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Tax Issues Affecting Marijuana Businesses

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TAX ISSUES AFFECTING MARIJUANA BUSINESSES

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This article considers several issues affecting Internal Revenue Code section 280E, which denies income-tax deductions and credits to businesses trafficking in controlled substances. Even though marijuana is legal in an increasing number of states, it remains a controlled substance under federal law and section 280E therefore applies to marijuana businesses. As a result, investing in a marijuana business is much less attractive than it would otherwise be. The article discusses issues of statutory interpretation but, more important, considers whether an almost complete denial of deductions and credits converts what is in form an income tax into something else. If the "income" tax as applied to a marijuana business is not on income, within the meaning of the Sixteenth Amendment, it may have to be apportioned among the states on the basis of population to be constitutional (the so-called direct tax apportionment rule). The article also argues, however, based on a 1911 Supreme Court decision, that the Sixteenth Amendment issues might go away if the business is conducted using a taxable corporation. Finally, the article includes a brief discussion about marijuana businesses conducted either directly by American Indian nations or through tribally created corporations. Those entities are not subject to the federal income tax; the limitations of section 280E therefore are irrelevant; and tribal businesses have a competitive advantage in the marijuana market. Because of section 280E's application to businesses that are legal under state law but illegal under federal law—an untenable situation—federalism issues underlie all of the discussion.

Suppose you are thinking about getting into the marijuana business—the *legal* marijuana business, that is—and your state has legalized that sort of activity. You assume, without legal advice, that you will be able to deduct the legitimate expenses associated with the business, just as almost any other type of business enterprise could. You might be in for quite a surprise, however, as this article will demonstrate.

A great deal of litigation in recent years has focused on Internal Revenue Code section 280E, which denies income-tax deductions and credits to taxpayers for any trade or business that involves "trafficking in controlled substances," as the section is applied to cannabis businesses.[1] Section 280E, enacted a long time ago—as part of the Tax Equity and Fiscal Responsibility Act of 1982—provides in full that, for purposes of the federal income tax:

> [n]o deduction or credit shall be allowed for any amount paid or incurred during the taxable year in carrying on any trade or

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1. I.R.C. § 280E (2013).

> business if such trade or business (or the activities which comprise such trade or business) consist of trafficking in controlled substances (within the meaning of schedule I and II of the Controlled Substances Act) which is prohibited by Federal law or the law of any State in which such trade or business is conducted.[2]

Since marijuana is a controlled substance under federal law, listed in schedule I of the Controlled Substances Act,[3] section 280E comes into play for those in the cannabis industry even though that industry has been legalized in many states—for medical marijuana in (as of this writing) around thirty-six states and the District of Columbia and for recreational use in about eighteen states[4]—and even though the federal government plays relatively little role in enforcing marijuana laws.[5] (Federal banking law does affect marijuana businesses in a critical way in that they often have no access to the banking system.[6] At the other extreme, under what is

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2. *Id.*

3. 21 U.S.C. § 812(b)(1), Sched. I (2013 & Supp. 2022).

4. The numbers keep changing—meaning going up. Will Yakowics, *Where Is Cannabis Legal? A Guide To All 50 States*, FORBES (Jan. 10, 2022, 8:37 AM), https://www.forbes.com/sites/willyakowicz/2022/01/10/where-is-cannabis-legal-a-guide-to-all-50-states/?sh=2c07f9d9d19b. The recent setback in South Dakota is presumably temporary. *See generally* Thom v. Barnett, 2021 SD 65, 967 N.W.2d 261 (concluding that the proposed amendment to the South Dakota Constitution that would have legalized, regulated, and taxed recreational marijuana and that was approved by 54.2% of South Dakota voters was invalid because it violated the single subject requirement in Article XXIII, section 1, of that Constitution. S.D. CONST. art. 23, § 1).

5. *See generally* Zachary S. Price, *Federal Nonenforcement: A Dubious Precedent*, *in* MARIJUANA FEDERALISM: UNCLE SAM AND MARY JANE 123, 123-39 (Jonathan H. Adler ed., 2020) (discussing the federal government's limited role in policing marijuana).

6. It is not that access is completely denied. It is that banks are leery that they would have to meet the cumbersome investigation and reporting requirements that might apply under the Bank Secrecy Act. *See* 31 U.S.C. § 5311 (2022); 31 U.S.C. § 5314 (2013). That would include having to file a Suspicious Activity Report if a bank knows, suspects, or has reason to suspect that a transaction involves funds from illegal activity, and cannabis businesses are technically illegal under federal law. 22 C.F.R. § 208.62 (2022). An apparently helpful 2013 memorandum from the Department of Justice has not eliminated the risk for banks because the memo is merely informal guidance. As a result, many banks simply will not deal with marijuana businesses, or so it is assumed. *See generally* Jennifer N. Le, *SAFE Banking Act of 2021: Where Are We on Cannabis Banking Change?*, 11 NAT'L L. REV. 260 (2021), www.natlawreview.com/article/safe-banking-act-2021-where-are-we-cannabis-banking-change (discussing the SAFE Banking Act); Jeremy Nobile, *Weed Companies Craving Conventional Credit Struggle to Find it, Absent Banking Reforms*, 42 CRAIN'S CLEVELAND BUS. 7 (2021) (describing concerns of Ohio banks).

The Biden Administration supported enactment of the Secure and Fair Enforcement Banking Act of 2021, H.R. 1996, 117th Cong., 1st Sess. (2021), which would permit financial institutions to serve cannabis businesses without Bank Secrecy Act risks in states where those businesses are legal. Among other things, the legislation would make enforcing the tax laws easier against cannabis businesses that currently rely on cash transactions. *See generally* Wesley Elmore, *Yellen Says Pot Banking Bill Would Make IRS's Job Easier*, 173 TAX NOTES FED. 1416 (2021) (discussing the effects of a marijuana banking bill). Not surprisingly, banking groups supported the legislation. *See* Letter from Rebeca Romero Rainey, President & CEO, Indep. Cmty. Bankers of Am., to U.S. Senate (Dec. 2, 2021), https://www.icba.org/docs/default-source/icba/advocacy-documents/letters-to-congress/letter-on-senate-safe-banking-act-ndaa-amendment.pdf?sfvrsn=a520217_0. As of this writing, however, even though a form of the legislation has passed the House of Representatives five times, this proposal disappeared from the fiscal 2022 National Defense Authorization Act (to which the provision was added with the hope that it would make approval easier). *See generally* Wesley Elmore, *Pot Banking Advocates to Keep Trying as Latest Effort Flames Out*, 173 TAX NOTES FED. 1568 (2021) (writing about marijuana bills). In any event, it may be that, for some banks, the benefit of attracting lucrative marijuana businesses as customers has outweighed Bank Secrecy Act concerns. *See* Roberto Pedace, Amanda Marion, Curtis Hall & James D.

usually called the Rohrabacher-Farr amendment[7]—a provision that has not been codified, but that is regularly extended by Congress—the Department of Justice may not spend funds to interfere with state medical marijuana laws.)[8] In any event, state legalization does not matter under section 280E if federal law continues to characterize the activity as trafficking in a controlled substance.

