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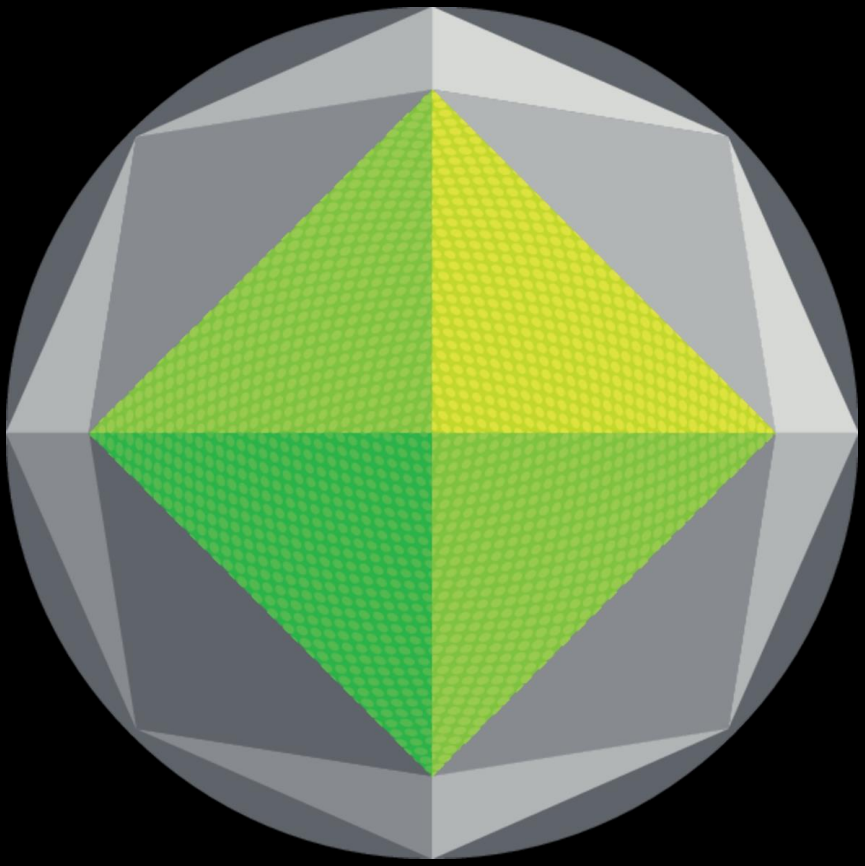

# India tax litigation settlement scheme: The Direct Tax Vivad se Vishwas Bill, 2020

FAQs: Special edition webcast held on 11 March 2020

# Suggested response to the queries raised by the attendees during the special edition webcast “India tax litigation settlement scheme: The Direct Tax Vivad se Vishwas Bill, 2020”.

## Is the INR 50 million threshold per assessment year or per application?

There is no threshold limit for regular matters.

The limit of INR 50 million is set only for search cases where the benefit of this scheme can be availed when disputed tax is less than INR 50 million.

This specified limit of INR 50 million is applicable **per assessment year**, and thus declaration can be filed for those years having disputed tax below the aforesaid limit in case of search-and-seizure cases.

## What if Income Tax Appellate Tribunal (“ITAT”) referred back the matter to Transfer Pricing Officer (“TPO”) or Assessing Officer (“AO”) and it is pending with AO/TPO. Will these matters be covered?

If an appellate authority has set aside an order for giving proper opportunity to the file of the AO/TPO or to carry out examination of the issue with specific direction, the assessee would be eligible to avail the Vivad se Vishwas (VsV) scheme. The application can be filed considering that the AO/TPO has decided the issue against the assessee.

However, where assessment has been cancelled with a direction that assessment is to be framed de novo, such cases have been excluded.

## What if ITAT refers the few points back to TPO or AO and gives a favourable judgement on few points. Remand back is pending with AO/TPO. Will these matters be covered?

As stated in response to the above question, set aside matters to the file of AO/TPO are eligible for the VsV scheme. It is clarified that the appellant shall also be required to settle other issues, if any, which have not been set aside in that assessment and in respect to which, other appeals are pending or time to file an appeal has not expired.

In such a case, disputed tax shall be the tax (including surcharge and cess) payable, if the addition with respect to the issues set aside by the appellate authority were to be repeated by the AO/TPO.

For example, if the tribunal has decided,
Issue-A - in favour of the assessee,
Issue-B - against the assessee, and
Issue-C - restored to the AO/TPO

In such a scenario, amount payable would be calculated by considering
Issue-A – 50 percent of disputed tax
Issue-B – 100 percent of disputed tax
Issue-C – 100 percent of disputed tax

**Referring to slide 8 of the agenda, it is stated that the entire appeal has to be conceded as against separate/individual issues. But those issues have been decided in our favour in earlier years and no appeal by department is pending on those issues.**

If there is a favourable decision in the assessee's own case on certain issues, 50 percent of disputed tax should be considered for the purpose of the VsV scheme. However, if there are other issues as well in an appeal which are not covered, 100 percent of disputed tax should be paid before 31 March 2020.

