The New Mexico Taxation and Revenue Department proposes to adopt the following rules under the Gross Receipts and Compensating Tax Act:

Section 7-9-51 NMSA 1978
3.2.209.25 NMAC - Carpets and Draperies Installed in a Construction Project

Section 7-9-52 NMSA 1978
3.2.210.24 NMAC - Construction-related Inspection Services
3.2.210.25 NMAC - Transactions Involving Construction-related Services

Section 7-9-52.1 NMSA 1978
3.2.249.8 NMAC - Leased Items Used on a Construction Project – Oil Field
3.2.249.9 NMAC - Lease of Construction Equipment

The New Mexico Taxation and Revenue Department proposes to amend the following rules under the Gross Receipts and Compensating Tax Act:

Section 7-9-3.4 NMSA 1978
3.2.1.7 NMAC - Definitions
3.2.1.11 NMAC - Construction

Section 7-9-3.5 NMSA 1978
3.2.1.16 NMAC - Gross Receipts - Real Estate and Intangible Property
3.2.1.17 NMAC - Gross Receipts - Leasing
3.2.1.18 NMAC - Gross Receipts; Services

Section 7-9-7 NMSA 1978
3.2.10.13 NMAC - Construction Projects Occupied or Leased Prior to Sale

Section 7-9-43 NMSA 1978
3.2.201.8 NMAC - Possession and Delivery of Nontaxable Transaction Certificates - Types of Certificates
3.2.201.11 NMAC - Construction Contractors

Section 7-9-48 NMSA 1978
3.2.206.12 NMAC - Nonconstruction Services Sold to Construction Contractors

Section 7-9-52 NMSA 1978
3.2.210.8 NMAC - General Business Services are not Construction Services or Construction-Related Services
3.2.210.9 NMAC - Well Construction Services
3.2.210.10 NMAC - Hauling Services
3.2.210.14 NMAC - Salvaging of a “Production Unit”
3.2.210.15 NMAC - Cleaning the Construction Site
3.2.210.16 NMAC - Damage to a Construction Project by Subcontractor
3.2.210.18 NMAC - Laboratory Work and Environmental Testing
3.2.210.19 NMAC - Construction-related Services and Associated Products
3.2.210.20 NMAC - Compensating Tax on Construction Services
3.2.210.21 NMAC - Mud Engineering Services
3.2.210.22 NMAC - Lease of Construction Equipment
The New Mexico Taxation and Revenue Department proposes to repeal the following rules under the Gross Receipts and Compensating Tax Act:

**Section 7-9-51 NMSA 1978**
3.2.209.22 NMAC - Ingredient and Component Parts of a Construction Project

**Section 7-9-52 NMSA 1978**
3.2.210.7 NMAC - Definitions: Hauling and Spreading Defined
3.2.210.12 NMAC - Sweat Labor Contract

These proposals were placed on file in the Office of the Secretary on October 8, 2012. Pursuant to Section 9-11-6.2 NMSA 1978 of the Taxation and Revenue Department Act, the final of these proposals, if filed, will be filed as required by law on or about December 14, 2012.

A public hearing will be held on these proposals on Monday, November 19, 2012, at 9:30 a.m. in the Secretary’s Conference Room No. 3002/3137 of the Taxation and Revenue Department, Joseph M. Montoya Building, 1100 St. Francis Drive, Santa Fe, New Mexico. Auxiliary aids and accessible copies of the proposals are available upon request; contact (505) 827-0928. Comments on the proposals are invited. Comments may be made in person at the hearing or in writing. Written comments on the proposals should be submitted to the Taxation and Revenue Department, Director of Tax Policy, Post Office Box 630, Santa Fe, New Mexico 87504-0630 on or before November 19, 2012.

**3.2.209.25 CARPETS AND DRAPERIES INSTALLED IN A CONSTRUCTION PROJECT:** When carpets or draperies are to be installed as an ingredient or component part of a construction project a person engaged in the construction business may deliver a nontaxable transaction certificate for the purchase of carpet or draperies, or the installation of carpets or draperies, to the seller and the seller may deduct receipts from the sale pursuant to Section 7-9-51 NMSA 1978.

**3.2.210.24 CONSTRUCTION-RELATED INSPECTION SERVICES:**
A. The receipts from the sale of inspection services to a person engaged in the construction business may be deducted from the seller’s gross receipts pursuant to Section 7-9-52 NMSA 1978 when they are directly contracted for or billed to a specific construction project and if all the requirements of Section 7-9-52 NMSA 1978 are met. These inspection services include but are not limited to:
   1. field sampling or testing of construction components in order to comply with building codes; and
   2. stormwater runoff testing and routine inspections for compliance with permits required under the federal Clean Water or Clean Air Acts.
B. Example 1: C is engaged in the construction business. C obtains the services of either H, a certified home energy rating system (HERS) or L, a leadership in energy and environmental design (LEED) consultant to perform inspections and make recommendations for compliance with the state’s energy conservation code. The receipts from the services performed by H or L are deductible under Section 7-9-52 NMSA 1978 when they are directly contracted for or billed to a specific construction project and if all the requirements of Section 7-9-52 NMSA 1978 are met.
C. Example 2: X is engaged in the construction business. X obtains the services of Y, an engineering service company to perform the weld inspection and testing required as a “special inspection” under provisions of the state’s commercial building code. Y also provides a “special inspection” service that includes inspecting forming and reinforcing rods, and observing concrete being poured. Both of these services are deductible under Section 7-9-52 NMSA 1978 when they are directly contracted for or billed to a specific construction project and if all the requirements of Section 7-9-52 NMSA 1978 are met.
D. Example 3: S is engaged in the construction business. S obtains the services of W, a stormwater professional, to prepare a federally-required SWPPP and monitor the quality of stormwater runoff by writing reports, suggesting additional best management practices, and sending samples to a testing lab. Even though S is not in the business of selling construction-related services, S may issue nttcs to W, and the testing laboratories (if they bill separately) as those are construction-related services deductible under Section 7-9-52 NMSA 1978 when they are directly contracted for or billed to a specific construction project and if all the requirements of Section 7-9-52 NMSA 1978 are met.
3.2.210.25 TRANSACTONS INVOLVING CONSTRUCTION-RELATED SERVICES: The following are examples of transactions that involve construction-related services and how the deduction for these services under Section 7-9-52 NMSA 1978 may or may not apply to the specific facts of these transactions.

A. Example 1: X is a general contractor who has been hired to design and build an office building. In addition to the typical construction service subcontractors, X also hires an Y, an engineering firm and Z, an architect, to perform construction-related services that are directly contracted for this particular construction project. If X provides Y and Z with an appropriate nontaxable transaction certificate, Y and Z can take the deduction for construction-related services under Section 7-9-52 NMSA 1978.

B. Example 2: T, a construction contractor, hires S, a security firm, to provide security services at T’s ten construction sites. S has experienced some recent employment turnover and does not have enough employees to provide security services for all of T’s construction sites. As a result, S is required to subcontract with W, an independent security company for two of the construction sites. T executes a nontaxable transaction certificate (nttc) pursuant to Section 7-9-52 NMSA 1978 to S for the security services for the ten construction sites which allows S to take the construction-related service deduction under Section 7-9-52 NMSA 1978.

C. The receipts from the services provided by W to S are subject to gross receipts tax unless a specific exemption or deduction applies. The deduction under Section 7-9-52 NMSA 1978 does not apply to this transaction, because S is not a person engaged in the construction business and therefore not authorized to execute an nttc under that section. The general service for resale deduction under Section 7-9-48 NMSA 1978 also does not apply because this deduction requires that the resale of the security services by S to T must be subject to gross receipts tax. Since S is taking the deduction under Section 7-9-52 NMSA 1978 this requirement in Section 7-9-48 NMSA 1978 cannot be met. W’s receipts from providing security services to S are subject to gross receipts tax.

D. Example 3: Same facts as in Example 3 except S does not enter into a subcontract with W. Instead, T amends the contract with S to provide security services for only eight of the construction sites and T enters into a separate contract with W to provide security services for the remaining two sites. So long as T provides nttcs to S and W, both security providers can take the construction related service deduction under Section 7-9-52 NMSA 1978.

3.2.249.8 LEASED ITEMS USED ON A CONSTRUCTION PROJECT - OIL FIELD:

A. On or after January 1, 2013, receipts from the lease of construction equipment may be deducted from gross receipts tax if the leased items are used on a construction project and the requirements of Section 7-9-52.1 NMSA 1978 are met. The following are some examples of items that if leased to a person engaged in the construction business would be deductible under Section 7-9-52.1 NMSA 1978:

1. Drilling equipment, including derricks, blocks, substructures, draw-works, flooring, rotary tables, engines, mud pumps, pipe racks, tanks, doghouses, hoses, water and fuel lines, water well equipment, blowout preventers and other drilling equipment and tools;
2. Drill stems, drill collars, subs and kelly; and
3. Fishing tools.

B. Receipts from the lease of the above items that remain on the oil field after the completion of the construction project, once the well is operational, do not qualify for the deduction under Section 7-9-52.1 NMSA 1978.

3.2.249.9 LEASE OF CONSTRUCTION EQUIPMENT:

A. Receipts from leasing construction equipment, with or without operators, to a person engaged in the construction business may be deducted from the lessor’s gross receipts pursuant to Section 7-9-52.1 NMSA 1978.

B. Example 1: A is regularly engaged in the lease and rental of construction equipment. A enters into an agreement to lease a crane with an operator to a contractor engaged in the construction business to be used on a construction project. The contractor will direct all of the activity of the crane and operator on the construction site. A’s receipts from the lease of the crane with an operator are receipts from leasing construction equipment pursuant to Section 7-9-52.1 NMSA 1978 and are deductible.
C. Example 2: X is a heating and air conditioning subcontractor on a construction project. X owns a crane which X regularly uses to lift equipment onto the roof of buildings on which X works. X’s receipts for construction services includes payment for using the crane. X may deduct those receipts under Section 7-9-52 NMSA 1978. If, however, X agrees to lease the crane with an operator to the prime contractor for work unrelated to the subcontract, which work is performed at the direction of the prime contractor, X would not be able to deduct the receipts for the leasing of the crane under Section 7-9-52 NMSA 1978, but could deduct the receipts under Section 7-9-52.1 NMSA 1978 as receipts from the lease of construction equipment.

D. Example 3: C is engaged in the construction business. C hires S, a scaffolding-rental company, to deliver scaffolding to a specific construction project, erect the scaffolding, inspect the equipment daily for continued safety compliance, disassemble the scaffolding and transport it away from the construction site upon completion of the project. C may execute a nontaxable transaction certificate to S for the lease of the scaffolding pursuant to Section 7-9-52.1 NMSA 1978.

