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**SENATE BILL 637**

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

**INTRODUCED BY**

**Leonard Lee Rawson**

**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;  
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:**

**A. "department" means the taxation and revenue**

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

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

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

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

12 (2) building, stadium or other structure;

13 (3) airport, subway or similar facility;

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

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

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

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

23 (8) transmission line;

24 (9) radio, television or other tower;

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

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1 (11) shaft, tunnel or other mining

2 appurtenance;

3 (12) microwave station or similar facility;

4 [~~or~~]

5 (13) retaining wall, wall, fence gate or

6 similar structure; or

7 [~~(13)~~] (14) similar work;

8 "construction" also means:

9 [~~(14)~~] (15) leveling or clearing land;

10 [~~(15)~~] (16) excavating earth;

11 [~~(16)~~] (17) drilling wells of any type,

12 including seismograph shot holes or core drilling; or

13 [~~(17)~~] (18) similar work;

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

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

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

25 (2) "engaging in business" does not include

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1 using a nonaffiliated third-party call center to accept and  
2 process telephone or electronic orders of tangible personal  
3 property or licenses primarily from non-New Mexico buyers,  
4 which orders are forwarded to a location outside New Mexico  
5 for filling;

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

16 (1) "Gross receipts" includes:

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

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

24 (c) amounts paid by members of any  
25 cooperative association or similar organization for sales or

1 leases of personal property or performance of services by such  
2 organization; and

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

6 (2) "Gross receipts" excludes:

7 (a) cash discounts allowed and taken;

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

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

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

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

25 (f) amounts received solely on behalf

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1 of another in a disclosed agency capacity.

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

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

17 H. "person" means:

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

25 (2) a national, federal, state, Indian or

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1 other governmental unit or subdivision, or an agency,  
2 department or instrumentality of any of the foregoing;

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

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

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

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

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

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

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

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

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

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

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

24 (4) inspection of preliminary prototypes  
25 developed by the performer of services; or



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1 (5) similar activities;

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

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

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

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

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

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

23 (6) the design and development of prototypes  
24 or the integration of systems incorporating advances,  
25 developments or improvements included in Paragraphs (1)

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1 through (5) of this subsection;

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

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

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

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

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

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

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

10                   "7-9-14. EXEMPTION--COMPENSATING TAX--GOVERNMENTAL  
11 AGENCIES--INDIANS.--

12                   A. Except as otherwise provided in this  
13 subsection, there is exempted from the compensating tax the  
14 use of property by the United States or the state of New  
15 Mexico or any governmental unit or subdivision, agency,  
16 department or instrumentality thereof. The exemption provided  
17 by this subsection does not apply to:

18                                   (1) the use of property that is or will be  
19 incorporated into a metropolitan redevelopment project under  
20 the Metropolitan Redevelopment Code; or

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

24                   B. Exempted from the compensating tax is the use  
25 of property by any Indian nation, tribe or pueblo or any

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1 governmental unit, subdivision, agency, department or  
2 instrumentality thereof on Indian reservations or pueblo  
3 grants. "

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

8 "7-9-51. DEDUCTION--GROSS RECEIPTS TAX--SALE OF  
9 ~~[TANGIBLE PERSONAL PROPERTY]~~ CONSTRUCTION MATERIAL TO PERSONS  
10 ENGAGED IN THE CONSTRUCTION BUSINESS. --

11 A. Receipts from selling ~~[tangible personal~~  
12 ~~property]~~ construction material may be deducted from gross  
13 receipts if the sale is made to a person engaged in the  
14 construction business who delivers a nontaxable transaction  
15 certificate to the seller.

16 B. The buyer delivering the nontaxable transaction  
17 certificate must incorporate the ~~[tangible personal property]~~  
18 construction material as:

19 (1) an ingredient or component part of a  
20 construction project ~~[which]~~ that is subject to the gross  
21 receipts tax upon its completion or upon the completion of the  
22 overall construction project of which it is a part;

23 (2) an ingredient or component part of a  
24 construction project ~~[which]~~ that is subject to the gross  
25 receipts tax upon the sale in the ordinary course of business

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1 of the real property upon which it was constructed; or

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

5 Section 4. Section 7-9-54 NMSA 1978 (being Laws 1969,  
6 Chapter 144, Section 44, as amended by Laws 2000, Chapter 84,  
7 Section 5 and also by Laws 2000, Chapter 98, Section 3) is  
8 amended to read:

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

11 A. Receipts from selling tangible personal  
12 property to the United States or New Mexico or any  
13 governmental unit or subdivision, agency, department or  
14 instrumentality thereof may be deducted from gross receipts or  
15 from governmental gross receipts. Unless contrary to federal  
16 law, the deduction provided by this subsection does not apply  
17 to:

18 (1) receipts from selling metalliferous  
19 mineral ore;

20 (2) receipts from selling tangible personal  
21 property that is or will be incorporated into a metropolitan  
22 redevelopment project created under the Metropolitan  
23 Redevelopment Code;

24 (3) receipts from selling [~~tangible personal~~  
25 ~~property that will become an ingredient or component part of a~~

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1 ~~construction project]~~ construction material; or

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

6 B. Receipts from selling tangible personal  
7 property for any purpose to an Indian tribe, nation or pueblo  
8 or any governmental subdivision, agency, department or  
9 instrumentality thereof for use on Indian reservations or  
10 pueblo grants may be deducted from gross receipts or from  
11 governmental gross receipts.

12 C. When a seller, in good faith, deducts receipts  
13 for tangible personal property sold to the state or any  
14 governmental unit, subdivision, agency, department or  
15 instrumentality thereof, after receiving assurances from the  
16 buyer's representative that the property sold is not  
17 construction material, the department is precluded from  
18 asserting in a later assessment or audit that the receipts are  
19 not deductible pursuant to Paragraph (3) of Subsection A of  
20 this section."

21 Section 5. Section 7-9-60 NMSA 1978 (being Laws 1970,  
22 Chapter 12, Section 4, as amended) is amended to read:

23 "7-9-60. DEDUCTION--GROSS RECEIPTS TAX--GOVERNMENTAL  
24 GROSS RECEIPTS TAX--SALES TO CERTAIN ORGANIZATIONS.--

25 A. Except as provided otherwise in Subsection B of

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1 this section, receipts from selling tangible personal property  
2 to organizations that have been granted exemption from the  
3 federal income tax by the United States commissioner of  
4 internal revenue as organizations described in Section  
5 501(c)(3) of the United States Internal Revenue Code of 1986,  
6 as amended or renumbered, may be deducted from gross receipts  
7 or from governmental gross receipts if the sale is made to an  
8 organization that delivers a nontaxable transaction  
9 certificate to the seller. The buyer delivering the  
10 nontaxable transaction certificate shall employ the tangible  
11 personal property in the conduct of functions described in  
12 Section 501(c)(3) and shall not employ the tangible personal  
13 property in the conduct of an unrelated trade or business as  
14 defined in Section 513 of the United States Internal Revenue  
15 Code of 1986, as amended or renumbered.

16 B. The deduction provided by this section does not  
17 apply to receipts from selling [~~tangible personal property~~  
18 ~~that will become an ingredient or component part of a~~  
19 ~~construction project~~] construction material or from selling  
20 metalliferous mineral ore. "