**O’Neill Consulting LLC**

3301 Beach Road NE

Albuquerque NM 87104-2911

505 228-8563

May 30, 2024

Stephanie Schardin Clarke

Secretary of Taxation and Revenue

P.O. Box 630

Santa Fe, New Mexico 87504-0630

Dear Secretary Schardin Clarke:

This is a comment for the record regarding your gross receipts tax rule amendments that were proposed May 21, 2024.

1. General

 In general, I am gratified that Taxation and Revenue Department is taking the opportunity provided by new legislation to review blocks of old rules, whether or not those rules are directly affected by the new legislation. As you know, I have shared some of my efforts over the years to modernize Department rules and I applaud your efforts here. Perhaps this is the beginning of a regular program?

The addition of some cross-referencing within the rules is also welcome.

There are some nit-picks mixed in with my substantive comments. Since in most cases these rules will not be re-visited any time soon, they ought to be set out in the most comprehensible fashion.

I am puzzled by one thing. While there may be a reason rooted in the deeper rhythms of the New Mexico Administrative Code, why replace all of the existing rules instead of simply amending the relevant ones? For example, in this proposal 3.2.116.1 through 7 and 3.2.211.1 through 6 are replaced even though there is no change to any of them. What is accomplished?

2. Amendments of 3.2.116 NMAC

 (a) **116.8**: Except as noted below, I don’t disagree with the substance of any of the offered changes but I believe they could be written more felicitously. I propose a revision of subsections D through F as follows:

 “D. whether any promotional activity is associated with the transaction, such as advertising or a business listing on web site;

 E. whether the seller(s)/lessor(s) hold themselves out, or represent themselves, as being in business;

 F. whether the seller/lessor is found to be engaging in business pursuant to Section 7-9-3.3 NMSA 1978.”

 Note: The meaning of your proposed Subsection F eludes me. Suppose, for example, the “type of sale” is a lease. My suggested replacement is actually more of a placeholder for a clearer statement of the original idea.

 (b) **116.9**:

 Subsection B, 1st sentence: since the sentence discusses “a business”, change “their” to “its”.

 Subsection B, 2nd sentence, insert a comma after “below”.

 Paragraph (1): Most property in this country is private property, which means this paragraph is unintentionally far too broad. I suggest replacing “in private and” with “for” and the second “private” with “such”.

 Paragraph (3): Also, too broad. Revise the last clause to: “…if {~~the~~] those services are of the same or similar nature as those performed by the person for an employer.”

 Should “or client” be appended to the end?

 (c) **116.10**:

 Subsection A: They do indeed qualify for the deduction under 7-9-53. The whole point to the current rule, however, is to avoid requiring people (voters) who own a rental unit or two on the side from having to register and report, especially since there is **NO** tax money on the table. The current rule declares that people with fewer than 4 units are not really in business and so do not have to submit to this type of bureaucratic paper-shuffling. I suspect most citizens find this eminently reasonable. Do not force these people into registering; you will not be thanked. Besides, you have enough work dealing with actual taxpayers. **RESTORE the current version** as Subsection A.

 Subsections B and C: Good cross-referencing.

 (d) **116.11**: Subsection B, new sentence: Replace with “If the taxpayer is engaged in the business of selling or leasing property and decides to terminate the business, receipts from selling the property of the business would not qualify for the exemption provided by Section 7-9-28 NMSA 1978 because those receipts are from engaging in the same line of business.”

 (e) **116.12**:

Subsection A: One of the bad habits of the regulation drafters in the 1960’s and 1970’s was making a blanket statement that some thing or some activity is subject to gross receipts *tax*. Receipts from the thing or activity may well be “gross receipts” but whether tax is due is another question. It depends on whether any exemption or deduction applies, not just the one that is the subject of the regulation. So, the first thing is to strike “are subject to the gross receipts tax” from this subsection. The second is to broaden, as you did earlier, the actions that may constitute engaging in the business of being the administrator or executor of estates. I suggest:

“A. The receipts of any person appointed as administrator or executor of an estate [~~are subject to the gross receipts tax and~~] who is regularly engaged in the business of providing such services are not exempt from the gross receipts tax pursuant to Section 7-9-28 NMSA 1978. Whether the person is regularly engaged in providing such services will be determined by application of the criteria presented in 3.2.116.8 NMAC. [~~The duration of … or administrator.~~]

Old subsection B, new C: This is strange; always has been. If the person acts to waive all fees but nonetheless receives and cashes payment for those services, TRD will credit the good intentions? Not in this world! In that case, the receipts are gross receipts not subject to the exemption provided by Section 7-9-28 NMSA 1978. If the fees are in fact waived, there are no gross receipts and accordingly no gross receipts tax due.

