NEW JERSEY PROVIDES G.I.L.T.I. GUIDANCE

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Federal tax law has introduced a new type of gross income. The provisions applicable to Global Intangible Low Tax Income ("G.I.L.T.I.") are designed to stop U.S. companies from shifting their profits to offshore jurisdictions. All states can incorporate parts of Federal law in one of three ways:

- Automatically follow the new Internal Revenue Code (the "Code") unless legislation affirmatively decouples, a process called "rolling conformity."
- Adopt all or part of the Code as it exists on a particular date, requiring legislative updates each time the Code changes, a process called "static conformity."
- Conform selectively, incorporating certain federal provisions or definitions by reference, a process called "selective conformity."

New Jersey uses selective conformity. State responses to international tax provisions, particularly those pertaining to the inclusion of G.I.L.T.I. remain substantially unresolved. The taxation of G.I.L.T.I. would represent an uncompetitive departure from typical approaches to state taxation and raises constitutional issues in many states.[1]

Most states compute their corporate taxable income using the Federal taxable income reported on line 28 or line 30. Therefore, Federal changes affect the states' taxable income. New Jersey is not any different; its starting point for calculating entire net income ("E.N.I.") is the Federal income tax before the net operating loss deduction and special deductions. Therefore, the income under the G.I.L.T.I. regime is included in the E.N.I.

The New Jersey Division of Taxation (the "Division") issued guidance[2] on G.I.L.T.I. treatment under Code §951 and the deductions allowed under Code §250. The Division is planning to issue regulations consistent with this guidance. According to this guidance, G.I.L.T.I. is not treated as dividend or deemed dividend income for New Jersey Corporate Business Tax ("C.B.T.") purposes. It is a separate category of income and is not treated as distributions from earnings and profits. Treatment as a dividend would escape New Jersey tax.

New Jersey allows the Code §250(a) deductions for New Jersey C.B.T. purposes, but such deductions are allowed only to the specific taxpayer that included the respective G.I.L.T.I. on its federal and New Jersey C.B.T. returns, and that actually took the deductions for federal tax purposes. If a taxpayer is not allowed the Code

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[1] "Toward a State of Conformity: State Tax Codes a Year After Tax Reform," *Tax Foundation*, January 28, 2019.

[2] TB-85(R) Issued December 24, 2018.

§250(a) deduction for federal tax purposes, then they will not be allowed the deduction for New Jersey C.B.T. purposes.

New Jersey sources the G.I.L.T.I. as an “all other business receipt,” as the Division thinks it will be inequitable to source it as “other business receipts,” thereby subjecting the entire amount to New Jersey tax. The Division has determined that G.I.L.T.I. constitutes displaced U.S. income at least in part. In order to prevent distortion to the allocation factor and arrive at a reasonable and equitable level of New Jersey taxation, all corporation business taxpayers filing Form CBT-100, New Jersey Corporation Business Tax Return or Form BFC-1, Corporation Business Tax Return for Banking and Financial Corporations will calculate the portion of G.I.L.T.I. that is subject to New Jersey tax based on a separate special accounting method.

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The relevant allocation factor for computing the tax on net G.I.L.T.I. amount will be equal to the ratio of New Jersey’s gross domestic product (“G.D.P.”) over the total G.D.P. of every U.S. state (and the District of Columbia) in which the taxpayer has economic nexus. G.D.P. amounts should be based on the most recent quarter’s data published by the U.S. Bureau of Economic Analysis as of the end of the taxpayer’s privilege period.

For example, assuming economic nexus in all 50 states, the current ratio of New Jersey G.D.P. for allocation purposes approximates 3.1%. When applied to the net G.I.L.T.I. amount (after reduction for the 50% Code §250 deduction), this results in taxation of approximately 1.6% of gross G.I.L.T.I.

Some see this as an aggressive approach by New Jersey. The Council on State Taxation (“C.O.S.T.”) has expressed concern with this approach and has offered the State of New Jersey a highly technical critique of the guidance.[3]

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[3] Karl A. Frieden, January 22, 2019, Re: COST’s Concerns with TB-85R, issued December 24, 2018 (“Tax Conformity to IRC Sec. 951A (GILTI) and IRC Sec. 250 (FDII)”).