IN THE NATIONAL COMPANY LAW TRIBUNAL, DIVISION BENCH – II, CHENNAI

IA(IBC)/146(CHE)/2022 in IBA/45/2020

(Filed under Sec. 60(5) of the Insolvency & Bankruptcy Code, 2016)

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... Applicants / Resolution Applicants

-Versus-

Mr. Tharuvai Ramachandran Ravichandran
Resolution Professional of
M/s. Kiran Global Chems Limited
G-3, Block – 2, Shivani Apartments,
40, East Coast Road,
Thiruvanmiyur, Chennai – 600 041

... Respondent / Resolution Professional

Present:

For Applicants	:	*PH Arvindh Pandian, Senior Advocate* *Raj Jhabakh, Advocate*
For Respondent	:	*Ramji Srinivasan, Senior Advocate* *S. Sathiyanarayanan, Advocate*

CORAM :

Justice (Retd.) S. RAMATHILAGAM, MEMBER (JUDICIAL)
ANIL KUMAR B, MEMBER (TECHNICAL)

Order Pronounced on 16th March 2022

ORDER

Per: **ANIL KUMAR B, MEMBER (TECHNICAL)**

IA(IBC)/146(CHE)/2022 is an Application which is moved by the Applicants under Section 60(5) of the Insolvency and Bankruptcy Code, 2016 (in short 'IBC, 2016') seeking relief as follows:

i) *That this Hon'ble Tribunal may be pleased to set aside the impugned emails / communications dated 25th January 2022 and 27th January 2022 (along with the certificate issued by the Chartered Accountant dated 24th January 2022) as illegal, unlawful, lawless and erroneous;*

ii) *That this Hon'ble Tribunal permit the Applicants to present their Resolution Plan in the capacity of an MSME and consequently direct the Respondent to include the Applicants as an Eligible Resolution Applicant;*

iii) *Permit the Applicant 30 days' time period from the date of this Order to file a resolution plan;*

iv) *That this Hon'ble Tribunal may be pleased to pass such other orders as it may deem fit in view of justice and equity;*

2. The Learned Senior Counsel for the Applicant submitted that the Applicants are the suspended Directors / promoters and 92.7% shareholders of the Corporate Debtor viz. M/s. Kiran Global Chems Limited. It was submitted that the Corporate Insolvency Resolution Process in respect of the Corporate Debtor was initiated by this Tribunal vide order dated 27.04.2021 passed in IBA/45/2020 and the Respondent herein was appointed as the Insolvency Resolution Professional (IRP).

3. The Learned Senior Counsel for the Applicant submitted that vide IA(IBC)/1231(CHE)/2021, the Applicant has sought to set aside the email / order of the Respondent dated 29.11.2021, whereby the Respondent had refused to accept the Expression of Interest submitted by the Applicant and to declare that the Applicants as being eligible for inclusion in the final list of

prospective Resolution Applicants and permit the Applicants to submit the Resolution Plan. This Tribunal vide order dated 22.12.2021 allowed the said application and extended the timeframe for the last date of submission of the Resolution Plan till 27.01.2022. Further, this Tribunal also directed the Respondent to independently verify the size of the Investment in plant and machinery or turnover on the basis of the extant guidelines issued by the Competent Authority in so far as it pertains to MSME status of the Applicants by obtaining a certificate from the practicing Chartered Accountant.

4. It was submitted that pursuant to the said order, 30 days' time period was provided to the Applicant to review the documents to be provided by the Respondent including the Request for Resolution Plan and to file the Resolution Plan. Therefore, it was submitted that the timeframe to file the Resolution Plan has been further extended to 14th February 2022 by virtue of the CoC meeting dated 27.01.2022. It was submitted by the Learned Senior Counsel for the Applicant that vide email dated 30.12.2021 the Applicant requested for communication regarding the amendment of the list of prospective Resolution Applicants with the inclusion of the Applicants herein.

5. The Learned Senior counsel for the Applicant submitted that the Respondent issued an email dated 22.01.2022 stating that the Applicants can submit the Resolution Plan, however being subject to the eligibility under Section 29A read with Section 240A of IBC, 2016 and the determination of the Corporate Debtor being MSME as per the report provided by the Chartered Accountant. It was submitted that to their shock and surprise, the Applicant received an email dated 25.01.2022, wherein the Respondent through bald statement and without having provided the Report prepared by the Chartered Accountant, stated that the Corporate Debtor is not an MSME. Subsequent to the same, certain emails were exchanged between the parties.

