

Wage and Hour Division, Labor

§ 779.17

the application of this definition and what is included in it.

§ 779.15 Sale and resale.

(a) Section 3(k) of the Act provides that “Sale” or “sell”, as used in the Act, “includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.” Since “goods”, as defined, includes any part or ingredient of goods (see § 779.14), a “resale” of goods includes their sale in a different form than when first purchased or sold, such as the sale of goods of which they have become a component part (*Arnold v. Kanowsky*, 361 U.S. 388). The Act, in section 3(n), provides one exception to this rule by declaring that “resale”, as used in the Act, “shall not include the sale of goods to be used in residential or farm building construction, repair, or maintenance: *Provided*, That the sale is recognized as a bona fide retail sale in the industry.” A resale of goods is not confined to resale of the goods as such, but under section 3(k) may include an “other disposition” of the goods in which they are disposed of in a transaction of a different kind; thus the sale by a restaurant to an airline of prepared meals to be served in flight to passengers whose tickets entitle them to a “complimentary” meal is a sale of goods “for resale”. (*Mitchell v. Sherry Corine Corp.*, 264 F 2d 831 (C.A. 4), cert. denied 360 U.S. 934.)

(b) In construing section 3(s)(1) of the Act as it was prior to the 1966 amendments it should be noted that section 3(n) of the prior Act defined “resale” by declaring that this term, “except as used in subsection (s)(1), shall not include the sale of goods to be used in residential or farm building construction, repair, or maintenance: *Provided*, That the sale is recognized as a bona fide retail sale in the industry.” Thus, although section 3(n) of the prior Act also provided the one exception to the meaning of “resale”, it made clear that the exception was inapplicable in determining under section 3(s)(1) of the prior Act, “if such enterprise purchases or receives goods for resale that move or have moved across State lines (not in deliveries from the reselling establishment) which amount in total volume to \$250,000 or more”. The applica-

tion of the inflow test under section 3(s) (1) of the prior Act is discussed fully in subpart C of this part.

§ 779.16 State.

As used in the Act, *State* means “any State of the United States or the District of Columbia or any Territory or possession of the United States” (Act, section 3(c)). The application of this definition in determining questions of coverage under the Act’s definition of “commerce” and “produced” (see §§ 779.12, 779.13) is discussed in the interpretative bulletin on general coverage, part 776 of this chapter. This definition is also important in determining whether goods “for resale” purchased or received by an enterprise move or have moved across State lines within the meaning of former section 3(s)(1) of the Act (prior to the 1966 amendments) and whether sales of goods or services are “made within the State” within the meaning of the retail or service establishment exemption in section 13(a)(2), as discussed in subpart D of this part.

§ 779.17 Wage and wage payments to tipped employees.

Section 3(m) of the Act provides that as used in the Act, “wage” paid to any employee:

includes the reasonable cost, as determined by the Secretary of Labor, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging or other facilities are customarily furnished by such employer to his employees: *Provided*, That the cost of board, lodging, or other facilities shall not be included as a part of the wage paid to any employee to the extent it is excluded therefrom under the terms of a bona fide collective-bargaining agreement applicable to the particular employee: *Provided further*, That the Secretary is authorized to determine the fair value of such board, lodging, or other facilities for defined classes of employees and in defined areas, based on average cost to the employer or to groups of employers similarly situated, or average value to groups of employees, or other appropriate measures of fair value. Such evaluations, where applicable and pertinent, shall be used in lieu of actual measure of cost in determining the wage paid to any employee. In determining the wage of a tipped employee, the amount paid such employee by his employer shall be deemed to be increased on account of tips by an amount determined by the employer, but not by an