

This is an amendment to 3.2.1 NMAC, Section 19 effective 11/29/2022.

3.2.1.19 GROSS RECEIPTS; RECEIPTS OF AGENTS:

A. Nonemployee agents:

(1) The receipts of nonemployee agents are subject to the gross receipts tax to the extent the education provided by Section 7-9-66 NMSA 1978 is not applicable. The indicia outlined in 3.2.105.7 NMAC will be considered in determining whether a person is an employee or a nonemployee agent.

(2) *Example 1:* S is a nonemployee salesperson for Z Corporation, an out-of-state business. Z Corporation arranges for S to sell securities belonging to corporation shareholders. Z accepts payment from the purchasers of the security, deposits this payment in a trust account, pays S the commission and then distributes the balance to the seller of the securities. Z does not incur gross receipts tax liability as the result of its activity because it is not selling property or performing services in New Mexico for a consideration. The commissions received by S for selling securities in New Mexico are receipts for performing services in New Mexico and are subject to the gross receipts tax.

(3) *Example 2:* The receipts of a nonemployee agent or sub-agent derived from commissions received from;

- (a) correspondence schools for enrolling persons in those schools;
- (b) freight companies, bus transportation firms, and similar business concerns for rendering services; and
- (c) the owner of trailers or trucks for leasing those trailers or trucks, are subject to gross receipts tax.

B. Receipts of condominium and other real property owners associations:

(1) As of March 8, 1988, the provisions of this subsection do not apply to receipts which are exempt under the provisions of Section 7-9-20 NMSA 1978.

(2) Associations in which common areas are owned by unit owners:

(a) Amounts received by this type of association from unit owners (owners of homes, offices, apartments or other real property) for accumulation in a trust account owned by the unit owners and expended to provide insurance and pay taxes on the common areas, elements or facilities are not taxable gross receipts since such amounts are not receipts of the association.

(b) Amounts received by an association of this type from unit owners for accumulation in a trust account owned by the unit owners for current or future expenditures for the improvement, maintenance or rehabilitation of the common areas, elements or facilities are not taxable gross receipts since such amounts are not receipts of the association. However, with respect to receipts not exempt under Section 7-9-20 NMSA 1978, when payments are made from the trust account to the association or its employees, officers or representatives for the improvement, maintenance or rehabilitation, these payments are taxable gross receipts of the association under Section 7-9-3.5 NMSA 1978. When payments are made directly from the account to third parties, those third parties will be liable for the gross receipts tax on those receipts.

(c) With respect to receipts which are not exempt under Section 7-9-20 NMSA 1978, associations of this type which bill unit owners may issue nontaxable transaction certificates (NTTCs) when appropriate under Section 7-9-48 NMSA 1978 (sale of a service for resale) to suppliers of these services, unless the service is deductible by the association under the Internal Revenue Code as an ordinary and necessary business expense. The association must report and pay gross receipts taxes on all its receipts for services, including those for which NTTCs are given. This version of Paragraph (2) of Subsection B of 3.2.1.19 NMAC applies to transactions occurring on or after July 1, 2000.

(3) *Example A 1:* Property Owners Association A receives monthly payments from each individual owner of property located in XYZ condominiums. The funds are held in a separate trust account by Association A for the XYZ unit owners to pay, on behalf of themselves, the property tax accruing to the common areas, insurance covering the common areas, maintenance and repair of the common areas and future improvements and additions to the common areas. On November 10, Association A, as trustee of such funds, issues a check directly from the trust account to the county treasurer for payment of property taxes on the common areas. This payment goes from the trust account directly to the county treasurer with Association A acting as agent for the actual owners of property; therefore, these funds do not become a part of Association A's gross receipts.

(4) *Example A 2:* Association A employs a maintenance person to maintain and clean the common areas. The maintenance person is responsible for mowing lawns, maintaining the landscape, cleaning halls, lobbies and other common areas and making minor repairs to common facilities. Funds received by Association A from the trust account to pay the maintenance person's wages and to pay various payroll taxes and employee benefits are gross receipts for the performance of service on which Association A is required to pay tax.

(5) *Example A 3:* NMO Construction Co. contracts to paint and remodel the halls, lobbies and other common areas of the condominiums. Association A, acting as agent, draws funds from the trust account which are paid directly to NMO Construction Co. Since such funds do not become receipts of Association A, the association is not liable for tax on these funds. The funds pass directly to NMO Construction Co. who becomes liable for the gross receipts tax on its receipts for performing construction services.

