

# the buzz:

## Cannabis News & Policy Update

### 2025 Special Tax Edition

Navigating the complex intersection of cannabis and tax law is more challenging than ever, with shifting regulations and increased IRS scrutiny creating new hurdles for businesses. In this Special Edition of *the buzz*, read on for practical considerations to help you prepare for the upcoming tax filing season.

## DOES I.R.C. SECTION 280E STILL APPLY?

By Jennifer Benda, Partner | Holland & Hart LLP

You most likely have heard that some cannabis companies have filed refund claims asserting that I.R.C. Section 280E (“280E”) does not apply to their 2020, 2021, 2022 or 2023 tax years. In fact, some cannabis companies have announced that they have received refunds. At the other end of the spectrum, the IRS has twice warned cannabis business from using such strategies, first asserting in June that “such claims are not valid” and also warning in December 2024 that “Form 8275 is not intended as a free pass on penalties for positions that are false.”

While courts have widely rejected constitutional challenges to 280E, soon a court will weigh in on whether Section 280E can be interpreted differently. A former DOJ attorney who argued and won several 280E cases for the government has filed a petition in U.S. Tax Court challenging the application of 280E to a New Mexico medical marijuana company for the tax years ended June 30, 2018, 2019 and 2020. This case is not based on an amended return filing, but rather arises from an IRS examination, which raises the issue without penalty exposure, because a “no-280E” position was not the basis for a return filing.

The case brings two statutory interpretation arguments that no court has previously considered:

First, the Petitioner in *New Mexico Top Organics vs. Commissioner* argues that marijuana is not “within the meaning of” Schedule I or II of the CSA because it does not satisfy the statutory criteria set forth in the CSA. Because 280E doesn’t say substances “listed on” Schedule I or II, but rather uses the words “within the meaning of”, we can ignore the fact that marijuana is listed on Schedule I and instead look to whether marijuana satisfies the statutory criteria for Schedule I or II controlled substances as set forth in the CSA. Because the HHS, FDA and NIDA have all found that marijuana does not satisfy the CSA’s criteria for Schedule I or II controlled substances, then it is not within the meaning of Schedule I or II.

The Petitioner’s second argument applies only to medical marijuana and asserts that medical marijuana is “not prohibited” by either federal or New Mexico law, which takes it outside the scope of 280E. It is clear that once a state legalizes marijuana it is no longer prohibited by the state, but how can one argue that marijuana is not prohibited by federal law? In short, because Congress has prohibited the Department of Justice from using funds to prosecute medical marijuana businesses since 2014, under the various Appropriations Acts, (also known as “Rohrabacher-Farr Amendment”), medical marijuana is no longer prohibited by federal law.

Time will tell whether these arguments are convincing enough to end the application of 280E to cannabis businesses.

## HOW TO ASSIST AN IRS EXAMINER UNFAMILIAR WITH THE CANNABIS INDUSTRY

By Lauren Egan, Tax Associate | Holland & Hart LLP

In the cannabis business, tax audits are likely, if not inevitable. If your assigned examiner is not familiar with the cannabis industry or how cannabis businesses operate, providing some information about the industry can be helpful to both the taxpayer and examiner, and can lead to a better outcome in the exam.

The taxpayer or taxpayer’s representative should:

- Explain the stringent regulations imposed by the state licensing agency and how the business has complied.
- Point out any audits of your books and records by state or local taxing authorities.
- State cannabis regulations often require strict recordkeeping and inventory control that can help support the costs allocated to each phase of the manufacturing process. Previous audits of the business’s books and records can lend credibility to the accuracy of the recordkeeping, and can normalize the business’s operations for the examiner.
- Consider including an employee knowledgeable about the company’s growing and manufacturing processes, the equipment, labor, and other costs associated with each step of production in an interview.

- Include a detailed cover letter specifying the documents the company has presented to the examiner in all responses to requests for information.

For any business, demonstrating the legitimacy and professionalism of the company and its operations can help an examiner accurately assess operations, potentially leading to a more accurate outcome for the examination.

## LET'S MAKE A DEAL: CLOSING THE INFORMATION GAP IN IRS APPEALS

By Matt Wright, Associate | Holland & Hart LLP

The IRS Appeals process provides taxpayers with a forum to settle tax cases without litigation, but the IRS's internal procedures and policies create an information gap that can weaken a taxpayer's negotiating position. While the Appeal Officer has the full administrative file—including tax returns, examination reports, and all of the other correspondence and case documents—the taxpayer often does not.

[The Taxpayer First Act](#) attempted to address this issue by granting “specified taxpayers” the right to access the nonprivileged portions of their case files. Taxpayers entitled to copies of the administrative case file sent to Appeals can request their file prior to the appeals conference. However, this protection does not extend to certain taxpayers, like businesses with gross receipts exceeding \$5 million.

[The Freedom of Information Act \(FOIA\)](#) can be an effective tool to access IRS information related to their case, but it comes with significant challenges. FOIA requests must meet strict requirements, and many are denied for technical reasons. In 2023, processing times averaged 82.5 days, but some requests took years to resolve. Appeals is not required to pause proceedings while a FOIA request is pending, so making early submission crucial.

