IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "D", MUMBAI

BEFORE SHRI B.R. BASKARAN, ACCOUNTANT MEMBER
AND
SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER

ITA Nos. 2294/MUM/2023 & 2295/MUM/2023	:	**A.Ys. : 2006-07 & 2007-08**
CO Nos. 78/MUM/2023 (Arising out of ITA No. 2294/M/23)		**A.Ys. : 2006-07 &**
77/MUM/2023 (Arising out of ITA No. 2295/M/23)		**2007-08**
Dy. Commissioner of Income Tax, Circle-3(3)(1), Room No. 609, Aayakar Bhavan, M.K. Road, Mumbai. (Appellant)	Vs.	Motech Software Pvt. Ltd., 56, Motech House, Mogra Village Lane Off Old Nagardas Road, Andheri East, Mumbai. PAN : AACCM0039Q (Respondent/Cross Objector)

Assessee by	:	Shri F.V. Irani, & Shri Devesh Vasavada
Revenue by	:	Smt. Sanyogita Nagpal & Ms. Mahita Nair, Sr.DR

Date of Hearing	:	31/05/2024
Date of Pronouncement	:	28/08/2024

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

<u>PER B.R. BASKARAN, A.M</u> :

The appeals filed by the Revenue and the cross objections filed by the assessee for assessment years 2006-07 and 2007-08 are directed against the orders passed by Ld CIT(A)-57, Mumbai. Since the issues contested in these appeals arise out of common set of facts, they were heard together and are being disposed of by this common order.

2. In the cross objection, the assessee is challenging the validity of reopening of assessment of both the years under consideration.

3. In the appeal filed by the revenue for assessment year 2006-07, following grounds of appeal have been raised:-

> *"1. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting addition of Rs. 1858, 79, 48, 919/- made as 'Unexplained Investment u/s.69 & 69A' in the hands of the assessee company without appreciating the fact that the information in the form of Base Documents provided by the Government of France to the Government of India under the Exchange of Information under DTAA between India and France clearly indicate that the assessee, as beneficial owner, is holding unexplained investment/deposits in the bank accounts maintained with HSBC Bank, Geneva in the names of (i) Infrastructure Company Ltd, (ii) HRJ Holdings NV and (iii) Aberdeen Enterprises NV aggregating to Rs.1858, 79,48,919/-.*
>
> *2. The Ld. CIT(A) erred in deleting the above addition by not taking cognizance of / the fact that the information received from the Government of France under DTAA ' is authentic and the same matched with the information received from the Swiss Banks and competent authorities of Foreign governments to the extent that the entities mentioned in the information received were holding Bank accounts in the HSBC Bank, Geneva and therefore, the AO had rightly relied on this information for making the addition.*
>
> *3. The CIT(A) erred in holding that the assessee company is not a beneficiary or beneficial owner of the assets in the Bank accounts with HSBC Bank held by the foreign entities, including Aberdeen Enterprises, HRJ Holdings NV and Infrastructure Company Limited and that Mr. James Walfenzao is the true owner / beneficiary of the deposits in the Bank accounts without appreciating the structure of Capital Investment Trust as evident from the Trust deed and contents of other documents. viz: Mandate Agreement dated 24.10.2003 and addendums thereto and letter of Mr. James Walfenzao dated 08.07.2011 to HSBC Bank, Geneva received from Government of Netherland, Curacao, according to which the assessee was made as a beneficial owner in the Bank Accounts of entities including (i) Infrastructure Company Ltd, (ii) HRJ Holdings NV and (iii) Aberdeen Enterprises NV but in this letter he was only trying to correct the records of the Bank which is nothing but an afterthought.*
>
> *4. The CIT(A) erred in not appreciating that the internal note dated.*

19.12.2003 by an officer of HSBC Trustee Company / HSBC bank of Mr. Raj Parmar confirming that the assessee company is ultimate beneficial owner of Bartow Holding NV is in conformity with the contents of the letter of Mr. James Walfenzao dated 08.07.2011 to HSBC Bank, Geneva as per which the assessee company was originally shown as beneficial owner and for the same reason the Swiss Government also states in their reply dated 17.01.2020 that for the Bank confirmed that the assessee company was mistakenly mentioned as the beneficial owner and all these documents finally support the base document received from Government of France.

5. The Ld. CIT(A) erred in holding that the assessee company is not a beneficiary or beneficial owner of the assets in the Bank accounts with HSBC Bank held by the impugned foreign entities by wrongly relying on the letters from HSBC bank dated 10.08.2011 and 18.10.2011 which were issued subsequent to letter of Mr. James Walfenzao to·the bank dated 08.07.2011 seeking correction and therefore these replies did not reflect true position.

6. The Ld. CIT(A) erred in deleting addition of Rs. 1858, 79, 48, 919/ - made as 'Unexplained Investment u/s.69 & 69A' in the hands of assessee company without appreciating the fact the information available on the record indicates that assessee company was the ultimate and beneficial owner of US$ 400 Million invested through GDR's in Reliance Port & Terminal Ltd. and Reliance Utility & Power Ltd., as the assessee company was ultimate and beneficial legal owner of Bartow Holding NV whi.ch is in tum beneficiary of Capital Investment Trust which held 100% ownership of Infrastructure Co. Ltd. through Thames Global Ltd. and Infrastructure Co. Ltd. invested USD 270 million in Reliance Port & Terminal Ltd and USD 170 million in Reliance Utilities & Power Ltd through GDR?.

7. The Appellant craves leave to add, amend and/or vary the grounds of Appeal before or during the course of hearing."

4. In the appeal filed by the revenue for assessment year 2007-08, ground No.1 reads as under:-

"1. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting addition of Rs.334,54,29,862/- made as 'Unexplained Investment u/s.69 & 69A' in the hands of the assessee company without appreciating the fact that the information in the form of Base Documents provided by the Government of France to the Government of India under the Exchange of Information under DTAA between India and France clearly indicate that the assessee, as beneficial owner, is holding unexplained

> *investment/deposits in the bank accounts maintained with HSBC Bank, Geneva in the names of (i) HRJ Holdings NV and (ii) HRJ Holdings NV2 aggregating to Rs.334,54,29,862/-.*

The remaining grounds 2 to 7 are identical with the grounds raised in AY. 2006-07. All the grounds raised by the revenue in both the years relate to a single issue, viz., relief granted by Ld CIT(A) in both the years pertaining to the addition made by the AO u/s 69/69A of the Act in respect of unexplained deposits kept in the bank accounts maintained with HSBC Bank, Geneva in the name of certain entities.

5. The facts that led to the reopening of assessment of both the years under consideration are discussed in brief. The assessee is engaged in the business of development of software and provision of IT enabled services. The original assessment u/s 143(3) of the Act was completed on 11-12-2008 for AY 2006-07 and on 21-12-2009 for AY 2007-08. Our Indian Government received information referred to as "Base Document" from French Government containing details of Indians, who held deposits in Swiss banks. It is submitted that the data containing those details were stolen by someone and handed over to the French Government, which in turn, shared it with various Governments. The information so received by our Indian Government, inter alia, included the name of the assessee. It was communicated to the Assessing officer that the assessee has held deposits in its name and in the name of certain entities in the accounts maintained with HSBC Bank, Geneva during the years under consideration. Hence the AO took the view that the income relating to AY 2006-07 and 2007-08 has escaped assessment. Accordingly, he reopened the assessment of both the years under consideration by recording following reasons:-

The reasons recorded for A.Y. 2006-07:-

"The assessee company electronically filed its return of income for AY. 2006-07 on 28-11-2006 declaring total income at Rs. 6,04,010/-. The case was selected under scruting and the assessment was completed under section 143(3) on 11-12-2008 determining total income at Rs. 1,70,19,180/-.

2. As per the information received from French Government, which was forwarded by the Addl. Director of Income-tax (Inv.), Unit-IV, Mumbai, it was mentioned that the assessee maintains an account with HSBC Bank, Geneva having huge unexplained deposits/investments. Information also suggests existence of a related entity (Avila Structured Pvt. Foundation), operating from the above said address and maintaining an account with HSBC Bank, Geneva having huge unexplained deposits/investments during the period ending 31-03-2006. The information also mentions of the assessee having linkage with the following entities:-

(i) Aberdeen Enterprise NV
(ii) HRJ Holdings NV
(iii) Infrastructure Company Ltd.,

3. On the basis of information received from the Addl.DIT(Inv.), Unit-IV, Mumbai, it is seen that the assessee is having unexplained investment/deposits through its related entity, the details of which is as under:-

Sr.No.	Name of the Entity	Peak Unexplained Investment in USD	Unexplained Investment in INR	Reference
1	Infrastructure Company Ltd.,	400,000,558.00	17,844,024,892	Pg.18
2.	HRJ Holdings NV	1,001,000.00	44,654,610	Pg.16
3.	Aberdeen Enterprises NV	8,283,320.73	369,518,938	Pg.15
	TOTAL	409,284,879	18,258,198,440	
	Conversion Rate	44.61		

4. Thus, primarily the income to the tune of Rs. 1825,81,98,440/- has escaped assessment in A.Y. 2006-07 relevant to F.Y. 2005-06.

5. In view of the above, the assessment passed on 11-12-2008 was under assessed to the tune of Rs. 1825,81,98,440/- by reason of the failure on the part of the assessee to disclose fully and truly all the material facts necessary for its assessment for the assessment year 2006-07. Necessary approval from the CIT-8, Mumbai under the provision of section 151(1) r.w.s. 149(1)(b) of the Income-tax Act, 1961, is obtained vide letter NO. CIT-8/MUM/147 (Mo Tech)/2011-12 dated 14-03-2012. Issue notice under section 148 of the Income Tax Act, 1961".

The reasons recorded for A.Y. 2007-08:-

"The assessee company electronically filed its return of income for AY. 2007-08 on 20-10-2007 declaring total income at Rs. 85,89,548/-. The case was selected under scrutiny and the assessment was completed under section 143(3) on 21-12-2009 determining total income at Rs. 1,51,38,250/-.

2. As per the information received from French Government, which was forwarded by the Addl. Director of Income-tax (Inv.), Unit-IV, Mumbai, it was mentioned that the assessee maintains an account with HSBC Bank, Geneva

having huge unexplained deposits/investments. Information also suggests existence of a related entity (Avila Structured Pvt. Foundation), operating from the above said address and maintaining an account with HSBC Bank, Geneva having huge unexplained deposits/investments during the period ending 31-03-2006. The information also mentions of the assessee having linkage with the following entities:-

(i) Aberdeen Enterprise NV
(ii) HRJ Holdings NV
(iii) Infrastructure Company Ltd.,

3. On the basis of information received from the Addl.DIT(Inv.), Unit-IV, Mumbai, it is seen that the assessee is having unexplained investment/deposits through its related entity, the details of which is as under:-

Sr.No.	Name of the Entity	Unexplained Investment in USD	Unexplained Investment in INR	Reference
1	HRJ Holdings NV	71,480,068.54	3,080,790,954	Pg.17
2.	Avila Structured Pvt. Foundation HRJ Holdings NV	4,212,937.00	181,577,585	Pg.23
	TOTAL	75,693,006	3,262,368,539	

Conversion Rate 43.1

4. Thus, primarily the income to the tune of Rs. 326,23,68,539/- has escaped assessment in A.Y. 2007-08 relevant to F.Y. 2006-07.

5. In view of the above, I have reason to believe that the income chargeable to tax of Rs. 326,23,68,539/-has escaped assessment within the meaning of Explanation 2(c) of section 147 of the Income Tax Act, 1961 by reason of the failure on the part of the assessee to disclose fully and truly all the material facts necessary for its assessment for the assessment year 2007-08. Hence, this is a fit case for initiation of proceedings u/s. 147 of the Income-tax Act, 1961. Accordingly, the case is reopened under section 147 of the Income-tax Act, 1961, and notice under section 148 of the Act shall be issued as per law."

In the reassessment proceedings, the AO assessed the deposit amounts kept in the name of above said entities in both the years, treating it as assessee's undisclosed income. The amount assessed by the AO in AY 2006-07 was Rs.1858.79 crores, which consisted of deposits held in the name of following entities:-

Infrastructure Ltd - 1822.10 crores
Aberdeen Enterprises NV- 36.69 crores

1858.79 crores
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The amount assessed by the AO in AY 2007-08 was Rs.334.54 crores in the name of following entities:-

HRJ Holdings NV	-	315.21 crores
HRJ Holdings NV2	-	19.33 crores

		334.54 crores
		===========

As noted earlier, since the Ld CIT(A) deleted those additions and hence the revenue has filed appeals for both the years.

