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Ms. Pragya Sahay Saksena, IRS
Member – Legislation & Systems
Central Board of Direct Taxes
Ministry of Finance

Subject: Requesting Clarity and Suggestions on TDS under Section 194R

Respected Madam,

Greetings from ***MAIT***, India's apex industry body empowering IT, Telecom & Electronics hardware Sectors!

This bears reference to Circular No.12 of 2022 F.No. 370142/27/2022-TPL dated 16th June 2022 regarding Guidelines for removal of difficulties under sub-section (2) of Section 194R of the Income Tax Act 1961 where Finance Act 2022 has inserted a new section 194R w.e.f. 1st July 2022. As per new section 194R, a person responsible for providing any benefit or perquisite to a resident is required to deduct tax at source @10% of the value or aggregate of value of such benefit or perquisite, before providing such benefit or perquisite.

Sir, referring to the circular issued as stated above, there are certain areas where there is lack of clarity and industry needs a better understanding; while there are some specific concerns where industry believes that the guidelines have enlarged the scope of section 194R, which are contrary to established principles laid down by the Courts.

In this context, we have divided this letter into 3 parts i.e., Part A including points where circular is silent, Part B where Specific Concerns along with Recommendations are listed and Part C where there are certain broad recommendations w.r.t timeframe and CSR

Part A: - Points where circular is silent & MAIT's request for clarity/suggestions

	Points where circular is silent	Request for Clarification as under
1	Whether furniture, fixtures, hoardings etc. provided to retailers with the intention of brand promotion amounts to benefit/perquisite?	It is very common practice in many industries to provide branded fixtures and furnishings like illuminated hoardings, name boards, front desk etc. However, there is no clarity provided in the FAQ on this specific aspect. **MAIT Suggestion** An appropriate clarification should be issued clarifying the applicability of the section for expense incurred by the brand owners in providing such materials to retail distributors. It is relevant to note that such branding materials kept in retail spaces are essentially a benefit for the brand owners considering the fact that if the same materials need to be kept in some other

		public spaces would cost the brand owner in the form of rental / space charges. There may be some incidental benefit to the retailers, but it would not be practically possible to quantify such benefit. Hence a clarification in this regard will avoid any future litigation on this aspect.
2	Whether the employees / contract manpower stationed at retail stores to promote the specific brand for which the cost is paid by the brand owners amounts to benefit/perquisite?	It is very common practice in FMCG / Electronic industries to appoint sales employees as In-Store Demonstrators (ISD) / Feet on Street (FOS), especially in large form retail outlets and brand exclusive stores. Such employees will be stationed at the stores owned by retailers / distributors, and they will exclusively demonstrate and promote the products of specific brands. There is no clarity provided in the FAQ on this specific aspect. **MAIT Suggestion** An appropriate clarification should be issued clarifying the applicability of the section for expense incurred by the brand owners in providing such manpower stationed at the stores owned by the retail distributors. It is relevant to note that efforts of such employees are directed towards exclusively promoting and demonstrating the specific brands and they do not act as the salesperson of the retail stores. There may be some incidental benefit to the retailers as any sale from that store will be the revenue of such retail stores. But it would not be practically possible to quantify such benefit. Hence a clarification in this regard will avoid any future litigation on this aspect.
3	**What is the definition of Customer in Question No. 4 of the Circular?** Guidelines recognizes that 'Sales discounts, Cash discounts and Rebates' given by the sellers to the customers are also benefits and perquisites, as it results into lesser realization of sales price of the seller, and reduction of purchase price of the customer, and the same is subject to TDS under section 194R. However, for administrative convenience, an exception is carved out wherein 'Sales discounts, Cash discounts and Rebates' allowed to the **'Customers'** is not subject to TDS under section 194R.	Corporates having a long distribution chain, to pass discounts and rebates etc. through their immediate customers to the downstream channel partners who are the ultimate beneficiaries. However, these beneficiaries are not the direct customers of the Corporate, but rather customers of their immediate sellers. The term 'customer' is not defined in the Circular. Thus, **a clarification is required as to whether such beneficiaries would fall within the term 'Customer'**. Further, **it may also be clarified which seller in the distribution chain to deduct TDS under section 194R.**

