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

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

ITA Nos. 5168 & 5169/Mum/2018
Assessment year: 2011-12 and 2012-13

Deputy Commissioner of Income Tax
Central Circle-2(4) Mumbai **…… Appellant**

Vs.

Macleods Pharmaceuticals Ltd. **……Respondent**
304, Atlanta Arcare, Marol Church Road,
Andheri (E), Mumbai 400 059 [PAN: AAACM4100C]

Appearances by
Mamta Bansal, Commissioner (DR) *for the revenue*
Ashok Bansal, CA, *for the assessee*

Date of concluding the hearing 12/10/21
Date of pronouncement of this reference : 14/10/21

SPECIAL BENCH REFERENCE

Per Pramod Kumar, VP:

1. One of the issues which have come up for our adjudication in both of these departmental appeals, against the relief granted by the CIT(A), is the Assessing Officer"s grievance, which raises the question as to whether "**the learned CIT(A) was erred "in deleting the disallowance made** *(of Rs 111,11,70,500 for the assessment year 2011-12 and of Rs 137,62,61,659 for the assessment year 2012-13- aggregating to Rs 248,74,32,259)* **on account of freebies to the doctors**." While, for the detailed reasons we will set out in a short while, are of the considered view that the Assessing Officer deserves to succeed on this issue, we are alive to the fact that there are several decisions of coordinate benches, in favour of the assessee, on this issue. It is in this backdrop that we proceed to place on record our reasons as to why the Assessing Officer, in our considered view, deserves to succeed on this issue and

as to why it is a fit case for the constitution of a special bench of three or more members, to consider the following question:

> **Whether 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?**

2. When the grievances raised by the Assessing Officer, as referred to in paragraph 1 above, came up for our consideration, we noticed that the related material facts are like this. By way of these appeals, the Assessing Officer has challenged correctness of a consolidated order dated 27th June 2018, passed by the learned CIT(A) in the matter of assessment under section 143(3) r.w.s. 153A of the Income Tax Act, 1961 for the assessment years 2011-12 and 2012-13. The only grievance raised in these two appeals, as noted earlier, is by raised by way of a question requiring our adjudication, as to whether "**the learned CIT(A) was erred "in deleting the disallowance made** *(of Rs 111,11,70,500 for the assessment year 2011-12 and of Rs 137,62,61,659 for the assessment year 2012-13- aggregating to Rs 248,74,32,259)* **on account of freebies to the doctors**." The assessee before us is a company engaged in the business of manufacturing pharmaceutical products, such as tablets, capsules, liquids and injectables etc. This is a case in which the assessee company was subjected to a search and seizure operation on 28th January 2016. It was in this backdrop that the assessments were reopened, and the present assessment proceedings under section 153A r.w.s 143(3) were initiated. During the course of these assessment proceedings, the Assessing Officer noted that while the assessee has Rs 221.25 crores on sales promotion so far as the assessment year 2012-13 is concerned, and Rs 139.07 crores so far as the assessment year 2011-12 is concerned, the amounts spent to the extent of Rs 137.62 crores for the assessment year 2012-13 and Rs 111.11 crores for the assessment year 2011-12 pertains to payments of freebies to doctors. These amounts, according to the Assessing Officer, included "payments made for gifts, promotion items, facilities etc given to various medical practitioners within the country as well as abroad". As for the details of expenses in question, for example, the breakup of expenses on account of freebies to doctors for the assessment year 2012-13 is, as given at page 47 of the paper-book, as follow:

Category		**Amount (In Rs)**
Corporate Gifts	Rs	60,12,56,051
Customer Relation Management- sponsor	Rs	18,42,07,762
Gift Cards	Rs	54,11,77,227
Journals, Books and Magazines	Rs	1,24,22,482
Medical Instruments and Books	Rs	3,71,98,134
Total	**Rs**	**137,62,61,656**

3. The Assessing Officer, in this backdrop, took note of the content of the CBDT circular No. 05/2012 dated 1st August 2012, took note of the amendment in the Medical Council of India regulations vide Gazette notification dated 10th December, 2009, and Explanation Section 37(1) of the Act, and put the ssessee to notice as to why these expenses not be disallowed as "it is clear from the Explanation 1 to Section 37 of the Act and the guidelines issued by Medical Council of India and the circular issued by the Central Board of Direct Taxes that the sales promotion expenses made by the assessee are prohibited in law (and) therefore, these are deemed o have been not incurred for the purpose of business and profession, and hence not an allowable expenditure". The stand of the assessee was that a coordinate bench, in assessee's own case, has allowed such expenditure mainly accepting the plea that "no disallowance of such sales promotion expenses could be made by applying CBDT circular dated 1-8-2012 insofar as CBDT circular was effective from AY 2013-14", and that, in view of the decision of another coordinate bench in the case of **DCIT Vs PHL Pharma Pvt Ltd [(2017) 163 ITD 10 (Mum)]** the disallowance could not be sustained as the MCI guidelines bind only the medical professionals and not the pharmaceutical companies. The Assessing Officer, however, proceeded to make the disallowances of Rs 111,11,70,500 for the assessment year 2011-12 and of Rs 137,62,61,659 for the assessment year 2012-13, on account of payments made for freebies to the doctors, by giving detailed reasons, common in both of these years, as follows:

1. **Board, vide circular No. 05/2012 (F.No. 225/142/2012-ITA.II), dated 01.08.2012 stated that Indian Medical Council (Professional Conduct,**

Etiquette and Ethics) Regulations, 2002, on 10.12.2009 imposed a prohibition on medical practitioners and their professional associations from taking any Gift, Travel facility, Hospitality, Cash or monetary grant from pharmaceutical and allied health sector industries.

2. **Section 37(1) of Income Tax Act provides for deduction of any revenue expenditure (other than those failing under section 30 to 36) from business Income if such expense is laid out/expended wholly or exclusively for the purpose of business or profession.**

3. **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.**

4. **Thus, the claim of any expense incurred in providing freebees in violation of the provisions of Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 shall not be admissible under section 370) 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 freebies and claimed it as a deductible expense in its accounts against income.**

5. **Once this has been prohibited by the Medical Council under the powers vested in it, Section 37(1) of Income Tax Act comes in to play. The amendment to the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 would only be clarificatory in nature.**

6. **Further, the explanation inserted to the section 37(1) by the Finance Act (No.2), 1998 is with retrospective effect from 01.04.1962. Therefore, the expense of the nature specifically mentioned to be not allowable in the captioned circular of CBDT would have its applicability in respect of the cases of the earlier period years as well. The explanation to section 37(1) is on the statute w.e.f. 1st April, 1962. The same has simply been clarified by way of a circular issued by CBDT.**

7. **The medical Council of India in exercise of powers conferred under section 20A read with section 33(m) of the Indian Medical Council Act, 1956 (MC) has made " The Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations 2002, which describes unethical acts under Chapter 6 of the said regulations. The MCI has made amendment in the above regulation vide notification dated 10-12-2009. As per said notification a medical practitioner is not allowed to receive any gift, travel facility, hospitality, cash or monetary grants from the pharmaceuticals or allied health care industry and violation of these conducts are liable for punishment as per The IndianMedical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002. The Hon'ble Himachal Pradesh High Court in case of Confederation of Indian Pharmaceutical Industries has upheld the validity of circular No. 5 of 2012 issued by the CBDT. The Hon'ble High Court has**

also observed that any violation of the same will attract the provisions of explanation to section 37(1) of the Act.

8. **In the case Kap Scan and Diagnostic Centre (P) Ltd. 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 tor 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.**

9. **In the case of Confederation of Indian Pharmaceutical Industry (Supra), the Hon'ble High Court of Himachal Pradesh has observed that MCI has imposed certain prohibition on medical practitioners as mentioned above under The Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations 2002. The Court held that this regulation is a very salutary regulation which is in 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 pharmaceu ical industries, Once this has been prohibited by the Medical Council under the powers vested in it, Section 37(1) of the Income-tax Act comes into play. The Court further held that the explanation to Section 37 (1) makes it clear that any expenditure incurred by an assessee for any purpose which is prohibited by law shall not be deemed to have been incurred for the purpose of business or profession. Therefore, if the assessee satisfies the assessing authority that the expenditure is not in violation of the regulations framed by the medical council then it may legitimately claim a deduction, but it is for the assessee to satisfy the assessing officer that the expense is not in violation of the Medical Council Regulations referred above.**

10. **In the case of Liva Healthcare Ltd, 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.**

11. **Therefore, it is amply clear from the above discussion that the expenditure claimed by the assessee is not allowable under the provisions of the Act.**

10.11 Thus, Rs. 1376261659 is disallowed (which has been incurred for gifts, providing travel facilities & hospitality to medical practitioners) from the total expenditure incurred for sales promotion keeping in view the discussion in paras above and added to the total income of the assessee. As apparent from the above discussion, it is clear that the nature of pre and post MCI notification expenses for freebees to doctors are illegal in nature. These illegal practices were later on noticed by Medical Council of India and Central Board of Direct Taxes which resulted in the amendment made in the Medical Council of India (MCI) Regulations vide Notification date 10.12.2009 and Circular No. 05/2012 dated 01.08.2012 issued by the Central Board of Direct Taxes, New Delhi vide F.No.225/142/2012-ITA-II respectively. In absence of these notification and circular also, the freebees to doctors are illegal in nature and liable to be disallowed u/s 37(1) of the Act.

