

Analysis of Vivad se Vishwas Scheme

The Direct Tax Vivad se Vishwas Bill, 2020 was laid down before the Parliament for resolution of pending tax disputes. Subsequently, there were a number of issues raised in relation to the said scheme. In view of these issues arising, the Direct Tax Vivad se Vishwas Bill, 2020 which was listed for passage in Lok Sabha on 11th February, 2020, the last day of the first phase of the budget session, was deferred. Thereafter, a note was circulated consequent to the amendment approved by the Parliament widening the scope of the Scheme. The text of the amendments to the above Bill was also put in public domain. These amendments were considered by the Lok Sabha on 4th March, 2020 and were approved. Post approval of the Bill by the Lok Sabha, the CBDT has issued Circular No. 7/2020 dated 4th March, 2020 clarifying various issues about the Scheme by way of FAQs. Thereafter, the scheme was amended by Ordinance extending the due date from 31st March, 2020 to 30th June, 2020. Now CBDT has issued another circular no 9/2020 dated 22nd April, 2020 and has withdrawn earlier circular no 7/2020.

Now, as per the Vivad se Vishwas Act, 2020, notwithstanding anything contained in Income Tax Act or any under law for the time being in force, a taxpayer is only required to pay the 'disputed tax' to be determined in accordance with the Scheme as a full and final settlement in respect of the tax arrear. The tax arrear includes the aggregate amount of the disputed tax, interest chargeable or charged on the disputed tax, and penalty leviable or levied on such disputed tax and also includes disputed interest, disputed penalty as well as disputed fee. The appeal in relation to the dispute shall be deemed to have been withdrawn and no further proceeding in respect of an offence shall be instituted nor any penalty as well interest shall be imposed or levied in respect of such tax arrear.

The Salient features of the Scheme are as under:

- 1. All disputes pending before CIT(A), DRP, ITAT, High Court, Supreme Court on 31.01.2020 or where time to file an appeal has not expired on 31.01.2020 eligible for Scheme.**

The provisions of the Direct Tax Vivad se Vishwas Act, 2020 shall be applicable to settle all disputes:

1. in respect of all the appeals/writ petition/special writ petition filed either by the taxpayers or by the Income Tax Authority or both and such appeal or petition is pending as on 31.01.2020 with the Commissioner (Appeals), Income tax Appellate Tribunal, High Court or Supreme Court;
2. Where Order has been passed by the Assessing Officer or CIT(A) or ITAT in appeal or High Court in a Writ Petition and for which time for filing any appeal or special leave petition against such order has not expired as on 31.01.2020.
3. Cases where objection has been filed before Dispute Resolution Panel (DRP) and the same is pending as on 31.01.2020;
4. Cases where DRP has issued direction but final Assessment Order has not been passed by the Assessing Officer on or before 31.01.2020;
5. Cases where assessee has filed application for revision under section 264 and such application is pending on or before 31.01.2020. It is to be noted that in respect of revision application the same should have been filed before the specified date 31.01.2020. The eligibility is where application for revision has been filed and does not cover cases where time period for filing revision petition has not expired. This extended period obviously has not been given considering the fact that the time for filing such revision petition is one year from the date of communication of the order.

It may be noted that all appeals/writs/ objections/ revision filed before CIT, CIT(A), DRP, ITAT, High Court or Supreme Court that are pending as on 31.01.2020 or all

cases where the time limit to file an appeal has not expired as on 31.01.2020 will be eligible for the benefit of the Scheme. It may be relevant to mention here that an appeal before the CIT(A) against an assessment order is required to be filed within 30 days from the date of receipt of assessment order, an appeal before ITAT against the order of the CIT(A) is required to be filed within 60 days, an appeal before High Court against the order of the ITAT is required to be filed within 120 days and an appeal before Supreme Court against the order of the High Court is required to be filed within 90 days of the receipt of the order. Accordingly, such time frame from the date of the receipt of the order may be considered by the taxpayer to determine its eligibility to fall under the scheme.

As per the Scheme, pendency of the appeal/writ or time period for filing such appeal has not expired as on 31.01.2020 is sacrosanct. Accordingly, those cases, where appeal stands dismissed but no appeal has been filed and time for filing appeal against such order has expired, will not be eligible for the Scheme. However, where an order has been passed before 31.01.2020 but the same has been recalled subsequently, then such cases will be covered as after recall of the order, the original appeal stands revived and hence can be presumed to be pending as on 31.01.2020.

