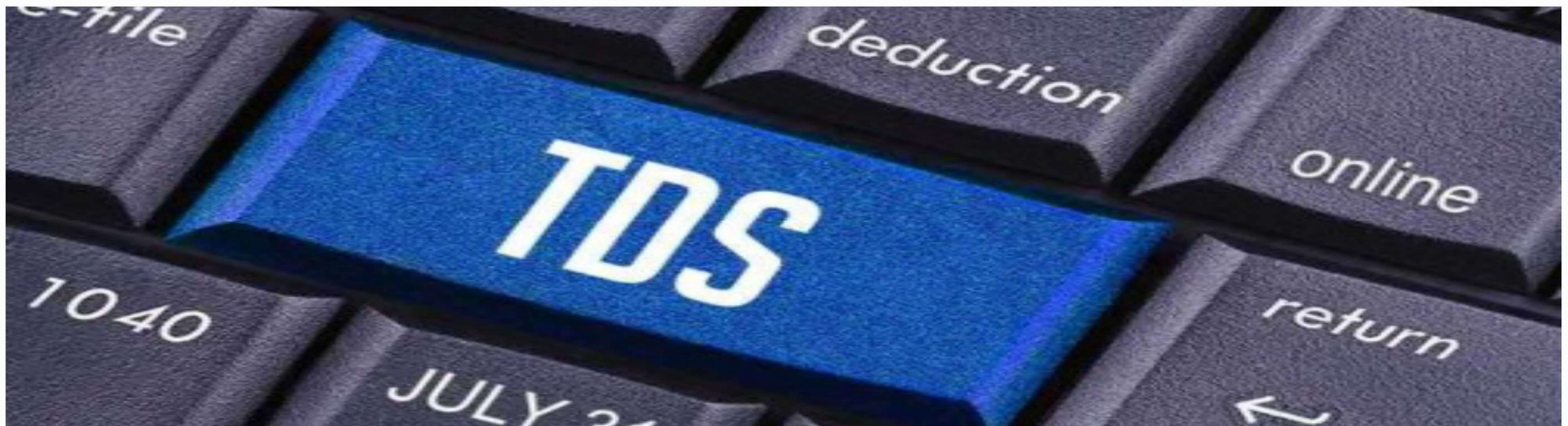


Impact Assessment of CBDT Circular on TDS on Benefits or Perquisites u/s 194R



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Scope & Coverage of Section 194R

Section 194R: TDS @ 10% on Benefits or Perquisites, arising out of Business or Profession

- In the **Finance Act 2022**, a new TDS section **194R**, has been inserted in the Income Tax Act, and which has been made applicable **w.e.f. 1.7.2022**.
- This new section **194R** requires deduction of tax at source **@ 10%**, by any person (resident or non resident), providing any benefit or perquisite, whether convertible into money or not, exceeding **Rs. 20,000** in value in a year, to a resident, arising from the carrying out of any business or exercise of any profession by such resident recipient.
- The provisions of this section **shall not apply** if the **benefit or perquisite provider** is an **individual** or a **Hindu undivided family**, whose total sales, gross receipts or turnover does not exceed **one crore rupees** in case of business or **fifty lakh rupees** 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.

Clarificatory Circular by CBDT

The Apex body CBDT has come up with a Clarificatory Circular No. 12 of 2022 bearing folio no. 370142/27/2022-TPL, dated 16.6.2022, containing clarificatory guidelines in the form of 'Ten Question-Answers', on newly inserted provisions concerning applicability of TDS on Benefits or Perquisites, u/s 194R of the Income Tax Act. The CBDT Circular provides that:

1. **TDS u/s 194R is to be deducted @ 10%, w.e.f. 1.7.2022, irrespective of whether the Benefit or Perquisite is Taxable or Not in the hands of the Recipient.**
2. **TDS u/s 194R is to be deducted on Purchase Value (Actual Cost Basis) of such Benefit or Perquisite, if such benefit or perquisite has been purchased before giving the same to recipient, and in other cases, on Fair Market Value of such Benefit or Perquisite.**
3. **GST is to be Excluded from the Purchase Value or Fair Market Value of such Benefit or Perquisite, for the Purpose of TDS Deduction.**
4. **TDS u/s 194R is to be deducted if the Aggregate Value of the Benefit or Perquisite is in excess of Rs. 20,000/-, in a Year, per Recipient.**
5. **For FY 2022-23, the Value of Benefit or Perquisite given in the Period from 1.4.2022 to 30.6.2022, will be counted and considered for determining the threshold limit of Rs. 20,000 in a year, but TDS u/s 194R will not be deducted on such Benefits or Perquisites. TDS u/s 194R will be deducted only on those Benefits or Perquisites which are provided or given on or after 1.7.2022.**

Perquisites under Salary Head are Not Covered u/s 194R

- The benefits or perquisites to be covered by this new section 194R are those perks, benefits, amenities, or facilities, in cash or 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.
- The benefit or perquisite referred to in this new section 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 section 192 is already there.
- **Therefore, any benefits or perks (perquisites) given by the Company to its Directors and Employees, like ESOPs, Cars, Rent Free Accommodations, Free Tours, LTCs, Mobiles, Performance Linked Incentives etc. are not covered u/s 194R, as these are already subject to TDS u/s 192 under the Salary Head, of the Income Tax Act.**

TDS Implication on Transactions with Dealers, Distributors, Channel Partners

	Nature of Benefits or Perks	Applicability of TDS u/s 194R
1.	Dealer/Business Conference where it is held with the prime object to educate dealers/customers about any of the following or similar aspects: a. new product being launched b. discussion as to how the product is better than others c. obtaining orders from dealers/customers d. teaching sales techniques to dealers/customers e. addressing queries of the dealers/customers f. reconciliation of accounts with dealers/customers.	Not Applicable, as per Clarification given in Ques. No. 8 of CBDT Circular No. 12/2022, dated 16.6.2022

TDS Implication on Transactions with Dealers, Distributors, Channel Partners

	Nature of Benefits or Perks	Applicability of TDS u/s 194R
1.	Dealer/Business Conference where it is in the nature of incentives/benefits to select dealers/customers who have achieved particular targets.	Subject to Deduction of TDS @ 10% on Fair Market Value of Such Incentives in Cash or Kind, or on Purchase Value, if acquired, before providing these, if the aggregate value of such Incentives exceeds Rs. 20,000/- in a year, per recipient.
2.	Expense attributable to leisure trip or leisure component, even if it is incidental to the dealer/business conference. Expenditure incurred for family members accompanying the person attending dealer/business conference. Expenditure on participants of dealer/business conference for days which are on account of prior stay or overstay beyond the dates of such conference.	Subject to Deduction of TDS @ 10% on Fair Market Value of Such Incentives in Cash or Kind, or on Purchase Value, if acquired, before providing these, if the aggregate value of such Incentives exceeds Rs. 20,000/- in a year, per recipient.

TDS Implication on Transactions with Dealers, Distributors, Channel Partners

	Nature of Benefits or Perks	Applicability of TDS u/s 194R
1.	Trade Discounts, Cash Discounts, Rebates on MRP/Listed Price of Products or Services	Not Applicable, as per Clarification given in Ques. No. 4 of CBDT Circular No. 12/2022, dated 16.6.2022
2.	Additional Quantities provided Free of Cost with the Basic Price (1 plus 1 or similar schemes)	Not Applicable, as per Clarification given in Ques. No. 4 of CBDT Circular No. 12/2022, dated 16.6.2022
3.	Incentives in Cash or Kind given to Dealers, Distributors, Channel Partners based on Target Completion	Subject to Deduction of TDS @ 10% on Fair Market Value of Such Incentives in Cash or Kind, or on Purchase Value, if acquired, before providing these, if the aggregate value of such incentives or gifts exceeds Rs. 20,000/- in a year, per recipient.

