

Present :- Hon'ble Mr. Justice Md. Nizamuddin

With

Judgment On :- **19.04.2022**

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and Ethics) Regulation, 2002 introduced w.e.f 14.12.2009 read with Circular No. 5/2012 dated 1st August, 2012 issued by the Central Board of Direct Taxes (CBDT), claim of deduction on expenditure made by the assessee/petitioner who is engaged in the business of running multi-speciality hospital, for the purpose of making payment to doctors as 'referral to doctors' for referring patients for treatment in its hospital acceptance of which is an offence and prohibited by law is disallowable under the explanation I of Section 37 (1) of the Income Tax Act, 1961?

- (ii) Whether Circular No. 5/2012 dated 1st August, 2012 issued by the Central Board of Direct Taxes (CBDT) is explanatory and retrospective in nature and is effective from 14.12.2009 in view of decision of the Hon'ble Supreme Court dated 22nd February, 2022 in Special Leave Petition (Civil) No. 23207 of 2019 in the case of M/s Apex Laboratories Pvt. Ltd. –vs- Deputy Commissioner of Income Tax, Large Tax Payer Unit – II reported in 2022 SCC OnLine SC 221?
- (iii) Whether action of the petitioner/assessee Hospital participating/indulging in making payment of fee to doctors as 'referral to doctors' for referring patients to its hospital fall within the purview of expression 'prohibited by law' in Explanation I to Section 37 (1) of the Income Tax Act, 1961 and is not allowable for deduction since acceptance of which by the medical practitioner is prohibited under the aforesaid Regulation of the Indian Medical Council and the view taken by the Hon'ble Supreme Court in its decision dated 22nd February, 2022 in Special Leave Petition (Civil) No. 23207 of 2019 in the case of M/s Apex Laboratories Pvt. Ltd. – vs- Deputy Commissioner of Income Tax, Large Tax Payer Unit – II reported in 2022 SCC OnLine SC 221 and in view of Circular No.5/2012 dated 1st August, 2012 issued by the CBDT?

- (iv) Whether on the facts and in the circumstances of the case initiation of impugned proceeding of reopening of assessment under Section 147 of the Income Tax Act, 1961 and issuance of notices under Section 148 of the Act after the expiry of 4 years from the end of the relevant assessment year are based on the self-same material which were already available before the Assessing Officer during the course of regular assessment under Section 143 (3) of the Act and can invoking of Section 147 of the Act on the selfsame material be called a mere change of opinion and is bad and not sustainable in law?
- (v) Whether on the facts and in the circumstances of the case impugned action of the assessing officer initiating proceeding for reopening of assessment relating to relevant assessment years 2011-12 and 2012-13 after the expiry of 4 years from the end of the relevant assessment year, under Section 147 of the Act without recording either in the impugned notices under Section 148 of the Act or in the recorded reason that there was any omission or failure on the part of the assessee/petitioner to disclose fully and truly all material facts necessary for assessment, is bad and not sustainable in law?

Since the facts and questions of law involved in both the Writ Petitions are similar, for the sake of convenience, facts in the case in W.P. No. 398 of 2018, is discussed in brief hereunder:

It is the case of the petitioner that it is a company within the meaning of Companies Act, 1956, engaged in the business of running a multi-speciality hospital and it intends to challenge the impugned notice dated 27th July, 2017 issued by the Assessing Officer concerned under Section 148 of the Income Tax Act, 1961, relating to assessment year 2011-12 (financial year 2010-11) which was served on the petitioner on 2nd August, 2017 and against which petitioner had filed an objection on 16th March, 2018 which was rejected by the Assessing Officer concerned on 16th July, 2018.

Dispute in this case according to the petitioner relates to a payment of Rs. 51,76,992/- as 'referral to doctors' which was claimed by it as business expense in its return of income filed for the assessment year 2011-12 and according to the petitioner this expense was referred in schedule -18 to the audited profit and loss account and that the petitioner had already explained the same in course of regular assessment proceeding and the Assessing Officer had allowed such deduction after due consideration of the relevant materials placed on record particularly Item No. 15 of the questionnaire dated 8th August, 2019 and its reply dated 26th April, 2013 filed with the Assessing Officer. Admittedly initiation of reopening of the assessment in question has been made after expiry of four years from the end of relevant assessment year. Petitioner also submits that the impugned action of initiation of proceeding of reopening of assessment in question under Section 147 of the Act is merely on change of opinion and neither there is any new material which came to the notice or knowledge of the Assessing Officer nor there is any case made out or recorded by the Assessing Officer either in the impugned notice under Section 148 of the Act or in the recorded reason for reopening of assessment that there was any omission or failure on the part of the assessee/petitioner to disclose fully and truly all material facts necessary during the assessment proceeding for the relevant assessment year.

