IN THE INCOME TAX APPELLATE TRIBUNAL

NAGPUR BENCH, NAGPUR

BEFORE SHRI P. K. BANSAL, VICE PRESIDENT

AND SHRI AMARJIT SINGH, JUDICIAL MEMBER

I.T.A. No.268 /Nag/2014

Asstt. Yrs.:2010-11

D.C.I.T. Central Circle-1(4) Nagpur. (Appellant)	Vs.	Shri Ashok Sunderlal DagaI(Indl.), 5th Temple Road, Civil lines Nagpur-440001 (Respondent)

I.T.A. No. 269/Nag/2014

Asstt. Yrs.:2010-11

D.C.I.T. Central Circle-1(4) Nagpur. (Appellant)	Vs.	Shri Ashok Sunderlal Daga(HUF), 5th Temple Road, Civil lines Nagpur-440001 (Respondent)

I.T.A. No.213/Nag/2014

Asstt. Yr.:2010-11

Shri Ashok Sunderlal Daga, 5th Temple Road, Civil lines Nagpur-440001	Vs.	D.C.I.T. Central Circle-1(4) Nagpur.

(Appellant)	(Respondent)

Appellant by	Shri A.R. Ninawe.
Respondent by	Shri K. P. Dewani
Date of hearing	21/6/2017
Date of pronouncement	27/06/2017

ORDER

PER P. K. BANSAL, V.P.

ITA Nos. 268 & 269/Nag/2014 (A.Y. 2010-11):

ITA Nos. 268 & 269/Nag/2014 are the appeals filed against the order of the CIT(Appeas) dated 5.2.2014. ITA No. 213/Nag/2014 is the appeal filed by the assessee. The only issue involved in ITA Nos. 268 and 269?Nag/2014 relates to the deletion of the addition of Rs. 2,38,86,809/- in the case of individual assessee and Rs. 2,37,67,809/- in the case of HUF.

2. The brief facts of the case are that during the course of search and seizure operations certain cash, gold and gold ornaments were found and seized, the value of the same were determined at Rs. 2,38,86,809/- in the case of assessee individual and at Rs. 2,37,67,809/- in the case of HUF. As regards these cash, gold and gold jewellery the assessee has stated that the same has been received as sale consideration of Artifacts which were inherited by assessee.At the time of operation of the bqnk lockers of the

assessee, he had explained that he has sold the Artifacts namely, Bikaneri Carpets, antique, wrist watches, wall clocks, metal furniture etc. For a sale consideration of Rs. 1,05,00,000/- in cash through broker namely Shri HAJI Hasan Wadia of Mumbai. In addition to this the assessee had also sold antique chandellers, lighta, Bikaneri Carpets and wearing apparels etc for a sale consideration of 8166 Grams of gold amounting to Rs. 1,33,24,809/- through broker namely Shri Lokendra Mehta from Jaipur during the year. The A.O. was not convinced with the explanation and submission made by assessee and therefore, he added a sum of Rs. 2,,37,67,809/- as undisclosed income in the case of assessee HUF. At the same time similar addition has been made in the case of assessee individual as an unexplained investment in gold and gold ornaments. Both these additions have been made on substantive basus. When the matter went before CIT(Appeals) the CIT(Appeals) has deleted the said addition additions. In HUF case the revenue has come up in appeal before us taking ground Nos. 1, 2 and 3 and in individual assessee's case the revenue has filed the appeal taking ground Nos. 1, 2 and 3.

3. We have heard the rival submissions and carefully considered the same along with the orders of tax authorities below. We noted that the CIT(A) has deleted the addition on the basis of appreciation of documents filed before him and facts on record. It was found that the assessee during the year under consideration had sold artifacts which he had inherited through broker and

