

TITLE 18. CALIFORNIA DEPARTMENT OF TAX AND FEE ADMINISTRATION

PROPOSED ADOPTION OF CALIFORNIA CODE OF REGULATIONS, TITLE 18, SECTION 3802, GROSS RECEIPTS FROM SALES OF CANNABIS AND CANNABIS PRODUCT, WITH PROPOSED AMENDMENTS

NOTICE IS HEREBY GIVEN that the California Department of Tax and Fee Administration (Department), pursuant to the authority in Revenue and Taxation Code (RTC) section 34013, proposes to adopt California Code of Regulations (CCR), title 18, section (Regulation or Reg.) 3802, Gross Receipts from Sales of Cannabis and Cannabis Products, with proposed amendments. The Department originally adopted Regulation 3802 as an emergency regulation to clarify the meaning of gross receipts from the retail sale of cannabis or cannabis products for purposes of the cannabis excise tax imposed by RTC section 34011.2, and the Department is now proposing to adopt it as permanent regulation through the regular rulemaking process in the Administrative Procedure Act (APA) (commencing with Gov. Code (GC), § 11340). The Department is proposing to adopt emergency Regulation 3802 with amendments clarifying that gross receipts from the sale of cannabis or cannabis products include any amount a purchaser is required to pay “To reimburse the cannabis retailer for the cost of doing business, including the costs of the sale.” The Department is also proposing to adopt emergency Regulation 3802 with amendments that add an example of an amount included in gross receipts because the purchaser is required to pay it for a service that is part of the sale of cannabis.

AUTHORITY

RTC section 34013

REFERENCE

RTC sections 6012, 34010, 34011.2, 55061, and 55302.

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

Summary of Existing Laws

Sales Tax

Sales tax is imposed on retailers for the privilege of selling tangible personal property at retail in California, and the rate of the sales tax applies to retailers’ gross receipts from the sale of tangible personal property sold at retail in this state. (RTC, § 6051.) RTC section 6012 provides that, for sales tax purposes:

- (a) “Gross receipts” mean the total amount of the sale or lease or rental price, as the case may be, of the retail sales of retailers, valued in money, whether received in money or otherwise, without any deduction on account of any of the following:

(1) The cost of the property sold. However, in accordance with any rules and regulations as the [Department] may prescribe, a deduction may be taken if the retailer has purchased property for some other purpose than resale, has reimbursed his or her vendor for tax which the vendor is required to pay to the state or has paid the use tax with respect to the property, and has resold the property prior to making any use of the property other than retention, demonstration, or display while holding it for sale in the regular course of business. If that deduction is taken by the retailer, no refund or credit will be allowed to his or her vendor with respect to the sale of the property.

(2) The cost of the materials used, labor or service cost, interest paid, losses, or any other expense.

(3) The cost of transportation of the property, except as excluded by other provisions of this section.

(4) The amount of any tax imposed by the United States upon producers and importers of gasoline and the amount of any tax imposed pursuant to Part 2 (commencing with Section 7301) of this division.

(b) The total amount of the sale or lease or rental price includes all of the following:

(1) Any services that are a part of the sale.

(2) All receipts, cash, credits and property of any kind.

(3) Any amount for which credit is allowed by the seller to the purchaser.

(c) "Gross receipts" do not include any of the following:

(1) Cash discounts allowed and taken on sales.

(2) Sale price of property returned by customers when that entire amount is refunded either in cash or credit, but this exclusion shall not apply in any instance when the customer, in order to obtain the refund, is required to purchase other property at a price greater than the amount charged for the property that is returned. For the purpose of this section, refund or credit of the entire amount shall be deemed to be given when the purchase price less rehandling and restocking costs are refunded or credited to the customer. The amount withheld for rehandling and restocking costs may be a percentage of the sales price determined by the average cost of rehandling and restocking returned merchandise during the previous accounting cycle.

(3) The price received for labor or services used in installing or applying the property sold.

(4) (A) The amount of any tax (not including, however, any manufacturers' or importers' excise tax, except as provided in subparagraph (B)) imposed by the United States upon or with respect to retail sales whether imposed upon the retailer or the consumer.

(B) The amount of manufacturers' or importers' excise tax imposed pursuant to Section 4081 or 4091 of the Internal Revenue Code for which the purchaser certifies that he or she is entitled to either a direct refund or credit against his or her income tax for the federal excise tax paid or for which the purchaser issues a certificate pursuant to Section 6245.5.

- (5) The amount of any tax imposed by any city, county, city and county, or rapid transit district within the State of California upon or with respect to retail sales of tangible personal property measured by a stated percentage of sales price or gross receipts whether imposed upon the retailer or the consumer.
- (6) The amount of any tax imposed by any city, county, city and county, or rapid transit district within the State of California with respect to the storage, use or other consumption in that city, county, city and county, or rapid transit district of tangible personal property measured by a stated percentage of sales price or purchase price, whether the tax is imposed upon the retailer or the consumer.
- (7) Separately stated charges for transportation from the retailer's place of business or other point from which shipment is made directly to the purchaser, but the exclusion shall not exceed a reasonable charge for transportation by facilities of the retailer or the cost to the retailer of transportation by other than facilities of the retailer. However, if the transportation is by facilities of the retailer, or the property is sold for a delivered price, this exclusion shall be applicable solely with respect to transportation which occurs after the sale of the property is made to the purchaser.
- (8) Charges for transporting landfill from an excavation site to a site specified by the purchaser, either if the charge is separately stated and does not exceed a reasonable charge or if the entire consideration consists of payment for transportation.
- (9) The amount of any motor vehicle, mobilehome, or commercial coach fee or tax imposed by and paid to the State of California that has been added to or is measured by a stated percentage of the sales or purchase price of a motor vehicle, mobilehome, or commercial coach.
- (10) (A) The amount charged for intangible personal property transferred with tangible personal property in any technology transfer agreement, if the technology transfer agreement separately states a reasonable price for the tangible personal property.
- (B) If the technology transfer agreement does not separately state a price for the tangible personal property, and the tangible personal property or like tangible personal property has been previously sold or leased, or offered for sale or lease, to third parties at a separate price, the price at which the tangible personal property was sold, leased, or offered to third parties shall be used to establish the retail fair market value of the tangible personal property subject to tax. The remaining amount charged under the technology transfer agreement is for the intangible personal property transferred.
- (C) If the technology transfer agreement does not separately state a price for the tangible personal property, and the tangible personal property or like tangible personal property has not been previously sold or leased, or offered for sale or lease, to third parties at a separate price, the retail fair market value shall be equal to 200 percent of the cost of materials and labor used to produce the tangible personal property subject to tax. The remaining amount charged under the technology transfer agreement is for the intangible personal property transferred.
- (D) For purposes of this paragraph, "technology transfer agreement" means any agreement under which a person who holds a patent or copyright interest assigns or