E. This version of 3.2.249.9 NMAC applies to transactions occurring on or after January 1, 2013.

3.2.1.7 DEFINITIONS: The terms defined in [Section 3.2.1.7 NMAC apply throughout [Section 3.2 NMAC.

A. Benefit: A “benefit” is any consideration to either party. “Benefit” is not limited to profits, pecuniary gains, or any particular kind of advantage.

B. Consideration: “Consideration” is any benefit, interest, gain or advantage to one party, usually the seller, or any detriment, forbearance, prejudice, inconvenience, disadvantage, loss of responsibility, act or service given, suffered, or undertaken by the other party, usually the buyer.

C. Detriment: A “detriment” is a forbearance of either party of a right which the party is entitled to exercise or any consideration flowing from either party, not limited to payment of money or transfer of property.

D. Financial corporations:

(1) A financial corporation is any corporation primarily dealing in moneyed capital and in substantial competition with commercial banks.

(2) Example 1: FC is a corporation which is primarily engaged in the following activities: (a) buying and selling mortgages on real estate, (b) initiating mortgages on real estate and selling these mortgages, and (c) servicing mortgages. FC is a financial corporation because it is primarily dealing in moneyed capital and is in substantial competition with commercial banks.

(3) Example 2: IA is an insurance agency which, as an adjunct of its primary business, loans money to finance premiums. IA is not a financial corporation because it is not primarily dealing in moneyed capital and it is not in substantial competition with commercial banks.

(4) Example 3: A corporation which receives a commission on sales of money orders to its customers as an adjunct of its primary business is not a financial corporation within the meaning of Subsection C of Section 7-9-3 NMSA 1978 simply because it engages in this business activity.

(5) Example 4: A corporation which is engaged in the following activities is not a financial corporation because it is not primarily dealing in moneyed capital and is not in substantial competition with commercial banks:

(a) acting as an investment advisor to a mutual fund and others and receiving a fee for such services;

(b) acting as principal underwriter for the same mutual fund as in 1 above and receiving a fixed percentage of the selling price of the securities sold as a commission or fee;

(c) issuing a weekly stock analysis report as an advisory service, receiving for this service payment in the form of subscription fees.

E. Franchise:

(1) A “franchise” is an agreement in which the franchisee agrees to undertake certain business activities or to sell a particular type of product or service in accordance with methods and procedures prescribed by the franchisor, and the franchisor agrees to assist the franchisee through advertising, promotion and other advisory services. The franchise usually conveys to the franchisee a license to use the franchisor’s trademark or trade name in the operation of the franchisee’s business.

(2) Example: Y, a pie company of Cambridge, Massachusetts, grants to X of Virden, New Mexico, the right to make pies according to their exclusive recipe and to operate Y Pie shops throughout New Mexico. The right to make the pies and operate the pie shops, whether granted for a “one-time” payment or for a continuing
percentage of the proceeds of the shops, is a franchise. Therefore, the receipts of Y, from its granting of the franchise are subject to gross receipts tax.

F. **Computer-related terms:**
   1. “Computer software” means computer programming in whatever form or medium.
   2. “Custom software” means computer programming developed specifically at the order of another or for a specific purpose. “Custom software” includes the modification of existing computer programming.
   3. “Packaged software” means computer programming embodied in electronic, electromagnetic or optical materials for transfer from one person to another, with or without explanatory materials, instructions or other programming and intended to be sold or licensed without modification to multiple buyers or users.
   4. “Software” means “computer software”.

G. **Practitioner of the healing arts:** A “practitioner of the healing arts” is a person licensed to practice in this state medicine, osteopathic medicine, acupuncture and oriental medicine, dentistry, podiatry, optometry, chiropractic, nursing or similar medical services for human beings. The term also includes veterinarians licensed to practice in this state.

H. **Person engaged in the construction business:** A "person engaged in the construction business" is a person who performs construction services as defined in Section 7-9-3.4 NMSA 1978.

3.2.1.11 **CONSTRUCTION**

A. **Construction service as distinguished from other services.**
   1. The term "construction" is limited to the activities, or management of the activities, which are listed in Section 7-9-3.4 NMSA 1978 and which physically change the land or physically create, change or demolish a building, structure or other facility as part of a construction project.
   2. “Construction” does not include services that do not physically change the land or physically create, change or demolish a building, structure or other facility as part of a construction project, even though they may be related to a construction project. The fact that a service may be a necessary prerequisite or ancillary to construction or a construction project does not in itself make the service a construction service. Excluded from the meaning of “construction” are activities such as, but not limited to: hauling to or from the construction site [except as otherwise provided in Subsection C of Section 3.2.52.10 NMAC], maintenance work, landscape upkeep, the repair of equipment or appliances, laboratory work or accounting, architectural, engineering, surveying, traffic safety or legal services. Some of these activities may qualify as construction-related services; see Section 7-9-52 NMSA 1978.

B. **Speculative builders.** A person is engaged in the construction business if that person constructs improvements on real property which the person owns and which improved property is held for sale in the ordinary course of business.

C. **Construction includes.** Pursuant to Section 7-9-3.4 NMSA 1978 the term "construction" includes the painting of structures, the installation of sprinkler systems and the building of irrigation pipelines.

D. **Construction does not include.**
   1. [Pursuant to Section 7-9-3.4 NMSA 1978] The term "construction" does not include the installation of carpets or the installation of draperies, but see 3.2.209.25 NMAC.
   2. [A person engaged in the construction business, however, may deliver a Type 6 nontaxable transaction certificate for the purchase of carpets, draperies, or installed carpet or installed draperies to the seller.
   3. Even though receipts from selling carpet installation services or drapery installation services to a person engaged in the construction business are receipts from the sale of a service for resale, a person engaged in the construction business may deliver a Type 7 nontaxable transaction certificate for the purchase of carpet installation services or drapery installation services.] The term “construction”, as defined in Section 7-9-3.4 NMSA 1978, does not include leasing or renting tangible personal property, such as construction equipment, with or without an operator but see Section 7-9-52.1 NMSA 1978 for transactions after January 1, 2013.

E. **Oil and gas industry construction.**
   1. "Construction", as this term is used in Section 7-9-3.4 NMSA 1978, includes the following activities related to the oil and gas industry:
      a. building and altering of gas compression plant facilities and pump stations, including: clearing of property sites; excavating for foundations; building and setting foundation forms; mixing, pouring, and
finishing concrete foundations for buildings and plant equipment on foundations; fabricating and installing piping; installing electrical equipment, insulation, and instruments; erecting buildings; placing sidewalks, drives, parking areas; installing storage tanks; and dismantling equipment and reinstalling elsewhere;

(b) building of or extension of gas-gathering pipelines, including: connecting gathering lines to lease separators, fabricating and installing meter runs, digging trenches, beveling pipe, welding pipe, wrapping pipe, backfilling trenches, testing pipelines, fabricating and installing pipeline drips and installing conduit for pipelines crossing roads or railroads;

(c) building of or extension of product pipelines, including: building pressure-reducing stations; connecting pipelines to storage tanks, fabricating and installing valve assemblies, digging trenches, beveling pipe, welding pipe, wrapping pipe, laying pipe, backfilling trenches, testing pipelines and installing conduit for pipeline crossing roads or railroads;

(d) building secondary-recovery systems, including: excavating and building foundations, installing engines and water pumps, installing pipelines for water intake, installing pipelines for carrying pressured water to input wells, installing instruments and controls and erecting buildings;

(e) installing lease facilities, including: installing wellheads, flow lines, chemical injectors, separators, heater-treaters, tanks, stairways and walkways; building foundations; and setting pump units and engines, central power units and rod lines;

(f) demolishing pipelines, including: digging trenches to uncover pipelines, dismantling and removing drips and meter runs, backfilling trenches, tamping and smoothing right-of-way;

(g) increasing pipeline capacity, including: removing small pipelines and replacing with larger lines, and digging adjoining trenches and laying new pipelines;

(h) repairing plant, including: replacing tubing in atmospheric condensers, replacing plugged boiler tubing; removing cracked, broken or damaged portions of foundations and replacing anew; replacing compressors, compressor engines, or pumps; and regrouting and realigning compressors;

(i) drilling wells, including: drilling ratholes, excavating cellars and pits, casing crew services, cementing services, directional drilling, drill stem testing and fishing jobs in connection with drilling operations;

(j) general dirt work, including: building roads, paving with caliche or other surfacing materials; digging pits, trenches, and disposal ponds, building firewalls and foundation footing; and constructing pads from caliche or other materials.

(2) "Construction", as the term is used in Section 7-9-3.4 NMSA 1978, does not include the following activities related to the oil and gas industry:

(a) well servicing, including: acidizing and fracturing formations; pulling and rerunning rods or tubing; loading or unloading a well; shooting; scraping paraffin; steaming flow lines and tubing; inspecting equipment; fishing jobs, other than in connection with drilling operations; bailing cave-ins; reverse circulating and resetting packers;

(b) lease and plant maintenance, including: cleaning; weed-control; preventive care of machinery, pipelines, gathering systems, and engines; tank cleaning; testing of flow lines by pressure or X-ray means; cleaning lines and tubing by acid treatment or mechanical means, or replacing and restoring machinery components;

(c) transporting equipment, including: transporting drilling rigs, rigging-up and rigging-down, and hauling water and mud;

(d) salvaging of materials from a "production unit", as defined in the Oil and Gas Emergency School Tax Act, such as: killing the gas pressure, removing casing heads, welding pull nipples on the casing, cutting or shooting casing strings, pulling casings from the well bore, cementing to fill the abandoned well or plug the well, filling the cellar, and welding steel pipe markers;

(e) rental of equipment such as: power tongs, blowout preventors, tanks, pipe racks, core barrels, integral parts of a drilling rig or integral parts of a circulation unit, for transactions after January 1, 2013, see Section 7-9-52.1 NMSA 1978;

(f) measuring, "logging" and surveying services in connection with the drilling of an oil or gas well are construction-related services as of January 1, 2013, see Section 7-9-52 NMSA 1978. "Logging" as that term is used in this subsection is a method of testing or measuring an oil or gas well by recording various aspects of the geological formations penetrated by the well.

Construction includes prefabricated buildings; prefabricated versus modular buildings.

(1) The sale of prefabricated buildings, whether constructed from metal or other material, is the sale of construction. A prefabricated building is a building designed to be permanently affixed to land and manufactured
(usually off-site) in components or sub-assemblies which are then assembled at the building site. Prefabricated buildings are not designed to be portable or relocatable nor are they capable of being relocated.

(2) A portable building or a modular building is a building manufactured (usually off-site) which is designed to be movable or is capable of being relocated and, when delivered to the installation site, generally requires only blocking, levelling and, in the case of modular buildings, joining of modules. For the purposes of Subsection F of Section 3.2.1.11 NMAC, neither portable buildings, modular buildings nor manufactured homes defined as vehicles by Section 66-1-4.11 NMSA 1978 are prefabricated buildings.

