

**TITLE 3: TAXATION**  
**CHAPTER 1: TAX ADMINISTRATION**  
**PART 10: COLLECTIONS**

**3.1.10.1 ISSUING AGENCY:** Taxation and Revenue Department, Joseph M. Montoya Building, 1100 South St. Francis Drive, P.O. Box 630, Santa Fe NM 87504-0630  
[10/31/96; 3.1.10.1 NMAC - Rn, 3 NMAC 1.10.1, 1/15/01]

**3.1.10.2 SCOPE:** This part applies to all taxpayers, their agents and representatives and all persons required to submit a return or information to the taxation and revenue department under any tax, tax act or other law administered and enforced pursuant to the Tax Administration Act.  
[10/31/96; 3.1.10.2 NMAC - Rn, 3 NMAC 1.10.2, 1/15/01]

**3.1.10.3 STATUTORY AUTHORITY:** Section 9-11-6.2 NMSA 1978.  
[10/31/96; 3.1.10.3 NMAC - Rn, 3 NMAC 1.10.3, 1/15/01]

**3.1.10.4 DURATION:** Permanent.  
[10/31/96; 3.1.10.4 NMAC - Rn, 3 NMAC 1.10.4, 1/15/01]

**3.1.10.5 EFFECTIVE DATE:** 10/31/96, unless a later date is cited at the end of a section, in which case the later date is the effective date.  
[10/31/96; 3.1.10.5 NMAC - Rn & A, 3 NMAC 1.10.5, 1/15/01]

**3.1.10.6 OBJECTIVE:** The objective of this part is to interpret, exemplify, implement and enforce the provisions of the Tax Administration Act.  
[10/31/96; 3.1.10.6 NMAC - Rn, 3 NMAC 1.10.6, 1/15/01]

**3.1.10.7 DEFINITIONS:** [Reserved.]  
[10/31/96; 3.1.10.7 NMAC - Rn, 3 NMAC 1.10.7, 1/15/01]

**3.1.10.8 SEIZURE OF REAL PROPERTY BY LEVY:** A levy on real property is made by personal service of a copy of the warrant of levy on the taxpayer-owner of the property, and by recording a copy of the levy in the county in which the property is located. The secretary or delegate shall make every reasonable effort to send notice of the levy to each party with a recorded interest in the property. Real property seized under warrant of levy shall be sold pursuant to the provisions of Sections 7-1-44 through 7-1-51 NMSA 1978.  
[7/19/67, 11/5/85, 8/15/90, 10/31/96; 3.1.10.8 NMAC - Rn & A, 3 NMAC 1.10.8, 1/15/01]

**3.1.10.9 SURRENDER OF PROPERTY UPON SERVICE OF LEVY ON A FINANCIAL INSTITUTION:**

A. If a warrant of levy is served upon a financial institution in New Mexico, the financial institution must survey all checking accounts, savings accounts, escrows for collection, safety deposit boxes, trusts, certificates of deposit and all other accounts or places in which it may possess or hold any property or rights to property belonging to the taxpayer as of the date of service of the warrant of levy.

B. The financial institution upon which a warrant of levy is served must immediately surrender to the department any property or rights to property of the taxpayer which that institution possesses or holds as of the date of service of the warrant. Failure to do so makes the financial institution liable to the state of New Mexico in a sum equal to the value of the property or rights not surrendered. If a financial institution upon which a warrant of levy is served knows of property or rights to property of the taxpayer in the possession of another as of the date of the service of the warrant of levy, it must immediately report this fact to the agent of the department. A mere expectation that funds of the taxpayer will come into the possession of the institution, however, absent a contractual or other legal obligation between the taxpayer, the financial institution or any third parties, is not required to be revealed by the financial institution since the mere expectation does not constitute possession of funds by the institution.

C. If a financial institution upon which a levy has been served complies with all of the requirements of Sections 7-1-31 and 7-1-34 NMSA 1978, and the taxpayer subsequently deposits funds or property with the institution, the institution is not required to reveal this fact to the department until a new warrant of levy is served.

D. For the purposes of Section 3.1.10.9 NMAC, the term "financial institution" shall mean any bank, savings and loan association, credit union, pawn shop or any other similar entity which acts as a depository for another person's funds.

