THE REPUBLIC OF UGANDA

IN THE TAX APPEALS TRIBUNAL AT KAMPALA

APPLICATION NO. TAT 16 OF 2016

INTERNATIONAL SCHOOL OF UGANDA ……..……APPLICANT

VERSUS

UGANDA REVENUE AUTHORITY ……..……RESPONDENT

RULING

This ruling is in respect of the rejection of an application by the applicant seeking for an exemption on the grounds it is an education institution of public character under the Income Tax Act.

The facts admitted by the parties are as follows: The applicant is a company limited by guarantee incorporated in Uganda in 1972 and is licensed by the Ministry of Education and Sports to provide education services to children in Uganda including children of diplomats working in Uganda. The operations of the school are funded by the school fees payable by students which range for US$ 16,000 to US$ 27,500 per student per year and also from donations. The student population was 564 students in the academic year 2013/2014. In April 2005, the respondent issued a ruling to the applicant stating that the applicant was an exempt organization as envisaged by S. 2(bb) of the Income Tax Act. The ruling or the certificate was expressed to be valid for a period of two years from 1st January 2004 to 31st December 2005. Upon expiry of the applicant's exemption status, it did not apply for renewal of the exemption since it was exempt under the provisions of S. 21 (2) (aa) of the Income Tax Act which has since been repealed. On the 18th February 2015, the applicant lodged an exemption application with the respondent. On 30th October 2015, the respondent rejected the application for the exemption on the grounds that the applicant did not fall within the provisions of S. 2(bb) that the applicant was not an education institution of public character. The applicant objection to the Commissioner General was disallowed. The applicant's appeal to the High Court as referred to the Tax Appeals Tribunal for determination by the court.

The following issues were set down for determination;

1. Whether the applicant is an education institution of public character within the provisions of S. 2(bb) of the Income Tax Act?
2. Whether the Commissioner General has a right to decline to issue a written ruling under S. 2(bb) of the income Tax Act, if the applicant fulfills all other requirements under S. 2 (b) of the Income Tax Act?
3. Whether the time bound nature of certificates of exemptions issued under S. 2 (bb) of Income Tax Act is ultra vires the Act?

The applicant was represented by Mr. Joseph Luswata while the respondent by Ms. Barbara Ajambo Nahom.

The applicant called one witness, Mr. Sean Granville- Ross who filed a witness statement. He deponed that the applicant is governed by a board of nine directors. Eight are elected from the parents of the pupils and one by the American Ambassador to Uganda. The membership of the applicant is composed of parents and legal guardians of the students registered at the school. The applicant is a non-profit making institution and none of its members are entitled to any payment like bonus, dividend or other form. Members of the board are not entitled to any payment, salary or other compensation. The applicant charges tuition that comprises of fees and a capital levy. Any surplus collected from the fees is credited to the reserve account of the applicant and is used to repair or construct school facilities and for the expansion programme.

In cross examination, Mr. Granville Ross was put to task on Shs. 28,803,133,750 which was stated to be income arising from professional/consultancy fees in the income tax returns for the year 2014/2015. He testified the applicant paid taxes on interest. The applicant's income is generated from school fees. The applicant pays NSSF and PAYE.

The tribunal wanted an expert witness from the Ministry of Education and Sports so as to ascertain on the difference between private and public schools. The ministry sent Mr. Ismail Mulindwa who is the Commissioner in charge of private schools and institutions. He was treated as a witness of the respondent.

He informed the Tribunal that the ministry does not have public character schools. It has public schools. A public school is one using government resources or funds. Under public schools there have two categories. Those formed by government and the second category are those aided by Government. The government aided schools fully use government funds but are not owned by government. Examples of such schools are Old Kampala, Makerere College, Lubiri, Ntale School and others.

The other type of schools is private ones. These are schools purely owned by individuals or private organizations. They also include community schools. These are set up by a community in an area. He testified that the applicant is considered a private school. He also testified that there was a pronouncement that all private schools should pay taxes on the profits. The respondent did not cross examine the witness because he was delaying the trial due to his absence when the matter was adjourned to other days.

