

TITLE 3: TAXATION
CHAPTER 2: GROSS RECEIPTS TAXES
PART 10: IMPOSITION AND RATE OF TAX - DENOMINATION AS “COMPENSATING TAX”

3.2.10.1 ISSUING AGENCY: Taxation and Revenue Department, Joseph M. Montoya Building, 1100 South St. Francis Drive, P.O. Box 630, Santa Fe NM 87504-0630
[11/15/1996, 3.2.10.1 NMAC - Rn, 3 NMAC 2.7.1, 4/30/2001]

3.2.10.2 SCOPE: This part applies to all persons using property in New Mexico.
[11/15/1996, 3.2.10.2 NMAC - Rn, 3 NMAC 2.7.2, 4/30/2001]

3.2.10.3 STATUTORY AUTHORITY: Section 9-11-6.2 NMSA 1978.
[11/15/1996, 3.2.10.3 NMAC - Rn, 3 NMAC 2.7.3, 4/30/2001]

3.2.10.4 DURATION: Permanent.
[11/15/1996, 3.2.10.4 NMAC - Rn, 3 NMAC 2.7.4, 4/30/2001]

3.2.10.5 EFFECTIVE DATE: 11/15/1996, unless a later date is cited at the end of a section, in which case the later date is the effective date.
[11/15/1996, 3.2.10.5 NMAC - Rn & A, 3 NMAC 2.7.5, 4/30/2001]

3.2.10.6 OBJECTIVE: The objective of this part is to interpret, exemplify, implement and enforce the provisions of the Gross Receipts and Compensating Tax Act.
[11/15/1996, 3.2.10.6 NMAC - Rn, 3 NMAC 2.7.6, 4/30/2001]

3.2.10.7 DEFINITIONS: [RESERVED]
[11/15/1996, 3.2.10.7 NMAC - Rn, 3 NMAC 2.7.7, 4/30/2001]

3.2.10.8 TANGIBLE PERSONAL PROPERTY ACQUIRED OUTSIDE NEW MEXICO FOR USE IN NEW MEXICO:

A. Tangible personal property acquired inside or outside New Mexico as a result of a transaction with a person located outside New Mexico which would have been subject to the gross receipts tax had the tangible personal property been acquired from a person with nexus with New Mexico is subject to the compensating tax if that tangible personal property is subsequently used in New Mexico. For compensating tax purposes, a transaction would have been “subject to the gross receipts tax” when the transaction would have been within New Mexico’s taxing jurisdiction, the receipts from the transaction would have been defined as gross receipts, the receipts would not have been deductible or exempt and taxation by New Mexico would not be pre-empted by federal law.

B. Example 1: X, a New Mexico business, purchases the furniture for a new office from an El Paso, Texas, merchant. X brings this furniture into New Mexico in X’s truck and puts it in the office. If X had purchased the furniture from a New Mexico business, the transaction would have been subject to the gross receipts tax. Therefore, X is liable for compensating tax measured by the sale price of the furniture. However, X may take a credit of up to 5% of the sale price of the furniture against the compensating tax liability on this furniture for any sales tax which was paid in Texas on the purchase of the furniture. Also, X pays no separate tax if tax collected by the seller is shown on the invoice as the New Mexico compensating tax collected by the El Paso, Texas, merchant.

C. Example 2: G operates a carnival concession. G has purchased tangible personal property in Iowa, to be used as prizes for persons performing certain skills at the carnival concession. G is subject to the compensating tax on the value of the tangible personal property acquired in Iowa, which is used as prizes in New Mexico.
[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, 10/28/94, 11/15/1996, 3.2.10.8 NMAC - Rn, 3 NMAC 2.7.8, 4/30/2001; A, 4/30/07; A, 8/15/12]

3.2.10.9 PERSONAL RATHER THAN COMMERCIAL USE OF TANGIBLE PERSONAL PROPERTY OR SERVICES:

A. When a person has delivered a nontaxable transaction certificate for a taxable purpose but then uses the service or tangible personal property in a manner other than indicated on the nontaxable transaction certificate, then the person who delivered the nontaxable transaction certificate is liable for the compensating tax on the value of the service or the tangible personal property.

