THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL APPEAL NO. 3 OF 2018

(Arising out of TAT 16 Of 2016)

INTERNATIONAL SCHOOL OF UGANDA LIMITED::APPELLANT

VERSUS

THE COMMISSIONER GENERAL

UGANDA REVENUE AUTHORITY:::RESPONDENT

BEFORE HON. JUSTICE DAVID WANGUTUSI

JUDGMENT.

The Appellant is an educational institute established in 1967 and incorporated as a company limited by Guarantee. Its objectives and mandate are well described in its Memorandum and Articles of Association which briefly were;

1. That its membership would be composed of parents, legal guardians and teachers of the children at the school at a given time. They specifically provided that membership would cease when the parent or guardian no longer had a child or when a teacher ceased to be so employed at the school.
2. Its business is to provide an International Curriculum which would enable transfer of students to other international schools if needed.
3. Income would be obtained from school fees and donations. This income from whatever source would be expended in Uganda solely to the objects of the company 'as set forth in the Memorandum and Articles of Association'.
4. No portion of the income would be paid or transferred directly or indirectly by way of dividend, bonus or otherwise howsoever, by way of profit to the members of the company.

5. The Board Members were to receive no salary or compensation for their service.
6. The above notwithstanding there would be re-imbursement of out of pocket if sanctioned in advance incurred by officers, employees or members of the company in the execution of the company's objectives.

The school has operated since then and has overtime accumulated a substantial sum of money. The Appellant contends that the income derived from the business is re ploughed into her educational purposes and is not for private gain of individuals.

In 2003 to 2005 and 2005 to 2007 the Appellant basing on section 2(bb) of the Income Tax Act sought exemption to tax. The respondent finding that she was an Educational Institute of Public Character within the meaning of section 2(bb) granted the exemption. The exemption would run for two years renewable. Granting the exemption, the Respondent wrote;

> *"We refer to the School's application for exemption from Income Tax and subsequent correspondence on this subject.*
>
> *We hereby grant the school exemption from Income Tax on the school's income on the basis that Lincoln International School is an education institution of a public character, and none of the income or assets confers or may confer a private benefit on any person."*

The exemption would be valid for two years running form 1st January 2004 to 31st December 2005, renewable on satisfactory compliance with the tax laws and other regulations.

The foregoing meant that at the time the Respondent granted the exemption, the Appellant had met the requirements;

a) Of being an *educational institution,*
b) *An institution of apublic character*
c) That *its income or assets did not confer a private benefit* to any individual.

That these were the prerequisites to tax exemption was attested to by one Apollo Kamwebaze Raymond an accountant working with the Respondents and responsible for evaluating applications of those

Respondents and responsible for evaluating applications of those seeking tax exemptions. Under cross examination before the Tribunal he stated;

> *"We have some tests or guidelines that we must follow on every application. If it passes that test, then we recommend it for Commissioner Domestic Taxes to sign. But if it fails, we refer it back to the station or we seek further clarification"*

On further cross examination he stated;

> *"There is a definition of who qualifies to be an exempt organisation. You check whether that application satisfies that criteria and basically that is it"*

The Respondents witness then proceeded to spell out the criteria in these words;

> *"The law says that the applicant should be an education Institution of public character and none of any incomes or assets should confer any private benefit to any person"*

The witness was emphatic that those were the criteria the Respondents use consistently to declare an applicant tax exemption under section 2(bb) of the Income Tax Act.

Asked whether anybody who satisfied those criteria automatically qualified to get a certificate of exemption, the witness replied in the affirmative.

The Appellant must have satisfied all those requirements for the Respondent to grant it certificates of exemptions in the first place. What then changed to disqualify the Appellant and remove her from the class of an educational Institute of public character?

It is worthwhile noting here that for some time the Appellant did not have to reapply for another term of exemption because this was rendered unnecessary by an amendment introduced by The Income Tax (Amendment) Act 2008 which gave a general income tax exemption to all educational institutions.

