

[Senate Bill 643](#) (McGuire)

Date: 04/06/15

Program: Local Marijuana and Marijuana Products Tax

Sponsors: Author

Government Code Section 23028

Effective January 1, 2016

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This analysis only addresses the provisions that impact the Board of Equalization (BOE).

Summary: Among other things, this bill:

- Authorizes a county or city to levy a transactions and use tax on marijuana and marijuana products, subject to current voter approval thresholds; and
- Requires the Board of Equalization (BOE) to compile a report on actual and expected marijuana tax revenues.

Purpose: To create an effective statewide system for regulating and controlling medical marijuana.

Fiscal Impact Summary: Unknown local revenue impact. Does not affect state revenues.

Existing Law: Except where the law specifies an exclusion or exemption, **California's Sales and Use Tax Law**¹ imposes the sales tax on all retailers for the privilege of selling tangible personal property at retail in this state. Therefore, under the law, sales tax applies to retail sales of marijuana, including medical marijuana, to the same extent as any other retail sale of tangible personal property.

For patient treatment, the law² exempts from sales and use tax retail sales of medicines, as defined, when the medicines sold or furnished are:

- prescribed by an authorized person and dispensed on a prescription filled by a pharmacist,
- furnished by a licensed physician to his or her own patient,
- furnished by a health facility for treatment pursuant to a licensed physician's order, or sold to a licensed physician.

The BOE administers locally-imposed sales and use taxes under the Bradley-Burns Uniform Local Sales and Use Tax Law and under the Transactions and Use Tax Law, which are set forth in the Revenue and Taxation Code. By law, cities and counties contract with the BOE to administer the ordinances imposing the local and transactions and use (district) taxes.

The **Bradley-Burns Uniform Local Sales and Use Tax Law**³ (Bradley-Burns Law) authorizes cities and counties to impose local sales and use tax. This tax rate currently⁴ is fixed at 1% of the sales price of tangible personal property sold at retail in the local jurisdiction, or purchased outside the jurisdiction for use within the jurisdiction. Of this 1%, cities and counties use 0.75% to support general operations. The remaining 0.25% is designated by statute for county transportation purposes, but restricted for road maintenance or the operation of transit systems. The counties receive the 0.25% tax for transportation purposes regardless of whether the sale occurs in a city or in the unincorporated area of a county. In California, all cities and counties impose Bradley-Burns local taxes at the uniform rate of 1%.

¹ Part 1, Division 2 of the Revenue and Taxation Code (commencing with Section 6001).

² Sales and Use Tax Law Section 6369.

³ Part 1.5 of Division 2 of the Revenue and Taxation Code (RTC), commencing with Section 7200.

⁴ RTC Section 7203.1.

The **Transactions and Use Tax Law**⁵ and the statutes imposing additional local taxes⁶ authorize cities and counties to impose district taxes under specified conditions. Counties may impose a district tax for general purposes and special purposes at a rate of 0.125%, or multiples of 0.125%, if the tax ordinance is approved by the voters in the county. Cities also may impose a district tax for general purposes and special purposes at a rate of 0.125%, or multiples of 0.125%, if the tax ordinance is approved by the voters in the city. Under these laws, the combined district tax rate imposed within any county cannot exceed 2%⁷ (with the exception of the counties of Alameda, Contra Costa, and Los Angeles⁸).

Counties also may establish a transportation authority to impose district taxes under the Public Utilities Code (PUC). Various statutes under the PUC authorize a county board of supervisors to create an authority within the county or designate a transportation-planning agency to impose a district tax, subject to the applicable voter approval requirement. District taxes imposed under the PUC must conform to the administrative provisions contained in the Transactions and Use Tax Law, including the requirement to contract with the BOE to perform all functions related to the administration and operation of the ordinance.

Currently, all district tax ordinances administered by the BOE have boundaries coterminous with city or county lines. Some districts consist of multiple counties.

Proposed Law: Among other things, this bill enacts Part 5 (commencing with Section 18100) of Division 7 of the Business and Professions Code (BPC) to establish the Bureau of Medical Marijuana Regulation (Bureau) within the Department of Consumer Affairs. The bill requires the Bureau to conditionally license and regulate dispensing facilities, cultivation sites, transporters, and manufacturers of medical marijuana and medical marijuana products, subject to local ordinances.

