

**NOTICE OF HEARING AND PROPOSED RULES**

The New Mexico Taxation and Revenue Department proposes to amend the following rules:

**Gross Receipts and Compensating Tax Act, Section 7-9-3.4 NMSA 1978**

3.2.1.11 NMAC - Construction

**Gross Receipts and Compensating Tax Act, Section 7-9-51 NMSA 1978**

- 3.2.209.9 NMAC - Items That Are Ingredient or Component Parts - Oil Fields
- 3.2.209.11 NMAC - Sale of Water
- 3.2.209.12 NMAC - Forms and Fuel
- 3.2.209.13 NMAC - Welding Rods
- 3.2.209.14 NMAC - Paint and Painting Supplies
- 3.2.209.15 NMAC - Sprinkler Systems
- 3.2.209.18 NMAC - Windows and Doors
- 3.2.209.21 NMAC - Compensating Tax on Materials (repeal)
- 3.2.209.22 NMAC - Ingredient and Component Parts of a Construction Project
- 3.2.209.23 NMAC - Construction Materials Used in Nontaxable Construction Projects
- 3.2.209.24 NMAC - Materials Used in Nontaxable Projects (repeal)
- 3.2.209.26 NMAC - Materials Used in Government or Non-Profit Projects (new)

**Gross Receipts and Compensating Tax Act, Section 7-9-54 NMSA 1978**

- 3.2.212.10 NMAC - Construction Performed for a Governmental Agency
- 3.2.212.14 NMAC - Landscaping
- 3.2.212.21 NMAC - Government Credit or Procurement Card Purchases (repeal)
- 3.2.212.22 NMAC - Tangible Personal Property in Projects Financed by Industrial Revenue or Similar Bonds
- 3.2.212.24 NMAC - Custom Software

**Gross Receipts and Compensating Tax Act, Section 7-9-60 NMSA 1978**

- 3.2.218.9 NMAC - Services, Leases, Construction Services
- 3.2.218.11 NMAC - Sale of Meals
- 3.2.218.13 NMAC - Sale of Gases
- 3.2.218.14 NMAC - Single Member Limited Liability Company Whose Sole Member is a 501(C)(3) Organization

The proposals were placed on file in the Office of the Secretary on October 18, 2018. Pursuant to Section 9-11-6.2 NMSA 1978 of the Taxation and Revenue Department Act, the final of the proposals, if filed, will be filed as required by law on or about December 27, 2018.

A public hearing will be held on the proposals on Thursday, November 29, 2018, at 10:00 a.m. in the Secretary's Conference Room on the third floor of the Joseph M. Montoya Building, 1100 St. Francis Drive, Santa Fe, New Mexico. Individuals with disabilities who need any form of auxiliary aid to attend or participate in the public hearing are asked to contact Alicia Romero at [alicia.romero@state.nm.us](mailto:alicia.romero@state.nm.us). The Taxation and Revenue Department will make every effort to accommodate all reasonable requests, but cannot guarantee accommodation of a request that is not received at least 10 calendar days prior to the scheduled hearing. Accessible copies of the proposals are available upon request; contact the Tax Policy Office at [policy.office@state.nm.us](mailto:policy.office@state.nm.us). Comments on the proposals are invited. Comments may be made in person at the hearing or in writing. Written comments on the proposals should be submitted to the Taxation and Revenue Department, Director of Tax Policy, Post Office Box 630, Santa Fe, New Mexico 87504-0630 or by email to [policy.office@state.nm.us](mailto:policy.office@state.nm.us) on or before November 29, 2018, at 9:00 a.m. All written comments received by the agency will be posted on [www.tax.newmexico.gov](http://www.tax.newmexico.gov) no more than 3 business days following receipt to allow for public review.

- 3.2.1.11 CONSTRUCTION:**
  - A. Construction service as distinguished from other services.**

(1) The term "construction" is limited to the activities, or management of the activities, which are listed in Section 7-9-3.4 NMSA 1978 and which physically change the land or physically create, change or demolish a building, structure or other facility as part of a construction project.

(2) "Construction" does not include services that do not physically change the land or physically create, change or demolish a building, structure or other facility as part of a construction project, even though they may be related to a construction project. The fact that a service may be a necessary prerequisite or ancillary to construction or a construction project does not in itself make the service a construction service. Excluded from the meaning of "construction" are activities such as, but not limited to: hauling to or from the construction site, maintenance work, landscape upkeep, the repair of equipment or appliances, laboratory work or accounting, architectural, engineering, surveying, traffic safety or legal services. Some of these activities may qualify as construction-related services; see Section 7-9-52 NMSA 1978.

**B. Construction includes:** Pursuant to Section 7-9-3.4 NMSA 1978 the term "construction" includes the painting of structures, the installation of sprinkler systems and the building of irrigation pipelines.

