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FEDERAL COURT, PUTRAJAYA

YAA TAN SRI DATUK AMAR ABANG ISKANDAR BIN ABANG HASHIM
YA TAN SRI DATUK NALLINI PATHMANATHAN
YA DATO' ZABARIAH BINTI MOHD YUSOF
YA DATO' RHODZARIAH BINTI BUJANG
YA DATO' ABU BAKAR BIN JAIS

2ND JULY 2025

Reinvestment Allowance, Schedule 7A Income Tax Act 1967 – Investment Allowance, Schedule 7B Income Tax Act 1967 – Judicial Review, Order 53 Rule 2, Rules of Court 2012

KETUA PENGARAH HASIL DALAM NEGERI
v.
TENAGA NASIONAL BERHAD
[01(f)-27-09/2024(W)]

The Federal Court unanimously allowed the appeal by the Revenue which was made against the decision of the Court of Appeal (COA) in allowing the Taxpayer's judicial review (JR) application.

This appeal turns on a single leave question approved by the Federal Court on 10.9.2024 for appeal on whether the COA is correct in its determination of the Taxpayer's activities is that of manufacturing under Schedule 7A of the Income Tax Act 1967 (ITA) based on the cases of *Majlis Perbandaran Seberang Perai v Tenaga Nasional Bhd* (2005) 1 MLJ 1 and *Ketua Pengarah Hasil Dalam Negeri v Success Electronics & Transformer Manufacturer Sdn. Bhd.* (2012) MSTC 30-039 without regard to the real intention of the Parliament in enacting Schedule 7B ITA which applies to the utility sector?

The Taxpayer was assessed with the additional assessment for the Year of Assessment (YA) 2018 amounting to RM1,812,506,384.64 after due audit was done by the Revenue.

The Taxpayer claimed RA under Schedule 7A ITA and submitted that its business activities of generating, transmitting, distributing and selling electricity are manufacturing activities as defined under Schedule 7A. The Revenue submitted otherwise where the clear issue is whether the classification of the Taxpayer's activities as a manufacturing activity under Schedule 7A concludes the claim for tax incentives by the Taxpayer or whether having regard to the real intention of Parliament in enacting Schedule 7B the Taxpayer's activities would fall under the utilities sector and therefore any claim for tax benefits must be made under Schedule 7B ITA.

The Revenue's main argument at the outset that the COA erred when it held that the determination of the Taxpayer's activities as being '*manufacturing*' in nature concluded its rights without more to the benefits under Schedule 7A ITA. The COA failed to appreciate that a taxpayer may be engaged in a manufacturing activity and yet be a service provider in the public sector. A utility company can also be a manufacturing company. The Taxpayer's business activities do not fall within the purview of Schedule 7A, which is confined to manufacturing companies engaged in manufacturing activities and hence, are not manufacturing under Paragraph 9 and not within 'qualifying project' under Paragraph 8(a) of Schedule 7A ITA thus making it ineligible for RA claim. The Taxpayer's business activity would fall as an approved service project under the Investment Allowance for Service Sector as defined by Paragraph 9 of Schedule 7B ITA.

On 1.3.1979, the Parliament passed the Income Tax (Amendment) Act 1979 (Act A451) to introduce the RA for manufacturing companies that invest in capital expenditure for expansion, modernization or automation of their existing business in respect of manufacturing of a product. Thus, Schedule 7A ITA would apply to a manufacturing company that manufactured products. The definition of "manufacturing" was added to the ITA through Act 693 of 2009 to provide clarity for companies claiming incentives under Schedule 7A ITA. The Revenue submits that the courts misunderstood the nature of electricity generation as manufacturing and incorrectly relied on Commonwealth authorities. Instead, the courts should have strictly interpreted the incentive provisions of Schedule 7A ITA, which place the burden of proof on the Taxpayer to demonstrate eligibility. The courts erred in ignoring the updated definition of manufacturing, which applied to the basis period for YA 2018.

Furthermore, Schedule 7B was introduced as a special incentive known as Investment Allowance through the Finance Act 1996 (Act 544) on 1.2.1996, that applied to the Taxpayer which was in a service sector as defined under the Schedule 7B ITA. The Taxpayer's claim for RA under Schedule 7A ITA was against the intention and objective of the Parliament when introducing the Schedule.

