

AccountAble™

AccountAble 122: Mythology of FCRA

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What are myths? According to one view, these are "stories about divine beings, generally arranged in a coherent system; they are revered as true and sacred; they are endorsed by rulers and priests..."¹

Another writer takes a dig at comparative religion studies, when he says that '[the] subjective and cultural truth of the Hindus is neither superior nor inferior to other truths'.² According to this view, myths help people understand a world that they otherwise find confusing. This makes myths dear to them, often sacred.

The NGO world's relationship with FCRA is no different. In the eighties and nineties, very few people knew anything about FCRA. Stories were passed around in workshops, meetings, hushed whispers.

This has changed significantly over the last decade. A number of books on FCRA have been pub-

lished. There are many web-sites which offer guidance and information. FCRA Department itself maintains a very informative website. Yet old legends continue to linger - while new ones are forged every month!

This issue of AccountAble continues an old attempt at demystifying FCRA, which began in Aug'96, with an AccountAble issued called 'Mysteries of FCRA'. Let's see where we are, some twenty years later.

FCRA funds can be converted to Indian funds...

In general - no. If a foreigner gives a donation to an Indian, and that Indian passes it on to another person, the donation still remains foreign contribution.

However, if an Indian receives salary, fees, etc. from a foreign source, the money is transformed. This

¹ J. Simpson & S. Roud, "Dictionary of English Folk-lore," Oxford, 2000, p.254, quoted at <http://www.etymonline.com>

² Devdutt Pattanaik, *Myth=Mithya*, Decoding Hindu Mythology. Penguin. 2008



money, if donated to an NGO would be local contribution.

And before you say 'hmm...' – the salary etc. should be earned in the ordinary course of business. It should not be used as a method to bypass FCRA.

FCRA does not apply to service contracts...

Right – if these are done in the ordinary course of business. If you try to disguise a program grant as consultancy work, you may still be breaking the law.

What is 'ordinary course of business'? This depends on the facts of each case. Basically, this means that the transaction is quite normal, and happens frequently.

Then there is the problem of presumption. If an NGO receives a payment from a foreign source, it will normally be treated as foreign contribution. The NGO should be able to show that it is not so.

On the other hand, if a for-profit receives a payment from the same foreign source, it will normally be treated as a business payment. However sometimes, the foreign source may allocate a consultancy payment from its CSR or grant budget. This can complicate the matter. In such cases, there are two helpful tests:

1. Who receives the services under the contract?

If these are received directly by the client, it would show that the payment is for services. If these are received by grantees of the client, it would still be a payment for services.

However, if general public or society receives these services, then the payment may be foreign contribution. In such a case, the second test should be applied.

2. Who identifies the beneficiaries?

If the beneficiaries are individually identified / nominated

by the foreign source, then the money is likely to be a business payment. However, if the receiving NGO identifies the beneficiaries on its own, the payment is likely to be a grant, covered by FCRA.

Dollar donations are foreign contribution

Not necessarily. If you receive a dollar donation from a non-resident Indian, it would be local contribution. This logic does not cover PIOs or OCI – they have a foreign passport, and should be treated as a foreign source.

Rupee donations are not foreign contribution...

Sometimes they could be. If you receive a rupee donation from a foreigner, it would be foreign contribution. The same logic applies to rupee donations from foreign companies or foreign MNCs in India.

Foreign Company may be an Indian source...

No. Never. Even if it was 100% owned by Indian citizens. A company or organisation formed abroad will always be a foreign source, even if it is controlled by Indian citizens. The same rule applies to foreign companies, which are part of an Indian MNC.

FCRA applies only to NGOs...

Wrong. FCRA applies to all organisations with cultural, religious, economic, educational or social programs (CREES).³ If a for-profit company takes up such a program, it would also be covered by FCRA.⁴

FCRA doesn't apply to individuals...

Wrong again. FCRA 2010 covers individuals also. If an individual takes up CREES activities, they need FCRA permission before accepting foreign contribution.

Program Salaries are not administrative expenses...

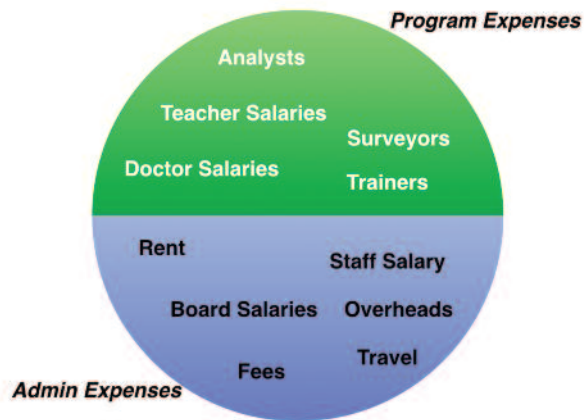
Well, normally they wouldn't be. However, under FCRA all program salaries are being treated as administrative expenses.

³ Organisations with political programs cannot get foreign contribution at all.

⁴ Q.5 Can a private limited company or a partnership firm get registration or prior-permission under FCRA, 2010?