It is to be further noted that in the initial proposal, the appeal pending before CIT(A) and where notice of enhancement has been issued were excluded from the Scheme. Now, in the proposed amendment, it has been clarified that appeals pending with CIT(A) including where notice for enhancement has been issued before the specified date i.e. 31.01.2020 shall also be eligible and in the income for which notice for enhancement has been given will be considered as an addition to the income for the purpose of computing tax in dispute.

2. Set Aside Matters to AO also made eligible

As per the provision of section 2(a) of the Direct Tax Vivad Se Vishwas Act, 2020, it is only an appellant that is a person in whose case an appeal or a writ petition is pending before an Appellate Forum is eligible to avail this Scheme. Further, Appellate Forum has been defined in clause (b) of section 2 to mean Supreme Court, High Court, ITAT or CIT(A). This does not include Assessing Officer. Accordingly, as per the provision of this Act, issues which are pending before the Assessing Officer cannot be settled under the Scheme. However, in the FAQ's issued by the CBDT, the scope has been widened to include those cases where assessments have been set aside by an Appellate Authority to the Assessing Officer for giving proper opportunity to an assessee. The FAQ No. 7 in this regard reads as under:

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| Question No. 7 | <i>If assessment has been set aside for giving proper opportunity to an assessee on the additions carried out by the AO. Can he avail the Vivad se Vishwas with respect to such additions?</i> |
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Answer: If an appellate authority has set aside an order (except where assessment is cancelled with a direction that assessment is to be framed de novo) to the file of the AO for giving proper opportunity or to carry out fresh examination of the issue with specific direction, the assessee would be eligible to avail **Vivad se Vishwas**. However, the appellant shall also be required to settle other issues, if any, which have not been set aside in that assessment and in respect of which either appeal is pending or time to file appeal has not expired. In such a case disputed tax shall be the tax (including surcharge and cess) which would have been payable had the addition in respect of which the order was set aside by the appellate authority was to be repeated by the AO. In such cases while filling the declaration form, appellant can indicate that with respect to the set-aside issues the appeal is pending with the Commissioner(Appeals).

As per the above, it has been clarified that where an Appellate Authority has set aside an order to the file of the Assessing Officer, except in a case where assessment has been cancelled with a direction that the same is to be framed de novo, for giving proper opportunity or to carry out fresh examination of the issue with specific direction, the assessee would be eligible to avail this Scheme.

3. Scope of the Scheme

The benefit of the Vivad se Vishwas Scheme is available regardless of the nature of dispute. All disputes whether in relation to tax, interest, penalty, fee are covered under the Scheme. Under the Scheme, the disputes may broadly be categorized into four categories. First category covers the disputed tax and the interest and penalty in relation to such disputed tax. The other three categories covers disputed interest, disputed penalty and disputed fee where such disputed interest or penalty or fee are not connected with the disputed tax.

It may be noted that all disputes whether or not the demand has already been paid shall be eligible under the Scheme.

Under the first category that covers disputed tax, the main subject matter of dispute is the tax on income or TDS/TCS. Such dispute in relation to tax may arise on account of any addition or disallowance made vide an assessment order or a reassessment order. Such assessment order may be an order under section 143(3) or best judgment assessment order under section 144 or a final assessment order under section 144C(13) r.w.s. 143(3). Similarly, the reassessment order may be order under section 143(3) r.w.s. 147 or a best judgment assessment order under section 144 r.w.s. 147 or an order passed under section 144C(13) r.w.s. 143(3) r.w.s. 147. Further, dispute in relation to TDS/TCS tax may be on account of a demand raised under section 200A on account of processing of statements of tax determined at source, demand raised under section 201 on account of non-deduction or short deduction of tax at source, demand under section 206C(6A) on account of non-collection or short collection of tax at source, demand under section 206CB on processing of statements of tax collected at source.

The other categories of disputes i.e. disputed interest, disputed penalty or disputed fees covers such cases where the subject matter of dispute pending as on 31.01.2020 is not related to dispute on account of tax.

