Department of Taxation and Finance

# Instructions for Form DTF-686-ATT

## New York Reportable Transaction Disclosure Statement and Request for a Determination

# DTF-686-ATT-I

All citations are to New York State Tax Law articles and sections unless specifically noted otherwise.

## General information

You must file a separate Form DTF-686-ATT for each New York reportable transaction you participated in.

Reporting a transaction on this form does **not** mean the Tax Department will disallow the tax benefits from the transaction.

To determine if you participated in a New York reportable transaction, see *Participation in a New York reportable transaction*. For more information on the disclosure rules, see New York Codes, Rules, and Regulations (NYCRR), Title 20, Part 2500, *New York Reportable Transactions*, or visit *www.tax.ny.gov* (search: *NYCRR)*.

To request a determination from the Tax Department that a specific transaction, or type of transaction, **is**, or **is not**, subject to the reporting requirement, complete Form DTF-686-ATT (see *Request for determination)*.

### Who must file

If you participated in a New York reportable transaction, you must file Form DTF-686-ATT.

However, a regulated investment company—as defined in Internal Revenue Code (IRC) § 851—that is subject to federal income tax under IRC § 852, or an investment vehicle that is at least 95% owned by one or more regulated investment companies at all times during the course of a transaction is **not** required to file Form DTF-686-ATT for any transaction other than a New York listed transaction.

### When and how to file

If you participated in a New York reportable transaction, you must complete and attach Form DTF-686-ATT to Form DTF-686, *Tax Shelter Reportable Transactions*. When you file for that tax year, attach Form DTF-686-ATT to Form DTF-686 and submit both forms with your tax return.

If a New York reportable transaction you participated in results in a loss or credit carried back to a prior tax year, attach Form DTF-686-ATT to Form DTF-686 and submit both forms with your amended returns.

If you filed a return or amended return that reflects the tax consequences or tax strategy of a transaction that later becomes a listed transaction, attach Form DTF-686-ATT to Form DTF-686 and submit both with the first tax return you file after the date the transaction becomes a listed transaction. See *New York listed transactions*.

If you are reporting this transaction to the IRS on your federal Form 8886 **and** it is also a New York listed transaction, you **must** complete Form DTF-686-ATT. If you are reporting this transaction to the IRS on federal Form 8886 as a confidential transaction or a transaction with contractual protection and the transaction is **not** a New York listed transaction, only complete Form DTF-686 and attach all your federal Forms 8886.

#### Protective disclosure

If you are uncertain whether a transaction must be disclosed, you may disclose the transaction following the instructions in this form. To indicate that the disclosure is being filed on a protective basis, mark an ***X*** in the box for line A on Form DTF-686-ATT.

#### Request for determination

Upon request, the Tax Department may determine whether a specific transaction, or type of transaction, is subject to the reporting requirement. To make such a request, you must mark an ***X*** in the box for line B and complete Form DTF-686-ATT as if you are disclosing the transaction for which you are requesting the determination.

If your request fully discloses all relevant facts relating to the transaction, the Tax Department will suspend the potential obligation to disclose the transaction while the determination is pending. If the Tax Department concludes that the transaction **is** a New York reportable transaction subject to disclosure, the department will further suspend the obligation until the sixtieth day after the department issues the determination (or, if you withdraw your request, 60 days after the date you withdraw your request). In the determination, the Tax Department may decide that the submission satisfies the disclosure rules for that particular transaction or type of transaction.

**Note:** Do not mail a request for determination with Form DTF-686 or with your return.

You must mail Form DTF-686-ATT on or before the date that disclosure would otherwise be required to:

**NYS TAX DEPARTMENT**
**TAX SHELTER DISCLOSURE**
**W A HARRIMAN CAMPUS**
**ALBANY NY 12227-4299**

If you wish to use a private delivery service, send your form to NYS Tax Department, Tax Shelter Disclosure, 90 Cohoes Ave, Green Island NY 12183-1515. For more information about the use of a private delivery service, see Publication 55, *Designated Private Delivery Services*.

### Definitions

A *New York reportable transaction* is a transaction that has the potential to be a tax avoidance transaction under Article 9, 9-A, 22, or 33.

A *taxpayer* is any person who is required to file a return or report under Article 9, 9-A, 22, or 33. This includes:

- corporations subject to tax under § 183, 184, or 186, and persons subject to tax under § 186-a or 186-e;
- general business corporations subject to tax under Article 9-A;
- individuals (including sole proprietorships), partnerships—including a limited liability company (LLC) that is treated as a partnership for federal income tax purposes—estates and trusts, partners in a partnership (including members of an LLC that is treated as a partnership for federal income tax purposes), shareholders of an S corporation, and beneficiaries of an estate or trust subject to tax or required to file a tax return under Article 22;
- insurance corporations and captive insurance companies subject to tax under Article 33; and
- each member of a combined group filing under Articles 9-A and 33. Each member must disclose its participation in a New York reportable transaction on a separate basis.