In 2014 the Income Tax Act was amended removing the general income tax exemption. The amendment did not however affect the exemption provisions in section 2(bb).

The Appellant contending it still qualified for exemption sought a renewal of certificate of exemption.

Represented by a tax adviser the Appellant on 18th February 2015 wrote to the Respondent seeking renewal of the exemption;

> *"We are tax advisers to the International School of Uganda, formerly Lincoln International School (hereafter ISU) and have been asked by our client to apply for renewal of their income tax exemption by the Uganda Revenue Authority. This letter is therefore to kindly ask your office to renew our client's exemption for the reasons we give below"*

The tax adviser then gave the justification for the exemption **Exh p6.** She wrote

> *"We and our clients believe that ISU is an exempt organisation in accordance with Section 2(bb) of the Income Tax Act (Cap 340) because it is registered under the Companies Act 2012 as a company limited by guarantee but also its business being a school, is that of an educational institute of a public character. Its memorandum of association which we attach as part of the bundle of documents, is clear in clause 7 that none of Company's property whatsoever can be distributed to its members and none of its income or assets confers or is likely to confer a private benefit to any person"*

The tax adviser added that moreover the Respondent in a letter to the Appellant dated April 7, 2005 she had affirmed that the Appellant *"was indeed an educational institution of a public character and that none of its income or assets confers or may confer a private benefit on any person*

To the application the tax adviser attached the following;

1) Final tax returns.

2) Financial and bank statements for the past three years

3) Certificate of registration

4) Memorandum and Articles of Association

5) List of Directors over the past three years

6) Asset register

On the 18 February 2015 the Respondent acknowledge receipt of the application and rejected it. To the Appellant She wrote;

> "We regret to inform you, that your Application for Income Tax Exemption. DT.1015 (Exemption Ruling for Income Tax) with Reference Number CRO1152529626 has NOT been granted"

The Respondent gave reasons for rejection;

> *"Your application has been rejected on the following legal grounds.*
>
> *1) The tax payer does not fall within the provision of section 2bb.*
> *2) Your organisation is not educational institution of a public character.*

The Respondent further noted;

> *"The operations of the school are open to all but it does not fall within the definition of a public character as envisaged by the law.*
>
> *The Application is therefore unsuccessful and not recommended for income Tax exemption."*

The Appellant lodged an objection against the refusal to grant of exemption and on the 7 January 2016 the objection was disallowed, **Exh A 8.**

The Appellant was not satisfied by the rulingso she filed a suit in the Commercial Division which however referred the matter to the Tax Appeals Tribunal. The Commercial Court ruled;

> *"The High Court has no jurisdiction to determine the questions disclosed in this appeal as an original court, and only enjoys appellate jurisdiction from the decision of the Tax Appeals Tribunal.....the above questions as to whether the Respondent (now Appellant) is an exempt organisation under section 2(bb) of the Income Tax Act and whether the earlier communication or ruling of the commissioner General on 7th April 2005 on the tax exempt status of the Appellant exhausted the powers of the Commissioner General on the issue is referred to the Tax Appeals Tribunal*

The parties then proceeded to the Tax Appeals Tribunal with the following questions in issue;

1) Whether the Appellant was not an educational Institution of a public character within the provisions of section 2(bb).
2) Whether the Commissioner General has a right to decline to issue a written ruling under section 2(bb) (ii) of the Income Tax Act, if the Applicant for income tax exemption all the other requirements stipulated under fulfils section 2(bb) of the Act.
3) Whether the time bound nature of certificates of exemption issued under section 2 (bb) of the Income Tax Act is ultra vires the Act

The appellants argument before the Tribunal was that she was an exempt organisation under section 2(bb) of the Income Tax Act. Section 2(bb) lists exempt organisations. Under **B** it provides exempt organisation to include;

> *"A religious, charitable or educational institution of a public character."*

The Appellant contended that she was an educational institution of a public character and that since her Constitution barred her from conferring any private benefits to any of its members or any other persons, the Respondent was obliged to grant her a certificate of exemption.

