REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JR CASE NO. 313 OF 2011

REPUBLIC……..APPLICANT

VERSUS

COMMISSIONER OF CUSTOMS SERVICES……...1ST RESPONDENT

COMMISSIONER OF INVESTIGATION &

ENFORCEMENT…….2ND RESPONDENT

KENYA REVENUE AUTHORITY…….3RD RESPONDENT

EX-PARTE

CANDY KENYA LIMITED

JUDGMENT

1. The ex-parte Applicant, Candy Kenya Limited is a limited liability company registered in Kenya. Its core business is the manufacture of candies, toffees and confectionery sweets for domestic use and export.

2. The 1st and 2nd respondents are Kenya Revenue Authority's Commissioner of Customs Services and the Commissioner of Investigation and Enforcement. Kenya Revenue Authority which is the 3rd Respondent is established under Section 5(1) of the Kenya Revenue Authority Act, Cap 467 to collect and receive revenue on behalf of the Government of Kenya. Among the Acts of Parliament that are enforced by the 3rd Respondent are the East African Community Customs Management Act (EACCMA) and the Customs Excise Act, Cap 472. The 4th Respondent is the Minister of Finance now known as the Cabinet Secretary for Finance.

3. Through the Notice of Motion application dated 8th December, 2011 the Applicant prays for orders as follows:

> **"a) An order of CERTIORARI do issue to remove into this honourable court and quash the 2nd Respondent's decision contained in the agency notice dated 30th November 2011 declaring the Branch Manager, Fina Bank, Kimathi Street an agent of the ex-parte Applicant and requiring the said Agent to pay to the 2nd Respondent Kshs. 10,582,232/- as custom import duties due from the Applicant.**
>
> **b) An order of PROHIBITION do issue to prohibit the 1st - 3rd respondents from acting or in**

any manner dealing with the demand notices dated 14th January, 2010, 12th February, 2011, 25th May, 2011, 15th September, 2011 and 7th November, 2011 giving notice to enforce demand for Kshs. 10,582,282/-, Kshs. 12,475,064/-, Kshs. 14,339,138/-, Kshs. 10,582,232/-, Kshs. 15,664,970/- and Kshs. 16,297,635/- respectively being customs import duties payable for the period commencing 1st July 2006 to 31st March 2008 pending the determination of the matter by the Minister for Finance.

c) An order of PROHIBITION do issue to prohibit the Respondents from demanding 10% of the value of the Industrial Sugar imported by the ex-parte Applicant for manufacture of goods for export commencing from 1st July, 2006 to 31st March, 2008 which sugar at the time was lawfully imported at zero rated duty.

d) Costs and incidentals of this application be provided for.

e) Such further and other reliefs that the Honourable Court may deem just and expedient to grant."

4. From the papers filed by the parties, there is no dispute about the facts in this matter. Prior to the coming into force of the EACCMA on 1st January, 2005, the Customs & Excise Act, Cap 472 governed import duties in Kenya. In 2002, the 4th Respondent had under Legal Notice No. 129 of 19th July, 2002 gazetted regulations setting up the Tax Remission for Export Office (TREO). One of the reasons for setting up this scheme was to make products exported from Kenya competitive thus attracting investments to the country.

5. The Applicant was one of the companies enjoying tax benefits under the TREO Scheme. At the time EACCMA came into force the 4th Respondent had approved 100% remission of import duty on industrial sugar for manufacture of goods for export for listed companies which included the Applicant. The duty remission on industrial sugar used for manufacture of goods for domestic consumption was 75%.

6. In 2006 the East African Community Council of Ministers ("the EAC Council") published a decision in Gazette No. Vol. AT-1-No.003 being Legal Notice number EAC/10/2006 granting 90% tax remission for import duty on industrial sugar used as raw material for manufacture of goods. The 90% duty remission rate continued to apply in 2007, 2008 and 2009.