Petitioner contends that it is aggrieved by the action of the Assessing Officer forming opinion in his recorded reason that the aforesaid expenditure on account of payment in question as 'referral to doctors' being an expense prohibited by law and is disallowable under explanation 1 to Section 37 (1) of the Income Tax Act, 1961 in relevant assessment years and in view of regulation under the amended Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulation, 2002 introduced w.e.f. 10th December, 2009 and Circular No. 5/2012 dated 1st August 2012 issued by the Central Board of Direct Taxes (CBDT) by applying the same retrospectively w.e.f. 10.12.2009. Petitioner submits that such opinion of the Assessing Officer concerned is misconceived and in total misinterpretation of the Regulation

6.4.1 of the aforesaid Regulation of the Indian Medical Council. In addition petitioner submits that the aforesaid Circular of the board dated 1st August, 2012 is not applicable to the case of the assessee/petitioner since it is engaged in the business of running a multi-speciality hospital and is not a medical practitioner and secondly it relates to assessment year 2011-12 (financial year 2010-11) and assessment year 2012-13 (financial year 2011-12) and the aforesaid circular of the CBDT dated 1st August, 2012 can't be applied retrospectively in relevant assessment years since nowhere it says that it is retrospective in nature.

Petitioner further submits that in assessee's own case relating to assessment years 2009-10 & 2013-14, the tribunal by its order dated 11th December, 2019, has allowed the assessee/petitioner such payment of referral fee to the doctors for referring their patients to the assessee hospital/petitioner, as deduction under Section 37 (1) of the Act.

Petitioner submits that following the aforesaid judgment of the Tribunal, the CIT (Appeal) has also allowed the aforesaid deduction by its order dated 18th March, 2021 relating to assessment year 2010-11 in assessee/petitioner's own case and the department has not gone in further appeal against the said order of CIT (Appeal).

Petitioner submits that in view of the aforesaid admitted position that the initiation of the impugned reassessment proceeding is after the expiry of four years from the end of the relevant assessment year and since the Assessing Officer concerned has nowhere made out a case either in its impugned notice under Section 148 of the Act or in the recorded reason or in the impugned order of rejection of its objection to Section 148 of the Act that there was any omission or failure on the part of the assessee/petitioner in disclosing fully and truly all material facts necessary for its assessment in course of regular assessment proceeding relating to relevant assessment year and thus it does not fulfil the condition precedent/criteria for reopening of assessment after expiry of four years from the end of relevant assessment year.

Petitioner has relied on the following several judgments, on the proposition of law that for reopening of assessment after the expiry of four years from the end of the relevant assessment year, Assessing Officer will have to specifically make out a case that at the time of regular assessment there was any omission or failure on the part of the assessee in disclosing fully and truly all material facts necessary for the assessment in respect of relevant assessment year.

Petitioner has relied on the decision of this Court in the case of **Calcutta Club Ltd. -vs- Income Tax Officer & Ors. reported in [2020] 426 ITR 157 (Cal)** and relevant Paragraph No. 30 of the said decision is quoted hereunder:

“Considering the submission of the parties, relevant records, Provisions of law and the decisions relied upon by the parties, in my considered view the impugned notices under Section 148 of the Income Tax Act, 1961 and the proceedings under Section 147 of the Act are not sustainable in law and should be quashed for the reason that admittedly impugned proceeding initiated under Section 147 and notices issued under Section 148 of the Income Tax Act, 1961, which were issued after the expiry of four years from the end of the relevant assessment year and in view of the fact that there is no whispering in the recorded reason that there was any omission or failure on the part of the assessee in disclosing fully and truly material facts for assessment and in view of the fact that the Assessing Officer could not establish that the information of alleged escaped income was not within his knowledge and was not considered at the time of passing of the assessment order under Section 143 (3) of the Income Tax Act, 1961 and it came to his knowledge subsequent to the assessment order passed under Section 143 (3) of the Income Tax Act, 1961 and that subsequent decision of the Hon'ble Supreme Court reversing the legal position prevailing at the time of regular assessment cannot be called an omission or failure on the part of the assessee in disclosing fully and truly the material facts necessary for relevant assessment.”

