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THE DIRECT TAX VIVAD SE VISHWAS ACT, 2020 (Amended)

An Analysis of the Scheme

THE DIRECT TAX VIVAD SE VISHWAS ACT, 2020

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SALIENT FEATURES OF THE DIRECT TAX VIVAD SE VISHWAS ACT, 2020 ('Scheme')

- The Direct Tax Vivad se Vishwas Act, 2020 is a separate Act and not part of the Income-tax Act, 1961 ('Act').
- **The Scheme had been introduced on 5 February 2020. A notice has been given for moving amendments to the Bill on 14 February 2020. This bulletin incorporates the Scheme alongwith the amendments.**
- The Scheme is on similar lines to the *Sabka Vishwas* Scheme introduced under Indirect tax regime, – Amount stuck in litigation: Rs. 3.75 lakh crores; No of cases settled under the Sabka Vishwas Scheme: 1,89,000; Realisation from the Sabka Vishwas Scheme: around Rs. 38,000 crores.
- For Direct Taxes, 4,83,000 cases pending, amount stuck in litigation: Rs. 9.32 lakh crore (as on 30 November 2019).
- In the Statement of objects and reasons it is clearly stated that the scheme is for dispute resolution relating to direct taxes, however the scheme provides only for disputes in relation to the Act and not for Wealth Tax or other direct taxes. It needs to be seen whether such exclusion was envisaged by the legislature.
- Appeals pending or where the time duration to file the appeal has not expired as on 31st day of January 2020 are covered by the scheme.
- Last date for opting for the scheme is yet to be notified. However, as per the Budget speech of the Hon'ble Finance Minister, the scheme will be operative up to 30 June 2020.
- The appeals can be pertaining to any assessment year.
- There is no minimum or maximum eligibility criterion for the purpose of opting into the scheme.
- The Scheme provides for payment of 100% of the disputed tax and consequently no interest and penalty shall be levied for such disputed tax. The scheme does not provide any reduction in payment of disputed tax, unlike the Sabka Vishwas Scheme which provided for the same under the indirect taxes regime, except where the assessee / declarant has got relief at any appellate level and the department is in appeal.
- Assent from the President is yet to be received and the Scheme/amended Scheme shall be effective on the day it receives assent from the President.

STEPS INVOLVED IN PAYMENT OF TAX ARREARS

Filing of declaration before designated authority in prescribed form

[Section 4]

within
15
days

Designated authority shall grant a certificate

[Section 5(1)]

within
15
days

Withdrawal of appeals and proceedings/Payment of disputed tax

[Section 4(3)/(4) & Section 5(2)]

Proof of withdrawal along with intimation of payment to be given to Designated authority

[Section 4(3)/(4) & Section 5(2)]

Designated authority shall pass an order stating that payment has been made

[Section 5(2)]

An undertaking waving all rights, remedies, claims in relation to the tax arrears is to be furnished by the declarant

IMPORTANT DEFINITIONS UNDER THE SCHEME

Important Definitions

[Section 2]

- The Scheme provides for the ‘declarant’ to file a ‘declaration’ in respect of the matters, for which the declarant / appellant is in appeal.
- The Scheme is in respect of an appellant who has filed an appeal before the appellate forum and such appeal is pending or the time duration for filing an appeal is not expired as on 31 January 2020 (being the ‘specified date’ under the Scheme).
- The appellate forum covered under the Scheme means the Commissioner (Appeals) [CIT(A)], Income-tax Appellate Tribunal (ITAT), High Court (HC), Supreme Court (SC).
- However, the proceedings before the Dispute Resolution Panel (DRP) have been covered under the Scheme.

**Important
Definitions**

‘Appellant’

and

‘Disputed tax’

**[Section 2(a) and
2(j)]**

Appellant’ means:

- Cases wherein appeal or writ petition or Special Leave Petition (SLP) has been filed and such an appeal is pending as on the specified date.
- Cases wherein order has been passed by the appellate forum on or before the specified date and the time limit for filing appeal or writ petition or SLP against such order has not expired on or before the specified date.
- Cases wherein order has been passed by the Assessing Officer (AO) and the time limit for filing appeal against such order has not expired on or before the specified date.
- Cases wherein objection has been filed before the DRP and the DRP has not issued any direction on or before the specified date.
- Cases wherein direction has been issued by the DRP but no order u/s 144(13) is passed by the AO.

Disputed tax shall be computed as under:

- Amount of disputed tax that is payable if the appeal, writ petition or SLP is decided against him.
- Amount of disputed tax payable after giving effect to the order so passed.
- Amount of disputed tax payable in accordance with such order.
- Amount of disputed tax payable if the DRP was to confirm the variation proposed in the draft order.
- Amount of disputed tax payable as per the assessment order to be passed by the AO under section 144(13), that is, giving effect to the directions of the DRP.

