REPORTABLE

IN THE SUPREME COURT OF INDIA
(CIVIL APPELLATE JURISDICTION)

CIVIL APPEAL NO. /2022
(@ SPECIAL LEAVE PETITION (CIVIL) NO. 23207 OF 2019)

M/s Apex Laboratories Pvt. Ltd. …Appellant

Versus

Deputy Commissioner of Income Tax,
Large Tax Payer Unit - II …Respondent

O R D E R

S. RAVINDRA BHAT, J.

1. Leave granted. The appellant (hereinafter, "Apex") is aggrieved by a judgment of the High Court of Judicature of Madras[1], wherein the Division Bench upheld an order of the Income Tax Appellate Tribunal[2] (hereinafter, "ITAT"), which in turn upheld an order of the Commissioner of Income Tax (Appeals)[3] (hereinafter, "CIT(A)"). The CIT(A) had partly allowed an appeal from an order of the respondent Deputy Commissioner of Income Tax[4], which partially allowed amounts claimed by Apex as 'business expenditure' under Section 37(1) of the Income Tax Act, 1961 (hereinafter, "IT Act").

2. The facts in brief are as follows: On 01.08.2012, the Central Board of Direct Taxes (hereinafter, "CBDT") issued a circular[5], which clarified that expenses incurred by pharmaceutical and allied health sector industries for distribution of incentives (i.e., "freebies") to medical practitioners are ineligible

[1] Tax Case Appeal No. 723 of 2018, dated 18.03.2019.
[2] IT ACT No. 1153/Mds/2014, dated 29.01.2018.
[3] I.T.A. No. 10/13-14/LTU(A), dated 29.01.2014.
[4] G.I. No./PAN AAACA5174G, dated 21.03.2013.
[5] Circular No. 5/2012 [F. No. 225/142/2012-ITA.II].

for the benefit of Explanation 1 to Section 37(1), which denies the application of the benefit for any purpose which is an '*offence*' or '*prohibited by law*'.

3. After the circular was issued, on 22.11.2012, Apex was issued a notice under Section 142(1) of the IT Act, to explain why the expenditure of ₹ 4,72,91,159/- incurred towards gifting freebies such as hospitality, conference fees, gold coins, LCD TVs, fridges, laptops, etc. to medical practitioners for creating awareness about the health supplement 'Zincovit', should not be added back to the total income of Apex.

4. The reason for only a partial allowance by the authorities below was that an amendment[6] to the Medical Council Act, 1956 (now repealed) through the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 (hereinafter, "2002 Regulations"), published in the Official Gazette on 14.12.2009, disallowed medical practitioners from accepting emoluments in the form of *inter alia* gifts, travel facilities, hospitality, cash or monetary grants.[7] Acceptance of such freebies could result in a range of sanctions against the medical practitioners, from 'censure' for incentives received up to ₹ 5,000/-, to removal from the Indian Medical Register or State Medical Register for periods ranging from three months to one year.[8] Therefore, only the expenses incurred till 14.12.2009 were eligible for the benefit of Section 37(1), and not for the entirety of the Assessment Year 2010-2011, as claimed by Apex.

Contentions of Apex

5. It was argued by the counsel for Apex, Mr. S. Ganesh, Senior Advocate, that the amended 2002 Regulations were not applicable to Apex, i.e., pharmaceutical companies were not bound by them. While medical practitioners were expressly prohibited from accepting freebies, no corresponding prohibition

[6] No. MCI-211(1)/2009(Ethics)/5567.
[7] *Id.*, Regulation 6.8, Code of Conduct for Doctors in their Relationship with Pharmaceutical and Allied Health Sector Industry.
[8] Regulation 6.8.1, inserted by Notification No. MCI-211(1)/2010(Ethics)/163013, issued on 01.02.2016.

in the form of any binding norm was imposed on the pharmaceutical companies gifting them. In the absence of any express prohibition by law, Apex could not be denied the benefit of seeking exclusion of the expenditure incurred on supply of such freebies under Section 37(1).

6. Counsel placed reliance on rulings by different High Court to establish that the 2002 Regulations were enforceable only *against medical practitioners* and not the donors, i.e., *pharmaceutical companies*. In *Max Hospital Pitampura v. Medical Council of India*[9] (hereinafter, "*Max Hospital*") the Delhi High Court held that the Medical Council of India (hereinafter, "MCI") had no jurisdiction to pass any orders against the appellant hospital, and adverse observations made against the hospital by MCI were quashed. Equally, in *Dr. Anil Gupta v. Addl. Commissioner of Income Tax*[10], a Division Bench of the Rajasthan High Court gave benefit of Section 37(1) to the appellant as Explanation 1 could not be raised by the respondent for the first time at an appellate stage, observing:

> "*Even otherwise in income tax proceedings the medical ethics will not be taken into consideration. At the most even if it is a professional misconduct, it is to be dealt with by Medical Council of India. The income tax authority cannot decide the medical ethics when the original authority has partly allowed the expenses.*"

The Counsel urged that as these decisions were not challenged by the revenue authorities, and thereby accepted by them, the present matter was not open for reconsideration.[11]

7. The Counsel further submitted that it was not open to the revenue to deny a tax benefit on the 'nature' of expenses incurred. This Court, in *T.A. Quereshi v. Commissioner of Income Tax, Bhopal*[12] (hereinafter, "*T.A. Quereshi*") allowed the appellant to deduct the cost of heroin seized as a business loss, holding that:

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[9] W.P. (C) No. 1334/2014 / ILR (2014) 1 Delhi 620, dated 10.01.2014.
[10] Income Tax Appeal No. 485/2008, decided on 18.07.2017.
[11] *See Berger Paints Ltd. v Commissioner of Income Tax*, (2004) 12 SCC 42 and *South India Bank Ltd. v Commissioner of Income Tax*, Civil Appeal No. 9606 of 2011 / 2021 SCCOnline SC 692, dated 09.09.2021.
[12] (2007) 2 SCC 759.

