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Legal Update
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Can You Simply Remove GILTI Income from Your State Tax Base (New York and Elsewhere)?

The New York State 2018 legislative session included a couple bills, including a State Senate draft of the budget bill, that aimed to exclude so-called GILTI income (explained below) from the corporate tax base. However, as finally passed, the new law is silent as to the treatment of such income. That is especially bad news for banks and other financial institutions that expect to report significant amounts of GILTI and do business in New York. Does the silence mean that a taxpayer with GILTI must include its GILTI inclusion in New York State taxable income, or does the silence mean that the legislature recognized other already-available methods to exclude such income, and therefore the explicit exclusion was not needed? Of course, we can debate for a lifetime what legislative silence means and never reach an answer. This Legal Update highlights several possible avenues for removing the GILTI inclusion from the tax base—some that are fairly obvious (but important and practical) and a few that are much less obvious but worthy of consideration nonetheless. While we focus primarily on New York, many of these positions are equally applicable in other states as well.

Background

The Tax Cuts and Jobs Act ("TCJA") created a new type of taxable income, called "global intangible low-taxed income" or "GILTI." Some states' laws will function in a way that GILTI income will not be included in the state's tax base to begin with. Some states' laws may explicitly exclude the GILTI inclusion or provide a subtraction or other modification. But in many of the states that conform to the Internal Revenue Code, as amended by the TCJA, there is no specific guidance that addresses the GILTI inclusion, causing concern that the GILTI inclusion will be includible in the state tax base and there will be no clear statutory modification to remove it.

The GILTI provisions are intended to discourage companies from moving or maintaining valuable intangibles outside of the United States and avoiding US tax on the income they generate. The US shareholder of a controlled foreign corporation (a "CFC") must include in gross income in the current year such shareholder's GILTI inclusion, which is very generally the US shareholder's share of net CFC tested income minus its net deemed tangible income return for the year.[1] Income already included in US taxable income (as a result of subpart F, as effectively connected income, etc.) is excluded from the GILTI inclusion. US shareholder is a defined term that applies to a US person that owns at least 10% of the vote or value of a foreign corporation (after taking ownership attribution into account). The US Treasury Department released an initial installment of proposed regulations that address important aspects of the GILTI inclusion under section 951A of the Internal Revenue Code, but also leave open significant questions. For an analysis of the new

proposed regulations, please read Mayer Brown's related Legal Update, *GILTI Pleasures: The IRS Releases Proposed Regulations on Global Intangible Low-Taxed Income*.[2]

Because many states conform to the federal tax code as currently in effect, those states will look to line 28 (or line 30) of the federal form 1120 as a starting point. The GILTI inclusion will generally be included in the starting point, because it will be incorporated into line 28, but the deduction provided in section 250 of the Internal Revenue Code may not naturally flow into the starting point because special deductions are not included in line 28. The new proposed regulations for GILTI are relevant to the inclusion that goes into the line 28 or line 30 starting point.

Some states may have or may enact modifications to provide partial or complete GILTI relief. But for the remainder of states, taxpayers are left with inflated state entire net income amounts. Even though GILTI does not represent actual cash received, state taxable income will increase, sometimes substantially. Financial institutions, as they have certainly discovered, face an acute problem at the state level because they have the twin pressure of intangible assets and capital requirements abroad.

There are several avenues a taxpayer should consider to mitigate the tax increase. This Legal Update discusses 5 (and ½) of those potential avenues.

Door No. 1 – Subpart F Treatment

Many states exclude Subpart F income from the state tax base. Therefore, if GILTI is considered Subpart F income for state tax purposes, it could be excludable on that basis.

