14 September 2022

EY Tax Alert

CBDT issues additional guidelines on withholding provision on payment of business perquisites to residents

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Executive summary

This Tax Alert explains Circular No. 18 dated 13 September 2022 (Circular) issued by the Central Board of Direct Taxes (CBDT)[1] with a view to remove difficulties and provide guidance on various issues on interpretation and application of a withholding provision, Section (S.) 194R, under the Income Tax Law (ITL).

S.194R, inserted in the ITL vide Finance Act, 2022, mandates a person providing benefit/perquisite to a resident to withhold tax at 10% on the value or aggregate value of such benefit or perquisite, subject to certain conditions. Furthermore, S.194R of the ITL contains a specific provision enabling the CBDT to issue guidelines for the purposes of removal of any difficulty in giving effect to the provisions of S.194R of the ITL.

In exercise of such powers, the CBDT had earlier issued Circular 12/2022 dated 16 June 2022[2] providing certain clarifications and relaxation on applicability of withholding under S.194R of the ITL. Subsequently, additional representations were made by the stakeholders requesting further clarifications on various issues in relation to withholding obligation under S.194R of the ITL. Accordingly, the CBDT has issued a Circular 18/2022 dated 13 September 2022 (Circular) to clarify certain additional issues on interpretation or application of S.194R of the ITL.

[1] Apex administrative body for direct taxes in India
[2] Refer EY Tax Alert dated 20 June 2022 titled as "CBDT issues guidelines for removal of difficulties on new withholding provision on payment of business perquisites to residents"

Building a better working world

Circular 18/2022, *inter alia,* clarifies that no withholding is required on waiver by banks on settlement of loan, reimbursement of out-of-pocket expense on which taxes are withheld under other provisions of ITL or incurred by 'pure agents', benefit provided by Embassies/High Commissions of foreign governments and issuance of bonus shares/right shares by widely held companies. It further provides clarity on some of the aspects dealing with dealer conference and depreciation claim with respect to benefit/perquisite received in the form of an asset.

Background

- Finance Act, 2022 introduced a new provision, S.194R, in the ITL, which mandates 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, subject to certain conditions. It has come into effect from 1 July 2022.

- The withholding does not apply where the value or aggregate of value of the benefits or perquisites provided or likely to be provided during the tax year do not exceed INR 20,000. Furthermore, it also does not apply to a provider, being an individual or Hindu Undivided Family, whose total sales, gross receipts or turnover does not exceed INR10m in case of business or INR5m in case of profession, during the tax year immediately preceding the tax year in which such benefit or perquisite is provided by such person.

- Subsequently, at enactment stage of Finance Bill, 2022, a specific provision was inserted in S.194R of the ITL to give power to the CBDT to issue guidelines for the purposes of removal of any difficulty in giving effect to S.194R. Such guidelines, after they are issued, shall be laid before the houses of parliament and shall be binding on the tax authority and on the person providing any such benefit or perquisite.

- The industry stakeholders made various representations to the CBDT to clarify certain issues on interpretation or application of the new withholding provision. Accordingly, the CBDT issued Circular No. 12 dated 16 June 2022 providing guidelines on various issues on interpretation and application of S.194R of the ITL.

- Subsequently, the stakeholders requested for more clarifications on various issues, including issues arising from clarifications provided in Circular 12/2022. In response, the CBDT has now issued a new Circular (Circular 18/2022)[3] to provide additional clarification to alleviate difficulties in implementation of provisions of S.194R of the ITL.

Clarifications apply only to the provider of benefit

At the outset, the Circular 18/2022 states that the clarifications provided are applicable only for removing difficulties in implementation of provisions of S.194R of the ITL in the hands of the provider of benefit and it does not impact the taxability of income in the hands of the recipient of benefit which shall be independently governed by the relevant provisions of ITL.

