162/95

Case No 385/94

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

THE CHANCELLOR, MASTERS AND SCHOLARS OF THE UNIVERSITY OF OXFORD . . . . . Appellant

and

THE COMMISSIONER FOR INLAND REVENUE . . . . . Respondent

CORAM : CORBETT CJ, E M GROSSKOPF, NESTADT, VAN DEN HEEVER, *et* SCHUTZ JJA

DATE OF HEARING : 24 November 1995

DATE OF JUDGMENT : 30 November 1995

J U D G M E N T

/CORBETT CJ . . . . .

CORBETT CJ:

The appellant, the University of Oxford, was founded more than 800 years ago. The first formal statement of its legal status was attempted in 1461 during the reign of King Edward IV. This was followed by a more comprehensive statement in the Great Charter of 1523 prepared for King Henry VIII. In time the need was felt for further clarification and amplification of the status of both the appellant and the University of Cambridge and in 1571 an Act for their incorporation was passed by Parliament. In terms of this statute the appellant was incorporated and accorded perpetual succession "by the name" of the Chancellor, Masters and Scholars of the University of Oxford. The statute identifies the maintenance of "good and godly literature" as one of the aims of Parliament in enacting it. Furthermore, the Great Charter of King Charles I to the University of Oxford, dated 3 March 1636, confirmed appellant's long-standing involvement in the publishing, printing and dissemination of books

worldwide.

Today the academic activities of the appellant are carried on at Oxford through 16 teaching faculties and to this end appellant provides laboratories, central lecture halls, libraries and museums. It prescribes entrance requirements, courses and syllabuses; sets, controls and marks examinations; and awards degrees. Many of the students, both undergraduate and postgraduate, come from outside the United Kingdom.

The appellant pursues its academic purpose, viz the furtherance of education and learning, partly by way of publishing books. It does so through one of its departments known as "The Oxford University Press" ("the OUP"). I might interpolate that the appellant ceased book-printing activities in 1989.

The appellant exercises control over the OUP by means of a university body known as "the Delegacy", which was first established in 1633. In terms of the Statutes, Decrees and

Regulations of appellant ("the Statutes"), the Delegacy currently consists of 19 members. They are the Vice-Chancellor, the Proctors and the Assessor, who are all Delegates *ex officio*, and 15 members of Congregation chosen by Council and the General Board of the Faculties of the appellant. The chosen delegates are all scholars of distinction and are selected to represent, as far as practicable, the major fields of learning.

While the Delegacy is placed in charge generally of the affairs of the OUP and at all times carries overall responsibility therefor, the day-to-day management of the OUP is carried out by salaried officers and employees. The chief executive of the OUP is the Secretary to the Delegates, who is appointed by the Delegacy. The present incumbent of this position is Sir Roger Elliott.

The Statutes further provide for a Finance Committee of the Delegacy, which is charged, subject to the general authority of the Delegacy, with the direction of the finance and management of the

business of the OUP. The Finance Committee establishes business policy and regularly monitors all aspects of the affairs of the OUP. At monthly meetings it reviews all phases of the operations of the OUP and receives reports from the heads of each of its operating divisions. It also reviews and authorizes all major investments, annual budgets, remuneration policies and so on. The proceedings of the Finance Committee are regularly reported to and received by the Delegacy, which maintains ultimate control over the Finance Committee.

The OUP operates in the United Kingdom and, through branches, in many other parts of the world. Currently there are eleven such branches, located in Australia, Canada, Japan, Hong Kong, Singapore, Malaysia, India, Kenya, New Zealand, Pakistan and South Africa. This last-mentioned branch has its headquarters in Cape Town and it serves a number of countries in Southern Africa, including South Africa.

The Delegacy maintains direct control over the OUP's

publishing activities and the choice of books to receive the OUP's imprint. The Delegates meet fortnightly during each academic term for this purpose. Every book published in the United Kingdom requires the prior approval of the Delegates. Overseas publications (i e those undertaken by branches of the OUP) are reported to and scrutinized by the Delegates, but in order to avoid undue delay, are not necessarily approved in advance. Delegates visit the various locations of the OUP, both in the United Kingdom and abroad, in order to keep in touch with the editors and staff of the OUP.

