

FCRA IMPACT

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OPTIONS AFTER PROHIBITION OF INTER CHARITY GRANT



Authors* :

Dr. Manoj Fogla, Advocate

Dr. Sanjay Patra, ED, FMSF

Suresh Kejriwal, Consultant

Sandeep Sharma, Director Program, FMSF

* The Authors can be contacted at mfogla@yahoo.com

Standards & Norms

Resource support on NGO Governance, Accounting and Regulations



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INTRODUCTION

1.01 The Foreign Contribution (Regulation) Amendment Act, 2020 has been enacted and notified effective from 29th September, 2020. This act has amended the Foreign Contribution (Regulation) Act, 2010 and has brought many radical changes having far reaching impact. The amended section 7 of the Act prohibits inter charity donations i.e. one FC registered organisation cannot sub-grant, further, to another FC registered organisation. We shall discuss the various immediate and long term issues and challenges in this regard herewith. The text of the amended section 7 is as under:

“7. Prohibition to transfer foreign contribution to other person.

No person who—

(a) is registered and granted a certificate or has obtained prior permission under this Act; and

(b) receives any foreign contribution,

shall transfer such foreign contribution to any other person.”

1.02 It can be seen that foreign contribution can no longer be transferred to another organisation as was permissible earlier. The text of section 7 prior to amendment was as under:

“No person who —

(a) is registered and granted a certificate or has obtained prior permission under this Act; and

(b) receives any foreign contribution,

shall transfer such foreign contribution to any other person unless such other person is also registered and had been granted the certificate or obtained the prior permission under this Act:

Provided that such person may transfer, with the prior approval of the Central Government, a part of such foreign contribution to any other person who has not been granted a certificate or obtained permission under this Act in accordance with the rules made by the Central Government.]”

CONTEXT AND IMPLICATIONS

- 2.01** The Concept of Mother NPO and Grassroot NPOs has been withdrawn, which will affect many large national level NPOs funding large number of downstream organizations.
- 2.02** It will also affect many NPOs, who are off-shoot of International agencies though registered in India but primarily function as grant making entities ushering development work through FC registered local partner organizations.
- 2.03** This amendment is a deviation from the normally accepted norms of charitable activity. The Supreme Court and other Courts of India have in the past ruled that working through another organisation is at par with implementing direct activities. This dictum will no longer apply to FC registered organizations sub granting out of FC fund.
- 2.04** The existing funds collected on behalf of other organisations cannot be transferred to such organisations. Such organisations have to apply the funds directly for charitable/religious purposes. A revision of grant contracts with the donors might be necessary in this regard.
- 2.05** It needs to be noted that such changes will have far reaching impact on the ongoing project contracts and thousands of employees and stake holders involved in this sector. There are many large organisations which run Indiawide programmes through small charities; any abrupt closure of such organisations would be against the principles of equity and natural justice. Such NPOs should have been given an opportunity to close existing obligations; and therefore it would defy natural justice if, atleast, a transition period is not provided.
- 2.06** Further, no reasonable cause has been cited which has necessitated this amendment because, in any case, under the current law FC funds can be granted only to another FC registered organisation. All FC registered organisations, both the grantee and sub-grantee, report to the Central Government on quarterly and annual basis regarding the funds received and activity thereof. Therefore the argument that the trail of FC fund is lost

in the chain of transfers, is not reasonable. Further, the affected organisations and stakeholders deserved an opportunity of being heard, to explain or clarify the apprehensions of the law makers in this regard. This amendment is against the principle of natural justice which states that **“No party should be condemned unheard”**

- 2.07** This amendment will also affect online appeal or donations from international sources by aggregator NPOs. It will no longer be possible to raise funds on behalf of the grassroots level organisations from international sources.

DONOR DIRECTLY WORKING WITH IMPLEMENTING NPOs

- 3.01** The above amendment has completely dismantled the role of mother NPOs working in India who receive funds from foreign NPOs and distribute the FC fund to various smaller NPOs. This amendment will not only eliminate the mother NPOs but also make it difficult for smaller NPOs to connect & tie-up with foreign sources for development projects.
- 3.02** Therefore, NPOs are completely clueless about continuing their activities without violating the new provisions.
- 3.03** One option is that the foreign donor agency can directly work with implementing partners without any role of mother NPOs. It may be noted that under the prevailing law there is no distinction between a mother NPO and a ‘so called’ child or smaller NPO. All the donor agencies can legitimately work directly with smaller NPOs provided these NPOs have registration under FCRA 2010.
- 3.04** However, this arrangement will have the following issues and challenges:
- It will increase the administrative cost of the donor agencies which, however, could be compensated from the savings made against the cost of working through a mother NPO.

