

**TITLE 3: TAXATION**  
**CHAPTER 3: PERSONAL INCOME TAXES**  
**PART 5: OIL AND GAS PROCEEDS WITHHOLDING**

**3.3.5.1 ISSUING AGENCY:** Taxation and Revenue Department, Joseph M. Montoya Building, 1100 South St. Francis Drive, P.O. Box 630, Santa Fe NM 87504-0630  
[3.3.5.1 NMAC - N, 10/15/03]

**3.3.5.2 SCOPE:** This part applies to all remitters of oil and gas proceeds from New Mexico wells and to pass-through entities.  
[3.3.5.2 NMAC - N, 10/15/03; A, 12/15/10]

**3.3.5.3 STATUTORY AUTHORITY:** Section 9-11-6.2 NMSA 1978.  
[3.3.5.3 NMAC - N, 10/15/03]

**3.3.5.4 DURATION:** Permanent.  
[3.3.5.4 NMAC - N, 10/15/03]

**3.3.5.5 EFFECTIVE DATE:** 10/15/03, unless a later date is cited at the end of a section, in which case the later date is the effective date.  
[3.3.5.5 NMAC - N, 10/15/03]

**3.3.5.6 OBJECTIVE:** The objective of this part is to interpret, exemplify, implement and enforce the provisions of the Oil and Gas Proceeds and Pass-Through Entity Withholding Tax Act.  
[3.3.5.6 NMAC - N, 10/15/03; A, 12/15/10]

**3.3.5.7 DEFINITIONS:** For the purposes of 3.3.5 NMAC:

- A. "gross amount" includes amounts deducted by the remitter for expenses and severance taxes, but does not include amounts deducted for expenses or taxes prior to receipt by the remitter. If a taxpayer receives a Form 1099-MISC for its oil and gas proceeds, the gross amount is the amount reported on federal Form 1099-MISC in box 2, royalties, and in box 7, nonemployee compensation; and
- B. "resident of New Mexico" means (1) an individual domiciled in this state during all of the taxable year, or (2) an individual other than an individual described in Subsection D of 3.3.1.9 NMAC who is physically present in this state for a total of one hundred eighty-five (185) days or more in the aggregate during the taxable year, regardless of domicile or (3) an individual who moves into this state with the intent to make New Mexico his permanent domicile.

[3.3.5.7 NMAC - N, 10/15/03; A, 12/15/10; A, 6/28/13]

**3.3.5.8 EFFECTIVE DATE OF OIL AND GAS PROCEEDS WITHHOLDING REQUIREMENTS:** The withholding requirements imposed by Section 7-3A-3 NMSA 1978 apply to payments made on or after October 1, 2003, regardless of production date.  
[3.3.5.8 NMAC - N, 10/15/03]

**3.3.5.9 OIL AND GAS PROCEEDS**

- A. The following are not oil and gas proceeds for the purposes of the Oil and Gas Proceeds Withholding Tax Act and are not subject to the withholding tax imposed by that act, when payment is not offset against a share of future production: advance royalty payments, bonus payments, minimum royalty payments, shut-in payments and rental payments.
- B. If the production is from a well subject to a unit or communitization agreement whose area crosses state boundaries, the amount attributable to "oil and gas production from any well located in New Mexico" may be derived through the allocation methodology set out in the agreement.
- C. If the amount received by the remitter has had severance taxes or other expenses deducted prior to the time the remitter receives it, then the remitter shall be required to withhold only from the amount it received.

[3.3.5.9 NMAC - N, 10/15/03]

**3.3.5.10 WITHHOLDING RATES:**

A. For periods beginning on or after January 1, 2005 and before January 1, 2011, the rate of withholding shall equal the maximum bracket rate set by Section 7-2-7 NMSA 1978 for the taxable year.

B. For periods beginning on or after January 1, 2011, the rate of withholding pursuant to the Oil and Gas Proceeds and Pass-Through Entity Withholding Tax Act shall be set by directive of the secretary. The withholding rate set in the directive shall be effective no earlier than ninety (90) days after the date on which the directive is promulgated. The directive shall be posted on the taxation and revenue department's web site, along with past, current and, when the rate is announced to change at a future time, future withholding rates and the time periods to which they pertain.

