Issues on Vivad se Vishwas Scheme

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The Finance Minister has introduced Direct Tax Vivad se Vishwas Bill, 2020 in the Parliament for resolution of pending tax disputes. The provisions of the Direct Tax Vivad se Vishwas Bill, 2020 are applicable to settle disputes in appeals filed by taxpayers or the Government, which are pending with the Commissioner (Appeals), Income tax Appellate Tribunal, High Court or Supreme Court as on the 31st day of January, 2020 irrespective of whether demand in such cases is pending or has been paid. The scheme though will benefit many taxpayers, however, there are issues which need consideration as explained herein below:

1. **Exclusion of cases where time limit to file appeal has not expired and appeal is pending to be filed as on 31.01.2020**

   The provisions of the Direct Tax Vivad se Vishwas Bill, 2020 are applicable to appeals filed by taxpayers or the Government, which are pending with the Commissioner (Appeals), Income tax Appellate Tribunal, High Court or Supreme Court as on the 31st day of January, 2020 irrespective of whether demand in such cases is pending or has been paid.

   It may be relevant to mention here that in case the assessment has been framed by the assessing officer on or before 31.01.2020, however, the appeal has not been filed on or before 31.01.2020 and there being still time to file appeal, no appeal being pending before an appellate forum as on 31.01.2020, the taxpayer will not be eligible for the benefit of Vivad se Vishwas scheme. Similarly, if the appeal has been disposed of by the appellate forum on or before 31.01.2020 and no appeal has been filed before the higher appellate forum on or before 31.01.2020 and there being still time to file appeal, such taxpayer may not be eligible for the benefit of Vivad se Vishwas scheme as no appeal was pending before the appellate forum as on 31.01.2020.

It would have been ideal if the benefit of such scheme would have been extended to all the assessments framed on or before 31.01.2020 whether or not appeal in relation to the same have been filed considering the fact that the assessment orders in relation to reassessment proceedings where notice under 148 have been issued prior to April 2019 or assessment proceedings for AY 2017-18 was required to be passed recently only by 31.12.2019 and the assessment orders have not been served in all cases in due time so that the taxpayer could have filed the appeal on or before 31.01.2020. It may be relevant to mention here that appeal before the CIT(A) against an assessment order may be made within 30 days from the date of receipt of assessment order, an appeal before ITAT against the order of the CIT(A) may be made within 60 days and an appeal before High Court against the order of the ITAT may be made within 120 days and an appeal before Supreme Court against the order of the High Court may be made within 90 days. Thus, considering such time frames, if the assessment order has been passed or appeal has been deposed by an appellate forum recently only say in the month of December-January, it is not necessary that the taxpayers would have filed the appeal before the appropriate appellate forums on or before 31.01.2020. Depriving such taxpayers from the benefit of the scheme cases undue hardship and is also discriminatory. Moreover, in case of any delay on the part of the revenue authority to serve the order, the taxpayer would suffer unnecessarily.

It may be relevant to point out that in case a taxpayer receives an order from an appellate forum say CIT(A) on 05.02.2020 i.e. after 31.01.2020 whereas the date of the order is prior to 31.01.2020 say 28.01.2020, the authorities may claim that the taxpayer is not eligible to claim the benefit of Vivad se Vishwas scheme since legally speaking, there is no appeal pending before appellate forum on or before 31.01.2020. It would be ideal if all such cases are considered before giving ascent to the Direct Tax Vivad se Vishwas Act.

2. **Exclusion of cases pending before DRP as on 31.01.2020**

It may be relevant to mention here that in case a taxpayer has filed objections before the Dispute Resolution Panel against a draft assessment order passed in accordance

with the provision of section 144C and the disposal of the objections and consequent final assessment order is pending as on 31.01.2020, the taxpayer will not be eligible for the benefit of the Vivad se Vishwas scheme as filing of objections before DRP is not an appeal and further, the forum of DRP has not been covered in the Scheme. It would have been ideal if such cases where objections have been filed and the same is pending before the DRP were also eligible for benefit under the scheme.

3. **Exclusion of cases pending before assessing officer or where similar disputes are likely to arise in future**

   Only those cases where appeals are pending before the appellate forums have been covered. Disputes that are pending with the assessing officer have not been covered in the scheme. Exclusion of such cases and not giving an option to settle disputes which are before assessing officer doesn't appear to be a good idea. Ideally, when settlement of disputes is the objective, the scheme should have been extended to cover all disputes and also such disputes that are likely to occur. There is a possibility that in one year, the dispute has reached to appeal level, and similar issue in next year is at assessing officer's level and further similar dispute will come up in subsequent year because of stand taken by the assessing officer in the earlier year for which appeal is pending. If one goes for this scheme, he will only be able to settle such years for which the appeal is pending. However, similar issues which in all likelihood will come up in future because of the stand taken by the assessing officer in earlier year will remain pending and entail unnecessary litigation in subsequent years. Ideally, option should have been given to settle all disputes now only where the appeals are pending but also where he visualize such dispute in subsequent years. This would have encouraged people to come out clean once and for all and avoid unnecessary litigation in the future on similar issues.

