**TAX FOCUS FORUM MEETING WITH**

**HON'BLE MEMBER (TAX PAYER SERVICES & REVENUE), CENTRAL BOARD OF DIRECT TAXES, SHRI HBS GILL**

**WITH STAKEHOLDERS OF INCOME TAX DEPARTMENT**

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|  | Clarify non-applicability of Section 194R on certain items like Free Medical Samples, Brand Reminders, etc. | * **Rationale and recommendations**
* This has reference to guidelines/clarifications issued by the Central Board of Direct Taxes (CBDT) through Circular No. 12/2022 dated 16 June 2022 and Circular No. 18/2022 dated 13 September 2022 for removal of difficulties in application of withholding provision section 194R which has come into effect from 1 July 2022.
* 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.
* Object of TDS u/s. 194R is to capture incomes u/s. 28(iv) hitherto unreported by recipients.
* The 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.
* As per Explanatory Memorandum to Finance Bill 2022, the object of this 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.”** 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. “** 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).
* Finance Act 2023 expanded the scope of both s.28(iv) and s.194R to monetary benefits. Furthermore, it made default in non-deduction of TDS on business perquisites in kind liable to both penalty u/s. 271C and prosecution u/s. 276B. Also, while Finance Act 2024 rationalised s.276B by providing that prosecution shall not apply if the TDS is deposited by due date of filing quarterly statement, this relaxation is not extended to, inter alia, default of non-deduction of TDS on business perquisites in kind. This casts very onerous burden on the industry and hence, it is of utmost importance there should be complete clarity on scope of TDS obligation u/s. 194R without casting burden on ordinary commercial transactions not constituting any personal perquisite or benefit to the recipient.
1. **Free non-medical samples given for testing are not ‘benefits’ or ‘perquisite’ – FAQ 4 of Circular No. 12/2022 may be reconsidered on this aspect**
* 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.
* Business exigencies require provision of free samples for bonafide business purposes. For example, whenever any new product is launched (e.g. 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.
* 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. For instance, small shampoo sachets are pasted on newspaper page containing ad of the product and made available to all subscribers of the newspaper. 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.
* 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
* 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.
* 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.
* 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% of total domestic sales may be considered as a bonafide sales promotion activity.
1. **Free medical samples are not ‘benefits’ or ‘perquisites’ in the hands of doctors – FAQ 4 of Circular No. 12/2022 may be reconsidered on this aspect**
* 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.
* The above clarifications in the guise of removal of difficulties creates huge compliance burden for the industry and unintended outcomes which is explained below.
* 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.
* 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.
* 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.
* 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.
* 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 2024 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.
* 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’.[[1]](#footnote-2)
* The above referred guidelines illustratively require following compliances by the pharma/medical devices industry
	+ 1. Samples to be provided only to Health Care Professionals (HCP) or their authorised representatives
		2. Quantity of samples should be very nominal – for medicines, it is restricted to prescribed dosage for 3 patients.
		3. It should be accompanied by latest product information
		4. 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
		5. The total quantum of free samples in a year cannot exceed 2% of annual domestic turnover.
* Relevant extracts from UCPMP 2024 are provided in Annexure A
* 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.
* We may also highlight the practical challenges which pharma/medical device industry and doctors face if TDS is made on value of free samples. In most cases, the free samples are either dispensed to patients or scrapped by the doctors and hence, the doctors do not perceive it as their income. This is not comparable to other freebies prohibited by MCI Guidelines.
* The pharma/medical device company, therefore, find it difficult to recover the TDS from the doctors. In fact, the doctors 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 causes 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 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 results in additional cost burden on the industry.
* 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 also poses challenges. The employee doctors cannot claim any deduction from salary income for the free samples distributed to patients. It results in unwarranted artificial taxation on such employee doctors.
* 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 inquiries and action by the AO in assessments to add the value of income appearing in Form 26AS or Form 16A to their returned income.
* All in all, TDS by pharma/medical device industry on value of free samples distributed to doctors causes immense practical difficulties for both industry and doctors.
* 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.
1. **Providing customary festival gifts, brand reminders of small value, etc may be clarified to be outside scope of TDS u/s. 194R**
* The ritual of giving gifts to each connected business partners be it employee, customer, vendor etc. has been an age-old tradition in India. The exchange of gifts on festive occasions such as Holi, Eid, Diwali etc. denotes the expression of companionship and fellowship among the people.
* Industry adopts various practices such as Diwali Sweets, Holi Colours, Pooja Materials, Chocolates, Shawls, Trophies, Small token gifts etc. Such courtesy extended during festival occasions need not be considered as benefit/income and accordingly TDS made applicable.
* Even in case of salary taxation, gifts from employers on ceremonial occasions not exceeding Rs. 5000 in aggregate during the financial year are not taxed as perquisites (Refer, proviso to Rule 3(7)(iv))
* Companies also distribute various small value brand reminders such as Pens, Product standees, Product design artworks, Paper holders, Calendars, Caps, Spreaders etc. UCPMP permits brand reminders in health care settings of small value of Rs. 1000 per item. The objective here is always the advertisement and brand recall.
* For the recipient there is no perceived benefit as a) it cannot be resold, b) it cannot be used privately as company logo / Brand images are there & more importantly this are in very nominal values. Larger benefit of such promotional activities is to the Company.
* While s.194R provides threshold of Rs. 20,000 per recipient to trigger obligation to deduct tax, keeping track of such threshold across a large number of stakeholders like distributors, retailers, consumers, etc is very cumbersome and very difficult.
* Companies conduct various promotional events as part of its brand promotion or CSR obligation which are more towards the welfare activity for the community of its buyers, users, consumers etc. For e.g., Yoga Day, Health Check-up Camps, etc. In all such programmes Company Name, Brand, logo, Products are displayed. Such programmes are intended to create brand image and support the community with cause.

