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MARIHUANA PROVISIONING CENTER TAX AND SALES AND USE TAX TREATMENT OF MARIHUANA

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 2018-2. This Revenue Administrative Bulletin (RAB) explains the marihuana¹ provisioning center tax imposed by the Medical Marihuana Facilities Licensing Act (MMFLA) and the sales and use tax treatment of marihuana and marihuana-derived products sold pursuant to the MMFLA and the Michigan Medical Marihuana Act (MMMA).²

ISSUES

- I.** What tax is imposed by the MMFLA?
- II.** Is the sale of marihuana or marihuana-derived products taxable under the General Sales Tax Act (GSTA) and the Use Tax Act (UTA)?
- III.** What are the tax return and remittance requirements and procedures under the MMFLA and the GSTA?

CONCLUSIONS

I. Provisioning Center Tax

The MMFLA imposes tax on the gross retail receipts of a provisioning center³ licensed under the MMFLA at a rate of 3%.⁴ The MMFLA does not limit the imposition of its tax

¹ “Marihuana,” rather than “marijuana,” is the spelling used by the MMFLA and the MMMA.

² This RAB does not address any of the duties or responsibilities the MMFLA or the MMMA places on the Department of Licensing and Regulatory Affairs (LARA).

³ The MMFLA defines “provisioning center” as “a licensee that is a commercial entity located in this state that purchases marihuana from a grower or processor and sells, supplies, or provides marihuana to registered qualifying patients, directly or through the patients’ registered primary caregivers. Provisioning center includes any commercial property where marihuana is sold at retail to registered qualifying patients or registered primary

to marihuana or marihuana-derived products; therefore, all gross retail receipts of a provisioning center⁵ are subject to the tax. This includes non-marihuana sales such as marihuana paraphernalia, clothing, food, or any other tangible personal property or service; there are no exemptions for any service or property under the MMFLA. In other words, all retail sales made by licensed provisioning centers are subject to the MMFLA's tax. Unlike sales tax, a seller subject to the MMFLA's gross retail receipts tax may not pass along the incidence of the tax to its customer; the seller may, however, consider the tax in establishing its prices.

Example 1. ABC, Inc. is a provisioning center. ABC sells rolling papers in addition to marihuana products. ABC is liable for the 3% tax imposed by the MMFLA for both rolling paper and marihuana product sales.

II. Sales and Use Tax⁶

The GSTA imposes a 6% sales tax on the gross proceeds of “all persons engaged in the business of making sales at retail, by which ownership of tangible personal property⁷ is transferred for consideration...”⁸ The UTA imposes a 6% tax “for the privilege of using, storing, or consuming tangible personal property⁹ in this state...”¹⁰ The GSTA and UTA (Acts) only impose tax on sale/use of tangible personal property not otherwise exempt under the GSTA and UTA and services that are specifically subject to tax.

The retail sales of marihuana and marihuana-derived products by a provisioning center are subject to sales tax.¹¹ The sale of any other tangible personal property by a provisioning center or other person that is not otherwise exempt from sales or use tax is also subject to tax.

A registered primary caregiver¹² under the MMMA “may receive compensation for costs associated with assisting a registered qualifying patient¹³ in the medical use of

caregivers. A noncommercial location used by a primary caregiver to assist a qualifying patient connected to the caregiver through the [LARA]'s marihuana registration process in accordance with the MMMA is not a provisioning center for purposes of this act.” MCL 333.27102(r).

⁴ MCL 333.27601(1).

⁵ For purposes of this RAB “provisioning center” only includes those provisioning centers that are licensed under the MMFLA.

⁶ This RAB does not address various exemptions for the inputs used to produce usable marihuana.

⁷ All marihuana products are “tangible personal property” as defined by the GSTA and UTA. MCL 205.51a(q) and MCL 205.92(k).

⁸ MCL 205.52(1).

⁹ See footnote 4, *infra*.

¹⁰ MCL 205.93(1).

¹¹ A Michigan sales tax license is required for any person making retail sales of tangible personal property. Mich Admin Code R 205.1(1).

