

TITLE 3: TAXATION
CHAPTER 2: GROSS RECEIPTS TAXES
PART 1: GENERAL PROVISIONS

3.2.1.1 ISSUING AGENCY: Taxation and Revenue Department, Joseph M. Montoya Building, 1100 South St. Francis Drive, P.O. Box 630, Santa Fe NM 87504-0630.
[11/15/1996, 3.2.1.1 NMAC - Rn, 3 NMAC 2.1.1, 4/30/2001]

3.2.1.2 SCOPE: This part applies to all persons engaging in business in New Mexico.
[11/15/1996, 3.2.1.2 NMAC - Rn, 3 NMAC 2.1.2, 4/30/2001]

3.2.1.3 STATUTORY AUTHORITY: Section 9-11-6.2 NMSA 1978.
[11/15/1996, 3.2.1.3 NMAC - Rn, 3 NMAC 2.1.3, 4/30/2001]

3.2.1.4 DURATION: Permanent.
[11/15/1996, 3.2.1.4 NMAC - Rn, 3 NMAC 2.1.4, 4/30/2001]

3.2.1.5 EFFECTIVE DATE: November 15, 1996, unless a later date is cited at the end of a section, in which case the later date is the effective date.
[11/15/1996, 3.2.1.5 NMAC - Rn & A, 3 NMAC 2.1.5, 4/30/2001]

3.2.1.6 OBJECTIVE: The objective of this part is to interpret, exemplify, implement and enforce the provisions of the Gross Receipts and Compensating Tax Act.
[11/15/1996, 3.2.1.6 NMAC - Rn, 3 NMAC 2.1.6, 4/30/2001]

3.2.1.7 DEFINITIONS: The terms defined in 3.2.1.7 NMAC apply throughout 3.2 NMAC.

A. Benefit: A “benefit” is any consideration to either party. “Benefit” is not limited to profits, pecuniary gains, or any particular kind of advantage.

B. Consideration: “consideration” is any benefit, interest, gain or advantage to one party, usually the seller, or any detriment, forbearance, prejudice, inconvenience, disadvantage, loss of responsibility, act or service given, suffered, or undertaken by the other party, usually the buyer.

C. Detriment: A “detriment” is a forbearance of either party of a right which the party is entitled to exercise or any consideration flowing from either party, not limited to payment of money or transfer of property.

D. Financial corporations:

(1) A financial corporation is any corporation primarily dealing in moneyed capital and in substantial competition with commercial banks.

(2) *Example 1:* FC is a corporation which is primarily engaged in the following activities:

(a) buying and selling mortgages on real estate;

(b) initiating mortgages on real estate and selling these mortgages; and

(c) servicing mortgages. FC is a financial corporation because it is primarily

dealing in moneyed capital and is in substantial competition with commercial banks.

(3) *Example 2:* IA is an insurance agency which, as an adjunct of its primary business, loans money to finance premiums. IA is not a financial corporation because it is not primarily dealing in moneyed capital and it is not in substantial competition with commercial banks.

(4) *Example 3:* A corporation which receives a commission on sales of money orders to its customers as an adjunct of its primary business is not a financial corporation within the meaning of Subsection C of Section 7-9-3 NMSA 1978 simply because it engages in this business activity.

(5) *Example 4:* A corporation which is engaged in the following activities is not a financial corporation because it is not primarily dealing in moneyed capital and is not in substantial competition with commercial banks:

(a) acting as an investment advisor to a mutual fund and others and receiving a fee for such services;

(b) acting as principal underwriter for the same mutual fund as in 1 above and receiving a fixed percentage of the selling price of the securities sold as a commission or fee; or

(c) issuing a weekly stock analysis report as an advisory service, receiving for this service payment in the form of subscription fees.

E. Franchise:

(1) A “franchise” is an agreement in which the franchisee agrees to undertake certain business activities or to sell a particular type of product or service in accordance with methods and procedures prescribed by the franchisor, and the franchisor agrees to assist the franchisee through advertising, promotion and other advisory services. The franchise usually conveys to the franchisee a license to use the franchisor's trademark or trade name in the operation of the franchisee's business.

(2) *Example:* Y, a pie company of Cambridge, Massachusetts, grants to X of Virden, New Mexico, the right to make pies according to their exclusive recipe and to operate Y Pie shops throughout New Mexico. The right to make the pies and operate the pie shops, whether granted for a “one-time” payment or for a continuing percentage of the proceeds of the shops, is a franchise. Therefore, the receipts of Y, from its granting of the franchise are subject to gross receipts tax.

F. Computer-related terms:

(1) “Computer software” means computer programming in whatever form or medium.

(2) “Custom software” means computer programming developed specifically at the order of another or for a specific purpose. “Custom software” includes the modification of existing computer programming.

(3) “Packaged software” means computer programming embodied in electronic, electromagnetic or optical materials for transfer from one person to another, with or without explanatory materials, instructions or other programming and intended to be sold or licensed without modification to multiple buyers or users.

(4) “Software” means “computer software”.

G. Practitioner of the healing arts: A “practitioner of the healing arts” is a person licensed to practice in this state medicine, osteopathic medicine, acupuncture and oriental medicine, dentistry, podiatry, optometry, chiropractic, nursing or similar medical services for human beings. The term also includes veterinarians licensed to practice in this state.

H. Person engaged in the construction business: A “person engaged in the construction business” is a person who performs construction services as defined in Section 7-9-3.4 NMSA 1978.

[12/5/1969, 3/9/1972, 11/20/1972, 3/20/1974, 7/26/1976, 6/18/1979, 4/7/1982, 5/4/1984, 4/2/1986, 12/29/1989, 11/26/1990, 11/15/1996, 4/30/1997, 1/15/1998; 3.2.1.7 NMAC - Rn & A, 3 NMAC 2.1.7, 4/30/2001; A, 12/30/2003; A, 12/14/2012]

3.2.1.8 CITATION OF REGULATIONS: Unless otherwise stated, all citations of statutes in Chapter 3.2 NMAC with respect to the Gross Receipts and Compensating Tax Act are to the New Mexico Statutes Annotated, 1978 (NMSA 1978).

[11/26/1990, 11/15/1996; 3.2.1.8 NMAC - Rn & A, 3 NMAC 2.1.8, 4/30/2001]

3.2.1.9 [RESERVED]

3.2.1.10 [RESERVED]

3.2.1.11 CONSTRUCTION:

A. Construction service as distinguished from other services.

(1) The term “construction” is limited to the activities, or management of the activities, which are listed in Section 7-9-3.4 NMSA 1978 and which physically change the land or physically create, change or demolish a building, structure or other facility as part of a construction project.

(2) “Construction” does not include services that do not physically change the land or physically create, change or demolish a building, structure or other facility as part of a construction project, even though they may be related to a construction project. The fact that a service may be a necessary prerequisite or ancillary to construction or a construction project does not in itself make the service a construction service. Excluded from the meaning of “construction” are activities such as, but not limited to: hauling to or from the construction site, maintenance work, landscape upkeep, the repair of equipment or appliances, laboratory work or accounting, architectural, engineering, surveying, traffic safety or legal services. Some of these activities may qualify as construction-related services; see Section 7-9-52 NMSA 1978.

B. Construction includes: Pursuant to Section 7-9-3.4 NMSA 1978 the term “construction” includes the painting of structures, the installation of sprinkler systems and the building of irrigation pipelines.

C. Construction does not include:

(1) The term “construction” does not include the installation of carpets or the installation of draperies, but see 3.2.209.25 NMAC.

(2) The term "construction", as defined in Section 7-9-3.4 NMSA 1978, does not include leasing or renting tangible personal property, such as construction equipment, with or without an operator but see Section 7-9-52.1 NMSA 1978 for transactions on or after January 1, 2013.

D. Oil and gas industry construction:

(1) "Construction", as this term is used in Section 7-9-3.4 NMSA 1978, includes the following activities related to the oil and gas industry:

(a) building and altering of gas compression plant facilities and pump stations, including: clearing of property sites; excavating for foundations; building and setting foundation forms; mixing, pouring, and finishing concrete foundations for buildings and plant equipment on foundations; fabricating and installing piping; installing electrical equipment, insulation, and instruments; erecting buildings; placing sidewalks, drives, parking areas; installing storage tanks; and dismantling equipment and reinstalling elsewhere;

(b) building of or extension of gas-gathering pipelines, including: connecting gathering lines to lease separators, fabricating and installing meter runs, digging trenches, beveling pipe, welding pipe, wrapping pipe, backfilling trenches, testing pipelines, fabricating and installing pipeline drips and installing conduit for pipelines crossing roads or railroads;

(c) building of or extension of product pipelines, including: building pressure-reducing stations; connecting pipelines to storage tanks, fabricating and installing valve assemblies, digging trenches, beveling pipe, welding pipe, wrapping pipe, laying pipe, backfilling trenches, testing pipelines and installing conduit for pipeline crossing roads or railroads;

(d) building secondary-recovery systems, including: excavating and building foundations, installing engines and water pumps, installing pipelines for water intake, installing pipelines for carrying pressured water to input wells, installing instruments and controls and erecting buildings;

(e) installing lease facilities, including: installing wellheads, flow lines, chemical injectors, separators, heater-treaters, tanks, stairways and walkways; building foundations; and setting pump units and engines, central power units and rod lines;

(f) demolishing pipelines, including: digging trenches to uncover pipelines, dismantling and removing drips and meter runs, backfilling trenches, tamping and smoothing right-of-way;

(g) increasing pipeline capacity, including: removing small pipelines and replacing with larger lines, and digging adjoining trenches and laying new pipelines;

(h) repairing plant, including: replacing tubing in atmospheric condensers, replacing plugged boiler tubing; removing cracked, broken or damaged portions of foundations and replacing anew; replacing compressors, compressor engines, or pumps; and regrouting and realigning compressors;

(i) drilling wells, including: drilling ratholes, excavating cellars and pits, casing crew services, cementing services, directional drilling, drill stem testing and fishing jobs in connection with drilling operations;

(j) general dirt work, including: building roads, paving with caliche or other surfacing materials; digging pits, trenches, and disposal ponds, building firewalls and foundation footing; and constructing pads from caliche or other materials.

(2) "Construction", as the term is used in Section 7-9-3.4 NMSA 1978, does not include the following activities related to the oil and gas industry:

(a) well servicing, including: acidizing and fracturing formations; pulling and rerunning rods or tubing; loading or unloading a well; shooting; scraping paraffin; steaming flow lines and tubing; inspecting equipment; fishing jobs, other than in connection with drilling operations; bailing cave-ins; reverse circulating and resetting packers;

(b) lease and plant maintenance, including: cleaning; weed-control; preventive care of machinery, pipelines, gathering systems, and engines; tank cleaning; testing of flow lines by pressure or X-ray means; cleaning lines and tubing by acid treatment or mechanical means, or replacing and restoring machinery components;

(c) transporting equipment, including: transporting drilling rigs, rigging-up and rigging-down, and hauling water and mud;

(d) salvaging of materials from a "production unit", as defined in the Oil and Gas Emergency School Tax Act, such as: killing the gas pressure, removing casing heads, welding pull nipples on the casing, cutting or shooting casing strings, pulling casings from the well bore, cementing to fill the abandoned well or plug the well, filling the cellar, and welding steel pipe markers;

(e) rental of equipment such as: power tongs, blowout preventors, tanks, pipe racks, core barrels, integral parts of a drilling rig or integral parts of a circulation unit, for transactions on or after January

1, 2013, see Section 7-9-52.1 NMSA 1978;

(f) measuring, "logging" and surveying services in connection with the drilling of an oil or gas well are construction-related services as of January 1, 2013, see Section 7-9-52 NMSA 1978. "Logging" as that term is used in this subsection is a method of testing or measuring an oil or gas well by recording various aspects of the geological formations penetrated by the well.

E. Construction includes prefabricated buildings; prefabricated versus modular buildings:

(1) The sale of prefabricated buildings, whether constructed from metal or other material, is the sale of construction. A prefabricated building is a building designed to be permanently affixed to land and manufactured (usually off-site) in components or sub-assemblies which are then assembled at the building site. Prefabricated buildings are not designed to be portable nor are they capable of being relocated.

