

AMENDED IN ASSEMBLY AUGUST 31, 2009

AMENDED IN ASSEMBLY JULY 15, 2009

AMENDED IN ASSEMBLY JULY 1, 2009

AMENDED IN SENATE MAY 28, 2009

AMENDED IN SENATE APRIL 28, 2009

**SENATE BILL**

**No. 401**

---

---

**Introduced by Senator Wolk**

February 26, 2009

---

---

An act to amend Sections 19116, 19504, 19755, and 19777 of, and to add Section 18407.5 to, the Revenue and Taxation Code, relating to taxation.

LEGISLATIVE COUNSEL'S DIGEST

SB 401, as amended, Wolk. Administration of taxes: abusive tax avoidance transactions: transactions of interest.

Existing law requires the Franchise Tax Board to administer specified taxes and fees, and certain penalties in connection with tax avoidance and abusive tax shelters, including reportable transactions.

This bill would expand the definition of reportable transactions to include abusive tax avoidance transactions, as defined, and transactions of interest, as defined. This bill would also make technical, nonsubstantive changes to conform to this expansion.

*This bill would incorporate changes made by AB 1580 that would become operative if both bills are enacted and this bill is enacted after AB 1580.*

Vote: majority. Appropriation: no. Fiscal committee: yes.  
State-mandated local program: no.

*The people of the State of California do enact as follows:*

1 SECTION 1. Section 18407.5 is added to the Revenue and  
2 Taxation Code, to read:

3 18407.5. (a) The term “reportable transaction,” as defined in  
4 paragraph (3) of subdivision (a) of Section 18407, shall also include  
5 any transaction of a type that the Secretary of the Treasury under  
6 Section 6011 of the Internal Revenue Code for federal income tax  
7 purposes or the Franchise Tax Board under this section for  
8 California income or franchise tax purposes determines is a  
9 transaction of interest, and shall be reported on the return or the  
10 statement required to be made.

11 (b) A transaction of interest is a transaction that is the same as  
12 or substantially similar to one of the types of transactions that the  
13 Franchise Tax Board has identified by notice or regulation as a  
14 transaction of interest. In addition, the transactions of interest  
15 identified and published pursuant to the preceding sentence shall  
16 be published on the Internet Web site of the Franchise Tax Board.

17 (c) This section shall apply to transactions of interest published  
18 on or after the effective date of the act adding this section and only  
19 to taxable years beginning on or after the effective date of this  
20 section.

21 SEC. 2. Section 19116 of the Revenue and Taxation Code is  
22 amended to read:

23 19116. (a) In the case of an individual who files a return of  
24 tax imposed under Part 10 (commencing with Section 17001) for  
25 a taxable year on or before the due date for the return, including  
26 extensions, if the Franchise Tax Board does not provide a notice  
27 to the taxpayer specifically stating the taxpayer’s liability and the  
28 basis of the liability before the close of the notification period, the  
29 Franchise Tax Board shall suspend the imposition of any interest,  
30 penalty, addition to tax, or additional amount with respect to any  
31 failure relating to the return which is computed by reference to the  
32 period of time the failure continues to exist and which is properly  
33 allocable to the suspension period.

34 (b) For purposes of this section:

35 (1) Except as provided in subdivision (e), “notification period”  
36 means the 18-month period beginning on the later of either of the  
37 following:

38 (A) The date on which the return is filed.

1 (B) The due date of the return without regard to extensions.

2 (2) “Suspension period” means the period beginning on the day  
3 after the close of the notification period and ending on the date  
4 which is 15 days after the date on which notice described in  
5 subdivision (a) is provided by the Franchise Tax Board.

6 (c) This section shall be applied separately with respect to each  
7 item or adjustment.

8 (d) This section shall not apply to any of the following:

9 (1) Any penalty imposed by Section 19131.

10 (2) Any penalty imposed by Section 19132.

11 (3) Any interest, penalty, addition to tax, or additional amount  
12 involving fraud.

13 (4) Any interest, penalty, addition to tax, or additional amount  
14 with respect to any tax liability shown on the return.

15 (5) Any criminal penalty.

