Governing Law

Clause 12 of the Finance Bill, 2022

12. In section 37 of the Income-tax Act, in sub-section (1), after Explanation 2, the following Explanation shall be inserted, namely:—

'Explanation 3.—For the removal of doubts, it is hereby clarified that the expression "expenditure incurred by an assessee for any purpose which is an offence or which is prohibited by law" under Explanation 1, shall include and shall be deemed to have always included the expenditure incurred by an assessee,—

(i) for any purpose which is an offence under, or which is prohibited by, any law for the time being in force, in India or outside India; or

(ii) to provide any benefit or perquisite, in whatever form, to a person, whether or not carrying on a business or exercising a profession, and acceptance of such benefit or perquisite by such person is in violation of any law or rule or regulation or guideline, as the case may be, for the time being in force, governing the conduct of such person; or

(iii) to compound an offence under any law for the time being in force, in India or outside India.'.

Relevant portion of Memorandum to the Finance Bill, 2022

Clause 12 - Clarifications on allowability of expenditure under section 37

Section 37 of the Act provides for allowability of revenue and non-personal expenditure (other than those failing under sections 30 to 36) laid out or expended wholly and exclusively for the purposes of business or profession. Explanation 1 of sub-section (1) of section 37 of the Act provides that if 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.

2. However, it is seen that certain taxpayers are claiming deductions on expenditure incurred in offering certain benefits or perquisite to a person which are not intended to be allowed under this section, like meeting his expenditure related to travel, hospitality, conference etc. In these cases acceptance of such benefit or perquisite by such person is in violation of a law or rule or regulation or guidelines, as the case may be, governing the conduct of such person.

3. CBDT, vide circular No. 5/2012 dated 1.8.2012, noted that the Indian Medical 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. Accordingly, CBDT clarified that the claim of any expense incurred in providing above mentioned or similar benefits in violation of the provisions of Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 shall be inadmissible under section subsection (1) of section 37 of Act being an expense prohibited by the law. This disallowance was directed to be made in the hands of such pharmaceutical or allied health sector Industries or other assessee which has provided aforesaid benefits and claimed it as a deductible expense in its accounts against income.

4. This circular was challenged in Himachal Pradesh High Court in the case of Confederation of Indian Pharmaceutical Industry Vs Central Board of Direct Taxes [(2013) 335 ITR 388 (HP)], in which the Hon'ble High Court rejected the petition and held that -

"The regulation of the Medical Council prohibiting medical practitioners from availing of freebies 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, s. 37(1) comes into play. The Petitioner's contention that the circular goes beyond the section is not acceptable. In case the assessing authorities are not properly understanding the circular then the remedy lies for each individual assessee to file an appeal but the circular which is totally in line with s. 37(1) cannot be said to be illegal. 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 AO that the expense is not in violation of the Medical Council Regulations."

5. After this there have been various judgments of Income-tax Appellate Tribunals. Some of these judgments have held that these expenses to be not allowable under sub-section (1) of section 37 the Act, while others holding it to be allowable. The latest judgment on this issue is from ITAT Mumbai in the case of Macleods Pharmaceuticals delivered on 14th October 2021 in ITA Nos. 5168 & 5169/Mum/2018. In this judgment ITAT held that the action of the assessing officer in disallowing the expenditure deserves to succeed and then explained as to why it is a fit case for the constitution of a special bench of three or more members. ITAT arrived at its recommendations based, inter-alia, on the followings:-

i. Honble Supreme Court, in the case of Keshavji Ravji& Co Vs CIT [(1990) 183 ITR 1 (SC)] has held that the burden that the Act itself through a correct interpretation of law envisages is equal to or higher than the burden envisaged by the CBDT circular, that burden of law cannot be negated because the circular also so states. Hence, the circular no 5 of 2012 is to be held as valid.

ii. Once a judicial forum higher than this Tribunal, (i.e Himachal Pradesh High Court in the case of Confederation of Indian Pharmaceutical Industry) holds that the interpretation to the scope of Explanation to sub-section (1) of section 37, as given in the circular, is a correct legal interpretation, it cannot be open to us to discard the interpretation so approved to be correct legal interpretation.

iii. In the case Kap Scan and Diagnostic Centre (P) Ltd. [(2012) 344 ITR 476 (P&H)], the Hon'ble High Court of Punjab & Haryana held that 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 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. The Court further held that 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 the 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 fair practice and has to be termed as against the public policy.