Each branch office has a measure of freedom and authority to make its own decisions, as long as these conform to a laid-down policy (in the form of guidelines issued to managers of the various branches), but it is ultimately subject to the direct authority and control of the appellant, through the Delegacy.

Inasmuch as the OUP does not enjoy the advantage of limited liability, the Delegates are very conscious of their

responsibility to exercise financial control over the OUP. Each year the Delegates publish an annual report, including audited accounts. For accounting purposes the worldwide operations of the OUP are consolidated. The OUP, being a department of the appellant, has no shareholders and does not distribute dividends. It has no access to capital markets and is entirely self-financing. Earnings generated by the activities of the OUP are in general devoted to maintaining and improving its ability to perform its functions. An overseas branch producing an operating surplus is permitted to retain what it requires to finance approved local programmes. Any moneys in excess of these requirements are remitted to the United Kingdom to sustain the general development of the OUP either in the United Kingdom or overseas. Once the internal needs of the OUP have been satisfied, any balance is applied towards the conduct of academic activities elsewhere within the appellant. In order to implement this policy each overseas branch is, for the purposes of financial management,

treated as a separate business centre. It is required to prepare and submit, for approval, annual budgets to the headquarters of the OUP, and also annual accounts for consolidation with the general accounts of the OUP.

A representative of the OUP was first appointed to cover the Southern African region in 1915. Initially the OUP's activities in this region consisted of the promotion and distribution of publications produced by the OUP outside Southern Africa. Subsequently in 1946 a local publishing programme was initiated and the first locally published book was brought out in 1947. Over the years the size of this branch (which I shall call "OUPSA") and its publishing programme has increased considerably. At present (i e the time when these proceedings were commenced in August 1993) it has a staff of 67 people and publishes 60 to 80 titles per annum. In addition to the local publishing programme, OUPSA promotes and distributes the OUP's worldwide list of publications, as also the books of other

publishers which complement the OUP's worldwide list. This last-mentioned activity accounts for a mere 8% of local turnover and is planned to decrease in the future.

In accordance with the aims of the appellant, acting through the OUP, to promote scholarship, education and culture, OUPSA concentrates on the publication of scholarly monographs, academic and school textbooks, reference works, selected children's fiction and non-fiction, general books and health topics and one or two titles per year on contemporary socio-political issues. In the next five years the mix of the publishing programme is planned to consist of 50% educational works, 30% academic works and 20% general works. Titles are published in English, Afrikaans and certain African languages.

In addition to publishing, OUPSA also conducts training courses for Black teachers, initiates innovative curriculum development work, lobbies the education department for the provision of

dictionaries and atlases to Black schoolchildren and encourages its staff to sit on public interest committees concerned with education.

As regards financial arrangements, for the past eleven years all surplus funds generated by the branch in its publishing operations have been reinvested in new local publishing programmes. In recent years, however, OUPSA has apparently run on "a more or less break even basis".

This appeal is concerned with the liability of the appellant to pay income tax on the taxable income, if any, derived from the activities of OUPSA. More specifically the question is whether the receipts and accruals of this branch are exempt from tax by virtue of sec 10(1)(f) of the Income Tax Act 58 of 1962, as amended ("the Act"), which provides such an exemption for -

> "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".

(I quote the subsection as it is after being amended by Act 113 of 1993, which came into effect after proceedings were launched in this case, but before judgment was delivered. In any event the changes introduced by the amending Act are not material for present purposes.)

On 16 June 1961 the Receiver of Revenue, Cape Town addressed a letter to the manager of the OUPSA, the body of which read -

> "INCOME TAX - OXFORD UNIVERSITY PRESS
>
> With reference to your letter of the 25th April, 1961, I have to inform you that the Commissioner for Inland Revenue has now ruled that the Oxford University Press is an educational institution within the meaning of Section 10(l)(f) of the Republic of South Africa Income Tax Act and therefore exempt from Republican Income Tax."

