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Our Ref: **AMS/db**

Your Ref:

31<sup>st</sup> May 2018

The Honourable K. Peter Turnquest  
Minister of Finance & Deputy Prime Minister  
Sir Cecil Wallace Whitfield Centre  
West Bay Street  
Nassau, Bahamas

Dear Minister Turnquest:

**Re: Budget Communication and Proposed Gaming House Operators  
(Amendment) Regulations 2018**

We write, on behalf of the Bahamas Gaming Operators Association, to protest the presentation of the expropriatory, discriminatory, excessive and penal revenue measure to increase the tax on our client by 400% from 11% of gross gaming revenue to 50% of gross gaming revenue, in addition to a Stamp Tax of 5% on all deposits, without any meaningful consultation with our client and the industry of gaming operators.

The Bahamas Gaming Operators Association comprises the owners of several Bahamian companies which were incorporated under the Companies Act of the Commonwealth of the Bahamas. The Bahamas Gaming Operators employ 2,800 Bahamians and contribute \$25 Million annually to the Consolidated Fund in taxes and fees.

These Bahamian companies possess gaming house operator licenses, pursuant to the Gaming Act 2014, the Gaming Regulations 2014, and the Gaming House Operators Regulators 2014, to conduct gaming business in the Commonwealth of the Bahamas. The companies are also "financial institutions," pursuant to the provisions of the the

Financial Transaction Reporting Act 2001, The Financial Transaction Reporting (Amendment) Act 2014, and the Financial and Corporate Service Providers Act 2014.

### **EXPROPRIATION**

You are also aware of the fact that the Bahamas Gaming Operators Association and their member companies are beneficially owned by enterprising, resourceful, and imaginative Bahamians, who do not enjoy any concessions or subsidy from the Government.

The principals of the Association listened attentively to your 2018/2019 Budget Communication Presentation and they were deeply disturbed and perplexed by the Government's proposal to increase the taxation of domestic gaming activities through the introduction of a sliding scale of rates applied to taxable revenue as reflected in the table below:

<b>CATEGORY</b>	<b>REVENUE COLLECTED</b>	<b>TAX RATE</b>
1	\$0 TO \$20 million	20%
2	\$20 million and \$1 to \$40 million	25%
3	\$40 million and \$1 to \$60 million	30%
4	\$60 million and \$1 to \$80 million	35%
5	\$80 million and \$1 to \$100 million	40%
6	\$100 million and \$1 and over	50%

Based on your proposed sliding scale, the Bahamas Gaming Operators tax rate on their collected revenue could increase from 11% to up to 50%. If the proposed sliding scale is implemented, then it would result in the Bahamian Government expropriating, or compulsorily acquiring more than 90% of our clients' revenue through various forms of taxation and licensing fees. Moreover, this would represent an anomalous 400% increase in the tax rate over the revenue collected by the Bahamas Gaming Operators. The result of this drastic increase in the tax rate, without industry consultation, would decimate most of the seven gaming operators within a year of the implementation of the Government's proposal. Therefore, the predominant motive appears not to be revenue raising, but rather the penal elimination of smaller operators and the expropriation of the larger gaming operators, under the guise of tax measures.

In addition, the Government proposes to apply a 5% Stamp Tax on deposits made to gaming houses. This tax will attach before consumption or the completion of any gaming transaction and may therefore amount to double taxation on the same funds.

