

The IRS Signals It Will Continue to Challenge Cannabis-Dispensary Business Deductions Under the Biden Administration

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The IRS recently indicated that it does not plan to reevaluate its position which precludes cannabis dispensaries from taking deductions for business costs and expenses under Section 280E of the Internal Revenue Code. The federal government recently made this position clear in its brief in opposition to a writ of certiorari to the US Supreme Court in *Standing Akimbo, LLC v. United States of America*, Case No. 20-645.

In this case, the petitioner, Standing Akimbo LLC, is a Colorado corporation that lawfully operates a medical-cannabis dispensary in Denver under Colorado law. In 2017, the IRS began an investigation into whether the petitioner had claimed business deductions prohibited under Section 280E of the Code (26 U.S.C. 280E) on its federal tax returns. Section 280E prohibits the deducting of costs incurred in the trafficking of controlled substances.

The IRS served subpoenas on the Colorado Department of Revenue for information related to the petitioner's cannabis sales, annual harvests, and plant inventories to determine whether its claimed business deductions violated Section 280E. Petitioner sought to quash the subpoenas, but the district court and the 10th Circuit sided with the IRS, resulting in petitioner filing a petition for writ of certiorari on November 12, 2020.

The Acting Solicitor General, Elizabeth B. Prelogar, signaled in the government's opposition brief that the IRS' position as to Section 280E violations will remain the same under the Biden Administration. The brief noted that while Colorado state law permits the operation of cannabis dispensaries, federal law does not, and federal law is what ultimately matters under the Code.

More specifically, the brief noted that while "as a general matter, the Code permits a taxpayer to deduct 'all the ordinary and necessary expenses paid or incurred during a taxable year in carrying on any trade or business.' ...the Code prohibits tax deductions (or tax credits) for expenditures made 'in carrying on any trade or business' that 'consists of trafficking in controlled substances (within

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the meaning of Schedule I and II of the Controlled Substances Act) which is prohibited by Federal law or the law of any State in which such trade or business is conducted.”

Consequently, because federal law classifies cannabis as a Schedule I controlled substance, businesses which sell it are subject to the prohibitions of Section 280E, regardless of the legality of such business under state law. In other words, until Congress either amends the Code to allow business deductions by cannabis dispensaries or changes the Schedule I classification for cannabis, the IRS will continue to scrutinize deductions taken by this industry. Bailey Glasser stands ready to assist if you have any questions or concerns regarding any matters related to the cannabis industry.

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