Malawi Judiciary

IN THE MALAWI SUPREME COURT OF APPEAL

MSCA CIVIL APPEAL NO. 29 OF 2011

(Being the High Court Civil Case No. 42 of 2011)

BETWEEN:

RAIPLY MALAWI LIMITED..... .....APPELLANT

-AND-

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

BEFORE:

THE HONOURABLE JUSTICE A.K.C. NYIRENDA SC, JA
THE HONOURABLE JUSTICE E.B. TWEA SC, JA
THE HONOURABLE JUSTICE DR J.M. ANSAH SC, JA

Msisha SC and Kanyenda, Counsel for the Appellant
Likomwa and Mangwera,Mrs, Counsel for the Respondent
Balakasi, Court Clerk
Banda Mrs, Personal Secretary

JUDGMENT

NYIRENDA SC, JA (Twea and Dr Ansah JJA, Concurring)

The background of this matter has not been articulated by either of the parties to the appeal. Perhaps that was felt not important or particularly relevant to what is on appeal because the appeal is more about construction of statute. We will give a very brief background. The appellant is a timber merchant dealing in the manufacture of plywood, block boards, flush doors, furniture and timber for both local and export market. In the business calendar years 2003- 2004 and 2004- 2005, the appellant made submissions to the respondent claiming export allowance pursuant to statutory entitlement, obviously to its understanding of the provisions. The claims were rejected by the respondent. Beyond rejecting the claims the respondent was of the view that the appellant had intended to mislead the respondent in order to get away with large sums of tax allowance. It was contended that for the year 2003-2004 the appellant claimed an allowance of K21, 333,771.00 instead of K2, 134,550.00. For the year 2004-2005 the appellant is said to have claimed K34, 681,708.00 instead of K2, 174,417.00. The allegations of fraud were based on the fact that while the allowances were meant to be export allowances and therefore based on exports only, the appellant based the calculations on its export sales as well as local sales.

Our impression is that in the appeal before us the appellant does not defend the allegations of fraud. If indeed the appellant submitted claims for export allowance based on export as well local sales, it would not be strange to us that the appellant would be silent on that matter. Export allowance cannot, by its term, be based on local business sales as well.

What is on appeal is how export allowance should be calculated and who has the authority to make the calculations. The appellant also submits that a practice has emerged over the years, accepted by the

respondent, on how export allowance is calculated. On that ground it is argued that the respondent and any relevant government authority is estopped from constructing and applying the relevant statutory provisions contrary to the practice which has been communicated and followed by traders for a considerable number of years. It is generally agreed though, from the appellant as well as the respondent, that the main issue on appeal is whether the export allowance is computed from "export sales" or from "taxable income".

The appellant maintains that on a reading of all relevant statutory provisions, coupled with the practice established by the respondent, export allowance should be calculated from export sales. It is argued that to calculate the allowance from taxable income would in fact result into a conflict between the relevant provisions in the Taxation Act Cap 41:01 and the Export Incentives Act Cap 39:04.

In order to best facilitate the discussion we should first set out all the relevant statutory provisions from the Taxation Act and the Export Incentives Act.

Section 36 (A) of the Taxation Act provides for "allowable deductions – export allowance" and states:

> (1) "There shall be allowed as a deduction an amount (hereinafter referred to as an "export allowance") determined under section 14 of the Export Incentives Act in respect of exports made during the year of assessment.
>
> (2) No deduction of an export allowance shall be made unless the Commissioner is satisfied that the taxable income from which the deduction is to be made has been determined in accordance with the provisions of this Act."

Section 28 (1) of the Taxation Act provides for allowable deductions in order to determine what then becomes "taxable income". It states:

> "For the purpose of determining the taxable income of any tax payer, there shall be deducted from the assessable income of such taxpayer the amounts of any expenditure and losses (not

being expenditure and losses of a capital nature) wholly and exclusively incurred by the taxpayer for the purpose of his trade or in the production of the income."

