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REVENUE ADMINISTRATIVE BULLETIN 2019-17

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**TAXATION OF ADULT-USE (RECREATIONAL) MARIHUANA UNDER THE
MICHIGAN REGULATION AND TAXATION OF MARIHUANA ACT**

Pursuant to MCL 205.6a, a taxpayer may rely on a Revenue Administrative Bulletin issued by the Department of Treasury after September 30, 2006, and shall not be penalized for that reliance until the bulletin is revoked in writing. However, reliance by the taxpayer is limited to issues addressed in the bulletin for tax periods up to the effective date of an amendment to the law upon which the bulletin is based or for tax periods up to the date of a final order of a court of competent jurisdiction for which all rights of appeal have been exhausted or have expired that overrules or modifies the law upon which the bulletin is based.

RAB 2019-17.

The Michigan Revenue Act authorizes the Department of Treasury (“Department”) to periodically issue bulletins that explain the Department’s interpretation of current state tax laws.¹ The purpose of this Revenue Administrative Bulletin (“RAB”) is to (i) explain the excise tax imposed on sales of marihuana² under the Michigan Regulation and Taxation of Marihuana Act (Initiated Law 1 of 2018) (“MRTMA” or the “Act”) (MCL 333.27951 *et seq.*), (ii) discuss the sales and use tax treatment of marihuana sales under the MRTMA, (iii) address certain other issues arising under the MRTMA, and (iv) establish and set forth the tax return and remittance requirements and procedures that taxpayers under the MRTMA must follow.

This RAB addresses only the taxation of adult-use or recreational marihuana which was legalized in Michigan by the MRTMA. It does not address the Medical Marihuana Facilities Licensing Act (“Marihuana Facilities Act”)³ or, except peripherally, the Michigan Medical Marihuana Act (“Medical Marihuana Act”).⁴ Additionally, this RAB does not directly address the duties and responsibilities of the Department of Licensing and Regulatory Affairs (“LARA”) under the MRTMA.

ISSUES

- I.** What is the excise tax that is imposed on sales of marihuana under the MRTMA?
- II.** Do the General Sales Tax Act and the Use Tax Act apply to sales of marihuana under the MRTMA?
- III.** What is the income tax expense deduction provided by the MRTMA?

¹ See MCL 205.3(f).

² “Marihuana,” rather than the more common “marijuana,” is the spelling used in the MRTMA.

³ MCL 333.27101 *et seq.*

⁴ MCL 333.26424 *et seq.*

- IV. Does the MRTMA replace the Marihuana Facilities Act or the Medical Marihuana Act?
- V. What are the tax return and remittance requirements and procedures under the MRTMA?

ANALYSIS AND DISCUSSION

I. Excise Tax

a. Rate, Administration, and Date of Imposition

The MRTMA imposes an excise tax on marihuana retailers and marihuana microbusinesses licensed under the Act at the rate of 10 percent of the “sales price” of adult-use marihuana sold or otherwise transferred to anyone other than a “marihuana establishment.”⁵ (MCL 333.27963(1).) The statute specifies that the 10 percent excise tax is imposed “[i]n addition to all other taxes.” *Id.* The excise tax is administered by the Department (MCL 333.27963(3)), and, like other taxes administered by the Department, it is subject to the administrative, audit, assessment, interest, penalty, and appeal procedures set forth in sections 21 to 30 of the Revenue Act. (MCL 205.20.)

The MRTMA became effective on December 6, 2018; however, the Act requires LARA to take many diverse actions, including the promulgation of multiple rules, prior to issuing licenses to marihuana retailers and marihuana microbusinesses. Because the 10 percent excise tax is only imposed upon, and only collected from, licensed marihuana retailers and marihuana microbusinesses, taxpayers are not required to remit the excise tax until LARA begins issuing licenses to marihuana establishments, and actual retail sales of adult-use marihuana have commenced.

b. “Sales Price”

As noted, the MRTMA imposes a 10 percent excise tax on the “sales price” applicable to each retail sale or other transfer of adult-use marihuana made by a licensed marihuana retailer or licensed marihuana microbusiness. In this context, “sales price” means the total amount of consideration, including cash, credit, property, services, or any other valuable consideration given in exchange for marihuana. This definition is consistent with the definition of “sales price” in the General Sales Tax Act. (See MCL 205.51(d).)

