

Direct Tax Vivad se Vishwas

2020



Message from the Partner

A tax dispute settlement scheme i.e. Vivad se Vishwas Act under direct tax has been introduced for settling Income tax disputes between taxpayers and the Income tax department.

The Tax appeals pending as on 31.01.2020 before the appellate forum, writ petitions, revision applications, Dispute Resolution Panel related proceedings and other proceedings of like matter set aside to the assessing officer by higher appellate authorities or arbitration, mediation or conciliation, etc., shall be eligible for the Scheme. Such appeals can also be the appeals filed by the Income Tax Department.

The date of furnishing of declaration, making payment without additional amount was first extended from March 31, 2020 to June 30, 2020 and further to December 31, 2020 due to Covid 19.

The main advantage for availing this scheme is that tax disputes settled under it cannot be reopened in any other proceeding by the income tax department or any other designated authority.

The declaration consisting of the details regarding the appeal to be settled and an undertaking concerning the waiving the right to seek or pursue any remedy is required to be furnished electronically on the income tax e-filing portal.

The Designated Authority within 15 days from the receipt of the declaration will issue the Certificate determining the amount payable. The declarant is required to pay the amount as determined within 15 days from the date of receipt of such certificate.

Further, the declarant shall intimate the details of tax paid along with proof of the withdrawal of appeals. Upon receipt of intimation from the declarant, the designated authority shall pass an order for full and final settlement.

This is an excellent opportunity for taxpayers and Income tax department to settle their pending disputes and start afresh. This will significantly reduce litigation burden both on judiciary and taxpayers.

Hope you enjoy reading our analysis.

Best Wishes,
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Introduction

In the past Government has taken several measures to reduce tax litigations. In the last budget, **Sabka Vishwas Scheme** was brought in to reduce litigation in indirect taxes. It resulted in settling over 1,89,000 cases.

Currently, there are 4,83,000 direct tax cases pending in various appellate forums, Thus, this year, the Hon'ble Finance Minister brought a scheme similar to the Indirect tax - Vishwas for reducing litigations in the direct taxes.

Earlier the Government has introduced Direct Tax Vivad se Vishwas Bill, 2020 in the Lok Sabha on February 5, 2020. Now the Government has made certain changes and the Bill received President's nod on 17th March 2020.

Applicability of Scheme

This scheme can be availed in following scenarios:

1	Pending appeals	Taxpayers in whose case appeals were pending as on January 31, 2020 before – <ul style="list-style-type: none"> • Commissioner (Appeals), • Income Tax Appellate Tribunal, • High Court, • Supreme Court, and writ petitions pending before the High Court/ Supreme Court and special leave petition is pending before the Apex Court as on January 31, 2020.
2	Where no appeal filed but time-limit for filing appeal is still available	Taxpayer in whose case order has been passed by the <ul style="list-style-type: none"> • Assessing Officer or • Commissioner (Appeals) or • Income Tax Appellate Tribunal or • High Court and time-limit for filing appeal against such orders has not expired as on January 31, 2020.
3	Direction of 'Dispute Resolution Panel' ('DRP') is pending	A person who has filed objections before DRP and such Panel has not issued any direction on or before January 31, 2020.
4	DRP issued directions but order of AO is pending	A person in whose case DRP has issued directions but AO has not passed order on or before January 31, 2020.

5	Pending revision application before Commissioner (Appeals)	Where assessee has filed revision application before Commissioner u/s 264 which is pending on or before January 31, 2020.
6	Cases of Arbitration in India and Abroad	Where taxpayer has initiated any proceedings for <ul style="list-style-type: none"> • Arbitration • Conciliation or • Mediation for cases in India and abroad.
7	Where no appeal is pending but case is pending in arbitration	An assessee whose case is pending in arbitration even if no appeal is pending.
8	Writ pending in HC against order of AAR	Where writ is pending in HC against such order of AAR where income is determined.
9	Where appeal filed against interest levied on assessed tax	Where there is dispute only against interest levied on assessed tax but there is no dispute on tax corresponding to such interest. Note:- If there is a dispute on tax amount, and a declaration is filed for the disputed tax, the full amount of interest levied or leviable related to the disputed tax shall be waived.
10	Where assessment set-aside for giving opportunity to an assessee on additions carried out by AO	If an appellate authority has set aside an order to the file of the AO for <ul style="list-style-type: none"> • giving proper opportunity or • to carry out fresh examination of the issue with specific direction Note:- Where assessment is cancelled with a direction that assessment is to be framed de novo, it shall not be eligible for such scheme.
11	Where appeal has been filed against imposition of fee for default or delay in filing of TDS/ TCS returns and income tax return	If appeal has been filed against imposition of fees <ul style="list-style-type: none"> • For delay or default in filing of TDS/TCS return u/s 234E or • For delay in filing of income tax return u/s 234F