licenses to another person the right to make and sell a product or to use a process that is subject to the patent or copyright interest.

(11) The amount of any tax imposed upon diesel fuel pursuant to Part 31 (commencing with Section 60001).

(12) (A) The amount of tax imposed by any Indian tribe within the State of California with respect to a retail sale of tangible personal property measured by a stated percentage of the sales or purchase price, whether the tax is imposed upon the retailer or the consumer.

(B) The exclusion authorized by subparagraph (A) shall only apply to those retailers who are in substantial compliance with this part.

For purposes of the sales tax, if the retailers establish to the satisfaction of the [Department] that the sales tax has been added to the total amount of the sale price and has not been absorbed by them, the total amount of the sale price shall be deemed to be the amount received exclusive of the tax imposed. Section 1656.1 of the Civil Code shall apply in determining whether or not the retailers have absorbed the sales tax.

Sales and Use Tax Annotations (Annotations) are summaries of the conclusions reached in selected legal rulings of Department counsel. Annotations do not embellish or interpret the legal rulings of counsel which they summarize and do not have the force and effect of law. (Reg. 35101, subd. (a)(1).) However, they are entitled to a degree of deference (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 11-15.)

Annotations 295.1242 (5/18/95), 295.1304 (7/3/96), 295.1319 (8/17/01), 295.1340 (2/20/96), 295.1410 (5/29/80), and 295.2000 (11/14/91) summarize the long-standing opinion of the Department's Legal Division that charges added to the price of tangible personal property to reimburse the retailer for a cost of doing business are included in gross receipts, unless expressly excluded or deductible from gross receipts pursuant to RTC section 6012. Also, Annotation 295.2000 summarizes the long-standing opinion of the Department's Legal Division that a fee a purchaser of tangible personal property is required to pay to reimburse the retailer for the cost of processing a credit card sale through the card issuer is included in gross receipts, as a nondeductible cost of doing business.

Annotation 295.1690 (8/16/78) summarize the long-standing opinion of the Department's Legal Division that "services that are part of the sale" within the meaning of subdivision (b)(1) of RTC section 6012 include any services the seller must perform to produce and sell tangible personal property, or for which the purchaser must pay as a condition of the purchase and/or functional use of the property. Also, Annotation 295.1502 (9/22/88) summarize the long-standing opinion of the Department's Legal Division that a retailer's charges for handling tangible personal property it sells are included in the retailer's gross receipts, as charges for services that are part of the sale.

Annotations 295.0647 (10/18/96), 295.0730 (10/4/76), 295.1675 (5/13/94) summarize the long-standing opinion of the Department's Legal Division that:

- Charges for services are included in the gross receipts from the sale of tangible personal property under RTC section 6012 when a purchaser must purchase the services to obtain the tangible personal property; and
- Charges for optional services, such as optional warranties, that are sold with tangible personal property, are not included in the gross receipts from the sale of the tangible personal property under RTC section 6012.

Also, the provisions regarding warranties in subdivision (b)(3) of Regulation 1546, Installing, Repairing, Reconditioning in General, incorporate that long-standing distinction between charges for mandatory and optional warranties.

In addition, Regulation 1628, Transportation Charges, currently clarifies when separately stated charges for transportation are excluded from “gross receipts” under subdivision (c)(7) of RTC section 6012, and not subject to sales or use tax. Subdivision (a) of Regulation 1628 clarifies when charges for transportation by a carrier are excluded from gross receipts and subdivision (b) of Regulation 1628 clarifies when charges for delivery by facilities of the retailer are excluded from gross receipts. Also, Annotation 557.0640 (12/2/64) summarizes the Legal Division’s long-standing opinion that transportation by a retailer’s employee is transportation by facilities of the retailer for purposes of applying subdivision (b) of Regulation 1628.

Furthermore, the administration of the Sales and Use Tax Law (SUTL) (RTC, § 6001 et seq.), Cannabis Tax Law (CTL) (RTC, § 34010 et seq.), and Fee Collection Procedures Law (FCPL) (RTC, § 55001 et seq.) was transferred from the State Board of Equalization (Board) to the Department, operative July 1, 2017, by Assembly Bill No. (AB) 102 (Stats. 2017, ch. 16) and references to the “Board” in the SUTL, CTL, and FCPL statutes discussed herein mean the “Department” pursuant to GC section 15570.24 and RTC section 20.

