



New York State Tax Treatment of Repatriation, Foreign-Derived Intangible Income Deduction, and Global Intangible Low-Taxed Income for Businesses

The federal Tax Cuts and Jobs Act¹ (the TCJA) created new provisions in the Internal Revenue Code (IRC) addressing income earned from overseas operations, including mandatory deemed repatriation income, foreign-derived intangible income (FDII), and global intangible low-taxed income (GILTI).

This memorandum generally explains the impact of these federal changes, as well as related changes enacted in the 2018-19 New York State budget,² on businesses.

Mandatory deemed repatriation income

The TCJA required taxpayers to recognize mandatory deemed repatriation income as Subpart F income. This is generally accomplished for U.S. shareholders by recognizing post-1986 accumulated earnings and profits and deficits of certain specified foreign corporations under IRC § 965(a) and (b) (together referred to as the *IRC § 965(a) inclusion amount*). These taxpayers are then allowed to deduct a portion of the inclusion amount under IRC § 965(c), resulting in a net IRC § 965 amount. The amounts recognized under IRC § 965 include amounts earned directly by the U.S. shareholders, as well as distributive shares of IRC § 965 amounts from flow-through entities. New York's tax treatment of these amounts varies by type of entity as explained below.

Unlike federal law, which allows certain taxpayers to elect to defer payment of a portion of their federal tax liability related to their mandatory deemed repatriation income, New York taxpayers, including combined groups, cannot defer payment of any portion of their New York State tax associated with mandatory deemed repatriation income.

Exempt organizations

Any net IRC § 965 amount required to be included in federal unrelated business taxable income is included in New York unrelated business taxable income under Article 13. There is no New York exemption or deduction for this income for exempt organizations and no related income modifications.

Insurance corporations³

For tax years beginning on or after January 1, 2017, the IRC § 965(a) inclusion amount received from foreign corporations that are not included in a combined report with the taxpayer must be subtracted when computing entire net income (ENI) under Article 33. Taxpayers must deduct this amount from ENI and add back to federal taxable income (FTI) interest and

¹ See Public Law 115-97.

² See Part KK of Chapter 59 of the Laws of 2018.

³ This information does not apply to captive insurers and insurance companies filing a CT-33-NL.

noninterest deductions directly or indirectly attributable to the IRC § 965(a) inclusion amount. Since the IRC § 965(a) inclusion amount is not included in entire net income, the federal deduction under IRC § 965(c) is not allowed.

Insurance corporations that have an underpayment of estimated tax penalty related to the addback of interest deductions directly and indirectly attributable to their IRC § 965(a) inclusion amount on their New York 2017 tax year return may request a penalty waiver if they receive a bill for that penalty. There is no penalty relief for tax years after 2017.

New York C corporations

For tax years beginning on or after January 1, 2017, the IRC § 965(a) inclusion amount received from both unitary and non-unitary corporations not included in a combined return with the taxpayer is considered gross exempt controlled foreign corporation (CFC) income under Article 9-A. It is never considered gross investment income.

The IRC § 965(a) inclusion amount, less any interest deductions directly or indirectly attributable to the income (or less 40% of the IRC § 965(a) inclusion amount if the safe harbor election is made), is considered exempt CFC income and deducted from entire net income (ENI) when computing business income. Since the IRC § 965(a) inclusion amount is considered gross exempt CFC income, the federal deduction under IRC § 965(c) is not allowed.

The IRC § 965(a) inclusion amount is not included in the numerator or denominator of the business apportionment factor (BAF).

The IRC § 965(a) inclusion amount is disregarded for purposes of the “principally engaged” test used to determine a taxpayer’s, or combined group’s, eligibility for preferential rates and amounts available to manufacturers.

New York C corporations that have an underpayment of estimated tax penalty related to the direct and indirect attribution of interest deductions to their IRC § 965(a) inclusion amount (or the 40% safe harbor election attributable to their IRC § 965(a) inclusion amount) on their New York 2017 tax year return may request a penalty waiver if they receive a bill for that penalty. There is no penalty relief for tax years after 2017.

New York S corporations

For purposes of the business apportionment factor (BAF), the net IRC § 965 amount is treated as dividends from stock. When the 8% fixed percentage method election is in effect and the stock that generated the net IRC § 965 amount is a qualified financial instrument, the net IRC § 965 amount is included in the denominator of the BAF and 8% of such amount is included in the numerator of the BAF. In all other instances, the net IRC § 965 amount is **not** included in the numerator or denominator of the New York S corporation’s BAF.

