

NEW MEXICO TAXATION AND REVENUE DEPARTMENT

NOTICE OF HEARING AND PROPOSED RULES

The Department proposes to amend the following regulations:

**Gross Receipts and Compensating Tax Act**

3.2.1.11 NMAC Section 7-9-3.4 NMSA 1978

*(Construction)*

3.2.1.18 NMAC Section 7-9-3.5 NMSA 1978

*(Gross Receipts; Services)*

3.2.1.29 NMAC Section 7-9-3(M) NMSA 1978

*(Services)*

3.2.10.18 NMAC Section 7-9-7 NMSA 1978

*(Compensating Tax on Dealer Use of Parts)*

3.2.201.13, 14 and 19 NMAC Section 7-9-43 NMSA 1978

*(Multijurisdictional Uniform Sales and Use Tax Certificates; Good Faith Acceptance of Nontaxable Transaction Certificates; Border States Uniform Sale for Resale Certificate)*

3.2.204.14 and 16 NMAC Section 7-9-46 NMSA 1978

*(Upholstery Materials; Receipts from Custom Software Developed for Manufacturer of Packaged Software not Deductible)*

3.2.205.10, 11, 13, 14, 18, 19 and 20 NMAC Section 7-9-47 NMSA 1978

*(Tangibles Sold for Use in Performance of a Service Versus Simultaneous Transactions - Billing Practices; Sale of Tangible Personal Property To a Federal Contractor or Subcontractor; Packaging and Related Materials; Medicines and Medical Supplies; Parts and Supplies Sold Under Service Contracts; Computer Software; Use of Tangible Personal Property by hotels, Motels and Similar Facilities)*

3.206.20, 21 and 22 NMAC Section 7-9-48 NMSA 1978

*(Telecommunications Services; Garage Collection; Receipts From Sale of Services to Fulfill Promisor's Obligation Under Automotive Service Contract Not Deductible)*

3.2.210.10 NMAC Section 7-9-52 NMSA 1978

*(Transportation Services)*

3.2.212.19 and 24 NMAC Section 7-9-54 NMSA 1978

*(Proof of Payment; Custom Software)*

3.2.215.11 NMAC Section 7-9-57 NMSA 1978

*(Product of Service Which is Reviewed and Accepted Outside of New Mexico But Initially Used in New Mexico)*

3.2.218.11 NMAC Section 7-9-60 NMSA 1978

*(Sale of Meals)*

3.2.235.10 and 11 NMAC Section 7-9-75 NMSA 1978

*(Receipts From Manufacturer for "Get Ready"; Receipts From Non-Manufacturers for "Get Ready")*

3.2.220.11 NMAC Section 7-9-62 NMSA 1978

*(Feed Storage)*

3.2.20.7 NMAC Section 7-9-3.2 NMSA 1978

*(Definitions)*

**Income Tax Act**

3.3.12.14 NMAC Section 7-2-12 NMSA 1978

*(Composite Returns for Owners of Pass-Through Entities)*

**Withholding Tax Act**

3.3.2.8 and 10 NMAC Section 7-3-3 NMSA 1978

*(Withholding From Irregular Wages)*

3.3.2.10 NMAC Section 7-3-12 NMSA 1978

*(Withholding By Pass-Through Entities)*

The Department also proposes to repeal 3.13.3.7 NMAC (*Definitions - Depreciable Equipment*) to Section 7-9D-3 NMSA 1978, 3.13.3.8 NMAC (*Application of the Credit*) to Section 7-9D-7 NMSA 1978, 3.13.3.9 NMAC (*Used Equipment*) to Section 7-9D-5 NMSA 1978 and 3.13.3.10 NMAC (*Credit Not Transferable*) to Section 7-9D-7 NMSA 1978 of the Capital Equipment Tax Credit Act.

The proposals were placed on file in the Office of the Secretary on August 4, 2005. Pursuant to Section 9-11-6.2 NMSA 1978 of the Taxation and Revenue Department Act, the final of the proposals, if filed, will be filed as required by law on or about October 31, 2005.

A public hearing will be held on the proposals on Thursday, October 13, 2005, at 9:30 a.m. in the Secretary's Conference Room No. 3002/3137 of the Taxation and Revenue Department, Joseph M. Montoya Building, 1100 St. Francis Drive, Santa Fe, New Mexico. Auxiliary aids and accessible copies of the proposals are available upon request; contact (505) 827-0928. Comments on the proposals are invited. Comments may be made in person at the hearing or in writing. Written comments on the proposals should be submitted to the Taxation and Revenue Department, Director of Tax Policy, Post Office Box 630, Santa Fe, New Mexico 87504-0630 on or before October 13, 2005.

3.2.1.11 **CONSTRUCTION.**

D. Construction does not include.

(2) A person engaged in the construction business, however, may deliver to the seller a [Type-6] nontaxable transaction certificate for the purchase of carpets, draperies, or installed carpet or installed draperies [~~to the seller~~].

(3) Even though receipts from selling carpet installation services or drapery installation services to a person engaged in the construction business are receipts from the sale of a service for resale, a person engaged in the construction business may deliver a [Type-7] nontaxable transaction certificate for the purchase of carpet installation services or drapery installation services.

3.2.1.18 **GROSS RECEIPTS; SERVICES.**

C. **Allocating receipts from selling services performed within and without New Mexico.**

(3) If a subcontract service is actually a service purchased for resale, and all conditions of Section 7-9-48 NMSA 1978 are met and the subcontracted service is actually sold intact to the prime contractor's customer, the prime contractor may issue a [Type-5] nontaxable transaction certificate to the subcontractor, ~~and the~~ The receipts from such subcontracted service will be deductible from the subcontractor's gross receipts.

3.2.1.29 **SERVICES.**

D. **When a transaction is predominantly a service:**

(2) When the transaction is predominantly a service other than construction, any tangible personal property transferred in conjunction with the service is incidental to the service, and the value of the property becomes an element of and is incorporated into the value of the service sold. [Type-2] Nontaxable transaction certificates (nttcs) may not be executed to acquire the property so incorporated.

(3) Example A1: C, a consultant, reviews operations of clients; C does not engage in the business of selling office supplies. C is hired to evaluate certain operations of L. C presents the evaluation to L as a written report[-] with supplemental data on computer disks. C contends that the paper used for the report and the computer disks were sold to L, and therefore C may execute [a Type-2] an nttc to acquire these tangibles. The transaction with L is predominantly the performance of a service. The paper and computer disks convey the result of [the] C's service and are incidental to that service. C may not execute [Type-2] nttcs for the purchase of these tangibles.

(4) Example A2: X is engaged in the business of performing certain services and is not engaged in selling tangible personal property in the ordinary course of business. X enters into a cost plus a fixed fee contract with Y to conduct a survey of residents of this state to determine consumer acceptability of and demand for particular household products which Y manufacturers and plans to distribute into New Mexico. The contract specifies that on completion or termination of the contract any tangible property purchased by X, and billed by X, will be paid by Y as a cost of fulfilling the requirements of the contract. X chooses to purchase a personal computer to use in the performance of the service. X will enter results of the surveys into the computer [~~which~~] that will classify the responses and generate reports which X will analyze, interpret and submit to Y. Since X has the power to exert significant influence over the degree of involvement (use) of the computer under the contract, and since X is not engaged in selling computers or similar property in the ordinary course of business, X's receipts attributed to the

cost of the computer are receipts from performing a service. X may not execute ~~[a Type-2]~~ an nttc for the purchase of the computer.

(5) Example A3. A well-servicing company uses disposable bits and other disposable “rubber goods” in servicing oil and natural gas wells. The disposable items are ~~used up~~ depleted in the course of the servicing; pieces of the abraded material are left in the well. The company claims it should be allowed to execute ~~[Type-2]~~ nttcs because the disposable items are left with the owner(s) of the well. These materials are incidental to the performance of the service. The company may not execute ~~[Type-2]~~ nttcs in acquiring these disposable items.

(8) Example B1: B, an engineering company, contracts to design a product for Y, a manufacturer~~;~~ who intends to manufacture the product for sale to the general public. The contract requires B to submit plans for the product and a prototype of it. B contends that the plans and prototype are tangible personal property and therefore ~~[Type-1 or Type-2 nttcs]~~ an nttc may properly be executed. B is performing a research and development service, even though the product of the service is embodied in tangible personal property. The tangibles used are incidental to the performance of the service. ~~[Type-1 and Type-2 nttcs]~~ Nttcs may not be executed to acquire the tangible personal property making up the plans and prototype.