E. Example: X Bank is served with a warrant of levy in an amount of \$2,000 by the department pursuant to Sections 7-1-31 and 7-1-32. The bank is required by the warrant of levy to reveal the amount of property in its possession that belongs to D, a delinquent taxpayer, and to surrender the property up to \$2,000, if available. D's account at X Bank contains a balance of \$100 on the date the warrant of levy is served on X. X also knows that D makes a deposit of \$1,000 every month and receives a \$50 royalty check every month; but on the date the warrant of levy is served, these deposits have not been made and will not be made for another week. X Bank is not required to reveal or surrender the \$1,050 which will come into its possession one week after the date the warrant of levy is served. It is required to disclose and surrender the \$100 of D's account which is in its possession on the date the warrant of levy is served. If X Bank is served with another levy, pursuant to the provisions of Section 7-1-33 NMSA 1978, after D has deposited the additional \$1,050, it will then be required to disclose and surrender that amount.

[5/24/90, 8/15/90, 10/31/96; 3.1.10.9 NMAC - Rn & A, 3 NMAC 1.10.9, 1/15/01]

**3.1.10.10 RELEASE OF LEVY:** The secretary or secretary's delegate is authorized by Section 7-1-52 NMSA 1978 to release all or any part of property levied upon under the following conditions:

- A. the release of levy will cause the collection of the taxes to be facilitated; and
- B. the interests of the state will continue to be protected.

[7/19/67, 11/5/85, 8/15/90, 10/31/96; 3.1.10.10 NMAC - Rn & A, 3 NMAC 1.10.10, 1/15/01]

**3.1.10.11 INJUNCTIONS:** The secretary has statutory authority to apply to a district court of New Mexico to have any delinquent taxpayer or other person who may be or may become liable for any tax enjoined from engaging in business in the state. The following examples illustrate some, but not all, situations where the secretary may make application to a district court for a temporary restraining order and an injunction against delinquent taxpayers or persons for the purpose of protecting the revenues of the state:

- A. a taxpayer who has established a record of recurring tax delinquency as defined by Section 7-1-16 NMSA 1978;
- B. a taxpayer who has neglected or refused to respond to a jeopardy assessment, issued pursuant to Section 7-1-59 NMSA 1978, by either paying the amount of tax demanded or furnishing satisfactory security;
- C. a taxpayer who has established a recurring record of attempting to pay taxes due with bad checks as defined in Section 7-1-70 NMSA 1978;
- D. a successor in business who has wrongfully failed to withhold and pay over tax or has not made payment or surrendered property after demand as provided by Section 7-1-63 NMSA 1978;
- E. a person who self-denominates by declaration or actions as a "tax protestor" and who, as a means of protesting taxation or other issues, refuses to comply with the provisions of the Tax Administration Act;
- F. a person who fails, neglects or refuses to collect and pay over withholding tax from that person's employees who perform personal services in New Mexico as provided by the Withholding Tax Act;
- G. a prime construction contractor with principal place of business located outside New Mexico, performing construction services in New Mexico, and who has failed to comply with acceptable security requirements pursuant to Section 7-1-55 NMSA 1978;
- H. a person who has failed within 90 days to respond to a demand from the department to file any tax return which was required to be filed on a date which occurred at least 45 days prior to the date the demand to file was made by the department.

[7/19/67, 11/5/85, 8/15/90, 10/31/96; 3.1.10.11 NMAC - Rn & A, 3 NMAC 1.10.11, 1/15/01]

**3.1.10.12 METHODS TO AVOID IMPENDING INJUNCTION:** Persons who are subject to an impending injunction action by the secretary may take any of the following actions to avoid an injunction:

- A. pay the assessed tax and, if applicable, submit a claim for refund pursuant to Section 7-1-26

NMSA 1978;

- B. furnish acceptable security as provided by Section 7-1-54 and Section 7-1-55 NMSA 1978;
- C. make application for an extension of time as provided by Section 7-1-13 NMSA 1978; or
- D. make application for and enter into an installment agreement as provided by Section 7-1-21

NMSA 1978.

