IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, ODEK & KANTAI, JJ.A)

CIVIL APPEAL NO. 164 OF 2013

BETWEEN

MOUNT KENYA BOTTLERS LTD.....1ST APPELLANT

RIFY VALLEY BOTTLERS LTD.....2ND APPELLANT

NAIROBI BOTTLERS LTD.....3RD APPELLANT

KISII BOTTLERS LTD.....4TH APPELLANT

AND

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

THE KENYA REVENUE AUTHORITY.....2ND RESPONDENT

THE COMMISSIONER-GENERAL OF KRA.....3RD RESPONDENT

THE COMMISSIONER OF CUSTOMS & EXCISE...4TH RESPONDENT

(Being an Appeal against the Judgment and Decree of the High Court of Kenya

at Nairobi (Lenaola, J.) delivered on 26th October 2012

in

H.C. Petition No. 72 of 2011)

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JUDGMENT OF THE COURT

1. The appellants herein are limited liability companies and franchisees of a multinational corporation, the Coca-Cola Company. Pursuant to the franchise agreements, the appellants hold territorially exclusive contracts with the company to manufacture liquid soda under Trade Marks owned by the Coca-Cola Company and to package, sell, distribute, and merchandise the packaged products to wholesalers and retailers.

2. In the course of their business, the appellants have set up a model of distribution of the products using returnable bottles and plastic crates for packing, distributing and delivering the packaged products. It is important to note that both the glass bottles and crates are returnable to the appellants by distributors, wholesalers, retailers and everyone else down the supply chain. To ensure return of the bottles and crates, all suppliers are charged a predetermined deposit for each bottle and/or crate refundable upon return of the same.

3. On diverse dates in the year 2009, the 2nd respondent purported to carry out various tax audits upon the appellants for the period between 2006 and 2008. In the course of the said audits the 2nd respondent in its findings stated that the appellants had failed to include the cost of returnable containers in arriving at the excise duty payable. It then purported to determine the number of products sold by the appellants from their monthly excise returns for the periods under review and applied the same to constructively establish the number of returnable containers used by the appellants for operations and thereafter multiplied the same by the deposits paid on the said containers by the appellants'

customers before arriving at the alleged outstanding aggregate sum of Kshs. 5,620,730,161.00 on account of alleged arrears of excise duty, VAT and interests thereon (the VAT chargeable was hinged on whether Excise duty was due and payable). The 2nd respondent through its officers 3rd and 4th respondents in turn demanded from the appellants the said amount.

4. Aggrieved by the assessment, the appellants raised objections with the 2nd respondent which nonetheless stood its ground maintaining that returnable containers (bottles and crates) were subject to excise tax and also Value Added Tax under the Customs and Excise Act and Value Added Tax Act (Cap 472 and 476 of the Laws of Kenya respectively), proceeded to demand payment of the assessed taxes against the appellants individually.

5. The assessment and incessant demand for payment is what prompted the appellants to file on 13th May, 2011 before the High Court Constitutional and Judicial Review Division, **Petition No. 27 of 2011** supported by the affidavit and further supplementary affidavit in support sworn on 13th May, 2011 and 29th November, 2011 respectively by one, Cyrus Chege Gitau, the Finance Manager of the 3rd appellant both in their own interests and for and on behalf of the Coca Cola company and in the public interest.

6. In the said petition they sought a declaration that the purported assessments of excise duty and VAT together with interest and/or penalties thereon imposed by the 2nd to 4th respondents upon the appellants for the period 2006 to 2008 as regards the returnable containers in which their products are packaged, transported and/or delivered to consumers are unconstitutional and illegal and consequently invalid, null and void and the demands made upon the appellants for the payment of the amounts so imposed together with interest and penalties thereon should be vacated. They also entreated the court to issue such other orders as may be necessary to safeguard and prevent the violation of their fundamental rights and freedoms guaranteed under the Constitution.