Ans. Yes, a private limited company too may seek prior permission/registration for receiving foreign funds in case they wish to do some charitable work at some point of time.

Source: FAQs on FCRA; <https://fcraonline.nic.in/home/index.aspx#>; Last accessed 29-Feb-16



The only exception is for welfare-oriented organisations such as schools and hospitals, where salary of teaching and medical staff is treated as program expense. Also if you are running a *research or training organisation*, salaries of analysts, field surveyors and trainers will be treated as program expenditure. (See AccountAble 54 for more)

FEMA doesn't apply to FCRA organisations...

Not true. FCRA 2010 applies in addition to FEMA. However, mostly you won't have to file any forms etc. under FEMA as your bank will take care of these automatically.

It is enough to intimate change in office bearers...

Yes. The restrictions on change of office bearers have been lifted since Dec'15. Even if the change in office bearers reaches 50%, you need not apply for permission. However,

you should file an intimation of change in form FC-6 within 15 days.

It's okay to make FC payments from local and vice versa...

Never. FCRA does not permit mixing of FC and non-FC funds at any stage. You must try your best to make payments such as salaries, rent, etc. from respective bank accounts. Lending of funds from FCRA bank to Indian or the other way around is also not permitted.

Why this rigidity? FCRA department wants to make sure all foreign contribution is kept in accounts where it can be seized if required. This becomes difficult, if you have inter-fund borrowings.

Legal Holder can pass on FCRA funds to others...

No. FCRA registration cannot be used legally for channelizing funds to non-FC organisations. If you do this, you are safe only so long as you are not detected.

Foreigners cannot be Board members...

Yes and no. PIOs are treated as a foreign source. However, for Board membership they are on par with Indians – there are no restrictions on their being appointed to Board.

Other foreigners need to meet rather stringent requirements.⁵

There are additional restrictions where the Indian NGO is closely connected with the 'parent' organisation abroad.⁶

FCRA is a product of the 1975 emergency...

This is one of the oldest myths, and one most difficult to

⁵ Q.8 Whether foreigners can be appointed as Executive Committee members of an association seeking registration or prior-permission?

Ans. Organizations having foreign nationals, other than of Indian origin, as members of their executive committees or governing bodies are generally NOT permitted to receive foreign contribution. However, foreigners may be allowed to be associated with such associations in an ex-officio capacity, 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.

Subject to relaxation given on a case to case basis, foreign nationals fulfilling the following conditions may be appointed as Executive Committee members, after obtaining prior approval of the Central Government:

- i. the foreigner is married to an Indian citizen;
- ii. the foreigner has been living and working in India for at least five years;
- iii. 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;
- iv. the foreigner is part of the Board of Trustees/Executive Committee in terms of the provisions in an inter-governmental agreement;
- v. the foreigner is part of the Board of Trustee/Executive Committee, in an ex-officio capacity representing a multilateral body which is exempted from the

definition of foreign source.

The need for such an appointment should, however, be adequately justified.

Source: FAQs) on FCRA; <https://fcraonline.nic.in/home/index.aspx#>; Last accessed 29-Feb-16

⁶ Q.3 What are the eligibility criteria for grant of prior permission?

Ans. ...For Indian recipient organizations and foreign donor organizations having common members, FCRA Prior Permission shall be granted to the Indian recipient organizations subject to its satisfying the following:

- i) The Chief Functionary of the recipient Indian organization should not be a part of the donor organization.

- ii) At least 51% of the office-bearers/ members of the Governing body of the Indian recipient organization should not be members/employees of the foreign donor organization.

- iii) In case of foreign donor organization being a single person/individual that person should not be the Chief Functionary of the recipient Indian organization.

- iv) In case of a single foreign donor, at least 51% office bearers/members of the governing body of the recipient organization should not be the family members and close relatives of the donor

Source: FAQs) on FCRA; <https://fcraonline.nic.in/home/index.aspx#>; Last accessed 29-Feb-16

scotch. Actually FCRA is a product of the 1967 general elections. The FCRA bill was drafted and was ready much before emergency was declared. The only emergency connection is that the bill was passed during the emergency.

This government is against foreign contribution...

Not quite. All governments have been concerned about foreign contribution since early '70s. And all political parties, whether right, left or centre, support regulation of foreign contribution.

Only India has FCRA...

No, though India certainly seems to have pioneered FCRA. Many countries in Asia, Africa, and South America now have FCRA or similar laws. Russia has also joined this category.

FCRA targets religious organisations...

There is no evidence to support this belief, held by

some. FCRA mostly views religious organisations as benign, engaged in relief and service delivery. The only time it interferes with religious organisations is when a law and order problem might arise due to religious activity.

In reality, FCRA seems to be more focused on secular organisations working on economic issues and rights. This is not new – intelligence agencies have always seen people's organisations as bordering on political. Hence the close watch.

Foreign Volunteers are okay...

Yes and no. If a volunteer comes of their own volition, on a suitable visa, there is no restriction. However, if the person is drawing remuneration from a foreign source, FCRA Dept. might view this as transfer of foreign contribution.

Same logic applies to local volunteers, if they are being paid by a different organisation with foreign contribution.

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