iv. ITAT noted earlier coordinate bench judgment in the case of DCIT Vs PHL Pharma Pvt Ltd (2017) 163 ITD 10 (Mum), where it was held that the disallowance could not be sustained as the MCI guidelines bind only the medical professionals and not the pharmaceutical companies. ITAT

noted that this judgment was not in line with earlier co-ordinate bench judgment In the case of Liva Healthcare Ltd, (2016) 161 ITD 63 (Mum) where the Hon'ble Mumbai ITAT has held that the CBDT circular dated 01.08.2012 is merely a clarification in nature and creates a bar on such illegal payments being against public policy, the said bar always existed in the statute by virtue of the existence of Explanation of Section 37 of the Act which was inserted by Finance Act, 1998 w.e.f. 01-04-1962. It was also noted that in Hon'ble AP High Court's full bench decision in the case of CIT Vs B R Constructions (1993) 202 ITR 222 (AP- FC) their Lordships have observed that a "precedent ceases to be a binding precedent ... (iii) when it is inconsistent with the earlier decisions of the same rank; and (iv) when it is rendered per incuriam". Clearly, therefore, the decisions which disregard earlier binding decisions on the same issue, "cease to be a binding judicial precedent".

v. ITAT also noted that Hon'ble Delhi High Court in the case of Max Hospital Vs Medical Council of India (WP No. 1334 of 2013; judgment dated 10th January 2014), in which it was held that the provisions of Medical Council of India only bind the medical professionals and not others, such as hospitals and pharmaceutical companies. ITAT explained that it was a case in which Ethics Committee of the Medical Council of India, upon a complaint alleging death of a patient due to medical negligence, passed an order punishing the erring doctors but this order also had certain adverse remarks against the Max Hospital as well. 36 Aggrieved by these observations, Max Hospital filed a writ petition contending that since the Medical Council of India (Professional Conduct, Etiquette and Ethics) Regulations, have been framed in exercise of the power conferred under Section 20-A read with Section 33 (m) of the Indian Medical Council Act, 1956, these regulations do not govern or have any concern with the facilities, infrastructure or running of the Hospitals and secondly, that the Ethics Committee of the MCI acting under the Regulations had no jurisdiction to pass any direction or judgment on the infrastructure of any hospital which power rests solely with the concerned State Govt. It was also contended that the Petitioner was not provided an opportunity of being heard and thus the principles of natural justice were violated. While dealing with these grievances, Hon'ble Delhi High Court has held, in its operative portion of the judgment- which was reproduced by the ITAT in entirety, as follows:

> *"8. It is clearly admitted by the Respondent that it has no jurisdiction to pass any order 78 against the Petitioner hospital under the 2002 Regulations. In fact, it is stated that it has not passed any order against the Petitioner hospital. Thus, I need not go into the question whether the adequate infrastructure facilities for appropriate post-operative care were in fact in existence or not in the Petitioner hospital and whether the principles of natural justice had been followed or not while passing the impugned order. Suffice it to say that the observations dated 27.10.2012 made by the Ethics Committee do reflect upon the infrastructure facilities available in the Petitioner hospital and since it had no jurisdiction to go into the same, the observations were uncalled for and cannot be sustained. 9. Since the MCI had no jurisdiction to go into the infrastructure facilities, I need not also go into the aspect that in the year 2011, the facilities available in the hospital were inspected and were found to be in order. 10. The petition therefore has to succeed. I hereby issue a writ of certiorari quashing the adverse observations passed by the MCI against the Petitioner hospital highlighted in Para 1 above."*

ITAT thus held that in their humble understanding, the judgment of Delhi High Court does not negate, dilute, or even deal with, ratio decidendi of, or even casual observations in, Hon'ble HP High Court's judgment in the case of Confederation 37 of Indian Pharmaceutical Industry (discussed earlier). These judgments are in altogether in different field.

vi. ITAT thus noted that while Hon'ble HP High Court dealt with the interpretation of Explanation to sub-section (1) of section 37, Hon'ble Delhi High Court dealt with the powers of the MCI to pass an order against a Hospital in Delhi on the question of adequacy regarding infrastructure facilities

by Hospitals in Delhi, and that too without affording an opportunity of hearing to the said hospital. Hon'ble Delhi High Court judgment in Max Hospitals case has no bearing on the question as to whether giving benefits to the medical professionals is in violation of law or not. ITAT further noted that it is also well settled in law, including by Hon'ble jurisdictional High Court in the case of CIT v. Sudhir Jayantilal Mulji (1995) 214 ITR 154 (Bom),that a judicial precedent is only "an authority for what it actually decides and not what may come to follow from some observations which find place therein".

