IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.1558 OF 2022

Pragati Pre Fab India Pvt. Ltd.)
having its office at Kanchan Ganga, Factory)
Lane, Near M.K. College, Borivali West,)
Mumbai – 400 092) ….Petitioner

V/s.

1. Principal Commissioner of Income Tax,)
Circle – 13, having his office at Room)
No.122, 1st Floor, Aayakar Bhavan, M.K.)
Road, Mumbai – 400 020)

2. Central Board of Direct Taxes,)
Government of India, Ministry of Finance)
and Department of Revenue, having its office)
at 3rd Floor, Vikas Bhawan, N-Block, I.P.)
Estate, New Delhi – 110 002)

3. Union of India)
through Ministry of Finance, North Block,)
New Delhi – 110 001) ….Respondents

WITH
WRIT PETITION (L) NO.5292 OF 2021

Pragati Pre Fab India Pvt. Ltd.)
a company incorporated under the)
provisions of the Companies Act, 1956,)
having registered address at Kanchan)
Ganga, Factory Lane, Near M.K. College,)
Borivali West, Mumbai – 400 092) ….Petitioner

V/s.

1. The Principal Commissioner of Income)
Tax, - 13, having his office at Room No.122,)
1st Floor, Aayakar Bhavan, M.K. Road,)
Mumbai – 400 020)

2. The Central Board of Direct Taxes,)
Government of India, Ministry of Finance)
and Department of Revenue, having its office)
at 3rd Floor, Vikas Bhawan, N-Block, I.P.)
Estate, New Delhi – 110 002)

3. The Union of India)
through the Secretary, Ministry of Finance,)
Government of India, Department of)
Revenue, Govt. of India, North Block, New)
Delhi – 110 001) ….Respondents

Mr. V. Sridharan, Senior Advocate a/w. Mr. Ravi Sawana and Ms. Neha Sharma i/b. Mr. Sriram Sridharan for petitioner.
Mr. Suresh Kumar a/w. Mr. Akhileshwar Sharma for respondents.

CORAM : K. R. SHRIRAM &
DR. N. K. GOKHALE, JJ.
DATED : 12th SEPTEMBER 2023

ORAL JUDGMENT (PER K.R. SHRIRAM, J.) :

WRIT PETITION NO.1558 OF 2022

1 Rule. Rule made returnable forthwith. By consent, the petition is taken up for final hearing at the admission stage.

2 Petitioner seeks to challenge the rejection by respondent no.1 of the declaration filed on 31st January 2021 under the Direct Tax Vivad Se Vishwas Act 2020 (DTVSV Act) for Assessment Years 2010-2011 and 2011-2012. The reason for rejection reads as under :

> *In this case, prosecution u/s. 276C(2) of the Income Tax Act had been filed before Addl. Chief Metropolitan Magistrate, Mumbai. As per report submitted by Assessing Officer and Range Head the assessee company is not eligible for VSV scheme, as prosecution has been launched on it and requested to reject the application of the assessee company. Accordingly, the application of VSV scheme of the assessee company is hereby rejected.*

The said rejection was pursuant to a clarification issued by respondent no.2 vide Circular No.21/2020 dated 4th December 2020.

3 Petitioner also seeks to challenge the legality and validity of the clarification issued by respondent no.2 in its reply to question no.73 in the said circular. It is petitioner's case that Section 9(a)(ii) of DTVSV Act dis-entitles a person to be eligible under the Act "*in respect of tax arrear …… relating to an assessment year in respect of which prosecution has been instituted …….*". Thus, according to petitioner, the bar against applicability of DTVSV Act is when prosecution initiated relates to tax arrear. Whereas, respondent no.2, in the said circular, has clarified that whether or not the prosecution relates to tax arrear (say for delay in filing of return, delay in deduction of TDS, etc.), the taxpayer is dis-entitled to apply for settlement of pending appeal in relation to the tax arrear under the DTVSV Act. It is alleged in the petition that the purported clarification is ultra vires and contrary to the provisions of DTVSV Act and the Direct Tax Vivad Se Vishwas Rules 2020, is beyond the powers and authority conferred upon respondent no.2 under Section 11 of the DTVSV Act, is arbitrary, and violative of Article 14 of the Constitution of India.