16 (6) Any interest, penalty, addition to tax, or additional amount  
17 with respect to any gross misstatement.

18 (7) Any interest, penalty, addition to tax, or additional amount  
19 relating to any reportable transaction with respect to which the  
20 requirements of Section 6664(d)(2)(A) of the Internal Revenue  
21 Code are not met, and any listed transaction, as defined in Section  
22 6707A(c) of the Internal Revenue Code.

23 (8) Any interest, penalty, addition to tax, or additional amount  
24 relating to any abusive tax avoidance transaction, as defined in  
25 Section 19777, as amended by the act adding this paragraph.

26 (e) For taxpayers required by subdivision (a) of Section 18622  
27 to report a change or correction by the Commissioner of Internal  
28 Revenue or other officer of the United States or other competent  
29 authority the following rules shall apply:

30 (1) The notification period under subdivision (a) shall be either  
31 of the following:

32 (A) One year from the date the notice required by Section 18622  
33 is filed with the Franchise Tax Board by the taxpayer or the Internal  
34 Revenue Service, if the taxpayer or the Internal Revenue Service  
35 reports that change or correction within six months after the final  
36 federal determination.

37 (B) Two years from the date when the notice required by Section  
38 18622 is filed with the Franchise Tax Board by the taxpayer or the  
39 Internal Revenue Service, if after the six-month period required

1 in Section 18622, a taxpayer or the Internal Revenue Service  
2 reports a change or correction.

3 (2) The suspension period under subdivision (a) shall mean the  
4 period beginning on the day after the close of the notification  
5 period under paragraph (1) and ending on the date which is 15  
6 days after the date on which notice described in subdivision (a) is  
7 provided by the Franchise Tax Board.

8 (f) For notices sent after January 1, 2004, this section does not  
9 apply to taxpayers with taxable income greater than two hundred  
10 thousand dollars (\$200,000) that have been contacted by the  
11 Franchise Tax Board regarding the use of a potentially abusive tax  
12 shelter, within the meaning of Section 19777, as added by Chapter  
13 656 of the Statutes of 2003 and amended by Section 331 of Chapter  
14 183 of the Statutes of 2004.

15 (g) This section shall apply to taxable years ending after October  
16 10, 1999.

17 (h) The amendments made to this section by Chapter 691 of the  
18 Statutes of 2005 shall apply to notices sent after January 1, 2005.

19 (i) The amendments made to this section by the act adding this  
20 subdivision shall apply to notices mailed, or amended returns filed,  
21 on or after the effective date of the act adding this subdivision.

22 *SEC. 2.5. Section 19116 of the Revenue and Taxation Code is*  
23 *amended to read:*

24 19116. (a) In the case of an individual who files a return of  
25 tax imposed under Part 10 (commencing with Section 17001) for  
26 a taxable year on or before the due date for the return, including  
27 extensions, if the Franchise Tax Board does not provide a notice  
28 to the taxpayer specifically stating the taxpayer's liability and the  
29 basis of the liability before the close of the notification period, the  
30 Franchise Tax Board shall suspend the imposition of any interest,  
31 penalty, addition to tax, or additional amount with respect to any  
32 failure relating to the return which is computed by reference to the  
33 period of time the failure continues to exist and which is properly  
34 allocable to the suspension period.

35 (b) For purposes of this section:

36 (1) Except as provided in subdivision (e), "notification period"  
37 means the ~~18-month~~ 36-month period beginning on the later of  
38 either of the following:

39 (A) The date on which the return is filed.

40 (B) The due date of the return without regard to extensions.

1 (2) “Suspension period” means the period beginning on the day  
2 after the close of the notification period and ending on the date  
3 which is 15 days after the date on which notice described in  
4 subdivision (a) is provided by the Franchise Tax Board.

5 (3) *If, after the return for a taxable year is filed, the taxpayer*  
6 *provides to the Franchise Tax Board one or more signed written*  
7 *documents showing that the taxpayer owes an additional amount*  
8 *of tax for the taxable year, paragraph (1) shall be applied by*  
9 *substituting the date the last of the documents was provided for*  
10 *the date on which the return was filed.*

11 (c) This section shall be applied separately with respect to each  
12 item or adjustment.

