



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Misc Civ Appli 743 of 2006

- Tax law principles
- Change of Tariff five years later found to be factually and legally incorrect
- Ex Post facto laws and retroactive tariffs equated and frowned upon by the Court
- Abuse of Discretion
- Abuse of power
- Legitimate expectations of a tax payer upheld
- Illegality, error of law, discrimination, bias, irrationality, Wednesbury unreasonableness considered
- Tax to be authorized in clear words and cannot be done on intendment or inference
- Rules of interpretation of Tax laws reviewed
- Certainty as an ingredient of the rule of law stated to be a lifeline of business and business plans and its enforcement has linkage to emerging and thriving economies.

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**IN THE MATTER OF AN APPLICATION BY KEROCHE INDUSTRIES LIMITED FOR
LEAVE TO APPLY FOR JUDICIAL RERNEW AND ORDERS OF CERTIORARI AND
PROHIBITION**

BETWEEN

KEROCHE INDUSTRIES LIMITED APPLICANT

VERSUS

THE KENYA REVENUE AUTHORITY 1ST RESPONDENT

COMMISSIONER GENERAL KRA 2ND RESPONDENT

COMMISSIONER OF CUSTOMS & EXCISE 3RD RESPONDENT

COMMISSIONER OF VALUE ADDED TAX 4TH RESPONDENT

COMMISSIONER OF DOMESTIC TAXES 5TH RESPONDENT

COMMISSIONER OF INCOME TAX 6TH RESPONDENT

JUDGMENT

This is an application for judicial review filed on 11TH December 2006 by the applicant Company, a manufacturer of wines. The application is brought against the Kenya Revenue Authority, its Commissioner General and Commissioners of its four Departments namely Customs and Excise, Value Added Tax, Domestic Taxes and the Income Tax respectively.

The Orders sought are:

- A. An order of certiorari to remove into the High Court and quash the decision of the Respondents and/or the 5th Respondent to remove the Applicants fortified wine products from the classification under the Harmonised System (H.S.) Code Tariff Heading 22.04 and to classify the Applicants fortified wine products under the Harmonised System (H.S.) Code Tariff Heading 22.06
- B. An order of certiorari to remove into the High Court and quash the decision of the Respondents and/or the 5th Respondent made in or about November 2006 and contained in the letter dated 29th November 2006 Ref P051138363E to issue assessments on Income Tax, Excise Duty and Withholding tax against the Applicant for the total sum of Kshs802,919,447.00
- C. An order of certiorari to remove into the High Court and quash the decision of the Respondents and or the 5th Respondent made in or about November 2006 and contained in a letter dated 29th November 2006 Ref P05TI 38363E to issue assessments on Value Added Tax, interest and penalty thereon against the Applicant for the total sum of Kshs 305,094,183.00
- D. An order of prohibition directed to each and all the respondents prohibiting each and all of them from removing the Applicants fortified wine products from the classification under the Harmonised System (H.S.) Code Tariff Heading 22.04
- E. An order of prohibition directed to each and all the Respondents prohibiting each and all them from classifying the Applicants fortified wine products under the Harmonised System (H.S.) Code Tariff Heading 22.06
- F. An order of prohibition directed to each and all the respondents prohibiting each and all of them from collecting or recovering by way of distress or distraight or by any other means the sum of Kshs 802,919,447 based on the assessments on Income tax Excise Duty and Withholding Tax made against the Applicant and communicated in the letter dated 29th November, 2006 Ref: P057138363E

G. An order of prohibition directed to each and all the Respondents prohibiting each and all of them from collecting or recovery by way of distress or distraint or by any other means the sum of Kshs 305,094,183 or based on the assessments on Value Added Tax made against the Applicant and communicated in the letter dated 29th November 2006 Ref: P0511,38363E.

The total Tax demanded is approximately 1.1 billion Kenya Shillings.

The grounds relied on are set out in the Statement and include the following illegality, unfairness, Capriciousness, Arbitrariness, Abuse of Power, Retrospective application of Tariff and demand of Tax due, Irrationality, Wednesbury unreasonableness, Factual & Legal errors and Legitimate Expectation.

The applicants rely on affidavits filed on 11th June, 2006, 12th January 2007, 23rd January 2007, 8th February 2007,

and skeleton arguments filed on 9th March 2007 and 5th May 2007 and 13th February 2007.

The Applicant and its predecessors appear to have applied for a licence to the Customs Department to manufacture wines between on or about 1996-1997 and a licence was granted which licence classified the Applicants products under Tariff Heading 22.04. The Applicants contend that they have paid duty under Tariff 22.04 from 1997 to 2006, that is, until the decision to change tariff was communicated to it vide the impugned letter of 29th November, 2006. The decision communicated is that the Applicants fortified wine products were not classified under Tariff Heading 22.04 but should have been classified under tariff Heading 22.06. The latter Tariff namely 22.06 attracts a higher rate of duty than tariff 22.06 in that it attracts 60% instead of 45%. By the same letter the Respondent issued tax assessments based on the new Tariff 22.06 from the year 2002 to 2005. Consequently the impugned letter demanded from the Applicant the payment of Kshs 1,108,013,630 (app.1.1 Bill) within 14 days of 24th November, 2006. This amount is without the usual penalties and therefore the amount due is certainly higher than the figure stipulated and it should also be noted that although the figure includes amounts in respect of various tax regimes namely, Custom Excise Duty, Value Added Tax, Withholding Tax and Income Tax only one global demand was sent to the Applicant.

The Respondents have strongly opposed the application and had in addition filed their own application dated 21st December, 2006 seeking inter alia to set aside the ex-parte order for leave to operate as stay and also seeking the freezing of the personal accounts of the directors of the applicant Company. The Respondents are therefore relying on Replying Affidavits sworn on 12th January 2007 by Justus Musau Kiuvu and Wilson Kimwele Nzoka. The affidavits were filed on 15th January 2007. In addition the Respondents rely on two sets of written skeleton arguments and the first set was filed on 9th February 2007. In brief the Respondents have relied on the statutory powers conferred on them under the following Acts as per the written skeleton arguments:

1. The Kenya Revenue Act Cap 469 (LOK)
2. The Income Tax Act Cap 470 (LOK)
3. The Customs and Excise Act Cap 472 (LOK)
4. The VAT Act Cap 476 (LOK)
5. Harmonised Commodity Description and Coding System 3rd Edition (2002) Vol.1

The Respondents have contended that as per section 90, of Excise & Customs Act no person can manufacture excisable goods unless he is licensed by the Commissioner of Customs and Excise duty and that an application for a licence was made sometimes in May 1996 and was issued in December 1996. The licence was addressed to the then entity or person who is not the ex-parte Applicant herein. The

licence was also in respect of a particular place for the sole purpose of producing wines. The Respondents have contended that there was no such entity as the ex-parte Applicant at the time by that name and in that particular place. The Respondents have asserted that the licence given did not include other products such as spirits, fruit juices or opaque beers that the Applicant has admittedly been manufacturing and that for any such manufacture of the other products, the ex-parte Applicant needed to seek recognition or formal permission from the Commissioner of Customs and Excise Duty and have the licence extended or amended to cover the other products that are not wines.

In the initial application the person or entity in its application for a license only disclosed that it would be manufacturing grape based wines, which was not the case and at the same time it applied for licenses from the Municipal Council of Naivasha and the Kenya Bureau of Standards and disclosed to them that it was producing three main products namely:

- (a) Vienna Special Alcoholic drink
- (b) Vienna Special
- (c) Cheers wine

And that all these products were not wines except cheers wine at (c) above which was also not grape based. This information was not disclosed to the Respondents although well within the knowledge of the person or entity which had applied for the initial licence. The Respondents have urged that the Applicants alcoholic drinks are cereal based spirits and opaque beer and have nothing to do with grapes and cannot therefore be classified under tariff 22.04 for tax purposes as they fall under tariff 22.06. As a result the Respondent have all along charged a flat rate of 40% arising out of self-assessments submitted by the Applicant and that no formula had been submitted or samples after diversification by the Applicant and therefore the Applicant have therefore fraudulently failed to give and/or disclose their formula, base ingredients and the nature of their products with the sole intention of taking advantage. The Respondents argue that in March 1997 they did conduct an audit so as to seek further details as to the base, formula ingredients and the nature of products produced and that the applicants have all along failed to address the issues. A further audit was conducted in the final quarter of 2005 and the same was triggered of by a news paper article in the Daily Nation JMK 6 in which the Applicant boasted of Kshs 1 Billion investments with 500 personnel and the introduction of a new 7,000 bottles per hour bottling plant. The Applicant did not agree with the audit report. The Respondents claim that the issue of a change of tariff did feature in their discussions with the Applicants management although the Applicants deny this. The Respondents contend that because of the dispute on tariff the Respondents sought for technical analysis from the Customs Laboratory for clarification and on 23rd February 2006 the Customs Laboratory confirmed that the Applicant's products were based on pineapple juice classifiable under tariff head of other fermented beverages, which is 22.06 and not tariff head 22.04 of wines which are based on fresh grapes or grape must – see JMK 17. The Respondent confirmed the use of pineapple juice on the Applicants products at a visit to the Applicants' factory at Naivasha on 14th March 2006 and the Respondents have throughout 2006 engaged the Applicants in meetings aimed at resolving the issue. The Respondents contend that they have the necessary statutory power to come up with the formulae based on input and output as they did.

On the other hand the Applicants have stressed that right from the beginning all the Tax returns have been checked and countersigned by the Respondents agents and payments made every month and that the production records were prepared on daily basis and have always been availed to the Respondents. In addition, the Respondents have had their officers at the factory as required and the products are released from a bonded warehouse over the years and therefore the Respondents have had knowledge of the products and the level of production because this is the purpose of having the bonded warehouse manned by the Respondents agents. They contend that over the years the Respondents have also conducted audits, and out of all the audits carried out the issue of change of tariff never arose at all and has over the years never been an issue. It became an issue after the Applicants application for a refund of Excise Tax Refund claim and this is apparent from the Respondent's own Audit Report JMMK1O which their Counsel did not want to have admitted in evidence although Counsel for the Respondent did not touch on

this in his submissions as he had promised the court. The change of tariff and the retrospective demand of arrears as set out above, was an afterthought, so as not to pay the applicants refund and to punish the Applicant for allegedly having successfully lobbied Parliament, to reject 65% taxation of their product and the zero rating of their rivals' products. There is a pending case before another Judge concerning the alleged selective taxation. Thus, the Report of the Audit of Excise Refund Claim Exhibit TMMK – (10) characterized the issue as moot albeit fundamental on the question of Excise Refunds claims and that the following conclusion in the Report reinforces their contention on the change of tariff:

“Keroche Limited has used the Harmonised System (HS) Code 22.04 tariff No 2204.10.90 for classification of its products since inception of the company. This code allows them to charge excise duty at 45% of the factory cost. However there is contention that the correct HS code is 2206 tariff No 2206.0090 which provides for Excise Duty to be charged at 60% of factory cost. We did not manage to get a clear interpretation as there were divergent views. A clear legal position should be obtained.”

The recommendation of the Audit Report states:

“Subject to the above and clear interpretation of the finding on tariff, H.S code, the claim is valid. However should the tariff Number be judged to be 22.06 then the Authority will be demanding further taxes from Keroche Ltd on account of the difference in the excise duty rate used. The Authority should therefore not pay the claim until proper legal position on the HS Code/tariff is arrived at.”

The Respondents have never rejected the applicant's Excise tax returns which have been produced in court covering the relevant period. Moreover the excise tax returns, are in the form stipulated in the regulations to the Customs and Excise Act and the form bears a declaration that it is endorsed by both the “proper officer”, who is an Agent of the Respondents and the licensee/agent. The declaration is to the effect that the particulars appearing in the form are true. This must include the item produced and the tariff. The form only requires disclosure of what is manufactured and the disclosure was always “wines” in particular, and there was no requirement to state the base. Due to the requirement under s 95 and 96 of the Act, the Applicant had a bonded warehouse. The purpose of this was to ensure that since the Applicant manufactured excisable goods the Respondents would have at site all the information necessary for the determination of the nature and class of the excisable goods manufactured and the materials used in the manufacture. It cannot be true that the licence was granted and renewed over the years without the knowledge that the Applicants fortified wines were pineapple based. It is apparent that even the Respondent had over the years always understood the correct tariff to be 22.04 and this having been the official position of the Respondent, the court should interpret it in accordance with the Department's rulings of many years. The Applicant has strongly contended that a tariff cannot be changed retrospectively as the Respondents have purported to do in this case in view of the provisions of s 137(1) of the Customs and Excise Act which provide:-

“The duty on locally manufactured excisable goods other than spirits shall become due and shall be charged at the rate in force when the goods liable to duty are *delivered* from the stock room of the licensee; and the duty shall, subject to any remission thereof which may be granted in accordance with the provision of this Act, be paid by the licensee on its becoming due.”

