
FYI-350

New Mexico
Taxation and Revenue Department

FOR YOUR INFORMATION

Tax Information/Policy Office ♦ P.O. Box 630 ♦ Santa Fe, New Mexico 87504-0630

CORPORATE INCOME TAX and CORPORATE FRANCHISE TAX

CONTENTS

| | |
|---|---------|
| Overview..... | page 2 |
| Exempt Corporations..... | page 3 |
| Tax Rates..... | page 3 |
| Tax Credits..... | page 5 |
| Tax Base..... | page 5 |
| Adjustments to Base Income..... | page 5 |
| Net Operating Losses..... | page 6 |
| Income Apportionment..... | page 7 |
| Reporting Requirements..... | page 7 |
| Reporting Options Prior To January 1, 2020..... | page 8 |
| Filing Requirements..... | page 10 |
| Pass-Through Entity Reporting (Form PTE)..... | page 10 |
| Estimated Payments..... | page 11 |
| Extension Payments..... | page 11 |
| Interest and Penalties..... | page 11 |
| Appendix: Information for Multistate and Multinational Corporations..... | page 12 |
| Taxpayer Information..... | page 17 |
| For Further Assistance..... | page 18 |

OVERVIEW

New Mexico Corporate Income Tax. New Mexico imposes a corporate income tax on the taxable income of a corporation or group of corporations, in whatever jurisdiction organized or incorporated, that is engaged in the transaction of business in, into, or from this state, or which derives income from property or employment within this state.

“Corporation” means corporations, joint stock companies, real estate trusts organized and operated under the Real Estate Trust Act, financial corporations, banks, and other business associations. For corporate income tax purposes, “corporation” also means limited liability companies and partnerships taxed as corporations under the Internal Revenue Code (IRC).

“Net income” means the base income of a corporation filing as a separate entity or the combined base income and losses of corporations that are part of a filing group computed after eliminating intercompany income and expense in a manner consistent with consolidated filing requirements of the IRC and the Corporate Income and Franchise Tax Act. (See the definition of “Base Income” on page 5).

“Taxable income” is a taxpayer’s apportioned net income minus the net operating loss deduction for the taxable year. The “apportioned net income” is net income allocated and apportioned to New Mexico but excluding from the sales factor any sales that represent intercompany transactions between members of the filing group.

New Mexico Corporate Franchise Tax is the obligation of every domestic and foreign corporation, including S corporations, that either engages in business in New Mexico or exercises its corporate franchise in this state whether actively engaged in business or not.

A corporation exercises its corporate franchise when it seeks treatment as a legal entity or person who is subject to the jurisdiction of and privileges provided by state law. Indications of exercise of a corporate franchise include but are not limited to:

- 1) registering with the Secretary of State;
- 2) registering with any regulatory agency of the state;
- 3) appointing a registered agent in this state to accept service of legal process on behalf of the corporation;
- 4) appointing any agent to carry on activity within this state;
- 5) using the New Mexico judicial system to enforce contractual provisions or to collect debt;
- 6) owning property located in this state;
- 7) registering trade names with the state; or
- 8) filing legal documents for public notice with any county clerk in this state.

EXEMPT CORPORATIONS

Exempt from corporate income tax and corporate franchise tax are:

- 1) insurance companies, health maintenance organizations (HMOs), and reciprocal or inter-insurance exchanges that pay a premium tax to the state;
- 2) trusts organized in the United States that form part of a stock, bonus, pension, or profit-sharing plan of an employer for the exclusive benefit of employees or their beneficiaries -- if the trust is exempt from federal income tax; and
- 3) nonprofit 501(c) organizations unless the nonprofit corporation has unrelated business income subject to federal income tax. A 501(c) organization with unrelated business income subject to federal income tax is subject to corporate income and franchise tax in New Mexico.

TAX RATES

For taxable years beginning on or after January 1, 2020, the ***New Mexico Corporate Income Tax*** is imposed on the *taxable* income which is the net income apportioned and allocated to New Mexico. Prior to January 1, 2020, the tax is imposed on total *net* income (including New Mexico and non-New Mexico income). The percentage of New Mexico income is then applied to the gross tax.

For taxable years beginning prior to January 1, 2014,

| <i>if total net income is...</i> | <i>then your tax is...</i> |
|---|---|
| Not over \$500,000 | 4.8% of net income |
| Over \$500,000 but not over \$1,000,000 | \$24,000 plus 6.4% of net income over \$500,000 |
| Over \$1,000,000 | \$56,000 plus 7.6% of net income over \$1,000,000 |

The highest corporate income tax rates will be decreasing over a period of five years, beginning in 2014 as follows.