12	Where appeal is pending for delay in deposit of TDS/TCS	The disputed tax includes tax related to TDS and TCS which are disputed and pending in appeal. Note:- If there is no dispute related to TDS or TCS and there is delay in depositing such TDS/TCS, then the dispute pending in appeal related to interest levied due to such delay will be covered under Vivad se Vishwas.
13	Where assessee has not filed objections before DRP	Where the AO has passed a draft assessment order before January 31, 2020 and assessee decides not to file objection with the DRP and is waiting for final order to be passed by the AO against which he can file appeal with Commissioner(Appeals).

Benefits of scheme

Scheme provides for waiver of interest, penalty & prosecution where the declaration is filed by the declarant before the designated authority.

The amount payable by the declarant under this Act shall be as under, namely:—

Appeal filed by	Nature of tax arrear	Amount payable before Dec 31, 2020	Amount payable after Dec 31, 2020 but on or before the last date as may be notified
Taxpayer	Disputed <ul style="list-style-type: none"> • tax, • interest and • penalty on such disputed tax. 	100% of disputed tax (complete waiver of penalty and interest)	Entire disputed tax + 10%* of disputed tax
Taxpayer	Disputed <ul style="list-style-type: none"> • interest, • penalty and • fee 	25% of disputed interest or disputed penalty or disputed fee	30% of disputed interest or disputed penalty or disputed fee
Taxpayer (Search and Seizure)	<ul style="list-style-type: none"> • Tax • Interest • Penalty determined on basis of search and seizure 	(100% + 25%)of disputed tax**	(100% + 35%) of disputed tax***

<ul style="list-style-type: none"> Income Tax department or where Income Tax Department lost case (assessee has favourable order of higher authority which is not reversed) 	<p>Disputed</p> <ul style="list-style-type: none"> Tax, Interest and Penalty on such disputed tax. 	50% of disputed tax (complete waiver of penalty and interest)	55% of disputed tax
<ul style="list-style-type: none"> Income Tax department or where Income Tax Department lost case 	<p>Disputed</p> <ul style="list-style-type: none"> interest, penalty and fee 	12.5% of disputed interest or disputed penalty or disputed fee	15% of disputed interest or disputed penalty or disputed fee
<ul style="list-style-type: none"> Income Tax department or where Income Tax Department lost case (Search and seizure) 	<ul style="list-style-type: none"> Tax Interest Penalty determined on basis of search and seizure 	62.5% of disputed tax	67.5% of disputed tax ***

*where 10% of disputed tax exceeds the aggregate amount of interest and penalty charged on disputed tax, such excess shall be ignored.

** where 25% of disputed tax exceeds aggregate amount of interest and penalty on such disputed tax, such excess shall be ignored

*** where 35% of disputed tax exceeds aggregate amount of interest and penalty on such disputed tax, such excess shall be ignored

Features of scheme



Reduction in loss

In case where the Assessing Officer has reduced the returned loss by making addition of income/disallowing expenditure, the taxpayer shall have following two options:-

Pay the notional tax on amount by which the loss has been reduced and carry forward the claimed loss without reduction.

Accept the reduced carry forward of loss without making any payment under the Scheme. Same mechanism would apply for reduction in MAT credit.



Transfer pricing adjustment

The setting of dispute 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 funds to India in respect of settled transfer pricing adjustment.



Declaration for all issues

If there are more than one issues involved in the appeal, the taxpayer would be required to file declaration for all issues, he cannot file declaration for some issues and litigate the balance issues.



