Guidelines to remove difficulties for deduction of tax at source on transfer of virtual digital asset

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Summary : Finance Act 2022 inserted a new section 194R in the Income-tax Act, 1961 (hereinafter referred to as "the Act") with effect from 1st July 2022. The new section mandates a person, who is responsible for providing any benefit or perquisite to a resident, to deduct tax at source @ 10% of the value or aggregate of value of such benefit or perquisite, before providing such benefit or perquisite. The new section mandates a person, who is responsible for paying to any resident any sum by way of consideration for transfer of a virtual digital asset (VDA), to deduct an amount equal to 1% of such sum as income tax thereon.

Link for the Circular/ Update : https://www.incometaxindia.gov.in/communications/circular/circular-no-12-2022.pdf

Full Provision :

Finance Act 2022 inserted a new section 194R in the Income-tax Act, 1961 (hereinafter referred to as "the Act") with effect from I" July 2022. The new section mandates a person, who is responsible for providing any benefit or perquisite to a resident, to deduct tax at source @ 10% of the value or aggregate of value of such benefit or perquisite, before providing such benefit or perquisite. The benefit or perquisite may or may not be convertible into money but should arise either from carrying out of business, or from exercising a profession, by such resident.

This deduction is not required to be made, if the value or aggregate of value of the benefit or perquisite provided or likely to be provided to the resident during the financial year does not exceed twenty thousand rupees.

The responsibility of tax deduction also does not apply to a person, being an Individual/Hindu undivided family (HUF) deductor, whose total sales / gross receipts / gross turnover from business does not exceed one crore rupees, or from profession does not exceed fifty lakh rupees, during the financial year immediately preceding the financial year in which such benefit or perquisite is provided by him.

Sub-section (2) of section 194R of the Act authorises the Board to issue guidelines, for removal of difficulties, with the approval of the Central Government. These guidelines are required to be laid before each House of Parliament and are binding on the income-tax authorities and the person providing the benefit or perquisite.

Accordingly, in exercise of the power conferred by sub-section (2) of section 194R of the Act, the Board, with the prior approval of the Central Government, hereby issues the following guidelines:-

Guidelines :

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?

Answer:

No. The deductor is not required to check whether the amount of benefit or perquisite that he is providing would be taxable in the hands of the recipient under clause (iv) of section 28 of the Act. The amount could be taxable under any other section like section 41(1) etc. Section 194R of the Act casts an obligation on the person responsible for providing any benefit or perquisite to a resident, to deduct tax at source @ 10%. 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.

In this regard it may be highlighted that in the context of section 195 of the Act it is a requirement to know whether the payment made by the deductor is income in the hands of the non-resident recipient as section 195 of the Act requires deduction on any other sum chargeable under the provisions of this Act at the rates in force. Thus there is requirement that deductor needs to verify if the "sum is chargeable under the Income-tax Act". The term " rate in force" is defined in clause (37A) of section 2 of the Act and it allows benefit of agreement under section 90 or section 90A of the Act, if eligible, in determining the rate of tax at which the tax is to be deducted at source. Hence, there is further requirement of checking if the amount is taxable under tax treaty and if yes, at what rate. Such a requirement is not there in section 194R of the Act, in the absence of these two terms in this section. Hence, there is no requirement for deductor to verify whether the amount is taxable in the hands of the recipient or section under which it is taxable.

It may also be highlighted that these two terms are also not there in section 194E of the Act and Hon'ble Supreme Court in the case of PILCOM vs. CIT West Bengal (Civil Appeal No. 5749 of 20 12), held that tax is to be deducted under section 194E of the Act at a specific rate indicated there in and there is no need to see the taxability or the rate of taxability in the hands of the non-resident.

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

Answer:
Tax under section 194R of the Act is required to be deducted whether the benefit or perquisite is in cash or in kind. In this regard it is important to draw attention to the first proviso to sub-section (1) of section 194R of the Act, which reads as under:

"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 ll1eet 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".

This proviso clearly indicates the intent of legislature that there could also be situations where benefit or perquisite is in cash or the benefit or perquisite is 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 cash or in kind or partly in cash or partly in kind.

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?