For taxable years beginning on or after January 1, 2014, and prior to January 1, 2015,

| <i>if your total net income is...</i> | <i>then your tax is...</i> |
|--|---|
| Not over \$500,000 | 4.8% of net income |
| Over \$500,000 but not over \$1,000,000 | \$24,000 plus 6.4% of net income over \$500,000 |
| Over \$1,000,000 | \$56,000 plus 7.3% of net income over \$1,000,000 |

For taxable years beginning on or after January 1, 2015, and prior to January 1, 2016,

| <i>if your total net income is...</i> | <i>then your tax will be...</i> |
|--|--|
| Not over \$500,000 | 4.8% of net income |

New Mexico Taxation and Revenue Department

| | |
|---|---|
| Over \$500,000 but not over \$1,000,000 | \$24,000 plus 6.4% of net income over \$500,000 |
| Over \$1,000,000 | \$56,000 plus 6.9% of net income over \$1,000,000 |

For taxable years beginning on or after January 1, 2016, and prior to January 1, 2017,

| <i>if your total net income is...</i> | <i>then your tax will be...</i> |
|--|---|
| Not over \$500,000 | 4.8% of net income |
| Over \$500,000 but not over \$1,000,000 | \$24,000 plus 6.4% of net income over \$500,000 |
| Over \$1,000,000 | \$56,000 plus 6.6% of net income over \$1,000,000 |

For taxable years beginning on or after January 1, 2017, and prior to January 1, 2018,

| <i>if your total net income is...</i> | <i>then your tax will be...</i> |
|--|---|
| Not over \$500,000 | 4.8% of net income |
| Over \$500,000 | \$24,000 plus 6.2% of net income over \$500,000 |

For taxable years beginning on or after January 1, 2018, and prior to January 1, 2020,

| <i>if your total net income is...</i> | <i>then your tax will be...</i> |
|--|---|
| Not over \$500,000 | 4.8% of net income |
| Over \$500,000 | \$24,000 plus 5.9% of net income over \$500,000 |

For taxable years beginning on or after January 1, 2020

| <i>If your total taxable income is...</i> | <i>then your tax will be...</i> |
|--|---|
| Not over \$500,000 | 4.8% of taxable income |
| Over \$500,000 | \$24,000 plus 5.9% of excess over \$500,000 |

New Mexico Corporate Franchise Tax is \$50 per year or partial year. Payment of the \$50 corporate franchise tax for *each* corporation that is a member of a combination of unitary corporations or of a consolidated group must accompany a combined or consolidated return if the entity is registered to do business in the state, engaged in the transaction of business in the state, or exercises its corporate franchise in the state. Corporate franchise tax is due even when the corporation is immune from the imposition of corporate income tax under Public Law (P.L. 86-272) or when a qualified Subchapter S subsidiary is “disregarded” for federal income tax purposes but is registered to do business, engaged in the transaction of business, or exercises its corporate franchise in the state. For more information about P.L. 86-272, see the *Appendix* on page 13.

TAX CREDITS

New Mexico offers a number of tax credits against corporate income tax for qualifying businesses. A list of credits and how to apply for them can be found in the publication FYI-106, *Claiming Business-Related Tax Credits for Individuals and Businesses*. The publication is available at the department's website at tax.newmexico.gov/forms-publications.aspx in the publications folder and at all district offices. See "For Further Assistance" on page 19 for locations and telephone numbers.

TAX BASE

The rate structure alone is insufficient for meaningful comparisons of state corporate income taxes due to the significant variations that exist among states on what constitutes a taxable income base. There are two major areas of difference. The first is the definition of "base income" with allowable deductions and exemptions. The second is the method of determining the portion of a multistate or multinational corporation's income that is taxable in a particular state.

New Mexico law adopts the federal IRC definitions of income, deductions and exemptions; that is, New Mexico "piggybacks" on federal taxable income, and federal base changes are automatically reflected in New Mexico's base. **NOTE:** *New Mexico does not follow federal net operating loss carry-over or carry-back provisions or tax credits.*

BASE INCOME

Base income is the federal taxable income or the federal net operating loss of a corporation calculated pursuant to the IRC, after the special deductions provided in Sections 241 through 249, but without any deduction for net operating losses, as if the corporation filed as a separate domestic entity, and modified by the following adjustments.

