



# **Seminar on Direct Taxation - Analysis of Vivad se Vishwas scheme**

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# **Vivad Se Vishwas Bill 2020 (VSV)**

**[Introduced on 5 February 2020]**

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# Objects of introduction of VSV

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- ▶ Status of pending litigation
  - ▶ Approximately 4.83 lakh direct tax cases are pending before various appellate forum i.e. CIT(A) / ITAT / HC / SC
  - ▶ Approximately INR 9.32 lakh crore locked in disputed tax arrears
    - ▶ It constitutes nearly 1 year of direct tax collection
- ▶ Increasing trend of litigation in direct tax arena
- ▶ Disputes consume copious amount of time, energy and resources of taxpayer and Government; deprive timely revenue collection – Hence, an urgent need for their resolution
- ▶ Similar measures taken in past to reduce litigation:
  - ▶ Kar Vivad Samadhan Scheme 1998
  - ▶ The Direct Tax Dispute Resolution Scheme 2016
  - ▶ Substantial increase in monetary limits for Tax Department to prefer appeal before ITAT / HC / SC – CBDT Press Release dated 8 August 2019
- ▶ Finance Bill 2020 has proposed VSV for the resolution of disputes before appellate forums and Courts
- ▶ VSV will be open for limited period of time – From the date of assent received by President till sunset date as may be notified by Central Government
  - ▶ Likely to be operative till 30 June 2020
  - ▶ Government targets maximum settlement before March 2020 to improve its revenue collection.

# Chronology of events in relation to VSV

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| Date                          | Description of event  |
|-------------------------------|---|
| 5 February 2020               | Introduction of VSV Bill in Lok Sabha                           |
| 12 February 2020              | Union Cabinet approves amendment in the proposed Bill           |
| 1 <sup>st</sup> week of March | Revised Bill is likely to be tabled in Lok Sabha                |
| ??                            | Bill approved by Lok Sabha is to be tabled in Rajya Sabha       |
| ??                            | President assent for enactment of Bill as law                   |
| ??                            | Sun-set date of VSV Scheme to be notified by Central Government |

- ▶ It is likely that the amended bill may be made public before its formal passing by both the Houses

# Cases eligible for opting VSV<sup>1</sup>

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- ▶ Appeals filed by taxpayers or Tax Department which are pending as on 31 January 2020
  - ▶ May be pending before CIT(A) / ITAT / HC / SC
  - ▶ Can be direct appeal or cross appeals
  - ▶ Covers cases of assessment, reassessment, transfer pricing, TDS appeals, order giving effect to appellate order, AAR appeals, dispute on levy of penalty, dispute on levy of interest, etc.
  - ▶ Cases of levy of interest under s. 23A/B/C, s. 220(2), s. 201(1A), etc.
  - ▶ Cases of penalty under s. 270A, 271(1)(c), s. 271F, s. 271AAB, s. 271AAC, etc.
  - ▶ Orders where time limit for filing appeal is not expired as on 31 January 2020
  - ▶ Cases pending before DRP
  - ▶ Cases where DRP had issued directions on or before 31 January 2020 but order giving effect has not been passed by Tax Authority
  - ▶ Writ petition or SLPs pending before SC / HC – including against AAR order

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<sup>1</sup> List is basis information about scope of amended bill in the public domain

# Cases eligible for opting VSV

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- ▶ Appeals filed by taxpayers or Tax Department which are pending as on 31 January 2020
  - ▶ Revision petitions pending before CIT (Revision under s. 264)
  - ▶ Search cases where disputed tax is less than INR 5 crore per AY
  - ▶ Intent is also to cover proceedings of arbitration, conciliation or mediation – But, defective language in Original Bill; expected to be corrected in Amended Bill
  - ▶ Belated appeal filed with condonation application before 31 January (Refer, SC ruling in CIT v. Shatrusailya Digvijaysingh Jadeja [2005] 277 ITR 435)
  - ▶ Belated appeal filed post 31 January if delay is condoned and appeal is admitted before date of declaration. Refer, CBDT FAQ No 6 of Circular No. 33 / 2016 dated 12 September 2016 in the context of DRS 2016]
  - ▶ Whether appeal on determination of DDT / BBT is eligible?
  - ▶ Appeal pending before CIT(A) in respect of which notice of enhancement u/s. 251 of the ITA has been issued on or before 31 January 2020
    - ▶ As per news report, this ineligibility appears to have been removed

