37(1)/194R of the Income Tax Act

by Ramesh Khaitan

S. 37(1) can be dissected as under:

(i) any expenditure not being expenditure of the nature described in Ss 30 to 36;

(ii) not being in the nature of capital expenditure or personal expenditure of the assessee;

(iii) laid out or expended wholly and exclusively for the purposes of business or profession; and

(iv) it shall be allowed while computing the income chargeable under the head 'Profits and gains of business or profession'.

Explanation 1 to the S. says that any expenditure incurred by an assessee which is an offence, or which is prohibited by law shall not be treated as expenditure incurred for the purpose of business or profession and accordingly no deduction or allowance shall be made in respect of such expenditure. *The Finance (No.2) Act, 1998 inserted this Explanation 1 to S. 37(1) w.r.e.f. 01.04.1962.*

The Indian Medical Council (Professional conduct, Etiquette and Ethics) Regulations, 2002 prohibits vide regulation 6.4.1 and MCI Regulations (as amended on 14.12.2009 and 08.10.2016) the physician to receive any gifts, gratuity, commission or bonus in consideration or return for referring the patients for medical, surgical or other treatment.

- ***Himalaya Wellness Company v. DCIT (TS-361-ITAT-2022 (Bang) – TP]*** Brand reminders below INR 1000 allowed (para 7.4 of the order).
- ***Dr. Reddy's Laboratories Ltd v. Addl. CIT (2017) 53 ITR (T) 285, 325 (Hyd)***
- ***Dr. Reddy's Laboratories Ltd v. Addl. CIT (2017) 81 taxmann.com 398 (Hyd)***
- ***Apex Laboratories (P) Ltd v. DCIT [2022] 442 ITR 1 (SC)***

  "…. when acceptance of freebies is punishable by the MCI (the range of penalties and sanction extending to ban imposed on the medical practitioner), pharmaceutical companies cannot be granted the tax benefit for providing such freebies, and thereby (actively and with full knowledge) enabling the commission of the act which attracts such opprobrium"

- ***Peerless Hospitex Hospital & Research Centre Ltd v. PCIT (2022) 137 taxmann.com 359 (Cal)*** - *dealing specifically with the referral fee- though in the context of reopening of assessment.*

- ***Stemade Biotech Private Limited v. DCIT (2022)-138 taxmann.com 368 (Mum)*** [referral fee for recommending stem cell banking].
- ***Agio Pharmaceutical Ltd v. DCIT (2022) TIOL-680-ITAT – Advisory fees paid to Doctors.***

The Finance Act, 2022 has inserted Explanation 3 w.e.f. 01.04.2022 and it reads as under:

"For the **removable of doubts, it is hereby clarified** that the expression "expenditure incurred by an assessee for any purpose which is an offence, or which is prohibited by law" under Explanation 1, shall include and **shall be deemed to have always included** the expenditure incurred by an assessee, -

(i) for any purpose which is an offence under, or which is prohibited by, any law for the time being in force, in India or outside India; or

(ii) to provide any benefit or perquisite, in whatever form, to a person, whether or not carrying on a business or exercising a profession, and acceptance of such benefit or perquisite by such person is in violation of any law or rule or regulation or guideline, as the case may be, for the time being in force, governing the conduct of such person; or

(iii) to compound an offence under any law for the time being in force, in India or outside India.

Explanation 3 to S. 37(1) is to support the Explanation 1

Explanation 1 was inserted by Finance (No.2) Act, 1998 w.r.e.f. 01.04.1962. The Finance Act 2022 has inserted Explanation 3 w.e.f. 01.04.2022 whereas the Apex Court has considered and rendered its decision based on the pre-amended law. The Apex Court without taking note of Explanation 3 has rendered the decision w.r.t. Explanation 1 to S. 37(1). The interpretation of the Hon'ble Supreme Court would be applicable from 01.04.1962 i.e., from the introduction of the Income-tax Act, 1961.

- ***M. M. Aqua Technologies Ltd v. CIT [2021] 436 ITR 582 (SC)*** [rendered in the context of Explanation 3C to S. 43B inserted by the Finance Act, 2006 - *retrospective provision in a taxing Act which is "for the removal of doubts" cannot be presumed to be retrospective, if it alters or changes the law as it earlier stood].

- ***CIT v. Mahendra Mills [2000] 243 ITR 56(SC)*** *– in the context of Explanation 5 to S.32(1)(i)*

- ***DCIT v. Core Health Care Ltd 298 ITR 194 (SC)*** *- proviso inserted to sec 36(1)(iii) by the Finance Act, 2003, with effect from 1/4/2004, has to be read prospectively with effect from 1/4/2004*

- ***Explanation 2 to S. 36(va) -****Salzgitter Hydraulics (P.) Ltd v. ITO (2021) 128 taxmann.com 192 / 189 ITD 676 (Hyd – Trib.), Flying Fabrication v DCIT (2021) 133 taxmann.com 84 (Del-ITAT), Dhabriya Polywood Ltd v. ADIT (2021) 133 taxmann.com 135 (Jp.), Gopalakrishna Aswini Kumar v. ADIT (2022) 134 taxmann.com 18 (Bang), Adyar Ananda Bhavan Sweets India Pvt Ltd v ACIT (2022) 134 taxmann.com 56 (Chen-Trib)], NCC Limited v. ACIT (2021) 63 CCH 60 (Hyd), Mahadev Cold Storage v JCIT [TS-441-ITAT-2021-AGR], Insta Exhibition Pvt Ltd v Addl. CIT [TS-775-ITAT-2021-DEL], Krishna Infrastructure Pvt Ltd v PCIT [2021-TIOL-1320-ITAT-PUNE], Harendra Nath Biswas v DCIT [TS-618-ITAT-2021-KOL], Crescent Roadways Private Ltd v. DCIT [TS -510-ITAT-2021-HYD], Volantis Technologies Pvt Ltd v. DCIT [2022-TIOL-88-ITAT-BANG], Eskay Heat Transfers Pvt Ltd v. ADIT [2022-TIOL-18-ITAT-BANG], Nigam Jewels Pvt Ltd v. DCIT [2022-TIOL-67-ITAT-JAIPUR], Shri Jagmohan Singh v. DCIT [2022-TIOL-69-ITAT-CHD], Shri Virendra Kumar Ahuja v. ITO [2022-TIOL-87-ITAT-JAIPUR], Jindal Petro Foam v ACIT [2022-TIOL-121-ITAT-CHD], Megneil Tech Pvt Ltd v CIT [2022-TIOL-120-ITAT-BANG], Indian Geotechnical Services v. ACIT 2021-TIOL-1589-ITAT-DEL, Sri Yeruva Prasad Srinivasa Security Services & House Keeping Agency v. ACIT/DCIT (2022- TIOL- 218-ITAT- Bang).*

When the Parliament in its wisdom has stated that the Explanation 3 to S. 37(1) is effective from 1.04.2022 and the amendment casts a burden on the taxpayers (in the light of favourable and adverse decisions in various appellate forums) it may be given prospective operation instead of retrospective force.

The CBDT Circular No.5 dated 01.08.2012 cited the amendments brought in by *Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002* published in the Official Gazette on 14.12.2009 which prohibited the medical practitioners from accepting emoluments in the form of gifts, travel facilities, hospitality, cash or monetary grants. Acceptance of such freebies could result in range of sanctions against the medical practitioners from "*censure*" for incentives received up to Rs.5000, to removal from the Indian Medical Register or State Medical Register for periods ranging from three months to one year.

Apex Laboratories (P.) Ltd v. DCIT (2022) 135 taxmann.com 286 / 442 ITR 1 (SC)

> ***36.*** *In the present case too, the incentives (or "freebies") ....., to the doctors, had a direct result of exposing the recipients to the odium of sanctions, leading to a ban on their practice of medicine. Those sanctions are mandated by law, as they are embodied in the code of conduct and ethics, which are normative, and have legally binding effect. The conceded participation of the assessee- i.e., the provider or donor- was plainly prohibited, as far as their receipt by the medical practitioners was concerned.....*

Himalaya Drug Company v. DCIT [2021] 124 taxmann.com 252 /188 ITD 201 (Bang)/ Himalaya Drug Co. v. ACIT [2020]119 taxmann.com 421 (Bang. - Trib.) [Gifts items each costing below INR 1000 – No censure under MCI Regulations.

Rationale for introduction of 194R

S. 194R in the Act to provide that the person responsible for providing to a resident, any benefit or perquisite, whether convertible into money or not, arising from carrying out of a business or exercising of a profession by such resident, shall, ensure that deduction of tax at 10% of the value of such benefit or perquisite. Such tax is to be required to be deducted before providing such benefit or perquisite and is proposed to be applicable from 1.07.2022.

Para 137 of Finance Budget Speech

137*. It has been noticed that as a business promotion strategy, there is a tendency on businesses to pass on benefits to their agents. Such benefits are taxable in the hands of the agents. In order to track such transactions, I propose to provide for tax deduction by the person giving benefits, if the aggregate value of such benefits exceeds Rs. 20,000 during the financial year.*

Extract from Memorandum "Section 28(iv) provides that value of benefit or perquisite whether convertible into money or not arising from business or exercise of profession is to be charged as business income in the hands of recipient of such benefit or perquisite. In may cases such recipient does not report the receipt of benefits in their return of income leading to furnishing of incorrect particulars of income"

Interpretation of Guidelines

- Section 194R(2) empowers CBDT to issue guidelines for the purpose of removing the difficulty.
- Section 194R(3) states that guidelines issued shall be laid before each House of Parliament and shall be binding on tax authorities and assessee.
- In context of Circular issued under section 119, SC has uniformly held that Circular are binding on tax authorities but not on assessee if it is prejudicial or adverse to assessee [***K.P. Varghese v. ITO [1981] 131 ITR 597 (SC)].***
- Contrary, section 194R(3) specifically states Circular is binding on assessee.
- However, Circular being delegated legislature need to adhere to various judgments made criteria established by Court. Circular contrary to such principles can be struck down by Court partly or wholly.
- CBDT cannot pre-empt a judicial interpretation of the scope and ambit of a provision of the Act. Also, a circular cannot impose on the tax-payer a burden higher than what the Act itself, on a true interpretation, envisages. The task of interpretation of the laws is the exclusive domain of the courts [***UCO Bank v. CIT (1999) 237 ITR 889 (SC)***].
- Executive instructions cannot amend or supersede the statutory rules or add something therein [***Vijay Singh v. State of U.P., 2004 (4) ESC 2209 (ALL) (FB)].***

Interpretation of Guidelines

- Circulars or instructions given by the board are no doubt binding in law on the authorities under the Act but when the Supreme Court or the High Court has declared the law on the question arising for consideration, it will not be open to a Court to direct that a circular should be given effect to and not the view expressed in a decision of the Supreme Court or the High Court [***Hindustan Aeronautics Ltd. v. CIT (2000) 243 ITR 808 (SC)]***.

