IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY

REVENUE DIVISION

REVENUE CAUSE NO. 4 OF 2020

VICTORIA PHARMACEUTICALS LIMITED ..... CLAIMANT

AND

THE ATTORNEY GENERAL
(MINISTRY OF FINANCE) ..... 1ST DEFENDANT

MALAWI REVENUE AUTHORITY ..... 2ND DEFENDANT

CORAM: HON. JUSTICE R. MBVUNDULA
N Alide, Counsel for the Claimant
Maulidi, Counsel for the 1st Defendant
Kambumwa, Counsel for the 2nd Defendant
Chimang'anga, Official Interpreter

RULING

This ruling is made on an *inter partes* application brought by the claimant seeking an order of an injunction essentially to stop the 2nd defendant from claiming certain taxes from the claimant. The application is vehemently opposed, particularly on the part of the 2nd defendant.

The case for the claimant is contained in a sworn statement by Faruk Gani, Chairman of the Board of Directors of the claimant. For the 2nd defendant is a sworn statement by Kingsley Chibwana, who identifies himself as a Team Leader in the Customs &

Excise Division, Technical Department. There are also skeleton arguments on both sides.

According to Mr Gani the claimant entered into an arrangement with the Malawi Government whereby the claimant was to set up a plant in Malawi for the manufacture of disposal syringes and various kinds of pharmaceuticals to be supplied to Central Medical Stores Trust (CMST) which, according to the claimant, and is not disputed, is a procurement agent for the Ministry of Health. In that regard the claimant and the Government entered into a Memorandum of Understanding (MOU), dated 27th June 2011, under which the claimant was to enjoy, *inter alia*, a five year corporate tax holiday. Clause 7 of the MOU (exhibit "FG 1" to the sworn statement of Mr Gani) reads:

> *"7. **INCENTIVES GRANTED TO THE COMPANY***
>
> *7.1 As a way of incentives, the Government shall ensure that:*
>
> *(i) the company shall benefit from the use of Industrial Rebate Scheme to import the raw materials duty free. This shall be implemented by the Malawi Revenue Authority.*
>
> *(ii) all machinery and plant imported by the Company for this purpose shall be duty free except parts.*
>
> *(iii) two motor vehicles for direct use of the Company, one saloon and one 4 by 4, shall be cleared duty free but shall remain under the control of the Malawi Revenue Authority.*
>
> *(iv) there is zero rating of Value Added Tax.*
>
> *(iv) the Company should at the moment benefit from allowable deductions provided for new investors in the Taxation Act. (sic)*
>
> *(v) the company shall benefit from a 5 year tax holiday.*
>
> *7.2 The Government shall ensure that all the concerned Government Ministries and Departments, including the Malawi Revenue authority are duly informed on the incentives granted herein."*

In regard to the MOU, Mr Chibwana underscores the fact that the MOU was clear that the tax holiday was for 5 years from 27th June 2011 and that it was to expire on 27th June 2016.

It is common ground that the tax incentives were to be implemented by the 2nd defendant.

After the MOU was executed the claimant set up a manufacturing plant following which, on 13th February 2013, the claimant entered into a Framework Agreement (FA) with the CMST ("FG 7"). The FA also contained a provision for tax incentives. The FA was subsequently revised, the revised FA also containing similar tax incentives (clause 17). Mr Chibwana makes the point, regarding the FA entered into by the claimant and the CMST, that its terms were contrary to those of the MOU in that the said FA, which was entered on 13th February 2013, the parties provided for a 5 year tax holiday from that date, notwithstanding that the MOU granted a 5 year tax holiday from 27th June 2011. Mr Chibwana states that the position that under the MOU the tax holiday was for 5 years from 26th June 2011 never changed. He goes further to admit that after the expiry of the MOU on 26th June 2016 the 2nd defendant started demanding tax from the claimant as, so he contends, there was nothing legally stopping the 2nd defendant from doing so.