This is serious stuff. A marijuana business that is totally legitimate under state law will not be able to deduct the expenses of earning income in computing its federal income tax liability. That makes creating a marijuana business a much less attractive opportunity, even (or maybe especially) in states where the business is completely legal.

Section 280E raises questions of statutory interpretation and constitutionality questions, and, when marijuana is involved, federalism concerns affect the analysis.[9] Justice Clarence Thomas recently wrote in a separate statement respecting the denial of certiorari in *Standing Akimbo, LLC v. United States*,[10] a case from the Tenth Circuit implicating section 280E,[11] that "[t]he federal government's current approach is a half-in, half-out regime that simultaneously tolerates and forbids local use of marijuana. This contradictory and unstable state of affairs strains basic principles of federalism and conceals traps for the unwary."[12] Justice Thomas is absolutely right, although it might be that the judiciary cannot resolve the contradictions. Ultimately Congress needs to act.

This article first addresses issues of statutory interpretation under section 280E and then moves to constitutional concerns—in particular, whether section 280E's denial of deductions for marijuana enterprises converts what would otherwise be an income tax, exempted from the direct-tax apportionment rule under the Sixteenth Amendment, into something else. As the article then discusses, however, the Sixteenth Amendment might be irrelevant to the

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Brushwood, *Legalizing recreational pot may have spurred economic activity in first 4 states to do so*, CONVERSATION (Feb. 2, 2022), https://theconversation.com/legalizing-recreational-pot-may-have-spurred-economic-activity-in-first-4-states-to-do-so-171778.

7. *See generally* 160 CONG. REC. H4982 (2014) (original text) (discussing the amendment).

8. *Id.* It is still generally known as the Rohrabacher-Farr amendment, although, after Farr left Congress, it is sometimes called the Rohrabacher-Blumenauer amendment.

9. Section 280 makes trafficking in other controlled substances unattractive too—including those illegal under both federal and state laws. In that situation, federalism issues presumably do not arise. Some of the issues discussed in this article, however, including the constitutional issue considered in Part II, *infra*, remain relevant. An income tax is supposed to be a tax on *net* income, whether the business is legal or not.

10. 141 S. Ct. 2236 (2021) (mem.).

11. Standing Akimbo, LLC v. United States, 955 F.3d 1146 (10th Cir. 2020). The specific issue was the validity of a third-party summons issued by the Internal Revenue Service to a Colorado marijuana business, with the taxpayer—in unsuccessfully resisting the summons—claiming that government audits were directed at issues that go beyond the application of section 280E—including criminal drug investigations. *Id.* at 1151-69. The taxpayer, it argued, was put in the position of having to admit to drug crimes or to commit tax crimes by not maintaining and producing records. *Id.* at 1153. A few days before the certiorari denial in *Standing Akimbo*, the Supreme Court had denied certiorari in another IRS summons case arising in the Tenth Circuit. *See* Speidell v. United States, 141 S. Ct. 2800 (2021) (mem.), *denying cert. to* 978 F.3d 731 (10th Cir. 2020).

12. *Standing Akimbo, LLC*, 141 S. Ct. at 2236. Justice Thomas concurred in the certiorari denial, but he made it clear that the issues raised in the case need to be addressed at some point—by courts or Congress or both. *Id.* at 2238.

constitutional analysis for entities that are taxable corporations.[13] Finally, the article presents a few thoughts on section 280E and marijuana businesses conducted within Indian Country, a subject of another panel at this symposium.

I. STATUTORY INTERPRETATION ISSUES

It may be a little strong to say that there are "issues" of statutory interpretation here in that most of the litigation about the meaning of language in section 280E has been resolved in a consistent way—to the detriment of taxpayers. One fundamental concern is that section 280E arguably conflicts with the usual understanding—one not necessarily dependent on constitutional law[14]—that taxpayers should be able to deduct the costs associated with earning income, even if illegal income is involved. A full denial of deductions converts what is purportedly an income tax into something approaching a gross receipts tax—a tax that can come into play even if a taxpayer has no net income. If you spend one hundred thousand dollars to take in fifty thousand dollars of revenue—that is, if you have lost money in a business or transaction—do you really have "income," as anybody would understand that term? A tax on the full fifty thousand dollars of revenue would be a tax on gross receipts, not a tax on income, and that is just not the way the income tax is supposed to work.

The Supreme Court has generally acted in accordance with that understanding, permitting deductions associated with the costs of earning illegal income unless Congress has explicitly provided otherwise.[15] (Illegal income is taxable, after all.)[16] For example, in *Commissioner v. Sullivan*,[17] the Supreme Court concluded in 1958 that, absent clear statutory language to the contrary, an illegal bookmaker was entitled to deductions for rent and wages associated with his business.[18] Furthermore, the Court has said in other contexts that extra-

13. For previous works discussing some of these issues, see Stephen L. Kadish, Thomas G. Haren & James H. Rownd, *Section 280E and the Cannabis Industry*, 37 J. TAX'N INVS. 29 (2020); Erik M. Jensen, *Marijuana Businesses, Section 280E, and the Sixteenth Amendment*, 168 TAX NOTES FED. 1643 (2020); Erik M. Jensen, *Marijuana Businesses, Section 280E, and the Sixteenth Amendment*, 97 TAX NOTES STATE 929 (2020); *see also* CONGRESSIONAL RSCH. SERV., *The Application of Internal Revenue Code Section 280E to Marijuana Businesses: Selected Legal Issues* 3-6 (Mar. 10, 2021), https://crsreports.congress.gov/product/pdf/R/R46709 (discussing how section 280E works in relation to the Sixteenth Amendment, and suggests that the provision "might be subject to constitutional challenge. This is based on the principle that the power to levy an 'income' tax granted by the Sixteenth Amendment to the U.S Constitution refers to 'gross income,' not gross receipts, and a tax on gross receipts might be interpreted as 'something other' than an income tax."). In addition, the IRS has recently issued guidance to help taxpayers work through what is an incredible maze. *See* De Lon Harris, *Providing Resources to Help Cannabis Business Owners Successfully Navigate Unique Tax Responsibilities*, IRS (Sept. 27, 2021), https://www.irs.gov/about-irs/providing-resources-to-help-cannabis-business-owners-successfully-navigate-unique-tax-responsibilities. For a discussion of issues involved in crafting marijuana tax legislation, see Benjamin M. Leff, *Marijuana Taxation: Theory and Practice*, 101 B.U. L. REV. 915 (2021).

