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**HOUSE BILL 743**

**45TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2001**

**INTRODUCED BY**

**Terry T. Marquardt**

**AN ACT**

**RELATING TO TAXATION; AMENDING THE GROSS RECEIPTS AND  
COMPENSATING TAX ACT TO DEFINE "CONSTRUCTION MATERIAL";  
PROVIDING THAT RECEIPTS FROM THE SALES OF CONSTRUCTION  
MATERIAL ARE NOT DEDUCTIBLE UNDER CERTAIN CIRCUMSTANCES;  
PROVIDING FOR THE SUSPENSION OF THE RIGHT TO EXECUTE  
NONTAXABLE TRANSACTION CERTIFICATES; PRECLUDING CERTAIN  
DEPARTMENT ACTIONS IN CERTAIN CIRCUMSTANCES.**

**BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:**

**Section 1. Section 7-9-3 NMSA 1978 (being Laws 1978,  
Chapter 46, Section 1, as amended by Laws 2000, Chapter 84,  
Section 1 and also by Laws 2000, Chapter 101, Section 1) is  
amended to read:**

**"7-9-3. DEFINITIONS. -- As used in the Gross Receipts and  
Compensating Tax Act:**

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1           A. "department" means the taxation and revenue  
2 department, the secretary of taxation and revenue or any  
3 employee of the department exercising authority lawfully  
4 delegated to that employee by the secretary;

5           B. "buying" or "selling" means any transfer of  
6 property for consideration or any performance of service for  
7 consideration;

8           C. "construction" means building, altering,  
9 repairing or demolishing in the ordinary course of business  
10 any:

11                   (1) road, highway, bridge, parking area or  
12 related project;

13                   (2) building, stadium or other structure;

14                   (3) airport, subway or similar facility;

15                   (4) park, trail, athletic field, golf course  
16 or similar facility;

17                   (5) dam, reservoir, canal, ditch or similar  
18 facility;

19                   (6) sewerage or water treatment facility,  
20 power generating plant, pump station, natural gas compressing  
21 station, gas processing plant, coal gasification plant,  
22 refinery, distillery or similar facility;

23                   (7) sewerage, water, gas or other pipeline;

24                   (8) transmission line;

25                   (9) radio, television or other tower;

1 (10) water, oil or other storage tank;  
2 (11) shaft, tunnel or other mining  
3 appurtenance;  
4 (12) microwave station or similar facility;  
5 [~~or~~]

6 (13) retaining wall, wall, fence gate or  
7 similar structure; or

8 [~~(13)~~] (14) similar work;

9 "construction" also means:

10 [~~(14)~~] (15) leveling or clearing land;

11 [~~(15)~~] (16) excavating earth;

12 [~~(16)~~] (17) drilling wells of any type,

13 including seismograph shot holes or core drilling; or

14 [~~(17)~~] (18) similar work;

15 D. "financial corporation" means any savings and  
16 loan association or any incorporated savings and loan company,  
17 trust company, mortgage banking company, consumer finance  
18 company or other financial corporation;

19 E. "engaging in business" means carrying on or  
20 causing to be carried on any activity with the purpose of  
21 direct or indirect benefit, except that:

22 (1) "engaging in business" does not include  
23 having a [~~world-wide~~] worldwide web site as a third-party  
24 content provider on a computer physically located in New  
25 Mexico but owned by another nonaffiliated person; and

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1 (2) "engaging in business" does not include  
2 using a nonaffiliated third-party call center to accept and  
3 process telephone or electronic orders of tangible personal  
4 property or licenses primarily from non-New Mexico buyers,  
5 which orders are forwarded to a location outside New Mexico  
6 for filling;

7 F. "gross receipts" means the total amount of  
8 money or the value of other consideration received from  
9 selling property in New Mexico, from leasing property employed  
10 in New Mexico, from selling services performed outside New  
11 Mexico the product of which is initially used in New Mexico or  
12 from performing services in New Mexico. In an exchange in  
13 which the money or other consideration received does not  
14 represent the value of the property or service exchanged,  
15 "gross receipts" means the reasonable value of the property or  
16 service exchanged.