7. On 1st May, 2008 the East Africa Community Customs, Management (Duty Remission) Regulations, 2008 came into force. The applicable remission on imported industrial sugar for use of manufacture of goods continued to be 90% until 26th November, 2009 when the EAC Gazette was amended and 100% duty remission granted on imported sugar for industrial use for manufacture of goods for export.

8. Sometimes in 2009, the 1st to 3rd respondents carried out post clearance audits on all the companies operating under the TREO Scheme. During the audit, it emerged that the Applicant had to pay 10% duty on industrial sugar imported for use of manufacture of goods for export during the period 1st July, 2006 to March, 2008. The 1st to 3rd respondents subsequently assessed alleged short-levied taxes amounting to Kshs, 12,475,064.00 as at 14th January, 2010. They then proceeded to write a letter demanding payment by the Applicant of the assessed amount.

9. The Applicant refused to pay the said amount insisting that during the said period duty on industrial sugar imported for use in the manufacture for goods for export was zero-rated. The 1st to 3rd respondents insisted that a duty of 10% on industrial sugar imported for use in the manufacture of goods for both the local and export markets was payable by the Applicant.

10. The Kenya Association of Manufacturers which held a position similar to that of the Applicant escalated the matter to the 4th Respondent. On 27th April, 2010 the 4th Respondent wrote a letter agreeing

with the 1st to 3rd respondents that duty of 10% was payable on industrial sugar imported between 1st July, 2006 and 31st March, 2008 for use in the manufacture for goods for domestic and foreign markets. Thereafter the 1st to 3rd respondents escalated their demand for the alleged short levied tax and subsequently issued agency notices leading to the filing of these proceedings by the Applicant.

11. According to the statutory statement dated 6th December, 2011 the Applicant seeks relief on the grounds that:

> **"1. The decisions are ultra vires to the provisions of the East African Customs Management Act and Rules made thereunder.**
>
> **2. The decisions are illegal, arbitrarily oppressive and unreasonable.**
>
> **3. The decisions are unprocedural as the dispute is pending the Minister of Finance's final decision.**
>
> **4. The decisions are actuated by bad faith and malice.**
>
> **5. The decision is against the Applicant's legitimate expectation.**
>
> **6. The Respondents are subject to the supervising jurisdiction of this Honourable Court.**
>
> **7. Such other and further reason to be adduced at the hearing hereof."**

12. A perusal of the pleadings and submissions filed by the parties reveal that the main question that needs to be decided by this court is the import of Legal Notice No. EAC/10/2006 of 30th June, 2006 issued by the EAC Council. The Applicant's case is that from 2004 up to 30th January, 2008 it imported industrial sugar duty free as the 4th Respondent had approved 100% remission on import duty on industrial sugar for manufacture of goods for export.

13. It is the Applicant's case that Legal Notice No. EAC/10/2006 dated 30th June, 2006 published a list of Kenyan manufacturers and the quantity of sugar they were to import within 12 months. According to the Applicant the said Legal Notice granted 90% remission. The Applicant asserts that at that time, the East African Community Customs Management Rules had not been enacted to govern export goods and therefore the 90% remission granted was applicable to industrial sugar imported for manufacture of goods for local use and did not apply to the 100% waiver applicable to goods for export.

14. It is the Applicant's case that the 4th Respondent continued to approve 100% import duty remission on industrial sugar for manufacture of goods for export until March 2008 when the 4th Respondent obtained a clarification from the EAC Council's Secretariat on the effect of the Gazette Notice dated 30th June, 2006.

15. The Applicant asserts that during this time the 4th Respondent cancelled all the bonds issued on importation of industrial sugar for use in the manufacture of goods for export. It is the Applicant's averment that following the clarification by the EAC Council, that 10% import duty was payable for imported industrial sugar for manufacture of goods for export as well as local markets, it paid 10% import duty on all industrial sugar from 1st April, 2008 to 25th November, 2008.

16. The 1st to 3rd respondents' reply is that sugar imported for industrial use for manufacture of goods for export was given 100% duty remission from 2004 until 30th June, 2006 when Legal Notice No. EAC/10/2006 dated 30th June, 2006 was published. Upon publication of that notice, sugar imported for industrial use was granted remission at the rate of 90%. It is their case that 10% import duty was henceforth payable in respect of industrial sugar imported for production of goods for export or for

domestic use.