[3.3.5.10 NMAC - N, 10/15/03; A, 12/15/10]

**3.3.5.11 WITHHOLDING MINIMUMS:**

A. With respect to oil and gas proceeds, no withholding from a payment to a remittee is required if:

(1) the sum of all payments, including the subject payment, to that remittee by the remitter in the calendar quarter does not exceed thirty dollars (\$30.00); and

(2) the amount to be withheld from the subject payment is less than ten dollars (\$10.00).

B. With respect to net income from pass-through entities, no withholding is required from a payment to an owner if the sum of all payments, including the subject payment, to that owner by the pass-through entity in the calendar year is less than one hundred dollars (\$100.00).

C. The remitter may withhold from a payment described in Subsection A or B of this section without creating a right of action by the remittee or owner against the remitter or pass-through entity.

D. This version of 3.3.5.11 NMAC applies to payments for periods beginning on or after January 1, 2012.

[3.3.5.11 NMAC - N, 10/15/03; A, 12/15/10; A, 6/28/13]

**3.3.5.12 REMITTEES WITH A NEW MEXICO ADDRESS:** With respect to payments made for periods prior to January 1, 2011, a remitter is not obligated to deduct and withhold under the Oil and Gas Proceeds Withholding Tax Act from payments to a remittee with a New Mexico address. The relevant address for purposes of Section 7-3A-3 NMSA 1978 is the remittee address to which federal Form 1099-MISC is mailed or otherwise transmitted, or the address that is shown on federal Form W-9 or similar form. If federal law does not require the remitter to mail a federal Form 1099-MISC to the remittee, and the remitter has not received a federal Form W-9 or similar form, the relevant address is the address to which the oil and gas proceeds are mailed or otherwise transmitted. This section does not apply to payments for periods beginning on or after January 1, 2011. See 3.3.5.16 NMAC for equivalent provisions for withholding for periods beginning on or after January 1, 2011.

[3.3.5.12 NMAC - N, 10/15/03; A, 12/15/10]

**3.3.5.13 PAYMENTS TO 501(C)(3) ORGANIZATIONS:** A remitter or pass-through entity is not obligated to deduct and withhold under the Oil and Gas Proceeds and Pass-Through Entity Withholding Tax Act from payments to a remittee or owner granted exemption from the federal income tax by the United States commissioner of internal revenue as an organization described in Section 501(c)(3) of the Internal Revenue Code. Acceptable proof that a remittee or owner is a 501(c)(3) organization includes a copy of the remittee's or owner's federal Form W-9, or a copy of the determination letter from the internal revenue service granting the remittee or owner 501(c)(3) status. This version of 3.3.5.13 NMAC applies to payments for periods beginning on or after January 1, 2011.

[3.3.5.13 NMAC - N, 10/15/03; A, 12/15/10]

**3.3.5.14 REASONS FOR NOT WITHHOLDING:** The department will accept as reasons for not withholding, the following:

A. written notification from a remittee that the payment is subject to further distribution by the remittee as a remitter to working interest owners, royalty interest owners, overriding royalty interest owners or production payment interest owners;

B. internal documentation such as signed division orders demonstrating that the payment is subject to further distribution by the remittee as a remitter to working interest owners, royalty interest owners, overriding royalty interest owners or production payment interest owners;

C. reliance on a New Mexico address, shown on internal revenue service Form 1099-MISC, or a successor form, or on a *pro forma* 1099-MISC, or a successor form, for those entities that do not receive an internal revenue service Form 1099-MISC, supplied by the remittee; the remitter may rely on a New Mexico address

supplied by the remittee for up to thirty (30) days after receiving written notice from the remittee of a change in address to an address outside New Mexico;

D. receipt of a declaration signed under penalty of perjury, from the remittee or owner, stating that the individual is a resident of New Mexico or that the corporation maintains a principal place of business in New Mexico;

E. receipt of a written agreement from a remittee or owner under 3.3.5.17 NMAC that the remittee or owner will timely report and pay amounts required to be withheld and remitted;

F. inability to make payment of withholding from net income for the quarter due to nonavailability of cash or due to contracts and other binding written covenants with unrelated third parties, unless cash payments have been made to any owner during the quarter, in which case the pass through entity is liable for payment of the withholding amount due up to the extent of the cash payment made during the quarter;

G. with respect to tax years 2014 through 2018, the pass-through entity has elected pursuant to 26 USC 108(i) to defer income from the discharge of indebtedness in connection with the reacquisition after December 31, 2008 and before January 1, 2011 of an applicable debt instrument for the period 2014 through 2018 and the entity has insufficient cash to remit the withholding amount due on the deferred income reported in the year; and