**C. Construction does not include:**

(1) The term "construction" does not include the installation of carpets or the installation of draperies, but see 3.2.209.25 NMAC.

(2) The term "construction", as defined in Section 7-9-3.4 NMSA 1978, does not include leasing or renting tangible personal property, such as construction equipment, with or without an operator but see Section 7-9-52.1 NMSA 1978 for transactions on or after January 1, 2013.

**D. Oil and gas industry construction:**

(1) "Construction", as this term is used in Section 7-9-3.4 NMSA 1978, includes the following activities related to the oil and gas industry:

(a) building and altering of gas compression plant facilities and pump stations, including: clearing of property sites; excavating for foundations; building and setting foundation forms; mixing, pouring, and finishing concrete foundations for buildings and plant equipment on foundations; fabricating and installing piping; installing electrical equipment, insulation, and instruments; erecting buildings; placing sidewalks, drives, parking areas; installing storage tanks; and dismantling equipment and reinstalling elsewhere;

(b) building of or extension of gas-gathering pipelines, including: connecting gathering lines to lease separators, fabricating and installing meter runs, digging trenches, beveling pipe, welding pipe, wrapping pipe, backfilling trenches, testing pipelines, fabricating and installing pipeline drips and installing conduit for pipelines crossing roads or railroads;

(c) building of or extension of product pipelines, including: building pressure-reducing stations; connecting pipelines to storage tanks, fabricating and installing valve assemblies, digging trenches, beveling pipe, welding pipe, wrapping pipe, laying pipe, backfilling trenches, testing pipelines and installing conduit for pipeline crossing roads or railroads;

(d) building secondary-recovery systems, including: excavating and building foundations, installing engines and water pumps, installing pipelines for water intake, installing pipelines for carrying pressured water to input wells, installing instruments and controls and erecting buildings;

(e) installing lease facilities, including: installing wellheads, flow lines, chemical injectors, separators, heater-treaters, tanks, stairways and walkways; building foundations; and setting pump units and engines, central power units and rod lines;

(f) demolishing pipelines, including: digging trenches to uncover pipelines, dismantling and removing drips and meter runs, backfilling trenches, tamping and smoothing right-of-way;

(g) increasing pipeline capacity, including: removing small pipelines and replacing with larger lines, and digging adjoining trenches and laying new pipelines;

(h) repairing plant, including: replacing tubing in atmospheric condensers, replacing plugged boiler tubing; removing cracked, broken or damaged portions of foundations and replacing anew; replacing compressors, compressor engines, or pumps; and regrouting and realigning compressors;

(i) drilling wells, including: drilling ratholes, excavating cellars and pits, casing crew services, cementing services, directional drilling, drill stem testing and fishing jobs in connection with drilling operations;

(j) general dirt work, including: building roads, paving with caliche or other surfacing materials; digging pits, trenches, and disposal ponds, building firewalls and foundation footing; and constructing pads from caliche or other materials.

(2) "Construction", as the term is used in Section 7-9-3.4 NMSA 1978, does not include the following activities related to the oil and gas industry:

(a) well servicing, including: acidizing and fracturing formations; pulling and rerunning rods or tubing; loading or unloading a well; shooting; scraping paraffin; steaming flow lines and tubing; inspecting equipment; fishing jobs, other than in connection with drilling operations; bailing cave-ins; reverse circulating and resetting packers;

(b) lease and plant maintenance, including: cleaning; weed-control; preventive care of machinery, pipelines, gathering systems, and engines; tank cleaning; testing of flow lines by pressure or X-ray means; cleaning lines and tubing by acid treatment or mechanical means, or replacing and restoring machinery components;

(c) transporting equipment, including: transporting drilling rigs, rigging-up and rigging-down, and hauling water and mud;

(d) salvaging of materials from a "production unit", as defined in the Oil and Gas Emergency School Tax Act, such as: killing the gas pressure, removing casing heads, welding pull nipples on the casing, cutting or shooting casing strings, pulling casings from the well bore, cementing to fill the abandoned well or plug the well, filling the cellar, and welding steel pipe markers;

(e) rental of equipment such as: power tongs, blowout preventors, tanks, pipe racks, core barrels, integral parts of a drilling rig or integral parts of a circulation unit, for transactions on or after January 1, 2013, see Section 7-9-52.1 NMSA 1978;

(f) measuring, "logging" and surveying services in connection with the drilling of an oil or gas well are construction-related services as of January 1, 2013, see Section 7-9-52 NMSA 1978. "Logging" as that term is used in this subsection is a method of testing or measuring an oil or gas well by recording various aspects of the geological formations penetrated by the well.

**E. Construction includes prefabricated buildings; prefabricated versus modular buildings:**

(1) The sale of prefabricated buildings, whether constructed from metal or other material, is the sale of construction. A prefabricated building is a building designed to be permanently affixed to land and manufactured (usually off-site) in components or sub-assemblies which are then assembled at the building site. Prefabricated buildings are not designed to be portable nor are they capable of being relocated.

