

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX REFERENCE NO.66 OF 2000

TRUSTEE OF SAURASHTRA TRUST)...APPELLANT

V/s.

**THE DIRECTOR OF INCOME-TAX)
(EXEMPTION))...RESPONDENT**

Mr.Sunil Lala a/w. Mr.Atul K. Jasani, Advocate for the Applicant.

Mr.A.R.Malhotra, Advocate for the Respondent.

**CORAM : S.V.GANGAPURWALA &
A. M. BADAR, JJ.**

**DATE : Reserved on : 6th July 2017
Pronounced on : 4th August 2017**

JUDGMENT : (PER A.M.BADAR, J.)

1 On allowing appeals by the Revenue and / or rejection of Cross Objections filed by the assessee, the assessee moved an application seeking reference of following two questions of law for decision of this court :

Question in R.A.No.293/Mum/97

Whether, on the facts and in the circumstances of the case, the Tribunal was justified in allowing the appeal of the Revenue and confirming penalty of Rs.2,90,409/- u/s.273(2)(a) ?

Question in R.A.No.292/Mum/97

Whether, on the facts and in the circumstances of the case, the Tribunal was justified in allowing the appeal of the Revenue and confirming penalty of Rs.26,34,216/- u/s.140A(3) ?

2 By this reference, decision of this court is sought on these two questions of law referred by the Income Tax Appellate Tribunal (hereinafter ITAT), Mumbai, at the instance of the assessee. Brief facts leading to the reference of two questions of law are thus :

(a) The assessee is a Trust founded in or about 1941 and it has been publishing newspapers and other periodicals since then. According to the assessee/Trust, it conducts activities for welfare of people of India in general and people from Kutch, Khatiawad

and Gujarat, in particular. For educating the masses, it is publishing newspapers and periodicals in Mumbai as well as Gujarat. It is case of the assessee/Trust that the income earned by it is exempt from the liability of payment of income tax. From Assessment Year 1941-42 till Assessment Year 1961-62 the income of the assessee/Trust was exempted under Section 4(3)(i) of the Income Tax Act, 1922, (hereinafter I.T.Act) as publishing of newspapers falls under the definition of General Public Utility. Subsequently, in the I.T.Act, 1961, the term “Charitable Purpose” came to be defined in Section 2(15) which included relief of poor, education, medical relief and the advancement of any other object of general public utility not involving carrying on of activity of profit.

(b) By following decision of the Hon'ble Supreme Court in the matter of Sole Trustee, Loka Shikshana Trust vs. CIT [1975] 101 ITR 234 (SC) and Indian Chamber of Commerce vs. CIT [1975] 101 ITR 796 (SC) the ITAT vide its order passed in the month of November 1976 denied exemption to the assessee /

Trust under Section 11 of the I.T.Act, 1961, by holding that the assessee/Trust had earned profit from the activity of distribution of newspaper, and therefore, it is not liable for exemption under Section 11 of the I.T.Act, 1961.

(c) The Hon'ble Supreme Court in the matter of **Additional Commissioner of Income Tax, Gujarat, vs. Surat Art Silk Cloth Manufacturers Association** reported in **(1980) 121 ITR 1 (S.C.)** disapproved the majority view of the **Sole Trustee, Loka Shikshana Trust (supra)** and **Indian Chamber of Commerce (supra)**. It is held therein that where the purpose of a Trust or Institution is relief of the poor, education or medical relief, the requirement of definition of "Charitable Purposes" would be fully satisfied, even if an activity for profit is carried on in the course of the actual carrying out of the primary purpose of the Trust or Institution. The learned ITAT, in view of the rulings of the Hon'ble Supreme Court in the matter of **Surat Art Silk Cloth Manufacturers Association (supra)**, instead of denying the exemption under Section 11 of the I.T.Act, 1961, for the

Assessment Year 1975-76 to Assessment Year 1978-79 remanded the matter to the Assessing Officer to re-examine the issue.

