

Interplay of Section 43B with MSME Act

28th February 2024
STBA

DAKSM & Co LLP | दक्षमः
CHARTERED ACCOUNTANTS

CA. Deepak Bholusaria

Disclaimer

This presentation has been prepared for academic use only for sharing knowledge on the subject. Though every effort has been made to avoid errors or omissions in this presentation yet any error or omission may creep in.

It is suggested that to avoid any doubt the user should cross check the correctness of text, contents and the law with the original documents and to dispel confusion should seek professional help/opinion.



DISCLAIMER

About CA. Deepak Bholusaria

- Nov 1998 batch Chartered Accountant.
- Commerce Graduate from Punjab University.
- Certificates in Indirect taxes, DISA, Valuation, and Blockchain from ICAI.
- Actively pursuing certifications in Ind-AS and Social Audit.
- Member of Taxation Audit Quality Review Board (TAQRB) and special invitee to Tender Monitoring Directorate of ICAI.
- Elected member of Executive Committee of Sales Tax Bar Association (STBA).
- Passionate about the innovative use of technology in the professional sphere.
- YouTuber, leveraging the power of digital platforms to share his knowledge and insights with fellow professionals.
- He may be contacted at deepakVcard.daksm.com



Background

MSME & Indian Economy

- Almost 33% GDP of India is from MSME sector
- Almost 45 to 50% export contribution is by MSMEs
- More than 95% of business units come from MSME
- Amidst the celebration of 'Amrit Kal,' the journey toward achieving developed country status by 2047 is reliant on the pivotal support of the MSME sector

Section 43B (h)

Payments to MSMEs

Section 43B

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

(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 :

Section 43B contd ...

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 subsection (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

Explanation 4.—For the purposes of this section,—

(e) "micro enterprise" shall have the meaning assigned to it in clause (h) of section 2 of the Micro, Small and Medium Enterprises Development Act, 2006 (27 of 2006);

(g) "small enterprise" shall have the meaning assigned to it in clause (m) of section 2 of the Micro, Small and Medium Enterprises Development Act, 2006 (27 of 2006)



Time limit to pay to supplier

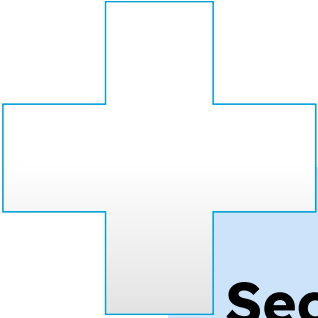
Section 15 of MSME act

43B(h) analysis

- Applicable w.e.f. 01-04-2023 (i.e AY 2023-24)
- Does not apply to any outstanding as on 31-03-2023
- If payment is made to **Micro** or **small** enterprises (M&SE) within the time allowed by section 15, then section 43B(h) shall not apply.
- If payment is made to **MSE** beyond due date as per sec 15 of MSME act, deduction to be allowed only in the year of payment (*benefit of proviso to section 43B not available*)
- It is irrelevant in which FY such liability was captured by the assessee basis method of accounting regularly employed by him.

Applicability to balances as on 1st April 2023

43B(h) vis-à-vis 31/03/2023



Sec 29: PGBP computed as per sec 30~43D

Sec 145: PGBP shall be computed as per in accordance with the method of accounting regularly employed.

Sec 43B(h)

- o/s balance as on 31/03/2023 ought to have been allowed as expenditure in earlier years.
- 43B(h) only restricts allowability of claimed expenditure in a particular year.
- 43B(h) does not bring any new charge for already allowed amount.

Case study

- Books of M/s DAKSM
- Ledger of M/s GGDB
- No written agreement

Date	Particulars	Amount	Dr/Cr
01-04-2023	Opening Balance	-5,00,000	Cr
12-04-2023	Payments	4,00,000	Dr
01-03-2024	Purchases. Invoice # 030203	-12,00,000	Cr
30-03-2024	Payments	12,00,000	Dr
31-03-2024	Closing Balance	1,00,000	Cr

Questions –

- a. Any disallowance u/s 43B for AY 2024-25?
- b. Will answer change if DAKSM insists that it has made payment on 30-03-2024 against invoice # 030203?