Marijuana and Marijuana Products District Tax. This bill, as it pertains to the BOE, adds Section 23028 to the Government Code (GC) to authorize any county's board of supervisors or city council of a city to impose, by ordinance, a tax on the privilege of cultivating, dispensing, producing, processing, preparing, storing, providing, donating, selling, or distributing marijuana by a licensee, as specified. The bill authorizes a county or city to impose a district tax solely on marijuana or marijuana products in a manner that conforms to the Transactions and Use Tax Law. The bill authorizes the board of supervisors or city council to impose the tax at any rate, and the tax would not be considered for purposes of determining the combined rate limitation pursuant to RTC Section 7251.1.

GC Section 23028 also:

- Requires the board of supervisors to specify whether the tax applies throughout the entire county or within the unincorporated area of the county.
- Requires any tax to be subject to applicable voter approval requirements imposed by any other law.

GC Section 23028 defines "marijuana" to have the meaning set forth in BPC Section 18100. BPC Section 18100 defines "marijuana" to mean:

"all parts of the plant *Cannabis sativa*, *cannabis indica*, or *cannabis ruderalis*, whether growing or not; the seeds thereof; the resin, whether crude or purified, extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin. "Marijuana" does not include the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin

⁵ Part 1.6 of Division 2 of the RTC, commencing with Section 7251.

⁶ Part 1.7 of Division 2 of the RTC, commencing with Section 7280.

⁷ RTC Section 7251.1.

⁸ Exceptions authorized through AB 1324 (Ch. 795, 2014, Skinner) for City of El Cerrito, AB 210 (Ch. 194, 2013, Wieckowski) for Alameda County and Contra Costa County and SB 314 (Chapter 785, 2003, Murray) for the Los Angeles Metropolitan Transportation Authority.

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extracted therefrom), fiber, oil, or cake, or the sterilized seed of the plant which is incapable of germination. "Marijuana" also means marijuana, as defined by Section 11018 of the Health and Safety Code."

BOE Report. The bill's uncodified language (Section 9) requires the BOE, on or before July 1, 2016, to compile a report on actual medical marijuana tax collected, using the most current data available. The bill further requires the report to include expected tax revenues, under the existing tax structure, for the years 2016 to 2021 exclusive. The report shall be submitted to the Legislature and the Governor's Office pursuant to GC Section 9795.

In General: District Taxes. California voters have approved new district taxes in their cities or counties. These district taxes are levied exclusively within the borders of either a county or an incorporated city (with the exception of the Bay Area Rapid Transit District, which is comprised of Alameda, Contra Costa, and San Francisco counties, and the Sonoma-Marín Area Rail Transit District). Cities and counties that levy a tax within their borders are referred to as "districts."

District transactions (sales) taxes are imposed on the sale of tangible personal property in a district. Retailers located in a district are generally subject to district sales tax, either when the purchaser receives the property at the retailer's place of business or when the retailer delivers the property to the purchaser in the district. Retailers located within a district who sell and deliver outside the district, generally are not liable for district sales tax in their district; however, they may be required to collect district use tax on the transaction in the district of delivery (if applicable).

District use tax is imposed on the storage, use, or other consumption of tangible personal property in a district. Retailers generally must report district use tax if they are "engaged in business" within a district. Retailers are considered "engaged in business" in a district in the following common scenarios:

- The retailer maintains, occupies, or uses, permanently or temporarily, directly or indirectly, or through a subsidiary or agent, by whatever name called, any type of office, sales room, warehouse, or other place of business in the district.
- The retailer has any kind of representative operating in the district for the purposes of making sales or deliveries, installing or assembling tangible personal property, or taking orders.
- The retailer receives rentals from a lease of tangible personal property located in the district.

A retailer "engaged in business" in a district generally is required to collect and report district use tax on a sale when it ships or delivers the property into the district or participates in making the sale of the property within the district. The following example illustrates when retailers should collect and report district use tax:

- A Sacramento County retailer makes a taxable sale of property to the purchaser in the City of Concord in Contra Costa County where the property is delivered and used. Even though the sale is subject to the state sales tax, the sale is not subject to the Sacramento County district sales tax because the property was required to be delivered pursuant to the contract of sale outside the county. However, use of the property in Concord makes the sale subject to the applicable district use tax in Concord and Contra Costa County. If the retailer is "engaged in business" in Concord and ships or delivers the property to the Concord location, it is responsible for collecting and reporting district use taxes applicable in the City of Concord and in Contra Costa County. Conversely, if the retailer is not engaged in business anywhere in Contra Costa County, the retailer is not responsible for collecting any district use tax.

