Re : Representations on FAQs covered in Circular No. 12/2022 issued for removal of difficulties in giving effect to TDS u/s. 194R on business perquisites/benefits

Executive Summary

1. FAQ 1 may be reconsidered and it may be clarified that TDS u/s. 194R is applicable only to payment of benefit or perquisite which is taxable u/s. 28(iv). Appropriate consequential clarifications are also required in FAQ 2 and FAQ 3 which reiterate that deductor is not required to check if the benefit or perquisite is taxable in the hands of recipient. It is also desirable to have specific definition of 'benefit' or 'perquisite' on lines of s.17(2) with appropriate valuation rules to have better clarity and consistency of application

2. FAQ 2 may be reconsidered and it may be clarified that TDS u/s. 194R is applicable only to payment of non-monetary benefit or perquisite which is taxable u/s. 28(iv) in line with ratio of SC ruling in Mahindra & Mahindra's case

3. The illustrations in FAQ 3 may be revisited and proper guidance may be given to taxpayers by citing those decisions where receipt of capital asset by taxpayer was held to be benefit or perquisite arising from business or exercise of profession.

4. It may be specifically clarified that any write off of debt whether unilateral or through negotiated settlement or one time loan settlement or under IBC is not a benefit or perquisite arising from business or exercise of profession and hence not liable to TDS u/s. 194R

5. The clarification provided in FAQ 4 with respect to free samples may be reconsidered and it may be clarified the provisions of free samples for testing or customer evaluation does not constitute benefit or perquisite liable to TDS u/s. 194R. If required, to avoid abuse, a safe harbour like total sample cost not exceeding 2% or 5% of total sales may be considered as a bonafide sales promotion activity

6. TDS on free medical samples is not justified since it does not represent 'benefit' or 'perquisite' for the doctors. Hence, it is humbly requested that the CBDT should not impose such burden on the industry. Rather it should be clarified that TDS u/s. 194R will not apply on free samples distributed in compliance with statutory guidelines. FAQ 4 may be revisited and modified to that extent

7. On FAQ 5 in respect of valuation of benefits/perquisites, we request the CBDT to issue illustration considering the factors such as date of FMV, related party etc. In absence of any clarification from CBDT, confusion and ambiguity may get created in the minds of stakeholder which may lead to increase in possibilities of TDS default and selection of scrutiny assessment / litigation

8. Appropriate considerations may be given in social media influencer illustration in FAQ 6 for one time use products or products permitted to used for its economic life or services consumed

9. FAQ 7 may be modified to clarify that reimbursement of personal expenses incurred by the service provider is a benefit or perquisite liable to TDS u/s. 194R

10. The reference to "conference in the nature of incentives/benefits to select dealers/customers who have achieved particular targets" in FAQ 8 may be deleted or clarified to cover only leisure components of such conferences with better guidance on identification and quantification of leisure components

11. Small value Diwali or other festival or event related (like dealer conference or 25/50 years of company, etc) small value corporate gifts/souvenirs may be exempted from TDS u/s.194R under a separate sub-limit

12. We most humbly request to take the above representation on record and issue required clarification / guidance / illustration to resolve the confusion and ambiguity in the minds of

stakeholders mentioned above. We request the CBDT to keep the applicability of section 194R in abeyance till the time the necessary clarifications are issued by the CBDT. Further, we request CBDT to grant opportunity for in-person meeting with our representative to put forward the stakeholder views in more detail

Detailed representations

1.1. This has reference to guidelines/clarifications issued by the Central Board of Direct Taxes (CBDT) through Circular No. 12/2022 dated 16 June 2022 for removal of difficulties in application of new withholding provision section 194R which has come into effect from 1 July 2022.

1.2. This representation seeks to put forth stakeholders views why some of the FAQs and/or illustrations provided therein need to be reconsidered by CBDT having regard to inconsistency with correct legal position and/or practical challenges in application of FAQs.

2. Object of TDS u/s. 194R – to capture incomes u/s. 28(iv) hitherto unreported by recipients

2.1. The new TDS provision u/s. 194R requires the payer to deduct tax @ 10% on provision of 'benefit' or 'perquisite', whether convertible into money or not, arising from business or exercise of profession,to a resident. The section provides a de-minimus threshold of Rs. 20,000 for applicability of TDS such that no TDS is required if the aggregate value of benefits or perquisites provided to a single person during a financial year does not exceed Rs. 20,000.

2.2. As per Explanatory Memorandum to Finance Bill 2022, the object of the new TDS provision is explained as follows which makes it clear that the intention is to capture those benefits which are admittedly taxable u/s. 28(iv) but were escaping assessment in absence of reporting framework :-

> *"**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. Accordingly, in order to widen and deepen the tax base, it is proposed to insert a new section 194R** to the Act to provide that the person responsible for providing to a resident, any benefit or perquisite, whether convertible into money or not, arising from carrying out of a business or exercising of a profession by such resident, shall, before providing such benefit or perquisite, as the case may be, to such resident, ensure that tax has been deducted in respect of such benefit or perquisite at the rate of ten per cent of the value or aggregate of value of such benefit or perquisite."*

2.3. The Budget Speech of Finance Minister while introducing Finance Bill 2022 referred to the provision as follows :-

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

2.4. The above extracts suggests that S. 194R was introduced with an intent to establish a withholding obligation in respect of income which is chargeable to tax u/s 28(iv). In fact, the language of S. 194R is also identical to S. 28(iv)

3. FAQ 1 on scope of s.194R requires reconsideration in the light of conflict with legislative object of introduction of s.194R and practical challenges

3.1. FAQ 1 states that S. 194R applies to a benefit or perquisite irrespective of whether such benefit is chargeable to tax and irrespective of the provision under which it is chargeable to tax. As an illustration, FAQ 1 suggests that S.194R can apply even where the benefit is taxable u/s. 41(1) of ITA. This expands the scope of s.194R much beyond s.28(iv).