sale consideration of the same has been received in the form of cash, gold and gold ornaments the value of which is determined at Rs. 2,37,67,809/- in the case of assessee HUF. A sum of Rs. 105 lakhs was received in cash through broker Shri Haji Hasan Ali Wadhia of Mumbai for sale of Bikaneri Carpets, wall clocks and furniture. The net consideration after the payment of brokerage was Rs. 1044320/-. A sum of Rs. 13324809/- was received through brokerShri lokendra Mehta of Jaipur for sale of Artifacts. The A.O. did not accept the submission made by the assessee and treated the brokerage note submitted by assessee as accommodation bill as the brokerage note was not found during the course of search and seizure proceedings but the same was submitted after opening of the locker. We noted that the fact that the assessee was the owner of the Artifacts is apparent as these artifacts had been duly declared in the wealth tax returns submitted by the assessee and were also appearing in the balance sheet placed on record before the A.O. wherein the assessee had included the value of precious stones, gold and artifacts as per the provision of law. Copies of the wealthtax returns for the assessment years 2004-05 and 2008-09 which were available at pages 16, 20 24,29 and 30 of the paper book and the same were filed before us which we have perused. We notice that the A.O. has conducted the enquiry through investigation wing of the department at Jaipur where the transaction of sale of artifacts by the assessee has been confirmed by son of Shri Lokrndra Mehta before Investigation Wing of the Incometax Department.. In respect to sum of

Rs. 1,05,00,000/- the son of Shri Haji Hasan Ali Wadhia has submitted evidence of receipt of commission on sale by his late father in respect to artifacts to the Investigation Department at Mumbai which was forwarded to the A.O. This evidence procured by revenue corroborates the evidence submitted by assessee. The CIT(A) has correctly appreciated the evidence and deleted the addition made in respect of cash found on the date of search. In respect to value of gold ornaments and gold coins and bars we note that the assessee has explained the same as sale proceeds of the artifacts through broker and the evidence in respect to the same has been placed on record. The A.O. also in the assessment order at page 22 has annexed the confirmation issued by Shri Lokendra Mehta as regard sale of artifacts through him wherein he has also given his PAN and also the details of the trasactions made by him for the assessee. This evidence has also been verified by the A.O. through investigation wing of the department at Jaipur. The Investigation Wing of the Department has recorded the statement of Shri Lokendra Mehta as per Annexure G of the assessment order. This statement makes it evident that Shri Lokendra Mehta has affirmed the transaction in the statement recorded on oath. The gold received in kind has also been observed in the commission bill on record. These evidences, in our opinion, clearly evidenced the possession and ownership of the gold found during the course of search for which addition has been made. We also noted that the A.O. has referred the statement of Shri Lokendra Mehta wherein it has been observed that he

has yet to receive the commission in the form of gold from assessee. These observation in our view is contrary to the written submission submitted by Shri Lokendra Mehta wherein it has been observed that he has received the commission in the form of gold coins. Even otherwise this observation, in our opinion, does not prove that the assessee has not sold the artifacts for gold received by assessee. We are of the view that the CIT(A) was fair and reasonable in accepting the explanation of the assessee. The CIT(A) while accepting the explanation of the assessee has also noted that the assessee family is an old highly reputed family of city of Nagpur having industrial business history of over 100 years. The family was in traditional coal mining business before nationalisation. One of the peredecessor of the family was a Minister of then Bikaner State and different titles were awarded to them such as Raja Rai Bahadur, Sir, Diwan Bahadur and KCE. The assessee's great grand father Shri Kasturchand Daga who donated the famous Kasturchad Park to the city of Nagpur. The assessee's grand mother Lady Amritabai Daga donated the LAD college for girls. The family also donated to the Government "Daga Hospital" for free treatment to the needy. The family name is also published in whose who book published by British India. In this case we also noted from the wealthtax order of the father of the assessee for the assessment years 1962-63 that the assessee was in possession of 2.9 kgs of gold ornaments . In view of this fact we do not find any infirmity in the order of the CIT(A) while accepting the evidence submitted by assessee by way of

broker note filed in respect to sale of artifacts. We therefore confirm the orders of the CIT(A) deleting the addition of Rs. 2,37,67,809/- in the case of assessee HUF and addition of Rs. 2,38,86,809/- in the case of individual assessee. The ground Nos. 1, 2 and 3 of the revenue's appeal are dismissed.

4. The ground Nos. 4 and 5 in the appeal filed by the revenue in assessee HUF and individual cases relates to the direction given by the CIT(A) to assess the profit realizaed on sale of shares amounting to Rs. 3,73,209/- as short term capital gain as declared by assessee instead of business income and similar direction given by CIT(A) to assess the profit realised on the sale of shares amounting to Rs. 41,89,794/- as short term capital gain as declared by assessee in his individual capacity instead of business income. Since the issue involved in individual and HUF cases of assessee is common except change in figure, therefore both the parties agreed that this issue be decided on the basis of the facts involved in the case of HUF and whatever view may be taken in the case of HUF, the same view may be taken in the case of individual assessee. In the case of HUF we noticed that the assessee during the year under consideration received net surplus on the sale of shares amounting to Rs. 3,73,209/- declared in its return of income as short term capital gain. The A.O. treated the same as business income of the assessee HUF. In reply to the show cause notice the assessee submitted before the A.O. that the assessee family invested capital in shares as an investment in shares. The investment in shares are made in public limited companies duly

