JURISDICTION:	**OKLAHOMA TAX COMMISSION DECISION**
CITE:	**2009-02-03-10 / NON-PRECEDENTIAL**
ID:	**P-08-030-H**
DATE:	**FEBRUARY 3, 2009**
DISPOSITION:	**SUSTAINED IN PART / DENIED IN PART**
TAX TYPE:	**COIN OPERATED DEVICES / FRANCHISE / USE**
APPEAL:	**NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

COMPANY (A Suspended Corporation) d/b/a BUSINESS, PRESIDENT, as President, and VICE PRESIDENT, (Deceased) as Vice President, and as Individuals ("Protestants") appears through ATTORNEY, Attorney. The Field Audit Section of the Compliance Division ("Division"), Oklahoma Tax Commission, appears through OTC ATTORNEY, Assistant General Counsel, Office of General Counsel, Oklahoma Tax Commission.

PROCEDURAL HISTORY

On March 19, 2008, the protest file was received by this office for further proceedings consistent with the *Uniform Tax Procedure Code*[1] and the *Rules of Practice and Procedure Before the Oklahoma Tax Commission*.[2] On March 24, 2008, OTC ATTORNEY filed an Entry of Appearance, as counsel of record for the Division. On March 28, 2008, a letter was mailed to the Protestants stating this matter had been assigned to ALJ, Administrative Law Judge, and docketed as Case Number P-08-030-H. The letter also advised the Protestants a Notice of Prehearing Conference would be sent by mail and enclosed a copy of the *Rules of Practice and Procedure Before the Oklahoma Tax Commission.*[3]

On April 16, 2008, the Notice of Prehearing Conference was mailed to the last-known address of the Protestants, setting the prehearing conference for April 29, 2008, at 10:30 a.m.[4] On April 24, 2008, ATTORNEY filed an Entry of Appearance, as counsel of record for the Protestants.

On April 29, 2008, the prehearing conference was held as scheduled. On April 30, 2008, the parties were advised by letter a status report was to be filed on or before May 29, 2008. On May 29, 2008, the Division filed the Status Report advising the Division was checking Tax Commission records to determine if the Protestants had purchased type "C" decals before 1996 and the Protestants were attempting to gather documents to determine the number of vending machines per customer.

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[1] OKLA. STAT. ANN. tit. 68, § 201 et seq. (West 2001).

[2] OKLA. ADMIN. CODE §§ 710:1-5-20 through 710:1-5-47.

[3] *See* Note 2.

[4] OKLA. STAT. ANN. tit. 68, § 208 (West 2001). The notice was mailed to the Protestants c/o ACCOUNTANT, CPA, ADDRESS.

On June 2, 2008, the parties were advised by letter a status report was due on or before June 30, 2008. On June 30, 2008, the Division filed the Status Report advising the Protestants were still attempting to gather documents, but none had been provided to the Division. On June 30, 2008, the parties were advised by letter a status report was due on or before July 30, 2008. On July 28, 2008, the Division filed the Status Report requesting this matter be set for hearing. The Protestants had not provided documents to the Division.

On July 31, 2008, the parties were advised by letter this matter had been set for hearing on October 2, 2008, at 9:30 a.m., with position letters or memorandum briefs due on or before September 25, 2008. On September 25, 2008, the Memorandum Brief of the Compliance Division was filed, with Exhibits A through P attached thereto. The Protestants did not file a position letter or memorandum brief.

On October 2, 2008, at 9:30 a.m., the hearing was held as scheduled. The Division was present at the hearing. The Protestants and ATTORNEY were not present at the hearing.[5] The Division called one (1) witness, AUDITOR, Field Auditor, Field Audit Section of the Compliance Division, Oklahoma Tax Commission, who testified about the audit and as custodian of the Division's records. The Division's Exhibits A through Q were identified, offered, and admitted into evidence. At the conclusion of the hearing, the record was closed and this matter was submitted for decision.

FINDINGS OF FACT

Upon review of the file and records, including the record of the proceedings, the exhibits received into evidence, and the brief, the undersigned finds:

1. On May 23, 1994, COMPANY d/b/a BUSINESS registered with the Tax Commission for purposes of employee withholding only, beginning September 21, 1993.[6] On July 11, 1994, BUSINESS filed a Business Registration changing the start date of employee withholding to October 1, 1993, and applied for a sales tax permit. On September 16, 1996, BUSINESS filed a Business Registration for another sales tax permit. BUSINESS is located at BUSINESS ADDRESS.[7]

[5] It was noted for the record ATTORNEY had not contacted the Division or the Administrative Law Judges Office concerning the hearing.

[6] According to the Oklahoma Secretary of State's website, BUSINESS registered September 21, 1993, with PRESIDENT, as the registered agent, https://www.sooneraccess.state.ok.us (Last visited October 6, 2008). The Administrative Law Judge is taking judicial notice of the Oklahoma Secretary of State's website to complete the factual details and background of this audit. OKLA. ADMIN. CODE § 710:1-5-36 (July 11, 1996).

