

Proposed Amendments to California Code of Regulations

Title 18. Public Revenues

Division 2. California Department of Tax and Fee Administration –

Business Taxes

Chapter 8.7. Cannabis Tax Regulations

Section 3700.

Regulation 3700. Cannabis Excise and Cultivation Taxes.

(a) Definitions. For purposes of this chapter (Cannabis Tax Regulations, commencing with Regulation 3700), the definitions of terms in part 14.5, Cannabis Tax, (commencing with section 34010) of division 2 of the Revenue and Taxation Code shall apply and the following terms are defined or further defined below.

(1) “California Cannabis Track-and-Trace system” means the system all persons licensed pursuant to division 10 (commencing with section 26000) of the Business and Professions Code are required to use to record the inventory and movement of cannabis and cannabis products through the commercial cannabis supply chain.

(2) “Cannabis accessories” shall have the same meaning as set forth in section 11018.2 of the Health and Safety Code.

(3) “Cannabis flowers” means the flowers of the plant *Cannabis sativa* L. that have been harvested, dried, trimmed or untrimmed, and cured, and prior to any processing whereby the plant material is transformed into a concentrate, including, but not limited to, concentrated cannabis, or an edible or topical product containing cannabis or concentrated cannabis and other ingredients. The term “cannabis flowers” excludes leaves and stems removed from the cannabis flowers prior to the cannabis flowers being transferred or sold.

(4) “Cannabis leaves” means all parts of the plant *Cannabis sativa* L. other than cannabis flowers that are sold or consumed.

(5) “Cultivator” means all persons required to be licensed to cultivate cannabis pursuant to division 10 (commencing with section 26000) of the Business and Professions Code, including a microbusiness that cultivates cannabis as set forth in paragraph (3) of subdivision (a) of section 26070 of the Business and Professions Code.

(6) “Distributor” means a person required to be licensed as a distributor pursuant to division 10 (commencing with section 26000) of the Business and Professions Code, including a microbusiness that acts as a licensed distributor as set forth in paragraph (3) of subdivision (a) of section 26070 of the Business and Professions Code.

(7) “Fresh cannabis plant” means the flowers, leaves, or a combination of adjoined flowers, leaves, stems, and stalk from the plant *Cannabis sativa* L. that is either cut off just above the roots, or otherwise removed from the plant.

To be considered “fresh cannabis plant,” the flowers, leaves, or combination of adjoined flowers, leaves, stems, and stalk must be weighed within two hours of the plant being harvested and without any artificial drying such as increasing the ambient temperature of the room or any other form of drying, or curing and must be entered into the California Cannabis Track-and-Trace system, manifested, and invoiced as “fresh cannabis plant.” If the California Cannabis Track-and-Trace system is not available, or a licensee is not required to record activity, the paper manifest or invoice shall indicate “fresh cannabis plant” is being sold or transferred.

(8) “Manufacturer” means a person required to be licensed as a manufacturer pursuant to division 10 (commencing with section 26000) of the Business and Professions Code, including a microbusiness that acts as a licensed manufacturer as set forth in paragraph (3) of subdivision (a) of section 26070 of the Business and Professions Code.

(9) “Ounce” means 28.35 grams.

(10) “Plant waste” means waste of the plant *Cannabis sativa* L. that is managed pursuant to the cannabis waste management provisions of chapter 1, division 8 of title 3 of the California Code of Regulations.

(11) “Wholesale cost” means:

(A) Prior to January 1, 2020, the amount paid by the cannabis retailer for the cannabis or cannabis products, including transportation charges. Discounts and trade allowances must be added back when determining wholesale cost.

For purposes of this subdivision, “discounts or trade allowances” are price reductions, or allowances of any kind, whether stated or unstated, and include, without limitation, any price reduction applied to a supplier's price list. The discounts may be for prompt payment, payment in cash, bulk purchases, related-party transactions, or “preferred-customer” status.

(B) On and after January 1, 2020, the amount paid by the cannabis retailer for the cannabis or cannabis products, including transportation charges.

