

## Chapter 1

# The Foreign Contribution (Regulation) Act, 2010 – impact on Not for Profit Organisations

### This article aims to:

Highlight various challenges faced by Not for Profit Organisations (NPOs) due to introduction of recent amendments in September 2020 to the FCRA. The amendments relate to renewal of FCRA registration, implication of cancellation/denial of renewal of FCRA registration and precautions NPOs should take in order to operate efficiently and effectively in India.

### Amendments to Foreign Contribution (Regulation) Act, 2010 (FCRA)

Over the last two years, Non Profit Organisations (NPOs) in India that accept foreign contributions have been subject to several amendments around compliance, disclosure and other critical areas in the governing regulation i.e. the Foreign Contribution (Regulation) Act, 2010 (FCRA or the Act).

In September 2020, the Central Government brought out a host of critical changes to the FCRA severely impairing existence in the case of smaller organisations and the ability to collaborate with other non-profits. The amendments restricted transfer (sub-granting) of foreign contributions to other organisations, lowered the cap on administrative expenses from 50 per cent to 20 per cent and increased administrative requirements, including the need for a separate bank account with the State Bank of India, Parliament Street Branch, New Delhi to receive any foreign contribution.

The process for renewal of registration is now subject to far greater scrutiny and inquiry similar to a new registration. The powers of the Government were enhanced to take over the assets/foreign contribution in several cases of suspension or cancellation of registration.

### Background

Over the last decade, India has witnessed a rapid increase in the number of NPOs due to increase in wealth generation, rising social inequality and changing mindset of entrepreneurs from 'profit generation' to 'contribution to society'.

Although an NPO is subjected to various accounting, tax and regulatory framework, this article touches upon certain important aspects and non-compliance of such matters which may lead to severe consequences including levy of penalties and cancellation of registration under the FCRA.

### Approval process

As per the provisions of the FCRA, an NPO which receives any donation/grant in cash or kind from a foreign source is required to obtain a prior approval from the Ministry of Home affairs (MHA) before receiving the donation/grant. Foreign source has been defined to include all foreign bodies (government, citizens, companies, trusts, associations and international agencies).

However, following types of receipts are exempted from FCRA regulations:

- Funds received from specified international agencies such as the World Bank, the United Nations, etc.
- All statutory bodies constituted or established by or under a Central Act or State Act that are required to have their accounts compulsorily audited by the Comptroller and Auditor General of India.

There are two kinds of approvals granted by the MHA i.e. a prior approval/permission and permanent registration.

A prior approval is required to be obtained by an NPO desirous of receiving one-time foreign contribution for a specified amount from a specified source for a specific purpose. Prior permission is given on case-to-case basis and is sought if an NPO does not have a permanent registration.

A permanent registration is granted to an NPO seeking foreign contribution on regular basis and a one-time approval is granted for a period of five years.

NPOs that have received prior permission/registration are required to maintain separate books of account for foreign contribution received and utilised.

## Status of renewal of registrations with FCRA

Historically, organisations registered under the erstwhile Foreign Contribution Regulation Act, 1976 were registered permanently. With the introduction of the new Act of 2010, existing registrations under the erstwhile Act were automatically granted a registration for a period of five years from 2011 when the erstwhile Act was replaced with the current Act of 2010 and brought into force.

All such organisations have undergone one cycle of renewal in 2016, where renewals were granted by the Government without significant hassle or enquiry. All these organisations, as well as the newer organisations whose registrations were due for renewal in 2021 shall be subject to the revised renewal processes notified by the Government.

Many organisations' registrations were due to expire on 31 October 2021. However, due to the hardships faced during the ongoing pandemic, the Government had extended the validity of all registrations expiring between 29 September 2020 and 31 December 2021 to 31 December 2021, thus providing temporary relief to the organisations who were unable to apply for renewal.

Generally, an organisation is permitted to apply for renewal within 6 months of expiry of the FCRA registration. On 31 December 2021, the Government provided further relief to organisations whose registrations were expiring on 31 December 2021 and who have filed for renewal of their registration by extending the validity of their FCRA registration

by an additional period of three months, up to 31 March 2022 or disposal of the renewal application, whichever is earlier.

As per data available on the FCRA portal of the Ministry of Home Affairs, there are currently over 16,000 organisations registered under the FCRA, excluding around 6,000 organisations whose registrations ceased to be valid on 31 December 2021. As per publicly available information, over 12,000 organisations were due for renewal in this period.

The organisations, whose registrations expired as on 31 December 2021, have either consciously chosen to not file for renewal of registrations, or are exempted from FCRA or have been unable to file their renewal applications for a variety of reasons including inability to open the bank account with the State Bank of India, non-filing of annual reports or other compliances.

In January 2020, the Ministry has exempted organisations set up or established under Central or State Acts whose accounts are audited by the Comptroller and Auditor General from the provisions of the FCRA.

The Government is facing severe challenges to scrutinise the volume of applications received and process the renewal applications in a timely manner. Till date applications for only a small fraction of organisations have been processed and closed while most other organisations are patiently waiting for information on their renewal applications.

## Cancellation and denial of FCRA registrations and renewals

The Government keeps a close watch on the utilisation of foreign contribution received by organisations to ensure the funds received are utilised for the specified purposes and are not diverted or used for activities which may be deemed to be against/ detrimental to the interests of the nation.

