

LFC Requester:	Caroline Malone
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**AGENCY BILL ANALYSIS
2015 REGULAR SESSION**

WITHIN 24 HOURS OF BILL POSTING, EMAIL ANALYSIS TO:

LFC@NMLEGIS.GOV

and

DFA@STATE.NM.US

{Include the bill no. in the email subject line, e.g., HB2, and only attach one bill analysis and related documentation per email message}

SECTION I: GENERAL INFORMATION

{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}

Check all that apply:

Original **Amendment**
Correction **Substitute**

Date Feb. 10, 2015
Bill No: SB 464

Sponsor: Senator Carlos Cisneros **Agency Code:** Attorney General's Office
Short **Person Writing** James C. Jacobsen, AAG
Title: Lodgers' Tax Audits **Phone:** 505-222-9085 **Email** jjacobsen@nmag.gov

SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY15	FY16		

(Parenthesis () Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY15	FY16	FY17		

(Parenthesis () Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY15	FY16	FY17	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total						

(Parenthesis () Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to: House Bill 326, Lodgers’ Tax Audits

Duplicates/Relates to Appropriation in the General Appropriation Act:

SECTION III: NARRATIVE

This analysis is neither a formal Attorney General’s Opinion nor an Attorney General’s Advisory Letter. This is a staff analysis in response to an agency’s, committee’s, or legislator’s request.

BILL SUMMARY

Synopsis: Senate Bill 464 would amend the Lodgers’ Tax Act, NMSA 1978, §§ 3-38-13 to §3-38-24, to authorize the governing body of any municipality or county collecting over \$250,000 in lodgers’ taxes to conduct audits of vendors (defined in Section 3-38-14(I) as a person furnishing taxable lodgings) for “good cause”, as well as of those randomly selected.

SB 464 would also change the enforcement provisions of the Act. Under present law, the Attorney General, the county’s district attorney, or a private party qualifying as a vendor are authorized to bring an action seeking a writ of mandamus, injunctive relief, or some other appropriate remedy to enforce collection and payment of the tax. The Bill would delete the authority of the two specified elected officers, and replace them with a “duly authorized representative.” It would also eliminate the private enforcement mechanism.

At present, Section 3-38-19 requires municipalities and counties to enact an ordinance making failure to pay, remit or properly account for the lodgers’ tax punishable as a misdemeanor, with a \$500 penalty, 90 days imprisonment, or both. SB 464 would add failure to cooperate in an audit to the list of punishable violations.

The final substantive provision differentiates between municipal and county advisory boards. The advisory boards make recommendations on the expenditure of the lodgers’ tax proceeds, which are to be directed towards advertising, publicizing and promoting tourist-related facilities and attractions. The proposed amendment to Section 3-38-22 would direct mayors to appoint not fewer than five members to the municipal advisory boards, of which there shall be one lay member to represent the public, and equal numbers of lodging and tourist-related facility operators. The proposed Bill retains the current five-member board for counties, with two each lodging and tourist-related operators and one lay member.

FISCAL IMPLICATIONS

There are no fiscal implications for this office.

SIGNIFICANT ISSUES

The Bill would shift the responsibility for forced collection of lodgers’ tax from the elected attorney general, district attorney, or competitor disadvantaged by actually paying the tax, to the authorized representatives of the taxing authority. Who might be an authorized representative is

left to the taxing authority. Presumably, it could be the city or county attorney, or it might be a private debt collection agency employing a private attorney. The Legislature might wish to consider explicitly providing authority for employing non-governmental collection agents, if that is the intent.

The Bill continues to allow for costs and attorney fees, but does not specify the measure of attorney fees, other than “reasonable”. In the absence of a set percentage of the debt as the measure, courts are likely to apply the lodestar method, whereby reasonable fees are calculated by number of hours worked times an hourly billing rate, plus gross receipts tax.

Existing law and the Bill are silent with respect to interest on lodgers’ tax debts. The lodgers’ tax is not governed by the Tax Administration Act, NMSA 1978, §§ 7-1-1 to 7-1-82, so the interest rate specified in Section 7-1-67 is not applicable. In what might be a case of first impression, courts may interpret the silence as not allowing interest, or they may interpret it as meaning the not-more-than 15% rate imposed by Section 56-8-3(B) on money received for the use of another and retained without consent is the correct measure.

The provision for other than random selection of vendors for audit has the potential for decisions on who to audit to be made at the behest of special interests. This could lead to allegations of arbitrary and capricious enforcement, improper favoritism, or selective prosecution. The Legislature may wish to consider amending NMSA 1978, Section 7-1-8.9 to authorize the Taxation and Revenue Department to reveal information on gross receipts taxes reported by lodging businesses within the jurisdiction, so that a discrepancy between what is reported to the Department and what is reported locally can form an objective selection criteria.

PERFORMANCE IMPLICATIONS

There are no performance implications for this office.

ADMINISTRATIVE IMPLICATIONS

There are no administrative implications for this office.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

Identical to House Bill 326, Lodgers’ Tax Audits.

TECHNICAL ISSUES

None.

OTHER SUBSTANTIVE ISSUES

None.

ALTERNATIVES

None.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Status quo.

AMENDMENTS

None.