IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.79 OF 2021
WITH
INTERIM APPLICATION (L) NO.1060 OF 2021

Macrotech Developers Limited … Petitioner
Vs.
Principal Commissioner of Income Tax and others … Respondents

Mr. V. Sridharan, Senior Advocate a/w. Mr. Prakash Shah and Mr. Jas Sanghavi i/b. PDS Legal for Petitioner.

Mr. Suresh Kumar for Respondents.

CORAM : UJJAL BHUYAN &
MILIND N. JADHAV, JJ.

Reserved on : FEBRUARY 1, 2021
Pronounced on: MARCH 25, 2021

Judgment and Order : (*Per Ujjal Bhuyan, J.*)

Heard Mr. V. Sridharan, learned senior counsel along with Mr. Prakash Shah, learned counsel for the petitioner and Mr. Suresh Kumar, learned standing counsel Revenue for the respondents.

2. By filing this petition under Article 226 of the Constitution of India, petitioner seeks a declaration that the clarification given by respondent No.2 to question No.73 *vide* circular No.21/2020 dated 04.12.2020 is violative of Article 14 of the Constitution of India and thus is arbitrary and ultra *vires* to the provisions of the Direct Tax *Vivad se Vishwas* Act, 2020 and the Direct Tax *Vivad se Vishwas* Rules, 2020. Therefore, petitioner seeks quashing of the said clarification and further seeks a direction to respondent No.1 to accept the declaration filed by the petitioner on 23.09.2020 under the Direct Tax *Vivad se Vishwas* Act, 2020.

3. Case of the petitioner as pleaded in the writ petition is that it is a public limited company incorporated under the Companies Act, 1956 having its registered office at Mahalaxmi, Mumbai. It is engaged in the business of land development and construction of real estate properties.

4. Initially, Shreeniwas Cotton Mills Private Limited ('Cotton Mills' for short) was a subsidiary of the petitioner. Subsequently it was merged with the petitioner on the strength of the amalgamation scheme sanctioned *vide* order dated 07.06.2019 passed by the National Company Law Tribunal, Mumbai Bench. The merger had taken place with effect from 01.04.2018. However, the pending tax demand against the cotton mills under the Income Tax Act, 1961 (briefly 'the Act' hereinafter) continued in the name of the cotton mills since migration of the permanent account number of the cotton mills to the permanent account number of the petitioner has not taken place. Therefore, it is pleaded that the tax demand of the cotton mills should be construed to be that of the petitioner and reference to the petitioner would mean and include the petitioner as well as the cotton mills.

5. For the assessment year 2015-16, petitioner had filed return of income under section 139(1) of the Act disclosing total income of Rs.2,05,71,01,650.00. The self-assessment income tax payable on the returned income as per section 115JB of the Act was Rs.69,92,08,851.00. At the time of filing of the return, an amount of Rs.27,34,77,755.00 was shown to have been paid by way of tax deducted at source. Balance of self-assessment tax of Rs.42,57,31,096.00 (Rs.69,92,08,851.00 less Rs.27,34,77,755.00) with interest thereon under sections 234A, 234B and 234C of the Act aggregating to Rs.12,36,74,855.00, totalling Rs.54,94,05,951.00 were paid by the petitioner after the due date for filing of the return in the

following manner:-

Sr. No.	Date	Amount Paid (Rs.)
1.	05 July 2016	2,00,00,000
2.	31 August 2016	52,94,05,951
	TOTAL	**54,94,05,951**

6. Respondent No.1 issued notice to the petitioner on 19.09.2017 to show cause as to why prosecution should not be initiated against the petitioner under section 276-C(2) of the Act for alleged wilful attempt to evade tax on account of delayed payment of the balance amount of the self-assessment tax. Petitioner replied to the same on 05.10.2017 denying the allegations made. Petitioner stated there was only a delay in payment of self-assessment tax that too on account of cash flow pressures on the business which was promptly discharged within six months and that there was no attempt made in any manner whatsoever to evade payment of tax. Therefore, request was made to respondent No.1 to withdraw the show cause notice.

7. Petitioner was informed by respondent No.1 by letter dated 07.12.2018 that income tax department was actively considering the case of the petitioner for alleged wilful attempt to evade payment of tax and interest. However, an offer was given to the petitioner for compounding of the offence under section 279(2) of the Act to which petitioner replied that since there was no *mala fide* intent to evade payment of tax, the proposed prosecution could be defended on merit. Therefore, petitioner did not apply for compounding under section 279(2) of the Act.