- Executive instructions can supplement a statute or cover areas to which the statute does not extend. But they cannot run contrary to statutory provisions or whittle down their effect….. if the statutory notification is construed as permitting the State by rules or executive instructions to prescribe other conditions for exemption, whether new or based on past practice, it is liable to be struck down on the ground of impermissible delegation of legislative power to the executive [***State of Madhya Pradesh v. G. S. Dall and Flour Mills, AIR 1991 SC 772, (1990) 1 SCR Supl. 590 (SC)***].

Extracts from **CTC v UOI [2018] 400 ITR 178 (Delhi)**

- Therefore, it **is only a competent legislature that can make a validation law to override judicial precedents and that too by actually removing the defect pointed out by such precedent. Such a power is not available to the executive**. In other words, where there is a binding judicial precedent, by virtue of Articles 141 and 144 of the Constitution, it is not open to the executive to override it unless there is an amendment to the Act by way of a validation law.

- If the ICDS is permitted, in exercise of the delegated power of the central government under Section 145 (2) of the Act, to override a governing principle recognized by the Act or the Rules or judicial precedents, it would be ultra vires the Act. It would then render the ICDS as an instance of excessive delegation of essential legislative functions.

S.194R(1). ***Any person*** responsible for providing to a ***resident***, ***any benefit or perquisite***, whether convertible into money or not, ***arising from business or the exercise of a profession***, by such resident, shall, before providing such benefit or perquisite, as the case may be, to such resident, ensure that tax has been deducted in respect of such benefit or perquisite @ 10% of the ***value or aggregate of value*** of such benefit or perquisite:

Provided that in a case where the benefit or perquisite, as the case may be, is wholly in kind or ***partly in cash and partly in kind*** but such part in cash is not sufficient to meet the liability of deduction of tax in respect of whole of such benefit or perquisite, the person responsible for providing such benefit or perquisite shall, before releasing the benefit or perquisite, ensure that tax has been paid in respect of the benefit or perquisite:

Provided further that the provisions of this Section shall not apply in case of a resident where the value or aggregate of value of the benefit or perquisite provided or likely to be provided to such resident during the financial year does not exceed INR 20,0000:

Provided also that the provisions of this Section shall not apply to a person being an individual or a Hindu undivided family, whose total sales, gross receipts or turnover does not exceed INR 1 crore in case of business or INR 50 Lacs in case of profession, during the financial year immediately preceding the financial year in which such benefit or perquisite, as the case may be, is provided by such person.

With S. 194R, if business entities gift valuable items, car, etc. to their customers instead of granting discount, the value of said gifts could be considered as benefit or perquisite arising out of business and provisions of S. 194R could be attracted. Similarly, corporates also gift valuables like vehicles, cars, etc. to their brand ambassadors, dealers, and distributors as part of sale promotion expenses. Since the said benefit is ***in kind***, tax is generally not deducted on said items. Now, in such case as well, provisions of S. 194R could be applicable.

However, deductibility of tax would have to be analysed in respect of multi-layer distribution in a chain from manufacturer to distributor, distributor to wholesaler and wholesale to retailer.

For instance, in a case, where manufacturer provides certain benefit/perquisite to the distributor, out of which, distributor is required to mandatorily pass certain benefit/perquisite to wholesaler, it would have to be examined that who would be liable to deduct tax from wholesaler– whether the manufacturer who is principally providing the benefit/perquisite or the distributor who is in direct contact with the wholesaler and provides benefit/perquisite to the wholesaler.

Further, it would have to be evaluated whether the manufacturer is required to deduct tax on the aggregate value of benefit/perquisite provided to the distributor or only on value of benefit/perquisite which the distributor can retain with it. If conservatively the Company deduct tax u/s 194R on such benefit which are meant to be passed over to wholesaler or retailer then in that case, there would be issue of taxability in the hands of distributor or issue of credit of TDS in the hands of distributor as that is not the income/benefit accrued to him.

Aids to Interpretation

1st proviso to S. 194R also discusses about cases where benefit is wholly ***in kind***, benefit is partly ***in kind*** and partly in cash.

S. 194R does not make reference to benefits or perquisites taxable under S. 28(iv) of the Act. Therefore, though the language under S. 28(iv) of the Act and S. 194R of the Act is similar, there is an anomaly that whether an assessee should refer to provisions and judicial precedence in respect of S. 28(iv) of the Act to analyse applicability of provisions of S. 194R of the Act.

The *benefits or perquisites* covered by S. 194R are those perks, benefits, amenities, or facilities, probably ***in kind***, or in a combination of cash and kind, which a resident person enjoys, pursuant to, or *in exercise of his business or profession*, in lieu of the regular consideration payable to him, in monetary terms, in exercise of such business or profession. Such benefits or perquisites are taxable as business receipts u/s 28(iv) of the Income Tax Act.

The key words in S. 194R are "***arising from***". The perquisite or benefit should be one arising from business or the exercise of a profession. Else, S. 194R is not attracted.

Black's Law Dictionary gives the following definition of the words "arising from" used in S. 28 (iv)

Arise. **To spring up, originate, to come into being** or notice; to become operative, sensible, visible, or audible; to present itself.

- ***Agra Chain Manufacturing Co. v. CIT (1978) 114 ITR 840 (All)***

To attract S. 28(iv), it is necessary that the benefit should arise from the business. That is to say, the benefit or perquisite should have originated from and be intimately connected with the business which the assessee was doing. The benefit or perquisite should spring up or come into being because of the business which the assessee was doing.

- ***CIT v. Bhavnagar Bone & Fertiliser Co. Ltd. (1987) 166 ITR 316 (Guj)***

Benefit received or receivable by a person must be one which has intimate connection with business and even if such benefit is derived by way of bounty, nevertheless it would be taxable, if accrues to it or if received by it in the course of business

- ***ITO v. Undavalli Constructions [2021] 191 ITD 749 (Visakh),***

the expression "arising from" in S. 28(*iv*) was interpreted by the Ld. CIT(A) as proximate cause or nexus. The Ld. CIT(A) had held that **before sub-S. (*iv*) of sec. 28 is invoked it is necessary to show and prove the proximate cause or nexus between the alleged benefit or perquisite and the business or profession actually carried on by the assessee.** The nexus or the proximate cause must be real, immediate and not illusionary or imaginary. The benefit or perquisite contemplated by sec. 28(*iv*) must necessarily have a live connection with the business or profession carried on by the assessee and the benefit must accrue or arise in the course of carrying on of such business or profession.

- ***Addl. CIT v. Bharat V. Patel (2018) 404 ITR 37***

  The applicability of S.28(iv) is confined to a case where there is any business or profession related to transaction involved.

- The causal connection suggests proximate cause. In other words, the business carried out by the recipient, or the profession exercised by him should the proximate cause of benefit or perquisite provided to him.
- To attract TDS u/s 194R, the benefit / perquisite should spring up or come into being to the recipient resident because of the business or profession which he was doing, and not because of the business of the provider /deductor entity. The benefit or perquisite shall originate from and be intimately connected with the business/profession of the recipient resident.
- Thus, the words "***arising from ….the exercise of a profession***" means the freebie(perquisite or benefit) springs forth or is a consequence of or results from the exercise of a profession. The words mean that the exercise of medical profession by doctor is the proximate cause of the freebie which is received by the doctor.
- No one can prescribe medicines unless he is a qualified and registered medical practitioner. Thus, these freebies (benefits or perquisites) clearly arise from exercise of the profession of a qualified and registered medical practitioner who prescribes medicines to patients in exercise of his profession.
- The proximate cause of these freebies is exercise of profession even if tainted by illegality of violation of MCI code of ethics.

The word "***business***" is one of wide import and in fiscal statutes, it must be construed in a broad rather than a restricted sense [***Mazgoan Dock Ltd v. CIT/CEPT (1958) 34 ITR 368 (SC)***].

The word "***business***" is one of wide import, the underlying idea being of continuous exercise of an activity. [***CIT v. A. Dharma Reddy (1969) 73 ITR 75 (SC)].***

Profession involves occupation requiring purely intellectual or manual skill (*CIT v. Manmohan Das (1966) 59 ITR 699 (SC).*

Meaning of "providing" benefit or perquisite to a resident.

The words "*provide*", "*provided*" and "*providing*" have several shades of meaning.

Provide means "*to supply or make available (something wanted or needed)"; to give or supply; to give someone something that they want or needed.*

CIT v. Bawa Singh Chauhan (1984) 16 Taxman 180 (Del)

The word provided means making it available for the use of the assessee. Whether the assessee actually uses them or not is irrelevant.

Templeton (Inspector of Taxes) v. Jacobs (1997) 224 ITR 151 (Ch.D)

Held no benefit is provided until the benefit in question becomes available to be enjoyed by the taxpayer in respect of which a charge to tax can arise.

The meaning of "*providing*" on stand alone basis is not much of help. It has to be understood in the context of a particular benefit or perquisite that is provided to the recipient resident.

Different stages of delivery of benefit / perquisite ?

a) A provision is made in the accounts of the provider-company for the estimated cost of foreign tours to those dealers/distributors who achieved target as of balance sheet date;
b) The dealer/distributor intimates the foreign destination he wants to proceed to and date when he wants to do so;
c) The provider-company makes payment to the tour operator and books the foreign tour;
d) The tickets are then handed over/emailed to the dealer/distributor;
e) Departure of dealer / distributor to a foreign destination.

Aids to Interpretation

Expression ***'whether convertible into money or not'*** would mean that benefit which is provided will be liable for TDS, irrespective of whether the benefit is capable of conversion into money form or not. Once the benefit itself is provided in the form of money – then provision is not attracted. In the case of ***CIT v. Mahindra & Mahindra Ltd. (2018) 404 ITR 37 (SC)*** it was held in unequivocal terms that in order to invoke S. 28(iv), the benefit which is received has to be in some other form rather than in the shape of money.

