



SELLING MARIJUANA IS STILL A FEDERAL CRIME, BUT INCOME MUST BE REPORTED

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Selling Marijuana Is Still a Federal Crime, but Income Must Be Reported

By Sanford Millar of MillarLaw A Professional Corporation – 11/6/16

The prevalence of state laws legalizing the sale of marijuana does nothing to change federal law. Marijuana remains a Schedule 1 drug under the Controlled Substances Act, (21 USC 801, et. seq.). The act of manufacturing, distribution or sale of marijuana is a federal felony. The Department of Justice in the Cole Memo of 08/29/13 stated its enforcement policy:

“For states such as Colorado and Washington that have enacted laws to authorize the production, distribution and possession of marijuana, the Department expects these states to establish strict regulatory schemes that protect the eight federal interests identified in the Department’s guidance. These schemes must be tough in practice, not just on paper, and include strong, state-based enforcement efforts, backed by adequate funding. Based on assurances that those states will impose an appropriately strict regulatory system, the Department has informed the governors of both states that it is deferring its right to challenge their legalization laws at this time. But if any of the stated harms do materialize-either despite a strict regulatory scheme or because of the lack of one-federal prosecutors will act aggressively to bring individual prosecutions focused on federal enforcement priorities and the Department may challenge the regulatory scheme themselves in these states.”

However, the enforcement position of the DOJ does not change the income tax law and the obligation of dispensaries to accurately report income and maintain books and records.

The IRS requires taxpayers to report all income, regardless of whether it is obtained legally or illegally. At the same time, Section 280E of the Internal Revenue Code states that taxpayers cannot deduct expenses related to income they obtain through an illegal enterprise. In addition the failure to maintain complete books and records can be prosecuted as a felony as an act of Obstruction under Internal Revenue Code Section 7212 (a)(2).

"Under section 7212(a), [w]hoever [1] corruptly or by force or threats of force (including any threatening letter or communication) endeavors to intimidate or impede any officer or employee of the United States acting in an official capacity under this title, **or [2] in any other way corruptly or by force or threats of force (including any threatening letter or communication) obstructs or impedes, or endeavors to obstruct or impede, the due administration of this title**"

The fact that the DOJ has deferred prosecution of state licensed marijuana dispensaries but can change its position at any time has led to some special requirements under the Bank Secrecy Act which financial institutions must meet if they accept deposits from dispensaries. These include the filing of designated Suspicious Activity

Reports for cash deposits. The line of attack on the state license businesses is, therefore, likely to come from underreporting of income and failure to maintain books and records. The key is adequate record keeping and compliance with state law.

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