**Our requests: In view of the above, we most humbly request to kindly consider the above representations and clarify the non-applicability of TDS u/s. 194R in above situations which will resolve the ambiguity and provide certainty to all stakeholders including the tax authorities.** |
|  | Clarify that write off of trade debts or waiver of loans does not attract TDS under S.194R | **Background*** S.28(iv) brings to tax value of any benefit or perquisite, whether convertible into money or not, arising from business or the exercise of a profession. This provision has existed in the Act since A.Y. 1964-65.
* FA 2022 introduced S.194R mandating a person responsible for providing any benefit or perquisite to a resident arising from the business or profession carried on by such resident to deduct tax at the rate of 10% of the value or aggregate value of such benefit or perquisite. The proviso to s.194R provides that if the benefit or perquisite is provided wholly in kind or partly in cash & partly in kind but the cash component is not sufficient to meet the TDS on whole of the benefit, then the provider should ensure that tax required to be deducted is paid.
* FAQ 1 of CBDT Circular No. 12 of 2022 dated 16 June 2022 clarified that the provider of benefit or perquisite is not required to ascertain taxability of benefit in the hands of recipient whether it is taxable under S.28(iv), S.41(1) or any other section. FAQ 2 clarified that s.194R covers cash benefits also. FAQ 3 thereof while clarifying that s.194R can also cover capital assets gave an illustration of principal amount of loan waiver under One-Time Settlement (OTS) by referring to CIT v. Ramaniyam Homes (P) Ltd – (2016)(68 taxmann.com 289)(Mad). The inclusion of this illustration creates an ambiguity inasmuch as this ruling has been reversed by the Hon’ble Supreme Court in the case of CIT v. Mahindra & Mahindra (404 ITR 1)(SC). Also, the waiver of loan does not result in capital asset in the hands of the taxpayer.
* But subsequently, FAQ 1 of CBDT Circular No. 18 of 2022 dated 13 September 2022, in case of waiver of loan, notes that saddling the banks with an obligation to withhold taxes on OTS, would cast an additional burden on the banks to pay additional amount in the form of taxes which are required to be withheld in addition to the haircut already suffered on account of loan waiver. In order to remove such difficulty, the CBDT Circular clarifies that withholding under S.194R will not be applicable to waiver of loan granted on one-time loan settlement by 10 categories of financial institutions. The FAQ further clarifies that exemption from TDS would not impact taxation in the hands of the borrower.
* S.28(iv) and S.194R as amended by FA 2023 clarify that provisions would apply to any benefit or perquisite, whether in cash or in kind or partly in cash and partly in kind.

**Issues*** In this regard, clarification is required on the treatment of bad debts arising out of the general trade practice and the receivables required to be written off owing to non-recovery and / or by generally accepted accounting principles. The receivables towards the principal dues may be non-realisable, despite the genuine efforts of the taxpayer and such reasons can be attributable to the financial position of the debtor, debtor not being traceable, etc. The machinery provision of recovery of TDS in such cases cannot be exercised as the principal sum itself would be non-realisable & therefore, TDS cannot be deducted. Further, in case the taxpayer has to gross up the TDS & bear the TDS liability owing to bad debts’ write-off in books, it leads to an out-of-pocket situation and undue hardship to the taxpayer.
* Furthermore, a bad debt write off is a unilateral action taken in the books of the creditor and at times emanating out of accounting principles. The creditor is not legally precluded from pursuing the recovery from the debtor even after such unilateral write off and hence, the write off in books of creditor cannot be regarded as benefit or perquisite in the hands of the debtor. If a TDS were to be done on this and reflected in the Form 26AS, then it would make it even more difficult to recover any amounts against the debt from the debtor, as the debtor would then argue that the debt is no longer payable or the liability stands waived off. The debtor would also claim credit for TDS borne by the creditor.
* Write off of bad debts is driven by commercial reasons of not being able to realise the debts and not with a view to grant any benefit or perquisite to the debtor. Insistence on TDS on such write offs will result in double whammy of being burdened with TDS obligation in addition to commercial loss of write off. Furthermore, in case of unilateral write off, the creditor can still pursue the debtor for recovery of the debt and any such recovery is taxable in the hands of the creditor u/s. 41(4).
* Party wise details of write off of bad debts of Rs. 1 lakh or more are already available with the Income tax Department through the Return of Income filed by corporate assessees. Additional details required, if any, can be obtained by the Dept. by widening the scope of such reporting to ensure collection of taxes u/s 41(1).