[G] F. Construction materials and services; landscaping.
(1) Landscaping items, such as ornaments, rocks, trees, plants, shrubs, sod and seed, which are sold to a person engaged in the construction business, that are an integral part of the construction project, are construction materials. Persons who seed, lay sod or install landscape items in conjunction with a construction project are performing construction services.

(2) Receipts from selling landscaping items to, and from seeding, laying sod or installing landscape items for, persons engaged in the construction business may be deducted from gross receipts if the buyer delivers a nontaxable transaction certificate to the seller as provided in Section 7-9-51 and Section 7-9-52 NMSA 1978, respectively.

[H] G. Nontaxable transaction certificates.
(1) Nontaxable transaction certificates are available from the department for persons who are engaged in the construction business and performing activities, as set forth in Sections 7-9-3.4, 7-9-52 and 7-9-52.1 NMSA 1978 to execute to providers of construction materials, and construction services, construction-related services and lessors of construction equipment. See 3.2.201.11 NMAC for additional requirements on construction contractors to obtain nontaxable transaction certificates.

(2) Only persons who are licensed by the state of New Mexico as construction contractors may apply for and execute nontaxable transaction certificates under the provisions of Sections 7-9-51 NMSA 1978, and 7-9-52 NMSA 1978, except that a person who performs construction activities as defined in Section 7-9-3.4 NMSA 1978 in the ordinary course of business, and who is exempt from the laws of the state of New Mexico requiring licensing as a contractor may apply for and execute such certificates.

[I] H. Fixtures.
(1) Construction includes the sale and installation of "fixtures" such as kitchen equipment, library equipment, science equipment and other miscellaneous equipment installed so that it becomes firmly attached to the realty. Fixtures are considered to be items of tangible personal property which are necessary or essential to the intended use of a construction project and which are so firmly attached to the realty as to constitute a part of the construction project.

(2) Receipts from the sale of furniture, kitchen equipment, library shelves and other furniture or equipment sold on an assembled basis that does not become a "fixture" is a sale of tangible personal property and not construction.

[J] I. Construction materials; general.
(1) The term "construction materials" means tangible personal property which is intended to become an ingredient or component part of a construction project.

(2) Tangible personal property intended ultimately to become an ingredient or component part of a construction project although not purchased for a specific project is nonetheless a construction material. Example: A government agency makes bulk purchases of asphalt which is stored by the agency for use in future road construction or repair projects. The asphalt is a construction material.

(3) Tools, equipment and other tangible personal property not designed or intended to become ingredients or component parts of a construction project are not construction materials if such materials accidentally become part of a construction project. Example: A workman accidentally drops a pair of gloves and a hammer into a form into which concrete is being poured. Because the gloves and the hammer are not intended to be included in the concrete structure, they are not construction materials.

[K] J. Meaning of "building".
(1) As used in Section 7-9-3.4 NMSA 1978, the noun "building" means a roofed and walled structure designed for permanent use but excludes an enclosure so closely combined with the machinery or equipment it supports, houses or serves that it must be replaced, retired or abandoned contemporaneously with the machinery or equipment.
(2) A "building" includes the structural components integral to the building and necessary to the operation or maintenance of the building but does not include equipment, systems or components installed to perform, support or serve the activities and processes conducted in the building and which are classified for depreciation purposes as 3-year property, 5-year property, 7-year property, 10-year property or 15-year property by Section 168 of the Internal Revenue Code or, if the Internal Revenue Code is amended to rename or replace these depreciation classes, would have been classified for depreciation purposes as 3-year property, 5-year property, 7-year property, 10-year property or 15-year property but for the amendment.

(3) Example: A building may include any of the following equipment, systems or components:
   (a) elevators and escalators used in whole or in part to move people;
   (b) heating, cooling and air conditioning systems except for air conditioning and air handling systems and components, separately depreciated under Section 168, installed to meet temperature, humidity or cleanliness requirements for the operation of machinery or equipment or the manufacture, processing or storage of products;
   (c) electrical systems except for electrical systems and components, separately depreciated under Section 168, installed to power machinery or equipment operated as part of the activities and processes conducted in the building and not necessary to the operation or maintenance of the building; and
   (d) plumbing systems except for plumbing systems and components, separately depreciated under Section 168, installed to perform, serve or support the activities and processes conducted in the building, such as for the handling, transportation or treatment of ingredients, chemicals, waste or water for a manufacturing or other process.

3.2.1.16 GROSS RECEIPTS - REAL ESTATE AND INTANGIBLE PROPERTY

A. Insurance proceeds
   (1) Receipts of an insured derived from payments made by an insurer pursuant to an insurance policy are not subject to the gross receipts tax. Such receipts are not receipts derived from the sale of property in New Mexico, the leasing of property employed in New Mexico, or the performance of a service.
   (2) Example: ABC is an auto dealer in the business of selling new and used cars. In addition to selling cars, ABC also maintains a service garage with a large inventory of automobile parts. As part of its regular sales practice, ABC allows potential purchasers to test drive the cars. ABC carries automobile insurance which is applicable in the situation where the potential purchaser is test driving the car. When an accident occurs, even though some or all the parts used to repair the automobile are taken from ABC's inventory of parts and ABC does the actual repair work, payment received from the insurance company for the damaged automobile is not gross receipts. Such a payment is not received as consideration for selling property in New Mexico, leasing property employed in New Mexico, or for performing services. ABC is not liable for compensating tax on the value of the parts used or the labor.

[B. Speculative housing sales]
   (1) Receipts of a person in the business of constructing improvements on real property owned and sold in the ordinary course of that person's construction business do not include amounts retained by financial institutions as prepaid finance charges or discounts, if these amounts are not received by the real estate vendor. It is immaterial whether or not such amounts are included in the quoted real estate sales price.
   (2) The receipts of such a person include all amounts actually paid over which are attributable to improvements constructed on the real property sold in the ordinary course of that person's construction business.
   (3) The receipts of such a person also include any amounts deducted by a title-insuring company to cover title insurance, legal fees, escrow fees, real estate brokerage commissions, real estate taxes, principal and interest on construction loans, liens, and the like.
   (4) Example 1: X, a speculative builder, sells improvements to Y who arranges to finance $43,000 with Z, a loan company. The loan company makes payment of $41,800 to X and designates the amounts retained as prepaid finance charges and/or discounts. X's gross receipts in this example are $41,800.
   (5) Example 2: The same facts as Example 1 above are used except that the loan company Z made payment to a title insurance company, legal fees to a lawyer, escrow fees to a bank and also paid the real estate brokerage commission. These payments referred to are part of the gross receipts of the speculative builder and are not deductible under Subsection B of Section 3.2.1.16 NMAC, whether or not actually paid over to the speculative builder.

C.] B. Receipts from sale of automotive service contracts:
(1) “Automotive service contract” means an undertaking, promise or obligation of the promisor, for a consideration separate from the sale price of a motor vehicle, to furnish or to pay for parts and labor to repair specified parts of the covered motor vehicle only if breakdowns (failures) of those specified parts occur within certain time or mileage limits. The promisor's obligation is conditioned upon regular maintenance of the motor vehicle by the purchaser of the automotive service contract at the purchaser's expense. The automotive service contract may also obligate the promisor to reimburse the purchaser for certain breakdown related rental and towing charges. The automotive service contract may require the payment of a specified “deductible” or “co-payment” by the purchaser in connection with each repair.

(2) The receipts of a person from selling an automotive service contract are not gross receipts. The undertaking, promise or obligation of the promisor under the automotive service contract to pay for or to furnish parts and service if an uncertain future event (breakdown) occurs is not within the definition of property under Subsection J of Section 7-9-3 NMSA 1978. Since the receipts from selling an automotive service contract do not arise “from selling property in New Mexico, from leasing property employed in New Mexico or from performing services in New Mexico”, the receipts are not gross receipts as defined in Section 7-9-3.5 NMSA 1978 and are not subject to the tax imposed by Section 7-9-4 NMSA 1978.

(3) The furnishing by the promisor of parts or labor or both to fulfill the promisor's obligation when a breakdown occurs is a taxable event.

[D.] C. Receipts from insurance company under an automotive service contract program: The receipts of a New Mexico automotive dealer from an insurance company are not taxable gross receipts if the payments by the insurance company are to reimburse the dealer, who is promisor under an automotive service contract as that term is defined in Subsection C of 3.2.1.16 NMAC, for all parts and labor furnished by the dealer under the contract or for parts and labor furnished by the dealer under the contract in an amount in excess of a specified reserve established by the dealer under an agreement with the insurance company. The receipt of the payments from the insurance company are not receipts from the sale of parts and labor but are payments to indemnify the dealer for the dealer's expense in fulfilling the dealer's obligation. The value of parts and labor furnished to make the repairs was subject to the gross receipts tax when the parts and labor were furnished to discharge the dealer's obligation as the promisor under the automotive service contracts.

[D.] D. Gift certificates:

(1) Receipts from the sale of gift certificates are receipts from the sale of intangible personal property of a type not included in the definition of “property” and, therefore, are not gross receipts.

(2) When a gift certificate is redeemed for merchandise, services or leasing, the person accepting the gift certificate in payment receives consideration, which is gross receipts subject to the gross receipts tax unless an exemption or deduction applies. The value of the consideration is the face value of the gift certificate.

(3) When a gift certificate is purchased during the time period set out in Laws 2005, Chapter 104, Section 25 subsequent redemption of the gift certificate for the purchase of qualified tangible personal property after that period is not deductible under Laws 2005, Chapter 104, Section 25.

(4) When a gift certificate is redeemed during the time period set out in Laws 2005, Chapter 104, Section 25 for the purchase of qualified tangible personal property, the receipts from the sale are deductible under Laws 2005, Chapter 104, Section 25.

[D.] E. Merchant discount and interchange rate fee receipts: Bank receipts derived from credit and debit card merchant discounts and bank interchange rate fees are not gross receipts within the meaning of the Gross Receipts and Compensating Tax Act and therefore are not taxable.

[G.] F. Prepaid telephone cards - “calling cards”

(1) Receipts from the sale of an unexpired prepaid telephone card, sometimes known as a “calling card”, are receipts from the sale of a license to use the telecommunications system and, therefore, are gross receipts and are not interstate telecommunications gross receipts. Receipts from selling an expired prepaid telephone card are receipts from the sale of tangible personal property and are gross receipts and are not interstate telecommunications gross receipts.

(2) Receipts from recharging a rechargeable prepaid telephone card are receipts from the sale of a license to use the telecommunications system and are gross receipts and are not interstate telecommunications gross receipts.

(3) Subsection F of 3.2.1.16 NMAC is retroactively applicable to transactions and receipts on or after September 1, 1998.

[3/9/72, 11/20/72, 3/20/74, 7/26/76, 6/18/79, 4/7/82, 5/4/84, 4/2/86, 6/12/89, 6/28/89, 11/26/90, 2/1/95, 11/15/96, 9/15/98, 1/29/99; 3.2.1.16 NMAC - Rn & A, 3 NMAC 2.1.16, 4/30/01; A, 12/30/03; A, 8/15/05; A, XXX]
3.2.1.17  GROSS RECEIPTS – LEASING

A. Leasing of property employed in New Mexico:

(1) Receipts derived from the rental or leasing of property employed in New Mexico are subject to
the gross receipts tax.

