



**Wood** LLP

# Tax Alert



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THE TAX LAWYER

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### **Marijuana Taxes Are Upheld, But Paying Them Could Incriminate You**

Remember Lois Lerner? She's the IRS Exempt Organizations Chief whose emails disappeared but whose texts revealed bias against conservative groups. She has refused to testify multiple times claiming protection under the Fifth Amendment. The right not to incriminate yourself runs deep in our Constitution.

Even so, a Colorado tax on marijuana has been upheld by a state court despite claims that paying it amounts to self-incrimination violating the Fifth Amendment. Plaintiffs want the taxes on recreational pot outlawed, reasoning that they require businesses and consumers to implicate themselves in federal crimes. The plaintiffs lost on getting an injunction at this point, but that doesn't mean the lawsuit is over.

Indeed, [the lawsuit challenging the taxes](#) will continue, and the stakes are high. In Colorado, there's a 2.9% sales tax plus a 10% marijuana sales tax. Plus, there is a 15% excise tax on the average market rate of retail marijuana. If you add that up, it's 27.9%. Medical marijuana only pays the 2.9% sales tax.



*Victoria, the nation's first legal medical marijuana plant. (Photo credit: Wikipedia)*

The argument is pretty clever: making you pay these taxes is making you admit to the government that you are violating federal law. Even getting witnesses is tough, said one of the lawyers involved. After all, just being a witness would mean incriminating oneself!

Under federal law, marijuana is still illegal and a controlled substance, even for medical use. And the gulf between federal law and recreational marijuana seems even bigger. Of course, this isn't the only context raising the [conflicting federal and state laws over marijuana](#). The tax problems of the industry remain a major impediment.

[Section 280E](#) of the tax code denies even legal dispensaries tax deductions. The IRS says it has no choice but to enforce the tax code passed by Congress. "The federal tax situation is the biggest threat to businesses and could push the entire industry underground," the [leading trade publication for the marijuana industry reported](#). One answer is for dispensaries to deduct expenses from other businesses distinct from dispensing marijuana.

If a dispensary sells marijuana and is in the separate business of care-giving, the care-giving expenses are deductible. If only 10% of the premises are used to dispense marijuana, most of the rent is deductible. In allocating expenses between businesses, good record-keeping is essential.

But there is only so far one can go. Some marijuana sellers operate as nonprofit social welfare organizations so [Section 280E](#) shouldn't apply. Some claim dispensaries should be organized as cooperatives or collectives.

The proposed [Marijuana Tax Equity Act](#) would end the federal prohibition on marijuana and allow it to be taxed. That way growers, sellers and users would not fear of violating federal law. The bill would also impose an excise tax on cannabis sales and an annual occupational tax on workers in the [growing field of legal marijuana](#).

Colorado's tax law is bringing in considerable revenue, and that may influence attempts to derail the tax. Early reports suggested that the taxes might be attacked as unconstitutionally high. But the Fifth Amendment assertions are more sophisticated. Not only that, they jab at the already sensitive issue of the conflict between state and federal law. As medical marijuana has gained widespread acceptance and now recreational marijuana is taking hold, the federal v. state conflict grows deeper.

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