The Chamber of Tax Consultants
Estd. 1926
ज्ञानं परमं बलम्
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22nd August, 2022

To,
Smt. Nirmala Sitharaman,
Hon'ble Finance Minister,
Ministry of Finance,
North Block, New Delhi 110 001

Respected Madam,

Sub : - **Representation on 194R**

1. The Chamber of Tax Consultants (CTC), Mumbai was established in 1926. CTC is one of the oldest (about 96 years) voluntary non-profit making organizations in Mumbai formed with the object of educating and updating its members and taxpayers on Taxation and other laws. It has a robust membership strength of about 4000 professionals comprising of Advocates, Chartered Accountants and Tax Practitioners.
2. CTC has been regularly making representations on various issues, *inter alia*, pertaining to Income-tax Act, 1961 ('the Act').
3. In the present communication, attention is invited to section 194R of the Act and the Circular No. 12 of 2022 dated 16 June 2022 and various issues arising thereunder.

Brief Introduction of section 194R

4. Vide Finance Act, 2022, a new section 194R has been introduced in the Income-tax Act, 1961. This section requires any person responsible for providing to any resident, any benefit or perquisite, whether convertible into money or not, arising from business or the exercise of a profession, by such resident, to deduct tax at source at the rate of 10% before providing such benefit or perquisite. The section has been made applicable with effect from 1st July, 2022. Section 194R(2) and 194R(3) empowers the Central Board of Direct Taxes ('Board') with the prior approval of Central Government to issue guidelines for the purpose of removing difficulty in giving effect to provisions of section 194R. Further, every guideline issued by the Board shall, as soon as may be after it is issued, be laid before each House of Parliament.

5. The Explanatory Memorandum to Finance Bill 2022, has explained the rationale behind such insertion. It has been stated that section 28(iv) of the Act taxes value of any benefit or perquisite, whether convertible into money or not, arising from business or exercise of profession. However, in many cases, the recipient does not report the receipt of benefits in their return of income and therefore, the same goes untaxed. Accordingly, in order to widen and deepen the tax base, section 194R has been introduced. Thus, the purpose behind introduction of the section is well documented and well appreciated.

6. The consequences of not deducting tax at source are severe. The same can be brought out, in nutshell, as under:
    a. Person responsible for deducting tax, is treated as an assessee-in-default u/s 201(1) of the Act.
    b. Interest is levied at the rate of 1% per month for non-deduction of tax at source u/s 201(1A) of the Act.
    c. Person responsible for deduction tax may be subjected to penalty u/s 271C of the Act, which provides for levy of penalty to the extent of TDS which the deductor has failed to deduct.
    d. If the payment or provision is made during the course of business or profession, then the benefits or perquisites are subject matter of disallowance u/s 40(a)(ia) of the Act.

7. The CBDT has issued a Circular, being Circular No. 12 of 2022 dated 16th June, 2022 in exercise of the powers granted by sub-section (2) of section 194R with a view to remove difficulties as brought out by various stakeholders. However, many of the issues raised by the stakeholders remain unaddressed. Further, the said circular has created more confusion and inconsistencies.

8. Considering the serious consequences involved, CTC desires to make the following representation in this regard which arises out of the interpretation of the section 194R and the Circular No. 12 of 2022, on behalf of its members and the taxpayers at large.

Power to issue guidelines to remove difficulties

9. It is noted that since, the last two Finance Acts, there is a new trend adopted by the Legislature to make provision for power to remove difficulties and such power has been bestowed upon the Board. Further, using such powers, clarifications and guidelines are issued which are made binding not only on the Department but also on the assessees at large.

10. At the outset, CTCwishes to place its strong reservations on record as regards this practice being adopted. 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, were 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. A clarification issued by the Board may bind the authorities as prescribed in section 119 of the Act but not the assessees and judicial forums. Such clarifications are in the nature of opinion of the Board which cannot and should not bind the assessees.

11. It is seen that certain clarifications are issued which run contrary to the provisions of the Act and the intention behind the amendment. This has been observed in relation to the section 194R of the Act and the same is brought out in the subsequent paragraphs.

12. 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 (See (1975) 98 ITR 209 (SC) Madeva Upendra Sinai vs. UOI & Ors. and (2004) 265 ITR 423 (Bom) The Jalgaon District Central Co-Operative Bank Ltd. & Anr. vs. UOI & Ors.).