Section 11 of the Act explains what assessable income is and provides:

"The income of a person shall include the total amount in cash or otherwise, received by or accrued to or in favour of the person in any year or period of assessment from a source within or deemed to be within Malawi and his assessable income shall be that income excluding-

(a) any amount (not being an amount included in "assessable income" by virtue of any of the provisions of this Act) so received or accrued which is proved by the taxpayer to be of a capital nature; and
(b) any amount exempt from tax under this Act."

The Export Incentives Act provides, in Section 14, for income tax allowance on export sales and states:

(1) " A registered exporter shall, in every financial year during which he exports products of Malawi, be entitled to an income tax allowance of twelve per cent of his taxable income derived from his export sales.

(2) Upon the recommendation of the Committee, the Minister, after consultation with the Minister of Finance, may, by order published in the Gazette, revise the rate of income tax allowance prescribed in subsection (1)

"Export sales" is defined in Section 2 of the Export Incentives Act as *"a value determined from invoices, bills of lading, inward letters of credit, landing certificates and other commercial documents of products of Malawi exported directly from Malawi by a registered*

exporter in a financial year". The Taxation Act does not define "export sales".

The appellant first explains that it is all wrong to assume that "income tax allowance" in Section 14 (1) of the Export Incentives Act is the same thing as "export allowance" in Section 36 A (1) of the Taxation Act. We should deal with this point of view at the onset.

Section 14 of the Export Incentives Act is sorely about a tax allowance that an exporter would be entitled to when tax is being computed on his export sales. In other words the provision is about a deduction that should be made on the tax that an exporter would be expected to pay on his income from exports.

Section 36 A of the Taxation Act is in Division 2 of the Act. That Division deals with deductions to be made to taxpayer's income in order to determine taxable income. In that regard Section 36 A relates to and deals with a particular deduction on exports. Section 36 A makes specific reference to section 14 of the Export Incentives Act. What Section 36 A says and does is to recognise and acknowledge the deduction (allowance) provided for in section 14 of the Export Incentives Act. In the words of Section 36 A "there shall be allowed as a deduction, in respect of exports, an amount determined under Section 14 of the Export Incentive Act. In other words the deduction on tax on exports in Section 36 A is that provided for by Section 14 of the Export Incentive Act. It could not have been made any clearer that Section 36 A of the Taxation Act refers to the same allowance provided for by section 14 of the Export Incentives Act.

The other way of looking at the two provisions is that Section 36 A of the Taxation Act does not provide for any allowance. It is Section 14 of the Export Incentives Act that provides for the allowance. All

that Section 36 A does is to recognise the allowance provided for in Section 14 of the Export Incentives Act as an acceptable deduction under the Taxation Act in respect of exports. So much for repeating, if only to make home the point that Section 36 A of the Taxation Act and Section 14 of the Exports Incentives Act are about the same allowance in respect of exports. The real question remains; how is the allowance to be determined. As we observe above this is the focus of the appeal.

The appellant's position is that export allowance provided in Section 14 of the Export Incentives Act should be calculated from "export sales" and not from "taxable income". The appellant submits and we quote specifically from the written submissions in that regard:

> "It is submitted that an examination of the relevant provisions of the two statutes will show that the intention was to use "export sales" as the basis for calculating the export allowance. There is an apparent conflict in the provisions of the two Acts which requires resolving.
>
> It is submitted that in so far as section 36 A (2) of the Taxation Act requires that the allowance permitted under section 14 of the Export Incentives Act come only out of taxable income and section 14 appears to prescribe a different pool from which the allowance is to be deducted, there is an apparent conflict".

The respondent sees no conflict. It is argued that the two provisions are in fact complementary and were meant to work one with the other.