6. Before the Ld CIT(A), the assessee challenged the validity of reopening of assessment of both the years, but he rejected the same. Hence the assessee has filed cross objections for both the years on the above said legal issue. Since the contention raised by the assessee in its cross objections filed for both the years under consideration is a legal issue and further, since it goes to the root of the matter, we shall first deal with the same. The assessee has raised various types of contentions in both the years with regard to the validity of reopening of assessment. They are:-

(a) The AO did not dispose of objections filed by the assessee against reopening of assessment by passing a separate speaking order. Hence the reassessment proceedings are rendered illegal, void and without jurisdiction.

(b) The reasons recorded for reopening of assessment indicate that the AO has reopened the assessment for making fishing and roving enquiries, which is not permitted under the law.

(c) The AO could not have reason to believe that income of the assessee has escaped assessment in both these years in view of the letter received from HSBC Bank by the AO before reopening of assessment, wherein it has been confirmed by HSBC Bank that the assessee did not hold any bank account with HSBC Private Bank (Suisse) and further it is not beneficiary of assets in the entities noted

by the tax authorities. We were given to understand that HSBC Bank and HSBC Private Bank (Suisse) refer to one and same Bank.

(d) There is no tangible material to support the belief entertained by the AO, since there was no live link between the materials relied by the AO and the reasons recorded by him.

6.1. The first contention raised by the assessee on this legal issue is that it had filed applications before the AO for both the years objecting to the reopening of assessment, but the AO has not disposed of them by passing separate orders. It is the contention of the assessee that non-disposal of the objections raised by the assessee would vitiate the assessment orders passed by the AO for both the years under consideration. In support of this proposition, the Ld A.R placed reliance on the decision rendered by Hon'ble Bombay High Court in the following cases:-

(a) Fomento Resorts & Hotels Ltd vs. ACIT (2019) (Tax Appeal No.63 of 2007)

(b) KSS Petron Private Ltd vs. ACIT (2016)(ITA No.224 of 2014)

(c) Bayer Material Science (P) Ltd vs. DCIT (2016)(382 ITR 333)

The Ld. AR submitted that the procedure for disposing of objections raised by the assessee to the reopening of assessment has been laid down by Hon'ble Supreme Court in the case of GKN Driveshars (India) Ltd vs. ITO (2003)(259 ITR 19)(SC). Accordingly, it was contended non-adherence of the procedure prescribed by the Hon'ble Supreme Court would vitiate the assessment orders and they are liable to be quashed.

6.2. The Ld. DR, on the contrary, submitted that the assessee did not file any objection at all to the reopening of assessments before the AO. The Ld D.R submitted that the AO had issued the notices u/s 143(2) and 142(1) of the Act upon filing of returns of income by the assessee.

The assessee has only replied to the notice issued u/s 142(1) of the Act and the same cannot be taken as the objections filed by the assessee.

6.3. We notice that the Assessing Officer has issued notices u/s 148 of the Act for AY 2006-07 and 2007-08 respectively on 15-03-2012 and 02-03-2012. It is the submission of the assessee that the assessee has objected to the reopening of assessments by filing letters dated 20th August, 2012 and 17th August, 2012 respectively for both the years. We notice that the contents of both the letters are identical. Both the letters have been written by Shri K Varadarajan, director of the assessee company. Hence, we refer to the letter dated 20th August, 2012 filed for AY 2006-07. The following contents of the said letter are worth to be noted:-

(a) The letter starts with the following sentence:-

> *"This has reference to your aforesaid notice no.DCIT-8(2)/Mum/Scr./20/2012-13 dt. 02-07-2012.*
>
> *The authorized representative of the erstwhile MoTech Software Pvt Ltd attended before you and you were kind enough to supply us copy of reasons for re-opening the assessment u/s 148 of the Income Tax Act, 1961.....*

Thereafter, the submissions with regard to the functions of the assessee have been stated. The letter finally concludes as under:-

> *"I therefore submit that the information as referred by you in your aforesaid notice does not have any basis relatable to us and we have no connection whatsoever with the parties mentioned in the aforesaid notice and with the bank mentioned in the aforesaid notice. It is submitted that no income has been undisclosed by the Company."*

It is the contention of the assessee that the above said letters constitute "Objection filed by the assessee to reopening of assessment". However, it is the contention of Ld D.R that the above said letter is the reply given by the assessee to the notice dated 02-07-2012 issued by the AO u/s 142(1) of the Act.

6.4. We noticed that the above said letter is commenced by referring to a notice No. *DCIT-8(2)/Mum/Scr./20/2012-13 dt. 02-07-2012.* Hence, prima facie, it appears to be the reply given to the above said notice. Further, the Ld D.R has also furnished copy of order sheet noting made in the assessment folder and in our view, the same will through light on the present dispute. The noting made by the assessing officer in the order sheet is extracted below:-

> "02/07/12 : Notices under section 143(2) & 142(1) issued to the assessee. Hearing fixed on 17-07-2012 at 4.30 p.m.
>
> 28/8/12 : The case is discussed with Smt. Chitalongia. The submission of the assessee is kept on record. Next date 18/09/12.
>
> 30/8/12 : In view of the fact that no objection for reopening of the case was filed by the assessee pursuant to reasons for reopening been provided on 18/7/12, no order for refusing the objection is warranted."
>
> "30/8/12 : In view of the fact that the "a" has not raised any objection for reopening of the assessment, even after providing the reasons for reopening were provided on 18/7/12 no order for disposal of objection is warranted."

The Ld. DR has furnished two noting that were made on 30-08-2012 in two different sheets. The first one is related to AY 2006-07, as the assessment year is mentioned on the top of the order sheet. The second noting was furnished in another sheet and hence it should be related to AY 2007-08, even though no assessment year is mentioned in that sheet.

6.5. We notice that the order sheet noting recorded on 02-07-2012 mentioned that the "hearing fixed on 17-07-2012 at 4.30 pm". However, the next date of hearing was noted as "28/8/12". The proceeding, if any, which took place on 17-07-2012 is not available. Be that as it may, the letter dated 17th August, 2012 has been filed by the

assessee after receipt of notice u/s 142(1). As per the contents of the letter extracted above, it refers to the notice issued on 02-07-2012 and it proceeds to discuss about the activities of the assessee company. It concludes that the information referred to by the AO are not relatable to the assessee and further it states that the assessee does not have any connection whatsoever with the parties mentioned in the aforesaid notice and with the bank mentioned in the notice. Finally it is averred that no income has been undisclosed by the Company. These contents in the letters, in our view, only states the factual aspects as per the assessee and the same appears to be the reply given to the notice issued u/s 142(1) of the Act. It can be noticed that the assessee nowhere specifically mentions in these letters that it is objecting to the reopening of assessment. Further, in the order sheet noting made by the AO on 30-08-2012 for both the years, he specifically mentions that the assessee has not filed any objection. This was the understanding between the parties during the course of assessment proceedings. Accordingly, upon cumulatively considering the surrounding facts, we are of the view that the above said letters are only replies given to the notice dated 02-07-2012 issued by the AO. Accordingly, we are of the view that the contents of the above said letters cannot be considered as "objection filed by the assessee to re-opening of assessment. Accordingly, we reject this contention of the assessee.

6.6. The next contention on this legal issue is that the AO has reopened the assessment for the purpose of making fishing and roving inquiries, which is not permitted under the law. We notice that the assessing officer has stated the details of information received by him in the reasons recorded for reopening of assessment, viz., the deposits kept in HSBC bank in the name of concerns to which the assessee is linked to. It is well settled proposition of law that the AO is required to have reasons to believe that there was escapement of income, at the time of reopening of assessment. However, during the course of

assessment proceedings, the AO may also come to the conclusion that no income has escaped assessment on the basis of materials examined by him. Hence the correctness or otherwise of the reasons entertained by the AO to believe that there was escapement of income can be known only when proper enquiries are made during the course of assessment proceedings. Such types of enquiries cannot be termed as fishing or roving enquiries. However, if the reasons for escapement of income are required to be found after making fishing or roving enquiry, the same is not permitted under the law. In the instant case, the belief arrived at by the AO is based on certain information received from the Investigation wing. Further, there is no requirement that the AO should have conclusive evidence at the time of reopening of assessment. The assessee is always entitled to furnish evidences against the reasons recorded by the AO, on which a decision will be taken by the AO after carrying out necessary examination. In this view of the matter, it cannot be said that the AO, in the instant cases, has reopened the assessment for making fishing or roving enquiry. Accordingly, we are of the view that the above said contention of the assessee is liable to be rejected.

6.7. The next two contentions of the assessee are that

(a) the AO could not have reason to believe that income of the assessee has escaped assessment in both these years in view of the letter received from HSBC Bank by the AO before reopening of assessment, wherein it has been confirmed by HSBC Bank that the assessee did not hold bank account with HSBC Private Bank (Suisse) and further it is not beneficiary of assets in the entities noted by the tax authorities.

(b) there is no credible material to support the belief entertained by the AO and hence there is no live link between the alleged materials and the reasons recorded by the AO.

We prefer to dispose of these two contentions later, as we feel that the back ground of the facts need to be appreciated before adjudicating these two contentions.

7. Accordingly, we proceed to examine the additions made by the AO on merits in both the years. We noticed earlier that the additions made by the AO in both the years were deleted by Ld CIT(A) and hence the revenue is challenging the relief granted by him. We shall take up the assessment year 2006-07 as the lead case. As the addition has been made in both AY 2006-07 and 2007-08 on identical set of facts, the decision rendered by us in Assessment year 2006-07 would be equally applicable to the assessment year 2007-08.

7.1. We noticed earlier that the assessing officer received information from the Investigation wing, which in turn had received information from French Government, that the assessee was maintaining an account with HSBC Bank, Geneva allegedly having huge unexplained deposits/investments. The postal address of the assessee assumes significance here, which is as given below:-

M/s Motech Software Pvt Ltd
56, Mogra Village Lane,
Off.: Old Nagardas Road, Andheri (E),
MUMBAI – 69.

Information also suggested existence of a related entity Avila Structured Pvt Foundation having very same address of the assessee as mentioned above and it was maintaining an account with HSBC Bank, Geneva allegedly having huge unexplained deposits/investments during the period ending 31.3.2016. The information also mentioned that the assessee is linked to the following entities:-

(i) Aberdeen Enterprise NV
(ii) HRJ Holding NV
(iii) Infrastructure Company Ltd

These three entities have held deposits in HSBC Bank, Geneva during the year relevant to AY 2006-07:-

Sr No.	NAME OF ENTITY	Peak Unexplained Investment in USD	Unexplained investment in INR	Reference
1	Infrastructure Company Ltd	400,000,558.00	17,844,024,892	Pg. 18
2	HRJ Holdings NV	1,001,000.00	44,654,610	Pg.16
3	Aberdeen Enterprises NV	8,283,320.73	369,518,938	Pg.15
	TOTAL	409,284,879.00*	18,258,198,440	

(* ROUNDED)

7.2. Based on the above information, the AO has reopened the assessment. In response to the notice issued by the AO u/s 148 of the Act, the assessee filed a letter requesting the AO to treat the return of income already filed by it as the return filed in response to the notice issued u/s 148 of the Act. Thereafter, the AO issued notices u/s 143(2) and 142(1) dated 02-07-2012 calling for documentary evidences with regard to the above deposits. In reply thereto, the assessee filed a letter dated 20-08-2012, wherein it is stated that

(a) it has not entered into any transactions with above said entities during the previous year relevant to AY 2006-07.

(b) it did not have any bank account with HSBC Private Bank (Suisee) S.A.

(c) it was carrying on software business only and also gave details of its gross income and net profit.

Accordingly, the assessee contended that no income has remained undisclosed by it. Not satisfied with the reply so given by the assessee, the AO proceeded to examine the matter further. During the course of assessment proceedings, the AO examined following persons and also recorded statements from them.

