

New Mexico Tax Bites

Tax and motor vehicle news from the 47th State

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Recent Tax Case Decisions: Who Said What?

A series of long-awaited legal decisions rendered in New Mexico in late 2005 and 2006 brought a mix of clarity and confusion to the interpretation of New Mexico gross receipts and corporate income tax laws.

Kmart and Sonic

Two cases decided by the New Mexico Supreme Court were related by their findings that the taxation of receipts from the sale of a license or a franchise depend upon the location of the sales transaction, not the place at which the property is used.

In *Kmart Corp. v. Taxation and Revenue Department*, the Court ruled that an investment holding company's sales of licenses to use Kmart's trademarks, trade names and domestic services marks used in New Mexico are not subject to New Mexico gross receipts tax if the sales are transacted outside this state. TRD had maintained that receipts from sales of licenses used in New Mexico were taxable, regardless of where the sale transaction occurred. The Supreme Court reversed a Court of Appeals decision that agreed with TRD's contention. Citing Section 7-9-3.5 NMSA 1978, which defined "gross receipts" to mean, in part, receipts from "selling property in New Mexico", the Supreme Court interpreted that language to mean that property must be sold in New Mexico in order for gross receipts tax to apply. Otherwise, the Court found, the statute would read "selling property used in New Mexico."

In *Sonic Industries v. State of New Mexico*, the Supreme Court again overturned a lower court finding in TRD's favor. The Court applied its *Kmart* reasoning to receipts from sales of franchises used by New Mexico franchisees. Such receipts, the Court ruled, also are exempt from gross receipts tax if the franchise agreements are executed outside New Mexico.

In response to the Court's *Kmart* interpretation of the definition of "gross receipts" in Section 7-9-3.5 the 2006 New Mexico Leg-

islature amended that definition to mean receipts from "selling property located in New Mexico." The amended definition, which became effective July 1, 2006, makes clear that licenses, such as software licenses and satellite TV contracts, as well as franchise fees, are taxed where used, not where contracts are signed.

Dell Catalog Sales

TRD's administrative hearing officer issued a decision and order upholding the assessment of gross receipts tax against Dell Catalog Sales, despite that Internet seller's lack of a direct physical presence in New Mexico. The hearing officer ruled that BancTec, Inc., acted as Dell's service representative in the state, performing some 300 service calls a year for Dell's New Mexico customers. The extensive control Dell maintained over BancTec gave Dell an indirect physical presence in New Mexico and sufficient nexus for gross receipts tax to apply to sales in which Dell's risk of loss transferred to customers in New Mexico, the hearing officer found. Dell appealed the decision to the New Mexico Court of Appeals.

Wal-Mart Stores, Inc.

In this TRD administrative hearing, the hearing officer found that, based on the Supreme Court's *Kmart* decision, gross receipts tax did not apply to royalty receipts from sales of licenses to use Wal-Mart trademarks in New Mexico.

The hearing officer upheld TRD's use, for corporate income and franchise tax purposes, of a modified three-factor formula for apportioning the income of a Delaware holding company which earned income in multiple states by licensing the use of the Wal-Mart brand name. The method was the same as that approved by the New Mexico Court of Appeals in *Kmart Properties, Inc., v. Taxation and Revenue Dept.* ■

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"Gross receipts" means the total amount of money or the value of other consideration received from selling property located in New Mexico, from leasing or licensing property employed in New Mexico, from selling services performed outside New Mexico, the product of which is initially used in New Mexico, or from performing services in New Mexico.

Section 7-9-3.5 NMSA 1978
As amended by the 2006
New Mexico Legislature

(Effective July 1, 2006)

From Secretary Jan Goodwin

Introducing: Libby Gonzales

The efficient and fair administration of the array of complex tax laws enacted by the New Mexico Legislature demand a broad range of education, skills and experience. The Taxation and Revenue Department is fortunate to have people who fill that difficult bill serving in key management positions, as well as the hundreds of workers who serve the public daily with dedication and commitment. I'd like to use this space from time to time to introduce to you some of our TRD team's key players. Today, I'd like you to meet Libby Gonzales, director of our Revenue Processing Division, which is responsible for processing hundreds of thousands of tax returns for more than 50 tax programs every year.

Libby has worked for the Taxation and Revenue Department (TRD) for 20 years. Libby began her career in state government as a Tax Accounts Auditor in the Technical Services Bureau where she performed out of state audits, assigned audits to district auditors and researched the status of audit assessments for cost recovery at the end of the fiscal year.