vii. On the coordinate bench judgment in the case of DCIT Vs PHL Pharma Pvt Ltd (2017), ITAT noted the following:-

"The more we ponder about the rationale of PHL Pharma decision (supra), the more convinced we are that this decision calls for reconsideration by a larger bench. In our humble understanding, conclusions arrived in the said decision do not reflect the correct legal position, and the same is the position with respect to a large number of other coordinate bench decisions following the said decision or following the line of reasoning in the said decision- as discussed above. However, in all fairness, while we may or may not agree with a coordinate bench decision, it cannot be open to us to disregard the same, lest such judicial inconsistency should shake public confidence in the administration of justice and lest one of the fundamental legitimate expectations of the stakeholders, i.e. those exercising judicial functions will follow the reason or ground of the judicial decision in the earlier cases on identical matters, will stand declined. "It is, however, equally true", to borrow the words of Hon'ble Supreme Courts as articulated in the case of Union of India Vs Paras Laminates Pvt Ltd [(1990) 186 ITR 722 (SC)], "that it is vital to the administration of justice that those exercising judicial power must have the necessary freedom to doubt the correctness of an earlier decision if and when subsequent proceedings being to light what is perceived by them as an erroneous decision in the earlier case" and that "in such circumstances, it is but natural and reasonable and indeed efficacious that the case is referred to a larger bench". Taking a cue from the path so guided by Hon'ble Supreme Court in the case of Paras Laminates (supra), we recommend constitution of a bench of three or more Members to consider the question as to whether or not an item of expenditure on account of freebies to medical professionals, which is hit by rule 6.8.1 of Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002- as amended from time to time, read with section 20A of the Indian Medical Council Act 1956, can be allowed as a deduction under section 37(1) of the Income Tax Act, 1961 read with Explanation thereto, in the hands of the pharmaceutical companies.

6. Thus, the legal position is clear that the claim of any expense incurred in providing various benefits in violation of the provisions of Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 shall be inadmissible under section sub-section (1) of section 37 of Act being an expense prohibited by the law. Delhi High Court decision which was relied upon by ITAT in some decisions was in completely different context as discussed by ITAT Mumbai in their judgment in the case of Macleods Pharmaceuticals. These ITAT decisions allowing such expenditure are clearly not in line with the intention of the legislation.

7. Further, some taxpayers are seen to be claiming deduction on expenses incurred for a purpose which is an offence under foreign law or for compounding of an offence for violation of foreign law, claiming that provisions of Explanation 1 to subsection (1) of section 37 of the Act applies only to offences which are prohibited by the domestic law of the country. In some case this view has also been accepted by the tribunal. These judgments are also against the intention of the legislation as the legislation does not say that the Explanation 1 applies only to the violation of domestic law. 8. In order to make the intention of the legislation clear and to make it free from any misinterpretation, it is proposed to insert another Explanation to sub-section (1) of section 37 to further clarify that the expression "expenditure incurred by an assessee for any purpose which is an offence or which is

prohibited by law", under Explanation 1, shall include and shall be deemed to have always included the expenditure incurred by an assessee, —

i. for any purpose which is an offence under, or which is prohibited by, any law for the time being in force, in India or outside India; or

ii. to provide any benefit or perquisite, in whatever form, to a person, whether or not carrying on a business or exercising a profession, and acceptance of such benefit or perquisite by such person is in violation of any law or rule or regulation or guidelines, as the case may be, for the time being in force, governing the conduct of such person; or

iii. to compound an offence under any law for the time being in force, in India or outside India.

This amendment will take effect from 1st April, 2022.

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:—

(a) Gifts: A medical practitioner shall not receive any gift from any pharmaceutical or allied health care industry and their sales people or representatives.

(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.]

(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.

The CBDT circular dated 01.08.2012

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.

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.

This may be brought to the notice of all the officers of the charge for necessary action.

Relevant Paragraphs of Supreme Court judgement in the case of Apex Laboratories Pvt. Ltd. V DCIT SLP-Civil No. 23207 of 2019 dated February 22, 2022

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")...

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...

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.

..
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, the PC Act only punished the bribe-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.*
>
> ***
>
> *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.*
> ***
> *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.*

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 (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 (2003) 4 SCC 257* 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 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.*

In Dhannalal vs. Kalawatibai and Ors.(2002) 6 SCC 16. 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 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 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)

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. *Biharilal Jaiswal v. CIT*, (1996) 1 SCC 443.

> para 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.

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

> "***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.

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.

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.