IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI K BENCH, MUMBAI

[Coram: Pramod Kumar (Vice President)
and Saktijit Dey (Judicial Member)]

ITA No 4949 and 4950/Mum/18
Assessment year: 2006-07

Kaybee Pvt Ltd **…….Appellant**
301, A Wing, Solaris I, Saki Vihar Road
Andheri (East), Mumbai 400 072
[PAN: AAACK1715H]

Vs

Income Tax Officer
Ward 10(1)(3), Mumbai **…….. Respondent**

Appearances by

P J Pardiwalla *along-with* **Madhur Agarwal** *for the appellant*
Ujjawal Kumar *for the respondent*

Dates of hearing of the appeal	:	February 18 and 21, 2020
Date of pronouncing this order	:	February 28, 2020

O R D E R

Per Pramod Kumar, VP:

1. These two appeals, filed by the assessee, call into question correctness of the orders of the learned CIT(A)- both dated 27th June 2018 , confirming the penalties imposed on the assessee under section 271 AA and section 271 BA for the assessment year 2006-07.

2. While penalty under section 271AA is levied for non-maintenance of the requisite records under section 92D in respect of international transactions, the penalty under section 271BA is levied for non- filing of report as required under section 92E in respect of the international transactions. These penalties thus proceed on the basis that there were 'international transactions' that the assessee had with its associated enterprises.

3. Vide our order of even date, however, we have held that the Kaybee Exim Pte Ltd, which is alleged to be an associated enterprises of the assessee, is not an associated enterprise of the assessee. While holding so, we have observed as follows:

1. This appeal, filed by the assessee, calls into question correctness of the order dated 2nd February 2015, passed by the learned CIT(A) in the matter of assessment under section 143(3) r.w.s. 147 of the Income Tax Act, 1961 (hereinafter referred to as 'the Act'), for the assessment year 2006-07.

2. Learned representatives fairly agree that whatever we decide for the assessment year 2007-08, on the learned CIT(A)'s order dated 30th January 2015, will apply mutatis mutandis for this assessment year as well.

3. Vide our order of even date, we have allowed the appeal of the assessee for the assessment year 2007-08 by observing as follows:

> *2. When this appeal was called out for hearing, learned senior counsel for the assessee submitted that though this appeal involves several legal issues, including the question on validity of the reassessment proceedings, the fundamental issue in this appeal deals with the question as to whether the assessee can be said to be an 'associated enterprises', within meanings assigned under section 92A, of Kaybee Exim Pte Ltd, a Singapore based entity, and, in the event of this issue being held in favour of the assessee, all other issues will be rendered academic and infructuous. He, however, hastens to add that while this issue is now required to be decided in favour of the assessee in the light of binding judicial precedents from Hon'ble Courts above, there are decisions against the assessee, by coordinate benches, in assessee's own cases for preceding assessment years. We are thus urged to take up this issue first, and, thereafter, if necessary, deal with other issues in the appeal. Learned Departmental Representative, even though he is emphatic that there is no reason to deviate from the earlier decisions of the coordinate benches, does not oppose the approach suggested by the learned senior counsel. We, therefore, begin by taking up the related ground of appeal, i.e. ground no. 3, which is as follows:*
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> > ***The learned CIT(A) erred, in facts and in law, in upholding that Kaybee Exim Pte Ltd Singapore (KPEPTL) is an associated enterprise (AE) of the appellant within the meanings of Section 92A***
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> *3. The material facts, relating to this grievance, are in a narrow compass. The assessee before us is an Indian company and 99.9% of its shareholding is held by a person by the name of Govind Karunakaram (GK). The assessee had certain business transactions, which admittedly fall in the definition of 'international transactions', with a Singapore based entity by the name of Kaybee Exim Pte Ltd (**KE- S**, in short). GK is also one of the three directors in KE-S. It was also noted by the Assessing Officer that KE-S website shows the assessee company as a "representative company". It was in this backdrop that the Assessing Officer observed that under section 92A(1)(b) "an associated enterprise, in relation to another associated enterprise, means an enterprise in respect of which one or more persons who participate, directly or indirectly or through one or more intermediaries, in its management or control or capital of the other enterprise". As regards plea of the assessee that relationship between the assessee company and KE-S does not satisfy the conditions laid out in section 92A(2), and, therefore, the assessee and KE-S cannot be treated as AEs, the Assessing Officer observed that "**sub section (2)** [of section 92A] **does not negate the provisions of section (1)** [of section 92A]". In other words, according to the learned Assessing Officer, the provisions of Section 92A(1) are required to be read on standalone basis rather than in conjunction with Section 92A(2). The assessee and KE-S were thus held*

to be AEs. Aggrieved, assessee carried the matter in appeal before the CIT(A) but without any success. The assessee is not satisfied and is in further appeal before us.

4. In all fairness to the learned Departmental Representative, this issue is covered, against the assessee, by two coordinate bench decisions in assessee's own case. While dealing with the assessment year 2008-09, a coordinate bench, vide order dated 29th May 2019, had held the issue and observed, inter alia, as follows:

> ***" The language of section 92A(1) is unambiguous and does not leave any scope of importing any meaning of expression "AE". The question raised before us is whether the meaning of expression "AE" as per s.s. (1) of section 92A is subjected to s.s. (2) of section 92A. The ld. Sr. counsel for the assessee has asserted that the criteria prescribed under s.s. (2) are necessarily be fulfilled for two enterprises to be treated as AEs. The meaning of AEs as provided under s.s. (1) of section 92A and if the condition provided in clause (a) & (b) of s.s. (1) are independently satisfied then the two enterprises for the purpose of section 92B to 92E of the Act will be treated as AEs. Sub Sec. (2) of section 92A is a deeming fiction and therefore, it expends/enlarges the scope and meaning of expression "AE" provided under s.s. (1) of section 92A. Since s.s. (2) is a deeming fiction, therefore, it can be applied only in the specific facts of the case where any of the conditions stipulated in the clauses of this sub section are fulfilled. It has no general application in respect of the meaning "AE". Even otherwise, s.s. (1) of section 92A does not begun with the subjective clause "subject to s.s. (2)".***
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> ***…….***
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> ***…….***
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> ***We have already discussed that s.s. (2) is a deeming fiction and, therefore, the condition/criteria specified therein are required to be fulfilled. As it is clear from the criteria enumerated in clause (a) to (m) of s.s. (2) of section 92A that none of the clauses prescribed any criteria in respect of one enterprise participate directly or indirectly or through one or more intermediaries in the management which is one of the conditions prescribed under clauses (a) & (b) of s.s. (1) of section 92A of the Act. jio Therefore, even if, for the sake of argument it is presumed that the meaning of AE in terms of s.s. (1) of section92A has to be understood as per the criteria provided in clause (a) to (m) of ss. (2), the condition of participating in the management directly or indirectly or one or more intermediaries as per clause (a) of s.s. (1) does not get effected by the criteria prescribed under s.s. (2). The Co-ordinate Bench of this Tribunal in the case of Diageo India (P.) Ltd. (supra) had the occasion to consider the meaning of "AE" as per section 92A (1) & (2) in para 10 & 11 as under:-***
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> > ***"10. We find that, in terms of the provisions of section 92A(l)(a), the expression 'associated enterprises' refers to an enterprises "which participates, directly or indirectly, or through***

one or more intermediaries, in the management or control or capital of the other enterprise". The scope of 'associated enterprises' is expanded further by section 92A(I)(b), taking into account group concerns, and it is provided that 'associated enterprises' covers an enterprise "in respect of which one or more persons who participate, directly or indirectly. or through one or more intermediaries, in its management or control or capital, are the same persons who participate, directly or indirectly, or through one or more intermediaries, in the management or control or capital of the other enterprise." In effect, thus, when same persons participate, directly or indirectly or through an intermediary, in the management or control or capital of two or more enterprises, such enterprises are required to be treated as 'associated enterprise'. Interestingly even as definition of 'associated enterprises' has crucial references to 'participation in management or control or capital' at some places, the precise scope of this expression has not been defined under the provisions of the Income- tax Act, and it has not come up for judicial adjudication either. This expression has been used in Article 9(1 of OECD and UN model conventions, but we find no assistance from the OECD and UN commentaries either. All that the OECD commentary says on the scope of this expression is that it refers to "parent and subsidiary companies and companies under common control". The true test of associated enterprise thus is control by one enterprise over the other, or control of two or more associated enterprises by a common interests, and such a control is essentially an effective control in decision making process.

11. In our considered view, therefore, the definition of associated enterprises in section 92A(1)(a) and (b) is, what can be termed as, basic rule. In plain terms, the basic rule is that when one enterprise participates in the control or management or capital of the other enterprise (directly or indirectly or through one or more intermediaries) or when persons participating (directly or indirectly or through one or more intermediaries) in control or management or capital of two or more enterprises are the same, the enterprises are said to be associated enterprise. The expression used in the statute is 'participation in control or management or capital', but essentially all these three ingredients refer to de facto control on decision making. In terms of the basic rule thus, whether one enterprise controls the decision making of the other or whether decisions making of two or more enterprise are controlled by same interests, these enterprises are required to be treated as 'associated enterprise'. Section 92A(2) gives practical illustrations of this kind of a control. All these illustrations deal with simple situations of dealing with two enterprise, as envisaged in section 92A(1)(a), but these are equally good for application in situations involving more than two enterprise, as envisaged in section 92A(1)(b). Section

92A(2)(e), for example, refers to a situation in which "more than half of the directors or members of the governing board, or one or more of the executive directors or members of the governing board, of each of the two enterprises are appointed by the same person or persons" but this deeming fiction is equally applicable when the same person appoints, say, more than half of the directors of the governing board for three or more enterprises. A literal interpretation to this clause will mean that if this relationship is between two enterprises, these two enterprises are required to be treated as 'associated enterprises' but when the same basis extends to more than two enterprises, these enterprises will not be associated enterprises. That is clearly an incongruous result. In our considered view, as all clauses of deeming fictions set out in section 92:(2) are only illustration of the manner in which this de facto control on decision making exists, It is necessary that, while interpreting these deeming fictions, we interpret the same in such a manner as to make them workable rather than redundant (ut res magis valeat quam pereat), and that the same test of effective control on decision making as are implicit In deeming fiction under section 92(A)(2) we also apply to the situations of more than two associated enterprises envisaged in section 92A(1)(b). In this light, let us analyse the situation before us. The manufacture of goods is carried out by the CBU Konkan Agro, which is controlled by the assessee inasmuch as the CBU is wholly dependent on the use of trade- marks in respect of which the assessee has exclusive rights. This relationship meets the test of de facto control on decision making as set out in section 92A(2)(g). The assessee in turn, as evident from information in Form 3CEB, is controlled, by way of equity participation, by Diageo PLC which also similarly controls other entities in the Diageo group, including the entities from which CBU has imported the raw materials. Diageo PLC thus, through the assessee as an intermediary, controls the CBU as also the Diageo group entities from which the CBU has imported raw materials. Clearly, therefore, the assessee, as also the CBU and its Diageo group supplier of raw materials are associated enterprises, and de facto all these enterprises are controlled, directly or indirectly or through intermediaries, by the same person i.e. Diageo PLC. In this view of the matter, as also bearing in mind entirety of the case, the relationship of AEs exist between the assessee, the CBU and Diego group entities from which raw materials were purchased by the CBU. In any case, since the costs of all the raw materials is picked up by the assessee for all effective purposes. the transaction is actually between the assessee and the Diageo group concerns supplying the raw material to the CBU, and since the assessee as also these vendors are admittedly under the control of Diageo PLC, the transactions are clearly between the associated enterprises The objection raised by the assessee to the effect that the transactions of imports of raw material by the CBU, i. e. Konkan Agro, from Diageo group

