CSR – transfer of unspent amount, disturbance of cash flow

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The concept of corporate social responsibility (CSR) was introduced as a mandatory provision in the Companies Act, 2013 ("the Act"). In the Act, Schedule VII states the eligible activities in which companies can spend CSR amount and also provided four different funds to which the CSR amount can be transferred. Since its introduction, the said provisions in the Act underwent amendments several times. The Companies (Amendment) Act, 2019 was introduced on 31st July, 2019 and the provisions of section 21 of the Companies (Amendment) Act, 2019 relating to section 135 of the Companies Act, 2013 came into effect on 22nd January, 2021. There were divergent views since introduction of the provisions that CSR is voluntary and not mandatory and companies either need to spend or explain in the report of Board of directors, the reasons for not spending the CSR amount. Later, it was made clear that it is mandatory for every eligible company to spend the CSR amount, i.e., at least 2% of the average net profits of the last three financial years.

The recent introduction of Companies (Corporate Social Responsibility Policy) Amendment Rules, 2021 (CSR Amendment Rules, 2021) and section 21 of the Companies (Amendment) Act, 2019 have come up with several important and major amendments and one among them is the transfer of unspent CSR amount to a separate fund established by the Government and also to keep the unspent amount relating to on-going projects in a separate bank account opened for this purpose. Quite worryingly, the whole nation is facing the fear of second wave of COVID-19 pandemic; therefore, mandating companies to part with the unspent CSR amount at this crucial juncture is really a tough task for companies, particularly MSMEs which will affect their cash flow drastically.

Unspent amount

The Companies (Amendment) Act, 2019 amended sub-section 5 and 6 of section 135 of the Companies Act, 2013.

Second proviso to sub-section 5 of section 135 of the Companies Act, 2013 was added with the following:

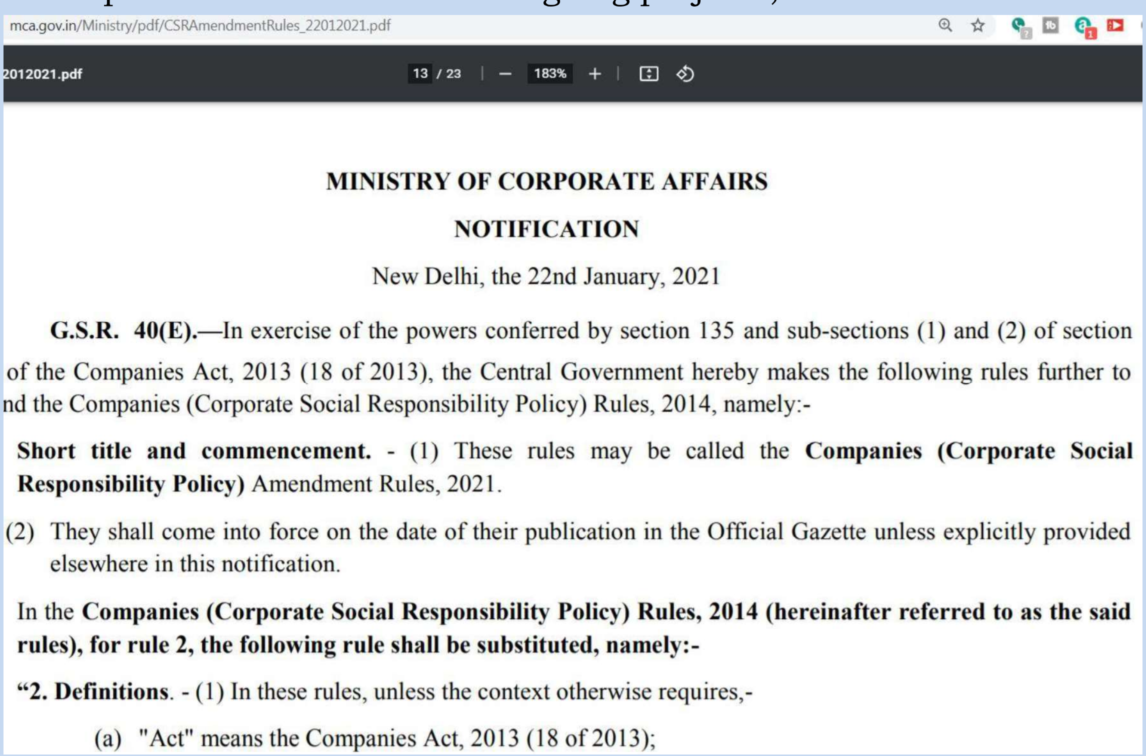
"and, unless the unspent amount relates to any on-going project referred to in sub-section 6, transfer such unspent amount to a Fund specified in Schedule VII within a period of six months of the expiry of the financial year."

