



DOCTRINE OF EXECUTIVE NECESSITY

By: Tara Carnegie, Contributor

Recently, the Minister of Finance and Planning announced in Parliament the government's intention to impose a new tax on the players in the betting and gaming industry.

The proposed tax caused controversy in the industry and one major player responded by proposing that, in return for an agreement on the part of the government: (i) to withdraw the tax and, (ii) to maintain and not increase the level of taxes currently charged for the duration of its contract with the company; it would pay a lump sum to the Government of Jamaica.

Having been duly reduced to writing, the proposal was forwarded to the Minister. Last Thursday's "*Gleaner*" reported that the Minister refused the scheme proposed and would therefore proceed with the tax.

The proposal has created a situation which is reminiscent of, though not identical to that which existed, and was raised for consideration in the Supreme Court of Jamaica in the case of ***Revere Jamaica Alumina, Ltd. v. Attorney General (1977)*** the issue in which case was whether the government could legally impose by Acts of Parliament a levy on the production of bauxite having previously entered into an agreement which provided that no further taxes, except as specifically provided elsewhere in the agreement, would be imposed.

In challenging the imposition of the levy an action was filed by Revere claiming damages and a number of declarations that the Acts were *ultra vires* and in breach of the Constitution.

To the extent that the decision of the Supreme Court is relevant for the purposes of this discussion the court held that the doctrine of executive necessity was still valid and that by virtue of that doctrine any undertaking not to impose future taxation was invalid.

What therefore is the "doctrine of executive necessity"? It is the principle which states that although government can be bound through its officers by a commercial contract, and like anyone else is liable to pay damages, government is not competent to fetter its future executive action, which must necessarily be determined by the needs of the community when the

question arises. The essence of the doctrine therefore is that government cannot hamper the freedom of the future actions of Parliament in matters which concern the welfare of the State. The then learned Chief Justice affirmed that principle as valid and found that the Acts validly imposed the bauxite production levy.

It appears that, based on the ruling on this issue in the “Revere case”, that if the government were to accept the proposal to accept the lump sum payment and to desist from implementing the tax proposed and further to agree not to tax the company for the eight year duration of its contract, it would be purporting to fetter Parliament in the future in the collection of taxes. The full expression of the principle may culminate in the imposition of a tax which may override the terms of any arrangement now entered into between the government and players in the industry presumably in the best interests of the country. It may well be that the doctrine of executive necessity was what Minister Davies had in mind when in declining to accept the proposal, he stated:

“I’d prefer not to go into details of the proposal, but partly one would be required...to make commitments for the future which, in terms of tax matters, is not a possibility.” (See “Gleaner” of July 31, 2003).

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