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25th
ANNIVERSARY

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September 8, 2022

Via E-Mail

Taxation and Revenue Department
Tax Information and Policy Office
Post Office Box 630
Santa Fe, New Mexico 87504-0630
E-mail: policy.office@state.nm.us

Re: Comments on Proposed Action on Proposed Rules Regarding Gross Receipts Tax at 3.1.4.13, 3.2.213.7, 3.2.213.9, and 3.2.213.13 NMAC (the "Proposed Rules")

To Whom it May Concern:

Pursuant to Section 14-4-5.3 NMSA 1978 and 1.24.25.11 NMAC, we appreciate the opportunity to submit the following comments on the New Mexico Taxation and Revenue Department's (the "Department") Proposed Rules at 3.1.4.13, 3.2.213.7, 3.2.213.9, and 3.2.213.13 NMAC in anticipation of the public hearing set for September 8, 2022 at 10:00 a.m. We respectfully provide the following comments and suggested revisions to the Proposed Rules in order to assist in the practical implementation of the Rules: (1) revise the definition of "principal place of business"; (2) create a presumption for determining a regional advertiser; and (3) determine reporting location by billing address, rather than by server location.

Background

Pursuant to the Proposed Rules, the Gross Receipts Tax (the "GRT") is imposed on the "[r]eceipts of a provider of digital advertising services, whose digital platform may be accessed or viewed from within New Mexico, from the sale of advertising services to advertisers within and without New Mexico[.]"¹

New Mexico provides a statutory deduction for "[r]eceipts from transactions in interstate commerce ... to the extent that the imposition of the gross receipts tax would be unlawful under the United States constitution."² Specifically, New Mexico has applied the deduction to advertising receipts:

[R]eceipts from the sale of radio or television broadcast time when the advertising message is supplied by or on behalf of a national or regional

¹ Prop. 3.2.213.13.A NMAC.

² § 7-9-55.A NMSA 1978.

seller or advertiser not having its principal place of business in or being incorporated under the laws of this state, may be deducted from gross receipts.³

The Department Should Also Allow the Use of Billing Address as the “Principal Place of Business.”

We respectfully request that the Department amend the Proposed Rules to enable providers of digital advertising services to comply with the deduction for receipts from transactions in interstate commerce.⁴ Digital advertising service providers’ receipts are deductible “[w]hen the receipts are from a national or regional advertiser not having its principal place of business in New Mexico, or that is not incorporated under the laws of New Mexico[.]”⁵

We respectfully request that the Department amend the Proposed Rules to allow advertisers to also use billing address as the “principal place of business.”

As currently drafted, the definition of “principal place of business” is not practical for some digital advertising service providers to administer for at least two reasons: (1) the “principal place of business” location cannot be determined where the definition’s three prongs conflict; and (2) the deduction cannot be administered where the national or regional advertiser does not provide its principal place of business to the digital advertising platform.

The proposed rules would define “principal place of business” as “the place in which a business:

- (1) earns the largest percentage of its revenue; **and**
- (2) owns the largest percentage of its capital assets; **and**
- (3) employs the largest percentage of its full-time equivalent employees.”⁶

However, the business can have “only one principal place of business.”⁷ Thus, the principal place of business must meet all three prongs of the above definition.

First, because a business can have only one principal place of business, it may be impossible to determine an advertiser’s principal place of business if the prongs conflict. For example, if the business earns the largest percentage of its revenue in State A and owns the largest percentage of its capital assets in State B, the advertiser

³ § 7-9-55.C NMSA 1978 (emphasis added).

⁴ Prop. 3.2.213.9.E NMAC.

⁵ Prop. 3.2.213.9.E NMAC (emphasis added).

⁶ Prop. 3.2.213.7.C NMAC (emphasis added).

⁷ *Id.*

has no method to determine which state is its principal place of business. The advertiser thus would have no principal place of business at all.

Second, it is difficult for some digital advertising service providers to administer the principal place of business designation. Only the advertiser – not the digital advertising service provider – would know where the advertiser’s revenue is located, where its capital assets are located, or where it employs the largest percentage of its full-time equivalent employees.

We suggest that for the principal place of business requirement to be practical and easy to administer, it should also allow digital advertising service providers to use billing address as the “principal place of business.”

The Department Should Create a Presumption for Determining Whether an Advertiser is a Regional Advertiser.

