



Commissioner of Customs & Border Control v Proto Energy Limited (Customs Tax Appeal E007 of 2022) [2024] KEHC 9486 (KLR) (Commercial and Tax) (11 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9486 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
COMMERCIAL AND TAX
CUSTOMS TAX APPEAL E007 OF 2022**

WA OKWANY, J

JULY 11, 2024

BETWEEN

COMMISSIONER OF CUSTOMS & BORDER CONTROL APPELLANT

AND

PROTO ENERGY LIMITED RESPONDENT

(Being an Appeal against the Judgment of the Tax Appeals Tribunal dated 23rd December 2021 in the Tax Appeal No. 75 of 2021)

JUDGMENT

The Parties

1. The Appellant herein is the Commissioner of Customs and Border Control, an officer with delegated powers and functions of the Commissioner-General of the Kenya Revenue Authority (the KRA), a body established under the provisions of the [Kenya Revenue Authority Act \(Act No. 2 of 1995\)](#) and is the principal agency charged with the responsibility of collection and administration of revenue taxes on behalf of the Government of Kenya. The Appellant is appointed pursuant to the provisions of Section 5(1) of the East Africa Community Customs Management Act (the EACCMA) and is responsible for the management and control of the Customs matters including the collection and accounting for Customs revenue in Kenya on behalf of the Government of Kenya.
2. The Respondent is a limited liability company incorporated in Kenya and whose business is the manufacturing of gas cylinders.



Introduction

3. The Respondent imported LPG tanks into the country on 5th November 2019 and declared the same to the Appellant through customs entry number xxxxxx. The Respondent declared the LPG gas tanks on tariff number xxxxxx at the then prevailing Excise Duty rate of 25% and submitted the declarations to the Appellant on 5th November 2019 through the Appellant's SIMBA system for validation and confirmation of the declarations including the accuracy of the applicable excise duty rates.
4. The Appellant verified the accuracy of the Appellant's entry declarations including the declared excise duty rate of 25% according to the then existing provisions of the *Excise Duty Act*, 2015 (the EDA). The Respondent thereafter paid the corresponding Excise Duty and other statutory charges amounting to KES 14,368,110 on 7th November 2019 at 10.18.48 am. The Appellant approved the Respondent's entry declarations which included the; value, description, and tariff classification of the LPG tanks and most importantly, the applicable rate of excise duty and the Respondent's excise duty computations.
5. Pursuant to Section 41 of the EACCMA, the Appellant retained control of the Respondent's LPG tanks and subjected them to a physical examination on 9th November 2019 in order to determine the accuracy of the Respondent's declarations and the declared taxes including confirmation of whether the correct rate of excise duty was applied. On 11th November 2019, the Appellant released the goods to the Respondent unconditionally upon satisfying itself as to the accuracy of the Respondent's declarations and the applied excise duty rate.
6. On 18th November 2020, however, the Respondent received a Demand Notice from the Appellant claiming additional taxes in the sum of KES 15,026,323 on the basis that the goods were subjected to an erroneous Excise Duty rate of 25% instead of an Excise Duty rate of 35%.
7. The Respondent answered to the Demand Notice and later made an application for its review but the Appellant rejected the Respondent's review application and issued a negative review decision.
8. Dissatisfied with the Review Decision, the Respondent filed an appeal before the Tax Appeals Tribunal (the Tribunal) and in a judgment delivered on 23rd December 2023, the Tribunal made a finding in favour of the Respondent and held that the Finance Act 2019 had been retroactively applied in the matter.

The Appeal

9. Aggrieved by the Tribunal's decision, the Appellant filed the instant appeal and listed the following grounds of appeal in its Memorandum of Appeal dated 18th February 2022: -
 - a. The Honourable Tribunal failed to appreciate and/or give due regard to the provisions of Section 235 and 236 of the East Africa Community Customs Management Act (EAC CMA) applicable to the dispute.
 - b. The Honourable Tribunal erred in law and in fact in failing to find that the Commissioner has no power in law to waive taxes unless expressly stated by law.
 - c. The Honourable Tribunal erred in law and in fact in setting aside the assessment despite the observance that as per section 120 and 2(2)(d) of EAC CMA, import duty is payable at the rate in force at the time of entry of goods for home consumption.
 - d. The Honourable Tribunal erred in law and in fact in failing to make a finding that indeed the import duty rate applicable was 35% as provided by section 26(a)(v) of the Finance Act, 2019



because the Respondent's goods were deemed entered on 7th November 2019 when the said Finance Act came into effect.