17 (1) "Gross receipts" includes:

18 (a) any receipts from sales of tangible  
19 personal property handled on consignment;

20 (b) the total commissions or fees  
21 derived from the business of buying, selling or promoting the  
22 purchase, sale or leasing, as an agent or broker on a  
23 commission or fee basis, of any property, service, stock, bond  
24 or security;

25 (c) amounts paid by members of any

1 cooperative association or similar organization for sales or  
2 leases of personal property or performance of services by such  
3 organization; and

4 (d) amounts received from transmitting  
5 messages or conversations by persons providing telephone or  
6 telegraph services.

7 (2) "Gross receipts" excludes:

8 (a) cash discounts allowed and taken;  
9 (b) New Mexico gross receipts tax,  
10 governmental gross receipts tax and leased vehicle gross  
11 receipts tax payable on transactions for the reporting period;

12 (c) taxes imposed pursuant to the  
13 provisions of any local option gross receipts tax that is  
14 payable on transactions for the reporting period;

15 (d) any gross receipts or sales taxes  
16 imposed by an Indian nation, tribe or pueblo; provided that  
17 the tax is approved, if approval is required by federal law or  
18 regulation, by the secretary of the interior of the United  
19 States; and provided further that the gross receipts or sales  
20 tax imposed by the Indian nation, tribe or pueblo provides a  
21 reciprocal exclusion for gross receipts, sales or gross  
22 receipts-based excise taxes imposed by the state or its  
23 political subdivisions;

24 (e) any type of time-price  
25 differential; and

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1 (f) amounts received solely on behalf  
2 of another in a disclosed agency capacity.

3 (3) When the sale of property or service is  
4 made under any type of charge, conditional or time-sales  
5 contract or the leasing of property is made under a leasing  
6 contract, the seller or lessor may elect to treat all  
7 receipts, excluding any type of time-price differential, under  
8 such contracts as gross receipts as and when the payments are  
9 actually received. If the seller or lessor transfers his  
10 interest in any such contract to a third person, the seller or  
11 lessor shall pay the gross receipts tax upon the full sale or  
12 leasing contract amount, excluding any type of time-price  
13 differential;

14 G. "manufacturing" means combining or processing  
15 components or materials to increase their value for sale in  
16 the ordinary course of business, but does not include  
17 construction;

18 H. "person" means:

19 (1) an individual, estate, trust, receiver,  
20 cooperative association, club, corporation, company, firm,  
21 partnership, limited liability company, limited liability  
22 partnership, joint venture, syndicate or other entity,  
23 including any gas, water or electric utility owned or operated  
24 by a county, municipality or other political subdivision of  
25 the state; or

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1 (2) a national, federal, state, Indian or  
2 other governmental unit or subdivision, or an agency,  
3 department or instrumentality of any of the foregoing;

4 I. "property" means real property, tangible  
5 personal property, licenses, franchises, patents, trademarks  
6 and copyrights. Tangible personal property includes  
7 electricity and manufactured homes;

8 J. "leasing" means an arrangement whereby, for a  
9 consideration, property is employed for or by any person other  
10 than the owner of the property, except that the granting of a  
11 license to use property is the sale of a license and not a  
12 lease;

13 K. "service" means all activities engaged in for  
14 other persons for a consideration, which activities involve  
15 predominantly the performance of a service as distinguished  
16 from selling or leasing property. "Service" includes  
17 activities performed by a person for its members or  
18 shareholders. In determining what is a service, the intended  
19 use, principal objective or ultimate objective of the  
20 contracting parties shall not be controlling. "Service"  
21 includes construction activities and all tangible personal  
22 property that will become an ingredient or component part of a  
23 construction project. Such tangible personal property retains  
24 its character as tangible personal property until it is  
25 installed as an ingredient or component part of a construction

