IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA

CORAM: ATUGUBA, J.S.C. (PRESIDING)
AKUFFO (MS), J.S.C.
DATE-BAH (DR), J.S.C.
OWUSU (MS), J.S.C.
BAFFOE-BONNIE, J.S.C.
GBADEGBE, J.S.C.
AKOTO- BAMFO (MRS), J.S.C.

CIVIL MPTION
NO. J7/10/2009
5TH MAY, 2010

CHAPEL HILL SCHOOL LTD. - - - PLAINTIFF/ APPELLANT/ RESPONDENT

VRS

THE ATTORNEY GENERAL
THE COMMISSIONER
INTERNAL REVENUE SERVICE - - - 2ND DEFENDANT/RESPONDENT/ RESPONDENT/APPLLICANT

R U L I N G

ATUGUBA, J.S.C:-

This application for Review raises a short point but involves important questions.

The earlier decision of this court in this case has been reported, see *In re Assessment of Income Tax by The Commissioner of Internal Revenue; Chapel Hill School v Attorney-General & Internal Revenue Service* (2009) SC GLR 432. The facts of the case are as stated in the headnote thereof as follows:

"The appellant in this case, Chapel Hill School, was originally established as the Takoradi Chapel Hill Preparatory School in December 1962 by fourteen people who subscribed its Instrument of Establishment and Governance as founders. The instrument of incorporation purported to establish it as a corporation sole. The appellant school was subsequently incorporated under the Companies Act, 1963 (Act 179), as a company limited by guarantee. However, in 2001, the appellant was incorporated as a company limited by shares under the said Companies Act, 1963 (Act 179)

The Internal Revenue Service (hereafter the second respondent), assessed the appellant tax for the years 1994 to 2004 in the sum of Gh¢39,864.40. Subsequently, the appellant's objection to that assessment was turned down by the Commissioner of Internal Revenue. *The appellant* Chapel Hill School therefore *appealed to the High Court, Sekondi*, in July 2005, *seeking a declaration that the appellant was an educational institution of a public character and thus its income was exempt from tax.* It also sought an order for the annulment of the tax assessments for the years 1994 to 2004. Even though the High Court found that the appellant school was an educational institution serving the people of Takoradi and its environs; and that the school was for the use and benefit of the public, the court held that, that finding alone, did not make the appellant a school "of a public character" The High Court therefore 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 brought the instant appeal before the Supreme Court."

On these facts this court held (1) that the respondent was until it converted into a company limited by shares, an educational institution of a public character and (2) that therefore its income is exempted from tax. In this review application the applicant contests the second limb of this court's decision.

Principles for entertaining Review applications:

The Review jurisdiction of this court is laid down in article 133 of the Constitution as follows:

> "**133**. **Power of the Supreme Court to review its decisions**
>
> (1) The Supreme Court may review any decision made or given by it on such grounds and subject to such conditions as may be prescribed by Rules of Court.
>
> (2) The Supreme Court, when reviewing its decisions under this article, shall be constituted by not less than seven Justices of the Supreme Court."

Pursuant to this provision r.54 of the Rules of this court, C.1.16 of 1996 provides thus:

> "**54**. **Grounds for review**
>
> The Court may review a decision made or given by it on the ground of
>
> *(a)* exceptional circumstances which have resulted in a miscarriage of justice; or
>
> *(b)* the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by the applicant at the time when the decision was given."

The application in this case is not based on r.54 (b) relating to the discovery of new evidence but on the preceding r (a) thereof. This provision itself is a codification of the common law principle earlier laid down judicially. The typical rendition of this principle is as laid down in *Quartey v Central Services Co. Ltd*. (1996-97) SC GLR 398 where at 399 Abban C.J. stated:

> "A review of a judgment is a special jurisdiction and not an appellate jurisdiction conferred on the court; and the court would exercise that special jurisdiction in favour of an applicant only in exceptional circumstances. This implies that such an applicant should satisfy the court that there has been some fundamental or basic error which the court inadvertently committed in the course of considering its judgment; and which fundamental error has

thereby resulted in a gross miscarriage of justice. These principles have been stated over and over again by this court. Consequently, a losing party is not entitled to use the review process to re-argue his appeal which had been dismissed or to use the process to prevail upon the court to have another or a second look at his case."

The Reign of the Stringent principle

The Review jurisdiction was originally judicially asserted by this court as an inherent jurisdiction in *Fosuhene v Pomaa* [1987-88]2 GLR 105 S.C and pursuant to that the guiding principles for its exercise were set out in *Practice Direction (Reviews in the Supreme Court)* (1987-88)2 GLR 274, S.C and the stringent principle referred to earlier was therein laid down and followed consistently. See *Mechanical Lloyd Assembly Plant v Nartey* [1987-88] 2 GLR 598, SC*; Bisi v Kwayie* [1987-88] 2 GLR 295, SC*; Nasali v* Addy [1989-90] 1 GLR 573, SC*; Quartey v Central Services Co Ltd* [1996-97] SC GLR 398*; Pianim (No. 3) v Ekwam* [1996-97 SC GLR 431*;*

Modification of the Stringent Principle

In *Afranie II v Qaurcoo* (1992)2 GLR 561 S.C the Court restated the Review jurisdiction thus:

"(2) *Under the law the only ground for the review of a decision of the Supreme Court was that the circumstances were exceptional and that in the interest of justice there should be a review*. Although what exactly constituted exceptional circumstances had not been spelt out, on the authorities *the court had found exceptional circumstances where (a) the circumstances were of a nature as to convince the court that the judgment should be reversed int he interest of justice and indicated clearly that there had been a miscarriage of justice;* or (b) *the demands of justice made the exercise extremely necessary to avoid irremediable harm to the applicant;* or (c) a fundamental and basic error might have inadvertently been committed by the court resulting in a grave miscarriage of justice; or (d) a decision had been given per incuriam for failure to consider a statute or a binding case law or a fundamental principle of practice and procedure relevant to the decision and which would have resulted in a different decision; or (e) the applicant

had sought for a specific relief which materially affected the appeal and had argued grounds in support but the appellate court had failed or neglected to make a decision on it. *The misconstruction of the words of a statute upon which the decision of a case depended was such an error of law that it would deprive the court of jurisdiction to decide the matter*. Under section 17(1)(h) of the Rent Act, 1962(Act 220) *it was only when a plaintiff could bring himself within the provisions of that section that the court would be clothed with jurisdiction to make an order for possession. The plaintiff had to establish to the satisfaction of the court that he was the landlord and he reasonably required the premises for his own business purposes*. Although section 36 of Act 220 defined a landlord to include any person deriving title under original landlord, it could not be said that an executor or administrator who derived his title from the court by the grant of probate or letters of administration also derived his title from the original landlord under the definition in Act 220, otherwise an executor or administrator would have the power to make a lease or other disposition of the property before grant. Even though under section 1(1) of the Administration of Estates Act, 1961 (Act 630) the property of the deceased vested in his executor or administrator it was only "on trust" and "for purposes of administration" and would not merge in any estate or interest vested in him in his own right. Accordingly, *the power of an executor or administrator to distrain for rent under section 71 of Act 63 and participate in the running of the estate on commercial basis did not empower executors and supposed trustees who had no beneficial interest in testator's estate to sue for possession of the testator's business under section 17(1)(h) of act 220*. In the instant case, therefore, the plaintiffs were not entitled to maintain the action for recovery of possession because they were not landlords, and were also not owners of the AAM'S Hotel business for which they sought Hotel de France as an annex. Not being owners of the AAM'S Hotel business, they could not reasonably establish that they required Hotel de France for their own business purpose. Since the plaintiffs failed to satisfy the court as to the statutory requirements provided under section 17(1) (h) of Act 220, they were not entitled to an order of possession. Accordingly, *since*

the Supreme Court erroneously construed the words of section 17(1) (h) of Act 220 so as to bring the plaintiffs within its ambit, they acted outside or in excess of the court's jurisdiction. In the result, its decision had had to yield to a review. *Davis v Warwick* [1943] KB 329, *CA; Sharpe v Nicholls* [1945] KB 152, CA and *Parker v Rosenberg* [1947] 1 KB 371, CA applied. *Nasali v Addy* [1987-88]2 GLR 286, SC; *Bisi v Kwayie* [1987-88] 2 GLR 295, SC; *Mechanical Lloyd Assembly Plant Ltd v Nartey* [1987-88]2 GLR598, SC and *Ababio v Mensah* (No. 2)[1989-90]1 GLR 573, SC cited.

In Republic v. High Court Kumasi Ex Parte Abubakari (No. 3)[2000] SC GLR 45, the judgment of which was delivered on 15 December 1999 the sole question as to whether the matter was a cause or matter affecting chieftaincy and which the earlier bench had answered in the affirmative fell for reconsideration before the Review panel which reversed the earlier decision. As captured in the headnote thereof:

"In 1994 the long-serving and acclaimed Moshiehene of Kumasi died. A dispute as to his successor erupted between two rival candidates: Alhaji Ibrahim on the one hand, and Alhaji Abubakari on the other. The dispute was referred to the Asantehene, who appointed a panel of arbitrators to settle the matter amicably. The arbitrators resolved the dispute in favour of Alhaji Abubakari. However not satisfied with the decision of the arbitrators, Alhaji Ibrahim sued in the High Court, Kumasi for, inter alia, a declaration that he, the plaintiff, "is the Head of the Moshie Community in Kumasi", duly selected, installed and recognised as such by the Asantehene. The defendant to the action, Alhaji Abubakari, denied the claim and also counterclaimed for the same relief, namely that he "is the Head of the Moshie Community in Kumasi." The trial High Court judge, on the evidence, found that the plaintiff, Alhaji Ibrahim, had been validly installed as the Moshiehene of Kumasi. He therefore gave judgement on 31 July 1996 in his favour.

Dissatisfied with the decision of the trial judge, *the defendant brought an application in the Supreme Court for an order of certiorari to quash the decision on jurisdictional grounds, namely that the matter determined by the High Court constituted a cause or matter affecting chieftaincy in the Moshie*

Community in Kumasi: and that the High Court had no jurisdiction to determine the same under the Courts Act, 1993 (Act 459), s 57, and the Chieftaincy Act, 1971 (Act 370), s. 15(1). *The Supreme Court, by a three to two majority decision, granted the application on that ground:* (see *Republic v High Court, Kumasi; Exparte Abubakari (No. 2)*[1998-99] SC GLR 904). The plaintiff therefore *brought the instant application for a review of the majority decision on grounds of want of jurisdiction*. The court noted that: (i) on the undisputed evidence before the trial High Court, the qualification for candidacy of headship of the Moshie Community in Kumasi was not based on blood or any royal lineage; and (ii) the applicant for certiorari, Alhaji Abubakari, ie the defendant, in his statement of defence filed at the trial High Court, had admitted that the headship of the Moshie Community was neither a stool or a skin.

Held, granting the application for a review- Ampiah JSC dissenting: (1) an application for a review founded on want of jurisdiction (as in the instant case) fell within the ambit of exceptional circumstances resulting in a miscarriage of justice in terms of rule 54 (a) of the Supreme Court Rules, 1996(CI 16), because jurisdiction was so fundamental in the adjudication of any dispute. Consequently, whenever it was established that an adjudicating authority had no jurisdiction in the matter it purported to determine, its proceedings and judgment were liable to be quashed. Dicta Bamford-Addo and Acquah JJSC in *Edusei (No. 2) v Attorney-General* [1998-99) SC GLR 753 at pp 757 and 776 respectively applied.