(a) Shri Varadarajan, Director of the assessee company. (He was director from January, 2009 to 30th May, 2012)

(b) Smt Annu Tandon, the past managing Director of the assessee company.

Both these officials reiterated that the assessee did not maintain any bank account with HSBC Bank and also pleaded ignorance about other entities mentioned above. Subsequently, the AO sent another show cause notice dated 14.3.2014 to the assessee asking it to explain as to why the peak balance of deposits standing in the name of M/s Infrastructure Company Ltd and M/s Aberdeen Enterprises NV should not be assessed as unexplained investments u/s 69 of the Act and/or unexplained money u/s 69A of the Act in the hands of the assessee company. The assessee replied to the above said notice on 25.3.2014, wherein it reiterated its earlier stand and denied the contents of Base Documents received from French Government.

7.3. The AO also wrote various letters to the Investigation wing and other higher officials as listed out below calling for further information:-

(a) Letter No. Addl.DIT (Inv.)/Unit-IV/Motech/2011-12 dated 02-11-2011.

(b) Letter dated 29.11.2012 to CIT-8, Mumbai requesting for reference u/s 90 of the Act for onward transmission to the Indian Competent Authority. The above said request was complied with by the Under Secretary (FT & TR III(2), Delhi), who forwarded the request to the Switzerland authorities.

(c) References were sent to Indian Competent Authority, New Delhi with respect to five Countries, viz., French Republic, Kingdom of Netherlands, Switzerland, Jersey and British Virgin Islands on 20-12-2013, who in turn, forwarded the requests to the respective competent authorities of the above said countries.

(d) Another reference was sent to Switzerland through Indian Competent Authority on 04-02-2013 calling for certain information and documents.

However, the AO did not receive any reply from any of them until the date of completion of the assessment. Hence the assessing officer took

the view that the present case has to be considered in the light of human probabilities.

7.4. The AO completely relied upon the Base documents (BD) which contained details like, Name of entity, Code BUP, client profile code, date of creation of profile, whether Account holder or not. It is pertinent to note that the BD did not state that the assessee is an Account holder. There was no information that the assessee was holding deposits in its own name, even though the reasons for reopening of assessment stated so. It also contained information on relationship amongst various entities. It stated that the assessee is legally related to following entities:-

The Capital Investment Trust and
Avila Structured Private Foundation

It further stated that the assessee is Beneficial Owner of

Lasemo Holdings Inc
HRJ Holdings NV
Stayer Corporation NV
Tremaine NV
Aberdeen Enterprises NV.

It also contained information about the details of beneficial ownership of M/s The Capital Investment Trust Ltd and M/s Avila Structured Private Foundation. Based on all these information, the AO came to the conclusion that the assessee has beneficially held deposits in the name of M/s Infrastructure Company Ltd and M/s Aberdeen Enterprises NV as detailed below in the year relevant to Ay 2006-07:-

M/s Infrastructure Company Ltd	-	1822,09,85,418
M/s Aberdeen Enterprises P Ltd	-	36,69,63,501
		1858,79,48,919

Accordingly, the AO assessed the above said amount of Rs.1858.79 crores as income of the assessee treating the same as unexplained investments/money u/s 69 & 69A of the Act.

8. It may be also noted that the assessee company was dissolved as per the provisions of sec. 560(5) of the Companies Act on 30th May, 2012 under Fast Track Exist Scheme. Hence the AO made enquiries with Registrar of Companies with regard to the notice issued to the Income tax department before dissolving the assessee company. It came to light that the Registrar of Companies has not issued notices to the Income tax department as required under the Companies Act. Subsequently, the department moved a petition before the Hon'ble High Court of Bombay for revival of the assessee company. Subsequently, the National Company Law Tribunal, vide its order no. TCO No.244 (MB)/2017 dated 29-05-2019, has directed the Registrar of Companies to revive the assessee company.

9. The assessee challenged the additions made by the AO by filing appeal before Ld CIT(A). Before Ld CIT(A), the assessee made detailed submissions along with paper book. We noticed earlier that the AO had made references to various Countries calling for various information and they were not received before the completion of assessment. After completion of the assessment, the DDIT received replies from some Countries and the copies of the same were given to the AO and also marked to Ld CIT(A). In view of the availability of fresh materials, the Ld CIT(A), vide his letter dated 21-03-2017, called for a comprehensive remand report from the AO. The remand report was submitted by the AO on 12-06-2019. The AO also submitted another remand report on 14-06-2019 after receipt of replies from all the Countries to whom references were made.

9.1. The contents of remand report given by the AO are summarized as under:-

(a) The assessee is the legal and beneficial owner M/s Bartow Holding NV. The above said M/s Bartow Holding NV is the beneficiary of M/s Capital Investment Trust. The above said Capital Investment Trust held 100% of shares of M/s Thames Global Limited. The above said M/s Thames Global Limited held 100% shares in M/s Infrastructure Limited. The above said M/s Infrastructure Limited invested USD 400 millions in M/s Reliance Port & Terminal Ltd and M/s Reliance Utilities & Power Ltd. Accordingly, the AO contended that the assessee is the ultimate beneficial owner of USD 400 millions invested in the above said two companies.

(b) The Base Document received from French Authorities showed that the assessee is the beneficial owner of M/s Infrastructure Company Ltd, M/s Aberdeen Enterprises and M/s HRJ Holdings NV. As per Base Document, the investment was made in December, 2005 and December, 2006.

(c) A note submitted by Shri Raj Parmar to HSBC Bank, Geneva made on 19-12-2003 (during the process of opening of bank account with HSBC Private Bank Suisse SA) of various entities including Capital Investment Trust, stated that M/s Motech Software Pvt Ltd is the ultimate legal and beneficial owner of Bartow Holdings NV. This note is corroborated by the fact that the Base Document also mentioned that the assessee company is beneficial owner of M/s Bartow Holdings NV. The internal note written by Shri Raj Parmar Reads as under:-

"Re CAPITAL INVESTMENT TRUST
I Confirm that I have been shown confidential documentation which confirms that Motech Software Pvt Ltd is the ultimate legal and beneficial owner of Bartow Holdings NV., and that the ultimate beneficial owners of Motech Software are represented by Mukesh

Ambani, his wife and issue and by Anil Ambani, his wife and issue in their personal capacities.

Raj Parmar *19th December 2003"*

This note also stated about the link between the assessee company and Shri C.J Damani, who was stated to be the erstwhile partner of Shri Dhirubhai Ambani.

(d) Letter dated 08-07-2011 written by Shri James Walfenzo to HSBC Private Bank Suisse SA, Geneva informing that, on the request of Shri Sandeep Tandon (then director of the assessee company), the assessee company has been introduced as beneficiary of the bank accounts of various entities including M/s Infrastructure Company Ltd instead of Shri Sandeep Tandon. According to the AO, this information clearly indicates that the assessee company is the ultimate & legal beneficial owner of bank account of various foreign entities.

(e) The replies received from various Countries were submitted by the AO to Ld CIT(A). But the contents of the same have not been discussed by the first appellate authority.

9.2. Thus, the inference that the assessee company is the ultimate beneficiary of M/s Infrastructure company and some other entities has been drawn by the AO on the basis of following documents:-

(a) A note written by Shri Raj Parmar
(b) The above note of Shri Raj Parmar mentioning that Shri C J Damani is the erstwhile partner of Shri Dhirubai Ambani.
(c) Letter dated 08-07-2011 written by Shri James Walfenzao.
(d) Base documents received from HSBC Bank.

9.3. The assessee refuted the above allegations of the AO by furnishing detailed explanations, evidences and highlighting certain factual aspects. It was submitted that the note written by Shri Raj

Parmar is not supported by any other material. Accordingly, it was contended that the AO could not have relied upon unsubstantiated materials and reliance so placed is against legal principles. The Ld CIT(A) was convinced with the contentions of the assessee and accordingly held that the assessee cannot be linked to the entities supposedly holding deposits with HSBC Bank and hence those deposits cannot be assessed as income of the assessee. Accordingly, he deleted the addition made by the AO in both the years under consideration. Aggrieved, the revenue has filed these appeals.

10. We heard the parties and perused the record. The first question is whether the note written by Shri Raj Parmar, which has been heavily relied upon by the AO, shall constitute evidence to prove the allegation of the deposits made by the assessee in the name of various entities or not?. We had also extracted the said note earlier. The note written by Shri Raj Parmar mentions that the assessee is the ultimate beneficial as well as legal owner of M/s Bartow Holding NV. Before Ld CIT(A), the assessee has refuted the above charge by filing detailed explanations. The assessee submitted there are other evidences which contradict the noting so made Shri Raj Parmar. The main contentions of the assessee before Ld CIT(A) were that:-

a. There is one more file note from Mr. D A Whitefield, dated 19-02-2004, which states that ***"We have no documentation for this except a certification from Raj Parmar dated 19 December 2003....."***.

b. In the covering letter to FT&TR, the BVI authorities clearly state in clause 'm' that *"HSBC International Trustees Limited* ***does not hold any documents detailing the legal and other relationships between the Capital Investment Trust and Motech Software Pvt Ltd other than file notes attached......"***

c. Curacao authorities, BVI authorities and HSBC Banks' other employees confirmed that there was no proof of legal and beneficial ownership except Raj Parmar's note.

10.1. The Ld CIT(A) examined the information received from foreign authorities and found the above said contentions of the assessee to be correct. The relevant discussions made by Ld CIT(A) in this regard are extracted below:-

> *"6.8 Documents received from Curacao Authorities contained following important documents which evidences legal and beneficial owner of Bartow Holdings NV:*
>
> > *(a) Shareholder Register of Bartow Holdings NV which showed some other foreign entity as its legal owner (Pg no.31 of FPB)*
> >
> > *(b) Structure chart which clearly evidences that Bartow Holdings NV, Infrastructure Company Ltd and all entities mentioned in letter of HSBC, Geneva are legally and beneficially owned by Mr James Walfenzao, a foreign national (Pg no. FPB)*
>
> *6.9 The documents received from various jurisdictions do not have a shred of evidence to show that Motech Software Private Limited is the parent of Bartow as claimed by Shri Raj Parmar in his internal note dated 19 December 2003 and by the AO in his Remand Report dated 12 June 2019."*

10.2. As noticed earlier, the Ld CIT(A) has recorded these factual aspects on the basis of information received from foreign Countries, viz., letters received from Curacao authorities, letter received from Shri D A Whitefield, the covering letter of BVI authorities etc. These information would show that the "foreign authorities themselves" have stated that the note written by Shri Raj Parmar is not supported by any other corroborative documents. Since the note written by Shri Raj Parmar is an abstract noting and since the same has been denied by the assessee, it is imperative on the part of the AO to bring on record any corroborative evidences to substantiate the said noting. We noticed that the foreign authorities themselves are confirming that the noting so made by Shri Raj Parmar is not supported by any other corroborative evidence. In that case, we are of the view that the said noting should not have been relied by the AO to arrive at the conclusion that the assessee is the beneficial owner of deposits held by certain entities.

There should not be any dispute that the unsubstantiated note would acquire the character of a "dumb document".

10.3. The legal principles on the evidentiary value of "dumb documents" are well settled. It has been held in various cases that they do not have any evidentiary value. In support of this proposition, we may refer to the decision rendered by Hon'ble Supreme Court in the case of Common Cause (A Registered Society) v. UOI [2017] (394 ITR 220)(11 SCC 731) (SC), wherein it was observed as under at paragraphs 278 to 282 of the judgment:-

> *"278. With respect to the kind of materials which have been placed on record, this Court in V.C. Shukla case has dealt with the matter though at the stage of discharge when investigation had been completed by same is relevant for the purpose of decision of this case also. This court has considered the entries in Jain Hawala Diaries, note books and file containing loose sheets of papers not in the form of "books of accounts" and has held that such entries in loose papers/sheets are irrelevant and not admissible under Section 34 of the Evidence Act, and that only where the entries are made in the books of accounts regularly kept, depending on the nature of occupation, that those are admissible.*
>
> *279. It has further been laid down in V.C. Shukla case as to value of entries in the books of account, that such statements shall not alone be sufficient evidence to charge any person with liability, even if they are relevant and admissible, and that they are only corroborative evidence. It has been held that even then independent evidence is necessary as to trustworthiness of those entries which is a requirement to fasten the liability."*

It was further held that there must be independent evidence of the transaction to which the entries relate and in absence of such evidence no relief can be given to the party who relies upon such entries to support his claim against another. Hence, it is apparent from the aforesaid discussion that loose sheets of papers are wholly irrelevant as evidence being not admissible under Section 34 of Evidence Act so as to constitute evidence with respect to the transactions mentioned therein being of no evidentiary value. It was further held that there has to be

some relevant and admissible evidence and some cogent reason, which is prima facie reliable and that too, supported by some other circumstances pointing out that the particular third person against whom the allegations have been leveled was in fact involved in the matter or he has done some act during that period, which may have co-relations with the random entries. The Hon'ble Supreme Court further went on to observe that, in case we do not insist for all these, the process of law can be abused against all and sundry very easily to achieve ulterior goals and then no democracy can survive in case investigations are lightly set in motion against important constitutional functionaries on the basis of fictitious entries, in absence of cogent and admissible material on record, lest liberty of an individual be compromised unnecessarily.

