

Michelle Lujan Grisham
Governor

Office of the Secretary

Stephanie Schardin Clarke
Cabinet Secretary

July 2, 2021

Enclosed is the following proposal:

The New Mexico Taxation and Revenue Department hereby gives notice as required under Section 14- 4- 5.2 NMSA 1978 and 1.24.25.11 NMAC that it proposes to amend, repeal and replace, repeal and adopt the following rules as authorized by Section 9-11-6.2 NMSA 1978:

Purpose: The proposed rules are being enacted, amended, repealed, and repealed and replaced to align with current law and provide guidance on the new method of sourcing to marketplace providers and sellers.

Summary of Proposed Changes: The New Mexico Taxation and Revenue Department proposes to amend/repeal/replace/adopt the following rules:

Gross Receipts and Compensating Tax Act

(Gross Receipts; Services)

3.2.1.18 NMAC Section 7-9-3.5 NMSA 1978

(Tax on Gross Receipts from Services Performed Outside the State)

3.2.1.21 NMAC Section 7-9-3.5 NMSA 1978

(“Performance of a service,” “product of the service,” “initial use,” and “delivery; presumptions)

3.2.1.23 NMAC Section 7-9-3.5 NMSA 1978

(Product of Service Which is Reviewed and Accepted Outside New Mexico but Initially Used in New Mexico)

3.2.215.11 NMAC Section 7-9-57 NMSA 1978

(General Examples)

3.2.215.12 NMAC Section 7-9-57 NMSA 1978

(Credit for Tax Paid on Services Performed Outside the State)

3.2.300.9 NMAC Section 7-9-79.1 NMSA 1978

Hearing Date: Notice of public rule hearing: A public hearing will be held on the proposed rule changes on August 10, 2021 at 10:00AM through the internet, email, and telephonic means in response to concerns surrounding COVID-19 and in accordance with Executive Order 2020-004, Declaration of a Public Health Emergency, and the March 12, 2020 Public Health Emergency Order to Limit Mass Gatherings Due to COVID-19.

Technical Information: No technical or scientific information was consulted in drafting these proposed rule changes.

Public Hearing Location: The Public Hearing will be accessible via WebEx <https://nm-tax.webex.com/nm-tax/j.php?MTID=m89c40dd3456122210f5483dfb3e9d5b2>. Meeting number (access code): 132 352 6577 Meeting password: 08102021 or by telephone by dialing 1-844-621-3956. Any oral comments made during this hearing will be recorded and any electronic written comments can be submitted during the hearing at policy.office@state.nm.us.

How to participate: Individuals with disabilities who need any form of auxiliary aid to attend or participate in the public hearing are asked to contact Alicia Romero at Alicia.Romero@state.nm.us. The Taxation and Revenue Department will make every effort to accommodate all reasonable requests but cannot guarantee accommodation of a request that is not received at least ten calendar days prior to the scheduled hearing.

Complete Copies of the proposed rule changes can be found at www.tax.newmexico.gov/proposed-regulations-hearing-notice.aspx or are available upon request by contacting the Tax Policy Office at policy.office@state.nm.us.

The copies of the proposed amended, repealed, and replaced rules were placed on file in the Office of the Secretary on July 2, 2021. Pursuant to Section 9-11-6.2 NMSA 1978 of the Taxation and Revenue Department Act, the final rules, if filed, will be filed as required by law on or about August 26, 2021.

When are comments due: Written comments on the proposals can be submitted by email to policy.office@state.nm.us or by mail to the Taxation and Revenue Department, Tax Information and Policy Office, Post Office Box 630, Santa Fe, New Mexico 87504-0630 or on or before August 10, 2021. All written comments received by the agency will be posted on www.tax.newmexico.gov no more than three business days following receipt to allow for public review.

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3.2.1.18. Gross Receipts; Services

~~_____ A. Receipts from performing a service in New Mexico. Receipts derived from performing a service in New Mexico are subject to the gross receipts tax unless a specific exemption or deduction provided for in the Gross Receipts and Compensating Tax Act applies.~~

~~_____ B. Services performed both within and without New Mexico. Receipts from services, other than research and development services and services subject to the Interstate Telecommunications Gross Receipts Tax Act, performed both within and without New Mexico are subject to the gross receipts tax on the portion of the services performed within New Mexico.~~

~~_____ C. Allocating receipts from selling services performed within and without New Mexico.~~

~~_____ (1) When a prime contractor performs services both within and without New Mexico, cost accounting records which reasonably allocate all costs to the location of the performance of the service shall be used to determine the amount of services performed in New Mexico. If adequate cost accounting records are not kept for the allocation of costs to specific locations, the receipts from performing such services shall be prorated based on the percentage of service actually performed within New Mexico. The percentage shall be calculated by dividing the time spent by the prime contractor in performing such services in New Mexico by the total contract time spent performing services everywhere. Other reasonable methods of prorating such services may be acceptable if approved by the department in advance of performing the services.~~

~~_____ (2) Services subcontracted to third parties under a single contract by a prime contractor and used or consumed by the prime contractor in the performance of the contract shall be prorated by the prime contractor on the same basis, i.e., based either on allocated costs using cost accounting records or on the percentage of the total service actually performed within New Mexico by the prime contractor or other reasonable method approved by the department.~~

~~_____ (3) If a subcontract service is actually a service purchased for resale, and all conditions of Section 7-9-48 NMSA 1978 are met and the subcontracted service is actually sold intact to the prime contractor's customer, the prime contractor may issue a Type 5 nontaxable transaction certificate to the subcontractor and the receipts from such subcontracted service will be deductible from the subcontractor's gross receipts.~~

~~_____ (4) The subcontractor must use the same method of prorating the performance of services within and without New Mexico as used by the prime contractor.~~

~~_____ (5) This subsection shall not apply to a contractor who is performing construction services.~~

~~_____ D. Expenses incurred outside New Mexico and allocated to operations in New Mexico.~~

~~_____ (1) General administrative and overhead expenses incurred outside New Mexico and allocated to operations in this state for bookkeeping purposes, costs of travel outside New Mexico, which travel was an incidental expense of performing services in New Mexico, employee benefits, such as retirement, hospitalization insurance, life insurance and the like, paid to insurers or others doing business outside New Mexico for employees working in New Mexico and other expenses incurred outside New Mexico which are incidental to performing services in New Mexico, all constitute the taxpayer's expenses of performing services in New Mexico.~~

~~_____ (2) No provision of the Gross Receipts and Compensating Tax Act allows a deduction for expenses incurred in performing services to determine gross receipts subject to tax. Therefore, the total amount of money or reasonable value of other consideration derived from performing services in New Mexico is subject to the gross receipts tax.~~

~~_____ E. Receipts from performing services outside New Mexico.~~

~~_____ (1) Receipts from performing services, except research and development services, outside New Mexico are not subject to the gross receipts tax under the provisions of Section 7-9-13.1 NMSA 1978.~~

~~_____ (2) Example 1: P, a resident of New Mexico, is an expert forest fire fighter. P's receipts from fighting forest fires outside New Mexico are not includable in P's gross receipts.~~

~~_____ (3) Example 2: D is a data processing bureau located in Lone Tree, Iowa. X, a New Mexico accounting and bookkeeping firm, mails accounting data to D. D then processes this material into general ledgers,~~

payroll journals and other journals and then returns this material by mail to X. The receipts of D are receipts from performing services entirely outside New Mexico and therefore are not subject to the gross receipts tax.

————— (4) Example 3: L, an Albuquerque attorney, is retained by a Colorado firm to negotiate and draw up oil and gas leases for lands in southern Colorado. To accomplish this objective, L goes to Pueblo, Colorado, and there negotiates and draws the leases. Receipts from the fee are not includable in L's gross receipts because the service was performed entirely outside the state of New Mexico.

————— F. Sales of state licenses by nongovernmental entities.

