

TITLE 3: TAXATION
CHAPTER 2: GROSS RECEIPTS TAXES
PART 116: EXEMPTION - GROSS RECEIPTS TAX - OCCASIONAL SALE OF PROPERTY OR SERVICES

3.2.116.1 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; 3.2.116.1 NMAC - Rn, 3 NMAC 2.28.1, 5/15/01]

3.2.116.2 SCOPE: This part applies to each person occasionally selling or leasing property or performing service but who is not regularly engaged in business of selling or leasing that type of property or performing that type of service.
[11/15/96; 3.2.116.2 NMAC - Rn, 3 NMAC 2.28.2, 5/15/01]

3.2.116.3 STATUTORY AUTHORITY: Section 9-11-6.2 NMSA 1978.
[11/15/96; 3.2.116.3 NMAC - Rn, 3 NMAC 2.28.3, 5/15/01]

3.2.116.4 DURATION: Permanent.
[11/15/96; 3.2.116.4 NMAC - Rn, 3 NMAC 2.28.4, 5/15/01]

3.2.116.5 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; 3.2.116.5 NMAC - Rn, 3 NMAC 2.28.5 & A, 5/15/01]

3.2.116.6 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; 3.2.116.6 NMAC - Rn, 3 NMAC 2.28.6, 5/15/01]

3.2.116.7 DEFINITIONS: [Reserved.]
[11/15/96; 3.2.116.7 NMAC - Rn, 3 NMAC 2.28.7, 5/15/01]

3.2.116.8 CRITERIA USED IN DETERMINING ISOLATED OR OCCASIONAL SALES: The department will use the following criteria, but not exclusively, in determining whether or not a transaction involves only an "isolated or occasional" sale or lease:

- A. the nature of the service or property;
- B. the nature of the market for the service or property sold or leased;
- C. the number of sales or leases made within a given period;
- D. the regularity of the sales;
- E. the duration of the sales or leasing activity;
- F. any promotional activity such as advertising or telephone yellow page listings; and
- G. any holding out as being in business by the seller or lessor.

[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; 3.2.116.8 NMAC - Rn, 3 NMAC 2.28.8, 5/15/01]

3.2.116.9 LICENSE TO DO BUSINESS OR HOLDING OUT TO DO BUSINESS

A. Any person who holds a license to sell or lease property or to carry on services or who regularly advertises property or services for lease or sale is holding out as engaged in the business of selling or leasing the same or similar property or services.

B. The following examples illustrate the application of Section 7-9-28 NMSA 1978.

(1) Example 1: D is a doctor who pumps water for private use from a well. D purchases a new pump for the well and sells the old pump to B. D does not have to pay the gross receipts tax on the sale to B. D is not in the business of selling pumps. This is an isolated or occasional transaction by one who is not engaged in the business of selling pumps.

(2) Example 2: The T club is a nonprofit association which is not exempted from the federal income tax pursuant to Section 501(c)(3) of the United States Internal Revenue Code of 1986. In order to raise money for its

other activities, it sponsors a matched roping contest once each year. The T club is not organized for the purpose of conducting roping contests. The very nature of the roping contest requires that it be conducted for only a short time each year, but the roping contest is not isolated or occasional within the meaning of the statute, and the receipts of the T club from the roping contest are subject to the gross receipts tax.

(3) Example 3: G, a homeowner, holds a garage sale every Wednesday for neighbors as consignee of the goods to be sold and claims that the receipts are not subject to gross receipts tax. G is regularly engaged in business and the sales are not isolated or occasional. Therefore G is subject to gross receipt tax.

(4) Example 4: L, an attorney, is a member of the bar of New Mexico. L maintains an office in Albuquerque, but L's main source of income is derived from a salaried position as house counsel for a large industrial firm. L takes one or two criminal cases a year to maintain abilities as a trial lawyer. While L is not regularly engaged in business as a criminal lawyer, L is holding out as licensed to practice law in New Mexico and, therefore, L's receipts from the cases taken are taxable gross receipts.

(5) Example 5: K purchases vacant land, builds a home, lives in it for a few months, sells it, and then repeats this process three months later. K's activity is not an isolated or occasional transaction. K is regularly engaged in the business of selling homes because of the frequency of the sales. Therefore, K's receipts from the sale of the improvements are subject to gross receipts tax.

(6) Example 6: Z ski club is a nonprofit organization which is sponsoring a ski swap and sale. X, a disenchanted skier, has decided to sell all of X's ski equipment at the club's ski swap and sale. The sale is an isolated or occasional sale, because X is neither regularly engaged nor holding out as engaged in the business of selling or leasing skis, ski equipment, or similar property. Therefore, X's receipts from the sale are exempt from the gross receipts tax. The receipts of the ski club are not subject to the gross receipts tax, because the ski club is merely providing the opportunity for its members to sell or trade their ski equipment. The club retains no receipts from this activity.

