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## TNB need not pay RM1.8 bil additional taxes as appellate court upholds High Court's decision

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PUTRAJAYA (May 16): A three-member Court of Appeal bench on Thursday upheld a High Court decision given two years ago, which had dismissed an Inland Revenue Board (IRB) claim of taxes amounting to RM1.8 billion against Tenaga Nasional Bhd (KL:TENAGA).

This follows the bench agreeing that TNB, as the electrical utility company is known, is in the business of manufacturing energy, and the sum sought comprises a reinvestment allowance (RA) that should have been exempted.

The decision was made unanimously by the bench led by Datuk Seri Kamaludin Md Said, and including Datuk See Mee Chun and Datuk Hashim Hamzah.

See, in delivering the unanimous decision, ruled that the High Court was right in allowing the judicial review sought by TNB, and the bench agreed that the expenses run by the company from 2003 to the year of assessment of 2018 amounted to manufacturing of energy, and thus the RA is applicable.

The court made no order as to costs.

TNB was represented by S Saravana Kumar and Amira Azhar from Rosli Dahlan Saravana Partnership, while senior revenue counsels Ashrina Ramzan Ali and Surani Che Ismail appeared for the director general of the IRB.

Saravana Kumar, when contacted by *The Edge*, confirmed the outcome of the appellate court's decision.

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The case arose when, on July 3, 2020, the IRB through a letter informed TNB that the RA that it had claimed for the year of assessment 2018 was disallowed, and then issued a notice of additional assessment on July 7, 2020, to the amount of RM1,812,506,384.64.

Following that, TNB filed a judicial review that same year over the imposition of the RM1.812 billion as additional assessment to be paid by the national utility company.

The IRB in its appeal argued that TNB is not a manufacturing company, and thus does not qualify for certain tax incentives under Schedule 7A of the Income Tax Act that would allow it for the RA.

"The RA applies only to manufacturing companies carrying out manufacturing activities that transform raw material into an end-product in a factory, and the capital expenditure incurred on the factory, plant, or machinery for a qualifying project is eligible for the RA," the IRB said in its submissions.

TNB, however, cited certain Commonwealth cases and a Federal Court case that support its stance that electricity generation is considered manufacturing activity globally, in the form of its expenditure on transmission lines, substations, and transponders.

### High Court's decision

In the High Court two years ago, judge Datuk Noorin Badaruddin had ruled in favour of TNB, when she said that TNB's business relates to manufacturing of electrical energy, and that the generation of electricity is considered a manufacturing activity.

"TNB has particularised its project to be a transmission project consisting of installation of new lines and reinforcement of existing lines to facilitate the increase in transmission of electricity to new development areas, as well as increasing efficiency and reducing interruption during the transmission. The distribution project consists of installation of new lines and substations to increase the capacity for distribution to new areas.

"TNB cannot be said to be a utility or service provider company per se. It has expanded and diversified its business activity into manufacturing, for it has to. Otherwise, the distribution of electrical supply in this country will never attain efficiency," said Noorin.

In arriving at her decision, Noorin quoted the case of Canada (Deputy Minister of National Revenue, Customs and Excise-MNR) v Quebec (Hydro-Electric Commission).

The court added that since TNB claimed the RA in 2003, it is entitled to claim it again 15 years later in 2018, as it is the company's vested right.

"In balancing the need of the government to realise taxes and the need for taxpayers to be protected from incorrect assessments, and in light of the above view and interpretation of the laws, this court finds that the balance tilts towards the applicant (TNB)," Noorin said in allowing TNB's judicial review application.

In civil cases, the burden of proof lies on the balance of probabilities, where an applicant or plaintiff needs only to convince the court more than 50% to prove its case.

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