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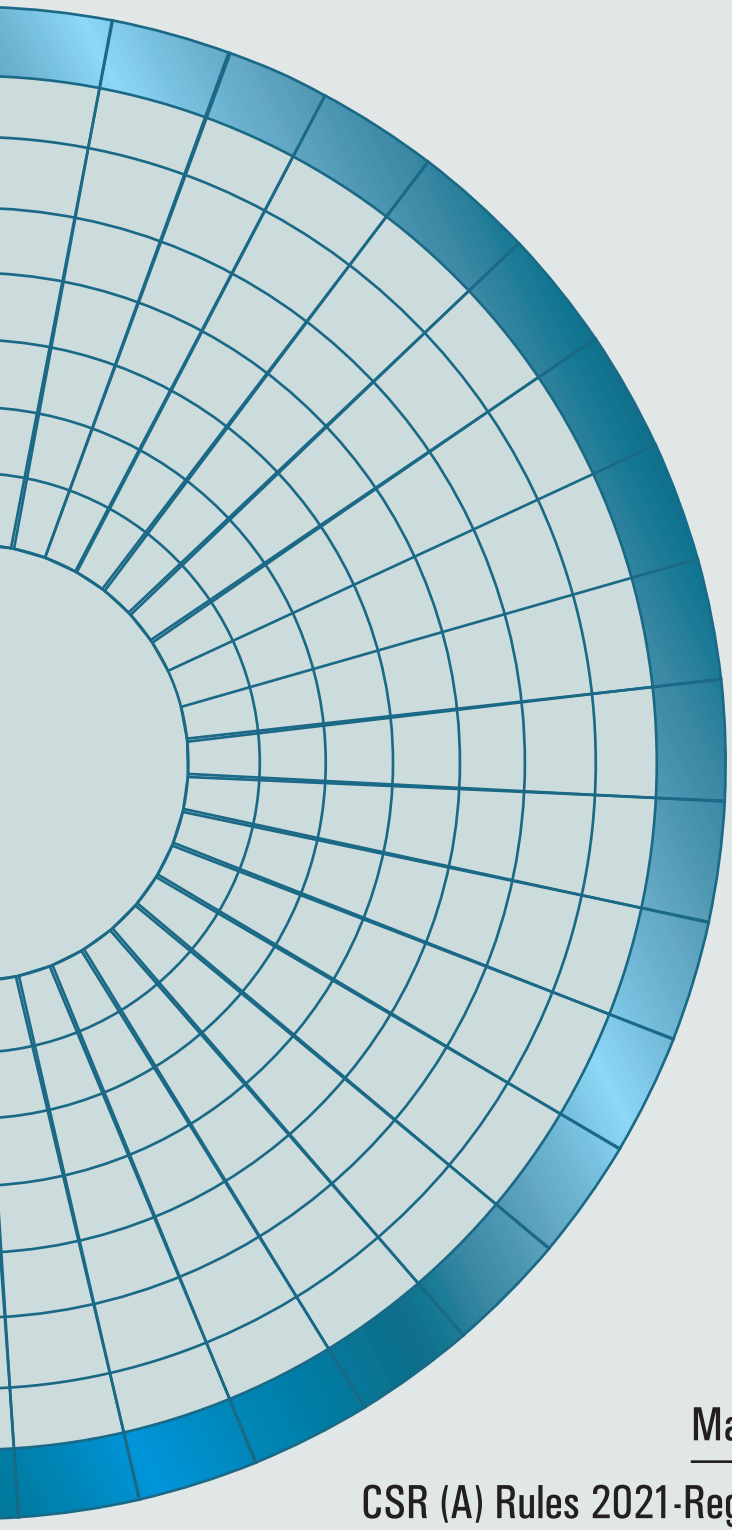

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Financial Management Service Foundation
Promoting Accountability
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Editorial Team: Dr. Sanjay Patra, Mr. Sandeep Sharma & Ms. Parul
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Financial Management Service Foundation
"ACCOUNTABILITY HOUSE". A-5, Sector-26, Noida-201301
Tel.: 00-91-120-4773200
E-mail: fmsf@fmsfindia.org; **Website:** www.fmsfindia.org

TRUST AND FAITH

A person started to walk on a rope tied between two tall towers. He was walking slowly, balancing a long stick in his hands. He had his son sitting on his shoulders.

Everyone on the ground were watching him in bated breath and were very tense. When he slowly reached the second tower, every one clapped, whistled and welcomed him. They shook hands and took selfies.

He asked the crowd "do you all think I can walk back on the same rope now from this side to that side?"

Crowed shouted in one voice "Yes, Yes, you can..."

Do you trust me, he asked? They said yes, yes, we are ready to bet on you.

He said okay, can any one of you give your child to sit on my shoulder; I will take the child to the other side safely...

There was stunned silence. Every one became quiet.

Belief is different. Trust is different. For Trust you need to surrender totally.

This is what we in today's world.

We believe but do we really trust each other and the almighty.... Something to think!

Sanjay Patra

CONTENT

BUDGET 2021 - MAJOR AMENDMENTS FOR NPOs

The Finance Bill 2021 has brought in some important changes for charitable and religious organisations which have been discussed in this issue.

Corpus donation subject to investment conditions: There have been few important changes pertaining to corpus donation. Effective from 1st April, 2021 corresponding to Assessment Year 2022-23 corpus donation received by an organisation will not be treated as exempt income unless such corpus donation is invested or deposited in one or more of the forms or modes specified in sub-section (5) of section 11 maintained specifically for such corpus. It may be noted that the condition of investing the corpus fund in section 11(5) investment shall apply only to that part of corpus fund which has been created from corpus donations exempted under section 11(1)(d), because organisations may have corpus funds invested in business assets under section 11(4) or (4A) which do not conform to the requirements of section 11(5). Further, a charitable organisation can be created with a corpus property which also does not conform to the requirements of section 11(5).

Application out of corpus no longer permissible to be set-off against current year income: Any expenditure or application made out of the corpus donation will not be allowed as application for charitable or religious purposes eligible for 85% application. Such amount shall be allowed as application in the year in which it is deposited back to corpus to the extent of such deposit or investment.

Application out of loans and borrowing permissible only in the year of repayment: Application from loans and borrowings shall not be considered as application for charitable or religious purposes for the purposes of third proviso to section

10(23C) and clauses (a) and (b) of section 11(1). However, when loan or borrowings are repaid from the income, such repayment shall be allowed as application in the year in which it is repaid to the extent of such repayment.

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Application out of corpus no longer permissible to be set-off against current year income: Any expenditure or application made out of the corpus donation will not be allowed as application for charitable or religious purposes eligible for 85% application. Such amount shall be allowed as application in the year in which it is deposited back to corpus to the extent of such deposit or investment.

Application out of loans and borrowing permissible only in the year of repayment: Application from loans and borrowings shall not be considered as application for charitable or religious purposes for the purposes of third proviso to section 10(23C) and clauses (a) and (b) of section 11(1). However, when loan or borrowings are repaid from the income, such repayment shall be allowed as application in the year in which it is repaid to the extent of such repayment.

Set-off of past deficit against current year income: Set-off of past deficit against current years' income will no longer be permissible for the purposes of computing 85% application. Rationale behind not allowing set-off of deficit against current years income:

Application for charitable and religious purposes can be out of three sources:

(i) Current year's income
(ii) Accumulated & Unconditional own funds (Corpus of the organisation)
(iii) Borrowed funds

In any year if there is a deficit i.e. excess of expenditure over income, it would imply that the organisation has over spent out of either borrowed funds or its corpus. Such deficit, earlier, was allowed to be set-off against future income, but the Finance Bill 2021 proposes that effective from 1st April, 2021 corresponding to Assessment Year 2022-23, such deficit cannot be set-off against future income. However, an organisation will be permitted to replenish the source of such deficit against income of future years i.e. (i) to repay the funds borrowed for such expenditure which created deficit, (ii) to create investments under section 11(5) to the extent of the deficit.

Educational and Medical institutions exempted upto Rs. 5 crores without any registration requirement: The Finance Bill 2021 has made path breaking changes in sub- clauses (iiiad) & (iiiae) of clause (23C) of the section 10 and has provided that any educational or medical institution shall be exempt from Income Tax upto a total income (turnover) of Rs. 5 crores annually. This limit was only Rs. 1 crore prior to be amendment. This is a big take away for such institutions. It may be noted that under section 10(23C) (iiiad) & (iiiae) an organisation is not required to get itself registered before any authority and is also not subject to 85% application. This amendment should immensely benefit small and medium educational or medical institutions. It appears that the Government intends to encourage NPOs which are engaged in direct delivery activities such as education and medical relief.

The Rs. 5 crore limit shall apply to the aggregate turnover of all institutions under the organisation: The Rs. 5 crore limit shall apply to the aggregate turnover of all institutions under the organisation. It may be noted that by virtue of certain case laws, organisations were allowed Rs.1 crore limit for each of the institution run by them. For example, if an organisation is running 10 schools and the turnover of each school is less than Rs. 1 crore, then the benefit of exemption was available to the organisation for all the schools without any registration or approval. After this amendment the aggregate turnover of all institutions under the organisation should not exceed Rs. 5 crore limit.

Less time to file belated or revised income tax returns: The last date for filing Belated or Revised Income Tax Returns has been preponed to 31st December, which was 31st March earlier.

AMENDMENT PERTAINING TO CORPUS DONATION:

Under the existing provisions of the Income Tax Act, 1961, corpus donations received by trusts, institutions, funds etc. are exempt from tax without any requirement for applying them for charitable purposes. This exemption pertaining to corpus donation is available to organisations approved under clause (23C) of section 10 as well as organisation registered under erstwhile section 12AA (now section 12AB).

However, as per the proposed amendment, the Corpus Donation shall be exempt only if the amount is invested or deposited in its specified modes as per Sec 11(5) of the Income Tax Act, 1961. Necessary amendments to this effect have been made under section 11(1)(d) as well as the third proviso under clause (23C) of section 10 of the Income Tax Act, 1961.

It may be noted that the condition of investing the corpus fund in section 11(5) investment shall apply only to that part of corpus fund which has been created from corpus donations exempted under section 11(1)(d), because organisations may have corpus funds invested in business assets under section 11(4) or (4A) which do not conform to the requirements of section 11(5). Further, a charitable organisation can be created with a corpus property which also does not conform to the requirements of section 11(5).

It may be noted that the corpus fund of an organisation may be created through many sources and may also include assets which do not conform to section 11(5). The sources from which a corpus fund could be created are broadly as under:

- Corpus donation received with the specific direction.
- 15% accumulation after applying 85% of income.
- By payment of taxes, for example an organisation pays taxes against anonymous donations in excess of 5%.
- At the time of creation of trust corpus may come as cash, property or even business.
- Corpus donation from any other exempt income not subject to application under section 11.

For the sake of greater clarity, it may be noted after the amendment only the corpus fund to the extent created out of corpus donation received under section 11(1)(d) has to remain invested as per section 11(5), for example such fund cannot be used for incidental business activity which is possible with other corpus fund.

Finally, there is no specific amendment regarding the consequences if investment made out of corpus donation is liquidated in subsequent year and not re invested. In our opinion, in such a situation the amount realised should be treated as income subject to application otherwise the proposed amendment will be negated.

Donations for construction of building: Now onwards corpus donation would imply that the funds so received have to be retained in the form of investments. In other words, corpus donation received towards construction of building or any other asset will no longer be treated as corpus donation. For example, if some donation is received

for creation of assets for project purposes then such donation cannot be treated as corpus donation. These amendments negate the case laws where in itwas held that donation received for construction of assets should be 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.

Investing surplus fund or corpus donation in immovable property: It may be noted that an organisation may also create capital assets as an investment to be liquidated in future. Immovable property is also a permissible mode of investment under section 11(5) of the Income Tax Act, 1961. However, one should understand the difference between creation of asset for advancement of objectives and investment in capital assets as an investment to be liquidated in future.

Technical flaw of not amending section 12(1): As per section 12(1), any voluntary contribution not being towards corpus donation shall be deemed to the income derived from trust property held for charitable & religious purposes. It may be noted that under the existing law as well as the proposed law there are two sections where corpus donation can be claimed as exempt:

(i) The first option is to treat corpus donation as income under section 11(1) and then again treat it as an application under section 11(1)(d).

(ii) The second option is to directly treat corpus donation as exempt income under section 12(1).

There should have been corresponding amendment in section 12(1) also, in absence of which the organisations will not include corpus donation in the income at all, by applying section 12(1), which will negate the very purpose of these amendments.

APPLICATION OUT OF CORPUS FUND

Any expenditure or application made out of the corpus donation will not be allowed as application for charitable or religious purposes eligible for 85% application.

Such amount shall be allowed as application in the year in which it is deposited back to corpus to the extent of such deposit or investment.

Understanding the mechanism of claiming application made out of corpus or borrowed funds: It may be noted that organisations used to claim expenditure made out of corpus fund as well as borrower funds as application of current year income. After the amendments, the application (expenditure) towards charitable purposes shall be divided into three broad categories:

(i) Application (expenditure) made out of current year income.
(ii) Application (expenditure) made out of corpus or the unconditionally available funds of the organisation.
(iii) Application (expenditure) made out of loans and borrowings.

After enactment of Finance Bill 2021, no application other than application made out of income shall be allowed to be claimed in the Income and Expenditure Account. However, any expenditure made out of either corpus or borrowed fund can be claimed as application to the extent

(i) new investment under section 11(5) is made,
(ii) repayment of loan is made.

For example, an organisation has a total income of Rs. 1 lakh but spends Rs. 2 lakh during the year for charitable purposes. The source of the additional Rs. 1 lakh application is (i) Rs. 50,000/- from corpus fund lying in FDRs, (ii) Rs. 50,000/- from loan taken from bank. Under normal circumstances this\ additional Rs. 1 lakh expenditure would have resulted in a deficit of Rs. 1 lakh in the Income and Expenditure Account. After the current amendment, deficit of Rs. 1 lakh can never be claimed or set-off against future income but the organisation can create FDRs worth Rs. 50,000/- in future and can also repay Rs. 50,000/- in future years.

Both will be treated as valid application in such future years.

APPLICATION OUT OF LOANS & BORROWINGS

Application from loans and borrowings shall not be considered as application for charitable or religious purposes for the purposes of third proviso to section 10(23C) and clauses (a) and (b) of section 11(1). However, when loan or borrowings are repaid from the income of the previous year, such repayment shall be allowed as application in the previous year in which it is repaid to the extent of such repayment.

TREATMENT OF SET-OFF OR DEDUCTION / ALLOWANCE OF EXCESS APPLICATION WHILE DETERMINING THE INCOME:

Set-off of past deficit against current years' income will no longer be permissible for the purposes of computing 85% application. Rationale behind not allowing set-off of deficit against current years' income:

Application for charitable religious purposes can be out of three sources:

(i) Current year's income
(ii) Accumulated & Unconditional own funds (Corpus of the organisation)
(iii) Borrowed funds

In any year if there is a deficit i.e. excess of expenditure over income, it would imply that the organisation has over spent either from borrowed funds or its corpus. Such deficit, earlier, was allowed to be set-off against future income, but the Finance Bill 2021 proposes that effective from 1st April, 2021 corresponding to Assessment Year 2022-23, such deficit cannot be set-off against future income however investment as per section 11(5) to the extent of such deficit could be created. Kindly also refer to the illustration under para 3.02.

EDUCATIONAL AND MEDICAL INSTITUTIONS TOTALLY EXEMPT UPTO RS. 5 CRORE

The Finance Bill 2021 has made significant changes in sub-clauses (iiiad) & (iiiae) of clause (23C) of the section 10 and has provided that any educational or medical institution shall be exempt from Income Tax upto a total income (turnover) of Rs. 5 crore annually. This limit was only Rs. 1 crore prior to be amendment. This is a big take away for such institutions. It may be noted that under section 10(23C)(iiiad) &(iiiae) an organisation is not required to get itself registered before any authority and is also not subject to 85% application. This amendment should immensely benefit small and medium educational or medical institutions. It also provides an insight into the Governments intent to encourage NPOs which are engaged in direct delivery activities such as education and medical relief.

REVISED AND BELATED RETURNS TO BE FILED BY 31ST OF DECEMBER EVERY YEAR

The last date of Belated or Revised Income Tax Returns has been preponed to 31st December. Earlier the last date of Belated or Revised Income Tax Returns was 31st March. As per the Proposed Amendment u/s 139(4) and (5), the last date for filing of belated or revised returns of income would be reduced by three months. Thus the belated return or revised return could now be filed three months before the end of the relevant assessment year or before the completion of the assessment, whichever is earlier. These amendments will take effect from 1st April, 2021 and will accordingly apply to the assessment year 2021-22 and subsequent assessment years.

Hence, all the NGOs are now required to submit their return latest by 31st December w.e.f. AY 2021-22 in order to be eligible to claim the benefit of Section 11. This is a slightly harsh amendment in the light of the fact that the opportunity to file a Belated Return or a Revised Return has more or less been negated and an organisation will have no window to correct its mistakes or file a belated return after 31st December. However, this is a general amendment which applies to all assesses including NPOs.

ANALYSIS OF FOREIGN CONTRIBUTION REGULATION (AMENDMENT) RULES, 2020

The Foreign Contribution (Regulation) Rules, 2020 has been notified and become effective from 10th November, 2020. The amended rules contain many procedural changes having far reaching impact.

The summary of the important amendments is as under:
In exercise of the powers conferred by under section 48 of the Foreign Contribution (Regulation) Act, 2010, the Central Govt. has amended Foreign Contribution (Regulation) Rules, 2011 and these amended Rules are called Foreign Contribution (Regulation) (Amendment) Rules, 2020. These amended Rules have been published in the Official Gazette on 10th November, 2020 and therefore, amended rules have become effective from 10th November, 2020.

There are comprehensive changes made in the process of application of registration, prior permission and, renewal. The process for surrendering the FCRA registration has been defined and, Rule 24 providing for approval of transfer of FC fund to an unregistered organisation has been deleted because of amendment in Sec. 7 of FCRA, 2010, thereby prohibiting inter charity donations. Simultaneously, Form FC 5 for approval of transfer of FC fund to an unregistered organisation has been deleted.

It is also provided that the intimation for any change shall be effective only when it is approved by the Central Govt. All the filling fees for registration, prior permission, renewal, revision and, compounding has been substantially increased.

All the forms have been modified; a new Form FC 7 has been inserted for surrender of FCRA registration, Form FC 4 has been modified by including fifteen self-declarations and one declaration towards use of FC fund for the same purpose for which FCRA registration is granted.

ELECTRONIC FORM

In the Foreign Contribution (Regulation) Rules, 2011 (hereinafter referred to as the said rules), in rule 2, in sub- rule (1), after clause (b), the following clause has been inserted, namely:

'(ba) "electronic form" shall have the same meaning assigned to it in clause (r) of sub-section (1) of section 2 of the Information Technology Act, 2000 (21 of 2000);

The meaning of Electronic form as per section 2(1)(r) of Information Technology Act 2000 is as under:

"Electronic form with reference to information, means any information generated, sent, received or stored in media, magnetic, optical, computer memory, micro film, computer generated micro fiche or similar device;"

The term 'electronic form' replaces the term 'electronically online' at many places in the FCR Rules 2020. In other words, any communication or submission shall be formally recognised if it fulfills the conditions as defined under the IT Act 2000.

FCRA ACCOUNT

The term "FCRA Account" has been defined as under "(f) "FCRA Account" means the FCRA Account referred to in section 17 of the Act."

It may be noted that section 17 of the FCR Amendment Act 2020 refers the Bank Accounts as "FCRA Account". Under section 17 there are three categories of bank accounts

(i) The designated bank account with the SBI, New Delhi branch,
(ii) The second designated bank account (the designated bank account prior to amendment) for keeping and utilising FC funds,
(iii) Utilisation bank accounts.