(9) Example B2: B, an engineering company, is a qualified contractor within the meaning of Section 3.2.205.11 NMAC under a contract with D, an agency of the United States. The contract is a research and development contract covered by the agreement between the state of New Mexico and several agencies of the United States, including D. The contract calls for B to design and submit plans for a rocket motor and to develop and deliver a facsimile of the rocket casing to a research facility for testing. B maintains that B is selling tangible personal property to the federal government. B is performing research and development services. The plans and facsimile are products of that service. The transaction is predominantly the performance of a service rather than the sale of tangible personal property. B is not selling tangible personal property to the federal government but may be eligible to execute ~~[Type-15]~~ nttcs if the conditions specified by Section 3.2.205.11 NMAC and the State-Federal agreement are met.

(10) When the performer of the service either is regularly engaged in selling or leasing by itself the type of tangible personal property transferred in the transaction, a single transaction may encompass both the sale of a service and the sale of property as distinct and separable parts of the transaction. In such a case, ~~[Type-2 nttcs]~~ an nttc may be executed to acquire the tangible personal property resold if the conditions in Subsection A of Section 3.2.205.10 NMAC are met.

(12) Example B4: H, who operates a computer hardware and software company, is hired to write computer programs for one of M's divisions, acquire and set up 25 computer stations for use of the division and to train the division personnel in the use of the stations and programs. H contends that the computer stations are sold to M and therefore H may execute ~~[Type-2]~~ nttcs to acquire them for resale. The transaction encompasses both the performance of services (developing the programs and training the division personnel) as well as the sale of tangible personal property (the computer stations) as separable elements. ~~[Therefore]~~ H may execute ~~[Type-2]~~ nttcs in acquiring the computer stations.

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]~~ an appropriate nttc, 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]~~ that 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.

3.2.201.13 **MULTIJURISDICTIONAL UNIFORM SALES AND USE TAX CERTIFICATES:**

A. The department deems the uniform sales and use tax certificate issued by the multistate tax commission or by any member state other than new mexico to a taxpayer not required to be registered in New Mexico to be a nontaxable transaction certificate (nttc) equivalent to ~~[a type-1 or a type-2]~~ an nttc, as appropriate, issued by the department. The department will accept as evidence of the deductibility of a specific transaction the multistate tax commission uniform sales and use tax certificate only in those situations in which possession of a properly executed ~~[type-1 or type-2]~~ nttc is acceptable evidence of the deductibility of the transaction, and the uniform sales and use tax certificate is issued by the multistate tax commission or a member state other than New Mexico to a taxpayer not required to be registered in New Mexico.

B. No certificate or other document from any other state or taxing jurisdiction is acceptable evidence under Section 3.2.201.13 NMAC.

C. This version of Section 3.2.201.13 NMAC applies to transactions occurring on or after July 1, 1998.

**3.2.201.14 GOOD FAITH ACCEPTANCE OF NONTAXABLE TRANSACTION CERTIFICATES:**

A. Acceptance of nontaxable transaction certificates (nttc) in good faith that the property or service sold thereunder will be employed by the purchaser in a nontaxable manner is determined at the time of each transaction. The taxpayer claiming the protection of a certificate continues to be responsible that the goods delivered or services performed thereafter are of the type covered by the certificate.

B. Example 1: ~~A type 6~~ An nttc, which may be executed and accepted for the purchase of construction materials, will not protect the deduction taken by an automobile dealer for receipts from the sale of automobile parts or a lumber yard for receipts from the sale of a power saw.

C. Example 2: An automobile dealer who accepts ~~a type 2~~ an nttc from an airline for the purchase of parts cannot rely on the ~~[type 2 (resale of tangibles)]~~ nttc to protect the deduction of receipts, pursuant to Section 7-9-47, from such sale unless the dealer can demonstrate good faith acceptance by showing that the airline is in the business of reselling parts. A statement on the back of or attached to the certificate separately signed by a responsible employee of the airline showing that the airline runs a retail parts store would protect the dealer who did not know the statement was false.

**3.2.201.19 BORDER STATES UNIFORM SALE FOR RESALE CERTIFICATE:**

A. For transactions specified below, the department deems a border states uniform sale for resale certificate issued by a border state other than New Mexico to a taxpayer not required to be registered in New Mexico to be a nontaxable transaction certificate (nttc) ~~[equivalent to a type 1 or type 2 nttc]~~, as appropriate, issued by the department. The department will accept as evidence of the deductibility of a specific transaction, the border states uniform sale for resale certificate only when the following conditions exist:

B. No other certificate or document from any other state or taxing jurisdiction is acceptable evidence under Section 3.2.201.19 NMAC.

C. For the purposes of Section 3.2.201.19 NMAC:

(1) "border state" means Arizona, California, New Mexico and Texas and any other state joining the Border States Caucus subsequent to January 1, 1996; and

(2) "northern border region" means:

(a) the border strip of 20 kilometers parallel, north and south, to the international dividing line between the United Mexican States and the United States of America;

(b) all territory of the Lower California states, South Lower California and Quintana Roo, the municipality of Cananea, Sonora and part of the State of Sonora as delimited by the Border States Caucus; and

(c) any additional territory of the United Mexican States incorporated into the definition by the Border States Caucus subsequent to January 1, 1996.

D. Section 3.2.201.19 NMAC is retroactively applicable to taxable events occurring on or after January 1, 1996.

**3.2.204.14 UPHOLSTERY MATERIALS:** Upholsterers are engaged in the business of performing a service and are not manufacturers. If an upholsterer separately states on the billings to customers the value of the material used in conjunction with the services, the upholsterer may issue a ~~[Type 2]~~ nontaxable transaction certificate (nttc) of the appropriate type to the supplier of the material. If the value of the material is not separately stated on the billings to customers and either an nttc is issued or the materials are purchased without a sales or gross receipts tax appearing on the invoice from an out-of-state vendor, the upholsterer will be liable for compensating tax on the value of the material.

**3.2.204.16 RECEIPTS FROM CUSTOM SOFTWARE DEVELOPED FOR MANUFACTURER OF PACKAGED SOFTWARE NOT DEDUCTIBLE:**

A. Receipts from developing custom software for a manufacturer of packaged software are not deductible under Section 7-9-46 NMSA 1978 because the deduction under Section 7-9-46 NMSA 1978 is available only for receipts from selling tangible personal property which is incorporated as an ingredient or component part of the manufactured product. Developing custom software is a service.

B. Example: M, a manufacturer of packaged software, contracts with S, a software development company, for the development of a new personal finances program which M plans to manufacture and sell. S is performing a service under this contract. M may not execute and S may not accept a ~~[Type 1 or Type 2]~~ nontaxable

transaction certificate for the purchase of tangible personal property because the property is not for resale or incorporation into a manufactured product.

3.2.205.10 **TANGIBLES SOLD FOR USE IN PERFORMANCE OF A SERVICE VERSUS SIMULTANEOUS TRANSACTIONS - BILLING PRACTICES**

A. **Use of tangible personal property in performing a service:**

(1) When a taxpayer uses tangible personal property in the performance of a service, the tangible personal property is acquired for use and not for sale in the ordinary course of business. Therefore, a nontaxable transaction certificate may not be executed under Section 7-9-47 NMSA 1978 to acquire the tangible personal property.

(2) [Reserved.]

(3) [Reserved.]

(4) Example 1: X, a dry cleaner, mends clothing that is brought to X for cleaning. X uses thread, material and buttons to mend the clothing. X maintains that X is selling these products. X does not sell thread, buttons or material; rather X is engaged in performing a service and uses the materials in the performance of the service. Therefore, the sale of these products to X is not a sale for resale. If, in this situation, X delivered an nttc to its supplier for the purchase of thread and buttons and if the supplier did not pay the gross receipts tax on those receipts, X will be subject to the compensating tax.