13 (d) This section shall not apply to any of the following:

14 (1) Any penalty imposed by Section 19131.

15 (2) Any penalty imposed by Section 19132.

16 (3) Any interest, penalty, addition to tax, or additional amount  
17 involving fraud.

18 (4) Any interest, penalty, addition to tax, or additional amount  
19 with respect to any tax liability shown on the return.

20 (5) Any criminal penalty.

21 (6) Any interest, penalty, addition to tax, or additional amount  
22 with respect to any gross misstatement.

23 (7) Any interest, penalty, addition to tax, or additional amount  
24 relating to any reportable transaction with respect to which the  
25 requirements of Section 6664(d)(2)(A) of the Internal Revenue  
26 Code are not met, and any listed transaction, as defined in Section  
27 6707A(c) of the Internal Revenue Code.

28 (8) *Any interest, penalty, addition to tax, or additional amount*  
29 *relating to any abusive tax avoidance transaction, as defined in*  
30 *Section 19777, as amended by the act adding this paragraph.*

31 (e) For taxpayers required by subdivision (a) of Section 18622  
32 to report a change or correction by the Commissioner of Internal  
33 Revenue or other officer of the United States or other competent  
34 authority the following rules shall apply:

35 (1) The notification period under subdivision (a) shall be either  
36 of the following:

37 (A) One year from the date the notice required by Section 18622  
38 is filed with the Franchise Tax Board by the taxpayer or the Internal  
39 Revenue Service, if the taxpayer or the Internal Revenue Service

1 reports that change or correction within six months after the final  
2 federal determination.

3 (B) Two years from the date when the notice required by Section  
4 18622 is filed with the Franchise Tax Board by the taxpayer or the  
5 Internal Revenue Service, if after the six-month period required  
6 in Section 18622, a taxpayer or the Internal Revenue Service  
7 reports a change or correction.

8 (2) The suspension period under subdivision (a) shall mean the  
9 period beginning on the day after the close of the notification  
10 period under paragraph (1) and ending on the date which is 15  
11 days after the date on which notice described in subdivision (a) is  
12 provided by the Franchise Tax Board.

13 (f) For notices sent after January 1, 2004, this section does not  
14 apply to taxpayers with taxable income greater than two hundred  
15 thousand dollars (\$200,000) that have been contacted by the  
16 Franchise Tax Board regarding the use of a potentially abusive tax  
17 shelter ~~(within the meaning of Section 19777)~~ *within the meaning*  
18 *of Section 19777, as added by Chapter 656 of the Statutes of 2003*  
19 *and amended by Section 331 of Chapter 183 of the Statutes of*  
20 *2004.*

21 (g) This section shall apply to taxable years ending after October  
22 10, 1999.

23 (h) The amendments made to this section by ~~the act adding this~~  
24 ~~subdivision~~ *Chapter 691 of the Statutes of 2005* shall apply to  
25 notices sent after January 1, 2005.

26 (i) *The amendments made to subdivision (d) by the act adding*  
27 *this subdivision shall apply to notices mailed, or amended returns*  
28 *filed, on or after the effective date of the act adding this*  
29 *subdivision.*

30 (j) *The amendments made to of subdivision (b) by the act adding*  
31 *this subdivision shall apply to notices and documents provided on*  
32 *or after January 1, 2010.*

33 SEC. 3. Section 19504 of the Revenue and Taxation Code is  
34 amended to read:

35 19504. (a) The Franchise Tax Board, for the purpose of  
36 administering its duties under this part, including ascertaining the  
37 correctness of any return; making a return where none has been  
38 made; determining or collecting the liability of any person in  
39 respect of any liability imposed by Part 10 (commencing with  
40 Section 17001), Part 11 (commencing with Section 23001), or this

1 part (or the liability at law or in equity of any transferee in respect  
2 of that liability); shall have the power to require by demand, that  
3 an entity of any kind including, but not limited to, employers,  
4 persons, or financial institutions provide information or make  
5 available for examination or copying at a specified time and place,  
6 or both, any book, papers, or other data which may be relevant to  
7 that purpose. Any demand to a financial institution shall comply  
8 with the California Right to Financial Privacy Act set forth in  
9 Chapter 20 (commencing with Section 7460) of Division 7 of Title  
10 1 of the Government Code. Information that may be required upon  
11 demand includes, but is not limited to, any of the following:

12 (1) Addresses and telephone numbers of persons designated by  
13 the Franchise Tax Board.