(d) On 5th June 1982, for the assessment year 1983-84, the assessee/Trust filed an estimate of income by estimating its income as Nil. The regular assessment was completed under Section 143(3) of the I.T.Act, 1961, on 17th October 1986 assessing the income of the assessee / Trust at Rs.84,65,270/-. The assessment came to be revised under CIT's order under Section 264 dated 14th December 1987 and total income came to be determined at Rs.6,26,52,031/-. The Assessing Officer, on perusal of the estimate of income for the purpose of advance tax submitted by the assessee/Trust, found it to be untrue. On being satisfied that the assessee/Trust has reason to believe the same to be untrue, the Assessing Officer imposed penalty of Rs.2,90,409/- to the assessee /Trust by invoking provisions of Section 273(2)(a) of the I.T.Act, 1961. Similarly, for the said assessment year, the Assessing Officer further found that the assessee/Trust did not pay the self assessment tax as was payable under Section 140A(1) of

the I.T.Act, the Assessing Officer imposed penalty of Rs.26,34,216/- on the assessee/Trust by invoking provisions of Section 140A(3) of the I.T.Act, 1961.

(e) In June 1985, the learned ITAT denied exemption claimed under Section 11 of the I.T.Act to the assessee/Trust for the Assessment Year 1975-76 to Assessment Year 1978-79. The Revenue, as such, was assessing the income earned by the assessee /Trust by publishing newspapers and periodicals as taxable income.

(f) Feeling aggrieved by the action of imposition of penalty under Section 273(2)(a) and under Section 140A(3) of the I.T.Act by the Assessing Officer, the assessee/Trust filed two separate appeals before the Commissioner of Income Tax (Appeals) (hereinafter CIT (Appeals)) challenging these orders. Both those appeals came to be allowed by the CIT (Appeals) and penalty levied by the Assessing Officer under Section 273(2)(a) and under Section 140A(3) came to be cancelled.

(g) The learned CIT (Appeals) was pleased to hold that there was no liability for payment of self assessment tax on the basis of the return of income filed by the assessee/Trust. It is further held that no penalty had been imposed in the past years under Section 140A(3) of the I.T.Act and the return of income filed for earlier years had not been decided by the Tribunal till June 1985. As such, there was no case for holding that the assessee/Trust should have declared the income in its return of income and should have filed the self assessment tax under Section 140A(1) of the I.T.Act. So far as penalty under Section 273(2)(a) is concerned, the learned CIT (Appeals) was pleased to hold that the assessee/Trust was relying on the decision of the Apex Court in the matter of **Surat Art Silk Cloth Manufacturers Association (supra)** for contending that its income was exempted from payment of the tax, and therefore, it was not liable to pay any advance tax. There was no malafide intention on the part of the assessee/Trust in filing NIL estimate of the advance tax and no penalty was levied in past assessment years on the assessee/Trust under Section 273(2) (a) of the Income Tax Act.

(h) The Revenue carried both the orders passed in appeals by the learned CIT (Appeals) cancelling the penalty imposed on the assessee/ Trust by filing two separate appeals bearing numbers Income Tax Appeal No.1233 and 1234 (Bom) of 1990 before the learned ITAT, Mumbai. Upon getting notice of these appeals, the assessee/Trust filed cross objection which came to be registered as Cross Objection No.537/Bom/95. The cross objection came to be filed with an averment that the CIT (Appeals) did not consider some of the pleas advanced by the assessee/Trust in the appeals challenging the penalty levied under Section 143A(3) of the I.T.Act, 1961. After hearing the parties on 22nd January 1997, the learned ITAT allowed both the appeals filed by the Revenue and restored penalty imposed on the assessee/Trust under Section 273(2)(a) and under Section 140A(3) of the I.T.Act, 1961. Hence, cross objection filed by the assessee/Trust came to be dismissed.