The second witness for the respondent was Mr. Apollo Raymond Kamwebaze who is working with the Domestic Taxes Department of the respondent. He stated in his witness statement that the applicant had applied and was issued an exemption ruling for a period of two years from 1st January 2004 to 31st December 2005. From 2005 to 2014 the applicant did not apply for an exemption nor its renewal because it was exempted from tax under S.21(z) Income Tax Act. The said Section was repealed in 2014 hence making private institutions exempt to tax. As a result, the applicant decided to fall back on S.2(bb) of the Income Tax Act and lodged this application. When the respondent analyzed the applicant's income tax returns it was established that it had unexplained reserves to the tune of Shs. 47,535,416,746 for the financial year 2013 to 2014 and Shs. 63,868,336,050/= for the year 2014 to 2015.

In cross examination, Mr. Apollo Kamwebaze testified that the applicant did not meet the requirements to obtain an exemption of income tax under the Act. He alleged that the applicant was not an institution of public character. He contended that for an institution to qualify for a public character it must be able to serve a sufficient section of the public. The respondent was not convinced that the school catered for a sufficient section of the public. He admitted that the law does not given any guidance on sufficient section of the public.

He also contended that applicant failed the test of whether the assets confer benefits to any private person. He contended that there was an accumulation of reserves by the applicant over time. The respondent could not see any criteria on how the funds should be utilized. He said an exemption means income is not subject to tax. The witness was questioned on a list of exempted organizations. The applicant was not among them. Not all of the institutions on the list were funded by government. The witness stated that provision for exempting government institutions is under S. 21. Funding by government is an essential element in defining institution of public character. As regards exemptions, he testified that they are those that are permanent and others that need to be reviewed periodically.

In reply the respondent admitted that the applicant is an educational institution. The respondent cited Black's Law Dictionary 8th Edition which defines an education institution as "a School, Seminary, College, University or Other Educational facility though not necessarily a Chartered Institution." However what is in contestation is that it an educational institution of public character. The respondent that Paragraph 3 (b) of the Practice Notes issued on 24th July 2006 defines an institution of public character as one which provides benefit to the public at large or at least a sufficient section of the community. The respondent cited Mohamed Falil Abdul Caffoor and others v Commissioner of Income Tax, Colombo 1961 ALLER 436 where Lord Radcliff held that there is no significant difference between the meaning of public character and for the public benefit and the two phrases are used interchangeably.

The respondent cited S. 1(g) of the Education Act that defines a public school to mean "a school maintained by the government, a district administration or an urban authority out of

public funds." Further S. 1(f) of the Education Act defines a private school as any school which is not maintained by the government out of public funds. The respondent submitted that the applicant is a company limited by guarantee governed by a board of directors composed of eight elected members and one appointed by the US ambassador. It is therefore not maintained by the government out of public funds and hence does not qualify for the exemption.

Without prejudice the respondent cited Halsbury's Laws of England 4th Edition Volume 23 paragraph 1167 pages 1062 -65 which provides that public schools are not necessarily those wholly supported by charity. The following factors have to be taken into account:

(i) That it is a perpetual foundation.

(ii) That a part of the income is charitable

(iii) That the managers are a public body.

(iv) That no private person is financially interested in the school

(v) That no profit was envisaged in founding it and that the objects of the charity, if the school is a charity, are for a large class of the public.

The respondent argued that in the alternative, the ordinary meaning of the words 'public' and 'character' should be used. The Advanced Learner's Dictionary defines public to mean "accessible, approachable, attainable, available, community, free to all, not private, reachable, unbarred, unprohibited, unreserved, unrestricted." Black's Law Dictionary defines public to mean "relating to entire community or state or notion" while character means "... mental or moral qualities that make a person, group or nation different from others." The respondent contended that the applicant's services are not public at large but rather to a small section of the community who can afford to pay the exorbitant fees ranging from US$ 16,500 to US$ 25,700.

The respondent also cited Chapel Hill School v the Attorney General and the Commissioner Internal Revenue Service (supra). He contended that the appellant was originally established as

a company limited by shares under the Companies Act. The Court held that the appellant was no longer of public character since there was potential for there to benefit private individuals. The respondent contended that the applicant had profits or surpluses and did not offer any clear explanation as to what happened to them. There is no proof that the said monies were not used for the benefit of individuals. The respondent submitted that the Commissioner General had powers under S. 91 (1)(c) of the Income Tax Act to recharacterize a transaction the form which does not reflect the substance.

