

20th June 2011

To
Shri GVV Sarma
Joint Secretary (Foreigners')
Ministry of Home Affairs
FCRA Wing
Jaisalmer House
26 Mansingh Road
New Delhi 110001

Dear Sir,

At the outset, we would like to thank you for participating, as Chief Guest, in the SRRF & Plan India organised on 16th June 2011 a RoundTable on FCRA 2010 provisions. Several delegates at the RoundTable appreciated your proactive involvement in implementation of these provisions and to familiarise with the issues that are being faced by various stakeholders.

Through this letter, we will like to bring to your kind attention some of the matters that emerged from the RoundTable discussions and hope that these find remedial measures.

As you yourself were a witness, the RoundTable was attended by more than 80 delegates. The delegates consisted of representatives of grass-root organisations, local and national NGOs, donor agencies, academicians & professionals associated with the NPO sector several banks and Institute of Chartered Accountants of India.

Several positive developments in the Act are welcomed, these include allowing more than one bank account for utilisation of funds, taking stipend and scholarships out of scope of FCRA, incorporating power of revision, allowing transfer of funds to unregistered bodies, etc. There is more transparency in the Act as the Govt. has now codified several of the procedures which were earlier internal practices of the Department. Organisations receiving more than Rs 1 crore would need to publish the same on their websites. Although some quarters have indicated their reservation for this process, however it will further add to the transparency in the sector. There is clarity on the education and other fees being received by the NPOs. Yet another change of limiting the life of accounting records to six years under FCRA is a most welcome development. The Act overall is certainly better structured.

The issues that arose during the RoundTable can broadly be categorised into two, one in which changes are required in the Rules (See Annexure I) and the other in which the changes would be necessary in the Act itself (See Annexure II).

The RoundTable made following suggestions:

- ***Changes in the Rules could be taken up immediately, since these are likely to be simpler. A list of some of the suggestions is attached as Annexure I.***
- ***Changes in legal provisions contained in the Act. Since these would require legislative approval, these could be considered in due course.***
- ***Most delegates at the RoundTable were agreeable that the NPO Sector should support the Dept. achieve its objectives of compliance with the FCRA Act 2010. To***

this end, one of the most important suggestion coming out of the RoundTable was that a consultation mechanism be instituted with various stakeholders, which could become a forum for resolving issues.

In case we are required to clarify any of these issues, we would be just a phone call away. Also in case you require any further support, it will be a pleasure to support you in this cause.

Yours sincerely,



Subhash Mittal
Secretary, SRRF

(For and on behalf of participants who attended the RoundTable)

CATEGORY I : Amendments which can be taken up by amending the rules

RELATIVE

While welcoming various positives referred to in the letter, we believe that in certain areas, it is important that rules are amended to further improve the implementation of the Act.

Rule 6: This rule requires that anyone receiving more than Rs 1 lakh or equivalent in a financial year from any of his relatives shall inform the Govt. through Form FC-1 within 30 days of receipt of such contribution. Since 'person' includes individual, hence the Rule is likely to be interpreted that every person in India who receives more than Rs 1 lakh in FC will need to intimate the Govt. in Form FC-1.

This would mean that all individuals who receive more than Rs 1 lakh from any of their relative whether covered under the FCRA Act or not would need to file Form FC-1. This would turn out to be an enormous exercise involving a very large number of persons. There is a need to review, if the same is intended by the Act.

This rule seems very restrictive since even under FEMA presently there are no restrictions on any funds being received from any relative, except for any interest free loans above USD 250,000. Rule 6 would create huge anomaly, where even parents with children, who may have taken foreign citizenship, may be required to disclose all receipts above Rs 1 lakh, putting an extra unnecessary burden on them.

This rule is not directly related to S. 4 (e), which allows complete exemption to persons who are otherwise prohibited from receiving FC.

This Rule does not seem to flow from any legislative provision either, since there is no requirement in the whole Act to receive information from relatives and that too for such low amounts.

Suggestion

Rule 6 should be withdrawn.

