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Honorable Stephanie Schardin Clarke
Secretary of Taxation and Revenue
Taxation and Revenue Department
P.O. Box 630
Santa Fe, NM 87504-0630

Dear Secretary Schardin Clarke:

This letter is a comment for the record on the TAA and GR&CTA regulations scheduled for hearing on April 29, 2021.

The subject matter is certainly broad-ranging and your Department has obviously made a real effort to corral and resolve issues. Before delving into the proposed regulations, however, these preliminary remarks are pertinent.

The regulations collected under 3.1 and 3.2 NMAC are “to interpret, exemplify, implement and enforce”—but not to repeat—the provisions of the Tax Administration Act or the Gross Receipts and Compensating Tax Act. There is no point to reiterating the law in the regulations. Washing the duplications of statutory language out of the proposed regulations would significantly shorten them. This would help readers and discussions to focus on what truly matters—TRD’s interpretations of the statutes. TRD has other tools to combine statutory and regulatory material for the guidance of taxpayers: instructions and FYI publications. Use regulations only to convey new interpretative or explanatory material that is meant to have the force of law; the statutes already have the force of law. [I admit to having laxer standards for examples.]

TRD regulations do not contain a lot of internal cross-referencing. Therefore where new material is placed within the existing body of regulations can make it easier or harder for a taxpayer to find it. Often the best placement is a judgment call. In a few cases, I offer an alternative to the suggested placements made by the proposals.

Enclosed is a separate paper with my comments on specific proposals.

Sincerely,

James P. O'Neill

Comments on Proposed TAA and GRT Rules Filed March 12, 2021
James P. O'Neill

I. (Revised) **3.1.4.13 NMAC**:

a) General comments:

(i) At several places in this regulation, it references itself as “this Reg. 3.1.4.13”. According to rule 1.24.10.9 NMAC, this is not correct. Presumably acceptable alternatives would include “3.1.4.13 NMAC”, “this regulation” and “this regulation (3.1.4.13 NMAC)”.

(ii) “Business location” versus “reporting location”. I believe there is (and should be) a real difference in the meaning of these terms. “Business location” indicates a place where the business actually operates. This could be one or more physical locations or metaphysical locations (the “cloud”). “Reporting location” refers to the TRD code to be used to identify the taxing jurisdictions that the business’s gross receipts are to be reported to. The present version of 3.1.4.13 NMAC, however, hopelessly confuses the two. I applaud the effort in these proposals to straighten out the mess. Perhaps this new clarity can be amended into the statutes.

(iii) These comments assume that there will be only one reporting code for all out-of-state locations. If there will be more than one, some wordsmithing may be needed.

b) **3.1.4.13A**: Section 14-4-5.7B NMSA 1978 specifically discourages defining in regulation terms that have been defined in statute. Since TRD has some useful things to say about “in-person service” and actually presents three new definitions (“gross receipts from”, “reporting location” and “seller’s location”), some editing of Subsection A is required. In the lead-in sentence, delete everything after “DEFINITIONS:”.

c) **3.1.4.13A(1)**: The first sentence misquotes Section 7-1-14K(2) NMSA 1978 and is unnecessary; Section 7-1-14 NMSA 1978 already states the point plainly enough. Anyway this is not the term you actually define. [Also, there is a typo following “lease”.] Delete the first sentence and re-draft the paragraph:

“(1) “Gross receipts from” and similar terms, as used in this regulation, indicate that under the Gross Receipts and Compensating Tax Act, the Leased Vehicle Gross Receipts Tax Act and the Interstate Telecommunications Gross Receipts Tax Act, the gross receipts, as defined in Section 7-1-14K(2) NMSA 1978, would be derived from a particular source or characterized as relating to a particular activity such as the lease of property or the sale of services.”

d) **3.1.4.13A(2)**: The first two sentences repeat the statute; delete them. In the third sentence, change “If the service...” to “If a service...”.

e) **3.1.4.13A(3)**: Delete this paragraph. The first sentence simply regurgitates Section 7-1-14K(4) NMSA 1978. The second, as it points out, merely repeats part of what 3.1.4.13A(2) NMAC has already presented. Renumber the following two items.