- ***CIT v. Mafatlal Gangabhai & Co. (P.) Ltd (1996) 219 ITR 644 (SC) –*** in the context of Section 40(a)(v).

S. 28(iv) can be applied when there is circumvention of income by taking or receiving income in other forms. Circumvention of income is explained in ***Helios Food Improvers (P.) Ltd. v. DCIT (2007) 14 SOT 546 (Mum)*** with the example of trader selling goods at a discounted price but receiving a gift of a car from the concerned buyer.

S.28(iv) aims at taxing fringe benefits that are availed in addition to consideration earned in carrying out a profession or while doing business ***(Rupee Finance & Management (P.) Ltd v. ACIT (2008) 120 ITD 539 (Mum).***

Sale of goods or assets at a lesser price or discount are not yielding any benefit to purchaser ***(David Dhawan v. DCIT (2005) 2 SOT 311 (Mum), ACIT v Swiftsol (I) (P.) Ltd [2018] 171 ITD 577 (Nag), Rupee Finance & Management (P.) Ltd. [2008] 120 ITD 539 (Mum).***

Section 2(24)(iv)

Since the definition of "***income***" u/s. 2(24) is an inclusive one, its ambit should be the same as that of the word "income" occurring in Entry 82 of List I of the 7th Schedule to the Constitution [*Chandra Mafatlal v. CIT (1954) 26 ITR 758 (SC), Bhagwan Dass Jain v. Union of India (1955) 28 ITR 315 (SC), Navneet Lal C. Javeri v. K. K. Sen, AAC (1965) 56 ITR 198 (SC), Elel Hotels & Investments v. Union of India (1989) 178 ITR 140 (SC), CIT v. G. R. Karthikeyan (1993) 201 ITR 866 (SC)].* The word "income" will take in any monetary return "coming in". It will take in voluntary and gratuitous payments which are connected or linked with the office, vocation or profession *[Father Ephram v. CIT (1989) 176 ITR 78 (Ker.).*

The value of any benefit or perquisite, whether convertible into money or not, obtained from a company either by a director or by a person who has a substantial interest in the company, or by a relative of the director or such person **(Limb 1)**, and any sum paid by any such company in respect of any obligation which, but for such payment, would have been payable by the director or other person aforesaid **(Limb 2)**

Points for consideration

- **Limb 2** does not form part of section 28(iv) and section 194R
- Absence of **Limb 2** will be helpful in understanding scope of section 28(iv) and section 194R.

S. 2(24) (iva)

- The expression "*benefit*" does not include enjoyment of loan or credit free of interest or at concessional rate [***CIT v. P. R. S. Oberoi (1990) 183 ITR 103 (Cal)***].
- The words "***benefit or perquisite obtained***" from a company would take in only such benefit or perquisite which the company had agreed to provide and which the person concerned could claim as of right based on such agreement and a mere advantage derived from the company without its authority or knowledge will not amount to a benefit or perquisite obtained [***CIT v. A. R. Adiakappa Chettiar (1973) 91 ITR 90 (Mad).***

Section 17(2)(iii)

the value of any benefit or amenity granted or provided free of cost or at concessional rate.

Points for consideration

• Section 17(2)(iii) qualifies the nature of benefit or amenity by restricting only to those which are provided free of cost or at concessional rate.

• Section 17(2)(vi) provides separate clause to cover any sum paid by the employer in respect of any obligation which, but for such payment, would have been payable by the assessee. This clause is missing in section 28(iv) and section 194R.

• Section 115WB defines fringe benefit to cover various categories of benefits provided by employer.

Meaning of "in kind"

1st proviso to S.194(1) refers to benefit or perquisite "in kind". What do the words "***in kind***" mean?

Kanchanganga Sea Foods Ltd. v. CIT (2010) 325 ITR 540 (SC).

Where non-resident was paid by way of share of cash of fish for assistance rendered by it.

The words "*in kind*" were interpreted in ***Meturit A. G. v. CIT (1990) 51 Taxman 289 (Kar)*** to mean goods or commodities as distinct from money. (pls also refer ***P.R. Aiyar's Advance Lexicon*** for the definition).

Meaning of benefit or perquisite

The words "***benefit***" or "***perquisite"*** have been defined in S.28(iv), which have to be read together and would draw colour from each other. Normally, 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. In this view of the matter, 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.

Meaning of *benefit*

- Black's Law Dictionary defines the expression "***benefit***" to mean advantage; profit; fruit; privilege.

- ***CIT v. Smt. Kamalini Gautam Sarabhai (1994) 208 ITR 139 (Guj)***

  The word "*benefit*" implies *an element of advantage, profit or gain*. Considering all these aspects, the word "benefit" occurring in S.2(24)(iv) would mean any advantage, gain or improvement in condition.

- ***Deewan Rahul Nanda v. DCIT (2008) 25 SOT 454 (Mum)***

  The benefit or perquisite should be of material things of life..... Irrespective of the fact whether the benefit received was in the nature of capital or whether there is any direct receipt in the transaction or whether there is any detriment to the company (provider of benefit) or not in the transaction. Where assesses, i.e., directors of a company, got benefit in the form of repairs and renovations to their own apartments at the cost of the company, amount so spent was the value of benefit.

- ***CIT v. S. Varadarajan (1966) 89 Taxmann 457 (Mad)***

<u>Meaning of Perquisite</u>

The expression '***perquisite***' is defined, by the Webster's Dictionary, as 'any casual emolument, fee or profit attached to an office or position'. Black's Law Dictionary defines perquisite as "*a privilege or benefit given to one's salary or regular wages. – often shortened to perk.*" ***(Nirmala P. Athawale v. ITO (2009) 118 ITD 373 (Mum))***

Will the pharma companies be liable to deduct TDS on freebies given to doctor under new S. 194R which is proposed by the Finance Bill, 2022?

Yes. Proposed new S. 194R engrafts the language used in S. 28(*iv*). Besides the *Explanatory Memorandum* to the Finance Bill, 2022 refers to S. 28(*iv*). With effect from 1-7-2022, pharma companies will be liable to deduct TDS if the value of any benefit or perquisite provided by them to a resident doctor exceeds Rs 20,000 in any financial year.

Will disallowance under *Explanation 1* apply if TDS is deducted under proposed S. 194R with effect from 1-7-2022?

Yes. S. 28(*iv*) and proposed S. 194R apply notwithstanding the taint of unethicality and prohibition under MCI Regulations. Taxation is neutral between legal and illegal transactions. It is settled law that by collecting tax state does not condone illegality.

Will there be double disallowance of freebies to doctors under S. 37(1) and S. 40(ia) with effect from 1-7-2022 if TDS is not deducted under S. 194R?

Disallowance under S. 40(*a*)(*ia*) of the Act operates only if expenditure incurred is otherwise deductible but for the lapse in respect of TDS. Since expenditure is not allowable under S. 37(1) due to operation under S. 37(1) thereto, there is no question of disallowance under S. 40(*a*)(*ia*).

- There could be benefits which are not capable of measurement such as loyalty points or reward points which can be encashed within a time frame.

- Applicability of S.28(iv) or otherwise which was a localized issue will now become viral due to universal applicability of TDS provisions.

- Issues are also likely for partnership firms where a partner is allowed use of residential premises, car, telephone, or is provided specific benefits (pls see ***Anandkumar v. ACIT (2022) 122 taxmann.com 252 (Mad)*** and ***Perijad Jorabian Irani v. PCIT (W.P. No. 1333 of 2021, dated 09.03.2022, Bom (HC)***. The applicability of S.28(iv) to these items have been subject matter of litigation and this litigation will now spill over to the firms.

- In the case of ***ACIT v. Ram Kripal Tripathi [(1980) 125 ITR 408 (All.)]*** disciples contributed funds for the purchase of a car for the assessee who was engaged in giving discourses on Vedanta. The disciples had collected amounts from different persons; deposited the same in the bank and out of these contributions, the car was purchased. The car was registered in the name of the assessee. The Allahabad High Court confirmed the applicability of S.28(iv) [pls also see ***CIT v. Ram Kripal Tripathi (1987) 163 ITR 716 (All***) – favourable to assessee – ***Nirmala P. Athavale v. ITO (2008) 22 SOT 197/(2009) 118 ITD 373***. Now, on these facts who should deduct TDS under S.194R?

Ms. Priyanka Chopra v. DCIT [2018] 89 taxmann.com 286 (Mumbai - Trib.)

Receipt of Toyota Car as gift for promotion of NDTV Toyota Greenathon campaign as brand ambassador is taxable under section 28(iv).

Receipt of watch of Rs. 40 lakhs as gift from company for which she had undertaken advertisements and promotional activities is taxable under section 28(iv).

ACIT v. Shahrukh Khan [2017] 84 taxmann.com 209 (Mumbai - Trib.)

Gift of Vila out of natural love and affection without any brand endorsement/advertisement for the donor cannot be said to be arising from business or profession.

CIT (TDS) v. Intas Pharmaceuticals Ltd. ~~[2021] 129 taxmann.com 347/439 ITR 692 (Guj.)~~ (2022) 137 taxmann.com 455 (SC)

Notice issued in SLP filed against order of High Court holding that where assessee-pharmaceutical company incurred expenses for providing services such as taxi services, booking of air-tickets, cost of souvenir, etc., for conferences of doctors, in view of fact that these doctors were not bound to prescribe medicines as suggested by assessee and, therefore, there existed no agency relationship between assessee and doctors, said expenses incurred by assessee for doctors could not be treated as 'commission' liable to TDS under S. 194H.

Helios Food Improvers (P.) Ltd. v. DCIT, (2007) 14 SOT 546 (Mum)

"Further, the words "benefit" or "perquisite" have been used in this sub-section, which have to be read together and would draw colour from each other. Normally, 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. In this view of the matter, the word "benefit" has also to be interpreted in the same manner i.e., at the time of execution of the business transaction, the one party should give to the other party some irretrievable benefit or advantage"

Nirmala P. Athavale v. ITO, (2009) 118 ITD 373 (Mum)

"Both the words 'benefit' and 'perquisite' refer to specific situations wherein, generally receipt of a revenue nature having attributes of income would be covered and such attribute should exist from the very beginning. To illustrate this aspect, we state that where a gift is made in lieu of paying consideration for services obtained and this fact is established, then, such amount of gift can fall within the provisions of section 28(iv). Further, the two words 'benefit' or 'perquisite' used in section 28(iv) would derive colour from each other.

