



Sai Sumed Yasaswi Kondapalli

Corporate Debtor turned MSME During Insolvency due to change in Classification Norms

With the introduction of the notification (**‘Notification’**) on classification of Micro, Small, And Medium Enterprises (**‘MSMEs’**), new conditions have been laid down for the classification, recognition, and registration of an entity as an MSME^[1].

By virtue of this Notification, entities that were not previously MSMEs are now classified as MSMEs if they meet the criteria laid down by the Notification. This paper addresses the following questions of law regarding Insolvency resolution of entities that have now turned into MSMEs while undergoing insolvency resolution:

1. Whether the MSME notification is retrospective or prospective in nature?
2. Whether entities undergoing Corporate Insolvency Resolution Process (**‘CIRP’**), which were previously not MSMEs, can now register as an MSME or not?
3. If the answer to the above is yes, whether the Resolution Professional (**‘RP’**) can apply for an MSME registration or not?
4. Whether the promoter of a company can now participate in insolvency resolution of the entity or not?
5. Post introduction of the notification, can every promoter of every corporate debtor under CIRP participate as a resolution applicant?
6. In the absence of any resolution plan, if the time limit is coming to an end, whether the RP can approach the National Company Law Tribunal (**‘NCLT / AA’**) for extension of the time considering the newly available right to the promoter or not?

To answer the above-mentioned issues, it is important to fully understand the Notification^[2].

Prior to the Notification, the MSME Act, 2006 read with notification No. S.O. 1642(E) dated 29th September 2006^[3] classified Manufacturing and Services sector as follows:

S.no	Class	Category	Criteria - Investment in Plant and Machinery
1		Micro	<25 Lakhs
2	Manufacturing and production	Small	>25 Lakhs but < 5 Crore Rupees
3		Medium	>5 Crores but < 10 Crores

S.no	Class	Category	Criteria - Investment in equipment
1		Micro	<10 Lakhs
2	Providing or rendering of services	Small	>10 Lakhs but <2 Crore Rupees
3		Medium	>2 Crore Rupees but <5 Crore Rupees.

Subsequently, on 1st June 2020, a new notification vide S.O. 1702(E)[4] was introduced **in suppression of the previous notification i.e. S.O. 1642(E)** which re-classified MSMEs as follows:

S.no	Class	Category	Criteria - Investment in Plant and Machinery AND turnover	
			Investment in plant and machinery	Turnover
1		Micro	< 1 Crore Rupees	< 5 Crore Rupees
2	Enterprise[5]	Small	< 10 Crore Rupees	< 50 Crore Rupees
3		Medium	< 50 Crore Rupees	<250 Crore Rupees

Finally, on 26th June 2020, the Notification mentioned above was issued **in suppression of the previous notification i.e. S.O. 1702(E)** and it classified the MSMEs as follows:

S.no	Class	Category	Criteria - Investment in Plant and Machinery AND turnover	
			Investment in plant and machinery	Turnover
1		Micro	< 1 Crore Rupees	< 5 Crore Rupees
2	Enterprise[6]	Small	< 10 Crore Rupees	< 50 Crore Rupees
3		Medium	< 50 Crore Rupees	<250 Crore Rupees

Having understood the transition of the classification of MSMEs from 2006 to 26.06.2020, it will now be easy to answer the issues mentioned above.

1. The Notification: Retrospective or Prospective?

1.1 The Notification (2119(E)) was issued **in suppression** of the previous notification - 1642(E) (Which was once again issued **in suppression** of 1642(E)). What has essentially happened because of the above acts of suppression is that there has been a new classification of enterprises as per the MSME Act, 2006. Therefore, even if enterprises existed (as an MSME or not) before the enforcement of the Notification, once the Notification took effect, any enterprise that meets the criteria can be declared as an MSME, respectively. To answer the issue better, we may answer the following sub-issues:

i. What was the purpose of enacting the Notification?

The Notification was passed as a part of *Atmanirbhar Bharath*^[7]. From a reading of the Notification and understanding the timing in which it was passed (during the Covid-19 Pandemic), it can be reasonably concluded that the Notification aims at protecting enterprises by expanding the definitions of MSMEs and by granting the benefits under the MSME Act, 2006.

ii. Does the Notification adversely impact any stakeholder's rights?

The Notification was passed because of the Covid-19 Pandemic. This was to help companies seek benefits under the MSME Act, 2006. On a bare reading of the Notification, there appears to be no adverse impact on any stakeholder's rights.