8. Similar notices as issued to the petitioner were issued by respondent No.1 to the directors of the cotton mills in their individual capacity to which the respective directors replied by denying the

allegations.

9. In the meanwhile, on 17.12.2017, the assessing officer passed the assessment order for the assessment year 2015-16 under section 143(3) of the Act. In the assessment order, assessing officer disallowed certain expenses claimed by the petitioner towards workmen's compensation and other related expenses. After disallowing such claim, assessing officer computed the tax liability of the petitioner at Rs.61.75 crores which was inclusive of interest.

10. When the aforesaid assessment order dated 17.12.2017 was challenged by the petitioner in appeal, the appellate authority i.e., Commissioner of Income Tax (Appeals) dismissed the appeal and upheld the assessment order *vide* order dated 27.12.2018.

11. Aggrieved by the order of Commissioner of Income Tax (Appeals) dated 27.12.2018, petitioner preferred further appeal before the Income Tax Appellate Tribunal (briefly 'the Tribunal' hereinafter) which was registered as ITA No.1538/Mum/2019. It is stated that the aforesaid appeal is pending before the Tribunal for final hearing.

12. While the appeal of the petitioner was pending before the Tribunal, central government enacted the Direct Tax *Vivad se Vishwas* Act, 2020 which came into force on and from 17.03.2020. Primary objective of the Direct Tax *Vivad se Vishwas* Act, 2020 (briefly 'the *Vivad se Vishwas* Act' hereinafter) is to reduce pending tax litigations pertaining to direct taxes and in the process, grant considerable relief to the eligible declarants while at the same time generating substantial revenue for the government.

13. Circular No.9 of 2020 dated 22.04.2020 was issued by respondent No.2 whereby certain clarifications were given in the form of question and answer. Be it stated that the central government *vide* notification dated 18.03.2020 has made the Direct Tax *Vivad se Vishwas* Rules 2020 (briefly 'the *Vivad se Vishwas* Rules' hereinafter).

14. With a view to settling the pending tax demand, petitioner submitted a declaration in terms of *Vivad se Vishwas* Act on 23.09.2020 in the name of the cotton mills in respect of the tax dues for the assessment year 2015-16 which is the subject matter of the appeal pending before the Tribunal.

15. While the petitioner's declaration dated 23.09.2020 was pending, it came to know that respondent No.1 had passed an order on 03.05.2019 authorizing the Joint Commissioner of Tax (OSD) to initiate criminal prosecution against the cotton mills and its directors by filing complaint before the competent magistrate in respect of the delayed payment of self-assessment tax for the assessment year 2015-16. On the basis of such sanction order, income tax department has filed criminal complaint under section 276-C(2) read with section 278B of the Act before the 38th Metropolitan Magistrate's Court at Ballard Pier which has been registered as Criminal Case No.470/SW/2019. However, no progress has taken place in the said criminal case.

16. Respondent No.2 issued impugned circular No.21/2020 dated 04.12.2020 giving further clarifications in respect of the *Vivad se Vishwas* Act. Question No.73 contained therein is when in the case of a tax payer prosecution has been initiated for the assessment year 2012-13, with respect to an issue which is not in appeal, would he be eligible to file declaration for issues which are in appeal for the said assessment

year and in respect of which prosecution has not been launched? The answer given to this is that ineligibility to file declaration relates to an assessment year in respect of which prosecution has been instituted on or before the date of declaration. Since for the assessment year 2012-13 prosecution has already been instituted, the tax payer would not be eligible to file declaration for the said assessment year even on issues not relating to prosecution.

17. It is the grievance of the petitioner that on the basis of the answer given to question No.73 as alluded to hereinabove its declaration would be rejected since the declaration pertains to the assessment year 2015-16 and prosecution has been launched against the petitioner for delayed payment of self-assessment tax for the assessment year 2015-16.

18. It is in this context that the present writ petition has been filed seeking the reliefs as indicated above.

19. Respondents have filed a common affidavit through Mr. Abhay Damle, Principal Commissioner of Income Tax, Central-4, Mumbai. Referring to section 9(a)(ii) of the *Vivad se Vishwas* Act, it is submitted that the same is an exclusionary clause. While clause (a) of section 9 excludes certain class of cases on the basis of tax arrears, clauses (b), (c) and (d) exclude certain class of persons on the basis of grave violation of certain enactments from the ambit of the *Vivad se Vishwas* Act. On that basis, it is contended that as per section 9(a)(ii), tax arrears relating to an assessment year in respect of which prosecution has been instituted on or before the date of filing of declaration are excluded from the ambit of the *Vivad se Vishwas* Act. As per the said provision, once prosecution is instituted in respect of an assessment year to which the tax arrears relate then the appeal pertaining to such assessment year is not eligible for

settlement under the *Vivad se Vishwas* Act. This is what has been clarified by answer to question No.73 of circular No.21/2020 dated 04.12.2020.