In a case, where benefit or perquisite to be provided is acquired from outside market by an assessee, it needs to be seen whether the cost of acquisition can be considered as ***'value***' for purpose of deduction of tax at source or the market value of the benefit, which is distributed, has to be considered.

In another case, where the assessee itself is manufacturer, it needs to be analysed whether cost in its hands or the ultimate selling price has to be considered as 'value' for deduction of tax. It should also be noted that the ultimate selling price would also be variable since it would be subject to negotiations for discount, quantum of purchase and other terms which would differ from party to party.

How the value of benefits or perquisites arising out of business or profession, provided in kind, will be arrived at, for the purpose of deduction of tax at source? Will it be the fair market value in line with existing Rule 11U or 11UA or any other criteria?

The benefit or perquisite referred to in S. 194R is **not** the perquisite u/s 17(2), under the head salary income, paid or payable by the employer to employees, as for that perquisite u/s 17(2), another TDS S. 192 is already there. Board Circular No.4 of 16.01.2020, also mentions about TDS and perks in S. 192 is salary income.

S. 194R provisions applicable w.e.f. 1.7.2022

1. The word "**any person**" indicates that the deductor can be a resident or a non-resident.
2. ***Exemption Limit :*** *INR 20,000 in the financial year.*
3. ***Time of deduction of TDS :*** *obligation is on any person (*including company) responsible for *providing benefit or perquisite to a resident to ensure that tax has been deducted before providing such benefit or perquisite. [pls refer* ***CIT v. Hindustan Lever Ltd (2013) 39 taxmann.com 152 (Kar).***

Ss. 194B & 194S have proviso similar to 1st proviso to S.(194R). However, both Ss. 194B & 194S use "*deduct*" whereas S. 194R uses the words "*ensure that tax has been deducted*"

4. ***Time limit for deposit /Time of payment of TDS:***
   (a) On or before 30th day of April, where the income or amount is credited or paid in the month of March; and
   (b) in any other case, on or before 7 days from the end of the month in which the deduction is made.
5. ***Statement/returns to the government:*** *In Form No.26Q on or before 31st July, 31st October and 31st January for the first 3 quarters and on or before 31st May for the last quarter. All returns to be delivered in accordance with S.206 or S. 206C(5)/(5B).*
6. ***Time limit for issue of certificate of TDS and Form:*** *Form 16A within 15 days from the due date for furnishing the statement of tax deducted at source under rule 31A. TDS certificates in Form 16A have to be issued quarterly on or before 15th August, 15th November 15th February and 15th June.*

S. 194R provisions applicable w.e.f. 1.7.2022

7. **Can AO's certificate for deduction at lower rate or non-deduction be obtained?:** No.
8. **Is payee's declaration for non –deduction admissible? (S. 197A)**: No.
9. **Rate of TDS w.e.f. 1.7.2022 :** 10% of the value or aggregate of value of benefit or perquisite provided. *11. No surcharge or health and education cess shall be added to the above rates.*
10. *The rate of TDS will be 20% in all cases, if PAN is not quoted by the deductee. [S.206AA]*
11. *Further as per S.206AB, notwithstanding anything contained in any other provisions of this Act, where tax is required to be deducted at source under S. on any sum or income or amount paid, or payable or credited by a person to a specified person, the tax shall be deducted at the higher of the following rates, namely –*
    (i) At twice the rate specified in the relevant provision of the Act; or
    (ii) at twice the rate or rates in force; or
    (iii) at the rate of 5%.

However, if in this case, PAN is also not provided, the tax shall be deducted at higher of the two rates provided in this S. and in S. 206AA. Thus, in this case the TDS shall also be 20%.

S. 194R provisions applicable w.e.f. 1.7.2022

- *Tax deduction account no. (TAN) under S.203A.*
- *All certificates to be furnished u/s 203.*

***Consequences of failure to deduct tax and / or pay tax, furnish returns, etc*.**

I. the payer would be treated as an assessee in default and an Order u/s. 201(1) for treating the assessee in default can be passed.
II. where an assessee defaults in fulfillment of obligation to deduct tax at source and pay to the credit of the Central Government within the prescribed time, he is liable for penalty u/s 221 and the total amount of penalty shall not exceed the amount of tax in arrears.
III. besides S.271C provides for imposition of penalty on any person who fails to deduct tax at source in contravention of Ss. 192 to 196D and the penalty could be equal to the amount of tax which should have been deducted at source.
IV. All the penalties u/s. 201(1), 221 and 271C can run parallelly.
V. Failure to comply with S.203A regarding tax deduction account no.- penalty upto Rs.10,000/-
VI. Failure to issue certificates or submit return /statement – liable for fee and penalty u/s. 272A(2)(g) (failure to issue TDS /TCS certificate), fee u/s. 234E and penalty u/s. 271H(1)(a) (failure to submit quarterly TDS/TCS return) and penalty u/s. 271H(1)(b) (quarterly TDS/TCS return furnished with incorrect information).

Impact Analysis of S. 194R -On Physician

Description	Remarks on TDS under S. 194R
Brand Reminders / Medical Devices – In Clinic – Each costing less than Rs. 1000. (For Clinical items such as pens, writing pads etc.)	194R applicable. However, a stand can be taken that the total amount to an HCP will not cross Rs. 20,000 in a year and hence 194R not applicable.
Brand Reminders – Non-clinic	194R applicable
MEDICAL CONFERENCES - Travel and Hospitality	194R Applicable
CME PROGRAMS - Travel and Hospitality	194R Applicable
CME PROGRAMS - Speaker Fees, Banquet Charges, Books, Journals	***Not applicable on Speakers Fees*** -194J will be applicable. On Medical Books, Journal Subscription etc. - 194R will be applicable
CAMP EXPENSES	194J will be applicable
MEDICAL CONSULTANCY & MEDICAL SURVEY	194J will be applicable

Impact Analysis of S. 194R -On Physician

Description	Remarks on TDS under S. 194R
CONFERENCE -REGISTRATION (Domestic or Foreign)	If registration fee along with other benefit exceeds Rs 20,000 per FY per doctor, then 194R will be applicable
MEDICAL CONFERENCE-SPONSORSHIP (Domestic or Foreign) (Conference /event Sponsorship /Session Sponsor/Stall/Banners/Exhibition/ Advertisement in Books/Journals etc., in India.)	Not applicable as no benefit to Doctors
ACADEMIC / EDUCATIONAL GRANT	194R applicable
HCP - Train the trainer program - Travel /Hospitality	194R may not be applicable if benefit is passed on to the society (including doctors) for advancement of new medical diagnosis.
Physician Sample – Not for sale	194R may be applicable but clarification sought from CBDT.
Consultancy / Advisory Fees to Doctors or Physicians	194R not applicable. 194J would be applicable.

Impact Analysis of S. 194R -On Distributors

Various Schemes	Remarks on TDS under S. 194R
Distributors foreign trip/Gift program for large distributors if they achieve certain threshold turnover.	194R applicable
Free gifts (e.g., buy 10 Item get 1 Dove Soap Free).	194R applicable
Trade Discount	FAQ no. 60 of CBDT Circular dated 8/2005, sales or trade discount are in nature of selling expenses and represent lesser realisation of sales price itself. Hence, discount is in the nature of selling expenses and not a benefit or perquisite. Also, such discount may be considered as a monetary benefit and therefore, not subject to TDS under S. 194R. Given the intent of S. 194R, since the trade discounts will be reduced from cost of purchases by the purchaser, it will be captured within the scope of taxable income of purchaser and no separate addition is required u/s 28(iv) and accordingly, better view is that TDS is not required u/s 194R.
1 Box Free on 5 Boxes/5 Strips Free On 45 Strips	194R not applicable, as it is in line with Trade Discounts.

Issues subject to clarification from Government

- The terms '*benefits*' and '*perquisites*' has not been separately defined for the purposes of S. 194R and these words are open ended, thus clarity on its coverage & scope is required.

- The basis of determining the value of benefit / perquisite has not been provided where they could not be converted in money.

- In case of non-monetary benefits / perquisites, the provider has been made liable to ensure that TDS is paid on benefit / perquisite before releasing benefits / perquisites. The proposed provisions do not clearly state as to how the provider will ensure this.

- Terms of loyalty program needs to be understood in detail to determine whether benefit arises irretrievably to dealer. If there is any contingency, TDS should be deducted at the time when real income accrues to dealer [***CIT v Excel Industries Ltd [2013] 38 taxmann.com 100 (SC)].***

- TDS is deductible on reimbursement of expenses ***Circular no.715 dated 08.08.1995 issued under S. 194C. Timken India Ltd. in re (2006) 143 Taxman 409 (AAR)***

Questions dealing with Scope

Question 1: Is it necessary that the person providing benefit or perquisite needs to check if the amount is taxable under clause (iv) of section 28 of the Act, before deducting tax under section 194R of the Act?

- Deductor is not required to check whether the amount of benefit or perquisite that he is providing would be taxable in the hands of recipient under section 28(iv)
- There is no further requirement to check whether the amount is taxable in the hands of the recipient or under which section it is taxable.

Analysis of Question No 1

- **Extract from FM Speech**

"It has been noticed that as a business promotion strategy, there is a tendency on businesses to pass on benefits to their agents. Such benefits are taxable in the hands of the agents. In order to track such transactions, I propose to provide for tax deduction by the person giving benefits, if the aggregate value of such benefits exceeds` 20,000 during the financial year."

- **Extract from Memorandum**

"Section 28(iv) provides that value of benefit or perquisite whether convertible into money or not arising from business or exercise of profession is to be charged as business income in the hands of recipient of such benefit or perquisite. ***In may cases such recipient does not report the receipt of benefits in their return of income leading to furnishing of incorrect particulars of income.***

Accordingly, in order to widen and deepen the tax base, it is proposed to insert a new section 194R to the Act ".