[7] Division's Exhibit A. All three (3) Business Registrations were signed by PRESIDENT, as President of BUSINESS. The Business Registrations also listed VICE PRESIDENT, as Vice President of BUSINESS.

2. BUSINESS owns and operates Coin-Operated Devices ("CODS"), which are placed at various businesses throughout the CITY metropolitan area, and splits the proceeds with the businesses.[8]

3. On April 27, 2007, the Division notified BUSINESS by letter it had been selected for a field audit by the Compliance Division.[9]

4. On June 7, 2007, a Taxpayer's Power of Attorney to REPRESENTATIVE was signed by PRESIDENT, as President/Owner of BUSINESS ("President").[10]

5. On June 11, 2007, the Division provided BUSINESS with a "Coin-Operated Device Document Requests"[11] in preparation for the field audit, in pertinent part, as follows, to-wit:

Vending Machines: From Inception

List of ALL vending machines owned and/or operated from _____ to _____
Include: Machine Location
Serial #
Date Purchased
Date Sold/Transferred (If Applicable)
OTC Coin Decal # Currently Affixed

Coin Operated Device: Records of decals purchased for each year from inception

Sales/Use and Withholding: Period of 05/01/04 through 05/31/07

Franchise Tax: 2004 through 2007

6. On June 11, 2007, an Assessment and Refund Statute of Limitation Waiver Agreement was signed by President of BUSINESS and AUDITOR for the period of 06/01/04 through 05/31/07 ("Audit Period") for sales/use, withholding, and franchise tax.[12]

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[8] Testimony of AUDITOR.

[9] Division's Exhibit B.

[10] Division's Exhibit E. According to the Field Audit Write-Up contained in the court file, at the time of the field audit, REPRESENTATIVE had been employed by BUSINESS for seven (7) years. REPRESENTATIVE was the Division's sole contact during the field audit. The court file contains an audit packet, which was forwarded by the Division as part of the protest file on this matter. The Administrative Law Judge is taking judicial notice of the materials contained in the court file to complete the factual details and background of this audit. OKLA. ADMIN. CODE § 710:1-5-36 (July 11, 1996).

[11] Division's Exhibit C. AUDITOR changed the beginning date for the field audit from May 1, 2004, to June 1, 2004.

[12] Division's Exhibit D. The agreement extended the period for assessment and refund to June 30, 2008.

7. On July 11, 2007, President signed a Taxpayer's List of Principal Officers, which listed himself as President of BUSINESS, and the sole officer of BUSINESS from 06/01/04 through 05/31/07.[13]

8. BUSINESS provided the Division with records consisting of payroll records, bank statements, purchase invoices, cash receipts/tickets, and BUSINESS' 2004 through 2006 Federal Income Tax Returns.[14]

9. BUSINESS is currently suspended for failure to file franchise tax returns. Tax Commission records reflect BUSINESS was suspended June 9, 2000, through July 12, 2000, and February 8, 2002, through June 30, 2007.[15]

10. On October 8, 2007, the Division issued a proposed Franchise Tax ("FRX") Assessment[16] against BUSINESS for July 1, 2002, through June 30, 2008 ("FRX Audit Period"), as follows, to-wit:

Tax Due:	$1,186.25
Interest @ 15% through 10/31/07:	485.17
Tax & Interest Due Within 30 Days:	$1,671.42
30 Day Delinquent Penalty @ 10%:	118.65
Tax, Interest & Penalty Due after 30 Days:	$1,790.07

11. There are no written contracts or agreements between BUSINESS and the businesses. BUSINESS also services CODS.[17]

12. BUSINESS does not keep records of the number of CODS it owns and operates or the locations of the CODS, the serial numbers of the CODS, or decal numbers of the CODS.[18]

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[13] *See* Note 10. The Field Audit Write-Up states in pertinent part:

> Franchise Tax Returns were not filed during the audit period, therefore, officer information could not be verified. The Corporate Income Tax Returns, Ownership Statements for the periods of 2004 and 2005 reflect PRESIDENT, percentage owned 100%. (Ref 402.15 and 402.16). OTC Research reflects two other officers. The Officer Statement completed and signed by PRESIDENT only list [sic] himself. I prepared another Officer Statement which list [sic] all officers reflected in our records.

[14] Testimony of AUDITOR.

[15] Testimony of AUDITOR.

[16] Division's Exhibit H. BUSINESS provided Federal Income Tax Returns for the taxyears 2003, 2004, and 2005, which were used to calculate the franchise tax for the years covered by the returns. For the remainder of the FRX Audit Period, the Division used the 2003 return. BUSINESS' Income Tax filing period begins October 1st and ends September 30th.

[17] Testimony of AUDITOR.

[18] Testimony of AUDITOR.