6. The Learned Senior Counsel for the Applicant submitted that the conduct of the Respondent is a classic case wherein the Respondent is drawing all attempts to ensure that the Applicants do not participate and are unable to present the Resolution Plan upon time. The Learned Senior Counsel for the Applicant further submitted that the certificate issued by the Chartered Accountant dated 24.01.2022 vide email dated 27.01.2022 is smacked with illegality, bereft of any information of form of veracity, beyond the tenets laid down under the purpose of determining whether an entity is an MSME under The Micro, Small and Medium Enterprises Development Act, 2006. The Learned Senior Counsel for the

Applicant submitted that the certificate issued by the Chartered Accountant is on the basis of the Income – Tax Returns of the Corporate Debtor without considering the Financial Statements of the Corporate Debtor which have been finalized by the Respondent himself through the auditors appointed during his tenure of being the RP of the Corporate Debtor. In support of his contention, the Learned Senior Counsel for the Applicant project the table of Investment made in Plant & Machinery vis-à-vis the Sales Turnover, which is as follows:

S. No.	YEAR	WDV OF PLAN & MACHINERY (₹)	SALES TURNOVER (₹)
1	2018-19	12,51,03,275	170,16,24,721
2	2019-20	10,02,46,075	135,41,98,743
3	2020-21	9,34,78,803	111,99,62,837

7. The Learned Senior Counsel for the Applicant further submitted that apart from the financial statements being conclusive, the Applicants are valid MSME vide Udayam Registration Certificate dated 27.05.2021 which is more than conclusive proof and an undefeatable fact that the Corporate Debtor is an MSME which is being questioned without any basis or validity by the Respondent only with a malafide intention of not permitting the Applicants to enjoy the benefits laid down under the provisions of IBC, 2016.

8. It was submitted that the Applicants vide email dated 27.01.2022 pointed out to the Respondent that the determination of the Corporate Debtor to be an MSME or not cannot be ascertained solely on the basis of the Income Tax Returns for the Financial Years 2019 – 2020, but the fact that the Financial Statements for years beginning from 2020 – 2021 would also have to be considered even more when the Respondent himself has finalized the accounts of the Corporate Debtor for the year 2020 – 2021 which clearly reflect the Corporate Debtor to meeting the thresholds of being an MSME.

9. The Learned Counsel for the Applicant submitted that the Certificate issued by the Chartered Accountant has referred to Income Tax Returns of the Corporate Debtor for the Financial Year 2019 – 2020 which reflect zero value and the non – filing of the tax audit report for the Financial Year 2019 – 2020 and the Applicant states that it is obvious without any iota of doubt that the Income Tax returns reflecting zero value is sheerly on account of technical glitch as the financial statements for the year 2019 – 2020 reflect otherwise. Further, it was submitted that any correction of the Income Tax Returns to reflect the true value of the investment of the Corporate Debtor can be conducted only by the Respondent and the tax audit report for the financial year 2019 – 2020 can only be filed by the Respondent. The Learned Senior Counsel for

the Applicant submitted that neither of these steps are being even considered by the Respondent and the consequence of such in-action done purposefully has severally prejudiced the Applicants.

10. The Learned Senior Counsel for the Applicant submitted that being stifled and aggrieved by the inactions and there being no response by the Respondents, the Applicants issued an email dated 01.02.2022 to the MSME Authorities along with the Financial Statements for the last (3) years of the Corporate Debtor indicating the Investment in Plant & Machinery and Sales Turnover. In response to the same, it was submitted that an email dated 04.02.2022 was received from the MSME Authorities directing the Applicants to file necessary documents and make changes on the Udyam Registration Portal. However, it was submitted that since the Corporate Debtor is under CIRP, the Applicant sought the Respondent to complete the process at Udyam portal.

11. Under the said circumstances, the Learned Senior Counsel for the Applicant submitted that the action of the Respondent in unilaterally and illegally declaring the Corporate Debtor as not an MSME is against the settled provision of law and sought to set aside the email communication and also the Report of the Chartered Accountant in declaring the Corporate Debtor as not an MSME.

12. The Respondent has filed counter. The Learned Senior Counsel appearing on behalf of the Respondent first and foremost submitted that the CIRP in relation to the Corporate Debtor was initiated by this Tribunal on 27.04.2021 and the Applicants herein have obtained the MSME certificate on 27.05.2021 behind the back of the Resolution Professional and that it was submitted that the email id mentioned in the Application is *vishal@kiranglobal.com* and the said email id is operated and managed by the suspended directors and also the mobile number reflecting also belongs to the Applicant. Thus, it was submitted that the Applicant has not only acted illegally but also played fraud upon the Ministry of MSME by intentionally suppressing the relevant and materials fact at the time of obtaining the MSME certificate. It was submitted that the Applicant has obtained the certificate on the basis of misrepresentation and wrong data with a malafide intent to regain the control of the Corporate Debtor through fraudulent manner.