In other words the tax due crystallises at the point of delivery from the stockroom of the licensee. This is what is due and recoverable. It cannot be imposed subsequently by plucking figures from the air or coming up with unilateral figures on the level of production by a taxman using any other formulae. In other words a taxman cannot wait for years and using its own formulae as in this case, impose excise duty – not based on what was delivered from the stockroom and at the prices prevailing during delivery. A formulae based on expected sales unilaterally calculated years later is illegal ultra vires unreasonable and oppressive. The argument by the Applicant is that the Commissioner is only empowered to claim, demand and collect what has become due and where the tax has become due and has not been declared or paid the Commissioner, has powers to demand for the same and collect the tax in arrears. The rate of duty in force is that assigned by the Commissioner to the goods when granting the licence under S 91 and that going by the provisions of section 137 of the Customs and Excise Act the licensee or manufacturer of excisable goods, is only liable to pay the rate of duty that was in force at the time when the duty became

due, and which is applicable to the class assigned to him by the Commissioner under S 91 of the Customs and Excise Act. The Applicant contends that duty is the rate applicable based on the tariff number assigned to the Applicants products which is 2204.10.90. The Applicant has through its Counsel argued that the Act does not give the Commissioner power to either come up with a Tax formulae or retrospectively amend the rate or duty applicable or issued under a licence in respect of a particular factory or class of excisable goods and that where new terms or conditions are sought, to be imposed a new licence must be obtained or granted. The only exception to this being when there is an amendment to the duty applicable which can only be effected by the Minister through Parliament under s119 of the Act. Thus, even where a licence is revoked a manufacturer is only required to pay duty on the excisable goods manufactured under the licence as per S 93(1) of the Act.

The Applicant has for the above reasons invited the court to find that the Respondents' decision is illegal and ultra vires the power of the Commissioner under S 137 of the Act and the Commissioner cannot renege on the terms and conditions under which the Applicants' licence was granted which is payment of Excise Duty under tariff head 22.04.

Furthermore the Applicants products are more akin to those described in tariff 22.04 than tariff 22.06 and that one would have to strain the language used in description in tariff 22.06, so as to include the Applicant's products and since the relevant legislation involves taxation, where there is ambiguity the schedule or any other provision should be construed strictly so as not to impose a tax burden not clearly provided for and in the event of any ambiguity it should be construed in favour of the Applicant as against the taxman – this being a penal statute or legislation. Finally on this point the explanatory notes published by the World Customs Organisation cannot supersede the clear and unambiguous descriptions found in the First schedule. The literal and grammatical meaning of an enactment using linguistic canons of construction is always preferred where the meaning of an enactment is clear and unambiguous. The Act is to be read as a whole, without attributing to any particular provisions or words a tortured or strained construction or interpretation. The first port of call, is the statute itself, which is read by construing the words used or gathering the meaning from the words used before venturing onto other aids to construction. The Act and the First Schedule have their integrity which the court must seek to uphold. Section 2(3) of the Customs and Excise Act provides that the interpretation of the first Schedule shall be governed by the principles contained in the section. The section does not provide for alternative principles or aid to interpretation. The Explanatory Notes on Harmonised Commodity Description and coding system published by the World Customs Organisation have not been demonstrated or incorporated by the Act and it is also significant that the Common External Tariff of East African Community Customs Union which includes the text of the Nomenclature established under the International Convention on the Harmonised Commodity Description and Coding System does not contain Heading Number and Harmonised System/tariff Number 2204.1090, just as the World Customs Organisation publication does not.

To strengthen their position the Applicants have relied on the definition of “wine” in the definition Section, under the Customs and Excise Act where “wine” is defined:

“liquor of a strength not exceeding 50 degrees of proof which is made from fruit and sugar or from fruit and sugar mixed with any other material and which has undergone a process of fermentation and includes mead”

Section 116A of the Act whose marginal notes are “fortification and mixing of wines” allows a wine manufacturer to mix in his factory spirits with wine in a proportion not exceeding ten litres of proof spirits to one litre of wine provided that the mixture shall not thereby be raised to a greater strength of proof than fifty degrees proof. Arising from the above interpretation, the Applicant submitted that both the interpretation section and s 116A of the Act do not draw a distinction between the fruit base of wine or fortified wine. It does not matter whether the wine is grape, pineapple, pawpaw or banana based or any other fruit base, so long as the wine is made from fruit and sugar or fruit and sugar mixed with any other material and in the case of fortified wines it is mixed with a spirit in accordance with the statutory provisions.

On this important point the Applicant has submitted that classification of excisable goods or products is a naked question of law which hinges on the true and proper construction and interpretation of the relevant provisions of the First Schedule to the Customs and Excise Act as read with the Act itself.

Concerning the taxes demanded under the other tax regimes, namely the Income Tax, Value added Tax the Applicants have submitted that the impugned letter, was procedurally incorrect in that under the Income Tax Act and the Valued Added Tax Act there are procedural safeguards including provisions of notice and objections, which the letter did not include or specify and separate assessments were only availed thereafter forcing the Applicant to seek immediate relief in court in the face of a 14 days notice set out in the letter and only a few days before the expiry of the notice. The applicant submits that the composite demand letter constitutes procedural unfairness in the circumstances and a violation of due process.

The Applicant further submitted that the Respondents have used their own Input – Output Ratio which is erroneous and this has also been compounded by the change over from tariff 22.04 to 22.06. The Respondents vide letter dated 23rd October 2006 JMC 24 have devised a formulae which has in turn yielded expected results instead of determining the actual results at the factory. This was in turn used to determine the expected sales. The respondents have also not used the prevailing sale prices but came up with their own prices thereby compounding the errors and that substantial errors of law ought to be a ground for court's intervention in judicial review. This has in turn had a direct impact on the computation of VAT, Income Tax etc as per the demand and that the Court must as per Michael Fordham's *JUDICIAL REVIEW HANDBOOK* resolve those factual disputes. The applicant therefore demands from the Court, a determination of the applicable tariff, the effect of the procedure of issuing tax assessments or making a combined demand plus the effect of the above on the statutory procedural safeguards given by the other Tax regimes, since these are fundamental conditions precedent to the proper exercise of the respondents' functions.

Perhaps it is important at this stage to highlight the legal background of the Respondents case:

1. The Kenya Revenue Authority Act Cap 469 which in S 5(2)(a)(i) & (ii)(b) and (c) that in collection and receipt of revenue the authority shall administer all written laws dealing with revenue.
2. Income Tax Act Cap 470 – Section 3, 4 & 5 - Powers vested in the Authority to charge income tax for each year of income in respect of gains or profits from a business employment or services rendered. S37 and 52 gives power for employer to deduct tax from emoluments and the Authority to demand returns of income. S72 deals with the additional Tax in the event failure to furnish return or fraud in relation to returns. S72 D gives power to impose penalties on unpaid tax and S 94 gives power to charge interest or unpaid tax.

S 77 empowers the Authority, where a person has been assessed at a less amount, to make an additional assessment according to his best judgment. S 79 Provides for a limitation of seven years for making assessments.

3. Customs and Excise Act S 90 empowers the Commissioner to issue a licence for the manufacture of excisable goods and S 91 gives discretion to the Commissioner to grant or refuse a licence. S93 empowers Commissioner to revoke, suspend or refuse a licence for fraud etc.

4. Section 95 makes provision for facilities for excise control in these terms:

“A licensee shall maintain just scales and weights and lights and ladder and other equipment for enable the proper officer to take account or check gauge or measure goods or material in the factory as well as provide suitable accommodation for the officer assigned duties in the factory.”

5. Section 96 requires a licensee to keep books:

“A licensee shall keep all records as may be required for the manufacture, storage and delivery of

excisable goods and file returns as or may be required and avail the records as and when he is required of him for inspection.”

6. S 127(c) provides:

“The value of locally manufactured goods for the purposes of levying advalorem excise duty shall be the ex-factory selling price.

7. Section 218A:

Gives the Commissioner power to use the best of his judgment in the absence of documents to determine duty payable for failure to keep records etc.

8. That Harmonised Commodity Description and Coding System 3rd Edition is the relevant aid for interpretation together with Explanatory notes issued by the World Customs Organisation to which Kenya is a member/signatory.

VAT

9. That the Tax covers supply of goods and services.

10. Section 6(1):

Every taxable person shall in accordance with the regulations, keep full and true records written up-to-date of all transactions which may affect his tax liability.

11. Section 58 gives power to the Minister to make Regulations and prescribe the form of notices returns on other forms required for the purpose the Act...

It is clear from the above provisions that under the Customs & Excise Act the Commissioner’s discretion to assess can only arise under S 218 A for failure to provide documents as per Section 96 otherwise duty must be assessed in terms of Section 137 of the Act – at ex factory selling price and he has a discretion to provide an officer on site pursuant to S 95 of the Act to assist in the implementation of the provisions of the Act, and in particular S 137.

THE TURNING POINTS

In this matter there are some essential facts or evidence or points of law I have considered significant in arriving at the overall decision in this matter. It is important to highlight these essentials or turning points:-

1) First letter on TARIFF DATED 4th June 1997 addressed to M/S *KEROCHE INDUSTRIES* “TMM 19” reads:

Re: *WINE FORMULA FORTIFICATION AND EXCISE RETURNS*

Your letter of even reference dated 22nd March 1997 refers. It is noted that your product is Wine, which attracts Excise Duty at the rate of 45%. In view of this, you are requested to kindly forward to us your Excise Returns without delay *W.K. NZIOKA for! PRINCIPAL COLLECTOR EXCISE & LOCAL INDUSTRIES NAIROBI.*

It will be noted from the letter, the respondent was quite clear even when granting the first licence that the manufactured product was wine and the duty was 45%.

2) Letter dated 27th April 1998 reads:-

KEROUCHE INDUSTRIES

P.O. BOX 6

NAIVASHA

Dear Sir,

Re: UNDERPAYMENT OF EXCISE DUTY FOR AUGUST 1997

Please take note that your Wine is classifiable under tariff 2204.29.20 attracting Excise Duty at the rate of 45%.

Your August 1997 Excise Account Revenue shows you paid Excise Duty at the rate of 15% which is the rate for opaque Beer. You are therefore required to pay Kshs 8085.00 plus penalty of 3% compound interest of Kshs 2.156.85. The amount is payable immediately but not later than 14 days from the date hereof.

H & M Mulwa

For: ASSISTING COMMISSIONER

EXCISE & LOCAL INDUSTRIES

Cc

Principal Collector

Excise

Senior Collector

Excise

- Again in the letter it is quite clear to the Respondent that the product was Wine and the classification Tariff No is 22.04.29.20

- Even at this stage the Respondent was quick to note an underpayment in respect of the month of August 1997 and was not only able to demand the underpayments, but it was also able to impose a penalty of 3%. The question which arises from the letter is what happened to this alertness or ability to detect underpayments so as to result to an input-output formulae nine (9) year after the Tariff classification and confirmation?

3) The first Application for licence dated 7th May 1996 to the Respondent reads:

“We are interested in manufacturing various *wines* in our *plant* in Naivasha. Your customs officer visited our proposed *plant* and explained to us the various customs requirements before we could commence production. Kindly issue us with the licence to enable us start production

4) The first licence is dated 3rd July 1996 and it reads: This licence is issued under Section 91 of the Customs and Excise Act to *KEROUCHE INDUSTRIES* of Post Office Box 6, Naivasha to manufacture *WINE* in the premises situated at Naivasha – Karai from the date hereof to 31st December, 1996

5) The formal application is in accordance with Regulation 128 of the Customs Regulations dated 8th May 1996 inquired:-

State the kind of goods which it is proposed to manufacture

Brief particulars could be sufficient for the application

letter of 14th May 1998 WKN7. Keroche writes to say they manufacture wine in the nature of opaque beer

Letter dated 11th March 1997 WKN8 reads:

(6) This is to follow up to the authority issued to you on July 1996 for the use of 3000 litres of spirit for the fortification of wine. Please submit the following information to the department within 14 days from the date hereof

(7) Letter dated 22.4.1997 WKN11(b). There was an under declaration of duty in respect of February and March and a penalty of 3% was levied and paid as per the letter of 21st May 1997 WKN12

(1) Formula used in the manufacture of wines

(2) Amount of wine treated per litre of spirit

(3) Excise returns justifying the account issued

8) Two statutory Forms under Rules 14 and 144 in respect of Receipts and Deliveries from the stockroom and the Stockbook completed on a daily and monthly basis have been exhibited from 1999 to 2005 Ex TMMK-2.

9) On 21st August 1998 the Applicant wrote to the Respondent following a suspension of the Excise Licence by the Respondent apparently under pressure because the wine was under some kind of suspicion. The applicant explained that although it was using rectified spirit it would henceforth use neutral spirit from Agro Chemical Food Ltd in Muhoroni. By an earlier letter the Respondent had written on 17th August 1998 requesting to know the type of spirit and also demanded the submission of the Kenya Bureau of Standards Certificate. The certificates from the KBS were availed setting out a detailed analysis of the Products – see JMK 22. Letter dated 3rd August 1998 to the Respondent requesting the reinstatement of the licences gave the description of the products as Vienna and Cheers and indicated that the products had not been banned by the Government. The letter attached, compliance certificates from the Government Chemist and the compliance certificates have been exhibited.

The observations which arise from the above is that the description of the products manufactured by the applicant and the chemistry of them was in full knowledge of the respondents even in the 1990's and the contention that the Applicant had failed to disclose the manufactured products is indeed an afterthought. The Respondents had sufficient time to consider the classification or change of tariff even in the 1990's but they did not change it.