**Recommendations*** It is recommended to clarify that withholding under S.194R is not required on write off of bad debt by creditor. It is recommended that similar relaxation as provided under CBDT Circular No. 18 of 2022 w.r.t. one-time settlements by specified financial institutions, may be extended to write off of trade debts.
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|  | Representation for relief from tax withholding in case of multiple small ticket transactions  | **Background** * As per the existing provisions of the Income Tax Act, 1961 (‘the Act’), certain receipts are subject to tax withholding (‘TDS’) at the rates specified under the Act. Accordingly, if a particular receipt is subject to TDS, the service provider (‘income recipient’) will receive the payment after the payer of income (‘deductor’) deducts the TDS.
* The deductors after deducting the TDS, deposit the same to the government treasury on behalf of the income recipient. Further, the deductors are required to report these transactions in their quarterly TDS statements whereupon the same are also reflected in Form 26AS/AIS of the income recipient.
* Form 26AS is a document capturing details of taxes paid by all deductors and collectors on behalf of the income recipient. It is issued by DGIT under section 285BB read with Rule 114-I. Such Form 26AS is a dynamic document and gets updated as and when the deductor makes amendment in their TDS returns.
* Typically, service or consumer facing industries having voluminous transactions, small ticket transactions with multiple deductors, face major challenges due to mismatch of TDS between the books of income recipient and deductor, multi-year reconciliation of receipts between books of accounts and Form 26AS and maintaining the physical copies of TDS certificates.
* Rule 37BA(3)(i)/(ii) provides that TDS credit shall be given in the year in which corresponding income is assessable and if corresponding income is assessable over more than one year, then TDS credit shall also be prorated across multiple year. Therefore, for the purpose of claiming credit of TDS in the return of income, the income recipient is also required to undertake reconciliation of TDS credit/receipts reflected in Form 26AS with TDS/revenue as offered in the books of accounts.
* The recent amendment in Section 155(20) of the Act also reinforces the fact that TDS credit shall be granted in the year in which the revenue is offered to tax. In terms of this amendment, if the income is offered to tax by the deductee in earlier year (say Year 1) but deductor deducts tax in subsequent year (say Year 2), the deductee is required to make separate application to the AO to seek credit in earlier year (Year 1) This further adds to the challenges faced by the income recipient in reconciliating the income and corresponding claim of TDS credit.
* Such reconciliation exercise poses considerable challenges to the income recipient due to the voluminous transactions and loss of TDS credit for unreconciled transactions. This defeats the government’s objective of ‘ease of doing business’. The same is explained in detail below.
* At present, TDS is done by the deductor at specified statutory rate (-say, 0.1% or 2%) on the gross amount of revenue, which results in higher than current effective tax rate (‘ETR’) on net income for various income recipients – especially in service industries, leading to significant refund position and working capital blockage as there are delays in processing/ encashing of the refunds in the form of TDS due to reconciliation mismatches.
* While the Act provides the option of availing nil or lower TDS certificate under Section 197 of the Act, the process involves intense scrutiny and reluctance on the part of income tax department to issue nil or lower TDS certificate.
* Also, TDS Assessing Officers (‘AO’) seldom give NIL TDS certificates. At the highest, they give certificates with reduced rates – say, 0.1% (as the AO has inherent apprehension that the NIL TDS certificates may be misused), which makes compliance and reconciliation even more cumbersome.
* The following are the key challenges being faced by the business under the existing TDS provisions:
1. ***Challenges in transactional reconciliation of receipts due to voluminous transactions:***
* For the purpose of claiming TDS credit pertaining to the voluminous transactions, reflected in Form 26AS of the income recipient, there is a need to reconcile the revenue offered in the books of accounts vis a vis the receipts reflected in Form 26AS.
* Due to huge volume of transactions, multiple issues in reconciling the TDS credit lead to loss of TDS credit viz
	1. Mismatch in timing of reporting of transaction by the income recipient vis a vis recording of expense corresponding to such transaction in books of accounts by deductor, specifically with respect to year end transaction which is recorded by deductors in earlier year and reported by income recipient in subsequent year or vice versa;
	2. TDS is also required on advance payments which may be appropriated subsequently against multiple invoices which may fall across different tax years. Sometimes the appropriation of advance payments is different in books of deductor and books of income recipient if there are multiple contracts between the same parties.