14 (2) Information contained on Federal Form W-2 (Wage and Tax  
15 Statement), Federal Form W-4 (Employee's Withholding  
16 Allowance Certificate), or State Form DE-4 (Employee's  
17 Withholding Allowance Certificate).

18 (b) The Franchise Tax Board may require the attendance of the  
19 taxpayer or of any other person having knowledge in the premises  
20 and may take testimony and require material proof for its  
21 information and administer oaths to carry out this part.

22 (c) (1) The Franchise Tax Board may issue subpoenas or  
23 subpoenas duces tecum, which subpoenas must be signed by any  
24 member of the Franchise Tax Board, and may be served on any  
25 person for any purpose.

26 (2) For taxpayers that have been contacted by the Franchise Tax  
27 Board regarding the use of an abusive tax avoidance transaction,  
28 as defined by Section 19777 as amended by the act amending this  
29 paragraph, the subpoena may be signed by any member of the  
30 Franchise Tax Board, the Executive Officer of the Franchise Tax  
31 Board, or any designee.

32 (d) Obedience to subpoenas or subpoenas duces tecum issued  
33 in accordance with this section may be enforced by application to  
34 the superior court as set forth in Article 2 (commencing with  
35 Section 11180) of Chapter 2 of Part 1 of Division 3 of Title 2 of  
36 the Government Code.

37 (e) When examining a return, the Franchise Tax Board shall  
38 not use financial status or economic reality examination techniques  
39 to determine the existence of unreported income of any taxpayer  
40 unless the Franchise Tax Board has a reasonable indication that

1 there is a likelihood of unreported income. This subdivision applies  
2 to any examination beginning on or after October 10, 1999.

3 (f) The amendments made to this section shall apply to  
4 subpoenas issued on or after the effective date of the act adding  
5 this subdivision.

6 SEC. 4. Section 19755 of the Revenue and Taxation Code, as  
7 added by Section 13 of Chapter 654 of the Statutes of 2003, is  
8 amended to read:

9 19755. (a) Notwithstanding Section 19057, with respect to  
10 proposed deficiency assessments related to an abusive tax  
11 avoidance transaction, as defined in Section 19777, other than a  
12 gross misstatement within the meaning of Section 6404(g)(2)(D)  
13 of the Internal Revenue Code, a notice of a proposed deficiency  
14 assessment may be mailed to the taxpayer within eight years after  
15 the return was filed, or within the period otherwise provided in  
16 Article 3 (commencing with Section 19031) of Chapter 4 of this  
17 part, whichever expires later.

18 (b) This section shall apply to any return filed under this part  
19 on or after January 1, 2000.

20 (c) The amendments made to this section by the act adding this  
21 subdivision shall apply to taxable years beginning on or after  
22 January 1, 2009.

23 SEC. 5. Section 19755 of the Revenue and Taxation Code, as  
24 added by Section 13 of Chapter 656 of the Statutes of 2003, is  
25 amended to read:

26 19755. (a) Notwithstanding Section 19057, with respect to  
27 proposed deficiency assessments related to an abusive tax  
28 avoidance transaction, as defined in Section 19777, other than a  
29 gross misstatement within the meaning of Section 6404(g)(2)(D)  
30 of the Internal Revenue Code, a notice of a proposed deficiency  
31 assessment may be mailed to the taxpayer within eight years after  
32 the return was filed, or within the period otherwise provided in  
33 Article 3 (commencing with Section 19031) of Chapter 4 of this  
34 part, whichever expires later.

35 (b) This section shall apply to any return filed under this part  
36 on or after January 1, 2000.

37 (c) The amendments made to this section by the act adding this  
38 subdivision shall apply to taxable years beginning on or after  
39 January 1, 2009.