(2) A portable building or a modular building is a building manufactured (usually off-site) which is designed to be moveable or is capable of being relocated and, when delivered to the installation site, generally requires only blocking, levelling and, in the case of modular buildings, joining of modules. For the purposes of Subsection F of 3.2.1.11 NMAC, neither portable buildings, modular buildings nor manufactured homes defined as vehicles by Section 66-1-4.11 NMSA 1978 are prefabricated buildings.

**F. Construction materials and services; landscaping:**

(1) Landscaping items, such as ornaments, rocks, trees, plants, shrubs, sod and seed, which are sold to a person engaged in the construction business, that are an integral part of the construction project, are construction materials. Persons who seed, lay sod or install landscape items in conjunction with a construction project are performing construction services.

(2) Receipts from selling landscaping items to, and from seeding, laying sod or installing landscape items for, persons engaged in the construction business may be deducted from gross receipts if the buyer delivers a nontaxable transaction certificate to the seller as provided in Section 7-9-51 and Section 7-9-52 NMSA 1978, respectively.

**G. Nontaxable transaction certificates:**

(1) Nontaxable transaction certificates are available from the department for persons who are engaged in the construction business and performing activities, as set forth in Sections 7-9-3.4, 7-9-52 and 7-9-52.1 NMSA 1978 to execute to providers of construction materials, construction services, construction-related services and lessors of construction equipment. See 3.2.201.11 NMAC for additional requirements on construction contractors to obtain nontaxable transaction certificates.

(2) Only persons who are licensed by the state of New Mexico as construction contractors may apply for and execute nontaxable transaction certificates under the provisions of Sections 7-9-51 NMSA 1978, 7-9-52 NMSA 1978, and 7-9-52.1 NMSA 1978, except that a person who performs construction activities as defined in Section 7-9-3.4 NMSA 1978 in the ordinary course of business, and who is exempt from the laws of the state of New Mexico requiring licensing as a contractor may apply for and execute such certificates.

**~~H. Fixtures:~~**

~~(1) Construction includes the sale and installation of "fixtures" such as kitchen equipment, library equipment, science equipment and other miscellaneous equipment installed so that it becomes firmly attached to the realty. Fixtures are considered to be items of tangible personal property which are necessary or essential to the intended use of a construction project and which are so firmly attached to the realty as to constitute a~~

part of the construction project.

~~(2) Receipts from the sale of furniture, kitchen equipment, library shelves and other furniture or equipment sold on an assembled basis that does not become a "fixture" is a sale of tangible personal property and not construction.]~~

**[I] H. Construction materials; general:**

(1) The term "construction materials" means tangible personal property which is intended to become an ingredient or component part of a construction project.

(2) Tangible personal property intended ultimately to become an ingredient or component part of a construction project although not purchased for a specific project is nonetheless a construction material. *Example:* A government agency makes bulk purchases of asphalt which is stored by the agency for use in future road construction or repair projects. The asphalt is a construction material.

(3) Tools, equipment and other tangible personal property not designed or intended to become ingredients or component parts of a construction project are not construction materials if such materials accidentally become part of a construction project. *Example:* A workman accidentally drops a pair of gloves and a hammer into a form into which concrete is being poured. Because the gloves and the hammer are not intended to be included in the concrete structure, they are not construction materials.

**[J. Meaning of "building":**

~~(1) As used in Section 7-9-3.4 NMSA 1978, the noun "building" means a roofed and walled structure designed for permanent use but excludes an enclosure so closely combined with the machinery or equipment it supports, houses or serves that it must be replaced, retired or abandoned contemporaneously with the machinery or equipment.~~

~~(2) A "building" includes the structural components integral to the building and necessary to the operation or maintenance of the building but does not include equipment, systems or components installed to perform, support or serve the activities and processes conducted in the building and which are classified for depreciation purposes as 3-year property, 5-year property, 7-year property, 10-year property or 15-year property by Section 168 of the Internal Revenue Code or, if the Internal Revenue Code is amended to rename or replace these depreciation classes, would have been classified for depreciation purposes as 3-year property, 5-year property, 7-year property, 10-year property or 15-year property but for the amendment.~~

~~(3) Example: A building may include any of the following equipment, systems or components:~~

- ~~(a) elevators and escalators used in whole or in part to move people;~~
- ~~(b) heating, cooling and air conditioning systems except for air conditioning and air handling systems and components, separately depreciated under Section 168, installed to meet temperature, humidity or cleanliness requirements for the operation of machinery or equipment or the manufacture, processing or storage of products;~~
- ~~(c) electrical systems except for electrical systems and components, separately depreciated under Section 168, installed to power machinery or equipment operated as part of the activities and processes conducted in the building and not necessary to the operation or maintenance of the building; and~~
- ~~(d) plumbing systems except for plumbing systems and components, separately depreciated under Section 168, installed to perform, serve or support the activities and processes conducted in the building, such as for the handling, transportation or treatment of ingredients, chemicals, waste or water for a manufacturing or other process.]~~

