

DEPARTMENT OF REVENUE

Taxpayer Service Division - Tax Group

RETAIL MARIJUANA TAX

1 CCR 201-18

RETAIL MARIJUANA EXCISE TAX

Rule 39-28.8-302. Retail Marijuana Excise Tax.

Basis and Purpose

The basis for this rule is §§ 39-21-112(1), 39-28.8-101, 301, 302, and 308, C.R.S. The purpose of this rule is to provide guidance regarding the imposition and calculation of retail marijuana excise tax and the record keeping requirements therefor.

(1) **Incidence of Tax.** The Excise Tax is imposed upon the Retail Marijuana Cultivation Facility, which shall pay the Excise Tax to the Department on the first ~~sale or~~ Transfer of Retail Marijuana to a Retail Marijuana Store or a Retail Marijuana Products Manufacturing Facility. No Colorado Retail Marijuana Excise Tax is imposed on the ~~sale or~~ Transfer of Retail Marijuana from one Retail Marijuana Cultivation Facility to another Retail Marijuana Cultivation Facility. In ~~such~~ the case of such Transfer, the Colorado Retail Marijuana Excise Tax will be imposed on the subsequent ~~sale or~~ Transfer of the Retail Marijuana to a Retail Marijuana Store or a Retail Marijuana Products Manufacturing Facility.

(a) *Virtual Transfers.* Except as provided in this paragraph (1)(a), Transfers subject to the Excise Tax include virtual Transfers of Retail Marijuana or Retail Marijuana Product between Unaffiliated Marijuana Licensees if such Transfers are accurately reflected in the Inventory Tracking System, even if the physical movement of the Retail Marijuana or Retail Marijuana Product does not follow the virtual Transfer. No Excise Tax is imposed on the Transfer or virtual Transfer of seeds or Immature Plants for subsequent cultivation in a Retail Marijuana Cultivation Facility, in which case the Excise Tax is imposed on the subsequent Transfer of Retail Marijuana cultivated from such seeds and Immature Plants. Any Retail Marijuana Cultivation Facility utilizing a virtual Transfer shall maintain documentation required by paragraph (6)(a) of this rule regarding the virtual Transfer and any subsequent Transfer of the Retail Marijuana. The Inventory Tracking System will not determine whether any Transfer from a Retail Marijuana Cultivation Facility is subject to Retail Marijuana Excise Tax. If any Transfer does not accurately represent legitimate business activity or is in any way designed to avoid or defeat the proper imposition and calculation of the Excise Tax, the Executive Directory may determine the Transfer of the Retail Marijuana upon which the Excise Tax is properly imposed.

(i) *Examples*

(A) Virtual Transfer would be recognized. A Retail Marijuana Store owned by Company A purchases Retail Marijuana from a Retail Marijuana Cultivation Facility owned by Company B through a documented point-of-sale transaction in the Inventory Tracking System reflecting the actual contract price paid. A second Transfer is then documented in the Inventory Tracking System transferring the Retail Marijuana from the

Retail Marijuana Store owned by Company A to a Retail Marijuana Cultivation Facility owned by Company A. The physical movement of Retail Marijuana need not follow all virtual Transfers. In this scenario, the Retail Marijuana Excise Tax would be imposed at the time of the first Transfer from the Retail Marijuana Cultivation Facility owned by Company B to the Retail Marijuana Store owned by Company A, even though that Transfer is virtual. No additional Excise Tax is imposed on the subsequent Transfer of that Retail Marijuana from the Retail Marijuana Cultivation Facility owned by Company A to the Retail Marijuana Store owned by Company A.

