IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

REVENUE DIVISION

JUDICIAL REVIEW NUMBER 08 OF 2022

BETWEEN:

SOUTHERN BOTTLERS LIMITED CLAIMANT

AND

THE COMMISSIONER GENERAL OF THE

MALAWI REVENUE AUTHORITY DEFENDANT

CORAM: HONOURABLE JUSTICE JOSEPH CHIGONA

MR. NJOBVU AND MS NYEMBA, OF COUNSEL FOR THE CLAIMANTS

MR. ANTHONY CHUNGU, OF COUNSEL FOR THE DEFENDANTS

MR FELIX KAMCHIPUTU, COURT CLERK

ORDER

1. The Claimants, Southern Bottlers Limited, is a manufacturer of assorted drinks in the Republic of Malawi. As a manufacturer of such drinks, the Claimant is subject to payment of various taxes collected by the Defendant. Through a letter dated 16th June 2022, the Defendant communicated a decision refusing to rescind the demand for payment of MK1, 605, 003, 904.91, being principal sums and related penalties on Excise, VAT and Corporate Tax assessed against the Claimant as determined in a revised audit report dated 27th May 2022.
2. Being dissatisfied with such a demand of taxes, the Claimant commenced the present proceedings seeking the following reliefs:

- A declaration that the defendant's decision as contained in the dated 16th June 2022 refusing to rescind the demand for payment of MK1, 605, 003, 904.91 being principal sums and related penalties on Excise, VAT and Corporate Tax assessed against the Claimant based on the sales price of products, instead of the ex-factory price, without providing any reason, despite the Claimant illustrating that the Malawi Revenue Authority (MRA) and the Ministry of Finance had previously indicated that the ex-factory price, is unreasonable in the Wednesbury sense, arbitrary, made in bad faith and/or in violation of the Claimant's legitimate expectation to be accorded fair administrative treatment which is justifiable and to be furnished with reasons in writing action under Section 43 of the Constitution of Malawi.
- A declaration that the decision of the Defendant to insist on payment of the taxes calculated based on the sales price is unlawful for being in contravention of the second schedule of the Customs and Excise Tariff Order.
- A declaration that the decision of the Defendant to calculate excise based on the sales price and not the ex-factory price is discriminatory against the Claimant as a local manufacturer because a base comparable to the ex-factory price is used in calculation excise tax on importer's beverages, that is cost plus Freight.
- A like Order to Certiorari quashing the Defendant's decision demanding payment of MK1, 605, 003, 904.91 being principal sums and related penalties on Excise, VAT and Corporate Tax.
- Order staying the Defendant's decision/restraining the Defendant from implementing its decision requiring the Claimant to pay the assessed tax and related penalties.
- Further or other reliefs, Order for costs, a direction that the hearing of the application be expedited and all necessary and consequential directions.

3. The application is supported by a sworn statement by Stailess Staga Kaitane, who is the Head of Tax and Accounting at Castel Malawi Limited (CML).
4. During the hearing of the application, I ordered the parties to address the issue of alternative remedy in their submissions. I am grateful to both parties for their industrious submissions (including the Claimant's reply) on this point. I assure the parties that I took considerable hours perusing through their submissions.

DID THE CLAIMANT EXHAUST ALL AVAILABLE REMEDIES?

5. There is no dispute between the parties that an alternative remedy is a bar to judicial review[1]. Where there is an alternative remedy and especially where the law has provided a statutory appeal procedure, only in exceptional circumstances will a court grant permission to apply for judicial review[2]. However, it has to be mentioned that existence of an alternative remedy, in certain circumstances, will not act as a bar to judicial review proceedings. As stated in **Ex-parte Waldron**[3] by Glidewell LJ, the court has to assess whether an alternative remedy is effective and more suitable remedy through consideration of the following:

> " Whether the alternative statutory remedy will resolve the question at issue fully and directly; whether the statutory procedure would be quicker or slower, than procedure by way of judicial review; whether the matter depends on some particular or technical knowledge which is more readily available to the alternative appellate body; these are amongst the matters which a court should take into account when deciding whether to grant relief by way of judicial review when an alternative remedy is available."

