IN THE HIGH COURT FOR THE STATE OF TELANGANA, HYDERABAD

*** * * ***

WRIT PETIITON No.8078 OF 2021

Between:

VPR Mining Infrastructure Pvt Ltd & Others

…Petitioners

Vs.

Union of India,
Rep. by its Revenue Secretary,
Ministry of Finance, Department of Revenue
New Delhi and Others.

….Respondents

JUDGMENT PRONOUNCED ON: 29.04.2022

HON'BLE SRI JUSTICE UJJAL BHUYAN

AND

THE HON'BLE SRI JUSTICE A.VENKATESHWEARA REDDY

1.	Whether Reporters of Local newspapers may be allowed to see the Judgments?	:	Yes
2.	Whether the copies of judgment may be Marked to Law Reporters/Journals?	:	Yes
3.	Whether His Lordship wishes to see the fair copy of the Judgment?	:	**Yes**

UJJAL BHUYAN, J

*** THE HON'BLE SRI JUSTICE UJJAL BHUYAN**

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Union of India,
Rep. by its Revenue Secretary,
Ministry of Finance, Department of Revenue
New Delhi and Others.

....Respondents

!	Counsel for Petitioner	Sri Avinash Desai
^	Counsel for the respondents:	Sri Sri N. Rajeshwara Rao learned ASG for R.1 & R.2 Sri B.Narasimha Sarma For Respondent Nos.3 to 6

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> HEAD NOTE:

? Cases referred

[1] 2021 SCC Online Bombay, 459
[2] 1993 SCC OnLine Bom 654 = (1994) 207 ITR 368
[3] W.P(C) 6825 of 2016

THE HON'BLE SRI JUSTICE UJJAL BHUYAN

And

THE HON'BLE SRI A.VENKATESHWARA REDDY

WRIT PETITION No.8078 OF 2021

ORDER:
(*Per* Hon'ble Sri Ujjal Bhuyan)

Heard Mr.Avinash Desai, learned counsel for the petitioners; Mr. B.Mukherjee, learned counsel representing Mr. N.Rajeshwara Rao, learned Assistant Solicitor General of India for respondent Nos.1 and 2; and Mr. B.Narasimha Sarma, learned standing counsel for the Income Tax department for respondent Nos.3 to 6.

2 By filing this petition under Article 226 of the Constitution of India, petitioners have prayed for the following reliefs:

> "(a) declaring the action of the Respondents in erroneously computing the compounding fees for offences committed by the Petitioners under Section 276CC of the Income Tax Act, 1961 for the Assessment years 2011-12 to 2015-16 vide Letter / Order dated 05.03.2021 as being arbitrary illegal unconstitutional and in contravention of the Income Tax Act 1961 and the Guidelines for Compounding Offences under Direct Tax Laws 2019 issued by the 2nd Respondent and consequently set aside the computation of the compounding fee vide Letter/Order dated 05.03.2021 by directing the Respondents to compound the offences under Section 276CC of the Income Tax Act 1961 for the Assessment years 2011-12 to 2015-16 by collecting Rs 36,96,000/ as the compounding fee payable by the Petitioner Company,
>
> b) declaring the action of the Respondents in not compounding the offences

> committed by the Petitioners under Section 276CC of the Income Tax Act, 1961 for the Assessment year 2010-11 as being arbitrary illegal and unconstitutional and consequently direct the Respondents to pass an order for compounding the offences under Section 276CC of the Income Tax Act 1961 for the Assessment year 2010-11,
>
> c) direct the Respondents to grant the Petitioner Company the benefits under the Direct Tax Vivad Se Vishwas Act, 2020 for the disputed assessment for the years 2011-12 to 2015-16."