### **DISCRIMINATION**

Our clients curiously observed that the Government is not proposing to increase the tax rate on other similar profitable "financial institutions" beneficially owned by other Bahamians and foreigners. We set out below a table illustrating the 2017 tax assessments of other publicly traded entities, which are similar to members of the

Bahamas Gaming Operators Association, either as financial institutions or providers of recreational products, but none of which will be subjected to your proposed draconian tax increases over their total collected revenue:

Company	Total Revenue	Net Income	taxes	% tax of total revenue
AML Foods Limited	\$156,808,000.00	\$6,856,000.00	\$296,000.00	0%
APD Limited	\$32,551,428	\$11,171,204.00	\$1,449,069.00	4%
Bahamas Waste Limited	\$4,197,997	\$1,141,049.00	\$146,026.00	3%
Colina Holdings Bahamas Limited	\$165,060,994	\$17,564,977.00	\$3,594,186.00	2%
Commonwealth Bank Limited	\$159,101,000	\$50,076,000.00	\$9,306,000.00	6%
Commonwealth Brewery Limited	\$133,093,069	\$24,173,979.00	\$16,092,838.00	12%
FAMGuard Corporation Limited	\$119,454,825	\$6,310,670.00	\$3,032,089.00	3%
Fidelity Bank (Bahamas) Limited	\$61,287,235.00	\$21,053,528.00	\$2,869,982.00	5%
Finance Corporation of the Bahamas	\$48,779,397.00	\$21,953,837.00	\$3,248,533.00	7%
First Carribbean International Bank (Bahamas) Limited	\$180,286,000.00	\$76,759,000.00	\$8,617,000.00	5%
FOCOL Holdings Limited	\$289,615,793	4,923,737.00	\$2,896,128.00	1%
J.S. Johnson and Company Limited	\$23,706,080	5,637,794.00	\$1,307,502.00	6%

Based on the table above, you will see that Commonwealth Brewery which had a total revenue of about One Hundred and Thirty-Three Million Ninety-Three Thousand and Sixty-Nine Dollars (\$133,093,069.00) in 2017 will still be taxed at a rate of 12% on its total revenue. We note that Commonwealth Brewery, like our client, provides

recreational products or activities, yet Commonwealth Brewery will not be subjected to the increase in the tax rate over revenue that will be imposed on gaming house operators.

Indeed, on its website Commonwealth Brewery describes itself as a company that offers buyers and end consumers alike with an impressive product portfolio comprising beers, wines and spirits and with a 150,000 square foot brewery sprawled across about 20 acres at Clifton Pier where Kalik, Heineken, Guinness, Ole Nassau and Ricardo Rums are produced.

Given the similarities between Commonwealth Brewery and Gaming Operators, in the provision of recreational products and experience, it appears to be inequitable for the Government of the Bahamas to impose the proposed sliding scale income taxation on Gaming Operators and exempt Commonwealth Brewery and other recreational businesses from an increase in the tax rate over their total revenue.

We have also observed that Commonwealth Bank, a licensed financial institution, which had a total revenue of One Hundred and Fifty-Nine Million One Hundred and One Thousand Dollars (\$159,101,000.00) in 2017 will continue to be assessed at a tax rate of a mere 6% of total revenue. This, in our view, is further evidence that the Government's proposed revenue generating measures are discriminatory, unfair and irrational. Like industries are being treated in a disparate manner, without any fair and rational justification.

The proposed sliding scale of rates to be applied to taxable revenue of Gaming Operators is an impermissible application of income tax over one industry rather than a national and progressive income tax system treating similar industries and enterprises the same.

It is ironic that casinos in The Bahamas, which are foreign-owned and subsidized by the Bahamian Government, is taxed at a sliding scale where taxable revenue is taxed at \$4.1 million, plus 5% of each \$1 of the taxable revenue in excess of \$20 million. This scale is the opposite to what is being proposed for gaming operators and amounts to more favourable treatment of foreign owned gaming operators in The Bahamas.

The inevitable consequence of the Government's misguided approach in this proposed selective tax increase will be the creation of "black market" gambling houses which will expose our jurisdiction to possible international sanctions.

