

## Sec. 43B (h): Explained briefly



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### A. Sec. 43B(h) of Income Tax Act 1961, reads as under:

*Any sum payable by the assessee to a micro or small enterprise beyond the time limit specified in section 15 of the Micro, Small and Medium Enterprises Development Act, 2006 (27 of 2006), shall be allowed (irrespective of the previous year in which the liability to pay such sum was incurred by the assessee according to the method of accounting regularly employed by him) only in computing the income referred to in section 28 of that previous year in which such sum is actually paid by him:*

**Provided that** nothing contained in this section *except the provisions of clause (h)* shall apply in relation to any sum which is actually paid by the assessee on or before the due date applicable in his case for furnishing the return of income under sub-section (1) of section 139 in respect of the previous year in which the liability to pay such sum was incurred as aforesaid and the evidence of such payment is furnished by the assessee along with such return.

### B. CBDT Circular 1/2024, dt. Dated the 23<sup>rd</sup> of January, 2024 explains that:

**21.** Promoting timely payments to Micro and Small Enterprises (is the object).

**21.1** Section 43B of the Act provides for certain deductions to be allowed only on actual payment. Further, the proviso of this section allows deduction on accrual basis, if the amount is paid by due date of furnishing of the return of income.

**21.2** In order to promote timely payments to micro and small enterprises, payments made to such enterprises have been included within the ambit of section 43B of the Act vide FA 2023. A new clause (h) has been inserted in section 43B of the Act to provide that any sum payable by the assessee to a micro or small enterprise beyond the time limit specified in section 15 of the Micro, Small and Medium Enterprises Development (MSMED) Act 2006 shall be allowed as deduction only on actual payment. However, it has also been provided that the proviso to section 43B of the Act shall not apply to such payments.

**21.3** Section 15 of the MSMED Act mandates payments to micro and small enterprises within the time as per the written agreement, which cannot be more than 45 days. If there is no such written agreement, the section mandates that the payment shall be made within 15 days. Thus, this amendment to section 43B of the Act allows the payment as deduction only on payment basis. It can be allowed on accrual basis only if the payment is within the time mandated under section 15 of the MSMED Act.

**Applicability:** This amendment takes effect from 1<sup>st</sup> April, 2024 and will accordingly apply in relation to the assessment year 2024-25 and subsequent assessment years.

### C. MSMED Act: important definitions

Sec. 2(b) (b) “**appointed day**” means the day following immediately after the expiry of the period

of fifteen days from the day of acceptance or the day of deemed acceptance of any goods or any services by a buyer from a supplier.

Explanation. — For the purposes of this clause, —

(i) “the day of acceptance” means, —

(a) the day of the actual delivery of goods or the rendering of services; or

(b) where any objection is made in writing by the buyer regarding acceptance of goods or services within fifteen days from the day of the delivery of goods or the rendering of services, the day on which such objection is removed by the supplier;

(ii) “the day of deemed acceptance” means, where no objection is made in writing by the buyer regarding acceptance of goods or services within fifteen days from the day of the delivery of goods or the rendering of services, the day of the actual delivery of goods or the rendering of services;

Sec. 2(d) **buyer means whoever buys** any goods or receives any services from a supplier for consideration.

Sec. 2(n) **supplier means** a micro or small enterprise, which has filed a memorandum with the authority referred to in sub-section (1) of section 8 and includes, -

- (i) The national Small Industries Corporation, being a company, registered under the Companies Act 1956 (1 of 1956),
- (ii) The small Industries Development Corporation of a State or Union Territory, by whatever name called being a company registered under the Companies Act 1956 (1 of 1956),
- (iii) Any company, cooperative society, trust or a body, by whatever name called, registered or constituted under any law for the time being in force and engaged in selling goods produced by **micro or small enterprises** and rendering services which are provided by such enterprises.

### **Sec.15. Liability of buyer to make payment**

Where **any supplier**, supplies any goods or renders any services to any buyer, the buyer shall make payment therefore on or **before the date agreed upon** between him and the supplier in writing or, where there is no agreement in this behalf, **before the appointed day**.

Provided that **in no case** the period agreed upon between the supplier and the buyer in writing shall exceed forty-five days from the day of acceptance or the day of deemed acceptance.

### **D. Explanations**

1. The conditions apply if the supplier has filed a memorandum with the authority referred to in sub-section (1) of section 8 of the MSMED Act.

This means the buyer will have to ensure first whether the supplier has the memorandum filed with the authority by obtaining required information from the supplier. If the supplier has not filed the memorandum, the provisions shall not apply.

2. As the section is applicable for computation of income from AY 2024-25, the payments to check shall be for the previous year ending 31-3-2024. For most of the businesses following mercantile system of accounting, the amounts debited to P/L account shall be from 1-4-2023

and not any earlier year. Thus, the provisions shall not apply for the any outstanding prior to 1-4-2023.

3. As the provisions of MSMED Act are now applicable to all and one including traders and professionals, all the suppliers including manufacturers are at par if they have filed the memorandum. It may be carefully noted that the concept of registration is done away with and filing of memorandum, which is a completely online and optional process, is applicable.

4. As per MSMED Act following are the investment and turnover criteria:

Criteria	Enterprises		
	Micro	Small	Medium
Investment limit	1	10	50
Turnover limit	5	50	250
Delayed payment benefit available	YES	YES	NO

Amounts in Rs. Crores

The twin conditions of investment and turnover limits have to be complied to be covered under the Micro/Small/Medium enterprise.

For the purpose of Investment in Plant and Machinery WDV as per IT is to be considered. However, cost of pollution control, R & D and industrial safety devices is not to be included.

