

TITLE 3: TAXATION
CHAPTER 2: GROSS RECEIPTS TAXES
PART 105: EXEMPTION - GROSS RECEIPTS TAX - WAGES

3.2.105.1 ISSUING AGENCY: Taxation and Revenue Department, Joseph M. Montoya Building, 1100 South St. Francis Drive, P.O. Box 630, Santa Fe NM 87504-0630
[11/15/96; 3.2.105.1 NMAC - Rn, 3 NMAC 2.17.1, 5/15/01]

3.2.105.2 SCOPE: This part applies to each person engaging in business in New Mexico.
[11/15/96; 3.2.105.2 NMAC - Rn, 3 NMAC 2.17.2, 5/15/01]

3.2.105.3 STATUTORY AUTHORITY: Section 9-11-6.2 NMSA 1978.
[11/15/96; 3.2.105.3 NMAC - Rn, 3 NMAC 2.17.3, 5/15/01]

3.2.105.4 DURATION: Permanent.
[11/15/96; 3.2.105.4 NMAC - Rn, 3 NMAC 2.17.4, 5/15/01]

3.2.105.5 EFFECTIVE DATE: 11/15/96, unless a later date is cited at the end of a section, in which case the later date is the effective date.
[11/15/96; 3.2.105.5 NMAC - Rn, 3 NMAC 2.17.5 & A, 5/15/01]

3.2.105.6 OBJECTIVE: The objective of this part is to interpret, exemplify, implement and enforce the provisions of the Gross Receipts and Compensating Tax Act.
[11/15/96; 3.2.105.6 NMAC - Rn, 3 NMAC 2.17.6, 5/15/01]

3.2.105.7 DEFINITIONS - EMPLOYEE:

A. In determining whether a person is an employee, the department will consider the following indicia:

- (1) is the person paid a wage or salary;
- (2) is the "employer" required to withhold income tax from the person's wage or salary;
- (3) is F.I.C.A. tax required to be paid by the "employer";
- (4) is the person covered by workmen's compensation insurance;
- (5) is the "employer" required to make unemployment insurance contributions on behalf of the person;
- (6) does the person's "employer" consider the person to be an employee;
- (7) does the person's "employer" have a right to exercise control over the means of accomplishing a result or only over the result (control does not mean "mere suggestion").

B. If all of the indicia mentioned Subsection A of Section 3.2.105.7 NMAC are present, the department will presume that the person is an employee. However, a person may be an employee even if one or more of the indicia are not present.

C. The following examples illustrate the provisions of Section 3.2.105.7 NMAC.

(1) Example 1: B is a carpenter who works for Y and is paid on an hourly basis. Y withholds income tax from the money paid to B. Y treats B as an employee and controls the details of B's work. B is covered by Y's workmen's compensation insurance. B is an employee working for a wage or salary. B does not have to report the wages as gross receipts.

(2) Example 2: A sells bibles door to door for the X Bible Company. X pays A a commission, does not control the details of A's work, is not required by applicable law to withhold income tax from A's commission, and is not required to make unemployment insurance contributions on A. A is not an employee. A is an independent contractor and is subject to the gross receipts tax on A's commissions.

(3) Example 3: Q is a used car salesman for the R Used Car Center. Q receives a 3% commission on each car Q sells. R retains authority to supervise all sales Q makes and approves all sales before they can become final. Every two weeks R issues Q a check based upon the commissions Q has earned. R withholds federal and state income taxes and F.I.C.A. taxes. Q is an employee of R.

[9/29/67, 12/5/69, 3/9/72, 11/20/72, 3/20/74, 7/26/76, 6/18/79, 4/7/82, 5/4/84, 4/2/86, 11/26/90, 11/15/96; 3.2.105.7 NMAC - Rn, 3 NMAC 2.17.7 & A, 5/15/01]

3.2.105.8 BLIND OPERATORS OF VENDING STANDS:

A. Except as provided in Subsection B of this section, receipts of blind operators of vending stands established in business pursuant to the Vending Stands for Blind in Federal Buildings Act, 20 U.S.C. Sections 107-107(f), or Sections 22-14-24 to 22-14-29 NMSA 1978 are subject to the gross receipts tax. Such operators are not employees within the indicia outlined in 3.2.105.7 NMAC.

B. The receipts of a blind "disabled street vendor" are exempt under Section 7-9-41.3 NMSA 1978. [12/5/69, 3/9/72, 11/20/72, 3/20/74, 7/26/76, 6/18/79, 4/7/82, 5/4/84, 4/2/86, 11/26/90, 11/15/96; 3.2.105.8 NMAC - Rn, 3 NMAC 2.17.8 & A, 5/15/01; A, 12/30/10]

3.2.105.9 SCHOOL BUS OPERATORS: The receipts of a person who furnishes a bus and operates that bus pursuant to a contract with a New Mexico school district are receipts from performing a service and are subject to the gross receipts tax; however, if that person is an employee of the school district, that portion of the receipts which is treated by the school district as wages or salary is not subject to the gross receipts tax. [3/9/72, 11/20/72, 3/20/74, 7/26/76, 6/18/79, 4/7/82, 5/4/84, 4/2/86, 11/26/90, 11/15/96; 3.2.105.9 NMAC - Rn, 3 NMAC 2.17.9, 5/15/01]

3.2.105.10 COMMISSIONED SALESPERSONS: A salesperson who sells for a company on a commission basis is not an employee of the company where the company exercises no direct control over the details of performance of the salesperson's duties beyond general statements about the scope and nature of the salesperson's obligations under the contract between the salesperson and the company. In addition, where commissions paid to a salesperson are not subject to withholding taxes or social security taxes, the salesperson is not considered an employee of the company. Therefore, receipts from commissions paid to such salesperson for selling property in New Mexico are subject to the gross receipts tax. [6/18/79, 4/7/82, 5/4/84, 4/2/86, 11/26/90, 11/15/96; 3.2.105.10 NMAC - Rn, 3 NMAC 2.17.10, 5/15/01]

3.2.105.11 EMPLOYER REIMBURSEMENT OF EXPENDITURES TO EMPLOYEES: An employee's receipts of reimbursements from the employer for expenses incurred by that employee in the performance of the duties and responsibilities assigned to the employee are exempt from gross receipts tax as remuneration paid to the employee. The provisions of Section 3.2.105.11 NMAC shall not be construed to allow an exemption under the provisions of Section 7-9-17 NMSA 1978 of any receipts of the employer which are represented to be charges to the customer for employee wages, salaries, commissions, reimbursement of employee expenditures or any other form of remuneration paid or to be paid to the employee. [12/29/89, 11/26/90, 11/15/96; 3.2.105.11 NMAC - Rn, 3 NMAC 2.17.11 & A, 5/15/01]

HISTORY OF 3.2.105 NMAC:

Pre-NMAC History:

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

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

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

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

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

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 4/7/82.

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 5/4/84.

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 4/2/86.

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 11/26/90.

History of Repealed Material: [RESERVED]

NMAC History:

3 NMAC 2.17, Exemption - Gross Receipts Tax - Wages, filed 11/4/96.

3.2.105 NMAC Exemption - Gross Receipts Tax - Wages, filed 4/30/2001.