District taxes currently administered by the BOE. Beginning April 1, 2015, 202 local jurisdictions (city, county, and special purpose entity) will impose a district tax for general or specific purposes. Of the 202 jurisdictions, 48 are county-imposed taxes and 154 are city-imposed taxes. Of the 48 county-imposed taxes, 29 are imposed for transportation purposes.

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District taxes increase the tax rate within a city or county because the district tax rate is added to the combined state and local (Bradley-Burns local tax) tax rate of 7.5%. As stated previously, subject to certain exceptions, the maximum combined rate of district taxes imposed in any county cannot exceed 2%. Each city district tax counts separately against the 2% maximum. For example, if a county imposes district taxes totaling 1.5%, each city within that county can only impose district taxes up to a maximum of 0.5%.

Currently, individual district tax rates vary from 0.1%⁹ to 1%. Some jurisdictions do not impose district taxes, while others, such as the cities of La Mirada, Pico Rivera, and South Gate, located in Los Angeles County, specifically are authorized to exceed the 2% cap for combined county and city district taxes. The combined state, local, and district tax rates range from 7.5 to 10%. A listing of the district taxes, rates, and effective dates is available on the BOE's [website](#).

Background: Medical Marijuana Sellers – Sales Tax. In 1996, California voters passed Proposition 215, also known as the Compassionate Use Act of 1996, which allows patients and their primary caregivers to cultivate or possess marijuana for personal medical treatment with the recommendation of a physician, as specified.

In 2003, Senate Bill 420 (Ch. 875, Stats. 2003, Vasconcellos) was enacted to establish statewide guidelines for Proposition 215 enforcement. In particular, SB 420 clarified that nonprofit distribution is allowed in certain cases for patient cultivation cooperatives, small-scale caregiver gardeners, and dispensing collectives. However, despite the fact that numerous medical marijuana dispensaries currently do business in California, the sale of medical cannabis is illegal under federal law. On December 16, 2014, Public Law 113-235¹⁰ became operative which prohibits the United States Department of Justice from using funds to prevent specified states, including California, from implementing state laws that authorize the use, distribution, possession, or cultivation of medical marijuana.

The sale of medical marijuana¹¹ is taxable. The BOE issues seller's permits to those medical marijuana sellers that apply and will issue seller's permits to any other sellers making unlawful sales.

In 2007, the BOE mailed a special notice to California sellers of medical marijuana to clarify the application of tax to medical marijuana sales and the requirement that they must hold a seller's permit.

Legislative History: Assembly Bill (AB) 2312 (Ammiano, 2012) and AB 1894 (Ammiano, 2014) were similar to this bill and also authorized a county to levy a transactions and use tax up to 5% (or a city to levy such a tax up to 2%) on tangible personal property that is medical marijuana or medical marijuana-infused products subject to current voter approval thresholds. AB 2312 was held in the Senate Business, Professions and Economic Development Committee. Assembly Bill 1894 failed to pass its house of origin with a 26-33 vote.

Commentary:

- 1. Conforming to the Transactions and Use Tax Law.** This bill provides that the local district tax imposed upon marijuana or marijuana products shall conform to the Transactions and Use Tax Law. However, not all of the provisions under the Transactions and Use Tax Law fit neatly with the proposed marijuana tax. The author may wish to consider amending the bill to incorporate stand-alone language into a new article under Part 1.7 (commencing with Section 7280) of Division 2 of the RTC, which includes:

⁹ Through specific authority, SB 1187 (Chapter 285, Stats. 2001, Costa) authorizes Fresno County to impose a 0.10% district tax for zoological purposes.

¹⁰ [H.R. 83](#) / Public Law 113-235, Consolidated and Further Continuing Appropriations Act, 2015, (Dec. 16, 2014; 128 Stat. 2130; 701 pages)

¹¹ All retail sales, including illegal sales, are subject to tax.