1 SEC. 6. Section 19777 of the Revenue and Taxation Code is  
2 amended to read:

3 19777. (a) If a taxpayer has been contacted by the Franchise  
4 Tax Board regarding an abusive tax avoidance transaction, and  
5 has a deficiency attributable to an abusive tax avoidance  
6 transaction, there shall be added to the tax an amount equal to 100  
7 percent of the interest payable under Section 19101 on the portion  
8 of the deficiency attributable to that transaction for the period  
9 beginning on the last date prescribed by law for the payment of  
10 that tax (determined without regard to extensions) and ending on  
11 the date the notice of proposed assessment is mailed.

12 (b) For purposes of this section, “abusive tax avoidance  
13 transaction” means any of the following:

14 (1) A tax shelter as defined in Section 6662(d)(2)(C) of the  
15 Internal Revenue Code. For purposes of this chapter, Section  
16 6662(d)(2)(C) of the Internal Revenue Code is modified by  
17 substituting the phrase “income or franchise tax” for “federal  
18 income tax.”

19 (2) A reportable transaction, as defined in Section 6707A(c)(1)  
20 of the Internal Revenue Code, with respect to which the  
21 requirements of Section 6664(d)(2)(A) of the Internal Revenue  
22 Code are not met.

23 (3) A listed transaction, as defined in Section 6707A(c)(2) of  
24 the Internal Revenue Code.

25 (4) A gross misstatement, within the meaning of Section  
26 6404(g)(2)(D) of the Internal Revenue Code.

27 (5) Any transaction to which Section 19774 applies.

28 (c) The penalty imposed by this section is in addition to any  
29 other penalty imposed under Part 10 (commencing with Section  
30 17001), Part 11 (commencing with Section 23001), or this part.

31 (d) (1) If a taxpayer files an amended return reporting an  
32 abusive tax avoidance transaction, described in subdivision (b),  
33 after the taxpayer is contacted by the Franchise Tax Board  
34 regarding that abusive tax avoidance transaction but before a notice  
35 of proposed assessment is issued under Section 19033, then the  
36 amount of the penalty under this section shall be 50 percent of the  
37 interest payable under Section 19101 with respect to the amount  
38 of any additional tax reflected in the amended return attributable  
39 to that abusive tax avoidance transaction.

1 (2) If a notice of proposed assessment under Section 19033,  
2 with respect to an abusive tax avoidance transaction as described  
3 in subdivision (a), is issued after the amended return described in  
4 paragraph (1) is filed, the penalty imposed pursuant to subdivision  
5 (a) shall be applicable to the additional tax reflected in the notice  
6 of proposed assessment attributable to that abusive tax avoidance  
7 transaction.

8 (e) (1) If the notice of proposed assessment of additional tax  
9 has been sent with respect to a penalty to which this section applies,  
10 only the Chief Counsel of the Franchise Tax Board may  
11 compromise all or any portion of that penalty.

12 (2) The exercise of authority under paragraph (1) shall be at the  
13 sole discretion of the Chief Counsel of the Franchise Tax Board  
14 and may not be delegated.

15 (3) Notwithstanding any other law or rule of law, any  
16 determination under this subdivision may not be reviewed in any  
17 administrative or judicial proceeding.

18 (f) The amendments made to this section by the act adding this  
19 subdivision shall apply to notices mailed on or after the effective  
20 date of that act and to amended returns filed more than 180 days  
21 after that effective date with respect to taxable years beginning on  
22 or after the effective date of that act.

23 *SEC. 7. Section 2.5 of this bill incorporates amendments to*  
24 *Section 19116 of the Revenue and Taxation Code proposed by*  
25 *both this bill and AB 1580. It shall only become operative if (1)*  
26 *both bills are enacted and become effective on or before January*  
27 *1, 2010, (2) each bill amends Section 19116 of the Revenue and*  
28 *Taxation Code, and (3) this bill is enacted after AB 1580, in which*  
29 *case Section 19116 of the Revenue and Taxation Code as amended*  
30 *by AB 1580, shall remain operative only until the operative date*  
31 *of this bill, at which time Section 2.5 of this bill shall become*  
32 *operative, and Section 2 of this bill shall not become operative.*