

STATE OF NORTH CAROLINA
COUNTY OF WAKE

BEFORE THE NORTH CAROLINA
DEPARTMENT OF REVENUE
09 REV 05218

ROBERT C. HARRISON)
)
 Petitioner,)
)
 v.)
)
 N.C. DEPARTMENT OF REVENUE,)
)
 Respondent.)
)

FINAL AGENCY DECISION

THIS MATTER came before the North Carolina Department of Revenue (“Department”) from the Decision Allowing Summary Judgment For Petitioner (“ALJ Decision”) of the Honorable Beecher R. Gray, Administrative Law Judge (“ALJ”), filed in the Office of Administrative Hearings (“OAH”) on June 30, 2011. After a full review of the entire record of this matter, including the official record as defined in N.C. Gen. Stat. § 150B-37(a), and upon consideration of the briefs and other documents filed or submitted by the respective parties, the Department makes the Final Agency Decision. By letter dated July 15, 2011, each party was notified of the opportunity to file exceptions to the ALJ’s Decision as well as file a supporting brief and proposed final order. Respondent filed exceptions, and both parties submitted a proposed order.

APPEARANCES

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Deletions from the Findings of Fact, Issues, Applicable Statutes and Rules, and Conclusions of Law of the ALJ are marked with ~~strikethroughs~~ and additions/modifications are in **bold**.

FINDINGS OF FACT

Finding of Fact number 1 is adopted by the Department and re-numbered as Finding of Fact number 4 below in the Findings of Fact made by the Department.

1. During Petitioner Harrison's 2006 tax year, federal authorities seized certain assets of Petitioner Harrison, which were related to his operation of a gambling enterprise through his company, Harrison Amusement Company, Inc. (the "Company").

The Department determines that Finding of Fact number 2 is contrary to a preponderance of evidence in the record and is hereby rejected. Following the December 5, 2006 seizure of the Company's assets, video poker was no longer a part of the Company's business. D.T., p. 10. The Company then liquidated the remaining assets of the Company, including pool tables and jukeboxes (the "Remaining Assets"). D.T., pp. 8, 10-11; Respondent's Motion for Summary Judgment, Affidavit of Joseph Noonan, Exhibit A, statements concerning sale of Remaining Assets. The record does not show that federal authorities allowed Petitioner to retain assets from the legal operations of the Company. Therefore, the Department rejects Finding of Fact number 2.

- ~~2. After the 2006 seizure, Petitioner Harrison was allowed by the federal authorities to retain certain assets from the legal operations of the Company, including pool tables and jukeboxes (the "Remaining Assets").~~

The Department determines that Finding of Fact number 3 is contrary to a preponderance of evidence in the record and is hereby rejected. Following the December 5, 2006 seizure of the Company's assets, video poker was no longer a part of the Company's business. D.T., p. 10. The Company then liquidated the remaining assets of the Company, including pool tables and jukeboxes (the "Remaining Assets"). D.T., pp. 8, 10-11; Respondent's Motion for Summary Judgment, Affidavit of Joseph Noonan, Exhibit A, statements concerning sale of Remaining Assets. The record does not show that the Petitioner had any of the Company's Remaining Assets to sell. Therefore, the Department rejects Finding of Fact number 3.

- ~~3. During his 2007 tax year, Petitioner Harrison sold the Remaining Assets for cash.~~

The Department determines that Finding of Fact number 4 is contrary to a preponderance of evidence in the record and is hereby rejected. Petitioner entered into a "Settlement Agreement" on March 6, 2008 in the matters of *United States of America v. 18 Charlestowne Court, Pawleys Island, Georgetown County, South Carolina, et al*, Case No. 1:06CV01045 (M.D.N.C.), *United States of America v. All Funds in the Vanguard Group Account Ending in 4897, In the Name of Otis T. Harrison, et al.*, Case No. 1:07CV00081 (M.D.N.C.), and *United States of America v. Vanguard Prime Money*