13. In light of the above, at the outset, we wish to request to the Hon Finance Minister that, such kind of powers having wide ramifications, should not be provided to an administrative body under the Legislation. We absolutely respect the right of the Board to come out with clarifications but at the same time request the Board to respect the rights of the taxpayers to interpret the law and not to enforce its view on the taxpayers at large. A natural corollary to the above, is our request that the Circulars issued should not go beyond the scope of the Act which will lead to unnecessary litigation.

Issues in Circular No. 12 of 2022 dated 16.06.2022

14. In response to Q. 1, it has been clarified that there is no necessity for a deductor to check whether the benefit or perquisite is chargeable to tax u/s 28(iv) of the Act. In fact, it has been clarified that there is no need to check whether the benefit or perquisite is taxable or not in the hands of the recipient. It is submitted that the above clarification runs contrary to the object/ purpose behind insertion of section 194R. The Explanatory Memorandum to Finance Bill, 2022 states that "*As per clause (iv) of section 28 of the Act, the value of any 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 the recipient of such benefit or perquisite. However, in many cases, such recipient does not report the receipt of benefits in their return of income, leading to furnishing of incorrect particulars of income*." Clearly, 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. Even the wordings of both the sections are identical. Therefore, the reply to Q. 1 of the Circular is contrary to such object and also the plain text of the section and therefore, the same should either be reconsidered or further clarification should be issued in this regard. Naturally, the reading of the above suggests that one has to check whether the benefit of perquisite is taxable in the hands of the recipient or not i.e., whether such benefit or perquisite is income in the hands of the recipient or not. In fact,

the words, benefits and perquisites itself means that the same should be taxable in the hands of the recipient and to supplement this proposition, it is submitted that section 194R uses the phrase arising from business or the exercise of a profession, by such resident, which again entails that such benefits or perquisites has to a taxable receipt under the head "Profits and Gains of business or profession". In the said reply, comparison with section 195 and refering to the judgment in case of PILCOM vs. CIT, 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. Moreover, under the guise of removing difficulties, such clarifications cannot be issued which are running contrary to the object/ purpose and the plain reading of section 194R. A question has also arisen, in the context of this response, as to the applicability of section 194R to write off of bad debts, loan waivers, guarantees, shareholder activities etc, which, with due respect, were never intended to be covered u/s 28(iv) and therefore, section 194R. The said issue may please be properly addressed.

15. In reply to Q. 2 of the Circular, it has been clarified that there is no necessity that the benefit or perquisite should be received in kind. Tax has to be deducted at source whether the benefit or perquisite is entirely in cash, partly in cash and partly in kind or entirely in kind. Reliance in this regard has been placed on proviso to section 194R(1). It is submitted that the phrase "*any benefit or perquisite, whether convertible into money or not*" has been subject matter of interpretation by the Hon'ble Apex Court in case of **CIT vs. Mahindra and Mahindra Ltd. [2018] 404 ITR 1 (SC).** The Hon'ble Apex Court in the said judgment, has categorically held that in order to invoke the

provision of Section 28(iv) of the Act, the benefit which is received has to be in some other form rather than in the shape of money. The said judgment has been ignored while drafting the response to Q. 2 off the Circular. Moreover, as per the Explanatory Memorandum to the provisions of the Finance Bill, 2022, as brought out earlier, section 194R is sought to be applied to income of the nature referred to in section 28(iv) of the Act. Since, the said clarification in the Circular runs contrary to the judgment of the Hon'ble Apex Court in our opinion, the same cannot be countenanced. In so far as the reliance on proviso is concerned, it nowhere suggests that even, benefits or perquisites in cash has to be subject matter of TDS. In any case, the proviso cannot run contrary to the main section. The proviso only provides that if benefit of perquisite is partly in cash and such component of cash is not sufficient to take care of TDS liability, then the deductor has to ensure that TDS has to be paid before such benefit or perquisite is paid. This has also been clarified in reply to Q. 9 of the same circular. Thus, the cash component of benefit or perquisite is not subject matter of TDS but the same can be used to discharge the tax liability. In fact, if cash benefit or perquisites are also sought to be taxed then there would be overlapping of various sections. For example, section 194J applies on payment of, *inter alia*, fees for tech services or professional fees. By virtue of this clarification, even section 194R would apply to such payments. Section 194C applies on payment to contractors. By virtue of this clarification, even section 194R would apply to such payments. Thus, this clarification is clearly not what the section intends to do. Thus, this reply of the Board creates more confusion and therefore, the same requires reconsideration. We request that the same may be either removed or there should be a further clarification in this regard.

