

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH: 'A' NEW DELHI**

**BEFORE SHRI R. K. PANDA, ACCOUNTANT MEMBER  
AND  
MS SUCHITRA KAMBLE, JUDICIAL MEMBER**

**ITA No. 1206/DEL/2013 ( A.Y 2009-10)**

DCIT Circle-2(1), Room No. 398D, C. R. Building New Delhi  <b>(APPELLANT)</b>	Vs	AMR Infrastructure Ltd. 2425/11, Beadonpura, Near Gurduwara Road, Karol Bagh, New Delhi AAFCA8375E <b>(RESPONDENT)</b>
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**ITA No. 1222/DEL/2013 ( A.Y 2009-10)**

DCIT Circle-2(1), New Delhi  <b>(APPELLANT)</b>	Vs	ARN Infrastructure Ltd. 9, Birla House, Arya Samaj Road Karol Bagh, New Delhi AAFCA6403M <b>(RESPONDENT)</b>
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<b>Appellant by</b>	<b>Dr. Rakesh Gupta, Adv, Sh. Ashwani Taneja, FCA</b>
<b>Respondent by</b>	<b>Sh. R. C. Dande, Sr. DR</b>

<b>Date of Hearing</b>	<b>03.08.2017</b>
<b>Date of Pronouncement</b>	<b>30.10.2017</b>

**ORDER**

**PER SUCHITRA KAMBLE, JM**

These appeals are filed against the order dated 19/1/2012 & 13/12/2012 by CIT(A)-V, New Delhi in Assessment Year 2009-10 respectively.

2. The facts of these two appeals are similar. Therefore, these two appeals are taken up together.

3. The grounds of appeal are as under:- (ITA No. 1206/Del/2013)

*“1. Whether the Ld.CIT(A) has erred on facts and in law in deleting the addition made by the A.O on account of unexplained money amounting to Rs.10,00,00,000/- ignoring the fact that during the survey carried out on 20/11/2008 at the premises of the assessee company, a large number of documents were impounded, cleanly establishing that the assessee was receiving major portion of the booking amount in cash and as such was not declaring the correct income in the tax return.”*

(ITA No. 1222/Del/2013)

*“1. Whether the Ld.CIT(A) has erred on facts and in law in deleting the addition made by the A.O on account of unexplained money amounting to Rs.10,00,00,000/- ignoring the fact that during the survey carried out on 20/11/2008 at the premises of the assessee company, a large number of documents were impounded, cleanly establishing that the assessee was receiving major portion of the booking amount in cash and as such was not declaring the correct income in the tax return.”*

4. The brief facts of the case in case of M/s AMR Infrastructure Ltd. is as follows:-

The assessee is a developer & builder and was developing various projects at different cites and locations of NCR. It had entered into various agreements with different companies for developing the residential and commercial properties. It has also entered into Memorandum of Understanding with the various companies. It had entered into an agreement dated 30.06.2006(pg 18 to 23 of PB) with M/s Real Gain Estates (P) Ltd., as per which the later was

appointed as sole and exclusive agent to sell/book the project for which the appellant was to pay 6.5% brokerage to M/s Real Gain Estates(P)Ltd. on each sale/booking of units in the said project. A survey was carried out on its premises on 20.11.2008, a large number of documents were impounded during survey alongwith copies of MOUs were impounded. Statement of one of the directors of the assessee company, Sh Krishan Kumar, was recorded on oath during the operation u/s 133 A of the IT Act. In the statement Shri Krishan Kumar in reply to question no. 17 voluntarily disclosed additional income to the extent of Rs. 10 crores to buy piece of mind. The relevant question no. 17 and reply of Shri Krishan Kumar are reproduced as under:

*"Question:- 17. You have been shown documents impounded during the course of survey at the business/office premises of M/s AMR Infrastructure Ltd. These documents have also been shown to Mr. R.C. Soni another director of the company. How do you explain the same and what you have to say in this regard?"*