A licensed marihuana retailer or licensed marihuana microbusiness is permitted to sell marihuana to customers for a set price that is inclusive of the 10 percent excise tax. Instructions accompanying the excise tax return worksheet explain how to calculate the amount of excise tax owed if the amount of the tax has been included in the business’s gross sales of marihuana. Taxpayers should retain all documentation supporting calculations made on the worksheet, including the “tax included in gross sales” calculation, in the event of audit. This includes items

⁵ A “marihuana establishment” means “a marihuana grower, marihuana safety compliance facility, marihuana processor, marihuana microbusiness, marihuana retailer, marihuana secure transporter, or any other type of marihuana-related business” licensed by LARA under the MRTMA. (MCL 333.27953(h).)

such as sales invoices, general ledgers, subsidiary ledgers and journals, workpapers and accounting data used to prepare the return, and any other supporting books and records. (See *Taxpayer Rights During an Audit*, available on the Department's website.)

The 10 percent excise tax is not owed on small amounts of adult-use marihuana taken from inventory by a licensed marihuana retailer or licensed marihuana microbusiness for direct use in the business, such as for display or to provide samples to customers, because such use does not constitute a sale of adult-use marihuana.⁶ Taxpayers must retain for audit purposes sufficient documentation to support such non-sale business uses of marihuana inventory.

c. Bundled Transactions

The MRTMA provides that “a product subject to the tax imposed by this section may not be bundled in a single transaction with a product or service that is not subject to the tax imposed by this section.” (MCL 333.27963(2).) This provision prohibits adult-use marihuana from being sold in a single-mixed or “bundled” transaction together with property or services other than marihuana. For the purposes of the 10 percent excise tax, a “bundled transaction” means the retail sale of marihuana together with one or more other products and services, where the other products and services are distinct and identifiable, and the marihuana and the other products and/or services are sold for one non-itemized price. Containers, wrappers, plastic bags or other packaging in which the marihuana is dispensed or packaged for sale, or labels attached or affixed to such packaging, are not considered separate products that are not subject to the excise tax, but are part of the sale of the marihuana.

If property or services other than marihuana are bundled and sold in a single transaction despite the prohibition against such transactions set forth in MCL 333.27963(2), then the entire sales price of the transaction, including the property or services that do not constitute marihuana, is subject to the 10 percent excise tax.

An invoice or similar sales document that separately itemizes and prices marihuana and non-marihuana property or services that are purchased together does not constitute a prohibited “bundled” or “single transaction.”

Example A: Joe buys marihuana, a marihuana vaporizer, and a tee shirt at Corner Supply, a licensed marihuana retailer. The items are rung up individually, and Joe pays for the items in one transaction with his debit card. Each item that Joe purchases is separately listed and priced on the receipt that he receives, and he is charged 10 percent excise tax on the sales amount of the marihuana only. Because the property purchased has been segregated and itemized on the receipt in a manner that permits determination of the consideration exchanged for each individual item, this is not a prohibited single or bundled transaction.

Example B: Jane buys a marihuana vaporizer, which includes a quantity of marihuana, at Corner Market, a licensed marihuana retailer. The vaporizer and marihuana are packaged together and sold for a single price. The receipt that Jane receives also reflects the sale of one item for a

⁶ However, 6% use tax would still be owed on the inventory value of the adult-use marihuana used in this way by the licensed marihuana retailer or microbusiness.

single price. Corner Market owes excise tax on the sales price of the vaporizer, including the marihuana packaged with the vaporizer, even though only the marihuana itself would be subject to the excise tax if it had been separately sold and itemized.

II. Sales and Use Tax

a. Applicability, Rate, and Tax Base

The 10 percent excise tax on sales of adult-use marihuana under the MRTMA is levied “in addition to all other taxes.” (MCL 333.27963(1).) Marihuana constitutes “tangible personal property” under Michigan’s General Sales Tax Act (MCL 205.51 *et seq.*). Accordingly, in addition to the 10 percent excise tax and absent a valid claim of exemption, retail sales of adult-use marihuana under the MRTMA are also subject to the state’s 6 percent sales tax,⁷ based upon the “sales price” of the property.⁸ Similarly, the use, storage, and consumption of adult-use marihuana in this state are subject to the Use Tax Act (MCL 205.91 *et seq.*).

The “sales price” of marihuana subject to the 6 percent sales tax includes the 10 percent excise tax levied under the MRTMA.

Example C: Corner Supply is a licensed marihuana retailer under the MRTMA. Corner Supply sells marihuana to Joe for \$100. Corner Supply is liable for the 10 percent excise tax on the sale, which totals \$10. In addition, Corner Supply must pay sales tax on the transaction. The “sales price” for sales tax purposes is \$110 (the sales price of the marihuana plus the amount of the excise tax). The amount of sales tax due is 6 percent of \$110, or \$6.60.