> ***entities cannot be treated as international transactions between the associated enterprises, therefore, is rejected.***
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> ***The Tribunal was of the view that all the clauses of deeming fictions set out in section 92A (2) are only illustration of the manner in which this de facto control on decision making exists. We will now examine the facts of the case in hand in the context of the requirement of one enterprise participate directly or indirectly or through one or more intermediaries inter alia in the management of the other enterprise as per clause (a) & (b) of s.s. (1) of section 92A. ……***
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> ***……..***
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> ***There is no denial of the fact that Mr. Govind Karunakaran is Director and 99.9% shareholder of the assessee company and also is a Director and Chief Operating Officer of Kaybee Exim Pte Limited, Singapore. Therefore, Mr. Govind Karunakaran is not only participates in management of both the companies by he is holding the key position in the management of Kaybee Exim Pte Limited, Singapore and is part of decision making process of the said company since 1996. Shri Govind Karunakaran is a common director in both the company and participating in the management of both the companies not for the name sake but he is holding the key position in taking the Idecision being a Chief Operating Officer of Kaybee Exim Pte Limited, Singapore and almost the entire shareholding of the assessee company, therefore, the condition of one enterprise participates directly or indirectly or through one or more intermediaries in its management or control or capital as prescribed under clause (a) & (b) of s.s. (1) of section 92A is satisfied. Hence, the assessee and Kaybee Exim Pte Limited, Singapore falls under the meaning of AEs as per the provisions of section 92A.***

5. When the matter again came up before another coordinate bench of this Tribunal, for the assessment years 2010-11 and 2011-12, learned counsel for the assessee invited attention of the bench to subsequent legal developments by way of judicial precedents, and urged the bench to follow these judicial precedents. Rejecting this plea vide order dated 8th August 2018, the coordinate bench, inter alia, observed as follows:

> ***14. Considering the decision of Co-ordinate Bench in assessee's own case on almost identical ground and on identical fact and respectfully following the same, the ground no.2 of the appeal is dismissed. For alternative contention of the ld. AR of the assessee that each year relationship for the determination of AE's has to be separately established. We have noted that the assessee has not brought any material fact on record to take any contrary view for the year under consideration. Therefore, the alternative submission of the assessee is that each year relationship for the determination of AE's has to be separately established, as also rejected.***

6. Learned counsel for the assessee, nevertheless, contends that, notwithstanding the above mentioned judicial precedents in assessee's own case, the issue is required to be decided in favour of the assessee now. His line of reasoning is this. He points out that when the first decision in the case of ***Diageo India Pvt Ltd Vs DCIT [(2011) 47 SOT 252]*** *was rendered, the bench did not have any occasion to look at the memorandum to the related finance bill which unambiguously reflects the legislative intent behind amendment in section 92 A(2) with effect from 1st April 2002. It is pointed out that while the transfer pricing provisions were brought on the statute with effect from 1st April 2001, there was an amendment in Section 92A(2) in the very next year which specifically provided that "****for the purpose of sub section (1)"*** *, two enterprises shall be deemed to be associated enterprises if, at any time during the previous year satisfy the conditions laid down in Section 92A(2). It is thus pointed out that by way of this amendment, the scope of Section 92A(1) was specifically restricted. Our attention is then invited to the CBDT circular No. 8 dated 27th August 2008), two enterprises shall be deemed to be associated enterprises if, at any time during the previous year st 2002 which, in paragraph 50.3, states that "the existing provisions contained in section 92A of the Income Tax Act, provide as to when the two enterprise will be deemed to be associated enterprises" and then adds that "the Finance Act, 2002, has amended sub section (2) of section 92A to clarify that where any of the criterion specified in sub section (2) is fulfilled, two enterprises shall be deemed to be associated enterprises". It is then pointed out that this aspect of the matter was missed out in the Diageo decision (supra). Subsequently, however, when this aspect of the matter was brought to the notice of the benches, the benches did proceed on the basis that section 92A(2) restricts the scope of section 92A(1)- an antithesis of the conclusions arrived in the Diageo decision. Learned counsel submits that the author of decision in the case of the assessee for the assessment year 2008-09 is co-author of one such subsequent decision in the case of* ***Page Industries Ltd Vs DCIT [(2016) 159 ITD 680]****. It is then pointed out that the author of decision in the case of* ***Diageo India Ltd*** *(supra) is also author of two such subsequent decisions in the cases of* ***Orchid Pharma Ltd Vs DCIT [(2016) 76 taxmann.com 63]*** *and* ***ACIT Vs Veer Gems [(2017) 77 taxmann.com 127]****, and one of these decisions is specifically approved by Hon'ble Gujarat High Court in the judgment reported as* ***PCIT Vs Veer Gems [(2017) 83 taxmann.com 271]*** *and SLP against the said approval has been rejected by Hon'ble Supreme Court in the judgment reported as* ***PCIT Vs Veer Gems [(2018) 95 taxmann.16]****. Once the contrary view is approved by Hon'ble Courts above, its no longer to open to the Tribunal to follow the earlier view which has not found favour with the higher judicial forum. He also invites our attention to Hon'ble jurisdictional High Court's judgment in the case of* ***CIT Vs Godavaridevi Saraf [(1978) 113 ITR 589]*** *in support of the proposition that even a non jurisdictional High Court, in the absence of anything to the contrary by Hon'ble jurisdictional High Court, is equally binding on the Tribunal. We are thus urged to follow the decision which has been approved by Hon'ble High Court and has thus merged therein. In any case, a decision unmindful of unambiguous legislative intent, cannot be followed- more so when contrary view taken by another coordinate bench has been approved by a Hon'ble High Court.*