3 From the above, it is seen that there are basically two grievances of the petitioners. First grievance relates to computation of compounding fee by the respondents for offences committed under Section 276 CC of the Income Tax Act, 1961 (briefly, 'the Act' hereinafter) for the assessment years 2011-12, 2012-13, 2013-14, 2014-15 and 2015-16, vide the order dated 05.03.2021. While the petitioners seek quashing of such computation and quantifying the compounding fee at Rs.36,96,000-00, they further seek a direction to the respondents for compounding of such offence for the assessment year 2010-11 as well. Second grievance of the petitioners pertains to rejection of declaration filed by petitioner No.1 under the Direct Tax Vivad se Vishwas Act, 2020 by the respondents for the assessment years 2011-12, 2012-13, 2013-14, 2014-15 and 2015-16.

4 Petitioner No.1 is a company engaged in the business of mining and infrastructural works. Business operations of the petitioner No.1 are spread across different states of the country. Petitioner No.2 is a former Managing Director of petitioner No.1 who had resigned from his position on 24.12.2018. Petitioner No.3 is a Director of petitioner No.1.

5 Petitioner No.1 is an assessee under the Act. For the assessment years 2010-2011 to 2015-2016, petitioner No.1 filed its returns after the due date for filing of returns under Section 139 (1) of the Act. However, it is contended that the returns were filed within the same assessment years as permitted under Section 139 (4) of the Act. Details of filing of returns by petitioner No.1 for the aforesaid assessment years are mentioned in paragraph No.5 of the writ affidavit.

6 Investigation wing of the Income Tax department, Hyderabad, had conducted a search and seizure operation in the premises of petitioner No.1 under Section 132 of the Act. This was followed by respondent No.5 issuing notice dated 29.09.2016 under Section 153A of the Act to reassess the total income of petitioner No.1 for the assessment years 2010-11 to 2015-16.

7 According to the petitioners during the search proceedings, petitioner No.1 had voluntarily declared Rs.21.00 crores as its additional income.

8 Be that as it may, respondent No.5 issued a show cause notice dated 11.01.2017 directing petitioner No.1 to show cause as to why prosecution should not be initiated against it under Section 276 CC of the Act for failing to furnish returns pursuant to notice issued under Section 153A of the Act.

9 Petitioner No.1 replied to the show cause notice on 23.01.2017 requesting respondent No.5 to drop the proceedings under Section 276 CC of the Act. It was pointed out that petitioner No.1 was unable to file the returns and to pay the tax on the additional income within the prescribed period as it was facing severe financial crunch. However, petitioner No.1 had already paid taxes amounting to Rs.5,25,00,000-00 on the admitted additional income and that it had no intention to delay filing of returns. Thereafter, on 18.02.2017 petitioner No.1 duly filed its returns under Section 153A of the Act for the assessment years 2010-11 to 2015-16. Respondent No.4 was informed that petitioner No.1 had not only filed the returns but had also paid the entire additional tax of Rs.9,32,59,471-00. In the

circumstances petitioner No.1 requested respondent No.4 to condone the delay in filing the returns and to drop the proceedings under Section 276 CC of the Act.

10 However, respondents filed complaints on 21.03.2018 before the Court of Special Judge for Economic Offences at Hyderabad under Section 276 CC and Section 278B of the Act against the petitioners for wilful default in filing of returns pursuant to notice issued under Section 153A of the Act. Separate complaints were filed for each of the assessment years 2010-11 to 2015-16.

11 Petitioner No.1 applied before respondent No.3 vide the letter dated 03.09.2019 for compounding of the offences under Section 276 CC of the Act for the assessment years 2011-12 to 2015-16. Later on, when it was realised that due to inadvertence assessment year 2010-11 was not included in the compounding application, petitioner No.1 addressed a letter dated 22.02.2021 to the third respondent to treat the petitioner's application for compounding dated 03.09.2019 as an application for the assessment year 2010-11 as well.

12 It is stated that petitioner No.1 had also submitted declarations under the Vivad se Vishwas scheme for the

assessment years 2011-12 to 2015-16, but those were not being considered since the offences had not been compounded.

