K C Mehta & Co LLP

Chartered Accountants

kcm Guide

Corporate Tax

Section 194R –TDS on benefits or perquisites

FAQs

Background

Our readers would recollect that Finance Act 2022 introduced section 194R in the Income-tax Act, 1961 ('the Act') under Chapter XVII-B (chapter dealing with deduction of tax). Section 194R provides for deduction of tax on benefits or perquisites arising from business or exercising of a profession.

Intent of section 194R

As per Memorandum explaining Finance Bill 2022, Hon'ble Finance Minister had made a reference to section 28(iv) of the Act that provides for taxability of value of any benefit or perquisite, whether convertible into money or not, arising from business or exercising of a profession. The said income is chargeable to tax under the head 'Profits and Gains from Business or Profession' in the hands of recipient of such benefit or perquisite. Section 28(iv) was introduced in the Act in 1964 to expand the scope of income in the hands of recipient of benefit or perquisite.

Hon'ble Finance Minister had expressed concerns that many times, recipient of such benefit or perquisite does not report such income while filing the tax return, which results into under-reporting of income and income goes untaxed. To avoid such mischief and to widen the tax base, section 194R is introduced in the Act, requiring deduction of tax in case a person provides benefit or perquisite.

From the Memorandum, it is evident that provisions of section 194R are introduced to cover the benefit or perquisite of a nature referred in section 28(iv) of the Act.

Bare language of section 194R of the Act

As per section 194R of the Act, any person responsible for providing any benefit or perquisite, whether convertible into money or not, to a resident, arising from business or exercising of a profession by such resident, shall be responsible for deduction of tax at source.

At this juncture, it is important to note that bare provisions of section 194R are nowhere refer to section 28(iv) of the Act and try to cover all the possible benefits or perquisites, whether in cash or kind, within its ambit.

The above section is applicable with effect from **01 July 2022**.

CBDT Guidelines for removal of difficulties

Sub-section (2) of section 194R empowers Central Board of Direct Tax ('CBDT') to issue guidelines in case any difficulty arises in effective implementation of the section. Sub-section (3) further provides that every guideline issued by the CBDT under section 194R of the Act shall be laid before both the houses of Parliament and shall be binding on income tax authorities and on person providing benefit or perquisite.

Since the section is applicable with effect from 01 July 2022 and stakeholders were anticipating huge impact of this section on business, there was a need of CBDT guidelines for resolving various practical difficulties which have arisen in implementing the section.

In view of above, CBDT has released guidelines in the form of FAQs, *vide* **Circular No 12 of 2022 dated 16 June 2022.** Though by issuing guidelines, CBDT had tried to answer queries, but at the same time it has resulted in various practical difficulties in interpreting the scope and applicability of the section.

In this regard, we are pleased to present our ***kcm*****Guide** on FAQs issued by the CBDT and various practical nuances arising from the same.

1. **When does section 194R of the Act apply?**

   Section 194R of the Act applies in a case where any person is providing any ***benefit or perquisite***, whether convertible into money or not, to a resident, arising from business or exercising of a profession by such resident.

2. **Who is responsible for deduction of tax under section 194R of the Act?**

   Section 194R of the Act provides that ***any person*** responsible for providing benefit or perquisite to a resident shall be responsible for deduction of tax.

   Section further provides that provisions are not applicable to a person, being an individual or HUF, whose total sales, gross receipts, or turnover does not exceed INR 1 crore in case of business or INR 50 lakhs in case of profession, during the financial year immediately preceding to the financial year in which benefit or perquisite is provided.

3. **Whether provisions of section 194R of the Act would apply to salaried individual who provides benefit or perquisite?**

   Provisions of section 194R would not apply in case of salaried individual. This is for the reason that provisions of section 194R of the Act are not applicable to person being an individual and HUF, if total sales, gross receipts, or turnover does not exceed INR 1 crore in case of business or INR 50 lakhs in case of profession, during the financial year immediately preceding to the financial year in which benefit, or perquisite is provided. Hence, in case of salaried individual, in absence of any business or profession carried out in_immediate previous financial year, requirement of deduction of tax under section 194R does not arise.

4. **Whether provisions of section 194R of the Act apply in case benefit or perquisite is given to non-resident?**

   Provisions of section 194R of the Act are not applicable in case a benefit or perquisite is provided to a non-resident. In such case, one has to refer to the provisions of section 195 of the Act and accordingly deduct tax at source, if the benefit or perquisite is chargeable to tax in the hands of non-resident in India.

5. **Whether provisions of section 194R of the Act apply in case benefit or perquisite is provided by a non-resident to a resident?**

   Provisions of section 194R of the Act apply to **any person who is responsible for providing benefit or perquisite** to a resident. In this regard, it is important to note that from a provider's perspective, there is no distinction as to whether payer is resident or non-resident.

   Further, Explanation to section 194R provides the meaning of the term **'person responsible for providing'** to include *the person providing such benefit or perquisite or in the case of the Company, the Company itself including principal officer thereof.*

   At this juncture, it is important to note that section 204 of the Act provides the meaning of the term **'person responsible for paying'**. As per section 204(v) of the Act, even a person who is non-resident in India is also covered within the definition of **'person responsible for paying'** *(non-resident was included in section 204 of the Act vide Finance Act 2020).*

The term **'person responsible for paying'** is used in various section such as section 194A, section 194C, section 194J, section 194Q, section 194H etc. However, unlike other sections, section 194R of the Act nowhere refers to the term **'person responsible for paying'**. Rather section 194R of the Act uses the term **'person responsible for providing'**. Also, section 194R of the Act does not contain a provision similar to what is provided in Explanation 2 of section 195 of the Act, wherein it has been categorically provided that deduction of tax under section 195 would also be applicable to non-resident.

CBDT has also issued a Circular No. 726 dated 18 October 1995 in the context of applicability of section 194J in case of payment made by foreign companies to residents in India. In the said circular, it has been clarified that any fee paid through a normal banking channel to any chartered accountant, lawyer, advocate or solicitor by a non-resident, who does not have any agent or business connection in India, no deduction is required to be made under section 194J of the Act.

Hence, from a plain reading of the section and above CBDT Circular, a possible view is that section 194R of the Act would not apply in case benefit or perquisite is provided by a non-resident to a resident.