(B) Virtual Transfer would not be recognized. A Retail Marijuana Store owned by Company A purchases seeds and Immature Plants from a Retail Marijuana Cultivation Facility owned by Company B through a documented point-of-sale transaction in the Inventory Tracking System. A second Transfer is then documented in the Inventory Tracking System Transferring the seeds and Immature Plants from the Retail Marijuana Store owned by Company A to a Retail Marijuana Cultivation Facility owned by Company A. The seeds and Immature Plants are cultivated and harvested at the Retail Marijuana Cultivation Facility owned by Company A. After cultivation and harvest, the Retail Marijuana Cultivation Facility owned by Company A Transfers the resulting Retail Marijuana to the Retail Marijuana Store owned by Company A. In this scenario, payment of Excise Tax on the Transfer from Company B to Company A would defeat the proper imposition and calculation of the Excise Tax. Instead, the Executive Director would impose the Excise Tax on the Transfer of the Retail Marijuana from the Retail Marijuana Cultivation Facility owned by Company A to the Retail Marijuana Store owned by Company A, using the applicable Average Market Rate(s).

- (2) **Local Incidence of Tax.** See §§ 29-2-114 and 32-1-1004, C.R.S. and the applicable local ordinance or resolution for information about the application of any local excise taxes to ~~R~~etail ~~M~~arijuana ~~sales and~~ Transfers.
- (3) **Exempt ~~Sales and~~ Transfers.** ~~No excise tax is imposed on the sale or Transfer of unprocessed medical marijuana by a marijuana cultivation facility to a medical marijuana center.~~ The Transfer of Retail Marijuana to a ~~Retail Marijuana T~~esting ~~F~~acility for testing purposes is exempt from Retail Marijuana Excise Tax so long as the marijuana is destroyed by the Retail Marijuana Testing Facility during or following the testing.
- (4) **Inventory Tracking System.** When a ~~sale or~~ Transfer is entered into the Inventory Tracking System, all ~~sales or~~ Transfers between Unaffiliated Marijuana Business Licensees, ~~whether virtual or physical,~~ must be entered in a manner that allows the price to be recorded in such ~~Inventory Tracking s~~ystem. When entering the price, the actual price charged, exclusive of tax, must be recorded in such ~~Inventory Tracking S~~ystem.
- (5) **Calculation and Payment of Tax.**
 - (a) The method for calculating ~~Colorado e~~Retail Marijuana Excise ~~t~~ax depends upon whether the first ~~sale or~~ Transfer of Retail Marijuana from a Retail Marijuana Cultivation Facility to a Retail Marijuana Store or a Retail Marijuana Products ~~Manufacturing Facility~~ is between Unaffiliated Marijuana Business Licensees or Affiliated Marijuana Business Licensees.
 - (i) Unaffiliated Marijuana Business Licensees –

- (A) If the first ~~sale or~~ Transfer is between Unaffiliated Marijuana Business Licensees, the ~~e~~Excise ~~t~~Tax is calculated based on the actual contract price of the Retail Marijuana ~~sold or~~ Transferred.
 - (B) If no contract price is established at the time of the first ~~sale or~~ Transfer the ~~e~~Excise ~~t~~Tax is calculated based on the Average Market Rate of the Retail Marijuana ~~sold or~~ Transferred. Examples of such ~~sales or~~ Transfers include:
 - (I) a temporary Transfer, that does not constitute a sale, of Retail Marijuana from a Retail Marijuana Cultivation Facility to an unaffiliated Retail Marijuana Products Manufacturing Facility that will process or manufacture the Retail Marijuana before returning it to the Retail Marijuana Cultivation Facility or to a Retail Marijuana Store affiliated with the Retail Marijuana Cultivation Facility; or
 - (II) a Transfer of Retail Marijuana from a Retail Marijuana Cultivation Facility to an unaffiliated Retail Marijuana Store for which a price is not established at the time of Transfer, but instead depends upon the revenue generated from the subsequent sale of the Retail Marijuana to the end consumer.
 - (ii) Affiliated Marijuana Business Licensees - If the first ~~sale or~~ Transfer is between Affiliated Marijuana Business Licensees, the ~~e~~Excise ~~t~~Tax is calculated based on the Average Market Rate of the Retail Marijuana ~~sold or~~ Transferred.
- (b) *Contract Price*
- (i) The contract price is the invoice price charged by a Retail Marijuana Cultivation Facility to each licensed purchaser for each ~~sale or~~ Transfer of Unprocessed Retail Marijuana, exclusive of any tax that is included in the written invoice price, and exclusive of any discount or other reduction. In the case of multiple invoices reflecting multiple prices for the same transaction, the contract price used to calculate the tax is the highest such price. For the purpose of this paragraph (45)(b)(i), the invoice price charged includes all consideration the seller receives from the buyer in whatever form and regardless of the time of receipt.
- (c) *Calculation of Average Market Rate.*
- (i) The Department will calculate the Average Market Rate using reported sales of each category during the Test Period. The Department will determine the best methodology to arrive at the Average Market Rate. The Department may, from time to time, change its method of calculating the Average Market Rate if, in the judgment of the Department, such change is necessary to arrive at the most accurate Average Market Rate given the market conditions.
- (d) In the case of Retail Marijuana ~~e~~Excise ~~t~~Tax calculated using Average Market Rate, the ~~Excise T~~ax shall be calculated based on the category of Retail Marijuana (i.e., Bud, Trim, Immature Plant, Wet Whole Plant, Seed, ~~or Contaminated Product~~ Bud Allocated for Extraction, ~~or Trim Allocated for Extraction~~) being ~~sold or~~ Transferred. The provisions of this paragraph (45)(d) apply only to ~~e~~Excise ~~t~~Tax calculated using Average Market Rate.
- (i) For the categories of Bud, Trim, Bud Allocated for Extraction, and Trim Allocated for Extraction, ~~T~~he ~~e~~Excise ~~t~~Tax ~~for Bud~~ is computed on the total weight of the

