Foreign Contribution (Regulation) Act, 2010 – A Changing Perspective

Currently, acceptance and utilisation of foreign contribution or foreign hospitality is regulated by the Foreign Contribution (Regulation) Act, 1976. Nearly after 35 years the Government has felt a need to replace the FCRA, 1976 with the Foreign Contribution (Regulation) Act, 2010. Similar attempt of replacing the FCRA, 1976 was made in the year 2005 when the Government of India introduced a Foreign Contribution (Management and Control) Bill, 2005 which for unknown reasons never became the law. Thereafter, the Government, in the year 2006, introduced a bill called Foreign Contribution (Regulation) Bill, 2006, which was nothing but the Foreign Contribution (Management and Control) Bill, 2005 with some minor changes. Once again the Government has reintroduced Foreign Contribution (Regulation) Bill, 2010 with little changes in Foreign Contribution (Regulation) Bill, 2006. But this time the bill of 2010 has been passed by both the Houses of the Parliament and is awaiting for the assent of the President to become law. Read on to know more…

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The Ideology

The main focus of the FCRA 1976, as its preamble implies, is to *regulate* the acceptance and utilisation of foreign funds such that these funds do not affect the democratic structure of the country. However, in the new Foreign Contribution (Regulation) Bill 2010, the focus has been shifted to *prohibit* acceptance and utilisation of foreign contribution or foreign hospitality for any activities detrimental to the national interest and for matters connected therewith or incidental thereto. There has been a pragmatic shift from regulatory framework to a prohibitory framework.

Changes in the Definition of 'Foreign Contribution'

Section 2(h) defines 'foreign contribution'. It means the donation delivery or transfer made by any foreign source of any article, currency or any security. It includes all types of foreign receipts. In the earlier FCRA 1976, any article having market value of more than ₹1000 was considered as 'foreign contribution,' if received from any foreign source. The monetary value of ₹1000 remained unchanged since its inception and difficulties were faced by many as any article received from foreign source having value of more than ₹1000 was to be reported. But in FCRA, 2010, this monetary value of the article has been waived off and now it will be fixed by the Central Government in the rules and that too may be changed from time to time. This is a welcome change in the definition of foreign

contribution as this has not only waived off the monetary limit from the statute so that no amendment is required every time in the statute for changing the monetary limit, but also the monetary limit will be specified from time to time so that effect of changes in prices will be taken care of. Explanation 3 to Section 2(h) has also been added, which carves out an exclusion from 'foreign contribution' of the amount received from any foreign source by way of fees or towards cost in lieu of goods and services rendered in the ordinary course of business, trade or commerce. This was a much awaited amendment as many NGOs and associations charge fee for their services, which is received from foreign source, and which was treated as 'foreign contribution' under FCRA, 1976. The change is a welcome step for those associations charging some fees for services rendered or selling some product to the foreign national as a part of their activities and to support there developmental activities. But the statute has exempted foreign contribution to the extent of cost of goods only. In many cases it is very difficult to determine the cost in the voluntary sector. What is 'cost' is also very difficult to define. The term itself is very subjective and relative. Different interpretations may be given to the word 'cost'. Similar is the case with the terms 'business,' 'trade' and 'commerce'. The act should have defined these words in the statute itself. There is no logic to exclude only cost of goods from the foreign contribution in the course of business, trade or commerce. Nominal profits are definitely charged by many associations to become self-sustained. Instead of excluding 'cost' the better option could have been setting out turnover limits say, an amount up to ₹10 lakh received in the ordinary course of business, trade or commerce is exempt. This could have been in line with the Section 2(15) of the Income-tax Act, 1961 which restricts business receipts to ₹10 lakh.

Foreign Company and Foreign Source

The term 'foreign company' has been defined under Section 2(1)(g) of the FCRA, 2010. This definition has been added under the new Act and was not present in the old FCRA, 1976. Contributions received from foreign companies are considered as a foreign source under Section 2(1)(j)(iii) of the FCRA 2010. Further if more than 50% of the nominal value of share capital of any Indian company is held by foreign company then contributions received from such Indian company is also considered as foreign source. This is a very harsh provision as in the time of equity dilution many Indian multinational companies have more than 50% of their equity capital held by foreign companies/ foreign citizens. Similarly, even if more than 50% of equity capital of a company incorporated outside India is held by an Indian company the contributions flowing from that foreign company to any association/person in India will also be considered as 'foreign source' by virtue of Section 2(1)(j)(iii) read with Section 2(1)(g) of the FCRA, 2010.

