

Payment to Micro or Small enterprises and applicability of
section 43B(h) of the Income-tax Act, 1961

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At the outset, it is relevant to quote the relevant provisions of section 43B:

43B. Notwithstanding anything contained in any other provision of this Act, a **deduction otherwise allowable** under this Act in respect of—

(a) ...

(b) ...

(c) ...

(d) ...

(e) ...

(f) ...

(g) ...

(h) *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

Q1. When do the amendments to Section 43B come into effect?

Ans. The insertion of clause (h) will come into effect from 1st April 2024 i.e. from assessment year 2024-2025.

Q2. What is the significance of Section 43B?

Ans. The significance of section 43B is that the expenses of nature as given in clause (a) to (h) will be allowed as deduction of sum payable in the **year of its payment**. There is a proviso which provides that if the payment is made in the subsequent year before the due date for filing of the return of income, the same will be allowed as deduction in the year of its provision however this does not apply to clause (h) i.e. sum payable beyond time limit to micro and small enterprises which we are going to discuss.

Q3. To attract the disallowance u/s 43B(h), is it mandatory that supplier should have registration under MSMED Act?

Ans. The definition of 'supplier' as given in MSMED Act is as under:

“(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 a Union territory, by whatever name called, being a company registered under the Companies Act, 1956 (1 of 1956);
- (iii) any company, co-operative 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;

It is also necessary to note the definition of micro or small enterprise which is as under:

- (h) “micro enterprise” means an enterprise **classified** as such under sub-clause (i) of clause (a) or sub-clause (i) of clause (b) of sub-section (1) of section 7;
- (m) “small enterprise” means an enterprise **classified** as such under sub-clause (ii) of clause (a) or sub-clause (ii) of clause (b) of sub-section (1) of section 7;

It is also pertinent to note the definition of ‘enterprise’ which is as under:

- (e) “enterprise” means an industrial undertaking or a business concern or any other establishment, by whatever name called, **engaged in the manufacture or production of goods**, in any manner, pertaining to any industry specified in the First Schedule to the Industries (Development and Regulation) Act, 1951 (55 of 1951) or **engaged in providing or rendering of any service or services**;

To summarise, a supplier will be :

- (i) A micro or small enterprise.
- (ii) An enterprise which is engaged in **manufacture or production of goods** or in **rendering of services**.
- (iii) The industry is specified in the First Schedule to the Industries (Development and Regulation) Act, 1951.

Q4. Whether section 43B(h) is applicable for dues outstanding to traders having MSME registration?

Ans. A trader, though, has been allowed to take Udyam registration as a MSME yet as specified in the office memorandum, it is facilitation for a **limited purpose of priority sector lending** and in the absence of manufacturing or production of goods, it cannot be termed as 'supplier' as defined in MSMED Act. It also does not amount to rendering of services.

Referring to the definition of 'enterprise' in answer to question no. 3 above, the traders having MSME registration will not be 'supplier' for the purpose of section 15 of MSMED Act, hence, the time limit provided there will not be available to such trading MSMEs. In other words, there is unlimited time for persons who are not falling within the definition of 'supplier' as given above.

Q5. Please clarify whether any liability which was outstanding in respect of the period prior to 01.04.2023 would not be hit by clause (h) of section 43B even if it is outstanding as on 31st March 2024 or even subsequent periods.?

Ans. According to section 29, the income from Profits and Gains of business or profession are computed in accordance with the provisions contained in section 30 to 43D. There are sections which provide for deductibility of certain specific expenditure or allowance with residual provisions and sections which provides for certain conditions for allowability of such expenditure and allowances. Further, section 145 provides that income chargeable under the head "Profits and gains of business or profession" or "Income from other sources" shall be computed in accordance with the method of accounting regularly employed.

Hence, the expenditure which is appearing as outstanding ought to have been allowed as deduction in the earlier years according to method of accounting employed by the assessee. Hence, the provisions of clause (h) of section 43B cannot apply to the outstanding provisions. It restricts the allowability of expenditure, and not bring to charge any amount which has already been allowed as deduction. A comparison may be made with the provisions of section 40A(3) and 40A(3A). Sub-section (3) restricts the allowance of any expenditure in excess of ₹ 10000/-, if it has been paid in cash. This provision cannot apply to the outstanding amount at the end of the year and will get allowed, even if it is paid in cash in the subsequent year. However, to overcome such a situation, sub-section (3A) provides that if payment of such liability is made in cash, it will be deemed to be the profits and gains and chargeable to tax as income of subsequent year in which such payment is made. There is no such provision in section 43B, hence, the amount which has already been allowed cannot be brought to tax.