The respondent averred that the surplus income earned by the applicant is subject to income tax. It cited Customs and Excise Commissioners v Bell Concord Educational Trust Ltd STC 1988 143 where the respondent was established to provide for advancement of education and to carry on, acquire and develop boarding or day schools or colleges. The court held that the word "profit" means a surplus of income over expenditure. In the instant case the company fixed fees for the educational courses with the view to making a large surplus and accordingly could not claim to provide education otherwise that for profit. The respondent also cited South Well v Governors of Royal Holloway College Egham 1895 2 QB 427 where Graham 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." In Birkenhead School Ltd v Dring HM Inspector of Taxes 1926 11 TC273 the court held that the school was for the benefit of a large class, but not manage by a public body and profits could become receivable by a private party hence it was not entitle to exemption as a public school. The respondent contended that though the applicant submitted that its board members are not entitled to salary or compensation, it charges school fees.

The respondent concluded on the issue by stating that the applicant is not an educational institution of public character because: it is not a public school within the meaning of the Education Act; it does not pass the public character test since its activities do not benefit a large class of the public but are available to a few students; its managers are not a public body: it does not pass the private benefit test since the school has not adduced evidence to prove that its reserves and surplus are not ploughed back.

On the second issue, the respondent submitted the requirement for an exemption ruling is a mandatory requirement which cannot be done away with. S. 2(bb) of the Income Tax Act grants the Commissioner General the discretion to vet applicants and establish whether their activities satisfy the requirements of an exemption ruling. If the law did not envisage such a situation then it would not have provided for it.

As regards the third issue the respondent cited Osborn's Law Dictionary which defines the term ultra vires to mean "… [Beyond the power] An act in excess of authority conferred by law and therefore invalid." Black's Law Dictionary defines it as "beyond the powers, unauthorized, beyond the scope of the power allowed or granted by a corporate charter or by law." The respondent submitted that S. 2(bb) of the Income Tax allows the Commissioner to issue a written ruling in respect of organizations that qualify as exempt. The respondent also cited S. 158 of the Income Tax Act which provides that "Forms, notices, 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." The respondent contended by alleging that the actions were ultra vires would cripple the proper execution of the administrative activities. Therefore the respondent prayed that the Tribunal actions of issuing exemption rulings for a specific period subject to continuous fulfillment of the requirements stipulated in the law does not amount to acting ultra vires.

In reply to the respondent's submissions, the applicant contended that the respondent's citation of cases to charitable institutions are irrelevant to the resolution of the first issue. The applicant contended that what is not in issue is not whether it is charitable per se but whether it is an education institution of public character.

The applicant further submitted that the Education Act was repealed by the Education (Pre-primary, Primary and Post Primary Act 13 of 2008 which now classifies educational institutions as public education institutions, government grant aided, private institutions (Profit and non-profit and international institutions) and non-forma education centres.

The applicant also submitted that “public school” and an “institution of Public Character” are not synonymous as clearly public character is wider than public school. The applicant stated that this approach was rejected in the Chapel Hills case.

The applicant cited the case of Semakula v Magala (1979) HCB 90 CA where the court noted that decisions of Indian and English cases especially from the highest court though not binding are persuasive. The respondent has not shown any reason why the court should depart from those decisions.

The applicant argued that the respondent’s contention that the applicant’s services are not to the public at large but to a small section of the community who can afford to pay the exorbitant fees should be ignored. Firstly, the case cited by the respondent of American School of Lagos v The Federal Inland Revenue Services is irrelevant. Secondly, the respondent did not demonstrate that the fees charged by the applicant are not commensurate to the cost of running the activities of the school. Thirdly, the respondent did prove that the fees are prohibitive. Lastly, the public benefit enable parents educate their children without the need to take them abroad.

The applicant further submitted that the respondent did not adduce any evidence to show that the applicant had the potential to benefit private individuals. S. 43 of the Companies Act prohibits a company limited by guarantee from giving any benefit to private individuals. The respondent audited the accounts of the applicant and did not find any distribution to private individuals. The applicant also contended that companies limited by guarantee are for non-profit.

In conclusion the applicant reiterated that criteria set by courts of commonwealth countries in interpreting similar provisions of the law in respect of institutions of public character should be followed. The definition of public school is irrelevant. Fees charged and level of fees is also irrelevant. The existence of surplus is the whole purpose for the exemption.