GILTI is not Subpart F income but it shares a statutory scheme with Subpart F income. Much like Subpart F income, GILTI arises from a US shareholder's interest in a CFC.[3] Additionally, the TCJA requires that US shareholder to include GILTI in current year gross income, despite GILTI amounts remaining undistributed by the CFC.[4] However, GILTI amounts are not included in the definition of Subpart F income and are explicitly determined without regard to amounts that would be considered Subpart F income of the CFC; GILTI would be included in the US shareholder's gross income even if the CFC would not otherwise generate Subpart F income to the US shareholder.[5]

Of course, there is an argument that GILTI is enough *like* Subpart F income that it should be entitled to the same treatment for state purposes. Before the TCJA, if what is now GILTI had become taxable in the United States, it would have been taxable as a dividend from a CFC. Recognizing this, a congressional Conference Committee Report analyzing a draft of the Senate version of what eventually became the TCJA stated "although [GILTI] Income inclusions do not constitute subpart F income, [GILTI] inclusions are generally treated similarly to subpart F inclusions."[6] Indeed, the GILTI provisions require GILTI to be treated as if it were Subpart F income in applying certain other provisions of the Code.[7]

For many financial institutions, the Subpart F exception for qualified banking or financing income[8] means that Subpart F income is not a material factor in their state tax bases, and GILTI redirects that income into their state tax bases for the first time, without the benefit of tax credits that apply at the federal level. For these taxpayers, the similarity (and differences) between Subpart F income and GILTI are exceptionally meaningful, and they will presumably report net tested income largely from unitary affiliates, which is relevant to the options discussed below.

Due to the similarities between GILTI and Subpart F income, some corporations will take the position that GILTI should have the same consequences as Subpart F income at the state level. Those corporations should find a basis in the statutory frameworks that exclude Subpart F

income; often an exclusion or deduction exists for US constitutional reasons and the considerations that apply to Subpart F income also apply to GILTI because of the different tax results that would arise for income from US subsidiaries and foreign subsidiaries. Therefore, it can be argued that the application of an exclusion or deduction for Subpart F income, whether provided by statute or pulled into a dividends received deduction, applies to GILTI as well, in order to give effect to the statutory scheme and to carry over the likeness provided in the Internal Revenue Code.

In New York State, the franchise tax provides a very specific template for excluding the Subpart F income of unitary subsidiaries and it means that financial institutions, as a result of the qualified banking or financing exception, will characterize income as GILTI that other taxpayers will characterize as Subpart F income (and exclude). Imposing different tax results on these similarly situated taxpayers would not make sense, and would contradict the intent of the recent tax reform legislation under Article 9-A of the New York Tax Law. The old law—applicable to tax years beginning before 2015—provided an exemption for income from subsidiaries, including Subpart F income, and the new law was designed to maintain that exemption to the extent of stock in unitary corporations. It provides a specific exemption for Subpart F income and dividends from unitary corporations that are not included in the taxpayer's combined group (often non-US subsidiaries).[9] Of course, GILTI did not exist at that time, and the drafters did not anticipate the new inclusion, but they would have treated it like Subpart F income if they could have foreseen the TCJA. Given this background and the disparate treatment applicable to a single industry, GILTI and Subpart F income should incur the same tax consequences. The two categories of income have more relevant similarities than differences in this context.

States may note that the Internal Revenue Code does not characterize GILTI as a deemed dividend for any purpose, in contrast to Subpart F income, and that GILTI is a share of active business income. However, the origin of the income abroad means that similar constraints apply to taxing it.

Door No. 2 – Remove "Phantom Income" from the Tax Base

Almost 100 years ago, the US Supreme Court defined the limits of taxable income: only actual increases in wealth may be taxed; "phantom" income may not be. In *Eisner v. Macomber*,[10] a seminal federal income tax case, the Supreme Court addressed whether an accumulated, but undistributed, dividend was "income . . . from whatever source derived." The Court determined that there must be an actual increase in wealth for "income" to be "derived." The Court defined income as:

> [G]ain derived from capital, from labor, or from both combined, provided it be understood to include profit gained through a sale or conversion of capital assets . . . . [It is] not a gain accruing to capital, not a growth or increment of value in the investment; but a gain, a profit, something of exchangeable value proceeding from the property, severed from the capital however invested or employed, and coming in, being "derived," that is received or drawn by the recipient (the taxpayer) for his separate use, benefit and disposal;—that is income derived from property. Nothing else answers the description.[11]

Here, of course, Congress has deemed GILTI income to be currently taxable in the United States. But does that necessitate a state increase? The phantom income concept is especially applicable to banks, which have capital requirements abroad, and do not have the same

opportunity to repatriate the profits that GILTI includes.

