

CONTRIBUTION IN KIND TO BENEFICIARIES

◆ Legal Series Vol. XIII ◆ Issue 2 ◆ May 2020

For private circulation only

Standards & Norms

Resource support on NGO Governance, Accounting and Regulations



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1.01 *Introduction:* In the difficult times of Corona Covid-19 pandemic, many NGOs are helping poor beneficiaries with financial and material support for survival or basic necessities. In our previous issue for the month of April 2020 we had covered the legal intricacies pertaining to Financial Support to beneficiaries. In this issue we are providing FAQs on various doubts raised by the NGOs and experts on contribution in kind to beneficiaries. In the light of the statutory provisions and the judicial precedence it seems that it is permissible to provide contribution in kind to poor beneficiaries for survival or basic necessities.

1.02 *Can a foreign donor transfer material directly to a beneficiary in India?*

Ans: This issue is complex and multifaceted and has to be understood as under:

- A foreign donor has no legal sanction to do charitable activity in India. A foreign donor to have activity in India should have a branch office approval from the Reserve Bank of India under the Foreign Exchange Management Act 1999(FEMA). Further, there is a circular issued by RBI directing branch and liaison offices of foreign donors to seek approval from FCRA authorities to receive foreign contribution in India.
- However, an Indian citizen can receive gifts/articles from a foreign entity including a donor without approval of FCRA, 2010, subject to certain conditions: An individual can receive an Article

upto Rs. 1 lakh as it is excluded from the definition of foreign contribution under section 2(h)(i) of FCRA 2010 read with under Rule 6A of Foreign Contribution (Regulation) (Second Amendment) Rules, 2019. Such Indian citizen can be a beneficiary or a deprived person receiving the gift for self consumption.

- Therefore, a foreign donor may gift some material to a particular beneficiary but it cannot distribute material directly to a large number of beneficiaries, as any such activity will be deemed as advancement of charitable activity in India without approval under FEMA.

1.03 *Can a foreign national (foreign source) transfer material to his friend in India? What are the legal consequences?*

Ans: As discussed under Query No. 1, a foreign national can gift material upto Rs. 1 lakh to his/her friend in India. However, to support a large number of beneficiaries the foreign national has to work through an NGO registered under FCRA 2010.

1.04 *Can a FC registered NGO purchase and distribute material/ equipments among beneficiaries even if the cost of the material is close to Rs. 1 lakh per beneficiary?*

Ans: In principle an FC registered organisation can purchase a capital asset or a high value item and hand it over to a beneficiary. However, in practice it will be difficult to establish how a particular beneficiary deserved to be the sole beneficiary of a high value item. We have to understand that the beneficiary is entitled to receive gift upto Rs. 1

lakh without FC approval, but the NGO is not entitled to distribute high value gift to selected persons. The NGO has to establish that the funds were utilized towards 'relief to poor'. Under normal circumstances it would not be possible to establish such activity as utilized towards 'relief to poor'. Therefore, the distribution of material should be reasonable and need based.

Further, if a capital asset is provided to a group of beneficiaries then it would tantamount to providing the asset to an SHG or a Association of Person on behalf of the beneficiaries. For such transfers permission in Form FC-5 under Rule 24 of FCR Rule 2011 shall become necessary.

1.05 *Can an NGO receive material from foreign sources and distribute them among beneficiaries?*

Ans: Yes, an NGO which is registered under FCRA 2010 or possesses prior permission can receive material from foreign sources and distribute them among beneficiaries.

1.06 *Can an NGO purchase material out of FC funds and hand it over to a Self-Help Group for distribution to its members?*

Ans: An NGO cannot hand over material purchased out of FC Funds to a Self-Help Group (SHG) for distribution to its members. However, the NGO can purchase and directly distribute the materials to the beneficiaries. To distribute the materials through SHG for distribution to its members, the NGO should take permission by filing Form FC-5 under Rule 24 of FCRR Rule 2011. In case of direct distribution to the beneficiaries, the material so distributed shall be treated as utilization in the books of the NGO and self-consumption at the hands of the beneficiary.