4. Quite clearly, therefore, the Assessing Officer disallowed the sales promotion expenses not only in the light of the CBDT circular *(supra)* but also in the light of a coordinate bench decision of this Tribunal in the case of **ACIT Vs Liva Healthcare Ltd [(2016) 161 ITD 63 (Mum)] ,** in the light of Hon'ble Himachal Pradesh High Court decision in the case of **Confederation of Indian Pharmaceutical Industry Vs Central Board of Direct Taxes [(2013) 335 ITR 388 (HP)]**, in the light of Hon'ble Punjab & Haryana High Court judgment in the case of **CIT Vs Kap Scan & Diagnostic Centre Pvt Ltd [(2012) 344 ITR 476 (P&H)]**, and in the light of his analysis about the scope of Explanation to Section 37(1) read with the provisions of the Medical Council of India Regulations. None of these issues were dealt with in the judicial precedent relied upon by the learned CIT(A). Ironically, however, learned CIT(A) proceeded as if the disallowance is on the basis of the CBDT circular simpliciter, and he simply, as he put it "in the absence of any change in facts or changes in the law in this regard", followed an earlier order in assessee's own case, which, *inter alia*, observed as follows:

We had carefully gone through the details of expenditure so incurred under the head "sales promotion" expenses and found that expenditure so incurred was wholly and exclusively for the purpose of assessee's business. The relevant assessment years under consideration are A.Ys. 2010-2011 and 2011-2012 during which there was no CBDT Circular as referred by AO for making disallowance by branding the expenditure as covered by Explanation to Section 37(1) of the Act. We found that the expenditures were incurred wholly and exclusively for the purpose of business, therefore, same cannot be disallowed by applying CBDT Circular dated 1-8-2012 in respect of years under consideration. The Tribunal in the case of Syncom Formulations (I) Ltd.(supra) vide order 23-12-2015 have dealt with exactly similar issue wherein also assessee was engaged in

manufacturing of various pharmaceutical products and having sales within and outside India. Exactly similar expenditure incurred under the head of sales promotion expenses was disallowed by the AO by applying CBDT Circular dated 1-8-2012, wherein Explanation to Section 37(1) was invoked, which was confirmed by the CIT(A). The assessee came before the Tribunal and the Tribunal held that CBDT circular dated 1-8- 2012 was applicable for A.Y.2013-14 and onwards and not applicable to prior assessment years. The Tribunal after observing that nature of expenses allowed the same. The Tribunal further observed that sponsoring doctors for conferences and extending hospitality by pharmaceuticals companies, to attend prestigious conferences so that they gather contemporary knowledge about management of certain illness/disease and learn about newer therapies, which can promote assessee"s business as pharmaceutical manufacturer. Under these facts and circumstances the Tribunal held that no disallowance of such sales promotion expenses can be made by applying CBDT Circular dated 1-8-2012, insofar as CBDT Circular was effective from A.Y.2013-2014. In the instant case before us the relevant assessment years are A.Y.2010-2011 & 2011-2012 during which this CBDT Circular was not applicable. As per the details of expenses placed on record, we found tha same was in the nature of sales promotion. Neither the AO nor the CIT(A) had doubted genuineness of the expenses nor there is any allegation to the effect that expenses were not incurred for the purpose of business. Even the G.P. and N.P. rate shown by assessee nowhere indicates that assessee had claimed any excessive expenditure under the head sales promotion. However, no decision to the contrary was brought to our notice by ld. DR, under these circumstances, respectfully following the decision of the Tribunal in the case of Syncom Formulations (I) Ltd. (supra), we do not find any justification in the orders of lower authorities for disallowing sales promotion expenses under Explanation to Section 37(1)…….

5. The Assessing Officer is aggrieved of the relief so granted by the learned CIT(A) and is in appeal before us.

6. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.

7. We find that there is no dispute about the foundational factual position that the assessee has extended freebies to the medical professionals such as Corporate Gifts, sponsoring the medical professionals, presenting them with gift cards which are as good as cash at the related commercial establishments, costs of journals, books and magazines for the medical professionals, and medical instruments and books. These expenses aggregate to as much as Rs 111,11,70,500 for the assessment year 2011-12 and of Rs 137,62,61,659 for the assessment year 2012-13. There is also no dispute that so far as the Indian Medical Council

