IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

ELM'S INC., dba TOWN & COUNTRY AMUSEMENT Petitioner, v. ESTHER CALVO, Acting Secretary of Finance, Respondent, and L & T GROUP OF COMPANIES, Intervenor.	)	Civil Action No. 98-212D **ORDER GRANTING WRIT OF MANDAMUS**

I. INTRODUCTION

This matter came before the Court on April 22, 1998, at 9:00 p.m. in Courtroom D on Petitioner's petition for writ of mandamus and application for preliminary injunction. Jay H. Sorenson, Esq. appeared on behalf of Petitioner. Alvin A. Horne, Esq. appeared on behalf of Respondent Esther Calvo and Cheryl D. George, Esq. appeared on behalf of Respondent/Intervenor L & T Group of Companies. The Court, having reviewed the memoranda, declarations, and exhibits, having heard and considered the arguments of counsel, and being fully informed of the premises, now renders its written decision.

FOR PUBLICATION

[p. 2] **II. FACTS AND PROCEDURAL BACKGROUND**

On February 23, 1998, Elm's Inc. (hereinafter referred to as "Petitioner") submitted its application to the Department of Finance to acquire 177 available pachinko slot machine licenses. With its application, Petitioner also submitted the required fee of $354,000. Just prior to submitting its application, Petitioner spoke with Ms. Debbie Covington, counsel for the Department of Finance, and indicated to her that it could not submit a completed application as the machines would not be ordered and imported unless they had some assurance that their application was acceptable. Ms. Covington reviewed Petitioner's application and indicated to Petitioner that the application was acceptable despite the fact that the application lacked some requisite information[1]. Based on Ms. Covington's representations, Petitioner immediately ordered 100 pachinko slot machines from a stateside manufacturer at a cost of $215,000.

On March 2, 1998, Respondent Esther Calvo (hereinafter referred to as "Respondent Calvo") sent Petitioner a letter advising Petitioner that the Department of Finance, Division of Revenue and Taxation, had to be in receipt of a completed application along with the applicable fees before it would review Petitioner's application. Along with the letter was a treasury check refunding Petitioner's licensing fees.

On March 16, 1998, Petitioner filed an application for a temporary restraining order and preliminary injunction. On the same day, Petitioner also filed a petition for writ of mandamus requesting that the court issue a writ mandating that Respondent accept, review and approve Petitioner's application.

On March 20, 1998, Respondent L & T Group of Companies (hereinafter referred to as "L & T") moved the court for leave to intervene. The Court granted the motion on March 26, 1998.

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[1] In order to fully complete the application, it is necessary to have the pachinko slot machines physically present in the CNMI. This is evident since the application requires the date that each pachinko slot machine was imported into the CNMI along with proof that all excise taxes have been paid [Pachinko Slot Machine Rules and Regulations § 2400.4(a)(2)]. Moreover, the application must contain a photograph of the machine(s) in operation [Pachinko Slot Machine Rules and Regulations § 2400.4(a)(4)]. Petitioner could not provide this information on its application until the machines were on-island.

[p. 3] **III. ISSUES**

1. Whether the CNMI regulatory scheme for licensing pachinko slot machines is preempted by federal law?

2. Whether Petitioner is required to exhaust its administrative remedies?

IV. ANALYSIS

A. Transportation of Gambling Devices into the CNMI

In its supplemental memorandum, Petitioner argues that the regulatory requirements in the licensing application which effectively require the machines to be in the Commonwealth prior to licensing are unenforceable as preempted by federal law. The Court disagrees.

In the early 1950's, Congress enacted several statutes whose purpose was to support the policy of those states that outlawed slot machines and similar gambling devices by prohibiting use of the channels of interstate commerce for the shipment of such machines or devices into the states.[2] The federal statutes included a provision for exempting from its operation the transportation of gambling devices into states where such devices are legal.[3] The CNMI exempted itself from this federal legislation when in enacted 6 CMC § 3153.[4] As such, it is legal to import pachinko slot machines into the CNMI.

Preemption occurs when a state regulation interferes unduly with the accomplishment of a congressional objective. Associated Builders and Contractors of Massachusetts/Rhode Island, Inc. v. **[p. 4]** Massachusetts Water Resources Authority, 935 F.2d 345 (1st Cir. 1991). However, the

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[2] Slot Machine Act of 1951, 15 USC §§ 1171, et seq. The 1951 Act was subsequently amended by the Gambling Devices Act of 1962 which, among other things, expanded the definition of gambling devices.