Market Account Ending in 7326, in the Name of Robert C. Harrison, Containing Approximately \$450,000.00 et al, Case No. 1:07CV00569, (collectively, the “Forfeiture Proceedings”), which Settlement Agreement is attached as Exhibit N to the Petitioner’s deposition transcript (“D.T.”). Exhibit A of Petitioner’s Motion for Stay of Proceedings in this matter, which was filed with OAH on December 2, 2010 and which is part of the OAH official record in this contested tax case, states the Forfeiture Proceedings allege violations of the following federal criminal statutes: 18 U.S.C. §§ 1952 (interstate travel in support of racketeering), 1955 (illegal gambling businesses), 1956 (money laundering) and/or 1957 (monetary transactions in property derived from specified unlawful activity) as bases for the seizure and forfeiture of the defendant properties, including Petitioner’s Vanguard account into which \$450,000.00 had been deposited. Petitioner’s Motion for Stay of Proceedings, Exhibit A, p. 2 of 10. In the Settlement Agreement reached in the Forfeiture Proceedings, Petitioner expressly admitted that the funds which were forfeited were subject to forfeiture “pursuant to 18 U.S.C. §§ 981(a)(1)(A), 981(a)(1)(C) and/or 1955(d), all as alleged in the Verified Complaints of Forfeiture.” D.T., Exhibit N, p. 2 of 8. The Settlement Agreement is signed by the Petitioner, who is listed as a “Claimant” in the Forfeiture Proceedings. D.T., Exhibit N, p. 8 of 8. Under the allegations of the Verified Complaints of Forfeiture and the statements agreed to by the Petitioner herein in the Settlement Agreement, the United States of America and the Petitioner herein represented that the funds in the Vanguard Prime Money Market Fund account ending in 7326, in a total amount of \$450,000.00, were derived from illegal business activities. In the light most favorable to Respondent, there is at least a controvertible question of fact as to the source of the funds in Petitioner’s Vanguard Prime Money Market Fund account ending in 7326 which were seized and which Petitioner agreed to forfeit to the United States of America. Therefore, the Department rejects Finding of Fact number 4.

- ~~4. In that same tax year, Petitioner, using, in part, the cash from the sale of the Remaining Assets, made a deposit of cash with Vanguard in a total amount of \$450,000.00 (the “Deposit”), with such cash to be deposited in a new investment account.~~

The Department determines that Finding of Fact number 5 is contrary to a preponderance of the evidence in the record and is hereby rejected. Letters written from Vanguard to Petitioner dated May 23, 2007 and May 24, 2007, respectively, indicate that \$450,000.00 was deposited into Petitioner’s existing Vanguard Prime Money Market Fund account ending in 7326 on May 15, 2007 and that a Seizure Warrant issued by the United States District Court, Middle District of North Carolina, was later received which required Vanguard to freeze the assets in Petitioner’s Vanguard Prime Money Market Fund account ending in 7326. D.T., Exhibits L and M. Vanguard does not agree that the account was subject to a seizure order at the time the Funds were deposited. D.T., Exhibits L and M. Although, the same account may have had funds seized by the federal government in December 2006, Vanguard states it received the seizure warrant on May 22, 2007 for the \$450,000.00 placed in the account on May 15, 2007. D.T., Exhibit M. The Verified Complaint of Forfeiture captioned *United States of America v. Vanguard Prime Money Market Account Ending in 7326, in the Name of Robert C. Harrison*,

Containing Approximately \$450,000.00 et al, Case No. 1:07CV00569, was filed in the United States District Court, Middle District of North Carolina on July 26, 2007. Noonan Affidavit, Exhibit A, Verified Complaint of Forfeiture, Civil No. 1:07CV00569; D.T., Exhibit N, p. 2 of 8. This evidence is contrary to Finding of Fact number 5 which indicates the Vanguard account was subject to a current seizure order of the United States at the time Petitioner's \$450,000.00 deposit was made on May 15, 2007. This issue of fact was not ripe for summary judgment. Therefore, the Department rejects Finding of Fact number 5.

