
FYI-205

New Mexico
Taxation and Revenue Department

FOR YOUR INFORMATION

Tax Information/Policy Office ♦ P.O. Box 630 ♦ Santa Fe, New Mexico 87504-0630

SALES OF UTILITIES ON INDIAN TERRITORY

This FYI summarizes the federal pre-emption of the imposition of New Mexico gross receipts tax on the gross receipts of utility and mobile telephone service companies from sales of natural gas, electricity, water, cable television service, telecommunications and mobile phone services and internet access service on Indian territory. The publication includes a description of the kinds of verification the seller must obtain from the buyer to document the pre-emption of gross receipts tax.

This publication is accurate as of its date of publication. Taxpayers should be aware that subsequent legislation, regulations, court decisions, revenue rulings, notices and announcements could affect the accuracy of its contents. Please contact your district office if in doubt.

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FEDERAL PROHIBITION OF GROSS RECEIPTS TAX

Federal law may prohibit New Mexico from imposing gross receipts tax on the receipts from transactions with Indian tribes or tribal members if the transactions occur on the territory of the tribe or tribal member. The receipts from sales made to members of tribes other than the tribe on whose territory the sale occurs remain subject to New Mexico gross receipts tax.

A federal prohibition of New Mexico gross receipts tax may apply to receipts from leases, services (including construction services and telecommunications services) and sales of general tangible personal property.

The prohibition also applies to the gross receipts from sales of natural gas, electricity and water by a “public utility”, as defined in Section 62-3-3 NMSA 1978. A sale occurs on the tribe’s territory when the meter measuring the quantity sold is located on the tribe’s territory.

The federal prohibition of New Mexico gross receipts tax is treated in detail in Regulation 3.2.4.9 NMAC, which may be accessed through “Publications” on the Resources menu on the home page of TRD’s web site at www.tax.state.nm.us.

Receipts from selling natural gas, electricity, water or telecommunications services in Indian country in New Mexico to the following customers *do not qualify* for exemption from New Mexico gross receipts tax under the federal prohibition:

1. a customer who is not an Indian tribe or member thereof;
2. a customer who is an Indian tribe other than the Indian tribe on whose territory the sale takes place; and
3. a customer who is a member of an Indian tribe other than the Indian tribe on whose territory the sale takes place *except that*, if the customer is the spouse of a member of the Indian tribe on whose territory the sale takes place, that customer will be considered to be a member of the spouse's Indian tribe (for the purposes of Regulation 3.2.4.9(F) NMAC).

REPORTING REQUIREMENTS

When New Mexico gross receipts tax is prohibited by federal law, the seller or lessor may treat the affected gross receipts as receipts *exempt* from gross receipts tax. Exempt gross receipts need not be reported to the New Mexico Taxation and Revenue Department (TRD) on the CRS-1 Form¹ used to report and pay New Mexico gross receipts, withholding and compensating taxes.

¹ Reporting of some pre-empted receipts may be required if the transaction occurs on the land of an Indian Nation, Tribe or Pueblo who has entered into a cooperative agreement with the Taxation and Revenue Department. See “Tribal Cooperative Agreements” on the next page.

The taxpayer may, however, choose to report such gross receipts on the CRS-1 Form, but treat them as *deductible* receipts, which are subtracted from total gross receipts before gross receipts tax is calculated. To report deductible gross receipts, the taxpayer must obtain a CRS identification number (also called a New Mexico business tax identification number) from TRD.

Business Location

Using the correct business location to report gross receipts tax is important not only because it enables TRD to distribute local options gross receipts taxes to the proper municipalities and counties, but also because the appropriate gross receipts tax rate is the rate that is in effect at the business location. The correct business location thus must be used to determine how much gross receipts tax is paid and where it should be sent. FYI-200, available through TRD's web site at www.tax.state.nm.us, provides further guidance regarding the determination of the correct business location.

Generally, the taxpayer's business location is the place where the taxpayer's business maintenance functions are performed and business records are kept. The location of the customer or point of delivery of products and services usually does not constitute a business location.

There are exceptions to the general rule, however, for utilities, real estate sales, construction services. For such exceptional transactions, the location of the customer, the real estate or the construction project becomes a business location for the seller.

