GILTI CONFESSIONS:

An Analysis of Maryland's Latest GILTI Stance

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On May 10, 2019, the Comptroller of Maryland published an income tax alert on the reporting and taxation of IRC §951A (GILTI). GILTI, known as Global Intangible Low Taxed Income, is a new category of income created by the Tax Cuts and Jobs Act (TCJA) of 2017. GILTI is included in the federal adjusted gross income (AGI), and the corresponding IRC§ 250 deduction for corporations is nestled into the Maryland Form 500. Through tax alert 05-19, the Maryland Comptroller had to address the mechanics of GILTI in both corporate and pass-through entity tax returns.

GILTI, Global Intangible Low Taxed Income, is a tax on the shareholders of controlled foreign corporations (CFCs) when the return on certain tangible assets is greater than 10%. These "certain tangible assets" are formally known as QBAI or qualified business asset investments. The theory behind this is that if a company invests in tangible assets, it should yield no more than a 10% return on that investment. The profit that is greater than 10% is attributed to assets housed in foreign low-tax-rate jurisdictions. Therefore, that excess profit must be sourced to the United States and taxed at a lower rate. This is achieved by permitting a deduction and a credit at the federal level. The IRC §250 deduction specifically provides C-Corps with a 50% deduction and a foreign tax credit on 80% of the foreign taxes paid. Partnerships and other pass-through entities are not entitled to a 50% haircut, as the income is passed through to the partners or shareholders, who report their aggregated share of GILTI on their returns.

Big Picture Q&A:

1. Is GILTI a dividend or deemed dividend for Maryland Tax Purposes?

Given the nature of the GILTI Income, it is not a traditional dividend or deemed dividend. Per MD law, § 10-307, corporations received a 100% dividend received deduction if the taxpayer owned greater than 50% of the outstanding shares of capital stock and the paying corporation was organized under a foreign jurisdiction. A 100% dividends received deduction was permitted, as MD followed the federal treatment of the DRD.

2. Are GILTI and the corresponding IRC §250 deduction included in the Maryland Tax Base?

GILTI is included in federal adjusted gross income on Line 28 of the federal 1120, and the IRC §250 deduction is located on Line 29b. Although MD reports Line 28 income on Line 1A and Special Deductions from Line 29b, its true starting point, net of special deductions, is on Line 1C. Therefore, GILTI net of IRC §250 will be in the Maryland tax base.

3. Is a foreign tax credit available to offset the impact of GILTI per the current Maryland law?

Per Bulletin 05-19, there is no foreign tax credit available in the Maryland tax code, so taxpayers will have to include the GILTI and IRC §250 deduction in taxable income. Therefore, GILTI net of IRC §250 will be in the tax base with no offsetting credits. When calculating quarterly estimated payments for 2019, taxpayers should strongly consider these implications in order to avoid underpayment.

4. How should GILTI be captured in the state apportionment factor? Is there a risk of misrepresentation in the apportionment factor with Maryland's single sales factor phase-in?

As GILTI is included in the state tax base, apportionment relief is available for taxpayers. Per the Comptroller, GILTI income is attributable to intangibles, so it must be included in the sales factor numerator and computed based on the average of the property and payroll factors. Given Maryland's single sales factor phase-in enacted in 2018, the sales factor will carry more weight each year. The denominator will be the total Gross GILTI not including the IRC §250 deduction. Therefore, the MD apportionment factor will be diluted and potentially hinder the ability of taxpayers to accurately apportion income to Maryland.

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