Note on further Clarifications/FAQ's required on Vivad se Vishwas Scheme

Ved Jain

The CBDT has issued Circular No. 7/2020 dated 4th March, 2020 clarifying various issues about the Scheme by way of FAQs. Thereafter, this circular has been withdrawn and a new circular 9/2020 on 22nd April, 2020 has been issued. These FAQ's have addressed many of the issues that arise from the Direct Tax Vivad se Vishwas, Act, 2020. However, there are many more issues which need clarification to make the Scheme a grand success. Some of these issues are discussed hereunder:

1. **Cases pending before AO or where similar disputes are likely to arise in future need to be included**

   Only those cases where appeals are pending before the appellate forums have been covered. Disputes that are pending with the assessing officer have not been covered in the scheme. Exclusion of such cases and not giving an option to settle disputes which are before assessing officer doesn't appear to be a good idea. Ideally, when settlement of disputes is the objective, the scheme should have been extended to cover all disputes and also such disputes that are likely to occur. There is a possibility that in one year, the dispute has reached to appeal level, and similar issue in next year is at assessing officer's level and further similar dispute will come up in subsequent year because of stand taken by the assessing officer in the earlier year for which appeal is pending. If one goes for this scheme, he will only be able to settle such years for which the appeal is pending. However, similar issues which in all likelihood will come up in future because of the stand taken by the assessing officer in earlier year will remain pending and entail unnecessary litigation in subsequent years. Ideally, option should have been given to settle all disputes now only where the appeals are pending but also where assessee visualises such dispute in subsequent years.

It may be relevant to point out that similar provision, i.e Explanation (i)(b) below clause (b) of Section 245A, is there under the Settlement Scheme under the Income Tax Act where an assessee can seek Settlement not only in respect of a pending reassessment under section 148 but also other years where similar dispute is likely to arise. This would not only encourage people to come out clean once and for all and avoid unnecessary litigation in the future on similar issues but also a big Revenue collection.

Voluntary compliance considering dispute may arise will be far more effective as against later on enforcement mechanism which may be able to identify only a few cases and take action and ultimate recover taxes. The number of cases coming up voluntarily and tax so recovered will be much higher. This will also ensure reduced litigation in future as well.

It may also be relevant to point out that in the Sabka Saath Sabka Vishwas Scheme of Indirect taxes, there was an option to the declarant to pay taxes in respect of anticipated disputes and one of the reason for the success of this Scheme was resolution of anticipated disputes. Accordingly, in FAQ's, it may be clarified that a declaration can include declaration in respect of anticipated disputes in respect of the returns already filed by the taxpayer. In order to avoid any misuse of such provision, the declarant be required to clearly state the precise issue, the amount involved, assessment year and pay taxes thereon. In case of any dispute arising in future, in respect of that assessment year the declarant will get benefit only in respect of the issue and to the extent of the amount stated in the Declaration. This will encourage many taxpayers to settle anticipated disputes and will ensure that the number of disputes in the coming years also do not rise much.

This enabling provision may itself bring additional revenue of at least Rs. 50,000 crore which otherwise may be difficult to realize despite best of enforcement mechanism provided in the Act.

2. **Need to waive off penalty inbuilt in tax rate of 60% applicable for dispute on income liable for tax under section 115BBE.**

The Taxation Laws (Second Amendment) Act, 2016, has amended the provision of section 115BBE increasing the tax rates applicable on the income in respect of cash credits i.e. unexplained share capital, loan and unexplained investment in money, bullion, jewelry, etc. to 60%. This 60% rate was apparently worked out to include tax of 30% and equivalent penalty of 30%. Further, the Finance Act has provided surcharge applicable on such income at the rate of 25% of the tax and cess at the rate of 4% with the result the effective tax rate on such income is 78% from assessment year 2017-18 onwards. A large number of disputes has arisen and are pending in appeals on the issue whether the additions made are justified or not and further, such additions falls within the meaning of income stated in this section 115BBE so as to be liable for higher rate of tax i.e. 78%. In order to encourage settlement of such disputes, it is imperative that the tax rate is commensurate and at par with the tax rate applicable on other income.