The criteria of investment and turnover limits are applicable equally to manufacturing, trading and services also and is applicable irrespective of the type of constitution of the enterprise.

5. If any one of the twin conditions is crossed, the enterprise goes out of the criteria and loses the benefits. If a micro enterprise exceeds either of the investment or turnover, then it enters the next criteria of Small enterprise and so on and loses the benefit of delayed payment when it exceeds the investment of Rs.10 crore or turnover of Rs.50 crores.

It must be carefully noted that the definition of supplier covers only a micro or a small enterprise. Hence, the Medium enterprise is not covered for the benefit of delayed payments and is not covered for disallowance u/s 43B.

This makes it compulsory to obtain the information about its status under MSMED Act from the supplier.

If this condition under Sec. 43B is to be strictly beneficial, it is expected that the information of the supplier be made available openly and to make it available openly. This is possible to be achieved by making it compulsory to be uploaded on GST portal so that the buyer can check the status on the GST portal.

6. The time limits specified under the MSMED Act are 45 days if there is a written agreement, otherwise it is 15 days by default.

It means if the clear terms of agreement are not specified then the payments must be made within 15 days. However, even the written agreement cannot override the limit of 45 days which will prevail over any agreement, as the words “in no case” in Sec. 15 of the Act are very specific.

The words “in no case” rule out any other possibility for any purchases of material or goods from the “supplier”. A doubt is raised about the purchases/expenses from the dates 16 March to 31 March. It may be noted that Sec. 43B has clearly put out the clause (h) from the

condition of payment before due date u/s 139(1). The reason that the MSMED Act is a specific law and specifically provides for payment time limits.

7. In an interesting case **Hon. Supreme Court has held that the MSMED Act is a special act and overrides any general act** like the Arbitration Act. It further held that if the supplier on the date of transaction is not holding the registration/memorandum and is not covered under the MSMED Act, it can't claim benefits with subsequent registration.

Please see- Gujarat State Civil Supplies Corporation Ltd. v. Mahakali Foods Pvt. Ltd. (unit2) & Anr. (2003) 6 SCC 401.

This makes it mandatory to check the status of the supplier on the date of transaction.

#### **E. To avail benefits**

1. To avail the benefits, it is advisable to file the memorandum online and obtain registration.
2. A question arises as to how a buyer would know the status of the supplier under the MSMED Act unless informed by it or inquired by the buyer.

This difficulty was conveyed to the Govt. and it has issued an advisory vide Office memorandum No. No.2(18)/2007-MSME(pol), dt. 26-08-2008 which states in para 3 that,

“The matter has been examined. It is considered advisable that the Micro and Small Enterprises should mention/ get printed on their letter heads, supply order sheets, invoices, bills and other relevant documents, the Entrepreneurs Memorandum (EM) Number {as allotted after filing of the said Memorandum, by the District Industries Centre (DIC) or competent authority, as notified by their respective State Government/ UT administration}, so that there always remains an identification of being a MSE supplier.”

Thus, it is not only enough to obtain Udyam Registration but necessary to print the said number on the tax and other invoices and letter heads etc. along with GST number and also include a declaration to the effect of its validity similar to that of declaration under the GST law. This will automatically cover the supply for 15 days limit except where a written agreement is there for time limit of payment.

3. As a corollary to the above clarification/advisory, it seems to absolve the buyer and its auditors for not disallowing the amounts or non-disclosures of dues to suppliers covered under MSMED, if the Udyam Registration is not mentioned in the tax invoices and/or other correspondence to the buyer.
4. From 1-7-2020 Udyam Registration (UR) has replaced the earlier Udyog Adhar Memorandum (UAM).

In case of those registered under the earlier UAM would be regarded as unregistered unless they have obtained the new UR.

For the time between 30-6-2020 and obtaining the new UR, the entity would be treated as unregistered. Consequently, the benefits under the MSMED Act would not be available for the transactions entered during that period.

5. One of the question is whether the Chapter V i.e. delayed payment benefits are available to a trading concern.

M/o Housing and Urban Affairs vide their D.O. letters No. K-12017(33)/1/2021-UPA-I-UD (9111371) dated 09.07.2021 and 19.07.2021 has requested for inclusion of urban street vendors in the ambit of MSME. Accordingly, M/o MSME vide notification 16/17/2020-P&G/Policy (E-19421) dated 09.08.2021 clarified that the Street Vendors can register as retail trades on Udyam Registration (UR) portal. The registration process does not differentiate between urban and rural enterprises.

However, the benefits to Retail and Wholesale trade MSMEs are to be restricted to Priority Sector Lending only.

6. To fall under the definition of “enterprise”, the service provider should be an industrial undertaking or a business concern or any other establishment. It seems that an individual service provider without an undertaking/concern/establishment would not qualify as an enterprise.

Thus, a CA of firm of CA having an office shall be enterprise. But an individual practising without an establishment will not be a service enterprise. To give an example, a photographer with a studio will qualify as an enterprise but without it he will not.

Thus, the tax professionals in practice with an establishment can avail benefits even of Chapter V i.e. delayed payments. This is a very beneficial provision for the profession.

7. The purchases made in last 15 days of the previous year will have to be checked carefully for disallowance. e.g. the payment for last purchase on 31<sup>st</sup> March will have to be paid on or before 15<sup>th</sup> April or 15<sup>th</sup> May (without agreement or with agreement) as the case may be.

This is due to the specific exclusion of Sec.43B(h) from the condition for payment on or before the due date u/s 139(1) in Sec.43B. In case this exclusion would not have been on statute book, still the payment would have been covered as held by Hon. SC that the MSMED Act is a special act and hence overrides any general act. That may be the reason to insert the exclusion of Sec. 43B(h) from the same.