The applicant submitted that to determine whether it is an institutional of public character is a two stage process. First one has to determine whether it is an educational institution. Secondly, one has to determine whether it is of public character. The applicant contended as o whether it is an educational institutional is not in doubt. Mr. Apollo Kamwebaze confirmed during cross examination that the applicant is an education institution.

As regards whether the applicant is of public character the respondent contended that: the applicant is a company limited by guarantee, enrollment of students is open to all; membership of the applicant comprises parents or guardians or teachers having children at the school; no private benefit is conferred upon any member of the applicant or salary pay to any member of the board and the applicant's circumstances have bit changed since incorporation.

The applicant submitted that the phrase "public character" is not defined in the Income Tax Act. The applicant submitted that case law in New Zealand, Ghana and Nigeria have defined the meaning to state that where an institution renders services to the general public and there is no beneficial interest vested in any private person, that institution can be regarded as being public or of a public character.

The applicant cited Chapel Hill School V The Attorney General and the Commissioner Internal Revenue Service Civil Appeal J4/25/2009 where the Supreme Court of Ghana held that for the applicant to succeed in showing that it is an institutional of public character it must establish that its educational business was of public benefit and did not confer any private benefits to individuals. It stated that "the fact that it is privately owned is not necessarily a bar to the appellant's ability to demonstrate this." The applicant submitted that where the institution is a not for profit organization such as a trust or a company limited by guarantee it is of public character as by law it cannot confer a private benefit to any person.

The applicant cited also Trustees of Sheik Fazal Noordin Charitable Trust V The Commissioner of Income Tax (1975) EA 616 where the Court held that the expressions "for the public benefit",

"directed to the public benefit" and "of a public character" when used in relation to the purpose or object of a trust, all have the same meaning.

In respect of fees the applicant contended that as long as the institution is open to all members of the public the requirement to pay fees is not relevant in considering whether an institution is of public character. The applicant cited the case of American International School of Lagos v The Federal Inland Revenue Service where the court held that it was not uncommon for schools to charge tuition fees to enable them carry out their objects.

In respect of the second issue the applicant submitted that once a tax payer as satisfied the requirements for exemption under S. 2(bb) of the Income Tax the respondent has no discretion and must issue a certificate of exemption. Secondly a ruling issued under the said section is not a substantive requirement for an organization to be an exempt organization. It is a procedural or administrative requirement.

As regards the third issue, the applicant submitted that the restriction in time of the certificate confirming that an organization has no basis in the Act and is ultra vires. The applicant compared the exemption under S. 2(bb) with those under S. 119 of the Income Tax Act. The applicant concluded by contending that the Tribunal should find that the certificate stating that the applicant was an exempt organization issued in 2005 should still be subsisting.

Having listened to the evidence, perused the exhibits and read the submissions of the parties this is the ruling of the Tribunal.

The applicant is a company limited by guarantee and is incorporated in Uganda. In 1972 it was licensed by the Ministry of Education and Sports to provide education services to children in Uganda. In April 2005 the respondent issued a ruling stating that it was an exempt organization under S. 2 (bb) of the Income Tax Act. A certificate of exemption was issued for a period of two years effective from 1st January 2004 to 31st December 2005. Upon the expiry of the exemption the applicant did not apply for a renewal as it was exempt under S. 21(z)(aa) of the Income Tax

Act which provided that the Income of a person managing or running an educational institution was exempt from tax. However S. 8(c) of the Income Tax (Amendment) Act 2014 repealed the above exemption. In the budget speech for the financial year 2014/2015 the Minister of Finance said:

> "Madam Speaker, I propose to terminate the exemption on income derived by a person from managing or running an educational institution for commercial gain. This is consistent with the principle of equity and transparency with in [the] tax regime…"

The repealing of the above Section would have the logical conclusion of barring entities that are not educational institution of public character from applying for an exemption under S. 2(bb) of the Income Tax Act. It is not denied that the applicant had a commercial gain in the financial years in dispute. For the Financial year 2014 and 2015 the applicant had a surplus income of Shs. 63, 868,336,050/=. The Income Tax Act is concerned with surplus income and or profits it is immaterial whether the said income is distributed as dividends or otherwise as there is another arrangement for taxing the same. In Customs and Excise Commissioners v Bell Concord Educational Trust Ltd [1988] QBD 143 the court held that the word profit means a surplus of income over expenditure.

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 the said institutions.