f) **3.1.4.13B(2)**: Delete this paragraph. The first sentence is unnecessary; Section 14-4-5.7A NMSA 1978 already makes this point—*for all rules*. Since TRD does not have legislative power, the second sentence also goes without saying.

g) **3.1.4.13B(3)(a)**: Actually, the statute sets the reporting requirement. Re-draft the second sentence:

“...Because Section 7-1-14F(1) NMSA 1978 provides that the reporting of gross receipts from professional services performed or sold outside New Mexico shall be to the location of the performer (or seller) of the service, the gross receipts would be reported to the reporting location for the state and only the state tax rate will apply. See also 3.1.4.13C(6) NMAC.”

h) **3.1.4.13B(3)(c)**: I think this example is erroneous without some additional detail. 7-1-14C(5) NMSA 1978 states that the gross receipts are to be reported under the location from which the property was *shipped or transmitted*. Also, the shipping location could be in New Mexico; e.g., a NM-located fulfillment center. Re-write along these lines:

“(c) Example: A seller that does not have access to sufficient information for reporting sales of tangible personal property to the reporting location where the customer receives the property may report the gross receipts from the sale to the reporting location from which the property was shipped or transmitted. So an out-of-state seller having such sales and shipping from an out-of-state warehouse would report the gross receipts to the reporting location for the state and would be taxed at the state rate. Sellers who have access to reliable information from which they can determine an estimate of receipts by reporting location must use that information to determine appropriate reporting locations. See also 3.1.4.13C(3)(a) NMAC.”

i) **3.1.4.13B(4)** has nothing to do with determining reporting locations. For the most part, it only repeats what is stated elsewhere. Delete and renumber the succeeding paragraph.

j) **3.1.4.13C(1)**: The implication that TRD rules may override statute is not correct and in any event is contrary to Section 14-4-5.7 NMSA 1978. Delete and renumber the succeeding paragraphs. Licenses are personal property, so it makes some sense to apply to rules for locating tangible personal property as a first try. But what does it mean to say that a license is delivered? (It would be a good thing to explain somewhere in this regulation what the concept “delivery of a license” means.) Isn’t it more appropriate to discuss where the license is used or usable? Since this idea connects reporting of intangible licenses to the reporting rules for tangible personal property, it ought to be clearly nailed down.

k) proposed **3.1.4.13C(2)** [renumbered here as C(1)]: I suggest replacing the second and third sentences (which are not entirely accurate) with the following:

“...The reporting location indicates the local jurisdiction or jurisdictions to which the transaction will be reported and the appropriate total tax rate, a

combination of the state and local option gross receipts tax rates, that applies for each location.”

l) proposed **3.1.4.13C(3)** [renumbered here as C(2)] : No need to mention the form on which tax is to be reported; it is not mentioned anywhere else in these proposals. On the third line, all language after “location” can be replaced with “...using the appropriate reporting location codes designated by the Secretary.”

m) proposed **3.1.4.13C(4)**: delete; repeats the statute. Renumber succeeding paragraphs.

n) proposed **3.1.4.13C(5)** [renumbered here as C(3)] : Although there is a minor degree of consolidation in (a) through (e), they are largely repetitions of the statute. Clauses (i) and (ii) and the examples, however, do add value and should be retained, with some editing.

“(3) Gross Receipts from the Sale or License of Tangible Personal Property and from Certain Licenses and Services.

(a) For purposes of Subsection C of Section 7-1-14 NMSA 1978, a seller is not considered to be without sufficient information if the seller:

(i) obtains or has access to sufficient information at the time of the sale, or subsequently, but simply fails to maintain that information in the seller’s records; or

(ii) has access to sufficient information from other reliable sources to make a reasonable estimate of the reporting location at the time the gross receipts are required to be reported. Examples of information from other reliable sources include population or market-penetration information that may be used to develop a reasonable estimate of the location of the seller’s consumers.

(b) If gross receipts are derived from a single sale or transaction where the property or the product of a service provided is determined to be delivered simultaneously at multiple locations throughout the state, the seller is deemed not to have sufficient information to determine the reporting location.