It may be noted that only the first two category of bank account are referred as "FCRA Account". The text of Section 17 is as under:

Foreign contribution through scheduled bank.
17 (1) Every person who has been granted certificate or prior permission under section 12 shall receive foreign contribution only in an account designated as "FCRA Account" by the bank, which shall be opened by him for the purpose of remittances of foreign contribution in such branch of the State Bank of India at New Delhi, as the Central Government may, by notification, specify in this behalf:

Provided that such person may also open another "FCRA Account" in any of the scheduled bank of his choice for the purpose of keeping or utilising the foreign contribution which has been received from his "FCRA Account" in the specified branch of State Bank of India at New Delhi:

Provided further that such person may also open one or more accounts in one or more scheduled banks of his choice to which he may transfer for utilising any foreign contribution received by him in his "FCRA Account"in the specified branch of the State Bank of India at New Delhi or kept by him in another "FCRA Account"in a scheduled bank of his choice.

Provided also that no funds other than foreign contribution shall be received or deposited in any such account."

It can be seen that Section 17 refers "the bank account with SBI" as FCRA Account and also mentions about another FCRA Account in a bank of choice for keeping and utilisation of foreign funds. The third type of bank account is mentioned as utilisation bank account and not FCRA account.

Therefore, for the purpose of the rules and filing of forms "FCRA Account" shall mean bank account with SBI, New Delhi and the second FCRA Account. This understanding gets reconfirmed when we review the form FC 3A, FC 3B, FC 3C which require the details of bank account with SBI and details of another FCRA account as FCRA account.

However, form FC 7 (application for Surrender of registration) also requires the detail of utilization bank account as a part of FCRA account.

DECLARING AN ORGANISATION TO BE OF POLITICAL NATURE

The Rule 3 has been amended by addition of a new sub rule (2) which provides that an organisation shall be considered to be an organisation of political nature only if it participates in active politics or party politics. The newly inserted sub rule (2) is as under:

> "(2) The organisations specified under clauses (v) and (vi) of sub- rule (1) shall be considered to be of political nature, if they participate in active politics or party politics, as the case may be.".

The organisation specified in clause (v) and (vi) of Rule 3(1) are as under:

> "(v) organisation of farmers, workers, students, youth based on caste, community, religion, language or otherwise, which is not directly aligned to any political party, but whose objectives, as stated in the Memorandum of Association, or activities gathered through other material evidence, include steps towards advancement of political interests of such groups;
>
> (vi) any organisation, by whatever name called, which habitually engages itself in or employs common methods of political action like 'bandh' or 'hartal', 'rasta roko', 'rail roko' or 'jail bharo' in support of public causes."

This amendment should come as a relief to many organisations, as prior to the amendments organisations could be declared to be a political organisation for a non- political activity, such as rally, dharna or any other form of protest. Now onwards an organisation cannot be declared to be a political organisation only because of any public in convenience or law and order issue for which other laws will apply.

APPLICATION FOR OBTAINING REGISTRATION

There has been considerable change with regard to the application for registration under FCRA. The Rule 9 of FCRR 2011 in relation to registration is amended as follows:

"(i) in sub-rule(1)-

(A) in clause (a), for the words "electronically online", at both places where they occur, the words "in electronic form" shall be substituted;

(B) for clause (d), the following clause shall be substituted, namely:-"(d) Any person making an application for registration under clause (a) of sub-rule (1) shall have an FCRA Account.";

(C) in clause (e), for the words "electronically online", the words "in electronic form" shall be substituted;

(D) after clause (e), the following clause shall be inserted, namely:

"(f) A person seeking registration under clause (b) of sub-section (4) of section 12 of the Act shall meet the following conditions, namely:-

(i) it shall be in existence for three years and have spent a minimum amount of rupees fifteen lakh on its core activities for the benefit of society during the last three financial years:

Provided that the Central Government, in exceptional cases or in cases where a person is controlled by the Central Government or a State Government may waive the conditions;

(ii) if the person wants inclusion of its existing capital investment in assets like and, building, other permanent structures, vehicles, equipment in the computation of its spending during last three years, then the chief functionary

shall give an undertaking that the assets shall be vested henceforth with the person till the validity of the certificate and they shall be utilised only for the activities covered under the Act and the rules made thereunder and shall not be diverted for any other purpose till the validity of its certificate of registration remains valid.";

(ii) after sub-rule (1), the following sub-rule shall be inserted, namely:

"(1A) Every application seeking registration under clause (a) of sub-rule (1), made before the commencement of these rules but not disposed of, shall be considered after furnishing the details of FCRA Account.";

The changes can be summarised as under:

Opening of FCRA Account: The person making an application for registration should have a FCRA Account i.e. a bank account with State Bank of India, Main Branch, New Delhi and another FCRA account in any PFMS compliant scheduled bank of the choice of the applicant.

Information of Bank Account: As per form FC 3A (Application Form for registration), though the detail of FCRA account with SBI NDMB is mandatory, additionally the details of second FCRA bank account can be given if any. It is also provided that all applications already made before the commencement of this Rule will be disposed of and shall be considered only after furnishing details of FCRA Account.

Opening of second FCRA Account: Rule 9(1)(e) continues to remain and it provides for opening of one or more utilisation bank account & submitting the intimation within 15 days of opening of such bank account. However, there is no corresponding amendment regarding opening, change & intimation of 2nd FCRA Account as provided in under Section 17 of FCRA, 2010.

Eligibility for making application of Registration: The eligibility requirement of being in existence of 3 years and minimum spending of Rs.15 Lakh during last 3 years on core activities has been provided in the rule as eligibility criteria. Further, expenditure on capital asset can also be included within the Rs.15 Lakh limit subject to the condition that such asset will remain registered for FC purposes. The amended provision is as under:

i) The applicant person shall be in existence for three years and should have spent a minimum amount of rupees fifteen lakh on its core activities for the benefit of society during the last three financial years:

Provided that the Central Government, in exceptional cases or in cases where a person is controlled by the Central Government or a State Government may waive the conditions;

ii) If the person making an application wants to include the existing capital investments, like bank, building, vehicles, etc. in computation of its eligibility of minimum spending of Rs.15 Lakh then such person shall:

(a) give an undertaking that the assets shall be vested henceforth with the person till the validity of the certificate.

(b) they shall be utilised only for the activities covered under the Act.

(c) the rules made thereunder and shall not be diverted for any other purpose till the validity of its certificate of registration remains valid.

Fees: The fees for submitting application has been increased to Rs. 10,000/- from Rs.5000/-.

The provision regarding including capital assets Rs.

15 lakh limit for eligibility criteria has the condition that such assets shall become a part of the FC assets. It is not clear whether such assets (created out of local source) shall also be vested with the prescribed authority at the time of surrender/ cancellation/non-renewal of FCRA registration. In our opinion since these assets are created out of local fund their use shall be restricted for FC purposes only till the time FCRA registration is valid, therefore it would not be treated as part of FC asset for the purposes of surrendering/vesting with the Government authorities. However, it is important to maintain the asset in the local books of account of the organization.

With regard to prior permission applications there are conditions regarding control or presence of foreign donor representative on the board of the organisation however no such condition is seen with regard to an application for FC registration.

APPLICATION FOR OBTAINING PRIOR PERMISSION

There have been considerable changes with regard to the application for registration under FCRA. Rule 9 of FCRR 2011 in relation to Prior permission is amended as follows

"(iii) in sub-rule (2), -

(A) for clause (d), the following clause shall be substituted, namely:
"(d) Any person making an application for obtaining prior permission under clause (a) of sub-rule (1) shall have an FCRA Account.";

(B) in clause (e), for the words "electronically online", the words "in electronic form" shall be substituted;

(C) after clause (e), the following clause shall be inserted, namely:

"(f) A person seeking prior permission for receipt of specific amount from a specific donor for carrying out specific activities or projects mentioned in clause (c) of sub-section (4) of section 12 of the Act shall meet the following criteria, namely:

(i) submit a specific commitment letter from the donor indicating the amount of foreign contribution and the purpose for which it is proposed to begiven;

(ii) for the Indian recipient persons and foreign donor organisations having common members, prior permission shall be granted to the person subject to it satisfying the following conditions, namely:

- the chief functionary of the recipient person shall not be a part of the donororganisation;

- seventy-five per cent. of the office-bearers or members of the governing body of the person shall not be members or employees of the foreign donor organisation; in case of foreign donor organisation being a single individual that individual shall not be the chief functionary or office bearer of the recipient person and

- in case of a single foreign donor, seventy-five per cent. of the office bearers or members of the governing body of the recipient person shall not be the family members or close relatives of the donor.";

Opening of FCRA Account: The person making an application for prior permission should have a FCRA Account i.e. a bank account with State Bank of India, Main Branch, New Delhi and another FCRA account in any PFMS compliant scheduled bank of the choice of the applicant.

As per form FC 3B (Application form for prior permission), though the detail of FCRA account with SBI NDMB is mandatory, the details of second FCRA bank account may be given if any.

It is also provided that all applications already made before the commencement of this Rule will be disposed of and shall be considered only after furnishing details of FCRA Account.

Common Governance with donor: The amended Rule 9(1)(f)(ii) specifically provide that the prior permission shall be granted only if the following conditions are being satisfied:

(A) the chief functionary of the recipient person shall not be a part of the donor organisation;

(B) seventy-five percent of the office-bearers or members of the governing body of the person shall not be members or employees of the foreign donor organisation;

(C) in case of foreign donor organisation being a single individual that individual shall not be the chief functionary or office bearer of the recipient person; and

(D) in case of a single foreign donor, seventy-five per cent. of the office bearers or members of the governing body of the recipient person shall not be the family members or close relatives of the donor.";

It is to be noted that these conditions were part of FAQs and now these are being formalized by inserting the same in the Rules.

Fees: The fees has been increased to Rs. 5,000/-.

APPLICATION FOR OBTAINING PRIOR PERMISSION OF OVER RS.1.00 CRORE

It may be noted that a new Rule 9A has been inserted to regulate prior permission application in excess of Rs. 1 crore. The Rule 9A is as under:

"9A. Permission for receipt of foreign contribution in application for obtaining prior permission - If the value of foreign contribution on the date of final disposal of an application for obtaining prior permission under clause (a) of sub-rule (1) of rule 9 is over rupees one crore, the Central Government may permit receipt of foreign contribution in such instalments, as it may deem fit: Provided that the second and subsequent instalment shall be released after submission of proof of utilisation of seventy five per cent. of the foreign contribution received in the previous instalment and after field inquiry of the utilisation of foreign contribution.".

Now onwards all applications for prior permission in excess of Rs. 1 crore shall be regulated through separate rules. It is important to note that prior to the amendments also theapplication for prior permission of more than Rs. 50 Lac was required to be accompanied with 3 years Financial Statements and Activity Reports and these requirements were by way of a note in the application form for application for prior permission.

The above condition has now been dropped & this is replaced by newly inserted Sec. 9A which provides that if the value of foreign contribution on the date of final disposal of an application for obtaining prior permission under clause of sub-rule (1) of rule 9 is over rupees one crore, then:

(i) The Central Govt. may permit receipt of foreign contribution in such instalment, as it may deem fit

(ii) Provided that the second and subsequent instalment shall be released after submission of proof of utilisation of seventy-five percent of the foreign contribution received in the previous instalment and

(iii) after field inquiry of the utilisation of foreign contribution

There is no prescribed format regarding the manner and form in which utilization of 75% of the FC contribution received shall be reported. In such circumstances such reporting should be made in soft copies to be sent through mail to support desk @FCRA dept. Further, organisations may seek clarity from the support desk.

As per the amended rule the exchange rate on the date of final disposal of application to be considered to determine whether the permission for prior permission is over Rs. 1 Crore or not.

EXPIRY OF CERTIFICATE ON SURRENDER

The FCRA registration certificate remains valid for period of 5 years, however, a new Rule 10(2) has been added to provide that in case of surrender the certificate shall expire on the date of acceptance of the request by theCentral Government. The Rule 10(2) is as under:

"(2) The validity of certificate surrendered under section 14A of the Act shall be deemed to have expired on the date of acceptance of the request by the Central Government.".

RENEWAL OF REGISTRATION CERTIFICATE

Rule 12 of FCRR 2011 regarding Renewal of registration has been amended as follows:

"(i) for sub-rule (2), the following shall be substituted, namely:

"(2) An application for renewal of the certificate of registration shall be made to the Central Government in electronic form in Form FC-3C accompanied with an affidavit executed by each office bearer, key functionary and member in Proforma 'AA' appended to these rules within six months from the date of expiry of the certificate of registration.";

(ii) after sub-rule (2), the following shall be inserted, namely:

"(2A) Every person seeking renewal of the certificate of registration under section 16 of the Act shall open an FCRA Account and mention details of the account in his application for renewal of registration.

(2B) Every application for renewal of the certificate of registration made under sub-rule (2) before commencement of these rules, but not disposed of, shall be considered after furnishing the details of FCRA Account.";

(iii) for sub-rule (4), the following sub-rule shall be substituted, namely:

"(4) An application made for renewal of the certificate of registration shall be accompanied by a fee of rupees five thousand only, which shall be paid through payment gateway specified by the Central Government.";

(iv) for sub-rule (5), the following sub-rule shall be substituted, namely:

"(5) No person whose certificate ofregistration has ceased to exist shall either receive or utilise the foreign contribution until the certificate is renewed.";

(v) for sub-rule (6), the following sub-rule shall be substituted, namely:
"(6) If no application for renewal of registration is received or the application is not accompanied by requisite fee before the expiry of the validity of the certificate of registration, the validity of the certificate of registration shall be deemed to have ceased from the date of completion of the period of five years from the date of the grant of certificate of registration.

Note 1: A certificate of registration granted on the 1st November,2016 shall be valid till the 31st October,2021 and a request for renewal of certificate of registration shall be submitted in electronic form accompanied by the requisite fee after the 1st May, 2021 and within 31st October, 2021.

Note 2: If no application is received or is not accompanied by renewal fee, the validity of the certificate of registration issued on the 1st November, 2016 shall be deemed to have ceased after the 31st October, 2021 and the applicant shall neither receive nor utilize the foreign contribution until the certificate of registration is renewed.";

(vi) after sub-rule (6), the following sub-rule shall be inserted, namely:
"(6A) The amount of foreign contribution lying unutilised in the FCRA Account and utilisation account of a person whose certificate of registration is deemed to have ceased under sub-rule (6) and assets, if any, created out of the foreign contribution, shall vest with the prescribed authority under the Act until the certificate is renewed or fresh registration is granted by the Centra Government.";

Existence of FCRA Account with SBI, Main Branch, New Delhi: The person making an application for renewal should have a FCRA Account i.e. a bankaccount with State Bank of India, Main Branch, New Delhi. It is also provided that all applications already made before the commencement of this Rule will be disposed of and shall be considered only after furnishing details of FCRA Account.

Time line for submitting application: As per the pre-amended provisions the application for renewal had to be submitted six months before the date of expiry of registration certificate, but as per the amended provision, application for renewal has be submitted within six months from the date of expiry of certificate for registration. For example, the organization whose certificate will expire on 31/10/2021 should apply between 1st May, 2021 but within 31st October, 2021.

Consequences if Certificate of Registration ceases to exist: As per the amended rules in case the certificate of registration has ceased to exist then neither the organisation can receive fresh foreign contribution nor can utilize foreign contribution in hand, until the certificate is renewed.Therefore, in all cases where

- application for registration could not be filed or
- application of renewal is not accompanied with requisite fees or
- application for renewal is in process as on date of expiry of certificate, then such organisation cannot receive fresh foreign contribution or can utilize foreign contribution in hand until the certificate is renewed.

Vesting of foreign contribution & assets: As per rule 6A, the amount of foreign contribution lying unutilized in the FCRA Account and utilization account of a person whose certificate of registration is deemed to have ceased under sub-rule (6) and assets, if any, created out of the foreign contribution, shall vest with the prescribed authority under the Act until the certificate is renewed or fresh registration is granted by the Central Government."

Rule 6 covers the situation where application for renewal is not made before the expiry of certificate or application is made but not accompanied with requisite fees.

Fees: The fees have been increased to Rs. 5,000 .

Whether renewal application needs to be filed within 6 months of expiry of the certificate or before six months of the date of expiry?

As explained earlier, as per amended rules, renewal application should be made within six months of the date of expiry. Therefore, for all registration that are valid till 31st October, 2021, application should be made after 1st May, 2021. However, there is a provision for delayed application for up to a period

of one year after the date of expiry after providing adequate reason for delay in applying for renewal.

After the lapse of registration validity, organization can neither receive nor utilize the existing funds irrespective of the reason for the delay.

In the event of no application for renewal is made or the application is made without requisite fees, the registration will cease and expire after date of completion of the five-year tenure of the certificate and all FC funds and assets shall vest with the prescribed Government authority. In other words, FC funds and assets shall remain with the organization only till such time the FC registration is valid, unless the prescribed authority allows the assets to continue in the possession of the organisation.

Therefore, FC assets or funds shall be under the right and ownership of the organization, only till the time FC registration is valid.

CUSTODY OF FOREIGN CONTRIBUTION IN CASE OF CANCELLATION OF CERTIFICATE

Rule 15 of FCRR 2011 in relation to custody of foreign contribution in case of Cancellation of Certificate is amended as follows:

"15. Custody of foreign contribution in respect of a person whose certificate has been cancelled. - If the certificate of registration of a person who has opened an FCRA Account under section 17 is cancelled, the amount of foreign contribution lying unutilised in that Account shall vest with the prescribed authority under the Act."

This Rule has been slightly modified. Prior to the amendment the amount of foreign contribution of a person, whose certificate of registration has been cancelled, was vested with the bank. However, as per the amendment made, the amount of foreign contribution lying unutilized in the FCRA Account shall vest with the prescribed authority under the Act. The FCRA Account shall include all the bank accounts including utilization accounts. Further all the other assets shall also vest in the prescribed authority.

VOLUNTARY SURRENDER OF CERTIFICATE

A new rule regarding voluntary surrender of certificate has been inserted as under: "15A. Voluntary surrender of certificate. - Every person who has been granted certificate of registration under section 12 of the Act may make an application in electronic form in Form FC-7 for surrender of the certificate of registration in terms of section 14A of the Act.".

This is a newly inserted section providing for application for surrender of certificate of registration shall be made in Form No. FC 7.

INTIMATION OF FC BY THE RECIPIENT

Rule 17 of FCRR 2011 in relation to intimation of FC by the recipient is amended as follows:
"In the said rules, in rule 17, in sub-rule (1), for the words "electronically online", the words "in electronic form" shall be substituted"

INTIMATION OF CHANGES

Rule 17A of FCRR 2011 in relation to intimation of changes is amended as follows :

"(i) for the opening paragraph, the following paragraph shall be substituted, namely:
"A person who has been granted a certificate of registration under section 12 or prior permission under section 11 of the Act shall intimate in electronic form within fifteen days, of any change in the following, namely:";

(ii) for clause (iv), the following shall be substituted, namely:
"(iv) office bearers or key functionaries or members mentioned in the application for grant of registration or prior permission or renewal of registration, as the case may be, in Form FC-6E.";

(iii) after clause (iv), the following proviso shall be inserted, namely:
"Provided that the change shall be effective only after final approval by the Central Government.".

Rule 17A provides for intimation within 15 days of the specified changes as mentioned in Rule 17A. As per the amended Rules all the specified changes though required to be intimated shall be effective only after approval of Central Government.

The amended Rules also provides that any change in the key functionary needs to be intimated in Form No. FC- 6E. It may be noted that prior to the amendment the requirement of change was only regarding more than 50% in the governing body members. Now onwards, every change has to be reported and the change shall also be subject to approval of FCRA Department.

Rule 17 A states that intimation in electronic form shall be given for any change of Board member, however it is subject to approval by the Central Government. The question arises whether FCRA Department can override the appointments made under the provisions of other statutes such as Companies Act 2013 or the respective Societies Registration Act. Further some organisation receive only negligible amount of foreign contribution, therefore, further question arises whether FCRA Department can control the governance of such organisation. Further, charitable/ religious organisations are private entities for public purposes (unless substantially funded or controlled by the government) therefore, can FCRA Department interfere into the governance of a private organisation?