Section 59 – Contract Act, 1872

59. Application of payment where debt to be discharged is indicated.

Where a debtor, owing several distinct debts to one person, makes a payment to him, either with express intimation, or under circumstances implying, that the payment is to be applied to the discharge of some particular debt, the payment, if accepted, must be applied accordingly.

Illustrations

- (a) A owes B, among other debts, 1,000 rupees upon a promissory note which falls due on the first June. He owes B no other debt of that amount. On the first June, A pays to B 1,000 rupees. The payment is to be applied to the discharge of the promissory note.
- (b) A owes to B, among other debts, the sum of 567 rupees. B writes to A and demands payment of this sum. A sends to B 567 rupees. This payment is to be applied to the discharge of the debt of which B had demanded payment.

Section 60 – Contract Act, 1872

60. Application of payment where debt to be discharged is not indicated.

Where the debtor has omitted to intimate and there are no other circumstances indicating to which debt the payment is to be applied, the *creditor may apply it at his discretion* to any lawful debt actually due and payable to him from the debtor, whether its recovery is or is not barred by the law in force for the time being as to the limitation of suits.

61. Application of payment where neither party appropriates.

Where neither party makes any appropriation, the payment shall be applied in discharge of the debts *in order of time*, whether they are or are not barred by the law in force for the time being as to the limitation of suits. If the debts are of equal standing, the payment shall be applied in discharge of each proportionally

MSME Act

Section 2 of MSME Act

(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

Definition	Reference of section 7 of MSME Act
Micro	7(1)(a)(i) or 7(1)(b)(i)
Small	7(1)(a)(ii) or 7(1)(b)(ii)

Section 7 of MSME Act

Activities and type of enterprise		Reference of section 7 of MSME Act
Manufacturing		(a) in the case of the enterprises engaged in the manufacture or production of goods pertaining to any industry specified in the First Schedule to the Industries (Development and Regulation) Act, 1951 (65 of 1951),as-
Micro	7(1)(a)(i)	(i) a micro enterprise, where the investment in plant and machinery does not exceed twenty five lakh rupees;
Small	7(1)(a)(ii)	(ii) a small enterprise, where the investment in plant and machinery is more than twenty-five lakh rupees but does not exceed five crore rupees ;
Services		(b) in the case of the enterprises engaged in providing or rendering of services, as-
Micro	7(1)(b)(i)	(i) a micro enterprise, where the investment in equipment does not exceed ten lakh rupees
Small	7(1)(b)(ii)	(ii) a small enterprise, where the investment in equipment is more than ten lakh rupees but does not exceed two crore rupees; or

Explanation 1.--For the removal of doubts, it is hereby clarified that in calculating the investment in plant and machinery, the cost of pollution control, research and development, industrial safety devices and such other items as may be specified, by notification, shall be excluded

Section 7 of MSME Act

(9) Notwithstanding anything contained in section 11B of the Industries (Development and Regulation) Act, 1951 (65 of 1951) and clause (h) of section 2 of the Khadi and Village Industries Commission Act, 1956 (61 of 1956), the Central Government may, while classifying any class or classes of enterprises under sub-section (1), **vary**, from time to time, **the criterion of investment and also consider criteria or standards in respect of employment or turnover of the enterprises** and include in such classification the micro or tiny enterprises or the village enterprises, as part of small enterprises.

Revised criteria w.e.f. 01-07-2020

Activities and type of enterprise	Investment in P&M		Turnover criteria
Micro	does not exceed 1 crore rupees	&	does not exceed 5 crore rupees
Small	does not exceed 10 crore rupees		does not exceed 50 crore rupees
Medium	does not exceed 50 crore rupees		does not exceed 250 crore rupees

Unlike earlier, there is no differentiation between manufacturing and services activities and these criteria are equally applicable for “suppliers” engaged in supply of goods or services.

What is Turnover for MSME Act?

Sales, turnover or gross receipts

- The “Guidance Note on Terms Used in Financial Statements” published by the ICAI, the expression “Sales Turnover”

“The aggregate amount for which sales are effected or services rendered by an enterprise. The term ‘gross turnover’ and ‘net turnover’ (or ‘gross sales’ and ‘net sales’) are sometimes used to distinguish the sales aggregate before and after deduction of returns and trade discounts”.