(2) A portable building or a modular building is a building manufactured (usually off-site) which is designed to be moveable or is capable of being relocated and, when delivered to the installation site, generally requires only blocking, levelling and, in the case of modular buildings, joining of modules. For the purposes of Subsection F of 3.2.1.11 NMAC, neither portable buildings, modular buildings nor manufactured homes defined as vehicles by Section 66-1-4.11 NMSA 1978 are prefabricated buildings.

F. Construction materials and services; landscaping:

(1) Landscaping items, such as ornaments, rocks, trees, plants, shrubs, sod and seed, which are sold to a person engaged in the construction business, that are an integral part of the construction project, are construction materials. Persons who seed, lay sod or install landscape items in conjunction with a construction project are performing construction services.

(2) Receipts from selling landscaping items to, and from seeding, laying sod or installing landscape items for, persons engaged in the construction business may be deducted from gross receipts if the buyer delivers a nontaxable transaction certificate to the seller as provided in Section 7-9-51 and Section 7-9-52 NMSA 1978, respectively.

G. Nontaxable transaction certificates:

(1) Nontaxable transaction certificates are available from the department for persons who are engaged in the construction business and performing activities, as set forth in Sections 7-9-3.4, 7-9-52 and 7-9-52.1 NMSA 1978 to execute to providers of construction materials, construction services, construction-related services and lessors of construction equipment. See 3.2.201.11 NMAC for additional requirements on construction contractors to obtain nontaxable transaction certificates.

(2) Only persons who are licensed by the state of New Mexico as construction contractors may apply for and execute nontaxable transaction certificates under the provisions of Sections 7-9-51 NMSA 1978, 7-9-52 NMSA 1978, and 7-9-52.1 NMSA 1978, except that a person who performs construction activities as defined in Section 7-9-3.4 NMSA 1978 in the ordinary course of business, and who is exempt from the laws of the state of New Mexico requiring licensing as a contractor may apply for and execute such certificates.

H. Construction materials; general:

(1) The term "construction materials" means tangible personal property which is intended to become an ingredient or component part of a construction project.

(2) Tangible personal property intended ultimately to become an ingredient or component part of a construction project although not purchased for a specific project is nonetheless a construction material. *Example:* A government agency makes bulk purchases of asphalt which is stored by the agency for use in future road construction or repair projects. The asphalt is a construction material.

(3) Tools, equipment and other tangible personal property not designed or intended to become ingredients or component parts of a construction project are not construction materials if such materials accidentally become part of a construction project. *Example:* A workman accidentally drops a pair of gloves and a hammer into a form into which concrete is being poured. Because the gloves and the hammer are not intended to be included in the concrete structure, they are not construction materials.

[9/29/1967, 12/5/1969, 3/9/1972, 3/20/1974, 7/26/1976, 6/18/1979, 11/8/1979, 4/7/1982, 5/4/1984, 4/2/1986, 11/26/1990, 3/19/1992, 1/13/1996, 11/15/1996, 5/15/1997, 9/15/1997, 3.2.1.11 NMAC - Rn & A, 3 NMAC 2.1.11, 10/31/2000; A, 12/30/2003; A, 12/14/2012; A, 12/27/2018]

3.2.1.12 ENGAGING IN BUSINESS:

A. Affiliated corporations:

(1) When a corporation is carrying on or causing to be carried on, with a wholly owned subsidiary, any activity with the purpose of direct or indirect benefit, both the corporation and the subsidiary are "engaging in business".

(2) *Example:* B corporation, which operates a hotel supply house, sells supplies only to C Hotel Corporation, which owns all the stock in B Corporation. B claims that since it sells only to C, its parent corporation, it is not engaging in business. B and C are each engaging in business because the purpose of their activities is to benefit either or both corporations.

B. Corporation not for profit: When a corporation not for profit is carrying on or is causing to be carried on any activity with the purpose of direct or indirect benefit it is “engaging in business”.

C. Leasing property:

(1) Persons leasing property employed in New Mexico are engaging in business within the state for the purpose of direct or indirect benefit.

(2) *Example:* X, an out of state business, leases construction machinery to Y who employs the leased property in New Mexico. X asks if X is engaged in business in New Mexico for purpose of registration, reporting and paying the gross receipts tax. X is engaged in business in New Mexico.

D. Hotels and motels providing interstate telecommunications service to guests:

(1) Hotels, motels and similar establishments offering interstate telecommunications service to guests in conjunction with the rental of rooms or other facilities are not “engaging in interstate telecommunications business” for purposes of the Interstate Telecommunications Gross Receipts Tax Act.

(2) A hotel, motel or similar establishment is primarily engaged in the business of renting rooms and meeting facilities to the general public. Providing interstate telephone service or other interstate telecommunications services to guests is incidental to the primary business of the hotel, motel or similar establishment. Receipts from providing such service are additional receipts from engaging in the primary business and are subject to the provisions of the Gross Receipts and Compensating Tax Act.

(3) Subsection D of 3.2.1.12 NMAC is retroactively applicable to transactions occurring on or after July 1, 1992.

E. Persons not engaging in business - foster parents: Individuals who enter into an agreement with the state of New Mexico to provide foster family care for children placed with them by the state are not thereby engaging in business. Receipts of the individuals from providing foster care pursuant to such an agreement are not receipts from engaging in business.

F. Persons not engaging in business - certain caretakers: Individuals who enter into an agreement with the state of New Mexico to provide non-medical personal care and housekeeping assistance to low income disabled adults pursuant to the critical in home care program are not thereby engaging in business. Receipts of the individuals from such caretaking activities are not receipts from engaging in business.

G. Persons not engaging in business - home care for developmentally disabled family members: Any individual who enters into an agreement with the state of New Mexico to provide home based support services for developmentally disabled individuals in the home of the developmentally disabled individuals or the home of the support provider and receives payments which under 26 USCA 131 are “qualified foster care payments” is not thereby engaging in business. Receipts of the individuals which are “qualified foster care payments” from providing such home based support services pursuant to such an agreement are not receipts from engaging in business.

H. Owner engaged in business when selling to an owned entity:

(1) Except as provided in Paragraph (2) of this Subsection, when an owner of an entity sells property in New Mexico to, leases property employed in New Mexico to, or performs services in New Mexico for the entity or other owners of the entity, the owner is engaging in business in New Mexico except when the transaction may be characterized for federal income tax purposes as a contribution of capital.

(2) When a partner or interest holder in an entity taxed as a partnership is allocated profits or receives a guaranteed payment or other distributions for activities undertaken as a partner on behalf of the partnership such as administrative services done solely for the benefit of the partnership or for activities for third-parties transacting business with the partnership, the partner is not engaging in business separately from the partnership and the allocations, payments, or distributions are not gross receipts. A partner may, however engage in business separately from the partnership and any transactions between that partner and the partnership, where the partner is not acting as a partner on behalf of the partnership, constitute gross receipts from engaging in business. Indicia that a partner is not acting as a partner on behalf of the partnership may include:

(a) that the partner engages in similar transactions with third parties other than the partnership; or

(b) that the allocation, payment, or distribution made by the partnership is not made under the partnership agreement; or

(c) that the partner’s transaction(s) with the partnership involve the sale or lease of goods or the sale of services not provided by the partnership to third parties.

(3) For the purposes of Subsection H of 3.2.1.12 NMAC, an “entity” means any business organization or association other than a sole proprietorship.

I. Persons not engaging in business - sale or exchange of renewable-fueled electricity generated from a system installed in a personal residence. Any individual who sells or transfers electricity to an entity engaged in the business of selling electricity, for which the individual receives monetary compensation or credit against a future month’s electricity use, is not engaged in business if the electricity is generated from a renewable-fueled system installed in a personal residence.

[12/5/1969, 3/9/1972, 3/20/1974, 7/26/1976, 6/18/1979, 4/7/1982, 5/4/1984, 4/2/1986, 11/26/1990, 9/3/1992, 7/19/1994, 11/15/1996, 5/14/1999, 6/15/1999, 10/29/1999; 3.2.1.12 NMAC - Rn & A, 3 NMAC 2.1.12, 4/30/2001; A, 9/30/2010; A, 9/25/2018]

3.2.1.13 [RESERVED]

3.2.1.14 GROSS RECEIPTS - GENERAL:

A. Gross receipts: Unless the receipt is from one or more of the following, it is not taxable:

- (1) selling property in New Mexico;
- (2) leasing property employed in New Mexico;
- (3) performing services outside of New Mexico the product of which is initially used in New Mexico; or

- (4) performing services in New Mexico.

B. Credit card sales: Gross receipts of the seller of property or services or the lessor of property include the full sale or lease contract amount of any property or service sold or of any property leased when payment is made through the use of a credit card which has been issued by a third party. The seller or lessor may not deduct from gross receipts the amount charged by the credit card company for converting the account into cash.

C. Consideration other than money:

(1) If the consideration received by the seller or lessor for the item sold or leased or for the service performed is in a form other than money, the fair market value of the consideration received or the fair market value of the item sold or of the lease or of the service performed must be included in gross receipts. The value of the consideration received or the item sold or of the lease or of the service performed is the fair market value at the time of the transaction.

(2) *Example 1:* X has Y, a garage owner, repair X's automobile. In exchange for the service performed by Y, X gives Y a deer rifle. The fair market value of the rifle at the time of the transaction is the measure of Y's gross receipts.

(3) *Example 2:* X, a New Mexico construction company, contracts with Y Electric Co-op Association for the construction of transmission lines. The contract requires X to furnish all materials and labor for a fixed price; however, it permits a reduction of the contract price in the amount of the value of materials furnished by Y. The gross receipts of X include the value of any material supplied by the cooperative.

(4) *Example 3:* X is a firm engaged in the construction business in New Mexico. The receipts of X from the sale of a completed construction project include the value of construction services performed by the buyer of the construction project pursuant to a “sweat labor contract” if the performance of services are required to fulfill a contractual obligation of X. A “sweat labor contract”, as used in this example, is a contract whereby the buyer of a completed construction project agrees to perform certain construction services for the seller of the construction project as partial payment of the sale price of the construction project.

(5) *Example 4:* M agrees to drill an oil well for the XYZ Oil Company. The contract provides that M will drill the well for seven dollars and fifty cents (\$7.50) per foot and a one-eighth interest in the minerals which belong to XYZ. The well, when completed, produces forty barrels of oil per day for a period which is expected to last for 10 years. M admits that the seven dollars and fifty cents (\$7.50) per foot that is received from drilling the well are gross receipts subject to the gross receipts tax. M questions whether the value of the one-eighth interest is gross receipts. The value of the mineral interest is consideration and must be included in M's gross receipts. It will be valued at its fair market value at the time the well is completed.

(6) *Example 5:* The A Oil Company hires the B Drilling Company to drill a well on its property. A furnishes drill bits to B, but A has the right to deduct the rental value of the bits from the total footage or day rate price it agrees to pay B for the drilling. The use of the drill bits is partial consideration, furnished by A, for the performance of the drilling service by B and the reasonable value of their use must be included in B's gross receipts. A also must include the rental value of the bits in its gross receipts because it is leasing the drill bits to B. However, if A furnishes drill bits to B and does not have the right to deduct the rental value of the bits from the total

footage or day rate price which it has agreed to pay B for the drilling, then no amounts from the drill bit transaction are includable in either A's or B's gross receipts. The same applies if B furnishes the drill bits.

D. Consideration less than fair market value:

(1) In a transaction where the actual consideration received does not represent the fair market value of the property sold or leased or of the service sold, the fair market value shall be included in the gross receipts of the seller or lessor. Fair market value is the value which the property or service can command in an arms length transaction between two independent parties in an open market.

(2) The following example illustrates the application of Section 7-9-3.5 NMSA 1978 with respect to consideration less than fair market value. Example: X, a land and cattle company, is a corporation which is affiliated with Y, an equipment company. Because of their affiliation, X leases a thirty thousand dollars (\$30,000) tractor from Y for one dollar (\$1.00) a month. Y reports that its gross receipts from this transaction are one dollar (\$1.00). Y's gross receipts are the market value of a monthly lease of a thirty thousand dollars (\$30,000) tractor. Y must pay gross receipts tax on the adjusted amount.