17. That there was indeed a dispute as to the import of Legal Notice No. EAC/10/2006 is not in doubt. The Applicant has all along argued that the 10% duty imposed on industrial sugar was only applicable to sugar used in producing goods for the domestic market.

18. In fact, the 1st to 3rd respondents were also confused as to the import of the said Legal Notice. I say so because in a letter dated 23rd December, 2007 addressed to the Chief Executive of the Kenya Association of Manufacturers, the 3rd Respondent stated, *inter alia*:

> **"You correctly point out that the 10% duty rate imposed by the EAC Council of Ministers on imported sugar for manufacture of goods was meant to harmonize the rates across East Africa as Kenya was charging 25%. What seems to pose a challenge is whether or not imported industrial sugar for manufacture of goods for export should attract the 10% duty.**
>
> **Duty remission schemes are provided for under section 140 of the EAC Customs Management Act. Under the same Section, it is provided that "*The Council may prescribe regulations on the general administration of the duty remission under the section.*"**
>
> **It is against the provisions of the said section that experts from the Partner States lastly met in November 2006 towards drafting Duty Remission Regulations. Regulations 3 of the said draft remission regulations provides that remission may be granted on imported goods for manufacture of goods for export.**
>
> **But the draft remission regulations have not been approved by the EAC Council of Ministers. The alternative is therefore to invoke the provision of Section 252 of the EACCMA, which states,**
>
> > **"(5) Any subsidiary legislation made under the Partner States' Customs laws in force at the commencement of this Act shall remain in force, so far as it is not inconsistent with this Act, until a new subsidiary legislation with respect to the same matter is made under this Act."**
>
> **It therefore follows that the provisions of Section 141 of the Customs and Excise Act and related regulations shall continue to apply with regard to the TREO Scheme until the EAC Council of Ministers approves the draft remission regulations."**

19. The position taken by the 3rd Respondent as conveyed in the said letter clearly supported the Applicant's argument that industrial sugar imported for use in the manufacture of goods for the export market was zero-rated.

20. Section 141(2) of the Customs & Excise Act, Cap 472 provided that:

> **"2) Subject to this Act and to any regulations made thereunder, raw materials imported for the manufacture of-**
>
> > **a) goods for export;**
> >
> > **b) goods for home use as may be approved by the Commissioner, shall be exempt from duty where the users and the approved quantity of such raw material have been Gazetted:**
> >
> > **Provided that in the case of refined sugar for industrial use, used in the manufacture of goods for home use, twenty-five per centum of the duty shall be payable."**

21. The fact that the 1st to 3rd respondents were not sure as to the applicability of Legal Notice No. EAC/10/2006 to industrial sugar for use in manufacture of goods for export was also confirmed by the fact that the 1st to 3rd respondents had to seek the advice of the 4th Respondent on that issue.

22. In turn the 4th Respondent sought guidance from the East African Community Secretariat and received a reply through letter Ref No. PRO/161 dated 18th March, 2008. The letter which was addressed to the Permanent Secretary in the Ministry of Finance and drawn to the attention of Wanyambura Mwambia states as follows:

> **"RE: CLARIFICATION ON REMISSION OF DUTY IN RESPECT OF SUGAR IMPORTED FOR MANUFACTURE OF GOODS FOR EXPORT**
>
> **Reference is made to your letter Ref. No. ZZ 130/09 of 11th March 2008 on the captioned subject.**
>
> **The Council decision of 17th September 2004 remitting duty on sugar for industrial use to 10% was general without distinguishing between manufacture for export and home consumption. By interpretation of Section 252 of the EAC Customs Management Act, 2004, this decision superseded all duty remission regulations on sugar of the Partner States.**
>
> **The EAC Customs Management Act 2004 empowers the Council under Section 140 to grant remission on goods imported for manufacture of goods in Partner States. In this regard, the Council pronounces itself on the extent of the remission. The Secretariat issues legal notices in accordance with the Council decision on that specific decision.**
>
> **As you are aware, the Council has adopted the EAC duty remission regulations that would cover manufacture for home consumption and for export. The Gazettement of these EAC Duty Remission Regulations to give them legal effect will be done immediately and application will follow thereafter.**
>
> **Please accept, Permanent Secretary, the Assurances of my highest consideration."**

The letter is signed by the Director of Customs on behalf of the Secretary General.