EY comments

This is an important clarification which can have impact in two ways. If an item qualifies as taxable benefit or perquisite in the hands of the payee, then merely because Circular relieves withholding obligation as a measure of removal of difficulty will not make it non-taxable. The payee is obliged to offer it to tax in his/her return. On the other hand, if an item does not qualify as taxable benefit or perquisite, then even if payer withholds tax based on clarifications provided in the Circular 12/2022 or the new Circular 18/2022, it is possible for the payee to independently claim it as non-taxable in his/her return of income (ROI).

FAQ 1 - Withholding does not apply on loan settlement or waiver by bank

- The Circular 18/2022 states that waiver or settlement of loan by bank may be an income to the borrower. However, saddling the banks with an obligation to withhold taxes 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. Thus, in order to remove such difficulty, the Circular clarifies that withholding under S.194R of the ITL will not be applicable to waiver of loan granted on one-time loan settlement by the following institutions:
  - Public financial institution[4]
  - Scheduled banks[5]
  - Cooperative banks[6] other than a primary agricultural credit society
  - Primary co-operative agricultural and rural development bank[7]
  - State financial corporation[8]

[3] Circular No 18/2022, dated 13 September 2022
[4] As defined as per S.2(72) of Companies Act, 2013
[5] As defined in Explanation(ii) to S.36(1)(viia) of the ITL
[6] As defined in Explanation to S.80P(4) of the ITL
[7] As defined in Explanation to S.80P(4) of the ITL
[8] Financial corporation established under S.3 or S.3A or an institution notified under S.46 of the State Financial Corporation Act, 1951.

- State industrial investment corporations engaged in the business of providing long-term finance for industrial projects [9]
- Deposit taking non-Banking financial company[10]
- Systemically important non-deposit taking non-banking financial company[11]
- Public company[12] engaged in providing long term finance for construction or purchase of houses in India for residential purpose
- Asset reconstruction companies[13]

- The Circular 18/2022 further clarifies that the tax treatment of such waiver in the hands of the borrower would not be impacted by this clarification and will be independently governed by the relevant provisions under the ITL.

EY comments

- While this clarification is welcome and clarifies the ambiguity in respect of withholding on loan settlement/waiver by banks and other financial institutions, it raises some further questions for the taxpayers.
- The view expressed by the CBDT about waiver or settlement of loan by bank being taxable income for the borrower conflicts with ratio of Supreme Court (SC) decision in the case of CIT v. Mahindra & Mahindra Ltd[14] which held that such waiver is not taxable in the hands of the borrower. The rationale for such contrary view adopted by Circular 18/2022, in absence of any amendment to law post the SC ruling, is not clear. While the Circular 18/2022 states that taxability of waiver is not impacted by this clarification and will be governed by relevant provisions of the ITL, it is possible for the borrower to rely on ratio of SC ruling while filing return of income.
- Absence of clarification on similar lines for similar waiver/settlement of loans or trading debts by creditors other than specified banks and financial institutions raises ambiguity on applicability of withholding in such cases. Unlike waiver of loans by banks and financial institutions, waiver of trading debt by the creditor is taxable in the hands of the debtor but not as benefit or perquisite arising from business or exercise of profession.

FAQ 2 – Non-applicability of withholding under S.194R on reimbursement of expenses to "pure agent"