3.2. Although, s.194R does not expressly refer to s.28(iv), the language of s.194R(1) is identical to s.28(iv) viz. any benefit or perquisite, whether convertible into money or not, arising from business or the exercise of a profession. No other section in the Income tax Act bears the same language. Even s.41(1) which is referred as illustration in FAQ 1 refers to *"obtaining whether in cash or in any other manner whatsoever, any amount in respect of such loss or expenditure or some benefit in respect of such trading liability by way of remission or cessation thereof"*. It does not refer to *"any benefit or perquisite, whether convertible into money or not, arising from business or the exercise of a profession"*

3.3. S.28(iv) and s.41(1) cover different types of business incomes. The scope of s.28(iv) was explained in CBDT Circular No. 20D dated 7 July 1964 by providing illustration of "*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*"

3.4. In contrast, s.41(1) is successor to s.10(2A) of 1922 Act which was required to be inserted in view of judicial precedents[1] which held that such remission of liability is not "income" at all in the hands of the taxpayer.

3.5. Similar rationale will apply to all other provisions which have different language and scope. Hence, it is incorrect to infer that TDS obligation u/s. 194R will extend to any benefit or perquisite and regardless of whether the amount is taxable or under which section it is taxable.

3.6. If FAQ 1 is accepted to be correct and it is applied on literal basis in conjunction with FAQ 2 and FAQ 3, then TDS u/s. 194R will become a residual or "catch all" TDS provision which covers all payments which are not already covered by other TDS provisions. This does not align with the legislative intent and express language of s.194R.

3.7. It also raises significant practical challenges. For instance, s.41(1) covers unilateral write back of trading liabilities by a debtor in his accounts even though creditor may not have written off as bad debt in his books u/s. 36(1)(vii). How can creditor keep track of write back in debtor's books? Instead of removing difficulties in giving effect to s.194R, this FAQ creates difficulties for taxpayers.

3.8. **Hence, it is submitted that FAQ 1 may be reconsidered and it may be clarified that TDS u/s. 194R is applicable only to payment of benefit or perquisite which is taxable u/s. 28(iv). Appropriate consequential clarifications are also required in FAQ 2 and FAQ 3 which reiterate that deductor is not required to check if the benefit or perquisite is taxable in the hands of recipient. It is also desirable to have specific definition of 'benefit' or 'perquisite' on lines of s.17(2) with appropriate valuation rules to have better clarity and consistency of application.**

4. FAQ 2 on monetary benefits requires reconsideration in view of conflict with Supreme Court ruling in the case of CIT v. Mahindra & Mahindra (404 ITR 1)(SC)

4.1. FAQ 2 states that S. 194R applies even to monetary benefits. This is contrary to SC ruling in the case of Mahindra and Mahindra (supra). The SC held that for benefit to be taxable u/s. 28(iv) (which has identical language as s.194R), the benefit should be received in some other form rather than in the shape of money.

[1] Refer, for instance, British Mexican Petroleum Co. Ltd. vs. Jackson (1932) 16 TC 570 (HL), Mohsin Rehman Penkar vs. CIT (16 ITR 183)(Bom)), Baroda Traders Ltd v. CIT (57 ITR 490)(Guj)

4.2. FAQ 2 justifies inclusion of monetary benefits by relying upon first proviso to s.194R(1). The said proviso refers to benefits which are provided (a) wholly in kind or (b) partly in cash and partly in kind but cash part is not sufficient to meet the TDS liability on whole of the benefit. It does not refer to situations of benefits provided (a) wholly in cash or (b) partly in cash and partly in kind where cash component is sufficient to meet TDS liability on whole of the benefit.

4.3. It is submitted that language of main provision of s.194R(1) is identical to s.28(iv) which is covered by ratio of SC ruling in Mahindra & Mahindra's case. The Legislature was very much conscious of law settled by SC. Hence, if Legislature wanted to expand the scope to monetary benefits, the language of s.194R(1) would have been different. The proviso merely ensures that taxpayers cannot escape their TDS obligation on the ground of impossibility of performance in case of in-kind payments. Hence, it is incorrect to infer that the proviso clearly indicates the legislative intent of covering situations where benefit or perquisite in cash.

4.4. If monetary benefits are considered to be covered by s.28(iv) it will result in significant overlap with other TDS provisions like s.194C, 194J, 194H, 194Q etc even for regular payments like labour charges, fees for technical services, commission, purchase of goods etc. It makes other TDS provisions which provide for lower TDS rates redundant. Such could never be the legislative intent. Contrary to removal of difficulty, FAQ 2 creates difficulty in understanding the true scope of TDS obligation u/s.194R.

4.5. It is also submitted that the s.194R(1) provides for deducting tax on "**any benefit or perquisite**, **whether convertible in to money or not**, arising from business or exercise of a profession, by such resident". On plain reading, it seems that the intent of legislature is to apply TDS only for non-monetary benefits or perquisites. If the intent is also to apply TDS on monetary benefits or perquisites, then these words "**whether convertible in to money or not"** would have been excluded. In other words, the language would have been like "**any benefit or perquisite**, **arising from business or exercise of a profession, by such resident**

4.6. **Hence, it is submitted that FAQ 2 may be reconsidered and it may be clarified that TDS u/s. 194R is applicable only to payment of non-monetary benefit or perquisite which is taxable u/s. 28(iv) in line with ratio of SC ruling in Mahindra & Mahindra's case**.

5. Illustrations provided in FAQ 3 on benefits received in the form of capital assets requires reconsideration

5.1. FAQ 3 correctly clarifies that benefit or perquisite u/s. 28(iv) may be received in the form of capital asset like motor car, land, etc. To this extent, the illustration of car given to assessee by his disciple who benefited from his preaching being held to be taxable u/s. 28(iv) in the case of CIT v. Ram Kripal Tripathi (1980)(125 ITR 408)(All) is apt.

