

# 3

## CHAPTER

# WHO CAN MAKE A DECLARATION & SETTLE TAX DISPUTES UNDER V SE V

- ◆ Declaration can be made by a ‘person’.
- ◆ The ‘person’ making a declaration should be an ‘appellant’ in terms of section 2(1)(a) of the Act.
- ◆ Declaration cannot be made by an ‘appellant’ for any assessment year if he is barred from making a declaration under clause (b) or clause (c) or clause (d) or clause (e) of section 9.
- ◆ Declaration made should be in respect of tax arrear.
- ◆ Declaration cannot be made in respect of certain tax arrears for which declaration is barred under clause(a) of section 9.
- ◆ No bar on the declaration by a person who had earlier availed the benefit of Kar Vivad Samadhan Scheme, 1998 or the Direct Tax Dispute Resolution Scheme, 2016.

### 3.1 WHO IS ELIGIBLE TO MAKE A DECLARATION UNDER THE ACT/SCHEME?

- ◆ ‘Declarant’ means a person making declaration under section 4 of the Act [Section 2(1)(c) of the Act].
- ◆ Thus, the declaration can only be made by a ‘person’ [**Para 3.2**].
- ◆ The ‘person’ making a declaration should be an ‘appellant’ [**Para 3.3**] in terms of section 2(1)(a) of the Act whose ‘appeal’ [*see* **Para 4.1**] is pending [**Para 3.4**].
- ◆ Declaration cannot be made by an ‘appellant’ for any assessment year if he is barred from making a declaration in terms of clause (b) or clause (c) or clause (d) or clause (e) of section 9 [**Para 3.6**].
- ◆ Declaration made should be in respect of tax arrear[*See* **Para 3.8**].

- ◆ Declaration cannot be made in respect of certain tax arrears for which declaration is barred under clause(a) of section 9 [See Chapter 5].

### 3.2 DEFINITION OF 'PERSON'

- ◆ The word 'person' is used in the Act and not defined therein but is defined in the 1961 Act.
- ◆ Therefore, in terms of section 2(2) of the Act, the term 'person' shall have the meaning assigned in the 1961 Act *i.e.* meaning assigned in section 2(31) of that Act.
- ◆ Section 2(31) of the 1961 Act gives an inclusive definition of person which specifically includes the following taxable entities in the definition of 'person' viz (1) Individual, (2) HUF, (3) Firm, (4) Company, (5) AOP, (6) BOI and (7) AJP.
- ◆ Definition of 'person' under section 2(31) does not include the Government itself. [*Dy. DIT (Exemptions) v. Andhra Pradesh Right to Sight Society* [2012] 24 taxmann.com 1/53 SOT 480 (Hyd.)].
- ◆ Thus, person includes taxpayer but not Government.

### 3.3 DEFINITION OF 'APPELLANT'

The term 'appellant' covers the following persons covered in sub-clauses (i) to (v) of section 2(1)(a) of the Act :

(i) a person in whose case:

- ◆ an appeal or a writ petition(WP) or special leave petition(SLP) has been filed either by him or by the income-tax authority or by both, before an appellate forum [See **Para 3.3-1**], and
- ◆ such appeal or petition is pending as on the specified date (*i.e.* as on 31.01.2020) [See **Para 3.3-2**].

(ii) a person in whose case:

- ◆ an order has been passed by the Assessing Officer (AO), or an order has been passed by the CIT(A) or the ITAT in an appeal, or by the HC in a writ petition, on or before the specified date (*i.e.* 31.01.2020), and
- ◆ the time for filing any appeal or SLP against such order by such person has not expired on that date.

- (iii) a person who has filed his objections before the Dispute Resolution Panel (DRP) under section 144C of the 1961 Act and the DRP has not issued any direction on or before the specified date (*i.e.* 31.01.2020).
- (iv) a person in whose case:
- ◆ the DRP has issued any direction under section 144C(5), and
  - ◆ the AO has not passed any order under section 144C(13) on or before the specified date (*i.e.* 31.01.2020)
- (v) a person who has filed an application for revision under section 264 of the 1961 Act and such application is pending as on the specified date (*i.e.* 31.01.2020).