TDS Implication on Transactions with Dealers, Distributors, Channel Partners

	Nature of Benefits or Perks	Applicability of TDS u/s 194R
1.	Loyalty Rewards in cash (cash back)/ prepaid vouchers/ kind/ in the form of discount on future purchases	Subject to Deduction of TDS @ 10% on Fair Market Value of Such Incentives in Cash or Kind, or on Purchase Value, if acquired, before providing these, if the aggregate value of such incentives or gifts exceeds Rs. 20,000/- in a year, per recipient.
2.	Gifts based on quantities/ values/ timing of purchase (e.g. Early bird schemes)	Subject to Deduction of TDS @ 10% on Fair Market Value of Such Incentives in Cash or Kind, or on Purchase Value, if acquired, before providing these, if the aggregate value of such incentives or gifts exceeds Rs. 20,000/- in a year, per recipient.

TDS Implication on Transactions with Dealers, Distributors, Channel Partners

	Nature of Benefits or Perks	Applicability of TDS u/s 194R
1.	Incentives and Gifts such as Bags, Kits, Gold/Silver Coins, Watches, Mobile Phones etc. for Target Completion	Subject to Deduction of TDS @ 10% on Fair Market Value of Such Incentives in Cash or Kind, or on Purchase Value, if acquired, before providing these, if the aggregate value of such incentives or gifts exceeds Rs. 20,000/- in a year, per recipient.
2.	Incentives such as Free/Company Sponsored Entertainment Tours for Target Completion	Subject to Deduction of TDS @ 10% on Fair Market Value of Such Incentives in Cash or Kind, or on Purchase Value, if acquired, before providing these, if the aggregate value of such Tours exceeds Rs. 20,000/- in a year, per recipient.

TDS Implication on Transactions with Dealers, Distributors, Channel Partners

	Nature of Benefits or Perks	Applicability of TDS u/s 194R
1.	Extended Credit period (offered as a special case)	Subject to Deduction of TDS @ 10% on Fair Market Value/Opportunity Cost of Benchmark Interest of Such Extended Period, if the aggregate value of such benefit, exceeds Rs. 20,000/- in a year, per recipient.
2.	Insurance coverage for the dealer and his employees/ families	Subject to Deduction of TDS @ 10% on Actual Cost Basis or on Fair Market Value of such Insurance Coverage, if the aggregate value of such benefit, exceeds Rs. 20,000/- in a year, per recipient.

TDS Implication on Transactions with Dealers, Distributors, Channel Partners

	Nature of Benefits or Perks	Applicability of TDS u/s 194R
1.	Display items provided free of cost (to ensure uniform customer experience across dealers)	May not be subject to any TDS as an analogy can be drawn from specific exclusion provided in Ques. No. 8 of CBDT Circular No. 12/2022, dated 16.6.2022, in respect of Dealer Conference.
2.	Training to the sales personnel of the dealers/ distributors	
3.	Assistance in stabilizing the operations of the dealers (developing marketing plans, maintenance of inventories etc.)	
4.	Access to the ERP developed by manufacturer free of cost aiding in operations/ maintaining records	

TDS Implication on Transactions with Auditors/Consultants

	Nature of Benefits or Perks	Applicability of TDS u/s 194R
1.	Reimbursement of out-of-pocket (travelling and conveyance, boarding and lodging) expenses to the auditors/ consultants by the recipient of service (company), where the Invoice of such out of pocket expenses, is not in the name of the company.	Subject to Deduction of TDS @ 10% on Actual Cost Basis, if applicable, or on Fair Market Value of Such Out of Pocket Expenses, if the aggregate value of such incentive exceeds Rs. 20,000/- in a year, per auditor/consultant. However, if the Invoice as raised by such travelling or boarding agency, of such out of pocket expenses is in the name of Company, then No TDS u/s 194R is applicable.
2.	Customary gifts to business/ professional associates on festive occasions, celebrating successful completion of projects, etc.	Subject to Deduction of TDS @ 10% on Actual Cost Basis, or on Fair Market Value, if the aggregate value of such Gifts exceeds Rs. 20,000/- in a year, per recipient.