listed in recognised stock exchanges of India. The investments are made through recognised and registered share brokers and STT has been duly charged by them. The purchases and sales are through account payee cheques. The investments in shares are duly appearing in De-mat account of the assessee and investments are appearing in the Balance sheet as investment and shown at cost. The assessee during the period under consideration has earned dividend income from these investments. On this basis it was submitted that the facts and circumstances clearly show that the assessee is an investor in shares and by no stretch of imagination it can be said that the assessee is engaged in the business of trading in shares and carrying on business activity in shares. Regarding the period of holding of shares it was submitted that the principle of investments is safely and appreciation in value of the investment as there is increasing volatility in the share market due to globalization and various market uncertainties which has affected the length of holding period in the cases of investors also. There is no minimum period prescribed for short term capital gain. It was further submitted that the ITAT, Nagpur Bench in the case of Shri Ashok Sunderlal Daga for the assessmqent year 2006-07 has held that the surplus arising on the sale of shares is liable to be taxed as short term capital gain. The A.O. did not agree with the assessee and when the matter went before the CIT(A), the CIT(A) treated the profit earned by assessee on the shale of shares as short term capital gain.

5. We have heard rival submission and considered the same along with orders of lower tax authorities. We noted that under similar facts and circumstances in the case of assessee in ITA No. 210/Nag/2009 vide order dated 29/7/2014 the ITAT, Nagpur Bench, Nagpur has taken the view that the profits earned by assessee on the sale of shares is liable to be assessed as short term capital gain by observing as under:

" 8. We have carefully considered the rival submissions. In this case, the assessee is an individual and it is revealed from the computation of income that he is deriving income from business conducted through proprietary concerns and share income from a partnership concern. Apart therefrom, the assessee also has rental income from house property and interest income from Bonds, etc. In the immediately preceding assessment year 2005-06 also, we find that the assessee has similar streams of income and also salary income from M/s. Daga Fuels & Binders P. Ltd. Nagpur. During the year under consideration, the assessee sold some shares on which he earned long-term capital gains as also short-term capital gains. The long-term capital of Rs. 11,78,779/- declared by the assessee has been accepted as such by the Assessing Officer, whereas the income from short-term capital gains on sale of shares has been assessed as business income. According to the Assessing Officer, the transaction of the sale of shares resulting in short-term capital gains was in the nature of trading activity and, thus liable to be assessed as business income.

9. Notably, it is evident from the fact-situation of the case that the primary business of the assessee is of dealings in coal carried out through its proprietary concerns. Further – more, in the immediately preceding assessment year 2005-06, which has also been taken note of by the Commissioner of Income-tax (Appeals), the assessee had earned income on sale of shares which has been declared under the head 'capital gains'. There is no disturbance to such claim of the assessee. In fact, during the year under assessment also in so far as the sale of shares resulting in long-term capital gain is concerned, the Assessing Officer has accepted the version of the assessee and has treated such transaction as sale of investments. It is only on account of the sale of shares resulting in short-term capital gain, the same has been considered by the Assessing Officer as sale of stock-in-trade, thus treating the assessee as a trader in shares. Considering all the aforesaid factors, at the threshold, in our view, the onus is on the Revenue to establish that the transactions resulting in short-term