In terms of FAQ No. 1 of CBDT's Circular No. 9/2020, dated 22.04.2020, the term 'appeal' has a much wider meaning and covers arbitration also [See **para 4.1**]

It may be noted that sub-clause (ii) as above refers to order passed by HC in a writ petition against which time limit for filing appeal/SLP has not expired but does not refer to order passed by HC in appeal against which time limit for filing appeal/SLP has not expired. However, sub-clause (B) of clause (j) of sub-section (1) of section 2 of the Act specifies how disputed tax amount is to be computed in the case of an appellant covered by sub-clause(ii) of clause (a) of sub-section (1) of section 2 of the Act *i.e.* in a situation where “an order in appeal or writ petition has been passed by an appellate forum on or before the specified date and the timer for filing appeal or special leave petition against such order has not expired ...” . **When sub-clause (B) is read with sub-clause (ii) of clause (a) of sub-section (1) of section 2, it becomes clear that V Se V also intends to cover a case where HC passes an order in appeal under section 260A on or before 31.01.2020 and time-limit for appeal/SLP against order has not expired.** The omission of words “in an appeal or” after the words “by the High Court” and before the words “in a writ petition” in sub-clause (ii) of clause (a) of sub-section (1) of section 2 of the Act is an inadvertent omission or *casus omissus* and this is clearly evident from the wordings of sub-clause (B) of clause (j) of sub-section (1) of section 2.

### 3.3-1 Dispute

Thus, 'appellant' means taxpayer/assessee in respect of whom dispute of the nature in sub-clauses (i) to (v) of section 2(1)(a) as above or arbitration is pending as on 31.01.2020.

Rule 2(b) of the DTVSV Rules, 2020 defines 'dispute' as under :

(b) "dispute" means appeal, writ or special leave petition filed or appeal or special leave petition to be filed by the declarant or the income-tax authority before the Appellate Forum, or arbitration, conciliation or mediation initiated or given notice thereof, or objections filed or to be filed before the Dispute Resolution Panel under section 144C of the Income-tax Act, or application filed under section 264 of the Income-tax Act;

Thus, "Dispute" means:

- ◆ Appeal/writ petition(WP)/Special leave petition(SLP) filed before appellate forum [*i.e.* CIT(A)/ITAT/HC/SC] by the declarant or income-tax authority or
- ◆ Appeal/SLP **to be filed** before the Appellate Forum by the declarant or income-tax authority or
- ◆ Arbitration, conciliation or mediation initiated or notice given thereof or
- ◆ Objections filed or to be filed before the DRP u/s 144C of the Income-tax Act, 1961 or
- ◆ Objections **to be filed** before DRP means that AO has passed the draft assessment order under section 144C(1) as of 31.01.2020 and the 30 days time limit for filing of objections by the assessee (appellant/declarant) against the draft order u/s 144C(2) has not expired. [Schedule II of Schedule A of declaration in Form No. 1]
- ◆ Revision application filed u/s 264 of the Income-tax Act, 1961 [Rule 2(b) of the DTVSV Rules, 2020]

Appeal/SLP filed or Appeal/SLP to be filed before ITAT/HC/SC may be either by assessee (declarant) or the department (income-tax authority). Appeal/SLP to be filed means order passed by AO/CIT(A)/ITAT/HC and time for filing appeal/SLP has not expired. Rest all disputes as above are filed/started by the assessee. All these disputes pending as on 31.01.2020 are eligible to be declared and settled under V Se V.

FAQ No.37 of *Circular No.9/2020, dated 22.04.2020* clarifies that if the appellant has got decision in his favour from SC on an issue, there is no dispute now with regard to that issue and he need not settle that issue. If that issue is part of the multiple issues, the disputed tax may be calculated on other issues considering *nil* tax on this issue.

So long as the liability of the assessee is in dispute/controversy by assessee or by the income-tax department as above and the dispute is pending as on 31.01.2020, the merits or strength of his case is irrelevant. The Designated Authority cant sit on judgment on the strength/merits of appeals/WPs/SLPs/objections/revision applications filed by the

assessee and pending as on 31.01.2020. Irrespective of the strength or merit of his case, it has to be regarded by the DA as a pending dispute eligible for declaration and settlement by the taxpayer under V Se V.

The above pending disputes may be regarding:

- ◆ disputed tax or
- ◆ disputed interest or
- ◆ disputed penalty or
- ◆ disputed fees or
- ◆ disputed TDS/TCS

### 3.3-2 Appellate Forum

In terms of section 2(1)(b) of the Act, “appellate forum” means:

- ◆ the Supreme Court, or
- ◆ the High Court, or
- ◆ the Income Tax Appellate Tribunal, or
- ◆ the Commissioner (Appeals).