Petitioner has relied on the decision of this Court in the case of **East India Hotels Ltd. -vs- Deputy Commissioner of Income Tax & Ors. reported in [1993] 204 ITR 435 (Cal)** and relevant portion of the said decision is quoted hereunder:

“It has been urged on behalf of the respondents that when excessive depreciation allowance was given by the Income-tax Officer, that will be treated as escapement of income within the meaning of Explanation 2 to Section 147 of the Act. But that does not resolve the dispute. The Explanation by itself will not turn every case of excessive depreciation allowance into a case of omission or failure to disclose fully and truly all material facts. If the reopening is to be done after the prescribed period of four years, failure to disclose fully and truly material fact by the assessee has to be established. Merely because an underassessment has taken place because excessive depreciation was allowed on a wrong understanding of law will not make it a case of omission to disclose fully and truly all material facts.”

Petitioner has also relied on the decision of Bombay High Court in the case of **Hindustan Lever Ltd. -vs- R.B. Wadkar reported in [2004] 137 Taxman 479 (BOM.)** and relevant Paragraph being Nos. 20 and 21 of the said decision are quoted hereunder:

“20. The reasons recorded by the assessing officer nowhere state that there was failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment of that assessment year. It is needless to mention that the reasons are required to be read as they were recorded by the assessing officer. No substitution or deletion is permissible. No additions can be made to those reasons. No inference can be allowed to be drawn based on reasons not recorded. It is for the assessing officer to disclose and open his mind through reasons recorded by him. He has to speak through his reasons. It is for the assessing officer to reach to the conclusion as to whether there was failure on the part of the assessee to disclose fully and truly all material

facts necessary for his assessment for the concerned assessment year. It is for the assessing officer to form his opinion. It is for him to put his opinion on record in black and white. The reasons recorded should be clear and unambiguous and should not suffer from any vagueness. The reasons recorded must disclose his mind. Reasons are the manifestation of mind of the assessing officer. The reasons recorded should be self-explanatory and should not keep the assessee guessing for the reasons. Reasons provide link between conclusion and evidence. The reasons recorded must be based on evidence. The assessing officer, in the event of challenge to the reasons, must be able to justify the same based on material available on record. He must disclose in the reasons as to which fact or material was not disclosed by the assessee fully and truly necessary for assessment of that assessment year, so as to establish vital link between the reasons and evidence. That vital link is the safeguard against arbitrary reopening of the concluded assessment. The reasons recorded by the assessing officer cannot be supplemented by filing affidavit or making oral submission, otherwise, the reasons which were lacking in the material particulars would get supplemented, by the time the matter reaches to the Court, on the strength of affidavit or oral submissions advanced.

21. Having recorded our finding that the impugned notice itself is beyond the period of four years from the end of the assessment year 1996-97 and does not comply with the requirements of proviso to section 147 of the Act, the assessing officer had no jurisdiction to reopen the assessment proceedings which were concluded on the basis of assessment under section 143(3) of the Act. On this short count alone the impugned notice is liable to be quashed and set aside.”

Petitioner has relied on the decision of this Court in the case of **Asoka Marketing & Ors. –vs- Income Tax Officer & Ors. reported in [1978] 111 ITR 783 (Cal)** and relevant portion of the said decision is quoted hereunder:

“I am unable to accept the contentions of Mr. Balai Lal Pal on this point. Entry No. 7 in the covering sheet of the recorded reasons in my view does not amount to a formation of belief that any income has escaped, assessment. Even assuming that by an over-generous interpretation in favour of the revenue, this entry may be construed to amount to the formation of a belief by the Income-tax Officer that income has escaped assessment, there is nothing in the recorded reasons to show that there was the formation of belief by the Income-tax Officer that such income escaped assessment by reason of any omission or failure on the part of the assessee to disclose fully and truly all relevant facts with regard to the particular year. The absence of this belief with regard to the omission or failure on the part of the assessee, in my view, is a fatal infirmity of the impugned notices. Consequently, it must be held that the impugned notices having been issued without the condition precedent having been complied with they are without jurisdiction and void. This point of Dr. Pal, therefore, succeeds.”