The Respondents contention was that the Applicant was an educational institute but because it was not a public school aided by government it did not fall amongst institutions envisaged under section 2(bb) of the Income Tax and was therefore not be exempt.

The Tax Appeals Tribunal after hearing from the parties ruled against the Appellant on the basis that being a privately owned, funded and managed, it could not be an institution of a public character.

It is this ruling that the Appellant seeks this court to overturn.

There are three grounds of appeal as follows;

1. The tribunal erred in law in finding that the Appellant is not an educational institution of public character.
2. The tribunal erred in law in finding that the respondent has discretion to grant or not to grant an exemption to a

person who has satisfied the conditions under section 2(bb) of the Income Tax Act.

3. The tribunal erred in law in finding that the Respondent's time limitations in rulings issued under section 2(bb) of the Income Tax Act is not ultra vires.

The Appellant therefore sought the following;

a) A declaration that the certificate/ ruling issued to the Appellant on 7th April 2005 as subsisting.
b) An order that the Respondent re-assesses the Appellants application for exemption submitted on 18th February 20015.

Starting with the first ground of appeal that the tribunal erred in finding that the Appellant was not an educational institution of public character, counsel for the Appellant submitted that the Appellant was a Company registered by guarantee which had in the past applied for and been granted a certificate of tax exemption.

That the grant was based on the fact that its business as an educational institution was not intended to confer any private benefit to any individual. That its membership comprised of parents, legal representatives of children registered at the school and teachers. Furthermore the board members were not entitled to any salary or other compensation for services rendered as board members.

Counsel for the Appellant also submitted that his client was aneducational institution of public character. Due to the absence of definition of the phrase "public character" in the Income Tax Act, he sought the definition outside from other common law jurisdiction with similar provisions as our section 2(bb) of the Income Tax Act.

For authority he relied **on Dilworth & others vs The Commissioner of Stamps & Income Tax (1899) AC 99 and Chapel Hill School vs Attorney General& Commissioner Internal Revenue Service 14/25/2009.**

He specifically relied on their lordships interpretation of the phrase in the Chapel Hill case wherein they observed that;

> *"For the Appellant to succeed in showing that it is an institution of 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 for Land and Income Tax [1899] AC 99"

Lastly counsel submitted that the requirement to pay fees at whatever rate did not change the position as long as the Appellant was open to all members of the public.

In reply Counsel for the Respondent submitted that the denial of exemption was due to the Appellants failure to show that the surplus money was to be reinvested in the school.

He referred Court to the Appellants Report and Financial statement **Exh R11 (a)** which did not show whether the surplus was reinvested in the school. He submitted that on the contrary the Appellants return indicated that it was shareholders' fund.

Furthermore that the Appellant was earning consultancy fees which ought to be taxed because it was not one of the objectives of the school. That this was reflected in the returns. That if the Appellant felt that consultancy fees were included wrongly then she should have amended the return.

Firstly I would like to deal with the issue of consultancy fees. It's clear from the returns at page 203 of the trial bundle there is a provision for sales/ Gross receipt from business or profession(net of return and refunds and duties or taxes if any. Under this there are three rows itemised alphabetically 'a' to 'c'. 'a' provides for sales/ Gross Interest Income (for banks), 'b' provides for Gross Receipt from Profession/Consultancy Fees and 'c' provides for Total of the two above. The Appellant filled its earnings under 'b' and so the Tribunal concluded that apart from school fees the Appellant also did consultancy work and since consultancy was not amongst its objectives, she should be taxed.

The issue of consultancy fees was first raised during cross examination of Sean Granville the Appellants witness before the tribunal. Asked what the 28,803,133,750 stood for, he replied that it was income from fees. He denied that the appellant made any earning from consultancy. He denied that the Appellant offered any consultancy. Mr Granville stated;

"What I am aware of Mr Chairman and to the best of my knowledge is that the school is licenced by the

Ministry of Education. Our income is generated from school fees."

