till end of 5 years

The TRee shall:  
furnish to the Assessing Officer a certificate in Form No. 62, duly verified by an accountant, to establish that production levels have been achieved

# Carry Forward of Losses and Unabsorbed Depreciation - Amalgamation(3/3)

## Points to note-

- **All** conditions (u/s 72A (2)(a) and (b)) must be fulfilled.
- Where such conditions are fulfilled,
  - Accumulated loss of the TRoR will be allowed to carried forward for a **fresh period of 8 years**;
    - *Supreme Industries Ltd. vs DCIT : 2007 17 SOT 476 (Mum ITAT)*
  - Unabsorbed depreciation can be carried forward **indefinitely**
- If the conditions mentioned in the previous slide are **not** fulfilled- [Sec. 72A (3)]
  - ❓ The set off of loss or allowance of depreciation made in any previous year in the hands of the TRee Co.
  - ❓ Shall be deemed to be the income of the TRee Co. chargeable to tax
  - ❓ For the year in which such conditions are not complied with.
  - ❓ **Accumulated loss** means loss of the TRoR under the head “Profit and Gains of business or profession” (**not being a loss due to speculation business**)
  - ❓ **Accumulated losses b/f** under the head “house property” or “capital gain” will get lost, and **neither co. will be able to avail c/f benefit**

# Carry Forward of Losses and Unabsorbed Depreciation - Sec 72A (4)

- ❑ **Losses and unabsorbed depreciation of the Demerged Co, shall be carried forward-**
  - ❑ **where such loss or unabsorbed depreciation**
    - ❑ is directly relatable to the undertakings transferred to the resulting company,
    - ❑ be allowed to be carried forward and set off in the hands of the resulting company
  - ❑ **where such loss or unabsorbed depreciation**
    - ❑ is not directly relatable to the undertakings transferred to the resulting company,
    - ❑ be apportioned between the demerged company and the resulting company in the same proportion in which the assets of the undertakings have been retained by the demerged company and transferred to the resulting company,
    - ❑ and be allowed to be carried forward and set off in the hands of the demerged company or the resulting company, as the case may be

## Other aspects

- By virtue of Section 2(22)(v) there will be no dividend in the hands of shareholders on distribution of shares pursuant to a demerger by the resulting company to the shareholders of the demerged company.
- By virtue of amendment in section 2(42A), for calculating the period for which the shares are received upon demerger are held, the period for which shares were held in the demerged company shall also be considered.
- The Resulting Company must record the cost of assets transferred pursuant to the demerger, as equal to the cost that would have been recorded in the books of the Demerged Co., i.e. **the actual cost:**
  - **However, exception made for companies which have adopted IndAS**

# Introduction to Slump Sale

## Provisions

- ❓ As per Section 2(42C) slump sale means transfer of business **undertaking** as a going concern for lump sum consideration without values being assigned to individual assets and liabilities.
- ❓ The definition of 'slump sale' was amended vide Finance Act, 2021 (further Finance Act, 2022) to expand its scope and include in its ambit all forms of transfer
  - As per Section 50B transferor company is liable to short/long term capital gains (holding period 36 months)
    - Capital gains computed by deducting 'net worth' from the sale consideration
- ❓ **Undertaking** has same meaning as under Explanation 1 to Sec 2(19AA)
- ❓ Computation of WDV as per sec. 43 (6)

## ❓ Whether Undertaking is a capital asset?

The Supreme Court in the case of *R.C. Cooper V. UOI* : AIR 1970 SC 564 (610) held that

**“the undertaking is distinct from the various assets which comprise the undertaking”**

- **Undertaking must be a business activity as a whole**
- **Whether in a slump sale some of the assets could be retained by the transferor?**

If some assets are retained by the transferor / liabilities not taken over by the transferee, the same does not militate against the concept of slump sale.

*[CIT v F.X. Periera and Sons Pvt. Ltd.: 184 ITR 461 (Ker.) ; Premier Automobiles Ltd. v. ITO: 264 ITR 193 (Mum.); ACIT v. Raka Food Products Ltd.]*

# Key Aspects

- ❓ Consideration is paid to the Transferor Company, not its shareholders
- ❓ Capital gains = Full value of consideration – Net worth of undertaking
  - ❓ Net worth = Aggregate value of WDV of the block of assets and book value of other assets of the undertaking – Value of liabilities of undertaking
  - ❓ Change in value of assets on revaluation be ignored for computing net worth
  - ❓ **Benefit of indexation not available**
  - ❓ Revaluation is completely ignored
- ❓ If values of individual assets are considered while computing the lumpsum value, or where it is possible to attribute prices to individual assets, the transaction may not amount to slump sale – *CIT vs Artex Manufacturing*, 227 ITR 260 (SC)
- ❓ If the net worth of the undertaking is negative, the entire sale consideration is capital gain – *Zuari Industries v CIT* (2006) SOT 563 (Mum.)
- ❓ Any business loss/ accumulated depreciation stays with the transferor.
- ❓ Slump sale provisions do not provide tax treatment for the purchaser. Hence, purchaser may split the actual consideration paid for the going concern and treat the assets/liabilities accordingly as if acquired in normal course of business
  - ❓ In *DE Nora India Limited vs CIT* (2015) 370 ITR 391 (Del), the transferee's right to allocate values based on valuations was also upheld



# Buyback of shares

## Reasons for Buyback

- ⊠ Buyback is by far the **only possible avenue for companies to scale down their size**
  - The other ways are reduction of capital, which is fraught with long process
- ⊠ Buybacks are also **often used to allow exit to particular shareholders:**
  - quite common for VCs or strategic investors to put in a clause for buyback
- ⊠ Buyback is also the **only way to cashout a compulsorily convertible debenture or a compulsorily convertible preference share**

## Conditions for Buyback

- Upto 10% of PUESC+FR: Board approval
- Upto 25% of PUSC+FR: SR
- Max. buyback: 25% of PUSC
- Debt-Equity Ratio post buy back  $\leq 2:1$

## Restrictions

- No buyback offer within 1 year of previous closure
- No further issue of same kind of shares/other securities within 6 months

## Sources

- Free Reserves, Securities Premium Reserve, proceeds of fresh issue

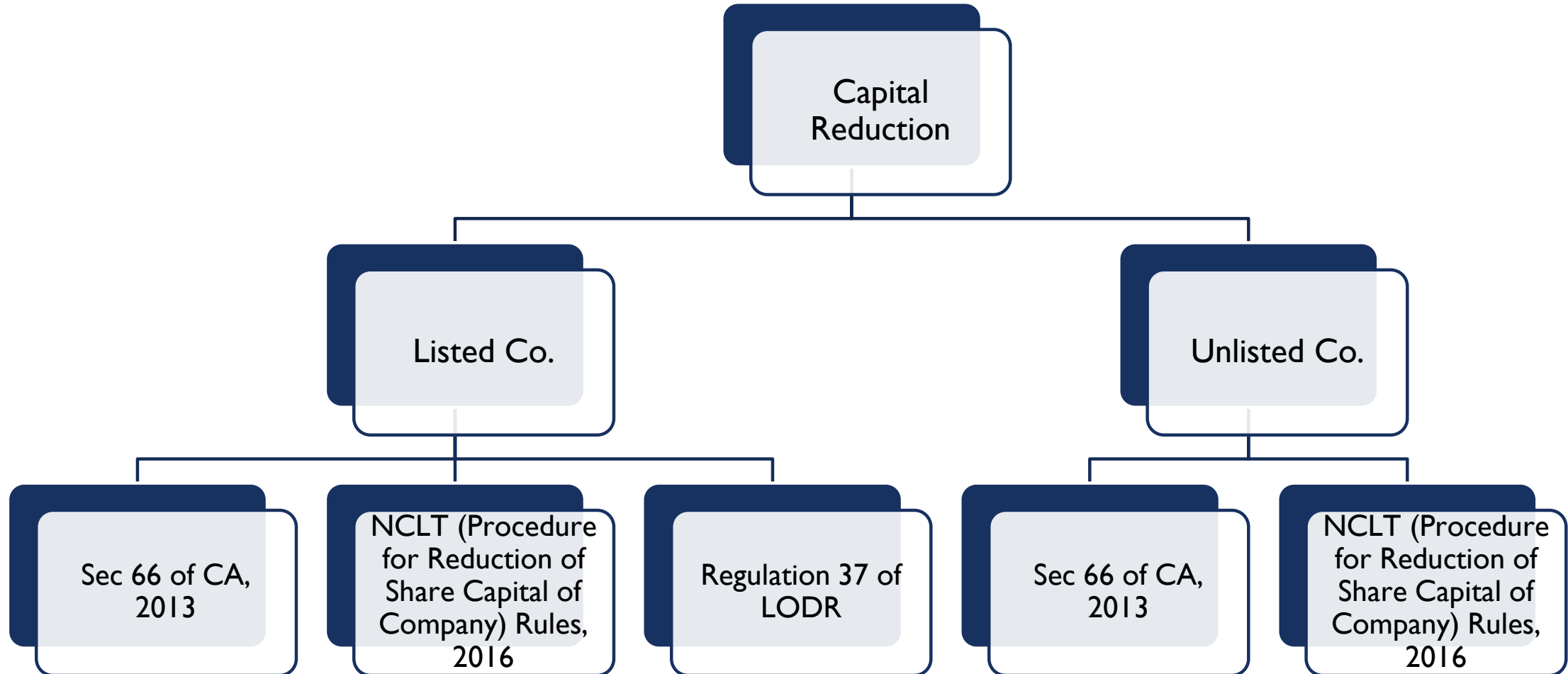
# Taxation on Buyback

- Entire consideration included u/s 2(22)(f) of IT Act, and to be taxable as “dividend”
  - Taxable at slab rates as applicable to respective shareholders, with a flat surcharge @ 15%
- Entire cost of acquisition in respect of shares bought back to be booked as “capital loss” [section 46A of IT Act]
  - Such capital loss may be set off against capital gains subsequently
- As per section 74 of IT Act, the set-off is available for a period of 8 AYs immediately after the AY in which loss arise
- No deductions allowed for any type of expense made in connection therewith [Section 57 of IT Act]

