

This is an amendment to 3.2.212 NMAC, Sections 10, 14, 22 and 24, effective 12/27/2018.

3.2.212.10 CONSTRUCTION PERFORMED FOR A GOVERNMENTAL AGENCY:

A. ~~[The]~~ Except as provided in Subsection B, receipts from performing a construction project for a governmental agency are receipts derived from performing a service and are not deductible pursuant to Section 7 9 54 NMSA 1978. The deduction is not available for construction materials whether the materials are billed separately on the same contract as the construction services or are billed under a separate contract.

~~[~~**B.**~~]~~ ~~Example: M, a construction company, contracts to build a building for the New Mexico general services department. M fails to include in its contract the cost of the gross receipts tax and therefore does not report the tax. After the tax has been assessed, M, in a hearing before the department, contends that it does not owe the tax. M says:~~

~~(1) that the tax is not applicable because, if it were, it would only mean that M would include the applicable tax in making its bid; that it would then pay the tax and bill the state the cost of the tax which only results in taking money from one state fund and putting it in another, a useless process;~~

~~(2) that it is actually selling tangible personal property to the state in the form of the materials which make up the building. The answer to M's first contention is simply that the law does not allow such a deduction. This is true even though the effect of the tax is simply to transfer money from one state fund to another. The answer to the second contention is that the law specifically bars application of the deduction provided by Section 7 9 54 NMSA 1978 for receipts from selling construction materials, whether separately stated under a contract for construction services or billed under a contract for materials only. Even absent the specific prohibition, the deduction is applicable only upon the sale of tangible personal property to the state. By definition M is selling the state a service. The gross receipts derived from performing the service for the state are not deductible, and it is of no consequence that construction materials may be billed separately.~~

~~C. Section 3.2.212.10 NMAC applies to transactions occurring on or after July 1, 1989.]~~

B. Receipts from the sale of construction material that is tangible personal property, whether removable or non-removable, that is or would be classified for depreciation purposes as three-year property, five-year property, seven-year property or 10-year property, including indirect costs related to the asset basis, by Section 168 of the Internal Revenue Code of 1986, as that section may be amended or renumbered, are deductible. The amount of the deduction is the asset basis, as those terms are defined by the Internal Revenue Code of 1986, as that code may be amended or renumbered.

C. Example: A contractor enters a contract with a municipality to construct a building and to furnish and equip it. Construction is a service, and receipts from selling construction, including construction materials except for certain tangible personal property, are not deductible under Section 7-9-54 NMSA 1978. An analysis is performed to distinguish the value of the construction, construction materials and tangible personal property included in the project. The contractor's receipts from the sale of tangible personal property, whether removable or non-removable, that is or would be classified for depreciation purposes as three-year property, five-year property, seven-year property or 10-year property including the indirect costs related to the asset basis, pursuant to Section 168 of the Internal Revenue Code, as that section may be amended or renumbered, are deductible provided the analysis includes sufficient information to demonstrate that the requirements of Section 7-9-54 NMSA 1978 are met. [9/29/1967, 12/5/1969, 3/9/1972, 11/20/1972, 3/20/1974, 7/26/1976, 6/18/1979, 4/7/1982, 5/4/1984, 4/2/1986, 11/26/1990, 11/15/1996; 3.2.212.10 NMAC - Rn & A, 3 NMAC 2.54.10, 5/31/2001; A, 12/27/2018]

3.2.212.14 LANDSCAPING:

A. Except when the landscape items are part of a construction project, receipts from selling and installing landscape items such as plants, shrubs, sod, seed, trees, rocks and ornaments are receipts from the sale of tangible personal property. Therefore, the receipts from the sale and installation of these landscape items pursuant to a contract with a governmental agency may be deducted from gross receipts pursuant to Section 7 9 54 NMSA 1978. Receipts from selling and installing these landscape items as part of a construction project may not be deducted pursuant to Section 7 9 54 NMSA 1978. This version of Subsection A of Section 3.2.212.14 NMAC applies to transactions occurring on or after ~~[July 1, 2000]~~ March 2, 2018.

B. Receipts from the installation of sprinkler systems are receipts from the performance of a service and are not receipts from selling tangible personal property. Therefore, receipts from the installation of sprinkler systems for a governmental agency may not be deducted from gross receipts pursuant to Section 7 9 54 NMSA

1978.

