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SENATE BILL 367

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

INTRODUCED BY

Manny M. Aragon

AN ACT

RELATING TO TAXATION; ELIMINATING THE GROSS RECEIPTS TAX ON  
FOOD SOLD AT RETAIL FOOD STORES; ENACTING THE LOCAL OPTION  
FOOD GROSS RECEIPTS TAX ACT; AMENDING AND ENACTING SECTIONS OF  
THE NMSA 1978.

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

Section 1. A new section of the Gross Receipts and  
Compensating Tax Act is enacted to read:

" [NEW MATERIAL] DEDUCTION-- GROSS RECEIPTS-- SALES OF FOOD  
AT RETAIL FOOD STORES. --Receipts from the sale of food at a  
retail food store may be deducted from gross receipts. "

Section 2. [NEW MATERIAL] SHORT TITLE. --Sections 2  
through 11 of this act may be cited as the "Local Option Food  
Gross Receipts Tax Act".

Section 3. [NEW MATERIAL] DEFINITIONS. --As used in the  
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1 Local Option Food Gross Receipts Tax Act:

2 A. "county" means a county, including an H class  
3 county;

4 B. "county area" means that portion of a county  
5 located outside the boundaries of any municipality, except  
6 that for H class counties, "county area" means the entire  
7 county;

8 C. "department" means the taxation and revenue  
9 department, the secretary of taxation and revenue or any  
10 employee of the department exercising authority lawfully  
11 delegated to that employee by the secretary;

12 D. "engaging in the retail food business" means  
13 selling food at a retail food store;

14 E. "food" means any food or food product for home  
15 consumption that meets the definition of food in 7 USCA  
16 2012(g)(1) for purposes of the federal food stamp program;

17 F. "food gross receipts" means the total amount of  
18 money or the value of other consideration received from  
19 selling food at a retail food store in New Mexico; "food gross  
20 receipts" excludes cash discounts allowed and taken and the  
21 municipal food gross receipts tax and the county food gross  
22 receipts tax;

23 G. "governing body of a county" means the board of  
24 county commissioners of a county;

25 H. "governing body of a municipality" means the

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1 city council or city commission of a city, the board of  
2 trustees of a town or village or the county council or board  
3 of county commissioners of an H class county;

4 I. "municipality" means any incorporated city,  
5 town or village, whether incorporated under general act,  
6 special act or special charter, and an H class county;

7 J. "retail food store" means an establishment that  
8 sells food for home preparation and consumption that meets the  
9 definition of retail food store in 7 USCA 2012(k)(1) for  
10 purposes of the federal food stamp program, whether or not the  
11 establishment participates in the food stamp program; and

12 K. "state gross receipts tax" means the gross  
13 receipts tax imposed pursuant to the Gross Receipts and  
14 Compensating Tax Act.

15 Section 4. [NEW MATERIAL] IMPOSITION AND RATE OF TAX--  
16 DENOMINATION AS MUNICIPAL FOOD GROSS RECEIPTS TAX. --

17 A. The majority of the members of the governing  
18 body of a municipality may impose by ordinance an excise tax  
19 on the food gross receipts of a person engaging in the retail  
20 food business in the municipality for the privilege of  
21 engaging in the retail food business at a rate equal to or  
22 less than the aggregate of all local option gross receipts tax  
23 rates imposed by the municipality on the gross receipts of a  
24 person engaging in business in the municipality for the  
25 privilege of engaging in business in the municipality.

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1           B. The tax imposed in Subsection A of this section  
2 may be referred to as the "municipal food gross receipts tax".

3           C. The governing body of the municipality, at the  
4 time of enacting an ordinance imposing the tax authorized in  
5 Subsection A of this section, may dedicate the revenue for any  
6 purpose for which any other municipal local option gross  
7 receipts tax has been or may be dedicated or any other  
8 specific or general municipal purpose.

9           D. If any reduction in revenue to a municipality  
10 resulting from the deduction from the state gross receipts tax  
11 of receipts from the sale of food at retail food stores  
12 impairs the ability of the municipality to meet its principal  
13 or interest payment obligations for revenue bonds outstanding  
14 prior to January 1, 2002 that are secured by the pledge of all  
15 or part of the municipality's revenue from any municipal local  
16 option gross receipts tax imposed by the municipality, then  
17 the municipality shall pledge an amount of revenue from the  
18 municipal food gross receipts tax sufficient to meet any such  
19 required payment obligations.

