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GILTI High Tax Election in the United States

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Net income earned by a Controlled Foreign Corporation ("CFC") may be subject to immediate US taxation to US shareholders, whether or not distributed. This results from the Global International Low Tax Income (GILTI) provisions of the US Tax Cuts & Jobs Act of 2017.

The effective tax rate on this income, governed by GILTI, is 10.5% for C corporations and as high as 37% for individuals. After 2025, the rate for C corporations increases to 13.125%. There are two significant factors in determining whether US shareholders will be subject to tax on a CFC's net income, explain the experts from Marcum LLP*. These factors are:

- The level of asset investment by the CFC in its own country. The GILTI provisions will tax, each year, the excess return of a CFC above 10% of foreign depreciable assets, known as the Qualified Business Asset Investment (QBAI).
- The effective foreign income tax rate on the CFC's earnings.

When to Include GILTI Income in US Income

Once the GILTI amount is determined, the US shareholder will be required to include the allocable share of this amount in US taxable income. There is an exclusion available equal to 50% of the GILTI amount, and the other 50% is taxed to the US shareholder in accordance with applicable federal income tax rates. For a corporate shareholder, the GILTI income is taxed at 21%, after taking into consideration the exclusion, for an effective tax rate of 10.5%.

Foreign income taxes paid by the CFC can be taken as a tax credit against US tax on GILTI income, subject to an 80% reduction. As such, if the CFC's effective foreign income tax rate (determined under US tax principles) is at least 13.125%, generally there should be no net US income tax due on a corporate US shareholder's GILTI income, after application of exclusions and

foreign tax credits. US individual shareholders with GILTI income can, by election, be entitled to the same exclusions and credits as a corporation.

Make Use of the Tax Election Annually

US tax regulations finalised in July 2020 provide for a GILTI High Tax Election. Under this election, a US shareholder of a CFC will not be required to include GILTI income on his/her/its US income tax return if the CFC's effective tax rate, as determined under US income tax principles, exceeds 18.9%. Once this threshold is met, a US shareholder can elect to exclude a tested unit's (defined below) income entirely in determining the GILTI amount.

The election may be made on an annual basis and applies, consistently, to all CFCs owned by the same domestic controlling US shareholder and to all of a CFC's US shareholders. A controlling US shareholder will provide notification to non-controlling US shareholders if the election is made.

We can help navigate the GILTI rules for US shareholders of foreign entities.
Mark Chaves, CPA, Co-Leader International Tax Services Practice, Marcum LLP*, Miami, Florida, USA

It is important to note that the GILTI High Tax Election is made on a tested unit basis, say the Marcum LLP advisers. A single CFC may be comprised of numerous tested units, or may itself constitute a tested unit. A tested unit may be a CFC, a branch of a CFC in certain cases, or certain entities in which a CFC has an interest. Tested units that are resident in the same country are combined.

The GILTI High Tax Election may not be beneficial in all cases. Clients should be careful to properly analyse the pros and cons before making the election on their US income tax returns.

For further information please contact:

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*Marcum LLP is the exclusive associated partner of ECOVIS International for accounting, tax and audit in the United States of America.