However, if the materials are given to a SHG for distribution then such SHG would receive the material for a definite purpose and therefore, it cannot receive without registration or prior permission as provided in section 11 of FCRA 2010.

Sometimes NGOs may use a local SHG as the facilitator for distribution of material. In such circumstances, the NGO should ensure that the SHG is not acting in an independent capacity and all the records and processes are being conducted by the NGO directly. For example identification of beneficiary, maintenance of distribution records etc. should be managed by the NGO and also be in the name of the NGO.

1.07 *Can an NGO purchase material out of FC funds and hand it over to another FC registered organization and then that recipient organization distributes it among beneficiaries?*

Ans: Yes, an NGO can purchase material out of FC funds and hand it over to another FC registered organization and then that recipient organization distributes it among beneficiaries. In this case the material donated shall be treated as contribution in kind in the books of both the donor and donee organisation.

The question of law in this query is, at what point the material shall be deemed as utilized in the books of the donor NGO? Will it be at the time of purchase of material or at the time of transfer of material to the other NGO? In our opinion the donor NGO should treat the fund as utilized at the time of purchase and subsequently when the material are transferred to the donee NGO such transfer should be treated as contribution in kind in the books of both the donor and donee organisations.

1.08 *Can an FC registered organization receive material from foreign sources and keep part of it for their own use in the organization and the rest be distributed among beneficiaries?*

Ans: An NGO holds everything on behalf of public at large, and therefore there is nothing called own use of an NGO. If an NGO receives materials from a foreign donor, unconditionally, then it can decide the distribution pattern and beneficiaries. However, If an NGO receives materials from foreign donor, with restrictions, then it has to follow the distribution pattern and beneficiaries as agreed upon. In either case, nobody except deserving beneficiaries should be benefit out of such materials.

1.09 *Can an FC registered organization purchase material from FC funds and distribute them directly among beneficiaries?*

Ans: Yes, however, the NGO should;

- (i) Do appropriate due diligence to ensure that the material is distributed amongst deserving beneficiaries only.
- (ii) The NGO should keep proper documentation of distribution of material and verifiable record of the beneficiaries.

1.10 *Can an FC registered organization purchase a capital asset (E.g Tractor) from FC funds and hand it over to beneficiaries?*

Ans: In principle an FC registered organisation can purchase a capital asset and hand it over to a beneficiary. However, in practice it will be difficult to establish how a particular beneficiary deserved to be the sole beneficiary of a high value item. Further, if a capital asset is provided

to a group of beneficiaries then it would tantamount to providing the asset to an SHG or an Association of Persons on behalf of the beneficiaries. For such transfers, Form FC-5 should be filed to seek permission under Rule 24 of FCR Rule 2011.

1.11 *What is the documentation needed for distribution of relief materials to the beneficiaries?*

Ans: The purpose of such transfers should be documented with the trail of information regarding the beneficiaries. It is desirable to involve the local panchayat or other authorities in identification of beneficiaries. Further, supporting evidence regarding actual distribution and receipt by the beneficiary should be available. Photograph/video of distribution is treated as a valuable evidence. If the amount is relatively material (say material worth Rs. 3,000/- per beneficiary) then proof pertaining to identity and address may be collected. In all such projects the organisation should be sensitive at the time of distribution and if some minimal exceptions have to be made then such exceptions could be made with approval from appropriate internal authority (within the organisation).

1.12 *Can material be transferred to another organization (not registered under FCRA) for distribution purposes, where such relief material has been bought from FCRA Funds?*

Ans: No, material brought out of FC cannot be transferred to a non FC organisation.

