

AccountAble™

'Foreign Source' in FCRA

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Foreign Contribution (Regulation) Act, 1976 (FCRA) is a very brief Act. However, there is an enormous amount of confusion about its provisions. Also, there is very little literature on the law itself. Most of the available material relates to practical procedures only.

In this issue, we discuss a key concept – 'Foreign Source' as defined in FCRA.

Foreign Source

Foreign source is defined in section 2(1)(e). However, the definition is an 'inclusive' definition¹. This means that the list provided in section 2(1)(e) is not complete or exhaustive.

This is a very important feature. Suppose there is a source 'xyz' which appears to be foreign, based on common sense. However, it is not listed in section 2(1)(e). How will 'xyz' be treated?

It will be treated as a foreign source. Why? Because the definition is not exhaustive. It allows the courts to treat other sources also as foreign.

There are five main categories listed in the ten clauses of this section. Going through these, you get the sense that anything under foreign control may be a foreign source. These categories are discussed below:

1. Individuals

How do you know whether a person is foreign or not? This is based on his or her

citizenship². The country of stay is not important.

This means that a foreigner staying in India, working in India, earning money in India, will still remain a foreign source.

However, an Indian working abroad, getting salary from a foreign company, will not be a foreign source. An example of this category is Mr. Amartya Sen.

On the other hand, if a foreigner acquires Indian citizenship, then he or she will become an Indian source. Similarly, if an Indian becomes a foreign citizen, then he or she will become a foreign source.

A common area of doubt is NRIs and PIOs:

a. Non-resident Indians (NRIs)

Are NRIs a foreign source or Indian source? In general, NRIs are not a foreign source. They are settled abroad but are still Indian citizens.

However, the term NRI is sometimes used very casually. Therefore, it is best to confirm this by asking whether the person has become a foreign citizen. If the answer is 'no', then funds given by him / her will be treated as Indian.

b. Persons of Indian Origin (PIOs)

Who are persons of Indian origin? One example is Shri V. S. Naipaul, Nobel laureate. His grandfather left India to settle in Trinidad. Both his father and Shri Naipaul were born in Trinidad. Later, he became a British citizen.

Shri Naipaul is eligible to apply under the Indian Government's PIO Card scheme. If he applies and gets this card³, then he will get some extra facilities, such as visa-free travel to India. However, he will not get any political rights, such as right to vote in India.

¹ It uses the word 'includes', instead of the word 'means'.

² Sec. 2(1)(e)(x). India does not recognize dual citizenship as yet. An Indian who acquires foreign citizenship promptly loses his or her Indian citizenship.

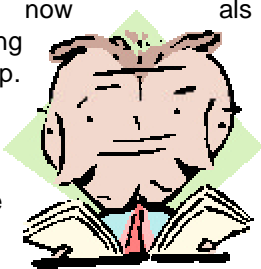
³ The PIO card fees is US\$ 1,000.



Persons of Indian origin are treated as a foreign source. It does not matter whether they hold the PIO card or not.

c. Dual Citizenship

The Government is now also so seriously talking about dual-citizenship. This means that an Indian can remain an Indian citizen, even though he or she becomes a foreign citizen.



Will this make a difference so far as FCRA is concerned? Surprisingly, the answer is 'no'.

Section 2(1)(e)(x) says clearly that a citizen of a foreign country is a foreign source. In the case of dual-citizenship, a person will be an Indian citizen but will also be a foreign citizen. Thus, he or she will attract clause (x) and will be treated as a foreign source!

Continuing with Shri Naipaul's example, what happens if he is granted dual citizenship in India? Nothing⁴. He will still be treated as a foreign source.

2. Government

Government of a foreign country or territory is a foreign source⁵.

When does a group become government of a foreign country? When the Indian Government recognizes it. For example, India did not recognize *Taliban* as government of Afghanistan⁶ during the years it was administering large parts of Afghanistan.

This distinction is more important for diplomatic relations than for FCRA. So far as FCRA is concerned, both (recognized Government and unrecognized one) will be treated as a foreign source.

Agencies of a foreign government are also treated as a foreign source.

3. International Agencies

All international agencies are a foreign source. However, multilateral agencies such as UNO, its specialized agencies, IMF, World Bank are not treated as a foreign source. Apart from these, Government

⁴ If he continues to be a British citizen as well

⁵ Sec. 2(1)(e)(i)

⁶ This merely means that *Taliban* will be categorized as a non-governmental foreign source.

can also exempt other international organizations from the definition⁷.

Why this 'discrimination'? Well, the reason appears to be that multilateral agencies such as UN, etc. are not under control of a single nation or group. It is assumed, therefore, that their funds will not be used to subvert Indian institutions.

But what is an international agency? The Act does not say anything on this. In common usage, 'agency' means an organization providing a public service. In some cases, agency may also mean a special Government Department (e.g. USAID) concerned with a specific field. When such an organization operates on an international scale, it is called an 'international agency'.

4. Non-profit organisations

Foreign trusts, foundations, societies, clubs and other associations also are foreign sources. These are discussed below in more detail:

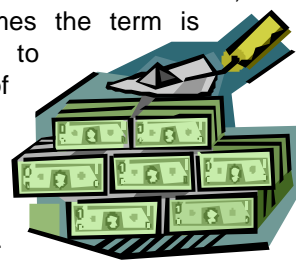
a. Trusts

What is a foreign trust? The Act does not say about this. However, normally a trust⁸ formed abroad would be a foreign trust. Also, a trust formed in India by a foreigner could be a foreign trust. Foreign trusts are a foreign source⁹.

b. Foundations

Foundations are also like trusts, though sometimes the term is also applied to other type of organisations.

