

# TAX FLASH NEWS

7 December 2020



## CBDT issues another set of FAQs on the Direct Tax Vivad se Vishwas Scheme

In March 2020, the Direct Tax Vivad Se Vishwas Act, 2020 (the Scheme) was passed by the Parliament and received presidential assent. The Central Board of Direct Taxes (CBDT) had issued a Circular<sup>1</sup> (No.7/2020) clarifying various issues relating to the Scheme in the form of 55 frequently asked questions (FAQs).

Recently, CBDT has issued another Circular<sup>2</sup> to provide 34 more FAQs (FAQ Nos. 56 to 89) related to the Scheme. These 34 FAQs further clarify on various aspects of the Scheme like scope/eligibility, computation, consequences and procedure of the Scheme. The FAQs are summarised as follows:

| FAQ   | Clarifications  |
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| <b>Scope and eligibility</b>  |   |
| Appeal or arbitration is pending with taxpayer authority as on 31 January 2020 (or the time for filing appeal has not expired as on 31 January 2020). However, subsequent to that date, and before filing of the declaration, the appeal has been disposed of by the appellate authority. Whether it is still eligible under the Scheme? If yes, how the amount payable under the Scheme shall be computed? | Yes, the taxpayer is eligible under the Scheme. The amount payable under the Scheme shall be computed with reference to the position of appeal or arbitration as on 31 January 2020.  |
| Whether the Scheme can be availed in a case where the enforceability of an assessment order passed by the AO has been stayed by the High Court or Supreme Court?  | Yes, the taxpayer can file declaration under the Scheme, whether or not the appeal has been filed against the assessment order. Writ/Appeal pending in the High Court and Supreme Court shall be required to be withdrawn by the taxpayer. Upon settlement of quantum appeal, interest and penalty, if any, will be waived.   |
| Appeal or writ against revision order <sup>3</sup> was pending on 31 January 2020 (or time to file appeal has not expired on 31 January 2020). Whether the Scheme can be availed for settling such appeal?  | If revision order contains general directions and income is not quantifiable, appeal against such order is not eligible under the Scheme. However, if revision order contains only specific directions and income is quantifiable (and does not contain any general directions due to which income is not quantifiable), appeal against such order is eligible under Scheme.<br><br>In such case, taxpayer is required to settle all the issues in the order, which are subject matter of Section 263 as well as issues pending in appeal (or issues in respect of which time to file appeal has not expired on 31 January 2020), if any, with reference to the said order. |