19.1. It is submitted that the exclusion as per section 9(a)(ii) applies to an assessment year and hence all the tax arrears of that assessment year. Intention of the statute is not to bifurcate the tax liability of an assessment year into parts that qualify for settlement under the *Vivad se Vishwas* Act and those which do not qualify for such settlement. Exclusion of such class of cases is reasonable. It is further clarified that unlike the exclusion under clauses (b) to (d) of section 9 which debars a person from filing declaration under the *Vivad se Vishwas* Act, the exclusion under sub-clause (ii) of clause (a) of section 9 only excludes an assessment year from settlement under the *Vivad se Vishwas* Act. However, such person is not barred from seeking settlement under the *Vivad se Vishwas* Act for assessment years that are not excluded. In this connection, reference has been made to question No.74 of circular No.21/2020 and the answer given thereto as per which prosecution in one assessment year would not debar an assessee from filing declaration for another assessment year, if it is otherwise eligible.

19.2. Respondents have contended that under the Act, there is a provision for compounding of offences in respect of which prosecution has been initiated. In the circular No.9/2020 dated 22.04.2020, it has been clarified that an assessee would be eligible to file declaration under the *Vivad se Vishwas* Act if he compounds his offence before filing of declaration.

19.3. In view of above, it is contended that the answer given to question No.73 of circular No.21/2020 is reasonable and rational having nexus to

the object sought to be achieved by the *Vivad se Vishwas* Act. In the circumstances, respondents seek dismissal of the writ petition.

20. Mr. Sridharan, learned senior counsel for the petitioner has referred to the statement of objects and reasons while introducing the *Vivad se Vishwas* Bill in the Parliament as well as the statement made by the Hon'ble Finance Minister in her Budget speech on 01.02.2020 and submits that the scheme introduced by way of the *Vivad se Vishwas* Act is to reduce litigation in direct taxes. A huge amount of disputed tax arrears is locked up in appeals at various stages and the amount of disputed direct tax arrears as on 30.11.2019 was Rs.9.32 lakh crores which is roughly almost one year of direct tax collections; besides, tax disputes consume enormous amount of time, energy and resources of both the tax payers and of the government. Therefore, resolution of pending tax disputes is the need of the hour. This will not only benefit the government by generating timely revenue but also the tax payers who will be able to deploy the time, energy and resources saved by opting for such dispute resolution towards their business activities. Therefore, while examining or considering a declaration filed under the *Vivad se Vishwas* Act, the above aspects need to be borne in mind.

20.1. Mr. Sridharan has meticulously referred to various provisions of the *Vivad se Vishwas* Act particularly the definition of 'tax arrear' as appearing in section 2(1)(o) and submits that the entire scheme of settlement centers around tax arrear. Referring to section 9(a) of the *Vivad se Vishwas* Act, he submits that language of this section is very clear in as much as this section provides that provisions of the *Vivad se Vishwas* Act would not apply in respect of tax arrear as covered by the four situations enumerated thereunder. As per sub-clause (i), provisions of the *Vivad se Vishwas* Act would not apply in respect of tax arrear

relating to an assessment year in respect of which an assessment has been made under section 143(3) or section 144 or section 153A or section 153C of the Act on the basis of search initiated under section 132 or section 132A of the Act if the amount of disputed tax exceeds Rs.5 crores. Sub-clause (ii) says that the tax arrear must relate to an assessment year in respect of which prosecution has been instituted on or before the date of filing of the declaration. Under sub-clause (iii), the tax arrear must relate to any undisclosed income from a source located outside India or undisclosed asset located outside India; and under sub-clause (iv), the tax arrear must relate to an assessment or re-assessment made on the basis of information received under an agreement referred to in section 90 or section 90A of the Act if it relates to any tax arrear.

20.2. Mr. Sridharan submits that a careful reading of section 9(a)(ii) would go to show that the thrust of the said provision is that provisions of the *Vivad se Vishwas* Act would not apply in respect tax arrear relating to an assessment year in respect of which prosecution has been instituted on or before the date of filing of declaration. Therefore, the prosecution must be relatable to the tax arrear of an assessment year and if interpreted in this manner the word 'of' appearing in sub-clause (ii) should be read as 'for'.