(Professional Conduct, Etiquette and Ethics) Regulations, 2002 are concerned, medical professionals are forbidden from accepting such freebies; learned counsel did not even dispute this position, and rightly so perhaps. Yet, notwithstanding Explanation to Section 37 (1) as it then was *[Explanation 1 to Section 37(1) now]*, the deduction for these expenses has been allowed. The reasoning adopted by the learned CIT(A) proceeds on the basis, as can be seen above, that since the CBDT circulars was applicable only from the assessment year 2013-14, the disallowance under the aforesaid circular could not have been made on the basis of this circular. This approach proceeds on the fallacy that the impugned disallowances were made on the basis of CBDT circular simpliciter, whereas, as we have noted earlier as well, "the Assessing Officer disallowed the sales promotion expenses not only in the light of the CBDT circular *(supra)* but also in the light of a coordinate bench decision of this Tribunal in the case of **ACIT Vs Liva Healthcare Ltd [(2016) 161 ITD 63 (Mum)],** in the light of Hon"ble Himachal Pradesh High Court decision in the case of **Confederation of Indian Pharmaceutical Industry Vs Central Board of Direct Taxes [(2013) 335 ITR 388 (HP)]**, in the light of Hon"ble Punjab & Haryana High Court judgment in the case of **CIT Vs Kap Scan & Diagnostic Centre Pvt Ltd [(2012) 344 ITR 476 (P&H)]**, and in the light of his analysis about the scope of Explanation to Section 37(1) read with the provisions of the Medical Council of India Regulations". In any case, the coordinate bench decision relied upon by the learned CIT(A) did not take into account another coordinate bench decision in the case of Live Healthcare *(supra)* and Hon"ble HP High Court"s judgment in the case of Confederation of Indian Pharmaceutical Industry *(supra),* which were rendered prior to that date but not taken into account by the coordinate bench. As to what should be precedence value of such a coordinate bench decision, we find guidance from Hon"ble AP High Court"s full bench decision in the case of **CIT Vs B R Constructions [(1993) 202 ITR 222 (AP-FC)]** wherein Their Lordships has 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**", and the coordinate bench decision in assessee"s own case thus ceases to be a binding precedent.

8. Be that as it may, let us deal with this CBDT circular aspect first. It is only elementary that the circulars issued by the Central Board of Direct Taxes do not bind the appellate authorities- not even the income tax authorities such as Commissioner (Appeals),

leave aside this Tribunal and Hon"ble Courts above as Income Tax Appellate Tribunal and the Hon"ble Courts are well beyond the limited class of persons to which Section 119 applies- i.e. "income-tax authorities" which are defined under section 116. There is also no doubt about the fundamental legal position that no CBDT circular, by itself, can put an assessee to any disadvantage vis-à-vis the provisions of the Act, inasmuch while these circulars can „tone down the rigour of law", these circulars cannot be „adverse to the assessee", and, as noted by Hon"ble Supreme Court, "**A circular cannot even impose on the tax-payer a burden higher than what the Act itself on a true interpretation envisages**". The judicial precedents in support of this proposition, if needed, are **UCO Bank Vs CIT [(1999) 237 ITR 889 (SC)], Navnitlal C Jhaveri Vs K K Sen [(1965) 56 ITR 198 (SC)]**. As noted by Hon"ble Supreme Court, in the case of **Keshavji Ravji & Co Vs CIT [(1990) 183 ITR 1 (SC)]**. Nothing, therefore, turns on the CBDT circular, so far as validity of disallowance in question is concerned. Whether the circular is retrospective or is prospective, whether the circular was issued before the commencement of the relevant assessment year, or after that, is, thus, wholly irrelevant and somewhat superfluous. The entire rationale of the approach adopted by the learned CIT(A) cannot thus meet our judicial approval. It is also important to note that, in any event, the decision relied upon by the learned CIT(A) had no occasion to deal with the binding judicial precedents in the cases of Liva Healthcare *(supra),* Confederation of Indian Pharmace tical Industry *(supra),* Kal Scan and Diagnostics *(supra)* and even analysis, on merits, on the scope of Explanation to Section 37(1) read with MCI regulations.

9. Coming back to the content of the CBDT circular (supra), we are of the considered view that what is material is whether the interpretation assigned in the circular to the provisions of the Act, i.e. Explanation to Section 37(1), is correct or not, because the true test, as noted by Hon"ble Supreme Court in **Keshavji Raviji & Co"s case *(supra)*,** is as to what the burden that the Act itself "**on a true interpretation envisages**". If the burden so envisaged on a true interpretation of the law is lesser than the burden envisaged by the CBDT circular, ignore that extra burden, but when the burden that the Act itself that 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. In other words, while an Assessing Officer does not get any help from the CBDT circular, in a

situation in which the CBDT circular also states something which the correct interpretation of law envisages, just because CBDT circular also states so, such a correct interpretation of law cannot be ignored either.

10. Let us, in this light, see what the Hon"ble Himachal Pradesh High Court, in the case of **Confederation of Indian Pharmaceutical Industry Vs Central Board of Direct Taxes [(2013) 335 ITR 388 (HP)]** has held. Their Lordships have, inter alia, held that "**The explanation to Section 37(1) makes it clear that any expenditure incurred by an assessee for any purpose which is prohibited by law shall not be deemed to have been incurred for the purpose of business or profession. The sum and substance of the circular is also the same**. In case the assessing authorities are not properly understanding the circular then the remedy lies for each individual assessee to file appeal under the Income-tax Act but **the circular which is totally in line with Section 37(1) cannot be said to be illegal**. In fact paragraph 4 of the circular quoted hereinabove itself clarifies that the value of the freebies enjoyed by the medical practitioner is also taxable as business income or income from other sources depending on the facts of each case. Therefore, if the assessee satisfies the assessing authority that the expenditure is not in violation of the regulations framed by the medical council then it may legitimately c aim a deduction, but it is for the assessee to satisfy the assessing officer that the expense is not in violation of the Medical Council Regulations referred to above" *[Emphasis, by underlining, by us]*. What is thus stated to be the interpretation of Explanation to Section 37(1) assigned in the CBDT circular in question is also the understanding of Hon"ble Himachal Pradesh High Court in the case of Confederation of Indian Pharmaceutical Industry *(supra)*.