Example D: Corner Market is a licensed marihuana retailer under the MRTMA. Corner Market sells marihuana and a tee shirt to Jane for \$120 in a prohibited bundled transaction. Corner Market is liable for the 10 percent excise tax on the combined sales price of the items purchased by Jane in the transaction, which totals \$12. In addition, Corner Market must pay sales tax on the transaction. The “sales price” for sales tax purposes is \$132 (the sales price of the bundled transaction plus the amount of the excise tax). The amount of sales tax due is 6 percent of \$132, or \$7.92.

b. Exemptions

i. Food or food ingredients

The General Sales Tax Act and the Use Tax Act exempt from taxation the sale and use of “food or food ingredients,” which are defined as “substances, whether in liquid, concentrated, solid, frozen, dried, or dehydrated form, that are sold for ingestion or chewing by humans and are

⁷ Sales of marihuana are subject to sales tax whether the marihuana is sold legally or illegally. (See *Notice Regarding Michigan Taxes on Illegal Activities*, available on the Department’s website.)

⁸ The General Sales Tax Act defines “sales price” as “the total amount of consideration, including cash, credit, property, and services, for which tangible personal property or services are sold, leased, or rented, valued in money, whether received in money or otherwise, and applies to the measure subject to sales tax.” (MCL 205.51(1)(d).) “Sales price includes ... taxes imposed on the seller other than taxes imposed by this act” (MCL 205.51(1)(d)(ii).)

consumed for their taste or nutritional value.” (MCL 205.54g(1)(a), MCL 205.54g(3); MCL 205.94d(1)(a), MCL 205.94d(3).) Food and food ingredients do not include alcoholic beverages and tobacco. (MCL 205.54g(3); MCL 205.94d(3).) Marihuana infused food products, sometimes called marihuana edibles, are not consumed for their taste or nutritional value, but are consumed as a method of ingesting the marihuana. Therefore, food or food products that have been infused with marihuana are not eligible for the exemption for “food or food ingredients” under the General Sales Tax Act or the Use Tax Act.

ii. Drugs legally dispensed by prescription

The General Sales Tax Act and the Use Tax Act also exempt from taxation the sale and use of “drugs for human use that can only be legally dispensed by prescription” as well as “over-the-counter drugs for human use that are legally dispensed by prescription.” (MCL 205.54g(1)(a), MCL 205.54g(3); MCL 205.94d(1)(a), MCL 205.94d(3).) “Drug” is defined as a “compound, substance, or preparation ... intended for human use” that is (i) recognized in the official U.S. pharmacopoeia or similar compilation, (ii) intended for use in the treatment or prevention of disease, or (iii) intended to affect the structure or a function of the body. (MCL 205.51a(i); MCL 205.92b(i).)

Adult-use marihuana does not meet the definition of a “drug,” nor can it be legally dispensed in this state by prescription. Therefore, sales and use of adult-use marihuana under the MRTMA are not exempt from taxation under the General Sales Tax Act or the Use Tax Act as a drug dispensed by prescription.

iii. Other exemptions

Unless otherwise specified in the MRTMA or other applicable law, other exemptions from taxation generally available to taxpayers under the General Sales Tax Act and the Use Tax Act are also available to marihuana retailers and marihuana microbusinesses licensed under the MRTMA, provided that the requirements for the particular exemption are fully met and the taxpayer can support its eligibility for the exemption. These exemptions may include the agricultural exemption, except for greenhouses primarily used to grow marihuana (MCL 205.54a(1)(e), 205.54a(5)(e); MCL 205.94(1)(f), 205.94(5)(e)), the industrial processing exemption (MCL 205.54e; MCL 205.94o), the resale exemption (MCL 205.94(1)(c)(i)), and others.

III. Expense Deduction

The MRTMA provides as follows:

In computing net income for marihuana establishments, deductions from state taxes are allowed for all of the ordinary and necessary expenses paid or incurred during the taxable year in carrying out a trade or business.

(MCL 333.27962.) Although the MRTMA does not directly amend the Michigan Income Tax Act (“MITA”), the deduction provided under the Act for the “ordinary and necessary expenses” of marihuana establishments operates to effectively amend the MITA by decoupling Michigan

from Internal Revenue Code (“IRC”) 280e. IRC 280e prohibits the federal tax deduction of “ordinary and necessary expenses” by certain businesses engaged in activities determined to be contrary to federal law.