[9/29/1967, 12/5/1969, 3/9/1972, 3/20/1974, 7/26/1976, 6/18/1979, 11/8/1979, 4/7/1982, 5/4/1984, 4/2/1986, 11/26/1990, 3/19/1992, 1/13/1996, 11/15/1996, 5/15/1997, 9/15/1997, 3.2.1.11 NMAC - Rn & A, 3 NMAC 2.1.11, 10/31/2000; A, 12/30/2003; A, 12/14/2012; A, xx/xx/2018]

**3.2.209.9 ITEMS THAT ARE INGREDIENT OR COMPONENT PARTS - OIL FIELDS:**

Receipts from the sale of casing, cement, shoes and float equipment, casing heads and well heads may be deducted from gross receipts if the other requirements of Section 7-9-51 NMSA 1978 are met and a nontaxable transaction certificate ~~[is issued]~~ or alternative evidence is provided by a well drilling company performing a turnkey project, as these items become ingredient or component parts of the construction project.

[12/5/1969, 3/9/1972, 11/20/1972, 3/20/1974, 7/26/1976, 6/18/1979, 4/7/1982, 5/4/1984, 4/2/1986, 11/26/1990, 11/15/1996; 3.2.209.9 NMAC - Rn, 3 NMAC 2.51.9 & A, 5/31/2001; A, xx/xx/2018]

**3.2.209.11 SALE OF WATER:**

Receipts from selling water to a construction company may be deducted from gross receipts if the sale is made to a

person engaged in the construction business who delivers a nontaxable transaction certificate or alternative evidence and if the water becomes an ingredient or component part of the finished product such as in concrete or in moistening fill. However, if the water is used as merely a lubricating agent, such as in well drilling, it is not a component part of the finished product and ~~is~~ the receipts are not deductible.

[12/5/1969, 3/9/1972, 11/20/1972, 3/20/1974, 7/26/1976, 6/18/1979, 4/7/1982, 5/4/1984, 4/2/1986, 11/26/1990, 11/15/1996; 3.2.209.11 NMAC - Rn, 3 NMAC 2.51.11, 5/31/2001; A, xx/xx/2018]

### **3.2.209.12 FORMS AND FUEL:**

**A.** Receipts from selling lumber for forms and fuel for trucks to a person engaged in the construction business may not be deducted from gross receipts because neither the lumber nor the fuel actually becomes an ingredient or component part of the finished product. However, if the form lumber is later used for sheeting in the construction project, the form lumber may be purchased with a nontaxable transaction certificate (nttc) or alternative evidence pursuant to Section 7-9-51 NMSA 1978.

~~**B.** If, in the situation described in Subsection A of Section 3.2.209.12 NMAC, the person engaged in the construction business delivered an nttc to a supplier for the purchase of lumber and the buyer converts some to use as forms and if the supplier did not pay the gross receipts tax on those receipts, the person engaged in the construction business will be subject to the compensating tax.~~

~~**C.] B.**~~ **B.** The receipts from selling screed pins used in plastering and forms which must, by reason of design, be left in place after concrete has been poured over them may be deducted from gross receipts if the sale is made to a person engaged in the construction business who delivers ~~an~~ a nontaxable transaction certificate (nttc) or alternative evidence.

[12/5/1969, 3/9/1972, 11/20/1972, 3/20/1974, 7/26/1976, 6/18/1979, 4/7/1982, 5/4/1984, 4/2/1986, 11/26/1990, 11/15/1996; 3.2.209.12 NMAC - Rn, 3 NMAC 2.51.12 & A, 5/31/2001; A, xx/xx/2018]

### **3.2.209.13 WELDING RODS:**

Receipts from selling welding electrodes (welding rods), which melt to provide filler or fused metal, to a person engaged in the construction business may be deducted from gross receipts if the buyer delivers a nontaxable transaction certificate (nttc) or alternative evidence to the seller ~~[H]~~ and the buyer delivering the nttc ~~[does not use]~~ uses the welding electrodes in such a way that they become an ingredient or component part of the construction project ~~[or comply with other requirements of Section 7-9-51 NMSA 1978, compensating tax will be imposed upon the buyer].~~

[3/9/1972, 11/20/1972, 3/20/1974, 7/26/1976, 6/18/1979, 4/7/1982, 5/4/1984, 4/2/1986, 11/26/1990, 11/15/1996; 3.2.209.13 NMAC - Rn, 3 NMAC 2.51.13 & A, 5/31/2001; A, xx/xx/2018]

### **3.2.209.14 PAINT AND PAINTING SUPPLIES:**

**A.** The receipts from the sale of paint, filler, thinner, varnish or similar items to a person engaged in the painting business who delivers a nontaxable transaction certificate (nttc) or alternative evidence to the seller may be deducted from the seller's gross receipts.