Subsequently, in May 1991, the respondent, the Commissioner for Inland Revenue, wrote to the manager of OUPSA raising anew the

applicability of sec 10(l)(f) and asking certain questions about OUPSA, its activities and its relationship with the appellant. In the ensuing correspondence respondent wrote to OUPSA's auditors as follows:

> "Having carefully considered the matter in the light of all the information submitted, I have come to the conclusion that OUPSA is not engaged in charitable or educational activities in the Republic of South Africa. It is merely carrying on the business of a dealer in books, acts as a publisher and receives interest. The provisions of section 10(1)(f) of the Income Tax Act are, therefore, not applicable to OUPSA and it will be subjected to tax as from the 1993 year of assessment."

Subsequent efforts were made by OUPSA's auditors to attempt to dissuade the respondent from this viewpoint, but without success. In order to resolve this dispute expeditiously the appellant applied on notice of motion to the Cape of Good Hope Provincial Division for orders declaring (a) that the appellant is an educational

institution of a public character as contemplated in sec 10(1)(f) of the Act, and (b) that the receipts and accruals derived from the activities carried on by the appellant in the Republic under the name and style of Oxford University Press are, accordingly, exempt from tax as contemplated by sec 10 of the Act, together with costs of suit.

The application was opposed by the respondent. The facts, as stated above, are derived from the affidavits filed on behalf of the appellant and deposed to by Ms K A McCallum, the publishing director of OUPSA, Mr A J Dorey, the Registrar of appellant, and Sir Roger Elliott. They are not disputed by the respondent. Moreover, no additional facts of any materiality are put forward in the answering affidavit filed on behalf of the respondent. The latter rests his case on the general proposition that on the facts which are common cause the appellant is, in law, not entitled to the exemption provided by sec 10(1)(f).

The matter was heard by the late Mr Justice Berman. He

ruled in favour of the respondent and dismissed the application with costs, but granted leave to appeal to this Court. The judgment of Berman J has been reported (see Chancellor, Masters and Scholars of the University of Oxford v Commissioner for Inland Revenue 1995 (3) SA 258 (C)).

In his judgment Berman J appears to have accepted that the appellant was an educational institution of a public character (see reported judgment at 262 A), but held that it did not follow that it, or the OUP, was entitled to the exemption provided for in sec 10(1)(f). Having referred to certain cases decided in the Income Tax Special Court (viz Income Tax Case 1262, 39 SATC 114 and Income Tax Case 1376, 45 SATC 213), the learned Judge propounded the following test for the applicability of sec 10(1)(f) in circumstances such as these (at 264 E - F):

> "To put the matter simply - in order to be tax-exempt the surplus funds in question must be received by an

> educational institution of a public character such as was envisaged by E M Grosskopf J in ITC 1262 and (a) must be used for the educational purposes for which that institution is maintained and conducted, and (b) such institution must be controlled, at least partly, from South Africa, although its day-to-day management may be in the hands of those who run the institution".

The "surplus funds" referred to in this passage of the judgment consist of the moneys representing an excess of income over expenditure (see reported judgment, at 260 H - I). The type of institution envisaged by E M Grosskopf J in Income Tax Case 1262, *supra*, appears from the following dictum in the judgment in that case (at p 117):

> "It was common cause in the argument before us that 'educational' in s10(1)(f) of the Act was not to be understood in the above wide sense as relating to the acquisition of knowledge, skill or competence by any means whatever. Once it is conceded that the means whereby knowledge, skill or competence is provided or acquired, constitutes a relevant factor in determining whether the institution providing the knowledge etc (or facilitating their acquisition) can be classed as

> 'educational', it becomes necessary to determine where the line is to be drawn between, on the one hand, the acquisition of knowledge etc in a completely unsystematic and informal manner and, on the other, its acquisition in a formal institution of learning. And in my view it is impossible to draw the line short of what the *Shorter Oxford Dictionary* calls 'systematic instruction, schooling or training' or *Webster's Dictionary* calls 'a formal course of study, instruction or training'. For present purposes it is not necessary to consider any possible conceptual differences between these two formulations."

(See also reported judgment, at 262H - 263B.)

Applying the aforestated test, Berman J held that the appellant did not qualify for the exemption provided by sec 10(1)(f) in respect of any "surplus funds" earned by it from the activities of OUPSA since the "end-user" or ultimate receiver of those funds was not an educational institution of a public character as envisaged by that subsection (see reported judgment, at p 264 G-H). The learned Judge appears also to have placed some reliance for his decision on the

requirement (posed by him) of management and control (see reported judgment, at 263 H, 264 C).