TRANSFER OF FUNDS TO REGISTERED ORGANISATIONS

A large number of registered organisations get several of their programmes implemented through other local and smaller NGOs. This forms part of the programme strategy to benefit from these NGOs local knowledge as well as build their capacity. However before the funds are transferred, it is ensured that these NGOs have FCRA registrations or prior permission. Requiring that these organisations take prior approval for each such transfer will become a major bottleneck in expeditious transfer of funds, as the transfers are frequent and large. This will affect the entire working systems developed and evolved by various organisations. In any case this information would be provided by the organisation through its annual return to the Department

The above requirement is based on Rule 24 (2), that if any person intends to transfer the funds to any other organisation, including a registered / prior permission organisation, even then prior permission would need to be taken by filing Form FC-10. *In the Act*

there is no specific provision which requires that a person before transferring of funds to another registered / prior permission organisation needs to obtain permission from the Govt. Closest that one comes to the above requirement is under Section 7, which states that funds may be transferred to unregistered bodies after taking permission from the Govt. Further S. 48 which empowers the Govt. to make rules does not cover S. 7 at all. Thus the above requirement does not seem to flow from any specific provision.

The Dept. has already clarified through its various letters that organisations applying for transfer of funds need not apply for permission, as long as the donor organisations ensure that the recipient organisations are not being proceeded against. This stand is not consistent with the legal provisions of the Act due to following reasons:

- Once Dept. has accorded prior permission / registration, applying again for permission under Rule 24(2) is inconsistent with S. 12 of the Act, which entitles organisations once registered / or given prior permission to receive FC.
- Putting the responsibility on donor organisations to ensure that recipient organisations are not being proceeded against is not backed with any legislative provision under the FCRA 2010.
- Rule 24 (2) does not have any legislative provision in the Act.

Suggestion

Rule 24 (2) should be withdrawn.

VALUE OF ARTICLE NOT SPECIFIED

S. 48 (2a) & S. 2(1)(h)(i) require the Govt. to define the value of an ‘article’. However no rule has been formulated defining the same. In absence of such a limit, no one can ascertain what value of Article be treated as Foreign Contribution.

Suggestion

New Rule be inserted to provide limit of value of Article, only above this limit, it may be treated as Foreign Contribution.

CATEGORY II : Amendments which can be taken up by amending the legal provisions in the FCRA 2010

RENEWAL OF REGISTRATION CERTIFICATE

FCRA provisions now require renewal of FCRA registration certificate every five years. This provision seems to be inconsistent with the Govt. thinking, where Income Tax Department has now removed the requirement of obtaining renewal of S.80G certificate. It appears that the reason for such a provision is to provide an opportunity to the Govt. to monitor organisations which have registration but are not filing the annual returns¹. While this may be a genuine concern of the Govt. it does mean that a large number of genuine organisations would also be put to trouble for helping the Govt. weed out non-serious organisations. Also what happens, if an NGO has not received any Foreign Contribution or received Foreign Contribution which the Department considers inadequate during the registration period, would the Department refuse to renew the registration. These questions are particularly relevant since the para 7 in Form FC-5 asks 'Reasons for seeking renewal of certificate' the Act / Rules do not specify what could be the grounds on which a renewal application can be refused. *For transparency, it is requested that the rules / Form FC-5 should make it abundantly clear the grounds on which renewal could be refused.*

Rule 10, it is further observed, specifies that the certificate of registration issued under the Act would be valid for five years. This rule seems to be superfluous considering that S.12(6) already states the same for registration certificates issued under the new Act and S.11(1) for the certificates already in existence on the date the Act comes into force.

DEFINITION OF ADMINISTRATIVE EXPENSES

For the first time, the Govt. has taken steps to ensure that funds are not frittered away on unproductive activities, accordingly it has made a provision that not more than 50% of funds be spent on administrative expenses. While the intention of the Govt is laudable the problem lies in the fact that Govt. has itself attempted to define 'administrative expenses', rather than relying on experts to define the same. For example, Rule 5 has included expenses towards running and maintenance of vehicles, cost of writing and filing reports, etc. Problem lies in the fact that the rule has been defined on the basis of 'natural' classification and not 'functional' classification. To illustrate, cost of printing a brochure by 'natural' classification would be defined as 'Printing Cost', however if the brochure explains, say, advantages of immunisation programme, then it would be a Programmatic expenditure and chargeable under the appropriate programme cost and not under administrative expenditure. However if the brochure highlights the achievements of the organisation and thus promotes the organisation it would be regarded as administrative cost. Such nuances while could be easily explained, however often officials who are likely to implement such provisions go strictly by the letter of the law and not the spirit, hence it is suggested that the Rule be modified so that the expenditures are classified under three broad classifications,

- Core Programme Costs
- Programme Support Costs and
- Administration Costs

¹ As per information released by the Govt. there are more than 20,000 organisations which have received registrations but not filing their annual returns.

