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SB-813 Franchise Tax Board: voluntary disclosure agreements. (2017-2018)

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Senate Bill No. 813

CHAPTER 288

An act to amend Sections 19191 and 19192 of the Revenue and Taxation Code, relating to taxation.

[Approved by Governor September 25, 2017. Filed with Secretary of State September 25, 2017.]

LEGISLATIVE COUNSEL'S DIGEST

SB 813, Committee on Governance and Finance. Franchise Tax Board: voluntary disclosure agreements.

Existing law with respect to voluntary disclosure by business entities requires a voluntary disclosure agreement entered into by the Franchise Tax Board and a qualified entity, qualified shareholder, qualified member, or qualified beneficiary to specify that the Franchise Tax Board shall, with respect to the qualified entity, qualified shareholder, qualified member, or qualified beneficiary for each of the 6 taxable years ending immediately preceding the signing date of the agreement, waive specified penalties, including a specified penalty for a partnership failing to make certain returns. Existing law defines a qualified beneficiary to include a beneficiary of a qualified trust. Existing law defines a qualified trust as a trust that has not been administered in California and that does not have any resident beneficiaries for the 6 taxable years ending immediately preceding the signing date of the voluntary disclosure agreement. Existing law defines "qualified beneficiary" to mean an individual who is a nonresident on the signing date of the voluntary disclosure agreement and each six taxable years thereafter and who is a beneficiary of a qualified trust that has applied for a voluntary disclosure agreement, as specified.

This bill would expand the specification requirement to apply to voluntary disclosure agreements between the Franchise Tax Board and a qualified partner. The bill would expand the types of partnership penalties waived to include a penalty related to the failure of a limited liability company classified as a partnership to make specified returns and would waive a penalty related to "S" corporations that fail to make specified returns. This bill would also eliminate the exclusion from a qualified trust of a trust with resident beneficiaries. The bill would add the additional requirement to the definition of "qualified beneficiary" of being a beneficiary with a contingent or noncontingent interest in the qualified trust. The bill would define "qualified partner" and "qualified partnership." The bill would apply these changes to voluntary disclosure agreements entered into on or after January 1, 2018.

Vote: majority Appropriation: no Fiscal Committee: yes Local Program: no

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 19191 of the Revenue and Taxation Code is amended to read:

19191. (a) The Franchise Tax Board may enter into a voluntary disclosure agreement with any qualified entity, qualified shareholder, qualified member, qualified beneficiary, or qualified partner, as defined in Section 19192, that is binding on both the Franchise Tax Board and the qualified entity, qualified shareholder, qualified member, qualified beneficiary, or qualified partner.

(b) The Franchise Tax Board shall do all of the following:

(1) Provide guidelines and establish procedures for qualified entities and their qualified shareholders, qualified members, qualified beneficiaries, or qualified partners to apply for voluntary disclosure agreements.

(2) Accept applications on an anonymous basis from qualified entities and their qualified shareholders, qualified members, qualified beneficiaries, or qualified partners for voluntary disclosure agreements.

(3) Implement procedures for accepting applications for voluntary disclosure agreements through the National Nexus Program administered by the Multistate Tax Commission.

(4) For purposes of considering offers from qualified entities and their qualified shareholders, qualified members, qualified beneficiaries, or qualified partners to enter into voluntary disclosure agreements, take into account the following criteria:

(A) The nature and magnitude of the qualified entity's previous presence and activity in this state and the facts and circumstances by which the nexus of the qualified entity or qualified shareholder, qualified member, qualified beneficiary, or qualified partner was established.

(B) The extent to which the weight of the factual circumstances demonstrates that a prudent business person exercising reasonable care would conclude that the previous activities and presence in this state were or were not immune from taxation by this state by reason of Public Law 86-272 or otherwise.

(C) Reasonable reliance on the advice of a person in a fiduciary position or other competent advice that the qualified entity or qualified shareholder, qualified member, qualified beneficiary, or qualified partner activities were immune from taxation by this state.

(D) Lack of evidence of willful disregard or neglect of the tax laws of this state on the part of the qualified entity, qualified shareholder, qualified member, qualified beneficiary, or qualified partner.