Q6. Is it safe to infer that those enterprises not registered under MSME Act are not to be considered for the purpose of disallowance under section 43B(h), if the payment is not made before the 'appointed day'. Elucidate?

Ans. Refer to my answer to Question 3. In my understanding, if one is not registered i.e. has not filed the memorandum, he will not be 'supplier' within the meaning of MSMED Act, and the time limit given in section 15 will not apply. In other words, the time is unlimited for persons who are not 'supplier' as per MSMED Act.

Q7. What if the supplier on the date of the transaction is not registered under the MSME Act but gets registered before 31.03.24 and the said invoice is outstanding as on 31st March 24.?

Ans. In my view, the provisions of section 43B(h) will not be applicable. To appreciate, we shall refer to section 15 which is as under:

“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 therefor 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.”

In my considered opinion, if at the time of making supplies, the seller is not 'supplier' as per MSMED Act, section 15 does not apply and accordingly, the provisions of section 43B also cannot apply.

Q8. When the amount is outstanding as on 31st March 2024 say for the purchases made in the last 15 days of the financial year 2023-24, its non-payment up to 31st March 2024 or even thereafter will not be liable for disallowance. Discuss?

Ans. I look at section 43B as a **proviso or exception** to the main provision. Clause (h) applies to '**any sum payable beyond the time limit**'. So, since the sum payable outstanding as on 31st March 2024 is not beyond the time limit, it will be governed by the normal provisions of computation and will be deductible in the year in which liability is incurred. The same theory will apply to provisions made.

Q9. What if in Q8 above the buyer raises objection to the goods or services within 15 days and the matter is settled on 10th April 24?

Ans. This question has two limbs. First, when the objection is raised, can the deduction be claimed as per normal provisions of law. In my view it cannot be claimed as it has become contingent, hence it will be deductible in the year when it is settled. Second, for understanding, what will be the 'appointed day' i.e. the due date for payment. The term appointed day is defined as under:

“(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.”

Q10. What if a trader occasionally doing manufacturing activity of goods specified under the First Schedule (IDR 1951) would be a person "engaged in the manufacture or production of goods" and will be covered here?

Ans. There is no easy answer to this question. It all will depend on facts of the case. In my view, the answer will be based on the nature of supplies made by him and the manufacturing being done.

Q11. In the case of taxpayers who opt for presumptive income determination under section 44AD the disallowance contained in section 43B will apply or not?

Ans. In my view, the provisions of section 43B will not apply to the case of presumptive income. I am aware of one isolated decision of tribunal to which I do not agree. I am not able to comment as the original assessment order and other details are not available.

Applying the first principles, the use of word ‘notwithstanding’, generally termed as overriding provision does not mean ‘overriding’ everything. Overriding means, overriding in the area of conflict i.e. when both cannot operate, then the provision with ‘notwithstanding’ will override the other. Section 44AD presumes ‘income’ and overrides the other computational provisions which includes section 43B also. It does not consider the deductibility of expenditure, nor considers each items separately. Section 43B deals with deductibility of **a deduction otherwise allowable**. Section 43B overrides ‘any other provision of this Act’ because it has to override the computation provisions as well as other provisions like section 145 also. In computing presumptive income, income is deemed and allowability of any

deduction is not considered, hence, for this reason also, in my view, section 43B will not be applicable. Further, suppose an assessee has already shown presumptive income which is much more than his actual income, still, can applying 43B disallowance be made? It will make the provisions of 44AD futile. If we interpret illogically that 43B is overriding all the provisions of Act, can we say belated payment to micro or small enterprises be made in cash and claimed deduction thereof as section 43B is overriding section 40A also. In my view, it cannot be argued.

Q12. What if a supplier has not intimated his registration under MSME in any manner to buyer?

