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, .206030.1
Chapter 145, Section 1, as amended) is amended to read:

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

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

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

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

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

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

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

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

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

B. Pursuant to the final order of the district court, the court of appeals, the supreme court of New Mexico or
a federal court, from which order, appeal or review is not
successfully taken, adjudging that a person has properly
claimed a credit or rebate or made an overpayment of tax, the
secretary shall authorize the payment to the person of the
amount thereof.

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

D. In an audit by the department or a managed audit
covering multiple reporting periods in which both underpayments
and overpayments of a tax have been made in different reporting
periods, the department shall credit the tax overpayments
against the underpayments; provided that the taxpayer files a
claim for refund of the overpayments. An overpayment shall be
applied as a credit first to the earliest underpayment and then
to succeeding underpayments. An underpayment of tax to which
.206030.1
an overpayment is credited pursuant to this section shall be deemed paid in the period in which the overpayment was made or the period to which the overpayment was credited against an underpayment, whichever is later. If the overpayments credited pursuant to this section exceed the underpayments of a tax, the amount of the net overpayment for the periods covered in the audit shall be refunded to the taxpayer.

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

F. If the department determines, upon review of an original or amended income tax return, corporate income and franchise tax return, estate tax return, special fuels excise tax return or oil and gas tax return, that there has been an overpayment of tax for the taxable period to which the return or amended return relates in excess of the amount due to be refunded to the taxpayer pursuant to the provisions of .206030.1
Subsection I of Section 7-1-26 NMSA 1978, the department may refund that excess amount to the taxpayer without requiring the taxpayer to file a refund claim.

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

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

SECTION 3. Section 7-9-3.3 NMSA 1978 (being Laws 2003, .206030.1
Chapter 272, Section 4) is amended to read:

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

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

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

C. the activities of a person without physical presence in this state if the person and the person's affiliates have less than one hundred thousand dollars ($100,000) of gross receipts in the state, based on receipts during the prior calendar year. As used in this subsection, "affiliate" means a business entity that, directly or indirectly, through one or more intermediaries, controls, is
controlled by or is under common control with another business entity."

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

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

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

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

(2) "gross receipts" includes:

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

(b) the total commissions or fees
derived from the business of buying, selling or promoting the
purchase, sale or lease, as an agent or broker on a commission
or fee basis, of any property, service, stock, bond or
security;

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

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

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

      (f) the receipts of a home service
provider from providing mobile telecommunications services to
customers whose place of primary use is in New Mexico if: 1)
the mobile telecommunications services originate and terminate
in the same state, regardless of where the services originate,
terminate or pass through; and 2) the charges for mobile
telecommunications services are billed by or for a customer's
home service provider and are deemed provided by the home
service provider. For the purposes of this section, "home
service provider", "mobile telecommunications services",
"customer" and "place of primary use" have the meanings given
in the federal Mobile Telecommunications Sourcing Act; and

(3) "gross receipts" excludes:

(a) cash discounts allowed and taken;

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

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

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

(e) any type of time-price differential;

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

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

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

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

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

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

(1) the property is used only for nonbusiness
purposes;
(2) the property is not a manufactured home;
and

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

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

(1) lacked physical presence in the state; and

(2) did not report taxable gross receipts.

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

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

- 12 -