IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY

REVENUE DIVISION

REVENUE CAUSE NO. 15 OF 2017

BLANTYRE PRINTING AND
PUBLISHING COMPANY LIMITED ..... CLAIMANT

AND

COMMISSIONER GENERAL OF THE
MALAWI REVENUE AUTHORITY ..... DEFENDANT

CORAM: HON. JUSTICE R. MBVUNDULA
Kalua, Mpaka, Counsel for the Claimant
Chiwala Chipeta, Counsel for the Defendant
Chimang'anga, Official Interpreter

JUDGMENT

Factual background

Blantyre Printing and Publishing Limited (BPP/claimant), applied for judicial review of several decisions of the Commissioner General of the Malawi Revenue Authority (the CG/the defendant) by which the defendant sought to enforce taxes due. The claimant challenges the manner and circumstance in which the defendant sought to enforce the collection of the taxes due.

The first set of decisions is set out in the application for judicial review which is supported by a sworn statement of Leonnard W.B. Chikadya, Managing Director of the BPP group of companies, and dated 5th December 2017. The court is informed thereby that BPP has six subsidiaries, all of them operating in the print and media sector and that for many years since 1994 BPP's financial position has been precarious, and that for the eight years leading to around March 2005 BPP was technically insolvent, being unable even to pay its employees' salaries, debts and taxes, as a result of which it closed some of its subsidiaries, taking over their tax liabilities, including penalties, without any related income.

For the five year period 2000-2004, BPP did not produce audited financial statements and therefore was unable to determine the correct tax liability and submit income tax returns as required by law. The audit of the group financial statements only commenced in 2005 when Mr Chikadya was appointed Managing Director.

Subsequently the defendant has carried out a series of tax compliance audits of BPP, and demanded payment of the tax liability thereby determined. It is stated that over the years BPP has managed to pay off most of the principal taxes due together with penalties, a small proportion of which was cleared through monthly installments, and the larger part through BPP's withholding tax credits, due to BPP's lack of cash flows to clear the liabilities.

Between December 2012 and January 2013 the defendant conducted a tax audit of BPP for the period between July 2008 and June 2012 ("Audit 1") which established a total tax liability at K1 329 665 511.38 broken down into about K627 million in agency taxes (VAT, PAYE, WT, FBT) and about K701 million in penalties. Following demand, BPP requested for settlement by monthly installments on the ground that it was not in a financial position pay at once. This was rejected with a warning that failure to comply would result in enforcement measures being taken. BPP felt aggrieved and commenced judicial review proceedings (*Judicial Review Case No. 11 of 2013: The State v. Malawi Revenue Authority ex parte Blantyre Printing and Publishing Company Limited*) (hereinafter "*the 2013 case*") challenging a) the decision to demand the full amount plus penalty interest; b) the decision refusing to allow settlement by installments; c) failure by the CG to make a decision on the BPP's appeal to the CG against the foregoing decisions; and d) failure by the CG to make a decision on BPP's request for a waiver or reduction of interest charged on the outstanding taxes. In granting permission to apply for judicial review the court granted an interlocutory order restraining the CG from

implementing his decisions until the determination of the judicial review, which order is still subsisting as the matter is yet to be resolved.

The parties, however, engaged in out of court negotiations in which BPP proposed to use its withholding tax credits (whose existence the CG acknowledged – exhibit LWB 6) to clear the outstanding liabilities as BPP did not have the cash flows to clear the liabilities as demanded by the CG. It is pointed out that using the withholding tax credits alone, BPP cleared the principal tax liability of (approximately) K627 million and K461 million in penalty interest leaving a balance of about K240 million.

As the parties attempted the out of court settlement over Audit 1, the defendant instituted another tax audit ("Audit 2") covering the period between July 2012 and March 2016 out which BPP was required to pay a total of approximately K675 million (Exhibit LWB 8). As was the case in relation to Audit 1 the CG undertook distraint action against BPP's property at its head office in Blantyre but the process was curtailed by an order of the court dated 12th October 2017.

Following the order of 12th October 2017 the defendant presented to BPP a afresh demand notice (LWB 7) requiring BPP to pay, within 21 days, the amount of K501 279 477.68 comprising

a) K240 115 157.03 being the balance due under Audit 1;
b) K261 164 320.65 being the sum found due under Audit 2.

The demand included a warning that failure by BPP to comply with the demand would "compel MRA to escalate enforcement measures without any further recourse."

BPP believes it to be erroneous and unlawful, and the CG concedes the error (see (paragraphs 6 and 7 of the sworn statement by MacDonald Chambukira of 18th December 2017) for the CG to have included in his demand notice for Audit 2 sums of money under Audit 1 when the court case and the injunction pertaining to Audit 1 is still pending, hence the sum validly due under Audit 2 is K261 164 320.65 and not K501 279 477.68.