- FAQ 7 of Circular 12/2022 clarified that any expenditure which is the liability of the service provider and met by the service recipient qualifies as a benefit or perquisite provided by the service recipient to the service provider. The Circular placed emphasis on the name in which the invoice is raised for determining whose obligation it is to incur the expense.
- As per FAQ 7 of Circular 12/2022, if service provider incurs certain expense during the course of rendering service, the invoice for which is raised in the name of the service provider and reimbursed by the service recipient, the service will qualify as a benefit provided by service recipient to service provider and hence, withholding under S. 194R will apply to such reimbursement.
- Circular 18/2022 reiterates and justifies the above position by clarifying that if the expense invoice is raised in the name of the service provider, the GST input tax credit (ITC) in respect of such invoice is claimed by the service provider, then such expense would be the liability of the service provider and if such liability is met by the service recipient it would qualify as a benefit/perquisite liable for withholding as rightly explained in Circular 12/2022. Circular seems to suggest that if the obligation to incur such expense is on the service recipient, the GST ITC can be claimed by the service recipient and not the service provider.
- Post Circular 12/2022, stakeholders brought the CBDT's notice to the concept of "pure agent" under the GST laws where GST ITC is allowed to service recipient and not to service provider. Further the expenditure incurred in the capacity of a "pure agent" is excluded from the value of supply and aggregate turnover of the service provider.
- As per GST laws, a service provider will be treated as a "pure agent" only if all the following conditions are satisfied:
    - The service provider enters into a contract with recipient of supply to act as the service provider's "pure agent" to incur expenditure or costs in the course of supply of goods or services or both;
    - The service provider neither intends to hold nor holds any title to the goods or

[9] Being a Government company as defined in S.2(45) Companies Act 2013
[10] Explanation 4(e) to S.43B of the ITL
[11] Explanation 4(g) to S.43B of the ITL
[12] Registered with National Housing Bank Act 1987
[13] Registered u/s.3 of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest (SRFAESI) Act 2002
[14] [(2018) 93 taxman.com 32]

services or both, so procured or provided as pure agent of the recipient of supply;

- The service provider does not use for its own interest, such goods or services so procured;
- The service provider receives only the actual amount incurred to procure such goods or services in addition to the amount received for supply it provides on its own account;
- The service provider acts as a pure agent of the service recipient when it makes payments to the third party on authorization by the service recipient;
- The payment made by the service provider on behalf of the service recipient is separately indicated in the invoice issued by the service provider to the service recipient; and
- The supplies procured by the service provider from the third party as a "pure agent" of the service recipient are in addition to services provided by the service provider on its own account.
- Circular clarifies that if the above conditions are not satisfied, such expenditure incurred is included in the value of supply under GST.
- However, if all the above conditions are satisfied, the GST ITC is allowed to the service recipient and it is not considered as supply of the "pure agent". Accordingly, in such case, the Circular clarifies that the amount incurred by such "pure agent" for which the agent is reimbursed by the service recipient would not be treated as a benefit or perquisite for the purposes of S. 194R.

EY comments

- The earlier clarification in FAQ 7 of Circular 12/2022 triggered controversy on applicability of withholding on reimbursement of out-of-pocket expenses to service providers where the expense invoices are in the name of service providers. This is contrary to stakeholders' representation that reimbursement of expenses which are necessarily and exclusively incurred for the purposes of rendering services to the service recipient does not represent benefit or perquisite of the service provider regardless of the name in which expense invoice is raised.
- Circular 18/2022 adds to the controversy by justifying the view expressed in FAQ 7 of Circular 12/2022 on the basis that since the service provider is eligible to claim GST ITC on such expense, hence it represents service provider's own liability and reimbursement thereof is a benefit or perquisite arising from business/profession liable to withholding by the service recipient.
- The clarification provided on non-applicability of withholding on reimbursement to "pure agent" is ambiguous. The clarification justifies non-applicability of withholding on the ground that GST ITC is available to service recipient in such cases and, hence, it represents service recipient's own liability. However, it is not clear whether this clarification implies that expense invoice is also in the name of service recipient. If so, it does not offer any further relief as compared to FAQ 7 of Circular 12/2022. But if it seeks to clarify that withholding will not apply even if expense invoice is not in the name of service recipient, then it represents a carve out and offer further relief as compared to FAQ 7 of Circular 12/2022.