- The words '*Sales*', '*Turnover*', '*Gross receipts*' are commercial terms and they should be construed in the commercial sense and in accordance with the normal rules of accountancy.
- Accordingly, 'Turnover' and 'Gross receipts' mean gross in-flow of cash receivables and other considerations arising in the course of ordinary activities of an enterprise from the sale of goods or from the rendering of services to the buyer or client.

Registration



Section 8 of MSME Act

(1) Any person who intends to establish,--

(a) a micro or small enterprise, may, *at his discretion*; or

shall file the memorandum of micro, small or, as the case may be, of medium enterprise with such authority as may be specified by the State Government under sub-section (4) or the Central Government under sub-section (3):



Time limit to pay to supplier

Section 15 of MSME act

Section 15 of MSME Act

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.”

Section 2:

(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,--

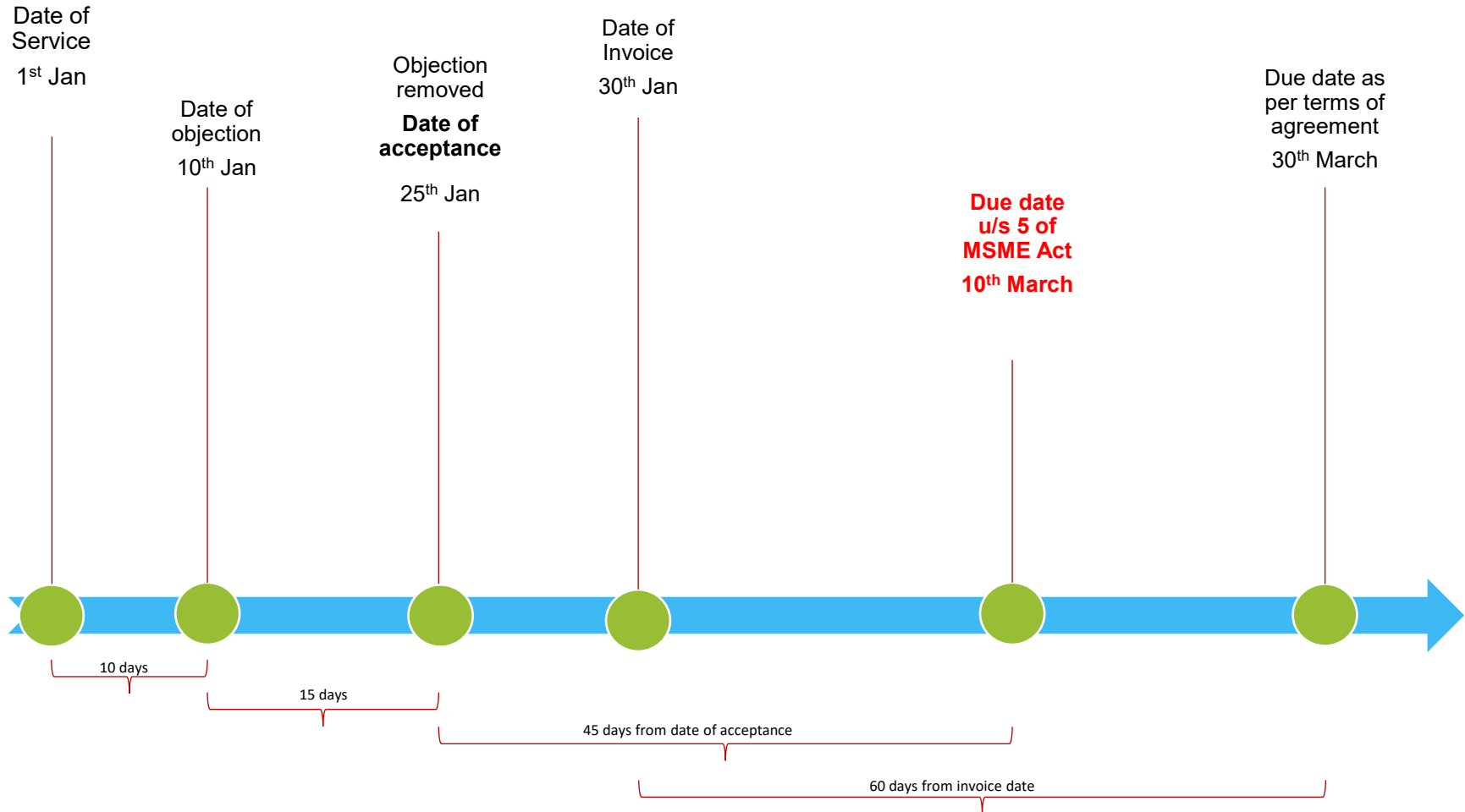
(a) the day of the actual delivery of goods or the rendering of services; or