- ~~5. In that same tax year, Vanguard placed the Deposit in an existing account, and not a new account, that was subject to a seizure order of the United States.~~

The Department determines that Finding of Fact number 6 is incomplete and should be appended for clarity. Letters written from Vanguard to Petitioner dated May 23, 2007 and May 24, 2007, respectively, indicate that \$450,000.00 was deposited into Petitioner's existing Vanguard Prime Money Market Fund account ending in 7326 on May 15, 2007 and that a seizure warrant issued by the United States District Court, Middle District of North Carolina, was later received which required Vanguard to freeze the assets in Petitioner's Vanguard Prime Money Market Fund account ending in 7326. D.T., Exhibits L and M. Vanguard received the seizure warrant on May 22, 2007. D.T., Exhibit M. Other evidence in the record states a seizure warrant for this account was issued by Judge P. Trevor Sharp on May 29, 2007. Petitioner's Supplemental Brief In Opposition To Respondent North Carolina Department of Revenue's Motion For Summary Judgment, Exhibit A, p. 8 of 9. In compliance with the seizure warrant, Vanguard was required to leave the assets in Petitioner's Vanguard Prime Money Market Fund account ending in 7326 and to restrict Petitioner's ability "to exchange, transfer or redeem the assets" in this account. D.T., Exhibit M. The restrictions were to remain in effect until Vanguard received "a certified order from a court of appropriate jurisdiction directing that the restrictions be removed, or the assets redeemed." D.T., Exhibit M. The addition made to Finding of Fact number 6 is supported by a preponderance of the admissible evidence in the record and is not inconsistent with any finding of fact contained in the ALJ Decision which is adopted by the Department. The Department modifies the ALJ's Finding of Fact number 6 and includes it as re-numbered Finding of Fact number 34 below in the Findings of Fact made by the Department.

6. In that same tax year, shortly after Vanguard's mistaken deposit of the Deposit into the existing account, the federal authorities seized the \$450,000.00 **pursuant to a seizure warrant, issued after Petitioner's May 22, 2007 telephone conversation with a Vanguard employee, which required Vanguard to freeze the assets in Petitioner's existing Vanguard PMM account to prevent Petitioner from exchanging, transferring or redeeming the assets in this account until a certified order from a court of appropriate jurisdiction directs that the restrictions be removed or the assets redeemed. D.T., Exhibits L and M; Petitioner's Supplemental Brief, Exhibit A, p. 8 of 9.**

The Department determines that Finding of Fact number 7 is contrary to a preponderance of evidence in the record and is hereby rejected. In the March 6, 2008 Settlement Agreement entered in the Forfeiture Proceedings, Petitioner agreed to forfeit the assets in his Vanguard Prime Money Market Fund account ending in 7326 except for \$10,000.00 which was exempt from forfeiture and was retained by Petitioner. D.T., Exhibit N, pp. 2 - 3 of 8; Harrison Deposition, p. 45.

- ~~7. The federal authorities retained the \$450,000.00, which has not been returned to Petitioner Harrison at any time in the 2007 tax year or in subsequent tax years.~~

The Department determines that Finding of Fact number 8 is contrary to a preponderance of evidence in the record and is hereby rejected. To the extent that Finding of Fact number 8 was used as support for a finding of a rescission or renunciation by Petitioner of the \$450,000.00 deposited in his existing Vanguard Prime Money Market Fund account ending in 7326 in 2007, that position is contradicted by the Settlement Agreement of March 6, 2008, in which Petitioner affirmatively signed over the funds in this account to the federal government. D.T., Exhibit N, p. 2 of 8. The terms of the Settlement Agreement exempted \$10,000.00 of Petitioner's Vanguard Prime Money Market Fund account ending in 7326 from forfeiture and allowed the \$10,000.00 to be retained by Petitioner. D.T., Exhibit N, pp. 2 - 3 of 8; Harrison Deposition, p. 45. Accordingly, the Department rejects Finding of Fact number 8.

- ~~8. Petitioner Harrison took no action with the federal authorities seeking return of the \$450,000.00.~~

FINDINGS OF FACT

The Department hereby makes the following Findings of Fact:

1. **Petitioner Robert C. Harrison ("Petitioner") was a nonresident of North Carolina. Petition for a Contested Case Hearing, Exhibits A and B.**
2. **Harrison Amusements Company, Inc. (the "Company") was a North Carolina corporation which elected to be taxed as an S corporation for federal and state tax purposes. Petition for a Contested Case Hearing, Exhibits A and B.**
3. **Petitioner was the sole shareholder who owned 100% of the stock in the Company. Petition for a Contested Case Hearing, Exhibits A and B; Deposition Transcript of Robert C. Harrison ("D.T."), Schedule K-1 of Exhibits B and C, Responses to Exhibit I.**

