

§ 779.258**ANNUAL GROSS VOLUME OF SALES MADE
OR BUSINESS DONE****§ 779.258 Sales made or business done.**

The Senate Report on the 1966 amendments reaffirmed the intent to measure the "dollar volume of sales or business" including "the gross receipts or gross business" to determine whether an enterprise is covered. This concept was first expressed in the Senate Report on the 1961 amendment (S. Rept. No. 145, 87th Congress, first session, p. 38). The phrase "business done" added by the 1966 amendments to section 3(s) merely reflects with more clarity the economic test of business size expressed in the prior Act in terms of "annual gross volume of sales" and conforms the language of the Act with the Congressional view expressed in the legislative history of the 1961 amendments. Thus, the annual gross volume of an enterprise must include any business activity in which it engages which can be measured on a dollar basis irrespective of whether the enterprise is tested under the prior or amended Act. The Senate Report on the 1966 amendments states:

The intent to measure the "dollar volume of sales or business" including the "gross receipts or gross business" in determining coverage of such an enterprise was expressed in the Senate report above cited at page 38. The addition of the term "business done" to the statutory language should make this intent abundantly plain for the future and remove any possible reason for misapprehension. The annual gross volume of sales made or business done by an enterprise, within the meaning of section 3(s), will thus continue to include both the gross dollar volume of the sales (as defined in sec. 3(k)) which it makes, as measured by the price paid by the purchaser for the property or service sold to him (exclusive of any excise taxes at the retail level which are separately stated), and the gross dollar volume of any other business activity in which the enterprise engages which can be similarly measured on a dollar basis. This would include, for example, such activity by an enterprise as making loans or renting or leasing property of any kind. (S. Rept. No. 1487, 89th Congress, second session, pp. 7-8.)

§ 779.259 What is included in annual gross volume.

(a) The annual gross volume of sales made or business done of an enterprise

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consists of its gross receipts from all types of sales made and business done during a 12-month period. The gross volume of sales made or business done means the gross dollar volume (not limited to income) derived from all sales and business transactions including, for example, gross receipts from service, credit, or other similar charges. Credits for goods returned or exchanged and rebates and discounts, and the like, are not ordinarily included in the annual gross volume of sales or business. The gross volume of sales or business includes the receipts from sales made or business done by the retail or service establishments of the enterprise as well as the sales made or business done by any other establishments of the enterprise, exclusive of the internal transactions between them. Gross volume is measured by the price paid by the purchaser for the property or service sold to him, as stated in the Senate Committee Report (§ 779.258). It is not measured by profit on goods sold or commissions on sales made for others. The dollar value of sales or business of the entire enterprise in all establishments is added together to determine whether the applicable dollar test is met. The fact that one or more of the retail or service establishments of the enterprise may have less than \$250,000 in annual dollar volume and may meet the other requirements for exemption from the pay provisions of the Act under section 13(a)(2), does not exclude the dollar volume of sales or business of that establishment from the annual gross volume of the enterprise. However, the dollar volume of an establishment derived from transactions with other establishments in the same enterprise does not ordinarily constitute part of the annual gross volume of the enterprise as a whole. The computation of the annual gross volume of sales or business of the enterprise is made "exclusive of excise taxes at the retail level which are separately stated". The taxes which may be excluded are discussed in §§ 779.261 through 779.264. The methods of calculating the annual gross volume of sales of an enterprise are set forth in §§ 779.265 through 779.269.

(b) In the ordinary case the functions of a leased department are controlled

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or unified in such a way that it is included in the establishment and therefore in the enterprise in which it is located, as discussed in § 779.225. The applicability of enterprise coverage and certain exemptions to such a leased department depends upon the enterprise coverage and the exemption status of the establishment in which the leased department is located. The annual gross volume of such a leased department is included in the annual gross volume of the establishment in which it is located as well as in the annual gross volume of the enterprise of which such establishment is a part.

(c) Likewise, where franchise or other arrangements result in the creation of a larger enterprise by means of operational restrictions so that the establishment, dealer, or concessionaire is an integral part of the related activities of the enterprise which grants the franchise, right, or concession, as discussed in §§ 779.229 and 779.232, it will follow that the annual gross volume of sales made or business done of such an enterprise includes the dollar volume of sales or business of each related establishment dealer, or concessionaire.

§ 779.260 Trade-in allowances.

Where merchandise is taken in trade when a sale is made, the annual gross volume of sales or business will include the gross amount of the sale before deduction of the allowance on such trade-in merchandise. This is so even though an overallowance or excessive value is allowed on the trade-in merchandise. In turn, when the trade-in merchandise is sold the amount of the sale will be included in the annual gross volume.

EXCISE TAXES

§ 779.261 Statutory provision.

Sections 3(s)(1) and 13(a)(2) of the amended Act as well as sections 3(s)(1), 3(s)(2), 3(s)(5), and 13(a)(2)(iv) of the prior Act provide for the exclusion of "excise taxes at the retail level which are separately stated" in computing the gross annual volume of sales or business or the annual dollar volume of sales for purposes of certain of the provisions contained in those sections. The Senate Committee report states as follows with respect to this provision:

* * * in determining whether the enterprise or establishment, as the case may be, has the requisite annual dollar volume of sales, excise taxes will not be counted if they are taxes that are collected at the retail level and are separately identified in the price charged the customer for the goods or services at the time of the sale. Excise taxes which are levied at the manufacturer's, wholesaler's, or other distributive level will not be excluded in calculating the dollar volume of sales nor will excise taxes be excluded in cases where the customer is charged a single price for the merchandise or services and the taxes are not separately identified when the sale is made. (S. Rept., 145, 87th Cong., first session, p. 39.)

In applying the above rules to determine annual gross volume of sales or business under section 3(s) or annual dollar volume of sales for purposes of the \$250,000 test under section 13(a)(2), excise taxes which (a) are levied at the retail level and (b) are separately stated and identified in the charge to the customer at the time of sale need not be included in the calculation of the gross or dollar volume of sales. Excise taxes which are levied at the manufacturer's, wholesaler's or other distributive level will not, ordinarily, be excluded in calculating the volume of sales, nor will excise taxes, even if levied at the retail level, be excluded in cases where the customer is charged a single price for the merchandise or services and the taxes are not separately identified when the sale is made. Excise taxes will be excludable whether they are levied by the Federal, State, or local government provided that the tax is "levied at the retail level" and "separately stated".

§ 779.262 Excise taxes at the retail level.

(a) Federal excise taxes are imposed at the retail level on highway vehicle fuels other than gasoline under the provisions of 26 U.S.C. 4041. Such excise taxes are levied at the retail level on any liquid fuel sold for use, or used in a diesel-powered highway vehicle. A similar tax is imposed on the sale of such special motor fuels as benzene and liquefied petroleum gas when used as a motor fuel. To the extent that these taxes are separately stated to the customer, they may be excluded from gross volume of sales. The extent to