# Cases eligible for opting VSV

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- ▶ Settlement under VSV is for all issues covered under an appeal
  - ▶ Not possible to opt benefit of VSV issue wise or appeal wise as between taxpayer's appeal and tax department's appeal
  - ▶ However, as per news report, issues favourable or covered by precedent in favour of taxpayers may be settled at some lower cost
- ▶ VSV is optional for the taxpayer



# Cases pending as on 31 January 2020 but not eligible for opting VSV

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- ▶ Following cases are not eligible even if pending as on 31 January 2020:
  - ▶ Assessments which are pending as on 31 January 2020
  - ▶ Rectification pending before AO
  - ▶ Revision order passed by CIT u/s. 263
  - ▶ Cases pending before Settlement Commission
  - ▶ Applications pending before AAR
  - ▶ Penalty proceedings at show cause stage
  - ▶ Tribunal set aside the assessment order back to AO for re-adjudication which is pending as on 31 January 2020
    - ▶ But if Tribunal's order setting aside assessment is challenged before HC, appeal is pending

# Ineligibility for opting benefit under VSV

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- ▶ Assessment Year in respect of which prosecution is instituted under ITA or Indian Penal Code on or before date of filing declaration
- ▶ Search cases where disputed tax amount is more than INR 5 crore per AY
- ▶ Tax areas relating to:
  - ▶ Undisclosed income from a source located outside India or undisclosed asset located outside India
  - ▶ Assessment / reassessment made basis information received under agreement referred to in s. 90 or s. 90A of the ITA
- ▶ A taxpayer being
  - ▶ A person on whom detention order is passed under Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (subject to certain conditions)
  - ▶ Notified under s. 3 of Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992
  - ▶ Prosecution for any offence punishable under following acts is instated before filing of declaration or taxpayer is convicted for such offence:
    - ▶ Indian Penal Code; Narcotic Drugs and Psychotropic Substances Act, 1985; Unlawful Activities (Prevention) Act, 1967,
    - ▶ Prevention of Corruption Act, 1988; Prohibition of Benami Property Transactions Act, 1988; Prosecution for the purpose of enforcement of any civil liability

# Settlement amount (disputed tax) payable under VSV

*The object of VSV is to settle dispute at the stage at which it is pending. Consequently, settlement under VSV cannot be beyond disputed amount payable under appellate forum*

| Particulars   | If opts before 31 March 2020               | If opts after 31 March 2020              |
|---|--|--|
| <b>In relation to appeals filed by Taxpayer:</b>  |  |  |
| <b>A. Cases involving disputed tax, interest and penalty</b>  |  |  |
| All cases (except for search case)  | 100% of the disputed tax                   | 110% of the disputed tax                 |
| Search cases  | 125% of the disputed tax                   | 135% of the disputed tax                 |
| <b>B. Cases involving disputed penalty or interest or fee</b>   | 25% of disputed penalty, interest or fee   | 30% of disputed penalty, interest or fee |
| <b>In relation to appeals filed by Tax Department<br/>(50% of disputed tax / interest / penalty, as the case may be):</b> |  |  |
| <b>A. Cases involving disputed tax, interest and penalty</b>  |  |  |
| All cases (except for search case)  | 50% of the disputed tax                    | 55% of the disputed tax                  |
| Search cases  | 62.5% of the disputed tax                  | 67.5% of the disputed tax                |
| <b>B. Cases involving disputed penalty or interest or fee</b>   | 12.5% of disputed penalty, interest or fee | 15% of disputed penalty, interest or fee |

*The news report suggests that pending issues in appeal which are covered in favour of taxpayer by an order of higher appellate forum are likely to be settled at 50% of disputed tax*

# Computation of ‘disputed tax’ – As originally proposed in the Bill

- ▶ Draft VSV Bill provides a ‘normative formula’ for computing the quantum of ‘disputed tax’ which is required to be deposited within the specified period for availing benefit under VSV - Proposed formula is in line with the normative formula presently exists under penalty provisions
- ▶ ‘Disputed tax’ shall be computed as under:

| <b>“Disputed tax = (A-B) + (C-D)”</b> |  |
|---------------------------------------|--|
| <b>Component</b>                      | <b>Particulars</b>   |
| <b>A</b>                              | Amount of tax on the total income assessed as per the general provisions of ITL  |
| <b>B</b>                              | Amount of tax on [Total income assessed as reduced by amount of income in respect of which appeal has been filed by the appellant] as per general provisions of ITL [other than MAT or AMT provisions] |
| <b>C</b>                              | Amount of tax on the total income assessed as per MAT or AMT provisions  |
| <b>D</b>                              | Amount of tax on [Total income assessed as reduced by amount of income in respect of which appeal has been filed by the appellant] as per MAT or AMT provisions  |