14. However, constitutional issues also remain. *See infra* Part II.

15. *See* James v. United States, 366 U.S. 213, 218-22 (1961).

16. *Id.* at 218.

17. 356 U.S. 27 (1958).

18. *Id.* at 28-29.

statutory, public-policy limitations on deductibility should be applied only in situations "where the allowance of a deduction would 'frustrate sharply defined national or state policies proscribing particular types of conduct.'"[19] If a sufficient business connection can be shown, deductibility of expenses thus is the norm—even if the business is illegal.

When Congress provides specific limitations on deductibility, however, courts almost always defer. Congress did speak directly in section 280E, providing a clear public-policy limitation on deductibility, just as it has done in several provisions in section 162.[20] Section 162 generally permits deducting ordinary and necessary expenses in carrying on a trade or business. But, for public policy reasons, no deductions are available for certain expenditures like fines and penalties—even if the connection with the business is clear.[21] You can tell your truck drivers that you will pay their traffic fines—you want deliveries made as quickly as possible—but you will not be able to deduct the fines, even though they would otherwise be considered ordinary and necessary business expenses.

Section 280E arguably does the same thing as the public-policy limitations in section 162—albeit with a much broader scope (including denying credits as well).[22] The recent Tax Court decision in *San Jose Wellness v. Commissioner*[23] is a good example of issues of statutory interpretation that are not really issues anymore. A marijuana dispensary, a taxable corporation, unsuccessfully challenged the application of section 280E with arguments focusing on statutory language.

For one thing, San Jose Wellness had argued that section 280E does not apply to depreciation allowances because nothing is paid during taxable years after the year of acquisition of depreciable property used in the marijuana business. Judge Emin Toro concluded, however, that argument failed because the statute refers to "paid or incurred," so "incurred" is good—or bad—enough.[24]

San Jose Wellness also argued that section 280E is directed at the deductibility of business expenses, and the section does not preclude a charitable contribution deduction. A charitable contribution, San Jose Wellness argued, is not paid "in carrying on" a trade or business, as required by the statute if a deduction is to be denied. This argument also failed because the statute permits

19. Comm'r v. Tellier, 383 U.S. 687, 694 (1966) (quoting Comm'r v. Heininger, 320 U.S. 467, 473 (1943)) (rejecting the Commissioner's argument that a deduction for the cost of defending against criminal charges arising from a business should be denied because it would violate public policy).

20. *See* I.R.C. § 162(c)-(g) (2013 & Supp. 2022).

21. *See* I.R.C. § 162(f). Other provisions in section 162 deny deductions for illegal bribes, kickbacks, and other payments, I.R.C. § 162(c); certain lobbying and political expenditures, I.R.C. § 162(e); and antitrust treble damage payments, I.R.C. § 162(g).

22. *See, e.g.*, Chief Counsel Memorandum No. 202205024 (Nov. 30, 2021), https://www.irs.gov/pub/irs-wd/202205024.pdf (concluding that the work opportunity credit under section 51 is unavailable to a marijuana business).

23. 156 T.C. 62 (2021).

24. *Id.* at 71-72 (citing Comm'r v. Idaho Power Co., 418 U.S. 1, 10-11 (1974)) (rejecting the argument that depreciation allowances associated with property used in constructing a power plant did not have to be capitalized into the basis of the plant because the allowances did not reflect amounts paid during the year).

"[n]o deduction" at all, and, in this context, "in carrying on" should be interpreted as meaning something like "in connection with"—a less restrictive requirement than that applied in determining deductibility under section 162.[25] (Deductions for state and local taxes listed in section 164 would therefore also be disallowed for a business trafficking in controlled substances, as Judge Toro noted.)[26]

Finally, San Jose Wellness had argued that marijuana businesses are not illegal in California, so the dispensary could not be trafficking in controlled substances—especially since it produced and sold other products as well. The Tax Court had rejected that argument three years earlier in *Patients Mutual Assistance Collective Corp. v. Commissioner* (*Patients Mutual*),[27] and Judge Toro rejected it again. One can be trafficking in controlled substances and engage in other trades or businesses as well; the limitation of section 280E applies only to deductions associated with the trafficking trade or business.[28]

The bottom line is that Congress intentionally drafted section 280E in a broad way to make trafficking in controlled substances, including marijuana, economically unattractive. The statute has been applied accordingly.

II. CONSTITUTIONAL ISSUES IN SECTION 280E'S APPLICATION

The statute itself might be fairly clear, as courts have concluded, but its constitutionality is not so obvious. This part discusses three questions: whether section 280E converts what would otherwise be a "tax on incomes" within the meaning of the Sixteenth Amendment into something else; whether a cost-of-goods-sold ("COGS") adjustment is arguably necessary in the computation of income subject to income taxation and is not precluded by section 280E; and whether the Sixteenth Amendment should be relevant at all to the constitutional analysis if the taxpayer conducting the cannabis business is a taxable corporation.

25. *See id.* at 76-77 (citing Snow v. Comm'r, 416 U.S. 500, 503 (1974)) (concluding that research or experimental expenditures could be currently deducted under section 174, as then in effect, for an enterprise that was not yet engaged in carrying on a trade or business, but the expenditures were nonetheless "in connection with" a trade or business in the making).

26. *Id.* at 66-69 (citing N. Cal. Small Bus. Assistants Inc. v. Comm'r (*N. Cal.*), 153 T.C. 65, 73 (2019)) (noting that in mandating "no deduction," "Congress could not have been clearer in drafting this section of the Code"). *Northern California* is discussed further in *infra* Part II.

27. 151 T.C. 176 (2018) (holding, among other things, that limiting a cost-of-goods-sold (COGS) adjustment to the direct costs of acquiring inventory does not make the corporate income tax, as constrained by section 280E, unconstitutional as applied to this taxpayer). *But see infra* Part II.C (suggesting that whether what is taxed is really "incomes" within the meaning of the Sixteenth Amendment does not matter if the taxpayer is a corporation). *Patients Mutual* has now been affirmed by the Ninth Circuit. *See* Patients Mut. Assistance Collective Corp. v. Comm'r, 995 F.3d 671, 680 (9th Cir. 2021); *see also* Desert Organic Sols. v. Comm'r, T.C. Memo. 2021-22 (2021) (holding that business can be trafficking in controlled substances even though it also sells other things).

28. *San Jose Wellness*, 156 T.C. at 69.

A. SECTION 280E AND THE MEANING OF "INCOMES"

Although some judges—including members of the Tax Court—have suggested that section 280E has constitutional problems, no taxpayer has yet prevailed in a constitutional challenge to the section's application. Judicial decisions have concluded that section 280E does not operate to impose an "excessive fine" for purposes of the Eighth Amendment[29] and that the Sixteenth Amendment does not require Congress to permit deductions for the costs of earning income in the computation of taxable income. This article will focus on that latter issue.