A *transaction* includes all of the factual elements relevant to the expected tax treatment of any investment, entity, plan, or arrangement and it includes any series of steps carried out as part of a plan.

A transaction is *substantially similar* to another transaction if it is expected to obtain the same or similar types of tax consequences and is either factually similar or based on the same or similar tax strategy. Receipt of any written advice regarding the tax

consequences of the transaction is not relevant to the determination of whether the transaction is the same as, or substantially similar to, another transaction. Further, the term *substantially similar* must be broadly construed in favor of disclosure.

A *tax benefit* includes any:

- deduction, exclusion, and modification included in:
  - gross receipts,
  - gross earnings,
  - income, including
    - entire net income (ENI),
    - gross income,
    - New York adjusted gross income,
    - New York source income
  - gain,
  - loss,
  - assets,
  - liabilities,
  - total capital,
  - capital stock,
  - tax credits,
- nonrecognition of gain,
- status as an entity exempt from New York State taxation, and
- any other tax consequences that may reduce the New York State tax liability of a taxpayer by affecting the amount, timing, character, or source of any such item, amount, or activity.

For purposes of this form*, tax* refers to franchise and excise taxes and the tax on furnishing of utility services under Article 9; business corporation franchise tax under Article 9-A; personal income tax under Article 22; and franchise taxes on insurance corporations under Article 33.

The term *tax return* refers to the original returns or reports and amended returns or reports.

*Tax treatment* is the claimed New York State tax treatment of the transaction.

*Tax structure* is any fact that may be relevant to understanding the claimed New York State tax treatment of the transaction.

An *abusive tax avoidance transaction* means a plan or arrangement devised for the principal purpose of avoiding tax.

## Participation in a New York reportable transaction

A New York reportable transaction is a transaction described in one or more of the following three types: New York listed transactions, New York confidential transactions, and New York transactions with contractual protection.

### New York listed transactions

*New York listed transactions* include transactions that are the same as, or substantially similar to, one of the types of transactions the Tax Department has determined to be tax avoidance transactions. The Tax Department must identify these transactions by notice or other form of published guidance as a New York listed transaction.

You have participated in a New York listed transaction if any of the following apply:

- your tax return reflects tax consequences, or a tax strategy described by notice or other form of published guidance that lists the transaction;
- you know or have reason to know that tax benefits reflected on your tax return are derived directly or indirectly from such tax consequences or tax strategy; or
- you are in a class or are a type of person that the notice or other form of published guidance treats as a participant in a New York listed transaction.

If, after you file your tax return, a transaction you're involved in becomes a New York listed transaction, you must disclose that transaction when you file your next return—regardless of whether you participated in the transaction in that tax year—if the transaction became a New York listed transaction:

- **after** you filed your tax return reflecting tax consequences, a tax strategy, or a tax benefit derived from either, described by notice or other form of published guidance listing the transaction; **and**
- **before** the end of the period of the statute of limitations for the tax return (whether or not already filed) reflecting the tax consequences, tax strategy, or tax benefit.

### New York confidential transactions

*New York confidential transactions* include transactions that are offered to you or a related person under *conditions of confidentiality* and for which you paid an advisor a fee (see *Fees paid to an advisor)*. *Related persons* who bear a relationship to each other as described in IRC § 267(b) or 707(b) will be treated as the same person.

#### Conditions of confidentiality

A transaction is considered to be offered under *conditions of confidentiality* if:

- the advisor who is paid the fee places a limitation on your disclosure of the tax treatment or tax structure of the transaction, and
- the limitation on disclosure protects the confidentiality of the advisor's tax strategies.

The transaction is treated as confidential even if the conditions of confidentiality are not legally binding on you.

If your tax return reflects a tax benefit from the transaction **and** the disclosure of the tax treatment or tax structure is limited as described above, you have participated in a New York confidential transaction. If disclosure by a pass-through entity (partnership, S corporation, or trust) is limited, but disclosure by the partner, shareholder, or beneficiary is **not** limited, then the pass-through entity (**not** the partner, shareholder, or beneficiary) has participated in the New York confidential transaction.

#### Fees paid to an advisor

A *fee* paid to an advisor includes all fees for a tax strategy, for services for advice (whether or not tax advice), or for the implementation of a transaction. These fees include consideration in whatever form paid (whether in cash or in kind) for:

- services to analyze the transaction (whether or not related to the tax consequences of the transaction),
- services to implement the transaction,
- services to document the transaction, and
- services to prepare tax returns to the extent that the fees exceed the fees customary for return preparation.