Per Edward Wiredu JSC, concurring. The quashing of the decision of the High Court, Kumasi, by the majority decision of the court on *grounds of want of jurisdiction was fundamentally wrong and has occasioned a serious miscarriage of justice* and ought to be reviewed. The applicant has demonstrated that there has been a basic error of law committed by the majority of the court in its judgment and this error, which is basic and fundamental, has resulted in a grave miscarriage of justice.

Per Ampiah JSC dissenting. In the present application, no new evidence has been adduced to warrant a re-consideration of the issue. The issue of jurisdiction cannot be said to raise exceptional circumstances to entitle this court to overturn its decision on the issue.

(2) *On the undisputed evidence or facts as found by the trial judge, the question of headship of the Moshie Community in Kumasi did not fall within the definition of "chief" under article 277 of the 1992 Constitution*. The legal definition required that for a candidate to qualify as a chief, he must hail from the "appropriate family and lineage", ie be a member of the family or lineage from which the candidate must be selected, and his nomination, election, etc must be in accordance with the established customary law and practice governing the position."(e.s)

Again in *Koglex Ltd. No. 2) v Field* (2000)SC GLR 175, dated 16 February 2000 the facts as stated in the headnote are as follows:

"Some time before 4 September 1985, the managing director of the plaintiff company entered into negotiations with the defendant for a lease of her landed property. The parties agreed on the payment of an annual rent of ¢600,000 as rent advance for five years. The plaintiff company paid also the payment of the sum of ¢200,000 as part of the agreed rent advance as at 5 September 1985, and the defendant issued receipt for same. Subsequently, the plaintiff delivered to the defendant a draft agreement embodying the agreed terms of the lease. On 11 September 1985, the defendant's solicitor wrote to the plaintiff, inviting the plaintiff to a meeting in respect of the intended lease. Attached to the letter was a handwritten memorandum of the solicitor, paragraph 4(ii) of which raised certain issues for discussion by the parties.

At the conclusion of the meeting on 14 September 1985, the parties agreed that the terms of the lease as discussed and agreed upon were to be embodied in a final lease document to be prepared within a week by the solicitor of the defendant. The plaintiff company, believing that all the terms of the lease had been concluded at the meeting, sent its workmen to the landed property pending the completion of the lease document. However,

the defendant caused the plaintiff's workmen to be thrown out of the property. Furthermore, the solicitor for the defendant, in a letter dated 30 September 1985 to the plaintiff's solicitor, denied that all the terms of the lease had been agreed upon at the 14 September meeting and, in fact, further stated that the defendant was "*no longer interested in any further negotiations regarding the plaintiff's offer to take the lease of the said premises*." However, the letter said nothing about the ¢200,000 rent advance paid by the plaintiff.

Consequently, the plaintiff, on 15 October 1985, sued in the High court, Accra for, inter alia, an order for specific performance of the lease. The trial High Court dismissed the claim for specific performance on the sole ground that issue 4(ii), raised in the handwritten memorandum, had not been discussed and agreed upon at the 14 September 1985 meeting. *The plaintiff appealed from that decision to the Court of Appeal, which by a majority decision affirmed the judgment of the High Court to the effect that, on the evidence, there was no concluded contract between the parties for which specific performance could be decreed. The plaintiff further appealed to the Supreme Court which also, by a majority decision (see Koglex Ltd v Field [1998-99] SC GLR 451), affirmed the majority decision of the Court of Appeal*. The plaintiff, therefore, brought the instant application for a review of the majority decision of the Supreme Court on the ground of exceptional circumstances resulting in a miscarriage of justice."

On these facts this court held as per holding (3) of the headnote as follows:

"(3) In the instant case, *the finding by the trial judge that the parties had not discussed and, therefore, not reached an agreement on the issue raised in paragraph 4(ii) of the handwritten memorandum (and which was the sole ground in refusing to grant the plaintiff's claim for specific performance) was patently erroneous and unsupported by the evidence on record*. On the contrary, there was, on the evidence, positive admission by the defendant and her witnesses that all the issues raised in the handwritten memorandum had been discussed and agreed on at the meeting attended by the parties.

The trial judge had committed a fundamental error in finding otherwise. The error had thus occasioned a grave miscarriage of justice to the plaintiff in that the judgment would have gone in favour of the plaintiff if the trial judge had not committed such a fundamental error. *The decision of the majority of the Court of Appeal, which had also failed to detect the error and which had been similarly affirmed by the majority of the Supreme Court, had thus occasioned a grave miscarriage of justice* to the plaintiff-applicant. The decision would, therefore, on a review be reversed."

This blaze reached its peak in *Attorney-General (No. 2) v Tsatsu Tsikata (No. 2)* [2001-2002] SC GLR 620 dated 26 June 2002 which reversed the earlier decision of this court that the Fast Track Division of the High Court had been unconstitutionally established. In his focal judgment at 634-635, Acquah JSC (as he then was), after reviewing the previously stringent principles governing the Review jurisdiction of this court continued thus:

"But as Francois JSC cautioned in *Ribeiro v Rebeiro* (No. 2) (Supra) at 143:

> "Our attempts to halt the abuse of the review jurisdiction of this court by frowning upon attempts to turn the exercise into another avenue for appeal, *must be matched by an equally genuine willingness for introspection. And where a fundamental error has occurred, to be prepared to admit and correct it*. Otherwise the exercise of review would only amount to *a confirmation of a previous stand and the mere endorsement of a majority view.*" (The emphasis is mine).