In answer to FAQ 37, circular 07/2020 states that when there is a Supreme Court decision it should be considered as NIL tax payable.

We believe that a similar situation would arise if the revenue accepts a decision and chooses not to file further appeal. (Not because appeal was not filed on account of monetary limit for filing appeal as per CBDT circular). And in such a scenario, no tax should be payable. However, there is no clarity on this point and further clarification is awaited.

**The scheme has been issued very recently. How can taxpayers be expected to complete all formalities by end of March 2020?**

Yes, the time is too short for this scheme.

Several representations have already been made on the timelines. However, considering that the government has not given any indication of extension of due date (31 March 2020), in the interest of time, we suggest that an assessee should kick-start the ground work, and prepare for discussion with designated authorities.

**If an assessee has won all issues except one issue, and the assessee has appealed against that, then can the assessee settle only that one issue?**

The settlement is appeal wise and not assessment wise. Hence, an assessee can choose to settle either a departmental appeal, an assessee's appeal, or both.

Thus, if an assessee has filed an appeal on one issue that has been decided against, and it is pending as on 31 January 2020, then the assessee can avail VsV scheme for that appeal.

**What is meant by "search cases"?**

The Income Tax Act, 1961 grants various powers to its officers, which includes, to enter, break open, and search any premises, and to seize any document, asset, etc. These powers are used to unearth undisclosed income and assets. Assessments made on the basis of information gathered during such search are generally termed as "search cases".

Search cases are excluded to avail the benefit of the VsV scheme except where the disputed tax is less than INR 50 million.

**If under the case of Tax Deducted at Source ("TDS") - prosecution - where the issue has arisen on account of delay in depositing the amount of TDS, no disputed tax/interest/penalty is required to be deposited. Kindly suggest what amount needs to be deposited?**

This scheme is applicable for appeals on account of TDS or Tax Collected at Source ("TCS") defaults. There can be four scenarios for such defaults.

The default is on account of non-deduction of TDS. In such a case, order u/s 201 is passed by treating the assessee in default on two counts,
Non-deduction of TDS
Interest on account of non-deduction of TDS

**ANS:**

This can be settled by paying 100 percent of TDS on or before 31 March, or 110 percent of interest post 31 March, up to notified date. Please refer to FAQ 15 of CBDT circular 07/2020.

In case the order u/s 201 is due to search u/s 132 or 132A, the amount payable would be 125 percent of TDS on or before 31 March, or 135 percent of interest post 31 March up to the notified date.

The default is on account of late payment of TDS. In such a case, order u/s 201 is passed by treating the assessee in default on one count
Interest on account of late deposit of TDS

**ANS:**

This can be settled by paying 25 percent of interest on or before 31 March, or 30 percent of interest post 31 March, up to the notified date. Please refer to FAQ 15 of CBDT circular 07/2020.

The default is on account of late payment of TDS. In such a case, order u/s 201 is passed by treating the assessee in default on one count,
Interest on account of late deposit of TDS
Apart from order passed u/s 201, notice for initiation of prosecution for above defaults has been issued by the CIT.

**ANS:**

This case can be settled as prosecution has not been instituted, but only a show cause notice has been issued by the CIT. Though as per the bill, it can be covered by a payment of 25 percent or 30 percent. However, FAQ 22 of CBDT circular 07/2020 gives a twist to this issue. It states that if a notice has been issued by the CIT, then the taxpayer has a choice to compound the offence and opt for the VsV scheme. Further clarification on such situations is expected in due course of time.

The default is on account of late payment of TDS. In such a case, order u/s 201 is passed by treating the assessee in default on one count,
Interest on account of late deposit of TDS
Apart from the order, prosecution is instituted and is now before the criminal court.

**ANS:**

This case cannot be settled as the prosecution has already been launched. Section 9(a)(ii) of the bill specifically excluded assessment years where prosecution has been instituted on or before 31 January 2020. FAQ 22 of CBDT circular 07/2020 reiterates the same.

## If the matter is related to an earlier year for which losses are now expired, and the assessee has not utilised any losses, can that also be set off with losses?

As per the amended bill, the taxpayer has the following options:

To adjust the losses and pay any tax amount on the balance i.e., post set off
Or
To pay the tax amount and carry forward the loss for future set offs

However, detailed rules for carry forward and set-off loss are yet awaited.
Answer to the question in hand could be explained through an example.