For the reasons which follow I am, with respect, not able to agree with the reasoning or the decision of the Judge *a quo*. In terms of the Act income tax is levied on taxable income received by or accrued to "any person" (see sec 5). It is not disputed, nor could it be disputed, that appellant is such a person. Nor is there any doubt, in my view, that in law the appellant and the OUP (including all its branches) constitute one single *persona*; and, therefore, one single taxable entity. As my recital of the facts indicates, the OUP is regarded and treated as a department of the appellant. It has a measure of autonomy in its operations and its finances are the subject matter of separate audited accounts. Nevertheless, the appellant maintains overall authority over the OUP; and separate accounts are kept in order to ensure financial control. There is no basis for treating the appellant and the OUP as separate and individual legal

personae and as separate taxable entities. (Cf Afrikaanse Verbond Begrafnis Onderneming Beperk v Commissioner for Inland Revenue 1950 (3) SA 209 (A), at 216 C-D.) *A fortiori* OUPSA could not be regarded as a *persona* and a taxable entity separate from the OUP.

In order to apply sec 10(1)(f) it is necessary in each case to categorize the person (i e taxable entity) who has received gross income or to whom gross income has accrued, i e to determine whether or not such person is a religious, charitable or educational institution of a public character. In the present case such categorization presents no difficulty. The appellant is manifestly an educational institution of a public character. This is not disputed. And that, one would imagine, is the end of the matter.

Respondent's counsel, however, contended that it is not. As I understand his argument, it was a two-pronged one. In the first place, he submitted that foreign institutions do not qualify for exemption under sec 10(l)(f); and, in the second place, he submitted

that, even if they do, they must be categorized with reference to their operations within South Africa only. I proceed to consider these arguments in turn.

It is not entirely clear to me what is meant by a foreign institution and where one draws the line. But that apart, I am unable to agree with counsel's submission. There is nothing in sec 10(1)(f), or, in my view, in the Act as a whole, to indicate that the general wording of the subsection should be given this restricted meaning. Indeed the word "all" seems to suggest the contrary. Moreover, if one reads the wording of the various exemptions contained in sec 10, it becomes clear that where the Legislature wished to impose conditions or qualifications or limitations upon the ambit of a particular exemption it was careful to do so in express terms. In this connection appellant's counsel drew our attention to various subsections relating to limitations on the manner of use of funds, as to the place of control of the taxpayer and as to the activities of the

taxpayer. A good example is sec 10(1)(fA), dealing with the receipts and accruals of any fund, the sole object of which is to provide funds for any religious, charitable or educational institution contemplated in sec 10(1)(f). It contains a series of restrictions and qualifications for such a fund to become entitled to the exemption.

A strong pointer as to the meaning of sec 10(1)(f) is provided by the wording of sec 42(2)(d) of the Act. Sec 42 deals with the amounts which are subject to the levy of non-resident shareholders' tax. Subsection (2) lists the cases where the tax is not payable; and in para (d) this is in respect of -

> "dividends accruing to any religious, charitable or educational institution of a public character, whether or not supported wholly or partly by grants from public revenue."

Plainly, what are referred to here are non-resident, or foreign, institutions receiving dividends from a South African source. The

wording of the relevant portion of sec 10(1)(f) is identical to the wording of sec 42(2)(d) and, accordingly, it seems to me that a conclusion that sec 10(l)(f) was intended to include reference to non-resident, or foreign, institutions is virtually inescapable. In the course of his argument respondent's counsel emphasized the rider to sec 10(l)(f), i e the words "whether or not supported wholly or partly by grants from public revenue" and submitted that, since the "public revenue" referred to could only mean public revenue having a South African source, the subsection did not apply to foreign institutions. This submission is not sound. It is refuted by, *inter alia*, the consideration that sec 42(2)(d) uses the same words, clearly with reference to foreign institutions.