*Ans:-I have seen the documents impounded as per annexure A-1 to A-13 & A-15 from the office premises of the company. These have also been discussed with Mr. R.C. Soni another director. I am not in a position to explain the same at this point of time. However, to buy piece of mind I do hereby declare an additional income at Rs. 10 crores Ten crores only) an behalf of the company for the current financial year 2008- 09 relevant to the assessment year 2009-10. This offer has been made on account of cash payments received for sale of plots/area which have not been fully accounted for in the regular books of account of the company. Amount -at expenditure has been deducted out of unaccounted cash payments received. This income has been declared voluntarily without any pressure, coercion and is subject to no penalty u/s 271(1)(c) of the I.T. Act, 1961. Advance-tax will be paid as per law.*

*I have read over the above statement and found it correctly recorded. The statement has been given by me without any fear and pressure/coercion."*

Statement of other director of the assessee company Sh R.C. Soni was also recorded on the day of survey and Sh. Soni had also stated that as the company was ready to voluntarily disclosure of Rs. 10 crore, it was requested not to start any penalty proceedings or prosecutions. Besides the statements of these directors recorded u/s 133A, a specific letter dated 21.11.2008 duly signed by Sh Krishan Kumar's was also submitted the contents of which are reproduced as under:

*"During the course of survey; certain loose papers and documents as per Annexure-A were impounded which were shown to me. I have seen the documents impounded as per annexure A-1 to A-13 and A-15 from the Office premises of the company. These have also been discussed with Sh. R.C. Soni', the other director. I am not in a position to explain the same at this point of time. However to by peace of mind, I do hereby declare an additional income of I 10 crores (Rs.Ten crores only) on behalf of the company for the current financial year 2008-09 relevant to the assessment year 2009-10. This offer has been made on account of cash payments received for sale of plots/area which have not been fully accounted or in the regular books of accounts of the company. Amount of expenditure incurred has been deducted out of unaccounted cash payments received. This income has been declared voluntarily without any pressure, coercion or undue influence and is subject to no penal action under section 271(1)1 of the Income Tact Act, 1961. Advance tax will be paid as per Law."*

However, in the return filed on 30.9.2009 for the AY under consideration a loss of rs.3,00,80,224/- only was declared and the surrender amount of Rs.10 crores was not included therein.

As per para-4 of the Assessment Order, during assessments proceeding, the assessee was provided photocopy of survey material and was asked to file

replies to the questionnaire, which as per the assessment order, was not replied by the assessee, in spite of a number of opportunities given by the AO. Since the assessment was getting barred by limitation on 31.12.2011 the AO completed the Assessment on 27.12.2011 relying solely on the survey report. The Assessing Officer made addition of Rs. 10 crore on account of unexplained money.

5. Being aggrieved by the assessment order, the assessee filed appeal before the CIT(A). The CIT(A) allowed the appeal of the assessee. The order of the CIT(A) at Para 10.1 read as under:-

*“10. As noted above in para 9, the addition made by the A.O has been deleted and the grounds of appeal have been allowed; now since the A/R of the appellant has made alternate arguments the same are also considered as under:*

*(a) The books of accounts were produced before the AO and the AO has not been able to point out any deficiency therein. The appellant has submitted that it had received Rs. 12 crores after the date of survey till 31.3.2009 and the AO has not pointed out any discrepancy in the post survey receipts shown by the appellant. It has further been submitted that even in the pre-survey receipts the AO has not questioned the figure of receipts shown by the appellant. The undersigned is in agreement with this version of the appellant.*

*(b) From the final accounts submitted during appeal proceedings, it has been seen that the total advance booking receipts received till the previous year ending 31.3.2008 were t 1,54,14,97,991.76 which have been shown under the head current liabilities in Schedule-J of the Balance Sheet as at 31.3.2008; in the previous year ending 31.3.2007 such receipts were Rs. 95,43,64,480.12 and were given similar treatment in the accounts i.e. these were also shown as current liability. In the Profit & Loss a/c the only income*

*shown for the year ending 31.3.2008 is other income of Rs.1,62,35,604.88 which has been shown in Schedule-K as bank interest on FDR including profit on sale of car at Rs. 83,643/-; it shows that there has been no income shown from the business activity of the appellant; same is the position with regard to year ending 31.3.2007.*

*As regards, the previous year ending 31.3.2009 relevant for the AY 2009- 10, there is no change in the method being followed i.e. amounts received on account of advance booking were shown as liability in Schedule-I at Rs. 2,15,07,28,058.83 and the only income shown in Schedule-J is bank interest on FDR at Rs. 1,02,91,650.58. In the Profit & Loss a/c the sales shown at Rs. 3,00,00,000/- are from sale of property and are not sales from the project.*

