

The Direct Tax Vivad Se Vishwas Act, 2020



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India has one of the highest pendency of tax litigation matters, of which, the number of pending Direct Tax appeals before various judicial fora are reaching almost 500,000, involving stakes of around INR 9.32 lakh crores. The complexity of income-tax laws, revenue-driven approach of the tax authorities and high petition rate by the income-tax department are amongst factors that contribute to such pendency. With a view to reduce the inflow of fresh litigations, the Central Board of Direct Taxes (hereinafter "**CBDT**") has enhanced the monetary limits for departmental appeals, but the quantum of existing disputes still haunts the taxmen. With this background and drawing inspiration from the laudable success of the recent indirect-tax amnesty scheme, the Government of India introduced the much-awaited direct-tax amnesty scheme enunciated in The Direct Tax Vivad Se Vishwas Act, 2020 (hereinafter "**the Scheme**").

The Direct Tax Vivad Se Vishwas Act, 2020 is an amnesty scheme that while enabling speedy resolution of pending income-tax disputes, also facilitates the timely generation of tax revenue for the Government. The Scheme envisages providing substantial relief in the form of a waiver of interest/ penalty and immunity from prosecution on the settlement of disputes relating to tax, interest and penalty. The coverage, nature of relief and mechanism for arriving at a settlement of the income-tax disputes is set out in the Scheme, when read with the Direct Tax Vivad Se Vishwas Rules, 2020 and the FAQs issued by CBDT. All open matters as on January 31, 2020, that are in the nature of- (i) an appeal, application before Dispute Resolution Panel (hereinafter "**DRP**") or revision application that is pending, (ii) an appeal to be filed against an order passed and the time limit for filing such appeal has not expired and (iii) final assessment order post issue of DRP directions, will be eligible for settlement under the Scheme.

From a procedural perspective, within 15 days of receipt of the declaration made by the taxpayer, the designated authority after carrying a preliminary verification of the appropriateness of the declaration made, would grant a certificate containing particulars of tax arrears and the amount payable for settlement under the Scheme. Consequent to such declaration and on the fulfilment of conditions, all appeals, writs, SLPs and arbitrations would be withdrawn by both, the taxpayer and the department.

Though the intent and coverage of the scheme are appreciable, a critical evaluation does pose the following practical issues:

- **Departmental appeals:** In case of departmental appeals and issues that are favourably covered in a taxpayer's own case, the Scheme still requires a payment of 50% of the disputed tax. Theoretically, these provisions may appear lucrative, more realistically, however, the taxpayer may not be inclined to opt for the scheme in such cases as the possibility of getting a favourable judgement is high and the cost (50%) outweighs the benefits. Departmental appeals constitute nearly 85% of the total number of income-tax appeals, with a success rate of the department being less than 30%. Thus, the law of averages suggests that in 85% of the pending matters, there is more than a 70% probability that the matter would be ruled in favour of the taxpayer. In such a situation, payment of 50% of disputed tax could be a nonstarter. Ideally, payment requirements in case of departmental appeals should have been structured as 20% to 30% of the disputed tax. In fact, a progressively lower percentage of payment with a rise in the quantum of disputed tax would garner a better response.

- **Order based declaration:** Generally, an order passed by the Assessing Officer (hereinafter "AO") for a particular assessment year would deal with multiple issues applicable to the taxpayer. As clarified vide the FAQs, picking and choosing of issues in an Order for settlement is not allowed under the Scheme and application for settlement has to be qua the Order. As a result, taxpayers may refrain from opting for settlement in case of Orders that partially involve issues which are covered by favourable precedence or on which the taxpayer believes to have a strong case on merits. Admittedly, the objective of the scheme is to reduce the number of pending appeals, however, this approach may defy the other purpose behind the Scheme i.e., reduction of the value under dispute and timely collection of tax revenues. Applying the scheme qua issues would have been fair. Apart from encouraging taxpayers to opt for the scheme, it would have ensured that the judiciary is left only with contentious issues to deal with.
- **Pending/potential litigation which has not culminated in an Order:** It is common for taxpayers to litigate adjustments made to the computation of tax payable, by the AO, either on account of increase in revenue or reduction in deductible expenses in the Order. Generally, AOs follow a common practice to keep the penalty proceedings in abeyance until disposal of the appeal by the first-level appellate authority. The Scheme does not provide for the waiver of potential penalty, in case of issues which are not appealed before the first appellate authority and on which penalty proceeding has not been concluded but are offered for settlement. In fact, it would be worse if the AO was to consider opting for settlement as an automatic acceptance of the default, and therefore, levy penalty. A favourable clarification in this regard would go a long way in keeping a check on potential litigations in relation to penalties.
- **Waiver of interest in certain cases:** Section 220(2) of the Income-tax Act, 1961 requires payment of interest if any demand remains unpaid beyond a specified period. Ordinarily, these provisions apply to demand a penalty as well. Therefore, a question arises as to whether if the taxpayer opts for the scheme in relation to a demand for a penalty or a pending penalty proceeding, whether interest under Section 220(2) shall be applicable for the period from the date of the demand for penalty up to the date of settling such penalty under the Scheme. It is unclear if the taxpayer would be immune to such a levy of interest, in view of Section 6 of the Scheme which provides general immunity against the charge of any interest. The approach of the AO while determining the amounts payable in this regard could decide the fate of the Scheme.
- **Waiver of disputed tax:** The trigger for laying down the Scheme seems to be influenced by the success of the Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019 (hereinafter "**indirect-tax amnesty scheme**"). However, the Scheme is not as attractive as the indirect-tax amnesty scheme, as the Scheme requires payment of 100% of the disputed tax (except in certain cases, as discussed above), whereas the indirect-tax amnesty scheme waived almost 50% of the disputed tax amount. Nevertheless, it is likely that such a feature has been intentionally excluded from the Scheme, considering the allegations faced by the Government that the indirect tax amnesty scheme was biased against honest taxpayers.
- **Instalment payments:** Another major shortcoming of the Scheme is the non-availability of instalment payments. Especially in the current times of economic crisis and liquidity crunch, the availability of instalment payments would have not only benefited ailing businesses, but also boosted the direct-tax collections that have reportedly slipped by a sum total of INR 1.2 lakh crores for the current financial year (i.e. 2020).

Despite all the odds, to conclude, the Scheme is a welcome initiative aimed at settling the direct-tax disputes. Undoubtedly, the Scheme would enable the reduction of pending litigation. Hopefully, such a reduction would enable future litigation to be taken up and resolved faster, thereby, giving a boost to the ease of doing business in India. However, liberating the scheme from a few of the issues cited above, can make the Scheme more lucrative and attractive for taxpayers to opt for. As Robert Schuller once said, "Problems are not stop signs, they are guidelines".