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- **Operative date.** As written, any new local marijuana tax would become operative on the first day of a calendar quarter commencing more than 110 days after the adoption of the ordinance, pursuant to RTC Section 7265. However, the 110-day timeframe would not provide the BOE sufficient time to effectively implement the **first county or city's** local marijuana tax ordinance. BOE staff estimates that it would take a minimum of six months to implement the initial marijuana program proposed by this bill. In order to provide the BOE with the necessary 6-month lead-time, it is suggested that the bill be amended to provide a delayed operative date of the first day of the first calendar quarter commencing more than six months after the first ordinance is adopted. This would provide the BOE with sufficient lead-time to successfully implement the initial local marijuana tax program.

As other counties or cities adopt a tax, the BOE would need time to notify affected retailers, modify tax returns, develop instructions for BOE staff and affected retailers, and perform minor programming changes. The BOE would need at least one quarter lead time from the date the ordinance is approved by the voters to prepare to administer the marijuana tax ordinance. The operative date provided under RTC Section 7265 should provide the BOE sufficient time to successfully implement subsequent marijuana tax ordinances.

- **Administrative costs.** Three different types of administrative costs associated with the local marijuana tax would apply: (1) start-up costs related to the implementation of a new (and distinctly different) tax program, which includes extensive modifications to the BOE's computer system; (2) preparatory costs for subsequent counties and cities adopting a local marijuana tax ordinance; and (3) ongoing administrative costs.
 - **Start-up Costs.** The Transactions and Use Tax Law includes provisions for reimbursement to the BOE for preparatory costs (Section 7272) and administrative costs (Section 7273); however, BOE staff has opined that these provisions would not include reimbursement to the BOE for administrative start-up costs. It is not clear how these one-time start-up costs would be funded.
 - **Preparatory Costs.** Preparatory costs include developing procedures, programming for data processing, developing and adopting appropriate regulations, designing and printing forms, developing instructions for BOE staff and taxpayers, and any other necessary preparatory costs. The Transactions and Use Tax Law limits the district's liability for costs to \$175,000. It is unknown at this time if the amount specified would sufficiently cover the BOE's actual costs to perform these tasks for a marijuana tax ordinance.
 - **Ongoing Administrative Costs.** Section 7273 requires the BOE to charge for its administration of each special taxing jurisdiction's district tax ordinance. Under this statute, the BOE is required to use a model for allocating its costs that is based on the methodology described in Alternative 4C of the November 2004 report by the BOE entitled "[Response to the Supplemental Report of the 2004 Budget Act.](#)" The methodology (referred to as the "modified revenue" model) utilizes the four sales and use tax program elements as reflected in the approved Governor's Budget. Those elements are Audit, Collections, Registration and Returns.

The proposed local marijuana tax differs from existing transactions and use taxes and therefore should not be part of the "modified revenue" model for allocating administrative costs.

To avoid any unintended impact on the General Fund, the bill should be amended to incorporate BOE reimbursement provisions specific to the local marijuana tax.

2. **Costs may exceed revenues.** The Transactions and Use Tax Law requires local jurisdictions that levy sales and use taxes to contract with the BOE to administer the district tax so that the entity may levy a tax at a low rate and take advantage of the BOE's functions in administering the Sales and Use Tax Law. Therefore, if a county or city passes an ordinance to impose a district tax on marijuana sales, that local jurisdiction would be required to contract with the BOE to perform functions related to the ordinance. The BOE would incur start-up costs related to the implementation of a new tax program, which are not impacted by the number of jurisdictions that impose the new tax. The ongoing costs would vary based on the number of jurisdictions adopting a marijuana tax ordinance and other factors.

If the tax rate is set too low and/or only a few counties or cities impose the tax, the BOE administrative costs would be paid from a smaller revenue base. Under these circumstances, the revenues generated by the proposed tax may be insufficient to cover the BOE's preparatory and ongoing administrative costs.