Second category is of disputed interest where there is no dispute pending regarding tax on income. For instance, where addition is made to the income which is not being disputed by the assessee or the dispute stands settled however, assessee is disputing levy of interest or cases where no addition has been made in the assessment order, however, interest is levied, say under section 234B, which has been challenged before the appellate forums, such cases may constitute a case of disputed interest as there is no dispute on account of tax.

Third category is of disputed penalty. Such cases may be where dispute in respect of tax on income stands settled and the dispute i.e. appeal pending is on account of levy of penalty such as penalty under section 271(1)(c), 271AAA, 271AAB etc. Further, there may be levy of penalty which is independent of the income such as penalty levied under section 271D for accepting loan or deposit in cash, 271E for repaying loan or deposit in cash, 271B for default in tax audit, etc. Similarly, there can be an appeal in respect of penalty order passed under section 271C for non-deduction of TDS, but there is no dispute pending for recovery of tax under section 201, the same may be considered to be a case of disputed penalty.

The fourth category can be of dispute in respect of levy of fees under section 234E for late filing of TDS/TCS statement or under section 234F for late filing of return. This category is independent of the other three categories.

4. Cases in respect of which provision of the Direct Tax Vivad se Vishwas Act, 2020 does not apply.

It has been provided that the benefit of Direct Tax Vivad se Vishwas Act, 2020 shall not be available in respect of the following cases/persons:

- (i) Search cases where the order is passed under section 153A or section 153C including year of search where order has been passed under section 143(3) or 144, if the amount of disputed tax is more than Rs. 5 crore. It is to be noted that in the earlier proposal, all search and seizure assessments completed under section 153A and Section 153C were proposed to be not eligible for the scheme. Now, in the revised proposal, search assessment completed under Section 153A and Section 153C will also be eligible under this scheme with a condition that the disputed tax in such cases is less than Rs.5 crore in the relevant assessment year. This condition of Rs. 5 crore of disputed tax shall also apply to the search year where assessment is not completed under section 153A or 153C but under section 143(3) or 144.

This limit of Rs.5.00 crore of disputed tax is to be computed with reference to an assessment year and hence there is a possibility that an assessee may be eligible in one or more assessment year where disputed tax is less than Rs.5.00 crore and may not be eligible in other assessment year/years if the disputed tax is Rs.5.00 crore or more in those assessment years.

- (ii) Cases relating to an assessment year in respect of which prosecution has been instituted under the Income-tax Act on or before the date of filing of declaration;
- (iii) Cases relating to any undisclosed foreign income or assets;
- (iv) Cases relating to an assessment or reassessment made on the basis of information received from foreign countries under Double Tax Avoidance Agreement or an agreement for exchange of information entered into with a foreign county;
- (v) to any person in respect of whom an order of detention has been made under the provisions of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 on or before the filing of declaration subject to specified exceptions;

- (vi) to any person in respect of whom prosecution for any offence punishable under the provisions of the under Narcotic Drugs and Psychotropic Substances Act, Special Courts Act, the Unlawful Activities (Prevention) Act, 1967, the Prevention of Corruption Act, the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, the Prevention of Money Laundering Act, 2002 or the Prohibition of Benami Property Transactions Act, 2016 on or before the filing of the declaration or such person has been convicted of any such offence punishable under any of these Acts.
- (vii) to any person in respect of whom prosecution has been initiated by the Income Tax Authority for any offence punishable under the provision of the Indian Penal Code or for the purpose of enforcement of any civil liability under any law before the filing of declaration or such person has been convicted of any such offence consequent to the prosecution initiated by the Income Tax Authority.
- (viii) Further, it has been clarified by FAQ No. 3 that this Scheme is not available for disputes pending before Authority for Advance Ruling (AAR) except where order has been passed by the AAR and writ petition against such order is pending before the High Court determining the total income of an Assessment Year. In such cases, disputed tax will be computed on the basis of the income so determined.

Barring the above cases/persons, the provisions of the Act are applicable to all the other cases that are eligible. It may be noted that the benefit of the Scheme will be available regardless of the nature of addition or disallowance made. The addition may be made under section 68 on account of unexplained cash credit such as share capital, share application money, unsecured loan or under section 69 on account of unexplained investments or under section 69A on account of unexplained money or under section 69B on account of investments not fully disclosed in the accounts or under section 69C on account of unexplained expenditure, dispute on income claimed to be exempt such as capital gain on

penny stock, long term vs short term, business income vs capital gain, exemption under any provision of the Act, etc. The nature of addition or disallowance made is immaterial for the purpose of the Scheme.

