

TITLE 3: TAXATION
CHAPTER 3: PERSONAL INCOME TAXES
PART 2: WITHHOLDING WAGES AND UNEARNED INCOME

3.3.2.1 ISSUING AGENCY: Taxation and Revenue Department, Joseph M. Montoya Building, 1100 South St. Francis Drive, P.O. Box 630, Santa Fe NM 87504-0630
[1/15/97; 3.3.2.1 NMAC - Rn, 3 NMAC 3.2.1, 12/14/00]

3.3.2.2 SCOPE: This part applies to each employer and to each person making payment of a pension or annuity to an individual domiciled in New Mexico.
[1/15/97; 3.3.2.2 NMAC - Rn, 3 NMAC 3.2.2, 12/14/00]

3.3.2.3 STATUTORY AUTHORITY: Section 9-11-6.2 NMSA 1978.
[1/15/97; 3.3.2.3 NMAC - Rn, 3 NMAC 3.2.3, 12/14/00]

3.3.2.4 DURATION: Permanent.
[1/15/97; 3.3.2.4 NMAC - Rn, 3 NMAC 3.2.4, 12/14/00]

3.3.2.5 EFFECTIVE DATE: 1/15/97, unless a later date is cited at the end of a section, in which case the later date is the effective date.
[1/15/97; 3.3.2.5 NMAC - Rn & A, 3 NMAC 3.2.5, 12/14/00]

3.3.2.6 OBJECTIVE: The objective of this part is to interpret, exemplify, implement and enforce the provisions of the Withholding Tax Act.
[1/15/97; 3.3.2.6 NMAC - Rn, 3 NMAC 3.2.6, 12/14/00]

3.3.2.7 DEFINITIONS: [Reserved]
[1/15/97; 3.3.2.7 NMAC - Rn, 3 NMAC 3.2.7, 12/14/00]

3.3.2.8 WITHHOLDING FROM IRREGULAR WAGES

A. Employers who make lump sum distributions, one time bonuses and other irregular payments to employees in addition to regular wages and employers required to withhold tax on fringe benefits for federal purposes shall compute the state withholding in the same manner used for computing federal withholding on these items. The employer will then use the withholding tax tables issued by the department to compute the amount of withholding tax due.

B. If an employer elects to withhold, for federal purposes, a flat percentage of the lump-sum distribution, one-time bonus, fringe benefits and other irregular wages as provided in the Internal Revenue Code, the employer shall withhold a flat percentage for state withholding tax purposes. The flat percentage for state withholding tax purposes shall be a rate equal to the maximum bracket rate set by Section 7-2-7 NMSA 1978 for the taxable year.

[9/8/86, 1/15/97, 12/15/98; 3.3.2.8 NMAC - Rn, 3 NMAC 3.2.8, 12/14/00, A, 10/31/05]

3.3.2.9 TRANSPORTATION COMPANIES REQUIRED TO WITHHOLD FROM WAGES OF CERTAIN EMPLOYEES

A. Railroads are required to withhold New Mexico withholding tax from the wages, salaries or other employee remuneration of any employee who is a resident of this state, without regard to the place of employment or amount of time which the employee performs services for the employer in this state or other states.

B. Motor carriers, private motor carriers and airlines shall withhold New Mexico income tax from the wages, salaries or other employee remuneration of any individual employee who is a resident of this state, without regard to the place of employment or amount of time which the employee performs services for the employer in this state or other states.

C. For purposes of this section (3.3.2.9 NMAC) the term "motor carrier" shall mean any person engaged in the business of transporting persons or property by motor vehicle which activity is subject to regulation by either the interstate commerce commission or the New Mexico public regulation commission. The term "private motor carrier" shall mean any person transporting persons or property by motor vehicle which activity is not subject

to regulation by either the interstate commerce commission or the New Mexico public regulation commission but who is subject to the Motor Transportation Act. The term "airline" shall mean any person who provides airplane or other aircraft transportation of persons or property for consideration.