Additions to base income:

- 1) Interest received on state or local bonds exempt under the IRC
- 2) Any deduction claimed in calculating taxable income for all costs directly or indirectly paid, accrued or incurred to a captive real estate investment trust
- 3) Any deduction, other than for premiums, paid directly or indirectly to a commonly controlled entity that is exempt from corporate income tax

Subtractions from base income:

- 1) Income from U.S. obligations net of expenses incurred to earn that income
- 2) Other amounts that the state is prohibited from taxing because of the laws or constitution of this state or the United States net of any related expenses
- 3) An amount equal to 100% of the subpart F income, as that term is defined in Section 952 of the IRC included in the income of the corporation
- 4) An amount equal to 100% of the income of the corporation under Section 951A of the IRC, after allowing the deduction provided in Section 250 of the IRC

Finally, other adjustments are made deemed necessary to properly reflect income of the unitary group, including attribution of income or expense related to unitary assets held by related corporations that are not part of the filing group.

NET OPERATING LOSSES

New Mexico recognizes a net operating loss (NOL) for New Mexico corporate income tax only when the federal corporate tax return shows the NOL. The NOL deduction is the portion of the *NOL carryover* that may be deducted from the taxpayer's apportioned net income under the IRC as of January 1, 2018 for the taxable year in which the deduction is taken, including the 80% limitation of Section 172(a) of the IRC as of January 1, 2018 calculated on the basis of the taxpayer's apportioned net income.

NOL carryover is the apportioned net loss properly reported on an original or amended tax return for the taxable years beginning on or after January 1, 2020, and then:

- 1) adding the portion of an apportioned net loss properly reported to New Mexico for a taxable year to the extent the taxpayer would have been entitled to include the portion of the apportioned net loss in the taxpayer's consolidated NOL carryforward under the IRC if the taxpayer filed a consolidated return, and adding the *grandfathered NOL carryover*; and
- 2) subtracting the amount of the NOL carryover attributed to an entity that has left the filing group, computed in a manner consistent with the consolidated filing requirements of the IRC and applicable regulations, as if the taxpayer were filing a consolidated return, and subtracting the amount of NOL deductions properly taken by the taxpayer.

The grandfathered NOL carryover is the amount of net loss properly reported to New Mexico for taxable years beginning January 1, 2013, and prior to January 1, 2020, as part of a timely filed original return or an amended return to the extent such loss can be attributed to one or more corporations that are properly included in the taxpayer's return for the first taxable year beginning on or after January 1, 2020.

Deductions for royalties or interest paid to one or more related corporations are then added back to the extent that the adjustment would not create a net loss for the related corporations. The amount is also reduced by the NOL deductions taken prior to January 1, 2020, that would be charged against those losses consistent with the law applicable to the year of the deduction. The amount is then apportioned to New Mexico using the apportionment factors that can properly be attributed to the corporation or corporations for the year of the net loss.

Prior to January 1, 2020, the NOL deduction is the amount of excess loss from the NOL year that is deductible from a corporation's federal taxable income in a carry-over year. For NOLs generated in tax years prior to January 1, 1991, the carry-back and carry-over periods are the same for New Mexico as for federal purposes: usually three years back and 15 years forward. Apply any NOL incurred before 1991 to carry-back years first, then to carry-forward years.

For NOLs generated in tax years beginning on or after January 1, 1991 and prior to January 1, 2013, the loss is eligible for carry forward only up to five years. Apply the NOL to each carry-forward year in sequence.

INCOME APPORTIONMENT

As a member of the Multistate Tax Compact, New Mexico has adopted the Uniform Division of Income for Tax Purposes Act (UDITPA). The Compact, UDITPA, and associated regulations spell out the rules by which a corporation or group of corporations operating in more than one state divides income and expenses among those states.

An average percentage is calculated for the ratios between property, payroll, and sales factors of business activity in New Mexico and the corporation's business activity everywhere. For most businesses New Mexico uses the standard three-factor formula. There are special rules for airlines, railroads, construction contractors, trucking companies, broadcasters, the financial industry, and the publishing industry. These special rules can be found in department regulation under Section 7-4-19 NMSA 1978.

For tax years beginning on January 1, 2020, if 80% or more of the property and payroll factors apportioned to New Mexico are employed in manufacturing, that taxpayer or filing group may elect to have business income apportioned to New Mexico by multiplying the income by the sales factor for the taxable year. For tax years beginning on or after January 1, 2014 and prior to January 1, 2020, taxpayers whose principal activity is manufacturing may elect to use a special apportionment formula that allows them to apportion the business income to New Mexico using an alternative method which, over a five-year period, phases in a single weighted sales factor.

For tax years beginning on or after January 1, 2015, a filing group or a taxpayer that has a headquarters operation in New Mexico may elect to have business income apportioned to New Mexico using the sales factor for the taxable year. To elect either of these two methods of election, the taxpayer must notify the department in writing no later than the date on which the taxpayer files the return for the first taxable year to which the election will apply.