Petitioner has relied on the decision of this Court in the case of **Mercury Travels Ltd. -vs- Deputy Commissioner of Income Tax reported in [2003] 133 Taxman 283 (Cal)** and relevant Paragraph being No. 13 of the said decision is quoted hereunder:

“13. My reading of Section 147 of the said Act is that a proceeding for reopening of an assessment, made under Sub-section (3) of Section 143 of the said Act, can be initiated when any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment for that assessment year. Where expressly deduction under Section 80HHD was claimed and it was examined and granted by the assessing authority, there was no omission or failure on the part of the assessee to disclose any material fact necessary for the assessment. In the case in hand, at the time of submission of the original returns, as per the requirements of the law, the assessee submitted certificates from the chartered accountant in the prescribed forms claiming such exemptions.

Thus, the primary facts were before the AO when he made the assessments under Sub-section (3) of Section 143 and it was not open to him to invoke the provisions of Section 147 of the said Act to reopen the assessments because he might have omitted to notice certain facts by oversight. For change of opinion, the provisions of Section 147 of the said Act cannot be put to service. In the reasons for reopening the assessments it has not been alleged that there has been any omission or failure on the part of the assessee to disclose fully and truly all the material facts necessary for the assessments for those assessment years. It is not even noted in the recorded reasons as to what other primary facts were required to be disclosed by the assessee before the AO at the time of assessments made under Sub-section (3) of Section 143. I am, therefore, clearly of the view that the assessee disclosed all the primary facts before the AO at the time of original assessments under Sub-section (3) of Section 143 of the Act and there was no omission or failure on the part of the assessee to disclose fully and truly all the material facts necessary for the assessment for those assessment years. Therefore, the notice issued under Section 148 was illegal and without jurisdiction as the conditions precedent to reopen the assessment are not available in the recorded reasons. I hold that no income chargeable to tax had escaped assessment for those assessment years due to failure of the assessee to disclose fully and truly all material facts necessary for its assessment.”

Petitioner has relied on the decision of this Court in the case of **Amiya Sales and Industries -vs- Assistant Commissioner of Income Tax reported in [2005] 274 ITR 25 (Cal)** and relevant Paragraph being Nos. 16 and 17 of the said decision are quoted hereunder:

“16. In the case in hand, as already noted, since the conditions for assumption of jurisdiction under Section 147 were not fulfilled, the notices under Section 148 of the Act were uncalled for and warrant interference by appropriate orders. In my view, if an authority assumes jurisdiction illegally

which is not vested under the law it would be fit and proper for the writ court to intervene.

17. In the instant case, as there was no omission or failure on the part of the assessee to disclose truly and fully all material facts in the return, as the Assessing Officer sought to reopen the assessments due to wrong interpretation of accounts by the Assessing Officer which was not permissible under Section 147 of the Act to assume jurisdiction and in view of the settled position of law laid down by the apex court in *Calcutta Discount Co. Ltd.* [1961] 41 ITR 191 and *Parashuram Pottery*, the writ petitioner was justified in invoking the writ jurisdiction.”

Mr. Bhowmick Learned Advocate appearing for the respondents opposing the Writ Petitions submits that even if there is no omission or failure on the part of the assessee/petitioner to disclose fully and truly all material facts necessary for the regular assessment in question at the time of relevant regular assessments still if there is escapement of any income, notice under Section 148 of the Act can be issued after expiry of four years from the end of relevant assessment year. On the issue of change of opinion he submits that there is no change of opinion but he could not demonstrate from any materials on record that the documents or materials on the basis of which the respondent Assessing Officer has formed the opinion was not disclosed by the assessee/petitioner or the same were not available before the assessing officer at the time of regular assessment under Section 143 (3) of the Act.

Mr. Bhowmick submits that the assessee Writ Petitioner which is running a hospital is not entitled for deduction on payment of ‘referral to doctors’ made to the medical practitioner in relevant assessment years in view of the aforesaid Circular of the CBDT.