Other than the said consultancy activities, the question remaining is whether the income from an educational institution is taxable? The applicant's application for an exemption in 2015 was rejected on the grounds that it was not an educational institution of public character. S. 2(bb) of the Income Tax Act provides:

> "exempt organization" means any company, institution, or irrevocable trust –
>
> (i) which is –
>
> (A) an amateur sporting association;

(B) a religious, charitable or educational institution of public character; or

(C) …

(ii) which has been issued with a written ruling by the Commissioner currently in force stating that it is an exempt organization; and

(iii) none of the income or assets of which confers, or may confer, a private benefit on any person;"

It is the interpretation of this section which is in contention. While the applicant contends that is an education institution of public character and does not confer a private benefit on any person. The applicant also contests the need of issuing a ruling by the commissioner. The respondent objects to the applicant's contentions.

The amended memorandum and articles of association, exhibit A3 shows that the applicant is a company limited by guarantee and not having a share capital. Its primary objective was to provide an international curriculum to students. The income of the company shall be applied solely for the objects of the company. No portion of it shall be paid by way of dividend, bonus or otherwise by way of profit to the member. The memorandum also states that company shall be a nonprofit making organization. In the event of its dissolution the remains shall not be distributed among the members.

The amended articles provide that the membership of the company shall be composed of parents, legal guardians and teachers. The company is governed by a board of 8 elected directors. The ambassador of the United States or his designee shall serve as the ninth member. The memorandum and articles of association may be modified by a special resolution passed by three quarters majority of the members present at a meeting.

It is not in dispute that the applicant is a company that falls under S. 2(bb) of the Income Tax Act. The Act does not define what an education institution is. However it is also not in dispute that it is an educational institution. What is in dispute is whether it is an educational institution of public character.

The Act also does not define what public character is. The respondent in a practice note issued on 26th July 2006 by the Commissioner General mentions that benefit by "an institution of public character" must be to the public at large or at least to a sufficient section of the community. However the said practice note did not define public character.

The applicant cited the case of Chapel Hills School Ltd v The Attorney General and the Commissioner Internal Revenue Service (supra) where the Court Stated that

> "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 others vs The Commissioner of Stamps and Income Tax (1899) AC 99".

The court went on to find that a company limited by guarantee in the advancement of education was an institution of public character. However, the court noted that "it is not safe to transport the judicial interpretation of a specific statute from a different jurisdiction into our [another] jurisdiction."

The Tribunal has had the opportunity to read the said decision. The court did not define what a public character was. It merely noted that the applicant's case is destroyed by its conversion in from a company limited by guarantee into a company limited by shares. It stated 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 court stated that: "However, before then the appellant's case that it was of public character is cogent and persuasive and, in our view, should be accepted."

The thrust of the appellants case was based on the rule of interpretation in the Latin maxim: *noscitur a sociiss.* The court stated that its argument runs as follows:

> "My lords, it is not for nothing that educational institutions were place 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 sociss 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 two other institutions are not controlled by the state. They are privately formed or owned organizations and do not pay taxes unless perhaps their income confers a private benefit on some person or persons."

The court had earlier on noted that the construing of educational institution of public character in the statues was "too simplistic and not sufficiently responsive to the nuanced complexities of modern Ghanaian life."

The question is should the Tribunal also apply the rule of interpretation in the Latin maxim noscitur *a sociiss*? That is, can we associate the words religious, charitable or educational institution of public character to mean privately owned? It was argued that religious and charitable institutions in Ghana are privately owned hence institutions of public character are privately owned. The word charity' is defined by Black's Law Dictionary 8th edition p. 250 as "1. CHARITABLE ORGANIZATION. 2. Aid given to the poor, the suffering, or the general community for religious, educational, economic, public safety, or medical purposes. 3. Goodwill". One cannot say that all charitable institutions in Uganda are privately owned. Mr. Apollo Kamwebaze testified that Uganda has public funded schools which are charitable in nature. In the Government White Paper on the education policy review commission report 1992 exhibit R8 p. 43 mentions free primary education being offered from 1992. The Education (Pre-Primary, Primary and Post Primary) Act 2008 defines 'UPE' as "state funded universal primary education programme where tuition fees are paid by the government…" USE refers to secondary education. These schools that offer free education are charitable in nature. One cannot say that the universal education primary schools are privately owned. The applicant is neither a religious institution. Furthermore one cannot say that a school that charges fees is charitable. In Southwell v Governors of Royal Hollway College, Egham 1895 2 QB 437 the court held that as the college was not primarily intended for the supply of gratuitous education, it did not come

within the exemption in favour of charity schools. The Tribunal cannot associate the words 'charitable' and 'educational institution of public character' in Uganda to mean privately owned. Nor can the Tribunal associate the word educational institution of public character to with charity. For the Tribunal to apply a decision whose foundation or underlying principles do not reflect the complexities of modern Ugandan life or the education policies in Uganda would be to defeat the intentions of the legislature.