(E) Demonstrations of good faith on the part of the qualified entity, qualified shareholder, qualified member, qualified beneficiary, or qualified partner.

(F) Benefits that will accrue to the state by entering into a voluntary disclosure agreement.

(5) Act on any application of a voluntary disclosure agreement within 120 days of receipt.

(6) Enter into voluntary disclosure agreements with qualified entities, qualified shareholders, qualified members, qualified beneficiaries, or qualified partners, as authorized in subdivision (a) and based on the criteria set forth in paragraph (4).

(c) Before any voluntary disclosure agreement becomes binding, the Franchise Tax Board, itself, shall approve the agreement in the following manner:

(1) The Executive Officer and Chief Counsel of the Franchise Tax Board shall recommend and submit the voluntary disclosure agreement to the Franchise Tax Board for approval.

(2) Each voluntary disclosure agreement recommendation shall be submitted in a manner as to maintain the anonymity of the taxpayer applying for the voluntary disclosure agreement.

(3) A recommendation for approval of a voluntary disclosure agreement shall be approved or disapproved by the Franchise Tax Board, itself, within 45 days of the submission of that recommendation to the board.

(4) A recommendation of a voluntary disclosure agreement that is not either approved or disapproved by the board within 45 days of the submission of that recommendation shall be deemed approved.

(5) Disapproval of a recommendation of a voluntary disclosure agreement shall be made only by a majority vote of the Franchise Tax Board.

(6) The members of the Franchise Tax Board shall not participate in any voluntary disclosure agreement except as provided in this subdivision.

(d) The voluntary disclosure agreement entered into by the Franchise Tax Board and the qualified entity, qualified shareholder, qualified member, qualified beneficiary, or qualified partner as provided for in subdivision (a) shall to the extent applicable specify that:

(1) The Franchise Tax Board shall with respect to a qualified entity, qualified shareholder, qualified member, qualified beneficiary, or qualified partner, except as provided in paragraph (4), (6), (9), or (11) of subdivision (a) of Section 19192:

(A) (i) Waive its authority under this part, Part 10 (commencing with Section 17001), or Part 11 (commencing with Section 23001) to assess or propose to assess taxes, additions to tax, fees, or penalties with respect to each taxable year ending prior to six years from the signing date of the voluntary disclosure agreement.

(ii) The waiver of authority to assess or propose to assess taxes, additions to tax, fees, or penalties under clause (i) with respect to the income of a trust for a taxable year ending prior to six years from the signing date of the voluntary disclosure agreement shall not prevent the taxation of income of a beneficiary of a trust pursuant to Section 17745.

(B) With respect to each of the six taxable years ending immediately preceding the signing date of the voluntary disclosure agreement, based on its discretion, agree to waive any or all of the following:

(i) A penalty related to a failure to make and file a return, as provided in Section 19131.

(ii) A penalty related to a failure to pay any amount due by the date prescribed for payment, as provided in Section 19132.

(iii) An addition to tax related to an underpayment of estimated tax, as provided in Section 19136.

(iv) A penalty related to Section 6810 or subdivision (a) of Section 8810 of the Corporations Code, as provided in Section 19141 of this code.

(v) A penalty related to a failure to furnish information or maintain records, as provided in Section 19141.5.

(vi) An addition to tax related to an underpayment of tax imposed under Part 11 (commencing with Section 23001), as provided in Section 19142.

(vii) A penalty related to a partnership required to file a return under Section 18633 or 18633.5, as provided in Section 19172.

(viii) A penalty related to an "S" corporation required to file a return under Section 18601, as provided in Section 19172.5.

(ix) A penalty related to a failure to file information returns, as provided in Section 19183.

(x) A penalty related to relief from contract voidability, as provided in Section 23305.1.

(2) The qualified entity, qualified shareholder, qualified member, qualified beneficiary, or qualified partner shall:

(A) With respect to each of the six taxable years ending immediately preceding the signing date of the written agreement:

(i) Voluntarily and fully disclose on the qualified entity's application all material facts pertinent to the qualified entity's, shareholder's, member's, beneficiary's, or partner's liability for any taxes imposed under Part 10 (commencing with Section 17001) or Part 11 (commencing with Section 23001).

