IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA

CORAM: ATUGUBA, JSC (PRESIDING)
AKUFFO ((MS), JSC
DATE-BAH (DR.), JSC
OWUSU (MS), JSC
B. BONNIE, JSC

CIVIL APPEAL
NO. J4/25/2009
22ND JULY, 2009

CHAPEL HILL SCHOOL LTD. .... APPELLANT

VERSUS

1. THE ATTORNEY GENERAL ... RESPONDENTS
2. THE COMMISSIONER
   INTERNAL REVENUE SERVICE

J U D G M E N T

DR. DATE-BAH JSC:

Introduction

The central issue in this case is the meaning to be given to the expression "educational institution of a public character" within the context of the Income Tax Act 1975 (SMCD 5**)** and the Internal Revenue Act, 2000 (Act 592). Unfortunately, the Court of Appeal wrongly characterised this central issue in terms of whether the plaintiff school qualifies as a public school. It accordingly addressed the wrong issue when it sought to establish a dictionary meaning for "public school" and "private school", respectively.

It seems clear that an educational institution may be characterised as being of a public character, although it is privately owned. This much is clear from the Privy Council cases of *Dilworth and Ors v The Commissioner of Stamps; Dilworth and Ors v The Commissioner for Land and Income Tax.* [1899] AC 99. These two consolidated cases were heard on appeal from the Court of Appeal of New Zealand. In these cases, where a wealthy testator made a gift for the establishment of an institution for the maintenance and education of boys who are orphans or the sons of parents in straitened circumstances, the Privy Council held that the institute, being an educational endowment in perpetuity vested in trustees without personal interest therein, the whole beneficial interest belonging exclusively and inalienably to the public, was a public institution within the meaning of section 2 of the Charitable Gifts Duties Exemption Act, 1883 of New Zealand. The said section 2 was in the following terms:

> "In this Act, the term 'charitable purposes' includes devises, bequests, and legacies of real or personal property respectively of whatever description to public institutions such as libraries, museums, institutions for the promotion of science and art, colleges and schools, or to hospitals, orphan, lunatic, or benevolent asylums, dispensaries."

While it is not safe to transport the judicial interpretation of a specific statute from a different jurisdiction into our jurisdiction, it is nevertheless instructive to note that a common law court has not viewed the expression "public institution" as limited to an institution that is publicly owned.

Lord Watson, delivering the judgment of the Privy Council, said (at p. 109):

> "Their Lordships have come to the conclusion, not without hesitation, owing to the view taken by the Courts below, that the Ulster Institute, as designed by its founder, does answer the description of a public institution such as a school. It appears to them that, if the testator had directed his trustees forthwith to hand

over the administration and management of the Ulster Institute to a public body in New Zealand, or if he had made his bequest directly to such public body for the same purposes, the institute would necessarily have been regarded as a public and not as a private institution. What he has directed to be done is in substance the same thing. His trustees, to whom he has delegated the duty of building the institute and of superintending its administration, are his trustees in this sense only – that he appointed them. They have no personal interest in the residue, which they hold only for behoof of those children, members of the public, whom he has directed them from time to time to select as the beneficiaries under the trust. The bequest is an educational endowment in perpetuity, and the beneficial interest in it is not vested in any private person, but belongs inalienably to the public. Such being the character of the charity founded by the testator, their Lordships do not think that the inmates of the Dilworth Ulster Institute could with propriety be described as the recipients of private education."

This case appears to establish the principle that where an institution renders services to the general public and there is no beneficial interest in it vested in any private person, that institution can be regarded as being public or of a public character. This principle is one that is worth exploring for the purposes of this case. This is because I think that construing "educational institution of a public character" in the context of the statutes mentioned above as a publicly-owned school is too simplistic and not sufficiently responsive to the nuanced complexities of modern Ghanaian life.

There is some advantage in borrowing some of the concepts of English charities law in this context. The English Charities Act 2006 defines a charitable purpose as a purpose which falls within certain descriptions of purposes in it and is for the public benefit. One of the descriptions of purposes relates to education. The 'advancement of education' is a description of purpose in section 2(2)(b) of the Charities Act 2006. Thus where there is advancement of education for public benefit, this activity qualifies as a

charity. This activity will so qualify even if it is not carried out by a public body. Whilst this Court is, of course, not bound by these statutory provisions, they provide food for its thought. In the Ghanaian context, the ideas underlying the English charities regime suggest that there could be advancement of education for the public benefit, even if the provider of it is a private body. For us, the crucial elements would be public benefit and the absence of private benefit for the providers of this "charity."