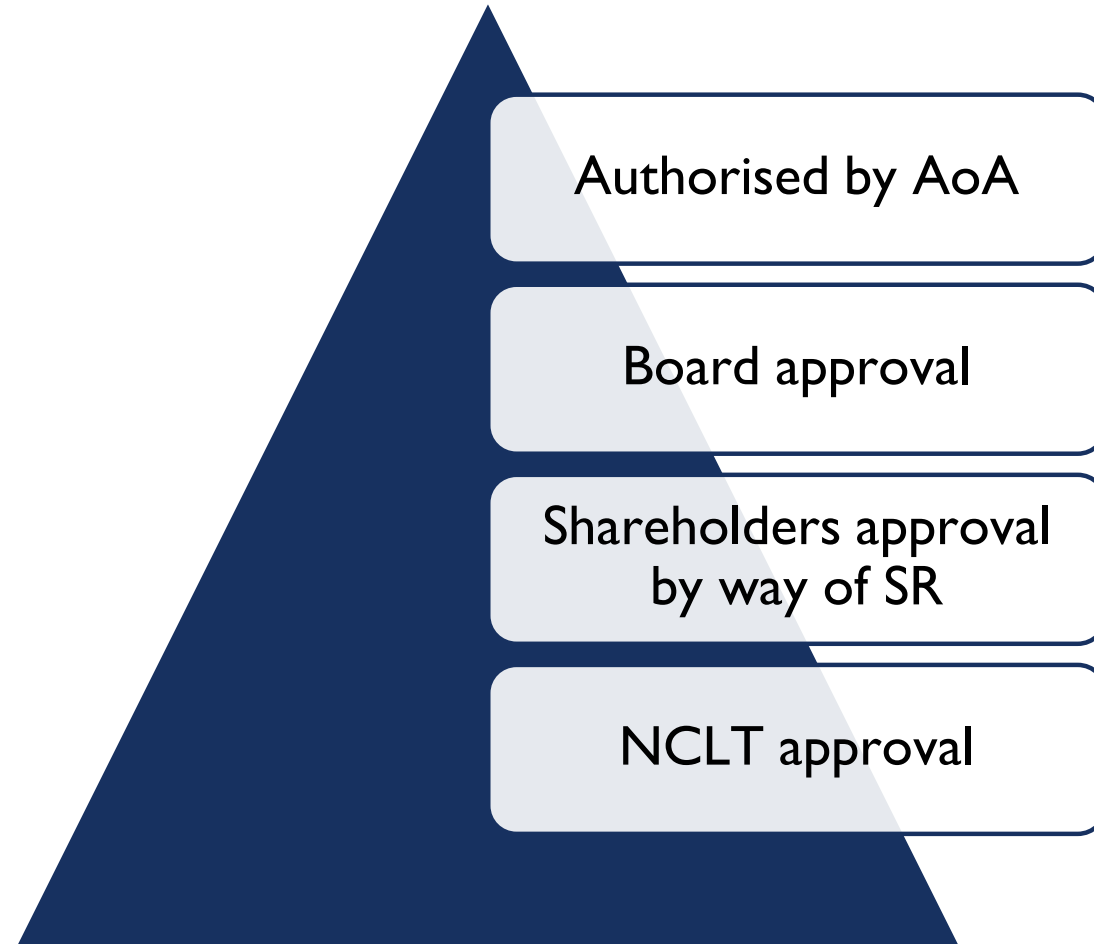
# Reasons for Reduction of Capital

- Internal restructuring (as a part of scheme of compromise or arrangement)
- Alteration of capital structure
- Company has surplus funds through which it intends to reduce its share capital
- To set off accumulated losses against share capital/reserves

# Provisions dealing with reduction of capital

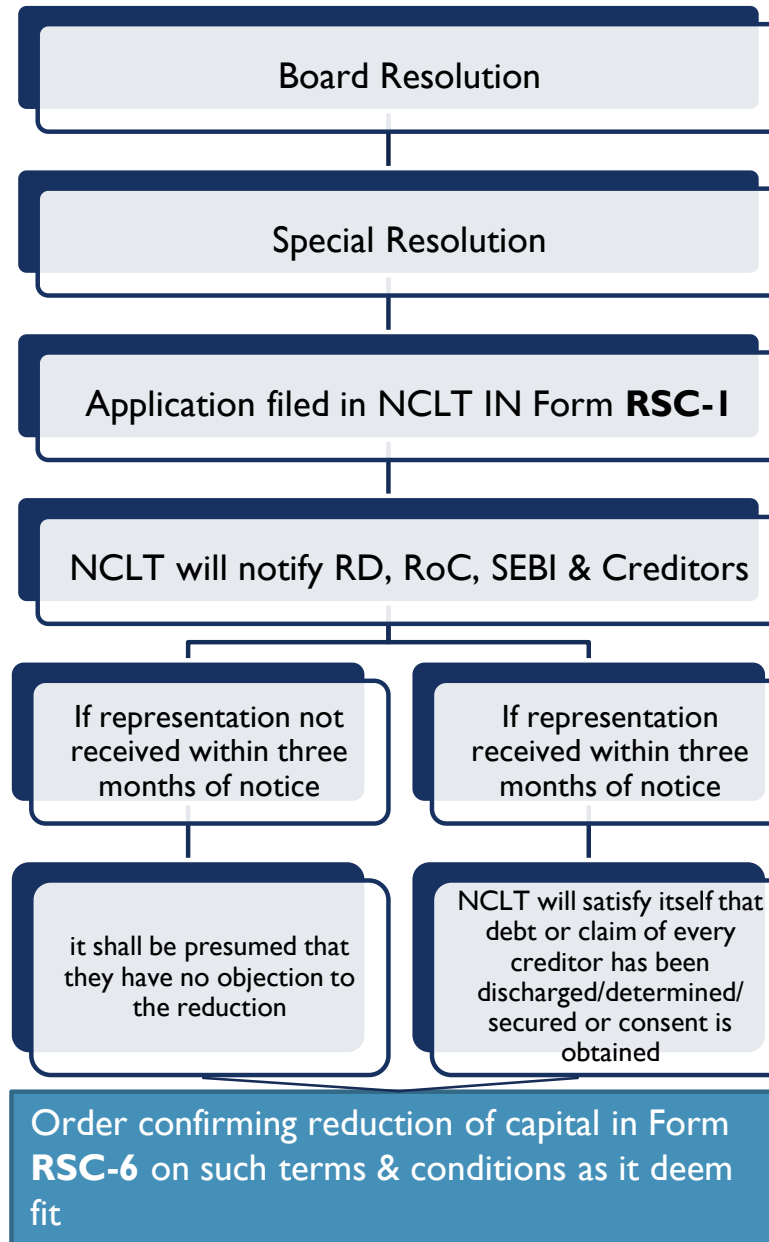


# Approvals required for capital reduction



Notice, in Form RSC-4 in English & Vernacular newspaper within 7 days, and on website, mentioning amount of reduction, time limit for raising objections and place where list of creditor can be inspected

Co. to file affidavit in Form RSC-5 confirming dispatch and publication of notice within 7 days from date of



**Attachments:**

- List of creditors;
- Auditor's Certificate that the list of creditors is correct as per the records of the company verified by the auditor;
- A certificate by the auditor and a director's declaration that the co. is not, in arrears in the repayment/interest of the deposits on the date of filing of the application;
- Auditor's Certificate that Accounting Treatment proposed for reduction of capital is in conformity with the AS;
- Any other relevant documents.

Within 15 days of submitting the application in Form RSC-2 to RD, ROC and SEBI and to every creditors in Form RSC-3

Co. shall send the representation or objections so received along with responses thereto to NCLT within 7 days of expiry of period upto which objections were sought.

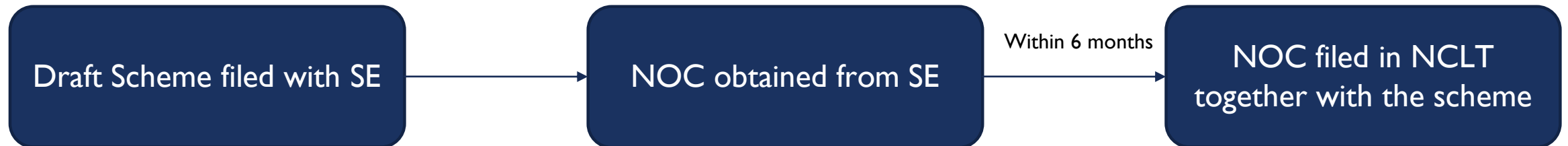
NCLT may hold any enquiry on adjudication of claim and/or give direction for securing the debts of the creditors.