10)The Customs & Excise Act has in the definition section defined “wine” as follows:

“Means a liquor of a strength not exceeding 50 degrees of proof which is made from fruit and sugar or from fruit and sugar mixed with any other material and which has undergone a process of fermentation and includes mead.”

An examination of the exhibited applications for licence shows or reveals that the applicant has invariably described its products as wine. This being a court of law it must be guided by the relevant law. There is no suggestion going by the above definition, that pineapple based wine falls outside the above definition of “wine”. On the contrary it is covered by the definition. The Respondents' allegations on non disclosure are therefore misinformed.

11) REPORT ON THE AUDIT OF EXCISE TAX REFUND

JANUARY 2006

At page 2 the report concludes:

(iii) Keroche Ltd has used the Harmonised System (Hs) Code 2204; tariff No 2204.10.90 for classification of its products since inception of the company. This code allows them to charge excise duty at 45% of the factory costs. However there is contention that the correct Hs Code is 2206; tariff No 2206.00.90 which provide for excise duty charged at 60% of factory cost. We did not manage to get a clear interpretation as there were divergent views. A clear legal position should be obtained.

Recommendation

“Subject to the above and clear interpretation of the ruling on tariff/HS Code, *the claim is valid*. However, should the tariff number be judged to be 2206, then the Authority will be demanding further taxes from Keroche Ltd on account of the difference in excise duty rate used. The Authority should therefore not pay the claim until the proper legal position on the HS Code/tariff is arrived at.”

What is clear from the above exhibits is that if the Applicant as at January 2006 had a valid claim for refund of Excise Duty as per the Respondents own records and Audit Report how could it have incurred a liability of nearly 900 Million, in November of the same year in respect of the Excise Duty? This defies reason and is irrational. It is important to point out that despite the audit recommendation that legal opinion on change of tariff be obtained, first, no such advice was tendered in evidence except the Respondents counsel’s own interpretation during the hearing of this matter. The inescapable conclusion is that when the decision to change the tariff was made by the Respondents they did not rely on legal advice as recommended in the Audit. Again it is also clear from the Report that a change in tariff was aimed at blocking the admitted refund which was due to the Applicant. This is clear evidence of ill motive or use of power for ulterior purposes or failing to take into account a relevant consideration by inquiring and taking legal advise on tariff first, before making the impugned decision of 29th November, 2006.

Finally as at the date of the report there was no liability due from the Applicant on account of Excise Duty, Vat or Income Tax. The liability sprung up in the decision due to:

- Change of tariff 22.06
- Applying it retrospectively during the period 2002-2005
- Affidavit of Wilson Kimule Nzoka filed on 15th January 2007 clearly demonstrates and confirms that the Respondents dealt with the predecessors of the Applicant as a continuation both in terms of the products and the licensing requirements. Thus para (19) of the affidavit reads:

“That my direction that the products produced by the applicant or their predecessor fall under duty at 45% was based on the examination of Excise return of February 1997 which indicated wine which is ordinarily understood in the industry as falling under 45% except where there is a further description.”

That all along the Department knew that the Applicants predecessor, whether individual or partnership was manufacturing “wine” as shown by the documents submitted.

From the above facts and evidence the Respondent’s contention of non disclosure necessitating the input – output analysis which in turn came up with a liability of 1.1 billion lacks any factual and legal basis. Similarly the contention that the applicant has come to court with unclean hands loses weight in the face of the Government Chemist’s reports and the Kenya Bureau of Standards Analysis of the Applicant products which documents have always been in possession of the Respondents. On the basis of the above evidence it is the Respondents who have changed course and have after several years of dealings based on

tariff 22.04, and for other reasons backed out of the accepted arrangement, and in particular for the reason set out in their own Audit Report – to block the applicants claim for refund.

(13) Indeed, the heart of the case is the issue of the proper tariff. Is the change of tariff proper in law? Even if it is proper can it be applied retrospectively? Under the relevant law is the input-output method justified?

(14) In the audits conducted by the Respondent it has not been suggested that the Applicant did not file the required returns. As shown above the returns filed between 1999-2005 are in a statutory form as per the regulations. Similarly approved Stockbooks have been exhibited. Both sets of documents deal with daily and monthly production. The documents indicate that they were being checked by the Respondents and stamped and signed by the Respondents as correct for the period in question. Prior to the final audit which was prompted by a refund claim by the Applicant there is no evidence that the Applicant had failed to keep any proper books of account or records of documents required under the Act or that it had failed to file a return or delayed the filing except in respect of the two months shown above and in respect of that default there was an immediate demand of duty and the imposition of a penalty of 3% which the Applicant promptly paid.

It is with the above background that the issue of the formulae used by the Respondent in determining the amount of duty now claimed should be considered. The Respondents have strongly argued that it invoked the power conferred on it by S 218A of the Customs & Excise Act which provides:

“Where in the opinion of the Commissioner, a person has failed to pay duty which is payable by him by reason of:

1. His failure to keep proper books of account, record of documents, as required under this Act, or the incorrectness or inadequacy of those books of account or records or documents; or
2. His failure to make any return required under this Act, or delay in making such return, or the inadequacy or incorrectness of any such return;

the Commissioner may, on such evidence as may be available to him, and according to the best of his own judgment, determine the amount of duty, if any which is payable.”

The Courts observations here are:-

- i. The Respondents must show what documents were required under the Act and were not furnished by the Applicant
- ii. That the Applicant failed to pay duty on account of failure to keep the records or account
- iii. Only where either of the sets of documents are unavailable is the Commissioners discretion triggered off to use such evidence as may be available to him and according to his own judgment determine the amount of duty.

In these proceedings the Respondents have not contested that the required returns were not made available by the Applicant – they have actually been exhibited and verified as to correctness by the Respondents. The issue of the returns inadequacy or incorrectness does not logically arise due to the confirmation by the Commissioner of their correctness as stated in the returns. The returns having been availed during the relevant period pursuant to the provision of S 218A the Respondents discretionary provision to determine amount of duty would not in the opinion of the court arise because the applicant has satisfied alternative (b). Any formulae based on input-output is therefore ultra vires this section as well.

It should also be observed that although the Respondent have strongly argued that they invoked the provision of S 218A, to come up with the formulae which determined, the amount of duty demanded, the

section does not empower the Respondent to either change the tariff as it did or to backdate the duty for five years because the making of the decision to change the tariff and to backdate has nothing to do with any of the two statutory failures concerning the documents.

Under the Act the documents required as per Section 96 are:-

“all records which may be required under the provisions of the Act and shall make therein the prescribed entries relating to the manufacture, storage and delivery of excisable goods and materials...

“A licensee shall render, in the prescribed manner and at the prescribed times, such returns as may be required of him in accordance with the provisions of this Act

“Records required to be available for inspection at all times”

Two points emerge about documents firstly they must be prescribed and secondly they must be available at the factory for inspection at all times. Books of account and others may be produced under Regulation 265 on manufacture and sales. However S 96 is the key – they must be *prescribed*.

What then is the power of the Respondent under S 218A:

- i. Failure to pay duty must be shown. They have not demonstrated this say, by using the returns filed. Instead they have used a formulae even in the face of clear provisions (a) and (b) – right from the start. Under the Act they can assess duty by either using books of account, record of documents, as required under the Act, or by returns filed pursuant to the Act;
- ii. Only when these are unavailable do they have power to use their discretion. The power is given to the Commissioner under the Section;
- iii. The returns having been availed and their correctness confirmed the Commissioners would be acting in error of law to use any other formulae;
- iv. The Respondents have not shown what other documents required under the provisions of the Act were unavailable;
- v. Having confirmed the correctness of the returns as and when availed they cannot reasonably prove incorrectness or inadequacy five years after the event. Even if this were legally possible it reveals incredible negligence on the Respondents part.

12)VAT relates to “services” or “supply of goods” as per S2 of the VAT Act. In the case of a manufacturer the supply includes the sale or provision or delivery of taxable goods to another person.

From this provision it is clear that even as regards VAT it is the production and sale at the factory which constitutes the basis for its assessment and S137 of Excise and S9 of the VAT Act are substantially the same. In the case of VAT the Respondents have a discretion when the price cannot be determined. In a situation where prescribed books are provided he has to use them.

INCOME TAX

This is legally based on gains or profits and in the case of a manufacturer it has to have a basis in production and sales and the profit arising from the sales. The enabling powers are Sections 3 and 4 of the Income Tax Act Cap 470.

LINKAGE

From the above provisions it is quite evident that duty on excisable goods shall be charged at the rate in force when the goods liable to duty are delivered from the stockroom of the licensee. That is when the

duty becomes due – in other words the time of delivery determines rate of excise duty. The production delivery and sales then becomes the basis for the other taxes like VAT and Income Tax which are based on supply and profits.

It follows that if the assessment of Excise Duty is based on factors outside the Excise Duty, the basis or substratum of the other taxes is equally ultra vires due to the above interrelationship. This linkage is acknowledged in the Respondents further skeleton Arguments pg11 as follows:-

(ii) “All the taxes are directly related to the sale volumes”

(iii) “The value of what has been manufactured has a direct correlative with the products manufactured”

In addition fortification and mixing of wine is the responsibility of the wine manufacturer as per S110A of the Excise Duty Act. This section coupled with SS137 and 218 A of the Excise Duty Act and S29 of the VAT Act denies legal validity to assessment of the two taxes on an input - output ratio basis. The contention that S 218A gives the Respondent the power to pluck its own figures from the blue (pages 153-163 Kiuvu’s affidavit of 12th January 2007) has no basis in law and is ultra vires the Respondents’ powers. It is arbitrary and oppressive and an improper exercise of the Respondents discretion as defined in S 218A in *particular*.

16) CLASSIFICATION OR TARIFF

The relevant law is the First Schedule to the Customs and Excise Act as read with the Act itself. This is therefore a naked question of law to be determined by the court.

What is apparent from the arguments presented on this, by both parties, both the interpretation section 2 of the Customs and Excise Act which defines what wines is and S 116 A which allows a wine manufacturer to mix in his factory spirits with wine, respectively do not draw a distinction between the fruit base of wine or fortified wine. This is clear from the definition of the word “wine” elsewhere in this judgment.

It is important to note that the Respondents have argued in their Skeleton Arguments that there are basically only two groups of wines:

- i. Grape based wines and;
- ii. Wines from other fruits;

They contend that either of these categories can be fortified by the addition of spirits. The classification of a wine and the determination of whether the wines falls under classification 22.04 or 22.06 is mainly determined by the heading under which it is classified. The basis for this is Part I of the Customs and Excise Act Cap 472 Laws of Kenya

ion 2 (3)(a)(f) and (g).

(f) reads:-

“For legal purposes the classification of goods in the tariff description of a heading shall be determined according to the terms of those tariff descriptions and any chapter notes relative to those tariff descriptions and mutatis mutandis –

(g) reads:-

The classification of goods within a tariff description shall have regard to the wording of the heading”

The Respondents further rely on explanation notes of the Harmonised System Code which is controlled

by the World Custom Organisation and Kenya is a member.

The notes on 22.06 which are not on all fours with the second Schedule of the Customs Act and the Finance Act 2002 – under the heading of Beverages have included:

“wines obtained by fermentation of fruit juice, other than juice of fresh grapes (fig dates or berry wines) or of vegetable juices, with an alcoholic strength of volume exceeding 0.5% volume.”

On the other hand the Applicant has contended that their wines fall under the description of fortified wines appearing under Tariff 22.04 where heading reads:

“WINE OF FRESH GRAPES; INCLUDING FORTIFIED WINES: GRAPE MUST OTHER THAN THAT OF HEADING 20.90

- Sparkling wine
- Other wine; grape must with fermentation prevented or arrested by the addition of alcohol
- In containers holding 21 or less
- Other
- Other grape must

The Applicant’s argument on this is that it does not matter whether the wine is grape, pineapple, pawpaw, or banana based or any other fruit base so long as the wine is made from fruit and sugar or fruit and sugar mixed with any other material, and in the case of fortified wines it is mixed with a spirit in accordance with the statutory provisions. It is further contended that the literal interpretation of the words or phrase in terms of the clear and unambiguous words of tariff 22.04 description there are two categories of wines and one wine base or material namely:

- i. Wine of fresh grapes;
- ii. Fortified wines (irrespective) of the wine base or must;
- iii. Grape must to the exclusion of those falling under heading 22.09.

The construction found in the first limb of the description can only be read disjunctively on account of the use of the plural in the words “fortified wines” and the singular form used in the words “wine of fresh grapes” and without carrying the adjectival description and construction of the words “of fresh grapes”. When this is contrasted with the tariff description under Heading No 22.05 the point becomes crystal clear.

22.05

The tariff description under the heading number “vermouth and other wine of fresh grapes flavoured with plants or aromatic substance.” Here it is clear that Vermouth and wine of fresh grapes flavoured with plants or aromatic substances are two distinct products. Vermouth is a red or white wine flavoured with aromatic herbs chiefly drunk mixed with gin but are flavoured with plants or aromatic substances. The adjective “of fresh grapes” does not apply to vermouth. But the process that both categories of wine falling under this description undergo ie flavouring with plants or aromatic substances apply.