7. Learned Departmental Representative, on the other hand, urges us to follow the coordinate bench decision in assessee's own case. He submits that only a larger bench can overturn this approach, and since we are a bench of equal strength, i.e. a division bench of two members, it cannot be open to us to deviate from the coordinate bench decisions in assessee's own case. In any case, he submits that even on the first principles the Diageo India decision, which is what the coordinate benches have followed in assessee's own case, makes more sense and satisfies the natural meanings

of the expressions of 'associated enterprises. When the decision of Hon'ble Gujarat High Court and the CBDT circular was pointed out to him, he did not have much to say beyond that Hon'ble Gujarat High Court is a non-jurisdictional High Court and the CBDT circular has been duly considered in the decisions that he has relied upon. As the matter is now before Hon'ble jurisdictional High Court, he submits, there is all the more reason of our not taking a different stand in the case now. In response to a question whether the issue of AE relationship is decided once for all or is on year to year basis on facts, he fairly accepts that it's a factual question though he also submits that on the same set of facts we should not differ.

8. In brief rejoinder, learned counsel for the assessee submits that since the matter is before the Hon'ble High Court, and there is already a binding decision by Hon'ble non-jurisdictional High Court which will bind the special bench anyway, there is no point in referring the matter to a special bench. He urges us to take an independent view of the matter rather than, though he puts it very diplomatically, knowingly perpetuating an error. He also refers to certain judicial precedents in support of relevance of memorandum to the finance bills, but, for the reasons we will set out in a short while, it is not really necessary to deal with this line of reasoning. Suffice to note that we are thus urged to follow the decisions of Hon'ble Courts above and, notwithstanding the decisions of coordinate benches in assessee's own case against the assessee, decide the issue in favour of the assessee now.

9. *We find that in the lead order in this case, i.e. in the case of Diageo India Ltd (supra), there was no occasion to take note of the fact that the words "for the purpose of Section 92A(1)" were inserted in Sub Section 92A(2) with a specific purpose, as unambiguously set out in the Memorandum to the Finance Bill 2002, to the effect "**It is proposed to amend sub-section (2) of the said section to clarify that the mere fact of participation by one enterprise in the management or control or capital of the other enterprise, or the participation of one or more persons in the management or control or capital of both the enterprises shall not make them associated enterprises, unless the criteria specified in sub-section (2) are fulfilled**". This aspect of the matter is further evident from the CBDT circular no. 8 of 2008 which states that "**the Finance Act, 2002, has amended sub section (2) of section 92A to clarify that where any of the criterion specified in sub section (2) is fulfilled, two enterprises shall be deemed to be associated enterprises**" (emphasis supplied by us now). The only insertion in section 90A(2) was of the words "for the purposes of sub section (1)" of Section 92A, which thus restricted the scope of section 92A(1). Except for these words, all the provisions of Section 92A(2) were anyway there prior to amendment as well. The clarification was possible only on this restriction on section 92A(1). In our humble understanding, what, in effect, this circular lays down is the principle that only when the criterion specified in sub section (2) is satisfied, two enterprises can be treated as associated enterprises. Now, it is only elementary that the circulars issued by the CBDT, in exercise of the powers under section 119 of the Act- which is what admittedly this circular is, bind all the field authorities. Section 119(1) provides that the CBDT "may, from time to time, issue such orders, instructions and directions to other income-tax authorities as it may deem fit for the proper administration of this Act, and such authorities and all other persons employed in the execution of this Act shall observe and follow such orders, instructions and directions of the Board". Once a circular is issued, even if it is in deviation with the provisions of the law or relaxes the rigour of law, it binds the field authorities. As held by Hon'ble Supreme Court in the case of **UCO Bank Vs CIT [(1999) 237 ITR 889]**, "**The relevant circulars of the Board cannot be ignored. The question is not whether a circular can override or detract***

