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EASE-OF-DOING-CSR ACTIVITIES BY FOREIGN COMPANIES*

INTRODUCTION

India is the first and till now only country to put a statutory mandate on a set of companies to perform CSR activities by spending 2% of average net profits of the company made during three immediately preceding financial year. The CSR is applicable on companies having net worth of rupees five hundred crore or more, or turnover of rupees one thousand crore or more or a net profit of rupees five crore or more during any last three financial year. Section 135 of the Companies Act, 2013 was notified by the Ministry of Corporate Affairs on 27th February, 2014 by the Companies (Corporate Social Responsibility Policy) Rules, 2014 and it came into force on 1st April, 2014. Schedule VII of the Companies Act, 2013 states activities which may be included by the companies in their CSR policies. The Board of the companies falling under the ambit of Section 135 are allowed to undertake its CSR activities through a 'trust' or a 'registered society' or a 'Section 8 Company'.[1] As it is the first time any country in the world has incorporated rules mandating CSR, the law has various ambiguities and even hardships for some companies in performing their CSR activities. The Government by its continuous efforts is trying to clear the ambiguity in the laws and to make it easy for the companies to perform its obligation like it has recently launched an online platform 'Sammaan' on Bombay Stock Exchange which connects a link between Companies willing to engage in CSR and NGO's requiring fund for social welfare activities. However what is pertinent to note here is the proposed amendment in The Foreign Contribution (Regulation) Act, 2010 by the Budget 2016. The purpose of this paper is to critically analyze the effect of this amendment on CSR and Foreign Companies.

Clash of CSR and FCRA

To understand the implications of the amendment, it is important to understand the relation between CSR and Foreign Companies. The Companies Act is the parent Act of which the Central Government by its executive body Ministry of Corporate Affairs has the power to make rules there under which must be supplementary to the Companies Act. When the Companies Act was incorporated he term 'foreign company' was not indicated under Section 135 of Companies Act as it distinguish between a company[2] and a foreign company[3] and under the Companies Act the CSR requirement was imposed only on the companies, but the Ministry of Corporate Affairs by the power of delegated legislation issued a notification by which it imposed CSR requirement even on the foreign companies, which gave rise to the clash of CSR and FCRA

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[1] Rule 3 sub-rule 1 of the Companies (Corporate Social Responsibility Policy) Rules, 2014
[2] Section 2(20) of the Companies Act, 2013
[3] Section 2(42) of the Companies Act, 2013

As it can be hard for the Foreign Companies to undertake CSR activities themselves, they may prefer in undertaking it by donating their 2% of profits to a trust or registered society as per CSR rules. FCRA, 2010 regulates the funding from the foreign sources to the Non-Profit Organizations in India. Section 2(1)(j) of FCRA provides inclusive definition of foreign source and its sub-sub-clause (vi) "*a company within the meaning of the Companies Act, 1956, and more than one-half of the nominal value of its share capital is held, either singly or in the aggregate, by one or more of the following, namely:- (A) the Government of a foreign country or territory; (B) the citizens of a foreign country or territory; (C) corporations incorporated in a foreign country or territory; (D) trusts, societies or other associations of individuals (whether incorporated or not), formed or registered in a foreign country or territory; (E) foreign company;*" This Act created many problems for some companies covered within the ambit of CSR provision By FCRA, an Indian subsidiary of a foreign company and Indian companies which have foreign ownership of more than 50% are deemed to be a foreign source and due to the liberalized Foreign Direct Investment norms many Indian companies have foreign ownership of more than 50%. By this all these companies before undertaking its mandatory CSR activities either through its own foundation or through an NPO has to get its foundation or the NPO registered under this Act, which is a very cumbersome process. The registration process is considered to be unwieldy because of the following reasons-:

- The central office of the registration is only based in Delhi.
- The pre requisite of a foundation in order to get itself registered is that it has to be at least three years old.
- The foundation, in order to get a foreign contribution, must obtain a prior permission from the government, which is only given for a specific purpose and a specific amount and so cannot the foundation cannot use that money for a different project or can accept an additional amount for the same project.[4]
- Before granting the registration to any foundation, the Home Ministry has to check whether a 'reasonable activity' has been taken by that foundation, but what act will constitute a 'reasonable activity' is undefined, which creates a doubt for the companies.[5]
- Although the Act specifies that the permission for the registration has to be granted in 90 days[6], there are no consequences provided by the Act except that the reasons has to be communicated to the applicant,[7] and so it is possible that the time for the approval can even take more than three months.
- Registration granted under this Act is valid only for five years and has to be read after it.[8]

Hence the fulfillment of the CSR requirements for the companies under the purview of FCRA is very difficult and gives them a tough task in fulfilling the legislative mandate of CSR. By mandating CSR for foreign companies we are using their corporate strength for fulfilling the social obligation but even then we are causing hardship for them in doing social welfare.

Finance Act, 2016 and Amendment in FCRA

As stated earlier Section 2(1)(j)(vi) of FCRA provides that a company with more than one-half of the nominal value of its share capital is held any foreign source will also be foreign source. This clause is proposed to be eased by the Finance Bill, 2016 as its Section 233 proposes an amendment in section 2, in sub-section (1), in clause (j), in sub-clause (vi), by inserting the

[4] Section 12(6) of The Foreign Contribution (Regulation) Act, 2010
[5] Section 14(1)(e) of The Foreign Contribution (Regulation) Act, 2010
[6] Section 12(3) of The Foreign Contribution (Regulation) Act, 2010
[7] First proviso of Section 12(3) of The Foreign Contribution (Regulation) Act, 2010
[8] Section 12(6) of The Foreign Contribution (Regulation) Act, 2010

proviso *"Provided that where the nominal value of share capital is within the limits specified for foreign investment under the Foreign Exchange Management Act, 1999, or the rules or regulations made thereunder, then, notwithstanding the nominal value of share capital of a company being more than one-half of such value at the time of making the contribution, such company shall not be a foreign source*;" When this amendment comes into effect will lead to ease in doing CSR activities by foreign owned and controlled companies. This is because by this proviso if any company whose more that 50% nominal value of share capital is held by foreign source can still get exemption from application of FCRA if the nominal value of share capital is within the limits prescribed by FEMA and rules and regulations made thereunder. Further this amendment is proposed to come into affect retrospectively from the 26th September, 2010 just a day before Companies Act came in enforcement which signifies the intention of legislature which was to promote ease-of-doing-CSR activities by foreign companies so they can contribute to social development of country easily.

Conclusion and Suggestion

Although it is a welcome step by the Government and once given effect will lead to social justice in the country, however the same is not enough as it is of utmost importance that clarity is provided by the Government on the Foreign Company. A High Level Committee was set up by Ministry of Corporate Affairs to suggest measure for improved monitoring of the implementation of CSR policies in which it has made some observance, one among such was on foreign Companies. It was stated in the report that "all provisions of Companies Act are applicable to companies incorporated under the Companies Act, 2013 or any other previous company law applicable in India. Foreign companies are defined as either branch office or project office or liaison office of a company incorporated outside India. Therefore, a view was expressed by the stakeholders that Section 135 should not be applicable to foreign companies." Many other problems were highlighted in the report as- a) CSR is not mandated by their home country laws; and b) Board of Directors of such a company is not likely to be located in India. Hence such supervision of implementation and ensuring compliance of the policy may not be feasible for their Board of Directors/ CSR committees and this would be serious challenges in their implementation of CSR programmes by foreign companies. It was suggested by the report that there must be further examination on this issue.

Hence unless these issues of foreign company are not solved and settled by the Government, the amendment will not be as fruitful as it should have been as there will still be ambiguity on the issue. Therefore Government must now consider acting on the report of High Level committee especially on the issue of foreign companies so that the law is enforced in an efficient manner.