[7/19/67, 11/5/85, 8/15/90, 10/31/96; 3.1.10.12 NMAC - Rn & A, 3 NMAC 1.10.12, 1/15/01]

### **3.1.10.13 GENERAL PROVISIONS FOR PROVIDING SECURITY:**

A. When the secretary or secretary's delegate believes that it is necessary to ensure payment of any tax due, or reasonably expected to become due, the secretary or secretary's delegate may require or allow a person subject to the Tax Administration Act to furnish acceptable security. The secretary or secretary's delegate will notify the person by mailing or hand-delivering a written notice of requirement to furnish security in the amount stated in the notice. If the person addressed does not promptly comply, the secretary or secretary's delegate will make a written demand of the person by certified mail or in person that the person furnish security in the stated amount. Upon the failure of any person to comply within ten days of the date of the written demand for furnishing security, the secretary may institute a proceeding to enjoin that person from engaging in business in the state as provided in Section 7-1-53 NMSA 1978. The following examples illustrate some, but not all, situations in which the secretary or secretary's delegate may require or allow the furnishing of security:

- (1) the taxpayer is a delinquent taxpayer;
- (2) the taxpayer is granted an extension of time to pay taxes;
- (3) the taxpayer enters into an installment agreement;
- (4) the taxpayer requests a stay of levy;
- (5) the taxpayer requests permission to report and pay certain taxes on a quarterly or semiannual

basis;

- (6) the taxpayer wishes to avoid an impending restraining order or an injunction proceeding;
- (7) the taxpayer wishes to stay the enforcement of a jeopardy assessment;
- (8) a successor in business has failed to withhold the amount of the tax liability of the predecessor or

to pay the tax or surrender the property;

- (9) a corporation is dissolving or withdrawing from the state;
- (10) the taxpayer is conducting a business of a transient nature;
- (11) the taxpayer has a recurring record of attempted payment of tax liabilities with bad checks;
- (12) the taxpayer has failed to file any required tax returns within 45 days from the date the return

was required to be filed;

(13) the taxpayer has engaged in business for more than three months during which period of time the taxpayer was not registered with the department or did not maintain an active identification number issued by the department.

B. The furnishing of security by a person liable for the payment of taxes will not prevent the imposition of interest due on deficiencies as provided by Section 7-1-67 NMSA 1978 nor prevent the imposition of civil penalty for failure to pay tax or file a return as provided by Section 7-1-69 NMSA 1978.

[7/19/67, 11/5/85, 8/15/90, 10/31/96; 3.1.10.13 NMAC - Rn & A, 3 NMAC 1.10.13, 1/15/01]

**3.1.10.14 SURETY BONDS:** The secretary will accept only those surety bonds underwritten by a company qualified to do business in New Mexico.

[7/19/67, 11/5/85, 8/15/90, 10/31/96; 3.1.10.14 NMAC - Rn, 3 NMAC 1.10.14, 1/15/01]

### **3.1.10.15 LIMITATION ON ACTIONS**

A. **LIMITATION ON ACTIONS TO COLLECT TAX DEBT:** Pursuant to the provisions of Section 7-1-19 NMSA 1978, the secretary or attorney general may not bring an action or proceeding to collect taxes after ten years from the date of the assessment of taxes.

B. **INTEREST ASSESSED FOR PRIOR TAX LIABILITIES:** When the secretary or delegate has, within the last ten years, caused interest to be assessed on a tax liability due under a self-assessment or notice of assessment of taxes made more than ten years ago, no action or proceeding to collect on the interest assessments may be brought by the secretary or secretary's delegate after ten years from the date of the underlying assessment,

even though the interest assessment may have been made less than ten years ago. Subsection 3.1.10.15B NMAC is applicable to liabilities which originally became due on or after October 31, 1986 and to the related interest assessments.

C. **TEN-YEAR LIMITATION OVERRIDES OTHER STATUTES:** The ten-year limitation in Section 7-1-19 NMSA 1978 overrides the permanence of tax debt provided for in Section 7-1-58 NMSA 1978 and Subsection 7-1-17D NMSA 1978.

[7/19/67, 11/5/85, 8/15/90, 10/31/96, 7/31/97; 3.1.10.15 NMAC - Rn & A, 3 NMAC 1.10.15, 1/15/01]

### **3.1.10.16 DETERMINATION OF SUCCESSOR IN BUSINESS:**

A. The following indicia are used by the secretary or secretary's delegate as factors in determining whether a business is a successor:

- (1) Has a sale and purchase of a major part of the materials, supplies, equipment, merchandise or other inventory of a business enterprise occurred between a transferor and a transferee in a single or limited number of transactions?
- (2) Was a transfer not in the ordinary course of the transferor's business?
- (3) Was a substantial part of both equipment and inventories transferred?
- (4) Was a substantial portion of the business enterprise that had been conducted by the transferor continued by the transferee?
- (5) By express or implied agreement did the transferor's goodwill follow the transfer of the business properties?
- (6) Were uncompleted sales, service or lease contracts of the transferor honored by the transferee?
- (7) Was unpaid indebtedness to suppliers, utility companies, service contractors, landlords or employees of the transferor paid by the transferee?
- (8) Was there an agreement precluding the transferor from engaging in a competing business to that which was transferred?