Persons Prohibited from Receiving Foreign Contribution

The following persons have been restricted from accepting foreign contribution under Section 3 (1)

(a) Candidate for election;
(b) Correspondent, columnist, cartoonist, editor, owner, printer or publisher of a registered newspaper;
(c) Judge, government servant or employee of any corporation or any other body controlled or owned by the Government;
(d) Member of any Legislature;
(e) Political party or office-bearers thereof;
(f) Organisation of a political nature as may be specified under sub-Section (*1*) of Section 5 by the Central Government;
(g) Association or company engaged in the production or broadcast of audio news or audio visual news or current affairs programmes through any electronic mode, or any other electronic form as defined in clause (r) of sub-Section (1) of Section 2 of the Information Technology Act, 2000 or any other mode of mass communication;
(h) Correspondent or columnist, cartoonist, editor, owner of the association or company referred to in clause (*g*).

Out of the above, category number (f), (g) and (h) have been added in this FCRA, 2010 and thus more number of persons have been debarred from receiving foreign contribution under FCRA, 2010.

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Even the above category of persons are also being allowed to receive foreign contribution in these following cases -

(a) By way of salary, wages or other remuneration due to him or to any group of persons working under him, from any foreign source or by way of payment in the ordinary course of business transacted in India by such foreign source; or
(b) By way of payment, in the course of international trade or commerce, or in the ordinary course of business transacted by him outside India; or
(c) As an agent of a foreign source in relation to any transaction made by such foreign source with the Central Government or State Government; or
(d) By way of a gift or presentation made to him as a member of any Indian delegation, provided that such gift or present was accepted in accordance with the rules made by the Central Government with regard to the acceptance or retention of such gift or presentation; or
(e) From his relative; or
(f) By way of remittance received in the ordinary course of business through any official channel, post office, or any authorised person in foreign exchange under the Foreign Exchange Management Act, 1999; or
(g) By way of any scholarship, stipend or any payment of the like nature.

The provisions of Section 4 are also same as contained in FCRA, 1976 except one change, i.e., in case of amount of foreign contribution received from relative there was a limit of ₹8000 per annum up to which no permission was required whereas in the new Act there is no such limit and any amount may be received. This is a welcome change.

Organisations of Political Nature

Political parties have been specifically debarred under Section 3(1)(e) from receiving foreign contribution. Under the FCRA, 2010 as per new clause 3(1)(f) organisations of political nature are also debarred from receiving foreign contribution. The Central Government can specify an organisation as an organisation of political nature under Section 5(1) as per the rules made by it and the guidelines specifying the grounds on which such organisation is specified as an organisation of political nature.

Subsequent Transfer of Foreign Contribution with Prior Approval of Central Government

A registered person or a person who has obtained prior permission to receive foreign contribution for specific project is not allowed to transfer foreign contribution to other persons who are not registered or who have not obtained prior permission under Section 7. Under FCRA 2010, a proviso to Section 7 has been inserted that provides that such a transfer is allowed with the prior permission of the Central Government and in accordance with the rules framed by the Central Government.

The Central Government has allowed the transfer of foreign contribution from registered organisation to an unregistered organisation, but with reluctance. There are many small, village level, grass root organisations which are working as mediator-cum-assistance provider between the actual beneficiaries and the big organisations. These small organisations require and receive funds from big organisations for village level development activities, but they cannot receive foreign contribution as they have no FCRA registration. This hinders the development work. Now with the insertion of this clause the transfer is permitted, but the transferor has to take permission from the Central Government which will definitely create many complexities for these organisations and will increase the work of the Government also. The Government has kept the bow in their hands. There is no blanket permission to transfer foreign funds. Instead of obtaining prior permission for subsequent transfer a better option would have been to set up a limit up to which transfer of foreign contribution is allowed and alternatively the Government could have come out with a reporting requirement for such transfer along with the annual return if they want to have a control on last utilisation of the foreign contribution.

Utilisation of Funds in Speculative Business and Administrative Expenses

Utilisation of foreign contribution in speculative business is not allowed both under FCRA, 1976 and FCRA, 2010. However, what is speculative business has not been specified under FCRA 1976. But in FCRA, 2010 what construes speculative business will be specified in the rules.

A new sub-clause (b) to Section 8(1) has been added which restricts the utilisation of foreign contribution in administrative expenses to the extent of 50% of total expenditure. Administrative expenditure beyond 50% can only be defrayed with the prior approval of the Central Government. Further sub-Section (2) to Section 8 provides that the Government will prescribe the elements that shall be included in the administrative expenses and the manner in which the administrative expenses shall be calculated. However, many organisations do not report their expenses under the administrative and project expenditure. Many a time project expenses and administrative

expenses overlap. A clear cut distinction cannot be made. For example, it is very difficult to appropriate salary of an employee working for both office and project under the administrative expenses and project expenditure. It is more difficult for the small organisations that have less number of employees having multi-tasks. Another example may be of bifurcation of conveyance expenses of a project worker sitting in the branch office and looking after a particular project. The list may be endless. We hope that Government will come out with clear cut guidelines considering all the above factors.

