

VOLUME 32

Opinion No. 7

**CRIMES AND CRIMINAL PROCEDURE; Gambling, Bonanza machine—
CRIMES AND CRIMINAL PROCEDURE; Gambling, Slot machines,
Bonanza machines—GAMBLING; "Bonanza machines" are
lotteries—Section 94-2401 and 94-3001, R.C.M. 1947.**

HELD: The "Bonanza machine" described herein is a gambling device under section 94-2401, R.C.M. 1947, and a lottery as that term is defined by Section 94-3001, R.C.M. 1947.

July 12, 1967

Mr. Byron Robb
Park County Attorney
Livingston, Montana 59047

Dear Mr. Robb:

You ask if the "Bonanza machine", described below, is a gambling device or lottery.

The "Bonanza machine" vends coupons of varying values, depending on the legend appearing on the face of the coupon. Some of the coupons entitle the holder to a discount at local businesses, some are redeemable in a specified amount of cash or merchandise at the place of business where the machine is located, some are good for discounts on merchandise listed in a catalog in the possession of the location operator.

The top of the machine contains a glass window which clearly displays the coupon available. A player obtains this coupon by inserting a 25 cent coin into the machine. The coupon is then delivered to the player and the next coupon available for purchase then becomes visible to the player. Thus, the player always sees the coupon he is purchasing and knows its value before inserting his quarter. But the player's coin not only gives him the coupon visible but also allows him to see the next coupon.

Our Supreme Court has consistently defined illegal lotteries as containing three essential elements: the offering of a prize, the awarding of the prize by chance, and the giving of a consideration for an opportunity to win the prize. See, e.g., **State v. Cox**, 136 Mont. 507, 349 P. 2d 104 (1960); **State v. Hahn**, 105 Mont. 270, 72 P. 2d 459 (1937); section 94-3001, R.C.M. 1947.

It is obvious that both the elements of prize and consideration are present in the "Bonanza machine". But its proponents contend that it escapes classification as a lottery or gambling device because it lacks the element of chance since a player knows exactly what he will receive for his coin before he deposits it. Were this scheme a novel

one, this analysis might be persuasive. But, like most artifices designed to evade anti-gambling laws, this device, newly baptized as the "Bonanza machine" and promoted by its sellers as "America's newest concept in vending machines", is merely an old scheme with a new name.

In **Marvin v. Sloan**, 77 Mont. 174, 250 Pac. 443 (1926), our Supreme Court passed upon the legality of a machine remarkably similar in its operation to the "Bonanza machine". The court described the machine at 77 Mont. 177-78, as follows:

. . . the machine in question is an automatic vending device used for the sale of packages of a certain kind of mint. Each package is of the retail value of five cents. In its general outlines the machine resembles somewhat an ordinary cash register. At the top of the machine is a place for the insertion of a coin of the size of a nickel; at the right side is a lever, and in front is a container with a glass front for packages of mint, with a small drawer at the bottom from which the packages may be removed. In front is this inscription: "For 5¢ you receive a package of mints and _____ trade checks." In the place indicated by the blank space is a glass covered opening in which appears either the word "no" or a numeral which may be any even number from two to twenty. The machine is operated by inserting a nickel and pulling the lever which causes a package of mint to fall into the drawer from which it may be removed. If, when the nickel is inserted, the word "no" appears at the window the purchaser receives nothing but the mint; if a numeral appears at the window there falls into the drawer in addition to the mint an equivalent number of trade checks; each check is good for purchase over the counter of a five-cent package of mint or other merchandise of the value of five cents. At the conclusion, and as a result of each operation, there appears at the window either the word "no" or a numeral showing the number of checks which the machine will deliver when it is again operated. It may show the same result as the preceding operation, or a different result. The purchaser always receives a package of mint whenever he places a nickel in the machine and operates it; he may or may not receive trade checks in addition thereto; but he receives trade checks only when the window indicates the fact. In operating the machine the purchaser knows before placing his nickel therein exactly what he will receive therefor. The completion of the operation indicates what will fall to him who deposits the next nickel. The machine may show that the depositor of the next nickel will receive a package of mint and twenty trade checks. Each operation is separate and distinct so far as the mechanism of the machine is concerned. A trade check may be used to operate the machine, but will not produce mint; it will produce only the number of trade checks the window indicates before the one inserted is deposited.