> "*In our opinion, the High Court has adopted an emotional and moral approach rather than a legal approach. We fully agree with the High Court that the assessee was committing a highly immoral act in illegally manufacturing and selling heroin. However, cases are to be decided by the court on legal principles and not on one's own moral views. Law is different from morality, as the positivist jurists Bentham and Austin pointed out*."

8. It was argued that similarly, in *Commissioner of Income Tax v. M/s Khemchand Motilal Jain*[13], a Division Bench of the Madhya Pradesh High Court allowed ransom money paid to the kidnappers of an employee of the respondent company on a business trip as business expenditure under Section 37(1), holding that:

> "*The aforesaid section provides that kidnapping a person for ransom is an offence and any person doing so or compelling to pay is liable for the punishment as provided in the Section, but nowhere it is provided that to save a life of the person if a ransom is paid, it will amount to an offence. No provision is brought to our notice that payment of ransom is prohibited by any law. In absence of it, the Explanation of sub-section (1), section 37 will not be applicable in the present case*."
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> "*Sukhnandan Jain remained in custody for a period of nearabout 20 days. The police were also informed and after waiting 20 days for the police action. If the respondents to save his life paid the aforesaid amount, then the aforesaid amount cannot be treated as an action, which prohibited under the law. No provision could be brought to our notice that payment of ransom is an offence. In absence of which, the contention of the petitioner that it is prohibited under Explanation of section 37(1) of the Income Tax Act has no substance. The entire tour of Sukhnandan Jain was for purchase of Tendu leaves of quality and for this purpose, he was on business tour and during his business tour, he was kidnapped and for his release the aforesaid amount was paid*."
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> (emphasis supplied)

9. Counsel brought this Court's attention to the Memorandum Explaining the Provisions of the Finance (No. 2) Bill, 1998 which stated that the introduction of Explanation 1 to Section 37(1) would disallow tax payers from claiming "*protection money, extortion, hafta, bribes, etc.*" as business expenditures,[14] from

[13] 2011 (4) MPLJ 691.
[14] Memorandum Explaining the Provisions of the Finance (No. 2) Bill, 1998, Section 15. Later adopted by CBDT Circular No. 772 ([1999] 235 ITR (St.) 35, 53), dated 23.12.1998.

which it could be inferred that the intention of the Parliament was to only bring into the ambit of Explanation 1 'illegal' activities which were deigned as 'offences' under relevant statutes. The IT Act not being a social reform statute, needed to be interpreted strictly, and not in a wide manner so as to include in its scope an act by a pharmaceutical company not recognized as 'illegal' by any statute – doing so would be against the canons of public law.

10. Finally, Counsel submitted that the CBDT circular dated 01.08.2012 enlarged the scope of the 2002 Regulations, and made it operable beyond medical practitioners, i.e., to pharmaceutical companies and allied health sector industries, which, in the absence of any enabling provision, was outside its dominion. *Arguendo,* if the CBDT circular had to be brought into effect, it could be done so only 'prospectively', and not 'retrospectively', i.e., from the date of publication of the CBDT circular on 01.08.2012, and not the date of publication of the 2002 Regulations on 14.12.2009. Reliance was placed on various decisions of this Court to show that beneficial circulars had to be applied retrospectively, however oppressive circulars could only be applied prospectively.[15]

Contentions of Revenue Authorities

11. Mr. Sanjay Jain, Additional Solicitor General appearing for the respondent revenue authorities, submitted that while the act of pharmaceutical companies gifting freebies to medical practitioners for promotion of their products may not be classified as an 'offence' under any statue, it was squarely covered within the scope of Explanation 1 to Section 37(1) by use of the words "*prohibited by law*", as it was specifically prohibited by the amended 2002 Regulations. While Apex could not be 'punished', it should not be allowed to benefit by claiming a tax exemption on the freebies distributed.

[15] *See* for e.g., *Director of Income-tax v. S.R.M.B Dairy Farming (P.) Ltd.*, (2018) 13 SCC 239.

12. Further, the ASG submitted that Parliament's intention to disincentivize the practice of receiving extravagant freebies in exchange for prescribing expensive branded medication over its equally effective generic counterparts, thereby burdening patients with unnecessary costs, was apparent not only from the amended 2002 Regulations, but also the Prevention of Corruption Act, 1988 (hereinafter, "PC Act"). A government doctor receiving any illegal gratification amounting to malpractice or any other offence was liable to be charged under PC Act and the Indian Penal Code, 1860 (hereinafter, "IPC").[16]

13. In the present instance, the medical practitioners were provided expensive gifts such as hospitality, conference fees, gold coins, LCD TVs, fridges, laptops, etc. by Apex to promote its nutritional health supplement 'Zincovit'. It was argued that receiving these, clearly - in letter and spirit, constituted professional misconduct on part of the medical practitioner. The scope of the 2002 Regulations was not limited to a finite list of instances of professional misconduct, but broad enough to cover those instances not specifically enumerated as well.[17] The menace of prescribing expensive branded medication as a *quid pro quo* arrangement had a direct bearing on public policy, which was implicit in the 2002 Regulations itself.

14. To elucidate the same, reliance was placed on two High Court decisions. In *Commissioner of Income-Tax v. Kap Scan and Diagnostic Centre P. Ltd.*,[18] a Division Bench of the Punjab and Haryana High Court disallowed the benefit of the exemption for commission provided to doctors engaged in private practice for referring their patients to the assessee's diagnostic centre, holding that:

> *"It, thus, emerges that an assessee would not be entitled to deduction of payments made in contravention of law. Similarly, payments which are opposed to public policy being in the nature of unlawful consideration cannot equally be recognized. It cannot be held that businessmen are entitled to conduct their business even contrary to law and claim deductions*

[16] *Kanwarjit Singh Kakkar v. State of Punjab*, (2011) 13 SCC 158.
[17] *See* regulation 8 of the 2002 Regulations.
[18] (2012) 344 ITR 476 (P&H HC).