We are informed that after the court order the CG revised downwards the sum due under Audit 2 from the initial K675 million to K261 million taking into account BPP's initial objections to the amount due - exhibit LWB 11.

In a supplementary sworn statement dated 30th May 2018 Mr Chikadya draws the court's attention to developments arising after the institution of the present proceedings. The court is informed that on 26th April 2018 BPP submitted a self-assessment of income tax for the year 2018 (LWB 20) showing, *inter alia*, that the sum of K200 039 792.00 was refundable to BPP in withholding tax credits. The CG was asked to reduce BBP's tax liability under Audit 2 by that amount so that its tax liability would drop to K61 124 528.65. BPP proposed to further reduce that amount by 6 monthly installments of K10 187 421.44. At the material time the CG had not responded to the proposal. That the amount of K200 039 792.00 was refundable to BPP was confirmed by the CG in his Notice of Assessment for Income Tax of 2nd May 2018 (LWB 21).

The court is further informed that earlier on in March 2018 the CG's office had requested for a schedule of BPP's outstanding taxes for the period between February 2017 and March 2018 which BPP provided, and based on which the CG through his Acting Manager – Collection and Filing Enforcement (Large Taxpayer Office) on 23rd April 2018 sent BPP an Initial Warning Notice for Domestic Tax Arrears (LWB 23) of K710 781 667.29 comprising K535 712 985.10 as the principal amount, the rest being penalty and interest, demanding the same to be settled by 30th April 2018, i.e. within 7 days. BPP responded thereto in writing explaining how the arrears had accumulated and that BPP was not in a position to settle them as demanded due to its precarious financial position, and requested to settle the arrears in 18 months by way of minimum monthly installments of K25 million and withholding tax credits which averaged K200 million per annum, with an explanation as to how the same was attainable. The CG turned down the proposal and demanded full payment by 10th May 2018 (LWB 28) the reason given being that "a large part of the tax arrears was due a long time ago". A statutory appeal to the CG was also rejected "because the offence could have been avoided" (LWB 30), and the CG issued a Final Notice of Intent to Distrain (LWB 31) giving BPP five days from 11th May 2018 to settle the outstanding liability or suffer distraint.

BPP complains that contrary to the notice in LWB 31, however, the CG proceeded to attach BPP's bank accounts by appointing BPP's bankers as his agents or garnishees for payment of the total amount of K681 939 309.99, which action this court stayed pending the hearing of this judicial review. BPP considers the decision to garnishee its bank accounts to be as severe as distress as it had completely paralysed its business operations, and could, in BPP's opinion, completely evict

BPP's commercial enterprise out of business when it could otherwise survive if the CG had employed less onerous tax collection methods.

It is the submission of BPP that fairness and reasonableness demand that the CG should have considered deploying a less onerous method, that in any case, the choice of such an onerous method as was deployed by the CG should have been accompanied by a pre-action hearing and supported by reasons, which, it is argued, the CG did not do, thereby failing to discharge the duty of procedural fairness and reasonableness. It is submitted that the decision is harsh and a threat to BPP's legitimate expectations to settle the old liabilities by monthly installments and through tax credits which have proved very effective in the past. Additionally, BPP believes that the decision was actuated by bad faith as the defendant allows other tax payers to settle their outstanding tax liabilities by installments and/or such similar arrangements, an example being that of Malawi Broadcasting Corporation (MBC) which reportedly owed taxes in excess of K4 billion, but with which the defendant had made certain special arrangements to recover the liability.

BPP asserts that the defendant's decision to demand payment within such periods as 21 days, 7 days and 5 days are procedurally unfair and harsh considering BPP's precarious financial position which the defendant is aware of. Further that having previously allowed BPP to settle outstanding tax liabilities by installments, specifically through withholding tax credits, the defendant's said demands for full payment violate BPP's right to legitimate expectation.

The decisions complained of and challenged by BPP may be summarised as follows:

a) The decision of the defendant to demand payment of large amounts of tax within short periods of time and to "escalate enforcement measures without further recourse";
b) The decision refusing to allow BPP to settle its tax arrears by installments and withholding tax credits;
c) Failure by the defendant to allow BPP a chance to be heard before escalating measures of enforcement, or before making the decision regarding the method of collection ;
d) The decision by the defendant to attach BPP's bank accounts without a prior hearing and without giving reasons;
e) The failure by the defendant to accord similar treatment to similarly placed taxpayers which it asserts to be unfair and unreasonable.

