DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR

(BAHAGIAN RAYUAN DAN KUASA-KUASA KHAS)

RAYUAN SIVIL NO: R1-14-02-2009

ANTARA

KETUA PENGARAH HASIL DALAM NEGERI ... PERAYU

DAN

ELI LILI (MALAYSIA) SDN BHD ... RESPONDEN

ALASAN PENGHAKIMAN

The Appellant appeals against the Deciding Order of the Special Commissioners of Income Tax ("SCIT") dated 8.8.2008 which upheld an appeal by the Respondent ("the Taxpayer") against the assessment raised by the Appellant for years of assessment ("YA") 2001 and 2002 as follows:

Year of Assessment	Date of Assessment	Tax Payable
2001	22.11.2005	419,512.08
2002	22.11.2005	667,975.16

2. The issues before the SCIT are as follows –

(a) whether the Congress Expenses of RM776,828.00 for year of assessment 2001 and RM1,131,419.00 for year of assessment 2002 incurred under section 33(1) of the Income Tax Act 1967 ("the Act") should be allowed as

entertainment expenses under section 39(1)(l) of the said Act 1967; and

(b) whether the 60% penalty imposed by the Appellant on the sums disallowed for all years of assessment under appeal are correct in law.

3. By a Deciding Order dated 8.8.2008 the SCIT made the following order –

> ADALAH DIPUTUSKAN bahawa perbelanjaan kongres (congress expenses) sebanyak RM776,282.00 bagi Tahun Taksiran 2001 dan RM1,131,419.00 bagi Tahun Taksiran 2002 bukan merupakan keraian seperti yang didefinisikan di bawah seksyen 18 Akta Cukai Pendapatan 1967; dan dengan itu perbelanjaan tersebut dibenarkan sebagai tolakan perbelanjaan di bawah seksyen 33(1) Akta yang sarna. Juga diputuskan penalti di bawah seksyen 113(2) Akta tidak patut dikenakan bagi kes ini.

4. The facts as found by the SCIT are as follows -

4.1. The Respondent is a company incorporated in Malaysia on 13 June 1979;

4.2 The Respondent is a wholly owned subsidiary of Eli Lily (Netherland B.V.);

4.3. The Respondent is in the business of trading in the human pharmaceutical and animal health products;

4.4. The Respondent's function and object in promoting the Respondent's products is to identify hospitals, physicians, pharmacists and health care professionals

and make them aware of the Respondent's products, including the indications for which it has been approved, clinical data with respect to efficacy, side-effects profile, interaction warning(s), dosage and administrative guidelines;

4.5. The pharmaceuticals products thus promoted through information to the hospitals, physicians, pharmacists, and health care professionals are those approved for marketing by the Ministry of Health;

4.6. The Respondent's products are distributed by a highly trained sales and marketing staff based in Malaysia, supported by a medical organization;

4.7. The Respondent ranks 9th in the market share among its competitors based on sales turnover report issued by a third party;

4.8. Respondent's products cannot be advertised in the local newspapers. There are strict controls over promotion of pharmaceutical products-

Regulations require companies to include chemical names on drug labels along with brand names,

Pharmaceutical products cannot be sold or advertised direct to end consumer i.e. patients;

4.9. Animal health products are dispensed by veterinarians and non-veterinarians;

4.10. Products prescribed by veterinarians are promoted in the same manner as pharmaceutical prescribed by physicians;

4.11. The Respondent's technical staff give technical support in case of products dispensed by non-veterinarians;

4.12. The Respondent is governed by statutory rules and regulations in respect of sales of drugs and medicine. These regulations prohibit the direct promotion and/or sales of drugs to end-consumers i.e. patients. Only doctors are allowed to prescribe the drugs and, therefore, the sponsorship of doctors and speakers are vital in the marketing chain in respect of promotion of sales, in order to ensure that they are aware of the clinical data with respect to the products, enabling them to make informed decisions about prescription. See Medicines (Advertisement & Sale) Act 1956, (Act 290), Sections 3, 4, 4A, 4B and Section 5 for penalties for contravening the provisions;

4.13. The Respondent is also governed by a code of conduct i.e. Pharma Code of Conduct For Prescription (ethical) products;

4.14. The relevant code of conduct may be summarized as follows:

(a) Promotional material should only be sent or distributed to those categories of persons whose need for or interest in the particular information can reasonably be assumed, but must not exceed the categories sanctioned by law.