Registration and the New Regime

No person having a definite cultural, economic, education, religious or social programme is allowed to accept the foreign contribution without obtaining a certificate of registration from the Central Government (Section- 11). For registration under the new FCRA 2010 application has to be made in prescribed form and manner and with prescribed '*fee*'. For registration in FCRA 1976 no fee was payable for registration. The purpose for prescribing a fee for registration is not known and it may be assumed that the Government wants to discourage unwanted registrations. The new process of registration provides that the Central Government may ordinarily register the person applying for registration or prior permission within 90 days from the date of receipt of application for registration or prior permission. The registration or prior permission is granted only on satisfying the following conditions-

(a) The person making an application for registration or grant of prior permission
  (i) is not fictitious or *benami*;
  (ii) has not been prosecuted or convicted for indulging in activities aimed at conversion through inducement or force, either directly or indirectly, from one religious faith to another;
  (iii) has not been prosecuted or convicted for creating communal tension or disharmony in any specified district or any other part of the country;
  (iv) has not been found guilty of diversion or mis-utilisation of its funds;
  (v) is not engaged or likely to engage in propagation of sedition or advocate violent methods to achieve its ends;
  (vi) is not likely to use the foreign contribution for personal gains or divert it for undesirable purposes;
  (vii) has not contravened any of the provisions of this Act;
  (viii) has not been prohibited from accepting foreign contribution;

(b) the person making an application for registration has undertaken reasonable activity in its chosen field for the benefit of the society for which the foreign contribution is proposed to be utilised

(c) the person making an application for giving prior permission has prepared a reasonable project for the benefit of the society for which the foreign contribution is proposed to be utilised

(d) in case the person being an individual, such individual has neither been convicted under any law for the time being in force nor any prosecution for any offence pending against him

(e) in case the person being other than an individual, any of its directors or office bearers has neither been convicted under any law for the time being in force nor any prosecution for any offence is pending against him

(f) the acceptance of foreign contribution by the person is not likely to affect prejudicially
  (i) the sovereignty and integrity of India; or
  (ii) the security, strategic, scientific or economic interest of the State; or
  (iii) the public interest; or
  (iv) freedom or fairness of election to any Legislature; or
  (v) friendly relation with any foreign State; or
  (vi) harmony between religious, racial, social, linguistic, regional groups, castes or communities

(g) the acceptance of foreign contribution
  (i) shall not lead to incitement of an offence;
  (ii) shall not endanger the life or physical safety of any person.

If the Central Government does not grant a certificate or prior permission within 90 days, reasons for refusal must be communicated to the applicant. Earlier under the FCRA, 1976 reasons for rejecting the application for registration were not communicated. The new process of obtaining prior permission stands on similar lines as of obtaining permanent registration. However, instead of relaxation in granting prior permission, the statute has eliminated the provision of 'deemed' prior permission if nothing is heard within 120 days of the application for seeking prior permission as contained in FCRA, 1976. This is again a great hindrance in receiving foreign funds for definite, certain and earmarked projects.

The registration certificate, under FCRA 2010 will be granted

for a period of five years only as compared to permanent registration in FCRA 1976. Thereafter, renewal of registration has to be made after every five years. A relaxation to the already registered associations has been given and they have to renew their registration only after five years from the date of enactment this section. The renewal application has to be made within six months before the expiry of the period of certificate.

Suspension and Cancellation of Registration

Under the new FCRA 2010 the Central Government is empowered to cancel the certificate of registration of any person on the following grounds –

(i) If the holder of the certificate has provided incorrect or false information at the time of application for grant of registration.
(ii) If the holder has violated the terms and conditions of the certificate.
(iii) If it is necessary in the public interest to do so,
(iv) If the holder of the certificate has violated any of the provisions of the Act.
(v) If the holder of the certificate has not done any reasonable activity for the benefit of the society for two consecutive years.

When the certificate is cancelled, all the foreign contribution and the assets created out of the foreign contribution will vest with the prescribed authority and it will manage the activities till the registration is subsequently granted. The prescribed authority will also have all the powers to dispose off the assets of the person created out of that foreign contribution if adequate funds are not available for managing the activities of the person.

Firstly, the above provisions will bring some sort of compulsion for the organisations to conduct some activities in the chosen field for the benefit of the society from year to year basis. Secondly, when the certificate is cancelled, the power to dispose off the assets created since inception from the foreign contribution is a very harsh provision. Imagine a situation when an organisation who has worked for so many years in development activities and has spent crores of rupees for benefit of the society and created assets from foreign contribution could not, due to one or more reasons, conduct any activity for two consecutive years and its registration is cancelled. Now, power to dispose off whole of the assets created in past by that organisation vests with the authority managing the affairs of the society due to cancellation. This will definitely bring arbitrariness among the persons of the prescribed authority managing the activities of the organisation.