The following issues arise:

1. Whether the CG's refusal to allow settlement of the tax arrears by way of withholding tax credits and installments was in violation of BPP's legitimate expectations;
2. Whether the CG's refusal to allow settlement of the tax arrears by way of withholding tax credits and installments, without first inquiring into and taking into account BPP's financial position and giving BPP an opportunity to be heard before choosing the method of collection and deciding to escalate enforcement measures was unfair and unreasonable and actuated by bad faith;
3. Whether the CG's demands for settlement of the tax arrears of the amount referred to within the periods of 21 and 7 days respectively were *Wednesbury* unreasonable;
4. Whether the CG acted in bad faith by not treating BPP in the same manner as it he treated MBC.
5. Whether the CG's decision to attach BPP's bank accounts was unfair and unreasonable;

Submissions and resolution

On legitimate expectation

Chigona J, in *The State v Commissioner General of Malawi Revenue Authority ex parte Blantyre Printing and Publishing Company Limited* Judicial Review Cause No. 5 of 2017 adopted the following general definition of legitimate expectation from *Council of Civil Service Unions and others v. Minister of Civil Service* (at p 944):

> "Legitimate expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue."

So it was stated in *Reg. v Inland Revenue Commissioners ex parte M.F.K. Underwriting Agents Limited and others* [1990] 1 W.L.R. 1545 with respect to taxpayer affairs (at pp 1569-70) that:

> "... it would not be reasonable for a representee to rely on an unclear or equivocal representation. Nor, I think, ... would it be fair to hold the revenue bound by anything less than a clear, unambiguous and unqualified representation."

It was also said in that case (at p 1574) that:

> "If ... the taxpayer approaches the revenue with clear and precise proposals about the future conduct of his fiscal affairs *and receives an unequivocal statement about how they will be*

treated for tax purposes if implemented, the revenue should ... be subject to judicial review on grounds of unfair abuse of power if it peremptorily decides that it will not be bound by such statements when the taxpayer relied on them." (emphasis supplied).

Such a promise may be by words or embodied in past conduct which led the complainant to believe that it will continue to act in a particular manner unless it gives notice to the contrary.

BPP relies, in main, on the following as the basis of its legitimate expectation:

1. That the defendant in an article published in the *Daily Times* newspaper of 26th May 2017 (exhibit LWB 32) made a representation that taxpayers with huge tax arrears would be allowed to settle the same by installments;
2. That the defendant previously acquiesced to BPP using withholding tax credits to settle a substantial amount of its tax liabilities dating back several years.

With reference to the *Daily Times* article (exhibit LWB 32), it was asserted that the legitimate expectation stemmed from the fact that the CG had clearly and unequivocally made a promise or a representation to the general public that tax payers with huge tax arrears would be allowed to settle the same by installments hence the CG's subsequent refusal to allow settlement by installments and withholding tax credits was in violation of BPP's legitimate expectation.

The newspaper article is misquoted. What was reported is that the Malawi Revenue Authority (MRA), through its spokesperson, was inviting taxpayers "with a huge debt" to approach MRA "and make arrangements on how best they can repay it by installments". Firstly, it must be objectively clear that no withholding tax credits were mentioned in the statement, therefore its mention here is misplaced. Secondly, an open invitation to the general body of taxpayers for negotiations is not, in my view, a promise or undertaking of the nature alleged by BPP and cannot create a legitimate expectation in respect of any single one of them. It is only as good as an invitation to treat under the law of contract, which creates no rights or obligations.

I accordingly dismiss the submission that the statement reported in the *Daily Times* article created the alleged or any legitimate expectation.

As to the CG's previous acquiescence to BPP using withholding tax credits and monthly installments to settle a substantial amount of its tax liabilities (by over 82%) dating several years back, thereby reducing the debt, it was submitted for the claimant that by its acquiescence the defendant created a legitimate expectation that the practice would continue. In reply, counsel for the CG, relying on *The State v Commissioner General of Malawi Revenue Authority ex parte Blantyre Printing and*

Publishing Company Limited Judicial Review Cause No. 5 of 2017 (supra) submitted that there having been no express promise given by the authority or a demonstrable existence of a regular practice a legitimate expectation was not herein established. Counsel argued further that despite having allowed BPP to make use of withholding tax credits, the CG had retained the discretion to allow or not to allow an arrangement taking into account the taxpayer's circumstances and the need for collecting taxes due.

In *Reg. v. Commissioner of Inland Revenue, ex parte Unilever; ex parte Mattessons Wall's Ltd* 68 TC 205, (*ex parte Unilever*)Thomas Bingham M.R. (at p 227) expressed the position that that where a regulatory rule is involved, acquiescence or 'silence' would be enough to create a legitimate expectation, provided such acquiescence is substantial. That case concerned the acceptance of 30 tax returns over a period of 25 years, contrary to regulation, and it was held that by allowing that practice for that long the revenue had created a legitimate expectation that the practice would continue until reversed by notice. That over the years, with the defendant's acquiescence, BPP has managed to clear most (82%) of the principal taxes and penalties mainly through withholding tax credits and, to a smaller extent, monthly installments is, in my view, substantial acquiescence by the defendant, and therefore creating a legitimate expectation of its continuance until reversed on proper notice.

