

NCEUS Cell/4/2010-Pt
Government of India
Ministry of Micro, Small and Medium Enterprises

Udyog Bhavan, New Delhi 110 107
Dated: 24th October, 2014

OFFICE MEMORANDUM

Subject: Micro Small & Medium Enterprises Development (Amendment) Bill, 2014 - special dispensation for revival and exit of MSMEs.

Issues related to sickness of MSMEs, Non-Performing Assets and exit policy have been raised from time to time in different quarters. Various Committees and Expert Groups have also made suggestions in this regard. The Ministry of Micro, Small & Medium Enterprises proposes to address this issue through Micro Small & Medium Enterprises Development Act, 2006 by introducing a new chapter in the same Act. In this regard, a Background Note and a draft Amendment Bill is enclosed herewith.

2. It is requested that the comments on the proposed amendments may be sent to this Ministry within 15 days.

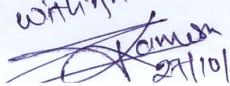
90

Enclosed: As above.


(S.N.Tripathi)
Joint Secretary
Tel. 23063283; Fax: 23062336
Email: js.sme@nic.in

To

1. Secretary, Planning Commission, Yojana Bhawan, Sansad Marg, New Delhi.
2. Secretary, Department of Economic Affairs, Ministry of Finance, North Block, New Delhi.
3. Secretary, Department of Financial Services, Ministry of Finance, Jeevan Deep Building, New Delhi.
4. Secretary, Department of Industrial Policy & Promotion, Udyog Bhawan, New Delhi.
5. Secretary, Ministry of Corporate Affairs, Shastri Bhawan, New Delhi.
6. Secretary, Ministry of Development of North Eastern Region, Vigyan Bhawan Annexe, New Delhi
7. Secretary, Ministry of Social Justice & Empowerment, Shastri Bhawan, New Delhi.
8. Secretary, Ministry of Tribal Affairs, Shastri Bhawan, New Delhi.
9. Secretary, Ministry of Labour and Employment, Shram Shakti Bhawan, New Delhi.

Issued with authority

27/10/14

Background Note on Micro Small & Medium Enterprises Development (Amendment) Bill, 2014 - Special dispensation for revival and exit of MSMEs.

Introduction

1.1 Prime Minister's Task Force on Micro Small & Medium Enterprises (MSME) 2010 recommended, inter-alia, that in place of out dated Provincial Insolvency Act, 1920, action may be initiated to formulate and circulate a draft Insolvency Act which will have enabling provisions for time-bound revival and exit for MSMEs. More than 90% of MSMEs in India are either Proprietorship or Partnership Enterprise. They are governed by Provincial Insolvency Act of 1920 where the focus is not on revival or structured exit in case of failure of an enterprise, but to recover outstanding dues through 'court driven process'. Similarly, there is no distinction between personal and business assets/ business liabilities.

1.2 Recommendations of Prime Minister's Task Force on MSME vide para 5.3.3 are as follows:-

"In place of the outdated Provincial insolvency Act, 1920, action may be initiated to formulate and circulate a model Insolvency Act within 6 months which will have enabling provisions for time-bound revival and exit for the unincorporated firms. The model Act should take into consideration the following 4 critical elements: (a) a specialized quasi-judicial body, to appraise viability and set up time bound revival/closure plans; (b) enabling provisions for a holding period for revival; (c) segregation of business assets from personal assets based on reasonable norms; and (d) speedy winding up in case the business is determined as non-revivable'.

1.3 The National Manufacturing Policy has also proposed an exit policy which, however, is made applicable to the units established within the National Investment and Manufacturing Zone (NIMZ). The salient features are as follows:-

- Exit Mechanism – Job Loss Policy – u/s 25 FFF of Industrial Dispute Act compensation under this Act shall be covered by either insurance policy or by a sinking fund.
- Premium for sinking fund/insurance shall be recovered from the intending units upfront while allotment of land in NIMZs.
- The sinking fund will be replenished constantly.
- Compensation for the workers will be 20 days per year of service.
- There is a provision for asset redeployment procedure for sick industries.

