

# **FOREIGN & INDIAN COMPANIES SUBJECT TO FCRA UNDER CSR**

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## 1. SUMMARY OF THE CHAPTER

- 1.1 The CSR law applies to Indian as well a foreign companies working in India. CSR involves charitable activity and grant making. In India, giving grant to other NPOs, is subject to the Foreign Contribution Regulation Act (FCRA), 2010. Therefore, it is important to understand the applicability of FCRA on CSR activities.
- 1.2 Under FCRA, foreign companies and even Indian companies are not allowed to provide grant to other NPOs, unless they have FCRA prior permission for registration. There are many Indian companies having more than 50% share holding by foreigners. Such companies should be careful while providing CSR grants to other NPOs.
- 1.3 In fact, all funds provided without consideration by such companies are treated as foreign contribution. Therefore, such companies cannot even setup an Indian Trust or Society by making initial contribution/ expenditure, because technically, even for such initial contribution/ expenditure, permission from FCRA department is necessary.
- 1.3 Such companies are treated as 'Foreign Source' and for the technical purposes of FCRA, such companies cannot do any charitable activity in India without prior permission. In this chapter, the FCRA law pertaining the foreign source has been discussed.
- 1.4 Indian companies like ICICI Bank Ltd., HDFC Bank Ltd., Maruti Suzuki India Ltd. etc. cannot give CSR grants to other NPOs, if such NPOs (including their own foundations) do not possess FCRA prior permission or registration.

## 2. MEANING OF 'FOREIGN SOURCE' UNDER FCRA

- 2.1 The term 'foreign source' has not been specifically defined under the FCRA. Unlike the term 'foreign contribution' which has been defined specifically, the term 'foreign source' has been only given an inclusive definition in FCRA. The statutory definition of 'foreign source' as per Section 2(1)(j) of FCRA, 2010 is as follows :

- “foreign source” includes, —
- the Government of any foreign country or territory and any agency of such Government;
- 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;
- a Foreign company;
- a corporation, not being a Foreign company, incorporated in a foreign country or territory;
- a multi-national corporation referred to in sub-clause (iv) of clause (g);
- 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;
- a trade union in any foreign country or territory, whether or not registered in such foreign country or territory;
  - a foreign Trust or a foreign foundation, by whatever name called, or such Trust or foundation mainly financed by a foreign country or territory;
  - a society, club or other association of individuals formed or registered outside India;
  - a citizen of a foreign country.”

**2.2** As it 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).

**2.3** Important: 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. Therefore, care should be taken before receiving local donations and grants from Indian companies and it should be ensured that more than 50% of the share capital is held by Indian promoters, otherwise it will be treated as foreign contribution.

### **3. WHAT IS A FOREIGN COMPANY UNDER FCRA**

**3.1** The statutory definition as per Section 2(1)(g) of FCRA 2010 of ‘foreign company’ is as follows :

“(g) “Foreign company” means any company or association or body of individuals incorporated outside India and includes—

- Foreign company within the meaning of Section 591 of the Companies Act, 1956;
- company which is a subsidiary of a Foreign company;
- the registered office or principal place of business of a Foreign company referred to in sub-clause (i) or company referred to in subclause(ii);
- a multi-national corporation.

Explanation.—For the purposes of this sub-clause, a corporation incorporated in a foreign country or territory shall be deemed to be a multi-national corporation if such corporation,—

- has a subsidiary or a branch or a place of business in two or more countries or territories; or
- carries on business, or otherwise operates, in two or more countries or territories.”

To determine whether a company is a foreign company or not, the provisions of Section 591 of the Companies Act, 1956 are relevant. Basically, the provisions consider any company as foreign company, if it has been incorporated outside India and has a place of business within India. Provisions of Section 591 are reproduced as under:

“591. Application of sections 592 to 602 to foreign companies.—(1) Sections 592 to “4. Meaning of ‘holding company’ and ‘subsidiary’ - (1) For the purposes of his Act, a company shall, subject to the provisions of sub-Section (3), be deemed to be a subsidiary of another if, but only if,—602, both inclusive, shall apply to all foreign companies, that is to say, companies falling under the following two classes, namely:—

- i. companies incorporated outside India which, after the commencement of this Act, establish a place of business within India; and
- ii. companies incorporated outside India which have, before the commencement of this Act, established a place of business within India and continue to have an established place of business within India at the commencement of this Act.

Notwithstanding anything contained in sub-Section (1), where not less than fifty per cent, of the paid-up share capital (whether equity or preference or partly equity and partly preference) of a company incorporated outside India and having an established place of business in India, is held by one or more citizens of India or by one or more bodies Corporate incorporated in India, or by one or more citizens of India and one or more bodies Corporate incorporated in India, whether singly or in the aggregate, such company shall comply with such of the provisions of this Act as may be prescribed with regard to the business carried on by it in India, as if it were a company incorporated in India.”

Subsidiaries are also included : The subsidiary of a foreign company, even if it is an Indian company is also considered as foreign source under FCRA. Again, to determine whether a company is a subsidiary of a foreign company or not, the provisions of Section 4 of Companies Act, 1956 are relevant which are reproduced as under

“4. Meaning of ‘holding company’ and ‘subsidiary’ - (1) For the purposes of his Act, a company shall, subject to the provisions of sub-Section (3), be deemed to be a subsidiary of another if, but only if,—

- that other controls the composition of its Board of Directors; or
- that other—
  - i. where the first-mentioned company is an existing company in respect of which the holders of preference shares issued before the commencement of this Act have the same voting rights in all respects as the holders of equity shares, exercises or controls more than half of the total voting power of such company;
  - ii. where the first-mentioned company is any other company, holds more than half in nominal value of its equity share capital; or
- the first-mentioned company is a subsidiary of any company which is that other’s subsidiary.

Illustration : company B is a subsidiary of company A, and company C is a subsidiary of company B. company C is a subsidiary of company A, by virtue

of clause (c) above. If company D is a subsidiary of company C, company D will be a subsidiary of company B and consequently also of company A, by virtue of clause (c) above, and so on.”

Important : It may be noted that FCRA makes a reference to the definition of foreign company and subsidiary company as it existed in the Companies Act, 1956. There is no reference of Companies Act, 2013. However, for the purposes of CSR grant, the difference between two definition is not relevant under FCRA.



#### **4. THE CHANGES IN DEFINITION OF ‘FOREIGN COMPANY’ AFTER COMPANIES ACT 2013**

- 4.1** The FCRA 2010 make a reference to the Companies Act, 1956 as it was enacted prior to the enactment of the Companies Act, 2013. The definition of foreign company in the Companies Act, 2013 is as under:

“Section 2 (42)

“Foreign company” means any company or body Corporate incorporated outside India which –

- has a place of business in India whether by itself or through an agent, physically or through electronic mode; and
- Conducts any business activity in India in any other manner.

Further, Section 379 under Chapter XXII requires a company to register under the companies Act, 2013 and for other compliances in India :

Section 379 – Companies incorporated outside India

Where not less than fifty per cent of the paid-up capital, whether equity or preference or partly equity and partly preference, of a Foreign company is held by one or more citizen of India or by one or more companies or bodies Corporate incorporated in India, or by one or more citizens of India and one or more companies or bodies Corporate incorporated in India, whether singly or in the aggregate, such company shall comply with the provisions of this Chapter and such other provisions of this Act as may be prescribed with regard to the business carried on by it in India as if it were a company incorporated in India.

Section 379 has become effective from 12th Sept. 2013.