(i) In its common judgment and order the learned ITAT, so far as penalty under Section 140A(3) is concerned, while confirming

the said penalty and allowing the appeal, has held that the question is whether the assessee/Trust really had a reasonable cause or belief that its income was totally exempted from the tax. The assessee/Trust cannot take shelter for refusal to pay tax by taking shelter of the decision of the Hon'ble Apex Court. The intention of the assessee/Trust was to withhold payment of lakhs of rupees as tax for number of years. The assessee/Trust had no reasonable cause or belief in not paying self assessment tax under Section 140A(1) of the I.T.Act, 1961. While upholding the penalty imposed under Section 273(2)(a) of the I.T.Act, 1961, the learned ITAT was pleased to hold that while filing the estimate of its advance tax, the assessee/Trust did not have a bonafide belief that its entire income is exempt from payment of tax, in view of the fact that for forty years it was being held liable for payment of the tax as the assessee/Trust was not falling in the category of the "Charitable Trust" in order to claim exempt income. It is further held that merely because the appeal has been filed before the Tribunal, the assessee/Trust cannot be said to hold a reasonable belief that its income is not chargeable to tax, and therefore, it is

not liable to declare it in an estimate of the advance tax.

(j) The assessee/Trust, thereafter, preferred an application under Section 256 of the I.T.Act for referring the two questions of law, as stated in foregoing paragraph of decision of this court. That reference application came to be allowed by the learned ITAT vide order dated 29th November 1999.

3 Before adverting to the arguments advanced by the learned advocates appearing for the parties, it would be apposite to quote the relevant provisions of law for better understanding the controversy. Section 140A of the I.T.Act, 1961, reads thus :

“140A. (1) Where any tax is payable on the basis of any return required to be furnished under section 139 or section 148 after taking into account the amount of tax, if any, already paid under any provision of this Act, the assessee shall be liable to pay such tax before furnishing the return and the return shall be accompanied by proof of payment of such tax.

(2) After a regular assessment under section 143 or section 144 has been made, any amount paid under sub-section (1) shall be deemed to have been paid

towards such regular assessment.

(3) If any assessee fails to pay the tax or any part thereof in accordance with the provisions of sub-section (1), the Income-Tax Officer may direct that a sum equal to two per cent of such tax or part thereof, as the case may be, shall be recovered from him by way of penalty for every month during which the default continues :

Provided that before levying any such penalty, the assessee shall be given a reasonable opportunity of being heard.”

Relevant portion of Section 273(2)(a) of the I.T.Act, 1961 reads thus :

“273.(1)

(2) If the Income Tax Officer, in the course of any proceedings in connection with the regular assessment for the assessment year commencing on the 1st day of April, 1970, or any subsequent assessment year, is satisfied that any assessee -

(a) has furnished under sub-section (1) or sub-section (2) or sub-section (3) or sub-section (5) of Section 209A, or under sub-section (1) or sub-section (2) of section 212, an estimate of the advance tax payable by him which he knew or had reason to

believe to be untrue, or

(aa)

(b)

(c)

he may direct that such person shall, in addition to the amount of tax, if any, payable by him, pay by way of penalty a sum"

4 We have heard the learned advocate appearing for the assessee/Trust. By taking us through the order of reference as well as order of the learned CIT (Appeals) as well as the learned ITAT, the learned advocate submitted that imposition of the penalty is not a routine matter. The learned ITAT had taken incorrect view in allowing the appeal of the Revenue and upholding the penalty levied on the assessee/Trust under Section 273(2)(a) and under Section 140A(3) of the I.T.Act. The learned advocate argued that, infact, the position of law is clear from the following judgments / orders :-

i) **Commissioner of Income Tax vs. Nayan Builders and Developers [2015] 56 taxmann.com 335 (Bombay)**

ii) Order of this court dated 17th February 2017 in **Income Tax**

Appeal No.1498 of 2014 in the matter of Commissioner of Income Tax – 21 vs. M/s.Advanta Estate Development Pvt. Ltd.,

iii) Order of this court dated 2nd December 2015 in Income Tax Appeal No.851 of 2014, in the matter of Commissioner of Income Tax – 8 vs. M/s.Aditya Birla Power Co. Ltd.,

