Standards & Norms

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BUDGET 2018 – FCRA RETROSPECTIVE AMENDMENT



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A joint initiative of fmsf VANI

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SUMMARY

1.1.1 The Finance Bill 2018 has amended the definition of foreign source retrospectively with effect from 5th August, 1976 the date of commencement of the Foreign Contribution (Regulation) Act, 1976. This amendment is primarily intended to protect political and other institutions which received donation from subsidiaries of foreign companies in violation of FCRA.

1.1.2 The FCRA 1976 had provision which deemed Indian companies as foreign source if more than 50% shareholding was held by foreigners. As a result any donation received from such company was also treated as foreign contribution.

1.1.3 Under FCRA 1976 it was permissible for a organization of political nature to receive foreign funds subject to prior approval. There have been litigations against money political and other institutions regarding receipt of donation from subsidiaries of foreign companies. The Delhi High Court in the case Association for Democratic Reforms (ADR) vs Union of India, W.P.(C) 131/2013, judgement dated 28th March, 2014 ruled that FCRA law had been violated.

1.1.4 The Finance Act 2016 amended the FCRA Act retrospectively from 2010 and change the definition of "foreign source" as a result the donations received from such companies was no longer considered as foreign contribution. However the FCRA violations in the impugned cases pertained to period prior to 2010, therefore there was a need to extend the effect of the amendments way back to 1976.

1.1.5 The Budget 2018 has further extended the retrospective effect to 1976 and thereby all donation received by all recipients from foreign subsidiaries becomes local contributions. It may be noted that it is permissible for a political institution to receive donation from a Indian company but it cannot receive contribution from foreign source.

LANDMARK DECISION OF DELHI HIGH COURT

1.2.1 In the case Association for Democratic Reforms (ADR) vs Union of India, judgement dated 28th March, 2014 the Delhi High Court held major National political parties BJP and Congress were guilty of taking foreign funding and violating the provisions of FCRA and directed the Ministry of Home Affairs (MHA) and Election Commission of India (ECI) to take action against the two parties within six months. It was observed

by the Court that these political parties had taken donations from Vedanta & its subsidiaries, registered in England and Wales, and its subsidiaries. The Bench also rejected the stand taken by Ministry of Home Affairs which said that FCRA has not been violated. The judgment drew attention to the donations made to INC and BJP for the period up to the year 2009.

1.2.2 As a response to the above judgement the Finance Act 2016 amended the FCRA Law with retrospective effect. However the amendment to FCRA 2010 did not help the recipient of foreign contribution from such companies prior to 2010. Therefore this year the Finance Bill 2018 as proposed to extent the effect of amendments to 5th August 1976 retrospectively.

THE PROPOSED AMENDMENTS

1.3.1 The Finance Bill 2018 has amended the FCRA 1976 w.e.f from 5th August, 1976. It is ironical that an amendment has been made to an act which has been repealed since September 2010.

1.3.2 In fact the Finance Act 2016 had amended the sub-clause (vi) of clause (j) of sub-section (1) of section 2 of the Foreign Contribution (Regulation) Act, 2010. By virtue of this amendment all contributions made by Indian Companies with foreign shareholding in excess of 50% were excluded form the definition of foreign source. It may be noted that prior to this amendment all Indian Companies with more than 50% shareholding by foreigners were treated as foreign source and FCRA law was applicable. Ironically under this law Indian companies like ICICI Bank or Infosys were not entitled to give donations even to their own foundations without FCRA prior permission or registration. The proposed amendment is as under:

> *"These amendments will take effect from 1st April, 2018.*
>
> *Clause 217 of the Bill seeks to amend section 236 of the Finance Act, 2016 which relates to amendment to sub-clause (vi) of clause (j) of sub-section (1) of section 2 of the Foreign Contribution (Regulation) Act, 2010. The proviso to the said sub-clause inserted under the Finance Act, 2016 states that notwithstanding the nominal value of share capital of a company exceeding one-half per cent. at the time of making contribution, such company shall not be deemed to be a foreign source, if the foreign investment is within the limit specified under the Foreign Exchange Management Act, 1999 or the rules or regulations made thereunder.*

It is proposed to bring the said amendment with effect from the 5th August, 1976 the date of commencement of the Foreign Contribution (Regulation) Act, 1976, which was repealed and re-enacted as the Foreign Contribution (Regulation) Act, 2010."

MEANING OF 'FOREIGN SOURCE' UNDER FCRA

1.4.1 Unlike the term 'foreign contribution' which has been defined specifically, the term 'foreign source' is given only an inclusive definition in FCRA. The statutory definition of 'foreign source' as per section 2(1)(j) of FCRA, 2010 after incorporating the amended proviso is as follows :

(j) "foreign source" includes, —

(i) the Government of any foreign country or territory and any agency of such Government;

(ii) any international agency, not being the United Nations or any of its specialised agencies, the World Bank, International Monetary Fund or such other agency as the Central Government may, by notification, specify in this behalf;

(iii) a foreign company;

(iv) a corporation, not being a foreign company, incorporated in a foreign country or territory;

(v) a multi-national corporation referred to in sub-clause (iv) of clause (g);

(vi) a company within the meaning of the Companies Act, 1956, and more than one-half of the nominal value of its share capital is held, either singly or in the aggregate, by one or more of the following, namely:—

(A) the Government of a foreign country or territory;

(B) the citizens of a foreign country or territory;

(C) corporations incorporated in a foreign country or territory;

(D) trusts, societies or other associations of individuals (whether incorporated or not), formed or registered in a foreign country or territory;

(E) foreign company;

"Provided that where the nominal value of share capital is within the limits specified for foreign investment under the Foreign Exchange Management Act, 1999, or the rules or regulations made there under, then, notwithstanding the nominal value of share capital of a company being more than one-half of such value at the time of making the contribution, such company shall not be a foreign source;".

(vii) a trade union in any foreign country or territory, whether or not registered in such foreign country or territory;

(viii) a foreign trust or a foreign foundation, by whatever name called, or such trust or foundation mainly financed by a foreign country or territory;

(ix) a society, club or other association of individuals formed or registered outside India;

(x) a citizen of a foreign country."

1.4.2 As is evident, the term "foreign source" has not been defined exhaustively. The Act has given an inclusive definition of the term 'foreign source' and that includes the sources mentioned in clauses (i) to (x). It may be noted that under clause (vi) above, a foreign source includes an Indian company if more than 50% of its share capital is held by persons covered under foreign source. However, by virtue of Finance Bill 2016 this clause shall not be applicable to those companies whose foreign shareholding is within the limits specified for foreign investment under the Foreign Exchange Management Act, 1999.

CONCLUDING REMARK

1.5.1 This amendment is apparently an attempt to protect various powerful institutions which had violated FCRA laws. It is unfortunate that the law makers themselves fiddle with the law to protect specific interest. In this case the retrospective effect has been extended to 1976, which is unusual and a subject matter of debate whether such amendments are constitutionally permissible. What about those institutions which may have been penalised for these violations in last 40 years.

1.5.2 Having said that, on flip side it is a much-needed correction of an anomaly which was existing by mistake in the FCRA Act. The Act when it was amended in 2010 consciously changed the definition of a foreign company with the intent to exclude

all Indian companies with more than 50% foreign shareholding. It may be noted that in the FCRA Act 1976 the definition of a foreign company included all Indian companies with more than 50% foreign shareholding.

1.5.3 However, probably by oversight the definition of foreign source was not amended and due to such partial amendment, the FCRA law technically continued to apply to all Indian companies with more than 50% foreign shareholding.

1.5.4 Barring the political conflict of interest, it is a positive change and it will provide an opportunity to all charitable organizations (including those without FC registration) to access corporate grants and CSR funds. Many of the larger corporates of India have more than 50% foreign shareholding and they were compelled to work with FC registration organizations only. FC registered organizations constitute a small portion of the NPOs sector, therefore this amendment will promote wider and greater reach of corporate grants to NPOs.

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