> *of payments as business expenditure, notwithstanding that such payments are illegal or opposed to public policy or have pernicious consequences to the society as a whole."*
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> ***
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> *"If demanding of such commission was bad, paying it was equally bad. Both were privies to a wrong. Therefore, such commission paid to private doctors was opposed to public policy and should be discouraged. The payment of commission by the assessee for referring patients to it cannot by any stretch of imagination be accepted to be legal or as per public policy. Undoubtedly, it is not a fair practice and has to be termed as against the public policy."*
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> ***

Further, the High Court referred to Section 23 of the Contract Act, 1872 (hereinafter, "Contract Act") to hold the consideration or object of the agreement between the assessee and private doctors as unlawful, and the agreement therefore void, as it was opposed to public policy.

15. A Division Bench of the Himachal Pradesh High Court decided along similar lines in *Confederation of Indian Pharmaceutical Industry (SSI) v. Central Board of Direct Taxes*[19](hereinafter, "Confederation"), holding:

> *"This regulation is a very salutary regulation which is in the interest of the patients and the public. This court is not oblivious to the increasing complaints that the medical practitioners do not prescribe generic medicines and prescribe branded medicines only in lieu of the gifts and other freebies granted to them by some particular pharmaceutical industries. Once this has been prohibited by the Medical Council under the powers vested in it, section 37(1) of the Income-tax Act comes into play"*

The High Court also upheld the legality of the CBDT circular dated 01.08.2012, stating that it was for the assessee to establish to the Assessing Officer that the expenditure incurred was not in violation of 2002 Regulations:

> "*Shri Vishal Mohan, advocate, on behalf of the petitioner, contends that the circular goes beyond the section itself. We are not in agreement with this submission. The Explanation to section 37(1) makes it clear that any expenditure incurred by an assessee for any purpose which is prohibited by law shall not be deemed to have been incurred for the purpose of business or profession. The sum and substance of the circular is also the same. In case the assessing authorities are not properly understanding the circular*

[19] (2013) 353 ITR 388 (HP HC).

> *then the remedy lies for each individual assessee to file appeals under the Income-tax Act but the circular which is totally in line with section 37(1) cannot be said to be illegal. In fact paragraph 4 of the circular quoted hereinabove itself clarifies that the value of the freebies enjoyed by the medical practitioner is also taxable as business income or income from other sources depending on the facts of each case. Therefore, if the assessee satisfies the assessing authority that the expenditure is not in violation of the regulations framed by the Medical Council then it may legitimately claim a deduction, but it is for the assessee to satisfy the Assessing Officer that the expense is not in violation of the Medical Council Regulations referred to above".*
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> (emphasis supplied)

16. Lastly, the ASG submitted that had the Assessing Officer allowed Apex to claim tax benefit, the authorities would have been deprived of revenue in the form of tax amount leviable on ₹ 4,72,91,159/-, which was a crucial omission. Thus, on a holistic reading of the statutes and regulations, Apex could not be allowed to claim deduction under Section 37(1).

Analysis and Conclusions

17. An examination of the relevant provisions is first necessary. Section 37 of the IT Act states as follows:

> *Section 37. General.—(1) Any expenditure (not being expenditure of the nature described in Sections 30 to 36 and not being in the nature of capital expenditure or personal expenses of the assessee), laid out or expended wholly and exclusively for the purposes of the business or profession shall be allowed in computing the income chargeable under the head "Profits and gains of business or profession".*
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> *[Explanation 1].—For the removal of doubts, it is hereby declared that any expenditure incurred by an assessee for* ***any purpose which is an offence or which is prohibited by law*** *shall not be deemed to have been incurred for the purpose of business or profession and no deduction or allowance shall be made in respect of such expenditure.]*
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> (emphasis supplied)

Section 37 is a residuary provision. Any business or professional expenditure which does not ordinarily fall under Sections 30-36, and which are not in the nature of capital expenditure or personal expenses, can claim the benefit of this

exemption. But the same is not absolute. Explanation 1, which was inserted in 1998 with retrospective effect from 01.04.1962, restricts the application of such exemption for "*any purpose which is an offence or which is prohibited by law*". The IT Act does not provide a definition for these terms. Section 2(38) of the General Clauses Act, 1897 defines 'offence' as "*any act or omission made punishable by any law for the time being in force*". Under the IPC, Section 40 defines it as "*a thing punishable by this Code*", read with Section 43 which defines 'illegal' as being applicable to "*everything which is an offence or which is prohibited by law, or which furnishes ground for a civil action*". It is therefore clear that Explanation 1 contains within its ambit all such activities which are illegal/prohibited by law and/or punishable.

18. Regulation 6.8. of the 2002 Regulations states as follows:

> *"6.8. Code of conduct for doctors in their relationship with pharmaceutical and allied health sector industry.*
> *6.8.1 In dealing with Pharmaceutical and allied health sector industry, a medical practitioner shall follow and adhere to the stipulations given below:—*
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> *(a) Gifts: A medical practitioner shall not receive any gift from any pharmaceutical or allied health care industry and their sales people or representatives.*
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> *(b) Travel facilities: A medical practitioner shall not accept any travel Facility inside the country or outside, including rail, road, air, ship, cruise tickets, paid vacation, etc. from any pharmaceutical or allied healthcare industry or their representatives for self and family members for vacation or for attending conferences, seminars, workshops, CME Programme, etc. as a delegate.]*
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> *(c) Hospitality: A medical practitioner shall not accept individually any hospitality like hotel accommodation for self and family members under any pretext.*
>
> *(d) Cash or monetary grants: A medical practitioner shall not receive any cash or monetary grants from any pharmaceutical and allied healthcare industry for individual purpose in individual capacity under any pretext. Funding for medical research, study etc. can only be received through approved institutions by modalities laid down by law / rules / guidelines adopted by such approved institutions, in a transparent manner. It shall always be fully disclosed."*

The regulation further lays down corresponding action or sanction which can be taken against, or imposed upon, the medical practitioner for violation of each stipulation, based on the monetary value of the same. Thus, acceptance of freebies given by pharmaceutical companies is clearly an offence on part of the medical practitioner, punishable with varying consequences.