B. Example 1: Z operates a furniture store in New Mexico. Z issues a nontaxable transaction certificate to all of Z's suppliers. Z decides to take a refrigerator out of stock for use in Z's home. Because the gross receipts tax was not paid at the time of the acquisition, Z must now pay the compensating tax on the value of the refrigerator.

C. Example 2: A, a garage operator, has the radiator on A's service truck repaired by B, a radiator repair specialist. A has previously delivered a nontaxable transaction certificate to B. Therefore, B does not pay gross receipts tax on this transaction. In this case A is not reselling the radiator repair service to one of A's customers; therefore A must pay the compensating tax on the value of the repair service. If A does not pay the compensating tax when due, A is also liable for penalty and interest, and if A does not pay the compensating tax within one year of the due date A may have the right to use nontaxable transaction certificates suspended by the secretary for up to one year. See prior example.

D. Example 3: G owns and operates a grocery store. G bought two dozen brooms for resale and delivered a nontaxable transaction certificate. G then removed six of these brooms from stock for use in cleaning the store. G is subject to the compensating tax on the value of the six brooms removed from stock.

[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, 3.2.10.9 NMAC - Rn, 3 NMAC 2.7.9, 4/30/2001]

3.2.10.10 [RESERVED]

[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, 3.2.10.10 NMAC - Rn, 3 NMAC 2.7.10, 4/30/2001; Repealed, 7/7/2021]

3.2.10.11 TANGIBLE PERSONAL PROPERTY ON WHICH THE COMPENSATING TAX HAS BEEN PREVIOUSLY PAID:

A. Persons who have previously paid the compensating tax on tangible personal property introduced into this state are not required to pay the compensating tax again on the reintroduction into the state of the same property if the property has been under the same ownership continuously since the time it was initially introduced into the state.

B. Example: A, a Colorado construction company, is awarded the contract for the improvement of a portion of the interstate highway in northern New Mexico. One of the pieces of equipment which A brings to perform the job is a tractor that A used on another New Mexico job earlier in the year. If A can prove that the compensating tax was paid at the time of the earlier use of the tractor and that A owned the tractor continuously since that time, A does not have to pay the compensating tax again.

[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, 10/28/1994, 11/15/1996, 3.2.10.11 NMAC - Rn, 3 NMAC 2.7.11, 4/30/2001]

3.2.10.12 PROMOTIONAL GIFTS:

A. If a taxpayer uses merchandise for advertising or promotional purposes by giving away the merchandise without the requirement of a concurrent purchase, the taxpayer is liable for the compensating tax on the value of the merchandise if the merchandise was acquired by the taxpayer in a transaction which was not subject to the gross receipts tax because the taxpayer furnished a nontaxable transaction certificate to the supplier pursuant to Section 7-9-47 NMSA 1978 or because the taxpayer acquired this merchandise outside New Mexico.

B. If a taxpayer "gives away" merchandise or services with a requirement of a concurrent purchase, no compensating tax is due on the merchandise or service "given away".

C. Example: X Restaurant gives a free drink to Y, a customer, on Y's birthday. The restaurant is not subject to the compensating tax on the value of the free drink if the drink is only given when there is a requirement of a concurrent purchase. If there is no requirement of a concurrent purchase, then the restaurant is liable for the compensating tax on the value of the drink if the liquor was acquired by the restaurant in a transaction which was not subject to the gross receipts tax because the restaurant furnished a nontaxable transaction certificate to its supplier pursuant to Section 7-9-47 NMSA 1978, because of the operation of Section 7-9-43.1 NMSA 1978 or because the taxpayer acquired the merchandise outside New Mexico. When restaurants or cocktail lounges promote their business by offering one free drink to a customer for every drink purchased, the restaurant or lounge is not subject to the compensating tax on the value of the free drink. In this situation, the drinks are only "given away" when there is a requirement of a concurrent purchase.

[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, 3.2.10.12 NMAC - Rn & A, 3 NMAC 2.7.12, 4/30/2001]

3.2.10.13 CONSTRUCTION PROJECTS OCCUPIED OR LEASED PRIOR TO SALE:

A. A person engaged in the construction business who purchases construction materials, construction services, construction-related services or who leases construction equipment using nontaxable transaction certificates (nttcs) provided by the department for use under Sections 7-9-51, 7-9-52 and 7-9-52.1 NMSA 1978 is liable for the compensating tax on the value of the materials and services purchased at the time when the construction project is initially leased or otherwise occupied prior to the sale. It is immaterial that the construction project is leased to enhance its value for sale as is the case with so-called income producing property.

