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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **<u>ITA 260/2017</u>**

PR. COMMISSIONER OF INCOME TAX- 11 ..... Appellant
Through: Mr. Zoheb Hossain, Advocate.

Versus

SHRI INDER PAL SINGH WADHAWAN ..... Respondent
Through: None.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE NAJMI WAZIRI

<u>O R D E R</u>

% 28.03.2017

1. The Revenue in its appeal under Section 260A of the Income Tax Act, 1960 (hereinafter to be referred as 'the Act') urges that the cancellation of disallowance under Section 40A(3) of the Act was, under the circumstances of the case, erroneous.

2. The facts for the purpose of this appeal are that amongst other expenses, the assessee had for Assessment Years 2007-08 claimed to have made payments to its suppliers. It relied upon the banker's cheques/pay orders issued for the purpose. The Assessing Officer was of the opinion that banker's cheques were not covered in any of the provisions of Rule 6DD of the Income Tax Rules as they were the account payee demand drafts under Section 40A()3) of the Act. The Commissioner of Income Tax (Appeals)

[CIT(A)] found that the expenses were genuine but agreed with the interpretation of the AO, which was concurred with by the Tribunal. This Court is of the opinion that the literal construction of Section 40A(3) sought to be canvassed by the Revenue is narrow and contrary to the provisions of the Negotiable Instruments Act, 1881, especially Section 5 thereof. Furthermore in ***Punjab & Sind Bank Vs. Vinkar Sahakari Bank Ltd. & Ors. (2001) 7 SCC 721,*** the Supreme Court examined a somewhat similar situation in the context of the banker's cheque or banker's demand draft and observed as follows:-

> *"7. The maker or the drawer of a bill of exchange must direct a "certain person" to pay a particular sum of money. This is the quintessence of a bill of exchange. Learned Senior Counsel for the respondents contended that in every bill of exchange there must necessarily be three parties, the maker, the payee and the person to whom the direction is given to pay. As a draft or a pay order contains only two persons i.e. the drawer and the payee, it is only an instrument promising to pay a certain sum of money, according to the learned counsel. He made an endeavour to show that a draft may at best be a promissory note but the bid made by him did not succeed as it is a difficult task to bring the draft or a pay order, as in this case, within the purview of the definition of promissory note in Section 4 of the Act. The indispensable postulate for a promissory note is that there should be an unconditional undertaking to pay a certain sum by the drawer. Such an undertaking cannot be read out from the impugned instrument. At any rate the instrument involved in this case is closer to a bill of exchange because of the unconditional order of its maker to the person concerned "to pay a certain sum".*
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> *xxxx xxxx xxxx xxxx*

9. In this context a reference to Section 85-A of the Act is of advantage. We may point out that the said section falls within Chapter VII under the title "Of discharge from liability on notes, bills and cheques". Section 85A deals with drafts drawn by one branch of a bank on another branch of the same bank. The section says that:

"85-A. Where any draft, that is, an order to pay money, drawn by one office of a bank upon another office of the same bank for a sum of money payable to order on demand, purports to be endorsed by or on behalf of the payee, the bank is discharged by payment in due course."

It is evident that the section renders such draft a negotiable instrument.

10. Section 131A, which was introduced in the statute by Act 33 of 1947, makes all the provisions for crossing of cheques applicable to the drafts also. That section says:

"131-A. The provisions of this Chapter shall apply to any draft, as defined in Section 85-A, as if the draft were a cheque."

Learned counsel for the first respondent contended that the said section is more in favour of the position that a draft is otherwise not a cheque and it is declared to be a cheque only for the limited purpose of Chapter XIV which deals with "crossed cheques". We are unable to agree with the said contention that Section 131A is intended to limit the operation of a draft as a cheque only for crossing purposes. In our view, the said section is intended to widen the scope of crossed drafts as to contain all incidences of a crossed cheque. This is for the purpose of foreclosing a possibility of holding the view that draft cannot be crossed.

11. Even if it is possible to construe the draft either as a promissory note or as a bill of exchange, law has given the option to the holder to treat it as he chooses. This can be discerned from Section 17 of the Act which says: "17. Where an instrument may be construed either as a promissory note or bill of exchange, the holder may at his election treat it as either, and the instrument shall be thenceforward treated accordingly."

This means once the holder, which in this case is the complainant Bank, has elected to treat the instrument as a cheque it cannot but be treated as a cheque thereafter. This is an irretrievable corollary of exercising such an election by the holder himself.

12. The House of Lords had to consider whether a banker's draft payable to order on demand addressed by one branch of a bank to another branch of the same bank, in the wake of Section 82 of the Bills of Exchange Act 1882. While holding that such a draft is not a cheque within the meaning of Section 60 and 82 of the said Act Lord Lindley made the following observations in Capital and Counties Bank vs. Gordon (1903 AC 240):

"But I agree with the Court of Appeal in thinking that the bank, which is both drawer and drawee of these instruments, is not entitled to treat them as bills of exchange as defined in Section 3 of the Bills of Exchange Act, although a holder may sue the bank upon them, and treat them either as bills of exchange or as promissory notes."

3. The Court also went on to hold that a complaint is maintainable under Section 142 in the event a banker's cheque is dishonoured. This Court also

notices that the expression used in the Income Tax itself is “a bill of exchange”, which is a class of instruments, that cannot be ignored or disallowed by virtue of Section 40A(3) read with Rules 6 DD of the Income Tax Rules.

4. For the above reasons, no substantial question of law arises. The appeal is therefore, dismissed.

S. RAVINDRA BHAT, J.

NAJMI WAZIRI, J.

MARCH 28, 2017
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