19. The CBDT circular dated 01.08.2012 is set out below:

> 1. *It has been brought to the notice of the Board that some pharmaceutical and allied health sector Industries are providing freebees (freebies) to medical practitioners and their professional associations in violation of the regulations issued by Medical Council of India (the 'Council') which is a regulatory body constituted under the Medical Council Act, 1956.*
> 2. *The council in exercise of its statutory powers amended the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 (the regulations) on 10-12-2009 imposing a prohibition on the medical practitioner and their professional associations from taking any Gift, Travel facility, Hospitality, Cash or monetary grant from the pharmaceutical and allied health sector Industries.*
> 3. *Section 37(1) of Income Tax Act provides for deduction of any revenue expenditure (other than those failing under sections 30 to 36) from the business Income if such expense is laid out/expended wholly or exclusively for the purpose of business or profession. However, the explanation appended to this sub-section denies claim of any such expense, if the same has been incurred for a purpose which is either an offence or prohibited by law.*
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>   *Thus, the claim of any expense incurred in providing above mentioned or similar freebees in violation of the provisions of Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 shall be inadmissible under section 37(1) of the Income Tax Act being an expense prohibited by the law. This disallowance shall be made in the hands of such pharmaceutical or allied health sector Industries or other assessee which has provided aforesaid freebees and claimed it as a deductable expense in its accounts against income.*
> 4. *It is also clarified that the sum equivalent to value of freebees enjoyed by the aforesaid medical practitioner or professional associations is also taxable as business income or income from other sources as the case may be depending on the facts of each case. The Assessing Officers of such medical practitioner or professional associations should examine the same and take an appropriate action.*
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> *This may be brought to the notice of all the officers of the charge for necessary action.*
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> (emphasis supplied)

The CBDT circular being clarificatory in nature, was in effect from the date of implementation of Regulation 6.8 of the 2002 Regulations, i.e., from 14.12.2009.

20. In *Dy. CIT 8(2) Mumbai v PHL Pharma P. Ltd.*[20] the ITAT reiterated *Max Hospital's* (supra) decision to conclude that the 2002 Regulations were inapplicable to pharmaceutical companies, and that in absence of requisite jurisdiction, it could not be said that the pharmaceutical companies had violated any law or regulation. Further, it held that there was no enabling provision to allow the CBDT to bring pharmaceutical companies within the fold of the 2002 Regulations, and even if such an act were to be permitted, it could be only be done so prospectively:

> *"Adverting to the contention of the Ld. CIT DR that CBDT is well empowered to issue such clarification, it is seen that the CBDT Circular dated 01.08.2012 (supra) in its clarification has enlarged the scope and applicability of 'Indian Medical Council Regulation 2002' by making it applicable to the pharmaceutical companies or allied health care sector industries. Such an enlargement of scope of MCI regulation to the pharmaceutical companies by the CBDT is without any enabling provisions either under the provisions of Income Tax Law or by any provisions under the Indian Medical Council Regulations. The CBDT cannot provide casus omissus to a statute or notification or any regulation which has not been expressly provided therein. The CBDT can tone down the rigours of law and ensure a fair enforcement of the provisions by issuing circulars and by clarifying the statutory provisions. CBDT circulars act like 'contemporanea expositio' in interpreting the statutory provisions and to ascertain the true meaning enunciated at the time when statute was enacted. However the CBDT in its power cannot create a new impairment adverse to an assessee or to a class of assessee without any sanction of law. The circular issued by the CBDT must confirm to tax laws and for purpose of giving administrative relief or for clarifying the provisions of law and cannot impose a burden on the assessee, leave alone creating a new burden by enlarging the scope of a different regulation issued under a different act so as to impose any kind of hardship or liability to the assessee. In any case, it is trite law that the CBDT circular which creates a burden or liability or imposes a new kind of imparity, same cannot be reckoned retrospectively. The beneficial circular may apply retrospectively but a circular imposing a burden has to be applied prospectively only. Here in this case the CBDT has enlarged the scope of 'Indian Medical Council Regulation, 2002' and made it applicable for the pharmaceutical companies. Therefore, such a CBDT circular cannot be reckoned to have retrospective effect. The same CBDT circular had come up for consideration before the co-ordinate Bench*

[20] ITA No. 4605/Mum/2014, dated 12.01.2017.

> *of the ITAT, Mumbai Bench in the case of Syncom Formulations (I) Ltd. (in ITA Nos. 6429 & 6428/Mum/2012 for A.Ys. 2010-11 and 2011-12, vide order dated 23.12.2015), wherein Tribunal held that CBDT circular would not be not be applicable in the A.Ys. 2010-11 and 2011-12 as it was introduced w.e.f. 1.8.2012."*
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> (emphasis supplied)

21. *PHL Pharma* (supra) further discussed the High Court decisions of *Kap Scan* and *Confederation* (supra), holding the even though they were decided against the assessee, they did not lay down a blanket ban on pharmaceutical companies claiming tax benefit under Section 37(1), and made it subject to the satisfaction of the Assessing Officer on a case-to-case basis. Subsequent decisions by ITATs across states have placed heavy reliance on *PHL Pharma* to grant relief to the assessee pharmaceutical companies.

22. This Court is of the opinion that such a narrow interpretation of Explanation 1 to Section 37(1) defeats the purpose for which it was inserted, i.e., to disallow an assessee from claiming a tax benefit for its participation in an illegal activity. Though the memorandum to the Finance Bill, 1998 elucidated the ambit of Explanation 1 to include "*protection money, extortion, hafta*, *bribes, etc.*", yet, *ipso facto,* by no means is the embargo envisaged restricted to those examples. It is but logical that when *acceptance* of freebies is punishable by the MCI (the range of penalties and sanction extending to ban imposed on the medical practitioner), pharmaceutical companies cannot be granted the tax benefit for providing such freebies, and thereby (actively and with full knowledge) *enabling* the commission of the act which attracts such opprobrium.