*(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;

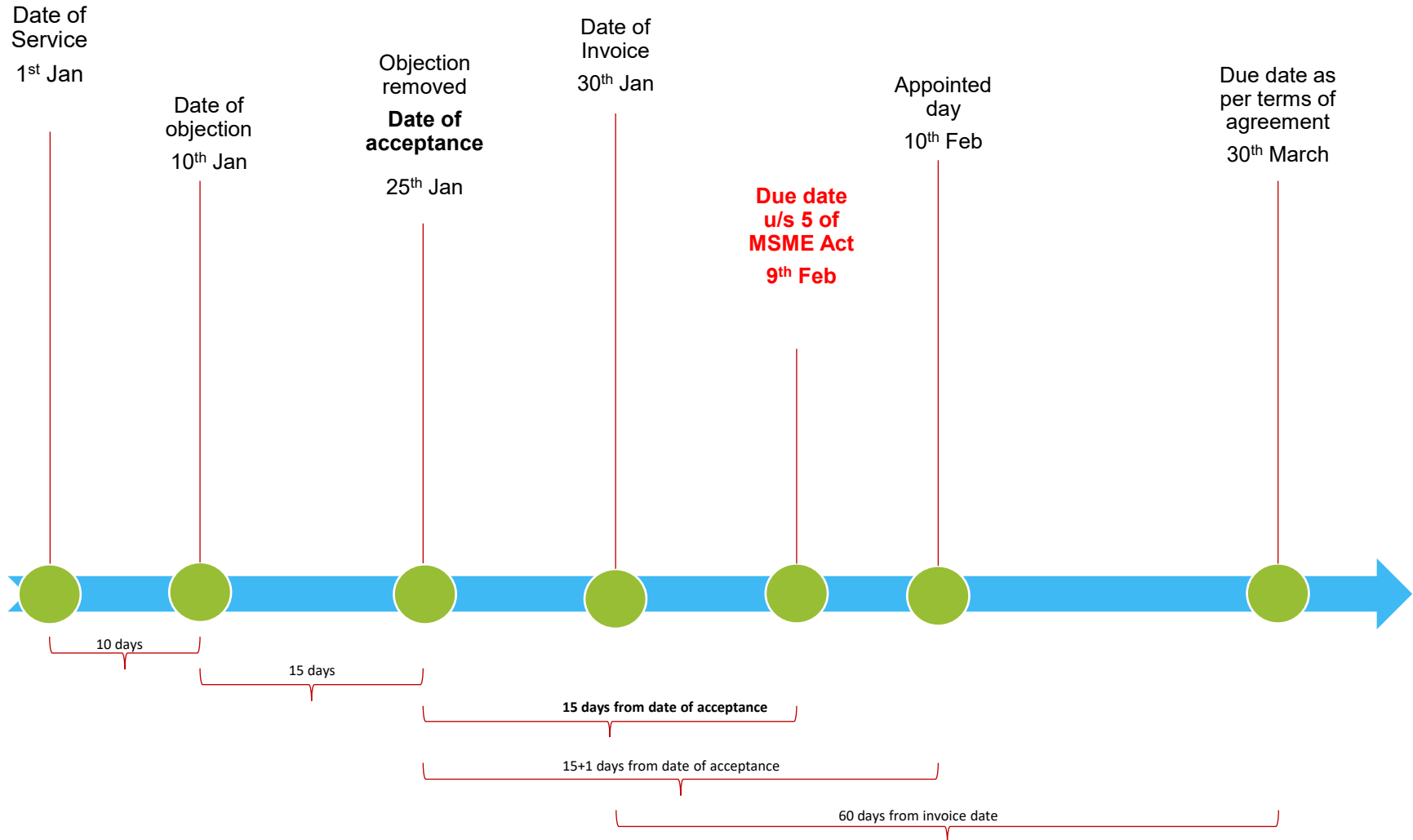
(n) "**supplier**" means a micro or small enterprise, which has filed a memorandum with the authority referred to in sub-section (1) of section 8 **{Udyog Aadhar}**