Analysis of Question No 1

- Speech of FM or Explanatory Memorandum can be referred to infer intention of legislature
    - Rangaswamy Vs. CWT [1996] 221 ITR 39 (Mad.)
    - Sole Trustee Loka Shikshana Trust Vs. CIT [1975] 101 ITR 234 (SC)
- Circular makes applicability of section 194R independent of taxability under section 28(iv). It enlarges the scope beyond what is envisaged by Memorandum.
- Section 28 starts by stating “income shall be chargeable to income-tax under the head "Profits and gains of business or profession“. Aspect of benefit or perquisite being “income” is sine qua none for clause (iv) of section 28 to be triggered.
- Circular makes section 194R applicable dehors of taxability in hands of recipient. It enlarges the scope of section far beyond what is intended by the legislature.
- Section 194R requires benefit or perquisite “arising from business or the exercise of profession”. Deductor needs to verify this aspect before applying section 194R.
- Thus, if benefit is not arising from business or exercise of profession, TDS under section 194R need not be deducted e.g. Credit card reward points to customers, air miles redemption.
- This fact is also not negated by Circular.

Question 2: Is it necessary that the benefit or perquisite must be in kind for section 194R of the Act to operate?

- Tax under section 194R is required to be deducted whether benefit or perquisite is in cash or in kind.
- Relies on proviso to section 194R to state section 194R clearly brings within its scope the situation where the benefit or perquisite is in cash or in kind or partly in cash or partly in kind.

Analysis of Question No 2

- Circular makes section 194R applicable even if benefit or perquisite is provided in cash. Limited exception are carved out in Qs No 4.

Provisions of Act	Interpretation by Supreme Court
Section 28(iv) the value of any benefit or perquisite, whether convertible into money or not, arising from business or the exercise of a profession.	in order to invoke the provision of section 28(iv), the benefit which is received has to be in some other form rather than in the shape of money [CIT v Mahindra & Mahindra Ltd. [2018] 404 ITR 1 (SC)].
Section 40(a)(v) any expenditure which results directly or indirectly in the provision of any benefit or amenity or perquisite, whether convertible into money or not, to an employee.	"The language employed in the sub-clause is not capable to taking within its ambit cash payments made to the employees, by the assessee. These cash payments will, of course, be treated as salary paid to the employees and will be subject to the limits/ceiling, if any, in that behalf. But they cannot be brought within the purview of the words "any expenditure which results directly or indirectly in the provision of any benefit or amenity or perquisite" -more so because of the following words 'whether convertible into money or not'. CIT vs. Mafatlal Gangabhai & Co. (P) Ltd. (1996) 219 ITR 644 (SC)].

- Supreme Court in context of identical language as used in section 194R have held that provision does not include cash benefit or perquisite. Circular runs contrary to Supreme Court decision.
- By virtue of Articles 141 and 144 of the Constitution, it is not open to the executive to override decision of Supreme Court unless there is an amendment to the Act [See CTC v UOI and other decisions in earlier slides].
- Section 194R(2) permits CBDT to issue guidelines for the purpose of removing difficulty. An interpretation contrary to Supreme Court ruling is beyond the scope of delegated legislature.

Proviso to section 194R

"Provided that in a case where the benefit or perquisite, as the case may be, is **wholly in kind** or **partly in cash and partly in kind** but such part in cash is not sufficient to meet the liability of deduction of tax in respect of whole of such benefit or perquisite, the person responsible for providing such benefit or perquisite shall, before releasing the benefit or perquisite, ensure that tax required to be deducted has been paid in respect of the benefit or perquisite:

Interpretation of Proviso by Circular

This proviso clearly indicates the intent of legislature that there could also be situations where **benefit or perquisite is wholly in kind** or partly in cash and partly in kind. Thus, section 194R of the Act clearly **brings in its scope** the situation **where the benefit or perquisite is in kind** or partly in cash or partly in kind

- Proviso to section 194R deals with a situation where benefit or perquisite is wholly in kind or partly in cash and partly in kind. It does not deal with a situation where benefit or perquisite is given in cash only as interpreted by Circular.
- Intention of proviso is to make deduct or responsible for TDS even if benefit is in kind. This proviso can be said to be clarificatory in nature [Refer Kanchanganga Sea Foods Ltd v CIT [2010] 325 ITR 540 (SC) where similar conclusion was reached in absence of similar proviso in section 195].
- Sole reliance on proviso to reach to conclusion that benefit given solely in cash is covered under Section 194R requires reconsideration.

Question 3 : Is there any requirement to deduct tax under section 194R of the Act, when the benefit or perquisite is in the form of capital asset?

Asset given as benefit or perquisite may be capital asset in general sense of the term like

Analysis of Question No 3

- Reliance is placed on decision in context of section 28(iv) to support capital asset is taxable in hands of recipient and subject to TDS.
- Once income is taxed, issue arises whether recipient can claim depreciation or claim cost base on the valuation taken as base for the purpose of section 194R.
- There is no explicit provision which grants cost benefit. However, under general principles value adopted for TDS under section 194R should be taken as cost base of asset.
    - CIT v Groz-Beckert Saboo Ltd [1979] 116 ITR 125 (SC)
    - Kalooram Govindram v. CIT, (1965) 57 ITR 335 (SC)

CS 1 – Waiver of loan

Facts of the case	Circular

• Bank Co had granted Rs. 100 crs of loan to ICO for purchase of capital asset.
• ICO is unable to repay loan and is under IBC proceeding
• Following options are possible as per resolution plan
  • Option 1 – ICO pays Rs. 50 crs and Bank Co waives its right for balance
  • Option 2 – Bank Co assigns loan to Buyer Co for Rs. 50 Crs
	• As per Circular
	  • Benefit is cash is covered under section 194R
	  • Section 194R applies to capital receipt
	  • Section 194R applies even if amount is not taxable in hands of recipient
	  • If benefit is in kind, deductor is required to gross up taxes (Refer Qs 9)

- Option 1: – ICO pays Rs. 50 crs and Bank Co waives its right for balance
  - Issue arises whether such benefit can be said to arise in course of business or profession.
  - Is Bank Co required to deduct tax? Since it is waiver of loan should it be considered as benefit in kind.
  - Amount is not taxable in hands of recipient as per SC decision in case of M&M.
  - Assuming, Bank Co does not deduct tax can Bank Co be held to be assessee in default since amount is not taxable in hands of recipient? How will section 201 and section 201(1A) apply? Section 40(ia) applies only if ‘sum is payable to resident’. In case of waiver there is no sum payable.

CS 1 – Waiver of loan

Option 2 - Bank Co assigns loan to Buyer Co for Rs 50 Crs

- ICO continues to owe Rs 100 crs to Buyer Co and hence there is no benefit to ICO.
- Can it be said that for Buyer Co the benefit is not arising in course of business or profession?
- Even if section 194R applies, benefit if at all arises when ICO pays to Buyer Co over and above Rs 50 crs

Other issues

- Applicability of section 194R is likely to create uncertainty in following illustrative cases
    - Bad debts written off
    - Loan given to sister concern at concessional rate
    - Demurrage on account of damage to goods or late delivery
    - Credit period beyond normal business practice
    - Obtaining interest rate on favourable terms
    - Non charging of corporate guarantee from subsidiary

Can Circular prescribe TDS even on items which are not chargeable to tax under section 4 read with section 5? Section 194C/194J/196D which refers to "any sum" nonetheless deals with income taxable under Act.

Sales and cash discount

Question 4 : Whether sale discount, cash discount and rebates are benefit or perquisite ?

- Sales discounts, cash discount or rebates allowed to customers from the listed retail price represents lesser realization of the sale price itself. To that extent purchase price of customer is also reduced.

- Logically these are also benefits though related to sales/purchase. Since TDS under section 194R is applicable on all forms of benefit/perquisite tax is required to be deduced. However, it is seen that subjecting these to tax deduction would put seller to difficulty.

- No TDS to be deducted under section 194R.

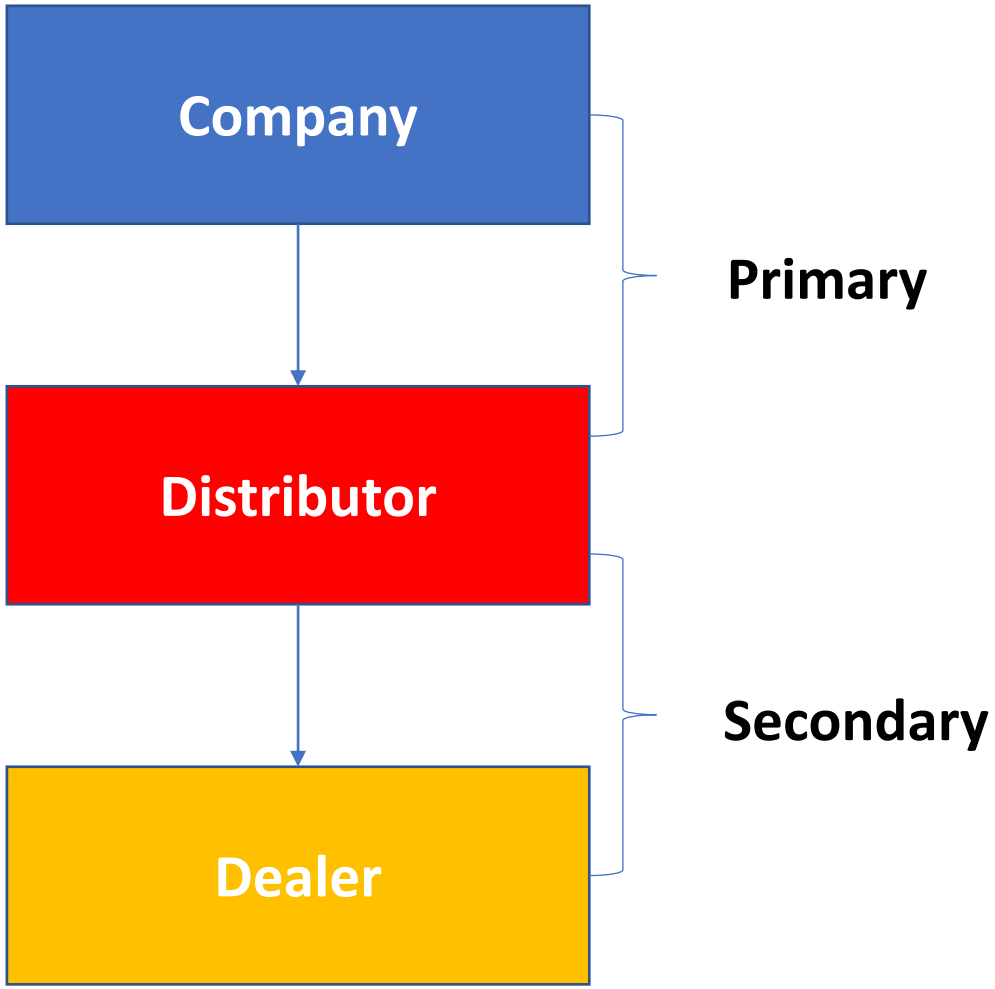
- Section 194R applies only if benefit or perquisite arises from business or profession. As rightly stated in Circular, it represents lesser realization of the sale price itself.