5.2. However, references of other five judicial precedents create ambiguity and confusion to the stakeholders which is explained below.

Sr	Gist of ruling in FAQ 3	Our observations
1	Assessee entered into an agreement with '1' for purchase of a plot of land and certain amount was paid as earnest 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 filed 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	• This case did not involve benefit received in the form of capital asset. • The taxpayer, as a buyer, received compensation for breach of contract for sale of land by seller. • Taxpayer claimed it to be capital gains while the Bombay HC held that it was received in the course of adventure in the nature of trade and hence represented a revenue receipt taxable u/s. 28(iv).

	28(iv). Ramesh Babulal Shah v CIT (2015) 53 taxmann.com 277 (Bom)	• Incidentally, taxpayer did not raise argument of benefit being monetary in nature and Bombay HC did not have benefit of SC ruling in Mahindra & Mahindra's case delivered subsequently laying down ratio that s.28(iv) does not cover monetary benefit. • Nevertheless, what was received was monetary compensation and not a capital asset like car or land.
2	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)	• This ruling on waiver of loan has been overruled by SC in Mahindra & Mahindra's case (supra). Hence, its reference creates confusion. • In any case, the taxpayer received benefit of waiver of loan which according to SC in Mahindra & Mahindra's case is not a benefit or perquisite arising from business or carrying on of profession. There was no receipt of capital asset. • Please also refer our separate representations at para 6 below on write off/one time settlement of loans of constituents by banks/financial institutions.
3	Value of rent free accommodation, furniture and fixtures given to director was held as taxable under section 28(iv). CIT v Subrata Roy (2016) 385ITR 547 (All)	• In this case, it was admitted that the taxpayer was an employee. Hence, the benefits were held primarily taxable u/s. 17(2). S.28(iv) was considered as secondary. • In any case, the decision does not clearly specify whether the taxpayer got ownership of the assets or was merely allowed use of the assets like accommodation, furniture & fixtures, etc. There were other benefits also like services of servants, gardeners, etc • Hence, it does not represent an illustration of receipt of benefit in the form of capital asset.
5	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)	• In this case, the benefit of free shares received in the capacity as director was held taxable under predecessor provision of s. 2(24)(iv) in 1922 Act. S.28(iv) was not on statute at the relevant point of time. • S.2(24)(iv) taxes value of any benefit or perquisite, whether convertible into money or not, obtained from a

		company, inter alia, by a director and any sum paid by any such company in respect of any obligation which, but for such payment, would have been payable by the director. There is no need for the director to be engaged in business or carrying on profession for this purpose. Hence, this section is not comparable to s.194R which requires the resident recipient to receive the benefit in the course of carrying on business or profession. • Separately, perquisites provided to executive directors are covered by Salary TDS u/s. 192 and those provided to non-executive directors are covered by TDS u/s. 194J(1)(ba). Hence, it would not be covered by TDS u/s. 194R. Considering the above position, the reference to this decision creates ambiguity and confusion for the taxpayers.
6	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)	• In this case, the gift of land received was held as received in the course of exercise of vocation of preaching religion and hence not exempt as 'casual receipt' under predecessor provisions of s.10(3) (now deleted) of 1922 Act. S.28(iv) was not on statute at the relevant point of time • Since it was held to be regular income dehors s.28(iv), confusion arises how does this support the proposition that perquisite or benefit arising from business or exercise of profession u/s.194R can also include a capital asset.

5.3. **Hence, it is represented that the illustrations may be revisited and proper guidance may be given to taxpayers by citing those decisions where receipt of capital asset by taxpayer was held to be benefit or perquisite arising from business or exercise of profession.**

6. Waiver/write off/one time loan settlement by banks/financial institutions whether or not under insolvency resolution process may be clarified to be outside the scope of TDS u/s. 194R

6.1. A conjoint reading of FAQ 1, 2 and illustration of CIT v Ramaniyam Homes (P) Ltd (2016) 68 taxmann.com 289 (Mad) creates an ambiguity as if CBDT believes that waiver/write off/one time loan settlement by banks/financial institutions is a benefit or perquisite to the borrower/debtor and hence the bank/financial institution is required to do TDS u/s. 194R on the amount of loan waived off (known as "haircut" in industry jargon). FAQ 1 clarifies that the payer is not required to evaluate taxability in hands of recipient whether u/s. 28(iv) or any other section. FAQ 2 clarifies that monetary benefits are also covered by s.194R. The illustration of Ramaniyam Homes ruling in FAQ 3 explains waiver of principal amount of loan under one time loan settlement scheme would constitute income taxable u/s. 28(iv) –

although as stated earlier, this ruling has been reversed by Supreme Court in the case of Mahindra & Mahindra Ltd (supra).

6.2. Any such view will create huge practical challenges for the banks/financial institutions and have unintended outcomes as explained below.

6.3. Assume that the original loan amount is Rs. 100 Cr and it is settled for Rs. 20 Cr as part of One Time Loan Settlement or insolvency resolution process. It would be incorrect to infer that the waiver of Rs. 80 Cr is a benefit or perquisite arising from business or exercise of profession for the borrower. The borrower is generally not in the business of borrowing and lending loans. The write off/waiver is an outcome of either unilateral action by the lender considering the non-realisability of debt (or inadequacy of collateral) and/or negotiated settlement with the borrower and/or statutory process laid down in Insolvency and Bankruptcy Code.