1.2 It is important to point out that the notification per se is silent on whether it is retrospectively or prospectively applicable. This question therefore needs to take the angle of statutory interpretation:

i. There exists a principle of law that follows the legal maxim '*Nova constitution futuris formam imponere debet non praeteritis*', which stands for - 'a new law ought to regulate what is to follow, not the past'. The same was adopted by the Supreme Court in *Monnet Ispat & Energy Ltd vs. Union of India & Ors*^[8] where the Hon'ble Supreme Court held that this principle operates until and unless there is an express provision in the statute stating/indicating retrospective applicability of the statutes^[9]. But, when a law is enacted for the **benefit** of the community, even in the absence of a provision, the statute may be held to be retrospective in nature^[10].

ii. The MSME Act is a **beneficial legislation**^[11] and is enacted for the benefit of the entities covered under the act. Therefore, such a benefit can be applied retrospectively, even in the absence of a provision.

iii. In terms of the Insolvency Law, The Insolvency Law Committee, in its March 2018 report had brought to light, the various issues that MSMEs experience. The Committee had suggested that the approach to provide relief to MSMEs is to exempt or relax certain provisions from the regular insolvency process, in their applicability to MSMEs. The Committee observed that MSMEs, which are usually Operational Creditors to large businesses, are suffering in two ways:

a. Temporary credit disruption being created by large businesses being in CIRP is leading the affected MSMEs to be dragged into Insolvency and subsequently, even into Liquidation,

b. In a CIRP, where MSMEs are operational creditors, the liquidation value guaranteed to them is negligible^[12].

iv. Therefore, the current situation is also in line with the problems of MSMEs that the Insolvency Law Committee observed. There currently is a disruption of businesses – although not due to big companies undergoing CIRP but due to the pandemic. This is therefore an extraordinary situation and by putting all the pieces together, it can be seen that one of the advantages of increasing the scope of entities under the MSME Act is that, entities can now not only avail the benefit of an MSME registration but also enjoy certain advantages under the Insolvency law.

1.3 It can also be argued that the Notification confers prospective benefits on antecedent facts. While the Notification is silent on retrospective application, an example may be drawn from the case of *Boucher Pierre Andre v. Superintendent, Central Jail, Tihar, New Delhi* [13]. In this case, The Supreme Court held that the benefit to set off pre-conviction detention period against the term of imprisonment conferred by Section 428 of the Criminal Procedure Code, 1974 ‘where an accused person, has, on conviction been sentenced to imprisonment for a term’ is also available where the sentence was imposed before the commencement of the Code to reduce the unserved portion of the sentence and that in so construing the section it was not given any retrospective effect for it did not affect the sentence already undergone but affected only that part of the sentence which remained to be served in the future [14]. In the same manner, the Notification did not affect the life and operation of enterprises before the passing of the Notification, but only affects the remaining duration for which such enterprises continue to exist.

1.4 From the above, it can be reasonably understood that in order to establish retrospective nature of a statute, what necessarily follows is that upon the passing or enactment of a statute, some extent of affect must be displayed on facts arising prior to the enactment of the statute. In the present case, there is no such retrospective affect but only **a prospective benefit which can be utilised by any enterprise meeting the revised criteria**. While the Notification is not retrospective per se, it confers prospective benefits to all enterprises that meet the criteria, which were registered as a company or an MSME even before the Notification was passed.

1.5 Therefore, from both the grounds mentioned above – (i) Beneficial legislations may be retrospectively applied and, (ii) that the notification confers prospective benefits on antecedent facts, it can be concluded that the notification can be made applicable to those companies that were previously not MSMEs.

2. Entities registering as an MSME while undergoing CIRP

2.1 As already discussed in the first issue, the Notification confers prospective benefits to antecedent facts.

2.2 The MSME Act, 2006 defines an “Enterprise” as, “an industrial undertaking **or a business concern or any other establishment, by whatever name called**, engaged in manufacture or production of goods, in any manner..... or engaged in providing or rendering of any service or services”. [15]

2.3 A *Corporate Debtor* [16] is a *Corporate Person* who owes a debt to any person and a *Corporate Person* [17] is a *Company* defined under section 2(20) of the Companies Act, 2013, a *limited liability partnership* as defined in section 2(1)(n) of the Limited Liability Partnership Act, 2008, or any other person incorporated with limited liability under any law for the time being in force but does not

include any financial service provider.

2.4 Therefore, from a combined reading of sections 2(e) of the MSME Act, 2006 and section 3(8) of the Insolvency and Bankruptcy Code, 2016, the term “Corporate Debtor” can be included in the words “*or a business concern or any other establishment by whatever name called*” of the definition of the term “Enterprise” in the MSME Act, 2006.

