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Report No. 1528
May 4, 2026

The Honorable Richard Lee
Commissioner
New York City Department of Finance
One Centre Street, Room 500
New York, NY 10007

Re: NYSBA Tax Section Report No. 1528 – Comments Concerning the Implications of the One Big Beautiful Bill Act for New York City Taxation of IRC Section 951A Income

Dear Commissioner Lee:

We are writing to address New York City's taxation of income includible under Internal Revenue Code ("**IRC**") Section 951A and to discuss how recent changes in the federal regime adopted by the One Big Beautiful Bill Act (the "**OBBBA**") have magnified concerns over how the City's Business Corporation Tax ("**BCT**") applies to such income.[1]

[1] This letter may be cited as New York State Bar Association Tax Section Report No. 1528, "Report Concerning the Impact of the OBBBA on New York City Taxation of IRC Section 951A Income" (May 4, 2026). The principal authors of this letter are Alysse McLoughlin, Jack Trachtenberg, and Mary Jo Brady. Helpful contributions were made by Lawrence Garrett, Richard Goldstein, Irwin Slomka, Zal Kumar, Michael Hilkin, Marc Simonetti, Andrew Walker, Michael Schler, and Kim Blanchard. This report reflects solely the views of the Tax Section of the New York State Bar Association (the "**Tax Section**") and not those of its individual members or any other party. Opinions expressed are those of the Tax Section and do not represent those of the New York State Bar Association unless and until they have been adopted by its House of Delegates or Executive Committee.

This letter first summarizes certain relevant changes to the IRC enacted by the OBBBA from a federal income tax standpoint, effective for tax years beginning after December 31, 2025.[2] These federal changes expand the foreign income that is subject to current inclusion and taxation under section 951A, undercutting the notion that IRC Section 951A targets only intangible income that has been shifted abroad. It is now clear that IRC Section 951A is intended to result in inclusion of most active foreign business income.

The letter then explains why we believe that, because New York City generally does not include income earned from non-U.S. operations in its apportionable tax base, notably with respect to subpart F income, as a tax policy matter (i.e., equal treatment of similarly situated taxpayers), New York City also should not include IRC Section 951A income in its apportionable tax base in the first instance. However, we recognize that excluding IRC Section 951A income from the tax base would require legislative action, which is beyond the scope of this letter. Accordingly, the letter explains why, assuming New York City continues to include IRC Section 951A income in its apportionable tax base, New York City should not tax such income differently than it taxes income earned from U.S. operations.[3] As discussed further below, we believe New York City should consider

[2] References in this letter to "**IRC Section**" or "**IRC §**" are to sections of the IRC.

[3] We are specifically addressing the New York City BCT regime in this letter, and not the New York State Franchise Tax on Business Corporations ("**NYS Franchise Tax**") regime, because, currently, the NYS Franchise Tax includes in the tax base only 5% of a taxpayer's IRC Section 951A income. Tax Law § 208.6-a(b) (Exempt CFC income is defined as "ninety-five percent of the income required to be included in the taxpayer's federal gross income pursuant to subsection (a) of Section 951A of the internal revenue code, without regard to the deduction under section 250 of the internal revenue code, received from a corporation that is not included in a combined report with the taxpayer . . . "). We believe that New York State should follow the same principles set forth in this letter with regard to the 5% of IRC Section 951A income that it does include in the tax base. Nevertheless, we do not specifically address the NYS Franchise Tax rules in this letter because the impact from New York State's failure to follow those principles is less significant than the impact from New York City's failure to follow those principles due to the significantly smaller amount of foreign income included in the NYS Franchise Tax base.

exercising its existing authority under Administrative Code Section 11-654.2.12[4] to achieve a proper allocation.