FAQ 3 - No withholding under S.194R on reimbursement of out-of-pocket expense which is subjected to withholding under other provisions of the ITL

- FAQ 7 of Circular 12/2022 clarified that withholding under S.194R (@ 10%) applies on reimbursement of out-of-pocket expense incurred by service provider in the course of rendering service where the expense invoice is in the name of service provider.
- On the other hand, in the past, FAQ 30 of Circular No. 715 dated 8 August 1995 had clarified in context of other withholding provisions applicable payments to contractors (@ 1%/2%) or consultants/professionals (@ 2%/10%) that such withholding has to be made on gross amount of bill including reimbursements.
- This raised an issue of conflict between FAQ 7 of Circular 12/2022 and FAQ 715 of Circular No. 715 on the issue of correct withholding provision to apply in case of out- of-pocket expense reimbursement to contractors/consultants/professionals where the base payment is covered by other withholding provisions.
- Circular 12/2022 clarifies that if taxes are withheld under other sections of the ITL in accordance with Circular No 715, then there will not be further liability for withholding under S.194R. It illustrates this clarification by stating that if out-of-pocket expense is part of the consideration in the bill for professional fee that is charged to the payer and

tax is withheld under S.194J on the entire consideration including out-of-pocket expense, then there is no further benefit/perquisite which requires withholding under S.194R.

EY comments

- This is a welcome clarification and clears the air on conflict of FAQ 7 of Circular 12/2022 with FAQ 30 of Circular 715/1994. The clarification is consistent with the view expressed by the CBDT in earlier Circular 720 dated 30 Aug 1995 that all withholding provisions are mutually exclusive and cover a specific type of payment to the exclusion of others. The clarification also supports that even if the withholding rate under the other withholding provision is lower (like 1% or 2%), still the lower withholding rate will apply and not 10% under S.194R.

FAQ 4 - Further clarifications on non-applicability of S. 194R on expenses incurred on dealer conference

- FAQ 8 of the Circular 12/2022 clarified that expenditure incurred on dealer/business conferences held with the primary objective to educate dealers/customers, will not be considered as benefit/perquisite for the purposes of S.194R, provided such conferences are not in the nature of incentives/benefits to select dealers who achieve particular targets.

- But it clarified that, the expenses attributable to the leisure trip or leisure component (even if it is incidental) will be treated as a benefit/perquisite.

- It also clarified that the expenditure incurred on account of overstay prior to or beyond the dates of such conference will be treated as a benefit or perquisite.

- Several representations were made seeking clarity on various issues arising on FAQ 8 of Circular 12/2022. In response, in modification of FAQ 8 of Circular 12/2022, the Circular now clarifies as follows:

    - The Circular clarifies that merely because all dealers are not invited to dealers/business conferences will not result in such expenses being treated as a benefit/perquisite provided to the dealers.

    - Expenses incurred on account of stay on the day immediately preceding the actual start date of conference and a day immediately succeeding the actual end date of the conference, will not be considered as overstay and, hence, will not be subject to withholding under s. 194R.

    - The Circular also acknowledges that there may be practical difficulties in identifying expenses resulting in benefit/perquisite to the participants of business conference due to the fact that it is a group activity and reasonable allocation is not possible. Further, non-compliance with withholding obligation under S.194R will not only result in disallowance of part (30%) of such expenses but also result in the provider of benefit being treated as "assessee-in-default" under the ITL with all other consequences.

    - In order to remove the practical difficulty, the Circular 18/2022 provides that if the provider of benefit is not able to allocate the benefit or perquisite to each of the participant using a reasonable allocation key, it may, at its option, chose not to claim deduction of expenses incurred on provision of such benefit or perquisite while computing total income under the ITL. If such option is exercised, the provider would be relieved from its obligation to withhold taxes S.194R on such benefit or perquisite and will also not be treated as "assessee-in-default" for non-deduction of tax. In such case, the provider must add back the expenditure, representing such benefit/perquisite, to calculate the provider's total income if such expenditure is debited in the account.