Mr Chibwana also underscores the fact that the FA was not signed by the 1st defendant.

According to Mr Gani, following the signing of the FA, the claimant was enjoying all the tax benefits under the MOU and the FA and that the 1st defendant through the Secretary to the Treasury advised the 2nd defendant, through letter dated 25th March 2014 (exhibit "FG 3") to allow the claimant to import the required raw materials under Customs Procedure Code (CPC) 445. The material terms of FG 3 read:

> *"I write to convey approval to allow Victoria Pharmaceuticals Limited to import the required raw materials and equipment specified in the Memorandum of Understanding under Customs Procedure Code 445."*

The approval is clearly, as Mr Chibwana contends in his sworn statement, with reference only to clearance of the raw materials and equipment specified in the MOU as FG 3 makes no reference to the FA as the claimant asserts. In this regard Mr Chibwana specifically points out that the claimant's goods were being cleared duty free pursuant to the MOU which was still in force as it was to expire on 26th (elsewhere 27th)) June 2016.

Mr Gani states that thereafter the CMST breached the terms of the FA by under-procurement, which led to the FA being renegotiated with the involvement of the Ministry of Finance and that this led to the claimant and CMST renegotiating the

quantities of the items to be procured, the period for such procurement as well as the prices, and that a revised FA was to be drafted by the Attorney General in conjunction with the claimant's lawyers. He further asserts that the revised FA was approved by the Secretary to the Treasury (ST) who advised the CMST to have it executed. A copy of a letter from the ST to that effect dated 30th March 2016 is exhibited to the sworn statement and marked "FG 6". The material part of "FG 6" advises of the grant of approval of the revised FA and permits the parties to execute it and furnish the Ministry of Finance with a copy of the signed agreement.

Clause 17.2 of the revised FA (exhibit "FG 7") reads as follows:

> *"17.2For capital equipment and necessary raw materials imported, the Supplier shall for seven (7) years period from the date this agreement is signed enjoy a tax-holiday under suspension of duty in terms of Customs Procedure Codes 405, 445 and 490 of the Customs and Excise (Tariffs) Order and under Industrial Rebate Scheme."*

The date of the revised FA is 12th April 2016 i.e. within the validity period of the MOU as the MOU was to expire on 26th June 2016.

It is Mr Gani's observation that whilst the MOU provided for a five year tax holiday and the revised FA provided for a seven year tax holiday, among other tax incentives, there never was any suspension or a renegotiation of the same and that despite the revised FA providing for the waiver of duty on imported raw materials and equipment to be supplied under the revised FA the 2nd defendant has been demanding payment of duty and other taxes from the claimant pertaining to such raw materials and equipment. Mr Gani states that the claimant's expectation was that the 1st defendant would advise the 2nd defendant to abide by the provisions of the revised FA. In this regard the claimant wrote the 2nd defendant for extension of the authority to clear the raw materials and equipment duty free but the 2nd defendant advised the claimant to itself seek the said authority from the from the 1st defendant which the claimant did by its letter dated 26th September 2016 (exhibit "FG 8"). Mr Gani states that in response thereto the ST by his letter dated 5th October 2016 ("FG 9") advised the claimant that the Ministry of Finance was not involved in the negotiations leading up to the revised FA and that the same was not signed by the Ministry, and that on 8th September 2016 the ST also wrote to the 2nd defendant in like terms (FG 10). It is worthy to reproduce the operative parts of FG 9 and FG 10.

In FG 9 the ST wrote to the claimant:

*"We notice in your letter that you have made reference to negotiating this new Agreement with **"Guidance"** from the Ministry of Finance, Economic Planning and Development.*

Kindly note that, all agreements containing fiscal issues are supposed to be vetted by this Ministry before they are signed. This agreement does not seem to have any signature from the authorities of this Ministry as required nor do we have records indicating that we were involved in the negotiations. Kindly provide us with the evidence that this agreement was vetted by this Ministry."