On discrimination and bad faith

BPP accuses the defendant of discrimination, in that the defendant accords MBC, a similarly placed taxpayer, preferential treatment. It was pointed out that the *Daily Times* article reported that MBC which owed MRA tax arrears amounting to over K4 billion was allowed to settle the same by installments, yet the defendant refused declined to accord BPP, which owed much less in taxes, the same treatment. It was BPP's submission that the defendant's preferential treatment of MBC was unreasonable and in violation of section 20(1) of the Constitution which prohibits discrimination of persons in any form and that no reasonable public authority, properly directing its mind to the law could have taken this position.

For the CG it was contended that the newspaper article which BPP relied upon to allege discrimination contained no particulars of the arrangements the CG had entered into with MBC, which contention is incorrect, as the article quoted the MRA spokesperson as saying that MRA enters into special arrangements with MBC to pay its tax debt by installments. Counsel for the CG also appealed to the duty of confidentiality as between the defendant and each individual taxpayer as precluding it from disclosing the nature of the arrangements it enters with each taxpayer, which

submission cannot also avail the defendant in this case for the reason that the defendant already placed such information in the public domain through the newspaper article.

I observe that the assertion that the two taxpayers are similarly placed is not contested.

In *Reg. v Inland Revenue Commissioners Ex parte National Federation of Self–Employed and Small Businesses Ltd* [1982] A.C. 617 (*the Self-Employed case*) Lord Scarman, at p 651, observed that the modern case law recognizes a legal duty owed by the revenue to the general body of the taxpayers to treat taxpayers fairly and "to ensure that there are no favourites and no sacrificial victims." Elsewhere, the Supreme Court of the Philippines in *Roxas eta al v. Court of Tax Appeals and another* [1968] PHSC 248 (cited with approval in *the 2013 case*) held that the power of taxation must be exercised "fairly, equally and uniformly". In the same vein, the Scottish Court of Session in *Al Fayed v. Advocate General for Scotland (representing the IRC)* [2004] ScotsCS 278, 77 TC 273, [2004] STC 1703, at par. 100 stated:

> "There is no doubt that it is unlawful for a public authority, such as the respondents, *to act with conspicuous unfairness*, and in that sense abuse of power. In applying the test of fairness in a particular case, the court will have regard to all the relevant circumstances and determine whether there has been an abuse of power. It is not difficult to envisage cases where a public authority is possessed of lawful powers which it misuses in an unfair manner. Thus in *R. v. Inland Revenue Commissioners ex parte Unilever plc* and *R. v. North and East Devon Health Authority ex parte Coughlan*, the power which was held to have been abused in each case was a perfectly lawful power." (emphasis supplied).

The court (at par. 102) did also accept that the duty to act fairly may be infringed where the revenue treats similarly placed taxpayers differently, albeit each case must be considered in light of its own particular circumstances. Macpherson J, in *ex parte Unilever* at p 218 (citing Lord Mustill in *Matrix-Securities Ltd v. Inland Revenue Commissioners* [1994] STC 272), noted that abuse of power can be a matter of impression, the test being whether a jury of reasonable men and women would be perfectly persuaded and impressed that, in all the circumstances of the whole of the picture presented, the case did smack of such abuse. And Sir Thomas Bingham M.R. in *ex parte Unilever* (at p 230) stated that in the exercise of its discretion a tax authority was expected to ensure that "the legitimate expectations of the public were advanced, or that the Revenue's acknowledged duty to act fairly and in accordance with the highest public standards was vindicated, by a refusal to exercise discretion in favour of [a taxpayer]."

The South African Constitutional Court held in *S vs. Makwanyane* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) that the unequal treatment of similarly placed persons amounts to arbitrary action or decision making, and is incapable of providing a rational explanation. In the same regard the High Court of Kenya at Nairobi in *Republic v. Minister of Finance and 2 others ex parte Kenneth Kiplagat* Miscellaneous Civil Appeal 364 of 2007, held that arbitrary action or decision making cannot stand the test of fairness and is liable to be struck down.

I fully subscribe to the foregoing jurisprudence and hold that in the circumstances of this case, no acceptable grounds for the unequal treatment of the two taxpayers having been advanced, the defendant violated the claimant's rights under section 20(1) of the Constitution, such conduct being arbitrary, unlawful and unfair and therefore liable to be struck down.

On the right to be heard

It was BPP's contention that since the Taxation Act provides the CG with various methods of collecting taxes falling due the CG should have, before issuing demand notices LWB 11 and LWB 23, granted BPP an opportunity to explain

i) *why* it had accumulated those arrears
ii) *how* it was going to make good the debt

in order to enable the CG to appreciate BPP's financial position and consequently "ensure proportionality of the collection method".