6.4. In case of unilateral write off in the books of creditor, the borrower is not relieved from loan obligation. The lender may continue efforts for recovery despite write off. Any recovery of bad debt written off earlier becomes business income taxable u/s. 41(4). Similar is the position in respect of provision made for bad and doubtful debts instead of write off – subject to difference that quantum of deduction for provision is regulated by s.36(1)(viia) and opening balance of provision is required to be reduced from bad debt write off of current year to avoid double deduction. Hence, there is no 'benefit' or 'perquisite' for the borrower

6.5. Even in case of negotiated settlement, the waiver is agreed considering the prospects of irrecoverability of whole of the amount if a negotiated settlement is not entered. For instance, in the above illustration, OTS is agreed for Rs. 20 Cr considering the prospect that if OTS is not entered, even recovery of Rs. 20 Cr will become difficult if the borrower goes into IBC or liquidation. The waiver of Rs. 80 Cr is not a benefit or perquisite since the borrower is ordinarily not capable of repaying the whole amount of the loan having regard to persistent losses and financial constraints. In any case, the lender will need to give up the amount involuntarily if the borrower goes into winding up.

6.6. In insolvency resolution process under IBC, no single lender has a say in the recovery process. The entire process works through a majority decision of the committee of creditors. The borrower also does not have any say in the proceedings. There is a regulated and transparent process of bids by various resolution applicants which are evaluated by committee of creditors, insolvency resolution professional and NCLT. The waiver is consequence of acceptance of the most favourable bid for the lenders. The entire proceedings are for the benefit of lenders and not to grant any benefit or perquisite to the borrower.

6.7. If the waiver/haircut is incorrectly viewed as benefit or perquisite arising from business for the borrower, the lender will need to part with a significant portion of recovered amount towards payment of TDS u/s. 194R. In the above illustration, out of recovery of Rs. 20 Cr, the lender will need to pay at least Rs. 9 Cr (10% of Rs. 80 cr on grossed up basis as per FAQ 9). While the lender and its depositors are deprived of this amount, the unintended outcome of the TDS will be that the borrower will be able to claim credit/refund of such TDS appearing in its Form 26AS/AIS defeating the very object of OTS. Neither the lender (or its creditors/depositors) nor the Government benefits from such TDS in the name of borrower. The benefit will be enjoyed by the borrower and it will become difficult for lenders to further pursue the borrower for recovery of the TDS amount. Such could never have been legislative intent of s.194R.

6.8. In the cases involving loan settlement/ waivers, the Non-Banking Financial Corporation ('NBFC') / banks has already suffered significant loss of principal and interest. The schemes for waivers or one-time settlements are arrived at after all practically possible modes of recovery have been exhausted and no other choice is left with the NBFC / banks but to bring matters to a close through a settlement.

6.9. The regulatory affairs and business transactions of NBFC / banks are under strict purview and supervision of RBI and therefore they have strict expenditure policy which is monitored

internally as well through external audits (including regulatory inspections). While the circular allows the person responsible for deducting tax to seek tax payment/ recovery of taxes from the deductee, it is next to impossible to recover anything further from the borrower that is already struggling with the repayments. As such, it would become the NBFC's obligation to bear the taxes out of its own pocket (that too after grossing up), thus putting the NBFC's / banks capital through further unwarranted strain.

6.10. It is submitted that the legislative intent of s.194R as clarified in Explanatory Memorandum to Finance Bill 2022 and Finance Minister's Budget speech was to capture sales promotion incentives which were hitherto going untracked and unreported. On the other hand, write off of bad debts above Rs. 1 lakh are required to be reported in ITR 6 with name, PAN and address of debtor. The said disclosure may need fine-tuning to specifically reflect one time settlement or waiver cases. Hence, imposing TDS obligation on bad debt write off is completely inconsistent with legislative intent.

6.11. FAQ 1, 2 and illustration of Ramaniyam Homes ruling provided in FAQ 3 is creating difficulty for the stakeholders rather than removing difficulty in giving effect to s.194R.

6.12. **Hence, it is represented that it may be specifically clarified that any write off of debt whether unilateral or through negotiated settlement or one time loan settlement or under IBC is not a benefit or perquisite arising from business or exercise of profession and hence not liable to TDS u/s. 194R**.

7. Free non-medical samples given for testing are not 'benefits' or 'perquisite' – FAQ 4 may be reconsidered on this aspect

7.1. FAQ 4 clarifies that the free samples would not fall under relaxation provided to sales discount, cash discount, rebate or quantitative discount referred in first three paras of FAQ 4.

7.2. Business exigencies require provision of free samples for bonafide business purposes. For example, whenever any new product is launched (eg. new industrial chemical), the manufacturer needs to give free samples to its customers to test whether it meets their requirements before placing large orders. Similarly, plywood and laminate manufacturers provides samples of their product portfolio in catalogues to the retailers so that end customers can browse through a range of choices before shortlisting the final shade, design and quality. Such catalogues have no commercial value except for the purposes of display to customers. Another instance in FMCG industry are 'tester products' for items like perfumes which are kept at sales counter for the customers to try before purchasing the product.

7.3. In case of FMCG companies it is a common practice to distribute samples of its products/goods for free through Marketing agencies to end consumers as an incentive / benefit. Such pass through of goods from Marketing agencies should not be treated as a benefit / perquisite in the hands of Marketing agency and suitable clarification should be issued in this regard. If the same is subject to TDS in the hands of Marketing agency it shall lead to significant hardships given 10% TDS deduction on value of goods can be exponentially higher as compared to marketing fees charged by the agency.

7.4. Similarly, clarification may also be provided on non-applicability of TDS under Section 194R on Point of sale material (POSM) provided by Companies with its branding and logo to retail outlets / chains wherein its goods are sold as same is for brand & business promotion and not a benefit / incentive to the retail outlet / chains

7.5. The illustrations of non-medical samples can be multiplied but the essence of all illustrations is that the samples are not for granting benefit or perquisite to the customers but for the purposes of customer's evaluation before buying the products.

7.6. Imposition of TDS on such transactions will create huge practical challenges and become roadblock for genuine sales promotion activity. No customer will be ready to pay tax on value of such samples since the customers are not personally enriched.