————— (1) Amounts retained by nongovernmental entities as compensation for services performed in selling state licenses are gross receipts.

————— (2) Example: G owns and operates a small grocery store in rural New Mexico which is located near a popular fishing area. As a convenience to the public, G sells New Mexico Game and Fish licenses. For its services in selling these licenses, G retains a small percentage of the total license fee. The amounts retained are gross receipts because they are receipts derived from services performed in New Mexico. G may not deduct the amounts retained pursuant to Section 7-9-66 NMSA 1978 which deals with commissions derived from the sale of tangible personal property not subject to the gross receipts tax. A New Mexico game and fish license is not tangible personal property pursuant to Subsection J of Section 7-9-3 NMSA 1978.

————— G. Stockbrokers' commissions. Gross receipts include commissions received by stockbrokers, located in New Mexico, for handling transactions for out-of-state as well as in-state residents.

————— H. Attorneys' fees. Regardless of the source of payment or the fact of court appointment, the fees of attorneys are subject to the gross receipts tax to the extent that their services are performed in this state.

————— I. Directors' or trustees' fees.

————— (1) The receipts of a member of a board of directors or board of trustees from attending a directors' or trustees' meeting in New Mexico are receipts derived from performing a service in New Mexico and are subject to the gross receipts tax.

————— (2) Example: X is on the board of directors of a New Mexico corporation and a Texas corporation. X attends directors' meetings in Texas and New Mexico. For each directors' meeting that X attends, X is paid a fee of \$50.00. X is performing a service. The fee which X receives from performing this service in New Mexico is subject to the gross receipts tax. The fee which X receives from performing the service in Texas is not subject to the gross receipts tax. However, the burden is on X to segregate receipts which are not taxable from those which are taxable.

————— (3) Example: Y is on the board of trustees of Z, a New Mexico electric cooperative organized under the provisions of the Rural Electric Cooperative Act. Y receives \$85 a day for Y to attend Z's regular meetings in New Mexico, plus reimbursement for mileage to and from the meeting at the standard IRS rate. Y also receives \$85 a day for Y to attend no more than one other meeting, conference or training inside or outside New Mexico within any one month, plus reimbursement of actual expenses, including hotel, transportation, tips and reasonable expenses for meals and entertainment. Y is performing a service. The fees and reimbursements Y receives for attending meetings, conferences and trainings in New Mexico are subject to gross receipts tax. The fees and reimbursements Y receives for attending meetings, conferences and trainings outside New Mexico are not subject to gross receipts tax.

————— (a) See Paragraph (1) of Subsection C of 3.2.1.19 NMAC regarding reimbursed expenditures.

————— (b) Y is not a volunteer as defined in Paragraph (2) of Subsection D of 3.2.1.19 NMAC because Y receives compensation for Y's services in addition to reimbursement of Y's out-of-pocket expenses incurred in the performance of Y's services.

————— J. Anesthetists' fees.

————— (1) The receipts of a nonemployee anesthetist from anesthetic services performed for a surgeon are subject to the gross receipts tax.

_____ (2) The receipts of an anesthetist from the performance of this service for a surgeon may be deducted from gross receipts if the surgeon resells the service to the patient and delivers a nontaxable transaction certificate to the anesthetist. The surgeon delivering the nontaxable transaction certificate must separately state the value of the service purchased in the charge for the service on its subsequent sale. The subsequent sale must be in the ordinary course of business and subject to the gross receipts tax.

_____ (3) Example: A is an anesthetist who is employed by a hospital and also performs services for and receives compensation from a surgeon who is not associated with the hospital. The surgeon does not consider the anesthetist to be an employee and does not withhold income or other taxes from the anesthetist's compensation. Although the surgeon may exercise some control over the services performed by the anesthetist, the surgeon relies on the anesthetist's training and experience to accomplish the result desired. The receipts of the anesthetist from this service performed are subject to the gross receipts tax.

_____ K. Athletic officials.

_____ (1) Receipts from refereeing, umpiring, scoring or other officiating at school events sanctioned by the New Mexico activities association are exempt from gross receipts tax pursuant to Section 7-9-41.4 NMSA 1978.

_____ (2) Receipts of a referee, umpire, scorer or other similar athletic official from umpiring, refereeing, scoring or officiating at a sporting event located in New Mexico that is not sanctioned by the New Mexico activities association, are receipts derived from performance of a service and are subject to the gross receipts tax. Such receipts will not be exempted from the gross receipts tax as "wages" unless the umpires, referees, scorers and other athletic officials demonstrate to the department that such receipts are derived from an employment relationship whereby they are employees within the meaning of 3.2.105.7 NMAC.

_____ L. Racing receipts.

_____ (1) Unless the receipts are exempt under Section 7-9-40 NMSA 1978:

_____ (a) the receipts of vehicle or animal owners from winning purse money at races held in New Mexico are receipts from performing services in New Mexico and are subject to the gross receipts tax if any charge is made for attending, observing or broadcasting the race.

_____ (b) receipts of vehicle drivers, animal riders and drivers and other persons from receiving a percentage of the owner's purse are receipts from performing services in New Mexico and are subject to the gross receipts tax, unless the person receiving the percentage of purse money is an employee, as that term is defined in 3.2.105.7 NMAC, of the owner.

_____ (2) Where there is an agreement between the driver, rider or other person and the owner for distribution of the winning purse, then only the amount received pursuant to the agreement is gross receipts of the driver, rider or other person receiving the distribution.

_____ M. Advertising receipts of a newspaper or broadcaster.

_____ (1) The receipts of a New Mexico newspaper or a person engaged in the business of radio or television broadcasting from performing advertising services in New Mexico do not include the customary commission paid to or received by a nonemployee advertising agency or a nonemployee solicitation representative, when said advertising services are performed pursuant to an allocation or apportionment agreement entered into between them prior to the date of payment.

_____ (2) Receipts of a New Mexico newspaper or a person engaged in the business of radio or television broadcasting from the sale of advertising services to an advertising agency for resale may be deducted from gross receipts if the advertising agency delivers a nontaxable transaction certificate to the newspaper or the person engaged in the business of radio or television broadcasting. The subsequent sale must be in the ordinary course of business and subject to the gross receipts tax, or the advertising agency will be subject to the compensating tax on the value of the advertising service at the time it was rendered. This version of Paragraph (2) of Subsection M of 3.2.1.18 NMAC applies to transactions occurring on or after July 1, 2000.

____ N. Advertising space in pamphlets. Receipts from selling advertising service to New Mexico merchants in a pamphlet printed outside New Mexico and distributed wholly inside New Mexico are receipts from performing an advertising service in New Mexico. Such receipts are subject to the gross receipts tax.

____ O. Billboard advertising. Receipts derived from contracts to place advertising on outdoor billboards located within the state of New Mexico are receipts from performing an advertising service in New Mexico. Such receipts are subject to the gross receipts tax, regardless of the location of the advertiser.

____ P. Day care centers:

____ (1) Receipts from providing day care are receipts from performing a service and are subject to the gross receipts tax.

____ (2) Receipts from providing day care for children in a situation where a commercial day care center provides day care for the children and the expenses of the care for some of these children is paid for by the state of New Mexico are subject to the gross receipts tax.

____ (3) Receipts from providing day care for children in a situation where a person provides day care for children in a residence and the care for all these children is paid for by the state of New Mexico are subject to the gross receipts tax.

____ (4) Receipts from providing day care for children in a situation where a person provides day care for children in the children's home and the care for all of these children is paid for by the state of New Mexico are subject to the gross receipts tax.

____ Q. Child care:

____ (1) Receipts derived by a corporation for providing child care facilities for its employees are subject to the gross receipts tax on the amount received from its employees.

____ (2) Example: The X corporation operates a licensed child care facility to accommodate dependent children of its employees. In order to defray a portion of the cost of the facility, the corporation charges each employee two dollars (\$2.00) per child per week for the use of the facility. All receipts from the two dollar charge per child per week are subject to the gross receipts tax.