It was also contended that by threatening to escalate enforcement measures "without further recourse" the CG unequivocally evinced an intention not to respect BPP's right to lawful and procedurally fair administrative action as envisaged under section 43 of the Constitution. I note here that the claimant uses interchangeably, with reference to escalation of enforcement measures, the words "decision" and "threaten", and, in my view, incorrectly. The correct impression the material correspondences portray is that of warnings (as opposed to decisions) that if certain steps were not taken the defendant reserved the right to escalate the enforcement measures.

In response to BPP's submission, counsel for the CG submitted that BPP already knew its liability and the reasons for the demand for its settlement as was evident from BPP's own self-assessment by which it established that it owed a sum of taxes in addition to the K201 million it still owed under Audit 1. As such, counsel submitted, circumstances had changed and a more drastic method was employed, within the powers of the CG and not unexpected of a tax collecting agency to employ against perennial tax defaulters.

The sworn statement of Mr Chikadya informs the court that in March 2018 following a request from the CG's office for a schedule of BPP's outstanding taxes for the period between February 2017 and March 2018, BPP did provide the required information to the CG, following which, on 23rd April 2018, under LWB 23, a demand for K710 781 667.29 was made. In response to the demand BPP explained how the arrears had accumulated and that BPP was not in a position to settle them as demanded due to its precarious financial position. BPP also requested to settle the arrears in installments and by withholding tax credits, which proposal the CG turned down and demanded full payment. This information, it is observed, is exactly that which BPP states the CG should have asked for before undertaking the enforcement i.e. *why* it had accumulated those arrears and *how* it was going to make good the debt. The court is also informed that a statutory appeal to the CG was rejected, after which the CG issued a Final Notice of Intent to Distrain. These facts clearly attest to the position that not only was BPP granted the opportunity to be heard, but was actually heard before the decision to undertake enforce measures was taken. I am therefore unable to accept BPP's argument that the CG did not accord it the right to be heard on this occasion.

It was the further submission for BPP that the CG should have given BPP an opportunity to be heard before choosing the method of collection and "deciding" to escalate enforcement measures, and having done so, furnished reasons why a particular method had been chosen. It was argued that in view of the CG's knowledge that BPP was not in a position to pay the sums demanded within the stipulated periods, and that if not allowed to settle by instalments, it could be forced out of business, and that triggering BPP's insolvency would, in the end, result in recovery of much less or no tax at all (in view of the likelihood that all proceeds of liquidation would meet preferential debts), acting reasonably, it was argued, entailed avoiding measures potentially capable of ejecting the taxpayer from business. It was submitted that the CG's demand notices, his refusal to allow settlement by installments, and execution by distress and garnishment were so unreasonable that no public authority properly directing its mind to the relevant facts and the law could have arrived at such decisions.

For the CG it was submitted that the power to recover tax espoused under section 107 of the Taxation Act and section 37 of the Value Added Tax Act, looked at holistically, does not yield the existence of a taxpayer's right to be heard before a tax liability is demanded or for reasons to be given for a particular chosen mode of collection. It was submitted that under section107 of the Taxation Act the CG is given wide discretion to demand the tax liability 'in the manner and at a place

prescribed' and under section 37(3) of the Value Added Tax Act that all that is required for companies is a written demand from the CG. It was further submitted that it was not incumbent upon the CG, under the tax laws, to assess the financial position of a tax payer before demanding a tax liability but inversely, that it should be for the taxpayer to raise such issues with the CG, for if the CG were to be treating taxpayers depending on their financial position a floodgate of impecunious taxpayers would be opened and there would be chaos, which would be difficult to manage, and that this would hamper tax collection generally. It was also counsel's view that the taxpayer should not be allowed to dictate when it should make payment or which mode of collection should be employed by the tax authority. Counsel disputed that the decisions to demand full payment of the taxes due are unreasonable since the taxes were due and payable; that on the contrary the longer the taxes remained unpaid the greater the harm on the public fiscus and the social amenities emanating therefrom which could not be quantified. It was counsel's submission, therefore, that the decisions impugned are not such as no reasonable public authority guided by the law could make.

It is not in dispute that the methods employed by the CG to collect the arrears are lawful. What BPP asserts, however, is that the CG should be faulted for having employed the most severe of the collection methods, namely, garnishment and distress as they interfere with various rights of the taxpayer such as the right to property guaranteed under section 28(2) of the Constitution, the right to economic activity under section 29 and legitimate expectation. Section 20(1) of the Constitution was, again, invoked for the principle of equality. It is submitted that since the principle of equality requires that the law must be applied completely and impartially regardless of the status of the person involved, the defendant may be said to act unlawfully if it discriminates against a particular taxpayer when it comes to the choice of tax collection methods. In addition, it is submitted, the tax authority is under a duty to act reasonably in choosing the tax collection method and enforcement and this entails ensuring proportionality of enforcement measures. Thus a fair balance must be struck between the public interest and the duty of the authority to collect tax on the one hand, and the taxpayer's fundamental rights, that the collection methods must be just and reasonable. Citing the decision of the Supreme Court of the Philippines in *Roxas eta al v. Court of Tax Appeals and another* (supra) it was submitted that the requirement for proportionality of enforcement measures stems from the realization that:

> "The power of taxation is sometimes called the power to destroy. Therefore it should be exercised with caution to minimize injury to proprietary rights of a taxpayer. It must be exercised fairly, equally and uniformly, lest the tax collector kills the "hen that lays the

golden egg". And in order to maintain the general public's trust and confidence in the Government this power must be used justly and not treacherously."