(5) Example 2: A person giving tangible personal property as prizes for performing certain skills at carnivals, amusement parks, fairs or similar recreation facilities is using the tangible personal property in the performance of its entertainment service. If this tangible personal property is acquired within New Mexico, the person may not execute ~~[Type 2 nttc]~~ an nttc to buy these items because the tangible personal property is not to be re-sold but used in the performance of an amusement or recreation service. If the tangible personal property were acquired from sources outside New Mexico, the person is subject to the compensating tax on the value of the tangible personal property.

(6) Example 3: An accountant purchases journal and ledger sheets, forms and supplies necessary to maintain books of account for clients. The accountant analyzes transactions and prepares journal entries and posts information to the ledgers. The accountant also prepares periodic financial statements and completes tax returns and other reports on behalf of the client. In billing for the services performed, the accountant separately states the value of the journal and ledger sheets, forms and other property used in the performance of the service. The accountant is using the tangible personal property in the performance of the service and may not execute a nontaxable transaction certificate under Section 7-9-47 NMSA 1978 to acquire these items. The fact that the accountant separately states the value of these tangibles is immaterial in this case.

(7) Example 4: O & G Service Company uses swabbing cups and other rubber goods in the course of its servicing an oil well. In fact, this tangible personal property loses its separate identity in the course of the service. As is customary in the industry, O & G Service Company separately states the value of the swabbing cups and other rubber goods in its billing to the person who contracted for the servicing of the well. O & G may not execute nontaxable transaction certificates under Section 7-9-47 NMSA 1978 to acquire the swabbing cups and other rubber goods because O & G is using those goods in the performance of its service. In this case, it is immaterial whether O & G Service Company separately states the value of such tangibles or whether it is the industry practice to do so.

(8) If a business regularly sells tangible personal property by itself as well as in connection with the performance of a service and if the property is not used by the business in the course of the performance of the service, a transaction in which tangible personal property is transferred to the buyer as the result of, or in connection with, the performance of a service contains as separate components both the performance of a service and the sale of tangible personal property. When it is the custom of both the industry and the business to separately state the value of the service and the value of the tangible personal property transferred to the buyer in the billing to the buyer, the tangible personal property is acquired for sale in the ordinary course of business. In this case, a nontaxable transaction certificate may be executed under Section 7-9-47 NMSA 1978 to acquire the tangible personal property.

B. **Purchase of blueprints by architects:** Architects are engaged in the business of performing services which include furnishing drawings and blueprints to their clients. Thus, they may not issue nontaxable transaction certificates for the purchase of extra copies of blueprints since they are not sellers of tangible personal property in the ordinary course of business as required under Section 7-9-47 NMSA 1978.

C. **Lawn service:** Receipts from selling fertilizer, insecticides, herbicides and similar items of tangible personal property to a person engaged in the business of providing lawn maintenance services may not be deducted from gross receipts pursuant to Section 7-9-47 NMSA 1978. Such receipts are not receipts from selling

tangible personal property for resale since the property is being used by the person in the course of providing lawn maintenance services.

D. **Sale of landscape items:** Receipts from selling landscape items such as plants, shrubs, trees, rocks, seed, sod and ornaments to a person engaged in the business of designing landscapes and selling and installing landscape items are receipts from selling tangible personal property for resale since it is the trade practice of persons engaged in the landscape business to bill landscape items separately from the design and installation services involved.

E. **Morticians:** Receipts from selling boxes and vaults, shipping pouches, burial clothing, monuments, grave markers, tombstones, flowers, memorial books, acknowledgement cards and caskets to morticians for use in their business are receipts from selling tangible personal property for resale since it is the custom of the undertaking industry to bill these items separately from the services rendered.

F. **Watch repair:** The receipts from selling watch repair parts and materials to watchmakers for use in the repair of watches are not receipts from selling tangible personal property for resale because it is not the custom of watchmakers to bill these parts and materials separately from watch repair services.

G. **Photographic processors:** If a person engaged in the business of processing photographic materials bills the charge for a finished photographic print separately from the charge for the services and the cost of the finished photographic print bears a reasonable relation to the cost of production of the finished photographic print, the receipts from the sale of the finished photographic print may be deducted from gross receipts if the sale of the print is made to a buyer who delivers a nontaxable transaction certificate under Section 7-9-47 NMSA 1978, because it is the custom of the photographic processing industry to bill labor separately from tangibles.

H. **Sale of paint to body shops:** Receipts from selling paint, primer, filler and other tangible personal property that is applied to and becomes part of a repaired vehicle, when such sales are made to a body shop, may be deducted from the gross receipts of the seller if the body shop issues a [Type 2] nontaxable transaction certificate (nttc) of the appropriate type, it being the custom of this industry to state separately those items in billings. If the seller delivering the nttc does not separately state the tangible personal property in its billings, compensating tax is due. A body shop may not issue [a Type 2] an nttc for items such as emery cloth, grinding wheels, buffers and sand for blasting which are consumed by the body shop in the performance of its services.

### 3.2.205.11 **SALE OF TANGIBLE PERSONAL PROPERTY TO A FEDERAL CONTRACTOR OR SUBCONTRACTOR:**

A. Receipts from selling tangible personal property to a federal contractor or subcontractor may be deducted from the seller's gross receipts if the federal contractor or subcontractor issues a [Type 15] nontaxable transaction certificate (nttc) to the seller. The federal contractor or subcontractor is authorized to issue [a Type 15] an nttc only if the federal contract number is entered on the appropriate line of the [Type 15] nttc and all of the criteria contained in the agreement between New Mexico and the U.S. Government are met and if the contracting agency is one of the United States agencies signatory to the agreement.

B. If the federal contractor or subcontractor issuing the [Type 15] nttc does not meet the criteria outlined in the agreement, it shall be liable for compensating tax on the value of the tangible personal property. A federal contractor or subcontractor may not issue [a Type 15] an nttc for the purchase of services.

### 3.2.205.13 **PACKAGING AND RELATED MATERIALS.**

#### A. **Containers, wrapping paper and other packaging products.**

(1) **Nonreturnable containers.** Sales of nonreturnable containers to persons who use them to package tangible personal property so that the containers become part of the products ultimately sold are sales for resale. The buyer of this type of container may give a nontaxable transaction certificate (nttc) for the containers purchased. Thus a person who sells nonreturnable containers to one who has delivered an nttc and uses the containers in packaging food which is then sold may deduct the receipts from the sales to the person who delivered the nttc under Section 7-9-47 NMSA 1978.

(2) **Returnable containers.** Sales of returnable containers to persons who use the containers for the delivery of their goods are not sales for resale. The purchase of the returnable containers by the person who packages the goods for sale is a purchase for use. Therefore, the seller of the containers must pay the gross receipts tax on the receipts from the sale. Normally included in the category of returnable containers are glass milk bottles, some gasoline and oil cans, water bottles and milk and soft drink cases.

(3) **Wrapping materials.** The sale of bags, wrapping paper, twine and similar articles to persons who use the materials to package merchandise which has been sold is a sale for resale. The receipts from these sales may

be deducted by a seller who has received an nttc from the buyer. The buyer of the bags, wrapping paper and twine may give an nttc for their purchase.

(4) **Paper towels, sales slips.** Sales of paper towels, toilet tissue, and like items, when sold to a person engaged in the business of performing a service are not sales for resale. The seller must pay the gross receipts tax on these sales. The sale of sales slips is subject to tax unless the buyer resells the sales slips in the ordinary course of business.

(5) **Crowns, bottles, crates, cartons.**

(a) Crowns. The sale of caps or crowns to persons who use them in bottling soft drinks are treated as sales for resale. The sale of caps or crowns as a part of the bottled beverage to a person selling the beverage for ultimate consumption also is a sale for resale.

(b) Bottles. The sale of nonreturnable bottles, cans or other types of containers to a bottler or canner for use in packaging soft drinks is a sale for resale. The sale of the bottle or can as a part of the drink to a person selling the beverage for ultimate consumption also is a sale for resale.

(c) Crates. The sale of crates, made of any material, to a soft drink bottler is not a sale for resale. The seller of the crate must pay the gross receipts tax if the sale is made in New Mexico. If the sale is not made in this state then the compensating tax must be paid by the buyer.

(d) Cartons or cases. The sale of paper, cardboard or plastic cartons and can and bottle holders to a soft drink bottler or canner is a sale for resale. The sale of the carton to a person engaged in selling soft drinks to consumers also is a sale for resale.