iv) Order of Hon'ble Delhi High Court dated 5th October 2010 in Income Tax Appeal No.240 of 2009, Commissioner of Income Tax vs. Liquid Investment & Trading Co.,

v) Judgment dated 11th January 2017 of Hon'ble Madhya Pradesh High Court in Income Tax Appeal No.89 of 2016, Pr.Commissioner of Income Tax vs. R.K.Gupta Contractors & Engineers Pvt. Ltd. with connected matters,

vi) the judgment dated 10th May 2017 of Hon'ble Rajasthan High Court in the matter of Pr.Commissioner of Income Tax vs. M/s.Modern Denim Ltd.,

vii) the judgment reported in [2017] 79 taxmann.com 344 of Karnataka High Court, in the matter of Commissioner of Income Tax vs. Ankita Electronic (P) Ltd.

5 It is argued that when the levy of penalty was debatable in the light of the fact that previously no penalty was imposed on the assessee/Trust, the learned ITAT was not justified in confirming the penalty imposed by the Assessing Officer. The issue was debatable and as such it cannot be said that the assessee /Trust had reason to believe that its estimate of advance tax or return of income showing exemption was untrue. It cannot be said that the assessee/Trust failed to pay the self assessment tax making it liable to pay penalty. Infact, there was no liability to pay self assessed tax as the assessee claimed exemption under Section 11 of the I.T.Act, 1961.

6 It is further argued that the penalty under Section 140A(3) is different from the penalty under Section 273(2)(a) but the learned ITAT applied the same reasoning for confirming both these penalties. Bonafides of the assessee / trust were not appreciated by the learned ITAT. Similarly, the Tribunal, in past, despite judgments of the Hon'ble Apex Court in the matter of

Surat Art Silk Cloth Manufacturers Association (supra)

remanded the matter in respect of the earlier assessment years and as such, the assessee / Trust was under bonafide belief that income earned by it is not liable to tax. There was difference of opinion between the Hon'ble Judges of the Supreme Court and subsequently in the matter of **Surat Art Silk Cloth Manufacturers Association (supra)**, judgments in the matter of **Sole Trustee, Loka Shikshana Trust (supra)** and **Indian Chamber of Commerce (supra)** came to be overruled. As such, it cannot be said that, the assessee / Trust had reason to believe its estimate of advance tax as untrue or that it was liable to pay self assessment tax.

7 The learned advocate appearing for the Revenue countered the submissions so advanced by contending that ratio of the judgment in the matter of **Surat Art Silk Cloth Manufacturers Association (supra)** is crystal clear and the same is not in respect of the activity of publishing newspaper and earnings therefor. It is in respect of promotion of commerce and

trade in silk and as such, the question of debatable views in the matter of income earned by the assessee / Trust does not arise. It cannot be said that the assessee / Trust was under bonafide belief that its income would not be chargeable to the tax. The liability to pay tax on its income ought not to have been decided by the assessee / Trust itself and there was no reasonable basis for declaring its income as exempt by the assessee / Trust. The learned advocate for the Revenue relied on order dated 21st August 2012 passed by the Division Bench of this court in **Income Tax Appeal No.2753 of 2010** in the matter of **The Commissioner of Income Tax – 10, Mumbai vs. M/s.Wander Pvt. Ltd.** and the order passed by the ITAT, New Delhi, in **Income Tax Appeal No.1395/DeL/2009** in the matter of **Assistant Commissioner of Income Tax vs. M/s.Khanna & Annadhanam** decided on 22nd July 2011 in order to buttress his contention that the entire exercise by the assessee / Trust in not paying the self assessment tax and in submitting NIL estimate of the advance tax is an attempt to evade the tax liability.

8 We have carefully considered the rival submissions and also gone through the record made available as well as written submissions placed on record by both parties. We have also gone through the case laws relied by both parties.