*Expenditure on construction/building activity has been shown as work-in-progress in the Balance Sheet of all the three years as at 31/3/2007, 31/3/2008 & 31/3/2009 under the head current assets.*

*The purpose of narrating the aforesaid is to confirm that the appellant is following the project completion method.*

- (b) *In normal circumstances, cash if any, received but not shown by the appellant in its books of accounts, if detected by the department has to be taken in its receipts; but in the statement recorded during survey, -eproduced above, Shri Krishan Kumar has unambiguously conveyed that he was surrendering Rs. 10 crores on account of cash receipts received from cash bookings after deducting unaccounted cash expense in the current Financial Year i.e. FY 2008-09 and further that he had offered this additional income of Rs. 10 crores to buy peace of mind. That statement does not have any evidentiary value as observed above after detailed discussion from legal as well as factual aspects; it has also been observed that the appellant is following project completion method for showing its profits.*

*Such being the position, even on this plea also the addition made by the AO deserves to be deleted.”*

6. The Ld. DR submitted that the survey was carried out on 20.11.2009 at the premises of the assessee company. Large number of documents were impounded during the survey clearly establishing that the assessee was receiving major portion of the booking amount in cash and as such was not declaring the correct income in the tax return. A surrender of income of Rs. ten crores was made voluntarily by the assessee company during the course of the survey. However, the assessee backtracked and while filing the tax return did not offer this surrendered amount to tax. The Ld. DR relied upon the Hon'ble Delhi High Court judgment in case of Bhagirath Aggarwal Vs. CIT 351 ITR 143 wherein it is held that an addition in assessee's income relying on statements recorded during the search operations cannot be deleted without proving statements to be incorrect. In case of Raj Hans Towers(P) Ltd. Vs. CIT 373 ITR 9, the Hon'ble Delhi High Court held that where the assessee had not offered any satisfactory explanation regarding surrender amount being not bona fide and it was not borne out in any contentions raised before lower authorities, additions so made after adjusting expenditure were justified. The Ld. DR further relied upon the judgment of Smt. Dayawanti Vs. CIT 390 ITR 496 wherein it is held that where inferences drawn in respect of undeclared income of the assessee were premised on materials found as well as statements recorded by assessee's son in course of search operations and assessee had not been able to show as to how estimation made by AO was arbitrary or unreasonable, additions so made by Assessing Officer by rejecting books of account was justified.

7. The Ld. AR relied upon the order of the CIT(A) and submitted that the survey had taken place at the premises of assessee and its selling agent namely M/s. Real Gain Estate Pvt. Ltd. Statement of one of the directors

namely Sh. Krishen Kumar (in AMR Infrastructure Ltd.) and Sh. Nitin Rekhan (in ARN Infrastructure Ltd.) was recorded u/s 133A wherein he declared additional income of Rs. 10 crores with a view to buy peace of mind. However, in the return filed by the assessee company, this income was not added and thus impliedly the aforesaid statement was retracted, but the AO did not accept the stand of assessee and made the addition on the ground that offer was made in view of documents found showing that assessee received cash payment which was not fully accounted for in regular books of accounts of the Company. The AO did not reject the books of account of the assessee. Therefore, the CIT(A) has rightly deleted the additions made. On merit also the assessee had good case which was taken into consideration by the CIT(A).

8. We have heard both the parties and perused the records. The contentions of the Ld. DR that the statement of the directors of the assessee should have been taken into consideration by the CIT(A) and the addition of the undisclosed income was justified by the assessee. This contention can not have a support unless and until the supportive documents were taken into cognizance by the Assessing Officer. The Assessing Officer has not taken any efforts to verify the statements of the Directors from the record. The CIT(A) has rightly deleted the additions by taking into consideration all the aspects of statements as well as the documents produced by the Assessee before the Assessing Officer. The Extracts of the CIT(A) order as follows (From pages 41 to 49 of CIT(A) order):

*“The version of the AO and of the appellant is considered in the following paras while deciding the issues raised in the grounds of appeal:-*

