

Federal Preemptions – Transactions with Indian Tribes:

3.2.4.7 DEFINITIONS:

For the purpose of Section 3.2.4.9 NMAC:

- A. “Indian tribe” means an Indian nation, tribe or pueblo, including:
 - (1) any political subdivision, agency or department of that Indian nation, tribe or pueblo;
 - (2) any incorporated or unincorporated enterprise of the Indian nation, tribe or pueblo or its political subdivisions, agencies or departments; and
 - (3) any corporation required to be considered an Indian and therefore a member of the Indian nation, tribe or pueblo under *Eastern Navaho Industries, Inc. v. Bureau of Revenue*, 552 P.2d 805 (N.M. App. 1976); and
- B. “tribe’s territory” means that part of Indian country in New Mexico reserved formally or informally for that Indian nation, tribe or pueblo, including its dependent Indian communities, and, with respect to a member of that tribe, any land in New Mexico allotted, reserved or held in trust by the United States for that member. [3/16/95, 8/30/95, 11/15/96; 3.2.4.7 NMAC – Rn & A, 3 NMAC 2.4.7, 4/30/01]

3.2.4.8 WHO IS THE TAXPAYER:

The gross receipts tax is imposed on persons engaging in business in New Mexico. Such persons are solely liable for payment of the tax; they are not “collectors” on behalf of the state. [7/26/76, 6/18/79, 4/7/82, 5/4/84, 4/2/86, 11/26/90, 11/15/96; 3.2.4.8 NMAC – Rn, 3 NMAC 2.4.8, 4/30/01]

3.2.4.9 FEDERAL PREEMPTIONS – TRANSACTIONS WITH INDIAN TRIBES:

A. Imposition barred by federal law – sale in Indian country of tangible personal property to a tribe or tribal member – general

(1) Except for receipts of a public utility from selling electricity, natural gas or water, receipts from selling tangible personal property to an Indian tribe or member thereof on that tribe’s territory are not subject to the gross receipts tax if taxation of such receipts is prohibited by federal law.

(2) The person selling tangible personal property to an Indian tribe or member thereof on that tribe’s territory must demonstrate that the sale is to an Indian tribe or member thereof. The person must also demonstrate that the sale takes place on the tribe’s territory. The documents demonstrating that the receipts from these sales are not subject to tax under Subsection A of Section 3.2.4.9 NMAC shall be retained in the person’s records.

(a) The first requirement may be met by obtaining a statement signed by the purchaser of the tangible personal property that the purchaser is an Indian tribe or member thereof. In the case of the Indian tribe itself, the statement must be attested to by a tribal official. In the case of a tribal member, the statement must either specify the tribal member’s official tribal or BIA census number or, in the case in which the Indian tribe does not maintain an official census system, the signature of an official of the member’s Indian tribe confirming this statement. This statement may also be provided to the person by the Indian tribe on behalf of one or more of its members if attested to by a tribal official. Upon request, the Secretary may approve additional methods. This

documentation shall be conclusive evidence, and the only material evidence, that the purchaser is an Indian tribe or member thereof.

(b) The second requirement may be met if the person keeps records adequate to document that delivery of the tangible personal property to the buyer took place on the tribe's territory and that at least two of the following activities also took place on the tribe's territory:

- (i) solicitation of the sale;
- (ii) making of the contract of sale; or
- (iii) payment for the property sold.

(3) Receipts from the sale of tangible personal property in New Mexico in Indian country to the following persons are subject to the gross receipts tax:

- (a) a person who is not an Indian tribe or member thereof;
- (b) a person who is an Indian tribe other than the Indian tribe on whose territory the sale takes place; and

(c) a person who is a member of an Indian tribe other than the Indian tribe on whose territory the sale takes place except that, if the person is the spouse of a member of the Indian tribe on whose territory the sale takes place, that person will be considered for the purpose of Subsection A of Section 3.2.4.9 NMAC to be a member of the spouse's Indian tribe.

(4) Receipts from the sale of tangible personal property in New Mexico to an Indian tribe or member thereof are subject to the gross receipts tax when the sale takes place outside the tribe's territory, even if the sale takes place within the territory of another Indian tribe.

B. Imposition barred by federal law – sale in Indian country of tangible personal property to a tribe or tribal member – electricity, natural gas or water sold by public utility:

(1) Receipts of a public utility (as defined in Section 62-3-3 NMSA 1978) from selling electricity, natural gas or water to an Indian tribe or member thereof on that tribe's territory are not subject to the gross receipts tax if taxation of such receipts is prohibited by federal law. A sale occurs on the tribe's territory when the meter measuring the quantity sold is located on the tribe's territory.