3. Application for an MSME Registration

3.1 The Resolution Professional’s powers and duties are mentioned in Section 25 of the I&B Code, 2016. Of these, it is important to mention that Section 25(1) of the I&B Code, 2016 stresses on the duty of the RP that he/she is to preserve and protect the assets of the Corporate Debtor **including the continued business operations of the Corporate Debtor.**

3.2 Also, the RP is empowered to act and execute, in the name on behalf of the Corporate Debtor, all deeds, receipts, and other documents, and for that purpose to use, when necessary, the seal of the Corporate Debtor^[18].

3.3 Therefore, getting the license that the Corporate Debtor is eligible for is a duty of the Resolution Professional while attempting to keep the Corporate Debtor as a going concern.

3.4 An MSME registration requires a company through its authorised signatory to provide its GSTIN and PAN, along with its Aadhaar number^[19]. In case of a Corporate Debtor undergoing CIRP, the RP is the authorised signatory and can submit the MSME Registration form on the Udyam portal^[20].

3.5 However, since the Adhaar card of the individual is required at the time of registration, it would be problematic if the RP’s Adhaar was used. Therefore, while the RP can apply, it would be best if the promoters applied and that way, their Adhaar details can be the basis of issuance of an MSME certificate of registration.

4. Participation of the Promoter in CIRP as a Resolution Applicant (‘RA’)

4.1 Once the RP applies for an MSME registration and the same is received, the Corporate Debtor now is an MSME.

4.2 This would mean that section 240A of the I&B Code, 2016 would apply which specifically dispenses the applicability of Section 29A Clause (c) to (h) in case the Corporate Debtor is an MSME.

4.3 Doing away with the requirements of Section 29A clauses (c) to (h) would naturally mean that a promoter can now be a Resolution Applicant. Therefore, a Promoter of an MSME can now bid for the Corporate Debtor.

5. Promoter Participation: Can every Promoter participate as an RA?

5.1 It would be a miscarriage of justice if every promoter of every Corporate Debtor under CIRP be allowed to participate in light of The Notification.

5.2 Therefore, there needs to be a balance point that must be identified to protect the interests of all the stakeholders.

5.3 For this exercise, one may not have to look beyond the NCLAT judgment in the case of *Numetal*^[21]. In this matter, while dealing with applicability of section 29A(c) of the I&B Code, 2016, the Hon'ble NCLAT stated that 'Expression of Interest' is a part of the 'Resolution Plan', which follows the 'Resolution Plan'. In such case, the date of submission of the 'Expression of Interest' should be treated to be the date of submission of 'Resolution Plan'^[22].

5.4 Drawing inference from the above, it can be similarly concluded that, any 'Expression of Interest' which was called after the introduction of The Notification, would enable the participation of promoters of the Corporate Debtor turned MSME in the insolvency resolution process. This would also naturally mean that any insolvency exercise where the 'Expression of Interest' was called for before The Notification took effect, in such cases, the promoter will not be able to participate.

5.5 However, one must not lose sight of the fact that the current times of the pandemic are extraordinary and therefore, the above test might not always hold good and judicious application of the mind should follow in every case based on the facts unique to it.

6. Extension of Time for Promoter Participation in CIRP

6.1 This question deals with a hypothetical situation where a Corporate Debtor which is undergoing CIRP is now recognised as an MSME but is nearing the end of its CIRP period with no resolution plan. In such a situation, can the Adjudicating Authority extend the period if the promoter of the Corporate Debtor wishes to submit his/her Resolution Plan or not?

6.2 The purpose of the Code is the maximisation of value of assets and to balance the interests of all the stakeholders. The Code stresses on Resolution over Liquidation and it can be concluded that Resolution is the rule and Liquidation is the exception.

6.3 The NCLT is sufficiently empowered under Rule 11 of the NCLT Rules, 2016^[23].

6.4 In the case of *Small Industries Development Bank of India (SIDBI)*^[24], the NCLT-Chandigarh Bench has extended the timelines of CIRP beyond 330 days based on the sustained efforts made in order to evaluate resolution plans under the consideration by the CoC. Therefore, it is submitted that it would be possible to extend the CIRP period beyond 330 days if it can be shown that (1) the promoter wishes to submit a plan and, (2) that the CoC wishes to consider it.

6.5 The above may hold good keeping in mind the fact that I&B Code, 2016 is a beneficial legislation intended to put the Corporate Debtor on its feet and is not a mere money recovery legislation^[25].

Reference

^[1] Ministry of Micro, Small And Medium Enterprises Notification dated 26th June, 2020 vide S.O. 2119(E).