New York adjudicative bodies have not often addressed the impact of phantom income in published decisions. In the single determination we are aware of,[12] the administrative law judge resolved the matter at issue, avoiding the creation of phantom income.

Other states have reached similar results. For example, the New Jersey Supreme Court permitted adjustment to federal basis calculations to avoid phantom income, stating, "Any income tax imposed on an amount greater than [the taxpayer's] economic gain [determined without the federal basis adjustments] constitutes a tax on amounts that represent neither economic gain nor recovery of a past tax benefit[, which] was not intended by the Legislature."[13] New Jersey courts have consistently applied this view that phantom income is not properly taxable by New Jersey.[14] Likewise, Massachusetts,[15] Oregon[16] and Connecticut[17] have each recognized that adjustments to federal taxable income must be made even where a statutory modification does not exist to account for differences between state and federal law.

In each of these matters, the mechanical application of state statutes resulted in the "creation" of income for which the taxpayer saw no true increase in wealth. In each of these matters, although no specific statutory modification applied to correct the distortion between state law and federal law, the courts nonetheless required a reduction to state taxable income.

Thus, one can argue that GILTI income reflects no state-level accretion to wealth and, the income should be excluded from the tax base, certainly until states shift to worldwide combined reporting.

Door No. 3 – Supremacy Clause

A third option would be to argue that Congress intended the foreign-derived intangible income ("FDII") provisions and GILTI provisions to operate cohesively (i.e., the "carrot and the stick" described by many tax commentators), and states that conform to the "stick" (GILTI) but not to the "carrot" (FDII) potentially violate the Supremacy Clause of the US Constitution.[18]

The Supremacy Clause provides that the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof…shall be the supreme Law of the Land . . . .." US Const., Article VI, cl. 2. When a state law conflicts with a federal provision, either directly or because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,"[19] the state law is unenforceable. If the case can be made that decoupling FDII and GILTI at the state level would have a detrimental impact on what Congress hoped to achieve, then a Supremacy Clause violation exists.

The analysis starts with the goal Congress sought to achieve through the new law. Here, Congress's purpose in enacting the combined FDII/GILTI regime was to encourage US companies to create and develop their valuable worldwide intangible rights in the United States (and, possibly, repatriate their existing intangibles to the United States), while penalizing US companies that hold their intangibles offshore (whether the actual rules are likely to further these objectives is a separate discussion). When a state increases a taxpayer's tax by including GILTI income in the state tax base but does not provide the beneficial rate reduction pursuant to the FDII regime, an argument can be made that, while companies are further discouraged from investing in intangible property abroad (and the income they generate), they are not correspondingly rewarded for retaining intangible property in the US, and

using those intangibles for the export of goods and services.

The question boils down to whether parallel state taxation of GILTI without the rate reduction provided by FDII is consistent with the FDII/GILTI regime as a whole.[20] The Joint Committee on Taxation ("JCT") issued a report on potential international tax reform, which stated that cross-border taxation policy objectives in the United States typically focus on "(1) fostering the growth of US multinationals abroad; (2) encouraging domestic investment by US and foreign businesses; and (3) promoting US ownership, as opposed to foreign ownership, of US and foreign assets."[21] As noted above, taken together, the GILTI/FDII regime was intended to satisfy each of these policy goals by encouraging growth of US investment in intellectual property to be exploited abroad (FDII) and discouraging non-US subsidiaries of US multinational companies from holding intangible property (GILTI). However, these two provisions are most effective in tandem: Domestic investment is most encouraged by discouraging foreign holdings, and *vice versa*. Indeed, the JCT presented both the current-year inclusion of GILTI for intangibles held offshore and the deduction for FDII as part of a multi-pronged approach to reform the taxation of mobile, intangible assets.[22]