Agreement exists in writing



➤ Payment terms - 60 days from the date of invoice

No agreement exists in writing



➤ Payment terms – 60 days from the date of invoice (verbal)

Section 15 of MSME Act

Type of payment arrangement	Payment time limit specified in section 15 of MSME Act
Agreement exists in writing	As per agreement in writing Or 45 days of acceptance or deemed acceptance <i>whichever is earlier</i>
No agreement for payment	15 days of acceptance or deemed acceptance

➤ Terms of payment mentioned on the face of invoice / PO to be treated as agreement in “writing”



**Who is
Supplier?**

Supplier

An enterprise shall not be deemed to be a "supplier" for Chapter V, if it is:

- (a) A micro or small enterprise *which has not filed a memorandum(Udyam Registration)* under section 8(1)(a) of the MSMED Act;
- (b) Medium enterprises; and
- (c) Large enterprises (i.e. manufacturing enterprises which have an investment in plant and machinery or equipment exceeding Rs. 50 crores or turnover exceeding Rs. 250 crores.

**Are traders micro or
small enterprises?**

Traders as MSME?

2(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;*

In accordance with section 7 read with definition of enterprise, the “traders” even if registered will not be treated as “Micro” or “Small” enterprises, or supplier for that matter.

Can of worms: Office Memo of 2021

Office Memorandum dated 02-07-2021:

“2. The Government has received various representations, and it has been decided to include Retail and wholesale trades as MSMEs and they are allowed to be registered on Udyam Registration Portal.

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

Effectively:

- Traders are allowed to be registered on MSME portal
- Benefits of registration are only for the purpose of “Priority Sector Lending”
- Mere registration of trader on MSME portal will not entitle them to claim as “Micro, Small or Medium” enterprise
- Consequently, no benefit of MSME act are available to them (*e.g. Section 15*)
- Thus, for the purpose of section 43B of IT Act, traders MSMEs to be excluded.

Can “traders” be micro/small enterprises?

Activities (NIC code) under MSMED Act, 2006 for Udyam Registration

NIC Code	Activities
45	Wholesale and retail trade and repair of motor vehicle and motorcycles
46	Wholesale trade except of motor vehicles and motorcycles
47	Retail Trade Except of Motor Vehicles and motorcycles

Who is Buyer?

Buyer – Section 2(b) of MSME Act

"buyer" means

- Whoever buys
- any goods or receives any services
- from a supplier for consideration.

From section 18(4) of the MSMED Act, it appears that the buyer can be located "anywhere in India", and a foreign buyer not located in India will not fall within the definition of "buyer".