On the contrary, second view is also possible that section 194R of the Act only provides exceptions for individual or HUF (subject to certain threshold) and no other persons are excluded from ambit of the same. Hence, a view is also possible that provisions of section 194R of the Act would apply to **any person** providing benefit or perquisite including non-resident. In order to avoid litigation, clarification from CBDT is expected.

6. **What is the threshold for applying provisions of section 194R of the Act and how to compute said threshold?**

Provisions of section 194R of the Act would apply if value or aggregate values of benefit or perquisite provided or likely to be provided to a resident exceeds INR 20,000 during the financial year.

Further, even though section is applicable with effect from 01 July 2022, limit of INR 20,000 has to be checked for the entire financial year (i.e., from 01 April 2022 to 31 March 2023).

Reference: FAQ 10 of CBDT Circular

7. **Whether benefit or perquisite provided between 01 April 2022 to 30 June 2022 would be subject to deduction of tax under section 194R of the Act?**

The benefit or perquisite provided on or before 30 June 2022 would not be subject to deduction of tax under section 194R of the Act.

Reference: FAQ 10 of CBDT Circular

8. **What is the rate for deduction of tax at source under section 194R of the Act?**

The rate for deduction of tax at source under section 194R of the Act is 10%. Further, as the rate is provided in the section itself and not in respective schedule of Finance Act, surcharge and cess would not apply while deducting tax under section 194R.

9. Whether provisions of section 206AA would apply in case recipient fails to intimate its permanent account number to a person providing benefit or perquisite?

Section 206AA of the Act provides for higher deduction of tax in case person who is entitled to receive any sum or income or amount on which tax is required to be deducted under Chapter XVII-B of the Act, fails to intimate its permanent account number to payer.

On plain reading of section 206AA of the Act, it seems that higher withholding is applicable only in case a particular amount represents in the form of sum or income or amount. Section 194R of the Act nowhere uses the term sum or income or amount. Hence, it is possible to take a view that section 206AA may not apply in case of receipt of benefit or perquisite referred in section 194R of the Act.

On the contrary, second view is also possible that in absence of any specific exclusion or exemption, section 206AA of the Act would apply on receipt of benefit or perquisite referred in section 194R.

In our view, adoption of first view can entail long drawn litigation.

10. Whether provisions of section 206AB would apply in case recipient of benefit or perquisite is non-filler of return of income (specified person)?

Section 206AB of the Act provides for higher deduction of tax in case any sum or income or amount is paid or credited to the account of specified person who has not furnished a return of income during the relevant assessment years.

On plain reading of section 206AB of the Act, it seems that higher withholding is applicable only in case a particular amount represents in the form of sum or income or amount. Section 194R of the Act nowhere uses the term sum or income or amount. Hence, it is possible to take a view that section 206AB may not apply in case of receipt of benefit or perquisite under section 194R of the Act.

On the contrary, second view is also possible that in absence of any specific exclusion or exemption, section 206AA of the Act would apply on receipt of benefit or perquisite referred in section 194R.

In our view, adoption of first view can entail long drawn litigation.

11. Whether guidelines / Circular issued by CBDT is binding on assessee who provides benefit or perquisite?

Yes, as per sub-section (3) of section 194R, every guideline issued by the CBDT is binding on tax authority as well as the person providing benefit or perquisite.

12. Whether guidelines / Circular issued by CBDT is binding on assessee who is recipient of benefit or perquisite?

No, sub-section (3) of section 194R does not provide that the guidelines issued by CBDT are also binding on the person who is recipient of benefit or perquisite.

13. Whether recipient of benefit or perquisite can challenge the guidelines / Circular for the purpose of taxability of benefit or perquisite?

As mentioned above, guidelines issued by CBDT are not binding upon the person being recipient of any benefit or perquisite. Hence, even if deduction of tax has been made by the provider of benefit or perquisite under section 194R of the Act, recipient of such benefit or perquisite can still challenge or contest taxability of such benefit or perquisite (including valuation adopted for valuing such benefit or perquisite), having regard to the facts of the case.

14. Whether guidelines issued by the CBDT would apply even if the same are not laid before both the houses of Parliament?

Sub-section (2) of section 194R of the Act provides that CBDT, **with a prior approval of Central Government**, can issue guidelines for removal of difficulties.

Sub-section (3) of section 194R of the Act *inter-alia* provides that guidelines issued by the CBDT is required to be laid before both the houses of Parliament.

The Circular issued on 16 June 2022 has been issued after taking prior approval of Central Government. While one may challenge the enforceability of the Circular, if the same is not laid before both the houses of Parliament, but considering the language used in the section, it would be difficult to say that the Circular does not have enforceability when the same is issued after approval of Central Government.

15. What is the meaning of benefit or perquisite?

The meaning of the term 'benefit' or 'perquisite' is not provided in section 194R as well as any other provisions of the Act. Hence, one may have to rely upon the dictionary meaning and judicial precedents in this regard.

Black Law's dictionary defines the expression 'benefit' to mean *advantage, profit, fruit, privilege*.

As per decision of *CIT v SMT Kamalini Gautam Sarabhai [1994] 208 ITR 139 (Gujarat)*, the Court held that meaning of the word 'benefit' occurring in section 2(24)(iv) of the Act means **'any advantage, gain or improvement of condition'**.

As per decision of *Helios Food Improvers (P.) Ltd. v Dy. CIT [2007] 14 SOT 546 (Mum. - Trib.)*, the term 'perquisite' denotes meeting out of an obligation of one person by another person either directly or indirectly or provision of some facility or amenity by

one person to another person and from the very beginning, the person providing such facilities or concessions knows that whatever is being done is irretrievable to him as it has been granted to a person as a privilege or right of that person. Also, the word "benefit" has also to be interpreted in the same manner i.e., at the time of execution of the business transaction, one party should give to the other party some irretrievable benefit or advantage.

Hence, the term 'benefit' or 'perquisite' are very wide enough to cover any kind of direct or indirect advantage or profit or gain or privilege.

16. Whether benefit or perquisite in the form of cash (either wholly or partly) would be subject to deduction of tax under section 194R of the Act?