11. Once a judicial forum higher than this Tribunal, as Hon"ble High Court indeed is, holds that the interpretation to the scope of Explanation to Section 37(1), 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 just because it is so stated in the CBDT circular.

12. The fact that this judicial precedent is from a non-jurisdictional High Court does not alter the position, as is explained by a coordinate bench of this Tribunal in its recent decision case of **Siro Clinipharm Pvt Ltd Vs ITO [(2021) 131 taxmann.73 (Mum)]** as follows:

> **7. While on this issue, we may usefully take note of the observations of Hon'ble Supreme Court in the case of ACCE v. Dunlop India Ltd. [(1985) 154 ITR 172 (SC)], wherein the Their Lordships quoted, with approval, from the decision of House of Lords to the effect that "We desire to add and as was said in Cassell & Co. Ltd. v. Broome [1972] AC 1027 (HL), we hope it will never be necessary for us to say so again that "in the hierarchical system of courts" which exists in our country, "it is necessary for each lower tier", including the High Court, "to accept loyally the decision of the higher tiers". "It is inevitable in hierarchical system of courts that there are decisions of the Supreme appellate Tribunal which do not attract the unanimous approval of all members of the judiciary... But the judicial system only works if someone is allowed to have the last word, and that last word, once spoken, is loyally accepted" and observed that. . . "the better wisdom of the Court below must yield to the higher wisdom of the Court above. That is the strength of the hierarchical judicial system." The principle is thus unambiguous. As a rule, therefore, judicial discipline warrants that the wisdom of a lower tier in the judiciary has to make way for higher wisdom of the tiers above. Unlike the decisions of Hon'ble jurisdictional High Court, which bind us in letter and in spirit on account of the binding force of law, the decisions of Hon'ble non-jurisdictional High Court are followed by the lower authorities on account of the persuasive effect of these decisions and on account of the concept of judicial propriety In the case of CIT v. Godavari Devi Saraf [(1979) 113 ITR 589 (Bom)], Hon'ble jurisdictional High Court took note of a non-jurisdictional High Court and held that the Tribunal, outside the jurisdiction of that Hon'ble High Court and in the absence of a jurisdictional High Court decision to the contrary, could not be faulted for following the same. Their Lordships observed that, "It should not be overlooked that the Income-tax Act is an All-India statute……. Until a contrary decision is given by any other competent High Court, which is binding on a Tribunal in the State of Bombay, it has to proceed on the footing that the law declared by the High Court, though of another State, is the final law of the land". Of course, these observations were in the context of a provision being held to be unconstitutional, an issue on which the Tribunal could not have adjudicated anyway, as evident from the observation "Actually, the question of authoritative or persuasive decision does not arise in the present case because a Tribunal constituted under the Act has no jurisdiction to go into the question of constitutionality of the provisions of that statute" but nevertheless the respect for the higher judicial forum was unambiguous. In Tej International Pvt Ltd v. DCIT [(2000) 69 TTJ 650 (Del)], a coordinate bench has, on this issue, observed that "In the hierarchical judicial system that we have, better wisdom of the Court below has to yield to higher wisdom of the Court above and, therefore, one a authority higher than this Tribunal has expressed an opinion on that issue, we are no longer at liberty to rely upon earlier decisions of**

this Tribunal even if we were a party to them. Such a High Court being a non-jurisdictional High Court does not alter the position…".. ……..

……Once Their Lordships of a higher judicial forum express their esteemed views on any subject, the views expressed by us, in the past, on that issue, have to make way for the higher wisdom of Their Lordships. As for the facets not argued nor not considered, even if any, as is laid down by the apex Court in the case of Ambika Prasad Mishra v. State of UP AIR 1980 SC 1762 : [1980] 3 SCC 719 (p. 1764 of AIR 1980 SC) "Every new discovery nor argumentative novelty cannot undo or compel reconsideration of a binding precedent A decision does not lose its authority merely because it was badly argued, inadequately considered or fallaciously reasoned...." Similarly, in the case of Kesho Ram & Co. v. Union of India [1989] 3 SCC 151, it was stated by the Supreme Court thus: "The binding effect of a decision of this Court (as indeed any superior court) does not depend upon whether a particular argument was considered or not, provided the point with the reference to which the argument is advanced subsequently was actually decided in the earlier decision". The more we ponder upon the correct course to be adopted in such matters as is before us, the more we are convinced with respect to the binding nature of decisions of even Hon'ble non-jurisdictional High Courts, unless there are specific good reasons not to do so. The doubts, if at all, and somewhat nightmarish doubts at that, arise about the manner in which Bank of India decision (supra) could be interpreted so as to destabilize the well settled norms of judicial discipline, but neither do we need to perpetuate an error, even if there be any, nor do we need to examine to that aspect any deeper at this stage. There is, thus, no legally sustainable justification, on the facts of this case, to disregard the views expressed by Hon'ble Madras High Court in …….. Given the important judicial developments by way of a binding legal precedent, directly on the issue, even if from a non-jurisdictional High Court, we cannot simply treat this issue as covered by decisions of the coordinate bench, and thus disregard the esteemed views expressed by a higher judicial forum.