Before dealing with the issues involved in the Writ Petitions and contention of the parties I would like to refer the relevant amended Regulation of the Indian Medical Council (Professional Conduct, Etiquette

and Ethics) Regulation, 2002 particularly Regulation 6.4.1, 6.4.2 & 8.1. which are quoted as hereunder:

“6.4 Rebates and Commission

6.4.1 A physician shall not give, solicit, or receive nor shall he offer to give solicit or receive, any gift, gratuity, commission or bonus in consideration of or return for the referring, recommending or procuring of any patient for medical, surgical or other treatment. A physician shall not directly or indirectly, participate in or be a party to act of division, transference, assignment, subordination, rebating, splitting or refunding of any fee for medical, surgical or other treatment.

6.4.2 Provisions of para 6.4.1 shall apply with equal force to the referring, recommending or procuring by a physician or any person, specimen or material for diagnostic purpose or other study/work. Nothing in this section, however, shall prohibit payment of salaries by a qualified physician to other duly qualified person rendering medical care under his supervision.

8. PUNISHMENT AND DISCIPLINARY ACTION

8.1 It must be clearly understood that the instances of offences and of Professional misconduct which are given above do not constitute and are not intended to constitute a complete list of the infamous acts which calls for disciplinary action, and that by issuing this notice the Medical Council of India and/or State Medical Councils are in no way preclude from considering and dealing with any other form of professional misconduct on the part of a registered practitioner. Circumstances may and do arise from time to time in relation to which there may occur questions of professional misconduct which do not come within any of these categories. Every care should be taken that the code is not violated in letter or spirit. In such instances as in all others, the Medical Council of India and/or State Medical Councils have to consider and decide upon the facts brought before the Medical Council of India and/or State Medical Councils.”

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In my view aforesaid circular of the CBDT dated 01.08.2012 is also relevant to this case which is quoted hereunder:

“CIRCULAR NO. 5/2012, DT. 1ST AUGUST, 2012

Inadmissibility of expenses incurred in providing freebees to medical practitioner by pharmaceutical and allied health sector industry

01/08/2012

Business Expenditure

Section 37 (1),

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 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 deductible 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 be 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.

[F. No. 225/142/2012-ITA.II]"

Recorded reason for the assessment year 2011-12 for the reopening of the assessment under Section 148 of the Act which is similar to the reason given for the assessment year 2012-13 which according to me is also relevant and quoted as hereunder:

“The reasons for reopening for the assessment proceedings of A.Y. 2011-12 is given as under:-

“The aforesaid assessee company filed its return of income for the Assessment Year 2011-12 on 28.09.2011 at a returned income/loss of (-) Rs. 5,33,14,806/-. The case was selected for scrutiny and the assessment order u/s 143 (3) of the IT Act was passed on 28.02.2014 at an assessed income/loss of (-) Rs. 4,87,24,396/-. On perusal of the assessment record it is seen that the assessee had paid an amount of Rs. 51,76,992/- (approximately) as ‘Referral to Doctors’ and the same was allowed during the assessment. The assessee was engaged in the business of Hospital services. Hence, the above expenditure is not an allowable expenditure vide departmental circular No 5/2012, dated 01.08.2021 issued by CBDT following the amended Indian Medical Council (Professional conduct, Etiquette and Ethics) Regulation, 2002 dated December 10, 2009. Based on the judgment of Hon’ble Punjab and Haryana High Court on similar issue in CIT vs KAP scan and Diagnostic centre [2012] 344 ITR 476 and many other judicial pronouncements it was held that commission or referral paid by Diagnostic centre/hospitals to private Doctors for referring patients for treatment /diagnosis is not an allowable expenditure. This was an expenditure illegally given as kickback to the Doctors and covered by the explanation to the Section 37 (1) of the Income Tax Act, 1961.

In view of the above facts and circumstances, I have reason to believe that income of the assessee company (with PAN – AABCP7225L) to the extent of Rs. 51,76,992/- has escaped assessment for the A.Y 2011-12 within the meaning of section 147 of the Income Tax Act 1961”

Before coming to the final conclusion with reasons in deciding the issues and questions of law involve in these Writ Petitions I would like to indicate an important development which took place after conclusion of hearing of this matter and making the judgment reserved on 16th February, 2022. It came to my notice a judgment delivered by the Hon’ble Supreme Court on 22nd February, 2022 in the case of **M/s Apex Laboratories Pvt.**