20           Section 5. [NEW MATERIAL] IMPOSITION AND RATE OF TAX--  
21 DENOMINATION AS THE COUNTY FOOD GROSS RECEIPTS TAX. --

22           A. The majority of the members of the governing  
23 body of a county may impose by ordinance an excise tax on the  
24 food gross receipts of a person engaging in the retail food  
25 business in the county area for the privilege of engaging in

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1 the retail food business at a rate equal to or less than the  
2 aggregate of all local option gross receipts tax rates imposed  
3 by the county only on the gross receipts of a person engaging  
4 in business in the county area for the privilege of engaging  
5 in business in the county area.

6 B. The majority of the members of the governing  
7 body of a county may impose by ordinance an excise tax on the  
8 food gross receipts of a person engaging in the retail food  
9 business in the county for the privilege of engaging in the  
10 retail food business at a rate equal to or less than the  
11 aggregate of all local option gross receipts tax rates imposed  
12 by the county on the gross receipts of a person engaging in  
13 business in the county for the privilege of engaging in  
14 business in the county, other than the imposed rates referred  
15 to in Subsection A of this section.

16 C. The taxes imposed in Subsections A and B of  
17 this section may be referred to as the "county food gross  
18 receipts tax".

19 D. The governing body of the county, at the time  
20 of enacting an ordinance imposing the tax authorized in  
21 Subsection A of this section, may dedicate the revenue for any  
22 purpose for which any other county local option gross receipts  
23 tax has been or may be dedicated or any other specific or  
24 general county purpose.

25 E. If any reduction in revenue to a county

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1 resulting from the deduction from the state gross receipts tax  
2 of receipts from the sale of food at retail food stores  
3 impairs the ability of the county to meet its principal or  
4 interest payment obligations for revenue bonds outstanding  
5 prior to January 1, 2002 that are secured by the pledge of all  
6 or part of the county's revenue from any county local option  
7 gross receipts tax imposed by the county, the county shall  
8 pledge an amount of revenue from the county food gross  
9 receipts tax sufficient to meet any such required payment  
10 obligations.

11 Section 6. [NEW MATERIAL] EFFECTIVE DATE OF ORDINANCE. --

12 An ordinance imposing, amending or repealing a tax or an  
13 increment of tax authorized by the Local Option Food Gross  
14 Receipts Tax Act shall be effective on July 1 or January 1,  
15 whichever date occurs first after the expiration of at least  
16 three months from the date the adopted ordinance is mailed or  
17 delivered to the department. The ordinance shall include that  
18 effective date.

19 Section 7. [NEW MATERIAL] ORDINANCE SHALL CONFORM TO  
20 REQUIREMENTS OF THE DEPARTMENT. --

21 A. The governing body of any municipality or  
22 county imposing a tax pursuant to the Local Option Food Gross  
23 Receipts Tax Act shall impose the tax by adopting the model  
24 ordinance with respect to the tax furnished to the  
25 municipality or county by the department. An ordinance that

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1 does not conform substantially to the model ordinance of the  
2 department is not valid.

3 B. A certified copy of the ordinance imposing or  
4 repealing a tax authorized pursuant to the Local Option Food  
5 Gross Receipts Tax Act or changing the tax rate imposed shall  
6 be mailed or delivered to the department within five days  
7 after the later of the date the ordinance is adopted or the  
8 date the results of any election held with respect to the  
9 ordinance are certified to be in favor of the ordinance.

10 Section 8. [NEW MATERIAL] PRESUMPTION OF TAXABILITY. -- To  
11 prevent evasion of the municipal or county food gross receipts  
12 tax and to aid in its administration, it is presumed that all  
13 food gross receipts of a person engaging in the retail food  
14 business are subject to the municipal food gross receipts tax  
15 or county food gross receipts tax, as applicable.

16 Section 9. [NEW MATERIAL] DATE PAYMENT DUE. -- The  
17 municipal food gross receipts tax and the county food gross  
18 receipts tax are to be paid to the department on or before the  
19 twenty-fifth day of the month following the month in which the  
20 taxable event occurs.