5. Declaration to be filed in respect of all issues in appeal.

It may be noted that if there are more than one additions or disallowances involved in the appeal, the declarant would be required to file declaration for all additions as well as disallowances. He cannot file declaration for some additions or disallowances and litigate on the remaining issues. However, in case there are two appeals one by the assessee and other by the Department, then the assessee shall have the option to avail the benefit of the Scheme in respect of both the assessee's appeal as well as the Department appeal or either of the appeal. In case he opts to settle appeal filed by him, then the Department appeal will continue. Further, it has been clarified in FAQ no. 36 that in case an appeal has been decided partly in favor of the assessee, then the Department shall have the right to file appeal against such order in case assessee does not avail this Scheme in respect of the issues decided in his favor. This right to file appeal by the Department shall however be subject to the guidelines issued by the CBDT including the guidelines of monetary limit.

6. Amount payable under the Declaration

As mentioned earlier, the dispute may either be on account of

- (i) disputed tax or
- (ii) disputed interest or
- (iii) disputed penalty or
- (iv) disputed fee

The criteria to determine the amount that is payable under the Scheme in respect of first category of dispute i.e. disputed tax and other category of disputes i.e. disputed interest or disputed penalty or disputed fees is different. Further, the criteria to determine the amount payable is prescribed with reference to the date on which the amount is paid i.e. whether the amount is paid before 01.07.2020 or

after such date. Further, the criteria to determine the amount payable is also with reference to the fact whether the assessee is in appeal or the Department is in appeal. Similarly, the amount payable in search cases is higher. The amount that is payable under the Scheme having regard to the various criteria's is summarized hereunder:

| S. No | Type of case | Amount payable up to 30-06-2020 | Amount payable on or after 01-07-2020 |
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| I. Cases relating to disputed tax, interest chargeable or charged and penalty levied or leviable on such disputed tax | | | |
| 1. | If an appeal is filed by a taxpayer . | Amount of disputed tax. | Amount of disputed tax <i>plus</i> 10% of disputed tax |
| 2. | If an appeal is filed by a taxpayer , in respect of tax arrear determined in any assessment on the basis of search under section 132/132A of the Act and the disputed tax does not exceed Rs. 5 crore. | Amount of disputed tax <i>plus</i> 25% of such disputed tax. | Amount of disputed tax <i>plus</i> 35% of such disputed tax. |
| 3. | If an appeal is filed by a taxpayer , however, the issue is covered in favor of the taxpayer by a higher forum | 50% of amount of disputed tax | 50% of amount of disputed tax <i>plus</i> 5% of disputed tax |
| 4. | If an appeal is filed by the department | 50% of amount disputed tax | 50% of amount of disputed tax <i>plus</i> 5% of disputed tax |
| 5. | If an appeal is filed by the Department , in respect of tax arrears determined in any assessment on the basis of search under section 132/132A of the Act and the disputed tax does not exceed Rs. 5 crore. | 50% of amount of disputed tax <i>plus</i> 12.5% of disputed tax | 50% of amount of disputed tax <i>plus</i> 17.5% of disputed tax |
| II. Cases relating to disputed interest, disputed penalty and disputed fee | | | |
| 1. | If an appeal is filed by the taxpayer | 25% of disputed | 30% of disputed |

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| | | interest, penalty or fee | interest, penalty or fee |
| 2. | If an appeal is filed by the department | 12.5% of disputed interest, penalty or fee | 15% of disputed interest, penalty or fee |

As mentioned in the above table, it may be noted that if an appeal is filed by the taxpayer, then, in case the payment is made till 30th June, 2020, the declarant will need to pay:

- (i) 100% of the disputed tax (125% of disputed tax in case of search cases) and the interest and penalty in relation to such tax whether charged/levied or chargeable/leviable shall be waived
- (ii) 25% of the disputed penalty, interest or fee in case dispute relates to disputed penalty, interest or fee and the balance 75% shall be waived.

However, in case the payment is not made till 30th June, 2020, Declarant will need to pay-

- (i) 110% of the disputed tax (135% of disputed tax in case of search cases) and the interest and penalty in relation to such tax whether charged/levied or chargeable/leviable shall be waived
- (ii) 30% of the disputed penalty, interest or fee in case dispute relates to disputed penalty, interest or fee and the balance 70% shall be waived.

