

DIRECT TAX UPDATE



THE DIRECT TAX VIVAD SE VISHWAS BILL, 2020

Tax disputes consume copious amount of time, energy and resources both on the part of the Government as well as the taxpayers. To reduce litigation, Ministry of Finance had in the past years introduced various measures, foremost being enhancement in the monetary limits for filing of appeals by the Income-tax department (ITD). This measure had led to withdrawal of 34% of direct tax litigation before the Income-tax Appellate Tribunal (ITAT), 48% before the High Courts and 54% before the Supreme Court. To further reduce the long drawn pending litigation in direct tax, the “Vivad se Vishwas Scheme” (the Scheme) has been proposed in the Union Budget, which was presented before the Parliament on February 1, 2020. The Finance Minister on February 5, 2020 presented the details of the Direct Tax Vivad Se Vishwas Bill, 2020 in Parliament to govern the application of the Scheme.

Key mechanics of the Scheme are summarised below:

Particulars	Provisions
Eligible cases	Appeals pending (either filed by a taxpayer or ITD) before the appellate forums i.e. the Commissioner of Income-tax (Appeals) (CIT(A)), ITAT, High court and Supreme Court as on January 31, 2020.
Designated Authority (DA)	An officer (not below the rank of Commissioner of Income-tax) notified by the Principle Chief Commissioner of Income-tax.
Tax arrear	<ul style="list-style-type: none"> ▪ Aggregate of disputed tax plus interest plus penalty on such disputed tax; or ▪ Disputed interest; or ▪ Disputed penalty; or ▪ Disputed fee
Disputed tax	<ul style="list-style-type: none"> ▪ Disputed tax = (A – B) + (C – D), where, <ul style="list-style-type: none"> A = Tax on the assessed total income as per the general provisions of Income- tax Act,1961 (IT Act) B = Tax on assessed income which is not a subject matter of appeal as per the general provisions of IT Act C = Tax on the assessed total income as per Minimum Alternate Tax (MAT) and Alternate Minimum Tax (AMT) provisions D = Tax on assessed income which is not a subject matter of appeal as per MAT/AMT provisions ▪ Tax determined in relation to provisions under tax deduction at source and tax collected at source in respect of which appeal has been filed
Disputed interest	Interest determined under IT Act which is not charged/chargeable on disputed tax and an appeal has been filed in respect of such interest
Disputed penalty	Penalty determined under IT Act which is not levied or leviable in respect of disputed income or disputed tax and an appeal has been filed in respect of such penalty
Disputed fee	Fee determined under IT Act in respect of which appeal has been filed
Declaration and particulars to be furnished	<ul style="list-style-type: none"> ▪ Declarant to file a declaration before the DA in the prescribed form and manner (<i>yet to be prescribed</i>). ▪ Upon filing of the declaration, appeal before the CIT(A) and ITAT appeal shall be deemed to have been withdrawn from the date of issuance of certificate on the amount payable ▪ Such declaration should be accompanied with a proof of withdrawal:

	<ul style="list-style-type: none"> – of any appeal or writ petition filed before High Court or Supreme Court – of any proceedings for arbitration, conciliation or mediation <ul style="list-style-type: none"> ▪ Such declaration shall also be accompanied by an undertaking waiving its right to seek any remedy in relation to tax arrears 									
Declaration presumed to never have been made	<p>The declaration shall be presumed never to have been made if:</p> <ul style="list-style-type: none"> ▪ Any material particulars furnished is found to be false at any stage ▪ Violation of any conditions of the Scheme ▪ Acts in any manner which is not in accordance with the undertaking given by him <p>In such cases all the proceedings and claims which were withdrawn shall be deemed to have been revived</p>									
Amount payable	<table border="1"> <thead> <tr> <th>Type of cases</th> <th>Payment upto March 31, 2020</th> <th>Beyond March 2020 upto last date (<i>yet to be prescribed</i>)</th> </tr> </thead> <tbody> <tr> <td>Appeals involving disputed tax and interest and penalty</td> <td>Disputed tax</td> <td>Disputed tax plus 10% of disputed tax (<i>If 10% of disputed tax exceeds total disputed interest and penalty, excess to be ignored</i>)</td> </tr> <tr> <td>Appeals related to disputed interest, disputed penalty or disputed fee</td> <td>25% of disputed penalty/interest/fees</td> <td>30% of disputed penalty, interest or fees</td> </tr> </tbody> </table>	Type of cases	Payment upto March 31, 2020	Beyond March 2020 upto last date (<i>yet to be prescribed</i>)	Appeals involving disputed tax and interest and penalty	Disputed tax	Disputed tax plus 10% of disputed tax (<i>If 10% of disputed tax exceeds total disputed interest and penalty, excess to be ignored</i>)	Appeals related to disputed interest, disputed penalty or disputed fee	25% of disputed penalty/interest/fees	30% of disputed penalty, interest or fees
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Time and manner of payment	<p>Procedure to be followed in relation to the amount payable under the Scheme:</p> <ul style="list-style-type: none"> ▪ Step 1: DA within 15 days of receipt of declaration shall pass an order and grant a certificate containing the particulars of the tax arrear and the amount payable <ul style="list-style-type: none"> – The orders passed shall be conclusive and no matter covered by such order shall be reopened under the IT Act or under any other law agreement ▪ Step 2: The declarant shall pay the amount determined within 15 days of receipt of the certificate and intimate details of such payment to the DA ▪ Step 3: DA shall pass an order stating that the declarant has paid the amount 									
Immunity	<p>DA shall not institute any proceeding in respect of an offence; or impose any penalty or charge any interest under the IT Act in respect of the tax arrear</p> <ul style="list-style-type: none"> ▪ However, no benefit, concession or immunity shall be conferred in relation to any proceedings other than those in relation to which the declaration has been made 									
No refund of amount paid	Amounts paid pursuant to the declaration made under the Scheme shall not be refundable									
Scheme not applicable in certain cases	<p>The Scheme shall not apply to few cases, some of which are as follows:</p> <ul style="list-style-type: none"> ▪ In respect of tax arrear, relating to: 									

