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SENATE BILL 376

45TH LEGISLATURE - STATE OF NEW MEXICO - SECOND SESSION, 2002

INTRODUCED BY

Patrick H. Lyons

AN ACT

RELATING TO TAXATION; AMENDING THE DEFINITION OF "CONSTRUCTION MATERIAL" IN THE GROSS RECEIPTS AND COMPENSATING TAX ACT; DECLARING AN EMERGENCY.

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 2001, Chapter 65, Section 1 and also by Laws 2001, Chapter 343, 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 department, the secretary of taxation and revenue or any employee of the department exercising authority lawfully delegated to that employee by the secretary;

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1 B. "buying" or "selling" means any transfer of
2 property for consideration or any performance of service for
3 consideration;

4 C. "construction" means building, altering,
5 repairing or demolishing in the ordinary course of business
6 any:

7 (1) road, highway, bridge, parking area or
8 related project;

9 (2) building, stadium or other structure;

10 (3) airport, subway or similar facility;

11 (4) park, trail, athletic field, golf course
12 or similar facility;

13 (5) dam, reservoir, canal, ditch or similar
14 facility;

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

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

20 (8) transmission line;

21 (9) radio, television or other tower;

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

23 (11) shaft, tunnel or other mining
24 appurtenance;

25 (12) microwave station or similar facility;

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1 (13) retaining wall, wall, fence gate or
2 similar structure; or

3 (14) similar work;

4 "construction" also means:

5 (15) leveling or clearing land;

6 (16) excavating earth;

7 (17) drilling wells of any type, including
8 seismograph shot holes or core drilling; or

9 (18) similar work;

10 D. "financial corporation" means any savings and
11 loan association or any incorporated savings and loan company,
12 trust company, mortgage banking company, consumer finance
13 company or other financial corporation;

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

17 (1) "engaging in business" does not include
18 having a worldwide web site as a third-party content provider
19 on a computer physically located in New Mexico but owned by
20 another nonaffiliated person; and

21 (2) "engaging in business" does not include
22 using a nonaffiliated third-party call center to accept and
23 process telephone or electronic orders of tangible personal
24 property or licenses primarily from non-New Mexico buyers,
25 which orders are forwarded to a location outside New Mexico

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1 for filling, or to provide services primarily to non-New
2 Mexico customer;

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

13 (1) "Gross receipts" includes:

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

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

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

25 (d) amounts received from transmitting

1 messages or conversations by persons providing telephone or
2 telegraph services.

3 (2) "Gross receipts" excludes:

4 (a) cash discounts allowed and taken;

5 (b) New Mexico gross receipts tax,
6 governmental gross receipts tax and leased vehicle gross
7 receipts tax payable on transactions for the reporting period;

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

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

20 (e) any type of time-price
21 differential; and

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

24 (3) When the sale of property or service is
25 made under any type of charge, conditional or time-sales

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

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

14 H. "person" means:

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

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

25 I. "property" means real property, tangible

1 personal property, licenses, franchises, patents, trademarks
2 and copyrights. Tangible personal property includes
3 electricity and manufactured homes;

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

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

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

4 M. "secretary" means the secretary of taxation and
5 revenue or the secretary's delegate;

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

11 O. "initial use" or "initially used" means the
12 first employment for the intended purpose and does not include
13 the following activities:

14 (1) observation of tests conducted by the
15 performer of services;

16 (2) participation in progress reviews,
17 briefings, consultations and conferences conducted by the
18 performer of services;

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

21 (4) inspection of preliminary prototypes
22 developed by the performer of services; or

23 (5) similar activities;

24 P. "research and development services" means an
25 activity engaged in for other persons for consideration, for

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1 one or more of the following purposes:

2 (1) advancing basic knowledge in a recognized
3 field of natural science;

4 (2) advancing technology in a field of
5 technical endeavor;

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

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

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

20 (6) the design and development of prototypes
21 or the integration of systems incorporating advances,
22 developments or improvements included in Paragraphs (1)
23 through (5) of this subsection;

24 Q. "local option gross receipts tax" means a tax
25 authorized to be imposed by a county or municipality upon the

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

12 R. "prescription drugs" means insulin and
13 substances that are:

14 (1) dispensed by or under the supervision of
15 a licensed pharmacist or by a physician or other person
16 authorized under state law to do so;

17 (2) prescribed for a specified person by a
18 person authorized under state law to prescribe the substance;
19 and

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

23 S. "construction material" means tangible personal
24 property that becomes or is intended to become an ingredient
25 or component part of a construction project. [but]

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1 "Construction material" does not include a replacement fixture
2 when the replacement is not construction or a replacement part
3 for a fixture, and "construction material" does not include a
4 wind generation nacelle, rotor or related equipment installed
5 on a supporting structure. "

6 Section 2. EMERGENCY.--It is necessary for the public
7 peace, health and safety that this act take effect
8 immediately.