4. During Petitioner Harrison's 2006 tax year, federal authorities seized certain assets of Petitioner Harrison which were related to his operation of a gambling enterprise through his company, Harrison Amusement Company, Inc. (the "Company").
5. Federal authorities shut down the Company's video poker operations on December 5, 2006. D.T., pp. 8-11.
6. Thereafter, the Company did not engage in its ordinary business activities, but in 2007, it liquidated the remaining assets from the legal operations of the Company, including pool tables and jukeboxes (the "Remaining Assets"). D.T., pp. 8, 10-11; Respondent's Motion for Summary Judgment ("M.S.J."), Affidavit of Joseph Noonan ("Noonan Affidavit"), Exhibit A, statements concerning sale of Remaining Assets.
7. During 2007, the Company wrote at least three checks to Petitioner on its BB&T Business Regular Checking account ending in 4257 ("BB&T account"), which amounts total \$295,534.71. M.S.J., Noonan Affidavit, Exhibit A, Copies of 3 checks.
8. Petitioner admits that the Company wrote check number 6620 dated January 5, 2007 from its BB&T account to him in the amount of \$80,000.00. D.T., p.26, Exhibit H, Response Number 4.
9. The Company's BB&T account statement dated January 31, 2007 shows check number 6620 in the amount of \$80,000.00 was paid on January 8, 2007. M.S.J., Noonan Affidavit, Exhibit A, Copy of said bank statement.
10. Petitioner admits that on January 8, 2007 he made a deposit in the amount of \$85,601.02 into his Wachovia bank account in the name of Bobby Harrison with an account number ending in 5818 (Bobby Harrison Wachovia account). D.T., p. 26, Exhibit H, Response Number 5.
11. The funds for the \$85,601.02 deposit into the Bobby Harrison Wachovia account were received by Petitioner from the Company. D.T., p. 28.
12. Petitioner admits that on January 23, 2007 he withdrew \$73,837.33 from the Bobby Harrison Wachovia account and closed this account. D.T., pp 26 – 27, Exhibit H, Response Numbers 6 and 7.
13. Petitioner admits that on January 25, 2007 he opened and deposited funds in the amount of \$78,466.26 into a Wachovia bank account under the name of Robert C. Harrison which had an account number ending in 9424 ("Robert C. Harrison Wachovia account"). D.T., p. 27, Exhibit H, Response Number 8.

14. The Company wrote check number 6628 dated May 3, 2007 to Petitioner from its BB&T account in the amount of \$180,000.00. M.S.J., Noonan Affidavit, Exhibit A, Copy of said check.
15. The Company's BB&T account statement dated May 31, 2007 shows check number 6628 in the amount of \$180,000.00 was paid on May 8, 2007. M.S.J., Noonan Affidavit, Exhibit A, Copy of said bank statement.
16. Petitioner admits that on May 7, 2007 he made a deposit in the amount of \$180,000.00 into his Robert C. Harrison Wachovia account. D.T., p. 27, Exhibit H, Response Number 10.
17. The funds for the \$180,000.00 deposit into the Robert C. Harrison Wachovia account were received by Petitioner from the Company as a result of the sale of Remaining Assets of the Company. D.T., pp. 27-28.
18. Petitioner states he received approximately \$450,000.00 from the Company for the Remaining Assets that were liquidated by the Company in 2007. D.T., pp. 10-11, 15.
19. Petitioner's bank statement for his Robert C. Harrison Wachovia account shows check number 1018 in the amount of \$450,000.00 was negotiated on May 14, 2007. D.T., p. 37, Exhibit J.
20. A statement from Petitioner's Vanguard Prime Money Market Fund account with an account number ending in 7326 ("Vanguard PMM account") shows a check purchase of shares in the amount of \$450,000.00 was transacted on May 15, 2007. D.T., pp. 37-38, Exhibit K.
21. The funds for the \$450,000.00 Vanguard PMM account purchase on May 15, 2007 came from Petitioner's Robert C. Harrison Wachovia account. D.T., pp. 38-39.
22. Petitioner's PMM account had been previously frozen pursuant to a seizure warrant. Petitioner's Supplemental Brief In Opposition To Respondent North Carolina Department of Revenue's Motion For Summary Judgment ("Petitioner's Supplemental Brief"), Exhibit A, p. 8 of 9.
23. The IRS has never frozen funds in Petitioner's Robert C. Harrison Wachovia account. D.T., pp. 38-39, 52-54.
24. Petitioner admits that the IRS never seized funds from his Robert C. Harrison Wachovia account. D.T., pp. 38-39, 52-54, Exhibit H, Response Number 19.
25. Petitioner stated he could have written a check from his Robert C. Harrison Wachovia account to anybody. D.T., pp. 38-39.