10.4. When the entries were made in the loose papers by a third party, which the accused is not aware of at all, the onus to prove that those noting is enormous. Admittedly, in the instant case, there is no corroborative material to support the note written by Shri Raj Parmar. Hence, the AO could not have relied upon these types of dumb documents for taking adverse view against the assessee, since reliance so placed is against the legal principles discussed above.

11. The next evidence relied upon by the AO is the letter dated 08-07-2011 written by Shri James Walfenzao. It is the contention of the assessee that the AO has selectively picked up some portion of the letter to suit his convenience. It was submitted that the above said letter of Shri James Walfenzao, if considered in totality, would clearly bring out the fact that the assessee was not beneficiary to any of the bank accounts standing in the name of many entities. It is the submission of the assessee that the above said letter written by Shri James Walfenzao clearly admits that he is the ultimate owner of the various entities. It

was also submitted that the said letter further states the reasons for which/circumstances under which the name of the assessee was shown as beneficiary of bank accounts of certain entities.

11.1. The contention of the assessee is that the AO did not consider the letter written by Shri James Walfenzao in its entirety, i.e., he has referred to some portion of the letter on pick and choose basis to suit his convenience. Such kind of approach has been disapproved by the judicial authorities. The following observations made by the co-ordinate bench on this legal point in the case of DCIT vs. Ashok R Ruia (HUF) (ITA No.6309/Mum/2019) is relevant:-

> *"12.19 To sum up, the seized document should be read as a whole if it has to be relied upon. It cannot be read only to the extent it is advantageous to the revenue and not read when it becomes disadvantageous to the revenue. It is an accepted principle of interpretation of documents that they should be read as a whole, as persons of common prudence will read them. They cannot be read in bits and parts to suit the convenience of one party or other."*

11.2. We notice that the ld CIT(A) has examined this aspect in a detailed manner. The submissions made by the assessee with regard to the above said letter before Ld CIT(A) are summarized below:-

<u>Letter dated 08-07-2011 of Mr. James Walfenzao cannot be read selectively but must be read with other documents</u>

i) It was submitted that the AO has selectively considered only the letter dated 08-07-2011 of Mr. James Walfenzao and has conveniently ignored following documents shared by Curacao authorities. One needs to read all these documents together to appreciate the correct facts:

   a. A "Mandate Agreement" dated 24-10-2003 was entered into between Mr James Walfenzao and Mr Sandeep Tandon whereby Mr Tandon agreed to provide certain services to Mr James in relation to his investments. For the services to be rendered, Mr Tandon was promised a consideration of US$ 2 million plus a share of profits earned from the

investments by Mr James Walfenzao. Through addendum dated 30.12.2003, it was clarified that share of profit of Mr Tandon would be 10% of the profits. The said addendum also provided that to protect the consideration due to Mr Sandeep Tandon, he will be designated as 10% beneficial owner of the assets in the Bank account of entities owned by Mr James Walfenzao. It was also clarified that Mr Sandeep Tandon would have only 10% in the profits of the entities owned by Mr James Walfenzao though he is shown as beneficial owner in the bank accounts.

b. Another document dated 16-01-2007, clarifies and declares that since there was no profit on investment proposals, no monies were owed by either party and accordingly the mandate agreement was terminated.

c. Mr James Walfanzao's letter dated 08-07-2011 to HSBC Bank Geneva stating the following has to be read with above two documents which were direct evidence of the complete contours of the arrangement between Mr James Walfenzao and Mr Sandeep Tandon in his personal capacity:

- Bank accounts of following entities were established by Mr James Walfenzao out of his own resources and he operated these accounts.
  - Infrastructure Company Ltd
  - Avila Structured Private Foundation
  - Aberdeen Enterprise N.V.
  - Stayer Corporation N.V.
  - Tremaine N.V.
  - Bartow Holdings N.V.
  - HRJ Holdings N.V.
  - Lasemo Holdings Inc.
- As per his arrangement with Mr Tandon and in order to protect the profit share, Mr Tandon would be named as 10% beneficial owner of the assets in the bank accounts of these foreign entities. Since Mr. Tandon was Indian resident and was subject to Indian regulations, his

name could not be reflected as beneficial owner and it was only for this reason that, on a temporary basis, instead of Mr Tandon, name of the assessee company Motech Software was intended to be nominally shown as beneficial owner, purely for the sake of convenience.

- As the investments did not yield any profit, it was decided to arrangement with these entities.

The cumulative reading of documents would establish beyond any doubt that all these foreign entities were owned, funded and controlled completely by Mr James Walfenzao, and Mr Tandon or the assessee company did not contribute any amount to these entities nor received any benefit from these entities.

d. Finally, the closing Memo dated 09-09-2011 which is also part of documents received by Indian Competent authority from Government of Curacao, whereby certain foreign entities including Aberdeen Enterprises and Bartow Holdings were liquidated. It establishes that these entities were set up by Mr James Walfenzao for some of his investments for which he had a profit sharing arrangement with an Indian resident Mr Sandeep Tandon. All these foreign entities were throughout 100% owned by Mr James through various foreign entities/trusts/foundation.

11.3. It can be noticed that Shri James Walfenzao has owned up bank accounts of all entities including Bartow Holdings NV. Further, he has also explained the reasons for showing the name of the "assessee" as a beneficiary of various accounts belonging to Shri James Walfenzao, i.e., it was explained in the letter that the assessee was shown as a beneficiary in accordance with the arrangement entered between Shri James Walfenzao and Shri Sandeep Tandon (erstwhile director of assessee company). As per the said arrangement, Shri Sandeep Tandon was engaged by Shri James Walfenzao to provide investment advisory services. For rendering those services, it was provided that Shri Sandeep Tandon will be given service charges @ 10% of the profits. Accordingly, in order to protect the share of income payable to Shri Sandeep Tandon, the name of the assessee has been shown as

"beneficiary of 10% of the balances available in the bank accounts of various entities" on a temporary basis. It was further submitted that the name of the assessee was used for the reason that Shri Tandon, being Indian resident, was subject to Indian regulations and hence, his name could not be shown as beneficial owner.

11.4. However, it is the case of the assessee that it had never given any authority/consent either to Shri Sandeep Tandon or Mr James Walfenzao to add its name as beneficiary to any of the Bank accounts. Accordingly, the assessee contended that the said action of both the parties have been done without its approval and hence it was not binding on it. Accordingly, it has been contended that the internal arrangement entered between Shri Sandeep Tandon and Shri James Walfenzao should not have been relied upon the AO to allege linkage of the assessee with some foreign assets held and owned by unconnected individual. The assessee further submitted that it has learnt that the investment advisory services provided by Shri Sandeep Tandon did not result in profits. Hence, the assessee did not derive any benefit at all from any of the bank accounts. Accordingly, it was submitted that name of the assessee was only shown as a nominal beneficiary for some purpose, that too without its consent and further, there was no occasion to act upon. Accordingly, the assessee submitted that the assessee did not derive any kind of benefit from any of the bank accounts. Accordingly, the disassociated itself from all the bank accounts.

11.5. The Ld CIT(A) examined contentions of the assessee and analysed as to whether the assessee company could be considered as the legal and/or beneficial owner/beneficiary of the bank accounts held by various entities with HSBC Bank, Geneva or not. In this regard, he analysed the ownership pattern of various entities on the basis of

information received from FT & TR. The relevant discussions made by Ld. CIT(A) is given below:-

"7.3.5 The main issue which requires adjudication is that whether the appellant company was the legal and/or beneficial owner/beneficiary of the bank accounts held by various entities with HSBC Bank, Geneva or not.

There are many ways to determine the legal ownership of a company. Most common way is that company's shareholders are the rightful owners. This is based on the fact that shareholders have a stake in the company as well as voting rights and other types of rights. To decide the legal ownership of Motech Software Pvt. Ltd., the appellant company, over various foreign entities, it is relevant to analyse the share holding pattern of various entities. On analysis of the various documents received from the foreign governments such as Switzerland, France, Curacao of Kingdom of Netherland, Jersey of Channel Islands and British Virgin Ireland, it is noticed that Mr. James Walfenzao had formed various entities such as (i) Corpag Management NV, (ii) Juriot N.V. Neth, Antilles, (iii) Preferential Inc, St. Lucia, (iv) Avilla Structured Foundation, (v) Aberdeen Enterprises N.V., (vi) Stayer Corporation, (vii) HRJ Holdings N. V., (viii) Tremaine N. V., (ix) Bartow Holdings N.V. and (x) Infrastructure Company Ltd.

The flow chart of the ownership of various entities, as received under the FT & TR reference, is as under:-

Corpag Management NV

100%

Juriot N.V. Neth, Antilles

100%

Preferential Inc. St. Lucia

100%

Avilla Structured Foundation

100%

Aberdeen Enterprises N.V.

100%

Stayer Corporation

Tremaine N.V. Bartow Holdings N.V. HRJ Holdings N. V., N. V.

Infrastructure Company Ltd.

From the information provided by various foreign Governments under FT&TR Reference, the share holding of the various entities are as under:

i) Avilla Structured Private Foundation:

The founder of Avilla Structure Private Foundation is preferential Inc., St. Lucia. The supervisory board members were James Walfenzao and Jayraj Sampat.

ii) Aberdeen Enterprises NV:

6000 shares of Aberdeen Enterprises NV was initially held by Corporate Agents NV. On 11.02.2004, those 6000 shares were converted into 5,100 preferential 'A' shares and 900 Common 'B' shares. Out of 5,100 preferential 'A' shares, 1,275 shares were held each by James Walfenzao, Cathy Walfenzao, Corporate Management Ltd. and Hazes Management Ltd. 900 Common 'B' shares were held by Corporate Agents NV, which were transferred to Driemolen Holdings BV on 06.10.2004 and the same are further transferred on 05.04.2005 to Juriot NV. Juriot NV further transferred those shares on 18.08.2005 to preferential Inc and the same were transferred to Avilla Structure Pvt. Foundation on 19.08.2005.

Thus, Avilla Structured Pvt. Foundation held 15% shares of Aberdeen Enterprises NV.

***iii) Stayer Corporation NV:** 100% of shares Stayer Corporation NV were held by Aberdeen Enterprises.*

***iv) Bartow Holdings NV:** 100% shares of Bartow Holdings NV were held by Stayer Corporation NV.*

***v) HRJ Holdings NV:** 100% shares of HRJ Holdings Nv were held by Stayer Corporation NV.*

***vi) Tremaine NV:** 100% shares of Tremaine NV were held by Stayer Corporation NV.*

***vii) Infrastructure Co. Ltd:** 100% shares of Infrastructure Co. LTd., were held by Bartow Holdings NV.*

11.6. The Ld.CIT(A), then examined the Swiss Laws & rules to find out the meaning of 'Beneficial ownership'. The relevant discussions are available in paragraphs 7.3.7 of his order passed for AY 2006-07. In this regard, the Ld CIT(A) concluded that the 'Agreement on the Swiss

banks Code of conduct' was made effective from 13-06-2018 only and prior to that it was not mandatory. The bank accounts considered in these two years were opened/closed much prior to 13.6.2018. Accordingly, he concluded that the information given in the Base Document cannot be considered to be conclusive or establishing the true facts. The Ld CIT(A) accordingly held that evidences such as client profiling and documents collected by the bank at the time of opening of bank account, trust deed, letter of wishes, etc. have to be taken into consideration to prove the fact that the appellant company was 'Beneficial holder/Beneficiary' of assets held in the bank accounts of those entities with the HSBC Bank. The relevant discussions made by Ld.CIT(A) on this point are extracted below:-

"7.3.8 From the plain readings of the provisions of the Agreement, it is very clear that (i) the code of conduct is unconditionally applicable to all accounts, savings books, securities accounts and safe deposit boxes identified by number or code word, (ii) the Code mandated the banks to establish the identity of the beneficial owner of assets and obtain from its contracting partner a statement in 'Form A' concerning the beneficial ownership of the assets and (iii) the concept of 'Domiciliary Companies' was defined.