20.3. In contradistinction to what is intended by section 9(a), under sections 9(b), (c), (d) and (e), the exclusion pertains to any person who is accused of infringing provisions of the related statutes. In (b), the provisions are of Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974; in (c), it is Unlawful Activities (Prevention) Act, 1967, the Narcotic Drugs and Psychotropic Substances Act, 1985, Prevention of Corruption Act, 1988, Prevention of Money Laundering Act, 2002 and Prohibition of Benami Property Transactions

Act, 1988; in (d), prosecution should be initiated by an income tax authority for any offence punishable under the provisions of the Indian Penal Code; and under (e), Special Court (Trial of Offences relating to Transactions in Securities) Act, 1992. He, therefore, submits that there is a fundamental distinction between the exclusionary provision of section 9(a) on the one hand and sections 9(b), (c), (d) and (e) on the other hand. While in the case of the former the exclusion is in respect of tax arrear relating to an assessment year, in the case of the later the exclusion pertains to a person who has suffered disability or prosecution under the mentioned statutes. If this is the position then the answer given to question No.73 contained in the circular No.21/2020 would be contrary to the statutory mandate. The answer given is only an interpretation. As per the said interpretation, the ineligibility to file declaration relates to an assessment year in respect of which prosecution has been instituted on or before the date of declaration. Since in question No.73 prosecution was initiated against the tax payer for assessment year 2012-13, for the said assessment year, the tax payer would not be eligible to file declaration even on issues not relating to prosecution. Mr. Sridharan submits that this interpretation is not only erroneous but is ultra *vires* the mandate of section 9(a)(ii) of the *Vivad se Vishwas* Act. By way of a circular or interpretation, the statutory requirement or intention of the legislature cannot be curtailed or narrowed down.

20.4. In the circumstances, he submits that the answer given to question No.73 is liable to be discarded and on the correct interpretation of section 9(a)(ii) of the *Vivad se Vishwas* Act declaration of the petitioner is liable to be accepted.

21. On the other hand, Mr. Suresh Kumar, learned counsel for the respondents contends that a careful reading of section 9(a) of the *Vivad*

se Vishwas Act would go to show that the disability to file declaration is *qua* assessment year. If any prosecution is pending for any assessment year then the tax payer would not be eligible to file declaration for the said assessment year. To buttress his point, he has referred to question No.74 in the circular No.21/2020 and the answer given thereto. The question is that if there is a prosecution against an assessee for a different assessment year and the pending appeal is for a different assessment year, would it debar the assessee from the benefit of the scheme? The answer given to this is that prosecution in one assessment year would not debar an assessee from filing declaration for any other assessment year if he is otherwise eligible.

21.1. Mr. Suresh Kumar submits that there is a distinction between the stage of finding out of eligibility to seek exemption and stage of applying the nature of exemption. Referring to the decision of the Supreme Court in the case of *Commissioner of Customs (Import), Mumbai Vs. Dilip Kumar and Company*, **(2018) 9 SCC 1**, he submits that in the case of exemption notifications a strict interpretation has to be applied at the stage of eligibility; but once that stage is crossed, the benefits available to a declarant is to be construed liberally. Adverting to the facts of the present case, he submits that provisions of section 9(a)(ii) has to be construed strictly. Viewed in that context, the departmental interpretation given as answer to question No.73 reflects the correct position. He, therefore, seeks dismissal of the writ petition.

22. Submissions made by learned counsel for the parties have been duly considered.

23. Before adverting to the *Vivad se Vishwas* Act, we may usefully extract the relevant portion of the budget speech of the Hon'ble Finance

Minister made on 01.02.2020 which reads thus:-

> " Sir, in the past our government has taken several measures to reduce tax litigations. In the last budget, *Sabka Vishwas Scheme* was brought in to reduce litigation in indirect taxes. It resulted in settling over 1,89,000 cases. Currently, there are 4,83,000 direct tax cases pending in various appellate forums i.e. Commissioner (Appeals), ITAT, High Court and Supreme Court. This year, I propose to bring a scheme similar to the indirect tax *Sabka Vishwas* for reducing litigations even in the direct taxes.
>
> Under the proposed '*Vivad se Vishwas*' scheme, a taxpayer would be required to pay only the amount of the disputed taxes and will get complete waiver of interest and penalty provided he pays by 31st March, 2020. Those who avail this scheme after 31st March, 2020 will have to pay some additional amount. The scheme will remain open till 30th June, 2020.
>
> Taxpayers in whose cases appeals are pending at any level can benefit from this scheme.
>
> I hope that taxpayers will make use of this opportunity to get relief from vexatious litigation process."