capital gain were carried on by the assessee as a trader and not as an investor. We say so for the reason that other than the selected transactions, namely, short-term capital gain, other similarly placed transactions carried out by the assessee during the year as well as in the earlier year have been accepted by the Assessing Officer as sale of investments. In so far as the discharge of onus is concerned. In our view, the Assessing Officer has not discharged such onus on the basis of any cogent material. In this case, the assessee has not used any borrowed fund to make the investments. In fact, the assessee has explained that only its surplus funds have been utilized for making investments in shares as also in mutual fund, bonds, etc. which have yielded income. The assessee has also explained the frequency of transactions. It is claimed that purchases have been made in smaller lots, whereas sales have been made on minimal times. Ostensibly, the assessee has been buying shares in smaller lots as and when considered appropriate for investment. Evidently, considering the past history and also the fact that there is no establishment for trading in shares, the assessee has been rightly regarded as an investor per se by the Commissioner of Income-tax (Appeals). At this point, we may also observe that in so far as certain transactions shown by the assessee on day trading is concerned, the same have been directed to be assessed as business income by the Commissioner of Income-tax (Appeals). On certain occasions, the assessee has bought and sold shares on the same day which, according to the Commissioner of Income-tax (Appeals), showed speculative activity which was assessable as business incomes. This aspect has not been challenged by the assessee before us. We are only observing the same to point out that the Commissioner of Income-tax (Appeals) has appropriately appreciated the entire factual position to come to the conclusion that the transactions in question has been rightly claimed by the assessee as short-term capital gains and not as business income as treated by the Assessing Officer. In the absence of any cogent material or reasoning to the contrary, we hereby affirm the conclusions drawn by the Commissioner of Income-tax (Appeals). As a result thereof, the order of the Commissioner of Income-tax (Appeals) is hereby confirmed."

Similar view has been taken by this Tribunal in ITA Nos. 188 & 189/Nag/2014 in the assessee's own case for the assessment year 2007-08 and 2008-09 vide order dated 31/08/2016 under the similar facts and circumstances. We therefore respectfully following decisions of this Tribunal in the assessee's

own case for earlier years dismiss the ground Nos. 4 and 5 taken by the revenue in the case of assessee HUF and individual case of assessee.

6. Thus both the appeals of the revenue are dismissed.

ITA No. 213/Nag/2014 (A.Y. 2010-11

7. This appeal has been filed by asessee against the order of CIT(A) dated 5/2/2014 . The only issue involved in ground Nos. 1 and 2 taken by assessee relates to the addition of Rs.5,07,500/- in respect to gold jewellery and addition of Rs. 8,70,000/- in respect of silver confirmed by CIT(A).

8. The brief facts relating to these grounds are that during the search and seizure preoceedings jewellery amounting to Rs. 5,[illegible],690/- and silver bars worth of Rs. 8,70,000/- found from the residence of the assessee. Besides, jewellery worth of Rs. 12.24,915/- was also found from the assessee's locker with Dena Bank, Nagpur. The A.O. held that the assessee could not discharge the onus of explaining the same and since these were jewellery items and were not declared in the wealthtax returns of the assessee and his family members, the A.O. treated the same as undisclosed income of the assessee. The assessee went in appeal before the CIT(A() and submitted before the CIT(A) the total jewellery which was found during the course of search were to be explained at Rs. 26,13,565/-. During the course of assessment proceedings reconciled some jewellery items with the

wealthtax return/valuation report. The items could not be reconciled are as under:

1. Jewellery item	Rs. 10,15,860/-
2. Silver weighing 30 kg.	Rs. 8,70,000/-
Total	Rs. 18,85,860/-

The assessee filed reconciled statement as per wealthtax returns as well as details of the recon ciled jewellery and contended that the jewellery worth of Rs. 18.85 lakhs are the ancestral valuables and submitted the history of the assessee's family and also submitted that after the dealth of the assessee's father the jewellery, ornaments and other valuables were not included in the wealthtax returns of the legal heirs for the simple reason that his tentative liabilities after the nationalisation of the coal mines worked out by the Government was more than the assets. The assessee also enclosed the copies of the wealthtax returns for the assessment year 1987-88 for himself and his late mother which contains a note that is as under:

"The assessee is a legal heir of late Shri Sunderlal Daga and since his liabilities exceeds his assets no portion of his wealth is included therein."

The assessee also enclosed copies of computation of wealth of assessee as well as of his mother late Smt. Umadevi Daga. It was further contended before the CIT(A) that the jewellery/ornaments and other valuables of late Shri Sunderlal Daga was in possession of his late mother Smt. Umadevi Daga.