**How to
determine
time of
rendering of
services?**

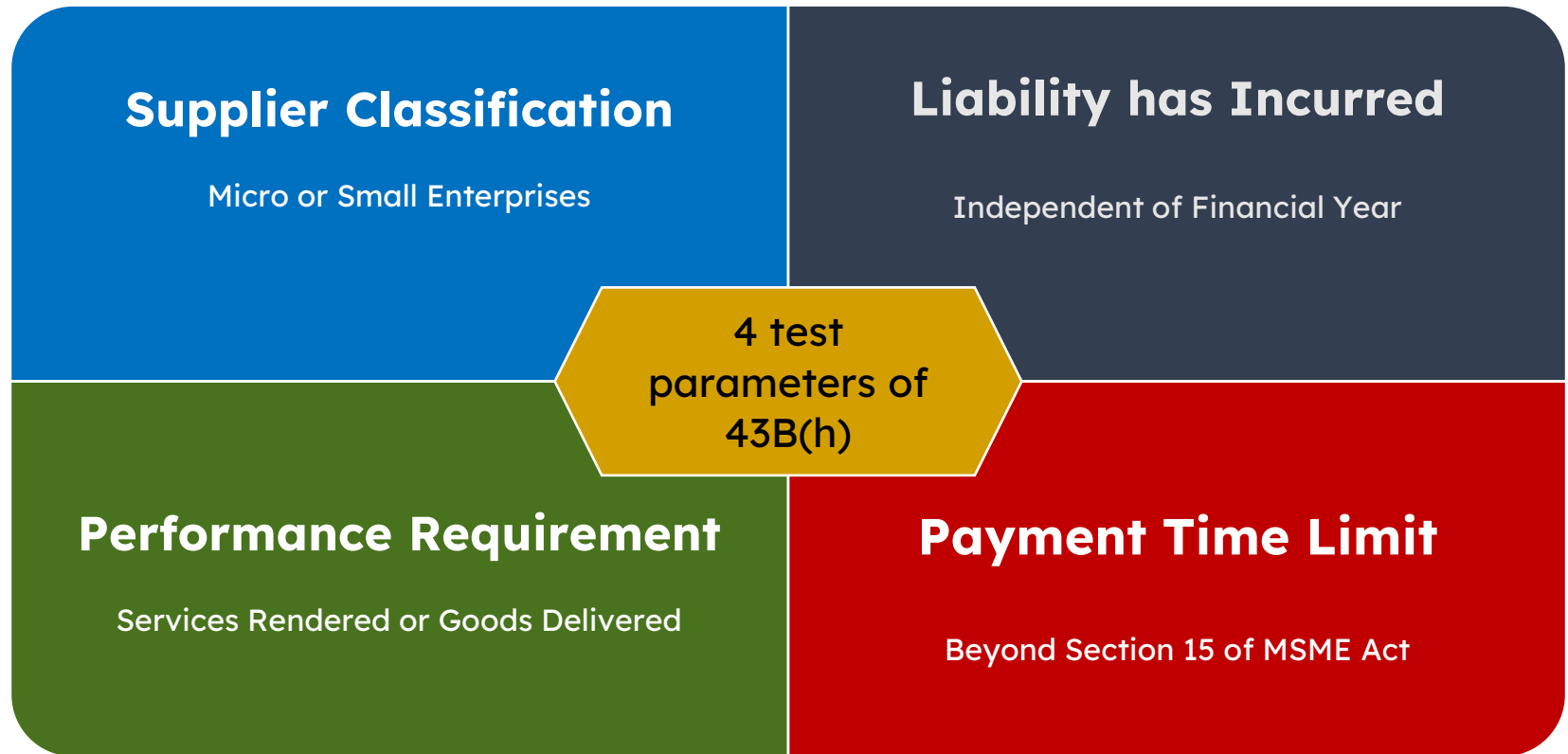
Rendering of services

- Services being intangible it is very difficult to determine time of rendering of services
- In case of assurance services, or where there is a written deliverable available like written opinion, audit report, test reports etc. date of services can be determined from date of such document.
- For other cases, supplier may be requested to communicate date of services
- For other cases, auditor may take a written representation on date of delivery of services
- Answer will depends on facts of each case.