~~Retail Marijuana all Bud that will be sold or~~ Transferred. If multiple categories of Retail Marijuana are included in the Transfer, the Excise Tax shall be calculated separately for each category of Retail Marijuana included in the Transfer by separately calculating the total weight of the Retail Marijuana included in each category and multiplying the weight by the Average Market Rate of each category and the applicable Excise Tax rate. Notwithstanding this rule, ~~the inadvertent inclusion of~~ inconsequential amounts of Bud inadvertently included in a ~~sale or~~ Transfer that is otherwise Trim shall ~~not~~ be treated as Trim and not as ~~the sale of~~ Bud.

- (A) Retail Marijuana categorized for the purpose of Excise Tax calculation as Bud Allocated for Extraction or Trim Allocated for Extraction may not be subsequently Transferred for direct sale to consumers unless it has first been subject to extraction as allocated.
- (B) If Bud Allocated for Extraction or Trim Allocated for Extraction is subsequently Transferred for direct sale to consumers and has not been subjected to extraction, the Retail Marijuana Cultivation Facility shall amend the Retail Marijuana Excise Tax Return upon which the Excise Tax was initially paid in order to recalculate the Excise Tax, and any applicable penalty and interest, using the Average Market Rates for the category of Bud or Trim, respectively.
- (C) The Retail Marijuana Product Manufacturing Facility shall notify, in writing, the Retail Marijuana Cultivation Facility of any subsequent Transfer of Bud Allocated for Extraction or Trim Allocated for Extraction that has not first been subjected to extraction within seven (7) days of the Transfer by the Retail Marijuana Product Manufacturing Facility. Any failure by a Retail Marijuana Production Manufacturing Facility to notify a Retail Marijuana Cultivation Facility in accordance with this paragraph (5)(d)(i)(C) shall not relieve the Retail Marijuana Cultivation Facility of liability for any additional tax, penalty, and interest due pursuant to paragraph (5)(d)(i)(B) of this rule.

- ~~(ii) — The excise tax for Trim is calculated on the total weight of all Trim that will be sold or Transferred. Notwithstanding this rule, the inadvertent inclusion of inconsequential amounts of Bud in a sale or Transfer that is otherwise Trim shall be treated as the sale of Trim.~~
- (iii) The Retail Marijuana Excise Tax for Immature Plants is calculated on the total number of Immature Plants being sold or Transferred.
- (iv) The Retail Marijuana Excise Tax for Wet Whole Plants is calculated on the total weight of the entire Retail Marijuana Wet Whole Plant. The weight of the entire Retail Marijuana Wet Whole Plant is subject to the Excise Tax because the Average Market Rate for Wet Whole Plant already reflects an allowance for water weight and waste. The Wet Whole Plant may not undergo any further processing (i.e., drying the plant and subsequently selling separately the Bud and Trim) prior to being weighed when using the Wet Whole Plant basis. The Wet Whole Plant must be harvested and packaged in the same day.
 - (A) The Retail Marijuana Wet Whole Plant must be weighed within 2 hours of the plant being harvested and without any further processing, including any artificial drying such as increasing the ambient temperature of the room or any other form of drying, curing, or trimming. The Retail Marijuana Excise Tax must be calculated and paid on the total Wet