(2) Example 1: A is in the business of leasing heavy equipment used in construction projects. The
receipts from the leasing of such equipment employed in New Mexico prior to January 1, 2013, are subject to
the gross receipts tax. Receipts from similar transactions after January 1, 2013, may be deductible under Section 7-9-
52.1 NMSA 1978.

(3) Example 2: Y, a New York corporation, leases four block-making machines to X who uses the
machines in X's block-making business in New Mexico. The rental contract is signed in Nebraska. The receipts
which Y receives from the rental of the equipment employed in New Mexico are taxable.

(4) Example 3: P corporation leases photocopying machines to Q, a state agency. The receipts of P
corporation from leasing these machines to the state agency are subject to the gross receipts tax.

B. Additional charges

(1) Receipts derived from additional charges made in conjunction with the rental or leasing of
property employed in New Mexico are subject to the gross receipts tax.

(2) Example 1: C owns and operates a business which leases gas cylinders. There is a clause in the
lease whereby the lessee will be liable for an additional charge if the gas cylinders are kept past a specific date
provided in the lease contract. Receipts from these penalties or demurrage charges for keeping the gas cylinders past
the specified date provided are receipts from leasing property employed in New Mexico and are subject to the gross
receipts tax.

(3) Example 2: D is in the business of leasing concrete forms which are employed in New Mexico.
The terms of the lease agreement require that the property leased be returned to the lessor in the condition in which
it was leased. Any receipts from charges for repairing and cleaning concrete forms returned to the lessor in a
damaged condition, for any material used in repair of such forms, or from charges for the purchase price of forms
which are not returned to the lessor, are receipts from leasing property employed in New Mexico and are subject to the
gross receipts tax.

C. Lease of license – franchise agreement: Receipts derived from the lease of a license, such as a
liquor license, or from a franchise agreement, are subject to the gross receipts tax.

D. Multistate use of leased equipment

(1) Where property is rented or leased for employment both within and outside New Mexico the
renter or lessor will be subject to the gross receipts tax on that portion of the receipts which is derived from the
renting or leasing of property employed in New Mexico.

(2) In order to determine the portion of the receipts which are subject to the gross receipts tax, the
total receipts from the lease are to be multiplied by whichever of the following fractions more accurately reflects the
receipts from the period of employment of the leased item inside New Mexico:

(a) the numerator is the total miles traveled by the leased items in New Mexico and the
denominator is the total miles traveled by the leased items during the lease period; or

(b) the numerator is the total time the leased items were employed in New Mexico and the
denominator is the total time of the lease period.

(3) The department will allow a person engaged in the business of leasing property employed both
within and without New Mexico to use other methods of apportioning the receipts of such leasing activities upon
showing that the other methods more accurately reflect the portion of employment of leased items within New
Mexico.

(4) Example: B owns and operates a business located in Santa Fe, New Mexico, which rents or
leases vehicles, airplanes, and mobile equipment. The items leased are employed both within and without New
Mexico. B is subject to the gross receipts tax on that portion of the receipts which is from employment of the
vehicles, airplanes, and mobile equipment within New Mexico.

E. Leasing of property employed outside New Mexico

(1) Receipts derived from the rental or leasing of property employed outside New Mexico are not
subject to the gross receipts tax.

(2) Example: L, a resident of Hobbs, New Mexico, owns a sawmill in Wyoming which is leased to S
for $3,000 per year. These receipts are not derived from selling property in New Mexico, leasing property employed
in New Mexico, performing services outside of New Mexico the product of which is initially used in New Mexico,
or performing services in New Mexico. These receipts are not includable in L's gross receipts.

F. Use of vehicles in New Mexico
Receipts from the rental or leasing of vehicles, airplanes, or mobile equipment which are employed both within and outside New Mexico are subject to the gross receipts tax on that portion of the receipts which are from employment of the vehicles, airplanes, or mobile equipment within New Mexico.

In order to determine the portion of receipts described in the above paragraph which are subject to the gross receipts tax, the total receipts from the lease are to be multiplied by whichever of the following fractions more accurately reflects the receipts from the period of employment of the leased item inside New Mexico:

(a) the numerator is the total miles traveled by the leased items in New Mexico and the denominator is the total miles traveled by the leased items during the period of lease; or
(b) the numerator is the total time the leased items were physically present in New Mexico and the denominator is the total time of the lease period.

The department will allow a person engaged in leasing the above described items to use other methods of apportionment upon a showing that the other methods will more accurately reflect the period of employment of the leased item within New Mexico.

Safe harbor lease - purchaser/lessor: A purchaser/lessor who enters into a qualified “safe harbor lease” transaction as defined in Section 168 of the Internal Revenue Code will be subject to the gross receipts tax on the receipts if the property being leased is located in New Mexico.

Leasing computers: Receipts from renting or leasing the use of computers or related equipment in New Mexico, on either a part-time or a full-time basis, are subject to the gross receipts tax.

Allocating receipts from selling services performed within and without New Mexico.

When a prime contractor performs services both within and without New Mexico, cost accounting records which reasonably allocate all costs to the location of the performance of the service shall be used to determine the amount of services performed in New Mexico. If adequate cost accounting records are not kept for the allocation of costs to specific locations, the receipts from performing such services shall be prorated based on the percentage of service actually performed within New Mexico. The percentage shall be calculated by dividing the time spent by the prime contractor in performing such services in New Mexico by the total contract time spent performing services everywhere. Other reasonable methods of prorating such services may be acceptable if approved by the department in advance of performing the services.

Services subcontracted to third parties under a single contract by a prime contractor and used or consumed by the prime contractor in the performance of the contract shall be prorated by the prime contractor on the same basis, i.e., based either on allocated costs using cost accounting records or on the percentage of the total service actually performed within New Mexico by the prime contractor or other reasonable method approved by the department.

If a subcontract service is actually a service purchased for resale, and all conditions of Section 7-9-48 NMSA 1978 are met and the subcontracted service is actually sold intact to the prime contractor's customer, the prime contractor may issue a Type 5 nontaxable transaction certificate to the subcontractor and the receipts from such subcontracted service will be deductible from the subcontractor's gross receipts.

The subcontractor must use the same method of prorating the performance of services within and without New Mexico as used by the prime contractor.

Expenses incurred outside New Mexico and allocated to operations in New Mexico.

(1) General administrative and overhead expenses incurred outside New Mexico and allocated to operations in this state for bookkeeping purposes, costs of travel outside New Mexico, which travel was an incidental expense of performing services in New Mexico, employee benefits, such as retirement, hospitalization insurance, life insurance and the like, paid to insurers or others doing business outside New Mexico for employees
working in New Mexico and other expenses incurred outside New Mexico which are incidental to performing services in New Mexico, all constitute the taxpayer’s expenses of performing services in New Mexico.

2. No provision of the Gross Receipts and Compensating Tax Act allows a deduction for expenses incurred in performing services to determine gross receipts subject to tax. Therefore, the total amount of money or reasonable value of other consideration derived from performing services in New Mexico is subject to the gross receipts tax.

E. Receipts from performing services outside New Mexico.

1. Receipts from performing services, except research and development services, outside New Mexico are not subject to the gross receipts tax under the provisions of Section 7-9-13.1 NMSA 1978.

2. Example 1: P, a resident of New Mexico, is an expert forest fire fighter. P’s receipts from fighting forest fires outside New Mexico are not includable in P’s gross receipts.

3. Example 2: D is a data processing bureau located in Lone Tree, Iowa. X, a New Mexico accounting and bookkeeping firm, mails accounting data to D. D then processes this material into general ledgers, payroll journals and other journals and then returns this material by mail to X. The receipts of D are receipts from performing services entirely outside New Mexico and therefore are not subject to the gross receipts tax.

4. Example 3: L, an Albuquerque attorney, is retained by a Colorado firm to negotiate and draw up oil and gas leases for lands in southern Colorado. To accomplish this objective, L goes to Pueblo, Colorado, and there negotiates and draws the leases. Receipts from the fee are not includable in L’s gross receipts because the service was performed entirely outside the state of New Mexico.

F. Sales of state licenses by nongovernmental entities.

1. Amounts retained by nongovernmental entities as compensation for services performed in selling state licenses are gross receipts.

2. Example: G owns and operates a small grocery store in rural New Mexico which is located near a popular fishing area. As a convenience to the public, G sells New Mexico Game and Fish licenses. For its services in selling these licenses, G retains a small percentage of the total license fee. The amounts retained are gross receipts because they are receipts derived from services performed in New Mexico. G may not deduct the amounts retained pursuant to Section 7-9-66 NMSA 1978 which deals with commissions derived from the sale of tangible personal property not subject to the gross receipts tax. A New Mexico game and fish license is not tangible personal property pursuant to Subsection J of Section 7-9-3 NMSA 1978.

G. Stockbrokers’ commissions. Gross receipts include commissions received by stockbrokers, located in New Mexico, for handling transactions for out-of-state as well as in-state residents.

H. Attorneys’ fees. Regardless of the source of payment or the fact of court appointment, the fees of attorneys are subject to the gross receipts tax to the extent that their services are performed in this state.

I. Directors’ or trustees’ fees.

1. The receipts of a member of a board of directors or board of trustees from attending a directors’ or trustees’ meeting in New Mexico are receipts derived from performing a service in New Mexico and are subject to the gross receipts tax.

2. Example: X is on the board of directors of a New Mexico corporation and a Texas corporation. X attends directors’ meetings in Texas and New Mexico. For each directors’ meeting that X attends, X is paid a fee of $50.00. X is performing a service. The fee which X receives from performing this service in New Mexico is subject to the gross receipts tax. The fee which X receives from performing the service in Texas is not subject to the gross receipts tax. However, the burden is on X to segregate receipts which are not taxable from those which are taxable.

3. Example: Y is on the board of trustees of Z, a New Mexico electric cooperative organized under the provisions of the Rural Electric Cooperative Act. Y receives $85 a day for Y to attend Z’s regular meetings in New Mexico, plus reimbursement for mileage to and from the meeting at the standard IRS rate. Y also receives $85 a day for Y to attend no more than one other meeting, conference or training inside or outside New Mexico within any one month, plus reimbursement of actual expenses, including hotel, transportation, tips and reasonable expenses for meals and entertainment. Y is performing a service. The fees and reimbursements Y receives for attending meetings, conferences and trainings in New Mexico are subject to gross receipts tax. The fees and reimbursements Y receives for attending meetings, conferences and trainings outside New Mexico are not subject to gross receipts tax.

(a) See Paragraph (1) of Subsection C of 3.2.1.19 NMAC regarding reimbursed expenditures.