Aikins JSC made the same point in *Afranie II v Quarcoo* [1992]2 GLR 561 at 609 thus:

> "...it is essential that this court *accommodates a re-examination of the judge's previous thinking...with a view to correcting a fundamental mistake that has occurred.* If this is not done, the exercise of the review power *would end in futility and would only serve to rubber stamp or confirm a previous stance of the court which may result in a miscarriage of justice."*

However, in the final analysis it is important to appreciate that *the review jurisdiction being a discretionary one, the decision to grant or not to grant* ultimately depends, as rightly held in Mechanical Lloyd's case (supra), *on the facts and circumstances of each and as dictated by the ends of justice."*

The trend has continued though once in a while echoes of the former stringent approach are still heard. However in *Hanna Assi (No. 2) v GIHOC Refrigeration & Household Products Ltd (No. 2)*[2007-2008] SC GLR 16 this court reversed its earlier decision that without a counterclaim the High Court could not grant a relief to a defendant. In all these cases the same issues were successfully reargued.
Most recently in *Antwi v NTHC Ltd* CM J7/3/09 this court (coram: Sophia Akuffo, Dr. Date-Bah, Sophia Adinyira, R C Owusu, Dotse, Anin Yeboah and Baffoe-Bonnie JJSC) unanimously reviewed its previous judgment reported as *NTHC Ltd v Antwi* (2009) SC GLR 117 by adjusting its award of interest in terms of duration and currency because it had overlooked certain material facts which were before the court at the time of its earlier decision.

From all the foregoing I hold that the Review jurisdiction of this court is exercisable upon grounds of the commission of very serious and important errors of fact or law upon which the judgment of the court is based and which uncorrected would occasion a serious miscarriage of justice. As Professor Ocran JSC said at 38 in respect of the *Tsatsu Tsikata (No. 2)* case, supra,

"*Adzoe JSC's explanation of an inadvertent error in that case makes me even more uncomfortable with this standard of review*. He wrote at page 742 (supra) that *when an error has been committed inadvertently: "this implies ...*that *the erroneous decision must have been made when no due consideration was given to the issues before the court.*" In other words, if *the ordinary panel considers a matter but commits a fundamental error, with their eyes and ears fully open, and their wits fully by them, this is still insufficient for review.*"(e.s)

Is there Reviewable error in this case?

Certainly there is reviewable error in this case. The *Afranie v. Quarcoo* case supra has held that the misconstruction of a statute which affects the court's decision is a reviewable ground. The perceived error in the *Koglex v Field* case supra was far inferior to that of the misconstruction of a statute and yet the Review succeeded. A statute is a solemn sovereign act and judges have professed themselves to be servants of the Legislature. The servant who realises that he has disobeyed the master and deliberately abstains from remedying the situation is certainly not a servant. In *Pattinson v Finningley Drainage Internal Board* [1970] 2 WLR 622 at 624 Bean J quoted the following passage from Maxwell on Interpretation of Statutes, (12 ed) (1969) with approval:

> "A later statute may repeal an earlier one either expressly or by implication. *But repeal by implication is not favoured by the courts*. `*Forasmuch', said Coke, 'as Acts of Parliament are established with such gravity, wisdom and universal consent of the whole nation, for the advancement of the commonwealth, they ought not by any constrained construction out of the general and ambiguous words of a subsequent Act, to be abrogated." (The emphasis is mine).*

In *Director of Public Prosecutions v Luft* [1976]3 WLR 32, HL at 41 the House of Lords held that a long standing wrong construction of the words of a statute in *pari materia* is no bar to its correction.

All this upholds the principle in *Asare v Brobbey* (1971) 2 GLR 33 C.A. in which at 338 Archer J.A. (as he then was) delivering the judgment of the Court of Appeal stated thus: "In *Phillips v Copping* (1935)1 KB 15 at p.21 Scrutton L.J. said "*it is the duty of the Court when asked to give a judgment which is contrary to a statute to take the point although the litigants may not take it.*"

On 22/7/2009 this court in *The Republic v High Court (Fast Track Division) Accra; Ex parte National Lottery Authority (Ghana Lotto Operators Association & Others Interested Parties)* (2009)SC GLR 390 unanimously held that a court has no jurisdiction to grant an injunction restraining a person from carrying out statutory functions pending appeal. At 402 Dr. Date-Bah JSC forcefully stated thus:

"*I agree that the order made on 1 April 2009 by his Lordship Asante J granting the interested parties an interlocutory injunction pending an appeal should be brought to this court and be quashed*. The learned judge acted in obvious excess of his jurisdiction. *No judge has authority to grant immunity to a party from the consequences of breaching an Act of Parliament. But this was the effect of the order granted by the learned judge. The judicial oath enjoins judges to uphold the law, rather than condoning breaches of Acts of Parliament by their orders. The end of the judicial oath set out in the Second Schedule of the 1992 Constitution is as follows: "I will at all times uphold, preserve, protect and defend the Constitution and laws of the Republic of Ghana." This oath is surely inconsistent with any judicial order that permits the infringement of an Act of Parliament."*

Misconstruction of the Statute

The gravamen of the applicant's case for review of this court's decision in this case, reported as *Chapel Hill School v Attorney-General & Internal Revenue Service* (2009) SC GLR 432 is that this court patently misconstrued sections 10 (1) (d) of the Internal Revenue Act, 2000 (Act 592) and 3(1) (d) of the Income Tax Decree, 1975 (SMCD 5). They are as follows:

"**10. Exempt income**

(1) The following incomes are exempt from tax:

X X X

(d) income accruing to or derived by an exempt organisation *other than income from a business;"*

Section 94 of Act 592 defines an exempt organisation as follows:

""**exempt organisation"** includes a person

(a) who or that is and functions as

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

X X X

(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);"

Section 3(1) (d) of SMCD 5 provides thus:

"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"* is exempted from tax.