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1 project in New Mexico. However, sales of tangible personal  
2 property that will become an ingredient or component part of a  
3 construction project to persons engaged in the construction  
4 business are sales of tangible personal property;

5 L. "use" or "using" includes use, consumption or  
6 storage other than storage for subsequent sale in the ordinary  
7 course of business or for use solely outside this state;

8 M. "secretary" means the secretary of taxation and  
9 revenue or the secretary's delegate;

10 N. "manufactured home" means a movable or portable  
11 housing structure for human occupancy that exceeds either a  
12 width of eight feet or a length of forty feet constructed to  
13 be towed on its own chassis and designed to be installed with  
14 or without a permanent foundation;

15 O. "initial use" or "initially used" means the  
16 first employment for the intended purpose and does not include  
17 the following activities:

18 (1) observation of tests conducted by the  
19 performer of services;

20 (2) participation in progress reviews,  
21 briefings, consultations and conferences conducted by the  
22 performer of services;

23 (3) review of preliminary drafts, drawings  
24 and other materials prepared by the performer of the services;

25 (4) inspection of preliminary prototypes



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1 developed by the performer of services; or

2 (5) similar activities;

3 P. "research and development services" means an  
4 activity engaged in for other persons for consideration, for  
5 one or more of the following purposes:

6 (1) advancing basic knowledge in a recognized  
7 field of natural science;

8 (2) advancing technology in a field of  
9 technical endeavor;

10 (3) the development of a new or improved  
11 product, process or system with new or improved function,  
12 performance, reliability or quality, whether or not the new or  
13 improved product, process or system is offered for sale, lease  
14 or other transfer;

15 (4) the development of new uses or  
16 applications for an existing product, process or system,  
17 whether or not the new use or application is offered as the  
18 rationale for purchase, lease or other transfer of the  
19 product, process or system;

20 (5) analytical or survey activities  
21 incorporating technology review, application, trade-off study,  
22 modeling, simulation, conceptual design or similar activities,  
23 whether or not offered for sale, lease or other transfer; or

24 (6) the design and development of prototypes  
25 or the integration of systems incorporating advances,

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1 developments or improvements included in Paragraphs (1)  
2 through (5) of this subsection;

3 Q. "local option gross receipts tax" means a tax  
4 authorized to be imposed by a county or municipality upon the  
5 taxpayer's gross receipts and required to be collected by the  
6 department at the same time and in the same manner as the  
7 gross receipts tax; "local option gross receipts tax" includes  
8 the taxes imposed pursuant to the Municipal Local Option Gross  
9 Receipts Taxes Act, Supplemental Municipal Gross Receipts Tax  
10 Act, County Local Option Gross Receipts Taxes Act, Local  
11 Hospital Gross Receipts Tax Act, County Correctional Facility  
12 Gross Receipts Tax Act and such other acts as may be enacted  
13 authorizing counties or municipalities to impose taxes on  
14 gross receipts, which taxes are to be collected by the  
15 department; [~~and~~]

16 R. "prescription drugs" means insulin and  
17 substances that are:

18 (1) dispensed by or under the supervision of  
19 a licensed pharmacist or by a physician or other person  
20 authorized under state law to do so;

21 (2) prescribed for a specified person by a  
22 person authorized under state law to prescribe the substance;  
23 and

24 (3) subject to the restrictions on sale  
25 contained in Subparagraph 1 of Subsection (b) of 21 USCA 353;

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1 and

2 S. "construction material" means tangible personal  
3 property that becomes, is intended to become or is  
4 manufactured, produced or commonly used as an ingredient or  
5 component part of a construction project, but "construction  
6 material" does not include a replacement fixture when the  
7 replacement is not construction or a replacement part for a  
8 fixture. "