from the provisions of the Act; the question is whether the circular seeks to mitigate the rigour of a particular section for the benefit of the assessee in certain specified circumstances. So long as such a circular is in force, it would be binding on the departmental authorities in view of the provisions of section 119 to ensure a uniform and proper administration and application of the Act*". In Diageo's case (supra) relied upon by the learned Departmental Representative, as indeed by the decisions in assessee's own case by the coordinate benches, there was no occasion to refer to this CBDT circular, and the fact that position laid out in the Supreme Court decisions that these CBDT circulars bind the Assessing Officer, as well. These aspects having been missed out by the bench in Diageo's case (supra), or not having been brought to the notice of the bench, perhaps renders the said decision per incurium. It cannot obviously be open to us to disregard the law settled by Hon'ble Supreme Court, which binds all of us under article 141 of the Constitution of India, or to disregard the CBDT circular once it is pointed out to us. What happened in the past was due to sheer inadvertence on this aspect of the matter. The fact that this decision was authored by one us (i.e. the Vice President) does not matter at all. There are two simple things that we must bear in mind. The first one is that what matters is the institutions and not the individuals; sooner or later all the individuals have to be fade into oblivion but the institutions can shine forever, and it is because of the institutions, as long as an individual occupies the position therein, that individuals are relevant. The relevance of individuals is because of their institutional positions and not because of their own persona. Whether this decision is rendered by one of us or by one of the esteemed colleagues, it does not matter at all; all these decisions are decisions of the Tribunal and are completely at par so far as precedence value is concerned. The second thing is that, even as judicial officers, all of us evolve every day, and, with the benefit of experience and exposure, we learn every day. In this learning process, when we sometimes discover our mistakes and errors, and we should not shy away from putting these learnings to use rather than perpetuating our mistakes, when we can do so within permissible legal framework. On the first limb of the second proposition, we are reminded of the words of Justice Cardozo, in his classic book 'The Nature Of Judicial Process', (first published by Yale University Press, United States, in December 1921; also at http://www.constitution.org/cmt/cardozo/jud_proc.htm) had said, "**I own that it is a good deal of a mystery to me how judges, of all persons in the world, should put their faith in dicta. A brief experience on the bench was enough to reveal to me all sorts of cracks and crevices and loopholes in my own opinions when picked up a few months after delivery, and reread with due contrition. The persuasion that one's own infallibility is a myth leads by easy stages and with somewhat greater satisfaction to a refusal to ascribe infallibility to others.**" On the second limb of this proposition, we are reminded of the words of Justice Bhagwati, in the case of **Distributors (Baroda) (P.) Ltd. v. Union of India (1985) 155 ITR 120 (SC),** to the effect that "**To perpetuate an error is no heroism. To rectify it is the compulsion of judicial conscience. In this, we derive comfort and strength from wise and inspiring words of Justice Bronson in Pierce v. Delameter :'a Judge ought to be wise enough to know that he is fallible, and, therefore, ever ready to learn; great and honest enough to discard all mere pride of opinion and follow the truth wherever it may lead; and courageous enough to acknowledge his errors****". Clearly, therefore, our ego must not come in the way of rectifying a mistake that we have committed in past and the only relevant question that we have to ask ourselves is whether it is permissible in law to rectify the mistake so committed. In the case of ****K P Verghese vs ITO [(1981) 131 ITR 597 (SC)]****, Hon'ble Supreme Court were dealing with a situation in which the construction of newly inserted statutory provisions came up for consideration. It was in this context that Their Lordships observed that the "****circulars of the CBDT are, as we shall presently point***

out, binding on the tax department in administering and executing the provisions enacted …… but, quite apart from their binding character, they are clearly in the nature of contemporanea expositio furnishing legitimate aid in construction *(of the related provision) ....." and then further observed that these circulars "****are legally binding on the revenue and this binding character attaches to the circulars even if they be found to be not in accordance with the correct interpretation*** *(of the related provision)* ***and they depart or deviate from such construction. It is now well settled, as a result of decisions of this court, one in Navnit Lal C Jhaveri Vs K K Sen, AAC [(1965) 56 ITR 198 (SC)] and the other in Ellerman Lines Ltd Vs CIT [(1971) 82 ITR 913 (SC)] that circulars issued by the CBDT under s 119 of the Act are binding on all officers and persons employed in execution of the Act even if they deviate from the provisions in law****". When a decision is arrived at contrary, in letter and in spirit, to the position set out in the CBDT circular, which are binding in the light of law laid down by Hon'ble Supreme Court in the cases of UCO Bank (supra), K P Verghese (supra), Ellerman Lines Ltd (supra) and Navnit Lal Jhaveri (supra), such a decision clearly per incurium and do not constitute binding judicial precedents. It cannot be open to the Assessing Officer to take a stand on an issue contrary to the assurance given in the Memorandum to the Finance Bill in most unambiguous terms as also in the CBDT circular. It is on the basis of these factors that Diageo decision was deviated from, and must be held to be per incurium- particularly as these aspects were not even brough to the notice of the bench. Learned senior counsel who had also pleaded Diageo's case (supra) before this Tribunal fairly concedes that these aspects of the matter were not even then brought to the notice of the bench, and that the entire discussion in Diageo's case proceeded on the first principles and without reference to this position in the CBDT circular and the Memorandum to the Finance Bill. Whatever be the academic merits of that discussion, it has to yield to the correct legal position. That, however, is not the only, or even predominant, reason as to why we must take a different stand in this assessment year vis-a-vis the stand taken by us in the earlier years in assessee's own case. We may also add that subsequent decision in the case of Veer Gems (supra), which has been approved by Hon'ble Gujarat High Court (supra)- SLP dismissed by Hon'ble Supreme Court, has observed as follows:*

> ***……****As long as an enterprise participates in any of the three aspects of the other enterprise, i.e. (a) management; (b) capital; or (c) control, these enterprises are required to be treated as associated enterprise, as also is the position when common persons participate in management, control or capital of both the enterprises.* ***However, the expression 'participation in management or capital or control' is not a defined expression. To find the meaning of this expression, one has take recourse to Section 92(2) which gives practical illustrations, which are exhaustive and not simply illustrative- as clarified in the Memorandum explaining the provisions of the Finance Bill 2002 which, while inserting the words "For the purpose of sub section (1) of section 92A" in Section 92A(2), observed that "It is proposed to amend subsection (2) of the said section to clarify that the mere fact of participation by one enterprise in the management or control or capital of the other enterprise, or the participation of one or more persons in the management or control or capital of both the enterprises shall not make them associated enterprises, unless the criteria specified in sub-section (2) are fulfilled".*** *In this sense, Section 92A(2) governs the operation of Section 92A(1) by controlling the definition of participation in management or capital or control by one of the enterprise in the other enterprise.* ***If a form of participation in management, capital or control is not recognized by Section 92A(2), even if***