H. any other reason acceptable to the secretary, to be determined on a case-by-case basis.  
[3.3.5.14 NMAC - N, 10/15/03; A, 12/15/10; A, 6/28/13]

### **3.3.5.15 STATEMENTS OF WITHHOLDING AND INFORMATION RETURNS:**

A. Each remitter shall:

(1) provide a federal Form 1099-MISC, or a successor form, or for those entities that do not receive an internal revenue service Form 1099-MISC, a *pro forma* 1099-MISC, or a successor form, to each remittee on or before February 15 of the year following the year for which the statement is made, reflecting the proceeds paid to the remittee and the state tax withheld;

(2) provide a federal Form 1099-MISC, or a successor form, or for those entities that do not receive an internal revenue service Form 1099-MISC, a *pro forma* 1099-MISC, or a successor form, to the department on or before the last day of February of the year following the year for which the statement is made; and

(3) provide to the department, a report listing the remitees to whom oil and gas proceeds were paid by the remitter, and for whom the remitter has received an agreement pursuant to Subsection G of Section 7-3A-3 NMSA 1978; this report must include:

(a) the name, address and federal identification number for each remittee;

(b) the gross oil and gas proceeds paid to the remittee during the tax year of the report; and

(c) the remitter's name, federal identification number and the total New Mexico gross oil and gas proceeds distributed by the remitter to all remitees.

B. The reports provided to the department pursuant to Paragraph (3) of Subsection A above, must be provided using a department-approved electronic medium, unless the remitter is not required to file electronically pursuant to 3.3.5.19 NMAC.

C. If a pass-through entity is not required to file a federal income tax return for the taxable year, the entity shall file an annual information returns with the department not later than one hundred five (105) days after the end of its taxable year and provide to each of its owners sufficient information to enable the owner to comply with the provisions of the Income Tax Act or Corporate Income and Franchise Tax Act with respect to the owner's share of the net income.

[3.3.5.15 NMAC - N, 10/15/03; A, 12/15/10; A, 6/28/13]

### **3.3.5.16 PRINCIPAL PLACE OF BUSINESS OR RESIDENCE IN NEW MEXICO:**

A. If a remitter or pass-through entity is not excused from the obligation to deduct and withhold from payments because of the provisions of the Oil and Gas Proceeds and Pass-Through Entity Withholding Tax Act, the obligation to deduct and withhold remains in force until the remitter or owner establishes that the corporation's principal place of business or the individuals residence is in New Mexico except as provided in Subsection E of this section.

B. Once the corporation establishes that its place of business is in New Mexico or an individual establishes that his or her residence is in New Mexico, it does not matter where remittances to the corporation or individual are sent.

C. A remitter or pass-through entity may establish residency if the address provided by the remittee or owner, to which federal Form 1099-MISC, *pro forma* 1099-MISC or successor form is to be mailed. A remitter or pass-through entity may also accept a declaration signed under penalty of perjury, from the remittee or owner,

stating that the individual is a resident of New Mexico or that the corporation maintains a principal place of business in New Mexico.

D. The obligation to deduct and withhold applies with respect to all remitees and owners that are not corporations or individuals regardless of the remitee's or owner's physical or mailing address, effective January 1, 2011, unless the remitter or pass-through entity is party to an agreement in force with the remitee or owner pursuant to Subsection G of Section 7-3A-3 NMSA 1978.

E. This version of 3.3.5.16 NMAC applies to payments for periods beginning on or after January 1, 2011. However, to ease the transition to the new requirements of this section, remitters and pass-through entities may continue to rely on New Mexico addresses pursuant to 3.3.5.12 NMAC for withholding for calendar quarters ending prior to January 1, 2012.

[3.3.5.16 NMAC - N, 12/15/10; A, 6/28/13]

### **3.3.5.17 OPTIONAL WITHHOLDING PAYMENT BY REMITTEE, OWNER:**

A. A remitter may enter into an agreement with a remitee that the remitee will remit to the taxation and revenue department at the time and in the manner required by the department the amounts that the remitter is required to withhold and remit with respect to payments to the remitee. Similarly, a pass-through entity may enter into an agreement with an owner, except as provided in Subsection E of 3.3.5.17 NMAC, that the owner will remit to the department the amounts that the pass-through entity is required to withhold and remit with respect to payments to the owner.