- e. The Honourable Tribunal erred in law and in fact in disregarding the fundamental rule that tax laws must be interpreted subject to strict construction and when interpreting tax laws, courts and tribunal are not to imply into the provisions of the statutes.
 - f. The Honourable Tribunal misdirected itself in holding that in the circumstances of the case, the provision at Section 26(a) (v) of the Finance Act 2019 is unfair and unreasonable to the Respondent yet there is no ambiguity in the provision.
 - g. The Honourable Tribunal erred in law and in fact in failing to find that legitimate expectation cannot arise where a person's action is in breach of clear provisions of statute.
10. The appeal was canvassed by way of written submissions as follows:-

Appellant's Submissions

11. The Appellant submitted that the Tribunal erred in its interpretation of the Finance Act 2019 and EAC CMA and maintained that it was not in the place of the Tribunal to state what the Law should be as its mandate is to interpret the law as it is. The Appellant argued that the Tribunal was required to apply the law as it is whether such law is unreasonable or not. Reference was made to the decision in *Law Society of Kenya v Kenya Revenue Authority & another* [2017] eKLR where the court stated that: -

“In my view, it is not the duty of the Court either to enlarge the scope of the legislation or the intention of the legislature when the language of the provision is plain and unambiguous. The Court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on the courts. The Court cannot add words to a statute or read words into it which are not there. Assuming there is a defect or an omission in the words used by the legislature the court cannot not go to its aid to correct or make up the deficiency. Courts decide what the law is and not what it should be. The Court of course adopts a construction which will carry out the obvious intention of the legislature but cannot not legislate itself.”

12. It was submitted that the Tribunal's attempt to tamper with express provisions of the law on the basis it leads to an unreasonable outcome amounted to actual reframing of the law thus effectively postponing the commencement date of the Finance Act 2019. The Appellant added that the decision, in effect, suspended the operation of Section 235, 120 and 135 of EAC CMA thus stripping the Appellant of its statutory powers and duty to conduct a Post Clearance Audit.
13. On whether the Appellant has the power to waive taxes owed, the Appellant cited Article 210(1) of *the Constitution* for the argument that such waiver was only possible within the confines of the law. Reference was also made to the decision in the case of *Cape Brandy Syndicate v Inland Revenue Commissioners* [1921] KB 64 where Ronlat J, restated the principle that: -

“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....”

14. It was submitted that Section 26(a)(v) of the Finance Act 2019, sets the excise duty rate for imported gas cylinders at 35% and that the Appellant’s role is merely to administer what had been set by the law as mandated under Section 5(2)(a) of the [Kenya Revenue Authority Act](#) which states as follows: -

In the performance of its functions under subsection (1), the Authority shall—

- (a) administer and enforce—
- (i) all provisions of the written laws set out in Part I of the First Schedule and for that purpose, to assess, collect and account for all revenues in accordance with those laws
15. The Appellant emphasized that its role is to apply the taxation rate as set out by Parliament as it has no power to alter the applicable rate. It was the Appellant’s case that enforcing the Tribunal’s judgments as it is would go against the spirit and letter of [the Constitution](#) and Tax laws.
16. The Appellant argued that Tribunal’s judgment had the effect of directing the Appellant to waive the taxes on the basis that their imposition placed a harsh burden on the Respondent which decision contravened the express provisions of Section 26(a)(v) of the Finance Act 2019.
17. On the applicability of the Legitimate Expectation principle to this case, it was submitted that the same cannot arise contrary to the express provisions of the law. It was submitted that the clearing and release of the goods to the Respondent could not in any way prevent the Appellant from conducting a post clearance audit under Section 235 and 236 of EAC CMA. The Appellant cited the decision in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR where the court set out the principles governing legitimate expectation as follows;
- a. the expectation itself must be reasonable;
- b. the representation must be one which it was competent and lawful for the decision-maker to make; and
- c. there cannot be a legitimate expectation against clear provisions of the law or [the Constitution](#)
18. It was submitted that the Tribunal’s decision, if upheld, would render Section 235 and 236 of EAC CMA a nullity thus offending the hierarchy of laws operational in Kenya. The Appellant faulted the Respondent for relying on Legitimate Expectation in a bid to prevent a public authority from conducting a statutory duty.
19. It was submitted that the Appellant’s performance of its statutory duty under Section 33(4) and Section 41 of the Act did not create a promise to the Respondent that a post clearance audit would not be done on the consignments.
20. On whether the Tribunal erred in holding that the Finance Act, 2019 was not applicable to the case, the Appellant submitted that the Tribunal erred in shifting the burden of proving the date of assent/commencement of the Finance Act, 2019 to the Appellant. The Appellant noted that since the Respondent alleged that the Excise Duty rate applicable as at the time of paying the tax was 25%, it was the Respondent’s duty to prove that Finance Act 2019 was not applicable at the time. The Appellant noted that duty was paid on 7th November 2019 at 10.18 a.m. yet the date of assent to the Finance Act, 2019 was 7th November 2019 and that Section 1(b) of the said Act confirms the date of assent to be the date of commencement.