Taxpayers who believe the allocation and apportionment rules do not fairly represent the extent of its business activities in New Mexico may petition the Secretary of Taxation and Revenue for, or the Secretary may require:

- 1) Use of separate accounting for corporations otherwise listed in combined or consolidated returns;
- 2) Exclusion of any of the standard factors;
- 3) Inclusion of one or more additional apportionment factors, or
- 4) Use of other reasonable methods to apportion the taxpayer's income equitably.

REPORTING REQUIREMENTS

On the first original return required to be filed for taxable years beginning on or after January 1, 2020, corporations that file as part of a **unitary group** are required to file as a **worldwide combined group** unless they properly elect to report and pay tax as a **water's-edge** or **consolidated group**. A unitary group is a group of two or more corporations, including captive real estate investment trusts, that are related through common ownership and are economically interdependent with one another as demonstrated by centralized management, functional integration, and economies of scale.

Not included in a unitary group are S corporations, insurance companies subject to the provisions of the New Mexico Insurance Code or insurance companies that would be subject to the insurance code if the company engaged in business in the state, or real estate investment trusts that are not captive real estate investment trusts.

A worldwide combined group includes all members of a unitary group, except members that are exempt corporations, irrespective of the country in which the corporations are incorporated or conduct business activity.

A water's-edge group consists of all corporations that are part of a unitary group, except for exempt corporations and corporations that have less than 20% of their property, payroll, and sales sourced to locations within the United States.

A consolidated group is a group of entities properly filing a federal consolidated return under the IRC for the taxable year. Corporations electing to file a consolidated return must file on that same basis for federal income tax purposes.

Once a unitary group or consolidated group has properly made an election to file as a water's-edge or consolidated group, the group and any of the group's members shall file a return on that basis for at least seven consecutive years unless the secretary grants permission otherwise. Corporations that are part of a unitary group filing a return are jointly and severally liable for the tax imposed pursuant to the Corporate Income and Franchise Tax Act on taxable income.

A corporation filing as a separate entity in New Mexico follows all federal rules for determination of income.

REPORTING OPTIONS FOR RETURNS PRIOR TO JANUARY 1, 2020

For returns filed for tax years prior to January 1, 2020, New Mexico offers corporate taxpayers three options for reporting corporate income tax. These are known as the "ladder." The state also allows an alternative tax reporting method. For tax years beginning on or after January 1, 2014, and prior to January 1, 2020, combined reporting is required for corporations with retail facilities exceeding thirty thousand feet, unless the corporation also employs 750 people in New Mexico in non-retail business activities.

The ladder options are:

Option 1: Separate corporate entity

Option 2: Combination of domestic unitary corporations

Option 3: Federal consolidated group

A taxpayer may elect to file the initial New Mexico corporate income tax return using one of the three reporting methods above. In succeeding years the taxpayer may choose a different reporting basis without written permission from the Secretary of Taxation and Revenue as long as the new reporting method is a higher option number on the ladder than the previous reporting method. By moving up the ladder a taxpayer includes more corporate activity in the reporting of income to the state of New Mexico. A request to move back down the ladder to a lower number requires prior approval from the Secretary of Taxation and Revenue.

The election of a reporting option is open to a taxpayer every year if it is for a higher-ranked reporting method. New Mexico does not permit retroactive election of a different reporting method.

Option 1: Separate Corporate Entity. Regardless of how the corporation actually files for federal purposes, it uses the separate corporate method to file in New Mexico as if it had filed as a stand-alone entity at the federal level.

A corporation filing as a separate entity in New Mexico submits a copy of its federal Form 1120 or other applicable form, following all federal rules for determination of income. A corporation that is part of a federal consolidated return submits a separate pro-forma 1120 return and follows all appropriate rules for the determination of federal income as if it were a stand-alone entity. Transactions with other members of the federal consolidated group may not be netted out.

Option 2: Combination of Domestic Unitary Corporations. Two or more corporations engaged in a unitary business may report the combined income of all members of the unitary business whether or not the unitary business files a federal consolidated return. "Unitary corporations" means two or more integrated corporations more than 50% owned and controlled by the same person. At least one of the following conditions must exist:

- 1) Centralized services;
- 2) Centralized management or executive force and centralized system of operation, or
- 3) Unity of operations shown by central purchasing, advertising, accounting, or other operations of the corporations are dependent on or contribute property or services to one another individually or as a group.

A domestic unitary group of corporations using the combination method must prepare and submit a simulated federal return on federal Form 1120 or other applicable form, following all federal rules for consolidation except those relating to ownership percentage. All unitary corporations must appear on the return, including those not engaged in business in New Mexico. The exceptions are:

- 1) Corporations incorporated in a foreign country and not engaged in a trade or business in the United States;
- 2) Insurance companies and other exempt organizations.