13. The Learned Senior Counsel for the Respondent submitted that the Applicant at the time of filing the Applicant for MSME certificate in the web portal had not only validated the PAN No. of the Corporate Debtor without any authority, but also deliberately stated that 'NO ITR is filed' despite of the fact that the Income Tax Return for the period 2019-20 was filed by the Applicant with 'Zero Value' in all the relevant fields. Thus, it was submitted that in view

of the wrongful conduct, the Applicant is liable to such penalty as specified under Section 27 of the MSME Act.

14. The Learned Senior Counsel for the Respondent submitted that this Tribunal vide order dated 22.12.2021 condoned the delay of 8 days in the submission of Expression of Interest by the Applicant and extended the last date for submission of the Resolution Plan by one month and further directed the Respondent to verify the size of Investment in Plant and Machinery or turnover on the basis of the extant guidelines issued by the Competent Authority to determine the MSME status of the Corporate Debtor by obtaining a certificate from the a Chartered Accountant. It was submitted that in pursuance of the same, the Respondent appointed PM & Co., Chartered Accountants to ascertain or determine the MSME status of the Corporate Debtor and the certificate dated 24.01.2022 was received from the Chartered Accountant on 25.01.2022 which specifically states that the 'Corporate Debtor does not fall under the MSME category'. It was submitted that the said certificate is self – explanatory, clearly bringing out the basis for decision and the details of documents relied upon to form the opinion.

15. The Learned Counsel for the Respondent submitted that the Chartered Accountant has relied on the provisions notified by the ministry of Micro, Small and Medium Enterprises vide notification

No. S.O. 2119(E) dated 26.06.2020 for the purpose of calculation of investment in Plant and Machinery or Equipment and turnover. Thus, it was submitted that the certificate issued by the Chartered Accountant is issued by perusing and scrutinizing the relevant documents as required under the law and hence the question does not arise on the authenticity of the said certificate issued by the Chartered Accountant.

16. The Learned Senior Counsel for the Respondent submitted that the Applicant after receipt of the certificate of the Chartered Accountant on 27.01.2022 has approached the MSME department without any authority requesting to rectify or amend the figures which is a clear case of aferthought, to change the figures on the MSME certificate of which the Applicant has no authority to raise request for change or updation in the MSME certificate. Further, it was submitted that the Applicant has deliberately filed the Income Tax return of the Corporate Debtor for the Financial year 2019 – 20 with 'zero value' in all the relevant field.

17. The Learned Senior Counsel for the Respondent submitted that the Applicant has failed to co-operate with the Respondent and has never handed over any records or information as sought by the Respondent which constrained the Respondent to file an Application under Section 19(2) of IBC, 2016 and the same is pending adjudication before this Tribunal. It was submitted that

the Applicant is willfully disobeying to comply with the directions of this Tribunal in handing over the Company records vide order dated 15.07.2021 passed in IA/565/2021. It was also submitted that the Applicant vide email dated 30.06.2021 stated that the balance sheet for 2018 – 2019 and 2019 – 2020, the Fixed Assets Register will be submitted with the Respondent provided that the Respondent withdraws the Application filed against the Applicant under Section 19(2) of IBC, 2016.

18. The Learned Senior Counsel for the Respondent submitted that as per the clarification issued by the Office of the Development Commissioner (MSME) dated 06.08.2020, the value of the Plant and Machinery or equipment for all enterprises shall be written down value as at the end of the financial year as defined in the Income Tax Act. Further, it was submitted that the MSME status cannot be arrived at on the basis of financial accounts as the financial accounts are stated as per the requirements of the Companies Act, 2013 and the block of assets under the Income Tax are completely different from the block of assets under the Companies Act.

19. The Learned Senior Counsel for the Respondent submitted that the MSME certificate is not authentic and obtained by suppressing the material facts and figures as admitted by the Applicant itself. Further, it was submitted that in order to

determine the MSME classification, the Written Down Value of the Plant and Machinery as per the Income Tax Returns is required to be considered and not the financial accounts as alleged by the Applicant. It was also submitted that the certificate issued by the Chartered Accountant is self – explanatory clearly bringing out the basis for decision and the details of documents relied upon to form the opinion and have arrived at his conclusion based on the regulations of MSME and hence the claim of the Applicant that they are eligible based on the financial accounts is totally incorrect and baseless.

20. The Learned Senior Counsel for the Respondent submitted that the Applicant has failed to provide the Respondent with a copy of the Tax Audit Report for the Financial Year from 2016 – 17 and hence the Respondent was constrained to approach the Income Tax Department to verify and collect the copy of the Tax Audit Reports wherein the Income Tax Officer vide email dated 27.01.2022 stated that the Corporate Debtor has not filed any tax audit report for the period 2016 – 17, 2017 – 18, 2018 – 19 and 2019 – 20 and hence, the requisite details cannot be provided. Further, it was submitted that the ITRs filed by the Corporate Debtor in the earlier years were defective and the status of the Corporate Debtor cannot be determined to be a MSME in terms of the notification issued by MSME Ministry. Further, the immediate

previous ITR filed by the erstwhile management carries wrong figures and the value of Plat & Machinery is stated as NIL and that it appears to be apparently contrary to the figures in the books of accounts.