- It will have a direct impact on the capacity building and monitoring services provided by mother NPOs. However, mother NPOs can still continue to do the capacity building and monitoring activities, but they will face a huge challenge in justifying such expenses as program activities in the absence of a direct program and also in the light of the fact that administrative expenses have been reduced to 20% by the FCRA amendment 2020, earlier it was 50%.
- It will motivate
 - (i) the smaller NPOs to undertake bigger programs under their direct implementation,
 - (ii) the mother NPOs to start undertaking direct field level programs.

MOTHER NPO WORKING DIRECTLY BY GIVING SERVICE CONTRACTS TO IMPLEMENTING NPO

4.01 It is being debated whether the mother NPO can start implementing the programs directly and award service contracts to the implementing NPOs for the entire program or for monitoring purposes. In our opinion, it is not advisable to award service contracts to the implementing NPOs. An NPO may award commercial contracts to vendors for rendering various services or materials which are required for implementation of the program. Any out sourcing of the 'charitable activity' itself will be treated as a colourable device to evade the amended FCRA Law. Further, such activities shall have very high tax implications under Goods and Service Tax (GST) and will also be treated as commercial activity under Income Tax Law which will endanger the tax exempt charitable status of the NPO.

FOREIGN DONOR AWARDING COMMERCIAL CONTRACT TO IMPLEMENT THE PROGRAMS

5.01 It is being debated whether the foreign donors can award commercial contract to implement the programs. In our opinion, such arrangements are legally not

permissible. After enactment of Foreign Exchange Management Act 1999 (FEMA) with effect from 1st June 2000, a foreign donor can work and have activity in India only under the following circumstances:

- A foreign donor can work in India through organisations which have FCRA registration or prior permission by providing grants for approved and permissible projects.
- A foreign donor can also work in India through its branch office in India. However, it will have to get an approval from the Reserve Bank of India under FEMA.

There is no third option for a foreign donor agency to have activity in India. If an Indian organisation (whether NPO or commercial entity) enters into a commercial contract with a foreign donor agency to implement its (foreign agency's) activity in India, then it should ensure that such foreign donor agency has the right to conduct charitable activity in India, which is available only if a branch office approval from RBI is obtained.

FOREIGN DONOR GIVING GRANT TO FC PARTNERS AND A COMMERCIAL CONTRACT TO MOTHER NPOs FOR MONITORING

- 6.01** It is being debated whether a foreign donor can provide grant directly to various FC registered organisations and simultaneously award a commercial contract to the mother NPO for monitoring or back donor reporting purposes. One may wonder why the mother NPO should not be given a grant contract for monitoring purposes. Such issue becomes relevant if not necessary, in the light of the reduction of the limit for administrative expenditure to 20% under by the FCR Amendment Act 2020.
- 6.02** In our opinion a foreign donor agency can hire consultants and contractors for facilitation or monitoring of its lawfully (under FCRA or FEMA) implemented programs or activities in India. There is nothing in the law to prohibit a foreign donor agency to hire consultants or contractors to support its otherwise legal and approved activities.

- 6.03** To hire a consultant or contractor, it is not necessary to work with a charitable organisation or a FC registered organisation. One may work with commercial entities also. However, there will be considerable tax implications under GST as well as Income Tax laws.
- 6.04** An NPO can also undertake commercial contracts with the tax implications mentioned in **Para 6.03**. It may be clarified that under Income Tax law a tax exempt charitable entity cannot have commercial activity in excess of 20% of its total receipts. A for profit organisation might be a better option in this regard.

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'ACCOUNTABILITY HOUSE', A-5, Sector 26, Noida-201 301
Tel. : 91-120-4773200, website : www.fmsfindia.org
e-mail : fmsf@fmsfindia.org