(6) **Labels, product name tags, price tags.** Receipts from selling labels, product name tags or price tags to a person who delivers [a Type-2] ~~an~~ nttc to the seller may be deducted from gross receipts. The buyer delivering the nttc must resell the labels, product name plates or price tags either by themselves or in combination with other tangible personal property in the ordinary course of business, or the buyer is subject to the compensating tax on their value. These items are resold in combination with tangible personal property if they are affixed to and sold along with the other property.

(7) *Example:* Z, a book and stationery store, is engaged in the business of selling office supplies. Among the items Z carries for sale to other merchants are sales slips which Z purchases from X. The sales slips which Z sells to its customers who use the sales slips in the regular course of their businesses are not sales for resale. Z must pay the gross receipts tax on its receipts from selling sales slips to other stores. X Company will be allowed to treat the sale of sales slips to Z as sales for resale if it has received an nttc from Z. Z also uses some of the sales slips which it purchases to record transactions between itself and its customers and to bill the customers. As to these purchases, Z may abide by the following procedure: Z may give X an nttc for the total purchases and then pay compensating tax on those sales slips which it uses because Z is in the business of purchasing sales slips for resale and its own use of the slips is minor in comparison to the total number of slips purchased.

**B. Sales to a burlap bag processor.**

(1) Receipts derived from the sale of used burlap bags to a person engaged in the business of processing burlap bags for sale in the ordinary course of business may be deducted from gross receipts if the buyer delivers a nontaxable transaction certificate (nttc) to the seller pursuant to Section 7-9-47 NMSA 1978.

(2) If the buyer delivering the nttc does not resell the used burlap bags in the ordinary course of business, the compensating tax is due.

**C. Sale of bagging and ties.** Receipts from the sale of bagging and ties to a person who operates a cotton gin for use in baling cotton are not receipts from selling tangible personal property for resale since the bagging and ties are used by the person in the course of his service of baling cotton.

**D. Steel strapping.**

(1) Receipts from selling strapping used to contain individual ingots of copper in packages may be deducted from gross receipts if the sale is made to a person who delivers a nontaxable transaction certificate (nttc) to the seller. The buyer delivering an nttc must resell the steel strapping either by itself or in combination with other tangible personal property in the ordinary course of business.

(2) If the buyer delivering the nttc does not resell the steel strapping in the ordinary course of business, the compensating tax is due.

**E. Sale of baling wire to a farmer.**

(1) Receipts from selling baling wire to a farmer who bales hay for sale to others may be deducted from the seller's gross receipts if the farmer issues a [Type-2] nontaxable transaction certificate. The baling wire is resold by the farmer in combination with other tangible personal property. The deduction would not apply to sales made to farmers of baling wire for their own use.

(2) A seller may not deduct the receipts from selling baling wire to a "custom worker" who bales hay for farmers for a consideration, since the wire is used by the worker in the course of performing his services.

3.2.205.14 **MEDICINES AND MEDICAL SUPPLIES**

A. **Dental supplies:**

(1) The receipts from selling supplies, gold, silver and similar items of tangible personal property used in making dentures, cement used in fillings, amalgam, anesthetics, orthodontia platinum wire, facing, backing, x-ray film and the like to dentists for use in their practices are not receipts from selling tangible personal property for resale since it is not the custom of the dental profession to bill material separately from the services involved.

(2) The receipts derived from selling the items mentioned in Paragraph (1) of Subsection A of Section 3.2.205.14 NMAC may not be deducted from gross receipts pursuant to Section 7-9-73 NMSA 1978 because the items sold are not prosthetic devices within the meaning of Section 7-9-73 NMSA 1978.

B. **Medical supplies:** Receipts from selling supplies, drugs, bandages, splints, syringes, tongue depressors, medicine used as injections and other similar items to practitioners of the healing arts for use in their practices are not receipts derived from selling tangible personal property for resale since it is not the custom of such practitioners to bill material separately from the services involved.

C. **Sale of radioisotopes:**

(1) Receipts from selling radioisotopes to a professional association of medical radiologists which furnishes a nontaxable transaction certificate (nttc) are receipts derived from selling tangible personal property for resale since it is the custom of radiologists to bill these materials separately from the services involved.

(2) If the radiologists delivering the nttc do not resell the radioisotopes in the ordinary course of business, the compensating tax is due.

D. **Issuance of nontaxable transaction certificates by oncologists:** Receipts from selling drugs used in the treatment of cancer by an oncologist who separately states these items in billings may be deducted by the seller if the oncologist delivers to the seller a [Type 2] nontaxable transaction certificate (nttc). If the oncologist delivering the nttc does not sell the items in the ordinary course of business or does not separately state the charges for the sale price of the items on the billings, the compensating tax is due. Receipts from the sale of other tangibles, such as supplies, bandages, syringes, etc., are not deductible.

E. **Sale of medicine to veterinarians:**

(1) Receipts from selling drugs, medicine, braces, dressings and other substances and preparations used in treating animals to a veterinarian who is engaged in the business of selling such items and who does not administer the items are receipts derived from selling tangible personal property for resale and may be deducted by the seller if the veterinarian delivers a [Type 2] nontaxable transaction certificate (nttc). If the veterinarian delivering the nttc does not resell the above items in the ordinary course of business, the compensating tax is due.

(2) Receipts from selling drugs, medicine, braces, dressings and other substances and preparations used in treating animals to a veterinarian who administers the items and who separately states these items in the billings may be deducted by the seller if the veterinarian delivers to the seller [a Type 2] an nttc because it is the custom of the trade to separately state these items in billings. If the veterinarian delivering the nttc does not resell the items in the ordinary course of business or does not separately state the charges for the sale price of the items on the billings, the compensating tax is due.

F. **Vitamins and drugs sold to sale barn:** Receipts from selling vitamins and drugs to a person engaged in the business of conducting a sale barn who administers vitamins and drugs to livestock consigned to the barn and who bills the consignor of the livestock for this property without charge for the service of administering the property are receipts from selling tangible personal property for resale.

3.2.205.18 **PARTS AND SUPPLIES SOLD UNDER SERVICE CONTRACTS**

A. **Receipts from sale of parts to fulfill promisor's obligation under automotive service contract not deductible:** The receipts of a repair facility from the promisor under an automotive service contract, as that term is defined in Subsection C of Section 3.2.1.16 NMAC, for furnishing parts to fulfill the promisor's obligation under the contract are taxable gross receipts of the repair facility. The receipts are not deductible by the repair facility even though the promisor may have furnished the repair facility with a [Type 2 (property for resale)] a properly executed nontaxable transaction certificate since the parts were sold by the repair facility to the purchaser of the automotive service contract for a consideration to be received from the promisor who makes the payment to the repair facility to discharge the promisor's obligation to the purchaser to pay for the parts

B. **Supplies billed by automotive dealer on repair orders subject to compensating tax:** New Mexico automotive dealers who issue [Type 2 (resale of tangibles)] nontaxable transaction certificates to suppliers



of shop supplies purchased for use in the dealers' service departments and body shops are liable for compensating tax on those supplies. Dealers are using and are not reselling (i.e., transferring) the shop supplies as required by Section 7-9-47 NMSA 1978 and are, therefore, liable for the compensating tax imposed by Paragraph (3) of Subsection A of Section 7-9-7 NMSA 1978. Separately stating a charge on the customer's billing for shop supplies used by a dealer does not constitute the resale of such supplies.

3.2.205.19 **COMPUTER SOFTWARE**

A. **Packaged software - sale of tangible personal property versus sale of a license:**

(1) When a person sells packaged software with restrictions such that the buyer may not transfer the software to another or may not permit another to use the software, the seller has receipts from the sale of a license.

(2) When a person sells packaged software without restrictions on the buyer's ability to transfer the property to another or to permit another to use the software, the seller has receipts from the sale of tangible personal property even if there may be restrictions on the number of simultaneous users or on the number of computers on which the software may be simultaneously installed.

B. **Packaged software - sale for resale:**

(1) Receipts from the sale of packaged software for resale may be deducted from gross receipts if the seller receives in good faith a ~~[Type-2]~~ nontaxable transaction certificate (nttc) of the appropriate type from the buyer.

(a) Example 1: X, a software manufacturer, sells its packaged software directly and through distributors. If X receives in good faith ~~[a-Type-2]~~ an nttc from a distributor, X may deduct receipts from the sale of its software for resale to the distributor.

