

Utilisation vis-à-vis Transfer of FCRA funds

AREAS COVERED

- Utilization & Transfer explained in context of FCRA
- Fund transfer to non-registered NGOs only possible under Rule 24.
- Precautions to be taken while transferring funds to FCRA registered NGOs.

Q: What is the difference between Transfer and Utilization?

One of the confusion that NGOs receiving FCRA funds face is how they can utilise or transfer FCRA funds. This SRRF Advisory series provides the basic difference between 'Utilisation' or 'Use' of funds and 'Transfer' of funds.

'Transfer' basically here denotes funds transferred to by an NGO (say 'A') to another (say 'B'). Once the funds are transferred, then NGO 'B' becomes responsible for **'utilization'** of funds so transferred and thus in turn also becomes responsible for its reporting. Since under the FCRA Act monitoring of utilisation of FCRA funds is undertaken through annual return filed by registered NGOs, it restricts transfer of FCRA funds to non-registered NGOs (S.7ⁱ).

Sometimes it creates confusion that an NGO cannot transfer FCRA funds to anyone, even to for-profit entities. This is the basic distinction between 'transfer' and 'utilization'. Once funds are transferred to NGOs, those NGOs

become responsible for their utilization. Thus when an NGO directly makes payment to a for-profit entity (including individuals, partnerships or companies) purpose is utilization by the NGO and needs to be reported in the annual return of that NGO. Main argument being that utilization involves discretion in how funds are used.

Q : Can NGOs by deducting TDS on grants treat transfer of funds as 'Utilization' and not 'Transfers'?

As stated above, sometimes it is argued that, more often than not, funds when transferred to other NGOs (B), they hardly have discretion on how funds would be utilized, since they only implement given proposal/s and would be subject to budgetary as well as monitoring controls of the funding agency¹. Hence in such a situation, such NGOs are not 'using their own discretion while utilizing funds given by NGO 'A' (transferor). On such grounds funds so utilized should be accounted for in the books of NGO 'A' (transferor), since NGO 'B' can be stated to be acting only as a consultant / contractor. Sometimes some organisations even take the original vouchers for such expenditures in their books, treating this as consultancy-contract / sub-contract and even deduct TDS.

¹ A funding agency here includes an NGO who may transfer funds to another NGO.

Undoubtedly there is merit in this argument, however problem is that by virtue of S. 11ⁱⁱ, FCRA Act restricts non-profits from accepting any FCRA funds without registration or prior permission.

Further considering 'proviso' under S. 7 which specifically provides on how funds can be transferred to non-registered NGOs, it is now amply clear that FCRA funds to non-registered NGOs should not be transferred without taking necessary permission from the FCRA Dept under Rule 24 (1) (see below). Thus it can be argued that all funds transferred to NGOs (whether registered or non-registered) by another NGO has to be treated only as 'transfer' in the books of transferor.

Q: Does this mean an NGO cannot transfer funds to another non-registered NGO? If yes, please advise how.

As mentioned above Proviso to S. 7 allows transfer of funds to NGOs who are neither registered under FCRA nor have received any prior permission. Procedures for effecting such transfer of funds have been specified under Rule 24. For this purpose, the donor NGO has to make an application to the FCRA Dept. in Form FC-10 and ensure that total funds transferred to non-registered NGOs is not more than 10% of the total Foreign Contribution received during a particular financial year.

Accordingly the donor NGO should make an application (FC-10) alongwith

following declarations to FCRA Dept. The declarations should state that the funds to be transferred are less than 10% of the total foreign contribution to be rec'd during the financial year and that transferor will not transfer funds until receiving the permission from the central Govt.

It may be noted that initial rules required application to be counter-signed by the District Magistrate of the district where funds would be utilized, however since then the rules have been amended² and now there is no such requirement.

Once the funds are transferred to non-registered NGO, rules make both NGOs responsible for compliance of FCRA provisions. Transferor NGO (or NGO A) in its annual return will show this as transfer, while recipient NGO would show it as utilization. Question does arise, since recipient NGO does not have a registration, how it will file an annual return. It is believed that permission given by FCRA Dept for transfer of funds should be treated as prior permission and in accordance therewith recipient NGO should file its annual return in form FC-6.

Q: What precautions one should take while transferring funds to other FCRA registered NGOs?

When rules came out way back in May 2011, these required that even when funds were being transferred by FCRA registered / prior permitted NGO to

² G.S.R 292 (E) dated 12th April 2012 effective 12-4-2012

another registered / prior permitted NGO, permission would need to be taken. This created hue and cry among several large NGOs, who regularly transfer funds to other registered NGOs. Several representations³ were made to FCRA authorities. This resulted in a clarification that no permission was needed when funds were being transferred to a registered / Prior permitted NGO. This has been now made official by amendment to the FCRA Rules 2011, (see Rule 24(3))ⁱⁱⁱ.

Thus, while, there is no need of any application to FCRA Dept while transferring funds to another NGO, the rule does impose an obligation on the transferor to ensure that 'the recipient has not been proceeded against under any of the provisions of the Act'. However ensuring this is easier said than done, since if the recipient NGO does not disclose this fact, it will be almost impossible for the donor NGO to ascertain this fact.

Hence in our opinion it would suffice as long as the donor NGO undertakes reasonable steps to ascertain the status of any proceeding against the recipient NGO. These steps could include:

- Verifying the FCRA website to ascertain if the concerned NGO is listed under any of the lists indicating violation of the Act. At the time of preparing this document the website had several

such lists, these are falling under following headings:

- Penal action (under this there are several lists, which one should scrutinize)
- List of cancel (*sic*) associations
- FC-6 return not filed

However considering the website may be updated anytime, please make a thorough check of the same.

- Obtain a written undertaking from the recipient NGO that it has not been 'proceeded under any of the provisions of the Act'.

ⁱ S.7 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 Govt., 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 Govt.

ⁱⁱ S.11(1) Save as otherwise provided in this act, no person having a definite cultural, economic, educational, religious or social programme shall accept foreign contribution unless such person obtains a certificate of registration from the Central Govt.

ⁱⁱⁱ Rule 24(3) A person who has been granted a certificate of registration or prior permission under section 11 shall not be required to seek the prior approval of the Central Govt. for transferring the foreign contribution received by him to another person who has been granted a certificate of registration or prior permission under the Act provided that the recipient has not been proceeded against under any of the provisions of the Act.

³ SRRF led a delegation of, such, major NGOs. One can see a clarification letter issued by the Dept. on SRRF website at this link.

http://www.srrf.org/workshop/16_June_11/Clarification_Rec%27d.pdf