~~**B.** If the person engaged in the painting business does not use the items purchased with the nttcs as required by Paragraphs (1) and (2) of Subsection B of Section 7-9-51 NMSA 1978, the compensating tax is due.~~

~~**C.] B.**~~ **B.** Receipts from the sale of brushes, sandpaper, scrapers, sand for sandblasting, machinery and similar items used in the painting business to persons engaged in the painting business may not be deducted from gross receipts because such items do not become an ingredient or component part of the construction project.

[3/9/1972, 11/20/1972, 3/20/1974, 7/26/1976, 6/18/1979, 4/7/1982, 5/4/1984, 4/2/1986, 11/26/1990, 11/15/1996; 3.2.209.14 NMAC - Rn, 3 NMAC 2.51.14 & A, 5/31/2001; A, xx/xx/2018]

### **3.2.209.15 SPRINKLER SYSTEMS:**

Receipts from selling pipes, joints, nozzles and similar items of tangible personal property which become ingredient or component parts of a sprinkler system to a person engaged in the business of selling and installing sprinkler systems may be deducted from gross receipts if the buyer delivers a nontaxable transaction certificate or alternative evidence.

[3/9/1972, 11/20/1972, 3/20/1974, 7/26/1976, 6/18/1979, 4/7/1982, 5/4/1984, 4/2/1986, 11/26/1990, 11/15/1996; 3.2.209.15 NMAC - Rn, 3 NMAC 2.51.15, 5/31/2001]

### **3.2.209.18 WINDOWS AND DOORS:**

**A.** Receipts from the sale of screens, screen doors and windows to a person engaged in the

construction business may be deducted from the seller's gross receipts if the buyer delivers a nontaxable transaction certificate (nttc) or alternative evidence and the person engaged in the construction business uses the screens, screen doors and windows in the manner described in Paragraphs (1) and (2) of Subsection B of Section 7-9-51 NMSA 1978.

~~[B.]~~ If the person engaged in the construction business does not use the screens, screen doors and windows purchased with the nttc as required by Paragraphs (1) and (2) of Subsection B of Section 7-9-51 NMSA 1978, the compensating tax is due.

~~[C.]~~ **B.** Receipts from the sale of aluminum panel, aluminum T bar, aluminum angle, bulk or roll screen stock and jalousie glass to a person who produces screens, screen doors or windows and sells them installed in a construction project may be deducted from the seller's gross receipts pursuant to Section 7-9-51 NMSA 1978 if the buyer delivers an nttc or alternative evidence.

~~[D.]~~ If the person engaged in the construction business does not use the items described in Subsection C of Section 3.2.209.18 NMAC and purchased with the nttc as required by Paragraphs (1) and (2) of Subsection B of Section 7-9-51 NMSA 1978, the compensating tax is due.]

[3/9/1972, 11/20/1972, 3/20/1974, 7/26/1976, 6/18/1979, 4/7/1982, 5/4/1984, 4/2/1986, 11/26/1990, 11/15/1996; 3.2.209.18 NMAC - Rn, 3 NMAC 2.51.18 & A, 5/31/2001; A, xx/xx/2018]

### **3.2.209.22 INGREDIENT AND COMPONENT PARTS OF A CONSTRUCTION PROJECT:**

In determining whether tangible personal property will become an ingredient or component part of a construction project, the department will use the following criteria, but not exclusively:

~~[A.]~~ Did the tangible personal property become "fixtures" as defined under Subsection I of Section 3.2.1.11 NMAC.

~~[B.]~~ **A.** Was the person performing the work using the tangible personal property required to be licensed under the Construction Industries Licensing Act, Sections 60-13-1 to 60-13-59 NMSA 1978.

~~[C.]~~ **B.** Did the work for which the tangible personal property was used require a permit from one or more of the trade boards established by the Construction Industries Licensing Act or from a municipal building or mechanical department.

[6/18/1979, 4/7/1982, 5/4/1984, 4/2/1986, 11/26/1990, 11/15/1996; 3.2.209.22 NMAC - Rn, 3 NMAC 2.51.22 & A, 5/31/2001; A, xx/xx/2018]

### **3.2.209.23 CONSTRUCTION MATERIALS USED IN NONTAXABLE CONSTRUCTION PROJECTS:**

**A.** A seller of ~~[tangible personal property]~~ construction material may not claim the deduction from gross receipts provided by Section 7-9-51 NMSA 1978, or accept a nontaxable transaction certificate (NTTC) in good faith as required by Section 7-9-43 NMSA 1978, when the seller can reasonably determine that the ~~[tangible personal property]~~ construction material sold will be incorporated into a construction project which will not be subject to gross receipts tax upon completion because it is located outside New Mexico.