22.06

The tariff description under Heading 22.06 is:-

“Other fermented beverages (for example cider, perry, mead): mixtures of fermented beverages and mixtures of fermented beverages and non-alcoholic beverages, not elsewhere specified or included”

From this description it is clearly evident, that fortified wines are not specified or included in the description nor is the process of fortification or addition of spirits referred to in the tariff description. If it was the intention of the legislature to include non grape based fortified wines in the tariff description, then the enactment would have been clear just as it is on the mixtures of fermented beverages and non alcoholic beverages. The tariff description would either have included fortified wines specifically or stated that the description included mixtures of fermented beverages and spirits or other alcohol.

I accept the Applicant’s contention that their products fall under tariff 22.04 for the following reasons:-

- i. It tallies with the definition of “wine” in S 2 of the Customs & Excise Act;
- ii. The tariff has a clear reference to fortified wines (in plural) and article description;
- iii. The literal and natural meaning of the words used in the heading clearly covers wine of fresh grapes and fortified wines and the phrase “fortified wines” must be read with the definition of the word “wine” in view – It covers all fortified wines regardless of their base which is generally fruit and sugar. The literal and natural method of interpretation must be the starting point because the words are not ambiguous;
- iv. The tariff description provides the most specific description, which is preferred to tariff descriptions providing a more general description. 22.06 is more general for example the word “beverage” means any drink other than water;
- v. The Applicants’ products should be classified under the tariff description appropriate to the goods to which they are most akin – the fruit based whether pineapple or other fruit are closely related and they should be grouped together;
- vi. Taking into account the provisions of S 2 of the Custom & Excise Act concerning the method of classification and the provisions of S 116A of the Act on what the manufacturer is authorized to do with his wines, the second description or second category of wines namely fortified wines in 22.04 is more in tune with these sections of the Act;
- vii. The beverages described under Tariff Heading No 22.06 like cider, berry, mead, beer, chibuku etc are not akin to the Applicants products eg pineapple based wine;
- viii. Placing the Applicants products under tariff 22.06 strains the language and this is against well known rules of construction of statutes;
- ix. The explanatory notes published by the World Customs Organisation (HS) cannot supercede the clear and ambiguous descriptions found in the First Schedule. The literal and grammatical meaning of a statute or Act using linguistic canons of constructions is always preferred where the meaning of an enactment is clear and unambiguous. The Act is to be read as a whole without attributing to any particular provisions or words a tortured or strained construction or interpretation. The starting point is the statute itself which is read by construing the words used or gathering the meaning from the words used before venturing onto other aids of construction. The Act and the First Schedule have their municipal integrity which this court must uphold. The court must turn against a construction, which would undermine the integrity of the clear words of an Act of Parliament and its provisions. International instruments do come in handy in situations of ambiguity (and there is none here) or where the Act is silent on an essential matter a court could use the instruments – see how the Constitutional Court ruled on the application of international instruments in the case of *RM infant suing by Josephine Kavinda next friend v Attorney General Civil Case No. 1351 of 2002*;
- x. The principle enunciated in the case of *JAFFERALI MOHAMEDALI ALIBHAI v THE*

“that the subject is not to be taxed unless the words of the taxing statute unambiguously impose the tax upon him”

Only the clear words of tariff 22.04 can be the basis of taxation – anything else is not permitted and cannot be used to impose an additional tax.

xi. Under 22.06 the Applicant can only be taxed by inference and analogy say of HS Code – this cannot be the basis of sound tax law – Taxation must be based on clear words – and this clarity is captured by tariff 22.04 and not tariff 22.06 in the case of the applicant products;

xii. The initial and subsequent licenses were all based on tariff 22.04. Certainty of law is an important ingredient of the rule of law including tax law.

S91(5) reads:-

“A licence under this section shall be issued to a particular person and shall be in respect of the factory and class or classes of excisable goods specified in the licence; and

i. the licenced factory shall not be used except for the manufacture of the goods specified in the licence; and

ii. only the licensee shall manufacture goods in the licensed factory.”

xiii. It is clear from the above that the tariff goes with the licence and tariff 22.04 has been attached to the applicant licence for nine years, including the 5 years in question thereby creating a legitimate expectation by the applicant in respect of the tariff.

(17) RULES OF INTERPRETATION WITH PARTICULAR

REFERENCE TO TAXATION

On this topic I accept the Applicant’s counsel powerful argument that taxation can only be done on clear words and that taxation cannot be on intendment. Linked to this is that a penalty must be imposed in clear words. Finally even where the inclination of the legislature is not clear or where there are two or more possible meanings, the inclination of the court should be against a construction or interpretation which imposes a burden, tax or duty on the subject. Again although the Respondents Counsel has argued that over the years the policy and attitude of the taxation has changed and that we are now in the era of self assessment and therefore impliedly, taxation is not penal, I hold that the reality on the ground is that the self assessment has NOT changed the penal/nature of taxation. Nothing summarises the above position better than *BROOMS LEGAL MAXIMS*:

“a remedial statute therefore shall be construed so as to include cases which are within the mischief which the statute was intended to remedy; whilst, on the other hand, where the intention of the Legislature is doubtful, the inclination of the court will always be against that construction which imposes a burden, tax or duty on the subject. It has been designated as “a great rule” in the construction of fiscal law, “that they are not to be extended by any laboured construction, but that you must adhere to the strict rule of interpretation; and if a person who is subjected to a duty in a particular character or answers that description, the duty no longer attaches upon him and cannot be levied. A penalty moreover must be imposed by clear words. The words of a statute shall be restrained for the benefit of him against whom the penalty is inflicted, and the language of the statute must be strictly looked at in order to see whether the person against whom the penalty is sought to be enforced has committed an offence to do with it.”

.....

The principle remarked Lord Abinger “adopted by Lord Tenterden, that a penal law ought to be construed strictly is not only a sound one, but the only one consistent with our free institutions. The interpretation of statutes has always in modern times been highly favourable to the personal liberty of the subject and I hope will always remain so. This Court of course does appreciate the point made by the Respondents’ Counsel that if the meaning of the provisions of the relevant empowering taxation laws is clear the court has no business intervening. This principle is based on the high authority of *BENNUN ON STATUTORY INTERPRETATION* at page 726, 727 as follows:-

...If the meaning of the provision is reasonably clear, the courts have no jurisdiction to mitigate such harshness. It is of course regarded as penal for a person to be taxed twice over in respect of the same matter.”

The significance of this quotation is that although the Applicant did file monthly returns and keep daily production records, and the stockbook as required the tax imposed by the subsequent formula based on input and output purports to tax the company twice. This is also reflected in the inconsistent figures reflected by the three major audits. The taxman had come up with inconsistent figures for the same period due to its lapse in adhering to the law especially S 137 of the Act. I find that they cannot tax the applicant twice over *BENNUN* adds:-

“Nevertheless taxation is clearly “penal” within this section of the Code, and must not be enforced by the courts unless clearly imposed. As Evans LJ said in the context of tax legislation it is necessary to consider the legal analysis with the utmost precision so that the taxpayer shall not become liable to tax unless this is clearly and unequivocally the object of the statutory provisions ... The Courts are reluctant to adopt a construction permitting a person’s tax liability to be fixed by administrative discretion.”

This is how this court has regarded the assessment of tax on an arbitrary input-output formulae because it is not supported by any law nor is its retroactivity permitted by law. There could not have been arrears of Excise Duty due outside S 137 of the Act. Failure to produce records under-declaration are all offences under the Act and they attract heavy penalties in some cases assessed at three times the *value* of goods. S 127 of the Act allows the determination of value but not the imposition of a formula. In addition failure to account for goods is properly captured by S 110 and S195. The remedies are clearly spelt out under the Act and these are the only remedies available as stated above and that, the taxman is not permitted to go on a frolic of his own to impose tax not specifically permitted.

The same principles as above, were accepted and applied in the case of *CAPE BRANDY SYNDICATE v INLAND REVENUE COMMISSIONERS [1921] K.B 64* where Ronlat J, restated the principle in these words:

“in a taxing Act clear words are necessary in order to tax the subject. Too wide and fanciful a construction is often to be given to that maxim, which does not mean that words are to be unduly restricted against the Crown or that there is to be any discrimination against the crown in those Acts. It simply means that in a taxing Act one has to look merely at what is clearly said. There is no reason for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing to be implied. One can only look fairly on the language used.”

Again, in the case of *RAMSAY LTD v INLAND REVENUE COMMISSIONER (1992) AC 300* the same principles were expressed as follows:-

“A subject is only to be taxed on clear words not upon intendment, or upon the “equity” of an Act”. Any taxing Act of Parliament as to be construed in accordance with this principle. What are “clear words” is to be ascertained upon normal principles; these do not confine the courts to literal interpretation. There may, indeed should, be considered the context and scheme of the relevant Act as a whole and its purpose may, indeed should be regarded ...” A subject is entitled to arrange his affairs so as to reduce his liability to tax. The fact that the motive for a transaction may be to avoid tax does not invalidate it unless a particular enactment so provides. It must be considered according to its legal effect.”

The applicant has in the last five years (the years in question sold its products in the market at a particular price) in the faith that its affairs are in order and have been carried out in line with the legal requirements. It did this with evident acquiescence, approval and authority of the Respondents who endorsed the monthly returns as correct as per the prescribed forms and who according to the law ought to have exercised its power to check the returns for any errors as they came in on a monthly basis and also check the stock records which were done on a daily basis. To illustrate that this is what the legislature intended in the case of Excise Duty at one point, the Applicant or its predecessor indicated the wrong tariff classification and underpaid Excise Duty and the Respondent was able to immediately impose the required penalty which was promptly paid in respect of one to three months. This is how the law provides in respect of the enforcement of Excise Duty. It will also be recalled that when the applicant was under a cloud of suspicion concerning the quality of its goods the licence was withdrawn and was only reinstated after the necessary clearance. The scheme of the Act does not permit or condone laxity or negligence on the part of the taxman to do nothing for five years or to say all is well for all this time and then one morning, reconstruct its own figures based on expected sales long after the goods were sold at exstockroom or delivery prices as per the Act. The taxman I hold could only have been entitled to recover any arrears based on the method set out in S 137 and the other relevant tax Acts – the recovering is of course subject to the limitation period stated in each of the other two Acts and it is clearly not entitled to reconstruct new figures based on a new tariff and brand then recoverable arrears under the Law. They are certainly not permitted and the above quotations on tax law settle the point beyond conjecture. Taxation must be on clear words of a statute or Act not intendment or formulae.

It follows therefore that the tax demanded by letter of 29th November 2006 was not based on what was actually due in terms of figure, value, or volume. It was based on a formulae other than what was actually produced and to this extent it was an illegal tax demand and I find that it is a nullity. The same position prevails as regards VAT assessment on an input-output formulae because S 2, S 5 and 6 of the VAT Act, make it abundantly clear that tax is due when goods are supplied or delivered. They ought to have been based on actual sales, that is what was actually supplied or delivered. On the other hand the letter of 23rd October shows that the assessment was based on an input-output ratio – and this is both outside the language and the relevant provisions of the Act the assessment is clearly ultra vires the Act and illegal. Small wonder, various assessments were made during the period 2001-2002 on the basis of the records availed. Another assessment was done between 2002 to 2004 on the basis of the availed records but records were said to have been unavailable in the year 2006. All the three audits come up with different figures over the same period. It is clear to the court that, in the entire decision making process the Respondents have acted with incredible negligence, arbitrariness irrationality and in disregard of the applicable law and their powers. The irrationality and unreasonableness in the varying figures is quite evident. All these varying figures were made over the same period on the basis of the availed records. The same position prevails as regards the Income Tax assessment which was also based on expected sales instead of actual gains or profits. Moreover the impugned decision as per the letter in question, represents an impropriety of procedure in making a composite demand that overlooked the procedural safeguards in each of the Acts. I find that the demands must fail on this ground as well. I accept the holding in *R v INLAND REVENUE COMMISSIONNER ex-parte OPMAN INTERNATIONAL U.K. [1986] 1 ALL ER 325* as good law that judicial review should still be available to litigants even where alternative procedures may be available but are not satisfactory in achieving the applicants claims. Many of the legal issues raised and determined in this judgment, clearly fall outside the fullest powers of the Tax Tribunals under the relevant Acts.

(18) IMPACT OF RULES OF CONSTRUCTION OF TAXATION STATUTES ON THE TARIFF CLASSIFICATION

Due to the obvious overlap of the grounds of judicial review interventions in this case, which cover inter-alia illegality, irrationality and impropriety of procedure it is again important to stress that this court's rejection of the formulae, has the support both of statute law and decided cases in this field of taxation. Thus, in the case of *COMMISSIONER OF INLAND REVENUE THE DUKE OF WESTMINISTER [1986] AC 1*, at page 24 Lord Russel addressed some of the points covered above, as follows:-

“I confess that I view with disfavour the doctrine that in taxation cases the subject is to be taxed, if in accordance with the court’s view of what it considers the substance of the transaction, the court thinks that the case falls within the contemplation or spirit of the statute. The subject is not taxable by inference or by analogy but only by plain words of a statute applicable to the facts and circumstances of the case. As Lord Cairns said many years ago in *PARTINGTON v ATTORNEY GENERAL* “As I understand the principle of fiscal legislation it is this, if the person sought comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown seeking to recover the tax cannot, bring the subject within the letter of the law, the subject is free however apparently within the spirit of the law the case ought otherwise appears to be ...”