Tribal Cooperative Agreements

An exception is also made for transactions occurring on the territory of Indian tribes, nations and pueblos that have entered into cooperative taxing agreements with the state of New Mexico. The state has entered into agreements with the Pueblos of Santa Clara, Santa Ana, Nambe, Laguna, Sandia, Pojoaque, Cochiti, Santo Domingo, Ohkay Owingeh, and Taos, the Jicarilla Apache Nation and the Albuquerque Indian School (AIS) Governing Board to collect a tax imposed by those tribes rather than New Mexico gross receipts tax. A person selling or delivering goods or performing services on the tribal land of a tribe or pueblo that has entered into such a cooperative agreement must report those receipts based on the tribal location of the sale or delivery of the goods or performance of the service, rather than the seller's business location. For example, a seller of janitorial services whose business location is in Albuquerque would report the gross receipts from sales of services sold to Laguna Pueblo and performed on that pueblo's territory using the Laguna Pueblo location code of 33-901 rather than the Albuquerque location code of 02-100. The correct gross receipts tax rate would be the rate for Laguna Pueblo's location code, 33-901, not the rate for the Albuquerque business location code.

The agreements also provide for mutual credits to the total tax when both the state (including local option taxes) and tribal taxes imposed on a taxpayer do not exceed the amount that either imposes individually. TRD is authorized to enter into similar agreements with all 19 New Mexico Pueblos and the Mescalero Apache Tribe.

DOCUMENTATION REQUIREMENTS

To document the exemption or deduction of gross receipts from sales of natural gas, electricity, water and telecommunications (telephone and telegraph) services that fall under the federal prohibition of New Mexico gross receipts tax, a public utility must retain in its records documents showing that a sale is to an Indian tribe or tribal member through a meter on that tribe's territory.

Evidence of Sale to Tribe or Tribal Member

According to Regulation 3.2.4.9(B) NMAC, as evidence that a sale is to an Indian tribe or tribal member, a public utility may obtain from the customer a statement, signed by the buyer, that the buyer is an Indian tribe or tribal member. If the buyer is an Indian tribe, the statement must be attested to by a tribal official.

When a sale is to a member of the tribe, the statement must specify the tribal member's official tribal or Bureau of Indian Affairs census number. If the tribe does not maintain an official census system, the tribal member's statement must be signed by an official of the member's Indian tribe as verification of the buyer's tribal membership. A statement of tribal membership may be provided to the public utility by the Indian tribe on behalf of one or more of its members, if the statement is attested to by a tribal official.

The secretary of Taxation and Revenue has approved two additional methods for verifying tribal membership of buyers. These are:

- 1) Self-certification by tribal or pueblo members, and
- 2) Reliance on a customer's physical address verified by reference to tribal maps and population data resources to lie within tribal or pueblo lands.

Regarding the self-certification method, the model declaration provided in Figure 1 on the next page contains the satisfactory information and certification to establish that the customer or the customer's spouse is a member of the tribe or pueblo. Use of services on the member's account by "dependants", as defined for federal income tax purposes, will not affect the member's tax exempt status, but the use of services on the account by non-dependant, non-members cannot be treated as exempt from New Mexico gross receipts tax. Dependants or other persons subscribing to services directly must establish their own tax exempt status to qualify.

DECLARATION OF TRIBAL MEMBERSHIP AND RESIDENCY	
For the purpose of claiming an exemption from the collection of New Mexico Gross Receipts Taxes, I, _____ (Print Name), hereby certify and attest that I (or my spouse) am currently an enrolled member of the _____ (Print Tribe or Pueblo Name) and that I currently reside upon the land of that tribe or pueblo.	
_____ Member's Signature	_____ Date

Figure 1. Model Self-certification Declaration.

The seller must obtain approval from TRD before making any material changes to the language of the model declaration in Figure 1. The seller must obtain a signed declaration from every new or existing customer seeking the exemption from New Mexico gross receipts tax on the seller's sales. Thereafter, the seller must obtain a new declaration whenever there is a change that could indicate a possible change in the status of that customer that could affect the customer's eligibility to be treated as exempt from the tax. Examples of such changes are a new mailing or physical address, a change to the party billed for service or a new service delivery address.

