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DONOR AGENCIES WORKING INSIDE INDIA

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CAN FOREIGN NGOS AVAIL EXEMPTIONS ON THEIR INCOME IN INDIA

1.1 Section 11 does not require the NGO to be established or registered in India. Therefore, it seems that even a foreign NGO would be entitled to apply for registration under section 12A and 10(23C). Foreign NGOs can also avail exemptions on their income, if any, earned in India.

Such exemptions shall be subject to having activities in India.

1.2 It may be noted that foreign NGOs will need exemptions under section 12A and 10(23C) only if they are collecting grant /donations from Indian sources or they are having any income which is generated in India.

1.3 It may further be noted that foreign

NGOs shall not be entitled for income tax exemptions if they are not having any considerable activity inside India. In other words if the income is generated in India for the purposes of repatriation outside India, then such foreign NGOs shall not be entitled for income tax exemptions.

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CASE LAWS IN FAVOUR OF FOREIGN NGOS GETTING EXEMPTIONS

2.1 In *Educational Institute of American Hotel and Motel Association v. CIT* [1996] 219 ITR 183 (AAR), the issue of a foreign organisation came before the court of the authority for advance ruling. The issue was whether, the applicant would be entitled to exemption under section 10(22) of the Income-tax Act, 1961, in respect of its various amounts of income from the following sources in India : 1. Conducting various courses and certification programmes in hospitality management and operations. 2. Providing educational and training materials. 3. Conducting seminars, workshops and other programmes. 4. Providing training, course materials and instructional resources to the in-house faculty of various institutions. It was held that exemptions under section 10(22) will be available. It was observed that to avail exemption the conditions under section 10(22) required the following (a) the educational institution must actually exist (b) a society need not itself be imparting education and it is enough if it runs some schools or colleges (c) it should exist only for educational purposes and not for profit (d) the income would be entitled to exemption provided it is directly relatable to the educational activity. The AAR found that the assessee was satisfying all the above conditions, therefore exemptions under section 10(22) were available.

2.2 The issue of eligibility of exemptions for foreign charities working in India also came up before the Supreme Court of India in *Oxford University Press v. CIT* [2001] 247 ITR 658. In this case though the ruling was against the assessee but the legal reasons on which the case was decided apparently was in favour of granting exemptions to foreign charitable institutions. The court found that the work of the Indian branch of Oxford University was not charitable in nature. It was engaged in publications, distribution and sales of books which could not be considered as an educational activity under section 2(15). It was observed that the label “university press” was not sufficient to establish that it was engaged in any educational activity. The purpose of the existence of the assessee in this country as appeared from the material on record, was possibly to earn profit.

2.3 Supreme Court clarified that if a foreign charity engaged in charitable activities in India is able to justify its activities are of charitable nature and it does not exist for profit, then there is no reason why exemption under section 11 should not be given.

2.4 The Supreme Court gave a landmark judgement in *American Hotel & Lodging Association Educational Institute vs. CBDT* (2006) 206 CTR (Del) 601 : (2007) 289 ITR 46 (Del). In this case

the assessee NGO was a branch office of an American NGO. It was not doing any charitable activity in India and all its income in India was repatriated to USA.

2.5 The Supreme Court was of the opinion that exemptions under section 10(23C) was not available if all the activities were outside India though 10(23C) did not specifically make it mandatory for the activities to be done in India. In other words, Supreme Court opined that NGOs registered under section 10(23C) may have some activities outside India but to claim exemptions they should primarily be working in India, only.

PERMISSION FROM RBI FOR OPENING LIAISON OR BRANCH OFFICE IN INDIA

3.1 All international NGOs are required to seek permission from the RBI for opening liaison or branch office in India. The relevant document is Notification No. FEMA 22/2000-RB, dated 3rd May, 2000. This regulation became effective from 1-6-2000.

3.2 Generally branch office permissions are not given and foreign NGOs should apply for opening of liaison office in India. However, there have been instances where the liaison office status has been upgraded to branch office, later on.

3.3 It may be noted that prior to 1st June 2000, there was no legal bar on foreign NGOs opening liaison or branch offices. Earlier, the establishment of a branch in India was regulated by section 29 of Foreign Exchange Regulation Act, 1973. Section 29 did not cover or prohibit the opening of the

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branch office or office of activity by a charitable organisation. Therefore, the opening of a branch office in India was not regulated by the RBI prior to 1st June, 2000.

PERMITTED ACTIVITIES OF LIAISON OFFICE

4.1 A liaison office has a very narrow scope of activities. It can act as a channel between the head office and the Indian partners in a representative capacity only. In other words, it cannot have any activity independently of its own. Schedule II of FEMA Notification No. 22/2000 RB, dated 3-5-2000, defines the permissible activity of liaison office which are as under:

- (a) Representing in India the parent company group companies.
- (b) Promoting export import from/to India.
- (c) Promoting technical/financial collaborations between parent/group companies and companies in India.
- (d) Acting as a communication channel between the parent company and Indian companies.