21 Section 10. [NEW MATERIAL] COLLECTION BY DEPARTMENT--  
22 TRANSFER OF PROCEEDS. --

23 A. The department shall collect the tax imposed  
24 pursuant to the provisions of the Local Option Food Gross  
25 Receipts Tax Act in the same manner and at the same time it

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1 collects the state gross receipts tax.

2 B. The department shall transfer to each  
3 municipality and county for which it is collecting a tax  
4 pursuant to the provisions of the Local Option Food Gross  
5 Receipts Tax Act the amount of the tax collected for the  
6 municipality or county. The transfer to the municipality or  
7 county shall be made within the month following the month in  
8 which the tax is collected.

9 Section 11. [NEW MATERIAL] INTERPRETATION OF ACT--  
10 ADMINISTRATION AND ENFORCEMENT OF ACT. --

11 A. The department shall interpret the provisions  
12 of the Local Option Food Gross Receipts Tax Act.

13 B. The department shall administer and enforce the  
14 collection of the tax authorized pursuant to the provisions of  
15 the Local Option Food Gross Receipts Tax Act, and the Tax  
16 Administration Act applies to the administration and  
17 enforcement of each tax.

18 Section 12. Section 7-1-6.4 NMSA 1978 (being Laws 1983,  
19 Chapter 211, Section 9, as amended) is amended to read:

20 "7-1-6.4. DISTRIBUTION--MUNICIPALITY FROM GROSS RECEIPTS  
21 TAX. --

22 A. Except as provided in Subsection B of this  
23 section, a distribution pursuant to Section 7-1-6.1 NMSA 1978  
24 shall be made to each municipality in an amount, subject to  
25 any increase or decrease made pursuant to Section 7-1-6.15

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1 NMSA 1978, equal to the product of the quotient of one and two  
2 hundred twenty-five thousandths percent divided by the tax  
3 rate imposed by Section 7-9-4 NMSA 1978 times the net receipts  
4 for the month attributable to the gross receipts tax from  
5 business locations:

6 (1) within that municipality;

7 (2) on land owned by the state, commonly  
8 known as the "state fair grounds", within the exterior  
9 boundaries of that municipality;

10 (3) outside the boundaries of any  
11 municipality on land owned by that municipality; and

12 (4) on an Indian reservation or pueblo grant  
13 in an area that is contiguous to that municipality and in  
14 which the municipality performs services pursuant to a  
15 contract between the municipality and the Indian tribe or  
16 Indian pueblo if:

17 (a) the contract describes an area in  
18 which the municipality is required to perform services and  
19 requires the municipality to perform services that are  
20 substantially the same as the services the municipality  
21 performs for itself; and

22 (b) the governing body of the  
23 municipality has submitted a copy of the contract to the  
24 secretary.

25 B. If the reduction made by Laws 1991, Chapter 9,

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1 Section 9 to the distribution under this section impairs the  
2 ability of a municipality to meet its principal or interest  
3 payment obligations for revenue bonds outstanding prior to  
4 July 1, 1991 that are secured by the pledge of all or part of  
5 the municipality's revenue from the distribution made under  
6 this section, then the amount distributed pursuant to this  
7 section to that municipality shall be increased by an amount  
8 sufficient to meet any required payment, provided that the  
9 distribution amount does not exceed the amount that would have  
10 been due that municipality under this section as it was in  
11 effect on June 30, 1992.

12 C. If any reduction to the distribution pursuant  
13 to this section resulting from the enactment of Section 1 of  
14 this 2001 act impairs the ability of a municipality to meet  
15 its principal or interest payment obligations for revenue  
16 bonds outstanding prior to January 1, 2002 that are secured by  
17 the pledge of all or part of the municipality's revenue from  
18 the distribution made pursuant to this section, the amount  
19 distributed pursuant to this section to that municipality  
20 shall be increased by an amount sufficient to meet any  
21 required payment; provided the revenue from the maximum rate  
22 of the municipal food gross receipts tax that the municipality  
23 is authorized to impose pursuant to the Local Option Food  
24 Gross Receipts Tax Act is not sufficient to meet the  
25 obligation and provided that the distribution amount does not

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1 exceed the amount that would have been due that municipality  
2 pursuant to this section as it was in effect on December 31,  
3 2001."