[3] 15 USC § 1172(a)["Provided that this section shall not apply to transportation of any gambling device to a place in any State which has enacted a law providing for the exemption of such State from the provisions of this section"].

15 USC § 1172(a) also provides that:

> [I]t shall not be unlawful to transport in interstate or foreign commerce any gambling device into any State in which the transported gambling device is specifically enumerated as lawful in a statute of that State.

6 CMC § 3156(a)(5) specifies as lawful the operation of pachinko slot machines.

[4] 6 CMC § 3153 provides as follows:

> Pursuant to the authority vested by 15 U.S.C. § 1172, the Commonwealth of the Northern Mariana Islands is exempted from the provisions of 15 U.S.C. § 1172.

Moreover, 4 CMC § 1503(a)(5) provides that pachinko slot machines are lawful in the CNMI.

CNMI exempted itself from the confines of the federal gambling devices act and enumerated by statute the legality of the operation of pachinko slot machines. Merely because the CNMI Legislature sought to impose additional licensing requirements once the machines arrived in the CNMI does not unduly interfere with the congressional objective of regulating the transportation of gambling machines or by allowing states or territories to exempt themselves from the federal scheme. As such, this Court finds that the regulatory licensing requirements proffered by the Department of Finance are not preempted by federal law.

B. Exhaustion Doctrine

Respondent Calvo contends that Petitioner failed to exhaust its administrative remedies prior to filing the instant petition. As such, the writ must be denied. The Court disagrees.

1. Irreparable harm

Courts of the United States have long acknowledged the general rule that parties exhaust prescribed administrative remedies before seeking relief from the courts. *See, e.g.*, Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51, 58 S.Ct. 459, 463-464 (1938). Exhaustion is required because it serves the twin proposes of protecting administrative agency authority and promoting judicial efficiency. McCarthy v. Madigan, 503 U.S. 140, 145, 112 S.Ct. 1081, 1086, 117 L.Ed.2d 291 (1992). Notwithstanding the purposes of exhaustion, courts are vested with a "virtually unflagging obligation" to exercise the jurisdiction given them. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817-818, 96 S.Ct. 1236, 1246-1247, 47 L.Ed.2d 483 (1976). Accordingly, courts have declined to require exhaustion in some circumstances even where administrative and judicial interests would counsel otherwise. McCarthy, *supra,* 503 U.S. at 146. In determining whether exhaustion is required, courts must balance the interest of the individual in retaining prompt access to a judicial forum against countervailing institutional interests favoring exhaustion. Id. Administrative remedies need not be pursued if the litigant's interests in immediate judicial review outweigh the government's interests in the efficiency or administrative autonomy that the exhaustion doctrine is designed to further. West v. Bergland, 611 F.2d 710, 715 (8th Cir.1979), *cert. denied,* 449 U.S. 821, 101 S.Ct. 79, 66 L.Ed.2d 23 (1980). One such set of circumstances in which the interests of the individual weigh heavily against **[p. 5]** requiring

administrative exhaustion is where the particular plaintiff may suffer irreparable harm if unable to secure immediate judicial consideration of his claim. Bowen v. City of New York, 476 U.S. 467, 483, 106 S.Ct. 2022, 2031, 90 L.Ed. 2d 462 (1986).

Respondent Calvo asserts in her answer to Petitioner's petition for writ of mandate that Petitioner failed to exhaust its administrative remedies as provided in: (1) the Rules and Regulations for the operation of pachinko slot machines as promulgated by the Department of Finance[5]; and (2), pursuant to 1 CMC § 9106 which allows for the filing of an administrative petition to change or amend an agency rule. However, as Petitioner correctly points out, neither the Rules and Regulations nor the statute are clear regarding the appropriate administrative procedure to handle disputes as involved in this matter. For example, Section 2400.25 of the Rules and Regulations provides a mechanism for an applicant to appeal the denial of a license application if the denial was based on a determination by the Secretary of Finance that the applicant "is not eligible to receive a license". This Regulation is inapplicable to this case as there has been no evidence that Petitioner was ineligible to receive the licenses. On the contrary, Petitioner complied to the extent it could on its application and included over $300,000 in licensing fees. There is also a catch-all provision in the Rules and Regulations which requires that all hearings be conducted in accordance with the CNMI Administrative Procedure Act.[6] However, as with the other Regulation cited above, this provision is of no help here.

The government's main objective in legalizing and licensing pachinko slot machines is to increase revenue in the CNMI[7]. In alignment with this objective is the government's concern that a business submitting an application and licensing fees be financially worthy of carrying on pachinko business once the licenses are issued. Petitioner has provided the requisite indicia of worthiness by not only submitting **[p. 6]** substantial licensing fees here, but successfully licensing and operating other pachinko slot machines on Saipan.