Ltd. –vs- Deputy Commissioner of Income Tax, Large Tax Payer Unit-II, (Civil Appeal No./2022) (Special Leave Petition (Civil) No. 23207 of 2019) reported in 2002 SCC OnLine SC 221. Thereafter parties were further heard and judgment was made reserved on 07th March, 2022. On perusal of the said judgment, in my considered opinion some of the issues involved and law laid down therein has very much relevance to this case particularly the issue of claim of deduction of expense incurred on freebies/payment of commission offered or paid to the doctors by the allied health care industry like hospitals Diagnostic Centres, clinical Laboratories as ‘referral to doctors’ for referring patients to its hospital for treatment, under Section 37 (1) and Explanation 1 thereunder, under the Income Tax Act, 1961, and in view of the aforesaid regulations of the Indian Medical Council and circular of CBDT, dated 1st August, 2012.

Relevant paragraphs of the said judgment of the Hon’ble Supreme Court are quoted hereinbelow:

“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”.

[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.]

(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:—

(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.

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 falling 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 deductible 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.

(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.

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 amendment²², 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.

(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, 1956²³ (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.

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)

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 of Multiple Source Brand Drugs in Medicare Part D (dated 23.07.2018). 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 There’s Proof: Docs who Get Company Cash Tend to Prescribe More Brand-Name Meds” (dated 17.03.2016) 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)

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)

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 Sharma³¹. We find that none of these judgments find 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 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.”

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.

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 licensee is permitted to bring in strangers into the business, which would mean that instead of the licensee 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:

"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*, 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. 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.”

Considering the submission of the parties, aims and object of the amended Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002, Explanation 1 to Section 37 (1) of the Income Tax Act, 1961, Circular No. 5/2012 dated 1st April, 2012 issued by Central Board of Direct Taxes and the judgment of the Hon’ble Supreme Court in the case of M/s Apex Laboratories Pvt. Ltd. (supra) my answer is in negative to the question as to whether Petitioner hospital is eligible and entitled to get deduction on expenditure by way of commission to the doctors as ‘referral to doctors’ for referring patients for treatment in its hospital as business expenditure under Section 37 (1) of the Income Tax Act, 1961?

In my considered opinion it is not entitled for deduction on such expenditure as a business expenditure in view of Explanation 1 to Section 37 (1) of the Income Tax Act, 1961, read with circular no. 5 dated 1st August, 2012 of the CBDT which is retrospective in nature with effect from 14th

December, 2009, as per decision of the Hon'ble Supreme Court in the case of M/s Apex Laboratories Pvt. Ltd. (supra) and in view of the relevant regulations of amended Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 under which receiving of the same by the medical practitioner is prohibited and violation of which invites punishment and disciplinary proceedings against doctors. In my considered opinion petitioner being a participant in an act which is an offence and is prohibited by law is not entitled for any deduction under Section 37 (1) of the Income Tax Act, 1961, and the aforesaid nature of expenses are disallowable under Explanation 1 to Section 37 of the Income Tax Act, 1961 for the following reasons:

(i) Ultimate object of amended regulation of Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002, is to protect the interest of the patients and for prevention of corruption in medical profession/medical practitioners and to save the patients from bearing the burden of unnecessary additional hidden costs of the aforesaid nature which are added to the patients' bill for their treatment by the allied health care industry including hospitals, diagnostic centres, pathological laboratories etc..

(ii) Object of all the rules of interpretation is to give effect to the object of the enactment having regard to the language used and not in a manner frustrating the very object of the same.

(iii) In my considered opinion when under the aforesaid regulations of Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002, receiving of any freebies, bonus or commission etc by physician/medical practitioners from allied health industry for referring any patient by them for medical investigation, surgical or other treatment purposes is prohibited under Regulation 6.4.1. and 6.4.2. and violation of the same is a punishable offence and invites disciplinary action under Regulation 8 of the aforesaid amended Regulations of Indian Medical Council then how can action of any allied health care industries including hospitals who are

