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Article

Foreign Contribution (Regulation) Act, 2010 - An Overview

By **Shagun Jain**

The Foreign Contribution (Regulation) Act, 2010 (FCRA 2010) and the Foreign Contribution (Regulation) Rules, 2011 (FCR Rules), replacing the earlier Act and rules of 1976, are in force from 1st May, 2011. FCRA 2010 lays down the regulations governing acceptance and utilization of foreign contributions by individuals and entities in India.

What is 'foreign contribution'?

The term 'foreign contribution' is defined in Section 2(1)(h), FCRA 2010 to mean any donation, delivery or transfer of any article, or currency (whether Indian or foreign) or any security [as defined in Section 2(h) of Securities Contracts (Regulation) Act, 1956 and Section 2(o) of the Foreign Exchange Management Act, 1999] from a 'foreign source'. The term 'foreign source', includes a foreign government or its agency; foreign trust; foreign society or club; foreign citizen; foreign company; Indian companies wherein 50% of nominal capital is held by any of the foreign trust, society, club, citizen, or company; and any international agency (excluding United Nations, World Bank, the IMF, and agencies notified by the Central Government). Foreign contribution may be received either directly, or indirectly from any other person and as long as the original source is foreign it will continue to be treated as such even if routed through several intermediaries.

The FCRA 2010 does not apply in the following cases:

(a) contribution from any foreign source towards scholarships or stipends

(b) receipts in the ordinary course of business, trade or commerce

(c) consideration for goods or services

(d) receipt of any foreign contribution by an individual from relatives

(e) receipt of gifts from any foreign source for personal use provided the market value of such gift does not exceed INR 25,000.

As per the FCR Rules, no approval is required in the event foreign contribution is received from a relative. However, in case the foreign contribution from a relative exceeds INR 1,00,000 in a financial year, the recipient is required to inform the Central Government within 30 days of receipt.

Who can receive foreign contribution?

Under FCRA 2010, only persons having a definite cultural, economic, educational, religious or social programme are eligible to receive foreign contribution, provided they are either registered with, or have obtained prior permission from the Central Government. For seeking registration, an association must be registered as a 'trust', 'society' or a 'non-profit company'; should have been in existence for over three years and should have undertaken reasonable amount of activity in its chosen field for the benefit of society.

An association that is not able to fulfill the aforesaid conditions for registration, will have to apply for prior permission for receiving the foreign contribution and must be able to demonstrate that it has a reasonable project that benefits society and

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for which the contribution will be used. Permission is valid only for the specific amount, purpose and source in respect of which the application is made. The registration granted under FCRA 1976 used to be valid perpetually, unless specifically revoked. However, the registration granted under FCRA 2010 is valid for 5 years and can be renewed thereafter provided application is submitted 6 months before the date of expiry of the certificate of registration.

FCRA 2010 provides that registration or prior permission may be granted within 90 days of an application in this regard at the absolute discretion of the government, though no penalty/consequence is provided if delayed beyond 90 days. In case of rejection, reasons for the same should be communicated to the applicant.

Restrictions on transfer of foreign contribution

A registered person or a person who has obtained prior permission to receive foreign contribution for any specific purpose, is allowed to transfer a maximum of 10% of such foreign contribution, to other persons who are not registered or who have not obtained prior permission under FCRA 2010, only after obtaining the prior approval of the Central Government.

Restrictions on utilization of foreign contribution

Foreign contribution when received is required to be utilised for the purposes for which it has been received/permitted. The utilization of foreign contribution to defray the administrative expenses is permitted up to the extent of 50% of total foreign contributions received in a financial year. However, if more than 50% amount is proposed to be utilized for such expenses, prior approval of Central Government shall be required.

Provision for compounding of offences

FCRA 2010 provides for 'compounding of offences' which was absent in FCRA 1976. However, the defaulter is required to approach the compounding authority before institution of prosecution. The Central Government has prescribed the categories of offences under FCRA 2010 that can be compounded and has also specified the amount of penalty and compounding fee payable for the same. Upon completion of the compounding proceedings, the defaulter is granted immunity from prosecution in respect of the offence compounded.