<p>Important Definitions</p> <p>‘Appellant’</p> <p>and</p> <p>‘Disputed tax’</p> <p>[Section 2(a) and 2(j)]</p> <p>[Cont...]</p>	<ul style="list-style-type: none"> ○ Revision application under section 264 is filed and such application is pending as on the specified date. 	<ul style="list-style-type: none"> ○ Amount of disputed tax payable if such revision was not accepted. ○ Where the CIT(A) has issued notice of enhancement under section 251 on or before the specified date, the disputed tax shall be increased by the amount of tax pertaining to issues for which such enhancement has been issued. ○ Where dispute relates to reduction of tax credit under section 115JAA or section 115D or any loss or depreciation, there is an option provided: <ul style="list-style-type: none"> - to include such reduction in the amount of disputed of tax, <i>or</i> - to carry forward such reduced tax credit or loss or depreciation, in such manner as may be prescribed.
<p>VTPA Comments</p>	<ul style="list-style-type: none"> ○ The Scheme does not cover any tax arrear in respect of other direct taxes, like Wealth Tax Act, Gift Tax, etc. ○ The Scheme covers all persons whether resident or non-resident under the Act. 	

AMOUNT PAYABLE BY DECLARANT (As per Section 3)

Sr. No	Nature of tax arrear (Disputed tax liability)	Amount payable on or before 31 March 2020	Amount payable on or after 1 April 2020 up to the last day of the Scheme
1	Tax arrear is aggregate of disputed tax, interest chargeable or charged on such arrears and penalty leviable or levied on such tax	100% of the disputed tax, i.e., without taking into consideration interest and penalty	110% of the disputed tax
2	Tax arrear is aggregate of disputed tax, interest chargeable or charged on such arrears and penalty leviable or levied on such tax, as determined under section 132 or 132A	125% of the disputed tax, i.e., without taking into consideration interest and penalty	135% of the disputed tax
3	Tax arrear relates to disputed interest or disputed penalty or disputed fee	25% of the disputed interest or disputed penalty or disputed fee	30% of the disputed liability

In case of Sr. no. 1 and 2 above, the excess amount, in respect of interest charged or chargeable or penalty levied or leviable, over 10, 25 and 35 respectively of the disputed tax, is to be ignored.

<p>Amount payable by Declarant</p> <p>[Section 3]</p>	<p>Reduction in tax payable in certain cases:</p> <ul style="list-style-type: none"> ○ If the appeal, writ petition or SLP is filed by department on any issue before the appellate forum, the amount payable shall be 50 percent of the relevant amount mentioned in the above table. ○ If the appeal is filed before the CIT(A) / ITAT or objection is filed before the DRP, by the declarant, on any issue and the declarant has got a favourable decision for that issue from higher appellate forum, the amount payable shall be 50 percent of the relevant amount mentioned in the above table. ○ The manner of computing the amount of tax would be prescribed.
<p>VTPA Comments</p>	<ul style="list-style-type: none"> ○ Further, from the bare reading of the Scheme, disputed penalty may be settled though the disputed tax liability continues to be litigated. ○ The Scheme needs to clarify whether if an appeal / writ petition is filed before the High Court; and for such issue the Supreme Court has ruled in favor of the appellant, in such a case should not the 50 percent relief be available?, in like manner as provided above in case of CIT(A), DRP and ITAT.

FILING OF DECLARATION

Filing of declaration and particulars to be furnished

[Section 4]

- Section 4 deals with the declaration to be filed with respect to the disputed tax arrear before the designated authority.
- Section 4 states that from the date on which the certificate under section 5(1) of the Scheme is issued in respect of the declaration filed, any appeal pending before CIT(A) or ITAT, in respect of the disputed tax, arrear shall be deemed to have been withdrawn.
- Where the declarant has filed any appeal before the appellate forum or any writ petition is filed before the HC or SC against any order in respect of tax arrear, the appeal or writ has to be withdrawn after issuance of certificate under section 5(1).
- The proof of withdrawal of such appeal or writ along with the intimation of payment, has to be submitted to the designated authority under section 5(2).
- If the appellant has initiated any proceedings or given notice thereof, in respect of any proceeding for arbitration, conciliation or mediation under any law in force or any treaty entered into by India with any other country or territory outside India, whether in respect of protection of investment (e.g., Investment Promotion Protection Agreement signed by India, etc); then the Scheme requires the declarant to withdraw all claims under such proceedings or notice given thereof, after certificate u/s 5(1) is issued.
- The proof of withdrawal of such arbitration, conciliation, mediation along with the intimation of payment, has to be submitted to the designated authority under section 5(2).
- The declarant is also required to give an undertaking in respect of the tax arrear, whereby he waives all rights under any law or in equity or agreement entered into by India with any country or territory outside India of any nature.