If you know, or **should** know, the amount you pay will be paid indirectly to the advisor, for instance, through a referral fee or fee-sharing arrangement, you are also treated as paying fees to an advisor. A fee does **not** include amounts paid to a person—including an advisor—in that person's capacity as a party to the transaction.

### New York transactions with contractual protection

*New York transactions with contractual protection* include transactions for which you have, or a related party—as described in IRC § 267(b) or 707(b)—has, the right to a full refund or partial refund of fees if all or part of the intended tax consequences from the transaction are not sustained. It also includes a transaction for which fees are contingent on your realization of tax benefits from the transaction.

This only applies with respect to fees you, or a related party paid to any person who makes or provides a written or oral statement to you or the related party (or for whose benefit a statement is

made or provided to you or the related party) as to the potential tax consequences that may result from the transaction. This includes such fees if paid on your behalf or on behalf of a related party.

The Tax Department will consider all the facts and circumstances relating to the transaction when determining whether a fee is refundable or contingent, including the right to reimbursements of amounts that the parties to the transaction have not designated as fees or any agreement to provide services without reasonable compensation.

If a person advises you (orally or in writing) as to the potential tax consequences that may result from a transaction only **after** you have entered into the transaction and reported the consequences of the transaction on a filed tax return, **and** the person has not previously received fees from you relating to the transaction, then the department will not take any refundable or contingent fees into account when determining whether the transaction has contractual protection.

A transaction is **not** considered to have contractual protection solely because a party to the transaction has the right to terminate the transaction upon the happening of an event affecting the taxation of one or more parties to the transaction.

If your tax return reflects a tax benefit from the transaction and you have the right to the full or partial refund of fees or the fees are contingent as described above, you have participated in a New York transaction with contractual protection.

If a pass-through entity (partnership, S corporation, or trust) has the right to a full or partial refund of fees or has a contingent fee arrangement, but the partner, shareholder, or beneficiary individually does **not**, then the pass-through entity (not the partner, shareholder, or beneficiary) has participated in the New York transaction with contractual protection.

### Shareholder of foreign corporation

You are deemed to participate in a New York reportable transaction if you own or control, either directly or indirectly, more than 50% of the voting stock of a corporation not subject to New York State tax:

- if such corporation would be considered to participate in a New York reportable transaction as described above, if it were a taxpayer filing a tax return that reflects the items from the transaction, and
- your return reflects a tax benefit from the transaction.

## Exception

### Published guidance

If the Tax Department makes a determination in *published guidance* that a transaction is not subject to the reporting requirements, that transaction is not:

- considered a New York reportable transaction; or
- included as a type of New York confidential transaction or a New York transaction with contractual protection.

## Recordkeeping

You must keep a copy of all documents and other records related to a New York reportable transaction in accordance with § 25(d). You must retain your documents for six years from the due date of the return for which you are required to disclose a New York reportable transaction, or the date of filing, if later.

## Penalties

Under §§ 685(x) and 1085(p), there is a penalty for the failure to include on any return or statement any information required to be disclosed under § 25 with respect to a New York reportable transaction. This penalty is in addition to any other penalty the Tax Department may impose.

The penalty for failure to include information with respect to a New York **reportable** transaction, other than a New York listed transaction, is $10,000 in the case of a taxpayer subject to Article 22 and $20,000 in any other case.

The penalty for failure to include information with respect to a New York **listed** transaction is $25,000 in the case of a taxpayer subject to Article 22 and $50,000 in any other case.

If you understate a New York reportable transaction, the Tax Department may impose an accuracy-related penalty. For more information, see §§ 685(p-1) and 1085(k-1).

If you are required to file Form DTF-686-ATT, you will be assessed a penalty if you:

a) fail to file the form by the due date, including extensions, or

b) file an incomplete or incorrect return.

**Note:** Do **not** write *Information provided upon request* or *Details available upon request* or any similar statement in the space provided (see *How to complete Form DTF-686-ATT).* If you include any such statements, you will be subject to the penalties previously discussed.

## Extended statutes of limitations

You are required to disclose a New York listed transaction within the time and manner prescribed under § 25 and the related regulations.

If you do not, then under §§ 1083(c)(ii) and 683(c), the Tax Department will extend the period of limitations to assess any tax with respect to the New York listed transaction beyond the normal assessment period. This extension ends one year after the earlier of either:

- the date you disclose the transaction by filing Form DTF-686-ATT; or
- the date that a material advisor provides the information required under IRC § 6112 in response to a request by the Tax Department under § 25(c).