- No capital gain tax in case asset is redeployed by the entrepreneur for a new unit within 3 years' time.

1.4 In view of above, there is a felt need for special dispensation for revival and exit of MSMEs. The MSME facing insolvency/bankruptcy should be provided legal opportunities to revive its unit. This could be by way of re-organization and rehabilitation scheme with comfort to creditors and a mechanism for interim suspension of enforcement rights. It is proposed that a separate chapter on Restructuring & Exit of MSME (as defined under the Act) can be added to the MSME Act, which mandates scheme for closure of sick MSMEs. These provisions are to formulate the features of re-organization from Sick Industrial companies (Special Provision) Act of 1985 and Insolvency Procedure under the Companies Act, 1956. 2.3

1.5 The changes proposed are in tune with “Body Corporate” as under Companies’ Act and Limited Liability Partnership (LLP) Act, 2008 with regard to limiting liabilities and improving process for winding up with affordable litigation process/administrative mechanism. While legislative intent has been taken up from US Bankruptcy Code for its effectiveness/simplicity, litigation process/administrative mechanism has been taken up from UK and other European states so that it should not become too much advocate-driven or such a mechanism could become out of reach for MSMEs. The LLP Act, 2008 considers partnership at par with the “firm” under the Finance Act of 2009”.

Purpose of Amendment

2 The main purpose of this exercise is to support entrepreneur ventures of MSMEs in positive and constructive manner. As of now, there is no legal frame work for re-organization/winding up/exit for small units leading to huge waste of human resources (promoters and employees), capital (banks & financial institutions) and physical resources (industrial land & buildings, plant, machinery etc.). The objective of proposed amendment for MSME Act is twofold –Revival and Exit of MSME. Revival-MSMEs that seek early assistance to tide over difficult financial times and provide a framework where a viable MSME can seek standard as well as customized relief and concession to revive; and Exit – to provide an easier and expeditious exit procedure for the benefit of promoters and guarantors through liquidation and change in management.

Broad Frame Work

2.1 The key element of proposed amendment is insertion of separate chapter, Section-25 of MSMED Act 2006. The framework of the chapter will be as follows:

2.1.1 Framework: Establishment of Revival and Exit Committee as an adjunct to MSME Facilitation Council (already present in almost all states) consisting of Chairman and Two members (with requisite qualifications).

2.1.2 Establishment of Appellate Authority: Attached to National Board of Micro Small and Medium Enterprises (NBMSME) consisting of one Chairman and two Members of NBMSME being persons of pre-eminence in fields of economic, science, technology, industry etc. (Ref. Sub-Section 3(m))

2.1.3 Initiation of proceedings: The MSME to file application voluntarily if accumulated losses of the enterprise equals to half or more of its entire net worth for last financial year and enterprise apprehends failure of its business specifying Revival plan or Exit through liquidation proceedings.

2.1.4 Moratorium: Upon filing, an automatic moratorium for a period of 180 days shall operate (extendable to 30 days more at a time till Revival Plan or Liquidation proceedings initiated)

2.1.5 Appointment: A Provisional Trustee(s) to automatically stand appointed upon filing of an application under Chapter 5A. (A panel of Provisional Trustee(s) to be attached to Revival and Exit Committee whose qualification is specified)

2.1.6 Exit-liquidation: a. Voluntary Liquidation – If an enterprise opts for exit through liquidation process – the business and assets of the enterprise shall be liquidated b. Involuntary Liquidation – Adjudicating Authority may order liquidation through Provisional Trustee if no Revival Plan can be formulated or fails.

2.1.7 Liquidation Process: Debtors to make payments due to enterprise within 30 days. In case of delay, debtor or the contributory to pay interest as specified under S. 16. Provisional Trustee to liquidate all movable and immovable assets of the enterprise by conducting sale by way of public auction or by private sale. Distribution of proceeds as under Section 529 of Companies Act.