____ R. Service charges; tips:

____ (1) Except for tips, receipts of hotels, motels, guest lodges, restaurants and other similar establishments from amounts determined by and added to the customer's bill by the establishment for employee services, whether or not such amounts are separately stated on the customer's bill, are gross receipts of the establishment.

____ (2) A tip is a gratuity offered to service personnel to acknowledge service given. An amount added to a bill by the customer as a tip is a tip. Because the tip is a gratuity, it is not gross receipts.

____ (3) Amounts denominated as a "tip" but determined by and added to the customer's bill by the establishment may or may not be gross receipts. If the customer is required to pay the added amount and the establishment retains the amount for general business purposes, clearly it is not a gratuity. Amounts retained by the establishment are gross receipts, even if labeled as "tips". If the customer is not required to pay the added amount and any such amounts are distributed entirely to the service personnel, the amounts are tips and not gross receipts of the establishment.

____ (4) Examples:

____ (a) Restaurant R has a policy of charging parties of six or more a set percentage of the bill for food and drink served as a tip. If a customer insists on another arrangement, however, the set amount will be removed. R places all amounts collected from the set tip percentage into a pool which is distributed to the service staff at the end of each shift. The amounts designated as tips and collected and distributed by R to the service staff, are tips and not gross receipts. If R retains any amounts derived from the set tip percentage, the amounts retained are gross receipts.

_____ (b) Hotel H rents rooms for banquets and other functions. In addition to the rental fee for the room, H also charges amounts for set up and post function cleaning. H retains these amounts for use in its business. These amounts are gross receipts. They are gross receipts even if H denominates them as "tips".

_____ S. Real estate brokers.

_____ (1) Receipts of a person engaged in the construction business from the sale of the completed construction project include amounts which the person has received and then paid to a real estate broker. The total receipts from the sale of the construction project are subject to the gross receipts.

_____ (2) Receipts of a real estate broker from the performance of services for a person engaged in the construction business may not be deducted from gross receipts pursuant to Section 7-9-52 NMSA 1978.

_____ (3) See Sections 7-9-53 and 7-9-66.1 NMSA 1978 for deductibility of receipts from certain real estate broker transactions.

_____ T. Entertainers. The receipts of entertainers or performers of musical, theatrical or similar services are subject to the gross receipts tax when these services are performed in New Mexico.

_____ U. Managers or agents of entertainers. Commissions received by managers or agents of entertainers for the managers' or agents' services in New Mexico are subject to the gross receipts tax.

_____ V. Water utilities; installation of water taps and pipes. The receipts of a water utility from providing a "tap" to a water main and installing a pipe from the water main to a meter which it provides are subject to the gross receipts tax. However, if the utility is owned or operated by a county, municipality or other political subdivision of the state of New Mexico, its receipts from providing a "tap" to a water main and installing a pipe from a water main to a meter which it also provides are exempted from the gross receipts tax.

_____ W. Utilities; installation charges.

_____ (1) The receipts of a utility from installation charges are subject to the gross receipts tax. However, if the utility is owned or operated by a county, municipality or other political subdivision of the state of New Mexico, its receipts from installation charges are exempt from the gross receipts tax.

_____ (2) The receipts of a private water utility from providing a "tap" to a water main and installing a pipe from the water main to a meter which it provides are subject to the gross receipts tax.

_____ (3) Receipts of a private electric utility from fees for changing, connecting or disconnecting electricity of customers, whether or not these services are required because of nonpayment of bills by a customer, are subject to the gross receipts tax.

_____ X. Construction on Indian reservations or pueblos. The receipts of a non Indian from construction services, as defined in Section 7-9-3.4 NMSA 1978 and regulations thereunder, performed on an Indian reservation or pueblo are subject to the gross receipts tax unless the imposition of the gross receipts tax is preempted by federal law.

_____ Y. Star route contractors. Receipts of a person holding a contract for transportation of United States mail, as a "Star Route Contractor", from points within New Mexico to other points within New Mexico and to points outside of New Mexico, are subject to the gross receipts tax on that portion of the receipts from transportation from a point within New Mexico to a point within New Mexico. See Paragraph (2) of Subsection B of 3.2.55.10 NMAC for deducting receipts from the portion in interstate commerce.

_____ Z. Racetrack operators. Receipts of operators of racetracks other than horse racetracks, from gate admission fees and entrance fees paid by drivers are subject to the gross receipts tax. Any portion of these fees paid out by the operator as prizes are not exempt or deductible since the payments are part of the operator's cost of doing business.

_____ AA. Data access charges. Receipts from fees or charges made in connection with property owned, leased or provided by the person providing the service are subject to the gross receipts tax when the information or data accessed is utilized in this state.

_____ BB. Specialty software package. [Repealed]

_____ CC. Receipts from telephone or telegraph services. Receipts derived from telephone or telegraph services originating or terminating in New Mexico and billed to an account or number in this state are receipts from

performing services in New Mexico and are subject to the gross receipts tax unless exempt under Section 7-9-38.1 NMSA 1978.

~~DD. Allied company underwriting automotive service contracts. When a New Mexico automotive dealer pays an entity which is allied or affiliated with that dealer (allied company) to undertake all of the dealer's obligations under automotive service contracts as that term is defined in Subsection C of 3.2.1.16 NMAC on which the dealer is promisor, the undertaking of the allied company does not involve the sale of property in New Mexico or the lease of property employed in New Mexico. The undertaking principally involves an obligation of the allied company to indemnify the dealer by paying the dealer for furnishing parts and labor to fulfill the dealer's obligation to furnish the parts and labor. However, the undertaking also involves the performance of services by the allied company for the dealer since the allied company undertakes to handle the claims of automotive service contract purchasers and otherwise perform the dealer's task under the contract. Absent a showing of a different value by the allied company or the department, 7.5 percent of the contract amount paid by the dealer to the allied company will be treated as consideration received for services performed in New Mexico.~~

~~EE. Custom software.~~

~~(1) Except as otherwise provided in Subsection EE of 3.2.1.18 NMAC, receipts derived by a person from developing custom software are receipts from performing a service.~~

~~(2) When custom software is developed by a seller for a customer but the terms of the transaction restrict the customer's ability without the seller's consent to sell the software to another or to authorize another to use the software, the seller's receipts from the customer are receipts from the performance of a service. The seller's receipts from authorizing the customer's sublicensing of the software to another person are receipts from granting a license. The seller's receipts from authorizing the use by another person of the same software are receipts from granting a license to use the software.~~

~~FF. Check cashing is a service. Receipts from charges made for cashing checks, money orders and similar instruments by a person other than the person upon whom the check, money order or similar instrument is drawn are receipts from providing a service, not from originating, making or assuming a loan. Such charges are not interest.~~

~~GG. Receipts of collection agencies:~~

~~(1) The fee charged by a collection agency for collecting the accounts of others is gross receipts subject to the gross receipts tax, regardless of whether the receipts of the client are subject to gross receipts tax and regardless of whether the agency is prohibited by law from adding its gross receipts tax amount to the amount collected from the debtor.~~

~~(2) Example 1: X is a cash basis taxpayer utilizing the services of Z collection agency for the collection of delinquent accounts receivable. From its New Mexico offices, Z collects from X's New Mexico debtors in the name of X, retains a percentage for its services and turns over the balance to X. The percentage retained by Z is its fee for performing services in New Mexico. The fee is subject to the gross receipts tax. It makes no difference that federal law prohibits Z from passing the cost of the tax to the debtor by adding it to the amount to be collected. X's gross receipts include the full amount collected by Z.~~

~~(3) Amounts received by collection agencies from collecting accounts sold to the collection agency are not gross receipts.~~

~~(4) Example 2: X, a cash basis taxpayer, sells its delinquent accounts receivable to Z, a collection agency, for a percentage of the face amount of the accounts. X's gross receipts include the full amount of the receivables, excluding any time-price differential. The amount subsequently collected by Z from those accounts, however, is not subject to gross receipts tax because the amount is not included within the definition of gross receipts. In this situation Z is buying and selling intangible property of a type not included within the definition of property in Subsection J of Section 7-9-3 NMSA 1978.~~

~~HH. Commissions of independent contractors when another pays gross receipts tax on the receipts from the underlying transaction.~~

_____ (1) Commissions and other consideration received by an independent contractor from performing a sales service in New Mexico with respect to the tangible or intangible personal property of other persons are gross receipts whether or not the other person reports and pays gross receipts tax with respect to the receipts from the sale of the property. This situation involves two separate transactions. The first is the sale of the property by its owner to the customer and the second is the performance of a sales service by the independent contractor for the owner of the property. The receipts from the sale of the property are gross receipts of the person whose property was sold. Receipts, whether in the form of commissions or other remuneration, of the person performing a sales service in New Mexico are gross receipts of the person performing the sales service.