Answer:
As has been stated in response to question no I, there is no requirement to check whether the perquisite or benefit is taxable in the hands of the recipient and the section under which it is taxable. Further, courts have held many benefits or perquisites to be taxable even though one can argue that they are in the nature of capital asset. The following judgments illustrate this point:

- Assessee entered into an agreement with' l' for purchase of a plot of land and certain amount was paid as eamest money. However, possession of land was not given to assessee and seller entered into another agreement with a third party to develop the said plot. Assessee tiled suit in which a consent decree was passed and in pursuance of same certain amount as paid to assessee. On appeal it was held that such sum received in pursuance of consent decree was liable to tax as business income under section 28(iv). Ramesh Babulal Shah v CIT (20 15) 53 taxmann.com 277 (Bom).
- The amount representing principal loan waived by bank under one time settlement scheme would constitute income falling under section 28(iv) relating to value of any benefit or perquisite, arising from business or exercise of profession. CIT v Ramaniyam Homes (P) Ltd (2016) 68 taxmann.com 289 (Mad)
- Value of rent free accommodation, furniture and fixtures given to director was held as taxable under section 28(iv). CIT v Subrata Roy (2016) 3851TR 547 (All)
- Where a car was given to an assessee by his disciple, who had been benefited from his preaching, the value of car was held to be taxable in the hands of the assessee being a receipt from the exercise of the vocation carried on by him. CIT (Addl) v Ram Kripal Tripathi (1980) 125 ITR 408 (All).
- The assessee was a director of a company. In terms of an agreement with the promoters, shares were allotted to the director. On these facts, it was held that the shares received by the director were benefit or perquisite received from a company by the director and it was a benefit assessable to tax. D. M. Neterwala v CIT (1986) 122 ITR 880 (Born)
- Value of gift of land was held as a receipt by the assessee in carrying on of his vocation and was held as taxable. Amarendra Nath Chakraborty v CIT (1971) 79 ITR 342 (Cal)

Thus, it can be seen that the asset given as benefit or perquisite may be capital asset in general sense of the term like car, land etc but in the hands of the recipient it is benefit or perquisite and has accordingly been held to be taxable. In any case, as stated earlier, the deductor is not required to check if the benefit or perquisite is taxable in the hands of recipient. Thus, the deductor is required to deduct tax under section 194R of the Act in all cases where benefit or perquisite (of whatever nature) is provided.

Question 4:

Whether sales discount, cash discount and rebates are benefit or perquisite?

Answer:

Sales discounts, cash discount or rebates allowed to customers from the listed retail price represent 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 of the Act is applicable on all forms of benefit/perquisite, tax is required to be deducted. However, it is seen that subjecting these to tax deduction would put seller to difficulty. To remove such difficulty it is clarified that no tax is required to be deducted under section 194R of the Act on sales discount, cash discount and rebates allowed to customers.

There could be another situation, where a 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, the seller is actually selling 12 items at a price of 10 items. Let us assume that the price of each item is Rs 12. In this case, the selling price for the seller would be Rs 120 for 12 items. For buyer, he has purchased 12 items at a price of 10. Just like seller, the purchase price for the buyer is Rs 120 for 12 items and he is expected to record so in his books. In such a situation, again there could be difficulty in applying section 194R provision. Hence, to remove difficulty it is clarified that on the above facts no tax is required to be deducted under section 194R of the Act. It is clarified that situation is different when free samples are given and the above relaxation would not apply to a situation of free samples.

Similarly, this relaxation should not be extended to other benefits provided by the seller in connection with its sale. To illustrate, the following are some of the examples of benefits/perquisites on which tax is required to be deducted under section 194R of the Act (the list is not exhaustive):

- 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.

The above examples are only illustrative. The relaxation provided from non-deduction of tax for sales discount and rebate is only on those items and should not be extended to others.

It is further clarified that these benefits/perquisites may be used by owner/director/employee of the recipient entity or their relatives who in their individual capacity may not be carrying on business or exercising a profession. However, the tax is required to be deducted by the person in the name of recipient entity since the usage by owner/director/employee/relative is by virtue of their relation with the recipient entity and in substance the benefit/perquisite has been provided by the person to the recipient entity.

To illustrate, the free medicine sample may be 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 the 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 (if the person who used it is his employee) under section 17 of the Act and deduct tax under section 192 of the Act. In such a case it would be first taxable in the hands of the hospital and then allowed as deduction as salary expenditure. Thus, ultimately the amount would get taxed in the hands of the employee and not in the hands of the hospital. Hospital can get credit of tax deducted under section 194R of the Act by furn ishing its tax return.

It is further clarified that the threshold of twenty thousand rupees in the second proviso to sub-section (I) of section 194R of the Act is also required to be seen with respect to the recipient entity.

Similarly, the tax is required to be deducted under section 194R of the Act if the benefit or perquisite is provided to a doctor who is working as a consultant in the hospital. In this case the benefit or perquisite provider may deduct tax under section : 94R of the Act with hospital as recipient and then hospital may again deduct tax under section 194R of the Act for providing the same benefit or perquisite to the consultant. To remove difficulty, as an alternative, the original benefit or perquisite provider may directly deduct tax under section 194R of the Act in the case of the consultant as a recipient.