Counsel for the Applicant submitted that the figures were written under 'b' because there was no provision in which the Appellant would have written their income. He insisted that the Appellant did not do any consultancy work.

The Respondents counsel submitted that the Appellant should have filled an amendment and that since she did not file one the sum of money must have come from consultancy. The Tribunal believed her and based part of its ruling on that. The Tribunal wrote;

"What is surprising is that the Applicant posted income which was a result of consultancy. For the financial year 2014 there was professional fees/ consultancy fees of Shs 28,803,133,750/=. The Applicant was incorporated an educational institution. Any income that is derived from activities other than educational activities are subject to tax as s. 2(bb) caters for interalia education institutions"

Later on in the ruling the Tribunal found in these words;

"The Tribunal finds that the respondent has not provided any evidence that there is a segment of Uganda's public that is excluded from benefiting from the services of the Applicant. There are no profits distributed to the guarantors. However, the Applicant derives income also from other sources than the provision of education services. The Tribunal already noted that in its financial statement it charged professional/consultancy fees"

This finding by the Tribunal showed that it believed that the sum of money indicated in row 'b' was consultancy fees. The Tribunal did not how ever give reasons for that finding. First of all problem with that finding is that it was never the Respondents case that the Applicant made earning in consultancy.

The Respondent's case was that the Applicant did not cater for a large section of the community and also had a big reserve yet there was no evidence that she intended to reinvest it in the school.

The Respondents case is fully embedded in the witness statement of Apollo Kamwebaze in paragraphs 8, 9 and 10which I reproduce for ease of reference;

> *8. That the services availed by the Applicant do not benefit a sufficient Section of the community and hence the Applicant does not qualify for an income Tax exemption under the above provisions.*
>
> *9. Upon analysis of the Applicant's Income Tax Returns, it was established that the Applicant obtained unexplained reserves to the tune of UGX 47,535,416,746 Billion and UGX 63,868,336,050 Billion for the Financial Years 2013 to 2014 and 2014 to 2015 respectively.*
>
> *10. In the absence of clear accountability in regard to the utilization of the above reserve, the Applicant could not be granted an income tax exemption.*

The foregoing shows clearly that the issue was not the source of the money but the destination. If the money had come from consultancy the Respondent would not have gone through the rigors of a trial. It would instead have given an assessment in the name of tax on money earned outside the Educational arena. There would have been no reason to ask the Appellant how she intended to use it.

I would also like to add here that the Tribunal should have given the Appellant a chance to react to the issue of consultancy before relying on it in there ruling. It was a new matter that was neither raised by the Respondent at the time they denied the Appellant the grant of exemption nor at the time they filed their pleadings before the tribunal. Pleadings are necessary to define matters in controversy to enable the parties prepare their cases, **InterfreightForwarders U Ltd v East African Development Bank C A 33 of 1992, Mohamad Hamid v Roko Ltd CA 1 of 2013.**

Lastly the return indicates only one item of income. The question that the tribunal should have posed is if that was earning from consultancy then where was that from the fees? The fee as a source of income was not in dispute. It was recognised by the Respondent. It had received returns before. Where was it in this return? The only believable explanation is that of the Applicant's witness that finding no box in the Return Form allocated for their type of income namely students fees, they wrote the sum in a box they thought nearly fitted their kind.

For those reasons I find for the Appellants that the sum of money in 'b' represented fees from students and should have been treated as such by the Tribunal.

Going backto the question whether the Appellant is an educational institution of a public character the Respondent dwelt a lot on the definition of a public school. She relied on the Education Act section 1(g) which defined public school as *"any school maintained by government, a district administration or an urban authority out of public funds."*

The fore going he said was opposed to a private school defined under section 1(f) of the same Act as *"any school which is not maintained out of public funds or does not receive an annual recurrent grant from government"*

The Respondents case was that the Appellant is not an educational institution of a public character because it is not a public school within the meaning of the Education Act.