> ***it ends up in de facto or even de jure participation in management, capital or control by one of the enterprise in the other enterprise, it does not result in the related enterprises being treated as 'associated enterprises'. Section 92A(1) and (2), in that sense, are required to be read together, even though Section 92A(2) does provide several deeming fictions which prima facie stretch the basic rule in Section 92A(1) quite considerably on the basis of, what appears to be, manner of participation in "control" of the other enterprise.*** *What is thus clear that as long as the provisions of one of the clauses in Section 92A(2) are not satisfied, even if an enterprise has a de facto participation capital, management or control over the other enterprises, the two enterprises cannot be said to be associated enterprises. That is a what coordinate bench decisions in the cases of* ***Orchid Pharma Ltd Vs DCIT [(2016) 76 taxmann.com 63 (Chennai - Trib.)]*** *and* ***Page Industries Ltd Vs DCIT {(2016) 159 ITD 680 (Bang)] also hold.***
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> *[Emphasis, by underlining, supplied by us now]*

10. The views expressed by the coordinate bench were approved by Hon'ble Gujarat High Court i.e. jurisdictional High Court in that case, in the judgment reported as PCIT Vs Veer Gems (supra). The Special Leve Petition filed by the Principal Commissioner of Income Tax against the aforesaid judgment was dismissed by Hon'ble Supreme Court, vide judgment dated 5th January 2018- also reported as PCIT Vs Veer Gems (supra). The view contrary to the view taken in assessee's own case has thus been approved by Hon'ble Courts above, and have thus achieved finality.

11. It is also important to note that once a higher judicial forum takes a decision one way or the other, all the decisions of the Tribunal, whether division benches or special benches, cease to be relevant. In the case of ***Tej International Pvt Ltd Vs DCIT (118 Taxman 59 (Mag)/ 69 TTJ 650****), a coordinate bench has, on this issue, observed that "****In the hierarchical judicial system that we have, better wisdom of the Court below has to yield to higher wisdom of the Court above and, therefore, one a authority higher than this Tribunal has expressed an opinion on that issue, we are no longer at liberty to rely upon earlier decisions of this Tribunal even if we were a party to them. Such a High Court being a non-jurisdictional High Court does not alter the position as laid down by Hon'ble Bombay High Court in the matter of CIT v. Godavari Devi Saraf [1978] 113 ITR 589 (Bom.). Therefore, we do not consider it permissible to rely upon the earlier decisions of this Tribunal".** *We are in considered views with the views so expressed by the coordinate bench. As for the binding nature of the decision of Hon'ble non-jurisdictional High Court, in the absence of anything to the contrary by the jurisdictional High Court, we may only refer to the decision of another coordinate bench, in the case of* ***ACIT Vs Aurangabad Holiday Resorts Pvt Ltd [(2009) 118 ITD 1 (Pune)]****, which, inert alia, analyses the position as follows:*

> *5. As observed by a Co-ordinate Bench of this Tribunal, in the case of Tej International (P.) Ltd. v. DCIT (69 TTJ 650), in the hierarchical judicial system that we have in India, the wisdom of the court below has to yield to the higher wisdom of the court above and, therefore, once an authority higher than this Tribunal has expressed its esteemed views on an issue, normally the decision of the higher judicial authority is to be followed. The Bench has further held that the fact that the judgment of the higher judicial forum is from a non-jurisdictional High Court does not really alter this position, as laid down by the Hon'ble Bombay High Court in the case of CIT v. Godavari Devi*

Saraf (113 ITR 589). For slightly different reasons and alongwith some other observations on the issue, which we shall set out a little later, we are in agreement with the conclusions arrived in this case.

6. That takes us to the question whether this decision stands overruled by the Hon'ble Bombay High Court's later judgment in the case of Thana Electricity Co. Ltd. (supra), as submitted by the learned Departmental Representative.

7. It is also important to bear in mind that the question requiring adjudication by Their Lordship was whether or not decision of one of the High Courts was binding on the other High Courts. This will be clear from following observations made by Their Lordships in the beginning of the judgment :

> *"On a careful consideration of the submissions of the learned counsel for the assessee, we find that before taking up the issue involved in the question of law referred to us in this case for consideration, it is necessary to first decide. whether this Court, while interpreting an all India statute like Income-tax Act, is bound to follow the decisions of any other High Court and to decide accordingly, even if its own view is contrary thereto, because of the practice followed in this Court. Because, if we are to accept this submission, it will be an exercise in futility to examine the real controversy before us. "*

8. One of the propositions that Their Lordships took note of was that 'the decisions of the High Court on the subordinate Courts and authorities or Tribunals under its superintendence throughout the territories in relation to which it exercises jurisdiction (but) it does not extend beyond its territorial jurisdiction.' Their Lordships in the same paragraph also noted that 'A Division Bench of the High Court should follow the decision of another Division Bench of equal strength or a Full Bench of the same High Court', and 'if one Division Bench differs with another Division Bench of the same High Court, it should refer the case to a larger Bench'. Having thus noted the proposition, Their Lordships proceeded to 'analyse the decisions of this Court, on which reliance has been placed by the learned counsel for the assessee, in support of his contention that decision of any other High Court on all India statute like Income-tax Act, is binding even on this Court and on the Tribunals outside jurisdictions of that High Court'. On Godavari Devi Saraf's case (supra), which was delivered by a Division Bench of equal strength of this very Hon'ble High Court, Their Lordships took note of revenue's stand as follows :

> *"Referring to the observations of Godavari Devi (supra), that an all India Tribunal acting anywhere should follow the decisions of any other High Court on the point, it was submitted by the counsel of the revenue that this observation itself would show that the High Court was aware of the fact that different High Courts were not bound by the decisions of each other and, as such, there may be contrary decisions of different High Courts on the same point."*