21. Finally, it was submitted by the Learned Senior Counsel for the Respondent that the Applicant have not approached this Tribunal with clean hands and has acted with a *malafide* intent to obtain the impugned MSME certificate after commencement of CIRP without authorization of Respondent which clearly reflects that the Applicant is desperate to regain the control of the Corporate Debtor through fraudulent action. Under such circumstances, the Learned Counsel for the Respondent prayed for dismissal of the present Application.

22. The Applicant has filed rejoinder and has strongly denied all the averments made in the counter. The Learned Senior Counsel for the Applicant submitted that the Corporate Debtor has obtained a MSME Certificate as earlier as on 09.02.2017, which is much prior to the initiation of CIRP in respect of the Corporate Debtor and as such due to change in law and by virtue of notification dated 26.06.2020, a new MSME registration was necessary as per law which does not any manner alter the existing MSME status of the Corporate Debtor even before the initiation of CIRP. It was submitted that only due to this legal mandate prescribed under the

notification dated 26.06.2020 and to prevent any detriment to the interest of the Applicant, an Application was made to MSME authorities on 27.05.2021.

23. The Learned Counsel for the Applicant placed reliance upon the Judgment of the Hon'ble NCLAT in the matter of **C. Raja John -Vs- Mr. R. Raghavendran, Resolution Professional of Springfield Shelters Pvt. Ltd. & Ors.** in *Company Appeal(AT)(Ch)(Ins) No. 207 of 2021* by order dated 18.06.2021, it was held that when the Corporate Debtor is an MSME and when there was a certificate which existed even prior to CIRP, it is not necessary for the Promoters to compete with other Resolution Applicant to regain control of the Corporate Debtor.

24. The Learned Counsel for the Applicant submitted that the certificate of the Chartered Accountant as referred by the Respondent does not in any way render the Corporate Debtor as not bring an MSME, as the certificate issued by the MSME authorities even prior to the CIRP is still valid under the law. Further, the Learned Senior Counsel for the Applicant also placed reliance upon the decision of Hon'ble NCLAT in the matter of **Rakesh Kumar Agarwal and Ors. -Vs- Devendra P. Jain, Liquidator of Asis Logistics Limited**, *in Company Appeal (AT)(Ins) No. 1034 of 2020* wherein the Hon'ble NCLAT permitted

promoters to present a Scheme under Section 230 of the Companies Act, 2013 without the requirement of MSME.

25. Heard the submissions made by the Learned Senior Counsel for both the parties. From the submissions made by the Learned Senior Counsel for both the parties, the sole issue which is required to be decided in the present case is that whether the Corporate Debtor is an MSME and the Applicants herein are eligible to submit a Resolution Plan in respect of revival of the Corporate Debtor.

26. In order to better address the said issue, it is important to get the facts straight. It is not in dispute that the Corporate Debtor has already obtained an MSME Registration in the year 2017 itself. However, the same was placed on record only in the rejoinder filed by the Applicant. Be that as it may, the Government of India, by way of notification No. S.O. 2119(E) dated 26.06.2020 has notified certain criteria for classifying the enterprises as micro, small and medium enterprises and specifies the form and procedure for filing;

MINISTRY OF MICRO, SMALL AND MEDIUM ENTERPRISES
NOTIFICATION

New Delhi, the 26th June, 2020

S.O. 2119(E).—In exercise of the powers conferred by sub-section (1) read with sub-section (9) of section 7 and sub-section (2) read with sub-section (3) of section 8, of the Micro, Small and Medium Enterprises Development Act, 2006, (27 of 2006), hereinafter referred to as the said Act, and in supersession of the notifications of the Government of India in the Ministry of Micro, Small and Medium

Enterprises number S.O.1702 (E), dated the 1st June, 2020, S.O. 2052 (E), dated the 30th June, 2017, S.O.3322 (E), dated the 1st November, 2013 and S.O.1722 (E), dated the 5th October, 2006, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-Section (ii), except as respects things done or omitted to be done before such supersession, the Central Government, after obtaining the recommendations of the Advisory Committee in this behalf, hereby notifies certain criteria for classifying the enterprises as micro, small and medium enterprises and specifies the form and procedure for filing the memorandum (hereafter in this notification to be known as ―Udyam Registration‖), with effect from the 1st day of July, 2020, namely:--

1. Classification of enterprises.- An enterprise shall be classified as a micro, small or medium enterprise on the basis of the following criteria, namely:--

(i) a micro enterprise, where the investment in plant and machinery or equipment does not exceed one crore rupees and turnover does not exceed five crore rupees;

(ii) a small enterprise, where the investment in plant and machinery or equipment does not exceed ten crore rupees and turnover does not exceed fifty crore rupees; and

(iii) (a medium enterprise, where the investment in plant and machinery or equipment does not exceed fifty crore rupees and turnover does not exceed two hundred and fifty crore rupees.