To the extent New York—or any other state—includes GILTI's "stick" in the tax base without the benefit of FDII's "carrot," it is likely inconsistent with the intention of the joint GILTI/FDII regime: US investment in foreign-exploited intangible property. As a result, state conformity to GILTI without FDII arguably obstructs the congressional purpose in enacting the joint GILTI/FDII regime, thereby violating the Supremacy Clause. While *Mobil Oil Corp. v. Commissioner of Taxes*[23] supports the authority of states to tax foreign source income without necessarily violating the Supremacy Clause, the statutory scheme created by GILTI/FDII is specifically directed to interrelated policies that states may undermine by picking up the GILTI inclusion and decoupling from FDII.

Door No. 4 – Discrimination against Foreign Commerce

The US Supreme Court has ruled that a state cannot tax income from foreign (non-US) subsidiaries more heavily than income from domestic subsidiaries.[24] The rationale is that income from foreign subsidiaries is foreign commerce and the disparate tax burden creates discrimination against foreign commerce, in violation of the US Constitution.

In the case that established this precedent, *Kraft General Foods, Inc. v. Iowa Department of Revenue,*[25] the State of Iowa used the federal definition of net income as the starting point for its business tax on corporations, with the result that dividends from domestic corporations benefited from a dividends received deduction, and dividends from foreign subsidiaries did not. The dividends from foreign subsidiaries entered apportionable income. The case might have turned out differently if Iowa required a combined return for unitary corporations, but the principle still stands—income from foreign subsidiaries cannot incur greater state tax than income from domestic subsidiaries.

Much like the situation faced by Iowa, states that start from federal taxable or net taxable income may inadvertently run afoul of the US Constitution after the TCJA. Discrimination may occur if the GILTI inclusion flows into state apportionable income but an equivalent proportion of income or dividends from domestic corporations does not. That disparity may be more likely to arise in states that require separate reporting (generally, a separate tax return from each corporation that is a taxpayer) because those states may have full or partial dividend received deductions that do not apply to the GILTI inclusion—thus applying a greater tax burden on certain foreign income. But discrimination may also occur if states

incorporate apportionment factors from domestic subsidiaries that generate unitary income but not from CFCs that generate the GILTI inclusion. That disparity might arise in states that require combined reporting (generally, a single tax return for a unitary business comprised of multiple corporations). In that circumstance, the state potentially subjects a greater proportion of foreign than domestic income to tax, relative to the origins of the income.

Apportionment is discussed more fully below, but, if a state subjects the GILTI inclusion to tax on a less favorable basis than income from domestic subsidiaries, its tax scheme arguably violates the US Constitution. In New York, an exemption applies to dividends from domestic unitary corporations that would not apply to the GILTI inclusion, in discrimination against foreign commerce; and, currently, the apportionment formula would reflect the activities of unitary domestic corporations but not unitary CFCs that generate the GILTI inclusion, also, potentially in discrimination against foreign commerce.[26]

Door No. 5 – Apportionment Relief

As, essentially, an artificial amount of income, GILTI defies easy apportionment. It does not fall cleanly into any specific category of income. State tax authorities, should they assert that it is nominally taxable, must nevertheless work with taxpayers to determine how much is taxable. Another approach for obtaining GILTI relief is therefore to use a state's allocation and apportionment rules to remove or dramatically reduce the amount included in the state's tax base. There are a few ways to achieve this result.

One could argue that GILTI is non-business income or another type of investment income that must be allocated entirely to the company's headquarters state, and not apportioned elsewhere.[27] This is an especially good answer for a company headquartered in a state that happens to be one of the states that does not conform to the current version of the Internal Revenue Code and, thus, would not itself include the GILTI inclusion in the state tax base. But this is an especially bad answer for financial institutions domiciled in New York (in the presumably rare scenario they report a GILTI inclusion as non-business income). By allocating 100% of the GILTI inclusion to the headquarters state, no GILTI would be included in the tax base apportioned elsewhere or in the apportionment fraction computations.