The Taxpayer's own declaration, admission and the charges of service tax contradict and inconsistent to their claim of being a manufacturer under Schedule 7A and instead it is in line with Schedule 7B ITA. The Taxpayer is a public utility company operating under the Electric Supply Act 1990 involved in the service sector wherein the Taxpayer had declared, announced and admitted to it in its Annual Report 2018 and in Main Market listing with Bursa Malaysia as '*utility sector*'. Furthermore, the Taxpayer imposes a service charge on its electricity revenue on the basis that the supply of electricity is a transfer of distinct goods to its customers as found in its Annual Report and Audited Accounts for YA 2018.

It is submitted that the application of statutory provisions to a situation is not a matter of option or choice of parties. There is no suggestion of any ambiguity in the application or wording of the two schedules. They both have their foundation under Section 133A ITA but have different origins in time and purpose. Section 133A mandates that the incentive relief is to be '*given in accordance with Schedule 7A and Schedule 7B of the ITA 1967'*. It thus does not provide a choice or option in a taxpayer claiming this tax relief but depends on the conditions and terms of eligibility stipulated in the two schedules. They are significantly different and compliance with the terms of eligibility is therefore mandated by the parent provision. Besides, the requirement under the two Schedules varies, in which the RA claim under Schedule 7A is based on 'qualifying project' under a prescribed form to be submitted and approved by the Revenue. However, the claim under Schedule 7B is under the jurisdiction of the Ministry of Finance subject to public interest element involving the service sectors mentioned in Paragraph 9 of Schedule 7B ITA namely the sectors of '*transportation, communication, utilities or any other sub-sector approved by the Minister*'. The manifest objective of Schedule 7B ITA is to place the monitoring and control of tax incentives in the service sector under the oversight of the Minister of Finance. The Parliament does not legislate in vain.

The general rule in tax cases is that in case of ambiguity, the benefit will be given to tax benefit or exemption, the burden of proof is on the party seeking relief/benefit/exemption i.e. the Taxpayer. The Revenue submits that the Taxpayer has failed to discharge the burden of establishing its entitlement to RA under Schedule 7A ITA nor that it has satisfied the eligibility criteria of 'qualifying project' set out in the Schedule.

The Revenue further argued that the High Court had wrongly relied on the Federal Court's decision in *Majlis Perbandaran Seberang Perai v Tenaga Nasional Bhd [2005] 1 MLJ 1* (MPSP) and *KPHDN v. Success Electronics & Transformer Manufacturer Sdn Bhd (2012) MSTC 30-039* (SETM) where the facts were distinguishable. The MPSP's case was decided under different legislation i.e. the Local Government Act 1976. The tax principles in SETM is the interpretation and definition of 'factory' in capital expenditure.

Decision: The Federal Court unanimously allowed the Revenue's appeal with no order as to cost due to public interest. The Court agrees with the Revenue's submissions that it is the Parliament intention in legislating Schedule 7B ITA (investment allowance for service sector) in which the Taxpayer falls within "utility" project under Paragraph 9 Schedule 7B ITA. The Court further agrees with the Revenue's submission that in any ambiguity to tax benefit/exemption, the benefit should be given to the tax authority, not the taxpayers even though there is no ambiguity at all in this case since both Schedules were legislated with different purpose and the Parliament does not legislate in vain. The Court further agrees with the Revenue's submission that the Taxpayer's action is double dipping; since the items claimed by the Taxpayer has been allowed capital allowance under Schedule 3 ITA. Hence, the Taxpayer's business activities should come under Schedule 7B ITA. The Federal Court specify that Sch 7B has been enacted specifically for those who provide services.

Impact:

With the ruling of the FC, the matter is now settles that the companies that provide services has stated under Schedule 7B such as – Where a company which is resident in Malaysia for the basis year for a year of assessment has *incurred* in the basis period for that year of assessment capital expenditure for the purpose of an *approved service project*, there shall be given to the company for that year of assessment an investment allowance of an amount *approved* by the Minister, such allowance being not less than sixty per cent of that expenditure.
They will now need to apply Investment Allowance complying to the criteria stated therein under the purview of the minister.
Schedule 7A of the ITA has been clarified to cater to companies that conduct activities of manufacturing has prescribed under Schedule 7A ITA, and the compliance of the law in accordance with the Year of Assessment applied.
No retrospective effect to be given.