(f) **116.13**: OK

(g) **116.14**: First problem is that 26 USC 168 does not define “safe harbor lease” and has not for a very long time. Towards the bottom of the notes under that section, there is discussion of the 1982 TEFRA provision that provided for a “transitional safe harbor lease” (also undefined). Second problem is that all of that was over 40 years ago, which hints that this rule is obsolete. I suggest that you **strike 3.2.116.14 NMAC**. If anyone squawks, react appropriately.

 3. Amendments of 3.2.211 NMAC

 (a) **211.7**:

 Subsection A: No quarrel with definition of “assisted living facility” but these facilities are just one type of a range of facilities providing lodging, meals and other services to elderly persons and others. Be prepared to cover other types of facilities.

Delete Subsections D (lease or leasing) & E (licensing or license) as unnecessary and contrary to law (see 14-4-5.7B NMSA 1978).

 Subsection F: The proposed definition of “manufactured home” at Subsection F differs substantially from the definitions in Sections 7-9-3J, 7-14-2B, 7-35-2E and 66-4-1.11B NMSA 1978, mainly by disregarding the width and length specifications. I believe this is beyond the Secretary’s authority in that it attempts to alter administratively what the Legislature has determined by law. Delete this subsection as well.

 (b) **211.8**: OK

 (c) **211.9**: OK

 (d) **211.10**: By removing the requirement for possessing a valid contractor’s license, you are expanding the field of those who are eligible for construction-related deductions and who may deliver and accept NTTCs. Maybe this is a good move; I have no feel for it. But it does merit a close review of the rules and processes surrounding construction for possible impacts.

 (e) **211.11**: OK.

 (f) **211.12 & .13**:

 Subsection A: It is good—both for the taxpayers and Department personnel--to lay out the principle that the examples are supposed to illustrate.

 Subsection C: I know you simply have moved the substance of 3.2.211.13 NMAC into this subsection. Yet the old rule papered over an issue. Why are we treating leased gasoline stations differently than, say, leased furnished apartments? Does TRD really insist that receipts from the rental of a furnished apartment must be decomposed into receipts from rental of real property vs those from rental of tangibles? How about commercial “turn-key” operations?

 (g) **211.14**:

 General: Since the sentence starting “The following examples…” should immediately follow “GENERAL EXAMPLES:” and on the same line, the “A.” should be deleted.

 Subsection C: Perhaps it would help to modernize a bit by replacing “$1200 per year” with “a set annual rental”. Also, to reinforce the point, add to the end of the last sentence “even if rented for periods in excess of a month”.

 (h) **211.15**: This rule was repealed on 4/30/99 (per New Mexico Selected Taxation and Revenue Laws and Regulations, 2001 Edition). How can you replace a rule that has not existed for 25 years? Ignore the zombie-like activity in the history note and just remove it altogether from this proposal. Maybe if it is left to die quietly, it won’t keep resurrecting itself.

 (i) **211.16**: OK

 (j) **211.17**: OK

 (k) **211.18**: OK

 4. New 7.3.30X NMAC, version 1

 (a) 7.3.30X.3: Add the [xx/xx/xxxx] placeholder.

 (b) 7.3.30X.7: As I understand NMAC’s unofficial formatting rules, you cannot have an “A” without a “B”. Accordingly, drop the “A.” and move “Taxable period” to the DEFINITIONS line.

 (c) 7.3.30X.8: It is true that the statute is inconsistent (“credit” in the catchline—which is not law—but “tax credit” in the text, which is) in its usage but Section 7-9-121 NMSA 1978 enacts a tax credit and this rule should use that term consistently throughout the rule. This has a bearing on whether Section 7-1-29.2 NMSA 1978 applies to Section 7-9-121 NMSA 1978. Also, add the [xx/xx/xxxx] placeholder.

 5. New 7.3.30X NMAC, version 2

 (a) 7.3.30X.3: Add the [xx/xx/xxxx] placeholder.

 (b) 7.3.30X.7: As I understand NMAC’s unofficial formatting rules, you cannot have an “A” without a “B”. Accordingly, drop the “A.” and move “Taxable period” to the DEFINITIONS line.

 (c) 7.3.30X.8: It is true that the statute is inconsistent (“credit” in the catchline—which is not law—but “tax credit” in the text, which is) in its usage but Section 7-9-58.1 NMSA 1978 enacts a tax credit and this rule should use that term consistently throughout the rule. This has a bearing on whether Section 7-1-29.2 NMSA 1978 applies to Section 7-9-58.1 NMSA 1978. Also, add the [xx/xx/xxxx] placeholder.

Sincerely,

James P. O’Neill