As per Memorandum explaining Finance Bill 2022, the intent of introducing section 194R of the Act is to cover within its ambit, the benefit or perquisite chargeable to tax under section 28(iv) of the Act.

Section 28(iv) talks about taxability of benefit or perquisite, whether convertible into money or not. Further, in the context of section 28(iv) of the Act, there are judicial precedents[1] where it has been held that provisions of section 28(iv) of the Act are not applicable in case benefit is received in the form of cash (for e.g., waver of loan).

Further, section 194R of the Act also referred to 'benefit or perquisite whether convertible into money or not'. Using the phrase **'whether convertible into money or not'** itself implies that the intention of section is to cover that kind of benefit or perquisite which is non-monetary in nature.

However, first proviso of section 194R provides that even if benefit or perquisite is kind or **party in cash or partly in kind**, tax is required to be deducted under section 194R of the Act.

Reference: FAQ 2 of CBDT Circular

At this juncture, it is important to note that the way CBDT Circular and section 194R of the Act are worded, it literally expands the scope of coverage of section 194R of the Act by including cash benefit or perquisite as well, which was not the intent of legislature. Further, it is a settled position by virtue of decision of Hon'ble Supreme Court (law of land) in case of *Mahindra and Mahindra* that provisions of section 28(iv) of the Act does not apply to cash benefit or perquisite.

In this regard, it is important to note that CBDT, while issuing any circular, needs to adhere to various judicial precedents and settled position on the subject matter. Any circular issued by CBDT which is in contrary to the principles laid down by the various Courts can be struck down. In this regard, reliance can be place on decision of Delhi High Court in case of *Chamber of Tax Consultants v. Union of India [2017] 87 taxmann.com 92 (Delhi),* wherein the Court held that

[1] Commissioner of Income-tax v. Mahindra & Mahindra Ltd. [2018] 93 taxmann.com 32 (SC) | Commissioner of Income-tax v. Essar Shipping Ltd [2020] 117 taxmann.com 389 (Bombay)

ICDS notified under section 145(2) of the Act cannot override binding judicial precedents.

In view of above, it is possible to contest that Circular issued by CBDT, wherein it proposed to cover cash benefit or perquisite within the ambit of section 194R of the Act, is against the binding judicial precedent and **effect of such Circular may not be given where Supreme Court or High Court had already settled a question of law on subject matter**[2]. This matter may require more clarification from CBDT to avoid high chances of litigation.

17. Whether receipt of professional fees in kind, pursuant to contractual obligation would be subject to deduction of tax under section 194R?

To understand this, let us take an example where a Firm of a Chartered Accountant receives a gold worth INR 15,00,000, in consideration of professional services rendered to one of its clients under retainership contract. In such case, one has to check whether tax is required to be deducted under section 194J or section 194R of the Act.

Section 194J generally deals with deduction of tax from payment of professional fees. Hence, if client would have paid fee / consideration of services in cash, the same would have been subject to deduction of tax under section 194J of the Act. However, in the present case, consideration is received in non-monetary terms. Further, section 194J of the Act only provides for deduction of tax in case of payment of 'sum' and does not cover a situation in case payment is made in kind.

Hence, in above case, it is possible to take a view that tax is required to be deducted on payment of such non-monetary consideration as per the provisions of section 194R of the Act.

Now, in the above example, assuming that a firm of a Chartered Accountants receives a gold worth INR 15,00,000 along with cash of INR 5,00,000 in consideration of professional services. In such case, ideally tax deduction under section 194R of the Act would be restricted to benefit or perquisite received in kind worth INR 15,00,000. As far as tax deduction on monetary payment is concerned, the same should be deducted under section 194J of the Act. However, the way section 194R of the Act is drafted and as the CBDT Circular stands today, payer may have to deduct tax on entire amount of consideration of INR 20,00,000 under section 194R of the Act, which in our view goes against the intention of the section.

Reference: FAQ 2 of CBDT Circular

18. Whether deduction of tax under section 194R of the Act would apply in case the benefit or perquisite is not taxable in the hands of recipient under section 28(iv) of the Act?

As per the provisions of section 194R of the Act read with CBDT Circular, it has been provided that any person responsible for providing benefit or perquisite is not required to see whether such benefit or perquisite is taxable in the hands of recipient under section 28(iv) or not. It has been further provided that the benefit or perquisite may be taxed under section 41(1) of the Act or any other provision.

[2] Hindustan Aeronautics Ltd. v. CIT [2000] 110 Taxman 311 (SC)

Hence, only requirement under section 194R of the Act is providing benefit or perquisite to a resident, arising from business or exercising of a profession by such resident. Provider of such benefit or perquisite is not required to test taxability of such income in the hands of recipient.

Reference: FAQ 1 of CBDT Circular

19. Whether deduction of tax under section 194R of the Act would apply in case the income in the hands of recipient is not subject to tax under the Act (for e.g., exempt income)?

As mentioned above, it has been provided that the person responsible for providing benefit or perquisite is not required to see whether such benefit or perquisite is taxable in the hands of recipient or not.

From a plain reading of section and in absence of any explicit relaxation or exemption, it appears that tax is required to be deducted under section 194R of the Act even if income in the hands of recipient is exempt under the Act.

There is no clarification provided either in the Act or in the Circular that tax deduction would not apply in case recipient of income is not chargeable to tax under the Act. Further, section also does not have any power to notify person or class of person to whom provisions of section 194R would not apply.

Further, it is also important to note that in the Circular issued by CBDT in the context of section 194Q of the Act *(Circular 13 of 2021 dated 30 June 2021)*, it has been specifically clarified that provisions of section 194Q of the Act (TDS on purchase of goods) are not applicable in case income of the person, being seller of goods, **is exempt from income tax**. However, no such clarification has been provided in the context of section 194R of the Act. Hence, even if income of recipient is not subject to tax, provisions of section 194R would apply.

Reference: FAQ 1 of CBDT Circular

20. Whether benefit or perquisite provided to employee would be subject to deduction of tax under section 194R of the Act?

Any benefit or perquisite provided to employee pursuant to employment relationship would be subject to tax under section 17 and chargeable under the head 'Salaries'. Accordingly, it would be subject to deduction of tax under section 192 of the Act. Hence, any benefit or perquisite provided to employee would not be subject to deduction of tax under section 194R of the Act as section 192 is a specific provision dealing with deduction of tax on salary income and specific provision prevails over general provision.

