

HOUSE BILL 202

**53RD LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2017**

INTRODUCED BY

Carl Trujillo

AN ACT

RELATING TO TAXATION; PROVIDING THAT THE PLACE OF BUSINESS OF A PERSON WITHOUT PHYSICAL PRESENCE IN THIS STATE IS WHERE THE PROPERTY OR SERVICE BEING SOLD IS DELIVERED; ALLOWING A REFUND OF GROSS RECEIPTS TAX DUE A PERSON TO BE APPLIED AGAINST COMPENSATING TAX OWED BY THE PERSON'S CUSTOMER AS A RESULT OF TRANSACTIONS WITH THAT PERSON; CLARIFYING THAT A PERSON WITHOUT PHYSICAL PRESENCE IN THE STATE THAT HAS LESS THAN ONE HUNDRED THOUSAND DOLLARS (\$100,000) IN GROSS RECEIPTS IS NOT ENGAGING IN BUSINESS PURSUANT TO THE GROSS RECEIPTS AND COMPENSATING TAX ACT; BARRING THE TAXATION AND REVENUE DEPARTMENT FROM ENFORCING COLLECTION OF THE GROSS RECEIPTS TAX IN CERTAIN CIRCUMSTANCES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

SECTION 1. Section 7-1-14 NMSA 1978 (being Laws 1969,

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1 Chapter 145, Section 1, as amended) is amended to read:

2 "7-1-14. SECRETARY MAY DETERMINE WHERE CERTAIN GROSS  
3 RECEIPTS ARE TO BE REPORTED--PLACE OF BUSINESS FOR CONSTRUCTION  
4 PROJECTS, [~~AND~~] CERTAIN REAL PROPERTY SALES AND SALES BY OUT-  
5 OF-STATE VENDORS.--

6 A. By regulation, the secretary may require any  
7 person maintaining one or more places of business to report the  
8 person's taxable gross receipts and deductions for each  
9 municipality or county or area within an Indian reservation or  
10 pueblo grant in which the person maintains a place of business.

11 B. For persons engaged in the construction  
12 business, the place where the construction project is performed  
13 is a "place of business", and all receipts from that project  
14 are to be reported from that place of business.

15 C. The secretary may, by regulation, also require  
16 any person maintaining a business outside the boundaries of a  
17 municipality on land owned by that municipality to report the  
18 person's taxable gross receipts for that municipality.

19 D. For a person engaged in the business of selling  
20 real estate, the location of the real property sold is the  
21 "place of business", and all receipts from that sale are to be  
22 reported from that place of business.

23 E. For a person engaging in business but is without  
24 physical presence in this state, "place of business" is the  
25 location where the property or the product of a service being

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1 sold by the person is delivered."

2 SECTION 2. Section 7-1-29 NMSA 1978 (being Laws 1965,  
3 Chapter 248, Section 31, as amended) is amended to read:

4 "7-1-29. AUTHORITY TO MAKE REFUNDS OR CREDITS.--

5 A. In response to a claim for refund, credit or  
6 rebate made as provided in Section 7-1-26 NMSA 1978, but before  
7 a court acquires jurisdiction of the matter, the secretary or  
8 the secretary's delegate may authorize payment to a person in  
9 the amount of the [~~creditor~~] credit or rebate claimed or refund  
10 an overpayment of tax determined by the secretary or the  
11 secretary's delegate to have been erroneously made by the  
12 person, together with allowable interest. A payment of a  
13 credit rebate claimed or a refund of tax and interest  
14 erroneously paid amounting to twenty thousand dollars (\$20,000)  
15 or more shall be made with the prior approval of the attorney  
16 general, except that the secretary or the secretary's delegate  
17 may make refunds with respect to the Oil and Gas Severance Tax  
18 Act, the Oil and Gas Conservation Tax Act, the Oil and Gas  
19 Emergency School Tax Act, the Oil and Gas Ad Valorem Production  
20 Tax Act, the Natural Gas Processors Tax Act or the Oil and Gas  
21 Production Equipment Ad Valorem Tax Act, Section 7-13-17 NMSA  
22 1978 and the Cigarette Tax Act without the prior approval of  
23 the attorney general regardless of the amount.