For tax years beginning on or after January 1, 2014, and prior to January 1, 2020, combined reporting is required for corporations with retail facilities exceeding thirty thousand feet, unless the corporation also employs 750 people in New Mexico in non-retail business activities.

Option 3: Federal Consolidated Group. A corporation filing a federal consolidated return reports the income of all affiliated corporations shown on the federal return.

A consolidated group consists of a parent corporation and its subsidiaries, even non-unitary entities. A taxpayer who files a consolidated New Mexico income tax return must do so on the same basis as the federal consolidated return, applying property, payroll, and sales factors to the total consolidated group. Include non-unitary corporations within the consolidated group. Entities excluded for federal purposes are similarly excluded from the state consolidated return. Consolidated filers must submit copies of federal consolidated return form 1120.

Option 4: Alternative Tax Reporting Method. New Mexico corporate tax law provides for election of an alternative tax-reporting method for any corporation required to file a corporate income tax return. To do so it must meet *all* the following requirements:

The corporation's only activities in New Mexico are sales;

The corporation does not own or rent real estate in New Mexico, and

The corporation's annual gross sales in or into New Mexico amount to \$100,000 or less.

A corporation meeting all three requirements may elect to pay a tax of .75% of its annual gross receipts from sales in or into New Mexico. The taxpayer must file using both Schedule CC and form CIT-1.

Reporting method options 1, 2 and 3 require allocation and apportionment of income under UDITPA for businesses operating in this state.

FILING REQUIREMENTS

Corporate Income Tax is due on or before the due date of the corporation's federal corporate income tax return for the taxable year.

Electronic Filing. For tax years beginning on or after January 1, 2016, the due date for taxpayers who file and pay electronically using a Department-approved electronic media have an extended due date until the last day of the month in which the corporation's federal corporate income tax return is originally due for the taxable year. For tax years beginning on or after January 1, 2015, the due date for taxpayers who file and pay electronically have an extended due date until the last day of the third month following the end of their calendar year.

Report and pay corporate income tax using form *CIT-1* for all corporate taxpayers except pass-through entities.

PASS-THROUGH ENTITY (PTE) REPORTING (Partnerships and S-Corps)

New Mexico law requires pass-through entities to submit a return if the entity does business in the state and has not chosen to report as a C corporation for federal income tax purposes. Partnerships report using form PTE and S-Corps report using form S-Corp. Among pass-through entities are any partnership, joint venture, common trust fund, limited association, pool or working agreement, limited liability company, or any combination of persons or interests required to file a federal partnership return of income. **Exceptions** are sole proprietorships, estates or trusts that do not distribute income to beneficiaries, insurance companies and reciprocal or inter-insurance exchanges that pay a premium tax to New Mexico, and rural electric cooperatives established under the Rural Electric Cooperative Act (Section 62-15-28 NMSA 1978).

A pass-through entity doing business in this state files an annual information return with the Department on or before the due date of the entity's federal return for the taxable year. At the time it files the information return, New Mexico requires the PTE to deduct and withhold from each non-resident owner's share of net income an amount equal to 4.9% of the owner's share of net income. For additional information on information return filing requirements, see FYI-330, *Income and Withholding Information Returns and Filing Methods*, available on our web site at

<http://www.tax.newmexico.gov/forms-publications.aspx>.

Corporate Franchise Tax, due at the same time as the corporate income tax, is reported on the appropriate income tax form. The franchise tax applies to each corporation in combined unitary or consolidated tax returns if the corporation exercises its corporate franchise in New Mexico. Every time a corporate income and franchise tax return is due, even for a short-year return, the \$50 franchise tax is due. Inactive corporations are liable for franchise tax as long as they exercise their corporate franchises in this state. Please see page 2 for parameters.

ESTIMATED PAYMENTS

Every corporation must pay quarterly estimated income tax if it has a tax liability for the tax year of \$5,000 or more after applicable credits. Use the CIT-ES form to make quarterly estimated payments.

The total estimate should be 80% of the amount due for the current year, 100% of the prior year's tax if the tax due was at least \$5,000, or 110% of the tax due for the year before the prior tax year if the tax due was at least \$5,000 -- whichever amount is smallest. The estimated tax payments are due in equal installments on the 15th day of the fourth, sixth, ninth, and twelfth months of the corporation's tax year.

Corporations with seasonal or annualized income may be able to reduce penalty and interest on underpayment of estimated tax by completing Form RPD-41287, *Calculation of Penalty and Interest on Underpayment of Estimated Tax*.

EXTENSION PAYMENTS

To prevent the accrual of interest on unpaid tax, corporations may make extension payments on or before the 15th day of the third month following the close of the taxable year. The CIT-EXT form is used for extension payments.