9 Section 2. Section 7-9-14 NMSA 1978 (being Laws 1969,  
10 Chapter 144, Section 7, as amended) is amended to read:

11 "7-9-14. EXEMPTION--COMPENSATING TAX--GOVERNMENTAL  
12 AGENCIES--INDIANS.--

13 A. Except as otherwise provided in this  
14 subsection, there is exempted from the compensating tax the  
15 use of property by the United States or the state of New  
16 Mexico or any governmental unit or subdivision, agency,  
17 department or instrumentality thereof. The exemption provided  
18 by this subsection does not apply to [~~(1)~~] the use of property  
19 that is or will be incorporated into a metropolitan  
20 redevelopment project under the Metropolitan Redevelopment  
21 Code. [~~or~~

22 ~~(2) the use of tangible personal property~~  
23 ~~that becomes an ingredient or component part of a construction~~  
24 ~~project]~~

25 B. Exempted from the compensating tax is the use

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1 of property by any Indian nation, tribe or pueblo or any  
2 governmental unit, subdivision, agency, department or  
3 instrumentality thereof on Indian reservations or pueblo  
4 grants. "

5 Section 3. Section 7-9-44 NMSA 1978 (being Laws 1969,  
6 Chapter 144, Section 34, as amended) is amended to read:

7 "7-9-44. SUSPENSION OF THE RIGHT TO USE A NONTAXABLE  
8 TRANSACTION CERTIFICATE. --

9 A. The secretary may suspend for not more than one  
10 year the privilege of a person to [~~use~~] execute nontaxable  
11 transaction certificates if that person:

12 (1) fails to pay, within one year of the date  
13 the tax is due, the compensating tax on the subsequent use of  
14 property or services purchased through the [~~use~~] execution of  
15 a nontaxable transaction certificate; or

16 (2) executes with the seller or lessor a  
17 nontaxable transaction certificate inapplicable to the  
18 transaction when no compensating tax is due on that buyer's or  
19 lessee's use of the property or service.

20 B. The secretary may suspend for not more than six  
21 months the privilege of a person to [~~use~~] execute nontaxable  
22 transaction certificates, to claim deductions on the basis of  
23 nontaxable transaction certificates accepted by that person or  
24 both if that person fails to account in the manner and time  
25 required by the department, in accordance with Subsection E of

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1 Section 7-9-43 NMSA 1978, for the certificates executed or  
2 accepted by that person.

3 C. A suspension under this section voids the  
4 department's approval of the person's application for the  
5 privilege of executing nontaxable transaction certificates  
6 and, prior to resumption of ~~[use of such certificates]~~ the  
7 privilege, the person whose privilege to ~~[use]~~ execute  
8 nontaxable transaction certificates has been suspended shall  
9 reapply for the privilege of executing such certificates in  
10 accordance with Section 7-9-43 NMSA 1978 ~~[and shall pay the~~  
11 ~~application fee]~~.

12 D. Notwithstanding the provisions of Section 7-1-8  
13 NMSA 1978, the department may notify the public or provide for  
14 notice to the public of the suspension of a person's privilege  
15 to ~~[use]~~ execute nontaxable transaction certificates."

16 Section 4. Section 7-9-51 NMSA 1978 (being Laws 1969,  
17 Chapter 144, Section 41, as amended by Laws 2000, Chapter 84,  
18 Section 3 and also by Laws 2000, Chapter 98, Section 1) is  
19 amended to read:

20 "7-9-51. DEDUCTION--GROSS RECEIPTS TAX--SALE OF  
21 ~~[TANGIBLE PERSONAL PROPERTY]~~ CONSTRUCTION MATERIAL TO PERSONS  
22 ENGAGED IN THE CONSTRUCTION BUSINESS.--

23 A. Receipts from selling ~~[tangible personal~~  
24 ~~property]~~ construction material may be deducted from gross  
25 receipts if the sale is made to a person engaged in the

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1 construction business who delivers a nontaxable transaction  
2 certificate to the seller.