After an extensive review of the authorities, the court held that the machine was a gambling device within the meaning of section 11159, Revised Codes of 1921 [now section 94-2401, R.C.M. 1947]. The court quoted with approval the ruling of the Indiana supreme court in **Ferguson v. State**, 178 Ind. 568, 99 N.E. 806, where that court stated:

In the present case, the fact that the machine would indicate the reward before it was played makes no difference. The inducement for each play was the chance that by that play the machine would be set to indicate that it would pay checks on the following play. The thing that attracted the player was the chance that ultimately he would receive something for nothing. The machine appealed to the player's propensity to gamble and that is the vice at which section 2474 is directed. The inventor of the machine has endeavored "to adhere to the letter of the law while violating its spirit," and, as always must be the result, has failed.

The ruling of the Montana Supreme Court in **Marvin v. Sloan**, is in accord with the decisions of most courts which have considered this question. See 135 A.L.R. 144-146, 81 A.L.R. 177-180.

The Internal Revenue Service has ruled that the "Bonanza machine" is a coin-operated gaming device within the meaning of 26 U.S.C.A., §4462, and persons maintaining such machines are liable for the \$250 federal tax imposed on such devices. Rev. Rul. 67-124, 26 CFR 45-4462-1. A copy of this ruling is attached for your information.

It is therefore my opinion that the "Bonanza machine" described herein is a gambling device under section 92-2401, R.C.M. 1947, and a lottery as that term is defined by section 94-3001, R.C.M. 1947.

Very truly yours,

FORREST H. ANDERSON
Attorney General

FHA:DAG
Attachment

Rev. Rul. 67-124

26 CFR 45.4462-1: Definition of coin-operated gaming device.

A machine is operated by insertion of a coin and entitles a player not only to obtain the top coupon, which is visible to the player, but also to see the next coupon. The coupons entitle the holder to cash merchandise, or discounts on merchandise depending upon the legend appearing on each coupon. Held, the machine is a coin-operated gaming device within the meaning of section 4462(a) (1) of the Internal Revenue Code of 1954.

Advice has been requested whether the coin-operated machine described below is considered to be a gaming device for purposes of

the imposition of the occupational tax on coin-operated gaming devices under section 4461 of the Internal Revenue Code of 1954.

A person maintains a so-called "advertiser bonanza" machine at his place of business for use by his customers.

The machine is initially stocked with a series of coupons (1,000 in number) which are placed in the machine by the location operator, or the owner of the machine. Each coupon has an element of value, such value depending upon the legend appearing thereon. Some coupons entitle the holder to a 20 percent discount on merchandise listed in a catalog in the possession of the location operator. Other coupons are good for discounts at specified local business establishments. Some coupons state that the holder is entitled to a specified amount of cash, or merchandise, at the place of business where the machine is located.

The machine is operated by the player inserting a 25-cent coin into the machine. The top coupon (which is available to the player upon the insertion of the coin) is always visible to the player through a window on the front of the machine. Thus, the player knows the value of the coupon available to him when he inserts his coin. Upon removing this coupon from the machine, the next coupon becomes visible to the player.

Section 4461 (a) of the Code imposes a special tax of \$250 a year to be paid by every person who maintains for use or permits the use of, on any place or premises occupied by him, a coin-operated gaming device as defined in section 4462 (a) (1) of the Code.

As defined in paragraph (1) of section 4462 (a) of the Code, a "coin-operated gaming device" includes a so-called "slot" machine which operates by means of the insertion of a coin, token, or similar object and which, by application of the element of chance, may deliver, or entitle the person playing or operating the machine to receive, cash, premiums, merchandise, or tokens.

Section 4462 (b) of the Code provides that the term "coin-operated gaming device" does not include a bona fide vending or amusement machine in which gaming features are not incorporated.

In the instant case, a gaming feature is present in the operation of the so-called "advertiser bonanza." By inserting a 25-cent coin in the machine, the player puts into motion the process by which he will see the next coupon which is not visible to him at the time of his play. He may repeat this procedure for subsequent coupons. In so operating this machine the player may be entitled, by application of the element of chance, to receive a cash award, trade in cash, or a discount on merchandise. Thus, it is held the "advertiser bonanza" is a coin-operated gaming device within the meaning of section 4462 (a) (1) of the Code. The tax is to be paid by every person who maintains for

use or permits the use of such a gaming device on any place or premises occupied by him.

However, with respect to tax years ending on or before June 30, 1967, this Revenue Ruling will not be applied, under the authority granted by section 7805 (b) of the Code, to a machine which was being maintained for use before May 1, 1967. Any such machine which is first maintained for use on or after that date will be subject to tax from the first day of the month during which it was first maintained for use through June 30, 1967, at the rate of \$250 a year.