(2) The public utility selling electricity, natural gas or water to an Indian tribe or member thereof on that tribe's territory must demonstrate that the sale is to an Indian tribe or member thereof. The public utility must also demonstrate that electricity, natural gas or water being sold is sold through a meter on the tribe's territory. The documents demonstrating that the receipts from these sales are not subject to tax under Subsection B of Section 3.2.4.9 NMAC shall be retained in the public utility's records.

(a) The first requirement may be met by obtaining a statement signed by the purchaser of the electricity, natural gas or water that the purchaser is an Indian tribe or member thereof. In the case of the Indian tribe itself, the statement must be attested to by a tribal official. In the case of a tribal member, the statement must either specify the tribal member's official tribal or BIA census number or, in the case in which the Indian tribe does not maintain an official census system, the signature of an official of the member's Indian tribe confirming this statement. This statement may also be provided to the public utility by the Indian tribe on behalf of one or more of its members if attested to by a tribal official. Upon request, the Secretary may approve additional methods. This documentation shall be conclusive evidence, and the only material evidence, that the purchaser is an Indian tribe or member thereof.

(b) The second requirement may be met if the public utility keeps records adequate to document that the meter through which the electricity, natural gas or water is sold is located on the tribe's territory.

(3) Receipts from the sale of electricity, natural gas or water in New Mexico in Indian country to the following persons are subject to the gross receipts tax:

(a) a person who is not an Indian tribe or member thereof;

(b) a person who is an Indian tribe other than the Indian tribe on whose territory the sale takes place and;

(c) a person who is a member of an Indian tribe other than the Indian tribe on whose territory the sale takes place except that, if the person is the spouse of a member of the Indian tribe on whose territory the sale takes place, that person will be considered for the purpose of Subsection B of Section 3.2.4.9 NMAC to be a member of the spouse's Indian tribe.

(4) Receipts from the sale of electricity, natural gas or water in New Mexico to an Indian tribe or member thereof are subject to the gross receipts tax when the sale takes place outside the tribe's territory, even if the sale takes place within the territory of another Indian tribe.

C. Imposition barred by federal law – leasing in Indian country to tribe or tribal members:

(1) Receipts from leasing property to an Indian tribe or member thereof on that tribe's territory are not subject to gross receipts tax if taxation of such receipts is prohibited by federal law. Leasing occurs on a tribe's territory when the property being leased is located on the tribe's territory.

(2) The lessor must demonstrate that the leased property is leased to an Indian tribe or member thereof. The lessor must also demonstrate that the property being leased is located on the tribe's territory. The documents demonstrating that lease receipts are not subject to tax under Subsection C of Section 3.2.4.9 NMAC shall be retained in the lessor's records.

(a) The first requirement may be met by obtaining a statement signed by the lessee that the lessee is an Indian tribe or member thereof. In the case of the Indian tribe itself, the statement must be attested to by a tribal official. In the case of a member, the statement must also either specify the lessee's official tribal BIA census number or, when the lessee's Indian tribe does not maintain an official census system, be attested to by an official of the lessee's Indian tribe confirming this statement. This statement may also be provided to the lessor by the Indian tribe on behalf of one or more of its members if attested to by a tribal official. Upon request, the Secretary may approve additional methods. This documentation shall be conclusive evidence, and the only material evidence that the lessee is an Indian tribe or member thereof.

(b) The second requirement may be met if the lessor keeps records adequate to document that the property being leased is located during the lease on the lessee's tribe's territory. If the property being leased is to be located both on and off the lessee's tribe's territory during the lease, the lessor must keep records documenting the time the property is on the lessee's tribe's territory.

(3) Receipts from leasing property in New Mexico in Indian country to the following persons are subject to the gross receipts tax:

(a) a person who is not an Indian tribe or member thereof;

(b) a person who is an Indian tribe other than the Indian tribe on whose territory the leased property is located; and

(c) a person who is a member of an Indian tribe other than the Indian tribe on whose territory the leased property is located except that, if the person is the spouse of a member

of the Indian tribe on whose territory the leased property is located, that person will be considered for the purpose of Subsection C or Section 3.2.4.9 NMAC to be a member of the spouse's Indian tribe.

(4) Receipts from leasing property in New Mexico to an Indian tribe or member thereof are subject to the gross receipts tax when the property being leased is located outside the tribe's territory, even if located within the territory of another Indian tribe.

D. Imposition barred by federal law – services in Indian country for tribe or tribal members – general:

(1) Receipts from performing services, other than construction or telecommunications services, sold to an Indian tribe or member thereof on that tribe's territory are not subject to gross receipts tax if taxation of such receipts is prohibited by federal law.