Sub-section 6 is inserted to section 135 of the Companies Act, 2013 which states as follow:

"Any amount remaining unspent under sub-section (5), pursuant to any on-going project, fulfilling such conditions as may be prescribed, undertaken by a company in pursuance of its Corporate Social Responsibility Policy, shall be transferred by the company within a period of thirty days from the end of the financial year to a special account to be opened by the company in that behalf for that financial year in any scheduled bank to be called the Unspent Corporate Social Responsibility Account, and such amount shall be spent by the company in pursuance of its obligation towards the Corporate Social Responsibility Policy within a period of three financial years from the date of such transfer, failing which, the company shall transfer the same to a Fund specified in Schedule VII, within a period of thirty days from the date of completion of the third financial year."

Thus, the section which was amended in 2019 has been notified on January 22, 2021 and was effective from that day itself. It was clear that unspent amount has to be transferred to a fund specified in Schedule VII within a period of six months of the expiry of financial year.

If the unspent amount relates to on-going projects, it has to be transferred



MINISTRY OF CORPORATE AFFAIRS

NOTIFICATION

New Delhi, the 22nd January, 2021

G.S.R. 40(E).—In exercise of the powers conferred by section 135 and sub-sections (1) and (2) of section of the Companies Act, 2013 (18 of 2013), the Central Government hereby makes the following rules further to nd the Companies (Corporate Social Responsibility Policy) Rules, 2014, namely:-

Short title and commencement. - (1) These rules may be called the **Companies (Corporate Social Responsibility Policy)** Amendment Rules, 2021.

(2) They shall come into force on the date of their publication in the Official Gazette unless explicitly provided elsewhere in this notification.

In the **Companies (Corporate Social Responsibility Policy) Rules, 2014 (hereinafter referred to as the said rules), for rule 2, the following rule shall be substituted, namely:-**

"2. Definitions. - (1) In these rules, unless the context otherwise requires,-

(a) "Act" means the Companies Act, 2013 (18 of 2013);

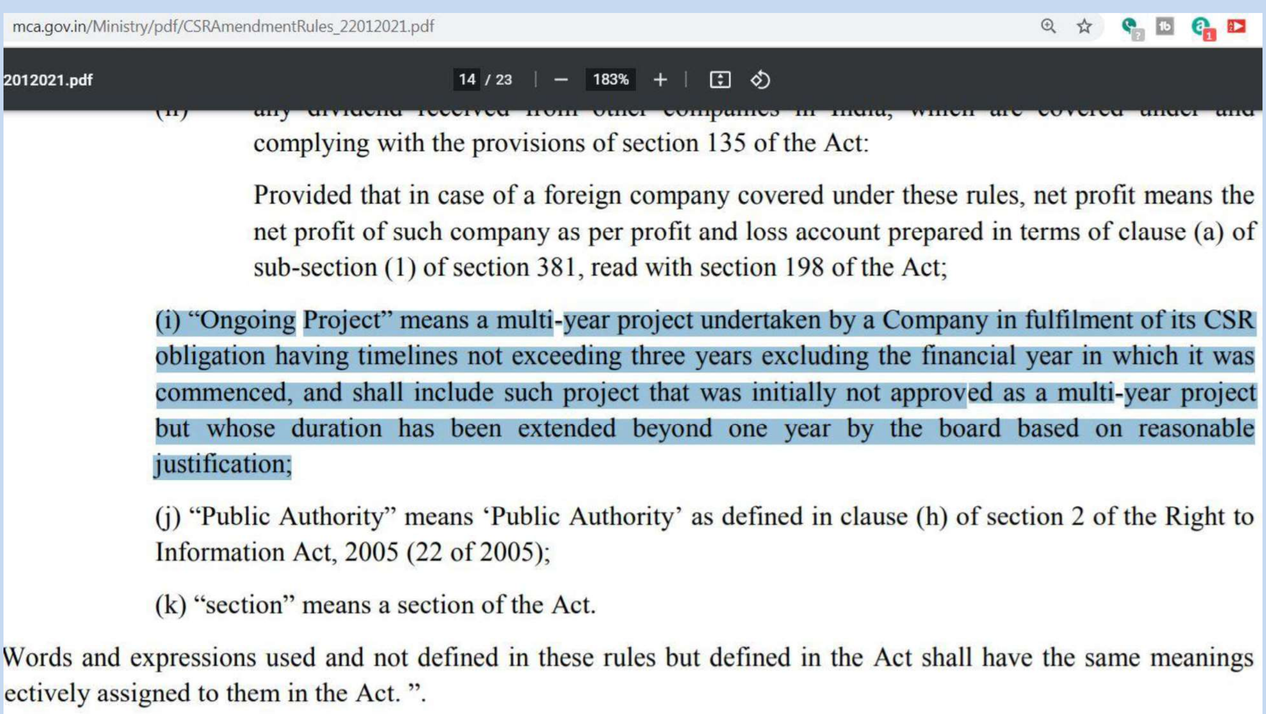
to a special account to be opened by the company in that behalf for that financial year in any scheduled bank to be called “Unspent Corporate Social Responsibility Account” within a period of thirty days from the end of financial year. Such amount shall be spent by the company in pursuance of its obligation towards the Corporate Social Responsibility Policy within a period of three financial years from the date of such transfer, failing which, the company shall transfer the same to a Fund specified in Schedule VII, within a period of thirty days from the date of completion of the third financial year.