However, such matters can only be decided through litigation in the court of law. For all practical purposes, approval of the FCRA department is a legal requirement for all changes which are required to be intimated to the FCRA Department.

REVISION OF AN ORDER

The Rule 20 has been amended as follows: "20. Revision. - An application for revision of an order passed by the competent authority under section 32 of the Act shall be made to the Secretary, Ministry of Home Affairs, Government of India, New Delhi on a plain paper and it shall be accompanied by a fee of rupees three thousand only, which shall be paid through the payment gateway specified by the Central Government."

Fees: As per the amended Rules the fees for submitting the renewal application has been increased to Rs.3000/- from the present fees of Rs.1000/-.

COMPOUNDING OF OFFENCE

The rule 21 has been amended as follows :
"21. Compounding of offence: An application for compounding of an offence under section 41 may be made to the Secretary, Ministry of Home Affairs, New Delhi in electronic form and shall be accompanied by fee of rupees three thousand only, which shall be paid through the payment gateway specified by the Central Government.".

Fees: As per the amended Rules the fees for submitting the renewal application has been increased to Rs.3000/- from the present fees of Rs.1000/-.

PUBLIC NOTICE REGARDING DESIGNATED BANK ACCOUNT

The Foreign Contribution (Regulation) Amendment Act, 2020 was introduced in Lok Sabha on September 20, 2020 and was made effective from 29th September 2020. It states that the designated bank account in which all the foreign contributions are received, should be opened in the specified branch of State Bank of India at New Delhi as the central government may by the Public Notice specify in this behalf.

The FCRA Department vide Public Notice dated 7th October, 2020 has specified the State Bank of India (SBI), Main Branch, 11, Sansad Marg, New Delhi - 110001 as the branch for the purposes of section 17 of FCR Amendment Act, 2020 under which designated account is required to be opened. The said Public Notice is available on FCRA website.

The FCRA Department vide Public Notice dated 13th October, 2020 has extended/relaxed the time in which the designated bank account in SBI Delhi is required to be opened. By virtue of this notice all NPOs can now open the designated bank account with SBI, New Delhi by 31st March 2021.

All NPOs can continue to receive foreign contribution in the existing designatedbank account till they open the designated bank account with SBI, New Delhi or 31st March 2021 whichever is earlier. The said Public Notice is available on FCRA website.

PRE-AMENDMENT PROVISION REGARDING BANK ACCOUNT

Section 17 of the FCRA Act, 2010 states that the organizations which have been granted prior permission or granted registration shall receive foreigncontributions in the designated bank account only. Currently, FCRA registered organizations can open designated bank accounts as well as utilization bank accounts with any core banking compliant bank integrated with the public financial management systems (PFMS). Hence there were two layers of bank accounts, one designated bank account for receiving foreign contribution and second utilization bank account for utilizing the FC received.

FCRA BANK ACCOUNT PROVISIONS AFTER AMENDMENT

The amended Section 17 after FCR Amendment Act, 2020 is reproduced as under: "Foreign Contribution through scheduled bank

> (1) Every person who has been granted certificate or prior permission under section 12 shall receive foreign contribution only in an account designated as "FCRA Account" by the bank, which shall be opened by him for the purpose of remittances of foreign contribution in such branch of the State Bank of India at New Delhi, as the Central Government may, by notification, specify in this behalf.

Provided that such person may also open another "FCRA Account" in any of the scheduled bank of his choice for the purpose of keeping or utilising the foreign contribution which has been received from his "FCRA Account" in the specified branch of State Bank of India at New Delhi.

Provided further that such person may also open one or more accounts in one or more scheduled banks of his choice to which he may transfer for utilizing any foreign contribution received by him in his "FCRA Account" in the specified branch of the State Bank of India at New Delhi or kept by him in another "FCRA Account" in a scheduled bank of his choice or kept by him in another "FCRA Account" in a scheduled bank of his choice.

"Provided also that no funds other than foreign contribution shall be received or deposited in any such account.

> (2) The specified branch of the State Bank of India at New Delhi or the branch of the scheduled bank where the person referred to in sub-section (1) has opened his foreign contribution account or the authorised person in foreign exchange, shall report to such authority as may be specified, -
>
> (a) the prescribed amount of foreign remittance;
> (b) the source and manner in which the foreign remittance was received; and
> (c) other particulars, in such form and manner as may be prescribed.]"

Summary of Amendments: The amended section 17 provides for three layers of bank accounts:

a) FCRA Designated Account: The designated bank account, in which all the foreign contributions are received, should be opened in the specified branch of State Bank of India at New Delhi as the central government may by the notification specify in this behalf.:

b) **Another FCRA Account:** Such person may also open another FCRA Account in any of the scheduled bank of his choice for the purpose of keeping or utilising the foreign contribution which has been received from their FCRA Account in the specified branch of State Bank of India at New Delhi, such bank account will become the "Defacto Designated Account".

c) **Utilisation Account:** Further, such person may also open one or more accounts in one or more scheduled banks of his choice to which he may transfer for utilising any foreign contribution received by him in his FCRA

account in the specified branch of the SBI, New Delhi or kept by him in another FCRA Account in a scheduled bank of his choice.

SPECIFIED BRANCH OF STATE BANK OF INDIA IN NEW DELHI

The FCRA Department vide Public Notice dated 7th October 2020 specified the State Bank of India, New Delhi Main Branch (NDMB), 11, Sansad Marg,New Delhi - 110001 as the branch for thepurposes of section 17 of FCRA2010 under which designated account is required to be opened.

The FCRA Department vide Public Notice dated 13th October 2020 has extended/relaxed the time in which the designated bank account in SBI Delhi is required to be opened. By virtue of this Public Notice all NPOs can now open the designated bank account with SBI, New Delhi by 31st March 2021.
All NPOs can continue to receive foreign contribution in the existing designated bank account till they open the designated bank account with SBI, New Delhi or 31st March 2021 whichever is earlier.

The public notice dated 13-10-2020 also mentions the relevant particulars of this branch i.e. NDMB as follows:

Branch Code : 00691
IFSC : SBIN000691
SWIFT : SBININBB104
E-mail : agmforex.00691@sbi.co.in/ agmcommercial.00691@sbi.co.in/ sbi.00691@sbi.co.in

TRANSITION WINDOW FROM 29.09.2020 TO 31.03.2021

The FCR Amendment Act, 2020 has become effective from 29th September, 2020 and as per the amended act an organisation can receive FC fund only through a designated bank account to be opened at SBI, New Delhi. The sudden enactment of the amendment resulted in virtual freeze over all FC inflow into the country. The process of opening of bank account with SBI, New Delhi was subject to designation of the bank branch and also the time needed to open bank account for all the FC registered organisations from all over the country.

"FCRA Account" in a scheduled bank of his choice or kept by him in another "FCRA Account" in a scheduled bank of his choice.

"Provided also that no funds other than foreign contribution shall be received or deposited in any such account.

(2) The specified branch of the State Bank of India at New Delhi or the branch of the scheduled bank where the person referred to in sub-section (1) has opened his foreign contribution account or the authorised person in foreign exchange, shall report to such authority as may be specified, -

(a) the prescribed amount of foreign remittance;
(b) the source and manner in which the foreign remittance was received; and
(c) other particulars, in such form and manner as may be prescribed.]"

Summary of Amendments: The amended section 17 provides for three layers of bank accounts:

a) FCRA Designated Account: The designated bank account, in which all the foreign contributions are received, should be opened in the specified branch of State Bank of India at New Delhi as the central government may by the notification specify in this behalf.:

b) **Another FCRA Account:** Such person may also open another FCRA Account in any of the scheduled bank of his choice for the purpose of keeping or utilising the foreign contribution which has been received from their FCRA Account in the specified branch of State Bank of India at New Delhi, such bank account will become the "Defacto Designated Account".

c) **Utilisation Account:** Further, such person may also open one or more accounts in one or more scheduled banks of his choice to which he may transfer for utilising any foreign contribution received by him in his FCRA In the light of the hardship caused by the provision pertaining to bank account, the FCRA department has issued a Public Notice dated. 13th October, 2020 allowing additional migration time upto 31st March 2021 for opening of such bank account. An organisation can receive foreign contribution in the existing bank account upto the date of opening of the designated bank account in SBI, New Delhi or 31st March 2021 whichever is earlier. The notice permits the following:

(a) All the persons/NGOs/associations who have been already granted certificate of registration orprior permission by the Central Government to receive FC and whose present accounts are in banks or branches other than the specified branch i.e. NDMB, shall have to open "FCRA Account" in the NDMB. The Central Government has decided to grant sufficient time to the existing "FCRA Account" holders for transitioning to the new regime. They can open the "FCRA Accounts" in the NDMB till 31st March, 2021.

(b) The existing FCRA account holders have to open the "FCRA Account"in the NDMB upto 31st March, 2021 or earlier. They shall be eligible to receive FC in the "FCRA Account" in the NDMB w.e.f. 1st April, 2021 or from the date of opening of the "FCRA Account" in the NDMB whichever is earlier. After that date they shall not be eligibleto receive FC in any account other than the "FCRA Account" opened in the NDMB. In this regard, suitable directions are being issued to all scheduled banks in the country.

(c) All the persons/NGO/associations who already have been granted certificate of registration or prior permission by Central Government may take note that they shall not receive any FC in any account other than the designated "FCRA Account" opened at NDMB of the SBI, 11, Sansad Marg, New Delhi-110001 from the date of opening of such account OR 1st April, 2021, which ever is earlier."

PROCESS OF OPENING OF NEW BANK ACCOUNT AT SBI

The above public notice also specified the following procedure for opening new account at SBI, New Delhi:

"(a) To open the afore-mentioned "FCRA Account" in the NDMB the applicant entity / NGO/association need not the visit the NDMB at Delhi. They may approach either the nearest SBI Branch or any other SBI Branch of their choice for taking action with regard to opening of their "FCRA Account"

(b) In this regard Standard Operating Procedure (SOP) to facilitate opening and operating the "FCRA Account" in NDMB has been worked out which will be soon uploaded in this portal.

(c) The NDMB will not levy any transfer charges/fees for transferring the FC from the "FCRA Account" to "another FCRA Account" or other utilization account / accounts in a branch of any scheduled bank."

WHAT IS THE SIGNIFICANCE OF THE DATE 31ST MARCH, 2021?

The existing FC registered NGOs or NGO having "prior permission are" allowed to open the new account with the specified branch of State Bank of India (NDMB) latest by 31st March 2021.

However once the new account with State Bank of India (NDMB) is opened, the FC Fund can be received only through the bank account opened with New Delhi Main Branch (NDMB) of State Bank of India. Hence, the foreign funds can be received in the present designated bank account upto 31st March, 2021 or the date of the opening of the bank account with NDMB of State Bank of India whichever is earlier.

However, if Specified bank account is not opened with NDMB of State Bank of India by 31st March, 2021 then no fresh FC Fund cannot be received after 31st March, 2021 till the bank account with NDMB branch of SBI is opened.

WHETHER THE BANK ACCOUNT OPENED WITH NDMB IS REQUIRED TO BE INTIMATED TO THE MINISTRY

The Public Notice issued by FCRA Department has not provided for any requirement of intimating the opening of this bank account to the Ministry and allowed the receipt of FC Funds through this Bank Account. However, under Rule 17A an organisation is required to file Form FC - 6E for change in bank account. Since there is no formal direction from the FCRA Department in this regard, it is advisable to file an intimation under Form FC - 6E after opening of the bank account, within 15 days.

WHETHER THE EXISTING DESIGNATED BANK ACCOUNT NEEDS TO BE RE-APPROVED WITH THE MINISTRY

The present Designated Bank account which is maintained for the purpose ofreceiving Foreign Contribution is an approved designated bank account. However, after the FCR Amendment Act, 2020, this bank account can be retained as "another FCRA Account" which can be used for the purpose of keeping and utilising Foreign Contribution.

The Point. No. 9 of the Public Notice dated 13th October, 2020 provides that "the applicant/NGO/association has complete liberty to retain its present 'FCRA Account' as another 'FCRA Account' in any branch of a scheduled bank of its choice. They can link this account with the designated 'FCRA Account' opened at the NDMB".

In our opinion there will be no further compliance for re-purposing this bank account as Ministry by above referred Public Notice has allowed to retain the present designated bank account as Another FCRA Account.

BANK ACCOUNT FOR FRESH APPLICANTS FOR CERTIFICATE OF REGISTRATION OR PRIOR PERMISSION

As per Point. No. 5 of the Public Notice "All the fresh applicants for certificate of registration or prior permission under the FCRA, 2010 shall have to open the 'FCRA Account' in the NDMB to receive any FC if they are granted certificate for registration or prior permission by the Central Government later on". Therefore, going by the current procedure all such applicants have to open a designated bank account in the in the SBI, New Delhi Main Branch at the time of making application for registration or prior permission. However, greater clarity in this regard is expected from FCRA Department.

WHETHER THE EXISTING UTILIZATION BANK ACCOUNT CAN CONTINUE WITHOUT ANY FURTHER FORMALITIES

As there is no change in the status of Utilized Bank Account, we understand that existing Utilized Bank Account can continue to be used without any further formalities.

ADMINISTRATIVE EXPENDITURE UNDER FCRA REDUCED TO 20% - IMPACT ANALYSIS

Section 8 of the FCRA, 2010 provides a cap on administrative expenses of 20% [reduced from 50% w.e.f 29th September 2020 vide FCR (Amendment) Act 2020] of FC fund received during the year. The section also provides that the administrative expenses may exceed this limit of 20% with the prior approval of the Central Government.

The FCR (Amendment) Act 2020 (effective from 29th September 2020) has reduced the limit of 50% to 20% of the total foreign funds received in a particular year. In other words, a FC registered organization cannot spend more than 20% of the FC received in that particular year on administrative expenses.

The limit of 20% administrative expenses should apply on FC utilization w.e.f. 29th September, 2020. Hence during FY 2020-21, the organisation can spend up to 50% on administrative expenses up to 28th September, .2020 and from 29th September, 2020 the limit of 20% on administrative Expenses shall apply. However, this is subject to any further exemptions (regarding the applicability date of the amendments) through circulars under section 50 of FCRA 2010.

Rule 5 of FCRR 2011 provides specifically what shall be included under administrative expenses. It also provides certain exclusions.

As the rule specifies that the natural heads of expenses that shall be treated as Administrative expenses, therefore expenses under those specified heads even if related to program shall be treated as

administrative expenditure, for the purpose of FCRA 2010.

Rule 5 of FCRR 2011 provides that salary in relation to management of the activity shall be included as administrative expenses. Therefore, it implies that salary in relation to staff engaged in implementation of the program shall not be covered within Administrative expenses for FCRA 2010.

The administrative expenditure as per Rule 5 of FCRR, 2011 does not include capital expenditure. However, such capital expenditure should be towards advancement of charitable objectives. Otherwise it shall be treated as either investment or applied for inadmissible purposes.

Under the current scheme of reporting under FCRA 2010, administrative expenditure is required to be reported to the FCRA authorities under clause 3(ii) of Form FC 4.

Administrative expenses in excess of 20% without prior approval of Central Government shall constitute non-compliance under FCRA 2010 and the organization may be required to pay a compounding fees which shall be Rs.1 lacs or 5% of excess administrative expenditure, whichever is higher. It may be noted that the penalty in any case cannot exceed the amount of foreign contribution involved in non compliance.

INTRODUCTION AND STATUTORY PROVISIONS

FCRA, 2010 provides that administrative expenditure out of FC fund should not exceed 20% [reduced from 50% w.e.f 29th September 2020 vide FCR (Amendment) Act 2020] of FC fund received during a year. In this Issue we shall try to understand the meaning of Administrative Expenditure for the purpose of FCRA 2010 and the provisions in relation thereto.

The text of Section 8 of FCR (Amendment) Act 2020: Regarding restriction to utilize foreign contribution for administrative purpose is as under:

"Restriction to utilize foreign contribution for administrative purpose

(i) Every person, who is registered and granted a certificate or given prior permission under this Act and receives any foreign contribution,

(a) shall utilise such contribution for the purposes for which the contribution has been received:

Provided that any foreign contribution or any income arising out of it shall not be used for speculative business;

Provided further that the Central Government shall, by rules, specify the activities or business which shall be construed as speculative business for the purpose of this section.

(b) shall not defray as far as possible such sum, not exceeding twenty percent of such contribution, received in a financial year, to meet administrative expenses:

Provided that administrative expenses exceeding twenty per cent. of such contribution may be defrayed with prior approval of the Central Government.

(ii) The Central Government may prescribe the elements which shall be included in the administrative expenses and the manner in which the administrative expenses referred to in sub-section (1) shall be calculated."

It may be noted that the limit was reduced to 20% by the FCR (Amendment) Act 2020; earlier it was 50%. Section 8 of the FCRA, 2010 provides a cap on administrative expenditure upto 20% FC fund received during the year. The section also provides that the administrative expenditure may exceed this limit of 20% with the prior approval of Central Government.

Rule 5 of FCRR 2011 provides specifically what shall be included under administrative expenditure. It also provides certain exclusions. The text of Rule 5 is as under:
"Administrative Expenses:

(i) salaries, wages, travel expenses or any remuneration realised by the Members of the Executive Committee or Governing Council of the person;

(ii) all expenses towards hiring of personnel for management of the activities of the person and salaries, wages or any kind of remuneration paid, including cost of travel, to such personnel;

(iii) all expenses related to consumables like electricity and water charges, telephone charges, postal charges, repairs to premise(s) from where the organisation or Association is functioning, stationery and printing charges, transport and travel charges by the Members of the Executive Committee or Governing Council and expenditure on office equipment;

(iv) cost of accounting for and administering funds;
(v) expenses towards running and maintenance of vehicles;
(vi) cost of writing and filing reports;
(vii) legal and professional charges; and
(viii) rent of premises, repairs to premises and expenses on other utilities:

Provided that the expenditure incurred on salaries or remuneration of personnel engaged in training or for collection or analysis of field data of an association primarily engaged in research or training shall not be counted towards administrative expenses:

Provided further that the expenses incurred directly in furtherance of the stated objectives of the welfare oriented organisation shall be excluded from the administrative expenses such as salaries to doctors of hospital, salaries to teachers of school etc."

OVERVIEW OF THE PROVISIONS PERTAINING TO ADMINISTRATIVE EXPENSES

Section 8 of FCR (Amendment) Act 2020 prescribes that the administrative expenditure in any year should not exceed 20% of the total FC funds received in that year. It may be noted that Rule 5 of FCR Rules, 2011 includes many expenditures under administration which might be necessary for implementation of programs.

The FCR (Amendment) Act 2020 has reduced the above limit of 50% to 20% of the total FC funds received in a particular year. In other words, a FC registered organization cannot spend more than 20% of the FC received in that particular year on administrative expenditure.

However, the option to spend more than 20% on administrative expenditure with prior approval of Central Government still remains.

Context and Implications: The erstwhile 50% limit may look on the higher side, but it is necessary to meet many expenditures in the nature of salary, rent, travel etc. which are actually incurred for programme purposes. Many NPOs have very high component of salaries and travel which are specifically towards programs. The Rule 5 also defines the meaning of administrative expenditure and what is covered within its ambit. Now bringing the threshold to 20% will effectively reduce the cushion for program management costs. Therefore, NPOs have to recalibrate their cost structure to adapt to these reduced thresholds. However, the problem arises when all expenditures pertaining to salaries, travel etc. are perceived as administrative expenditure. This amendment will increase litigations due to the lack of any acceptable standards and norms for determining what is "administrative expenditure."

The limit of 20% of administrative expenditure should apply on FC utilization w.e.f. 29.09.2020. Therefore, during FY 2020-21 the organisation can spend up to 50% on administrative expenditure up to 28th September, .2020 and from 29th September, 2020 the limit of 20% on administrative expenditure shall apply.