Despite the common understanding, the Sixteenth Amendment did not authorize Congress to impose a tax on income. Congress always had that power.[30] The amendment was a reaction to the Supreme Court's two 1895 decisions in *Pollock v. Farmers' Loan & Trust Co.*,[31] concluding that the 1894 income tax on individuals was invalid because it was a direct tax—at least insofar as it reached income from property—and it had not been apportioned among the states on the basis of population, as required by two clauses in the Constitution.[32] Apportionment is a difficult requirement to satisfy. It means that a state with, say, one-tenth of the national population must bear one-tenth of the aggregate liability for any direct tax, regardless of how the tax base is distributed across the country. That is a serious limitation on the utility of direct taxation.

Since an apportioned income tax would have absurd results—tax rates for a *national* income tax would probably have to be higher in poorer states than in richer ones—Congress presumably would not enact such a tax.[33] The Sixteenth Amendment, ratified in 1913, removed the apportionment requirement for "taxes

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29. The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII, § 1. It is not at all clear that section 280E imposes a fine to begin with. If there is no fine, there is obviously no excessive fine.

30. The Taxing Clause of the Constitution is very broad. *See* U.S. CONST. art. I, § 8, cl. 1 (granting Congress "Power To lay and collect Taxes, Duties, Imposts and Excises . . . .").

31. 157 U.S. 429, *aff'd on reh'g*, 158 U.S. 601 (1895).

32. *See* U.S. CONST. art. I, § 2, cl. 3 (providing that "Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers . . . ."); U.S. CONST. art. I, § 9, cl. 4 (providing that "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or enumeration herein before directed to be taken"). The first *Pollock* decision determined that taxation, without apportionment, of individuals' income from real estate is unconstitutional, and the second extended that principle to income from the personal property of individuals and concluded that the entire 1894 income tax statute was unconstitutional. *Pollock*, 157 U.S. at 607-08; *Pollock*, 158 U.S. at 637. (The tax applied only to the well-to-do, those with incomes over four thousand dollars, whose income overwhelmingly came from property—dividends, interest, rent, gain on sale of property, etc.). Focusing on income from property tied the result in *Pollock* to that in *Hylton v. United States*, 3 U.S. 171 (1796), the first Supreme Court decision to consider the meaning of "direct tax," in which the Court—made up of founders—concluded that taxes on real property were unquestionably direct. *See* Erik M. Jensen, *The Apportionment of "Direct Taxes": Are Consumption Taxes Constitutional?*, 97 COLUM. L. REV. 2334, 2353-58 (1997). The *Pollock* majority concluded that a tax on income from property is no less direct than a tax on the value of property that may generate income.

33. Imagine a rich state and a poor state with equal populations. If an income tax is a direct tax that has to be apportioned, the total amount collected from each of the two states would have to be the same, making it necessary for different rates in the two states or for some other preposterous mechanism to make the numbers come out right.

on incomes," making the modern income tax—an unapportioned income tax—possible. The amendment thus did increase congressional power in a sense by doing away with a limitation that might have made enactment of an unapportioned income tax impossible, or nearly so, but the power to tax income was always part of the constitutional scheme.

If the Sixteenth Amendment has legal effect, however, and for these purposes let us assume that it does,[34] it exempts only a "tax on incomes" from apportionment. Nebraska Senator Norris Brown, the guiding force behind the resolution that became the amendment, resisted attempts to do away with the direct-tax apportionment rule. He insisted that the amendment apply only to taxes on incomes, not the universe of all direct taxes.[35] And the Supreme Court has never said that Congress has unlimited power to define "incomes"; in fact, the Court has said the opposite—for example, a century ago, in *Eisner v. Macomber* (*Macomber*).[36] The *Macomber* Court held that the receipt of a totally proportionate stock dividend—one that did not change Mrs. Myrtle H. Macomber's proportionate interest in the assets, and earnings and profits, of a corporation—was not income to her within the meaning of the amendment and therefore could not be reached by an unapportioned income tax:

> A proper regard for its genesis, as well as its very clear language, requires . . . that this Amendment shall not be extended by loose construction, so as to repeal or modify, *except as applied to income,* those provisions of the Constitution that require an apportionment according to population for direct taxes upon property, real and personal . . . .
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> . . . [I]t becomes essential to distinguish between what is and what is not "income" . . . ; and to apply the distinction, as cases arise, according to truth and substance, without regard to form. *Congress cannot by any definition it may adopt conclude the matter, since it cannot by legislation alter the Constitution, from*

34. At a minimum, the amendment made it politically possible for Congress to enact an unapportioned income tax soon after the Supreme Court's 1895 decisions in *Pollock*. Enacting a new income tax without a constitutional amendment would have attracted an immediate judicial challenge, and the Court might well have been irritated by what could have seemed like a direct challenge to its legitimacy. *See* Erik M. Jensen, *Did the Sixteenth Amendment Ever Matter? Does It Matter Today?*, 108 NW. U. L. REV. 799, 814 (2014). For over a century, commentators have argued that the amendment was a legal nullity—that the Court's 1895 decisions were so clearly wrong that it should not have been necessary to amend the Constitution to have an unapportioned income tax. That argument is not clearly right, however, and courts considering the constitutionality of section 280E have assumed that the amendment had legal effect, just not the effect claimed by taxpayers challenging the section's application.

35. *See* Erik M. Jensen, *The Taxing Power, the Sixteenth Amendment, and the Meaning of "Incomes"*, 33 ARIZ. ST. L.J. 1057, 1114-23 (2001). For other direct taxes, apportionment remains an onerous requirement, and the effect of the rule is to keep Congress from enacting direct taxes, except in unusual circumstances. Congress enacted several apportioned direct taxes on real estate between 1798 and 1861, in wartime or in anticipation of war, but Congress has imposed no apportioned direct tax since 1861. *See* Jensen, *supra* note 32, at 2355-56. The apportionment rule may explain why we have no national property tax today.

36. 252 U.S. 189 (1920).

> *which alone it derives its power to legislate, and within whose limitations alone that power can be lawfully exercised.*[37]

Several older cases, including *Macomber*, none of which has been explicitly repudiated,[38] concluded that particular clauses in the income-tax provisions of revenue acts reached items that were not income within the meaning of the Sixteenth Amendment. The amendment, therefore, did not exempt those levies from the apportionment rule.[39]

The results in those cases, including *Macomber*, have been criticized,[40] but the important point for present purposes is that the Court saw limits to the concept of income. And in many other cases at the time, it was taken for granted that "taxes on incomes" had enforceable content. The Court often made that point in passing when a statute was deemed to meet constitutional requirements anyway. For example, in *Taft v. Bowers*,[41] the Court said in 1929, "[T]he settled doctrine is that the Sixteenth Amendment confers no power upon Congress to define and tax as income without apportionment something which theretofore could not have been properly regarded as income."[42] That statement was dictum,[43] but it reflected a generally undisputed proposition.[44]

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37. *Id.* at 206 (emphasis added).