Year 1: Loss of 5,00,00,000
Year 2: loss of 2,00,00,000
Year 3: Nil income. Assessing officer makes an adjustment of 4,00,00,000
Year 4 to 10: Operations are reduced and hence there is negligible income or NIL income.

Appeal is filed against the order passed for year 3 as there was penalty levied, and the fear of prosecution prevailed.

As per Indian tax laws, losses can be carried forward only for a maximum of eight years. In such a scenario, losses for year 1 and 2 would lapse. However if the taxpayer goes under the VsV scheme, then the losses would be adjusted against the year 3 income and there would be no amount payable.

## Would there be an undertaking given by the department in case the assessee settles a department appeal?

There is no undertaking from the department. However as per section 4(2), departmental appeals before CIT(A) and ITAT will be deemed to be withdrawn. Answer to FAQ 48 (CBDT circular 07/2020) stated that the department will withdraw and appeal/writ/SLP on intimation of payment to the designated authority.

## Is there an option to seek settlement to check the tax liability amount and later choose to accept the settlement or continue with the tax appeal?

Yes.

As mentioned in section 4 and 5 of the VsV bill, the options are as follows:

1. Taxpayer to file declaration in specified form
2. Taxpayer to furnish an undertaking waiving his right (direct or indirect) to seek or pursue any remedy or claim in relation to the tax arrears under any law.
3. Designated authority shall, within 15 days, determine the amount payable by the taxpayer, by issue of a certificate.
4. Taxpayer to pay the amount determined within 15 days and inform the designated authority. Taxpayer shall submit proof of payment and withdrawal of such appeal.
5. Designated authority will then pass an order, which shall be conclusive as to the matters stated in the declaration.

Section 4(6) states that a declaration shall be presumed never to have been made if, the declarant violates any of the conditions (payment of taxes, etc.), or the declarant litigates thereafter, and in such cases, all the proceedings and claims that were withdrawn shall be deemed to have been revived.

Thus, an assessee can undertake step 1 to 3, and if the scheme does not seem feasible then not pay taxes as per step 4.

**A Ltd. and B Ltd. have merged with C Ltd. in the past, and as of date, A Ltd., B Ltd., and C Ltd. have pending appeals before appellate authorities (CIT(A)/ITAT). On one of the issues on merits in the case of A Ltd., the appellate authorities in the past, prior/after merger with C Ltd., have decided in favour of A Ltd. A similar issue exists in the pending appeals of B Ltd. and C Ltd. before the appellate authorities (CIT(A)/ITAT).**

**In the above scenario, can the favourable appellate authority's decision in the case of A Ltd. be applied to the cases of B Ltd. and C Ltd., which are pending before appellate authorities (CIT(A)/ITAT) for the purposes of computing tax payable at 50 percent, in case of covered cases under VsV scheme?**

**This case is fact specific.**
Considering the merger of A Ltd., B Ltd., and C Ltd., one may take view that issues decided in favour of A Ltd. post-merger, will be applied as covered issues in assessee's own case. Similar logic may be applied for appeals filed by B Ltd. and C Ltd., and are pending before appellate authorities. Therefore, for the purposes of computing the tax payable, 50 percent of disputed tax should be payable under VsV scheme for cases covered in the assessee's own case.

It is also pertinent to highlight that it will be considered as covered in favour, only if the earlier decision is passed by a higher appellate forum as compared to the appellate forum of the appeal for which VsV is being considered.

Further clarifications are expected, and we hope that this issue is answered in subsequent FAQs to be issued by the CBDT.

**If a refund is due (post final assessment order) to the assessee from the tax department, and demand arises under VsV scheme, can this demand can be adjusted against the refund already due (but not yet paid) to the assessee?**

If refund arises on account of taxes paid being more than the amount payable under the VsV scheme, the assessee will be entitled to refund without interest under section 244A of the Income-tax Act, 1961. However, if refund due pertains to years other than an assessment year for which appeal is pending, there is no clarity on adjustment of such refunds against amount payable under the VsV scheme. There would be more clarity once rules are notified in this regard.

It would be advisable that representation be made before the AO to adjust the refund against outstanding demands and then file an application under this scheme.

**We have over-payment of taxes and the case is pending hearing at Supreme Court as ITD appealed against favourable orders issued by CIT(A), ITAT, and High Court. Would it be feasible to consider VsV scheme in this situation?**

It is pertinent to note that appeal/petition pending as on 31 January 2020, before any appellate forums i.e., Supreme Court, High Court, ITAT, or Commissioner ( Appeals), is eligible for the VsV scheme. In case of departmental appeals, 50 percent of disputed tax is payable under the VsV scheme.

As all the lower appellate forums have decided in favour of the assessee, the VsV scheme may not seem lucrative. However, it is worth analysing, and carrying out a cost–benefit analysis before deciding on the feasibility of the VsV scheme.

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