21. It was submitted that no material was presented to inform the Tribunal of the specific time of commencement of the Act save for the evidence that Duty was paid on the same day of the commencement of the Act. The Appellant argued that the Tribunal therefore erred in placing the burden of proof on the Appellant and presuming that the commencement of the Finance Act 2019 was after the alleged payment of the Duty. It was submitted that the burden rested on the Respondent to bring forth evidence to show the exact time that President assented to the Act and contrast it with the time that they paid the Duty.
22. Reference was made to Article 116(2) of *the Constitution* which stipulates that: -

Subject to clause (3), an Act of Parliament comes into force on the fourteenth day after its publication in the Gazette, unless the Act stipulates a different date or time at which it will come into force
23. The Appellant also cited the decision in *Trusted Society of Human Rights Alliance vs. Cabinet Secretary Devolution and Planning & 3 others* [2016] eKLR wherein it was held that: -

“Parliament by virtue of Article 116(2) of *the Constitution* had the powers to legislate and state or stipulate the commencement date. Read purposively, Parliament can legislate and publish an Act and then in the Act itself also determine (legislate) that it comes into effect at a later date...What is however clear in such instances is that both Parliament and the people of Kenya, on whose behalf Parliament legislates, have an expectation that the Act will come into operation and such expectation must not be denied or defeated.”
24. It was submitted that since Section 1(b) of the Finance Act 2019 provided that the Act was to come into force on the date of assent, and because the date of assent was specified as 7th November 2022, the Act gained the force of law on the very date of assent. The Appellant maintained that the Tribunal’s decision had the effect of amending the Finance Act 2019 as the determination of the commencement date of an Act of parliament is a legislative function.

The Respondent’s Submissions

25. The Respondent invited this Court to consider the the circumstances under which the contested excise duty rate of 35%, which the Appellant claimed in its Demand Notice, came into force. The Respondent explained that its goods arrived in Kenya on 5th November 2019 after which it made the requisite statutory declarations which declarations the Appellant approved including the Excise Duty rate of 25%, and the Respondent proceeded to pay all duties due on the imported goods on 7th November 2019 at 10.18 a.m. According to the Respondent, the President assented to the Finance Act, 2019 (the Finance Act) later on the same day, being 7th November 2019 after it had paid the Excise Duty.
26. The Respondent noted that Section 26 (a) (v) of the Finance Act increased the rate of Excise Duty for imported gas cylinders from 25% to 35% and that pursuant to Section 1 of the Finance Act, the said Section 26 was to come into force on the assent of the Finance Act which means that the increased rate of excise duty took effect on 7th November 2019, the very day the Respondent paid excise duty based on the existing provisions of the EDA.
27. The Respondent submitted that the Appellant’s quest to apply the impugned excise duty rates one year after the goods were physically examined, verified and cleared for home entry is unjustified and in bad faith. The Respondent urged this court to consider the principle of strict interpretation of tax statutes alongside other canons of interpretation such as certainty in tax law.