_____ (2) Example 1: S is a national purveyor of tangible personal property. S has stores and employees in New Mexico. S also has catalogue stores in less populated parts of New Mexico. Catalogue stores maintain minimal inventories; their primary purpose is to make S's catalogues available to customers, to take orders of merchandise selected from the catalogues, to place the orders with S and to provide general customer service. The catalogue stores are operated by independent contractors and not by S. S pays the contractors commissions based on the orders placed. In charging its customers, S charges the amount shown in the catalogue and does not add any separate amount to cover the cost of the contractors' commissions. S pays gross receipts tax on its receipts from the sale of catalogue merchandise. The contractors contend that the cost of their selling services is included in the amount S charges for its merchandise and so their commissions are not gross receipts. The contention is erroneous. The contractors have receipts from performing a service in New Mexico; it is immaterial that S paid the amount of gross receipts tax S owed on S's receipts. See, however, the deduction at Subsection B of Section 7-9-66 NMSA 1978.

_____ (3) Example 2: M is a nationwide, multi level sales company with presence in New Mexico. M sells products to households mainly through a network of individual, independent contractors. The network of sellers is controlled by one or more sets of individuals, also independent contractors, who train and supervise the individuals selling the merchandise; these supervisory contractors may also sell merchandise. The sellers display, promote and take orders for M's products. Payment for orders are sent to M along with the orders. M ships the merchandise directly to the final customers. M has agreed to, and does, pay the gross receipts tax on the retail value of the merchandise sold, whether sold by M or one of the independent contractors. Based on the volume and value of merchandise sold, M pays both the selling and supervisory independent contractors a commission. The commissions received by the independent contractors engaging in business in New Mexico with respect to merchandise sold in New Mexico are gross receipts subject to the gross receipts tax. The commissions are receipts from performing a service in New Mexico. The fact that M pays gross receipts tax on M's receipts from the sale of the property is immaterial in determining the liability of the independent contractors.

_____ (4) Commissions and other consideration received by an independent contractor from performing a sales service in New Mexico with respect to a service to be performed by other persons are gross receipts whether or not the other person reports and pays gross receipts tax with respect to the receipts from the performance of the underlying service. This situation involves two transactions. The first is the performance of the underlying service by the other person for the customer and the second is the performance of the sales service by the independent contractor for the performer of the underlying service. The receipts from the performance of the underlying service for the customer are gross receipts of the person performing that service. Receipts, whether in the form of commissions or other remuneration, of the person performing the sales service are gross receipts of the person performing the sales service.

_____ (5) Example 3: P is the publisher of a magazine published in New Mexico. P enters into arrangements with independent contractors to solicit ads to be placed in P's publication. P pays each contractor a percentage of the billings for the ads placed by the contractor as a commission. The independent contractors claim that they owe no gross receipts tax with respect to ads solicited in New Mexico because P has paid gross receipts tax on P's advertising revenues. The contractors are incorrect. There are two transactions in this situation, P's service of publishing advertisements and the contractors' service of soliciting ads for P. The fact that P paid the amount of

gross receipts tax due on P's advertising revenues is immaterial regarding the contractors' gross receipts tax obligations on their receipts.

~~(6) If the receipts from the underlying sale of the tangible property are exempt or deductible, the commission received by an independent contractor from selling the tangible property of another may be subject to the deduction provided by Section 7-9-66 NMSA 1978.~~

~~II. Receipts from winning contest.~~

~~(1) Receipts of a contestant from winning purse money in a rodeo or an athletic game, match or tournament held in New Mexico are gross receipts from performing services if any charge is made for attending, observing or broadcasting the event. Such receipts are subject to the gross receipts tax unless an exemption or deduction applies. Where the contestant is a team and there is an agreement among the team members governing distribution of the purse money, then only the amount received by each team member pursuant to the agreement is gross receipts of the team member.~~

~~(2) Subsection II of 3.2.1.18 NMAC does not apply to receipts exempt under Section 7-9-40 NMSA 1978 nor does it apply to activities that are primarily or solely gambling.~~

3.2.1.18 Gross Receipts: Services Generally

A. Receipts from performing a service in New Mexico or performing a service outside New Mexico the product of which is initially used in New Mexico. Receipts derived from performing a service in New Mexico or performing a service outside New Mexico the product of which is initially used in New Mexico are subject to the gross receipts tax unless a specific exemption or deduction provided for in the Gross Receipts and Compensating Tax Act applies.

B. Sales of state licenses by nongovernmental entities.

(1) Amounts retained by nongovernmental entities as compensation for services performed in selling state licenses are gross receipts.

(2) Example: G owns and operates a small grocery store in rural New Mexico which is located near a popular fishing area. As a convenience to the public, G sells New Mexico Game and Fish licenses. For its services in selling these licenses, G retains a small percentage of the total license fee. The amounts retained are gross receipts because they are receipts derived from services performed in New Mexico. G may not deduct the amounts retained pursuant to Section 7-9-66 NMSA 1978 which deals with commissions derived from the sale of tangible personal property not subject to the gross receipts tax. A New Mexico game and fish license is not tangible personal property pursuant to Subsection J of Section 7-9-3 NMSA 1978.

C. Stockbrokers' commissions. Gross receipts include commissions received by stockbrokers for handling transactions. The commissions are receipts from performing a service.

D. Directors' or trustees' fees. Receipts from attending a board of directors or board of trustees meeting in New Mexico are gross receipts from performing services in New Mexico. Receipts from attending a board of directors or board of trustees meeting outside New Mexico are not gross receipts because the initial use of the product of the service is not in New Mexico.

E. Racing receipts.

(1) Unless the receipts are exempt under Section 7-9-40 NMSA 1978:

(a) the receipts of vehicle or animal owners from winning purse money at races held in New Mexico are receipts from performing services in New Mexico and are subject to the gross receipts tax if any charge is made for attending, observing or broadcasting the race.

(b) receipts of vehicle drivers, animal riders and drivers and other persons from receiving a percentage of the owner's purse are receipts from performing services in New Mexico and are subject to the gross receipts tax, unless the person receiving the percentage of purse money is an employee, as that term is defined in 3.2.105.7 NMAC, of the owner.

(2) Where there is an agreement between the driver, rider or other person and the owner for distribution of the winning purse, then only the amount received pursuant to the agreement is gross receipts of the driver, rider or other person receiving the distribution.

(3) Racetrack operators. Receipts of operators of racetracks other than horse racetracks, from gate admission fees and entrance fees paid by drivers are subject to the gross receipts tax. Any portion of these fees paid out by the operator as prizes are not exempt or deductible since the payments are part of the operator's cost of doing business.

F. Advertising services. The service of advertising is performed and initially used at the location of the intended recipient or viewer regardless of where related services may be performed or the location of the advertiser who purchases the advertising services.