23. In order to fully understand the said letter, one needs to look at the report of the EAC's 7th Ordinary Meeting of the Council held on 17th September, 2004. In that meeting the Council resolved as follows:

> **"(a) Decided that the rate applicable to sugar for Industrial use shall be 10% (that is, 90% remission to qualifying manufacturers who use sugar in industrial input)**
>
> **(b).....**
>
> **(c) Directed the Working Group on Customs Management Bill to develop regulations to provide for the administration and management of duty relief for sugar for industrial use by 31st October 2004."**

24. This issue had earlier on been discussed in the meeting of the Ministers of Finance held on 27th May, 2004. The discussion on the question of duty relief for sugar is captured at page 31 of the Report of the meeting as follows:

> **"2.17.4 CONSIDERATION OF DUTY RELIEF FOR SUGAR FOR INDUSTRIAL USE**
>
> > **The meeting recalled the decision of the Permanent Secretaries at their meeting referred to above, that the Fiscal Affairs Committee considers at its next meeting**

scheduled for May 2004 the Partner States' request to provide for duty relief for sugar for industrial use.

The committee agreed that currently there is limited production of sugar for industrial use within the East African Community, though there exists potential. There should therefore be duty remission for industrial sugar.

However the Partner States did not reach consensus on the level of duty remission. Partner States proposed the rates applicable after remission as follows; Kenya 25 percent; Tanzania 10 percent and Uganda 0 percent.

Decisions

(a) Undertake further consultations on this matter and report by October 2004.

(b) Regulations be developed by the Working Group on CMA to provide for the administration and management of duty relief for sugar for industrial use.

(c) A definition of sugar for industrial use be included in the EAC-CET Handbook by the High Level Task Force."

25. It is important to note that the percentages proposed in that meeting by the three Partner States were those applicable to sugar for use in the manufacture of goods for domestic consumption. It is not disputed that in Kenya sugar imported for use in manufacture of goods for domestic use attracted 25% duty whereas sugar used for manufacture of goods for export did not attract any duty.

26. I have already reproduced a letter addressed to the Kenya Association of Manufacturers by Kenya Revenue Authority which indicated that Section 141 of the Customs and Excise Act was applicable for sugar imported for use in the manufacture of goods for export.

27. The said letter was also supported by the action of the 1st to 3rd respondents. The Applicant has exhibited several letters in which 1st Respondent cancelled bonds that had been provided by the Applicant.

28. One such letter is dated 1st March, 2007. The letter which was written eight months after the coming into force of the Legal Notice No. EAC/10/2006 states as follows:

"DEPUTY COMMISSIONER

CENTRAL REGION

DEPUTY COMMISSIONER

SOUTH REGION

RE: BOND CANCELLATION – M/S CANDY KENYA LIMITED. TREO CONROL NO. 5266 AND 5926

A TREO audit on M/s Candy Kenya Limited has been carried out and finalized.

The audit was carried out pursuant to the Legal Notice No. 129/02 of the Principal Regulations to the Customs and Excise Act.

The company has accounted for all materials imported under the Duty/VAT remission facility. The following bonds may be cancelled on application PBNSB 5318/06, PR

56602/06, PBNSB 7279/06.

By copy of this letter M/S Candy Kenya Limited are requested to inform this office of the bond cancellation to enable us update our records."

The letter was signed on behalf of the 1st Respondent.

29. That letter confirms several things. It confirms that a TREO audit had been carried out; that the Applicant had accounted for all materials imported under the Duty/VAT remission facility; and that the bonds provided could be cancelled meaning that the Applicant had discharged its tax liability.