28. The Respondent's case was that the Tribunal correctly held that the Appellant subjected the Respondent's goods to a physical examination of goods on 9th November 2019 which examination included ensuring that the correct amount of tax is declared by the taxpayer before it released the goods.
29. It was submitted that the Tribunal correctly held that the excise duty rate that was applicable to the Respondent's goods was 25%.
30. The Respondent submitted that it was not enough for the Appellant to merely state that the Finance Act was in force on 7 November 2019 they needed to demonstrate that the said Act had been assented to on the said date as at 10.18 a.m. when the Respondent paid the Excise Duty. The Respondent added that the Tribunal correctly held that the Appellant failed to discharge this burden of proof thereby leaving the Tribunal with no option but to rule in favour of the Respondent.
31. The Respondent noted that since it was not possible to ascertain the exact time (hour, minute and second) that the Finance Act was assented to, an element of uncertainty was created bearing in mind that the fact that the said Act was to come into force on the date of its assent. In view of the uncertainty, the Respondent argued that the Tribunal correctly addressed its mind to the provisions of the Article 116 of *the Constitution*, Section 9 of the IGPA and applicable case law in arriving at the correct conclusion that an Act of Parliament can only become effective upon being published to taxpayers in the Kenya Gazette. It was therefore Respondent's position that the provisions of the Finance Act could only be enforced against it for actions or transactions undertaken after 15 November 2019 when it was officially published in the Kenya Gazette.
32. On the Appellant's assertion that the Tribunal erred in failing to find that the Commissioner has no power in the law to waive taxes is, the Respondent submitted that was not called upon to waive taxes but was instead called upon to strictly enforce the applicable rate at the time of entry, that is, 25% as correctly applied by the Respondent.
33. It was submitted that the Appellant's demand for additional Excise Duty infringes on its legitimate expectation as the Respondent's imported goods underwent all the requisite importation procedures before being released by the Appellant. The Appellant explained that it went ahead to sell the goods to its customers for a whole year fully convinced that all due importation taxes and procedures had not only been complied with but had also been verified by the Appellant. It was submitted that it is on this legitimate expectation that the Respondent passed on the cost of Excise Duty at 25%, and not the rate of 35% that the Appellant seeks to retrospectively impose, to its customers in sales of its products. It was submitted that it would be unlawful, unfair, unreasonable and contrary to the Respondent's legitimate expectation for the Appellant to turn around one year later and claim that an alternative Excise Duty rate was applicable when the said rate had not come into force was unknown to both the Respondent and the Appellant at the time of entry into home use of the goods.
34. The Respondent reiterated that the unfairness and unreasonableness of the Appellant's claim is further exacerbated by the fact that the respondent has already sold the imported goods without factoring in the alleged increase by 10% of the Excise Duty rate and that there is no mechanism for recovering the demanded Excise Duty from its customers considering that Excise Duty being is an indirect tax to be borne by the final consumer of the goods.

Analysis and Determination

35. I have carefully considered the Record of Appeal and the parties' respective submissions together with the authorities that they cited. I find that the main issue for determination is whether the Tribunal arrived at the correct finding that the Finance Act 2019 was not applicable to the Respondent's goods



as at the time that the Respondent paid for the Excise Duty. A determination of the above issue will require this court to consider, among other things, the exact time that the Finance Act 2019 came into force.

36. It was not disputed that the Finance Act 2019 was assented to on 7th November 2019 and that the Respondent paid Excise Duty on its imported goods on the same date, being 7th November 2019 at 10.18.am. It was also not disputed that Excise Duty rate that was applied to the Respondent's goods was 25% under the Finance Act 2015 that was the applicable law prior to the enactment of the Finance Act 2019.
37. Section 1 (b) of the said Finance Act 2019 provides that its date of assent was the date of its commencement.
38. Section 120 of the EACCMA stipulates as follows: -
- “subject to subsection (3) and section 94, import duty shall be paid at the rate in force at the time when the goods liable to such duty are entered for home consumption.”
39. Section 2 (2) (a) of the EACCMA provides that goods shall be deemed to have entered for home consumption when: -
- “the entry in the prescribed manner is made and lodged by the owner and any duty due or deposit required under this Act in respect of the goods has been paid, or security has been paid, or security has been given for compliance with this Act.”
40. The point of departure between the parties was the applicable Excise Duty rate as at 7th November 2019 at 10.18 a.m. when the Respondent paid the Excise Duty. The Appellant argued that since the commencement date of the Finance Act was stated to be the date of assent which was 7th November 2019, the applicable Excise Duty rate was 35% as provided under that said Act. The Respondent, on the other hand argued that since there was uncertainty as to the exact time that the said Act was assented to as the same was not indicated or established, the application of the old rate of 25% was justified.
41. What then was the correct date/time or manner of the commencement of the Finance Act 2019? The answer to this question can be found in Article 116 (2) of *the Constitution* and Section 9 of the Interpretations and General Provisions Act, Chapter 2 of the Laws of Kenya (the IGPA).
42. Article 116 (2) of *the Constitution* stipulates as follows: -
- Coming into force of laws.
- (1) A Bill passed by Parliament and assented to by the President shall be published in the Gazette as an Act of Parliament within seven days after assent.
- (2) Subject to clause (3), an Act of Parliament comes into force on the fourteenth day after its publication in the Gazette, unless the Act stipulates a different date on or time at which it will come into force.
43. Section 9 of the IGPA, on the other hand, provides as follows on the manner in which an Act of Parliament comes into force: -
9. Commencement of Acts
- (1) Subject to the provisions of subsection (3), an Act shall come into operation on the day on which it is published in the Gazette.