B. The agreement must be in a form prescribed by the department or substantially equivalent to such form. It must be in the remitter's or pass-through entity's possession at the time it files its annual statement of withholding pursuant to Section 7-3A-7 NMSA 1978. The agreement may remain in effect for a single taxable year, multiple taxable years, or an indefinite term, and may be revoked or amended on mutual agreement of the parties.

C. Upon notice by the department that the remitee or owner has not complied with the requirements of the agreement, the remitter or pass-through entity must revoke the agreement and withhold and remit with respect to future payments to the remitee or owner pursuant to the Oil and Gas Proceeds and Pass-Through Entity Withholding Tax Act. Once an agreement has been revoked a new agreement between the remitter and remitee or between the pass-through entity and the owner, may not be entered into for two years from the date the department notifies the remitter or the pass-through entity of the remitee's or owner's failure to pay amounts required by the agreement.

D. Remittances to the department pursuant to an agreement by a remitee or owner that is subject to corporate income tax or personal income tax may be credited against the remitee's or owner's estimated tax liability pursuant to Section 7-2A-9.1 NMSA 1978 or Section 7-2-12.2 NMSA 1978 since the remittances relate to the remitter's or owner's own corporate income tax or personal income tax liability.

E. Pursuant to Subsections H and I of Section 7-3A-3 NMSA 1978 a pass-through entity that is a personal service business as defined in Subsection J of Section 7-3A-2 NMSA 1978 may not enter into an agreement with its owners.

[3.3.5.17 NMAC - N, 12/15/10; A, 6/28/13]

### **3.3.5.18 DISREGARDED ENTITIES**

A. The term "pass-through entity," in addition to the exclusions listed in Subsection H of Section 7-3A-2 NMSA 1978, also excludes entities treated as "disregarded entities" for federal income tax purposes. These include qualified subchapter S subsidiaries, as defined in 26 USC Section 1361(b)(3)(B), partnerships electing under 26 USC Section 761(a) to be treated as disregarded entities, qualified joint ventures, as defined in 26 USC Section 761(f), and qualified entities defined in internal revenue service revenue procedure 2002-69.

B. When a business association is treated as a disregarded entity for federal income tax purposes for only part of the association's taxable year, the association is subject to the withholding and reporting requirements of the Oil and Gas Proceeds and Pass-Through Entity Tax Withholding Act for that portion of the taxable year in which it is not treated as a disregarded entity and must submit an annual statement of withholding pursuant to Section 7-3A-7 NMSA 1978 covering that portion its taxable year in which the association was not treated as a disregarded entity.

[3.3.5.18 NMAC - N, 12/15/10]

### **3.3.5.19 E-FILING REQUIREMENTS:**

A. Annual income and withholding information returns, federal Form 1099-MISC, *pro forma* 1099-MISC or successor forms must be filed with the department using a department-approved electronic medium if the

remitter or pass-through entity has more than fifty (50) New Mexico payees in a tax year, unless the remitter or pass-through entity obtains an exception pursuant to Subsection C of 3.3.5.19 NMAC.

B. The annual income information report of oil and gas proceeds distributed - no tax withheld, and the annual income and withholding detail report of pass-through entity allocable net income must be filed using a department-approved electronic medium if the pass-through entity or remitter has more than fifty (50) New Mexico payees in a tax year, unless the remitter or pass-through entity obtains an exception pursuant to Subsection C of 3.3.5.19 NMAC.

C. A taxpayer may request an exception to the requirement of electronic filing. The request must be in writing, addressed to the secretary of the taxation and revenue department and must be received by the department at least thirty (30) days before the taxpayer's electronic information return or report is due. Exceptions will be granted in writing and only upon a showing of hardship including that there is no reasonable access to the internet in taxpayer's community. The taxpayer must also show a good faith effort to comply with the electronic filing requirements before an exception will be considered. The request for an exception must include the information return or report to which the exception if granted will apply; a clear statement of the reasons for the exception; and the signature of the taxpayer.

D. If a remitter or pass-through entity is required by regulation or statute to file information returns or reports electronically, the information return or report shall not be considered filed until filed electronically if filed by any means other than as specified in that regulation or statute.

[3.3.5.19 NMAC - N, 6/28/13]

History of 3.3.5 NMAC [Reserved]