The Respondent contended that since the Appellant was a private school not funded by government, she could not be an institution of public character.

With a lot of respect I would like to say that in doing so the Respondent failed in three things. Firstly she relied on a repealed law the Education Act the definition in the section having been changed in the Education (Pre Primary, Primary and Post Primary) Act 2008.

Secondly the Respondent departed from defining an institution of public character and dwelt on that of a public School.

Thirdly Respondent narrowed the definition to only government funded schools leaving out private schools yet RW1 who testified on her behalf told court that there were several private companies without government funding which were of public character.

Fourthly she disregarded the parameters given under section 2(bb) of the Income Tax and based all her argument on the Education Act

What qualifies for exemption is an educational institution of public character. The Income Tax Act provides in 2(bb) as follows;

"Exempt organisations 'means any company, institution, or irrevocable trust;

(1)Which is

(A) An amateur sporting association.
(B) A religious, charitable or educational institution of a public character or
(C).....

(ii) Which has been issued with written ruling by Commissioner currently in force stating that it is an exempt organisation and,

(iii) None of the income or assets of which confers, or may confer, a private benefit on any person.

The Tribunal found that the whole case was based on the interpretation of whether the institution was of a public character. The Tribunal also found that the Applicant was a company limited by guarantee and did not have a share capital. That its primary objective was to provide an international curriculum to students.

The Tribunal observed that the Memorandum and Articles of Association of the Applicant clearly stated that the income of the company would solely be for the objects of the company.And that no portion would be paid by way of dividends, bonus or otherwise to by way of profit to membersThat its membership comprised of parents, guardians, or teachers having children at school at a given time and that such membership would cease on the exiting of the student from the school.

It was a non-profit making organisation and the members would not benefit even at its dissolution.

The Tribunal seems to have been carried away by the Respondents'contention that the issue was about the difference between a private school and a public. The Tribunal even called an expert witness Mr Ismail Mulindwa a Commissioner In- charge Private Schools and Institutions. He described the Appellant as a private school and that all private schools were obliged to pay tax on profits made. That it meant that schools not making profit would not pay.

Thc Tribunal correctly found that the applicable provisions of thc law in this case was section 2(bb) of the Income Tax Act. It wrote;

> *"it is not a dispute that the Applicant is a company that falls under s. 2(bb) of the Income Tax Act. It not in dispute that the Applicant is an educational institute"*

The tribunal then went on to clarify that tax is imposed by the law and not courts. That one should not read his own things into tax

legislation. The Tribunal cited **Canada Trustco Mortgage v Canada [2005] 2 SCR 601;**

> *"That tax payers are entitled to rely on the clear meaning of taxation provisions in structuring their affairs. Where the words are equivocal those words will play a dominant role in the interpretation process."*

On the same point Lord Donovan **in Mangin v Inland Revenue Commissioner [1971] 1 All ER 179 wrote;**

> *"First the words are to be given their ordinary meaning. They are not to be given some other meaning simply because their object is to frustrate legitimate tax avoidance device. Moral precepts are not applicable to the interpretation of revenue statute. One has to look merely at what is clearly stated. There is no room for any internment. 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 at the words used"*

I am in full agreement with that finding and for those reasons I shall give prominence to S.2 (bb) of the Income tax by giving the words in the section their ordinary meaning in resolving the issue of whether the Appellant is an institute of a public character.

The Respondents witness argued that for an institution to qualify as one with a public character, it must be able to serve a sufficient section of the public. He however admitted that the law did not provide what constituted "sufficient section of the public"

The Respondent further contended that because of the exorbitant fees charged by the Appellant only a few students from well-off families can access that education which in essence erodes the public character status.