(6) *Example A 4:* For the last 10 years, funds have accumulated in the trust for construction of a swimming pool. A Pool Co. builds the pool and is paid directly from the trust account. A Pool Co. is subject to gross receipts tax on the receipts from the construction of the pool. Association A, acting as agent for the property owners, has no receipts and pays no tax on this transaction.

(7) *Example A 5:* Association A purchases, with its own funds, chemicals which its employee will use to maintain the new swimming pool. To recover this expense, Association A increases the amount it charges the property owners each month and draws funds from the trust account which it places with its own funds. These receipts of Association A are subject to the tax since Association A is performing services for the property owners. This treatment of receipts applies to purchases of other maintenance or cleaning supplies which Association A consumes in the performance of maintenance and cleaning services. Association A may not execute a non-taxable transaction certificate for the purchase of these chemicals or other cleaning supplies, because the chemicals and supplies are consumed in the performance of services by the association.

(8) Associations in which common areas are owned by the association with long-term real property rights held by individual unit owners:

(a) An association of unit owners in a real estate development in which the common elements, areas or facilities are owned by the association but subject to long-term (10 or more years) real property rights of the unit owners (as defined in Paragraph (2) of Subsection B of 3.2.1.19 NMAC) granted by deed or covenant, appurtenant to and inseparable from unit ownership, transferable only by the unit owner or upon acceptance of deed, and not extinguishable by the association shall be subject to tax in the same manner as associations described in Subsection B of this section. If the unit owners cease to hold or possess such real property rights, the association shall become subject to tax in the same manner as associations described in Paragraph (9) of Subsection B of 3.2.1.19 NMAC.

(b) All examples in Paragraphs (3) through (7) of Subsection B of 3.2.1.19 NMAC also apply to associations of unit owners identified in Paragraph (8) of Subsection B of 3.2.1.19 NMAC.

(9) **Associations in which common areas are owned by association:** Different treatment is required for an association of unit owners in a real estate development in which the common elements, areas or facilities are owned by the association and the unit owners (as defined in Subparagraph (a) of Paragraph (2) of Subsection B of 3.2.1.19 NMAC) do not possess the real property rights to the common elements described in Paragraphs (2) and (8) of Subsection B of 3.2.1.19 NMAC. All receipts of this type of association (e.g., payments by unit owners for maintenance and use of the common areas) are fully taxable and no NTTCs may be issued for services purchased. Because of the association's status as owner and the absence of real property rights of the unit owners in the common areas, the association is not acting as the unit owners' agent, nor is it reselling a service.

(10) *Example C 1:* Association C holds title to all common areas of a development which includes a clubhouse, golf course, swimming pool and tennis courts. Each owner of property within the development is a member of Association C and pays a membership fee. In consideration for the fees received, Association C grants each member a license to use facilities owned by the association. Association C is liable for gross receipts tax on its receipts from granting the licenses to use the facilities.

(11) *Example C 2:* Association C contracts with a security services company to provide a security officer to patrol the facilities which the association owns. Association C does not resell these services provided by the security services company and may not execute a non-taxable transaction certificate to purchase these services.

(12) *Example C 3:* Association A, Association B and Association C maintain vending machines from which soft drinks, snacks and other items of tangible personal property are sold. The associations are deriving gross receipts from the sale of tangible personal property and must pay gross receipts tax on these receipts. However, they may also execute a non-taxable transaction certificate when purchasing the soft drinks, snacks and other tangibles, since these items are resold by the associations.

C. Reimbursed expenditures:

[~~_____ (1) _____] The receipts of any person received as a reimbursement of expenditures incurred in connection with the performance of a service or the sale or lease of property are gross receipts as defined by Section 7-9-3.5 NMSA 1978, unless that person incurs such expense as agent on behalf of a principal while acting in a disclosed agency capacity. [An agency relationship exists if a person has the power to bind a principal in a contract with a third party so that the third party can enforce the contractual obligation against the principal.~~

~~_____ (2) _____ Receipts from the reimbursement of expenses incurred as agent on behalf of a principal while acting in a disclosed agency capacity are not included in the agent's gross receipts if the expenses are separately stated on the agent's billing to the client and are identified in the agent's books and records as reimbursements of expenses incurred on behalf of the principal party.~~

~~_____ (3) _____ If these requirements are not met, the reimbursement of expenses are included in the agent's gross receipts.~~