9 At the outset, it needs to be noted that the facts involved in the instant reference are not in dispute. Undisputedly, the assessee/Trust came to be formed in the year 1941 and it is involved in activities of publishing newspaper and periodicals. It is undisputed that the assessee/Trust was earning income from its activities of publishing newspapers and periodicals and was claiming its income to be exempt since its formation. At this juncture, it is apposite to note that in the matter of **Surat Art Silk Cloth Manufacturers Association (supra)** the Hon'ble Apex Court had an occasion to examine the term "Charitable purpose." It is relevant to quote the observations of the Hon'ble Apex Court in that regard which reads thus :

“At this stage, it will be appropriate to point out that the question whether a trust is created or an institution is established for a charitable purpose

falls to be determined by reference to the real purpose of the trust or the institution and not by the circumstance that the income derived can be measured by standards usually applicable to a commercial activity. The quantum of income is no test in itself. It may be the result of an activity permissible under a truly charitable purpose for, as has been observed, a profitable activity in working out the charitable purpose is not excluded. I am unable to agree, with respect, with all that has fallen from H. R. Khanna and A. C. Gupta, JJ. in [Sole Trustee, Loka Shikshana Trust v. CIT, \[1975\] 101 ITR 234\(SC\)](#) that the terms of the trust must impose restrictions on making profits, otherwise the purpose of the trust must be regarded as involving the carrying on of a profit making activity. On the contrary, I find myself in agreement with Beg, J. to the extent that he says, in the same case, that it is the genuineness of the purpose, that it is truly charitable, which determines the issue. It seems necessary to me that a distinction must constantly be maintained between what is merely a definition of "charitable purpose" and the powers conferred for working out or fulfilling that purpose. While the purpose

and the powers must correlate, they cannot be identified with each other.”

It is, thus, held by the Hon'ble Apex Court that the quantum of its income is not the test to determine whether the Trust is created for a charitable purpose. What is relevant is the object and purpose of creation of the Trust.

10 As per provisions of Section 273(2)(a) of the I.T.Act, 1961, a false estimate or failure to pay advance tax makes an assessee liable for penalty. However, such penalty is leviable after hearing the affected party and only when the Assessing Officer comes to the conclusion that the assessee knew or had reason to believe that the estimate of advance tax submitted by the assessee is untrue. Similarly, Section 140A(1) enjoins a assessee to submit the returns of income after assessing the tax and after paying the tax prior to furnishing the return of income. The return of income of the assessee is required to be accompanied by proof of payment of self assessed tax. If the assessee fails to pay such self assessed tax, then after hearing the assessee, the Income Tax Officer can direct him to pay penalty as prescribed by sub-section (3) of

Section 140A(1) of the I.T.Act, 1961. In the case in hand, undisputedly, the assessee/Trust has not submitted any estimate of advance tax by declaring estimated taxable income and by paying advance tax as per estimate of the income offered for the tax for the assessment year 1983-84. Ultimately, in the original assessment it was found that the assessee/Trust had earned income of Rs.84,65,270/- which came to be revised under orders of the CIT (Appeals) under Section 264 of the Income Tax Act, 1961, to Rs.62,65,203/-. The assessee/Trust claimed that income earned by it by the activity of publishing newspaper and periodicals is an exempt income, it being a Trust meant for “Charitable purpose.” However, the record reveals that since beginning the Revenue was treating the income earned by the assessee/Trust as taxable. It is worthwhile to mention that from the assessment year 1962-63 onwards, in view of specific definition of the term “Charitable purpose” as found in Section 2(15) of the I.T.Act, 1961, the income earned by the assessee/Trust came to be assessed for the income tax. By enactment of the Income Tax Act of 1961, the term “Charitable