In the case *SCOTT v RUSSELL (INSPECTOR OF TAXES TC 394 at pg 424* Lord Simonds observed:

“that the subject is not to be taxed unless the words of the taxing statute unambiguously impose the tax upon him.”

Using the above principles the Respondents’ classification of the applicants’ products under tariff 22.06 which is for:

“Other fermented beverages (for example cider, perry mead); mixtures of fermented beverages and mixtures of fermented beverage and non alcoholic beverages not elsewhere specified or included.” Such classification is not in clear words because they do not refer or describe the applicants products.

As it is not denied that the Applicants products, were fortified pineapple based wines three aspects of the words used in 22.06, take it out of this tariff namely:-

- (i) there is no fortification at all of the products under tariff 22.06 only fermentation is referred to
- (ii) it covers non alcoholic beverages not otherwise specified
- (iii) the term “beverage” in the Concise Oxford Dictionary tenth Edition means “*a drink other than water*” Surely fortified wines do not become drinks until properly or suitably fortified. The word “wine” as is defined in the Act, and set out elsewhere in this judgment clearly gives a *fruit sugar base* to wines and they therefore fall under a description of their own in 22.04 which covers two products namely wine of fresh grapes, and fortified wines. The pineapple based products of the applicant clearly fall under this category as a matter of law and by definition and in terms of being more akin to products under 22.04) than the beverages under 22.06. Pineapple based products cannot be denied their fruit base and be classified under 22.06 without straining the language. It cannot be correct, to describe them as specified beverages because the word wine has been given a statutory definition which gives it a tariff of its own – wine with a fruit base and fortified.

It certainly lacks “akinness” to “beer” or “chibuku” which are included in 22.06.

I find and hold that you cannot strain the language of the Act and the Schedule on Tariff in order to impose additional tax on a taxpayer as the Respondents have purported to do. It is clearly not permitted by the Act or any law including the principles of construction set out in extenso in this judgment. You cannot tax by inference or analogy. Any attempt to do so perpetrates an illegality; it is arbitrary and oppressive. I further find that wine having been specifically defined in the Act it cannot be construed to be a beverage which means a drink other than water. The court has to give the word wine its statutory meaning which clearly takes it out of Tariff 22.06.

The additional reason why the Applicant company’s products must be confined to tariff 22.04, is that over a period of nine years, the applicant run its affairs on the basis that it was the correct classification of the applicants products and on the strength of an annual licence renewed on the same terms each year and which the applicant in all the respective renewal applications indicated as “wine” and which resulted in licences issued to S91 of the Customs & Excise Act. Thus, in *BENNION FRANCIS STATUTORY INTERPRETION* at page 597 the Respondents own *rulings* (that the tariff was 22.04) for over nine years

must be applied against it for the reason stated in the book as under:-

... “The administration of every Act of Parliament is within the purview of some government department. This applies even where other public bodies (such as local authorities) are charged with the day to day operation of the Act. It follows that the relevant government department is frequently obliged to form a view as to the meaning of a doubtful enactment. This may happen before the point has come before any court and arises simply as a matter of administration. The informed interpretation rule requires that an Act is to be interpreted in the light of such *official rulings*”.

From the January 2006 audit report, it is clear that the Respondents were authorized to seek legal opinion on tariff but the official position before that, or the administration position was that the applicants' products fell under tariff 22.04 and not tariff 22.06. Tariff 22.04 was the Respondents own rulings over the years. The Respondents own report clearly reveals that the change of tariff was being sought in order to block the payment of the Applicant's admitted refund. The purpose was manifestly ulterior to the Respondent statutory duty and it is clear to the court that the change to 22.06 was to fulfill the ulterior motive. The tariff was changed taking into account an irrelevant consideration namely to block a refund and not as a matter of law. It is clear to the court that no attempt was made to address the relevant law on classification, and failure by a decision maker to address the relevant law in a ground for judicial review intervention. Similarly taking into account irrelevant considerations in the decision making is also a ground for intervention, in judicial review. The net result of the respondents' action is discrimination, bad faith and a monumental abuse of power, which in turn demand this court's intervention.

LEGITIMATE EXPECTATION AND ABUSE OF POWER

The Applicant claims its legitimate bargain of paying tax on tariff 22.04 has been thwarted by the Respondent since before the use of this tariff upon which taxation has been based, the respondents had taken into account the chemistry of the applicants manufacture and deliberately identified tariff 22.04 as the correct tariff for the manufacture and accordingly issued a licence under S 91 of the Act specifying in a tariff 22.04. The Applicants expectation over the years and even now are based both on practice of many years and on the Respondents promise as per the correspondence exhibited and in particular letter dated 27th April 1996. Since the classification was pegged to the initial licence which has been renewed from year to year including the relevant period 2002-2005, the court finds that there is proof of a written representation or promise capable of sustaining legitimate expectation or legitimate expectation based on conduct by the Respondent in accepting payments based on tariff 22.04 over nine years. In addition, addressee of the letter of 27th April 1996 whether as an individual or partnership is directly linked to the Applicant and was treated as such by the Respondents in their licensing procedures and the fact that the premises of the factory remained the same for the partnership and the company applicant. I find and hold that there is legitimate expectation in favour of the applicant based on the written promise and/or legitimate expectation based on the conduct of the Respondents over the years.

The court finds that the Applicants claim is well embraced by the principle of legitimate expectation and the following decisions underpin the applicant's claim.

In *R (BIBI) v NEWHAM LONDON BOROUGH COUNCL* Schieman LJ gave a set of three practical questions for the Court to pose in ascertaining whether a claim based on legitimate expectation is properly grounded and these are:

- (1) What has the public authority, whether by practice or by promise committed itself;
- (2) Whether the authority has acted or proposes to act unlawfully in relation to its commitment;
- (3) What should the court do.

Using the first question the Respondents have for a number of years by both practice and promise committed themselves to tariff 22.4 and the Applicant has on its part, acted on the practice and promise. Surely the Respondent cannot in the circumstances say that as a public body, they had done nothing or

said nothing which could reasonably have generated the expectation that taxation on this tariff would not continue. This is the expectation that is being advanced to the court by the Applicant. The answers to the first question above is clearly in favour of the Applicants even on the documentary evidence by way of letters written by the Respondents and also by conduct of the parties during the relevant period as well..

Taking the second question above, arbitrary change of tariff in the face of the same chemistry in the manufacture of the Applicants products is arbitrary, unlawful, in bad faith and above all, abuse of power. Pineapple based wine is wine as defined in the Act. As held by this court in the *R v JUDICIAL COMMISSION OF INQUIRY & 3 OTHERS ex-parte SAITOTI Misc Civil Application No. 102 of 2006* where there is an abuse of power the court should invoke its judicial review jurisdiction to prevent such an abuse of power. Thus, even assuming that the Respondents are in law, entitled to change their taxation policy, and this the court cannot deny the Respondents, what it is in fact doing in so far as the evidence goes, is to specifically deal with the applicant by effecting or targeting the change of tariff on the Applicant only. In other words the change of tariff is not based on a broad change of policy based on any broad conceptions of the public interest. In the later situation the court would have no power or need to intervene.

As indicated by the Applicant the Respondents through 2005-2006 Budget in Parliament attempted to present to Parliament what purported to be a broad policy touching on tariffs by increasing them from 45% to 65% as they are now trying to do from their offices in respect of the Applicant Company but Parliament rejected that and found the policy although couched as applicable generally, was targeted at the Applicants and rejected it. Seen from this standpoint the Respondents arbitrary imposition of a tariff attracting higher taxation literally wants to have a second bite to a forbidden cherry!

Taking the above into consideration, the court finds it improper, that the Respondent have used their power the way they have done in the circumstances of the case, in that the motive for the change is improper, discriminatory and done in bad faith and in addition the Applicants have quite rightly demonstrated that, there is in the circumstances detrimental reliance in the past practice and promise. Moreover effecting the change of tariff retroactively is in the view of the Court *Wednesbury* unreasonable and irrational. No reasonable taxman or any reasonable public body would abruptly change tariffs retrospectively to an industry that has been in existence for over 10 years. In other words the conduct of the Respondents does not reflect consistency of treatment and equality. Even in taxation law, these ideals and values must be protected by the courts. Failure to adhere to these values leads to unfairness and legitimate expectation is about fairness at the end of the day. Whether or not there is unfairness in law has to be ascertained on a case to case basis and there cannot be a rule of thumb. In this regard this court adopts as good law the visionary observation by Sir Thomas Bingham MR in *R v INLAND REVENUE COMMISSIONER, ex-parte UNILIVER p/c* [1996] STC p 681 at page 690 in these words:

“The categories of unfairness are not closed, and precedent should act as a guide and not as a cage.”

This court is well aware of its limitations and would not interfere with the Respondents ability to change their taxation general policy from time and as it deems it fit. Indeed this is why it exists. The court must take cognisance of the fact that the Respondents must have the flexibility in articulating and implementing that policy. It would be unreasonable for instance to expect the Respondents to be wedded to the same tariff policy forever but they must be held to their bargain in adhering to consistency where the chemistry of the products has not changed at all. They cannot unilaterally rule that the tariff of a product which has not changed and which has over the years been allocated a particular tariff should move to another different tariff. Such a change is arbitrary, oppressive and *Wednesbury* unreasonable. In the case in question the Respondent plucked from the air a tax liability of 1.1 billion and placed on the shoulders of a company which on the evidence had paid taxes lawfully due under the applicable tariff during the relevant period.

By rejecting the applicants decision to change the tariff as proposed, the court will be sending out a clear signal that legitimate expectation is based not only on ensuring that legitimate expectations by the parties are not thwarted, but on a higher public interest beneficial to all including the respondents, which is, the value or the need of holding authorities to promises and practices they have made and acted on and

by so doing upholding responsible public administration. This in turn enables people affected to plan their lives with a sense of certainty, trust, reasonableness and reasonable expectation.

An abrupt change as was intended in this case, targeted at a particular company or industry is certainly abuse of power. Stated simply legitimate expectation arises for example where a member of the public as a result of a promise or other conduct expects that he will be treated in one way and the public body wishes to treat him or her in a different way. In this case the applicant did not expect an abrupt change of tariff where the process of manufacture or its products had not changed. Public authorities must be held to their practices and promises by the courts and the only exception is where a public authority has a sufficient overriding interest to justify a departure from what has been previously promised. In this case imposing a liability of 1 billion on the applicant to be paid within 14 days though attractive in terms of enhanced public revenue and perhaps for the zeal of meeting annual tax targets, I find is not such an overriding interest for the reasons set out in this judgment including failure to satisfy the principle of legality.

In order to ascertain whether or not the Respondents decision and the intended action is an abuse of power the court has taken a fairly broad view of the major factors such as the abruptness, arbitrariness, oppressiveness and the quantum of the amount of tax imposed retrospectively and its potential to irretrievably ruin the applicant. All these are traits of abuse of power. Thus I hold that the frustration of the applicants' legitimate expectation based on the application of tariff amounts to abuse of power.

I follow and adopt as good law the holdings in the following tax cases:

- 1) *REG v INLAND REVENUE COMMISSIONERS ex-parte PRESTON* [1985] AC 835
- 2) *REG v INLAND REVENUE COMMISSIONER, ex-parte UNILIVER plc* [1996] S.T.C. 681

The cases are in relation to a decision by a public body in both cases to resile from representations (in tax matters) about how the public bodies namely the Crown would treat taxpayers. In both cases it was confirmed that special principles of public law should not apply to tax payers or the taxman.

The Respondents conduct in the case before the court is clearly caught by each of these forms of abuse of power. To illustrate this, the Respondents have targeted one company and reneged on a past practice touching on tariff for a particular chemistry or process where the ingredients remain the same. The court cannot therefore allow them to renege on past practice. It is clear that the intended change of tariff is aimed at achieving a collateral purpose and in the circumstances the court is of the view that it has the mandate to redress the unfairness and abuse of power. Indeed in the *PRESTON* case Lord Scarman held that judicial review must reach out if the Commissioners were in breach of representations made to a tax payer.

Finally I must conclude this topic of legitimate expectations and abuse of power by holding as I have held in the past that it is implied that power given to authorities or persons by an Act of Parliament must be exercised fairly, and the court has the power to reach out where the exercise of that power is unfair and I further endorse Lord Scarman's quote in *REG v SECRETARY OF STATE FOR THE ENVIRONMENT ex parte NOTTINGHAM SHIRE COUNTRY COUNCIL* [1986] AC where he stated:

“A power which is abused should be treated as a power which has not been lawfully exercised.”

Thus the courts role cannot be put in a straight jacket. The courts task is not to interfere or impede executive activity or interfere with policy concerns, but to reconcile and keep in balance, in the interest of fairness, the public authorities need to initiate or respond to change with the legitimate interests or expectation of citizens or strangers who have relied, and have been justified in relying on a current policy or an extant promise.