21. Whether provisions of section 194R of the Act would apply in case benefit or perquisite is received in the form of capital asset (say land or building or gold)?

Provisions of section 194R of the Act would apply even in case where benefit or perquisite is received in the form of capital asset.

For e.g., ABC Private Limited receives a flat worth INR 15,00,000 towards services rendered to one of its customers. In such case, receipt of flat in lieu of consideration of services would be treated

as benefit or perquisite and accordingly subject to deduction of tax under section 194R of the Act.

Reference: FAQ 3 of CBDT Circular

22. What would be the value subject to deduction of tax under section 194R of the Act in case benefit or perquisite is provided in kind?

The valuation would be the **fair market value** of the benefit or perquisite except in following cases:

a. *The benefit or perquisite provider has purchased the benefit / perquisite before providing it to the recipient:* In that case, **the purchase price** shall be the value of such benefit / perquisite.

b. *The benefit or perquisite provider has manufactured such item given on benefit / perquisite:* In that case, the **price that would be charged to customer** for such items shall be the value of such benefit / perquisite.

Reference: FAQ 5 of CBDT Circular

Example: ABC, one of the customers of PRQ Private Limited has paid consideration for services in the form of gold coin having fair market value of INR 5,00,000 and the same is taxable under section 28(iv) of the Act. The said gold coin was purchased by ABC at value of INR 4,50,000. For the purpose of section 194R of the Act, value of benefit or perquisite for the purpose of deduction of tax would be INR 4,50,000 and not INR 5,00,000.

In this regard, it is important to note that as far as deduction of tax at source is concerned, the value is INR 4,50,000. However, section 28(iv) does not provide any mechanism for determination of value of benefit or perquisite. At this stage, it may happen that while deduction of tax is happened on INR 4,50,000, the amount of income required to be taxed in the hands of recipient could be INR 5,00,000, being fair market value.

Also, it is also important to note that no clarity has been provided with respect to determination of cost of acquisition for future sale, in case benefit or perquisite is received in the form of gold coin, being capital assets in the hands of recipient. In this regard, it is important to note that in case inventory is converted into capital asset, section 28(via) provides for taxability of fair market value of such inventory as business income. Further, section 49(9) of the Act provides that if capital asset converted from inventory is sold, then cost of acquisition of such capital asset would be the fair market value so taxed under section 28(via).

However, unlike above provision, no clarity has been provided for determination of cost of capital asset received in the form of benefit or perquisite and chargeable to tax under section 28(iv) of the Act. In such case, a better view is that the amount chargeable to tax under section 28(iv) of the Act would be the amount of cost of acquisition. In order to avoid any litigation, clarification is expected from the CBDT.

Further, with respect to manufactured item which is provided as benefit or perquisite, the value of benefit or perquisite would be the price charged to customer. In this regard, it is important to note that price charged to customer may vary depending upon the customer and having regard to the facts of each case. Further,

customer can be wholesaler or distributor or retailer. In such case, price ordinarily charged to the type of customer with which sale of goods is happening should be the value of benefit or perquisite. Sometimes, it may also happen that goods are not meant for sale or prohibited from sale in open market. These are the open areas and may impose a practical difficulty in implementation of section. In order to avoid litigation, clarification from CBDT is expected.

23. Whether GST would be included while valuing the benefit or perquisite under section 194R of the Act?

No, GST would not be included for the purpose of valuing benefit or perquisite under section 194R of the Act.

Reference: FAQ 5 of CBDT Circular

24. Whether Stock Appreciation Rights provided to independent consultant would be subject to deduction of tax under section 194R of the Act?

If stock appreciation rights are provided to independent consultant in consideration of rendering the professional services, the same may be treated as benefit or perquisite arising from carrying business or exercising of a profession. Accordingly, the same should be subject to deduction of tax under section 194R of the Act.

25. Whether receipt of interest of income tax refund from income tax department pursuant to statutory provision of section 244A of the Act would be subject to deduction of tax under section 194R of the Act?

Interest on income tax refund received from the income tax department is a statutory claim of the taxpayer arising from section 244A of the Act. In such case, it is possible to argue that when income tax department pays interest on income tax refund, the same is towards compensating the taxpayer for recovering the tax amount which was not payable by the taxpayer.

A person is said to receive a benefit or perquisite if the same is received in addition to what was entitled for and for free of cost and without any legal obligation. In case of interest on income tax refund, taxpayer is not receiving the interest as free of cost or as additional benefit, rather the same is received for compensating the taxpayer for recovering tax amount which was not payable by the taxpayer. Hence, a view is possible that interest on income tax refund should not be subject to provisions of section 194R of the Act.

26. Whether waiver of loan would be subject to deduction of tax under section 194R of the Act?

As per section 41(1) of the Act, in case any income is arising in cash or otherwise in respect of any loss or expenditure or some benefit in respect of any trading liability by way of remission or cessation, then such income would be chargeable to tax as business income, provided such amount has been claimed as deduction in any of the earlier assessment years. Let us understand that implication of waiver of loan in the context of section 194R of the Act in following two scenarios:

- **Waiver of loan under mutual agreement between both parties (bilateral action)**

  In such case, provisions of section 41(1) should not apply for a reason that basic condition of claiming amount as deduction in the earlier assessment year is not fulfilled. Hence, income is not liable to tax under section 41(1). Similarly, waiver of loan is also not subject to tax under section 28(iv) of the Act as the said waiver tantamount to benefit received in cash and section 28(iv) of the Act should not apply to cash benefits[3].

  In above case, as clarified in FAQ 1 of CBDT Circular, irrespective of whether income is taxable under section 28(iv) or section 41(1) of the Act, deduction of tax under section 194R would apply. Further, granting of waiver of loan by lender in the favor of borrower can said to be the benefit provided by the lender to borrower. Hence, on plain reading of section 194R of the Act and CBDT Circular, tax is required to be deducted under section 194R of the Act.

The above should equally apply in case of waiver of trade liability.