Further, it may be noted that if the appeal or the writ petition or special leave petition is filed by the Department or the department has lost on any issue or in a case where the appeal is filed by taxpayer, however, the issue is covered in favor of the taxpayer by a higher forum, then, in case payment is made till 30th June, 2020, the declarant will need to pay-

- (i) 50% of the disputed tax (62.5% of disputed tax in case of search cases) and the interest and penalty in relation to such tax whether charged/levied or chargeable/leviable shall be waived
- (ii) 12.5% of the disputed penalty, interest or fee in case of appeals related to disputed penalty, interest or fee and the balance 87.5% shall be waived

However, in case payment the is made after 30th June 2020, the Declarant will need to pay-

- (i) 55% of the disputed tax (67.5% of disputed tax in case of search cases) and the interest and penalty in relation to such tax whether charged/levied or chargeable/leviable shall be waived
- (ii) 15% of the disputed penalty, interest or fee in case of appeals related to disputed penalty, interest or fee only and the balance 85% shall be waived.

It may be relevant to point out that in case there are more than one issue or addition in respect of which the assessee is in appeal and one of the addition is covered in favor of the assessee by the higher forum, then the benefit of the payment of tax at half the normal rates prescribed shall be only available in respect of such issue which is covered in favor of the assessee and not all the issues. Similarly, in case the appeal on one issue is decided by the appellate authority in favor of the assessee whereas the appeal on some other issue forming part of the said order is decided by the appellate forum in favor of the Department, then in case both the assessee and department had filed appeal, the assessee shall be eligible for the benefit of making payment at half the normal rates only in respect of the Department appeal and not in respect of appeal filed by him. Further, it is to be noted that in the cases relating to disputed tax and interest and penalty in relation to such disputed tax, in case the payment is made after 30th June,2020 then the excess payment required to the extent of 25% or 35% or 17.5% or 12.5% or 10%

or 5% of disputed tax, as the case may be, exceeds the total of interest and penalty, such excess amount is to be ignored while computing the amount payable under the declaration.

7. Computation of disputed tax for payment under declaration.

As noted above, the payment to be made under the Scheme is computed with reference to disputed tax. Accordingly, it may be relevant to understand the meaning of such term. "Disputed tax" is the amount of tax that would have been payable if the appeal were to be decided against the assessee. It has been provided that the Disputed tax in relation to an assessment year shall be the income tax including surcharge and cess that is payable by the appellant as computed hereunder:

- (i) In case where appeal, writ or special leave petition is pending before the appellate forum as on 31.01.2020, the income tax including surcharge and cess that is payable by the appellant if such appeal is to be decided against him;
- (ii) in a case where an order in an appeal or in writ petition has been passed by the appellate forum, and the time for filing appeal or special leave petition against such order has not expired as on 31.01.2020, the income tax including surcharge and cess payable by the appellant after giving effect to the order so passed;
- (iii) in a case where the order has been passed by the Assessing Officer and the time for filing appeal against such order has not expired as on 31.01.2020, the income tax including surcharge and cess payable by the appellant in accordance with such order;
- (iv) in a case where objection filed by the appellant is pending before the Dispute Resolution Panel under section 144C of the Income-tax Act as on 31.01.2020, the income tax including surcharge and cess payable by the appellant if the Dispute Resolution Panel was to confirm the variation proposed in the draft order;

- (v) in a case where Dispute Resolution Panel has issued any direction under sub-section (5) of section 144C of the Income-tax Act and the Assessing Officer has not passed the final assessment order under sub-section (13) of that section on or before the 31.01.2020, the income tax including surcharge and cess payable by the appellant as per the final assessment order to be passed by the Assessing Officer under sub-section (13) thereof;
- (vi) in a case where an application for revision under section 264 of the Income-tax Act is pending as on 31.01.2020, the amount of tax payable by the appellant if such application for revision was not to be accepted:

Further, it has been provided that where the Commissioner (Appeals) have issued a notice of enhancement under section 251 of the Act, the disputed tax amount will be increased by the amount of tax pertaining to the issues for which the notice of enhancement has been issued.