Conclusion

FCRA 2010, on one hand, aims to resolve procedural hassles under FCRA 1976, and on the other it provides for stringent compliance requirements to be observed by the recipients of foreign contribution. While the provisions pertaining to transfer of foreign contribution and compounding of offences are welcome changes for the recipients of such contribution, restriction on utilization for administrative purposes shall aid in ensuring that the funds are utilized for the purpose for which they were received.

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NOTIFICATIONS & CIRCULARS

Product / Activity classification code mandatory for cost audit reports: For the purpose of cost audit reports, various products and activities have been grouped or classified under 4-digit code called 'Product or Activity Group Code'. The notification dated 7th August, 2012 [S.O. 1747(E)] also mentions corresponding heading number under Central Excise Tariff, wherever applicable. The codes are applicable to specified compliance reports also which are filed under various cost audit / accounting rules. The codes may be required to be mentioned in any other document also as may be specified by the government in future.

Remuneration of Directors exceeding specified limit of profit – Approval not required in specified cases: Commission / sitting fees of non-whole time Directors of a company have become liable to Service Tax from 1-7-2012. When the company pays service tax, the remuneration may exceed the specified limit of profit in which case prior approval of government is required. It is now clarified that government's approval will not be required for the FY 2012-13 if any increase in the remuneration of non-whole time directors is solely on account of payment of service tax on commission payable to them by the company [MCA General Circular No. 24/2012, dated 9-8-2012.]

RATIO DECIDENDI

Arbitral award reasoned and considering all claims - Delay in pronouncement not renders such award illegal

The Delhi High Court has held that delay in pronouncement of an arbitral award (which is reasoned and deals with each claim and counter-claim at length) does not render it patently illegal or opposed to the public policy of India. The appellant, against whom the award was passed, had argued that the award was vulnerable to invalidation on account of unexplained delay in its pronouncement. The court however highlighted that as per the curial law or the ICA rules, a time limit of two years has been set for conclusion of the proceedings and that the rules provide that a party which proceeds with arbitration, conscious of any non-compliance of such rules, shall be deemed to have waived its right to object. In the present matter, not only did the appellant waive its right to object by submitting to the delay, it further showed lack of interest, as it could have, at an earlier instance, filed an application under Section 14 of the Arbitration and Conciliation Act, 1996 terminating the mandate of the tribunal on grounds of 'undue delay'. Ruling on the merits of the dispute the court held that the power of review of final award under the Act is a limited one and the court would interfere only in those cases where the award is unfair or unreasonable. The court formed a view that the majority award was reasonable and detailed, settling the dispute validly. The dispute earlier arose between the parties to a turnkey contract and was referred to the Indian Council of Arbitration ('ICA') as agreed by the parties under the contract. [*Oil India Limited* v. *Essar Oil Limited*, Delhi High Court order dated 17th August, 2012 in Case No: OMP 416 of 2004]

Arbitration award without considering directions of Supreme Court, not valid

The Bombay High Court in one of its recent orders has set aside the arbitration award where claim of the petitioner was rejected by the arbitrator on the ground of lack of jurisdiction and barred by Section 15 of the Telecom Regulatory Authority of India Act, 1997 (TRAI Act), as the matter fell within the jurisdiction of Telecom Regulatory Authority of India Appellate Tribunal

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(TRAIAT) even while granting the counterclaim of the respondents. The Court held that as the Supreme Court had earlier directed resolution of the matter through the arbitrator based on the agreement (prior to 1999) between the parties and the basic circulars which were prior to 2000, i.e. before the establishment of TRAIAT, rejection of the claim of the petitioner solely on the ground of lack of jurisdiction, without considering the directions issued by the Supreme Court, was contrary to the order passed by the Supreme Court. It was noted that the Apex Court had so directed knowing fully the provisions of the TRAI Act, 1997 as well as the regulations and the relevant orders which existed before the establishment of the TRAIAT and that the arbitrator in complete ignorance of such order of Supreme Court, proceeded to decide the matter afresh as if the parties had themselves based on the agreement, appointed the arbitrator to proceed in accordance of law. It was noted that the claim and the counterclaim were interconnected and cannot be separated and therefore, the whole award was required to be set aside. In view of the apparent error on face of record the award was set aside and the matter was remanded back for fresh hearing. [*Kansan Communications Pvt. Ltd* v. *Mahanagar Telephone Nigam Ltd. & Ors.* - Arbitration Petition No. 571 of 2008 decided on 30-7-2012 by the Bombay High Court].