This code of conduct for Swiss Banks came into effect from 13.06.2018, i.e., from the signing of the agreement between the 'Swiss Bankers Association' and 'Swiss banks'.

In the case of Infrastructure Company Ltd., HRJ Holdings N.V. And Aberdeen Enterprises NV, the bank accounts with HSBC bank were opened and those bank account ceased to operate from F.Y. 2010-11 due to dissolution of those entities. Prior to 13.06.2018, it was not mandatory for the HSBC bank to obtain a statement in 'Form A' from those entities for disclosure of Beneficiary holders of the accounts held by such entities. Therefore, the rules/provisions of ***'Agreement on the Swiss banks' code of conduct with regard to the exercise of due diligence (CDB 20)'*** *are not applicable to the case appellant for F.Y. 2005-06 and 2006-07.*

7.3.9. *In Switzerland, sometimes the professional notaries and lawyers, banks and other financial intermediaries (FI) hold and administer assets on behalf of clients. Under Swiss law, relationships in which "one party holds assets for the benefit of another" are contractual. Such relationship is ruled by the "Law of Obligations", SR 220, Part V of the Civil Code. It is also governed by the position of a guardian in the 'Law of Tutelage, Article 360 et seq. of the Civil Code, SR 210. Swiss law has no equity, therefore, relationship between the client and who hold and administer the assets cannot have equitable relationships. Therefore, such relationships do not qualify as "trusts". Prior to 13.06.2018, at*

the time of opening of the bank account in Switzerland, standard 'profiling' of clients generally established how the assets were obtained and whether he could reasonably be expected to be the owner of the assets in question. Thus, the legal title or the contractual claim to assets was normally an indicator of legal owner or beneficial owner of the assets. Trust deed, documentation used when the trust was created, a letter of wishes provided clues and formed the basis to determine the beneficial owner of the trust.

7.3.10 *The information contained in the 'Base Note' provided by the French government mentioned the appellant company as beneficiary holder/beneficiary of the assets held in bank in the bank accounts of Lasemo Holdings Inc., Infrastructure Company Ltd., HRJ Holdings NV, Stayer Corporation NV, Tremaine NV, Aberdeen Enterprises NV, Bartow Holdings NV, Alloy International Management Limited and Antalis Management Limited. Therefore, evidences such as client profiling and documents collected by the bank at the time of opening of bank account, trust deed, letter of wishes, etc. have to be taken into consideration to prove the fact that the appellant company was 'Beneficial holder/Beneficiary' of assets held in the bank accounts of those entities with the HSBC Bank.*

Apart from the 'Base Note' received from the French Government, the information provided under FT & TR reference by various foreign governments, such as (i) letter dated 08.07.2011 written by Shri James Walfenzo to HSBC Bank and (ii) files notes submitted by the executives of HSBC Bank Geneva, including note dated 19.12.2003 submitted by Shri Raj Parmar, indicated the appellant company was the beneficial owner/ beneficiary of the assets in the bank accounts of the above mentioned foreign entities."

11.7. The Ld CIT(A) concluded that the assessee cannot be considered to be the legal owner of various bank accounts. His conclusions are extracted below:-

> ***7.3.6*** *Thus, from the pattern of share holdings of the above mentioned entities, it is seen that Mr. James Walfenzao, through his company Avilla Structured Private Foundation was the ultimate legal owner of Aberdeen Enterprises NV, Stayer Corporation NV, HRJ Holdings NV, Tremaine NV & Infrastructure Co. Ltd.*
>
> *Even the documents received from various foreign governments in response to FT & TR reference did not indicate that the appellant company was the legal owner of the above mentioned entities. Thus, the findings of the AO in the remand report that the appellant company was the ultimate legal and beneficial owner of Bartow Holdings NV, Capital Investment Trust, Thames Global Ltd. and Infrastructure Co. Ltd., is not supported by any documentary evidence."*

11.8. The Ld CIT(A) also referred to various letters written by HSBC Bank itself in this regard, wherein the HSBC again time and again

confirmed that the assessee did not own any bank account and it is not shown as beneficiary in any of the bank accounts. The details of those letters are discussed in the ensuing paragraphs. Then the Ld CIT(A) also referred to the replies received from various Countries. After examination of all the information received from various foreign authorities, he concluded that the assessee company is neither legal owner nor beneficiary of the bank accounts maintained with HSBC bank by various entities.

11.9. The analysis made by Ld CIT(A) has proved that the assessee is not the beneficiary of any of the bank accounts and Shri James Walfenzao is the ultimate owner of bank accounts maintained in the name of various entities. The above mentioned Shri James Walfenzao has also explained the reason for mentioning the name of the assessee company as one of the beneficiary for a temporary period. It may be recapitulated that the name of the assessee company was shown as beneficiary for some collateral purpose as per the agreement entered between Shri James Walfenzao and Shri Sandeep Tandon, the erstwhile director of the assessee company. It was further stated that it so turned that above said person was not liable to pay any money Shri Sandeep Tandon, meaning thereby, no benefit was derived by the assessee by showing its name as one of the beneficiaries. We notice that the revenue could not bring on record any material to contradict the above said submissions made by Shri James Walfenzao. Further, various confirmation letters issued by HSBC would support the explanations given by Shri James Walfenzao. Accordingly, we are of the view that the Ld CIT(A) was right in arriving at the conclusion that the assessee could not be considered to be the real beneficiary of various bank accounts referred to in the Base Document.

12. The next information that was relied upon by the AO in the remand report was about a person named Shri C J Damani. It is pertinent to note the information about this person also emanates from the note written by Shri Raj Parmar. According to this information, Shri C J Damani had settled the trust named Capital Investment Trust. It is stated that the beneficiaries of this trust are Bartow Holdings NV and its ultimate parent company. We noticed earlier that the name of the assessee was shown as a beneficiary in M/s Bartow Holdings NV. In the note written by Shri Raj Parmar, it was further stated that M/s Motech Software P Ltd is the ultimate legal and beneficial owner of Bartow Holdings NV. He has further stated that the ultimate beneficial owners of M/s Motech Software P Ltd are represented by Ambani family.

12.1. The note written by Shri Raj Parmar further stated that there was a business relationship between Shri C J Damani and Shri Dirubhai Ambani. We noticed earlier that M/s Bartow Holdings NV was said to be the beneficiary of Capital Investment Trust and the said trust was claimed to have been set up by Shri C J Damani. The assessee company was claimed to be the ultimate beneficiary of M/s Bartow Holdings NV and in turn, it was stated that the Ambani family was claimed to be the ultimate beneficial owners of assessee company in their personal capacities. Hence, the alleged business relationship between Shri C J Damani and Shri Dhirubai Ambani assumed significance. It appears the above said alleged business relationship was taken as corroborative evidence to hold that the assessee company is the real beneficiary of M/s Bartow Holdings NV. However, the assessee refuted the above said allegations by furnishing following explanations before Ld CIT(A) :-

> (a) The AO has not identified or referred to any document or evidence in which such kind of allegation has been made. Hence on this count itself, no cognizance should be taken for such bald allegation made by the AO in the remand report.

(b) The AO had further alleged that there was business relationship between so called Mr C J Damani and Shri Dhirubhai Ambani. It was submitted by the assessee that the above information is totally incorrect. It is an allegation only and further, in may be a fraud perpetuated by persons in the process of establishing banking relationship with HSBC Geneva by impersonating Mr Chimanlal Jivandas Damani (C J Damani) as a relative and business associate of Mr Dhirubhai Ambani. The fact remains that another person named "Mr Trambaklal Anderjee Damani" was the real relative and business associate of Mr Dhirubhai Ambani and not C J Damani, as mentioned by the AO.

(c) The Internal notes of Mr. Raj Parmar and Mr. R Duplessis of HSBC Trust / Bank allege the following:

(i) Shri. Dhirubhai Ambani was the step-cousin of one Mr. Chimanlal Jivandas Damani. Dhirubhai's aunt was the second wife of the father of Chimanlal Damani i.e., Jivandas Damani.

(ii) Dhirubhai Ambani and Chimanlal Damani were engaged in business together in Aden.

(iii) Dhirubhai returned to India in 1957 and started a business in partnership with the brother of Chimanlal Damani.

(iv) In 1965 the partners split. The Damani sold the partnership to Dhirubhai for a huge profit.

(v) The families continued ties.

(vi) Chimanlal Damani, NRI, managed the assets of Dhirubhai outside India.

(vii) In 2003, it was decided that the money belonging to the 'family' should be put in a trust for the benefit of the 'family' since the 'family' was not in need of money.

However, the assessee presented following facts and submitted that the above said noting made by Shri Raj Parmar is not correct:-

A. That Mr Chimanlal Jivandas Damani is not related to Mr Dhirubhai Ambani.

B. Chimanlal Jivandas Damani and Dhirubhai Ambani did not carry out any business in Aden.

C. This Damani family and Dhirubhai Ambani family did not have any business connection.

D. The Damani family which had business connection with Dhirubhai Ambani was "Anderjee Damani" family.

E. Partner of Dhirubhai in India between 1957-1965 was not the brother of Chimanlal Jivandas Damani as stated in the internal note.

F. The partner of Dhirubhai Ambani between 1957-1965, in the firm named "Reliance Commercial Corporation" was Trambaklal Anderjee Damani.

G. In order to establish correct factual position and also in support of the above said contentions, the print out of website of Ashvin Exports and Imports *http://www.aeaispices.com/about-us/ is taken and* the history page states as under:

> *"Mr. Trambaklal A. Damani was working with his father Late. Mr. Anderjee Manekchand Damani who had his offices in Addis Ababa, Dire Dawa (Ethiopia), Aden, Djibouti (Somali Coast) in the name of "Anderjee Manekchand" mainly engaged in the Import of Textiles from Japan, India, U.K., Germany, U.S.A. and Italy for about 70 years. They also had agency of Bridgestone Tyres, Japan.*
>
> *In the year 1958, Mr. Trambaklal A. Damani came to India and started a partnership firm namely "Reliance Commercial Corporation" with his cousin brother Mr. Dhirubhai H. Ambani doing exports of Spices & Artsilk. In the year 1965, business from this partnership was taken over by Mr. Trambaklal A. Damani by starting a new concern namely "Ashvin Traders" and started exports of Spices to main world markets such as Western Europe, U.S.A., Japan, Middle East and was*

also dealing in Art Silk Yarn in the local market. Later on, the firm has also started exporting all kinds of Handicrafts and Immitation Jewellery."

H. Accordingly, the assessee contended that the above facts prove beyond doubt that the contents of the unsubstantiated internal notes are factually incorrect and it may be a fraud, viz., impersonation committed by the persons concerned. In these circumstances, there cannot be any truth in the contents of internal notes and such internal notes cannot be made the basis of the allegations against the assessee.

12.2. The Ld CIT(A) noticed that the above said noting made by Shri Raj Parmar is in contradiction to the confirmation letters issued by HSBC Bank, wherein the HSBC Bank as time and gain had confirmed that the assessee does not hold any bank account and further, it was not shown as beneficiary in any of the bank accounts. The Ld CIT(A) also observed that the confirmation letters so issued by HSBC Bank has remained uncontroverted by the AO. Accordingly, the Ld CIT(A) held the reference made to the name of Shri C J Damani is a case of mistaken identity, i.e., his name was wrongly mentioned in the place of Shri Trambaklal Anderjee Damani, who had real business relationship with Shri Dhirubhai Ambani. The relevant discussions made by Ld CIT(A) in this regard are extracted below:-

"7.3.17 The AO has placed heavy reliance on the file noting dated 19.12.2003 of Mr Raj Parmar, an employee of HSBC Bank where in he has stated that he was shown confidential documents which confirmed that Appellant was the ultimate legal and beneficial owner of Bartow and the ultimate beneficial owner of Appellant was represented by Mukesh Ambani, his wife and issue and by Anil Ambani, his wife and issue intheir personal capacities.