(1) Advertising receipts of a newspaper or broadcaster. The receipts of a New Mexico newspaper or a person engaged in the business of radio or television broadcasting from performing advertising services in New Mexico do not include the customary commission paid to or received by a nonemployee advertising agency or a nonemployee solicitation representative, when said advertising services are performed pursuant to an allocation or apportionment agreement entered into between them prior to the date of payment.

(2) Advertising space in pamphlets. Receipts from selling advertising service to New Mexico merchants in a pamphlet printed outside New Mexico and distributed wholly inside New Mexico are receipts from performing an advertising service in New Mexico. Such receipts are subject to the gross receipts tax.

(3) Billboard advertising. Receipts derived from contracts to place advertising on outdoor billboards located within the state of New Mexico are receipts from performing an advertising service in New Mexico. Such receipts are subject to the gross receipts tax, regardless of the location of the advertiser.

F. Day care centers.

(1) Receipts from providing day care are receipts from performing a service and are subject to the gross receipts tax.

(2) Receipts from providing day care for children in a situation where a commercial day care center provides day care for the children and the expenses of the care for some of these children is paid for by the state of New Mexico are subject to the gross receipts tax.

(3) Receipts from providing day care for children in a situation where a person provides day care for children in a residence and the care for all these children is paid for by the state of New Mexico are subject to the gross receipts tax.

(4) Receipts from providing day care for children in a situation where a person provides day care for children in the children's home and the care for all of these children is paid for by the state of New Mexico are subject to the gross receipts tax.

G. Child care.

(1) Receipts derived by a corporation for providing child care facilities for its employees are subject to the gross receipts tax on the amount received from its employees.

(2) Example: The X corporation operates a licensed child care facility to accommodate dependent children of its employees. In order to defray a portion of the cost of the facility, the corporation charges each employee two dollars (\$2.00) per child per week for the use of the facility. All receipts from the two-dollar charge per child per week are subject to the gross receipts tax.

H. Service charges; tips.

(1) Except for tips, receipts of hotels, motels, guest lodges, restaurants and other similar establishments from amounts determined by and added to the customer's bill by the establishment for employee services, whether or not such amounts are separately stated on the customer's bill, are gross receipts of the establishment.

(2) A tip is a gratuity offered to service personnel to acknowledge service given. An amount added to a bill by the customer as a tip is a tip. Because the tip is a gratuity, it is not gross receipts.

(3) Amounts denominated as a "tip" but determined by and added to the customer's bill by the establishment may or may not be gross receipts. If the customer is required to pay the added amount and the establishment retains the amount for general business purposes, clearly it is not a gratuity. Amounts retained by the establishment are gross receipts, even if labeled as "tips". If the customer is not required to pay the added amount and any such amounts are distributed entirely to the service personnel, the amounts are tips and not gross receipts of the establishment.

(4) Examples:

(a) Restaurant R has a policy of charging parties of six or more a set percentage of the bill for food and drink served as a tip. If a customer insists on another arrangement, however, the set amount will be removed. R places all amounts collected from the set tip percentage into a pool which is distributed to the service staff at the end of each shift. The amounts designated as tips and collected and distributed by R to the service staff, are tips and not gross receipts. If R retains any amounts derived from the set tip percentage, the amounts retained are gross receipts.

(b) Hotel H rents rooms for banquets and other functions. In addition to the rental fee for the room, H also charges amounts for set-up and post-function cleaning. H retains these amounts for use in its business. These amounts are gross receipts. They are gross receipts even if H denominates them as "tips".

I. Entertainers. The receipts of entertainers or performers of musical, theatrical or similar services in New Mexico are subject to the gross receipts tax.

J. Data access charges. Receipts from fees or charges made in connection with property owned, leased or provided by the person providing the service are subject to the gross receipts tax when the information or data accessed is utilized in this state.

K. Allied company underwriting automotive service contracts. When a New Mexico automotive dealer pays an entity which is allied or affiliated with that dealer (allied company) to undertake all of the dealer's obligations under automotive service contracts as that term is defined in Subsection C of 3.2.1.16 NMAC on which the dealer is promisor, the undertaking of the allied company does not involve the sale of property in New Mexico or the lease of property employed in New Mexico. The undertaking principally involves an obligation of the allied company to indemnify the dealer by paying the dealer for furnishing parts and labor to fulfill the dealer's obligation to furnish the parts and labor. However, the undertaking also involves the performance of services by the allied company for the dealer since the allied company undertakes to handle the claims of automotive service contract purchasers and otherwise perform the dealer's task under the contract. Absent a showing of a different value by the allied company or the department, 7.5 percent of the contract amount paid by the dealer to the allied company will be treated as consideration received for services performed in New Mexico.

L. Custom software.

(1) Receipts derived by a person from developing custom software are receipts from performing a service.

(2) When custom software is developed by a seller for a customer, but the terms of the transaction restrict the customer's ability without the seller's consent to sell the software to another or to authorize another to use the software, the seller's receipts from the customer are receipts from the performance of a service. The seller's receipts from authorizing the customer's sublicensing of the software to another person are receipts from granting a license.

M. Check cashing is a service. Receipts from charges made for cashing checks, money orders and similar instruments by a person other than the person upon whom the check, money order or similar instrument is drawn are receipts from providing a service, not from originating, making or assuming a loan. Such charges are not interest.

N. Receipts of collection agencies.

(1) The fee charged by a collection agency for collecting the accounts of others is gross receipts subject to the gross receipts tax, regardless of whether the receipts of the client are subject to gross receipts tax and

regardless of whether the agency is prohibited by law from adding its gross receipts tax amount to the amount collected from the debtor.

(2) Example 1: X is a cash basis taxpayer utilizing the services of Z collection agency for the collection of delinquent accounts receivable. From its New Mexico offices, Z collects from X's New Mexico debtors in the name of X, retains a percentage for its services and turns over the balance to X. The percentage retained by Z is its fee for performing services in New Mexico. The fee is subject to the gross receipts tax. It makes no difference that federal law prohibits Z from passing the cost of the tax to the debtor by adding it to the amount to be collected. X's gross receipts include the full amount collected by Z.

(3) Amounts received by collection agencies from collecting accounts sold to the collection agency are not gross receipts.

(4) Example 2: X, a cash basis taxpayer, sells its delinquent accounts receivable to Z, a collection agency, for a percentage of the face amount of the accounts. X's gross receipts include the full amount of the receivables, excluding any time-price differential. The amount subsequently collected by Z from those accounts, however, is not subject to gross receipts tax because the amount is not included within the definition of gross receipts. In this situation Z is buying and selling intangible property of a type not included within the definition of property in Subsection J of Section 7-9-3 NMSA 1978.

O. Commissions of independent contractors when another pays gross receipts tax on the receipts from the underlying transaction. The following regulations address independent contractors, including commissioned sales agents, who are not consignees or marketplace providers.

(1) Commissions and other consideration received by an independent contractor from performing a sales service in New Mexico with respect to the tangible or intangible personal property of other persons are gross receipts whether or not the other person reports and pays gross receipts tax with respect to the receipts from the sale of the property. This situation involves two separate transactions. The first is the sale of the property by its owner to the customer and the second is the performance of a sales service by the independent contractor for the owner of the property. The receipts from the sale of the property are gross receipts of the person whose property was sold. Receipts, whether in the form of commissions or other remuneration, of the person performing a sales service in New Mexico are gross receipts of the person performing the sales service.

(2) Example 1: S is a national purveyor of tangible personal property. S has stores and employees in New Mexico. S also has catalogue stores in less populated parts of New Mexico. Catalogue stores maintain minimal inventories; their primary purpose is to make S's catalogues available to customers, to take orders of merchandise selected from the catalogues, to place the orders with S and to provide general customer service. The catalogue stores are operated by independent contractors and not by S. S pays the contractors commissions based on the orders placed. In charging its customers, S charges the amount shown in the catalogue and does not add any separate amount to cover the cost of the contractors' commissions. S pays gross receipts tax on its receipts from the sale of catalogue merchandise. The contractors contend that the cost of their selling services is included in the amount S charges for its merchandise and so their commissions are not gross receipts. The contention is erroneous. The contractors have receipts from performing a service in New Mexico; it is immaterial that S paid the amount of gross receipts tax S owed on S's receipts. See, however, the deduction at Subsection B of Section 7-9-66 NMSA 1978.

