

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**

**TAX APPEAL No. 2186 of 2009**

**With**

**CIVIL APPLICATION No. 470 of 2009**

**In TAX APPEAL No. 2186 of 2009**

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**M/S M KANTILAL EXPORTS - Appellant(s)**

**Versus**

**ASSISTANT COMMISSIONER OF INCOME TAX - Opponent(s)**  
=====

**Appearance :**

MR JP SHAH with MR MANISH J SHAH for Appellant(s) : 1,  
MR MR BHATT, SENIOR ADVOCATE with MRS MAUNA M BHATT  
for Opponent(s) : 1,  
=====

**CORAM : HONOURABLE MR.JUSTICE K.A.PUJ**

**and**

**HONOURABLE MR.JUSTICE RAJESH  
H.SHUKLA**

**Date : 04/12/2009**

**ORAL ORDER**

**(Per : HONOURABLE MR.JUSTICE K.A.PUJ)**

**Order in Tax Appeal:**

**ADMIT.**

**Order in Civil Application:**

1.0 The applicant has filed this application for stay under O. 41 R. 5 and R. 6(2) of the Code of Civil Procedure praying for stay of the demand of Rs.9,86,37,022/- till the final disposal of the Tax Appeal. During the course of hearing of the Stay Application, the applicant, through its partner, has filed an affidavit cum undertaking praying for release of stock of diamond seized in the recovery proceedings on 12<sup>th</sup> November 2009.

2.0 Mr. JP Shah, learned Advocate appearing for the applicant has submitted that for Assessment Year 2001-02, the Assessing Officer accepted the Income tax Return of the applicant of Rs.65,36,135/-. He, however, has added an amount of Rs.17,50,00,000/- by way of unexplained expenditure in purchase of rough diamonds under Sec. 69C of the Income tax Act, 1961 on the basis of pure typographical mistake in the Audit Report under Sec. 44AB of the Act. In appeal, from the said order of the Assessing Officer, the CIT (Appeals) deleted the said addition of Rs.17.50 Crores holding that 430701.14 is typographical mistake in place of 290701.14 carats. The Tribunal reversed the order of CIT (Appeals) and reinstated the addition of Rs.17.50 crores. The applicant has filed the Tax Appeal before this Court and said Tax Appeal is being admitted by this Court.

2.1 Mr. Shah further submitted that on dismissal of the appeal by the Tribunal, the Assessing Officer has issued a Demand Notice, directing the applicant to pay a demand of Rs.9,86,37,022/- within a period of five days of service of notice. He further submitted that to enforce the recovery of this demand, the stock of diamond worth Rs.10 crores has been seized and Bank Account has also been attached. The applicant has, therefore, filed the present Stay Application before this Court.

2.2 Mr. Shah further submitted that the Assessing Officer has already adjusted the refund of more than Rs.3 crores, which the applicant was entitled to. He further submitted that the applicant is prepared to file an undertaking before this Court that the properties belonging to the firm worth Rs.82 crores shall not be transferred or alienated till the pendency of appeal. He further submitted that, over and above, this undertaking and the security, the applicant has originally made a commitment before the Assessing Officer and prepared to pay an amount of Rs.10 lakhs every month till the appeal is heard by this Court. He has, therefore, submitted that the diamonds being stock in trade of the applicant cannot be seized as per the Departmental instructions. He, therefore, submitted that considering the facts of the case, the stay may be granted by this Court and the stock of diamond, which is seized by the Assessing Officer, may be ordered to be released forthwith.

3.0 Mr. MR Bhatt, learned Senior Counsel appearing for the Tribunal, on the other hand, has strongly objected to grant of any stay or to pass any order of release of stock of diamond. He further submitted that if the stock is ordered to be released, it is practically impossible for the Revenue to recover the demand from the respondent assessee. He further submitted that there is a huge outstanding demand against the group of companies amounting to more than Rs.77 crores. He further submitted that the Tribunal has already decided the appeal against respondent assessee and since it amounts to a money decree, the respondent assessee may be directed to deposit the amount before passing any order of release of stock of diamond.

3.1 He further submitted that no exceptional circumstances are pointed out by the respondent assessee, which require this Court to pass the order of release of the stock of diamond.

3.2 Mr. Bhatt has alternatively submitted that if the Court is not inclined to the above submissions of the Revenue, in that case, the respondent assessee may be directed to deposit the substantial amount towards outstanding dues. He further submitted that all the Directors of the respondent firm should also be directed to file their undertaking before the Court stating therein that, till the appeal is disposed of, they will not transfer or alienate any of the properties belonging to them. He further submitted that respondent assessee may be directed to maintain the stock of diamond, equivalent to the outstanding demand till the appeal is finally disposed of.

4.0 Having heard the learned Advocates appearing for the parties and having considered the rival submissions, we are of the prima facie view that the short point of dispute between the assessee and the Revenue on the basis of which huge addition of Rs.17.50 crores is made is that there is mistake in mentioning the figure of stock consumed according to the assessee, whereas, as per the Revenue's version, it is not a mistake but stock actually consumed by the respondent assessee, which was reflected in the books of account. Be that as it may, that is the subject matter of the appeal. However, looking to the fact that learned CIT (Appeals) has accepted the claim of the assessee, which was, of course, reversed by the Tribunal. Hence, on this aspect there are two different views prevalent amongst the appellate authority, and this Court will have to examine as to which view is correct.

5.0 In the above view of the matter, the only question, which has to be decided by the Court at this stage is, as to whether the respondent assessee deserves any relief qua the stay of demand, during the pendency of the appeal. From the facts, which emerge, it is apparent that the Assessing Officer has already adjusted the refund of more than Rs.3 crores against the outstanding demand. Moreover, the respondent assessee has already shown its willingness to pay Rs.10 lakhs every month till the appeal is

heard and/or the demand is paid. Not only that, an undertaking is filed by the partner of the respondent assessee, wherein, detailed description of the assets are given, which amount to more than Rs.82 crores. It is specifically stated in the said undertaking that all these assets will not be transferred or alienated during the pendency of the appeal. It is further stated that there is no encumbrance and/or any charge on these assets. We are, therefore, of the view that, that there are sufficient safeguards, so far as outstanding demand of the Revenue is concerned.

6.0 In the above view of the matter, we grant stay against recovery of the outstanding demand during the pendency of appeal, subject to the following conditions:

*i) The respondent assessee shall pay a sum of Rs.10 lakhs every month to the Revenue against its outstanding demand till the appeal is finally heard. This amount will be paid on or before 15<sup>th</sup> of every month. On deposit of the first instalment of Rs.10 lakhs, the stock of diamond, which is seized by the Assessing Officer, shall be released forthwith.*

*ii) The other partners of the respondent firm shall file an undertaking before this Court giving therein a detailed description of the assets belonging to them and further stating that they will not transfer or alienate those assets during the pendency of the appeal, a copy thereof, will be submitted to the Assessing Officer.*

*iii) The respondent firm shall maintain stock of diamond to the knowledge of the Assessing Officer, equivalent to the demand, outstanding, till the appeal is finally disposed of.*

6.1 Subject to the aforesaid terms and conditions, this Civil Application is allowed with no order as to costs.

7.0 Looking to the facts of the case, the **main matter** be listed for Final Hearing on **12<sup>th</sup> January 2009**.

[ K. A. Puj, J. ] [ Rajesh H. Shukla, J.