- **Mere passing an accounting entry of write back of loan in the books of borrower without expressed consent of lender (unilateral action)**

  In such case, mere write back of loan payable to a lender, without express consent of lender would not be sufficient to say that lender has provided any benefit to borrower. Hence, in absence of any benefit being provided by the lender, section 194R of the Act should not be applicable.

27. Whether receipt of money toward recovery of bad debt (arose from sale of goods) would be subject to deduction of tax under section 194R of the Act?

In case the amount is received towards recovery of bad debt, which was earlier claimed as deduction, would be subject to tax as business income under section 41(4) of the Act. In such case, such payment of bad debt is benefit provided, especially when the same was claimed as deduction in earlier.

However, it is important to note that if such bad debt arose in connection with sale of goods, then person being a purchaser of goods might have deducted tax under section 194Q of the Act while crediting the sum to the account of seller. Hence, tax required to be deducted on such transaction might have been deducted under section 194Q.

Now, at the time of payment of sum toward such bad debt, a possible view can be taken that no tax is required to be deducted under section 194R of the Act as tax has already been deducted and paid under section 194Q earlier. However, possibility of income tax department taking a contrary view cannot ruled out.

28. Whether sales discount, cash discount, rebates etc. would be covered under section 194R of the Act?

Provisions of section 194R of the Act would apply to all kind benefit / perquisites. Sales discount, cash discount, rebate etc. are

[3] Commissioner of Income-tax v. Mahindra & Mahindra Ltd. [2018] 93 taxmann.com 32 (SC)

also in the nature of benefit or perquisites. However, keeping in mind that the difficulties may have to be faced by the seller, CBDT has clarified that sales discount, cash discount, rebate etc. would not be subject to deduction of tax under section 194R of the Act.

It has been further clarified that by way of an example that when seller sells 12 items and collects price for only 10 items (buy 10 get 2 free basis), provisions of section 194R of the Act would not apply.

Reference: FAQ 4 of CBDT Circular

29. What are the other benefits / perquisites provided by seller of goods would be subject to deduction of tax under section 194R of the Act?

Following are some of the illustrative examples of benefit or perquisite, which would be subject to deduction of tax under section 194R of the Act:

- Distribution of free samples (e.g., free samples of medicine to medical practitioners)
- Incentives in the form of cash, kind like mobile, car, accessories, TV, computer, gold etc. for achieving sales target (no TDS under section 194R if above item is taxable under the head 'salaries' and subject to deduction of tax under section 192)
- Sponsorship of foreign / domestic trip for the sales team upon fulfilment of sales target (no TDS under section 194R if perquisite is taxable under the head 'salaries' and subject to deduction of tax under section 192)
- Distribution of free tickets for an event

Reference: FAQ 4 of CBDT Circular

30. In case of distribution of free sample of goods, in whose hands, tax is required to be deducted under section 194R of the Act?

The benefit or perquisite can be used by the entity itself or the owner/employee/director of the recipient entity or the relatives (of the individual) who are not carrying out any business or profession.

In such case, tax is required to be deducted under section 194R of the Act in the name of recipient entity who receives such free sample since the usage by owner/employee/director or relative of any individual is by virtue of their relationship with the recipient entity and in substance benefit or perquisite is provided to recipient entity.

Let us understand the implications of distribution of free sample in the context of section 194R of the Act in following scenarios:

- **Distribution of free sample to individual person engaged in business or profession**

  In such case, tax is required to be deducted under section 194R of the Act in the name of individual who is recipient of such free sample and is engaged in the business.

- **Distribution of free samples to the Company engaged in the business**

  In such case, tax is required to be deducted under section 194R of the Act in the name of recipient entity who receives such free sample and is engaged in the business.

- **Distribution of free samples to the Company engaged in the business for the use of individual employee or its family members**

  Example: XYZ Limited, a pharma company, distributes free samples of its medicines to medical practitioners who are the **employees** of ABC Healthcare Hospital. In such case, tax under section 194R of the Act is required to be deducted in the name of ABC Healthcare Hospital due to the reason that medical practitioners have received the free samples owing to their employment relation with the hospital. Hence, the ultimate recipient of such free sample is the hospital.

  The hospital may subsequently treat the said free sample as benefit or perquisite in the hands of medical practitioners and deducts tax under section 192 of the Act, if such medical practitioners are using such free samples for their own purpose.

- **Distribution of free sample to individual person, being independent consultant**

  Example: XYZ Limited, a pharma company distributes free samples of its medicines to medical practitioners who are the **consultants** of ABC Healthcare Hospital. In such case, tax under section 194R of the Act may have to be deducted in the name of ABC Healthcare Hospital due to the reason that medical practitioners have received the free samples owing to their professional relation with the hospital. The hospital will subsequently treat the said free sample as benefit or perquisite in the hands of medical practitioners and deduct their tax under section 194R.

  Alternatively, benefit provider may deduct tax directly in the name of medical professional, being a consultant associated with the hospital.

Reference: FAQ 4 of CBDT Circular

31. Whether provisions of section 194R of the Act would apply to government entity?

Section 194R of the Act does not provide any such relaxation or exemption to person or class of person. However, in CBDT Circular, it has been clarified that the provisions of section 194R of the Act are not applicable to government entity like government hospital not carrying on business or profession.

Reference: FAQ 4 of CBDT Circular

32. Whether provisions of section 194R of the Act would apply in case of free distribution of goods to charitable trust engaged in charitable activities?

Charitable trust engaged in performing charitable activities are not said to be engaged in business or profession. Provisions of section 194R of the Act apply to a benefit or perquisite provided to a resident, which arises from carrying business or exercising of a profession by such resident.

Hence, from plain reading of section 194R of the Act, unless a recipient person is engaged in business or profession, providing benefit or perquisite may not be subject to deduction of tax under section 194R of the Act. Charitable trusts registered under income tax are also not engaged in business or profession. Hence, free

distribution of goods to charitable trust not engaged in business or profession should not be subject to deduction of tax under section 194R of the Act.

33. How to ensure payment of tax when benefit or perquisite is provided in kind or partly in kind or partly in cash and cash amount is not sufficient to deduct whole amount of tax on such benefit or perquisite?