38. Not only has *Macomber* not been repudiated, even though few commentators (other than this author) think it was rightly decided, but Chief Justice John G. Roberts cited the case favorably in his controlling opinion in *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 571 (2012), the case that upheld the "penalty" in the Obamacare legislation for failing to acquire acceptable health insurance as a valid exercise of the congressional taxing power. And the Court concluded that the tax/penalty was not a direct tax. (If apportionment were required, the penalty could not have worked as intended.)

39. *See, e.g.*, Weiss v. Stearn, 265 U.S. 242, 252 (1924) (holding that to the extent a shareholder in a corporate reorganization maintained a stock interest in the surviving entity—a new corporation formed under the laws of the same state—there was no severance of income from capital and therefore, constitutionally, no income to be taxed); Edwards v. Cuba R.R. Co. (*Cuba R.R.*), 268 U.S. 628, 633 (1925) (holding that subsidies paid by the Cuban government to facilitate railroad construction in Cuba were not income to the recipients: "The subsidy payments taxed were not . . . profits or gains from the use or operation of the railroad, and do not constitute income within the meaning of the Sixteenth Amendment.").

40. Indeed, one of them—*Edwards v. Cuba Railroad Co.* (*Cuba Railroad*)—is inconsistent with the argument made later in this article that the Sixteenth Amendment should be irrelevant in evaluating a corporate income tax. *See infra* Part II.C.

41. 278 U.S. 470 (1929).

42. *Id.* at 481.

43. The case considered whether, under an unapportioned income tax, a donee who later sold property received as a gift could be taxed on appreciation that occurred while the *donor* had held the property. The tax did not violate constitutional requirements: "There is nothing in the Constitution which lends support to the theory that gain actually resulting from the increased value of capital can be treated as taxable income in the hands of the recipient only so far as the increase occurred while he owned the property." *Id.* at 484.

44. Many other cases contained dicta supporting this conception. *See, e.g.*, Helvering v. Indep. Life Ins. Co., 292 U.S. 371, 379 (1934) ("The rental value of the building used by the owner does not constitute income within the meaning of the Sixteenth Amendment."); Bowers v. Kerbaugh-Empire Co., 271 U.S. 170, 174 (1926) ("It was not the purpose or effect of that Amendment to bring any new subject within the taxing power."); Burk-Waggoner Oil Ass'n v. Hopkins, 269 U.S. 110, 114 (1925) (stating that "Congress cannot make a thing income which is not so in fact."); Merchs.' Loan & Tr. Co. v. Smietanka, 255 U.S. 509, 519 (1921) ("[I]n determining the definition of . . . 'income,' . . . this Court has . . . approved . . . what it believed to be the commonly understood meaning of the term which must have been in the minds of people when they adopted the Sixteenth Amendment . . . .").

In ruling on what constitutes a "tax on incomes" within the meaning of the Sixteenth Amendment, modern courts examining section 280E (and, at the trial court level, that has almost always meant the Tax Court) have often said that it is within Congress's power to determine whether deductions are permissible. That is so even if the potential deductions relate to expenditures that are unquestionably costs of earning income. Deductions (and credits, too) are matters of "legislative grace," say the courts. "Income" for constitutional purposes need not satisfy an economic definition of income—or even a common-sense definition, for that matter. For the Sixteenth Amendment to operate to avoid apportionment, it is not necessary that the tax be on *net* income.

Those points are best illustrated by the October 2019 decision in *Northern California Small Business Assistants Inc. v. Commissioner* (*Northern California*).[45] In that case, an overwhelming majority of the full Tax Court,[46] in denying the taxpayer's motion for partial summary judgment, held that section 280E did not violate the Eighth Amendment[47] and said that precedents were clear that Congress alone has the authority to determine permissible deductions. The opinion cited earlier decisions by individual Tax Court judges, but the significance of *Northern California* is that the full court stated its institutional understanding that those earlier decisions were correct. (This decision involved an incorporated medical marijuana dispensary, legal under California law, that received notices of deficiency for several open years. This decision involved only one taxable year, so more cases are likely to come.)

On the Sixteenth Amendment point, that it is up to Congress to decide what deductions and credits are permissible—Congress can do what it wishes—the *Northern California* majority used broad language: "[S]ection 280E is enacted under Congress' unquestionable authority to tax *gross income* pursuant to the Sixteenth Amendment . . . ."[48] Apparently the Tax Court (albeit with some significant dissenters) thinks the term "incomes" in the amendment can mean gross income (and maybe even gross receipts) just as well as it might mean what we would now call taxable income—that is, net income that takes into account the costs of earning the income.[49] The Tenth Circuit, which has been unfriendly to

45. 153 T.C. 65 (2019).

46. All but one Tax Court judge participated, so the case provides the best sense of what the Tax Court as a whole thinks about these issues.

47. *See N. Cal.*, 153 T.C. at 71-72, 74-76; Chief Counsel Memorandum No. 202205024, *supra* note 22; *supra* note 22 and accompanying text.

48. *N. Cal.*, 153 T.C. at 70 (emphasis added). The quoted language from the majority opinion did not get constitutional basics right. The unquestioned authority to tax income comes from the Taxing Clause. What the Sixteenth Amendment does is make it possible to tax "incomes," within the meaning of the amendment, without having to apportion the tax on incomes. *See* San Jose Wellness v. Comm'r, 156 T.C. 62, 66-69 (2021); Patients Mut. Assistance Collective Corp. v. Comm'r (*Patients Mut.*), 151 T.C. 176, 208-10 (2018); Patients Mut. Assistance Collective Corp. v. Comm'r, 995 F.3d 671, 675 (9th Cir. 2021); Desert Organic Sols. v. Comm'r, T.C. Memo. 2021-22 (2021); U.S. CONST. amend. VIII, § 1; U.S. CONST. art. I, § 8, cl. 1; *infra* Part II.C.