We also respectfully request that the Department create a presumption that advertisers with a billing address outside of New Mexico are regional advertisers and intend for the advertising to be heard or viewed in multiple states.

To qualify for the interstate commerce deduction, the advertiser or seller must be regional or national. The Department proposes to define a “regional” seller or advertiser as “a person who sells from locations in more than one state or who purchases advertising services intended to be heard or viewed in more than one state. ... A person does not advertise in more than one state if the advertisement is intended to be viewed only in one state, but some incidental views occur outside of that state.”⁸

Similar to the principal place of business, it is difficult for the digital advertising service provider to administer the regional advertiser designation. Only the advertiser – not the digital advertising service provider – would know if it has locations in more than one state. Further, any data indicating where the advertiser intends to have advertisements heard or viewed may not be accessible at the time of reporting. Therefore, we suggest that for the regional advertiser designation to be practical and easy to administer, it should be presumed that advertisers with a principal place of business or billing address outside of New Mexico are regional advertisers. We also suggest that clicks or post-advertisement data showing where the advertisements were actually viewed are not relevant to intent.

The Department Should Amend the Proposed Rules to Indicate that Billing Address is the Digital Advertising Service Reporting Location, Rather than Server Location.

⁸ Prop. 3.2.213.7.A NMAC.

We also respectfully request that the Department amend the example regarding the reporting location for digital advertising services. The reporting location “determines the local jurisdiction to which the tax will be reported as well as the gross receipts or compensating tax rate that applies.”⁹ The Department has proposed the following example that uses server location to determine the reporting location of digital advertising services:

Example: Company X provides a digital advertising service to Customer Y that can be viewed in New Mexico, and is intended to be viewed only in New Mexico, through access to Company X’s digital platform, as that term is defined in Subsection B of 3.2.213.x NMAC. The product of the digital advertising service is delivered to the locations of all persons in New Mexico viewing or accessing the advertising. Under subparagraph (e) of Paragraph (5) of Subsection C of 3.1.4.13 NMAC, the reporting location of the gross receipts and related deductions from this service is the location of the server of Company X hosting the digital platform from which the advertising is accessed.¹⁰

It is nearly impossible for digital advertising service providers to determine New Mexico reporting location by server location. A server is “[a] computer that manages centralized data storage or network communications resources. A server provides and organizes access to these resources for other computers linked to it.”¹¹ A few of the challenges that result from using server location are:

- Digital advertising service providers utilize servers located throughout the United States. Digital advertisements may be served to the viewer from any of the servers or more than one server, without regard to location. In other words, ads served to New Mexico residents are not limited to certain servers. Thus, regardless of whether a server is located in any particular New Mexico jurisdiction or outside of New Mexico, the seller will be unable to accurately determine reporting location.
- If the digital advertising service provider utilizes servers through a third party, the third party would then need to track the server from which the advertisement was transmitted and send that information to the platform.
- Reporting location based on server location incentivizes digital advertising service providers to utilize servers located outside of New Mexico or at local New Mexico jurisdictions with local GRT rates.
- Reporting location based on server location disincentivizes data center and server investment in the state.

⁹ 3.1.4.13.C(2) NMAC.

¹⁰ Prop. 3.1.4.13.C(5)(e)(v) NMAC (emphasis added).

¹¹ Server, Dictionary.com, *available at* [dictionary.com/browse/server](https://www.dictionary.com/browse/server).

Rather than rely on server location, which is inherently unreliable and difficult to administer, the Department should instead determine reporting location by advertiser billing address or principal place of business. Billing address provides a practical data point that a digital advertising service provider can easily comply with.

Additionally, the new example referencing server location is not necessary because the provisions of existing Rule Sec. 3.1.4.13.C(5) would generally apply in determining the reporting location of digital advertising services gross receipts. Applying the waterfall sourcing rules under Subsection (C)(5), the purchaser's billing address, known to the digital advertising service provider at the time of the sale, would be a reporting location specified under either Subparagraphs (c) or (d).

For the reasons set forth above, we respectfully request that the Department amend the Proposed Rules consistent with the above comments. We appreciate the Department's consideration of these important issues. If you have any questions or wish to discuss any aspect of our comments, please contact me at dhoffman@technet.org or (505) 402-5738.

Best,

A handwritten signature in black ink, appearing to read 'Dylan Hoffman', with a large, sweeping flourish extending to the right.

Dylan Hoffman
Executive Director for California and the Southwest