13 Respondent No.6, vide the impugned letter / order dated 05.03.2021, conveyed approval for compounding of offences under Section 276 CC of the Act for the assessment years 2011-12 to 2015-16. Respondent No.6 directed the petitioners to make payment of the compounding charges in the following manner:-

Sl.No.	**Assessment Year**	**Amount**
i.	2011-12	Rs.1,05,93,600-00
ii.	2012-13	Rs.86,61,120-00
iii.	2013-14	Rs.65,70,240-00
iv.	2014-15	Rs.8,65,800-00
v.	2015-16	Rs.29,42,160-00

14 By way of a detailed letter dated 15.03.2021, petitioner No.1 contended before respondent No.3 that the compounding charges were grossly erroneous being contrary to the provisions of the Act and the extant guidelines for compounding of offences. According to the petitioners, the compounding charges would be Rs.36,96,000-00 only.

15 Reverting to the declarations made by petitioner No.1 under the Vivad se Vishwas scheme, it is stated that declarations of petitioner No.1 dated 29.12.2020 were not considered by the respondents on the ground of pendency of complaint against the petitioners and was rejected on 31.01.2021. It is stated that

petitioner No.1 had made another application on 31.01.2021 which was pending.

16 Aggrieved by the above, petitioners have preferred the present writ petition seeking the reliefs as indicated above.

17 Insofar compounding fee is concerned, according to the petitioners the amounts quantified by the respondents are erroneous as the compounding fee would only be Rs.36,96,000 - 00. In this connection petitioners have referred to and relied upon paragraph No.13.4.1 (d) of the Guidelines for Compounding Offences under Direct Tax Laws, 2019 which has to be read in conjunction with Section 139 (4) and Section 276 CC of the Act. Petitioners have also referred to and relied upon a Circular dated 22.04.2020 issued by the Central Board of Direct Taxes (CBDT) clarifying that the benefit under the Vivad se Vishwas scheme would be available to any person where the offences against such person have been compounded.

18 This Court by order dated 15.04.2021 had issued notice and as an interim measure, had directed the respondents to keep the application (declaration) made by petitioner No.1 under the Vivad se Vishwas scheme pending.

19 Petitioners have filed an additional affidavit in the form of interlocutory application being I.A.No.4 of 2021. Petitioner No.1 has enclosed the reasons for rejection of the declarations dated 29.12.2020 on 31.01.2021. As per the reasons, the declarations were rejected on the ground that provisions of the Direct Tax Vivad se Vishwas Act, 2020 were not applicable in view of pending prosecution proceedings against petitioner No.1.

20 It is stated that subsequent to the rejection on 31.01.2021 petitioner No.1 had filed fresh applications on 31.01.2021, which were rejected on 30.03.2021 on the same grounds that the provisions of the Direct Tax Vivad se Vishwas Act, 2020 would not be applicable in view of the pending prosecution proceedings against petitioner No.1.

21 Thereafter, petitioner No.1 had filed fresh declarations dated 30.03.2021 as the deadline for filing declarations was 31.03.20221 and there being no limitation as to the number of declarations that could be filed under the Direct Tax Vivad se Vishwas Act, 2020. It is contended that there was no basis for rejection of the declarations filed by petitioner No.1 under the Direct Tax Vivad se Vishwas Act, 2020. The criminal complaints pertain to alleged delay in filing of returns under Section 153A of

the Act whereas declarations of petitioner No.1 dated 29.12.2020, 31.01.2021 and 30.03.2021 relate to resolving disputed tax arrears. Therefore, the two are totally unrelated. Pending criminal cases do not relate to subject matter of the declarations. In this connection petitioners have placed reliance on a decision of a Division Bench of the Bombay High Court in **Macrotech Developers Limited Vs. Principal Commissioner of Income Tax[1].** In the circumstances petitioners seek a direction to the respondents to grant the benefits under the Direct Tax Vivad se Vishwas Act, 2020 for the assessment years 2011-12 to 2015-16.