13. When we put our above understanding to learned counsel for the assessee, he makes several submissions, in defence, on this point.

14. Learned counsel submits that firstly, in the text of the judgment in the case of **Confederation of Indian Pharmaceutical Industry** *(supra)*, in the case of it is specifically states that this judgment it is specifically stated that this judgment has not been cleared by Their Lordships for publication, that in any case a judgment in the writ jurisdiction, as is this case, „has a much lesser evidentiary value" vis-à-vis a judgment in appellate jurisdiction, and, finally, since 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), has categorically held that the provisions of Medical Council of India only bind the medical professionals and not the

others, such as hospitals and pharmaceutical companies, Hon'ble Delhi High Court is presumed to have consciously departed from the view taken by Hon'ble Himachal Pradesh High Court in the case of **Confederation of Indian Pharmaceutical Industry** *(supra).* Learned counsel submits that once Hon'ble Delhi High Court holds that the provisions of MCI regulations do not even apply to persons other than medical professionals, the very basis of impugned disallowance in principle ceases to hold good in law. We are thus urged to disregard the Hon'ble HP High Court judgment *(supra)* as inapplicable on the facts of the case and, in any event, no longer good law.

15. It is difficult to understand, much less approve, the argument of the learned counsel that since Hon'ble HP High Court's judgment in the case of **Confederation of Indian Pharmaceutical Industry** *(supra).*is an unreported judgment or it is a judgment in the writ jurisdiction rather than an appellate jurisdiction, it does no bind us. Whether the judgment is reported or is unreported, there is no difference so far as its binding nature is concerned, and the same is the position as to whether the judgment is in writ jurisdiction or in appellate jurisdiction. It is not the evidentiary value but the binding precedence value of a judgment from the Hon'ble Court above that is really matters. The expression „evidentiary value", as used by the learned counsel, is, therefore, somewhat inappropriate in the present context. A judgment of the Hon'ble Court above as for paramount importance to us as it constitutes a binding judicial precedent for us on the point decides in the said judgment. The distinctions being canvassed by the learned counsel between unreported judgments vis-à-vis reported judgments, and between judgments, in writ jurisdictions, vis-à-vis appellate jurisdictions are distinctions without any material difference so far as relevance to us is concerned. We are unable to see any legally sustainable merits in these arguments so advanced by the assessee. As regards learned counsel's reliance on Hon'ble Delhi High Court's judgment in the case of **Max Hospital** *(supra)* is concerned, it is important to understand 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. Aggrieved by these observations, Max Hospital filed a writ petition contending that (i) "**since the Medical Council of India (Professional Conduct, Etiquette and Ethics) Regulations, 2002 (the 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" and (ii) 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 is reproduced below is entirety, as follows:

> **8. It is clearly admitted by the Respondent that it has no jurisdiction to pass any order 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 infact 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.**

16. In our humble understanding, this judgment 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 of Indian Pharmaceutical Industry** *(supra).* These judgments are in altogether different fields. While Hon'ble HP High Court deals with the interpretation of Explanation to Section 37(1), Hon'ble Delhi High Court deals 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. As for the affidavit filed by the Medical Council of India, which has been referred to by the learned counsel, all it states is that "**That the jurisdiction of MCI is limited only to take action against the registered medical professionals under the Indian**

Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 (hereinafter the 'Ethics Regulations') and has no jurisdiction to pass any order affecting rights/interests of any Hospital, therefore the MCI could not have passed and has not passed, any order against the petitioner which can be assailed before this Hon'ble Court in writ jurisdiction" but then this affidavit cannot, and does not, dilute the law laid down by Hon'ble HP High Court in the case of **Confederation of Indian Pharmaceutical Industry** *(supra).* In any event, an action being contrary to law is one thing and an authority to take note of such violation of law and suitably punish is another for such a violation is another. Hon'ble Delhi High Court judgment in Max Hospital's case (supra) has no bearing on the question as to whether giving freebies to the medical professionals is in violation of law or not. This 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)]**, 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**". The propositions which are assumed by the Court to be correct for the purpose of deciding the same are, according to this judgment of the Hon'ble jurisdictional High Court, lack precedence. In any case, it is not even relevant for deciding the issue before us. Nothing therefore, turns on Hon'ble Delhi High Court's judgment in the case of **Max Hospitals** *(supra).*