Further, the definition provides that where disputes in relation to any assessment year relates to reduction of tax credit of MAT under section 115JAA or reduction of tax credit of AMT under section 115D or reduction of any loss or depreciation, the appellant shall have an option either to include the amount of tax related to such tax credit or loss or depreciation in the amount of disputed tax, or to carry forward the reduced tax credit or loss or depreciation in the manner as may be prescribed.

As per the FAQ's issued by the CBDT, it has been clarified vide FAQ no. 26 that in respect of undisputed income, the assessee shall be required to pay tax as well interest. Similarly, vide FAQ no. 27, it has been clarified that interest is to be paid in respect of the undisputed issue. Further, vide FAQ no 38, it has been clarified that interest and penalty will be waived only in respect of the issue which is disputed in appeal and in respect of undisputed issue, the interest and penalty shall be leviable. These clarifications are in line with the objective of the Scheme which is to give relief of interest and penalty in respect of disputed issues only.

8. Procedure to file declaration.

The procedure for filing of declaration and making the payment under the scheme is as under:

(i) Filing of declaration

A declaration is required to be filed in accordance with the provision of section 4 of the Direct Tax Vivad se Vishwas Act, 2020. The declaration will have to be filed in the manner to be prescribed before the designated authority. Designated Authority has been defined to mean an officer not below the rank of a Commissioner of Income-tax notified by the Principal Chief Commissioner for the purposes of Direct Tax Vivad se Vishwas Act.

(ii) Order to be passed determining the amount payable under the Act and certificate to be issued

Upon filing of the declaration by the declarant, the Designated Authority shall within a period of 15 days from the date of receipt of the declaration, determine the amount payable by the declaration in accordance with the provision of the Act by an order under section 5(1) and grant a certificate under section 5(1) to the declarant in the prescribed form containing particulars of the tax arrears and the amount payable after determination of the same. Thus, the amount to be paid for availing the Scheme will be determined by the Designated Authority and this will help in avoiding dispute regarding the correct amount of the disputed tax to be paid for availing the Scheme. Though, a time period of 15 days has been prescribed for determining the amount payable, however, in FAQ no 41, it has been clarified that this 15 days period is an outer limit but Designated Authority has been instructed to grant certificate at an early date so as to facilitate payment of tax before due date at reduced rates.

(iii) Payment of amount within 15 days of the receipt of the order

As per section 5(2) of the Act, the declarant is required to pay the amount determined as specified in the Certificate issued under section 5(1) within 15

days of the date of the receipt of the certificate and intimate the details of such payment to the Designated Authority in the prescribed form. In case any amount has already been paid, the declarant shall be required to pay the balance amount only. In case the declarant has made payment in excess of the amount required to be paid before filing of declaration, such excess amount shall be refundable. However, it need to be noted that any amount paid post filing of declaration shall not be refundable under any circumstances. These issues have been clarified by way of example in FAQ no 26 and FAQ no. 27 and FAQ no 29 which reads as under:

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| Question No. 26 | <i>Refer to question number 5. How will disputed tax be calculated in a case where disputed demand including interest has been paid by the assessee while being in appeal?</i> |
| Answer: | <p><i>Please refer to answer to question no. 5. To illustrate, consider a non search case where an assessee is In appeal before Commissioner (Appeals). The tax on returned income (including surcharge and cess) comes to ₹ 30,000 and interest under section 234B of ₹ 1,000. Assessee has paid this amount of ₹ 31,000 at the time of filing his tax return. During assessment an addition is made and additional demand of ₹ 16,000 has been raised, which comprises of disputed tax (including surcharge and cess) of ₹ 10,000 and interest on such disputed tax of ₹ 6000. Penalty has been initiated separately.</i></p> <p><i>Assessee has paid the demand of ₹ 14,000 during pendency of appeal; however interest under section 220 of the Act is yet to be calculated. Assessee files a declaration, which is accepted and certificate is issued by the designated authority (DA). The disputed tax of ₹ 10,000 (at 100%) is to be paid on or before 31" March 2020. Since he has already paid ₹ 14,000, he would be entitled to refund of ₹ 4,000 (without section 244A interest). Further, the interest leviable under section 220 and penalty leviable shall also be waived.</i></p> |
| Question No. 27 | <i>Refer to question no 7. How will disputed tax be computed in a case where assessment has been set aside for giving proper opportunity to an assessee on the additions carried out by the AO?</i> |
| Answer: | <i>Please refer to answer to question no. 7. To illustrate, return of income was filed by the assessee. The tax on returned income was ₹ 10,000 and interest was ₹ 1,000. The amount of ₹ 11,000 was paid before filing the return. The AO made two additions of ₹ 20,000/- and ₹ 30,000/-. The tax</i> |