The Facts

The facts of the case which have given rise to the issue highlighted above are as follows: the appellant in this case was originally established as the Takoradi Chapel Hill Preparatory School in December 1962 by fourteen people who subscribed its Instrument of Establishment and Government as founders. The Instrument of Incorporation purported to establish it as a corporation sole. The learned High Court judge in this case, also found, and this has not been challenged by the appellant, that it was originally limited by guarantee. Indeed, in the Commissioner's Reply to the Appellant's Notice of Appeal to the High Court under Order 54 rule 7, he admitted that the appellant was governed by its instrument of incorporation and limited by guarantee. (See para. 3 at p. 5 of the Record of Appeal.) However, in 2001 the appellant was incorporated as a company limited by shares under the Companies Act, 1963 (Act 179). The learned trial judge further found that (p. 29 of the Record):

> "The appellant is an educational institution that serves the people of Takoradi and its environs. In other words it is a school for the use and benefit of the public but I venture to state that this alone does not make it a school of public character."

The Internal Revenue Service (hereafter the Second Respondent) assessed the appellant to tax for the years 1994 to 2004 in the sum of 39,864.40 ghana cedis. When the appellant's objection to this assessment was turned down by the Commissioner of

Internal Revenue, it appealed to the High Court, Sekondi, in July 2005, seeking a declaration that the appellant is an educational institution of a public character and thus its income is exempt from tax. It also sought an order for the annulment of the tax assessments for the years 1994 to 2004. The learned High Court judge dismissed the appeal. Upon a further appeal to the Court of Appeal, that court also dismissed the appeal. Being aggrieved by the dismissal of its appeal by the two lower courts, the appellant has appealed to this court.

Its grounds of appeal are as follows:

i. "The Court of Appeal erred in affirming the trial Court's holding that the Appellant School is not an "educational institution of a public character" within the meaning of s. 3(1)(d) of the Income Tax Decree, 1975, SMCD 5 and ss 10(1)(d) and 94 of Internal Revenue Act, 2000, Act 592.
ii. The Court failed to hold that the Appellant School's income derived from functioning solely as an educational institution is exempt income.
iii. The Court erred in relying on dictionary definitions of "public school" in defining "educational institution of a public character" as it appears in the statutes.
iv. The Court failed to consider the fact of a letter dated 9th February, 2001, by the Chief Inspector of Taxes confirming the tax exempt status of the Appellant School; and which formed part of the record.
v. The Court, by reason of its judgment, ought to have upheld the appeal in part, to the extent that the Appellant's income for the period dating from 1994 to 2001 is exempt from tax.
vi. There was no evidence on record to support the holding by the Court that the Appellant School "deals in stationary *(sic)* and acts as local representatives of foreign companies which deals in stationary *(sic)*."
vii. The Court erred in dismissing the appeal."

Section 10(d) of the Internal Revenue Act, 2000 (Act 592) exempts from tax "income accruing to or derived by an exempt organisation other than income from a business", whilst section 94 of the same Act defines "exempt organisation" as including a person:

> "who or that is and functions as
> (i) a religious, charitable or educational institution of a public character;
> (ii) …;
> (iii) …;
> (iv) …
> (v) ….; and
>
> (b) who or that has been issued with a written ruling by the Commissioner currently in force stating that it is an exempt organisation; and
> (c) none of whose income or assets confers, or may confer, a private benefit, other than in pursuit of the organisation's function referred to in paragraph (a)."

The Internal Revenue Act, 2000 repealed the Income Tax Decree, 1975 (SMCD 5), which had similarly provided in its section 3(1)(d) that "the income of an ecclesiastical, charitable or educational institution of a public character in so far as such income is not derived from a trade or business carried on by such institution" was exempted from tax.

The Arguments of the Parties

The appellant contends in its Statement of Case that from the statements filed in the High Court the following matters were not disputed:

i. "Chapel Hill School is an educational institution opened to members of the public
ii. It does not carry on any other business or trade apart from functioning as an educational institution

iii. None of its income or assets confers a private benefit to any person
iv. It is financed by fees and endowments.
v. It was under a trusteeship from its inception and later incorporated on 21/9/2001."