(2) The seller of the services must demonstrate that the service is sold to an Indian tribe or member thereof. The seller must also demonstrate that the service is performed on the tribe's territory. The documents demonstrating that the receipts are not subject to tax under Subsection D of Section 3.2.4.9 NMAC shall be retained in the seller's records.

(a) The first requirement may be met by obtaining a statement signed by the purchaser that the purchaser is an Indian tribe or member thereof. In the case of the Indian tribe itself, the statement must be attested to by a tribal official. In the case of a member, the statement must also either specify the purchaser's official tribal or BIA census number or, when the purchaser's Indian tribe does not maintain an official census system, be attested to by an official of the purchaser's Indian tribe confirming this statement. This statement may also be provided to the seller by the Indian tribe on behalf of one or more of its members if attested to by a tribal official. Upon request, the Secretary may approve additional methods. This documentation shall be conclusive evidence, and the only material evidence, that the purchaser is an Indian tribe or member thereof.

(b) The Second requirement may be met if the seller keeps records adequate to document that the services are performed on the purchaser's tribe's territory. If the services are performed both on and off the purchaser's tribe's territory, the seller must keep records documenting the value of the services performed on the purchaser's tribe's territory.

(3) Receipts from performing services, other than construction or telecommunications services, in New Mexico in Indian country which are sold to the following persons are subject to the gross receipts tax:

- (a) a person who is not an Indian tribe or member thereof;
- (b) a person who is an Indian tribe other than the Indian tribe on whose territory the sale takes place; and
- (c) a person who is a member of an Indian tribe other than the Indian tribe on whose territory the sale takes place except that, if the person is the spouse of a member of the Indian tribe on whose territory the sale takes place, that person will be considered for the purposes of Subsection D of Section 3.2.4.9 NMAC to be a member of the spouse's Indian tribe.

(4) Receipts from performing services, other than construction or telecommunications services, in New Mexico for an Indian tribe or member thereof are subject to the gross receipts tax when the services are performed outside the tribe's territory, even if performance takes place within the territory of another Indian tribe.

E. Imposition barred by federal law – services in Indian country for tribe or tribal members – construction services:

(1) Receipts from construction services sold to an Indian tribe or member thereof on that tribe's territory are not subject to gross receipts tax if taxation of such receipts is prohibited by federal law. Construction occurs on a tribe's territory when the construction site is located on the tribe's territory.

(2) The seller must demonstrate that the construction service is sold to an Indian tribe or member thereof. The seller must also demonstrate that the construction site is located on the tribe's territory. The documents demonstrating that the receipts are not subject to tax under Subsection E of Section 3.2.4.9 NMAC shall be retained in the seller's records.

(a) The first requirement may be met by obtaining a statement signed by the purchaser that the purchaser is an Indian tribe or member thereof. In the case of the Indian tribe itself, the statement must be attested to by a tribal official. In the case of an individual, the statement must also either specify the purchaser's official tribal or BIA census number or, when the purchaser's Indian tribe does not maintain an official census system, be attested to by an official of the purchaser's Indian tribe confirming this statement. This statement may also be provided to the seller by the Indian tribe on behalf of one or more of its members if attested to by a tribal official. Upon request, the Secretary may approve additional methods. This documentation shall be conclusive evidence, and the only material evidence, that the purchaser is an Indian tribe or member thereof.

(b) The second requirement may be met if the seller keeps records adequate to document that the construction site is located on the purchaser's tribe's territory. If the construction site is located partly on and partly off the purchaser's tribe's territory, the seller must keep records documenting the portion of construction occurring on the purchaser's tribe's territory.

(3) Receipts from construction services in Indian country sold to the following persons are subject to the gross receipts tax:

- (a) a person who is not an Indian tribe or member thereof;
- (b) a person who is an Indian tribe other than the Indian tribe on whose territory the sale takes place; and
- (c) a person who is a member of an Indian tribe other than the Indian tribe on whose territory the sale takes place except that, if the person is the spouse of a member of the Indian tribe on whose territory the sale takes place, that person will be considered for the purpose of Subsection E of Section 3.2.4.9 NMAC to be a member of the spouse's Indian tribe.

(4) Receipts from performing construction services in New Mexico for an Indian tribe or member thereof are subject to the gross receipts tax when the construction site is outside the tribe's territory, even if the construction site is within the territory of another Indian tribe.