(b) Example 2: Y, a software manufacturer, has developed an application. Y reached an agreement with M, a manufacturer of a desktop computer, in which M would sell its desktop computer with a copy of Y's software already installed. Copies of diskettes and instruction manuals for Y's software would also be delivered to the buyer. The manufacturer buys the packaged software from Y at a discount. If Y receives in good faith ~~[a-Type-2]~~ an nttc from M, Y may deduct receipts from the sale for resale of its packaged software to the manufacturer. In this case, it does not matter whether the ultimate buyer of the computer with the installed software is restricted from selling the software or authorizing others to use it.

(2) Receipts from the sale of packaged software in combination with a computer for a single price are receipts from the sale of tangible personal property whether or not the packaged software is installed on the computer. Example: Z is in the business of selling computers and software at the distributor level. Z prepares special packages for sale at a single price in which selected models of computer are sold with certain software already installed. Z may accept properly executed ~~[Type-2]~~ nontaxable transaction certificates (nttc) from retailers who intend to resell the package either by itself or in combination with other devices or software. Z may execute ~~[Type-2]~~ nttcs to acquire the computers, related hardware and packaged software.

C. **Packaged software - sale for use:**

(1) Except as provided in Paragraph (2) of Subsection C of Section 3.2.205.19 NMAC, receipts from the sale of packaged software which is intended to be used by the purchaser for a purpose other than resale are not deductible under Section 7-9-47 NMSA 1978, even if the purchaser is regularly engaged in the business of developing, manufacturing or selling software.

(a) Example 1: V, a vendor of software, sells to Z, a software development company, a package of CASE tools (programming designed to assist the development of other programs) which Z intends to use in creating new products. Although a sale of tangible personal property has occurred, the software is not intended to be resold. The receipts from this sale are not deductible. Z may not execute a ~~[Type-2]~~ nontaxable transaction certificate (nttc) with respect to this transaction. If Z does execute ~~[a-Type-2]~~ an nttc and V can and does accept it in good faith, Z will owe compensating tax on the value of the CASE tools acquired.

(b) Example 2: S, a seller of computer hardware and software, buys packaged software to do S's own bookkeeping. After using the packaged software for a period of time, S sells it. If S executed ~~[a-Type-2]~~ an nttc to acquire the packaged software, S owes compensating tax for using the software in New Mexico. S also owes gross receipts tax on S's receipts from the sale of the packaged software.

(2) If the buyer is a qualified contractor of the federal government and uses packaged software to fulfill an appropriate research and development contract with a signatory federal agency, the buyer may execute, and the seller may accept in good faith, ~~[a-Type-15 nttc]~~ an nttc, pursuant to Section 3.2.205.11 NMAC with respect to the packaged software. Example: X, a research and development company, enters into a qualifying research and development contract with a signatory agency of the United States. The contract is to develop a program to test certain devices which the United States is considering purchasing. 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~~] nttcs for the purchase of the packaged software.

(3) Receipts from the sale of packaged software which is designed to enable the purchaser to provide a service to its own customers are not deductible under Section 7-9-47 NMSA 1978. Example: An accountant opens a tax preparation service. The accountant purchases packaged software applications to assist in the preparation of various federal and state tax forms. Receipts from the sale of the software to the accountant are not deductible. The accountant may not execute nttcs to acquire the software in a nontaxable transaction. If the accountant does execute an nttc with respect to this transaction and the vendor can and does accept it in good faith, the accountant owes compensating tax on the value of the packaged software acquired.

### 3.2.205.20 **USE OF TANGIBLE PERSONAL PROPERTY BY HOTELS, MOTELS AND SIMILAR FACILITIES.**

A. Hotels, motels, inns, rooming houses and similar facilities are engaged in the business of granting a license to use real and tangible personal property. Tangible personal property provided to a guest in conjunction with the license and intended to be consumed by the guest, such as soap, paper products and single serving packets of coffee, is resold in the ordinary course of business.

B. *Example 1:* M, a motel, buys from Z bathroom tissue and single-serving coffee packets to use in M's motel business. M maintains that it is entitled to execute a [~~Type 2~~] nontaxable transaction certificate (nttc) in purchasing the tangible personal property. M contends that, because the cost of the tangibles is included in the charge M sets for rooms, M is reselling the products in combination with the license to use the room. M is correct and may execute [~~a Type 2~~] an nttc to purchase these goods.

C. *Example 2:* H, a hotel, offers its guests at no additional charge a continental breakfast with the rental of rooms. H may execute [~~a Type 2~~] an nttc to purchase the food provided at these breakfasts and related non-food tangible personal property, such as paper napkins, provided [~~in conjunction~~] with the food.

D. Tangible personal property, such as sales slips, computer paper or forms, cleaning materials, vacuum cleaners and computers, to be used or consumed by the hotel, motel, inn or similar facility or its staff is not resold in the ordinary course of business. Tangible personal property provided by a hotel, motel, inn or similar facility for the use of guests, such as furniture, tableware, bedding and towels, but intended to be retained by the facility are not resold in the ordinary course of business. Tangible personal property not resold by itself or in conjunction with other tangible personal property or licenses is not deductible under Section 7-9-47 NMSA 1978. [~~A Type 2~~] An nttc may not be executed with respect to such tangible personal property.

E. This version of Section 3.2.205.20 NMAC is retroactively applicable to receipts from transactions on or after 11/1/97.

### 3.2.206.20 **TELECOMMUNICATIONS SERVICES.**

A. **Cable television hook-up.** Receipts from selling the service of hook-ups to cable television for resale may be deducted from gross receipts if the sale is made to a buyer who delivers a nontaxable transaction certificate (nttc) to the seller. The subsequent sale must be in the ordinary course of business and the receipts subject to the gross receipts tax. This version of Subsection A of Section 3.2.206.20 NMAC applies to transactions occurring on or after July 1, 2000.

#### B. **Telephone services.**

(1) Receipts of a telephone company from the performance of telephone services for a hotel or motel, to the extent that they are attributable to calls made from the rooms of the hotel's or motel's guests, may be deducted from gross receipts if the hotel or motel delivers a nontaxable transaction certificate (nttc) to the telephone company. The charge must be subject to the gross receipts tax or the hotel or motel will be subject to the compensating tax on the value of the telephone services.

(2) In order to apportion the use of telephone service at a hotel or motel between local calls made from the rooms of the hotel's or motel's guests and other local calls made from the hotel or motel, the department will, on audit of the telephone company claiming the deduction described in the preceding paragraph, allow as a deduction that portion of the receipts of the telephone company which are calculated in the following manner with respect to the month's billing to the hotel or motel:

(a) the telephone company's receipts from charges, indicated on its billing to the hotel or motel, as local service and additional local call and message units, which represent local telephone service are calculated; and

(b) the total calculated in Subparagraph (a) of Paragraph (2) of Subsection B of Section 3.2.206.20 NMAC is multiplied by a fraction, the numerator of which is the number of message units, as the term is used by the telephone company, indicated on its billing to the hotel or motel which represent local telephone calls which were made from the hotel or motel and the denominator of which is the total of message units, as the term is used by the telephone company, indicated on the telephone company's billing to the hotel or motel.

(3) The method set forth in Paragraph (2) of Subsection B of Section 3.2.206.20 NMAC is acceptable to the department as an "apportionment of use". However, other methods which more accurately reflect the apportionment of use may be acceptable to the department.

(4) *Example:* X is engaged in the business of selling alarm systems in New Mexico. As a part of these systems, a telephone line is leased by X from Y, a telephone company. Y bills X for each line on a monthly basis. X bills each customer on a monthly basis for service plus a telephone line charge. Receipts of Y from the performance of the telephone service for X may be deducted from Y's gross receipts if X delivers ~~[a type 5]~~ an appropriate nttc to Y. Receipts of X from its customers must be subject to the gross receipts tax, or X will be liable for the compensating tax on the value of the telephone services at the time they were rendered.

(5) This version of Subsection B of Section 3.2.206.20 NMAC applies to transactions occurring on or after July 1, 2000.

