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HOUSE BILL

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

INTRODUCED BY

DISCUSSION DRAFT

AN ACT

RELATING TO TAXATION; 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 7-1-29 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

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

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

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

13 D. In an audit by the department or a managed audit
14 covering multiple reporting periods in which both underpayments
15 and overpayments of a tax have been made in different reporting
16 periods, the department shall credit the tax overpayments
17 against the underpayments; provided that the taxpayer files a
18 claim for refund of the overpayments. An overpayment shall be
19 applied as a credit first to the earliest underpayment and then
20 to succeeding underpayments. An underpayment of tax to which
21 an overpayment is credited pursuant to this section shall be
22 deemed paid in the period in which the overpayment was made or
23 the period to which the overpayment was credited against an
24 underpayment, whichever is later. If the overpayments credited
25 pursuant to this section exceed the underpayments of a tax, the

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1 amount of the net overpayment for the periods covered in the
2 audit shall be refunded to the taxpayer.

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

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

24 G. Records of refunds and credits made in excess of
25 ten thousand dollars (\$10,000) shall be available for

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1 inspection by the public. The department shall keep such
2 records for a minimum of three years from the date of the
3 refund or credit.

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

20 SECTION 2. Section 7-9-3.3 NMSA 1978 (being Laws 2003,
21 Chapter 272, Section 4) is amended to read:

22 "7-9-3.3. DEFINITION--ENGAGING IN BUSINESS.--As used in
23 the Gross Receipts and Compensating Tax Act, "engaging in
24 business" means carrying on or causing to be carried on any
25 activity with the purpose of direct or indirect benefit,

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1 without regard to having physical presence, including the
2 presence of a representative acting on behalf of the person, in
3 the state, except that "engaging in business" does not include:

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

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

14 C. the activities of a person without physical
15 presence in this state if the person and the person's
16 affiliates have less than one hundred thousand dollars
17 (\$100,000) of gross receipts in the state, based on receipts
18 during the prior calendar year. As used in this subsection,
19 "affiliate" means a business entity that, directly or
20 indirectly, through one or more intermediaries, controls, is
21 controlled by or is under common control with another business
22 entity."

23 SECTION 3. Section 7-9-7.1 NMSA 1978 (being Laws 1993,
24 Chapter 45, Section 1, as amended) is amended to read:

25 "7-9-7.1. DEPARTMENT BARRED FROM TAKING COLLECTION

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1 ACTIONS WITH RESPECT TO CERTAIN COMPENSATING AND GROSS RECEIPTS
2 TAX LIABILITIES.--

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

6 (1) the property is used only for nonbusiness
7 purposes;

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

10 (3) the individual is not an agent for
11 collection of compensating tax pursuant to Section 7-9-10 NMSA
12 1978.

13 B. The department shall take no action to enforce
14 collection of gross receipts tax for a tax period prior to July
15 1, 2018 on persons engaging in business if, for those tax
16 periods, those persons:

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

18 (2) did not report taxable gross receipts.

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

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1 homes."

2 SECTION 4. EFFECTIVE DATE.--The effective date of the
3 provisions of this act is July 1, 2018.

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