Furthermore that the Appellants mission is to make profit not to serve the public. Counsel submitted that through the heavy fees, the Appellant made profit and surplus. That since the income was profit it was subject to income tax, she relied on **Customs and Excise Commissioners v Bell Concord Educational Trust Ltd (1988) 143**

The Tribunal found that the Appellant was accessible to the public but the fees charged restricted the accessibility of the members of the public. That although it specialised in an international curriculum, it was accessible to the public since its enrolment was open to the public.

On who the beneficiaries are, the Tribunal wrote;

> *"The Applicant benefits both the private individuals that set it up by providing an international curriculum to students and the public, by educating its members"*

On the high fees charged the Tribunal found that it was a common occurrence in educational institutions. It cited American International School of Lagos v The Federal Inland Revenue Service;

> *"The charging of fees for educational services is not strange to the income generation activities of a school. The Respondents argument that the rate of fees limits the Appellants' services to select few and this strips the school from being of a public character is futile"*

Basing its self on that decision, the Tribunal in the instant case found that the Respondent had failed to adduce evidence that there was a segment of the public that was excluded from benefiting from the services of the Appellant.

From the evidence the Tribunal also found that there was no distribution of profits to the guarantors. Interestingly after finding that the money raised from fees was not for private benefit of the members or directors, the Tribunal went on to conclude that the Appellant fixed fees just to make profit. It took solace in **Customs and Excise Commissioners v Bell Concord Trust Ltd, particularly the following words;**

> *"In the instant case the company fixed fees for the educational courses with a view to making a large surplus and accordingly could not claim to provide education other than for profit"*

Finding the Appellant liable to tax the Tribunal wrote;

> *"The tax man is interested in taxing surplus income. That is income over expenditure. The large reserves the Applicant has accumulated*

from the high fees that it charges are testimony that it is in its business more for profit than education. The said revenues are not put to public use"

This conclusion of the Tribunal was not based on evidence. In my view it required evidence suggesting that the Appellant was accumulating the money for private benefit of individuals. There is not a scintilla of evidence that the income was for the private benefit of the members, board members or any other individual. The Tribunal had earlier in there ruling found that the Respondent had not shown that the income was being diverted from the objectives of the company.

The Tribunal had also earlier found that the Appellant was a Company Limited by Guarantee and so was prevented by the Companies Act from distributing the money to members, directors or other private individuals. The fact that the Appellant had not yet used the reserves was no evidence that she intended to divert it from the company objectives.

The objects of the Appellant as the Memorandum and Articles of Association shows were to expend all its income solely to the objects of the company and that no business would be carried on except in the actual execution of such objects.

Clause 5 of the objects states;

" The income and property of the company whenever derived shall be applied solely towards the promotion of the objects of the company as set forth in the Memorandum and Articles of Association and no portion thereof shall be transferred directly or indirectly by way of dividends, bonuses or otherwise howsoever by way of profit to the members of the company"

It is upon these assurances that the Respondent gave the Appellant a certificate of tax exemption in 2005. None of these have changed as to now eject her from the arena of the exempted.

What caused the Tribunal to refer to the Appellant as "an institution of a **private** character" is clear on page 20 of the ruling;

"Having looked at the above characteristics it is difficult to say that an institution that is privately owned, privately funded, privately

managed though accessible to the public and benefits both the public and privateindividuals is an institution of a public character. If we are to say so the law would be described an institution of private character. The word 'public' in S.2 (bb) would become superfluous. We have to call a spade a spade and not a big spoon. It may have a mixture of both private and public characters but it is overwhelmingly an institution of a private character and not one of a public character. Using the above parameters the Tribunal is satisfied that the applicant is not an educational institution of public character"

From the above it is clear that the tribunal branded the Appellant an 'institute of **private** character' as against an' institute of **public** character' because it was privately owned, privately funded and privately managed.