New Mexico honors Internal Revenue Service extensions of time to file but imposes statutory interest on underpayments from the time the tax was originally due. If there is no federal extension, the taxpayer may request a state extension from the Department's Corporate Income Tax Section before the tax-due date.

INTEREST AND PENALTIES

If the corporation does not pay its New Mexico corporate income tax or corporate franchise tax on time, interest accrues at the quarterly rate set by the United States Internal Revenue Code, calculated daily, on the amount of tax due. For the second quarter of 2017 the interest rate is 4% (0.010958904% daily). **Current daily and quarterly interest rates are available on our web site at www.tax.newmexico.gov. Interest accrues even when the corporation has an extension of time to file a return.** The statute imposing interest is Section 7-1-67 NMSA 1978.

Should the tax remain unpaid when due because of negligence or disregard of rules or regulations but without intent to defraud, the corporation is liable for a penalty of 2% per month or partial month from the date the return was due, not to exceed 20% of the tax amount due but not paid. Penalty does not apply when there is an extension of time to file and the tax is paid by the extended due date. The statute imposing penalty is Section 7-1-69 NMSA 1978.

A check not paid by the financial institution on which it is drawn does not constitute payment. The

corporation incurs a penalty of \$20 plus any other applicable penalty or interest.

APPENDIX

INFORMATION FOR MULTISTATE AND MULTINATIONAL CORPORATIONS

| | |
|--|---------|
| Determining Nexus | page 12 |
| Criteria for Immunity Under P.L. 86-272..... | page 12 |
| Protected Activities | page 13 |
| Independent Contractors..... | page 14 |
| Unprotected Activities..... | page 14 |

DETERMINING NEXUS

Liability for New Mexico corporate income tax often depends on whether a corporation has *nexus* in New Mexico. To have nexus means a corporation has enough connection to New Mexico that it is fair for the state to subject the business to state corporate income tax.

Any corporation with income from the transaction of business in, into, or from New Mexico or from property or employment in this state has nexus — that is, sufficient presence for New Mexico to impose the corporate income tax — unless its activities are immune under Public Law (P.L.) 86-272 (31 USCA 351).

P.L. 86-272 restricts a state's imposition of income tax on income from within its borders under certain circumstances. If a corporation's sales into New Mexico meet all the following criteria, the corporation may be immune from New Mexico corporate income tax under P.L. 86-272. *Please note that P.L. 86-272 does not provide immunity from the corporate franchise tax:*

CRITERIA FOR IMMUNITY UNDER P.L. 86-272 (THE CORPORATION MUST MEET ALL CRITERIA)

- 1. The corporation does not maintain a business location or office in New Mexico.** A business location includes but is not limited to an office, warehouse, or other site in this state from which the corporation sells, stores or displays a product or service. The home of a resident employee may be a business location if potential customers know they can go there to purchase the product or service that the corporation sells.
- 2. The corporation is not incorporated in New Mexico.** The immunity afforded by P.L. 86-272 does not extend to a corporation incorporated in New Mexico. Immunity is not lost merely by registering with the Public Regulation Commission to do business in the state, however.
- 3. All sales occur in interstate commerce.** For a sale to qualify as interstate commerce under P.L. 86-272, approval of the sale must occur outside the state (except for sales by independent contractors — see page 15), and deliveries must be via common carrier from a point outside the state.

Under this criterion the state permits one activity -- the solicitation of sales in interstate commerce. A corporation having any other activity, except those listed below as immune or otherwise incidental to solicitation, loses its immunity from state taxation.

- 4. The corporation sells only tangible personal property in the state.** A corporation that sells

only tangible personal property is immune under P.L. 86-272 if it meets the other four criteria. Immunity does not extend to a corporation that leases, rents, or licenses tangible personal property or conducts transactions involving such intangibles as franchises, patents, copyrights, trademarks and the like.

A corporation selling services is not immune under P.L. 86-272. When a sale combines tangible personal property and services, the corporation surrenders immunity. Examples of combinations are photographic development, fabrication of customer's materials, installation of equipment, architectural services, and engineering services.

5. All sales solicited in New Mexico are contingent on approval (acceptance) outside the state. To retain immunity from corporate income tax under P.L. 86-272 a corporation must limit its activities in New Mexico to soliciting sales of tangible personal property. Independent contractors, however, may perform some additional activities on the corporation's behalf without the corporation's losing its immunity (*Independent Contractors*, page 15).