- Subsequently para which states that logically discounts are benefits and section 194R applies does not take into consideration that there is not benefit which arises to the business at the time of purchase.

- Benefit arises at the time of sale of goods which is subject to tax.

- Sales discount should include both cash and volume discount.

CS 2 - End of season sale



Scheme

- Company controls price in the entire supply chain.
- Distributor shall purchase the products at the rates which will be fixed by Company.
- Distributor undertakes that in respect of supplies to be made by it to dealer it shall not charge prices exceeding the prices recommended by Company.
- Fixed margin is given to Distributor.
- Company devises end of season sale by reducing retail price of products.
- Distributors are given credit notes which distributor is obligated to pass on to dealers.

CS 2 – End of season sales

- Circular is not clear whether sales or cash discount should be at the time of sale or benefit can apply even in case of discount given after sale.

- Circular States –No tax is required to be deducted under section 194R of the Act on sales discount, cash discount and rebates allowed to customers.

- Thus, benefit of Circular should be available in case where price is reduced after first sale through credit notes.

- From business standpoint, benefit arises only when product is sold and not purchase of same at lesser price.

CS 3 – Finance Scheme

Scheme	Nature of Incentive	Example

Cash back scheme	• Standard credit period given to distributors/retailers
	• Distributor/retailers are given additional discount if payment is made ahead of credit period
		• Cash back on pro-rata basis on standard credit days of 60
		  • 16 days -2.5 %
		  • 30 days -1.8%
		  • 45 days -1%

- Section 194R gets triggered only if benefit or value arises from business or the exercise of a profession.
- In present context, transaction of sale and discount on early payment should be treated separately. Accordingly, it may not be correct to say it fits within sales discount or cash discount which reduces purchase price. Thus, it does not directly fall within the exception carved out by Circular.
- Nonetheless, early payment discount should be benefit or value arising in course of business. Arguably, such benefit or perquisite should be real benefit or perquisite and cannot be hypothetical. This will be true even if Circular makes section 194R applicable dehors of section 28(iv) which requires satisfaction of "income". [See CIT v Excel Industries Ltd [2013] 38 taxmann.com 100 (SC)].
- It can also be argued that fair value of benefit (i.e. discount) gets set off by opportunity cost of paying early and thus there is no amount taxable [See Miss Dhun Dadabhoy Kapadia v CIT [1967] 63 ITR 651 (SC)].

Example in Circular

Example - section 194R not applicable

- Seller is selling its items from its stock in trade to a buyer
- The seller offers two items free with purchase of 10 items
- In substance, seller is actually selling 12 items for price of 10 items
- No tax is required to be deducted under section 194R
- Situation is different when free samples are given and the above relation would not apply to a situation of free samples

Example - section 194R applicable

Relaxation should be extended to other benefits provided by seller in connection with its sale.

- When a person gives incentives (other than discount, rebate) in the form of cash or kind such as car, TV, computers, gold coin, mobile phone etc
- When a person sponsors a trip for the recipient and his/her relatives upon achieving certain targets
- When a person provides free ticket for an event
- When a person gives medicine samples free to medical practitioners

Relaxation provided from non-deduction of tax for sales and rebate is only on those items and should not be extended to others.

Analysis of example

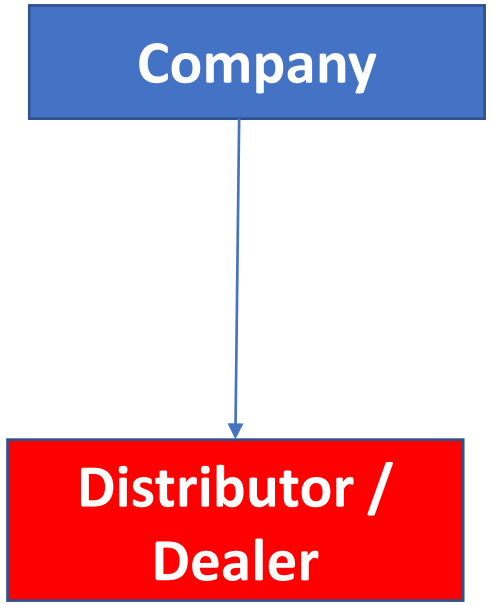
- Exemption given by Circular are more of clarificatory in nature. Even without such exception on legal interpretation similar conclusion was possible. Buy one get one free is a promotional acronym which in substance reflects purchase of items at concessional price.

- Circular caveats itself by use of words “is selling its items from stock in trade of dealer”. Statement to the effect that situation is different when free samples are given, and the above relation would not apply to a situation of free samples makes law furthermore difficult to interpret.

- Statement to the effect that relation should be extended to other benefits provided by seller in connection with its sale makes Circular vague. Meaning of “in connection with sale” is not clear. Example which follows indicates that incentives given on achievement of target seems to be covered.

- Dividing line seems to be that benefit or perquisite provided on achievement of milestone which is in addition to benefit provided at the time of purchase seems to be covered under section 194R.

CS 4 -Buy one get one free



- Buy more save more

Scheme

- Sales promotion strategy to supply extra packs of goods along with their regular supply quantity
  - Get 30 gram extra at cost of 100 grms
  - Get one Cooker along with One box of 100 pieces of cutlery
  - Get 10 gram gold coin on purchase of Rs 10 lakhs
- MRP would be printed one each freebie and there is no restriction for sale or self consumption.
- Distributor can pass the benefit or keep with themselves

CS 4 -Buy one get one free

- First incentive get 30 grams extra at cost of 100 grams seems to be covered by Circular.
- Subsequent schemes deals with a case where Manufacturer is distributing items free which is not part of stock in trade in the sense that Manufacturer does not deal with those items.
- Further, these items are given at the time of purchase itself and is not dependent upon achieving any target.
- Logic of exclusion stated is “in substance, the seller is actually selling 12 items at a price of 10 grams”. This indicates that in promotional schemes substance of the transaction needs to be seen and not the nomenclature.
- It is possible to suggest that similar logic should be applied to other two schemes as well. From Buyer perspective, commercially, consolidated price is paid inclusive of product and freebie. It cannot be said that “cooker” or “gold coin” is freebie as it is given as part of purchase itself.

- **Mark and Spencer PLC v Revenue and Customs UT/2018/0067**

“The position became even clearer when account was taken of the economic and commercial reality of the transaction. Adopting the approach of Lord Neuberger in Secret Hotels 2 and looking beyond the labels attached by M&S, the wine was not being supplied as a gift or for nil consideration. **Applying what Lord Neuberger described as “commercial common sense” the term “free” was clearly being used in a marketing sense, as in “buy two get one free” promotion. The economic and commercial reality was that M&S was offering a package of items –dine in for 2 for £10 with free wine – at an attractive discount to their aggregate shelf price if bought separately”**

GST Circular No. 92/11/2019-GST dated 7 March 2019

“Sometimes, companies announce offers like ‘Buy One, Get One free‟ For example, buy one soap and get one soap free or Get one tooth brush free along with the purchase of tooth paste. As per sub-clause (a) of sub-section (1) of section 7 of the said Act, the goods or services which are supplied free of cost (without any consideration) shall not be treated as supply under GST (except in case of activities mentioned in Schedule I of the said Act). It may appear at first glance that in case of offers like Buy One Get One Free, one item is being supplied free of cost without any consideration. **In fact, it is not an individual supply of free goods but a case of two or more individual supplies where a single price is being charged for the entire supply. It can at best be treated as supplying two goods for the price of one”**

CS 5 – Zero Cost EMI

Incentive Policy	Analysis
• XYZ offers its white goods like ACs, television, refrigerator, laptop etc at Zero Cost EMI. • Customer buys the product and pays in 12 monthly equal instalment without interest. • Is this benefit or perquisite taxable under section 194R? • Such schemes are also prevalent in automobile, real estate, e-commerce portals.	• RBI 2013 Circular has stated that zero percent interest on EMI is not in existence (Refer Next slide). • Either customer foregoes discount and pays zero cost EMI or price of interest is built in the product. Thus there is no benefit or perquisite in real terms. • Even otherwise, such offers are given to end customer. It may be possible to argue that they are not in business or profession (if GST credit is not provided)

Analysis

- Qs 4 accepts that substance of the transaction needs to be seen. In real life there are no free lunches and zero cost EMI is only a marketing scheme to attract customer where discount is camouflaged as zero cost EMI

Circular

Question 5 – How is the valuation of benefit/perquisite required to be carried out?

The valuation would be based on fair market value of the benefit or perquisite except in following cases –

i. The benefit/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.
ii. The benefit/perquisite provider manufactures such items given as benefit/perquisite, then the price that it charges to its customers for such items shall be the value of such benefit/perquisite.

It is further clarified that GST will not be included for the purposes of valuation of benefit/perquisite for TDS under section 194R of the Act.

Valuation of perquisite

- Circular provides valuation mechanism by valuing benefit/perquisite equivalent to FMV except in suggested cases.
- Reference to 'goods' should be read as inclusive of 'services'.
- Section 194R as per Memorandum was meant to be complementary to section 28(iv). In context of section 28(iv), Tribunal in following cases have disregarded the proposition of value of benefit or perquisite equivalent to fair market value (as prescribed by Circular)
  - ACIT v Swiftsol (I) (P.) Ltd [2018] 171 ITD 577 (Nagpur)
  - Rupee Finance & Management (P.) Ltd. [2008] 120 ITD 539 (Mumbai)

- TDS under section 194R will be reflected as income of recipient. Recipient may not agree with deductor's valuation yardstick. Valuation prescribed under section 194R will not be binding on recipient offering income under provision of Act.