The crucial part of this court's judgment on this issue is as stated by Dr. Date-Bah JSC in delivering the judgment of this court at p.442 of the Report as follows:

"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 Schollars of the University of Oxford v Commissioner for Inland Revenue, Republic of South Africa* (1996) 58 SATC 45; [1996] (3) 1 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 "of educational institution of a public character" which this court has to construe in this case. Section 10(1)(f) of the Income Tax Act, 1962 (Act 58) of South Africa provides as follows:

"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 section 10(1)(f) it is necessary in each case to categorize the person (ie taxable entity) who has received gross income* or to whom gross income has accrued, ie 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."*

The respondent's contention which found favour with this court is that once an organisation is an exempt organisation its income from the function that makes it an exempt organisation is ***pro tanto*** exempt from income tax. Indeed the contention is that an exempt organisation is not taxable at all. That is the South African position from s.10 (1) (f) of their Income Tax Act, 1962 (Act 58).

However, in his invaluable book, Ghana Tax Law Primer, Dr. Benjamin Kunbuor, at p. 11 cites *Lord Donovan in Margin v IRC* (1971) AC 739 to the effect that tax legislation has to be strictly construed thus:

"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 devices...*Secondly, 'one has to look merely at what is said. There is no room for any intendment. There is no equity about tax.*

There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used' (Per Rowlatt, J, in Cape Brandy Syndicate v I.R. C [1921] 1 KB 64). Thirdly, the object of the construction of a statute being to ascertain the will of the legislature, it may be presumed that neither injustice nor absurdity was intended. If, therefore, a literal interpretation would produce such a result, and the language admits of an interpretation, which would avoid it, then such an interpretation may be adopted. Forthly, the history of an enactment and the reasons, which led to it being passed may be used as an aid to its construction"

At p. 26 the learned author states thus:

"**The Source Rule**

The importance of the source rule or "source doctrine" as is often called in taxing statutes resides in the fact that *income tax is imposed on income from various specific sources*. The corollary to this is that if a source ceases to exist in the year of assessment there is theoretically no basis upon which tax can be imposed.....

Ghana's income tax jurisdiction is basically source i.e. it is the source which determines the jurisdiction to tax."

Quite clearly then since the respondent does not dispute the fact that its educational activity constitutes a business that should end the matter. Since sections 3(1)(d) of SMCD 5 and 10(1)(d) of Act 592 subject income derived from the business of an exempt organisation to tax it is a plain serious infraction of the statute to contend that an exempt organisation is free from tax despite these clear provisions. However an exempt organisation's income that does not emanate from business will be free from tax. Examples of such exempt income in my opinion will include, endowment fund, which the respondent admits is one of its sources of income, gifts, income from investment etc; but certainly not income from business. As stated at p.17 of Dr. Kumbuor's book,

"(b) Income as a legal concept

Ghana, very much like other commonwealth jurisdictions, *leaves the task of defining income to the courts*. Income tax Acts merely *provide for a series of*

definitions of various types of incomings, which are declared to be either taxable or not taxable. They do not attempt to define income and *the rules only generally define the source of income. Income tax base is therefore whose or what incomes are chargeable with tax.*

Various rules are laid down for computing the amount of income liable to tax and decisions of the courts contribute to the law on the subject."

One, inter alia, has to roam over the Act to ascertain what constitutes income and its sources. See for examples s.7 relating to "Income from a business," s.8 relating to "Income from an employment" and s.9 "Income from an Investment." These incomes will not except as to section 7 land an exempt organisation in tax liability. S.94 deals only with the status of exempt organisation, but not non liability to tax, which is dealt with generally under s.10 and ss.3(1)(d) of SMCD 5 and 10 (1)(d) of Act 592, as far as relevant to this case. The taxing provisions in s.31 (d) of SMCD 5 and 10 1(d), Act 592 should not be read as if the word "other" or some such wording preceded the word "business". The earlier construction of this court in this case which is sought to be reviewed by this application, operates to render the qualifying words "...*other than income from a business*" and "...*in so far as such income is not derived from a trade or business carried on by such institution*" in SMCD 5 and Act 592 respectively unduly restricted in their scope.

It is clear that the misconstruction will cause serious loss of revenue to the applicant and hence a serious miscarriage of justice.

For all these reasons I would allow this application.

W.A. ATUGUBA
JUSTICE OF THE SUPREME COURT

AKUFFO (MS), JSC:-

I have deeply reflected on the arguments and submissions made in support of this application and have not been able to glean any justification for granting the application herein. I, therefore, agree with those of my brethren who are of the view that this application be dismissed as not showing any grounds for review within the terms of Rule 54 of the Supreme Court Rules, 1996 (C.I. 16). There is really no need to expatiate extensively on the circumstances under which the court may, appropriately exercise its review jurisdiction. Enough has been written about it in some of the opinions read today and I do not intend, in this application to say more than that our review jurisdiction is one which has and must be used with the greatest circumspection and within very narrow parameters.

According to the Applicant, in its Reply to the Respondent's Statement of Case, each of the courts that have considered this case had 'inadvertently' failed to apply '*a statute which is at the core of the matter in controversy, namely Section 10(1)(d) and how it affects the business income of the Respondent'*. The Applicant, therefore, submitted that the decision of this court, delivered on 22nd July 2009, would have been different had the court, adverted its mind to the said section, in which case the court would have concluded that an exempt organisation 'of whatever description is liable to pay tax on its business income'. Indeed, had this Court failed to take into account any relevant provision of any applicable statute, we would have been duly clothed, pursuant to Rule 54, to exercise our review jurisdiction in this matter. However, the most cursory reading of the judgment read on behalf of the Court by my esteemed brother Dr. Date-Bah, JSC, shows that, not only was the said provision taken into account, but, rather, in view of the opposing views between the parties as to its scope, meaning and import, (particularly the expression 'income from any business') it was interpreted and the court gave it a meaning that is clearly within the confines of the provisions of the statute. The fact that such meaning turns out to be more in line with that put forward by the Respondent herein cannot amount to a miscarriage of justice to the Applicant.