22 Respondents have filed a common counter affidavit through Sri Susheel Agarwal, Principal Commissioner of Income Tax (Central), Hyderabad. Stand taken in the affidavit is that petitioner No.1 had filed an application on 04.09.2019 for compounding of offences under Section 276CC of the Act for the assessment years 2011-12 to 2015-16. It is stated that the said application was considered by the committee constituted for compounding of offences, comprising of Principal Chief Commissioner of Income Tax, Andhra Pradesh and Telangana, Hyderabad; Director General of Income Tax (Investigation), Hyderabad; and Chief Commissioner of Income Tax, Hyderabad.

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[1] 2021 SCC Online Bombay, 459

In the meeting held on 19.02.2021 the committee accepted the compounding petition subject to payment of compounding fee of Rs.2,96,32,920-00 to be paid within one month from the end of the month on receipt of the intimation; the intimation was sent by the assessing officer to petitioner No.1 on 05.03.2021. Answering respondents have denied the contention of the petitioners that the compounding fee for the assessment years 2011-12 to 2015-16 was erroneously computed and have asserted that the compounding fee was determined by the committee in accordance with the guidelines of the CBDT dated 14.06.2019 on compounding of offences which are binding on the committee. Petitioner No.1 had also filed a separate application on 22.01.2021 for compounding of offence under Section 276CC of the Act for the assessment year 2010-11. After considering the application, committee rejected the same for the reasons provided in the minutes of the meeting held on 19.02.2021.

23 It is further stated that petitioner No.1 had filed declarations under the Direct Tax Vivad se Vishwas Act, 2020 introducing the Vivad se Vishwas scheme on 29.12.2020 for the assessment years 2011-12 to 2015-16. The declarations were rejected on 31.01.2021 in accordance with Section 9 of the Direct Tax Vivad se Vishwas Act, 2020 since prosecution

proceedings instituted against the petitioners for the assessment years 2011-12 to 2015-16 were pending. Petitioner No.1 filed revised declarations for the said assessment years on 31.01.2021 which were also rejected on 31.03.2021 for the same reasons. Thereafter, petitioner No.1 again filed declarations for the said assessment years on 31.03.2021 which are pending as no decision thereon has been taken in deference to order of this Court dated 15.04.2021.

24 Answering respondents have asserted that rejection of the declarations of petitioner No.1 filed under the Vivad se Vishwas scheme was in accordance with Section 9 of the Direct Tax Vivad se Vishwas Act, 2020 and clarifications issued by the CBDT vide the Circular Nos.7/2020, 9/2020 and 21/2020. Thereafter, reference has been made to Section 9 of the aforesaid Act. Answering respondents have also referred to CBDT Circular No.7/2020 dated 04.03.2020, more particularly to the Frequently Asked Question (FAQ) No.22 and the answer given thereto which are extracted hereunder:

> **CBDT's Circular No.7/2020 dated 04.03.2020.**
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> **FAQ No.22:** In the case of an assessee prosecution has been instituted and is pending in Court. Is assessee eligible for the Vivad se Vishwas?
>
> **Answer:** No. However, where only notice for intimation of prosecution has been issued with reference to tax arrears, the taxpayer has a choice to compound the offence and opt for Vivad se Vishwas.

25 Further, reliance has been placed on FAQ No.73 contained in Circular No.21/2020 of CBDT dated 04.12.2020 and the answer given thereto. The hypothetical statement is 'in case of a tax payer prosecution has been instituted for the assessment year 2012-13 with respect to an issue which is not in appeal'. Question is, whether he would be eligible to file declaration in respect of issues for which prosecution has not been launched? Answer given thereto is that ineligibility to file declaration relates to an assessment year. If prosecution for that assessment year 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. FAQ No.73 and the answer given thereto are extracted hereunder:

> **CBDT's Circular No.21/2020 dated 04.12.2020.**
>
> **FAQ No.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?
>
> **Answer:** 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.