(3) Example 2: M is a nationwide, multi-level sales company with presence in New Mexico. M sells products to households mainly through a network of individual, independent contractors. The network of sellers is controlled by one or more sets of individuals, also independent contractors, who train and supervise the individuals selling the merchandise; these supervisory contractors may also sell merchandise. The sellers display, promote and take orders for M's products. Payment for orders are sent to M along with the orders. M ships the merchandise directly to the final customers. M has agreed to, and does, pay the gross receipts tax on the retail value of the merchandise sold, whether sold by M or one of the independent contractors. Based on the volume and value of merchandise sold, M pays both the selling and supervisory independent contractors a commission. The

commissions received by the independent contractors engaging in business in New Mexico with respect to merchandise sold in New Mexico are gross receipts subject to the gross receipts tax. The commissions are receipts from performing a service in New Mexico. The fact that M pays gross receipts tax on M's receipts from the sale of the property is immaterial in determining the liability of the independent contractors.

(4) Commissions and other consideration received by an independent contractor from performing a sales service in New Mexico with respect to a service to be performed by other persons are gross receipts whether or not the other person reports and pays gross receipts tax with respect to the receipts from the performance of the underlying service. This situation involves two transactions. The first is the performance of the underlying service by the other person for the customer and the second is the performance of the sales service by the independent contractor for the performer of the underlying service. The receipts from the performance of the underlying service for the customer are gross receipts of the person performing that service. Receipts, whether in the form of commissions or other remuneration, of the person performing the sales service are gross receipts of the person performing the sales service.

(5) Example 3: P is the publisher of a magazine published in New Mexico. P enters into arrangements with independent contractors to solicit ads to be placed in P's publication. P pays each contractor a percentage of the billings for the ads placed by the contractor as a commission. The independent contractors claim that they owe no gross receipts tax with respect to ads solicited in New Mexico because P has paid gross receipts tax on P's advertising revenues. The contractors are incorrect. There are two transactions in this situation, P's service of publishing advertisements and the contractors' service of soliciting ads for P. The fact that P paid the amount of gross receipts tax due on P's advertising revenues is immaterial regarding the contractors' gross receipts tax obligations on their receipts.

(6) If the receipts from the underlying sale of the tangible property are exempt or deductible, the commission received by an independent contractor from selling the tangible property of another may be subject to the deduction provided by Section 7-9-66 NMSA 1978.

P. Consignees and Marketplace Providers. Consignees and marketplace providers have gross receipts from amounts collected by those persons for the sale, lease or license of property or the sale of services to customers as defined under Section 7-9-3.5, regardless of whether the consignee or marketplace provider is obligated to pay the consignor or marketplace seller some part of the amounts collected or whether the contract between the consignee and consignor or the marketplace provider and marketplace seller calls for the consignor or marketplace provider to perform certain services in conjunction with the sale, lease or license of property or the sale of services to the customer. A consignee or marketplace provider will be considered to be selling a separate service for the consignor or marketplace seller only if the contract requires the performance of the service separate and apart from any sale, lease or license of property or sale of a service to the customer.

Q. Receipts from winning contest.

(1) Receipts of a contestant from winning purse money in a rodeo or an athletic game, match or tournament held in New Mexico are gross receipts from performing services if any charge is made for attending, observing or broadcasting the event. Such receipts are subject to the gross receipts tax unless an exemption or deduction applies. Where the contestant is a team and there is an agreement among the team members governing distribution of the purse money, then only the amount received by each team member pursuant to the agreement is gross receipts of the team member.

(2) Subsection II of 3.2.1.18 NMAC does not apply to receipts exempt under Section 7-9-40 NMSA 1978 nor does it apply to activities that are primarily or solely gambling.

[9/29/67, 12/5/69, 3/3/71, 3/9/72, 11/20/72, 3/20/74, 7/26/76, 3/16/79, 6/18/79, 11/20/79, 4/7/82, 1/6/84, 5/4/84, 10/16/84, 4/2/86, 10/21/86, 6/28/89, 11/26/90, 11/15/96, 1/31/97, 4/30/97; R, 3 NMAC 2.1.18.28, 4/30/97; 3 NMAC 2.1.18.31, 4/30/97; 10/31/97, 7/31/98; R, 4/30/99, 11/15/99, 3.2.1.18 NMAC - Rn & A, 3 NMAC 2.1.18, 10/31/2000; A, 5/31/02; A, 12/30/03; A, 3/15/10; A, 10/15/10; A, 12/14/12; Rp, xx/xx/xxxx]

3.2.1.21. Tax on Gross Receipts from Services Performed Outside the State.

A. Beginning July 1, 2021 most services performed outside New Mexico the product of which is initially used in New Mexico are not exempt under Section 7-9-13.1 1978.

B. The term “initial use” is used here as defined in Section 7-9-3 NMSA 1978 and in other regulations under the Gross Receipts and Compensating Tax Act. Gross receipts from selling services performed outside New Mexico are subject to the gross receipts tax only if the product of the service is initially used in the state. If the product of the service performed outside of New Mexico is delivered in New Mexico but not initially used in the state, receipts from selling the service are not taxable in the state.

C. If the product of a service performed outside of New Mexico is initially used in the state, then the business location to which the gross receipts and related deductions are reported and the applicable tax rate will be determined under Section 7-1-14 NMSA 1978, which, depending on the type of service, may look to the location of delivery of the service to the customer.

[3.2.1.21 NMAC – N, xx/xx/xxxx]

3.2.1.23 “Performance of a service,” “product of the service,” “initial use”, and “delivery”; presumptions.

A. Relationship between certain terms and consistency in use of those terms. The terms “sale of a service performed,” “performance of a service,” “product of the service,” “initial use” and “delivery” are defined or used in the Gross Receipts and Compensating Tax Act and regulations in a way that makes them closely related in their application. The terms are used in Section 7-9-3.5, the definition of “gross receipts,” to describe gross receipts from performing or selling services that will be subject to tax and in Section 7-9-57 to describe a deduction for sales to out-of-state buyers. Regardless of the context in which they are used, or whether the service is performed inside or outside the state, these terms will be interpreted and applied consistently.

B. Delivery and initial use of the product of construction services and construction related services, in-person services, and services which that produce tangible personal property.

(1) The product of a construction service or a construction related service is delivered and initially used in New Mexico if the related construction site is located in New Mexico.

(2) The product of an in-person service is delivered and initially used in New Mexico if the location of the performance of the service is in New Mexico.

(3) The product of a service, the primary purpose of which is to produce tangible personal property, is delivered and initially used in New Mexico if the tangible personal property is delivered to the purchaser or a person designated to receive the property in New Mexico.

C. Delivery and initial use of the product of a service other than construction services, construction related services, in-person services, or services which produce tangible personal property - generally.

(1) As defined under Section 7-9-3.E, “initial use” or “initially used” means the first employment for the intended purpose and expressly excludes the following:

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

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

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

(d) inspection of preliminary prototypes developed by the performer of services; or

(e) similar activities.

(2) The location of delivery or initial use of the product of a service is determined based on relevant facts and circumstances, including primarily:

(a) The location of the purchaser or the person to whom the service is intended to be delivered.

(b) The terms of the agreement between the parties, as evidenced by any formal writing or documentation as well as the parties' behavior, including, but not limited to, any behavior which constitutes an alteration of the parties' agreement.

(c) The nature of the service and the manner in which similar services are ordinarily delivered and initially used.