23.1. Thus, what was intended by the Hon'ble Finance Minister was to bring a scheme similar to the *Sabka Vishwas* (Legacy Dispute Resolution) Scheme, 2019 which pertained to indirect taxes. The object of the *Vivad se Vishwas* scheme is to reduce litigations in direct taxes. It was pointed out that under the scheme, a tax payer would be required to pay only the amount of disputed taxes and would get complete waiver of interest and penalty subject to payment by the specified date. In case of payment made after the specified date, the tax payer would have to pay some additional amount. As per her speech, tax payers in whose cases appeals were pending at any level could avail the benefit from the scheme.

24. Let us now read the statement of objects and reasons of the *Vivad se Vishwas* Bill when introduced in the Parliament which later on

became the *Vivad se Vishwas* Act. The statement of objects and reasons reads as under:-

> " Over the years, the pendency of appeals filed by taxpayers as well as Government has increased due to the fact that the number of appeals that are filed is much higher than the number of appeals that are disposed. As a result, a huge amount of disputed tax arrears is locked-up in these appeals. As on the 30th November, 2019, the amount of disputed direct tax arrears is Rs. 9.32 lakh crores. Considering that the actual direct tax collection in the financial year 2018-19 was Rs.11.37 lakh crores, the disputed tax arrears constitute nearly one year direct tax collection.
>
> 2. Tax disputes consume copious amount of time, energy and resources both on the part of the Government as well as taxpayers. Moreover, they also deprive the Government of the timely collection of revenue. Therefore, there is an urgent need to provide for resolution of pending tax disputes. This will not only benefit the Government by generating timely revenue but also the taxpayers who will be able to deploy the time, energy and resources saved by opting for such dispute resolution towards their business activities.
>
> 3. It is, therefore, proposed to introduce the Direct Tax Vivad se Vishwas Bill, 2020 for dispute resolution related to direct taxes, which, inter alia, provides for the following, namely:—
>
> (a) the provisions of the Bill shall be 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;
>
> (b) the pending appeal may be against disputed tax, interest or penalty in relation to an assessment or reassessment order or against disputed interest, disputed fees where there is no disputed tax. Further, the appeal may also be against the tax determined on defaults in respect of tax deducted at source or tax collected at source;
>
> (c) in appeals related to disputed tax, the declarant shall only 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;

(d) 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.

4. The proposed Bill shall come into force on the date it receives the assent of the President and declaration may be made thereafter up to the date to be notified by the Government."

24.1. From a reading of the statement of objects and reasons what is deducible is that the purpose for introduction of the *Vivad se Vishwas* Bill was to reduce tax disputes pertaining to direct taxes. It was noted that amount of disputed direct tax arrears as on 30th November, 2019 was Rs.9.32 lakh crores bottled up in appeals across the spectrum which is almost a year's direct tax collection. Not only that a good amount of time, energy and resources are consumed in such tax disputes, both on the part of the government as well as on the part of the tax payers. Settlement of such tax disputes will, therefore, not only benefit the government by generating timely revenue but also the tax payers who would then be able to deploy the time, energy and resources saved by opting for such dispute resolution towards their business activities. The provisions of the Bill were made applicable to appeals filed by the assessees or by the revenue pending before the Commissioner (Appeals), Income Tax Appellate Tribunal, High Court or Supreme Court and that such pending appeals may be against disputed tax, interest or penalty in relation to an assessment or re-assessment.

25. Preamble of the *Vivad se Vishwas* Act describes the same as an act to provide for resolution of disputed tax and for matters connected therewith or incidental thereto. Section 2 thereof provides for definitions of various expressions used in the *Vivad se Vishwas* Act. As per section 2(1)(g), 'disputed income' in relation to an assessment year has been defined to mean the whole or so much of the total income as is relatable to the disputed tax. ‘Disputed tax’ is defined in section 2(1)(j) to mean income tax including surcharge and cess in relation to an assessment year or financial year as the case may be payable by the appellant under the provisions of the Act in the manner computed under the said provision. Similarly, ‘disputed fee’, ‘disputed interest’ and ‘disputed penalty’ have also been defined under sections 2(f), 2(h) and 2(i). Under section 2(1)(h), 'disputed interest' has been defined to mean the interest determined in any case under the provisions of the Act where such interest is not charged or chargeable on disputed tax; and an appeal has been filed by the appellant in respect of such interest. Finally, 'tax arrear' has been defined in section 2(1)(o) in the following manner:-