7.7. **Hence, it is requested to reconsider the clarification provided in FAQ 4 with respect to free samples and it may be clarified the provisions of free samples for testing or customer evaluation does not constitute benefit or perquisite liable to TDS u/s. 194R. If required, to avoid abuse, a safe harbour like total sample cost not exceeding 2% or 5% of total sales may be considered as a bonafide sales promotion activity.**

8. Free medical samples are not 'benefits' or 'perquisites' in the hands of doctors – FAQ 4 may be reconsidered on this aspect

8.1. FAQ 4 clarifies that the free samples would not fall under relaxation provided to sales discount, cash discount, rebate or quantitative discount referred in first three paras of FAQ 4. It further provides illustration of free medicine samples to medical practitioners as transaction liable to TDS u/s. 194R. It further provides for "dual TDS" mechanism where free samples are provided to employee or consultant doctors of hospital in terms of pharma company is required to do TDS u/s. 194R in name of hospital and hospital, in turn, is required to do TDS u/s. 192 for employee doctors and u/s. 194R for consultant doctors. It also provides alternative of pharma company doing direct TDS in the name of consultant doctor.

8.2. The above clarifications in the guise of removal of difficulties creates huge compliance burden for the industry and unintended outcomes which is explained below.

8.3. It may be recollected that CBDT Circular No. 20D dated 7 July 1964 had explained the effect of s.28(iv) by providing illustration of "*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".* This itself suggests that s.28(iv) is intended to cover an item which results in personal benefit or enrichment to the taxpayer. It cannot cover free medical samples which doctors are statutorily required to use strictly for clinical evaluation purposes by giving them to patients and cannot be sold or monetised by them.

8.4. The Hon'ble Supreme Court ruling in the case of Eskayef v. CIT (245 ITR 116) supports that expenditure incurred on physician's samples are for the purposes of advertisement, publicity or sales promotion – regardless of whether they are for the purposes of testing efficacy of new medicine or for promoting an established medicine.

8.5. FAQ 64 in CBDT Circular No. 8/2005 in context of erstwhile Fringe Benefits Tax (FBT) clarified that they are in the nature of 'sales promotion and publicity' and hence liable to FBT. But subsequently, S.115WB was amended firstly to exclude distribution of free samples of medicines or medical equipment to doctors by Finance Act 2006, and subsequently by Finance Act 2007 to distribution of samples either free of cost or at concessional rate of any products (not necessarily pharma products), from scope of FBT on the ground of being an ordinary selling expenditure which does not result in any fringe benefit for the employees.

8.6. The above judicial and legislative development shows that distribution of free physician samples is an ordinary/bonafide selling expenditure which cannot be regarded as resulting in benefit or perquisite to the doctors.

8.7. Providing samples of pharmaceutical products is not prohibited under either the Indian Medical Council (Professional Conduct, Etiquette and Ethics), Regulations 2002 ("MCI Code") or the Uniform Code of Pharmaceutical Marketing Practices by the Department of Pharmaceuticals ("UCPMP"). The UCPMP prescribes guidelines under which medical samples should be dispensed which ensure that they are used strictly for clinical evaluation purposes. Even the draft Uniform Code for Medical Device Marketing Practices ("UCMDMP") published for stakeholder consultation on 16 March 2022 lays down guidelines to ensure that medical devices are distributed as samples for evaluation purposes only.

8.8. The Drugs and Cosmetics Rules, 1945 also recognizes the practice of providing drugs for distribution to medical professionals as a free sample by providing specific labelling requirements, requiring such sample to be labelled with the words 'Physician's Sample – Not to be sold'.[2]

8.9. The above referred guidelines illustratively require following compliances by the pharma/medical devices industry

(a) Samples to be provided only to Health Care Professionals (HCP) or their authorised representatives

(b) Quantity of samples should be very nominal – for medicines, it is restricted to prescribed dosage for 3 patients.

(c) It should be accompanied by latest product information

(d) The pharma/medical device company must maintain record of the quantities of samples distributed, details of the HCP to whom they were supplied and date of supply

Relevant extracts from UCPMP and draft UCMDMP are provided in Annexure A

8.10. Considering the above referred strict conditions under which product samples are distributed to doctors, it is humbly submitted that distribution of free samples cannot be regarded as benefit or perquisite for the doctors. The doctors are required to administer them to patients. They cannot monetise them or personally enjoy them like other gift items like television, gold coins, free travel or hospitality, etc.

8.11. We may also highlight the practical challenges which pharma/medical device industry and doctors may face if TDS is made on value of free samples. In most cases, the free samples will either be dispensed to patients or scrapped by the doctors and hence, the doctors may not perceive it as their income. This is not comparable to other freebies prohibited by MCI Guidelines.

8.12. The pharma/medical device company will, therefore, find it difficult to recover the TDS from the doctors. In fact, the doctors may simply refuse to accept the free samples if pharma/medical device company requests for TDS amount and PAN/Aadhar. The issue of recovery of TDS will cause friction between the industry and doctors defeating the purpose of statutory guidelines on dispensation of free samples. Ultimately, due to business considerations, the pharma/medical device industry may need to bear the TDS liability themselves by suitably grossing up the value of free samples in terms of s.195A and FAQ 9 which will result in additional cost burden on the industry.

8.13. Since the free samples are either distributed to patients or scrapped, the doctors should be entitled to corresponding deduction, if the value of free samples is considered as taxable in their hands. However, in absence of clarity, the issue of allowability of corresponding deduction for such expense in the hands of the doctors will also pose challenges. The employee doctors cannot claim any deduction from salary income for the free samples distributed to patients. It will result in unwarranted artificial taxation on such employee doctors.

8.14. Some doctors may wish to take position that the free samples do not constitute their income and hence not offer anything in their return of income nor claim corresponding TDS credit. But their AIS/Form 26AS will reflect TDS u/s. 194R made by pharma/medical device companies on value of free samples. This will result in the doctors facing action by the CPC u/s. 143(1)(a)(vi) while processing their returns to add the value of income appearing in Form 26AS or Form 16A to their returned income.