(1) Example: Company X provides an advertising service to Customer Y that will be distributed or displayed to the general public in New Mexico through general access to particular media. The product of the advertising service is delivered to the location of every person accessing or viewing the advertising. As a practical matter, the locations of these persons is unascertainable. Therefore, the reporting location of the gross receipts and related deductions from this service is X’s location from which the advertising service was primarily provided.

(2) Example: Company X provides Customer Y with a license to use X’s digital goods at Y’s various locations throughout the state. The license is delivered to those locations of Y in New Mexico. The reporting location of the gross receipts and related deductions of Company X from providing Y the license to use X’s digital goods is X’s location from which the digital goods were primarily provided.”

What if X sells a license (digital good) to Y, who is either the federal government or a multistate corporation with locations in New Mexico and other states? How does X even know that X has New Mexico gross receipts? If X is a non-US firm with no presence in the USA, it is likely to neither know nor care that it has a NM tax liability. These proposals do not address these issues. Perhaps the most reasonable answer lies in additional legislation.

o) proposed **3.1.4.13C(6)** [renumbered here as C(4)]: It is true that Section 7-1-14 NMSA 1978 does not deal with most licenses, an omission that should be addressed in the next legislative session. A reference to Subsection D--mixed transactions, would be helpful because licenses are frequently bundled with tangibles or services.

p) proposed **3.1.4.13C(7)**: Simply repeats the statute. Delete and renumber succeeding paragraphs.

q) proposed **3.1.4.13C(8)** [renumbered here as C(5)]: The first sentence repeats the statute; delete. Retain the second sentence as is.

r) proposed **3.1.4.13C(9)** [renumbered here as C(6)]: Paragraphs (a) through (e) mostly repeat the statutes; delete. (Maybe some day an official definition of “product of the service” may be necessary.) Perhaps this—

“(6) The reporting location of location of services other than professional services, construction services and transportation services is determined in general by locating the delivery of the product of the service following the rules for locating the delivery of tangible personal property.

(a) Advertising services. An advertising service involves an agreement with a client to communicate or to place advertisements before an intended audience, on behalf of the client. The product of an advertising service is the ad which is capable of being heard or viewed by the intended audience. The reporting location for gross receipts from an advertising service is determined by the location where the ad may be heard or seen by the intended audience.

(b) Services ancillary to advertising. Services ancillary to advertising include design of the advertisement, creation of data processing or information technology to capture of customer related information, and other like services, which the seller may treat as a separate service under Subsection D of this regulation, and which are provided to a client. The reporting location of gross receipts from a service ancillary to advertising depends where the product of the service is delivered, but will generally be the location of delivery of that product of the service to the client.

(c) The reporting location of gross receipts from in-person services is the location of the performance of the service, which is also the location of the customer or the customer’s property on which the service is performed.”

s) **3.1.4.13D**, TRD is authorizing, even mandating, unbundling of transactions, which overturns a longstanding tradition. TRD has resisted doing this because of the endless arguments it could provoke (both with taxpayers and with local governments) and the tax-gaming it could permit. TRD has to date preferred basing the characterization of a transaction based on its predominate component; see for example

3.2.1.29 NMAC. I believe TRD would have a difficult time enforcing this proposed rule with out-of-state taxpayers. It certainly runs afoul of the Streamlined Sales Tax's concept of a single tax rate per transaction.

In the example, would the conclusion change if the charge for the service were \$1,000 or \$10,000? If so, the rule doesn't explain the actual principles in play.

t) **3.1.4.13E(1)**: Although more words are involved, this repeats the statute. Delete.

u) **3.1.4.13E(2)** [renumbered here as 3.1.4.13E]: I suppose this is necessary for the sake of completeness but it is unenforceable. TRD doesn't even provide a way for such a tax owner to report and pay the tax.

v) **3.1.4.13E(3)**: Delete. Subparagraph (a) repeats the statute. Subparagraph (b) refers to transactions subject to the interstate telecommunications gross receipts tax, which transactions are exempt from the gross receipts and compensating taxes; Section 7-9-38.1 NMSA 1978.

w) **3.1.4.14E(4)**: Examples seem OK.

x) **3.1.4.13F**: Seems OK; just update the references.

y) **3.1.4.13G**: This mostly repeats statute and can be shortened. Also, the interstate telecommunications gross receipts tax rate is 4.25%, not the 5.125% state gross receipts tax rate as implied by the presented language. And anyway, this regulation is only about the reporting location, not the tax rate.