The provision of section 194R of the Act shall not apply if the benefit or perquisite is being provided to a Government entity, like Government hospital, not carrying on business or profession.

Question 5.

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

Answer:

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. [n that case the purchase price shall be the value for 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 for 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.

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?

Answer:

Whether this is benefit or perquisite will depend upon the facts of the case. [n 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 for the purpose of rendering service, then it will not be treated as a benefit/perquisite for the purposes of section 194R of the Act. However, if the product is retained then it will be in the nature of benefit/perquisite and tax is required to be deducted accordingly under section 194R of the Act.

Question 7:

Whether reimbursement of out of pocket expense incurred by service provider in the course of rendering service is benefit/perquisite?

Answer:

Any expenditure which is the liability of a person carrying out business or profession, if met by the other person is in effect benefit/perquisite provided by the second person to the first person in the course of business/profession.

Let us assume that a consultant is rendering service to a person "X" for which he is receiving consultancy fee. [n the course of rendering that service, he has to travel to different city from the place where is regularly carrying on business or profession. For this purpose, he pays for boarding and lodging expense incurred exclusively for the purposes of rendering the service to "X". Ordinarily, the expenditure incurred by the consultant is part of his business expenditure which is deductible from the fee that he receives from company "X". In such a case, the fee received by the consultant is his income and the expenditure incurred on travel is his expenditure deductible from such income in computing his total income. Now if this travel expenditure is met by the company "X", it is benefit or perquisite provided by "X" to the consultant.

However, sometimes the invoice is obtained in the name of "X" and accordingly, if paid by the consultant, is reimbursed by "X". In this case, since the expense paid by the consultant (for which reimbursement is made) is incurred wholly and exclusively for the purposes of rendering services to "X" and the invoice is in the name of "X", then the reimbursement made by "X" being the service recipient will not be considered as benefit/perquisite for the purposes of section 194R of the Act.

If the invoice is not in the name of "X" and the payment is made by "X" directly or reimbursed, it is the benefit/perquisite provided by "X" to the consultant for which deduction is required to be made under section 194R of the Act.

Question 8:

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

Answer:

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

1. new product being launched
2. discussion as to how the product is better than others
3. obtaining orders from dealers/customers
4. teaching sales techniques to dealers/customers
5. addressing queries of the dealers/customers
6. reconciliation of accounts with dealers/customers

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

Further, in the following cases the expenditure would be considered as benefit or perquisite for the purposes of section I 94R of the Act:-

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

Question 9:

Section 194R provides that if the benefit/perquisite is in kind or partly in kind (and cash is not sufficient to meet TDS) then the person responsible for providing such benefit or perquisite is required to ensure that tax required to be deducted has been paid in respect of the benefit or perquisite, before releasing the benefit or perquisite. How can such person be satisfied that tax has been deposited?

Answer:

The requirement of law is that if a person is providing benefit in kind to a recipient and tax is required to be deducted under section 194R of the Act, the person is required to ensure that tax required to be deducted has been paid by the recipient. Such recipient would pay tax in the form of advance tax. The tax deductor may rely on a declaration along with a copy of the advance tax payment challan provided by the recipient confirming that the tax required to be deducted on the benefit/perquisite has been deposited. This would be then required to be reported in TDS return along with challan number. This year Form 26Q has included provisions for reporting such transactions.

In the alternative, as an option to remove difficulty if any, the benefit provider may deduct the tax under section 194R of the Act and pay to the Government. The tax should be deducted after taking into account the fact the tax paid by him as TDS is also a benefit under section 194R of the Act. In the Form 26Q he will need to show it as tax deducted on benefit provided.

Question 10.

Section 194R would come into effect from the I" July 2022. Second proviso to subsection (I) of section 194R of the Act provides that the provision of this section does not apply where the value or aggregate of value of the benefit or perquisite provided or likely to be provided to a resident during the financial year does not exceed twenty thousand rupees. It is not clear how this limit of twenty thousand is to be computed for the Financial Year 2022-23?

Answer:

It is hereby clarified that,-

1. Since the threshold of twenty thousand rupees is with respect to the financial year, calculation of value or aggregate of value of the benefit or perquisite triggering deduction under section 194R of the Act shall be counted from I" April, 2022. Hence, if the value or aggregate value of the benefit or perquisite provided or likely to be provided to a resident exceeds twenty i)thousand rupees during the financial year 2022-23 (including the period up to 30th June 2022), the provision of section 194R shall apply on any benefit or perquisite provided on or after I" July 2022.
2. The benefit or perquisite which has been provided on or before 30" June 2022, would not be subjected to tax deduction under section 194R of the Act.