8.15. All in all, if TDS is made by pharma/medical device industry on value of free samples distributed to doctors, it will cause immense practical difficulties for both industry and doctors.

8.16. **TDS on free medical samples is not justified since it does not represent 'benefit' or 'perquisite' for the doctors. Hence, it is humbly requested that the CBDT should not**

[2] Drugs and Cosmetics Rules, 1945, rule 96 (ix)

impose such burden on the industry. Rather it should be clarified that TDS u/s. 194R will not apply on free samples distributed in compliance with statutory guidelines. FAQ 4 may be revisited and modified to that extent.

9. Valuation of benefits / perquisites – FAQ 5 – Issuance of illustrations

9.1. The CBDT has also mentioned about the valuation of benefit / perquisites in FAQ 5. As per the FAQ 5, the valuation of the benefit or perquisite would be based on fair market value ('FMV'). The CBDT should issue more clarification / guidance or provide illustration for the calculation of FMV. For instance, it is not clear whether it appropriately covers captive services provided by service providers like free stay in hotel provided by hotel to its agents.

9.2. It is better to provide valuation rules on lines of Rule 3 to prescribe different valuation rules for different types of benefits/perquisites.

9.3. **We request the CBDT to issue illustration considering the factors such as date of FMV, related party etc. In absence of any clarification from CBDT, confusion and ambiguity may get created in the minds of stakeholder which may lead to increase in possibilities of TDS default and selection of scrutiny assessment / litigation**.

10. Appropriate considerations may be given in social media influencer illustration in FAQ 6 for one time use products or products permitted to used for its economic life or services consumed

10.1. As per FAQ 6, no tax is to be deducted if products like car, mobile, outfit, cosmetics etc returned after use. However, to avoid confusion and litigation, it is also necessary to clarify that no tax is required to be deducted even in following scenarios:

(a) Product is allowed to be used till the end of economic life but only for business purposes (eg. refrigerator with manufacturer's logo provided for storing soft drinks or food items) and is returned /scrapped.

(b) Product cannot be reused by any other person due to nature of such product (eg cosmetics - hygiene reasons). Accordingly, it may be scrapped and not returned by the influencer

(c) Services consumed in the rendering of advertisement services like free hotel stay provided by a hotel for the purposes of content creation to be released on social media for promotion of the hotel.

10.2. **Accordingly, it may be clarified that TDS u/s. 194R will not apply in above referred situations.**

11. Reimbursement of out of pocket expenses to service providers for expenses incurred in rendering of services is not a benefit or perquisite – FAQ 7 may be revisited

11.1. FAQ 7 clarifies that any expenditure which is the liability of a person carrying on business or profession, it met by the other person is in effect benefit/perquisite by the second person to the first person in the course of business/profession. It further provides illustration of reimbursement of hotel and travel expenses of consultant and clarifies that if the underlying invoices are not in the name of client, the client should deduct TDS u/s. 194R whereas if the underlying invoices are in the name of client, no TDS needs to be made.

11.2. It is submitted that reimbursement of expenditure which is necessarily required to be incurred for providing of services to client cannot be regarded as benefit or perquisite. (Refer Owen vs. Pook (1969)(74 ITR 147)(HL). It does not matter whether the invoice of the expense is in the name of service provider or client. Moreover, such reimbursement of expense at actuals does not partake a character of income in the hands of the service provider and therefore should be excluded from the applicability of TDS u/s. 194R

11.3. On the other hand, reimbursement of some personal expenditure incurred by the service provider (like personal electricity bills or rent for residential accommodation) which has no connection with rendering of services to client would be a benefit or perquisite on which TDS u/s. 194R can apply.

11.4. As a trade practice, there are instances where in the contract for appointment of a consultant, the Company states that it would be their responsibility to take the Consultant to the desired place of work at their cost and expenses, and shall either arrange for tickets or shall reimburse the same, the Consultant will not be "liable" to incur any expenses towards the traveling costs. In such case, TDS u/s 194R should not get attracted.

11.5. Further, whenever a Contract says "Consultants fees + out of pocket expenses at actuals", the service receiver actually undertakes the liability of all out of pocket expenses actually incurred by the service provider in rendering the services, whether the invoice for the same is in the name of service provider or service receiver. However third-party invoice to claim the reimbursement, is a must. However, when a consultant claims reimbursement of expenses towards ink and paper or printing expenses used/incurred in the process of rendering his opinion, the same is his liability and obligation which is met by the service receiver.

11.6. The consultant gets reimbursement not because the Company wants to provide him with some benefit or perquisite but the Company reimburses on account of its contractual obligation towards the consultant, for the same. So if the contract provides for reimbursement, there is no question that the liability of service provider is taken over by the service receiver, irrespective of the fact whether the third-party invoice is in the name of service provider or service receiver. Further the case of reimbursement does not attract any tax in the hands of recipient u/s 28(iv). Firstly, because it is a cash receipt and secondly it is P&L neutral. Even if the amount of reimbursement is credited in the hands of the service provider, the same is also allowed as his/her business expenditure u/s 37(1). The dictionary meaning of the word "reimbursement" is to make restoration or payment of an equivalent amount. Hence, doing the hair-spitting as to whether the invoice is in the name of service provider or service receiver, for a revenue neutral case is unwarranted

11.7. Incidentally, FAQ 7 appears to be in direct conflict with FAQ 30 of Circular No. 715 dated 8 August 1995 where CBDT clarified that reimbursement of expenses to contractor or professional will be liable to TDS u/s. 194C or 194J. This creates ambiguity and uncertainty for stakeholders as to which TDS provision should be applied.