(b) Collection of Cultivation Tax When Testing Requirement is Waived. For purposes of the cultivation tax imposed on all harvested cannabis that enters the commercial market pursuant to section 34012 of the Revenue and Taxation Code, when the testing requirement is waived pursuant to subdivision (1) of section 26070 of the Business and Professions Code, a distributor shall collect the cultivation tax from cultivators when cannabis is transferred or sold to the distributor.

(c) Cultivation Tax. For transactions made on and after January 1, 2018, the rate of the cultivation tax applies as follows:

(1) Per dry-weight ounce of cannabis flowers, and at a proportionate rate for any other quantity.

(2) Per dry-weight ounce of cannabis leaves, and at a proportionate rate for any other quantity.

(3) Per ounce of fresh cannabis plant, and at a proportionate rate for any other quantity.

(d) Cultivation Tax Invoicing Requirements. A cultivator is liable for the cultivation tax imposed pursuant to section 34012 of the Revenue and Taxation Code. A cultivator's liability for the cultivation tax is not extinguished until the cultivation tax has been paid to the State, except as otherwise provided in subdivision (h) of Revenue and Taxation Code section 34012.

(1) The distributor shall provide to the cultivator, or to the manufacturer if the cannabis was first sold or transferred to a manufacturer, an invoice, receipt, or similar document that identifies the licensee receiving the product, the originating cultivator, associated unique identifier of the cannabis, the amount of cultivation tax, and the weight and category of the cannabis. The weight and category of the cannabis identified on the invoice shall equal the weight and category of the cannabis entered into the California Cannabis Track-and-Trace system.

(2) The manufacturer shall provide to the cultivator when a cultivator sells or transfers cannabis to a manufacturer, an invoice, receipt, or similar document that identifies the licensee receiving the product, the originating cultivator, the associated unique identifier of the cannabis, the amount of cultivation tax, and the weight and category of the cannabis. The weight and category of the cannabis identified on the invoice shall equal the weight and category of the cannabis entered into the California Cannabis Track-and-Trace system.

(3) The manufacturer shall include on the invoice, receipt, or similar document to the distributor or the next party in the transaction, the associated weight and category of the cannabis used to produce the cannabis products. This associated cultivation tax and the weight and category of the cannabis used to produce a cannabis product shall follow the cannabis product from one party to the next until it reaches a distributor for quality assurance review, as described in section 26110 of the Business and Professions Code.

(e) Remittance of Cultivation Tax. A distributor who conducts the required quality assurance review before the cannabis or cannabis products can be sold or transferred to a cannabis retailer pursuant to section 5307, of chapter 2, division 42 of title 16 of the California Code of Regulations, is responsible for the remittance of the cultivation tax based on the weight and category of the cannabis that enters the commercial market.

(f) Cannabis Removed from a Cultivator's Premises is Presumed Sold.

(1) Unless the contrary is established, it shall be presumed that all cannabis removed from the cultivator's premises, except for plant waste, is sold and thereby taxable pursuant to section 34012 of the Revenue and Taxation Code.

(2) The presumption in subdivision (f)(1) may be rebutted by a preponderance of the evidence demonstrating that the cannabis was removed for purposes other than for entry into the commercial market. Reasons for which cannabis may be removed and not subject to tax on that removal include, but are not limited to, the following:

(A) Fire,

(B) Flood,

(C) Pest control,

(D) Processing by a cultivator, such as trimming, drying, curing, grading, packaging, or labeling,

(E) Storage prior to the completion of, and compliance with, the quality assurance review and testing, as required by Business and Professions Code section 26110, and

(F) Testing.

(g) Receipts for Cannabis Excise Tax Paid to Cannabis Retailers. A purchaser of cannabis or cannabis products is liable for the cannabis excise tax imposed pursuant to section 34011 of the Revenue and Taxation Code. A purchaser's liability for the cannabis excise tax is not extinguished until the cannabis excise tax has been paid to the State, except as otherwise provided in subdivision (g)(2).

(1) Each cannabis retailer is required to provide a purchaser of cannabis or cannabis products with an invoice, receipt, or other document that includes a statement that reads: "The cannabis excise taxes are included in the total amount of this invoice."