13. The Tax Commission's records reflect BUSINESS did not purchase any Coin-Operated Device Decals ("STC Decals") for the period of 1996 through 2003.[19]

14. The Division reviewed the receipts/tickets provided by BUSINESS, which reflected the money collected from the machines and how the money was split with the different businesses. The receipts/tickets did not reflect the number of CODS at each location.[20]

15. BUSINESS' 2005 Federal Depreciation Schedule reflected 101 assets dated October 20, 1994, through July 12, 1996, but from the schedule, the number of CODS cannot be determined.[21]

16. Tax Commission records reflect BUSINESS purchased STC Decals,[22] as follows, to-wit:

Date	Type "A" Decal $50.00	Type "C" Decal $15.00	Total
2004	50	0	50
2005	50	0	50
2006	2	0	2
May 31, 2007	100	3	103
June 26, 2007	45	1	46
Totals	247	4	251

17. The Division based the STC Fee and Penalty in part on the 149 STC Decals purchased by BUSINESS during 2007. The Division gave BUSINESS credit for the 102 Type "A" STC Decals purchased between 2004 and 2006.[23] However, REPRESENTATIVE informed the Division that during the seven (7) years she had worked for BUSINESS, it averaged approximately fifty-five (55) customers, but in the three (3) to five (5) years prior to 2007,

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[19] Testimony of AUDITOR.

[20] Testimony of AUDITOR. *See* Note 10. According to the Field Audit Write-Up, AUDITOR asked REPRESENTATIVE to prepare a list of current customers and the number of CODS currently at the locations. On July 19, 2007, REPRESENTATIVE faxed the list, which reflected thirty-six (36) customers and 138 CODS. The list does not contain the serial numbers of the CODS or the STC Decal numbers.

[21] Testimony of AUDITOR. *See* Note 10. The court file contains a copy of BUSINESS' 2005 Depreciation Schedule which lists a number of individual CODS, but for a number of assets the description is plural and does not list the number of CODS or the schedule lists assets by year only.

[22] *See* Note 10. The court file contains a copy of the Renewal For Coin-Operated Device Decal filed with the Tax Commission on May 31, 2007, by PRESIDENT, for the purchase of 100 Type "A" decals and three (3) Type "C" decals for $5,045.00. The court file also contains a copy of the Over The Counter Purchase Of Coin-Operated Device Decals filed with the Tax Commission on June 26, 2007, by PRESIDENT, for the purchase of forty-five (45) Type "A" decals and one (1) Type "C" decal for $2,265.00

[23] Division's Exhibit F. Testimony of AUDITOR.

BUSINESS averaged approximately seventy (70) customers. For the years 1996 through 2003, AUDITOR increased the number of CODS by one-third (1/3), or 198 CODS, based solely upon the conversation with REPRESENTATIVE.[24]

18. On October 8, 2007, the Division issued a proposed STC Fee Assessment[25] against BUSINESS for July 1, 1996, through June 30, 2007 ("STC Fee Audit Period"), as follows, to-wit:

STC Fees Due:	$ 94,630.00
Penalty:	192,900.00
Total Due:	$287,530.00

19. On October 8, 2007, the Division issued proposed STC Fee Assessments[26] against President and VICE PRESIDENT, Vice President, and as individuals for June 9, 2000, through July 12, 2000, and February 8, 2002, through June 30, 2007, the periods BUSINESS was suspended for failure to file franchise tax returns, as follows, to-wit:

STC Fees Due:	$ 40,461.75
Penalty:	82,614.00
Total Due:	$123,075.75

20. The invoices reviewed by the Division consisted of several out-of-state purchases.[27]

21. On October 8, 2007, the Division issued proposed Use Tax ("STU") Assessments[28] against the Protestants for June 1, 2004, through May 31, 2007 ("STU Audit Period"), as follows, to-wit:

Tax Due:	$665.77
Interest @ 15% through 10/31/07:	242.38
Tax & Interest Due Within 30 Days:	$908.15
30 Day Delinquent Penalty @ 10%:	66.58
Tax, Interest & Penalty Due After 30 Days:	$974.73

22. On November 27, 2007, the Division received a timely filed protest[29] on behalf of VICE PRESIDENT (Deceased), by ACCOUNTANT, CPA, against the proposed STC Fee

[24] *See* Note 23.

[25] Division's Exhibits I.

[26] Division's Exhibits J and K.

[27] Division's Exhibit G. Testimony of AUDITOR. Only parts, supplies, and games purchased out-of-state were scheduled. Stuffed animals, toys, etc., which are placed inside CODS, were not scheduled.

[28] Division's Exhibits L, M, and N.

[29] *See* Note 10. The court file contains a copy of the protest letter and attachments.