However, this is subject to any further exemption (from the applicability date of the amendments) through circulars under section 50 of FCRA 2010, which may be announced.

MEANING OF ADMINISTRATIVE EXPENSES

Rule 5 of FCRA 2010 provides what shall constitute administrative expenditure and further provides a list of expenditure which shall be treated as administrative in nature.

It can be seen that the definition of administrative expenses includes various cost such as salaries, rent, vehicles etc. which are also incurred for programme purposes. Therefore, the scope of the Rule is more important than the traditional understanding of administrative expenditure. In other words, some expenditure may have been incurred specifically for the programmes but for the purpose of FCRA 2010 they shall be treated as administrative expenditure, as per the list of expenditures defined in the Rule above.

The administrative expenditure shall briefly consist of :

- Remuneration and other expenditure to Board Members and Trustees.
- Remuneration and other expenditure to persons managing activity.
- Expenses at the office of the NGO.
- Cost of accounting and administration.
- Expenses towards running and maintenance of vehicle.
- Cost of writing and filing reports.
- Legal and professional charges.
- Rent and repairs to premises.

For example, the salary of the Programme Director shall be treated as administrative expenditure, as a Program Director is a person responsible for the management of activities. The Rule 5(ii) is reproduced here:

> *"all expenses towards hiring of personnel for management of the activities of the person and salaries, wages or any kind of remuneration paid, including cost of travel, to such personnel;"*

In the light of the abovementioned rule all the salaries of senior program management personnel are treated as administrative cost. This above rule has to be read in context of the following exclusions:

> *"Provided that the expenditure incurred on salaries or remuneration of personnel engaged in training or for collection or analysis of field data of an association primarily engaged in research or training shall not be counted towards administrative expenses*
>
> *Provided further that the expenses incurred directly in furtherance of the stated objectives of the welfareoriented organisation shall be excluded from the administrative expenses such as salaries to doctors of hospital, salaries to teachers of school etc."*

Now one has to understand that all salaries are first treated as administrative expenses and subsequently the above two exclusions are provided.

That means a research organisation can exclude "salaries or remuneration of personnel engaged in training or for collection or analysis of field data". Other organisations can exclude

> *"expenses incurred directly in furtherance of the stated objectives of the welfare oriented organisation such as salaries to doctors of hospital, salaries to teachers of school etc."*

This exclusion is subject to interpretation but seems that only salaries of those persons who are technically qualified for programs such as Doctors, Nurses, Teachers, Health Workers, Experts in their

respective fields such as environment, livelihood etc. are excluded. In other words, the exclusions are too narrow and confusing and it seems that most of the salaries and other expenditure shall be covered under the category of "administrative expenditure". Further, salaries of all such staff who are involved directly in implementation of program at the grassroot level shall also not be treated as administrative expenditure.

From the above exclusion, the following expenditures may be carefully examined whether they will fall under administrative category. All kinds of vehicle expenditure have been considered as administrative in nature. However, the last proviso provides that expenses for furtherance of activity shall be excluded. Therefore, all direct programme related vehicle expenses and other expenditures are excluded from calculation of administrative expenses. All vehicle expenditure other than those which could be established as 'directly incurred on activities' shall be treated as administrative expenses.

PRECAUTION AN NPO SHOULD TAKE TO ADHERE TO THE REDUCED LIMIT OF 20%

The organisation should review all the budgets for the period starting from the effective date of the amended law and calculate the Administrative Expenditure. If it is found that the administrative component exceeds 20% then the following few options are available:

- It is not advisable to explore the possibility of meeting the administrative expenditure from local sources. However, under the Income Tax law also, the Assessing Officer may treat administrative expenditure as not applied towards charitable purposes. Normally, if there is a violation in one statute then the impugned amount cannot be claimed under another statute. The Supreme Court in the case of Maddi Venkatraman & Co. (P) Ltd. vs. CIT [(1998) 229 ITR 534] held that it is against the public policy to allow the benefit of deduction under one statute of any expenditure incurred in violation of the provisions of another statute and therefore, allowed the appeal filed by the Revenue to the said extent.

- The organisation may apply to the FCRA Department for prior approval against such excess expenditure.

- One may legally challenge the micro-management made by FCRA Department, in the light of the following facts;

  (i) the genuineness of the expenditure is not disputed,
  (ii) the need and relevance of such expenditure is also not disputed,
  (iii) security threat to the country is not alleged
  (iv) FC funds being private money being incurred at the direction of the donors; it would be constitutionally beyond the mandate of FCRA Department to stop or micro manage such projects or programs.

However, legal challenge is subject to the judgement of the respective Courts.

WHETHER ADMINISTRATIVE EXPENDITURE INCLUDES CAPITAL EXPENDITURE

The Administrative Expenses as Rule-5 of FCRR, 2011 does not include Capital Expenditure.It may be noted that Form FC-4 bifurcates total FC Utilization as under:

(a) Details of utilization of Foreign Contribution:

  i) Total utilization for projects as per aims and objectives of the association.
  ii) Total Administrative expenses as provided in rule 5 of the Foreign Contribution (Regulations) Rules, 2011(Rs.)

(b) Total purchase of fresh assets (Rs.)
(c) FC transferred to other associations.

The above reporting requirements also consider capital expenditure and administrative expenditure separately, for the purposes of FCRA 2010.

However, such capital expenditure should be towards advancement of charitable objectives otherwise, and shall be treated as either investments or applied for inadmissible purposes.

WHETHER ADMINISTRATIVE EXPENDITURES INCLUDE GRANT MADE TO OTHER FC REGISTERED ORGANISATIONS

Administrative expenditure does not include grant made to other FC registered organization even if there are approved budget for administrative expenditure for which grant is being made to other FC registered organization. administrative expenditure incurred out of the grant amount shall be reported by the donee organisation under FCRA. However, the FCR (Amendment) Act 2020 has also prohibited inter charity grant by amending section 7 and therefore, this issue becomes academic in nature.

HOW TO CALCULATE AND APPLY FOR APPROVAL IF ADMIN EXPENDITURE EXCEEDS 20%

Section 8 of the FCRA, 2010 provides a cap on administrative expenditure of 20% on total FC fund received during the year. The section also provides that the administrative expenditure may exceed this limit of 20% with the prior approval of Central Government.

However, the FCRR 2011 has so far not prescribed any process for seeking approval for increase in administrative expenditure beyond 20% and therefore it appears that request for prior approval may be sent by email communication.

How to calculate: The limit of 20% of administrative expenditure is on the basis of Foreign Contribution received during the year instead of Foreign Contribution utilized and therefore it may have its impact when Foreign Contribution is received in advance in one year and expenditure is incurred in the subsequent year. In other words, the law states that 20% of the FC received during the year shall be allowed as administrative expenditure. Ideally it should have been 20% of the FC utilized during the year. Further, no distinction has been made for FC funds received specifically as corpus donation or for creation of specific assets. Such anomalies compound the problem of determination of administrative expenditure.

IS SEPARATE ACCOUNTING NECESSARY FOR ADMINISTRATIVE EXPENDITURE AS PER FCRA?

The requirement of separate Books of Account is for FC fund received and utilised. Separate ledger or books for administrative expenditure are not required to be maintained. However, the organisation should be in a position to clearly segregate the expenditure, which is administrative in nature from the books of account maintained by them.

IS ADMINISTRATIVE EXPENDITURE REQUIRED TO BE REPORTED TO FCRA AUTHORITIES

Under the current law, the administrative expenditure is required to be reported to the FCRA authorities under clause 3(ii) of Form FC 4. It is a statutory compliance which the organisation has to follow.

CONSEQUENCES OF INCURRING ADMINISTRATIVE EXPENDITURE IN EXCESS OF SPECIFIED LIMIT OF 20%

Administrative expenditure in excess of 20% without prior approval of Central Government shall constitute non-compliance under FCRA 2010. In such cases, the person may have to go for compounding of this non-compliance under section 41 of FCRA 2010. As per the notification dated 5th June, 2018 providing for compounding fees, it is provided that for spending more than 20% of the administrative expenditure the compounding fees shall be Rs.1 lacs or 5% of excess expenditure on administration whichever is higher.

It may be noted that the penalty in any case cannot exceed the amount of foreign contribution involved in non compliance. For example, if the administrative expenditure exceeds the 20% limit by Rs. 10,000/- then the total penalty will be only Rs. 10,000/- and not Rs. 1,00,000/-.

CAN THE VIOLATION PERTAINING TO ADMINISTRATIVE EXPENSES BE COMPOUNDED EVERY YEAR?

It may be noted that under section 41(2) an offence once compounded cannot be compounded again within a period of 3 years i.e. second or subsequent offences cannot be compounded within a block of 3 years. In other words, a violation pertaining to administrative expenditure cannot be compounded more than once in block of three years. The Act does not specifically provide for the penalty for second or third offence pertaining who administrative expenses, but it will be treated as a violation under the Act which may lead to non-renewal or cancellation of the certificate of registration.

Nothing in sub-section 41(1) shall apply to an offence committed by an individual or association or its officer or other employee within a period of three years from the date on which a similar offence committed by it or him was compounded under this section.

"The amount of penalty computed under column (3) of the Table in respect of any offence or offences referred to in column (2) thereof shall not be more than the value of the foreign contribution involved."

FAQs ISSUED BY THE FCRA DEPARTMENT ON ADMINISTRATIVE EXPENSES

Q.1 What are the administrative expenditure as per FCRA, 2010?

Ans. Rule 5 of FCRR, 2011 defines that administrative expenditure constitute the following:

(i) salaries, wages, travel expenses or any remuneration realised by the members of the executive committee or governing council of the person;

(ii) all expenses towards hiring of personnel for management of the activities of the person and salaries, wages or any kind of remuneration paid, including cost of travel, to such personnel;

(iii) all expenses related to consumables like electricity and water charges, telephone charges, postal charges, repairs to premise(s) from where the organisation or Association is functioning, stationery and printing charges, transport and travel charges by the Members of the Executive Committee or Governing Council and expenditure on office equipment;

(iv) cost of accounting for and administering funds;

(v) expenses towards running and maintenance of vehicles;

(vi) cost of writing and filing reports;

(vii) legal and professional charges; and

(viii) rent of premises, repairs to premises and expenses on other utilities;

Provided that the expenditure incurred on salaries or remuneration of personnel engaged in training or for collection or analysis of field data of an association primarily engaged in research or training shall not be counted towards administrative expenses:

Provided further that the expenses incurred directly in furtherance of the stated objectives of the welfare oriented organisation shall be excluded from the administrative expenses such as salaries to doctors of hospital, salaries to teachers of school, etc.

TREATMENT OF INTER CHARITY DONATIONS UNDER FCRA

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 at 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."

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

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.

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.

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.

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.

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 India wide 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.

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"

FOREIGN DONOR AWARDING COMMERCIAL CONTRACT TO IMPLEMENT THE PROGRAMS

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

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.

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.

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.

An NPO can also undertake commercial contracts with the tax implications mentioned above. 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.

ROAD AHEAD AFTER ENACTMENT OF FC(R)A 2020-FCRA FAQS

The Foreign Contribution (Regulation) Amendment Act, 2020 has been enacted and notified effective from 29th September, 2020. This act amends the Foreign Contribution (Regulation) Act, 2010 and has brought many radical changes. Some of the changes have resulted in operational issues and have a direct impact on the ongoing activities and transactions. In this issue we are addressing some of such issues and confusions.

FAQ No. 1: Can the government allow transition period for providing exemptions for some period?

Answer: It may be noted that once the effective date of the new Act has been notified then the provisions of the older law will no longer apply. Therefore, all organisations have to follow the amended law in letter and spirit, irrespective of the practical problems which may arise.

However, under Section 50 of the FCRA 2010 the Central Government has the power to exempt the application of certain provisions of the amended law for specific period as it may decide in the light of the practical problems which may arise.

FAQ No. 2: Whether NGO can receive FC fund from Foreign sources from 29th September till the FCRA bank account is opened in specified branch of SBI.

Answer: No, in our opinion, as per the amended Act, the FC funds are to be received in the specified branch of SBI in New Delhi. However, the specific branch has not been notified till date by the of Home affairs. Therefore, in our opinion, we

Ministry should wait for further notification in this regard to receive funds in FC Designated Bank Account.

FAQ No. 3: What would be the implication of FC fund received on or after 29th September, 2020 in the existing bank accounts received from a foreign source?
or
What would be the implication of FC Funds received from an Indian Organization as a subsequent receipt (inter charity donation) on or after 29th September, 2020?

Answer: In our opinion, it not permissible to receive the funds in any other bank other than the notified Branch in SBI, New Delhi. Therefore, unless a notification/ circular is issued from FCRA department any funds whether received or disbursed as Inter Charity Grant would be a violation of the amended law.

As per Section-17 as amended by FCRA Amendment Act, 2020 effective from 29th September,2020, "Every person who has been granted certificate or prior permission under section 12 shall receive foreign contribution only in an account designated as "FCRA Account" by the bank, which shall be opened by him for the purpose of remittances of foreign contribution in such branch of the State Bank of India at New Delhi, as the Central Government may, by notification, specify in this behalf"

Hence after 29th September,2020, foreign fund can be received only through the bank account maintained in the specified branch of SBI.

However, if any amount has been received or disbursed as Inter Charity Grant on 29th September 2020 then such transfer cannot be treated as an wilful violation on the part of such organisations as the communication regarding the effective date of the new law was available in public domain only after the start of banking hours on 29th September 2020.

Finally, it is very likely that the FCRA department shall issue a notification/ circular in this regard; it is advisable to wait for such notification/circular.

FAQ No. 4: Whether NGO can receive FC fund from Indian organization as a subsequent receipt from 29th September through their existing Designated bank account.

Answer: No, as per Section 7, sub-granting of FC funds has been disallowed and therefore, an Indian Organization should not receive any funds from an Indian organization as a subsequent recipient. However, sub granting of non FC funds is permissible.

FAQ No. 5: What would be the implication of regular FC income like (interest, rent, sale proceeds of assets etc.) being received in designated bank account on or after 29th September,2020.

Answer: It may be noted that FC income like (interest, rent, sale proceeds of assets etc.) are deemed foreign contribution as they are generated locally. However, the amended provision under section 17 does not distinguish between: (i) Foreign Contribution received from foreign source and (ii) deemed foreign contribution as they are generated locally. Therefore, technically such income is also foreign contribution and our Opinion No. 3 shall apply. It is important that the FCRA department clarifies and allows such receipts in other approved bank accounts.

FAQ No. 6: Should the NGO write to the bank to hold the payment till FCRA account with SBI is opened? In the case of rent or any income from FCRA Assets, should the NGO write to the tenant or any other vendor to hold their payments till the new SBI bank is notified?

Answer : In our view, you may write to your respective banks, vendors or tenant to hold the payments till the MHA notifies further instructions in this regard.

FAQ No. 7: Whether NGO can utilize FC fund lying with them as on 29th September, 2020.

Answer: Yes, the utilization of the FC funds can be done from the existing bank accounts and however, there is no restriction on the utilization of the funds from the existing bank accounts. However, such

funds cannot be sub-granted to another FCRA registered organization in compliance with the amended Section 7 of the Act. In other words, the existing unutilized funds can be directly spent by the NGO on Programme, Admin or Capital expenditures.

FAQ No. 8: Whether NGO can transfer funds (in terms of the agreement with sub grantee) to other FC registered organization on or after 29th September, 2020.

Answer: No, as per the amended Section 7 of the Act, sub-granting of FC funds has been disallowed. Hence, no sub-granting can be done to another NGO, whether registered or unregistered under FCRA, on or after 29thSeptember, 2020. This provision would supersede the fund commitments made under such grant agreement by the FCRA registered organization. In other words, sub-granting of FC funds would be disallowed irrespective of the contractual obligations made under the Grant Agreements, unless FCRA department grants any exemptions in this regards through an order under Section 50 of FCRA 2010.

FAQ No. 9: Whether sub grantee can refund the unutilized balance lying with them to the Foreign Donor on or after 29thSeptember,2020.
or
Whether sub grantee can refund the unutilized balance lying with them to the Indian donor on or after 29th September,2020

Answer: This issue has to be understood in the light of the technicalities and the contractual term. Normally, refund of a grant received is not treated as a grant; only the net amount is treated as the sub grant from the donor. However, for all practical purposes organisations treat any refund of grant, also, as utilisation towards charitable purposes both under Income Tax and FCRA Law.

We understand Section 7 of amended FCRA Act prohibits any type of transfer of FC fund to another person and therefore, even the refund of unutilised balance by sub-guarantee to mother NGO in India shall be covered u/s. Sec.7 of Amended FCRA act.

It is recommended that any such return or refund of the unutilised grant amount should be made with approval from FCRA department.

FAQ No. 10: As per the amended law, the admin expenses are reduced to 20%. Whether such reduced limit of 20% for administrative expenses shall be calculated for expenses from 29th September or 20% limit shall apply for the entire financial year 2020-21?

Answer : The limit of 20% of administrative expenses should apply on FC utilizationw.e.f. 29/09/2020. During FY 2020-21 the organisation can spend up to 50% on administrative Expenses up to 28th September, 2020 and from 29th September, 2020 the limit of 20% on administrative expenses shall apply.

FAQ No. 11: What precaution an NGO should take to adhere to the reduced limit of 20% for Administrative expenses?

Answer: The organisation should review all the budgets for the period from 29th September, 2020 to 31st March, 2021 and calculate the administrative expenses that will be incurred out of the FC fund and initiate necessary action including the option of charging the excess administrative cost under the local funded program so as to make the total Administrative costs within the limit of 20% under FC fund.

However, in cases where administrative expense is projected to be more than the specified limit of 20%, then in such cases, necessary application shall be submitted before the Central Government for prior approval.

FAQ No. 12: Whether the NGO can transfer funds from existing designated bank account to the utilization bank account for utilization purposes?

Answer: Yes, as per the existing laws, there is no restriction on transfer of funds from existing designated bank accounts to the utilization bank account for utilization purposes.

FCRA CHARTER FOR THE BANKS

1. The Foreign Contribution (Regulation) Act, 2010 (FCRA, 2010) assigns a very crucial role to banks. All foreign contributions (FCs) received from any "foreign source" (FS) must be necessarily received only in a bank account and must be routed and spent only through bank accounts. Therefore, the competent authorities in the banks are expected to scrupulously follow various provisions of the FCRA, 2010 and Foreign Contribution (Regulation) Rules, 2011 (FCRR, 2011). They are available on the FCRA website fcraonline.nic.in

2. The Parliament amended the FCRA, 2010 in September, 2020. One of the major amendments mandates compulsory opening of an FCRA account in the State Bank of India (SBI), Main Branch located at Sansad Marg, New Delhi by each NGO/association registered or given prior permission under FCRA 2010. Each existing FCRA registration holder as well as new applicant for registration or for prior permission would also have to comply with the same. This "FCRA account" of the NGO would be the first exclusive port of receipt of its FC in India.

6. It is again clarified that each NGO / association has to open its exclusive FCRA account in the SBI, Main Branch, Sansad Marg, New Delhi by 31st March, 2021. If it is not done by that time then no foreign contribution shall be credited by any bank branch in the account of such NGO /association w.e.f 01/04/2021.

It may be noted that foreign contribution has to be received only through banking channels and it has to be accounted for in the manner prescribed. Any violation by the NGO or by the bank may invite penal provisions of the FCRA, 2010.

7. Bankers are requested to refer to the definition of "foreign contribution"(FC) provided in Section 2(1)(h) and definition of "foreign source " in section 2(1)(j) of The FCRA, 2010. For any contribution to constitute FC, it must emanate from a "foreign source" even if that foreign source is located within India and even if that donation is in Indian rupees or cash etc.

8. Attention has also been drawn to the provisions of Section 2(1)(h) - Explanation 2 & Explanation 3. Any kind of interest or income that is derived from the foreign contribution or interest again becomes part of foreign contribution. Therefore, it will be credited back into the foreign contribution account to be utilized strictly as per the provisions of The FCRA, 2010.