The said jewellery came into possession of the assessee after the death of his mother in February, 2008. Most of the above valuables were kept by the assessee's mother in her lockers with Bank of India which were inherited by her from her late husband. The assessee and his family members were not aware of the lockers and its contents. The assessee came to know only after the death of his mother in discussion with his sisters. The lockers were opened and the contents of the lockers are in possession of assessee and not distributed amongst the legal heirs of his two sisters. The assessee was not aware as to how much he will get on distribution and this is the reason the same were not included in his as well as his other family members in their wealthtax returns filed for the assessment year 2009-10. The assessee also enclosed a copy of declaration executed between him and his sisters dt. 16/02/2008. Thus, it was contended before the CIT(A) that the source of jewellery and other valuables has been explained. The CIT(A) did not agree with the contention of the assessee but looking to the family history he treated 50% of the total jewellery of Rs. 10,15,00/- i.e. at Rs. 5,07,500/- to be ancestral jewellery and treated it as explained. The CIT(A) confirmed the balance addition of Rs. 5,07,500/- on account of jewellery. In so far as the addition with regard to the silver bars of 30 kgs found and seized amounting to Rs. 8,70,000/- is concerned, the CIT(A) held that the same have not been declared by assessee in wealth tax return. The CIT(A) confirmed the said addition to the extent of Rs. 8,70,000/-.

9. Before us, the learned counsel for the assessee reiterated the submission made before the CIT(A) and has also given details of family history by stating that Daga family is an old highly reputed family of the city of Nagpur having industrial business history of over 100 years, He has submitted certain photographs of family members and articles possessed at pages 19 to 32 of the paper book. It was contended that jewellery and silver belonged to father of assessee Shri Sunderlal Daga. The weath tax assessment order of Shri Sunderlal Daga for the assessment year 1962-63 are filed at pages 15 to 18 of the paper book which shows that late Shri Sunderlal Daga was possessing 2.5 kg of gold ornaments. It was submitted that the silver was not included as the same was not chargeable to wealthtax upto assessment year 1970-71. After the death of father of assessee the jewellery and silver were in possession of mother of assessee Smt. Umadevi Daga and after death of mother of assessee in February, 2008 the same were in possession of assessee. The jewellery and silver of the mother of assessee were to be distributed amongst the assessee and his two sisters being legal heirs.. The copy of the declaration with regard to the distribution of assets belonging to Smt. Umadevi was submitted on record before us and the same is placed at pages 39 to 47 of the paper book. Since the jewellery was not distributed therefore, the same was not included in the wealthtax return. It was further submitted that the CIT(A) himself accepted that 50% of the gold jewellery to be ancestral jewellery and deleted the addition of Rs.5,07,500/-.

10. The learned Departmental Representative on the other hand relied on the orders of tax authorities below.

11. We have heard the rival submissions and considered the same along with orders of tax authorities below.We have also gone through the wealthtax assessment order of the father of assessee for the assessment year 1962-63 which shows that the father of the assessee was in possession of the gold jewellery of 2.5 kg. This in our opinion it is that the assessee family was having the old jewellery and must have ancestral jewellery at the hands of assessee. It is also an undisputed fact that silver was not chargeable to wealthtax upto assessment year 1970-71. We have noticed that the mother of assessee Smt. Umadevi expired in February, 2008. As per the Hindu tradition, in our opinion, the ancestral jewellery must have been kept with the oldest family member of assessee. It is also fact that once the mother of the assessee expired as per the provisions of Hindu Succession Act, the assessee and his two sisters became legal heirs and were entitled to share the jewellery. The whole of the jewellery cannot be treated to be belonging to the assessee and keeping in view of the facts of the case that since the jewellery was not distributed amongst the assessee and his two sisters, as per the provisions of the wealthtax Act as well as income tax Act the assets of the deceased till its distribution amongst the legal heirs has to be charged to tax separately. The provisions of section 159 of the Income Tax Act, 1961 states so. The CIT(A) has also accepted that the assessee was having the ancestral

jewellery but estimated to 50% of the gold jewellery. It is also fact that the family used to have silver utensils, silver bars for their day to day use and since silver are being owned by family has been assessed at the hands of assessee's father in the assessment year 1962-63, there is no reason to disbelieve the submission of the assessee. We, therefore, set aside the order of the CIT(A) and delete the additions of Rs. 5,07,500/- on account of jewellery and Rs. 8,70,000.- on account of silver as sustained by the CIT(A). The ground Nos. 1 and 2 of the assessee stand allowed.

12. In the result, the appeal of the assessee is allowed.

Sd/-

(AMARJIT SINGH)

Judicial Member

sd/-

(P. K. BANSAL)

Vice President

Dated: 27/06/2017

*Singh

Copy of the order forwarded to :

1. The Appellant
2. The Respondent
3. Concerned CIT
4. The CIT(A)
5. D.R.,
6. Guard file

R.D

Asstt. Registrar