Proposition 64

On November 8, 2016, California voters approved Proposition 64 (Prop. 64). As relevant here, Prop. 64 added the CTL to the RTC and imposed a marijuana excise tax, effective January 1, 2018. As added by Prop. 64, RTC section 34010 provided that “gross receipts” shall have the same meaning as set forth in RTC section 6012. Subdivision (a) of RTC section 34011 provided that “Effective January 1, 2018, a marijuana excise tax shall be imposed upon purchasers of marijuana or marijuana products sold in this state at the rate of 15 percent of the gross receipts of any retail sale by [specified retailers required to be licensed under specific provisions of the Business and Professions Code (BPC)].” Subdivision (b) of RTC section 34011 provided that “Except as otherwise provided by regulation, the tax levied under this section shall apply to the full price, if nonitemized, of any transaction involving both marijuana or marijuana products and any other otherwise distinct and identifiable goods or services, and the price of any goods or services, if a reduction in the price of marijuana or marijuana products is contingent on purchase of those goods or services.” Therefore, for purposes of the marijuana excise tax originally imposed by Prop. 64, taxable “gross receipts” included charges for marijuana or marijuana products and other goods or services under specified circumstances.

In addition, as added by Prop. 64, subdivision (c) of RTC section 34011 required the specified retailers to collect the marijuana excise tax from purchasers and remit it to the Department. RTC section 34015 also required the specified retailers to remit the marijuana excise taxes they were required to collect to the Department quarterly on or before the last day of the month following each quarterly period of three months with returns subject to audit by the Department.

Subdivision (d) of RTC section 34011 provided that the marijuana excise tax was in addition to the sales and use tax imposed by the state and local governments. Also, subdivision (e) of RTC section 34011 provided that gross receipts include the marijuana excise tax for purposes of assessing sales and use tax. So, for example, if thirty dollars (\$30) was subject to marijuana excise tax, then a four dollar and fifty cent (\$4.50) marijuana excise tax would apply ($\$30 \times .15$) and sales and use tax would apply to thirty-four dollars and fifty cents (\$34.50 or $\$30 + \4.50).

Senate Bill No. 94

In 2017, the Legislature enacted Senate Bill No. (SB) 94 (Stats. 2017, ch. 27). As relevant here, SB 94 replaced the references to “marijuana” with references to “cannabis” throughout the CTL. It replaced subdivision (b) of RTC section 34011 (quoted above), which clarified the meaning of gross receipts, with a new subdivision (b) that required a distributor that sold or transferred cannabis or cannabis products to a cannabis retailer to collect the cannabis excise tax from the cannabis retailer, sometimes before the cannabis or cannabis products were purchased from the cannabis retailer in a retail sale. It amended RTC section 34015 to require distributors to remit the cannabis excise taxes they were required to collect from cannabis retailers to the Department quarterly on or before the last day of the month following each quarterly period of three months with returns subject to audit by the Department. It also amended RTC section 34015 so that cannabis retailers were no longer required to remit cannabis excise tax to the Department or file returns subject to audit by the Department.

SB 94 also made it easier to calculate the amount of cannabis excise tax to be collected when a distributor sold or transferred cannabis or cannabis products to a cannabis retailer in an arm’s length transaction. This was done by amending subdivision (a) of RTC section 34011 so that the cannabis excise tax was imposed upon purchasers of cannabis or cannabis products at a rate of 15 percent of the “average market price of any retail sale by a cannabis retailer.” This was also done by amending RTC section 34010 to define “average market price” to mean:

- The average retail price determined by the wholesale cost of the cannabis or cannabis products sold or transferred to a cannabis retailer, plus a mark-up, as determined by the Department, in an arm’s length transaction; and
- The cannabis retailer’s gross receipts from the retail sale of the cannabis or cannabis products in a nonarm’s length transaction.

Therefore, after the amendments made by SB 94, the amount of cannabis excise tax due on a retail sale of cannabis or cannabis products depended entirely on the retailer’s wholesale cost when the cannabis or cannabis products were sold or transferred to the retailer in an arm’s length transaction.

However, SB 94 did not make it easier for a distributor to calculate the amount of cannabis excise tax to be collected when a distributor sold or transferred cannabis or cannabis products to a cannabis retailer in a nonarm's length transaction. This is because a cannabis retailer's gross receipts from a retail sale of cannabis or cannabis products are indeterminable until the retail sale occurs. Also, SB 94 was silent about how a distributor was supposed to determine a retailer's gross receipts from a subsequent retail sale, particularly when the sale had not occurred before the distributor was required to collect the cannabis excise tax on that sale from the cannabis retailer.

In addition, SB 94 renumbered subdivisions (d) and (e) of RTC section 34011 as subdivisions (c) and (d) without further amendments. Therefore, the cannabis excise tax was still in addition to the sales and use tax imposed by the state and local governments and gross receipts still included the cannabis excise tax for purposes of assessing sales and use tax. Also, SB 1289 (Stats. 2018, ch. 92) revised RTC section 34010 to provide that "gross receipts" has the same meaning as set forth in RTC section 6012, but it did not materially change the definition of gross receipts, as added by Prop. 64.

Regulation 3700

The Department previously determined that there was an issue (or problem) regarding how the cannabis excise tax imposed by RTC section 34011, as amended by SB 94, applied to the sale of cannabis or cannabis products with cannabis accessories, such as vaping devices, which was not explicitly addressed in the CTL after SB 94 replaced subdivision (b) of RTC section 34011. The Department determined that the application of tax depended upon how the distributor sold or transferred the cannabis or cannabis products to the retailer, based upon the way SB 94 changed the imposition, collection, and remittance of cannabis excise tax. The Department also determined that the cost of cannabis accessories was included in the average market price to which the cannabis excise tax applied when a distributor sold or transferred cannabis or cannabis products to a cannabis retailer with cannabis accessories for a lump-sum charge. However, when a distributor separately stated the price of the cannabis or cannabis products from the cannabis accessories, the cannabis excise tax applied to the average market price of the cannabis or cannabis products, and not to the separately stated charge for the cannabis accessories.