B. Example 1: Y is a company which constructs office buildings for sale to investors as income producing property. Y has issued nttcs to material suppliers and subcontractors. Upon completion of the building, Y leases office space to tenants in order to enhance the salability of the building. Y is liable for the compensating tax at the time it leases the first office.

C. Example 2: Z is building an apartment complex consisting of five separate buildings with twenty apartments in each building. Z begins renting apartments in each building as the building is completed. If Z issued nttcs to purchase construction materials and construction services for incorporation into these apartment buildings, Z will be liable for compensating tax on the value of the materials and services purchased for each building when any apartment in the building is rented. The rental of the apartments is a conversion to use by Z. When Z subsequently sells any or all of the five buildings, the compensating tax previously paid by Z on construction materials and construction services which became an ingredient or component part of each building may be credited against the gross receipts tax due on the sale.

D. Example 3: R is a homebuilder who typically sells the homes he builds either prior to the start of construction, or on a speculative basis prior to the completion of the home. R has executed nttcs to material suppliers and subcontractors for a specific home. Upon completion of the home, R is unable to find a buyer, and decides to retain title to the home and use it as his personal home or rent the home to a third party until a buyer can be found. R is liable for the compensating tax on the value of the construction materials, construction services and construction-related services purchased with the nttcs at the time the home is initially rented or occupied by the homebuilder prior to the sale.

[7/26/1976, 6/18/1979, 4/7/1982, 5/4/1984, 4/2/1986, 11/26/1990, 11/15/1996, 3.2.10.13 NMAC - Rn & A, 3 NMAC 2.7.13, 4/30/2001; A, 12/14/2012]

3.2.10.14 PROCESSING PIPE: A New Mexico buyer who purchases pipe from outside the state is subject to the New Mexico compensating tax on the total value of the pipe at the time it is introduced into New Mexico for use. Value includes charges for labor and material used in processing the pipe when processed outside New Mexico prior to initial introduction into the state.

[6/18/1979, 4/7/1982, 5/4/1984, 4/2/1986, 11/26/1990, 11/15/1996, 3.2.10.14 NMAC - Rn, 3 NMAC 2.7.14, 4/30/2001]

3.2.10.15 MATERIALS USED ON NONTAXABLE PROJECTS.

A. Construction materials purchased with a nontaxable transaction certificate and subsequently used in a project, other than a project located on tribal territory the state taxation of which is pre-empted by federal law, which upon completion is not subject to gross receipts tax are subject to the compensating tax for the value of materials used in the project.

B. *Example:* X construction company purchases a truckload of lumber from A lumber company with whom X has previously executed the appropriate nontaxable transaction certificate. X takes delivery of, and title to, the lumber at A's yard in New Mexico. X then transports the lumber by its own vehicle to a location outside New Mexico and incorporates the lumber into a construction project outside New Mexico. X is subject to the compensating tax on the value of the lumber purchased from A lumber company since the construction project outside New Mexico is not subject to gross receipts tax upon completion.

[1/26/1986, 2/21/1986, 4/2/1986, 11/26/1990, 11/15/1996, 3.2.10.15 Rn & A, 3 NMAC 2.7.15, 10/31/00; A, 8/15/2012]

3.2.10.16 ORDINARY AND NECESSARY BUSINESS EXPENSE: Services performed in New Mexico deductible by the purchaser as ordinary and necessary business expenses under the provisions of the Internal Revenue Code are "used" for purposes of Subsection B of Section 7-9-7 NMSA 1978. Nontaxable transaction certificates may not be issued for such transactions. If a taxpayer acquires the services through the inappropriate use of a nontaxable transaction certificate, the compensating tax is due on the value of the services and the taxpayer's right to issue nontaxable transaction certificates will be jeopardized under the provisions of Section 7-9-44 NMSA

1978.

