

This is an amendment to 3.5.4 NMAC, Sections 9, 10 and 11 effective 3/23/2021.

3.5.4.9 TAXABLE IN ANOTHER STATE - WHEN A TAXPAYER IS “SUBJECT TO” A TAX - FOR TAXABLE YEARS BEGINNING PRIOR TO JANUARY 1, 2020:

A. A taxpayer is “subject to” one of the taxes specified in Subsection A of Section 7-4-4 NMSA 1978 if it carries on business activity in such state and such state imposes or has the ability to impose such a tax thereon. Any taxpayer which asserts that it is subject to one of the taxes specified in Subsection A of Section 7-4-4 NMSA 1978 in another state shall furnish to the department upon its request evidence to support such assertion. The department may request that such evidence include proof that the taxpayer has filed the requisite tax return in such other state and has paid any taxes imposed under the law of such other state; the taxpayer's failure to produce such proof may be taken into account in determining whether the taxpayer in fact is subject to one of the taxes specified in Subsection A of Section 7-4-4 NMSA 1978 in such other state.

B. If the taxpayer voluntarily files and pays one or more of such taxes when not required to do so by the laws of that state or pays a minimal fee for qualification, organization or for the privilege of doing business in that state, but

(1) does not actually engage in business activity in that state; or

(2) does actually engage in some business activity, not sufficient for nexus, and the minimum tax bears no relation to the taxpayer's business activity within such state, the taxpayer is not “subject to” one of the taxes specified within the meaning of Subsection A of Section 7-4-4 NMSA 1978.

C. The concept of taxability in another state is based upon the premise that every state in which the taxpayer is engaged in business activity may impose an income tax even though every state does not do so. In states which do not, other types of taxes may be imposed as a substitute for an income tax. Therefore, only those taxes enumerated in Subsection A of Section 7-4-4 NMSA 1978 which may be considered as basically revenue raising rather than regulatory measures shall be considered in determining whether the taxpayer is “subject to” one of the taxes specified in Subsection A of Section 7-4-4 NMSA 1978 in another state.

D. When determining whether a taxpayer is taxable in another state, the term “taxpayer” shall apply to each separate member of a combined or consolidated filing group and shall not apply to the group as a single taxpaying entity, unless the taxpayer can demonstrate that application of this rule will subject it to multiple taxation based on the application of a contrary rule in the other state.

E. This version of this section applies to taxable years beginning prior to January 1, 2020. For tax periods beginning on or after January 1, 2020 see 3.5.4.11 NMAC.

[1/15/1974, 9/15/1988, 9/20/1993, 1/15/1997; 3.5.4.9 NMAC - Rn & A, 3 NMAC 5.4.9, 6/29/2001; A, 3/23/2021]

3.5.4.10 TAXABLE IN ANOTHER STATE - WHEN A STATE HAS JURISDICTION TO SUBJECT A TAXPAYER TO A NET INCOME TAX FOR TAXABLE YEARS BEGINNING PRIOR TO JANUARY 1, 2020:

The second test, that of Subsection B of Section 7-4-4 NMSA 1978, applies if the taxpayer's business activity is sufficient to give the state jurisdiction to impose a net income tax by reason of such business activity under the constitution and statutes of the United States. Jurisdiction to tax is not present where the state is prohibited from imposing the tax by reason of the provisions of Public Law 86-272, 15 U.S.C.A. Sections 381-385. In the case of any “state” as defined in Section 7-4-2 NMSA 1978 other than a state of the United States or political subdivision of such state, the determination of whether such “state” has jurisdiction to subject the taxpayer to a net income tax shall be made as though the jurisdictional standards applicable to a state of the United States applied in that “state”. If jurisdiction is otherwise present, such “state” is not considered as without jurisdiction by reason of the provisions of a treaty between that “state” and the United States. This section applies to taxable years beginning prior to January 1, 2020. For taxable years beginning on or after January 1, 2020 see 3.4.11 NMAC.

[1/15/1974, 9/15/1988, 9/20/1993, 1/15/1997; 3.5.4.10 NMAC - Rn & A, 3 NMAC 5.4.10, 6/29/2001; A, 3/23/2021]

3.5.4.11 TAXABLE IN ANOTHER STATE; WHEN A TAXPAYER IS “SUBJECT TO” A TAX - FOR TAXABLE YEARS BEGINNING ON OR AFTER JANUARY 1, 2020:

For periods beginning on or after January 1, 2020. New Mexico follows the so-called Finnigan approach. This approach determines when a corporation will be deemed to be taxable in New Mexico as well as to the question of when a taxpayer is “taxable in another state” for purposes of Section 7-4-4 NMSA 1978, and sourcing of sales under Sections 7-4-17 and 7-4-18 NMSA 1978. In general, under the Finnigan approach, New Mexico looks to the activities of the unitary group, or if

the group has elected to file a consolidated return, to the activities of the consolidated group, to determine if any member of the group is taxable in New Mexico or in another state. If the group, or any member of the group, could be subjected to New Mexico corporate income tax under both constitutional principles and any applicable federal statutory law, then all members of the group are taxable in New Mexico. Similarly, when determining if a member of the group is “taxable in another state,” if the state has jurisdiction to impose such a tax on the unitary business in whatever form it may allow that unitary business to file, whether or not it does impose such a tax, then all members of that unitary group are taxable in that state. This version of this section applies to taxable years beginning on or after January 1, 2020.

[3.5.4.11 NMAC - N, 3/23/2021]