2.1.8 Appeals and discharge: First appeal by aggrieved an enterprise/creditor before Appellate Authority within 30 days; second appeal against Appellate Authority's order would lie before Supreme Court of India.

2.1.9 Certificate of Discharge: would be given to the entrepreneur and/or guarantor subsequent to implementation of Revival Plan or Liquidation.

2.2 Draft Chapter (Section-25) of MSMED Act 2006 is placed at Annexure-I

Proposed Amendment

**THE MICRO, SMALL AND MEDIUM ENTERPRISES DEVELOPMENT
(AMENDMENT) ACT, 2014**

An Act to further to amend the Micro, Small and Medium Enterprises Development Act, 2006

Be it enacted by Parliament in the sixty-fourth year of the Republic of India as follows:-

PRELIMINARY

1. (i) This Act may be called the Micro, Small and Medium Enterprises Development (Amendment) Act, 2014

(ii) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint:

Provided that different dates may be appointed for different provisions of this Act

and

any reference in any such provision to the commencement of this Act shall be construed as a reference to the coming into force of that provision.

2. In the Micro, Small and Medium Enterprises Development Act, 2006 the following Sections and a Chapter V- A shall be inserted.

Definitions –

(q) “authorized person” means

(i) in case of an enterprise run as a sole proprietorship by an individual, the individual himself;

(ii) in case of an enterprise run as a partnership, any person who is authorized under the provisions of the Indian Partnership Act, 1932 and Indian Limited Liability Partnership Act, 2008 in cases of a Limited Liability Partnership to represent and act on behalf of the partnership;

(iii) in case of a company, any person who is authorized under the provisions of the Companies Act, 1956 and the constitutional documents of the company to represent and act on behalf of such a company.

(r) “claim” means a right to payment, whether or not such right is reduced to judgement, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured.

(s) "creditor" means any person or entity that has a claim against the debtor that arose at the time of or before the initiation of proceedings by the enterprise or the Creditor(s) as mentioned under Section 25A and 25B of this Act.

(t) "entrepreneur" shall means and include a sole proprietor in case of a proprietorship, all the partners in case of a partnership and shareholders in case of a company.

3A. Establishment and Composition of Appellate Authority (1) The Central Government shall also, by notification, establish an adjudicating wing under the Board to be known as Appellate Authority, National Board of Micro Small and Medium Enterprises consisting of a Chairman and not more than two members, for hearing appeals under Section 25 of Chapter V A. The Central Government may also decide to set up regional benches of the Appellate Authority if deemed fit and necessary.

(2) The Chairman shall be a person who has been a judge of a Supreme Court or High Court for not less than five years.

(3) The other two Members shall be nominated, one each from the fields of economics and public administration, having dealt with industrial finance and issues connected with MSMEs

The following section 20 shall be substituted in place of the existing Section 20 :-

20. Establishment of Micro, Small and Medium Enterprises Facilitation Council – The State Government shall, by notification, establish one or more Micro, Small and Medium Enterprises Facilitation Councils, at such places, exercising such jurisdiction and for such areas, as may be specified in the notification.

For this purpose of the clarity, it may be noted that the Micro, Small and Medium Enterprises Facilitation Council, as set up under Section 20 shall continue to discharge same functions, as prior to the amendment and no additional benefit shall accrue to Medium Enterprises except as under Chapter V A inserted vide the amendment.

20A. Establishment and Composition of Adjudicating Authority – (1) The State Government shall also, by notification, establish one or more Authority as an adjudicating wing of the Micro and Small Enterprises Facilitation Councils, to be named as Adjudicating Authority, Micro, Small and Medium Enterprises Facilitation Council at such places, exercising such jurisdiction and for such areas, as may be specified in the notification, for the purpose of Chapter V A.

(2) The Adjudicating Authority as established under sub section (1) above, shall consist of a chairman and not more than two members.

(3) The Chairman and other two members of the Adjudicating Authority shall be persons who are qualified to be High Court Judges or persons who have special knowledge of a

professional experience of not less than 10 years in the field of micro, medium and small enterprise industry, economics, banking, industry, finance, law, trade or commerce.