As held in *Ex PARTE UNILEVER plc* (supra) the Court is there to ensure that the power to make and alter policy is not abused by unfairly frustrating legitimate individual expectations. It is no defence for a

public body to say that it is in this case rational to change the tariffs so as to enhance public revenue. The change of policy on such an issue must pass a much higher test than that of rationality from the standpoint of the public body. The unfairness and arbitrariness in the case before me is so clear and patent as to amount to abuse of power which in turn calls upon the courts' intervention in judicial review. A public authority must not be allowed by the court to get away with illogical, immoral or an act with conspicuous unfairness as has happened in this matter, and in so acting abuse its powers.

In this connection Lord Scarman put the need for the courts' intervention beyond doubt in the *ex-parte PRESTON* where he stated the principle of intervention in these terms:

“I must make clear my view that the principle of fairness has an important place in the law of judicial review: and that in an appropriate case, it is a ground upon which the court can intervene to quash a decision made by a public officer or authority in purported exercise of a power conferred by law.”

The same principle was affirmed by the same Judge in the House of Lords in *REG v INLAND REVENUE COMMISSIONERS, ex-parte NATIONAL FEDERATION OF SELF EMPLOYED AND SMALL BUSINESS LTD [1982] AC 617* that a claim for judicial review may arise where the Commissioners have failed to discharge their statutory duty to an individual or have abused their powers or acted outside them and also that unfairness in the purported exercise of a power can be such that it is an abuse or excess of power. In other words it is unimportant whether the unfairness is analytically within or beyond the power conferred by law: on either view, judicial review must reach it. Lord Templeman reached the same decision in the same case in those helpful words:

“Judicial review is available where a decision making authority exceeds its powers, commits an error of law commits a breach of natural justice reaches a decision which no reasonable tribunal could have reached or *abuses its powers*.”

Abuse of power includes the use of power for a collateral purpose, as set out in *Ex PRESTON*, reneging without adequate justification on an otherwise lawful decision, on a lawful promise or practice adopted towards a limited number of individuals.

I further find as in the case of *R (BIBI) v NEWHAM LONDON BOROUGH COUNCIL [2001] EWCA Cin 607, [2002] WLR 237*, that failure to consider a legitimate expectation is a failure to consider a relevant consideration and this would in turn call for the courts' intervention in assuming jurisdiction and giving the necessary relief.

ABUSE OF DISCRETION

Even assuming that the Applicants' products and their chemistry fell under tariff 22.06 it is unfair and unlawful for the Respondent to exercise its discretion by changing to tariff 22.06 when it had for several years, in fact nearly 9 years led the Applicant to act and pay on the basis that tax was due, only under tariff 22.04 and the Applicant had so believed and acted and planned the affairs of the company in that belief. Although the Respondents contend that the written representation to classify the applicants' products was made to a partnership and not the applicant limited liability company there is correspondence from the Respondent treating them as the same when demanding books of accounts. Even if the Respondent had statutory discretion to change tariffs the court holds that such statutory discretion cannot be exercised arbitrarily or improperly.

It follows that as the Applicant has been paying and is up to-date with the tax payments based on tariff 22.04 the claim for 1.1 billion which is substantially, if not wholly based on tariff 22.06 is not based on any evidence of non payment and is founded on a illegality because it is based on a formulae outside the clear provisions of S 137.

I further find that even assuming that the Respondent had a discretion (which it did not have) that discretion was in the circumstances exercised arbitrarily and oppressively.

In this regard I endorse fully, the holdings reached in the *CONGREVE v HOME OFFICE* [1976] QB 629. Acting as the Respondent did in assessing a figure without evidence, is a ground for the exercise of this courts judicial review jurisdiction. In the circumstances, lack of evidence for a decision is a ground for judicial review - see the case of *R v BEDWELLY JUSTICES Exp WILLIAM* [1997] AC 225.

Singling out the Applicant and arbitrarily changing the tariff is in the view of the court an abuse of discretion or the use of a discretion for an improper purpose because the amount now demanded would drive the applicant out of business, lead to a monopolistic market situation, destroy jobs and ultimately deny tax revenue which the company has been paying and is expected to generate and pay in future. Decision makers including taxmen must not exercise their discretion for an improper purpose that is, to block an admitted refund.

In this regard my own recent decision in favour of the taxman (Respondent in the case) of the *R v KENYA REVENUE AUTHORITY ex-parte ABERDARES* where I held, that there cannot be estoppel against the taxman when he is invoking statutory power only protects the taxman when he is acting strictly in accordance with the statute as is clear from the *MARITIME* case appearing below.

In *MARITIME ELECTRIC COMPANY LTD v GENERAL DAIRIES QB 27* it was correctly stated:

“The underlying principle is that the crown cannot be estopped from exercising its powers, whether given in a statute or common law when it is doing so in the proper exercise of its duty to act for the public good, even though this may work some injustice or unfairness to the private individual ... it can however be estopped when it is not properly exercising its powers but is misusing them and it does misuse them if it exercises them in circumstances which work injustice or unfairness to the individual without countervailing benefit to the public.”

ILLEGALITY

The imposition of the tariff was based on an illegality in that an authority such as the Respondent (KRA) must not exceed its jurisdiction by purporting to exercise powers which it does not possess, which is to impose and apply a different tariff retrospectively. The Authority’s decision is also illegal in that the Respondents have not addressed themselves properly on the law. It is also illegal in that the Authority must not use its power for an improper purpose ie to single out the applicant to apply the tariff in order to block unpaid refund which they admit in their audit report is rightly due and valid.

In addition failure to consider a legitimate expectation as the Respondent did is a failure to consider relevant consideration see *R (BIBI) v NEWMAN* (supra). To the extent that the Respondent (KRA) acted outside the law or asked itself the wrong question it did so without jurisdiction and such exercise is a nullity see the cases of *ANISMINIC LTD (1969) 2AC 147* and *Re RACAL COMMUNICATIONS Re [1981] AC 374* as per Lord Diplock All errors of law go to jurisdiction.

In *CONGREVE v HOME OFFICE* (1976) IQ B 629 Lord Denning at 651 held:

“If the licence is to be revoked and his money forfeited the Minister would have to give good reasons to justify it. Of course, if the licensee had done anything wrong – if he had given a cheque for 12 pounds which was dishonoured, or he had broken the conditions of the licence –the Minister could revoke it. But when the licensee has done nothing wrong at all, I do not think the Minister can lawfully revoke the licence, at any rate, not without offering him his money back and not even then except for good causes. If he should revoke it without giving reasons or for no good reason, the court can set aside the revocation and restore the licence. It would be a misuse of the power conferred on him by Parliament and these courts have the authority and I would add the duty – to correct a misuse of power by a Minister or his department, no matter how much he may resent it or warn us of the consequences if we do.”

Finally even assuming for the purpose of argument that the Respondents have a discretion (and this is not accepted) to impose or alter the tariff without any restriction can this court intervene in the exercise of such an unqualified discretion. The court is of the view that it has such powers to intervene.

(1) From the circumstances and the manner of imposition of the tariff it is selective, arbitrary and oppressive which in itself is indicative of bad faith by the Respondents in the exercise of their discretion.

(2) It is also clear that the discretion if any was exercised unreasonably and or for an improper purpose.

Where there is no real or genuine exercise of discretion the courts must intervene. - see *PADEFIELD v MINISTER OF AGRICULTURE FISHERIES AND FOOD* [1985] AC 997.

Finally this court is entitled to intervene on the ground that there is no evidence shown that the Respondents in charging the tariffs acted on evidence of any change in the manufacturing or the chemistry of the manufacture of the relevant products. Thus lack of evidence for a decision is a ground for judicial review. Where a tribunal makes a finding of fact wholly unsupported by evidence or draws an inference wholly unsupported by any of the prevailing facts found by it, it may be held to have erred in point of law.

The applicant having paid regularly, taxes based on the tariff allocated to it, it is unreasonable and abuse of power for the Respondents to have purported to change the tariff and a breach on the part of the respondents to act fairly. Statutory power must be exercised fairly.

Perhaps it is important to recall the observations made in the English case of *REG v SECRETARY OF STATE FOR THE HOME DEPARTMENT ex-parte DOODY* [1994] IAC 531 as follows:

“The rule of law in its wider sense has procedural and substantive effect ... Unless there is the clearest provision to the contrary, Parliament must be presumed not to legislate contrary to the rule of law. And the rule of law enforces minimum standards of fairness, both substantive and procedural.”

The unilateral change of tariff indicate that this change was done nearly nine (9) years after its use by the Applicant company with its predecessors who shared the same licence that was based on tariff 22.04. The applicant has over this period arranged its business affairs in reliance with the principle of certainty of law – and that should there be a change it will only apply to the future. I hold that the applicant is entitled to hold the taxman to its bargain and its business expectations based on the principle of legality ought not to be thwarted. The Respondents should have exercised their power to change the tariff (if so entitled because elsewhere I have held that the correct tariff for the Applicants products was 22.04 and must remain so), in a spirit of legality and fairness. The retrospective application of the tariff was done:

(a) without notice or adequate notice;

(b) without allowing the Applicant to explain its position. There is correspondence to the effect that the Respondents decision on tariff would remain – and the Applicant was shut out;

(c) The change of tariff according to the Respondents own report was intended to block the payment of a refund in the sum of Kshs 36 million valid refund due to the applicant;

(d) The exercise of the power to change the tariff was not admittedly based on the respondents addressing the law on tariff. They admit that the law on tariff was uncertain and needed to be ascertained. It was clearly irrational to change the tariff before the legal position was ascertained. The fact that this was done before that ascertainment is evidence of irrationality in the exercise of power and due to failure to give reasons for the change before effecting the change, the decision to change does clearly violate the rules of natural justice. An attempt by the Applicant to be heard on the change of tariff was rejected in writing;

(e) The change over created an uncertainty in the law and this is itself a violation of the rule of law by the Respondent;

The Applicants expectation on assessment is that they should have come with the necessary procedural safeguards based on the rules of natural justice for example the periods for objections and the right of

hearing by the tribunals in the case of VAT and Income Tax. A 14 days fax notice violates the principles or safeguards of procedural fairness and also legitimate expectation of the applicant.

In this regard I find that the law requires that any legitimate expectation be properly taken into account in the decision making process. It has not been in the present case and therefore the Respondent acted unlawfully. Had the Respondent taken the Applicants legitimate expectation that the tariff for example would not be changed without notice, it would not have applied it retrospectively, yet this appears not to have been addressed at all in the decision making process.

ERROR OF LAW

After nine years since the first licence based on tariff 22.04 was issued, the Respondent without indicating that it had sought legal advice on the tariff changed it to 22.06. Since the licence was the same for both pre 2002 period and post 2002 the legitimate expectation created by the letters addressed to the Applicants' partnership also apply to the Applicant Company. In addition, I find that the respondents did create legitimate expectation by conduct in relation to the applicant limited liability company during the material period 2002-2005 for the following reasons:

- (i) The audits by the Respondent did reveal the nature and description of the products that were being manufactured by the company. And this is apparent from the audit reports exhibited. Several audits were conducted during this period;
- (ii) The Kenya Bureau of Standards certificate of analysis clearly described the products as far back as 1997;
- (iii) The monthly stock book and the daily returns clearly bear the stamp of approval by the Respondent confirming the correctness. These were the two vital documents which explain the level of production over the years. The applicant has produced returns and stock books during the material time yet they were never questioned for any under declaration or error over the years. Similarly there is documentary evidence of payment of Customs duty during the entire period in question and receipts have been exhibited. All the payments were based on the applicable tariff 22.04;
- (iv) Although the Respondents have denied that they did not have one of their officials stationed at the Applicants' warehouse the requirement for such a person according to the respondent could only have been so if the applicant was a large tax payer but it was not. There is however correspondence showing that the Applicant was being regulated from the Large Tax payers Department and I find that the Applicant version of this is more consistent and supported by some documentary evidence as exhibited. It follows that if such a person was stationed at the warehouse as alleged under declaration could not have taken place – taking into account the daily returns were clearly signed by an official of the Respondent. Section 95 was intended to achieve this goal, which is ascertaining the production on the spot.

As reflected above the change of tariff was unilateral and abrupt and no evidence has been given concerning whether legal advice was sought and given before the change over. In view of the courts finding as above that the correct tariff was and is 22.04, the Respondents decision on tariff constitutes an error of law and as a result the decision is ultra vires because by the change over the respondent had exceeded its rightful jurisdiction.

In judicial review it is trite law that all errors of law are ultra vires in that they reflect excess of jurisdiction see *ANIMINISTIC v FOREIGN COMPENSATION COMMISSION* (1969) AC 147.

In other words all errors of law went to jurisdiction, and the decision on tariff cannot stand even on this ground and is reviewable by this court for this reason as well. And even if the decision to change the tariff may be interpreted to be an error of fact, the court is still entitled to review the decision because the respondent did in the circumstances act perversely that is basing the changeover on the need not to pay, or to block the payment a valid refund in the sum of KShs.36 million thereby revealing ill motive and ulterior motive or purpose.

