
Inside the Revamping of Corporate Social Responsibility in India in COVID-19

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INTRODUCTION

India is the first country in the world to make corporate social responsibility (CSR) mandatory, following an amendment to the Companies Act, 2013 in April 2014. Businesses can invest their profits in areas such as education, poverty, gender equality, and hunger as part of any CSR compliance.¹

The objective of this paper is to highlight the latest amendments in the CSR policy and the opportunities as well as the challenges that brings on the table. It is also needed to understand the changes introduced by the new CSR Amendment Rules. The advantages and disadvantages of CSR has been a very hotly debated topic in the recent times.

The Ministry of Corporate Affairs has already proclaimed various activities related to COVID-19, such as the promotion of healthcare, sanitation and disaster management, as eligible CSR activities. Many have pontificated about the role that CSR funds can play in these testing times but much of the discourse has originated from the narrow perception of donating them to designated funds mentioned in Schedule VII of the Companies Act, 2013, which now also includes the Prime Minister Cares Fund. Amidst this conversation, the original vision of unlocking CSR's power and prospect as a tool to strengthen the social responsibility of businesses while capitalising on their physical presence in distributed pockets of the country has been lost in translation.²

BREAKING DOWN THE KEY CHANGES INTRODUCED BY THE 2021 AMENDMENT

1. New Definition of Corporate Social Responsibility

The definition of CSR was considered more or less comprehensive and dubious in nature. It comprises of all those undertakings or programs related to activities, areas or subject specified in Schedule VII of the Companies Act, 2013³. Along with this, other activities not particularly mentioned in Schedule VII were also permitted, subject to the condition that such activities will include areas or subjects specified in Schedule VII of the Companies Act, 2013.

¹ Inside the reshaping of CSR in India during Covid-19, Divya Shekhar, May 2021, Forbes India

² Leveraging CSR to Complement India's Covid-19 Mitigation Strategy, Vishal Tripathi, 21 April 2020

³ Companies Act, 2013

Although there was a need to include any activities, areas or subjects mentioned in Schedule VII of the Companies Act, 2013 but at the same time, the quantum of the same was nowhere an compulsion. The Companies were carrying out any sort of social welfare activities by including the insignificant part of activities mentioned in Schedule VII of the 2013 Act and regarding all activities carried out as CSR.⁴

In accordance with the newly introduced CSR definition, the following activities will not be regarded as part of a CSR expenditure:-

- Activities carried out in normal course of business.

Exclusion for three years till FY 2022-23, in case companies incur expense for Research & Development activity with respect to covid-19 vaccine, drugs or medical devices, to such companies which are engaged in R&D activity of new vaccine, drugs and medical devices in their normal course of business. This exclusion will be allowed only in case the companies are doing such R&D in collaboration with organisations as mentioned in item 'ix' of schedule VII and disclose the same in their board's report.

- Activity carried out outside India.

Excluded: training of Indian sports personnel appearing on behalf of any State or Union territory at national level or India at international level

- Donation to political party under section 182 of the Companies Act, 2013. The same was already excluded by virtue of Rule 4 (7) of the CSR Amendment Rules.
- Activities profiting the employees only-

In case the activity is intended to provide generic benefit to the public and large and the employees also get benefited in the process, the Rule does not intend to discard such activity as a CSR activity. The idea is that the companies should not come out with activities where the employees are the only intended beneficiaries.

It is also noteworthy that the definition of 'employee' has been referred from Code on Wages which is quite broad.

In the draft rules, it was proposed that the activities which have less than 25 percent employees shall be deemed to be CSR activity. This proposal has been dropped in the final Rules.

- Sponsorship activities which help the company in deriving marketing benefits. This has now has been made undoubtedly clear that sponsorship or marketing activities cannot be classified as CSR expenditure.

⁴ A brief on the CSR Amendment 2020, Rachit Garg, April 2020, Ipleaders

- Activities carried out for fulfilling statutory obligation.

