

TITLE 3: TAXATION
CHAPTER 2: GROSS RECEIPTS TAXES
PART 205: DEDUCTION - GROSS RECEIPTS TAX - SALE OF TANGIBLE PERSONAL PROPERTY FOR RESALE

3.2.205.1 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, 3.2.205.1 NMAC - Rn, 3 NMAC 2.47.1, 5/31/01]

3.2.205.2 SCOPE: This part applies to all persons engaging in business in New Mexico.
[11/15/96, 3.2.205.2 NMAC - Rn, 3 NMAC 2.47.2, 5/31/01]

3.2.205.3 STATUTORY AUTHORITY: Section 9-11-6.2 NMSA 1978.
[11/15/96, 3.2.205.3 NMAC - Rn, 3 NMAC 2.47.3, 5/31/01]

3.2.205.4 DURATION: Permanent.
[11/15/96, 3.2.205.4 NMAC - Rn, 3 NMAC 2.47.4, 5/31/01]

3.2.205.5 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, 3.2.205.5 NMAC - Rn, 3 NMAC 2.47.5, 5/31/01]

3.2.205.6 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, 3.2.205.6 NMAC - Rn, 3 NMAC 2.47.6, 5/31/01]

3.2.205.7 DEFINITIONS: [Reserved.]
[11/15/96; 3.2.205.7 NMAC - Rn, 3 NMAC 2.47.7, 5/31/01]

3.2.205.8 DELIVERY OF THE NONTAXABLE TRANSACTION CERTIFICATE:

A. In order for a taxpayer to qualify for the deduction provided in Section 7-9-47 NMSA 1978 the taxpayer must meet the requirements of Section 7-9-47 NMSA 1978, which include being the recipient of a nontaxable transaction certificate (nttc) of the type specified and furnished by the department to be delivered by a buyer who resells tangible personal property in the ordinary course of business. Other evidence in lieu of an appropriate nttc may be acceptable as provided in Section 7-9-43 NMSA 1978 and 3.2.201.10 NMAC.

B. Example: X, a retail grocer, buys \$150 worth of brooms from Y. X, however, will not give Y a nttc. The sale from Y to X is a taxable transaction since X did not give Y a nttc. If X had presented the certificate, Y could have deducted the proceeds of the sale from Y's gross receipts.

[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; 3.2.205.8 NMAC – Rn, 3 NMAC 2.47.8 & A, 5/31/01; A, 8/15/11]

3.2.205.9 SALE ON INSTALLED BASIS:

A. Receipts from selling tangible personal property to a person who resells that property on an installed basis are receipts derived from the sale of tangible personal property for resale even though material and services are not separately stated when the property is resold on an installed basis.

B. Example: C is in the carpeting and drapery business. When M came to see C about carpeting a bedroom, C quoted a price of \$9.95 per square yard installed. The sale was completed and the carpet installed. Even though C did not separately state materials and services in the billing to M, C was correct in delivering a nontaxable transaction certificate to C's supplier because the sale from the supplier to C was in fact a sale of tangible personal property for resale.

[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; 3.2.205.9 NMAC - Rn, 3 NMAC 2.47.9, 5/31/01]

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

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

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

(2) [Reserved.]

(3) [Reserved.]

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

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

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

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

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

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

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

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

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

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

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

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

[9/29/67, 12/5/69, 3/9/72, 11/20/72, 3/20/74, 7/26/76, 9/7/78, 6/18/79, 4/7/82, 5/4/84, 4/2/86, 11/26/90, 11/15/96, 10/31/97, 4/30/99; 3.2.205.10 NMAC - Rn, 3 NMAC 2.47.10 & A, 5/31/01]

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

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

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

[1/14/86, 4/2/86, 11/26/90, 11/15/96; 3.2.205.11 NMAC - Rn, 3 NMAC 2.47.11 & A, 5/31/01]

3.2.205.12 CONSIGNMENT SALES: Receipts of a consignor from the sale of tangible personal property handled on consignment, when the sale is made by the consignee, may be deducted from gross receipts if the consignee delivers either a nontaxable transaction certificate to the consignor pursuant to Section 7-9-47 NMSA 1978 or other proof acceptable to the department that the consignor's tangible personal property was sold by consignment.