<sup>1</sup> CBDT Circular No.7/2020, dated 4 March 2020

<sup>2</sup> CBDT Circular No. 21/2020, dated 4 December 2020

<sup>3</sup> Under Section 263

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| Whether the taxpayer is eligible for the Scheme in whose case the time limit for filing of appeal has expired before 31 January 2020 but an application for condonation of delay has been filed?  | If the time limit for filing of appeal expired during the period from 1 April 2019 to 31 January 2020 (both dates included in the period), and the application for condonation is filed before the date of issue of this circular, and appeal is admitted by the appellate authority before the date of filing of the declaration, such appeal will be deemed to be pending as on 31 January 2020. |
| Whether cross objections filed and pending as on 31 January 2020 will also be covered by the Scheme?  | Yes. However, the main appeal is also required to be settled along with cross objections.  |
| Whether Miscellaneous Application (MA) pending as on 31 January 2020 will also be covered by the scheme?  | If the MA pending as on 31 January 2020 is in respect of an appeal which was dismissed in <i>limine</i> (before 31 January 2020), such MA is eligible. Disputed tax will be computed with reference to the appeal which was dismissed.   |
| Whether search cases where assessment which was made under block assessment <sup>4</sup> are covered under the Scheme?  | Appeal, writ or Special Leave Petition (SLP) in respect of block assessment is eligible if the disputed tax does not exceed five crore rupees for the said block assessment.   |
| Whether the Scheme can be availed in a case where proceedings are pending before the Income Tax Settlement Commission (ITSC) or where writ has been filed against the order of ITSC?  | The Scheme cannot be availed in the said cases.  |
| Appeal against assessment order is pending (or time to file appeal against such order has not expired) on 31 January 2020. The taxpayer has also filed application for resolution of assessment order under Mutual Agreement Procedure (MAP). Whether the Scheme can be availed?                          | In a case where MAP resolution is pending or the taxpayer has not accepted MAP decision, the related appeal shall be eligible under the Scheme. In such case, the declarant will be required to withdraw both MAP application and appeal.  |
| If the Authority for Advance Ruling (AAR) has ruled in favour of the taxpayer and the tax department has gone in writ or appeal before the High Court/Supreme Court and the total income of the taxpayer was quantifiable on the facts of the case before AAR, is the taxpayer eligible under the Scheme? | Yes, the taxpayer is eligible since the income is quantifiable. In such case, since the issue is covered in favour of taxpayer, only 50 per cent of the disputed tax is payable.   |
| Appeal has been set aside to CIT(A) / Dispute Resolution Panel (DRP) and was pending as on 31 January 2020? Whether it is eligible?   | Yes, such case can be settled under the Scheme and the set aside issues will be deemed to be pending at the level of CIT(A)/DRP as on 31 January 2020. However, all issues which were either pending in appeal (whether set aside or not) or in respect of which time to file appeal has not expired on 31 January 2020 have to be settled.  |
| Whether in cases where the appellate authority has quashed the prosecution complaint or ruled in favour of the taxpayer and no further appeal is filed by tax department on or before filing of declaration, the taxpayer is eligible for the Scheme?   | Yes, such cases are eligible if the time limit for filing of appeal by the tax department has expired and the tax department has not filed appeal (with or without condonation of application).  |
| Whether the taxpayer is eligible to opt for the Scheme if prosecution has been instituted due to a Tax Deduction at Source (TDS) default?   | If prosecution has been instituted for TDS default in a financial year on or before the date of filing of declaration, it cannot be settled under the Scheme   |
| A trust has been denied registration <sup>5</sup> . Whether appeal against such order is eligible for the Scheme?   | No, appeal against such order is not eligible for the Scheme.  |

<sup>4</sup> Under Section 158BA (i.e. block assessment)

<sup>5</sup> Under Section 12AA

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| If the assessment order has been framed in the case of a taxpayer <sup>6</sup> based on the search executed in some other taxpayer's case, whether it is to be considered as a search case or non-search case under the Scheme?   | Such case is to be considered as a search case.  |
| The Scheme Forms do not contain a specific option to settle appeal filed against intimation <sup>7</sup> . Accordingly, clarification to settle such appeal which is pending as on 31 January 2020 (or time of file appeal has not expired on 31 January 2020).                                     | Appeal filed against intimation <sup>8</sup> is eligible under the Scheme if certain adjustment has been made in the notice of intimation <sup>9</sup> .   |
| Whether appeal filed under Section 248 <sup>10</sup> is eligible under the Scheme?  | Yes, appeal filed under Section 248 is eligible under the Scheme.  |
| In the case of the taxpayer, prosecution has been instituted for assessment year 2012-13 with respect of an issue which is not in appeal. Will he be eligible to file declaration for issues which are in appeal/or this assessment year and in respect of which prosecution has not been launched? | The ineligibility to file declaration relates to an assessment year in respect of which prosecution has been instituted on or before the date of declaration. Since in this example, for the same assessment year (2012-13) prosecution has already been instituted, the taxpayer is not eligible to file declaration for this assessment year even on issues not relating to prosecution.         |
| If the prosecution is for a different assessment year and the appeal for a different one, would it debar the taxpayer from the benefit of this scheme?  | Prosecution in one assessment year does not debar the taxpayer from filing declaration for any other assessment year if it is otherwise eligible.  |
| Whether cases where the taxpayer/tax department has filed declaration/ application under Section 158A/158AA <sup>11</sup> are eligible under the Scheme?  | Yes, in such case declaration /application filed under Section 158A/158AA on or before 31st January 2020 shall be deemed to be a pending appeal as on 31st January 2020 for the purpose of the Scheme.   |
| <b>Computation</b>  |  |
| Whether enhancement notice issued by CIT(A) post 31 January 2020 is to be taken into account for computation of disputed tax?   | Enhancement notice issued by the CIT(A) after 31 January 2020 but before the date of issue of this circular shall be required to be taken into account for determining amount payable under the Scheme. However, the enhancement notice issued on or after the date of this circular but on or before 31 December shall not be taken into account for determining amount payable under the Scheme. |
| Whether any additional ground filed in relation to an appeal is to be considered while computing disputed tax?  | If any additional ground has been filed on or before 31 January 2020, it shall be considered for the purpose of computing disputed tax.  |
| In case of appeals pending against both assessment and reassessment where addition is repeated on same issue, would tax be payable twice in respect of the same issue if both appeals are settled?  | Since disputed tax in respect of repeated addition will be payable only once, both the assessment and reassessment appeals are required to be settled together. If there is a difference between tax liability in respect of such addition in assessment and reassessment, then higher of the two tax liabilities will be considered for computing disputed tax.                                   |

