



October 16, 2017

## LEGAL RULING 2017- 02

**SUBJECT: Conformity to Federal Information Filing Requirements Relating to Certain Foreign Financial Assets [Internal Revenue Code section 6038D].**

### ISSUE

Whether California's conformity to federal information filing requirements relating to certain foreign financial assets imposed by Internal Revenue Code (IRC) section 6038D applies to nonresident aliens.

### SITUATION ONE

Airi is a nonresident alien, who has an information filing requirement with his federal tax return imposed by IRC section 6038D because he holds foreign financial assets that exceed the reporting threshold and is a specified individual required to file under Treasury Regulation section 1.6038D-1(a)(2) for the 2017 taxable year. Assume Airi also had California source income for the 2017 taxable year, and thus has an income tax return filing requirement in California.

### SITUATION TWO

Assume the same facts as Situation One, except that Airi does not have any California source income for the 2017 taxable year, and thus does not have an income tax return filing requirement in California.

### SITUATION THREE

Assume the same facts as Situation One, except that Airi does not have an information filing requirement with his federal income tax return imposed by IRC section 6038D because Airi is not a specified individual required to file under Treasury Regulation section 1.6038D-1(a)(2).

### LAW AND ANALYSIS

Under federal law, IRC section 6038D requires specified individuals and business entities to file information with their federal income tax returns relating to their interests in specified foreign financial assets if the aggregate value of those assets exceeds \$50,000 or a higher

prescribed amount.<sup>1</sup> IRC section 6038D(h)(2) grants the Secretary the authority to promulgate regulations that are necessary or appropriate to provide appropriate exceptions from the application of the information filing requirement for nonresident aliens. Treasury Regulation section 1.6038D-1(a)(2) provides that the specified individuals, who are required to file information with their federal income tax returns under IRC section 6038D are (i) U.S. citizens, (ii) resident aliens of the United States for any portion of the taxable year, (iii) nonresident aliens for whom an election under IRC section 6013(g) or (h) is in effect, or (iv) nonresident aliens who are bona fide residents of Puerto Rico or an IRC section 931 possession (as defined in Treasury Regulation section 1.931-1(c)(1)). IRC section 6038D(d) imposes a minimum penalty of \$10,000 for failure to file the required information with the income tax return. The penalty is not imposed if the failure is shown to be due to reasonable cause and not willful neglect.<sup>2</sup>

In 2015, AB 154 (Stats. 2015, ch. 359) amended Revenue and Taxation Code (RTC) section 19141.5 to add subdivision (d), which conforms California to IRC section 6038D without any modifications. RTC section 19141.5(d)(2) imposes a penalty determined in accordance with IRC section 6038D.

RTC section 17024.5(b)(11) provides that unless otherwise specifically provided, when applying any provision of the IRC for California purposes, any provision that refers to nonresident aliens shall not be applicable. RTC section 19141.5(e), which provides that the information filed with the Franchise Tax Board (FTB) is a copy of the information filed with the Internal Revenue Service (IRS), is a specific exception to the RTC section 17024.5(b)(11) general rule concerning nonresident alien provisions.

Additionally, it is reasonable to infer that the Legislature did not intend to impose a broader filing requirement under RTC section 19141.5(d) than would be required for IRC section 6038D because it was enacted as part of general federal conformity legislation, and the legislative history of AB 154 does not show any legislative intent to impose the filing requirement upon a broader class of individuals than it would be imposed under federal law.

Therefore, California follows the federal law regarding the application of the IRC section 6038D information filing requirements with income tax returns for nonresident aliens.

## **HOLDING – SITUATION ONE**

Airi has an information filing requirement with his California income tax return imposed by RTC section 19141.5(d) for the 2017 taxable year because Airi has an information filing requirement with his federal income tax return imposed by IRC section 6038D, and has an income tax return filing requirement in California. Treasury Regulation section 1.6038D-2 provides that the information required to be furnished with the federal income tax return is IRS Form 8938, "Statement of Specified Foreign Financial Assets." Therefore, Airi is required

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<sup>1</sup> Int.Rev. Code, § 6038D(a), (b); 26 C.F.R. §§ 1.6038D-1, 1.6038D-6.

<sup>2</sup> Int.Rev. Code, § 6038D(g).

to attach a copy of the IRS Form 8938 that he filed with the IRS to his California income tax return for the 2017 taxable year.<sup>3</sup> A minimum penalty of \$10,000 may be imposed by the FTB for failing to provide a copy of the filed IRS Form 8938 with his California income tax return, unless it can be shown that the failure was due to reasonable cause and not willful neglect.<sup>4</sup>

#### **HOLDING – SITUATION TWO**

Airi does not have an information filing requirement with his California income tax return under RTC section 19141.5(d) for the 2017 taxable year because Airi does not have an income tax return filing requirement in California for the 2017 taxable year.

#### **HOLDING – SITUATION THREE**

Airi does not have an information filing requirement with his California income tax return under RTC section 19141.5(d) for the 2017 taxable year because Airi does not have an information filing requirement with his federal income tax return imposed by IRC section 6038D.

#### **DRAFTING INFORMATION**

The principal author of this Legal Ruling is Gi Jung Nam of the Franchise Tax Board, Legal Division. For further information regarding this ruling, contact Mr. Nam at the Franchise Tax Board, Legal Division, P.O. Box 1720, Rancho Cordova, California 95741-1720.

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<sup>3</sup> Rev. & Tax. Code, § 19141.5(e).

<sup>4</sup> Rev. & Tax. Code, § 19141.5(d)(2); Int.Rev. Code, § 6038D(d), (g).