23. The illogicality and completely misconceived nature of such an interpretation was dealt with in a similar interpretation of the provisions of PC Act, by a Constitution Bench of this Court in *P.V. Narasimha Rao v. State (CBI/SPE)*[21]. Prior to the 2018 amendment[22], the PC Act only punished the bribe-

[21] (1998) 4 SCC 626.
[22] Subs. Section 8, Act 16 of 2018, w.e.f. 26.07.2018.

taker who was a public servant, and not the bribe-giver. Reliance was placed on this to acquit the appellant bribe-giver. Rejecting such an interpretation, this Court held:

> *"145. Mr Rao submitted that since, by reason of the provisions of Article 105(2), the alleged bribe-takers had committed no offence, the alleged bribe-givers had also committed no offence. Article 105(2) does not provide that what is otherwise an offence is not an offence when it is committed by a Member of Parliament and has a connection with his speech or vote therein. What is provided thereby is that a Member of Parliament shall not be answerable in a court of law for something that has a nexus to his speech or vote in Parliament. If a Member of Parliament has, by his speech or vote in Parliament, committed an offence, he enjoys, by reason of Article 105(2), immunity from prosecution therefor. Those who have conspired with the Member of Parliament in the commission of that offence have no such immunity. They can, therefore, be prosecuted for it.*
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> *147. Mr Rao submitted that the alleged bribe-givers had breached Parliament's privilege and been guilty of its contempt and it should be left to Parliament to deal with them. By the same sets of acts the alleged bribe-takers and the alleged bribe-givers committed offences under the criminal law and breaches of Parliament's privileges and its contempt. From prosecution for the former, the alleged bribe-takers, Ajit Singh excluded, enjoy immunity. The alleged bribe-givers do not. The criminal prosecution against the alleged bribe-givers must, therefore, go ahead. For breach of Parliament's privileges and its contempt, Parliament may proceed against the alleged bribe-takers and the alleged bribe-givers.*
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> *150. To repeat what we have said earlier, Mr Rao is right, subject to two caveats, in saying that Parliament has the power not only to punish its Members for an offence committed by them but also to punish others who had conspired with them to have the offence committed : first, the actions that constitute the offence must also constitute a breach of Parliament's privilege or its contempt; secondly, the action that Parliament will take and the punishment it will impose is for the breach of privilege or contempt. There is no reason to doubt that the Lok Sabha can take action for breach of privilege or contempt against the alleged bribe-givers and against the alleged bribe-takers, whether or not they were Members of Parliament, but that is not to say that the courts cannot take cognizance of the offence of the alleged bribe-givers under the criminal law.*
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> (emphasis supplied)

24. Even if Apex's contention were to be accepted - that it did not indulge in any illegal activity by committing an offence, as there was no corresponding

penal provision in the 2002 Regulations applicable to it - there is no doubt that its actions fell within the purview of "*prohibited by law*" in Explanation 1 to Section 37(1).

25. Furthermore, if the statutory limitations imposed by the 2002 Regulations are kept in mind, Explanation (1) to Section 37(1) of the IT Act and the insertion of Section 20A of the Medical Council Act, 1956[23] (which serves as parent provision for the regulations), what is discernible is that the statutory regime requiring that a thing be done in a certain manner, also implies (even in the absence of any express terms), that the other forms of doing it are impermissible.

26. In this regard the decision of this Court in *Jamal Uddin Ahmad v. Abu Saleh Najmuddin & Anr*[24] is of some relevance. There, the scope of Section 81 of the Representation of the People Act, 1951 was examined in the light of powers of the High Court to administer election petitions by invoking the rule of implied prohibition. The Court observed that:

> *"Dealing with "Statutes conferring power; implied conditions, judicial review", Justice G.P. Singh states in the Principles of Statutory Interpretation (Eight Edition 2001, at pp. 333, 334) that a power conferred by a statute often contains express conditions for its exercise and in the absence of or in addition to the express conditions there are also implied conditions for exercise of the power. An affirmative statute introductive of a new law directing a thing to be done in a certain way mandates, even if there be no negative words, that the thing shall not be done in any other way. This rule of implied prohibition is subserved to the basic principle that the Court must, as far as possible, attach a construction which effectuates the legislative intent and purpose. Further, the rule of implied prohibition does not negative the principle that an express grant of statutory power carries with it by necessary implication the authority to use all reasonable means to make such grant effective. To illustrate, an Act of Parliament conferring jurisdiction over an offence implies a power in that jurisdiction to make out a warrant and secure production of the person charged with the offence; power conferred on Magistrate to grant maintenance under Section 125 of the Code of Criminal Procedure 1973 to prevent vagrancy implies a power to allow interim maintenance; power conferred on a local authority to issue licences for holding 'hats' or fairs implies incidental power to fix days therefore; power conferred to compel cane growers to*

[23] Inserted vide Medical Council (Amendment) Act, 1964.
[24] (2003) 4 SCC 257.

> *supply cane to sugar factories implies an incidental power to ensure payment of price. In short, conferment of a power implies authority to do everything which could be fairly and reasonably regarded as incidental or consequential to the power conferred.*
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> *Herbert Broom states in the preface to his celebrated work on Legal Maxims --"In the Legal Science, perhaps more frequently than in any other, reference must be made to first principles." The fundamentals or the first principles of law often articulated as the maxims are manifestly founded in reason, public convenience and necessity. Modern trend of introducing subtleties and distinctions, both in legal reasoning and in the application of legal principles, formerly unknown, have rendered an accurate acquaintance with the first principles more necessary rather than diminishing the values of simple fundamental rules. The fundamental rules are the basis of the law; may be either directly applied, or qualified or limited, according to the exigencies of the particular case and the novelty of the circumstances which present themselves. In Dhannalal vs. Kalawatibai and Ors.*[25] *this court has held that:*
> *"When the statute does not provide the path and the precedents abstain to lead, then sound logic, rational reasoning, common sense and urge for public good play as guides of those who decide".”*

27. It is also a settled principle of law that no court will lend its aid to a party that roots its cause of action in an immoral or illegal act *(ex dolo malo non oritur action)* meaning that none should be allowed to profit from any wrongdoing coupled with the fact that statutory regimes should be coherent and not self-defeating. Doctors and pharmacists being complementary and supplementary to each other in the medical profession, a comprehensive view must be adopted to regulate their conduct in view of the contemporary statutory regimes and regulations. Therefore, denial of the tax benefit cannot be construed as penalizing the assessee pharmaceutical company. Only its participation in what is plainly an action prohibited by law, precludes the assessee from claiming it as a deductible expenditure.