Co. shall deliver a certified copy of the order of NCLT and of minute approved by NCLT to ROC showing—

- the amount of share capital, no. of shares into which it is to be divided, amount of each share and amount, if any, at the date of registration deemed to be paid-up on each share
- file e-form INC-28 within 30 days of the receipt of order and ROC shall issue a certificate to that effect in Form RSC-7.

## Additional requirements for a listed company

- ❑ Draft scheme to be filed with NCLT shall first be filed with the stock exchange (SE) where securities of the company are listed.
- ❑ No-objection letter (NOC) to be received from stock exchange which shall be filed in the NCLT while submitting application
- ❑ NOC shall be valid for six months from the date of issuance, within which the draft scheme shall be submitted to the NCLT



Upon sanction of the scheme by NCLT, the listed entity shall submit the documents, to SE.

# Tax on reduction of capital

Tax on capital reduction is levied in two ways

As per section 2(22) (d) of the Income-tax Act, 1961 (IT Act), any distribution of accumulated profits to the shareholders, whether capitalised or not, pursuant to capital reduction, is considered as dividend.

Any distribution over and above the accumulated profits would be chargeable to capital gains tax in the hands of the shareholders. It was also held that reduction in capital will be construed as a transfer within the meaning of section 2(47) of the IT Act

SC in *CIT v. G. Narasimhan*, 1999 (1) SCC 510



# Reduction of capital - possible scenarios

Particulars	Consideration	Taxability
Capital reduction at fair value	Fair value > Cost of acquisition	<ul style="list-style-type: none"> <li>• Distribution from accumulated profits = deemed dividend</li> <li>• Difference between remaining and Cost of Acquisition = capital gains</li> </ul>
	Fair value < Cost of acquisition	<ul style="list-style-type: none"> <li>• Distribution from accumulated profits = deemed dividend</li> <li>• Difference between remaining and Cost of Acquisition = capital loss</li> </ul>
Capital reduction at face value	Face value = Cost of acquisition	<ul style="list-style-type: none"> <li>• Deemed dividend = 0</li> <li>• Capital gains = 0</li> </ul>
	Face value < Cost of acquisition	<ul style="list-style-type: none"> <li>• Deemed dividend = 0</li> <li>• Difference between consideration and cost of acquisition = capital loss</li> </ul>
Capital reduction without payment of consideration		<ul style="list-style-type: none"> <li>• Cost of acquisition = capital loss</li> </ul>

## Selective reduction of capital (1/2)

- Reduction of capital resulting in compulsory extinguishment of the shares of some shareholders, without affecting the other shareholders of the same class
- Section 66 of the Act says ***“that a company limited by shares or limited by guarantee and having a share capital may reduce its share capital by special resolution in any manner xxxxxx”***
- In re *Philip India Ltd* (19.09.24), NCLT Kolkata examined whether section 66 can be invoked for buying out minority stake
  - answered in negative considering *“...share capital reduction is only incidental to the main objective of buy back of shares...”*
  - Tested against the objectives of capital reduction u/s 66(1)(a) and (b)
  - Currently in appeal before NCLAT
- In re *Bombay Gas Company Ltd* (21.05.24), the Scheme providing selective reduction of capital was approved
  - Reliance made on various rulings, by Petitioner Company, as cited in Regional Director’s (Western Region) Report
  - Concluded selective reduction to be permissible since non-promoter shareholders are being paid fair value of their shares. It is nobody’s case that the proposed reduction is unfair or inequitable.
- In re *Reliance Retail Ltd* (05.01.24), NCLT Mumbai approved capital reduction scheme stating that
  - it is a settled law that selective capital reduction is permitted under Section 66 of the Companies Act, 2013
  - Reliance placed on NCLAT judgement in *Brillio Technologies Pvt Ltd. vs ROC & RD*
    - *As per Section 66 of the Act, reduction of share capital can be done in ‘any manner’. Clause (a) & (b) of Section 66 of the Act, mere illustration and not the only manner in which share capital may be reduced.*
- In *Sandvik Asia Ltd. Vs. Bharat Kumar Padamsi & Ors.* (2009) SCC Online Bom. 541
  - In our opinion, once it is established that non-promoter shareholders are being paid fair value of their shares, at no point of time it is even suggested by them that the amount that is being paid is any way less and that even overwhelming majority of the non-promoters shareholders having voted in favour of the resolution shows that the court will not be justified in withholding its sanction to the resolution.
  - Reference to judgment in the case of *Poole and ors. v/s. National Bank of China Limited*

## Selective reduction of capital (2/2)

- In re *Reckitt Benckiser (India) Ltd* 122(2005) DLT612
  - While reducing the share capital company can decide to extinguish some of its shares without dealing in the same manner as with all other shares of the same class. Consequently, it is purely a domestic matter and is to be decided as to whether each member shall have his share proportionately reduced, or whether some members shall retain their shares unreduced, the shares of others being extinguished totally, receiving a just equivalent.
  - Reference to Re. *Denver Hotel Co.*, 1893 (1) Chancery Division 495
  - Also referred to in re *Syngenta India Limited*
- In re *R.S. Live Media Pvt Ltd* (2014) 187 Comp Cas,
  - Selective reduction permitted, reliance on international judgements such as
    - *British and American Trustee and Finance Corpn. v. Couper*, (1894) AC 399
    - *Thomas de La Rue & Co. and Reduced*. (1911) 2 Ch. D 361)

- *British and American Trustee and Finance Corporation v. Couper* (1894), A.C. 399

*If the parties to the transaction come to the conclusion that the bargain is a fair one, why should the Court say that there is a preference on the one side or on the other? If there is nothing unfair or inequitable in the transaction, I cannot see that there is any objection to allowing a company limited by shares to extinguish some of its shares without dealing in the same manner with all other shares of the same class. There may be no inequality in the treatment of a class of shareholders, although they are not all paid in the same coin, or in coin of the same denomination.*

- Re-affirmed in the matter of *Poole and Others v National Bank of China*, [1907] UKHL 616
- *Westburn Sugar Refineries Ltd.*: (1951) 1 All.E.R. 991 (H.L.)  
“...the general rule is that the prescribed majority of the shareholders is entitled to decide whether there should be a reduction of capital, and, if so, in what manner and to what extent it should be carried into effect.”

# Wide interpretation of term “in any manner”

- Reduction of capital and payment to shareholders through creation of loan to be repaid over a period of time
  - In Re *Ulundurpet Expressways Private Limited* (NCLT Mumbai - 19.12.2023)
  - NCLT rejected Scheme on the grounds that there is no excess capital to be repaid, and hence, intent of the section is not met *the scheme of section 66(1)(b)(ii) of the Companies Act, 2013 only enables a company to pay off excess capital to its shareholders, which is considered in excess of wants of the company. The facts of the case clearly shows that such reduced share capital can not be said to be in excess of wants of the company on the date of passing of special resolution. Accordingly, such reduction is not permissible under the terms of Section 66(1)(b)(ii) of the Companies Act, 2013.*
  - Further, results in indirect lending by overseas shareholders, attracting compliance with ECB Guidelines
- NCLAT reversed NCLT’s order considering that:  
*A bare perusal of the above section would show it gives discretion to the appellant company to reduce its share capital “in any manner” subject to special resolution being passed by requisite majority of shareholders.*
- Referred to *Tamil Nadu Newsprint & Papers Ltd* (CP No.17 of 1995)
  - Capital reduction through issuance of NCDs
  - *Indian National Press (Indore) Ltd* (1989) 66 Comp Cas 387 (MP)  
*The company has the right to determine the extent, the mode and incidence of the reduction of its capital. But the court, before it proceeds to confirm the reduction of capital, must see that the interests of the minority and that of the creditors are adequately protected and there is no unfairness to it, even though it is a domestic matter of the company. The power of confirming or refusing to confirm the special resolution of a company to reduce its capital is conferred on the court in order to enable it to protect the interest of person who dissented or even of persons who did not appear, except on the argument and hearing of the petitioner.*
- Petitioner Company also referred to:
  - NCLT Mumbai in *Dewas Bhopal Corridor Private Limited* (10.02.23) - cancellation of shares against loan

# What is more tax efficient - Buyback or Capital Reduction?

	Buyback				Capital Reduction			
Period	Particulars	No. of shares	Price per share	Amount (Rs.)	Particulars	No. of shares	Price per share	Amount (Rs.)
FY 2020	Total proceeds received	50	Rs. 80	4,000	Total proceeds received	50	Rs. 80	4,000
AY 2026	Income taxable as deemed dividend	50	Rs. 80	4,000	Income taxable as deemed dividend (proceeds received to the extent of accumulated profits)*	50	Rs. 30	1,500
	Cost of acquisition	50	Rs. 30	1,500	Cost of acquisition	50	Rs. 30	1,500
AY 2026	Capital loss (cost of acquisition of bought back shares)	50	Rs. 30	1,500	Capital Gains (difference between net consideration not considered as deemed dividend and cost of acquisition)	40	Rs. 20	800
AY 2026-2034 (upto 8 years)	Set-off of capital loss against capital gains							

Reduction of capital is concerned with repayment of capital and securities premium. Accordingly, it is unlikely to utilise accumulate profits for the purpose of capital reduction. However, where a part of the consideration is payable through accumulated profits (on account of fair valuation), the same will be taxable as deemed dividend.