TDS Implication on Transactions with Social Media Influencers/ Artists/ Brand Ambassadors

	Nature of Benefits or Perks	Applicability of TDS u/s 194R
1.	If the Social Media Influencer/Brand Ambassador/Artist retains with it the Benefit or Perquisite or Product like Car, Mobile, Outfit, Cosmetics etc, for which he is exercising his social media influence, and the said Benefits or Perks are not returned to Company.	TDS @ 10% u/s 194R, on Actual Cost Basis, or on Fair Market Value of such Benefits or Perks is required to deducted by the Company hiring such Brand Ambassador or Artist, as clarified in Ques. No. 6 of CBDT Circular No. 12/2022, dated 16.6.2022.

TDS Implication on Deeming Basis On Incentives given by Third Parties to Company's Director/Employee/Consultant

	Nature of Benefits or Perks	Applicability of TDS u/s 194R
1.	Incentives in Cash or Kind given to any Director, Employee, Associate or Consultant of the Company by any Third Party, by virtue of the employment of such Director or Employee with the Company or by virtue of professional association of such Associate or Consultant with the Company.	Third Party providing such Incentives or Benefits, to any Director, Employee, Associate or Consultant, will deduct TDS @ 10% u/s 194R, in the Name of the Company, on deeming fiction basis, as clarified in Ques. No. 4 of CBDT Circular No. 12/2022, dated 16.6.2022

Some Controversial Interpretations in CBDT Circular

In exercise of the power conferred by section 194R(2) of the Income Tax Act, the CBDT, has issued the following guidelines, in its Circular No. 12/2022 dated 16.6.2022:

1. Section 194R requires deduction of TDS on any Benefit or Perquisite, irrespective of whether such amount is taxable in the hands of recipient or not and also irrespective of the falling of such income, in any particular section of the Income Tax Act or not.

It is imperative to note here that the Memorandum explaining the provisions of the Finance Bill 2022 specially and categorically required the deduction of tax at source u/s 194R of the Income Tax Act, only in respect of those Benefits or Perquisites which are in the nature of business income falling under section 28(iv) of the Income Tax Act.

However, the captioned CBDT Circular No. 12/2022 dated 16.6.2022, containing the clarificatory guidelines on TDS provisions in section 194R, takes a complete U turn and departure from the above reproduced Legislative Intent of the Parliament in bringing about this new TDS section 194R and in the very First Question contained in it, clarifies that the requirement of deduction of TDS u/s 194R on any benefit or perquisite arising out of any business or profession of a resident Indian will arise, irrespective of whether such benefit or perquisite is in the nature of any business income under section 28(iv) of the Income Tax Act, or not.

Some Controversial Interpretations in CBDT Circular

- In fact, in the said Question No. 1, the CBDT Circular goes to the extent of clarifying that 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% and as such 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 arriving at this conclusion, the CBDT Circular relies upon the Hon'ble Supreme Court Judgement in the case of PILCOM vs. CIT West Bengal (Civil Appeal No. 5749 of 2012), requiring the deduction of TDS u/s 194E of the Act, in respect of Non Resident Sportsmen or Sports Association, irrespective of whether such sum is taxable in the hands of the recipient or not. The CBDT Circular also tries to bring out a distinction between the language used in section 195 and section 194R of the Act, to infer that as the expression 'rates in force' as used in section 195 has not been used in section 194R of the Act, therefore, there is no requirement to check the aspect of taxability of such income in the hands of the recipient.
- However, it is pertinent to mention here that both sections 195 and section 194E of the Act are applicable in respect of Non-Resident Recipients, whereas section 194R of the Act is applicable on a Resident Recipient of any Benefit or Perquisite, and as such this analogy as brought about by the CBDT Circular seems to be vague and ambiguous, and as such requires reconsideration.

Some Controversial Interpretations in CBDT Circular

2. Section 194R requires Deduction of TDS on any Benefit or Perquisite, either in Kind, or Cash or a Combination of Both.