PROTECTED ACTIVITIES

A corporation performing the following "protected" activities in New Mexico in conjunction with soliciting sales of tangible personal property is immune under P.L. 86-272:

- 1) Soliciting orders by any medium of advertising;
- 2) Soliciting orders through an in-state resident employee or representative of the corporation. This person may not maintain or use any office or place of business in the state except an "in-home" office. An "in-home" office is an office located within the residence of the employee or representative that (i) is not publicly attributed either to the company or to the employee as a representative of the company, and (ii) is limited to soliciting and receiving orders from customers, transmitting such orders outside the state for acceptance or rejection by the company, or for other such activities on this list;
- 3) Carrying samples and promotional materials only for display or distribution without charge or other consideration;
- 4) Furnishing and setting up display racks and advising customers on the display of the company's products without charge or other consideration;
- 5) Providing automobiles to sales personnel for their use in conducting protected activities;
- 6) Passing orders, inquiries, and complaints to the home office;
- 7) Missionary sales activities; that is, soliciting indirect customers for the company's goods. An example is a manufacturer who solicits retailers to buy the manufacturer's goods from the manufacturer's wholesale customers. Mission activity is protected if the solicitation activities are otherwise immune;
- 8) Coordinating shipment or delivery without payment or other consideration and providing information about shipment or delivery either before or after placing the order;
- 9) Checking customers' inventories without charge for reorder but not for other purposes like quality control;

- 10) Maintaining a sample or display room for up to two weeks (14 days) at any one location within the state during the tax year;
- 11) Recruiting, training, or evaluating sales personnel, including occasionally using homes, hotels, or similar places for meetings with sales personnel;
- 12) Mediating direct customer complaints when the sole purpose is to ingratiate sales personnel with the customer and facilitate requests for orders;
- 13) Owning, leasing, using, or maintaining personal property for use in the employee's or representative's in-home office (see item 2, page 14, for definition of "in-home") or automobile, but the use must be limited to the conduct of protected activities. An employee's or representative's limited use of such personal property as a cellular telephone, facsimile machine, duplicating equipment, personal computer, and computer software for conducting protected solicitation does not by itself remove a corporation's immunity.

INDEPENDENT CONTRACTORS

A contracting corporation may retain immunity under P.L. 86-272 when its independent contractors make sales and maintain an office in this state. If an independent contractor maintains a stock of goods in the state under consignment or any other type of arrangement with the corporation except for display and solicitation, immunity is lost.

Sales representatives of a single principal are not independent contractors. They are subject to the limitations defined by P.L. 86-272.

UNPROTECTED ACTIVITIES

A corporation performing any of the following activities in New Mexico in conjunction with the solicitation to sell tangible personal property loses its immunity under PL 86-272:

- 1) Making repairs or providing maintenance or service to the property sold or to be sold;
- 2) Collecting current or delinquent accounts directly or by third parties through assignment or otherwise;
- 3) Investigating creditworthiness;
- 4) Installing or supervising installation during or after shipment or delivery;
- 5) Conducting training courses, seminars, or lectures for personnel other than personnel involved in solicitation only;
- 6) Providing any kind of technical assistance or service, including but not limited to engineering assistance or design service, when one of the purposes is other than to facilitate solicitation of orders;

- 7) Investigating, handling, or otherwise assisting in resolving customer complaints except for mediating direct customer complaints when the sole purpose of the mediation is to ingratiate sales personnel with the customer;
- 8) Approving or accepting orders;
- 9) Repossessing property;
- 10) Securing deposits on sales;
- 11) Picking up or replacing damaged or returned property;
- 12) Hiring, training, or supervising any personnel except those involved only in solicitation;
- 13) Using agency stock checks or any other instrument or process by which sales personnel make sales within this state;
- 14) Maintaining a sample or display room for longer than 14 days at any one location within the state during the tax year;
- 15) Carrying samples for sale, exchange or distribution in any manner for consideration or other value;
- 16) Owning, leasing, using or maintaining any of the following facilities or property in the state:
 - a) Repair shop
 - b) Parts department
 - c) Any office but an in-home office described on page 14
 - d) Warehouse
 - e) Meeting place for directors, officers, or employees
 - f) Stock of goods except samples for sales personnel or goods used entirely ancillary to solicitation
 - g) Telephone answering service publicly attributed to the company or to employees or agents of the company in their representative status
 - h) Mobile store; that is, vehicles with drivers who are sales personnel making sales from the vehicles
 - i) Real property or fixtures to real property of any kind;
- 17) Consigning stock of goods or other tangible personal property to any person, including an independent contractor, for sale;
- 18) Maintaining by any employee or other representative an office or place of business of any kind except an in-home office described on page 14

(Note: a telephone listing or other public listing within New Mexico for the company or for an employee or representative of the company in such capacity, or other indications through advertising or business literature that the company or its employee or representative can be contacted at a specific address within New Mexico, normally means that the company is

maintaining within this state an office or place of business attributable to the company or its employee or representative in a representative capacity.