Normally, a benefit or perquisite would not be in the form of cash. In such case, it would be difficult for the provider of benefit to deduct tax as no sum is payable to the recipient. In this regard, the ideal situation would be for the provider of benefit to gross up the value of the benefit and compute the amount of tax to be deducted assuming such amount of tax as also the value of benefit. This view seems to find support from FAQ No. 9 of CBDT Circular

Example: ABC Cinema House conducts a quiz competition and Mr. X won the said quiz competition. For winning the quiz, ABC Cinema House has announced a prize in the form of car worth INR 15 lakhs to Mr. X. Further, ABC Cinema has also agreed to pay tax amount corresponding to such prize on behalf of Mr. X. In such case, tax required to be deducted under section 194R would be calculated as follows:

Sr. No	Particulars	Amount (in INR)
1	Amount of prize / value of car	15,00,000
2	Tax payment by ABC Cinema House (INR 15,00,000/90%*10%)	1,66,667
3	**Total value of benefit to Mr. X**	**16,66,667**

The above calculation shows grossing up mechanism where tax paid by ABC Cinema House is also required to be added as benefit or perquisite provided to Mr. X, for deduction of tax under section 194R of the Act. It is important to note that unlike section 195A, section 194R of the Act does not provide for grossing up mechanism. Requirement of grossing up is emanates from CBDT Circular.

Alternatively, the Circular provides for a mechanism whereby an obligation is cast on the provider of benefit to obtain declaration from the recipient regarding payment of advance tax on such benefit and to release the benefit or perquisite only after receiving the declaration along with proof of payment of taxes on such benefit. This proposition could lead to practical challenges for the taxpayers in terms of seeking declarations and substantiating payment of taxes. On the one hand, the CBDT Circular provides for tax liability even in case where there is no element of income and on the other it requires the provider of benefit to obtain declaration of payment of advance tax from the recipient. This

would unnecessarily put compliance burden on the provider of benefit.

Reference: FAQ 9 of CBDT Circular

34. Whether recipient of benefit / perquisite can apply for lower deduction certificate?

As per the provisions of section 197 of the Act, person can apply for lower deduction certificate only in respect of specified sections covered. In this regard, it is important to note that section 194R of the Act is not covered under section 197 of the Act. Hence, person cannot apply for lower deduction certificate for the income covered under section 194R of the Act.

35. Whether provisions of section 194R of the Act apply on receipt of benefit or perquisite of personal nature?

Section 194R of the Act provides for deduction of tax on benefit or perquisite arising from carrying business or exercising of a profession. Hence, receipt of benefit or perquisite in personal capacity would not be subject to deduction of tax under section 194R of the Act.

At this juncture, it is important to make distinction between personal benefits or benefits arising from business or profession, which depends on facts of each case. This is an additional responsibility cast upon the person providing benefit or perquisite to check whether such benefit or perquisite is in connection with business / profession of recipient or not.

36. Whether product given to social medial influencer by a Company engaged in manufacturing of such product would be subject to deduction of tax under section 194R of the Act?

Many times, various companies use social medial influencer and its platform for promoting their products in market. While undertaking such promotion, the Company gives such products to social medial influencer for rendering promotional services and upon completion of such services, products are required to be returned to company.

In such case, products distributed to social media influencer only for marketing and promotional purpose would not be treated as benefit or perquisite under section 194R of the Act. However, if product is retained by the social medial influencer, the same would be subject to deduction of tax under section 194R of the Act.

Reference: FAQ 6 of CBDT Circular

37. Whether reimbursement of expenditure would be subject to deduction of tax under section 194R of the Act?

In this regard, CBDT Circular provides as under:

Any expenditure, which is liability of any person, if met by other person, is in effect a benefit / perquisite provided by other person to first person. In this regard, CBDT in its Circular has categorically provided that if invoice in respect of expense is obtained in the name of service recipient and if the same is recovered by service provider by way of reimbursement, then there is no benefit or perquisite being provided to service provider. However, if the invoice of expenditure is in the name of service provider and if the

same is recovered either by way of reimbursement or is directly paid to third party by service recipient, there is a benefit or perquisite provided by service recipient to service provider.

Let us understand the implications of clarification provided by CBDT by following example:

1. **Invoice of traveling and boarding expense is in the name of ABC & Co LLP, paid by ABC & Co LLP and reimbursed by MNO Private Limited:**

   In above case, traveling and boarding expense which was liability of ABC & Co LLP is reimbursed by MNO Private Limited and accordingly, a benefit is passed on to ABC & Co LLP. Hence, reimbursement of such out of pocket expense in cash would be subject to deduction of tax under section 194R of the Act.

2. **Invoice of traveling and boarding expense is in the name of MNO Private Limited, paid by ABC & Co LLP and reimbursed by MNO Private Limited:**

   In above case, traveling and boarding expense which was liability of MNO Private Limited is being paid by ABC & Co LLP at first instance and then reimbursed from MNO Private Limited. Here, there is no provision of any benefit by MNO Private Limited to ABC & Co LLP. Hence, reimbursement of such expense should not be subject to deduction of tax under section 194R of the Act.

3. **Invoice of traveling and boarding expense is in the name of ABC & Co LLP and directly paid by MNO Private Limited:**

   In above case, traveling and boarding expense which was liability of ABC & Co LLP is directly paid by MNO Private Limited. Hence, a possible view could be that MNO Private Limited is passing a benefit to ABC & Co LLP by making a direct payment to third party. Hence, payment of such expense in cash would be subject to deduction of tax under section 194R of the Act.

With respect to above examples, it is important to note that difficulties may arise in implementation of section 194R of the Act. For example, while making direct payment of traveling expense to third party, payer may have to deduct tax under section 194C of the Act, as may be applicable. Also, before releasing such payment to third party, payer will also have to ensure that tax required to be deducted under section 194R of the Act is paid by recipient of benefit.