- ▶ If an amount in respect of which appeal is pending is reduced while computing ‘Component B’, same amount shall not be required to be reduced again while computing ‘Component D’
- ▶ Limb “(C-D)” shall be ignored if MAT provisions are not applicable to appellant
- ▶ Where income in respect of which appeal has been filed has effect of reducing returned loss or converting returned loss into income, Limb (A-B) above shall be equal to tax that would have been chargeable on total income in respect of which appeal has been filed

# Computation of 'disputed tax' – As proposed in amended bill as per media report

- ▶ As per news report, mechanism for computation of disputed tax under VSV is proposed to be amended as under:

| Nature of case  | Amount payable under VSV<br>(Inclusive of surcharge and cess but excluding interest)                                   |
|---|--|
| Where appeal is pending before any appellate forum  | Amount of tax payable if such appeal was to be decided against taxpayer  |
| Where any appeal is decided by the lower authority but time limit for filing appeal against such order is not expired | Amount of tax payable after giving effect to such order  |
| Where objections are pending before Dispute Resolution Panel (DRP)  | Amount payable if DRP was to confirm variation proposed in the draft order   |
| Where DRP issued directions but Tax Authority didn't pass the final assessment order                                  | Amount of tax would have been payable had the order been passed by Tax Authority                                       |
| Where an application for revision u/s. 264 filed by the taxpayer is pending   | Amount of tax payable if the application was to be rejected  |
| Where CIT(A) has issued an enhancement notice u/s. 251  | Amount of tax payable in respect of enhancement proposed in additions to amount payable relating to the disputed issue |

- ▶ In cases where disputed tax is related to reduction of MAT / AMT credit or loss or depreciation, taxpayer can have option to settle under VSV:
  - ▶ **Option A:** To include amount of tax related to reduction of MAT / AMT credit or loss or depreciation in amount of disputed tax or
  - ▶ **Option B:** To carry forward the reduced MAT / AMT credit or loss or depreciation (manner to be prescribed)

# Computation of 'Disputed Tax' – Company Taxpayer - Illustration 1

- ▶ Company has filed an appeal before ITAT which is pending as on 31 January 2020. The assessment was concluded under MAT provisions as returned by the taxpayer but some addition was made under normal provision thereby resulting reduction in MAT credit

| Particulars             | Computation of income as per general provisions of the ITA |            | Computation of income as per MAT provisions of the ITA |              |            |
|-------------------------|--|------------|--|--------------|------------|
|                         | Income   | Tax (@30%) | Income   | Tax (@18.5%) | MAT Credit |
| As per assessment order | 70   | 21         | 140  | 26           | 5          |
| As per ROI              | 60   | 18         | 140  | 26           | 8          |
| Disputed income / tax   | 10   | 3          | Nil  | -            | -          |

| Particulars  | Disputed tax as per Original Bill introduced         | Disputed tax as per Amended Bill as per media report   |
|--|--|--|
| Amount payable (100% of disputed tax)  | Payment of disputed tax<br>(A-B) + (C-D) = 3 + 0 = 3 | Nil  |
| MAT credit   | 5  | Option with the taxpayer:<br>(a) Pay INR 3 and carry forward MAT credit of INR 8<br>(b) Settlement at Nil disputed tax (manner to be prescribed) and Carry forward MAT credit of INR 5 |
| Once appeal is settled under VSV, immunity will be granted from levy of any interest or penalty or prosecution proceedings |  |  |

# Computation of 'Disputed Tax' – Illustration 2 – Search cases

- ▶ Company has filed an appeal before ITAT which is pending as on 31 January 2020. The appeal is in relation to search assessment. No addition is made under MAT provisions of the ITA

| Particulars             | Computation of income as per general provisions of the ITA |            | Computation of income as per MAT provisions of the ITA |              |            |
|-------------------------|--|------------|--|--------------|------------|
|                         | Income   | Tax (@30%) | Income   | Tax (@18.5%) | MAT Credit |
| As per assessment order | 600  | 180        | 100  | 18.5         | Nil        |
| As per ROI              | 100  | 30         | 100  | 18.5         | Nil        |
| Disputed income / tax   | 500  | 150        | Nil  | -            | -          |

| Particulars  | Disputed tax as per Original Bill introduced | Disputed tax as per Amended Bill as per media report |
|--|--|--|
| Amount disputed tax  | Not eligible to opt for VSV                  | INR 150  |
| Amount payable (125% of disputed tax)  |  | INR 187.5  |
| MAT credit   |  | Nil  |
| Once appeal is settled under VSV, immunity will be granted from levy of any interest or penalty or prosecution proceedings |  |  |