Ans. MSMED Act is an Act to facilitate and does not provide for any penal provisions for non-payment. It only provides for facilitation. Hence, in my view, it is incumbent on the micro or small enterprises to claim his such status in any manner. In my view, if a supplier is willing to take benefit of section 15 of the MSMED Act, it is incumbent upon him to inform his credentials as to be 'supplier'. It may be by putting his MSME identification number etc. on his invoice itself.

Q13. Can disallowance be attracted under section 43B(h) for dues outstanding in relation to capital expenditure?

Ans. Section 43B applies only to 'deduction otherwise allowable', hence, it does not apply to capital expenditure.

Q14. What if the buyer makes payment to the supplier after 15/45 days, but before filing the return of income for that financial year?

Ans. As the proviso to section 43B does not apply to clause (h), if it gets hit by the provision of clause (h), it will be allowed in the year of its payment even if delay is of 1 day.

Q15. What if a cheque is issued for payment which gets cleared in the next year after the appointed day or 45 days in case of agreed terms?

Ans. In my view, in case of payment by cheque, it relates to the date of issue with delivery of the cheque and not the clearance. However, a word of caution may be put that the cheque should not remain outstanding for long and the assessee should be able to demonstrate that there is sufficient arrangement for clearance of cheque when issued.

Q16. What if the agreed credit period between the buyer and the supplier is for more than 45 days?

Ans. As per section 15 of the MSMED Act, the agreed terms cannot provide for more than 45 days, hence, the time limit will be restricted to 45 days.

Q17. What if the expenses for which the payment is due are not debited to the P/L account and are capitalized in the books as an asset?

Ans. Refer to answer to question 13.

Q18. Can the terms of payment mentioned in the invoice itself be considered as written agreement?

Ans. Section 15 provides for 'date agreed upon between him and the supplier in writing'. In other words, it only means one cannot say that we have agreed orally for such a period. In my view, if terms of payments are explicitly written on the invoice itself, it will amount to 'date agreed in writing'.

Q19. Will the provision of section 43B(h) apply to the provisions made at the end of the year?

Ans. Refer my earlier replies. In my view, it will not apply as 'it is not sum payable beyond the time limit'.

Q20. Is it necessary to check status every year or at the time of every transaction?

Ans. If one is supplier at the time of the transaction, section 15 of MMED Act gets attracted. In my view, the status is relevant at the time of the transaction. If the entity becomes Medium or comes out of MSMED by surrendering his registration after the transaction, it will continue to apply.

Q21. From which date appointed date or deemed date of acceptance will commence in case of 'goods ordered and received on Approval'.

Ans. Section 2(b) defines 'appointed day' and it starts from 'day of acceptance'. Day of acceptance is 'the day of actual delivery of goods or rendering of service', if no objection is made within 15 days. In case of objection, it is date of removal of such objection.

Section 24 of Sale of Goods Act, 1930 is relevant which is as under:

"When goods are delivered to the buyer on approval or "on sale or return" or other similar terms, the property therein passes to the buyer—

(a) when he signifies his approval or acceptance to the seller or does any other act adopting the transaction;

(b) if he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time."

Hence, in my view, it is not an actual delivery but notional delivery. The date of actual delivery will be the date when any of the acts as given in section 24 of the Sale of Goods Act happens. Secondly, the liability to pay will arise only when invoice is raised and the invoice can only be raised when the property in goods passes to the buyer.

Q22. In case of services, a certain percentage is deducted from normal payments as retention money and withheld as performance guarantee, whether the provisions of section 15 will be applicable.

Ans. In my view it will be based on terms of individual contracts. Retention money is a consideration for 'contract of indemnity' and is separable from main contract of rendering of service. Section 15 provides time for payment for supply of goods and services, and in my view, retaining such money in terms of contract will be constructive payment for supply and appropriation towards 'contract of indemnity'.

Q23. The definition of 'supplier' includes 'any company, co-operative 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. Explain.

Ans. This category is an expansive definition. In my view, if we look at this category along with 2 other definitions, it will apply only to such entities which are engaged for marketing of products of micro or small enterprises.

Q24. Whether MSMED Act applies to 'works contract'.

Ans. No. In the case of works contract, there is composite supply. Hence, the provisions of MSMED Act do not apply.