17. Learned counsel has then submitted that Medical Council of India regulations bind the medical professionals and not the pharmaceutical companies, and, therefore, these regulations cannot be pressed into se vice for disallowing the bonafide business expenses incurred by the pharmaceutical companies. This contention is only fit to be noted and rejected. The relevant question is not whether pharmaceutical companies are allowed to incur such an expenditure or not, the relevant question is whether the purpose of which the expenditure is incurred is prohibited by law or not, and if the purpose is unlawful, as to what are the inevitable corollaries of incurring expenses for '**any purpose…….which is prohibited by law**', and one of these corollaries, under Explanation to Section 37(1) is that such an expense is that it "**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**". If there is a prohibition for incurring an item of expenditure by the pharmaceutical companies, such expenditure cannot be incurred at all and the discussions about its admissibility as deduction are wholly academic. The true test, therefore, is whether the expense is incurred for any

purpose which is prohibited by law or not. When acceptance of freebies by the doctors is prohibited by law, as undisputedly is the position, can it be said that extending these freebies does not constitute expenditure for a purpose that is prohibited by law. It may be perfectly legal for a corporate to send free first-class tickets and hotel vouchers for vacations abroad to anyone but when they extend such freebies to the public servants, who are forbidden under the law from accepting the same, it cannot be said that the expenditure is made for a purpose not prohibited by law. The true test, therefore, is whether such a transaction is legally permissible in principle. When it is not permissible in law, for whatever reasons, the purpose of the transaction is required to be treated as „prohibited by law". Let us in this light, look at Section 20A(1) and (2) of the Indian Medical Council Act 1956, which provides that "**The Council may prescribe standards of professional conduct and etiquette and a code of ethics for medical practitioners**" and that "**(Regulations made by the Council under sub-section (1) may specify which violations thereof shall constitute infamous conduct in any professional respect, that is to say, professional misconduct, and such provision shall have effect notwithstanding anything contained in any law for the time being in force**". It is under powers vested under section 20A of the Indian Medical Council Act 1956 that the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 have been framed and under rule 6.8 thereof, as it came into effect vide Gazette Notification dated 14th December 2009, it is inter alia provided as follows:

> **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, air, ship , cruise tickets, paid vacations 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: <u>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.</u> ……..

(rule 6.8.1 e, f, g and h are not reproduced, as these are not relevant for the present purposes)

18. This rule so framed under section 20A does not only have the authority of law, these provisions "**<u>shall have effect notwithstanding anything contained in any law for the time being in force</u>**". Clearly, therefore, any gifts and freebies or any kind are prohibited to be accepted by the medical professionals **notwithstanding anything contained in any law for the time being in force**. As a corollary to this legal position, any payments of such a nature as above are "**for any purposes which is prohibited by law**" and, as such, these expenses "**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**". Let us also see it from the perspective that once Hon'ble Himachal Pradesh High Court, in the case of Confederation of Pharmaceutical Industry *(supra)*, holds that "if the assessee satisfies the assessing authority that the expenditure is no in violation of the regulations framed by the medical council then it may legitimately claim a deduction, but it is for the assessee to satisfy the assessing officer that the expense is not in violation of the Medical Council Regulations referred to above", it cannot be open to us to hold that, irrespective of whether the expenditure is in violation of the MCI regulations or not, the Explanation to Section 37(1) will not be invoked. The better wisdom of the coordinate bench has to make way for the higher wisdom of Hon'ble Courts above, and it is this judicial discipline which is the true strength of our hierarchical judicial system -see **ACCE v. Dunlop India Ltd. [(1985) 154 ITR 172 (SC)].**

19. In view of the above discussions, it is clear that the regulations prohibiting the acceptance of freebies by the medical professionals provide, under section 20A of the Indian Medical Council Act 1956 read with rule 6.8 of Indian Medical Council (Professional conduct, Etiquette and Ethics) Regulations, 2002, as amended from time to time, that such freebies cannot be lawfully accepted by medical professionals, and, therefore, any expenditure incurred for extending these freebies to the medical professionals is for a

"**purpose which is prohibited by law**". On these facts, therefore, Explanation to Section 37(1) is clearly attracted.

20. It is an open secret, secret if it is, that all these freebies extended by the pharmaceutical companies to the medical professionals, more often than not, come with strings attached, and that is what makes the expenditure in question for a purpose which is, as discussed earlier, „prohibited by law". The plea of the learned counsel that these regulations do not bind pharmaceutical companies, and, therefore, extending these freebies to medical professionals canot be treated as „prohibited by law" is thus wholly irrelevant in the present context. What is material is that the expenditure in question is incurred for the purposes which are prohibited in law, and that is what disqualifies the expenditure in question from deduction under section 37(1) by virtue of Explanation thereto. The freebies from pharmaceutical companies cannot, under section 20A o the Indian Medical Council Act 1956 read with rule 6.8 of Indian Medical Council (Professional conduct, Etiquette and Ethics) Regulations, 2002, as amended from time to time, be lawfully accepted by medical professionals and, therefore, an extension o such freebies is for a purpose „prohibited by law". The stand of the Assessing Officer cannot, therefore, be faulted.