This is not a new provision, this was already covered under Rule 4 of CSR by Ministry of Corporate Affairs from where it has been replaced in the definition clause.⁵

2. Definition of CSR Policy

In the CSR Amendment Rules, a new definition has been provided to CSR Policy. Pursuant to such definition, CSR policy essentially means a statement that describes and includes the approach and directions of the Board regarding CSR activity to be undertaken by the company on the recommendation of the CSR Committee. Additionally, it includes the regulations for selection, implementation and monitoring of activities, and the particular manner in which an annual action plan must be prepared. Policy in its literal sense means course of action, terms and conditions, and mechanism to implement or attain something. Its meaning is not just limited to restricting the nature of activities to be undertaken, on the contrary it aims to cover all questions of ‘what, when, how and where?’ If there is a comparison drawn between the new definition with the old repealed definition, it can be established that the streamlining effect has been given to it which appears to be much more clear, explicable and precise in nature.⁶

3. Introduction of the term ‘International Organization’

A new concept of international organization has been introduced in the new Amendment Rules. In accordance with Rule 4(3) of the CSR Amendment Rules: ‘A company may engage international organizations for designing, monitoring and evaluation of the CSR projects or programs as per its CSR policy as well as for the capacity building of their own personnel for CSR.’⁷ This essentially means that a company on which CSR provisions are applicable can engage any international organization for designing, monitoring and evaluation of CSR projects except for the implementation of the CSR projects. Further, whether the CSR expenditure under CSR provisions allow payment to such international organization is yet to be established. The same will be allowed under CSR expenditure or not as the main objective of doing CSR expenditure is doing it in India and not outside India; and making payment to such international organization is also not covered under the scope of definition of administrative overheads provided under CSR Amendment Rules. With respect to Rule 2 (g) of CSR Amendment Rules, International Organisation means ‘an organization notified by the Central Government as an international organization under section 3 of the United Nations

⁵ CSR-comply or suffer provisions made effective, Nitu Poddar, January 2023, Vinod Kothari & Company

⁶ Draft Rules make CSR more prescriptive, Pammi Jaiswal, Vinod Kothari & Company

⁷ MINISTRY OF CORPORATE AFFAIRS NOTIFICATION New Delhi, 22nd January 2021

(Privileges and Immunities) Act, 1947⁸ to which the terms of the Schedule to the said Act apply.⁹

Treatment of surplus out of CSR program

Yet another notification for making Section 21 of the Companies (Amendment) Act, 2019 effective with respect to the amendments in the second proviso to Section 135(5) of the Companies Act, 2013 and insertion of sub-section (6) under Section 135 was introduced on 22th January 2021. Prior to such amendment, the concept was either ‘comply or explain the reason for not complying’, but after the amendment has been made effective under the second proviso to Section 135(5), the concept has totally changed to ‘comply or transfer the unspent amount’ to a Fund specified under Schedule VII of the Companies Act, 2013 within 6 months from the end of the financial year. Therefore, even in the cases where implementing agency has been hired to perform CSR Activity, the Company has to justify whether actual expenditure has occurred or not and in case it has not occurred, the company is under obligation to transfer such ‘unspent amount’ to the fund specified under Schedule VII of the Companies Act, 2013.

Whereas, if the company has undertaken any ongoing project in accordance with a CSR Activity, the Company has to transfer the unspent amount to a specific account namely ‘Unspent Corporate Social Responsibility Account’ to be opened with any Scheduled Bank within a period of thirty days, and the company must make assure that the amount is spent within a period of three years, failing which, the unspent amount will be transferred to the fund specified under Schedule VII of the Companies Act, 2013.

5. Meaning of the concept of ‘Ongoing Projects’ and its significance

The definition of Ongoing Projects provided by Rule 2 (i) of the CSR Amendment Rules describes it as multi-year projects carried out by the company in fulfilment of its CSR obligations with a timeline not exceeding three years. Additionally, this also covers those projects which were initially not approved as multi-year projects but the board has extended the same beyond one year on reasonable grounds and justification.¹⁰ Further, the question arises whether the CSR Ongoing Projects must be completed in three years or only the amount of CSR expenditure under obligation must be spent in such timeframe and the project can be carried out beyond three years. With respect to this question raised, one must assure that the ongoing project and CSR expenditure both have to be achieved within the period of three years. It is noteworthy that the year of commencement shall not be included while calculating the three years period for the multi-year projects since inception.