It is of more than passing interest to note that with reference to a similarly-worded tax exemption in sec 23(e) of the Income Tax Assessment Acts 1936 in favour of, *inter alia*, public educational institutions the High Court of Australia held that this was

not limited to institutions in Australia and that the University of Birmingham and Epsom College, both of which did not carry on any activities in Australia, but derived income from Australian investments, qualified for the exemption. (See The University of Birmingham and Another v The Commissioner of Taxation of the Commonwealth of Australia; Epsom College and Another v The Commissioner of Taxation of the Commonwealth of Australia 1 AITR 383; [1938] 60 CLR 572).

The argument that sec 10(l)(f) does not apply to foreign institutions can thus not prevail.

As to the second prong of the argument of respondent's counsel, viz that appellant must be categorized by reference to its activities or operations in South Africa only, I am again of the view that it is unsound. There is no warrant in the language of sec 10(1)(f) for such an approach. Indeed, as I have already pointed out, where in sec 10 the Legislature intended to limit the ambit of an exemption

by reference to the activities of the taxpayer it did so in express terms. The approach advocated by respondent's counsel would lead to a wholly artificial and illogical splitting up of the activities of a foreign institution into what was done outside South Africa and what was done within South Africa. Moreover, carried to its logical conclusion, it would mean that, say, a foreign university deriving income from a South African investment, such as fixed property (which it let) or moneys loaned against the security of a mortgage bond, would for the purposes of sec 10(l)(f) be categorized not as an educational institution, but as a landlord or as a money-lender, as the case may be. This borders on the absurd. Indeed, once one postulates that institutions in foreign countries are included under sec 10(l)(f), it follows inevitably that such an institution must be categorized by its activities generally, including what it does in the foreign country. Otherwise only a foreign institution which carried on the full range of its activities both in the foreign country and in South Africa would

qualify under sec 10(1)(f). There is no warrant for so circumscribing the scope of sec 10(I)(f). Nor is such an interpretation consistent with sec 42(2)(d).

Respondent's counsel argued that it could never have been the intention of the Legislature to permit, for example, an overseas university to carry on business in this country in competition with local traders in the same line of business and to escape paying income tax. The answer is that if the Legislature wishes to avoid this situation, then it must change the law. The law as it is grants such an exemption. And here I would point out that we are not dealing with the case where a foreign educational institution is taking advantage of the law in order to run, in South Africa, a profitable business unrelated to the general scope of its aims and activities. On the contrary the appellant has for centuries regarded the publication of books to be an integral part of its general aim and function to further education and learning. And this is precisely what it does in South

Africa through the OUPSA.

Respondent's counsel also sought to invoke the general canon in the interpretation of statutes that the legislation is presumed not to have extra-territorial application; and he also referred to the provisions of the Companies Act 61 of 1973 relating to an "external company". I do not think that either the presumption or the provisions of the Companies Act assist respondent's case. The presumption is merely an aid to interpretation. In my view, the position is clear and there is no need to invoke the presumption. Furthermore, I doubt whether the interpretation which I have placed on sec 10(l)(f) involves extra-territorial application at all. If it does, then it is clear that the Act which taxes persons (whether resident in South Africa or not) on income which has its source here, contemplates extra-territorial application in the sense contended for by counsel. As to the Companies Act, I fail to see its relevance in the interpretation of sec 10(1)(f).

In argument respondent's counsel did not support the reasons for judgment given by the Judge *a quo*. These reasons involved the test for the applicability of sec 10(1)(f) which I have quoted above. With respect, I can find no justification for importing into the subsection the requirements listed (a) and (b) in this test.

For these reasons, I hold that the appellant qualifies for the exemption provided by sec 10(l)(f) and is entitled to the declaration sought in its notice of motion.

It is ordered:

(1) The appeal is allowed with costs, including the costs occasioned by the employment of two counsel.

(2) The order of the Court *a quo* is set aside and there is substituted the following: -

"An order -

(a) declaring that applicant is an educational

institution of a public character in terms of section 10(1)(f) of the Income Tax Act 58 of 1962;

(b) declaring that the receipts and accruals derived from the activities carried on by the applicant in the Republic under the name of the Oxford University Press are exempt from income tax under sec 10(1)(f); and

(c) ordering the costs of the application to be paid by the respondent."

M M CORBETT

E M GROSSKOPF JA)
NESTADT JA)
VAN DEN HEEVER JA) CONCUR
SCHUTZ JA)