	3. The quarterly statements do not require the deductors to report the invoice numbers of the deductors against which TDS is made. Furthermore, Form 26AS/AIS does not reflect the PAN of the deductor. Absence of these crucial data items make reconciliation exercise for the income recipient very cumbersome.
	4. Non reflection of transaction in Form 26AS on the date on which it is generated but since it is dynamic and keeps on changing frequently, the income recipient has to keep track of TDS reflected in Form 26AS till the date of filing return and even thereafter.
* Also, in course of processing of the return of income (‘ROI’) under Section 143(1) of the Act, entire TDS credit claimed is not granted on account of the mismatch in the amount claimed in return vis a vis that appearing in Form 26AS or the revenue reported in return. Many a times there is update in Form 26AS which is not available at the time of filing ROI but available at the time of processing of return leading to such discrepancy which is beyond the control of the income recipient.
* During the course of the assessment/scrutiny proceedings under the Act, such reconciliation is requested by the assessing/tax officer for verification purposes. In case of gap in Form 26AS and income offered to tax, either an addition is made to the returned income or TDS claim is denied.
* Further, large number of entries in Form 26AS due to voluminous transactions, because of huge volume of transaction involves greater administrative efforts from both income recipient and income tax department for review/ reconciliation, etc. Even the optimum use of technology for such reconciliation does not fully ease the administration efforts.
* Further, at times, on account of various reasons (split of functions between jurisdictional AO and CPC without clear demarcation, corporate actions undertaken by the deductors or income recipient, etc.) there are systemic challenges for such TDS credit not granted, during the rectification proceedings under the Act.
* Further sometimes post deduction, the deductor does not deposit the TDS and/or does not appropriately report the same in TDS return. Hence there is loss of TDS credit to the income recipient and/or loss of revenue to the government.
1. ***Significant blockage of working capital due to higher TDS percentage as compared to the ETR of income recipient***
* Typically, in many cases especially in service industries, profit margins of income recipient is low which leads to low ETR (total tax liability/total receipts). However, TDS done at the statutory rate on gross revenue is higher as compared to ETR of various income recipient owing to low profit margins.
* Accordingly, the total tax liability is substantially lower than TDS credit leading to higher refund claim. However, on account of significant delay in processing the refunds/ reduction in the quantum of refund processed/ denial of TDS credit, the working capital of the income recipient is significantly blocked. The release of such stuck refunds requires persistent follow up with CPC and JAO and also issues like short grant of interest u/s. 244A which results in multiplicity of rectification proceedings.
1. ***Intense scrutiny and resistance from the income tax department to issue ‘nil’ TDS orders***
* At times, the applications for lower/nil deduction are not disposed in a timely manner and rate granted therein is generally higher as compared to that requested by the income recipient.
* Further, on an average it takes 4-5 months for the income tax department to issue the lower/nil TDS order and is generally close to the average ETR for past three years and also there is buffer added on the rate as requested by the income recipient
* Rule 28AA(2)(iv) requires AO to consider the advance tax payment, TDS/TCS for the relevant assessment year till the date of making application under Rule 28(1). Hence, even if the application is made at the beginning or prior to the beginning of the financial year, there being no advance tax and/or low TDS, the rate computed for issuing lower TDS rate is higher. Rule 28AA(2)(iv) does not cover advance tax payments committed to be paid by the taxpayer after the issue of lower or NIL TDS certificates.
* Further, there is Inherent apprehension from tax department for misuse of nil withholding tax order. This apprehension is misplaced since the deductors are required to report NIL TDS cases in quarterly TDS statements. But the departmental officials believe that NIL TDS cases may not be reported by the deductors leading to loss of information captured in Form 26AS. We may clarify that where the transactions are subject to GST, even this apprehension is misplaced since both outward and inward supply transactions are captured in Form 26AS from GST filings made by the deductors and income recipients.
* To summarize, the existing TDS provisions are leading to higher compliance burden, working capital blockage on account of delayed processing of refunds, higher withholding tax and denial of TDS credit adversely impacting the “ease of doing business”.
* The Government has announced simplification of existing income tax law where one of the important aspects is reduction in compliance burden for taxpayers.