- (2) Deleted by [Act No. 18 of 1968](#), Sch.
- (3) If it is enacted in the Act, or in any other written law, that the Act or any provision thereof shall come or be deemed to have come into operation on some other day, the Act or, as the case may be, that provision shall come or be deemed to have come into operation accordingly.
44. My understanding of the above cited provisions of [the Constitution](#) and the IGPA is that a bill passed by Parliament shall not only be published in the Gazette as an Act of Parliament within seven days after-assent, but shall (2) Subject to clause (3), an Act of Parliament comes into force on the fourteenth day after its publication in the Gazette, unless the Act stipulates a different date on or time at which it will come into force.
45. I note that clause (3) of the Article 116 of [the Constitution](#) is concerned with the pecuniary benefits of Members of Parliament which has no relevance or bearing to the instant case. My reading of Article 116(1) of [the Constitution](#) is that the requirement that an Act of Parliament be published in the Gazette is a mandatory Constitutional and statutory interdict as shown in the use of the word shall as opposed to may. What then is the purpose of Gazettement of bills of Parliament? Is it an idle requirement or does it serve any useful purpose?
46. This court had occasion to deal with the meaning and import of gazette, as a procedure within our legal system, in the case of Michelle Kemuma [Omwoyo vs Independent Electoral & Boundaries Commission & another \(Petition E005 of 2023\)](#) [2023] KEHC 24521 (KLR) wherein it was held, inter alia, as follows: -
- “What then is the purpose of gazette? Is it a mandatory legal requirement? Is it a mere formality?”
59. The answer to the above question can be found in the decision by the Court of Appeal in [Nderitu Gachagua vs Dr. Thuo Mathenge & 2 others Civil Appeal No. 14 of 2013](#) (Nyeri), where the learned judges explained the purpose of a gazette notice and held thus: -“The court observes that the Gazette is an official document of the Government of Kenya in which official matters including official notices by the Government are published. Any notice published in the Gazette is deemed as notice to the general public and one is barred from pleading ignorance of the same.”
60. Section 69 of the [Interpretation and General Provisions Act](#), Chapter 2, Laws of Kenya provides that: -
69. The production of a copy of the Gazette containing a written law or notice, or of copy of a written law or notice purporting to be printed by the Government printer shall be prima facie evidence in all courts and for all purposes whatsoever of the due making and tenor of the written law or notice.
61. Section 85 of the [Evidence Act](#) provides thus: -85. Gazette, etc., to be prima facie evidence. The production of a copy of any written law, or of a copy of the Gazette containing any written law or any notice purporting to be made in pursuance of a written law, where such law or notice (as the case may be) purports to be printed by the Government Printer, shall be prima facie evidence in all courts and for all purposes whatsoever of the due making and tenor of such written law or notice.
62. The above provisions and cited cases posit that a gazette notice is evidence, at face value, of the existence of a law or a notice that has been duly formulated. This implies that a gazette



notice merely brings to the attention of the public, information or a law or a directive. In simple terms, a Gazette notice is an official communication or a formal expression of the existence of the notice or law.”