26 Thereafter averments have been made by answering respondents on the merit justifying initiation of prosecution proceedings under Section 276CC of the Act. Answering

respondents have also given details of calculation of compounding fee and thereafter assert that there is no error in the computation of compounding fee. Computation of compounding fee has been done as per guidelines issued by the CBDT.

27 Contending that no case has been made out by the petitioners, respondents seek dismissal of the writ petition.

28 Petitioners have filed a rejoinder affidavit contesting the stand taken by the respondents and asserting the averments made in the writ affidavit as well as in the interlocutory application. Insofar reliance placed by the respondents on FAQ No.73 is concerned, petitioners have stated that Bombay High Court in **Macrotech Developers Limited** (1 supra) has quashed the said FAQ No.73 as being in contravention of Section 9 of the Direct Tax Vivad se Vishwas Act, 2020.

29 Mr. Avinash Desai, learned counsel for the petitioner, submits that the returns for the assessment years 2010-11 to 2015-16 were filed within the same assessment years though after the due date of filing of returns. A conjoint reading of Section 139 (1) and Section 139 (4) of the Act would show that no adverse inference can be drawn against petitioner No.1 for filing

of returns after the due date but within the same assessment years.

30 Insofar filing of returns pursuant to notice dated 29.09.2016 under Section 153A of the Act for the assessment years 2010-11 to 2015-16 is concerned, learned counsel for the petitioners submits that there was no wilful or intentional default by petitioner No.1. As a matter of fact, petitioner No.1 was going through a severe financial crunch which caused the temporary default. However, petitioner No.1 had paid the entire additional tax of Rs.9,32,59,471-00 and had filed the returns of income under Section 153A of the Act for the assessment years 2010-11 to 2015-16 on 18.02.2017. It was in such circumstances that petitioner No.1 had requested respondent No.5 to drop the proceedings under Section 276 CC of the Act. According to Mr. Desai, learned counsel for the petitioners, stand of the petitioner No.1 is fortified by a decision of the Bombay High Court in **Trustees of Tulsidas Gopalji Charitable and Chateshwar Temple Vs. Commissioner of Income Tax[2].**

31 Insofar compounding of the offences under Section 276 CC of the Act is concerned, learned counsel for the petitioners

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[2] 1993 SCC OnLine Bom 654 = (1994) 207 ITR 368

submits that there was no wilful default by petitioner No.1 in delayed filing of returns under Section 153A of the Act. Petitioners had filed applications for compounding of offences to put a closure to the issue and also to avail the benefit of the Vivad se Vishwas scheme as one of the conditions of eligibility under the aforesaid scheme was that there should be no criminal prosecution pending at the time of filing of declaration. Highlighting the need for compounding of such offences, learned counsel for the petitioner has referred to a decision of the Delhi High Court dated 11.04.2017 rendered in **Vikram Singh Vs. Union of India**[3]**.**

32 Learned counsel for the petitioners submits that while respondent agreed to the prayer of the petitioners for compounding of the offences, nonetheless, respondents had computed the compounding charges in a very arbitrary manner seeking a huge amount for such compounding, virtually rendering compounding impossible. He submits that respondents had erred in quantifying such stiff amount as compounding charges. As against compounding charges of Rs.36,96,000-00, respondents have quantified the compounding

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[3] W.P(C) 6825 of 2016

charges at Rs.2,96,32,920-00 which is not only irrational but is absurd as well.

33 Turning to the rejection of declarations of the petitioners under the Vivad se Vishwas scheme, he submits that such rejection is wholly erroneous and contrary to Section 9 of the Direct Tax Vivad se Vishwas Act, 2020. That apart, this issue is squarely covered by a Division Bench decision of the Bombay High Court in **Macrotech Developers Limited** (1 supra).

