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Righteousness of Section 194R Guidelines

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In their circular No.12 of 2022 dated 16 June 2022 the Central Board of Direct Taxes (CBDT) has devised guidelines to regulate the implementation of TDS provisions of new section 194R with respect to the amount of benefits or perquisites arising to any resident from the business or exercise of profession which seems at sixes and sevens. In the memorandum to the Finance Bill it is perceived that the recipients do not report the receipt of benefits in their return of income as these are otherwise chargeable to tax under clause (iv) of section 28 of the Income tax Act. In other words the withholding of tax is felt desirable to plug this loophole. A duty has been cast upon the payer to deduct tax on any benefit or perquisite provided in cash or in kind to a resident. In the guidelines the board has defended its logic to enforce TDS on benefit or perquisites citing judicial pronouncements. These have been framed in a firm manner in a 10-tier question answer mode.

In the very first tier answer it is stated that the deductor is not required to check whether the amount of benefit or perquisite that he is providing would be taxable in the hands of the recipient under clause

(iv) of section 28 of the Act. This statement is contradictory to the budget explanatory memorandum where it has been only stated that as per clause (iv) of section 28 of the Act, the value of any benefit or perquisite, whether convertible into money or not, arising from business or exercise of profession is to be charged under the head business in the hands of the recipient of such benefit or perquisite whereas in many cases it has been declared by the recipients. The two statements do not go hand-in-hand as on one hand in the memorandum it is stated that such benefit must be chargeable under the head business in the hands of the recipient and on the other hand in the guidelines it is suggested that it is not so required upon the payer to ascertain whether the amount of benefit or perquisite that he is providing would be taxable in the hands of the recipient under clause (iv) of section 28 of the Act. By this approach the provisions of section 194R are being read as controlling the taxability of the receipt of any benefit or perquisite which is not permissible under the law.

Further, comparison has been drawn with section 194E and legal precedent mentioned PILCOM vs. CIT [2020] 116 taxmann.com 394/271 Taxman 200/425 ITR 312 (SC) SC totally ignoring the context in which the decision was given. The judgement talks about taxability in case of non residents whose incomes are otherwise not taxable in India whereas sec 194 R is for residents.

In the context of interest awarded in the motor accident claim cases on compensation or enhanced compensation the Gujarat High Court in *Oriental Insurance Co. Ltd*. v. *Chief CIT* [2022] 138 taxmann.com 88 [05-04-2022] held that Section 194A of the Act is only a provision for deduction of tax at source. Any provision for deduction of tax at source in the said section would not govern the taxability of the receipt. The question of deduction of tax at source would arise only if the payment is in the nature of income of the payee. As in this case the interest awarded by the Motor Accident Claim Tribunal u/s 171 of the Motor Vehicles Act 1988 is held not taxable under the Income Tax Act, 1961 the Court directed the insurance companies not to deduct TDS on the interest awarded by the Motor Accident Claims Tribunal. The High Court of Karnataka in [2020] 122 taxmann.com 5/[2021] 276 Taxman 194/430 ITR 464 *CIT* v. *TTK Healthcare TPA Private Limited (P.) Ltd*. also held that the nature of payment in the hands of the recipient, is determinative of deductibility of tax at source.

It is a settled law that the Act imposes a liability to tax upon income. The circular guidelines somewhat give a new dimension to an otherwise self contained law of charge of income tax under section 4 of the Act and perceives to impose a liability on whatever is received by a person as his income liable to tax.

In the guidelines attempt has been made to define various kinds of benefits or perquisites. It states as under:-

To illustrate, the following are some of the examples of benefits/perquisites on which tax is required to be deducted under section 194R of the Act (the list is not exhaustive):

- When a person gives incentives (other than discount, rebate) in the form of cash or kind such as car, TV, computers, gold coin, mobile phone etc.
- When a person sponsors a trip for the recipient and his/her relatives upon achieving certain targets
- When a person provides free ticket for an event
- When a person gives medicine samples free to medical practitioners.

If we look to each of these items closely they would either are inadmissible deductions to the business or items of the nature of sales promotion expenditure. In the first case of incentives in the form of capital items would be in the nature of capital expenditure which is not admissible a deduction in computing business income. In which case to insist with a requirement to deduct tax u/s 194R from the recipient would amount to double taxation. Similarly to sponsor a trip for the recipient and his relative would be in the nature of personal expenditure which is again not admissible as deduction under the Act in which case a further deduction of tax u/s 194R from the recipient would be amounting to double taxation. Likewise would be the case with free ticket for an event. Again free samples to medical practitioners are meant for redistribution so that there is no real income earned by the recipient in this kind of transaction.

Section 194 R mandate companies and others to deduct tax on behalf of the Government without even checking whether or not amounts received are chargeable incomes. It is an open question and ultra virus the Act. For instance the circular states that expenditure on

participants of dealer/business conference for days which are on account of prior stay or overstay beyond the dates of such conference is a benefit. Are we therefore suggesting that such expenditure of prior or overstay is deductible as business expenditure under the law. That cannot be the intent under the law. And if such expenditure is not deductible under the law then how can we enforce TDS on such expenditure. Thus instead of charging the payer the board by these statutory guidelines is attempting to put the baton upon the recipient.

The feather on the cap is TDS on reimbursements. Taxability of reimbursement is already an apple of discord and there are plethora of cases citing non taxability of reimbursements. Income-tax is deductible at source, in respect of income chargeable to tax under section 4(1) of the Act. In other words, it is quite clear that tax is deductible at source, in respect of income, which is chargeable to tax under the Act. Out of pocket expenses are actual expenses incurred on behalf of payer and is not an income for the service provider as there is no profit element in it.

Further section 194R is an absent entry in section 197 so that there is no route possible to avoid deduction of tax in this case by making an application for issue of certificate for deduction at lower rate. Any failure to deduct would mean penalty equivalent to the amount of tax not deducted at source.

The guidelines which prima facie in their present form deeply suffer from various defects are superfluous in nature. The terminology 'benefit or perquisite' in section 194R also must be defined like rule 3 narrative in the context of employer employee engagements to make its implementation little orderly and further to avoid unwanted litigations. A proper rule may be framed to identify benefits that are clearly forming part of contract of engagement only may be chosen as benefit or perquisite for section 194R application. All other voluntary considerations by gifts, trips, tickets etc are inadmissible list of items in the computation of total income of the payer only and further shall not warrant any TDS thereon u/s 194R. It's a scheme of wheels within wheels and a vision/ clarity is required before it is challenged as ultra virus to the Act.

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