F. Imposition barred by federal law – services in Indian country for tribe or tribal members – Telecommunication services:

(1) Receipts from selling telecommunications services to an Indian tribe or member thereof on that tribe's territory are not subject to gross receipts tax if taxation of such receipts is prohibited by federal law. Telecommunications services occurs on a tribe's territory when:

- (a) calls originate or terminate through an instrument on the tribe's territory;
- and
- (b) the service is billed to the Indian tribe or a member thereof.

(2) The seller must demonstrate that the telecommunications service is sold to an Indian tribe or member thereof. The seller must also demonstrate that the telecommunications service originates or terminates through an instrument located on the tribe's territory and is billed

to the Indian tribe or member thereof. The documents demonstrating that receipts from providing telecommunications services are not subject to tax under Subsection F of Section 3.2.4.9 NMAC shall be retained in the seller's records.

(a) The first requirement may be met by obtaining a statement signed by the purchaser that the purchaser is an Indian tribe or member thereof. In the case of the Indian tribe itself, the statement must be attested to by a tribal official. In the case of an individual, the statement must also either specify the purchaser's official tribal or BIA census number or, when the purchaser's Indian tribe does not maintain an official census system, be attested to by an official of the purchaser's Indian tribe confirming this statement. This statement may also be provided to the seller by the Indian tribe on behalf of one or more of its members if attested to by a tribal official. Upon request, the Secretary may approve additional methods. This documentation shall be conclusive evidence, and the only material evidence, that the purchaser is an Indian tribe or member thereof.

(b) The second requirement may be met for fixed location instruments if the seller keeps records adequate to document that calls originate or terminate through instruments located on the purchaser's tribe's territory and that the call is billed to the Indian tribe or member thereof. The second requirement may be met for mobile instruments if the seller keeps adequate records to document that:

(i) with respect to charges billed regardless of volume of calls, the purchaser's address is within the purchaser's tribe's territory and

(ii) with respect to charges for calls, the call either originates or terminates within the purchaser's tribe's territory. Sellers of telecommunications services through mobile instruments may estimate the percentage of receipts for the report month from calls through such instruments which do not originate or terminate on the purchaser's tribe's territory. The estimate shall be the total receipts from calls from purchasers whose address is within the purchaser's tribe's territory for the reporting period multiplied by the percentage of actual receipts from calls by those purchasers originating or terminating off the purchaser's tribe's territory during the previous calendar year. The amount of actual receipts during the previous calendar year from off-territory calls shall be determined based upon evidence satisfactory to the department.

(3) Receipts from selling telecommunications services in New Mexico in Indian country to the following persons are subject to the gross receipts tax:

(a) a person who is not an Indian tribe or member thereof;

(b) a person who is an Indian tribe other than the Indian tribe on whose territory the sale takes place; and

(c) a person who is a member of an Indian tribe other than the Indian tribe on whose territory the sale takes place except that, if the person is the spouse of a member of the Indian tribe on whose territory the sale takes place, that person will be considered for the purpose of Subsection F of 3.2.4.9 NMAC to be a member of the spouse's Indian tribe.

(4) Receipts from selling telecommunications services in New Mexico to an Indian tribe or member thereof are subject to the gross receipts tax when the instrument through which the calls originate or terminate is located outside the tribe's territory, even if the location is within the territory of another Indian tribe.

(5) For the purpose of Subsection F of Section 3.2.4.9 NMAC, "telecommunications services" means the transmission of messages or conversations by persons providing telephone or telegraph services; "telecommunications services" excludes the transmission or re-transmission of radio or television programming.

G. Imposition barred by federal law – receipts of federally licensed Indian traders: The receipts of a federally licensed Indian trader as defined in Sections 25 U.S.C. 261 to 264 from trading with an Indian tribe on that tribe's territory are exempt from the gross receipts tax to the extent that the tax is pre-empted by federal law.

H. Imposition barred by federal law – Indian business within tribe's territory:

(1) The receipts of a qualifying business from transactions occurring within the tribe's territory are exempt from gross receipts tax to the extent that such tax is pre-empted by federal law. The receipts of a qualifying business from transactions occurring anywhere else are not exempt under Subsection H of Section 3.2.4.9 NMAC

(2) A "qualifying business" is a business that:

(a) is physically located within an Indian tribe's territory; and

(b) is fifty percent or more owned by individuals who are enrolled members of the Indian tribe within whose territory the business is located, provided that for purposes of establishing the percentage of ownership the Indian spouse of an enrolled member of that Indian tribe is to be considered an enrolled member of that Indian tribe. **[3/16/95, 8/30/95, 11/15/96, 4/30/99; 3.2.4.9 NMAC – Rn & A, 3 NMAC 2.4.9, 4/30/01]**