

Further evidence from Lord Lipsey

The Chair kindly agreed that I might offer further evidence if there were any points from the Committee's questions which remained unanswered. There is I think only one: taxation.

I said "there can be no doubt that as a matter of legal taxonomy, the levy is a form of taxation." I added: The government's authoritative Guide for Policy Officials (2016) for officials says that an LRO cannot "impose, abolish or vary taxation." (p6). It says that "a proposal may not impose a charge on the public revenues or contain provisions requiring payment to be made...to any public authority (Para 16 page 22)". The Minister however said: "During the passage of the Legislative and Regulatory Reform Act 2006, taxation was defined as the compulsory levying of money for state revenue. The horse-racing betting levy does not amount to state revenue; the levy funds do not enter the Consolidated Fund so we believe that the levy should not be classed as a tax for this purpose...Lord McKenzie of Luton defined the term "taxation" as the compulsory levying of money for state revenue. We do not believe that matches what is being done in this case."

The full extract from Lord McKenzie's speech of 19th July 2006 is below together with a link to the relevant webpage.

I find the Minister's contention surprising. However, as that is what she said, it seemed right to take further advice from Dan Tench of the law firm, CMS, who has been assisting me. What follows is based on Mr Tench's analysis.

Either (a) the levy does as a matter of legal construction constitute "taxation" for the purposes of section 5, in which case the proposed LRO is simply *ultra vires*; or in any event (b) the Committees should nonetheless consider the levy to be tantamount to taxation and so should consider the LRO to be inappropriate. The reasoning in respect of both contentions is the same.

It is extremely doubtful that any proper regard should be had by either the courts or Parliament to the words of Lord McKenzie. The definition he advanced for "taxation" was not included within the Act as passed and this is unlikely to be held to be a situation under the rule in *Pepper v Hart* where a court would allow reference to a Parliamentary speech.

Nonetheless, the definition offered by Lord McKenzie for the word "taxation" supports the view that it includes the levy. Plainly, the essential feature of taxation is the "*compulsory levying of money*", that is that it is mandatory, there is a collection authority and that a putative payer will face a penalty if he or she does not pay. These have always been the essential features of taxation which have caused Parliament to consider that legislation concerning it merited special controls. All of these apply to the levy.

As regards whether it is applied "*for state revenue*", it is true that the levy is somewhat unusual in that the amount raised is hypothecated for specific purposes. But if the Minister is contending that the money raised from the levy is not "*for state revenue*", that is absurd. The purposes for which the levy can be applied as set out in 1963 Levy Act and retained in the proposed LRO are (a) the improvement of breeds of horses; (b) the advancement or encouragement of veterinary science or veterinary education; and (c) the improvement of horse racing. These are clearly state purposes and thus the expenditure

must be “state revenue”. The mere fact that they are prescribed by statute would almost certainly be sufficient by itself to make them for state purposes but the purposes here are plainly for the public benefit generally.

Moreover, if for some reason the levy were not to be considered to be “for state revenue”, but for some other purpose (presumably a private purpose), given that it is undoubtedly compulsorily raised, there is no conceivable principled basis to consider that any reform of it should be subject to a lesser degree of scrutiny by Parliament. Indeed, obviously the reverse is true.

What Lord McKenzie goes on to say in the extract below is informative. He says that “taxation” is not “a fee or charge to recover the costs of supply in a specific service” and that “Fines are not taxation”. The levy is neither a fee nor a fine. On his categorisation, it evidently falls to be a tax. He also says that “the meaning of taxation is not restricted to any particular taxes and is not narrowly defined”.

For these reasons, the words of Lord McKenzie are strongly supportive of the view that the levy should be considered to be “taxation” for the purposes of section 5.

In any event, if there were any remaining doubt, the levy has been judicially described as a “tax”. In *R (on app Sporting Options) v Levy Board* [2003] EWHC 1943, Mr Justice Hooper stated as follows (emphasis added) in respect of the levy: “In my view, fairness required consultation with those liable to be adversely affected by the imposition of a tax by a statutory body such as the Levy Board.”

That the Minister, no doubt on advice from her Department has apparently proceeded on the erroneous basis that the levy does not constitute a tax simply reinforces my view that her proposals should be subject to the full scrutiny afforded by primary legislation.

23 November 2018

Extract from speech of “Lord McKenzie of Luton 19/7/2006

I hope that I can help on the points that have been raised. I understand the thrust of the amendment, which is probing. At the moment, the clause prevents an order from imposing or increasing taxation. It is not the intention that orders should be used to remove taxes or lower tax rates. Under the amendment, orders could not remove or alter taxation.

I note this amendment and assure noble Lords that the Government agree that orders under Part I should not be able to remove taxes or lower tax rates, which is why we are keen to have this discussion today. We will consider carefully options for making it explicit in the Bill that orders cannot remove taxes or reduce tax rates. However, it is important to get the detail right. In particular, it is important that we do not inadvertently rule out being able to deliver a merger of regulators which would reduce or remove burdens on the regulated by reducing the multiple inspections of regulated firms, for example. If we are transferring regulatory functions from one regulator to another, it will often be necessary also to make provision relating to the transfer of assets and liabilities. It will also often be necessary to make associated provision relating to the tax treatment of those transfers—and only those transfers. Noble Lords may wish to refer to the example of Schedule 10 to the Railways Act 2005.

As I say, it is not the intention that orders should remove taxes or lower tax rates, but it is important that any amendment to Clause 6 does not rule out the possibility of such mergers. When an order under Clause 1 is considered appropriate by Parliament and its committees to deliver such a merger for the purpose of removing or reducing burdens, it is important that the order can also make the necessary provision varying the incidence of taxation in that particular case.

On the basis of that explanation, I hope that the noble Lord will be satisfied. He asked, too, about the definition of taxation. For these purposes, taxation is the compulsory levying of money for state revenue, either nationally or locally, when the levy is not a fee or charge to recover the costs of supply in a specific service to which the fee or charge relates. Fines are not taxation; they are penalties for unlawful activities. It should be noted that there are precedents for using the term “taxation” as it is used in this Bill.

For the purposes of Clause 6 it is important that, to prevent the imposition or increase of any tax, the meaning of taxation is not restricted to any particular taxes and is not narrowly defined. I hope that the use of that precedent in that way will reassure noble Lords. With the thrust of what we are trying to achieve, we shall need to bring something back to meet the narrow circumstances that I outlined, with the need to have some tax provisions, possibly associated with mergers of regulators.”

<https://hansard.parliament.uk/Lords/2006-07-19/debates/06071986000002/LegislativeAndRegulatoryReformBi>