

EY Tax Alert

CBDT issues second round of frequently asked questions in relation to Direct Tax Vivad Se Vishwas Scheme, 2024

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Executive summary

This Tax Alert summarizes Circular No. 19/2024 dated 16 December 2024 (VSV 2-December Circular) issued by the Central Board of Direct Taxes¹ (CBDT) which contains second round of 27 frequently asked questions (FAQs) on the operation of Direct Tax Vivad Se Vishwas Scheme, 2024 (VSV 2). The Circular is issued in continuation of an earlier Circular No. 12/2024 dated 15 October 2024² (VSV 2 - October Circular) which contained the first round of 35 FAQs.

¹ Apex administrative body for direct taxes in India

² Refer our alert titled "CBDT issues Frequently Asked Questions in relation to Direct Tax Vivad Se Vishwas Scheme, 2024" dated 17 October 2024.



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Background

- ▶ The Finance (No. 2) Act, 2024 enacted the Direct Tax Vivad Se Vishwas Scheme, 2024³ (VSV 2) on similar lines of Direct Tax Vivad Se Vishwas Act, 2020 (VSV 1)⁴. VSV 2 provides an opportunity to taxpayers to settle tax disputes pending as on 22 July 2024 (i.e., specified date) at various appellate forums⁵, in relation to tax, interest, penalty or fees payable under the Indian Tax Laws (ITL).
- ▶ Taxpayers can settle their disputes by filing a declaration in the prescribed form to the Designated Authority (DA). Where declaration is filed on or before 31 December 2024, settlement is possible without payment of additional amount. Where declaration is filed on or after 1 January 2025, but before the sunset date (to be notified), settlement will require payment of additional amount. Once the disputed tax is settled under VSV 2, taxpayers will enjoy complete waiver and immunity from interest, penalty and prosecution in relation to tax arrears which are the subject matter of the settlement.
- ▶ A Notification⁶ has also been issued for notifying the "Direct Tax Vivad se Vishwas Rules, 2024" in relation to VSV 2.
- ▶ Similar to VSV 1, VSV 2 also grants a general power to the Government of India to issue directions or instructions for the purpose of VSV 2 in public interest. In deference thereto, the CBDT had issued the first round of 35 FAQs as part of VSV 2 - October Circular. In deference to several queries seeking further clarifications, the CBDT has now issued the second round of 27 FAQs as part of VSV 2 - December Circular.

VSV 2 - December Circular:

A. Clarifications on scope/eligibility for VSV 2:

▶ Cases eligible to opt for VSV 2:

- ▶ As per FAQ 8 of VSV 2 - October Circular, appeals which were pending as of 22 July 2024 but disposed off subsequently and not pending as of the date of filing the declaration, were ineligible. VSV 2 - December Circular supersedes FAQ 8 and replaces it with FAQ 36, which states that such cases are now eligible

for settlement. FAQ 36 states that, cases where appeal pending as of 22 July 2024 has been disposed off on merits or dismissed as withdrawn before the date of filing the declaration are eligible for settlement since appeal was pending as of 22 July 2024. It further states that disputed tax would be calculated as if such appeal was yet to be disposed off.

- ▶ Where appeal pending as of 22 July 2024 has been disposed off after the date of filing the declaration (FAQ 37).
- ▶ Additional ground filed on or before 22 July 2024 (FAQ 51).
- ▶ Where appeal has been belatedly filed before 22 July 2024 along with application for condonation of delay and such appeal has been admitted by allowing condition of delay before the date of filing the declaration (FAQ 39).
- ▶ Where appeal has been set aside fully or partly to Income Tax Appellate Tribunal (ITAT) / First Appellate Authority (FAA) / Dispute Resolution Panel (DRP). In such cases, the set aside issues shall be treated as a separate appeal and disputed tax would be computed as if the appeal is pending at the level to which they are set aside (FAQ 47).
- ▶ Appeal filed against an intimation under section (u/s.) 143(1) or s.200A of the ITL, which is pending as of 22 July 2024 (FAQ 41, 59).
- ▶ Appeal filed by the payer u/s. 248 of the ITL denying the liability to deduct tax at source (on payments where such tax is to be borne by the payer), which is pending as of 22 July 2024 (FAQ 42).
- ▶ VSV 2 states that tax arrears relating to tax year in respect of prosecution has been instituted on or before the date of filing the declaration is ineligible. It is now clarified that such ineligibility applies only where prosecution proceedings have been filed before a court of law as on the date of filing the declaration. (FAQ 48). It is also now clarified that such ineligibility is restricted to tax year in respect of which prosecution has been instituted and no other tax years. (FAQ 49).

³ Refer our alert titled "Key highlights of Vivad Se Vishwas Scheme, 2024" dated 24 July 2024.

