

TDS on Benefits or Perquisites - Trinity of Sec.194R, 28(iv) & 37(1)

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Navneet Singal

Founder & Managing Partner, EvoBreyta TaxFinTech LLP

I. Introduction

In the Wealth of Nations, Adam Smith famously noted that complexity makes taxes **'much more burdensome to the people than they are beneficial to the sovereign'**.^[1] The cost of taxes isn't just what we pay. It's also the cost of complexity, or what economists call "compliance costs."

The Finance Act, 2022 (FA, 22) and the Finance Act, 2023 (FA, 23) have made sweeping changes in the way, the benefits or perquisite in a business or profession are being taxed and in their compliance. When one felt all arrows are out from quiver of chargeability provisions, TDS provisions comes as a bolt from the blue. Introduction of section 194R in the Income-tax Act, 1961 ('the Act') is one of such examples which has made it compulsory to deduct the tax on provision of such benefits during the course of business whether these are taxable or not under the purview of the Act.

Where at one place, amendment had been made in the section 28(iv) and section 37(1) of the Income-tax Act, 1961 ('the Act') to widen the scope of benefits or perquisite in business or profession, section 194R also incorporated to ensure the deductibility on such income. To remove difficulties in giving effect to the provision of section 194R, the CBDT has further issued the guidelines vide circulars^[2] ^[3] dated 16.06.2022 and 13.09.2022.

In this article, the Author has tried to understand the changes which have been brought in, to charge and deduct tax on benefits and perquisites in business or profession, and whether the guidelines will be helpful in their swift implementation. He has also tried analyse the complexity involved in compliance of these provision and what can be the best interpretation while reading these changes cumulatively under different scenarios.

II. Interplay between charging section 28(iv) and TDS provision u/s 194R

The Section 194R of the Act has been introduced to deduct tax at source on the income which is covered under section 28(iv) of the Act. It was stated in the Memorandum explaining to the Finance Bill^[4] that in many cases, the recipients of income related to the benefit or perquisite arising from business or exercise of profession does not report the receipt of such benefits in their return of income, leading to furnishing of incorrect particulars of income. In order to widen and deepen the tax base, section 194R has been introduced to ensure that the person responsible for providing such income deduct tax at source in respect of such benefits and perquisites.

First of all, we will try to understand that nature of the income which has been covered under section 28(iv) of the Act. Section 28(iv) reads as under

"28. The following income shall be chargeable to income-tax under the head "Profits and gains of business or profession", -

(i)

- (iv) the value of any benefit or perquisite arising from business or the exercise of a profession, whether—
- (a) convertible into money or not; or
- (b) in cash or in kind or partly in cash and partly in kind;”**

(After amendment by the Finance Act, 2023)

The issues derived from the outcome of different case laws can be discussed to interpret the coverage of the section 28(iv), which are as follows:

(i) Transactions in which payments have been made only in money

It was vehemently debated whether or not transactions in which payments were made in cash and not in kind should be covered by Section 28(iv) prior to amendment by the Finance Act, 2023, which added the clause (b) to the Section.

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. Hon'ble Apex Court in the case of **Mahindra & Mahindra Ltd**^[5] has held in unequivocal terms that in order to invoke the provisions of section 28(iv) of the Income Tax Act, the benefit which is received has to be in some other form rather than in the shape of money.

In order to overturn the Apex Court's decision, Section 28(iv) has been amended to include all benefits, whether paid in cash or not. The following is from the memorandum outlining the Finance Bill, 2023:

“Section 28 of the Act provides for income that shall be chargeable to income-tax under the head “Profits and gains of business or profession”. Clause (iv) of this section brings to chargeability the value of any benefit or perquisite, whether convertible into money or not, arising from business or the exercise of a profession. This provision was inserted through the Finance Act 1964 and the Circular no 20D dated 7th July 1964 issued to explain the provisions of this Act stated clearly that the benefit could be in cash or in kind. Therefore, the intention of the legislation while introducing this provision was also to include benefit or perquisite whether in cash or in kind. However, Courts have interpreted that if the benefit or perquisite are in cash, it is not covered within the scope of this clause of section 28 of the Act.

In order to align the provision with the intention of legislature, it is proposed to amend clause (iv) of section 28 of the Act to clarify that provisions of said clause also applies to cases where benefit or perquisite provided is in cash or in kind or partly in cash and partly in kind.” (Emphasis applied)

Now, it has been made unambiguous that any perks or benefits given in the course of doing business or exercising a profession, whether in cash or in kind, are taxable.