B. If one or more of the indicia mentioned above are present, the secretary or secretary's delegate may presume that ownership of a business enterprise has transferred to a successor in business.

C. Example 1: A father owning a business enterprise in sole proprietorship decided to retire. He transferred the substantial part of all tangible and intangible business property to his son. The father was liable for payment of state, municipal and county gross receipts taxes in the amount of \$10,000 on the date of transfer. The son continued the business enterprise, but changed the trade name, added some new product lines, sold off some obsolete equipment and rented new store, warehouse and office business locations. The son is a successor in business to his father and shall follow the provisions of Subsection 7-1-61C NMSA 1978 by withholding or paying over the amount due.

D. Example 2: A person owning a road construction company sold one-half of the company's new and used heavy equipment to another person to reduce the company's inventory of construction equipment because the person planned to discontinue bidding on out-of-state road projects. The person plans to continue road construction services in New Mexico using the remaining equipment. The purchaser of the heavy equipment is not a successor in business to the seller since few of the indicia are present for determination of a successor in business.

E. Example 3: A title and abstract company which had been inactive for several months sold its remaining assets to a purchaser who incorporated the tangible and intangible property into the purchaser's own business. The seller was liable for payment of gross receipts taxes on the date of the transfer of the business assets and the purchaser failed to withhold and place into a trust account a sufficient amount of the purchase price to cover the taxes owed or to pay over to the department the seller's unpaid assessments of gross receipts taxes. The purchaser claimed to be unaware of the seller's tax liabilities. The department made a demand on the purchaser for payment and gave the amount and basis of the unpaid assessments of tax for which the seller was liable, in accordance with Subsection 7-1-63A NMSA 1978. The New Mexico court of appeals upheld the department's determination that a business which changes hands need not be an active or solvent business to come under the provisions of Section 7-1-61 NMSA 1978. Although not all the separate indicia listed in Section 3.1.10.16 NMAC were applicable to this illustration, the indicia of Paragraphs 3.1.10.16A(1) through (4) NMAC used by the department did apply and supported a presumption to meet the statutory requirements of Section 7-1-61 NMSA 1978. (*Sterling Title Co. v. Commissioner of Revenue*, 85 N.M. 279)

F. For the purposes of Sections 7-1-61 through 7-1-63 NMSA 1978 and Section 3.1.10.16 NMAC:

(1) “mere continuation” is determined by the “substantial continuity test” used in other contexts where the government is seeking to impose successor liability and is determined by addressing whether the successor maintains the same business with the same employees doing the same jobs under the same supervisors, work conditions and production process and produces the same product for the same customers. See *B.F. Goodrich v. Betkoski*, 99 F.3d 505 (2<sup>nd</sup> Cir. 1996);

(2) “successor” means any transferee of a business or property of a business, except to the extent it would be materially inconsistent with the rights of secured creditors that have perfected security interests or other perfected liens on the business or property of the business. A “successor” may include a business that is a mere continuation of the predecessor after those connected with the business re-acquire at a foreclosure sale property used in the predecessor’s business, a business that is acquired and run for indefinite period by a creditor of the predecessor and any business that assumes the liabilities of the predecessor. A “successor” does not include a disinterested third party who purchases property at a commercially reasonable foreclosure sale, a bank or other financial institution or government that acquires and operates a business for a limited period of time in order to protect its collateral for eventual resale in a commercially reasonable manner or a franchisor that cancels a franchise agreement due to material default by the franchisee;

(3) “transfer” means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with the property of a business; and

(4) “used in any business” means reasonably necessary for the business’s continued operations, whether or not the property is actually owned by the business.

[7/19/67, 11/5/85, 8/15/90, 10/31/96; 6/15/98; 3.1.10.16 NMAC - Rn & A, 3 NMAC 1.10.16, 1/15/01]

**3.1.10.17** [Reserved.]

[10/31/96; 6/15/98 - Repealed; 3.1.10.17 NMAC - Rn, 3 NMAC 1.10.17, 1/15/01]

**3.1.10.18 INTEREST**

**A. INTEREST:**

(1) Interest on the unpaid portion of a tax indebtedness is due to the State of New Mexico at the rate of 15% per year computed on a daily basis for amounts due on or after January 1, 2001. The daily rate will be determined by dividing the annual rate by 365 or 366 as appropriate.