⁴ Refer our tax alerts titled: (a) "Key amendments proposed in the Vivad se Vishwas Scheme 2020" dated 22 February 2020 (b) "Key highlights of amended Vivad se Vishwas Bill 2020" dated 25 February 2020 (c) "CBDT issues Frequently Asked Questions in relation to Vivad Se Vishwas Bill, 2020" dated 6 March 2020 (d) "Central Government notified rules and forms for settlement under the Direct Tax Vivad se Vishwas Act, 2020" dated 20 March 2020 (e) "CBDT issues Revised Frequently Asked Questions in relation to Vivad Se Vishwas Act, 2020" dated 22 April 2020 (f) "Clarification on date of payment for disputed tax under VSV post Notification no. 85 of 2020" dated 28 October 2020 (g) "CBDT notifies sunset date for filing declaration under Vivad Se Vishwas Act and extends due date for payment of disputed tax" dated 28 October 2020; (h) "CBDT issues second round of Frequently Asked Questions in relation to "Direct Tax - Vivad Se Vishwas Act 2020" dated 5 December 2020;

⁵ FAA, DRP, ITAT, HC and SC.

⁶ Refer our alert titled "Central Government notifies commencement date of Direct Tax Vivad Se Vishwas Scheme, 2024 (VSV 2) and rules and forms for settlement" dated 24 September 2024.

- ▶ VSV 2 states that tax arrears relating to an assessment/reassessment made basis information received pursuant to tax information exchange agreements is ineligible. It was earlier clarified as part of FAQ 10 that an appeal which involves any issue pertaining to such non-qualifying tax arrears is ineligible in its entirety. It is now clarified that, where information has been received pursuant to such agreements, but such information has not been 'used' for making additions in the assessment or reassessment order, appeal filed against orders is eligible (FAQ 43).
- ▶ To avoid repetitive appeals, the ITL states that, where any question of law arising in the taxpayer's own case for a tax year (the relevant case) is identical with question of law arising in the taxpayer's own case for another tax year which is pending before High Court (HC) or Supreme Court (SC) (the other case), the taxpayer may furnish an application seeking the agreement of the Tax Authority or the Appellate Authority to apply the final decision in the other case to the relevant case - so that the relevant case can be temporarily disposed off until the other case is finally decided. A similar facility is available even for the Tax Authority, to defer filing an appeal in the relevant case until the other case has been finally decided. It is now clarified that, where such applications have been filed on or before 22 July 2024, the relevant case is eligible, provided any appeal pertaining to the tax year to which the relevant case relates to, is also settled. (FAQ 46)
- ▶ Where disputed tax demand has already been fully paid before filing declaration, appeal pending as of 22 July 2024 is still eligible (FAQ 57).
- ▶ **Cases ineligible to opt for VSV 2:**
 - ▶ Where time limit for filing appeal had expired before 22 July 2024 and an appeal is belatedly filed after 22 July 2024 (FAQ 38)
 - ▶ Review petitions pending before HC/SC as of 22 July 2024 (as these are not an appeal) (FAQ 44)
 - ▶ Proceedings pending before Income-tax Settlement Commission (ITSC), or where writ has been filed against order of ITSC (FAQ 45)
 - ▶ Under the erstwhile search assessment regime (i.e. before 1 April 2021), past year's assessments of taxpayers on whom search was conducted were made u/s. 153A of ITL. However, for the year in which search is conducted, the assessment is completed as part of regular assessment u/s. 143(3) of ITL. It is now clarified that regular assessment made u/s 143(3) of the ITL for the year in which search is conducted is ineligible. (FAQ 40)

B. Clarifications in relation to computation of amount to settle dispute

- ▶ Where declaration is filed on or before 31 December 2024, no additional amount is required for settlement even if payment is made after 31 December 2024 but within 15 days from the date of receipt of certificate by the DA. (FAQ 50)
- ▶ Where quantum additions have attained finality and only penalty appeal (relating to such additions) is pending as on 22 July 2024, there is no disputed tax, and such penalty appeal can be settled separately under the category of disputed penalty (FAQ 53).
- ▶ Penalty unrelated to quantum additions, for which appeal is pending as on 22 July 2024, can be settled independently of quantum appeals (FAQ 53). These penalties are not automatically waived upon settlement of quantum appeals. These penalties illustratively are: penalty for failure to get accounts audited (s.271B), failure to furnish transfer pricing report (s.271BA), receiving an amount in cash of INR 0.2 million or more (s.271DA) (FAQ 54).
- ▶ In case of appeal involving Advance Pricing Agreement (APA)/Mutual Agreement Procedure (MAP) adjustments and other additions, it is not possible to only settle other additions, the appeal has to be settled in full, including APA/MAP adjustments (FAQ 55).
- ▶ Credit for taxes paid against disputed tax before filing declaration will be available while determining amount payable for settlement (FAQ 56).

C. Clarifications related to consequences of settlement under VSV 2:

- ▶ Secondary adjustment provisions in the ITL will apply if VSV 2 is availed for primary transfer pricing adjustment for tax year 2016-17 and subsequent years (FAQ 62)
- ▶ **Consequential relief to the payer upon settlement of the payee's dispute [FAQ 58]:** If the payee settles its own dispute with reference to assessment of an income which was not subjected to withholding tax by the payer, it was earlier clarified as part of FAQ 21 that such payer would not be required to pay the tax amount under default. However, such payer would be required to pay interest for default in withholding of tax. Dispute in respect of such interest, if eligible for VSV 2, can be settled separately by the payer. It is now clarified as part of FAQ 58 that, consequential relief of expense deduction u/s. 40(a) shall also be available to such payer.
- ▶ Any penalty levied after a declaration has been filed for settlement of the associated quantum appeal would be waived off by the DA (FAQ 52).