4 The question that arises in the petition is whether the rejection of the declarations filed by petitioner under the DTVSV Act is invalid?

5 Petitioner had filed its return of income for Assessment Year 2010-2011 on 23rd October 2010 declaring a total income of Rs.26,06,385/- and for Assessment Year 2011-2012 on 23rd September 2011 declaring a total income of Rs.13,37,173/-.

6 The tax due on the income returned for Assessment Year 2010-2011 was duly paid by petitioner by way of TDS and self assessment tax and for Assessment Year 2011-2012 by way of TDS, advance tax and self assessment tax. The return filed by petitioner for both the assessment years was processed under Section 143(1) of the Income Tax Act, 1961 (the Act). Subsequently, assessments for Assessment Years 2010-2011 and 2011-2012 were reopened under Section 147 of the Act by issuance of notice dated 5th February 2015 under Section 148 of the Act. Re-assessment proceedings were concluded and the Assessing Officer passed an assessment order dated 28th March 2016 under Section 144 read with Section 147 of the Act assessing petitioner's income for Assessment Year 2010-2011 at Rs.11,69,41,860/- and for Assessment Year 2011-2012 at Rs.34,88,000/-.

7 For the purpose of this matter, we need not go into the details of the re-assessment order passed. The Assessing Officer raised a demand of Rs.6,77,59,232/- and Rs.7,37,609/- on the additional income determined in the re-assessment proceedings for Assessment Years 2010-2011 and 2011-2012, respectively. Notice dated 27th April 2016 under Section 156 of the Act was issued. The assessment order and the consequent notice of demand were impugned by petitioner before the Commissioner of Income Tax (Appeals) [CIT(A)] which were pending adjudication at the time of filing the petition. Pending the appeal, petitioner paid 20% of the demand as permissible under Office Memorandum [F. No.404/72/93-ITCC] dated

31st July 2017. Upon payment, petitioner would cease to be an assessee in default. The appeal was dismissed by CIT(A) and petitioner's appeal before the ITAT is still pending.

8 Alongwith the assessment orders dated 28th March 2016 for Assessment Years 2010-2011 and 2011-2012, the Assessing Officer also initiated proceedings for imposition of penalty under Section 271(1)(c) of the Act. In view of the pending appeal, the penalty proceedings were kept in abeyance.

9 Subsequently, respondent no.1 issued show cause notices dated 7th December 2017 to petitioner alleging, *inter alia*, that there was a *prima facie* case made out against petitioner for willfully attempting to evade payment of taxes in respect of demand raised pursuant to the re-assessment orders dated 28th March 2016. Petitioner was also called upon to show cause why sanction should not be granted by respondent no.2 to file a complaint with the appropriate Court for committing an offence punishable under Section 276C(2) read with Section 278B of the Act. Prosecution was subsequently commenced by the Revenue which filed complaint before the Additional Chief Metropolitan Magistrate, 38th Court at Ballard Pier.

10 In the meantime, DTVSV Act was notified and petitioner decided to take advantage of the provisions of DTVSV Act and, therefore, on 21st March 2020 filed declarations for Assessment Years 2010-2011 and 2011-2012. Petitioner's declaration was rejected for the reason noted

earlier.