(ii) Except as provided in paragraph (3), within 30 days from the signing date of the voluntary disclosure agreement:

(I) File all returns required under this part, Part 10 (commencing with Section 17001), or Part 11 (commencing with Section 23001).

(II) Pay in full any tax, interest, fee, and penalties, other than those penalties specifically waived by the Franchise Tax Board under the terms of the voluntary disclosure agreement, imposed under this part, Part 10 (commencing with Section 17001), or Part 11 (commencing with Section 23001) in a manner as may be prescribed by the Franchise Tax Board. Paragraph (1) of subdivision (f) of Section 23153 shall not apply to qualified entities admitted into the voluntary disclosure program.

(B) Agree to comply with all franchise and income tax laws of this state in subsequent taxable years by filing all returns required and paying all amounts due under this part, Part 10 (commencing with Section 17001), or Part 11 (commencing with Section 23001).

(3) The Franchise Tax Board may extend the time for filing returns and paying amounts due to 120 days from the signing date of the voluntary disclosure agreement or to the latest extended due date of the return for a taxable year for which relief is granted, whichever is later.

(e) An addition to tax under Section 19136 or 19142 shall not be made for any underpayment of estimated tax attributable to the underpayment of an installment of estimated tax due before the signing date of the voluntary disclosure agreement.

(f) The amendments to this section made by Chapter 954 of the Statutes of 1996 shall apply to taxable years beginning on or after January 1, 1997.

(g) The amendments to this section made by Chapter 543 of the Statutes of 2001 shall apply to voluntary disclosure agreements entered into on or after January 1, 2002.

(h) The amendments to this section made by Chapter 354 of the Statutes of 2004 shall apply to voluntary disclosure agreements entered into on or after January 1, 2005.

(i) The amendments to this section made by Chapter 296 of the Statutes of 2011 shall apply to voluntary disclosure agreements entered into on or after January 1, 2011.

(j) The amendments to this section made by the act adding this subdivision shall apply to voluntary disclosure agreements entered into on or after January 1, 2018.

SEC. 2. Section 19192 of the Revenue and Taxation Code is amended to read:

19192. For purposes of this article, the following terms have the following meanings:

(a) (1) "Qualified entity" means an entity that is all of the following:

(A) A corporation, as defined in Section 23038, a limited liability company, as defined in subdivision (d) of Section 17941, a qualified trust, as defined in paragraph (7), or a qualified partnership, as defined in paragraph (12).

(B) An entity, including any predecessors to the entity, that previously has never filed a return with the Franchise Tax Board pursuant to this part, Part 10 (commencing with Section 17001), or Part 11 (commencing with Section 23011).

(C) An entity, including any predecessors to the entity, that previously has not been the subject of an inquiry by the Franchise Tax Board with respect to liability for any of the taxes imposed under Part 10 (commencing with Section 17001) or Part 11 (commencing with Section 23001).

(D) An entity that voluntarily comes forward prior to any unilateral contact from the Franchise Tax Board, makes application for a voluntary disclosure agreement in a form and manner prescribed by the Franchise Tax Board, and makes a full and accurate statement of its activities in this state for the six immediately preceding taxable years.

(2) (A) Notwithstanding paragraph (1), a qualified entity does not include any of the following:

(i) An entity that is organized and existing under the laws of this state.

(ii) An entity that is qualified or registered with the office of the Secretary of State.

(iii) An entity that maintains and staffs a permanent facility in this state.

(B) For purposes of this paragraph, the storing of materials, goods, or products in a public warehouse pursuant to a public warehouse contract does not constitute maintaining a permanent facility in this state.

(3) "Qualified shareholder" means an individual that is all of the following:

(A) A nonresident on the signing date of the voluntary disclosure agreement.

(B) A shareholder of an "S" corporation (defined in Section 23800) that has applied for a voluntary disclosure agreement under this article under which all material facts pertinent to the shareholder's liability would be disclosed on that "S" corporation's voluntary disclosure agreement as required under clause (i) of subparagraph (A) of paragraph (2) of subdivision (d) of Section 19191.