There is a second file note dated 07.11.2003 written by R. Duplessis where he discussed about the journey of business developed and carried out by Shri Chimanlal Jivandas Damani. It has described in detail about settlement of investments of US$ 400 million through trust by Mr Damani.

There is a third file note dated 26.11.2003 written by Raj Parmar reiterating the facts of business journey of Shri Damani mentioned by R. Duplessis in his note dated 07.11.2003. It is also mentioned in the note that due diligence on Shri Damani was completed by the team and, therefore, he provided his

recommendation to establish new relationship of Shri Damani with the Geneva office of HSBC Bank.

The fourth note was written by D.A. Whitefield on 19.02.2004. In this note, with respect to Capital Investment Trust, he stated that it was introduced to HFSC during the visit to HSBC, Geneva in November 2003 by Bob Duplessis. It was stated in the note that due diligence in accordance with the usual requirement was completed normally. It was also mentioned that some of the issues and doubts were raised and were resolved. Further it was noted that the bank had no documentation, except a certification from Raj Parmar dated 19.12.2003.

The above set of noting of employees of HSBC particularly that of Mr. Raj Parmar relied upon by the AO in the remand report is primarily based on the transaction initiated by Mr. Chimanlal J Damani, ***is in direct contradiction of the unambiguous letter issue by HSBC Bank Geneva, the authenticity and validity of which has remained unquestioned by the AO and even after repeated references to the foreign governments, position that the appellant was not having any account with the Bank and was not beneficial owner of any account with HSBC Geneva, remains unchanged****.* ***It is noteworthy that the appellant has asserted and produced evidence to substantiate that said Chimanlal J Damani had no relationship with the leading business house. Mr Trambaklal Anderjee Damani was the real relative and business associate of Ambani family. The name of Chimanlal Jivandas Damani as a relative and business associate of Dhirubhai Ambani was wrongly impersonated in place of Mr Trambaklal Anderjee Damani.***

7.3.18. *As notied earlier, the members of Management Committee of the Capital Investment Trust were M K Shetty, James Walfenzao and Catharine Walfenzao. Further members of Enforcer Committee were M K Shetty, JairajSampat and Sandeep Tandon. The Trust deed of Capital Investment Trust provides that the Trustees had no investment powers or functions as same were vested with the Management Committee and the trustees were guided by the enforcer committee in relation to distribution of the assets of the Trust. These documents and presence of James Walfenzao and Sandeep Tandon in the two committees lends credence to the submission of the appellant that the background of the transaction was purported arrangement between James Walfenzao and Sandeep Tandon. The set of documents already referred provide enough evidence that these intended transactions to be undertaken under the mandate agreement could not succeed and were abandoned. In any case, the role of Management committee and Enforcer Committee does not have any relevance for the year under consideration as the document in the form of Distribution receipt issued by Bartow Holdings NV and share certificate of Infrastructure Company Limited issued in the name of Bartow Holdings NV shared by BVI Government vide its reply dated 11.06.2015 as part of attachment 26, shows that the Trust had already distributed its assets to Bartow Holdings in 2005."*

12.3. We notice that the assessee has offered above explanations on the basis of credible evidences and the prove that the note written by Shri

Raj Parmar about the business relationship between Shri C J Damani and Shri Dhirubhai Ambani are against actual facts. Further, there was no evidence to substantiate the note so written by Shri Raj Parmar. We noticed earlier that the alleged business relationship was used to corroborate the relationship between the assessee company and M/s Bartow Holding NV. However, this noting has also been proved to be wrong by the assessee company. In any case, we had held earlier that the note written by Shri Raj Parmar was unsubstantiated note and hence the same could not have been relied upon by the AO. Accordingly, the AO was not correct in law in placing reliance on the alleged business relationship mentioned above for supporting the addition made by him.

12.4. The assessee also explained as to how “legal ownership” and “beneficial ownership” could be ascertained. It was submitted that the assessee can have legal ownership of Bartow Holdings NV, only if it owns directly or indirectly shares and voting rights of Bartow Holdings NV. It was submitted that no documentation was brought on record, nor does it exist, to show that assessee was ultimate legal and beneficial owner of Bartow at any point of time. The assessee also relied upon the following documents received from the Curacao authorities and submitted that these documents would establish actual legal and beneficial ownership of Bartow Holdings NV:

a. Shareholder Register of Bartow Holdings NV which showed some other foreign entity as its legal owner and not the assessee,

b. Structure chart which clearly evidences that Bartow Holdings NV, Infrastructure Company Limited and all entities mentioned in letter of HSBC Geneva are legally and beneficially owned by Mr. James Walfenzao, a foreign national.

It was submitted that these documents conclusively prove that the assessee is not shareholder of Bartow Holding NV and thereby cannot

be said to be ultimate and beneficial legal owner of Bartow Holding NV. In addition to the above, the assessee also submitted following:-

i) Further, the Trust synopsis of Capital Investment Trust shared by BVI authorities under point no. 4 - Names of Beneficiaries – Capital and Income mentions:

(i) Bartow Holdings NV

(ii) ***Any person with beneficial interest in ultimate parent of Bartow Holdings NV*** *in respect of whom the Enforcement Committee has provided a written certificate to the trustee* ***(none advised at 31/12/03)***

Accordingly, it was submitted that if Mr Raj Parmar's internal note dated 19 December 2003 was considered to be correct, then the assessee's name or actual beneficial owners' name should have appeared in the documents as on 31-12-2003 shared by the BVI authorities. Accordingly, it can be noticed that the assessee cannot be considered to be a beneficiary of bank accounts as per the above said information received from foreign authorities.

12.5. The assessee also contended that it cannot be considered as "beneficial owner" or "beneficiary" of the alleged bank accounts/Assets under the Indian Income tax Act. In this regard, the assessee relied upon Explanation 4 to Section 139(1), wherein the term "beneficial owner" is defined as under:-

> *"Explanation 4:- For the purposes of this section "Beneficial owner" in respect of an asset means an individual who has provided, directly or indirectly, consideration for the asset for the immediate or future benefit, direct or indirect, of himself or any other person."*

It was submitted that there is no evidence to show that the assessee company has provided funds or any consideration of any kind to these foreign entities. Hence the assessee cannot be considered as "beneficial owner". The assessee also relied upon the definition of the term

"beneficiary" provided in Explanation 5 to Sec.139, which reads as under:-

> *"Explanation 5:- For the purposes of this section "beneficiary" in respect of an asset means an individual who derives benefit from the asset during the previous year and the consideration for such asset has been provided by any person other than such beneficiary".*

The assessee submitted that there is no evidence to show that the assessee has ever received any benefit direct or indirect from these foreign entities and further, it cannot be considered to be either beneficial owner or beneficiary of those bank accounts as per the definition given in the Income tax Act.

12.6. The Ld CIT(A) has dealt with these contentions as under:-

7.3.13 The ownership structure of various companies listed in the Base Document do not lead to any legal ownership of the appellant company of those foreign entities. Also conjoint reading of Mandate agreement dated 24.10. 2003 and Addendum to Mandate Agreement dated 30.12.2003, 27.01.2005 and 03.07.2006, reveals that even though Sandeep Tandon was designated beneficial owner of the assets in the bank accounts of those entities, he had 10% share of profit of those entities only. The HSBC bank vide letters dated 10.08.2011 and 18.10.2011 had stated that (i) the appellant company had no bank account with HSBC Private Bank and also it was not beneficiary of assets held in accounts with the Bank by those entities, (ii) Avila Structured Private Foundation had no account with the bank and (ii) the beneficiary of all the above entities was not an Indian citizen. The Federal Tax Authorities of Swiss Government has also confirmed the validity and authenticity of the HSBC Bank's letters dated 10.08.2011 and 18.10.2011. After a new and through research conducted by the FTA and the HSBC bank, the FTA reiterated that the appellant company was mistakenly mentioned as a beneficial owner of certain bank accounts and that the company actually never had any bank accounts at HSBC Private Bank (Suisse) S.A. as holder or beneficial owner. All these evidences establish that neither Sandeep Tandon nor the appellant company were a beneficial owner/beneficiary of assets in the bank accounts of the above mentioned entities".

12.7 Accordingly, the Ld CIT(A) came to the definite conclusion that the assessee herein is not either beneficiary or beneficial owner of any of the entities having bank accounts with HSBC Bank. His conclusions are extracted below:-

"7.3.16. In the remand report, the AO has stated that the ultimate legal and beneficial owner of investment of US$ 400 million was the appellant company. The underlying asset was investment of US$ 400 million in Capital Investment Trust. Therefore, it is relevant to examine the entire facts of the case and determine whether the appellant is ultimate beneficiary of such investment or not. Entire case of the AO that the Appellant company is ultimate beneficiary of the investment of US$400 million hinges on the following documents:

a. *Base document received from French Authorities*

b. *File / internal noting of HSBC officials including of Shri Raj Parmar*

c. *Letter dated 08.07.2011 written by James Walfenzao to HSBC Private Bank, Geneva*

After going through all the documents received from different Governments, it is not in dispute that ultimate beneficiary of the investment in Capital Investments Trust is Bartow Holding NV. Share holder register of Bartow Holdings NV shows that the Appellant was never its legal or beneficial share holder. Structure chart as depicted in earlier paras clearly shows that Bartow Holdings NV, Infrastructure Company Limited and all entities mentioned in letter of HSBC Geneva are legally and beneficially owned by Mr. James Walfenzao, a foreign national. Annual accounts of the appellant company do not show appellant holding any bank account with HSBC Bank, Geneva or any interest in any of the alleged foreign entities.

The base document received from French Government alleges that the Appellant is beneficiary of assets of various foreign entities. The linkage of the Appellant with these foreign entities comes from the correspondence with James Walfenzao, which will be dealt with in later paragraphs. At this point, it is useful to refer to the HSBC Bank letter dated 10.08.2011, where in it confirmed that (i) Appellant company did not hold bank account with HSBC Private Bank (Suisse) SA, (ii) Appellant company was not a beneficiary of assets of Aberdeen Enterprise N.V., Stayer Corporation N.V., Tremaine N.V., Bartow Holdings N.V., HRJ Holdings N.V., Infrastructure Company Ltd. and Lasemo Holdings Inc., (iii) Appellant company never transacted any business with the HSBC Bank or received any distributions, and (iv) No Indian citizen was beneficiary of these entities.

On further inquiry by the Investigation wing of the income tax department, HSBC Bank confirmed vide letter dated 18.10.2011 that the letter dated 10.08.2011 was duly issued by the bank. Later, in response to FT&TR request dated 02-07-2016, Swiss Government Authorities vide letter dated 03.11.2016 confirmed the authenticity and validity of the aforesaid letters dated 10-08-2011 and 18-10-2011 to the Indian

Competent Authority. Thereafter, in response to one more FT&TR reference vide letter dated 23.05.2019, the Swiss Government replied vide its communication dated 17.01.2020 that after a new and thorough research that was conducted by the Swiss Authorities and HSBC Bank, the statement made in their reply of 03-11-2016 still applies. It also confirmed that Appellant was mistakenly mentioned as a beneficial owner of certain bank accounts and the appellant never had any bank accounts at the HSBC Bank as holder or beneficial owner.

Thus, the above correspondence from the Swiss Government and the HSBC Bank clearly spells out that Appellant never held any bank accounts with the HSBC Bank directly or indirectly and it also was never a beneficial owner of any of the Bank accounts of the entities specified including Bartow Holdings NV. This also shows that sole reliance of the AO on the base document to allege the appellant as beneficiary of foreign bank accounts is uncalled for when the Bank where the account is held as well as the foreign government where the Bank is situated have not once, twice but four time unambiguously and consistently held that the appellant never had any bank account with the HSBC Bank nor it was beneficiary of any account maintained with the HSBC Bank.