To determine the proportionality of the enforcement measures, it was submitted, the CG has a duty to consider all the circumstances of the taxpayer. Counsel then cited Mwaungulu J, as he then was, in *the 2013 case*:

> "One dominant development is that in certain circumstances, ... the revenue authority must call for a pre-action hearing where the citizen must bring all detail about the operation so that the revenue authority can determine the best way to ensure collectability of taxes. ... The Taxation Act provides the Revenue with many options. In my judgment, where there are many such options, the citizen can properly query the decision why the Revenue Authority opted for a particular or onerous method."

It is thus submitted that a decision regarding a tax collection method may be said to be unreasonable if it is disproportionate to the aim of collecting taxes or if made without considering the taxpayer's circumstances.

I wish to observe, at the outset, that the factual context of *the Roxas case* is quite different from that of the present, and to urge caution regarding the application of the dicta cited. The facts are that the Roxas brothers availed the government of the Philippines large pieces of land inherited by them from their grandparents thereby facilitating the government's constitutional duty to provide land to landless citizens. Through the transactions the Roxas partnership, Roxas y Compania, made a net gain which was reported for income tax purposes and the Commissioner of Internal Revenue contended, under these circumstances, that Roxas y Compania should be considered a real estate dealer because it engaged in the business of selling real estate, the business alluded to being the act of subdividing the lands and selling them to the farmers-occupants, on installment. The court disagreed, observing that:

> "It was the bounden duty of the Government to pay the agreed compensation after it had persuaded Roxas y Cia. to sell its haciendas, and to subsequently subdivide them among the farmers at very reasonable terms and prices. However, the Government could not comply with its duty for lack of funds. Obligingly, Roxas y Cia. shouldered the Government's burden, went out of its way and sold the lands directly to the farmers in the same way and under the same terms as would have been the case had the Government done it itself. For this magnanimous act, the municipal council of Nasugbu passed a resolution expressing the people's gratitude."

It was the court's position that it did "not conform with [the court's] sense of justice in the instant case for the Government to persuade the taxpayer to lend it a helping hand and later to penalize him for duly answering the urgent call."

It can clearly be observed that nothing of the nature of that case obtains in the present.

Section 43 of our Constitution provides:

> "43. Administrative justice
> Every person shall have the right to—
> (a) lawful and procedurally fair administrative action, which is justifiable in relation to reasons given where his or her rights, freedoms, legitimate expectations or interests are affected or threatened; and
> (b) be furnished with reasons, in writing, for administrative action where his or her rights, freedoms, legitimate expectations or interests are affected."

The provisions of Section 43 are similar to those of Article 47 of the Kenyan Constitution. In that regard I find the judgment of the High Court of Kenya in *Republic v Minister of Finance and 2 others ex parte Kenneth Kiplagat* (supra), (particularly paragraphs 51 to 59 thereof) to be quite instructive as regards the principle underlying section 43 of our Constitution, with regard to the matter at hand. It was held there that the exercise of administrative discretion and power by a tax authority affects the taxpayer's legal interests, and as such, the tax authority is expected to furnish reasons where its administrative action adversely affects such interests, and if the authority fails to do so, it is presumed that the decision is without justification or that the authority took into account concerns other than legitimate tax considerations, and in either case the decision is to be regarded as arbitrary, hence cannot stand the test of fairness and should be struck down.

Some correspondences were exchanged between the defendant and BPP in April and May 2018 over the tax arrears owed by BPP. One of these was LWB 23, the initial warning and demand dated 23rd April 2018, which warned of the possible escalation of enforcement measures if the demand was not complied with. In response BPP wrote LWB 25, dated 24th April, wherein the explanation as to how the arrears had accumulated and a proposal as to settlement were made. Then came LWB 28 dated 3rd May, advising of the non-acceptance of the proposal in LWB 25 for the reason that "a large part of the tax arrears was due and payable a long time ago", and that in the light of the foregoing MRA still expected payment of the tax arrears of K718 116 297.43 by 10th May 2018. There was again a threat that failure might drive the defendant to "escalate enforcement measures without further recourse". LWB 28 was followed by LWB 29, the statutory appeal by BPP earlier on mentioned, which was rejected under cover of LWB 30, and accompanied by a Final Notice of intention to Distrain which warned, "If we do not receive your payment or if you do not contact our office within the stipulated period, enforcement action will be taken without further notice to you."