6. My interpretation of the law, therefore, is to the effect that where the alternative remedy is available but due to other considerations will not assist in resolution of the issues, the court may in those circumstances grant permission to apply for judicial review.
7. Reverting to the present case, there is no dispute that section 121 of the Customs and Excise Act provides an alternative remedy to aggrieved taxpayers. Section 121 (1) provides as follows:

> "If a dispute arises between the owner of any goods and the Controller as to the amount of duty payable on those goods, the owner may, if he (or she) pays the amount demanded as duty by the Controller or furnishes security to the satisfaction of the Controller for the payment of that amount, within three months after the payment or furnishing of security, appeal to the special referee against such demand."

8. Section 121 of the Customs and Excise Act confers alternative remedy only in circumstances where the dispute is on the amount of duty payable. It is clear therefore that the alternative remedy provided under section 121 of the Customs and Excise Act is a specific remedy and not a general remedy. Where a dispute arises on other issues other than amount of duty payable, the alternative remedy in section 121 will not come to the aid of the aggrieved taxpayer. In **The State V The Commissioner General of the Malawi**

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[1] Malawi Communications Regulatory Authority V Makande and Another MSCA Civil Appeal No. 28 of 2013 (unreported).

[2] R-V-Birmingham City Council, ex parte Ferrero Ltd [1993] 1 ALL ER 530, 537.

[3] [1986] QB 824 at 852

Revenue Authority and Another Ex-parte Justice Dingiswayo Madise[4], the court had this to say:

> "There is no doubt that section 121 (1) confers upon the Special Referee jurisdiction over disputes as to the amount of duty payable. The provision confers no further jurisdiction on the Special Referee as to whether duty is payable or not. There is no ambiguity. The Special Referee's jurisdiction is clearly limited as in the italicized part of the section above, that 'as to the amount of duty payable..." If the Special Referee were to exceed those powers they would be acting outside their jurisdiction and unlawfully... Consequently, the 1st Defendant's submission that the Claimant has an alternative remedy under section 121 (1) of the Customs and Excise Act is not legally sustainable and fails."

9. The pronouncement by the court, which I am persuaded to follow, is therefore clear that section 121 (1) of the Customs and Excise Act provides for an alternative remedy where the amount of duty payable is in dispute and nothing more.
10. Reverting to the present case, the Claimant argues that the dispute between the parties is not on amount of duty payable. The Claimant submitted that the dispute is on other issues, of paramount importance, the formula on the calculation of Excise Tax. The Claimant is aggrieved by the decision of the Defendant to insist on payment of the taxes calculated based on the sales price instead of the ex-factory price. The sum of MK1, 605, 003, 904.91, based on the argument of the Claimant is as a result of the sales price and not ex-factory price. In my considered view, the dispute between the parties is on the amount of duty payable as clearly stipulated by the Claimant. It is clear that the Claimant is disputing payment of MK1, 605, 003, 904. 91 assessable duty. In my considered view, the issue of the formula is incidental to the disputed assessable duty.
11. The Special Referee when called upon to decide the correct amount of duty payable in these circumstances will definitely delve into issues of the formula used. I find it challenging, adopting the argument of the Claimant, that the framers of the law conferred on the Special Referee jurisdiction only to deal with clerical or arithmetical corrections. I have arrived at this decision since adopting the Claimant's interpretation will result in the Special Referee being responsible only for correction of figures in terms of assessable taxes. I do not think that was the intention of the framers of the law when they conferred on the Special Referee jurisdiction to deal with disputes on amount of duty payable. The issue at hand is not whether duty is payable or not. The issue is the amount of such assessable duty. Indeed, if the issue was on whether Excise duty is payable or not, definitely the Special Referee has no jurisdiction. The issue at hand is the amount of duty payable, which the Special Referee has the requisite jurisdiction under section 121 (1) of the Customs and Excise Act.
12. The alternative remedy under section 121 (1) of Customs and Excise Act was available to the Claimant. There are no exceptional circumstances for me to grant the Claimant