*(i) From the facts noted above, it is clear that the statement (pg 24 to 34 of PB) of Shri Krishan Kumar was recorded under oath during survey operation and the surrender made in that statement, in reply to question no. 17 of the*

*statement; was used for making an addition of 10 crores by the settled legal proposition that a statement recorded during survey does not have any evidentiary value unless it is supported by corroborated evidence. The surrender made during survey does not have any value unless the Assessing Officer gives specific finding as to the evidence in this regard. It may further be noted that there is a difference between the statement recorded u/s 133A and Sec. 132(4); the statement under the latter section is under oath but under the former section it is not under oath; this is because the officers u/s 133A are not authorized to take statement under oath. In this regard, a reference is being made to the judgement of Hon'ble High Court of Madras in the case of CIT v/s S Kader Khan & Sons 300 ITR 157 in which the Hon'ble High Court, after discussing Sec.133A & 132(4). .....*

*.....In view of the above legal position, the AO's blindly following the statement recorded during survey and making the addition on the basis of surrender is not in order.*

*ii) The appellant has submitted that the statement of Shri Shri Krishan Kumar was recorded under duress-the survey started on 20.11.2008 and ended on 21.11.2008(page-24 & 32 of the paper book). Attention has been drawn to the judgement in the case of Kailashben Manoharlal Choksi v/s CIT(2008) 174 Taxman 466 wherein the Hon'ble Gujrat High Court has held that "statement recorded u/s 132(4) at midnight during search operation is not voluntary statement, it may not be enumerated at the time of assessment after search". As per the appellant the position is worse u/s 133A which is not having any evidentiary value as such therefore, the statement recorded under duress/stress/exhaustion is not a voluntary statement.*

*The A.O's version is that it is not material because in the absence of cooperation by the party the survey would continue; to which the appellant has stated that it is not backed by evidence that the appellant had not cooperated during the survey operation.*

*The version of the AO and of the appellant have been considered carefully. Normally, when a survey operation is started as per Rules, it continues till the operation is completed. Merely, because the survey continued till the next day would not make the statement recorded under duress; however, a person is normally under stress when a survey party or a search party of the Income-tax department visits its office/house and remains there for such a long period. Besides this, the subsequent finding/results:*

- (a) the AO's finding no discrepancy in the books of accounts; and*
- (b) his failure to bring any circumstantial evidence on record to show that cash was received to the extent of ( 10 crores surrendered by Shri Krishan Kumar;*

*lead to the conclusion that the statement was given under stress-*

- (i) The AO is a quasi judicial authority; should apply his own mind at the time of reaching conclusions, the AO has not applied his mind in this case; he has not brought anything on record, even circumstantial evidence, to show that the appellant had received cash in addition to the declared amount. More so, when M/s Real Gain were assigned the task of booking the space/property as per agreement dated 30.06.2006(page 18 to 23 of the paper book).*
- (ii) The AO has not bothered to follow the instruction of the CBDT dated 10.3.2003. The Hon'ble High Court of Madras in its judgement in the case of CIT v/s S Kader Khan & Sons 300 ITR 157 noted above has taken a serious view of the ignoring of this instruction by the A.O.....*

*.....No corroborative evidence while making the addition has been brought on record. There is not even a whisper of recording made in the*

*papers impounded during survey; this is clearly against the spirit of instruction dated 10.03.2003 issued by the Board.*

*(v) The undersigned has seen the assessment record and has also perused the record of assessment proceedings(Note-Sheets). The AO has noted on 21.12.2011 that 'requisite reply furnished and placed on record. Books of c/cs produced and examined by test check. Case discussed; Such being the noting made by the AO on 21.12.2011 his observation in Para 8 of the assessment order, that information provided by the appellant is neither complete nor conclusive, is ill founded rather it is contradictory. The AO has not pointed out any information asked by it, but not provided by the appellant. The AO's brushing aside the information collected/record impounded during survey is not in order. The AO has blindly followed the survey report and the surrender made by the appellant.*