CHAPTER V A

REVIVAL AND EXIT FOR MICRO, SMALL AND MEDIUM ENTERPRISES

- 25A. Voluntary Initiation of proceedings** – (1) Any Micro, Small and Medium enterprise may voluntarily initiate proceedings under this Chapter if the accumulated losses of the enterprise equals to half or more of its entire net worth and the enterprise reasonably apprehends failure of its business.
- (2) The application for initiation of the proceedings under this Chapter shall be verified by an affidavit of authorized person in the form prescribed at Schedule A, with such variation as circumstances may require. The enterprise in the application shall specify as to whether the application has been filed for revival or exit and mention all relevant details as required under the Schedule A.
- 25B. Initiation of proceedings by Creditor(s)** – Any Creditor or Creditors in a joint action may initiate proceedings under this Chapter against a Micro, Small and Medium enterprise if the enterprise fails to make payment of dues for consecutively three or more occasions within a period of one year to any such Creditor or the Creditors jointly.
- Provided no such action may be initiated by any Creditor or Creditors jointly unless the amount in default exceeds the threshold as may be prescribed by Government from time to time;
- 25C. Notice of proceedings to the enterprise** – (1) Upon filing of an application by a Creditor or Creditors in joint action, the Adjudicating Authority would immediately and in any case within 15 (fifteen) working days from the date of filing of an application, issue a notice of intimation to the enterprise concerned and call upon the enterprise to indicate if it prefers a Revival Plan or exit through liquidation proceedings under the provisions of this Chapter or indicate its willingness to pay up the Creditor (with applicable interest, if any), within 45 (forty five) working days of receipt of the notice.
- 25D. Moratorium** – Notwithstanding anything contained in any other law in operation, or any other instrument having effect under any other law, upon filing of an application under this Chapter by the enterprise or the Creditor/s, there shall operate an automatic moratorium for a period of 90 (ninety) days from the date of filing of application, wherein under, the enterprise would be exempt from commencement

or continuation of any proceedings for recovery, execution, distress, collection, repossession or the like against any of the properties of the enterprise, or for enforcement of any liability, contract or guarantee in respect to any loans or advances granted to the enterprise, except with prior consent of the Adjudicating Authority or as the case be, the Appellate Authority².

Such a period for moratorium can be extended by the Adjudicating Authority or the Appellate Authority, as the case may be, for a period of 30 (thirty) days at a time till a Revival Plan is accepted or the enterprise goes under liquidation under the provisions of this Chapter. The moratorium shall continue to operate after the acceptance of Revival Plan till its implementation in terms of such a Plan.

25E. Appointment of Provisional Trustee and Notice to Creditor(s) – (1) Upon filing of an application under this Chapter, a Provisional Trustee attached to the Adjudicating Authority in terms of Section 25J would automatically stand appointed and a copy of the application would be immediately forwarded to the Provisional Trustee so appointed.

2. An unlimited period moratorium clause regarding may adversely affect the availability of finance to MSMEs especially in view of Securitisation remedy also getting stayed due to such moratorium.

(2) In case of an application having been filed by the enterprise, the Provisional Trustee after examining the application as regards the eligibility of the enterprise to file such an application, but in any case within 3 (three) working days of receipt of such an application, serve a notice to all the Creditors as disclosed by the enterprise in its application as well as publish public notices calling upon all the creditors of the enterprise to file their claims against the enterprise within 30 (thirty) days of publication of such a public notice.

(3) In case of an application having been filed by the Creditor(s), the Provisional Trustee after examining the application as regards the satisfaction of conditions by the Creditor(s) to file such an application, but in any case within 3 (three) working days of receipt of such an application, serve a notice to all the known Creditors of the enterprise if any, and publish public notices calling upon all the creditors of the enterprise to file their claims against the enterprise within 30 (thirty) days of publication of such a public notice.