EY comments

- The clarifications are welcome and resolves the ambiguity created by FAQ 8 of Circular 12/2022 in respect of conferences involving only select dealers who have achieved performance targets, overstay by one day prior or after the actual conference date and group benefits.

- It may be noted that non-applicability of withholding in case of group benefits is conditional upon difficulty to match the benefit/perquisite to each participant using a reasonable allocation. For instance, it may apply in case of vehicle hire charges for leisure trip where it may be practically difficult to keep tab on participants who actually availed the benefit. Furthermore, it is optional to the payer. Hence, the payer has to choose between (a) applying withholding and claiming deduction for corresponding expense or (b) not applying withholding and forfeiting deduction for corresponding expense. Also, the Circular 12/2022 clarifies that relief from withholding does not impact taxability in the hands of the recipient. Hence, it is possible that the benefit may still be taxable in the hands of the participants.

- It is important to note that this FAQ merely relieves withholding obligation qua the benefit/perquisite arising to the participant. The payer will still need to withhold tax as applicable to payments made qua the vendor (e.g., vehicle hire charges payable to vehicle hire vendor). While there may be no expense disallowance for such primary withholding default if the payer has opted not to claim deduction of such expense, but the payer may still be liable to be regarded "assessee-in-default" if the payer fails to

withhold taxes applicable qua the payment to the vendor.

- The mode and manner of conveying the option exercised by payer to the tax authority is not clear. Payers liable to tax audit can report the exercise of option in tax audit report in Form 3CD.

- It is not clear whether taxpayers governed by special provisions like tonnage tax or life insurance companies or presumptive basis will also need to add back the expenditure in computation of total income, if option is exercised for non-application of withholding. This is because the expense disallowance for withholding tax default is otherwise not applicable to such taxpayers governed by special scheme of taxation.

FAQ 5 - Depreciation allowance on benefit/perquisite received in the form of a depreciable asset

- The Circular 18/2022 clarifies that where a benefit is provided in the form of capital asset and such asset is used in the business of the recipient, then the value of such asset which is subjected to tax deduction at source under s. 194R and which is offered to tax as income by the recipient will be deemed as the "actual cost" of the asset in the hands of the recipient. The Circular 18/2022 further clarifies that the recipient will be eligible to claim depreciation in respect of such asset on such deemed "actual cost" if all other conditions for depreciation allowance under ITL are satisfied[15].

- Circular 18/2022 provides an illustration of "A" gifting a car to its dealer "B" and dealer "B" using the car in its business to explain this principle. In this case, dealer "B" will be entitled to depreciation on the gifted car subject to satisfaction of following conditions:

    - "A" withholds taxes on the benefit provided to "B" as per S. 194R or obtains a declaration that the dealer "B" has paid the required taxes on such benefit by way of advance tax along with the proof for payment of advance tax as per FAQ 9 of Circular 12/2022 [16]

      AND

    - Dealer "B" includes such benefit as income in its ROI

EY comments

- This is a welcome clarification and clears the air on allowability of depreciation in the hands of the recipient on fair market value (FMV) of the asset considered for withholding purpose by the payer. The clarification may also support allowability of business expense deduction if the benefit/perquisite represents a revenue expenditure incurred wholly and exclusively for business or profession. For example, while FAQ 4 of Circular 12/2022 clarifies that distribution of free sample is a benefit/perquisite liable to withholding, if such samples are used for business/professional purposes by the recipient, the recipient can claim business deduction as also claim credit for taxes withheld by the payer.

FAQ 6 - Relaxation from withholding obligation u/s 194R for benefit provided by Embassies/High Commissions, etc. of foreign governments or international organisations

- For the removal of difficulty, Circular 18/2022 clarifies that the obligation to withhold taxes under S. 194R is not applicable on benefits/perquisites provided by following persons:

    - Organisations which are eligible for privileges and immunity under "The United Nations (Privileges and Immunity Act) 1947"

    - International organization whose income is exempt under specific Act of Parliament[17],

    - Embassies, High Commissions, legations, commissions, consulates and the trade representations of a foreign state.