Purpose” came to be defined under Section 2(15) of the said Act. It is, thus, clear that to the knowledge of the assessee / Trust, since last about 21 years, that is from Assessment year 1962-63 to Assessment year 1982-83, consistently, the Revenue is treating the income earned by the assessee / Trust as taxable income by holding that the income earned by the assessee / Trust by publishing newspaper and periodicals is not the income exempt from payment of the income tax. Attempt of the assessee / Trust to show that its income is exempt from the liability of payment of income tax, taken from the year 1962-63 onwards, consistently failed. It is borne from the record that in November 1976 the learned ITAT decided appeals of the assessee / Trust in respect of the assessment years 1962-63 to 1970-71 rejecting the claim of the assessee / Trust for having earned income exempted from the liability of payment of income tax, on the presume that it being a charitable Trust. This claim of the assessee / Trust came to be negated by holding that the income from activities relating to printing, publishing newspapers is not exempted under Section 11 of the Income Tax Act, 1961. This makes it explicitly clear that the assessee / Trust was well aware of the fact that even the

learned ITAT had given the verdict that the income earned by the assessee/Trust cannot be exempted from the liability of payment of income tax. This verdict of the learned ITAT for the assessment years 1962-63 to 1970-71 was very much available to the assessee/Trust in November 1976 itself. In the wake of this factual backdrop, the act of the assessee/Trust in not paying self assessment tax by returning its income and filing “NIL” estimate of the advance tax cannot be said or termed as bonafide act. If the assessee had taken due care and acted authentically or genuinely by keeping in its mind the verdict of the learned ITAT in respect of assessment years 1962-63 onwards, then it would not have acted in such a manner of declaring “NIL” estimate of the advance tax and non-payment of the self assessment tax while returning its income for the assessment year 1983-84. The excuse sought to be given by the assessee/Trust that it was swayed by the verdict of the Apex Court in the matter of Surat Art Silk Cloth Manufacturers Association (supra) appears to be a lame excuse in order to avoid the tax liability and depriving the Revenue its due share in the taxable income earned by the assessee/Trust.

The verdict in the said matter was pronounced long back on 19th November 1979. Till the Assessment Year 1983-84 the assessee/Trust could not demonstrate before the authorities of the Income Tax Department that in view of the ratio and judgment of the Apex Court in the matter of Surat Art Silk Cloth Manufacturers Association (supra), it is earning exempt income and therefore not liable to pay the advance tax or the self assessment tax. The ITAT while deciding appeals of earlier period has never held that the assessee/Trust earns exempt income, it being a charitable Trust, and therefore, not liable to pay income tax.

11 After decision of the ITAT in November 1976 in respect of assessment year 1962-63 to 1970-71 for subsequent years, the assessee/Trust never paid advance or self assessment tax. It appears that despite this fact the Revenue had not imposed any penalty on it. This resulted in continuation of non-payment of the income tax by the assessee/Trust on the pretext that its income is exempt. The act on the part of the assessee/Trust gives an

indication that as the Revenue was not imposing any penalty on its income held to be taxable in past years, a modus was adopted to submit "NIL" estimate of the advance tax and non-payment of the self assessment tax, while filing return of its income. The assessee/Trust ought not to have assumed for itself that it is not liable to pay tax on its income, particularly in the light of past verdicts of the authorities in its own matter. Reversal of order of penalty for the assessment year 1982-83 by the CIT (Appeals) vide its order dated 30th September 1987 is of no avail for the assessment year 1983-84 with which we are concerned. So also, non-levying penalty in the past years is no ground to conclude that the assessee/Trust was not having any reason to believe that the estimate of advance tax payable by it is untrue or that it had bonafide belief that income earned by it is an exempt income not liable to be taxed at the hands of the Revenue. At this juncture, it is apposite to note that despite past orders of several authorities that the income earned by the assessee/Trust is liable for tax at the hands of the Revenue, even in the assessment year 1983-84 return of income came to be filed by the assessee/Trust without

paying self assessed tax but by making note in the statement of computation of income that the income is exempt under Section 11 of the I.T.Act, 1961. The assessee/Trust had given complete go bye to earlier decisions of the learned ITAT and other authorities in its own case which were available to the assessee/Trust from the assessment year 1962-63 onwards.