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| | <p>(including surcharge and cess) on this comes to ₹ 6,240/- and ₹ 9,360/- and interest comes to ₹ 2,500 and ₹ 3,500 respectively. Commissioner (Appeals) has confirmed the two additions.</p> <p>ITAT confirmed the first addition (₹ 20,000/-) and set aside the second addition (₹ 30,000/-) to the file of AO for verification with a specific direction. Assessee appeals against the order of ITAT with respect to first addition (or has not filed appeal as time limit to file appeal against the order has not expired). The assessee can avail the Vivad se Vishwas if declaration covers both the additions. In this case the disputed tax would be the sum of disputed tax on both the additions i.e. ₹ 6240/- plus ₹ 9,360/-.</p> <p>In such cases while filling the declaration form, appellant can indicate that with respect to the set-aside issues the appeal is pending with the Commissioner(Appeals) .</p> |
| Question No. 29 | Whether credit for earlier taxes paid against disputed tax will be available against the payment to be made under Vivad se Vishwas? |
| Answer: | <p>The amount payable by the declarant under Vivad se Vishwas shall be determined by the DA under clause 5. Credit for taxes paid against the disputed tax before filing declaration shall be available to the declarant. Please refer to example at question no. 26 above. If in that example against disputed tax of ₹ 10,000 an amount of Rs. 8,000/- has already been paid, the appellant would be required to pay only the remaining Rs. 2,000/- by 31st March 2020.</p> |

(iv) Withdrawal of appeal

As per provision of section 4(2), consequent to the filing of declaration and the issuance of certificate by the Designated Authority, appeals of taxpayers and department in respect of the disputed income, disputed interest or disputed penalty or disputed fee pending before the Commissioner (Appeals) or ITAT shall be deemed to have been withdrawn from the date on which certificate under section 5(1) is issued by the Designated Authority. This deemed withdrawal of appeal is in respect of appeals before CIT(A) and ITAT and hence, there will be no need to file any application for withdrawal of appeals before CIT(A) and ITAT. This deemed withdrawal of appeal before CIT(A) and ITAT upon determination of amount payable by the designated authority may create a practical problem in the case of a declarant who is not able to make payment of such amount determined or where he disputes the amount so

determined and consequently does not want to go ahead with the Scheme. In the FAQ No. 43 this issue has been raised. This FAQ reads as under:

Question No. 43 *Where appeals are withdrawn from the appellate forum, and the declarant is declared to be ineligible under the Vivad se Vishwas by DA at the stage of determination of amount payable under [section 5\(1\)](#) or, amount determined by DA is at variance of amount declared by declarant and declarant is not agreeable to DA's determination of amount payable, then whether the appeals are automatically reinstated or a separate application needs to be filed for reinstating the appeal before the appellate authorities*

Answer: Under the amended procedure no appeal is required to be withdrawn before the grant of certificate by DA. After the grant of certificate by DA under clause 5, the appellant is required to withdraw appeal or writ or special leave petition pending before the appellate forum and submit proof of withdrawal with intimation of payment to the DA as per the same clause. Where assessee has made request for withdrawal and such request is under process, proof of request made shall be enclosed.

Similarly in case of arbitration, conciliation or mediation, proof of withdrawal of arbitration/conciliation/mediation is to be enclosed along with intimation of payment to the DA.

On going through the above question 43 it is to be noted that this issue has been raised but there is no answer to the question of automatic reinstatement of the appeal in case of failure by the declarant to pay the amounts determined by the designated authority.

(v) Proof of withdrawal of appeal before High Court or Supreme Court also within 15 days of receipt of order

As per the amended provision, in case a declarant has filed an appeal or petition before the appellate forum being High Court or Supreme Court, he is required to withdraw such appeal/petition and furnish proof of such withdrawal along with the intimation of payment. The declarant also needs to withdraw

the proceedings, if any, initiated by him for arbitration, conciliation or mediation and furnish the proof of such withdrawal along with the intimation of payment. In the original proposal, the declarant was required to withdraw such appeal/petition or arbitration or conciliation and mediation prior to the furnishing of the declaration and furnish proof of the same along with the declaration. However, under the amended proposal, such proof is required to be submitted along with the intimation of the payment.