# Difference between Buyback and Capital Reduction

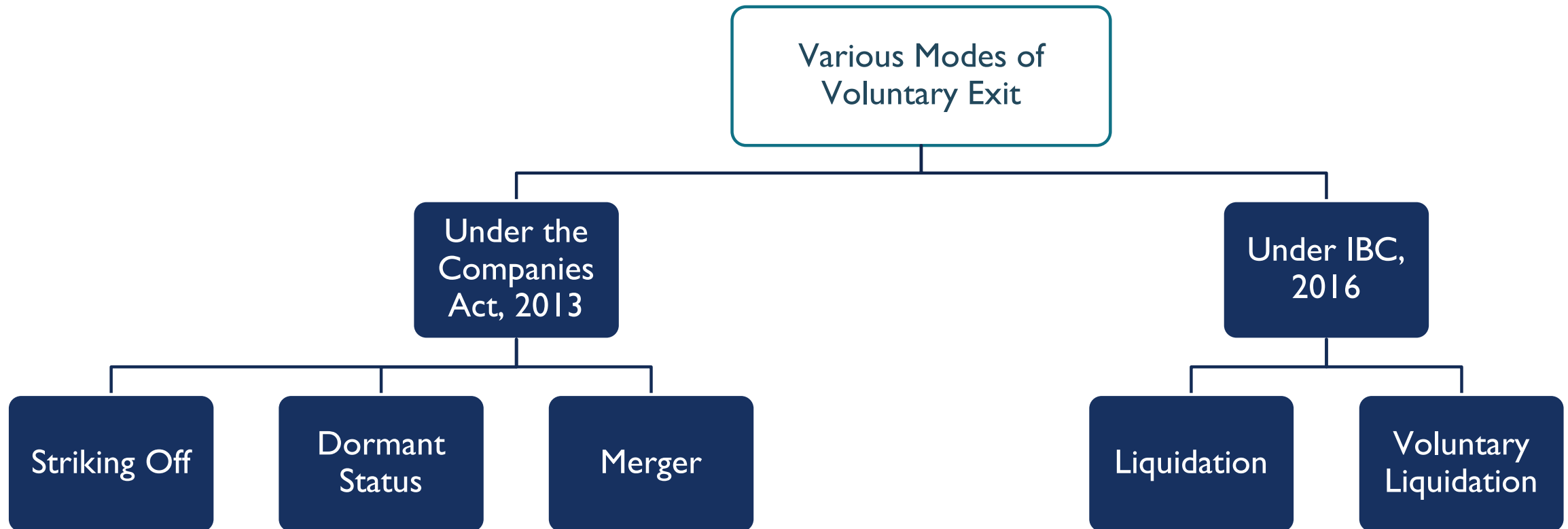
Particulars	Buyback	Capital Reduction
Maximum amount that can be utilised	The fair value of shares can be paid out; upto 25% of paid up capital and free reserves	No such limits
Source of distribution	Profits, share premium, or proceeds of issue of securities	Not specified
Approvals required	Upto 10% of Net worth: Board Upto 25% of Net worth: special resolution	Board Special Resolution No-objection of creditors NCLT
Impact on the shareholder	To the extent sold back, the holding of the shareholder comes down	
Taxability	Entire amount paid by the company is taxable u/s 2(22)(f)	<ul style="list-style-type: none"> <li>Entire amount paid by the company to the extent of accumulated profits is taxable u/s 2(22)(d)</li> <li>For remaining part, only capital profits are taxable</li> </ul>



# MODES OF EXIT



# Modes of Voluntary Exit





# Under Companies Act



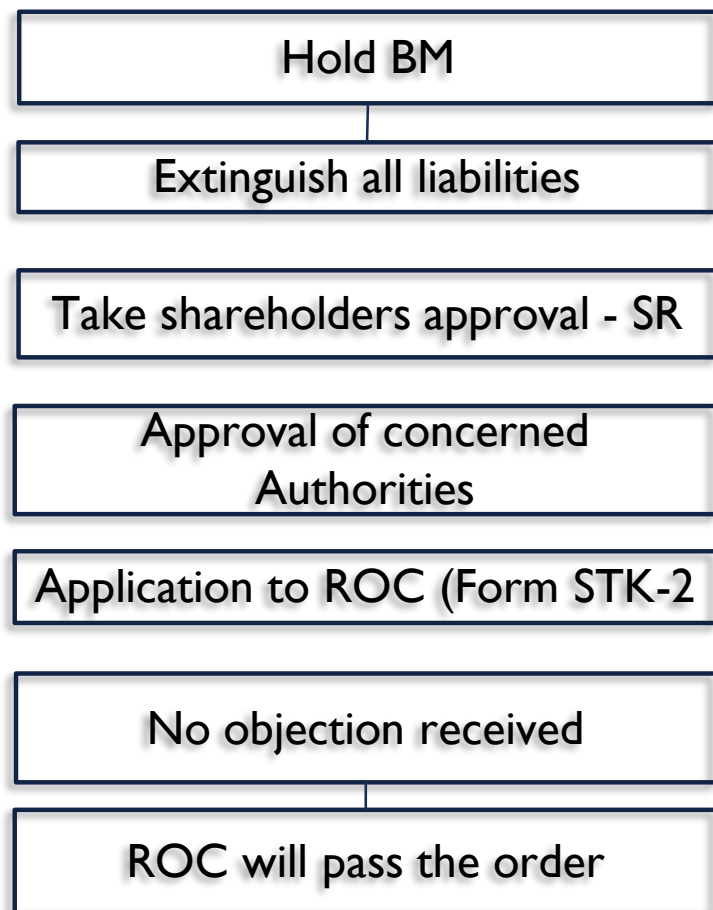


# STRIKING OFF

SECTION 248 (2) OF THE COMPANIES ACT, 2013



## Striking off u/s 248 (2) of the Companies Act, 2013



### Prerequisites-

- Nil assets nil liabilities;
- Company should not be in receipt of notice from ROC u/s 248 (1) ;
- No change in name or RO of the company in preceding 3 months;
- No matter of compromise or arrangement pending before NCLT;
- Should be inactive in previous 3 months

# Striking off u/s 75 of LLP Act r.w. Rule 37 of LLP Rules, 2009

- *Suo moto* by ROC
  - where LLP is not carrying on business/ operation for 2 years or more
  - Notice to be sent to LLP and its partners to send representations, within 1 month of receipt of notice
  - Notice on MCA website for 1 month
- Application by LLP
  - In form 24
  - With the consent of all partners in LLP
  - Application published on MCA site for 1 month

## **Prerequisites –**

- The LLP should not be carrying on any business or operation for a period of 1 year
- Nil asset and liabilities
- LLP is not having any bank account or the bank account is closed
- The LLP has not filed any income tax return (in cases where no business has commenced since incorporation)

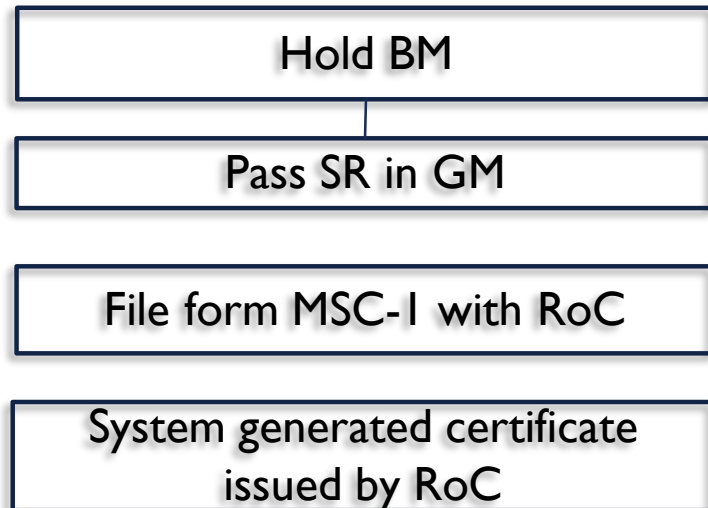


# DORMANT STATUS

SECTION 455 OF THE COMPANIES ACT, 2013



## Striking off u/s 455 of the Companies Act, 2013



### Prerequisites-

- Inactive Company;
- Cos having no significant accounting transaction;
  - (a) payment of fees by a company to the Registrar;
  - (b) payments made by it to fulfil the requirements of this Act or any other law;
  - (c) allotment of shares to fulfil the requirements of this Act;
  - (d) payments for maintenance of its office and records
- No enquiry/ investigation should be pending against the company



# MERGER

SECTION 230 READ WITH SECTION 232 OR 233 OF THE COMPANIES ACT, 2013



# Merger

Who can apply u/s 232?