This conclusion gets further support from the other documents shared by the Curacao Government in the form of mandate agreement dated 24.10.2003 between James Walfenzao and Sandeep Tandon read with Addendums there to and other correspondence by James Walfenzao with the HSBC Bank. As dealt with in detail in earlier paras of this order, as per these documents, Sandeep Tandon was to provide services related to investments to be made by James Walfenzaoand also in international taxation matters related to such investments. For these services, final consideration was determined in the form of 10% profit share earned from investment in various companies by James Walfenzao. Further to protect the consideration due to Sandeep Tandon, for providing his services, he was designated as beneficial owner in the bank account of those entities. It was also clarified that even though Sandeep Tandon was shown as beneficial owner in the bank account of those entities, it was understood that he had only 10% share in the profits of the above-mentioned entities. Another document dated 16-01-2007 clarified that since there was no profit on investment proposals, no monies were owed by either party and accordingly the mandate agreement was terminated. Mr James Walfenzao's letter dated 08-07-2011 to HSBC Bank Geneva stating the following has to be read with above two documents which were direct evidence of the complete contours of the arrangement between Mr James Walfenao and Mr Sandeep Tandon in his personal capacity. Mr James Walfenzao in his letter dated 08-07-2011 to HSBC Bank Geneva had

stated that Bank accounts of Infrastructure Company Ltd., Avila Structured Private Foundation, Aberdeen Enterprise N.V., Stayer Corporation N.V. Tremaine N.V., Bartow Holdings N.V., HRJ Holdings N.V. and Lasemo Holdings Inc. were established by James Walfenzao out of his own resources and he operated these accounts.

In the said letter, James Walfenzao has stated that as per his arrangement with Sandeep Tandon and in order to protect the profit share, Mr Tandon would be named as 10% beneficial owner of the assets in the bank accounts of these foreign entities. On a temporary basis, instead of Mr Tandon, name of the Appellant, Motech Software was intended to be shown as beneficial owner. It is also mentioned that as the investments did not yield any profit, it was decided to discontinue business through these entities.

Thus, the above documents clearly demonstrates the Appellant was intended to be designated as beneficial owner for a temporary period in the bank accounts of foreign entities owned by Mr James Walfenzao to the extent of 10% to protect Mr Sandeep Tandon's profit share from the investment advisory services to be rendered by him. However, since there was no profit earned from these activities, neither Mr Sandeep Tandon nor the Appellant earned even a single penny from the same. Said entities were always owned by Mr James Walfenzao and Appellant never earned any income therefrom.

Further the statement by the HSBC Bank and Swiss Government that Appellant's name was result of a mistake gets duly supported and corroborated by the above referred correspondence of James Walfenzao as shared by another Government i.e Government of Curacao.

It is imperative under the circumstances that the documents received from Swiss Government must be relied upon their face value. These documents on one hand establishes that the Appellant never held any account in HSBC Bank Geneva, on the other hand, documents received from Government of Curacao establishes that the investments in the impugned foreign entities were made by and owned by and their bank accounts were operated by James Walfenzao."

12.8. The Ld.CIT(A) has primarily relied upon the letters received from HSBC Bank confirming that the assessee did not have any bank account with it and also it is not related to any other bank account. Accordingly, the Ld CIT(A), after examining various documents, remand

report of the AO and submissions of the assessee finally concluded as under:-

"The facts that emerge from analysis of various evidence in the form of documents provided by various foreign governments are that (i) US $ 400 million transferred from National Industries owned by Chimanlal J Damani,(ii) the bank accounts of foreign entities owned and operated by James Walfenzao and (iii) the Appellant has never contributed any money to these foreign entities.

No consideration of any kind has flown to the Appellant from these foreign entities nor there was any entitlement of any such consideration. Hence, the appellant cannot be considered as "beneficial owner" in respect of bank accounts under consideration. Similarly, the appellant has not received any benefit directly or indirectly from the assets owned by Mr Chimanlal J Damani or Mr James Walfenzao and in fact the arrangement of profit share between Mr Sandeep Tandon and James Walfenzao did not materialise. Thus, the appellant cannot be considered as beneficiary.

7.3.20. *Thus, considering the facts of the case of the appellant and analysis of the evidences gathered by the AO,/DDIT from various foreign governments under FT & TR reference, the appellant was not holding any bank account with the HSBC Bank, Geneva and also was not a beneficiary or beneficial owner of assets in the bank accounts with HSBC Bank held by the foreign entities, including Aberdeen Enterprises N.V and Infrastructure Company Limited. Therefore, the addition of Rs.1858,79,48,919/- made by the AO in respect of peak amount in the bank account held with HSBC Bank cannot be sustained and it is to be deleted."*

13. The letters written by HSBC authorities confirm that the assessee was not related to any of the bank accounts. Since the bank accounts are held in HSBC Bank and since the authorities of the bank themselves have confirmed the above fact, in our view, the AO could not have reached a conclusion, which is different from or contrary to the fact stated by the HSBC Bank itself. We feel it pertinent to extract the contents of the letters written by HSBC Bank:-

(a) Letter dated 10-08-2011 issued by HSBC, Geneva to M/s MDP Advocates & Solicitors, in response to the clarification sought by them on behalf Smt Annu Tandon. In this letter, the HSBC confirmed that Motech Software P Ltd neither had a bank account with it nor was beneficial owner of any of the entities specified in that letter including Infrastructure Company Ltd and Bartow Holdings NV.

"Zurich, 10 August 2011

Re: Information with regard to Motech Software Private Limited

Dear Sir

In the above mentioned matter reference is made to your letter dated 18-July-2011 and 30 July 2011 as well as the letter of authorisation dated 16 July 2011 received from Mrs. Annu Tandon. We would like to answer your questions as follows

1. Motech Software Private Limited has not had a bank account with HSBC Private Bank (Suisse) SA (the "Bank")

2. Based upon a review of our files we have established that Motech Software Private Limited was not beneficiary of assets of the following entities held in accounts with the Bank.

a) Aberdeen Enterprise N.V.

b) Stayer Corporation N.V.

c) Tremaine N.V.

d) Bartow Holdings NV

e) HRJ Holdings N.V

f) Infrastructure Ltd.

g) Lasemo Holdings Inc

.

Please be informed that Avila Structured Private Foundation has not had an account with the bank.

3. In answer to your question 4(ii) in your letter dated 30 July 2011 we are permitted to inform you that the beneficiary of all the above entities is not an Indian citizen.

3. Finally, we confirm that we have not found any record that Motech Software Private Limited has transacted any business with the Bank or that any distributions have been made from accounts held with the Bank to Motech Software Private Limited.

HSBC Private Bank

In accordance with standard procedure, please take note that the above encompasses the course of the past ten years. We hope the above is suitable for your purposes. Should you have further questions please do not hesitate to contact us.

Yours faithfully

HSBC Private Bank (Suisse) SA

Sd/- *Sd/-*

Petra Muheim Quick *Stephen Barney*

Deputy General Counsel *Director..."*

(b) Letter dated 18-10-2011 issued by HSBC Geneva in response to the letter written by DDIT (Inv), Unit-4, Mumbai in order to verify the authenticity of the above letter dated 10-08-2011. In this letter, it was confirmed by HSBC that the letter dated 10-08-2011 was issued by it.

Dear Sir or Madam

Reference is made to your enquiry dated 20 September 2011. Attached to said enquiry you have sent the copy of a letter issued by our Bank to MDP Advocates & Solicitors dated 10 August 2011.

This is to confirm to you that this letter has indeed been issued by HSBC Private Bank (Suisse) SA and that the two signatories are duly authorised to sign such statements.

Due to article 271 of the Swiss Criminal Code our bank is not authorised to disclose information beyond what was provided above. Article 271 of the Swiss Criminal Code states that

"Any person who carries out activities on behalf of a foreign state on Swiss territory without lawful authority, where such activities are the responsibility of a public authority of public official, any person who carries out such activities for a foreign party or organisation, any person who encourages such activities, shall be liable to a custodial sentence not exceeding three yours or to a monetary penalty, or in serious cases to a custodial sentence of not less than one year "

Therefore, in order for our bank to answer your request to the full extent, it should be ordered to do so by a competent Swiss authority. The competent Swiss authorities would issue such an order for instance upon a request for international administrative assistance by the Indian Government as set forth in the Double Taxation Treaty in place between India and Switzerland.

Yours sincerely

HSBC Private Bank (Suisse) SA"

(c) The reply from Federal Tax Authority of Switzerland dated 03-11-2016 received by tax department in response to the reference (dated 02-07-2016) made by the AO. In this letter also, the Federal Tax Authority of Switzerland has confirmed the validity and authenticity of the letter dated 10-08-2011.

Dear Ms Saksena,

We refer to the aforementioned request for administrative assistance dated 2 July 2016.

Based on Article 26 DTA CH-IN we send you the following information provided by HSBC Private Bank (Suisse) SA:

1) The Swiss authorities are hereby requested to ascertain from HSBC Bank, Geneva, the authenticity of letters dated 10 August 2011 and 18 October 2011 which were purportedly issued by the HSBC Bank. A copy of the said letters are enclosed.

We can hereby confirm the validity and authenticity of the two letters from HSBC Private Bank dated 10 August 2011 and 18 October 2011.

2) In the event of HSBC Bank, Geneva, confirming the authenticity of the letters referred to above, the Swiss authorities is requested to obtain the following from the Bank:

a) Copies of the letters dated 16 July,2011, 18 July 2011 and 30 July 2011. Please

find enclosed a copy of the letters dated 16, 18 and 30 July 2011 (Annex 1)

b) Clarification as to how and on what basis HSBC Bank disclosed the existence or otherwise of bank account in the name of MOTECH SOFTWARE PVT LTD and their relationship to third parties viz Ms Annu TANDON and MDP ADVOCATES & SOLICITORS in the light of Article 271 of the Swiss Criminal Code?

The letter dated 10 August 2011 was sent to the representatives of Ms Annu TANDON based on the power of attorney signed by Ms Annu TANDON dated 16 July 2011 (see Annex. 1). According to the understanding of HSBC Private Bank (Suisse) SA, the representatives of Ms Annu TANDON have requested information due to the fact that as former managing director of MOTECH SOFTWARE PRIVATE LTD during the material time the name of Ms Annu TANDON could have appeared in the bank's documents.

c) Copies of documents based on which the bank disclosed information to third parties is also requested.

Please see the answer to question b.

d) It is also requested to provide a clarification as to how and on what basis HSBC Bank disclosed the existence or otherwise of bank account in the name of

i) Berdeen Enterprises NV

ii) Stayer Corporation NV

iii) Tremaine NV

iv) Bartow Holdings NV

v) HRJ Holdings NV

vi) Infrastructure Ltd

vii) Lasemo Hldings Inc And nationality of the account holders of these accounts to the third parties such as Ms. Annu Tandon and MDP Advocates & Solicitors in the light of Article 271 of the Swiss Criminal Code?

Based on the Information provided by your request, we do not see the foreseeable relevance of this question for the taxation of the person concerned. Should you provide us with further information, we will be re-examine this point once again.

The person authorised to consent Ms Annu TANDON has irrevocably consented to the transfer of the information.

With regard to the aforementioned information we would like to draw your attention to the fact that the transmitted information is only to be used in proceedings concerning Ms. Annu TANDON. We further draw your attention to the restrictions on the usability of the transmitted information as well as the confidentiality obligations under the administrative assistance provisions of the applicable agreement.

We hope these details correspond to your request and thus consider your request to have been met.

Kindly confirm receipt of this letter.

Please do not hesitate to contact us should you have any questions.

