

Corporate Social Responsibility In India: Truth Behind Legal Façade

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Abstract: *Growth of the companies should be inclusive of growth of the society. May be keeping this in mind Indian law makers introduced the Section 135 in the Companies Act, 2013 thus making India the first country in the world to mandate spending on corporate social responsibility (CSR). It is a revolutionary legislation yet, there are lot of grey areas in the law which makes its espousal and implementation difficult. The paper presents a framework to analyze the key changes introduced by the CSR Rules and Section 135 of the Companies Act 2013. The paper highlights the missing links and ambiguities' relating to the provision and offers valuable suggestions to make smooth and effective implementation of these provisions to enable the state to achieve the true purpose with which these provisions were enacted.*

Key Words : *revolutionary legislation ; grey areas ; missing links; effective implementation*

1. INTRODUCTION:

Corporate social responsibility is a company's sense of responsibility towards society. It is all about how companies manage the business processes to produce an overall positive impact on society. Corporate social responsibility has come a long way in India from responsive activities to sustainable initiatives. Growth of the companies should be inclusive of growth of the society. May be keeping this in mind Indian law makers introduced the Section 135 in the Companies Act, 2013 thus making India the first country in the world to mandate spending on corporate social responsibility (CSR).

Several companies have by now understood that they will benefit from undertaking CSR activities as they have realised the fact that the 'licence to operate' is no longer given by governments alone, but by communities that are impacted by these businesses (Walhurst, 2005). It is believed that there are three potential benefits of demonstrating CSR, reduced employee turnover, increased customer satisfaction and improved reputation (Galbreath, J., 2010). A CSR program that meets the aspirations of communities not only provides them with the licence to operate, but also to maintain the licence, thereby prevent a 'trust deficit' with external stakeholders (PwC, 2013). It is increasingly and widely accepted now that attempting to isolate business from society is unrealistic and that dichotomising economic and social objectives as distinct and competing is false. However many prominent thinkers have reservations that whether it was right to mandate CSR for companies. Good CSR situation is where the firm goes beyond compliance and engages in 'actions that appear to further some social good, beyond the interests of the firm and that which is required by law (Williams, Siegel and Wright) . A renowned businessman and philanthropist Azim Premji, who has been donating to several charitable causes, thinks it is a not a good idea for the government to force companies to spend money (Jayashankar, Paul & Bhat, 2013). Such a mandate can be interpreted as another form of corporate tax under the pretense of CSR.

Data on past CSR spending shows a apparent potential to increase contributions to fitting social and environmental causes. In 2012-13, when section 135 was not mandated 760 firms that crossed the threshold of 5 Crore net profits spent only 33,668 million on CSR activities which amounts to less than 75% of the 2% spending as required by Section 135 (Rai and Bansal, 2014). To understand the guiding spirit and the main idea behind CSR provisions we need to take a closer look. The Section 135 the Companies Act, and CSR Rules have come into effect from the first day of April, 2014. It is pertinent to understand the key changes brought in by the CSR Rules and Section 135 of the Companies Act. For this purpose certain major provisions have been joted down.

2. OBJECTIVES OF STUDY:

- To analyse the key changes introduced by the CSR Rules and Section 135 of the Companies Act 2013.
- To highlights the missing links and ambiguities' in related provisions and offers valuable suggestions to enable smooth and effective implementation.

3. SOME SALIENT FEATURES:

As per the Section 135(1) of Company Act 2013 companies having a net worth of INR 500 crore (Cr.) or more; or a turnover of INR 1000 Cr. or more; or a net profit of INR 5 Cr. or more in a given financial year are required to spend for CSR projects. Section 135(5) mandates spending of 2 percent of the Average net profit during

the three immediately preceding financial years. Example : For Financial Year 2016-17, CSR Contribution Calculation: Average of net profits of FY 2013-14, 2014-15 & 2015-16 needed to be considered.

It is Board of Directors' responsibility to form CSR committee which will formulate and recommend to board the activities to be carried out & amount of expenditure to be incurred from time to time. The Board shall place CSR policy on *company's website* and shall also submit an *annual report* on the CSR activities of the company in the format prescribed in the CSR Rules . However, failure to report CSR spending or the specific reasons for non-expenditure shall attract penalty in the form of fine, which shall not be less than fifty thousand rupees and may extend to INR 2.5 Million. Also, every officer who will be liable for such a default will be punished with imprisonment for a term extending to 3 years, along with fine of minimum fifty thousand rupees but which may extend to INR five lakh rupees or both.