The applicant also cited the case of *the American International School of Lagos v Federal Inland Revenue Service* (unreported) where S. 23 (1)(c) of the Companies Income Tax Act exempts from tax "the profits of any company engaged in ecclesiastical, charitable or educational activities of a public character". Unlike the Income Tax Act of Uganda which mentions educational institutions of public character, the Act of Nigeria talks of activities. The words 'activities' and 'institutions' are not the same. Both Acts cannot be said to be *pari materia* as they use different words in the Acts.

The applicant cited The Trustees of Shiek Fazal Noordin Charitable Trust V the Commissioner of Income Tax (1975) EA 616 the court held that the expressions "for the public benefit" directed to the public benefit and of a public character when used in relation to the purpose of object of a trust all have the same meaning. In the matter before the Tribunal we are not dealing with a trust but a company limited by guarantee.

The respondent cited the Education Act Cap 127 S.1 which defines "private school" to mean 'any school which is not maintained out of public funds or does not receive an annual recurrent grant from the Government.' It also defines "public School" to mean 'any school which is not maintained by the Government, a district administration or an urban authority out of public funds.' However, as noted by the applicant, the said Act was repealed by the Education (Pre-Primary, Primary and Post Primary) Act 2008. The new Act defines "private schools" to mean a school not founded by government and which does not receive statutory grants from Government. One of the objectives of the latter Act is to give full effect to education policy of

Government and services by Government. However the Income Tax Act does not mention schools of private character.

Though we agree with the respondent that terms "public school" and "an institution of public character" are not the synonymous as the latter is wider than the former, it is not in dispute that the applicant is a school. The term education institution includes school, colleges, universities. However, at this stage, the distinction is irrelevant.

Both parties cited a number of decisions from commonwealth courts. As contended by the respondent in *Semakula v Magala* (1979) HCB 90 CA:

> "This court is not bound to follow Indian or English decisions although such decisions especially those emanating from the highest courts in those countries interpreting similar provisions of law are as a matter of comity of great persuasive value."

The Tribunal has already taken into consideration the ones of Ghana and Nigeria whether they are relevant to the current conditions in Uganda.

In order to arrive at the meaning of the term "education institution of public character" the Tribunal has to use rules of statutory interpretation and discern what was the intention of the Parliament? Under the Constitution of Uganda Article 152 no tax shall be imposed unless with the authority of Parliament. It is the legislature that imposes taxes and not courts of law nor tax tribunals. The Parliament is composed of lay people who represent the ordinary man of the street and not lawyers. They speak ordinary English and not in legal tongues.

The first rule of statutory interpretation is to give words their ordinary meaning. In *Heritage v Uganda Revenue Authority* Application 26 of 2010, the Tribunal stated:

> "There is a maxim – "*Benigne faciendae sunt interpretationes propter simplicitatem laicorum, ut res magis valeat quam pereat; et verba intentioni, non e contra, debent inservire"* meaning constructions (of written instruments) are to be made liberally, for the simplicity of laymen, in order that the matter may have effect rather than fail (or become void); and words must be subject to the intention, not the intention to the

words. See *Black's Law Dictionary* 8th Edition, page 1707. In *Canada Trustco Mortgage V Canada* [2005] 2 S.C.R. 601, 2005 SCC 54 at paragraph 11 it was held that taxpayers are entitled to rely on the clear meaning of taxation provisions in structuring their affairs. Where the words are precise and unequivocal, those words will play a dominant role in the interpretative process."

We cannot use legal jargons to interpret tax acts where the words are clear and precise.

The application of the ordinary rule of statutory interpretation is clearly stated by Lord *Donovan in Mangin v Inland Revenue Commissioner* [1971] 1 ALL ER 179 at 182:

> "First the words are to be given their ordinary meaning. They are not 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 look merely at what is clearly stated. 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 to be implied. One can only look fairly at the language used…"

Taking that into consideration, the Tribunal shall embark on the task at hand of defining an 'education institution of public character'. Education institution not in dispute. It is the public character that is in contention.