One could alternatively argue that GILTI is attributable to the countries of origin, rather than any state, in an apportionment analysis. GILTI should be apportionable—it is, despite its name, income from an operating business, and most likely a unitary business. In the logical application of *any* state's apportionment method, the related receipts would not be counted as local income/sales but would rather be counted as out of state income/sales.[28] Apportionment usually takes the form of a fraction, and the argument for exclusion from the numerator is straightforward: state numerators are intended to reflect the portion of the company's activities within the state under the state's specific scheme. Whether measuring by COP, market, where earned, or some other method, the answer for GILTI appears to be consistent. Net tested income is not generated by services performed in any state and is not income from customers physically located in any state. The only US connection to the income appears to be the US taxpayer who owns shares in a CFC that is generating the GILTI inclusion.

Thus, whether looking to where performed, where customers are located or some other amorphous "where earned" concept, the answer appears to be: outside of the United States. This position would result in GILTI being apportionable, but with the GILTI-generating receipts being included in the apportionment fraction denominator, thereby likely diluting the overall apportionment fraction.

The question then becomes, what amount should be included in the denominator of the apportionment fraction? The taxpayer's gross tested income, or gross tested income minus its gross deemed tangible income return, or the GILTI inclusion before application of the § 250 deduction, or the GILTI inclusion after application of the § 250 deduction, or some other combination of the foregoing? Based on apportionment principles, an argument exists that any state tax base that includes GILTI should apply an apportionment method that includes the factors of the CFCs that generate the income, but standard apportionment principles do not account for the net deemed tangible income return, the § 250 deduction or the taxpayer's aggregation of net tested income, tested loss and net deemed tangible income return, some of which artificially reduce the GILTI inclusion and may obscure the apportionment analysis.

In New York, the franchise tax applies a single-factor customer-based method to apportion business income. New York therefore cannot tax unitary income without apportioning it—or exempting it—which means New York must give unitary income factor representation in most circumstances—or exempt it. If the apportionment fraction incorporates the GILTI inclusion, the question is whether it should include all sales of the CFCs or some other amount in the denominator (GILTI attributes definitely do not belong in the numerator). The statutory apportionment rules do not, however, contemplate miscellaneous income from stock like the GILTI inclusion (dividends and net gains from stock that is business capital are mentioned, but do not receive default factor representation). Accordingly, unclassified income from stock could push into three other potential buckets: (1) a catch-all for other business receipts, (2) the Commissioner's authority to make a discretionary apportionment adjustment or, (3) as discussed further below, investment income.

With regard to the first bucket, the statute apportions other business receipts pursuant to a hierarchy that starts with the location where the benefit is received, and it captures all the receipts included in business income.[29] It may be difficult to decipher the location where the benefit is received for a GILTI inclusion, but that analysis should nevertheless lead to a location outside the United States (and obviously New York) because GILTI does not include effectively connected income. The receipts to be counted, on a plain reading, would include the gross tested income minus, possibly, the deemed return on intangible assets prior to netting. The § 250 deduction would not automatically reduce the receipts included in the apportionment fraction. The GILTI inclusion is not a perfect fit in the paradigm for other business receipts, though, and it would be reasonable for taxpayers to move on to other possibilities.

With regard to the second bucket, taxpayers in New York have the option of presenting an alternative apportionment method to the tax department and requesting approval to use it. Taxpayers consider this route if the standard apportionment formula does not accurately reflect the income they earn in New York, which would be the case for the GILTI inclusion. While taxpayers may achieve a better result by reporting the GILTI inclusion as an “other business receipt”—if not investment income—the tax department would likely take a request for an alternative apportionment method seriously. It understands the issues and would like to be reasonable.

Overall, taxpayers have apportionment options that may help them avert the most drastic state tax consequences that result from the GILTI inclusion, before reaching the third New York bucket below. By removing GILTI receipts from the apportionment numerator and including a "gross" figure in the denominator (or by allocating GILTI income exclusively to the taxpayer’s headquarters state), most taxpayers

will see some relief—and that relief could be substantial in many cases.