Assessment and STU Assessment.[30] The protest letter states VICE PRESIDENT was never an officer of BUSINESS. The letter also states VICE PRESIDENT is deceased. A copy of VICE PRESIDENT'S death certificate was enclosed. The date of death was December 11, 2002. Also enclosed was a sworn Affidavit from President dated November 23, 2007, which states as follows, to-wit:

> I, PRESIDENT duly sworn and under oath state that I am the sole shareholder and President of COMPANY, an Oklahoma corporation incorporated on September 21, 1993.
>
> I further state that VICE PRESIDENT was never at any time elected as a director or as an officer of COMPANY.
>
> I further state that VICE PRESIDENT was never at any time appointed to serve as a director or as an officer of COMPANY.
>
> I further state that VICE PRESIDENT was never at any time an employee of COMPANY. I further state that VICE PRESIDENT did not at any time participate in the management or operation of the business known as COMPANY as a director, officer or employee.

23. On December 5, 2007, the Division received a timely filed protest on behalf of BUSINESS and President, by ACCOUNTANT.[31]

24. On July 11, 2008, the Division revised the proposed STC Fee Assessment against VICE PRESIDENT to remove the portion of the proposed assessment after his date of death,[32] as follows, to-wit:

STC Fee Due:	$18,283.00
Penalty:	37,224.00
Total	$55,507.00

25. The Division did not withdraw the proposed STU Assessment for the STU Audit Period (June 1, 2004/May 31, 2007), which began after VICE PRESIDENT'S death.[33]

[30] *See* Notes 10 and 29. The court file contains a Taxpayer's Power of Attorney signed on January 28, 2008, by PERSON (possibly a son), as Deputy Trustee of the NAME Revocable Trust to ACCOUNTANT, CPA.

[31] Division's Exhibit O.

[32] Division's Exhibit P.

[33] Division's Exhibit M.

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of this proceeding.[34]

2. If any tax due under any state tax law is not paid within thirty (30) days after such tax becomes delinquent, a penalty of ten percent (10%) on the total amount of tax due and delinquent shall be added thereto, collected and paid.[35]

3. The Tax Commission shall also collect interest at the rate of one and one-quarter percent (1 ¼ %) per month from the date prescribed by state law.[36]

4. The rules promulgated pursuant to the Administrative Procedures Act are presumed to be valid and binding on the persons they affect and have the force of law.[37]

5. An order of the Tax Commission must be supported by substantial evidence.[38] Likewise, the audit upon which a portion of the record is formed and order issued must be supported by substantial evidence.[39]

6. An audit is supported by substantial evidence when an evidentiary foundation for the audit has been established. In a majority of cases, the evidentiary foundation will be established by the records reviewed by the auditor. In those cases where an evidentiary foundation for the audit has been established, the taxpayer has the burden of proving in what respect the action of the Tax Commission in assessing the tax is incorrect. Where, however, an evidentiary foundation has not been laid or the records upon which the audit is based do not establish a basis for assessing a tax, the audit, and assessment, in the initial instance, cannot be sustained as being supported by substantial evidence.[40]

7. In all proceedings before the Tax Commission, the taxpayer has the burden of proof.[41] A proposed assessment is presumed correct and the taxpayer bears the burden of showing that it is incorrect and in what respects.[42]

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[34] OKLA. STAT. tit. 68, § 221(D) (West Supp. 2002).

[35] OKLA. STAT. tit. 68, § 217(D) (West Supp. 2004).

[36] OKLA. STAT. tit. 68, § 217(B) (West Supp. 2004).

[37] OKLA. STAT. ANN. tit. 75, § 250 et seq. (West 2001). *See Toxic Waste Impact Group, Inc. v. Leavitt*, 1988 OK 20, 755 P.2d 626.

[38] *Dugger v. State ex rel. Oklahoma Tax Com'n*, 1992 OK 105, 834 P.2d 964.

[39] Commission Order No. 2003-07-22-09 (July 22, 2003), 2003 WL 2347117 (Okl. Tax Com.), available at *http://westlaw.com*

[40] *See* Note 38.

[41] OKLA. ADMIN. CODE § 710:1-5-47 (June 25, 1999):

CONCLUSIONS OF LAW

FRANCHISE TAX

8. The terms of the Oklahoma Franchise Tax Code[43] shall apply to every corporation organized under the laws of this state, or qualified to do, or doing business in Oklahoma in a corporate or organized capacity by virtue of creation or organization under the laws of this or any other state, territory or district, or a foreign country.[44]

9. A franchise tax at the rate of One Dollar and twenty five cents ($1.25) for each One Thousand Dollars ($1,000.00) or fraction thereof of the amount of capital used, invested or employed within the state is assessed against every corporation, association, joint-stock company and business trust organized under the Oklahoma law.[45]

10. The Division's proposed FRX Assessment against BUSINESS is supported by substantial evidence.

> In all administrative proceedings, unless otherwise provided by law, the burden of proof shall be upon the protestant to show in what respect the action or proposed action of the Tax Commission is incorrect. If, upon hearing, the protestant fails to prove a prima facie case, the Administrative Law Judge may recommend that the Commission deny the protest solely upon the grounds of failure to prove sufficient facts which would entitle the protestant to the requested relief.