We have already stated that the term "public character" is not defined. We shall deal with the said term as if it involves two separate words 'public' and 'character' as there is no hyphen in between. The word "public" is defined by *Black's Law Dictionary* 8th Edition page 1264 as

> "*n*. **1**. Relating or belonging to an entire community, state, or nation. [Cases: Municipal Corporations 72], C.J.S Municipal Corporations 1557- 1559] **2**. Open or available for all to use, share or enjoy. **3**. (Of a company) having shares that are available on an open market…"

The Oxford Advanced Learner's Dictionary p. 181 defines character to mean "all the qualities that make a person, group or nation different from others." It does not involve looking at one quality for instance private ownership when dealing with institutions of public character. It is like a blind man touching the tail of an elephant and concluding that it is a rope. One must look

at all the characters. To analyze the characters of public one must understand what it is distinguished from. Usually the word public is distinguished from private of government. Black's Law Dictionary (supra) page 1253 defines private as "*adj*. 1. Relating or belonging to an individual as opposed to the public or the government. 2. (Of a company) not having shares that are freely available on an open market. From the definition of public in Black's Law Dictionary it connotes one must look at ownership and accessibility.

The Income Tax Act does not mention the characters that distinguish institutions of a public character from those of a private character. As a court we can fill in the characters to give effect to the intention of the legislature. In order to understand the characters that distinguish a public institution from a private one has to look at the following:

1> Ownership:

2> Funding:

3> Management

4> Accessibility

5> Beneficiary or who does it benefit most

Using the above parameters, it is not in dispute that the applicant is a private company limited by guarantee. It does not have shares available for sale on the open market. One cannot even call it a public limited company. Its membership is composed of parents and legal guardians and teachers. It is owned by individuals. The ownership is private. The funding of the company is from private individuals who guarantee that in the event of its winding up they will meet the liabilities. The applicant charges parents fees for its operation. The funding is private. The company is governed or managed by a board of directors. Eight of the directors are elected. The ninth is designated by the ambassador of the United States but not the United States. Therefore the applicant is privately managed. The applicant is accessible to the public and individuals. However the fees charged by the applicant restrict the accessibility of the members of the public. Furthermore the said international curriculum provided by the applicant restricts the members of public wishing to join it unlike the Uganda curriculum offered to the majority of

the students in Uganda. Nevertheless the Tribunal finds that applicant's services are accessible to the public. It enrolment is open to the public.

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. The applicant charges fees which benefit it individually as a private entity. In *American International School of Lagos v The Federal Inland Revenue Service* (supra)it was held that it was not uncommon for schools to charge tuition fees to enable them carry out their objective (provision of education). The court also noted that "Thus, the charging of fees for educational services is not strange to the income general activities of a School. The respondent's argument that the rate of fees limits the appellant's services to [a] select few and thus strips the school from being of public character is futile. The court further noted that "that respondent did not provide any evidence that any segment of the Nigerian public is excluded from benefitting for the educational services of the Appellant, or that any profits or incomes are distributed to the Appellant's director or guarantors, or that the Appellant derives any income or profits from sources other than the provision of educational services." The Tribunal finds that the respondent has not provided any evidence that there is a segment of the Uganda public that is excluded from benefitting from the services of the applicant. There are no profits distributed to the guarantors. However, the applicant derives income from sources other than the provision of education services. The Tribunal already noted that in its financial statement it charged professional/ consultancy fees.

As regard the fees charged, the above case differs from the case of *Customs and Excise Commissioners V Bell Concord Educational Trust Ltd* (supra) where the court held that "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 "otherwise than for profit'… We find the second authority more persuasive. The taxman is interested in 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 reserves are not put to public use.

Having looked at the parameters 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 private individuals is an institution of public character. If we are to say so then how would we describe an institution of private character? The word 'public' in S. 2(bb) of the Income Tax Act 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 overwhelming an institution of private character and not one of public character. Using the above parameters, the Tribunal is satisfied that the applicant is not an educational institution of public character.