RTC section 34013 authorizes the Department to prescribe, adopt, and enforce regulations relating to the administration and enforcement of the CTL. In 2019, the Department adopted subdivisions (a)(2) and (i) of Regulation 3700, Cannabis Excise and Cultivation Tax, to clarify the meaning of the "average market price of any retail sale by a cannabis retailer," as used in RTC section 34011, when a distributor sold or transferred cannabis or cannabis products to cannabis retailers with cannabis accessories. Subdivision (a)(2) provides that "cannabis accessories" has the same meaning as provided in Health and Safety Code (HSC) section 11018.2, which states that "cannabis accessories" means any equipment, products or materials of any kind which are used, intended for use, or designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, smoking, vaporizing, or containing cannabis, or for ingesting, inhaling, or otherwise introducing cannabis or cannabis products into the human body. Subdivision (i) provides that the cost of cannabis accessories is included in the average market price to which the cannabis excise tax applied when a distributor

sold or transferred cannabis or cannabis products to a cannabis retailer with cannabis accessories for a lump-sum charge. However, when a distributor separately stated the price of the cannabis or cannabis products from the cannabis accessories, the cannabis excise tax applied to the average market price of the cannabis or cannabis products, and not to the separately stated charge for the cannabis accessories. Regulation 3700 does not further clarify how a distributor is supposed to determine a cannabis retailer's gross receipts from a retail sale in the case of a nonarm's length transaction.

The Department also previously determined that the separately stated rule in subdivision (i) of Regulation 3700 did not ultimately ensure full compliance with RTC section 34011 as intended. This is because the cannabis excise tax is 15 percent. It is in addition to state and local sales and use tax. It is also included in gross receipts for purposes of assessing state and local sales and use tax. Therefore, some distributors and retailers misused the separately stated rule to evade the cannabis excise tax and gain a competitive advantage. They used the separately stated rule to artificially attribute taxable charges for cannabis or cannabis products to other tangible personal property, such as plastic bags and jars, for cannabis excise tax purposes.

AB 195

On June 30, 2022, the Legislature enacted AB 195 (Stats. 2022, ch.56). As relevant here, AB 195 added RTC section 34011.2 and amended RTC sections 34011 and 34015 to:

- Change the cannabis excise tax so it is “imposed upon purchasers of cannabis or cannabis products sold in this state at 15 percent of the gross receipts of any retail sale by a cannabis retailer,” on and after January 1, 2023 (RTC, § 34011.2, subd. (a)).
- Remove the requirement for the distributor to collect the cannabis excise tax from the cannabis retailer on cannabis or cannabis products sold or transferred to the cannabis retailer on or after January 1, 2023.
- Require cannabis retailers to remit the cannabis excise tax imposed on and after January 1, 2023, directly to the Department with a return subject to audit by the Department. (RTC, §§ 34011.2, subd. (c), 34015).

However, the Legislature did not add a provision to the CTL to further clarify how the current cannabis excise tax applies to the retail sale of cannabis or cannabis products with other tangible personal property, such as packaging and vaping devices, on and after January 1, 2023.

Also, AB 195 amended subdivision (e) of RTC section 34013 to authorize the Department to prescribe, adopt, and enforce any emergency regulations, until January 1, 2024, as necessary to implement, administer, and enforce its duties under division 2 of the RTC, which includes the CTL and FCPL. Subdivision (e) also specifies that the emergency regulations adopted by the Department may remain in effect for two years from adoption.

RTC sections 55061 and 55302

Subdivision (a) of RTC section 34013 provides that the Department shall administer and collect the taxes imposed by the CTL pursuant to the FCPL. As relevant here, RTC section 55302 in the FCPL authorizes the Department to examine the books and records of any person liable for the payment of the cannabis excise taxes imposed by the CTL as it may deem necessary in carrying out the administration and collection of such taxes. Regulation 4901, Records, implements RTC section 55302. It requires a person liable for the payment of cannabis excise tax to maintain and make available for examination on request by the Department all records necessary to determine their correct cannabis excise tax liability and all records necessary for the proper completion of their cannabis excise tax returns. It also provides that those records include but are not limited to books of account, bills, receipts, invoices, cash register tapes, or other documents of original entry supporting the entries in the books of account, and the schedules or working papers used in connection with the preparation of their cannabis excise tax returns. Also, RTC section 55061 in the FCPL authorizes the Department to compute and determine the amount of cannabis excise tax to be paid under the CTL based upon any information available, and issue deficiency determinations (or billings) for the collection of unreported, underreported, or unpaid cannabis excise tax.

Division 10

Division 10 (commencing with section 26000) of the BPC defines “package” to mean any container or receptacle used for holding cannabis or cannabis products (BPC section 26001, subd. (ap)) and requires cannabis or cannabis products to be labeled and placed in a tamper-evident, child-resistant package, prior to delivery or sale at a cannabis retailer. (BPC section 26120, subd. (a).) The Department of Cannabis Control (DCC) has adopted regulations that further clarify that “package” or “packaging” means any container or wrapper that may be used for enclosing or containing any cannabis or cannabis product but does not include a shipping container or outer wrapping used solely for the transport of cannabis or cannabis products in bulk quantity to a licensed premises. (DCC Regulation 15000, subd. (yy).) DCC has also adopted regulations that further clarify division 10’s packaging requirements. (DCC Regulations 17401, 17411, and 17412.) Also, Annotation 295.1387 (11/15/91) summarizes the Legal Division’s long-standing opinion that amounts a purchaser of tangible personal property must pay to compensate or reimburse a retailer for the cost of labor or materials used to package an item are generally included in taxable gross receipts under RTC section 6012.