4.2 From the above four clauses, it can be seen that only clauses (a) and (d) are

somehow related to the purposes of an NGO. The scope of activities permitted for liaison office practically rule out the possibilities of having any independent activity in India. A liaison office has to act as a representative and co-ordinating body in India.

Form FNC-1 should be signed by the Overseas authorized signatory of the Foreign NGOs and not the Indian representative.

PROCESS FOR SETTING UP LIAISON OFFICE IN INDIA

5.1 As per the Notification No. 22/2000, dated 3-5-2000, no person resident outside India shall establish a office without prior approval of RBI. Therefore, before setting up of a branch/liaison office, approval of RBI should be taken. Application in Form FNC-1 is required to be made.

DOCUMENTS TO BE FILED FOR LIAISON OFFICE

6.1 The following documents are required to be filed with RBI:

- (1) Form FNC-1.
- (2) English version of the Certificate of incorporation/registration or memorandum of articles of association of the Foreign NGO. Either the Indian Embassy or a notary public of that country should attest this document.
- (3) Latest audited balance sheet of the foreign NGO.
- (4) Detail of activities proposed to be supported by the foreign NGO.
- (5) Overview of the activities, mission and vision of the foreign NGO.
- (6) Power of the attorney in favour of the consultant, if any.

WHO SHOULD SIGN THE FORM FNC-1 AND POWER OF ATTORNEY FOR LIAISON OFFICE

7.1 Form FNC-1 should be signed by the Overseas authorized signatory of the Foreign NGO and not the Indian representative.

7.2 The power of attorney should be signed by the overseas authorized signatory of the Foreign NGO and not the Indian representative.

AUTHORITY TO WHOM DOCUMENTS TO BE FILED FOR LIAISON OFFICE

8.1 All applications should be filed to the :
Chief General Manager,
Exchange Control Department,
Reserve Bank of India, Central Office,
Saheed Bhagat Singh Road,
Mumbai-400001.

TIME TAKEN FOR PROCESSING THE APPLICATION

9.1 No time limit has been prescribed in Foreign Exchange Management Act (FEMA). The RBI normally takes 2-3 weeks for processing such applications. However, in the case of charitable organisations, all applications

are referred to Finance Ministry, Government of India. It can be a time consuming process. It may take anywhere between 6-12 months to get the first approval for liaison office, but renewal is done at RBI level only, which should not take more than 2-3 weeks.

DOCUMENTS TO BE FILED ANNUALLY BY LIAISON OFFICE

10.1 Annually a auditors' certificate is required to be filed to the Regional Office of RBI. The auditor should certify that :

- (i) all expenditure/payments were made out of inward remittances only.
- (ii) only permitted activities were taken up by the liaison office and all the provision of FEMA were complied with.

10.2 There are no statutory requirement to file audited statement/activities, but the organisation may enclose the audited statements as well as a brief activity report of its operations in India.

SETTING UP OF ADDITIONAL LIAISON OFFICE

11.1 An application in Form FNC-1 has to be made to the Central Office of RBI, Mumbai for setting up additional liaison office. An application for setting up an additional office does not require any enclosure, which were already submitted with the initial application. It is generally understood that the permission for additional offices is processed at RBI level only and normally it does not take too much of time.

RENEWAL OF THE LIAISON OFFICE APPROVAL

12.1 The approval provided for liaison office

It may take anywhere between 6-12 months to get the first approval for liaison office, but renewal is done at RBI level only, which should not take more than 2-3 weeks.

is valid for 3 years only. Every 3 years an application has to be made to the Regional Office of RBI for renewal of the liaison office approval. This application can be in form of a letter and FNC-1 is not required to be filed again. The organisation, optionally, should also file a copy of the memorandum/constitution and other documents such as activity report, audited statements, etc.

12.2 The application for renewal of liaison office is not forwarded to any other Government department/ministry, therefore, it should not take more than 2-3 weeks.

BELATED APPLICATION FOR APPROVAL OF LIAISON OFFICE

13.1 The delay in making application to RBI even after the commencement of operation in India is condonable at the discretion of RBI.

REGISTRATION WITH THE RoC, NEW DELHI FOR ALL LIAISON OFFICES

14.1 It may also be noted that after receiving an approval from RBI for setting up of liaison office, the foreign NGO is also required to register itself with the Registrar of Companies (RoC), New Delhi. The RoC, New Delhi keeps a register of branches and liaison offices of foreign entities. A foreign NGO is required to record its name in that register.

CAN A LIAISON OFFICE SIGN MOUS WITH INDIAN PARTNERS

15.1 This is a legally debatable issue and therefore divergent views are available. There are some foreign NGOs who sign MoUs in India through their liaison offices. On the other hand there are some other foreign NGOs who send the documents to the headquarter for the purposes of signing.

15.2 In our opinion, this issue should not be confused with the liaison office. The issue is whether a representative of a foreign NGO can enter into a valid legal MoU by signing the document in India. In our opinion an authorised representative can enter into a valid MoU on behalf of its parent body provided he/she is properly authorised to do so. The authorisation to sign MoUs should be given to an individual rather than the liaison office. As a liaison office is not a separate legal entity, all valid legal documents, in any case, will be signed on behalf of the parent body. Further, signing of a document is not an activity, *per se*. The place of signing cannot change the activities embedded in the MoU. Therefore, more importantly it has to be ensured that the liaison office does not engage in any kind of prohibited activity. The moot point is that the character of a liaison office is of 'representative' in nature and, therefore, it has to confine to that only. Signing of MoU can be done in representative capacity without infringing the rules of FEMA, in our opinion.