(II) Irretrievable benefits or advantage

The term "perquisite" typically refers to

- (a) meeting of an obligation owed by one person to another, whether directly or indirectly, or
- (b) the provision of a facility or amenity to another person, where the person providing the facility or concession is aware from the outset that what is being done is irretrievably lost to him because it has been granted to the recipient as a privilege or right. It has been held^[6] that the phrases "benefit" or "perquisite" are to be interpreted together and would provide colour to one another in the context of section 28(iv).

According to this perspective, the word "benefit" must also be understood in the same way, i.e., that the one party must provide the other party with some irretrievable benefit or advantage at the moment the commercial transaction is executed.

(III) Benefit or perquisite received should be the consideration received for the services

Benefits or perks that are covered should come from operating a business or practicing a profession, thus there must be some connection between the receiving resident's business and the benefits that are given to him. Provisions of section 28(iv) can be applied only when there is circumvention of income by taking or receiving income in other forms[7].

This aspect is also evident from illustration considered in Circular 20-D[8] issued long back at the time of insertion of section 28(iv)

" 83. The effect of the above-mentioned amendment is that in respect of an assessment for the assessment year 1964-65 and subsequent years, the value of any benefit or amenity, in cash or kind, arising to an assessee from his business or the exercise of his profession, e.g. the value of rent-free residential accommodation secured by an assessee from a company in consideration of the professional services as a lawyer rendered by him to that company, will be assessable in the hands of the assessee as his income under the head 'Profits and gains of business or profession'"

Section 28(iv) aims at taxing fringe benefits that are availed in addition to consideration earned in carrying out a profession or while doing business.[9]

The case of **Helios Food Improvers**[10], also explained circumvention with the example of trader selling the goods at a discounted price but receiving a gift of car from the concerned buyer. In that case there being no other consideration or reason for such party for giving car in gift to the seller, the value of that car can be taxed as income under section 28(iv) of the Act.

III. Disallowance of expenditure u/s 37(1) and its interplay with TDS u/s 194R

The newly amended Explanation 3(ii) to section 37(1) provides that no expenditure should be allowed, where the recipient:

- a) may or may not be carrying on a business or exercising a profession; and
- b) acceptance of benefit or perquisite is in violation of any law or rule or regulation or guideline which for the time being in force governs the conduct of the recipient

It is imperative to take into account that prior to the amendment whereby Explanation 3(ii) to Section 37(1) was introduced, the Supreme Court in the case of **Apex Laboratories (P) Ltd. v. DCIT**[11], held that even if the payer or provider of the benefit of perquisite is not bound or regulated by any code, regulation, etc., which prohibits acceptance of gifts, benefits, gratuity, etc., still if the same is opposed to public policy, disallowance under Section 37(1) shall be attracted.

Thus, with the insertion of Explanation 3(ii) to section 37(1) of the Act, pharmaceutical companies and allied health sector industry should take care that any expenditure incurred on Doctors which is not permitted by MCI Regulations 2002 (as amended by Regulation 2009 and 2016), Uniform Code of Pharmaceutical Marketing Ethics ("UCPMP"), Drugs and Cosmetics Act, 1945 and UCMDMP and PhRMA Code (applicable from 1st January 2022) will not be allowed under Section 37(1) read with Explanation 1 and 3 thereto.

The approach can be applied to other industry sectors and professions. The regulations also apply to legislation that are now in effect abroad, outside of India. Litigation may become quite heated depending on each specific act and whether it contravenes a law, rule, or other guideline. What will happen to the allowability of an expenditure if it is initially determined to be illegal and prohibited but is later considered as legal in court on appeal by a higher court.

Furthermore, even though the aforementioned expense is prohibited under section 37(1), the payer is nevertheless obligated to deduct tax from the amount of the expense. Additionally, the same will be regarded as the recipient's income under Section 28(iv) of the Act.

IV. Liability to deduct tax u/s 194R under different Scenarios

The CBDT released guidelines attempted to provide a practical approach in many instances, however, its implementation has caused a lot of problems. The author has made an effort to suggest a solution that works on the applicability of the TDS provision under Section 194R in light of these guidelines and other practical scenarios.