**Applicability on
provisions and
accrued liabilities
made on 31st March**

Section 43B(h) with Section 15 of MSME Act

Provisions v/s accrued liabilities



- If all 4 conditions are met than section 43B(h) is triggered

Provisions & accrued expenses as per accounting standards

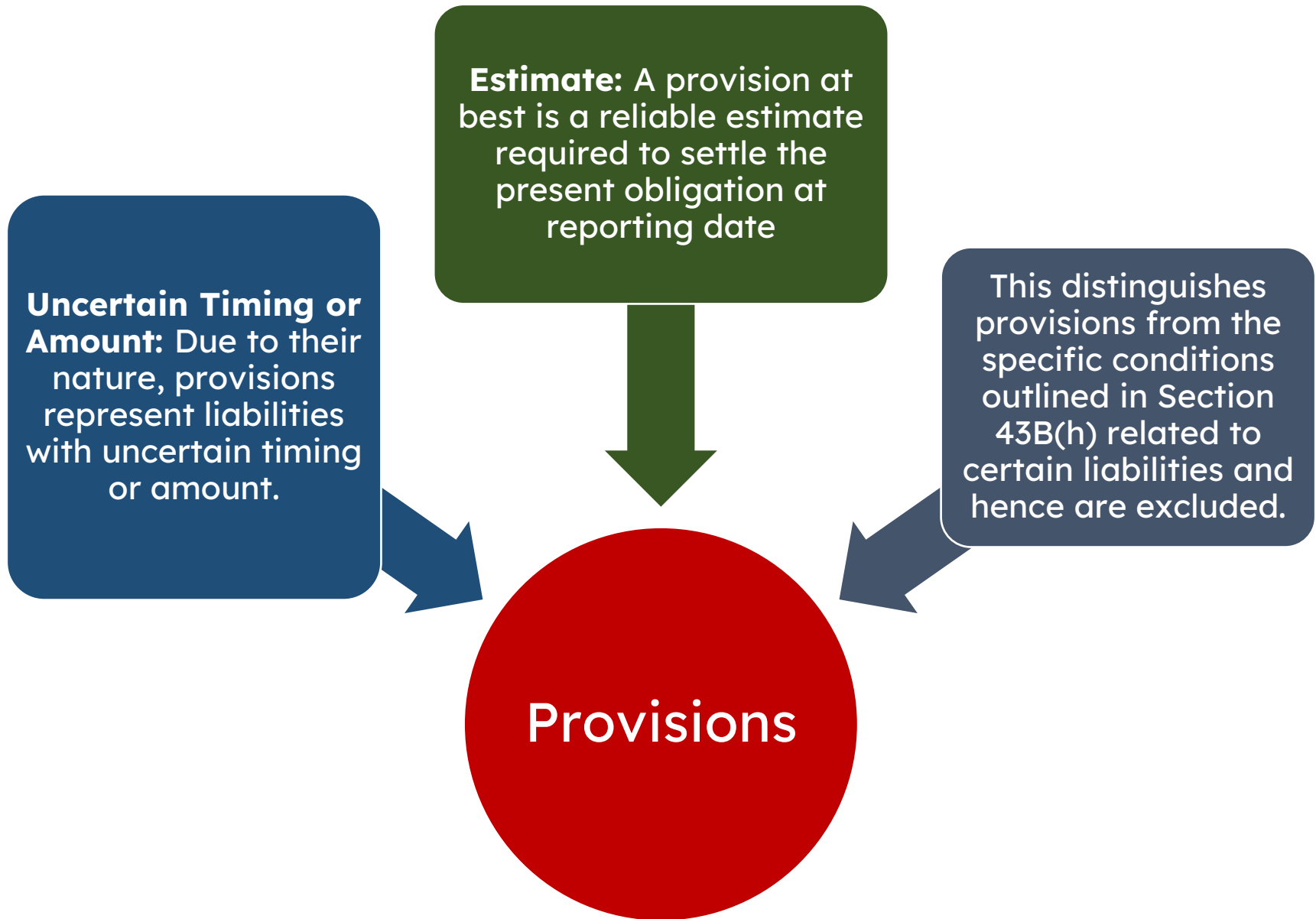
Head	Explanations
Definition	Ind-AS 37: A provision is a liability of uncertain timing or amount.
	AS-29: A provision is a liability which can be measured only by using a <i>substantial degree of estimation</i> .
Accruals v/s provisions	Ind-AS 37: Provisions can be distinguished from other liabilities such as trade payables and accruals because there is <i>uncertainty</i> about the timing or amount of the <i>future expenditure</i> required in settlement.
	AS-29: Provisions can be distinguished from other liabilities such as trade payables and accruals because in the measurement of provisions <i>substantial degree of estimation</i> is involved with regard to the <i>future expenditure</i> required in settlement.
Summary	<ul style="list-style-type: none"> • Accrued expenses and provisions are separated by their respective degrees of certainty. • All accrued expenses have already been <i>incurred*</i> but are not yet paid. • By contrast, provisions are allocated toward probable, but not certain, future obligations. They act like a rainy-day fund, based on educated guesses about future expenses.

* In accounting, "incurred" refers to a financial obligation or expense created but not yet paid for or recorded in the company's financial records. This means the liability has been established, but the payment still needs to be made.

Examples of provisions and accrued liabilities

Provisions example	Accrued expenses examples
<ul style="list-style-type: none">• Provisions for warranties or post-sales client support• Provisions for gratuity• Provisions for lease encashment• Provisions for long term service award	<ul style="list-style-type: none">• Audit fee payable• Electricity expenses payable• Telephone expenses payable• Salary payable

Provisions and 43B(h)



Accrued liabilities and 43B(h)

Conservative approach: Culmination of following 4 factors may trigger 43B(h) -

CERTAINTY OF AMOUNT AND TIME

Amount and time to pay is certain



01

ACCRUAL IN FY 2023-24

Considered as incurred in the same year, even if services are rendered in the next FY



02

SERVICES ARE RENDERED

Even if rendered in next FY 2024-25



03

LATE PAYMENT

If payment in the next FY exceeds the due date as per Section 15.



