September 8, 2022

New Mexico Taxation and Revenue Department
Tax Information and Policy Office

Via email to policy.office@state.nm.us

Re: Comment on proposed new regulation 3.6.1.7(D)

Dear Secretary Clarke and the Policy Office:

I submit the following comments concerning proposed new regulation 3.6.1.7(D).

This new regulation is directly contrary to NMSA 1978 §7-35-2 insofar as it will result in the imposition of property tax on intangible property through its new requirement that “to the extent that intangible property contributes to, or affects, the value of property, its value must be appropriately considered when determining taxable value.” The meaning of “appropriately considered” is undefined, but the intent appears to be to add the value of intangible property to the value of tangible property.

That would be contrary to the clear language of the Property Tax Code, which states (§7-37-2) that

A tax is imposed upon all property subject to valuation for property taxation purposes under Article 36 of Chapter 7 NMSA 1978. The tax shall be imposed at the rates authorized and in the manner and for the purposes specified in this article.

The “property subject to valuation” is in turn defined in §7-36-7 (A):

Except for the property listed in Subsection B of this section or exempt pursuant to Section 7-36-8 NMSA 1978, all property is subject to valuation for property taxation purposes under the Property Tax Code if it has a taxable situs in the state.

Finally, “Property” is defined in §7-35-2 (J):

"property" means tangible property, real or personal."
In short, the Legislature has specified that property tax is imposed only on tangible property. This new proposed regulation attempts to qualify that by changing the definition of property to something like

“property” means tangible property, real and personal, and intangible property if it has some sort of association with tangible property.

If the definition of property is to be changed, it is the Legislature, not the Department, which should change it. The Legislature knows the difference between “tangible” and “intangible,” and is capable of specifying which one it means. NMSA 1978, for example, refers to “intangibles” in twenty sections of the Uniform Commercial Code (Chapter 55 NMSA). Section 42-9-4 refers to “real or personal, tangible or intangible property.” The Uniform Principal and Income Act, the Legislature refers to “the assets held in the trust; the extent to which they consist of financial assets, interests in closely held enterprises, tangible and intangible personal property or real property.” (NMSA § 46-3A-104). Even the tax statutes recognize the difference and refer to “intangible property” when it is meant to be covered. NMSA § 7-8A-10.1, for example, addresses the treatment of holders of “unclaimed intangible property.”

Numerous other instances of the Legislature’s recognition of “intangible property” as a category separate from “tangible property” could be cited, but the point is a simple one: when the Legislature wants to distinguish between tangible property and intangible property, it does so. It made that distinction in the Property Tax Code, but this proposed regulation seeks to bypass the definition of property as being limited to “tangible” property. That is something that must be done by legislation, not by regulation.

In addition to that fundamental problem, the proposed regulation is also confusing. It defines “intangible property” as “contingent and dependent upon other property and cannot be owned, used, transferred, or held separately from other property.” But then it refers to “Examples of non-property intangibles are shares of stock, bonds, bills, notes, checks, drafts, bills of exchange, certificates of deposit, letters of credit and negotiable monetary instruments.” The regulation appears to acknowledge that property tax cannot be imposed on “non-property intangibles”, while apparently it would be permissible permissible to impose the tax on “property intangibles” (presumably the opposite of non-property intangibles), even though the property tax code defines property as tangible.

The proposed regulation would be contrary to the underlying statutes in the Property Tax Code and should not be adopted.

Very truly yours,

Zachary McCormick