**Filing of
declaration and
particulars to be
furnished**

[Section 4]

- The presumption under the Scheme is that all the declarations made by the declarant would be nullified and all the consequences under the Act against the declarant would be deemed to be revived 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 this Act;
 - the declarant acts in any manner which is not in accordance with the undertaking given by him.

<p>Time and manner of payment</p> <p>[Section 5]</p>	<ul style="list-style-type: none"> ○ Section 5(3) states that once an order has been passed under section 5(1) containing particulars of the tax arrear and the amount payable by the declarant after such determination, then no further proceedings can be initiated under the Act or under any law in force or any agreement as noted above. ○ Explanation to section 5 states that declaration made under the Scheme shall not amount to conceding a tax position, either by the declarant or the department. ○ It is further explained that neither of the party to the appeal, writ petition or SLP can contend that a party has acquiesced in the decision on the disputed issue by settling the dispute under the Scheme.
<p>VTPA Comments</p>	<ul style="list-style-type: none"> ○ The Scheme does not clarify that the below instances would also stand withdrawn: <ul style="list-style-type: none"> - proceedings pending before the DRP or - in a case where DRP has issued direction and the AO has not passed an order. ○ The provisions of section 4 are very onerous and the declarant would need to be aware that he would be waving all his rights under the Act, Double Taxation Avoidance Agreements, Bilateral Investment Promotion and Protection Agreement and under general provisions of law, if he intends to be covered under the Scheme. ○ However, where the tax dispute has been carried forward in appeal by the tax department, the Scheme does not spell out in detail, how such tax dispute would need to be settled by the declarant and what would be the duties or the responsibilities of the tax department to bring an end to such dispute.

IMMUNITY FROM INITIATION OF PROCEEDINGS

<p>Immunity from initiation of proceedings in respect of offence and imposition of penalty in certain cases</p> <p>[Section 6]</p>	<ul style="list-style-type: none">○ Section 6 and section 8 of the Scheme needs to be read together.○ Section 6 clearly states that the designated authority cannot initiate any proceeding in respect of any offence in respect to tax arrear or impose or levy any penalty or charge any interest in respect of the tax arrear.○ Section 8 tends to constrict the immunity granted under the Scheme in terms of section 5(3) and section 6 by stating that nothing contained in the Scheme can be construed to give any benefit or concession in any other proceedings under any law in India other than those in relation to which the declaration is made.
<p>VTPA Comments</p>	<ul style="list-style-type: none">○ The Scheme does provide for benefits/ concessions/ immunity. However, this benefit is only in relation to the declaration and not anything beyond that.
<p>No Refund of amount paid</p> <p>[Section 7]</p>	<ul style="list-style-type: none">○ Section 7 provides that any amount paid in pursuance of declaration made under the Scheme, no amount shall be refunded under any circumstances.○ Explanation to section 7 provides, that if any amount has been paid under normal tax proceedings before filing declaration under the Scheme, the payment exceeding the amount payable as per section 3 (table) shall be refunded.○ However, such refund shall not be entitled to interest under section 244A.

NON APPLICABILITY OF SCHEME

Scheme not to apply in certain cases **[Section 9]**

- Section 9 of the Scheme provides cases wherein the provisions of the Scheme would not apply. They are as under:
 - Tax arrear arising in respect of any assessment year wherein assessment has been made under section 143(3) or 144 or 153A or 153C of the Act; on the basis of any search initiated under section 132 or 132A, if the amount of disputed tax exceeds rupees five crores.
 - Cases in which prosecution under the Act has been instituted on or before the date of declaration.
 - Tax arrear in respect of cases relating to undisclosed income arising from a source or undisclosed asset located outside India
 - Assessments made on the basis of any information received under an agreement referred to in section 90 or 90A.
 - In respect of any person 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 certain conditions provided in the Scheme.
 - In respect of which prosecution has been instituted for any offences in respect of various legislations mentioned in the Scheme before the date of declaration or such person has been convicted of any offence punishable under the said legislations.

VTPA Comments

- If any prosecution had been instituted by Income-tax authority or the department against a person under :
 - the provisions of Indian Penal Code or
 - for enforcement of any civil liability or
 - such person has been convicted of any such offence consequent to the prosecution initiated by the Income-tax authority
- to any person notified under section 3 of the Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992 on or before the filing of declaration

Power to make Rules

- o Section 12 provides rule making power to the Central Government in respect of all aspects of the Scheme.

[Section 12]

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