It is further suggested that *Institute of Chartered Accountants of India (ICAI) should be roped* in to provide a proper description of these different type of expenses. ICAI is also in the process of bringing an Accounting Standard to standardised accounting practices for the NPO sector. It would be most appropriate body to define the administrative expenses.

PAYMENT OF FEES FOR PENDING APPLICATIONS

Applications for registration and prior permission made under FCRA 1976 but which remain pending at the time the FCRA 2010 comes into effect will remain valid and will be considered under the new Act. However Rule 9(5) requires that the applicants would need to deposit the prescribed fee as applicable under the new Act.

Intention of the Govt. seems to be that since these applications would be considered under the new legislation and hence the applicant needs to deposit the fee as per the proposed Act. One estimate is that there could be as many as 3000 such applications. To enable these applicants to comply with the rules, the Department may need to write to each of such applicant. While most would comply with the requirement, there would always be cases who may not receive such intimation and hence may not be able to deposit the requisite fee. Non-deposit of fee would mean the application becoming invalid. Once rejected, it would not be possible to revive these applications for another six months. This could cause a lot of hardships. In any case, overall costs involved in serving of notice on all individual cases, hidden costs likely to be incurred by each person in deposit of the fee, etc. would be quite high. *To enable easier compliance and to avoid hardships to applicants who submitted the applications when no such fee was applicable, it is suggested that the Govt. waive the fee on these applications as a one time gesture.*

ORGANISATIONS OF POLICIAL NATURE

Rule 7 identifies grounds on which organisations of different types can be declared as an organisation to be of a political nature, not being a political party. Sub-rule (v) states that 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 (as gathered through other material evidence) include steps towards advancement of **larger socio-economic** or political interests of the organisation.

Since most social organisations aim is to advance larger socio-economic status of the constituencies that they serve, this rule may cover almost the entire NGO community and hence the words 'larger socio-economic' needs to be dropped.

Similarly sub-clause (vi) states that 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 rook*, *jail bharo*, etc. in support of public causes. It appears that the intention of the Govt. is to not allow any organisation to undertake activities which cause public disturbance using the foreign funds. However since many of the civil society organisations undertake demonstration and *dharna* to draw attention to their causes, such a rule could be misinterpreted by the officials implementing these rules. Hence either the rule should be dropped or at least following added

Provided that nothing will apply to organisations which undertake activities which are not against the public interest or do not violate any of the laws of the land.

TIMEBOUND PRINCIPLE OF RESPONDING REMOVED

Under the old Act, Govt. had imposed the principle of accountability on itself by ensuring that if it fails to reject an application within 120 days, the application for registration / prior permission would be taken as deemed, however the Govt. has now removed this time-frame. Provision of fixed time-frame was considered as a good law, since it was based on a general principle of fairness. The new provision, replacing the earlier one states that the Government will only provide reason for delay after 90 days, but is not obliged to either reject or accept the application within a particular timeframe. There is a general feeling of disappointment on the same, since the new provision are not based on the principle of fairness, requiring both the government as well as the general public to comply with provisions in a time bound manner. Though since the provision is included in the Act, scope for change is limited, but the Government could consider how it could be brought on a similar footing as that of the earlier Act.

CONTRARY TO COMMUNITY RADIO POLICY OF GoI

As per S.3 (1g) no 'association' or company engaged in production or broadcast of audio news or audio visual news or current affairs programme shall accept foreign contribution. In this regard, it may be worth noting that as per a policy expanded in 2006 by the Ministry of Information and Broadcasting, only 'Non-profit' and 'voluntary organisations' are eligible for running Community Radio Service (CRS). The policy for the purpose of the funding, particularly specifies that the applicants will be eligible to seek multilateral and foreign aid. Since FCRA provisions now forbid acceptance of foreign contribution for undertaking any audio news programme, it will not be possible for voluntary organisations who accept foreign contribution to undertake CRS, even if these are funded from local sources. Thus the relevant provision in the FCRA Act is likely to stall the CRS policy of GoI.

BANK INTEREST TREATED AS FOREIGN CONTRIBUTION

Since bank interest is provided by investment of funds by *Indian banks / agencies* this should not be treated as foreign contribution, since Foreign Contribution by definition is to be received from a 'Foreign Source'.

This Representation letter is based on a FCRA RoundTable organised by SRRF & Plan India on June 16, 2011 with Donors, NGOs, ICAI at India Habitat Centre, New Delhi