(a) Sale discount, Cash discount and rebates

Sales discounts, cash discount or rebates allowed to customers from the listed retail price represent lesser realization of the sale price itself and there is no requirement to deduct tax u/s 194R.

(b) Incentives post the sale of goods/services which are not the part of initial offer

As per the understanding of the author, such incentives are not the part of the initial offer and can't be considered as sale/cash discount of the sale. In such circumstances, it will be the additional benefits or perquisites which has been provided to the recipient and should be considered for the purpose of deduction of tax u/s 194R of the Act.

(c) Free samples

Free samples are benefits and perquisites provided to the recipient, hence, will be liable for tax deduction. Some of such examples can be illustrated as below:

- Incentives in the form of cash or kind such as car, TV, computers, gold coin, etc.
- A trip for the recipient and his/her relatives upon achieving certain targets
- Free ticket for an event
- Medicine samples free to medical practitioners.

(d) Benefits which are not capable of measurement such as loyalty/reward points

In such cases, the FMV of such reward/loyalty points need to be calculated and section 194R will be applicable on such amount accordingly.

(e) Reimbursement of out-of-pocket expenses

Any reimbursement of out-of-pocket expenses should be considered for the purpose of tax deductibility u/s 194R of the Act. For example, a consultant is rendering service to a person "X" for which he is receiving consultancy fee. In the course of rendering that service, he has to travel (travel is exclusively for services rendered to "X") to different cities and boarding and lodging expenses are incurred, the applicability of the section 194R can be defined as below:

- In case, the invoice is in the name of consultant and paid by him - **applicable**
- In case, the invoice is in the name of "X" and paid by the consultant - **Not applicable**
- In case, the invoice is in the name of consultant and paid by the "Y" - **applicable**
- In case, the invoice is in the name of "X" and paid by him - **Not applicable**

However, it can be litigated that reimbursement of any expenses does not lead to any income. It is very well settled by the judgment of Hon'ble Apex Court and various other High Courts, that reimbursement of any expense is not income if there is no mark up.[\[12\]](#)

(f) Dealer conference to educate the dealers about the products of the company

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:

- For obtaining orders from dealers/customers or launch of new product
- Teaching sales techniques to dealers/customers or addressing their queries
- Any business-related activity, e.g., reconciliation of accounts

The guidelines also clarify that,

- All dealers are not required to be invited in a dealer/business conference.
- A day immediately prior to or post the duration of the conference - no requirement to deduct tax u/s 194R on such expenditure.
- If benefit/perquisite is provided in a group activity in a manner that it is difficult to match such benefit/perquisite to each participant using a reasonable allocation key, the benefit/perquisite provider may at his option not claim the expense, representing such benefit/perquisite, as deductible expenditure for calculating his total income and then no requirement of TDS.

However, such conference must not be in the nature of incentives/benefits to select dealers/customers who have achieved particular targets. Further, in the case of expenditure attributable to leisure trip or leisure component of the dealer or his family member, it should be considered for the applicability of tax deduction u/s 194R.

(g) Benefit or perquisite is in the form of capital asset

The deductor is not required to check that whether the benefit is in the form of capital asset or not. 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 accordingly tax is required to be deducted irrespective of its nature. Some case laws and examples can be presented as below:

- Value of gift of land was held as a receipt by the assessee in carrying on of his vocation and was held as taxable.[\[13\]](#)
- Shares were allotted to the director of the company were held as benefit or perquisite.[\[14\]](#)
- A car to a preacher by his disciple, held to be taxable being a receipt from the exercise of the vocation carried on by him.[\[15\]](#)
- The amount representing principal loan waived by bank under one time settlement scheme would constitute income falling under section 28(iv).[\[16\]](#) - However, to remove difficulties, the guidelines provided that one-time loan settlement with borrowers or waiver of loan granted on reaching settlement with the borrowers by the certain notified institutions would not be subjected to tax deduction at source under section 194R of the Act.
- Value of rent-free accommodation, furniture and fixtures given to director was held as taxable under section 28(iv).[\[17\]](#)

(h) Benefits or perquisite to the owner/director/partner/employee of the business entity

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. In such cases, tax is required to be deducted by the person in the name of recipient entity, e.g., the free medicine sample may be provided by a company to a doctor who is an employee of a hospital, the TDS u/s 194R is required to be deducted by the company in the hands of hospital. The hospital may subsequently treat this benefit/perquisite as the perquisite given to its employees and deduct tax u/s 192 of the Act. However, 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.