- Section 194R valuation applies irrespective of the fact whether parties are AEs, value of transaction etc.

- Valuation guidelines are fictional and arbitrary. It does not accord to common understanding of valuation. Especially in case of manufactured goods, valuation can be cost of production of goods.

- Section 194R(2) empowers CBDT to issue guidelines for removal of difficulties. Attempt to prescribe valuation norms contrary to legal interpretation provided by Tribunal can be treated as overreach by Circular.

The benefit/perquisite provider has purchased the benefit/perquisite before providing it to the recipient. In that case, the purchase price shall be the value for such benefit/perquisite [Limb (i)]

- Whether purchase price means basic purchase price or even cost incurred like freight, travel, insurance, courier etc should also be included?
- Arguably, GST should be excluded even if input credit is denied to deductor in terms of Section 17 (5)(h) of the CGST Act.
- Whether line by line reconciliation with purchase cost is required or monthly average cost should suffice?

The benefit/perquisite provider manufactures such items given as benefit/perquisite, then the price that it charges to its customers for such items shall be the value for such benefit/perquisite [Limb (i)]

- Whether goods manufactured from sub-contractor will fall in Limb (i) or Limb (ii)?
- Meaning of price charges to customer. Price charged depends upon multiple factors ; price charged to distributor v/s retailer v/s/ customer; price charged during festive season; volume and quantitative difference;
- How to value items which involves both Limb (i) and Limb (iii) e.g. in case of corporate gifting Company may give its product and also purchase some third-party product as part of gift hamper.

Circular

Question 6 –Many a times a social media influencer is given a product of a manufacturing company so that he can use that product and make audio/video to speak about that product in social media. Is this product given to such influencer a benefit or perquisite?

Whether this is benefit or perquisite will depend upon the facts of the case. In case of benefit or perquisite being a product like car, mobile, outfit, cosmetics etc and if the product is returned to the manufacturing company after using the purpose of rendering service, then no TDS under section 194R.

However, if the product is retained then it will be in nature of benefit/perquisite and tax is required to be deducted.

Analysis

- Circular acknowledges the fact that whether subject proper is benefit or perquisite depends upon facts and circumstances of the case.
- Circular deals with tangible goods where it is possible to return. Items which are consumable in nature (e.g. food bloggers, movie blogger etc) is not dealt with by Circular
- Importance of 'factual aspect' in Circular may support a view that if item by its nature cannot be returned but is subject matter of review should not fall under section 194R
- Returning of product even in dilapidated stage should meet the requirement of Circular. Product should be returned within reasonable period (even though not stated in Circular)
- It may be possible in some case, cost of returning product may be more cumbersome. In such case, whether declaration of disposal of product after review suffice?
- Can purchase of product after specific period at token price by influencer be subject to TDS? Since Company does not deal in secondhand products how valuation rules will work?

CS: Point of sale

Scheme	Analysis

• ABC is cellphone manufacturer. It provides following to retailers to promote its products
  • Pop display stand
  • Display phone for user experience
  • Selfie stand
 	
• Title of goods remains with retailer. Retailer is obligated to use goods for display only.
 	
• Only after reasonable period, it is sold to retailer at nominal price.
	• Since title continues to be with Manufacturer it cannot be said to be freebie.
	
	• Situation can be said to be comparable to influencer example where rather than returning goods, it is purchased by Distributor

Physician samples

Guidelines by Circular

- Section 194R applies when a person gives medicine samples free to medical practioners.
- Free medicine samples provided by a company to a doctor who is an employee of a hospital. The TDS under section 194R of the Act is required to be deducted by the company in the hands of hospital as the benefit/perquisite is provided to the doctor on account of him being employee of the hospital.
- Thus, in substance, the benefit/perquisite is provided to the hospital. The hospital may subsequently treat this benefit/perquisite as the perquisite given to its employees under section 17 of the Act and deduct tax under section 192.
- It is first taxable in hands of hospital and then allowed as deduction as salary expenditure. Thus, amount is ultimately taxed in hands of employee.
- Similarly, tax is required to be deducted under section 194R if the benefit or perquisite is provided to a doctor who is working as consultant in hospital.
- To remove difficulty, an alternative, the original benefit or perquisite provided may deduct tax under section 194R in the case of consultant as recipient.
- Section 194R shall not apply if benefit or perquisite is being provided to Government entity, like hospital, not carrying on business or profession.
- Threshold of Rs 20,000 is qua hospital and not doctor.

Analysis of physician samples

- Circular treats physician samples as perquisite and benefit.
- It is treated as benefit or perquisite in the hands of hospital where doctor is employed as employee or consultant.
- Having treated as income, deduction is granted if tax is deducted under section 17 in hands of employee or section 194R in hands of consultant.
- Having treated as income in hands of hospital, deduction will be granted if tax is deducted by Hospital in hands of employee or consultant.

Analysis of physician samples

- As per Rule 96(ix) of the Drugs & Cosmetics Rules, 1995, every drug intended for distribution to the medical practitioners as a free sample is required to contain a label on the container with the words "physician's sample Not to be Sold“.

- Sale of physician sample is offense as per Sections 18(a)(VI) and 27(d) of Drugs and Cosmetics Act, 1940 read with Rule 65(18) of Drugs and Cosmetics Rule, 1945. It can entail fine or imprisonment depending upon nature of offense.

- Free samples are to be distributed by Pharma companies in accordance with Uniform Code of Pharmaceuticals Marketing Practices released by Ministry of Chemicals, Fertilizers and Department of Pharmaceuticals.

- Uniform Code of Pharmaceuticals Marketing Practices released by Ministry of Chemicals, Fertilizers and Department of Pharmaceuticals stipulates following conditions:
  - Such samples are provided on an exceptional basis only (see (ii) to (viii) below) and for the purpose of acquiring experience in dealing with such a product.
  - Such sample pack shall be limited to prescribed dosages for three patient for required course treatment.
  - Any supply of such samples must be in response to a signed and dated request from the recipient.
  - An adequate system of control and accountability must be maintained in respect of the supply of such samples.
  - Each sample pack must not be larger than the smallest pack present in the market.

- Uniform Code of Pharmaceuticals Marketing Practices released by Ministry of Chemicals, Fertilizers and Department of Pharmaceuticals stipulates following conditions:
  - Each sample shall be marked “free medical sample –not for sale” or bear another legend of analogous meaning.
  - Each sample shall be accompanied by a copy of the most up to date version of the Product information (as required in Drug and Cosmetic Act, 1940) relating to that product.

- The companies will have to maintain details such as product name, doctor name, quantity of sample given, Date of supply of free samples distributed to healthcare practitioners etc.
- Based on above, it can be contended that there is no benefit or value arising from business or exercise of profession.

Valuation of physician samples

- Qs 5 requires that for manufactured goods, price that it charges to its customer for such items shall be value for such perquisite/benefit.

- Can it be argued that since goods are not for sale, price which manufacturer charges is zero and accordingly nothing is taxable.

- View 1: Price charged is zero and nothing is taxable

    - Law requires adoption of price that manufacturer charges to its customer for such items shall be value for such perquisite/benefit. Reference to such items indicates that it should be exactly same and identical. Since goods cannot be sold, price charged is zero.
    - Goods sold are for medical use and not consumption and thus cannot be compared with goods sold to public.
    - Doctor derives no benefit as he does not consume sample.

- View 1: Price charged to distributor should be value for section 194R

    - The word 'such goods' means that the goods in question must be similar or identical to and have same quality or character to the goods sold and delivered.
    - Physician samples must be strictly identical to the goods which are cleared on sale in the wholesale trade. By distributing physician samples freely, the assessee represents to the physician that the product same physical and chemical properties, composition, potency, etc.
    - If the physician samples are not similar or identical to the goods that are sold in the wholesale trade, then the consequences will be disastrous, because the physicians prescribe medicines based on the free samples supplied by the assessee.

Valuation of physician samples

- View 1: Price charged to distributor should be value for section 194R
    - The fact that the physician samples may be distributed in a different pack or in a different bottle would not make the physicians samples different from the goods sold in the open market. The difference in the size or quantity may entitle the assessee to some adjustment in the value, however, that would not make the physicians samples to be distinct from the goods sold in the open market.

- Valuation of physician sample has been subject matter of debate in Central Excise law. Section 4(1)(b) read with Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 on pro-rata basis (subject to adjustment for size & pack etc.) Circular 915/5/2010 and Supreme Court decision Madley Pharmaceuticals Pvt. Ltd., Vs. CCE, Daman 2011 (263) ELT 641 (SC).

- Central Excise law provides valuation rules like Circular and thus, supports View 2. However, conclusion reached under Central Excise law may not apply automatically as there was specific provision in law itself dealing with valuation.

- Further, benefit or perquisite is qualified by ‘arising from business or exercise of profession’. Thus, automatic application of Central Excise law may not be permissible.

Exemption to Government hospital

- Circular states section 194R shall not apply if benefit or perquisite is being provided to a Government entity, like Government hospital, not carrying on business or profession.

- Following question arises:

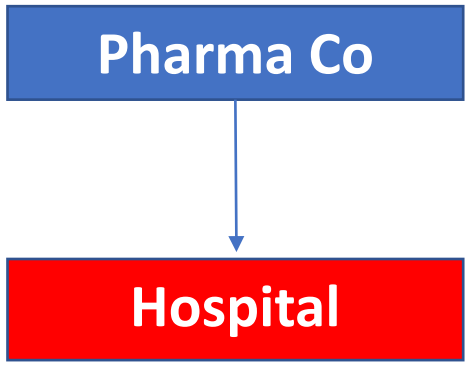
- Whether exemption is provided because recipient is Government entity or because Government hospital does not carry-on business or profession?

- Whether exemption is available to Government hospital from TDS when they distribute free samples to hospital doctors?

- Meaning of Government entity.

- Can similar benefit be extended to other hospital exempt under section 2(15). Proviso to section 2(15) denies exemption if activity involves carrying of business.