While Section 135 (1) of Companies Act only covers every company incorporated in India. The CSR Rules appear to widen the ambit for compliance obligations to include the *holding and subsidiary* companies as well as *foreign* companies whose branches or project offices in India fulfil the specified criteria.

In case of an *Indian company* average net profit" shall be calculated in accordance with the provisions of section 198 of the companies act 2013. In order to determine the 'net profit', dividend income received from another Indian company or profits made by the company from its overseas branches have been excluded

In case of a *Foreign Company* the CSR Rules prescribe that in case a foreign company has its branch or a project office in India, CSR provision will be applicable to such offices.

Schedule VII mandates expenditure for initiatives, such as promoting education, gender equality, women's empowerment, improving maternal health, or ensuring environmental sustainability. Several new spectrum of activities such as promoting rural sports, nationally recognised sports, setting up homes and hostels for women, orphans and senior citizens, reducing inequalities in socially and economically backward groups and support to technology incubators in academic institutions have also been included in the list of CSR activities under Schedule. Expenditure incurred on specified activities that are carried out in India will qualify as CSR expenditure. Any activity undertaken solely for the benefits of employees and their families will remain outside the purview of CSR activity. The CSR Rules have liberalised the participation of a third party to undertake CSR activities on behalf of the spending company. Such an entity would have to follow the specifications and guidelines regarding utilisation of funds, monitoring and reporting requirements as provided by the spending company.

Full autonomy is granted to the companies to carry out their CSR activities through their own or their through holding, subsidiary or associate company's registered society or trust or Section 8 company have been provided. Collaboration with other companies for undertaking CSR projects or programs is also permitted subject to the condition that the collaborating companies are in a position to report separately as per the reporting requirements under the Companies Act.

The requirement and compliance under the CSR provision will cease to be applicable to a company which for the *three consecutive years* falls outside the purview of the threshold requirement of annual turnover or net worth or net profit as envisaged under Section 135(1) of the Companies Act.

Although the activities enlisted in the Schedule are intended to cover a wide range yet, certain activities are specifically disallowed .One-off events such as marathons/awards/ charitable contribution advertisement/ sponsorships of TV programs ,expenses incurred by companies for the fulfillment of any Act, any form of direct or indirect contribution made to any political party by company etc. cannot be counted towards CSR activity.

4. LIMITATIONS OF CSR PROVISIONS:

There is indeed great insight behind the new provision especially seen from the perspective of government failure to provide for its countrymen with social and educational development. With such a law, companies can be opted for being a partner for investing funds and resources into projects relating to education, health, skill development and in building social infrastructure. Such a partnership is imperative for India if it has to successfully translate its population into a demographic dividend. However, complying with this law does not seem to be an easy task due to some grey areas in the provision and its rules which require clarifications. Some of the limitations in the act have been discussed below.

One of the biggest drawback of CSR provision is that it *lacks precise definition*. What exactly is CSR is defined nowhere in the act. Defining clearly is essential to draft suitable policies within its ambit.

Similarly, there is an *absence of clearly laid down powers, duties and responsibilities of the Committee* entrusted to carry out the CSR policy this leads to the failure of purpose with which the framework was set up by any company.

Absence of any prescribed penalties in case any company fails to comply or set aside 2 per cent of net profits for CSR is another grey area since it is not clear whether any company can get away from non-compliance simply by disclosing reasons for not spending mandatory amount or would they be liable to pay any sort of penalties. This is said to be a major setback due to an absence of a deterrent force to curb fraudulent practices.

Yet another issue is that there may be companies which technically do not fall under the category. Such companies are obviously not keen in making such CSR spending because of the reason that the companies are *not such massive profit making companies* but they do fall under the Section 135 category mainly due to meeting net worth and turnover criteria. This will be detrimental to the interest of the company.

Schedule VII of the draft rules specifically mention a list of eight activities and ninth contribution to PM's National Relief Fund and such other funds set up by governments, which may be chosen by the companies for their CSR spending. The recommended activities are already being circulated by many agencies and individuals and are being accepted by many corporate as the preferred activities for CSR. This is *polarizing the CSR resources to few chosen areas*.