Any information designed to encourage the use of pharmaceutical products in clinics, industrial concerns, clubs or schools must be addressed to the medical advisor or medical officer or to the medical auxiliary staff.

No promotional material shall be issued unless the final text and layout have been certified by a senior official of the company, preferably a doctor or a pharmacist.

Symposia, congresses and the like are indispensable for the dissemination of knowledge and experience. Scientific objectives should be the principal focus in arranging such meetings and entertainment and other hospitality shall not be consistent with such objectives when a pharmaceutical company or association sponsors a symposium, congress or other medical/health care or educational programme.

On a professional basis, a doctor or pharmacist under the employment of a member company is allowed to attend Scientific meetings under the umbrella of a professional Society or Organization of which he is a member (e.g., MMA, MPS) even though it maybe organized by a competitor company.

Sponsorship is limited to travel, meals, registration fee and accommodation. Entertainment or recreational activities including events such as tickets to cinema, shows, performances, a paid game of golf are not allowed.

Sponsorship to attend overseas scientific meetings (exclude internal company meetings) will only cover :

- basic economy travel (if less than 8 hours) meals and lodging

- registration fee
- exclude accompanying persons.

(b) Giving away of “samples” as an inducement to purchase is discouraged.

Except when provided for specific clinical trials, samples of products given out should be modest, both in size and face value and clearly labeled as samples. (Supply for organized trial of registered products should be adequate to fulfill protocol requirements.)

Where samples of products restricted by law to supply on prescription are distributed by a representative, the sample must be handed direct to the doctor or given to a person authorized to receive the sample on his behalf.

4.15. The congress are in the subject related to the products of the Respondent. The list of products related to the congress are given at pages 7-10, C2 (year of assessment 200l) and pages 11- 12 (year of assessment 2002);

4.16. The cost of dinners to speakers have been added back in the tax computation. The entertainment expenses have also been added back in the tax computation (year of assessment 2002);

4.17. The cost of “entertainment” of RM88,825.00 was added back in the tax computation for year of assessment 2001;

4.18. A sum of RM29,033.00 (entertainment - RM14,233.00 and contribution RM14,800.00) was added back in the tax computation for year of assessment 2001;

4.19. A sum of RM60,777.00 of the congress expenses was added back in the tax computation for year of assessment 2002. This sum of RM60,777.00 is composed of –

(i)	Entertainment	RM 1,397.00
(ii)	Contribution	RM 54,300.00
(iii)	Hand bouquet	RM 150.00
(iv)	Gifts	RM 4,930.00
		RM 60,777.00

4.20. A gift of RM175.00 was added back for year of assessment 2002;

4.21. A gift of RM1000.00 was added back in year of assessment 2002;

4.22. A detailed analysis of the congress expenses for years of assessment 2001 and 2002 was provided to the Inland Revenue Board and tax computations for years of assessment 2001 and 2002;

4.23. The speakers chosen to be sponsored were leaders and authorities and specialists in their field. In their talks, clinical data on side effects, efficiency of drugs and other specific information was given to the audience composed of doctors, pharmacists and health care professionals who were the ones prescribing drugs and medicine to the patients;

4.24. The speakers in their talks referred to special chemicals or molecules in the drugs and medicine;

4.25. All drugs and medicine produced by the Respondent have labels denoting specific chemicals and molecules;

4.26. The Respondent did not have any influence on the speakers who were sponsored to give talk on their products; neither on the doctors who were sponsored to attend the congress to decide to purchase their products;

4.27. The doctors sponsored to the various seminars are those who make decisions on the type of drugs and medicine to be prescribed for specific health conditions or diseases;

4.28. All doctors, pharmacists and health care professionals need to upgrade and update their knowledge of the latest developments and advances in medical technology in relation to drugs and medicine available for specific health conditions and diseases. This need to update their knowledge and skills is self evident (in any field);