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[5] See Rules and Regulations for the Operation of Pachinko Slot Machines in the Commonwealth of the Northern Mariana Islands, §§ 2400.1, et seq., Commonwealth Register, Volume 17, No. 7, July 15, 1995.

[6] Interestingly, this Regulation is also numbered as § 2400.25.

[7] See PL 9-29, § 2.

The Court also finds as unreasonable the requirement that the machines be on-island prior to licensing. To go through the expense of bringing the machines on-island without any assurance that licenses will be available is an unreasonable business risk. Respondent Calvo contends that if reasonableness is an issue, then Petitioner should have exhausted its administrative remedies by seeking a declaratory ruling pursuant to 1 CMC § 9106. However, in light of the important govemmental objectives in producing revenue and the harm Petitioner would suffer if denied the licenses, the Court finds that prompt judicial review outweighs any questionable or tenuous exhaustion requirement.

2. Public Laws 9-29 and 10-89

In February 1995, Public Law 9-29 was signed into law as The Pachinko Slot Machine Act.[8] Subsequent to the passage of this Act, Petitioner applied for and was granted licenses for pachinko slot machines in accordance with the terms of Public Law 9-29 and the rules and regulations promulgated to implement the Act.[9] After the implementation of Public Law 9-29 and after licensing pachinko slot machines in accordance with the Rules and Regulations adopted and promulgated by Respondent Calvo, it became apparent that the machines authorized by this statute and the regulations could not be operated at a profit. As such, many of the licenses lapsed and the projected revenues from the licensing of the machines fell below expectations. In February 1998, Public Law 10-89 was enacted to change the technical definition of "pachinko slot machine" and to in effect reduce the pay out specifications and make the operation of the machines more profitable and consequently the ownership of the licenses more desirable.[10] The legislation had the desired effect. Petitioner immediately sought to obtain a large **[p. 7]** portion of the available machine licenses. The new legislation, however, failed to specify any procedure for re-issuing the available licenses. Based on the existing regulations, Respondent Calvo treated the matter as a renewal of licenses for

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[8] PL 9-29, "The Pachinko Slot Machine Act", February 16, 1995. Under the Act, up to 500 pachinko slot machines were authorized to be licensed in the Third Senatorial District, with fifty percent (50%) of the revenue therefrom to benefit the Northern Marianas Retirement Fund and fifty percent (50%) to benefit the School Lunch Program Trust Fund.

[9] Commonwealth Register, Volume 17, No.7, July 15, 1995, pgs. 13603 et seq.

[10] PL 10-89, "An Act to repeal Section 2400.3(p) and (q) of the 'Rules and Regulations for the Operation of Pachinko Slot Machines in the Commonwealth of the Northern Mariana Islands:' and for other purposes." February 20 ,1998.

existing machines. Therefore, the regulations require the machines to be in operation on Saipan and the applicant to provide pictures of the machines in their locations as well as their serial numbers. But what the legislation did, in effect, was authorize the use of new machines which are more like regular slot machines.[11] Therefore, it is inappropriate to utilize the renewal procedure for machines which are not on the island. Perhaps Ms. Covington realized this when she told the Petitioner that its license application would be acceptable without all the information normally required. Intervenor intends to get licenses issued to machines currently in operation and then order the new machines which will replace the existing machines. At which time, Respondent Calvo will receive new pictures and serial numbers to replace those of the existing machines.

To interpret the statute in this fashion would mean that the Legislature intended to give those persons or entities with a large number of currently existing licenses a priority or advantage over new applicants or applicants with a smaller number of licenses. There appears to be no language or legislative intent in the statute to suggest such a discriminatory scheme.

[p. 8] **V. CONCLUSION**

For all the reasons stated above, Petitioner's writ of mandate is **GRANTED**. The Secretary of the Department of Finance is ordered to accept Petitioner's application and licensing fees for the 177 available pachinko slot machine licenses. The requirements in Petitioner's application that the pachinko slot machines be on-island prior to licensing , i.e. proof of excise tax payment and photos of the machines in operation, shall not apply.

So ORDERED this 23 day of July, 1998.

/s/ Timothy H. Bellas
TIMOTHY H. BELLAS, Associate Judge

[11] "The term 'pachinko' slot machine' as used in this Act refers to the slot machine whose outer structure has three reels with symbols to be matched by pressing three buttons to stop the rotation of the spinning reels. It is a machine that requires a degree of skill in order for the winner to win a prize." Public Law 9-29, Section 3.