- 26. Petitioner stated he could have purchased a car or purchased real estate with the funds he had on deposit in his Robert C. Harrison Wachovia account. D.T., p. 39.**
- 27. The IRS has never frozen funds in Petitioner's Bobby Harrison Wachovia account. D.T., pp. 52-54.**
- 28. Petitioner admits that the IRS never seized funds from his Bobby Harrison Wachovia account. D.T., pp. 52-54, Exhibit H, Response Number 18.**
- 29. At the time of the May 15, 2007 purchase of shares in the amount of \$450,000.00 in Petitioner's Vanguard PMM account, the United States Attorney was listed on this account statement to receive a copy of the statement. D.T., Exhibit K.**
- 30. On May 21, 2007, the United States Attorney's Office received a written notice that \$450,000.00 had been deposited by check into Petitioner's Vanguard PMM account. Petitioner's Supplemental Brief, Exhibit A, p. 8 of 9.**
- 31. Petitioner had submitted a check for \$450,000.00 to Vanguard along with a new account application. Petitioner's Supplemental Brief, Exhibit A, p. 8 of 9.**
- 32. Vanguard erroneously deposited the \$450,000.00 into Petitioner's existing Vanguard PMM account. Petitioner's Supplemental Brief, Exhibit A, p. 8 of 9.**
- 33. Petitioner and an employee of Vanguard had a telephone conversation on May 22, 2007 during which the employee indicated the \$450,000.00 deposit into the existing Vanguard PMM account would be canceled and the deposit credited to a new account in accordance with Petitioner's original instructions. D.T., Exhibits L and M.**
- 34. In that same tax year, shortly after Vanguard's mistaken deposit of the Deposit into the existing account, the federal authorities seized the \$450,000.00 pursuant to a seizure warrant, issued after Petitioner's May 22, 2007 conversation with a Vanguard employee, which required Vanguard to freeze the assets in Petitioner's existing Vanguard PMM account to prevent Petitioner from exchanging, transferring or redeeming the assets in this account until a certified order from a court of appropriate jurisdiction directs that the restrictions be removed or the assets redeemed. D.T., Exhibits L and M; Petitioner's Supplemental Brief, Exhibit A, p. 8 of 9.**

35. Several Verified Complaints of Forfeiture were filed against Petitioner, including the matter captioned *United States of America v. Vanguard Prime Money Market Account Ending in 7326, in the Name of Robert C. Harrison, Containing Approximately \$450,000.00 et al*, Case No. 1:07CV00569 (“Case No. 1:07CV00569”). D.T., Exhibit N.
36. Case No. 1:07CV00569 was filed in the United States District Court, Middle District of North Carolina on July 26, 2007. Noonan Affidavit, Exhibit A, Verified Complaint of Forfeiture, Civil No. 1:07CV00569; D.T., Exhibit N, p. 2 of 8.
37. The forfeiture proceedings, including Case No. 1:07CV00569, allege violations of the following federal criminal statutes: 18 U.S.C. §§ 1952 (interstate travel in support of racketeering), 1955 (illegal gambling businesses), 1956 (money laundering) and/or 1957 (monetary transactions in property derived from specified unlawful activity) as bases for the seizure and forfeiture of the defendant properties, including Petitioner’s Vanguard account into which \$450,000.00 had been deposited. Petitioner’s Motion for Stay of Proceedings, Exhibit A, p. 2 of 10.
38. On March 6, 2008, Petitioner signed a Settlement Agreement with regard to the several forfeiture proceedings (“Settlement Agreement”), including Case No. 1:07CV00569. D. T., pp. 47-50, Exhibit N.
39. In the Settlement Agreement, Petitioner, who was listed as “Claimant,” agreed to relinquish his claim to all but \$10,000.00 of the \$450,000.00 which had been deposited into his Vanguard PMM account. D.T., pp. 63-65, Exhibit N.
40. At the time Petitioner executed the Settlement Agreement, there were criminal charges pending against him for operating an illegal gambling business and for crossing state lines to operate an illegal gambling business. D.T., pp. 49-50.
41. In the Settlement Agreement, Petitioner expressly admitted that the funds which were forfeited were subject to forfeiture “pursuant to 18 U.S.C. §§ 981(a)(1)(A), 981(a)(1)(C) and/or 1955(d), all as alleged in the Verified Complaints of Forfeiture.” D.T., Exhibit N, p. 2 of 8.
42. Petitioner received three years probation as a result of his conviction of operating an illegal gambling business and for crossing state lines to operate an illegal gambling business. D.T., pp. 49-50.
43. Petitioner had the understanding that he would receive a jail sentence if he did not sign the Settlement Agreement. D.T., pp. 59-60.