E. Sale of commercial paper:

(1) The full sale or leasing contract amount of property or service sold, excluding any type of time price differential, is included in the seller's gross receipts even though the seller subsequently sells the contract and does not receive the total contract price in money. No deduction is allowed for discounts suffered from the sale of commercial paper arising from a sale or lease.

(2) *Example:* X sells a washing machine to Y under a conditional sales contract in which the full sale contract amount, excluding time price differential, is one hundred twenty dollars (\$120.00). The principal on the washing machine is to be paid for over a twelve month period at ten dollars (\$10) a month. X collects twenty dollars (\$20.00) of principal under the contract and then assigns its rights to W for ninety dollars (\$90.00). Depending upon the method regularly used for reporting gross receipts, X would either pay tax on the full contract amount for the month in which the sale was made (accrual basis) or pay tax measured by the receipts as they were received (cash basis). If X had elected to pay tax measured by its receipts as they were received, X would have reported twenty dollars (\$20.00) during the first two months from this transaction. When X assigned the contract, X would have to include one hundred dollars (\$100.00) in the gross receipts for the third month since a deduction is not allowed for a discount suffered upon the transfer of a conditional sales contract.

F. Interdepartmental transfers:

(1) Receipts derived from an interdepartmental transfer of services or property are not subject to the gross receipts tax. To qualify as an interdepartmental transfer, the transfer must be a transfer of services or property within the same corporation or other taxable entity.

(2) *Example:* C, a company located in New Mexico, operates both an electric utility and a water utility. C records on its books the sale of the electricity to the water utility in order to comply with the public service commission regulations but does not thereby incur gross receipts as that term is used in the Gross Receipts and Compensating Tax Act. Such book entries do not record receipts from selling property in New Mexico but record interdepartmental transfers. However, the value of the electricity at the time of its conversion to use by the water utility is subject to the compensating tax.

G. Service charges computed on balances:

(1) Service charges on accounts receivable balances or installment sales contracts which are not computed at the time of sale, are time-price differential charges, are not subject to the gross receipts tax and are not to be included in the sales price of an item brought into New Mexico for the purpose of computing the compensating tax.

(2) *Example:* X corporation located outside New Mexico is engaged in the business of publishing books. X has several nonemployee salesmen soliciting orders on a commission basis in New Mexico. Every such order is forwarded to X's main office where it is reviewed and then either accepted or rejected. Accepted orders are shipped directly to the purchaser from X's binderies located outside of New Mexico. Since X has salesmen in New Mexico, it is an agent for collection of the compensating tax, pursuant to Section 7-9-10 NMSA 1978. The purchaser may elect to pay for the books on an installment basis. If after 90 days from purchase, the balance has not been paid, a one percent per month service charge is added to the balance. This charge is not precomputed and no portion thereof is due unless the purchaser elects to pay on an installment plan extending over 90 days. Such a charge is a time-price differential and is not a part of the sales price of the item. Therefore, it should not be included in the sales price when considering the amount of compensating tax that should be paid over to the state of New Mexico.

H. Corporations and organizations not organized for profit - fund raising activities:

(1) Receipts of a corporation or organization not organized for profit, other than an

organization granted a 501(c)(3) determination by the internal revenue service, derived from fund raising activities which are in the nature of donations, gifts, and contributions are not subject to the gross receipts tax.

(2) The department will presume that the total receipts of such a nonprofit organization from a fund raising activity are receipts derived from a taxable activity if the project involves the performance of any service or the sale or lease of any property by the organization. This presumption may be overcome by establishing the following:

(a) the purchaser or lessee of the property or service intended by the purchase or lease to make a gift, donation, or contribution to the organization; and

(b) the purchase or lease price clearly exceeded the fair market value of the service or property or the fair rental value of the property.

(3) If these conditions are satisfied, the amount of consideration received by the organization in excess of the fair market price or fair rental value is not subject to the gross receipts tax.

I. Discount coupons: The gross receipts attributable to a sale in which a seller accepts discount coupons provided by buyers are measured by the cash received plus the value of the coupon. However, if the discount coupon is not redeemable by the seller, the acceptance of the coupon constitutes a cash discount allowed and taken and is excluded from gross receipts.

J. Gross receipts embezzled: Receipts that have been embezzled or lost through bookkeeping errors are not a cash discount allowed and taken; such receipts are not deductible under Section 7967 NMSA 1978 because they are not a refund, allowance or uncollectible debt.

K. Vending machines:

(1) A vending machine is a device that, when the appropriate payment has been inserted into it, whether payment is made by coins, tokens, paper money, credit card, debit card or other means, dispenses tangible personal property, performs a service (including entertainment) or dispenses tickets, tokens or similar objects redeemable for money, tangible personal property or services; but “vending machine” does not include any device which is designed to primarily or solely to play a game of chance, such as slot machines, video gaming machines and the like.

(2) Amounts received from allowing the vending machine to be placed in a location as well as amounts received from use of or sales from vending machines are gross receipts and are subject to the gross receipts tax. The vending machine owner is responsible for reporting the receipts and paying the gross receipts tax.

(3) Receipts derived from allowing vending machines to be placed in a location not owned or rented by the vending machine owner are gross receipts and are subject to the gross receipts tax. Except as provided otherwise in Subsection K of Section 3.2.1.14 NMAC, the person receiving the receipts is responsible for reporting the receipts and paying the gross receipts tax with respect to such receipts.

(4) If the vending machine owner and a person controlling the premises where the machine is located enter into a written agreement similar to the one below, the department will presume that a joint venture has been created, that the joint venture is registered with the department and that the vending machine owner has agreed to pay all gross receipts tax due with respect to the joint venture. In such a case, the person owning the machine, on behalf of the joint venture, will report and pay the gross receipts tax due on all the receipts derived from either allowing the vending machine to be placed in a location or sales from the vending machine for all parties in the joint venture and the person controlling the premises is relieved of the duty to report or pay gross receipts tax on those same receipts.

(5) Agreement: Total amounts collected from the vending machine shall be allocated between the vending machine owner and the person controlling the location. The vending machine owner will receive a percentage of the amounts collected net of gross receipts tax due, plus an amount equal to the gross receipts tax payable on the entire proceeds from the vending machine. The person controlling the location will receive a percentage of the amounts collected net of gross receipts tax due. The vending machine owner will report and pay any gross receipts tax due on all the receipts derived from either the use of or sales from the vending machine.

(6) In the event that no such agreement exists, the department will presume that no joint venture exists. In such a case, the vending machine owner will be subject to gross receipts tax on the entire amounts collected from the use of or sales from the vending machine, and the person controlling the premises will be subject to gross receipts tax on the amount that person receives from the vending machine owner for allowing the placement of the machine on the premises.

(7) In the event the vending machines are leased to the person who services them, the term “vending machine owner” means the lessee of the vending machines.

L. “Gross receipts” excludes leased vehicle surcharge: For the purposes of Subparagraph (b) of

Paragraph (3) of Subsection A of Section 7-9-3.5 NMSA 1978, the term “leased vehicle gross receipts tax” includes the leased vehicle surcharge. The amount of any leased vehicle surcharge may be excluded from gross receipts.

M. Receipts from furnishing parts or labor under automotive service contract:

(1) When an automobile dealer, who is the promisor under an automotive service contract as that term is defined under Subsection C of Section 3.2.1.16 NMAC, furnishes parts or labor or both to satisfy the promisor's obligation to repair the breakdown involving a part specified in the contract, the dealer has taxable gross receipts equal to the retail value of the parts and labor furnished. A transfer of property or performance of service for a consideration has occurred and therefore a receipt from selling property or performing services has been realized by the dealer.

(2) The consideration received by the dealer is the discharge of the dealer's obligation to make the repair which obligation arose when the covered breakdown occurred.

(3) Receipts of a repair facility, including an automobile dealer, from furnishing parts and labor to fulfill the obligation of another person under an automotive service contract are gross receipts and not deductible under Sections 7 9 47 and 7 9 48 NMSA 1978, even though the seller has received NTTCs for other transactions.

N. Receipts from deductibles/co-payments under automotive service contracts: The receipts of a New Mexico automotive dealer or other repair facility, including the promisor under an automotive service contract, from the “deductible” or “co-payment” amount paid by a customer as required by automotive service contract as that term is defined in Subsection C of Section 3.2.1.16 NMAC in connection with the provision of repair services under contract are gross receipts.

O. Receipts of dealer from own reserve:

(1) The receipts of a New Mexico auto dealer for repairs provided by the dealer under an automotive service contract as that term is defined in Subsection C of Section 3.2.1.16 NMAC, on which the dealer is obligated as promisor are not gross receipts if:

(a) the receipts are paid from a reserve account established by the dealer under an agreement with an auto service contract administrator or an insurance company, or both, and

(b) the dealer is entitled to a return of any amounts in the reserve account not used to pay for parts and labor or to pay other charges against the dealer in connection with the auto service contract.

(2) In this situation, the dealer is being “paid” from the dealer's own funds and has no receipts. However, the dealer as promisor is liable for gross receipts tax on the retail value of the parts or labor or both furnished to discharge the dealer's obligation.

P. Water conservation fee: Section 74-1-13 NMSA 1978 imposes the water conservation fee on the operator of a public water supply system. The fee is measured by the amount of water produced. The operator is not authorized to impose the water conservation fee on the operator's customers. If the operator of the system separately bills an amount characterized as a reimbursement of the water conservation fee to the operator's customers, the separately stated amount is simply an element of the price of the water sold and the “reimbursement” is included in gross receipts. The definition of “gross receipts” does not exclude the water conservation fee or amounts characterized as reimbursements of water conservation fee paid.

Q. Sales of items subject to the federal manufacturer's excise tax:

(1) The gross receipts from sales of items such as motor vehicle tires include the total amount of money or the value of other consideration received even though this amount includes the Federal Manufacturer's Excise Tax, 26 U.S.C.A. Section 4061 *et seq.*, (1986) which is separately stated on the invoice. Gross receipts do not include the amount of money attributable to the Federal Communications Excise Tax, 26 U.S.C.A. Section 4251, *et seq.*, (1986), and the Federal Air Transportation Excise Tax, 26 U.S.C.A. Section 4261 *et seq.*, (1986), which are user's taxes.

(2) Example: A tire dealer sells a tire in New Mexico to a retail customer for forty dollars (\$40.00) and separately states one dollar (\$1.00) for Federal Manufacturer's Excise Tax on the sales ticket. The seller's gross receipts for this transaction are forty one dollars (\$41.00).

R. Transactions among related persons are gross receipts:

(1) Each person engaging in business in New Mexico is subject to the provisions of the Gross Receipts and Compensating Tax Act. Each person who is a member of any group of related or affiliated persons and who engages in business in New Mexico is a taxpayer. The provisions of the Gross Receipts and Compensating Tax Act apply to the transactions between that taxpayer and all other persons, including the other related or affiliated persons, even though consideration is not received in the form of cash or other monetary remuneration.

(2) Example 1: A cooperative association and X both engage in business in New Mexico.

The cooperative sells services to X, one of its members. The cooperative is a taxpayer and the receipts from this transaction are subject to the provisions of the Gross Receipts and Compensating Tax Act.

(3) *Example 2:* Both X and a cooperative association engage in business in New Mexico. X is a member of the cooperative and sells services to it. X is a taxpayer and the receipts from this transaction are subject to the provisions of the Gross Receipts and Compensating Tax Act.

(4) *Example 3:* X engages in business in New Mexico, specifically by selling office supplies. X is also a partner in a partnership. Sales by X to the partnership are subject to the provisions of the Gross Receipts and Compensating Tax Act.

(5) *Example 4:* C is a corporation engaging in business in New Mexico. S, an individual who is the majority stockholder in C, buys in New Mexico services and goods from C. C's receipts from these transactions with S are subject to the provisions of the Gross Receipts and Compensating Tax Act.

(6) *Example 5:* C and S are corporations engaging in business in New Mexico. S is a wholly-owned subsidiary of C. C sells tangible personal property in New Mexico to S. C's receipts from the transaction are subject to the provisions of the Gross Receipts and Compensating Tax Act.