Emergency Regulation 3802

The Department previously determined that there was an issue (or problem within the meaning of GC section 11346.2, subd. (b)) because the CTL does not expressly clarify whether “the gross receipts of any retail sale by a cannabis retailer,” as used in RTC section 34011.2, include charges for other tangible personal property (non-cannabis items) purchased with cannabis or cannabis products in a retail sale. The Department previously determined that there were also issues (or problems) regarding whether cannabis retailers’ charges for services and transportation are included in their gross receipts for purposes of the cannabis excise tax imposed by RTC section 34011.2. The Department previously determined that the issues (or problems) were not addressed by subdivision (i) of Regulation 3700 because that subdivision clarifies the meaning of

“the average market price of any retail sale by a cannabis retailer” as used in RTC section 34011 and the definition of “average market price” in RTC section 34010. The Department also previously determined that it was reasonably necessary to adopt emergency Regulation 3802, Gross Receipts from Sales of Cannabis and Cannabis Products, to have the effect and accomplish the objective of addressing the issues (or problems).

Emergency Regulation 3802 became operative on December 15, 2023. Also, emergency Regulation 3802 will be repealed by operation of law on December 16, 2025, unless the Department adopts it as permanent regulation through the APA’s regular rulemaking process and submits the completed rulemaking file to the Office of Administrative Law (OAL) by December 15, 2025.

Charges for Non-Cannabis Items

Subdivision (a) of RTC section 34011.2 only imposes cannabis excise tax on purchasers of cannabis or cannabis products. Also, subdivision (a) of RTC section 6012 provides that “gross receipts” mean the total amount of the sale price of the retail sales of retailers. Therefore, the Department determined that the gross receipts of any retail sale by a cannabis retailer, as used in subdivision (a) of RTC section 34011.2, include any amount the purchaser is required to pay to purchase cannabis or cannabis products.

The Department determined that whether the gross receipts of any retail sale by a cannabis retailer, as used in subdivision (a) of RTC section 34011.2, include charges for non-cannabis items, such as packaging, depends upon the terms of the retail sale of the cannabis or cannabis products because the tax applies to the gross receipts from that retail sale. The Department determined that when the cannabis retailer requires a purchaser to purchase specific non-cannabis items as a condition of the retail sale of cannabis or cannabis products, there is a bundled transaction. (*Bekkerman v. California Dept. of Tax & fee Administration* (2024) 99 Cap.App.5th 1264, 1269 (*Bekkerman*).) The Department also determined that when there is such a bundled transaction, the charges for the non-cannabis items included in the bundled transaction are required to be attributed to the cannabis or cannabis products and included in the cannabis retailer’s gross receipts from the sale of the cannabis or cannabis products. This is because:

- The charges are commingled in such a bundled transaction (*Bekkerman* at pp. 1273, 1274), regardless of whether the cannabis retailer segregates or separately states the charges;
- Including all the charges for such a bundled transaction in gross receipts is necessary to provide consistent tax treatment and certainty for cannabis retailers (*Bekkerman* at p. 1274); and
- Including all the charges for such a bundled transaction in gross receipts is necessary to discourage cannabis retailers from trying to evade the cannabis excise tax by artificially attributing commingled charges for cannabis or cannabis products to the non-cannabis items included in such a bundled transaction. (*Levitt v. Faber et al.* (1937) 20 Cal.App.2d Supp. 758, 762 (*Levitt*).)

In addition, the Department determined that when a cannabis retailer does not require a purchaser to purchase specific non-cannabis items as a condition of the retail sale of cannabis or cannabis products, and a purchaser purchases the optional non-cannabis items with the cannabis or cannabis products it is not a bundled transaction. Also, when a transaction is not a bundled transaction, a reasonable amount charged for the optional non-cannabis items is not required to be attributed to the cannabis or cannabis products and included in the cannabis retailer's gross receipts from the sale of the cannabis or cannabis products. However, when the amount claimed as charged for optional non-cannabis items exceeds a reasonable amount, the excess amount is in fact charged for the cannabis or cannabis products. Therefore, the excess amount is required to be attributed to the cannabis or cannabis products and included in the cannabis retailer's gross receipts from the sale of the cannabis or cannabis products to discourage the cannabis retailer from trying to evade the cannabis excise tax by artificially attributing charges for cannabis or cannabis products to optional non-cannabis items. (*Levitt, supra*, at p. 762.)

Charges for Services and Transportation

Subdivision (b)(1) of RTC section 6012 requires charges for services that are part of the sale of tangible personal property to be included in gross receipts for sales tax purposes. Therefore, the Department determined that RTC section 6012 also requires charges for services that are part of the sale of cannabis or cannabis products to be included in gross receipts for purposes of the cannabis excise tax imposed by RTC section 34011.2.

Regulation 1628 currently clarifies when separately stated charges for transportation are excluded from "gross receipts" under subdivision (c)(7) of RTC section 6012. The Department also determined that the rules in Regulation 1628 should apply when determining if a cannabis retailer's charges for transportation are excluded from gross receipts for purposes of the cannabis excise tax imposed by RTC section 34011.2.

Text of Emergency Regulation

Based upon the above discussion, subdivision (a) of emergency Regulation 3802 clarifies that for purposes of the cannabis excise tax imposed by RTC section 34011.2 gross receipts from the retail sale of cannabis or cannabis products include any amount the purchaser is required to pay to purchase the cannabis or cannabis products, regardless of how the amount is denominated or labeled on the invoice, receipt, or other document provided to the purchaser, unless the amount is excluded or deductible from gross receipts pursuant to RTC section 6012.