The appellant highlights the use of the phrase "of a public character" in the relevant provision of the Internal Revenue Act 2000 and the Income Tax Decree, 1975. It notes that this phrase is not defined in either of these tax statutes and argues that since there is no guidance in the statute itself to the interpretation of the phrase, there has to be resort to extrinsic aids to the interpretation of the phrase. It prays in aid the rule of interpretation embodied in the latin maxim: *noscitur a sociis*. Its argument runs as follows:

> "My Lords, it is not for nothing that educational institutions were placed together with religious or ecclesiastical and charitable organizations in one and the same paragraph in the Income Tax Decree of 1975, SMCD 5, and its successor legislation, the Internal Revenue Act, 2000, Act 592.
>
> I wish to submit therefore that on the basis of noscitur a sociis rule, educational institution as appears in the statutes must take its colour and character from the preceding words that is, "the religious or ecclesiastical and charitable". These 2 other institutions are not controlled by the state. They are privately formed or owned organizations and do not pay tax unless perhaps their income confers a private benefit on some person or persons.
>
> Regrettably, and with due deference to His *(sic)* Lordships of the Court of Appeal, the Court rather than define the phrase "of a public character" dwelt extensively on the definition of "**public school"** and slipped into palpable error as a result."

The appellant points out that the tax statutes in question do not mention "public school" and that the phrase "of a public character" is not coterminous with public school. It therefore urges on this court its view that the phrase "of a public character", as used in the two tax statutes, does not connote State or government ownership or management. It endeavours to persuade this Court that although paragraph 3(1)(d) of SMCD 5 and paragraph 10(1)(d) and s.94 of Act 592 recognise that the provision of training and instruction to children is an economic activity or business, they exempt the income accruing from this activity or business, in so far as that income does not confer any private benefit. It contends that the essential element of public character is that the management and control are not in the hands of individuals for personal benefit.

The Second Respondent filed a Statement of Case opposing the Appellant's appeal. It contends that there is an onus on the Appellant to demonstrate that the core function of the school does not constitute a business. In support of this argument, it quotes section 5 of Act 592 which provides that:

> "Subject to this Act, the chargeable income of a person for a year of assessment is the total of that person's assessable income for the year from each business, employment, and investment less the total amount of deductions allowed to that person for the year under sections 13 to 22 (relating to general and specific deductions), 39 (relating to personal reliefs), 57 (relating to life insurance) , and 60 (relating to contributions to retirement funds)."

The Second Respondent argues that what the Appellant does, namely offering tuition for fees, out of which activity it makes a gain or loss, constitutes a business.

Our comment on this argument by the Second Respondent would be that the mere fact that what the Appellant does constitutes a business does not inevitably lead to the conclusion that the activity cannot be exempt from tax. If the business concerned is one that falls within the purview of the educational business carried out by an

educational institution of a public character, then the income from that business will qualify for exemption from tax.

The South African case of *Chancellor, Master and Scholars of the University of Oxford v Commissioner for Inland Revenue, Republic of South Africa* (1996) 58 SATC 45; [1996] (3) I All SA 257 illustrates this. In this case, the South African tax authorities sought to assess the South African branch of the Oxford University Press to tax on its business in South Africa. The South African tax code has a provision on exemption which is substantially *in pari materia* with the language which this Court has to construe in this case. Section 10(1)(f) of the Income Tax Act 58 of 1962 of South Africa provides as follows:

> "Exemptions
> 10(1) There shall be exempt from tax –
> *(f)* the receipts and accruals of all religious, charitable and educational institutions of a public character, whether or not supported wholly or partly by grants from public revenue…"

The South African Appellate Court held that Oxford University Press was part of Oxford University and had no independent legal personality. The person whose liability to tax was being assessed was thus Oxford University, which the court held to be indubitably an educational institution of a public character. The fact that the activities of Oxford University Press South Africa appeared commercial did not deprive Oxford University of its exemption from tax in respect of the proceeds from the business from South Africa. Corbett CJ explained the Court's decision thus:

> "In order to apply sec. 10(1)(f) it is necessary in each case to categorize the person (i e taxable entity) who has received gross income or to whom gross income has accrued, i e to determine whether or not such person is a religious, charitable or educational institution of a public character. In the present case

such categorization presents no difficulty. The appellant is manifestly an educational institution of a public character. This is not disputed. And that, one would imagine, is the end of the matter."

What was important was that the income derived by Oxford University from its business in South Africa was fed into its educational purposes and was not for the private gain of individuals.

In its Statement of Case, the Second Respondent also denies that the Appellant is of a public character. It contends as follows:

> "That appellant school is opened to members of the public by simply admitting children from far and near is what is expected of all schools.
>
> Therefore, the fact that Appellant school is open to the public cannot under any stretch of imagination cloth *(sic)* it with public character status.
>
> My lords, it is Respondent's submission that Appellant has not led any evidence to show that what it does is neither trade nor business.
>
> Appellant school indeed is engaged in the business of educating children for fees which fees constitute its income and is subject to tax."

