

Larry's Tax Law

The Oregon Legislature Appears to Have Brought More Joy to the Cannabis Industry: House Bill 4014 Signed Into Law by Governor Kate Brown

By Larry Brant on 3.17.16 | Posted in Internal Revenue Service, Legislation, Oregon Tax Laws

As reported in my [November 2015 blog post](#), in accordance with Internal Revenue Code (“Code”) Section 280E, taxpayers (for purposes of computing federal taxable income) are prohibited from deducting expenses related to the production, processing or sale of illegal drugs, including marijuana.

A Bit of Welcome Relief?

Measure 91, officially called the Control, Regulation, and Taxation of Marijuana and Industrial Hemp Act, passed by Oregon voters, appears to have alleviated some of the impact of Code Section 280E as it relates to Oregon taxable income. Specifically:

- Section 71 of Measure 91 provides that Code Section 280E does not apply for purposes of determining Oregon taxable income or loss under our corporate income tax regime. This provision sets forth no specific effective date. So, in accordance with Sections 81 and 82 of Measure 91, it became effective on July 1, 2015.
- Section 74 of Measure 91 provides that Code Section 280E does not apply for purposes of determining Oregon taxable income or loss under our individual income tax regime. This provision of Measure 91 specifically provides that the change became effective for tax years beginning on or after January 1, 2015.

So, following the passage of Measure 91, were there any Oregon tax problems plaguing the cannibals industry? The short answer is: Maybe.

Measure 91 generally only applies to the recreational marijuana industry. Even though nothing in Measure 91 says Sections 71 and 74 are limited to recreational marijuana, maybe an argument could be made that these provisions did nothing to alleviate the Code Section 280E issue for medical marijuana business activities.

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Don't despair; Oregon lawmakers came to the rescue. The law is now clear (at least as clear as a law can be) that, with respect to the Oregon individual income tax regime, folks in both medical and recreational marijuana businesses may deduct (for Oregon purposes only) expenses that would otherwise be nondeductible under Code Section 280E.

House Bill 4014 Is Signed Into Law

On March 3, 2016, Oregon Governor Kate Brown signed House Bill 4014 into law. The bill, which spans numerous pages, deals with several issues related to the Oregon cannabis industry, including the application of Code Section 280E to both the recreational and the medical marijuana industries.

The provisions of House Bill 4014 relating to Oregon income taxation are contained in: Sections 28, 28a and 29.

SECTION 28 of House Bill 4014 amends ORS 316.680 by adding subsection (i) providing that there shall be subtracted from federal taxable income:

"Any federal deduction that the taxpayer would have been allowed for the production, processing or sale of marijuana items authorized under ORS 475B.010 to 475B.395 but for section 280E of the Internal Revenue Code."

SECTION 28a of House Bill 4014 amends ORS 316.680 by adding subsection (i) providing that there shall be subtracted from federal taxable income:

"Any federal deduction that the taxpayer would have been allowed for the production, processing or sale of marijuana items authorized under ORS 475B.010 to 475B.395 or 475B.395 or 475B.400 to 475B.525 but for section 280E of the Internal Revenue Code."

SECTION 29 of House Bill 4014 provides that the amendments to ORS 316.680 by Section 28 apply to conduct occurring on or after July 1, 2015 but before January 1, 2016, and to tax years ending before January 1, 2016. The amendments to ORS 316.680 by section 28a apply to conduct occurring on or after January 1, 2016, and to tax years beginning on or after January 1, 2016.

Implications for the Oregon Cannabis Industry

What this means for the cannabis industry in Oregon is twofold:

- For Oregon personal income tax purposes only (for tax years beginning on or after July 1, 2015 but before January 1, 2016), the prohibition contained in Code Section 280E does

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not apply to the **non-medical** production, processing or sale of marijuana. In other words, a subtraction from **Oregon personal income tax** is permitted by folks in a recreational marijuana business for any federal deduction a taxpayer would have been allowed for expenses related to the production, processing or sale of marijuana had there been no prohibition under Code Section 280E.

- For Oregon personal income tax purposes only (for tax years beginning on or after January 1, 2016), the prohibition contained in Code Section 280E does not apply to the production, processing or sale of marijuana (**medical and non-medical marijuana**). In other words, on or after January 1 of this year a subtraction from **Oregon personal income tax** is permitted by folks in **both a medical and recreational** marijuana business for any federal deduction a taxpayer would have been allowed for expenses related to the production, processing or sale of marijuana had there been no prohibition under Code Section 280E.

Interestingly, House Bill 4014 does **not** appear to address the Oregon corporate excise or income tax regimes. Remember, Section 71 of Measure 91 clearly tells us that, after July 1, 2015, Code Section 280E does not apply to the computation of Oregon corporate taxable income.

Why did Oregon lawmakers feel the need to make it clear that Code Section 280E does **not** apply to the computation of Oregon individual taxable income in the case of both medical and recreational marijuana business activities (as of January 1, 2016), but did not do the same for the computation of Oregon corporate taxable income?

Oregon law clearly contemplates corporations and other entities will be used to operate marijuana related businesses. In fact, both Measure 91 and the Oregon regulations governing the local marijuana industry allow businesses to be organized as corporations (and other entities). The definition of "person" in Measure 91 includes corporations (Section 5(24)), and various parts of the regulations contemplate that marijuana licenses will be issued to corporations and other entities (e.g., OAR 845-025-1045(3)).

Was this apparent omission intentional or simply an oversight by Oregon lawmakers? It certainly seems Measure 91 covers (for purposes of Code Section 280E) recreational and medical marijuana activities at both the Oregon corporate and individual income tax levels. Was House Bill 4014 necessary to clarify the elimination of the application of Code Section 280E for Oregon income tax purposes?

It will be interesting to see how the Oregon Department of Revenue interprets House Bill 4014 and Measure 91 in this regard. Time will tell.

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An Observation

One interesting observation about Measure 91 is that the clear language eliminating the application of Code Section 280E for Oregon individual and corporate taxation is **not** expressly limited to marijuana activities. Arguably, it eliminated the application of Code Section 280E for Oregon income tax purposes in all instances (including the sale or distribution of illegal drugs). It appears House Bill 4014 removes that interpretation of the law in the instance of the Oregon individual tax regime as it expressly limits the application to marijuana, but its silence as to the Oregon corporate tax regime leaves that interpretation alive. I hope this was not the legislature's intent.

Tags: Cannabis, Corporate Tax, deductions, Governor Kate Brown, House Bill 4014, Section 280E