9. The issue of consideration was thus confined to the question whether or not a High Court decision is binding on another High Court or not. That admittedly was the core issue decided by Their Lordships. As for the binding nature of non-jurisdictional High Court decisions on the Tribunal, the observations made by Their Lordships were no more than obiter dictum and in this very judgment, Their Lordships have held that even in the case of Hon'ble

Supreme Court judgments, which are binding on all Courts, except Supreme Court itself, but 'what is binding, of course, is the ratio of the decision and not every expression found therein'. Their Lordships have also referred to the oft quoted judgment of the Hon'ble Supreme Court in the case of CIT v. Sun Engg. Works (P.) Ltd. (198 ITR 297) wherein it is held that 'it is neither desirable nor permissible to pick out a word or a sentence from the judgment of this Court, divorced from the context of question under consideration, and treat it to be complete law declared by this Court." [Emphasis supplied].

10. In this light, and bearing in mind the fact that limited question before Their Lordships was whether or not decision of one of the High Courts is binding on another High Court, it would appear to us that ratio decidendi in Thana Electricity Co. Ltd. (supra), is on the non-binding nature of a High Court's judgment on another High Court. In any case, this Division Bench did not, and as stated in this judgment itself, could not have differed with another Division Bench of the same strength in the case of Godavari Devi Saraf (supra). Therefore, it cannot be open to a subordinate Tribunal like us to disregard any of the judgments of the Hon'ble Bombay High Court, whether in the case of Thana Electricity Co. Ltd. (supra) or in the case of Godavari Devi Saraf. It is indeed our duty to loyally extend utmost respect and reverence to the Hon'ble High Court, and to read these two judgments by the Division Benches of equal strength of the Hon'ble jurisdictional High Court, i.e., in the cases of Thana Electricity Co. Ltd. (supra) and Godavari Devi Saraf (supra), in a harmonious manner.

11. Let us now take a look at the Hon'ble jurisdictional High Court's judgment in the case of Godavari Devi Saraf (supra). In this case, question before Their Lordships was as follows :

> *"Whether, on the facts and circumstances of the case, and in view of decision in the case of A.M. Sali Maricar (90 ITR 116), the penalty imposed on the assessee under section 140A(3) was legal?"*

12. The specific question before Their Lordships was whether the Tribunal, while sitting in Bombay, was justified in following the Madras High Court decision holding the relevant section as unconstitutional. Hon'ble High Court concluded as follows :

> *"It should not be overlooked that Income-tax Act is an all India statute, and if a Tribunal in Madras has to proceed on the footing that section 140A(3) was non-existent, the order of penalty under that section cannot be imposed by any authority under the Act. Until a contrary decision is given by any other competent High Court, which is binding on the Tribunal in the State of Bombay (as it then was), it has to proceed on the footing that the law declared by the High Court, though of another State, is the final law of the land ..... an authority like Tribunal has to respect the law laid down by the High Court, though of a different State, so long as there is no contrary decision on that issue by any other High Court ....."*

13. It is thus clear that while the issue before the Hon'ble High Court in Thana Electricity Co. Ltd.'s case (supra) was whether or not a High Court should follow another High Court, whereas in Godavari Devi Saraf's case (supra), Their Lordships dealt with the issue whether or not a non-jurisdictional High

Court is to be followed by a Bench of the Income-tax Appellate Tribunal. To that extent, and irrespective of some casual observations on the applicability of non-jurisdictional High Court judgments on subordinate courts and Tribunals, these two decisions deal in two different areas. As we have noticed earlier also, in Thana Electricity Co. Ltd.'s case, a note was taken of Godavari Devi Saraf's judgment and neither the said judgment was dissented nor overruled. In any event, in Thana Electricity Co. Ltd.'s case, Hon'ble Court was alive to the fact, which was acknowledged in so many words, that a Co-ordinate Bench decision cannot be overruled. In this view of the matter, it is difficult to hold, as has been strenuously argued before us by the learned Departmental Representative, that the Hon'ble Bombay High Court's judgment in the case of Godavari Devi Saraf's case stands overruled by Their Lordship's judgment in the case of Thana Electricity Co. Ltd.'s case. The only way in which we can harmoniously interpret these judgments is that these decisions deal with two different issues and ratio decidendi of these decisions must be construed accordingly.

14. Let us also see this issue from a different perspective. Even if we are to assume that it is possible to interpret that Godavari Devi Saraf's decision stands overruled by judgment in the case of Thana Electricity Co. Ltd.'s case, one cannot be oblivious to the fact that an interpretation is indeed possible to the effect that even non-jurisdictional High Court's judgment, for the reasons set out above, is binding on the Tribunal. This non-jurisdictional High Court's judgment is in favour of the assessee. Now, as held by the Hon'ble Supreme Court's judgment in the case of CIT v. Vegetable Products Ltd. (88 ITR 192), when two interpretations are possible, one in favour of the assessee must be adopted. For this reason, in our humble understanding, the plea of the assessee deserves to be accepted.

15. We may, however, add that the observations that we have made are particularly with reference to the legal position in the jurisdiction in Hon'ble Bombay High Court, as the view so taken in Godavari Devi Saraf's case (supra) has not found favour with Hon'ble Karnataka High Court as well as Hon'ble Punjab and Haryana High Court, in the case of Patil Vijay Kumar v. Union of India (151 ITR 48) and CIT v. Ved Prakash (178 ITR 332). The observations made in this order are subject to this rider and, therefore, while we agree with the conclusions arrived at by a Co-ordinate Bench in Tej International (P.) Ltd. (supra), our reasons are not exactly the same as adopted by our distinguished colleagues.