This argument of the Second Respondent is effectively answered in the Appellant's Reply to the Second Respondent's Statement of Case as follows:

> "It is not and has never been the case of the Appellant that its core function does not constitute business and therefore is not liable to tax.

If what the Appellant does cannot be termed as business, or that it does not earn income therefrom, then the whole issue of tax will not arise in the first place. The Appellant admits that what it is engaged in is business and derives income from it, but contends that the law specifically has exempted this income from tax.

Ecumenical work may involve generation of revenue or income. This income, the law has exempted from tax only if it does not confer a private benefit on any person, otherwise it will be subject to tax."

Without citing the South African case of *Chancellor, Master and Scholars of the University of Oxford v Commissioner for Inland Revenue, Republic of South Africa* referred to *supra,* the Appellant in effect makes the same point.

In further elaborating on its contention that the Appellant is not "of a public character", the Second Respondent contends that "public character" within the meaning of the statutes in issue is, in relation to the Appellant, "coterminous with public institution or public school". The Second Respondent distinguishes the private ownership of churches on the ground that their core function of evangelism cannot be classified as business or trade and also because their public character flows from the fact that they are administered by trustees elected by the congregation or its representatives. It continues as follows:

"Again, these institutions have constitutions which have been so crafted that no one individual can claim ownership of their assets or derive any special benefit save emoluments, salaries or allowances paid them for performing specific assignments in those institutions.

The same can not be said of Appellant school. Indeed the instrument of Establishment and Government of Chapel Hill School reserved membership of the

Board of Governors of the school to only the Founders, the customary successors or heirs of unavailable founders. (Page 13 of record). Lately when the school was converted into a Limited Liability Company, it was the same Founders who hold shares in the company and have been appointed as directors as well. Their control over the company thus becomes absolute."

The Law

The appellant makes a persuasive case for its interpretation of the phrase "of a public character". For the appellant to succeed in showing that it is an institution of a public character, it must, in our view, establish that its educational business was of public benefit and did not confer any private benefit on individuals. The fact that it is privately owned is not necessarily a bar to the appellant's ability to demonstrate this, as we have shown in our earlier discussion of the Privy Council case of *Dilworth and Ors v The Commissioner of Stamps; Dilworth and Ors v The Commissioner for Land and Income Tax.* [1899] AC 99. .

Unfortunately, the appellant's case is destroyed, in part, by its conversion in form from a company limited by guarantee into a company limited by shares. By this conversion, whether or not profits are actually distributed, the members of the company are entitled to profit from the business run by the company. The potential for there to be benefit to private individuals implies that, from 2001 onwards, the appellant school was no longer of a public character. However, before then the appellant's case that it was of a public character is cogent and persuasive and, in our view, should be accepted. Section 10 of the Companies Act, 1963 (Act 179) provides that a company limited by guarantee shall not be incorporated with the object of carrying on business for the purpose of making profits. It spells out a sanction for officers and members of a

company limited by guarantee who breach this prohibition against making profit. Accordingly, for as long as the appellant was a company limited by guarantee, there was a legal assurance that its business was not conferring any private benefit on individuals. Indeed, the company limited by guarantee, which was introduced into Ghanaian law by the Companies Act 1963, can be said to be functionally equivalent to a trust. It is functionally a trust in corporate form. By this we are not asserting that the technical equitable rules on trusts apply to it. However, we do say that the function of the two institutions is identical in this context. This connotes that the members of the company, like a trustee, cannot benefit from the revenue from the trust, which should be used exclusively for the purposes of the guarantee company. Thus any excess revenue remaining after all the expenditures of the company in any year has to be retained and applied in the future to the company's purposes. This assurance was removed by appellant's conversion into a limited liability company. We therefore consider that from the date of the conversion of the appellant from a company limited by guarantee into a company limited by shares, it ceased to be of a public character.

Conclusion

We are therefore willing to, and do hereby, grant a declaration that the appellant was an educational institution of a public character until it was converted into a limited liability company in 2001. The Court of Appeal was thus partly in error in affirming the trial Court's holding that the appellant is not an "educational institution of a public character" within the meaning of section 3(1)(d) of the Income Tax Decree, 1975 (SMCD 5) and sections 10(1)(d) and 94 of the Internal Revenue Act, 2000 (Act 592). The appeal is thus upheld in part.

DATE-BAH (DR.)
(JUSTICE OF THE SUPREME COURT)

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