In FG 10 the ST wrote to the 2nd defendant:

"We write to advise that we are aware of the Framework Agreement between Central Medical Stores Trust and Victoria Pharmaceuticals Industry Limited regarding the supply and purchase of pharmaceuticals. The Treasury, however, never endorsed any exemption of duties or any taxes on imports by Victoria Pharmaceuticals in relation to the Framework Agreement.

We thus, advise you to treat any imports by Victoria Pharmaceuticals in accordance with the applicable customs laws."

Mr Gani states that following the foregoing position taken by the ST the claimant took up the matter up with the Attorney General but the Attorney General did not respond. Subsequently, however, the ST, by letter dated 16th March 2016 (FG 14), addressed to the 2nd defendant, granted authority for the claimant to clear the materials and equipment then already imported into the country by the claimant. In a subsequent letter the Ministry of Finance informed the claimant that its endorsement of the revised FA was only in respect of changes in quantities to be supplied to CMST but did not to extend to tax incentives mentioned therein. In this connection the ST advised the claimant to explore registration under the Industrial Rebate Scheme "FG 15". Following this advice, so states Mr Gani, the claimant applied and got approval from the 2nd defendant, and registered for Industrial Rebate Scheme under CPC 4000.402 and 4071.402. The approval was granted on 23rd April 2018 ("FG 18"). Mr Chibwana however asserts that despite the said advice being made, the same was erroneous because CPC 4000.402 and 4071.402 apply to Fertilizer Manufacturing Industries category and Medicaments and Pharmaceutical Manufacturing Industries category, whereas the claimants are in the Medical Apparatus Manufacturing Industries category which falls under CPC 4000.401. Mr Chibwana's explains that applying CPC 4000.402 to the claimant's case would have

contravened the provisions of the Eighth Schedule, Industrial Rebate, "Appendix A" as amended under Government Notice No. 10 dated 5th June 2015, exhibited to his sworn statement and marked "KC 1", which placed the Medical Apparatus Manufacturing under CPC 4000.401. Mr Chibwana points out that under CPCs 4000.402 and 4071.402 all taxes, including VAT are exempted whereas under CPC 4000.401 (which applies to the claimant's industry category, namely, Medical Apparatus Manufacturing Industries) VAT is payable.

Mr Chibwana further informs that when approving registration under industrial rebates schemes what is approved is the industry and not a CPC hence, contrary to the claimant's assertion that they had approval under CPC 4000.402, the claimant was actually granted approval under the Medical Apparatus Manufacturing Industries which falls under CPC 4000.401 (where VAT is payable). In this connection Mr Chibwana points out that, in fact, FG 18, the letter of approval, does not mention a CPC but rather an industry, namely, Medical Apparatus Manufacturing Industry.

Mr Chibwana does not stop there. He goes further to explain that even if the claimant's approval was under CPC 4000.402, it would have been impossible to clear the materials under CPC 4000.402 because the materials are not listed under that CPC but under CPC 4000.401. Mr Chibwana therefore concludes that the claimant is liable to pay VAT on their raw materials as the same is a requirement of the law – KC 1 - regardless of the agreement they allegedly had with the 1st defendant.

The contentions by Mr Chibwana regarding the industry categories and application of CPCs are not contested by the claimant.

The claimant complains that despite the approval of the revised FA when the claimant's raw materials arrived in the country, the 2nd defendant refused to clear them under the aforesaid CPCs but opted to clear them under CPC 401 where VAT was payable. The claimant then requested that the goods be cleared under CPC 490 but the 2nd defendant again refused to do so. The sworn statement does not state why CPC 490 was preferred at this stage. However in a letter from the claimant to the 2nd defendant dated 1st October 2019 ("FG 19") the claimant gave the fact that they had previously cleared under CPC 490 as the basis for their request to clear under the same CPC. By letter dated 11th November 2019 ("FG 20") the 2nd defendant rejected the request made in "FG 19". In order to fully appreciate the reasons the material parts of "FG 20" are hereunder reproduced:

"Kindly be advised that pursuant to the provisions of the Eighth Schedule to the Customs and Excise (Tariffs) Order, the company is registered to operate under Industrial Rebate Scheme in the ***Medical Apparatus Manufacturing Industry****. Victoria Pharmaceutical Industry Limited being a medical apparatus manufacturing industry is therefore covered under Appendix A of the Eighth Schedule – Part I that covers CPC 4000.401 and CPC 4071.401*

Please note that the Industry cannot clear its raw materials under Part II to Appendix A of the Eighth Schedule CPC 4000.402 and CPC 4071.402 which according to Government Notice No. 10 of 5th June. 2015 only covers Fertilizer Manufacturing Industry and Medicaments and Pharmaceutical Manufacturing Industry.

In view of the above you are therefore advised to finalise clearance of all raw materials approved and gazetted under Medical Apparatus Manufacturing Industry under Appendix A of the Eighth Schedule – Part I."

I have examined the provisions of the Order referred to i.e. The Customs and Excise (Tariffs) (Amendment) Order, 2015 published as a Government Gazette Supplement being Government Notice No.10 of 2015, dated 5th June 2015, exhibit KC 1 to the sworn statement of Mr Chibwana, and satisfied myself that the representations made in FG 20 are correct. The relevant provisions are under Order 2, paragraphs (m) and (n) at page 125 of the Gazette Supplement. It is also clear that under Appendix A of the Eighth Schedule – Part I Medical Apparatus Manufacturing Industry VAT is Payable at 16.5% (see page 141 of the Gazette Supplement). In the premises I am inclined to agree with the position herein advanced by Mr Chibwana on the issue.

Mr Gani states that subsequently by letter dated 28th February 2020 ("FG 21"), apparently in response to an application by the claimant for renewal of its registration under the Industrial Rebate Scheme, the 2nd defendant advised of cancellation of the said registration "in accordance with the Eighth Schedule to the Customs and Excise (Tariffs) Order" … because, according to the letter, the 2nd defendant's verification had proved that the claimant did not have a valid tax clearance certificate at the time the renewal was sought. The defendant went on to advise that as a result of the cancellation of the licence the claimant would cease to operate under the Industrial Rebate Scheme and would therefore be expected to pay full duties on all imported raw materials. The claimant faults the 2nd defendant for exposing the claimant to payment of duties and taxes due to the refusal by the Ministry of Finance to extend the tax incentives under the revised FA and the cancellation by the 2nd defendant of

the claimant's Industrial Rebate registration resulting in some difficulties being faced by the claimant to import raw materials and equipment, thereby affecting the claimant's ability to fulfil its obligations to CMST under the revised FA.

The claimant complains that as matters stand, the claimant is exposed to payment of duties as a result of the defendant's (thought the Ministry of Finance) refusal to extend tax incentives under the revised FA and also due to the 2nd defendant's cancellation of the claimant's Industrial Rebate registration which has resulted in difficulties being faced by the claimant in its bid to import raw materials and equipment, in turn affecting the claimant's ability to fulfil its obligations under the revised FA. The claimant also laments that the 2nd defendant continues to refuse to issue a Tax Clearance Certificate to the claimant due to outstanding tax issues, which the claimant challenges in light of the tax holiday under the revised FA, which development has rendered it impossible for the claimant to bid for tenders since every bidder must produce a Tax Clearance Certificate. The claimant further laments that its business has generally been negatively affected as a result of the defendant's continued refusal to clear its raw materials duty free and has had to suffer demurrage charges often due to delayed clearance of the same.

Two issues must be addressed here. The first is whether the 1st and 2nd defendants (the latter as the implementing agent of the 1st defendant) would be legally compelled to honour the tax incentives, waivers and/holiday provided for in the revised FA, or, for that matter, even the initial FA. The second issue is whether the non-issuance of the Tax Clearance Certificate is bad at law.