4.29. Each drug of the Respondent's has a brand name and the labels denote chemicals and molecules in the drugs;

4.30. Outside speakers are engaged because the Respondent's does not have staff who are experts in all fields of medicine. Certain outside speakers are acknowledged as leading authorities in the field and whose words are relied upon by other doctors, pharmacist and health care professionals;

4.31. Speakers are paid a fee, an honorarium of in the range of RM500.00 to RM1,000.00;

4.32. The screening of the film “A Beautiful Mind” had the purpose of creating awareness of a specific disease, for the treatment of which drugs were marketed by the Respondent;

4.33. Tax Returns

(a) The tax returns for year of assessment 2001 was submitted in time on 30th August 2002;

(b) The tax returns for year of assessment 2002 was submitted in time on 14th August 2003;

(c) The tax agent A W2 attended to the tax matters of the Appellant since 1985. The tax agent gave a detailed analysis of the congress expenses each year to the Inland Revenue. This was part of the requirement of the tax agent's risk management;

(d) RWI admitted that the congress expenses in previous years of assessment (2000 and previous years) were allowed as a deduction. (The court ruled that in view of this admission the Appellant need not produce the documents in support of the Appellant's claim that the Inland Revenue allowed such congress expenses in previous years).

(e) A full disclosure of the facts and circumstances supported by ledger records, invoices and payment vouchers were supplied to the Inland Revenue (A W2).

4.34. Sales of Respondent"s products for 31st December 2000 were RM28,108,557.00 (RM27,043,325.00 for 33st December 1999);

4.35. Sales of Respondent's products for 31st December 2001 were RM36,130,132.00;

4.36. Sponsorship of speakers are based on defined factors such as –

(a) speaker is reputable and an authority in the field,

(b) speaker is well abreast of technological advances in drugs and medicine, and

(c) the topic of his paper is related to the diseases or medical conditions for which the Appellant has drugs or medicine;

4.37. The Respondent cannot advertise its products in the daily newspapers but may advertise in medical journals. This in effect means that the Respondent's products must be promoted through doctors, pharmacists and health care professionals;

4.38. The Appellant incurred the following expenses for –

Year of Assessment ("YA")	**Nature of Expenses**	**Amount of Expenses**	**Amount of Tax**
2001	Congress Expenses	776,282.00	419,521.08
2002	Congress Expenses	1,131,419.00	667,975.16

4.39. The Appellant disallowed the congress expenses incurred for the years of assessment 2001 and 2002 and raised additional assessment for both years of assessment dated 22 November 2005 with a penalty of 60% for each year of assessment.

Pursuant to the said additional assessments, the Respondent is aggrieved and filed notices of appeal in Form Q dated 7 December 2005 to the SCIT.

5. Contention by the Appellant –

(a) The Appellant contends that the expenses were not deductible under section 33 of the Act, as the expenses were not wholly and exclusively incurred in the production of the Respondent's gross income; rather the expenses were in the provision of entertainment;

(b) It was submitted that the expenses incurred by the Respondent in sponsoring the doctors, specialists, pharmacists, practitioners who were not its employees in attending the congresses, symposia and the like are not deductible as the expenses were not related to the business of the Respondent and not wholly and exclusively incurred in the production of the Respondent's gross income. Furthermore these expenses were entertainment as they fall under the definition of "entertainment" in section 18 of the Income Tax Act 1967; and by virtue of section 39(1)(l) of the Act, the entertainment expenses are not deductible;

(c) On the penalty, the Appellant submits that the penalty was imposed on the ground that the Respondent made incorrect

return in deducting certain expenses which were not supposed to be deducted.

6. Contention by the Respondent –

(a) The Respondent submits that the Congress Expenses were wholly and exclusively incurred in the production of income under section 33 of the Act, and the said expenses do not fall under the definition of "entertainment" in Section 18 of the Act;

(b) In respect of the sponsored speakers, there is consideration moving from the sponsored speakers in that they, the speakers had to present a paper on the special fields. A service was, therefore, provided by the speakers in return, for the sponsorship i.e. cost of travel and lodging and in alternate, both the speakers and the Respondent derived a practical advantage, and a practical advantage is consideration in law;

(c) In respect of sponsored doctors etc who attended congress, symposia and the like, they gave their time to the Appellant in investing in time to upgrade their knowledge and technological advances in drugs and medicine, and or alternatively the sponsored doctors and the Respondent derived a practical advantage and a practical advantage is consideration in law;