It may be noted that the payment is required to be made with 15 days from the date of receipt of the certificate issued by the designated authority. Considering the fact that there may be a practical challenge for the declarant to withdraw such appeal and have the order of withdrawal in hand within such period of 15 days so as to be able to furnish the proof of the same along with the payment intimation, CBDT vide FAQ no. 43 has clarified that the declarant may submit proof of request made to the Court for withdrawal of appeal and not necessarily the order passed by the Court allowing such withdrawal.

In respect of appeals before High Court and Supreme Court, the same can be withdrawn only with the permission of the Court under the rules of the respective Courts. Accordingly, there is no such provision of deemed withdrawal. In such appeals before High Court or Supreme Court, appropriate application will be required to be filed seeking withdrawal of the appeal. Such request for withdrawal is to be filed only after determination of the amount by the designated authority. Hence, the issue of reinstatement of such appeal consequent to failure to make payment may not arise except in those cases where a declarant has made an application before payment of the amount determined. It will be advisable that such application for withdrawal of appeal is filed after the determination of the amount and payment thereof.

(vi) Declarant to submit an undertaking

Further, the declarant is also required to furnish an undertaking waiving his right, whether direct or indirect, to seek or pursue any remedy or any claim in relation to the tax arrears. Such undertaking shall be made in such form and manner as may be prescribed. It is to be noted that the taxpayer will not be eligible to pursue any remedy or make any claim subsequently in respect of the tax arrears in respect of which the declaration is filed.

(vii) Designated authority to pass an order upon receipt of intimation of payment

Upon receipt of the intimation of payment, the designated authority shall pass an order under section 5(2) stating that the declarant has paid the amount. No time limit has been prescribed for the designated authority to pass such an order to the effect that the declarant has paid the amount.

9. Immunity from prosecution, levy of penalty and charging of interest

As per the provision of section 6, immunity will be granted from institution of any proceeding for prosecution for any offence under the Income-tax Act in respect of matters covered in the declaration. Further, the immunity will also be provided from imposition of penalty and levy of interest in respect of such matters. The amount paid under the Scheme shall be full and final settlement in respect of such matter and shall be conclusive as to the matters stated in the Declaration and no matter covered by such certificate shall be reopened in any other proceeding under the Act or any other law for the time being in force. Further, it may be noted that filing of the declaration will not set any precedence and neither the Department nor the declarant can claim in any other proceedings that the taxpayer or the Department has conceded its tax position by settling the dispute.

10. Declaration deemed to have never been made in few cases

The declaration furnished by the declarant shall be presumed never to have been made if any material particular furnished in the declaration is found to be false at any stage; the declarant violates any of the conditions referred to in Direct Tax

Vivad se Vishwas Act, 2020; or the declarant acts in any manner which is not in accordance with the undertaking given by him along with the declaration. In such cases where it is presumed that the declaration was never made, all the proceedings and claims which were withdrawn under section 4 and all the consequences under the Income-tax Act against the declarant shall be deemed to have been revived.

11. Amount paid in pursuance of a declaration shall be non-refundable

As per the provision of section 7, any amount paid in pursuance of a declaration made shall not be refundable under any circumstances. It may be noted that in case the declaration is held to be invalid for one reason or the other, not only the proceedings dropped will stand revived but the amount paid in pursuance of the declaration shall also be non-refundable.

12. However, excess amount paid prior to date of declaration, if any, shall be refundable

As per the Explanation proposed to be inserted in section 7, if the amount paid by declarant before filing declaration exceeds the amount payable under the Scheme, the declarant would be granted the refund for such excess amount. However, interest under section 244A will not be granted on such refund.

13. Secondary adjustment shall be required in pursuance to the settlement of disputes.

It is proposed to be provided that the settling of disputes regarding transfer pricing adjustment would not have any effect on the secondary adjustment, both being independent provisions, and the taxpayer would be required to repatriate fund to India in respect of settled transfer pricing adjustment. It is to be further noted that the provisions of secondary adjustment are applicable only in respect of primary adjustment to arm's length price from Assessment Year 2017-18 and hence, in respect of declaration made in respect of arm's length price issue for Assessment Year 2016-17, secondary adjustment cannot be made.