As per the Scheme, in the ordinary case, howsoever grave the case may be, the assessee is required to pay only tax at ordinary rate which is 30% and on payment of such tax, the interest and penalty get waived off. In this rate of 78%, the element of penalty at the rate of 30% is already included as penalty in such cases is limited to 10% of the income in dispute as against 30% to 90% of the income in the other cases. When this penalty of 30% to 90% is being waived, there is justification that the penalty component of 30% included in the tax rate of 60% in section 115BBE be also reduced appropriately. Thus, in the case of the income in dispute on which tax rate has been applied under section 115BBE, instead of asking 100% of the tax, 50% of the tax may be asked for settlement of the dispute under this Scheme. This will be in line with the amended Scheme where a higher rate of 125% of tax has been proposed in search cases and lower rate of 50% has been proposed in the case where Department is in appeal.

Further, this will also remove discrimination of different tax rates on similar nature of income. The addition in dispute in respect of unexplained cash credit/investment for AY 2016-17 and earlier years can be settled by paying 30% tax whereas the similar addition for AY 2017-18 onwards have to be settled by paying tax at the rate of 75%.

It may also be relevant to point out that this amendment in section 115BBE was made by the Taxation Laws (Second Amendment) Act, 2016 on 16.12.2016 i.e. when 9 months of the year had already passed. This reduction in the tax rate will go a long way in settling dispute in appeals which have come in large numbers in January 2020 itself and revenue collection on this account itself will at least be another Rs. 50,000 crore and all the litigation/appeals filed consequent to assessment for the year 2017-18 will get disposed of. Otherwise all these disputes considering the exorbitant tax rate of 78% will linger on and continue to clog the judicial system for a long time. This may be done by clarifying in FAQ's that the declarant need to pay 50% of the tax in case of income assessed under section 115BBE for assessment year 2017-18.

3. Clarity needed where addition is made on substantive basis in the hands of two persons

Vide FAQ no. 35, CBDT has clarified that where substantive addition as well as protective addition in the case of same assessee for different assessment year, or where substantive addition is made in the case of one assessee and protective addition on same issue has been made in the case of another assessee, then if the substantive addition is eligible to be covered under the Vivad se Vishwas Scheme, then on settlement of dispute related to the substantive addition, AO shall pass a rectification order deleting the protective addition relating to the same issue in the case of the other assessee. The said clarification provides clarity on such issue.

However, there may be cases where substantive addition on the same issue may have been in the hands of two assessee's. Take the case of a Company where share capital or unsecured loan received by the Company have been

added as unexplained cash credit and same amount is added also in the hands of the director/shareholder as the creditor. Thus, same income stands assessed on substantive basis in the hands of two different persons. In such cases, there is no clarity whether the same benefit will be available or not. Accordingly, it need to be clarified in the FAQ's that in case same income has been assessed in two different hands and tax is paid in one hand under the Scheme, the other addition will stand deleted. For implementing this, there can be another way whereby an assessee can make an application for rectification when same income has been assessed in two hands and the AO may rectify one order deleting the addition on the assessee paying tax under the Scheme in the other hand.

4. **Dispute in relation to year in which income is to be offered to tax – adjustment of such income included by the taxpayer in another assessment year be allowed**

In some cases, the dispute may be in respect of the year in which an income is to be assessed to tax. Say, for instance, assessee has offered to tax the income in AY 2018-19 whereas the Department contests that the income is chargeable to tax in AY 2014-15. Such issues may be more common in the real estate industry where the assessee are following percentage completion method and the dispute is often with regard to the year in which income is assessable. Department contests that the assessee has tried to defer the recognition of revenue in such cases and assesses the income from earlier years itself. In such cases, there is no clarity as to whether if an assessee settles the dispute in respect of the year in which income has been assessed to tax by the Department, then if such income has been offered to tax in subsequent years by the assessee itself, whether the assessee will be allowed corresponding adjustment/deduction from the income of the subsequent years or not. It may be relevant to point out that that in a case where the dispute in relation to an assessment year relates to reduction of tax credit of MAT under section 115JAA or reduction of tax credit of AMT under section 115D of the

Income-tax Act or reduction of any loss or depreciation computed, the assessee has been given 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 to be prescribed. Thus, an option has been given in cases where there is a reduction in carried forward losses. Accordingly, it would be ideal that a similar option is extended in such cases well where the dispute is regarding the year of taxability. Such an option will be in consonance with the principle that same income cannot be taxed twice.