With the greatest respect of the Tribunal those are not the parameters to be considered when vetting an institution on whether it is or not an institution of a public character. The considerations are all in S.2 (bb) and to begin adding and reading into the law our own things would be contrary to what was well laid out in the Mangin v Inland Revenue Commissioner case, supra.

Considering the meaning of "educational institution of a public character" in **Chapel Hill School Ltd v Attorney General and The Commissioner Internal Revenue Service CA J4/25/2009** their lordships held;

"The central issue in this case is the meaning to be given to the expression "educational institution of public character" within the context of the Income Tax Act 1975. Unfortunately, the Court of Appeal wrongly characterised this central issue in terms of whether the 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."

In my view interpreting the expression "public character" outside section the 2(bb) of the Income Tax Act was to go astray.

The Appellant is an institution with a membership that has no private interest in the company residue, which they hold only on behalf of the students and members present at a given time. The beneficial interest is not based in any private person but belongs to the public as users. It surely had the public at heart.

In the **Chapel Hill School Ltd** case, supra their lordships observed;

> *"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"*

The court then observed that construing "educational institution of a public character" in the context of the statute like the Income Tax Act as a publicly owned school was too ***simplistic.*** I agree with that finding.

The Appellant sought exemption under S2(bb) of the Income Tax Act. It had to prove that it was an educational institution of a public character, which had been issued with a written ruling by the Commissioner stating that it was an exempt organisation. It also had to show that none of the income or assets conferred or may confer a private benefit on any person

The record shows that the Applicant did in fact prove all those requirements in 2005 to the satisfaction of the Respondent upon which she was found to be an educational institution of public character whose income or assets did not confer private benefit on any person. The Respondent must have been reassured of the foregoing by the registration of the Appellant as a Company Limited by Guarantee knowing that section 42 of the Companies Act, 2012 prevented her from diverting her income to individuals for private gain.

The only thing that changed were the reserves. This was bound to happen in a successful school. The reserves do not however draw the Appellant out of the armpit of S.2 (bb) of the Income Tax. It is only if the Appellant attempted to put the reserves to something outside the objectives of the company that the Respondent would proceed to tax them on that income

The Respondent has continuously argued that that the surplus in the reserves is taxable because it was a profit and that therefore the Appellant was doing business and not a charity. Counsel cited **Customs and Excise Commissioners v Bell Concord Educational Trust Ltd STC (1988) 143** in which profit was considered. The Court observed;

> *"The word profit means a surplus of income over expenditure....in the instant case the company fixed fees for the educational courses with a view to making a huge surplus and accordingly could not claim to provide education otherwise than for profit.*

In yet another charity, **South Well v Governors of Royal Highway College Egham (1895) 2 QB 437** where the students were required to pay fees and extra charges, Gratham J stated;

> *"It is impossible to contend as a fact of everyday life that a school or college where every student pays 90L a year can be a charity school. It can only be so treated by a fiction of law"*

I realise that the two authorities were in respect of charities that were not behaving in a manner expected of charities. They were commercial bodies hidden behind masks of charity. In the instant case we are not looking at a charity. We are instead dealing with an educational institution that charges fees and big fees at that.

I agree with the submissions of the Respondent that the Appellant was doing business. Infact the Appellant has not at any stage denied the fact that its activities constitute business and that it is therefore not liable to tax.

There is clearly income derived from fees as the Appellant's returns and financial statements indicate. There is no doubt that the issue of tax arose because of this income. It is however clear that while the Appellant does educational business and derives income from it, the Income Tax Law has exempted that income from tax

The Appellant still retains the same character it had in 2005. There was no proof that it had or intended to divert from those characters that qualified her to be an educational institution of a public character. That being the case it is this Court's finding that the Appellant met all the requirements and is manifestly an educational

institution of a public character. The Appellant is declared as such. The Respondent was therefore obliged to give it a certificate of tax exemption.