In 1989 Libby was named to a supervisory position in the Department's Revenue Processing Division (RPD). Fourteen years later she was appointed Division Director of RPD where she oversees the mailing of more than 3 million

pieces of mail, the processing of over 2 million returns and the deposit of nearly \$5 billion dollars into state coffers, which is later dispersed to counties and municipalities and other state agencies.



Libby Gonzales

Libby graduated magna cum laude from the College of Santa Fe with a Bachelor's of Business Administration. She is board president of New Vistas, which provides counseling services and rehabilitation services to at risk babies and children up to three years old and their families, as well as peer counseling and job placement for developmentally disadvantaged adults. ■

TRD to Offer Expanded Online Services

New online features promise to make many tax transactions and inquiries easier for taxpayers in the very near future.

The personal income tax (PIT) electronic filing application will be completely redesigned in time for the filing of returns for tax year 2006 in 2007. In TRD's ongoing efforts to encourage taxpayers to choose the electronic filing option, the revamped PIT program will include line-by-line instructions, error descriptions for easy problem solving, form-printing capability and a refund status report. The enhanced PIT electronic filing program will be available beginning on Tuesday, January 16, 2007, at [https://ec3.](https://ec3.state.nm.us/NMWebFile)

[state.nm.us/NMWebFile](https://ec3.state.nm.us/NMWebFile).

Another new feature, of interest to CRS taxpayers, will be the Taxpayer Access Point (TAP) software. This application, which will be phased in beginning at the end of 2006, will allow taxpayers to perform account inquiry and update activities currently unavailable through the Internet. Taxpayers will be able to register for a CRS identification number, change names and addresses in their registration records, close an account and view account balances and details of returns and payments.

These online capabilities are part of TRD's continuing pursuit of better customer service for New Mexico taxpayers. ■

PIT refund status and enhanced filing capabilities, along with new CRS online features, will allow taxpayers greater independence in creating, monitoring and updating their New Mexico tax accounts.

TRD Legislative Proposals for 2007

Move Ahead with Governor's Approval

As of the first late October, Governor Bill Richardson's office had approved 23 of the 37 pieces of legislation proposed by TRD for the 2007 session of the New Mexico Legislature. Most of the remaining proposals were denied or put on hold for further review.

Among TRD's approved proposals are:

- Mandatory electronic filing of personal income tax returns by tax preparers who file more than 25 income tax returns. Returns for taxpayers who do not want their returns filed electronically are excluded from this requirement if the taxpayers indicate their wishes in writing. Tax preparers who do not comply with this requirement will be subject to a maximum penalty of \$5.00 per return.
- Legislation allowing TRD to honor the IRS's revision of the duration of automatic filing extensions from four to six months.
- Reducing the threshold for mandating a special payment method from more than \$25,000 to \$10,000.
- Requiring employers, payors, withholders and pass-through entities that do not have a New Mexico Department of Labor filing requirement to file an information return with TRD through the Tri-Agency system on a quarterly basis. All employers with more than 50 employees would be required to file electronically or face a penalty.
- Allowing taxpayers to enter into an agreement with TRD to report gross values, gross receipts, deductions or the value of property on an estimated basis for gross receipts tax, compensating tax, oil and gas severance tax, oil and gas conservation tax, oil and gas emergency school tax and oil and gas ad valorem production tax for a period of up to four years. "Estimated basis" means a methodology that is reasonably expected to approximate the tax that will be due over the period of the agreement using summary, rather than detail, data or alternate valuation applications or methods. This change would give TRD the flexibility to negotiate alternative valuation methods under the oil and gas tax programs.
- Authorizing the New Mexico Motor Vehicle Division to register, under NAFTA, Mexican truckers in New Mexico without requiring the relinquishment of the carrier's Mexican title. Without a title, Mexican carriers would be unable to return to Mexico.
- Requiring Mexican truckers who have been adopted by New Mexico to furnish a surety bond to ensure the payment of the weight distance or special fuel excise tax.
- Making 10 amendments to the commercial driver's license statutes to comply with the federal Motor Carrier Safety Act. A state not in compliance with that law is subject to withholding of 5 percent of federal-aid highway funds for the first fiscal year and 10 percent for the second and subsequent years of noncompliance.
- Allowing an out-of-state distributor to remit the gasoline or special fuel excise tax imposed on fuel imported into New Mexico on behalf of the importer. This would avoid requiring importers to pay the tax twice until they can claim a refund of the tax paid in the other state.
- Amending the Cigarette Tax Act to address concerns expressed by the cigarette and cigar industries by providing clarification of the intent of the Act and eliminating inconsistencies. The changes would provide clear guidance to Cigarette Tax Act taxpayers.
- Listing all tax credits administered by TRD under the Tax Administration Act to provide consistency in administration of the tax credits and ensure that related taxpayer information is covered by the confidentiality statute.
- For a taxpayer who has entered into a managed audit agreement with TRD, extending from 30 days to 180 days the time allowed after the mailing of an assessment to remit payment in order to avoid the accrual of interest.
- Providing TRD statutory authority to inform licensing bodies when a licensee fails to file or pay taxes.