Subdivision (a) further clarifies that gross receipts specifically include, but are not limited to any amount the purchaser is required to pay for services that are part of the sale of the cannabis or cannabis products. For example, when a cannabis retailer requires a purchaser to pay a fee to reimburse itself for the cost of processing the purchaser's credit card payment for the purchase of cannabis, the fee is included in the gross receipts from the sale of the cannabis.

Subdivision (a) also further clarifies that gross receipts specifically include, but are not limited to any amount the purchaser is required to pay for tangible personal property, including packaging, the purchaser is required to purchase as condition of the sale of the cannabis or cannabis products. For example, if a purchaser is required to purchase a plastic bag or jar as a condition of

the retail sale of the cannabis, the amount the purchaser is required to pay for the plastic bag or jar is included in the gross receipts from the sale of the cannabis. If a purchaser is required to purchase a cartridge as a condition of the retail sale of the cannabis product contained in the cartridge, the amount the purchaser is required to pay for the cartridge is included in the gross receipts from the sale of the cannabis product. Also, if a purchaser is required to purchase a cartridge and vaping device as a condition of the retail sale of the cannabis product contained in the cartridge, the amount the purchaser is required to pay for the cartridge and vaping device is included in the gross receipts from the sale of the cannabis product.

Subdivision (b)(1) of emergency Regulation 3802 clarifies that, for purposes of the cannabis excise tax, gross receipts from the retail sale of cannabis or cannabis products does not include a reasonable amount charged for optional tangible personal property purchased with cannabis or cannabis products in the same retail sale regardless of whether those amounts are separately stated on the invoice, receipt, or other document provided by the cannabis retailer to the purchaser and regardless of whether the optional tangible personal property is purchased with the cannabis or cannabis products as a unit. Subdivision (b)(1)(A) clarifies that “optional tangible personal property” means tangible personal property that a purchaser is not required to purchase as a condition of the sale of the cannabis or cannabis product because the purchaser could purchase that cannabis or cannabis product or the same kind of cannabis or cannabis product, as defined in subdivision (b)(1)(B), from the cannabis retailer without purchasing the tangible personal property. Subdivision (b)(1)(B) further provides that for purposes of subdivision (b)(1)(A), “same kind of cannabis” means cannabis that is the same brand, quantity, strain, and type (e.g., flower, pre-roll, shake) as the cannabis purchased and “same kind of cannabis product” means cannabis product that is the same brand, quantity, strain, and type (e.g., beverage, capsule, concentrate, edible, tincture, topical, cannabis oil) as the cannabis product purchased.

Subdivision (b)(1)(C) of emergency Regulation 3802 provides examples to further illustrate these points and clarify that emergency Regulation 3802 does not generally include all charges for tangible personal property, other than cannabis or cannabis products, in gross receipts subject to the cannabis excise tax. The subdivision provides that when a cannabis retailer sells seven-gram jars of XYZ brand Hawaiian Punch strain cannabis flower separately from lighters or pipes so that purchasers are not required to purchase the lighters or pipes as a condition of the sale of the cannabis, then a lighter or pipe is optional tangible personal property when a purchaser chooses to purchase one with a seven-gram jar of XYZ brand Hawaiian Punch strain cannabis flower in the same retail sale. Also, when a cannabis retailer sells one-gram cartridges of XYZ brand Hawaiian Punch strain cannabis oil separately from vaping devices so that purchasers are not required to purchase the vaping devices as a condition of the sale of the cannabis products, then a vaping device is optional tangible personal property when a purchaser chooses to purchase one with a one-gram cartridge of XYZ brand Hawaiian Punch strain cannabis oil in the same retail sale.

Subdivision (b)(2) of emergency Regulation 3802 clarifies that the cannabis retailer has the burden to maintain and make available to the Department records that establish that tangible personal property purchased with cannabis or cannabis products in a retail sale was optional tangible personal property. If the Department determines that tangible personal property purchased with cannabis or cannabis products in a retail sale was not optional tangible personal

property, the entire amount charged for the tangible personal property shall be included in the gross receipts from the retail sale of the cannabis or cannabis products pursuant to subdivision (a).

Subdivision (b)(3) of emergency Regulation 3802 clarifies that the cannabis retailer also has the burden to maintain and make available to the Department records that establish that the amount charged for optional tangible personal property purchased with cannabis or cannabis products in a retail sale was reasonable. If the Department determines that any amount charged for optional tangible personal property exceeds a reasonable charge, the excess amount shall be included in the gross receipts from the sale of the cannabis or cannabis products pursuant to subdivision (a). The factors the Department may consider in determining whether the amount charged for optional tangible personal property is reasonable, include, but are not limited to:

(A) The wholesale cost of optional tangible personal property.

(B) The size of the markup added to the wholesale cost of the optional tangible personal property.

(C) The amount charged for the cannabis or cannabis products sold with the optional tangible personal property in the same retail sale.

Finally, subdivision (c) of emergency Regulation 3802 clarifies that for purposes of the cannabis excise tax, gross receipts from the retail sale of cannabis or cannabis products excludes certain transportation charges as provided in RTC section 6012 and Regulation 1628, Transportation Charges.