2. Becoming a micro, small or medium enterprise.—

(1) Any person who intends to establish a micro, small or medium enterprise may file Udyam Registration online in the Udyam Registration portal, based on self-declaration with no requirement to upload documents, papers, certificates or proof.

(2) On registration, an enterprise (referred to as ―Udyam‖ in the Udyam Registration portal) will be assigned a permanent identity number to be known as ―Udyam Registration Number‖.

(3) An e-certificate, namely, ―Udyam Registration Certificate‖ shall be issued on completion of the registration process.

3. **Composite criteria of investment and turnover for classification.—**

(1) A composite criterion of investment and turnover shall apply for classification of an enterprise as micro, small or medium.

(2) If an enterprise crosses the ceiling limits specified for its present category in either of the two criteria of investment or turnover, it will cease to exist in that category and be placed in the next higher category but no enterprise shall be placed in the lower category unless it goes below the ceiling limits specified for its present category in both the criteria of investment as well as turnover.

(3) All units with Goods and Services Tax Identification Number (GSTIN) listed against the same Permanent Account Number (PAN) shall be collectively treated as one enterprise and the turnover and investment figures for all of such entities shall be seen together and only the aggregate values will be considered for deciding the category as micro, small or medium enterprise.

4. **Calculation of investment in plant and machinery or equipment.—**

(1) The calculation of investment in plant and machinery or equipment will be linked to the Income Tax Return (ITR) of the previous years filed under the Income Tax Act, 1961.

(2) In case of a new enterprise, where no prior ITR is available, the investment will be based on self-declaration of the promoter of the enterprise and such relaxation shall end after the 31st March of the financial year in which it files its first ITR.

(3) The expression ―plant and machinery or equipment‖ of the enterprise, shall have the same meaning as assigned to the plant and machinery in the Income Tax Rules, 1962 framed under the Income Tax Act, 1961 and shall include all tangible assets (other than land and building, furniture and fittings).

(4) The purchase (invoice) value of a plant and machinery or equipment, whether purchased first hand or second hand, shall be taken into account excluding Goods and Services Tax (GST), on self-disclosure basis, if the enterprise is a new one without any ITR.

(5) The cost of certain items specified in the Explanation I to sub-section (1) of section 7 of the Act shall be excluded from the calculation of the amount of investment in plant and machinery.

5. Calculation of turnover.—

(1) Exports of goods or services or both, shall be excluded while calculating the turnover of any enterprise whether micro, small or medium, for the purposes of classification.

(2) Information as regards turnover and exports turnover for an enterprise shall be linked to the Income Tax Act or the Central Goods and Services Act (CGST Act) and the GSTIN.

(3) The turnover related figures of such enterprise which do not have PAN will be considered on self-declaration basis for a period up to 31st March, 2021 and thereafter, PAN and GSTIN shall be mandatory.

6. Registration process.—

(1) The form for registration shall be as provided in the Udyam Registration portal.

(2) There will be no fee for filing Udyam Registration.

(3) Aadhaar number shall be required for Udyam Registration.

(4) The Aadhaar number shall be of the proprietor in the case of a proprietorship firm, of the managing partner in the case of a partnership firm and of a karta in the case of a Hindu Undivided Family (HUF).

(5) In case of a Company or a Limited Liability Partnership or a Cooperative Society or a Society or a Trust, the organisation or its authorised signatory shall provide its GSTIN and PAN along with its Aadhaar number.

(6) In case an enterprise is duly registered as an Udyam with PAN, any deficiency of information for previous years when it did not have PAN shall be filled up on self-declaration basis.

(7) No enterprise shall file more than one Udyam Registration: Provided that any number of activities including manufacturing or service or both may be specified or added in one Udyam Registration.

(8) Whoever intentionally misrepresents or attempts to suppress the self-declared facts and figures appearing in the Udyam Registration or updation process shall be liable to such penalty as specified under section 27 of the Act.

7. Registration of existing enterprises.---

(1) All existing enterprises registered under EM–Part-II or UAM shall register again on the Udyam Registration portal on or after the 1 st day of July, 2020.

(2) All enterprises registered till 30th June, 2020, shall be re-classified in accordance with this notification.

(3) The existing enterprises registered prior to 30th June, 2020, shall continue to be valid only for a period up to the 31stday of March, 2021.

(4) An enterprise registered with any other organisation under the Ministry of Micro, Small and Medium Enterprises shall register itself under Udyam Registration.