3. **Tax could complicate retailers' records and reporting.** If approved, a district tax would be levied on the sale of marijuana or marijuana products. As previously stated, retail sales of marijuana and marijuana products are already subject to sales tax (including applicable district tax(es)) to the same extent as any other retail sale of tangible personal property. Accordingly, marijuana retailers would be burdened with additional record keeping and the need to segregate marijuana transactions in order to report the correct amount of sales and use tax, any current applicable district taxes, and any local marijuana taxes. This segregation may increase reporting errors and confusion.
4. **Local marijuana tax considered a district tax.** Under the existing Bradley-Burns Law, Section 7203.5 provides that the BOE shall not administer and shall terminate its contract to administer any sales or use tax ordinance of a city, county, or city and county, if that city, county, or city and county imposes a sales or use tax in addition to the sales and use taxes imposed under an ordinance conforming to specified provisions of the Bradley-Burns Law. Section 7211, however, makes an exception to Section 7203.5's restriction, by authorizing the BOE to continue to administer the sales and use tax ordinance of any county that imposes a district tax pursuant to the Transactions and Use Tax Law.

A local marijuana district tax imposed pursuant the Transaction and Use Tax Law, as set forth in GC Section 23028(a)(3), would not violate Section 7203.5. Accordingly, the BOE may administer a local marijuana tax without affecting the Bradley-Burns local tax imposed by that jurisdiction.

5. **Medical marijuana is not a prescription medicine.** RTC Section 6369 of the Sales and Use Tax Law exempts retail sales of medicines, as defined, under certain conditions, including when furnished by a health facility for patient treatment pursuant to the order of a certificated physician, or when prescribed by a certificated physician and dispensed on a prescription filled by a registered pharmacist in accordance with law. Medical marijuana dispensaries generally are not considered to be health care facilities, as provided in that section, nor, are they registered pharmacists. Consequently, sales of medical marijuana by dispensaries and primary caregivers do not qualify for the Section 6369 exemption, regardless of whether the purchasers possess a medical marijuana identification card.
6. **Medical marijuana tax report.** The bill requires the BOE, on or before July 1, 2016, to compile a report on actual medical marijuana tax collected and expected medical marijuana tax revenues for the years 2016 to 2021. The BOE does not gather information specific to the medical marijuana sales. Taxpayers that hold a seller's permit report *total gross sales*. Sales of specific products are not identified on a taxpayer's return. Thus, the bill's requirement for the BOE to compile an **actual** medical marijuana report cannot be performed without that specific information. BOE staff recommends the report provide **estimated** medical marijuana sales and use tax collected and estimated medical marijuana sales and use tax revenues for the specified period.

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- 7. Suggested technical amendments.** GC Section 23028(a)(1) generally authorizes a county or city to impose, by ordinance a marijuana tax by a licensee operating pursuant to *Chapter 18 (commencing with Section 26000) of Division 9 of the Business and Professions Code*. The bill should instead reference a licensee operating pursuant to Part 5 (commencing with Section 18100) of Division 7 of the Business and Professions Code.

In addition, BOE staff suggests GC Section 23028 define “marijuana product” to have the same meaning as the term “marijuana product” set forth in Health and Safety Code Section 111658. Or, to have the same meaning as the term “marijuana product” set forth in BPC 18100 if the bill adds a definition to that section.

- 8. Related legislation.** [AB 34](#) (Bonta) and [AB 266](#) (Cooley) contain similar provisions to authorize a county to levy a transactions and use tax on marijuana and marijuana products.

Administrative Costs: This bill does not increase administrative costs to the BOE because it only authorizes a county or city to impose a district tax on marijuana and marijuana products. Voter approval would be required before any tax is levied pursuant to these provisions.

If a county or city adopts an ordinance to levy a tax that conforms to the Transactions and Use Tax Law, the county or city would be required to contract with the BOE to perform all functions related to the ordinance, and reimburse the agency for its administrative costs, as well as the costs for the BOE’s administration of the ordinance. Costs for preparation and administration of this tax would likely be higher than other district taxes the BOE administers, since the proposed tax is unlike other district taxes.

To the extent that more marijuana tax measures are approved by local voters, the BOE will need additional resources to administer the new taxes. The BOE will utilize the normal budget change proposal process to obtain the necessary funding when the number of newly approved measures requires additional staff to administer the workload.

Revenue Impact: The bill does not include a specific tax rate, thus a revenue estimate cannot be prepared. The marijuana tax revenue is limited to the local agencies that impose a special tax and is dependent on the rate at which the special tax is established.