**Recommendations*** In order to address the above and as a measure of simplification of withholding tax compliances, through this representation, we request CBDT to make amendment in Rule 28AA of the Income Tax Rules, 1962 to direct the field level officer(s) to issue nil TDS certificate by considering declaration by the income recipient to pay advance tax in monthly instalments at the beginning of each month or providing bank guarantee, in lieu of TDS. This will protect the interests of Revenue and also result in significant ease of doing business for taxpayers without blockage of working capital in excess TDS and loss of TDS credit.
* We reiterate that such measure will not lead to misuse of NIL TDS certificate or loss of data for populating Form 26AS since the transactions are subject to GST which is already captured in Form 26AS.
* The above measure will result in several advantages for deductors, income recipients and the Tax Department without any loss of revenue which is explained below.

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| **On Revenue** | **On income payers/ recipient** |
| * Positive impact on revenue collections on account of lumpsum monthly advance tax payments by the income recipient as against small ticket multiple TDS by multiple tax deductors
* No loss to the revenue
* Reduction in administrative efforts to address TDS credit mismatch/not granted issues
* Lower rectifications / appeals leading to reduced payout of interest on income tax refund under Section 244A of the Act by the government
* Obviates multiple administrative proceedings since there is upfront collection of tax from the payee/deductee
* Tracking of transaction would continue as deductor would still report NIL TDS order in TDS returns. In any case, transactions can be tracked through GST returns filed by deductor and deductee. Thus, better control and monitoring over tax collections along with collection details of payers/ deductor(s).
 | * Deductors are relieved from deducting small amounts of TDS on multiple transactions leading to lesser compliance burden. They are protected from interest, penalty and prosecution proceedings for any unintentional TDS defaults.
* For income recipients, obviates tracking of deductor and their depositing TDS regularly, PAN/TAN mismatch issues, etc.
* No need to reconcile TDS on advance payments against multiple invoices
* No issues of year mismatch by way of TDS on yearend provision by deductor and recognition of revenue in subsequent year by income recipient
* Reduction in administrative efforts due to elimination of unproductive compliances/reconciliation, multiple rectifications for grant of TDS credits, appeals, etc. which will be effectively used elsewhere.
* Timely compliances of tax payments without any practical difficulties
* Promotes ease of doing business on account of compliance simplification and better cash flow management
* Overall optimization of work and deployment of resources for better value-added work/compliances
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|  | Onerous compliance w.r.t. issuance of TDS / TCS certificates | **Rationale:*** Provisions of section 203 of the Income Tax Act, 1961 read with rule 31 require every deductor to issue certificate of [**tax deducted at source**](https://taxguru.in/income-tax/frequently-asked-questions-on-tax-deducted-as-source-tds.html)**(in Form 16A)** within 15 days from the due date for furnishing the statement of tax deducted at source.
* Failure to comply with the provisions of the Act attract penalty under the provisions of section 272A of the Act, a sum of Rs. 100 for every day during which the failure continues.
* Currently, TDS certificates in Form 16A to be issued are to be downloaded from Income Tax website. The same is on the basis of the TDS return filed by the deductor which gets reflected in form 26AS of the payee.
* With increasing reliance on Form 26AS by the deductees for claim of TDS /TCS credit and information being auto updated in the returns of income, such certificates are not much of relevance.
* The requirement of issuing TDS certificates has become obsolete and if continued, leads to substantial administrative inconvenience without adding any corresponding value to the compliance requirement of service vendors or service providers.
* Issuance of such certificates is only a cumbersome process.
* In fact, s.199 r.w. Rule 37BA does not require furnishing of TDS certificate for grant of TDS credit. Rule 37BA(1) provides that TDS credit shall be given to the person to whom payment has been made or credit has been given on the basis of information relating to deduction of tax furnished by the deductor (i.e quarterly TDS statements) to the income-tax authority or person authorised by such authority (i.e DGIT(Systems)). Practically, TDS credit is granted on the basis of TDS credit appearing in Form 26AS/AIS of the taxpayer and taxpayers find it difficult to claim credit for TDS not appearing in Form 26AS/AIS.
* Rule 37BA(2) refers to procedure for granting credit to person other than person from whom tax is deducted through the procedure of declaration and requires the deductor to issue TDS certificate to the other person. However, even in case of such other person, the TDS credit is not granted on the basis of furnishing of TDS certificates.
* Further, in light of compliance requirement for Sections 194 (dividends), 193 (securities), 194Q (purchase of goods), 194R (business perquisites) and 206C(1H) (TCS on sale of goods) issuance of certificates has become a humongous task even if accomplished with the help of technology and automation. It is a process which merely adds to administrative burden of deductors without any value addition to deductees and Government.
* The need for issue of TDS certificates in the present circumstance exists only in following three cases viz.
1. Salary TDS certificates in Form 16 – This is an important document for salaried employees (including pensioners) which is used for many commercial transactions like borrowing loan, buying insurance policies, etc
2. Non-residents – Issue of TDS certificate is essential to enable them to claim FTC in their home country
3. S.206AA/s.206CC cases where PAN is not available since the TDS/TCS cannot be populated in Form 26AS in such cases.

**Recommendation*** The requirement to issue TDS / TCS certificate can be done away for bring in ease of compliance. Section 203 of the Income Tax Act, 1961 (Certificate for tax deducted) should be modified accordingly to define an end date to the said provision.
* However, exceptions should be made for (A) Salary TDS certificates in Form 16, (B) TDS certificates to non-residents and (C) TDS certificates in s.206AA cases where PAN is not available. To cover up any other situation where the deductee requires a TDS certificate, a residual exception can be provided whereby the deductee makes a specific request to the deductor to furnish TDS/TCS certificate.
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|  | Digitisation of process of obtaining approvals for recognised PF, SAF and Gratuity Fund | **Background*** Over a period of one and half decade, the Income Tax Department has successfully converted most manual processes and interactions between taxpayers and Tax Department into digitised/faceless manner which has resulted in efficiencyand transparency
* In the last Budget, the Hon’ble Finance Minister announced that the process of application and disposal of rectification petitions and order giving effect to appellate orders will also be digitised.
* In this regard, we are happy to note that some charges in Mumbai have moved to centralised digital entry of tapalthrough Aayakar Seva Kendras (ASK) as informed by Hon’ble PCCIT of Mumbai.

**Issue*** However, there are still certain compliances which are required to be made in manual mode. One of them is the process of obtaining approvals for recognised provident fund, superannuation fund and gratuity fund u/s. 36(1)(iv)/(v).
* Many taxpayers face difficulty of their applications for approval being pending for a very long time. Often, old records are difficult to retrieve both at the Tax Department’s end and Taxpayer’s end.