(d) When rebutting the issue, the Respondent claimed that the issue was clearly stated as whether the congress expenses should be disallowed as entertainment expenses under section 39(1)(l) of the Act, and submitted that, it was a common ground between the parties, that the congress

expenses are wholly and exclusively incurred in the production of gross income;

(e) On the penalty, the Respondent submits that penalty under section 113(2) of the Act may be imposed only if an incorrect return was filed by the Respondent. But in this case, the Respondent was filing returns based on claiming the congress expenses as a deduction since such expenses were first incurred. Since the Respondent gave a full disclosure of all facts and circumstances, correct information was given to the Appellant. It was also admitted that prior to the appeal years the Appellant allowed such expenses.

7. On the issue "*whether the expenses incurred under section 33(1) of the Act should be disallowed as entertainment under section 39(1) (*l*) of the Act*" the SCIT made the following findings –

(a) the congresses, symposia and the like were held with the objective of promoting products of the Respondent. Once that is found as a fact it is irrelevant question whether such symposia in fact resulted in sales;

(b) the congress expenses were incurred solely for the promotion of business, which is not "entertainment";

(c) to apply section 39(1)(l) of the Act, the congress expenses must be "entertainment", but it cannot be applied if the dominant purpose is to promote the company's business or product (*Aspac Lubricants (Malaysia) Sdn. Bhd. v KPPHDN* [2007] 6 MLJ 65);

(d) in respect of sponsored doctors, the doctors attending gave their valuable time (and lost the opportunity cost of earning fees at their clinics etc) to the Respondent. In return, the

doctors acquired the knowledge of advances in medicine and drugs. Therefore time given in return for knowledge and tickets etc must be considerations;

(e) the doctors, pharmacist and the health care professionals, including the speakers had obtained the practical advantage. They acquired the new and updated knowledge. The Respondent's products were made known to them, where chemicals, molecules in their drugs and medicine relevant to the medical condition and diseases were discussed and thereby ensured an increase in its sale or the market share. A 'practical advantage' is considered as "consideration" (*Fong Holdings Pte. Ltd. v. Computer Library (S) Pte Ltd* (1992) lSLR 332);

(f) in respect of the sponsored doctors, there is clearly consideration moving from the speakers to the Respondent in that there is a service performed by the speakers in presenting the paper. The requirement of presenting a paper in return for an honorarium must surely be consideration (*Bentleys, Stores L, Lowless v Beeson* (1952) 2 All ER, 82);

(g) The Respondent had increased in sale in this manner as the Respondent's staff attended the conferences and were with the doctors, pharmacist and healthcare provider.

8. Conclusion by SCIT -

(a) The SCIT found that it was common ground between parties that the congress expenses are wholly and exclusively incurred in the production of income. The difference of opinion is on whether some of the expenses

fall within the definition of “entertainment” as provided under section 18 of the Act, which correlate to section 39(1)(l) of the Act.

(b) The SCIT found insufficient facts and evidence adduced in order to acknowledge that the expenses were entertainment as provided and defined in section 18 and section 39(1)(l) of the Act. The SCIT noted that similar expenses were allowed in prior years. Further the SCIT found that the Appellant has failed to submit in facts and in law that the expenses were entertainment. The SCIT concluded that the whole object of the sponsored doctors, pharmacists and health care professionals was to increase the sales of the Respondent’s products. There was no other purpose. Applying the test of consideration, the SCIT concluded that the congress expenses cannot be entertainment on this ground. Therefore the SCIT allowed the appeal on this issue.

9. With regard to the penalty imposed, the SCIT is of the view that based on the facts and circumstances of the case, where it was admitted and confirmed that in prior years since such expenses were claimed as a deduction, the Appellant had allowed such expenses as a deduction, the penalty should not be imposed against the Appellant. By a unanimous decision the SCIT allowed the Respondent’s appeal.