34 On a query by the Court, learned counsel for the petitioners fairly submits that respondents have challenged the decision in **Macrotech Developers Limited** (1 supra) before the Supreme Court by filing Special Leave Petition, but he hastened to add that neither any notice has been issued nor any stay granted by the Supreme Court.

35 On the other hand, Mr. B.Narasimha Sarma, learned counsel for respondent Nos.3 to 6 has relied upon the counter affidavit filed by the said respondents. While justifying initiation of criminal prosecution against the petitioners under Section 276 CC of the Act, he, however, submits that respondents acted fairly and judiciously in accepting the prayer of the petitioners for compounding of offences under Section 276 CC of the Act.

Thereafter, the high powered committee constituted for compounding of offences quantified the compounding fee at Rs.2,96,32,920-00. He asserts that the compounding fee was determined by the committee in accordance with the guidelines of the CBDT dated 14.06.2019 regarding compounding of offences, further submitting that such guidelines are binding on the committee.

36 Mr. Sarma has also justified rejection of the declarations of petitioner No.1 under the Vivad se Vishwas scheme. Referring to Section 9 of the Direct Tax Vivad se Vishwas Act, 2020, he submits that as on the date of filing of the declarations by petitioner No.1, the criminal prosecutions were pending. As the offences were not yet compounded since the petitioners did not pay the compounding charges, therefore petitioner No.1 was not eligible to file the declarations. As such respondents were fully justified in rejecting the declarations of petitioner No.1. In the circumstances, he seeks dismissal of the writ petition.

37 Submissions made by learned counsel for the parties have received the due consideration of the Court.

38 We may deal with the second grievance of the petitioners first as the outcome of this adjudication would have a bearing on

the first grievance of the petitioners. As already noted above, this grievance pertains to rejection of the declarations filed by petitioner No.1 under the Direct Tax Vivad se Vishwas Act, 2020 by the respondents for the assessment years 2011-12, 2012-13, 2013-14, 2014-15 and 2015-16. The reasons given for such rejection is that prosecution proceedings under Section 276 CC of the Act were instituted for the aforesaid assessment years before the date of filing of the declarations and the proceedings were pending. Therefore, provisions of the Direct Tax Vivad se Vishwas Act, 2020 would not be applicable in respect of tax arrears for the aforesaid assessment years. Hence the declarations were rejected.

39 To appreciate the above, let us advert to and analyse relevant provisions of the Direct Tax Vivad se Vishwas Act, 2020 (briefly referred to hereinafter as 'the Vivad se Vishwas Act'). It is an Act to provide for resolution of disputed tax and for matters connected therewith or incidental thereto. The statement of objects and reasons necessitating the enactment says that over the years pendency of appeals filed by the tax payers as well as by the 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 of. As a result, a huge amount of

disputed tax arrears is locked up in these appeals. It was stated that as on 30.11.2019 the amount of disputed direct tax arrears was Rs.9.32 lakh crores, whereas actual direct tax collection in the financial year 2018-19 was Rs.11.37 lakh crores. Therefore, it was noticed that the disputed tax arrears constituted nearly one year of direct tax collection. It was also mentioned that tax disputes consume copious amount of time, energy and resources both on the part of the Government as well as tax payers. Those also deprive the Government from timely collection of revenue. Therefore, there was an urgent need to provide for resolution of the pending tax disputes which will not only benefit the Government by generating timely revenue but would also benefit the tax payers who would be able to deploy the time, energy and resources saved by opting for such dispute resolution towards their business activities.