44. **Petitioner admits that on December 12, 2007, the Company closed its BB&T account and \$35,534.71 was withdrawn by check number 6632, which was payable to Petitioner. D.T., p. 32, Exhibit H, Response Number 14.**
45. **Petitioner admits that on December 14, 2007 a deposit in the amount of \$37,125.06 was made into his Robert C. Harrison Wachovia account. D.T., p. 32, Exhibit H, Response Number 15.**
46. **The Company initially filed a North Carolina 2007 S Corporation income tax return which showed ordinary business income of \$278,868.00. D.T., p. 12, Exhibit B.**
47. **The Company subsequently filed an amended North Carolina income tax return for 2007 which showed ordinary business income of zero. D.T., p. 13, Exhibit C.**
48. **Petitioner thereafter filed a North Carolina individual income tax return for 2007, reflecting that he had received no taxable income from the Company for 2007. D.T., pp. 13-14, Exhibit D.**
49. **The Department subsequently issued a proposed assessment (“assessment”) to Petitioner for individual income tax based upon the \$278,868.00 (“Assessed Income”) in ordinary business income shown on the Company’s initial 2007 tax return. D.T., pp. 20-21, Exhibit E.**
50. **From this assessment, Petitioner requested a departmental review, and subsequently the Department issued a Notice of Final Determination (“NOFD”) in which it denied Petitioner’s objections to the assessment. D.T., Exhibit F.**
51. **Petitioner appealed the NOFD by filing a Petition For A Contested Case Hearing with OAH. Petitioner’s Petition For A Contested Case Hearing.**
52. **In 2010 Petitioner filed a lawsuit against Vanguard in the U.S. District Court for South Carolina to recover the funds in the deposit Vanguard erroneously made into Petitioner’s existing Vanguard PMM account which was later seized by federal authorities. D.T., pp. 46-47; Motion for Stay of Proceedings, p. 2, Exhibits A and B.**
53. **Petitioner has not disputed the Department’s calculation of the assessment, other than to assert that the Assessed Income should not be treated as taxable income. Petitioner’s Pre-Hearing Statement; Petition, Exhibit A.**

ISSUES

Whether Petitioner Harrison's receipt of the \$450,000.00 **from the Company** in the 2007 tax year constitutes taxable income under North Carolina law when the federal authorities seized the \$450,000.00 **which had been placed in Petitioner's personal money market account** in that same year **prior to Petitioner signing a Settlement Agreement in March 2008 in which he consented to forfeit all but \$10,000.00 of the funds in said account.**

APPLICABLE STATUTES AND RULES

The Department finds that the Applicable Statutes and Rules should read as follows:

26 U.S.C. § 61;
26 U.S.C. § 63;
N.C. Gen. Stat. § 105-134;
 N.C. Gen. Stat. § 105-134.5;
N.C. Gen. Stat. § 105-241.9(a).

CONCLUSIONS OF LAW

With regard to the ALJ's Conclusions of Law and based upon the foregoing Findings of Fact, the Department decides as follows:

The Department rejects Conclusion of Law number 1 as the Department determines said Conclusion of law is erroneous as a matter of law as said statement is an incorrect summary of the contents of N.C. Gen. Stat. § 105-134.5, which statute merely states that federal taxable income is the starting point for determining state taxable income. However, and *contra* to Conclusion of Law number 1, federal interpretations of tax law are not controlling on the State of North Carolina's interpretation of North Carolina tax law. *Stone v. Lynch*, 68 N.C. App. 441, 443-44, 315 S.E.2d 350, 352-353 (1984), *affirmed*, 312 N.C. 739, 326 S.E.2d 230 (1985). Therefore, the Department rejects Conclusion of Law number 1.