Effects, Objectives, and Benefits of Adopting Regulation 3802 with the Proposed Amendments

The Department subsequently determined that there is an issue (or problem) because subdivision (a)(1) of emergency Regulation 3802 clarifies that gross receipts specifically include, but are not limited to any amount the purchaser is required to pay for services that are part of the sale of the cannabis or cannabis products. However, the Department inadvertently included an example in subdivision (a)(1) of an amount included in gross receipts because the purchaser of cannabis is required to pay it to reimburse the cannabis retailer for a cost of doing business, rather than an example of an amount included in gross receipts because the purchaser is required to pay it for a service that is part of the sale of cannabis, as intended. The Department also determined that there is an issue (or problem) because emergency Regulation 3802 does not expressly clarify that for purposes of the cannabis excise tax imposed by RTC section 34011.2 gross receipts from the sale of cannabis or cannabis products includes any amount a purchaser is required to pay to reimburse the cannabis retailer for the cost of doing business, even though subdivision (a)(1) includes an example of such an amount. Therefore, the Department determined that it is reasonably necessary to propose to amend subdivision (a) of emergency Regulation 3802 to have the effect and accomplish the objective of addressing both issues (or problems).

The proposed amendments delete “for” from the end of subdivision (a) of emergency Regulation 3802 for solely grammatical reasons. The proposed amendments replace the first sentence in subdivision (a)(1) with a new sentence that is consistent with the example in subdivision (a)(1) and expressly clarifies that for purposes of the cannabis excise tax imposed by RTC section

34011.2, gross receipts from the sale of cannabis or cannabis products include any amount a purchaser is required to pay “To reimburse the cannabis retailer for the cost of doing business, including the costs of the sale.” The proposed amendments also add a new subdivision (a)(2) to expressly clarify that for purposes of the cannabis excise tax imposed by RTC section 34011.2 gross receipts from the sale of cannabis or cannabis products include any amount a purchaser is required to pay “For services that are part of the sale of the cannabis or cannabis products. For example, when a cannabis retailer requires a purchaser to pay a handling charge for services provided during their purchase of cannabis, the service charge is included in the gross receipts from the sale of the cannabis.” The amendments also renumber current subdivision (a)(2), as subdivision (a)(3) and add “For” to the beginning of renumbered subdivision (a)(3) for grammatical reasons.

The Department determined that there is an issue (or problem) with emergency Regulation 3802 because the second and third sentences in subdivision (b)(3) refer to the “amount charged for optional tangible personal property.” However, those sentences are about determining whether any of the amount claimed as charged for optional tangible personal property is in fact charged for cannabis or cannabis products and is required to be included in the cannabis retailer’s gross receipts for purposes of the cannabis excise tax imposed by RTC section 34011.2. Therefore, the Department determined that it is reasonably necessary to propose non-substantive amendments to clarify that both sentences are referring to “the amount claimed as charged for optional tangible personal property” to have the effect and accomplish the objective of addressing the issue (or problem).

The Department also determined that there is an issue (or problem) with emergency Regulation 3802 because it may be necessary for the Department to consider factors affecting the value of the optional tangible personal property or the cannabis or cannabis products sold with the optional tangible personal property, such as scarcity, to determine whether the amount claimed as charged for optional tangible personal property is reasonable in some cases. However, subdivision (b)(3) does not expressly refer to such factors. Therefore, the Department determined that it is reasonably necessary to propose to amend subdivision (b)(3) to expressly clarify that the Department may consider any factors affecting the value of the optional tangible personal property or the cannabis or cannabis products sold with the optional tangible personal property in same retail sale, such as scarcity, in determining whether the amount claimed as charged for optional tangible personal property is reasonable to have the effect and accomplish the objective of addressing the issue (or problem).

Also, for the reasons discussed above, the Department determined that it is reasonably necessary to propose to adopt emergency Regulation 3802 with the proposed amendments through the APA’s regular rulemaking process to have the effects and accomplish the objectives of addressing the issues (or problems) regarding charges for optional non-cannabis items, charges for services and transportation, and charges to reimburse the cannabis retailer for the cost of doing business discussed above. The Department anticipates that the adoption of emergency Regulation 3802 with the proposed amendments discussed above through the APA’s regular rulemaking process will promote fairness and benefit cannabis retailers, purchasers, and the Department by clarifying the application of the cannabis excise tax.

The Department has performed an evaluation of whether emergency Regulation 3802 with the proposed amendments is inconsistent or incompatible with existing state regulations and determined that emergency Regulation 3802 with the proposed amendments is not inconsistent or incompatible with existing state regulations. This is because there are no other regulations that clarify the meaning of gross receipts from the retail sale of cannabis or cannabis products for purposes of the cannabis excise tax imposed by RTC section 34011.2. In addition, the Department has determined that there is no existing federal regulation or statute that is comparable to emergency Regulation 3802 with the proposed amendments.

NO MANDATE ON LOCAL AGENCIES AND SCHOOL DISTRICTS

The Department has determined that the adoption of emergency Regulation 3802 with the proposed amendments will not impose a mandate on local agencies or school districts, including a mandate that requires state reimbursement under part 7 (commencing with section 17500) of division 4 of title 2 of the GC.

ONE-TIME COST TO THE DEPARTMENT, BUT NO OTHER COST OR SAVINGS TO STATE AGENCIES, LOCAL AGENCIES, AND SCHOOL DISTRICTS

The Department has determined that the adoption of emergency Regulation 3802 with the proposed amendments will result in an absorbable \$484 one-time cost for the Department to update its website after the proposed regulatory action is completed. The Department has determined that the adoption of emergency Regulation 3802 with the proposed amendments will not result in any other direct or indirect cost or savings to any state agency, no cost to any local agency or school district that is required to be reimbursed under part 7 (commencing with section 17500) of division 4 of title 2 of the GC, no other non-discretionary cost or savings imposed on local agencies, and no cost or savings in federal funding to the State of California.

NO SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS

The Department has made an initial determination that the adoption of emergency Regulation 3802 with the proposed amendments will not have a significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states.