### 3.3-3 Specified Date

In terms of section 2(1)(o) of the Act, specified date means 31.01.2020.

## 3.4 IF CASE PENDING IN ARBITRATION, IS TAX PAYER ELIGIBLE FOR MAKING DECLARATION UNDER THE ACT?

An assessee whose case is pending in arbitration is eligible to apply for settlement under *Vivad se Vishwas* even if no appeals/writ/SLP/DRP objections/revision application under section 264 is pending. In such case assessee should fill the relevant details applicable in his case in the declaration form.

In terms of FAQ No. 1 of CBDT’s *Circular No. 9/2020, dated 22.04.2020*, the term ‘appeal’ has a much wider meaning and covers arbitration also [see **para 4.1**]

CBDT in FAQ No. 2 of *Circular No. 9/2020, dated 22.04.2020*, has clarified as under:

**“Ques 2. If there is no appeal pending but the case is pending in arbitration, will the taxpayer be eligible to apply under Vivad se Vishwas? If yes, what will be the disputed tax?”**

**Ans.:** An assessee whose case is pending in arbitration is eligible to apply for settlement under *Vivad se Vishwas* even if no appeal is pending. In

such case assessee should fill the relevant details applicable in his case in the declaration form. The disputed tax in this case would be the tax (including surcharge and cess) on the disputed income with reference to which the arbitration has been filed.”

### 3.5 IF PROCEEDING PENDING BEFORE AAR, CAN TAXPAYER AVAIL VIVAD SE VISHWAS?

*Vivad se Vishwas* is not available for disputes pending before Authority of Advance Ruling (AAR). [FAQ No. 3 of *Circular No. 9/2020, dated 22.04.2020*].

#### 3.5-1 If a writ is pending against order passed by AAR in a HC will that case be covered and how disputed tax to be calculated?

If the order passed by AAR has determined the total income of an assessment year and writ against such order is pending in HC, the appellant would be eligible to apply for the *Vivad se Vishwas*. The disputed tax in that case shall be calculated as per the order of the AAR and accordingly, wherever required, consequential order shall be passed by the AO. However, if the order of AAR has not determined the total income, it would not be possible to calculate disputed tax and hence such cases would not be covered. To illustrate, if AAR has given a ruling that there exists Permanent Establishment (PE) in India but the AO has not yet determined the amount to be attributed to such PE, such cases cannot be covered since total income has not yet been determined [FAQ No. 3 of *Circular No. 9/2020, dated 22.04.2020*].

### 3.6 PERSONS BARRED FROM MAKING A DECLARATION

Clauses (b) to (e) of section 9 of the Act provides that the benefit of the declaration under section 4 cannot be availed by the following persons:

- ◆ any person in respect of whom an order of detention has been made under the provisions of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 **on or before the filing of declaration:** [Clause (b) of section 9].
- ◆ any person in respect of whom prosecution has been instituted for any offence punishable under any of the specified enactments **on or before the filing of the declaration** or such person is convicted under any of those enactments [Clause (c) of section 9].
- ◆ any person in respect of whom prosecution has been initiated by an Income Tax Authority for any offence punishable under the Indian Penal Code or for enforcement of any civil liability

under any law for the time being in force, **on or before the filing of the declaration**, or such person is convicted of any such offence consequent to a prosecution initiated by the Income-tax Authority [Clause (d) of section 9].

- ◆ any person notified under section 3 of the Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992 **on or before the filing of the declaration** [Clause (e) of section 9].

[See Chapter 6]

### 3.6A NO BAR ON DECLARATION IN RESPECT OF A PERSON WHO AVAILED KVSS, 1998

A person who had availed *Kar Vivad Samadhan Scheme, 1998* is not barred from making a declaration under the Act. There is no provision in the Act which bars the making of declaration by such persons.

### 3.7 NO BAR ON DECLARATION IN RESPECT OF A PERSON WHO AVAILED THE DIRECT TAX DISPUTE RESOLUTION SCHEME, 2016

A person who had availed the *Direct Tax Dispute Resolution Scheme, 2016* is not barred from making a declaration under the Act. There is no provision in the Act which bars declaration by such persons.

