

## 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

from customers for goods to be obtained from outside the State; (b) contemplates the purchase of goods from outside the State to fill a customer's orders; or (c) is made to a customer for his use in interstate or foreign commerce or in the production of goods for such commerce.

SALES MADE TO OTHER BULK  
DISTRIBUTORS

**§ 794.130 Not more than 25 percent of sales may be to customers engaged in bulk distribution of petroleum products for resale.**

As a further requirement for exemption, section 7(b)(3) limits to not more than 25 percent (measured by annual dollar volume) the sales which an enterprise engaged in the wholesale or bulk distribution of petroleum products may make to customers who are engaged in the bulk distribution of such products for resale. It should be noted that this limitation does not depend on whether the goods sold by the enterprise to such customers are sold by it for resale, or on whether the goods sold to such customers are petroleum products. It is whether the customer is engaged in the bulk distribution of petroleum products for resale that is controlling. A sale of any goods must be included in this 25 percent limitation so long as it is made to a customer who, as described in section 7(b)(3), can be characterized as one "engaged in the bulk distribution of such products for resale". It should be also noted that this provision does not in any way limit the sales which the enterprise may make to customers who are not engaged in the bulk distribution of petroleum products for resale. Thus, there is no limitation on the sales the enterprise may make to gasoline service stations which sell such products for resale but do not engage in the "bulk distribution" of the products so sold, or to any other customers except those specified in the exemption in section 7(b)(3). Who is a "customer engaged in the bulk distribution of such products for resale" is discussed in §§ 794.131—794.133.

**§ 794.131 "Customer \* \* \* engaged in bulk distribution".**

A sale to a customer of an enterprise engaged in the wholesale or bulk dis-

tribution of petroleum products will be considered to come within the 25 percent limitation for purposes of the exemption under section 7(b)(3) if it is made to a "customer who is engaged in the bulk distribution of such products for resale". The identity of such customers is generally well known in the trade. For example, this would generally include other petroleum jobbers, brokers, wholesalers, and any others who engaged in the bulk distribution of petroleum products for resale. Thus a sale to a petroleum jobber who is engaged in selling petroleum products to gasoline stations would clearly be a sale to a customer described in section 7(b)(3). The essential tests are: first, that the customer must be one who is engaged in the distribution of "such products", which means petroleum products; second, that he must engage in "the bulk distribution" of such products; and finally, that he must be engaged in such distribution "for resale". These three requirements are discussed in §§ 794.132 through 794.134.

**§ 794.132 "Petroleum products".**

A sale by an enterprise engaged in the wholesale or bulk distribution of petroleum products will be included in the 25 percent limitation under the exemption only if it is made to a customer who engages in the distribution, in bulk and for resale, of "petroleum products". The term "petroleum products" as used in section 7(b)(3) includes such products as gasoline, kerosene, diesel fuel, lubricating oils, fuel oils, greases, and liquified-petroleum gas. Sales to customers who are not engaged in the distribution of petroleum products will not be included in the 25 percent limitation.

**§ 794.133 "Bulk" distribution.**

"Bulk" distribution of petroleum products typically connotes those methods of distribution in which large quantities of the product are distributed in a single delivery or delivery trip. Thus, "bulk" distribution includes deliveries from bulk storage facilities at the establishment to the tank truck of a customer (whether or not at "wholesale"). It also includes deliveries made in series on a single trip on a delivery route to the storage