3 B. The buyer delivering the nontaxable transaction  
4 certificate must incorporate the [~~tangible personal property~~]  
5 construction material as:

6 (1) an ingredient or component part of a  
7 construction project [~~which~~] that is subject to the gross  
8 receipts tax upon its completion or upon the completion of the  
9 overall construction project of which it is a part;

10 (2) an ingredient or component part of a  
11 construction project [~~which~~] that is subject to the gross  
12 receipts tax upon the sale in the ordinary course of business  
13 of the real property upon which it was constructed; or

14 (3) an ingredient or component part of a  
15 construction project that is located on the tribal territory  
16 of an Indian nation, tribe or pueblo. "

17 Section 5. Section 7-9-54 NMSA 1978 (being Laws 1969,  
18 Chapter 144, Section 44, as amended by Laws 2000, Chapter 84,  
19 Section 5 and also by Laws 2000, Chapter 98, Section 3) is  
20 amended to read:

21 "7-9-54. DEDUCTION--GROSS RECEIPTS TAX--GOVERNMENTAL  
22 GROSS RECEIPTS TAX--SALES TO GOVERNMENTAL AGENCIES.--

23 A. Receipts from selling tangible personal  
24 property to the United States or New Mexico or any  
25 governmental unit or subdivision, agency, department or

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1 instrumentality thereof may be deducted from gross receipts or  
2 from governmental gross receipts. Unless contrary to federal  
3 law, the deduction provided by this subsection does not apply  
4 to:

5 (1) receipts from selling metalliferous  
6 mineral ore;

7 (2) receipts from selling tangible personal  
8 property that is or will be incorporated into a metropolitan  
9 redevelopment project created under the Metropolitan  
10 Redevelopment Code;

11 (3) receipts from selling [~~tangible personal~~  
12 ~~property that will become an ingredient or component part of a~~  
13 ~~construction project~~] construction material; or

14 (4) that portion of the receipts from  
15 performing a "service", as defined in Subsection K of Section  
16 7-9-3 NMSA 1978, that reflects the value of tangible personal  
17 property utilized or produced in performance of such service.

18 B. Receipts from selling tangible personal  
19 property for any purpose to an Indian tribe, nation or pueblo  
20 or any governmental subdivision, agency, department or  
21 instrumentality thereof for use on Indian reservations or  
22 pueblo grants may be deducted from gross receipts or from  
23 governmental gross receipts.

24 C. When a seller, in good faith, deducts receipts  
25 for tangible personal property sold to the state or any

1 governmental unit, subdivision, agency, department or  
2 instrumentality thereof, after receiving written assurances  
3 from the buyer's representative that the property sold is not  
4 construction material, the department is precluded from  
5 asserting in a later assessment or audit that the receipts are  
6 not deductible pursuant to Paragraph (3) of Subsection A of  
7 this section."

8 Section 6. Section 7-9-60 NMSA 1978 (being Laws 1970,  
9 Chapter 12, Section 4, as amended) is amended to read:

10 "7-9-60. DEDUCTION--GROSS RECEIPTS TAX--GOVERNMENTAL  
11 GROSS RECEIPTS TAX--SALES TO CERTAIN ORGANIZATIONS.--

12 A. Except as provided otherwise in Subsection B of  
13 this section, receipts from selling tangible personal property  
14 to organizations that have been granted exemption from the  
15 federal income tax by the United States commissioner of  
16 internal revenue as organizations described in Section  
17 501(c)(3) of the United States Internal Revenue Code of 1986,  
18 as amended or renumbered, may be deducted from gross receipts  
19 or from governmental gross receipts if the sale is made to an  
20 organization that delivers a nontaxable transaction  
21 certificate to the seller. The buyer delivering the  
22 nontaxable transaction certificate shall employ the tangible  
23 personal property in the conduct of functions described in  
24 Section 501(c)(3) and shall not employ the tangible personal  
25 property in the conduct of an unrelated trade or business as

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1 defined in Section 513 of the United States Internal Revenue  
2 Code of 1986, as amended or renumbered.

3 B. The deduction provided by this section does not  
4 apply to receipts from selling [~~tangible personal property~~  
5 ~~that will become an ingredient or component part of a~~  
6 ~~construction project~~] construction material or from selling  
7 metalliferous mineral ore. "

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