^[2] *Ibid.*

- [3] Ministry of Small Scale Industries Notification dated 29th September, 2006, vide S.O. 1642(E).
- [4] Ministry of Micro, Small And Medium Enterprises Notification dated 1st June, 2020 vide S.O. 1702(E).
- [5] Section 2(e) of the MSME Act, 2006 defines “Enterprise” to include either Manufacturing or providing services.
- [6] *Ibid.*
- [7] ‘Revised definition of MSME, registration process, credit/finance schemes and procurement policy’, ICN Group, available at <https://www.indianchemicalnews.com/chemical/revised-definition-of-msme-registration-process-credit-finance-schemes-and-procurement-policy-5974>
- [8] (2012) 11 SCC 1
- [9] ‘Procedural Amendments Affecting Vested Rights Of A Litigant Are Prospective In Application Unless Made Applicable Retrospectively’, Jeevan Ballav Panda, Shalini Sati Prasad, and Asees Jasmine Kaur, available at <https://www.mondaq.com/india/trials-appeals-compensation/702132/procedural-amendments-affecting-vested-substantive-right-of-a-litigant-are-prospective-in-application-unless-specifically-made-applicable-retrospectively>
- [10] *Vijay vs. State of Maharashtra & Ors*, Supreme Court of India Appeal (Civil) 3164 of 2006, date of judgment: 26/07/2006.
- [11] *Indian Oil Corporation Limited vs. Fepl Engineering (P) Limited*, Delhi High Court, OMP (COMM) 144/2019, I.A.s 5291/2020, 5918/2020 & 5919/2020, date of judgment: 30.07.2020.
- [12] ‘Report of The Insolvency Law Committee’, March 2018, available at http://www.mca.gov.in/Ministry/pdf/ReportInsolvencyLawCommittee_12042019.pdf at Pg. 71, 27.3.
- [13] AIR 1975 SC 164: (1975) 1 SCC 192.
- [14] Principles of Statutory Interpretation, Justice G P Singh, Revised by Justice A K Patnaik, Lexis Nexis, Page 610.
- [15] *Supra Note 5.*
- [16] Section 3(8) of the Insolvency and Bankruptcy Code, 2016.
- [17] Section 3(7) of the Insolvency and Bankruptcy Code, 2016.
- [18] Section 17 of the I&B Code, 2016. Also see <http://www.ipaicmai.in/IPA/Upload/Power-Duties.pdf>
- [19] Udyam Registration Booklet, Page 8, Point 6(5), available at <https://udyamregistration.gov.in/docs/Udyam%20Registration%20Booklet.pdf>
- [20] <https://udyamregistration.gov.in/Government-India/Ministry-MSME-registration.htm>

[21] In the matter of *Numetal Limited vs. Satish Kumar Gupta & Ors*, Company Appeal (AT)(Insolvency) No. 169 of 2018, available at <https://nclat.nic.in/Useradmin/upload/8283361285b9256d604992.pdf>

[22] Para 109, *Ibid*.

[23] Inherent powers of the NCLT.

[24] *Small Industries Development Bank of India (SIDBI) vs. International Mega Food Park Limited*, NCLT/CHD/Reg/CC/1159 - IA No. 38&73/2020 IN CP(IB) No. 174/Chd/CHD/2018, available at <https://resolutionbazaar.com/attachments/beyond-330-days-pdf.1589/>

[25] '*NCLAT reiterates IBC is beneficial legislation intended to put Corporate Debtor on its feet, not a mere money recovery legislation*', SCC ONLINE, available at <https://www.sconline.com/blog/post/2020/10/21/nclat-reiterates-ibc-is-beneficial-legislation-intended-to-put-corporate-debtor-on-its-feet-not-a-mere-money-recovery-legislation/>

Click on below button to search similar judgments:

[Case Laws Portal](#)

[Join WhatsApp Channel](#)

[Subscribe Now](#)

[Corporate Plan](#)

[Dashboard/OnePage](#)

[Case Laws Portal](#)

[Bare Acts/Legal Contents](#)

[IBC Commentary](#)

[Arbitration Portal](#)

[Case Citation](#)

[Weekly Bulletins](#)

[Articles](#)[e-Journals](#)[Annual Case Digest](#)[Testimonials](#)**Follow for daily updates:**

-  [Facebook](#)
-  [LinkedIn](#)
-  [Telegram](#)
-  [X](#)
-  [WhatsApp](#)
-  [YouTube](#)

[Download Mobile App](#)[Subscribe Daily Email Newsletter](#)

- - -

Disclaimer: While every effort is made to avoid any mistake or omission, this document including case-summary/brief about the decision/ add. info/headnote/ judgment/order/ act/ rule/ regulation/ circular/ notification is being circulated on the condition and understanding that the publisher would not be liable in any manner by reason of any mistake or omission or for any action taken or omitted to be taken or advice rendered or accepted on the basis of this document. The authenticity of this text must be verified from the original source. Read more [here](#).