Favourable decision

In a case where the taxpayer has got a favourable decision on an issue at higher forum, he would be required to pay only 50% of disputed tax on that issue even in the cases in which he has filed appeal.

Exclusions

Such scheme is not applicable in the following scenarios:-

1	Where search and seizure action taken by Income Tax Department	Tax assessment made u/s 143(3) or 144 or 153A or 153C on the basis of search initiated by the Income Tax Department where amount of disputed tax exceeds Rs 5 crores in that assessment year. Example:- If there are 7 assessments of an assessee relating to search & seizure, out of which in 4 assessments, disputed tax is Rs 5 crores or less in each year and in remaining 3 assessments, disputed tax is more than Rs 5 crores in each year, declaration can be filed for 4 assessments where disputed tax is Rs 5 crores or less in each year.
2	Proceedings before AAR	Disputes pending before AAR
3	Where prosecution initiated by Income Tax Authority	Where prosecution has been initiated on or before the date of filing of declaration and it has not been compounded before filing a declaration under this scheme.
4	Undisclosed foreign income and foreign asset	Undisclosed income from a source located outside India or undisclosed asset located outside India.
5	Information received under TIEA	Assessment made on the basis of information received under Tax Information Exchange Agreement.
6	Where order of detention was made	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 certain exceptions).

7	Where prosecution instituted	<p>Any person in respect of whom prosecution for any offence punishable under the provisions of the</p> <ul style="list-style-type: none"> • Unlawful Activities (Prevention) Act, 1967, • the Narcotic Drugs and Psychotropic Substances Act, 1985, the Prevention of Corruption Act, 1988, • the Prevention of Money Laundering Act, 2002, • the Prohibition of Benami Property Transactions Act, 1988 <p>has been instituted on or before the filing of the declaration or such person has been convicted of any such offence punishable under any of those Acts.</p> <p>Note:- Where only notice for initiation of prosecution has been issued with reference to tax arrears, the taxpayer has a choice to compound the offence and opt for Vivad se Vishwas.</p>
8	Where prosecution instituted by Income Tax Authority	<p>Any person in respect of whom prosecution has been initiated by an Income-tax authority for any offence punishable under the provisions of the Indian Penal Code or for the purpose of enforcement of any civil liability under any law for the time being in force, on or before the filing of the declaration or such person has been convicted of any such offence consequent to the prosecution initiated by an Income tax authority.</p>
9	Where writ against order of AAR is pending in High Court but no income is determined by AAR	<p>Where AAR has not determined the total income, it would not be possible to calculate disputed tax. Accordingly, such cases are specifically excluded from such Scheme.</p> <p>Example: Where the AAR has determined the existence of PE of foreign company in India but the AO has not determined the profit attributable to PE. Such cases are excluded as total income has not been determined in those cases.</p>
10	Where taxpayers want to settle concealment penalty appeal while continuing to litigate quantum appeal	<p>It would not be possible for the appellant to apply for settlement of penalty appeal only when the appeal on disputed tax related to such penalty is still pending.</p>
11	Where disputed tax also contains tax in respect of undisclosed foreign income	<p>If the tax arrears include tax on issues that are excluded from the Vivad se Vishwas, such cases are not eligible to file declaration under Vivad se Vishwas.</p> <p>For one pending appeal, all the issues are required to be settled and if anyone of the issues makes the declaration invalid, no declaration can be filed.</p>

12	Where a writ filed against reassessment notice u/s 148 and no assessment order passed by AO	If a writ has been filed against a notice issued under section 148 of the Act and no assessment order has been passed consequent to that section 148 notice such cases are not covered as there is no determination of income against said notice.
13	Waiver applications	Where assessee has filed waiver application with respect to interest u/s 234A, 234B and 234C.
14	Disputes other than relating to Income Tax Act	Where disputes relates to wealth tax, securities transaction tax, commodity transaction tax and equalisation levy.
15	Others	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.