In conducting the audit that triggered the unprecedented claim and in coming up with an input output formula based on figures other than the actual production by the manufacturer the Respondents were guilty of an illegality under S 137 of the Customs & Excise Act because they did not in their assessment use the Stockroom delivery and price. The assessments are ultra vires S 137 of the Act.

In this state of affairs the court is also entitled to infer first the Respondents “input output formula was not based on evidence but plucked from documents which had nothing to do with production and sales. Lack of evidence for a decision is also a ground for review by a reviewing court. *See R v BEDWELLY JUSTICES EXP. WILLIAMS [1997] HC 225.*

In addition the composite demand for 1.1 Billion (appx) sent by fax without the proper notice and assessment for each tax regime governed by Customs Excise Duty, VAT and Income Tax Act respectively is in review of the court a procedural impropriety which constitute in the circumstances ulterior motive. *IN AGRICULTURAL TRAINING BOARD VAYLESBURY MUSHROOMS LTD* it was held that where parliament has laid a procedure which should be followed before a body can exercise its powers, the body will be acting ultra vires it does not follow the procedure. The letter of 29/11/06 was ultra vires the powers of the respondents on thus ground and again the court is entitled to intervene because the 14 days notice was clearly intended to be a substitute for the periods of objection for each tax regime because the actual demands were never received with the actual assessments stipulating the period for internal objections until just before the expiry of the 14 days notice. The Notice was by fax until when the original was finally demanded by the Applicant only a few days before the expiry of the 14 days notice, when the actual assessments were availed.

NON DISCLOSURE OF MATERIAL FACTS

The Respondents contentions based on this ground have not demonstrated any material non disclosures.

For the Rule to apply, there must be non disclosure of fundamental material facts or facts touching on the important issues for determination in the case. As found above, the Applicant has consistently disclosed in the prescribed documents that it manufactures wine which in turn is statutorily defined and it has further filed the prescribed returns which have been over the years scrutinized by the Respondents.

The nature, relevance or materiality of what is alleged not to have been disclosed are important elements. As regards documents the court has already ruled elsewhere in this judgment that the material documents were the prescribed documents, consisting of the stockbook and the returns which have been exhibited by the Applicant. On the bankings if the overall effect was a loss to the company it is irrational to penalize the “victim” applicant Company. Moreover on the ground the source of all the funds was the production as defined in S 137 of the Customs and Excise Act. It follows therefore the assessments in respect of Income Tax and VAT are tainted with the same illegality which tainted the source. Their base which is the Excise duty having been ultra vires illegal and based on substantial errors of law and fact taints them with the same sins. They cannot reasonably be severed from the base sins. I therefore find that there was no material non disclosure by the Applicant which could have influenced my decision to grant stay at leave stage or even now, in making this decision.

RETROACTIVITY AND POST FACTO LAWS

One other reason why the Respondents conduct in changing the tariff and making its effect retroactive is illegal, is that it became penal and penal laws should not be retroactive. The applicant has in the circumstances of this case the right to protect its reliance on legitimate expectations as elaborated elsewhere in this judgment. The applicant in conducting its affairs is entitled to rely on certainty and regularity of law. The capriciousness, oppression and arbitrary application of the tariff retroactively is the antithesis of certainty and regularity of law. Having written to the Applicants’ predecessor and having by conduct made the applicant rely on it as the applicant having relied on the representations in planning its affairs, the law must intervene to protect settled expectations.

This is the reason why our Constitution prohibits ex-post facto laws. Although the tariffs were in

existence and not new laws, their arbitrary imposition in a retroactive manner has the same effect as the ex post facto laws.

Moreover isolating the applicant is discriminatory and I would reject the tariff on this ground as well.

Despite its antiquity nothing expresses the principles involved in the above holdings than the American case of *HURTADO v CALIFORNIA* 110 US 51-0535-36 (1884):

“Law is something more than mere will exerted as an act of power. It must not be special rule for a particular person on a particular case but ..., the general law ...” so that every citizen shall hold his life, liberty property and immunities under the protection of the general rules which govern society, and this excluding as not due process of law acts of attainder bills of pains and penalties acts of confiscation ...’ and other similar special, partial and arbitrary exertions of power under the forms of legislation. Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects is not law, whether manifested as the decree of a personal monarch or an impersonal multitude.”

The fact that the Respondents have arbitrarily and without notice imposed, the tariff, goes against governmental regularity and the rule of law as well. One of the ingredients of the rule of law is certainty of law. Surely the most focused deprivations of individual interest in life, liberty or property must be accompanied by sufficient procedural safeguards that ensure certainty and regularity of law. This is a vision and a value recognized by our Constitution and it is an important pillar of the rule of law. No one including a zealous taxman should be allowed to violate these principles. In short burdening otherwise the lawful activities of the applicant in relying on tariff 22.04 automatically converts the switch over to a higher tariff 22.06, into a law, that is discriminatory in its effect. It is no good answer for the taxman to proclaim that Kshs 1 billion (appx) is intended to swell the public treasury because due to the application of the above principles that money is not lawfully due. It stems from illegality, improper exercise of law, disregard of legitimate expectation, in violation of Government regularity, in breach of the rule of law, abuse of power and in total disregard of constitutionism. All these are proper grounds of intervention by this court.

Imposing another tariff retrospectively is punitive and our courts ought to frown upon any such practice because the effect of such imposition is the same as retroactive laws. A change of tariff just like most laws must be prospective to be fair. In *PHILIPS v EYRE* (1870) LR QB 1 Excheque Chamber, the legislature of Jamaica had passed an Indemnity Act following the suppression of a rebellion in the colony. If the Act was valid it would prevent the claimant suing for assault and false imprisonment, Willes J held:

“Retrospective laws are no doubt prima facie of questionable policy, and contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts and ought not to change the character of past transactions carried on upon the faith of the then existing law: Accordingly, the court will not ascribe retrospective force to new laws affecting rights unless by express words or necessary implication it appears that such was the intention of the legislature.”

In *BURMAH OIL COMPANY v LORD ADVOCATE* (1965) AC 75 HL, the Company was successful in its claim for compensation against the Crown for the destruction of its installations in Burma during the Second World War, the destruction having been ordered by the commander of British Force to prevent the installations falling into the hands of the adversary Japanese forces. In response to this decision Parliament hastily passed the War Damage Act 1965 with retrospective effect to deny entitlement to compensation for damage for acts lawfully done by the Crown during war in which the sovereign was engaged.

By analogy although the law under which the tariffs are imposed is not a new law which is being applied retrospectively as in the illustrations above there is nothing in the Customs & Excise Act or the other relevant Acts which supports expressly the retroactive operation of the tariff and such application is patently illegal.

There are no express words or necessary implication by the legislation to support that a new tariff could be applied retrospectively. This also goes against the principle of certainty of law.

CASE LAW

In this judgment, I have considered all the cited cases and have where appropriate, applied principles enunciated in the cases. However, I wish to single out for special observation my own decision, in the case of *REPUBLIC v KENYA REVENUE AUTHORITY EX PARTE ABERDARE FREIGHT SERVICES – HC MISC NO.946 OF 2004* relied on by the Respondents.

The ratio of this case as far as the law on excise duty is concerned is that the rate of duty in force at the time of arrival of the goods at the port or place of discharge was recoverable and that the Kenya Revenue Authority (who are now the Respondents in this case) could not in law be estopped from performing their statutory duty of collecting duty at the prescribed rate. This is clearly a case where, duty was in law payable under the relevant provisions and I had no hesitation in upholding the statutory right of the KRA to recover duty. The facts of the current case and the law are certainly different in that the court in this case, is being asked to make a legal determination on a heavily contested tariff change from 22.04. to 22.06 where the change has been effected by the Tax authority after a period of over five years and where the Tax Authority has sought to recover duties and taxes exceeding one billion Kenya Shillings based on the change of tariff retrospectively and within 14 days. The challenge in the case before me is firstly whether the duty is lawfully due under the relevant law, and even if found due whether in the circumstances the recovery could be retrospective. In addition other important grounds for judicial review intervention have been raised, including ultra vires, illegality, legitimate expectation, irrationality, unreasonableness, oppression, arbitrariness, bias, discrimination and abuse of power. In the *ABERDATE* case, the KRA was not tainted with any sin including abuse of power. It was only performing its statutory duty.

In other words, the respondents discretionary power to assess duty based on documents and formula is in issue and whether the formulae of assessment is contrary to the provisions of the relevant laws including the Customs and Excise Act. In short the two matters are clearly distinguishable and are in fact poles apart!

On the issue of discretion Prof. Sir William Wade has summarized the position as follows:

“The powers of public authorities are --- essentially different from those of private persons. A man making his will, may subject to any right of his dependants dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law, this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his landregardless of his motives. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest The whole conception of unfettered discretion, is inappropriate to a public authority which possesses powers solely in order that it may use them for the public good.”

The other case which deserves specific treatment and highlighting is that of *R v SOMERSET* (1995) QBD 513, which was cited by the Applicants counsel Mr Orengo towards the end of his reply. It is particularly relevant in that Prof. Wades, quotation above in his Book, Administrative Law was adopted, at page 524 of *SOMERSET* as follows:-

“But for public bodies the rule is opposite and so of another character altogether. It is that any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake, at every turn, all of its dealings constitute the fulfillment of duties which it owes to others; indeed, it exists for no other purpose.”

Again on the same page the court notes:

“But in every such instance and no doubt many others where a public body asserts claims or defences in

court, it does so, if it acts in good faith, only to vindicate the better performances of the duties for whose the merit it exists. It is in this sense that it has no rights of its own, no axe to grind beyond its public responsibility; a responsibility which defines its purpose and justifies its existence, under our law, that is true of every public body. The rule is necessary in order to protect the people from arbitrary interference by those set in power over them.”

Applying the same reasoning, to the matter before this court, it does not matter that the respondents say and think they are owed over a billion Kenya shillings - what matters is whether the amount is lawfully due and whether the law allows its recovery? It is not a question of impression or perception of what is owed, instead it is what if anything, is owed under the relevant law and whether its assessment and recovery is permitted by the applicable law. If rightly due, the huge amount notwithstanding the court must uphold the right of recovery regardless of its consequence to the applicant and if not due under the law it must not hesitate to disallow it and must disallow it to among other things to uphold both the law the integrity of the rule of law.

The respondents’ argument that the applicant came to court prematurely without exhausting the internal tax objection process as regards each category of tax, is a serious misdirection because as it has been stated elsewhere in this judgment the issues raised were greater than any of the internal tribunals could handle. The task before the court is not, and has not been that of counting the shillings, it has been one of adjudicating on illegality, the doctrine of ultra vires, irrationality, procedural impropriety, Wednesbury unreasonableness, oppression, malice, bias, discrimination and abuse of power. Based on the turning points, outlined above the Court finds that the Applicant has demonstrated that the Respondents have acted ultra vires their powers to assess and levy tax in relation to the Applicant. The act of lumping together assessments whereas the statute provides for separate notices of assessment to be issued and giving a 14 days notice, initially, without the separate assessments, was an act aimed at ambushing the Applicant and causing panic. In short it was a malicious act which the Respondent were not legally entitled to do – what the Respondents were authorized to do as stated in *SOMERSET* is only what is within their statutory powers. And in the face of this, the Respondents still have the courage to fault the Applicant in seeking judicial review. I say no, when litigants come to the courts it is the core business of the courts and the courts role is to define the limits of their power. It is not for the Executive to tell them when to come to court! It is the constitutional separation and balance of power that separates democracies from dictatorships. The courts should never, ever, abandon their role in maintaining the balance. In the case cited by the leading counsel for both parties in this matter, namely, *REGINA v INLAND REVENUE COMMISSIONERS, Ex parte NATIONAL FEDERATION OF SELF EMPLOYED AND SMALL BUSINESSES LTD (1982) AC 617 at 652 Lord Scarman* emphasised the same point in these apt words:-

“The duty of fairness as between one taxpayer and another is clearly recognized in these (and other passages) in the modern caselaw. Is it a mere moral duty, a matter of policy but a rule of law? If it be so, I do not understand why distinguished judges allow themselves discuss the topic: they are concerned with laws not policy. And is it acceptable for the courts to leave matters of right and wrong, which give rise to genuine grievance and are justiciable in the sense that they may be decided and are effective remedy provided by the courts to the mercy of policy? Are we in the twilight world of “maladministration” where only Parliament and the Ombudsman may enter, or upon the commanding heights of the law? The courts have a role long established, in the public law. They are available to the citizen who has a genuine grievance if he can show that it is one in respect of which prerogative relief is appropriate. I would not be a party to the retreat of the courts from this field of public law merely because the duties imposed upon the revenue are complex and call for management decisions in which discretion must play a significant role.”

The court must however add that it is perfectly aware of the need for the respondents to collect revenue this being the lifeline of the State responsibilities, but as stated by the Court of Appeal this must be done within the confines of the relevant statutes. Thus, in the *COMMISSIONER GENERAL, KENYA REVENUE AUTHORITY v STEPHANO ONEMA OWAKI C.A. 45 of 2000* the court observed:

“It is in the context of the Act that the allegations of malice and denial of opportunity to be heard are to be examined and tested, for it is in the Act that the duties of the Revenue are to be spelt out and that

liabilities of every tax payer are contained ... We should observe that the Revenue, in carrying out the duties imposed on it by Parliament could not, without proof, be said to be acting maliciously.”