12 Section 140A(1) of the Income Tax Act, 1961, contemplates payment of tax on the basis of any return required to be furnished. The return contemplated under Section 140A is true and faithful return. This means that the return must contain declaration regarding the income offered for the tax. Though the assessee/Trust was knowing from its past experience that its income was liable for tax, despite filing the return under Section 139 of the I.T.Act, 1961, the same was not accompanied by proof of payment of the tax. Rather, no tax was paid prior to filing of the return of self assessment and only exempt came to be claimed. In view of the fact that the assessee/Trust was earning income and it was made subjected to payment of tax by the Revenue, the act of

the assessee/Trust cannot be said to be genuine or bonafide act. Till the assessment year 1983-84, the claim of the assessee/Trust that in the light of verdict of the Apex Court in the matter of **Surat Art Silk Cloth Manufacturers Association (supra)**, income earned by it is exempted from the liability of payment of the tax was never upheld by the authorities under the I.T.Act, 1961. The petitioner cannot interpret the finding of Apex Court erroneously and say it bonafidely believed that its income is exempted. As such, by no stretch of imagination it can be said that the assessee/Trust was acting bonafidely having belief that it is earning an exempt income, and therefore, the assessee/Trust is not liable either to pay advance tax or the self assessment tax.

13 It is relevant to note that while confirming the penalty levied on the assessee/Trust under Section 273(2)(a) as well as under Section 140A(3) of the Income Tax Act 1961, the learned ITAT has thoroughly examined the matter and concluded that as for last forty years, income of the assessee/Trust was held to be taxable by several decisions rendered by the Tribunal which were

not upset till then, there is no scope for holding that the assessee/Trust was prevented by a reasonable cause from filing its estimate of advance tax and in not paying the tax on the basis of self assessment. The learned ITAT further held that there is no provision in law to conclude that the penalty under Section 140A(3) cannot be imposed if the proceedings were not initiated during the course of original assessment or that the return came to be filed under Section 239 of the I.T.Act, 1961. The learned ITAT further held that even if the claim is for an exemption being a charitable society, the society is bound to file its return under section 139(4)(a), if its income without taking into account the provisions of Sections 11 and 12 is above the taxable limit. The learned ITAT held that the assessee/Trust is not covered by the provisions of Section 2(15) of the I.T.Act, 1961 and hence the return cannot be considered as one filed under Section 239 of the I.T.Act, 1961. We do not find any illegality or perversity in such finding. It cannot be said that the assessee/Trust was under bonafide belief that its activities were nontaxable and therefore there was no reason for it to believe that its estimate of advance

tax was untrue or that it was under bonafide and reasonable belief that its income is exempt. To our mind, that which an ordinary person of average intelligence and sound mind would believe is a reasonable belief. Existence of reasonable basis to believe is sine-qua-non for ascertaining whether a person had reasonable belief. However, in the case in hand, as held by the learned ITAT, for more than forty years, income of the assessee/Trust was being held as a taxable income by the authorities and it could not get benefit of the judgment of the Apex Court in **Surat Art Silk Cloth Manufacturers Association (supra)** till the assessment year 1983-84 upon consideration of its case on factual premises. As such, it cannot be held that the assessee/Trust had compelling reason to consider its income as exempt from the tax liability. The history of this assessee/Trust with repeated non-compliance despite orders of the learned ITAT must weigh negatively on the assessee bonafides. The length of period during which the assessee/Trust was denied benefit of exemption does not allow us to hold that the assessee/Trust had reasonable belief to consider its income entitled for exemption, resulting in consequential

actions of filing “NIL” estimate of advance tax and non-payment of the self assessment tax.

14 In the light of foregoing discussion, we hold that the ITAT was justified in allowing the appeals of the Revenue and confirming penalty levied on the assessee/Trust under Section 273(2)(a) and under Section 140A(3) of the I.T.Act, 1961.

15 In this view of the matter, the reference is answered in Affirmative.

(A. M. BADAR, J.)

(S.V.GANGAPURWALA), J.)