



FCRA NO LONGER APPLICABLE TO COMPANIES WITH FOREIGN SHAREHOLDING

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1. INTRODUCTION

1.1 The Finance Bill 2016 has proposed radical changes to the Foreign Contribution (Regulation) Act, 2010. It has amended section 2(1)(j)(vi) to exclude Indian Companies with foreign shareholding in excess of 50%. It may be noted that prior to this amendment all Indian Companies with more than 50% shareholding by foreigners were treated as foreign source and FCRA law was applicable.

1.2 Ironically under this law Indian companies like ICICI Bank or Infosys were not entitled to give donations even to their own foundations without FCRA prior permission or registration.

2. PROPOSED AMENDMENTS

2.1 The Part xiii to the Finance Bill 2016 has proposed the following amendments:

AMENDMENT TO THE FOREIGN CONTRIBUTION (REGULATION) ACT, 2010

In the Foreign Contribution (Regulation) Act, 2010, in section 2, in sub-section (1), in clause (j), in sub-clause (vi), the following proviso shall be inserted and shall be deemed to have been inserted with effect from the 26th September,

2010, namely:—

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

2.2 By virtue of this amendment FCRA law will not apply even if the nominal value of share capital of a company held by foreigners exceeds 50 per cent at the time of making contributions provided the foreign investment is within the limit specified under the Foreign Exchange Management Act, 1999 or the rules or regulations made there under.

2.3 Therefore for all practical purposes, Indian Companies where more than 50 percent of shareholding is by a foreign source will be exempted from definition of “Foreign Source” as all Indian Companies have to comply with the limits set by FEMA for foreign investment.

3. RETROSPECTIVE DATE OF APPLICABILITY AND CONDONATION

3.1 The amended law shall be applicable with retrospective effect from 26th September, 2010. In other words, all donations/ grant given by such companies since 26th September, 2010 in violation of FCRA will be condoned. There were many companies who had violated the FCRA Law by providing grant to various Indian Organizations without FCRA registration or prior permission. This amendment will provide a great relief to such companies as well as NGOs.

4. MEANING OF 'FOREIGN SOURCE' UNDER FCRA

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

- (j) "foreign source" includes, —
- (i) the Government of any foreign country or territory and any agency of such Government;
 - (ii) any international agency, not being the United Nations or any of its specialised agencies, the World Bank, International Monetary Fund or such other agency as the Central Government may, by notification, specify in this behalf;
 - (iii) a foreign company;
 - (iv) a corporation, not being a foreign company, incorporated in a foreign country or territory;
 - (v) a multi-national corporation

referred to in sub-clause (iv) of clause (g);

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

- (A) the Government of a foreign country or territory;
- (B) the citizens of a foreign country or territory;
- (C) corporations incorporated in a foreign country or territory;
- (D) trusts, societies or other associations of individuals (whether incorporated or not), formed or registered in a foreign country or territory;
- (E) foreign company;

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

- (vii) a trade union in any foreign country or territory, whether or not registered in such foreign country or territory;
- (viii) a foreign trust or a foreign foundation, by whatever name called, or such trust or foundation mainly financed by a foreign country or territory;
- (ix) a society, club or other association

of individuals formed or registered outside India;

(x) a citizen of a foreign country.”

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

5. CONCLUDING REMARKS

5.1 This amendment is a much needed correction of an anomaly which were existing by mistake in the FCRA Act. The Act when it was amended in 2010 consciously changed the definition of a foreign company with the intent to exclude all Indian companies with more than 50% foreign shareholding. It may be noted that in the FCRA Act 1976 the definition of a foreign company included all Indian companies with more than 50% foreign shareholding.

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

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