4 Section 13. Section 7-9-3 NMSA 1978 (being Laws 1978,  
5 Chapter 46, Section 1, as amended by Laws 2000, Chapter 84,  
6 Section 1 and also by Laws 2000, Chapter 101, Section 1) is  
7 amended to read:

8 "7-9-3. DEFINITIONS. --As used in the Gross Receipts and  
9 Compensating Tax Act:

10 A. "department" means the taxation and revenue  
11 department, the secretary of taxation and revenue or any  
12 employee of the department exercising authority lawfully  
13 delegated to that employee by the secretary;

14 B. "buying" or "selling" means any transfer of  
15 property for consideration or any performance of service for  
16 consideration;

17 C. "construction" means building, altering,  
18 repairing or demolishing in the ordinary course of business  
19 any:

20 (1) road, highway, bridge, parking area or  
21 related project;

22 (2) building, stadium or other structure;

23 (3) airport, subway or similar facility;

24 (4) park, trail, athletic field, golf course  
25 or similar facility;

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1 (5) dam, reservoir, canal, ditch or similar  
2 facility;

3 (6) sewerage or water treatment facility,  
4 power generating plant, pump station, natural gas compressing  
5 station, gas processing plant, coal gasification plant,  
6 refinery, distillery or similar facility;

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

8 (8) transmission line;

9 (9) radio, television or other tower;

10 (10) water, oil or other storage tank;

11 (11) shaft, tunnel or other mining  
12 appurtenance;

13 (12) microwave station or similar facility;

14 [~~or~~]

15 (13) retaining wall, wall, fence gate or  
16 similar structure; or

17 [~~(13)~~] (14) similar work;

18 "construction" also means:

19 [~~(14)~~] (15) leveling or clearing land;

20 [~~(15)~~] (16) excavating earth;

21 [~~(16)~~] (17) drilling wells of any type,  
22 including seismograph shot holes or core drilling; or

23 [~~(17)~~] (18) similar work;

24 D. "financial corporation" means any savings and  
25 loan association or any incorporated savings and loan company,

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1 trust company, mortgage banking company, consumer finance  
2 company or other financial corporation;

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

6 (1) "engaging in business" does not include  
7 having a world wide web site as a third-party content provider  
8 on a computer physically located in New Mexico but owned by  
9 another nonaffiliated person; and

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

16 F. "gross receipts" means the total amount of  
17 money or the value of other consideration received from  
18 selling property in New Mexico, from leasing property employed  
19 in New Mexico, from selling services performed outside New  
20 Mexico the product of which is initially used in New Mexico or  
21 from performing services in New Mexico. In an exchange in  
22 which the money or other consideration received does not  
23 represent the value of the property or service exchanged,  
24 "gross receipts" means the reasonable value of the property or  
25 service exchanged.

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(1) "Gross receipts" includes:

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

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

(c) amounts paid by members of any cooperative association or similar organization for sales or leases of personal property or performance of services by such organization; and

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

(2) "Gross receipts" excludes:

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

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

(d) any gross receipts or sales taxes imposed by an Indian nation, tribe or pueblo; provided that

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1 the tax is approved, if approval is required by federal law or  
2 regulation, by the secretary of the interior of the United  
3 States; and provided further that the gross receipts or sales  
4 tax imposed by the Indian nation, tribe or pueblo provides a  
5 reciprocal exclusion for gross receipts, sales or gross  
6 receipts-based excise taxes imposed by the state or its  
7 political subdivisions;

8 (e) any type of time-price  
9 differential; and

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

12 (3) When the sale of property or service is  
13 made under any type of charge, conditional or time-sales  
14 contract or the leasing of property is made under a leasing  
15 contract, the seller or lessor may elect to treat all  
16 receipts, excluding any type of time-price differential, under  
17 such contracts as gross receipts as and when the payments are  
18 actually received. If the seller or lessor transfers his  
19 interest in any such contract to a third person, the seller or  
20 lessor shall pay the gross receipts tax upon the full sale or  
21 leasing contract amount, excluding any type of time-price  
22 differential;

23 G. "manufacturing" means combining or processing  
24 components or materials to increase their value for sale in  
25 the ordinary course of business, but does not include

1 construction;

2 H. "person" means:

3 (1) an individual, estate, trust, receiver,  
4 cooperative association, club, corporation, company, firm,  
5 partnership, limited liability company, limited liability  
6 partnership, joint venture, syndicate or other entity,  
7 including any gas, water or electric utility owned or operated  
8 by a county, municipality or other political subdivision of  
9 the state; or