9. The banks are expected to go through all the provisions of the amended FCRA 2010 as well as amended FCRR, 2011. Various public notices to facilitate smooth transition to the new FCRA regime have also been posted on the website along with an SOP for opening of the"FCRA account" in the SBI Main Branch, Sansad Marg, New Delhi.

10. The following is an illustrative (but not exhaustive) list of such contributions which are Foreign Contribution as defined under The FCRA, 2010:

    (i) Donations given in Indian rupees (INR) by any foreigner/foreign source including foreigners of Indian origin like OCI or PIO cardholders (in SBI, New Delhi Main Branch).

    (ii) Donations received in Indian rupees (INR) from any 'foreign source' even if that source is located in India at the time of such donation (in SBI, New Delhi Main Branch).

    (iii) FC received in cash/local cheque / demand draft or through overseas bank transfers in any currency including Indian rupees from any "foreign source" (in SBI, New Delhi Main Branch).

    (iv) All interest that accrues on the FC received in any bank account including interest on FDs (in any Bank Branch).

    (v) Any income generated in India from assets created by spending the funds from FC. This includes proceeds from sales of such assets which have been credited even partly by spending the FC (in ny Bank Branch).

    (vi) Proceeds from sale of FC received in kind or in the form of securities (in any Bank Branch).

    (vii) Re-depositing the unutilised FC which might have been drawn out as advance for any purpose by the NGO / association. Such a re-deposit, however, must be backed by matching withdrawal entries and relevant records to establish that it was unutilised /unspent FC amount. This would include any refund received on account of cancellation of any services/ tickets etc. sought to be taken by utilising FC (in any Bank Branch).

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CHARTER FOR ASSOCIATIONS APPLYING FOR GRANT OF PRIOR PERMISSION/ REGISTRATION

1 With a view to streamlining the procedures and ensuring effective enforcement and compliance, the Foreign Contribution (Regulation) Act, 2010 has been further amended on 28th September, 2020. Accordingly, the FAQs have been updated on the official website: fcraonline.nic.in. One of the major amendments mandates compulsory opening of an FCRA account in the State Bank of India (SBI), Main Branch located at Sansad Marg, New Delhi by each NGO /association registered or given prior permission under FCRA 2010. Each new applicant for registration or for prior permission would also have to comply with the same. This "FCRA account" of the NGO would act as the first exclusive port of receipt of foreign on tribution in India.

2 Application for grant of registration and prior permission is to be made online in the amended Form FC-3A and Form FC-3B respectively on the FCRA web portal: fcraonline.nic.in.

3 Every applicant for Registration/Prior Permission shall obtain a unique Darpan ID from the Darpan Portal of NITI Aayog.

4 Any Association wishing to receive foreign contribution (FC) must have a definite cultural, economic, educational, religious or social programme for the benefit of society.

5 The NGO shall neither receive nor utilise any FC without obtaining either prior permission or registration from the Central Government.

6 Detailed qualifying criterion for registration or prior permission are enumerated in Rule 9(1)(f) and 9(2)(f) for seeking Registration and Prior Permission respectively.

7 No foreign national other than one of Indian Origin can be an office bearer or a trustee including the Chief Functionary of an organization/NGO. Foreigners can, however, be, allowed to be associated with such associations in ex-officio capacity if they are representing multilateral bodies, foreign contribution from whom is exempted from the purview of the Foreign Contribution (Regulation) Act, 2010, or in a purely honorary capacity depending upon the person's stature in his / her field of activity. Relaxation may be considered, on a case to case basis, if any of the following grounds is met:

a) the foreigner is married to an Indian Citizen;
b) the foreigner has been living and working in India for at least five years;
c) the foreigner has made available his / her specialized knowledge, especially in the medical and health related fields on a voluntary basis in India, in the past;
d) the foreigner is a part of the Board of Trustees / Executive Committee in terms of the provisions of an inter governmental agreement.
e) The foreigner is part of the Board of Trustees / Executive Committee, in an ex-officiocapacity representing a multilateral body which is exempted from the definition of foreignsource.

8 All associations seeking registration or prior permission under FCRA, 2010 shall be required to give affidavits signed by all members/trustees and an undertaking for adherence to good practice guidelines of Financial Action Task Force (FATF) as at Annexure.

9 The application should be complete in all respects with no field left blank and no concealment of any earlier application for Registration/Prior Permission under FCRA, 2010.

10 Request for prior permission should be sent for receiving a specific amount, for a specific purpose/project and from a specific donor.

11 Following documents are to be uploaded with the online application for grant of Registration:

a) Certified copy of registration certificate or Trust deed or such document, as the case may be;
b) Details of activities during the last three years;

c) Copies of audited statement of accounts for the past three years (Asset and Liabilities, Receipt and Payment, Income and Expenditure);

d) Affidavit executed by each office bearer and key functionary and member (in Proforma 'AA') as mandated under Gazette Notification No. G.S.R. 659(E) dated 16 September, 2019.

12 It may be noted that fee of Rs. 10,000/- is required to be paid through the online payment gateway.

13 Following documents are required to be uploaded with the online application for grant of Prior Permission:

a) Certified copy of registration certificate or Trust deed or other such document, as the case may be;
b) Commitment letter from foreign donor specifying the amount of foreign contribution;
c) Copy of the project report for which foreign contribution is solicited/being offered;
d) Affidavit executed by each office bearer and key functionary and member (in Proforma

'AA') as mandated under Gazette Notification No. G.S.R. 659(E), dated 16th September, 2019.

14 It may be noted that fee of Rs. 5000/- is required to be paid through online payment gateway.

Note: FCRA, 2010, FCRR, 2011, FAQs thereon and all other related information and, the FormFC-3A and FC-3B as also link to FCRA Online Services are available at the website of the Ministry of Home Affairs at http://fcraonline.nic.in.

CHARTER FOR ASSOCIATIONS WHO HAVE BEEN GRANTED PRIOR PERMISSION OR REGISTRATION UNDER FCRA

Registration and Prior Permission is granted for a definite cultural, economic, educational, religious or social programme under sections 11 and 12 of the FCRA, 2010. An association is granted registration for five years. The Prior permission is granted for a specific purpose/project for a specific amount from a specific source.

Every certificate of registration shall have to be renewed before the date of expiry of its validity.

The application for renewal is to be made online in Form FC-3C along with the prescribed fee to be paid through online payment gateway, six months before the date of expiry of the certificate of registration. In case, no application for renewal of registration is received or such application is not finally submitted accompanied by the requisite fee through the prescribed mode, the validity of the certificate of registration shall be deemed to have ceased from the date of completion of the period of five years from the date of the grant of registration. Such deemed to have ceased associations are not permitted to either receive or utilize foreign contribution anymore.

An association granted prior permission or registration under the FCRA, 2010 should initially receive the foreign contribution only in the FCRA account at SBI, Main Branch located at Sansad Marg, New Delhi. This account number would be the same as has been intimated by the organisation in their application for prior permission/registration or intimated through FC-6C. Deposit of any local fund/domestic contribution in this bank account is not allowed. One or more accounts in any PFMS enabled scheduled bank may be opened for utilizing the foreign contribution. For more clarity, Section 17 of the FCRA, 2010 is reproduced as below:

17. (1) Every person who has been granted certificate or prior permission under section 12 shall receive foreign contribution only in an account designated as "FCRA Account" by the bank, which shall be opened by him for the purpose of remittances offoreign contribution in such branch of the State Bank of India at New Delhi, as the Central Government may, by notification, specify in this behalf:

Provided that such person may also open another ''FCRA Account'' in any of the scheduled bank of his choice for the purpose of keeping or utilising the foreign contribution which has been received from his ''FCRA Account'' in the specified branch of State Bank of India at New Delhi: Provided further that such person may also open one or more accounts in one or more scheduled banks of his choice to which he may transfer for utilising any foreign contribution received by him in his ''FCRA Account'' in the specified branch of the State Bank of India at New Delhi or kept by him in another ''FCRA Account'' in a scheduled bank of his choice:

Provided also that no funds other than foreign contribution shall be received or deposited in any such account.

17 (2) The specified branch of the State Bank of India at New Delhi or the branch of the scheduled bank where the person referred to in sub-section (1) has opened his foreign contribution account or the authorised person in foreign exchange, shall report to such authority as may be specified,-

(a) the prescribed amount of foreign remittance;
(b) the source and manner in which the foreign remittance was received; and
(c) other particulars,
in such form and manner as may be prescribed.

Foreign contribution cannot be mixed with local/ domestic funds being handled by the organisation.

An association granted prior permission or registration is required to carry out the activities, for which foreign contribution is received, in India only and the amount should not be utilised for purposes other than for which it is received.

The FC received by the association shall not be transferred to any other association for any other purpose.

Any fixed asset acquired out of the foreign contribution and any article received in kind from the foreign source should be in the name of the association and not in the name of any individual in the association.

Not more than 20% of the foreign contribution shall be defrayed to meet administrative expenses of the association. What constitutes 'administrative expenses' has been defined in Rule 5 of the Foreign Contribution (Regulation) Rules, 2011 (FCRR, 2011).

Any foreign contribution or any income (interest, rent, enterprise or FD etc.) arising out of utilization of FC shall not be used for "speculative business". What constitutes 'speculative business'has been defined in Rule 4 of FCRR, 2011.

An association granted prior permission or registration shall maintain a separate set of accounts, assets and records, exclusively for foreign contribution received and utilised. If the foreign contribution relates only to articles/ foreign securities, the intimation shall be submitted online in Form FC-1 and such articles/ securities shall be reflected in online Annual report FC-4.

Every account giving details of the receipt and purpose-wise utilisation of the FC, including the interest earned on the FC amount, should be maintained on an yearly basis, commencing on the 1st day of April each year, and every such yearly account is to be uploaded online only, in the prescribed Form FC- 4 and uploaded therewith the income and expenditure statement, balance sheet and statement of receipt and payment, duly certified by a chartered accountant, within nine months of the closure of the year, i.e., before 31st December on www.fcraonline.nic.in . A copy of a statement of account from the FCRA account in SBI, New Delhi Main Branch and utilization accounts in anyscheduled bank duly certified by an officer of such bank should also be uploaded. The cash book

and ledger account is to be maintained on double entry basis, where the FC relates to currency received and utilised.

An online annual return in Form FC-4 shall reflect the foreign contribution received in the FCRA account at SBI, New Delhi Main Branch and include the details in respect of other FCRA bank accounts, if any, for utilisation. No physical copy of Annual return is accepted.

The accounting statements shall have to be preserved by the NGO/association for a period of six years.
Even if no FC is received during a year, a 'Nil' return is required to be filed online in Form FC-4 within the prescribed time limit. However, certificate from Chartered Accountant or Income & Expenditure statement or R&P account or balance sheet is not required to be uploaded.

Intimation for Change of name, address, registration, nature of activities or aims and objectives of an association, bank and/or bank account number and opening of bank account for utilisation of foreign contribution should be intimated online only in Form FC-6(A to E) and uploading requisite documents within 15 days of effecting the change.

For any change (addition / deletion) of any functionary or member, the associations shall apply online through FC-6E and seek approval from Central Government. For any chang (addition / deletion) of any functionary or member, the associations shall apply online through FC-6E and seek approval from Central Government.

All associations granted registration or prior permission under FCRA, 2010 shall be required to adhere to Good practice guidelines of Financial Action Task Force (FATF) as at Annexure.

Annexure

Good practice Guidelines to the Non-Profit Organisations (NPOs) to ensure compliance with FATF requirements.

1. Wherever necessary, NPO shall inform the MHA (FCRA Wing) about the suspicious activities of the customer, without waiting for annual returns.

2. The Board of Directors/Chief Functionary of NPO shall issue directions regarding duties of official who shall be required to enforce these guidelines and other rules of FCRA, 2010 read with FCRR, 2011.

3. The NPO shall put its goals, objectives and activities on its website.

4. The NPO shall upload the details of key persons associated with NPOs activities on its website.

5. The NPO shall take due diligence of its employees at the time recruitment.

6. The NPO shall collect the information of beneficiaries of funds and to upload on its website and monitor the activities of the beneficiaries. Wherever a beneficiary is a legal person, the details of beneficial owner shall also be uploaded.

7. The NPO shall ensure that the financial transactions involving more than Rs.20,000/- to be routed through Banking channels only.

8. The Board of Directors/Trustees of NPOs must ensure utilization of funds consistent with objectives as approved by MHA.

9. The Board of Directors/Trustee of NPO's shall conduct meeting once at least in six months to review the working of these instructions and shall record the minutes of these meetings.

10. The NPO shall train its staff on the FCRA and about the application of these guidelines.

11. When any transaction is under investigation by any authority, the MHA shall be informed by such NPO.

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CHARTER FOR THE CHARTERED ACCOUNTANTS

Since the Foreign Contribution (Regulation) Act, 2010 (FCRA, 2010) is national security legislation; associations are required to exercise extreme care and caution in dealing with foreign contribution from the time of its receipt to its final utilization. As the Chartered Accountants audit the accounts of the associations and certify the accounts before submission to the Government, they are required to provide proper guidance to the associations who are either applying for grant of prior permission /registration or who have been granted prior permission/registration under FCRA, 2010. The Chartered Accountants are requested to get themselves thoroughly familiarised with FCRA, 2010 and the Foreign Contribution (Regulation) Rules, 2011 (FCRR, 2011), amendments and notifications issued from time to time so that they can help the associations:

- To verify whether the associations are eligible to receive foreign contribution.
- To guide the applicant organization in submission of application for registration prior permission;
- To ensure that the association receives and utilises the foreign contributions through its bank account exclusively opened for the purpose in accordance withthe provisions of FCRA, 2010 and FCRR, 2011 and that foreign contribution is not deposited or utilised from the bank account beingused for domestic funds.
- To assist in the proper maintenance of prescribed books of accounts in accordance with the provisions of FCRA, 2010 and FCRR, 2011;
- To ensure that the annual returns of an association have been prepared in accordance with the provisions of FC(R) Act, 2010 and FCRR, 2011 as amended from time to time.

CRITICAL APPRAISAL OF SOCIAL STOCK EXCHANGE REPORT

"Working Group" was constituted by SEBI in view of establishing a "Social Stock Exchange" (SSE) as mentioned by Hon'ble Finance Minister in her Budget speech for FY 2019-20. The intent behind to create SSE is to provide platform to NPOs for fundraising and also incorporate a set of procedures by which social impact will be measured and reported by the NPOs.

The "Working Group" had submitted a report on the possible structure and mechanisms for the proposed SSE. In this issue we will try to analyse the various aspects of the proposed SSE and the legal and governance issues arising out of it.

COVERAGE OF SCOPE AS PER TOR

As mentioned in Para 1.2 of Working Group report on Social Stock Exchange, the "Working Group" so created had the following scope:

- Possible structures and mechanisms, within the securities market domain, to facilitate raising of funds by social enterprises and voluntary organizations

- Associated regulatory framework inter-alia covering the issues relating to eligibility norms for participation, disclosures, listing, trading, oversight etc.

Comments: The SSE report is primarily based on the possible financial products which could be traded on SSE. It does not provide the structures, particularly the mechanism through which smaller NPOs and Grassroot level initiatives could directly

participate in the Social Stock Exchange. Similarly,it does not talk about the possible mechanism through which the smaller stake holders or donors could participate in the Governance and activities of NPOs.

The report also does not discuss the
(i) eligibility norms for participation,
(ii) disclosures,
(iii) listing,
(iv) trading, and
(v) oversight,

except suggesting minimum norms and use of intermediaries which seems to be out of context and does not address the direct issues of the sector adequately.

Recommendation 1: Point A of summary of recommendations provided in Para 1.4.1 of Working Group report on Social Stock Exchange recommends to"Activate and mainstream social capital to NPOs as zero coupon zero principal bonds (ZCZP) to be directly listed on the SSE."

Comment: The ZCZP bond is the normal project grant-based mechanism on which the charity sector is mostly dependent at present. The report has not addressed the following issues:

- Whether the NPO will be registered or the product will be registered.

- If an entire project is treated as one product, then the job of the Stock Exchange will be to replicate the existing practice where one or two donors identify a suitable project and fund it. We already have a large framework used by Government and Corporates to fund NPO projects. The idea should be to provide small units of the projects which can be funded by small and big donors. If there is multiplicity at both ends, then only SSE will make sense.

- The report talks about impact reporting against ZCZP which can only be an incidental requirement. The primary requirement will be the fulfillment of trusteeship on the part of the NPO and the actual utilization of such funds.

Recommendation 2: Point B of summary of recommendations provided in Para 1.4.1 of Working Group report on Social Stock Exchange recommends to"Activate and mainstream already available funding structures, i.e., SVFs and MFs."

Comment: The report has not addressed the following issues:

- The already existing Social Venture funding to various startups by the incubators and accelerators.

- The existing funding to incubate companies (start-ups) are primarily investment in equity of a for-profit company. The report should have completed much on investment in Governance and equity (without dividend or any right to asset) of NPOs.

- The report fails to distinguish between a Social Venture (SV) v/s NPO and suggests that SV could be listed on self-declaration basis, which if implemented would be disastrous and lead to encroachment by for-profit entities into the space of NPOs.

- Distributing dividend from mutual funds like 'HDFC Cancer Fund' is no product at all. It is distribution of some money on behalf of the investor in the common parlance.

Recommendation 3 : Point C of summary of recommendations provided in Para 1.4.1 of Working Group Report on Social Stock Exchange recommends to "Implement common minimum standards for reporting on social impact."

Comment: The minimum standards are irrelevant as far as Social Stock Exchange level due diligence is concerned. It needs to be noted that the 'Credibility Alliance' minimum standards or the 'Give India' due diligence framework are primarily for small and micro organizations with fund absorption capacity of below INR 5 lakhs or so. The minimum standards primarily help the large NPOs and Donors to reach out to small NPOs in rural and remote places. Minimum standards are not structured to assesss large NPOs ability and credibility.

Therefore, the assurance standards for listing instruments should be in the light of the fund absorption capacity and the Governance Framework required for that particular instrument.

Recommendation 4: Point D of summary of recommendations provided in Para 1.4.1 of Working Group report on Social Stock Exchange recommends to"Implement common minimum standards for reporting on governance and financials."

Comment: The common minimum standards of Governance and Financial reporting provided as Annexures are too basic from a point of view of the national and international instruments to be traded on the exchange.

Recommendation 5: Point E of summary of recommendations provided in Para 1.4.1 of Working Group report on Social Stock Exchange recommends to"Develop new institutions that provide sector-level infrastructure."

Comment: The report seems to have been written under a hypothesis that the NPO sector regulations and reporting requirement are minimal and not adequate except for Section 8 company. However, it should be noted that the NPO sector is one of the very tightly regulated sectors with stringent applicable laws and compliances. Some of the requirements are as under:

- Contrary to what has been mentioned in the report, Section 8 company does not have NPO specific reporting framework. Under the Companies Act the reporting formats used for commercial company is being applied to Section 8(Charity) company. However, beyond the reporting framework under the registering statute, there are a number of other statutes which have very high reporting requirements. Under the Income Tax Act, very rigorous reporting and compliance mechanism exist. For example, a commercial entity having a turnover of up to Rs. 2 crores may not maintain Books of Account by opting for presumptive taxation. But an NPO has to maintain extensive books and records if the turnover exceeds Rs. 2.5 lakh. A commercial organisation is subjected to tax audit if its turnover exceeds Rs. 1 crore. But an NPO has to conduct extensive audit if the turnover exceeds Rs. 2.5 lakh. A commercial organisation is not scrutinized by the Commissioner of Income Tax before getting registration certificate. But an NPO has to go through extensive enquiry from the Commissioner of Income Tax, if the turnover exceeds Rs. 2.5 lakh.

- An NPO files the most complicated Income Tax return form ITR-7 where all kinds of minute financial data are uploaded.

- FCRA law also has very stringent reporting requirement and so on.

Recommendation 6: Point F of summary of recommendations provided in Para 1.4.1 of Working Group report on Social Stock Exchange recommends to"Enable new funding mechanisms: pay-for-success (social impact bonds; development impact bonds)."