Schedule VII of the original Companies Act, 2013 contained 'social business projects' among the list of various activities that a company could undertake as part of its CSR policy. The Central Government made amendments to the Schedule while deleting 'social business projects' from the list of activities. Although government has powers to amend to make simple alterations without affecting the legislative policies in the Companies Act, 2013 yet by deleting 'social business projects' through the notification, the central government appears to have exceeded its legislative authority and the same may have to face judicial review in coming time.

CSR provisions are not clear on the tax treatment of CSR activities. CSR Rules are silent on the tax treatment of 'contribution' and 'spending' made through CSR fund by the companies. The tax difference between making donations (*contribution*) and spending towards activities enumerated under the Schedule may vary vastly. By including PM National Relief Fund into the Schedule, policy-makers have allowed companies to make donations & merely write cheques and claim tax deductions instead of carrying CSR activities on the ground. Therefore, the new CSR provisions have to be aligned with the existing income-tax laws.

The provisions under FCRA and CSR are overlapping. Any foreign contribution received from any foreign source requires approval under the Foreign Contribution Regulation Act, 2010 ("FCRA"). Therefore any spending or contribution made by the foreign source falling within the ambit of the CSR provision will come within the purview of FCRA hence no spending/contribution can be made without the express approval or permission by the Ministry of Home Affairs. Condition on foreign companies' to make contributions under CSR provision may give rise to inter-regulatory flaw-lines within the broader context of CSR and foreign contribution regime in India.

Activities for Exclusive" benefit to employees and their families will not be considered as CSR. This provision requires further clarification as some (even if occasional/ smaller) benefit to the local community, can also result in the activity being listed as CSR activity..

Although the CSR Rules are explicit in stating that any surplus arising out of CSR activities will not be considered as business profit for the spending company yet there is *ambiguity whether the surplus will form part of the CSR Fund for the next financial year*.

Another issue is that there is *no clarity* under the Companies Act regarding any *mechanism that allows computation of accounts of a foreign company* in order to determine the net worth or turnover of a branch or a project office. Establishing the incidence of CSR coverage in the absence of any clear provision for financial computation of branch or project offices of foreign companies may prove tricky and create practical difficulties.

Schedule VII is said to pose another challenge regarding *contributions to PM's national relief fund and such other funds* established by the central or state government. This is argued to be deeply flawed as it is believed that such an activity is subject to misuse as the funds so raised are not accountable. As per the submission of the Prime Minister's Office (PMO) to the Central Information Commission, the Prime Minister's National Relief Fund itself is not a Government body. It is not even answerable to either houses of the parliament (Verdict by the CIC, A.K. Goel vs PMO, 2009).

No clear directive or guidelines have been set up regarding many issues which exhibits that these provisions are vague. A pertinent point that has been raised with respect to corporate social responsibility is that when a liquor or tobacco company has to comply with section 135 should it be at the same footing with a company which produces environment friendly products for the society. Such questions remain unanswered by this new provision.

Companies Act, 2013 provides a list of CSR activities to be undertaken by the companies but, it is strongly debated that *government should not direct where to spend*. The present discussion on corporate philanthropy without giving any explicit autonomy to companies in choosing their CSR activities may not yield the desired outcome. Permitting only limited activities within the schedule may end up promoting only a passive participation by corporates towards CSR activities. There is harsh criticism on the point that it is not for the government to tell to the companies where to spend and it should be left to the companies to decide the type of CSR activity they want to undertake. Businesses see this provision as impractical and unnecessary as the government has failed to show any specific purpose or objective for adoption of this model for which such expenditure must be made by any Company. Many fallouts are debated for this stance, a few are discussed below.

This has also been criticised by the Planning Commission of India, which holds the view that companies must take CSR as a voluntary measure and it must not be made mandatory since these will lead to a rise in corrupt practices.

