

AN ACT

H
B
1
2
6
P
a
g
e
1

RELATING TO TAXATION; REORGANIZING DEFINITION SECTIONS OF THE GROSS RECEIPTS AND COMPENSATING TAX ACT; AMENDING, REPEALING AND ENACTING SECTIONS OF THE NMSA 1978.

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

Section 1. Section 7-1-55 NMSA 1978 (being Laws 1975, Chapter 251, Section 3, as amended) is amended to read:

"7-1-55. CONTRACTOR'S BOND FOR GROSS RECEIPTS--TAX--PENALTY.--

A. A person engaged in the construction business who does not have a principal place of business in New Mexico and who enters into a prime construction contract to be performed in this state shall, at the time such contract is entered into, furnish the secretary or the secretary's delegate with a surety bond, or other acceptable security, in a sum equivalent to the gross receipts to be paid under the contract multiplied by the sum of the applicable rate of the gross receipts tax imposed by Section 7-9-4 NMSA 1978 plus the applicable rate or rates of tax imposed pursuant to local option gross receipts taxes to secure payment of the tax imposed on the gross receipts from the contract and shall obtain a certificate from the secretary or the secretary's delegate that the requirements of this subsection have been met.

B. If the total sum to be paid under the contract is changed by ten percent or more subsequent to the date the surety bond or other acceptable security is furnished to the secretary or the secretary's delegate, such person shall increase or decrease, as the case may be, the amount of the bond or security within fourteen days after the change.

C. If a person fails to comply with Subsection A or B of this section, the secretary or the secretary's delegate:

(1) may demand of the person by certified mail or in person that the person comply. Upon the failure of the person to comply within ten days of the date of the mailing of such demand, the secretary may institute a proceeding to enjoin the person from doing business as provided in Section 7-1-53 NMSA 1978; or

(2) may, when a serious and immediate risk exists that an amount of tax due or reasonably expected to become due from the person on gross receipts from a prime construction contract will not be paid, request the person to comply with Subsections A and B of this section, and, upon failure immediately to comply, the secretary may, without further notice of any kind, apply to any district court of the state for an injunction as provided in Section 7-1-53 NMSA 1978.

D. Subsections A, B and C of this section shall not apply if the total gross receipts to be paid under the construction contract, including any change in such amount, are less than fifty thousand dollars (\$50,000).

E. As used in this section, "construction" shall have the meaning set forth in Section 7-9-3.4 NMSA 1978 and "engaging in business" shall have the meaning set forth in Section 7-9-3.3 NMSA 1978.

F. A municipality or other political subdivision of the state or any agency of the state shall not issue a building or other construction permit to any person subject to the requirements of Subsection A of this section without first having been furnished by the construction contractor with the certificate from the secretary or the secretary's delegate specified in Subsection A of this section. Any person who issues any such permit before receiving the certificate shall be deemed guilty of a

misdemeanor and, upon conviction, be fined not less than fifty dollars (\$50.00) nor more than one hundred dollars (\$100) for each offense."

Section 2. Section 7-9-3 NMSA 1978 (being Laws 1978, Chapter 46, Section 1, as amended by Laws 2002, Chapter 28, Section 1 and by Laws 2002, Chapter 45, Section 1 and also by Laws 2002, Chapter 49, Section 1) is amended to read:

"7-9-3. DEFINITIONS.--As used in the Gross Receipts and Compensating Tax Act:

A. "buying" or "selling" means a transfer of property for consideration or the performance of service for consideration;

B. "department" means the taxation and revenue department, the secretary of taxation and revenue or an employee of the department exercising authority lawfully delegated to that employee by the secretary;

C. "financial corporation" means any savings and loan association or any incorporated savings and loan company, trust company, mortgage banking company, consumer finance company or other financial corporation;

D. "initial use" or "initially used" means the first employment for the intended purpose and does not include the following activities:

(1) observation of tests conducted by the performer of services;

(2) participation in progress reviews, briefings, consultations and conferences conducted by the performer of services;

(3) review of preliminary drafts, drawings and other materials prepared by the performer of the services;

(4) inspection of preliminary prototypes developed by the

performer of services; or

H
B

(5) similar activities;

