



STATE OF CALIFORNIA
FRANCHISE TAX BOARD - Legal Department
PO Box 1720
Rancho Cordova CA 95741-1720
(916) 845-3306 Fax (916) 845-3648

JOHN CHIANG
Chair

BETTY T. YEE
Member

MICHAEL C. GENEST
Member

July 31, 2007

FTB NOTICE 2007-3

SUBJECT: 60-Day Period to File Complete Forms 8886 for Each Taxable Year for Which Taxpayers Participated in a Reportable Transaction Prior to Imposing Penalties Under Revenue and Taxation Code Section 19772

The purpose of this Notice is to advise taxpayers and practitioners that the Franchise Tax Board (FTB) will allow taxpayers who filed incomplete IRS Forms 8886, *Reportable Transaction Disclosure Statement*, or any successor form, or who failed in the first instance to file a Form 8886 when it was originally due, for each taxable year for which they participated in a reportable transaction, a period of 60 calendar days from the date of this Notice to file complete disclosure statements for any transaction that should have been disclosed on or before the date of this Notice. If a taxpayer that is required to file a disclosure statement fails to file a complete Form 8886 on or before the conclusion of this 60-day period, the FTB will assess penalties pursuant to Revenue and Taxation Code (RTC) section 19772.¹

I. FILING REQUIREMENT

RTC section 18407 incorporates by reference Internal Revenue Code (IRC) section 6011 and the regulations thereunder. Treasury Regulation section 1.6011-4(a) requires a taxpayer that has participated in a reportable transaction, including a listed transaction, to disclose certain information with respect to the reportable transaction on the taxpayer's return. Treasury Regulation section 1.6011-4(d) requires a taxpayer to file a complete disclosure statement on IRS Form 8886 (in accordance with paragraph (d) of the federal regulation and the instructions to the form) for each reportable transaction in which the taxpayer participated. Treasury Regulation section 1.6011-4(e)(1) provides that the disclosure statement is due when the taxpayer files an original or amended return for each year that reflects the taxpayer's participation in a reportable transaction. For the initial year only for which a disclosure statement is filed for a particular reportable transaction, the taxpayer must also send a duplicate copy to the federal Office of Tax Shelter Analysis.²

For California purposes, the general rule is that IRS Form 8886 must be attached to the taxpayer's original or amended tax return for each taxable year for which the taxpayer participates³ in a reportable transaction. Additionally, only for disclosure statements (IRS Form 8886) **filed for the initial year of participation**, the taxpayer is required to

¹ Participants in the Franchise Tax Board's 2004 Voluntary Compliance Initiative (RTC section 19751 et seq.) and in the 2006 California Tax Shelter Resolution Initiative (FTB Notice 2006-1) are not subject to penalties under RTC section 19772.

² See Treas. Reg. § 1.6011-4(h) for the effective dates of the federal regulations.

³ See Treas. Reg. § 1.6011-4(c)(3) for the definition of "Participation."

mail a copy of that disclosure to FTB's Abusive Tax Shelter Unit (ATSU) at the following address:

US Mail:

ATSU 398 MS: F385
FRANCHISE TAX BOARD
P.O. BOX 1673
SACRAMENTO, CA 95812-9900

For Courier Service Delivery or Private Courier Mail:

ATSU 398 MS: F385
FRANCHISE TAX BOARD
SACRAMENTO, CA 95827-9900

A Form 8886 containing a statement that information will be provided upon request is not considered a complete disclosure statement. Also, if the taxpayer failed to complete the Form 8886 in accordance with paragraph (d) of Treasury Regulation 1.6011-4 and the instructions to that form, the taxpayer is not considered to have complied with the disclosure requirements. For example, if the taxpayer failed to file the disclosure statement with FTB's ATSU for the initial year of participation at the same time the taxpayer filed a disclosure statement with the taxpayer's return, the taxpayer is considered to have failed to comply with the disclosure requirements, even though disclosure was made on the return.

Taxpayers who failed to comply with these reporting requirements, for any transaction that should have been disclosed on or before the date of this Notice, have 60 calendar days from the date of this Notice to file complete Forms 8886 for each taxable year for which they participated in a reportable transaction. A taxpayer filing a disclosure statement in accordance with this Notice need only file the statement with ATSU and need not file an amended return to make disclosure. For disclosure statements being filed in response to this Notice, Taxpayers should write in red on the top of the Form 8886 "FTB Notice 2007-3."

II. PENALTY FOR FAILURE TO DISCLOSE

RTC section 19772 was added by SB 614 (Stats. 2003, ch. 656), and was generally operative for taxable years beginning on or after January 1, 2003, and, due to a subsequent amendment, before January 1, 2005. It was also specifically operative for any transaction that a taxpayer invested in after February 28, 2000, and before January 1, 2004, where at any time that transaction became a listed transaction. (SB 614, Stats. 2003, ch. 656, § 15, subd. (c)(1)(B).) For taxable years beginning on or after January 1, 2003, and before January 1, 2005, the failure to disclose penalty under RTC section 19772 was limited to large entities or high net worth individuals, as defined in former RTC section 19772, subdivisions (c)(1) and (c)(2).

The current provisions of RTC section 19772 were enacted as part of AB 115 (Stats. 2005, ch. 691), and are operative for taxable years beginning on or after January 1, 2005. Those provisions provide, among other things, that for taxable years beginning on or after January 1, 2005, the penalty may be imposed on those taxpayers with taxable income greater than \$200,000.00. As a general rule, the penalty applies to all taxpayers who: (1) fail to attach a complete disclosure statement to an original or amended return, and/or (2) fail to file a separate IRS Form 8886 with the FTB's ATSU when required.

For those taxpayers who are required to file a disclosure statement but fail to file a complete Form 8886 on or before the date that is 60 calendar days from the date of this Notice, the FTB will impose a penalty pursuant to RTC section 19772 with respect to each failure to disclose a reportable transaction. The amount of the penalty for each failure to provide a disclosure statement is \$15,000 for reportable transactions and \$30,000 for listed transactions.

The principal author of this notice is Craig L. Scott of the Franchise Tax Board, Legal Department. For further information regarding this notice, contact Mr. Scott at P.O. Box 1720, Rancho Cordova, CA 95741-1720.