(7) *Example 6:* X and Y are both divisions of corporation Z. X and Y are both parts of the same person, Z, and are not "related persons". Receipts from transactions between these two divisions are activities within Z and do not constitute gross receipts.

(8) *Example 7:* P, an individual, operates two businesses as sole proprietorships. One of P's businesses transfers tangible personal property to the other. Since both businesses and P are the same person, they are not "related persons" and the transaction does not constitute gross receipts.

S. Owner's receipts from transactions with owned entity are gross receipts:

(1) Except as provided in Paragraph (2) of this Subsection, when a person who owns all or part of an entity has receipts from the sale of property in New Mexico to, the lease of property employed in New Mexico to or the performance of services in New Mexico for the entity, the person's receipts are gross receipts except when the transaction may be characterized for federal income tax purposes as a contribution of capital. The person's receipts include the actual amount of money received by the person plus the value of any additional consideration. Additional consideration includes forbearance of charges against the person's ownership interest. These gross receipts are subject to the gross receipts tax unless an exemption or deduction applies.

(2) When a partner or interest holder in an entity is allocated profits or receives a guaranteed payment or other distributions for activities undertaken as a partner on behalf of the partnership such as administrative services done solely for the benefit of the partnership or for activities for third-parties transacting business with the partnership, these receipts of the partner are not gross receipts and are not subject to the gross receipts tax. When a partner engages in business separately from the partnership any transactions of that partner with the partnership, where the partner is not acting as a partner on behalf of the partnership, are gross receipts. Indicia that a partner is not acting as a partner on behalf of the partnership may include:

(a) that the partner engages in similar transactions with third parties other than the partnership;

(b) that the allocation, payment, or distribution made by the partnership is not made under the partnership agreement;

(c) that the partner's transaction(s) with the partnership involve the sale or lease of goods or the sale of services not provided by the partnership to third parties.

(3) For the purposes of Subsection S of Section 3.2.1.14 NMAC, an "entity" means any business organization or association other than a sole proprietorship.

(4) *Example:* C is a corporation and S is C's wholly owned subsidiary corporation. C and S create L, a limited liability company; C and S each own fifty percent of L. L purchases a twenty percent interest in P, a limited partnership. C sells goods to P. P pays the amount charged. C has gross receipts from this transaction equal to the amount received for the goods.

[9/29/1967, 12/5/1969, 3/9/1972, 11/20/1972, 3/20/1974, 7/26/1976, 6/18/1979, 4/7/1982, 5/4/1982, 5/4/1984, 4/2/1986, 4/20/1990, 11/26/1990, 9/20/1993, 2/22/1995, 11/15/1996, 5/31/1997, 6/15/1999; 3.2.1.14 NMAC - Rn & A, 3 NMAC 2.1.14, 4/30/2001; A, 12/30/2003; A, 9/25/2018]

3.2.1.15 GROSS RECEIPTS; TANGIBLE PERSONAL PROPERTY:

A. Lease purchase agreement as a sale: The receipts from a two party "lease-purchase" or "paid-out lease" agreement for tangible personal property will be treated as receipts from the sale of tangible personal property under the Gross Receipts and Compensating Tax Act if the lessee-buyer treats the property as an asset and depreciates the property pursuant to generally accepted accounting practices.

B. Consignment sales: Receipts of both a consignor and a consignee from the sale of tangible personal property handled on consignment are subject to the gross receipts tax.

C. Delivery expenses:

(1) Receipts from charges by a seller of tangible personal property for delivery costs, including postage and transportation charges, paid by the seller and passed on to the buyer, are an element of the sales price of the property.

(2) *Example:* X sells tangible personal property in the state of New Mexico and transports property to buyers located in New Mexico in its own equipment from its factory and warehouse. In some instances the contracts of sale which X has with its buyers stipulate that title passes on completion of manufacturing; in other cases there is no stipulation regarding passage of title. On its billing to buyers, X separately states amounts categorized as "warehouse charges" and "delivery charges". These separately stated charges are elements of the sale price of the property.

D. Freight charges:

(1) Transportation costs that are paid by the seller to the carrier are an element of the sales price of the property.

(2) Transportation costs that are paid to the carrier by the buyer are not an element of the sales price of the property. If the buyer transports the property with the buyer's own equipment, the cost of the transportation does not increase the value of the property.

(3) If the seller transports the property with its own equipment, and the cost of the transportation is already included in the price of the property, it is considered as an element of the sales price of the property. If extra separate charges are made, receipts from such charges are gross receipts.

E. Refundable deposits: Amounts received in the form of refundable deposits on bottles, cartons, cases and the like are to be included in gross receipts of the seller or lessor and are subject to the gross receipts tax.

F. Buyer's financing costs: In a situation where:

- (1) a lending institution lends money directly to a buyer of tangible personal property;
- (2) the buyer executes a promissory or installment note together with a security agreement or a retail financing agreement directly to the lending institution;
- (3) neither the note nor the agreement is endorsed or guaranteed in any manner by the seller of the property; and
- (4) the lending institution as agent for the buyer, pays the seller by crediting the account of the seller with an amount equal to the loan against the property, with no amount added or later rebated, the receipts of the seller from the sale of the property include any down payment and the amount credited to the account of the seller unless that amount is less than the fair market value of the property sold, in which case the fair market value would be the measure of the seller's gross receipts.

G. Sale of items subject to the state Cigarette Tax Act: The gross receipts from sales of cigarettes include the total amount of money or the value of other consideration received even though this amount includes the excise tax levied by the Cigarette Tax Act.

H. Florist receipts: Receipts of a New Mexico florist are gross receipts when the florist:

- (1) receives an order and payment for flowers under an agreement that the flowers are to be delivered at another location by another florist; and
- (2) uses long distance communication to authorize the other florist to make delivery; and
- (3) pays the other florist for the flowers.

I. Sale of food and beverage at horse racetracks: Receipts from the sale of food and beverage either by a concessionaire or the owner of a New Mexico horse racetrack, including the track at the state fair grounds, are subject to the gross receipts tax. If a concessionaire pays a racetrack owner a consideration for operating a food and beverage concession, the racetrack owner's receipts are subject to the gross receipts tax.

J. Packaged software:

(1) The transaction constitutes a sale of tangible personal property when a person sells a packaged software where:

- (a) no extraordinary services are performed in order to furnish the packaged software; and
- (b) the buyer pays a fixed amount for the packaged software and the license to use the software; and
- (c) the buyer is allowed to resell the license to use the software with the packaged software itself.

(2) Sale of such property for resale is subject to the deduction provided in Section 7-9-47 NMSA 1978.

(3) This version of Subsection J of Section 3.2.1.15 NMAC is retroactively applicable to transactions occurring on or after July 1, 1991.

K. Sale of postage stamps:

(1) Receipts in excess of the face value of the postage stamps from reselling un-canceled postage stamps issued by the United States postal service or any foreign government are gross receipts. Receipts in excess of the face value of the postage from imprinting, mechanically or by other means, the amount of postage on documents to be mailed are gross receipts.

(2) Receipts from selling canceled postage stamps issued by the United States postal service or any foreign government are gross receipts.

L. Refined metals: The receipts of a person who sells refined metals in New Mexico are gross receipts subject to the gross receipts tax regardless of whether the seller is a severer or processor as defined in the Resources Excise Tax Act or the Severance Tax Act.

[12/5/1969, 3/9/1972, 11/20/1972, 3/20/1974, 7/26/1976, 3/16/1979, 6/18/1979, 4/7/1982, 5/4/1984, 4/2/1986, 11/26/1990, 9/17/1991, 10/28/1994; 3 NMAC 2.1.15.10, 11/15/1996; 4/30/1997, 10/31/1997, 3.2.1.15 NMAC - Rn & A, 3 NMAC 2.1.15, 10/31/2000]

3.2.1.16 GROSS RECEIPTS - REAL ESTATE AND INTANGIBLE PROPERTY:

A. Insurance proceeds:

(1) Receipts of an insured derived from payments made by an insurer pursuant to an insurance policy are not subject to the gross receipts tax. Such receipts are not receipts derived from the sale of property in New Mexico, the leasing of property employed in New Mexico, or the performance of a service.

(2) Example: ABC is an auto dealer in the business of selling new and used cars. In addition to selling cars, ABC also maintains a service garage with a large inventory of automobile parts. As part of its regular sales practice, ABC allows potential purchasers to test drive the cars. ABC carries automobile insurance which is applicable in the situation where the potential purchaser is test driving the car. When an accident occurs, even though some or all the parts used to repair the automobile are taken from ABC's inventory of parts and ABC does the actual repair work, payment received from the insurance company for the damaged automobile is not gross receipts. Such a payment is not received as consideration for selling property in New Mexico, leasing property employed in New Mexico, or for performing services. ABC is not liable for compensating tax on the value of the parts used or the labor.

B. Receipts from sale of automotive service contracts:

(1) "Automotive service contract" means an undertaking, promise or obligation of the promisor, for a consideration separate from the sale price of a motor vehicle, to furnish or to pay for parts and labor to repair specified parts of the covered motor vehicle only if breakdowns (failures) of those specified parts occur within certain time or mileage limits. The promisor's obligation is conditioned upon regular maintenance of the motor vehicle by the purchaser of the automotive service contract at the purchaser's expense. The automotive service contract may also obligate the promisor to reimburse the purchaser for certain breakdown related rental and towing charges. The automotive service contract may require the payment of a specified "deductible" or "co-payment" by the purchaser in connection with each repair.

(2) The receipts of a person from selling an automotive service contract are not gross receipts. The undertaking, promise or obligation of the promisor under the automotive service contract to pay for or to furnish parts and service if an uncertain future event (breakdown) occurs is not within the definition of property under Subsection J of Section 7-9-3 NMSA 1978. Since the receipts from selling an automotive service contract do not arise "from selling property in New Mexico, from leasing property employed in New Mexico or from performing services in New Mexico", the receipts are not gross receipts as defined in Section 7-9-3.5 NMSA 1978 and are not subject to the tax imposed by Section 7-9-4 NMSA 1978.

(3) The furnishing by the promisor of parts or labor or both to fulfill the promisor's obligation when a breakdown occurs is a taxable event.

C. Receipts from insurance company under an automotive service contract program: The receipts of a New Mexico automotive dealer from an insurance company are not taxable gross receipts if the payments by the insurance company are to reimburse the dealer, who is promisor under an automotive service contract as that term is defined in Subsection C of 3.2.1.16 NMAC, for all parts and labor furnished by the dealer under the contract or for parts and labor furnished by the dealer under the contract in an amount in excess of a specified reserve established by the dealer under an agreement with the insurance company. The receipt of the

payments from the insurance company are not receipts from the sale of parts and labor but are payments to indemnify the dealer for the dealer's expense in fulfilling the dealer's obligation. The value of parts and labor furnished to make the repairs was subject to the gross receipts tax when the parts and labor were furnished to discharge the dealer's obligation as the promisor under the automotive service contracts.

D. Gift certificates:

(1) Receipts from the sale of gift certificates are receipts from the sale of intangible personal property of a type not included in the definition of "property" and, therefore, are not gross receipts.

(2) When a gift certificate is redeemed for merchandise, services or leasing, the person accepting the gift certificate in payment receives consideration, which is gross receipts subject to the gross receipts tax unless an exemption or deduction applies. The value of the consideration is the face value of the gift certificate.

(3) When a gift certificate is purchased during the time period set out in Laws 2005, Chapter 104, Section 25 subsequent redemption of the gift certificate for the purchase of qualified tangible personal property after that period is not deductible under Laws 2005, Chapter 104, Section 25.

(4) When a gift certificate is redeemed during the time period set out in Laws 2005, Chapter 104, Section 25 for the purchase of qualified tangible personal property, the receipts from the sale are deductible under Laws 2005, Chapter 104, Section 25.

E. Merchant discount and interchange rate fee receipts: Bank receipts derived from credit and debit card merchant discounts and bank interchange rate fees are not gross receipts within the meaning of the Gross Receipts and Compensating Tax Act and therefore are not taxable.