[3/11/1988, 11/26/1990, 11/15/1996, 3.2.10.16 NMAC - Rn & A, 3 NMAC 2.7.16, 4/30/2001]

3.2.10.17 SERVICES WHICH QUALIFY AS CAPITAL EXPENDITURES: Services performed in New Mexico which are capitalized under the provisions of the Internal Revenue Code are "used" for purposes of Subsection B of Section 7-9-7 NMSA 1978. Nontaxable transaction certificates may not be issued for such transactions. If a taxpayer acquires these services through the issuance of a nontaxable transaction certificate, the compensating tax is due on the value of the services, and the taxpayer's right to issue nontaxable transaction certificates will be jeopardized under the provisions of Section 7-9-44 NMSA 1978.

[3/11/1988, 11/26/1990, 11/15/1996, 3.2.10.17 NMAC - Rn & A, 3 NMAC 2.7.17, 4/30/2001]

3.2.10.18 COMPENSATING TAX ON DEALER USE OF PARTS: The value of parts, motor oils and similar items taken from inventory held for sale, or purchased under Type 2 (resale) NTTCS, by automobile dealers for use in repairing or maintaining vehicles used by the dealers in the operation of the dealerships, as distinguished from vehicles held for sale, is subject to compensating tax. A new vehicle which has been titled and registered, other than pursuant to Subsection C of Section 66-3-118 NMSA 1978 pertaining to new vehicles held for sale and allowed to be registered without payment of the motor vehicle excise tax, will be treated as a vehicle used in the dealer's business for purposes of applying Section 3.2.10.18 NMAC.

[6/28/1989, 11/26/1990, 11/15/1996, 3.2.10.18 NMAC - Rn & A, 3 NMAC 2.7.18, 4/30/2001]

3.2.10.19 TANGIBLE PERSONAL PROPERTY FURNISHED TO DEALERS BY OUT-OF-STATE SERVICE CONTRACT ADMINISTRATORS: Tangible personal property, such as contract forms and promotional and administrative materials, furnished to New Mexico dealers by out-of-state companies which undertake to administer automotive service contracts for a fee is property acquired as a result of a transaction with a person located outside New Mexico that would have been subject to the gross receipts tax had the property been acquired from a person with nexus with New Mexico. The value of the tangible personal property is subject to compensating tax to be paid by the dealers when the property is stored, used or consumed in New Mexico.

[6/28/89, 11/26/90, 10/28/94, 11/15/1996, 3.2.10.19 NMAC - Rn, 3 NMAC 2.7.19, 4/30/2001; A, 8/15/12]

3.2.10.20 TELECOMMUNICATIONS SERVICE USED BY HOTELS AND MOTELS: If a hotel, motel or similar establishment has represented to a company engaged in the business of providing interstate telecommunications service that the hotel, motel or similar establishment is purchasing interstate telecommunication service for use as a service to guests of the hotel, motel or similar establishment for an additional separately stated charge, it is liable for compensating tax on the value of any interstate telecommunications service purchased but not separately stated in its billings to its guests.

[3/9/1992, 11/15/1996, 3.2.10.20 NMAC - Rn & A, 3 NMAC 2.7.20, 4/30/2001; A, 8/15/2012]

3.2.10.21 FEDERAL PREEMPTION AND STATE EXEMPTION - CREDIT UNIONS:

A. 12 U.S.C. 1768 exempts federal credit unions from state taxation, other than property taxation. Accordingly, the use of property in New Mexico by federal credit unions is exempt from compensating tax.

B. Section 58-11-61 NMSA 1978 exempts from state taxation credit unions organized under or subject to the Credit Union Regulatory Act to the same extent that the credit unions chartered under federal law are exempt. Therefore the use of property in New Mexico by credit unions organized under or subject to the Credit Union Regulatory Act is exempt from compensating tax.

[5/31/1997, 3.2.10.21 NMAC - Rn & A, 3 NMAC 2.7.21, 4/30/2001]

3.2.10.22 FEDERAL PREEMPTION - JOB CORPS CONTRACTORS: 29 U.S.C. 1707(c) bars imposition of any use or similar tax on the use by a Job Corps contractor of any property or service in connection with the operation of a Job Corps center, program or activity. Therefore, Job Corps contractors are exempt from the compensating tax with respect to property used in connection with operating a Job Corps center, program or activity.