⁸ MINISTRY OF CORPORATE AFFAIRS NOTIFICATION New Delhi, 22nd January 2021

⁹ Commentary on newly amended CSR Rules 2021, Santosh Pandey, March 2021, Taxscan

¹⁰ MINISTRY OF CORPORATE AFFAIRS NOTIFICATION New Delhi, 22nd January 2021

6. Changes in CSR Implementation (Rule 4) with respect to Rule 4 of the CSR

The board is obligated to undertake the CSR Project either by itself or via a Company established under Section 8 of the Companies Act, 2013¹¹, registered public trust or society established by the Company or Central Government or State Government or through entity established under the statutory act of parliament or a state legislature. Also, the companies established under Section 8 of the Companies Act, 2013, registered public trust or society, not being an entity established by the Company, Central Government or State Government, or under any statutory act of parliament or state legislature can become involved in the implementation of CSR, provided such entity must have an recognized track record of at least three years in undertaking similar projects. Additionally, Section 8 Company, registered public trust or society, not being incorporated by the central government or state government or under any statutory act of parliament or state legislature, must also be registered under Section 12A and 80G of the Income Tax Act, 1961,¹² and the companies not having such registration under the Income Tax Act, 1961 will not be eligible to undertake CSR Activities for the purpose of Companies Act, 2013. The amendment introduced by the new CSR Amendment Rules has taken a very deep turn and though the registration under Income Tax Act, 1961 is not mandatory in nature, but the same will be mandatory for the purpose of the Companies Act, 2013.¹³

7. Evolution of ‘Impact Assessment’ Concept

According to the new CSR Amendment Rules, an obligation has been made for certain companies to compulsorily get an impact assessment done. These companies include the companies which have an average CSR obligation of INR 10 Crore or more in the last three preceding financial years. This impact assessment has to be carried out by an independent agency and must be done for those CSR Projects undertaken by the Company which has an outlay of at least INR 1 crore and one year has elapsed before carrying out such impact study. The objective of introducing such a concept is to discover and substantiate whether the CSR Projects undertaken by the Company have in actuality benefited society to a satisfactory extent or not. The impact assessment hypothesis is nothing but similar to the examination of the patient done by the doctors after completion of their treatment.¹⁴

8. Changes in the provision of ‘CSR Expenditure’

In the past, the rule related to CSR Expenditure was very ambiguous with loopholes as it only laid out that any expenses incurred for the CSR Activities sanctioned by the board will be equivalent to CSR Expenditure. Surprisingly, contribution to the corpus of CSR was regarded as CSR Expenditure. At the same time, if any expenses are incurred not in line with what has been mentioned in Schedule VII of the Companies Act, 2013, the same will not be regarded

¹¹ Companies Act, 2013

¹² Income Tax Act, 1961

¹³ Commentary on newly amended CSR Rules 2021, Santosh Pandey, March 2021, Taxscan

¹⁴ CSR-comply or suffer provisions made effective, Nitu Poddar, January 2023, Vinod Kothari & Company

as CSR Expenditure, as result of which the Companies had started booking expenditure under various heads with respect to CSR Activities and the true and fair picture of real expenditure which was supposed to be incurred on the CSR Activities was not underlined. However, now this issue has been systematically dealt with by making proper upper caps for the expenditure which cannot be ignored from incurring but where major manipulation can happen. To begin with, the upper cap has been provided on the expenditure for Administrative Overheads and the maximum of 5 percent of the total CSR Expenditure can now be spent under such head. Furthermore, any company which is undertaking impact assessment can book the expenditure incurred on such thing under CSR Expenditure and the same shall not exceed 5 percent of the total CSR Expenditure or INR 50 Lakhs, whichever is less.¹⁵

