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Notice to Taxpayers Regarding the Michigan Regulation and Taxation of Marihuana Act

1.29.2019

On January 29, 2019, the Michigan Department of Treasury issued a notice regarding the Michigan Regulation and Taxation of Marihuana Act. The following is a summary of the notice.

On November 6, 2018, Michigan voters approved a ballot initiative legalizing the recreational use and possession of marihuana for adults 21 years of age and older and enacting an excise tax on retail marihuana sales. The resulting legislation is known as the Michigan Regulation and Taxation of Marihuana Act (MRTMA). MRTMA does not replace either the Medical Marihuana Facilities Licensing Act (Marihuana Facilities Act) or the Michigan Medical Marihuana Act. Marihuana sold under MRTMA is referred to as “recreational” or “adult-use” marihuana.

Regulatory Aspects of MRTMA

MRTMA establishes a regulatory system for the issuance of licenses for the cultivation, processing, testing, transportation and retail sales of marihuana for use by Michigan adults 21 years of age and older. All regulatory aspects of MRTMA, including specific requirements and standards for marihuana cultivation, processing, testing, packaging, labeling, and transportation, as well as for the licensing of marihuana establishments, will be administered through the Michigan Department of Licensing and Regulatory Affairs (LARA).

The legislation provides for a “ramping up” period for the state to put necessary regulations and procedures into place. Therefore, although MRTMA became effective on December 6, 2018, commercial sales of marihuana will not begin immediately. Under MRTMA, LARA must begin accepting applications for licenses within 12 months of the effective date of the legislation.

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Excise Tax on Marihuana Sales

MRTMA imposes a 10% excise tax on marihuana sales at the retail level, which will be administered by the Michigan Department of Treasury. The 10% excise tax is levied in addition to any other applicable state taxes, including the existing 6% sales tax.

MRTMA further provides that taxable marihuana “may not be bundled in a single transaction with a product or service” that is not subject to the 10% excise tax. This provision prohibits marihuana from being sold in single-mixed or bundled transactions. Consequently, the “incidental to service” test established by the Michigan Supreme Court in *Catalina Mktg Sales Corp v. Dept of Treasury*, 470 Mich 13 (2005), with which many retailers may be familiar, is not applicable to sales of recreational marihuana.

In the coming months, the Department of Treasury expects to issue taxpayer guidance establishing the definition of “sales price” and clarifying the tax result of retail marihuana sales made in violation of the no-bundling provision.

Sales Tax on Marihuana Sales

In addition to the new 10% excise tax, marihuana sales under MRTMA will also be subject to Michigan’s 6% sales tax. Importantly, marihuana sales are subject to sales tax whether the marihuana is sold legally or illegally. See Notice Regarding Michigan Taxes on Illegal Activities, available on the Department of Treasury’s website, for additional information.

Medical Marihuana

MRTMA does not replace either the Marihuana Facilities Act or the Michigan Medical Marihuana Act—all three statutes are currently effective. The Marihuana Facilities Act imposes a 3% excise tax on the gross retail receipts of medical marihuana “provisioning centers” (sometimes informally known as dispensaries). However, the Marihuana Facilities Act also provides that the 3% excise tax is repealed by operation of law beginning 90 days after the effective date of a law “authorizing the recreational or nonmedical use of marihuana in this state.” Accordingly, due to the passage of MRTMA, the 3% excise tax on medical marihuana provisioning centers will not be applicable beginning on March 6, 2019 (90 days from December 6, 2018).

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