24 B. Pursuant to the final order of the district  
25 court, the court of appeals, the supreme court of New Mexico or

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1 a federal court, from which order, appeal or review is not  
2 successfully taken, adjudging that a person has properly  
3 claimed a credit or rebate or made an overpayment of tax, the  
4 secretary shall authorize the payment to the person of the  
5 amount thereof.

6 C. In the discretion of the secretary, any amount  
7 of credit or rebate to be paid or tax to be refunded may be  
8 offset against any amount of tax for which the person due to  
9 receive the credit, rebate payment or refund is liable, or in  
10 the case of a refund of gross receipts tax, any compensating  
11 tax owed by that person's customer as a result of transactions  
12 with that person. The secretary or the secretary's delegate  
13 shall give notice to the taxpayer that the credit, rebate  
14 payment or refund will be made in this manner, and the taxpayer  
15 shall be entitled to interest pursuant to Section 7-1-68 NMSA  
16 1978 until the tax liability is credited with the credit,  
17 rebate or refund amount.

18 D. In an audit by the department or a managed audit  
19 covering multiple reporting periods in which both underpayments  
20 and overpayments of a tax have been made in different reporting  
21 periods, the department shall credit the tax overpayments  
22 against the underpayments; provided that the taxpayer files a  
23 claim for refund of the overpayments. An overpayment shall be  
24 applied as a credit first to the earliest underpayment and then  
25 to succeeding underpayments. An underpayment of tax to which

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1 an overpayment is credited pursuant to this section shall be  
2 deemed paid in the period in which the overpayment was made or  
3 the period to which the overpayment was credited against an  
4 underpayment, whichever is later. If the overpayments credited  
5 pursuant to this section exceed the underpayments of a tax, the  
6 amount of the net overpayment for the periods covered in the  
7 audit shall be refunded to the taxpayer.

8 E. When a taxpayer makes a payment identified to a  
9 particular return or assessment, and the department determines  
10 that the payment exceeds the amount due pursuant to that return  
11 or assessment, the secretary may apply the excess to the  
12 taxpayer's other liabilities pursuant to the tax acts to which  
13 the return or assessment applies, without requiring the  
14 taxpayer to file a claim for a refund. The liability to which  
15 an overpayment is applied pursuant to this section shall be  
16 deemed paid in the period in which the overpayment was made or  
17 the period to which the overpayment was applied, whichever is  
18 later.

19 F. If the department determines, upon review of an  
20 original or amended income tax return, corporate income and  
21 franchise tax return, estate tax return, special fuels excise  
22 tax return or oil and gas tax return, that there has been an  
23 overpayment of tax for the taxable period to which the return  
24 or amended return relates in excess of the amount due to be  
25 refunded to the taxpayer pursuant to the provisions of

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1 Subsection I of Section 7-1-26 NMSA 1978, the department may  
2 refund that excess amount to the taxpayer without requiring the  
3 taxpayer to file a refund claim.

4 G. Records of refunds and credits made in excess of  
5 ten thousand dollars (\$10,000) shall be available for  
6 inspection by the public. The department shall keep such  
7 records for a minimum of three years from the date of the  
8 refund or credit.

9 H. In response to a timely refund claim pursuant to  
10 Section 7-1-26 NMSA 1978 and notwithstanding any other  
11 provision of the Tax Administration Act, the secretary or the  
12 secretary's delegate may refund or credit a portion of an  
13 assessment of tax paid, including applicable penalties and  
14 interest representing the amount of tax previously paid by  
15 another person on behalf of the taxpayer on the same  
16 transaction; provided that the requirements of equitable  
17 recoupment are met. For purposes of this subsection, the  
18 refund claim may be filed by the taxpayer to whom the  
19 assessment was issued or by another person who claims to have  
20 previously paid the tax on behalf of the taxpayer. Prior to  
21 granting the refund or credit, the secretary may require a  
22 waiver of all rights to claim a refund or credit of the tax  
23 previously paid by another person paying a tax on behalf of the  
24 taxpayer."