# Computation of 'Disputed Tax' – Illustration 3 – Cases of loss under general provisions of the ITA

- Company has filed an appeal before ITAT which is pending as on 31 January 2020. The appeal is in relation to search assessment. No addition is made under MAT provisions of the ITA

| Particulars             | Computation of income as per general provisions of the ITA |            | Computation of income as per MAT provisions of the ITA |              |            |
|-------------------------|--|------------|--|--------------|------------|
|                         | Income   | Tax (@30%) | Income   | Tax (@18.5%) | MAT Credit |
| As per assessment order | (10)   | -          | 100  | 18.5         | 18.5       |
| As per ROI              | (50)   | -          | 100  | 18.5         | 18.5       |
| Disputed income / tax   | 40   | 12         | Nil  | -            | -          |

| Particulars  | Disputed tax as per Original Bill introduced | Disputed tax as per Amended Bill as per media report   |
|--|--|--|
| Amount disputed tax (Amount payable is 100%)   | $(A-B) + (C-D) = 40 + 0 = 40$                | Nil  |
| MAT credit   | 18.5   | 18.5   |
| Loss carried forward   | (10)   | Option with the taxpayer:<br>(a) Pay INR 12 and carry forward loss of INR 50 & MAT Credit 18.5<br>(b) Settlement at Nil disputed tax (manner to be prescribed) and Carry forward loss of INR 10 with MAT Credit 18.5 |
| Once appeal is settled under VSV, immunity will be granted from levy of any interest or penalty or prosecution proceedings |  |  |



# Computation of 'Disputed Tax' – Illustration 4 – Taxpayer being an individual

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- ▶ Taxpayer (being an individual) had sold some shares during previous year
- ▶ Gain on sale of such shares (INR 100) was offered as capital gains and appropriate tax (@ 20%) were paid (INR 20)
- ▶ During the course of assessment proceedings, Tax Authority considered the same as business activity and gain on sale of shares (INR 100) as business income (taxed at higher rate of 30%) (i.e. INR 30)
- ▶ Taxpayer has filed an appeal before ITAT disputing re-characterisation of such income. Appeal is pending as on 31 January 2020
- ▶ Whether the taxpayer will be able to make declaration under VSV?
  - ▶ Yes, since the case does not fall within any of the ineligibility conditions
- ▶ What will be the amount of disputed tax?
  - ▶ Under amended bill (as per media report), amount of disputed tax will be the amount which is payable by the taxpayer if the appeal is decided against the taxpayer (i.e. INR 10 viz 30 - 20)

# Computation of 'Disputed Tax' – Illustration 5 – (Variation of Illustration 4)

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- ▶ Taxpayer (being an individual) had sold some shares during previous year
- ▶ Gain on sale of such shares (INR 100) was offered as capital gains and appropriate tax (@ 20%) were paid (INR 20)
- ▶ During the course of assessment proceedings, Tax Authority doubted the genuineness of such transaction. Tax Authority assessed the said income under s. 68 / 69 of the ITA and taxed at higher rate of 77.25 (including surcharge and cess) (i.e. INR 77.25) u/s 115BBE
- ▶ Taxpayer has filed an appeal before ITAT which is pending as on 31 January 2020
- ▶ Whether the taxpayer will be able to make declaration under VSV?
  - ▶ Yes, since the case does not fall within any of the ineligibility conditions
- ▶ What will be the amount of disputed tax?
  - ▶ Under amended bill (as per media report), amount of disputed tax will be the amount which is payable by the taxpayer if the appeal is decided against the taxpayer (i.e. INR 57.25 viz 77.25 - 20)

# Procedure for making declaration under VSV

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- ▶ **Step 1:** Taxpayer to make declaration before Designated Authority (AU)
  - ▶ Form and manner is yet to be prescribed
  - ▶ Mandatory online submission of declaration
- ▶ **Step 2:** DA to certify tax arrears and amount payable under VSV
  - ▶ Within 15 days of receipt of declaration
- ▶ **Step 3:** Taxpayer shall make payment of disputed tax as computed by DA in Step 2 within 15 days of receipt of certificate of tax arrears
  - ▶ In case payment is already made, excess amount shall be refunded to taxpayer without interest
  - ▶ Delay in 1 day may make declaration invalid? But no bar no making another declaration?
- ▶ **Step 4:** Post receipt of proof of payment and withdrawal of appeal, DA to pass final certificate under VSV
  - ▶ Most likely various immunity proposed under VSV (i.e. immunity from interest, penalty, prosecution, etc.) will be granted under this certificate