21. In any case, the ill effects of this not so holy nexus between some unscrupulous medical professionals and some greedy pharmaceutical companies have played havoc with the reputation of one of the noblest professions in the world, and this pampering of the medical professionals is perceived as at the cost of the helpless end consumer, i.e. the patients seeking medical help- overwhelmingly from the most underprivileged sections of the fellow citizenry. Hon'ble Prime Minister echoed these feelings when, on 19th April 2018, he explained how the use of generic medicines, through Jan Aushadhalya, has brought down medicine cost by almost 85%, and subtly hinted towards this not so holy nexus between medical professionals and pharmaceutical companies by observing that "In the same way…..the person who writes the medicine also gets something. You must know that the doctors' conference is sometimes in Singapore, sometimes it is in Dubai. It is not because someone is sick there; it is so because it is necessary for the pharmaceutical companies" (https://www narendramodi.in/preliminary-text-of-pm-s-interaction-in-bharat-ki-baat-sabke-saath-programme-at-london--539744). If Government can bring down the effective cost of medicine by 85% by selling the same

medicine by its generic name, one can imagine how end users have been taken for a ride all along- and these freebies have played a critical role in those manoeuvrings. Not only it is wholly illegal that medical professionals are extended freebies by the pharmaceutical companies, but such gratifications are also clearly opposed to public policy as well- as is recognized by Hon'ble Punjab & Haryana High Court in the case of **Kap Scan's** case *(supra).*

22 As regards learned counsel's reliance on the decision of a coordinate bench in the case of **Medley Pharmaceuticals Ltd Vs DCIT *and vice versa* [(2020) 118 taxmann.com 44 (Mum)]**, that is a case in which the coordinate bench has quashed the reassessment proceedings but then made some observations, which even according to the coordinate bench are "academic in nature", on merits which primarily rely upon another coordinate bench decision. These observations thus are more of an *obiter dictum* and not binding in nature.

23. In any event, this decision refers to another coordinate bench decision, which decision, in turn, refers to and relies upon yet another coordinate bench decision in the case of **DCIT Vs PHL Pharma Pvt Ltd [(2017) 163 ITD 10 (Mum)]**. Incidentally, PHL Pharma decision *(supra)* was the first decision dealing with the period post insertion of rule 6.8.1 in the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 and the reasoning adopted therein is also followed by a large number of other coordinate bench decisions- including many decisions cited at the bar as well. All these decisions primarily bank on Hon'ble Delhi High Court's judgment in the case of Max Hospital *(supra)* in support of the stand that the MCI regulations does not come in the way of the pharmaceutical companies' extending freebies to the medical professionals, and, therefore, Explanation to Section 37(1) *[now Explanation 1 to Section 37(1)]* cannot be invoked. We have reservations on this proposition, and we have discussed our reservations at considerable length in paragraphs 15 to 19 above. This decision also holds that the CBDT circular, which creates new impairment and imposes disallowbility not envisaged in any of the Act or regulations, cannot be reckoned to be retrospective, but then, as we have analyzed in 8 to 11 above, what is stated to be the interpretation of Explanation to Section 37(1) assigned in the CBDT circular in question is also the understanding of Hon'ble Himachal Pradesh High Court in the case of Confederation of Indian Pharmaceutical Industry *(supra)* and once a judicial forum higher than this Tribunal, as Hon'ble High Court indeed is, holds that the

interpretation to the scope of Explanation to Section 37(1), 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 just because it is so stated in the CBDT circular. Nothing, therefore, turns on the CBDT circular having an only a prospective effect; that is wholly immaterial. We, therefore, regret our inability to be persuaded by the PHL Pharma decision *(supra).* This coordinate bench decision also comes in conflict with the decision of another coordinate bench in the case of Live Healthcare *(supra),* wherein, even dealing with pre 2011-12 period, that coordinate bench had held that the expenditure on freebies to medical professionals will attract disallowance under Explanation to Section 37(1). This decision was disregarded by the coordinate bench in PHL Pharma case *(supra)* by pointing out, what they perceived as, lacunas in the said order. There is, thus, no meeting ground between these two diametrically opposed schools of thought- one followed by PHL Pharma *(supra),* and the other followed by Liva Healthcare *(supra).* As a coordina e bench of equal strength, it is not for us to disregard the decisions in the case of PHL Pharma *(supra)* but, with due respect though without the slightest hesitation, we do indeed have our considered reservations on its correctness.

24. 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 arriv d 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.

25. The registry is directed to place the case records for appropriate consideration by the Hon'ble President. Ordered, accordingly.

Sd/-
Saktijit Dey
(Judicial Member)

Sd/-
Pramod Kumar
(Vice President)

Mumbai, dated the 14th day of October, 2021

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

By order

Assistant Registrar/ Sr PS
Income Tax Appellate Tribunal
Mumbai benches, Mumbai