(7) Example 7: T is an auctioneer who sells property on a commission or fee basis. X, an individual not engaged in business, takes an old lawn mower to T in order for T to auction it off at the weekly auction. The receipts X derived from such sale are exempted from the gross receipts tax because the sale is isolated and occasional and X is neither regularly engaged nor holding out as engaged in the business of selling or leasing the same or similar property.

[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; 3.2.116.9 NMAC - Rn, 3 NMAC 2.28.9 & A, 5/15/01]

3.2.116.10 PERSONS HAVING THREE OR FEWER RENTAL UNITS: Any person who rents or leases three or fewer rental units of real property is not regularly engaged in the business of leasing real property for the purposes of Sections 7-9-28 and 7-9-53 NMSA 1978. Such a person need not register with the taxation and revenue department for gross receipts tax purposes nor report the receipts if there are no other receipts, but the person may be required to register to report another tax.

[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; 3.2.116.10 NMAC - Rn, 3 NMAC 2.28.10 & A, 5/15/01]

3.2.116.11 SALE OR LEASING THE SAME OR SIMILAR PROPERTY:

A. Receipts from an isolated or occasional sale are exempt pursuant to Section 7-9-28 NMSA 1978 only when the seller of the property is not engaged in the business of selling or leasing the same or similar property.

B. Example: T is regularly engaged in the business of leasing construction and paving equipment to third parties. T contemplates terminating its leasing business and plans on having all equipment sold at public auction by a third party. Since T is regularly engaged in the business of leasing property which is the same as or similar to the property to be sold, the receipts from the sale are not exempt pursuant to Section 7-9-28 NMSA 1978 as isolated or occasional.

[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; 3.2.116.11 NMAC - Rn, 3 NMAC 2.28.11 & A, 5/15/01]

3.2.116.12 EXECUTORS' AND ADMINISTRATORS' FEES:

A. The receipts of any person appointed as administrator or executor of an estate are subject to the gross receipts tax and are not exempt from the gross receipts tax pursuant to Section 7-9-28 NMSA 1978. The duration of the person's activity in performing the service, usually a minimum of eight (8) months, indicates that the person is regularly engaged in the business of selling services as an executor or administrator.

B. Where an administrator or executor effectively waives the right to receive statutory fees or commissions within a reasonable time after commencing to serve as the executor and all other actions by that person with respect to the estate are consistent with the intention to render a gratuitous service, the administrator or executor is not subject to the gross receipts tax on the value of the services rendered.

C. Example: E, an individual appointed executor of an estate by a court order, performs the duties of executor for a period of approximately eight (8) months. E is not otherwise engaged in the business of performing services as an executor or fiduciary and is not an attorney or certified public accountant or anyone who customarily receives fees for the performance of professional services. E is not an employee of a bank, trust department, or financial institution. Receipts of E are subject to the gross receipts tax because the duration of E's activity in performing the service indicates that E is regularly in the business of selling services as an executor.

[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; 3.2.116.12 NMAC - Rn, 3 NMAC 2.28.12 & A, 5/15/01]

3.2.116.13 TRUSTEE FEES:

A. The receipts of a person appointed as trustee, who is not an employee of the trust, court or other appointing authority, are not exempt from gross receipts tax under the provisions of Section 7-9-28 NMSA 1978 if the appointment exceeds a term of more than 30 days.

B. Example: Q, an individual appointed trustee by a court order, performs the duties of a trustee for a period of approximately eighteen (18) months at a specified monthly rate of compensation. Q is not otherwise engaged in the business of performing as a fiduciary, is not an attorney or a certified public accountant or anyone who customarily receives fees for the performance of personal services. Q is not an employee of a bank, trust department or other financial institution. Receipts of Q are subject to the gross receipts tax because the duration of Q's activity in performing the service indicates that Q is regularly engaged in the business of selling services as trustee.

[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; 3.2.116.13 NMAC - Rn, 3 NMAC 2.28.13 & A, 5/15/01]

3.2.116.14 SAFE HARBOR LEASE - SELLER/LESSEE: A seller/lessee who enters into a qualified "safe harbor lease" transaction as defined in Section 168 of the Internal Revenue Code and who is not in the business of selling or leasing the same type of property being sold under the "safe harbor lease" will not be subject to the gross receipts tax on the sale and subsequent receipts derived from such transaction since those receipts are exempt under Section 7-9-28 NMSA 1978. A seller/lessee may not issue a nontaxable transaction certificate to purchase the property from a vendor.

[2/23/83, 5/4/84, 4/2/86, 11/26/90, 11/15/96; 3.2.116.14 NMAC - Rn, 3 NMAC 2.28.14 & A, 5/15/01]

HISTORY OF 3.2.116 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 2.28, Exemption - Gross Receipts Tax - Occasional Sale of Property or Services, filed 11/4/96.

3.2.116 NMAC, Exemption - Gross Receipts Tax - Occasional Sale of Property or Services, filed 4/30/2001.