25F. Proposal of a Revival Plan – (1) On completion of a period of 30 (thirty) days for filing of claims by the Creditors, in case the enterprise prefers a Revival Plan under Section 25C, the Provisional Trustee shall formulate and propose a Revival Plan in consultation with the enterprise and file it for approval by the Adjudicating Authority

within a period of 30 (thirty days). Such a Rehabilitation Plan may include the following among other measures towards revival and rehabilitation of an enterprise:

- (a) Composition with Creditors
 - (b) Re-organization and re-structuring of debt
 - (c) Sale or lease of part of the plant and machinery or equipment of the enterprise
 - (d) Amalgamation, merger or de-merger of the enterprise with another entity
 - (e) Any other preventive, ameliorative and remedial measures as may be appropriate
 - (f) Such other incidental, consequential or supplemental measures as may be expedient or necessary for revival of the enterprise and **are consistent with instructions issued by RBI .**
- (2) A Revival Plan framed under this Section shall subsist for a maximum period 5 (five) years.
- (3) A Revival Plan framed under this Section may include standard concessions from Central and State Government and local authorities and the creditors as contained in Schedule B.³ Any concession beyond the standard concessions and waivers as contained in Schedule B would require prior approval from Central and State Government and other local authorities as well as the creditors as the case may be.

Any such consent required from any of these entities shall not be unreasonably withheld.

³ The schedule shall provide the standard concessions based on the study of concessions granted to sick units, RBI OTS schemes etc.

25G. Alternative Measures – In case the Provisional Trustee fails to formulate a Revival Plan in consultation with the enterprise, or the enterprise chooses not to prefer a Revival Plan, the Provisional Trustee shall file a detailed report giving reasons and suggest an alternate measure including sale of the enterprise as a going concern or liquidation of assets etc.

25H. Approval of Revival Plan or Alternative Measures – The Adjudicating Authority shall take a final decision for approval of the proposed Revival Plan or the Alternative Measures as proposed by the Provisional Liquidator within 30 (thirty) days of filing of such a Plan with the Adjudicating Authority.

- 25I. Modification of Revival Plan after approval** – (1) At any time after approval of the plan but before the completion of payments under such plan, the plan may be modified by the Adjudicating Authority upon the recommendation of the Provisional Trustee after receiving a request for it from the enterprise or otherwise to:
- a) Increase or reduce the amount of payments on claims of a particular class provided by the plan with prior approval by such class or entity;
 - b) Extend or reduce the time for repayment with prior approval of such class or entity;
 - c) Make such other modifications as may be required with consent of concerned creditors and the enterprise.

Provided that a plan modified under this Section may not extend the overall period of implementation of the plan beyond five years.

25J. Procedure for Appointment, Qualifications and Remuneration of Provisional Trustee – (1) The Facilitation Council shall appoint one or more Provisional Trustee(s) as required, to be attached to the Adjudicating Authority.

- (2) The Provisional Trustee to be appointed by Facilitation Council shall either be a chartered accountant, advocate, company secretary, costs and works accountant or a Partnership Firm or Limited Liability Partnership having a combination of these professions.
- (3) The remuneration payable to the Provisional Trustee shall be approved by the Central Government and shall be jointly and in equal proportion be borne by the enterprise, creditors and the government out of the Fund created under Section 12 of this Act.

25K. Functions of the Provisional Trustee – (1) The Provisional Trustee shall assist the Adjudicating Authority and Appellate Authority in implementation of the provisions of this Chapter subject to supervision and control of the Adjudicating Authority or the Appellate Authority as the case may be.