11 Petitioner, therefore, approached this Court and has sought the following reliefs :

> *(a) that this Hon'ble Court may be pleased to issue a writ of certiorari or a writ in the nature of certiorari or any other appropriate writ, order or direction under Article 226 of the Constitution of India calling for the record of the purported clarification in reply to Question No. 73 of Circular No. 21 of 2020 dated 04.12.2020 (Ex. 'B'), and after going through the same and examining the question of legality thereof to quash the same.*
>
> *(b) that this Hon'ble Court may be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or direction under Article 226 of the Constitution of India ordering and directing the Respondent No.2 to withdraw, revoke and cancel the purported clarification in reply to Question No. 73 of impugned Circular No. 21 of 2020 dated 04 December 2021 (Ex. 'B').*
>
> *(c) that this Hon'ble Court may be pleased to issue a writ of certiorari or a writ in the nature of certiorari or any other appropriate writ, order or direction under Article 226 of the Constitution of India calling for the record of the case and after going through the same and examining the legality thereof, to quash and cancel the rejection of the declarations (Ex. 'A-1' and 'A-2') filed by the Petitioner under the VSV Act.*
>
> *(d) that this Hon'ble Court may be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or direction under Article 226 of the Constitution of India ordering and directing the Respondent No.1 to withdraw, revoke and cancel the impugned rejection of the declarations (Ex. 'A-1' and 'A-2') filed by the Petitioner under the VSV Act.*
>
> *(e) that this Hon'ble Court may be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or direction under Article 226 of the Constitution of India ordering and directing the Respondent No.1 to accept the declarations filed by the Petitioner under the VSV Act for AY's 2010-11 and 2011-12 (Ex. J-1' and 'J-2').*

12 At the outset, Mr. Sridharan submitted that :

(a) prayer clauses - (a) and (b) are answered by a Division

Bench of this Court in ***Macrotech Developers Ltd. V/s. Principal Commissioner of Income Tax***[1]. Mr. Sridharan of course clarified that the Revenue has filed a Special Leave Petition in the Apex Court which is yet to be taken up for admission. Therefore, the law as laid down by *Macrotech* (Supra) holds the field;

(b) Section 3 of the DTVSV Act provides for a schedule containing revised payment obligations for applicants. In essence, the DTVSV Act provided for a framework in which declarants would be given an opportunity to settle pending disputes through a cost-effective, timely and non-adversarial framework;

(c) Section 9 of the DTVSV Act lists the cases whereby the DTVSV Act will not be applicable. Section 9(a)(ii) of the DTVSV Act provides that the provisions of the Act shall 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. This makes it apparent that the bar under the provision is applicable only to those cases where prosecution has been initiated in respect of "tax arrear" as defined under the DTVSV Act;

(d) Section 2(1)(o) of the DTVSV Act defines "tax arrear". Tax arrear means 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

1. (2021) 126 taxmann.com 1 (Bombay)

determined under the provisions of the Act. On a combined reading of Section 9(a)(ii) and Section 2(1)(o) of the DTVSV Act, it is abundantly clear that the bar on filing of declaration under the DTVSV Act is only when prosecution initiated by the Income Tax Department realtes to tax arrears and not for any prosecution in relation to an assessment year per se;

(e) respondent no.1 has rejected the declaration filed by petitioner on the erroneous presumption that petitioner was an ineligible declarant in view of pending prosecution proceedings against petitioner, whereas the subject prosecution is not related to the tax arrear in respect of which declaration was filed;

(f) in view of Section 9(a)(ii) of the DTVSV Act, it cannot have been the intent of the statute to exclude resolution of disputes under the DTVSV Act in respect of those tax arrears for which prosecution has not been initiated. If the intent was to prohibit resolution of disputes under the DTVSV for a person against whom prosecution has been initiated, then the bar would have been across time period, not just limited to a particular assessment year.

13 The line of arguments of Mr. Sharma was as per the stand taken in the affidavit in reply of one Devinder Kumar Gupta, PCIT, affirmed on 17th February 2023. Of course Mr. Sharma stated in fairness that answer given to question no.73 contained in the clarification dated 4th December 2020 vide Circular No.21/2020 has been held to be an improvement over

the answer given to question no.22 and that it was not in alignment with the legislative intent as held in *Macrotech* (Supra). Mr. Sharma also submitted that (a) admittedly on the date of filing of declaration, prosecution had already been initiated against petitioner on account of tax arrear and, therefore, respondent had rightly rejected the declaration; (b) in view of sanction given by PCIT to prosecute petitioner and its Directors, where it is mentioned that there was a willful attempt to evade payment of tax, it would be covered under the definition of tax arrear; (c) the sanction letter dated 7th December 2017 clearly states the assessee has paid only Rs.45 lakhs against the outstanding demand of Rs.6.78 Crores for Assessment Year 2010-2011 and for Assessment Year 2011-2012 nothing has been paid against the outstanding demand of Rs.7 lakhs.