OKLA. ADMIN. CODE § 710:1-5-77(b) (June 25, 1999), provides in pertinent part:

> …"preponderance of the evidence" means the evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; evidence which as a whole shows that the fact sought to be proved is more probable than not.

[42] *See Enterprise Management Consultants, Inc. v. State ex re.l Oklahoma Tax Com'n*, 1988 OK 91, 768 P.2d 359.

[43] OKLA. STAT. ANN. tit. 68, § 1201 et seq. (West 2008).

[44] OKLA. STAT. ANN. tit. 68, § 1201 (West 2008).

[45] OKLA. STAT. ANN. tit. 68, § 1203 (West 2008):

> There is hereby levied and assessed a franchise or excise tax upon every corporation, association, joint-stock company and business trust organized under the laws of this state, equal to One Dollar and twenty-five cents ($1.25) for each One Thousand Dollars ($1,000.00) or fraction thereof of the amount of capital used, invested or employed in the exercise of any power, privilege or right inuring to such organization, within this state; it being the purpose of this section to require the payment to the State of Oklahoma this tax for the right granted by the laws of this state to exist as such organization and enjoy, under the protection of the laws of this state, the powers, rights, privileges and immunities derived from the state by reason of the form of such existence.

11. BUSINESS has failed to meet its burden of proof the proposed FRX Assessment is incorrect and in what respects.

DISCUSSION FRANCHISE TAX

BUSINESS does not challenge whether it is subject to the imposition of franchise tax, but asserts no detail was provided in the audit report as to how franchise tax was computed for the FRX Audit Period. This assertion is not supported by the record. The Division was provided copies of BUSINESS' Federal Income Tax Returns for the tax years 2003, 2004, and 2005, which included balance sheet information. The Division provided copies of the audit work papers to REPRESENTATIVE at the conclusion of the audit.[46]

CONCLUSIONS OF LAW

USE TAX

12. Use tax is an excise tax which the State of Oklahoma is authorized to exact, in connection with sales tax, for the primary purpose of raising revenue for state purposes, and is designed to prevent consumers from escaping sales tax by going outside the state and purchasing property and bringing it into the State of Oklahoma for use or consumption.[47]

13. The Oklahoma Use Tax Code imposes tax solely on tangible personal property purchased outside the State of Oklahoma and brought into the State of Oklahoma. Neither intangible personal property nor services fall within the scope of the Oklahoma Use Tax Code.[48]

14. A tax of four and one-half percent (4.5%) is imposed and shall be paid by every person "storing, using, or otherwise consuming within this state, tangible personal property purchased or brought into this state. . . ."[49]

15. The Division's proposed STU Assessments against BUSINESS and President are supported by substantial evidence.

16. BUSINESS and President have failed to meet their burden of proof the Division's proposed STU Tax Assessments are incorrect and in what respects.

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[46] Testimony of AUDITOR. *See* Note 10.

[47] *Southeastern, Inc. v. Oklahoma Tax Commission*, 1960 OK 97, 351 P.2d 739.

[48] *Globe Life and Accident Insurance Company v. Oklahoma Tax Commission*, 1996 OK 39, 913 P.2d 1322.

[49] *See* OKLA. STAT. ANN. tit. 68, § 1401 (West 2008) and OKLA. STAT. ANN. tit. 68, § 1402 (West 2008). *See also* OKLA. ADMIN. CODE § 710:65-21-2, OKLA. ADMIN. CODE § 710:65-21-3, and OKLA. ADMIN. CODE § 710:65-21-4.

17. VICE PRESIDENT'S date of death is December 11, 2002. The STU Audit Period (June 1, 2004, through May 31, 2007) is after VICE PRESIDENT'S death. The proposed STU Assessment against VICE PRESIDENT should be withdrawn.

CONCLUSIONS OF LAW

COIN-OPERATED DEVICES

18. The collection and remittance of sales tax is governed by the Oklahoma Sales Tax Code ("Sales Tax Code").[50] The Sales Tax Code levies "upon all sales,[51] not otherwise exempted . . . an excise tax of four and one-half percent (4.5%) of the gross receipts or gross proceeds[52] of each sale of . . . tangible personal property. . . ."[53]

19. Sales from CODS on which the fee imposed by the Coin-Operated Music and Amusement Devices Code ("CODS Code")[54] has been paid are exempt from sales tax imposed by the Sales Tax Code.[55]

20. The fee herein levied is the exclusive fee to be imposed by the state, and is in lieu of all taxes upon coin-operated devices, except ad valorem taxes and municipal license fees except as otherwise provided by Sections 1509.1 through 1509.4 of Title 68.[56]

21. "Coin-operated devices" means coin-operated devices, coin-operated amusement devices, coin-operated vending devices, and coin-operated bulk vending devices.[57]

22. Every person who owns and has available to any of the public for operation, or who permits to be operated in or on his place of business, coin-operated devices shall pay for such privilege an annual fee (Type A Decal/$50.00) (Type C Decal/$15.00).[58]

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[50] OKLA. STAT. ANN. tit. 68, § 1350 et seq. (West 2008).