It is also argued that before the statutory provision of mandating CSR initiatives in the Indian corporate sector was introduced, CSR was already present in the activities of various corporations and business groups in India. To quote a few examples;

IBM had joined hands with the Tribal Development Department of Gujarat aiming at upliftment of the tribals in the Sasan area of Gir forests. The *Tata Group* had a range of projects which is based on CSR activities like providing health services, family planning, endorsing sports as a part of life by establishing football and archery academies. *Infosys* has created a not-for-profit trust named Infosys Foundation to which it contributes up to 1% of profits after tax annually taking various initiatives in areas of education, research, healthcare, programmes for generating employment. *Reliance Industries Ltd.* has launched a “Project Drishti” which is a countrywide initiative to help the economically weaker visually challenged people. *ITC Limited* is involved in facilitating livelihood of the Indian farmers by partnering with them and came up with ‘e-Choupal’ initiative by leveraging information technology, along with making investments in rain water harvesting to improve irrigation facility, empowering the rural women and providing infrastructural support in the villages. The financial sector in India like *HSBC India, Max New York Life and Standard Chartered Bank* has backed the Green Movement in the country by asking the customers to adopt paperless measures and recognise the environment standards.

5. TRENDS IN CSR SPENDING (Before & After Section 135)

Table 1 : Amount Spent Against the Prescribed 2 Percent on CSR (Before Section 135 & After)

<i>Before</i>			
<i>Year</i>	<i>Amount spent</i>	<i>Prescribed 2 percent</i>	<i>Percentage spent</i>
2012-13	3366.8	4515.4	75
<i>After</i>			
2014-15	5115	6490	79
2015-16	6518	7233	90

Source: *Economic and Political Weekly*13, Dec, 2014 and *KPMG India CSR Reporting Survey 2016*

As per Table I, during the 2015-16 year, against the requirement to spend INR 7233 Cr., Indian companies spent INR 6518 Cr. (90 per cent). This is higher as compared to last year when the companies had spent INR 5115 Cr. (79 per cent) against the requirement of INR 6490 Cr. An increase of 15 per cent spend is noticed during the 2015-16 as compared to period before section 135. It is a positive sign. This is an indication of India Institution getting familiar with the requisites of Act.

Table 1.1 : Sector-wise CSR Spendings by Companies in India (Before Section 135 & After)

<i>Year</i>	<i>Ranking of Sectors as per CSR Spendings</i>			
	Health	Education	Community/Rural Development	Environment
2012-13	III	II	I	IV
2015-16	I	II	IV	III

Source: *Economic and Political Weekly*, 13, Dec, 2014 and *KPMG India CSR Reporting Survey 2016*

As delineated by Table II there is major shift in CSR spending styles from community/rural development projects to health projects in 2012-13 to 2015-16. CSR spending on education has interested most of the companies during the same period. During the year 2015-16, the health, sanitation and education sector account for the 63.74 per cent (INR 4155 Cr.) of the total spends on CSR against 50 per cent (INR 2592 Cr.) in the last year, an increase by 14 per cent. The CSR spend on the rural development sector has considerably increased from INR 443 Cr. (8.84 per cent) in 2014 - 15 to INR 804 Cr (12.34 per cent) in 2015-16 (*KPMG India CSR Reporting Survey 2016*).

Another study undertaken in partnership with **IIM Udaipur** and **Futurescape** is a quantitative and analytical examination of Indian sustainability reports, annual reports and business responsibility reports. A study of top 100 companies for CSR has been done based on the parameters of the Governance, Disclosure, Stakeholders and Sustainability. These four factors are assigned weights of 20% for Governance, 15% for Disclosure, 35% for Sustainability and 30% for Stakeholders respectively and form the basis of the ranking. These weights were based on the outcome of a Delphi study with industry leaders and academics. It covers industries as varied as automobiles, banks, diversified, FMCG, infrastructure, information technology, metals and mining, oil, power, steel, pharmaceuticals, telecommunications and others. As per the study top 10 companies for CSR are listed below.