47. I note that the requirement for the publishing of bills of Parliament in the Gazette is, under the Constitution, couched in mandatory terms which means that the commencement date of Acts of Parliament is a matter that should not happen before the Gazettement of the Act. An argument was advanced, by the Appellant, that since the Finance Bill 2019 provided that its commencement date was the date of assent by the President, then the said Act came into force on 7th November 2019 when the President assented to it. I find that this line of argument presupposes that the said Act would come into force immediately even before members of the public were made aware of its existence through gazettement. My finding is that to the extent that the Finance Act stipulated, at Section 1 (b) thereof that it shall come into effect on the date of assent by the President, the said Act clearly conflicted with the provisions of Article 116 (1) of the Constitution which provides for gazettement as a mandatory step before an Act of Parliament comes into force.
48. It is trite that the Constitution is the supreme law of the land and that any law that is inconsistent with the Constitution is void to the extent of its inconsistency. This principle is embodied in Article 2 of the Constitution which stipulates as follows: -
- Article 2
2. (1) This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.
- (2) No person may claim or exercise State authority except as authorised under this Constitution.
- (3) The validity or legality of this Constitution is not subject to challenge by or before any court or other State organ.
- (4) Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.
49. For the above reasons and guided by the provisions of Article 116 (1) and (2) of the Constitution and Section 9 of the IGPA, I find that the earliest time that the Finance Act 2019 should have come into force was when it was published in the Gazette which is the earliest date that members of the public could have known about its existence.
50. Looking at all the facts of this case, one gets the impression that even the Appellant was not aware of the existence of the Finance Act 2019 as at the time it cleared the Respondent’s goods and this explains why it received the Respondent’s payment of Excise duty at 25% percent without any objection. It therefore beats all logic that the Appellant expected the Respondent to comply with a law that had not been formally communicated to the public through gazettement or brought to its attention in any other manner whatsoever. I find that the Tribunal arrived at the right decision in finding that the applicable Excise Duty rate as at 7th November 20219 was 25%.
51. My above finding on the commencement date of the Finance Act 2019 notwithstanding and assuming that the Appellant was right in its argument that the said Act came into force on 7th November 2019, a question will still arise on the exact time that the Act came into force. As I have already stated in this judgment, it was not disputed that the Respondent paid the Excise Duty on 7th November 2019 at 10.18 a.m. To my mind, this means that the exact time that the President signed the bill into law would



be a critical factor in determining the applicable Excise Duty rate such that if, for example, the bill is signed at 10.19a.m. on the said date, then the excise duty rate would still have been the old rate of 25%.

52. I hasten to add that the absurdity of split-second time calculation on the commencement date of Acts of Parliament must be the very reason why both *the Constitution* and the IGPA provide for the timelines for the publishing of the Act in the Gazette as the baseline for the commencement of the Act. It is instructive to note that even the Appellant could not tell the exact time that the bill was assented to but only insisted on enforcing it in a manner that favoured their claim for additional taxes.
53. The uncertainty as to the exact time that the bill was signed into law is a matter that this court cannot sweep under the carpet in light of the clear requirement of certainty in the law and most specifically tax laws. In *Law Society of Kenya v Kenya Revenue Authority & another (Supra) Mativo J.* (as he then was) held as follows on certainty of laws: -

“Vague laws aren’t just a threat to individual freedom. They constrict economic growth and discourage legitimate enterprise. As Justice Thurgood Marshall once wrote, vague laws “lead citizens to steer far wider of the unlawful zone ... than if the boundaries of the forbidden areas were clearly marked.

Vagueness is an argument typically used in criminal cases. In *Giaccio vs. Pennsylvania* 382 U.S. 399 (1966)

the Supreme Court held the doctrine of vagueness also applies in civil cases. A close look at the relevant provisions in the schedule leaves no doubt that they are open to more than one possible interpretations. Key among the possible interpretations is the question “when does transfer of property take place and when is the tax payable?” A law that is open to more than one interpretations or causes evident contradiction of what the law intends is not only contradictory, but vague.”

54. It is now a well settled principle of law, as captured under Article 10 of *the Constitution*, that the law must be certain. Certainty of the law is even more critical in tax laws considering that taxes impose a great burden and responsibility on citizens especially businesses who are required to pass or share the tax burden with their customers. The question which this court has to grapple with is why it took the Appellant over one year to discover that the applicable excise duty rate was 35% and how the Respondent was expected to recover this additional tax from its customers long after it had sold the subject goods using the old tax rates.
55. My finding is that in light of the uncertainty as to the exact time that the new excise tax rate came into force, coupled with the reasons that I have highlighted in this judgment, this court will adopt an interpretation that best favours the taxpayer. For the above reasons, I find that the Tribunal arrived at the correct finding that the applicable Excise Duty rate as at 7th November 2019 at 10.18 a.m. was 25%.
56. In sum, I find that the instant appeal is not merited and I therefore dismiss it. Because the uncertainty and confusion on the commencement date of the Finance Act 2019 is a matter that was embedded in the Act itself and cannot be attributed to any of the parties in this dispute, I order that each party shall bear its own costs of the appeal.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NYAMIRA VIA MICROSOFT TEAMS THIS 11TH DAY OF JULY 2024.

W. A. OKWANY

JUDGE