### **ABSENCE OF CONSULTATION**

Where the Government's policy will have a major disruptive impact on the life and affairs of the Bahamian citizenry, as in the instant case where there will be a 400% increase in the rate of tax from 11% to possibly 50%, there is a legitimate expectation that the Government will consult with the citizens likely to be affected by such policies. The Privy Council held that where there is a legitimate expectation of consultation, "it

must be proper consultation. . . undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken. . .” Save Guana Cay Reef Association Ltd and others v. The Queen and others, (The Bahamas) [2009] UKPC 44 (17 November 2009). Should these proposed “**tax measures**” be enacted, without any meaningful consultation with our client and appropriate modifications made, our client’s legitimate expectation of consultation would have been breached in these circumstances.

In particular, our clients take the view that:

1. The Government’s proposed revenue generating measures amount to a fundamental change in the **gaming and value added tax systems** in the country, without any or any sufficient consultation with the Bahamian people and industry stakeholders.
2. There is no empirical data to show that the Government’s proposed sliding scale taxation for gaming operators and other revenue generating measures are sustainable. In fact, expert opinion in the global gaming industry, such as the expert report of 2016 entitled “**Licensing System for online Gambling: Which Tax-Rate Yields both High Channelization and High Tax Revenue**” by Copenhagen Economics concluded that the optimum online gaming tax rate to generate high tax revenue “**lies within the range of 15 to 20 percent of the gross gambling revenue (GGR).**”
3. The Government has failed to analyze whether the proposed sliding scale and revenue generating measures are equitable, compared to other financial institutions and businesses within The Bahamas offering financial services or recreational products and experience.
4. The proposed sliding scale rates applied to taxable revenue of Gaming Operators would be unconstitutional expropriation, discriminatory, penal, irrational and inequitable.
5. The discriminatory proposed sliding scale rates will have a materially prejudicial effect on the pending Share Offering Fund applications before the Securities Commission for permission to offer ownership shares in gaming houses to the wider Bahamian public.

We refer you to the Privy Council decision of the Bahamas District of Methodist Church in the Caribbean and the Americas and Others v The Hon. Vernon J. Symonette and

others (2000) UKPC 31 where the Privy Council declared that in exceptional circumstances the Bahamian Supreme Court does indeed have jurisdiction to interfere with the legislative process of Parliament before the enactment of a Bill where the intended protection afforded by the Bahamian Constitution cannot be provided by the courts unless they intervene before the Bill's enactment where the consequences of the proposed legislation may be immediate and irreversible and give rise to substantial damage or prejudice.

Clearly, the proposed sliding scale rate on taxable revenue, coupled with the 5% deposit Stamp Tax, are exceptional and would have immediate, irreversible damage, amounting to expropriation without compensation, cause massive unemployment, the closure of the webshops, loss in revenue and other substantial damage and prejudice to Gaming Operators. Based on the aforesaid facts, Gaming Operators have an actionable claim against the Bahamian Government. In such a case, it is our legal opinion that **"parliamentary privilege must yield to the court's duty to give the Constitution the overriding primacy which is its due."**

In order to obviate the need for legal action in this matter, our clients propose that the Government of the Bahamas engage in meaningful consultation with the Gaming Operators before taking any further steps to move forward with the proposed unconstitutional, discriminatory, punitive, irrational and unfair sliding scale tax increase and Stamp Duty deposit revenues measures on the revenue of Gaming Operators.

We are happy to discuss this matter further with you and arrange a meeting to address the concerns of the Gaming Operators.

If you decline our invitation or fail to respond to this letter within the next seven (7) days, then we hereby put you on notice that our clients will be compelled to seek the intervention of the Supreme Court to protect their rights without any further notice to you.

We hope that the concerns of our clients can be resolved without costly, unnecessary and embarrassing litigation.

We await your response.

Yours sincerely,  
**SEARS & CO.**

  
Alfred M. Sears, Q.C.

cc: **Speaker of The House of Assembly, The Hon. D. Halson Moultrie  
Honourable Members of Parliament  
President of The Senate, Sen. The Hon. Katherine Forbes-Smith  
Honourable Senators**