Submissions

10. It is submitted for the Appellant that Section 33 only allows expenses incurred exclusively for the production of income of the taxpayer to be deducted. Counsel submits that the act of sponsoring doctors to attend the congress free of charge falls within the meaning of 'entertainment' under Section 18 of the Act. It is submitted that the SCIT erred in law in not construing the congress expenses incurred by the Respondent in the form of provision of food, accommodation and travel to the doctors who were speakers at the congress and the doctors invited to attend the congress, though incurred for the purpose of its business, are 'entertainment' as defined by Section 18 and are therefore caught by Section 39(1)(l) of the Act (*Syarikat Jasa Bumi (Woods) Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2000] 2 CLJ 481; *Margaret Luping & Ors v Ketua Pengarah Hasil Dalam Negeri* [2000] 3 CLJ 409).

11. Counsel submits that though the entertainment is for promotion of the business, the crucial issue arising is whether the entertainment involve the element of 'consideration' (*United Detergent Industries Sdn Bhd v Director General of Inland Revenue* [1999] 1 AMR 462). Counsel refers to the case of *Aspac Lubricants (M) Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2007] 6 MLJ 65 where in that case the taxpayer gave

promotional items to its dealers which did not bear the taxpayer's logo but the items given to its customers carried the taxpayer's logo. There is no dispute over the items given to the dealers. The issue is whether the expenses related to the items given to the customers were tax deductible as having been incurred in the production of gross income or whether the said expenses were spent on entertainment and were therefore not tax deductible. The taxpayer relied on s.33(1), the 'basket provision' and also argued that the customers' items were a consideration in law and therefore part of a bargain which was to realize the sole purpose of business promotion. The respondent relied on s.39(1) and argued that the expenses were entertainment and not tax deductible. The Court of Appeal held *inter alia* that -

> *(1) The expenses incurred in respect of the customers' items did not amount to entertainment under s.39(1)(*l*) as entertaining involves an element of hospitality or charity; (Bentleys, Stokes and Lowless v Beeson [1952] 2 All ER 82 followed)*
>
> *(2) The appellant incurred the expenses solely for the promotion of its business;*
>
> *(3) The customers' items were a valid consideration in law and therefore part of a bargain and the bargains were made by the appellant solely for the purpose of business and falls within the 'basket provision' in s.33 of the Act;*
>
> *(4) The receipt of a customers' item by a customer* ***who purchases the appellant's product confers on the purchaser a 'practical advantage'*** *which also amounts to good consideration in law and has the effect of bringing the customers' item within bargains made by the appellant solely for the purpose of business promotion.* (emphasis added)

In his judgment James Foong JCA (as His Lordship then was) said *inter alia* as follows –

> *I think that the proper approach in determining whether the expenses in respect of the customer's items were incurred in the production of income, is to examine the true nature of the transaction between the appellant and its customers. In my judgment the expenses incurred in respect of the customers' items did not amount to entertainment within s.39(1).*

His Lordship then referred to the case of *Bentleys, Stokes and Lowless v Beeson* wherein Romer LJ said *inter alia* –

> *….Was the entertaining , the charitable subscription, the guarantee, undertaken solely for the purpose of business, that is, solely with the object of promoting the business or its profit earning capacity?*
>
> *…the purpose must be the sole purpose….If the activity be ubdertaken with the object of both promoting the business and with also some other purpose, for example, with the object of indulging an independent wish of entertaining a friend or stranger or of supporting a charitable or benevolent object, then the paragraph is not satisfied though in the mind of the actor the business motive may predominate….Per contra, if in truth the sole object is business promotion, the expenditure is not disqualified because the nature of the activity necessarily involves some other result, or the attainment or furtherance of some other objective, since the latter result or objective is necessarily inherent in the act.*

Based on the above case, counsel for the Appellant submits that the issue of 'bargain' or 'consideration' is crucial to determine whether or not the expenses incurred by the Respondent herein is 'entertainment'.

12. In the present appeal, the speakers and the doctors were sponsored for free. It is submitted that in so far as the speakers are concerned the consideration moving from the Respondent is the honorarium. The speakers are paid honorarium and that is the consideration. However the provision of food, travel and accommodation is not part of the consideration but is hospitality. In respect of the doctors who attended the congress, apart from time to attend and participate in the congress, there is no consideration from the attendees. The doctors attending are not required or obliged to purchase the Respondent's products hence there is no consideration. The purpose of the entertainment of future clients with a view to getting increased sales is immaterial.