3.2.206.21 **GARBAGE COLLECTION:** Receipts from selling the service of garbage collection for resale may be deducted from gross receipts if the sale is made to a buyer who delivers a ~~[type 5]~~ nontaxable transaction certificate (nttc) to the seller. The subsequent sale must be in the ordinary course of business and subject to the gross receipts tax or governmental gross receipts tax, or the buyer will be liable for the compensating tax on the value of the service at the time it was rendered. If the seller of the service of garbage collection is a political subdivision of the state of New Mexico, its receipts from the sale are ~~[exempted]~~ exempt from the gross receipts tax but will be subject to the governmental gross receipts tax. This version of Section 3.2.206.21 NMAC applies to transactions occurring on or after July 1, 2000.

3.2.206.22 **RECEIPTS FROM SALE OF SERVICES TO FULFILL PROMISOR'S OBLIGATION UNDER AUTOMOTIVE SERVICE CONTRACT NOT DEDUCTIBLE:** The receipts of a repair facility from the promisor under an automotive service contract, as that term is defined in Subsection C of Section 3.2.1.16 NMAC, for furnishing services to fulfill the promisor's obligation under the contract are taxable gross receipts of the repair facility and are not deductible by the repair facility. Even though the promisor may have furnished the repair facility with ~~[a type 5 (service for resale)]~~ an appropriate nontaxable transaction certificate, the receipts are not deductible because the services were sold by the repair facility to the purchaser of the automotive service contract for a consideration to be received from the promisor who makes the payment to the repair facility to discharge the promisor's obligation to the purchaser to pay for the services.

3.2.210.10 **TRANSPORTATION SERVICES**

A. **HAULING:** Receipts from hauling materials and supplies to and from a building site for a person engaged in the construction business are not deductible from the hauler's gross receipts pursuant to Section 7-9-52 NMSA 1978 because hauling materials and supplies to and from a construction site is not a construction service.

B. **HAULING PREFABRICATED BUILDINGS:** A builder of prefabricated buildings may not issue a ~~[Type 7]~~ nontaxable transaction certificate for the purchase of construction services to a company hired to move completed buildings from the builder's lot to the permanent site. Haulers are not engaged in construction as defined under Section 7-9-3 NMSA 1978. A deduction may be available under Section 7-9-48 NMSA 1978 if all the criteria of that section are met.

C. **HAULING AND SPREADING MATERIALS WITHIN CONSTRUCTION PROJECT:** Receipts of a person from hauling and spreading dirt, sand, gravel and rock, treated or untreated, for the purpose of furnishing materials to a construction project when such materials have been obtained from a source which is on or in the proximity of that construction project are receipts from performing a construction service. Such receipts may be deducted from the seller's gross receipts if the buyer delivers a nontaxable transaction certificate to the seller.

3.2.212.19 **PROOF OF PAYMENT:**

A. A seller must be able to prove that payment for the tangible personal property sold was made from the United States, or any agency or instrumentality thereof, or from the state of New Mexico, or any political subdivision thereof, or from the governing body of any Indian nation, tribe or pueblo or the deduction will not be allowed.

B. Proof of payment acceptable to the secretary consists of either [~~a-Type-9~~] an appropriate nontaxable transaction certificate or other documentation demonstrating payment by a governmental entity. Such other documentation includes:

- (1) for sales to any governmental entity (including federal agencies), documents related to the transaction showing the governmental entity's name, such as purchase orders, copies of warrants issued in payment and contracts covering the items purchased;
- (2) for sales to federal agencies only, the federal contract number; and
- (3) other documents determined by the secretary to constitute proof of payment.

**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~~] nttcs pursuant to Section 3.2.205.11 NMAC, for the purchase of the packaged software.

**3.2.215.11 PRODUCT OF SERVICE WHICH IS REVIEWED AND ACCEPTED OUTSIDE OF NEW MEXICO BUT INITIALLY USED IN NEW MEXICO:**

- A. Effective July 1, 1989, and for so long as the provisions of that version of Section 7-9-57 NMSA 1978 enacted by Laws 1989, Chapter 262, Section 6 remain in effect, the deduction provided by Section 7-9-57 NMSA 1978 does not apply to the receipts from the sale of a service the product of which is initially used for the intended purpose in New Mexico even though the product of the service is delivered to the buyer outside of New Mexico for review and acceptance. Review and acceptance of the product of the service does not constitute "initial use" or "initially used" as those terms are defined in Section 7-9-3 NMSA 1978. The initial use of the product of the service is the "first employment for the intended purpose".
- B. Example 1: X, an architect, prepares in New Mexico plans for a construction project to be built in New Mexico. On completion of the plans, X delivers the plans outside of New Mexico to the project owner for the owner's review and acceptance. After accepting the plans, the owner delivers the plans to the construction contractor who uses the plans during the construction of the project in New Mexico. Since the intended purpose of architectural plans is to serve as instructions for construction of a project, the initial use of the plans occurred when the contractor used the plans during the actual construction of the project in New Mexico. Therefore, X's receipts for preparing architectural plans for a construction project to be built in New Mexico are not deductible under the provisions of Section 7-9-57 NMSA 1978.
- C. Example 2: Y, a research and development contractor, has a contract with the government to develop a new application for existing technology. In order to complete the contract, Y subcontracts a portion of the service to Z who analyzes particular data and prepares a report, all work being done outside New Mexico. Z delivers the report to the government in Washington, D.C., for review and acceptance. Upon granting approval of Z's report, the government delivers the report to Y in New Mexico. Y uses the report to construct a prototype as a component of the service which Y performs under the terms of its contract with the government. The initial use of Z's report is Y's use of the information contained in the report to construct the prototype. The review and acceptance of the report is not the initial use of the report. Since the initial use occurred in New Mexico, Z's receipts from the sale of Z's service are not deductible under the provisions of Section 7-9-57 NMSA 1978. Z, however, may be entitled to the deduction provided by Section 7-9-48 NMSA 1978 if Y provides [~~a-Type-5~~] an appropriate nontaxable transaction certificate (nttc) to Z. Y must meet the requirements set forth by Section 7-9-48 NMSA 1978 if Y issues the nttc to Z.
- D. Section 3.2.215.11 NMAC applies to transactions on or after July 1, 1989.

**3.2.218.11 SALE OF MEALS:** Meals are tangible personal property. Therefore receipts from selling meals to a 501(c)(3) organization are receipts from selling tangible personal property. Such receipts may be deducted from

gross receipts under Section 7-9-60 NMSA 1978 if the organization delivers a properly executed [Type 9] nttc [with] to the seller. Sales of meals directly to members of a 501(c)(3) organization may not be deducted under Section 7-9-60 NMSA 1978 even if the meals are served at a function of the organization. The 501(c)(3) organization is an entity distinct from its members.

3.2.235.10       **RECEIPTS FROM MANUFACTURER FOR “GET READY”:** Amounts paid to, or credited against the account of, an automotive dealer by a manufacturer to compensate the dealer for inspection and other “get ready” operations performed on new vehicles manufactured by that manufacturer may be deducted from gross receipts if the dealer has in possession a [Type 13 (manufacturing services)] nontaxable transaction certificate (nttc) of the appropriate type (manufacturing services) issued by the manufacturer of the vehicles since the dealer is performing services directly on the property which the manufacturer is in the business of manufacturing. A reduction in the dealer's invoice price for a new vehicle to compensate the dealer for “get ready” operations on that vehicle involves a receipt by the dealer, but a deduction of that amount may be claimed by the dealer who has [a Type 13 nttc] an nttc issued by the manufacturer.

3.2.235.11       **RECEIPTS FROM NON-MANUFACTURERS FOR “GET READY”:** Amounts paid to a New Mexico automotive dealer by another dealer for inspection and other “get ready” operations performed on new vehicles being sold by the other dealer may not be deducted under a [Type 13] nontaxable transaction certificate pursuant to Section 7-9-75, issued by the other dealer since the New Mexico dealer is not performing the services for the manufacturer.

3.2.220.11       **FEED STORAGE:** [The receipts from selling metal] Metal bins and similar devices designed to store feed on a farm or ranch, which, in addition to storing, measure and control the flow of livestock, are agricultural implements. Therefore, 50% of the receipts derived from selling those articles may be deducted from gross receipts pursuant to Section 7-9-62 NMSA 1978.