~~_____ (4) _____ Example 1: A, an accountant, whose office location is in Albuquerque is engaged to audit the financial statements of C, A's client. To facilitate the audit A must travel to Deming to examine the operations and records of C's business location in Deming. In addition to the normal fee for A's service, A charges C for A's expenses for travel, meals and lodging which A incurred in traveling to Deming. A's gross receipts include the total amount of consideration received from C, including amounts received to cover A's expense of travel.~~

~~_____ (5) _____ Example 2: L, an attorney, pays a filing fee to the clerk of the district court on behalf of C, L's client. In billing for the professional services rendered, L separately states on the billing the amount of the filing fee which was paid to the court clerk. L is an agent for C in the instance of filing documents with the court. When L paid the filing fee, L was acting within the terms of a disclosed agency relationship. L should exclude the amount received for reimbursement for L's expenditure in paying the court filing fee.~~

~~_____ (6) _____ Example 3: R, an architect, whose office is located in Santa Fe, is engaged by C to design and oversee the construction of a project in Albuquerque. In the course of performing those services for C, R incurs charges for long distance telephone calls. R charges C for the long distance telephone calls under the terms of R's contract with C. R's gross receipts include the amounts it collects from C for long distance calls. No disclosed agency relationship exists which would enable the telephone company to hold C liable for the long distance charges incurred by R.~~

~~_____ (7) _____ Example 4: X contracts with company Y to perform administrative functions relating to the employment relationship between Y and its workers. Y pays X the costs for Y's employees' payroll, payroll taxes, worker's compensation, contributions to employee benefits and healthcare and other amounts X pays to or on behalf of Y's workers. Y separately pays X a two percent fee for the administrative services. Y or X recruits workers, selects them for work assignments, establishes their rate of pay, assigns their schedule, instructs them when and where to work, assigns them their duties, supervises and monitors the performance of their duties, authorizes leaves of absence, handles worker's complaints, union grievances or disputes, and disciplines, lays off or terminates the workers. X issues payroll checks, with X as payor. The checks are distributed by Y to workers. X also secures worker's compensation coverage for the workers, calculates, withhold and submits payroll taxes to appropriate taxing authorities, calculates and makes contributions to union health, pension and welfare benefit trust funds for workers, funds unemployment insurance contributions and responds to unemployment compensation claims, and processes garnishment orders. X can require Y to post a bond or other security for the payment of payroll. Y agrees to indemnify X against worker's claims for non-payment of wages, any claims arising from the acts of worker at the work site, grievances by unions representing the worker arising from acts of Y, wage and hour claims, tax claims, and failure of Y to provide training to workers. X has no gross receipts from the amount representing the payroll, payroll taxes, worker's compensation and benefits; this amount is not subject to the gross receipts tax. The additional two percent, however is X's fee for performing services and is subject to tax.~~

~~_____ (8) _____ Example 5: A enters into an agreement with its client B to provide temporary workers to B. The agreement provides that A retains the right to select and hire employees, to control when the employees are paid, and the right to replace employees. A issues the payroll checks to employees with A as payor. The employees are unaware of any principal agent relationship between A and B. All receipts A receives from B for payroll and A's commission or fee for its services to B are subject to gross receipts tax.~~

~~_____ (9) _____ All receipts or fees for services provided by an agent are subject to the gross receipts tax.]~~

D. Reimbursement of expenditures made to volunteers:

(1) A volunteer who contributes time, effort or talent without expectation of consideration or remuneration is not selling the services performed. When a volunteer receives reimbursement for out-of-pocket expenses incurred in the performance of a service as a volunteer which were directly related to the work volunteered, reimbursement of those expenses is not gross receipts.

(2) For purposes of Paragraph (1) of Subsection D of 3.2.1.19 NMAC, the term "volunteer" means any person who contributes time, effort or talent for the direct benefit of an organization which is exempt from taxation under the Internal Revenue Code. The term also extends to any person who contributes time, effort or talent without the receipt of consideration or remuneration to the state of New Mexico or any agency or any political subdivision of the state, or to the United States or any agency of the United States. "Volunteer" further includes any elected official serving without consideration or remuneration and any appointive non-employee member of any public commission or board serving without consideration or remuneration, whether the appointment was made by the governor, any other elected official or a public body.

(3) For purposes of Paragraph (1) of Subsection D of 3.2.1.19 NMAC, "reimbursement" includes per diem amounts set by statute to reimburse uncompensated elected and appointed governmental officials for the expense of carrying out official duties.

[3.2.1.19 NMAC - Rp, 3.2.1.19 NMAC 10/13/2021; A, 11/29/2022]