

## Wage and Hour Division, Labor

## § 779.328

for making final decisions, of course, rests with the courts. An employer disagreeing with the determinations of the Secretary and claiming exemption has the burden of proving in a court proceeding that the prescribed percentage of the establishment's sales or services are recognized as retail in the industry and that his establishment qualifies for the exemption claimed by him. (See *Wirtz v. Steepleton*, cited above, and 95 Cong. Rec. 12510.)

### § 779.326 Sources of information.

In determining whether a sale or service is recognized as a retail sale or service in a particular industry, there are available to the Secretary a number of sources of information to aid him in arriving at a conclusion. These sources include: (a) The legislative history of the Act as originally enacted in 1938 and the legislative history of the 1949, 1961, and 1966 amendments to the Act pertaining to those sections in which the term "retail or service establishment" is found, particularly in the section 13(a)(2) exemption; (b) the decisions of the courts during the intervening years; and (c) the Secretary's experience in the intervening years in interpreting and administering the Act. These sources of information enable the Secretary to lay down certain standards and criteria, as discussed in this subpart, for determining generally and in some cases specifically what sales or services are recognized as retail sales or services in particular industries.

### § 779.327 Wholesale sales.

A wholesale sale, of course, is not recognized as a retail sale. If an establishment derives more than 25 percent of its annual dollar volume from sales made at wholesale, it clearly cannot qualify as a retail and service establishment. It must be remembered, however, that what is a retail sale for purposes of a sales tax law is not necessarily a retail sale for purposes of the statutory definition of the term "retail or service establishment". Similarly, a showing that sales of goods or services are not wholesale or are made to the ultimate consumer and are not for resale does not necessarily prove that such sales or services are recognized in

the particular industry as retail. (*Wirtz v. Steepleton General Tire Co.*, 388 U.S. 190.)

### § 779.328 Retail and wholesale distinguished.

(a) The distinction between a retail sale and a wholesale sale is one of fact. Typically, retail sales are made to the general consuming public. The sales are numerous and involve small quantities of goods or services. Wholesale establishments usually exclude the general consuming public as a matter of established business policy and confine their sales to other wholesalers, retailers, and industrial or business purchasers in quantities greater than are normally sold to the general consuming public at retail. What constitutes a small quantity of goods depends, of course, upon the facts in the particular case and the quantity will vary with different commodities and in different trades and industries. Thus, a different quantity would be characteristic of retail sales of canned tomato juice, bed sheets, furniture, coal, etc. The quantity test is a well-recognized business concept. There are reasonably definite limits as to the quantity of a particular commodity which the general consuming public regularly purchases at any given time at retail and businessmen are aware of these buying habits. These buying habits set the standard for the quantity of goods which is recognized in an industry as the subject of a retail sale. Quantities which are materially in excess of such a standard are generally regarded as wholesale and not retail quantities.

(b) The sale of goods or services in a quantity approximating the quantity involved in a normal wholesale transaction and as to which a special discount from the normal retail price is given is generally regarded as a wholesale sale in most industries. Whether the sale of such a quantity must always involve a discount in order to be considered a wholesale sale depends upon industry practice. If the practice in a particular industry is such that a discount from the normal retail price is not regarded in the industry as significant in determining whether the sale of a certain quantity is a wholesale sale, then the question of whether