Regarding whether the 1st and 2nd defendant would be legally compelled to honour the tax incentives, waivers and/holiday provided for in the revised FA, it is submitted for the defendants that the defendants cannot be bound on the ground that the 1st defendant did not sign the FA. The defence is here invoking the doctrine of privity of contract. The case of *Les Range v Granco* [1934] 2 K.B. 394 is cited as authority.

The general doctrine of privity is to the effect that no-one is to be bound by the terms of a contract to which he is not an original party. The doctrine has long endured since the cases *Price v Easton* (1883) 4 B & Ad 433 and *Tweddle v Atkinson* (8161) 1 B & S 393. In *Chitty on Contracts*, Twenty-Sixth Edition, par 1330, page 823, it is expressed as follows: "The doctrine of privity means, and means only, that a person cannot acquire rights, or be subjected to liabilities, *arising under* a contract to which he is not a party." I would, in view hereof, be incline to agree with the submission

that the defendant cannot be bound by the terms of the revised FA because the 1st defendant is not a party to it.

The following other considerations would persuade me to be firmly of that view.

Firstly, that the letter approving the revised FA makes no mention of, nor does it approve, any tax incentives.

Secondly, as was mentioned earlier, that both the original and the revised FA were drawn up and executed during the duration of the MOU, which MOU did also contain tax incentives, the two sets of tax incentives being contradictory. It would be odd and absurd, in my opinion, that the 1st defendant would have approved discordant incentives as between the FAs, on the one hand, and the MOU, on the other.

Thirdly, the approval made by the 1st defendant in FG 3 for the claimant to import materials and equipment duty free was expressly made pursuant the MOU and not the FA.

Fourthly, it will be noted that according to paragraph 12 of the sworn statement of Mr Gani the revised FA was entered into because the CMST breached the terms of the FA by under-procurement, and that the FA was renegotiated with regard to *the quantities of the items to be procured, the period for such procurement as well as the prices*. Had tax incentives mattered, as important as they would seem, Mr Gani would, without fail, have stated so.

Fifthly, it is of very doubtful legality that the Ministry of Finance would delegate the power to grant tax incentives and holidays through the agency of a third party, let alone through an entity of the nature of CMST which, as the claimant acknowledges, is only a procurement agency of the Ministry of Health, which lacks fiscal authority.

I now consider whether the non-issuance of the Tax Clearance Certificate is bad at law. Briefly, the complaint is that the 2nd defendant continues to refuse to issue a Tax Clearance Certificate to the claimant due to outstanding tax issues, which the claimant challenges in light of the tax holiday under the revised FA.

Having already faulted the claimant's reliance on the revised FA as the basis of his tax claims, I am of the view that the complaint's claim is baseless, particularly there being nothing to show that the claimant has fulfilled the prerequisites for it to be to be granted a Tax Clearance Certificate are not before the court.

Upon the foregoing considerations, I form the view that if an interlocutory injunction were to be granted herein it would not endure at the conclusion of judicial review. As such the balance of justice against granting the same.

I am also of the view that in the event, however, that the judicial review would go in the claimant's favour, damages would be an adequate remedy, as any unduly paid taxes would be refunded to the claimant under the scheme provided for refunds under section 96(1)(b) of the Customs and Excise Act which provides:

> *"96. Suspensions, rebates, remissions and refunds of duty*
>
> *(1) The Minister may, by regulations made under section 175 and subject to such conditions as he may prescribe—*
>
> *(a) ...*
>
> *(b) grant a rebate, remission or refund of the duty otherwise payable, or already paid, on such goods, in such circumstances or to such classes of persons as he may specify, and such suspension, rebate, remission or refund may be granted with retrospective effect."*

The application for an interlocutory injunction is therefore dismissed with costs.

Made at Blantyre this 13th day of August 2020.

R Mbvundula
JUDGE