3.2.20.7        **DEFINITIONS.**

A.       **Admission:** An “admission” to a recreational, athletic or entertainment event includes the granting of permission to observe or participate in a recreational, athletic or entertainment activity.

(1)       Example 1: City C charges a “greens fee” for use of a public golf course maintained by the city. Receipts from the greens fee are admissions.

(2)       Example 2: County Y charges a fee for use of a swimming pool and surrounding area maintained by the county. Receipts from this fee are admissions.

B.       **Agency, institution or instrumentality:**

(1)       An agency, institution or instrumentality includes all parts of the agency, institution or instrumentality. An entity which is administratively attached to an agency, institution or instrumentality is not thereby part of the agency, institution or instrumentality. An agency, institution or instrumentality which is subject to the supervisory or regulatory authority of another is not thereby part of the supervising or regulating entity.

(2)       Example 1: The New Mexico Museum of Natural History is part of the museum division of the office of cultural affairs. The New Mexico museum of natural history is not an “agency” or “institution” for purposes of the governmental gross receipts tax but only a component of an agency. In contrast, the office of cultural affairs is administratively attached to the department of finance and administration. The office of cultural affairs is not part of the department of finance and administration, which merely provides the office with some administrative support. The office of cultural affairs is an “agency” for the purposes of the governmental gross receipts and is responsible for reporting for all of its components.

(3)       Example 2: Under the Property Tax Code, the Taxation and revenue department has general supervisory power over county assessors and the department of finance and administration has certain enforcement powers relating to county treasurers. The existence of these authorities does not make either county officer a part of the superintending state agency.

C.       **Entertainment, athletic or recreational services or events:** The term “entertainment, athletic or recreational services or events” includes any recreational, athletic or entertainment activity.

D.       **State of New Mexico and any agency, institution, instrumentality or political subdivision thereof:**

(1)       For the purposes of the Gross Receipts and Compensating Tax Act, the term “state of New Mexico and any agency, institution, instrumentality or political subdivision thereof” includes:

(a) The legislature of the state of New Mexico and any committee or employee thereof; Examples of committee: the legislative council, the legislative finance committee, the legislative education study committee and any interim committee; staff of such a committee are part of the committee.

(b) The Supreme Court, Court of Appeals, district courts, metropolitan courts, magistrate courts, probate courts and any agency thereof; Examples of agency: the administrative office of the courts, the judicial standards commission and the compilation commission.

(c) The office of the Governor and every state executive agency subject to the authority of the governor; Examples of agency: every state cabinet agency, such as the taxation and revenue department, every agency not a cabinet agency whose head is directly responsible to the governor for the operations of the agency, such as the public defender department, whether or not the agency is administratively attached to a state cabinet agency, and every advisory committee established pursuant to Section 9-1-9 NMSA 1978.

(d) Every other state executive agency, board, commission or authority whose governing body is a board or commission either elected by the people or appointed by the governor, with or without consent of the Senate, whose actions are not formally subject to the control or approval of the governor, whether or not such agency is administratively attached to a state cabinet agency; Examples: the state public regulation commission, the state racing commission, the public service commission, the state personnel board, and the state game commission [~~and the commission on higher education~~].

(e) A state officer other than the governor whose office is created by the state Constitution, together with the agency or office such person heads, whether or not the officer is elected or appointed; Examples: The secretary of state, the attorney general, the state treasurer, the state auditor, the commissioner of public lands and the state mine inspector.

(f) Every executive agency created by the state Constitution not included in items c through e above; Examples: The state board of education, the state department of education and the department of agriculture.

(g) Every health, educational, penal or other institution of the state; every entity controlled or operated by such an institution is part of that institution;

(i) Examples of institutions: the entities enumerated in Article XII, Section 11 and Article XIV, Section 1 of the state Constitution, community colleges, branch colleges, junior colleges, technical and vocational institutions, area vocational institutions and hospitals not enumerated in Article XIV, Section 11 of the state Constitution.

(ii) Examples of controlled entities: any newspaper published by a state university or college, whether or not operated as an educational function of the university, or any radio or television stations, the license to operate which is held by an entity or entities described in Section 3.2.20.1 NMAC.

(h) Every instrumentality of the state which has the power to levy a tax or assessment, whether the instrumentality was created by the state Constitution or by law, whether the governing power is vested in an officer or a board or commission or whether the officer or members of the board or commission are elected or appointed; Examples: New Mexico beef council, economic advancement districts, irrigation districts, conservancy districts, soil and water conservation districts and flood control districts.

(i) Every instrumentality of the state administering state retirement and other programs benefitting employees of the state: Examples: The public employees retirement association and its governing board and the educational retirement board.

(j) Every instrumentality of the state other than those described in Subparagraph (h) of Subsection D of Section 3.2.20.7 above, whether created by the state Constitution or by law, whether the governing power is vested in an officer or a board or commission or whether the officer or members of the board or commission are elected or appointed; Examples: the mortgage finance authority, the industrial and agricultural finance authority, the business development corporation and any corporation established under the Educational Assistance Act;

(k) Every county of New Mexico, which includes all of its parts, instrumentalities and elected officials; Example: a county hospital, regardless of whether operation of the hospital is conducted by another entity under contract, or any entity with power of taxation or assessment authorized to be established with the permission of the county commission or the voters of the county under Article 4 NMSA 1978, such as a county improvement district.

(l) Every municipality of New Mexico, whether incorporated under special law or general law, which includes all of its parts, instrumentalities and elected officials; Examples: any municipal housing authority, any municipally-owned transit, water, sewer, electric or gas utility, any municipally-controlled organization operating a convention center, any regional planning commission or any entity with power of taxation or assessment authorized to be established with the permission of the governing body of the municipality or the voters of the

municipality under Article 3 NMSA 1978, such as a municipal parking authority or community development agency.

(m) Every public school district of New Mexico;  
(n) Community ditch or acequia associations;  
(o) Community land grants, whether incorporated or not, which have statutory power of taxation or assessment; and  
(p) Every other political subdivision of New Mexico, including every component or instrumentality of that political subdivision.

(2) The term "state of New Mexico and any agency, institution, instrumentality or political subdivision thereof" does not include:

(a) organizations created by interstate compact; Examples: Cumbres and Toltec scenic railroad commission, multistate tax commission, interstate agricultural grain marketing commission, western interstate commission for higher education and the council of state governments.

(b) or any entity not created by the state Constitution or by law or local ordinance, which has no power of taxation and in which membership is voluntary; Examples: New Mexico association of counties, New Mexico municipal league, any union of government employees and any association advancing the professional interests of its members.

### 3.3.12.14 COMPOSITE RETURNS FOR OWNERS OF PASS-THROUGH ENTITIES

A. For the purposes of 3.3.12.14 NMAC:

(1) "authorized representative" means any of the qualifying owners, the entity the qualified owner is an owner of or the entity's or the qualifying owners' contractor or agent authorized to file composite returns for the qualified owners;

(2) "entity" means a partnership which has not elected to be taxed for federal income tax purposes as a corporation, a limited liability company which is not taxed as a corporation for federal income tax purposes or an S corporation;

(3) "owner" means an individual who is a partner in a partnership which has not elected to be taxed for federal income tax purposes as a corporation, a shareholder in an S corporation or a member of a limited liability company which is not taxed as a corporation for federal income tax purposes; and

(4) "qualifying owner" means an owner who is not a resident of New Mexico and who has no income from New Mexico sources (including spouse's income on a joint return) other than the owner's share of the entity's income from New Mexico or the owner's share of income from New Mexico of other entities, the income from which is reported on composite returns.

B. Qualifying owners of a qualifying entity may elect to have the entity file a composite income tax return on behalf of certain individual owners with prior approval of the department on a form prescribed by the secretary. The filing of a composite return by the entity is in lieu of the filing of individual personal income tax returns by each owner included in the return and if properly completed the filing of the composite return shall fulfill the filing requirement for each owner qualified to be included in, and included in, the return.

C. An entity may file a composite return on behalf of its qualified owners if the following conditions are met:

(1) the entity assumes responsibility for payment of any liability of each qualified owner included in the composite return for income tax due to New Mexico for the taxable year for which the return is filed.

(2) all qualified owners included in the composite return report, for federal income tax purposes, on the same fiscal year basis as the fiscal year for which the composite return is being reported.