IRC Section 951A at the Federal Level: Certain limited categories of income earned by controlled foreign corporations ("**CFCs**") – generally passive income or types of income that can easily be shifted abroad – have long been includible by applicable U.S. shareholders[5] in income on a current basis under IRC Section 951 of the Subpart F regime discussed further below. In 2017, with the passage of the Tax Cuts and Jobs Act, a new section was added to the IRC, imposing tax currently on certain other foreign income earned by CFCs. This provision – IRC Section 951A – imposed tax on the U.S. shareholder's share of the CFC's "Global Intangible Low-Taxed Income" ("**GILTI**"). IRC Section 951A was enacted to supplement the existing subpart F regime of the IRC and followed much of its architecture. While subpart F income was traditionally limited to passive or easily shifted (mobile) income, GILTI potentially encompassed much more of a CFC's income than the CFC's subpart F income already subject to current taxation. Thus, IRC Section 951A largely eliminated deferral of the shareholder-level tax on foreign income whether or not it was passive, mobile, or distributed by a CFC to its U.S. shareholder in the form of a dividend.

[4] This section provides "[i]f it shall appear that the receipts fraction determined pursuant to this section does not result in a proper reflection of the taxpayer's business income or capital within the city, the commissioner of finance is authorized in his or her discretion to adjust it, or the taxpayer may request that the commissioner of finance adjust it, by (a) excluding one or more items in such determination, (b) including one or more other items in such determination, or (c) any other similar or different method calculated to effect a fair and proper allocation of the business income and capital reasonably attributed to the city. The party seeking the adjustment shall bear the burden of proof to demonstrate that the receipts fraction determined pursuant to this section does not result in a proper reflection of the taxpayer's business income or capital within the city and that the proposed adjustment is appropriate."

[5] Generally, a U.S. shareholder for this purpose is a U.S. person that owns 10% or more of the CFC.

The amount of a taxpayer's GILTI was equal to its share of net CFC tested income minus an amount that was deemed equal to a normal return on the CFC's tangible investments.[6] Generally, to arrive at a U.S. shareholder's GILTI, 10 percent of CFC qualified business asset investment ("**QBAI**"), excluding certain attributable interest expenses, was deducted. QBAI was a CFC's adjusted basis in its tangible assets.[7] Allowing the deduction of 10% of QBAI from net CFC tested income ("**NCTI**") was an attempt to exempt a routine return on a CFC's tangible business assets from inclusion as GILTI.

The IRC Section 951A regime may have been an effort to tax income that had been shifted abroad to low- or no-tax jurisdictions, with GILTI intended to target excess profit, or non-routine returns, of CFCs. However, if GILTI was aimed at taxing income from intangible assets shifted outside of the US to low- or no-tax jurisdictions, GILTI was not particularly effective at isolating this type of income. The formula used to compute GILTI captured not only income from intangibles but could also capture other active foreign business income, especially for service companies and for companies with largely depreciated assets.

The effective tax rate imposed on GILTI was reduced by IRC Section 250, which provided a deduction equal to a percentage of a taxpayer's GILTI income. The deductible percentage was originally 50 percent of GILTI (which reduced the tax rate imposed on GILTI from the 21% corporate tax rate to 10.5%), and was scheduled to decrease to 37.5% for tax years beginning after December 31, 2025 (which would have increased the tax rate imposed on GILTI to 13.125%).[8] Federal tax on GILTI was, as is the tax imposed on subpart F income, offset by a credit for foreign income taxes paid on the GILTI income. Unlike the subpart F foreign tax credit, the GILTI foreign tax credit was subject to a 20% haircut, which effectively increased the GILTI rate from 10.5% to 13.125%.[9]

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[6] IRC § 951A(b) as in effect prior to the OBBBA.

[7] IRC § 951A(b)(2) as in effect prior to the OBBBA.

[8] IRC § 250(a) as in effect prior to the OBBBA.