- Company
- Creditors
- Members
- Liquidator

Who can apply u/s 233

- 2 or more small company
- Holding company and wholly owned subsidiary

Application u/s 232

Calling of meeting by  
Tribunal

Notice of meeting

Service of notice to  
Tribunal

No objection  
received

Filing of scheme

Passes the order

Application u/s 233

Pass BR

Submission of scheme  
for objection

Declaration of  
solvency

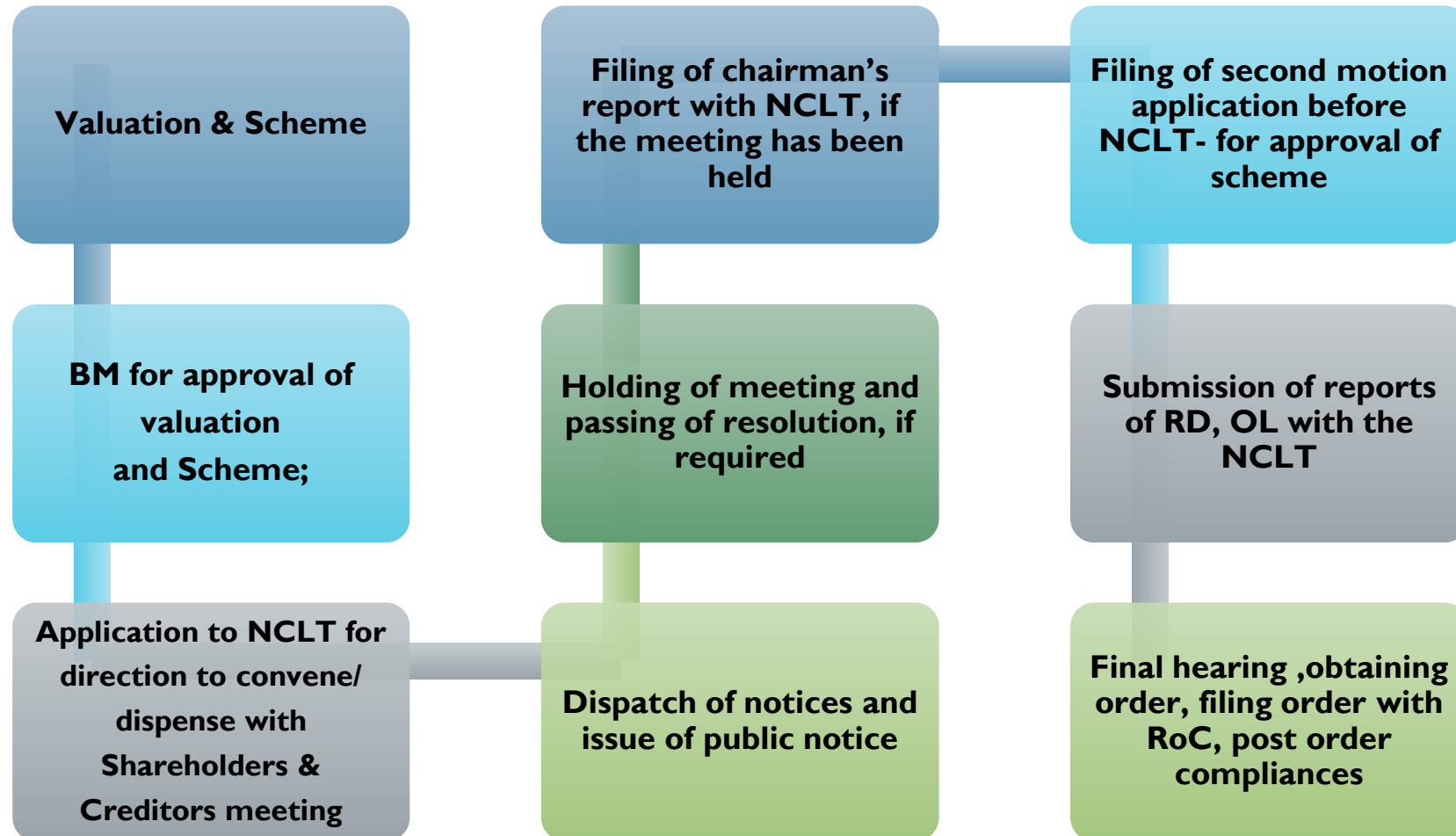
Take shareholders and  
creditors approval

File scheme with RD

Approval of scheme by  
RD



# Broad Process of merger





**UNDER IBC**



# VOLUNTARY LIQUIDATION

SECTION 59 OF THE INSOLVENCY AND BANKRUPTCY CODE, 2016

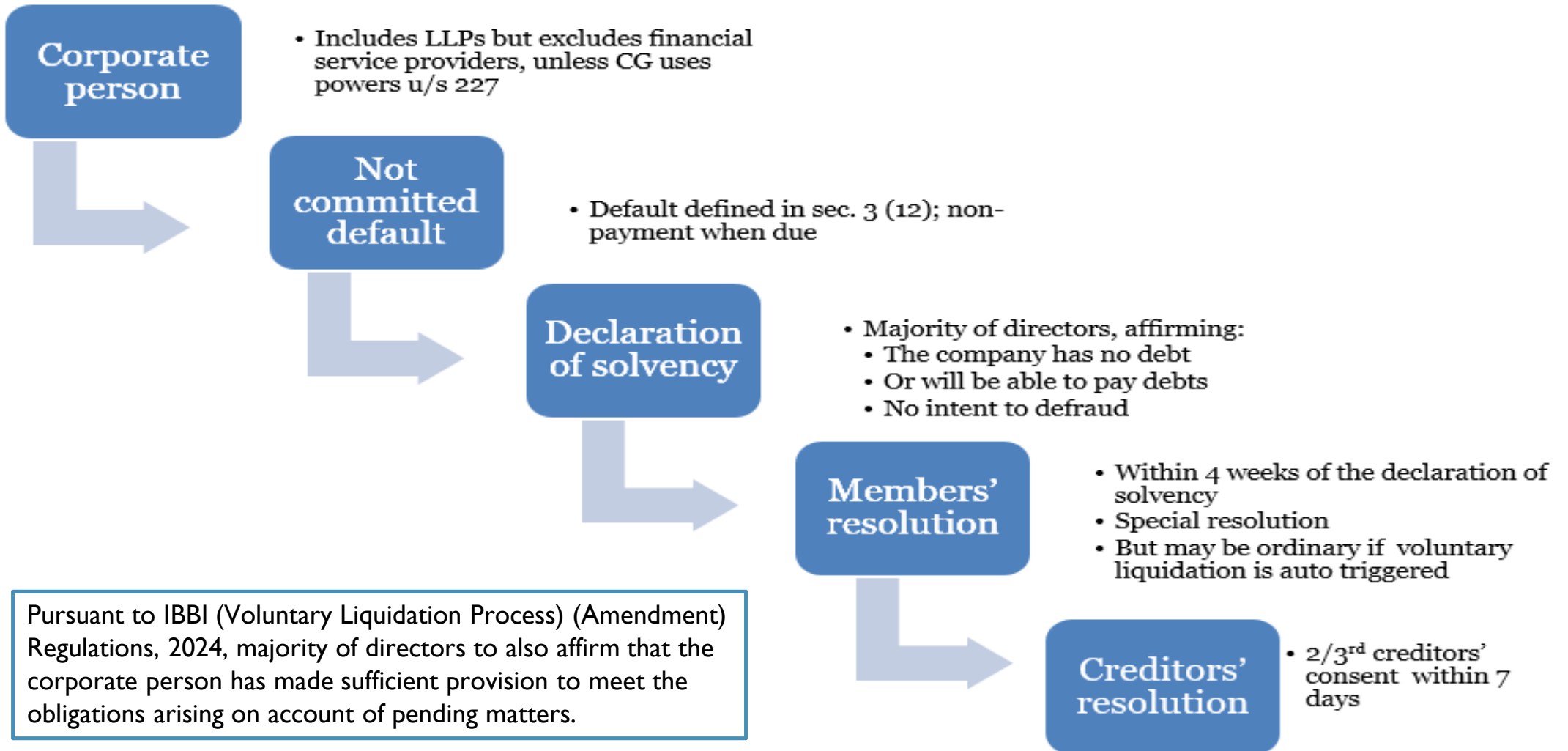


# Applicable Provisions of Law | Voluntary Liquidation

## **IBC, 2016:**

- Section 59 read with IBBI (Voluntary Liquidation) Regulations, 2017
- Sections 35 to 53 with such modifications as may be necessary [Sec 59(6)]
  - **Sec 35-** Powers and duties of liquidator
  - **Sec 36-** Liquidation estate
  - **Sec 37-** Powers of liquidator to access information
  - **Sec 38-** Consolidation of claims
  - **Sec 39-** Verification of claims
  - **Sec 40-** Admission or rejection of claims
  - **Sec 41-** Determination of valuation of claims
  - **Sec 42-** Appeal against the decision of liquidator
  - **Sec 43-** Preferential transactions and relevant time
  - **Sec 44-** Orders in case of preferential transactions
  - **Sec 45-** Avoidance of undervalued transactions
  - **Sec 46-** Relevant period for avoidable transactions
  - **Sec 47-** Application by creditor in cases of undervalued transactions
  - **Sec 48-** Order in cases of undervalued transactions
  - **Sec 49-** Transactions defrauding creditors
  - **Sec 50-** Extortionate credit transactions
  - **Sec 51-** Orders of Adjudicating Authority in respect of extortionate credit transactions
  - **Sec 52-** Secured creditor in liquidation proceedings
  - **Sec 53-** Distribution of assets
- **Income Tax Act, 1961:**
  - Section 2 (22) (c) - Dividend
  - Section 46 - Capital Gain
  - Section 176 - Discontinued Business
  - Section 178 - Company in Liquidation
- **Companies Act, 2013:** In case of financial service providers, until explicit provisions are enacted, either the Companies Act 2013, and/or the relevant special laws, will continue to prevail.