(2) An invoice, receipt, or other document with the required statement set forth in subdivision (g)(1) obtained from the cannabis retailer is sufficient to relieve the purchaser of the cannabis excise tax imposed on the purchase of the cannabis or cannabis products.

(3) A cannabis retailer may separately state a charge for the cannabis excise tax when the cannabis or cannabis products are sold to a purchaser and the separately stated charge shall be equal to the cannabis excise tax required to be paid to a distributor pursuant to section 34011 of the Revenue and Taxation Code.

(h) Excess Cannabis Excise Tax Collected by a Cannabis Retailer.

(1) Definition. When an amount represented by a cannabis retailer to a customer as constituting cannabis excise tax is computed upon an amount that is not taxable or is in excess of the taxable amount and is actually paid by the customer to the cannabis retailer, the amount so paid is excess cannabis excise tax collected. Excess cannabis excise tax is charged when tax is computed on a transaction which is not subject to cannabis excise tax, when cannabis excise tax is computed on an amount in excess of the amount subject to cannabis excise tax, when cannabis excise tax is computed using a tax rate higher than the rate imposed by law, and when mathematical or clerical errors result in an overstatement of the cannabis excise tax on an invoice, receipt, or similar document.

(2) Procedure Upon the Determination of Excess Cannabis Excise Tax Collected. Whenever the Department determines that a person has collected excess cannabis excise tax, the person will be afforded an opportunity to refund the excess cannabis excise tax collection to the customers from whom they were collected.

(3) Evidence Sufficient to Establish that Excess Cannabis Excise Tax Amounts Have Been or Will Be Returned to the Customer.

(A) If a person already has refunded to each customer amounts collected as excess cannabis excise tax due, this may be evidenced by any type of record that can be verified by audit such as:

1. Receipts or cancelled checks.
2. Books of account showing that credit has been allowed the customer as an offset against an existing indebtedness owed by the customer to the person.

(B) If a person has not already made excess cannabis excise tax refunds to each customer but desires to do so rather than incur an obligation to the state, the person must:

1. Inform in writing each customer from whom an excess cannabis excise tax amount was collected that the excess cannabis excise tax amount collected will be refunded to the customer or that, at the customer's option, the customer will be credited with such amount, and
2. The person must obtain and retain for verification by the Department an acknowledgement from the customer that the customer has received notice of the amount of indebtedness of the person to the customer.

(C) In the event a cannabis retailer is unable to make such refunds to a customer, the cannabis retailer shall remit the excess cannabis excise tax to a distributor pursuant to paragraph 4 of this subdivision.

(4) Cannabis Retailer's Remittance of Excess Cannabis Excise Tax to a Distributor.

(A) Once a cannabis retailer determines that it has collected excess cannabis excise tax and is unable to make a refund to the customer, and has not previously paid the excess cannabis excise tax to a distributor, the cannabis retailer shall remit the excess cannabis excise tax to a distributor licensed pursuant to division 10 (commencing with section 26000) of the Business and Professions Code.

(B) Upon a cannabis retailer's remittance of the excess cannabis excise tax to a distributor, as set forth in subdivision (h)(4)(A), a distributor shall provide the cannabis retailer with an invoice, receipt, or other similar document that contains all of the following:

1. Date of execution of the invoice, receipt, or other similar document,
2. Name of the distributor,

3. Name of the cannabis retailer,
4. The amount of excess cannabis excise tax,
5. The number of the seller's permit held by the cannabis retailer, and
6. The number of the seller's permit held by the distributor. If the distributor is not required to hold a seller's permit because the distributor makes no sales, the distributor must include a statement to that effect on the receipt in lieu of a seller's permit number.

(5) Distributor's Reporting and Remittance of the Excess Cannabis Excise Tax. A distributor shall report and remit the excess cannabis excise tax collected from the cannabis retailer pursuant to subdivision (h)(4) with the distributor's first return subsequent to receiving the excess cannabis excise tax from the cannabis retailer.