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

13 I. "property" means real property, tangible  
14 personal property, licenses, franchises, patents, trademarks  
15 and copyrights. Tangible personal property includes  
16 electricity and manufactured homes;

17 J. "leasing" means an arrangement whereby, for a  
18 consideration, property is employed for or by any person other  
19 than the owner of the property, except that the granting of a  
20 license to use property is the sale of a license and not a  
21 lease;

22 K. "service" means all activities engaged in for  
23 other persons for a consideration, which activities involve  
24 predominantly the performance of a service as distinguished  
25 from selling or leasing property. "Service" includes



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1 activities performed by a person for its members or  
2 shareholders. In determining what is a service, the intended  
3 use, principal objective or ultimate objective of the  
4 contracting parties shall not be controlling. "Service"  
5 includes construction activities and all tangible personal  
6 property that will become an ingredient or component part of a  
7 construction project. Such tangible personal property retains  
8 its character as tangible personal property until it is  
9 installed as an ingredient or component part of a construction  
10 project in New Mexico. However, sales of tangible personal  
11 property that will become an ingredient or component part of a  
12 construction project to persons engaged in the construction  
13 business are sales of tangible personal property;

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

17 M. "secretary" means the secretary of taxation and  
18 revenue or the secretary's delegate;

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

24 O. "initial use" or "initially used" means the  
25 first employment for the intended purpose and does not include

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1 the following activities:

2 (1) observation of tests conducted by the  
3 performer of services;

4 (2) participation in progress reviews,  
5 briefings, consultations and conferences conducted by the  
6 performer of services;

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

9 (4) inspection of preliminary prototypes  
10 developed by the performer of services; or

11 (5) similar activities;

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

15 (1) advancing basic knowledge in a recognized  
16 field of natural science;

17 (2) advancing technology in a field of  
18 technical endeavor;

19 (3) the development of a new or improved  
20 product, process or system with new or improved function,  
21 performance, reliability or quality, whether or not the new or  
22 improved product, process or system is offered for sale, lease  
23 or other transfer;

24 (4) the development of new uses or  
25 applications for an existing product, process or system,

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1 whether or not the new use or application is offered as the  
2 rationale for purchase, lease or other transfer of the  
3 product, process or system;

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

8 (6) the design and development of prototypes  
9 or the integration of systems incorporating advances,  
10 developments or improvements included in Paragraphs (1)  
11 through (5) of this subsection;

12 Q. "local option gross receipts tax" means a tax  
13 authorized to be imposed by a county or municipality upon the  
14 taxpayer's gross receipts and required to be collected by the  
15 department at the same time and in the same manner as the  
16 gross receipts tax; "local option gross receipts tax" includes  
17 the taxes imposed pursuant to the Municipal Local Option Gross  
18 Receipts Taxes Act, Supplemental Municipal Gross Receipts Tax  
19 Act, County Local Option Gross Receipts Taxes Act, Local  
20 Hospital Gross Receipts Tax Act, County Correctional Facility  
21 Gross Receipts Tax Act and such other acts as may be enacted  
22 authorizing counties or municipalities to impose taxes on  
23 gross receipts, which taxes are to be collected by the  
24 department; [and]

25 R. "prescription drugs" means insulin and

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1 substances that are:

2 (1) dispensed by or under the supervision of  
3 a licensed pharmacist or by a physician or other person  
4 authorized under state law to do so;

5 (2) prescribed for a specified person by a  
6 person authorized under state law to prescribe the substance;  
7 and

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

10 S. "food" means any food or food product for home  
11 consumption that meets the definition of food in 7 USCA  
12 2012(g)(1) for purposes of the federal food stamp program; and

13 T. "retail food store" means an establishment that  
14 sells food for home preparation and consumption that meets the  
15 definition of "retail food store" in 7 USCA 2012(k)(1) for  
16 purposes of the federal food stamp program, whether or not the  
17 establishment participates in the food stamp program.

18 Section 14. EFFECTIVE DATE. --

19 A. The effective date of the provisions of  
20 Sections 2 through 11 of this act is July 1, 2001.

21 B. The effective date of the provisions of  
22 Sections 1 and 13 of this act is January 1, 2002.