Procedure

- **Filing of declaration:** The declaration shall be filed by the declarant before designated officer (i.e., officer not below the rank of Commissioner) in prescribed form **(Form 1)**.
- **Deemed withdrawal of appeal before ITAT and CIT(A):** Upon the filing the declaration, any appeal pending before the Income Tax Appellate Tribunal or Commissioner (Appeals), in respect of the disputed tax shall be deemed to have been withdrawn from the date on which certificate **(Form 3)** is issued by the designated authority.
- **Withdrawal of appeal before HC and SC:** Where the declarant has filed any appeal before the High Court or Supreme Court or writ before the High Court or the Supreme Court against any order in respect of tax arrear, he shall withdraw such appeal or writ petition with the leave of the Court after issuance of certificate and furnish proof of such withdrawal along with the intimation of payment **(Form 4)** to the designated authority.
- **Withdrawal of arbitration cases in India and Abroad:** Where the declarant has initiated any proceeding for arbitration, conciliation or mediation, or has given any notice thereof in India and abroad, he shall withdraw the claim, if any, in such proceedings or notice after issuance of certificate and furnish proof of such withdrawal along with **undertaking in Form 2** and the intimation of payment to the designated authority.
- **Furnishing of declaration:** The declarant shall furnish an undertaking waiving his right, whether direct or indirect, to seek or pursue any remedy or any claim in relation to the tax arrear which may otherwise be available to him under any law for the time being in force.
- **No refund:** Any amount paid in pursuance of a declaration made under such scheme shall not be refundable under any circumstances.
- **Refund in case of excess payment:** Where disputed demand along with interest has been paid by appellant while in appeal such cases are also covered under such scheme. If the amount of tax paid is

more than amount payable under Vivad se Vishwas, the appellant will be entitled to refund without interest under section 244A of the Act.

- **Issue of Final Order of Settlement:** When the payment is made and intimated to the Designated Authority, a Final Order of Settlement will be issued in **Form 5** and this order will provide immunity from initiation of proceedings in respect of offence and imposition of penalty under Income Tax Act in respect of tax arrear paid.

Validity of declaration in case of incorrect particulars

The declaration made under Scheme 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 this Act;
- the declarant acts in any manner which is not in accordance with the undertaking given by him as aforesaid,

and in such cases, all the proceedings and claims which were withdrawn and all the consequences under the Income-Tax Act against the declarant shall be deemed to have been revived.

Other issues

1	Where assessee settles TDS appeal or withdraws arbitration (against order U/S 201) as deductor of TDS, will credit of such tax be allowed to deductee?	The deductee shall be allowed to claim credit of taxes in respect of which the deductor has availed of dispute resolution under this Scheme. However, the credit will be allowed as on the date of settlement of dispute by the deductor and hence the interest as applicable to deductee shall apply.
2	Where assessee settles TDS liability as deductor of TDS under this scheme (i.e, against order u/s 201), when will he get consequential relief of expenditure allowance under proviso to section 40(a)(i)/(ia)?	The deductor 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.
3	When assessee settles his own appeal or arbitration under this Scheme will consequential relief be available to the deductor in default from liability determined under TDS order U/S 201?	When an assessee (being a person receiving an income) settles his own appeal or arbitration under Vivad se Vishwas and such appeal or arbitration is with reference to assessment of an income which was not subjected to TDS by the payer of such income (deductor in default) and an order under section 201 of the Act has been passed against such deductor in default, then such deductor in default would not be required to pay the corresponding TDS amount.