indulging or participating in commission of such prohibited and punishable act be called legal or legitimate and be allowed to take advantage of any lacuna or loopholes in the statute and be allowed to take benefit of deduction of such expenditure as allowable business expenditure under Section 37 (1) of the Income Tax Act by accepting their contention that though accepting by the physicians or medical practitioners from allied health care industries/hospitals such freebies, commission, bonus etc. may be prohibited and punishable under the aforesaid Regulations but giving or offering the same to the medical practitioners/physicians and expenditure incurred by the petitioner hospital in such prohibited purpose or in participation of such punishable offence should be treated as legal and should be allowed as business expenditure under Section 37 (1) of the Income Tax Act, 1961 and should not be disallowed under Explanation 1 of Section 37 (1) of the Income Tax Act, 1961. Such interpretation and submission of the petitioner is not acceptable by this Court and is held not sustainable in law since allowing deduction of such nature of expense by treating the same as legal and valid business expenditure by these allied health care industry including hospitals would encourage and cause proliferation of corruption in medical field and will frustrate the very purpose and object of the aforesaid Indian Medical Council Regulations, 2002 and Explanation 1 of Section 37 (1) of the Income Tax Act, 1961, and the aforesaid Circular No. 5 of 2012 of the Central Board of Direct Taxes.

(iv) In my considered opinion, unnecessary cost of these nature which is prohibited by the aforesaid regulations, to be incurred by the patients will make the treatment costlier and unaffordable to the poor and middle class patients who can't afford these unnecessary hidden costs towards commissions/bonus/freebies to doctors for referring the patients to the hospitals and other health care unit which are ultimately added to the patients' bill by treating the same as part of the cost of treatment in addition to the hospital's profit, actual cost of treatment including investigation in course of or for the purpose of treatment. Taking into consideration that such

unnecessary costs are paid to the doctors not out of own profits of the hospitals/allied health care industry and the same are recovered by them from the patients by adding it to the patients' hospitalization and treatment bill, deduction on the same as business expenditure should not be allowed under the Income Tax Act.

(v) In my considered opinion, expenditures incur by allied health industry including hospitals, for the purpose of offering or payment of these nature of commission/bonus/freebies to the doctors for referring patients to them are immoral and opposed to public policy since acceptance of such payments or offers of like nature by medical practitioner is prohibited by law, are not entitled for deduction under Section 37 (1) of the Income Tax Act, 1961, as business expenditure and the same should be disallowable under Explanation 1 to Section 37 (1) of the Act and in view of decision of the Hon'ble Supreme Court in the case of M/s Apex Laboratories Pvt. Ltd. (supra) where a similar nature of defence was taken by the Appellant that it was a Laboratory and was not a medical practitioner and as such payment or offer of these nature of commission/bonus/freebies etc. to the Doctors are not an offence by them under the law though acceptance of the same may be punishable offence for doctors or medical practitioners under the aforesaid Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002, such defence of the appellant laboratory was not accepted by the Hon'ble Supreme Court in the said case.

(vi) The aforesaid regulations of the Medical Council is a very salutary regulation and is in the interest of the patients and the public and once acceptance of this nature of payments are prohibited by the Indian Medical Council under the power vested in it, such expenditure should not be allowed for deduction under Explanation 1 to Section 37 (1) of the Income Tax Act as business expenditure by the hospitals or other allied health care industry.

(vii) I am not inclined to accept such contention and interpretation of the petitioner hospital that since their indulgence or participation in offering/paying the commission/bonus/freebies to the medical

practitioner/doctors for referring the patients to their hospital for treatment is not prohibited for them and not punishable under the aforesaid Regulation of Indian Medical Council and that only accepting of the same by the medical practitioner/doctor is prohibited and punishable, such nature of expenditure by them should be allowable for deduction by treating it as business expenditure. In my considered opinion if such contention or interpretation of the petitioner is accepted it would amount to justify and legalise their action like legalizing bribe giving in spite of the legal position that the bribe taking or accepting is clearly prohibited and is a punishable offence.

(viii) Furthermore, the denial of tax benefit under Section 37 (1) of the Income Tax Act cannot be construed as penalising the petitioner/assessee hospital and it only precludes it from claiming these nature of expense as a deductible expenditure.

