

makes them for the purpose of selling them at other establishments the establishment making the goods is a factory and not a retail establishment.

(b) Where the making or processing of the goods takes place away from the selling establishment, the section 13(a)(4) requirement that both the making or processing and selling take place at the same establishment cannot be met. This will be true even though the place at which the goods are made or processed services the retail selling establishment exclusively. In such a situation, while the selling establishment may qualify for exemption under section 13(a)(2), the separate establishment at which the goods are made or processed will not be exempt. The latter is a manufacturing establishment. For example, a candy kitchen manufacturing candy for sale at separate retail outlets is a manufacturing establishment and not a retail establishment. (*Fred Wolferman, Inc. v. Gustafson*, 169 F. 2d 759 (CA-8.))

(c) The fact that goods made or processed on the premises of a bona fide retail establishment are sold by the establishment through outside salesmen (as, for example, department store salesmen taking orders from housewives for draperies) will not defeat the exemption if otherwise applicable. On the other hand, in the case of a factory or similar establishment devoted to making or processing goods, the fact that its goods are sold at retail by outside salesmen provides no ground for recognizing the establishment as a retail establishment or qualifying it for exemption.

§ 779.349 The 85-percent requirement.

The final requirement for the section 13(a)(4) exemption is that more than 85 percent of the establishment's sales of the goods it makes or processes, measured by annual dollar volume, must consist of sales made within the State in which the establishment is located. A retail establishment of the type intended to be exempt under this exemption may also sell goods which it does not make or process; the 85-percent requirement applies only to the sales of goods which are made or processed at the establishment. This must not be confused with the additional test which

requires that the establishment, to be exempt, must derive more than 50 percent of its entire annual dollar volume of sales of goods from sales made within the State. (See § 779.339.) In other words, more than 85 percent of the establishment's annual dollar volume of sales of goods made or processed at the establishment, and more than 50 percent of the establishment's total annual dollar volume of sales of all the goods sold by the establishment, must be derived from sales made within the State. An establishment will not lose an otherwise applicable exemption under section 13(a)(4) merely because some of its sales of goods made or processed at the establishment are sales for resale or are not recognized as retail sales in the particular industry. Sales for resale, such as wholesale sales, and other sales not recognized as retail sales in the industry, will be counted in the 25-percent tolerance permitted by the exemption. (Cf. *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388.) Thus, for example, a bakery otherwise meeting the tests of 13(a)(4) making and selling baked goods on the premises nevertheless will qualify as an exempt retail establishment even though it engages in the sale of baked goods to grocery stores for resale if such sales, together with other sales not recognized as retail in the industry, do not exceed 25 percent of the total annual dollar volume of the establishment.

§ 779.350 The section 13(a)(4) exemption does not apply to service establishments.

The section 13(a)(4) exemption applies to retail establishments engaged in the selling of goods. It does not apply to service establishments. If the establishment is a service establishment, it must qualify under section 13(a)(2) in order to be exempt. A retail establishment selling goods, however, also may perform services incidental or necessary to the sale of such goods, such as a delivery service by a bakery store or installation of antennas by a radio dealer for his customers, without affecting the character of the establishment as a retail establishment qualified for exemption under section 13(a)(4).