**Recommendation*** Hence, we recommend that the process for obtaining approvals for recognised provident fund, superannuation fund and gratuity fund may also be converted into digital process.
* Digitisation will enable monitoring of the applications and faster disposal by the Tax authorities.
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|  | Rationalization of Central Processing Centre (CPC) processes | **Background*** Currently, income tax returns e-filed by taxpayers are centrally processed at CPC, Bangalore u/s 143(1) of the Income Tax Act (Act). The objective for establishing CPC was to expeditiously determine the tax payable or any refund due to the taxpayers or check for any mistakes apparent in the income tax return.
* Statutorily, the return processing framework is governed by s.143(1) to s.143(1D) of the Act and Centralized Processing of Returns Scheme. S.143(1)(a) permits CPC to make following adjustments while processing the ITRs:-
1. any arithmetical error in the return
2. an incorrect claim apparent from any information in the return. This is defined to mean a claim, on the basis of an entry, in the return-
	1. of an item, which is inconsistent with another entry of the same or some other item in such return;
	2. in respect of which the information required to be furnished under the Act to substantiate such entry has not been so furnished; or
	3. in respect of a deduction, where such deduction exceeds specified statutory limit which may have been expressed as monetary amount or percentage or ratio or fraction
3. disallowance of loss claimed, if return of the tax year for which set off of loss is claimed was furnished beyond the due date specified u/s. 139(1)
4. disallowance of expenditure or increase in income indicated in the audit report but not taken into account in computing the total income in the return
5. disallowance of deduction claimed u/s. 10AA or Chapter VIA-C if the return is furnished beyond due u/s. 139(1)
* The first proviso to s.143(1) casts statutory obligation on CPC to give prior intimation of proposed adjustment to taxpayer and consider taxpayer’s response before making such adjustment. It further provides for minimum thirty days time for taxpayer to provide response to the proposed adjustment.
* However, there are various hardships being faced currently by taxpayers in such processing which are summarized below:-
* Anomalies in ITR utility
* Anomalies in CPC return processing software
* Non-provision of statutory opportunity of prior intimation before making adjustment
* Non-consideration of taxpayer’s response to prior intimation – adjustments are mechanically made
* Delays or refusal in carrying out rectifications
* Non-redressal of adjustments made u/s. 143(1) in scrutiny assessment
* Each of them are explained and illustrated in following paras.