13. Similarly it is submitted that when the Respondent sponsors the costs for the doctors to attend scientific meetings overseas there is no consideration moving from the doctors to the Respondent. Thus the cost of sponsoring the doctors to attend the scientific meetings overseas must also be disallowed. Counsel submits that the SCIT erred when it found that the fact that the doctors attended the meetings amount to consideration. The view of the SCIT that time spent to attend the congress is a consideration is unsupported by any authority. It is submitted that the time taken by the doctors to attend the seminars or symposium cannot amount to consideration.

14. For the Respondent counsel submits that the Respondent as a pharmaceutical company is not allowed by law to advertise directly to the consumer about their products. Therefore the Respondent manages their sales through the holding of congresses and seminars specific to the Respondent's products. The seminars are not social events. The seminar is aimed at increasing sales of the Respondent, therefore it is not entertainment under Section 18.

15. The speakers sponsored are specialists in their field and in return for their services the Respondent pays them honorarium and sponsors their cost of travel and lodging as honorarium alone is not sufficient. In respect of the doctors sponsored to participate in the congress, counsel submits that these doctors are specialists who make decisions. They not only gave their time and energy to be at the seminars but they also participate, for which the Respondent sponsors their costs of travel and lodging. Counsel submits that there is a contractual obligation on both the speakers and the sponsored doctors to attend the seminar.

16. With reference to *Aspac's* case, counsel submits that a practical advantage can also be consideration, and when there is a material gain by either party that is also consideration. It is

submitted that for the Respondent, the practical advantage received is by having these doctors who are potential customers to attend the seminars. Counsel refers to the case of *Sabah Berjaya Sdn Bhd v Ketua pengarah Hasil Dalam Negeri* [1999] 3 AMR 3264. In that case the appellant is a subsidiary of the Sabah Foundation ("the Foundation"). As an approved institution of a public character, gifts of money made to the Foundation were tax deductible in the hands of the donor. The State Ministry of Finance wrote a letter to the managing director of the group of companies that were the subsidiaries of the Foundation, which includes the appellant, that the State Government wished for all surplus funds in the subsidiary companies of the Foundation to be donated to the Foundation. The State Government will provide *inter alia* all necessary assistance in obtaining tax relief or exemption. At a meeting of the appellant's Board of Directors chaired by the then Chief Minister of Sabah, it was resolved that the all the appellant's profits for the year be donated to the Foundation. The appellant continued to do so for the next eight years. The respondent raised tax assessments and disallowed the sums donated to the Foundation. The Special Commissioners refused the appellant's appeal on the ground that the donations were not 'gifts' under s.44(6) of the Act as they were not made voluntarily but made under the direction of the State Government, that they were made pursuant to a contractual obligation and the appellant had obtained a material advantage in return. The High Court upheld the order of the Special Commissioners on only one

ground i.e. that the donations were not ‘gifts’ because they were involuntary in the sense that they were the product of compulsion. Gopal Sri Ram, JCA (as His Lordship then was) agreed with the learned High Court judge who found that the Special Commissioners erred in law when they held that the appellant had acted under a contractual obligation and that the appellant had obtained a material advantage from making the payments to the Foundation. His Lordship said that the disposition by the appellant of its profits to the Foundation were made voluntarily because, as found by the judge, it did not receive any valuable consideration or material benefit in return. Therefore the payments fell within s.44(6) of the Act and were deductible. Counsel therefore submits that where there is a material advantage gained, it is no more a gift. To be ‘entertainment’, there must be no material advantage to the Respondent. Counsel submits that there is a material advantage and a practical consideration to the Respondent because it has its market assembled before hand (*Fong Holding Pte Ltd v Computer Library (S) Pte Ltd* (1992) 1 SCR 332). Therefore there is consideration in law and the congress expenses cannot be entertainment.

17. However for the Appellant it is submitted that the sponsored speakers do not speak about or promote the Respondent’s products and the doctors sponsored to attend the congress are not obliged to buy the Respondent’s products. They

were sponsored to attend for free. The expenses were gratuitous with no consideration. Therefore there is no direct benefit to the Respondent. It is akin to a company holding an event and inviting potential customers to attend. There is no consideration. Counsel concedes that there would be consideration if these sponsored doctors were obliged to buy the Respondent's products.