(b) Y is not a volunteer as defined in Paragraph (2) of Subsection D of 3.2.1.19 NMAC because Y receives compensation for Y’s services in addition to reimbursement of Y’s out-of-pocket expenses incurred in the performance of Y’s services.

J. Anesthetists’ fees.
The receipts of a nonemployee anesthetist from anesthetic services performed for a surgeon are subject to the gross receipts tax.

(2) The receipts of an anesthetist from the performance of this service for a surgeon may be deducted from gross receipts if the surgeon resells the service to the patient and delivers a nontaxable transaction certificate to the anesthetist. The surgeon delivering the nontaxable transaction certificate must separately state the value of the service purchased in the charge for the service on its subsequent sale. The subsequent sale must be in the ordinary course of business and subject to the gross receipts tax.

(3) Example: A is an anesthetist who is employed by a hospital and also performs services for and receives compensation from a surgeon who is not associated with the hospital. The surgeon does not consider the anesthetist to be an employee and does not withhold income or other taxes from the anesthetist's compensation. Although the surgeon may exercise some control over the services performed by the anesthetist, the surgeon relies on the anesthetist's training and experience to accomplish the result desired. The receipts of the anesthetist from this service performed are subject to the gross receipts tax.

K. Athletic officials.

(1) Receipts from refereeing, umpiring, scoring or other officiating at school events sanctioned by the New Mexico activities association are exempt from gross receipts tax pursuant to Section 7-9-41.4 NMSA 1978.

(2) Receipts of a referee, umpire, scorer or other similar athletic official from umpiring, refereeing, scoring or officiating at a sporting event located in New Mexico that is not sanctioned by the New Mexico activities association, are receipts derived from performance of a service and are subject to the gross receipts tax. Such receipts will not be exempted from the gross receipts tax as "wages" unless the umpires, referees, scorers and other athletic officials demonstrate to the department that such receipts are derived from an employment relationship whereby they are employees within the meaning of 3.2.105.7 NMAC.

L. Racing receipts.

(1) Unless the receipts are exempt under Section 7-9-40 NMSA 1978:
   (a) the receipts of vehicle or animal owners from winning purse money at races held in New Mexico are receipts from performing services in New Mexico and are subject to the gross receipts tax if any charge is made for attending, observing or broadcasting the race.
   (b) receipts of vehicle drivers, animal riders and drivers and other persons from receiving a percentage of the owner's purse are receipts from performing services in New Mexico and are subject to the gross receipts tax, unless the person receiving the percentage of purse money is an employee, as that term is defined in [Section] 3.2.105.7 NMAC, of the owner.

(2) Where there is an agreement between the driver, rider or other person and the owner for distribution of the winning purse, then only the amount received pursuant to the agreement is gross receipts of the driver, rider or other person receiving the distribution.

M. Advertising receipts of a newspaper or broadcaster.

(1) The receipts of a New Mexico newspaper or a person engaged in the business of radio or television broadcasting from performing advertising services in New Mexico do not include the customary commission paid to or received by a nonemployee advertising agency or a nonemployee solicitation representative, when said advertising services are performed pursuant to an allocation or apportionment agreement entered into between them prior to the date of payment.

(2) Receipts of a New Mexico newspaper or a person engaged in the business of radio or television broadcasting from the sale of advertising services to an advertising agency for resale may be deducted from gross receipts if the advertising agency delivers a nontaxable transaction certificate to the newspaper or the person engaged in the business of radio or television broadcasting. The subsequent sale must be in the ordinary course of business and subject to the gross receipts tax, or the advertising agency will be subject to the compensating tax on the value of the advertising service at the time it was rendered. This version of Paragraph (2) of Subsection M of [Section] 3.2.1.18 NMAC applies to transactions occurring on or after July 1, 2000.

N. Advertising space in pamphlets. Receipts from selling advertising service to New Mexico merchants in a pamphlet printed outside New Mexico and distributed wholly inside New Mexico are receipts from performing an advertising service in New Mexico. Such receipts are subject to the gross receipts tax.

O. Billboard advertising. Receipts derived from contracts to place advertising on outdoor billboards located within the state of New Mexico are receipts from performing an advertising service in New Mexico. Such receipts are subject to the gross receipts tax, regardless of the location of the advertiser.

P. Day care centers.

(1) Receipts from providing day care are receipts from performing a service and are subject to the gross receipts tax.
Receipts from providing day care for children in a situation where a commercial day care center provides day care for the children and the expenses of the care for some of these children is paid for by the state of New Mexico are subject to the gross receipts tax.

Receipts from providing day care for children in a situation where a person provides day care for children in a residence and the care for all these children is paid for by the state of New Mexico are subject to the gross receipts tax.

Receipts from providing day care for children in a situation where a person provides day care for children in the children's home and the care for all of these children is paid for by the state of New Mexico are subject to the gross receipts tax.

Q. Child care.

(1) Receipts derived by a corporation for providing child care facilities for its employees are subject to the gross receipts tax on the amount received from its employees.

(2) Example: The X corporation operates a licensed child care facility to accommodate dependent children of its employees. In order to defray a portion of the cost of the facility, the corporation charges each employee two dollars ($2.00) per child per week for the use of the facility. All receipts from the two-dollar charge per child per week are subject to the gross receipts tax.

R. Service charges; tips.

(1) Except for tips, receipts of hotels, motels, guest lodges, restaurants and other similar establishments from amounts determined by and added to the customer's bill by the establishment for employee services, whether or not such amounts are separately stated on the customer's bill, are gross receipts of the establishment.

(2) A tip is a gratuity offered to service personnel to acknowledge service given. An amount added to a bill by the customer as a tip is a tip. Because the tip is a gratuity, it is not gross receipts.

(3) Amounts denominated as a "tip" but determined by and added to the customer's bill by the establishment may or may not be gross receipts. If the customer is required to pay the added amount and the establishment retains the amount for general business purposes, clearly it is not a gratuity. Amounts retained by the establishment are gross receipts, even if labeled as "tips". If the customer is not required to pay the added amount and any such amounts are distributed entirely to the service personnel, the amounts are tips and not gross receipts of the establishment.

(4) Examples:

(a) Restaurant R has a policy of charging parties of six or more a set percentage of the bill for food and drink served as a tip. If a customer insists on another arrangement, however, the set amount will be removed. R places all amounts collected from the set tip percentage into a pool which is distributed to the service staff at the end of each shift. The amounts designated as tips and collected and distributed by R to the service staff, are tips and not gross receipts. If R retains any amounts derived from the set tip percentage, the amounts retained are gross receipts.

(b) Hotel H rents rooms for banquets and other functions. In addition to the rental fee for the room, H also charges amounts for set-up and post-function cleaning. H retains these amounts for use in its business. These amounts are gross receipts. They are gross receipts even if H denominates them as "tips".

S. Real estate brokers.

(1) Receipts of a person engaged in the construction business from the sale of the completed construction project include amounts which the person has received and then paid to a real estate broker. The total receipts from the sale of the construction project are subject to the gross receipts.

(2) Receipts of a real estate broker from the performance of services for a person engaged in the construction business may not be deducted from gross receipts pursuant to Section 7-9-52 NMSA 1978.

(3) Receipts of a real estate broker from the performance of services for a person engaged in the construction business that are attributable to improvements constructed on real property that are taxable under Subsection A of Section 7-9-53 NMSA 1978 may be deducted pursuant to Section 7-9-66.1 NMSA 1978.

T. Entertainers. The receipts of entertainers or performers of musical, theatrical or similar services are subject to the gross receipts tax when these services are performed in New Mexico.

U. Managers or agents of entertainers. Commissions received by managers or agents of entertainers for the managers' or agents' services in New Mexico are subject to the gross receipts tax.

V. Water utilities; installation of water taps and pipes. The receipts of a water utility from providing a "tap" to a water main and installing a pipe from the water main to a meter which it provides are subject to the gross receipts tax. However, if the utility is owned or operated by a county, municipality or other political
subdivision of the state of New Mexico, its receipts from providing a "tap" to a water main and installing a pipe from a water main to a meter which it also provides are exempted from the gross receipts tax.

**W. Utilities; installation charges.**

1. The receipts of a utility from installation charges are subject to the gross receipts tax. However, if the utility is owned or operated by a county, municipality or other political subdivision of the state of New Mexico, its receipts from installation charges are exempt from the gross receipts tax.

2. The receipts of a private water utility from providing a "tap" to a water main and installing a pipe from the water main to a meter which it provides are subject to the gross receipts tax.

3. Receipts of a private electric utility from fees for changing, connecting or disconnecting electricity of customers, whether or not these services are required because of nonpayment of bills by a customer, are subject to the gross receipts tax.

**X. Construction on Indian reservations or pueblos.** The receipts of a non-Indian from construction services, as defined in Section 7-9-3.4 NMSA 1978 and regulations thereunder, performed on an Indian reservation or pueblo are subject to the gross receipts tax unless the imposition of the gross receipts tax is preempted by federal law.

**Y. Star route contractors.** Receipts of a person holding a contract for transportation of United States mail, as a "Star Route Contractor", from points within New Mexico to other points within New Mexico and to points outside of New Mexico, are subject to the gross receipts tax on that portion of the receipts from transportation from a point within New Mexico to a point within New Mexico. See Paragraph (2) of Subsection B of [Section] 3.2.55.10 NMAC for deducting receipts from the portion in interstate commerce.

**Z. Racetrack operators.** Receipts of operators of racetracks other than horse racetracks, from gate admission fees and entrance fees paid by drivers are subject to the gross receipts tax. Any portion of these fees paid out by the operator as prizes are not exempt or deductible since the payments are part of the operator’s cost of doing business.

**AA. Data access charges.** Receipts from fees or charges made in connection with property owned, leased or provided by the person providing the service are subject to the gross receipts tax when the information or data accessed is utilized in this state.

**BB. Specialty software package.** [Repealed]

**CC. Receipts from telephone or telegraph services.** Receipts derived from telephone or telegraph services originating or terminating in New Mexico and billed to an account or number in this state are receipts from performing services in New Mexico and are subject to the gross receipts tax unless exempt under Section 7-9-38.1 NMSA 1978.

**DD. Allied company underwriting automotive service contracts.** When a New Mexico automotive dealer pays an entity which is allied or affiliated with that dealer (allied company) to undertake all of the dealer's obligations under automotive service contracts as that term is defined in Subsection C of [Section] 3.2.1.16 NMAC on which the dealer is promisor, the undertaking of the allied company does not involve the sale of property in New Mexico or the lease of property employed in New Mexico. The undertaking principally involves an obligation of the allied company to indemnify the dealer by paying the dealer for furnishing parts and labor to fulfill the dealer's obligation to furnish the parts and labor. However, the undertaking also involves the performance of services by the allied company for the dealer since the allied company undertakes to handle the claims of automotive service contract purchasers and otherwise perform the dealer's task under the contract. Absent a showing of a different value by the allied company or the department, 7.5 percent of the contract amount paid by the dealer to the allied company will be treated as consideration received for services performed in New Mexico.