[5/24/90, 12/3/90, 1/15/97; 3.3.2.9 NMAC - Rn & A, 3 NMAC 3.2.9, 12/14/00]

3.3.2.10 WITHHOLDING BY PASS-THROUGH ENTITIES

A. **Withholding by pass-through entities; rate.** For periods beginning on or after January 1, 2004 and ending prior to January 1, 2011, the rate of withholding by pass-through entities pursuant to the provisions of Subsection D of Section 7-3-12 NMSA 1978 shall equal the maximum bracket rate set by Section 7-2-7 NMSA 1978 for the taxable year.

B. **Withholding by pass-through entities; agreements; reasonable cause.** The obligation to collect and remit withholding amounts pursuant to Subsection D of Section 7-3-12 NMSA 1978 may be avoided if the nonresident owner submits to the pass-through entity an agreement authorized by Subsection E of that section in the form and manner prescribed by the secretary. An agreement may be restricted to a single taxable year, may cover multiple years or may be put into effect for an indefinite term subject to revocation by the nonresident owner. An agreement must be in the possession of the pass-through entity at the time the pass-through entity files its return for the taxable year to which the agreement pertains. When a nonresident owner becomes a resident of New Mexico, the agreement submitted by that owner is revoked automatically, effective for the taxable year in which the change in residence took place. The obligation to withhold may also be avoided if the pass-through entity demonstrates that failure to withhold is due to a reasonable cause pursuant to Subsection B of Section 7-3-5 NMSA 1978.

C. **Due date exception.** The due date specified in Section 7-3-6 NMSA 1978 does not apply to payment of amounts withheld in accordance with Section 7-3-12 NMSA 1978. The due date specified in Section 7-3-12 NMSA 1978 with respect to such amounts controls.

D. **Crediting to tax year.** Amounts withheld pursuant to the provisions of Section 7-3-12 NMSA 1978 with respect to an owner shall be credited to the owner for the same taxable year for which the income is required to be reported for federal income tax purposes.

E. Withholding by pass-through entities for periods beginning on or after January 1, 2011 is governed by the Oil and Gas Proceeds and Pass-Through Entity Withholding Tax Act and 3.3.5 NMAC. 3.3.2.10 NMAC does not apply to such withholding by pass-through entities after December 31, 2010 except as provided in Subsection E of 3.3.5.16 NMAC.

[12/31/99; 3.3.2.10 NMAC - Rn & A, 3 NMAC 3.2.10, 12/14/00, A, 10/31/05; A, 12/15/10]

3.3.2.11 CLAIMS FOR SETTLEMENT PAYMENTS FROM THE NATIVE AMERICAN VETERANS' INCOME TAX SETTLEMENT FUND

A. A claim for a settlement payment from the Native American veterans' income tax settlement fund may be made for any period of active duty in the armed forces of the United States during which the claimant or, where the claimant is a successor, the deceased veteran:

- (1) was a member of a federally recognized Indian nation, tribe, or pueblo;
- (2) was a resident within the boundaries of the Indian member's or the member's spouse's reservation or pueblo grant, or within the boundaries of lands held in trust by the United States for the benefit of the member or spouse or the member's or spouse's nation, tribe or pueblo; and
- (3) had New Mexico personal income tax withheld from his or her active duty military pay, and the amount withheld:

- (a) has not already been refunded to the claimant or the claimant's representative; and
- (b) cannot be claimed as a refund by filing a New Mexico personal income tax return because the period for filing a refund has run under the applicable statute of limitations.

B. A claim for a settlement payment must provide the following substantiation of the claimant's or, where the claimant is a successor, the deceased veteran's, eligibility for the claim and the amount of the claim.

(1) **Active duty in the armed forces of the United States.** The claimant must provide a copy of *certificate of release or discharge from active duty* (DD Form 214) or other proof of service provided by the department of defense and approved by the department of veterans' service. If a claimant does not have a copy of his or her DD Form 214 or other proof of service, the claimant can request that the department of veterans' services request the claimant's DD Form 214 or other proof of service from the department of defense.

