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PINBALL MACHINE WHICH CONTAINS THE ELEMENTS OF PRIZE AND CHANCE, BUT NOT PRIZE, IS NOT A GAMBLING DEVICE—§§4461 & 4462 OF TITLE 26, UNITED STATES CODE—CHAPTER 2915, R.C.

SYLLABUS:

The display of a pinball machine which contains the elements of price and chance in its operation, but not prize, so that it is not a gambling device under Chapter 2915., Revised Code, plus the fact that the exhibitor has paid a federal tax on such machine pursuant to Sections 4461 and 4462 of Title 26, United States Code, does not constitute a violation of any of the provisions of Chapter 2915., Revised Code, containing the state gambling laws.

Columbus, Ohio, March 30, 1960

Hon. Bernard T. McCann, Prosecuting Attorney
Jefferson County, Steubenville, Ohio

Dear Sir:

I have before me your request for my opinion which reads as follows:

> "I am familiar with the decision of the Supreme Court in the case of Westerhaus Co., Inc. vs. City of Cincinnati, 165 Ohio St. 327, and also your opinion number 813 dated September 9, 1959 which I believe answers their inquiry. However, I would appreciate your opinion as to whether the display of a pinball machine which contains the elements of price and chance in its operation, but no prize, so that it is not a 'gambling device' per se, plus the fact that the exhibitor has purchased a $250.00 Federal Stamp Tax, is sufficient evidence for a violation under any sections in Chapter 2915 of the Revised Code."

You refer to my Opinion No. 813, issued September 9, 1959. In that opinion, the third paragraph of the syllabus reads as follows:

> "3. A pinball machine with provisions for multiple coin insertion for increasing the odds, but with no free games, delivery of coins, tokens or similar thing of value for attaining a certain score, while containing the elements of price and chance in its operation, does not contain the element of prize and so is not a 'gambling device' within the purview of Sections 2915.15, 2915.16, 2915.17, and 2915.18, Revised Code."

In *Westerhaus Co., Inc., Appellant, vs. City of Cincinnati, et al., Appellees,* 165 Ohio St., 327, the court held in paragraphs 5, 6, 7, and 12 of the syllabus:

> "5. In general, the elements of gambling are payment of a *price* for a *chance* to gain a *prize.*
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> "6. Where the operator of a pinball machine puts a nickel into the machine to operate it, he thereby pays the *price* which is necessary in order to have the operation of such a machine constitute gambling.
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> "7. The right, to replay a nickel pinball machine, if a sufficient score is attained, by merely pushing a button and without using another nickel, may represent the *prize* which is necessary in order to have the operation of such a machine constitute gambling.
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> "12. Where it is necessary to put a nickel into a pinball machine in order to operate it, and where the operation of such machine may enable the operator to replay the machine by merely pushing a button and without a further payment for such replay if the operator obtains a sufficient score, and where the operation of such machine will not certainly result in attaining such sufficient score, such operation constitutes gambling and such machine is, within the meaning of Section 13066, General Code (now Section 2915.15, Revised Code), a 'gambling machine or device' per se, notwithstanding that the operation of such machine to attain such sufficient score is predominantly dependent on the skill of the operator."

The *Westerhaus* case, above, was concerned with a pinball machine which contained the three elements of gambling as set forth in syllabus 5 above; that is, "price," "chance," and "prize." It was, therefore, a gambling device *per se,* and the possession of such machines was in violation of Chapter 2915., Revised Code. Your question, however, concerns a machine which is not a gambling device *per se.*

The $250.00 federal stamp tax to which you refer is an excise tax levied by Sections 4461 and 4462 of Title 26, United States Code, which read, insofar as pertinent:

> SECTION 4461:
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> "Sec. 4461. (a) In General.—There shall be imposed a special tax 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 amusement or gaming device at the following rates:
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> "(1) $10 a year, in the case of a device defined in paragraph (1) of section 4462 (a);

"(2) $250 a year, in the case of a device defined in paragraph (2) of section 4462 (a); and

"(3) $10 or $250 a year, as the case may be, for each additional device so maintained or the use of which is so permitted. If one such device is replaced by another, such other device shal lnot be considered an additional device."

SECTION 4462:

"Sec. 4462. (a) In General.—For purpose of this subchapter, the term 'coin-operated amusement or gaming device' means—

"(1) any machine which is—

"(A) a music machine operated by means of the insertion of a coin, token or similar object,

"(B) a vending machine operated by means of the insertion of a one cent coin, which, when it dispenses a prize, never dispenses a prize of a retail value of, or entitles a person to receive a prize of a retail value of, more than 5 cents, and if the only prize dispensed is merchandise and not cash or tokens,

"(C) an amusement machine operated by means of the insertion of a coin, token, or similar object, but not including any device defined in paragraph (2) of this subsection, or

"(D) a machine which is similar to machines described in subparagraph (A), (B), or (C) and is operated without the insertion of a coin, token, or similar object; and

"(2) any machine which is—

"(A) 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 token, or

"(B) a machine which is similar to machines described in subparagraph (A) and is operated without the insertion of a coin, token, or similar object."