**EE. Custom software.**

1. Except as otherwise provided in Subsection EE of [Section] 3.2.1.18 NMAC, receipts derived by a person from developing custom software are receipts from performing a service.

2. When custom software is developed by a seller for a customer but the terms of the transaction restrict the customer's ability without the seller's consent to sell the software to another or to authorize another to use the software, the seller's receipts from the customer are receipts from the performance of a service. The seller's receipts from authorizing the customer's sublicensing of the software to another person are receipts from granting a license. The seller's receipts from authorizing the use by another person of the same software are receipts from granting a license to use the software.

**FF. Check cashing is a service.** Receipts from charges made for cashing checks, money orders and similar instruments by a person other than the person upon whom the check, money order or similar instrument is drawn are receipts from providing a service, not from originating, making or assuming a loan. Such charges are not interest.
GG.  Receipts of collection agencies.

(1) The fee charged by a collection agency for collecting the accounts of others is gross receipts subject to the gross receipts tax, regardless of whether the receipts of the client are subject to gross receipts tax and regardless of whether the agency is prohibited by law from adding its gross receipts tax amount to the amount collected from the debtor.

(2) Example 1: X is a cash basis taxpayer utilizing the services of Z collection agency for the collection of delinquent accounts receivable. From its New Mexico offices, Z collects from X’s New Mexico debtors in the name of X, retains a percentage for its services and turns over the balance to X. The percentage retained by Z is its fee for performing services in New Mexico. The fee is subject to the gross receipts tax. It makes no difference that federal law prohibits Z from passing the cost of the tax to the debtor by adding it to the amount to be collected. X’s gross receipts include the full amount collected by Z.

(3) Amounts received by collection agencies from collecting accounts sold to the collection agency are not gross receipts.

(4) Example 2: X, a cash basis taxpayer, sells its delinquent accounts receivable to Z, a collection agency, for a percentage of the face amount of the accounts. X’s gross receipts include the full amount of the receivables, excluding any time-price differential. The amount subsequently collected by Z from those accounts, however, is not subject to gross receipts tax because the amount is not included within the definition of gross receipts. In this situation Z is buying and selling intangible property of a type not included within the definition of property in Subsection J of Section 7-9-3 NMSA 1978.

HH. Commissions of independent contractors when another pays gross receipts tax on the receipts from the underlying transaction.

(1) Commissions and other consideration received by an independent contractor from performing a sales service in New Mexico with respect to the tangible or intangible personal property of other persons are gross receipts whether or not the other person reports and pays gross receipts tax with respect to the receipts from the sale of the property. This situation involves two separate transactions. The first is the sale of the property by its owner to the customer and the second is the performance of a sales service by the independent contractor for the owner of the property. The receipts from the sale of the property are gross receipts of the person whose property was sold. Receipts, whether in the form of commissions or other remuneration, of the person performing a sales service in New Mexico are gross receipts of the person performing the sales service.

(2) Example 1: S is a national purveyor of tangible personal property. S has stores and employees in New Mexico. S also has catalogue stores in less populated parts of New Mexico. Catalogue stores maintain minimal inventories; their primary purpose is to make S’s catalogues available to customers, to take orders of merchandise selected from the catalogues, to place the orders with S and to provide general customer service. The catalogue stores are operated by independent contractors and not by S. S pays the contractors commissions based on the orders placed. In charging its customers, S charges the amount shown in the catalogue and does not add any separate amount to cover the cost of the contractors’ commissions. S pays gross receipts tax on its receipts from the sale of catalogue merchandise. The contractors contend that the cost of their selling services is included in the amount S charges for its merchandise and so their commissions are not gross receipts. The contention is erroneous. The contractors have receipts from performing a service in New Mexico; it is immaterial that S paid the amount of gross receipts tax S owed on S’s receipts. See, however, the deduction at Subsection B of Section 7-9-66 NMSA 1978.

(3) Example 2: M is a nationwide, multi-level sales company with presence in New Mexico. M sells products to households mainly through a network of individual, independent contractors. The network of sellers is controlled by one or more sets of individuals, also independent contractors, who train and supervise the individuals selling the merchandise; these supervisory contractors may also sell merchandise. The sellers display, promote and take orders for M’s products. Payment for orders are sent to M along with the orders. M ships the merchandise directly to the final customers. M has agreed to, and does, pay the gross receipts tax on the retail value of the merchandise sold, whether sold by M or one of the independent contractors. Based on the volume and value of merchandise sold, M pays both the selling and supervisory independent contractors a commission. The commissions received by the independent contractors engaging in business in New Mexico with respect to merchandise sold in New Mexico are gross receipts subject to the gross receipts tax. The commissions are receipts from performing a service in New Mexico. The fact that M pays gross receipts tax on M’s receipts from the sale of the property is immaterial in determining the liability of the independent contractors.

(4) Commissions and other consideration received by an independent contractor from performing a sales service in New Mexico with respect to a service to be performed by other persons are gross receipts whether or not the other person reports and pays gross receipts tax with respect to the receipts from the performance of the underlying service. This situation involves two transactions. The first is the performance of the underlying service
by the other person for the customer and the second is the performance of the sales service by the independent contractor for the performer of the underlying service. The receipts from the performance of the underlying service for the customer are gross receipts of the person performing that service. Receipts, whether in the form of commissions or other remuneration, of the person performing the sales service are gross receipts of the person performing the sales service.

(5) Example 3: P is the publisher of a magazine published in New Mexico. P enters into arrangements with independent contractors to solicit ads to be placed in P's publication. P pays each contractor a percentage of the billings for the ads placed by the contractor as a commission. The independent contractors claim that they owe no gross receipts tax with respect to ads solicited in New Mexico because P has paid gross receipts tax on P's advertising revenues. The contractors are incorrect. There are two transactions in this situation, P's service of publishing advertisements and the contractors' service of soliciting ads for P. The fact that P paid the amount of gross receipts tax due on P's advertising revenues is immaterial regarding the contractors' gross receipts tax obligations on their receipts.

(6) If the receipts from the underlying sale of the tangible property are exempt or deductible, the commission received by an independent contractor from selling the tangible property of another may be subject to the deduction provided by Section 7-9-66 NMSA 1978.

II. Receipts from winning contest.

(1) Receipts of a contestant from winning purse money in a rodeo or an athletic game, match or tournament held in New Mexico are gross receipts from performing services if any charge is made for attending, observing or broadcasting the event. Such receipts are subject to the gross receipts tax unless an exemption or deduction applies. Where the contestant is a team and there is an agreement among the team members governing distribution of the purse money, then only the amount received by each team member pursuant to the agreement is gross receipts of the team member.

(2) Subsection II of 3.2.1.18 NMAC does not apply to receipts exempt under Section 7-9-40 NMSA 1978 nor does it apply to activities that are primarily or solely gambling.

3.2.1.18 NMAC - Rn & A, 3 NMAC 2.1.18, 10/31/2000; A, 5/31/02; A, 12/30/03; A, 3/15/10; A, 10/15/10; A, XXX]

3.2.10.13 CONSTRUCTION PROJECTS OCCUPIED OR LEASED PRIOR TO SALE:

A. A person engaged in the construction business who purchases construction materials, construction services, construction-related services or who leases construction equipment using nontaxable transaction certificates (nttcs) provided by the department for use under Sections 7-9-51, 7-9-52 and 7-9-52.1 NMSA 1978 is liable for the compensating tax on the value of the materials and services purchased at the time when the construction project is initially leased or otherwise occupied prior to the sale. It is immaterial that the construction project is leased to enhance its value for sale as is the case with so-called income producing property.

B. Example 1: Y is a company which constructs office buildings for sale to investors as income producing property. Y has issued nontaxable transaction certificates nttcs to material suppliers and subcontractors. Upon completion of the building, Y leases office space to tenants in order to enhance the salability of the building. Y is liable for the compensating tax at the time it leases the first office.

C. Example 2: Z is building an apartment complex consisting of five separate buildings with twenty apartments in each building. Z begins renting apartments in each building as the building is completed. If Z issued nontaxable transaction certificates nttcs to purchase construction materials and construction services for incorporation into these apartment buildings, Z will be liable for compensating tax on the value of the materials and services purchased for each building when any apartment in the building is rented. The rental of the apartments is a conversion to use by Z. When Z subsequently sells any or all of the five buildings, the compensating tax previously paid by Z on construction materials and construction services which became an ingredient or component part of each building may be credited against the gross receipts tax due on the sale.

D. Example 3: R is a homebuilder who typically sells the homes he builds either prior to the start of construction, or on a speculative basis prior to the completion of the home. R has executed nttcs to material suppliers and subcontractors for a specific home. Upon completion of the home, R is unable to find a buyer, and decides to retain title to the home and use it as his personal home or rent the home to a third party until a buyer can be found. R is liable for the compensating tax previously paid by R on the value of the construction materials, construction services and construction-related services purchased with the nttcs at the time the home is initially rented or occupied by the homebuilder prior to the sale.
3.2.201.8  POSSESSION AND DELIVERY OF NONTAXABLE TRANSACTION CERTIFICATES - TYPES OF CERTIFICATES:

A. With respect to receipts and transactions [occurring prior to July 1, 1992 or after June 30, 1997] deductible under the Gross Receipts and Compensating Tax Act:

(1) The taxpayer should be in possession of all nontaxable transaction certificates (nttcs) at the time the deductible transaction occurs.

(2) The taxpayer must be in possession of and have available for inspection all nttcs for the period of an audit within 60 days of notice by the department requiring such possession. This notice may be sent out or delivered no earlier than the commencement of an audit of the taxpayer claiming the deduction.

(3) An nttc acquired by the taxpayer after the 60 days following notice have expired will not be honored by the department for the period covered by the audit.

(4) An nttc executed using the department’s online system, and that is recorded on the online system, will be considered to be in the possession of the taxpayer to whom the nttc has been executed.

B. With respect to receipts and transactions occurring on or after July 1, 1992 and prior to July 1, 1997, the taxpayer is required to possess the appropriate nontaxable transaction certificate by the time the return is due for receipts from the transaction, except as otherwise provided herein. A certificate received after that time does not substantiate the deduction. The taxpayer must demonstrate possession of all nttcs at the commencement of an audit. In the alternative, upon receipt of a notice requiring possession of the certificates, the taxpayer has sixty days to demonstrate that the taxpayer did in fact possess the certificates at the time the receipts were required to be reported. In the case where a notice requiring possession of the certificates has been given prior to July 1, 1997, demonstration that the certificates were possessed at the time the audit commenced or the notice was received is not adequate. In the case where notice requiring possession of the nttcs expired on or after July 1, 1997, the taxpayer must be in possession of and have available for inspection all nttcs for the period of an audit within 60 days of notice by the department requiring such possession.