Additional TRD legislative proposals may be introduced, as well as tax bills proposed by the governor. You may visit the Legislature's web site at www.legis.state.nm.us. ■

Additional TRD-proposed legislation remains under review by the Governor's Office. Tax legislation also will be proposed by Governor Richardson for consideration by the New Mexico Legislature, which will convene in January, 2007, for a 60-day session.

State Revenues Show Steady Growth

For the second consecutive fiscal year, New Mexico's recurring revenue showed double-digit growth in FY 2006, according to the latest report issued by the Legislative Finance Committee, the New Mexico Department of Finance and Administration and TRD in October, 2006.

The report cautioned, however, that the growth will slow significantly in the near future. The forecast calls for a 1.3 percent decline in FY 2007 and a 2.9 percent increase in FY 2008.

New Mexico's revenue growth comes from a broad range of economic activities, some of which show greater strength in the state than in the rest of the United States. Statistics through May, 2006, suggested a 12 percent growth in gross receipts tax revenues for FY 2006, a rate surpassing the 7.3 percent growth seen for FY 2005. FY 2006 taxable gross receipts increased by \$5.3 billion (11.1 percent).

The construction industry accounted for 25.5 percent of the total increase in taxable gross receipts, with an additional \$1.4 billion dollars in receipts above the previous year. The next largest percentage of total growth, 16.4 percent, came from the retail trade industry, which saw its revenues boosted by \$852 million over FY 2005. Another major contributor to the revenue growth was "Other Services", with taxable gross receipts \$593 million above those in FY 2005. Mining, oil and gas showed an increase of more than \$508 million, while wholesalers generated more than a \$421 million increase.

Revenues from New Mexico personal income tax (PIT) grew from 2005 to 2006, despite cuts in the tax rates, and are predicted to rise gradually through 2010.

PIT collections reached \$1.125 billion in 2006, up 3.7 percent from 2005. The forecast for 2007 PIT collections calls for no increase to \$1.125 billion. By 2010, the prediction is for \$1.3 billion collected, based on yearly-climbing underlying personal income.

High wage and salary growth, gains in dividends, income and rents, and strength in taxable income are offsetting the impact of PIT rate reductions, the report states. That underlying economic growth is expected to slow from 2007 through 2010, returning to more normal rates of growth of around 6.0 percent, as opposed to the 16 percent growth seen in 2006. Net revenue growth will parallel underlying growth when all major rate changes are fully phased in.

Revenues from corporate income tax

(CIT) also appear to have a healthy outlook, although the CIT revenue growth, like that of PIT, is expected to slow in FY 2007 and the immediate future. The CIT revenues for FY 2006 are almost 60 percent higher than those for FY 2005. The report predicts growth will return to a more normal level of 5 percent in FY 2007.

The top 100 firms account for more than 70 percent of total CIT payments during FY 2006. Half of the CIT payments during that period came from mineral extraction companies. Slightly more than a quarter of the payments were made by firms engaged in manufacturing. The mining and manufacturing industries paid some \$250 million during FY 2006, almost 80 percent of the payments by the top 100 firms.

The report notes that revenue projections for mineral production taxes, rents and royalties will decline from a peak of \$1.16 billion in FY 2006 to \$933 million in FY 2007. The decrease resulted from the significantly lower crude oil prices and slightly lower natural gas prices upon which the revenue forecast is based.

While earnings on state balances were revised downward by \$10 million in FY 2006, \$29.8 million was added to the FY 2007 forecast, and an additional \$17.8 million is expected in FY 2008, according to the report. Greater general fund earnings from state balances were created by higher portfolio balances and a higher federal funds rate. Portfolio balances at the end of FY 2006 were about \$2.9 billion, much higher than previous years, when the average balance was about \$2.0 billion.

The FY 2008 forecast for recurring revenues of \$5,689.3 million yields \$576.3 million of "new money" compared with FY 2007 recurring appropriations of \$5,113.0 million. Recurring revenues for 2008 are expected to be a modest \$161.8 million more than expected for FY 2007.