# Pre-conditions for Voluntary Liquidation





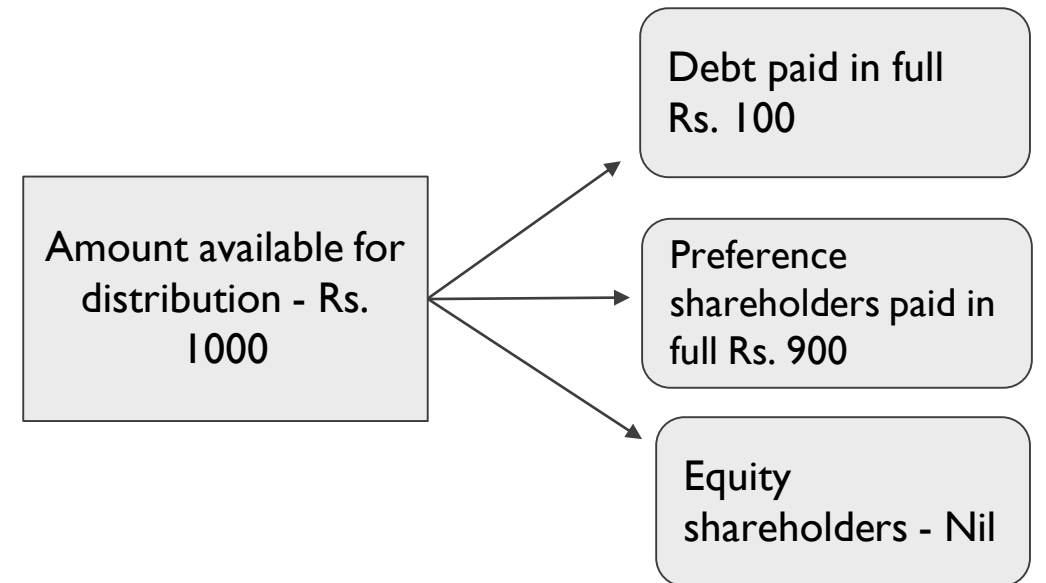
# VOLUNTARY LIQUIDATION

CASE STUDIES ON WHEN THE CORPORATE DEBTOR CAN BE SAID TO BE SOLVENT



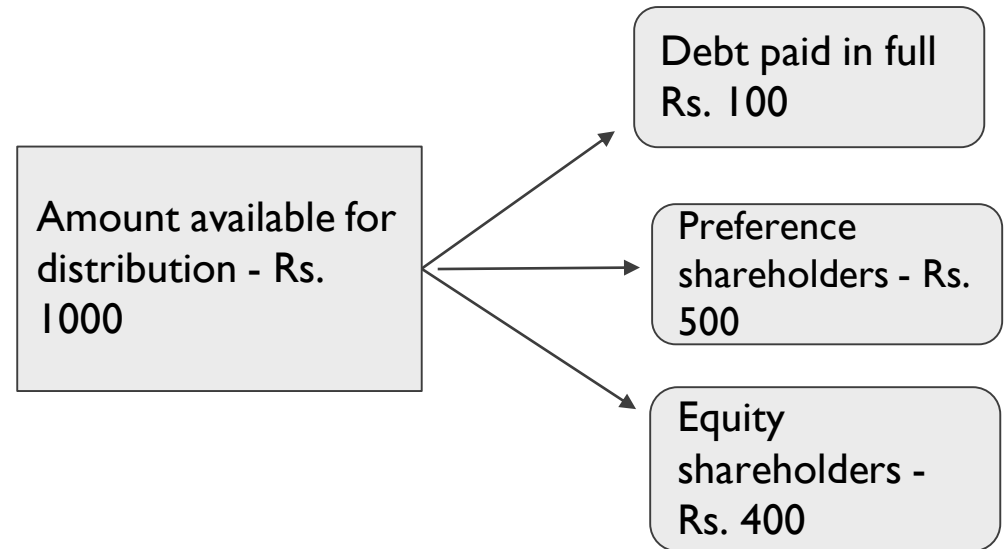
## Case Study - I

LIABILITIES	ASSETS
Share capital - Equity: Rs. 500 - Preference: Rs. 900	Cash: Rs. 1000
B/f losses: (Rs. 500)	
Debt: Rs. 100	
<b><u>1000</u></b>	<b><u>1000</u></b>



## Case Study - II

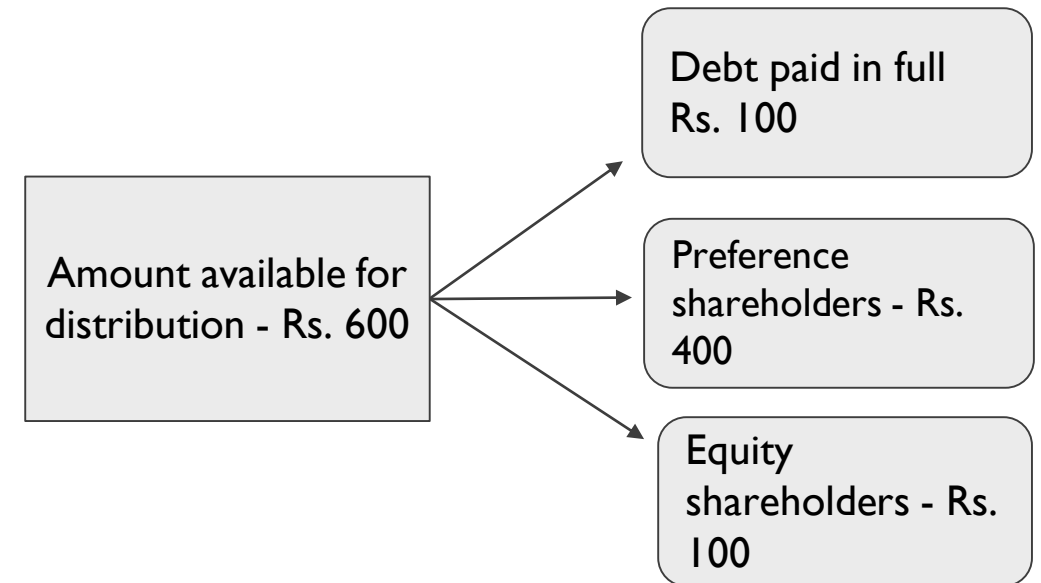
LIABILITIES	ASSETS
Share capital - Equity: Rs. 500 - Preference (inc. premium on issue Rs. 400): Rs. 900	Cash: Rs. 1000
B/f losses: (Rs. 500)	
Debt: Rs. 100	
<b><u>1000</u></b>	





## Case Study - II

LIABILITIES	ASSETS
Share capital - Equity: Rs. 800 - Preference: Rs. 200	Cash: Rs. 600
B/f losses: (Rs. 500)	
Debt: Rs. 100	
<b><u>600</u></b>	
	<b><u>600</u></b>



### Additional information:

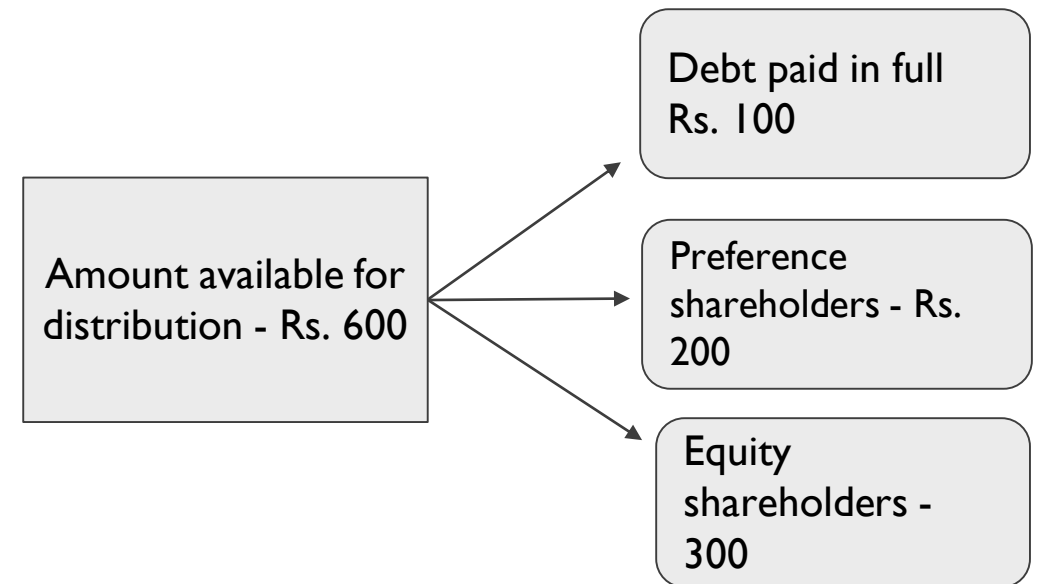
- I. Premium payable on redemption of preference shares - Rs. 200

## Case Study - IV

LIABILITIES	ASSETS
Share capital - Equity: Rs. 800 - Preference: Rs. 200	Cash: Rs. 600
B/f losses: (Rs. 500)	
Debt: Rs. 100	
<b><u>600</u></b>	
	<b><u>600</u></b>