(2) **Status as a Native American.** The claimant must provide a statement signed by the claimant that the claimant or, where the claimant is a successor, the deceased veteran was a member of a federally recognized Indian nation, tribe, or pueblo during the period(s) of his or her active duty in the armed forces of the United States.

(3) **Domicile on tribal land during period(s) of active duty.** The claimant must substantiate domicile on tribal land (as described in Paragraph (2) of Subsection A above) during the period(s) any New Mexico personal income tax was withheld from active duty military pay. If the address shown on the DD Form 214 or other proof of service is on the claimant's tribal land, the claimant's or deceased veteran's DD Form 214 is sufficient substantiation. If the address shown on the claimant's or deceased veteran's DD Form 214 or other proof of service is not on tribal land, or the claimant cannot establish that the address is on tribal land, the claimant must provide a statement signed by the claimant that the claimant or deceased veteran was domiciled on tribal land during the period(s) any New Mexico personal income tax was withheld from active duty military pay; the statement must provide the claimant's or deceased veteran's address on the tribal land for each period and an official designated by the nation, tribe, or pueblo must attest that each address is on tribal land.

(a) For the purposes of this regulation, "domicile" means a place where an individual has a true fixed home and is a permanent establishment to which the individual intends to return after an absence. Every individual has a domicile somewhere, and each individual has only one domicile at a time. Once established, domicile does not change until the individual moves to a new location with the bona fide intention of making that location his or her permanent home. No change in domicile results when an individual leaves the tribal land if the individual's intent is to stay away only for a limited time, no matter how long.

(b) Examples:

(i) G is a Native American who lives and works on his tribe's pueblo in New Mexico. G joins the marines and is stationed outside New Mexico. G's domicile remains unchanged during his military service unless G moves to a new location with the intent to make that location his permanent home after leaving the military.

(ii) C is a Native American who lives on her tribe's pueblo in New Mexico. She leaves New Mexico to pursue a two-year master's degree program in Spain. She intends to return to her pueblo when she completes her studies. She remains domiciled on her pueblo while in Spain.

(4) **Amount of New Mexico personal income tax withheld from active duty military pay.** The claimant can substantiate this amount by providing copies of Form(s) W-2 covering active duty military pay for the year(s) during which New Mexico personal income tax was withheld. If a claimant does not have copies of the applicable Form(s) W-2 for one or more of these years, the claimant can request that the taxation and revenue department obtain the claimant's or deceased veteran's Form(s) W-2 (or other withholding information in a form approved by taxation and revenue department) from the department of defense.

(5) **Amount of withholding has not already been refunded.** The claimant must provide a signed statement attesting that the claimant or deceased veteran did not receive a refund of the New Mexico personal income tax withheld for the year(s) for which the claimant is filing a claim for a settlement payment.

C. A claim for a settlement payment must be made by the eligible Native American veteran, or, in the case of a deceased veteran, by the veteran's surviving spouse, other successor or personal representative (an executor, administrator, or anyone in charge of the deceased veteran's property). If the claim is being made for a deceased veteran, the claim must be accompanied by a death certificate or other proof of death and by:

(1) if the claimant is a successor who is not the surviving spouse of the deceased veteran, a signed and dated notarized statement attesting that:

(a) the value of the entire probate estate of the decedent, wherever located, less liens and encumbrances, does not exceed thirty thousand dollars (\$30,000);

(b) at least 30 days have elapsed since the death of the decedent; and

(c) the successor is entitled to the settlement payment, or

(2) if the claimant is a personal representative, executor, or other representative authorized to administer the estate under applicable state law or the tribal law of the deceased veteran, a signed and dated notarized statement attesting that:

(a) he or she has been duly appointed as the personal representative, executor, or other representative of the estate of the decedent; and

(b) a copy of that appointment is attached;

(3) if the estate exceeds thirty thousand dollars (\$30,000), only the surviving spouse, a personal representative, an executor, or other representative of the estate as designated by applicable law or tradition may make a claim.