D. The entity shall exclude from the composite filing any owner who is a resident of New Mexico or who is a nonresident of New Mexico having income from other sources within New Mexico, including any income of a spouse.

E. Corporations shall always be excluded from composite returns filed by any entity. Corporations which are partners in a partnership or members of a limited liability company which partnership or company derives income from New Mexico sources must file, in accordance with the Corporate Income and Franchise Tax Act, a New Mexico corporate income and franchise tax return and must include all sources of income, including income from the partnership or limited liability company, in that return.

(1) A partnership which has elected to report for federal income tax purposes as a corporation may not file composite returns. Each partner of such a partnership shall file separate individual or corporate income tax returns for New Mexico.

(2) A limited liability company which is taxed as a corporation for federal income tax purposes may not file composite returns. Each member of such a company shall file separate individual or corporate income tax returns for New Mexico.

F. The following requirements must be met for an authorized representative to file a composite return on behalf of qualifying owners of an entity:

(1) All qualifying owners included in the composite return must authorize in writing the authorized representative to file the New Mexico income tax return on their behalf.

(2) No qualifying owner may be included in a composite return if that owner files an individual New Mexico income tax return for the same taxable year for which the composite return is filed. A qualifying owner may be included in more than one composite return if the qualifying owner has income from more than one entity and does not file an individual New Mexico income tax return for that same year.

(3) The composite return must be accompanied by the following information for each owner of the entity, whether included or excluded from the composite return:

- (a) the name of each owner;
- (b) the owner's address;
- (c) the owner's social security number;
- (d) the income distributed to the owner;
- (e) the owner's percentage of ownership in the entity; and
- (f) a statement of whether the owner is included or excluded from the composite return.

(4) The composite return shall be filed under the name of the entity and shall not be filed under the name of any individual owner.

(5) The entity shall allocate and apportion to New Mexico the income of each owner included in the composite return in accordance with the provisions of the Uniform Division of Income for Tax Purposes Act and the regulations and instructions of the department under the Income Tax Act and under the Uniform Division of Income for Tax Purposes Act. The sum of the income allocable to New Mexico plus the income apportionable to New Mexico shall be divided by the entity's total income. The result, carried to four places in decimal form, will be referred to hereinafter as the "New Mexico ratio".

(6) With respect to taxable years beginning on or after January 1, 1998, to determine the amount due for an owner included in the composite return, apply ~~the rate of 7.7%~~ a rate equal to the maximum bracket rate set by Section 7-2-7 NMSA 1978 to the distribution of entity income to the owner without allowance for exemptions, deductions or rebates of any kind other than the deduction for interest from investments in obligations of New Mexico, the United States or other jurisdictions which states are prohibited from taxing by the laws of the United States. The resulting tax shall be multiplied by the New Mexico ratio. The amount due on the composite return shall be the aggregate amount due for all of the owners included on the return.

G. If it is determined that an individual owner who was previously included in one or more composite returns had income from sources in New Mexico other than that reported in the composite return or returns, that owner shall file an amended individual income tax return for each year in which the owner was included in a composite return and had income from sources in New Mexico other than that included in the composite return or returns. The individual owner shall receive credit against the tax due on the filing of the owner's amended individual income return for the owner's share of any income tax actually paid to this state with the composite return.

H. The filing of a composite income tax return does not relieve any owner included in the return from any liability for income tax due this state unless the tax due from the individual has actually been paid with the filing of the composite return.

### 3.3.2.8 WITHHOLDING FROM IRREGULAR WAGES

A. Employers who make lump sum distributions, one time bonuses and other irregular payments to employees in addition to regular wages and employers required to withhold tax on fringe benefits for federal purposes shall compute the state withholding in the same manner used for computing federal withholding on these items. The employer will then use the withholding tax tables issued by the department to compute the amount of withholding tax due.

B. If an employer elects to withhold, for federal purposes, a flat percentage of the ~~[lump sum] lump-sum~~ distribution, ~~[one-time] one-time~~ bonus, fringe benefits and other irregular wages as provided in the Internal Revenue Code, the employer shall withhold ~~[8.2% of the lump sum distribution, one time bonus, fringe benefits and other irregular wages]~~ a flat percentage for state withholding tax purposes. The flat percentage for state withholding tax purposes shall be a rate equal to the maximum bracket rate set by Section 7-2-7 NMSA 1978 for the taxable year.



3.3.2.10 **WITHHOLDING BY PASS-THROUGH ENTITIES**

A. **Withholding by pass-through entities; rate.** For periods beginning on or after January 1, 2004, the rate of withholding by pass-through entities pursuant to the provisions of Subsection D of Section 7-3-12 NMSA 1978 [is 7.14%] shall equal the maximum bracket rate set by Section 7-2-7 NMSA 1978 for the taxable year.

B. **Withholding by pass-through entities; agreements; reasonable cause.** The obligation to collect and remit withholding amounts pursuant to Subsection D of Section 7-3-12 NMSA 1978 may be avoided if the nonresident owner submits to the pass-through entity an agreement authorized by Subsection E of that section in the form and manner prescribed by the secretary. An agreement may be restricted to a single taxable year, may cover multiple years or may be put into effect for an indefinite term subject to revocation by the nonresident owner. An agreement must be in the possession of the pass-through entity at the time the pass-through entity files its return for the taxable year to which the agreement pertains. When a nonresident owner becomes a resident of New Mexico, the agreement submitted by that owner is revoked automatically, effective for the taxable year in which the change in residence took place. The obligation to withhold may also be avoided if the pass-through entity demonstrates that failure to withhold is due to a reasonable cause pursuant to Subsection B of Section 7-3-5 NMSA 1978.

C. **Due date exception.** The due date specified in Section 7-3-6 NMSA 1978 does not apply to payment of amounts withheld in accordance with Section 7-3-12 NMSA 1978. The due date specified in Section 7-3-12 NMSA 1978 with respect to such amounts controls.

D. **Crediting to tax year.** Amounts withheld pursuant to the provisions of Section 7-3-12 NMSA 1978 with respect to an owner shall be credited to the owner for the same taxable year for which the income is required to be reported for federal income tax purposes.

3.13.3.7 ~~**[DEFINITIONS—DEPRECIABLE EQUIPMENT:** For purposes of Part 3.13.3 NMAC, “equipment that is depreciable for federal income tax purposes” means equipment depreciated on the books and records of the taxpayer and that the expense of the depreciation shall be reflected on the federal income tax return as a depreciation expense. Equipment depreciated under the accelerated cost recovery system, Internal Revenue Code Section 168, and property for which the taxpayer makes an election under Internal Revenue Code Section 179 shall also qualify for the credit.] [RESERVED]~~

3.13.3.8 ~~**[APPLICATION OF THE CREDIT:** The credit allowed by Section 7-9D-7 NMSA 1978 may not be applied against any local option gross receipts tax imposed by a county or municipality.] [RESERVED]~~

3.13.3.9 ~~**[USED EQUIPMENT:** Equipment used at a site outside New Mexico but subsequently imported into New Mexico and installed at a New Mexico call center may be eligible for the capital equipment tax credit if compensating tax was due and paid when the equipment was imported, the equipment was purchased by the operator of the New Mexico call center on or after July 1, 1999, and the equipment is used as required by Subsection C of Section 7-9D-5 NMSA 1978. The valuation of the used equipment for purposes of the Capital Equipment Tax Credit Act is the same as for purposes of the compensating tax.] [RESERVED]~~

3.13.3.10 ~~**[CREDIT NOT TRANSFERABLE:**~~

~~A. Any amount of capital equipment tax credit claimed and approved may be applied by the claimant only against the gross receipts, compensating and withholding taxes owed by the claimant. The credit amount may not be transferred to any other person, including affiliates.~~

~~B. Example: Corporation T sets up a call center in New Mexico. T subsequently qualifies for \$50,000 in capital equipment tax credit. After applying \$13,000 to its own gross receipts, compensating and withholding tax liabilities, T creates a subsidiary corporation, S, to own and operate all of T's New Mexico business, including the call center. T may not transfer the \$37,000 remaining authorized capital equipment tax credit to S nor may S apply any of the remaining tax credit to S's gross receipts, compensating and withholding tax liability. T, to the extent T still has gross receipts, compensating and withholding tax obligations, may apply the \$37,000 balance against those obligations.] [RESERVED]~~