9. Set Off Provisions

A lot of times the CSR Activities carried out by the Company makes more expenditure than the obligation under the Act. Since there was no provision of set-off of such excess expenditure and such excess amount spent cannot be carried forward for the upcoming years, corporates were not religiously spending on CSR. Under the new rules, particular provision has been inserted for such set-off under Rule 7(3) of the CSR Amendment Rules, which now allows the set-off of any excess amount spent by the Company in any year to carry forward for subsequent three years for set off against the obligation under Section 135(5) of the Companies Act, 2013 for those years.¹⁶ Before this the Company must ensure certain nominal points like 'such excess amount is not including any surplus arising out of CSR Activities' and Board has passed a resolution for giving that effect of carrying forward and set off. This new provision will most definitely encourage more CSR Activities without any restrictions in mind.¹⁷

10. Treatment of Capital Assets under [Rule 7(4)]

Under the new provisions, companies are allowed to spend CSR amount to create or acquire capital assets, but, such capital assets cannot be held by the Company itself and shall be held either by Company established under Section 8 of the Companies Act, 2013, Registered Trust, or Society having charitable objects and who have obtained CSR Registration number by filing e-Form CSR-1, or by beneficiaries of the said CSR Project, in the form of self-help groups, collectives, entities, or by a public authority. In all respects, the capital assets created or acquired by spending CSR amount will be held by the above-mentioned persons in a fiduciary capacity and the company cannot hold the owners of the same. Furthermore, if any capital assets created by the company prior to commencement of CSR Amendment Rules, the same shall be transferred in favour of the above-mentioned persons within 180 days from the

¹⁵ Commentary on newly amended CSR Rules 2021, Santosh Pandey, March 2021, Taxscan

¹⁶ MINISTRY OF CORPORATE AFFAIRS NOTIFICATION New Delhi, 22nd January 2021

¹⁷ Commentary on newly amended CSR Rules 2021, Santosh Pandey, March 2021, Taxscan

commencement of such rules, which may be further extended by the board based on reasonable ground and justification for 90 days.¹⁸

IS THE LAW BEHIND CORPORATE SOCIAL RESPONSIBILITY WORKING AS INTENDED?

Earlier, many companies in India were using shady means and loopholes in the Companies Act to avoid disbursing large funds for CSR activities. One could marvel at the level of creativity involved in strategizing this evasion. Rather than fulfilling their social obligation and doing public welfare, they were convoluting the meaning of sustainability to serve their own financial interests. Many large organizations were handling CSR through their foundations while some intermediate size companies were creating internal teams to supervise projects carried out by implementing partners. Additionally, many companies had grabbed at the simple solutions for their desired expenditure, by financing the government's most pressing issues such as building toilets as part of Narendra Modi's 'Clean India Mission' or pumping investments into the Prime Minister's Relief Fund.

One of the ways Indian companies were increasing their profit in the name of CSR is through awareness campaigns. As innocuous as it may sound, these campaigns were actually profit driven marketing schemes that do more for the brand than the beneficiaries.

Awareness campaigns usually incorporate matters related to health and sanitation. Corporates classify them as social outreach programmes/schemes for behaviour change. Fast moving Consumer Goods (FMCG) companies run these campaigns as part of their CSR in new markets to grow market for their own products, like handwash, soaps, sanitizers, detergents and other toiletries. This CSR expenditure would have otherwise fallen under the cost for business promotions. There is no room for shared value proposition in CSR, yet some conglomerates are getting away with it especially after COVID-19.

These are all noble causes but are these actions really promoting CSR in India? Are they creating actual value for the companies and the communities? Are they transforming corporate behaviours? Or are they just a sop to please the government?

However, there are some companies who are doing exceptionally well in regards to CSR, there are some who are catching up and there are some who have not even apprehended the concept of CSR and probably are not doing it the way it should be done.

Former Rajya Sabha Member Beni Prasad Verma was accused of diverting crores of CSR funds by public company SAIL to a private university for his own gain. In the past, ministers

¹⁸ Draft Rules make CSR more prescriptive, Pammi Jaiswal, Vinod Kothari & Company

have reportedly used the CSR funds from public sector companies to hire choppers and run ads for their political parties. With the amendment, any sort of donation to political party under section 182 of the Companies Act, 2013 will not be regarded as a part of the CSR expenditure¹⁹.