D. No claim for a settlement payment can be made for an amount of withholding that can be claimed as a refund by filing a New Mexico personal income tax return. A New Mexico personal income tax return can be filed by a Native American veteran to claim a refund by the later of:

- (1) December 31 of the year three years after the veteran separated from military service, or
- (2) December 31 of the year three years after the year in which New Mexico personal income tax was withheld from the active duty pay of the veteran.

E. All claims for settlement payments must be made with the department of veterans' services on the form prescribed by the taxation and revenue department. No claim for a settlement payment may be made after December 31, 2012.

F. Settlement payments will include interest on substantiated amounts of eligible withholding, computed on a daily basis from the date of withholding to the date a settlement warrant is issued at the rate specified for individuals pursuant to Section 6621 of the Internal Revenue Code of 1986. The date of withholding will be determined as follows:

- (1) for withholding that occurred over an entire calendar year, one-twelfth of the amount withheld during the year will be considered to have been paid on the last day of each calendar month of the year; or
- (2) for withholding that occurred over a period of less than an entire calendar year, the amount withheld during the period will be divided by the number of months (including partial months) in the period, and the resulting amount will be considered to have been paid on the last day of each calendar month during the period.

G. Eligible settlement payments will be made by the taxation and revenue department from the Native American veterans' income tax settlement fund. Settlement payments will be made on a "first come, first served" basis until the fund is exhausted or until no further claims are received.

H. Department of veterans' services must determine whether the claim meets the requirements of Paragraphs (1), (2) and (3) of Subsection B above and must act on a claim for settlement payment within 210 days of receipt of the claim. Claims not acted upon within 210 days are deemed denied.

I. A claimant whose claim is denied by department of veterans' services for failure to meet the requirements of Paragraphs (1), (2) and (3) of Subsection B above may dispute the denial by filing with the secretary of the department of veterans' services a written protest of the denial.

(1) The protest must contain the name and address of the claimant and must state with specificity the grounds for the protest. All evidence in support of the protest must also be submitted with the written protest. The secretary or designated hearing officer shall not consider any evidence that has not been submitted to the department of veterans' services at least 10 days prior to the hearing.

(2) The written protest must be filed within 30 days of the date of mailing to the claimant by the department of veterans' services of the denial of the claim.

(3) Upon timely receipt of a protest, the department of veterans' services shall promptly set a date for hearing and on that date hear the protest. The hearing shall be scheduled no later than 90 days after the filing of the written protest. Notice of the hearing shall be mailed to the protestant no less than 15 days prior to the date of the hearing. The secretary of the department of veterans' services may designate a hearing officer to conduct the hearing. The claimants may appear at a hearing for themselves, may have the assistance of an advocate, or may be represented by an attorney. Hearings shall not be open to the public except upon request of the claimant and may be postponed or continued at the discretion of the secretary or hearing officer.

(4) The technical rules of evidence and the rules of civil procedure shall not apply in the hearings, but hearings shall be conducted so that claims are amply and fairly presented. It is the burden of the claimant to prove that the denial of the claim was improper.

(5) A complete record of the proceedings will be made. A written decision shall be issued within 30 days of the hearing.

J. If the department of veterans' services approves the claim, the claim will be sent to taxation and revenue department to determine whether the claim meets the requirements of Paragraphs (4) and (5) of Subsection B above. The taxation and revenue department must act on a claim within 210 days of the date that the claim is received by the taxation and revenue department from the department of veterans' services. Claims not acted upon within 210 days are deemed denied.

K. A claimant whose claim is denied in whole or in part by the taxation and revenue department for failure to meet the requirements of Paragraphs (4) and (5) of Subsection B above may dispute the denial by filing with the secretary of the taxation and revenue department a written protest of the denial.

(1) The protest must contain the name and address of the claimant and must state with specificity the grounds for the protest. All evidence in support of the protest must also be submitted with the written protest. The

secretary or designated hearing officer shall not consider any evidence that has not been submitted to the taxation and revenue department at least 10 days prior to the hearing.

(2) The written protest must be filed within 30 days of the date of mailing to the claimant by the taxation and revenue department of the denial of the claim.