> “(o) ‘tax arrear’ means,-
>
> (i) the aggregate amount of disputed tax, interest chargeable or charged on such disputed tax, and penalty leviable or levied on such disputed tax; or
>
> (ii) disputed interest; or
>
> (iii) disputed penalty; or
>
> (iv) disputed fee,
>
> as determined under the provisions of the Income Tax Act.”

25.1. Thus, ‘tax arrear’ would mean the aggregate amount of disputed tax, interest chargeable or charged on such disputed tax and penalty leviable or levied on such disputed tax or disputed interest or disputed penalty or disputed fee as determined under the provisions of the Act.

26. Section 3 deals with the amount payable by a declarant. A reading

of section 3 makes it clear that where a declarant files a declaration under the *Vivad se Vishwas* Act, the same is in respect of tax arrear. A statement is provided thereunder determining the amount payable depending upon the nature of tax arrear.

26.1. Filing of declaration and particulars to be furnished are dealt with in section 4. Sub-section (1) says that the declaration shall be filed by the declarant before the designated authority in the prescribed format. As per sub-section (2), upon filing of such declaration any appeal pending before the Income Tax Appellate Tribunal or Commissioner (Appeals) in respect of the disputed income or disputed interest or disputed penalty or disputed fee and the tax arrear shall be deemed to have been withdrawn from the date on which certificate is issued under section 5(1). As per sub-section (3), where the appeal or writ petition is pending in the High Court or in the Supreme Court, the declarant is required to withdraw such appeal or writ petition with the leave of the Court after issuance of certificate under sub-section (1) of section 5.

26.2. Section 5 provides for the time and manner of payment. As per sub-section (1), the designated authority shall within a period of fifteen days from the date of receipt of the declaration by order determine the amount payable by the declarant in accordance with the provisions of the *Vivad se Vishwas* Act and grant a certificate to the declarant containing particulars of the tax arrear and the amount payable after such determination. While under sub-section (2), the declarant is required to pay the amount determined under sub-section (1) within fifteen days, sub-section (3) makes it clear that once an order is passed under sub-section (1) that would be conclusive as to the matters stated therein, which cannot be re-opened.

26.3. Section 6 provides for immunity from prosecution or imposition of penalty or levy of interest in respect of tax arrear once section 5 comes into play.

27. Section 9 is relevant. This section provides for instances where *Vivad se Vishwas* Act would not apply. Section 9(a) mentions four instances where provisions of the *Vivad se Vishwas* Act would not be applicable. Section 9(a) reads as under:-

> "9. The provisions of this Act shall not apply-
>
> (a) in respect of tax arrear,--
>
> (i) relating to an assessment year in respect of which an assessment has been made under sub-section (3) of section 143 or section 144 or section 153A or section 153C of the Income-tax Act on the basis of search initiated under section 132 or section 132A of the Income-tax Act, if the amount of disputed tax exceeds five crore rupees;
>
> (ii) relating to an assessment year in respect of which prosecution has been instituted on or before the date of filing of declaration;
>
> (iii) relating to any undisclosed income from a source located outside India or undisclosed asset located outside India;
>
> (iv) relating to an assessment or reassessment made on the basis of information received under an agreement referred to in section 90 or section 90A of the Income-tax Act, if it relates to any tax arrear;"

27.1. As per sub-clause (i), provisions of the *Vivad se Vishwas* Act would not apply in respect of tax arrear relating to an assessment year in respect of which an assessment has been made including on the basis of search and seizure. In so far sub-clause (ii) is concerned, provisions of the *Vivad se Vishwas* Act would not apply in respect of tax arrear relating to an assessment year in respect of which prosecution has been instituted on or before the date of filing of declaration. Likewise in sub-clause (iii), provisions of the said Act would not be applicable in respect

of tax arrear relating to any undisclosed income from a source located outside India or undisclosed asset located outside India. Finally, under sub-clause (iv), the exclusion would be in respect of tax arrear relating to an assessment or re-assessment made on the basis of information received under an agreement referred to in section 90 or section 90A of the Act.