28. This Court also notices that medical practitioners have a quasi-fiduciary relationship with their patients. A doctor’s prescription is considered the final word on the medication to be availed by the patient, even if the cost of such

[25] (2002) 6 SCC 16.

medication is unaffordable or barely within the economic reach of the patient – such is the level of trust reposed in doctors. Therefore, it is a matter of great public importance and concern, when it is demonstrated that a doctor's prescription can be manipulated, and driven by the motive to avail the freebies offered to them by pharmaceutical companies, ranging from gifts such as gold coins, fridges and LCD TVs to funding international trips for vacations or to attend medical conferences. These freebies are technically not 'free' – the cost of supplying such freebies is usually factored into the drug, driving prices up, thus creating a perpetual publicly injurious cycle. The threat of prescribing medication that is significantly marked up, over effective generic counterparts in lieu of such a *quid pro quo* exchange was taken cognizance of by the Parliamentary Standing Committee on Health and Family Welfare[26] which made the following observations:

> "*The Committee also notes that despite there being a code of ethics in the Indian Medical Council Rules introduced in December 2009 forbidding doctors from accepting any gift, hospitality, trips to foreign and domestic destinations etc from healthcare industry, there is no let-up in this evil practice and the pharma companies continue to sponsor foreign trips of many doctors and shower with high value gifts like air conditioners, cars, music systems, gold chains etc. to obliging prescribers who then prescribe costlier drugs as quid pro quo. Ultimately all these expenses get added up to the cost of drugs. The Committee's attention was drawn to a news item in Times of India dated July 1, 2010 by Reema Nagarajan giving specific instances of violations of MCI code. The Committee calls upon the Government to take strict and speedy action on such violations. Since MCI has no jurisdiction over drug companies, the Government should take parallel action through DCGI and the Income Tax Department to penalize those companies that violate MCI rules by cancelling drug manufacturing licences and/or disallowing expenses on unethical activities."*
>
> (emphasis supplied)

Interestingly, a similar conclusion was arrived at by the US Department of Health and Human Services Office of the Assistant Secretary for Planning and Evaluation, in a report called *Savings Available Under Full Generic Substitution*

[26] 45th Report on Issues Relating to Availability of Generic, Generic-Branded and Branded Medicines, their Formulation and Therapeutic Efficacy and Effectiveness), dated 04.08.2010.

of Multiple Source Brand Drugs in Medicare Part D (dated 23.07.2018).[27] The report noticed *inter alia*, that an empirical study conducted in respect of 20 odd (out of the 600 drugs which were the subject matter of the research paper) brand medications dispensed for a particular period, were capable of generic substitution and would have resulted in substantial benefit to the patients:

> *"Beneficiaries could have saved over $600 million in out of pocket payments had they been dispensed generic equivalent drugs. A significant amount of this spending occurred among the top 20 multiple source brands. Substituting these drugs for generic competitors at their median prices would have saved the program and beneficiaries $1.8 billion."*

Likewise, in a previous study by ProPublica (an independent, non-profit newsroom that does investigative journalism) titled *"Dollars for Doctors: Now*

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[27] Extracted from https://aspe.hhs.gov/reports/data-point-savings-available-under-full-generic-substitution-multiple-source-brand-drugs-medicare accessed at 16:37 on 13.02.2022. The report states, *inter alia*, that:
"More 600 brand name drugs were dispensed and paid for by Part D plans in 2016, despite the presence of generic competition. Plans and beneficiaries paid $8.7 billion for multiple source brands and $34.0 billion for generics. Full substitution of multiple source brands would have resulted in total spending on generic drugs of $39.9 billion, saving the Part D program and its beneficiaries $2.8 billion in 2016. These estimates do not account for manufacturer rebates paid to Part D plans or pharmacy benefit managers (PBMs) or statutory discounts paid by manufacturers for brand name drugs, and thus may overstate savings to the program after accounting for the effects that rebates often have on premiums. See Figure 1.
****
Of this $2.8 billion, $2.25 billion is for brand name drugs that have faced generic competition for at least a full year (e.g. the first generic was available in 2015 or earlier). A further $584 million in savings is estimated for substituting generics that were first launched in 2016 and therefore on the market for less than a full year. These 12 Single source includes payments for brand drugs prior to generic entry, e.g. $1.13 billion of Crestor spending in the example used in the Methods section. savings are likely to grow as additional generic competitors enter the market. Beneficiaries spent $1.1 billion out-of-pocket in cost-sharing for brand drugs with comparable generics, averaging twice as much out-of-pocket than for comparable generics. In 2016, multiple source brand drug cost-sharing averaged $39.15, while generic cost-sharing for substitutable products was $17.04. Beneficiaries could have saved over $600 million in out of pocket payments had they been dispensed generic equivalent drugs. A significant amount of this spending occurred among the top 20 multiple source brands. Substituting these drugs for generic competitors at their median prices would have saved the program and beneficiaries $1.8 billion. See Appendix Table A for these drugs, and figure 2 below for an example. In terms of beneficiary cost-sharing, we find similar results as for the overall calculation. Average per beneficiary spending is significantly higher for these brands than for the substitutable generics. (See Appendix Table A, also.) Brand drug cost-sharing averaged $30.69, compared to $22.41 for their generic equivalents. For 17 of the top 20 drugs, the ratio of brand to comparable generic out-of-pocket spending ranges from 117% (Namenda) to 1,476% (Lamictal) indicating significant per-drug savings are available for beneficiaries. In three cases (Abilify, Lovenox, and Tricor), beneficiary out-of-pocket costs are marginally higher for the generic than the brand drug. We believe this is due to the interaction of total drug costs and plan coverage in the coverage gap for generics (42% in 2016), meaning patients paid 58% coinsurance for generics that year. This compares to 25% plan coverage and a 50% statutory manufacturer discount for brand drugs in 2016."