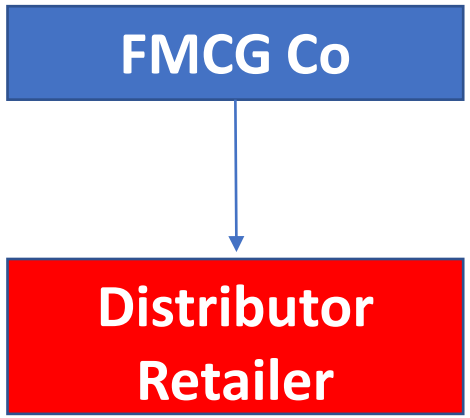
Analysis of physician samples



Circular –Challenges in implementation

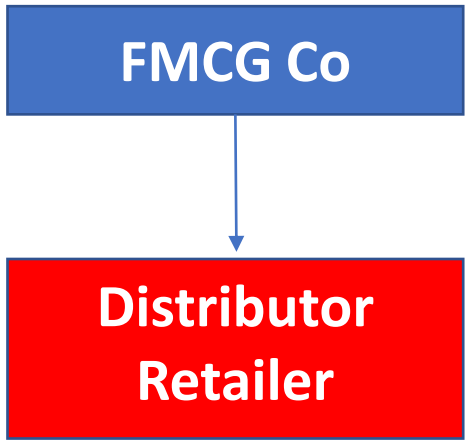
- Samples are benefit or perquisite in kind. Accordingly Pharma Co will have to gross up taxes.
- For valuation, MRP is price which it charges to its customers for such items.
    - Should it be price charged to first level distributor or MRP charged to end consumer of medicine.
- Hospital will again be required to gross up tax as benefit is in kind.
    - On what value TDS should be deducted? Free sample are neither bought or manufactured by hospital and cannot be sold to have a fair market value.
- Assuming doctor (who is consultant in hospital) gives sample to patient, will he be allowed deduction as expenditure?
- If doctor (who is salaried employee in hospital) gives sample to patient, there is no provision in law to give deduction.

Obligation to pass on to customer



Scheme

- FMCG Co introduces new product. Small quantity of new product is given along with purchase of existing product.
- Purpose is to market new product. It also appoints survey agencies which interviews target customers and gives survey report to Company.
- Distributor is obligated to pass the same to retailer and retailer is obligated to pass on the same to customer.
- Whether section 194R applies to FMCG Co on distribution of free sample to Distributor? Whether section 194R applies distribution of free samples to retailer?



Analysis

- There is overriding obligation on distributor and in turn on dealer to pass on the same to end consumer.
- It can be argued that there is no benefit of perquisite arising from business or exercise of profession (refer next slide for meaning).
- Reference can be made to following cases where it is held that amount disbursed on behalf of other is not taxable.
  - CIT v U. P. Upbhokta Sahkari Sangh Ltd [2007] 288 ITR 106 (Allahabad)
  - CIT v S. Kamalahasan(2001) 249 ITR 726 (Mad)

Meaning of benefit or perquisite

- Nirmala P. Athavale v. ITO, (2009) 118 ITD 373 (Mum)

"Both the words 'benefit' and 'perquisite' refer to specific situations wherein, generally receipt of a revenue nature having attributes of income would be covered and such attribute should exist from the very beginning. To illustrate this aspect, we state that where a gift is made in lieu of paying consideration for services obtained and this fact is established, then, such amount of gift can fall within the provisions of section 28(iv). Further, the two words 'benefit' or 'perquisite' used in section 28(iv) would derive colour from each other."

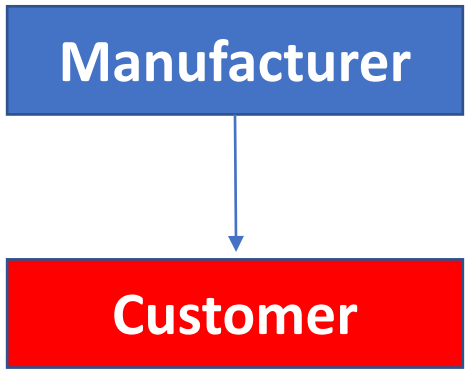
- Helios Food Improvers (P.) Ltd. v. DCIT, (2007) 14 SOT 546 (Mum)

"Further, the words "benefit" or "perquisite" have been used in this sub-section, which have to be read together and would draw colour from each other. ***Normally, 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. In this view of the matter, the word "benefit" has also to be interpreted in the same manner i.e. at the time of execution of the business transaction, the one party should give to the other party some irretrievable benefit or advantage"***

Meaning of Perquisite

The expression 'perquisite' is defined, by the Webster's Dictionary, as 'any casual emolument, fee or profit attached to an office or position'. Black's Law Dictionary explains the scope of this expression as "emoluments or incidental profits attached to an office or official position, beyond the salary or regular fees."

Testing sample for production



Scheme

- Manufacturer Co manufactures speciality chemicals which are used as input by Customer.
- It provides small quantity of chemical for free so that Customer can evaluate technical feasibility. Customer buys product if it meets technical parameters else rejects the same giving detail reasoning.
- Manufacturer Co either amends its product and sells commercial quantity or moves on.
- Whether Manufacturer Co is liable for TDS under section 194R.

Analysis

Possible defences against non-applicability of section 194R

- Circular in following FAQs gives consideration to business realities:
  - Qs 4 exempts form TDS sales discount, cash discount, exempting free items given with purchase of main item
  - Qs 6 exempts products given to influencer if return back after use
  - Qs 8 exempts dealer conference driven by business objective
- It can be argued that sample for production testing should be treated similar and exempt from TDS. It cannot be treated as free sample as there is obligation to use for specific purpose.

It is necessary to put SOP in place. Its needs to be seen if schemes can be amended to ensure transaction does not fall under section 194R.

Channel Support

Scheme

- XYZ has operates PAN India retail outlet under franchisee model
- Following are terms of dealership:
  - XYZ undertakes renovation of shop so all stores looks similar and resonates with Company brand
  - Providing uniform to sales girls and boys which embosses Company brand
  - Providing outdoor holdings and carry bags which needs to be used in accordance with Company policy
  - Dealer have to use inventory and billing software provided free by XYZ.
- Non adherence of aforesaid clause may result in cancellation of dealership. Agreement provides lock in period as XYZ picks up upfront cost.

View 1: Section 194R not applicable	View 2: Section 194R applicable
• XYZ incurs expenditure to protect its own interest and not for benefit of dealers. Section 194R needs to be seen from payer perspective. • Benefit if at all received by dealers is incidental. • Section 194R states person responsible for 'providing any benefit or perquisite to recipient'. Honouring contractual commitment is not providing benefit or perquisite.	• Section 194R needs to be seen from recipient perspective. Section 28(iv) is applicable in hands of recipient. • Benefit of perquisite are received in kind. Section 194R gets triggered. • Contractual commitment cannot have any role in determination of TDS. As per Qs 1 of Circular even non taxable payment are subject to section 194R.

Circular

Question 5 –If there is a dealer conference to educate the dealers about the products of the company –Is it benefit/perquisite?

The expenditure pertaining to dealer/business conference would not be considered as benefit/perquisite for the purpose of section 194R where dealer/business conference is held with the prime object to educate dealers/customers about any of the following or similar aspects.

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

However, conference must not be in nature of incentives/benefits to select dealers/customers who have achieved particular targets.

Question 5 –If there is a dealer conference to educate the dealers about the products of the company –Is it benefit/perquisite?

Further in following cases the expenditure would be considered as benefit or perquisite for the purposes of section 194R –

i. Expense attributable to leisure trip or leisure component, even if it is incidental to the dealer/business conference
ii. Expenditure incurred for family members accompanying the person attending dealer/business conference
iii. Expenditure on participants of dealer/business conference for days which are on account of prior stay or overstay beyond the dates of such conference.

Analysis

- Dealer/customer conference for stated and similar purposes are excluded.
- This exclusion needs to be seen as recognition of business realities. Conference which is driven by business objective is not considered as benefit/perquisite.
- This conclusion should equally apply to other situations where business objective is predominant
  - Travel by independent directors overseas to attend board meeting
  - Attending overseas conference as guest speaker
  - Sponsorship of events, competition etc to promote companies brand name
  - Inviting prospective customer to outstation hotel for product launch –e.g. Marque real estate project, Premium cars etc.
- Inclusion in section 194R of a) expense attributable to leisure trip or leisure component, even if it is incidental to the dealer/business conference b) Expenditure on participants of dealer/business conference for days which are on account of prior stay or overstay beyond the dates of such conference is regressive
- Practical difficulty will arise in meaning of leisure trip or leisure component e.g. wine and dine at end of conference, gala night by Bollywood singer etc
- It is for the assessee to decide how best to protect its own interest. It is not open to Assessing Officer to prescribe what expenditure an assessee should incur and in what circumstances he should incur that expenditure (CIT v. Dhanrajgiri Raja Narasingiri [1973] 91 ITR 544 (SC)).
- In applying the test of commercial expediency for determining whether the expenditure was wholly and exclusively laid out for the purposes of the business, reasonableness of the expenditure has to be adjudged from the point of view of the businessman and not of the revenue (Jamshedpur Motor Accessories Stores v. CIT [1974] 95 ITR 664 (Pat.); J.K. Woollen Mfgr. v. CIT [1969] 72 ITR 612 (SC)
- Treating expenditure attributable to leisure trip or leisure component even if incidental to conference and treating day prior or overstay as benefit or perquisite infringes with aforesaid principle laid down by Supreme Court making Circular amenable to challenge.

Other Clarifications

- In case where benefit is in kind, recipient may pay advance tax and provide challan number to deductor. Deductor will have to make appropriate filing in TDS return (Qs 9).
- In case deductor bears the tax, same has to be grossed up (Qs 9).
- For computing threshold limit of Rs 20,000, aggregate value of benefit or perquisite from 1 April 2022 needs to be counted (Qs 10).

Concluding remarks

- Unfortunately, Circular intended to remove difficulties have created more difficulties leaving more questions than answer.
- Interpretation in deference to judicial precedent is likely to make Circular subject matter of challenge in writ petition.
- Inclusion of free sample, treating incentive paid in cash as benefit or perquisite is likely to create practical difficulties and will impair business.
- Business will have to evaluate each of the scheme and document its position on applicability of section 194R.
- Tax Auditor will be required to verify TDS compliance and business should plan audit strategy in case questions are raised on section 194R compliance in case of TDS assessment.

THANK YOU