of consumer goods; they are often distributed in stores or showrooms by means not dissimilar to those used for consumer goods; and they are frequently used in commercial activities of limited scope. The list of strictly commercial items whose sale can be deemed retail is very small and a determination as to the application of the retail exemption in specific cases would depend upon the consideration of all the circumstances relevant to the situation. (Idaho Sheet Metal Works, Inc. v. Wirtz and Wirtz v. Steepleton General Tire Company, Inc., 383 U.S. 190, 202, rehearing denied 383 U.S. 963.)

§ 779.319 A retail or service establishment must be open to general public.

The location of the retail or service establishment, whether in an industrial plant, an office building, a railroad depot, or a government park, etc., will make no difference in the application of the exemption and such an establishment will be exempt if it meets the tests of the exemption. Generally, however, an establishment, wherever located, will not be considered a retail or service establishment within the meaning of the Act, if it is not ordinarily available to the general consuming public. An establishment, however, does not have to be actually frequented by the general public in the sense that the public must actually visit it and make purchases of goods or services on the premises in order to be considered as available and open to the general public. A refrigerator repair service shop, for example, is available and open to the general public even if it receives all its orders on the telephone and performs all of its repair services on the premises of its customers.

§ 779.320 Partial list of establishments whose sales or service may be recognized as retail.

Antique shops.
Auto courts.
Automobile dealers' establishments.
Automobile laundries.
Automobile repair shops.
Barber shops.
Beauty shops.
Bicycle shops.
Billiard parlors.
Book stores.
Bowling alleys.
Butcher shops.
Cafeterias.
Cemeteries.
China, glassware stores.
Cigar stores.
Clothing stores.
Coal yards.
Confectionery stores.
Crematories.
Dance halls.
Deli-catesen stores.
Department stores.
Drapery stores.
Dress-suit rental establishments.
Drug stores.
Dry goods stores.
Embalming establishments.
Farm implement dealers.
Filling stations.
Floor covering stores.
Florists.
Funeral homes.
Fur repair and storage shops.
Fur shops.
Furniture stores.
Gift, novelty and souvenir shops.
Grocery stores.
Hardware stores.
Hosiery shops.
Hotels.
Household appliance stores.
Household furniture storage and moving establishments.
Household refrigerator service and repair shops.
Infants' wear shops.
Jewelry stores.
Liquor stores.
Luggage stores.
Lumber yards.
Masseur establishments.
Millinery shops.
Musical instrument stores and repair shops.
Newstands.
Paint stores.
Public parking lots.
Photographic supply and camera shops.
Piano tuning establishments.
Public baths.
Public garages.
Recreational camps.
Reducing establishments.
Restaurants.
Roadside diners.
Scalp-treatment establishments.
Shoe repair shops.
Shoeshine parlors.
Sporting goods stores.
Stationery stores.
Taxidermists.
Theatres.
Tourist homes.
Trailer camps.
§ 779.321 Inapplicability of “retail concept” to some types of sales or services of an eligible establishment.

(a) Only those sales or services to which the retail concept applies may be recognized as retail sales of goods or services for purposes of the exemption. The fact that the particular establishment may have a concept of retailability, in that it makes sales of types which may be recognized as retail, is not determinative unless the requisite portion of its annual dollar volume is derived from particular sales of its goods and services which have a concept of retailability. Thus, the mere fact that an establishment is of a type noted in §779.320 does not mean that any particular sales of such establishment are within the retail concept. As to each particular sale of goods or services, an initial question that must be answered is whether the sales of goods or services of the particular type involved can ever be recognized as retail. The Supreme Court in Wirtz v. Steepleton General Tire Co., 383 U.S. 190, confirmed the Department’s position that (1) The concept of “retailability” must apply to particular sales of the establishment, as well as the establishment or business as a whole, and (2) even as to the establishment whose sales are “variegated” and include retail sales, that nonetheless classification of particular sales of goods or services as ever coming within the concept of retailability must be made. Sales of some particular types of goods or services may be decisively classified as nonretail on the ground that such particular types of goods or services cannot ever qualify as retail whatever the terms of sale, regardless of the industry usage or classification.

(b) An establishment is, therefore, not automatically exempt upon a finding that it is of the type to which the retail concept of selling or servicing is applicable; it must meet all the tests specified in the Act in order to qualify for exemption. Thus, for example, an establishment may be engaged in repairing household refrigerators, and in addition it may be selling and repairing manufacturing machinery for manufacturing establishments. The retail concept does not apply to the latter activities. In such case, the exemption will not apply if the annual dollar volume derived from the selling and servicing of such machinery, and from any other sales and services which are not recognized as retail sales or services, and from sales of goods or services for resale exceeds 25 percent of the establishment’s total annual dollar volume of sales of goods or services.

(c) Since there is no retail concept in the construction industry, gross receipts from construction activities of any establishment also engaged in retail selling must be counted as dollar volume from sales not recognized as retail in applying the percentage tests of section 13(a)(2). Also, since construction and the distribution of goods are entirely dissimilar activities performed in industries traditionally recognized as wholly separate and distinct from each other, an employee engaged in construction activities is not employed in any week in which the employee engages in such construction work, and is therefore (see §779.308) not employed “by” a retail or service establishment within the meaning of the Act in such workweek.

(d) Certain business establishments engage in the retail sale to the general public, as goods delivered to purchasers at a stipulated price, of items such as certain plumbing and heating equipment, electrical fixtures and supplies, and fencing and siding for residential installation. In addition to selling the goods they may also install, at an additional charge, the goods which are sold. Installation which is incidental to a retail sale (as distinguished from a construction or reconstruction contract to do a building alteration, or repair job at a contract price for materials and labor required, see §779.355(a)(1) is considered an exempt activity. By way of example, if the installation for the customer of such goods sold to him at retail requires only minor carpentry, plumbing or electrical work (as may be