16. In reply to Q. 3, similar reply, as given in reply to Q. 1, has been given which has been already discussed hereinabove. Thus, even reply to this question requires reconsideration. Also, the reply to such question deviates from the plain text of the main provision that such benefit or perquisites should arise from business or exercise of profession of the recipient. Same should be

clarified by the Board comprehensively. Moreover, certain examples have been given in this regard which are dealt with hereunder :

a. The first example deals with compensation received by a person on consent decree passed. The said sum was held to be taxable by the Hon'ble Bombay High Court in Ramesh Babulal Shah vs. CIT reported in [2015] 53 taxmann.com 277. The said judgment is however no longer a good law in light of the judgment of the Hon'ble Apex Court in case of Mahindra and Mahindra (supra) wherein it has been held that any benefit in the nature of cash cannot be taxed u/s 28(iv) of the Act.

b. The second example deals with waiver of principle loan and reliance is placed on the judgment of the Hon'ble Madras High Court in case of CIT vs. Ramaniyan Homes P Ltd. reported in (2016) 68 taxmann.com 289. This judgment cannot be said to be a good law pursuant to the judgment of the Hon'ble Apex Court in case of Mahindra and Mahindra (supra). In fact, subsequently, this judgment of the Hon'ble Madras High Court has not been followed in light of the Hon'ble Apex Court judgment. It is very strange that judgment of the Hon'ble Apex Court, interpreting section 28(iv) has not been considered while drafting the present circular.

c. The third example given deals with value of rent free accommodation, furniture etc. given to the directors. Reliance is placed on the judgment of the Hon'ble Allahabad High Court in case of CIT vs. Subrata Roy (2016) 385 ITR 547. It is submitted that the said judgment deals with section 17(2) of the Act, as the assessee was an employee of the company. Reference has been made to section 28(iv) of the Act but that appears to be obiter. In fact, this clarification would create a doubt as to whether perquisites provided to an employee would be subject matter of TDS u/s 192 of the Act or 194R of the Act. The Board is requested to reconsider this example.

d. The fifth example given is receipt of shares by a director from the company which was held to be taxable by the Hon'ble Bombay High Court in D.M. Neterwalla vs. CIT (1986) 122 ITR 880. Such kind of transaction of issuing shares to employees of the company are now termed as ESOPs and are specifically taxable u/s 17 of the Act. Again, this clarification would create a doubt as to whether perquisites in the nature of ESOPs provided to an employee would be subject matter of TDS u/s 192 of the Act or 194R of the Act. The Board is requested to reconsider this example. In fact, reply to Q. 4 on page 4 states that any benefits to employee is subject matter of TDS u/s 192 of the Act. Thus, contrary clarifications have been given which creates more confusion rather than resolving the same.

17. The broad nature of interpretation applied by the Board that any benefit or perquisite whether taxable or not or whether in kind or in cash has to be subjected to TDS u/s 194R would lead to a conclusion that any payment made to any person in the course of the business/ profession of the recipient has to be subject matter of section 194R. Such is clearly, not the interpretation of the section and it would lead to utter chaos and confusion.

18. In reply to Q. 4, it has been stated that sales discount, cash discount or rebates are in the nature of benefits, though to remove difficulty, it has been clarified that no tax is required to be deducted at source. In the very same reply, it has been stated that if two items are given free on purchase of 10 items, then there is no benefit or perquisite as the cost of 10 items should be considered as cost of 12 items. To clear our stand on this issue, we submit that cash discount/ sale discount or rebate cannot be considered as benefit or perquisite as the ultimate price paid by the buyer should be considered as the actual purchase price. Even if such discounts are given after goods are sold, still it shall go on to reduce the purchase price and cannot be considered as perquisites or benefits. In the latter situation, it is submitted that the benefits/ perquisites if any, is in terms of money/ cash and therefore, section 194R

should not apply at all. Also, the clarification about free medicine samples to doctors has to be reconsidered. The distribution and use of samples is properly regulated and the regulation is followed by the honest doctors which outnumber those handful which may not be following the guidelines prescribed for the distribution and use thereof. It is well settled that for the catching of a delinquent few, the law cannot operate to the detriment of the honest majority. Incidentally, there is a clarification issued about section 192 on page 4, which, with due respect it is submitted, cannot be clarified in a circular issued u/s 194R(2) of the Act.