7. Simultaneously, the appellants filed a chamber summons application under a certificate of urgency, seeking conservatory orders restraining the 2nd, 3rd and 4th respondents by themselves, their offices, servants, agents or otherwise howsoever from purporting to levy distress against the property of the appellants including their bank accounts or any of them, issuing Agency Notices against any of them or otherwise purporting to take any steps pursuant to the assessments and demands under challenge, whether under the Customs and Excise Act or the Value Added Tax Act or any other legislation relating to measures for the recovery of unpaid taxes. The High Court granted interim conservatory orders pending the hearing of the application.

8. The application was compromised by way of a consent of the parties filed in court on the 20th of May, 2011 before Musinga, J. (as he then was), on the terms that the existing interim conservatory orders be maintained until the hearing and determination of the main petition.

9. The gist of the appellants' petition was that excise duty is to be levied on the ex-factory price of excisable goods and that this ex-factory price should include the wrapper of the excisable product. That the returnable containers are solely used for packing and distributing liquid soda and remain the property of the appellant hence they ought not be subjected to tax as they are not the manufacturers of the said containers. The petitioners contended that the deposit paid by the distributors on purchase of the liquid soda carried in the returnable containers was a guarantee/security to ensure that the distributors returned the containers, and once the bottles/crates were returned, the appellants refunded the deposit to the customers.

10. The appellants argued that the respondents misinterpreted the law; that the ex-factory selling price of the products which is the legal basis for liability of excise duty under the Customs and Excise Duty Act, Cap 472, only excluded VAT and excise stamp. Therefore, the 2nd to 4th respondents were wrong to include such refundable security deposits paid to secure the returnable containers. Therefore, the respondents' assessment was illegal and unfairly based on the *ex post* determination of the cost or value of the deposits paid or payable for the returnable containers.

11. Further, the appellants contended that given that the returnable containers were re-useable, the respondents' contention that the deposit is excisable is not plausible as it would involve a scenario where every time diverse distributors put in a deposit for the same container, the same is subjected to excise tax hence a single container may attract tax severally.

12. It was also the appellants' case that the respondents' demanding taxes in respect of audits reflecting back to the period between 2006 and 2008 in the year 2009, meant that the appellants were not in a position to backtrack and pass on to their customers any of the taxes sought by the taxman which was grossly unfair and unjustifiable. Accordingly, they contended that the foregoing was a violation of **Article 210(1) of the Constitution** and **Section 2(1)** as read together with **Section 127C (2)** of the **Customs and Excise Act**.

13. In opposition the 2nd, 3rd and 4th respondents filed a replying affidavit dated 9th November, 2011 sworn by one Justus Kivivu, a Senior Assistant Commissioner of the 2nd respondent. The respondents contended that the tax audits revealed that the returnable containers despite being bought once were sold to distributors as was evidenced by the appellants' invoices; that when such invoices were issued, ownership passed from the appellants to the distributors and that the containers were only returned for refill. Further, that upon such refill, each bottle was again invoiced and dispatched from the appellants' premises.

14. They argued that the audit was based on the appellants' books of accounts, which revealed that the appellants treated the returnable containers as capital assets and not inventory items. They also contended that the appellants had failed to explore the existing alternative remedies before a tribunal, which ought to be exhausted before approaching a court of law as envisaged in the Customs and Excise Act, which provides for the establishment of an appeals tribunal.

15. After hearing the parties, Lenaola J (as he then was) identified the issues for determination under three main issues i.e.: whether the matter was properly before the court; whether the respondent acted within the law and; whether there was a breach of fundamental rights of fair administrative action and legitimate expectation. In a nutshell he found that on the first issue, the matter was properly before the court as the appellant did not invoke the jurisdiction of the High Court as an appellate court but instituted a petition citing infringement of fundamental rights and freedoms. On the second issue the learned Judge found that the respondents had acted within the law in demanding payment of excise duty on returnable containers and in the third, that there was no breach of any constitutional right against the appellants. In conclusion he dismissed the petition with costs to be paid to the respondents. Aggrieved by the decision of the High Court, the appellants herein proffered the instant appeal.