C. An audit of such a taxpayer commences when one of the following occurs:

(1) a department auditor physically gives a dated letter of introduction which states the auditor is commencing an authorized audit of the taxpayer or states the auditor requires the production of the taxpayer's books and records for examination; or

(2) a department employee begins an authorized office examination of files, books or records pertaining to the taxpayer, provided that the taxpayer or the taxpayer's representative is informed reasonably promptly by letter or in person that an audit has commenced.

D. The department issues different types of nttcs. Each type is of limited usage and relates to a particular deduction allowed by possession of that certificate. An nttc is valid only if it contains the information and is in a form prescribed by the department. All other types of proof of deductibility are invalid and will not be accepted by the department, unless the deduction provision explicitly permits other proof.

E. The department issues different types of nttcs. Each type is of limited usage and relates only to one or more particular deductions. An nttc is not valid if it does not contain the information or is not in a form prescribed by the department. For a deduction that requires possession of the appropriate nttc, other types of proof of deductibility are invalid and will not be accepted by the department, unless other proof is permitted explicitly by the deduction or another provision of the Gross Receipts and Compensating Tax Act with respect to that deduction.

F. Nothing shall prevent the department from changing the substance, form or type of nttcs to be used. Nothing shall prevent the department from changing the form of notification requiring the possession of nttcs.

3.2.201.11  CONSTRUCTION CONTRACTORS:

A. Any person applying to execute nontaxable transaction certificates (nttcs) related to [construction as defined in Section 7.9-3 NMSA 1978] deductions found under Sections 7-9-51, 7-9-52 or 7-9-52.1 NMSA 1978.
must indicate the applicant's New Mexico contractor's license number or furnish proof that no contractor's license is required by the construction industries division of the regulations and licensing department in order to engage in one of the construction activities listed in 7-9-3.4 NMSA 1978. Failure to comply with [Section 3.2.201.11 NMAC will result in denial of the requested certificates.

B. A person [performing construction services] engaged in the construction business who makes any false or misleading representations in any material respect in an application for nttcs may become subject to the penalties imposed by Section 7-1-73 NMSA 1978 as well as other penalties, civil or criminal, prescribed in the Tax Administration Act. False or misleading representations include, but are not confined to:

(1) indicating a contractor's license number on the application which is not issued to the applicant or which cannot lawfully be used by the applicant;

(2) applying for nttcs which someone other than the applicant will execute; or

(3) furnishing false or misleading documentation that a contractor's license is not required of the applicant by the construction industries division.

C. Any person who has previously applied for and been issued nttcs related to construction as defined in Section [7-9-3.4] 7-9-3.4 NMSA 1978, under circumstances wherein the person would not have been entitled to obtain such certificates pursuant to [Section 3.2.201.11 NMAC, will be assessed gross receipts or compensating tax, as appropriate, based on the representations actually made in the application for nttcs.

D. Any person engaged in the [business of construction, as defined by Section 7-9-3.4 NMSA 1978, is presumed to be engaged solely in the business of construction and] construction business is presumed not to be engaged in reselling services other than construction services, or, on or after January 1, 2013, construction-related services, in the ordinary course of business. Except as provided in Subsection E of this section, this person will not be issued [nontaxable transaction certificates (nttc)] nttcs other than those appropriate for the deductions under Sections 7-9-51 [and] 7-9-52 and 7-9-52.1 NMSA 1978.

E. A person who can demonstrate to the department’s satisfaction that the person is engaged in the [business of construction and] construction business and also in the business of selling property other than construction materials or performing or selling one or more services, [such as engineering or architectural design,] that are not construction services or, on or after January 1, 2013, construction-related services, may qualify for and be issued nttcs in addition to those appropriate for the deductions under Sections 7-9-51 [and] 7-9-52 and 7-9-52.1 NMSA 1978. The additional types of nttcs may be executed by the person only when the person is acquiring tangible personal property other than construction materials, [or a service other than a construction service or, on or after January 1, 2013, a construction-related service,] in a manner meeting the conditions for execution of the additional type of nttc. In determining whether the person engaged in the construction business is engaged in a business in addition to the construction business, the department will consider these factors:

(1) whether the person possesses, when possession is required, a current license to sell or lease the nonconstruction property or to perform or sell the nonconstruction service;

(2) whether the person has entered into a contract requiring the sale or lease of the nonconstruction property or the performance or sale of the nonconstruction service;

(3) whether the person holds himself out to be in the business; and

(4) other factors deemed appropriate by the secretary.

[7/26/76, 6/18/79, 4/7/82, 5/4/84, 4/2/86, 11/26/90, 9/20/93, 11/15/96, 4/30/99; 3.2.201.11 NMAC - Rn, 3 NMAC 2.43.1.11 & A, 5/31/01; A, 11/30/05; A, XXX]

3.2.206.12 NONCONSTRUCTION SERVICES [NOT RESOLD BY] SOLD TO CONSTRUCTION CONTRACTORS:

A. Prior to January 1, 2013, any person engaged solely in the business of construction[ as defined by Section 7-9-3.4 NMSA 1978] is not engaged in reselling services other than construction services in the ordinary course of business and may not [issue execute a nontaxable transaction certificate (nttc) to purchase services for resale in connection with the construction business under the provisions of Section 7-9-48 NMSA 1978.

B. On or after January 1, 2013, any person engaged in the construction business who purchases construction-related services as defined in Section 7-9-52 NMSA 1978 and is engaged in reselling those construction-related services may execute an nttc to support the deduction under Section 7-9-52 NMSA 1978.

[3/11/88, 11/26/90, 11/15/96; 3.2.206.12 NMAC - Rn, 3 NMAC 2.48.12 & A; 5/31/01; A, 11/30/05; A, XXX]

3.2.210.8 INDIRECT SERVICES ARE NOT CONSTRUCTION SERVICES
A. Indirect services, such as accounting, architectural, engineering, drafting, bid depository services and plan room services are not construction services within the definition of construction under Section 7-9-3 NMSA 1978.

B. Example 1: K is a surveying company that contracts with C, a contractor, to survey the site. K incorrectly maintains that it is selling a construction service to C and that its receipts are deductible. Surveying and related services other than construction staking are not included as construction under the definition of construction under Section 7-9-3 NMSA 1978. Therefore, they are not construction services as that term is used in Section 7-9-52 NMSA 1978.

C. Example 2: E, an excavator, contracts with B, a prime contractor, to dig the trenches for the water and sewer lines from the city mains to the building site in connection with a building project. E is performing a construction service that is immediately adjacent to the project and is therefore entitled to the deduction providing B delivers a non-taxable transaction certificate. GENERAL BUSINESS SERVICES ARE NOT CONSTRUCTION SERVICES OR CONSTRUCTION-RELATED SERVICES:

A. General business services, such as accounting, legal services, real estate brokering, telecommunications and plan room services are not construction services within the definition of construction under Section 7-9-3.4 NMSA 1978 nor are they construction-related services as defined in Section 7-9-52 NMSA 1978. Receipts from performing these types of services to a construction contractor are subject to gross receipts tax.

B. Example 1: K is a law firm that contracts with C, a contractor, to provide legal services. K maintains that it is selling a legal service to C that is necessary for the completion of the construction project and that its receipts should not be subject to gross receipts tax. Legal services are not included under the definition of construction under Section 7-9-3.4 NMSA 1978 or under the definition of construction-related services under Section 7-9-52 NMSA 1978. There is no deduction available for K’s receipts from providing legal services to C.

C. Example 2: C provides B with telecommunications services through which B can maintain contact with B’s construction crew working at a remote site. C’s receipts from this service are not deductible under Section 7-9-52 NMSA 1978.

D. Example 3: C is engaged in the construction business and undertakes a project where the builder has no pre-paid client, and the project is speculative. C acquires the land and obtains a construction loan to fund the improvements on the land. The construction loan documents include charges for banking fees that are not pre-paid interest or interest on the loan balance. The banking fees are for a general business service and not considered a construction-related service and therefore not deductible under Section 7-9-52 NMSA 1978.

E. This version of 3.2.210.8 NMAC applies to transactions occurring on or after January 1, 2013.

3.2.210.9 WELL CONSTRUCTION SERVICES:

A. Receipts from the sale of the following services in connection with well drilling are receipts from the sale of construction services as defined in Section 7-9-3.4 NMSA 1978, and may be deducted from gross receipts if all other requirements of Section 7-9-52 NMSA 1978, are met:

(1) dirt work and surfacing;
(2) digging cellars and pits;
(3) drilling ratholes;
(4) drilling water wells;
(5) laying water and fuel lines;
(6) directional drilling services;
(7) casing crew services;
(8) cementing services;
(9) drill stem testing; and
(10) fishing jobs.

B. Receipts from the sale of the following services in connection with well drilling are not receipts from the sale of construction services within the meaning of Section 7-9-3.4 NMSA 1978 and may not be deducted from gross receipts:

(1) repairing drilling equipment;
(2) hauling water and mud;
(3) hauling drilling equipment, rigging-up and rigging-down;
(4) field inspecting drill collars and drill stems; and
(5) furnishing compressed air.
C. On or after January 1, 2013, receipts from the sale of the following services in connection with well drilling are receipts from the sale of construction-related services as defined in Section 7-9-52 NMSA 1978 and are deductible under Section 7-9-52 NMSA 1978 if all the requirements of that section are met:
   (1) hauling water and mud;
   (2) hauling drilling equipment, rigging-up and rigging-down;
   (3) field inspecting drill collars and drill stems; and
   (4) furnishing compressed air.

3.2.210.10 [TRANSPORTATION] HAULING SERVICES:
   [A. HAULING:] On or after January 1, 2013, receipts from hauling materials, prefabricated buildings and supplies to and from a building site for a person engaged in the construction business are [not] construction-related services and are deductible from the hauler's gross receipts pursuant to Section 7-9-52 NMSA 1978 [because hauling materials and supplies to and from a construction site is not a construction service pursuant to Subsection A of Section 7-9-3.4 NMSA 1978] if all requirements of Section 7-9-52 NMSA 1978 are met.
   [B. HAULING PREFABRICATED BUILDINGS: A builder of prefabricated buildings may not issue a type 7 nontaxable transaction certificate to a company hired to move completed buildings from the builder's lot to the permanent site. Haulers are not engaged in construction as defined under Section 7-9-3.3 NMSA 1978. A deduction may be available under Section 7-9-48 NMSA 1978 if all the criteria of that section are met.
   C. HAULING AND SPREADING MATERIALS WITHIN CONSTRUCTION PROJECT: Receipts of a person from hauling and spreading dirt, sand, gravel and rock, treated or untreated, for the purpose of furnishing materials to a construction project when such materials have been obtained from a source which is on or in the proximity of that construction project are receipts from performing a construction service. Such receipts may be deducted from the seller's gross receipts if the buyer delivers a nontaxable transaction certificate to the seller.