8. Updation of information and transition period in classification.—

(1) An enterprise having Udyam Registration Number shall update its information online in the Udyam Registration portal, including the details of the ITR and the GST Return for the previous financial year and such other additional information as may be required, on selfdeclaration basis.

(2) Failure to update the relevant information within the period specified in the online Udyam Registration portal will render the enterprise liable for suspension of its status.

(3) Based on the information furnished or gathered from Government's sources including ITR or GST return, the classification of the enterprise will be updated.

(4) In case of graduation (from a lower to a higher category) or reverse-graduation (sliding down to lower category) of an enterprise, a communication will be sent to the enterprise about the change in the status.

(5) In case of an upward change in terms of investment in plant and machinery or equipment or turnover or both, and consequent re-classification, an enterprise will maintain its prevailing status till expiry of one year from the close of the year of registration.

(6) In case of reverse-graduation of an enterprise, whether as a result of re-classification or due to actual changes in investment in plant and machinery or equipment or turnover or both, and whether the enterprise is registered under the Act or not, the enterprise will continue in its present category till the closure of the financial year and it will be given the benefit of the changed status only with effect from 1st April of the financial year following the year in which such change took place.

9. Facilitation and grievance redressal of enterprises.—

(1) The Champions Control Rooms functioning in various institutions and offices of the Ministry of Micro, Small and Medium Enterprises including the Development Institutes (MSME-DI) shall act as Single Window Systems for facilitating the registration process and further handholding the micro, small and medium enterprises in all possible manner.

(2) The District Industries Centres (DICs) will also act as Single Window facilitation Systems in their Districts.

(3) Any person who is not able to file the Udyam Registration for any reason including for lack of Aadhaar number, may

approach any of the above Single Window Systems for Udyam Registration purposes with his Aadhaar enrolment identity slip or copy of Aadhaar enrolment request or bank photo pass book or voter identity card or passport or driving licence and the Single Window Systems will facilitate the process including getting an Aadhaar number and thereafter in the further process of Udyam Registration.

(4) In case of any discrepancy or complaint, the General Manager of the District Industries Centre of the concerned District shall undertake an enquiry for verification of the details of Udyam Registration submitted by the enterprise and thereafter forward the matter with necessary remarks to the Director or Commissioner or Industry Secretary concerned of the State Government who after issuing a notice to the enterprise and after giving an opportunity to present its case and based on the findings, may amend the details or recommend to the Ministry of Micro, Small or Medium Enterprises, Government of India, for cancellation of the Udyam Registration Certificate.

[F. No. 21(5)/2019-P&G/Policy (Pt-IV)]
A. K. SHARMA, Secy.

27. Thus, from the above said notification, it is manifest that all the enterprises which have been registered as MSME before 30.06.2020 are required to register again after 01.07.2020, afresh. Further, the old MSME Registration Certificate was valid only upto 31.03.2021.

28. It is also pertinent to note here that Section 4 of the said notification also describes about the calculation of investment in Plant and Machinery or equipment and how it is required to be done. A conjoint reading of the Section 7 and 4 of the above notification afore-extracted provisions would show that an

enterprise which claims to be an MSME is required to satisfy the conditions as laid down in Section 4 and is required to register afresh as per stated in the notification.

29. While coming to the facts of the present case, it is required to be seen that the Corporate Debtor has already obtained a certificate of MSME as early as on 09.02.2017. However, as per the notification No. S.O. 2119(E) dated 26.06.2020, in terms of Section 7, the Corporate Debtor is required to again register itself in order to claim the benefit of MSME. By operation of Section 7, the MSME certificate dated 09.02.2017 is not valid after 31.03.2021. Further, in order to arrive at calculation of investments, Section 4 stipulates the method in which it is required to be done.

30. Admittedly in the present case, the CIRP in respect of the Corporate Debtor was initiated by this Tribunal on 27.04.2021 and the new MSME certificate was obtained by the Applicants only on 27.05.2021. It is not in dispute that the MSME certificate dated 27.05.2021 was obtained by the Applicants after the commencement of CIRP and without the knowledge of the Resolution Professional. Further, after the initiation of CIRP, when the affairs of the Company were handed over the IRP, the Applicants ought not to have gone ahead and given their email

address and phone number for registration in the Udyam portal. This act of the Applicants is viewed seriously by this Tribunal.

31. In the present case, the Applicants after obtaining the MSME Certificate without the knowledge of the RP and without disclosing any details as to the same, in para 11 of the Application has pleaded as follows;

> 11. ....The Applicant state that since the Corporate Debtor is under Corporate Insolvency Resolution Process, the Applicants in good governance and keeping in spirit of the provisions of the Insolvency and Bankruptcy Code, 2016 issued an email communication dated 6th February 2022 to the Respondent to complete the necessary action with the Udyam Registration Portal followed up with a reminder on 8th February 2022, which emails, have not been responded or acted upon till date by the Respondent......