(3) The delivery and initial use of the product of a separate service, which is sold with other services or property, will be determined based on the facts and circumstances relating to that separate service. For this purpose, a "separate service" is a service that would be considered a service under Reg. 3.2.1.29, but may be sold together with property or other services, and which the seller could have sold separately to the buyer, though it was in fact sold as part of a single transaction or contract along with other services or property. Similarly, a single contract may involve services that are to be performed in multiple phases, where each phase may constitute a separate service under Reg. 3.2.1.29. The delivery and initial use of the product of each separate service, as described in this Paragraph (3), may occur at different locations under the relevant facts and circumstances.

(4) A single or separate service, as that term is used in paragraph 3 of this Section C, may, under all the relevant facts and circumstances, appear to have multiple points of delivery or initial use both inside and outside the state. In particular, this may be the case for services sold to businesses or organizations. If there is a primary location of delivery or initial use, this location will be deemed the location of delivery or initial use for purposes of the Gross Receipts and Compensating Tax Act. The primary location of delivery may be determined by facts and circumstances that show the location of the persons or offices that contracted for or oversee the service or that approve payment of the service or determine if the service has been completed properly. The primary location of initial use may be determined by the primary location of delivery or the place in which the most significant portion of initial use takes place.

D. Presumptions as to delivery and initial use of the product of the service in New Mexico; reliance on purchaser representations. Other than services described in Section B above, the following presumptions apply to all sales of services unless the seller has information and evidence sufficient to rebut the presumptions:

(1) If the purchaser of the service is an individual, then delivery and initial use of the product of the service are presumed to occur in New Mexico if the seller has information showing a billing address or other primary location for that purchaser in New Mexico;

(2) If the purchaser of the service is a person other than an individual, then delivery and initial use of the product of the service are presumed to occur in New Mexico if that person's domicile or primary place of business or operations is in New Mexico;

(3) If the purchaser of the service is a person other than an individual and the person has its domicile or primary place of business or operations outside New Mexico, then delivery and initial use of the product of the services are presumed to occur in New Mexico if the seller's primary contact for purposes of the contract or the billing address for the services is located in New Mexico; and

(4) In a case where the facts and circumstances demonstrate that delivery of the product of the service occurs in New Mexico, initial use of the product of the service is presumed to occur in New Mexico. In order to rebut these presumptions, the seller must show that delivery and/or initial use of the product of the service is not in New Mexico considering the relevant facts and circumstances as generally described in this Regulation _____, Section C. The seller may also rely in good faith on written representations made by the purchaser of the service that the initial use of the service will not be made in New Mexico, provided that the seller has no indication that this representation is untrue.

E. Partial Performance of Service Inside the State. If a seller performs services partially inside and outside New Mexico which are delivered in New Mexico but are initially used outside the state, only the portion of the gross receipts from the service performed inside New Mexico will be subject to the gross receipts under Sections 7-9-3.5 and 57 NMSA 1978. Because the seller delivers the product of the service in New Mexico, the portion of gross receipts from the service performed in the state is not deductible under Section 7-9-57 NMSA 1978. The seller may

apportion the gross receipts from the service performed inside and outside the state using the relative direct costs incurred.

F. Change in facts and circumstances during the performance of a service and incomplete services. A change in facts and circumstances during the performance of a service may change the delivery or initial use of the product of a service. Likewise, the failure to complete the performance of a service may change the delivery or initial use of the product of a service.

G. No effect on compensating tax due. The provisions of this regulation apply only to a seller's determination of whether the delivery or initial use of the product of a service are in New Mexico. A purchaser who makes a taxable use of a service in New Mexico may owe the compensating tax even if the seller was not required to pay tax on the gross receipts from the performance or sale of that service.

H. Examples:

(1) A lawyer in New Mexico and her New Mexico client, with a New Mexico billing address, agree that the lawyer will perform the legal service of drafting a will. The lawyer charges for her service on an hourly basis. The lawyer reviews the client's finances and other information. The lawyer completes the will and provides it to the client. After reviewing the will, the client executes the will. Under Section D of this Regulation _____, delivery and initial use of the product of the service are presumed to be in New Mexico. Nor would the lawyer be able to rebut these presumptions since, under all the facts and circumstances, delivery of the product of the service occurs in New Mexico when the client receives the draft will from the lawyer and initial use of the product of the service occurs in New Mexico when the client executes the will.

(2) Same facts as in example (1) except that before the will is finally drafted, the client tells the lawyer she has changed her mind and will not need the will. The lawyer and the client agree that the lawyer will not provide any documentation of advice or a draft of the will based on the work done, even though the client will pay for the hours already worked. As in example (1), under Section D of this Regulation _____, delivery and initial use of the product of the service are presumed to be in New Mexico. Nor would the lawyer be able to rebut this presumption since under the product of this incomplete service is the work done by the lawyer for the client in New Mexico and there are no facts that would rebut the presumption that delivery and initial use of this product occur in New Mexico.

(3) Same facts as in example (1) except the client is outside New Mexico and the lawyer delivers the will to the client outside New Mexico where the client executes the will. In this case, there is no presumption under Section D of this Regulation _____ that delivery or initial use of the product of the service is in New Mexico. Under the facts and circumstances, the product of the service, the will, is delivered and initially used outside New Mexico. Therefore, the lawyer will be entitled to a deduction under Section 7-9-57 NMSA 1978 provided the lawyer has evidence required to support the deduction.

(4) Same facts as in example (1) except the lawyer performs the service outside New Mexico and the lawyer delivers the will to the client in New Mexico, where the client executes the will. As in example (1), under Section D of this Regulation _____, delivery and initial use of the product of the service are presumed to be in New Mexico. Nor would the lawyer be able to rebut this presumption since under the facts and circumstances, the product of the service, the will, is delivered and initially used in New Mexico. Note that while lawyer in this case would have gross receipts subject to tax because the service is initially used in the state, under Regulation 3.1.4.13, because the service is a professional service, the gross receipts would be sourced to the state reporting location and subject to tax at the state rate.

(5) Same facts as in example (2) except the lawyer is outside New Mexico. As in example (2), under Section D of this Regulation _____, delivery and initial use of the product of the service are presumed to be in New Mexico. In this case, however, the product of this incomplete service is the work done by the lawyer for the client outside New Mexico and the lawyer may, therefore, be able to rebut the presumption that delivery or initial use of this product occurs inside New Mexico. Assuming the lawyer can rebut the presumption and show that

initial use of the product of the service occurs outside New Mexico, the lawyer would have no gross receipts subject to tax.

(6) A New Mexico seller agrees to provide a consulting service to a federal government agency, contracting and overseeing the performance of the service at an out-of-state location. The contract for the service provides that the seller is required to prepare a report summarizing the work and deliver that report to the out-of-state location. The contract also provides that the government will use the report to select products for purchase at facilities outside New Mexico. During the contract, the government agency, which has offices in New Mexico, answers questions posed by the New Mexico seller and responds to requests for data. Here, there is no presumption in this case under Section D of this Regulation _____ that the delivery or initial use of the product of the service are in New Mexico. Furthermore, under all the facts and circumstances, the product of the service, the report, is delivered and initially used outside the state.

(7) A seller performs website design services outside New Mexico for a client that has business locations inside and outside the state. The seller works with and responds to the client's technology manager the client's out-of-state office. The seller and the client agree that the seller will make a demo of the proposed website for the technology manager to test. After the test, the seller will finish the website, with any necessary changes, and will give the client access to operating the website. The operation of the website will be done primarily at offices of the client outside the state, although some operations will also be done in the New Mexico office. Here, there is no presumption under Section D of this Regulation _____ that the product of the service is delivered or initially used in New Mexico. Furthermore, under all the facts and circumstances, the product of the service, the final website, will be delivered and initially used outside the state.