I note that the $250.00 tax is paid in the case of a device defined in paragraph (2) of section 4462 (a) which paragraph deals with a machine which may provide a prize. I further note that your request deals specifically with a machine which does not contain the element of prize, thus raising the question of whether the federal tax should be $10.00 instead of $250.00. This question, however, is a matter to be settled between the federal government and the owner of the machine, the instant question

being whether the display of the machine plus the payment of the tax would constitute a violation of Chapter 2915., Revised Code, containing the state gambling laws.

The special tax levied by section 4461 of Title 26, United States Code, is a *tax* on the use of a "coin-operated amusement or gaming device" and the mere fact that a person paid such a tax would not appear to be evidence of gambling to constitute a violation of any of the provisions of Chapter 2915., Revised Code. In the case of *State v. Curry,* 92 Ohio App., 1, the court did hold that the making of a *federal gambling tax return* may be admissible in evidence under certain circumstances, the third paragraph of the headnotes reading:

> "3. A 'Special Tax Return and Application for Registry-Wagering' made to the federal government, may be admissible in evidence, as bearing upon the intent of one charged with being a common gambler, upon the theory that a subsequently-intended course of conduct, showing a then existing state of mind, may be shown, from which the inference may be drawn of a previous intention to pursue a similar course of conduct, when coupled with proof of prior conduct tending to prove the offense charged."

In the *State v. Curry case, supra,* however, the accused was charged as a common gambler under Section 2915.14, Revised Code, reading in part:

> "No person shall engage in gambling for a livelihood, or be without a fixed residence and in the habit or practice of gambling.
> "* * * * * * * * *"

The evidence in the case showed that the accused was convicted 22 times for possession of number slips; that he had admitted to a police officer that he was engaged in the "numbers business," and that his income tax returns showed profits from this business. The court held that the fact that the accused had filed an application for *registry for wagering and a special tax return* was not alone sufficient to prove him a common gambler, but that such fact was admissible in evidence as bearing upon the question of the intent of the accused.

The instant question, of course, differs considerably from *State v. Curry, supra.* Where in that case the accused made a federal gambling tax return and the evidence showed many instances of gambling violations, the present case concerns the payment of a federal tax on a machine

which is not a gambling device under Chapter 2915., Revised Code; and the display of which violates no law of this state. Moreover, as noted, even in the Curry case, *supra,* which dealt with a gambling charge, and in which a *federal gambling tax return* was made by the accused, the court held that making such return was not alone sufficient to prove the accused a common gambler. Further, the payment of the federal tax is certainly not an offense under the laws of this state and could not be construed to make a gambling device out of a machine which is not a gambling device under the state gambling laws. I conclude, therefore, that in the instant case there is no illegal act committed either by the display of the machine in question or the payment of the federal tax on said machine, or both.

In reaching my conclusion in this matter, I might again state what I believe is the state law pertaining to a pinball machine which contains the elements of *price, chance* and *prize.* In my Opinion No. 813, issued on September 9, 1959. I stated in this regard:

> "Regarding the first machine, it would appear that if such machine provides free plays and is operated by a player after a coin insert, it has the essential elements of a 'gambling device' —*price, chance,* and *prize*—within the purview of Section 2915.15, Revised Code. It is also possible that such a machine is a gambling device within the provisions of division (B) of Section 2915.16, Revised Code, set forth earlier in this opinion, and thus within the prohibitions of Sections 2915.17 and 2915.18, *supra.* Since such machines are definitely covered by Section 2915.15, *supra,* however, I see no necessity for exploring this aspect in answering your question."

Thus, if a machine contained the elements of *price, chance,* and *prize* it would be a gambling device *per se* under Ohio law whether or not a federal tax was paid on the machine, and there would be no necessity to refer to the payment of such a tax even if it were admissible in evidence. The machine to which you refer, however, does not fall within this category.

Answering your specific question, it is my opinion and you are advised that the display of a pinball machine which contains the elements of price and chance in its operation, but not prize, so that it is not a gambling device under Chapter 2915., Revised Code, plus the fact that the exhibitor has paid a federal tax on such machine pursuant to Sections 4461 and 4462 of Title 26, United States Code, does not constitute a

violation of any of the provisions of Chapter 2915., Revised Code, containing the state gambling laws.

Respectfully,
Attorney General
MARK MCELROY