CAN FUNDS BE TRANSFERRED TO FCRA PARTNERS

16.1 A liaison office cannot receive funds on behalf of the partners and therefore it cannot transfer any funds to its partner

A liaison office cannot receive funds on behalf of the partners and therefore it cannot transfer any funds to its FCRA partners

NGOs having FCRA registration. Liaison office can receive funds only and to the extent of its administrative expenses. Further, all the administrative expenses should be made out of inward remittances only.

CAN LIAISON OFFICE HOLD WORKSHOPS AND CONFERENCES WITH INTERNATIONAL PARTICIPANTS

17.1 In our opinion liaison office cannot hold conferences or workshop with international or even local participants, going by the rules of FEMA. However, the FCRA department in its FAQ No. 19, requires that all liaison offices should obtain prior permission from the FCRA Department for receiving remittances from its Head Office abroad for conducting conferences or carrying out other activities/ programmes, etc. in India.

17.2 There seems to be a contradiction between the FEMA and FCRA provisions. Whereas, such activities are not permissible under FEMA, they are permissible with prior permission under FCRA.

17.3 Conferences can always be held through the NGO partners. Such event should be designated as the project of a partner. In such cases, there should not be

any problem even if there are international participants. However, separate permissions are required to be taken for holding international conferences. For details, kindly see *Standards & Norms*, Legal Series Vol. I, Issue 3 October 2008.

ROLE OF LIAISON OFFICE IN TRAINING, EVALUATION, WORKSHOP, CONSULTANCY, ETC.

18.1 If the training, evaluation, workshop, consultancy etc. are conducted by third parties then the liaison office can facilitate all such activities. All payments should be made directly to such third parties by the head office. The liaison office can only play a catalytic role in representative capacity. In this regard, it is important to note that the involvement of liaison office will be determined in terms of money spent from its account. Therefore, care should be taken to avoid monetary transactions.

SHOULD A BRANCH OF FOREIGN NGO APPLY FOR FCRA REGISTRATION

19.1 In our opinion, a branch of a foreign NGO is considered a *foreign source* under FCRA. Therefore, any inward remittance in the account of a liaison office or a branch office should not be considered as foreign contribution which implies that FCRA registration is not necessary. However, the FCRA department in its FAQ No. 19, requires that all liaison offices should obtain prior permission for receiving remittances from its Head Office abroad for conducting conferences or carrying out other activities/programmes in India.

The liaison office is not expected to have any income or activity in India, therefore, 12A registration is not necessary.

19.2 In our understanding prior permission from FCRA would be required if some activities are to be conducted in India. Otherwise, prior permission is not necessary if the liaison office remains within the limited mandate of a representative body without any activity. It may be noted that FEMA does not permit any activity other than acting in representative capacity.

DOES LIAISON OFFICE OF FOREIGN NGO NEED 12A REGISTRATION

20.1 The liaison office is not expected to have any income or activity in India. Therefore, 12A registration is not necessary. 12A registration is required by only those organisations which are generating taxable income in India.

APPLICABILITY OF FBT ON LIAISON OFFICES

21.1 Under section 115WA(2) of Income Tax Act, Fringe Benefit Tax (FBT) is levied in respect of expenses incurred for employees. Certain organisations including NGOs registered under section 12A and 10(23C) are exempted from the payment of FBT.

21.2 Liaison offices are charitable organisations but do not possess 12A or 10(23C) registration as they do not have any income in India. The question arises whether the liaison offices shall be subjected to FBT. It has been held that liaison offices have to pay FBT even if they do not have any income in India.

21.3 The Authority for Advance Rulings, in the case of *The Population Council, Inc., In re (2006) 205 CTR (AAR) 97 : (2006) 286 ITR 342(AAR)* held that FBT was payable by the assessee on various expenditures incurred in India under the head *Travel, Workshop, Conference, etc.* In this case all such expenditures were incurred out of inward remittances. The same ruling was again followed in the case *Singapore Tourism Board, In re (2008) 219 CTR (AAR) 657* where it was again

held that even if a foreign entity is not earning any income in India, it is liable to pay FBT.

APPLICABILITY OF FBT ON BRANCH OFFICES OF FOREIGN NGOS

22.1 It is interesting to note that though liaison offices are liable to pay FBT, the branch offices of foreign NGOs may not be subjected to FBT. The branch offices of foreign NGOs which are having registration under section 12A or section 10(23C) will not be liable to pay FBT as section 115WA(2) clearly exempts charitable organisations which are having registration under section 12A or section 10(23C). However, if the branch office is not having such registration, then it will be subjected to FBT.

Reference Book : **Taxation of Trust and NGOs with FCRA & FEMA** by **Manoj Fogla**, published by TAXMANN Publications.

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