(3) Upon timely receipt of a protest, the taxation and revenue department shall promptly set a date for hearing and on that date hear the protest. The hearing shall be scheduled no later than 90 days after the filing of the written protest. Notice of the hearing shall be mailed to the protestant no less than 15 days prior to the date of the hearing. The secretary of the taxation and revenue department may designate a hearing officer to conduct the hearing. The claimants may appear at a hearing for themselves, may have the assistance of an advocate, or may be represented by an attorney. Hearings shall not be open to the public except upon request of the claimant and may be postponed or continued at the discretion of the secretary or hearing officer.

(4) The technical rules of evidence and the rules of civil procedure shall not apply in the hearings, but hearings shall be conducted so that claims are amply and fairly presented. It is the burden of the claimant to prove that the claimant or deceased veteran is entitled to a settlement payment.

(5) A complete record of the proceedings will be made. A written decision shall be issued within thirty (30) days of the hearing.

[3.3.2.11 NMAC - N, 12/1/09; A, 12/15/11]

HISTORY OF 3.3.2 NMAC:

Pre-NMAC History: The material in this part was derived from that previously filed with the State Records Center: BOR 71-1, (Income Tax Regulation 10-1) Attachment of Federal Schedule C to New Mexico Income Tax Return, filed 1/5/71.

BOR 72-1, Regulation for Income Tax Act Section 72-15A-10 NMSA 1953, filed 1/12/72.

BOR 72-2, (Income Tax Reg. 10-2) Filing of New Mexico Partnership Returns, filed 1/18/72.

BOR 74-1, Regulations in Effect and Pertaining to the New Mexico Income Tax Act and the New Mexico Uniform Division of Income for Tax Purposes Act, filed 1/15/74.

TRD Rule 4-88, Regulations Pertaining to the Uniform Division of Income for Tax Purposes Act Sections 7-4-1 to 7-4-21 NMSA 1978, filed 9/16/88.

BOR 77-2, Solar Heating and Cooling Tax Credit Regulations, filed 8/8/77.

R.D. 78-2, Solar Heating and Cooling Tax Credit Regulations, filed 11/9/78.

Rule No. 7-2-16, Regulations Pertaining to the Income Tax Act (Solar Heating and Cooling Tax Credit), 7-2-16 NMSA 1978, filed 2/18/80.

R.D. Statute 7-2-16, Regulations Pertaining to the Income Tax Act (Solar and Wind Energy Tax Credit), 7-2-16 NMSA 1978, filed 2/23/82.

R.D. Statute 7-2-16, Regulations Pertaining to the Solar or Wind Energy Tax Credit under the Income Tax Act, 7-2-16 NMSA 1978, Laws of 1983, Chapter 213, filed 5/18/84.

R.D.I.T. Reg. 7(b), Tax Tables - Regulations Pertaining to the Income Tax Act, Section 7-2-7.1 NMSA 1978, filed 12/11/81.

R.D.I.T. Regulation 2.1, Modified Gross Income Definitions Regulation Pertaining to the Income Tax Act, Section 7-2-2 (Q) NMSA 1978, filed 1/18/82.

R.D.I.T. Regulation 20:1, Information Returns: Royalties - Regulations Pertaining to the Income Tax Act, Section 7-2-20 NMSA 1978, filed 2/4/82.

R.D.I.T. Regulation 20:1, Regulations Pertaining to the Information Returns: Rents and Royalties Income Tax Act, Section 7-2-20 NMSA 1978, filed 1/25/83.

R.D. Statute 7-2B-1, Regulations Pertaining to the Income Tax Act (Solar Capital Investments Credit), Section 7-2B-1 NMSA 1978, filed 2/23/82.

R.D.I.T. Regulation 12:1, Regulation Pertaining to Reporting Methods for the Income Tax Act, Laws 1971, Chapter 20, Section 3, Section 7-2-12 NMSA 1978, filed 6/10/82.

R.D.I.T. Regulation 5.2:1, Exemption Apportionment Regulation Pertaining to the Income Tax Act, Section 7-2-5.2 NMSA 1978, filed 6/22/82.