F. Prepaid telephone cards - "calling cards":

(1) Receipts from the sale of an unexpired prepaid telephone card, sometimes known as a "calling card", are receipts from the sale of a license to use the telecommunications system and, therefore, are gross receipts and are not interstate telecommunications gross receipts. Receipts from selling an expired prepaid telephone card are receipts from the sale of tangible personal property and are gross receipts and are not interstate telecommunications gross receipts.

(2) Receipts from recharging a rechargeable prepaid telephone card are receipts from the sale of a license to use the telecommunications system and are gross receipts and are not interstate telecommunications gross receipts.

(3) Subsection F of 3.2.1.16 NMAC is retroactively applicable to transactions and receipts on or after September 1, 1998.

[3/9/1972, 11/20/1972, 3/20/1974, 7/26/1976, 6/18/1979, 4/7/1982, 5/4/1984, 4/2/1986, 6/12/1989, 6/28/1989, 11/26/1990, 2/1/1995, 11/15/1996, 9/15/1998, 1/29/1999; 3.2.1.16 NMAC - Rn & A, 3 NMAC 2.1.16, 4/30/2001; A, 12/30/2003; A, 8/15/05; A, 12/14/2012]

3.2.1.17 GROSS RECEIPTS - LEASING:

A. Leasing of property employed in New Mexico:

(1) Receipts derived from the rental or leasing of property employed in New Mexico are subject to the gross receipts tax.

(2) *Example 1:* A is in the business of leasing heavy equipment used in construction projects. The receipts from the leasing of such equipment employed in New Mexico prior to January 1, 2013, are subject to the gross receipts tax. See Section 7-9-52.1 NMSA 1978 for deductibility of receipts from such leases on or after January 1, 2013.

(3) *Example 2:* Y, a New York corporation, leases four block-making machines to X who uses the machines in X's block making business in New Mexico. The rental contract is signed in Nebraska. The receipts which Y receives from the rental of the equipment employed in New Mexico are taxable.

(4) *Example 3:* P corporation leases photocopying machines to Q, a state agency. The receipts of P corporation from leasing these machines to the state agency are subject to the gross receipts tax.

B. Additional charges:

(1) Receipts derived from additional charges made in conjunction with the rental or leasing of property employed in New Mexico are subject to the gross receipts tax.

(2) *Example 1:* C owns and operates a business which leases gas cylinders. There is a clause in the lease whereby the lessee will be liable for an additional charge if the gas cylinders are kept past a specific date provided in the lease contract. Receipts from these penalties or demurrage charges for keeping the gas cylinders past the specified date provided are receipts from leasing property employed in New Mexico and are subject to the gross receipts tax.

(3) *Example 2:* D is in the business of leasing concrete forms which are employed in New Mexico. The terms of the lease agreement require that the property leased be returned to the lessor in the condition in which it was leased. Any receipts from charges for repairing and cleaning concrete forms returned to the lessor in a damaged condition, for any material used in repair of such forms, or from charges for the purchase price of forms which are not returned to the lessor, are receipts from leasing property employed in New Mexico and are subject to the gross receipts tax.

C. Lease of license - franchise agreement: Receipts derived from the lease of a license, such as a liquor license, or from a franchise agreement, are subject to the gross receipts tax.

D. Multistate use of leased equipment:

(1) Where property is rented or leased for employment both within and outside New Mexico the renter or lessor will be subject to the gross receipts tax on that portion of the receipts which is derived from the renting or leasing of property employed in New Mexico.

(2) In order to determine the portion of the receipts which are subject to the gross receipts tax, the total receipts from the lease are to be multiplied by whichever of the following fractions more accurately reflects the receipts from the period of employment of the leased item inside New Mexico:

(a) the numerator is the total miles traveled by the leased items in New Mexico and the denominator is the total miles traveled by the leased items during the lease period; or

(b) the numerator is the total time the leased items were employed in New Mexico and the denominator is the total time of the lease period.

(3) The department will allow a person engaged in the business of leasing property employed both within and without New Mexico to use other methods of apportioning the receipts of such leasing activities upon showing that the other methods more accurately reflect the portion of employment of leased items within New Mexico.

(4) *Example:* B owns and operates a business located in Santa Fe, New Mexico, which rents or leases vehicles, airplanes, and mobile equipment. The items leased are employed both within and without New Mexico. B is subject to the gross receipts tax on that portion of the receipts which is from employment of the vehicles, airplanes, and mobile equipment within New Mexico.

E. Leasing of property employed outside New Mexico:

(1) Receipts derived from the rental or leasing of property employed outside New Mexico are not subject to the gross receipts tax.

(2) *Example:* L, a resident of Hobbs, New Mexico, owns a sawmill in Wyoming which is leased to S for three thousand dollars (\$3,000) per year. These receipts are not derived from selling property in New Mexico, leasing property employed in New Mexico, performing services outside of New Mexico the product of which is initially used in New Mexico, or performing services in New Mexico. These receipts are not includable in L's gross receipts.

F. Use of vehicles in New Mexico:

(1) Receipts from the rental or leasing of vehicles, airplanes, or mobile equipment which are employed both within and outside New Mexico are subject to the gross receipts tax on that portion of the receipts which are from employment of the vehicles, airplanes, or mobile equipment within New Mexico.

(2) In order to determine the portion of receipts described in the above paragraph which are subject to the gross receipts tax, the total receipts from the lease are to be multiplied by whichever of the following fractions more accurately reflects the receipts from the period of employment of the leased item inside New Mexico:

(a) the numerator is the total miles traveled by the leased items in New Mexico and the denominator is the total miles traveled by the leased items during the period of lease; or

(b) the numerator is the total time the leased items were physically present in New Mexico and the denominator is the total time of the lease period.

(3) The department will allow a person engaged in leasing the above described items to use other methods of apportionment upon a showing that the other methods will more accurately reflect the period of employment of the leased item within New Mexico.

G. Safe harbor lease - purchaser/lessor: A purchaser/lessor who enters into a qualified "safe harbor lease" transaction as defined in Section 168 of the Internal Revenue Code will be subject to the gross receipts tax on the receipts if the property being leased is located in New Mexico.

H. Leasing computers: Receipts from renting or leasing the use of computers or related equipment in New Mexico, on either a part-time or a full-time basis, are subject to the gross receipts tax.

[12/5/1969, 3/9/1972, 11/20/1972, 3/20/1974, 7/26/1976, 6/18/1979, 4/7/1982, 5/4/1984, 4/2/1986, 11/26/1990, 11/15/1996; 3.2.1.17 NMAC - Rn & A, 3 NMAC 2.1.17, 4/30/2001; A, 12/14/2012]

3.2.1.18 GROSS RECEIPTS; SERVICES:

A. Receipts from performing a service in New Mexico: Receipts derived from performing a service in New Mexico are subject to the gross receipts tax unless a specific exemption or deduction provided for in the Gross Receipts and Compensating Tax Act applies.

B. Services performed both within and without New Mexico: Receipts from services, other than research and development services and services subject to the Interstate Telecommunications Gross Receipts Tax Act, performed both within and without New Mexico are subject to the gross receipts tax on the portion of the services performed within New Mexico.

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

(1) When a prime contractor performs services both within and without New Mexico, cost accounting records which reasonably allocate all costs to the location of the performance of the service shall be used to determine the amount of services performed in New Mexico. If adequate cost accounting records are not kept for the allocation of costs to specific locations, the receipts from performing such services shall be prorated based on the percentage of service actually performed within New Mexico. The percentage shall be calculated by dividing the time spent by the prime contractor in performing such services in New Mexico by the total contract time spent performing services everywhere. Other reasonable methods of prorating such services may be acceptable if approved by the department in advance of performing the services.

(2) Services subcontracted to third parties under a single contract by a prime contractor and used or consumed by the prime contractor in the performance of the contract shall be prorated by the prime contractor on the same basis, i.e., based either on allocated costs using cost accounting records or on the percentage of the total service actually performed within New Mexico by the prime contractor or other reasonable method approved by the department.

(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 receipts from such subcontracted service will be deductible from the subcontractor's gross receipts.

(4) The subcontractor must use the same method of prorating the performance of services within and without New Mexico as used by the prime contractor.

(5) This subsection shall not apply to a contractor who is performing construction services.

D. Expenses incurred outside New Mexico and allocated to operations in New Mexico:

(1) General administrative and overhead expenses incurred outside New Mexico and allocated to operations in this state for bookkeeping purposes, costs of travel outside New Mexico, which travel was an incidental expense of performing services in New Mexico, employee benefits, such as retirement, hospitalization insurance, life insurance and the like, paid to insurers or others doing business outside New Mexico for employees working in New Mexico and other expenses incurred outside New Mexico which are incidental to performing services in New Mexico, all constitute the taxpayer's expenses of performing services in New Mexico.

(2) No provision of the Gross Receipts and Compensating Tax Act allows a deduction for expenses incurred in performing services to determine gross receipts subject to tax. Therefore, the total amount of money or reasonable value of other consideration derived from performing services in New Mexico is subject to the gross receipts tax.

E. Receipts from performing services outside New Mexico:

(1) Receipts from performing services, except research and development services, outside New Mexico are not subject to the gross receipts tax under the provisions of Section 7-9-13.1 NMSA 1978.

(2) *Example 1:* P, a resident of New Mexico, is an expert forest fire fighter. P's receipts from fighting forest fires outside New Mexico are not includable in P's gross receipts.

(3) *Example 2:* D is a data processing bureau located in Lone Tree, Iowa. X, a New Mexico accounting and bookkeeping firm, mails accounting data to D. D then processes this material into general ledgers, payroll journals and other journals and then returns this material by mail to X. The receipts of D are receipts from performing services entirely outside New Mexico and therefore are not subject to the gross receipts tax.

(4) *Example 3:* L, an Albuquerque attorney, is retained by a Colorado firm to negotiate and draw up oil and gas leases for lands in southern Colorado. To accomplish this objective, L goes to Pueblo, Colorado, and there negotiates and draws the leases. Receipts from the fee are not includable in L's gross receipts because the service was performed entirely outside the state of New Mexico.

F. Sales of state licenses by nongovernmental entities:

(1) Amounts retained by nongovernmental entities as compensation for services performed in selling state licenses are gross receipts.

(2) *Example:* G owns and operates a small grocery store in rural New Mexico which is located near a popular fishing area. As a convenience to the public, G sells New Mexico Game and Fish licenses. For its services in selling these licenses, G retains a small percentage of the total license fee. The amounts retained are gross receipts because they are receipts derived from services performed in New Mexico. G may not deduct the amounts retained pursuant to Section 7-9-66 NMSA 1978 which deals with commissions derived from the sale of tangible personal property not subject to the gross receipts tax. A New Mexico game and fish license is not tangible personal property pursuant to Subsection J of Section 7-9-3 NMSA 1978.

G. Stockbrokers' commissions: Gross receipts include commissions received by stockbrokers, located in New Mexico, for handling transactions for out-of-state as well as in-state residents.

H. Attorneys' fees: Regardless of the source of payment or the fact of court appointment, the fees of attorneys are subject to the gross receipts tax to the extent that their services are performed in this state.

I. Directors' or trustees' fees:

(1) The receipts of a member of a board of directors or board of trustees from attending a directors' or trustees' meeting in New Mexico are receipts derived from performing a service in New Mexico and are subject to the gross receipts tax.

(2) *Example:* X is on the board of directors of a New Mexico corporation and a Texas corporation. X attends directors' meetings in Texas and New Mexico. For each directors' meeting that X attends, X is paid a fee of fifty dollars (\$50.00). X is performing a service. The fee which X receives from performing this service in New Mexico is subject to the gross receipts tax. The fee which X receives from performing the service in Texas is not subject to the gross receipts tax. However, the burden is on X to segregate receipts which are not taxable from those which are taxable.

(3) *Example:* Y is on the board of trustees of Z, a New Mexico electric cooperative organized under the provisions of the Rural Electric Cooperative Act. Y receives eighty five dollars (\$85.00) a day for Y to attend Z's regular meetings in New Mexico, plus reimbursement for mileage to and from the meeting at the standard IRS rate. Y also receives eighty five dollars (\$85.00) a day for Y to attend no more than one other meeting, conference or training inside or outside New Mexico within any one month, plus reimbursement of actual expenses, including hotel, transportation, tips and reasonable expenses for meals and entertainment. Y is performing a service. The fees and reimbursements Y receives for attending meetings, conferences and trainings in New Mexico are subject to gross receipts tax. The fees and reimbursements Y receives for attending meetings, conferences and trainings outside New Mexico are not subject to gross receipts tax.