Door No. 5 ½: Unconstitutional to Apportion Leads to Exclusion from New York Tax Base

While most of the arguments presented in this Legal Update could be made in states across the map, this one hinges on a specific aspect of New York law, and it builds upon the apportionment argument above. Following the analysis behind Door No. 5, let's say you reach the point in your analysis where you have concluded that it would be unconstitutional to apportion GILTI based on the statutorily computed apportionment percentage, or the method the Commissioner prescribes. If you reach this conclusion on your New York State or New York City returns, you may then trigger a provision of the New York law that was enacted as part of New York's own tax reform, effective for years beginning on or after January 1, 2015.

As part of New York's reform, entire net income is divided into three general categories: investment income, other exempt income and business income. Investment income and other exempt income are subtracted from the taxable base. Business income (which is entire net income minus investment income and other exempt income, with some modifications not addressed here) is then apportioned by the taxpayer's business apportionment fraction, that is, its market-based sales factor.[30]

Some business income, however, may not necessarily be unitary, and other business income, namely dividends and net gains from stock and partnership interests, may have no apportionment representation at all.[31] The new law includes a potential escape valve for income that falls into these categories, and for the GILTI inclusion. This unique provision states that a security automatically converts to investment capital if it would be unconstitutional to apportion the corresponding income to New York using the statutory method[32]; in that case, the income becomes exempt "investment income," rather than business income. Much like dividends, the GILTI inclusion does not receive factor representation. For GILTI from a unitary CFC, or reported by an out of state taxpayer, that could result in an unconstitutional apportionment result—and an opening to convert the GILTI inclusion to exempt investment income.

Thus, a taxpayer can assert that if the statutory apportionment result is unconstitutional, its investments in the CFCs that generate the GILTI inclusion are reclassified as investment capital, and the resulting income is reclassified as investment income—and exempt from tax.

It should be noted that the New York Department of Taxation and Finance has attempted to limit application of the "unconstitutional to apportion" provision to taxpayers domiciled outside of New York. While there is some merit to that limitation (we'll leave that for another Legal Update), the statutory provision certainly does not include such a limitation. If a taxpayer can demonstrate the unconstitutionality of apportioning GILTI, in particular unitary income, the reclassification to investment income is absolutely available—regardless of domicile.

Conclusion

States will likely vary in the extent to which they expressly adopt or decouple from the various provisions of the TCJA. Where, like New York, a state is silent on whether it includes GILTI in current-year taxable income, taxpayers with significant offshore intangible holdings, such as banks, should evaluate whether a viable position to exclude GILTI from current-year state taxable income is available even where the state has not provided for a statutory modification to federal taxable income to exclude GILTI.

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Endnotes

[1] This Legal Update does not address the nuances of GILTI at the federal level. [For Law360 coverage of the federal implications of GILTI, see Gary Wilcox, Jason Osborn, Rebecca Eisner, and Brad Peterson, *Tax Reform Reshuffles The Deck For Outsourcing*, Law360, Jan. 17, 2018; Frederick Fisher, Barbara Goodstein, Michael Marion, Adam Wolk, Christopher Chubb, and Lucas Giardelli, *The Impact of Tax Reform On Leveraged Transactions*, Law360, Mar. 20, 2018.]

[2] See Mark H. Leeds and Lucas Giardelli, *GILTI Pleasures: The IRS Releases Proposed Regulations on Global Intangible Low-Taxed Income*, Mayer Brown Legal Update, Sept. 21, 2018.

[3] IRC § 951A(a).

[4] IRC §§ 951A(a), (b), (c).

[5] IRC §§ 951(a), 952(a), 951A(c)(2)(A)(i)(II).

[6] Staff of J. Comm. on Taxation, Description of the Chairman's Mark of the "Tax Cuts and Jobs Act," No. JCX-51-17, at 227 (Nov. 13, 2017).

[7] IRC § 951A(f)(1)(A).

[8] IRC § 954(h).