The key words that should resolve any misunderstanding of the two provisions are in Section 14 (1) of the Export Incentive Act which say *"income tax allowance of his taxable income derived from his export sales".* As we state earlier, it is Section 14 (1) that creates the allowance in question. Section 36 A of the Taxation Act does not create any allowance. It is also correct to say it is Section 14 (1) that provides for how the allowance is to be calculated. Section 36 A does not provide any formula for the calculation of the allowance. It

is Section 14 (1) that makes reference to "taxable income" which is merely replicated in Section 36 A (2).

As regards what Section 14 (1) provides as the basis for calculating the allowance, we are more than clear in our minds and we believe there should be no splitting of hairs in that respect. The section talks about an allowance of the tax payer's "taxable income" and the taxable income would be determined (derived) from "export sales".

In the clearest and literal reading of Section 14 (1) the tax allowance is to be calculated from taxable income and not export sales. As to what is export sales Section 2 of the Export Incentives Act defines them as:

> "A value determined from invoices, bills of lading, inward letters of credit, landing certificates and other commercial documents of products of Malawi exported directly from Malawi by a registered exporter in a financial year."

"Export sales" is therefore the gross sales value of exports before consideration of any expenses incurred by the exporter merely by looking at invoices, bills of lading and related documents. There is no definition of "export sales" in the Taxation Act. On the other hand "taxable income" is only defined in Section 2 of the Taxation Act as:

> "Income as defined in section 28 and is assessable income after deduction of allowable deductions."

Section 28 (1) of the Taxation Act in turn provides:

> "For the purpose of determining the taxable income of any taxpayer, there shall be deducted from the assessable income of such taxpayer the amounts of any expenditure and losses (not being expenditure and losses of a capital nature) wholly and exclusively incurred by the taxpayer for the purpose of his trade or in the production of the income"

It would, therefore, obviously make a significant difference if an allowance was calculated on the basis of "export earnings" as opposed to "taxable income". An exporter would get a bigger allowance if the calculation was based on export sales and lesser if

the calculation was based on taxable income. For that reason, we believe, it was deliberate that Section 14 (1) restricted the allowance, which is meant to be an incentive allowance, to be calculated on taxable income. What should not be lost is that the allowance in Section 14 (1) is in addition to the allowances provided for in Section 28 (1) of the Taxation Act. It is a further incentive to exporters.

The appellant next opines that the Export Incentives Act is under the jurisdiction of the Council and the Committee established under Section 4 thereof. It is argued that the statute allows the Council and not the Commissioner to grant allowances specified in the Act; that the role of the Commissioner is to receive decisions of the Council and to implement them. The Commissioner being referred to is the Commissioner General appointed under section 17 (1) of the Malawi Revenue Authority Act, Cap 39:07. The Commissioner, as the Chief Executive of the Malawi Revenue Authority, has the general responsibility to administer and enforce laws and provisions of the Taxation Act among others. It is further submitted that it is not the role of the Commissioner to question the construction of the provisions of the Exports Incentives Act as made by Council.

This statement of law and fact is a correct analysis of the relationship between the two pieces of legislation. No one could argue that the Commissioner has authority to challenge that which the Council has determined under the Export Incentives Act. We would further agree that the role of the Commissioner is merely to implement that which the Council has determined. The fact is that the Commissioner does not make a determination under the Export Incentives Act. The base upon which the allowance in question rests has already been determined by the Council. The percentage of the allowance is determined by the Minister responsible upon recommendation of the Committee established under Section 4 of the Export Incentives Act from time to time and is now settled at twelve per cent.

We agree with the appellant that the responsibility of the Commissioner, as indeed provided for under Section 36 A (2) of the

Taxation Act, is merely to implement that which has already been determined. The way to understand the relationship between Section 14 of the Export Incentives Act and Section 36 A of the Taxation Act is that Section 36 A (2) could literally be ignored without it making any difference to the process of calculating the allowance in question. We understand Section 36 A (2) as merely compelling the implementing authority to comply with Section 14 (1) of the Export Intensive Act when calculating the allowance. Such implementing authority would have to make sure that the taxable income of an exporter has been determined first before calculating the allowance. Otherwise it would not be possible to calculate the same. Such authority just happens to be the Commissioner by operation of the two Acts. The Commissioner is merely a conduit, shall we say, to realising that which section 14 (1) requires.