[9] IRC § 960 as in effect prior to the OBBBA. As an alternative to the foreign tax credit, in certain circumstances, a U.S. shareholder may elect to exclude foreign income from Subpart F income or

Effective for tax years beginning after December 31, 2025, changes were made to the IRC Section 951A regime by the OBBBA. These changes, including the elimination of QBAI in determining income subject to inclusion under IRC Section 951A and the explicit renaming of GILTI as NCTI, further undercut the rationale that IRC Section 951A was intended to tax only income from intangible property diverted to low- or no-tax jurisdictions.[10]

After the OBBBA, the contention that IRC Section 951A is targeting only foreign intangible income is no longer plausible, because NCTI does not provide a deduction for a routine return on tangible business assets. The retirement of the statutory term "Global Intangible Low-Taxed Income" implies that, if it ever did, Congress no longer intends to tax only low-taxed intangible income under Section 951A.

To fully understand how IRC Section 951A works and why it does not result in current taxation only of low-taxed intangible income, it is helpful to review the history behind subpart F. When subpart F was enacted in 1962, it followed much debate about how to prevent U.S. taxpayers from setting up CFCs to earn passive or easily shifted (mobile) income such as investment income that was not subject to current tax in the U.S. Congress did not think it could simply tax the income of the CFC at the shareholder level because U.S. and international norms prevented one country from taxing the income of a corporation formed in another country. Congress understood that the shareholder would be taxed when the CFC paid a dividend; the problem was that the CFC might be able to defer paying dividends indefinitely. Accordingly, subpart F was designed to eliminate this ability to defer dividends attributable to passive or mobile income. Subpart F does this by taxing what can be viewed as a dividend-equivalent amount or what, at the state level, is sometimes referred to as a "deemed dividend."

GILTI when the relevant net item of income is subject to tax in a foreign country at an effective rate of greater than 90% of the maximum U.S. corporate tax rate (the so-called "**high tax exception**").

[10] For taxable years beginning after December 31, 2025, the OBBBA generally set the IRC Section 250 deduction at 40% of NCTI and decreased the haircut of the deemed paid foreign tax credit applicable under IRC Section 960 to 10%.

Because subpart F was based on a corporate model that taxed a U.S. shareholder not on its subsidiaries' income, but only on amounts that would have been dividends had they been distributed by such CFC subsidiaries, subpart F income was limited to the CFCs' "earnings and profits" ("**E&P**"). Accordingly, when an actual dividend is paid out of E&P that was already subject to tax as subpart F income, it is not taxed again at the federal level, and E&P available for future dividends is reduced at that point in time.[11] Thus, the result at the federal level is that taxation on subpart F income results in a taxpayer being taxed as if its CFCs had actually paid dividends. Accordingly, there is no incentive to defer payment of a dividend with respect to impacted income.

IRC Section 951A (and the regime for GILTI or NCTI) was based on this subpart F architecture, although E&P is not a limitation in computing GILTI or NCTI. This history demonstrates that, to the extent that IRC Section 951A was enacted for reasons analogous to the reasons for the enactment of subpart F (i.e., to discourage shifting certain income and activity outside of the United States), in practical application, it required inclusion as GILTI of income that is not limited to income shifted abroad, low-taxed income, or income from intangibles. Enactment of subpart F ended the deferral of taxation on passive or most easily shifted (mobile) types of income. Enactment of IRC Section 951A and the taxation of GILTI then extended current inclusion treatment to what was deemed formulaically to be excessive profits of CFCs but in practice reached some ordinary operating income of CFCs. In addition, the OBBBA has changed IRC Section 951A to tax NCTI, rather than GILTI, thus effecting the elimination of deferral on nearly ***all*** CFC income, not merely traditional subpart F income.

Even though foreign corporations are not included in a federal consolidated tax return, the inclusion of NCTI in a U.S. taxpayer's federal taxable income results in taxation of income from foreign operations generated by CFCs. Through the foreign tax credit mechanism (or

[11] IRC § 959.

high tax exception),[12] U.S. taxpayers can be relieved of double federal income taxation to the extent NCTI has been subjected to tax outside of the U.S.