[9] N.Y. Tax Law § 208(6-a).

[10] 252 U.S. 189 (1920).

[11] *Id.* at 207.

[12] *Matter of Cofinco, Inc.*, N.Y. Tax Appeals Tribunal Determination No. 807835 (May 21, 1992). While Tax Appeals Tribunal determinations are non-precedential, they often indicate how an administrative law judge would approach an issue.

[13] *Koch v. Dir., Div. of Taxation*, 722 A.2d 918, 921-922 (N.J. 1999).

[14] *E.g.*, *Moroney v. Dir, Div. of Taxation*, 868 A.2d 1132 (N.J. Super. Ct. App. Div., 2005) (permitting departure from federal gain calculations where differences between New Jersey and federal depreciation deductions would have created "phantom" income) and *Toyota Motor Credit Corp. v. Dir., Div. of Taxation*, 28 N.J. Tax 96 (N.J. Tax Ct. 2014) (permitting similar adjustment to federal basis resulting from New Jersey Corporation Business Tax and federal depreciation deductions).

[15] *Rohrbough, Inc. v. Comm'r of Revenue*, 434 N.E.2d 211 (1982) (taxable installment payments not included in Massachusetts income even though there was no statutory modification to remove from federal gross income); *T.H.E. Inv. Co. v. Comm'r of Revenue*, 1986 WL 22662, No. 132408 (Mass. App. Tax. Bd. Dec. 19, 1986) (federal basis adjustments resulting from excess loss accounts did not reduce shareholder's basis in subsidiary where the losses were not deductible for Massachusetts tax purposes and did not defer Massachusetts tax liability, as they did for federal income tax purposes).

[16] *Foote v. Dept. of Revenue*, 2006 WL 3487429 (Or. Tax Magistrate Div. Nov. 14, 2006) (losses for which taxpayer did not receive state tax benefit could not cause taxpayer to reduce basis for state tax purposes).

[17] *Bello v. Comm'r of Revenue Servs.*, 11 Conn. L. Rptr. 339 (Conn. Super. Ct., Apr. 20, 1994) (losses for which taxpayer did not receive state tax benefit could not cause taxpayer to reduce basis for state tax purposes).

[18] A similar argument can be made regarding the intended connection between the new interest limitation provisions of I.R.C. § 163(j) and the full expensing provisions of I.R.C. § 168(k). While Congress intended for these to function together, many states will pick up the interest limitations but will decouple from the full expensing provisions.

[19] *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

[20] *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992).

[21] Staff of J. Comm. on Taxation, Background and Selected Policy Issues on Int'l Tax Reform, No. JCX-45-17, at 20 (Sept. 28, 2017).

[22] Staff of J. Comm. on Taxation, Description of the Chairman's Mark of the "Tax Cuts and Jobs Act," No. JCX-51-17, at 227-231 (Nov. 13, 2017).

[23] *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425 (1980).

[24] *Kraft General Foods, Inc. v. Iowa Dep't of Revenue*, 505 U.S. 71, 82 (1992).

[25] *Id.*

[26] N.Y. Tax Law §§ 208(6-a)(c), 210-C(2)(c), 210-C(5).

[27] *Allied-Signal, Inc. v. Dir., Div. of Taxation*, 504 U.S. 768 (1992).

[28] Some states' apportionment provisions may not clearly provide for the GILTI inclusion to be included in the apportionable tax base. However, taxpayers are entitled to "factor representation," meaning that the income being apportioned must be included in the computation of the apportionment factor. E.g., *Mobil Oil Corp. v. Comm'r of Taxes*, 445 U.S. 425, 462 (1980) (Stevens, J., dissenting) (stating that failure to include apportionment factors for the entire unitary enterprise that was included in the tax base "will inevitably cause [apportioned] income to be overstated.").

[29] N.Y. Tax Law § 210.A(1) and (10).

[30] N.Y. Tax Law § 210-A.

[31] N.Y. Tax Law § 210-A(5)(a)(2)(G).

[32] N.Y. Tax Law § 208(5)(e).

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