**Rationale**1. Anomalies in ITR utility
* It is often seen that ITR utility contains anomalies which lead to adjustments u/s. 143(1). For instance, if there is no change in method of valuation of closing stock, the ITR utility does not permit reporting of figures of increase or decrease in profit due to s.145A adjustments for adding the amounts of taxes, duties, etc. This leads to s.143(1) adjustment based on number reported in tax audit report (TAR) towards increase in profit as part of s.145A adjustment by ignoring the numbers reported towards decrease in profit. The ITR forms do not contemplate deemed LTCG u/s. 54F(3) on transfer of residential house within a period of 3 years which is taxable at 10%/12.5% u/s. 112A where the original capital gains from which s.54F exemption was claimed was in respect of listed shares u/s. 112A. The ITR utility provides for taxation of deemed LTCG at 20% rate alone which is incorrect.
1. Anomalies in CPC return processing software
* The CPC return processing software merely picks up adjustments leading to increase in total income by ignoring the adjustments reported in audit report leading to decrease in total income on the same issue. It is true that s.143(1)(a)(iv) permits CPC to make adjustment in respect of disallowance of expenditure or increase in income indicated in the audit report but not taken into account in computing the total income in the return. But it is submitted that such adjustments should be with respect to net figure of disallowance of expenditure or increase in income as reported in audit report and not the gross figure
* As another illustration, Clause 25 of tax audit report requires reporting of amount of profit chargeable to tax u/s. 41 even if it is already credited to P&L. But it is again added by CPC ignoring that the said amount is already credited in books of accounts under “Other Income” and is offered to tax in the return form.
* In Schedule MAT, the amount of tax (net-off of deferred tax) is required to be added back to compute the book profit. However, in Schedule Part A – P&L, the amount of current tax and deferred tax are to be reported separately. Ideally, the addition made in Schedule MAT should be compared with total amount of current tax + deferred tax reported in Schedule Part A – P&L. However, in cases where the deferred tax amount is negative, the addition made in Schedule MAT is compared with current tax only, and an addition is being made to book profit computed as per section 115JB. Such adjustment ought not to be made, and suitable changes be made to the CPC return processing software.
* It may be noted that role of tax auditor as explained by ICAI in its Guidance Note on Tax Audit u/s. 44AB is to furnish the facts required by the Assessing Officer to determine whether or not disallowance is required. The tax auditor’s opinion about disallowance of expenditure or taxability of receipt is not binding either on taxpayer or Assessing Officer. Hence, it is submitted that the power to make adjustment u/s. 143(1)(a)(iv) with respect to disallowance of expenditure or increase in income indicated in audit report must not be used indiscriminately to make adjustments merely because it is indicated so in the tax audit report. The power must be used with appropriate care and caution to make adjustments only in respect of patently is allowable items or inadvertently missed incomes after affording proper opportunity of hearing to taxpayer.
1. Non-provision of statutory opportunity of prior intimation before making adjustment
* It has been experienced that various unilateral adjustments as illustrated above are being made by CPC without even affording an opportunity to the taxpayer for some of the adjustments thereby even violating the principles of natural justice. It is also contrary to express statutory requirement of first proviso to s.143(1) to give prior intimation to taxpayer and consider his response before making any adjustment.
* There have been instances where details of the proposed adjustments are not shared with the taxpayer apart from the mention of the schedule of the return of income where unexplained adjustment has been carried out.
1. Non-consideration of taxpayer’s response to prior intimation – adjustments are mechanically made
* Even where prior intimation is given for response of the taxpayer, it is noticed that simple and straight forward response of the taxpayers are not considered at all while issuing final intimation under section 143(1). There is no express mention why taxpayer’s response is not considered/rejected by CPC. It is not clear whether taxpayer’s response is considered by a competent officer who can easily identify the erroneous nature of adjustment proposed or by software algorithm or by a person not equipped to deal with such issues. There is no opportunity of personal hearing to taxpayer to explain the issue. In fact, Rule 12 of Centralised Processing of Returns Scheme specifically prohibits any personal appearance before CPC. This makes it difficult for the taxpayer to explain why a particular proposed adjustment is not warranted.
* Also, it is observed that, in certain cases, sufficient time is not provided to the taxpayer to furnish its response to the adjustments proposed to be carried out which is against the statutory requirement of granting 30 days from issue of intimation of proposed adjustments as provided under second proviso to section 143(1) (a) of the Act.
1. Rectification of mistakes
* It is noticed that rectification application filed by taxpayers against the erroneous adjustments made under section 143(1) of the Act are not considered and as a result the rectification applications are kept pending constraining the taxpayer to approach the appellate authorities for seeking appropriate relief. The taxpayer continues to receive reminders and notices for coercive actions for outstanding demands despite pendency of disposal of rectification petitions.
* Where erroneous adjustments are proposed by the CPC in 143(1) order, during the 143(3) proceedings, the AO has, in some cases, not been able to rectify such errors resulting into undue hardship to the Assessee. In certain cases, the rectification rights are transferred to Jurisdictional AO whereas the assessment is done by Faceless AO. Accordingly, such errors do not get rectified by the Faceless AO and separate channel gets opened with the Jurisdictional AO. In few other cases, rectification rights are not transferred to the Jurisdictional AO and stay with the CPC and the income tax portal also does not reflect the actual status of the same.
* It may also be mentioned that the CPC does not respond to taxpayer’s communication despite sending several reminders.
1. Non-redressal of adjustments made u/s. 143(1) in scrutiny assessment
* Where adjustments are made on processing returns u/s. 143(1) and the case is subsequently picked up for regular scrutiny or reassessment, it is noticed that the Faceless Unit/AO starts with total income after s.143(1) adjustments and not total income as per return. The Faceless unit/AO does not give opportunity to taxpayer to explain why adjustments made u/s. 143(1) against which rectification petitions or appeals are pending should not be perpetuated in the regular assessment/reassessment order. In fact, the Faceless Unit/AO who are statutorily required to give personal hearing to the taxpayer are best placed to understand and rectify the erroneous adjustments whether arising out of anomalies in ITR utility or CPC return processing software or due to inadvertent mistakes by taxpayer while filing ITR.
* The adjustments being made under section 143(1) of the Act are leading to unnecessary harassment to the taxpayer forcing the taxpayer to approach appellate authorities over trivial matters and resulting in waste of time and resources over such matters for both taxpayers and Government, thereby increasing tax litigation. Majority of the appeals filed before CIT(A) are now appeals against s.143(1) intimations since taxpayers file both appeal and rectification application so as not to miss out on time limit for filing appeals. If the adjustments are carried out in rectification, the appeals are withdrawn. This course of action leads to increase in number of both pending appeals and pending rectification petitions.