40 Provisions of the Vivad se Vishwas Act relevant for the present *lis* may now be referred to. Section 2 provides for definition of various expressions used in the Vivad se Vishwas Act. As per Section 2 (1) (g) 'disputed income' in relation to an assessment year means, 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' are also defined under sections 2(f), 2(h) and 2(i). 'Disputed fee' means the fee determined under the Act in respect of which appeal has been filed by the appellant. 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 is chargeable on disputed tax; and an appeal has been filed by the appellant in respect of such interest. 'Disputed penalty' means the penalty determined in any case under the Act where such penalty is not levied or is leviable in respect of disputed income or disputed tax, as the case may be; and an appeal has been filed by the appellant in respect of such penalty.

41 '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."

42 From the above, it is evident that '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.

43 Section 3 deals with the amount payable by a declarant. It says that subject to the provisions of the Vivad se Vishwas Act, where a declarant files a declaration on or before the last date to the designated authority in respect of tax arrear, then notwithstanding anything contained in the Act or in any other law for the time being in force, the amount payable by the declarant under the Vivad se Vishwas Act would be as provided in Section 3. 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 the tax arrear.

44 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 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.

45 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 subsection (1) that would be conclusive as to the matters stated therein, which cannot be re-opened.

46 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.

47 This brings us to Section 9 of the Vivad se Vishwas Act, which is relevant for adjudication of the present *lis*. Section 9 provides for five situations i.e. from (a) to (e) where the Vivad se Vishwas Act would not apply. Section 9 (a) mentions about non-applicability of the Vivad se Vishwas Act in respect of tax arrear. 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;
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> (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;"

48 We will advert to Section 9 (a) a little later while we complete our reference to the relevant provisions of the Vivad se Vishwas Act.

49 Section 9 (b) to 9 (e) deals with situations where a detention order has been passed against a person or prosecution has been instituted against such person under various penal laws or special laws on or before filing of declaration in which event provisions of the Vivad se Vishwas Act would not apply.

50 While Section 10 empowers the CBDT to issue directions or orders to the income tax authorities from time to time, Section 12 is the rule making provision.

51 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 (briefly referred to hereinafter 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 amount payable by the declarant as per certificate granted under Sub-Section (1) of Section 5 shall be in Form No.5. Form No.5 is appended to the Vivad se Vishwas Rules. A perusal of Form No.5 would show that it is a certification certifying full and final settlement of tax arrear under Section 5 (2) read with Section 6 of the Vivad se Vishwas Act. Thus, immunity is granted to the

declarant from prosecution or from imposition of penalty in respect of the tax arrear.

52 A Division Bench of the Bombay High Court in **Macrotech Developers Limited** (1 supra) had analysed the provisions of Section 9 (a) and thereafter has held as follows:

> 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.
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> 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).

53 Thus, Bombay High Court has held that the thrust of the aforesaid provision is in respect of tax arrear. The prosecution must be in respect of tax arrear as defined under the Vivad se Vishwas Act which naturally is relatable to an assessment year. Under Section 9 certain categories of assessees are excluded from availing the benefit of the Vivad se Vishawas Act. Exclusion under Clause (a) of Section 9 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.

54 As already discussed above, tax arrear in the context of the Vivad se Vishwas Act has a definite connotation under Section 2 (1) (o) which has to be read in conjunction with Section 2 (1) (f) to 2 (1) (j).

55 Respondents have placed reliance upon FAQ No.22 and the answer given thereto in Circular No.7 of 2020 of CBDT dated 04.03.2020. We have already extracted FAQ No.22 and the answer given thereto. The question posed is, if in the case of an assessee prosecution has been instituted and is pending in Court, would the assessee be eligible under the Vivad se Vishwas scheme. As a corollary to the above, the further question posed is, in the event prosecution has not been instituted, but notice has been issued, whether the assessee would be eligible under the said scheme. CBDT has clarified by way of answer to the above question opining that where only notice for initiation of prosecution has been issued without prosecution being instituted, assessee would be eligible to file declaration under the scheme. But where prosecution has been instituted with respect to an assessment year, the assessee would not be eligible to file declaration for that assessment year under the Vivad se Vishwas scheme unless the prosecution is compounded before filing the declaration. Thus, what answer to FAQ No.22 says 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.