### Additional information:

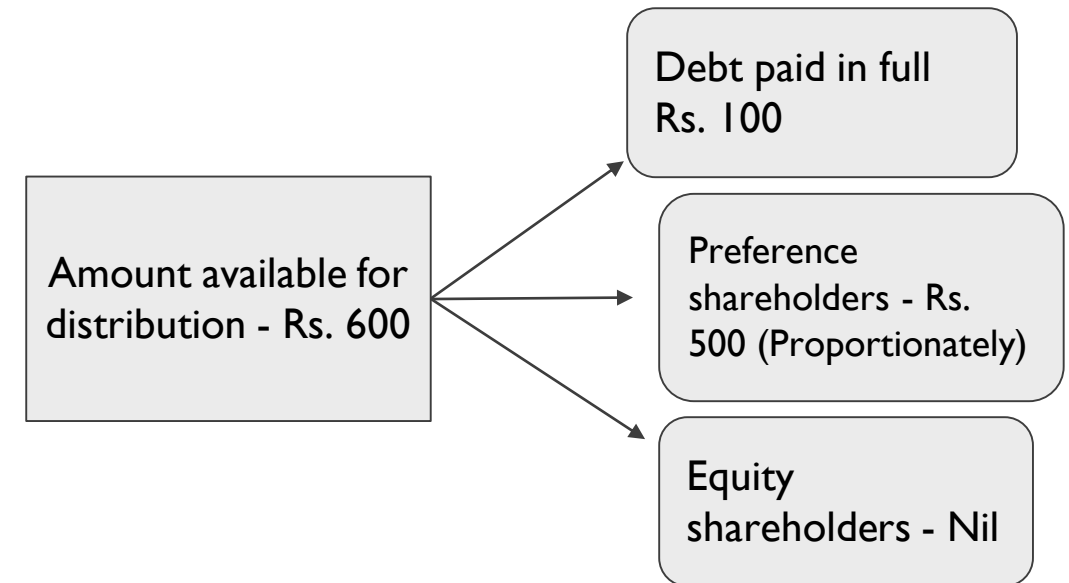
- I. Premium payable on redemption of equity shares - Rs. 200



The premium on redemption of equity is just a trap - there is no question of redemption of equity, and hence, no question of any premium

## Case Study - V

LIABILITIES	ASSETS
Share capital - Equity: Rs. 300 - S-1: Preference: Rs. 400 - S-2: Preference: Rs. 300	Cash: Rs. 600
B/f losses: (Rs. 500)	
Debt: Rs. 100	
<b><u>600</u></b>	<b><u>600</u></b>



*Assumption-*

- *There is no preference among the preference shareholders*

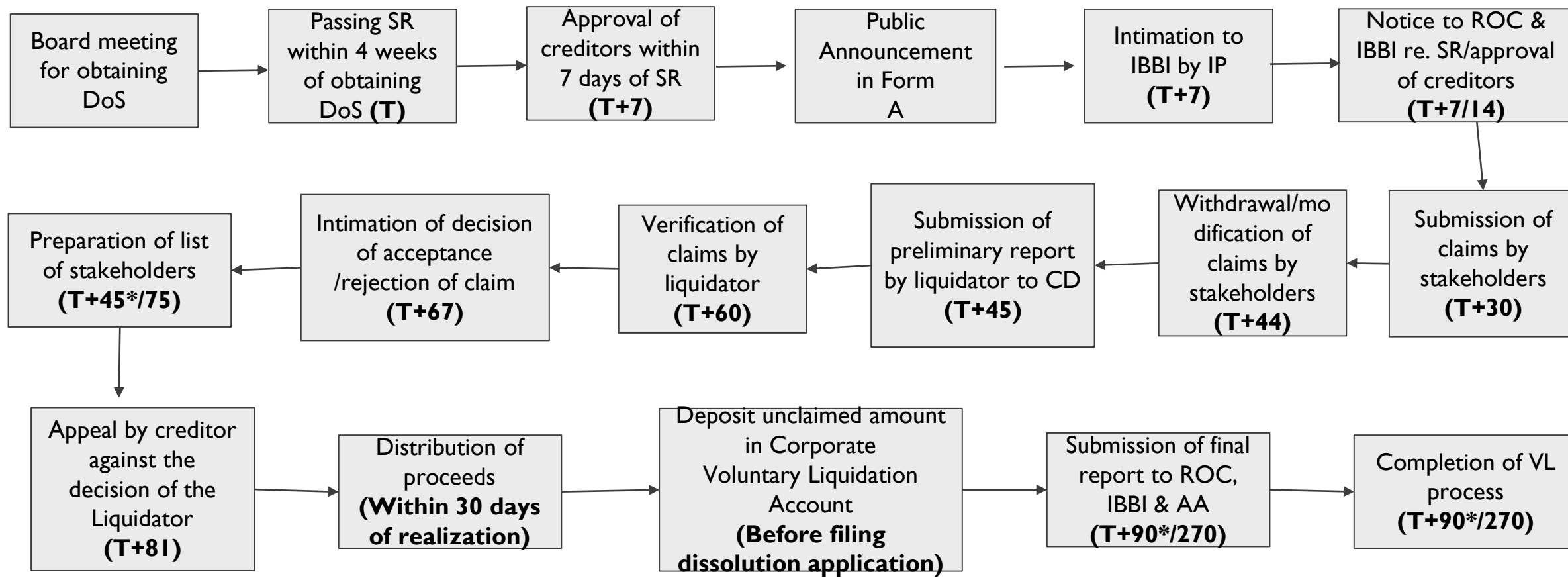


# VOLUNTARY LIQUIDATION

PROCEDURAL ASPECTS & PRACTICAL CONCERNS

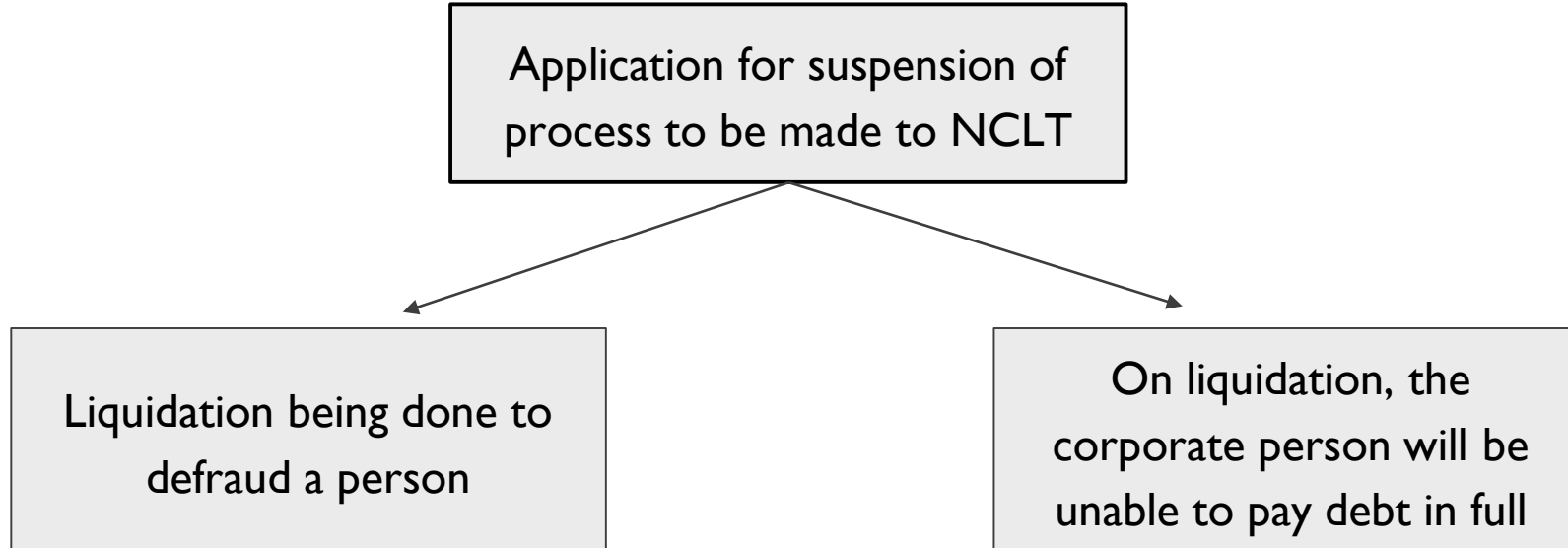


## Voluntary Liquidation - Process timeline



\* Applicable where approval of creditors was not required  
 T = Liquidation commencement date

# Instances of suspension of process



# Practical concerns - I

- Reg 31 provides liquidation may sell assets in such manner and mode as permitted by corporate person
  - ❑ Ideally, the special resolution approving voluntary liquidation may grant permission to liquidator
- Transparency of selling process important
  - ❑ Liquidator accountable for any shortfalls vis-à-vis valuations done by the board
- Can liquidator distribute assets in kind
  - ❑ Generally permitted. However, specific approval may be obtained in the members' resolution
- What will be the fate of the subsidiary company whose holding company has filed for liquidation?
- What will be the fate of a guarantee provided by a corporate person which is under liquidation?
- Whether Co. under VL required to file Annual Return?
  - ❑ No. As per MCA circular dated 6th March, 2020, Form AOC-4 and MGT-7 is to be filed through GNL-2 till the Company is under CIRP.
- Will IT returns be filed for a company under liquidation ?
  - ❑ Yes, liquidator has to ensure that IT returns and all other statutory dues required to be paid and returns required to be filed are carried out regularly during the period of Voluntary Liquidation
- Can dividend be declared by a company which is under liquidation?
  - ❑ No, a Company under Voluntary Liquidation cannot declare dividend.
- Whether liquidator's accounts need to be audited?
  - ❑ Yes, as per reg. 37 in case the liquidation period continues for more than 1 year, the annual status report submitted by the liquidator must contain the audited annual account of liquidation,
  - ❑ Further, as per reg. 38 the final report of the liquidator must contain the audited accounts of the liquidation, since the liquidation commencement date.
- Is a no-dues certificate from the IT Department required to be submitted along with the dissolution application?
  - ❑ IBBI vide circular dated November 15, 2021 has clarified that NoC from the IT Department is not required.