49. Judge Gustafson concurred with the result reached by the majority, given that he thought the petition for partial summary judgment had not shown that no issues of material fact remained, but he emphasized, among other things, that the Sixteenth Amendment authorizes an unapportioned tax only on "incomes," Congress has no power to disallow all deductions necessary to compute "income," and

challenges to section 280E, recently cited the Tax Court's *Northern California* decision with approval, albeit in *Standing Akimbo*, a third-party summons case.[50]

To say that Congress can deny or delay deductions for a particular sort of expense is constitutionally unobjectionable. Congress must have latitude in defining what taxable "income" is under the Internal Revenue Code, and not every denied or delayed deduction creates a constitutional issue. Furthermore, courts are generally inclined to defer to congressional enactments. But it is quite a leap from concluding that Congress must have some flexibility to concluding that, in an unapportioned income tax, Congress can deny *all* deductions (and other offsets, like credits and maybe even COGS adjustments)[51] to taxpayers. That is not how the drafters and ratifiers of the Sixteenth Amendment conceived of "incomes." Indeed, the foremost academic proponent of the modern individual income tax, Professor Edwin R.A. Seligman, wrote at the time that "[i]ncome . . . *always* means net income."[52]

Some members of the Tax Court (Judges David Gustafson and Elizabeth A. Copeland) made that point in *Northern California*. For example, Judge Gustafson wrote that, "[b]ecause the Sixteenth Amendment gives Congress only the power to tax 'incomes' [without apportionment], Congress does not have the prerogative to disallow deductions to such an extent that the resulting tax fails to be a tax on 'income.'"[53] (Good soldier that he is, however, Judge Gustafson followed *Northern California* in a case he decided in August 2021: "This Court has previously held, in a precedential Opinion reviewed by the entire Court . . . , that disallowing deductions for ordinary and necessary business expenses under section 280E does not violate the Eighth or Sixteenth Amendment.")[54]

The Tenth Circuit in 2018, in *Alpenglow Botanicals, LLC v. United States*,[55] had referred to basis and COGS, the subject of the next section of this article, as "mandatorily excluded" in computing income,[56] and, in *Northern California*, Judge Gustafson agreed, noting "these 'mandatory exclusions[s]' . . . arise not from any express constitutional rule about COGS or basis but rather from the very meaning of the 'incomes' that the Sixteenth Amendment permits Congress to tax."[57] Judge Gustafson concluded "that this wholesale disallowance of all

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Congress must permit taxpayers to take account of basis and COGS in determining income. *N. Cal*., 153 T.C. at 77-84.

50. *See* Standing Akimbo, LLC v. United States, 955 F.3d 1146, 1157 n.7 (10th Cir. 2020) (citing *N. Cal*., 153 T.C. at 69) (stating that "§ 280E falls within Congress's authority under the Sixteenth Amendment to establish deductions"); *see also* Standing Akimbo, LLC v. United States, 141 S. Ct. 2236, 2236-38 (2021) (mem.) (noting certiorari denial and Justice Thomas's statement in *Standing Akimbo*).

51. About which, more below. *See infra* Part II.B.

52. EDWIN R.A. SELIGMAN, THE INCOME TAX: A STUDY OF THE HISTORY, THEORY AND PRACTICE OF INCOME TAXATION AT HOME AND ABROAD 19 (2d ed., Macmillan Co. 1914) (emphasis added). Professor Seligman was an economist at Columbia University, but that should not be held against him.

53. *N. Cal.*, 153 T.C. at 77.

54. Today's Health Care II LLC v. Comm'r, 122 T.C.M. (CCH) 126, *7 (2021).

55. 894 F.3d 1187 (10th Cir. 2018).

56. *Id.* at 1200. *See infra* note 59 and accompanying text (noting congressional understanding at time of section 280E's enactment).

57. *N. Cal.*, 153 T.C. at 81 (Gustafson, J., concurring in part and dissenting in part).

deductions transforms the ostensible income tax into something that is not an income tax at all . . . ."[58]

Although taxpayers pressing the constitutional argument have regularly lost, the issues about the meaning of "incomes" in the Sixteenth Amendment remain—and they are serious ones. This article next considers why a COGS adjustment in computing taxable income has (or should have) a different status under section 280E than the deductions that are explicitly disallowed by that section.

B. COGS VERSUS DEDUCTIONS

The results for taxpayers affected by section 280E can be severe. Some decisions have not only denied ordinary and necessary business expense deductions claimed under section 162; deductions (or credits) for state, local, and foreign taxes usually available under section 164; depreciation allowances otherwise permitted under section 167; and charitable contribution deductions otherwise allowed by section 170—a bad enough result for the businesses involved, but supported by statutory language. But some decisions have also, at least implicitly, prevented taxpayers in the marijuana business from reducing taxable income by part or all of what they considered to be their COGS.[59]

COGS is, in effect, a basis concept for property sold in the ordinary course of business—a reduction in the amount of a taxpayer's gross income. Gross income includes "*gains* derived from dealings in property" in gross income,[60] and gain is only the excess of the amount realized over basis.[61] Like a deduction, COGS reduces taxable income—something that is not gross income to begin with will not be reflected in taxable income[62]—but COGS technically is not a deduction (and it is certainly not a credit), and thus does not seem to be picked up by the language of section 280E. (Congress appeared to understand the difference at the time section 280E was enacted and intended not to limit any COGS

58. *Id.* at 84.

59. *See, e.g.*, *Alpenglow Botanicals, LLC*, 894 F.3d at 1202 (affirming a district court's determinations that an LLC, licensed under Colorado law to sell marijuana for medical and recreational use, was not entitled to ordinary and necessary business deductions for that activity, and that the Sixteenth Amendment does not require Congress to allow such deductions in computing "income"). Because of procedural issues, the *Alpenglow Botanicals, LLC* court did not focus on whether section 280E distinguishes between deductions otherwise allowable under section 162 and COGS. *See generally* Feinberg v. Comm'r, 916 F.3d 1330 (10th Cir. 2019), *cert. denied*, 140 S. Ct. 49 (2019) (affirming the Tax Court's holding that a medical marijuana company, formed as an S corporation, was not entitled to the COGS figure it claimed to reduce the income passed through to its shareholders). In *Patients Mutual*, Judge Mark V. Holmes wrote that "[t]he Constitution does limit Congress to taxing only gross income, and courts have consistently held—including in cases [taxpayer] cites—that gross income is gross receipts minus *direct* costs." Patients Mut. Assistance Collective Corp. v. Comm'r (*Patients Mut.*), 151 T.C. 176, 208 (2018). *See supra* note 27. There is no constitutional obligation, wrote Judge Holmes, for Congress to permit the inclusion in COGS of indirect costs, the deductibility of which would be denied by section 280E. *Patients Mut.*, 151 T.C. at 208.

60. I.R.C. § 61(a)(3) (2013 & Supp. 2022) (emphasis added).

61. *See* I.R.C. § 1001(a) (2013).

62. The portion of the amount realized that reflects recovery of basis disappears from the calculation of taxable income.

adjustments.)[63] Most judges have gotten the distinction between COGS and a deduction right, but then many have required calculation of the COGS adjustment in taxpayer-unfriendly ways.[64]

Properly understood, therefore, section 280E does not convert the income tax into a pure gross receipts tax because marijuana businesses should be able to take COGS into account in computing taxable income. But section 280E gets the unapportioned income tax as applied to traffickers in marijuana much closer to a gross receipts tax than may be constitutionally permissible—if, that is, the tax is to be exempted from the apportionment rule by the Sixteenth Amendment.