Decision

18. The purpose of the congress is to disseminate general information about molecules of the medicines related to the Respondent's products but not the brand of the Respondent's product. The Appellant contends that these expenses are entertainment within the meaning of Section 18 which defines 'entertainment' as follows –

> "entertainment" includes -
>
> (a) the provision of any food, drink, recreation or hospitality of any kind; or
>
> (b) the provision of accommodation or travel in connection with or for the purpose of facilitating entertainment of any kind mentioned in paragraph (a),
>
> by a person or an employee of his in connection with a trade or business carried on by that person

19. In the case of *United Detergent Industries Sdn Bhd v Director General of Inland Revenue* (supra) the court dealt with the question of 'entertainment'. In that case the taxpayer incurred

additional expenses in the purchase in bulk of items of goods (known as 'consumer premium items') to be offered to its customers along with its own detergent product not for free but at the discounted price of those items purchased for the purpose of promoting sales of its own detergent. Of attraction to the customers is that the price of the consumer premium item is cheaper than their actual market price as the taxpayer bought them in bulk from the supplier. The taxpayer regarded the expenses incurred in the purchase of the consumer premium items as deductible from its gross income of the business under Section 33(1) of the Act as outgoings wholly and exclusively incurred in the production of gross income. The issue for determination is whether such expenses incurred by the taxpayer in the purchase of the consumer premium items to be sold together with its own product constitute 'entertainment' within the contemplation of Section 39(1)(l) of the Act. The Special Commissioners found that the expenses incurred by the taxpayer for the premium consumer items were for the purpose of promoting sales which is entertainment as defined under s.18 and entertainment being prohibited under s.39(1)(l) of the Act, it is immaterial that there was a cost element borne by the purchasers. The learned Judge said as follows –

> What then is entertainment? Section 18 of the 1967 Act defines entertainment but not at all exhaustive…..In the circumstances, entertainment embraces also its ordinary meaning of the terms. One of the meaning of "entertainment" given by the Concise Oxford Dictionary, 9th Ed, is hospitality and "hospitality" according to the

Dictionary means the friendly and generous reception and entertainment of guests or strangers. So when one entertaions one's guest or a stranger, it is not expected of the guest or the stranger to pay for the entertainment so given. *The Short Oxford English Dictionary* defines "hospitality" as the act or practice of being hospitable, the reception and entertainment of guests or strangers with liberality and goodwill. Similarly, one cannot be said to have entertained one's guest or a stranger with liberality and goodwill if the guest or the stranger is made to pay for the entertainment so given. *Webster's New Dictionary* defines the word to mean the act, practice, or quality of being hospitable, solicitous entertainment of guests. Thus the word "hospitality" connotes the action of entertaining someone without that someone having to subscribe towards the cost incurred by the host for the purpose of entertaining that someone. That appears to be the general meaning of hospitality in the context of the host entertaining his guest. But the definition of "entertainment" as listed in paragraph (a) in s.18 of the Act includes hospitality of any kind, which is not confined to the provision of food or drink only.

His Lordship said further -

The Special Commissioners had ignored the fact that the said items were not given to the appellant's customers gratuitously and without consideration, and that they were given only upon the option made by concerned customers. For the reason that the customer premium items were given away by the appellant to its customers……not as a free gift but subject to the payment of the cost incurred by the appellant in the purchasing of the items from its suppliers, and also that upon the wishes of the appellant's customers only in respect of the items, it can no longer be considered as a form of entertainment upon its customers by the appellant. This is so because there is no hospitality of any kind on the part of the appellant being extended to its customers by charging them the cost incurred in the purchase of the items on their behalf….