**B.** A seller can reasonably determine that a project is located outside New Mexico when the seller has documents identifying the location of the project.

**C.** No construction project located outside New Mexico will be subject to gross receipts tax upon completion.

~~[D.]~~ This version of 3.2.209.23 NMAC applies retroactively to transactions occurring on or after March 7, 2000.]

[1/24/1986, 4/2/1986, 11/26/1990, 11/15/1996, 3.2.209.23 NMAC - Rn & A, 3 NMAC 2.51.23, 10/31/2000; A, xx/xx/2018]

### **3.2.209.26 MATERIALS USED IN GOVERNMENT OR NON-PROFIT PROJECTS:**

Receipts from the sale to a person engaged in the construction business who delivers a nontaxable transactions certificate or alternative evidence to the seller of construction materials that are tangible personal property, whether removable or non-removable, that is or would be classified for depreciation purposes as three-year property, five-year property, seven-year property or 10-year property by Section 168 of the Internal Revenue Code of 1986 as that section may be amended or renumbered, may be deducted if the construction material will ultimately be deductible pursuant to Section 7-9-54 or 7-9-60 NMSA 1978 provided that the remaining construction services portion of the project is subject to gross receipts tax.

[3.2.209.26 NMAC - N, xx/xx/2018]

### **3.2.212.10 CONSTRUCTION PERFORMED FOR A GOVERNMENTAL AGENCY:**

**A.** ~~[The]~~ Except as provided in Paragraph B, receipts from performing a construction project for a governmental agency are receipts derived from performing a service and are not deductible pursuant to Section 7 9 54 NMSA 1978. The deduction is not available whether the materials are billed separately on the same contract as the construction services or are billed under a separate contract.

~~[~~ **B.** ~~Example: M, a construction company, contracts to build a building for the New Mexico general services department. M fails to include in its contract the cost of the gross receipts tax and therefore does not report the tax. After the tax has been assessed, M, in a hearing before the department, contends that it does not owe the tax. M says:~~

~~\_\_\_\_\_ (1) \_\_\_\_\_ that the tax is not applicable because, if it were, it would only mean that M would include the applicable tax in making its bid; that it would then pay the tax and bill the state the cost of the tax which only results in taking money from one state fund and putting it in another, a useless process;~~

~~\_\_\_\_\_ (2) \_\_\_\_\_ that it is actually selling tangible personal property to the state in the form of the materials which make up the building. The answer to M's first contention is simply that the law does not allow such a deduction. This is true even though the effect of the tax is simply to transfer money from one state fund to another. The answer to the second contention is that the law specifically bars application of the deduction provided by Section 7 9 54 NMSA 1978 for receipts from selling construction materials, whether separately stated under a contract for construction services or billed under a contract for materials only. Even absent the specific prohibition, the deduction is applicable only upon the sale of tangible personal property to the state. By definition M is selling the state a service. The gross receipts derived from performing the service for the state are not deductible, and it is of no consequence that construction materials may be billed separately.~~

~~\_\_\_\_\_ C. \_\_\_\_\_ Section 3.2.212.10 NMAC applies to transactions occurring on or after July 1, 1989.]~~

**B.** Receipts from the sale of construction material that is tangible personal property, whether removable or non-removable, that is or would be classified for depreciation purposes as three-year property, five-year property, seven-year property or 10-year property, including indirect costs related to the asset basis, by Section 168 of the Internal Revenue Code of 1986, as that section may be amended or renumbered, are deductible. The amount of the deduction is the asset basis, as those terms are defined by the Internal Revenue Code of 1986, as that code may be amended or renumbered.

**C.** Example: A contractor enters a contract with a municipality to construct a building and to furnish and equip it. Construction is a service, and receipts from selling construction, including construction materials except for certain tangible personal property, are not deductible under Section 7-9-54 NMSA 1978. An analysis is performed to distinguish the value of the construction, construction materials and tangible personal property included in the project. The contractor's receipts from the sale of tangible personal property, whether removable or non-removable, that is or would be classified for depreciation purposes as three-year property, five-year property, seven-year property or 10-year property including the indirect costs related to the asset basis, pursuant to Section 168 of the Internal Revenue Code, as that section may be amended or renumbered, are deductible provided the analysis includes sufficient information to demonstrate that the requirements of Section 7-9-54 NMSA 1978 are met. [9/29/1967, 12/5/1969, 3/9/1972, 11/20/1972, 3/20/1974, 7/26/1976, 6/18/1979, 4/7/1982, 5/4/1984, 4/2/1986, 11/26/1990, 11/15/1996; 3.2.212.10 NMAC - Rn & A, 3 NMAC 2.54.10, 5/31/2001; A, xx/xx/2018]