(a) See Paragraph (1) of Subsection C of 3.2.1.19 NMAC regarding reimbursed expenditures.

(b) Y is not a volunteer as defined in Paragraph (2) of Subsection D of 3.2.1.19 NMAC because Y receives compensation for Y's services in addition to reimbursement of Y's out-of-pocket expenses incurred in the performance of Y's services.

J. Anesthetists' fees:

(1) The receipts of a nonemployee anesthetist from anesthetic services performed for a surgeon are subject to the gross receipts tax.

(2) The receipts of an anesthetist from the performance of this service for a surgeon may be deducted from gross receipts if the surgeon resells the service to the patient and delivers a nontaxable transaction certificate to the anesthetist. The surgeon delivering the nontaxable transaction certificate must separately state the value of the service purchased in the charge for the service on its subsequent sale. The subsequent sale must be in the ordinary course of business and subject to the gross receipts tax.

(3) *Example:* A is an anesthetist who is employed by a hospital and also performs services for and receives compensation from a surgeon who is not associated with the hospital. The surgeon does not consider the anesthetist to be an employee and does not withhold income or other taxes from the anesthetist's compensation. Although the surgeon may exercise some control over the services performed by the anesthetist, the surgeon relies on the anesthetist's training and experience to accomplish the result desired. The receipts of the anesthetist from this service performed are subject to the gross receipts tax.

K. Athletic officials:

(1) Receipts from refereeing, umpiring, scoring or other officiating at school events sanctioned by the New Mexico activities association are exempt from gross receipts tax pursuant to Section 7-9-41.4 NMSA 1978.

(2) Receipts of a referee, umpire, scorer or other similar athletic official from umpiring, refereeing, scoring or officiating at a sporting event located in New Mexico that is not sanctioned by the New Mexico activities association, are receipts derived from performance of a service and are subject to the gross receipts tax. Such receipts will not be exempted from the gross receipts tax as "wages" unless the umpires, referees, scorers and other athletic officials demonstrate to the department that such receipts are derived from an employment relationship whereby they are employees within the meaning of 3.2.105.7 NMAC.

L. Racing receipts:

(1) Unless the receipts are exempt under Section 7-9-40 NMSA 1978:

(a) the receipts of vehicle or animal owners from winning purse money at races held in New Mexico are receipts from performing services in New Mexico and are subject to the gross receipts tax if any charge is made for attending, observing or broadcasting the race.

(b) receipts of vehicle drivers, animal riders and drivers and other persons from receiving a percentage of the owner's purse are receipts from performing services in New Mexico and are subject to the gross receipts tax, unless the person receiving the percentage of purse money is an employee, as that term is defined in 3.2.105.7 NMAC, of the owner.

(2) Where there is an agreement between the driver, rider or other person and the owner for distribution of the winning purse, then only the amount received pursuant to the agreement is gross receipts of the driver, rider or other person receiving the distribution.

M. Advertising receipts of a newspaper or broadcaster:

(1) The receipts of a New Mexico newspaper or a person engaged in the business of radio or television broadcasting from performing advertising services in New Mexico do not include the customary commission paid to or received by a nonemployee advertising agency or a nonemployee solicitation representative, when said advertising services are performed pursuant to an allocation or apportionment agreement entered into between them prior to the date of payment.

(2) Receipts of a New Mexico newspaper or a person engaged in the business of radio or television broadcasting from the sale of advertising services to an advertising agency for resale may be deducted from gross receipts if the advertising agency delivers a nontaxable transaction certificate to the newspaper or the person engaged in the business of radio or television broadcasting. The subsequent sale must be in the ordinary course of business and subject to the gross receipts tax, or the advertising agency will be subject to the compensating tax on the value of the advertising service at the time it was rendered. This version of Paragraph (2) of Subsection M of 3.2.1.18 NMAC applies to transactions occurring on or after July 1, 2000.

N. Advertising space in pamphlets: Receipts from selling advertising service to New Mexico merchants in a pamphlet printed outside New Mexico and distributed wholly inside New Mexico are receipts from performing an advertising service in New Mexico. Such receipts are subject to the gross receipts tax.

O. Billboard advertising: Receipts derived from contracts to place advertising on outdoor billboards located within the state of New Mexico are receipts from performing an advertising service in New Mexico. Such receipts are subject to the gross receipts tax, regardless of the location of the advertiser.

P. Day care centers:

(1) Receipts from providing day care are receipts from performing a service and are subject to the gross receipts tax.

(2) Receipts from providing day care for children in a situation where a commercial day care center provides day care for the children and the expenses of the care for some of these children is paid for by the state of New Mexico are subject to the gross receipts tax.

(3) Receipts from providing day care for children in a situation where a person provides day care for children in a residence and the care for all these children is paid for by the state of New Mexico are subject to the gross receipts tax.

(4) Receipts from providing day care for children in a situation where a person provides day care for children in the children's home and the care for all of these children is paid for by the state of New Mexico are subject to the gross receipts tax.

Q. Child care:

(1) Receipts derived by a corporation for providing child care facilities for its employees are subject to the gross receipts tax on the amount received from its employees.

(2) *Example:* The X corporation operates a licensed child care facility to accommodate dependent children of its employees. In order to defray a portion of the cost of the facility, the corporation charges each employee two dollars (\$2.00) per child per week for the use of the facility. All receipts from the two-dollar charge per child per week are subject to the gross receipts tax.

R. Service charges; tips:

(1) Except for tips, receipts of hotels, motels, guest lodges, restaurants and other similar establishments from amounts determined by and added to the customer's bill by the establishment for employee services, whether or not such amounts are separately stated on the customer's bill, are gross receipts of the establishment.

(2) A tip is a gratuity offered to service personnel to acknowledge service given. An amount added to a bill by the customer as a tip is a tip. Because the tip is a gratuity, it is not gross receipts.

(3) Amounts denominated as a "tip" but determined by and added to the customer's bill by the establishment may or may not be gross receipts. If the customer is required to pay the added amount and the establishment retains the amount for general business purposes, clearly it is not a gratuity. Amounts retained by the establishment are gross receipts, even if labeled as "tips". If the customer is not required to pay the added amount and any such amounts are distributed entirely to the service personnel, the amounts are tips and not gross receipts of the establishment.

(4) *Examples:*

(a) Restaurant R has a policy of charging parties of six or more a set percentage of the bill for food and drink served as a tip. If a customer insists on another arrangement, however, the set amount will be removed. R places all amounts collected from the set tip percentage into a pool which is distributed to the service staff at the end of each shift. The amounts designated as tips and collected and distributed by R to the service staff, are tips and not gross receipts. If R retains any amounts derived from the set tip percentage, the amounts retained are gross receipts.

(b) Hotel H rents rooms for banquets and other functions. In addition to the rental fee for the room, H also charges amounts for set-up and post-function cleaning. H retains these amounts for use in its business. These amounts are gross receipts. They are gross receipts even if H denominates them as "tips".

S. Real estate brokers:

(1) Receipts of a person engaged in the construction business from the sale of the completed construction project include amounts which the person has received and then paid to a real estate broker. The total receipts from the sale of the construction project are subject to the gross receipts.

(2) Receipts of a real estate broker from the performance of services for a person engaged in the construction business may not be deducted from gross receipts pursuant to Section 7-9-52 NMSA 1978.

(3) See Sections 7-9-53 and 7-9-66.1 NMSA 1978 for deductibility of receipts from certain real estate broker transactions.

T. Entertainers: The receipts of entertainers or performers of musical, theatrical or similar services are subject to the gross receipts tax when these services are performed in New Mexico.

U. Managers or agents of entertainers. Commissions received by managers or agents of entertainers for the managers' or agents' services in New Mexico are subject to the gross receipts tax.

V. Water utilities; installation of water taps and pipes: The receipts of a water utility from providing a "tap" to a water main and installing a pipe from the water main to a meter which it provides are subject to the gross receipts tax. However, if the utility is owned or operated by a county, municipality or other political subdivision of the state of New Mexico, its receipts from providing a "tap" to a water main and installing a pipe from a water main to a meter which it also provides are exempted from the gross receipts tax.

W. Utilities; installation charges:

(1) The receipts of a utility from installation charges are subject to the gross receipts tax. However, if the utility is owned or operated by a county, municipality or other political subdivision of the state of New Mexico, its receipts from installation charges are exempt from the gross receipts tax.

(2) The receipts of a private water utility from providing a "tap" to a water main and installing a pipe from the water main to a meter which it provides are subject to the gross receipts tax.

(3) Receipts of a private electric utility from fees for changing, connecting or disconnecting electricity of customers, whether or not these services are required because of nonpayment of bills by a customer, are subject to the gross receipts tax.

X. Construction on Indian reservations or pueblos: The receipts of a non-Indian from construction services, as defined in Section 7-9-3.4 NMSA 1978 and regulations thereunder, performed on an Indian reservation or pueblo are subject to the gross receipts tax unless the imposition of the gross receipts tax is preempted by federal law.

Y. Star route contractors: Receipts of a person holding a contract for transportation of United States mail, as a "star route contractor", from points within New Mexico to other points within New Mexico and to points outside of New Mexico, are subject to the gross receipts tax on that portion of the receipts from transportation

from a point within New Mexico to a point within New Mexico. See Paragraph (2) of Subsection B of 3.2.55.10 NMAC for deducting receipts from the portion in interstate commerce.

Z. Racetrack operators. Receipts of operators of racetracks other than horse racetracks, from gate admission fees and entrance fees paid by drivers are subject to the gross receipts tax. Any portion of these fees paid out by the operator as prizes are not exempt or deductible since the payments are part of the operator's cost of doing business.

AA. Data access charges: Receipts from fees or charges made in connection with property owned, leased or provided by the person providing the service are subject to the gross receipts tax when the information or data accessed is utilized in this state.

BB. Receipts from telephone or telegraph services: Receipts derived from telephone or telegraph services originating or terminating in New Mexico and billed to an account or number in this state are receipts from performing services in New Mexico and are subject to the gross receipts tax unless exempt under Section 7-9-38.1 NMSA 1978.

CC. Allied company underwriting automotive service contracts: When a New Mexico automotive dealer pays an entity which is allied or affiliated with that dealer (allied company) to undertake all of the dealer's obligations under automotive service contracts as that term is defined in Subsection C of 3.2.1.16 NMAC on which the dealer is promisor, the undertaking of the allied company does not involve the sale of property in New Mexico or the lease of property employed in New Mexico. The undertaking principally involves an obligation of the allied company to indemnify the dealer by paying the dealer for furnishing parts and labor to fulfill the dealer's obligation to furnish the parts and labor. However, the undertaking also involves the performance of services by the allied company for the dealer since the allied company undertakes to handle the claims of automotive service contract purchasers and otherwise perform the dealer's task under the contract. Absent a showing of a different value by the allied company or the department, 7.5 percent of the contract amount paid by the dealer to the allied company will be treated as consideration received for services performed in New Mexico.

DD. Custom software:

(1) Except as otherwise provided in Subsection DD of 3.2.1.18 NMAC, receipts derived by a person from developing custom software are receipts from performing a service.

(2) When custom software is developed by a seller for a customer but the terms of the transaction restrict the customer's ability without the seller's consent to sell the software to another or to authorize another to use the software, the seller's receipts from the customer are receipts from the performance of a service. The seller's receipts from authorizing the customer's sublicensing of the software to another person are receipts from granting a license. The seller's receipts from authorizing the use by another person of the same software are receipts from granting a license to use the software.

EE. Check cashing is a service: Receipts from charges made for cashing checks, money orders and similar instruments by a person other than the person upon whom the check, money order or similar instrument is drawn are receipts from providing a service, not from originating, making or assuming a loan. Such charges are not interest.

FF. Receipts of collection agencies:

(1) The fee charged by a collection agency for collecting the accounts of others is gross receipts subject to the gross receipts tax, regardless of whether the receipts of the client are subject to gross receipts tax and regardless of whether the agency is prohibited by law from adding its gross receipts tax amount to the amount collected from the debtor.