The normal distribution and use of business cards and stationery showing the employee's or representative's name, address, telephone, fax numbers and affiliation with the company, however, shall not by themselves be considered as advertising or otherwise publicly attributing an office to the company, its employee or representative.

To maintain any office or other place of business in this state that does not qualify as an in-home office as defined on page 14 causes loss of protection under P.L. 86-272. For the purpose of this list it does not matter if the company pays directly, indirectly, or not at all for the cost of maintaining an in-home office.);

19) Entering into franchise or license agreements; selling or otherwise disposing of a franchise or license, or selling or otherwise transferring tangible personal property pursuant to such franchise or license by the franchisor or licensor to its franchisee or licensee within the state;

20) Conducting any activity not listed on the "Protected Activities" list that is not entirely ancillary to requests for orders, even if the activity helps to increase purchases.

TAXPAYER INFORMATION

The Department offers a variety of taxpayer information. Some information is free and other information must be purchased.

General Information. FYIs and Bulletins present general information with a minimum of technical language. All FYIs and Bulletins are free and available through all local tax offices, the Tax Information and Policy Office, and on the Internet. The Taxation and Revenue Department's Internet address is:

<http://www.tax.newmexico.gov>

Regulations. The Department establishes regulations to interpret and exemplify the various tax acts it administers. The Taxation and Revenue Department regulation book is available from the New Mexico Compilation Commission on a prepaid basis. The New Mexico Compilation Commission also has a compact disk of all statutes and regulations. Specific regulations are also available at the State Records Center or on its web page at <http://www.srca.nm.gov/nmac-home/>.

Order regulation books directly from:

New Mexico Compilation Commission

<http://www.nmcompcomm.us/index.html>

Rulings. Rulings signed by the Secretary and approved by the Attorney General are written statements that apply to one or a small number of taxpayers. A taxpayer may request a ruling (at no charge) to clarify its tax liability or responsibility under specific circumstances. The request for a ruling must be in writing, include accurate taxpayer identification and the details about the taxpayer's situation, and be addressed to the Secretary of the Taxation and Revenue Department at P.O. Box 630, Santa Fe, NM 87504-0630. The taxpayer's representative, such as an accountant or attorney, may request a ruling on behalf of the taxpayer but must disclose the name of the taxpayer. While the Department is not required to issue a ruling when requested to do so, every request is carefully considered.

The Department will not issue a ruling to a taxpayer who is undergoing an audit, who has an outstanding assessment, or who is involved in a protest or litigation with the Department over the subject matter of the request. The Secretary may modify or withdraw any previously issued ruling and is required to withdraw or modify any ruling when subsequent legislation, regulations, final court decisions or other rulings invalidate a ruling or portions of a ruling. Taxation and Revenue Department rulings are compiled and available on the Department's web page free of charge at <http://www.tax.newmexico.gov/rulings.aspx>.

Public Decisions & Orders. All public decisions and orders issued since July 1994 are compiled and available on the Department's web page free of charge at <http://www.tax.newmexico.gov/tax-decisions-orders.aspx>.

FOR FURTHER ASSISTANCE

The New Mexico Taxation and Revenue Department's local tax offices provide full service and information about Department-administered taxes, programs, and forms as well as specific information about your filing situation.

ALBUQUERQUE

Taxation and Revenue Department
5301 Central NE
P.O. Box 8485
Albuquerque, NM 87198-8485

LAS CRUCES

Taxation and Revenue Department
2540 S. El Paseo Bldg. #2
P.O. Box 607
Las Cruces, NM 88004-0607

SANTA FE

Taxation and Revenue Department
Manuel Lujan Sr. Bldg.
1200 S. St. Francis Dr.
P.O. Box 5374
Santa Fe, NM 87502-5374

ROSWELL

Taxation and Revenue Department
400 Pennsylvania Ave., Suite 200
P.O. Box 1557
Roswell, NM 88202-1557

FARMINGTON

Taxation and Revenue Department
3501 E. Main St., Suite N
P.O. Box 479
Farmington, NM 87499-0479

Call Center: 1-866-285-2996

This publication provides general information. It does not constitute a regulation, ruling, or decision issued by the Secretary of the New Mexico Taxation and Revenue Department. The Department is legally bound only by a regulation or a ruling [7-1-60, New Mexico Statutes Annotated, 1978]. In the event of a conflict between FYI and statute, regulation, case law or policy, the information in FYIs is overridden by statutes, regulations and case law. Taxpayers and preparers are responsible for being aware of New Mexico tax laws and rules. Consult the Department directly if you have questions or concerns about information provided in this FYI.