

## Wage and Hour Division, Labor

## § 794.129

the Act for the 3-month period commencing 1 month after the end of the preceding calendar or fiscal quarter. Once adopted the same basis must be used for each successive 3-month period.

### § 794.126 Computations for a new business.

When a new business is commenced the employer will necessarily be unable for a time to determine its annual dollar volume on the basis of a full 12-month period as described in §§ 794.123 and 794.124. In many cases, it is readily apparent that the enterprise will or will not have the requisite annual dollar volume specified in the Act. For example, the new business may be so large that it is clear from the outset that the business will exceed the \$1 million test of the exemption. In other cases, where doubt exists, the gross receipts of the new business during the first quarter year in which it has been in operation will be taken as representative of its annual dollar volume tests for purposes of determining its status under section 7(b)(3) of the Act in workweeks falling in the following quarter-year period. Similarly, for purposes of determining its status under the Act in workweeks falling within ensuing quarter-year periods, the gross receipts of the new business for the completed quarter-year periods will be taken as representative of its annual dollar volume in applying the annual volume tests of the Act. After the new business has been in operation for a full calendar or fiscal year, the analysis can be made by the methods described in §§ 794.123 and 794.124.

#### SALES MADE WITHIN THE STATE

### § 794.127 Exemption conditioned on making 75 percent of sales within the State.

A further requirement of the section 7(b)(3) exemption is that more than 75 percent of the sales of the enterprise engaged in the wholesale or bulk distribution of petroleum products (measured by annual dollar volume) must be made "within the State in which such enterprise is located." This means that over 75 percent of the annual dollar volume of sales must be from sales to customers within the same State in

which the enterprise is located. If 25 percent or more of its sales volume is from sales to customers outside the State of its location, the requirement is not met and the enterprise cannot qualify for exemption.

### § 794.128 Sales made to out-of-State customers.

Whether the sale of goods or services is made to an out-of-State customer is a question of fact. In order for a customer to be considered an out-of-State customer, some specific relationship between him and the seller has to exist to indicate his out-of-State character. On the one hand, sales made to the casual cash-and-carry customer (such as at a gasoline station owned or operated by the enterprise), who, for all practical purposes, is indistinguishable from the mass of customers who visit the establishment, are sales made within the State even though the seller knows or has reason to believe, because of his proximity to the State line or because he is frequented by tourists, that some of the customers who visit his establishment reside outside the State. If the customer is of that type, sales made to him are sales made within the State even if the seller knows in the particular instance that the customer resides outside the State. On the other hand, a sale is made to an out-of-State customer and therefore, is not a sale made "within the State" in which the enterprise is located, if delivery of the goods is made outside that State, or if the relationship with the customer is such as to indicate his out-of-State character. Such a relationship would exist, for example, where an out-of-State company in the regular course of dealing picks up the petroleum products at the bulk storage station of the enterprise and transports them out of the State in its own trucks.

### § 794.129 Sales "made within the State" not limited to noncovered activity.

Sales to customers located in the same State as the establishment are sales made "within the State" even though such sales may constitute activity within the interstate commerce coverage of the Act, as where the sale (a) is made pursuant to prior orders