The report tempers its forecast with a caution that high oil prices may cause inflation, forcing the Federal Reserve Board to increase interest rates to the point that they significantly reduce growth. Increasing interest rates and inflation may cause the housing market and construction industry, along with consumer spending, to slow faster than expected. Further complicating the ability to forecast state revenues is the fact that energy prices are volatile and notoriously difficult to predict accurately, the report points out. ■

Each change of 10 cents per mcf in the price of natural gas for a year changes General Fund revenue by about \$11.5 million for that year. Each \$1.00 per barrel change in the price of oil causes a \$4 million change.

REGULATIONS

After public hearings in July-September, these regulations were filed by TRD and are now effective:

18.19.3.50 NMAC
(Salvage-Branded Titles—Definitions);
18.19.3.51 NMAC
(Salvage-Branded Titles—Stolen Vehicles);
18.19.3.52 NMAC
(Salvage-Branded Titles—Salvage Vehicles);
18.19.3.53 NMAC
(Salvage-Branded Titles—Branding of Title);
18.19.4.7 NMAC
(Definitions as Used in 18.19.4 NMAC);
3.6.5.27 NMAC **(Special Method of Valuation—Land Used Primarily for Agricultural Purposes);**
3.2.241.13 NMAC
(Receipts of Corporate Practice).

* * * * *

This regulation has been filed and became effective October 16, 2006:

3.2.241.10 NMAC
(Receipts from Insurance Companies Pursuant to Contract with Independent Practice Organizations).

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These proposed regulations are under review by the TRD secretary after public hearing:

3.9.1.7 NMAC
(Definition—Small Cigars Defined);
3.9.1.9 through 3.9.1.18 NMAC **(Relating to the Cigarette Tax Act).**

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A public hearing scheduled on October 19 for Reg. 18.19.5.12 NMAC pertaining to proof of identification number, identity and residency for driver's licenses and id cards was postponed. A hearing is scheduled on November 20 for Reg. 3.1.12.13 NMAC relating to collection of community debt against a spouse or former spouse. For details, please visit "Public Events" on the home page of our web site at www.state.nm.us/tax.

FREE CRS WORKSHOPS

November-December, 2006

Albuquerque: Nov. 7, 14, 21 and 28*, Dec. 5, 12, 19 and 26*	505/841-6200
Santa Fe: Nov. 14	505/827-0951
Las Cruces: Nov. 21, Dec. 19	505/524-6225
Farmington: Dec. 14	505/599-9701
Roswell: Nov. 7	505/624-6065
Hobbs: Nov. 9	505/393-0163
Clovis: Nov. 14	505/763-5515
Carlsbad: Nov. 16	505/885-5616

* Workshops for businesses that are new employers. Please call to reserve a place and verify the time and location of the workshop. Telephone numbers are for district offices or satellites.

The complete 2006 CRS workshop schedule is available on our web site at www.state.nm.us/tax. You will find the schedule by clicking on "Public Events" under "Resources" on the home page.

To Contact Us

Main Office Telephones

All telephone numbers use the 505 AREA CODE. Also see district office numbers above, under "Free CRS Workshops."

Main Switchboard: 827-0700
Motor Vehicle Division: 827-2296
Audit & Compliance Division: 827-0900
Revenue Processing Division: 827-0800
Admin. Services Division: 827-0369
Property Tax Division: 827-0870
Office of the Secretary: 827-0341

Tax Information & Policy:
827-0908, 0679, 2588, 0928, 2523

Inspector General:
841-6580 (Alb.) 476-1510 (S.F.)

Tax Fraud Investigations Division:
841-4731 (Alb.), 476-1765 (S.F.)

New Mexico Tax Fraud Hotline:
1-866-457-6789

Satellite Office Telephones

Alamogordo 505/437-2322
Carlsbad 505/885-5616

Clovis 505/763-5515
Hobbs 505/624-6065
Silver City 505/388-4403

Mail

New Mexico Taxation & Revenue Dept.
P.O. Box 630
Santa Fe, NM 87504-0630

Street Addresses

For the street address of your nearest district office call either TRD's main switchboard at 505/827-0700 or the appropriate number shown on the CRS workshop calendar above.

For other New Mexico agencies check the state web site at www.state.nm.us.

E-mail

policy.office@state.nm.us

TRD Web Site

www.state.nm.us/tax

Fax

Tax Information & Policy 505/827-0331