Yours sincerely,

Service for Exchange of Information in Tax Matters

Sd!-	*Sd!-*
Metine Mehmeti	*Fabienne Zenklusen*
Team Head	*Jurist*

Enclosure: Copies of the letters dated 16,18 and 30 July 2011 (3 pages)

(d) Letter dated 17.01.2020 issued by the Competent Authority of Swiss Government in response to the reference dated 23-05-2019 made by the AO through the Indian Competent authority. In this letter, it is once again stated that, after a new and thorough research conducted by the FTA and HSBC bank, the validity and authenticity of the letters dated 10-08-2011 and 18-10-2011 issued by the HSBC Bank is confirmed. They also reiterated that the Motech Software P Ltd was mistakenly mentioned as a beneficial owner of certain bank accounts and the above said company never had any bank account with HSBC Private Bank (Suisse) SA as holder or beneficial owner:

> *"Dear Colleagues,*
>
> *We refer to the above mentioned request for administrative assistance dated 23 May 2019.*
>
> *In this request you requested banking information form HSBC Private Bank (Suisse) S.A. about the Indian taxpayer M.S.P. Ltd.*
>
> *The request is very similar to one that was answered back in November 2016 (your ref: 504/0454/2015/FT&TR-III). In the reply to this request for administrative assistance, we informed you about the validity and authenticity of two letters from HSBC Private Bank (Suisse) S.A. in which it was confirmed that M.S.P. Ltd was mistakenly mentioned as a beneficial owner of certain bank accounts and that the company actually never had any bank accounts at HSBC Private Bank (Suisse) S.A. as holder or beneficial owner.*
>
> *After a new and through research that was conducted by the FTA and the bank in question, the statement made with our answer of 3 November 2016 (See attachment) still applies. HSBC Private Bank (Suisse) S.A. confirmed again that M.S.P. Ltd never held any ties through any entity (including the ones that you mentioned in your request specifically) with HSBC Private Bank (Suisse) S.A. in the relevant time period.*
>
> *We therefore consider your request dated 23 May 2019 as closed.*
>
> *Please do not hesitate to contact us should you have any questions.*
>
> *Kind regards,*
>
> *Stefan Schenker*
>
> *Federal Department of Finance FDF*
>
> *Federal Tax Administration FTA*
>
> *Service for Exchange of Information in Tax Matters SEI"*

(e) We noticed earlier that the documents received by the tax department from Curacao included Statutory share register and charts and they clearly established that the assessee was not the beneficiary or parent of M/s Bartow, Abardeen Enterprise and other specified entities.

The above said letters have been received from HSBC Bank itself and in these letters, the HSBC Bank has confirmed that the assessee did not have any bank account and further, it is not shown as beneficiary in any of the bank accounts. The above said letters have been written by the responsible authorities of the bank and hence the AO could not have made impugned additions in both the years on the basis of unsubstantiated noting made by Shri Raj Parmar.

14. A careful analysis of the above said observations made by the Ld CIT(A) would show that the Ld CIT(A) has reached his conclusions on the basis of proper analysis of facts and evidences surrounding the case. While the AO has placed reliance on the Base Documents, which were initially received by the Indian Government, the Ld CIT(A) has noticed that subsequent clarificatory letters received from various foreign authorities including the HSBC Bank itself would negate the noting made in the Base Documents. We have also noticed that the noting made by Shri Raj Parmar also was against the facts and evidences subsequently obtained. Hence we are of the view that Ld CIT(A) was justified in holding that the assessee did not have any bank account nor was it a real beneficiary of any of the bank accounts held by various entities in HSBC Bank.

15. We noticed earlier that the AO, during the course of assessment proceedings, had made the additions on the basis of human probabilities and surrounding circumstances, since the details called by him from various foreign jurisdictions did not reach him before the completion of the assessment. After receipt of the reports from various foreign authorities, the Ld CIT(A) called for a remand report and it is noticed that the AO has stood by his decision in the remand report. In our view, such a stand of the assessing officer is contrary to the evidences obtained and hence the stand taken by the AO in the remand report could be said to be based upon surmises and conjectures.

Accordingly, on a careful consideration of the discussions made by the Ld CIT(A) on this point, we are of the view that the Ld CIT(A) was justified in holding that the assessee cannot be linked to any of the bank accounts maintained by the entities mentioned by the AO.

16. The decision so rendered by us in AY 2006-07 is equally applicable to the assessment year 2007-08, wherein the assessing officer had made addition of Rs.334.54 crores. In view of the detailed discussions made supra, we uphold the order of Ld CIT(A) in deleting the additions made by the AO u/s 69 & 69A of the Act in both the years.

17. We shall now deal with the two other contentions raised by the assessee in cross objection with regard to the validity of reopening of assessments of the two years under consideration. We noticed earlier that the erstwhile Managing Director Smt Annu Tandon furnished a copy of letter dated 10-08-2011 received by her Advocates from HSBC Bank clarifying that the assessee was not holding any bank account and also not a beneficiary in any of the bank accounts. The veracity of the above said letter was also confirmed by the DDIT, who received the reply from HSBC Bank on 18-10-2011. Despite the existence of these two letters, the AO has reopened the assessments of both the years by issuing notice u/s 148 of the Act on 16-03-2012 for AY 2006-07 and on 05-03-2012 for AY 2007-08. It can be noticed that, on the date of issuing notices u/s 148 of the Act for both the years under consideration, the AO was having two types of information, viz.,

(a) Information based on Base Document supplied by French Government, which alleged that the assessee is maintaining an account with HSBC Bank, Geneva having huge unexplained deposits/investments and further, the assessee was having linkages with some accounts maintained in the name of other

entities. It is also pertinent to note that the information supplied by the French Government is based on stolen documents.

(b) Letters dated 10-08-2011 and 18-10-2011 issued by HSBC Bank itself confirming that the assessee did not have any bank accounts with it and further the assessee was not shown as beneficiary in any of the bank accounts.

It can be noticed that the first information is based on some stolen document and its veracity could not be known when the information first received by the Government of India. However, the assessee furnished a letter dated 10-08-2011 from HSBC Bank itself denying the above said information. Subsequently, the department itself wrote letters to HSBC bank, which was duly replied by the bank through its letter dated 18-10-2011, wherein the contents of letter dated 10-08-2011 stood confirmed.

17.1. Hence the question that arises is - whether the AO, based on the above said materials, could entertain reason to believe that the income chargeable to tax in the hands of the assessee has escaped assessment. For answering this question, one has to read the reasons recorded by the AO. The principles governing the examination of existence of reasons has been explained by Hon'ble Bombay High Court in the case of Hindustan Lever Ltd vs. R B Wadkar (2004)(268 ITR 332 @ 338), wherein it was observed as under:-

> *"20…. It is needless to mention that the reasons are required to be read as they were recorded by the Assessing Officer. No substitution or deletion is permissible. No additions can be made to those reasons. No inference can be allowed to be draw based on reasons not recorded… The reasons recorded by the assessing officer cannot be supplemented by filing affidavit or making oral submission, otherwise, the reasons which were lacking in the material particulars would get supplemented by the time the matter*

> *reaches to the Court, on the strength of affidavit or oral submissions advanced."*

In the instant case, the AO has referred to the information received from the investigation wing only, which was uncorroborated information received from French Government by way of Base Documents. The AO has consciously did not refer to the letters written by HSBC to the Advocates of erstwhile MD and also the confirmatory letter written by HSBC to the Income tax authorities, wherein the HSBC has confirmed that the assessee did not have any bank account with it and further, it was not shown as beneficiary in any of the bank accounts. The AO preferred to ignore both the letters written by HSBC Bank consciously and proceeded to reopen the assessment on the basis of unsubstantiated information.

17.2. The contention of the assessee is that the AO should have considered all the available documents, viz., information received from French Government, letters dated 10-08-2011 and 18-10-2011 issued by HSBC Bank. Had he considered all the above documents, the AO could not have reached the belief that there was escapement of income. In support of this proposition, the Ld A.R relied upon various case laws and contended that the AO has reopened the assessment without application of mind and hence the reopening is bad in both the years. The submissions made by the assessee and the case laws relied upon it are summrised below:-

1. The first decision relied upon by the Ld A.R is the case of Ms. Amrita Jhaveri v. DCIT [2023] 150 taxmann.com 371 (Mum)(ITAT). In this case also, the Assessee had furnished bank statements, account details, to the investigation wing and AO before re-opening of assessment by AO. However, in the reasons for re-opening, the AO only relied on the Base Note received from French Government and did not refer to the details furnished by the Assessee. Under these set of facts, the Hon'ble ITAT held the reasons as not only vague and general but also without

application of mind on the material and information filed by the Assessee before issuance of notice u/s. 148.

In the instant case also, the AO has made reference only to the information received from French government by investigation wing, i.e. the Base Note, to form a belief that the income of the Assessee had escaped assessment. However, the letter issued by the HSBC Bank, Geneva on 18th October 2011 and 10.8.2011, to the investigation wing confirming that the Assessee did not hold any bank account in the Bank and it was not shown as a beneficiary in any of the bank accounts held by foreign entities, were not referred to in the reasons recorded at all, even though those letters of HSBC Bank, Geneva, were already available with the Department.

2. Ld. Counsel of the Assessee also relied upon the decision rendered by the jurisdictional Hon'ble Bombay High Court in case of Sesa Sterlite Ltd. v. ACIT [2019] 417 ITR 334 (Bom) (HC), wherein the assessment was re-opened on the basis of report of Shah Commission, alleging under-invoicing of exports by the assessee and, since mining activity was illegal, income arising from it ought to be assessed as income from other sources. The Hon'ble jurisdictional Bombay High Court observed that all that was available to the Assessing Officer was the information that the export prices recovered by the assessee were less in some cases than the market prices said to be prevailing in those days. This information itself is highly doubtful, since there is nothing to indicate that there was any particular market price as at the relevant date which ruled or which alone was the correct price. The re-opening was quashed as the AO could not establish direct nexus between escapement of income with the material relied upon by him.

In the instant cases also, the reliance was placed by the AO on Base Note, which was stolen information passed on to India by the French government. Its authenticity was highly doubtful. Subsequent letters issued by actually proved that the assessee did not hold any bank account and it was not shown as beneficiary in any of the bank accounts. Hence, there was no live link between the Base Note and the

formation of belief that income of the Assessee has escaped assessment is absent.

3. Reliance was also placed on the decision rendered by Hon'ble Bombay High Court in case of PCIT v. Shodiman Investments (P.) Ltd. [2018] 93 taxmann.com 153, wherein the re-opening of assessment was quashed as it was initiated merely based on the information received from investigation wing without linking the same by any reason to come to the conclusion that income had escaped assessment.

In our view, the above discussed case laws relied upon by the assessee support its stand on the validity of reopening of assessment. Accordingly, in the facts and circumstances of the case, we are of the view that the AO was not right in law in reopening the assessment of both the years on the basis of Base documents alone, more particularly, in view of the fact that the HSBC bank itself had issued two letters (referred supra) denying the information found in the Base Documents prior to the reopening of assessment. Accordingly, we are of the view that the reopening of assessment of both the years is bad in law.

17.3. It is settled law that even if the reopening is held to be valid, yet the same need not result in making any addition. This is for the reason that the AO, after reopening the assessment, might come to the conclusion during the course of hearing that no addition is warranted on the issue on which the reopening was done. In that situation, the AO may complete the assessment without making any addition. In the instant case, we noticed that the AO himself, during the course of assessment proceedings, has sought clarification from HSBC Bank through FT & TR division of Government of India two times. Though the replies were not received before the completion of the assessment, yet it were received on 03-11-2016 and 17.11.2021, i.e., when the appellate proceedings were pending before Ld CIT(A). Based on these two letters only, the Ld CIT(A) called for a remand report. Hence, the AO could

have very well reported in the remand report that these deposits in the name of various entities could not be assessed in the hands of the assessee. However, he chose to stand by the assessment order despite the confirmations obtained from HSBC Bank. Accordingly, in the instant cases, even if the reopening of the assessment is held to be valid for a moment, still the impugned additions could not have been made by the AO on the basis of subsequent confirmations received from HSBC Bank.

18. Accordingly, we hold that the reopening of assessment of both the years is bad in law for the reasons discussed in the above paragraphs. However, the Ld CIT(A) had confirmed the validity of reopening of assessment. In view of the foregoing discussions, the order passed by Ld CIT(A) on the legal issue of validity of reopening of assessment in both the years is set aside. In the preceding paragraphs, we had concurred with the view taken by Ld CIT(A) on merits of addition, i.e., we have held that the Ld CIT(A) was justified in deleting the additions. Accordingly, the additions made by the AO in both the years under consideration are liable to be deleted. We order accordingly.

19. In the result, both the appeals filed by the Revenue are dismissed and both the cross objections filed by the assessee are allowed.

Order pronounced in the open court on 28th August, 2024

Sd/-	Sd/-
(PAVAN KUMAR GADALE)	(B.R. BASKARAN)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai, Date : 28th August, 2024

TNMM

Copy to :

1) The Appellant
2) The Respondent
3) The CIT concerned
4) The D.R, “D” Bench, Mumbai
5) Guard file

By Order

Dy./Asst. Registrar
I.T.A.T, Mumbai