EY comments

- This is also a welcome clarification. It clarifies non-applicability of withholding despite physical presence of such foreign embassies, consulates, etc. in India.

- Non-residents who do not have taxable presence in India can argue that they do not have withholding obligation in favor of residents by drawing support from clarification provided by the CBDT in case of withholding on purchase of goods from residents[18].

[15] Section 32 of ITL
[16] FAQ 5 of Circular 12/2022 clarifies that tax needs to be withheld on fair market value (FMV) of the benefit/perquisite. Where the provider has purchased the benefit/perquisite before providing to recipient, the purchase price shall be the FMV. Where the provider manufactures the items given as benefit/perquisite, then the price it charges to its customers shall be the FMV

[17] Such as the Asian Development Bank Act 1966
[18] Para 4.4 of Circular 13/2021 dated 30 June 2021 clarifies that non-resident whose purchase of goods from seller resident in India is not effectively connected with fixed place permanent establishment of such non-resident in India is not liable to withhold tax on such purchase of goods.

FAQ 7 - No withholding required on issue of bonus shares/right shares issued by widely held companies

- Stakeholders made representations that issue of bonus shares by widely held companies[19] does not result in any benefit or perquisite for the shareholders on the following grounds:
  - The overall value and ownership of shareholders in the company does not change on issue of bonus shares.
  - Furthermore, cost of acquisition of bonus share is taken as nil for capital gains computation when such bonus shares are sold.
- Similarly, representations were made seeking clarity on applicability of S. 194R on issuance of right shares.
- In response, Circular 18/2022 clarifies that withholding under S. 194R is not required on issuance of bonus/right shares by widely held companies where such bonus shares are issued, or rights offer is made, to all shareholders, as the case may be.

EY comments

- While this FAQ clarifies non-applicability of withholding for bonus shares issued and rights shares offered to all shareholders by widely held companies, it raises ambiguity for bonus shares issued and rights shares offered by closely held companies[20]. One would believe that the rationale should equally apply to bonus/rights issue by closely held companies. However, if the tax authority rely on this FAQ to assert applicability of withholding in case of closely held companies, it may give rise to further issues on computation of FMV for the purposes of withholding.
- It may be noted that for rights issue, it is sufficient that they are "offered" to all shareholders by the widely held company. The offer need not be accepted by all shareholders.
- Apart from closely held companies, the FAQ can also create controversy in situations like bonus shares issued or rights offered to equity shareholders only and not to preference shareholders.

Conclusion

While Circular 18/2022 seeks to offer relief or clarify some of the ambiguities arising from earlier Circular 12/2022, it has potential to generate controversy on additional issues like waiver/settlement of trading debts, exact scope of exemption for "pure agents", applicability of group benefit disallowance for taxpayers governed by special scheme of taxation, bonus/rights issue by closely held companies, etc.

As in case of Circular 12/2022, the Circular 18/2022 also appears to travel beyond the remit of removal of difficulties by providing clarification contrary to ratio of legal position settled by SC rulings (e.g., on non-taxability of waiver of loans).

Depending upon the stakes involved and business criticality, there could be multiple alternatives on the way forward, like: (a.) Follow the Circular to avoid litigation. (b.) Change the business practice to align with the Circular. (c.) Seek professional advice and take position contrary to the Circular with readiness to face litigation. (d.) Seek legal advice and challenge the Circular in writ before High Court. (e.) Pursue further advocacy with the government to review some of the contentious views. Each taxpayer may need to formulate appropriate strategy on different types of transactions considering its own facts and circumstances.

[19] Company in which public are substantially interested as defined in s.2(18) of the ITL

[20] Company which is not a company in which public are substantially interested as defined in s.2(18) of the ITL

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