(i) Benefit or perquisite not in the course of business or profession, e.g., Govt. Entities

Section 194R would not apply to benefit or perquisite to a Government entity, like Government hospital, not carrying on business or profession as per the clarification given in the Guidelines as these recipients do not receive the benefit or perquisite in the course of business or profession. On the same logic, it can be considered that not only Government entities like hospitals but benefits or perquisites to other institutions, e.g., charitable trusts, NGOs which are not carrying any business or profession, cannot be subject to TDS u/s 194R of the Act.

(j) Product given to celebrities while influencing to the prospective customers

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 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.

(k) Any perquisite or benefit received out of natural love and affection not arising from business or profession – provisions of section 194R is not applicable.

(l) Bonus share/right share issued by a company

The tax under section 194R of the Act is not required to be deducted on issuance of bonus or right shares by a company in which the public are substantially interested as defined in clause (18) of section 2 of the Act, where bonus shares are issued to all shareholders by such a company or right shares are offered to all shareholders by such a company, as the case may be.

The justification provided behind this interpretation is that this does not result in any benefit to shareholders as the overall value and ownership of their holding does not change. Further cost of acquisition of bonus share is taken as nil for capital gains computation when this share is sold. As per the understanding of the author, in case, the same logic is applied to the closely held or Pvt Ltd companies, there should be no required to withhold any tax u/s 194R.

V. Controversial matters, their interpretation and the author's take

(i) Binding nature of Guidelines issued by Circulars[18] [19] on the Taxpayers

It should be identified that the Legislature has started a new trend with the passage of the last two Finance Acts to grant the CBDT the authority to resolve issues. Further, using such powers, clarifications and guidelines has been made binding not only on the Department but also on the assesses at large. 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.

Traditionally, clarifications/ instructions/ guidelines were issued by the Board u/s 119 of the Act. Further, it is very well settled that such clarifications/ instructions/ guidelines, though binding on the Department, are not binding on either the Courts or the taxpayers. However, under the new mechanism, though clarifications are issued by the Board the same are sought to be made binding on the taxpayers also. This, appears to be incongruous with the prevailing position in law. It is very well settled that by using the 'removal of difficulty clause' the Central Government cannot change, disfigure or do violence to the basic structure and primary features of the Act. In no case, can it, under the guise of removing a difficulty, change the scheme and essential provisions of the Act.[20][21]

(ii) Deduction of TDS irrespective of the taxability nature of benefits or perquisite

In response to Q. 1 of guidelines issued on 16.06.2022, it has been clarified that there is no necessity for a deductor to check whether the benefit or perquisite is taxable or not in the hands of the recipient. The clarification runs contrary to the object/ purpose behind insertion of section 194R, wherein, the Explanatory Memorandum to Finance Bill, 2022 clearly mentioned that the object behind insertion of section 194R is to collect tax on benefits or perquisites which are taxable u/s 28(iv) of the Act.

In the said guidelines, comparison with section 195 and referring to the judgment in case of PILCOM vs. CIT[22], have no relevance and that there are ample examples of TDS provisions and judgments to the contrary. The whole idea behind collecting tax in advance by way of TDS is that an income should not go untaxed. The same becomes evident on reading of section 199 of the Act read with Rule 37BA which states that credit of TDS would be available in the year in which corresponding income is offered to tax. It is therefore, clear that TDS u/s 194R has to be deducted only if the benefit or perquisite is taxable u/s 28(iv) of the Act.

(iii) Interplay in applicability of different provisions of TDS

There would be interplay of section 194R with other sections like pharma companies deduct tax at 0.1% under section 194O on purchase from supplier; deduct tax under section 194C at 1% on payment to

courier company; disallowance of these expenses under section 37(1) post amendment, etc.

Such interplay will cause a lot of complexity in compliance of such provisions. **As per my understanding, which provision is more specific to the transaction should be applicable, however, the litigation can't be avoided in such cases.**

(iv) Valuation of the benefits or perquisites provided in kind or partly in kind

The guidelines provides that the valuation would be based on fair market value of the benefit or perquisite except in following cases, i.e.,

- In case the provider has purchased the benefit/perquisite - the purchase price
- In case the provided is the manufacture of such item - The price that is charges to its customers.

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.

