

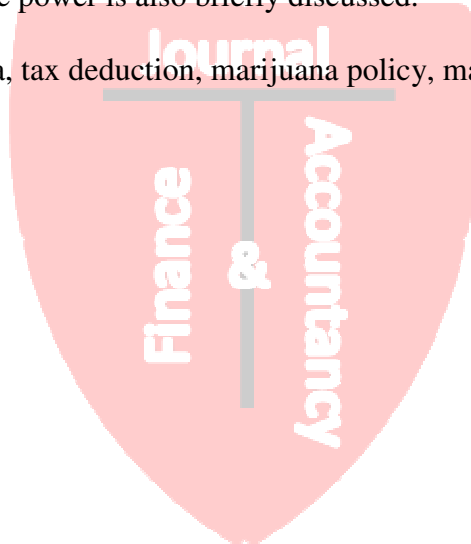
Tax deductibility of medical marijuana: Is it deductible and should it be?

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ABSTRACT

The purpose of this paper is to explore the current state of statutory law, common law and policy with respect to the income tax treatment of marijuana. The historical acceptance of marijuana and the changing climate of marijuana policy in the United States will be reviewed as a backdrop for the policy arguments made for the deductibility of medical marijuana. The current federal income tax deductibility of marijuana when it is acquired under state medical marijuana laws by operation of a physician's recommendation is analyzed through a legal lens as well as the lens of public policy. The juxtaposition of federal and state laws and authority regarding medicinal licensing and police power is also briefly discussed.

Keywords: medical marijuana, tax deduction, marijuana policy, marijuana history



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INTRODUCTION

Marijuana (or cannabis) is a drug, the existence of which can consistently be traced back at least 5,000 years (Rudgeley, 1998). Throughout the documented history of its existence as a consumable, it has been used for various reasons: as a religious rite, as a medicinal herb, and as a recreational activity. Though rarely an issue of legality in its long history, by the early 20th century, marijuana was criminalized throughout most of the world (Levinson, 2002). In the last 25 years, marijuana has enjoyed a renaissance of acceptance in the general populace of the United States and many other countries. This is evidenced by the growing number of states that have adopted or plan to adopt some form of marijuana legalization (either medicinal or recreational). Marijuana was first approved for medical use at the state level in California when, on November 5, 1996 the people of California voted to approve Proposition 215 which legalized the medical use of marijuana (Cal Health and Safety, 1996). Since that time, it has been legalized for medical use at the state level in 23 other states and several US Territories (National conference, 2016).

MARIJUANA THROUGH THE AGES

Marijuana has been documented as a way to alter a person's physical or mental state for a very long time. In fact, it is one of the earliest known substances that is specifically linked to use for medicinal purposes. There is evidence of use of the cannabis plant dating back as early as 10,000 BC (Abel, 1980). The first recorded use of marijuana as a remedy for a particular ailment dates back to around 3,000 BC, when marijuana was in recorded use as an anesthetic (de Crespigny, 2007).

There have been many references to marijuana in religious context throughout the annals of time. Some of these suggested use cases are mere speculation, whereas some are more concrete references. In or around 1,500 BC, during the time period depicted in the Biblical book of Exodus, there is heavy speculation that the holy anointing oil that was supposedly passed from God to Moses contained cannabis as one of the ingredients. The claim is that the concept of "fragrant cane" was mistranslated to be the plant calamus in one of the most popular translation of the Bible (King James Version). In theory, cannabis would have been the correct translation instead of calamus (Kari, 2010). "The Venidad, one of the volumes of the Zend-Avesta, the ancient Persian religious text written around the seventh century BC purportedly by Zoroaster (or Zarathustra), the founder of Zoroastrianism, and heavily influenced by the Vedas, mentions bhang and lists cannabis as the most important of 10,000 medicinal plants (Booth, 2005)." There is scholastic speculation that Jesus himself was a user of cannabis (Ruck, 2003).

In addition to the medicinal and religious uses of cannabis, many well-respected and/or famous people from the past have been tied to marijuana use. There is evidence that famous poet/playwright, William Shakespeare, or at least someone in his household, was a user of marijuana (Thackeray, 2015). Early settlers to the Americas at the Jamestown settlement farmed hemp (a synonym for the marijuana plant) and hemp was a vital export to early colonies, though not necessarily for its properties as a drug (Segal, 1986). Not only do George Washington's diaries show that he was a hemp farmer, but they also indicate that he was interested in the plant for the medicinal values of its main psychoactive ingredient, THC (Deitch, 2003). Thomas Jefferson grew industrial hemp, but there is no record of his use of the plant for any other purpose. (Thomas, 2003). There is record that the great French general Napoleon brought back

cannabis when his army entered Egypt for the purpose of the scientific investigation of the plant for sedation and pain relief (US National, 1972). In Victorian England, marijuana was used to cure or treat a variety of ailments and there is documentation it was used by a range of respected people including then Queen Victoria, herself (House, 1998).