D. Clarifications related to procedural compliances:

- ▶ DA can amend its order to rectify any apparent errors (FAQ 60).
- ▶ Where appeal is pending in respect of a foreign entity not having adequate business presence in India, declaration can be filed through its representative assessee having presence in India, who is authorized for this purpose. Similarly, where appeal is pending in respect of a deceased taxpayer, taxpayer's legal representative may also opt for settlement. (FAQ 61).

Comments

Appeals pending as of 22 July 2024 though, disposed off subsequently as of the date of filing the declaration, were previously considered ineligible, but are now made eligible. This is a welcome clarification, consistent with requirements of VSV 2. It is also clarified that disputed tax would be calculated as if such appeal is yet to be disposed off. However, since appeal has already been disposed off, requirement of withdrawal of appeal under VSV 2 may pose difficulty.

Another welcome clarification is that the taxpayers would be ineligible for settlement only where prosecution proceedings under the ITL have been filed before a court of law as on the date of filing the declaration and not at the stage of issuance of show cause notice.

If the payee settles its own dispute with reference to assessment of an income which was not subjected to withholding tax by the payer, besides granting relief to the payer from tax deducted at source (TDS) demand, it is now clarified that payer is also entitled to expense deduction u/s. 40(a). While this is a welcome clarification, ambiguity exists as to the year in which payer will get expense deduction - whether in the year of settlement of dispute by the payee or in the year of default in tax withholding? FAQ 22 of VSV 2 - October Circular had clarified that, upon settlement of TDS dispute by the payer, the payer is entitled to expense deduction in the year in which tax was required to be deducted, hence whether same fall out to prevail on payee's settlement.

The following aspects of the VSV 2 - December Circular may conflict with judicial precedents rendered in the context of VSV 1 and may not be binding on taxpayers:

- ▶ It is now clarified that appeal belatedly filed before 22 July 2024 is eligible only if such appeal has been admitted by allowing condition of delay before the date of filing the declaration. However, courts^[7] have held

^[7] Medeor Hospital Ltd. (2023) 221 DTR 169 (Del); Dhanraj Malchand Rathi vs. UOI - [2022] 137 taxmann.com 448 (Bombay)

that such belated appeal is eligible regardless of the fact that delay has not been condoned as of the date of the declaration.

- ▶ It is now clarified that an appeal belatedly filed after 22 July 2024 is ineligible. However, courts^[8] have held that such appeal is eligible, if the delay was condoned by the appellate authority as of the date of the declaration.

As regard to APA/MAP adjustments, it is now clarified that taxpayer has to settle not only other additions, but also APA/MAP adjustments. There is ambiguity on the scope coverage of clarification. Where APA/MAP has already been obtained as of 22 July 2024, the ground of appeal covered by APA/MAP would have already been withdrawn in terms of relevant provisions of the ITL applicable to such settlement, and ordinarily, no occasion arises for settlement of those issues under VSV 2. Therefore, the clarification appears to cover cases where applications for APA/MAP are pending as of 22 July 2024 but finalized before the filing of declaration under VSV. In such cases, if the taxpayer wants to settle appeal pending as on 22 July 2024, the taxpayer may have to also settle issues covered in APA/MAP along with other issues in appeal. Consequently, such year may be excluded from roll back years for APA/MAP in terms of FAQ 7 of VSV 2 - October Circular.

While VSV 2 allows settlement of appeals pending as on 22 July 2024, it does not specifically include, unlike VSV 1, cases where the time limit to prefer appeal has not expired as on 22 July 2024. Recently, the Delhi HC^[9] expressed prima facie concerns that VSV 2 discriminates between taxpayers based on timing of filing an appeal. The Delhi HC directed CBDT to consider whether it is apt to cover cases where time limit to prefer appeal has not expired as on 22 July 2024. VSV 2- December Circular does not touch upon this issue, and one may have to wait for further clarification from the CBDT.

Like in case of VSV 1 clarifications, FAQ 62 of the VSV 2 - December Circular states that secondary adjustment will apply if primary transfer pricing adjustment is settled. This is highly debatable, and in some quarters, contrary view also exists. While eligibility to VSV settlement for primary adjustment in appeal does not get impacted, litigation on applicability or otherwise to secondary adjustment may emerge in subsequent year.

^[8] Mrs. Amina Khatoon vs. UOI (2022) 445 ITR 367 and Boddur Ramesh vs. DA (2021) 437 ITR 32 (Telangana HC); PCIT vs. Aditya Saraf (HUF) (2023) 330 CTR 321 [Calcutta HC]

^[9] Naveen Kumar Aggarwal vs. CBDT (WP No. (C) 17014/2024; order dated 9 December 2024)

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