	<ul style="list-style-type: none"> – Assessment year where an assessment has been made under Section 153A or Section 153C of the IT Act – Assessment Year where prosecution has been instituted on or before the date of filing of declaration – Undisclosed income from a source or asset located outside India – Assessment or reassessment on the basis of information received under an agreement referred to in Section 90 or Section 90A of the IT Act – An appeal filed before the CIT(A) in respect of which notice of enhancement under Section 251 of the IT Act has been issued on or before the specified date ▪ In matters wherein order of detention has been made under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 ▪ In matters wherein prosecution has been instituted for any offence punishable under specified laws or enforcement of any civil liability or such person has been convicted of any offence punishable under these laws, which are as follows: <ul style="list-style-type: none"> – Indian Penal Code – Unlawful Activities (Prevention) Act, 1967 – Narcotic Drugs and Psychotropic Substances Act, 1985 – Prevention of Corruption Act, 1988 – Prevention of Money Laundering Act, 2002 – Prohibition of Benami Property Transactions Act, 1988 ▪ In matters wherein any person has been notified under Section 3 of the Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992
<p>Removal of difficulties/make rules/issue directions</p>	<p>Central Government/Central Board of Direct Taxes (“CBDT”) shall remove difficulties or make rules in giving effect to the provisions of the Scheme, issue directions to the income-tax authorities, as it may deem fit.</p>

ELP COMMENTS

Issuance of the Scheme is certainly a strong step towards reducing pending litigation. As on November 30, 2019 the total amount of disputed direct tax arrears is INR 9.32 lakh crores, which has led to introduction of this Scheme. Similar Scheme was introduced under the Indirect Taxes called “Sabka Vishwas (Legacy Dispute Resolution) Scheme”, 2019. It is important to note that under the Indirect Tax Scheme, various clarifications were issued in relation to tax dues, amount in arrears, eligibility criteria, etc. Considering the complex formula for determining the disputed tax, difference of opinion between the taxpayers and ITD to compute the disputed tax claim and the short time period to avail the Scheme, the impact of the Scheme may be diluted.

One of the key points of distinction between the two schemes is that the direct tax ‘Scheme’ does not allow waiver of any quantum of the disputed tax amount, which has to be paid in full so as to be eligible under the Scheme. Such scenario does not present any effective benefit in most cases. Since if the taxpayer would have been fine with payment of such quantum, it could have done so in the original period itself (which would have been without interest and penalty anyway).

Separately, the applicability of the Scheme appears to be *qua* an appeal rather than distinct issues thereunder. Taxpayers opting for the Scheme may, therefore, have to undertake payments towards all issues cumulatively notwithstanding the merits of individual issues.

Additionally, there is no option to the taxpayer to opt out of the Scheme, especially in a situation wherein it doesn’t agree with the amount determined. An exception should have been carved out, wherein the taxpayer should have been given an option to opt out of the Scheme and in such situation, the appellate proceedings should be revived. In case the taxpayer does not want to pay the amount determined; the taxpayer should not be subjected to adverse consequences.

Under the Circular for increase in monetary limits issued by CBDT for filing of the appeal by ITD, it has been provided that where appeal has been withdrawn, there will be no presumption that ITD has accepted the decision of the disputed issue and the ITD shall be at liberty to file an appeal on similar issue in any other assessment year or in relation to any other assessee. Similar provision should have been introduced in the Scheme in relation to taxpayers to protect them from adverse interpretations adopted by ITD.

Additionally, clarity vis-à-vis the following scenarios is yet to emerge:

- a) The disputed tax amounts may have been paid by the taxpayers in parts or full previously. Such pre-deposits/on account payments most likely would be adjusted against the final dues determined under the Scheme.
- b) A taxpayer may have already paid the entire amount of tax including interest and penalty for a given matter. Since the Scheme only requires payment of the base tax amounts in full, whether the balance amounts would be refunded?

Lastly, it is interesting that the Scheme only looks at compounding of matters in appeal. However, if an option of voluntary disclosure would have been given as part of the Scheme, it would have allowed the taxpayers to lighten the baggage of issues even for periods, where the assessment is yet to be completed. Thus, no appellate proceedings exist. Taxpayers would have appreciated that in cases where post filing of returns and pending assessment, certain issues may have been decided by the Courts against other taxpayers, in such a case, an option for payment of taxes as a voluntary disclosure would have certainly reduced future litigation. There may be a very small window to represent on this issue since the Bill has already been tabled.

Nevertheless, the Scheme would certainly have a huge impact on the pending litigation and many taxpayers will adopt to the Scheme to buy peace.

All in all, a welcome step.



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