1

E. "leasing" means an arrangement whereby, for a consideration, property is employed for or by any person other than the owner of the property, except that the granting of a license to use property is the sale of a license and not a lease;

2
6
P
a
g
e

F. "local option gross receipts tax" means a tax authorized to be imposed by a county or municipality upon the taxpayer's gross receipts and required to be collected by the department at the same time and in the same manner as the gross receipts tax; "local option gross receipts tax" includes the taxes imposed pursuant to the Municipal Local Option Gross Receipts Taxes Act, Supplemental Municipal Gross Receipts Tax Act, County Local Option Gross Receipts Taxes Act, Local Hospital Gross Receipts Tax Act, County Correctional Facility Gross Receipts Tax Act and such other acts as may be enacted authorizing counties or municipalities to impose taxes on gross receipts, which taxes are to be collected by the department;

4

G. "manufactured home" means a movable or portable housing structure for human occupancy that exceeds either a width of eight feet or a length of forty feet constructed to be towed on its own chassis and designed to be installed with or without a permanent foundation;

H. "manufacturing" means combining or processing components or materials to increase their value for sale in the ordinary course of business, but does not include construction;

I. "person" means:

(1) an individual, estate, trust, receiver, cooperative association, club, corporation, company, firm, partnership, limited liability company,

limited liability partnership, joint venture, syndicate or other entity, including any gas,
water or electric utility owned or operated by a county, municipality or other political
subdivision of the state; or

(2) a national, federal, state, Indian or other governmental unit
or subdivision, or an agency, department or instrumentality of any of the foregoing;

J. "property" means real property, tangible personal property, licenses,
franchises, patents, trademarks and copyrights. Tangible personal property includes
electricity and manufactured homes;

K. "research and development services" means an activity engaged in
for other persons for consideration, for one or more of the following purposes:

(1) advancing basic knowledge in a recognized field of natural
science;

(2) advancing technology in a field of technical endeavor;

(3) developing a new or improved product, process or system
with new or improved function, performance, reliability or quality, whether or not the
new or improved product, process or system is offered for sale, lease or other transfer;

(4) developing new uses or applications for an existing product,
process or system, whether or not the new use or application is offered as the
rationale for purchase, lease or other transfer of the product, process or system;

(5) developing analytical or survey activities incorporating
technology review, application, trade-off study, modeling, simulation, conceptual
design or similar activities, whether or not offered for sale, lease or other transfer; or

(6) designing and developing prototypes or integrating systems
incorporating the advances, developments or improvements included in Paragraphs

(1) through (5) of this subsection;

L. "secretary" means the secretary of taxation and revenue or the secretary's delegate;

M. "service" means all activities engaged in for other persons for a consideration, which activities involve predominantly the performance of a service as distinguished from selling or leasing property. "Service" includes activities performed by a person for its members or shareholders. In determining what is a service, the intended use, principal objective or ultimate objective of the contracting parties shall not be controlling. "Service" includes construction activities and all tangible personal property that will become an ingredient or component part of a construction project. Such tangible personal property retains its character as tangible personal property until it is installed as an ingredient or component part of a construction project in New Mexico. However, sales of tangible personal property that will become an ingredient or component part of a construction project to persons engaged in the construction business are sales of tangible personal property; and

N. "use" or "using" includes use, consumption or storage other than storage for subsequent sale in the ordinary course of business or for use solely outside this state."

Section 3. A new section of the Gross Receipts and Compensating Tax Act, Section 7-9-3.1 NMSA 1978, is enacted to read:

"7-9-3.1. 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

H
B
1
2
6
P
a
g
e
6

property 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;

H
B
1
2
6
P
a
g
e
7

(2) "gross receipts" includes:

- (a) any receipts from sales of tangible personal property handled on consignment;
- (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

H
B
1
2
6
P
a
g
e
8

(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.

H
B

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 his interest in any such contract to a third person, the seller or lessor shall pay the gross receipts tax upon the full sale or leasing contract amount, excluding any type of time-price differential."

1
2
6
P
a
g
e
9

Section 4. Section 7-9-3.3 NMSA 1978 (being Laws 2002, Chapter 18, Section 1) is repealed and a new Section 7-9-3.3 NMSA 1978 is enacted 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, except that:

A. "engaging in business" does not include having a worldwide web site 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."