32. A perusal of the aforesaid averment would show that the Applicants in good governance and keeping in spirit of the provisions of IBC, 2016 has stated that the RP has not acted and completed the necessary action with the Udyam portal, however in the present case, without the knowledge of the RP, the Applicants have gone ahead and obtained the MSME Certificate and is trying to switch over on the blame upon the RP to state that he has not acted upon. Further, it is also pertinent to note here that the RP has filed IA/565/2021 before this Tribunal under Section 19(2) of IBC, 2016 seeking directions against the Applicants herein to provide certain documents and orders were passed by this Tribunal

vide order dated 15.07.2021. Till date the said application is not disposed of by this Tribunal.

33. Be that as it may, in the facts and circumstances of the present case, it is imperative for this Tribunal to ascertain whether the Corporate Debtor is an MSME or not in tune with the notification issued by the Government of India, by way of notification No. S.O. 2119(E) dated 26.06.2020. This Tribunal already vide order dated 22.12.2021 passed in IA(IBC)/1231/CHE/2021 directed the RP to verify the size of investment in Plant & Machinery or turnover on the basis of the extant guideline issued by the Competent Authority in so far as it pertains to MSME status by obtaining a certificate from the Chartered Accountant. In pursuance of the same, it is seen that the RP has appointed PM & Co., as the Chartered Accountants who have given his Certificate dated 24.01.2022 to the RP.

34. It is seen that the said Chartered Accountants, after going through the provisions of MSME and the notification of the Government of India, vide No. S.O. 2119(E) dated 26.06.2020 have given a conclusion that the Corporate Debtor cannot be classified as MSME enterprises. The said certificate of the Chartered Accountants dated 24.01.2022 is extracted hereunder:

PM & Co.
Chartered Accountants

January 24,2022

To

Shri T R Ravichandran
Resolution Professional - Kiran Global Chems Limited
IBBI/IPA-002/N00241/2017-18/10692
#63, 3rd Floor, C P Ramaswamy Road
Alwarpet, Chennai 600 018

<u>Certificate on MSME Classification of Kiran Global Chems Limited</u>

1. Background: Kiran Global Chems Limited is currently under Corporate Insolvency Resolution Process, and its affairs are being managed by Resolution Professional, Shri T R Ravichandran (IBBI Regn No: **IBBI/IPA-002/N00241/2017-18/10692).**

Hon'ble NCLT, Chennai vide its' order dated December 22, 2021(Ref: IA(IBC)/1231CHE/2021 in IBA/45/2020) directed the Resolution Professional "to verify the size of investment in Plant and Machinery or turnover on the basis of the **extant guideline** issued by competent authority in so far as it pertains to MSME status by **appointing** a Certificate from a Practicing Chartered Accountant"

Accordingly, Shri T R Ravichandran, Resolution Professional for Kiran Global Chems Limited, appointed our firm P M & Co., Chartered Accountants, vide letter of engagement dated January 04, 2022, to verify the size of investment in Plant and Machinery or turnover on the basis of the extant guideline issued by competent authority in so far as it pertains to MSME status.

2. What constitutes **MSME**: MSME's classification are defined in Section 7 of The Micro, Small and Medium Enterprises Development Act, 2006, and the notification dated 1st of June 2020 supersedes any norms of classification issued earlier under the Act.

Excerpts from the notification no 1702(E) on **classification** of MSME:

...*The Central Government, hereby notifies the following criteria for classification of micro, small and medium enterprises, namely:—*

(i) *a micro enterprise, where the investment in Plant and Machinery or Equipment does not exceed one crore rupees **and** turnover does not exceed five crore rupees;*
(ii) *a small enterprise, where the investment in Plant and Machinery or Equipment does not exceed ten crore rupees **and** turnover does not exceed fifty crore rupees;*
(iii) *a medium enterprise, where the investment in Plant and Machinery or Equipment does not exceed fifty crore rupees **and turnover** does not exceed two hundred and fifty crore rupees.*

This notification came into effect from 01.07.2020.

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3. Definition of Turnover: As provided for in the MSME Act.

(1) Exports of goods or services or both, shall be excluded while calculating the turnover of any enterprise whether micro, small or medium, for the purposes of classification.

(2) Information as regards turnover and exports turnover for an enterprise shall be linked to the Income Tax Act or the Central Goods and Services Act (CGST Act) and the GSTIN.

(3) The turnover related figures of such enterprise which do not have PAN will be considered on self-declaration basis for a period up to 31st March, 2021 and thereafter, PAN and GSTIN shall be mandatory.

4. Definition of investment in plant and machinery or equipment: Clarification issued by Office of the Development Commissioner (MSME) dated 6th of August 2020

Para 5 of the said clarification states:

"...