Under FOIA, the government is supposed to meet strict response deadlines and if the IRS exceeds a deadline, the requesting taxpayer can sue. While filing suit can create negotiation opportunities, which may result in faster disclosure, if negotiations fail, ongoing litigation can take months or years to resolve. Historically, 45% of IRS FOIA lawsuits have extended beyond 12 months, so acting quickly is crucial.

## TAX COLLECTIONS: WHAT TO DO WHEN THE TAX MAN COMETH

By Rachel Gillette, Partner | Holland & Hart LLP

We all know the feeling... a certified letter comes to your mailbox and the sender is a taxing authority. It can't be good news, can it?

Unless you're due a tax refund, the notice is a likely reminder of an unpaid tax liability. But not all notices are the same. Certain collection notices, if ignored, can quickly lead to enforced collections, such as liens and levies. Below are some tips to avoid enforced collections.

**1. Don't bury your head in the sand—open the mail.** Taxpayers should promptly open all mail from tax authorities. Collection notices can contain valuable information to help a taxpayer prevent enforced collections. These letters often explain a taxpayer's appeal or other rights—particularly the strict deadlines for filing an appeal and/or proposing a collection alternative. Failure to respond within the allotted time can lead to more aggressive collection action.

**2. Understand the full scope of the overall tax liability.** Tax collections notices are often sent separately for each period. It's important to fully understand the scope of the total tax liability, not just react to a single tax collection notice. This includes understanding your ability to pay current or future tax liabilities that may be coming due. If funds are limited, a taxpayer should understand the most effective use of available funds.

For example, to establish an Installment Agreement, the IRS will require a taxpayer to be both current (with ongoing payments due for the current year or tax period) and compliant with all required tax filings. A taxpayer cannot establish an IRS installment payment plan if the taxpayer has missing returns or has failed to make required estimated or quarterly tax payments. A taxpayer should focus on their ongoing and future compliancy as the first step in resolving any tax debt.

**3. Propose a collection alternative by filing an appeal or following the instructions in the notice.** If you cannot afford to pay your tax bill in full, there are alternatives. The first is an installment agreement, where a taxpayer can pay the past due liability over a period of months or years. These payment plans are either based on a taxpayer's ability to pay or payable over a certain number of months, depending on the type and scope of the liability. If a taxpayer's financial situation is dire, other alternatives are also available, including a partial-pay installment agreement, “currently-not-collectable status” and an offer-in-compromise. Taxpayers should talk with a trusted tax adviser to determine the best available collection alternative based on their financial circumstances.

**4. Prepare to provide updated financials.** Unless the tax liability is relatively small (<\$25,000), most installment agreements will require the taxpayer to provide financial information, such as the IRS' Form 433-A, 433-B, or 433-F, along with supporting documents. An installment agreement will be based on a taxpayer's ability to pay, even if a taxpayer cannot pay the liability in full within the collection statute (10 years from the date of assessment).

**5. Request penalty relief, if available.** Taxpayers can and should request penalty relief, if available. Many state tax authorities have programs for requesting relief from penalties, and often, collections officers may have some discretion in waiving penalties. IRS penalties can also be abated if the taxpayer has reasonable cause, and the circumstances leading to the tax deficiency were not due to willful neglect. Situations where a taxpayer exercised ordinary business care and prudence, but was still unable to comply, may be grounds for reasonable cause to abate a penalty. The IRS also has a first-time abatement program, where taxpayers who otherwise have a history of compliance, can request an abatement of a penalty, regardless of the cause.

**6. Know your rights.** Taxpayers have rights under the IRS Taxpayer Bill of Rights. This includes the right to retain representation and to be treated fairly.

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## CPAS AND ATTORNEYS: YES, YOUR CANNABIS BUSINESS MAY NEED THEM BOTH

By Marc A. Claybon, J.D., LL.M., | Principal, Crowe LLP

CPAs and tax attorneys bring unique skills and expertise to a cannabis business's tax return. CPAs generally focus on tax return preparation, financial reporting, and tax planning, such as I.R.C. Sec. 280E ("280E") / inventory methods. Tax attorneys typically focus on resolving legal tax disputes, IRS litigation, and complex tax transactional matters. In our experience, both perspectives are valuable and necessary given the challenges of operating state-legal businesses in a federally illegal industry environment.

Both CPAs and tax attorneys should be proactively involved in assisting with key tax decisions throughout the lifecycle of a cannabis business, such as forming a new entity, merging, or dissolving a business. This ensures financial and tax efficiency, legal and regulatory compliance, and helps facilitate the proper tax reporting of the legal positions.

In the case of a 280E tax dispute, a CPA often receives the first communication as the return signer and the party that manages a company's detailed tax records. Tax counsel can be brought in from the onset to assist the CPA in direct communication with examiners, or in anticipation of IRS Appeals or litigation.

An important benefit of working with a tax attorney early on is to preserve the attorney-client privilege. A Kovel Agreement may allow for attorney-client privilege to extend to communications with a CPA. Tax counsel and CPAs also work collaboratively interpreting the Tax Code, responding to, and resolving IRS questions, and assisting with financial modeling and tax computations, whether in an exam or a dispute that escalates to litigation.

**Key takeaway:** Utilizing both CPAs and tax attorneys provides a balanced, thorough approach to a cannabis businesses' tax needs and most often achieves the best results.