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A ‘NO’ TO PHARMA FREEBIES, A ‘YES’ FOR PUBLIC GOOD

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‘The judgment will go a long way in checking unethical and illegal practices’ | Photo Credit: Getty Images/iStockphoto

The judgment by a two-judge Bench of the Supreme Court of India in *M/s Apex Laboratories Pvt. Ltd. vs Deputy Commissioner of Income Tax, Large Tax Payer Unit-II*, on February 22, 2022 has struck a blow for public good.

Justice Uday Umesh Lalit and Justice S. Ravindra Bhat dismissed the Special Leave Petition by Apex Laboratories to claim deduction on freebies given to doctors. Upholding a decision by the Madras High Court, the Bench said that the act of pharmaceutical companies giving freebies to doctors is clearly ‘prohibited by the law’. Further, it cannot be claimed as a deduction under Section 37(1) of the Income Tax Act, 1961.

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The judgment will go a long way in checking unethical and illegal practices in the pharma sector which has become so out of reach for the common man.

Repelling the contention of the company by S. Ganesh, Senior Counsel, Justice Ravindra Bhat said that pharmaceutical companies have misused a legislative gap to actively perpetuate the commission of an offence of giving freebies to doctors to promote their brands, even though this was prohibited in the law framed by the Medical Council of India (MCI). In the said case, the company was giving out freebies to doctors in order for them to create awareness about a health supplement it was manufacturing called Zincovit.

The judge said that in the process of interpretation of the law, it is the responsibility of the court to discern the social purpose which the specific provision subserves. The judgment said: “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.”

Upholding the Central Board of Direct Taxes (CBDT) circular dated August 1, 2012, and applying it to the case, the Court also cited and relied upon Regulation 6.8 of the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 framed under the Medical Council Act, 1956, now repealed and substituted by the National Medical Commission Act, 2019. The Court also highlighted *Quereshi* (2007) 2 SCC 759 and *Commissioner Of Income Tax vs Khemchand Motilal Jain* to show that the assessee was not a wilful participant in any offence or illegal activity prohibited by law.

While overruling the Income Tax Tribunal’s view in the case of *PHL Pharma* (2017) and *Max Hospital* (2014) ILR 1 P. 620, the Court held that Regulations 2002 did apply to pharma companies also. Further, they could not be allowed to perpetuate the illegality of violations of norms by doctors. Invoking the principle of implied condition, the Court relied on the precedents

in the case of *P.V. Narasimha Rao* (1998) 4 SCC 626 under the Prevention of Corruption Act, and *Jamal Uddin Ahmad* (2003) 4 SCC 257 under the Representation of the People Act.

Laying emphasis on the fiduciary relationship between doctor and patient, the Court noted that a doctor's prescription is considered as the final word on medication by the patient even if the cost of such medication is unaffordable. In a situation where such trust is reposed in doctors, having prescriptions manipulated by the lure of freebies is immoral. The Court was conscious that the cost of such freebies is factored in the cost of medicines sold, in turn driving up their prices and perpetuating a publicly injurious cycle. This fact was taken note of by the Parliamentary Standing Committee on Health and Family Welfare in its 45th report, dated August 4, 2010.

In its elaborate judgment, the Court also took note of a report issued by the United States Department of Health and Human Services Office called "Savings Available Under Full Generic Substitution of Multiple Source Brand Drugs in Medicare Part D" dated July 23, 2018. Here, it was stated that the beneficiaries could have saved over $600 million in out-of-pocket payments had they been dispensed generic equivalent drugs. In a previous study by ProPublica titled "Dollars for Doctors: Now There is Proof: Docs who get Company Cash Tend to Prescribe Brand Name Meds" dated March 17, 2016 also, similar feelings were echoed. In the U.S., by the reason of the Physician Payments Sunshine Act 2010 also known as Section 6002 of the Affordable Care Act (ACA) of 2010, the law compels the manufacturers of drugs, devices, biologic and medical supplies to report to the Centers for Medicare and Medicaid Services, on three broad categories of payments or transfers of value such as meals, travel reimbursements 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.

Obviously, the uncovered field in this judgment — and it was not the controversy in hand before the Court — is the sale of medicines at Maximum Retail Price, or MRP. This is a scam and a case of underhand dealing that happens in the pharma world (the giving away of freebies is a smaller part of it) because drugs are invariably sold in pharmacist shops at MRP only. This is what affects medical treatment. Even though the Drug Price Control Order and Drugs and Cosmetics Act are there on the statute book, there is hardly any action to keep the sale price of medicines under control with due and proper investigation into their so-called research and development costs and keeping their profit margins within a prescribed limit.

One fails to understand why the law cannot be amended to compel the manufacturer of drugs to sell at the verified genuine cost, that also factors in a reasonable profit margin for each product by bringing manufacturers, both foreign or domestic, under the control of the MCI or any other equivalent body such as the Institute of Chartered Accountants of India. This must be at a uniform rate throughout the country; further, classified life saving drugs should be sold at cost only or even at subsidised rates.

Nobody is against the pharma industry earning a reasonable profit. But there is an urgent need to check looting that is driven by drug manufacturers to distribute their products using freebies or 'bribes'.

This judgment can also go far. It should be debated and applied to other unethical practices and expenditure out of public funds. The strategy here should be to use financial tools such as income-tax provisions for disallowing such expenditure and taxing the same as perquisites or taxable income in the hands of recipients *viz*. assurances and declarations in election campaigns by political parties by giving away free laptops, waived electricity charges, food grains, loan waivers, etc. It is tax-payers money that is being used to garner votes.

Justice Vineet Kothari is a former Acting Chief Justice of the Gujarat and Madras High Courts and Judge of the Rajasthan and Karnataka High Courts

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