There is the need to stress, in particular, that, contrary to the Applicant's assertion, in no part of the judgement did the court hold that '*by reason of being an 'exempt*

organisation the Appellant was exempt from tax on all types of income....'; this is rather stretching the clear import of the words used. What the judgement did state in this regard was 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 of that business will qualify for exemption from tax**."

Thus, it remains up to the Applicant to carry out its functions, as usual, and subject the Respondent's streams of income to scrutiny and earmark the appropriate sources in accordance with law.

The fact that the Applicant does not like the interpretation this court has placed on section 10 (1) (d) does not amount to an error, or any other exceptional circumstance, and is not sufficient reason to review the interpretation. In the interpretation of statutes, whatever be the philosophical concepts guiding the Court in its decision, it is still required to read every provision as part of the whole statute. Therefore, the Court is also required to read the statute in such a way as to give effect to every part thereof so as not to do damage to or ignore any provision or part hereof. This is what the Court did. It did not purport to add anything to or take anything away from the statute, and certainly we did not attempt to apply any principles of equity to a fiscal statute.

Consequently, because the Appellant has failed to demonstrate in any cogent manner that the decision of the court has given rise to any exceptional circumstances that have resulted in a miscarriage of justice, I join those of my brethren who are minded to dismiss the application for review.

S.A.B. AKUFFO (MS)
JUSTICE OF THE SUPREME COURT

DR. DATE-BAH, JSC:-

I do not consider that this case deserves any lengthy treatment. I think that it represents a classic case of a losing party seeking to re-argue its appeal under the garb of a review application. It is important that this Court should set its face against such endeavour in order to protect the integrity of the review process. This court has reiterated times without number that the review jurisdiction of this court is not an appellate jurisdiction, but a special one. Accordingly, an issue of law that has been canvassed before the bench of five and on which the court has made a determination cannot be revisited in a review application, simply because the losing party does not agree with that determination. This unfortunately is in substance what the current application before this court is.

In *Chapel Hill School Ltd. V The Attorney-General and the Commissioner, Internal Revenue Service* (Civil Appeal No. J4/25/2009), this court made the following determination:

> "The Second Respondent argues that what the Appellant does, namely offering tuition for fees, out of which 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 Applicant disagrees with this determination and has therefore brought this review application, arguing that if the Court had adverted its mind to section 10(1)(d) of Act 592, this would have materially affected its decision and it would have come to the conclusion that an exempt organization of whatever description is

liable to pay tax on its business income. This argument is disingenuous since the concluding sentences of the Supreme Court's judgment are as follows:

> "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."

The point is that the Supreme Court did not act *per incuriam* and indeed did advert its mind to section 10(1)(d) of Act 592. Merely because the Applicant does not like, or agree with, the decision reached by the Supreme Court is not sufficient reason for that decision to be reversed on a review application. The Applicant has in my view failed to establish any exceptional circumstances resulting in a miscarriage of justice and therefore I would dismiss its application.

I would like to reiterate the view that I expressed in *Gihoc Refrigeration (No. 1) v Hanna Assi (No. 1)[2007-2008]*SCGLR 1 at pp. 12-13 that:

> "Even if the unanimous judgment of the Supreme Court on the appeal in this case were wrong, it would not necessarily mean that the Supreme Court would be entitled to correct that error. This is an inherent incident of the finality of the judgments of the final court of appeal of the land. The brutal truth is that an error by the final court of the land cannot ordinarily be remedied by itself, subject to the exception discussed below. In other words, there is no right of appeal against a judgment of the Supreme Court, even if it is erroneous. As pithily explained by Wuaku JSC in *Afranie v Quarcoo [1992] 2GLR 561* at pp. 591-592:
>
> > "There is only one Supreme Court. A review court is not an appellate court to sit in judgment over the Supreme Court."

> However, in exceptional circumstances and in relation to an exceptional category of its errors, the Supreme Court will give relief through its review jurisdiction. The grounds on which this Court will grant an application for review have been clearly laid out in the case law. Notable in the long line of relevant cases are *Mechanical Lloyd Assembly Plant v Nartey* [1987-88] 2 GLR 598; *Bisi and Others v Kwayie* [1987-88] 2 GLR 295; *Nasali v Addy* [1987-88] 2GLR 286; *Ababio v Mensah (No.2)* [1989-90] 1 GLR 573; *Quartey v Central Services Co. Ltd.* [1996 – 97] SCGLR 398; *Pianim (No. 3) v Ekwam* [1996-97] SCGLR 431; *Koglex (Gh) Ltd. v Attieh* [2001-2002] SCGLR 947; and *Attorney-General (No. 2) v Tsatsu Tsikata (No.2)* [2001-2002] SCGLR 620. The principles established by these cases and others are that the review jurisdiction of the Supreme Court is a special jurisdiction and is not intended to provide an opportunity for a further appeal. It is a jurisdiction which is to be exercised where the applicant succeeds in persuading the Court that there has been some fundamental or basic error which the Court inadvertently committed in the course of delivering its judgment and which error has resulted in a miscarriage of justice. This ground of the review jurisdiction is currently exercised by the Court pursuant to rule 54(a) of the Supreme Court Rules 1996 (CI 16), which refers to "exceptional circumstances which have resulted in miscarriage of justice." This is a high hurdle to surmount."

The public interest in avoiding the protraction of litigation requires that this Court should continue to uphold these principles.

On the particular facts and statutory provisions of this case, I wish to state, for the avoidance of doubt, that I do not in fact consider that the panel of five was in error. There were at least two competing and available interpretations of the provision in question, of which the Court was aware. The one interpretation is the literal one, propounded by the applicant and now espoused by the learned President of this Court. Another was based on the context, or one could call it purposive. I am reluctant, for the reasons set out

above, to revisit the pros and cons of these alternative interpretations. My reason is that to go into the merits of the case again would be to entertain an illegitimate appeal. It is sufficient to state that the Supreme Court's decision to adopt the one interpretation rather than the other cannot fairly be characterized as a "misconstruction". It is certainly not such a misconstruction as to attract the review jurisdiction of this Court.