In the past few years, FCRA registrations of several NPOs have been cancelled for multiple reasons - non-compliances with the various provisions of the Act as well as improper disclosures made ranging from minor one-off transgressions to repeated non-compliances by serial offenders. The following are some of the most common examples of non-compliances by the NPOs:

- **Funds transfer:** Transfer of funds between domestic and FCRA designated account. This is also known as inter-mixing of local funds with FCRA funds and vice versa.
- **Non-filing of annual returns:** All the organisations receiving the foreign contributions are mandatorily required to file form FC 4 within 9 months of the relevant financial year (i.e. by 31 December) duly audited by a chartered accountant. The form FC 4 contains the details relating to the opening balance of foreign contribution, amount of foreign contribution received during the year, closing balance of foreign contributions, details of the donors from whom the foreign contributions have been received by the NPO and the details of the projects on which the foreign contribution has been spent.

- **Improper classification of expenses in the annual returns:** Not more than 20 per cent of foreign contribution received in a financial year should be utilised for meeting administrative expenses. Utilisation of more than 20 per cent shall require prior approval of the MHA. Rule 5 of the Foreign Contribution Regulation Rules, 2011 (FCRR) defines the type of expenses that can be considered as an administration expense.
- **Sub granting not permitted:** As opposed to earlier provisions, post September 2020, the amended Act prohibits the sub granting of foreign contributions to another similar FCRA registered organisation. This has significantly impacted the operational capacity of various organisations. Since, NPOs are not permitted to sub grant now, they will have to build up their own capacity to execute various projects which earlier were executed with the help of other partner NPOs operating in the similar field.
- **Non-filing of changes in the Board:** The amended FCRA requires intimation to be provided to the MHA if one of key member is appointed, elected, resign or dies within 15 days of the change. Also such change would be effective only after the approval of MHA.
- **Non-filing of intimations pertaining to utilisation accounts:** Foreign contribution should be received in foreign contribution designated account only and Registered Association should not have more than one foreign designated account. Further, hiding of amount, source and manner in which the foreign contribution/ remittance was received can lead to cancellation of registration.

- **Investments:** Foreign contribution is not invested in speculative investments or profitable ventures.
- **Not working in public interest:** Lot of organisations have lost their registration with MHA as they have been found to be working against the national interest.

All the NPOs should ensure the compliances of the above provisions as they are critical to ensure compliance with the regulations. The amended form FC 4 also requires an NPO to specifically confirm the following statements for the period under audit, which clearly demonstrates the seriousness of the regulator to monitor the activities of the NPOs receiving the foreign contributions:

- any foreign contribution was transferred to any FCRA registered association
- any functionary of the Association has been prosecuted or convicted under the law of the land
- any asset created out of foreign contribution is registered in names other than the name of the Association
- any domestic contribution has been credited in any 'FCRA Account'
- the Association has received any foreign contribution in an account other than the designated FCRA receipt Account
- the Association has invested any foreign contribution in any speculative activity as defined in rule 4 of the Foreign Contribution (Regulation) Rules, 2011
- Association or any of its functionary/office bearer has violated any of the conditions as enumerated under

sub-section (4) of section 12 of the Act

- Association has made expenditure on administrative expenses exceeding 20 per cent. of the foreign contribution received
- the Association has utilised any foreign contribution outside India.

### Consequences of denial of renewal or cancellation

Organisations whose FCRA registrations are not renewed or cancelled face serious consequences such as:

- Inability to access the unutilised foreign contributions lying in its bank accounts
- Potential vesting of all assets acquired out of foreign contributions and unspent foreign contribution received with the Government.

Any person whose registration has been cancelled, shall not be eligible for another registration for a period of three years from the date of cancellation of the registration.

In cases where the Government has denied the renewal of registrations or cancelled registrations, the organisations may approach the High Courts for relief or filing of appeals against the decision of the Government as the Act does not prescribe any remedial measures for NPOs, except filing for a fresh application after a fixed period of time.

### Steps to ensure compliance with regulations

Given the increased scrutiny and focus on the non-profits receiving foreign contributions, it is imperative that such organisations pay renewed focus and attention to the requirements under the FCRA such as:

- Separate books of accounts to be maintained for foreign contributions and local funds clearly maintaining the trail of funds received and utilised during the year
- Foreign contributions received is only utilised for the specified purposes for which it is received as per the key objectives of the organisation
- Organisations need to introspect and review past compliances and disclosures to ensure appropriate filings have been made with the FCRA regulators. The NPOs needs to ensure that in case there were non compliances in the past, the same are made good as early as possible.
- Appropriate disclosures in the annual returns need to be made including
  - a. Classification of expenditure
  - b. Project related activities
  - c. Transfer of foreign contribution to other registered organisations.

Post the recent amendments, the organisations need to ensure activities are appropriately organised such that

- foreign contributions are directly utilised for their own activities
- funding is received in the designated accounts
- classification of expenditures incurred out of foreign contribution are minutely reviewed to ensure the administrative expenses remain within the limits specified.

As the requirements under FCRA have become stringent, it is imperative for NPOs to meet the compliances in the right spirit of the law to avoid any scrutiny and operational