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New York Clarifies GILTI Exemption; New Jersey Now Lone Major Commercial State to Significantly Tax Foreign Income

The STAR Partnership congratulates New York leaders on enacting a policy that will increase investment and quality jobs in the state with the passage of S. 6615. With this action from New York, New Jersey is now the only major commercial state not to exempt the majority of so-called Global-Intangible Low Taxed Income (GILTI) from the state corporate income tax.

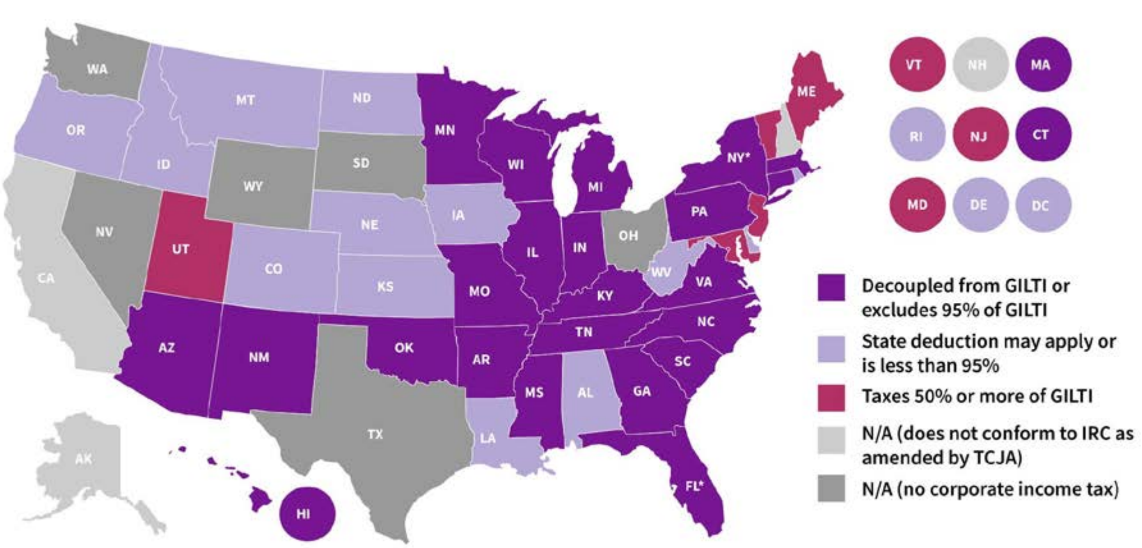
"New York took an important step in recognizing the harmful and unconstitutional effects of including foreign income in the tax base," said Stephen P. Kranz, Partner, McDermott Will & Emery.

Twenty-three states have either decoupled from GILTI or exclude 95 percent of GILTI from the state tax base. In another 14 states, the state has a deduction that may apply to GILTI, or the deduction for GILTI is less than 95 percent. Only five states tax 50 percent or more of GILTI.

Recognizing the flaws associated with including GILTI in the tax base, only one of the 18 states which have 10 or more Fortune 500 company headquarters include 5% or more of GILTI in their tax base: New Jersey. New Jersey's tax on GILTI is 10 times higher than any other major commercial state. The other top states for large corporate headquarters recognize that including GILTI in the tax base is akin to shooting oneself in the foot.

"New Jersey should follow New York's lead and end its time as the only major commercial state to adopt this unprecedented and growth-stifling policy of taxing foreign income" said Joe Crosby, CEO of MultiState Associates.

State Action on TCJA's GILTI Provisions



*Legislation in Florida and New York is pending gubernatorial approval.

Legal Experts Agree: Taxing GILTI is problematic for states.

"...despite the name, not all GILTI is abusive tax haven income. The calculation of GILTI is complicated and can capture legitimate manufacturing and financial services...**Not all states, however, can tax GILTI, despite what their legislatures might want. They have to abide by that pesky U.S. Supreme Court.**"

- *Richard D. Pomp, Alva P. Loiselle Professor of Law at the University of Connecticut School of Law*

"…[T]he apparent benefits of conformity and increased revenue that may well be offset by the costs of conformity, and controversies over the inclusion that could well lead to the conclusion that **inclusion of GILTI is not worth the candle**."

- *Walter Hellerstein, Distinguished Research Professor Emeritus and the Francis Shackelford Professor of Taxation Emeritus at the University of Georgia Law School and chair of the State Tax Notes Advisory Board*

"Tax preparers, when asked about conformity, almost unanimously agree that conformity is always the right answer, and that anything but conformity creates chaos for the preparer. **But for GILTI, nonconformity might in fact be the more efficient and viable approach**."

- *Kathleen K. Wright, director of the SALT program in the School of Taxation at Golden Gate University, San Francisco*

"Based on the significant differences in federal and state taxation of GILTI from both a policy and operational perspective, the states should decouple from the GILTI provision. Moreover, from a constitutional standpoint, **the taxation of GILTI by separate company filing states directly violates the U.S. Supreme Court's decision** in Kraft, because of the differential treatment of foreign-source and domestic-source income. And for combined reporting states, GILTI must be afforded appropriate apportionment factor representation for its taxation to pass constitutional muster."

- *Karl A. Frieden, vice president and general counsel with the Council on State Taxation; Ferdinand S. Hogroian; former senior tax and legislative counsel with the Council On State Taxation; Joseph X. Donovan, Counsel with Sullivan & Worcester LLP; and Chelsea A. Wood associate with Sullivan &; Worcester*

"While GILTI may easily roll off the tongue, the clever juxtaposition of words (global intangible low-taxed income) by the TCJA drafters to derive a judgment-laden imposition may have encouraged some states to take an aggressive position regarding how they would treat GILTI for tax purposes. **But my answer to the question "Should states treat GILTI as U.S. shareholder income and then subject that income to tax?" is simple: No.**"

- *Amy Nogid, Counsel at Mayer Brown*

Most states with a high concentration of Fortune 500 companies don't tax GILTI.

State	**Number of Fortune 500 Companies**	**Is GILTI included in the tax base?**
California	54	No
Colorado*	10	No
Connecticut	16	No
Florida*	15	No
Georgia	16	No
Illinois	32	No
Massachusetts	12	No
Michigan	19	No
Minnesota	19	No
Missouri	10	No
New Jersey	**21**	**Yes**
New York	52	No
North Carolina	12	No
Ohio	27	No
Pennsylvania	21	No
Texas	52	No
Virginia	23	No
Wisconsin	10	No

**Note: Colorado has a partial exemption for foreign source income that could apply to GILTI. Florida and New York have passed legislation to exempt GILTI from the tax base, but as of June 24, 2019, they have not been signed by the Governor.*