This case supports the Applicants contention that the so called formulae of assessment based on input – output being outside the statute and not supported by any specific provision, is clearly ultra vires the powers of the respondent. And even for the purpose of argument, the court is mistaken on this, there is again no provision for retrospective application because no tax was due. What the Revenue has authority to do is to recover arrears of duty or tax due and have no power to invent it and backdate it.

By levying Excise duties outside the powers conferred on the Respondent by the Excise Duty Act and imposing a tariff illegally and applying its effect retrospectively the Respondents so to speak build a pyramid on sinking sands, that have in turn swallowed VAT and Income Tax the source having been inseparably soiled and linked.

Jurisdictional competence

Independent decision making power of the Judiciary also comprises jurisdiction over all issues of a judicial nature and exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law. No organ other than the courts themselves should decide on its own competence as defined by law.

The jurisdiction as set out above is recognized even under international law – see Article 36(6) of the Statute of the International Court of Justice and Article 32(2) of the European Convention on Human Rights.

This is why the submission by the learned Counsel for the Respondents Mr Gatonye that this court ought not to have intervened in this matter because various Tax Tribunals could have sorted out the matter. While this court has due deference to the Tribunals, the applicant in this matter had a genuine apprehension that the Respondents were bent to take drastic actions against it, in a manner contrary to the applicable law and they were just about to abuse their powers. These are certainly not issues the Tribunals would have had the competence or jurisdiction to deal with, determine or give relief. I reject the argument that the applicant came to the court prematurely. It was under a threat which only this court could prevent or avert. It is for the courts of law to define the limits of their competence. Even in the field of tax law judicial issues cannot be left to the tax bureaucrats. If the courts were to do this, it would be serious abdication of their core role or duty.

SUMMARY AND HIGHLIGHTS

1. On all the turning points 1 to 18 I find for the Applicant. The Respondents Counsel Mr Gatonye, put up a powerful case for the Respondents based on tariff classification on the basis of the Harmonised System Code (H.S) but firstly the HS code itself is different from the relevant schedule in the Customs and Excise Act and also in the Finance Act. Secondly the definition of wine in the Act is not entirely consistent with the H.S code. Thirdly for the H.S. Code to be used the local municipal law and the schedule must be ambiguous which is not the case with our law. One only seeks the assistance of the international Code where our law is silent or ambiguous. The conclusion here is that it was illegal to have changed the tariff

Retrospective application of Tariff similar to ex-posta facto laws

- i. There is no enabling law which permits the backdating of the changed tariff (even assuming for a moment that it was proper to change it). This violates statutory provisions such as S 137, S 91 and S 218A of the Customs & Excise Act
- ii. Any backdating or retrospective application violates the rule of law. Certainty of law is an ingredient of the rule of law upon which our system of justice is anchored. A change to tariff 22.06 would also fail for this reason

iii. Retrospective application is Wednesbury unreasonable, irrational, oppressive, biased, discriminatory, mala fides, unfair, arbitrary, procedural improper and abuse of power. It is also lacking in proportionality

iv. The retrospective laws, except where specifically allowed by the legislature, are generally frowned upon as a matter of policy

3. The applicant has successfully demonstrated that it has a legitimate expectation, that it would not be abruptly and unilaterally, transplanted from tariff 22.04 which has been the basis of its business and its business plans and projection for over nine years. In particular the legitimate expectations include:-

(a) There would be legal certainty in the classification of goods, products or services

(b) The Respondents would not renege on its decision to tax the applicant under Tariff 22.04

(c) Any subsequent changes or reconsideration of the tariff classification affecting its tax obligation would be done in consultation with it, in accordance with the relevant law and would not be applied retrospectively

(d) The Respondents would make their decisions with fairness to all tax payers with the same products

(e) The Respondents would not exercise their discretion in bad faith or in any unlawful manner or abuse their powers to achieve an improper motive or purpose

(f) The Respondents would not abuse their powers to selectively victimize or punish the Applicant.

The Court's finding here is that the Respondents' decisions have threatened or threatens to thwart the above legitimate expectations and the court must come to the defence of legitimate expectations because, fair bargains ought not be thwarted – this being a principle of fairness. The court would therefore uphold the above expectations.

4. Changing the tariff and proceeding to assess duty on the basis of the new tariff, and sending a composite demand of "arrears" based on duty not already due and disregarding the fact that the Applicant was update with payments, under the existing tariff 24.04 is a decision that is Wednesbury unreasonable, irrational tainted with procedural improprieties, mala fides, arbitrary, oppressive, biased, discriminatory and an abuse of power

5. Changing the tariff, as the evidence has shown above, in order to block or not to pay a refund due to the applicant reveals ill-motive, ulterior motive, malice, manipulative tendencies, oppression, improper use of power and/or discretion, taking into account irrelevant consideration and an abuse of power

6. Purporting to change tariff 22.04 on which the initial licence and other subsequent licences renewals were based without taking into account the relevant law which only allows duty on the basis of production and sales from the stockroom and coming up with calculations based on other criteria is ultra vires, illegal, indicative of gross negligence, irrational, unfair and grossly unreasonable and also breach of the Respondents' statutory duty to act fairly

7. The documentary evidence by way of the Respondents' own report acknowledged that the applicant was as late as January 2006 entitled to a refund and yet they went on an expedition to come up with an illegal formulae to defeat the claim. There cannot be greater abuse of power than this, and it is the function of the court to stop it in line with the authorities cited above and the uphold the rule of law, if not its majesty.

8. The Court finds that all the reliefs claimed are justified. The applicant would have been successful in proving either one of the major grounds such as illegality, irrationality or impropriety of procedure (the three "Is") but as is clearly demonstrated above, in this case the spectrum of judicial review grounds has

been the most extensive so far in our judicial review jurisprudence.

CONCLUSION

From the above analysis this is a case which has given rise to nearly all the known grounds for intervention in judicial review, that is almost the entire spectrum of existing grounds in judicial review. It seems apt to state that public authorities must constantly be reminded that ours is a limited government – that is a government limited by law – this in turn is the meaning of constitutionalism. Certainty of law is a major requirement to business and investors. Imposition of a different tariff, to that an investor contemplated when setting up an industry is reckless, irrational and unreasonable and it violates the principle of certainty and the rule of law. Such a style of decision making cannot offer a conducive business or investment climate. The courts have a role in keeping public authorities within certainty of law. To enable them to do this the frontiers of judicial review have to expand. For now let it suffice to state and hold that the actions and decision of public authorities must be questioned directed and shaped by the law and, if not the courts must intervene. This is the essence of this decision.

This case as analysed above competes equally with the other leading decision of this court in the *R v ATTORNEY GENERAL ex-parte GEORGE SAITOTI Misc Civil Application No. 102 of 2006* in terms of covering nearly all the known grounds in judicial review, namely illegality impropriety of procedure, and irrationality including the supporting “dependants” of *Wednesbury* unreasonableness, bias, bad faith, malice, ultra vires, retrospective laws and abuse of power. In respect of abuse of power *GITHUNGURI II* set the pace. The court has in each case analysed the relevance of each ground to the outcome herein. Of great significance is the principle of certainty of law especially on taxation in a democratic state such as ours. Certainty of law is an important pillar in the concept of the rule of law. As is no doubt clear in the findings in this case, it is an essential prerequisite of business planning and survival as well. Yes, the rule of law is a lifeline of the economy as is illustrated in the emerging and thriving economies of the world. The courts in my view have a responsibility to uphold the rule of law for this reason. The ability of businesses to plan stems from the bedrock of the rule of law.

While the Applicants are evidently successful on all the judicial review grounds as indicated above, I think it is significant to stress on the ground of certainty of law as an ingredient of the rule of law because it is easy for public authorities and bodies to overlook it in their decision making processes, as has happened in this case. The Respondents argument that the applicant should not have come to court before exhausting the internal objection arrangements in respect of each tax regime should also be considered from the standpoint of the rule of law. While judicial review could be a collateral attack, the right of access to court is a fundamental principle and cannot be taken away except in exceptional cases. It is the basis of an orderly society and the rule of law. The rule of law is the cog upon which all the provisions of the Constitution turn. For example, the intended tariff change has clearly been shown to have been discriminatory in its effect contrary to S 82 of the Constitution. I hold that the public bodies decisions and activities should always turn on this cog as well, failing which the courts are entitled to intervene where this is overlooked, as I have done in this case.

Finally, I would like to stress on the impact of the evidence of abuse of power in this case. It is clear to the court that the entire assessment was based on the need to block a valid refund of the Applicant. Abuse of power in my view poisons the entire tree as rightly put by the learned counsel for the Applicant Mr Orengo. My finding on this is that where there is evidence of abuse of power as indicated in one or two of the cases cited above the court is entitled to proceed as if the source of that power did not exist in respect of the special circumstances where the abuse was perpetrated. Parliament did not confer and cannot reasonably be said to have conferred power in any of the taxing Acts so that the same powers are abused by the decision making bodies. In such situations even in the face of express provision of an empowering statute appropriate judicial orders must issue to stop the abuse of power. A court of law should never sanction abuse of power, whether arising from statute or discretion. Equally important is the uncertainty resulting from a change of tariff. As held above this is a violation of the rule of law. This violation has the same legal effect as abuse of power and attracts the same verdict – see *BENETT CASE* (supra) Nothing is to be done in the name of justice which stems from abuse of power. It must be settled law by now, that a decision affecting the rights of an individual which stems from abuse of power cannot

be lawful because it is outside the jurisdiction of the decision making authority guilty of abusing power. Abuse of power taints the entire impugned decision. A decision tainted with abuse of power is not severable. The other reason why the impugned decision cannot be severed from any other lawful actions in the same decision is because of the great overlap which has occurred in this case stretching from illegality, irrationality, impropriety of procedure to abuse of power. Once tainted always tainted in the eyes of the law.

The court's conclusion that the change of tariff and its retrospective application are a threat to the rule of law and the principle of legitimate expectation and constitutes abuse of power, is supported by the House of Lords' decision in the case of *BENNETT v HORSE FERRY ROAD MAGISTRATE'S COURT AND ANOR* [1993] 3 AIL ER AT PAGE 150 where the following significant observations were made by Lord Griffiths:

1. "...there is a clear public interest to be observed in holding officials of the State to promises made by them in full understanding of what is entailed by the bargain"
2. "...if the court is to have the power to interfere with the prosecution in the present circumstances it must be because the judiciary accepts a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law. My lords, I have no doubt that the judiciary should accept this responsibility in the field of criminal law. The great growth of administrative law during the latter half of this century has occurred because of the recognition by the Judiciary and Parliament alike that it is the function of the High Court to ensure that executive action is exercised responsibly and as Parliament intended. So also should it be in the field of criminal law and if it comes to the attention of the court, that, there has been a serious abuse of power it should, in my view, express its disapproval by refusing to act upon it."

In other words an otherwise meritorious prosecution as in the *BENETT* case founded on abuse of power could be stopped. Closer home we invoked the same principle in the *SAITOTI CASE*. In this case as analysed above there is a serious abuse of power by the Respondents and the only remedy available in law is to reject their contentions.

The other reason for holding that all the actions of the Respondents are not severable once there is evidence of abuse of power, stems from the observations in the *BENETT* case above and also on the basis of the holding in the case of *R v SOMERSET COUNTY COUNCIL, ex-parte FENWICK & OTHERS* (1995) 1 ALLER 513 at page 524 cited earlier:-

The Notice of Motion seeking the freezing of the directors' accounts, I find was misconceived as the applicant company was the victim and the directors were not parties in this matter. There cannot be any basis for setting aside ex-parte Order for leave and stay at this second stage of the proceedings on merit. I dismiss it on similar grounds.

Thus, it is quite clear to the court that the Respondents acted outside the law and for reasons outside their mandate as each of the grounds analysed above demonstrate. They acted outside the provisions of the enabling Acts and their calculations were ultra vires the relevant law, violated the principle of the rule of law and their actions constituted abuse of power.

In view of the fact that the Applicant company has been successful in all the analysed grounds for judicial review namely illegality, irrationality and impropriety of procedure (the 3 "ls"), and although this judgment has dealt with three substantial tax regimes namely, Custom and Excise Duty, VAT and Income Tax, the court's finding is that the source of all the taxes was the production at the factory. The outcome is that because of the great overlap and the same source of funds the good cannot be separated from the bad and the other regimes assessments cannot be severed in the circumstances. I hold that where there is proof of abuse of power and a violation or threat to the rule of law, the court must wholly stop what the perpetrator of those ills intended to do. I apply the principle in the *BENETT CASE* above. The reason for this is that only the might and majesty of law can prevent or act as a deterrence against the temptation to

abuse power and also, send the right signals, that public administration must adhere to the rule of law. In the result, I find that the applicant company is entitled to the reliefs claimed. The judicial review orders sought to forthwith issue as prayed with costs to the Applicant. I wish to record the Court's appreciation of the excellent work done by Counsel in assisting the Court.

DATED and delivered at Nairobi this 6th day of July, 2007.

J.G. NYAMU

JUDGE