16. Attempts by the parties to settle the matter out of court bore no fruit and with prospects of an out of court settlement getting dimmer by the day, the Court decided to hear the appeal and render itself on the issues raised in the memorandum of appeal. The appeal came for plenary hearing on the 1st April, 2019 where parties were represented by learned counsel Mr. Ohaga and Mr. Kiche for the appellants and Ms. Mwangi for the 1st respondent. Although learned counsel on record for the 2nd, 3rd and 4th respondents was duly served with the hearing notice on 26th March, 2019 there was no attendance by any counsel on behalf of those respondents on the hearing date. The Court nonetheless observed that all the parties had filed written submissions which have been fully considered for purposes of this appeal. Mr. Ohaga and Ms. Mwangi made brief oral highlights of their submissions.

17. The appeal is premised on 14 grounds which counsel in his submissions collapsed into two main issues for determination i.e.

> ***"(i) Whether the 2nd - 4th Respondents were entitled to levy tax on returnable containers between the year 2004 and half of 2010 under the Customs and Excise Act, Chapter 472;***
>
> ***(ii) Whether the learned judge erred in fact and in law in the manner in which he framed the Appellants' case as being that it was founded on section 19 of the Sale of Goods Act, chapter 31 when in fact this was in response to an argument put forward by the 2nd – 4th***
>
> ***Respondents."***

18. Urging the Court to allow the appeal, counsel for the appellants urged the two main issues as aforementioned. On the first issue he contended, relying on **Section 2 (1)** as read together with **Section 127C of Customs and Excise Act** that the excisable value of the goods was determined either by the ex-factory selling price or the value of the goods. Citing the Concise Oxford Dictionary's meaning of 'OR' – "introducing the second of two alternatives" – he argued that the use of the word 'or' in the provisions of Section 2(1) of the Customs and Excise Act can be interpreted to mean that excise value is determinable in two alternative ways i.e. as ex-factory selling price or; as value determined in accordance with Section 127C of the same Act. Therefore, that where Section 127C fails to determine value, then the alternative excisable value for purposes of excise duty would be the ex-factory selling price as defined by Section 2(1) of the Act.

19. Counsel submitted by demonstrating to the Court the amendments made to Section 127C of the Customs and Excise Act through the year 1991 to 2004 Finance Act highlighting that when the audit was done, the Act was silent on the treatment of the cost of returnable containers. We shall revert to the issue of the amendments later on in this judgment.

20. He went on to submit that the epicenter of this appeal is the exclusion of the cost of returnable containers in the amendment of the Act in 2004. That the Act expressly excluded two items i.e. VAT and Cost of excise stamps. Therefore, the primary question would be whether this means that the cost of returnable containers was excluded by implication or exclusion. He cited **Section 13 of the Finance Act, 2004** which brought about the amendment to the Customs and Excise Act which provides that, ***"Section 127C of the Customs and Excise Act is amended in subsection (3) by deleting paragraph (b)"*** (b) Cost of returnable containers.

21. He contended that a reading of the Act as amended provided that the 1st respondent had express power to levy excise duty only on excisable goods as defined in the Act – ***"excisable goods" means goods manufactured in Kenya or imported into Kenya on which an excise duty is imposed under this Act; ".*** That such 'excisable goods' are identified under the Fifth schedule of the Act which do not include the returnable containers. Therefore, that the goods contemplated under **Section 2(1) of the Custom and Excise Act** are those under the Fifth Schedule.

22. Citing **Article 210 of the Constitution**, counsel posited that no tax or licensing fee may be imposed, waived or varied except as provided by statute. He further placed reliance on **Bennion on Statutory Interpretation, 5th Edition at Page 469** for the proposition that the sole object in statutory interpretation is to arrive at the legislative intention and that it is the duty of a court to interpret a statute in its entirety to discern its legislative intention.