- (2) The Provisional Trustee shall be under an obligation to act independently, professionally and diligently with a specific obligation to strictly adhere to prescribed time lines under the chapter.
- (3) The Provisional Trustee in discharge of its functions shall work towards the revival of the enterprise while balancing it with the interests of the creditors as well.
- (4) The Provisional Trustee shall discharge the following specific functions:



- a) Preparing an inventory of assets and liabilities of an enterprise including the outstanding dues and list of creditors after verification of claims against the enterprise.
- b) Classification of claims or interests in a particular class (statutory, banks, sundry etc.) only if such claim or interest is substantially similar to the other claims .
- c) Examining the financial and business health of an enterprise and suggest appropriate revival or alternate measures for the enterprise.
- d) Propose, formulate and prepare a Draft Revival Plan for the enterprise in consultation with the enterprise, while also considering the interests of the creditors.
- e) Oversee the implementation of an approved Revival Plan by the enterprise.
- f) To institute or defend any suit, prosecution, or other legal proceedings, whether civil or criminal, in the name and on behalf of the enterprise.
- g) To sell the immoveable and movable property and actionable claims of the enterprise by public auction or private contract, with a power to sell the same as a whole or in parcels.
- h) To sell whole of the undertaking of the enterprise as a going concern.
- i) To do all such other things which may be necessary for formulation and implementation of the Revival Plan and/or for liquidated of assets of the enterprise.

25L. Liquidation of Assets – (1) In case the enterprise on its own or upon filing of an application by creditor(s) chooses to opt for exit through liquidation process, the business and assets of the enterprise shall be liquidated by the Provisional Trustee.

(2) After an order for liquidation is passed by the Adjudicating Authority under Section 25G, the Provisional Trustee on behalf of the Adjudicating Authority shall call upon all the debtors to make payment of any money as may be due to be paid to the enterprise for satisfying the debts and liabilities of the enterprise. Such a payment by a debtor would be required to be cleared within 30 (thirty) days of receipt of notice from the Provisional Trustee.

In case any such payment is delayed beyond the period of 30 (thirty) days specified here, the debtor or the contributory would be liable to pay interest as specified under Section 16 of this Act for the period of delay.

(3) The Provisional Trustee shall also liquidate other movable and immovable assets of the enterprise by conducting sale by way of public auction or by private sale, after due permission from the Adjudicating Authority.

25M. Distribution of proceeds from liquidation – (1) The proceeds of liquidation shall be distributed in the following manner of priority:

- i) Workmen's dues;
- ii) Debt due to secured creditors to the extent such debts rank pari passu with workmen's dues;
- iii) All revenue, taxes, cesses and rates due to the Central or State government or to a local authority.
- iv) Dues owed to unsecured creditors and sundry debtors.

25N Exemption from attachment and sale of personal assets of an entrepreneur – (1) The following property of the entrepreneur shall be exempt from attachment and sale while implementing Revival Plan or liquidating the business and assets of the enterprise under this chapter, irrespective of unlimited liability of an entrepreneur otherwise, under any law including under the Indian Partnership Act and/or under an instrument of guarantee, indemnity or the like:

- a) A single dwelling unit owned by an entrepreneur and his family;
- b) The necessary wearing apparel, cooking vessels, beds and bedding of the entrepreneur, his wife and children and such personal ornaments as, in accordance with religious usage, cannot be parted with by any woman;
- c) Any life insurance policy or pension plan taken on the name of the entrepreneur or his family

25 O. Appeals – (1) An enterprise aggrieved by any order passed by the Adjudicating Authority or a creditor aggrieved by an order of Adjudicating Authority requiring it to grant concession or waiver beyond the automatic approval under Section 25F may appeal before the Appellate Authority within 30 days of rejection of plan by the Adjudicating Authority.

Provided that any such appeal may be filed only if the enterprise or aggrieved creditor within 7 (seven) days of passage of the order, has notified to the Adjudicating Authority and the Provisional Trustee that it shall be preferring such an appeal.

- (2) An appeal filed under this section shall be decided by the Appellate Authority within 30 (thirty) days of filing of the same.
- (3) No appeal can be preferred by the Provisional Trustee or a creditor against rejection of a Revival Plan.

25P. Second Appeal – (1) A second appeal against the order passed by Appellate Authority under Section 25O would lie before the Supreme Court of India within 30 (thirty) days of order of the Appellate Authority subject to deposit of 50% of total outstanding dues by the enterprise.⁵