[51] OKLA. STAT. ANN. tit. 68, § 1352(15)(a) (West 2008)

[52] OKLA. STAT. ANN. tit. 68, § 1352(7) (West 2008).

[53] OKLA. STAT. ANN. tit. 68, § 1354(A) (1) (West 2008).

[54] OKLA. STAT. ANN. tit. 68, § 1501 et seq. (West 2008).

[55] OKLA. STAT. ANN. tit. 68, § 1355 (5) (West 2008).

[56] OKLA. STAT. ANN. tit. 68, § 1511 (West 2008)

[57] OKLA. STAT. ANN. tit. 68, § 1501(7) (West 2008). *See* OKLA. STAT. ANN. tit. 68, §§ 1501(2) through 1501(6) (West 2008). *See also* OKLA. ADMIN. CODE § 710:25-1-4 (June 11, 1998).

[58] OKLA. STAT. ANN. tit. 68, § 1503 (West 2008) and OKLA. ADMIN. CODE § 710:25-1-2 (June 11, 1998). *See* OKLA. ADMIN. CODE § 710:25-1-3 (June 11, 1998) and OKLA. ADMIN. CODE § 710:25-1-5. *See also* OKLA. ADMIN. CODE § 710:25-1-14 (June 11, 1998) for permits for sales or distribution of CODS.

23. Any person owning CODS or operating the premises where the same is to be operated or exposed to the public, shall apply to the Tax Commission for decal for such device and shall, at the same time, pay to the Tax Commission the annual fee herein levied.[59]

24. STC Decals are issued for a one (1) year period, which begins the first day of July and ends the last day of June ("Fee Year").[60]

25. Any owner of CODS who places such device in operation or in a place available to the public for operation, and any person who permits CODS to be in operation or accessible to the public for operation in his place of business, without a decal affixed as required by Section 1504 of Title 68, shall be liable for the fee on such device at the full annual rate and shall be liable for penalty, in addition to the amount of the fee, in the amount of One Hundred Dollars ($100.00).[61]

26. In the case of a failure to file a report or return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.[62]

27. The legislative purpose of the CODS Code is to provide revenues for general government functions of the state government.[63]

DISCUSSION

COIN-OPERATED DEVICES

The Protestants' first contention is the proposed STC Fee Assessment "…is obviously an arbitrary estimated number used by the Tax Commission and does not accurately reflect the correct number of decals required and purchased by the taxpayer."[64]

The Protestants' second contention is, "A majority of the proposed assessment of the Coin Device Tax is barred by the Statute of Limitations, as decals were purchased and displayed on the machines for the earlier years 68 O.S. Section 223(a)."[65]

The Division responds to the Protestants' first contention stating "…the Division would have calculated the tax and penalty due on the unlicensed vending machines by consulting

[59] OKLA. STAT. ANN. tit. 68, § 1504 (West 2008). *See* OKLA. ADMIN. CODE § 710:25-1-9 (June 11, 2007).

[60] OKLA. STAT. ANN. tit. 68, § 1505 (West 2008). *See* OKLA. ADMIN. CODE § 710:25-1-8.

[61] OKLA. STAT. ANN. tit. 68, § 1506 (West 2008). *See* OKLA. ADMIN. CODE § 710:25-1-10.

[62] OKLA. STAT. tit. 68, § 223(E) (West Supp. 2006).

[63] OKLA. STAT. ANN. tit. 68, § 1510 (West 2008).

[64] Division's Exhibit O.

[65] *See* Note 64.

Protestants' records of vending machines owned and operated during the audit period. …Protestants did not provide, and apparently does not have, any records documenting the number of vending machines owned during the audit period.…the Division had to formulate some reasonable method to determine the amount due."[66]

The Division used the most reliable information available, the records of the Tax Commission, which reflects BUSINESS purchased 149 STC Decals during the 2006/2007 Fee Year.

As to the Protestants' second contention, the Division responds that the records of the Tax Commission do not support the Protestants' position and the Protestants did not meet their burden of proof by producing any documents to indicate that STC Decals were purchased for the earlier years, tolling the three (3) year period contained in Section 223 of Title 68.[67]

However, the Division also increased the number of CODS by one-third (1/3) for the Fee Years 1996/1997 through 2003/2004, based solely upon a conversation with REPRESENTATIVE.

The record does not support increasing the number of CODS by one-third (1/3) without any supporting documentation to back up the conversation with REPRESENTATIVE.

