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HOUSE BILL 119

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

INTRODUCED BY

Debbie A. Rodella

FOR THE REVENUE STABILIZATION AND TAX POLICY COMMITTEE

AN ACT

RELATING TO TAXATION; CLARIFYING THAT CERTAIN USES OF A CALL CENTER DO NOT CONSTITUTE A BUSINESS OR ACTIVITY SUBJECT TO THE GROSS RECEIPTS TAX OR OTHER PROVISIONS OF THE GROSS RECEIPTS AND COMPENSATING TAX ACT; AMENDING SECTIONS OF THE NMSA 1978; 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 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 department, the secretary of taxation and revenue or any

1 employee of the department exercising authority lawfully
2 delegated to that employee by the secretary;

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

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

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

11 (2) building, stadium or other structure;

12 (3) airport, subway or similar facility;

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

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

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

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

22 (8) transmission line;

23 (9) radio, television or other tower;

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

25 (11) shaft, tunnel or other mining

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1 appurtenance;

2 (12) microwave station or similar facility;

3 or

4 (13) similar work;

5 "construction" also means:

6 (14) leveling or clearing land;

7 (15) excavating earth;

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

10 (17) similar work;

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

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

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

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

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1 which orders are forwarded to a location outside New Mexico
2 for filling or to provide services primarily to non-New Mexico
3 customers;

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

14 (1) "Gross receipts" includes:

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

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

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

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

4 (2) "Gross receipts" excludes:

5 (a) cash discounts allowed and taken;

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

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

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

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

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

25 (3) When the sale of property or service is

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

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

15 H. "person" means:

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

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

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

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

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

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1 business are sales of tangible personal property;

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

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

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

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

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

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

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

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

24 (5) similar activities;

25 P. "research and development services" means an

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1 activity engaged in for other persons for consideration, for
2 one or more of the following purposes:

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

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

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

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

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

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

25 Q. "local option gross receipts tax" means a tax

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

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

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

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

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

23 Section 2. Section 7-9-10 NMSA 1978 (being Laws 1966,
24 Chapter 47, Section 10, as amended) is amended to read:

25 "7-9-10. AGENTS FOR COLLECTION OF COMPENSATING TAX--

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1 DUTIES. --

2 A. Every person carrying on or causing to be
3 carried on any activity within this state attempting to
4 exploit New Mexico's markets who sells property or sells
5 property and service for use in this state and who is not
6 subject to the gross receipts tax on receipts from these sales
7 shall collect the compensating tax from the buyer and pay the
8 tax collected to the department. "Activity", for the purposes
9 of this section, includes but is not limited to engaging in
10 any of the following in New Mexico: maintaining an office or
11 other place of business; soliciting orders through employees
12 or independent contractors; soliciting orders through
13 advertisements placed in newspapers or magazines published in
14 New Mexico or advertisements broadcast by New Mexico radio or
15 television stations, soliciting orders through programs
16 broadcast by New Mexico radio or television stations or
17 transmitted by cable systems in New Mexico; canvassing,
18 demonstrating, collecting money, warehousing or storing
19 merchandise or delivering or distributing products as a
20 consequence of an advertising or other sales program directed
21 at potential customers [~~but~~]. "Activity", for the purposes of
22 this section, does not include having a world wide web site as
23 a third-party provider on a computer physically located in New
24 Mexico but owned by another nonaffiliated person, and
25 "activity" does not include using a nonaffiliated third-party

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

6 B. To ensure orderly and efficient collection of
7 the public revenue, if any application of this section is held
8 invalid, the section's application to other situations or
9 persons shall not be affected. "

10 Section 3. EMERGENCY.--It is necessary for the public
11 peace, health and safety that this act take effect
12 immediately.