<sup>6</sup> Under Section 143(3) / 144

<sup>7</sup> Under Section 143(1)

<sup>8</sup> Under Section 143(1)

<sup>9</sup> Under sub-clauses (iii) to (vi) of clause (a) of Section 143(1)

<sup>10</sup> Appeal by a person denying liability to deduct tax in certain cases

<sup>11</sup> Procedure when taxpayer claims identical question of law is pending before High Court or Supreme Court / procedure when in an appeal by revenue an identical question of law is pending before Supreme Court

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| <p>In a case where taxpayer accepts certain additions in an order (giving rise to undisputed tax liability) and appeals against certain additions (giving rise to disputed tax liability), how the prepaid taxes will be adjusted against the disputed tax liability or undisputed tax liability?</p>   | <p>If prepaid tax, being TDS/TCS, is clearly identifiable with the source of income, it will be adjusted against tax liability with respect to such income. Rest of the pre-paid tax, which cannot be clearly identified with the source of income, will be apportioned against the remaining tax liability.</p>   |
| <p><b>Consequences</b></p>  |  |
| <p>Whether appeal against penalties<sup>12</sup> that are not related to quantum assessment are also waived upon settlement of appeal relating to disputed tax?</p>   | <p>No, appeal against such penalty order is required to be settled separately.</p>   |
| <p>In respect of some loan, addition was made as unexplained cash credits<sup>13</sup>. Appeal is pending before the CIT(A) and the taxpayer is eligible for opting the Scheme. After making the payment of tax under the Scheme, can the taxpayer make entries in his books by crediting the said loan in his capital account?</p>   | <p>No, the Scheme is not an amnesty scheme. It only provides an option to settle appeals on contentious issues that are neither accepted by the tax department nor the taxpayer.</p>   |
| <p>Whether the immunity from prosecution is only for the declarant or also for the director of the company or partner of the firm with respect to the issues settled under the Scheme?</p>  | <p>If an issue has been settled under the Scheme, the immunity from prosecution with respect to that issue shall also extend to the director/partner of company/firm (being the declarant) in respect of same issue<sup>14</sup>.</p>  |
| <p>If appeal involving issue of disallowance<sup>15</sup> is settled under the Scheme, whether consequential relief will be available in proceedings<sup>16</sup> initiated qua the same payment/ deduction.</p>  | <p>No</p>  |
| <p>Tax was not deducted on an income and TDS order<sup>17</sup> was passed in the case of the deductor. The said income was also assessed in the case of the deductee. Both deductor and deductee are in appeal or arbitration, which is eligible under the Scheme. What would be the amount payable by the deductor and the deductee with reference to the said income under the Scheme in the following scenarios:</p> <ul style="list-style-type: none"> <li>• Where the deductor settles his appeal or arbitration and makes payment under the Scheme?</li> <li>• Where the deductee settles his appeal or arbitration and makes payment under the Scheme?</li> </ul> | <ul style="list-style-type: none"> <li>• Since the deductor has settled his appeal (or arbitration) and paid the tax he would get waiver from interest and penalty under the Scheme. The deductee will not be required to pay the tax under the Scheme with reference to the said income and he will get credit for taxes paid by deductor. However, the deductee shall be required to pay interest and penalty, if any, with reference to said income and if such interest or penalty qualifies for the Scheme, he can settle the same by paying the applicable amount (25/30 per cent).</li> <li>• Since the deductee has settled his appeal (or arbitration) and paid the tax, he would get waiver from interest and penalty. The deductor will not be required to pay tax under the Scheme with reference to non-deduction of tax on said income. However, the deductor shall be required to pay interest and penalty, if any, with reference to said income and if such interest or penalty qualifies for the Scheme, he can settle the same by paying the applicable amount (25/30 per cent).</li> </ul> |
| <p>In the scenarios mentioned above<sup>18</sup>, what will be the amount of tax credit if the payment of amount on settlement of Section 201 appeal is more than 100 per cent of disputed tax for it being a search case or for the reason that the payment is made after 31st March 2021?</p>   | <p>Tax credit in the hands of deductee cannot be more than 100 per cent of disputed tax, even if the payment of more than 100 per cent of disputed tax is required to be made by the deductor settling his Section 201 appeal.</p>   |

