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Marijuana Dispensaries Lose IRS Tax Fight Over FedEx Delivery

Marijuana, and the IRS have a difficult relationship. A recent tax case from the [United States Court of Appeals for the Ninth Circuit](#), *Organics Cannabis Foundation LLC v. Commissioner* (Jun. 19, 2020) is an unhappy story about a tax audit of several marijuana dispensaries. *Any* marijuana business faces extra tough tax treatment, since Section 280E of the tax code flatly disallows all tax deductions for a business that consists of “trafficking in controlled substances.” Isn’t marijuana legal in California and many other states? Yes, but federal law hasn’t caught up, and the tax law still calls it trafficking. This flat “you can’t deduct it” rule even includes regular trade or business expenses that are easily deductible by *everybody* else. That means marijuana businesses need tax lawyers to help them finesse their income and expenses very carefully.

This tax dispute started escalating, so the IRS wanted to turn audit notices into final tax bills. After an audit, the IRS usually writes it up and proposes more taxes. You can “protest” in writing to send your tax dispute to the next level of the IRS, the IRS Appeals Office. But if you fail to protest, or if you do not resolve your case at IRS Appeals, you’ll receive an IRS Notice of Deficiency

by certified mail. It can't come any other way. A Notice of Deficiency is often called a "90-day letter" by tax practitioners, because you'll have 90 days to respond. Writing to the IRS to protest a Notice of Deficiency is a waste of time. In fact, only *one* response to a Notice of Deficiency is permitted: filing a Tax Court petition in the U.S. Tax Court clerk's office in Washington, D.C. The Tax Court judges hear cases in federal courthouses all over the country, but the clerk's office is in Washington.



If you miss the 90-day deadline, the U.S. Tax Court cannot hear your case, and that's what happened here. The dispensaries tried to file their petitions in Tax Court April 22, 2015, the last day in the 90 days they were allowed to file them. They used FedEx, which seems reasonable, right? FedEx said it tried to deliver them (too early maybe), but FedEx said it couldn't. So, FedEx delivered to the Tax Court on the morning of April 23, 2015, one day too late. The dispensaries noted that FedEx *tried* to deliver them on the 22nd, but the Tax Court and the Ninth Circuit rejected the argument that the clerk's office was

inaccessible on that day. A clerk's office is "inaccessible" on the last day of a filing period only if the office cannot practicably be accessed for delivery of documents during a sufficient period of time up to and including the point at which the clerk's office is scheduled to close. The dispensaries had no evidence that the Tax Court Clerk's Office could not have been accessed during the rest of the day after FedEx unsuccessfully attempted delivery.

But isn't mailing *usually* "filing" for tax purposes? Yes, if the dispensaries had sent the petitions regular U.S. mail, that would have been true. Postmarking is what counts, even if it had taken the Postal Service a week to deliver it. Many tax cases are about whether the taxpayer can actually *prove* they mailed the Tax Court petition before the magic 90-day deadline. Couldn't the dispensaries show that they sent it FedEx before the deadline? The IRS now lists some FedEx services as qualifying too, but here, the dispensaries used a particular FedEx service that was not on the IRS's formal list of designated delivery services at the time. The qualifying list of included FedEx, DHL, and UPS. But for FedEx, you could send "FedEx Priority Overnight" and "FedEx Standard Overnight," but not "FedEx First Overnight."

The dispensaries raised other arguments, including equitable tolling, and even argued that the IRS waived the issue. After all, it took a whopping 15 months after the Tax Court "filing" before the IRS filed a motion in Tax Court to throw out the case as not timely. Maybe the IRS didn't notice the glitch for over a year, but even that delay didn't save the dispensaries. So, after all of this fighting in the Tax Court and in the Ninth Circuit just for the chance to fight over the dispensaries' tax bills, are they out of luck? Yes and no.

Tax Court is the only place you can fight about your taxes before paying them. If you don't file within 90 days in Tax Court, your Notice of Deficiency becomes final. That means you get a final tax bill. The only way to fight it then

is to pay it and then ask for a refund. If the IRS denies your refund request (they will), you can sue for a refund in federal district court. But that is usually a lot more expensive and the procedures are quite different. Is any of this fair? Formalities and technical rules often don't seem fair, as these dispensaries can probably attest. When it comes to taxes, procedure is important, and mistakes can be painful indeed.

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