- In its second question, the CBDT Circular clarifies that tax under section 194R of the Act is required to be deducted irrespective of whether the benefit or perquisite is in cash or in kind, by virtue of the language used in first proviso to section 194R.
- It is imperative to mention here that as discussed supra, the Explanatory Memorandum to the Finance Bill 2022, envisaged the applicability of TDS deduction u/s 194R of the Act, only in respect of business income falling under section 28(iv) of the Income Tax Act, and the Hon'ble Supreme Court in the Mahindra & Mahindra Case 93 taxmann.com 32 (SC) has categorically held that only business income represented in Kind, are taxable u/s 28(iv) of the Act. Thus, as a natural corollary, it was inferred that requirement of deduction of TDS u/s 194R of the Act, will arise only in respect of those benefits or perquisites, which are in kind.
- However, as the CBDT Circular in its question no 1 has clarified that applicability of section 194R of the Act, will arise even in those cases which are not covered by section 28(iv) of the Act, and as such, in a way has negated the reliance on the hon'ble Supreme Court judgement in the case of Mahindra & Mahindra, as discussed supra.

Some Controversial Interpretations in CBDT Circular

3. Section 194R requires Deduction of TDS on any Benefit or Perquisite, even a Capital Asset

- In Question No. 3, the CBDT Circular has clarified that 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
- As discussed in point no 1 and 2 above, the CBDT Circular, on one hand, has categorically clarified that TDS u/s 194R will be required to be deducted on any benefit or perquisite, irrespective of whether such benefit is taxable as business receipts u/s 28(iv) of the Act or not.
- However, interestingly, on the other hand, in its Question No. 3, CBDT has relied upon several judgements of the Hon'ble High Courts, wherein it has been held that business income falling u/s 28(iv) of the Act is taxable, even if the same is a Capital Asset like the judgements of Ramesh Babulal Shah v CIT (2015) 53 taxmann.com 277 (Born), CIT v Rainaniyam Homes (P) Ltd (2016) 68 taxmann.com 289 (Mad), CIT v Subrata Roy (2016) 385ITR 547 (All), in clarifying that TDS is required to be deducted on any benefit or perquisite, even if it is a Capital Asset.
- Therefore, the CBDT Circular very conveniently adopts the Cherry-picking approach of relying upon some selective judgements rendered in the context of very same section 28(iv) of the Act, the applicability of which section has been tried to be made redundant in Question No. 1 of the very same CBDT Circular.

Some Controversial Interpretations in CBDT Circular

4. TDS u/s 194R is to be Deducted in some cases, even if the Recipient in his individual capacity, is not carrying on any business or profession

- In Question No. 4 of the said CBDT Circular, it has been 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 furnishing its tax return. It is further clarified that the threshold of twenty thousand rupees in the second proviso to sub-section (1) of section 194R of the Act is also required to be seen with respect to the recipient entity.

- Thus, a deeming fiction of obtainment of any benefit or perquisite not arising out of carrying out of any business or profession in the individual capacity of the recipient, but by virtue of his employment, has been provided by the CBDT Circular, for the applicability of the TDS provisions as contained in section 194R of the Act.

Some Controversial Interpretations in CBDT Circular

5. Applicability of TDS u/s 194R on Reimbursement of Out of Pocket Expenses

- In Question No. 7, the CBDT Circular has clarified that TDS u/s 194R would be required to be deducted even on Out of Pocket Expenses, being incurred by the Service Provider, and being reimbursed to him by the Service Recipient, if the Bill/Invoice of such Out of Pocket Expenses, is not in the name of Service Recipient.
- However, if the Invoice/Bill of such Out of Pocket Expenses is in the name of Service Recipient, then TDS provisions u/s 194R would not be applicable.
- This treatment of applicability of deduction of TDS u/s 194R, even on Out of Pocket Expenses, being incurred by the Service Provider and being reimbursed by the Service Recipient, on Cost to Cost basis, if the Bill of such Out of Pocket Expenses is not in the name of Service Recipient, is clearly contradictory to the legislative intent of bringing in this TDS section 194R by the Legislature, as in such cost to cost basis reimbursement of out of pocket expenses, no benefit or perquisite is arising in the first place to attract TDS levy u/s 194R.

Impact Assessment of TDS on Benefits or Perquisites u/s 194R

Thank You