¹² A “primary caregiver” is “a person who is at least 21 years old and who has agreed to assist with a patient's medical use of marihuana and who has not been convicted of any felony within the past 10 years and has never been convicted of a felony involving illegal drugs or a felony that is an assaultive crime as defined in section 9a of chapter X of the code of criminal procedure, 1927 PA 175, MCL 770.9a.”

marihuana. Any such compensation does not constitute the sale of controlled substances.”¹⁴ Therefore, primary caregiver provision of marihuana and marihuana-derived products in compliance with the MMMA is a non-taxable service and not subject to sales or use tax. However, a qualifying patient that receives marihuana from a primary caregiver is liable for use tax at a rate of 6% of the “purchase price” of the marihuana.¹⁵ Use tax should be remitted and reported annually on the qualifying patient’s Michigan Individual Income Tax Return (Form MI-1040).

Example 2. Carrie is a caregiver under the MMMA. Carrie provides marihuana in exchange for \$100. Carrie is not liable for sales tax on the \$100 since sales by caregivers under the MMMA are a non-taxable service. However, Paul is liable for use tax based on the purchase price of the marihuana. Paul should report and remit \$6 in use tax for the use and consumption of this property on line 23 of his Michigan Individual Income Tax Return (MI-1040).

The GSTA and UTA exempt the “sale of drugs for human use that can only be legally dispensed by prescription.”¹⁶ However, this exemption does not apply to the sale, use, storage, or consumption of marihuana or marihuana-derived products because at the time of the sale they are not dispensed pursuant to a prescription. Rather, a qualifying patient presents a registry identification card indicating that a physician has certified that the patient has a debilitating medical condition. Therefore, this exemption is inapplicable to the sale or transfer of marihuana for purposes of the MMFLA and the MMMA.

The GSTA and UTA also exempt the sale/use of “food or food ingredients,”¹⁷ 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 consumed for their taste or nutritional value. Food and food ingredients do not include alcoholic beverages and tobacco.”¹⁸ Marihuana-infused products¹⁹ are not eligible for this exemption because they are consumed for their medicinal value rather than for their taste or nutrition.

The sales and use tax bases include taxes imposed on the seller other than those imposed by the GSTA and UTA.²⁰ Therefore, the 3% tax imposed by the MMFLA is also subject

¹³ A “qualifying patient” is “a person who has been diagnosed by a physician as having a debilitating medical condition.” MCL 333.26423(l).

¹⁴ MCL 333.26424(f).

¹⁵ MCL 205.93(1); MCL 205.92(d).

¹⁶ MCL 205.54g(1)(a) and MCL 205.94d(1)(a).

¹⁷ *Id.*

¹⁸ MCL 205.54g(3) and MCL 205.94d(3).

¹⁹ “Marihuana-infused product” means “a topical formulation, tincture, beverage, edible substance, or similar product containing any usable marihuana that is intended for human consumption in a manner other than smoke inhalation. Marihuana-infused product shall not be considered a food for purposes of the food law, 2000 PA 92, MCL 289.1101 to 289.8111.” MCL 333.26423(f).

²⁰ MCL 205.51(1)(d)(ii) and MCL 205.92(f)(ii).

to sales and use tax when a provisioning center or other person sells property that is subject to sales and use tax.

Example 3. ABC, Inc. is a provisioning center. ABC sells marihuana to Customer for a sales price of \$100. ABC is liable for \$3 in tax under the MMFLA. ABC also is liable for sales tax based on 6% of \$103, which amounts to a sales tax liability of \$6.18. ABC must report and remit \$3 on its return under the MMFLA and \$6.18 on its sales tax return.

III. Return and Remittance Requirements and Procedures

The MMFLA requires provisioning centers to remit the provisioning center tax for a calendar quarter to the Department of Treasury (Treasury) by 30 days after the end of that calendar quarter, accompanied by a form prescribed by Treasury.²¹ The return must disclose the provisioning center's gross quarterly retail receipts and the amount of tax due under the MMFLA. The return must be submitted electronically through Michigan Treasury Online (MTO).

Provisioning centers must file sales tax returns based on the frequency directed by Treasury (i.e., monthly, quarterly, or annually). Filing of returns for sales, use, and withholding taxes must be done electronically through MTO; sales, use, and/or withholding tax payments may also be remitted electronically through MTO.

Alternatively, payment of any Michigan taxes, including the provisioning center tax and sales, use and withholding taxes, may be made by cash or check at any Treasury field office. In order to process in-person payments of tax by check or cash, the taxpayer must provide either 1) a Medical Marihuana Tax Payment Voucher, Form 5098, and/or a Sales, Use and Withholding Payment Voucher, Form 5094, or 2) its tax identification number. Treasury field offices and MTO will not accept payments that are due to any other agencies, such as LARA.

²¹ MCL 333.27601(1).