1.13 *How will the receipt of relief material be accounted for in the books of recipient organization? Will it be considered as Income for the purposes of Section 11 of the Act? What would be the valuation of such material for Accounting purposes?*

Ans: The recipient organisation is not required to treat such material as income for the purposes of section 11 of the Income Tax Act, 1961. For the purposes of FCRA 2010 contribution received in kind is required to be recorded separately at a approximate or reasonable valuation. There is a CBDT Circular: No. 580, dated 14-9-1990, which clarifies that donation in kind other than jewellery and furniture (which are specifically exempted) are not subject to application. The Circular and a Note in this regard is provided in *Annexure 1*.

1.14 *Can a donor provide relief material to an 80G registered organization and claim deduction under the said section?*

Ans: No, 80G benefit shall be available only if the NGO receives funds in cash or through banking channels from the donor.

1.15 *Does the distribution of material to any board member or his/her relatives attract section 13(1) of the of the Income Tax Act?*

Ans: Yes, the distribution of material to any board member or his/her relatives shall attract section 13(1) of the of the Income Tax Act. However, if the amount distributed is not material then the entire income will not be taxed and only the value of the material distributed for the benefit of the interested member shall be subjected to tax.

1.16 *How do we report distribution of material to FCRA under COVID-19 reporting? How will the distribution of material till a particular date be valued?*

Ans: The FCRA Department issued DO No. II/21022/36(0069)/2020-FCRA-II dated 01.04.2020 and followed it with a further instruction dated 07.04.2020 regarding the special reporting requirements under Covid-19. The copy of the latest instruction is provided in *Annexure 2*.

All FCRA registered organisation have to provide detail of their Covid-19 related activities to the FCRA Department directly in the online COVID-19 RESPONSE FORMAT that is available at FCRA login Portal <https://fcraonline.nic.in> in the Service under FCRA tab.

Organisations who have sent their report through email should resubmit the same information in the ONLINE format.

The online format may be updated by 15th of every month. At the time of updation, the latest details and figures (inclusive of all support provided till date) should be entered. In other words, cumulative total support provided should be entered as on date during each updation.

The FAQs on the reporting on Covid-19 related work to FCRA Department is provided in *Annexure 3*.

With regard to contribution received in kind an organisation has to follow the rules regarding acceptance and distribution of contribution in kind. The organisation may value the material at an approximate or reasonable value on the date of receipt.

There is no additional change in the quarterly and annual reporting requirements under FCRA 2010.

Standards & Norms aims to provide relevant informations and guidance on NGO governance, Financial Management and Legal Regulations. The informations provided are correct and relevant to the best of the knowledge of the author and contributor. It is suggested that the reader should cross check all the facts, law and contents before using them. The author or the publisher will not be responsible for any loss or damage to any one, in any manner.



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NOTE ON TAXATION OF IMMOVABLE PROPERTY AND DONATION RECEIVED IN KIND

Immovable Property: In case of a charitable or religious organization in immovable property received as donation is treated as corpus donation. As a matter of fact even funds received towards construction of building are also treated as corpus donation. In the case of *St. Anns Home for the Aged v. ITO* [1982] 13 TTJ (Bang.) 185, it has been held that the voluntary contributions expressly received for construction of a building were corpus donations, since they were received and utilized for a capital purpose. In the case of *ITO v. Satya Kabir Sahabani Gadi* [1994] 50 TTJ (Ahd.) 501, the Tribunal held that Building Fund and Kayami Fund were corpus of the Trust and donations received towards such funds were corpus donations. In the case it was held that receipts from a drama staged for the purpose of construction of a new building formed a corpus donation. The Tribunal was of the view that the occasion and circumstances of the case effectively implied that the donation were specifically given for the purpose of construction of a new building.

Secondly, any donation received in kind is not available for utilisation or accumulation unless a further inter charity donation is made, therefore it has been held that such receipts are not subject to application. The only requirement is that they should be used for charitable/religious purposes.