**Recommendations**In order to achieve desired objectives of section 143(1) of the Act and CPC Scheme 2011, following measures are recommended for kind consideration of CBDT:-* The anomalies in ITR utility and CPC return processing software as pointed out in foregoing part of these representations may be addressed at the earliest. There may be many such anomalies experienced by large number of taxpayers across the country. While there exists helpline and email support on ITR filing portal, in many cases, taxpayers face difficulty in explaining the issues over a call or on email. It would be good if DGIT (Systems) or relevant offices in CPC hold regional camps to interact with taxpayers and professional/industry chambers to understand such anomalies and appropriate way to address them.
* Alternatively, just like facility is presently made available on income tax portal for providing suggestions for comprehensive review of Income Tax Act with a view to simplify it, it is recommended to make a similar facility available on income tax return filing website for stakeholders to point out defects in ITR utilities. The CPC may consider them and provide response to the suggestions. If accepted, ITR utility/form may be changed. This process of interaction will build trust between the taxpayers and Tax Department.
* Scope of processing of income tax returns by CPC should strictly be limited to determination of any tax payable or refund due to the taxpayer or determination of any mistake apparent from the record and not beyond the same. It must be clarified that the scope of jurisdiction of CPC u/s. 143(1) is the same as jurisdiction u/s. 154 to rectify errors apparent from record and not delve into debatable issues.
* Instructions may be given to CPC to clarify that adjustments in respect of disallowance of expenditure or increase in income indicated in audit report can be made only in respect of patently disallowable items or inadvertently missed incomes after affording proper opportunity of hearing to taxpayer. In particular, no such disallowance or addition can be made where the issue is covered in taxpayer’s favour by any judicial precedent.
* There should be proper service level escalation framework of CPC communicated to taxpayers to ensure transparency and accountability in functioning of CPC. The CPC (included outsourced agency) staff should be adequately trained to identify debatable issues for which adjustments cannot be made and there should oversight of experienced senior officials to keep a check on unwarranted adjustments.
* Any adjustment proposed to be made by the CPC should only be made after providing complete details of the adjustment as well as sufficient time as per law for the taxpayer to furnish a response. The response must be considered by competent officer who can understand the technical and legal nuances of issues involved.
* Rule 12(i) which prohibits personal appearance before CPC may be amended to permit personal appearance through video conferencing for the limited purposes of explaining why proposed adjustment or rectification prejudicial to the taxpayer should not be made. This is very critical since one cannot expect algorithms and data processors to appreciate the nuances of income tax law. A personal interaction with taxpayer to understand the issue enables faster resolution of the issue and avoids repetitive reminders and rectification applications.
* Rectified applications or rectified return of income filed electronically should be disposed off within reasonable time which will surely eliminate the need to unnecessarily approach the appellate authorities seeking redressal of the unwarranted adjustments. There should be clarity on who can make the rectification and the taxpayer should not be made to shuttle between CPC/Faceless Unit and Jurisdictional AO.
* Furthermore, as a measure of building trust between Taxpayers and Tax Department, the “rules” or “logics” built into the return processing software on interpretational issues (like priority of set off loss, permissibility of set off of loss, restricting profit linked Chapter VIA deduction to income of such nature forming part of Gross Total income, etc) may be published for stakeholders’ comments. This will provide opportunity to taxpayers and professionals to point out flaws in the rules or logics which are contrary to the express provisions of the Act or Rules or constitute debatable issues which are outside the scope of s.143(1) adjustments. It will lead to improvision of the return processing software and minimisation of incorrect adjustments which will reduce the need for repetitive rectification applications or appeals before CIT(A).
* Before adopting the total income as per s.143(1) intimation as start-point for regular assessment, the AO must follow the same process as adopted for making additions in regular assessment i.e. after giving proper opportunity of hearing to the taxpayer including personal hearing where so desired by the taxpayer.
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**Annexure A**

**Extracts from Uniform Code of Pharmaceuticals Marketing Practices 2024 (UCPMP) on distribution of free samples**

**From UCPMP**

**5 Brand Reminders**

5.1 Brand Reminders are permitted in the following two categories, viz., (i) Informational and education items and (ii) Free samples provided by the companies to medical professionals.

i. Informational and educational items mean books, calendars, diaries, journals (including e-journals), dummy device models and clinical treatment guidelines for professional used and other items for professional use in healthcare settings value of which does not exceed Rs. 1000 per item. Such items should not have an independent commercial value for the healthcare professionals.

**ii. Free samples:**

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

• Where samples of products are distributed by a medical representative, the sample must be handed directly to the person qualified to prescribe such product, or to a person authorized to receive the sample on their behalf, and the name and address of the healthcare practitioner noted for records.

• The following conditions shall be observed while providing samples to a person qualified to prescribe such product:

a. Such samples are provided only for the purpose of creating awareness about treatment options and for acquiring experience in dealing with the product;

b. Sample packs should be limited to prescribed dosage for not more than three patients for the required course of treatment and no company should offer more than twelve such sample packs per drug to any healthcare practitioner per year;

c. Each sample should be marked "free medical sample not for sale" or bear another legend of analogous meaning;

d. Each sample pack should not be larger than the smallest pack present in the market;

e. An adequate system of accountability and control must be maintained in respect of supply of such samples;

f. A pharmaceutical company shall not supply a sample of a drug which is a hypnotic, sedative, or a tranquillizer.

• Each company should maintain details such as product name, doctor name, quantity of samples given, date of supply of free samples to healthcare practitioners etc, and the monetary value of samples so distributed should not exceed two percent of the domestic sales of the company per year.

5.2 Receipt of brand reminders from pharmaceutical companies by healthcare practitioners may not be construed as endorsement activity if it does not amount to recommendation or issuance of a statement by a healthcare professional w.r.t. use of the respective brand.

5.3 The giver and recipient of brand reminders should comply with the relevant provisions of the Income Tax Act, 1961 with respect to deductions and reporting of income

1. Drugs and Cosmetics Rules, 1945, rule 96 (ix) [↑](#footnote-ref-2)