

k. **The Lodgers' Tax Act [NMSA 1978 3-38-13 to 3-38-24 and Rule 2 NMAC 105.2]**

(1) Purpose

Section 3-38-13 NMSA 1978, the "Lodgers' Tax Act," was originally enacted in 1969. It authorizes municipal and county governments (by ordinance) to impose and collect an occupancy tax for revenues on lodging establishments within municipal boundaries or within that part of the county outside of municipal boundaries. Proceeds may be used to defray the costs of:

- X collecting and otherwise administering the tax;
- X establishing, operating, purchasing, constructing, otherwise acquiring, reconstructing, extending, improving, equipping, furnishing or acquiring real property or any interest in real property for the site or grounds for tourist related facilities, attractions or transportation systems of the municipality, the county in which the municipality is located or the county;
- X advertising, publicizing and promoting tourist-related attractions, facilities and events of the municipality or county and tourist facilities or attractions within the area;
- X providing police and fire protection and sanitation service for tourist-related events, facilities and attractions located in the respective municipality or county;
- X principal and interest on certain premiums due in connection with (lodgers' tax) revenue bonds [see Section 3-38-23 and 24 NMSA 1978]; and
- X performance of required audits pursuant to DFA/LGD guidelines.

(2) Source of Funding and Administration

Every vendor furnishing lodging must collect the tax for and remit the proceeds to the municipality or county imposing the tax.

The tax cannot exceed 5% of gross taxable rent. A municipality or county imposing a tax of no more than 2% **must expend at least 25%** of tax proceeds for advertising, publicizing and promoting tourist-related attractions, facilities and events. For non-class A counties and municipalities not within class A counties, if more than 2% is imposed, at least **one-half of the first 3% and one-fourth of the tax proceeds in excess of 3% must be expended** for advertising, publicizing and promoting. For class A entities, at least **one-half of all tax proceeds must be expended** for advertising, publicizing and promoting. The proceeds that are required to be used to advertise, publicize and promote **shall be used within two years** of the close of the fiscal year in which collected. The 50% requirement is waived if principal and interest payments on lodgers' tax revenue bonds issued prior to January 1, 1996 are impacted [see Section 3-38-15(H) NMSA 1978].

The ordinance imposing the (lodgers') occupancy tax may:

- X provide that a vendor is liable for the payment of the tax proceeds if the vendor fails to collect the tax or remit the proceeds and provide for civil penalties for these and other violations of the act;
- X bring action in the district court for collection, interest and attorneys' fees;
- X provide a procedure for licensing each vendor and for refusing a vendor a license (for cause); or
- X state the tax rate, time, place and method for payment, accounts and records to be maintained, procedures for making refunds and resolving disputes, lien procedures, and other rights, privileges, powers and immunities relating to the tax.

(3) Exemptions to the Act

The Act provides for the following exemptions:

- X vendees who are permanent residents of the taxable premises or who pay less than \$2.00 per day for rent;
- X lodging accommodations at governmental, religious, charitable, educational or philanthropic institutions (including summer camps), clinics, hospitals or other medical facilities, privately owned and operated convalescent homes, homes for the aged, infirm, indigent or chronically ill; or
- X taxable premises having less than 3 rooms or units of accommodations for lodging.

(4) Other Provisions

Advisory boards must be created in accordance with Section 3-38-22 NMSA 1978 and financial reports and audits must be made available to such board in a timely manner (Section 3-38-17.2 NMSA 1978 and Rule 2 NMAC 105.2). Quarterly financial reports that conform to guidelines prescribed by the LGD must be prepared and submitted by all entities imposing a lodgers= tax (Section 6-6-11 NMSA 1978).

Vendors must be audited pursuant to Section 3-38-17.1 NMSA 1978 and reports submitted to the LGD.

Lodgers= Tax Act Audit Procedures:

Municipalities and counties receiving more than \$250,000 in lodgers tax in any fiscal year must audit at least **one** lodging establishment for fiscal year end June 30, 1997 and annually thereafter. Audits should include the following:

- X the amount of gross rents subject to lodgers tax;
- X the amount of lodgers= tax payable to the local government for the period tested;
- X that the amount of lodgers tax paid to the local government was correct if not, the findings and dollar amount of non-compliance;
- X who performed the audit;
- X a description of the procedure(s) agreed upon and performed;
- X the number of lodging establishments and the total number of establishments in the municipality or county;
- X whether payment/refund has been made; and
- X date and signature of the external auditor or employee in charge.

You *may* also include the cost to perform the audit. All reports submitted to LGD will be available for public inspection and therefore **should not include** any confidential information

Entities receiving less than \$250,000 in lodgers tax per annum must perform *random audits* and report to LGD for fiscal year ending June 30, 1997. **It is recommended**, but not required by law, that audits be performed and submitted to LGD at least every third year.

A lodgers= tax audit may be performed by (a) employees of the local government or (b)

persons external to the local government with demonstrated expertise in generally accepted auditing standards, normally this would be a certified public accountant. The selection of an external auditor to perform a lodgers= tax audit does not require State Auditors Office (SAO) or LGD approval. The audits are not to be filed with the SAO.

Standard procedures for the procurement of professional services should be followed with the RFP and/or Enforcement of the Lodgers Tax Act in accordance with Section 3-38-17.3 NMSA 1978.

Expenditures for contractual services must be in compliance with Section 3-38-21.1 NMSA 1978.