20. The Appellant contends that since the congress expenses are entertainment therefore by virtue of Section 39(1)(l) these expenses are not deductible. Section 39(1)(l) of the Act provides as follows –

> **Deductions not allowed**
>
> **39.** (1) Subject to any express provision of this Act, in ascertaining the adjusted income of any person from any source for the basis period for a year of assessment no deduction from the gross income from that source for that period shall be allowed in respect of –
>
> *(a)-(k)* (not applicable)
>
> (l) any expenses incurred in the provision of entertainment including any sums paid to an employee of that person for the purpose of defraying expenses incurred by that employee in the provision of entertainment:

21. In the case of *Syarikat Jasa Bumi (Woods) Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2000] 2 CLJ 481 the Court of Appeal held as follows –

> *For a taxpayer to qualify for deduction of any payment or expenditure incurred by him he must first of all place the payment or expenditure as allowable under s.33 of the Act. He has to justify that the payment or expenditure incurred by him is an allowable deduction under s.33 of the Act. If the payment or expenditure is not allowed under s.33(1) of the Act then it will not be allowed as a deduction. On the other hand, if it is allowed as a deduction under s.33(1) of the Act, one has to proceed to the next step to ascertain whether the payment is caught under s.39(1) of the Act. If it is caught under s.39(i) of the Act, then it will not be allowed as a deduction although it is allowable under s.33(1) of the Act.*

Again in the case of *Margaret Luping & Ors v Ketua Pengarah Hasil Dalam Negeri* [2000] 3 CLJ 409 the Court of Appeal held that that "*for a taxpayer to qualify for deduction of any expenditure incurred by him, he must first ascertain that the expenditure is an allowable deduction under s.33 of the Act. Once that is ascertained, he has to find out if the expenditure is barred by the provision of s.39(1) of the Act from being so deductible*.".

22. In *Aspac's* case James Foong JCA found that the consideration moving from the customer is the payment he makes while the consideration moving in the opposite direction is the appellant's product and a customer's item. *"That then is the bargain."* His Lordship said –

> *Viewed from any perspective, the transaction in respect of the customers' items were plainly bargains made by the appellant for the sole purpose of business promotion and hence fall within the basket provision. The expenses incurred are not entertainment expenses within s.39(1)(*l*).*

23. *Aspac's* case shows that if the receipt by the customer of hospitality is accompanied by purchases made by the customer, that confers a 'practical advantage' on the customer and that amounts to good consideration in law. It has the effect of bringing the customer's items within bargains made by the taxpayer solely for the purpose of business promotion. Similarly in the case of *United Detergent Industries Sdn Bhd* (supra) it was found that

there was no hospitality of any kind extended by the taxpayer because the customers were charged for the costs incurred by the taxpayer for the items. These two authorities show that for expenses incurred by the taxpayer in the promotion of its business to be deductible under Section 39(1), the expenses incurred has to be for consideration and not gratuitous.

24. The SCIT found that time given in return for knowledge and tickets etc must be considerations and the acquisition of new and updated knowledge is a 'practical advantage' which is 'consideration'. Applying the test of consideration, the SCIT concluded that the congress expenses cannot be entertainment.

25. In my opinion though the predominant purpose in the Respondent's mind is to promote its business, no purchases are required to be made by the sponsored doctors or speakers in return for the hospitality accorded by the Respondent. The Respondent says that there is a contractual bargain between the Respondent and the doctors to attend the congress and the knowledge gained by them at the congress confers a practical advantage. In my opinion mere attendance and participation and acquisition of knowledge alone is not sufficient to amount to a practical advantage. There is no valuable consideration moving from the doctors who attended and the Respondent. As regards the purportedly contractual bargain to attend the congress as submitted by counsel for the Respondent, there is no evidence of

any liability to be borne by a doctor who fails to attend the congress.

26. I agree with counsel for the Appellant that the conclusion by the SCIT that giving time to attend the congress amounts to consideration and acquiring new and updated knowledge amounts to practical advantage is unsupported by authority. In my opinion the expenses incurred to provide food, travel and accommodation are gratuitous. I agree with the Appellant that the congress expenses are entertainment within the definition of Section 18 and not allowable as deduction under Section 39(1)(l) of the Act. For the aforementioned reasons the appeal is allowed. In the circumstances the penalty imposed is correct. Costs of RM3,000.00 to the Appellant.

Dated 29.4.2010

DATO' AZIAH ALI
HAKIM
MAHKAMAH TINGGI MALAYA
KUALA LUMPUR

Counsel :

Abu Tariq Jamaluddin, Revenue Counsel with Salwani Mohd Noor for the Appellant
(Inland Revenue Board)

Dr Arjunan Subramaniam for the Respondent
(Messrs Shanker & Arjunan)