# Procedure for making declaration under VSV

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## ▶ **Withdrawal of appeal pursuant to the Declaration:**

- ▶ Taxpayer's appeal before CIT(A) / ITAT deemed to be withdrawn from the date of issue of certificate by DA
  - ▶ Not clear whether the reference to certificate is to certificate for determination of disputed tax or finality of declaration
- ▶ To withdraw appeal pending before HC / SC (with leave of the respective Court)
  - ▶ Proof of withdrawal of appeal or petition to be furnished along with intimation of payment
- ▶ To withdraw any arbitration, conciliation and mediation claim in relation to tax arrear
  - ▶ To furnish undertaking for waiver of right (direct or indirect) to seek or pursue any remedy or any claim in relation to the tax arrears
  - ▶ Proof of withdrawal of appeal or petition to be furnished along with intimation of payment
- ▶ Tax department is also required to withdraw its appeals before issuance of final certificate
- ▶ Exit from VSV due to non-payment of disputed tax unlikely to prejudice taxpayer's pending appeals / proceedings

# Effect of order passed by DA – Benefits under VSV

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- ▶ Settlement of litigation under VSV shall not be considered as concession by taxpayer or tax authority and will have no binding precedent value.
  - ▶ No reopening in any proceeding under ITA / any other law / any inter-governmental agreement
- ▶ **There will be waiver of interest, penalty and immunity from prosecution**
- ▶ Once an appeal is settled under VSV, no appellate authority / arbitrator / conciliator / mediator shall decide on any issue relating to disputed matter

# Other Important points

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- ▶ Any amount paid under the Scheme shall not be refundable under any circumstances
  - ▶ One may need to explore, if on equity and on the ground of no unjust enrichment of the Government such tax be refunded, in case declaration is held invalid.
  - ▶ SC in the case of Hemalatha Gargya (2003) 259 ITR 1 in the context of similarly worded provisions of VDIS 1997 directed tax authority to refund the tax or adjust the same against outstanding dues of the taxpayer if declaration of the taxpayer was not accepted under the Scheme
- ▶ No benefit, concession or immunity to Declarant in any proceedings other than those in relation to which the declaration has been made
- ▶ **Invalidation of Declaration: Declaration can be considered as presumed never to have been made if:**
  - ▶ Any material particular in the declaration is found to be false
  - ▶ Declarant violates any conditions under VSV
  - ▶ Acts in a manner which is not in accordance with the undertaking given under VSV

Once declaration is considered as invalid, **all the proceedings and claims which were withdrawn earlier** and all consequences under ITA against declarant shall be deemed to have been revived

# Certain issues for clarifications

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- ▶ Whether taxpayer can withdraw declaration filed if not satisfied with disputed tax computed by DA?
- ▶ Where there are two appeals filed for an assessment year – one by the Taxpayer and one by the tax department, whether the taxpayer can opt for only one appeal?
  - ▶ If yes, how would the disputed tax be computed?
- ▶ Whether appellate proceedings against original assessment order and in pursuance of revision order needs to be taken together since settlement as per the scheme is per AY in particular where 2 separate appeals are pending before Appellate authorities?
- ▶ Cases where taxpayer and Tax Department, both have filed appeal and tax effect of Tax Department appeal is below the monetary limit, then whether disputed tax on Tax Department appeal also needs to be paid or should taxpayer to get that appeal as dismissed or withdrawn and then go for this scheme?

# Certain issues for clarifications

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- ▶ Whether credit for earlier taxes paid or refund due will be available against the payment to be made under the Scheme?
- ▶ If the assessment order / intimation contains any issues rectifiable u/s. 154, then whether same can be rectified before computing the final amount payable under the scheme?
- ▶ If an appeal in relation to interest under s. 201(1A) is settled, whether immunity from penalty under s. 271C will be available?
- ▶ Where taxpayer settles TDS appeal (against order u/s. 201) as deductor of TDS, will deductor get consequential relief of expenditure allowance under proviso to s.40(a)(i)/(ia) in the year in which tax under VSV paid?
- ▶ Conversely, when deductee settles his own appeal under VSV, will consequential relief be available for the deductor from liability determined under TDS order u/s. 201? Also, what happens when the liability is not determined but a notice for assessment has been issued u/s 201?
- ▶ Whether D.A. will provide taxpayer sufficient opportunity of being heard before disqualifying declaration or where settlement amount determined by D.A. is at variance with declaration filed? Will personal hearing be granted to declarant to explain the point of view on issue of variation or disqualification?



# Questions?

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# Thank You

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