[IRC § 965; Tax Law §§ 208(6-a)(b), 208(9)(b)(23), 1085(c)(1), 1503(b)(1)(A), 1503(b)(1)(B), 1503(b)(1)(S), 1503(b)(2)(B), 1503(b)(2)(H), 1503(b)(2)(W)]

Foreign-derived intangible income (FDII) deduction

For federal tax purposes, a U.S. domestic corporation taxed as a C corporation⁴ can deduct a portion of its income derived from serving foreign markets. For purposes of Article 9-A and Article 33, the federal FDII deduction is not allowed for tax years beginning on or after January 1, 2017.

[IRC § 250(a)(1)(A); Tax Law §§ 208(9)(b)(24), 1503(b)(2)(X)]

Global intangible low-taxed income (GILTI)

For federal tax purposes, a U.S. shareholder of any CFC is required to include in gross income its GILTI, which is the excess of a U.S. shareholder's net CFC tested income for the tax year over the U.S. shareholder's net deemed tangible income return for the tax year.⁵ A U.S. domestic corporation taxed as a C corporation⁶ is allowed a deduction for a portion of its GILTI.⁷ GILTI includes amounts earned directly by the U.S. shareholder, as well as distributive shares of GILTI from flow-through entities.

Exempt organizations

Any GILTI amount required to be included in federal unrelated business taxable income is included in New York unrelated business taxable income under Article 13. There is no New York exemption or deduction for this income for exempt organizations and no related income modifications.

Insurance corporations

If the stock of a foreign corporation that generates GILTI is subsidiary capital, the GILTI under IRC § 951A and any GILTI-related IRC § 78 dividends are considered income from subsidiary capital and are exempt from tax. The corresponding deductions allowed under IRC § 250 for GILTI and IRC § 78 dividends attributable to GILTI are disallowed.

In all other instances, the GILTI under IRC § 951A, as well as any GILTI related IRC § 78 dividends, remain in entire net income and are subject to tax. The corresponding deductions allowed under IRC § 250 for GILTI and IRC § 78 dividends attributable to GILTI are allowed in computing ENI.

New York C corporations⁸

Net GILTI income, which is the GILTI recognized under IRC § 951A less the allowable IRC § 250(a)(1)(B)(i) deduction, is included in ENI under Article 9-A. IRC § 78 dividends attributable to GILTI are not included in ENI.

⁴ Real estate investment trusts (REITs) and regulated investment companies (RICs) are not eligible for the deduction allowed under IRC § 250 related to FDII.

⁵ See IRC § 951A.

⁶ REITs and RICs are not eligible for the deduction allowed under IRC § 250 related to GILTI.

⁷ See IRC § 250(a)(1)(B).

⁸ As REITs and RICs are not allowed the IRC § 250 deduction related to GILTI, these entities must use GILTI, as opposed to the net GILTI income, when following the instructions in this section.

If the stock of a foreign corporation that generates GILTI is business capital, net GILTI income needs factor representation in the BAF in order to properly reflect the taxpayer's business income and capital in the State. The Commissioner has determined that such net GILTI income must be included in the denominator but not the numerator of the BAF. Taxpayers must report this amount in the *Everywhere* column of the discretionary adjustment line of Part 6 of Form CT-3 or Form CT-3-A and attach a statement to the return indicating the GILTI amounts included on this line.

If the stock of a foreign corporation that generates GILTI is investment capital, only the net GILTI income may be deducted as investment income in the computation of business income. Such net GILTI amount, like all other income from investment capital, is not included in the numerator or denominator of the BAF.

The net GILTI amount is disregarded for purposes of the "principally engaged" test used to determine a taxpayer's, or combined group's, eligibility for preferential rates and amounts available to manufacturers.

New York S corporations

GILTI income reported on the federal return and, consequently, the New York return, needs factor representation in the BAF in order to properly reflect the S corporation's business income and capital in the State. Therefore, the Commissioner has determined that such GILTI income must be included in the denominator but not the numerator of the New York S corporation's BAF. Taxpayers must report this amount in the *Everywhere* column of the discretionary adjustment line of Part 3 of the Form CT-3-S and attach a statement to the return indicating the GILTI amounts included on this line.

[IRC §§ 250(a)(1)(B) and 951A; Tax Law §§ 208(9)(b)(2), 208(9)(a)(6), 1503(b)(1)(A)]

Note: A TSB-M is an informational statement of existing department policies or of changes to the law, regulations, or department policies. It is accurate on the date issued. Subsequent changes in the law or regulations, judicial decisions, Tax Appeals Tribunal decisions, or changes in department policies could affect the validity of the information presented in a TSB-M.