GIL 24-20-1 Income Tax: Global Intangible Low-Taxed Income and Foreign-Derived Intangible Income

Supersedes GIL 24-19-3, issued December 10, 2019

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November 19, 2020

Dear XXXX,

This guidance document is in response to several inquiries regarding Nebraska's treatment of Global Intangible Low-Taxed Income (GILTI) and Foreign-Derived Intangible Income (FDII).

Based on the information provided in those inquries, we are providing this General Information Letter (GIL). GILs address general questions; provide analysis of issues; and direct taxpayers to the Nebraska statutes, DOR regulations, revenue rulings, or other sources of information to help answer a question. A GIL is a statement of current DOR policy, and taxpayers may rely on DOR to follow the principles or procedures described in a GIL until it is rescinded or superseded. Current regulations, revenue rulings, information guides, taxpayer rulings, and other GILs that may be helpful to you are available at revenue.nebraska.gov.

The Tax Cuts and Jobs Act (TCJA), enacted in 2017, created sections 951A and 250 of the Internal Revenue Code (IRC). Section 951A requires taxpayers who are United States shareholders of a controlled foreign corporation (CFC) to include the taxpayer's GILTI in the taxpayer's gross income. GILTI is calculated as the taxpayer's net CFC tested income over the taxpayer's net deemed tangible income return. Section 250(a) allows domestic corporations to claim a deduction against a portion of GILTI from its gross income. Section 250(a) also allows a deduction from gross income of a portion of a domestic corporation's FDII. Nebraska law conforms with IRC sections 951A and 250(a).

United States shareholders of CFCs must include GILTI in their gross income for each taxable year and report GILTI on the applicable federal return. Federal Taxable Income (FTI), as adjusted, for corporate entities and federal adjusted gross income (AGI) for individuals are the Nebraska tax bases. Because GILTI is included in FTI, as adjusted, and AGI, GILTI is also included in Nebraska taxable income and must be reported on the appropriate Nebraska return. For domestic corporations, the FTI amount includes the IRC section 250(a) GILTI and FDII deductions (§ 250(a) Deductions) as reported on the U.S. Corporation Income Tax Return, Form 1120.

IRC Sections 951A and 250(a) on the Nebraska Tax Return

Any IRC section 951A income included in the taxpayer's federal return as FTI, as adjusted, for corporations or AGI for individuals must also be included in the Nebraska tax return. For domestic corporations, the § 250(a) Deductions are included in the calculation of federal taxable income. As FTI is the starting point for calculating Nebraska Taxable Income (NTI), the § 250(a) Deductions are already included in the calculation of NTI and are not separately deducted on the Nebraska tax return.

Foreign Dividends Deduction on Nebraska Tax Returns

Nebraska law allows a deduction from FTI and federal AGI, to the extent so included, for any dividends or deemed dividends from corporations that do not meet the requirements of IRC § 243 (Neb. Rev. Stat. §§ 77-2716(5) and 77-2734.04(23)). Examination of the IRC and related Treasury Regulations establish that GILTI is not a foreign dividend except for IRC § 78 dividends that are attributed to GILTI pursuant to IRC § 250(a)(1)(B)(ii). Therefore, under Nebraska law, with the exception of these IRC § 78 dividends attributed to GILTI, there is no exclusion for GILTI income as a foreign dividend or deemed foreign dividend.

Apportionment

If a corporate taxpayer is taxable in both Nebraska and one or more other states, the income of the corporate taxpayer must be apportioned to Nebraska based on the Nebraska receipts as compared to all receipts as provided by Neb. Rev. Stat. §§ 77-2734.05 to 77-2734.15. Sales includes all gross receipts of the taxpayer. Neb. Rev. Stat. § 77-2734.04(20). Neb. Rev. Stat. § 77-2734.10 instructs that the "sales factor shall include income from intangibles." Thus the denominator of the sales factor should include the entire amount of GILTI.

Generally, GILTI is intangible value generated by United States operations but realized by a CFC. This activity may include research and development of patents and trademarks, or generating brand recognition that is tied to marketing and selling products in the United States. Sales other than sales of tangible personal property are in the numerator of the apportionment formula as provided in Neb. Rev. Stat. § 77-2734.14(3)(a) through (k). Subdivisions (a) through (j) deal with sales of services, interest and dividends from intangible assets held in connection with a treasury function, interest and fees from loans, credit cards and other financial instruments, and licenses and rentals. Since GILTI income is not derived from intangible assets held in connection with a treasury function, none of these subdivisions apply in the case of GILTI. Subdivision (k) states "Sales other than sales of tangible personal property not specifically addressed in this subsection must be sourced so as to fairly represent the extent of the taxpayer's business activity in this state."

There does not appear to be a uniform way to identify how much activity that results in GILTI is associated with Nebraska to "fairly represent the extent of the taxpayer's business activity in this state." Neb. Rev. Stat. § 77-2734.14(3)(k). However, a part or all of the GILTI amount included in the denominator should be included in the numerator of the sales factor to the extent that part or all of the intangible value that gives rise to GILTI is connected with and fairly attributable to developing or maintaining the intangible property in Nebraska.

For the Tax Commissioner

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