

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 89-18

Date issued: December 5, 1989

Requested by: Richard J. Riha  
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- QUESTION PRESENTED -

Whether a "penny fall" device is "coin-operated" subject to the regulatory provisions of either N. D. C. C. chs. 12.1-28 or 53-04.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that a "penny fall" device is "coin-operated" subject to the regulatory provisions of either N. D. C. C. chs. 12.1-28 or 53-04.

- ANALYSIS -

A penny fall is a device where a coin, typically a quarter or a token, is inserted in a "shooter." The "shooter" is normally a small chute which is movable and may be used to direct the coin or token to an area on a playing surface which contains other coins or tokens. The player of the device may stop and start a "pusher" behind the coins or tokens. As the "pusher" exerts pressure on the coins or tokens, the coins or tokens may move forward toward the player, accumulate on an area of the play surface, fall into side chutes if present on the device, or fall into a hopper for collection by the player.

Typically, the penny fall is in continuous operation and no coin or token is used to start the electronic operation of the device. However, the coins or tokens are used as playing pieces and/or prizes and the device may not be played unless coins or tokens are inserted into the device.

Although the term "coin-operated" is not specifically defined in either the gambling (N. D. C. C. ch. 12.1-28) or amusement device (N. D. C. C. ch. 53-04) provisions of state law, N. D. C. C. ' 12.1-28-02(5)(a) does define a "coin-operated gaming device." That section provides:

5. a. As used in subsection 4 but with the exceptions provided by subdivision b of this subsection, the term "coin-operated gaming device" means any machine which is:
  - (1) 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; or

- (2) A machine which is similar to machines described in paragraph 1 and is operated without the insertion of a coin, token, or similar object.

A federal tax on coin-operated gaming devices was authorized by 26 U.S.C. ' 4461 (1976), and was in effect until June 30, 1980. That section defined the term "coin-operated gaming device" in a manner virtually identical to the definition found in N. D. C. C. ' 12.1-28-02(5)(a). 26 U.S.C. ' 4462(a) (1976) provided, in part:

(a) In general.--For purposes of this subchapter, the term "coin-operated gaming device" means any machine which is--

- (1) 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, or

- (2) a machine which is similar to machines described in paragraph (1) and is operated without the insertion of a coin, token, or similar object.

In United States v. 28 "Mighty Payloader" Coin-Operated Gaming Devices, 623 F.2d 510 (8th Cir. 1980), the definition of "coin-operated gaming device" as found in 26 U.S.C. ' 4462 (1976) was applied to penny fall devices. The court rejected claims by the owners of devices known as "Mighty Payloader," "Crompton Penny Falls," and "Sweepstakes" that the devices were not "coin-operated."

The "Mighty Payloader" was described as a device which possessed a blade which moved across a playing surface containing tokens, prizes, and coins. When the player inserted a coin through a coin slot at the front of the machine, the coin may land on the playing surface, be pushed by the moving blade, and then push one of the tokens, coins, or prizes on the playing surface into the dispensing bin.

In affirming the lower court's decision that these devices were "coin-operated," the court stated: "The phrase 'coin-operated' is not limited to electronic operations. See Rev. Rul. 58-346, 1958-2 C.B. 854." United States v. 28 "Mighty Payloader Coin-Operated Gaming Devices, at 513 n. 3.

The device considered in Rev. Rul. 58-346, 1958-2 C.B. 854, consisted of a rectangular box with a glass front and an opening in the top through which a coin is dropped. A maze of nails was fastened to the inside wall of the box.

A coin was inserted through the top of the box and bounced through the maze of nails until it reached a compartment at the bottom. The object of the game was to catch the coin, as it descended, by placing a shovel in the place where

it is expected the coin will pass just before it enters the compartment in the base. No part of the game contained electrical components.

It was determined in Revenue Ruling 58-346 that this device, even though it contained no electrical components and the coin was the playing piece, was a "coin-operated" gaming device within the provisions of 26 U.S.C. ' 4462 because it was operated by insertion of a coin, token, or similar object.

A penny fall cannot be played unless the player first inserts a coin, token, or similar object for deposit upon the playing surface. Since this device is "operated" by insertion of a coin, token, or other object, it is my opinion a penny fall is "coin-operated" regardless of whether the coin or token initially activates the electronic or mechanical portions of the device.

A penny fall may be either a coin-operated gaming or amusement device. If the manner of play of the device involves a game of chance, the device may not be operated since such a penny fall is not an authorized game of chance under N. D. C. C. ch. 53-06.1 and is a coin-operated gaming device prohibited by N. D. C. C. ch. 12.1-28.

If the manner of play does not involve a game of chance, the penny fall is a coin-operated amusement game or device subject to the licensing requirements of N. D. C. C. ch. 53-06. The penny fall is then subject to the provisions of N. D. Admin. Code ' 10-09. N. D. Admin. Code ' 10-09-01-02. Under this section, a penny fall may not be operated as a coin-operated amusement game or device in this state if it pays cash or gives credits redeemable for cash or prizes.

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- EFFECT -

This opinion is issued pursuant to N.D.C.C. ' 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.

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