Two questions stand to be addressed, firstly, whether or not under these circumstances BPP was afforded a hearing, and, secondly, whether or not reasons

were furnished for the decision or decisions? The answer to both, in my assessment, must be in the affirmative.

In regard to the first question, the reason is that in the correspondences referred to BPP was allowed to, and actually explained its position. In addition, I would take the view that by saying, in the Final Notice of intention to Distrain, that "... if you do not *contact our office within the stipulated period*, (my emphasis) enforcement action will be taken without further notice to you" the CG left it open for BPP to make further representations on the matter. In *Chirwa v. The State & National Compensation Tribunal* [2002-2003] MLR 33 the Supreme Court of Appeal held that if a party is adversely affected by any evidence, and is given the right to comment on the evidence, then the principle of right to be heard is complied with. Applying that thinking to this case I would hold that the opportunity granted to the claimant to make further representations, further to the exchanges aforesaid, satisfied the principle of the right to be heard. There is, in addition, mention in the sworn statement in support the fact that after the first enforcement was curtailed by an order of the court, the parties entered into out of court negotiations, implying that the defendant continued to receive the complainant's submissions.

And in regard to the second question, the reason for the decision was stated in LWB 28 to be that "a large part of the tax arrears was due and payable a long time ago". That some of the taxes had been overdue was actually known to BPP as is attested to in the initial sworn statement in support and in its own self-assessment. The deponent narrates a history dating back to1994. There is case authority, *Kambuwa v. Malawi Institute of Management* [2000-2001] 1MLR 190 (see in particular p 204), that where reasons for the decision are known there is no obligation to give reasons, that in such a case "The court would be loathe, and indeed unable to conclude that [the complainant] was not given an opportunity to be heard in terms of section 43 of the Constitution."

I am in the premises unable to accept the complainant's submission on the point.

Concerning the requirement for pre-action hearings prior to enforcement measures being taken, I take note that the learned Judge in *the 2013 case* was clear that this is applicable "in certain circumstances", and I do agree. To render it a universal requirement would, if nothing else, be unduly burdensome to the revenue collector and an unnecessary spanner in the spokes of the tax collection machinery, for practically every enforcement measure provided for could in some way be more onerous than some other. The demand in my view would turn out to be extravagant.

Account should also be taken of the fact that certain enforcement measures require pre-enforcement secrecy to avoid the movement and concealment or dissipation of

the assets targeted for execution. It is, for example, a legally accepted practice, in order to prevent removal and concealment and/or dissipation of chattels or funds, that a creditor maintains secrecy over his intention to distrain the debtor's goods or to garnishee the debtor's funds. A pre-action hearing ahead of such intention, therefore, could in some circumstances, be counter-productive.

Lord Templeman in *Reg. v. Inland Revenue Commissioners, ex parte Preston* [1985] 1 A.C. 835 at 864 stated that

> "... a taxpayer cannot complain of unfairness, merely because the commissioners decide to perform their duties under [statute] to make an assessment and to enforce a liability to tax. The commissioners ... must bear in mind that their primary duty is to collect, and not to forgive, taxes. And if the commissioners decide to proceed, the court cannot *in the absence of exceptional circumstances* decide to be unfair that which the commissioners by taking action against a taxpayer have determined to be fair. The commissioners possess unique knowledge of fiscal practices and policy." (emphasis supplied).

Simon Brown L.J. in *ex parte Unilever* at p 234 admonished that courts should only interfere with the revenue's decision to enforce a tax liability where the decision is "so outrageously unfair that it should not be allowed to stand." And according to Lord Wilberforce in *the Self-Employed* case, at p 635, it is not the duty of the court to involve itself in "the care and management of taxes, a function entrusted in the revenue". Or as Lord Roskill pointed out in the same case, at p 662

> "... that it is equally important that the courts do not by use or misuse of the weapon of judicial review to cross the clear boundary between what is administration, whether good or bad administration, and what is an unlawful performance of the statutory duty by a body charged with the performance of that duty".

This is consistent with the notorious principle that in conducting judicial review the court must not substitute its own decision for that of the body entrusted by the legislature to make such a decision. I am therefore unable to sustain the position advanced by the claimant under this head.

On Wednesbury unreasonableness

BPP also contended that the decision to distrain or garnishee is *Wednesbury* unreasonable, (i.e. that it is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it) as it could drive it out of business or trigger its insolvency, and thereby result in collection of less tax or no tax at all because granted BPP's financial position and inability to clear the arrears, due to inadequate cash flows, and that using withholding tax credits alone it had previously been able to clear the greater part of its tax liability, the CG's refusal to further use BPP's

withholding tax credits and to pay the remaining relatively smaller balance, comprising penalties and interest only by installments, as the principal debt had been cleared. Here it is to be recalled that in May 2018 BPP computed the amount of withholding tax credits owed to it as amounting to K200 039 792.00, which amount the CG's office confirmed, and that if this amount was to be used to reduce BPP's tax liability, the same would have dropped to K61 124 528.65 which BPP proposed to further reduce by 6 monthly installments of K10 187 421.44, to which proposal BPP received no response. These are developments occurring after the rejection of the appeal and the attachment of BPP's accounts (which the court suspended), and the status quo at the time of the commencement of this judicial review.

