

# Taxation of Sales of Medical Marijuana and Related Paraphernalia

**Tax:** Sales and Use Tax

**Statutory References:**

Title 32, Chapter 233

Title 18, Chapter 86

This fact sheet addresses the applicability of the Vermont Sales and Use Tax to sales of medical marijuana and related paraphernalia from a registered dispensary.

## Findings

Due to the regulated nature of the purchases of medical marijuana, it is exempt from sales and use tax under the prescription drug statutory definition. Pipes, vaporizers, and other items classified as drug paraphernalia sold in a medical marijuana dispensary are, however, subject to sales and use tax because they do not meet the definition of medical supplies. Medical marijuana is exempt from the Vermont Sales and Use Tax. Marijuana-related supplies are subject to sales and use tax.

## Background

Vermont sales tax applies to retail sales of several categories of property and services, one of which is “tangible personal property” or “TPP.” 32 V.S.A. § 9771(1). TPP is defined as “personal property which may be seen, weighed, measured, felt, touched or in any other manner perceived by the senses.” 32 V.S.A. § 9701(7).

Vermont has legalized the therapeutic use of marijuana when sold by a registered dispensary to certain patients and their caregivers who are registered. 18 V.S.A. Chapter 86, Therapeutic Use of Cannabis. Marijuana (Cannabis) meets the definition of TPP, and sales would be subject to tax unless an exemption applies.

## Rationale

The sales tax law exempts certain vendors from having to collect the tax. Exempt vendors are listed in Section 9743, and include “organizations which qualify for exempt status under the provisions of Section 501(c)(3)” of the Internal Revenue Code. Title 18 requires that a dispensary be operated on a nonprofit basis, but it need not qualify under 501(c)(3). 18 V.S.A. § 4474e(b)(1). If a dispensary qualifies for (501)(c)(3) status, however, this vendor exemption will only apply to the dispensary if its prior year’s sales did not exceed \$20,000. 32 V.S.A. § 9743(3)(C). For purposes of this fact sheet, it is assumed that the \$20,000 threshold would

be exceeded, and therefore, the nonprofit vendor exemption would not apply to the dispensary.

The sales tax law exempts certain items from the sales and use tax. Exempt items are listed in Section 9741, and include “drugs intended for human use, . . . and supplies . . . , used in treatment intended to alleviate human suffering. . . .” 32 V.S.A. § 9741(2). An exempt “drug” is defined as follows:

. . . a compound, substance, or preparation . . . that is:

- (A) Recognized in the official United States Pharmacopeia, official Homeopathic Pharmacopeia of the United States, official National Formulary, or in supplements to any of them; or
- (B) Intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease; or
- (C) Intended to affect the structure or any function of the body. 32 V.S.A. § 9701(29).

Marijuana is apparently not recognized in the United States Pharmacopeia or the National Formulary.<sup>1</sup> It is also not recognized in the Homeopathic Pharmacopeia except in the form of a tincture with 65% alcohol, when further attenuated and prescribed by a health care provider with prescribing privileges.<sup>2</sup> So, marijuana does not meet the definition in Subsection (A).

Marijuana does not, by itself, qualify as a “substance intended for use in the mitigation of disease” under Subsection (B), either. But when sold by a registered dispensary to a registered patient or registered caregiver, it is, in that context, a substance intended to relieve symptoms of a debilitating condition. In that context, it is a “drug” under the Subsection (B) definition, not based on the product per se, but based on the use of the product.

<sup>1</sup> Per email of November 4, 2013, from Technical Services Scientist, Reference Materials Support, United States Pharmacopeial Convention.

<sup>2</sup> Per email of November 6, 2013, from Senior Scientist, Homeopathic Pharmacopeia Convention of the United States.

The sales tax regulations further require that a drug be either a “prescription drug” or an “over-the-counter drug.” Department of Taxes Regulations (Regs.) § 1.9741(2)A.1., 2. Marijuana does not qualify as an over-the-counter drug because an “over-the-counter drug” must “contain a label that identifies the product as a drug as required by 21 C.F.R. § 201.66.” Reg. § 1.9741(2)A.2. A “prescription” is defined in the regulations as follows:

“Prescription” means an order, formula or recipe issued in any form of oral, written, electronic or other means of transmission by a duly licensed practitioner authorized by the laws of the state. Regs. § 1.9741(2)A.1.

Although marijuana is not “prescribed” in the traditional sense, the requirements of Title 18 are sufficiently similar to meet the definition of “prescription” for purposes of the sales tax exemption. To obtain therapeutic marijuana, “a person must be diagnosed with a debilitating medical condition by a health care professional.” 18 V.S.A. § 4473(a). A “health care professional” is

[A]n individual licensed to practice medicine. . . . certified as a physician’s assistant . . . or an individual licensed as an advanced practice registered nurse . . . [and] includes individuals who are professionally licensed under substantially equivalent provisions in New Hampshire, Massachusetts, or New York. 18 V.S.A. §4472(6).

The patient must then register with the Department of Public Safety, and must designate a single registered dispensary to be used for that patient. 18 V.S.A. § 4473. Once registered, the patient, or the patient’s registered caregiver, may obtain up to two ounces of therapeutic marijuana in each 30-day period from the designated registered dispensary. 18 V.S.A. §§ 4472(10); 4474b(a); 4474e(a), (k)(1)(B). The State, through the provisions in Title 18, thus authorizes the health care practitioner to certify a patient for access to the drug otherwise unavailable by law. In this regulated context, the authorization for purchase and use of therapeutic marijuana is sufficiently similar to the statutory definition of a “prescription” to qualify as a prescription drug exempt from sales tax.

#### **Do I Need an Exemption Certificate?**

As noted above, the exemption is a use-based exemption and not a product-based exemption. Items that qualify for a use-based exemption may be sold without collection of sales tax if the vendor first obtains an exemption certificate from the purchaser. 32 V.S.A. § 9745(a). If a vendor fails to

possess an exemption certificate at the time of sale, the law presumes the sale is taxable. Id.

The requirement for a certificate is discretionary, since the law provides that the Commissioner “may” require the vendor to obtain an exemption certificate for a use-based exempt sale. In the case of a registered dispensary, the Commissioner will not require exemption certificates for authorized dispensary sales of marijuana, because of patient confidentiality protections in Title 18. The Commissioner will assume that the statutory presumption of taxability is rebutted when the marijuana is sold by a registered dispensary under the provisions of Title 18.

#### **Are marijuana-related supplies taxable?**

Title 18 also authorizes a registered dispensary to sell marijuana-related supplies such as “pipes, vaporizers and other items classified as drug paraphernalia,” 18 V.S.A. § 4474e(a)(1)(B). Sales of these items would not be exempt from tax. The sales tax law exempts certain medical “supplies” if they are “designed primarily to cure, correct, or reduce the severity of human ailments. . . . Reg. § 1.19741(2) [emphasis added]. Supplies must also be items “not normally used by persons absent illness or injury, and . . . not capable of repeated usage.” Reg. § 19741(2)F.

Pipes, vaporizers and other items sold by the dispensary are not designed primarily to cure, correct, or reduce the severity of human ailments, are normally used by persons absent illness or injury, and are capable of repeated usage. They are in the nature of the items listed in the regulation as not exempt. As a result, the supplies sold by a registered dispensary are TPP subject to the sales tax.

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