Whole Plant weight. If the Wet Whole Plant is not weighed within 2 hours of being harvested or is subjected to further processing before being weighed, the Excise Tax on such plant cannot be calculated and paid on the Wet Whole Plant basis and must instead be calculated and paid at the Bud and Trim rates.

- (B) ~~The~~ A Retail Marijuana Cultivation Facility ~~that calculates and pays the Excise Tax using the Wet Whole Plant rate~~ must maintain records of the time each ~~Wet Whole Plant~~ (identified by its RFID tag) was harvested and weighed and the weight of each ~~Wet Whole Plant~~. The records must be in writing and created contemporaneously with the harvesting and weighing.
- (v) The Retail Marijuana Excise Tax for seeds is calculated on the total number of ~~Seeds being sold or~~ Transferred.
- ~~(vi) The excise tax for Contaminated Product Allocated for Extraction is computed on the total weight of all Contaminated Product Allocated for Extraction that will be sold or Transferred.~~
- (vii) The Retail Marijuana Excise Tax for Retail Marijuana Concentrate ~~created~~ produced by a Retail Marijuana Cultivation Facility ~~can~~ shall be ~~paid~~ calculated either pursuant to paragraph (5)(d)(i) of this rule based on the ~~amount~~ weight of Bud Allocated for Extraction and/or Trim Allocated for Extraction used in the extraction or ~~can be paid~~ pursuant to paragraph (5)(d)(iii) of this rule based on the weight of Wet Whole Plant(s) used in the extraction ~~basis pursuant to paragraphs (4)(b)(i), (4)(b)(ii), and (4)(b)(iv) of this rule.~~
- (A) ~~Example: A Retail Marijuana Cultivation Facility uses 100 grams of Bud and 348 grams of Trim to make 15 grams of concentrate on March 9, 2016. (Note: Average Markets Rates are based on the rates effective on January 1, 2016.) The following calculation will need to be performed:~~
 - Bud:
 $100 \text{ grams} / 453.592 \text{ grams} = 0.2205 \text{ lb. used to create the concentrate}$
 $0.2205 \text{ lb.} \times \$1948/\text{lb.} = \$430 \text{ (Taxable Amount)}$
 $\$430 \times 15\% = \65
 - Trim:
 $348 \text{ grams} / 453.592 \text{ grams} = 0.7672 \text{ lb. used to create the concentrate}$
 $0.7672 \text{ lb.} \times \$464/\text{lb.} = \$356 \text{ (Taxable Amount)}$
 $\$356 \times 15\% = \53
 - Total Due is $\$65 + \$53 = \$118$
 - ~~*448 grams per pound is acceptable to use in this calculation.~~

(6) Evidence of Payment of Tax.

- (a) Both the Retail Marijuana Cultivation Facility and the first purchaser or transferee shall maintain documentation ~~of the payment of~~sufficient to determine the Excise Tax due for the Transfer. Such ~~evidencedocumentation may be the purchase or Transfer invoice, so long as the invoice shows~~must include:
- (i) the name and license number of the Retail Marijuana Cultivation Facility,
 - (ii) ~~the~~ name and license number of first purchaser or transferee, ~~the amount of excise tax paid or that will be paid by the Retail Marijuana Cultivation Facility when it files its next Retail Marijuana Excise Tax Return,~~
 - (iii) the category of ~~product~~Retail Marijuana ~~being sold or~~ Transferred,
 - (iv) the date of ~~sale or~~ Transfer, ~~and~~
 - (v) the weight of the ~~product being~~Retail Marijuana ~~sold or~~ Transferred, ~~and~~
 - (vi) the contract price for the Transfer, if applicable.