“G. REPORTING LOCATION—RECEIPTS SUBJECT TO THE
INTERSTATE TELECOMMUNICATIONS GROSS RECEIPTS TAX: The
reporting location for interstate telecommunications gross receipts subject to the
interstate telecommunications gross receipts tax is the state location.

z) **3.1.4.13H**: This is OK as far as it goes. But why not make it apply to Section 9-11-12.2 as long as you are in the neighborhood? While the Navajo Nation might not have a gross receipts tax agreement with TRD now, that statute certainly allows for one.

II. **3.2.1.7 NMAC**

a) As has been pointed out, repeating in regulation what the statute has already written does not advance the goal of interpreting, exemplifying, implementing and enforcing the statutes. The statutory quotes in Subsections D, H and I should be deleted.

b) Subsection D: The proposed second and third sentences are misplaced. They do not define “digital good” (the statute does that). Move the substance of those sentences to 3.2.1.16 NMAC.

c) Subsections H and I: All but the last sentence of each should be deleted. The material in those two sentences isn't really definitional and should be moved to 3.2.1.20 NMAC.

III. **3.2.1.12 NMAC** Looks good. I suppose the citation's page number will be available soonish.

IV. **3.2.1.14 NMAC** Even if stated in the negative, Subsection A still mostly repeats the statute and should be deleted as you have. The point could still be made in other venues, like the FYI publications.

V. **3.2.1.15 NMAC** Subsection J: “, as defined by Reg. 3.2.1.7” should be deleted. The statute defines the term.

VI. **3.2.1.20 NMAC** Again, material simply quoting statute or repeating previous material should be deleted. This is also a good place to incorporate the proposed ideas from 3.2.1.7H&I NMAC. Material regarding deductions should also be deleted since the regulations here concern what is or is not “gross receipts”, not taxable gross receipts.

“3.2.1.20. GROSS RECEIPTS - MARKETPLACE PROVIDERS AND MARKETPLACE SELLERS:

A. Marketplace providers

(1) The gross receipts of a marketplace provider include the provider’s gross receipts from the sales or leases of licenses, including digital goods.

(2) The phrase “collected by a marketplace provider”, as used in Section 7-9-3.5A(2)(g) NMSA 1978, means amounts paid by the customer directly to the marketplace provider or indirectly through third parties, where the marketplace provider retains any portion of the gross receipts as consideration in exchange for the marketplace provider’s services. The receipts of the marketplace provider, therefore, include all gross receipts collected from the customer for the sales, leases and licenses of tangible personal property, sales of licenses and sales of services of licenses for use of real property that are sourced to this state regardless of whether any amount is paid over to a marketplace seller.

B. Marketplace sellers

(1) The gross receipts of a marketplace seller include the seller’s gross receipts from the sales or leases of licenses, including digital goods.

(2) A marketplace seller that sells, leases or licenses tangible personal property, sales of licenses and sales of services of licenses for use of real property through a marketplace provider to customers in New Mexico has gross receipts in New Mexico.”

VII. **3.2.6.8 NMAC**

a) Subsection A, second line: insert “or” between “bill” and “other”.

b) The constant switching between “charged” and “billed” is a little unsettling. Is there a distinction? If not, use one term throughout. Regs are not literature.

c) For completeness, insert the following clause at the beginning of Subsection B: “If the person separately states the gross receipts tax amount,”.

VIII. **3.2.10.23 NMAC** Subsection A, third line: I believe replacing “gross receipts” with “compensating” is called for. Since nothing in these proposals or in existing GR&CTA regulations, defines “taxable use”, replace that term with “use”.