Jurisdiction of State Commission in inter-state power purchase agreements

The Appellate Tribunal for Electricity in its recent order has held that Haryana State Electricity Regulatory Commission has no jurisdiction to go into the dispute on validity of termination of Power Purchase Agreement (PPA) between the power producer (appellant) and the inter-state power trading licensee in a petition filed by purchaser who was not a party to the said PPA. The trading concern had another Power Sale Agreement (PSA) with the purchaser for sale of power generated by the appellant. The Tribunal held that there was no nexus between the generating company and the state where the power was going to be consumed and even between the PPA and the PSA. The Tribunal held that the State Commission had committed an error by construing that PPA and PSA are fully inter-dependent as the trader had undertaken not to terminate PPA without prior consent of the purchaser. It was observed that there was no agreement between the distribution licensee of the State and the generating company and that identification of purchaser just prior to the execution of PSA without reference to the said identification in the PPA or in the amendment of PPA, cannot be construed to be "nexus". The Tribunal also noted that the inter-state trader is under the jurisdiction of Central Commission and the generating company was situated in Himachal Pradesh which is out of the jurisdiction of the Haryana State Commission. [*Lanco Budhil Hydro Power Private Ltd.* v. *Haryana Electricity Regulatory Commission* – Appellate Tribunal for Electricity, Order dated 9-8-2012 in Appeal No. 188 of 2011].

CCI directs motion picture association not to block telecast of dubbed TV serial

The Competition Commission of India in its recent order has directed the Eastern India Motion Pictures Association and the Co-ordination Committee of Artist and Technicians of West Bengal Film and Television Industry not to impose restrictions on telecast of any films or TV serials. It also directed the former to dispense with the rules prohibiting exhibition of dubbed films or serials. The Commission observed that the plea of the opposite parties that allowing the dubbed films will take jobs away from Bengali artists is a specious argument and that protection in the name of the language goes against the interest of competition. It was noted that call for boycott of a competing member would amount to depriving same of due opportunity of fair and free

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competition in the market. The opposite parties were held as violating Section 3(3)(b), by limiting and controlling the supply of Bengali dubbed serials. It also held that the Co-ordination Committee is an 'association of enterprises' with its members engaged in economic activities. [*Sajjan Khaitan* v. *Eastern India Motion Picture Association* – CCI Order dated 9-8-2012 in Case No. 16 of 2011].

Synchronised trading when not illegal

The Securities Appellate Tribunal in its recent order has held that synchronized trades per se are not illegal and that it is only when such trades are executed with a view to manipulate the price of the scrip that the provisions of the SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 1995 will get attracted. It was noted that the alleged trades were carried out only for four days spread over a period of three months with substantial time difference between trades; that the buyers and sellers for each of the four trades were different entities; that there was no reversal of trades; that the transactions were executed at the prevailing market price with no allegation of price manipulation and that the trades were carried out on the floor of the exchange with transfer of beneficial ownership in all the transactions. Earlier it was found in the investigation that there was price fluctuation in the price of a scrip in which the appellant had traded extensively on behalf of clients who were related/connected/associated to Ketan Parekh and it was alleged that the transactions in the scrip of the company were in tandem with other group/associate companies of Ketan Parekh to deflate the price of the scrip and create artificial demand. [*Subhkam Securities Private Limited* v. *Securities and Exchange Board of India* – SAT Order dated 25-7-2012 in Appeal No. 73 of 2012].

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