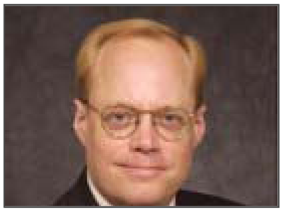
Forbes



Robert W. Wood
THE TAX LAWYER

TAXES | 4/25/2013

Harvard Law School Offers 'Tax Planning For Marijuana Dealers'---No Joke

Pound Hall at Harvard Law School (Photo credit: Wikipedia)

I'm the last one to say this is a silly topic, because it is not. But you have to admit is ***sounds*** a little funny. Bizarrely–and there's much in our tax law that's downright bizarre–there's actually a need for this kind of, er, down and dirty tax planning session. And someone should bring the Cheetos.

Perhaps Harvard's Board of Trustees will get wind of it and get upset. But the ire should be directed at tax rules that need fixing. Now that we have legalized medical marijuana in 18 states and the District of Columbia can these businesses be run like businesses? Not really. Massachusetts was the most recent entrant, and its marijuana businesses, like those in all the other states, face legal and tax problems.

For that matter, Colorado and Washington have even legalized ***recreational*** use. Again, tax problems there too. Why? Because even legal dispensaries are drug traffickers to the feds. Section 280E of the tax code denies them tax deductions, even for legitimate business costs. Of all the federal enforcement efforts, taxes hurt most. "The federal tax situation is the biggest threat to businesses and could push the entire industry underground," the leading trade publication for the marijuana industry reports.

One answer is for dispensaries to deduct ***other*** expenses distinct from dispensing marijuana. If a dispensary sells marijuana and is in the ***separate*** business of care-giving, the care-giving expenses are deductible. If only 10% of the premises are used to dispense marijuana, most of the rent is deductible. Good record-keeping is essential. See Medical Marijuana Dispensaries Persist Despite Tax Obstacles.

Another idea was presented April 24 at Harvard by Professor Benjamin Leff of American University's Law School. Professor Leff's paper carried an unvarnished title: Tax Planning for Marijuana Dealers. It was part of Harvard's Tax Policy Seminar hosted by Harvard Prof. Stephen Shay. Mr. Leff correctly pointed out the 280E Catch 22 and came up with another end run.

Marijuana sellers could operate as nonprofit social welfare organizations, he suggested. See Growing the Business: How Legal Marijuana Sellers Can Beat a Draconian Tax. That way Section 280E shouldn't apply. A social welfare organization must promote the common good and general welfare of people in its neighborhood or community. Operating businesses in distressed neighborhoods to provide jobs and job-training for residents? That could fit a dispensary nicely.

You don't need a Harvard education to see that there's something wrong with this picture. Meanwhile, Congressmen Jared Polis (D-CO) and Earl Blumenauer (D-OR) have introduced a bill to end the federal prohibition on marijuana and allow it to be taxed. This legislation would remove marijuana from the Controlled Substances Act.

That way growers, sellers and users could no longer fear violating federal law. Their Marijuana Tax Equity Act would also impose an excise tax on cannabis sales and an annual occupational tax on workers dealing in the growing field of legal marijuana. Whatever happens, it's at least good that someone is paying attention to this mess.

Robert W. Wood practices law with Wood LLP, in San Francisco. The author of more than 30 books, including Taxation of Damage Awards & Settlement Payments (4th Ed. 2009 with 2012 Supplement, Tax Institute), he can be reached at Wood@WoodLLP.com. This discussion is not intended as legal advice, and cannot be relied upon for any purpose without the services of a qualified professional.