(4) Notwithstanding paragraph (3), subparagraph (B) of paragraph (1) of subdivision (d) of Section 19191 shall not apply to any of the six taxable years immediately preceding the signing date that the qualified shareholder was a California resident required to file a California tax return, nor to any penalties or additions to tax attributable to income other than the California source income from the "S" corporation that filed an application under this article.

(5) "Qualified member" means an individual, corporation, or limited liability company that is all of the following:

(A) (i) In the case of an individual, is a nonresident on the signing date of the voluntary disclosure agreement.

(ii) In the case of a corporation or limited liability company, is not either of the following:

(I) Organized under the laws of this state.

(II) Qualified or registered with the office of the Secretary of State.

(B) A member of a limited liability company that has applied for a voluntary disclosure agreement under this article under which all material facts pertinent to the member's liability would be disclosed on that limited liability company's voluntary disclosure agreement as required under clause (i) of subparagraph (A) of paragraph (2) of subdivision (d) of Section 19191.

(6) Notwithstanding paragraph (5), in the case of a qualified member who is an individual, subparagraph (B) of paragraph (1) of subdivision (d) of Section 19191 shall not apply to any of the six taxable years immediately preceding the signing date that the qualified member was a California resident required to file a California tax return, nor to any penalties or additions to tax attributable to income other than the California source income from the limited liability company that filed an application under this article.

(7) "Qualified trust" means a trust, the administration of which has never been performed in California. For purposes of this paragraph, administrative activities performed in California would be deemed to be performed outside of California if those activities were inconsequential to the overall administration of the trust.

(8) "Qualified beneficiary" means an individual who is all of the following:

(A) A nonresident on the signing date of the voluntary disclosure agreement and a nonresident during each of the six taxable years ending immediately preceding the signing date of the voluntary disclosure agreement.

(B) A beneficiary with a contingent or noncontingent interest in the qualified trust. A beneficiary's trust interest for a taxable year is not contingent if the trust has made any distribution to that beneficiary.

(C) A beneficiary of a qualified trust that has applied for a voluntary disclosure agreement under this article under which all material facts pertinent to the beneficiary's liability would be disclosed on that trust's voluntary disclosure agreement as required under clause (i) of subparagraph (A) of paragraph (2) of subdivision (d) of Section 19191.

(9) Notwithstanding paragraph (8), subparagraph (B) of paragraph (1) of subdivision (d) of Section 19191 shall not apply to any penalties or additions to tax attributable to income other than income from the trust that filed an application under this article.

(10) "Qualified partner" means an individual that is both of the following:

(A) A nonresident of this state as of the signing date of the voluntary disclosure agreement.

(B) A partner of a qualified partnership that has applied for a voluntary disclosure agreement under this article under which all material facts pertinent to the partner's liability would be disclosed on the partnership's voluntary disclosure agreement as required under clause (i) of subparagraph (A) of paragraph (2) of subdivision (d) of Section 19191.

(11) Notwithstanding paragraph (10), in the case of a qualified partner, subparagraph (B) of paragraph (1) of subdivision (d) of Section 19191 shall not apply to any of the six taxable years immediately preceding the signing date that the qualified partner was a California resident required to file a California tax return, nor to any penalties or additions to tax attributable to income other than the California source income from the partnership that filed an application under this article.

(12) "Qualified partnership" means a partnership, as defined in Section 17008, a limited partnership, as defined in subdivision (d) of Section 17935, or a limited liability partnership, within the meaning of Section 17948.

(b) "Signing date" of the voluntary disclosure agreement means the date on which a person duly authorized by the Franchise Tax Board signs the agreement.

(c) The amendments to this section made by Chapter 954 of the Statutes of 1996 shall apply to taxable years beginning on or after January 1, 1997.

(d) The amendments to this section made by Chapter 543 of the Statutes of 2001 shall apply to voluntary disclosure agreements entered into on or after January 1, 2002.

(e) The amendments to this section made by the act adding this subdivision shall apply to voluntary disclosure agreements entered into on or after January 1, 2005.

(f) The amendments to this section made by the act adding this subdivision shall apply to voluntary disclosure agreements entered into on or after January 1, 2018.