### **3.2.212.14 LANDSCAPING:**

**A.** Except when the landscape items are part of a construction project, receipts from selling and installing landscape items such as plants, shrubs, sod, seed, trees, rocks and ornaments are receipts from the sale of tangible personal property. Therefore, the receipts from the sale and installation of these landscape items pursuant to a contract with a governmental agency may be deducted from gross receipts pursuant to Section 7 9 54 NMSA 1978. Receipts from selling and installing these landscape items as part of a construction project may not be deducted pursuant to Section 7 9 54 NMSA 1978. This version of Subsection A of Section 3.2.212.14 NMAC applies to transactions occurring on or after ~~[July 1, 2000]~~ March 2, 2018.

**B.** Receipts from the installation of sprinkler systems are receipts from the performance of a service and are not receipts from selling tangible personal property. Therefore, receipts from the installation of sprinkler systems for a governmental agency may not be deducted from gross receipts pursuant to Section 7 9 54 NMSA 1978.

[3/9/1972, 11/20/1972, 3/20/1974, 7/26/1976, 6/18/1979, 4/7/1982, 5/4/1984, 4/2/1986, 11/26/1990, 11/15/1996, 3.2.212.14 NMAC - Rn & A, 3 NMAC 2.54.14, 10/31/2000; A, xx/xx/2018]

### **3.2.212.22 TANGIBLE PERSONAL PROPERTY IN PROJECTS FINANCED BY INDUSTRIAL**

## REVENUE OR SIMILAR BONDS:

**A.** For the purposes of this section, a “bond project” is an arrangement entered into under the authority of the Industrial Revenue Bond Act, the County Industrial Revenue Bond Act or similar act in which a private person agrees:

(1) to arrange for the constructing and equipping of a facility for a state or local government by acting as agent for the government in procuring construction services, other services, tangible personal property which becomes an ingredient or component part of a construction project and other tangible personal property necessary for constructing and equipping the facility;

(2) to lease the completed facility from the government; and

(3) to buy the facility upon repayment of the bonds. The government agrees to own the facility, to finance the project in whole or in part through the issuance of bonds, to designate the private person as its agent in procuring the necessary property and services, to lease the facility to the private person and to sell the facility to the private person upon repayment of the bonds.

**B.** Receipts from the sale of tangible personal property to the private person who is acting as agent for the government with respect to the bond project are deductible under Section 7 9 54 NMSA 1978 if the tangible personal property is not ~~[an ingredient or component part of a construction project]~~ construction material excluding tangible personal property whether removable or non-removable, that is or would be classified for depreciation purposes as three-year property, five-year property, seven-year property or 10-year property, including indirect costs related to the asset basis, by Section 168 of the Internal Revenue Code of 1986, as that section may be amended or renumbered. To be deductible, ~~[the cost of the bond project tangible personal property must meet all of the following criteria:~~

~~\_\_\_\_\_ (1) \_\_\_\_\_]~~ the cost of the bond project tangible personal property ~~[does]~~ must not increase the basis, as determined under the provisions of Section 1011 of the Internal Revenue Code in effect on the date the bond project commences, of the structure or other facility included in the definition of construction ~~[and~~

~~\_\_\_\_\_ (2) \_\_\_\_\_ the tangible personal property is:~~

~~\_\_\_\_\_ (a) \_\_\_\_\_ not included in, or similar to, the list of structures and facilities specifically itemized in the definition of construction at Section 7 9 3 NMSA 1978; and~~

~~\_\_\_\_\_ (b) \_\_\_\_\_ classified for depreciation purposes as 3 year property, 5 year property, 7 year property, 10 year property or 15 year property by Section 168 of the Internal Revenue Code in effect on the date the bond project commences or, if the Internal Revenue Code is amended to rename or replace these depreciation classes, would have been classified for depreciation purposes as 3 year property, 5 year property, 7 year property, 10 year property or 15 year property but for the amendment.]~~

**C.** A bond project commences when the governing body of the state or local government takes official action to enter into the arrangement, but no earlier than the adoption of an inducement resolution.

~~[\_\_\_\_\_ **D.** \_\_\_\_\_ Receipts from the sale of tangible personal property which becomes an ingredient or component part of a construction project, whether the sale is to the private person acting as agent for the government or to the government itself, are not deductible under Section 7 9 54 NMSA 1978.]~~

**D.** This version of 3.2.212.22 NMAC applies to transactions occurring on or after March 2, 2018. [2/22/1995, 11/15/1996; 3.2.212.22 NMAC - Rn & A, 3 NMAC 2.54.22, 5/31/2001; A, xx/xx/2018]

## 3.2.212.24 CUSTOM SOFTWARE:

**A.** Because it is a service, receipts from developing or selling custom software for governmental entities are not deductible under Section 7 9 54 NMSA 1978.