(8) A seller of medical testing services performed outside New Mexico has a client in New Mexico who purchases the services for its own medical facilities both inside and outside the state. The seller of testing services charges by the test. The results of tests are sent to the client's medical facilities in New Mexico where they are reviewed and then made available to doctors and patients. Each testing service is a separate sale of a service. Here, for each service, the product of the service is presumed to be delivered and initially used in New Mexico under Section D of this Regulation _____. The seller in this case will not be able to rebut the presumption because, under the facts and circumstances, the product of these services are the results which are delivered to New Mexico and initially used at facilities where they are reviewed.

(9) A seller of payroll services performed outside New Mexico has a business client which has offices both inside and outside New Mexico. The seller's contact is with the business's headquarters, outside the state, and the seller obtains information to perform the payroll service from the business's chief accountant located in that office. Each pay period, the seller transmits funds electronically drawing on the business's accounts to pay employees and to submit tax returns and also transmits reports to the business at the headquarters office. This information is reviewed by the headquarters office and any mistakes are communicated by the business to the seller. Each year the seller also transmits W-2s and other tax information by mail. Here, there is no presumption under Section D of this Regulation _____ that the product of the service is delivered or initially used in New Mexico. It may appear that the product of the service is delivered and initially used both in and outside New Mexico. Under Section C paragraph 4 of this Regulation _____ and under all the relevant facts and circumstances, the product of the service, payroll information, is deemed delivered to the primary location of delivery outside the state and the initial use of the product of the service is, likewise, deemed delivered to occur at the primary location of initial use outside the state.

(10) Same facts as example (9) except that the seller of payroll services performs those services in New Mexico. Again, as in example (9), while the product of the service may appear to be delivered and initially used both inside and outside New Mexico, under Section C paragraph 4 of this Regulation _____ and under all the relevant facts and circumstances, the product of the service, payroll information, is deemed delivered to the primary location of delivery outside the state and the initial use of the product of the service is, likewise, deemed to occur at the primary location of initial use outside the state.

(11) A seller of video editing services performed inside New Mexico are sold to an out-of-state customer who posts the edited video on-line for use by its customers throughout the United States. After the edited video is delivered and posted on the customer's website, the customer then asks the seller in New Mexico to test access to the video, and the seller agrees to do so. The fact that the final action related to the service, the testing of the access to the video, occurs in New Mexico does not change the result under all the relevant facts and circumstances that the delivery and initial use of the product of the service, the edited video, occurs outside New Mexico when the video is delivered to and posted by the customer on its website.

(12) Same facts as example (11) except that the seller in New Mexico agrees to both edit the video and provide data from a survey of other websites. The seller charges separately for these services, which it also regularly sells on a separate basis, but the contract and billing information for the two services are combined. These services would be separate services under Reg. 3.2.1.29. and the delivery and initial use of the product of each service would be determined based on the relevant facts and circumstances for each service.

[3.2.1.23 NMAC – N, xx/xx/xxxx]

[3.2.215.11. Product Of Service Which Is Reviewed And Accepted Outside of New Mexico but Initially Used in New Mexico

——— A. Effective July 1, 1989, and for so long as the provisions of that version of Section 7-9-57 NMSA 1978 enacted by Laws 1989, Chapter 262, Section 6 remain in effect, the deduction provided by Section 7-9-57 NMSA 1978 does not apply to the receipts from the sale of a service the product of which is initially used for the intended purpose in New Mexico even though the product of the service is delivered to the buyer outside of New Mexico for review and acceptance. Review and acceptance of the product of the service does not constitute "initial use" or "initially used" as those terms are defined in Section 7-9-3 NMSA 1978. The initial use of the product of the service is the "first employment for the intended purpose".

——— B. Example 1: X, an architect, prepares in New Mexico plans for a construction project to be built in New Mexico. On completion of the plans, X delivers the plans outside of New Mexico to the project owner for the owner's review and acceptance. After accepting the plans, the owner delivers the plans to the construction contractor who uses the plans during the construction of the project in New Mexico. Since the intended purpose of architectural plans is to serve as instructions for construction of a project, the initial use of the plans occurred when the contractor used the plans during the actual construction of the project in New Mexico. Therefore, X's receipts for preparing architectural plans for a construction project to be built in New Mexico are not deductible under the provisions of Section 7-9-57 NMSA 1978.

——— C. Example 2: Y, a research and development contractor, has a contract with the government to develop a new application for existing technology. In order to complete the contract, Y subcontracts a portion of the service to Z who analyzes particular data and prepares a report, all work being done outside New Mexico. Z delivers the report to the government in Washington, D.C., for review and acceptance. Upon granting approval of Z's report, the government delivers the report to Y in New Mexico. Y uses the report to construct a prototype as a component of the service which Y performs under the terms of its contract with the government. The initial use of Z's report is Y's use of the information contained in the report to construct the prototype. The review and acceptance of the report is not the initial use of the report. Since the initial use occurred in New Mexico, Z's receipts from the sale of Z's service are not deductible under the provisions of Section 7-9-57 NMSA 1978. Z, however, may be entitled to the deduction provided by Section 7-9-48 NMSA 1978 if Y provides a Type 5 Nontaxable Transaction Certificate (NTTC) to Z. Y must meet the requirements set forth by Section 7-9-48 NMSA 1978 if Y issues the NTTC to Z.

D. Section 3.2.215.11 NMAC applies to transactions on or after July 1, 1989.] **[RESERVED]**

[3/8/91, 11/15/96; 3.2.215.11 NMAC – Rn & A, 3 NMAC 2.57.11, 5/31/01; R, xx/xx/xxxx]

[Regulation 3.2.215.12. General Examples

For transactions occurring on or after July 1, 1989, ~~the following statements examples illustrate circumstances which:~~

~~_____ A. contravene necessary for deducting the sale of a service for initial use out of state under Section 7-9-57 NMSA 1978 and, therefore, eliminate the deduction and cause the transaction to be taxable:~~

~~_____ (1) the product of the service is delivered in New Mexico to the purchaser or to an employee, agent or authorized representative of the purchaser; or~~

~~_____ (2) the purchaser's initial use of the product of the service occurs in New Mexico;~~

~~_____ B. do not contravene the conditions set forth in Section 7-9-57 NMSA 1978, thereby allowing the deduction for the receipts from the transaction:~~

~~_____ (1) the purchaser has a person or persons assigned in this state to oversee the performance of the service in New Mexico by the contractor, but the product of the service is delivered to the purchaser outside of this state and the purchaser initially uses the product of the service outside of this state;~~

~~_____ (2) the purchaser has a person or persons in New Mexico assigned to the project who work in conjunction with employees of the seller on the product or the service required by the contract but the product of the service is delivered to the purchaser outside of this state and the purchaser initially uses the product of the service outside of this state;~~

~~_____ (3) the purchaser or employees, agents or authorized representatives of the purchaser exercise administrative control from within New Mexico over the performance of the service by the contractor but the product of the service is delivered to the purchaser outside of this state and the purchaser initially uses the product of the service outside of this state; or~~

~~_____ (4) the purchaser maintains a place of business in New Mexico and is performing work in this state related to the subject matter of the contract, but the product of the service is delivered to the purchaser outside of this state and the purchaser initially uses the product of the service outside of this state.] **[RESERVED]**
[12/29/89, 11/26/90, 3/15/95, 3.2.215.12 NMAC - Rn & A, 3 NMAC 2.57.12, 10/31/2000; R, xx/xx/xxxx]~~

3.2.300.9 Credit for Tax Paid on Services Performed Outside the State

Under Section 7-9-79.1 NMSA 1978, if another state's sales, gross receipts, or similar tax is paid on services performed outside the state, the gross receipts from which would be subject to the New Mexico gross receipts tax, the taxpayer may take a credit for against the gross receipts tax owed for an amount of the other state's tax paid, provided the credit may not exceed gross receipts tax due on each transaction.

[3.2.300.9 NMAC – N, xx/xx/xxxx]