23. He contended that the learned Judge erred in his reliance on **Halsbury's Law of England, 4th Edition Vol. 44(1), 1995**

with respect to exclusionary clauses, where the learned author states that ***"to express one thing is by implication to exclude the other"***, in arriving at a finding that by excluding the cost of returnable containers from the ex-factory selling price value parliament meant that they should have been included.

24. Relying on among other cases the cases of **Cape Brandy Syndicate vs. Inland Revenue Commissions (1921) 1 KB 64,** and **Russell vs. Scott (1948) 2 All ER 5** he submitted that in construing tax statutes it is an acceptable cannon of interpretation that the letter of the law must be clear. That there is no room for intendment or implication as to tax; further, that there is no doubt that the aforementioned excerpt of the Halsbury's Law applied where a formula which in itself may or may not include a certain class is accompanied by words of extension or exception naming only some members of that class, the remaining members of the class being taken to be excluded from the formula.

25. He urged that the returnable containers are neither dutiable nor excisable but the contents i.e. liquid soda is; that, that notwithstanding such containers may attract excise duty when they are used by a manufacturer in the packaging of excisable goods as part of the excisable value of such goods. In this case however, the crates and bottles were not sold together with the liquid and were not therefore part of the excisable goods. He submitted that from the foregoing, the applicable inference would be that the value of locally manufactured liquid soda for purposes of levying *ad valorem* excise duty shall be the price at which the liquid soda is sold from the appellants' factories exclusive of VAT and excise duty. In sum, counsel was urging that imposing excise tax on the liquid and also on the crates and bottles which were returnable, was subjecting the appellants to multiple taxation over the same products. On interpretation of the relevant law, counsel submitted that in the year 2004 to the first half of 2010, the Customs and Excise Act was silent on the treatment of returnable containers in which excisable goods are packaged as regards the computation of value for Excise Duty purposes, which in the year 2003 had already been expressly excluded by parliament. Therefore, any introduction of taxation of returnable containers could only be done by an express stipulation in the Act. According to him, between 2004 and first half of 2010, the appellants were entitled to the legitimate expectation that the cost of returnable containers would remain excluded in the computation of excise duty and would therefore not be considered for such purposes unless and until Parliament legislated otherwise. Relying on the case of **Keroche Industries vs. The Kenya Revenue Authority (Unreported), Nairobi High Court Miscellaneous Civil Application No. 743 of 2006 at page**

71 he urged that the 2nd to 4th respondents lacked statutory basis to impose the disputed tax and their actions were therefore in breach of Article 210 of the Constitution and amounted to an illegality.

26. He reiterated that the respondents are relying on a provision which did not provide for taxation of returnable crates and bottles to levy the tax insisting that under Section 127C (2), excise duty is levied on the ex-factory selling price of locally manufactured goods; the appellants herein manufacture only the liquid soda but not the returnable containers and it is therefore inconsistent with the provisions of the said Act to subject the appellants to excise duty based on the cost of returnable containers. He urged us to allow the appeal.

27. On her part, Ms. Mwangi learned counsel for the 1st respondent relied on the submissions filed on 9th March, 2018 by Ms. Lavuna learned counsel for the 2nd to 4th respondents, who though served with the hearing notice for 26th March, 2019 learned counsel for the 2nd to 4th respondents did not appear in Court on the hearing date for purposes of highlighting her submissions. The Court has however considered her written submissions which were quite detailed.

28. The respondents do not deny the factual aspect of the matter. The audit and the assessment of the contested tax is not disputed. According to the respondents, the singular issue falling for this Court's determination is;

> **"Whether between the year 2004 and 2010, the law provided for the levying of excise duty on the cost of returnable containers, as part of the excisable value, in accordance with section 127C of the Customs and Exercise Act."**

The respondents answered this question in the affirmative. They gave a chronological history of the development of the law in this area. In 2001, Section 127C (4) of the Act expressly excluded the cost of returnable containers and excise stamps from duty. The Section provided:-

> **Notwithstanding subsection (3)(b), the cost of returnable containers and excise stamps shall be excluded from the excisable value.**

29. There was another amendment in 2002 which specified that:-

> **"for purposes of sub section 2, the ex-factory selling price shall be determined in accordance with part 11 of the seventh schedule."**

30. That amendment however does not seem to have any bearing on this matter. The next amendment in 2003 deleted subsection (3) and (4) of Section 127C of the Act and in what the respondents refer to as 'exclusive' definition introduced another subsection (3).