27.2. Therefore, from a careful and conjoint reading of the various sub-clauses comprised in section 9(a), we find that the thrust of the said provision is in respect of tax arrear which appears to be the common thread running through all the sub-clauses. Extricating clause (ii) from the above, we find that the exclusion referred to in section 9(a)(ii) is in respect of tax arrear relating to an assessment year in respect of which prosecution has been instituted on or before the date of filing of declaration. Thus, what section 9(a)(ii) postulates is that the provisions of the *Vivad se Vishwas* Act would not apply in respect of tax arrear relating to an assessment year in respect of which prosecution has been instituted on or before the date of filing of declaration. Therefore, the prosecution must be in respect of tax arrear relating to an assessment year. We are of the view that there is no ambiguity in so far the intent of this provision is concerned and as pointed out by the Supreme Court in **Dilip Kumar and Company** *(supra)*, a statute must be construed according to the intention of the Legislature and that the courts should act upon the true intention of the Legislature while applying and interpreting the law. Therefore, what section 9(a)(ii) stipulates is that the provisions of the *Vivad se Vishwas* Act shall not apply in the case of a declarant in whose case a prosecution has been instituted in respect of tax arrear relating to an assessment year on or before the date of filing of declaration. The prosecution has to be in respect of tax arrear which naturally is relatable to an assessment year.

27.3. If we look at clauses (b) to (e) of section (9), we find that there is a clear demarcation in section 9 in as much as the exclusions provided under clause (a) is in respect of tax arrear whereas in clauses (b) to (e), the thrust is on the person who is either in detention or facing prosecution under the special enactments mentioned therein. Therefore, if we read clauses (b) to (e) of section 9, it would be apparent that such categories of persons would not be eligible to file declaration under the *Vivad se Vishwas* Act in view of their exclusion in terms of section 9(b) to (e).

28. While section 10 empowers respondent No.2 to issue directions or orders to the income tax authorities from time to time, section 12 is the rule making provision.

29. In exercise of the powers conferred by sub-section (2) of section 12 read with sub-sections (1) and (5) of section 4 and sub-sections (1) and (2) of section 5 of the *Vivad se Vishwas* Act, central government has made the Direct Tax *Vivad se Vishwas* Rules, 2020 (already referred to as the '*Vivad se Vishwas* Rules'). Rule 7 says that order by the designated authority under sub-section (2) of section 5 in respect of payment of amount payable by the declarant as per certificate granted under sub-section (1) of section 5 shall be in Form No.5. A perusal of Form No.5 which is appended to the *Vivad se* Vishwas Rules would show that it is an order for full and final settlement of tax arrear under section 5(2) read with section 6 of the *Vivad se Vishwas* Act. Here also, if we analyze clause (b) it is seen that immunity is granted to the declarant from prosecution or from imposition of penalty in respect of the tax arrear.

29.1. Therefore, if we look at the scheme of the Act and the Rules as a whole we find that the basic thrust is settlement in respect of tax arrear. Under section 9 certain categories of assessees are excluded from availing the benefit of the *Vivad se Vishwas* Act. While those persons who are facing prosecution under serious charges or those who are in detention as mentioned in clauses (b) to (e) are excluded, the exclusion under clause (a) is in respect of tax arrear which is further circumscribed by sub-clause (ii) to the extent that if prosecution has been instituted in respect of tax arrear of the declarant relating to an assessment year on or before the date of filing of declaration, he would not be entitled to apply under the *Vivad se Vishwas* Act. Now tax arrear has a definite connotation under the *Vivad se Vishwas* Act in terms of section 2(1)(o) which has to be read together with sections 2(f) to 2(j).

30. Having noticed the above, we may mention that respondent No.2 had issued Circular No.9 / 2020 dated 22.04.2020 issuing certain clarifications in respect of the *Vivad se Vishwas* Act. The clarifications have been issued in the form of question and answer upto question No.55. Question No.22 and the answer given thereto is relevant, which is extracted hereunder:-

> "22. In the case of an assessee prosecution has been instituted and is pending in court. Is assessee eligible for the *Vivad se Vishwas*? Further, where the prosecution has not been instituted but the notice has been issued, whether the assessee is eligible for *Vivad se Vishwas*?
>
> Ans: Where only notice for initiation of prosecution has been issued without prosecution being instituted, the assessee is eligible to file declaration under *Vivad se Vishwas.* However, where the prosecution has been instituted with respect to an assessment year, the assessee is not eligible to file declaration for that assessment year under *Vivad se Vishwas*, unless the prosecution is compounded before filing the declaration."