According to the supplementary sworn statement in support the defendant did not respond to this proposal but instead proceeded to garnishee the claimant's bank accounts. There being no acceptance the effect is that the defendant declined the proposal. What is the effect in law? I refer, once again, the Kenyan High Court decision in *ex parte Kiplagat* for the position that a decision made without furnishing reasons is an arbitrary decision. An arbitrary decision cannot meet the test of reasonableness, just as it fails the test of fairness. In the premises I hold that notwithstanding that the defendant would be entitled to undertake the enforcement action in question, to the extent, however, that the defendant failed to respond to the proposal before undertaking enforcement action, the defendant's decision being without reasons and therefore arbitrary, was, apart from being unfair, also *Wednesbury* unreasonable.

Related to this is the issue of the length of notice which I consider next.

On the length of demand notices

BPP submitted that the CG's decision to demand payment within such periods as 21 days, 7 days and 5 days are procedurally unfair and harsh considering BPP's precarious financial position which the CG is aware of. BPP's argument comes against the background that part of the tax debt could have been settled by way of withholding tax credits owed to BPP by the defendant which could have substantially reduced the debt, the balance of which the claimant had put forward a proposal for settlement, which proposal, as has been observed, was not attended to. Whilst accepting, on the authority of *ex parte Preston* (where the revenue cut short an argument with the taxpayer to obtain an immediate payment of tax, and was held to be within its managerial discretion) the defendant's argument that under section 107 of the Taxation Act the CG is given wide discretion to demand the tax liability

'in the manner and at a place prescribed' and under section 37(3) of the Value Added Tax Act that all that is required for companies is a written demand from the CG, within his managerial discretion, it seems to me that irrespective of the length of the notice, absent the defendant's prior objective assessment of the proposal put forward by the claimant, the issuing of the demand notices was procedurally unfair.

BPP asks this court for the following reliefs:

a) A declaratory order that in the exercise of discretionary powers under sections 105 and 107 of the Taxation Act and section 37 of the Value Added Tax Act which give the CG a plethora of methods for collecting tax, the CG is under the obligation to respect taxpayers' rights to administrative justice as guaranteed by section 43 of the Constitution of the Republic. I so declare.
b) A declaratory order that the obligation to respect taxpayers' rights to administrative justice requires that prior to making a decision regarding the method of collecting taxes due, the CG shall be under a legal obligation to grant the taxpayer an opportunity to be heard on the proposed collection method and the reasons for choosing a particular collection method. In my assessment each case must be determined on its own facts and circumstances. I do not therefore accept it to be a hard and fast rule.
c) A declaration that the decision of the CG [contained in the letter of 15th November 2017 aforesaid] requiring BPP to pay tax arrears of about K261 m and of 23rd April 2018 requiring about K701 million to be paid within 21 days lacked procedural fairness in that the CG did not give BPP any opportunity to be heard regarding the method of collecting the taxes due prior to the decision being made, and why a particular onerous method –payment in full – was chosen over less onerous ones. Having found that the CG did give reasons namely that the taxes had been due and payable much earlier and the arrears avoidable, and further that the defendant left room for further discussions if the claimant would be so minded, I am unable to make this declaration.
d) A declaration that the decision 'to escalate enforcement measures without any further recourse' to BPP should BPP fail to pay the tax arrears within the period stated in the letter was similarly procedurally unfair. Having held that there was no such decision but merely a warning to that effect such a declaration does not avail the claimant.
e) A declaration that the decision refusing to allow payment by installments and tax credits are *Wednesbury* unreasonable. I so declare.
f) A declaration that the decisions are in violation of BPP's legitimate expectations. I so declare.

g) A quashing order invalidating the decisions. To the extent that the defendant did not accord the claimant's proposal to settle the arrears any objective assessment, and therefore his decision arbitrary, the said decision is hereby quashed and it is directed that the defendant shall accord the proposal such objective assessment and give reasons for his decision.

h) A prohibiting order compelling the CG not to implement the decisions or taking any enforcement action on the basis of the decision. Here the directive under (g) is repeated.

i) A mandatory order compelling the CG to follow due process of the law by upholding BPP's rights to administrative justice in exercising his discretion over the method of collecting taxes from BPP. The directive under (g) again applies.

Regarding costs, each party having partially succeeded, it is ordered that each shall bear their own costs.

Pronounced in open court at Blantyre this 11th day of March 2019.

R Mbvundula

JUDGE