(i) *There are clarifications sought by the entrepreneurs regarding valuation of plant and machinery or equipment (sic) on cost or purchase price while filling the Udyam Registration*

(ii) ***Para 3 of Clause 4 Notification No. S.O. 2119(E) dated 26.6.2020 reads as follows: "The expression plant and machinery or equipment of the enterprise, shall have the same meaning as assigned to the plant and machinery in Income tax Rules, 1962 framed under the Income tax Act, 1961 and shall include all tangible assets (other than land and building, furniture and fittings)"***

(iii) *It is clarified that online Form for Udyam Registration captures depreciated cost as on 31st of March each year of the relevant previous year. Therefore, the value of Plant and Machinery or equipment for all purpose of notification no S.O. 2119(E) dated 26.6.2020 and for all enterprises shall mean the **written down value as at the end of the financial year** as defined in the Income tax Act, and not the cost of acquisition or original price, which was applicable in the context of earlier classification criteria*

5. MSME Classification for Kiran Global:

a) ITRs filed by Kiran Global Chems Limited between Financial years 2016-17 and 2018-19 claims that tax Audit Reports under Section 44AB of Income Tax Act had been filed.
b) Similarly, ITR of financial year 2019-20 mentions that Tax Audit under Section 44AB of Income tax is applicable.
c) It was observed that the IT return filed for the PY 19-20 had been filed with Zeros value in all the relevant fields and also the tax audit report not filed for PY 19-20.
d) However, when scrutinized the Income Tax Portal of the Company, it was observed that, tax audit reports had not been filed since Financial Year 2015-16.

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6. Effects of Non – filing

In the absence of a valid tax audit which is a requirement for the company, the Income Tax Return filed becomes defective in nature u/s 139(9)- explanation (bb) of the Income tax Act .U/s 139(9) of Income tax Act, a defective return when not rectified before the due date specified, it would be deemed as the Assessee has not filled any return of Income.

7. Conclusion:

a. As detailed in Para (5) and (6) above , the Income Tax Return filed in 2019-20 (which is to be used as basis of classification under MSME Act – copy enclosed) had been filed with "Zero value" in all the relevant fields and also the tax audit report not filed for PY 19-20. Tax audit reports from the PY 2016-17 onwards also not filed.
b. Considering the provisions contained in the MSME Act and also the applicability of the relevant provisions to Kiran Global Chems Limited (as detailed in para 5 and 6 above) Kiran Global Chems Limited cannot be classified as MSME enterprise.

For P M & Co
Chartered Accountants
FRN 012594S

Digitally signed by varadharajan CHANDRAMOULI
Date: 2022.01.24 16:22:16 +05'30'

Date: 24 Jan 2022
Place: Coimbatore

V. Chandramouli
Partner
MM No 214642
UDIN - 22214642AAAAAJ2

Annexure:

1. Details of Tax Audit Report Filed from Income Tax Portal
2. Income Tax Return of previous years, which have been classified as defective return by Income Tax Department.
3. Income Tax return filed for the FY 2019-20.

Data Classification – **Confidential.**

-------------------**This Report contains 91 pages including Annexures**-------------------

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35. A perusal of the aforesaid Report would also prove that the Chartered Accountant after verifying the records has found that the Corporate Debtor for the Financial Years 2019 – 2020 has filed the Income Tax Returns with 'Zero Value' in all the relevant fields and has also not filed the Tax Audit Report. Thus, by considering the provisions of MSME Act and also the applicability of the relevant provisions, the Chartered Accountants have given a certificate stating that the Corporate Debtor cannot be classified as MSME.

36. Further, it is also seen from page 199 of the typed set filed along with the counter that when the said question was put forth to the Corporate Debtor as to when 'Zero Value' was mentioned in all the parameters in the ITR filing, it was replied by stating that it is a strategic approach of the Corporate Debtor and all the necessary consequences will be faced by them. Hence, it is proved that the Corporate Debtor knowing fully well the consequences has filled in 'Zero Value' in all the parameters of ITR filing. However, now we are unable to comprehend as to how the Applicants plead that it is a mistake and the RP ought to have rectified the same.

37. Thus, after examining the documents filed by the parties and also after perusal of the Certificate of the Chartered Accountant, this Tribunal comes to an irresistible conclusion that based upon the latest notification issued by the Government of India vide notification vide No. S.O. 2119(E) dated 26.06.2020 and the

procedures specified therein, the Corporate Debtor is not an MSME and the certificate obtained by the Applicants after the initiation of the CIRP, behind the back of the Applicants, with false declarations as to the Income Tax Returns, cannot be considered as valid so as to claim benefits under Section 240A of IBC, 2016.

38. Accordingly, the Application stands **dismissed**. No costs.

-Sd-	-Sd-
B. ANIL KUMAR	**Justice (Retd.) S. RAMATHILAGAM**
MEMBER (TECHNICAL)	MEMBER (JUDICIAL)

Raymond