04

 In an alternate perspective, the non-rendering of services within FY 2023-24 raises the argument that Section 15 of the MSME Act may not apply, consequently challenging the applicability of Section 43B.

Presumptive taxation vis-à- vis section 43B(h)

44AD/44ADA/44AE

- Section 43B deals with deductibility of a deduction *otherwise allowable*.
- In computing presumptive income, income is deemed and allowability of any deduction is not considered, hence 43B does not override presumptive sections like 44AD!

**What if vendor
does not
intimate MSME
registration
details in any
manner?**

- It is incumbent on MSME to claim his status in any manner – Either through express intimation or through intimation through transaction documents like invoice.
- Buyer should request all vendors preferably through registered / speed post to intimate MSME status. A reminder also be sent, should supplier does not respond.
- Buyer should also verify registration information from Udyam portal.
- Suppliers who obtained registration prior to June 30, 2020 and did not renew registration, such registration lapsed on 30th June 2022.

How to identify MSME then?

The GOI has issued OM no. 2(18)/2007-MSME (pol) dated 26-08-2008, which provides as under –

“...Apprehensions have been expressed that in the absence of the identification of MSE Supplier on its supply order/ invoices and other documents may leave a scope for the buyer to omit their mention in the annual statements of accounts. The auditors while auditing the annual accounts may not be able to deduct (sic: detect) such omission from the available documents because of non-availability of identification. In terms of the provisions of MSMED Act, 2006, the MSE supplier is defined as under:

As per section 2(a)(ii)(n) of the MSMED Act,2006 the ‘supplier’ means a micro or small enterprise, which has filed an memorandum with the authority referred to in sub- section (1) if section 8. 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 filling of the said Memorandum, by the District Industries Centre (DIC) or competent authority, as notified by their respective State Government/ UT am/ administration), so that there always remains an identification of being a MSE supplier.

Action points for buyer

- Obtain and maintain MSME status of suppliers
- Verify that registration is valid
- Verify that vendor is not registered as “Traders”
- Category of suppliers gets renewed on yearly basis
- Suppliers must verify that category of vendor has not changed from Micro/small to “medium” during 2023-24.

**Can
outstanding be
converted to
loan?**

AP to Loan

- There is no bar in law *per se* to convert amount outstanding to vendor into loan.
- However, care should be taken to keep in mind provisions of section 269SS and 269T.
- Mass conversion may also trigger scrutiny proceedings.
- In case of companies, “deposits” related provisions to be taken.

**What if
cheques is
issued on
31/03/2024?**

Cheques issued but cleared after 45 days?

- Payment by cheque: Date of issue with delivery of the cheque and not the clearance is the date of payment
- Word of caution:
 - Cheque should not remain o/s long
 - There should be adequate documentation that cheque was issued and indeed delivered to drawee.
 - There were sufficient funds arrangement for clearance of cheque

Case studies on due dates under MSME act

Due date u/s 15

Type of supplier	Payment terms	Date of supply	Date of invoice	Date of objection in writing	Date of resolving objection	Date of acceptance or deemed acceptance	Due date of payment u/s 15
Services	Past practice of 45 days from the date of invoice	28-02-2024	15-03-2024	16-03-2024	20-03-2024	28-02-2024	13-03-2024
Manufacturing	60 days from the date of invoice as per PO	01-02-2024	01-02-2024	10-02-2024	01-04-2024	01-04-2024	15-05-2024
Trader	Immediate on delivery	01-03-2024	01-03-2024	None	NA	01-03-2024	NA
Services	Within 30 days of invoice (mentioned on invoice)	01-03-2024	31-03-2024	None	NA	01-03-2024	15-04-2024
Manufacturer doing trading	Silent	15-02-2024 (Challan on approval)	22-02-2024	None	NA	22-02-2024	07-03-2024

**Thanks for your
time!**

Contact us

DAKSM & Co LLP | **दक्षम:**
CHARTERED ACCOUNTANTS

921, Tower Astralis
Supernova, Sector 94
Expressway, Noida 201303, UP
T: +91 (120) 432 8552
E: support-ncr@daksm.com
W: www.daksm.com

Delhi | Hyderabad | Mumbai | Noida