Comment: The impact bond needs to be further studied and researched before its adoption. The reasons as follows:

- The impact bond is silent about the actual utilisation of the fund. A corporate cannot claim charitable expenses without ensuring actual utilization under the Income Tax law as well as Evidence Act.

- An impact is a future event and therefore, the year of expenditure and the year of utilization related issues needs greater in-depth study.

- The impact bond proposes to reward the risk investor instead of the NPO. On the other hand, the accountability of the NPO has not been addressed in case of failure. In some cases, there may serious implications for failure to create impact ranging from civil to criminal breach of trust.

Recommendation 7: Point G of summary of recommendations provided in Para 1.4.1 of Working Group report on Social Stock Exchange recommends to"Provide capacity building support for reporting requirements."

Comment: Providing capacity building supporting in principle looks like a good step. But by loading the cost of capacity building and monitoring into the instrument may actually result in less money being available at the grassroot and the poor. In this proposed model, new spaces for intermediaries and service providers will emerge at the cost of the intended beneficiaries. The space for intermediaries normally should be left to market forces. The regulatory authorities should not provide a mandate which may result in additional systems and revenue leakage.

Recommendation 8: Point H of summary of recommendations provided in Para 1.4.1 of Working Group report on Social Stock Exchange recommends to "Provide fiscal benefits (to NPOs and donors)"

Comment: In India the donors already have various kinds of benefit ranging from 50% deduction under section 80G to more than 100% under section 35 of the Income Tax Act. So, there are already laws which are charity friendly. Above all 'restricted grant' for charitable purposes do not form a part of the income of the recipient NPO and therefore, there is no tax implications at the hands of the NPO.

Recommendation 9: Point I of summary of recommendations provided in Para 1.4.1 of Working Group report on Social Stock Exchange recommends to "Fine-tune regulations to unlock more funds"

Comment: This is a general recommendation; a statute wise study is necessary.

ISSUES ARISING OUT OF THE LEGISLATIVE CHANGES SUGGESTED BY THE WORKING GROUP

The committee has suggested many legislative changes across the statutes. Let us understand the implications from a legal context:

- Para 6.2 of the report talks about the smoothening of regulatory wrinkles and further states that Rule 4 of FCR Rule should be changed to allow foreign investors to invest in NPOs. It may be noted that if a foreign investor invests in an NPO or SVF without expectation of return then it will be a foreign contribution and Rule 4 will not apply. On the contrary, if the foreign investors invest in the NPO on commercial terms, then the FCRA Act itself will not apply to such activity. Rule 4 applies only to the FC registered organizations who would like to make investments.

- Para 6.4 of the report mentions that tax policy expected to be critical for the success of any Social Stock Exchange and as a tax incentive the report says that section 2(15) of the Income Tax Act would be amended to allow up to 50% commercial activity which is now 20%. The fact is that section 2(15) does not apply to NPOs working on relief to poor, environment, education, health etc. there are other nuances which the committee seems to have not considered. The same has been recommended by the Working Group report in Point H of the summary of recommendations.

- Point H of summary of recommendations provided in Para 1.4.1 of Working Group report on Social Stock Exchange recommends to remove the 10% cap on income eligible for deduction under 80G. This 10% cap is already on the higher side as it allows 10% of the total income to be donated as against 2% under CSR.

- The report suggests that in India administrative expenses and establishment expenses are not being allowed like western countries. However, the fact is that regulations in India are very liberal in this regard. The Rule 5 of FCR Rules 2011 allows up to 50% as administrative expenses. Under section 11 of Income Tax Act, any amount of administrative and establishment expenditure can be

claimed provided its relationship with the objects is established. In India even an unregistered NGOs can receive corpus donation without any condition to spend it without any tax implications.

- Similarly, there are many other legal issues which we have not addressed in this note.

SUGGESTED WAY FORWARD FOR SSE

The draft report assumes that the donor should not participate in the Governance of the organisation. In the Governance standards it also proposes independent directors on the board of NPOs. It has to be understood that there is no concept of any interested director in a non-profit in the first place. The civil law as well as Income tax law requires that every director in an NPO should be independent without any earning/profit motive or interest. All transactions with the Directors of an NPO should be on arm's length.

The NPO law is based on the understanding that the donor normally controls and manages the fund/asset (A note in this regard as provided in Annexure1).

Therefore, a settlor can become the Managing Trustee in a trust and the shareholder can become the Managing Director in section 8 company. It has been held that NPOs are private institutions for public purposes. Under this background the following issues should be discussed:

- There is no reason why an NPO cannot be a large professionally managed corporation like L&T or ICICI Bank with millions of share holders who control and Govern the organisation with the only distinction that they will get shares against corpus or other donations.

- The proposed stock exchange should allow the existing products to be traded on the stock exchange. For example, NGOs collect, say, Rs. 3,000/- per month to support an elderly person or Rs. 2,000/- per month for the education of a child etc. All these existing products should find a place in the stock exchange which will enable the smaller NPOs to participate. Further, currently some NPOs are engage fund raising agencies for resource mobilization through tele callers and other marketing initiatives. Such agencies charge exorbitant commission to the tune to 40-70% against the donations collected. SSE should provide and transparent and efficient alternative.

Annexure 1

NOTE ON CONTROL OF DONOR ON THE GOVERNANCE OF NPOs

It is normally believed that participation of a donor in the implementation of activties would result in conflict of interest. Such misconception arises due to the fact that the trusteeship aspect is ignored. All the board members or trustees in a charitable organisation work in the capacity of a 'trustee' and are inherently independent in nature. There is no concept of 'interested' and 'independent' board members or trustees in an NPO; all the board members or trustees are independent in nature. The conflict arises only if a board member or trustee avails any benefit from the income or property of the trust. A benefit implies something which is not due to a person.

The law pertaining to constitution of NPOs has been structured to encourage the ownership and control of the donors. For instance, in case of a Trust, the settlor is the primary donor who contributes the property of the trust and such settlor can be the permanent Chairman cum Managing Trustee of the Trust.

When a section 8 company is registered the primary donor are the initial subscriber who contribute to the share capital or give guarantee. The law is structured in such a way that the subscribers and determine the governance structure and at their discretion can participate in the management of the company.

In fact, all NPOs, unless substantially funded or controlled by Government, are private institutions for public purposes. Participation of the donor in the Governance will in fact create greater oversight and enhance the efficiency of the programe.

The Management can be private

In the case of Ganeshi Devi Rami Devi Charity Trust v. CIT [1969] 71 ITR 696 (Kol.) it was held that the management of the trust need not necessarily be private in nature. A trust will not become non-charitable only because the control of funds is not left to the public. The Court observed that there was no doubt that the control of the trust property was not left to the members of the public. There was no doubt that the control of the trust fund was left to the members of the family, but, even though the control was with the members of the family and even when there was no control by the public, the question was whether the trust was created for religious and charitable purposes which would "enure to the benefit of the public". The case of Reliable Educational Alliance Society v. CIT [2009] 126 TTJ (Delhi) 407/31 DTR 239 is also relevant in this.

FUNDAMENTAL DOCUMENTS FOR NPOs

NPOs have a legal existence i.e. an artificial legal entity, which is bound by the principles of Privity Cestui Que Trust, which means the right to sue and the obligation of being sued. Documents such as the Trust Deed, bye-laws or even project contracts are documents subject to legal rights, obligation and duties. Such documents provide the basis of the rights and duties to organisations and group of persons and can be very crucial and jeopardise the interest of various stakeholders in the short or long run. Therefore, it is important to understand the implications as well as basics of legal documents which form the basis of NPO constitution and governance.

For instance, a clause in the main objectives which allows religious activities may result in rejection of registration. Or in a project agreement if there are some charges or expenses charged on percentage basis which results in a surplus may affect the 'not for profit' nature if not drafted properly and endanger the exemptions and privileges enjoyed. Some fundamental documents and the pertaining issues are discussed in this standard.

TRUST DEED OR MEMORANDUM OF ASSOCIATION

It is the legal document that is filed with the appropriate government authority at the time of registration of an NPO.

The form and content of this document varies from country to country. However the issues that should ideally be addressed while drafting a Trust Deed or Memorandum of Association are as under :

- Name of the organisation.
- Duration of the organisation, usually perpetual
- Purpose for which the organisation is formed.
- Provision for conducting the internal affairs of the organisation.
- Names and address of the subscribers / founders.
- Address of the registered office.
- Names and address of the Secretary and initial Board Members
- Clause for distribution of the assets on dissolution.
- Declaration regarding the not for profit nature.

The object clause should be broad enough to cover the mission, vision and the future perspectives and evolution. The object clause should be very focused and should not mingle unrelated or divergent objectives. For instance, in India it is not permissible to have a mixed (religious as well as charitable) trust.

ARTICLES OF ASSOCIATIONS OR THE BYE-LAWS

It is the legal document that is filed along with the memorandum of association with the appropriate government authority at the time of registration of an NPO. This document comprises a set of rules and regulations which enables the organisation to govern, manage and conduct its affairs. It is necessary that the bye-laws are clearly stated, shared and understood by all the stakeholders. The issues normally addressed in bye-laws are as under:

- Interpretation of expressions used
- Requirements pertaining to notice, frequency and quorum of board and general meetings
- Voting criteria and procedure including use of proxy
- The board, its size and scope of authority
- The method of nomination, election tenure of functionaries and board members
- Membership criteria, rights and duties
- Termination of membership
- Code of conduct
- Custody of assets and funds
- Bank account operations
- Scope and authority of the chief functionary
- Accounts and financial reporting
- Audit
- Indemnity

PROJECT CONTRACTS

An NPO works either on the support of its own funds and internal accruals or on external funding. When externally funded projects are undertaken they are usually based on a legal contract.

A donor and NPO partnership is a legally bound activity and such partnership should have the following characteristics:

- Clarity of purpose
- Clarity of rules & functions
- Clarity of working methods
- Clarity of practice standards
- Clarity of resources & performances targets
- Clarity of accountability & ownership
- Clarity of mutual trust & commitments

The basic legal requirement of a valid contracts includes the following:

- Intention to create legal relationship
- Clear identification of the subject matter
- Offer & Acceptance
- Consideration
- Cognizance of the relevant laws

The normal contents of a legally consistent contract should cover the following:

- Name and Address
- Duration and time
- Date of commencement
- Description of objectives
- Specification of inputs, procedures, output, activity and quality
- Methodology/Access
- Evaluation criteria
- Monitoring methods
- Finance/payment details
- Reporting procedures

PROJECT GRANTS & VOLUNTARY CONTRIBUTION

It is important to understand from a legal perspective that voluntary contribution and project grants may have different legal status and implications. For instance, a grant bound by a specific project agreement is a legal obligation towards the donor. On the other hand, the voluntary contribution implies that the donor has provided funds without any conditions to be applied for the objects of the society. Legally a voluntary contribution can be treated as income because the funds are available unconditionally to the organisation. However, specific project grants cannot be treated as income unless the legal obligation is executed. The legal difference between voluntary contribution and project grants will have an implication on the accounting and tax treatment also.

AMENDMENT OF TRUST DEED

It is extremely difficult to amend a trust deed since a trust by its inherent nature is irrevocable. Therefore, it is important to provide the amendment clauses in the trust deed itself. However, if the amendment clauses provided in the trust deed are too wide, then the trust may not be treated as irrevocable. In the trust deed where there is no mention about amendment, the amendment has to be done with the permission of a civil court. Even the civil courts do not have unlimited powers of amendment.

The Civil Courts permit amendment under the doctrine of Cy-pres, which means the original intent of the settlor should prevail. Therefore, only such amendments should be made which are in line with the original intent of the settlor. It may further be noted that even the settlor does not have powers to amend the trust deed.

AMENDMENT OF THE TRUST DEED BY TRUSTEES

It is generally a settled principle of trust law that once a trust is created with certain objects, no one has the power to delete any of the original objects. This was also affirmed by the Madras High Court in Sakthi Charities v. CIT [1984] 149 ITR 624/19 Taxman 100, where a deed of rectification deleting certain original objects of a trust deed was held to be invalid. The landmark decision on this issue was given by the Supreme Court in CIT v. Palghat Shadi Mahal Trust 2002] 254 ITR 212/120 Taxman 889 (SC) where a trust was constituted for the educational, social and economic advancement of backward class Muslims. A general body resolution extended these objects to all communities irrespective of religion or creed. The Supreme Court held that this amendmentwould be invalid because it implied alteration in the

object of the trust deed which was not contemplated by the settlor.

THE SETTLOR OR FOUNDER HAS NO POWER TO REVOKE

The Madras High Court in Thanthi Trust v. ITO [1973] 91 ITR 261 observed, it is well established that the subsequent acts and conduct of the founder of trust cannot affect the trust if there has been already a complete dedication (complete handover of the property). If a valid and complete dedication has taken place, there would be no power left in the founder to revoke and no assertion on his part or the subsequent conduct of himself or his descendants contrary to such dedication would have the effect of nullifying it. If the trust has been really and validly created, any deviation by the founder of the trust or the trustees from the declared purposes would amount only to a breach of trust and would not detract from the declaration of trust. In this regard the Supreme Court ruling in the case Sri Agasthyar Trust v. CIT [1999] 236 ITR 23 (SC) is also relevant.

It should be kept in mind that the trustees inherently do not possess any power to amend the trust deed, for that matter even the settlor does not have the power of any subsequent amendment. The power to amend shall be limited to the extent provided in the trust deed itself. Therefore, drafting of trust deed becomes very important and suitable clauses should be kept for future need of changes and contingencies. Further, care should be taken to ensure that the amendment clauses are not too wide or discretionary in nature which may render the trust invalid and revocable.

LIMITED POWER OF RECTIFICATION BY CIVIL COURT

A civil court has been conferred with the power to amend a trust deed and the Income Tax Officer has to take notice of such amendment. In the case CIT v. Kamla Town Trust [1996] 217 ITR 699 (SC), [1996] 84 Taxman 248 (SC), the Hon'ble Supreme Court held that any change in Trust Deed is not possible unless the deed itself provides for such change. Approaching the Registrar or a Court of law shall only be relevant if a change is legally permissible.

The Civil Courts have power to direct changes in the trust deed in the spirit of the Doctrine of Cy-pres which implies that the original intent of the settlor should not fail. However once a civil court has allowed amendment, it is not open on the part of the Income Tax Officer or any other person to challenge such rectification.

SECTION 26 OF SPECIFIC RELIEF ACT IS THE REMEDY AND NOT SECTION 34 OF TRUST ACT

In the above Kamla Town case (supra), the Supreme Court observed that the Section 34 of the Indian Trust Act, 1882 was not applicable as far as amendment of Trust deed was concerned. It may be noted that Section 34 of the Indian Trust Act, 1882 provides the right to apply to court for opinion in management of Trust property. The apex court was of the opinion that section 34 was confined only to

Managing change
Managing disputes
Indemnity and liabilities

management of trust property and could not be invoked for amendment in the deed and objects. It was also observed that the right legal provision was section 26 of the Specific Relief Act, 1963 under which an application for amendment to trust deed could be made.

SECTION 92 OF CIVIL PROCEDURE CODE (CPC)

In Kamla Town Trust v. CIT [1982] 133 ITR 632 (All.), the question debated was whether the Civil Court had the power to rectify the trust deed under section 92. It was observed that Section 92 nowhere enables the Civil Court to alter or rectify the terms of a trust. It only enables the Civil Court in suitable cases to remove any trustee, appoint a new trustee, vesting any property in a trustee, directing any ex-trustee to deliver possession of the trust property to the person entitled to the possession of such property, directing accounts and enquiries, declaring that portion of the trust property or interest therein shall be allotted to any particular objects of the trust or to settle a scheme. Thus, the court has got power

to allocate the trust properties to any particular field of the trust. In this case the Civil Court had deleted from the trust deed certain objects so as to enable the trustees to claim the benefit of exemption under the Income Tax Act, 1961. It was held that section 92 of CPC was not the appropriate section / statute for amendment of Trust Deed. Under section 92 of CPC, the court can give a direction which is necessary for the administration of any trust. However, it can only exercise the powers expressly set out thereunder, and by exercising the power under section 92, it cannot alter the objects of the trust deed.

REVENUE NEED NOT BE A PARTY TO RECTIFICATION

The Income Tax Department or any other authority cannot decline to accept an amended deed only on the ground that they were not made party to such amendment. In the case CIT v. Kamla Town Trust [1996] 217 ITR 699 (SC), [1996] 84 Taxman 248 (SC) one of the contentions of the revenue was that the rectification decree of the trust deed was in person and not in rem to which the revenue was not a party and, therefore, it was not binding on the income-tax authorities. It was held that in such proceedings, the order granting rectification of such instrument of trust would certainly remain relevant. Consequently, it cannot be said that such rectification orders passed by Civil Courts permitting rectifications of trust deeds under the relevant provisions of the Specific Relief Act could not be relied upon by the assessee-trust in assessment proceedings before the Income Tax Officer (ITO) even though the revenue or the ITO was not a party to such rectification proceedings. The ITO has to consider the real scope and ambit of the trust deed as presented to him in rectified form with a view to finding out whether on the basis of such a rectified instrument, the assesse trust had earned exemption from payment of income-tax under the relevant provisions.

In this context it is pertinent to note that a judgment in rem is a judgement pronounced on the status of some particular subject or property or thing (as opposed to one pronounced on persons). In the case of amendment of Trust Deed, though the rectification orders of the Civil Court is not judgments in rem, still it is binding in assessment proceedings before the ITO and will have to be given effect to for whatever they are worth.

THE EFFECT OF RECTIFICATION IS NOT RETROSPECTIVE

In the case Bhriguraj Charity Trust v. CIT [1997] 228 ITR 50 (Del.)(FB), the full bench of the Delhi High Court observed that any rectification would have only prospective operation and would not affect the assessment years in question, which were prior to the date of the Civil Court's decree.

SUPPLEMENTARY TRUST DEEDS

In the case Laxmi Narain Lath Trust v. CIT [2000] 244 ITR 272 (Raj.), it was held that a supplementary trust deed permitted by appropriate civil court was legally valid and binding on the department. The court relied on the assessee's own case for the assessment year 1972-73 in Laxminarain Lath Trust v. CIT [1988] 170 ITR 375/[1987] 33 Taxman 194, where it had held that the supplementary deed bound the trustees who were parties to the said deed as well as future trustees of the assessee-trust and in view of the supplementary deed it was no longer permissible for the trustees of the assessee to use the trust funds.

SUM UP POINTS

- It is important to provide the amendment clause in the Trust Deed itself.
- If there is no amendment clause in the Trust Deed, any amendment has to be done with the permission of a Civil Court.
- Once the Civil Court has allowed permission for amendment, it is not open on the part of the Income Tax Officer or any other person to challenge such amendment.
- Amendments made should be in line with the original intention of the Settlor and should not negate or deviate from the original intention of the Settlor.

- To form a valid trust the trust property has to be completely handed over, thereafter the founder or the Settlor do not have any powers to revoke or nullify the objects of the Trust.

- Section 26 of the Specific Relief Act, 1963 is the appropriate statutory under which an application for amendment to Trust Deed can be made. It may be noted that the Section 34 of the Indian Trust Act, 1882 only provides the right to apply to court for direction in the management /administration of the Trust.

- Similarly, a Civil Court cannot alter the objects of the Trust Deed by exercising its power under Section 92 of the Civil Procedure Code (CPC) under this provision it can only give direction for administration of any Trust.

- The Income Tax Department or any other authority cannot decline to accept an amended Trust Deed only on the ground that theywere not made party to such amendment.

- The Assessee Trust for Income Tax purposes, can rely on the amended Trust Deed for availing Income Tax exemptions, eventhough the Income Tax Department was not party to the amendment carried out.

- The amendment to Trust Deed made with a Civil Court order, takes onward effect from the date of the Civil Court's decree and does not bind the operation of those assessment years which were prior to that date.