C. IS THE SIXTEENTH AMENDMENT RELEVANT IF THE INCOME-TAXPAYER IS A CORPORATION?

Courts have gone on and on discussing the extent, if any, to which the Sixteenth Amendment constrains Congress's ability to define income, but that question should have been irrelevant in some section 280E cases, like *Northern California*, that involve taxable corporations. The courts may have thought they were taking the Sixteenth Amendment issues seriously, but the legitimacy of the unapportioned federal *corporate* income tax does not seem to depend on the Sixteenth Amendment. If a C corporation—a corporation subject to the corporate income tax—is engaged in the marijuana business, whether the corporate income tax reaches something other than net income might not matter, for the reasons given below.

The Supreme Court had struck down the unapportioned 1894 individual income tax on constitutional grounds in 1895. In 1911, however, the Court, in *Flint v. Stone Tracy Co.*,[65] held that an unapportioned *corporate* income tax was not a direct tax subject to the apportionment rule.[66] It was instead a valid excise

63. Congress apparently thought that denying an adjustment for COGS might be a constitutional problem. *See* S. REP. 97-494, at 309 (1982) ("To preclude challenges on constitutional grounds, the adjustment to gross receipts with respect to effective costs of goods sold is not affected by this provision of the bill."). Denying deductions and credits must have been thought not to present constitutional problems.

64. In *Richmond Patients Group v. Commissioner*, for example, Judge Kathleen Kerrigan correctly stated that "[s]ection 280E disallows only deductions for the expenses of a business and does not preclude taxpayers from taking into account COGS." 119 T.C.M. (CCH) 1342, at *14 (2020). But she also interpreted the capitalization rules of section 263A narrowly, concluding that the taxpayer could not include in COGS some indirect costs that it would not be able to deduct as ordinary and necessary business expenses. *Id.* at *15. *See generally Alpenglow Botanicals, LLC*, 894 F.3d 1187 (describing COGS conclusion in *Patients Mutual*).

65. 220 U.S. 107 (1911).

66. The Constitution distinguished between direct taxes subject to apportionment (unless exempted by the Sixteenth Amendment) and indirect taxes (duties, imposts, and excises) subject to the uniformity rule—that the tax be "uniform throughout the United States." U.S. CONST. art. I, § 8, cl. 1. That requirement has been interpreted to mean that an indirect tax must be applied at the same rates and on the same tax base in every state in the union—a requirement that, because of the apportionment rule, a direct tax could not satisfy. (The term "indirect taxes" is not used in the Constitution itself, but it was used in founding-era debates. And it is a useful term for those taxes that are not subject to the apportionment rule.)

(a form of indirect tax). The result in *Flint* did not depend on the Sixteenth Amendment, which was not ratified until 1913.[67]

Section 38 of the Payne-Aldrich Tariff Act of 1909[68] provided, in pertinent part,

> [t]hat every corporation, joint stock company or association, organized for profit and having a capital stock represented by shares, and every insurance company, now or hereafter organized under the laws of the United States or of any State or Territory of the United States or under the Acts of Congress applicable to Alaska or the District of Columbia, or now or hereafter organized under the laws of any foreign country and engaged in business in any State or Territory of the United States or in Alaska or in the District of Columbia, shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation, joint stock company or association, or insurance company, equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year [with some exceptions, of course].[69]

In *Flint*, the Court concluded that this levy was "a tax upon business done in a corporate capacity,"[70] and that was an excise, not subject to the direct-tax apportionment rule and therefore unaffected by the Sixteenth Amendment, even if the amount of tax due was measured by income:

> It is therefore apparent, giving all the words of the statute effect, that the tax is imposed not upon the franchises of the corporation irrespective of their use in business, nor upon the property of the corporation, but upon the doing of corporate or insurance business, and with respect to the carrying on thereof, in a sum equivalent to 1 per centum upon the entire net income over and above $5,000 received from all sources during the year; that is, when imposed in this manner it is a tax upon the doing of business, with the advantages which inhere in the peculiarities of corporate or joint stock organizations of the character described.[71]

The ultimate result: "If we are correct in holding that this is an excise tax, there is nothing in the Constitution requiring such taxes to be apportioned according to population."[72]

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67. *Flint*, 220 U.S. at 107.

68. Tariff of 1909, Pub. L. No. 61-5, 36 Stat. 11, 11-118. The corporate income tax was included in the tariff act, at President William Howard Taft's insistence, to make up for revenue lost through reductions in many tariffs. Congress needed the revenue, and a new individual income tax had to await ratification of the Sixteenth Amendment.

69. *Flint*, 220 U.S. at 112.

70. *Id.* at 150.

71. *Id.* at 145-46.

72. *Id.* at 152.

When *Flint* was before the Supreme Court, what would become the Sixteenth Amendment was working its way through state legislatures in the ratification process. The Court must have been aware that the apportionment requirement might be eliminated for some subset of "taxes on incomes"—those applicable to individuals. If the amendment was unnecessary to validate an unapportioned corporate income tax, however—and the Court has not seriously reconsidered its conclusion in *Flint*—the Tax Court's discussion of Sixteenth Amendment issues in several cases, including *Northern California*, was arguably beside the point. (A grudging concession is appropriate here, however: the Court has often ignored *Flint* in disputes when the case should have been relevant, so the continuing relevance of that case might be in question.)[73]

Some of the litigants challenging section 280E have been either limited liability companies ("LLC") that have not checked the box to be taxed as corporations[74]—the LLCs are therefore treated as partnerships not subject to an entity-level tax[75]—or as S corporations, also passthrough entities that are not income-taxpayers except in special circumstances.[76] In those cases, the ultimate federal income tax liability arises at the level of the partner, LLC member, or S corporation shareholder, as the case may be. If the meaning of "incomes" under the Sixteenth Amendment has any relevance at all to the interpretation of section 280E when a passthrough entity operates the cannabis business, it would be to determine whether deductions and credits can be completely denied for such entities when the partners, the members, or the shareholders are not taxable corporations themselves. Those are legitimate issues, but they are not legitimate for a corporation that is itself a taxable entity—unless the corporation is willing to challenge the continuing vitality of *Flint*.