Section 5. A new section of the Gross Receipts and Compensating Tax Act, Section 7-9-3.4 NMSA 1978, is enacted to read:

"7-9-3.4. DEFINITIONS--CONSTRUCTION AND CONSTRUCTION

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

A. "construction" means:

- (1) the building, altering, repairing or demolishing in the ordinary course of business any:
 - (a) road, highway, bridge, parking area or related project;
 - (b) building, stadium or other structure;
 - (c) airport, subway or similar facility;
 - (d) park, trail, athletic field, golf course or similar facility;
 - (e) dam, reservoir, canal, ditch or similar facility;
 - (f) sewerage or water treatment facility, power generating plant, pump station, natural gas compressing station, gas processing plant, coal gasification plant, refinery, distillery or similar facility;
 - (g) sewerage, water, gas or other pipeline;
 - (h) transmission line;
 - (i) radio, television or other tower;
 - (j) water, oil or other storage tank;
 - (k) shaft, tunnel or other mining appurtenance;
 - (l) microwave station or similar facility;
 - (m) retaining wall, wall, fence, gate or similar structure;

or

 - (n) similar work;

- (2) the leveling or clearing of land;

(3) the excavating of earth;

(4) the drilling of wells of any type, including seismograph shot holes or core drilling; or

(5) similar work; and

B. "construction material" means tangible personal property that becomes or is intended to become an ingredient or component part of a construction project, but "construction material" does not include a replacement fixture when the replacement is not construction or a replacement part for a fixture."

Section 6. Section 7-9-54 NMSA 1978 (being Laws 1969, Chapter 144, Section 44, as amended) is amended to read:

"7-9-54. DEDUCTION--GROSS RECEIPTS TAX--GOVERNMENTAL GROSS RECEIPTS TAX--SALES TO GOVERNMENTAL AGENCIES.--

A. Receipts from selling tangible personal property to the United States or New Mexico or a governmental unit, subdivision, agency, department or instrumentality thereof may be deducted from gross receipts or from governmental gross receipts. Unless contrary to federal law, the deduction provided by this subsection does not apply to:

(1) receipts from selling metalliferous mineral ore;

(2) receipts from selling tangible personal property that is or will be incorporated into a metropolitan redevelopment project created under the Metropolitan Redevelopment Code;

(3) receipts from selling construction material; or

(4) that portion of the receipts from performing a "service", as defined in Subsection M of

Section 7-9-3 NMSA 1978, that reflects the value of tangible personal property utilized or produced in performance of such service.

B. Receipts from selling tangible personal property for any purpose to an Indian tribe, nation or pueblo or a governmental unit, subdivision, agency, department or instrumentality thereof for use on Indian reservations or pueblo grants may be deducted from gross receipts or from governmental gross receipts.

C. When a seller, in good faith, deducts receipts for tangible personal property sold to the state or a governmental unit, subdivision, agency, department or instrumentality thereof, after receiving written assurances from the buyer's representative that the property sold is not construction material, the department is precluded from asserting in a later assessment or audit that the receipts are not deductible pursuant to Paragraph (3) of Subsection A of this section."

Section 7. Section 7-9-73.2 NMSA 1978 (being Laws 1998, Chapter 95, Section 2 and Laws 1998, Chapter 99, Section 4) is amended to read:

"7-9-73.2. DEDUCTION--GROSS RECEIPTS TAX AND GOVERNMENTAL GROSS RECEIPTS TAX--PRESCRIPTION DRUGS.--

A. Receipts from the sale of prescription drugs may be deducted from gross receipts and governmental gross receipts.

B. For the purposes of this section, "prescription drugs" means insulin and substances that are:

(1) dispensed by or under the supervision of a licensed pharmacist or by a physician or other person authorized under state law to do so;

(2) prescribed for a specified person by a person authorized under state law to prescribe the substance; and

H
B

1
2
6
P
a
g
e

1
2

(3) subject to the restrictions on sale contained in
Subparagraph 1 of Subsection (b) of 21 USCA 353." Section 8. EFFECTIVE DATE.--
The effective date of the provisions of this act is July 1, 2003.