4	**Sell-out Rebate Scheme** The companies in electronic industry in the normal course of business offer Sell-out schemes to the dealers/distributors /trade partners. The scheme offers certain incentive basis the targeted sales achievement by direct trade partner or by Sub dealers. In such cases these incentives are given through Credit Notes and properly accounted in the books of Company as well as recipient. Therefore all such Incentives are properly accounted in books of recipient. Thus it is recommended not to treat them benefit under 194R provisions to avoid additional compliance burden on Industry.	As per FAQ 4 of circular 12 /2022 dated 16th June 2022 issued by CBDT, sales discount, cash discount or rebate offered to dealers/distributor/trade partners at the time of purchase is not covered under section 194R of the Act. However, the rebate/discount offered to dealers/distributor/trade partners at the time of sale to sub dealer / to ultimate customer is not covered specifically. It appears that the intent of the government is to exclude such type of rebate/discount out of the purview of section 194R of the Act, a clarification in this regard would help the industry.
5	**Provision of manpower to dealers/distributors /trade partners** The companies incur lot of promotional expenses to enhance / push the secondary sales of dealers / Retailers. Such expenses may include distribution of marketing material, providing sales staff and imparting training to sales staff of dealer / retailer to make them aware about brand and features of the products of company. The objective of the same is to promote the sales of the company. However, such activities may provide incidental benefit to such dealers / retailers also. Such type of arrangement is very common in the electronics industry.	Specific clarity is recommended to exclude such promotional expenses out of scope of 194R compliances.

PART B: - Specific concerns w.r.t. Circular where guidelines have enlarged the scope of Section 194R contrary to principles laid by Courts and MAIT recommendations on elimination of such concerns

Sl. No	Specific Concerns w.r.t. Circular	MAIT Recommendations
1	The Circular states that providing of free samples would be considered as a 'benefit/ perquisite' in hands of recipient and hence liable for TDS. It is a common practice in trade to provide free product samples to prospective / existing customers for the purpose of evaluation/ testing and to solicit feedback on the efficacy of the product. These product samples have restrictions on right of	It is to be clarified that free new product samples which have restrictions on further sale / disposal, and which are given for the purpose of evaluation /testing/ soliciting feedback / inducing prospective customers, should not be considered as a 'benefit / perquisite' in hands of the customer, even if the sample is not returned. It should be clarified that if the testing period of the sample has spanned the substantive useful life of the sample, then there is no benefit at all

	further sale / disposal and are not given with the intention of providing a benefit / perquisite for rewarding performance / meeting sales targets but are incurred as a matter of business survival / necessity due to market requirement to generate demand and promote/ generate sales. The benefit if at all, arises to the provider of the free samples and not to the customer. Moreover, if the period of testing has spanned the substantive useful life of the sample, then there is no benefit at all to the customer/ dealer even if the sample is retained by him as the product has become obsolete and is of no utility to customer. Subjecting the value of such product samples to tax would prohibit critical testing and evaluation activities and adversely affects the ability to determine the quality and utility of the products being tested. It also pushes up the cost of doing business, impact revenue growth and dent the already thin profit margins, resulting in lesser tax outflow. Also, the circular is silent on the valuation methodology to be adopted in case of products given for evaluation / testing and thereafter retained by customer post testing. Whether depreciated value can be taken to be the fair market value in such cases.	to the customer/ dealer even if the sample product is retained by him as the same has become outdated / obsolete and is of no utility to customer. In case of products given for evaluation / testing and thereafter retained by customer, the valuation methodology is to be clarified (whether depreciated value can be taken to be the fair market value)
2	Typically, companies provide small gifts, souvenirs etc. to business partners or vendors in the interest of maintaining good business relations and promoting its business. Such activities are essentially a benefit to the provider company instead of the recipient and the industry relies on these promotional engagements to maintain goodwill in the market. Considering that such gestures are an important part of business activities, especially for certain sectors such as MSME, travel, hospitality etc, the taxation of these activities would curtail the regular flow of routine promotional engagements, thereby adversely affecting the business of such sectors.	It is recommended to exclude such instances from the ambit of section 194R of the Act, such that gifts, souvenirs, small goodies etc. of token value that are provided to customers as part of normal business promotion activities (and not for the benefit of the recipient) are not subject to tax.
3	The circular clarifies that TDS under 194R will apply even if the benefits or perquisites are provided wholly in cash. This interpretation has expanded the scope of the main provision and also	It should be clarified that where the cash benefit / perquisite is already subject to TDS under other provision of the Act, the same should be exempt from TDS under section 194R.