## Practical concerns - II

- Presence of preference shares and debentures
  - ❑ Solvency position of the Company, to meet other liabilities should not be compromised, along with the preference shares and debentures
- Multiple Branches
  - ❑ In case on rent, termination of rent may be a lengthy process and may consume substantial time during liquidation process.
- Terminal benefits of employees
  - ❑ While determining the solvency position, such expenses must also be considered, further the Company may also consider adopting a gradual release of employees
- Contingent liabilities and litigations
  - ❑ The value of such assets must be crystallised so as to ascertain whether the declaration of solvency can be made
- Proceedings from avoidance transaction application, if any
  - ❑ Will go to shareholders.
- Role of directors and promoters vis-à-vis the Voluntary Liquidator
  - ❑ In case of any non-cooperation by the directors/ promoters or officials of the Company, the Liquidator shall have the right to report the same before NCLT





# COMPARISON B/W VARIOUS MODES



## Comparison (1/8)

Basis	Striking Off	Dormant Status	Merger	Liquidation	Voluntary Liquidation
<b>Governing Statute</b>	Sec. 248 (2) of CA, 2013	Sec. 455 of CA, 2013	Sec. 230 read with sec 232 or 233 of CA, 2013	Sec. 33 of IBC, 2016	Sec 59 of IBC, 2016
<b>Eligibility/ Prerequisites</b>	<ul style="list-style-type: none"> <li>• Nil assets nil liabilities;</li> <li>• Non received not from Roc u/s 248 (1);</li> <li>• No change in name or RO of the company in preceding 3 months;</li> <li>• No matter of compromise or arrangement pending before NCLT;</li> <li>• Not active in previous 3 months</li> </ul>	<ul style="list-style-type: none"> <li>• Companies formed for future project or hold assets;</li> <li>• Inactive Company;</li> <li>• Companies having no significant accounting Transaction</li> </ul>	<ul style="list-style-type: none"> <li>• Approval of members or creditors wither by way of affidavit or at NCLT convened meeting</li> </ul>	<ul style="list-style-type: none"> <li>• Failure/ non-receipt of approval of Resolution Plan from CoC;</li> <li>• Decision of CoC before expiry of moratorium</li> </ul>	<ul style="list-style-type: none"> <li>• Solvency</li> <li>• No default</li> </ul>

## Comparison (2/8)

Basis	Striking Off	Dormant Status	Merger	Liquidation	Voluntary Liquidation
<b>Liability of directors</b>	Directors will remain responsible to make payment of all the lawful claim/ liabilities that may arise after striking off in terms of indemnity bond	Filing return on financial position on annual basis (within 30 days from the end	Liabilities of Transferor Company will be vested into the Transferee Company	Liabilities of directors shall continue and may be enforced	<ul style="list-style-type: none"> <li>Liabilities to prosecution for wrong DoS- As per sec 72 (wilful and material omission) or sec 235A</li> <li>Liability to breach of fiduciary duty- may be asked to compensate</li> </ul>

## Comparison (3/8)

<b>Basis</b>	<b>Striking Off</b>	<b>Dormant Status</b>	<b>Merger</b>	<b>Liquidation</b>	<b>Voluntary Liquidation</b>
<b>Who controls the process?</b>	Company	Company	Company	Liquidator	Liquidator
<b>Payback to shareholders</b>	No question arises	No question arises	Shareholders of the transferor company will get shares of the transferee company in terms of exchange ratio	In terms of section 53. Lowest in the hierarchy	Surplus, if any, after paying all the liabilities, will be distributed among shareholders in proportion to their contribution
<b>Involvement of creditors</b>	-	-	For approval of the scheme	Consultation Committee is for advising the Liquidator	For approval of liquidation process.

## Comparison (4/8)

<b>Basis</b>	<b>Striking Off</b>	<b>Dormant Status</b>	<b>Merger</b>	<b>Liquidation</b>	<b>Voluntary Liquidation</b>
<b>Liabilities towards creditors</b>	To be paid before filing for striking off	Company will be liable towards its creditors, if any, as it is merely getting the status of 'Dormant Company'	Liabilities of transferor company will get vested into transferee company	To be paid in terms of sec 53 of the Code	To be paid in terms of section 53 of the Code
<b>Appointment of professional</b>	No	No	Yes	Yes. AA shall appoint the Liquidator	Yes. The BoD shall appoint liquidator subject to approval of shareholders

## Comparison (5/8)

Basis	Striking Off	Dormant Status	Merger	Liquidation	Voluntary Liquidation
<b>Role of Professional</b>	N/A	N/A	<p>Companies are required to appoint</p> <ul style="list-style-type: none"> <li>(a) registered valuer for calculating exchange ratio; and</li> <li>(b) Advocate/AR- to represent before NCLT</li> </ul>	<p>As per Ch. III of the Liquidation Regulations including <i>inter-alia</i>-</p> <ul style="list-style-type: none"> <li>(a) Inviting claims;</li> <li>(b) Verification of claims</li> <li>(c) Reporting to AA;</li> <li>(d) Realisation of assets of CD;</li> <li>(e) Distributing realised proceeds among stakeholders in terms of section 53;</li> <li>(f) Filing dissolution application</li> </ul>	<ul style="list-style-type: none"> <li>(a) Inviting claims;</li> <li>(b) Verification of claims</li> <li>(c) Reporting to contributories</li> <li>(d) Realisation of assets of CD;</li> <li>(e) Distributing realised proceeds among stakeholders in terms of section 53;</li> <li>(f) Filing dissolution application</li> </ul>

## Comparison (6/8)

Basis	Striking Off	Dormant Status	Merger	Liquidation	Voluntary Liquidation
<b>Role of NCLT</b>	Not applicable. However, NCLT can wound up struck off companies	N/A	<ul style="list-style-type: none"> <li>• Dispensing with the meeting of shareholders and creditors/ passing order for NCLT convened meeting(s);</li> <li>• Approval of Scheme;</li> <li>• Dissolution of transferor company without winding up</li> </ul>	<ul style="list-style-type: none"> <li>• Sanction of Resolution Plan/Liquidation order;</li> <li>• Condonation of delay in filing claim;</li> <li>• Matters connected with liquidation;</li> <li>• Periodical Reporting by Liquidator;</li> <li>• dissolution of company</li> </ul>	At the time of dissolution

## Comparison (7/8)

Basis	Striking Off	Dormant Status	Merger	Liquidation	Voluntary Liquidation
<b>Tax implications as per IT, 1961</b>	Sec 179- Pending tax liabilities of struck off co. (private limited) may be recovered from the directors of the co.	As company is getting merely 'dormant status', all the liabilities will remain unaffected	<ul style="list-style-type: none"> <li>(a) Sec 47-No capital gain tax on transfer of capital assets, if transferor co. is an Indian co.;</li> <li>(b) Sec 72A- Carry forward of accumulated losses and unabsorbed depreciation;</li> <li>(c) Sec 35 DD-Deduction of expenses done for the purpose of merger- 1/5<sup>th</sup> every year for 5 years</li> </ul>	<p>Income, if any, during the liquidation, will be liable to tax</p> <p>Shareholders will be liable for capital gains u/s 46</p>	<ul style="list-style-type: none"> <li>(a) Section 2 (22)(c)- Amount distributed to shareholders to the extent of attributable profit, shall be treated as Dividend</li> <li>(b) Income, if any, will be liable to tax</li> </ul> <p>Shareholders will be liable for capital gains u/s 46</p>



## Comparison (8/8)

<b>Basis</b>	<b>Striking Off</b>	<b>Dormant Status</b>	<b>Merger</b>	<b>Liquidation</b>	<b>Voluntary Liquidation</b>
<b>Role of Regulatory Authorities</b>	Mandatory NOC from Regulatory Authorities required	N/A	NOC from RD, ROC, SEBI (if Listed), RBI (if NBFC), IRDA (if insurance co.), IT and OL	Regular Reporting to IBBI	Regular Reporting to IBBI
<b>Tentative time taken</b>	Within 1 -2 month	Within 1 month	6-7 months	Case specific. Normally 2-3 years	Case specific. Normally 1-2 years
<b>Whether applicable on section 8 company ?</b>	No	Yes	Sec 8 co. can only merge with other sec 8 company	Not expressly exempted	Not expressly exempted

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