We shall revert to these amendments shortly.

31. The elephant in the room however is the subsequent amendment in 2004 which was introduced vide the **Finance Act of 2004** by deleting Section 127C(3)(b) (*supra*) hence providing an exclusive definition of ex-factory selling price. According to the respondents, by amending Section 127C (3) and (4), parliament refrained from specifically listing the items to be included in determining the ex-factory selling price, and only listed those expressly excluded, meaning all other applicable costs were to be included in the ex-factory selling price. Further, that the only cost not to be included in the ex-factory selling price is; (a) VAT and (c) Cost of Excise stamps; that the deletion by the Finance Act No.4 of 2004 meant subsection 3 effectively provided for the inclusion of cost of returnable containers in assessing ex-factory selling price.

32. According to counsel, the deliberate effect of deleting the former sub-section 127C(3)(b), was to legislate that returnable bottles are also excisable and therefore, the respondents' audit findings conformed with the said provision. She differed with the appellant's position that excisable value is determinable in two alternative ways i.e. as factory selling price or as value determined in accordance with **Section 127C** of the Act, maintaining that the two provisions are not disjunctive but conjunctive and complementary.

33. She urged further that the provisions of **Section 2(3)(e)(ii) of the Customs & Excise Act** as relied on by the appellant is not applicable as the said section relates to imported goods yet the issue at hand is in relation to locally manufactured products and that the provision does not relate to containers of long-term use as of such nature as the appellants' returnable containers.

34. Citing the provisions of **Section 4 of Part II of the Seventh Schedule of the Customs & Excise Act** counsel submitted that the returnable containers used by the appellants were indeed used in producing excisable goods and hence were taxable. Further, that the appellants' sell the liquid soda together with the bottle at a price as evidenced by sample invoices on record before this Court. She submitted that the appellants could not rely on the argument that as a matter of practice the respondents did not subject them to taxes with regard to returnable containers and could not go against such practice because taxes accrue and are levied according to the provisions of the law and cannot be waived except according to the provisions of the law; that any agreements contrary to the law do not act as estoppel, especially where such agreements are made under circumstances of non-disclosure.

35. Relying on the case of **R vs. KRA Ex-parte Beiersdorf East Africa Ltd, Nairobi H.C Misc. No. 413 of 2009** she contended that the appellants had not been subjected to double taxation. That by virtue of section 127C and the Seventh Schedule of the Customs & Excise Act, every stage from the manufacturing process to distribution of the manufactured product attracts some excisable value and this cannot be deemed to be double taxation. She urged the Court to dismiss the appeal with costs.

36. This being a first appeal, this Court has a duty to consider the evidence, re-evaluate it and arrive at its own conclusion bearing in mind that an appellate court would not ordinarily interfere with a finding of fact by the trial court unless it was based on misapprehension of the evidence or that the Judge was shown demonstrably to have acted on a wrong principle in reaching such conclusion. (See: ***Sumaria and Another vs***

Allied Industries Ltd [2007] eKLR).

37. Having considered the record, and the parties' submissions, we agree that the gravamen of this appeal is the interpretation of Section 127 C and in particular, following the 2004 amendment referred to earlier. Did the deletion of Section 127C (3) (b) mean that the cost of returnable containers was henceforth excisable?

38. To address the said issue, it is paramount that this Court interrogates the provisions of Section 127C of the Customs & Excise Act, the various amendments thereto both prior and post 2004, and the effect of the said amendments with regard to the inclusion and/or exclusion of the cost of returnable containers in the excise value for purposes of taxation.