(2) *Example 1:* X is a cash basis taxpayer utilizing the services of Z collection agency for the collection of delinquent accounts receivable. From its New Mexico offices, Z collects from X's New Mexico debtors in the name of X, retains a percentage for its services and turns over the balance to X. The percentage retained by Z is its fee for performing services in New Mexico. The fee is subject to the gross receipts tax. It makes no difference that federal law prohibits Z from passing the cost of the tax to the debtor by adding it to the amount to be collected. X's gross receipts include the full amount collected by Z.

(3) Amounts received by collection agencies from collecting accounts sold to the collection agency are not gross receipts.

(4) *Example 2:* X, a cash basis taxpayer, sells its delinquent accounts receivable to Z, a collection agency, for a percentage of the face amount of the accounts. X's gross receipts include the full amount of the receivables, excluding any time-price differential. The amount subsequently collected by Z from those accounts, however, is not subject to gross receipts tax because the amount is not included within the definition of gross receipts. In this situation Z is buying and selling intangible property of a type not included within the definition of property in Subsection J of Section 7-9-3 NMSA 1978.

GG. Commissions of independent contractors when another pays gross receipts tax on the receipts from the underlying transaction:

(1) Commissions and other consideration received by an independent contractor from performing a sales service in New Mexico with respect to the tangible or intangible personal property of other persons are gross receipts whether or not the other person reports and pays gross receipts tax with respect to the receipts from the sale of the property. This situation involves two separate transactions. The first is the sale of the property by its owner to the customer and the second is the performance of a sales service by the independent contractor for the owner of the property. The receipts from the sale of the property are gross receipts of the person whose property was sold. Receipts, whether in the form of commissions or other remuneration, of the person performing a sales service in New Mexico are gross receipts of the person performing the sales service.

(2) *Example 1:* S is a national purveyor of tangible personal property. S has stores and employees in New Mexico. S also has catalogue stores in less populated parts of New Mexico. Catalogue stores maintain minimal inventories; their primary purpose is to make S's catalogues available to customers, to take orders of merchandise selected from the catalogues, to place the orders with S and to provide general customer service. The catalogue stores are operated by independent contractors and not by S. S pays the contractors commissions based on the orders placed. In charging its customers, S charges the amount shown in the catalogue and does not add any separate amount to cover the cost of the contractors' commissions. S pays gross receipts tax on its receipts from the sale of catalogue merchandise. The contractors contend that the cost of their selling services is included in the amount S charges for its merchandise and so their commissions are not gross receipts. The contention is erroneous. The contractors have receipts from performing a service in New Mexico; it is immaterial that S paid the amount of gross receipts tax S owed on S's receipts. See, however, the deduction at Subsection B of Section 7-9-66 NMSA 1978.

(3) *Example 2:* M is a nationwide, multi-level sales company with presence in New Mexico. M sells products to households mainly through a network of individual, independent contractors. The network of sellers is controlled by one or more sets of individuals, also independent contractors, who train and supervise the individuals selling the merchandise; these supervisory contractors may also sell merchandise. The sellers display, promote and take orders for M's products. Payment for orders are sent to M along with the orders. M ships the merchandise directly to the final customers. M has agreed to, and does, pay the gross receipts tax on the retail value of the merchandise sold, whether sold by M or one of the independent contractors. Based on the volume and value of merchandise sold, M pays both the selling and supervisory independent contractors a commission. The commissions received by the independent contractors engaging in business in New Mexico with respect to merchandise sold in New Mexico are gross receipts subject to the gross receipts tax. The commissions are receipts from performing a service in New Mexico. The fact that M pays gross receipts tax on M's receipts from the sale of the property is immaterial in determining the liability of the independent contractors.

(4) Commissions and other consideration received by an independent contractor from performing a sales service in New Mexico with respect to a service to be performed by other persons are gross receipts whether or not the other person reports and pays gross receipts tax with respect to the receipts from the performance of the underlying service. This situation involves two transactions. The first is the performance of the underlying service by the other person for the customer and the second is the performance of the sales service by the independent contractor for the performer of the underlying service. The receipts from the performance of the underlying service for the customer are gross receipts of the person performing that service. Receipts, whether in the form of commissions or other remuneration, of the person performing the sales service are gross receipts of the person performing the sales service.

(5) *Example 3:* P is the publisher of a magazine published in New Mexico. P enters into arrangements with independent contractors to solicit ads to be placed in P's publication. P pays each contractor a percentage of the billings for the ads placed by the contractor as a commission. The independent contractors claim that they owe no gross receipts tax with respect to ads solicited in New Mexico because P has paid gross receipts tax on P's advertising revenues. The contractors are incorrect. There are two transactions in this situation, P's service of publishing advertisements and the contractors' service of soliciting ads for P. The fact that P paid the amount of gross receipts tax due on P's advertising revenues is immaterial regarding the contractors' gross receipts tax obligations on their receipts.

(6) If the receipts from the underlying sale of the tangible property are exempt or deductible, the commission received by an independent contractor from selling the tangible property of another may be subject to the deduction provided by Section 7-9-66 NMSA 1978.

HH. Receipts from winning contest:

(1) Receipts of a contestant from winning purse money in a rodeo or an athletic game, match or tournament held in New Mexico are gross receipts from performing services if any charge is made for attending, observing or broadcasting the event. Such receipts are subject to the gross receipts tax unless an exemption or deduction applies. Where the contestant is a team and there is an agreement among the team members governing distribution of the purse money, then only the amount received by each team member pursuant to the agreement is gross receipts of the team member.

(2) Subsection HH of 3.2.1.18 NMAC does not apply to receipts exempt under Section 7-9-40 NMSA 1978 nor does it apply to activities that are primarily or solely gambling.
[9/29/1967, 12/5/1969, 3/3/1971, 3/9/1972, 11/20/1972, 3/20/1974, 7/26/1976, 3/16/1979, 6/18/1979, 11/20/1979, 4/7/1982, 1/6/1984, 5/4/1984, 10/16/1984, 4/2/1986, 10/21/1986, 6/28/1989, 11/26/1990, 11/15/1996, 1/31/1997, 4/30/1997; R, 3 NMAC 2.1.18.28, 4/30/1997; 3 NMAC 2.1.18.31, 4/30/1997; 10/31/1997, 7/31/1998; R, 4/30/1999, 11/15/1999, 3.2.1.18 NMAC - Rn & A, 3 NMAC 2.1.18, 10/31/2000; A, 5/31/2002; A, 12/30/2003; A, 3/15/2010; A, 10/15/2010; A, 12/14/2012]

3.2.1.19 GROSS RECEIPTS; RECEIPTS OF AGENTS:

A. Nonemployee agents:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Reimbursed expenditures.

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

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

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

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

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

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

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

(8) *Example 5:* A enters into an agreement with its client B to provide temporary workers to B. The agreement provides that A retains the right to select and hire employees, to control when the employees are

paid, and the right to replace employees. A issues the payroll checks to employees with A as payor. The employees are unaware of any principal-agent relationship between A and B. All receipts A receives from B for payroll and A's commission or fee for its services to B are subject to gross receipts tax.

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

D. Reimbursement of expenditures made to volunteers:

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

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

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

[3/9/1972, 11/20/1972, 3/20/1974, 7/26/1976, 6/18/1979, 4/7/1982, 5/4/1984, 4/2/1986, 6/8/1987, 1/29/1988, 12/14/1988, 12/29/1989, 4/20/1990, 11/26/1990, 11/15/1996, 10/31/1997, 9/30/1998, 3.2.1.19 NMAC - Rn & A, 3 NMAC 2.1.19, 10/31/2000; A, 12/30/2003; A, 9/30/2010]

3.2.1.20 [RESERVED]

3.2.1.21 [RESERVED]

3.2.1.22 LEASING: Security agreement distinguished from a lease - tax consequences:

A. The gross receipts from leasing equipment to a lessee for the lessee's own use and not for subsequent leasing are subject to the gross receipts tax unless the presence of all or a majority of the following or similar indicia indicates that the transaction between lessor and lessee is in fact a financing transaction between a secured party and a buyer:

(1) There is a written agreement which provides that, upon compliance with the terms of the agreement, the buyer has the option to purchase the property without additional consideration or with nominal consideration; exercise of the option in itself is not sufficient to establish the transaction as an installment sale.

(2) The secured party pays for the equipment selected by the buyer from the stock of an independent vendor with funds allocable to a line of credit previously extended by the secured party to the buyer.

(3) The payments made by the buyer to the secured party are determined by the cost of the equipment selected by the buyer plus an interest charge added by the secured party.

(4) If the buyer is not a federal, state, local or Indian government, the equipment is carried as an asset on the books of the buyer and depreciated by the buyer, not the secured party, and if the buyer is a federal, state, local or Indian government, the tangible personal property is not carried as an asset on the books of the seller or depreciated by the seller.

(5) The secured party treats the total amount of payment as receivables on its books and treats the interest charged the buyer as "unearned income", transferring amounts to "income" as payments are received.

B. The presence of these or other such factors between the parties to an agreement denominated as a "lease agreement" will lead to the conclusion that the lessee under such an arrangement is the purchaser of the equipment, and that the lessor as the seller of the equipment is a secured party financing the sale and is using the "lease" as a form of security agreement. In such cases the rental receipts of the lessor will not be gross receipts from leasing and, unless all or a portion of the rental receipts are gross receipts from the installment sale of property, will not be subject to the gross receipts tax. However, the gross receipts from the sale of such equipment by a vendor in New Mexico who also may be the secured party in a two party transaction will be subject to the gross receipts tax unless an exemption or deduction applies.

C. The buyer, other than a federal, state, local or Indian government, in such an arrangement will be liable for payment of the compensating tax if the buyer introduces property into this state which was acquired

outside the state as a result of a transaction that would have been subject to the gross receipts tax had it occurred within the state and if the property is not subject to any exemption from payment of the compensating tax. [12/5/69, 3/9/72, 3/20/74, 7/26/76, 6/18/79, 4/7/82, 5/4/84, 4/2/86, 11/26/90, 11/15/1996; 3.2.1.22 NMAC - Rn, 3 NMAC 2.1.22, 4/30/2001]

3.2.1.23 [RESERVED]

3.2.1.24 [RESERVED]

3.2.1.25 MANUFACTURING - GENERAL EXAMPLES.

A. For purposes of Subsection H of Section 7-9-3 NMSA 1978, combining means assembling two or more pieces of tangible personal property to create another piece of personal property. Processing means to convert tangible personal property into a marketable form. A person is engaged in the business of manufacturing only if:

- (1) that person combines or processes components or materials;
- (2) the value of the tangible personal property which has been combined with other tangibles or which has been processed has increased as a direct result of the manufacturing process; and
- (3) the person manufacturing sells the same or similar type of manufactured products in the ordinary course of business.

B. The following examples illustrate the application of Subsection H of Section 7-9-3 NMSA 1978.

C. *Example 1:* Y sells parts and bodies for automobiles to X. X, who owns a used car lot and garage, places the parts and bodies in and on used cars from his lot. X then resells the renovated cars to the general public in the ordinary course of business. X is manufacturing because X is assembling and fabricating the cars to increase their value and is selling them in the ordinary course of business.

D. *Example 2:* Y, a machine tool firm, assembles three machine tools solely for its own use in producing components. Y does not sell any of these three machine tools. Assembling the machine tools is not "manufacturing" because Y is not assembling the tools to increase their value for sale in the ordinary course of business.

E. *Example 3:* S, who is in the business of building custom boats, purchases fiberglass and other supplies from F, a fiberglass manufacturer. S is furnished blueprints by customers and all the materials that are to be purchased are specified in those blueprints. After S obtains all the materials from F, S builds the boats to the specifications set out in the blueprints and then sells the boats to customers in the ordinary course of business. S is manufacturing boats. S may therefore give F a nontaxable transaction certificate.

F. *Example 4:* R is in the business of retreading and recapping pneumatic tires. If R retreads and recaps a tire carcass which R owns in order to increase its value for sale in the ordinary course of business and that tire carcass becomes a component part of a recapped tire, then R is "manufacturing".