	lead to overlap with other TDS provisions of the Act such as section 194H which already cover TDS on incentives / benefits given in cash.	
4	With respect to reimbursement of out-of-pocket expenses, the circular has taken a position that if the invoice is in the name of the consultant / service provider, the reimbursement of the same by the Client / service recipient would constitute a 'benefit/ perquisite' attracting TDS u/s 194R. As long as the contractual obligation is on the person reimbursing the expenses, the service provider cannot be said to have obtained any benefit or perquisite. Further, tax may already have been deducted where the OPE amount is included in the invoice for service fee.	Instead of relying on the aspect of whose name the invoice is issued, it is to be clarified that so long as the contractual obligation is on the person reimbursing the expenses, the service provider cannot be said to have obtained any benefit or perquisite and hence should not be subject to TDS u/s 194R. It should also be clarified that where the nature of service / payment is falling under other TDS provisions of the Act such as section 194C/ 194H/194J etc. for which the OPE is incurred, then such OPE should not once again be subjected to the provisions of section 194R of the Act.
5	The circular states that expenditure attributable to leisure component of the conference would attract TDS u/s 194R. There is a practical difficulty in attributing / quantifying expense to a leisure component which is inbuilt in the overall conference cost, which may involve even employees of the organizing entity. In such situation, where there are a number of participant entities, attributing the leisure cost to a particular entity would be a challenge. Also, leisure is not at all the object of the event.	It is recommended to exempt the leisure component of the conference, from the purview of TDS when it is only incidental and not the prime objective of the conference. Further with respect to the leisure element, a threshold of INR 20,000 should be applied on a per individual participant, per event basis.
6	The circular states that expenditure on participants of dealer/ business conference for days which are on account of prior stay or overstay beyond dates of conference, would amount to a benefit / perquisite requiring TDS. There can be situations where outstation participants coming from distant places, need to check in the accommodation, a day in advance so as to be in time for the conference and hence subjecting such genuine extended stays to TDS, would result in undue hardships whereby the intention is not to enjoy a benefit but has arisen due to necessity.	It is requested to bring in a clarification to exempt such genuine overstay cases from the scope of this TDS.

Last but not the least, there are certain broad recommendations **(Part-C)** w.r.t. Date of Implementation and CSR for your consideration as under: -

1. **Date of implementation of Section 194R should be relaxed to 1 April 2023.** Being a very new provision and intended to tax transactions that are not routinely reported / tracked, taxpayers need adequate time to put the necessary processes in place to be able to track and report these transactions.

2. **Corporate Social Responsibility (CSR) spends should be kept out of the ambit of Section 194R** –

   - The objective of CSR is to invest corporate profits in areas such as poverty, education, etc. These investments are intended to benefit various organizations that work towards these goals, and hence, technically, such expenses would fall within the ambit of CSR. CSR investments are not deductible expenditures for tax purposes and subjecting these expenses to TDS provisions would result in the Govt getting a share of these expenses (as taxes) which would defeat the very purpose of CSR (to the extent of amount spent on taxes). Hence, CSR expenses should be kept outside the purview of section 194R

   - The intent behind implementing Section 194R is to tax transactions that are not reported. CSR is a reportable transaction and not deductible for tax purposes. Hence, it should be kept outside the purview of Section 194R.

Look forward to your favorable consideration.

With regards,

Col. AA Jafri, Retd.
Dy. COO
(Acting Director General – MAIT)

CC: Shri Nitin Gupta, IRS, Chairman, CBDT, Ministry of Finance

CC: Shri Tarun Bajaj, IAS, Secretary–Revenue, Ministry of Finance