73. For example, in *Cuba Railroad*, decided fourteen years after *Flint*, the Court bewilderingly assumed that the Sixteenth Amendment was relevant in deciding whether Cuba Railroad, a corporation, could be taxed on subsidy payments it received from the Cuban government. Edwards v. Cuba R.R. Co. (*Cuba R.R.*), 268 U.S. 628, 632-33 (1925). (The answer: No, because the payments were not income, and the tax had not been apportioned.) The result might be defensible, but Justice Pierce Butler's opinion is nonsense, characterizing the amendment as one "like other laws authorizing or imposing taxes," and bizarrely stating that the term "income" should have the same meaning in the income tax statutes enacted in 1913 and 1916 that it had in the Corporation Excise Tax Law of 1909. *Cuba R.R.*, 268 U.S. at 631. The Court recognized, that is, that it had already approved the constitutionality of an unapportioned corporate income tax and then wrote as if it were the amendment that had authorized such a tax. Some (but not all) of the cases mentioned in *supra* note 40 that contain dicta about the meaning of "incomes" in the Sixteenth Amendment also involve taxpayers that were corporations (for example, *Bowers v. Kerbaugh-Empire Co.*) or that, although unincorporated under state law, were corporations for federal tax purposes (for example, *Burk-Waggoner Oil Association v. Hopkins*).

74. *See* Treas. Reg. § 301.7701-3(a) (2020).

75. *See* I.R.C. § 701 (2013); Treas. Reg. § 301.7701-3(b)(1)(i). That is, the default rule for an LLC is partnership status unless the LLC has only one member. (A partnership cannot have only one "partner.") In that case, the LLC is a "disregarded entity"; it is treated for tax purposes (and tax purposes only) as if it did not exist. Treas. Reg. § 301.7701-3(b)(1)(ii).

76. *See* I.R.C. §§ 1374-1375 (2013 & Supp. 2022).

III. CANNABIS BUSINESSES CONDUCTED IN INDIAN COUNTRY

This wonderful symposium included a panel on another sort of entity—a sovereign one at that—operating cannabis businesses. One panel—"Tribes Entering the Marijuana Industry"—discussed the successful cannabis businesses operating in Indian Country (a term that includes reservations and other lands that are, in general, under tribal control).[77] In general, these businesses are operated by the tribal governments themselves or by corporations formed by the tribal governments.[78] This adds another layer of complexity to federalism issues.

There are an extraordinary number of difficult issues involving taxation in Indian Country.[79] One thing is clear, however: tribal governments are not subject to the federal income tax. No statutory provision specifically says that, but it has been assumed to be the case forever, or so it seems.[80] (The principle is so well-established that, to change it, Congress presumably would have to act.) It has been similarly understood, although with perhaps more doubt on this point, that corporations formed by tribal governments—at least if the corporations are formed under either section 17 of the Indian Reorganization Act[81] or the Oklahoma Indian Welfare Act[82]—share the exemption from federal income taxation.[83]

What this means is that the limitations of section 280E are irrelevant to most tribal cannabis businesses. For businesses that are not subject to the federal income tax to begin with, limitations on the deductibility of business and other expenses and on the availability of tax credits simply do not matter. In that respect,

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77. Congress has defined "Indian Country" as including:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151 (2013). Although this definition technically applies only for purposes of criminal law, it has been applied in other situations.

78. *See* Eric L. Jensen & Aaron Stancik, *The Emerging Cannabis Industry Among Native American Tribes: Jurisdictional Complexities and Policy in Washington State*, 57 IDAHO L. REV. 325, 337 (2021). *See generally* Katherine Florey, *Waiting for the Smoke to Clear: The Complicated Beginnings and Promising Future of Tribal Cannabis*, 67 S.D. L. REV. 443 (2022) (reflecting on tribal cannabis operations given uncertain legal landscapes and the relationships between state and tribal governments); Paul Mooney, *Making Marijuana Less Illegal: Challenges for Native American Tribes Entering the Marijuana Market*, 67 S.D. L. REV. 482 (2022) (discussing issues that can arise when starting a tribal marijuana business, including financing and tax considerations).

79. Many are addressed in Erik M. Jensen, *Taxation and Doing Business in Indian Country*, 60 ME. L. REV. 1 (2008). The most pervasive set of questions involves state taxation within Indian Country, issues put aside for present purposes.

80. *See id.* at 41-42.

81. Act of June 18, 1934, ch. 576, § 17, 48 Stat. 984, 988 (codified at 25 U.S.C. § 5124 (2013)).

82. Act of June 26, 1936, ch. 831, 49 Stat. 1967 (codified at 25 U.S.C. §§ 5201-5209 (2013)).

83. *See* Jensen, *supra* note 79, at 42 (quoting Rev. Rul. 94-16, 1994-1 C.B. 19) ("Neither an unincorporated Indian tribe nor a corporation formed under section 17 of the Indian Reorganization Act is subject to federal income tax on its income, regardless of the location of the activities that produced the income."). Rev. Rul. 94-16 cites no Internal Revenue Code provision in support of that principle, but it does reflect the position of the Internal Revenue Service—at least for now.

tribal businesses have a major competitive advantage over businesses conducted by taxable entities. That might be a justifiable policy result, in that it furthers economic activity within Indian Country, but it is something Congress should consider when it revisits section 280E.

IV. CONCLUSION

The inconsistencies between federal and state laws affecting marijuana are unsustainable, and section 280E makes everything worse. Litigation is not the way to deal with constitutional issues involving section 280E. Litigation takes too much time and is too costly, and the danger of inconsistent judicial results across the country is real. Yes, the Supreme Court could resolve those conflicts, but the Court (even if it is the highest court in the land) really does not want to consider the intricacies of section 280E. Tax cases are not popular among the justices.[84]

If section 280E is a real problem for the marijuana industry, and it is, Congress needs to act. Congress presumably will, at some point in the foreseeable future, if only because marijuana has become more socially acceptable, and there seems to be rising sentiment for congressional action.

84. *See generally* Erik M. Jensen, *Of Crud and Dogs: An Updated Collection of Quotations in Support of the Proposition That the Supreme Court Does Not Devote the Greatest Care and Attention to Our Exciting Area of the Law*, 58 TAX NOTES 1257 (1993) (collecting pithy anti-tax quotations from justices); Letter from Erik M. Jensen, *Nontax Lawyers Have Had Enough*, 108 TAX NOTES 708 (2005) (noting that a clerk for Chief Justice William H. Rehnquist—one of whom was John Roberts—devised a voting system in connection with reviewing certiorari petitions to ensure that clerks "did not get stuck with a lot of tax cases"); Justice Ruth Bader Ginsburg, Gillian Metzger & Abbe Gluck, *A Conversation with Justice Ruth Bader Ginsburg*, 25 COLUM. J. GENDER & L. 6, 9 (2013) (noting that, in her pre-judicial days, Justice Joan Ruth Bader Ginsburg told her tax lawyer husband, "I don't read tax cases," although he convinced her to change her mind and tax—and cinema—history was made). The movie was "On the Basis of Sex," a 2018 product that, among other things, reenacted the Justice Ginsburg's successful representation of a male sex-discrimination plaintiff in a tax case, *Moritz v. Commissione'r*, 469 F.2d 466 (10th Cir. 1972).