I.T. Regulation 5.2:2, Regulation Pertaining to Apportionment Income Tax Act, Section 7-2-5.2 NMSA 1978, filed 3/3/89.

R.D. Statute 7-2-17, Regulation Pertaining to the Income Tax Act (Credit for Solar Irrigation; Refund), Section 7-2-17 NMSA 1978, filed 5/2/83.

R.D. Statute 7-2-17, Regulation Pertaining to the Income Tax Act Credit for Solar Irrigation; Refund, Section 7-2-17 NMSA 1978, Laws of 1983, Chapter 17, Section 1, filed 5/18/84.

R.D.I.T. Regulation 18.1:1, Regulation Pertaining to Definition of “Dependent” for Purposes of the Child Care Credit Income Tax Act, Section 7-2-18.1(5) NMSA 1978, filed 11/10/83.

R.D.I.T. Regulation 7(D) & (E), Proration for Fiscal Year Taxpayer - Regulation Pertaining to the Income Tax Act, Section 7-2-7(D) & (E) NMSA 1978, filed 1/6/84.

R.D.-I.T. Regulation 11:1, Regulation Pertaining to the Computation for Non-Resident Taxpayers Who Have New Mexico Royalty Income Under the Income Tax Act, Section 7-2-11(E) NMSA 1978, filed 2/15/84.

R.D.-I.T. Regulation 11:1 and 11.2, Regulation Pertaining to Income Tax Act Section 7-2-11 NMSA 1978, filed 8/12/85.

R.D.-I.T. Regulation 12:2 Regulation Pertaining to Requirement for the Acceptance of Computer Generated Form PIT-1 and Related Schedules Income Tax Act, Section 7-2-12 NMSA 1978, filed 4/2/84.

I.T. Regulation 12:4, Regulation Pertaining to Requirement for the Acceptance of Computer Generated Form PIT-1 and Related Schedules Income Tax Act, Section 7-2-12 NMSA 1978, filed 9/4/87.

R.D.I.T. Regulation 12:3, Regulation Pertaining to Requirement for the Preparation of Acceptable Reproductions of New Mexico Income Tax forms Income Tax Act, Section 7-2-12 NMSA 1978, filed 4/18/84.

R.D. - I.T. Regulations 18.2:1, 2, 3, 4, Regulation Pertaining to Income Tax Act, Section 7-2-18.2 NMSA 1978, filed 5/17/85.

R.D. - I.T. Regulation 2(L), Regulation Pertaining to Income Tax Act, Section 7-2-2 NMSA 1978, filed 10/23/85.

R.D.I.T. Regulation 7.1:1 & 2, Regulation Pertaining to the Income Tax Act, filed 3/31/86.

I.T. Regulation 11:3/4, Regulations Pertaining to Income Allocation Apportionment Income Tax Act, Section 7-2-11 NMSA 1978, filed 2/28/89.

I.T. Regulation 5.4:1, Regulations Pertaining to Exemption Apportionment Income Tax Act, Section 7-2-5.4 NMSA 1978, filed 3/3/89.

I.T. Regulation 2(N):2, Regulation Pertaining to Income From United States Obligations Income Tax, Section 7-2-11 NMSA 1978, filed 5/25/89.

TRD - I.T. Regulation 18.1:2/3, Regulation Pertaining to the Income Tax Act, Section 7-2-18.1 NMSA 1978, filed 10/24/89.

TRD Rule 2-89, Regulations Pertaining to the Income Tax Act, Sections 7-2-1 to 7-2-30 NMSA 1978, filed 12/29/89.

TRD Rule IT-91, Regulations Pertaining to the Income Tax Act, Sections 7-2-1 to 7-2-30 NMSA 1978, filed 3/16/92.

History of Repealed Material: [RESERVED]

NMAC History:

3 NMAC 3.2, Withholding Wages and Unearned Income, filed 12/31/96.

3.3.2 NMAC, Withholding Wages and Unearned Income, filed 12/1/2000.