If a deficiency is attributable to an abusive tax avoidance transaction, the department may assess tax at any time within six years after you filed your return. Abusive tax avoidance transactions include, but are not limited to, New York listed transactions.

# Specific instructions

## How to complete Form DTF-686-ATT

You must complete all required entries on Form DTF-686-ATT and include any required attachments when you file. Do not simply write *See attached*. If you file a return that is missing required pages or entries, the Tax Department cannot process your return. As a result, you may be subject to penalty and interest (see *Penalties).*

**Note:** Do **not** report more than one transaction on each form.

### Additional sheets

If the information required exceeds the space provided, complete as much information as possible in the available space and attach additional sheets containing the remaining information. The additional sheets must be in the same order as the lines to which they correspond and must include your name and identifying number at the top of each sheet and the line number that corresponds to the information being reported.

### Line 1a

Enter the name, if any, by which the transaction is known. If no name exists, provide a short identifying description of this transaction that distinguishes it from other New York reportable transactions in which you have participated (or may participate in the future).

### Line 1b

Enter the first year you participated in this transaction. This may not be the same as the year for which you are disclosing a New York reportable transaction.

### Line 2

Mark an ***X*** in the box for all types that apply to the transaction you are reporting.

The three types of New York reportable transactions are:

**Box a:** If the transaction is a **New York listed transaction**, mark an ***X*** in this box, in addition to any other box that may apply. Also complete line 3.

**Box b:** If the transaction is a **New York confidential transaction**, mark an ***X*** in this box. Also complete line 6b.

**Box c:** If the transaction is a **New York transaction with contractual protection**, mark an ***X*** in this box. Also complete line 6b.

For more information, see *Participation in a New York reportable transaction*.

### Line 3

Provide a brief identifying description of the New York listed transaction and identify the notice or other form of *published guidance*.

### Line 4

If you participated in the transaction through another entity, such as a partnership, an S corporation, or a foreign corporation, complete line 4, boxes a through d.

If you are reporting more than one entity, separate the information for each entity by commas in each space provided.

**Box c:** Enter the form number of the New York State tax or information return filed by the entity (for example, Form IT-204). If the entity did not file a New York State tax return, enter ***None***.

**Box d:** Enter your Employer identification number (including the hyphen), if any.

### Lines 6a and 6b: Facts

Include the facts necessary to understand the claimed or expected New York income or franchise tax treatment of the transaction.

### Line 6a

Identify the type of tax benefit generated by the transaction. Mark an ***X*** in the boxes that apply.

- **Deductions**
- **Capital loss**
- **Ordinary loss**
- **Exclusions from gross income**
- **Nonrecognition of gain**
- **Adjustments to basis**
- **Tax credits**
- **Deferral**
- **Absence of adjustments to basis**, or
- **Other:** Including status as a tax-exempt organization, or any other tax consequences that may reduce your tax liability by affecting the amount, timing, character, or source of any item of income, gain, loss, expense, credit, or activity.

For more information about tax benefits, see *Definitions*.

### Line 6b

**New York confidential transaction:** If you marked an ***X*** in line 2, box b, explain how your disclosure of information concerning the transaction was limited (for example, by contract or verbal agreement) and the nature and extent of the disclosure limitations.

**New York transaction with contractual protection:** If you marked an ***X*** in line 2, box c, describe the terms of the contractual protection.

If you need more space, see *Additional sheets*.

### Line 7

Provide the complete name, address, and all identifying numbers for all parties to the transaction (including, but not limited to, participants in the transaction), and describe their involvement in the transaction, for example:

- other investors in the transaction;
- tax-exempt entities that received fees, contributions, income, or gains in connection with the transaction;
- foreign individuals or entities not subject to New York State income or franchise tax that received fees, income, or gains in connection with the transaction; or
- financial institutions that loaned money used in the transaction.

## Need help?

Visit our website at ***www.tax.ny.gov***

- get information and manage your taxes online
- check for new online services and features

**Telephone assistance**

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|---|---|
| **Automated income tax refund status:** | **518-457-5149** |
| **Personal Income Tax Information Center:** | **518-457-5181** |
| **Corporation Tax Information Center:** | **518-485-6027** |
| **To order forms and publications:** | **518-457-5431** |
| **Text Telephone (TTY) or TDD equipment users:** | **Dial 7-1-1 for the New York Relay Service** |

## Privacy notification

New York State Law requires all government agencies that maintain a system of records to provide notification of the legal authority for any request for personal information, the principal purpose(s) for which the information is to be collected, and where it will be maintained. To view this information, visit our website, or, if you do not have Internet access, call and request Publication 54, *Privacy Notification*. See *Need help?* for the Web address and telephone number.