25 SECTION 3. Section 7-9-3.3 NMSA 1978 (being Laws 2003,

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1 Chapter 272, Section 4) is amended to read:

2 "7-9-3.3. DEFINITION--ENGAGING IN BUSINESS.--As used in  
3 the Gross Receipts and Compensating Tax Act, "engaging in  
4 business" means carrying on or causing to be carried on any  
5 activity with the purpose of direct or indirect benefit,  
6 without regard to having physical presence, including the  
7 presence of a representative acting on behalf of the person, in  
8 the state, except that "engaging in business" does not include:

9 A. [~~"engaging in business" does not include~~] having  
10 a worldwide [~~web site~~] website as a third-party content  
11 provider on a computer physically located in New Mexico but  
12 owned by another nonaffiliated person; [~~and~~]

13 B. [~~"engaging in business" does not include~~] using  
14 a nonaffiliated third-party call center to accept and process  
15 telephone or electronic orders of tangible personal property or  
16 licenses primarily from non-New Mexico buyers, which orders are  
17 forwarded to a location outside New Mexico for filling, or to  
18 provide services primarily to non-New Mexico customers; and

19 C. the activities of a person without physical  
20 presence in this state if the person and the person's  
21 affiliates have less than one hundred thousand dollars  
22 (\$100,000) of gross receipts in the state, based on receipts  
23 during the prior calendar year. As used in this subsection,  
24 "affiliate" means a business entity that, directly or  
25 indirectly, through one or more intermediaries, controls, is

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1 controlled by or is under common control with another business  
2 entity."

3 SECTION 4. Section 7-9-3.5 NMSA 1978 (being Laws 2003,  
4 Chapter 272, Section 3, as amended) is amended to read:

5 "7-9-3.5. DEFINITION--GROSS RECEIPTS.--

6 A. As used in the Gross Receipts and Compensating  
7 Tax Act:

8 (1) "gross receipts" means the total amount of  
9 money or the value of other consideration received from selling  
10 property in New Mexico, from leasing or licensing property  
11 employed in New Mexico, from granting a right to use a  
12 franchise employed in New Mexico, from selling services  
13 performed outside New Mexico, the product of which is initially  
14 used in New Mexico, or from performing services in New Mexico.  
15 In an exchange in which the money or other consideration  
16 received does not represent the value of the property or  
17 service exchanged, "gross receipts" means the reasonable value  
18 of the property or service exchanged;

19 (2) "gross receipts" includes:

20 (a) any receipts from sales of tangible  
21 personal property handled on consignment, including third-party  
22 sales made over a multi-vendor marketplace platform that acts  
23 as the intermediary, typically as the processor of the  
24 transaction, between the seller and the purchaser;

25 (b) the total commissions or fees

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1 derived from the business of buying, selling or promoting the  
2 purchase, sale or lease, as an agent or broker on a commission  
3 or fee basis, of any property, service, stock, bond or  
4 security;

5 (c) amounts paid by members of any  
6 cooperative association or similar organization for sales or  
7 leases of personal property or performance of services by such  
8 organization;

9 (d) amounts received from transmitting  
10 messages or conversations by persons providing telephone or  
11 telegraph services;

12 (e) amounts received by a New Mexico  
13 florist from the sale of flowers, plants or other products that  
14 are customarily sold by florists where the sale is made  
15 pursuant to orders placed with the New Mexico florist that are  
16 filled and delivered outside New Mexico by an out-of-state  
17 florist; and