A seller who chooses to rely upon verification of tribal membership by means of physical addresses within tribal or pueblo boundaries must:

1. Maintain documentation showing how it determined that the physical addresses of its customers are located within tribal or pueblo boundaries;
2. Maintain documentation showing that the tribal or pueblo government was provided with the identification of the seller's customers residing on tribal or pueblo lands and that the tribe or pueblo provided a response indicating which residents, if any, were not enrolled members of the tribe or pueblo; and
3. Develop a plan to keep its information regarding customers residing on tribal or pueblo lands current, using periodic updates (at least annually) or other methods that ensure that information is current.

Evidence of Sale on Tribal Territory

As evidence that a sale occurs on the customer's tribal territory, a **public utility company** must keep records that adequately document that the meter through which the natural gas, electricity or water is sold is located on the tribe's territory.

A seller of **telecommunications (telephone and telegraph) services** through *fixed instruments* must keep records that adequately document that calls originate or terminate through instruments located on the tribal territory of the purchaser and that the call is

billed to the Indian tribe or tribal member. For *mobile instruments*, the seller must keep records that adequately document that:

1. The purchaser's address is within the purchaser's tribal territory; and
2. The call either originates or terminates within the purchaser's tribal 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 must 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 must be determined based upon evidence satisfactory to the department.

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.

TAXPAYER INFORMATION

The Department offers a variety of taxpayer information. Some information is free and other information must be purchased.

General Information. FYIs and Bulletins present general information with a minimum of technical language. All FYIs and Bulletins are free and available through all local tax offices, the Tax Information and Policy Office, and on the Internet. The Taxation and Revenue Department's Internet address is:

<http://www.tax.state.nm.us>

Regulations. The Department establishes regulations to interpret and exemplify the various tax acts it administers. The Taxation and Revenue Department regulation book is available from the New Mexico Compilation Commission on a prepaid basis. The Compilation Commission also has a compact disk of all statutes and regulations. Specific regulations are also available at the State Records Center or on its web page at www.nmcpr.state.nm.us/nmac.

Order regulation books directly from:

New Mexico Compilation Commission
<http://www.nmcompcomm.us/index.html>

Rulings. Rulings signed by the Secretary and approved by the Attorney General are written statements that apply to one or a small number of taxpayers. A taxpayer may request a ruling (at no charge) to clarify its tax liability or responsibility under specific circumstances. The request for a ruling must be in writing, include accurate taxpayer identification and the details about the taxpayer's situation, and be addressed to the Secretary of the Taxation and Revenue Department at P.O. Box 630, Santa Fe, NM 87504-0630. The taxpayer's representative, such as an accountant or attorney, may request a ruling on behalf of the taxpayer but must disclose the name of the taxpayer. While the department is not required to issue a ruling when requested to do so, every request is carefully considered.

The department will not issue a ruling to a taxpayer who is undergoing an audit, who has an outstanding assessment, or who is involved in a protest or litigation with the department over the subject matter of the request. The Secretary may modify or withdraw any previously issued ruling and is required to withdraw or modify any ruling when subsequent legislation, regulations, final court decisions or other rulings invalidate a ruling or portions of a ruling. Taxation and Revenue Department rulings are compiled and available on the department's web page free of charge at www.tax.state.nm.us. Click on "publications."

Public Decisions & Orders. All public decisions and orders issued by the hearing officers since July 1994 are compiled and available on the department's web page free of charge at www.tax.state.nm.us. Click on "publications."

FOR FURTHER ASSISTANCE

Local tax offices can provide full service and information about the department's taxes, programs, and forms as well as specific information about your filing situation.

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This publication provides general information. It does not constitute a regulation, ruling, or decision issued by the Secretary of the New Mexico Taxation and Revenue Department. The Department is legally bound only by a regulation or a ruling [7-1-60, New Mexico Statutes Annotated, 1978]. In the event of a conflict between FYI and statute, regulation, case law or policy, the information in FYIs is overridden by statutes, regulations and case law. Taxpayers and preparers are responsible for being aware of New Mexico tax laws and rules. Consult the Department directly if you have questions or concerns about information provided in this FYI.