5. **Where dispute is in relation to the method of accounting (accrual vs cash accounting) – corresponding adjustment of income be allowed in respect of same income in another year included by the taxpayer in its return of income**

In some cases, dispute may be on account of method of accounting of a particular income. In some cases, assessee despite following mercantile system of accounting defers recognition of income in respect particular receipts on cash basis as against mercantile basis. This is often done by the assessee due to uncertainty in collection of income on the ground of real income theory. Such income to the extent realized is offered to tax by the assessee in the subsequent years on cash basis. However, the Department contests that hybrid accounting is not permissible under the Law and accordingly makes addition on such ground. In such cases, there is no clarity as to whether if an assessee settles the dispute in respect of the year in which income has been assessed to tax by the Department, then if such income has been offered to tax in subsequent years by the assessee itself on cash basis, whether the assessee will be allowed corresponding adjustment/deduction from the income of the subsequent years when such income is offered to tax or not. Ideally, adjustment should be allowed as it is a settled law that same income cannot be taxed twice. This can be clarified in the FAQ.

6. **Capital vs Revenue – corresponding adjustment in subsequent years**

In many cases, the dispute are going on the issue whether the expenditure incurred is capital or revenue. The assessee have made a claim that the expenditure is revenue and full deduction of the same be allowed. The Assessing officer however has considered the expenditure as capital in nature and hence, allowed depreciation at the appropriate rate. The appeal against such order is pending before the appellate forum. There is no clarity in the FAQ's that in such a case, if the assessee goes for the Vivad se Vishwas Scheme and accepts the contention of the Revenue, then, whether benefit of depreciation in respect of the balance written down value will be available in the subsequent years. Thus, it need to be clarified that in case the assessee settles the dispute, it will be eligible to claim depreciation on the balance written down value.

7. **Where taxpayer accepts the addition on account of 43B in one year under the Scheme, corresponding deduction be allowed in the year of payment as per law.**

Under section 43B, certain deductions such as deduction on account of tax, duty, cess, payment towards provident fund or superannuation fund or gratuity fund, etc are allowed on payment basis regardless of the method of accounting followed by the assessee In some cases, dispute may be on account of disallowance made under section 43B wherein the assessee may be contesting that the nature of payment is not covered under section 43B. In such cases, if the assessee opts to settle the dispute under the Scheme, it may be clarified that the assessee will be allowed benefit of deduction in subsequent years when the payment is made by the assessee. Further, in case the payment is made in subsequent years for which period for revising return has expired, the assessee can claim benefit of deduction of the same in AY 2021-21.

8. **Credit of TDS paid under the Scheme by the deductor – deductee need not be asked to pay interest**

In FAQ no 30, it has been stated that where the deductor settles TDS appeal by paying tax in respect of the demand created for non-deduction of TDS, the credit of such tax paid will be allowed to the deductee. However, it has been further stated that such credit will be allowed on the date of settlement of dispute by the deductor and consequently, the deductee shall be required to pay interest from the date when such tax was payable till the date of settlement of dispute by the deductor. This clarification goes against the objective of the Scheme. The Scheme envisages that on payment of tax in dispute, the interest charged or chargeable will stand waived off. Thus, on payment of tax by the deductor, there should not be any liability on the deductee to pay interest. This is more so when an income is subject to TDS, the deductee is not required to pay such tax and consequently the interest thereon. It is because of the default of the deductor that such tax is in arrears in the hands of the deductee. In a reverse situation where the deductee is disputing its liability, the same gets waived off on payment of tax without any obligation to pay interest.

It may also be relevant to point out that in FAQ no 31, it has been stated that where the deductor settles its TDS liability under the Scheme, he shall be entitled to get consequential relief of allowable expenditure under proviso to section 40(a)(i)/(ia) in the year in which the tax was required to be deducted. This clarification in FAQ no. 31 gives credit in the year to which such tax pertains to in the hands of deductor. On this reasoning also, there is a need to revisit clarification in FAQ no. 30 so as to allow the credit of the TDS paid by the deductor under the Scheme to the deductee in the year to which it pertains without any obligation to pay further interest. In the absence of such clarification, there is no incentive as interest being waived off in the hands of the deductor is being recovered from the deductee. This also goes against the proviso of section 201(1A) read with proviso to section 201(1) whereby interest

is required to be paid by deductor only upto the furnishing of return of income by the deductee.

It may also be relevant to point that in FAQ no. 32, it has been clarified that where the deductee settles a dispute in respect of an income which was not subjected to TDS, the deductor can settle its dispute by paying 25% of disputed interest subject to such deductor being eligible for the Scheme i.e. the dispute should be pending in appeal. Considering the fact in large number of cases, either of the deductor and deductee may be in appeal and both may not be in appeal on same issue, it may be clarified that on settlement of dispute, consequent to the payment of tax which was supposed to be deducted at source and deposited, under the Scheme either by the deductor or deductee, the corresponding benefit will be extended to the deductor or the deductee as the case may be. This will help in reducing the litigation and the arrears. Otherwise, same tax and interest on the same tax will continue to be subject matter of dispute.

