JURISDICTION:	OKLAHOMA TAX COMMISSION
CITE:	2006-10-31-03 (Non-Precedential)
ID:	P-05-136-H
DATE:	OCTOBER31, 2006
DISPOSITION:	SUSTAINED IN PART/DENIED IN PART
TAX TYPE:	SALES/TOURISM/MIXED BEVERAGE
APPEAL:	NONE

FINDINGS OF FACT AND CONCLUSIONS OF LAW

COMPANY and PRESIDENT, as President and as an Individual, ("Protestants") appear pro se[1] through PRESIDENT. The Field Audit Section of the Audit Division ("Division"), Oklahoma Tax Commission, appears through OTC ATTORNEY, Assistant General Counsel, Office of General Counsel, Oklahoma Tax Commission.

PROCEDURAL HISTORY

On September 20, 2005, the protest file was received by this office for further proceedings consistent with the Uniform Tax Procedure Code[2] and the Rules of Practice and Procedure Before the Oklahoma Tax Commission.[3] On October 3, 2005, a letter was mailed to the Protestants stating that this matter had been assigned to ALJ, Administrative Law Judge, and docketed as Case Number P-05-136-H. The letter also advised the Protestants that 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.* On November 8, 2005, the Notice of Prehearing Conference was mailed to the last known address of the Protestants, setting the prehearing conference for November 21, 2005, at 3:00 p.m.[4]

The prehearing conference was held as scheduled. Both parties appeared by telephone. Pursuant to the prehearing conference, a status report was to be filed on or before December 21, 2005. On December 16, 2005, the Division filed a Status Report advising that the Division was contacting the "wholesaler" to request invoices. On December 19, 2005, the parties were directed to file a status report on or before January 23, 2006. On January 23, 2006, the Division filed the Status Report advising that the parties had meet and that the Protestants had provided invoices and documents for review. On January 24, 2006, the parties were directed to file a status report on or before February 22, 2006. On March 1, 2006, the Division filed a Status Report stating that the Protestants had provided invoices indicating the "wholesaler" records for

[1] "**pro se**" (proh **say** *or* **see**), *adv.* & *adj.* [Latin] For oneself; on one's own behalf; without a lawyer <the defendant proceeded pro se> <a pro se defendant>. -- Also termed *pro persona*; *in propria persona*; *propria persona*; *pro per*. See PROPRIA PERSONA. BLACK'S LAW DICTIONARY (8th ed. 2004), available at http://westlaw.com. (March 16, 2006).

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

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

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

2003 were incorrect and that they were trying to locate invoices for 2004. The Procedural History from March 2, 2006, to May 24, 2006, is being omitted.

On May 25, 2006, the Division filed a Status Report advising that the parties were not able to settle this matter and the Division requested a hearing be set. On May 26, 2006, a notice was mailed to the parties setting a hearing before the undersigned on June 29, 2006, at 9:30 a.m., with position letters or memorandum briefs due on or before June 22, 2006. On June 13, 2006, the Brief of the Audit Division was filed. On June 22, 2006, the Brief of the Protestants was filed.

On June 28, 2006, the Division filed a Motion for Continuance because the Division's witness had been in a car accident and the witness would not be able to appear at the hearing the next morning. The Protestants did not have any objections to the Division's request. On June 29, 2006, an Order Granting Motion for Continuance was issued by the undersigned, resetting the hearing for July 20, 2006, at 1:30 p.m.

An open hearing[5] was held on July 20, 2006, at approximately 1:30 p.m. The Division called one witness, AUDITOR, Field Auditor, Field Audit Section of the Audit Division, Oklahoma Tax Commission, who testified regarding the records of the Division. The Division's Exhibits A through N were identified, offered, and admitted into evidence. The Protestants' exhibits were identified, offered, and admitted into evidence as Division's Exhibits M and N.

