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November 7, 2023

Via E-Mail

Taxation and Revenue Department
Tax Information and Policy Office
Post Office Box 630
Santa Fe, NM 87504-0630
E-mail: policy.office@tax.nm.gov

Re: Comments on Proposed Action on Proposed Rules Regarding Gross Receipts Tax at 3.1.4.13 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 and 3.2.213.13 NMAC in anticipation of the public hearing set for November 9, 2023 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) Confirm the availability of the deduction at Section 7-9-55 NMSA 1978 to providers of digital platforms that display digital advertising services; and
- (2) Rely on the billing address or commercial domicile of the digital advertising provider as its reporting location.

Background

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

New Mexico sources receipts from advertising services to "the location where the product of the service is delivered" (i.e., destination sourcing).² If the Department cannot otherwise determine the delivery location, it relies instead on "the location from which the property or product of the service was shipped or transmitted to the purchaser" (i.e., origin sourcing).³ The Department proposes adding an example to 3.1.4.13.C(5)(e)(v) NMAC that would source gross receipts

¹ Prop. 3.2.213.13.A NMAC.

² 3.1.4.13.C(9)(e) NMAC.

³ 3.1.4.13.C(5)(e) NMAC.

from digital advertising services that can and are only intended to be viewed in New Mexico to the digital advertising service provider's location, rather than the purchaser's location.

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."⁴ 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 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.⁵

The Department Should Confirm that the Interstate Commerce Deduction is Available to Providers of Digital Platforms that Display Digital Advertising Services.

We respectfully request that the Department revise the Proposed Rules to confirm the availability of the interstate commerce deduction (7-9-55 NMSA 1978) to the receipts from "a provider of a digital platform that displays digital advertising services." Under New Mexico's Broadcasting and Related Advertising Rule set forth in 3.2.213.9.E NMAC, the Department explains that "[p]roviders of digital advertising services are eligible for the deduction provided by Section 7-9-55 NMSA 1978." However, to clarify that the deduction is not limited to digital advertising services provided by a broadcaster, we respectfully ask that the deduction be incorporated into Prop. 3.2.213.13 NMAC – which indicates that the gross receipts tax is imposed on digital advertising services. We recommend that the Department amend Prop. 3.2.213.13.A NMAC as follows:

Receipts of a provider of a digital platform that displays digital advertising services, whose digital platform may be accessed or viewed within New Mexico, from the sale of advertising services to advertisers within and without New Mexico are subject to the gross receipts tax. **Providers of digital platforms that display digital advertising services are eligible for the deduction provided by Section 7-9-55 NMSA 1978.**

⁴ § 7-9-55.A NMSA 1978.

⁵ § 7-9-55.A NMSA 1978 (emphasis added).

We also recommend the following change be made to Section E of 3.2.213.9 NMAC, the regulation applying the interstate commerce deduction to providers of digital advertising services:

Digital advertising services: Providers of digital advertising services **and providers of a digital platform that displays digital advertising services** are eligible for the deduction provided by Section 7-9-55 NMSA 1978. Receipts of a provider of digital advertising services **and a provider of a digital platform that displays advertising services** are deductible when the receipts:

- (1) 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, or
- (2) are from an advertising agency which purchases the display of advertisements on the platform on behalf of, or for subsequent sale to, a seller defined in Paragraph (1) of Subsection E of 3.2.213.9 NMAC. However, the commissions of advertising agencies from performing services in this state may not be deducted.

Additionally, we request that the Department amend its proposed example at Prop. 3.1.4.13.C(e)(v) NMAC to address the interstate commerce exemption. This proposed example directs taxpayers on how to source receipts from digital advertising services. As proposed, the example appears to already address – albeit indirectly – the interstate commerce exemption by stating that the digital advertising service “can be viewed in New Mexico, and is intended to be viewed only in New Mexico.” As stated above, 7-9-55.C NMSA 1978 allows for a deduction for receipts from digital advertising services “when the advertising message is supplied by or on behalf of” of certain “national or regional seller[s] or advertiser[s].” A “regional” seller or advertiser is defined 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.”⁶

Because the proposed example addresses only the intended viewing of the advertisement in New Mexico, the seller may still be a “regional” seller or advertiser subject to the deduction if it “sells from locations in more than one state.” To clarify the interstate commerce deduction’s applicability, we request that the Department amend the proposed example at 3.2.213.9.E NMAC, as follows:

Example: Company X provides a digital advertising service to Customer Y – **a person who is neither a national,**

⁶ NMAC 3.2.213.7.A (emphasis added).

nor a regional seller or advertiser pursuant to Subsection C of 7-9-55 NMSA 1978 – 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 D of 3.2.213.13 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 Company X as being the location from which the product of the digital advertising service was transmitted to the purchaser.

The Department Should Amend the Proposed Rules to Indicate that the Digital Advertising Provider’s Billing Address or Commercial Domicile is its Reporting Location.

We also request that the Department clarify that the digital advertising provider’s billing address or commercial domicile is used to determine its location (i.e., the “reporting location”) to source gross receipts pursuant to 3.1.4.13.C(5)(e) NMAC and the proposed example at Prop. 3.1.4.13.C(5)(e)(v) NMAC. 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.”⁷ Per the proposed example at 3.1.4.13.C(5)(e)(v) NMAC, the Department would source receipts from digital advertising services to the provider’s [seller’s] location because it is “the location from which the product of the digital advertising service was transmitted to the purchaser.”⁸

By regulation, New Mexico refers to the following provision on how to determine the seller’s location:

In general, a seller's location may include a particular building, including a store or office, or other physical location maintained or operated by or for the seller, or used by the seller, where some designated activity giving rise to gross receipts takes place. If the seller uses no such physical location in New Mexico, and if the seller's domicile is not in New Mexico, then the “seller's location” as used in this regulation is deemed to be outside the state.⁹

⁷ 3.1.4.13.C(2) NMAC.

⁸ Prop. 3.1.4.13.C(5)(e)(v) NMAC

⁹ 3.1.4.13.A(5) NMAC.

A digital advertising service provider may have multiple New Mexico locations – including, as was previously considered and rejected by the Department, servers – involved with transmitting the digital advertising service to the purchaser or otherwise engaging in “some designated activity giving rise” to the digital advertising service. Digital advertising service providers are thus faced with questions of where, among various locations, to source their receipts. In light of the complexities of choosing one location to source their digital advertising service receipts, taxpayers need a simple solution. The digital advertising service’s billing address or commercial domicile provides a practical data point that it can easily comply with.

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 stylized flourish extending to the right.

Dylan Hoffman
Executive Director for California and the Southwest