19. It has been further, clarified in response to Q. 4, that section 194R would not apply to benefit or perquisite to a Government entity, like Government hospital, not carrying on business or profession. The said clarification appears to be vague and ambiguous. It is submitted that section 194R does not apply to a recipient who does not receive the benefit or perquisite in the course of business or profession. Thus, receipts by not only Government entities like hospitals but also by charitable trusts, not carrying on any business cannot be subject matter of TDS u/s 194R of the Act. A suitable clarification may be issued in this regard.

20. In reply to Q. 7, it has been clarified that reimbursement of out-of-pocket expenses is subject matter of TDS u/s 194R. Examples have been given. Such clarification is unlawful on various counts. Firstly, 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 (See (2017) 392 ITR 186 (SC) DIT vs. A.P. Moller Maersk AS). In absence of any element of income, such reimbursement cannot be considered as benefit or perquisite which can be subjected to TDS u/s 194R of the Act. Secondly, if such reimbursement is paid in cash and not in kind, then again section 194R has no applicability.

Thus, this clarification is not in sync with the position in law. In the reply, a further example has been given that if in the course of providing consultancy service, if a person has to travel then ordinarily travel and lodging expenses are to be incurred by the consultant and if the same is reimbursed then the same amounts to benefits or perquisites on which tax has to be deducted at source u/s 194R of the Act. The said clarification is incorrect. If a professional has been engaged, for example a lawyer practicing in Mumbai is engaged to argue a matter in Delhi, in such a case, the responsibility of travel and lodging is ordinarily of the person to whom services are provided. There is no question of any benefit or perquisite in this regard. Even otherwise, such lodging and travelling cannot be considered as benefit or perquisite. It is something which is mandatory or sine qua non to provide services. It is something without which a person cannot render services. In such case, there is no question of treating the same as benefit or perquisite. The clarification issued in this regard, is stretching the concept of benefit or perquisite too far. In fact, in the very same reply, a second example is given that if the invoice is obtained in the name of the service recipient and if such cost is incurred by the service provided and subsequently reimbursed, then there would not arise any liability to deduct TDS u/s 194R of the Act. The name mentioned on the invoice cannot determine the nature of the transaction. Out of some policy, the name on the invoice may be mentioned of the person travelling or persons staying but that does not change the situation, in so far as income tax is concerned. Thus, the said clarification may be recalled or reconsidered.

21. In reply to Q. 8, the Board has provided instances as to when a conference to educate dealers would not be considered as benefit/ perquisite. It is clarified that if the conference is for selected dealer or customers, who have achieved particular targets then the same would be in the nature of benefit/ perquisite. The said clarification appears to be incongruous to the earlier paragraph of the reply. The invitees should not matter if the purpose of the conference is one of the prescribed in the said reply. In the said reply, it has been specified that any expenditure attributable to leisure trip or leisure component even, if

the same is incidental to the conference would be in the nature of benefit or perquisite. It would be difficult to compute the expenditure towards the leisure component and to deduct tax. Thus, suitable clarification may be issued in this regard. Various other issues such as what exactly is meant by 'leisure component', i.e. whether gala dinners, cocktails, light music at dinner time etc, constitute 'leisure' and the mechanism of monitoring which recipient availed of the said facility or not, need to be considered and a suitable clarification be issued in this regard. Also, the previous night's stay or the following night's stay on account of non-availability of suitable transport / travel arrangements ought not to be included.

In light of the above, we request the Hon. Finance Ministerto kindly consider the above issues on priority basis. We look forward to Your Honor's intervention and taking up our request for kind consideration. Further, we are also willing to personally present this issue before you, if need so arises.

Yours Sincerely,

For **THE CHAMBER OF TAX CONSULTANTS**

Sd/ Sd/- Sd/-

Parag Ved **Mahendra Sanghvi** **Ketan Vajani**
President **Chairman** **Co-Chairman**
Law and Representation Committee

CC : **Chairman, CBDT.**