39. Of equal importance is the definition of **'excisable goods', 'excisable value'**, '**ex-factory selling price'** and '**excise duty'** as defined by the Act. Section 2 of the Customs & Excise Act, which is the definition provision of the Act, defines the aforementioned as follows:

> ***"2. Interpretation***
>
> ***(1) In this Act, except where the context otherwise requires— "excisable goods" means goods manufactured in Kenya or imported into Kenya on which an excise duty is imposed under this Act;***
>
> ***"excisable value" means ex-factory selling price or the value determined in accordance with section 127C;***
>
> ***"ex-factory selling price" means the price at which goods are sold from a factory exclusive of value added tax and excise duty;***
>
> ***"excise duty" means a duty of excise imposed on goods manufactured in Kenya or imported into Kenya and specified in the Fifth Schedule."***

40. It is at this point pertinent to examine the relevant provisions of the Customs & Exercise Act as has evolved over time upon enactment of the Finance Act. Prior to the year 2003 Section 127C of the Customs & Excise Act provided as follows:

> ***"127C. Value of goods for excise duty purposes***
>
> ***(1) The value of imported goods for purposes of levying excise duty shall be the sum of—***
>
> ***(a) the value of such goods ascertained for the purpose of import duty; and***
>
> ***(b) the amount of import duty, suspended duty and dumping duty if any.***
>
> ***(2) The value of locally manufactured goods for purposes of levying ad valorem excise duty shall be the ex-factory selling price.***
>
> ***(3) For the purposes of subsection (2), the ex-factory selling price shall be determined in accordance with Part II of the Seventh Schedule and include-***
>
> ***(i) The cost of any wrapper, package, box, bottle or other container in which the excisable goods are packaged***
>
> ***(ii) The cost of any other goods contained in or attached to the wrapper, package, box, bottle or other container; and***
>
> ***(iii) Any other cost incidental to the sale of goods including advertising, financing, warranty, commission, transportation, markup or any other cost incurred related to delivery to the point of sale.***
>
> ***(4) Notwithstanding subsection (3)(b), the cost of returnable containers and excise stamps shall be excluded from the excisable value.***

41. In the year 2003, the **Finance Act, No. 15 of 2003** amended section **127C of the Customs & Excise Act** as provided for hereinabove to read as follows:

> ***"127C. Value of goods for excise duty purposes***
>
> ***(1) The value of imported goods for purposes of levying excise duty shall be the sum of—***
>
> ***(a) the value of such goods ascertained for the purpose of import duty; and***
>
> ***(b) the amount of import duty, suspended duty and dumping duty if any.***
>
> ***(2) The value of locally manufactured goods for purposes of levying ad valorem excise duty shall be the ex-factory selling price.***
>
> ***(3) For the purposes of subsection (2), the ex-factory selling price shall not include—***
>
> ***(a) value added tax;***
>
> ***(b) cost of returnable containers; or***
>
> ***(c) cost of excise stamps"***

42. In view of the above provisions it is worth noting that before 2004 the Customs & Excise Act made exceptions in respect of determining the ex-factory selling price and expressly excluded the cost of returnable containers. There was therefore no excise duty charged on the cost of returnable containers.

43. In the year 2004, the Finance Act No. 4 of 2004 amended the provisions of section 127C of the Customs & Excise Act aforesaid by virtue of Section 13 thereof. The said provision henceforth provided that ***"13.***

> ***Section 127C of the Customs and Excise Act is amended in subsection (3) by deleting paragraph (b)".*** By virtue of the said Amendment the Act read as follows: -
>
> ***"127C. Value of goods for excise duty purposes***
>
> ***(1) The value of imported goods for purposes of levying excise duty shall be the sum of—***

(a) the value of such goods ascertained for the purpose of import duty; and

(b) the amount of import duty, suspended duty and dumping duty if any.