The Limits on a Jurisdiction's Ability to Impose Tax: While a full review of U.S. Commerce Clause and Due Process jurisprudence concerning state tax apportionment principles is beyond the scope of this letter, a brief review of some basic principles is necessary to understand our concerns regarding the proper New York City treatment of GILTI for tax years beginning prior to 2026, and of NCTI for tax years thereafter.

Pursuant to the Commerce Clause and the Due Process Clause, a state can tax only income that is properly attributable to the state.[13] There must be a "rational relationship between the income attributed to the State and the intrastate values of the enterprise" (*Mobil Oil Corp. v Commissioner of Taxes*, 445 US 425, 436-437; see also*, Allied-Signal, Inc. v Director, Div. of Taxation*, 504 US _____ , _____ , 112 S Ct 2251, 2255; *Container Corp. v Franchise Tax Bd*., 463 US 159, 165-166)."[14] Furthermore, the U.S. Supreme Court has determined that "[a] tax must be struck down if it seeks to "reach profits which are in no just sense attributable to transactions within [the taxing] jurisdiction." *Hans Rees' Sons*, 283 U.S. at 134.

When foreign commerce is involved, there are additional considerations that need to be addressed. In *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 448 , 99 S. Ct. 1813 , 60 L. Ed. 2d 336 [1979], as relevant concerning apportionment, the Supreme Court determined that a tax affecting foreign commerce raises a concern regarding the enhanced risk of multiple taxation, subjecting foreign commerce to double taxation to which domestic commerce is not exposed.

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[12] See n.9, *supra*.

[13] Matter *of British Land (Maryland), Inc. v. Tax Appeals Tribunal of the State of New York*, 85 NY2d 139 (NY Ct. App. 1995).

[14] *Id.*

A well-accepted method of determining the portion of a taxpayer's income that is properly attributable to a state is by means of application of an apportionment formula to a taxpayer's business income.[15] In our view, assuming that New York City continues to tax NCTI inclusions in the same manner as it currently taxes GILTI inclusions, New York City's business allocation factor statute, as applied to GILTI and presumably as applied to NCTI, fails to properly attribute a taxpayer's income to New York City.

New York City's Treatment of GILTI and NCTI: While the OBBBA adjusted the computation of income to be included in the U.S. tax base pursuant to IRC Section 951A, in the absence of any changes being made to the New York City Administrative Code, NCTI will be treated in the same manner for BCT purposes as GILTI.[16] The discussion below describes the current treatment of GILTI, and assumes that GILTI/NCTI inclusions will continue to be subject to New York City BCT and that NCTI will be subject to the same treatment under New York City BCT for years beginning after 2025 as previously applied to GILTI.

The Mechanics of New York City's Taxation of GILTI: The BCT uses federal taxable income as the starting point for determining a taxpayer's apportionable tax base. For purposes of conformity to the IRC, this reference does not fix entire net income to the IRC in effect on a specific date, but rather automatically includes, or "rolls," amendments to the IRC into the calculation of entire net income under the BCT unless and until enacted legislation specifically decouples the BCT from any particular amendment. Due to this

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[15] *Id.* ("[T]he taxing State need not identify and select out its specific intrastate income-producing activities so long as the corporation is operating a unitary business enterprise and the income is derived from the unitary business; it may then apply an apportionment formula to tax an appropriate proportional share of the interstate income of the enterprise (see*, Underwood Typewriter Co. v Chamberlain*, 254 US 113, 120-121; *Butler Bros. v McColgan*, 315 US 501, 509; see also*, Allied-Signal, Inc. v Director, Div. of Taxation*, 504 US, at _____ , 112 S Ct, at 2259 , *supra*).").

