

This is an amendment to 3.2.1 NMAC, Section 12, effective 12/19/2023.

3.2.1.12 ENGAGING IN BUSINESS:

A. Engaging in business [~~—Generally~~]:

(1) Generally: For periods beginning July 1, 2020, “engaging in business” conforms to the constitutional requirement for substantial nexus under *South Dakota v. Wayfair*, 585 U.S. ___ (2018). A person that has physical presence in the state and is also conducting activity with the purpose of direct or indirect benefit is engaging in business and subject to the imposition of gross receipts tax. A person that does not have physical presence in the state is nevertheless engaging in business and has substantial nexus in New Mexico if, in the preceding calendar year, that person has total taxable gross receipts from sales, leases and licenses of tangible personal property, sales of licenses and sales of services and licenses for use of real property sourced to this state pursuant to Section 7-1-14 NMSA 1978, of at least one hundred thousand dollars (\$100,000).

(2) A person who is required to register with the department for the purposes of the gross receipts tax may close its gross receipts tax account following any calendar year in which it no longer meets the requirements for engaging in business set out in Section 7-9-3.3 NMSA 1978. For example, a person who does not currently have physical presence in New Mexico and who did not have total taxable gross receipts from sales, leases and licenses of tangible personal property, sales of licenses and sales of services and licenses for use of real property sourced to this state pursuant to Section 7-1-14 NMSA 1978 of at least \$100,000, may close its gross receipts tax account for the 20XX calendar year. In order to close its registration and its future filing obligations, such person must submit its request to close its registration and specify the closure date on a form prescribed by the department. The person’s duty to register will resume in any calendar year in which it meets the requirements of Section 7-9-3.3 NMSA 1978.

(3) A person who has not registered or been otherwise identified is nonetheless a “taxpayer” subject to the provisions of the Tax Administration Act, 3.1.1.13 NMAC.

B. Affiliated corporations:

(1) When a corporation is carrying on or causing to be carried on, with a wholly owned subsidiary, any activity with the purpose of direct or indirect benefit, both the corporation and the subsidiary are "engaging in business".

(2) Example: B corporation, which operates a hotel supply house, sells supplies only to C Hotel Corporation, which owns all the stock in B Corporation. B claims that since it sells only to C, its parent corporation, it is not engaging in business. B and C are each engaging in business because the purpose of their activities is to benefit either or both corporations.

C. Corporation not for profit: When a corporation not for profit is carrying on or is causing to be carried on any activity with the purpose of direct or indirect benefit it is "engaging in business".

D. Leasing property:

(1) Persons leasing property employed in New Mexico are engaging in business within the state for the purpose of direct or indirect benefit.

(2) Example: X, an out of state business, leases construction machinery to Y who employs the leased property in New Mexico. X asks if X is engaged in business in New Mexico for purpose of registration, reporting and paying the gross receipts tax. X is engaged in business in New Mexico.

E. Hotels and motels providing interstate telecommunications service to guests:

(1) Hotels, motels and similar establishments offering interstate telecommunications service to guests in conjunction with the rental of rooms or other facilities are not "engaging in interstate telecommunications business" for purposes of the Interstate Telecommunications Gross Receipts Tax Act.

(2) A hotel, motel or similar establishment is primarily engaged in the business of renting rooms and meeting facilities to the general public. Providing interstate telephone service or other interstate telecommunications services to guests is incidental to the primary business of the hotel, motel or similar establishment. Receipts from providing such service are additional receipts from engaging in the primary business and are subject to the provisions of the Gross Receipts and Compensating Tax Act.

(3) Subsection D of 3.2.1.12 NMAC is retroactively applicable to transactions occurring on or after July 1, 1992.

F. Persons not engaging in business - foster parents: Individuals who enter into an agreement with the state of New Mexico to provide foster family care for children placed with them by the state are not thereby

engaging in business. Receipts of the individuals from providing foster care pursuant to such an agreement are not receipts from engaging in business.

G. Persons not engaging in business - certain caretakers: Individuals who enter into an agreement with the state of New Mexico to provide non-medical personal care and housekeeping assistance to low income disabled adults pursuant to the critical in home care program are not thereby engaging in business. Receipts of the individuals from such caretaking activities are not receipts from engaging in business.

H. Persons not engaging in business - home care for developmentally disabled family members: Any individual who enters into an agreement with the state of New Mexico to provide home based support services for developmentally disabled individuals in the home of the developmentally disabled individuals or the home of the support provider and receives payments which under 26 USCA 131 are "qualified foster care payments" is not thereby engaging in business. Receipts of the individuals which are "qualified foster care payments" from providing such home based support services pursuant to such an agreement are not receipts from engaging in business.

I. Owner engaged in business when selling to an owned entity:

(1) Except as provided in Paragraph (2) of this Subsection, when an owner of an entity sells property in New Mexico to, leases property employed in New Mexico to, or performs services in New Mexico for the entity or other owners of the entity, the owner is engaging in business in New Mexico except when the transaction may be characterized for federal income tax purposes as a contribution of capital.

(2) When a partner or interest holder in an entity taxed as a partnership is allocated profits or receives a guaranteed payment or other distributions for activities undertaken as a partner on behalf of the partnership such as administrative services done solely for the benefit of the partnership or for activities for third - parties transacting business with the partnership, the partner is not engaging in business separately from the partnership and the allocations, payments, or distributions are not gross receipts. A partner may, however engage in business separately from the partnership and any transactions between that partner and the partnership, where the partner is not acting as a partner on behalf of the partnership, constitute gross receipts from engaging in business. Indicia that a partner is not acting as a partner on behalf of the partnership may include:

(a) that the partner engages in similar transactions with third parties other than the partnership; or

(b) that the allocation, payment, or distribution made by the partnership is not made under the partnership agreement; or

(c) that the partner's transaction(s) with the partnership involve the sale or lease of goods or the sale of services not provided by the partnership to third parties.

(3) For the purposes of Subsection H of 3.2.1.12 NMAC, an "entity" means any business organization or association other than a sole proprietorship.

J. Persons not engaging in business - sale or exchange of renewable-fueled electricity generated from a system installed in a personal residence. Any individual who sells or transfers electricity to an entity engaged in the business of selling electricity, for which the individual receives monetary compensation or credit against a future month's electricity use, is not engaged in business if the electricity is generated from a renewable-fueled system installed in a personal residence.

[3.2.1.12 NMAC - Rp, 3.2.1.12 NMAC 10/13/2021; A, 12/19/2023]