

FCRA ISSUES

♦ Legal Series Vol. XIV ♦ Issue 8

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UNDERSTANDING SUB GRANTS UNDER AMENDED FCRA 2020



Standards & Norms

Resource support on NGO Governance, Accounting and Regulations



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CONTENTS

1.	OVERVIEW OF SUB GRANTING LAW UNDER FCRA	01
2.	STATUTORY CHANGES PERTAINING TO SUB GRANTING	02
3.	AS SUB GRANTING IS NOT PERMISSIBLE CAN THE LEAD NPO WORK INDIRECTLY WITH THE IMPLEMENTING ORGANISATION	03
4.	CAN THE LEAD PARTNER DRAW A CONSULTANCY CONTRACT WITH THE STAFF OF THE IMPLEMENTING ORGANISATION	04
5.	CAN THE LEAD PARTNER HIRE THE STAFF OF IMPLEMENTING ORGANISATION AS VOLUNTEERS	06
6.	CAN THE DONOR MAKE TRIPARTITE AGREEMENT AND TRANSFER FUNDS DIRECTLY TO ALL PARTNERS	06
7.	IS IT PERMISSIBLE TO CONTRIBUTE FUNDS/EQUIPMENTS TO SHG, PANCHAYAT OR LOCAL COMMITTEE	07
8.	IS IT PERMISSIBLE TO CONTRIBUTE TO AN INDIVIDUAL MEMBER OF SHG, PANCHAYAT OR LOCAL COMMITTEE	08
9.	UNDER FCRA RULES, CAN WE RECOGNISE AN SHG OR LOCAL COMMITTEE AS EQUIVALENT TO AN INDIVIDUAL	09
10.	Schedule I - PETITION UNDER SECTION 50 OF FCRA2010	11

OVERVIEW OF SUB GRANTING LAW UNDER FCRA

- 1.01 The Foreign Contribution (Regulation) Amendment Act, 2020 prohibits inter charity donations i.e. one FC registered organisation cannot sub-grant, further, to another FC registered organisation. This amendment has become effective from 29th September, 2020.
- 1.02 The Concept of Mother NPO and Grassroots NPOs has been withdrawn, which implies that all NPOs receiving FC fund have to directly implement the project activities. Now onwards large national level NPOs cannot work with smaller downstream organizations.
- 1.03 This amendment is a deviation from the normally accepted norms of charitable activity. The Supreme Court and other Courts of India have in the past ruled that working through another organisation is at par with implementing direct activities. The Supreme Court in *CIT v. Thanthi Trust* [1999] 239 ITR 502, has also upheld the treatment of inter-charity donations as valid application of funds. This dictum will no longer apply to FC registered organizations sub granting out of FC fund.
- 1.04 The unspent project funds, as on 29th September 2020, collected on behalf of other organisations cannot be transferred to such organisations. After the amendment in the FCRA law, it is not permissible to pay or reimburse for any charitable activity undertaken by the partner prior to 29th September 2020. Any such partner may make a petition under section 50 of the FCRA seeking specific permission to receive any such fund. A template for making such application is provided in **Schedule I** to this chapter.
- 1.05 Consortium contracts, where multiple Indian registered organisation partner together undertake a project, will no longer be permissible unless the partners are covering their costs with their own funds (Indian Funds). The donor has to work with only one Indian registered implementing partner at a time. However,

there may be relationship with other partners or stake holders to the extent it does not involve transfer of FC fund directly or indirectly.

STATUTORY CHANGES PERTAINING TO SUB-GRANTING

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

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

No person who—

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

(b) receives any foreign contribution,

shall transfer such foreign contribution to any other person.”

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

“No person who —

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

(b) receives any foreign contribution,

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

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

It can be seen that the sub granting shall be permissible only with prior approval of the Central Government. There is no known precedence of any such approval being granted by the Central Government.

AS SUB-GRANTING IS NOT PERMISSIBLE CAN THE LEAD NPO WORK INDIRECTLY WITH THE IMPLEMENTING ORGANISATION

- 3.01** It has to be understood that under the amended law there is no concept of lead NPO and implementing NPO; all organisations have to be direct implementers as far as FC fund/projects are concerned.
- 3.02** It can be seen that foreign contribution can no longer be transferred to another organisation as was permissible earlier. The FCRA law is very particular that there should not be any direct or indirect involvement of any other entity in utilisation of FC funds.
- 3.03** It may also be noted that the Foreign Contribution (Regulation) Amendment Rule 2020 has amended Form FC - 4 and this amended form requires a declaration on 15 specific points which also includes direct or indirect transaction or activity with any FC or Non-FC registered organisation. The three relevant declaration in this regard are re-produced as under:

“(i) any foreign contribution was transferred to any FCRA registered association?”	Yes	No
“(ii) any foreign contribution was transferred to any Non FCRA registered association?”	Yes	No
“(xiv) any organization/entity not belonging to the Association is being managed/financially supported by the Association?”	Yes	No”

3.04 In the light of the above three clauses, particularly clause (xiv), it is important that there is no direct or indirect relationship with the implementing FC registered partner for that matter and any other charitable organisation whether registered under FCRA or not. Further, it is not advisable to hire any erstwhile implementing partner as a vendor or service provider for any program component, unless such organisation is actually providing such services in the normal course of its functioning.