One may also appreciate that on account of covering reimbursement payment within the ambit of section 194R of the Act, out of pocket expense charged by service provider from service recipient, which is a general industry practice prevailing at large, would be subject to deduction of tax under section 194R of the Act in majority of the cases. While CBDT has provided above clarifications, we have following observations:

- There are various judicial precedents[4] in the context of reimbursement payments in which the Courts have held that no tax is required to be deducted from payment of reimbursement, provided the amount of reimbursement is shown separately.
- As per Question 30 of CBDT Circular 715 dated 08 August 1995, issued in the context of section 194C and section 194J of the Act, it has been clarified that reimbursement cannot be deducted out of the gross amount of bill and the **same is also subject to deduction of tax under section 194C or section 194J** of the Act.
- Applying the above principles laid down in judicial precedents and CBDT Circular, one would appreciate that either tax should not be deducted from the amount of reimbursements or the same should be deducted under section 194C or section 194J of the Act (as reimbursement would take the character of the main transaction), as may be applicable.
- Further, at various time, contractual terms between service provider and service recipient provides for reimbursement of out-of-pocket expense, which is incurred in the course of rendering of services. Such reimbursement can at best be termed as receipt from rendering of service and tax should be deducted under the relevant section, viz. section 194C or section 194J or any other section of the Act, as may be applicable. Further, it is also worth to say that recovery of such reimbursement expense would not provide any benefit to service provide but is recovered merely in the course of rendering of services.
- Hence, once a particular item is not benefit or perquisite and if other sections are already dealing with deduction of tax from such amount, question of deduction of tax under section 194R should not arise.

Hence, though CBDT Circular is providing for deduction of tax on reimbursement payments based on invoice criteria, we are of the view that such clarification results into creation of additional charge on particular amount, without appreciating whether receipt of any amount partakes the character of benefit or perquisite or not. Section 194R, being machinery provision only deals with collection and recovery of tax and it is a settled position that machinery provision cannot overrule charging provisions. Hence, to that extent, clarification provided by CBDT requires reconsideration. Further, one may also seek to challenge the constitutional validity of the Circular on the ground of it expanding the scope of the main provisions.

However, at the same time, it is also important to note that direct payment to third party or reimbursement of expense, which does not arise from rendering of services and has a link with business or exercising of a profession, should be subject to deduction of tax

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[4] Kalyani Steels Ltd. v CIT [2018] 91 taxmann.com 359 (Karnataka), Consumer Marketing (India) (P.) Ltd v. PCIT [2015] 64 taxmann.com 16 (Gujarat), Vishinda Diamonds v. ITO [2013] 34 taxmann.com 163

under section 194R of the Act (for e.g., rent free accommodation at the guest house of client for service provider and its family, sponsoring travel and boarding expense for leisure trip, etc.)

Reference: FAQ 7 of CBDT Circular

38. Whether provision of rent-free premise / accommodation by holding company to its group company for carrying out business would be subject to deduction of tax under section 194R of the Act?

In case where holding company provides rent-free premise / accommodation to its group company and pays rent of such accommodation to third party without cross charging it to its group company, it may be termed as benefit granted by the holding company to its group company arising from business.

In such case, a view is possible that provision of rent-free accommodation may be subject to deduction of tax under section 194R of the Act.

39. Whether laptop or iPad given by partnership firm to its partner would be subject to deduction of tax under section 194R of the Act?

Provisions of section 194R of the Act covers all kind of benefit or perquisite arising from carrying business or exercising of a profession by recipient of such benefit or perquisite.

Before jumping to the applicability of provisions of section 194R of the Act, one has to first check whether partner working for and on behalf of firm is said to be engaged in the business or profession.

In this regard, attention is invited on the provision of section 28(v) of the Act wherein it has been provided that any interest, salary, bonus, commission or remuneration, by whatever name called, due to, or received by, a partner of a firm from such firms is income chargeable to tax under the head 'Profits and Gains from Business or Profession'. Hence, one may seek to contend that partner working for and on behalf of firm is said to be engaged in the business or profession.

Now, coming to section 194R of the Act in the above case, there can be following possibilities in the context of section 194R of the Act:

- **Laptop and iPad provided by firm to partner is acquired by firm and returnable by the partner at the time of leaving the firm**

  In above case, it is possible to contend that laptop and iPad provided by the Firm to partner does not represent any benefit as the said laptop and iPad is required to be used by the partner wholly and exclusively in connection with the business or profession of the firm.

  Further, assuming that said laptop and iPad is in the name of firm only and partner is required to return it back if he ceases to associate with firm. In such case, there is no element of benefit provided to a partner and it is possible to take a view that provisions of section 194R of the Act are not applicable in such case.

- **Laptop and iPad provided by firm to partner is acquired by firm and non-returnable by the partner at the time of leaving the firm**

  In such case, one may argue that granting laptop or iPad at free of cost to the partner which is not returnable to the firm in case partner leaves, is a benefit granted by the firm to a partner. Hence, the same may be subject to deduction of tax at source under section 194R of the Act.

40. Whether expenditure incurred towards dealer conference to educate dealer about the products of the Company would be subject to deduction of tax under section 194R of the Act?

Let us understand the implications of above in the context of section 194R of the Act in following scenarios:

- **Incurring expense towards dealer / business conference merely for the purpose of educating the dealers / clients about new products**

  The expenditure pertaining to dealer / business conference would not be considered as benefit or perquisite under section 194R of the Act if the same is held with a prime objective of educating a dealer / customer about any of the following:

  - New product being launched
  - Discussion as to how the product is better than others
  - Obtaining orders from dealer / customer
  - Teaching sales techniques
  - Addressing queries of the dealer / customers
  - Reconciliation of accounts with dealers / customers

  In above case, conference must not be in the nature of incentive / benefits to selected dealer / customer on achieving specific target.

- **Incurring expense towards dealer / business conference for selected dealers / clients for achieving sales target / key milestones**

  CBDT has clarified that if the expenditure pertaining to dealer / business conference is incurred for selected dealers / clients for achieving sales target / milestones, then it may be termed as benefit provided to such dealers / clients. In such case, the same may be subject to deduction of tax under section 194R of the Act. However, this may impose a practical difficulty on allocation of total expense / benefit amongst the selected dealers / clients. In this regard, no mechanism has been prescribed on allocation of total benefit amongst the selected dealers / clients.

  Further, a person organizing a conference would also have to ensure that tax under section 194R has been paid by the selected dealer / clients on benefit received. This would again impose additional compliance burden on the person organizing conference.