30. However, through a letter dated 29th September, 2009, the 1st to 3rd respondents notified the Applicant that it had been picked, among other companies, for a detailed compliance check of its TREO operations.

31. This audit is what allegedly revealed to the 1st to 3rd respondents that the Applicant had not paid duty of 10% for sugar imported for use in the manufacture of goods for export during the period 1st July, 2006 to 31st March, 2008.

32. Upon conclusion of the audit, the 1st to 3rd respondents demanded unremitted tax from the Applicant. Their actions triggered an exchange of correspondence. On 27th April, 2010 the Permanent Secretary, Treasury wrote to the 2nd Respondent as follows:

"RE: DEMAND NOTICE TO PAY OUTSTANDING IMPORT DUTY AMOUNTING TO KSHS. 12,475,064.00 ON SUGAR FOR INDUSTRIAL USE

Please refer to a letter Ref. KAM/10/04/BM/DAP dated 16th April, 2010 addressed to you and copied to the Permanent Secretary Office of the Deputy Prime Minister and Ministry of Finance on the above subject.

We have noted with concern the contents of the letter and we wish to make the following clarifications:

That, before the EAC Council of Ministers' decision to grant remission on imported sugar for industrial use at a rate of 90% which led to gazettement of the manufactures and their respective quantities vide Legal Notice No. EAC/10/2006 dated 30th June 2006, sugar imported for industrial use to manufacture goods for domestic market attracted import duty at a rate of 25% and while that for manufacture of goods for export attracted import duty at a rate of 0%. However from 30th June 2006, all sugar for industrial use whether for production of goods for export or domestic, attract duty rates of 10%.

That the Ministry of Finance never introduced nor changed any duty on sugar imported for industrial use as alleged by Kenya Association of Manufacturers. The Ministry only clarified that the duty rate for sugar imported for industrial use, imported by gazetted manufacturers attract duty rate of 10% (as per the Council decision gazetted on 30th June, 2006 referred above). This remission granted by Council did not differentiate between industrial sugar imported either for the production of goods for domestic use or for export. (This was affirmed by the EAC Secretariat when the Ministry of Finance sought for clarification).

That the Council in November, 2009 granted duty remission on all raw materials imported for the manufacture of goods for export vide Legal Notice No. EAC/32/2009 dated 26th November, 2009 in accordance with the provisions of Section 140(1) of the EAC Customs Management Act. However, Section 140(3) provides that "The manufacturer, and the approved quantity of the goods with respect to which remissions is granted under this section

shall be published by the Council in the Gazette." The manufacturers that import sugar for industrial use for manufacture of goods for export and the respective quantities to be imported are yet to be gazetted hence nobody is currently allowed to import sugar for industrial use at a duty rate of 0%. The process of gazettement is at advanced stage.

In view of the foregoing, sugar for industrial use imported by gazetted manufacturers should attract import duty at a rate 10%. In this regard, Kenya Revenue Authority is right in demanding of 10% of duty on sugar imported for industrial use under duty remission scheme from those manufacturers that did not pay at the time of clearance through Customs starting from 30th June, 2006."

33. That letter appeared to have sealed the Appellant's fate. However, more letters would be exchanged. On 7th November, 2011 the Permanent Secretary Treasury wrote to the 2nd Respondent, as follows:

"RE: 10% DUTY ON SUGAR IMPORTED BETWEEN 1ST JUNE, 2006 AND 1ST APRIL, 2008 FOR USE TO MANUFACTURE GOODS FOR EXPORT

Please refer to our previous correspondences on the above mentioned subject

Before the publication of Legal Notice No. EAC/10/2006 of 21st August, 2006, the Kenyan manufacturers were enjoying remission on imported sugar for industrial use as follows:

a) Sugar for industrial use to manufacture goods for domestic market was enjoying 75% remission; and

b) Sugar for industrial use to manufacture goods for export was enjoying 100% remission.