Donation Received in Kind: There is a CBDT Circular : No. 580, dated 14-9-1990, is clarifies that donation in kind other than jewellery and furniture (which are specifically exempted) are not subject to application. The Circular is reproduced as under:

134. *Where donations in kind are not in form of jewellery, furniture or any other notified article*

1. Under section 10(23C)(iv) and (v) of the Income-tax Act, income received by certain charitable and religious funds, trusts and institutions is exempt from tax if the conditions specified for this purpose are satisfied. One such condition, as laid down in the third proviso to section 10(23C), is that the fund, trust or institution applies its income, or accumulates it for application, wholly and exclusively to the object for which it is established and it does not invest or deposit its funds (other than voluntary contributions received and maintained in the form of jewellery, furniture or any other article as the Board may, by notification in the Official Gazette specify) for any period during the previous year otherwise than in any one or more of the forms or modes specified in sub-section (5) of section 11 of the Income-tax Act.

2. References have been received from various trusts and institutions pointing out that certain funds, trusts and institutions running hospitals, creches, orphanages, schools, etc., and enjoying exemption under section 10(23C)(iv) or (v), of the Income-tax Act, often receive donations in kind from various sources for application towards their charitable purposes. These contributions may be in the shape of books, clothes for the poor, grains to feed the poor, drugs, hospital equipment, etc. It has been pointed out that all these are used as such for the purposes of the fund, trust or institution.

3. A doubt has, however, been raised as to whether the fund, trust or institution would be eligible for the tax exemption under section 10(23C)(iv) or (v) of the Act even if the donations-in-kind are not in the form of jewellery, furniture or any other article notified by the Board for the purposes of these provisions.

4. Since the donations-in-kind, of the nature referred to above, received by a fund, trust or institution, would be income within the meaning of section 2(24) of the Income-tax Act, it is clarified that use of these towards objects for which the

fund, trust or institution is established would be regarded as application of income of the fund, trust or institution within the meaning of clause (a) of the third proviso to section 10(23C). Accordingly, the fund, trust or institution would be eligible for the tax exemption if the other conditions specified in section 10 (23C)(iv) of the Income-tax Act are satisfied.

Further the Jodhpur Tribunal in the case the *I.T.O., Ward 2(2), Jodhpur Vs. Shri Sachyaya Mataji Trust, Jodhpur*, I.T.A. No.538/Jodh/2013 for Assessment Year: 2009-10 held as under:

“17. We have considered the submissions of both the parties and carefully gone through the material available on the record. In the present case, it is an admitted fact that the assessee received the donations in kind and the same could not be applied, accumulated or invested, therefore, it cannot be treated as income. Therefore, the Ld. CIT(A) was fully justified in reversing the observations of the Assessing Officer. We do not see any infirmity in the order of the Ld. CIT(A) on this issue.”

**LATEST INSTRUCTION DATED 07.04.2020 ISSUED
BY FCRA DEPARTMENT**

SUMANT SINGH
Director



गृह मंत्रालय
भारत सरकार
मेजर ध्यान चन्द राष्ट्रीय स्टेडियम
नई दिल्ली-110002
MINISTRY OF HOME AFFAIRS
GOVERNMENT OF INDIA
MAJOR DHYAN CHAND NATIONAL STADIUM
NEW DELHI - 110002

Dated : 07.04.2020

Dear friend,

Kindly refer to DO dated 01.04.2020 of Additional Secretary (F) regarding seeking your Association's support in COVID-19 response. A format for your response was also attached in the previous letter.

2. I would request you to kindly provide the information of your Association's COVID-19 response directly in the online 'COVID-19 RESPONSE FORMAT' which is available at the FCRA login Portal <https://fcraonline.nic.in> in the Service under FCRA tab. Henceforth the scanned format may not be sent by email. If you have already sent the format by email in the scanned format, please resubmit the same information in the ONLINE format.

3. The online format may kindly be updated by 15th of every month. At the time of updation, the latest details and figures (inclusive of all the support provided till date) should be entered. In other words, cumulative total support provided should be entered as on date during each updation.