However, in numerous cases, the purchaser is not the buyer and the manufacturer, in such cases, no rules have been provided to calculate the FMV of the good, which can cause the practical issues in the implementation of the provisions.

(v) Ultimate beneficiary is not identified due to complexity of incentives schemes.

Sometimes, incentives schemes are drafted in such a manner that it is practically impossible to find out that who is the ultimate beneficiary. There are many intermediaries through which the incentives are passed on. The question arises, that how to deduct tax in such cases and how the deductor ensure that tax has been deposited by the recipient in such transactions. As per the author understanding, TDS should be deducted on the 1st receipt of such services.

(vi) Liability on the Deductor to ensure that tax has been paid or deposited.

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. In such cases, **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.**

As per the author, the deductor's liability should end with tax deduction only and should not be extended such that he also ensures that tax has been paid on perquisite or benefit before releasing such benefit or perquisite. There is no mechanism for ensuring that such liability has been settled has been brought out in the provisions. Taking a declaration from the recipient, as provided in the guidelines, is a cumbersome job which is practically not possible.

VI. Conclusion

The famous tax proverb by Alfred E. Neuman that reads, "*Today, it takes more brains and effort to make out the income-tax form than it does to make the income,*" perfectly sums up the design of the TDS provisions of the Income-tax Act.

In a number of circumstances, the Revenue Department has released guidelines with FAQs to address the practical problems. Even though, these guidelines have tried to provide answers to most of the queries of taxpayers, but still, it has nonetheless generated greater debate. For law to be successfully implemented, it must be clear and simple to understand. The complexity of these newly added regulations and their severance nature in the event of non-compliance will only lead to additional litigation and controversy.

There are still many issues that remain unresolved, and only time will tell how much litigation is going to arise from conflicting interpretations and comprehensions of the TDS regulations. The gap between the two pillars of the tax conflicts, i.e., the taxpayers and the revenue authority will continue to widen,

making it seem difficult to build a bridge between them.

[1] <https://www.economist.com/special-report/2005/04/14/the-burden-of-complexity>

[2] [Circular No. 12 of 2022, F. No. 370142/27/2022-TPL, Dated: 16.06.2022](#)

[3] [Circular No 18 of 2022, F. No. 370142/27/2022-TPL, Dated: 13.09.2022](#)

[4] Explanatory Memorandum to Finance Bill 2022

[5] Mahindra & Mahindra Ltd [\[TS-220-SC-2018\]](#)

[6] [\[TS-220-SC-2018\]](#)

[7] [\[TS-47-ITAT-2007\(MUM\)-O\]](#)

[8] Circular 20-D dated 07.07.1964

[9] Rupee Finance & Management (P.) Ltd. [\[TS-5108-ITAT-2008\(MUMBAI\)-O\]](#)

[10] Helios Food Improvers reported at [\[TS-47-ITAT-2007\(MUM\)-O\]](#)

[11] Apex Laboratories (P) Ltd. v. DCIT [\[TS-104-SC-2022\]](#)

[12] DIT vs. A.P. Moller Maersk AS [\[TS-70-SC-2017\]](#)

[13] Amarendra Nath Chakraborty v. CIT [\[TS-5075-HC-1969\(CALCUTTA\)-O\]](#)

[14] D. M. Neterwala v. CIT [\[TS-5605-HC-1978\(BOMBAY\)-O\]](#)

[15] CIT (Addl) v. Ram Kripal Tripathi [\[TS-5262-HC-1980\(ALLAHABAD\)-O\]](#)

[16] CIT v. Ramaniyam Homes (P) Ltd [\[TS-217-HC-2016\(MAD\)\]](#)

[17] CIT v. Subrata Roy [\[TS-374-SC-2016\]](#)

[18] Circular No. 12 of 2022, F. No. 370142/27/2022-TPL, Dated: 16.06.2022

[19] Circular No 18 of 2022, F. No. 370142/27/2022-TPL, Dated: 13.09.2022

[20] The Jalgaon District Central Co-Operative Bank Ltd. & Anr. vs. UOI & Ors. [\[TS-5690-HC-2003\(BOMBAY\)-O\]](#)

[21] Madeva Upendra Sinai vs. UOI & Ors. [\[TS-5021-SC-1974-O\]](#)

[22] PILCOM vs. CIT, West Bengal-VII, [\[TS-219-SC-2020\]](#)