IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No. 21 of 1996

For Approval and Signature:

HONOURABLE MR.JUSTICE D.A.MEHTA
HONOURABLE MR.JUSTICE Z.K.SAIYED

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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COMMISSIONER OF INCOME TAX - Applicant(s)
Versus
KUTCH MINERALS - Respondent(s)

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Appearance :
MR MANISH R BHATT for Applicant(s) : 1,
SERVED BY RPAD - (N) for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA

and

HONOURABLE MR.JUSTICE Z.K.SAIYED

Date : 29/01/2008

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE D.A.MEHTA)

1. The Income-tax Appellate Tribunal, Ahmedabad Bench "B" has referred the following question under Section 256 (1) of the Income-tax Act, 1961 ("the Act") at the instance of Revenue :

> "Whether, the Appellate Tribunal is right in law and on facts in holding that in respect of unpaid royalty to Government the provisions of Section 43B are not attracted?"

2. The Assessment Year 1985-86 and the relevant Accounting period is year ending 30.6.1984. The Assessee, a registered Firm, claimed deduction of royalty paid to the Government on the basis of mercantile system of accounting by debiting appropriate amount in the accounts. The deduction was disallowed by the Assessing Officer by invoking the provisions of Section 43-B of the Act qua unpaid royalty amount. The Commissioner (Appeals) deleted the addition and hence the Revenue carried the matter in Appeal before the Tribunal. The Tribunal upheld the order made by the Commissioner (Appeals) on the basis of its earlier order in the case of another assessee - one Gujarat State Forest Development Corporation.

3. Mr. M.R.Bhatt, learned Senior Standing Counsel for the Applicant – Revenue fairly pointed out that the issue now stands concluded against

Revenue by virtue of Judgment of the Apex Court in the case of **STATE OF WEST BENGAL & ANR. V/s. KESORAM INDUSTRIES LTD. & OTHERS,** reported in (2004) 266 ITR 721, with special reference to the observations from Page No.762 onwards.

4. Once the Apex Court has categorically recorded that the Royalty is not a tax the provision of Section 43-B of the Act cannot be invoked. The said section requires that an amount of tax, which is otherwise deductible expenditure, is not to be allowed deduction unless and until actually paid. However, royalty not being a tax, the prohibition laid down by Section 43-B of the Act will not apply.

5. Hence, the Appellate Tribunal was right in law in holding that in respect of unpaid royalty the provisions of Section 43-B of the Act are not attracted. The question referred for the opinion of this Court is, therefore, answered in affirmative i.e. in favour of the assessee and against the Revenue. Reference stands disposed of accordingly with no order as to costs.

(D.A.MEHTA, J.)

(Z.K.SAIYED,J.)

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