Thanking you,

Yours sincerely

(Sumant Singh)

To,

The Chief Functionaries of all
FCRA Associations as per the
List and e-mail addresses

FAQS ON THE REPORTING ON COVID-19 RELATED WORK TO FCRA DEPARTMENT**Q1. Whether it is compulsory to submit such reports?**

A1. It can be inferred that such reporting is not compulsory for any organization. It is more in the nature of appeal. However, it is advised to report the support related to COVID-19 in the said format and be actively involved in the process.

Q2. What if our organization has not provided any support?

A2. As mentioned above, this is not a compulsory reporting and hence, may be avoided if no support is being provided by the organization.

Q3. Whether such reporting/non-reporting is linked to FCRA renewal of our organization?

A3. In our opinion, the notice and the reporting formats do not suggest any linkage with FCRA Renewal. On the other hand, in case your organization is not reporting, it does not hamper your FCRA renewals due in 2021. However, it is advised that the Organisations support and engage actively in this pandemic of such magnitude.

Q4. Our organization has not received the notice in our registered e-mail id. Can we still report the relief support that is being provided?

A4. In case, you have not received the FCRA notice in the registered mail id, you may not be required to report under the said portal. However, from a conservative point of view, it is advisable to visit the portal and check if the organization is required to report under the said portal. In case, it reflects a pop-up message that you may not be required to report, then it is suggested to take a screenshot of the message and keep for documentation purposes.

Q5. Whether we need to report FC funded support or all the support that is provided?

A5. Upon review of the Form, it clearly mentions to report that all the support provided till date needs to be mentioned. It does not differentiate between FC funds or local funds and hence, it is advised all the cumulative support provided till date (whether from FC Funds or Local funds) should be reported in this form. In such case, you can disclose the fact that the support is being provided from Local and FCRA Funds. The relevant text in the format has been reproduced as under:

“At the time of updation, the latest details and figures (inclusive of all support provided till date) should be entered. In other words, cumulative total support provided should be entered as on date during each updation”

Q6. Do I need to report if our organization has been engaged in in-kind distribution and not spending cash directly?

A6. Yes, the reporting format includes the type of support that is being provided. Therefore, in case your organization is engaged in in-kind distribution, such as distribution of food, clothes, sanitizers, soaps etc, then the same should be reported as well. Further, an estimated value of goods distributed needs to be mentioned in the amount column in the said format.

Q7. Our organization has planned for distribution in the upcoming days; however, we have not provided any support till date. Do I need to report the planned activities?

A7. The earlier format provided that the planned activities and the estimated amount needs to be reported.

However, the form has been revised subsequently. Now, the reporting formats suggests that the organization needs to report the actual support provided till date and not the planned activities. The organization can report through the online portal by the 15th of every month regarding the activities completed till such reporting date.

Q8. There is a list of activities mentioned in the Notice. Do we need to confine our reporting only to such activities?

A8. No, you can report any kind of support that is being provided by your organization. The list of activities are only suggestive in nature and not exhaustive. You can mention the type of support that is being provided in the reporting format irrespective of whether such support is being included in the notice or not. Further, an estimated value of such support in monetary terms can be mentioned in the space provided for such information.

Q9. Can I update the support related information once it has been filed at the online portal?

A9. Yes, it should be noted here that the reporting format requires to 'save and update' and there is no option for upload. This implies that we can update the information multiple times as and when required. However, as suggested in the notice, we should update the information prior to 15th of every month at the online portal.

Q10. Can we provide funds to other organization who is in relief work related to COVID-19 and report it hereof?

A10. Yes, technically this is possible, since funds have been provided for COVID-19 response. However, the donor organization should take care of the following things while reporting such support;

- Donor Organization should state in writing about the support related to COVID-19 to the recipient organization in its donation letter.
- In case, FC funds are being provided, the recipient organization should have a valid FCRA registration and 12A registration to receive FC Funds.
- In case, local funds are provided, the recipient organization should have a valid 12A registration to receive tax-free donations.

