



January 7, 2005

FLSA2005-6

Dear *Name**,

This is in response to your letter requesting an opinion on behalf of a client ("the Employer") regarding the application of the "retail or service establishment" criterion of the section 7(i) exception from the overtime requirements of the Fair Labor Standards Act (FLSA).

We restate parts of your letter for discussion purposes. We are to assume that the Employer is an "enterprise engaged in commerce or in the production of goods for commerce" within the meaning of section 3(s)(1)(A) of the FLSA. Its principal business is the sale of automobiles, light trucks, and similar vehicles to ultimate purchasers. The Employer's enterprise consists of three establishments which are separate and distinct from one another within the meaning of 29 CFR Part 779.302-.305. These establishments are hereby designated "A", "B", and "C".

You provide the following facts regarding Establishment "A." Establishment "A" sells vehicles principally to rental companies and to large fleet operators; about 95% of its sales are non-retail. Establishment "A" makes these sales through its own outside-sales representatives; it prepares all sales-related paperwork; it conducts any necessary pre-delivery vehicle preparation on its own premises; and it handles all other sales related activities independently from Establishments "B" and "C". The Employer's central office is located at Establishment "A". For purposes of section 7(i), Establishment "A" is not a retail or service establishment.

You further indicate that, by contrast, almost 90% of the vehicle sales made by Establishment "B", and more than 85% of the vehicle sales made by Establishment "C", are to members of the general consuming public and are not for resale. In each case, the balance of the business done represents sales to fleet operators or sales for resale. You ask us to assume that, subject only to the resolution of the issue presented below, each of the two locations, Establishments "B" and "C", qualifies as a "retail or service establishment" for section 7(i) purposes.

A manufacturer will ship vehicles directly to rental-company customers and similar buyers only if the shipment is made under a manufacturer's "dealer code". However, Establishment "A" has no dealer code of its own even though 95% of its sales involve precisely that sort of customer. Consequently, due to this technicality flowing from the nature of a typical manufacturer's franchise agreements, for business-record purposes most of the sales made by Establishment "A" are recorded on the books of Establishments "B" and "C" as if those locations had made them. The manufacturer will therefore ship vehicles sold by Establishment "A" directly to the establishment's rental company and similar customers.

The manufacturer knows about this record-keeping practice and accepts the arrangement as complying with the "dealer code" requirement. But the manufacturer is willing to do so only because it is aware that:

- a) None of the vehicles sold by Establishment "A" is ever actually located on the premises of Establishments "B" or "C";
- b) Neither Establishment "B" nor Establishment "C" (nor any employee of either of them) has any contact whatsoever with the customers of Establishment "A";
- c) Neither Establishment "B" nor Establishment "C" (nor any employee of either of them) prepares any sales-related paperwork relating to an Establishment "A"-sold vehicle at any time; and
- d) Neither Establishment "B" nor Establishment "C" (nor any employee of either of them) prepares or otherwise handles or has contact with any of the vehicles. Establishments "B" and "C" do receive about \$5 per vehicle from Establishment "A" as an administrative fee to cover the burden of recording the sales on their books. This administrative fee is reflected in the financial records of Establishments "B" and "C", and is viewed for section 7(i) purposes as non-retail. You ask us to assume that this income is far too trivial in itself to affect the "retail or service establishment" status of Establishment "B" or "C".



If the Establishment "A" sales were considered actually to be sales of Establishments "B" and "C", then their status as "retail or service establishments" would be nullified, because more than 25% of their sales would be for resale and/or would not be recognized as retail. You suggest that this recordkeeping convention should not be viewed as converting the sales of Establishment "A" into sales supposedly made by Establishments "B" or "C" for purposes of assessing their status as "retail or service establishments" within the meaning of section 7(i).

For section 7(i) purposes, a "retail or service establishment" is "an establishment 75 percent of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry" (see 29 CFR

Part 779.24 and 779.411). In considering whether there is a sale of goods or services and whether such goods or services are sold for resale in any specific situation, the term "sale" includes, as defined in section 3(k) of the FLSA, "any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition."

"Though the term 'sale' does not always have a fixed or invariable meaning, it is generally held to be 'a contract between parties to give and to pass rights of property for money, which the buyer pays or promises to pay to the seller for the thing bought or sold.'" Wirtz v. Charleston Coca-Cola Bottling Company, Inc., 237 F.Supp. 857 (E.D.S.C. 1965).

It is clear from your description that the buyer in this situation is the customer of Establishment "A", and the seller is Establishment "A". Establishments "B" and "C", as you describe above, merely act as the "billing agent". We would expect that the company's financial records would make this arrangement clear (for example, in addition to the \$5 per vehicle fee, other records would show where pre-delivery vehicle preparation occurred, which sales representative of Establishment "A" was responsible for the sale, that no Establishment "B" or "C" employee received a commission on the sale, etc.). In that case, in calculating the annual dollar volume of each establishment for the purpose of assessing whether it qualifies as a "retail or service establishment," it is our opinion that the sales made by Establishment "A", even though recorded on the books of Establishments "B" and "C", belong to Establishment "A". Hence, only those sales made or business done attributable to either Establishments "B" or "C" can be considered in calculating their respective annual dollar volume. The exemption tests are in terms of the annual dollar volume of the establishment. This will include dollar volume from transactions with other establishments in the same enterprise, for example the administrative fee mentioned above, even though such transactions within an enterprise may not be part of the annual gross volume of the enterprise's sales made or business done (see 29 CFR Part 779.342, .259).

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances which would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein. You have represented that this opinion is not sought by a party to pending private litigation concerning the issue addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Wage and Hour Division or the Department of Labor.

We trust that the above is responsive to your inquiry.

Sincerely,

Alfred B. Robinson, Jr.
Acting Administrator

*Note: * The actual name(s) was removed to preserve privacy.*