- Supplementary Trust Deed is also permitted by Civil Court. The Supplementary Trust Deed is also binding on the Trustees in the manner the original Trust Deed binds.

BOOK OF ACCOUNTS UNDER NPOs

Establishing the Book-keeping system is a serious matter, it requires alot of thought and expertise to determine the system depending upon the type of the organisation, the volume and nature of its transactions. One has to carefully select the books and sub-books after analysing the following:

- Quantum and frequency of various transactions
- Number of bank accounts in operation
- Foreign Contribution receipts
- The number of Funding Partners and their reporting expectation
- Prevailing legal statutes
- Level of Internal Control measures required
- Level of Centralisation / Decentralisation in operation etc.

TYPES OF BOOKS OF ACCOUNTS

We can broadly divide the books of accounts into 3 categories:

i) Primary Books of Accounts
ii) Final Books of Accounts
iii) Subsidiary registers

Each of these books of account are discussed briefly in the following paras.The flowchart prepared later in this chapter may also be referred for anoverall understanding.

PRIMARY BOOKS OF ACCOUNTS

Cash Book: Cash Book is the most basic book of account. Normally it records all transactions involving cash and bank receipts and payments. The most commonly followed cash book is the one which has a bank column to record the bank transactions. However, an NPO may or may not record its bank transactions through a cashbook.

Petty Cash Book: Petty cash book as the name suggests is just adownward extension of the main cash book. An NPO may be subjected to lots of small transactions such as conveyance, postage, refreshment etc. everyday. Recording such small transactions in the main cash book sometimes makes it untidy and need lesslyel aborate. Therefore, a petty cash book is maintained to record small transactions and consolidated amounts from the petty cash book are recorded in the final cash book periodically.

Journal: Journal is the book where those entries are recorded which do not find a place in the cash book. Though, in strict accounting sense journal entries should be passed even for cash transactions, but for the sake of convenience cash & bank transactions are recorded directly into the cash book. The journal still remains one of the most important book of account because all non cash transactions have to be routed to the General Ledger through journal only. The journal book is normally used for the following types of entries:

- Opening Entries
- Closing Entries
- Rectification/Correction Entries
- Transfer Entries
- Adjustment Entries
- Non-cash Contributions
- Debit Notes received from funding agencies
- Exchange Rate Adjustments
- Accrued/pre-paid Expenses; and
- Transactions of a Special Nature.

FINAL BOOKS OF ACCOUNTS

General Ledger: General Ledger is probably the most important bookof account. General Ledger is the book where all the entries, whether madein a journal or in the cash book, are finally posted. It is the book where allthe transactions, whether cash or non-cash are recorded separately in theirindividual account heads. For example, if you want to know how muchmoney was spent on conveyance on a particular date, we may go to thecash book and see the amount spent on conveyance on that particular date.

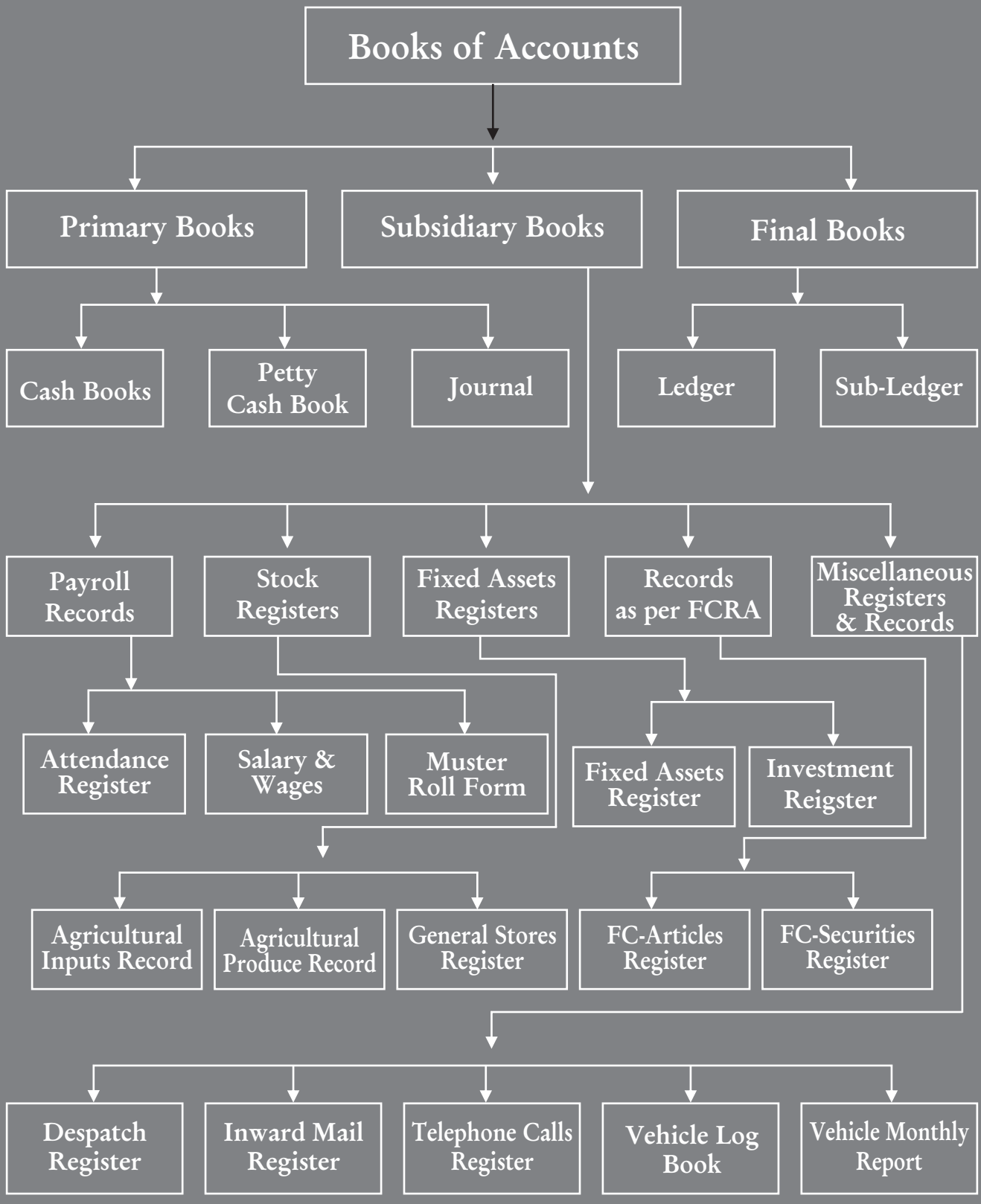
But, if you want to know the amount spent on conveyance in one complete month it might not be possible on our part to find from the cash book as the expenditure would be spread over 30 or may be more folios of that month, but we can find it easily through the ledger by going to the folio named Conveyance Account. All the accounts of an NPO and all the transactions of the NPO can be found in the General Ledger. Accounts are alphabetically indexed in the ledger to facilitate easy access for recording or locating particular account.

With the help of a General Ledger, we can know the debit balance or the credit balance of any account on any day during the year. The list of closing balances of all the accounts of the General Ledger at the end of the year is known as the trial balance which in turn is used to prepare financial statements.

Sub-ledger: Under certain accounts, the ledger runs into several pages and the General Ledger become really large hence became really difficult to handle all the accounts in one book. Therefore, in this situation take out certain accounts involving huge number of transactions and create separate books for these accounts where the details would be recorded. However, the periodic sum total of these transactions would find place in the General Ledger so that the General Ledger balances would also tally, at the same time one can record the transactions more systematically without making the General Ledger cumbersome.

SUBSIDIARY REGISTERS

NPO should maintain subsidiary books and records in addition to themain registers for the purposes of internal control and transparency in thestate of affairs. The following flowchart in the next page illustrates the various types of subsidiary records.


Books of Accounts
Primary Books
Subsidiary Books
Final Books
Cash Books
Petty Cash Book
Journal
Ledger
Sub-Ledger
Payroll Records
Stock Registers
Fixed Assets Registers
Records as per FCRA
Miscellaneous Registers & Records
Attendance Register
Salary & Wages
Muster Roll Form
Fixed Assets Register
Investment Reigster
Agricultural Inputs Record
Agricultural Produce Record
General Stores Register
FC-Articles Register
FC-Securities Register
Despatch Register
Inward Mail Register
Telephone Calls Register
Vehicle Log Book
Vehicle Monthly Report

ADMINISTRATIVE EXPENSES

The main objective of this chapter is to provide guidance on the assessment of administrative expenditure and the policy with regard to apportionment of such expenditures. The important issues/questions in this regards are as under:

- Has the organisation assessed and booked the administrative expenditures separately?

- Is there a clearly defined policy with regard to expenditure apportion men between programme heads and administrative heads, particularly expenditures such as salaries, travel, etc ?

- The administrative expenditure should be distinguished from fundraising expenditure and the core cost of the organisation even without projects and programme activities.

- What is the percentage of administrative expenditure to total expenditure? The percentage of administrative expenditure to total expenditure should be reasonable, anything in the range of 20% is acceptable. The administrative expenditure may vary according to the size and nature of activity.

- What is the ratio of administrative expenditures to programme expenditures?

- Is the total travel expenses at board and senior management level separately assessed and documented ? Is such expenditure reasonable with regard to the activities?

- Is the administrative expenditure in compliance with the donor's agreement?

- Is the administrative expenditure in compliance with legal statutes such as the Foreign Contribution Regulation Act, 2010 and the Indian Income Tax Act, 1961 ?

GENERAL NOTES ON ADMINISTRATIVE EXPENDITURE

Administrative expenditure is an eternal challenge for the NPOs. High administrative expenditure decrease the amount available for programmes and very low administrative cost may affect the quality of the programme.

Administrative expenditure may pertain to the core cost of the NPO. It may also pertain to the specific project. The distinction between the two is important.

There is a general understanding that expenditures such as salaries and travel are administrative in nature. However, salaries can also be entirely programme related. It is very important that the NPO distinguishes the salaries in categories such as core administration, programme administration and programme cost. Sometimes it maybe necessary to apportion a part of the salary/expenditure as programme or administrative expenses.

ADMINISTRATIVE AND ESTABLISHMENT EXPENSES AS PER INCOME TAX LAW

Administrative and establishment expenses have always remained an issue for judicial and legislative debate under the Income Tax Laws. The prime issue in this regard is whether the income available for charitable or religious purposes should be considered after deducting administrative and establishment expenses or should they be considered as an application for charitable or religious purposes. Or to what extent establishment expenditure would be permitted because there might be a circumstance where the activities are dormant but establishment expenditure still continues.

The view of Income Tax department: The view of the Income Tax department seems to be towards deducting administrative and establishment expenses from the total income to determine the income available for application for charitable purposes. Establishment or administrative expenses are considered as a charge to the income of the organisation and, therefore, only the net income after such expenses is available for charitable purposes.

Circular No. 5-P (LXX-6) of 1968, dated June 19, 1968, states that the income should be computed on the basis of normally accepted commercial principles. Therefore, it implies that establishment expenses should be deducted in order to determine the net income available for charitable purposes. The relevant extracts of the said circular are as under: "Where the trust derives income from house property, interest on securities, capital gains, or other sources, the word 'income' should be understood in its commercial sense, i.e., book income, after adding back any appropriations or applications there of towards the purposes of the trust or otherwise, and also after adding back any debits made for capital expenditure incurred for the purposes of the trust or otherwise. It should be noted, in this connection, that the amounts so added back will become chargeable to tax under section 11(3) to the extent that they represent outgoings for purposes other than those of the trust. The amounts spent or applied for the purposes of the trust from out of the income, computed in the aforesaid manner, should be not less than 75 per cent of the latter, if the trust is to get the full benefit of the exemption under section 11(1)."

WHETHER SUCH EXPENSES AMOUNT TO APPLICATION OF INCOME FOR CHARITABLE PURPOSES

There seems to be a generic treatment to the establishment expenses and they are considered as application for charitable purposes along with other items of expenses, though in strict commercial/accounting sense, such treatment is debatable. The establishment expenses are a charge on the income and 'application' is analogous to

'appropriation' of the income available for charitable purposes. Administrative and establishment expenses could be of various categories, some part of which could be directly attributed to the generation of income and some part could be towards charitable or religious purposes. This issue has been debated in various cases, whether establishment expenses can be considered as application for the objects of the organisation.

In CIT v. Birla Janahit Trust [1994] 208 ITR 372 (Cal.), the Court opined that expenses incurred for running a trust should be considered to have been applied for the objects of the trust. In this case, reference to various other cases was also made. The following extracts are very relevant in this regard:
"It appears from the order of the Appellate Assistant Commissioner that the assessee has incurred the expenditure on salaries and miscellaneous expenses for the purpose of carrying out the objects and purposes of the trust and not only to earn the income from dividend. It is now well-settled that in determining the portion of income applied or accumulated for charitable or religious purposes, regard should be had to the trust income in a commercial sense or according to the accounts of the trust and not the total income as computed under the provisions of the Income-tax Act. Our attention has been drawn to several decisions in this connection. In Deo Radha Madhava Lalji Genda Trust v. Property Tax Officer [1980] 125 ITR 531 (MP), it has been observed that tax liability and other outgoings in respect of the trust property are all incidental expenses relating to and connected with the main objects of the trust, which are exclusively religious and charitable. If the trust property is not properly maintained and proper accounts are not kept, the very existence of the trust would be in jeopardy and its object and purpose would be lost. In this view of the matter, simply because a part of the rental income is spent in the maintenance, repairs, payment of salaries to employees, taxes and legal expenses, etc., it could not be said that the income derived from the trust property was not applied exclusively to religious or charitable purposes."

In Gem & Jewellery Export Promotion Council v. ITO [1999] 68 ITD 95 (Mum.), the Tribunal held that the entire non-code expenditure could notbe said to have been incurred towards earning of the income and, therefore,only that portion of the expenditure-which could be attributed to the earningof income should be deducted from the gross income for computing the income on which application and accumulation under section 11(1)(a) was allowed. The following extracts are relevant in this regard:

"It is clear from the decisions cited above, that it is the income computed on commercial principles which is available for purposes of accumulation under section 11(1)(a). The contention that in the case of Trust, gross receipts is the income of the Trust, in the light of the above decisions, we find is not well founded. We accordingly hold that the income available for accumulation under section 11(1)(a) is the income as computed on commercial principles, as also taking into account the provisions of the Income-tax Act, 1961.

We, however, agree with the contention on behalf of the assessee, that the entire non code expenditure cannot be attributed to the earning of the income of the assessee. The contention of the assessee that only a small portion of the expenditure is attributable to the earning of income shall have to be determined by the revenue authorities, after giving an opportunity of being heard to the assessee. For that purpose, the issue is set aside and remitted to the Assessing Officer for working out the expenditure to be deducted out of the gross income, for the purpose of determining the income and then working out the 25% of the same for accumulation."

In other words, the expenditure which can be precisely or reasonably be attributed to earning of income should be deducted first to determine the income available for charitable purposes, the rest portion of expenditure shall be treated as applied towards charitable purposes.

ADMINISTRATIVE EXPENSES UNDER FCRA

FCRA 2010 prescribes that the administrative expenditure in any year should not exceed 20% of

the total utilisation of FC funds received in that year. For the purpose of determining the administrative expenditure Rule 5 of FCRR 2011 provides the list of expenditure which shall be treated as administrative in nature.

The text of Rule 5 of FCRR 2011 is as under: Administrative expenses shall constitute

- salaries, wages, travel expenses or any remuneration realised by the Members of the Executive Committee or Governing Council of the person;

- all expenses towards hiring of personnel for management of the activities of the personand salaries, wages or any kind of remuneration paid, including cost of travel, to such personnel;

- all expenses related to consumables like electricity and water charges, telephone charges, postal charges, repairs to premise(s) from where the organisation or Association is functioning, stationery and printing charges, transport and travel charges by the Members of the Executive Committee or Governing Council and expenditure on office equipment;

- cost of accounting for and administering funds;

- expenses towards running and maintenance of vehicles;

- cost of writing and filing reports;

- legal and professional charges; and

- rent of premises, repairs to premises and expenses on other utilities:

Provided that the expenditure incurred on salaries or remuneration of personnel engaged in training or for collection or analysis of field data of an association primarily engaged in research or training shall not be counted towards administrative expenses:
Provided further that the expenses incurred directly in furtherance of the stated objectives of the welfare oriented organisation shall be excluded from the administrative expenses such as salaries to doctors of hospital, salaries to teachers of school etc."

It can be seen that the definition of administrative expenses includes various expenses such as rent, vehicles etc. which may also be incurred for programme purposes. Therefore, the scope of the Rule is more important than the traditional understanding of administrative expenses. In other words, some expenditure may be related with the programmes but for the purpose of FCRA 2010 they shall be treated as administrative expenditure if such expenditure falls under the list of expenditures defined in the Rule above.

For example, the salary of the programme director may be treated as administrative expenditure. However, in order to accommodate such aberrations, the limit of administrative expenditure has been kept at a high level of 20%.

The definition of administrative expenditure briefly is as under:

- Remuneration and other expenditure to Board Members and Trustees.
- Remuneration and other expenditure to persons managing activity.
- Expenses at the office of the NPO.
- Cost of accounting and administration.
- Expenses towards running and maintenance of vehicle.
- Cost of writing and filing reports.
- Legal and professional charges.
- Rent and repairs to premises.

The Rule further provides that the following salaries shall not be considered as administrative in nature:

- Salaries of personnel engaged in training or for collection or analysis of field data of an association primarily engaged in research or training (1st proviso)

- Expenses related to activities, for example, salaries to doctors of hospital, salaries to teachers of school etc. (2nd proviso) From the above definition of administrative expenses,

the following expenditures may be carefully ascertained.

- All kinds of vehicle expenditure has been considered as administrative in nature. However, the last proviso provides that expenses for furtherance of activity shall be excluded. Therefore, all direct programme related vehicle expenses and other expenditures are excluded from calculation of administrative expenses. All vehicle expenditure other than those which could be established as 'directly incurred on activities' shall be treated as administrative expenses.

- The Rule includes the salaries of persons engaged in management of activity and at the same time the proviso as discussed above also applies. Therefore, salaries paid to all the staff directly engaged in implementation of the programmes shall be treated as programme expenditure. However, salary of senior management persons shall be treated as administrative expenses.

Is separate Accounting Necessary: It is not necessary to maintain separate books of account showing the administrative expenditure as per FCRR 2011. However, the organisation should be in a position to clearly segregate the expenditure, which is administrative in nature, in the booksof account. In other words, the organisation may not maintain separate ledger heads based on the FCRR 2011 rules for administrative expenditure but it should have the detail and the supporting accounts to justify the percentage of administrative expenditure for the purposes of audit and reporting, if necessary.

Is Administrative expenditure required to be reported to FCRA Authorities: Under the current scheme of law, the administrative expenditure is not required to be reported to the FCRA authorities. It is a statutory compliance which the organisation has to follow. The annual return form FC-6 also does not require the reporting of administrative expenditure. However, the Central Government may call for such information and records.

ACCOUNTING OF OWN MEANS CONTRIBUTION

Own Means generally refers to the component of resources and funds mobilised or contributed by the implementing or co-ordinating partner of a development project. In an externally funded project own means could be the value of goods & services and funds other than the grants receive from the donor agency. In other words, own means is the commitment or contribution of various stakeholders to the project other than the funding agencies. A donor/funding agency normally does not finance 100% of the project and it expects that the following stakeholders should contribute the remaining amount of funds or resources:

- Partner organisation
- Community based organisation
- Beneficiaries
- Other local organisation
- Government Agencies
- And, at times, co-funding organisations

WHY OTHER STAKEHOLDERS SHOULD PARTICIPATE IN PROJECT FINANCING

There are good reasons for the project- partner to participate in the expenditure (upto a certain percentage) to be incurred on a programme/project. For example:

- strengthening of responsibility and decision making as all the stakeholders play a proactive role rather than doing the job of only implementation

- motivation and a sense of ownership for the beneficiaries to contribute to their project/programme

- better co-operation between beneficiaries and credit in stitutions in case of bank financing

- educational effects for the beneficiaries; and

- creating conditions for the contribution of the project (project sustainability) after contributions from funding agencies have been exhausted.