[4] Judicial Review Cause Number 1 of 2022, (HC, Revenue Division, Blantyre) (unreported)

permission to apply for judicial review in this matter. It seems to me that the Claimant understood the position of the law when they furnished security for the assessable taxes in compliance with section 121 of the Customs and Excise Act. Exhibit **SSK 22** (a letter from Managing Director, Herve Milhade) states as follows on this appeal issue:

> "... furthermore, MRA has advised us that if we are still dissatisfied with its determination, we should follow the appeal's procedure as prescribed under **Section 121** of the **Customs and Excise Act** after payment of the assessed duty or as indicated, furnish security for payment of the same, before lodging such an appeal....we have decided to immediately lodge an appeal against the assessments because, in our view, the base for calculating the excise tax is on the **ex-factory price** that excludes the cost of transportation and distribution as we have explained to you in previous correspondences.'

13. It is clear therefore that the Claimant understood the procedure under Section 121 of the Customs and Excise Act. In fact, the Claimant through Exhibit **SSK 22** proposed to provide a security in form of a bank guarantee in favour of MRA at 50% value of the excise tax claim amounting to MK687, 000, 000...The Commissioner General accepted the proposal put forward by the Claimant through a letter, exhibited as **SSK 23.** All these processes were undertaken in compliance with the dictates of section 121 of the Customs and Excise Act. The reason for abandoning the procedure after furnishing security is best known to the Claimant.
14. Further, I am of the considered view that even assuming that there was no alternative remedy, the present application cannot stand. Order 19 rule 20 (5) of the Courts (High Court) (Civil Procedure) Rules, 2017 provides that an application for judicial review shall be filed promptly and shall be made not later than 3 months of the decision. Order 19 rule 20 (6) of the Courts (High Court) (Civil Procedure) Rules, 2017 gives power to the court to extend time. Reverting to the present case, the decision the subject matter of the present proceedings was communicated to the Claimant on 10th February, 2022 and confirmed on 16th March, 2022. The Claimant filed the current application on 15th September 2022. This means that the application for judicial review was filed after the expiry of the prescribed 3 months' period as provided under the law. The Claimant in their reply (submissions in reply, paragraph 3.5) observed that this court has the power to extend the time as the defendant will not suffer any prejudice from the extension. I am at pains to accept the Claimant's argument. In the first place, the Claimant did not file any application for extension of time. The Claimant was supposed to obtain leave to file the present application out of time. I am of the considered view that the defendant has a right to respond to such an application. In the absence of such an application for extension of time within which to apply for judicial review, I find it unprocedural for me to entertain the present application for judicial review.

15. At this juncture, allow me to reiterate what I pronounced in **State (on the application of Thirsty Juice Company and Malawi Revenue Authority**[5]**,** that discussions that take place after the defendant has communicated its decision to a taxpayer do not operate as an extension of time within which an aggrieved taxpayer is supposed to file an application of present nature. Time does not stop running due to these discussions. In the present case, discussions that ensued after the decision was communicated to the Claimant in February 2022 did not extend time within which the Claimant was supposed to file an application for judicial review.
16. Based on the foregoing, I dismiss the present application for permission to apply for judicial review with costs to the Defendant.

MADE IN OPEN COURT THIS 6TH DAY OF FEBRUARY 2023 AT PRINCIPAL REGISTRY, REVENUE DIVISION, BLANTYRE.

JOSEPH CHIGONA

JUDGE

[5] Judicial Review Cause Number 3 of 2022, Revenue Division, (Unreported)