There is some debate as to when the earliest medical use of marijuana occurred, but there is no debate that the historical record is ripe with examples of marijuana being used as medicine across cultural and geographic boundaries around the world and throughout written record. It is possible that the Chinese emperor Fu Hsi was referencing marijuana when he noted that it was a very popular medicine possessing both Yin and Yang around 3000 BC (Deitch, 2003). Several hundred years later, Shen Nung, the father of Chinese medicine, referenced marijuana's healing properties along with ginseng (Joy and Mack, 2001). The ancient Egyptians used marijuana for treating the eyes (possibly glaucoma), general inflammation, and also for enemas (Manniche, 1989). There is evidence that it was used in India around 1000 BC to make Bhang, which was cannabis and milk mixed together and used as an anesthetic (US National, 1972). In 600 BC, cannabis was used in India as a treatment for leprosy (Green, 2002). Ancient Greeks used the drug for relieving earaches, edema, and inflammation (US National, 1972). In 1 AD, a Chinese drug compendium, Pen Ts'ao Ching, lists marijuana as a treatment for over 100 remedies (Joy and Mack, 2001). In 70 AD, a greek physician serving in the Roman army published a medical treatise that listed cannabis as a treatment option for earaches and to suppress sexual longing (Booth, 2005). In or around the 8th or 9th century AD, cannabis was prescribed widely for a plethora of ailments in the Arabic world (Booth). An English book published in the early 1600's that is still used, The Anatomy of Melancholy lists marijuana as a treatment for depression (Grinspoon, 2005).

The widespread use of marijuana in religious contexts and by respected leaders throughout the past is an important indicator of the historical treatment of marijuana in society and should be considered when analyzing the policy side of the medical marijuana debate from a societal acceptance standpoint. It should also be noted that the historical record is understandably lessened during times when marijuana was not widely accepted in society. However, caution should be used when attempting to suggest that lack of open admissions of use can be equated to the nonexistence of use. The medicinal value of marijuana is critical to a proper policy analysis of the issue with respect to the stated purposes of the medical deduction allowance within the Internal Revenue Code and common law related to the deduction of medical expenses from Federal and/or State and Local income taxes.

THE VILLIANIZATION OF MARIJUANA

At the beginning of the 20th century, laws that prohibited the use of marijuana began to be passed in the United States and throughout the world. Marijuana was the victim of several unfortunate circumstances that later created the perceived policy necessity of a smear campaign. Ironically, California was the first state to list cannabis as a poison and makes its possession a misdemeanor. However, it was later determined that the inclusion of marijuana was likely due to a mistake in the drafting of the statute (Gieringer, 1999). Other states followed suit, and ultimately marijuana was grouped in with other drugs that were being used recreationally and all were branded with the same dangers (Brecher, 1972).

DEDUCTIBILITY OF MEDICAL EXPENSES GENERALLY

The current codified tax laws dealing with the issue of deducting medical expenses from taxable income generally, and prescription drugs specifically are found in the Internal Revenue Code and Regulations, specifically, 26 USC 213(b) and 26 CFR 1.213-1(e). In order to provide a guide in layman's terms for the deduction of medical expenses, the IRS put out Topic 502, which is an explanation of the deductibility of medical and dental expenses. In relevant part, it says "You may deduct as an expense insulin or any medicine or drug that is required to be prescribed. You may not deduct funeral or burial expenses, over-the-counter medicines (i.e., medicines or drugs that are not required to be prescribed), toothpaste, toiletries, cosmetics, a trip or program for the general improvement of your health, or most cosmetic surgery. You may not deduct amounts paid for nicotine gum and nicotine patches that do not require a prescription" (Topic 502, 2016). The statutes and the IRS interpretation both seem to suggest that the question of deductibility turns on whether or not a doctor has prescribed the medication as part of a treatment plan. In 26 CFR 1.213-1, there is a provision that states that the treatment must be something that is legal. The legality of medical marijuana is not something that is a simple yes or no. However, this is an issue that requires further analysis. There are examples of taxable deductions for otherwise illegal activities because the weight of rationality sides with the deduction (see 26 USC 170(n), whaling captain exemption). There are also constitutional questions with respect to federalism and the authority of the federal government to even declare a drug to be illegal. The federalism argument is beyond the scope of this paper, but it at least weighs on the policy balance in determining the deductibility of a medical expense of otherwise questionable legality.