There's Proof: Docs who Get Company Cash Tend to Prescribe More Brand-Name Meds" (dated 17.03.2016)[28] stated that:

> *"…doctors who receive payments from the medical industry do indeed tend to prescribe drugs differently than their colleagues who don't. And the more money they receive, on average, the more brand-name medications they prescribe."*

Data is now available publicly, in the United States, by reason of the Physician Payment Sunshine Act, 2010 i.e., Section 6002 of the Affordable Care Act, 2010. This law compels manufacturers of drugs, devices, biologics, and medical supplies covered by Medicare, Medicaid, or the Children's Health Insurance Program to report to the Centers for Medicare & Medicaid Services on three broad categories of payments or "transfers of value". These categories cover general payments or *transfers of value such as meals, travel reimbursement, and consulting fees*. These include expenses borne by manufacturers, such as speaker fees, travel, gifts, honoraria, entertainment, charitable contribution, education, grants and research grants, etc.

29. The impugned judgment, along with the judgments of Punjab & Haryana High Court (*Kap Scan*) and Himachal Pradesh High Court (*Confederation*) (supra) have correctly addressed the important public policy issue on the subject of allowance of benefit for supply of freebies. The impugned judgment's reasoning is quoted as follows:

> *"A perusal of the decision of Co-ordinate Bench of this Tribunal in the assessee's own case as also the decision of the Hon'ble Himachal Pradesh High Court clearly shows that the basic intention of the decision was that the receiving of the gifts/freebies by Professionals is against public policy as also against the law in so far as the amendment by the Medical Council Act, 1956 to the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002, once receiving of such gifts have been held to be unethical obviously the corollary to this would also be unethical, being giving of such gifts or doing such acts to induce such Doctors and Medical Professionals to violate the Medical Council Act, 1956.*"
>
> (emphasis supplied)

[28] https://www.propublica.org/article/doctors-who-take-company-cash-tend-to-prescribe-more-brand-name-drugs accessed at 16:45 on 13.02-2022

30. Thus, one arm of the law cannot be utilised to defeat the other arm of law – doing so would be opposed to public policy and bring the law into ridicule.[29] In *Maddi Venkataraman & Co. (P) Ltd. v. CIT*[30], a fine imposed on the assessee under the Foreign Exchange Regulation Act, 1947 was sought to be deducted as a business expenditure. This Court held:

> *"Moreover, it will be against public policy to allow the benefit of deduction under one statute, of any expenditure incurred in violation of the provisions of another statute or any penalty imposed under another statute. In the instant case, if the deductions claimed are allowed, the penal provisions of FERA will become meaningless".*
>
> (emphasis supplied)

31. It is crucial to note that the agreement between the pharmaceutical companies and the medical practitioners in gifting freebies for boosting sales of prescription drugs is also violative of Section 23 of the Contract Act, 1872 (as also noted by the Punjab and Haryana High Court in *Kap Scan* (supra)). The provision is as follows:

> "***23. What considerations and objects are lawful, and what not.****—The consideration or object of an agreement is lawful, unless—*
> *it is forbidden by law; or*
> *is of such a nature that, if permitted, it would defeat the provisions of any law; or*
> *is fraudulent; or*
> *involves or implies injury to the person or property of another; or the Court regards it as immoral, or opposed to public policy.*
> *In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful, is void.*
>
> (emphasis supplied)

32. Before us, Apex has continually stressed on the need to divorce interpretation of tax provisions from a perceived immorality / violation of public policy. Apex repeatedly relied on *T.A. Quereshi* (supra), *M/s K.M. Jain* (supra) and *CIT v. Pt. Vishwanath Sharma*[31]. We find that none of these judgments find

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[29] *Biharilal Jaiswal v. CIT*, (1996) 1 SCC 443.
[30] (1998) 2 SCC 95.
[31] I.T.R. No. 27 of 1999, Allahabad HC, dated 21.02.2008.

much favour with the case of the appellant. *T.A. Quereshi* addressed a business 'loss', not a business 'expenditure' as envisioned under Section 37(1). In *M/s K.M. Jain,* the ransom money paid to kidnappers of the employee of the assessee company was allowed deduction primarily based on the fact that the assessee was helpless and coerced to pay the amount in order to save its employee's life. Thus, the assessee was not a wilful participant in commission of an offence or activity prohibited by law. The same is not applicable to the present facts. Pharmaceutical companies have misused a legislative gap to actively perpetuate the commission of an offence. In *Pt. Vishwanath Sharma*, a Division Bench of the Allahabad High Court was faced with the question of whether payment of commission to government doctors could be exempted under Section 37(1). At the time, there was no statutory provision prohibiting doctors engaged in private practice from accepting such commission. Hence, the High Court held that while the Assessing Officer had correctly allowed such deduction for private doctors, the same could not be allowed for Government doctors:

> *"In the present case, payment of commission to Government Doctors cannot be placed on the same pedestal. A distinction has already been made by the authorities while allowing deduction to the assessee in respect to commission which the assessee has paid to private doctors since in their case, payment of commission cannot be said to be an offence under any statute but in respect to Government doctors such payment could not have been allowed as it is an offence under the Statutes as stated above."*
> ***
> *"We are, therefore, clearly of the opinion that payment as commission to Government doctors for obtaining a favour therefrom by prescribing medicines in which the assessee was dealing cannot be said to be a "business expenditure" and no deduction can be allowed thereof under the Act."*
>
> (emphasis supplied)

The 2002 Regulations, applicable to all medical practitioners (including doctors in private practice), was introduced w.e.f. 14.12.2009.

33. Thus, pharmaceutical companies' gifting freebies to doctors, etc. is clearly "*prohibited by law*", and not allowed to be claimed as a deduction under Section 37(1). Doing so would wholly undermine public policy. The well-established

principle of interpretation of taxing statutes – that they need to be interpreted strictly – cannot sustain when it results in an absurdity contrary to the intentions of the Parliament. A Bench of this Court in *C.W.S. (India) Ltd. v. CIT*[32] held as follows:

> *"While a literary construction may be the general rule in construing taxing enactments, it does not mean that it should be adopted even if it leads to a discriminatory or incongruous result. Interpretation of statutes cannot be a mechanical exercise. Object of all the rules of interpretation is to give effect to the object of the enactment having regard to the language used".*

Justice Oliver Wendell Holmes had once said:

> *"A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in colour and content according to the circumstances and the time in which it is used."* [33]

Holmes thus summed up the elusive nature of words, which lies at the heart of the many issues concerning interpretation of statutes.

