

June 20, 2024

Sent only via email to policy.office@state.nm.us

New Mexico Taxation and Revenue Department
Tax Information and Policy Office
P.O. Box 630
Santa Fe, New Mexico 87504-0630

Comments for Proposed Changes to NMAC
3.2.116.8(F), 3.2.116.11, 3.2.116.12,
3.2.116.13, 3.2.211.7(A), and 3.2.211.18

Dear Sir or Madame,

In response to the New Mexico Taxation and Revenue Department's ("Department") Notice of Proposed Rulemaking dated May 21, 2024, we submit the following comments to the proposed changes to NMAC 3.2.116.8(F), 3.2.116.11, 3.2.116.12, 3.2.116.13, 3.2.211.7(A), and 3.2.211.18.

NMAC 3.2.116.8(F) Criteria Used in Determining Isolated or Occasional Sales, and NMAC 3.2.116.11 Sale or Leasing the Same or Similar Property

The proposed change to NMAC 3.2.116.8(F) includes in its criteria "if found to be engaging in business pursuant to NMSA 1978, Section 7-9-3.3, the type of sale in relation to the transaction in question." We think using the definition for "engaging in business" to determine whether someone is "regularly engaging" in the business of selling or leasing the same or similar type of property is misplaced. This will add a requirement that is simply not included in the NMSA 1978, Section 7-9-28 statutory exemption from gross receipt tax for an occasional or isolated sale.

The determination of whether a person is engaging in business is a threshold question. Once the standard for engaging in business is met, it is then determined whether there are any applicable exclusions, exemptions or deduction that may apply. This is true for determining whether the transaction is eligible for the isolated or occasional sale exemption. The definition for engaging in business should then not be used again to determine whether the transaction qualifies for the exemption.

For example, a construction service company that is located outside New Mexico and is not in the business of selling tangible personal property might sell one of its cranes for more than \$100,000.00 to a buyer located in New Mexico. The construction service company would meet the definition of engaging in business because the sale exceeded \$100,000. However, it does

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not mean that the business is regularly engaging in the business of selling cranes and would not qualify for the isolated or occasional sale exemption from gross receipts.

NMAC 3.2.116.12 Executors' and Administrators' Fees

Both the Uniform Probate Code and the Uniform Statutory Will Act use the term "personal representative" and define it to include "executor, administrator, successor personal representative, special administrator and a person who performs substantially the same functions relating to the estate of a decedent under the law governing their status[.]" NMSA 1978, Sections 45-1-201A(37); 45-2A-2C. We think the same term could be used here and the definition tied to those definitions.

NMAC 3.2.116.13 Trustee Fees

The proposed changes to NMAC 3.2.116.13 do not contemplate an appointed trustee who might only be acting as a trustee to simply wind up an estate where the trustee does not regularly engage in the business of trust administration. The Uniform Statutory Will Act permits appointment of a personal representative or trustee and allows a person to be named in the will or be appointed by the court. See NMSA 1978, Section 45-2A-13. Although a trustee in these circumstances would play a similar role as an administrator or executor in winding up the affairs of the estate (including terminating the trust), a trustee would not be considered exempt from gross receipts tax and would be treated differently than an administrator or executor. We think the proposed regulation should treat these types of trustees the same as administrators and executors.

In addition, trustees often acting in this capacity do not charge for their services because the trustee services are typically provided for a family member or close friend. If not exempt, does this mean the fair market value of the services would be imputed and then taxed? See NMAC 3.2.1.14(C)(1) ("In a transaction where the actual consideration received does not represent the fair market value of the property sold or leased or of the service sold, the fair market value shall be included in the gross receipts of the seller or lessor. Fair market value is the value which the property or service can command in an arms length transaction between two independent parties in an open market.")

NMAC 3.2.211.7(A) Definition: "Assisted Living Facility"

While we think the proposed definition of "assisted living facility" in NMAC 3.2.211.7(A) is broad enough to include independent living facility, we recommend that the proposed definition expressly state that an "independent living" facility is a type of "assisted living facility." We offer the following revised definition:

- A. "Assisted living facility" means a facility that provides dwelling units for residents, and which includes common rooms and other facilities appropriate for the provision of supportive services to residents of the facility, and which makes available to residents

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supportive services to assist the residents in carrying out activities of daily living, such as bathing, dressing, eating, getting in and out of bed or chairs, walking, going outdoors, using the toilet, laundry, home management, preparing meals, shopping for personal items, obtaining and taking medication, managing money, using the telephone, or performing light or heavy housework, and which may make available to residents home health care services, such as nursing and therapy. Assisted living facilities are distinguished from other long-term care facility types, such as skilled nursing facilities, in that they do not provide round-the-clock supervision by nurses or other medically trained personnel. A residential facility of the type commonly referred to as an "independent living" facility is an "assisted living" facility if it provides services to residents beyond those typically provided to residents of an ordinary apartment complex.

We believe that expressly including "independent living" facilities within the definition of "assisted living facility" will avoid the potential for ambiguity and uncertainty if the regulation is silent on this issue.

NMAC 3.2.211.18 Assisted Living Facilities

The proposed changes to NMAC 3.2.211.18 do not provide guidance about the valuation procedure for including common areas. Residents of "assisted living facilities" have the right to occupy not only their individual units, but also common areas that are part of the facility. Lessors charge for the use of common areas as part of the rent. "Fair rental value" calculations should include the proportionate share of the square footage of the common areas. These common areas can be significant in "assisted living facilities" and add considerable value to the "fair rental value" of individual units within those facilities. A "fair rental value" calculation could result in incorrect valuations if an allowance for common areas is not included.

We recommend including the guidance of relevant Rulings of the Department regarding the treatment of common areas in the "fair market value" calculation. In Ruling 440-98-2, the Department accepted a method of apportionment that calculated "the value of the rental portion of the monthly charge by multiplying the square footage of each apartment (adjusted for a proportionate share of the square footage of the common areas) by a square footage rental rate that is comparable for the market." This is consistent with Ruling 430-94-2 where the common areas were similarly permitted to be included in the calculation for the rental of real property. We think it would be helpful to include this same language in the regulation.

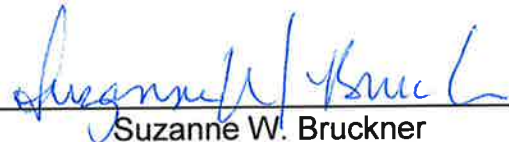
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We appreciate your consideration of these comments. Please contact us if you have any questions or would like to discuss further.

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