### 3.8 TAX ARREAR

- ◆ Section 3 of the Act requires that the declaration made should be in respect of 'tax arrear'.
- ◆ Declaration cannot be made in respect of certain specified tax arrears covered by section 9(a) of the Act [See **Chapter 5**].
- ◆ Section 2(1)(o) of the Act defines 'tax arrear' to mean the following disputed amounts as determined under the provisions of the 1961 Act: (i) the aggregate amount of disputed tax [See **Para 3.8-1**], interest chargeable or charged on such disputed tax, and penalty leviable or levied on such disputed tax; or (ii) disputed interest [See **Para 3.8-2**]; or (iii) disputed penalty [See **Para 3.8-3**]; or (iv) disputed fee [See **Para 3.8-4**].

#### 3.8-1 Disputed Tax

Section 2(1)(j) of the Act defines "disputed tax" to mean the income-tax including surcharge and cess (hereinafter referred to as 'the amount of tax') payable by the appellant under the provisions of the 1961 Act, as computed hereunder:—

Sub-clause	Situation	Computation of “disputed tax”
(A)	any appeal, writ petition or SLP is pending before the appellate forum as on the specified date( <i>i.e.</i> as on 31.01.2020).	The amount of tax that is payable by the appellant if such appeal or writ petition or SLP was to be decided against him.  <b>Note:</b> In a case where CIT(A) has issued notice of enhancement under section 251 of the 1961 Act on or before the specified date( <i>i.e.</i> on or before 31.01.2020), the disputed tax shall be increased by the amount of tax pertaining to issues for which notice of enhancement has been issued.
(B)	an order in appeal or in writ petition has been passed by the appellate forum on or before 31.01.2020 and the time for filing appeal or SLP against such order has not expired as of that date.	The amount of tax payable by the appellant after giving effect to the order so passed.
(C)	an order has been passed by AO on or before 31.01.2020 and the time for filing appeal against such order has not expired as of that date.	The amount of tax payable by the appellant in accordance with such order.
(D)	objection filed by the appellant is pending before the DRP under section 144C of the 1961 Act as on 31.01.2020.	The amount of tax payable by the appellant if the DRP were to confirm the variation proposed in draft order.
(E)	DRP has issued any direction under section 144C(5) of the 1961 Act and the AO has not passed any order under section 144C(13) on or before 31.01.2020.	The amount of tax payable by the appellant as per assessment order to be passed by AO under section 144C(13).
(F)	An application for revision under section 264 of the 1961 Act is pending as of 31.01.2020.	The amount of tax payable by the appellant if such application for revision were not to be accepted.

**3.8-1a Manner of computing disputed tax in cases where loss or un-absorbed depreciation is reduced** - Rule 9 of the DTVSV Rules, 2020 provides that where the dispute in relation to an assessment year relates



to reduction in loss or unabsorbed depreciation to be carried forward under the Income-tax Act, the declarant shall have two options:

- (i) include the tax, including surcharge and cess, payable on the amount by which loss or unabsorbed depreciation is reduced in the disputed tax and carry forward the loss or unabsorbed depreciation by ignoring such amount of reduction in loss or unabsorbed depreciation; or
- (ii) carry forward the reduced amount of loss or unabsorbed depreciation.

Where the declarant exercises the option (ii) as above, he shall be liable to pay tax, including surcharge and cess, along with interest, if any, as a consequence of carrying forward the reduced amount of loss or unabsorbed depreciation in subsequent years:

The following points may be noted as regards exercise of option (ii) as above.

- ◆ written down value of the block of asset on the last day of the year, in respect of which unabsorbed depreciation has been reduced, shall not be increased by the amount of reduction in unabsorbed depreciation:
- ◆ in cases other than the eligible search cases, in computing the reduced amount of loss or unabsorbed depreciation to be carried forward as per option (ii) above, one-half of the amount by which loss or unabsorbed depreciation is reduced shall be considered for reduction, if such reduction is related to issues covered in favour of declarant:
- ◆ in case of eligible search cases, in computing the reduced amount of loss or unabsorbed depreciation to be carried forward as per option (ii) above, one and one-fourth times of the amount by which loss or unabsorbed depreciation is reduced shall be considered for reduction and where the one and one-fourth times of the amount by which loss or unabsorbed depreciation is reduced exceeds the amount of loss to be carried forward before it's reduction, such excess shall be ignored:
- ◆ in case of eligible search cases in computing the reduced amount of loss or unabsorbed depreciation to be carried forward as per option (ii) above, five-eighth of the amount by which loss or unabsorbed depreciation is reduced shall be considered for reduction, if such reduction is related to issues covered in favour of declarant.