However, it appears the Division's calculation of the STC Fee Assessment is incorrect as issued because the Division assigned calendar year designations to the STC Fee Audit Period, instead of fiscal year designations arranged in descending order, which appears to have contributed to the miscalculation. The Division also failed to give BUSINESS credit for STC Decals purchased during the July 1, 2006, through June 30, 2007, Fee Year.

The Division calculated the proposed STC Fee Assessment[68] against BUSINESS for the STC Fee Audit Period, as follows, to-wit:

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[66] *See* Brief of Division filed herein.

[67] In *Solberg v. Davenport*, 232 N.W. 477, the Court held, "It is also a well-settled rule that the terminology used in the act is in no way controlling in determining this question as to whether it is a license or tax." The Court also noted, "That there is a very definite distinction existing between a license fee when imposed under the police power and a tax imposed for revenue under the power of taxation…" (Citations Omitted.)

In this matter, the stated legislative purpose of the STC Fee is to provide revenues for general government functions of the state government. *See* Note 63. For purposes of Section 223 of Title 68, the STC Fee is a tax and the three (3) year period does not begin to run until the taxpayer filed the required application. Alternatively, Statutes of limitation do not run against the state when it is acting in its sovereign capacity to enforce a public right. *Charles Banfield Co. v. State ex rel. Fallis*, 1974 OK 92, 525 P.2d 638.

[68] Division's Exhibit F.

July st/ June 30th	Decal Type	Decal Price	Est. # of CODS	Total Paid For Decals	Total Due For Decals	Est. Unlicensed CODS	$100.00 Fee per Unlicensed CODS	Total Due
Lic. Yr. 2006	A	50.00	145	100.00	7,150.00	143	14,300.00	21,450.00
	C	15.00	4		60.00	4	400.00	460.00
Lic. Yr. 2005	A	50.00	145	2,500.00	4,750.00	95	9,500.00	14,250.00
	C	15.00	4		60.00	4	400.00	460.00
Lic. Yr. 2004	A	50.00	145	2,500.00	4,750.00	95	9,500.00	14,250.00
	C	15.00	4		60.00	4	400.00	460.00
Lic. Yr. 2003	A	50.00	193		9,650.00	193	19,300.00	28,950.00
	C	15.00	5		75.00	5	500.00	575.00
Lic. Yr. 2002	A	50.00	193		9,650.00	193	19,300.00	28,950.00
	C	15.00	5		75.00	5	500.00	575.00
Lic. Yr. 2001	A	50.00	193		9,650.00	193	19,300.00	28,950.00
	C	15.00	5		75.00	5	500.00	575.00
Lic. Yr. 2000	A	50.00	193		9,650.00	193	19,300.00	28,950.00
	C	15.00	5		75.00	5	500.00	575.00
Lic. Yr. 1999	A	50.00	193		9,650.00	193	19,300.00	28,950.00
	C	15.00	5		75.00	5	500.00	575.00
Lic. Yr. 1998	A	50.00	193		9,650.00	193	19,300.00	28,950.00
	C	15.00	5		75.00	5	500.00	575.00
Lic. Yr. 1997	A	50.00	193		9,650.00	193	19,300.00	28,950.00
	C	15.00	5		75.00	5	500.00	575.00
Lic. Yr. 1996	A	50.00	193		9,650.00	193	19,300.00	28,950.00
	C	15.00	5		75.00	5	500.00	575.00
			2031	5,100.00	94,630.00	1929	192,900.00	287,530.00

It appears the proposed STC Fee Assessment against BUSINESS for the STC Fee Audit Period (July 1, 1996/June 30, 2007) should be calculated as follows, to-wit:

July st/ June 30th	Decal Type	Decal Price	Est. # of CODS	Total Due For Decals	Total Paid For Decals	Est. Unlicensed CODS	$100.00 Fee per Unlicensed CODS	Total Due
07/01/96-	A	50.00	145	7,250.00		145	14,500.00	21,750.00
06/30/97	C	15.00	4	60.00		4	400.00	460.00
07/01/97-	A	50.00	145	7,250.00		145	14,500.00	21,750.00
06/30/98	C	15.00	4	60.00		4	400.00	460.00
07/01/98-	A	50.00	145	7,250.00		145	14,500.00	21,750.00
06/30/99	C	15.00	4	60.00		4	400.00	460.00
07/01/99-	A	50.00	145	7,250.00		145	14,500.00	21,750.00
06/30/00	C	15.00	4	60.00		4	400.00	460.00
07/01/00-	A	50.00	145	7,250.00		145	14,500.00	21,750.00
06/30/01	C	15.00	4	60.00		4	400.00	560.00
07/01/01-	A	50.00	145	7,250.00		145	14,500.00	21,750.00
06/30/02	C	15.00	4	60.00		4	400.00	460.00
07/01/02-	A	50.00	145	7,250.00		145	14,500.00	21,750.00
06/30/03	C	15.00	4	60.00		4	400.00	460.00
07/01/03-	A	50.00	145	4,750.00	(2,500.00)	95	9,500.00	11,750.00
06/30/04	C	15.00	4	60.00		4	400.00	460.00
07/01/04-	A	50.00	145	4,750.00	(2,500.00)	95	9,500.00	11,750.00
06/30/05	C	15.00	4	60.00		4	400.00	460.00
07/01/05-	A	50.00	145	7,250.00	(100.00)	143	14,300.00	21,450.00
06/30/06	C	15.00	4	60.00		4	400.00	460.00
07/01/06-	A	50.00	145	7,250.00	(7,250.00)	0	0.00	0.00
06/30/07	C	15.00	4	60.00	(60.00)	0	0.00	0.00
			1,639	75,410.00	(12,410.00)	1,388	138,800.00	201,800.00