Mr. Sridharan responded that to get over the limitations on the time to pay under the DTVSV Act expiring, petitioner has, without prejudice to the rights and contentnions, paid the entire tax component of the demands for Assessment Years 2010-2011 and 2011-2012.

14 Mr. Sharma clarified that acceptance of the declaration on the directions of this Court, which is again without prejudice to the pending SLP, will not put an end to the prosecution in view of Section 6 of the DTVSV Act. Mr. Sridharan states that that is a separate aspect which can be argued by the parties before the appropriate forum and that Court will decide the matter in accordance with law. Of course we also do not express

any view or opinion on this point.

15 The moot question before us, therefore, is whether the provisions of DTVSV Act shall apply to petitioner. *Macrotech* (Supra) answers and relying on the said judgment, we would say the DTVSV Act shall apply to petitioner.

16 At the outset, we should keep in mind that the object of the DTVSV Act was to reduce litigations in direct taxes. Under the said Act, a tax payer would be required to pay the amount of disputed taxes and would get complete waiver of interest and penalty subject to payment by the specified date. The objects and reasons of the DTVSV Bill when introduced in the Parliament which later on became the DTVSV Act 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.

Therefore, the purpose was to reduce tax disputes pertaining to direct taxes.

17 Tax arrear has been defined in Section 2(1)(o) as under :

"(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."

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. Section 9 of the DTVSV Act provides for instances where DTVSV Act would not be applicable. Section 9(a) (relevant to this case) of the DTVSV Act 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.*

18 Petitioner's case would come under sub-clause (ii) of Section 9(a) which says provisions of the DTVSV 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. As held in *Macrotech* (Supra), the intention of the legislature was that the provisions of DTVSV Act shall not, in view of Section 9(a)(ii), 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.

19 In *Macrotech* (Supra) also the facts were that the prosecution had been initiated against petitioner therein under Section 276C(2)of the Act because of the delayed payment of the balance amount of the self assessment tax. The Court held that 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 and hence, petitioner in that case was declared to be entitled to file a declaration under the DTVSV Act. Paragraphs 27.2, 29.1 to 34 read as under :

> *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.

xxxxxxxxxxxxx

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.*
>
> *(emphasis supplied)*

20 In *Macrotech* (Supra) the assessee had not paid even the self assessment tax on time but deposited it later with interest after the due date.

In the case at hand, assessee had paid self assessment tax but has not paid the demand made due to re-assessment/re-opening of

assessment and has challenged the order now pending before ITAT. As permissible under Office Memorandum [F. No.404/72/93-ITCC] dated 31st July 2017, petitioner had even deposited 20% of the demand and hence, is not an assessee in default. Later, Mr. Sridharan stated that the entire amount has been paid.

We must also note that under Section 9(a)(ii) of DTVSV Act, the only exclusion visualised is a pendency of prosecution in respect of tax arrear relatable to an assessment year as on the date of filing the declaration and not pendency of a prosecution in respect of an assessment year on any issue.

21 In the petition before us also prosecution has been instituted against petitioner under Section 276C(2) of the Act. Therefore, in our view, *Macrotech* (Supra) will squarely apply to the facts and circumstances of this case.

22 The declaration of petitioner filed on 31st January 2021 for Assessment Years 2010-2011 and 2011-2012 would have to be decided by respondent no.1 in conformity with the provisions of DTVSV Act.

23 Petition is accordingly allowed to the extent indicated above.

24 Petition disposed. There shall be no order as to costs.

WRIT PETITION (L) NO.5292 OF 2021

25 In view of our findings in Writ Petition No.1558 of 2022 above, Mr. Sridharan states that this petition has become infructuous.

26 Petition disposed.

(DR. N. K. GOKHALE, J.) (K. R. SHRIRAM, J.)

Gauri Gaekwad