(ix) Though under the aforesaid Regulations of Indian Medical Council Regulation, 2002, there are provisions for prohibition and punishing those doctors or medical practitioners who accept freebies, commission, bonus etc. from hospitals or other allied health care industry for referring patients to them but there are no similar regulations or provisions for prohibiting and penalising or punishing these hospitals, nursing homes or diagnostic centres or allied health care industry for curbing this act of indulgence or participation by them in such prohibited and penalizing offence resulting addition of these unnecessary expenses to the bill of the patients for their treatment and are recovered from them making the medical treatment costlier for the poor and middle class patients. This Court expects that the Central Government and the State Government will take note of corruption in medical field by the hospitals, pathological laboratories, diagnostic centres and other allied health care industry as discussed in this judgment and in the interest of public and the society and to protect the poor and middle class patients from bearing the burden of these unnecessary hidden additional costs of these natures of commission, bonus, freebies etc. for their treatment, investigations etc. shall bring similar appropriate legislation or regulations

like Indian Medical Council Regulations, 2002, to prevent or curb this misusing of legislative gap or loopholes by them including hospitals and to deter them from perpetuating commission of such offence since once receiving of such 'referral to doctors' have been held to be prohibited and unethical obviously the corollary to this would be unethical being giving of such commission/bonus/gifts etc. to induce such doctors and medical practitioners to violate the Medical Council Act, 1956 and Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulation, 2002, and they should also be equally penalized like medical practitioners who accept the same and only disallowance of such nature of expense under the Income Tax Act would not deter them from indulging and participating in these nature of prohibited, unethical and immoral act.

The second issue is about the legality and validity of initiation of impugned proceeding for reopening of assessment under Section 147 and issuance of notices under Section 148 of the Income Tax Act, 1961, admittedly after expiry of four years from the end of relevant assessment year on the self-same material facts which were already available before the assessing officer at the time of regular assessment and without recording of any omission or failure on the part of the petitioner to disclose fully and truly any material fact necessary for assessment before the assessing officer in course of regular assessment proceeding. I am of the considered opinion that in the facts and circumstances of the case initiation of the impugned proceeding under Section 147 of the Income Tax Act, 1961, is bad and not sustainable in law and is liable to be quashed for the following reasons:

(i) It is admitted position as substantiated by record that the impugned notices under Section 148 of the Act were issued after the expiry of four years from the end of the relevant assessment years.

(ii) Nowhere the assessing officer has recorded either in the impugned notices under Section 148 of the Act or in the recorded reason for reopening of assessment in question that in course of regular assessment there was any omission or failure on the part of the assessee/petitioner in disclosing fully

and truly all material facts necessary for its assessment relating to the relevant assessment years or that any new material/information other than those which were already available at the time of regular assessment has come to his knowledge. In view of these admitted factual position I am of the considered opinion that criteria for reopening of assessment under Section 147 of the Income Tax Act, 1961, has not been fulfilled in this case.

(iii) It appears from the recorded reason itself that the payment on account of 'referral to doctors' was already considered and allowed under Section 37 (1) of the Income Tax Act, 1961 by the predecessor of the present Assessing Officer at the time of passing regular assessment order under Section 143 (3) of the Act, dated 28th February, 2014 and the present Assessing Officer himself has recorded in its recorded reason that those materials upon which he has formed his opinion after the expiry of four years from the end of relevant assessment year were already available at the time of regular assessment yet on the self-same material he has formed an opinion that the same should not have been allowed in view of Circular No. 5/2012 dated 1st August, 2012 and Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulation, 2002 which is nothing but mere change of opinion.

Considering the facts and circumstances of the case as appears from record and discussion made herein, I am inclined to hold that since condition precedent for invoking Section 147 of the Income Tax Act, 1961, for reopening of assessments after expiry of four years from the end of relevant assessment years has not been fulfilled and the impugned reopening of assessment is on mere change of opinion, the impugned notices dated 27th July, 2018 under Section 148 of the Income Tax Act, 1961 in both the Writ Petitions relating to assessment year 2011-12 and 2012-13 are held as bad and not sustainable in law and the said impugned notices under Section 148 of the Income Tax Act, 1961 and all subsequent proceedings on the basis of the aforesaid impugned notices under Section 148 of the Income Tax Act, 1961, are quashed.

Accordingly these Writ Petitions being WPO No. 398 of 2018 and WPO No. 399 of 2018 are disposed of by holding partly in favour of respondent revenue and partly in favour of the assessee petitioner by answering the question nos. (i), (ii) and (iii) in the affirmative and in favour of revenue/respondents and against the assessee and question nos. (iv) & (v) in the affirmative and in favour of assessee/petitioner and against the revenue/respondents. No order as to costs.

Urgent certified photocopy of this judgment, if applied for, be supplied to the parties upon compliance with all requisite formalities.

(MD. NIZAMUDDIN, J.)