Following the publication of Legal Notice No. EAC/10/2006 of 21st August, 2006 that approved the list of manufactures and quantities of sugar for industrial use at a duty rate of 10% under the Duty Remission Scheme, the sugar importers under TREO argued that the new system should not leave them worse off and, therefore, the duty rate of 10% was only applicable to sugar imported for use to manufacture goods for domestic market and that sugar imported for manufacture of goods for export should continue to enjoy 100% remission.

It was at this point that on 11th March, 2008 the Treasury sought clarification from the EAC Directors of Customs. The clarification was given vide letter Ref. No. PRO/161 dated 18th March, 2008. The clarification was that the 10% duty was applicable to sugar imported for use in the manufacture of goods for both domestic and export markets.

Following this clarification the importers of sugar under TREO started complying and have no issue for the period after the clarification.

The Government of Kenya later made proposals to the Council of Ministers following which remission in respect of the sugar imported for use to manufacture goods for export was raised to 100%.

As you are aware, we had agreed that the tax between 1st July, 2006 and 1st April, 2008 would be paid but the importers would be given adequate time and that their imports would not be affected unless it was due to other factors and not the 10% duty payable on sugar imported for use to manufacture goods for export for the period between 30th June, 2006 and 1st April, 2008.

However, affected importers have, through the Kenya Association of Manufacturers (KAM),

petitioned the Minister for Finance to abandon the tax that relates to the period before the clarification by the East African Community Secretariat.

Following the petition, the Permanent Secretary, Treasury, directed that the matter be discussed by the concerned parties and necessary recommendation be given for consideration by the Treasury. Subsequently, a meeting was held at the Treasury with representation from KAM, KRA and selected manufacturers in order to agree on the way forward.

After deliberating on the matter, it was agreed that:

1) The request be forwarded to the Minister for his decision; and

2) The affected manufacturers be allowed to continue importing sugar and other goods if the only tax liability relates to the 10% duty payable in respect of sugar imported for the period of 1st July, 2006 and March, 2008 for use to manufacture goods for export.

The purpose of this letter is to request KRA to proceed according to (2) above."

34. I have reproduced the letters exchanged at length as they will form the basis for the determination of this matter. The Applicant has accused the respondents of acting *ultra vires* the EACCMA and its regulations; acting arbitrarily and in an oppressive manner; acting in bad faith and malice; and going against its legitimate expectation.

35. There was an argument by the respondents that the Applicant ought to have resorted to the alternative remedy of filing an appeal. The respondents' assertion that the Applicant ought to have resorted to the appellate mechanism provided by statute does not hold any water. The Applicant is complaining against oppressive and unfair action by the 1st to 3rd respondents and in such a case judicial review is available to the Applicant. The Applicant is not complaining about the assessed taxes but the manner in which it is being treated by the respondents.

36. I think the proper starting point in this matter is Legal Notice No. EAC/10/2006. The said Notice is as follows:

"IN EXERCISE of the powers conferred upon the Council of Ministers by Article 39(c) of the Protocol on the Establishment of the East African Community Customs Union and Section 140 of the East African Community Customs Management Act 2004, the Council of Ministers has approved the following manufacturers to import the specified quantities of sugar for industrial use specified below at a duty rate of 10% for 12 months under the Duty Remission Scheme."

A list of the manufacturers and the quantity of sugar allocated to each manufacturer is then given.

37. In my view the said Legal Notice is self-explanatory and does not need additional explanation. It grants a duty rate of 10% to the listed manufacturers importing sugar for industrial use. The Applicant appears on that list. It is authorized to import 5,400 metric tons of sugar for use in manufacture of confectionary. The Legal Notice does not differentiate between sugar imported for manufacture of products for the local market and sugar imported for manufacture of goods for the export market. The respondents are therefore correct that the Applicant ought to have paid duty of 10% on all the sugar it imported.

38. Even though the Legal Notice was quite clear the respondents' actions implied that the said Legal Notice only applied to sugar imported for use in the manufacture of goods for the domestic market. I have reproduced the letter dated 23rd December, 2007 from the 1st to 3rd respondents in which it informed Kenya Association of Manufacturers that the Customs and Excise Act would continue applying to the TREO Scheme. By the time the letter was written, Legal Notice No. EAC/10/2006 had already been published and was being applied to sugar imported for use in the manufacture of goods for the domestic

market.