(2) Except as otherwise provided in Subsection 7-1-67A NMSA 1978, interest on the unpaid portion of a tax indebtedness shall begin to accrue on the day following the date on which payment of the tax is required by law. Interest shall continue to accrue until the tax indebtedness is paid.

(3) [Reserved.]

(4) The following are instances when interest is accrued on the unpaid balance of a taxpayer’s tax indebtedness under the Tax Administration Act from the day following the due date:

- (a) granting of an extension of time pursuant to Subsection 7-1-13E NMSA 1978;
- (b) entering into a closing agreement pursuant to Section 7-1-20 NMSA 1978;
- (c) entering into an installment agreement pursuant to Section 7-1-21 NMSA 1978;
- (d) making of a protest of an assessment of tax pursuant to Section 7-1-24 NMSA 1978 unless

payment has been made under the provisions of Section 3.1.7.9 NMAC, in which case interest will accrue only until the date payment is tendered to the department;

- (e) an appeal by a taxpayer from an adverse decision rendered at an administrative hearing;
- (f) the granting of a partial abatement of an assessment of tax;
- (g) seizure of property under levy pursuant to Section 7-1-34 NMSA 1978;
- (h) imposition of an injunction or temporary restraining order against a taxpayer pursuant to

Section 7-1-53;

(i) furnishing of security by the taxpayer pursuant to Sections 7-1-54 and 7-1-55 NMSA 1978;

(j) in the case where a tax liability was incurred by a predecessor in business, ignorance of a successor in business of a tax liability;

- (k) an attempt to pay tax by a bad check; and
- (l) proper dissolution of a corporation.

(5) In the case where the due date has not yet passed, interest will begin to accrue on the sixth day following the jeopardy assessment made pursuant to Section 7-1-59 NMSA 1978.

**B. APPLICATION OF INTEREST PROVISIONS TO GOVERNMENTS:**

(1) Interest on the unpaid portion of a tax indebtedness is due to the state of New Mexico when the tax indebtedness is owed by any agency, institution, instrumentality or political subdivision of the state of New Mexico.

(2) To the extent permitted by the constitution, treaties and laws of the United States, interest on the unpaid portion of a tax indebtedness is due to the state of New Mexico when the tax indebtedness is owed by any other state, any Indian tribe, nation or pueblo, the United States, any alien government or any agency, institution, instrumentality or political subdivision of any of the foregoing.

(3) Subsection 3.1.10.18B NMAC is retroactively applicable to unpaid tax indebtedness due on or after July 1, 1992.

**C. WHEN INTEREST APPLIES TO REPAYMENTS OF EXCESS REFUNDS:**

(1) "Tax", as defined by the Tax Administration Act, includes any amount of any credit, rebate or refund paid by the department contrary to any law subject to administration under the Tax Administration Act. An excess credit, rebate or refund paid is a tax owed to the state. When no due date is specified by statute, the due date of such a tax is thirty days after the excess credit, rebate or refund is received by the taxpayer. Interest shall be applied for each month or fraction thereof from the due date until the excess credit, rebate or refund is paid.

(2) Unless the preponderance of evidence indicates another date, the person to whom the department mails an excess credit, rebate or refund shall be presumed to have received the excess credit, rebate or refund seven days after the department mailing.

(3) Subsection 3.1.10.18C NMAC applies to any excess credit, rebate or refund paid by the department after January 1, 1994.

[7/19/67, 11/5/85, 8/15/90, 10/31/96, 7/31/97; 3.1.10.18 NMAC - Rn & A, 3 NMAC 1.10.18, 1/15/01]

**3.1.10.19** [Reserved.]

[7/3/92, 10/31/96; 7/31/97 - Repealed; 3.1.10.19 NMAC - Rn, 3 NMAC 1.10.19, 1/15/01]

**HISTORY OF 3.1.10 NMAC:**

Pre-NMAC History: The material in this part was derived from that previously filed with the State Records Center: BOR 67-1, Tax Administration Act, 7/19/67, filed 7/28/67.

R.D./OGAD Rule No. 1985, Regulations Pertaining to the Tax Administration Act, filed 11/5/85.

TRD Rule TA-90, Regulations Pertaining to the Tax Administration Act, Sections 7-1-1 to 7-1-82 NMSA 1978, filed 8/15/90.

History of Repealed Material: [RESERVED]

NMAC History:

3 NMAC 1.10, Tax Administration - Collections, filed 10/17/96.

3.1.10 NMAC, Tax Administration - Collections, filed 1/4/2001.