<sup>12</sup> Under Section 271B, 271BA, 271DA

<sup>13</sup> Under Section 68

<sup>14</sup> Under Section 278B

<sup>15</sup> Under Section 40(a)(i)(ia)

<sup>16</sup> Under Section 201

<sup>17</sup> Under Section 201

<sup>18</sup> Where the deductor settles his appeal or arbitration and makes payment under the Scheme / where the deductee settles his appeal or arbitration and makes payment under the Scheme

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| <p>CBDT in earlier set of FAQs<sup>19</sup> has clarified that where taxpayer settles TDS liability as deductor of TDS under the Scheme he will get consequential relief of expenditure allowance<sup>20</sup> in the year in which the tax was required to be deducted.</p> <p>What will happen in a situation where the same amount of TDS was recovered in subsequent year and accordingly the taxpayer has already claimed deduction in that year?</p> | <p>There is no question of double deduction. If the taxpayer has already claimed deduction of the same amount<sup>21</sup> in subsequent year on account of payment of such sum, he shall not be entitled to again claim the deduction on the basis of the settlement under the Scheme.</p> |
| <p>The declarant has filed a declaration for disputed penalty. He is required to pay 25 or 30 per cent of disputed penalty to settle the dispute. Will interest levied or leviable be waived in this case?</p>   | <p>Yes. Once the required amount of disputed penalty has been paid by the declarant, interest relating to such penalty would be waived</p>  |
| <p><b>Procedure</b></p>  |   |
| <p>Separate TDS orders were passed<sup>22</sup> for a particular assessment year. The taxpayer has filed two separate appeals for principal portion<sup>23</sup> and interest portion<sup>24</sup>. Can he file only one declaration under the Scheme against principal portion order<sup>25</sup> and seek 100 per cent waiver of interest levied<sup>26</sup>.</p>   | <p>Yes, once appeal against principal portion order<sup>27</sup> is settled under the Scheme, there would be 100 per cent waiver of interest levied<sup>28</sup>.</p>   |
| <p>Once declaration is filed by taxpayer under the Scheme can the same be revised? If Yes, at what stage of the proceedings will the same be allowed?</p>  | <p>Yes, declaration can be revised any number of times before the Designated Authority issues a certificate under the Scheme.</p>   |

## Our comments

The CBDT circular is a welcome move. CBDT clarifies on various issues for example availability of the Scheme where appeal/arbitration was pending as on 31 January 2020 but was subsequently disposed of before filing of declaration, where the application for condonation is filed before the date of issue of the circular and appeal is admitted before the date of filing of the declaration, etc.

CBDT also clarifies that cross objections, miscellaneous application pending as on the specified date will also be covered under the Scheme, however, it denies availability of the Scheme where proceedings are pending before the Settlement Commission.

Further the taxpayer is entitled to the Scheme in respect of AAR and MAP cases. In a case where MAP resolution is pending or the taxpayer has not accepted MAP decision, the related appeal shall be eligible for the Scheme. Further CBDT has given clarity on relief for the payer/payee in settlement of TDS disputes.

It was also clarified that the declaration can be revised any number of times before the Designated Authority issues a certificate under the Scheme.

However, some of the issues are still unaddressed for example adjustment of refund for one year with disputed tax payable for another year.

<sup>19</sup> FAQ 31

<sup>20</sup> Under proviso to section 40(a)(i)/(ia)

<sup>21</sup> Under Section 40(a)(i)/(ia)

<sup>22</sup> Under Section 201(1) & 201(1A)

<sup>23</sup> Under Section 201(1)

<sup>24</sup> Under Section 201(1A)

<sup>25</sup> Under Section 201(1)

<sup>26</sup> Under Section 201(1A)

<sup>27</sup> Under Section 201(1)

<sup>28</sup> Under Section 201(1A)

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