30.1. From the above, what is discernible is that where only notice for

initiation of prosecution has been issued, assessee would be eligible to file declaration. However, once prosecution is instituted with respect to an assessment year, the assessee would not be eligible to file declaration for that assessment year unless the prosecution is compounded before filing the declaration.

31. In the circular No.20 / 2020 dated 04.12.2020, respondent No.2 issued further clarifications in respect of *Vivad se Vishwas* Act. In the circular dated 22.04.2020, the clarifications were upto question No.55. In the circular dated 04.12.2020 further clarifications have been given from question No.56 onwards upto question No.89. Question No.73 and the answer given thereto has been impugned by the petitioner by contending that on the basis of such interpretation declaration of the petitioner is liable to be rejected. Question No.73 and the answer given thereto are as under:-

> "73. In the case of a taxpayer, prosecution has been instituted for assessment year 2012-13 with respect of an issue which is not in appeal. Will he be eligible to file declaration for issues which are in appeal for this assessment year and in respect of which prosecution has not been launched?
>
> Ans. The ineligibility to file declaration relates to an assessment year in respect of which prosecution has been instituted on or before the date of declaration. Since in this example, for the same assessment year (2012-13) prosecution has already been instituted, the taxpayer is not eligible to file declaration for this assessment year even on issues not relating to prosecution."

31.1. From the above, it is seen that the answer given to question No.73 is an improvement over the answer given to question No.22. Here it is asserted that the ineligibility to file declaration relates to an assessment year in respect of which prosecution has been instituted on or before the date of declaration. If prosecution has already been instituted for a particular assessment year, the tax payer would not be eligible to file

declaration for the said assessment year even on issues not relating to prosecution.

32. We are afraid such an interpretation given by respondent No.2 in the answer to question No.73 is not in alignment with the legislative intent which has got manifested in the form of section 9(a)(ii). The ineligibility to file declaration is in respect of tax arrear relating to an assessment year in respect of which prosecution has been instituted. Therefore, to say that the ineligibility under section 9(a)(ii) relates to an assessment year and if for that assessment year a prosecution has been instituted, then the tax payer would not be eligible to file declaration for the said assessment year even on issues not relating to prosecution would not only be illogical and irrational but would be in complete deviation from section 9(a)(ii). Such an interpretation would do violence to the plain language of the statute and, therefore, cannot be accepted. We have already discussed in detail section 9(a)(ii) and we have no hesitation to hold that either on a literal interpretation or by adopting a purposive interpretation, the only exclusion visualized under the said provision is pendency of a prosecution in respect of tax arrear relatable to an assessment year as on the date of filing of declaration and not pendency of a prosecution in respect of an assessment year on any issue. The debarment must be in respect of the tax arrear as defined under section 2(1)(o) of the *Vivad se Vishwas* Act. To hold that an assessee would not be eligible to file a declaration because there is a pending prosecution for the assessment year in question on an issue unrelated to tax arrear would defeat the very purport and object of the *Vivad se Vishwas* Act. Such an interpretation which abridges the scope of settlement as contemplated under the *Vivad se Vishwas* Act cannot therefore be accepted.

33. In so far the prosecution against the petitioner is concerned, the same has been initiated under section 276-C(2) of the Act because of the delayed payment of the balance amount of the self-assessment tax. Such delayed payment cannot be construed to be a tax arrear within the meaning of section 2(1)(o) of the Act. Therefore such a prosecution cannot be said to be in respect of tax arrear. Because such a prosecution is pending which is relatable to the assessment year 2015-16, it would be in complete defiance of logic to debar the petitioner from filing a declaration for settlement of tax arrear for the said assessment year which is pending in appeal before the Tribunal.

34. Considering the above, the clarification given by respondent No.2 by way of answer to question No.73 *vide* circular No.21/2020 dated 04.12.2020 is not in consonance with section 9(a)(ii) of the *Vivad se Vishwas* Act and, therefore, the same would stand set aside and quashed. Declaration of the petitioner dated 23.09.2020 would have to be decided by respondent No.1 in conformity with the provisions of the *Vivad se Vishwas* Act *dehors* the answer given to question No.73 which we have set aside and quashed.

35. Writ petition is accordingly allowed to the extent indicated above. However, there shall be no order as to cost.

36. In view of the above order passed in the writ petition, no further order is called for in Interim Application (L) No.1060 of 2021, which is accordingly disposed of.

(MILIND N. JADHAV, J.) **(UJJAL BHUYAN, J.)**

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