12. Viewed thus, the views expressed by the coordinate benches, which have met approval of Hon'ble Courts above, are required to be followed, in preference over views expressed by any other benches, whether in assessee's own case or in any other case and irrespective of the views being that of a division bench or even larger bench. We humbly bow to the wisdom of Hon'ble Courts above. As we do so, we cannot help quoting from the decision of the Hon'ble Supreme Court in the case of ***Assistant Collector of Central Excise v. Dunlop India Ltd. [(1985) 154 ITR 172 (SC)],*** *where the Hon'ble Supreme Court has itself quoted from the decision of House of Lords as under:*

We desire to add and as was said in Cassell & Co. Ltd. v. Broome [1972] AC 1027 (HL), we hope it will never be necessary for us to say so again that "in

> ***the hierarchical system of courts" which exists in our country, "it is necessary for each lower tier", including the High Court, "to accept loyally the decision of the higher tiers". "It is inevitable in hierarchical system of courts that there are decisions of the Supreme appellate Tribunal which do not attract the unanimous approval of all members of the judiciary... But the judicial system only works if someone is allowed to have the last word, and that last word, once spoken, is loyally accepted.". . . The better wisdom of the Court below must yield to the higher wisdom of the Court above. That is the strength of the hierarchical judicial system.***
>
> *[Emphasis, by underlining, supplied by us]*

13. Such being the guidance of Hon'ble Supreme Court on the issue, and for the detailed reasons set out above, we are inclined to follow the line of reasoning expressed by the coordinate benches in the cases of Page Industries (supra), Orchid Pharma (supra) and Veer Gems (supra). One of the decisions, on this line of reasoning, in case of Veer Gems was carried in appeal before Hon'ble Gujarat High Court, and Their Lordships, in the judgment reported as PCIT vs Veer Gems (supra), were pleased to confirm the said order of the Tribunal. We, therefore, follow this line of reasoning.

14. As regards the request for reference to a larger bench, we donot think that will be appropriate on the facts and in the circumstances of this case.

15. The reasons are more than one.

16. Firstly, once a higher judicial forum has expressed its view on the subject, it will be wholly inappropriate for us to do, or to be seen to be doing, a parallel exercise and thus sit, directly or indirectly, in judgment over what a higher judicial forum has already decided. Secondly, Hon'ble jurisdictional High Court has already admitted appeals of the assessee, so far as earlier years decided against the assessee are concerned, and it is only a matter of time that the views of Their Lordships, on this issue thus, are to be expressed, and all of us have the benefit of these well considered views. Whatever we decide at this stage is nothing more than a writing on the sand and anyway subject to what Their Lordships eventually decide. The relevance, of the decisions of this Tribunal, is thus unambiguously ephemeral. There is no point in prolonging the decision-making process at the Tribunal by sending the matter to the larger bench. Finally, in any case, as analysed in great detail above, the views of non-jurisdictional High Court will bind the special bench anyway, and constitution of special bench will be a meaningless ritualistic exercise.

17. The oral prayer for the constitution of special bench must, therefore, be rejected.

18. Learned representatives fairly agree that the case of the Assessing Officer hinges only on application of Section 92A(1) and it does not meet any of the specific conditions set out in Section 92A(2). Once we hold that Section 92A(1) cannot be applied on standalone basis, and has to be essentially considered in conjunction of Section 92A(2) – only when it satisfies at least one of the conditions set out therein, it is clear that the relationship between the assessee company and its KE-S cannot be said to be that of the associated enterprises. The case of the revenue must, therefore, fail on this test.

> *19. In view of the above discussions, as also bearing in mind entirety of the case, we have to hold that the relationship between the assessee and the KE-S was not of the AEs, and, accordingly, no arm's length price adjustments could be made on the transactions between these two entities. Ground no. 3 is thus allowed, and, as a corollary thereto, the impugned ALP adjustment must, therefore, be deleted for this short reason alone. Ordered, accordingly.*
>
> *20. As we have decided the appeal on the short issue, as discussed above, we see no need to deal with the other legal and factual issues raised in this appeal. These grievances are academic at this stage.*
>
> *21. In the result, the appeal is allowed in the terms indicated above. ....*

4. We see no reasons to take other view of the matter, than the view so taken by us for the assessment year 2007-08, and, respectfully following the same, we hold that there was that the assessee and its Kaybee Exim Pte Ltd could not be treated as 'associated enterprises' under section 92 A of the Act. The observations extracted above are equally applicable in the present appeal as well. As a corollary to this stand, the arm's length price adjustments in respect of assessee's transactions with Kaybee Exim Pte Ltd must stand deleted. Ordered, accordingly.

5. In the result, the appeal is allowed in the terms indicated above.

4. Once we hold that the assessee and the alleged AE could not be treated as associated enterprises, and there are no other alleged 'international transactions' on the facts of this case, it could not be said that the assessee had entered into any international transactions. As a corollary to this finding, the very foundation of impugned penalties ceases to hold good in law. The impugned penalties, therefore, must be deleted. Ordered, accordingly.

5. In the result, the appeals are allowed in the terms indicated above. Pronounced in the open court today on the 28th day of February, 2020.

Sd/xx ***Sd/xx***
Saktijit Dey **Pramod Kumar**
(Judicial Member) (Vice President)

Mumbai, dated the 28th day of February, 2020

Copies to:	*(1)*	*The appellant*	*(2)*	*The respondent*
	(3)	*CIT*	*(4)*	*CIT(A)*
	(5)	*DR*	*(6)*	*Guard File*

By order

Assistant Registrar
Income Tax Appellate Tribunal
Mumbai benches, Mumbai