As observed earlier Section 36 A (2) is in fact superfluous. The Commission might as well stop at determining taxable income within his authority under the Taxation Act. An exporter, desirous of getting his allowance under section 14(1) of the Export Incentives Act, will be compelled to look for the Commissioner to get the allowance.

This says to us, in the scheme of the statutes and if honestly approached, there is no conflict. We agree that if there was any conflict we would not have hesitated to resolve the conflict so that the taxpayer is not prejudiced, see **Estate Lambat v Blantyre Municipality** (1961-63)2 ALR (Mal) 513 and **Re Tayub (1923-60)** 1ALR(Mal)79. We maintain, however, that there is no conflict in the operation of the statutes given their apparent meaning. This is to agree with **Duport Steels Ltd v. Sirs** [1980] 1 WLR 142, that where the meaning of statutory words is plain and unambiguous, it is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to the plain meaning.

It is further the appellant's case that the respondent is estopped from using a different formula for calculation of the allowance other than the formula that has been used the past twenty years. It is

contended that since 1988 both the Income Tax Department and subsequently the Malawi Revenue Authority were agreed in calculating the allowance based on export sales. As observed by the Senior Resident Magistrate, as Special Arbitrator, and subsequently the High Court, this assertion is without supporting evidence. The appellant refers to publications by two Government Parastatal Institutions, the Malawi Investment Promotion Agency and the Malawi Export Promotion Council, to further its position. We have seen copies of the publications. We could have made a number of observations about them but we believe two would suffice.

The first observation is that the two institutions could not have been speaking for the Commissioner under the Taxation Act or the Council, under the Export Incentives Act. Further, what is in the publications is how the two institutions understood and interpreted the relevant statutory provision. As mentioned above there is no evidence that the respondent has in fact been calculating the allowances in the manner publicised by the two institutions.

The second observation is that the Commissioner's mandate, functions and responsibilities are defined by statute. So is the mandate, function and responsibility of the Council under the Export Incentives Act. What these institutions can do and how they are to go about their business is also clearly defined by statute. Ultimately it is about the correct interpretation of the relevant statutes that must be upheld.

It is quite possible, and we have said we do not have proof thereof, that the two institutions have been misguided in their application of the statutes. That cannot compel us to ignore the correct interpretation of the statutes and uphold a misdirection. The doctrine of estoppel has no application where, for example, a particular interpretation of a statute has been communicated to a subject by an official of the government, relied upon by that subject to his or her detriment and then withdrawn or changed by government. In such a case a tax payer, for example, may seek to invoke the doctrine of estoppel. Such attempt would be in vain not

because such representations give rise to an estoppel that does not bind the state, but rather because no estoppel can arise were such representations are not in accord with the law. It is said although estoppel is now a principle of substantive law, it had its origins in the law of evidence and as such relates to representations of fact. It has no role to play where questions of interpretation of the law are involved, because estoppel cannot override the law; see **Maritime Electric Co. v. General Dairies Ltd** [1937] AC 610; **MNR v. INLAND Industries Ltd**., 72 DTC 6013, **Stickel v. MNR,** 72 DTC 6178; **Granger v. C. E. I. C**. [1986] 3 FC 70.

We are, thus far, unable to sustain any aspect of the appeal. In the premises, we would dismiss the entire appeal. Costs are for the respondent.

Pronounced in open Court at Blantyre this 28th day of August 2014.

SIGNED: .....

THE HONOURABLE JUSTICE A.K.C NYIRENDA SC, JA

SIGNED: .....

THE HONOURABLE JUSTICE E.B. TWEA SC, JA

SIGNED: .....

THE HONOURABLE JUSTICE DR J.M. ANSAH SC, JA