4. **Search year covered under the scheme but 6 years prior to search excluded**

   As per the Scheme, where assessment has been made under section 153A or section 153C of the Income-tax Act, the benefit of Vivad se Vishwas scheme will not be available. In this regard, it is to be noted that 6 years prior to the search are assessed

under section 153A or section 153C. The year in which search takes place is assessed under section 143(3) and not under section 153A or section 153C. Accordingly, the year of search will be eligible under the Vivad se Vishwas scheme as the assessment order in respect of the search year is passed under section 143(3) and not under section 153A.

5. **Exclusion of cases pending before the Commissioner (Appeals) in respect of which notice of enhancement under section 251 of the Income-tax Act has been issued on or before 30.01.2020**

   Cases that are pending before the Commissioner (Appeals) in respect of which notice of enhancement under section 251 of the Income-tax Act has been issued on or before 30.01.2020 are ineligible for benefit under the scheme. It appears that the idea behind excluding such cases from benefit under the scheme is that since the tax demand has not become ascertained on account of enhancement proceedings being pending, there may be apprehensions that the taxpayer would get away with payment of an amount less than the demand that may arise pursuant to the completion of the enhancement proceedings. Excluding taxpayers on account of such reason may be discriminatory. An option should have been given to such taxpayers to claim benefit under the scheme after consideration of the tax demand after including the income as proposed for enhancement by the CIT(A).

6. **No option to contest any mistake apparent from record if the tax demand is arithmetically incorrect.**

   There may be cases where the disputed tax or disputed interest or disputed penalty or disputed fee as the case may be arithmetically incorrect. It may so happen that an application for rectification may have been filed by the taxpayers in respect of the same which are pending for disposal. In such cases, in order to avail the benefit under the scheme, the taxpayers would be required to pay the disputed demand even if the same happens to be arithmetically incorrect. The appeal is to be withdrawn in totality in order to claim benefit under the scheme. An option should have been provided for expeditious disposal of such rectification applications and consideration of the

demand that is in force pursuant to the rectification order for the purpose of computation of the amount payable under the scheme.

7. **Time lag between date of filing of declaration and issuance of order determining the amount of tax payable will make payment before 31.03.2020 practically difficult for declaration filed in March 2020.**

In appeals related to disputed tax, the taxpayer is only required to pay the whole of the disputed tax if the payment is made before the 31st day of March, 2020 and for the payments made after the 31st day of March, 2020 but on or before the date notified by Central Government, the amount payable shall be increased by 10 per cent of disputed tax. Further, in appeals related to disputed penalty, disputed interest or disputed fee, the amount payable by the declarant shall be 25 per cent of the disputed penalty, disputed interest or disputed fee, as the case may be, if the payment is made on or before the 31st day of March, 2020. If payment is made after the 31st day of March, 2020 but on or before the date notified by Central Government, the amount payable shall be increased to 30 per cent. of the disputed penalty, disputed interest or disputed fee, as the case may be.

The benefit of concessional payment is not available on the basis of the date on which the declaration is made but on the basis of date on which payment is made. In order to claim the benefit of making payment at normal rate, the payment is required to be made on or before 31.03.2020. Upon filing of the declaration before the designated authority, the designated authority is required to determine the amount payable by the declarant in accordance with the provision of the Direct Tax Vivad se Vishwas Bill, 2020 by an order under section 5(1) and grant a certificate under section 5(1) to the declarant in the prescribed form containing particulars of the tax arrears and the amount payable after determination of the same. It has been provided that such order is to be passed and the certificate is to be issued within a period of 15 days from the date of receipt of the declaration. Further, it has been provided that the declarant is required to make the payment within 15 days of the receipt of the certificate issued under section 5(1) of the Direct Tax Vivad se Vishwas Bill, 2020. Accordingly, in the

case where declaration is filed say on 20.03.2020, the order determining the tax payable on the basis of declaration may not be available before 31.03.2020 so as to avail payment of normal tax i.e. 100 per cent of disputed tax. Thus, for all practical purposes, the last date for filing declaration for claiming normal tax benefit will at best be 15.03.2020 and that too with an obligation to deposit tax immediately after receipt of declaration i.e. by 31.03.2020.

8. Refund of excess tax paid.

As per the scheme proposed in the Bill, the declarant is required to pay 100 per cent of the disputed tax in case the appeal relates to disputed tax and interest and penalty in relation to such disputed tax. Further, in case of penalty or interest or fee which is not related to income, the declarant is required to pay 25 per cent of such penalty or interest or fee as the case may be. There may be cases where a taxpayer may have paid not only the full tax but also the interest, penalty, etc. In such cases, the declarant apparently will be eligible to avail the scheme. However, while computing the amount payable under the scheme, there will be a refund as the amount paid in such cases will be more than the amount payable as per the scheme. There is no clarity whether in such cases, the declarant will be entitled to the refund of the excess tax paid. In this regard, it may be noted that as per section 7 of the Bill, any amount paid in pursuance of a declaration made shall not be refundable under any circumstances. Thus, this restriction of not refunding is when the amount has been paid in pursuance of the declaration. Where the amount has already been paid before filing the declaration, the excess payment is not in pursuance of the declaration. Accordingly, in such cases, the declarant should be entitled to refund of the excess amount paid. Thus, there is need to provide clarity on this issue.