CONCLUSIONS OF LAW

OFFICER LIABILITY

(SUSPENDED CORPORATION)

28. Each officer of a corporation, whose right to do business within this state shall be so forfeited, shall, as to any and all debts of such corporation, which may be created or incurred with his or her knowledge, approval and consent, within this state after such forfeiture and before the reinstatement of the right of such corporation to do business, be deemed and held liable thereon in the same manner and to the same extent as if such officers of such corporation were partners.[69]

29. There is no dispute PRESIDENT was President of BUSINESS during the periods BUSINESS was suspended. Only the amounts of the proposed assessments are in dispute.

30. However, the only evidence that VICE PRESIDENT was an officer of BUSINESS is the Business Registrations filed by President. All of the documents in the record are signed by President. President is the sole owner of BUSINESS. President executed a sworn Affidavit that VICE PRESIDENT was never an officer of BUSINESS. The Division's proposed STC Fee

[69] OKLA. STAT. tit. 68, § 1212(C) (West Supp. 2006).

Assessment against VICE PRESIDENT, as Vice President, and as an Individual is not support by substantial evidence.

DISPOSITION

It is the ORDER of the OKLAHOMA TAX COMMISSION, based upon the facts and circumstances of this case, the protest to the proposed FRX and STU Assessments against BUSINESS should be denied.

It is further ORDERED, based upon the facts and circumstances of this case, the protest to the proposed STU Assessment against President should be denied.

It is also ORDERED, based upon the facts and circumstance of this case, the protests to the proposed STC Fee Assessments against BUSINESS and President (Period BUSINESS Suspended) should be sustained in part and denied in part, as set forth herein.

It is also ORDERED, based upon the facts and circumstances of this case, the protest to the proposed STU and STC Fee Assessments against VICE PRESIDENT, Deceased, should be sustained.

ADDENDUM TO FINDINGS OF FACT AND CONCLUSIONS OF LAW

The *Findings, Conclusions and Recommendations* issued on October 30, 2008, in the above styled and numbered cause, comes on for consideration of recommendations as to the amount of the deficiency which should be confirmed by an order of the Tax Commission.

The Division, as directed by the *Findings, Conclusions and Recommendations,* revised the proposed STC Fee Assessments and provided notice of the revisions to the Protestants. The Protestants have not challenged the revisions proposed by the Division.

Upon consideration of the *Findings, Conclusions and Recommendations* and the revisions to the proposed STC Fee Assessments, the undersigned finds the following findings should be added to and incorporated in the *Findings, Conclusions and Recommendations*:

1. On November 12, 2008, the Division filed a Notice of Coin Operated Device Fee Adjustment ("Notice of Adjustment") submitting work papers for the revised STC Fee Assessments for the Audit Period, as follows, to-wit:

BUSINESS	
STC Fees Due:	$ 63,000.00
Penalty:	138,800.00
Total Due:	$201,800.00

President	
STC Fees Due:	$ 29,593.30
Penalty:	70,707.00
Total Due:	$100,300.30

2. The Protestants were provided the Division's Notice of Adjustment.

3. The Protestants did not file a response to the Division's Notice of Adjustment.

4. The revisions to the proposed STC Fee Assessments for the Audit Period comply with the recommendations set forth in the *Findings, Conclusions and Recommendations* issued on October 30, 2008.

The undersigned further finds the following recommendation should be added to and incorporated in the *Findings, Conclusions and Recommendations:*

It is further ORDERED the revised STC Fees and Penalties against BUSINESS and President should be fixed as the amounts due and owing.

THEREFORE, the *Findings, Conclusions and Recommendations* issued on October 30, 2008, are amended to include and incorporate the above and foregoing findings of fact and recommendation.

OKLAHOMA TAX COMMISSION

CAVEAT: This decision was NOT deemed precedential by the Commission. This means that the legal conclusions are generally applicable or are limited in time and/or effect. Non-precedential decisions are not considered binding upon the Commission. Thus, similar issues may be determined on a case-by-case basis.