The specified funds for transfer of unspent amount are:

- The Prime Minister’s National Relief Fund;
- Clean Ganga Fund set-up by the Central Government for rejuvenation of river Ganga;
- Prime Minister’s Citizen Assistance and Relief in Emergency Situations Fund (PM CARES FUND);
- Swachh Bharat Kosh set-up by the Central Government for the promotion of sanitation.

On-going project

“On-going project” has been defined in the CSR Amendment Rules, 2021. *On-going Project means a multi-year project undertaken by a company in fulfilment of its CSR obligation having timelines not exceeding three years excluding the financial year in which it was commenced, and shall include such project that was initially not approved as a multi-year project but whose*



complying with the provisions of section 135 of the Act:

Provided that in case of a foreign company covered under these rules, net profit means the net profit of such company as per profit and loss account prepared in terms of clause (a) of sub-section (1) of section 381, read with section 198 of the Act;

(i) “Ongoing Project” means a multi-year project undertaken by a Company in fulfilment of its CSR obligation having timelines not exceeding three years excluding the financial year in which it was commenced, and shall include such project that was initially not approved as a multi-year project but whose duration has been extended beyond one year by the board based on reasonable justification;

(j) “Public Authority” means ‘Public Authority’ as defined in clause (h) of section 2 of the Right to Information Act, 2005 (22 of 2005);

(k) “section” means a section of the Act.

Words and expressions used and not defined in these rules but defined in the Act shall have the same meanings ectively assigned to them in the Act. ”.

duration has been extended beyond one year by the Board based on reasonable justification.

If we read the bare definition, its sounds that the duration of on-going project cannot be more than four years. It is not just one-time expenditure. There needs to be clarity whether there is an extension possible after the aforesaid period of three years in extraordinary circumstances or whether the company can increase the period of on-going project after completion of initial period of four years. COVID-19 pandemic is just an example and in the last one year almost all the projects/ programmes to be undertaken by various companies are at a standstill and unless there is a provision that in extraordinary circumstances, i.e., any natural calamities such as earthquakes, floods etc., it would be difficult to complete the on-going projects within the stipulated period of time.

Cash flow

The financial year 2020-21 has severally affected all the companies and more particularly MSMEs. The recent decision of Hon'ble Supreme Court giving relief from the charge of interest for certain delayed period is just an example of the bad situation companies faced with financial difficulties. The Government has also put a brake on Insolvency and Bankruptcy Code for nine months to enable companies to settle down at this juncture.

Another important issue to address is whether companies which transfer funds to a separate bank account for unspent on-going projects can keep such funds in a deposit account to earn interest. The amount to be kept is at least for a period of three years and keeping the amount in bank in a separate account without yielding any return will be advantageous for the banks and disadvantageous to the companies. Keeping the amount as deposit will yield interest and will directly increase the amount kept in the account and companies will have more amount to spend in CSR activities.

Overall, it would be appreciable if the applicability of the provisions is extended by one more year so that companies can plan very well and spend the CSR amount effectively by achieving the objects. Also, the period of on-going project must be relaxed and it must be left on the approval of the Board of directors of the company to further extend the period of on-going projects subject to all necessary disclosures. It will also save companies from the disturbance of cash flow crunch during this alarming, threatening situation of second wave of COVID-19 pandemic.

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