Table 2 : Survey Based Top 10 Companies for CSR (Before & After Section 135)

<i>Rank</i>	Name of the Company		
	2012-13	2013-14	2015-16
1	Tata Steel Ltd	Mahindra & Mahindra Ltd.	Tata Steel Ltd
2	Tata Chemicals Ltd	Tata Power Company Ltd.	Tata Power Company Ltd

3	Mahindra & Mahindra	Tata Steel Ltd	UltraTech Cement Ltd
4	Maruti Suzuki India Ltd	Larsen & Toubro Ltd	Mahindra & Mahindra Ltd
5	Tata Motors Ltd	Tata Chemicals Ltd	Tata Motors Ltd
6	Siemens Ltd.	Tata Motors Ltd	Tata Chemicals Ltd
7	Larsen & Toubro Ltd	GAIL (India) Ltd.	ITC Ltd
8	Coca-Cola India Pvt. Ltd	BharatPetroleum Corp Ltd	Shree Cements Ltd
9	SAIL	Infosys Ltd.	Bharat Petroleum Corp. Ltd
10	Infosys Ltd.	Jubilant Life Sci. Ltd.	Larsen & Toubro Ltd

Source: IIM Udaipur and Futurescape Sustainability & CSR 2015, 2016 Study

As per the Table III the CSR study of 2014, 2015 & 2016 finds that many companies have scaled up operations in CSR and are looking at it as a priority. Mahindra and Mahindra leads in 2014 compared to the previous study it has jumped two ranks. There are four Tata group companies in the top 10 list. GAIL replaces SAIL in the public sector, while Bharat Petroleum joins the top ten list. One of the most startling observation is that no foreign players make it to the top 10 list. Jubilant Lifesciences, a healthcare company is new kid on the block as it makes to the top ten list.

6. RECOMMENDATIONS FOR MEASURES TO IMPROVE EFFECTIVENESS OF CSR SPENDING UNDER SECTION 135.

Clarity over definition of CSR is necessary. Moreover many important aspects like net profit, provisions for foreign companies etc. are lacking explicit definitions. They are required to be explained appropriately.

List of activities recommended as CSR in Schedule VII should be widened up adding up other critical areas such as Human rights (one of the key business responsibility issues featuring in almost all international corporate responsibility frameworks including UN-Global compact), Governance (its non-inclusion would undermine the role of good governance), livelihood interventions, healthcare issues (accessibility, affordability and availability of health services are critical), Welfare of elderly (elderly care and social security in India and globally is an increasing issue). The new initiatives like Make in India, Skill India, Namami Ganga, Digital India etc have many significant subcomponents which can be considered under CSR. Government need to identify such areas and declare them as a part of CSR. Recent inclusion of CSR in swachh bharaat is good step for its assistance.

Allowing flexibility in using CSR funds like if CSR targets are missed in present year than company should be allowed to carryover it to next year. This way more fund can be available in next year and company will be able to plan accordingly. There can be a sundown clause of 5 or 6 years after which unspent amount has to be transferred to one of the government created funds for the activities listed in schedule VII.

Working on the same logic as of independent directors on the Company board, company promoted trusts/ society/ section 8 companies should not be headed by any of the employees or their family members or any CSR donations should not be given to any trust/society/ section 8 company promoted by any employee or his/ her family members.

At least 50 per cent of the CSR funds should be channelised to work through local development organisations not created by the company to implement activities planned.

Social development projects are often complex with elongated gestation times hence they take time to cede sustainable results. A major percentage of CSR funds should be mandated to be invested in projects aiming at bringing long term sustainable socio-economic changes. This will ensure that CSR activities should not remain activity/ event based but rather work on a long term change viewpoint of social justice and social development.

Some leniency in not inflicting harsh penalties in initial few years is okay. The government should enable the corporates to graduate to compliance culture. but later on some stringent penalties should be imposed.

CONCLUSION:

There is serious debate as to can the companies act on behalf of the government to uphold the spirit of the provision. Due to this, there is a mixed opinion about this move. However the inclusion of CSR in the Companies Act 2013 is believed to be a revolutionary legislation. However the pitfalls as have been discussed in the paper may act as hurdle in the success of this legislation. The government must issue clarifications with respect to the grey areas in the statute which makes effective and efficient adoption and implementation of the law difficult. Until these ambiguities are not removed it is most likely that corporations will exploit them to their own advantages by using it as a shield to escape their liabilities. Therefore, clarifications with respect to above mentioned areas is ardently sought. Eliminating these loopholes has become the need of the hour to achieve the true purpose with which this provision was enacted.

Filling the missing links and removing ambiguities' relating to the provision shall ensure that the provision is accepted by the companies across the country and the objective with which it was incorporated is successfully

achieved. The companies will be then able to involve themselves in wholesome development of the society, living up to the true meaning of the concept of Corporate Social Responsibility and become a responsible entity.

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