[3/9/1972, 11/20/1972, 3/20/1974, 7/26/1976, 6/18/1979, 4/7/1982, 5/4/1984, 4/2/1986, 11/26/1990, 11/15/1996, 3.2.212.14 NMAC - Rn & A, 3 NMAC 2.54.14, 10/31/2000; A, 12/27/2018]

3.2.212.22 TANGIBLE PERSONAL PROPERTY IN PROJECTS FINANCED BY INDUSTRIAL REVENUE OR SIMILAR BONDS:

A. For the purposes of this section, a “bond project” is an arrangement entered into under the authority of the Industrial Revenue Bond Act, the County Industrial Revenue Bond Act or similar act in which a private person agrees:

(1) to arrange for the constructing and equipping of a facility for a state or local government by acting as agent for the government in procuring construction services, other services, tangible personal property which becomes an ingredient or component part of a construction project and other tangible personal property necessary for constructing and equipping the facility;

(2) to lease the completed facility from the government; and

(3) to buy the facility upon repayment of the bonds. The government agrees to own the facility, to finance the project in whole or in part through the issuance of bonds, to designate the private person as its agent in procuring the necessary property and services, to lease the facility to the private person and to sell the facility to the private person upon repayment of the bonds.

B. Receipts from the sale of tangible personal property to the private person who is acting as agent for the government with respect to the bond project are deductible under Section 7 9 54 NMSA 1978 if the tangible personal property is not ~~[an ingredient or component part of a construction project]~~ construction material excluding tangible personal property whether removable or non-removable, that is or would be classified for depreciation purposes as three-year property, five-year property, seven-year property or 10-year property, including indirect costs related to the asset basis, by Section 168 of the Internal Revenue Code of 1986, as that section may be amended or renumbered. To be deductible, ~~[the cost of the bond project tangible personal property must meet all of the following criteria:~~

~~(1) —] the cost of the bond project tangible personal property [does] must not increase the basis, as determined under the provisions of Section 1011 of the Internal Revenue Code in effect on the date the bond project commences, of the structure or other facility included in the definition of construction [and~~

~~(2) — the tangible personal property is:~~

~~(a) — not included in, or similar to, the list of structures and facilities specifically itemized in the definition of construction at Section 7 9 3 NMSA 1978; and~~

~~(b) — classified for depreciation purposes as 3 year property, 5 year property, 7 year property, 10 year property or 15 year property by Section 168 of the Internal Revenue Code in effect on the date the bond project commences or, if the Internal Revenue Code is amended to rename or replace these depreciation classes, would have been classified for depreciation purposes as 3 year property, 5 year property, 7 year property, 10 year property or 15 year property but for the amendment.]~~

C. A bond project commences when the governing body of the state or local government takes official action to enter into the arrangement, but no earlier than the adoption of an inducement resolution.

D. ~~[Receipts from the sale of tangible personal property which becomes an ingredient or component part of a construction project, whether the sale is to the private person acting as agent for the government or to the government itself, are not deductible under Section 7 9 54 NMSA 1978.] This version of 3.2.212.22 NMAC applies to transactions occurring on or after March 2, 2018.~~

[2/22/1995, 11/15/1996; 3.2.212.22 NMAC - Rn & A, 3 NMAC 2.54.22, 5/31/2001; A, 12/27/2018]

3.2.212.24 CUSTOM SOFTWARE:

A. Because it is a service, receipts from developing or selling custom software for governmental entities are not deductible under Section 7 9 54 NMSA 1978.

B. Example 1: X contracts with the United States to develop software to test certain devices which the United States is considering purchasing. X is performing a service under this contract.

C. Example 2: Same facts as in Example 1 except that X is to modify an existing software test program. X is nonetheless performing a service under the contract.

D. Example 3: X enters into a qualifying research and development contract with a signatory agency of the United States. The contract is to develop software to test certain devices which the United States is considering purchasing. X is performing a service under this contract. To create the testing program X buys several pieces of packaged software and develops new programming to interconnect the packaged software into a coherent

testing program. X may execute, and the vendors may accept in good faith, Type 15 ~~[notes]~~ non-taxable transaction certificates or alternative evidence as provided by Section 7-9-43 NMSA 1978 for the purchase of the packaged software.

[4/30/1997; 3.2.212.24 NMAC - Rn & A, 3 NMAC 2.54.24, 5/31/2001; A, 12/27/2018]