

# Gross Receipts Tax and Digital Advertising in New Mexico

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# Background: What is Digital Advertising?

- Digital advertising is the use of digital platforms to disseminate advertising messages to the consuming public.
- Unique aspects of digital advertising:
  - Ability to narrowly target desired audience.
  - Physical location of viewer at the time the advertisement is seen may be difficult to determine, as advertisement may be viewed on a mobile device.
  - Time when advertising is seen is broad, i.e. an advertisement is not seen at a particular time, as with typical television advertising.

# Application of Gross Receipts Tax to Advertising Receipts in New Mexico

- New Mexico currently taxes receipts from all forms of advertising services.
  - New Mexico is one of few states that broadly taxes services.
  - Gross receipts tax is “inclusive” – services are taxed unless a specific exclusion applies.
- New Mexico taxes print advertising, billboard advertising, radio advertising, and television advertising.
  - Current regulations address these forms of advertising. Sections 3.2.213.7 through 3.2.213.12, NMAC.
  - These regulations are primarily directed to issues arising under the Commerce Clause of the U.S. Constitution.
  - These regulations have been upheld by New Mexico’s Courts.

# Application of Gross Receipts Tax to Digital Advertising in New Mexico

- Like receipts from all other forms and methods of advertising, receipts from providing digital advertising services are subject to the gross receipts tax.
- The same legal constraints apply to the taxation of these receipts.
  - Commerce clause constraints, which limit the power of states to tax interstate commerce.
- Additional legal constraints apply, however.
  - The Internet Tax Freedom Act, which forbids discrimination against internet-based commerce with respect to taxation.

# Applying the Gross Receipts Tax to Digital Advertising in New Mexico

- These receipts are already taxable. No change in statute or regulation is required to make the receipts subject to the gross receipts tax.
- But the regulations are outdated.
  - Drafted before digital advertising became an important method of communicating advertising messages, and so only specifically address other forms of advertising.
  - Do not specifically address what portion of digital advertising revenues are subject to the gross receipts tax.
  - Do not specifically address how receipts from digital advertising are to be sourced.

# Applying the Gross Receipts Tax to Digital Advertising in New Mexico

- The Taxation and Revenue Department is updating its gross receipts tax regulations to clarify how receipts from performing digital advertising services in New Mexico should be taxed and sourced.
  - The proposed regulations do not impose a tax on a new tax base, or apply the gross receipts tax to a new class of receipts.
  - The proposed regulations stick closely to the scope of the existing regulations as applied to other forms of advertising.
    - The existing regulations have been held to comply with the constraints of the Commerce Clause on taxation of interstate commerce.
    - By going no further than existing treatment of other forms of advertising, the regulations avoid violating the Internet Tax Freedom Act.

# The Regulatory Process

- In consultation with the Multistate Tax Commission, the Department drafted regulations, and submitted them to public review and comment.
- Public Hearing was held on September 8, 2022.
- The Department also received written comments from a number of sources, including taxpayers providing digital advertising services, and industry groups representing such taxpayers.
- The comments contained helpful suggestions that would make compliance and administration easier for taxpayers and the Department.
- The Department is revising the proposed regulations, incorporating ideas from the comments received, and will publish them for further public review and comment in the near future.

# Questions?

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