Having discussed that the applicant is not an educational institution of public character it may not be necessary to discuss whether none of its income or assets of confers, or may confer, a private benefit on any person under S. 2(b)(iii) of the Income Tax Act. However the Tribunal will not leave it hanging. It reads as follows: "none of the income or assets of which confers, or may confer, a private benefit on any person;"

The applicant is a company limited by guarantee. It does not declare dividends. The applicant is a non-profit making institution and none of its members are entitled to any payment like bonus, dividend or other form. Members of the board are not entitled to any payment, salary or other compensation. From the above its clear that the income or assets of the company does not confer any private benefit on any person.

However, S. 2(b)(iii) mentions 'or may confer'. A perusal of the memorandum and articles of association of the applicant shows that its status as a company limited by guarantee and the non-payment of dividends and salaries is not cast in stone. Under Article 32 of the Articles of Association the memorandum and articles of association may be modified, enlarged abridged or added from time to time by a special resolution passed by three quarters of the majority of the members. The applicant previously began its operation as a trust in 1967 and was converted to a company limited by guarantee. If the company can covert from a trust to a company limited by guarantee there is nothing that prevents the three -quarter majority of its members from converting the applicant into a company limited by shares. That is speculation

and the Tribunal does not want to go into that direction. As of now, there is no evidence that the applicant may confer a private benefit on any person. However, this explains why it is necessary for the Commissioner General to issue a written ruling that a tax payer is a public institution of public character after having appraised the circumstances of each application.

The second issue was in respect of whether the Commissioner can refuse to issue a written ruling under S. 2 (bb) (ii) of the Income Tax Act if the applicant fulfills all the other requirements stipulated in the Second. As we have already noted the applicant does not meet the requirements of an educational institution of a public character. S. 2 (b) states that the written ruling should be issued stating that the applicant is an exempt organization. Since the applicant is not an exempt organization there is no obligation on the Commissioner to issue a ruling stating that the former is not exempt. The Act only allows the Commissioner to issue the ruling when an applicant is an exempt organization and not when it is not which is ironical. If a party is aggrieved by the refusal by the Commissioner to grant it an exemption it does not have a decision to appeal against. That is a lacuna in the law. S. 1(1)(k) of the Tax Appeals Tribunal defines a "taxation decision" to mean any assessment, determination, decision or notice. The refusal to grant an exemption even where the Commissioner is silent is a taxation decision. The law does not require the Commissioner to give reasons where he has refused to grant an exemption. Where a party feels aggrieved it can appeal to the Tax Appeals Tribunal. The Tribunal has powers under S. 19(1) of the Tax Appeals Tribunal to step in the shoes of the Commissioner and exercise all the powers and discretions that are conferred by the relevant taxing Act on the decision maker. That is it may either rescind the refusal to grant the exemption or give reasons why it should not be granted.

The Tribunal notes that the respondent issued an objection decision. However, the respondent merely stated: Objection "disallowed. Please reapply for exemption." The no reasons were given. His Lordship Madrama in Civil Appeal 004 of 2016 *International School V Commissioner General Uganda Revenue Authority* CA 004 of 2016 noted

"… an objection decision arises form an objection to an assessment. There was no assessment of the Appellant for income tax by the Commissioner General by the time a decision is made…"

The court further noted

"… A decision characterizing the Appellant as an exempt organization or not is not an objection decision but a taxation decision. It is appealable to the Tax Appeals Tribunal.".

Despite the inadequacies in the law the applicant has appealed to the Tax Appeals Tribunal. The Tribunal has listened to the arguments of all the parties and given a decision on "educational institutional of public character". This decision will suffice.

The word Ultra vires is defined by Black's Law dictionary 8th Edition page 1559 adj Unauthoirsed: beyond the scope of the power allowed or granted by a corporate charter or by law.

very clear on the Tribunal finds it odd for the respondent to give such sfirst issue as to whether the custom entries for the period 2005 to 2007 were exempted from tax by a letter dated 24th February 2000 by the Ministry of Finance was resolved by consent of both parties. A consent order was entered by both parties whereby the applicant agreed to pay Shs. 204,720,636 as full and final settlement of the issue. Therefore the Tribunal will not delve into that issue.

The remaining issue was whether the items imported between 2008 and 2010 classified by the respondent as without sufficient justification should be treated as part shipments or individual items as presented by Customs.

DR. ASA MUGENYI **DR.STEPHEN AKABWAY** **MR. ALI SIRAJI**

CHAIRMAN **MEMBER** **MEMBER**