*(vi) There is no dispute as to the fact that the survey report was not confronted to the appellant before this being used against the appellant. The AO has himself accepted in the remand report that it is internal arrangement between two officials regarding confidential correspondence and the assessee is not supposed to know everything regarding the correspondence between two officials being informative and confidential. The version of the AO is palpably wrong; a quasi judicial authority is duty bound to follow the cardinal principles of natural justice i.e. no document can be used against any person unless that person is given reasonable opportunity to submit his version thereon. Correspondence between officers of the Directorate of Investigation and an AO is not a 'privileged correspondence'; at the stage of assessment proceedings when actual operation u/s 133A or 132 of the Income-tax Act has already taken place; it has to be confronted to an assessee for its comments/version before being used against the assessee in the asst, order. Similar views have been expressed by the Hon'ble Supreme Court in the case*

of *Kishanchand Chellaram v/s Commissioner Of Income-Tax, Bombay City* II125 ITR 713. Further, the full bench of the Hon'ble jurisdictional High Court of Delhi in the case of *J.T.(India)Exports & Another v/s Union of India and Another*, 262 ITR 269 has observed:

"How then have the principles of natural justice been interpreted in the courts and within what limits are they to be confined? Over the years by a process of judicial interpretation two rules have been evolved as representing the principles of natural justice in judicial process, including their quasi judicial and administrative process. They constitute the basic elements of fair hearing, having their roots in the innate sense of man for fairplay 'and justice which is not the preserve of any particular race or country but is shared in common by all men. The first rule is *nemo judex in causa sua*' or *nemo debet esse judex in propria causa sua*<sup>1</sup> as stated in [1605] 12 Co. Rep. 114, that is, "no man shall be a judge in his own cause". Coke used the form "*aliquis non debet esse judex in propria causa quia non potest esse judex et pars*" (Co. Litt. 141 a), that is, "no man ought to be a judge in his own cause, because he cannot act as judge and at the same time be a party". The form "*nemo potest esse simul actor et judex*", that is, "no one can be at once suitor and judge" is also at times used. The second rule and that is the rule with which we are concerned in this case is "*audi alteram partem*", that is, "hear the other side". At times and particularly in continental countries, the form "*audietur at altera pars*" is used, meaning very much the same thing. A corollary has been deduced from the above two rules and particularly the *audi alteram partem* rule, namely, "*qui aliquid statuerit parte inaudita altera, aequam licet, dixerit, haud aequum facerit*", that is, "he who shall decide anything without the other side having been heard, although he may have said what is right, will not have been what is right" or in other words, as it is now expressed, "justice should not only be done but should manifestly be seen to be done".

Even if grant of an opportunity is not specifically provided for it has to be read

*into the unoccupied interstices and unless specifically excluded the principles of natural justice have to be applied. Even if a statute is silent and there are no positive words in the Act or Rules spelling out the need to hear the party whose rights and interests are likely to be affected, the requirement to follow fair procedure before taking a decision must be read into the statute, unless the statute provides otherwise".*

*Since the survey report was not confronted to the appellant, but was used by the AO, the asst, order framed on that basis is bad in law.*

*9. In view of the above discussion, the addition of Rs.10 crores made by the A.O is deleted and the grounds of appeal are allowed."*

Thus, the CIT(A) has in detail considered not only assessee's grounds but also the comments offered by the Assessing Officer while dealing the remand report before him in details. There is no need to interfere with the order of the CIT(A). Thus, the appeals of Revenue in both the cases which are identical in nature are dismissed.

9. In result, both the appeals of the Revenue are dismissed.

**Order pronounced in the Open Court on 30<sup>th</sup> October, 2017.**

**Sd/-**

**(R. K. PANDA)  
ACCOUNTANT MEMBER**

**Sd/-**

**(SUCHITRA KAMBLE)  
JUDICIAL MEMBER**

Dated: 30/10/2017  
R. Naheed \*

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR

ITAT NEW DELHI

		Date	
1.	Draft dictated on	7/08/2017	PS
2.	Draft placed before author	7/08/2017	PS
3.	Draft proposed & placed before the second member	.2017	JM/AM
4.	Draft discussed/approved by Second Member.		JM/AM
5.	Approved Draft comes to the Sr.PS/PS	30.10.2017	PS/PS
6.	Kept for pronouncement on		PS
7.	File sent to the Bench Clerk	30.10.2017	PS
8.	Date on which file goes to the AR		
9.	Date on which file goes to the Head Clerk.		
10.	Date of dispatch of Order.		