56 The above stand taken by the CBDT has been further clarified in the answer given to FAQ No.73 in CBDT Circular No.21/2020 dated 04.12.2020. We have already extracted the question and the answer given thereto. The question posed is, if prosecution has been instituted in the case of a taxpayer, for an assessment year in 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. Clarification given by CBDT in the form of answer thereto 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 prosecution has already been instituted for the assessment year in question, the taxpayer would not be eligible to file declaration for the said assessment year even on issues not relating to prosecution.

57 Thus, on a conjoint reading of FAQ Nos.22 and 73 and the answers given thereto, it is seen that the answer given to FAQ No.73 is an improvement over the answer given to FAQ No.22. In

FAQ No.73 it has been opined that ineligibility to file declaration relates to an assessment year in respect of which prosecution has been instituted; the taxpayer would not be eligible to file declaration for the said assessment year even on issues not relating to the prosecution. This appears to be the stand of CBDT which is reflected in the counter affidavit of the respondents.

58 In **Macrotech Developers Limited** (1 supra), petitioners had sought for quashing of the answer given to FAQ No.73. After a threadbare analysis, Bombay High Court held as follows:

> 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.

59 We agree with the views expressed by the Bombay High Court and hold that an assessee would be ineligible to file declaration in the event of pendency of prosecution in respect of the tax arrear relatable to the assessment year in question as on the date of filing of the declaration; and not on account of pendency of prosecution in respect of the assessment year on any issue unrelated to the tax arrear. Bombay High Court has rightly held that the debarment must be in respect of the tax arrear as defined under Section 2 (1) (o) of the Vivad se Vishwas Act. We reiterate the view of the Bombay High Court that to hold that an assessee would not be eligible to file a declaration because there is 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.

60 We have already analysed the scheme of the Vivad se Vishwas Act and the Vivad se Vishwas Rules. We find therefrom that the basic thrust is settlement of direct tax disputes in respect of tax arrears which as already noticed above has a definite connotation under the Vivad se Vishwas Act. Therefore, the interpretation which has been put forward by the

respondents runs counter to the scope of settlement as contemplated under the Vivad se Vishwas Act. To that extent answers given to FAQ Nos.22 and 73 are contrary to the very scheme of the Vivad se Vishwas Act.

61 Coming back to the facts of the present case, prosecution against petitioner No.1 is under Section 276 CC which pertains to failure to furnish return under Sections 139 (1) or under Section 153 A etc., of the Act. Such delayed filing of income tax returns cannot be construed to be a 'tax arrear' within the meaning of Section 2 (1) (o) of the Vivad se Vishwas Act. Therefore, such pending prosecution cannot be said to be in respect of tax arrear though it may be relatable to the assessment years in question and cannot render petitioner No.1 ineligible.

62 Thus, having regard to the discussions made above, rejection of the declarations of petitioner No.1 by the respondents on 31.01.2021 and 31.03.2021 cannot be sustained and those are accordingly set aside and quashed. Consequently, the matter is remanded back to the respondents who shall consider the declarations of petitioner No.1 dated 29.12.2020 (or subsequent declarations dated 31.01.2021 and 31.03.2021) in conformity

with the provisions of the Vivad se Vishwas Act *dehors* the answers given to FAQ Nos.22 and 73.

63 In view of the decision rendered on the second grievance of the petitioners, it may not be necessary for us to adjudicate on the other grievance of the petitioners relating to computation of compounding fee by the respondents and the related compounding of offences under Section 276 CC of the Act.

64 Writ petition is accordingly allowed to the extent indicated above. However, there shall be no order as to costs. Miscellaneous petitions, if any, pending in this writ petition shall stand closed.

UJJAL BHUYAN, J.

A.VENKATESHWARA REDDY, J.

Date: 29.04.2022

L.R. copy be marked

B/o Kvsn