34. Interpretation of law has two essential purposes: one is to clarify to the people governed by it, the meaning of the letter of the law; the other is to shed light and give shape to the intent of the law maker. And, in this process the courts' responsibility lies in discerning the social purpose which the specific provision subserves. Thus, the cold letter of the law is not an abstract exercise in semantics which practitioners are wont to indulge in. So viewed the law has birthed various ideas such as implied conditions, unspelt but entirely logical and reasonable obligations, implied limitations etc. The process of continuing evolution, refinement and assimilation of these concepts into binding norms (within the body of law as is understood and enforced) injects vitality and dynamism to statutory provisions. Without this dynamism and contextualisation, laws become irrelevant and stale.

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[32] 1994 Supp (2) SCC 296.
[33] *Tomne v. Eispzer,* 245 U.S. 418 (1918).

35. In *Bihari Lal Jaiswal & Ors. v. Commissioner of Income Tax & Ors*[34], the issue of what is "*prohibited by law*" was considered by this Court, in the context of interpretation of a condition in a statutory license (for vending liquor) which prohibited transfer of the license by way of sub-letting or entering into a partnership agreement. While dealing with the recognition of such a partnership under the IT Act, this Court held that allowing the same would attract the very mischief sought to be avoided:

> *"This object will be defeated if the licencee is permitted to bring in strangers into the business, which would mean that instead of the licencee carrying on the business, it would be carried on by others - a situation not conducive to effective implementation of the excise law and consequently deleterious to public interest. It is for this very reason that transfer or sub-letting of licence is uniformly prohibited by several State Excise enactments. It, therefore, follows that any agreement whereunder the licence is transferred, sub-let or a partnership is entered into with respect to the privilege/business under the said licence, contrary to the prohibition contained in the relevant excise enactment, is an agreement prohibited by law. The object of such an agreement must be held to be of such a nature that if permitted it would defeat the provisions of the excise law within the meaning of Section 23 of the Contract Act. Such an agreement is declared by Section 23 to be unlawful and void. The question is whether such an unlawful or void partnership can be treated as a genuine partnership within the meaning of Section 185(1) and whether registration can be granted to such a partnership under the provisions of the Income Tax Act and the Rules made thereunder. We think not. When the law prohibits the entering into a particular partnership agreement, there can be in law no partnership agreement of that nature. The question of such an agreement being genuine cannot, therefore, arise.*

It is also a known principle that what cannot be done directly, cannot be achieved indirectly. As was said in *Fox v. Bishop of Chester*[35] that it is a:

> *"Well-known principle of law that the provisions of an Act of Parliament shall not be evaded by shift or contrivance"*

And that:

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[34] (1995) Supp (5) SCR 285.

[35] (1824) 2 B & C 635, quoted and applied in *Jagir Singh v. Ranbir Singh & Ors.* 1979 (2) SCR 282.

> *"To carry out effectually the object of a Statute, it must be construed as to defeat all attempts to do, or avoid doing, in an indirect or circuitous manner that which it has prohibited or enjoined"*

This Court, in an appeal arising from an action for specific performance, in *G.T. Girish v. Y. Subba Raju (D) by L. Rs & Ors*[36], held that giving the relief would imply doing something prohibited by law (bar against conveyance, for a specific period) – it had the effect of defeating the provisions of the law. It was held that:

> *"Taking the agreement as it is, it necessarily would be in the teeth of the obligation in law of the first Respondent to put up the construction. The agreement to sell involved clearly terms which are impliedly prohibited by law in that the first Defendant was thereunder to deliver title to the site and prevented from acting upon the clear obligation under law. This is a clear case at any rate wherein enforcing the agreement unambiguously results in defeating the dictate of the law. The 'sublime' object of the law, the very soul of it stood sacrificed at the altar of the bargain which appears to be a real estate transaction. It would, in other words, in allowing the agreement to fructify, even at the end of ten-year period of non-alienation, be a case of an agreement, which completely defeats the law for the reasons already mentioned.*
>
> *78. Going by the recital in the agreement entered into between the Plaintiff and the first Defendant, possession is handed over by the first Defendant to the Plaintiff. The original Possession Certificate is also said to be handed over to the Plaintiff. The agreement, even according to the Plaintiff, contemplated that within three months of conveyance of the site in favour of the first Defendant, the first Defendant was to convey her rights in the site to the Plaintiff. It is quite clear that the parties contemplated a state of affairs which is completely inconsistent with and in clear collision with the mandate of the law. On its term, it stands out as an affront to the mandate of the law.*
>
> *79. The illegality goes to the root of the matter. It is quite clear that the Plaintiff must rely upon the illegal transaction and indeed relied upon the same in filing the suit for specific performance. The illegality is not trivial or venial. The illegality cannot be skirted nor got around. The Plaintiff is confronted with it and he must face its consequences. The matter is clear. We do not require to rely upon any parliamentary debate or search for the purpose beyond the plain meaning of the law. The object of the law is set out in unambiguous term. If every allottee chosen after a process of selection under the Rules with reference to certain objective criteria were to enter into bargains of this nature, it will undoubtedly make the law a hanging* (sic laughing) *stock."*

[36] 2022 SCC Online SC 60.

36. In the present case too, the incentives (or "freebies") given by Apex, to the doctors, had a direct result of exposing the recipients to the odium of sanctions, leading to a ban on their practice of medicine. Those sanctions are mandated by law, as they are embodied in the code of conduct and ethics, which are normative, and have legally binding effect. The conceded participation of the assessee- i.e., the provider or donor- was plainly prohibited, as far as their receipt by the medical practitioners was concerned. That medical practitioners were forbidden from accepting such gifts, or "freebies" was no less a prohibition on the part of their giver, or donor, i.e., Apex.

37. In view of the foregoing discussion, the impugned judgment cannot be faulted with. The appeal is dismissed without order on costs. Pending application(s), if any, also stand disposed of.

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[UDAY UMESH LALIT, J.]

……..……
[S. RAVINDRA BHAT, J.]

New Delhi
February 22, 2022.