

Amendments to the Procedural Regulations Relating to New York Reportable Transactions

Amendments that add a new Part 2500 to the Procedural Regulations of the Department of Taxation and Finance relating to the disclosure of New York reportable transactions were adopted on December 12, 2006. New Part 2500, *New York Reportable Transactions*, provides a definition of a New York reportable transaction for purposes of Articles 9, 9-A, 22, 32, and 33 of the Tax Law and the disclosure requirements for participants in a New York reportable transaction. The amendments apply to taxable years beginning on or after January 1, 2006.

As part of an effort to curtail the use of tax shelters, section 25 of the Tax Law was added by Chapter 61 (Part N) of the Laws of 2005. Section 25 requires taxpayers and others to disclose to the Department of Taxation and Finance information relating to transactions that present the potential for tax avoidance. Penalties are imposed for failure to disclose and for understatement of tax attributable to these transactions. Section 25(a)(1) requires the disclosure of certain information that is reported to the Internal Revenue Service. Section 25(a)(2) requires the disclosure of New York reportable transactions as prescribed by regulations.

New Part 2500 of the regulations defines a New York reportable transaction as a transaction having the potential to be a state tax avoidance transaction and identifies three categories of reportable transactions. The categories chosen are types of arrangements that a taxpayer would have reason to know are designed for state tax avoidance purposes. The structure and content of the regulations are analogous to Treasury Regulation §1.6011-4, *Requirement of statement disclosing participation in certain transactions by taxpayers*.

A general overview of new Part 2500 follows.

Section 2500.1 provides the statutory authority for the amendments, a brief description of a New York reportable transaction, and the purpose of the Part.

Section 2500.2 requires every taxpayer that has participated in a New York reportable transaction during its taxable year to disclose its participation with its tax return for that taxable year. This section also states that the designation of a transaction as a New York reportable transaction does not affect the legal determination of whether the taxpayer's tax treatment of the transaction is proper.

Section 2500.3 defines a New York reportable transaction as a transaction that has the potential to be a tax avoidance transaction under Articles 9, 9-A, 22, 32, or 33 and includes a description of three categories of New York reportable transactions: New York listed

transactions, New York confidential transactions, and New York transactions with contractual protection. A brief description of each category follows:

- A *New York listed transaction* is a transaction that is the same or substantially similar to a transaction that the Commissioner of Taxation and Finance has determined to be a tax avoidance transaction and has identified by notice or other form of published guidance as a New York listed transaction. New York listed transactions will be published as TSB-Ms. The determination that a transaction is a tax avoidance transaction must be based upon a finding that:
 - the transaction is not done for a valid business purpose;
 - the transaction does not have economic substance apart from its tax benefits; or
 - the tax treatment of the transaction is based upon an elevation of form over substance.
- A *New York confidential transaction* is a transaction that is offered to a taxpayer under conditions of confidentiality and for which the taxpayer or related party has paid an advisor a fee.
- A *New York transaction with contractual protection* is a transaction where the taxpayer or a related party has a right to a full or partial refund of fees if the tax treatment is not sustained or where the fee is contingent on the taxpayer's realization of tax benefits from the transaction.

Section 2500.4 provides the definitions for Part 2500. A *taxpayer* is defined as a person who is required to file a return, including an information return, under Tax Law sections 183, 184, 185, 186, 186-a, or 186-e of Article 9 or under Articles 9-A, 22, 32, or 33 or who is included in a combined report under Articles 9-A, 32, or 33.

The definition of *participation* in section 2500.4(b) includes a description of participation for each of the three categories of New York reportable transactions. Generally, a taxpayer is considered to have participated in a transaction if the taxpayer's tax return reflects a tax benefit from the transaction. A taxpayer has *participated in a New York listed transaction* if the taxpayer's tax return reflects tax consequences or a tax strategy described by notice or other form of published guidance that lists the transaction. A taxpayer has *participated in a New York confidential transaction* if the taxpayer's return reflects a tax benefit from the transaction and the taxpayer's disclosure of the tax treatment or tax structure is limited. A taxpayer has *participated in a New York transaction with contractual protection* if the taxpayer's return reflects a tax benefit from the transaction and the taxpayer has the right to a full or partial refund of fees or the fees are contingent on the taxpayer's realization of tax benefits from the transaction. The section describes when a controlling shareholder of a foreign corporation that is not subject to New York State tax is deemed to have participated in a New York reportable transaction. Section 2500.4 also provides definitions for the terms: tax return, substantially similar, tax, tax benefit, tax treatment, and tax structure.

Section 2500.5 provides that a taxpayer is required to report its disclosure on the forms and in the manner prescribed by the Commissioner. To fulfill its disclosure requirement, a taxpayer must complete Form DTF-686-ATT, *New York Reportable Transaction Disclosure Statement and Request for a Determination*, and Form DTF-686, *Tax Shelter Reportable Transactions*, according to the instructions for disclosure. Both forms must be attached to the taxpayer's tax return for the taxable year that encompasses its participation in the New York reportable transaction. This section also provides the requirement for a timely disclosure of participation in a New York listed transaction when the designation of the transaction as a listed transaction occurs after a taxpayer has filed the tax return that encompasses the date the New York listed transaction occurred. The taxpayer must disclose its participation in this transaction with the next tax return filed after the date the transaction is listed.

Section 2500.6 allows a taxpayer to request a review of a transaction to determine whether or not a transaction is subject to the New York reportable transaction disclosure requirements prior to the date that disclosure would normally be required. To request a determination, a taxpayer must complete Form DTF-686-ATT according to the instructions for a request for a determination and mail the form to the address provided on the form. This section also allows for the protective disclosure of a transaction when a taxpayer is uncertain whether a transaction is subject to the disclosure requirements. To make a protective disclosure, a taxpayer must complete Form DTF-686-ATT and Form DTF-686 according to the instructions for a protective disclosure. Both forms must be attached to the taxpayer's tax return for the taxable year that encompasses its participation in the New York reportable transaction.

Section 2500.7 provides the document retention requirements based upon Tax Law sections 25(d) and (e). This section also provides that these retention requirements are intended to supplement any existing provisions of the Tax Law.

The full text of new Part 2500 can be found on the Tax Department's Web site (www.nystax.gov).