(2) The value of locally manufactured goods for purposes of levying ad valorem excise duty shall be the ex-factory selling price.

(3) For the purposes of subsection (2), the ex-factory selling price shall not include—

(a) value added tax;

(c) cost of excise stamps"

44. In the above amendment, it is evident that the effect of this statutory provision was that the cost of excise stamps and VAT were to be excluded in the ex-factory selling price. Despite the deletion of the said provision by virtue of the foregoing amendment, the Act was silent on whether ex-factory selling price excluded the cost of returnable containers as was the case before the amendment for purposes of computing excise duty. This therefore meant that upon deletion of subsection 3(b) of Section 127C the only subsisting provision in that regard in respect of excise duty would be those prescribed in section 127C (1) and (2) thereof. For avoidance of doubt, there was no express provision in the Act to suggest or stipulate that the cost of returnable containers would be included in the cost of the ex-factory selling price.

45. The question that therefore begs our determination is whether the deletion of returnable containers in assessment of ex-factory selling price for purposes of computation of excise duty payable, meant *ipso facto* that the ex-factory selling price was to be applied on the cost of returnable containers automatically. It is a question of interpretation of the said provision which must be done within the larger context of the intendment of the legislature, and also the history of the amendments to the said provision which we have analysed above.

46. This Court has in previous occasions been faced with the issue of Constitutional as well as Statutory interpretation and has looked up to the Supreme Court for jurisprudential guidance. For instance in the case of **Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 others, Supreme Court Petition No. 26 of 2014 [2014] eKLR**, the Supreme Court pronounced that a purposive interpretation should be given to statutes so as to reveal the intention of the statute. The Court observed that:

"In Pepper vs. Hart [1992] 3 WLR, Lord Griffiths observed that the "purposive approach to legislative interpretation" has evolved to resolve ambiguities in meaning. In this regard, where the literal words used in a statute create an ambiguity, the Court is not to be held captive to such phraseology. Where the Court is not sure of what the legislature meant, it is free to look beyond the words themselves, and consider the historical context underpinning the legislation. The learned Judge thus pronounced himself:

"The object of the court in interpreting legislation is to give effect so far as the language permits to the intention of the legislature. If the language proves to be ambiguous I can see no sound reason not to consult Hansard to see if there is a clear statement of the meaning that the words were intended to carry. The days have long passed when courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted."

47. Guided by the above principles this Court in its analysis of determining the intention of a statute, in the case of **County Government of Nyeri & Anor. Vs. Cecilia Wangechi Ndungu [2015] eKLR** pronounced itself as follows:

"Interpretation of any document ultimately involves identifying the intention of Parliament, the drafter, or the parties. That intention must be determined by reference to the precise words used, their particular documentary and factual context, and, where identifiable, their aim and purpose. To that extent, almost every issue of interpretation is unique in terms of the nature of the various factors involved. However, that does not mean that the court has a completely free hand when it comes to interpreting documents; that would be inconsistent with the rule of law, and with the need for as much certainty and predictability as can be attained, bearing in mind that each case must be resolved by reference to its particular factors."

48. The above principles apply to general interpretation of statutes. However, when it comes to interpretation of tax legislation, the statute must be looked at using slightly different lenses. With regard to tax legislation, the language imposing the tax must receive a strict construction. Judge Rowlett in his decision in **Cape Brandy Syndicate v I.R. Commissioners [1921] 1KB** (cited by the appellants), expressed the common law position in this area when he stated;

'…in a taxing Act one has to look at what is clearly said. There is no room 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 is to be implied. One can only look fairly at the language used'.