UNDERSTANDING THE CONTEXT

The assessment and accounting of own means has always remained a source of ambiguity and confusion. For instance, contribution made by the beneficiaries directly to the project do not normally pass through the books of account of the partner organisation. But they are reflected as sources of funds to meet the requirement of the funding agencies. Therefore, it is important to understand the context and the purpose for which own means is being assessed and accounted for.

In strict literal or technical sense, only the contributions made by the partner organisation could be considered as own means because legally whether the funds were generated locally or through beneficiaries or through donor agencies, they are all external sources as far as the legalentity of partner organisation is concerned. Similarly, the beneficiaries, who are the ultimate owners of the project, will consider everything external funded except their own specific contributions.

In the example, given in the box below, as far as the funding partner is concerned the own means is 30%. In strict legal and technical interpretation, the own means of partner organisation is 10%. But for reporting purposes it has to prepare records for entire 30% local generation.

The contribution of government subsidy and beneficiaries being directly made to the project, it does not get reflected in the books of the partner organisation. Similarly, the beneficiaries who are the ultimate owners of the project contribute only 5%, therefore the own means for them is only 5% and rest 95% is external grants.

It is important to understand the context in which we are assessing and accounting own means. Once the conceptual or the fundamental clarity is established then it would become much easier to assess and account for the own means contribution. Generally, the need for assessing own means arises out of the requirement of the funding agencies and therefore it remains contingent upon the policies of that particular funding agencies.

CASH AND NON-CASH INPUTS

Own means could be in cash as well as in kind and it can come fromvarious sources. In the case of non-cash contribution, it becomes important that proper assessment of the value of the contribution is made and also ensured that the contribution is relevant and as per the project plans.

It is advisable if the project-partner is in a position to assess separately the quantum of its contribution in cash and non-cash inputs in the beginning itself. Further, the composition of non-cash inputs may be in the form of donations of land, building, capital equipment, labour, material and other services.

It is advisable if non-cash contributions in various identifiable forms are estimated by the project-partner at the time of working out the source of funds for financing a particular project/programmes so that there is no room for difference of opinion between the funding agencies and the project partner at a later stage. Before making a commitment of an expenditure (either of a capital or revenue nature) to be financed by funding agencies/own means, it shall be ensured by the project-partner that the proposed expenditure forms part of the approved 'Cost Plan'. If not, the ways and means of financing the same should be explored outside the project. If the project-partner is not able to arrange outside finance, consent of the funding agency should be taken in advance.

ASSESSING CONTRIBUTION IN NON-CASH INPUTS

As explained earlier, contribution in non-cash inputs can be in the form of donations of land, building, capital equipment, Labour, materials and other services.

Particular care should be taken in preparing vouchers in supportof expenditure representing the project-partner's own non-cash contribution to ensure that they explain adequately and in sufficient detail the nature and make up of such expenditure.

Donation of Land and Building : Donation of land/building madeto a project/programme can be accounted for as "Own Means" by the project-partner if the same forms part of the approved "Cost Plan". For this purpose, the following criteria should be adopted.

a) Land

- The acquisition of land should be budgeted in the approved "cost Plan"
- Total area of land
- Type of Land (freehold, leasehold)
- Prevalent market rate per acre/hectare
- Cost of registration of land
- Legal title of the property
- Physical possession of the property
- Acknowledgment from the donor; and
- Registration of land in favour of the organisation

b) Building

- Construction/acquisition of building should be included in the approved "Cost Plan"
- Total covered area
- Type of Construction
- PWD rate of construction per sq.ft.
- Prevalent market rate as per certificate or architect approved Civil Engineer.
- Legal title to the land and building Acknowledgment from the donor
- Physical possession of the property and
- Registration of land and building in favour of the organisation.

DONATION OF CAPITAL EQUIPMENTS

There may be cases where the farmers /inhabitants/ beneficiaries of a particular area may donate capital equipments for a project/programme (tractor, vehicle etc). It shall, however, be ensured that:

a) capital equipments financed out of funds provided earlier are notcharged to the project again.
b) in case of second hand capital equipments, they are in good working condition and not more than five years old.

The following points shall be taken into account while arriving at the value of the capital equipment donated to the project:

- Nature of the capital equipment
- Acquisition of capital equipment should be budgeted in the approved "Cost Plan"
- Present condition of the equipment
- Estimated realisable value, if sold in the market
- Legal title to the property
- Physical possession of the property
- Acknowledgment from the donor; and
- transfer of name in the vehicle registration book

DONOR OF LABOUR

In a Project Implementation Programme, 'Shramdan' (Donation of Labour) given by a group of farmers/beneficiaries/labourers shall be evaluated as "Own Means" of financing on the basis of the following criteria:

- There should be a provision in the approved "Cost Plan"
- Category of farmers/labourers worked i.e. skilled, semi-skilled and unskilled.
- Actual number of days/hours worked
- Nature of work done
- Rate per day/hour keeping in view the provisions of Minimum Wages Act prevalent in the States/area of work
- Piece rate/volumes of work done and payments normally made for such services rendered
- Estimated and actual measurement of work done before and after the completion of the assigned job; and
- Certificate from each farmer/labourer regarding "Shramdan" given for a project.

DONATION OF MATERIALS

Donation like bricks, cement, sand, stones, bamboos, seeds, fertilizers etc. can be accounted for as "Own Means" of financing in the books of account on the basis of the following guidelines :

- Materials, seeds, fertilizers etc. should form part of the approved "Cost Plan"
- Nature of Materials (seeds, fertilizers etc.) received.
- Actual quantity received and used in the project standard usage per sq. feet cubic feet acre/hectare as per PWD or other standards
- Market price of such materials seeds, fertilizers etc. and
- Acknowledgment from the donor.

In case of free use of capital equipments for a specific purpose/period, the value of the same can be ascertained as "Own Means" on the following basis:

- Name of Capital Equipment (e.g. tractor, jeep etc.)
- Number of days/hours used
- Cost of running and maintenance of capital equipment in the form of:
  - Salary
  - Repairs and Maintenance
  - Other direct expenses, if any
  - Depreciation, or equivalent hire charges it the equipment would have been taken on hire.

ACCOUNTING POLICIES AND CONSULTATION WITH THE AUDITOR

Each organisation should develop a guideline for assessment, documentation and accounting for own means, keeping in view the requirements of the funding partners. Certain components of own means may not find place in the books of accounts of the partner organisation, in such circumstances subsidiary statements and records may be prepared.

Lot of organisation face difficulty in convincing their Auditor at the time of certification of such contribution, therefore it is important to involve and take advises of the Auditor from the planning stages itself.

SUGGESTED PRACTICES IN ASSESSMENT OF OWN MEANS OF CONTRIBUTION

It should be ensured that the contribution is directly relevant to the project. Even genuine contribution received outside the project plan should not be considered in that particular project. The items/services treated as own means should be otherwise available at a cost. In other words, the goods and services contributed should have a reasonably ascertainable andrealizable value. For instance, the goods and services contributed towards construction of a community hall can easily be treated as own means of contribution. But, if a painting is hung in the community hall then it would be difficult to assess the amount of contribution unless the cost of material used is only claimed.

The basis of valuation should be reasonable and acceptable. Arbitrary basis of valuation should always be avoided. For instance, contribution of labour should always be related with actual work done. The cost of materials and other capital items should be taken at the accepted market value.

Small items of revenue nature should normally be taken at cost. For instance, if food is provided to the participants in a programme then the valuation should be made on the basis of actual cost to the contribution including labour, fuel, transportation, etc. Any debatable basis such as per plate or approximate value should be avoided unless the amount is very small or negligible.

Large items generally of capital nature should be treated at market value. For instance, land contributed by a stakeholder should be treated at the market value at the time of contribution even if the actual cost of acquisition is less. It is not necessary to consider at what price the contributor had purchased/acquired the land. People may have

ancestral land where the cost of acquisition is nil. Similarly, items such as bricks, sand etc, should be treated at market value.A written acknowledgment from the donor should always be obtained and kept as a supporting document for the own means of contribution.

Proper subsidiary records should be prepared for all the own means of contribution generated. Preparation of subsidiary records becomes very important because all the own means may not find a place in the main books of account.

The donor agencies should be informed of the various components of own means as well as the methods of assessing the own means of contribution.

Organisation usually face problems in convincing Auditor while certification of own means received in kind for reporting purpose. It is important that the Auditor is involved during the planning and implementation stage also.

CSR (A) RULES 2021- REGISTRATION PROCESS FOR NGOs TO AVAIL CSR GRANTS

Corporate social responsibility (CSR) has received considerable attention lately, and has been the subject matter of debate. While CSR was considered as a matter of voluntarism to be exercised by companies in the interests of stakeholders, it is increasingly acquiring legal status, with several international efforts to formalise CSR obligations to the extent possible.

The concept of CSR has found its place in India through the Companies Act, 2013 whereby every company of a certain size is to announce a CSR policy. India is one of the earliest countries to require large companies to spend a stipulated amount, i.e., at least 2 percent of their average net profits made during the three immediately preceding financial years, in pursuance of their CSR policy towards specified activities.

Recently, the MCA has notified Companies (CSR Policy) Amendment Rules, 2021 Notification No. G.S.R. 40(E) dated 22.01.2021 and also notified amendment to Section 135 of Companies Act, 2013 w.e.f 22.01.2021. As per the notification issued by MCA dated 22.01.2021, it is mandatory for all NGO's that wish to raise CSR Funding to enroll with MCA w.e.f 04.01.2021 to receive CSR Funding. This notification has clarified and mentioned that companies can undertake its CSR activities through below mentioned entities:

- a company established under section 8 of the Act, or a registered public trust or a registered society, registered under section 12A and 80G of the Income Tax Act, 1961 (43 of 1961), established by the company, either singly or along with any other company, or

- company established under section 8 of the Act or a registered trust or a registered society, established by the Central Government or State Government; or

- any entity established under an Act of Parliament or a State legislature; or

- a company established under section 8 of the Act, or a registered public trust or a registered society, registered under section 12A and 80G of the Income Tax Act, 1961, and having an established track record of at least three years in undertaking similar activities.

Further, the notification has also mentioned the procedure to be followed by all who intend to undertake any CSR activity of the companies. All such entities (Trust, section 8 companies or societies) shall register themselves with the Central Government by filing the form CSR-1 electronically with the Registrar, with effect from the 1st day of April 2021.

Form CSR-1 shall be signed and submitted electronically by the entity and shall be verified digitally by a Chartered Accountant in practice or a Company Secretary in practice or a Cost Accountant in practice.

On the submission of the Form CSR-1 on the portal, a unique CSR Registration Number shall be generated by the system automatically. Further, following documents are required for filing Form CSR-1:

- Copy of PAN Card of the NGO
- Mail ID and Mobile Number
- Details of Governing Body Members
- Copy of Registration Certificate
- Digital Signature of the Authorised Person with his PAN Number

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INDIAdonates™
A movement to change lives
An Initiative of DevPro

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Redefine your path to social excellence through innovation

We identify ourselves as **Enablers**, in the field of Fundraising and Capacity Building

WHO WE ARE

INDIAdonates is a non-profit organization, which focuses on building capacities of NGOs and provides a fundraising platform for raising resources. It works with small and mid-sized NGOs working on the ground to bring about meaningful change in the communities. INDIAdonates identifies itself as Enablers-bringing systematic change towards how fundraising is approached by organizations. By following a multi-pronged strategy of strengthening program design, accountable financial processes and good governance framework, it seeks to provide opportunity for NGOs to gain financial autonomy and sustainability.

WHAT WE OFFER

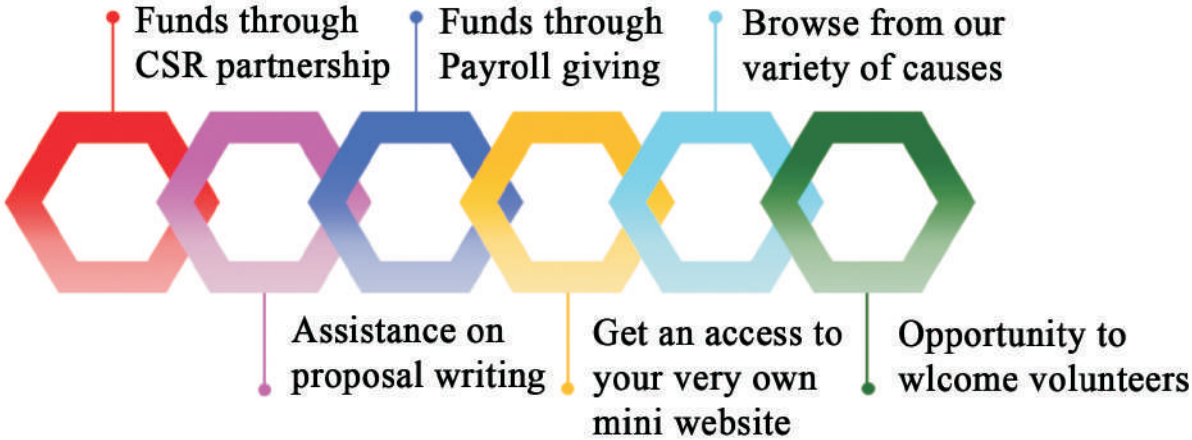
FUND MOBILISATION

A transparent and accountable platform to raise funds for development projects and campaigns through CSR partnerships, payroll giving and individual fundraising digitally. INDIAdonates enables NGOs to create curated campaigns, and appeal to a large donor base, following a targeted approach by leveraging the power of technology. NGOs get access to dedicated customised pages. This not only allows them to raise necessary funds but also provides a sand-box environment to understand the space of digital fundraising.

CAPACITY BUILDING

While mobilising funds is the primary objective, the focus is also on creating and strengthening fundraising systems for greater financial sustainability. INDIAdonates help partners create a growth map, aligning it with their objective on fundraising, campaign design, & communication through multiple modules. Our program opens a vast arena of knowledge sharing opportunity with world class thought-leaders.

Why should an NGO register at INDIAdonates ?



Contact us at:
Email: info@indiadonates.org
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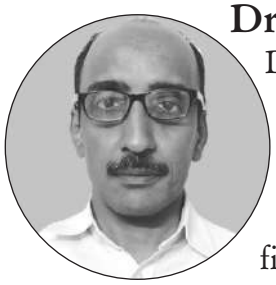
We are grateful to the authors who have contributed for the articles in this edition.



Dr Manoj Fogla

Dr Fogla is the principal author of the articles published in this edition. He is a Chartered Accountant by Profession and is a development consultant. He has been involved with voluntary sector for many years. His area of specialization includes financial evaluations and reviews of development programs. Over the years, he has authored several books on governance, financial management, legal and taxation aspects of NGOs.

Mr. Suresh Kumar Kejriwal

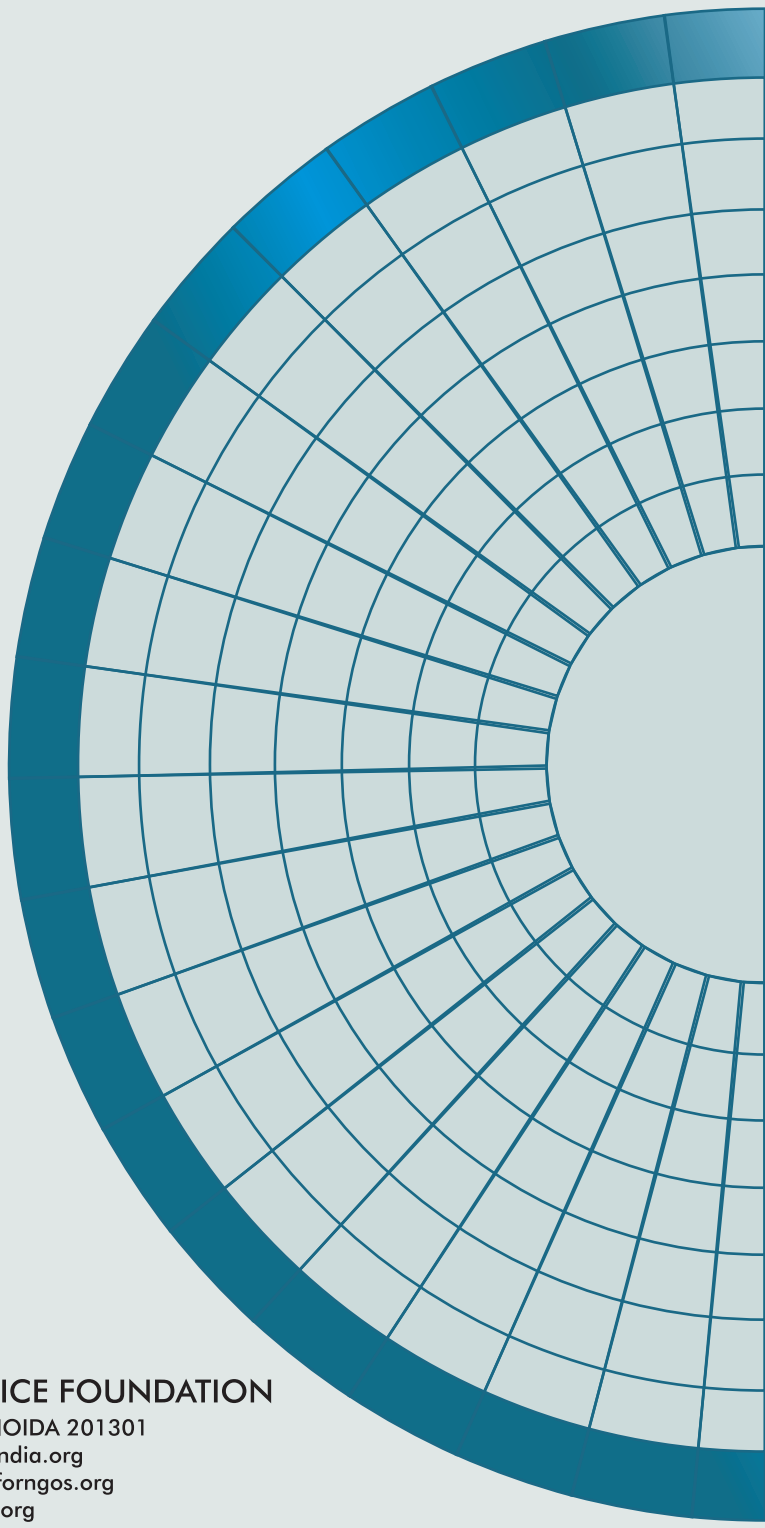
Mr. Suresh Kejriwal is a Charted Accountant, practising in Kolkata. He is working with NGO sector for more than 23 years. He is one of the prominent resource person with vide knowledge of NGO sector, and is associated with FMSF as consultant in the areas of Financial Management and Legal compliance.

Mr. Sandeep Sharma

Mr. Sandeep Sharma is the Director Programme in Financial Management Service Foundation (FMSF). He has an extensive experience of working for the development sector. He has been involved in several organizational development processes for various national and international organizations. He is a seasoned trainer and has facilitated more than 300 workshops across the globe.

Dr Sanjay Patra

Dr Sanjay Patra is the Executive Director of Financial Management Service Foundation (FMSF). He has experience of more than 25 years in the voluntary sector and has been actively engaged with many national and international voluntary organizations in the areas of financial management, legal compliances, governance and transparency and accountability.Over the years, he has engaged in major research, training and has also authored books on financial audit & written several articles.



FINANCIAL MANAGEMENT SERVICE FOUNDATION
"ACCOUNTABILITY HOUSE", A-5, Sector-26, NOIDA 201301
Tel: 00-91-120-4773200 I E-mail: fmsf@fmsfindia.org
Website: www.fmsfindia.org I www.legalissuesforngos.org
www.fcraforngos.org I www.incometaxforngos.org