DR. S.K. DATE-BAH
JUSTICE OF THE SUPREME COURT

OWUSU (MS), JSC:-

Under Article 133 of the 1992 constitution, the Supreme Court is given power to review any decision made or given by it on such grounds and subject to such conditions as may be prescribed by Rules of court.
When reviewing its decision under this article, the Supreme Court shall be constituted by not less than seven Justices of the Supreme Court.
Under rule 54 of the Rules of this court, C. I, 16 of 1996:

"**The court may review a decision made or given by it on the ground of Exceptional circumstances which have resulted in a miscarriage of Justice; or**

(a) The discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produces by the applicant at the time when the decision was given."

The present application is therefore invoking this special jurisdiction of the court and praying for a review of the Judgment of the court delivered on the 22nd of July 2009

by which the court allowed the appeal of the Appellant/Respondent in this application, exempting it from payment of tax as an educational institution of Public character.

The Respondent had in the appeal sought the following reliefs from the High Court:

1. A declaration by the court that Chapel Hill School Limited is an educational Institution of public character and thus its income is exempt from tax.

"An order for the annulment of the tax assessment for the year 1994 to 2004.

The application was brought under rule 54(a) as in paragraph 12 of the affidavit in support of the motion, the Applicant avers as follows:

> **"that I have been advised by counsel and verily believe same to be true that the matters deposed to in paragraphs 10 and 11 of this affidavit, constitute exceptional circumstances resulting in a miscarriage of Justice to the commissioner of Internal Revenue and by Extension to the Republic of Ghana, thus necessitating this application for review."**

Paragraph 7 of the affidavit states as follows:

> **"That I have been advised by counsel and verily believe same to be true that section 10 (1) (d) of Act 592 of 2000, exempts from tax, all types of income of an exempt organisation except business income. However the honorable court erroneously held that an 'exempt organisation' like the appellant/respondent in this review application, i.e. Chapel Hill School Limited is not liable to pay tax on its business income."**

The Respondent vehemently opposed the application for the reason that the application has not shown any exceptional circumstance that has occasioned a

miscarriage of Justice within the context of section 54 of the Rules of the court to warrant a review by the court of its Judgment.

It averred further that there is no error in the Judgment of the court and that it has demonstrated in the statement of case in reply to that of the Applicant that the application is mischievous and misconceived.

What was the Judgment of the court following which this application for review was filed?

On an appeal against the Judgment of the Court of Appeal dismissing the appeal of the Appellant against the Judgment of the High Court, this court allowed the appeal in part set aside the Judgment of the Court of Appeal and held that –

(1) The Appellant was until it converted into a company limited by shares, an educational institution of a public character and therefore

(2) Its income is exempt from tax.

The Appellant, Chapel Hill School Ltd was originally established as the Takoradi Chapel Hill Preparatory School in December 1962 by fourteen people who subscribed its instrument of Establishment and Governance as founders. The instrument of incorporation purported to establish it as a corporation sole. The school was subsequently incorporated under the companies Act, 1963 (Act 179) as a company limited by guarantee.

In 2001, however the school was incorporated as a company limited by shares under the same Act, 179.

For the years 1994 – 2004 the school's income tax was assessed by the Internal Revenue Service, the second Respondent/Applicant herein as GH¢39,864.40. The Appellant/Respondent in this application objected to that assessment but the objection was turned down. The school appealed to the High Court seeking the declaration already referred to and annulment of the tax assessment.

The High Court refused the school's appeal and on appeal to the court of Appeal, that court affirmed the High Court's decision that the school was not an educational institution of Public Character and therefore did not qualify to be an "***exempt Organisation***" as defined under section 94 of the Internal Revenue Act of 2000, Act (592) which is as follows:

> **"exempt organisation" includes a person**
>
> **(a) Who or that is and functions as (i) a religious, charitable or educational institution of a public character;**
>
> **(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)"**

Under section 10(1) (d) of Act 592, among others –

> **"income accruing to or derived by an "exempt organisation" other than income from a business" is exempt from tax."**

Until the coming into force of Act 592, section 167 of which repealed SMCD 5, section 3 (1) of the Decree provided that:

> **"3. - - - there shall be exempt from tax 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"**

In the instant application, therefore the applicant has no quarrel with the court's decision that Chapel Hill School until it converted into Limited Liability Company was an educational institution of public character. What the Applicant is complaining about that it terms an error is the court's decision that as such educational institution of public character, its income is exempt from tax.

The second Respondent/Applicant herein has argued that what the Appellant does namely offering tuition for fees, out of which activity it makes a gain or loss, constitutes a business.

To this argument, the court per my respected brother Dr. Date-Bah JSC said:

> "**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 the business will qualify for exemption from tax."**

In this application, therefore, for the Applicant to succeed, it must satisfy this court that in the appeal, it established before the court that apart from the business of offering tuition for fees out of which it makes a gain or loss, it carried on business unrelated to that for which it is an "exempt organisation.

In the Applicant's statement of case, it is stated that "***the import of the judgment is that an exempt organisation***" within the meaning provided in section 94 of the Internal Revenue Act 2000, Act 592 is exempt from all tax types. [emphasis mine]

It is upon this premise that counsel submits that the court erroneously held that the Respondent in this application is not liable to pay tax on its business income.

The import of the judgment as stated by counsel with due deference to counsel is a misstatement. The court had qualified the business to be business concern that falls within the purview of the educational business carried out by an educational institution of a public character.

A tax "***exempt organisation***" may still be liable for taxes on its unrelated business income." Unrelated business income is income from a trade or business regularly carried on, that is not substantially related to the charitable, educational or other purpose that is the basis of the organisation's tax exemption.