3.2.210.14 SALVAGING OF A “PRODUCTION UNIT”: Receipts of a person engaged in the business of servicing “production units” as defined in the Oil and Gas Emergency School Tax Act, Section 7-31-2 NMSA 1978, from performing services in connection with salvaging of materials from a “production unit” are not receipts from the sale of construction services or from construction-related services within the meaning of Section 7-9-52 NMSA 1978 and may not be deducted from gross receipts.

3.2.210.15 CLEANING THE CONSTRUCTION SITE:
   A. Receipts from cleaning a building upon completion of a construction project; from cleaning masonry upon the completion of a construction project; from making an earth fill for drainage purposes; from providing an earth fill of a granular type required by specifications; and from replacing construction rejected by the architects, the engineers or the owners are receipts from performing construction services. Such receipts may be deducted from gross receipts if the buyer delivers a nontaxable transaction certificate to the seller.
   B. Receipts from cleaning the building at any time other than during or immediately after completion of the construction project or cleaning masonry in a standing building in order to restore its appearance [from performing concrete and soil tests and from charges for maintaining a watchman on a construction project during the construction period are not receipts from performing construction services as that term is used in Section 7-9-52 NMSA 1978 and may not be deducted from gross receipts] are not deductible under Section 7-9-52 NMSA 1978.

3.2.210.16 DAMAGE TO A CONSTRUCTION PROJECT BY SUBCONTRACTOR:
   A. Charges by a contractor to a subcontractor for damages to a construction site caused by the subcontractor are not gross receipts to the contractor, but constitute a reduction in the amount of consideration paid to the subcontractor for the service performed by the subcontractor.
   B. Example: A, a prime contractor, contracts with C, an independent contractor, to repair a part of a construction project damaged by B, a subcontractor on the project. B is responsible to A for the cost of such repair.
A also contracts with D, a person engaged in the business of hauling trash, to remove trash and debris left by B after completion of B’s portion of the project. B is obligated by the terms of the contract to remove the trash and debris. A charges B for the cost of repair paid to C and for the cost of hauling paid to D, either by deducting such cost from the amount A will pay B upon completion of B’s work or by billing B directly for them.

(1) A’s charges to B for the cost of repair is a reduction in the cost of A’s subcontract with B. A, therefore, derives no receipts from the charge to B, regardless of whether A subtracts the cost of work done by C from the amount A pays B or whether B pays A the cost of the work performed by C.

(2) A may deliver a nontaxable transaction certificate (nttc) to C, the independent contractor, if the service performed by C is a construction service within the meaning of Section 7-9-52 NMSA 1978.

(3) On or after January 1, 2013, A may deliver an nttc to D for hauling trash, since hauling is not a construction-related service within the meaning of Section 7-9-52 NMSA 1978 if all the requirements of that section are met.

3.2.210.18 LABORATORY WORK AND ENVIRONMENTAL TESTING:

A. Prior to January 1, 2013, receipts of a person engaged in the business of performing laboratory work, such as the design or testing of dirt or concrete work, from the sale of these services to a person engaged in the construction business are not construction services within the meaning of Section 7-9-52 NMSA 1978 and may not be deducted from the seller’s gross receipts pursuant to Section 7-9-52 NMSA 1978.

B. Receipts for laboratory work or environmental testing performed on or after January 1, 2013, are receipts from performing construction-related services as defined in Section 7-9-52 NMSA 1978 and are deductible if the requirements of Section 7-9-52 NMSA 1978 are met.

C. Example: X is engaged in the construction business. In order to comply with the requirements of the federal environmental protection agency, X must obtain the services of Y, a certified lead paint consultant. Y will test for the existence of lead paint in any building being demolished or remodeled by X, prepare a federally required report, suggesting additional best management practices, and send samples to a testing lab. Services provided by Y after January 1, 2013, are construction-related services and are deductible under Section 7-9-52 NMSA 1978 as long as all the requirements in the statute are met.

3.2.210.19 BLUEPRINTS—PHOTOSTATS: Receipts from the sale of blueprints or photostats to a person engaged in the construction business are subject to the gross receipts tax. These receipts may not be deducted pursuant to Section 7-9-52 NMSA 1978 because they are not construction services. CONSTRUCTION-RELATED SERVICES AND ASSOCIATED PRODUCTS:

A. Receipts from the sale of design services and special inspections that are required to verify specifications in design criteria to a person engaged in the construction business, are construction-related services and deductible under Section 7-9-52 NMSA 1978.

B. Receipts from the sale of building plans, professional stamps, or similar products to a person engaged in the construction business are construction-related services as defined in Section 7-9-52. Receipts from such sales that are contracted for or billed to a construction project may be deducted from the seller’s gross receipts pursuant to Section 7-9-52 NMSA 1978 if the buyer is engaged in the construction business and delivers a nontaxable transaction certificate to the seller.

C. Example 1: C is engaged in the construction business. In order to begin the construction project C obtains the services of A, a design/architectural firm, to draw the plans necessary to obtain the building permit. Under Section 7-9-52 NMSA 1978, the plan preparations are a construction-related service. As long as the construction project is subject to gross receipts tax upon its completion, or located on tribal land, C may execute an nttc to A and A’s receipts will be deductible under Section 7-9-52 NMSA 1978 as construction-related services.

D. Example 2: X is engaged in the construction business and contracts with Y, who is also engaged in the construction business, for the design and construction of the mechanical ducting system on X’s construction project. Building code requires certain portions of the mechanical system to be designed by a mechanical engineer. Y enters into a contract for the services of E, an engineering firm, to perform the calculations, design a portion of the system, and place an engineer’s “seal” on E’s part of the mechanical ducting design. E is able to accept an nttc from Y as E’s service is a construction-related service as defined in Section 7-9-52 NMSA 1978. X may also
To execute an nttc under Section 7-9-52 NMSA 1978 to Y so long as the X's completed project is subject to gross receipts tax.

This version of 3.2.210.19 NMAC applies to transactions occurring on or after January 1, 2013.


### 3.2.210.20 COMPENSATING TAX ON CONSTRUCTION SERVICES:

When a person engaged in the construction business leases out or otherwise uses a construction project for which construction services or construction-related services were purchased using a nontaxable transaction certificate (nttc), the compensating tax is due if the project is occupied or leased prior to sale. The value of the construction services or construction-related services to be reported is the actual cost of the construction services purchased using nttcs, and the tax is due at the time of occupancy.


### 3.2.210.21 MUD ENGINEERING SERVICES:

Gross receipts from providing a mud engineering service at the well site to supervise the mixing of various agents and to make recommendations as to the type of fluids needed for the particular formations encountered in drilling wells are not receipts from providing construction-related services as defined in Section 7-9-52 NMSA 1978 and are deductible pursuant to Section 7-9-52 NMSA 1978. Mud engineering service is a professional service, not a construction service. Receipts from mud engineering services performed after January 1, 2013, may be deductible pursuant to Section 7-9-52 NMSA 1978 if a buyer engaged in the construction business delivers a nontaxable transaction certificate to the seller.


### 3.2.210.22 LEASE OF CONSTRUCTION EQUIPMENT:

**A.** This version of 3.2.210.22 NMAC applies to transactions prior to January 1, 2013. Receipts from the lease of construction equipment on or after January 1, 2013, may be deductible under Section 7-9-52.1 NMSA 1978, if all requirements set out in Section 7-9-52.1 NMSA 1978 and 3.2.249.8 and 9 NMAC are met.

**[A.] B.** Receipts from leasing construction equipment, with or without operators, to a person engaged in the construction business may not be deducted from the lessor's gross receipts pursuant to Section 7-9-52 NMSA 1978. Leasing of construction equipment is not a construction service as defined in Subsection A of Section 7-9-3.4 NMSA 1978.

**[B.] C.** In contrast, when a person who is regularly engaged in the selling of construction services, such as a subcontractor, uses the subcontractor's own construction equipment to perform construction services for a person engaged in the construction business, the subcontractor may deduct the receipts for the services and equipment under Section 7-9-52 NMSA 1978 if:

1. the subcontractor is an independent contractor and not an employee of the person engaged in the construction business; and
2. the subcontractor exercises control over the use of the property in performing the services; the controlling factor is whether the equipment owner has control over the performance of the construction service which involves using the equipment or is simply operating the equipment at the direction of some other person engaged in the construction business.

**[C.] D.** Example 1: A is regularly engaged in the lease and rental of construction equipment. A enters into an agreement to lease a crane with an operator to a contractor engaged in the construction business to be used on a construction project. The contractor will direct all of the activity of the crane and operator on the construction site. A's receipts from the lease of the crane with an operator are not receipts from performing construction services. A cannot deduct such receipts.

**[D.] E.** Example 2: X is a heating and air conditioning subcontractor on a construction project. X owns a crane which X regularly uses to lift equipment onto the roof of buildings on which X works. X's receipts for construction services includes payment for using the crane. X may deduct those receipts under Section 7-9-52 NMSA 1978. If, however, X agrees to lease the crane with an operator to the prime contractor for work unrelated to the subcontract, which work is performed at the direction of the prime contractor, X would not be able to deduct the receipts for the leasing of the crane.

3.2.209.22 **[INGREDIENT AND COMPONENT PARTS OF A CONSTRUCTION PROJECT]**: In determining whether tangible personal property will become an ingredient or component part of a construction project, the department will use the following criteria, but not exclusively:

A. Did the tangible personal property become “fixtures” as defined under Subsection I of Section 3.2.111 NMAC?

B. Was the person performing the work using the tangible personal property required to be licensed under the Construction Industries Licensing Act, Sections 60-13-1 to 60-13-59 NMSA 1978?

C. Did the work for which the tangible personal property was used require a permit from one or more of the trade boards established by the Construction Industries Licensing Act or from a municipal building or mechanical department? [RESERVED]

[6/18/79, 4/7/82, 5/4/84, 4/2/86, 11/26/90, 11/15/96; 3.2.209.22 NMAC - Rn, 3 NMAC 2.51.22 & A, 5/31/01; Repealed, XXX]

3.2.210.7 **[DEFINITIONS]**: [HAULING AND SPREADING DEFINED]: For purposes of Subsection C of Section 3.2.210.10 NMAC, hauling and spreading means the transporting of material from a location on or in proximity to a construction site and applying the material to the point of usage required as a step in completing the construction project. [RESERVED]

[11/15/96; 3.2.210.7 NMAC - Rn, 3 NMAC 2.52.7, 5/31/01; A, 11/30/05; Repealed, XXX]

3.2.210.12 **[“SWEAT LABOR CONTRACT”]**: Receipts of a person who performs construction services pursuant to a “sweat labor contract” include the value of the consideration received from the sale of construction services pursuant to the “sweat labor contract”. However, such a person may deduct the receipts from the sale of these construction services to a person engaged in the construction business if the person engaged in the construction business delivers a nontaxable transaction certificate pursuant to Section 7-9-52 NMSA 1978. [RESERVED]