~~1. — North Carolina law on taxation, unless explicitly stated otherwise, follows federal law on taxation. N.C. Gen. Stat. § 105-134.5.~~

The Department reverses Conclusion of Law number 2 as the Department determines said Conclusion of Law is not supported by the Findings of Fact nor the evidence contained in the record and is erroneous as a matter of law.

The conclusion reached in this Conclusion of Law is that Petitioner either renounced or rescinded his ownership, dominion, and control over the \$450,000.00 because he took no action to challenge the seizure during 2007. The Findings of Fact and the evidence contained in the record do not support Conclusion of Law number 2.

Black's Law Dictionary defines "renounce" as "to make an affirmative declaration of abandonment." Black's Law Dictionary, p. 1460. West Publishing Co. (Fourth Ed. 1951). There is no evidence of record to support a finding of fact that Petitioner affirmatively abandoned the \$450,000.00 during the 2007 tax year.

Black's Law Dictionary defines "rescind" as "to abrogate, annul, or cancel a contract; particularly, nullifying a contract by the act of a party." Black's Law Dictionary, p. 1471. West Publishing Co. (Fourth Ed. 1951). There is no evidence of record to support a finding of fact that Petitioner had a contract with the Federal Government whereby Petitioner could retain funds from the sale of non-gambling related assets of the Company.

The cases and Revenue Ruling 80-58 cited in support of Conclusion of Law number 2 have no application in this matter where there is no evidence of record with regard to rescission or renunciation. If Petitioner had actually renounced or rescinded his interest in the \$450,000.00, he would not have been able to execute the Settlement Agreement of March 6, 2008 with the Federal Government, nor would he have been able to retain \$10,000.00 of these funds. Moreover, Petitioner's claim of renunciation or rescission is inconsistent with his lawsuit against Vanguard for recovery of the money. D.T., pp. 46-47; Motion for Stay of Proceedings. Accordingly, the Department reverses Conclusion of Law number 2.

2. ~~Because the federal authorities seized the \$450,000.00 in the 2007 tax year and Petitioner took no action to challenge the seizure in the 2007 tax year,~~ Petitioner Harrison's ownership, dominion, and control over the \$450,000.00 was **not** renounced or rescinded in the 2007 tax year —~~the same year as receipt.~~ *Penn v. Robertson*, 155 F.2d 167, 172 (4th Cir. 1940); *United States v. Merrill*, 211 F.2d 297, 303-04 (9th Cir. 1954); *Bishop v. Comm'r*, 25 T.C. 969 (1956); *Gaddy v. Comm'r*, 38 T.C. 943, 949 (1962); Rev. Rul. 80-58, 1980-1 C.B. 181.

The Department reverses Conclusion of Law number 3 as the Department determines said Conclusion of Law is not supported by the Findings of Fact nor the evidence contained in the record and is erroneous as a matter of law. Conclusion of Law number 3 is based upon the *Penn* case, which pertains to rescission of a contract. 115 F.2d at 175 - 176. Since the evidence of record fails to establish a contract between Petitioner and the Federal Government whereby Petitioner was to be allowed to retain the proceeds from the sale of certain assets of the Company, Conclusion of Law number 3 is without factual or legal support and the Department reverses it for those reasons.

3. ~~Under federal law, and therefore North Carolina law,~~ **There is no evidence of Petitioner renouncing or rescinding his ownership, dominion, and control of the money in the same tax year as receipt of the money. Therefore, Petitioner has taken no affirmative action which prevents income taxation of the \$450,000.00 received from the Company.** *E.g., Penn*, 115 F.2d at 172.