11.8. As earlier stated, S. 194R does not refer to a situation of benefit or perquisite provided either in cash or partly in cash and partly in kind where cash component is sufficient to discharge TDS obligation on whole of the benefit or perquisite. We therefore believe that since the reimbursement of out of pocket expenses is nothing but a cash payment to a service provider and hence should be outside the ambit of S. 194R

11.9. Also, the concept of "pure agent" is well recognised in GST. It is defined as follows in GST Valuation Rules :-

> *""pure agent" means a person who -*
>
> *a) enters into a contractual agreement with the recipient of supply to act as his pure agent to incur expenditure or costs in the course of supply of goods or services or both;*
>
> *b) neither intends to hold nor holds any title to the goods or services or both, so procured or provided as pure agent of the recipient of supply;*
>
> *c) does not use for his own interest such goods or services so procured; and receives only the actual amount incurred to procure such goods or services in addition to the amount received for supply he provides on his own account"*

11.10. The important thing to note is that a pure agent does not use the goods or services so procured for his own interest and this fact has to be determined from the terms of the contract. The illustrations of "pure agent" provided in GST flyer published by CBIC are Customs Broker and C&F agents. Imposing TDS obligation on clients while making reimbursements to pure agents merely because invoices are not in name of clients will result in significant blockage of working capital for such agents. In many cases, their own agency fees are less than 10% of total reimbursements and such agency fees are already subject to TDS u/s. 194C or 194H. Thus TDS amount will be much more than their own income.

11.11. **Hence, it is submitted that FAQ 7 may be modified to clarify that reimbursement of personal expenses incurred by the service provider is a benefit or perquisite liable to TDS u/s. 194R.**

12. The reference to "conference in the nature of incentives/benefits to select dealers/customers who have achieved particular targets" in FAQ 8 may be deleted or clarified to cover only leisure components of such conferences with better guidance on leisure components

12.1. The first para of FAQ 8 clarifies that there is no benefit/perquisite if dealer/business conference is held with prime object to educate dealers/customers about any of specified business aspects like new product launch, sales techniques, addressing queries, etc. The third para of FAQ 8 clarifies that expenditure attributable to leisure/personal components of conferences are liable to TDS u/s. 194R. These principles are correct – although there is practical difficulty in identifying leisure/personal component from overall composite conference expense.

12.2. However, the second para of FAQ 8 creates ambiguity when it states *"However, such conference must not be in the nature of incentives/benefits to select dealers/customers who have achieved particular targets."*

12.3. Considering business exigencies, logistics, etc it is possible that participation in business conferences is restricted to select dealers who have achieved particular targets since it may not be possible or economical to take all dealers to such conferences. Such practice also promotes a healthy competition amongst the dealers to perform better. It is submitted that even at such conference, if the prime object is to educate dealers about business related aspects mentioned in first para of FAQ 8, the entire conference expenditure should not be considered as benefit or perquisite liable to TDS u/s. 194R. Even at such conferences, it should only be expenditure attributable to leisure or personal components referred in third para of FAQ 8 like leisure trip, accompanying family members or prior/overstay which should be made liable to TDS u/s. 194R.

12.4. It is submitted that business character of conference does not turn into leisure/personal character merely because select dealers who have achieved particular targets are invited so long as conference involves aspects mentioned in first para and TDS is made on leisure/personal components mentioned in third para.

12.5. In case of a dealer conference undertaken by a Company there can be multiple activities which needs to be evaluated in absence of appropriate methodology for identification of above mentioned exceptions which may lead to litigations.

E.g. In a dealer conference of a Company, there may be Gala dinner, entertainment activities (eg stand-up comedy show) held for motivating and engaged dealers, rental cost for event, decoration cost. Firstly, such activities will have to be evaluated by the Company whether same would be treated as an incentive / benefit. Additionally, it shall have to track the number of dealers who enjoyed such a benefit, value the benefit and accordingly deduct TDS which seems to be a tedious process.

12.6. **Hence, it is represented that second para of FAQ 8 be deleted to avoid ambiguity and confusion for Tax authorities and stakeholders**. **Also, appropriate methodology /**

documentation should be prescribed for identification of above exceptions on which TDS shall be applicable

13. Small value Diwali or other festival or event related (like dealer conference or 25/50 years of company, etc) small value corporate gifts/souvenirs may be exempted from TDS u/s.194R under a separate sub-limit

13.1. Typically corporate events has leisure element necessarily built in to sustain participants' engagement at the event in the interest of the business. While the option provided in section 194R (where the transactions are in kind) to ask the other parties to deposit tax or otherwise, to seek reimbursement for tax from them. However, the same is not often practically feasible and would only go to increase the cost of these transactions for the organization as the payer entity itself would have to eventually bear the taxes. Also, the fallout would be that businesses would ultimately start curtailing these costs, which would have an adverse impact on several other industries such as MSME, food and beverages, travel and tourism leading also to fall in GST collections. We do not believe that to be the desired impact of the section.

13.2. Separately, gifts and souvenirs are essential to build and nurture the relationships with business associates. It is important to duly recognise this human aspect and go beyond just being transactional. The Courts have repetitively held that the taxman should not sit in judgement and decide what is appropriate for the business. Thus, a broader perspective should be adopted in understanding whether or not an activity can be seen as giving rise to a benefit or perquisite. Having said that this creates humungous administrative challenges in monitoring these transactions.

13.3. In case of salary taxation, there is separate sub-limit of Rs. 5000 for gifts on ceremonial occasions or otherwise for employees in Rule 3(7)(iv).

13.4. **Thus, from that perspective and also from perspective of ease of doing business, the CBDT may alternatively consider enhancing the threshold value for such gifts to attract implications under section 194R or having a separate threshold of – say, Rs. 5000 for such gifts**

14. Grant of sufficient time to implement TDS u/s. 194R – Defer the date of applicability and/or clarify that no punitive action will be taken for any TDS default u/s. 194R for a period of at least 6 months.