In QUARTEY and others VRS. CENTRAL SERVICES CO. LTD [1996-97] SCGLR 398 the Supreme Court, dismissing an application for review, unanimously held that:

"the court would exercise its review Jurisdiction – being a special jurisdiction and not an appellate Jurisdiction – in favour of an applicant only in exceptional circumstances. Such an applicant should satisfy the court that there had been some fundamental or basic error – resulting in a gross miscarriage of justice which the court inadvertently committed in the course of considering its judgment on hearing the appeal. Consequently, a loosing party was not entitled to use the review process to - - - or to use the process to prevail upon the court to have another look at this case. - - -" [1996-97] SCGLR 431

In PIANIM (No. 3) VRS EKWAM AND ANOTHER, the court had the occasion to reiterate the distinction between a review jurisdiction and the appellate jurisdiction of the Supreme Court.

per curiam:

"**there is a clear line of distinction between a review Jurisdiction and the appellate Jurisdiction of the Supreme Court. This court in several decided cases has made it clear that:**

"the review Jurisdiction is not intended as a try-on by a party losing an appeal; neither is it meant to be resorted to as an emotional re-action to an unfavourable judgment."

See MECHANICAL LLOYD ASSEMBLY PLANT LTD VRS NARTEY [1987-88]2 GLR 598

In AFRANIE II VRS QUARCOO [1992] GLR 561 the Supreme Court reiterated its review Jurisdiction in holding 2 as follows:

"Under the law the only ground for the review of a decision of the Supreme Court was that the circumstances were exceptional and that in the interest of justice there should be a review. Although what exactly constituted exceptional circumstances had not been spelt out, on the authorities the court had found exceptional circumstances where

(a) the circumstances were of a nature as to convince the court that the judgment had been a miscarriage of justice; or

(b) the demands of justice made the exercise extremely necessary to avoid irremediable harm to the applicant; or

(c) a fundamental and basic error might have inadvertently been committed by the court resulting in a grave miscarriage of justice; or

(d) a decision had been given per incuriam for failure to consider a statute or a binding case law or a fundamental principle of practice and procedure relevant to the decision and which would have resulted in a different decision; or

(e) the applicant had sought for a specific relief which materially affected the appeal and had argued grounds in support but the appellate court had failed or neglected to make a decision on it. The misconstruction of the words of a statute upon which the decision of a case depended was such an error of law that it would deprive the court of jurisdiction to decide the matter.

Under section 17(1) (h) of the Rent Act, 1962 (Act 220) it was only when a plaintiff could bring himself within the provisions of that section that the court would be clothed with jurisdiction to make an order for possession. The plaintiff had to establish to the satisfaction of the court that he was the landlord and he reasonably required the premised for his own business purposes.

Although section 36 of Act 220 defined a landlord to include any person deriving title under the original landlord, it could not be said that an executor or administrator who derived his title from the court by the grant of probate or letters of administration also derived his title from the original landlord under the definition in Act 220, otherwise an executor or administrator would have the power to make a lease or other disposition of the property before grant. Even though under section 1 (1) of the Administration of Estates Act, 1961 (Act 63) the property of the deceased vested in his executor or administrator it was only "on trust" and "for purposed of administration" and would not merge in any estate or interest vested in him in his own right. Accordingly, the power of an executor or administrator to distrain for rent under section 71 of Act 63 and participate in the running of the estate on commercial basis did not empower executors and supposed trustees who had no beneficial interest in testator's estate to sue for possession of the testator's business under section 17(1) (h) of Act 220.

In the instant case, therefore, the plaintiffs were not entitled to maintain the action for recovery of possession because they were not landlords, and were also not owners of the AAM'S Hotel business for which they sought Hotel de France as an annex. Not being owners of the AAM'S Hotel business, they could not reasonably establish that they required Hotel de France for their own business purpose.

Since the plaintiffs failed to satisfy the court as to the statutory requirements provided under section 17(1) (h) of Act 220, they were not entitled to an order of possession.

Accordingly, since the Supreme Court erroneously construed the words of section 17 (1) (h) of Act 220 so as to bring the plaintiff's within its ambit, they acted outside or in excess of the court's jurisdiction. In the result, its decision had to yield to a review."

In this application, it is section 10(1) (d) that the Applicant is contending has been erroneously construed by the court. If indeed the words of the statute upon which the Judgment of the court depended had been misconstrued as counsel urged upon the court, then the error would be one for which the court would exercise its review Jurisdiction to correct it.

In NASALI VRS ADDY [1987-88] 2 GLR 286, in an application for a review of a split decision of the Supreme Court against him, although the applicant contended that the majority ignored relevant authorities and thus occasioned gross miscarriage of justice, it was found that that contention was wrong. The application was dismissed. The court held that even though the Supreme Court had power to correct its own errors by way of review, it could not encourage an application which merely seeks to re-open the appeal under the guise of review.

I have meticulously examined the application before us and regret to say that I am unable to conclude that this court committed any error in its Judgment and therefore renders it a proper case for review.

The whole application was grounded on a wrong premise as to what the import of our judgment is. The application is therefore misconceived and same is hereby dismissed.

R. C. OWUSU (MS)
JUSTICE OF THE SUPREME COURT

BAFFOE-BONNIE, JSC:-

I agree that the application be dismissed.

P. BAFFOE-BONNIE
JUSTICE OF THE SUPREME COURT

GBADEGBE, JSC:-

In my view the application does come within the intendment of rule 54 of the Supreme Court rules, 1996 (C.I.16). Accordingly, I am in agreement with those of my brethren who have come to the view that the application be dismissed.

N. S. GBADEGBE
JUSTICE OF THE SUPREME COURT

AKOTO-BAMFO (MRS), JSC:-

I had the benefit to read beforehand the opinion of my brother Atuguba, JSC and I agree with the conclusion reached by him that the application be allowed.

V. AKOTO-BAMFO (MRS)
JUSTICE OF THE SUPREME COURT

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