The MRTMA provision referenced above permits a validly licensed marihuana establishment to deduct on its Michigan tax return those “ordinary and necessary” business expenses that it is otherwise prohibited from deducting on its federal return due to the operation of IRC 280e. The “ordinary and necessary expenses” of a business are not the same as the expenditures used to determine the business’s “cost of goods sold,” a calculation intended to reflect direct business expenses, such as direct labor, raw materials, and overhead production costs. All businesses may subtract the “cost of goods sold” for federal tax purposes, and that subtraction is subsumed in the initial gross income calculation that is the basis of the Michigan tax return. Accordingly, the “ordinary and necessary expenses” of a validly licensed marihuana establishment may be taken as a Michigan deduction from adjusted gross income for individuals and from federal taxable income for corporations. Only those “ordinary and necessary” expenses paid or incurred after the date of licensure by LARA, as determined by using the taxpayer’s method of accounting used for federal income tax purposes, may be deducted under this provision.

IV. Relationship to Other Marihuana Statutes

a. Repeal of Excise Tax Under Marihuana Facilities Act

The MRTMA does not repeal or replace either the Marihuana Facilities Act or the Medical Marihuana Act; all three statutes are currently effective. The Marihuana Facilities Act imposes a 3 percent excise tax on the gross retail receipts of licensed medical marihuana “provisioning centers” (sometimes informally known as dispensaries). (MCL 333.27601.) However, the Marihuana Facilities Act also provides that the 3 percent excise tax is repealed by operation of law beginning 90 days after the effective date of a law “authorizing the recreational or nonmedical use of marihuana in this state.” (MCL 333.27601.) The MRTMA authorizes the recreational or nonmedical use of marihuana in Michigan. Accordingly, the 3 percent excise tax on medical marihuana provisioning centers imposed by the Marihuana Facilities Act was repealed as of March 6, 2019, 90 days following the effective date of the MRTMA.

b. Dual Licensing

The MRTMA permits a marihuana retailer or a marihuana microbusiness licensed to sell adult-use marihuana to concurrently be licensed as a “provisioning center” under the Marihuana Facilities Act. (MCL 333.27959(6).) Additionally, an entity holding both licenses is permitted to operate both businesses out of the same physical location. (MCL 333.27958(3)(c).) For an entity holding licenses under both the Marihuana Facilities Act and the MRTMA, sales of medical marihuana to registered qualifying patients⁹ are not subject to the 10 percent excise tax on adult-use marihuana. An entity holding licenses under both statutes must separately identify, itemize, and account for sales of medical marihuana to registered qualifying patients in its books and records, so that such sales are clearly differentiated from the entity’s sales of adult-use

⁹ A “registered qualifying patient” is “a qualifying patient who has been issued a current registry identification card under the Michigan medical marihuana act or a visiting qualifying patient as that term is defined in section 3 of the Michigan medical marihuana act, MCL 333.26423.” (MCL 333.27102(x).)

marihuana. An entity holding licenses under both statutes must maintain or otherwise be able to provide, at the request of the Department, documentation supporting and clearly evidencing the validity of each sale of medical marihuana accounted for in its books and records. A sale of marihuana by an entity licensed under both statutes that cannot be shown by the taxpayer to be a valid sale of medical marihuana will be presumed to be a sale of adult-use marihuana under the MRTMA, subject to the 10 percent excise tax.

V. Return and Remittance Requirements and Procedures

The MRTMA does not set forth specific requirements or procedures regarding remittance to the Department of the 10 percent excise tax. In order to ensure payment of the tax and to provide for efficient administration, the Department will initially determine how frequently marihuana retailers and marihuana microbusinesses licensed under the MRTMA must file returns and remit the excise tax, and those requirements may be modified in the future. Specific guidance regarding remittance of the 10 percent excise tax will be available on the Department's website shortly before actual retail sales of adult-use marihuana are expected to commence. Returns are submitted electronically through Michigan Treasury Online ("MTO").

Marihuana retailers and marihuana microbusinesses must file sales tax returns based upon the frequency directed by the Department (i.e., monthly, quarterly, or annually). Filing of returns for sales and use taxes may be made electronically through MTO. Payments for sales and use taxes may also be remitted electronically through MTO. The discounts set forth in MCL 205.54(1) for timely tax payments are applicable to marihuana retailers and marihuana microbusinesses licensed under the MRTMA. Please refer to the Department's website for additional information on sales and use taxes.