(Emphasis ours)

49. Similar statements have been made in several judgments on tax cases. In **Scott v. Russell (Inspector of Taxes), [1948] 2 All ER** Lord Simonds expressed:

> ***"… there is a maxim in Income tax law which, though it may sometimes be over-stressed, yet ought not to be forgotten. It is that the subject is not to be taxed unless the words of the taxing statute unambiguously impose the tax upon him."***

This common law position is what pertains here and has been adopted by our courts as good law. In our view there cannot be an equitable construction of income tax legislation. The norm is that a taxing legislation must be construed with perfect strictness whether or not such construction is against the State or against the person sought to be taxed. If however there is any real ambiguity in a taxing Act, such ambiguity may be resolved in favour of the taxpayer, or, as it is sometimes stated: *contra fiscum.* The following excerpt from the renowned author of **Bennion on Statutory Interpretation, 5th Edition**, summarises the correct position in law as far as interpretation of tax legislation is concerned.

> **"I find that they cannot tax the applicant twice over *Bennion* 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…The same principles as above, were accepted and applied in the case of *Cape Brandy Syndicate vs. Inland Revenue Commissioners [1921] KB 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. <u>There is no presumption as to a tax. Nothing is to be read in, nothing to be implied</u>. One can only look fairly on the language used.'… Again, in the case of *Ramsay Ltd vs. 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."** (Emphasis supplied).

52. This is indeed the position adopted by our courts. For instance, this Court in **Commissioner of Income Tax vs Pan African Paper Mills (E.A) Limited 2018 eKLR**, cited with approval decisions of the High Court in **Republic vs Kenya Revenue Authority & Another Ex-parte Kenya Nut Company Limited [2014] eKLR,** and **Republic vs Kenya Revenue Authority & Another Ex-parte Fontana Limited [2014] eKLR**. There should be no room for presumption or assumption in this case. The difference between the case before us and some of the cited cases is that in this case, there are no words or text in Section 127C that is ambiguous. The ambiguity here is in the silence and exclusion. The amendment deleted the entire subsection that dealt with the returnable containers. Do we therefore assume that Parliament meant to include the returnable crates and bottles into the excise tax regime? If that was the intention, why didn't the statute specifically state so? Can we read in or assume that the returnable crates and bottles are included by implication? As stated earlier, nothing is to be read in or implied in tax law and a strict constructionist interpretation must be adopted.

53. In his judgment, now impugned, the learned Judge relied on the quotation by the learned author of Halsbury's Laws of England 4th Edition Vol.44 with respect to exclusionary clauses to the effect that *"to express one thing is by implication to exclude another"* to conclude that the Act did not exclude the cost of returnable containers from the list of excisable goods. We hold the view that in doing so, the learned Judge fell into error as he failed to differentiate between the rules of interpretation in ordinary legislation as opposed to Tax legislation. As stated earlier, there is no intendment in Tax Law, there are no assumptions or presumptions.

54. For the sake of argument, but more importantly in the interest of wholesome and purposive interpretation of the said section, why would Parliament have expressly excluded the tax on returnable containers before 2004 and re-introduce subsections **(3)(b)** and **(d)** to again expressly exclude the returnable containers from the tax bracket through **Section 5 of the Finance Act No. 10 of 2010**? In our view, the exclusion of returnable containers from the ex-factory selling price as per the previous legislations must have appreciated the unique nature of the practice in the industry and the dealing in such containers.

55. It is not in dispute that such returnable containers are manufactured once and used for purposes of distribution. The said returnable containers are returned to the appellants by distributors, retailers and all parties involved in the supply chain. They are not sold to either the distributors, retailers or the end users and any deposits received in the said supply chain is refundable. This unique situation may perhaps

explain why such returnable containers were excluded from the ex-factory selling price. Levying tax on returnable containers every time they are refilled would amount to multiple taxation which is, needless to say, unconscionable and unlawful.

56. We could say more, but we believe we have demonstrated that with the above interpretation of the law, it will not be necessary to discuss the issue of legitimate expectation or any other issues raised by the appellants. We are persuaded that this appeal has merit and we consequently allow the same with costs to the appellants.

Delivered and dated at Nairobi this 19th day of July, 2019.

W. KARANJA

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JUDGE OF APPEAL

J. OTIENO ODEK

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR