

Wage and Hour Division, Labor

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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

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which State taxes are levied at the retail level, and thus excludable when separately stated, depends, of course, upon the law of the State concerned. However, as a general rule, State, county, and municipal sales taxes are levied at the retail level, and to the extent that they are separately stated, may be excluded. All State excise taxes on gasoline are, for purposes of section 3(s), taxes levied at the retail level, which, if separately stated, may be excluded.

(b) The circumstances surrounding the levying and collection of the Federal excise taxes on gasoline, tires, and inner tubes reflect that, although they are listed under the title of "Manufacturers Excise Taxes," they are, in practical operation, taxes "at the retail level." Federal excise taxes on gasoline, tires, and inner tubes, when "separately stated," may therefore be excluded in computing the annual gross volume of an enterprise for the purpose of determining coverage under section 3(s)(1) of the Act and section 13(a)(2) for purposes of applying the \$250,000 test for determining the retail and service establishment exemption of an establishment in a covered enterprise.

§ 779.263 Excise taxes not at the retail level.

There are also a wide variety of taxes levied at the manufacturer's or distributor's level and not at the retail level. It should be noted, however, that the circumstances surrounding the levying and collection of taxes must be carefully considered. The facts concerning the levying and collection of Federal excise taxes on alcoholic beverages and tobacco reflect that such taxes are upon the manufacture of these products and that they are neither levied nor collected at the retail level and thus are not excludable. However, in some cases the circumstances may reflect that despite the fact that such taxes may be levied upon the manufacturer or distributor, nevertheless they may be, in practical operation, taxes at the retail level and may be so regarded for the purpose of this provision.

29 CFR Ch. V (7-1-10 Edition)**§ 779.264 Excise taxes separately stated.**

A tax is separately stated where it clearly appears that it has been added to the sales price as a separate, identifiable amount, even though there was no invoice or sales slip. In the absence of a sales slip or invoice, the amount of the tax may either be separately stated orally at the time of sale, or visually by means of a poster or other sign reasonable designed to inform the purchaser that the amount of the tax, either as a stated sum per unit or measured by the gross amount of the sale, or as a percentage of the price, is included in the sales price. A sign on a gasoline pump indicating in cents per gallon the amount of State and Federal highway fuel excise taxes is an example of "separately stated" taxes.

COMPUTING THE ANNUAL VOLUME**§ 779.265 Basis for making computations.**

The annual gross dollar volume of sales made or business done of an enterprise or establishment consists of the gross receipts from all of its sales or its volume of business done during a 12-month period. Where a computation of the annual gross volume is necessary to determine monetary obligations to employees under the Act whether in an enterprise which has one or more retail or service establishments, or in any establishment in such enterprise, or in any gasoline service establishment, it must be based on the most recent prior experience which it is practicable to use. This was recognized in the Congress when the legislation was under consideration. (S. Rept. No. 145, 87th Cong., first session, p. 38 discusses in detail the calculation of the annual gross volume.) When gross receipts of an enterprise show that the annual dollar volume of sales made or business done meets the statutory tests for coverage and nonexemption, the employer must comply with the Act's monetary provisions from that time on or until such time as the tests are not met. (See § 779.266.)