3.05 Further, if it is proposed to hire the staff of the implementing organisation then any such recruitment should be an independent process i.e. anybody working anywhere shall have the opportunity to be recruited subject to eligibility criteria. In other words, such independent partner should terminate and settle the employment contract of all the employees being recruited by the lead NGO. The lead NGO may employ all or some of those staff with independent employment contracts through a normal recruitment process.

CAN THE LEAD PARTNER DRAW A CONSULTANCY CONTRACT WITH THE STAFF OF THE IMPLEMENTING ORGANISATION

4.01 In our opinion it is not advisable to use fulltime employees of other organisations as contractors. However, the following issues are relevant in this regard:

- a consultant cannot be hired to implement the primary activities of an organisation, a consultant can be hired to deliver specific goods or services in the course of implementation of the program. For example, a doctor cannot hire another person to carry out diagnosis or treatment on its behalf, it can hire the services of a nurse, pathologist, attendant, medicines supplier etc.
- When a consultant is hired to implement a charitable project then such consultant would not be giving any services back to the contractee, he/she would be delivering the service on behalf of the NGO to the beneficiaries or the community. Therefore, the consultant will be in the nature of an intermediary or a trustee for implementation of a charitable project. The only difference will be that such consultant is working on commercial terms. It has been held that a charitable activity does not get converted into a commercial activity only due to existence of profit.

4.02 Further, if the idea is to hire consultants who would work like the staff of the organisation, then in our understanding there is a fundamental difference between a consultancy contract and an employment contract. To establish a contract to be in the nature of a consultancy contract, the following conditions should be fulfilled:

- A consultancy contract should be based on deliverables. The consultant should be bound by the deliverables and not working days/hours.
- An invoice should be raised by the consultant.
- A consultancy contract should not be based on working hours at a particular place of work (it could include travel and work from home).
- A consultant should not report to the employer; he should only be liable for the deliverables and other terms of the contract.

In the light of the above whether a contract should be in the nature of consultancy or employment, may be determined.

- 4.03** In the light of the above the lead agency may implement the project directly by hiring employees. It should avoid consultancy contract unless such contracts are for specific service or deliverable.
- 4.04** An NPO may award commercial contracts to vendors for rendering various services or materials which are required for implementation of the program. Any outsourcing of the 'charitable activity' itself may be treated as a colourable device to evade the amended FCRA Law.

CAN THE LEAD PARTNER HIRE THE STAFF OF IMPLEMENTING ORGANISATION AS VOLUNTEERS

- 5.01** As discussed earlier a person working as a whole time employee in another organisation should not be considered for execution responsibility. An organisation may have staff and volunteers only in the normal course of its functioning. Using the staff or functionaries of another FC registered organisation is not advisable under the current FCRA law.

CAN THE DONOR MAKE TRIPARTITE AGREEMENT AND TRANSFER FUNDS DIRECTLY TO ALL PARTNERS

- 6.01** Such an option is technically possible but generally not feasible for most of the donors as the cost and the monitoring responsibility increases many fold if the donor works with various small partners by directly transferring funds each of such partners. In our opinion a tripartite agreement (one project split into several contracts) is not advisable unless all the parties, except the donor, are direct implementers. If there is a mother agency engaged in say, monitoring work then;
- (i) the entire budget at the end of the mother NGO will be treated as admin expenses.

- (ii) the implementing partner may be perceived as an organisation managed by the mother NGO, in the light of the declaration No. (xiv) under Form FC – 4.

IS IT PERMISSIBLE TO CONTRIBUTE FUNDS/EQUIPMENTS TO SHG, PANCHAYAT OR LOCAL COMMITTEE

- 7.01** An NPO cannot make a payment from foreign contribution or give ownership of the assets created by utilising foreign contribution to SHG, Panchayat or Local Committee for development of local school, medical etc. after the amendments introduced by the Foreign Contribution (Regulation) Amendment Act, 2020.
- 7.02** Self Help Groups (SHGs) are an association of persons, facilitating the implementation of development activities in the communities at the grassroots, the same is true for Panchayats and Local Committees; they cannot be treated as individual beneficiaries. Any amount of assets transferred to them will be utilized for the benefits of the beneficiaries or their members. We have to understand that transferring fund to a member of SHG is different from transferring fund to the SHG, the former is permissible but transferring to SHG on behalf of members is technically not permissible. These associations/entities will be treated as intermediaries. Therefore, such transfer of amount/ assets is not permissible.
- 7.03** The Section 7 of the Foreign Contribution (Regulation) Amendment Act, 2020 prohibits the transfer of Foreign contribution from one registered organisation to another registered/unregistered organisation. In other words, the organisation can itself utilise the foreign contribution towards the objective of the economic, educational, religious, cultural, or social program, as approved in the FCRA registration certificate, but cannot make a subgrant out of it.