18 (f) the receipts of a home service  
19 provider from providing mobile telecommunications services to  
20 customers whose place of primary use is in New Mexico if: 1)  
21 the mobile telecommunications services originate and terminate  
22 in the same state, regardless of where the services originate,  
23 terminate or pass through; and 2) the charges for mobile  
24 telecommunications services are billed by or for a customer's  
25 home service provider and are deemed provided by the home

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1 service provider. For the purposes of this section, "home  
2 service provider", "mobile telecommunications services",  
3 "customer" and "place of primary use" have the meanings given  
4 in the federal Mobile Telecommunications Sourcing Act; and

5 (3) "gross receipts" excludes:

6 (a) cash discounts allowed and taken;

7 (b) New Mexico gross receipts tax,  
8 governmental gross receipts tax and leased vehicle gross  
9 receipts tax payable on transactions for the reporting period;

10 (c) taxes imposed pursuant to the  
11 provisions of any local option gross receipts tax that is  
12 payable on transactions for the reporting period;

13 (d) any gross receipts or sales taxes  
14 imposed by an Indian nation, tribe or pueblo; provided that the  
15 tax is approved, if approval is required by federal law or  
16 regulation, by the secretary of the interior of the United  
17 States; and provided further that the gross receipts or sales  
18 tax imposed by the Indian nation, tribe or pueblo provides a  
19 reciprocal exclusion for gross receipts, sales or gross  
20 receipts-based excise taxes imposed by the state or its  
21 political subdivisions;

22 (e) any type of time-price differential;

23 (f) amounts received solely on behalf of  
24 another in a disclosed agency capacity; and

25 (g) amounts received by a New Mexico

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1 florist from the sale of flowers, plants or other products that  
2 are customarily sold by florists where the sale is made  
3 pursuant to orders placed with an out-of-state florist for  
4 filling and delivery in New Mexico by a New Mexico florist.

5 B. When the sale of property or service is made  
6 under any type of charge, conditional or time-sales contract or  
7 the leasing of property is made under a leasing contract, the  
8 seller or lessor may elect to treat all receipts, excluding any  
9 type of time-price differential, under such contracts as gross  
10 receipts as and when the payments are actually received. If  
11 the seller or lessor transfers the seller's or lessor's  
12 interest in any such contract to a third person, the seller or  
13 lessor shall pay the gross receipts tax upon the full sale or  
14 leasing contract amount, excluding any type of time-price  
15 differential."

16 SECTION 5. Section 7-9-7.1 NMSA 1978 (being Laws 1993,  
17 Chapter 45, Section 1, as amended) is amended to read:

18 "7-9-7.1. DEPARTMENT BARRED FROM TAKING COLLECTION  
19 ACTIONS WITH RESPECT TO CERTAIN COMPENSATING AND GROSS RECEIPTS  
20 TAX LIABILITIES.--

21 A. The department shall take no action to enforce  
22 collection of compensating tax due on purchases made by an  
23 individual if:

24 (1) the property is used only for nonbusiness  
25 purposes;

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1 (2) the property is not a manufactured home;  
2 and

3 (3) the individual is not an agent for  
4 collection of compensating tax pursuant to Section 7-9-10 NMSA  
5 1978.

6 B. The department shall take no action to enforce  
7 collection of gross receipts tax for a tax period prior to July  
8 1, 2017 on persons engaging in business if, for those tax  
9 periods, those persons:

10 (1) lacked physical presence in the state; and

11 (2) did not report taxable gross receipts.

12 ~~[B-]~~ C. The prohibition in Subsection A of this  
13 section does not prevent the department from enforcing  
14 collection of compensating tax on purchases from persons who  
15 are not individuals, who are agents for collection pursuant to  
16 Section 7-9-10 NMSA 1978 or who use the property in the course  
17 of engaging in business in New Mexico or from enforcing  
18 collection of compensating tax due on purchase of manufactured  
19 homes."

20 SECTION 6. EFFECTIVE DATE.--The effective date of the  
21 provisions of this act is July 1, 2017.

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