EFFECT ON SMALL BUSINESS

The adoption of emergency Regulation 3802 with the proposed amendments may affect small business.

NO COST IMPACTS TO PRIVATE PERSONS OR BUSINESSES

The Department is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

RESULTS OF THE ECONOMIC IMPACT ASSESSMENT REQUIRED BY GC SECTION 11346.3, SUBDIVISION (b)

The Department assessed the economic impact of adopting emergency Regulation 3802 with the proposed amendments on California businesses and individuals and determined that the proposed regulatory action is not a major regulation, as defined in GC section 11342.548 and CCR, title 1, section 2000. Therefore, the Department prepared the economic impact assessment required by GC section 11346.3, subdivision (b)(1), and included it in the initial statement of reasons. In the economic impact assessment, the Department determined that the adoption of emergency Regulation 3802 with the proposed amendments will neither create nor eliminate jobs in the State of California nor result in the creation of new businesses or the elimination of existing businesses within the State of California and will not affect the expansion of businesses currently doing business within the State of California. Furthermore, the Department determined that the adoption of emergency Regulation 3802 with the proposed amendments will not affect the benefits of the regulations to the health and welfare of California residents, worker safety, or the state's environment.

NO SIGNIFICANT EFFECT ON HOUSING COSTS

The adoption of emergency Regulation 3802 with the proposed amendments will not have a significant effect on housing costs.

DETERMINATION REGARDING ALTERNATIVES

The Department must determine that no reasonable alternative considered by it or that has otherwise been identified and brought to its attention would be more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law than the proposed action.

CONTACT PERSONS

Questions regarding the substance of emergency Regulation 3802 with the proposed amendments should be directed to Sarah Smith, Business Taxes Specialist II, by telephone at (916) 309-5292, by e-mail at BTC.InformationRequests@cdtfa.ca.gov, or by mail at California Department of Tax and Fee Administration, Attn: Sarah Smith, MIC:50, 651 Bannon Street, Suite 100, PO Box 942879, Sacramento, CA 94279-0050.

Written comments for the Department's consideration, written requests to hold a public hearing, notices of intent to present testimony or witnesses at the public hearing, and other inquiries concerning the proposed regulatory action should be directed to Kim DeArte, Regulations Coordinator, by telephone at (916) 309-5227, by e-mail at CDTFARegulations@cdtfa.ca.gov, or by mail to: California Department of Tax and Fee Administration, Attn: Kim DeArte, MIC:50, 651 Bannon Street, Suite 100, PO Box 942879, Sacramento, CA 94279-0050. Kim DeArte is the designated backup contact person for Sarah Smith.

WRITTEN COMMENT PERIOD

The written comment period ends on June 9, 2025. The Department will consider the statements, arguments, and/or contentions contained in written comments received by Kim DeArte at the postal address, or email address provided above, prior to the close of the written comment period, before the Department decides whether to adopt emergency Regulation 3802 with the proposed amendments. The Department will only consider written comments received by that time.

However, if a public hearing is held, written comments may also be submitted during the day of and at the public hearing and the Department will consider the statements, arguments, and/or contentions contained in written comments submitted during the day of or at the public hearing before the Department decides whether to adopt emergency Regulation 3802 with the proposed amendments.

AVAILABILITY OF INITIAL STATEMENT OF REASONS AND TEXT OF PROPOSED REGULATION

The Department has prepared copies of the text of emergency Regulation 3802 with the proposed amendments illustrating the express terms of the proposed action. The Department has also prepared an initial statement of reasons for the proposed adoption of emergency Regulation 3802 with the proposed amendments, which includes the economic impact assessment required by GC section 11346.3, subdivision (b)(1). These documents and all the information on which the proposed regulatory action is based are available to the public upon request. The rulemaking file is available for public inspection at 651 Bannon Street, Suite 100, Sacramento, California. The express terms of emergency Regulation 3802 with the proposed amendments and the initial statement of reasons are also available on the Department's website at www.cdtfa.ca.gov/taxes-and-fees/regscont.htm.

PUBLIC HEARING

The Department has not scheduled a public hearing to discuss the proposed adoption of emergency Regulation 3802 with the proposed amendments. However, any interested person or his or her authorized representative may submit a written request for a public hearing no later than 15 days before the close of the written comment period, and the Department will hold a public hearing if it receives a timely written request.

SUBSTANTIALLY RELATED CHANGES PURSUANT TO GC SECTION 11346.8

The Department may adopt the proposed regulatory action with changes that are non-substantial or solely grammatical in nature, or sufficiently related to the original proposed text that the public was adequately placed on notice that the changes could result from the originally proposed regulatory action. If a sufficiently related change is made pursuant to GC section 11346.8, the Department will make the full text of the resulting regulation, with the change clearly indicated, available to the public for at least 15 days before adoption. The text of the resulting regulation will be mailed to those interested parties who commented on the original proposed regulation orally or in writing or who asked to be informed of such changes. The text

of the resulting regulation will also be available to the public from Kim DeArte. The Department will consider timely written comments it receives regarding a sufficiently related change.

AVAILABILITY OF FINAL STATEMENT OF REASONS

If the Department adopts emergency Regulation 3802 with the proposed amendments, the Department will prepare a final statement of reasons. Upon its completion, the final statement of reasons will be made available for inspection at 651 Bannan Street, Suite 100, Sacramento, California, and available upon request by contacting the contact person(s) named above.

AVAILABILITY OF DOCUMENTS ON THE INTERNET

Copies of the notice, initial statement of reasons, and the text of emergency Regulation 3802 with the proposed amendments are available on the Department's website at www.cdtfa.ca.gov/taxes-and-fees/regscont.htm. If the Department publishes other related documents, they will also be available at that website.