[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, 3.2.205.12 NMAC - Rn, 3 NMAC 2.47.12 & A, 10/31/2000]

3.2.205.13 PACKAGING AND RELATED MATERIALS:

A. Containers, wrapping paper and other packaging products.

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

(2) Returnable containers. Sales of returnable containers to persons who use the containers for the delivery of their goods are not sales for resale. The purchase of the returnable containers by the person who packages the goods for sale is a purchase for use. Therefore, the seller of the containers must pay the gross receipts

tax on the receipts from the sale. Normally included in the category of returnable containers are glass milk bottles, some gasoline and oil cans, water bottles and milk and soft drink cases.

(3) Wrapping materials. The sale of bags, wrapping paper, twine and similar articles to persons who use the materials to package merchandise which has been sold is a sale for resale. The receipts from these sales may be deducted by a seller who has received an nttc from the buyer. The buyer of the bags, wrapping paper and twine may give an nttc for their purchase.

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

(5) Crowns, bottles, crates, cartons.

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

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

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

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

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

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

B. Sales to a burlap bag processor.

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

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

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

D. Steel strapping.

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

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

E. Sale of baling wire to a farmer.

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

(2) A seller may not deduct the receipts from selling baling wire to a "custom worker" who bales hay for farmers for a consideration, since the wire is used by the worker in the course of performing his services. [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, 4/30/99, 3.2.205.13 NMAC - Rn, 3 NMAC 2.47.13 & A, 10/31/2000]

3.2.205.14 MEDICINES AND MEDICAL SUPPLIES

A. Dental supplies:

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

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

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

C. Sale of radioisotopes:

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

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

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

E. Sale of medicine to veterinarians:

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

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

F. Vitamins and drugs sold to sale barn: Receipts from selling vitamins and drugs to a person engaged in the business of conducting a sale barn who administers vitamins and drugs to livestock consigned to the barn and who bills the consignor of the livestock for this property without charge for the service of administering the property are receipts from selling tangible personal property for resale. [12/5/69, 3/9/72, 11/20/72, 3/20/74, 7/26/76, 6/18/79, 4/7/82, 5/17/83, 5/4/84, 4/2/86, 11/26/90, 11/15/96; 3.2.205.14 NMAC - Rn, 3 NMAC 2.47.14 & A, 5/31/01]

3.2.205.15 FOOD AND RELATED SUPPLIES

A. Sale of food: Receipts from the sale of food to a person engaged in the business of operating a nursing home, day care facility, kindergarten or a facility for retired elderly persons may be deducted from gross

receipts if the person delivers a nontaxable transaction certificate to the seller. The person engaged in the business of operating a nursing home, day care facility, kindergarten or a facility for retired elderly persons must resell the food either by itself or in combination with other tangible personal property in the ordinary course of business or be subject to the compensating tax for the value of the food.

B. Sale of food to certain nonprofit organizations: Receipts from selling food and beverages to a nonprofit organization which furnishes meals to persons who pay a boarding fee may be deducted from gross receipts if the buyer delivers a nontaxable transaction certificate to the seller pursuant to Section 7-9-47 NMSA 1978.

C. Sale of animal food:

(1) Receipts from selling animal food, animal accessories and similar items of tangible personal property to a veterinarian who is engaged in the business of selling such items may be deducted from gross receipts if the buyer delivers a nontaxable transaction certificate (nttc) to the seller pursuant to Section 7-9-47 NMSA 1978.

(2) If the veterinarian delivering the nttc does not resell the items mentioned in Paragraph (1) of Subsection C of Section 3.2.205.15 NMAC in the ordinary course of business, the compensating tax is due.

D. Restaurants - nonreusable items - supplies: Receipts from the sale of straws, toothpicks, coffee stirrers, coffee coasters, steak markers, paper doilies, paper mats, paper napkins, menus which normally are retained by the customer, nonreturnable food containers, including disposable plastic or paper cups, plates, spoons, forks and knives as well as receipts from the sale of materials used to wrap food, such as aluminum foil, plastic wrap and wax paper may be deducted from gross receipts if the sale is made to a person, e.g., a restaurant, who delivers a nontaxable transaction certificate (nttc) to the seller. The buyer delivering the nttc must resell the item purchased either by itself or in combination with other tangible personal property in the ordinary course of business or become liable for compensating tax on the value of the item purchased. Receipts from selling garbage can liners, paper hats, aprons and uniforms used by restaurant personnel, guest checks, candles, fuel for candle burners, sterno, janitorial supplies, toilet tissue and paper towels may not be deducted from gross receipts. Such items are not resold by the buyer.