9. **Concessional rate of 50% need to be applied on issue decided by High Court in favor of assessee where similar issue is pending before the High Court**

In FAQ no. 37, it has been clarified that if the appellant has an appeal pending in High Court on an issue where he has got a decision in his favor from the Supreme Court, there is no need to settle the issue as the Supreme Court decision will be final. However, it has not been clarified that concessional rate of 50% will be applicable in case where an issue has been decided by the High Court in favor of the assessee and similar issue for another assessment year is pending before the High Court. It may be relevant to point out that in FAQ no 39, it has been clarified that where a taxpayer has got a favorable order from ITAT not reversed by the High Court or Supreme Court in an earlier year, then, the taxpayer can settle the dispute in another year by paying 50% of the normal rate of tax. Similar analogy should apply in respect of appeal pending at the

same forum where a favorable order has been passed in another year and not reversed by the Higher Forum.

10. **In search cases, where there dispute is on account of penalty but there is no dispute on account of tax, whether Rs. 5 crore disputed tax ceiling will be applicable and if yes, then whether it is reference to disputed tax of quantum of penalty**

As per section 9(a)(i) of the Direct Tax Vivad se Vishwas Act, 2020, the provision of the Vivad se Vishwas Scheme shall not apply in respect of tax arrear relating to an assessment year in respect of which an assessment has been made under section 143(3) or section 144 or section 153A or section 153C of the Act on the basis of search initiated under section 132 or section 132A of the Act if the amount of disputed tax exceeds Rs. 5 crore. As per the said clause, search cases are excluded except where the disputed tax in relation to an assessment year does not exceed Rs. 5 crore. It is to be noted that the term tax arrear has been defined to include, *inter-alia*, disputed penalty. Further, disputed penalty has been defined to mean such cases where the dispute in relation to penalty is not on account of disputed tax i.e. where there is either no disputed in relation to tax or where the dispute in relation to tax is settled by the Supreme Court. Thus, it is to be noted that when it is stated that the provision of the Direct Tax Vivad se Vishwas Act, 2020 shall not apply in respect of tax arrear relating to an assessment year in respect of which assessment has been made in pursuance of search, since the term tax arrear includes 'disputed penalty' as well, the exclusion apparently applies to cases of disputed penalty as well.

In such cases of disputed penalty, there is no clarity whether all such cases are excluded from the Scheme. It may be noted that only such search cases are covered under the Scheme where the disputed tax does not exceed Rs. 5 crore. Since when there will be no dispute on account of tax, there will not be any 'disputed tax' as well, it will not be possible to practically apply the test of threshold ceiling of 5 crore to ascertain the eligibility in the cases of disputed

penalty. This may either mean by implication that all the disputed cases are not eligible for the Scheme. Alternatively, a view may also be taken that cases of disputed penalty are covered under the Scheme. Clarity on such issue is much required. These issues may be clarified in the FAQ's.

11. Additional 10 % tax post 31.03.2020 need to have nexus with the disputed tax in arrears.

As per the Scheme, disputed tax at the rate of 100% is required in case payment is made on or before 31.03.2020. Similarly, penalty or fee at the rate of 25% is required to be paid before 31.03.2020. However, in case payment is not made by 31.03.2020, then, tax at the rate of 110% and penalty at the rate of 30% is required to be paid. The difference in payment of tax is of 10% and that of penalty is 20%. This provision does not take into account the tax already paid by the taxpayers. The requirement of paying additional tax of 10% should be limited to the amount of disputed tax in arrears as on 31.03.2020 rather than on the total disputed tax. There is a possibility that in the case of a declarant, the total disputed tax may be Rs. 200 lakhs and out of which, Rs. 190 lakhs would have been recovered and the balance tax payable may be only Rs. 10 lakhs as per the Scheme. In the case of such person, if a declaration is filed and payment is made by 31.03.2020, he will be required to pay just Rs. 10 lakhs. But in case, the declaration is filed after 31.03.2020, then such person will be required to pay Rs. 30 lakhs i.e. 110% of disputed tax of Rs. 200 lakhs which comes to Rs. 220 lakhs minus Rs. 190 lakhs already paid. Considering this fact, this additional tax of 10% be limited to disputed tax in arrear as on 31.03.2020 rather than the total disputed tax. Similarly, in the case of penalty, the additional liability should be restricted to 10% of 25% and not 20% of 25% to make the Scheme fair and equitable. Accordingly, it may be clarified that additional liability shall be in respect of tax in arrears on the date of filing of declaration.