- **Additional benefits**

  CBDT has clarified that following expenditure would be considered as benefit / incentives for the purpose of section 194R of the Act:

  - Expenses attributable to leisure trip / leisure component even if attributable to dealer / business conference;

- Expenditure incurred for family members accompanying the person attending dealer / business conference;
- Expenditure of participants of dealer / business conference for days which are on account of prior stay or overstay beyond the date of conference

The term such as 'leisure trip' or 'leisure component' is quite wide. In absence of any specific meaning assigned to it, the above clarification may impose lot of practical challenges in implementing section 194R of the Act which may results into litigation.

Reference: FAQ 8 of CBDT Circular

41. Whether provisions of section 40(a)(ia) would apply in case of failure to deduct tax or failure to make payment tax after deduction under section 194R of the Act?

As per the provisions of section 40(a)(ia) of the Act, 30% of sum payable to a resident shall be disallowed, if tax was deductible under Chapter XVII-B of the Act and such tax has not been deducted or after deduction has not been paid to the account of central government.

One view is possible that section 194R of the Act is also covered under Chapter XVII-B of the Act. Hence, if tax is not deducted under section 194R of the Act or has not been paid after deduction, then 30% of value of benefit or perquisite provided to a resident may be disallowed under section 40(a)(ia) of the Act.

On the other hand, second view is also possible that section 40(a)(ia) refers to the term 'sum payable'. In this case, when benefit or perquisite provide in kind, there is no sum payable involved in such case. Hence, one may seek to contend that provisions of section 40(a)(ia) should not apply in case benefit or perquisite is provided in kind. In order to avoid litigation, this requires a clarification form CBDT. In our view, this view can entail litigation.

42. What would be the implications in case trade creditor has not ensured payment of tax under section 194R of the Act on waiver of dues in the favor of sundry debtor?

Waiver of dues by trade creditor in the favor of sundry debtor would be termed as remission or cessation of trading liability and accordingly chargeable to tax under section 41(1) of the Act in the hands of sundry debtor.

Further, writing off amount receivable from sundry debtor would be eligible for deduction under section 36(1)(vii) of the Act in the hands of creditor. At the same time, it is also important to note that granting waiver of dues receivable from sundry debtor would be termed as benefit provided to sundry debtor and may be subject to deduction of tax under section 194R of the Act.

In such case, if trade creditor fails to discharge its obligation under section 194R of the Act, then a view is possible that irrespective of satisfaction of condition laid down under section 36(1)(vii) of the Act for claiming deduction of bad debt, 30% of the amount of bad debt (benefit provided to debtor) would be disallowed in the hands of trade creditor. This is for a reason that provisions of section 40(a)(ia) start with a non-obstante clause.

On the contrary, second view is also possible that provisions of section 40(a)(ia) refer to 'sum payable'. In present case, writing off receivables from sundry debtor would not involve any payment of sum. Hence, one may seek to contend that provisions of section 40(a)(ia) should not be applicable in case of bad debt written off. This view is not free from litigation.

43. How to report amount of tax deducted under the provisions of section 194R of the Act?

The amount of tax deducted under section 194R of the Act is required to be reported in Form 26Q (Quarterly withholding tax return). In this regard, CBDT *vide* its Notification No 67 dated 21 June 2022, has amended Form 26Q under Rule 31A of the Income-tax Rules, 1962 by inserting details seeking particulars of benefit or perquisite provided as per first proviso to section 194R (i.e., partly in cash and partly in kind or fully in kind).

Illustrative examples

Sr. No	Particulars	Whether section 194 applies*
1.	Trade discount, cash discount, rebate	No
2.	Personal gift out of love and affection	No
3.	Distribution of free goods or samples	Yes
4.	Waiver of loan	Debatable
5.	Waiver of trade liability	Yes
6.	Sponsoring trip of dealer for meeting sales target	Yes
7.	Sponsoring leisure trip for dealers attending conference	Yes
8.	Conducting dealer / business conference for promoting product	No
9.	Granting ESOP to employees at a discounted price	No
10.	Granting stock appreciation rights to consultant at a discounted price	Yes
11.	Any benefit or perquisite to employees for employment	No
12.	Reimbursement of expense payable by another person	Debatable
13.	Providing rent free accommodation / office premise by one company to another group company	Yes
14.	Freebies to medical practitioners	Yes
15.	Incentives to chemist for bulk purchase (except by way of discounts)	Yes
16.	Providing branding accessories to dealers and traders for promotion	Yes
17.	Receipt of capital subsidy or revenue subsidy or subvention amount (with conditions attached)	No
18.	Granting of accessories by firm to partner which is not returnable to firm	Yes

*Please note that above is mere illustrative list and applicability of section 194R of the Act is purely based on current understanding of section and CBDT guidelines. Possibility of contrary view cannot be ruled out.

Conclusion

The introduction of section 194R of the Act would surely increase the compliance burden for the taxpayer, more importantly, considering that this section applies to all kind of benefits or perquisites and also expands the scope of income. Further, it is also worth to say that when section 194R of the Act is introduced in the Statute book followed by guidelines issued by CBDT, it is completely taking a U turn from the intention behind introduction of section in the Act and which was expressed in the Memorandum explaining Finance Bill 2022.

The guidelines issued by the CBDT addresses certain important points in the context of scope and applicability of the section. However, at the same time, it also creates certain difficulties in implementation of section 194R in the hands of taxpayer. Even after issue of CBDT guidelines, there are various areas which are not yet settled, and more clarification is required on the same. Hence, once the section becomes effective, taxpayer would have to apply due care in taking positions for implementing section 194R of the Act. In case the due care is not taken, the same may entail a litigation.

It is also expected that CBDT may amend tax audit report for seeking specific details on benefit or perquisite provided by taxpayers and details of deduction of tax under section 194R of the Act.

As general and settled principle, guidelines issued by CBDT is required to take into the account various judicial precedents of High Courts and Supreme Court, which settles question of law on subject matter. In the present case, as the way guidelines stand today, they are not in sync with the intention of legislature and hence, one may seek to challenge the constitutional validity of the same due to the reason of traveling beyond the intent of legislature and expanding scope of applicability and coverage of the section irrespective of taxability which was not intended.

It would not be a surprise if CBDT is mandated to withdraw the Circular and issue fresh guidelines or if certain guidelines get struck down.

For further analysis and discussion, you may please reach out to Mr. Yash Purohit, Manager, International Tax at yash.purohit@kcmehta.com.

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