14.1. The TDS u/s. 194R was introduced in Finance Bill 2022 on 1 February 2022. It got enacted into law on 30 March 2022. The Circular No. 12/2022 for removal of difficulties was issued on 16 June 2022. S.194R has come into effect from 1 July 2022. Hence, the industry had a very short time of merely 15 days to understand the true scope of s.194R and implement it in their day to day transactions.

14.2. It is submitted that implementation of any new TDS provision is a humongous task for large corporates. It takes significant time and efforts to (a) understand the exact scope of the new provisions (b) understand CBDT's views on various issues (c) analyse the provisions and CBDT's views on various different business transactions (d) evaluate the changes required in the software and internal processes to identify & track the transactions and ensure that TDS is made (e) engage and work with impacted counterparties to arrive at common understanding of the TDS compliance (f) work with software vendor and experts to make the necessary changes in the system (g) sensitise and train the employees and (h) perform testing procedures to ensure that the process is correctly implemented. It is humanely impossible to achieve all this within a short period of 15 days.

14.3. The Income tax Department should empathise with industry given its own experience while switching over from old income tax return e-filing portal to new e-filing portal. Similarly, the Income tax Department has been facing challenges in implementing faceless assessment process and faceless appeals process.

14.4. The industry is keen to comply with the law of land and help the Government in collection of tax revenue which is in national interest. But industry seeks a sympathetic approach at least in the matter of TDS/TCS which the industry performs purely as an agent for the Government without any compensation or consideration. Expecting the industry to comply with a new TDS provision within 15 days of issue of Guidelines and imposing penalties and fines for non-compliance will be very punitive for the act of assisting the Government in collection of taxes.

14.5. It is requested to provide industry with sufficient lead time after issue of final guidelines to carry out such changes. Also, it would have helped both industry and Government if draft guidelines were released for public consultation before final notification to address any implementation issues or difficulties.

14.6. **Hence, it is recommended that a lead time of at least 6 months may be provided and the effective date of new TDS provisions u/s. 194R may be deferred to that extent. Alternatively, it may be clarified that no punitive action by way of recovery of TDS, interest, penalty or disallowance of expense will be taken for any TDS default u/s. 194R for a period of 6 months from 1 July 2022.**

Our requests: In view of the above, we most humbly request to take the above representation on record and issue required clarification / guidance / illustration to resolve the confusion and ambiguity in the minds of stakeholders mentioned above.

We request the CBDT to keep the applicability of section 194R in abeyance till the time the necessary clarifications are issued by the CBDT.

Further, we request CBDT to grant opportunity for in-person meeting with our representative to put forward the stakeholder views in more detail.

Annexure A

Extracts from Uniform Code of Pharmaceuticals Marketing Practices (UCPMP) and draft Uniform Code for Medical Device Marketing Practices (UCMDMP) on distribution of free samples

From UCPMP

5. Samples

5.1 Free samples of drugs shall not be supplied to any person who is not qualified to prescribe such product.

5.2 Where samples of products are distributed by a medical representative, the

sample must be handed directly to a person qualified to prescribe such product or to a person authorized to receive the sample on their behalf.

5.3 The following conditions shall be observed in the provision of samples to a person qualified to prescribe such product:

(i) Such samples are provided on an exceptional basis only (see (ii) to (vii) below) and for the purpose of acquiring experience in dealing with such a product;
(ii) Such sample packs shall be limited to prescribed dosages for three patients for required course of treatment;
(iii) Any supply of such samples must be in response to a signed and dated request from the recipient;
(iv) An adequate system of control and accountability must be maintained in respect of the supply of such samples;
(v) Each sample pack shall not be larger than the smallest pack present in the market;
(vi) Each sample shall be marked “free medical sample - not for sale” or bear another legend of analogous meaning;
(vii) Each sample shall be accompanied by a copy of the most up-to-date version of the Product Information (As required in Drug and Cosmetic Act, 1940) relating to that product.

5.4 A pharmaceutical company shall not supply a sample of a drug which is an anti-depressant, hypnotic, sedative or tranquillizer.

5.5 The companies will maintain details, such as product name, doctor name Quantity of samples given, Date of supply of free samples distributed to Healthcare practitioners etc.

From draft UCMDMP

5. Evaluation Samples

5.1 Free evaluation samples of Medical Devices shall not be supplied to any person other than HCPs or as per hospital protocol to reach the HCPs.

5.2 Where evaluation samples of products are distributed by a medical representative, the sample must be handed directly to a person qualified to use & prescribe such product or to a person authorized to receive the sample on their behalf.

5.3 The following conditions shall be observed in the provision of evaluation samples to a person qualified to prescribe such product:

(i) Such samples are provided for the purpose of acquiring experience in using such a product, hands on experience and evaluation.
(ii) An adequate system of control and accountability must be maintained in respect of the supply of such samples by all Companies including maintaining proper documentation and rationale.
(iii) Each sample shall be accompanied by a copy of the most up-to-date version of the Product IFU/DFU/ e-IFU (link to the website/digital IFU), wherever applicable, relating to that product.
(iv) The number of evaluation samples (single use products) provided at no charge should not exceed the quantity reasonably necessary for the adequate evaluation of the products.

5.4 The Companies will maintain details, such as product name, HCP's name& contact information, Quantity of evaluation samples given, Date of supply of evaluation samples distributed to HCPs, relevant product traceability information.

5.5 Demonstration products: Company demonstration products are different from Evaluation Samples. Demonstration products can be either single use products, mock-ups, temporary software or equipment that are used for HCP and Patient awareness & education. Demonstration products are typically identified as not intended for patient use and demonstration equipment are taken back by Company after the demonstration period is over. However, consumables used in live procedural demonstration usually cannot be taken back. Clause 5 of this code does not apply to demonstration products and is limited to Evaluation Samples only. Demonstration products shall be specifically identified and tracked by the Company.

5.6 The documents/records required to be maintained under this Clause shall be maintained by Company for a period, as per applicable laws specific to category of document/record and in absence of such applicable laws as per Company's record management policy.