Multiple Bank Accounts Allowed

Foreign contribution is to be received in single designated bank account as specified in the application for registration. This requirement is same as in FCRA 1976. Under FCRA 1976, multiple bank accounts were not allowed, though in project accounts, for utilisation purposes, more than one bank account was allowed in some cases. But this was not under the Statute and was through administrative directions. Under the new FCRA 2010, opening of more than one bank account for utilisation of foreign contribution is allowed under Section 17. This will definitely help many small organisations (like a micro finance organisation) whose nature of work is such that they have to open different bank accounts for disbursement and utilisation of foreign funds. Still, opening of more than one bank account is allowed for utilisation purposes only and not for receipts of foreign funds. This is a dual edge sword. When a bank account is opened by an organisation it will have credit from only main foreign designated bank account and disbursement for varied purposes. In many cases it will not be strictly possible as it may have credits as in the case of a micro finance institution. In such cases it will not be possible to disburse the amount from one account and receiving back the amount in the main foreign contribution designated bank account. The receipt of foreign contribution in one designated bank account is only an administrative convenience so that there can be a track on the foreign funds. It would have been very convenient for many small village level development organisations if at least some credit (say up to a prescribed limit) to the bank account opened for utilisation purposes would have been allowed.

A registered person or a person who has obtained prior permission to receive foreign contribution for specific project is not allowed to transfer foreign contribution to other persons who are not registered or who have not obtained prior permission under Section 7. Under FCRA 2010, a proviso to Section 7 has been inserted that provides that such a transfer is allowed with the prior permission of the Central Government and in accordance with the rules framed by the Central Government.

A Critical Note

FCRA 2010 is a mixed bag. In many cases it has tried to solve out some genuine problems of persons receiving foreign contribution, but at the same time it has added to the rigours of many genuine organisations receiving foreign contribution. The provisions like excluding receipt of amount from foreign source as fees or cost in lieu of goods or services in the course of business, trade or commerce, statutorily allowing multiple bank accounts and freely accepting foreign contribution as stipend, scholarship are welcome changes which were much awaited. Apart from this, the under-current in the FCRA 2010 is subjective and will definitely increase the litigation. Many of the provisions like considering Indian Companies having more than 50% equity holding by foreign company/ foreign citizen as 'Foreign Source' will definitely hinder the growth of the voluntary sector participating in nation building.

Similarly, provisions like adhering to the below 50% benchmark of administrative expenses and cancellation of registration in case there is no reasonable activity for the society for consecutive two years are very harsh in nature and highly subjective. The Government has also tried to become 'manager' instead of 'regulator' in cases where registration has been cancelled. Prescribing fees for the grant of registration as well as prior-permission will add to the cost of organisations genuinely serving people and is not in line with the registration of voluntary associations with Government departments. Renewal of registration after every five years will also add to the administrative cost of the organisations.

In short we can say that with FCRA 2010, the Government has given something, but taken back many things. We can only hope that the subjectivity in the statute will be used in favour of the persons receiving foreign contribution and then only the very purpose of the enactment is served.

FCRA 1976 and FCRA 2010 – A Synopsis

S. No.	FCRA, 1976	FCRA, 2010
1.	Any article received from foreign source having market value of more than ₹1000 was foreign contribution.	The value of articles which will be included in foreign contribution will be specified in rules framed.
2.	Interest accrued on foreign contribution was not Statutorily included in foreign contribution.	Interest accrued on foreign contribution is Statutorily included in foreign contribution.
3.	Amount received in the ordinary course of trade, commerce or business from foreign source was included in foreign contribution.	Amount received in the ordinary course of trade, commerce or business from foreign source is not a foreign contribution.
4.	No terms like organisations of political nature.	Such organisations will be notified and debarred from accepting foreign contribution.
5.	Transfer of foreign funds to unregistered person not allowed.	Foreign funds may be transferred to unregistered person after obtaining prior approval of the Central Government.
6.	No reference to administrative expenses and its limits.	Administrative expenses beyond 50% are not allowed.
7.	Registration once granted was permanent and no renewal clause was there.	Registration is granted for five years only and it has to be renewed after every five years.
8.	Conditions for registration were not set out in the Act.	Conditions are Statutorily set out.
9.	No provision of suspension of registration certificate.	There can be suspension of certificate for the time being as well as cancellation on certain conditions.
10.	In no case, management of foreign contribution lies with Central Government.	In case of cancellation of registration, management of foreign contribution and assets created out of them lies with the Government.
11.	Multiple bank accounts were not permitted.	Multiple bank accounts are permitted for utilisation of foreign contribution.
12.	No mention of disposal of assets created out of foreign funds.	In case of cessation, the Central Government will notify the procedure of disposal of assets created out of foreign funds.

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