4	Where DRP order passed on or after 1st July, 2012 and before 1st June, 2016 have given relief to assessee and Department has filed appeal, how assessed tax to be calculated?	If department appeal is required to be settled, then against that appeal the appellant is required to pay only 50% of the amount that is otherwise payable if it was his appeal.
5	In a case ITAT has passed order giving relief on two issues and confirming three issues. Time to file appeal has not expired as on specified date. The taxpayer wishes to file declaration for the three issues which have gone against him. What about the other two issues as the taxpayer is not sure if the department will file appeal or not?	The Vivad se Vishwas allow declaration to be filed even when time to file appeal has not expired considering them to be a deemed appeal. Vivad se Vishwas also envisages option to assessee to file declaration for only his appeal or declaration for department appeal or declaration for both. Thus, in a given situation the appellant has a choice, he can only settle his deemed appeal on three issues, or he can settle department deemed appeal on two issues or he can settle both. If he decides to settle only his deemed appeal, then department would be free to file appeal on the two issues (where the assessee has got relief) as per the extant procedure laid down and directions issued by the CBDT.
6	There is no provision for 50% concession in appeal pending in HC on an issue where the assessee has got relief on that issue from the SC?	If the appellant has got decision in his favour from SC on an issue, there is no dispute now with regard to that issue and he need not settle that issue. If that issue is part of the multiple issues, the disputed tax may be calculated on other issues considering nil tax on this issue.
7	Addition was made u/s 143(3) on two issues whereas appeal filed only for one addition. Whether interest and penalty be waived for both additions?	Under Vivad se Vishwas, interest and penalty will be waived only in respect of the issue which is disputed in appeal and for which declaration is filed. Hence, for the undisputed issue, the tax, interest and penalty shall be payable.
8	DRP has issued directions confirming all the proposed additions in the draft order and the AO has passed the order accordingly. The issues confirmed by DRP include an issue on which the taxpayer has got favourable order from ITAT (not reversed by HC or SC) in an earlier year. The time limit to file appeal in ITAT is still available. The taxpayer is eligible for Vivad se Vishwas treating the situation as taxpayer's deemed appeal in ITAT. In this case how will disputed tax be calculated? Will it be 100% on the issue allowed by ITAT in earlier years or 50%?	In this case, on the issue where the taxpayer has got relief from ITAT in an earlier year (not reversed by HC or SC) the disputed tax shall be computed at half of normal rate of 100%, 110%, 125% or 135%, as the case maybe.

9	Where there are two appeals filed for an assessment year-- one by the appellant and one by the tax department, whether the appellant can opt for only one appeal? If yes, how would the disputed tax be computed?	The appellant has an option to opt to settle appeal filed by it or appeal filed by the department or both. Declaration form is to be filed assessment year wise. So, the appellant needs to specify in the declaration form whether he wants to settle his appeal, or department's appeal in his case or both for a particular assessment year. The computation of tax payable would be carried out accordingly.
10	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 or, amount determined by Designated Authority('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.	No appeal is required to be withdrawn before the grant of certificate by DA. After the grant of certificate by DA, the appellant is required to withdraw appeal or writ or special leave petition pending before the appellant 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.
11	Whether DA can amend his order to rectify any apparent errors?	Yes, the DA shall be able to amend his order to rectify any apparent errors.
12	Where tax determined by DA is not acceptable can appeal be filed against the order of designated authority before ITAT, High Court or Supreme Court?	No
13	Where the demand in case of an assessee has been reduced partly or fully by giving appeal effect to the order of appellate forum, how would the amount payable under Vivad se Vishwas be adjusted?	After getting the proof of payment of the amount payable under Vivad se Vishwas, the AO shall pass order under Vivad se Vishwas was to create demand in case of assessee against which the amount payable shall be adjusted.
14	Will the result of this Vivad se Vishwas be applied to same issues pending before AO?	No, only the issues covered in the declaration are settled in the dispute without any prejudice to same issues pending in other cases.

15	If the taxpayer avails Vivad se Vishwas for Transfer Pricing adjustment, will provisions of section 92CE of the Act apply separately?	Yes, secondary adjustment u/s 92CE will be applicable. However, it may be noted that the provision of secondary adjustment is not applicable for primary adjustment made in respect of an assessment year commencing on or before the 1st day of April 2016.
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Time and manner of payment



Determination of tax payable: The designated authority shall, within a period of 15 days from the date of receipt of the declaration, determine the amount payable by the declarant and grant a certificate to the declarant.

Time-limit for payment of tax: The declarant shall pay the amount determined as aforesaid within 15 days of the date of receipt of the certificate and intimate the details of such payment to the designated authority and there upon the designated authority shall pass an order stating that the declarant has paid the amount.

For the removal of doubts, it is hereby clarified that making a declaration under this Act shall not amount to conceding the tax position and it shall not be lawful for the income-tax authority or the declarant being a party in appeal or writ petition or special leave petition to contend that the declarant or the income-tax authority, as the case may be, has acquiesced in the decision on the disputed issue by settling the dispute.

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