

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

% Judgment pronounced on: 30.01.2012

+ **ITA No. 1138/2011**

ORIENTAL BANK OF COMMERCE ... Appellant

versus

DY COMMISSIONER OF INCOME TAX ... Respondent

**Advocates who appeared in this case:**

For the Appellant : Mr Rajat Navet  
For Respondent : Mr Abhishek Maratha

**CORAM:**

**HON'BLE MR. JUSTICE BADAR DURREZ AHMED**

**HON'BLE MR. JUSTICE V.K.JAIN**

**BADAR DURREZ AHMED, J. (ORAL)**

1. This is an appeal under Section 260-A of Income Tax Act, 1961 (hereinafter referred to as "the said Act") in respect of the Assessment Year 2004-05 and is directed against the order dated 08.04.2011 passed by the Income Tax Appellate Tribunal in ITA No. 1542/Del/2010.
2. The appellant's appeal before the Tribunal has been dismissed on the ground of limitation inasmuch as it has been filed after a delay of 1049 days. The appeal before the Tribunal was against the order of Commissioner of Income Tax passed under Section 263 of the said Act on 16.03.2007. After the Commissioner of Income Tax passed the order dated 16.03.2007, the matter was placed before the Assessing Officer for re-computing the income on the basis of the decision taken by the Commissioner of Income Tax. The Assessing Officer passed his order on 31.08.2007. Being aggrieved by that order, the appellant filed an appeal before the Commissioner of Income Tax (Appeals) which was also dismissed on 17.12.2007.

Against that order, the appellant preferred an appeal before the Income Tax Appellate Tribunal which also was dismissed by the Tribunal on 13.11.2009. In that order, it had been indicated that the order dated 16.03.2007 passed by the Commissioner of Income Tax under Section 263 had become final and since the appellant had not challenged it, the Tribunal could not go into the matter. Paragraph 8 of the Tribunal's order dated 13.11.2009 is relevant and the same reads as under:

“We have considered the rival contentions and gone through the record carefully. The order passed under Section 263 became final. Learned Commissioner while exercising the powers under Section 263 has decided the issue himself and directed the Assessing Officer to re-compute the income on the basis of his decision. He has not relegated the issue to the file of the Assessing Officer for re-adjudication. He specifically held that capital loss on account of transfer of US 64 unit Scheme cannot be set off against the long term capital gains as well as the assessee cannot be permitted to carry forward this loss for set up in the future years. Assessing Officer has just executed this order. Until and unless this order is revoked, assessee cannot agitate the issue on merit. The judgment relied upon by the assessee are not application on the facts. In the decision of Hon'ble Calcutta High Court, sub-section (4) of Section 249 was brought on the state book w.e.f 1.10.1975. As per this section before entertaining any appeal of an assessee it has to be seen whether assessee has to pay the undisputed tax. In that case, assessee has not paid the tax and, therefore, its appeal was dismissed by the learned CIT (Appeals) on the ground of non-maintainability. The appeal was filed by the learned CIT (Appeals) on 09.01.1975. Hon'ble High Court has held that right to appeal is a statutory right and an appeal is a continuation of

original proceedings. In that case, the right of the assessee to prefer an appeal was considered as accrued when the notice under Section 143(2) of the Act was issued. According to the Hon'ble High Court, the right of appeal having being accrued to the assessee prior to 01.10.1975 when the amendment came into force. The date of appeal was considered neither relevant nor material and the appeal of the assessee was directed to be decided on merit before the learned CIT (Appeals). The facts of that case are quite distinguishable to the facts of the present case. Similarly, the facts in the case of CIT vs. Mahabir Prasad (125 ITR 165) relied upon by the assessee are quite distinguishable. In that case, the issue before the Hon'ble High Court was whether assessee can challenge levy of interest along with the additions in one common appeal. The Hon'ble High Court has held that the assessee is entitled to contest levy of interest in an appeal against the quantum order before the Learned First Appellate Authority. In the present case, the dispute is altogether different. Here the issue is whether an executing authority can travel beyond the order while executing that order. In our opinion, it is not permissible for the executing authority to look beyond the order it is required to execute. Thus, we do not find any merit in the appeal of the assessee. It is dismissed.”

(underlining added)

3. It is thereafter that the appellant filed the appeal against the order dated 16.03.2007 before the Tribunal in which the impugned order dated 08.04.2001 has been passed. The Tribunal has taken the view that there has been a delay of 1049 days in approaching the Tribunal against the order dated 16.03.2007 and that several proceedings have taken place pursuant to the said order which had become

final. It would be relevant to refer to paragraph 3.2 of the impugned order. The same reads as under:-

“Thus, we find that the Tribunal order is based upon the premise that the order under Section 263 has become final. Assessee has not pointed out to the Tribunal that it was challenging the order under Section 263. It actually filed the appeal much later. From the above factual background it is apparent that assessee had accepted the C.I.T.’s order under Section 263. Later on after a delay of 1049 days it changed its mind and filed an appeal. In these circumstances, in our considered opinion, the delay in this case is not liable to be condoned, as reasonable cause attributed for the delay, in our considered opinion, is not cogent enough.”

4. We have heard the learned counsel for the parties. There is no perversity in the Tribunal’s order. No substantial question of law arises for our consideration.

The appeal is dismissed.

**BADAR DURREZ AHMED, J**

**V.K.JAIN, J**

**JANUARY 30, 2012**  
**BG**