Turning to the common law, many relevant court cases have been argued going up through the hierarchy of levels of judicial authority. The court cases have served to flesh out details that aren't entirely clear from the specific language alone in the statute and regulations. In the court cases, the cases that are determining the tax deductibility of something that is not immediately clear as to whether it should be within the parameters of deductibility, all have differing facts, but a clear pattern is shown. A treatment that might not normally be considered to be medicinal or might only be tangentially considered medicinal, is allowable if it has been prescribed or recommended by a doctor. In the Herbert Cherry case, the petitioner is trying to deduct the costs of a pool and pool room addition (costing \$40,000) that were added to a \$90,000 home. The deduction was allowed by the Tax Court and the reasoning was cited as being that the doctor recommended regular use of a pool in the petitioner's treatment plan (Herbert, 1983). In a Washington Superior Court Case, a marijuana dispensary owner argued for the refund of taxes paid because of the nature of prescription drugs not requiring the payment of sales tax. The trial court agreed. (Rhonda Duncan, 2016). In an entertaining case, a 77-year old petitioner was trying to deduct over \$100,000 in medical expenses associated with the cost of prostitutes, pornographic materials and sex therapy books. The petitioner was ultimately not allowed to claim the deduction, but the reasoning of the tax court was that the deductions were not allowable because the therapies had not been prescribed or recommended by a doctor (Halby, 2009).

LEGAL ANALYSIS

Looking at the relevant language in the Internal Revenue Code, the relevant language in the Tax Regulations, the opinions in various court cases that make up the common law that is most on point for this subject, and the IRS interpretations, there seem to be only a couple of

determining factors that all cases seem to look at in order to determine deductibility. First, the code and regulations call for a doctor's prescription. The common law has extended the idea of this concept to include doctor recommendations that conform to a treatment plan for a specific ailment. This extension by the common law would clearly encapsulate the medical marijuana provisions of all U.S. states and territories that have passed medical marijuana legislation (State medical, 2016). All states that allow for medical marijuana usage stipulate that the usage must be in response to a doctor's recommendation that cannabis would be useful in alleviating symptoms associated with a specific ailment that is within the scope of their state's medical marijuana regulations. This "recommendation" looks, for all intents and purposes, to be a prescription in all but name. The FDA controls prescriptions and because marijuana is federally considered to be a Schedule I drug, the FDA will not allow marijuana prescriptions (US FDA, 2016).

The legality of the medical marijuana is a question that is beyond the scope of this paper. Currently, there is no precedent to determine whether the "legality" mentioned in the Tax Regulations could be considered to be met by looking at legality at the State level. Even if medical marijuana is considered to not meet the legality component, the whaling captain's exception discussed earlier shows that there are exceptions that are made based on strong policy reasons, and that those exceptions are typically only codified when some common-law precedent has been set.

Overall, there is a strong argument that, under the current statutory and common laws a tax or other court that is deciding the deductibility of medical marijuana expenses as deductible medical expenses would decide that it is and should be deductible as a medical expense.

POLICY ANALYSIS

In arguing for the deductibility of medical marijuana from a policy standpoint, one needs only to analyze the policy reason for deductions in general, and for medical expense deductions specifically. "Medical expenses, which comprise one category of deductible personal expenditures, are deductible because Congress felt that excessive medical expenses might ultimately affect a taxpayer's ability to pay his or her federal income tax" (Pope, 2015).

Does medical marijuana fit into this policy in the same way as other prescription drugs and other doctor recommended therapies? Yes, it is a costly medical expense that may prevent an otherwise willing taxpayer from being able to afford to pay their federal and state income tax bills. This could cause some patients to have to make a choice between adhering to a doctor's recommended treatment plan or complying with federal and state laws. In addition, the tide of public opinion on marijuana in general has been changing for the past 20 years, and looking at public opinion for marijuana throughout recorded history, it would appear that public opinion is simply moving back towards its normal equilibrium point, with respect to marijuana, after suffering from unfounded negative propaganda.

CONCLUSION

Marijuana is a substance that has been around longer than recorded history. Throughout its existence, marijuana has had many uses to society. As a medicine, its history is similarly utilitarian. With the exception of the past 100 years, the general population of the world has been accepting of marijuana use for the treatment of a variety of ailments. Legal and policy analysis suggests that medical marijuana could be currently considered deductible as a medical expense

and that even if courts determine that it is not currently deductible, the policy described by Congress as the logical reasoning for a medical expense deduction is equally applicable to medical marijuana as it is to other physician prescribed and recommended treatment options such as pharmaceuticals and other alternative therapies.

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