[16] This letter does not address considerations under the other New York City business income taxes, specifically the General Corporation Tax applicable to S corporations, the Unincorporated Business Tax, and the Banking Corporation Tax applicable to banking corporations that are also S corporations).

starting point, the BCT apportionable tax base includes the same income that is included at the federal level, unless the BCT statute provides for a specific modification.[17] Because there are no specific statutory modifications that exclude GILTI income in determining the BCT apportionable tax base, taxpayers subject to the BCT must include their federal GILTI amount, less the IRC Section 250 deduction, in computing their BCT apportionable tax base. Unlike at the federal level, there is no relief for GILTI that has been subject to tax abroad because New York City does not incorporate foreign tax credits into its system.[18]

The BCT treatment of GILTI is different from the BCT treatment of subpart F income, with subpart F income from unitary CFCs being specifically excluded from the apportionable tax base pursuant to the definition of other exempt income.[19] Subpart F income was likely excluded from the tax base because it was thought to be all passive income, but GILTI was taxed because it was thought to be income that had been shifted abroad. From a tax policy perspective and for purposes of ease of administration, we believe it would be preferable to exclude all CFC-generated income from the apportionable tax base, including both GILTI or NCTI, and subpart F income, which is already fully excluded from the base. However, because we recognize this would require legislative action, which raises a variety of considerations beyond the scope of this letter, we have simply assumed that New York City will continue to tax IRC Section 951A income, and therefore needs to address the proper

[17] NYC Admin. Code § 11-652.8 ("The term 'entire net income' means total net income from all *sources*, which shall be presumably the same as the entire taxable income, which, except as hereafter provided in this subdivision, (i) the taxpayer is required to report to the United States treasury department . . . ").

[18] If a U.S. shareholder elects to apply the high tax exception (see supra, n. 9) rather than claim foreign tax credits such that the high-taxed foreign income is not includible as GILTI/NCTI under IRC Section 951A then, in effect New York City would not tax the income or include it in the apportionable tax base. However, that depends on the happenstance of a *particular taxpayer's* overall federal tax planning. This can lead to inconsistent New York City tax treatment of taxpayers that are similarly situated from a New York City tax perspective.

[19] NYC Admin. Code § 11-652.5-a(b) ("Exempt CFC income" means (i) except to the extent *described* in subparagraph (ii) of this paragraph, the income required to be included in the taxpayer's federal gross income pursuant to subsection (a) of section 951 of the internal revenue code . . . ").

apportionment of GILTI (for tax years beginning prior to 2026) or NCTI (for tax years thereafter) included in the New York City tax base.

Currently, in computing BCT liability, taxpayers are required to classify GILTI either as business income or investment income, depending on the nature of the underlying stock.[20] For such purposes, the character of the stock that generates GILTI determines its classification. If the stock is considered investment capital, the income is treated as investment income; otherwise, the stock is considered business capital, and the resulting income is treated as business income. Because taxpayers subject to the BCT reduce their entire net income by taking the IRC § 250(a)(i)(B)(i) deduction into account, they must allocate the deduction between business and investment income as applicable.[21] If the stock of a foreign corporation that generates GILTI is business capital, as will usually be the case, then GILTI, net of the allocable deduction under IRC § 250, will be treated as apportionable business income.

Under N.Y. City Admin. Code § 11-654.2.5-a, the amount of GILTI net of the IRC § 250 deduction that is characterized as business income is included in the receipts factor denominator, but not the numerator. New York City has characterized this treatment as "factor representation . . . in order to properly reflect the taxpayer's business income and capital in the City."[22] However, this treatment is significantly different from how receipts of domestic corporations are incorporated into the business allocation factor on their own return, or on a combined return, which are the two most comparable circumstances for income that a corporation is deemed to recognize from the active business operations of foreign corporate subsidiaries. While GILTI reflects net income (i.e., gross income less deductions), domestic corporations (separately or if combined) typically include their gross receipts or revenue in the numerator (as applicable) and denominator when calculating the

[20] *NYC* Department of Finance, *Finance Memorandum 18-9* (rev. Feb. 11, 2021).

[21] *Id.*

[22] *Id*., p. 3.

business apportionment factor. As a result, inclusion in the denominator of GILTI (a net income concept), rather than the receipts that generated GILTI, may contribute to higher overall apportionment for a taxpayer than is appropriate (as the denominator will be smaller than it would be if gross receipts were included instead of net income).