**B.** Example 1: X contracts with the United States to develop software to test certain devices which the United States is considering purchasing. X is performing a service under this contract.

**C.** Example 2: Same facts as in Example 1 except that X is to modify an existing software test program. X is nonetheless performing a service under the contract.

**D.** Example 3: X enters into a qualifying research and development contract with a signatory agency of the United States. The contract is to develop software to test certain devices which the United States is considering purchasing. X is performing a service under this contract. 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 ~~[notes]~~ nontaxable transaction certificates or alternative evidence as provided by Section 7-9-43 NMSA 1978 for the purchase of the packaged software.

[4/30/1997; 3.2.212.24 NMAC - Rn & A, 3 NMAC 2.54.24, 5/31/2001; A, xx/xx/2018]



### **3.2.218.9 SERVICES, LEASES, CONSTRUCTION SERVICES**

**A.** Receipts from services performed for and from leases entered into with 501(c)(3) organizations are ~~[fully taxable. Such receipts are]~~ not deductible pursuant to Section 7-9-60 NMSA 1978. ~~[Only receipts from selling tangible personal property to a 501(c)(3) organization are deductible.]~~

**B.** ~~[Receipts]~~ Except as provided in Paragraph C, receipts from ~~[performing a construction project for]~~ selling construction, including construction material to a 501(c)(3) organization, ~~[including the construction services and the value of all property used in the construction project,]~~ are receipts derived from performing a service and are ~~[fully taxable.]~~ not eligible for the deduction pursuant to Section 7-9-60 NMSA 1978.

**C.** Receipts from selling construction material that is tangible personal property, whether removable on non-removable, that is or would be classified for depreciation purposes as three-year property, five-year property, seven-year property or 10-year property, including indirect costs related to the asset basis, by Section 168 of the Internal Revenue Code of 1986, as that section may be amended or renumbered, may be deducted from gross receipts when the sale is made to a 501(c)(3) organization.

[3/16/1979, 6/18/1979, 4/7/1982, 5/4/1984, 4/2/1986, 11/26/1990, 11/15/1996; 3.2.218.9 NMAC - Rn, 3 NMAC 2.60.9 & A, 6/14/01; A, xx/xx/2018]

### **3.2.218.11 SALE OF MEALS:**

Meals are tangible personal property. Therefore receipts from selling meals to a 501(c)(3) organization are receipts from selling tangible personal property. Such receipts may be deducted from gross receipts under Section 7 9 60 NMSA 1978 if the organization delivers a properly executed Type 9 ~~[note with]~~ nontaxable transaction certificate or alternative evidence to the seller. Sales of meals directly to members of a 501(c)(3) organization may not be deducted under Section 7 9 60 NMSA 1978 even if the meals are served at a function of the organization. The 501(c)(3) organization is an entity distinct from its members.

[10/29/1999; 3.2.218.11 NMAC - Rn, 3 NMAC 2.60.11 & A, 6/14/2001, xx/xx/2018]

### **3.2.218.13 - SALE OF GASES:**

Gases, such as natural gas, nitrogen, carbon dioxide, helium, oxygen, propane, acetylene and nitrous oxide, are tangible personal property. Therefore receipts from selling gases to a 501(c)(3) organization may be deducted from gross receipts under Section 7 9 60 NMSA 1978 if the organization delivers a properly executed ~~[note]~~ nontaxable transaction certificate or alternative evidence to the seller.

[3.2.218.13 NMAC - N, 3/15/2010; A, xx/xx/2018]

### **3.2.218.14 SINGLE MEMBER LIMITED LIABILITY COMPANY WHOSE SOLE MEMBER IS A 501(c)(3) ORGANIZATION:**

**A.** A single member limited liability company (llc) whose sole member is a 501(c)(3) organization will be treated like a 501(c)(3) organization and receive the same treatment for purposes of Section 7-9-60 NMSA 1978 so long as the llc is recognized by the internal revenue service as a disregarded entity for federal income tax purposes.

**B.** Receipts from the sale of tangible personal property to an llc described in Subsection A above when the property is employed in the conduct of an unrelated trade or business as defined in Section 513 of the Internal Revenue Code of 1986, as amended or renumbered, are not deductible pursuant to Subsection A of Section 7-9-60 NMSA 1978. If the llc, or its 501(c)(3) single member, delivering the ~~[note]~~ nontaxable transaction certificate or alternative evidence employs the tangible personal property in the conduct of an unrelated trade or business, the ~~[compensating tax is due.]~~ llc, or its 501(c)(3) single member, is liable for the seller's gross receipts tax plus penalty and interest pursuant to Section 7-9-43 NMSA 1978.

[3.2.218.14 NMAC - N, 1/15/2015; A, xx/xx/2018]