G. *Example 5:* P is in the business of printing and silk screening. If P uses only printing supplies which P owns as an ingredient or component part of the end product which P sells in the ordinary course of business, then P is "manufacturing". If P uses printing supplies such as paper, ink, staples, glue, binding, chemicals, and dyes provided by the customer, then even though such supplies become ingredient or component parts of an end product which P sells in the ordinary course of business, P is "performing a service" and not "manufacturing".

H. *Example 6:* Y is a newspaper publishing company located outside New Mexico with no business location, salespersons or other presence in New Mexico. Z is a printing company inside New Mexico. Y arranges to have Z print the newspapers which it publishes. Z is required to provide newsprint (paper), ink, and all the materials required for the production of newspapers. Z is manufacturing printed material. Z, in the given fact situation, does not have receipts from either publishing a newspaper or selling a newspaper; therefore, the deductions provided by Section 7-9-63 NMSA 1978 and Section 7-9-64 NMSA 1978 do not apply. Z may deduct from its gross receipts its receipts from selling printed material to Y if the printed material is delivered to Y outside New Mexico.

I. *Example 7:* A is in the business of painting oil and water color pictures for sale in the ordinary course of business. A is a manufacturer of tangible personal property. A combines oils, color pigments, fixing agents, canvas, frames and glass in a painting as components and properly issues a nontaxable transaction certificate to the seller of the components. A cannot properly issue a nontaxable transaction certificate to the seller of brushes, palettes, knives, cleaners, erasers and easels since these items of property are not components for purposes of Subsection H of Section 7-9-3 NMSA 1978.

[12/5/69, 3/9/72, 3/20/74, 7/26/76, 6/18/79, 4/7/82, 5/4/84, 4/2/86, 11/26/90, 11/15/1996; 3.2.1.25 NMAC - Rn & A, 3 NMAC 2.1.25, 4/30/2001; A, 12/30/2003]

3.2.1.26 [RESERVED]

3.2.1.27 PROPERTY.

A. Bills, notes, etc.: Tangible personal property does not include bills, notes, checks, drafts, bills of exchange, certificates of deposit, letters of credit, or any negotiable instrument. Coins, stamps, and documents which have a historic value or market value in excess of their face value are tangible personal property.

B. Sale of license to use software is sale of property:

(1) The definition of property includes licenses. The sale of a license to use software constitutes a sale of property and comes within the definition of gross receipts.

(2) The transaction constitutes a sale of a license to use the software program when a computer software company sells an already-developed software program where:

(a) no extraordinary services are performed in order to furnish the program;

(b) the buyer pays a fixed amount for the license to use the program and use is generally limited to a specific computer; and

(c) the buyer may not resell to any other person a license to use the program and may not transfer the software package itself to any other person.

C. Granting the right to hunt is the sale of a license to use: For purposes of this section, granting by a landowner to another, a right to access and hunt within the boundaries of the landowner's real property is a license to use the real property. A license is a form of property as defined in Subsection J of Section 7-9-3 NMSA 1978 and the receipts from the sale of a license are subject to the gross receipts tax. The following are four types of hunting-related transactions, that when sold, may include the sale of a license:

(1) the sale of a hunting package that includes permission to hunt on private land;

(2) the sale of an authorization to hunt on private land granted by the New Mexico department of game and fish;

(3) the granting of permission or access to enter onto the private land to hunt; or

(4) the sale of a license/permit issued by the state to hunt on public land.

D. Receipts from selling a hunting package are subject to gross receipts tax to the extent that the individual components of the package are not deductible or exempt from the gross receipts tax pursuant to the Gross Receipts and Compensating Tax Act. A person that sells a hunting package that consists of taxable and nontaxable components must reasonably allocate the receipts based on the value of the individual components. For purposes of this section, a "hunting package" may include the following components:

(1) lodging;

(2) meals;

(3) delivery and transportation services;

(4) guide services;

(5) license to use the property;

(6) carcass of the hunted animal; or

(7) other services or tangible personal property included in the package.

E. Example: X owns a ranch in New Mexico and sells guided hunting packages. Included in the price for the hunt X guarantees that the hunter will retrieve an animal, lodging at the ranch, meals, experienced hunting guide, retrieval, caping, delivery to local meat processor and taxidermist. Not included in the price are expenses associated with alcohol consumption, meat processing, taxidermy services or gratuities for guides. X receipts from the sale of this type of hunting package includes receipts from providing services, the sale of tangible personal property (meals), the sale of the carcass (possibly livestock) and from granting a license to use the land within the ranch boundaries. X must determine a reasonable method of allocating their receipts between components that are subject to gross receipts tax and those that are exempt from gross receipts tax (sale of livestock).

[12/5/69, 3/9/72, 3/20/74, 7/26/76, 6/18/79, 4/7/82, 5/4/84, 4/2/86, 11/26/90, 9/17/91, 11/15/1996; 3.2.1.27 NMAC - Rn, 3 NMAC 2.1.27, 4/30/2001; A, 8/15/12]

3.2.1.28 [RESERVED]

3.2.1.29 SERVICES:

A. When a transaction is predominantly a service:

(1) A transaction involving both the transfer of tangible personal property to the buyer and the performance of a service other than a construction or research and development service is predominantly a service when:

(a) the seller is not regularly engaged in selling or leasing the same or similar tangible personal property other than in conjunction with the sale of a service; and

(b) at least one of the following conditions applies:

(i) the transaction is primarily the performance of work and the transfer of any property through the transaction is incidental to the performance of the required work; or

(ii) the transaction requires the performance of work which is substantially greater in value than the value of the tangible personal property involved in the transaction; or

(iii) the performer of the service has the power to influence significantly the degree of involvement of the tangible personal property in the transaction.

(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 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 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 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 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.

(6) Construction is defined to be a service and that service is defined to include all tangible personal property which becomes an ingredient or component part of the construction project. Under the provisions of Section 7-9-51 NMSA 1978, however, a person engaging in the construction business may execute a nontaxable transaction certificate for the purchase of tangible personal property which will become an ingredient or component part of a construction project.

(7) The product of a research and development service may be tangible property, such as prototypes, facsimiles, reports or other similar property. Even though the product of the service may itself be tangible, receipts from the transaction are receipts from the sale of a service and not from the sale of tangible personal property. Accordingly the performer of research and development services may not execute a nontaxable transaction certificate when purchasing tangible personal property used to assemble or create such product of the service, except as provided by Section 3.2.205.11 NMAC.

(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 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 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 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.

(11) *Example B3:* F, an accountant, performs bookkeeping services for several clients. The accountant transmits various forms and papers to the clients in the course of providing this service. G, another accountant, runs short of certain forms and purchases some from F to tide G over until G's regular suppliers are open for business. F contends that, because F has sold to G tangible personal property by itself of the type sold to F's clients, two separate transactions occur with F's clients. F is not regularly engaged in the business of selling these forms. F's transactions with F's clients are not separable into distinct service and tangible components. F's transactions are predominantly the performance of a service.

(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.

(13) See Paragraph (8) of Subsection A of Section 3.2.205.10 NMAC for transactions in which buyer regularly sells the tangible personal property by itself.

B. Transactions in which neither the performance of a service or the sale of tangible personal property predominates:

(1) In some cases, a transaction involving the performance of a service other than a construction or research and development service and the sale of tangible personal property may not be predominately either the performance of a service or the sale of tangible personal property, as for example where receipts attributable to each constitutes more than forty percent of the total receipts from the transaction. In such cases, if the market value or costs of the tangible personal property or services is readily ascertainable and if the taxpayer's records adequately reflect the portion of receipts derived from the sale of tangible personal property and the portion derived from the performance of services, the receipts may be apportioned accordingly. The burden rests on the taxpayer to provide that information, and to justify that the portion of receipts attributable to the sale of the tangible personal property or to the performance of services accurately reflects the relative market value or costs, including reasonably apportioned overhead, of the tangible personal property or services. The clearest way of carrying that burden is to specify separately on the invoice the charges for the property and the charges for the services, and to retain sufficient records to allow a determination that the relative value of either the property or the services is not overstated.

(2) *Example 1:* Taxpayer X enters into a contract with a governmental entity to maintain the entity's computer equipment. The contract obliges X to check and maintain the equipment, providing replacement parts such as toner cartridges on a regular basis, and to repair the equipment, including the replacement of broken parts. X bills the entity separately stating the charges for its maintenance and repair services and for the replacement parts. Receipts from the charges for replacement parts will be receipts from the sale of tangible personal property to a governmental entity and are deductible pursuant to Section 7-9-54 NMSA 1978. Receipts from charges for the services are not deductible.

(3) Subsection E of Section 3.2.1.29 NMAC does not apply to construction or to transactions in which prototypes or other tangible products of a service are transferred.
[9/29/1967, 12/5/1969, 3/9/1972, 3/20/1974, 7/26/1976, 6/18/1979, 4/7/1982, 5/4/1984, 4/2/1986, 11/26/1990, 11/15/1996, 4/30/1999; 3.2.1.29 NMAC - Rn & A, 3 NMAC 2.1.29, 4/30/2001]

3.2.1.30 USE AND USING: The definition of “use” and “using” pursuant to Subsection N of Section 7-9-3 NMSA 1978 includes three components: use, consumption and storage.

A. Use: The first component, “use”, means to employ or utilize property or a service for a particular purpose. Use does not include mere ownership or possession of property. Use does not include the mere treatment, processing or servicing of tangible property to make the property fit for utilization when the ultimate use of the property is outside New Mexico. Use does not include the transfer to the customer of tangible personal property in the course of the treatment, processing or servicing or the return of the property to the owner at the conclusion of the treatment, processing or servicing.

(1) *Example 1:* The uses of a chair are many and varied. Its designed or intended use is being sat on by human beings. A chair, however, may also be “used” to wedge a door shut, as a step-ladder to reach something, as a receptacle to hold objects, as a display item, as a support to prop up a table or shelf and many other purposes not planned by its designer or maker. In contrast, a chair is not “used” by being assembled, polished, painted, upholstered or recaned.

(2) *Example 2:* B enters into a contract with C, a firm in New Mexico. Under the contract, B sends a gaseous compound to C for separation. C returns the separated materials to B or delivers them to D for further processing. B has not used the compound or the separated materials in New Mexico.

B. Storage:

(1) The term “using” includes storage in New Mexico except where the storage is for subsequent sale of the property in the ordinary course of the seller's business or for use solely outside New Mexico.

(2) *Example 1:* D, a resident of Utah, buys pipe in Texas to be used solely in Utah. The pipe is shipped into New Mexico, unloaded, and stored for three days. It is then reloaded and shipped to Utah. There is no use of the pipe in New Mexico within the meaning of Subsection N of Section 7-9-3 NMSA 1978. The transaction which occurred was merely storage for use solely outside New Mexico.

(3) *Example 2:* X Construction Company purchases a bulldozer in Illinois intending to use it in its construction business. The bulldozer is then delivered to X in New Mexico. X does not have any immediate use for the bulldozer so it is stored in the back lot of the construction company with other equipment. Two months later X changes plans and sells the bulldozer to Y Construction Company who needs it for a job. The bulldozer remained in storage from the day X received it until the day it was sold. Since the storage of the tractor was not for subsequent sale in the ordinary course of X's business, the storage of the tractor is a “use” within the meaning of Subsection N of Section 7-9-3 NMSA 1978. Therefore, X Construction Company will be subject to the compensating tax on the value of the tractor because it has used the property in New Mexico.

[9/29/1967, 12/5/1969, 3/9/1972, 3/20/1974, 7/26/1976, 6/18/1979, 4/7/1982, 5/4/1984, 4/2/1986, 11/26/1990, 11/15/1996; 3.2.1.30 NMAC - Rn & A, 3 NMAC 2.1.30, 4/30/2001; A, 12/30/2003; A, 2/29/2012]

HISTORY OF 3.2.1 NMAC:

Pre-NMAC History:

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

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

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

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

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

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

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

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

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

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

History of Repealed Material: [RESERVED]

NMAC History:

3 NMAC 2.1, Gross Receipts Taxes - General Provisions, filed 11/4/1996.

3.2.1 NMAC, Gross Receipts Taxes - General Provisions, filed 4/17/2001.