(6) The excess cannabis excise tax provisions in subdivisions (h)(1) through (5) are superseded by the provisions in Regulation 3703 and no longer operative on and after January 30, 2023.

(i) Cannabis or Cannabis Products Sold with Cannabis Accessories. A cannabis excise tax shall be imposed upon purchasers of cannabis or cannabis products sold in this state at the rate of 15 percent of the average market price of any retail sale by a cannabis retailer. Unless as otherwise provided below, the cannabis excise tax does not apply to cannabis accessories.

(1) When cannabis or cannabis products are sold or transferred with cannabis accessories (e.g., vape cartridges) to a cannabis retailer, and a distributor separately states the price of the cannabis or cannabis products from the cannabis accessories, the cannabis excise tax applies to the average market price of the cannabis or cannabis products, and not to the separately stated charge for the cannabis accessories.

(A) A distributor that makes a sales price segregation must maintain supporting documentation used to establish the individual cost of the cannabis or cannabis products and the cannabis accessories.

(B) Charges will be regarded as separately stated only if they are separately set forth in the invoice, receipt, or other document issued to the purchaser contemporaneously with the sale. The fact that the charges can be computed from other records will not suffice as a separate statement.

(2) When cannabis or cannabis products are sold or transferred with cannabis accessories (e.g., vape cartridges) to a cannabis retailer, and a distributor does not separately state the sales price of the cannabis or cannabis products from the cannabis accessories, the cost of the cannabis accessories shall be included in the average market price to which the cannabis excise tax applies.

(3) Subdivision (i) is inoperative on and after January 1, 2023.

(j) Reporting the Cannabis Excise Tax. A distributor shall report and remit the cannabis excise tax due with the return for the quarterly period in which the distributor sells or transfers the cannabis or cannabis products to a cannabis retailer.

(1) A person that holds both a cannabis retailer license and a distributor license, or a microbusiness that is authorized to act as a distributor, is subject to the same cannabis excise tax collection and reporting requirements as a person that holds only a distributor license.

(2) A distributor that sells or transfers cannabis or cannabis products to another distributor is not responsible for collecting the cannabis excise tax from the other distributor.

(3) Transactions between two distributors shall document that no cannabis excise tax was collected or remitted on the invoice between the two distributors. Documentation shall identify the selling distributor, the selling distributor's license number, the purchasing distributor, and the purchasing distributor's license number. When the transaction is between a distributor and a microbusiness acting as a distributor, the documentation shall indicate that the microbusiness is acting as a distributor.

(4) The distributor or microbusiness that sells or transfers cannabis or cannabis products to a cannabis retailer is responsible for collecting the cannabis excise tax from the cannabis retailer based on the average market price of the cannabis or cannabis products supplied to the cannabis retailer.

(k) Penalties.

(1) Penalty for Unpaid Taxes. In addition to any other penalty imposed pursuant to the Fee Collection Procedures Law (commencing with section 55001 of the Revenue and Taxation Code) or any other penalty provided by law, a penalty of 50 percent of the amount of the unpaid cannabis excise tax or cannabis cultivation tax shall be added to the cannabis excise tax and cultivation tax not paid in whole or in part within the time required pursuant to sections 34015 and 55041.1 of the Revenue and Taxation Code.

(2) Relief from Penalty for Reasonable Cause. If the Department finds that a person's failure to make a payment of the cannabis excise tax or cannabis cultivation tax is due to reasonable cause and circumstances beyond the person's control, and occurred notwithstanding the exercise of ordinary care and the absence of willful neglect, the person may be relieved of the penalty provided by subdivision (k)(1) for such failure.

Any person seeking to be relieved of the penalty shall file with the Department a statement under penalty of perjury setting forth the facts upon which the claim for relief is based.

Note: Authority cited: Section 15570.40(b), Government Code; and Section 34013, Revenue and Taxation Code. Reference: Sections 34010, 34011, 34012, 34013, 34015, 55041.1 and 55044, Revenue and Taxation Code; Section 11018.2, Health and Safety Code; and Section 15570.40(b), Government Code.