- 7.04** If an NPO intends to work with the SHG/Local Committee by creating an asset, then such NPO should retain the ownership of the asset and can give right of managing or facilitation to the SHG/Local Committee for the beneficiaries.

IS IT PERMISSIBLE TO CONTRIBUTE TO AN INDIVIDUAL MEMBER OF SHG, PANCHAYAT OR LOCAL COMMITTEE

- 8.01** The ownership of the assets can be transferred to a particular member of LC/SHG provided such member of the LC/SHG is individual and is the end user or beneficiary. It is to be understood that the members are distinct from the LC/SHG. An NPO can give assets only to individual members provided such members are eligible as beneficiaries.
- 8.02** If the asset is transferred to an individual who is a part of SHG or a member of LC, the ownership shall vest with the individual. In case the member leaves the LC/SHG the asset will continue to vest with the member being the legal holder of the asset. The LC/SHG will have no right on such assets. As discussed above FC or FC Asset cannot be transferred to the LC or the SHG as they are not the end user or beneficiaries of the assets. However, FC or FC asset can be transferred to an individual for the end use for self-consumption.
- 8.03** Having said that, any grant made to individual beneficiaries is subject to due diligence with respect to selection of beneficiaries and the nature of the grant. There should be a systematic criterion to establish the eligibility and selection of the beneficiary and the amount or the nature of asset which could be given to each beneficiary should be reasonable and justified.

UNDER FCRA RULES, CAN WE RECOGNISE AN SHG OR LOCAL COMMITTEE AS EQUIVALENT TO AN INDIVIDUAL

9.01 SHG is an association of a person and not an individual. Usually, the members of SHG are individuals. From a legal perspective, it is to be understood that FCRA, 2010 applies to the persons that include an individual, association including an SHG and other entities as defined under section 2(m) of FCRA, 2010. The text of section 2(m) is reproduced below for your ready reference-

In terms of FCRA, 2010 “person” includes

- (i) an individual;
- (ii) a Hindu undivided family;
- (iii) an association;
- (iv) a company registered under section 25 of the Companies Act, 1956 (now Section 8 of Companies Act, 2013).

9.02 The FCRA 2010 further defines the term ‘**association**’ under section 2(1)(a) as follows:

“association means an association of individuals, whether incorporated or not, having an office in India and includes a society, whether registered under the Societies Registration Act, 1860 (21 of 1860), or not, and any other organisation, by whatever name called;”

9.03 Hence, SHG is an ‘association’ and falls under the definition of person under FCRA 2010. In light of the above, giving any amount to SHG out of Foreign Contribution is prohibited but the amounts given to the **individual members of SHG for their end use as beneficiaries can be** claimed as program expenses by the NPO. In other words, individual beneficiaries can be provided support for

self-consumption. However, we wish to reiterate that no FC can be transferred either to SHG or the member as a subgrant. Further as discussed earlier there should be a systematic criterion to establish the eligibility and selection of the beneficiary and the amount or asset which could be given to each beneficiary should be given in a reasonable manner.

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Schedule I**PETITION UNDER SECTION 50 OF FCRA 2010**

The Secretary,
 Ministry of Home Affairs (FCRA Wing)
 1st Floor, Major Dhyan Chand National Stadium,
 Near Pragati Maidan, New Delhi-110001.

Date:

Re: Petition for permission to receive foreign contribution or activities implemented prior to 29th September 2020.

Name of Association:, FC Registration No

Dear Sir,

Facts & Issues:

1. **XYZ** is a charitable organization duly registered under FCRA since 2010. An overview of its activity is provided in **Annexure**.
2. **XYZ** is also registered under section 12AA of the Income Tax Act bearing Registration No..... It continues to remain the compliant tax exempt charity under Income Tax Law.
3. **XYZ** has been filing audited statements and annual returns as per the law. There are no proceedings pending against it under the FCRA Law.
4. **XYZ** was engaged in implementing an XX Project as a sub grantee. In other words the foreign contribution were received by the lead partner..... and XYZ received the foreign contribution as a subsequent recipient to implement the project. XYZ was implementing the project on reimbursement mode out of its general fund available under FCRA. Various expenditures also remain outstanding which are paid after receipt of foreign contribution. The lead partner was reimbursing the expenditures at the end of each quarter/six months.

5. After the enactment of FCR Amendment Act 2020 sub grantee is no longer permissible under section 7 with effect from 29th September 2020. XYZ had incurred a sum of Rs. as on 29th September 2020 on FC projects and the amount is due from the donor but due to the amendment under section 7 it is no longer permissible or an Indian FC registered organization to further sub grant the amount.
6. As the funds has already been spent it would create undue hardship if our organization is not allowed to receive those funds.

Prayer:

It is humbly prayed that permission may be granted to receive foreign contribution amounting to Rs. from **ABC** and suitable direction may be issued in this regard.

Thanking You,

Yours sincerely,

For XYZ