Hopefully, the Amendments in the CSR rules will place a greater responsibility on companies in India to set out a clear CSR framework requiring companies to formulate a proper CSR policy and spend on social upliftment activities. Boosting profits is no longer the sole business performance indicator for the corporate and they have to play the role of responsible corporate citizens as they owe a duty towards society.²⁰

LONG WAY TO GO

The new Rules give out strict punishment for non-compliance, which is a long way from the social responsibility regulation that was initially voluntary for companies. The new Rules stipulate greater obligations for the Board and the CSR Committees of companies to monitor and report on CSR activities through annual action plans along with a necessity for certification of the CFO on fund disbursement and utilisation.

Capital assets that companies have produced or obtained using CSR cannot be held directly by them but by the NGOs or project beneficiaries, including a Section 8 company, registered trust or society. Accordingly, if companies procure movable or immovable assets like ambulances or construction of school buildings, for instance, they are bound to pass it on to the CSR entity within six months. So many companies are distressed as they do not have their own CSR Foundations and they usually partner with third-party NGOs that carry out their CSR activities.

Along with this, there are other changes to the Rules that both companies and non-profit organizations are expected to find demanding as they go about their CSR activities this year. One is a provision that states transfer of unspent funds to a designated Unspent CSR account or to a fund specified in Schedule VII of the Companies Act, 2013 within prescribed timelines. This creates a lot more pressure on spending in contrast with using it judiciously.

Professionals and experts in the social sector direct our attention towards other challenges, aggravated by the pandemic and the recent amendments, which need to be ironed out.

Non-Governmental Organizations do not get money to scale up people skills, governance, technological capabilities and their ability to fundraise. Growing organisations require financial assistance for that to be able to make a significant difference. But most organisations, including the amendments, consider these expenses as simply overhead expenses of an NGO. This creates a malicious cycle. If the NGO cannot invest in the growth of their non-profits, they can't deliver a better quality of impact. Corporate Social

¹⁹ Shady tactics by India to spend less on CSR, Kasmin Fernandez, October 2020, The CSR Journal

²⁰ CSR in India is now a law, B The Change, June 2016

Responsibility demands outcomes but are not willing to invest in those line items that are important to organisations.

Amendments are also likely to restructure grant cycles of corporates now, in a way that aligns with an NGO's financial planning cycle of April to March. Earlier, Grant cycles ranged from company to company. So, it was a nightmare to keep track of funds and budget for them. Companies used to juggle with reporting deadlines and timelines which would be different for different funders. With the amendment, the grant cycle will possibly stick to the 'April-March cycle' which will help them to get a realistic estimate of fund inflow and outflow, plan more efficiently, and streamline review and reporting.

Additionally, the compliance requisites and emphasis on impact assessment in the new CSR Rules will stimulate a greater focus on accountability for CSR.²¹

CONCLUSION

The amendments introduced have been focused particularly on the internal control measures of a company. While the amended rules are quite technical in nature, considering the intent of CSR, it should be predominantly 'principle based' then laden with heavy rules and the CSR committee could be burdened with the onus of compliance of the provisions in such case.

In any case, the mind of the government seems to be loud and clear that gone are those days when the companies used to take the CSR provisions lightly by giving fortuitous explanations in the annual report for all the gaps for unspent amount.²²

Besides, pursuant to the Companies Auditor's Report Order 2020, the auditors are needed to provide their inputs and comments on the CSR provisions with specific reference to the transfer of the unspent amount. Thus, the implementation of these amendments will see an advancement in societal standards of living.²³

²¹ Inside the reshaping of CSR in India during Covid-19, Divya Shekhar, May 2021, Forbes India

²² CSR-comply or suffer provisions made effective, Nitu Poddar, January 2023, Vinod Kothari & Company

²³ Commentary on newly amended CSR Rules 2021, Santosh Pandey, March 2021, Taxscan