Upon conclusion of the hearing, the record was held open for the limited purpose of the Division searching Tax Commission records for the Protestants' October 2004 Mixed Beverage Report, along with a copy of the check evidencing payment. On July 21, 2006, a letter confirming the instructions was mailed to the parties that the Division was to submit the documents on or before August 3, 2006, at which time the record would be closed and the case submitted for decision. On July 25, 2006, the Division filed a Status Report stating that it had been unable to locate an October 2004 Mixed Beverage Report filed by COMPANY and a check evidencing payment. No response was received from the Protestants.[6] On August 8, 2006, the record in this matter was closed and this case 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 position letters, the undersigned finds:

1. On or about April 2005, the Division conducted a Mixed Beverage Depletion Audit and 3.2 Beer Depletion Audit on COMPANY, a night club that was located at BUSINESS

[5] The Protestant waived his right to a confidential hearing. OKLA. STAT. ANN. tit. 68, § 205 (West Supp. 2006).

[6] PRESIDENT testified that he brought in a copy of the cancelled check, with the micro-film number or DLN, which enabled a Collections Division employee to find the October 2004 Mixed Beverage Report. The Division did not have a copy of the cancelled check with the DLN, which is why the report could not be located.

ADDRESS.[7] The night club's main source of revenue was the sale of 3.2 beer.[8] The Division's audit covered the period from January 1, 2003, to December 31, 2004 ("Audit Period").

2. During the Audit Period, PRESIDENT was the President of COMPANY.[9]

3. The Mixed Beverage Depletion Audit conducted by the Division resulted in zero *tax* liability.[10] The 3.2 Beer Depletion Audit resulted in unreported sales of $168,593.60.[11]

4. The Division obtained records of 3.2 beer purchases for the Audit Period from COMPANY'S wholesalers, WHOLESALER 1[12] and WHOLESALER 2[13] .

5. PRESIDENT provided AUDITOR with the following 3.2 beer price list for the Audit Period:

Draft	$1.25
Happy Hour Draft	$0.50
Pitchers	$1.00
Bottle	$1.75
Happy Hour Bottle	$1.50

During "Promotional Nights," such as "Ladies Night," "Birthday Parties," and "Football Watch Parties," 3.2 beer (draft beer) was given to customers free.[14]

6. The Division requested records from the Protestants for purposes of the audit. The Protestants did provide summaries of weekly sales figures and monthly sales figures,[15] partial

[7] Division's Exhibit A. PRESIDENT testified that the night club was a small neighborhood bar with sixty (60) chairs.

[8] PRESIDENT testified that he had requested the audit himself because he had leased the night club on December 21, 2004. The night club reopened January 1, 2005, as "NEW NAME." PRESIDENT also testified that the night club closed its doors August 2005.

[9] Division's Exhibit B. Testimony of PRESIDENT.

[10] Testimony of AUDITOR. PRESIDENT also testified that he had a computerized system to track mixed beverages.

[11] Division's Exhibit E.

[12] Division's Exhibit C.

[13] Division's Exhibit D.

[14] Testimony of PRESIDENT. *See* Brief filed June 22, 2006.

[15] *See* Brief of Protestants filed June 22, 2006, Exhibit B.

banking statements for the Audit Period, and the price list.[16] The Protestants did not provide any other records to the Division *during* the audit. A beginning and ending inventory was not requested from the Protestants. AUDITOR determined that approximately twenty percent (20%) of COMPANY'S sales were at Happy Hour prices and another ten percent (10%) of sales were for draft pitchers. The sales tax and waste percentages were removed from the weighted average prices and applied to the monthly purchases from BOTH WHOLESALERS.[17]

7. On June 6, 2005, the Division issued proposed sales tax assessments[18] against the Protestants as follows, to-wit:

Sales Tax	$13,487.48
Interest @ 15% through 06/30/05	3,014.18
Tax & Interest due within 30 Days	$16,501.66
30 day delinquent Penalty @ 10%	1,348.80
Tax, Interest & Penalty due after 30 Days	$17,850.46

8. On June 6, 2005, the Division issued proposed assessments of Mixed Beverage Penalty[19] and Tourism Tax[20] against COMPANY, as follows, to-wit:

Mixed Beverage Period	Failure To File Penalty
October 2004	$300.00
Tourism Tax	$166.78
Interest @ 15% through 06/30/05	32.49
Tax & Interest due within 30 Days	$199.27
30 day delinquent Penalty @ 10%	16.68
Tax, Interest & Penalty due after 30 Days	$215.95

9. On July 26, 2005, the Division received a timely filed protest to the proposed assessments.[21] The basis of the protest was the erroneous reporting of 3.2 beer purchases from WHOLESALER 2 and the 3.2 beer given to customers for free during "Promotional Nights."[22]

[16] PRESIDENT testified that his son had set up his computerized record keeping system, but when 2004 began, PRESIDENT starting typing data over the data for 2003. PRESIDENT also testified that he still had Z-Tapes from the register, but they are illegible due to their age.

[17] Division's Exhibits E, F, and G. Testimony of AUDITOR.

[18] Division's Exhibits H and I.

[19] Division's Exhibit K.

[20] Division's Exhibit J.

[21] Division's Exhibit L.

[22] *See* Note 20.

10. Approximately ninety percent (90%) of the invoices for the purchase of 3.2 beer by COMPANY were examined by AUDITOR for the period of January 1, 2003, through December 31, 2003.[23]

11. The banking records provided to the Division during the audit did not reflect that deposits were being made to the Protestants' account, which supported unreported sales of $168,593.60 during the Audit Period.[24]

12. Subsequent to the issuance of the proposed assessments, PRESIDENT provided the Division with a summary of "estimated" sales made during "Promotion Nights."[25] Copies of twenty (20) invoices[26] for 3.2 beer purchased from WHOLESALER 2 during March 2004 through June 2004, and October 2004 through November 2004, along with a computer print-out of COMPANY'S "Daily Sales Inquiry Report" from WHOLESALER 2 for 2004, was provided to AUDITOR post-audit.[27]

13. AUDITOR reviewed the twenty (20) invoices and "Daily Sales Report" from WHOLESALER 2 for 2004 and confirmed the Protestants' claim that WHOLESALER 2's records were "inflated" for COMPANY's 3.2 beer purchases for 2004.[28] Without copies of all invoices from WHOLESALER 2 for 2004, AUDITOR analyzed the difference between the hard copy invoices and the purchases according to WHOLESALER 2. From that analysis AUDITOR determined that approximately sixty-five and one-half percent (66.5%) of the 3.2 beer purchases reported by WHOLESALER 2 were correct and approximately thirty-three and one-half percent (33.5%) of the purchases reported were incorrect.[29]

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[23] Testimony of AUDITOR and PRESIDENT.

[24] Testimony of AUDITOR.

[25] *See* Brief of the Protestants filed June 22, 2006, Exhibit A.

[26] PRESIDENT testified that COMPANY made 3.2 beer purchases from WHOLESALER 2 twice a week. COMPANY'S records should have contained approximately one hundred (100) invoices versus the twenty (20) invoices PRESIDENT provided. Both PRESIDENT and AUDITOR contacted WHOLESALER 2 and requested copies of all invoices, but were not able to obtain them. Testimony indicated that WHOLESALER 2 had purged its computer records for 2003 and 2004. Testimony also indicated that WHOLESALER 2 still retained copies of the invoices, but that the invoices could not be produced because all of the invoices were stored in the basement in no particular order.

[27] Division's Exhibits M and N.

[28] Division's Exhibits M and N. Testimony of AUDITOR.

[29] Division's Exhibit M, Second Page. PRESIDENT also asserted that there were purchases reported on the report that he did not make and without copies of all invoices from WHOLESALER 2, how do you prove a negative? Example: Report reflects purchases on January 2, 2004, but PRESIDENT testified that COMPANY was closed on January 2, 2004. PRESIDENT'S explanation of why the purchases were inflated was that WHOLESALER 2's driver (through July 2004) was selling beer off the truck and invoicing it to COMPANY and other customers. AUDITOR contacted WHOLESALER 2 regarding the allegations and WHOLESALER 2 would neither confirm nor deny that it had happened, but WHOLESALER 2 did indicate that the date discrepancy on some of the invoices was because WHOLESALER 2 closed its books out at noon each day and that is why some of the purchases made after 12:00 p.m. have the next day's date on them. However according to the Division's records,

14. The parties were unable to agree on the amount of adjustment to the proposed assessments, so at the time of the hearing, no revisions had been made.[30]

CONCLUSIONS OF LAW

1. The Oklahoma Tax Commission is vested with jurisdiction over the parties and subject matter of this proceeding.[31]

2. The collection and remittance of sales tax is governed by the Oklahoma Sales Tax Code ("Sales Tax Code").[32] The Sales Tax Code levies "upon all sales,[33] not otherwise exempted . . . an excise tax of four and one-half percent (4.5%) of the gross receipts or gross proceeds[34] of each sale of . . . tangible personal property. . . ."[35] Oklahoma Statutes authorize incorporated cities, towns, and counties to levy taxes as the Legislature may levy and collect taxes for purposes of state government.[36]

3. The tax levied by the Oklahoma Sales Tax Code[37] shall be paid by the consumer or user to the vendor[38] as trustee for and on account of this state and each and every vendor shall

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COMPANY's 3.2 beer purchases from WHOLESALER 2 dropped dramatically when the new driver started August 2004. *See* Division's Exhibit D, Page 3. Example: In July 2004, WHOLESALER 2's records reflect that COMPANY purchased 194 cases of 3.2 beer and when the new driver took over in August 2004, WHOLESALER 2's records reflect a purchase of 21 cases of 3.2 beer.

[30] Testimony of AUDITOR.

[31] OKLA. STAT. ANN. tit. 68, § 221(D) (West Supp. 2006).

[32] OKLA. STAT. ANN. tit. 68, § 1350 et seq. (West 2001).

[33] OKLA. STAT. ANN. tit. 68, § 1352(21)(a) (West Supp. 2006):

> "Sale" means the transfer of either title or possession of tangible personal property for a valuable consideration regardless of the manner, method, instrumentality, or device by which the transfer is accomplished in this state, or other transactions as provided by this paragraph, including but not limited to:
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> a. the exchange, barter, lease, or rental of tangible personal property resulting in the transfer of the title to or possession of the property,
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> …

[34] OKLA. STAT. ANN. tit. 68, § 1352(11) (West Supp. 2006).

[35] OKLA. STAT. ANN. tit. 68, § 1354(A) (1) (West Supp. 2006).

[36] OKLA. STAT. ANN. tit. 68, § 1370 et seq. (West Supp. 2006) and OKLA. STAT. ANN. tit. 68, § 2701 (West Supp. 2006).

[37] OKLA. STAT. ANN. tit. 68, § 1350 et seq. (West 2001).

collect from the consumer or user the full amount of the tax or an amount equal as nearly as possible or practicable the average equivalent thereof.[39]

4. All sales of drinks sold or dispensed by hotels, restaurants, or other dispensers, and sold for immediate consumption upon the premises, are subject to sales tax, unless otherwise exempted by the Sales Tax Code.[40]

5. For the purpose of proper administration of the provisions of the sales and use tax laws, it is presumed that all gross receipts are subject to tax until they are shown to be tax exempt. The burden of proving that a sale of tangible personal property or enumerated service is an exempt sale is upon the vendor.[41] The Sales Tax Code does not contain an exemption[42] for the 3.2 beer given free to customers during "Promotional Nights," and is therefore subject to sales tax.

6. The Division used the depletion method to audit the sale of 3.2 beer. This method accounts for the number of drinks available for sale, preparation, or service from the total 3.2 beer sales reported. It is a reasonable method for determining the total gross receipts subject to sales and tourism tax.[43]

7. The sales of "[a]ny food, confection, or drink sold or dispensed by hotels, restaurants or bars, and sold for immediate consumption upon the premises or delivered or carried away from the premises for consumption elsewhere" are subject to tourism tax (1/10 of 1%).[44]

8. Rules promulgated pursuant to the Administrative Procedures Act[45] are presumed to be valid until declared otherwise by a district court of this state or the Supreme Court.[46] They

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[38] "Vendor" is defined as "any person making sales of tangible personal property or services in this state, the gross receipts or gross proceeds from which are taxed by the Oklahoma Sales Tax Code." OKLA. STAT. ANN. tit. 68, § 1352(27) (a) (West Supp. 2006).

"Person" is defined to include "any individual" or "[any] corporation." OKLA. STAT. ANN. tit. 68, § 1352(17) (West Supp. 2006).

[39] OKLA. STAT. ANN. tit. 68, § 1361(A) (West Supp. 2006). *See also Wal-Mart Stores, Inc. v. Oklahoma Tax Commission*, 1991 OK CIV APP 73, 817 P.2d 1281.

[40] OKLA. STAT. ANN. tit. 68, § 1354(A) (9) (West Supp. 2006).

[41] OKLA. ADMIN. CODE § 710:65-1-4 (June 26, 1994).

[42] OKLA. STAT. ANN. tit. 68, § 1355 (West Supp. 2006).

[43] The Division uses the same depletion method for mixed beverages subject to gross receipts tax. *See* OKLA. STAT. ANN. tit. 37, § 579 (West 2001) and OKLA. ADMIN. CODE § 710:20-5-8 (May 25, 2002). *See also Kifer v. Oklahoma Tax Commission*, 1998 OK CIV APP 34, 956 P.2d 162, which upheld the Tax Commission using the depletion method rather than actual cash register receipts.

[44] OKLA. STAT. ANN. tit. 68, § 50012(A) (2) (West 2001).

[45] OKLA. STAT. ANN. tit. 75, § 250 et seq. (West 2001).

are valid and binding on the persons they affect, have the force of law, and are prima facie evidence of the proper interpretation of the matter to which they refer.[47]

9. Vendors shall keep records and books of all sales and all purchases of tangible personal property. Vendors must maintain complete books and records covering receipts from all sales and distinguishing taxable from nontaxable receipts.[48] In this matter the Protestants failed to maintain complete books and records for the purchase of 3.2 beer and the receipts from the sale of 3.2 beer.

10. "Every person required to collect any tax imposed by the [the Oklahoma Sales Tax Code], and in the case of a corporation, each principal officer thereof, shall be personally liable for the tax."[49]

11. When the Tax Commission issues a proposed assessment against a corporation for unpaid sales tax, the Commission shall file assessments against the principal officers of the corporation personally liable for the tax. The principal officers of the corporation shall be liable for the payment of sales tax during the period of time for which the assessment is made. The liability of a principal officer for sales tax shall be determined in accordance with the standards for determining liability for payment of federal withholding tax.[50]

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[46] OKLA. STAT. ANN. tit. 75, § 306(C) (West 2001).

[47] OKLA. STAT. ANN. tit. 75, § 308.2(C) (West 2001).

[48] OKLA. ADMIN. CODE § 710:65-3-30 (June 26, 2003). *See* OKLA. ADMIN. CODE § 710:65-3-31 (June 26, 1994).

[49] OKLA. STAT. ANN. tit. 68, § 1361(A) (West Supp. 2006). *See also* OKLA. STAT. ANN. tit. 68, § 253 (West 2001). The Tax Commission identifies the "President, Vice-President, Secretary, Treasurer, or Secretary/Treasurer as principal officers." OKLA. ADMIN. CODE § 710:65-7-3-(1) (Text current through May 15, 2006).

[50] The full text of OKLA. STAT. ANN. tit. 68, § 253 (West 2001) is as follows:

> When the Oklahoma Tax Commission files a proposed assessment against corporations or limited liability companies for unpaid sales taxes, withheld income taxes or motor fuel taxes collected pursuant to Article 5, 6 or 7 of this title, the Commission shall file such proposed assessments against the principal officers of the corporations or the managers or members personally liable for the tax. The principal officers of any corporation shall be liable for the payment of any tax as prescribed by this section if such officers were officers of the corporation during the period of time for which the assessment was made. Managers or members of any limited liability company shall be liable for the payment of any tax as prescribed by this section if the managers or members were specified as responsible for withholding or collection and remittance of taxes during the period of time for which the assessment was made. If no managers or members were specified to be responsible for duty of withholding and remittance of taxes during the period of time for which the assessment was made, then all managers and member shall be liable.
>
> The liability of a principal officer for sales tax, withheld income tax or motor fuel tax shall be determined in accordance with the standards for determining liability for payment of federal withholding tax pursuant to the Internal Revenue Code of 1986, as amended, or regulations promulgated pursuant to such section.

12. In this matter there is no dispute that PRESIDENT was the President of COMPANY during the Audit Period and a principal officer responsible for the collection and remittance of sales tax.[51]

13. Oklahoma Statutes provide for the collection of interest and penalty on delinquent tax.[52] "All penalties or interest imposed by [Title 68], or any state tax law, shall be recoverable by the Tax Commission as a part of the tax with respect to which they are imposed. . . ."[53]

14. A proposed assessment is presumed correct and the taxpayer bears the burden of showing that it is incorrect and in what respect.[54]

15. An order of the Tax Commission must be supported by substantial evidence.[55] Likewise, the audit upon which a portion of the record is formed and order issued, must be supported by substantial evidence.[56]

16. 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.[57] In this matter the evidentiary basis for the portion of the audit based upon Premium's records of the Protestants' 3.2 beer purchases from January 2004 through July 2004 is not supported by substantial evidence.

Section 253 sets out the trust taxes (which cannot be discharged in bankruptcy) for which a principal officer of a corporation that is also a "responsible person" is held personally liable, regardless of whether a corporation is in good standing or suspended. The current Business Registration Form on the signature line in part states, "I further acknowledge and agree that sales, withholding and motor fuel taxes are trust taxes for the State of Oklahoma and that any use of these trust funds other than timely remittance to the State of Oklahoma is embezzlement and can result in criminal prosecution." The current form is available on-line at *http://www.oktax.state.ok.us*.

[51] Division's Exhibit B. Testimony of PRESIDENT.

[52] OKLA. STAT. ANN. tit. 68, § 217 (West 2001).

[53] OKLA. STAT. ANN. tit. 68, § 217(G) (West 2001).

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

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

[56] Commission Order No. 2003-07-22-09 (July 22, 2003), 2003 WL 2347117 (Okl. Tax Com.), available at *http://westlaw.com*. (August 10, 2006).

[57] *See* Notes 54 and 55.

17. As to the remainder of the audit, the Protestants have failed to meet their burden of proof and have cited no authority that the proposed assessments are incorrect and what respects.

18. The protests should be sustained in part and denied in part, in accordance with the findings of fact and conclusions of law as set out herein.

DISPOSITION

It is the ORDER of the OKLAHOMA TAX COMMISSION, based upon the specific facts and circumstances of this case, that the protest of COMPANY to the proposed sales tax assessment and tourism tax assessment should be sustained in part and denied in part.

It is further ORDERED that PRESIDENT'S protest to the proposed sales tax assessment should be sustained in part and denied in part.

It is further ORDERED that the protest of COMPANY to the proposed assessment of penalty for mixed beverage should be denied.

It is further ORDERED that the audit be adjusted in accordance with the findings of fact and conclusions of law herein and that the revised amounts, inclusive of accrued interest and penalty, should be fixed as the amounts due and owing.

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.