[5/31/1997, 3.2.10.22 NMAC - Rn & A, 3 NMAC 2.7.22, 4/30/2001]

3.2.10.23 COMPENSATING TAX ON SERVICES PERFORMED OUTSIDE THE STATE:

A. For periods after July 1, 2021, if a purchaser acquires services performed outside the state in a transaction that was not subject to the gross receipts tax and subsequently makes taxable use of that service in New Mexico, the service is subject to the gross receipts tax. For services that were performed outside the state, the

taxable use in New Mexico is not subject to compensating tax unless that use is the initial use of the service, as that term is defined under Subsection E of Section 7-9-3 NMSA 1978 and applicable regulations.

B. Examples:

(1) X acquires financial advisory services from Y. Y performs the services entirely outside New Mexico resulting in recommendations for investing in certain assets. Y delivers the recommendations to X in New Mexico and has no reason to believe that X will not make initial use of the recommendations in New Mexico. X does not owe compensating tax on the service. Instead, Y owes the gross receipts tax on that service because it was initially used in New Mexico.

(2) Same facts as Paragraph (1) of Subsection B of 3.2.10.23 NMAC except that Y relies in good faith on X's representation that X will make initial use of the recommendations outside New Mexico. X owes the compensating tax if initial use of the recommendations is made in New Mexico.

(3) Same facts as Paragraph (2) of Subsection B of 3.2.10.23 NMAC except that X makes initial use of the recommendations outside of New Mexico. Subsequently, X makes use of the recommendations in New Mexico. Because that subsequent use is not the initial use, X does not owe compensating tax.

[3.2.10.23 NMAC - N, 7/7/2021]

3.2.10.24 PURCHASER ENTITLED TO RELY ON SELLER'S STATEMENT AS TO WHETHER TAX WAS CHARGED: In determining whether compensating tax is owed, the purchaser may rely on the seller's invoice or other written billing or contract documentation that indicates that the seller has charged the gross receipts tax or has included the tax in the amount billed (whether by name or indicating that taxes for the state of New Mexico were charged or included). Under Section 7-9-6 NMSA 1978, the seller need not state the amount of tax charged or paid.

[3.2.10.24 NMAC - N, 7/7/2021]

HISTORY OF 3.2.10 NMAC:

Pre-NMAC History:

BOR 67-2, NM Gross Receipts and Compensating Tax Regulations, September 1967, filed 9/29/1967.

BOR 69-4, Regulations in Effect and Pertaining to the New Mexico Gross Receipts and Compensating Tax Act, 12-5-69, filed 12/5/1969.

BOR 72-4, Regulations in Effect and Pertaining to the New Mexico Gross Receipts and Compensating Tax Act, 3/9/72, filed 3/9/1972.

BOR 74-2, Regulations in Effect and Pertaining to the New Mexico Gross Receipts and Compensating Tax Act, 12/15/73, filed 3/20/1974.

BOR 76-1, Regulations in Effect and Pertaining to the New Mexico Gross Receipts and Compensating Tax Act, 7/26/76, filed 7/26/1976.

R.D.79-1, Gross Receipts and Compensating Tax Act Regulations, filed 6/18/1979.

R.D. Rule No. 82, Regulations Pertaining to the Gross Receipts and Compensating Tax Act, Sections 7-9-1 to 7-9-80.1 NMSA 1978, filed 4/7/1982.

R.D. Rule No. 84, Regulations Pertaining to the Gross Receipts and Compensating Tax Act, Sections 7-9-1 to 7-9-80.1 NMSA 1978, filed 5/4/1984.

TRD Rule No. 9-86, Regulations Pertaining to the Gross Receipts and Compensating Tax Act, Sections 7-9-1 to 7-9-80.1 NMSA 1978, filed 4/2/1986.

TRD Rule GR-90, Regulations Pertaining to the Gross Receipts and Compensating Tax Act, Sections 7-9-1 to 7-9-80.1 NMSA 1978, filed 11/26/1990.

History of Repealed Material: [RESERVED]

NMAC History:

3 NMAC 2.7, Imposition and Rate of Tax - Denomination as "Compensating Tax", filed 11/4/1996.

3.2.10 NMAC Imposition and Rate of Tax - Denomination as "Compensating Tax", filed 4/17/2001.