The Department reverses Conclusion of Law number 4 as the Department determines said Conclusion of Law is not supported by the Findings of Fact nor the evidence contained in the record and is erroneous as a matter of law. Conclusion of Law number 4 is unsupported by law for the reasons set out in the preceding paragraphs dealing with Conclusions of Law numbers 2 and 3. Moreover, the ALJ Decision fails to specify what provision of the Internal Revenue Code would authorize the deduction it purports to allow. Finally, even if a deduction were to otherwise be proven under the authorities cited in the ALJ Decision, such a deduction must be disallowed under the prevailing law here in the Fourth Circuit. *Hackworth v. Comm’r*, 155 Fed. Appx. 627, 630 (4th Cir. 2005) (unpublished). The United States Court of Appeals has clearly ruled that no deduction may be allowed for the forfeiture of gambling assets due to the frustration of public policy that would ensue. *Id.* Both North Carolina and the United States have well-established public policies against gambling. *See* 18 U.S.C. §981; N.C. Gen. Stat. §§ 14-306.1 - 14-306.9. Accordingly, the Department reverses Conclusion of Law number 4.

4. Therefore, the North Carolina Department of Revenue is ~~not~~ permitted to tax under the undisputed facts of this case the \$450,000.00 as income to Petitioner Harrison.

ALJ DECISION

The Decision portion of the ALJ Decision is not supported by the admissible evidence, nor by the law as applied to that evidence. The ALJ Decision does not reflect that the appropriate burden of proof was applied, nor does it address the statutory presumption of correctness set out in N.C. Gen. Stat. §105-241.9(a). The ALJ Decision appears to be based upon Petitioner’s claim that he rescinded a contract or renounced his interest in \$450,000.00. Those allegations are not supported by the evidence. There is no record of an offer, acceptance, and consideration to support Petitioner’s allegation that there was a contract which entitled him to keep the proceeds from the sale of business assets. The Petitioner’s actions in executing the Settlement Agreement with the federal Government in 2008, and in suing Vanguard to recover the money, precludes a finding of a voluntary renunciation of the funds. The decision fails to specify the provision of the Internal Revenue Code under which it determined a deduction should be allowed. And regardless of the grounds for the deduction, the *Hackworth* case would appear to preclude allowing a deduction for Petitioner on these facts, in any event. Accordingly, and for the reasons set out herein, the “Decision” contained in the ALJ Decision is rejected. The Department adopts the following:

FINAL AGENCY DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the Department determines that the Decision Allowing Summary Judgment For Petitioner is contrary to the preponderance of admissible evidence in the record and to the law as applied to that evidence. Therefore, the Department rejects and declines to adopt the ALJ Decision. Pursuant to N.C. Gen. Stat. §150B-36(d), the case is remanded to the Office of Administrative Hearings for a contested case hearing.

APPEAL

Pursuant to N.C. Gen. Stat. § 150B-45, a party wishing to appeal the final decision of the Department in a contested tax case arising under N.C. Gen. Stat. § 105-241.15 may commence such an appeal by filing a Petition for Judicial Review in the Superior Court of Wake County and in accordance with the procedures for a mandatory business case set forth in N.C. Gen. Stat. § 7A-45.4(b) through (f) within 30 days after being served with a written copy of this Final Agency Decision. Before filing a Petition for Judicial Review, a taxpayer must pay the amount of tax, penalties, and interest that this Final Agency Decision states is due. N.C. Gen. Stat. § 105-241.16. Tax, penalties, interest, and the rate interest accrues are calculated as of September 27, 2011 as follows:

Tax (as shown on Notice of Final Determination)	\$18,547.00
Penalties (as shown on Notice of Final Determination)	4,636.75
Interest (updated through September 27, 2011)	<u>3,276.31</u>
Total due as of September 27, 2011	\$26,460.06

Plus daily interest which accrues at the rate of \$2.54 per day.

Under N.C. Gen. Stat. § 150B-47, the Department is required to file the official record in the contested case under review, any exceptions, proposed findings of fact, or written arguments submitted to the Department, as well as the Department's Final Agency Decision, with the reviewing court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the petition must be sent to the following address: North Carolina Department of Revenue, ATTN: Janice W. Davidson, 1429 Rock Quarry Road, Suite 105, Raleigh, North Carolina 27610, at the time the appeal is initiated to ensure timely filing of the record.

This the 27th day of September, 2011.

NORTH CAROLINA DEPARTMENT OF REVENUE

/s/ Janice W. Davidson

Janice W. Davidson
Agency Legal Specialist II
North Carolina Department of Revenue