The second ground is that the Tribunal erred in law finding that the Respondent has discretion to grant or not to grant an exemption to a person who has satisfied the conditions under section 2(bb) of the Income Tax Act. On this point it seems the parties were arguing over the format of the ruling but as to whether the Commissioner General must give a ruling is something provided by the law itself. It is interesting that it was an issue because the law says the Commissioner will rule on an application submitted. The ruling is the only basis upon which the Applicantknows whether she has been or not exempted.

That the Commissioner is obliged to give a ruling was conceded to by the Respondent. At page 325 of the trial bundle, counsel for the Respondent submitted;

> "The requirement for an exemption ruling from the Commissioner is not merely an administrative requirement but a mandatory requirement for one to be exempted under section 2(bb) of the Income Tax Act."

I agree with that position because the process involves vetting. When a public body vets, it is obliged to give a result.

Furthermore the Respondent's witness during cross examination confirmed that a ruling was inevitable after the vetting exercise. I am in full agreement with the above. The sum total is that the Commissioner General cannot decline and must issue a ruling granting the application for exemption.

The third ground of appeal is that the Tribunal erred in law in finding that the respondent's time limitations in rulings issued under section 2(bb) of the Income Tax Act is not ultra vires the Act.

In 2005 when the Respondent granted the Appellant a certificate of exemption, it stated that it would run for two years. It reads;

> *"This exemption is valid for a period of two years running from 1st January 2004 to 31st December 2005 renewable on satisfactory compliance with the tax laws and other regulations"*

The Appellant contends that the law does not provide for the two year period and therefore certificates granted should be open. That in giving them a two year period the Respondent acted ultra vires the law.

In reply counsel for the Respondent contended that the two year period was not unlawful being merely procedural. That in any case section 158 of the Income Tax act allowed them to do so. The section provides;

> *"Forms, notices, returns, statements, tables and other documents required under this Act may be in such form as the Commissioner may determine for the effective administration of this Act.*

With respect I do not agree with that interpretation because the section only talks about the format but not time spans.

That notwithstanding in a matter which involves vetting and which remains in place only if the beneficiary stays within the provisions of the law, it is necessary for the authority granting the certificate of exemption to review and monitor the conduct and status of the Applicant from time to time so as to be sure that the exempted institution still qualifies to remain so.

This becomes necessary because the managers of the Appellant may change the institutions objectives say from those expected of a company limited by guarantee to one limited by shares where the members would now be entitled to a profit. A good example of such change is in **Chapel Hill School v The Attorney General and the Commissioner Internal Revenue Services CA J4/25/2009** where their Lordships observed that the assurances that members would not derive private benefit from the schools income was lost when its status changed from company limited by guarantee to one limited by shares. They wrote;

> *"Unfortunately the Appellants 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 the profits are actually distributed, the members of the company are entitled to profit from the businesses run by the company"*

I do agree with the Respondent that there are circumstances where a company may alter its status as to move outside the parameters set by section 2(bb) of the Income Tax Act. For those reasons it would be risky to give a perpetual grant of exemption without checking on the status from time to time. The check is best done at the application

because the grant is based on the status of the applicant at that time. Moreover the time spans given do not change the requirements under 2(bb) of the Act.

I find that, as long as the Respondent issues exemptions to those who qualify, interacting with them from time to time would not occasion any miscarriage of justice. That being the case I find no reason to fault the Respondents in the prudent action they took to ensure that the exempted remained straight in their obligations. This ground of appeal therefore fails.

In conclusion Court finds and orders as follows;

a) That at the time the Appellant filed this appeal on the 18th January 2018 she was an educational institution of public character as earlier found by the Respondent and therefore entitled to the exemption it sought.
b) That since there could now be changes in the appellants objects the Respondent re-assesses her application for exemption to ascertain whether she still qualifies for exemption.
c) The Respondent shall bear the costs of this appeal and those before the Tribunal.

Dated at Kampala this .....10th day of ...June 2020.

Hon Justice David Wangutusi

JUDGE