39. It is also noted that the respondents audited and cleared the Applicant in respect of the sugar imported. They never raised any queries regarding non-payment of duty on sugar imported for use in manufacture of goods for export. They cancelled bonds that the Applicant had provided. That means they were satisfied that the Applicant had met its tax obligations.

40. The 4th Respondent, a party who participated in the negotiations leading to the publication of Legal Notice No. EAC/10/2006 of 30th June, 2006 was also in doubt of the applicability of the Legal Notice to sugar imported for use in the manufacture of goods for export. That is why it had to seek clarification from the EAC Secretariat.

41. However, the Applicant cannot rely on the doctrine of legitimate expectation to defeat the respondents' demand for tax. Upon the publication of the Legal Notice, the same became the law that governed tax remission in respect of sugar imported for use in manufacture of goods. The provisions of the Customs and Excise Act ceased to operate in that regard. For legitimate expectation to apply, it must be based on a reasonable promise, made by a person authorized to make the decision and must be in compliance with the Constitution and the laws of the land.

42. The grounds for grant of orders on reliance on the doctrine of legitimate expectation were captured by the Supreme Court in the case of **Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR** as follows:

> **"[269] The emerging principles may be succinctly set out as follows:**
>
> **(a) there must be an express, clear and unambiguous promise given by a public authority;**
>
> **(b) the expectation itself must be reasonable;**
>
> **(c) the representation must be one which it was competent and lawful for the decision-maker to make; and**
>
> **(d) there cannot be a legitimate expectation against clear provisions of the law or the Constitution."**

43. Whatever promise was made to the Applicant, and I agree there was indeed a promise made by authorities with powers to make the promise, was not in compliance with the law. The Applicant cannot thus rely on it.

44. The 4th Respondent however seems to understand that rulers should keep the promises they make to their subjects. Even as the 1st and 3rd respondents are trying to collect the taxes, there lies in the office of the 4th Respondent a recommendation on the way forward which was made after discussions by all the parties involved. There is need for the Cabinet Secretary to consider the matter before any action is taken by any of the parties.

45. It is noted by this Court that the 1st – 3rd respondents' agency notice was issued on 30th November, 2011 about three weeks after the 4th Respondent had asked the 2nd Respondent not to enforce the demand for the taxes accrued during the disputed period. Isn't it therefore an act of bad faith for the 2nd Respondent to act as it did?

46. It should be remembered that the Applicant did not refuse to pay the taxes. It was promised that the taxes were not payable. It could have declared those taxes as profits and paid them out to its owners. Going after the tax plus the interest and penalties that it would attract may bring the Applicant's business to its knees. A tax collector should only take that which the law allows it and that which is reasonable.

The Cabinet Secretary should be given an opportunity to address the issue at hand. The Applicant is correct that the 1st to 3rd respondents are acting in haste. Bad faith and malice can be imputed in their actions. In the circumstances, I agree with the Applicant that the 1st to 3rd respondents' actions were premature.

47. Consequently, the agency notice dated 30th November, 2011 declaring the Branch Manager, Fina Bank, Kimathi Street an agent of the Applicant for purposes of collecting Kshs. 10,582,232/- in custom import duties is thus called into this Court and quashed.

48. The 1st to 3rd respondents are prohibited from demanding the tax in question pending the determination of the matter by the Cabinet Secretary for Finance.

49. The Applicant's prayer for an order of prohibition to prohibit the respondents from demanding 10% of the value of industrial sugar imported from 1st July, 2006 to 31st March, 2008 for use in the manufacture of confectionary for export fails. Issuing such an order would amount to taking over the statutory responsibilities of the respondents.

50. Considering the outcome of this case, I make no order as to costs.

Dated, signed and delivered at Nairobi this 1st day of July, 2016.

W. KORIR,

JUDGE OF THE HIGH COURT