[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; 3.2.205.15 NMAC - Rn, 3 NMAC 2.47.15 & A, 5/31/01]

3.2.205.16 VENDING MACHINES:

A. Receipts from selling tangible personal property to the owner or lessee of vending machines, which property will be sold through the vending machines, may be deducted from gross receipts if the owner or lessee delivers a nontaxable transaction certificate (nttc) to the seller pursuant to Section 7-9-47 NMSA 1978.

B. If the owner or lessee delivering the nttc does not resell the tangible personal property in the ordinary course of business, the compensating tax is due.

[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; 3.2.205.16 NMAC - Rn & A, 3 NMAC 2.47.16, 5/31/01]

3.2.205.17 SALE TO AN ELECTRIC COOPERATIVE ASSOCIATION:

A. Receipts from selling tangible personal property to an electric cooperative association which later sells the property to a person engaged in the construction business for incorporation into the construction project are receipts from selling tangible personal property for resale and may be deducted from gross receipts if the electric cooperative association delivers a nontaxable transaction certificate (nttc) to the seller pursuant to Section 7-9-47 NMSA 1978.

B. If the electric co-operative association delivering the nttc does not resell the tangible personal property in the ordinary course of business, the compensating tax is due.

[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; 3.2.205.17 NMAC - Rn, 3 NMAC 2.47.17 & A, 5/31/01]

3.2.205.18 PARTS AND SUPPLIES SOLD UNDER SERVICE CONTRACTS

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

consideration to be received from the promisor who makes the payment to the repair facility to discharge the promisor's obligation to the purchaser to pay for the parts

B. Supplies billed by automotive dealer on repair orders subject to compensating tax: New Mexico automotive dealers who issue Type 2 (resale of tangibles) nontaxable transaction certificates to suppliers of shop supplies purchased for use in the dealers' service departments and body shops are liable for compensating tax on those supplies. Dealers are using and are not reselling (i.e., transferring) the shop supplies as required by Section 7-9-47 NMSA 1978 and are, therefore, liable for the compensating tax imposed by Paragraph (3) of Subsection A of Section 7-9-7 NMSA 1978. Separately stating a charge on the customer's billing for shop supplies used by a dealer does not constitute the resale of such supplies.
[6/28/89, 11/26/90, 11/15/96; 3.2.205.18 NMAC - Rn, 3 NMAC 2.47.18 & A, 5/31/01]

3.2.205.19 COMPUTER SOFTWARE

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

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

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

B. Packaged software - sale for resale:

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

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

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

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

C. Packaged software - sale for use:

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

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

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

(2) If the buyer is a qualified contractor of the federal government and uses packaged software to fulfill an appropriate research and development contract with a signatory federal agency, the buyer may execute, and

the seller may accept in good faith, a Type 15 nttc with respect to the packaged software. Example: X, a research and development company, enters into a qualifying research and development contract with a signatory agency of the United States. The contract is to develop a program to test certain devices which the United States is considering purchasing. To create the testing program X buys several pieces of packaged software and develops new programming to interconnect the packaged software into a coherent testing program. X may execute, and the vendors may accept in good faith, Type 15 nttcs for the purchase of the packaged software.

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

[4/30/97; 3.2.205.19 NMAC - Rn, 3 NMAC 2.47.19 & A, 5/31/01]

3.2.205.20 USE OF TANGIBLE PERSONAL PROPERTY BY HOTELS, MOTELS AND SIMILAR FACILITIES:

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

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

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

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

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

[10/31/97; 3.2.205.20 NMAC - Rn, 3 NMAC 2.47.20 & A, 10/31/2000]

3.2.205.21 UTILITY SALES BY LANDLORD: When the lessor of real property conveys water, natural gas or electricity to a lessee as a condition of the lease of the real property, the lessor is using the water, natural gas or electricity to fulfill the conditions of the lease whether or not a separate charge is made to the lessee. The lessor is not reselling the water, natural gas or electricity in the ordinary course of business and may not execute a nontaxable transaction certificate under Section 7-9-47 NMSA 1978 for the purchase of the water, natural gas or electricity. See Subsection E of Section 3.2.211.8 NMAC.

[7/30/99; 3.2.205.21 NMAC - Rn, 3 NMAC 2.47.21 & A, 5/31/01]

HISTORY OF 3.2.205 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 2.47, Deduction - Gross Receipts Tax - Sale of Tangible Personal Property for Resale, filed 11/4/96.

3.2.205 NMAC, Deduction - Gross Receipts Tax - Sale of Tangible Personal Property for Resale, filed 5/17/2001.