The section talks about two types of foreign foundations:



- a. a foreign foundation which is in the nature of a trust; and,

⁷ At present more than 104 organisations are exempt from this definition. S.O. 1014(E) dated 13-Nov-00.

Gazette of India, Extraordinary. Part 2, sec. 3, sub-section (ii)

⁸ A trust is formed by attaching a legal obligation to a property. This is done by the owner of the property who makes a Trust Deed. Trustees are also nominated and are responsible for fulfilling the legal obligation.

⁹ Sec. 2(1)(e)(viii)

- b. a foreign foundation which is mainly financed by a foreign country is a foreign source¹⁰.

Now a doubt arises. What would be the status of a foreign foundation, which is not in the nature of a trust, and is not supported by a foreign country? It is possible that such a foundation will not fall within this clause¹¹.

c. Society, clubs, etc.

In the case of societies¹², the Act is clearer. Societies, etc. formed or registered outside India are treated as foreign source¹³. What if the society was formed by Indians living abroad? The society will still be treated as a foreign source.

What about a society formed in India by foreigners? This is also not clear from the Act.

d. Corporations

In some countries, non-profit organizations are registered as charitable corporations. These are also treated as foreign source¹⁴.

e. Trade Unions

A trade union formed or operating in a foreign country (or territory) is a foreign source¹⁵. It does not matter whether it is registered there or not.

What is a trade union? Trade Union is defined in sec. 2(1)(k) of the FCRA. This definition refers to unions registered under Trade Unions Act, 1926. Therefore, this definition is relevant for Unions registered in India only. It is, thus, not valid for interpreting sec. 2(1)(e)(vii).

The definition of a Trade Union will vary from country to country. For example, the standard reference Black's Law Dictionary¹⁶ defines it as 'a union composed of workers of the same or of several allied trades'. This may perhaps be relevant in some Western countries. But what about a

¹⁰ Sec. 2(1)(e)(viii)

¹¹ However, it may be that it will be caught by another clause because it's registered as a corporation, society or a company. If everything fails, then it will be probably be netted by the fact that the definition in section 2(1)(e) is merely an inclusive one!

¹² Also clubs or other associations of individuals

¹³ Sec. 2(1)(e)(ix)

¹⁴ Sec. 2(1)(e)(iv)

¹⁵ Sec. 2(1)(e)(vii)

¹⁶ 7th Edition, 1999. p.1532

Trade Union formed and registered in an Arabian country? Or in Russia?



This is an issue which the Government may perhaps rectify when it next amends the FCRA.

5. Business Organisations

Five types of business organizations are listed: a). a foreign company, b). subsidiary of a foreign company, c). a foreign corporation, d). a multi-national corporation, and e). a company controlled by foreigners. All five are treated as foreign source.

a. Foreign Company

What is a foreign company? It is defined in section 591 of the Companies Act, 1956. Any company incorporated¹⁷ outside India is a foreign company¹⁸.

b. Subsidiary

Any subsidiary¹⁹ of a foreign company is also treated as a foreign company. It does not matter if the subsidiary is formed in India.

c. Corporation

As discussed above, a corporation formed in a foreign country is a foreign corporation. What is a corporation? It has four key features²⁰:

- (i) It is an entity recognized by law;
- (ii) It has a personality of its own, distinct from the persons who formed it;

¹⁷ Formed

¹⁸ There is a quirk in the definition given in section 591: the company should have an office in India. If we interpret this literally, it may appear that a company registered in Belgium will not be a foreign company, if it does not set up an office in India!

¹⁹ When does company B become a subsidiary of company A? There are four ways: (i) A controls the board of B; (ii) A controls more than 50% of the voting power (in general meetings) in B; (iii) A holds more than 50% of the equity shares in B; (iv) B is a subsidiary of A under the laws of A's home country (the country where A was formed). Sec. 4, Companies Act, 1956.

²⁰ Based on Black's Law Dictionary, 1999, p.341

- (iii) It has only those powers, which its constitution gives it;
- (iv) It has perpetual succession.

Sounds complicated? Well, a company and a society are both examples of corporations.

d. Multi-national Corporation (MNC)

MNCs are treated as a foreign source. However, the term MNC has a special meaning under FCRA.

The definition²¹ of an MNC has two parts. First, that the corporation should have an office or business in two or more countries. Second, the corporation should have been formed in a foreign country.

What does this mean? If an Indian corporation²² starts operating in a foreign country, it will not become an MNC for the purpose of FCRA.

e. Company controlled by foreigners

The last category is that of ordinary companies. These are treated as foreign organisations, if more than 50% of their share capital is held by foreigners.

Who could be these foreign shareholders? The clause lists four types: i. Foreign Government, ii. Foreign citizens, iii. Corporations formed abroad, and, iv. A trust, society or AOP²³, which has been formed or registered abroad.



Permitted institutions

The last para of section 2(1)(e) provides a special exemption. Any foreign institutions permitted to work in India by Indian Government are not a foreign source.

What does this mean? There are many foreign organizations working in India. The Government may have a special agreement with some of them. Others may have been given permission by RBI or other Government agencies. Are these a foreign source or not?

Such permissions or agreements mean nothing for FCRA. This exemption is available only if the Government has issued a

notification²⁴ in the official Gazette permitting the organization to work in India.

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²¹ Explanation to section 2(1)

²² or company

²³ Association of Persons

²⁴ See footnote 7. Also see AccountAble 40: Non-foreign Sources