12. **Benefit of concessional rate of payment under the Scheme be eligible where case is covered by the same forum.**

As per the second proviso to section 3 of the Direct Tax Vivad se Vishwas Act, 2020, in a case where an appeal is filed before the Commissioner (Appeals) or objections is filed before the Dispute Resolution Panel by the appellant on any issue on which he has already got a decision in his favour from the Income Tax Appellate Tribunal (where the decision on such issue is not reversed by the High Court or the Supreme Court) or the High Court (where the decision on such issue is not reversed by the Supreme Court), the amount payable on such issue under the Scheme shall be one-half of the amount that is otherwise payable under the Scheme. Similarly, the third proviso to section 3 of the Direct Tax Vivad se Vishwas Act, 2020, provides that in a case where an appeal is filed before the ITAT by the appellant on any issue on which he has already got a decision in his favour from the High Court (where the decision on such issue is not reversed by the Supreme Court), the amount payable on such issue under the Scheme shall be one-half of the amount that is otherwise payable under the Scheme. It is to be noted that in respect of pending appeals, the benefit of payment under the Scheme at concessional rate of 50% the normal rates prescribed under the Scheme is available only if the issue is covered in favor of the assessee by a higher forum but not if the issue is covered in favor of the assessee by the same forum.

For instance, take a case where addition on some issue is made by the AO for AY 2012-13. Say the appeal filed against such order of the AO before CIT(A) is decided in favor of the assessee. Further, say the department files an appeal against the order of the CIT(A) before ITAT which is pending on 31.01.2020. Now, say the AO has made the addition on the same issue in assessment for AY 2013-14 as well. Now, in case such appeal is pending before CIT(A) as on

31.01.2020 as well, then the benefit of concessional rate of payment will not be available in respect of the appeal for AY 2013-14 pending before CIT(A) as the issue is not decided in favor of the assessee by a higher forum. However, the department appeal for the preceding year i.e. AY 2012-13 will be eligible for the concessional rate in view of the first proviso to section 3.

This results in disparity wherein in respect of the same issue, the assessee will be required to pay amount under the Scheme at different rates. The appeal filed by the Department will be eligible for benefit of payment at concessional rate of 50% of the normal rate prescribed under the Scheme whereas the other appeal not being an appeal filed by the Department and not being decided in favor of the assessee by a higher forum will not be eligible for benefit of concessional rate of payment under the Scheme. It may be relevant to point out that had such appeal for AY 2013-14 been decided by the CIT(A) on or before 31.01.2020, then, in all likelihood, the CIT(A) would have decided such appeal in favor of the assessee in view of the principle of consistency and the Department would in such case would have required to file an appeal against such issue and the assessee would have been eligible for payment at concessional rate. Thus, there is a need to clarify that such issues which are covered by the decision of same forum unless reversed by the higher forum in favor of the assessee should also be eligible for benefit of payment at concessional rate of 50%.

13. **Whether pendency of to file appeal as on 31.01.2020 is sufficient to file the declaration or whether in such cases, filing of appeal is required even if the person is filing declaration- need to be clarified.**

Cases where time limit to file an appeal is pending as on 31.01.2020 are covered under the Scheme. In such cases, clarity is required whether pendency of time limit to file an appeal as on 31.01.2020 is sufficient and the assessee may file declaration on such basis itself or whether the assessee is required to file an appeal before filing the declaration.

Similarly, cases where appeal is pending as on 31.01.2020 are covered under the Scheme. There may be cases where the order may be disposed by the appellate authority after 31.01.2020. However, the assessee intends to settle the dispute under the Scheme. In such cases as well, clarity is required as to whether pendency of appeal as on 31.01.2020 is sufficient and the assessee may file declaration on such basis itself or whether the assessee is required to file an appeal before filing the declaration. This may be clarified in the FAQ's that no appeal is required to be filed in case the taxpayer is opting for the Scheme.

14. Cases set aside by Commissioner consequent to revision under section 263 may be included

There may be cases where assessment orders have been set aside by the Commissioner invoking its powers of revision under Section 263 of the Act. Such cases are not eligible under the Vivad se Vishwas Scheme. It would have been ideal if such cases were included in the Scheme as well. It may be relevant to point out that in the revised Scheme, a person who has filed an application for revision under section 264 of the Act and such application is pending as on 31st January, 2020 is eligible for the Scheme. Accordingly, apparently, there is no reason to not extend the benefit of the Scheme to cases where power under section 263 have been invoked.