Following are several examples that illustrate the effect this may have.

Examples: As currently required, inclusion of GILTI/NCTI in the receipts factor, instead of the revenue that generated GILTI/NCTI, results in less favorable treatment of income generated by foreign corporations from their foreign operations than the treatment of income generated by domestic corporations and partnerships. The following examples demonstrate this in five fact patterns: (i) a base case where a U.S. corporation has no CFC/NCTI; (ii) a scenario where the taxpayer has NCTI income, with the CFC generating NCTI having the same profit margin as the U.S. operations; (iii) a scenario where the taxpayer has NCTI income, with the CFC generating NCTI being more profitable than the U.S. operations; (iv) a scenario where the taxpayer has NCTI income, with the CFC generating NCTI being less profitable than the U.S. operations; and (v) a scenario where the taxpayer has NCTI income, with the CFC generating much more NCTI and receipts than are generated by the domestic corporation's domestic operations.

Example 1:

Base case – XYZ Corporation has no NCTI: XYZ Corporation, a U.S. manufacturing corporation that sells product A, has $1,000,000 of revenue from sales of product A and $900,000 of expenses (including purchases of inputs and overhead expenses (including salary, equipment, and rent)), resulting in $100,000 of federal taxable income. $50,000 of its sales are to New York City customers.

Assuming no adjustments in converting that federal taxable income to Jurisdiction A taxable income, XYZ Corporation will have a $100,000 apportionable tax *base*. That $100,000 is then apportioned to New York City by means of a business allocation factor, which is computed by dividing XYZ Corporation's New York City sales of $50,000 over XYZ Corporation's total sales of $1,000,000, resulting in a business allocation factor of 5%. Application of this business allocation factor to

XYZ Corporation's New York City apportionable tax base of $100,000 results in apportioned income of $5,000.

Example 2:

XYZ Corporation *has NCTI, and XYZ Corporation and the CFC have the same profit margin:* Same as in Example 1, but in addition XYZ Corporation owns a CFC that has NCTI of $100,000, with such NCTI generated by foreign sales of $1,000,000, none of which is attributable to customers in New York City.

Based on New York City's rules, XYZ Corporation will include $60,000 of the NCTI in its tax base (based on the 40% section 250 deduction), and its apportionable tax base now equals $160,000. Then, XYZ's business allocation factor will be computed by dividing XYZ Corporation's New York City sales of $50,000 over XYZ Corporation's total sales of $1,000,000 plus the $60,000 of NCTI included in the tax base. This results in a business allocation factor of 4.717%. Application of this business allocation factor to XYZ Corporation's New York City tax base of $160,000 would result in apportioned income of $7,547.

If, however, the income from foreign operations were treated as the income from domestic operations, the business apportionment factor would be computed by dividing XYZ Corporation's New York City sales of $50,000 over XYZ Corporation's total sales of $1,000,000 plus 60% of the CFC's sales in foreign jurisdictions ($600,000).[23] This would result in a business allocation factor of 3.125%. Application of this business allocation factor to XYZ Corporation's New York City tax base of $160,000 would result in apportioned income of $5,000. Please note that this is exactly what the tax base would be if no NCTI was included, which is the appropriate answer in this situation since this example assumes the operations outside of the US are commensurate and exactly as profitable as the sales within the US.

Example 3:

XYZ Corporation has NCTI, and XYZ Corporation is more profitable than the CFC*:* This computation (facts same as Example 2 other than the CFC's profit margin)

[23] Because only 60% of NCTI is included in apportionable income (i.e., by virtue of the 40% IRC Section 250 *deduction*), the examples in the text include only 60% of the CFC's gross receipts in the business allocation factor denominator as a matter of consistency; limiting the inclusion to only 60% of gross receipts in the denominator, as opposed to including 100%, should not be uniformly favorable or unfavorable to taxpayers.

illustrates that inclusion of NCTI in the business allocation factor denominator results in apportioned income of $6,311, which is more than the $5,000 if NCTI were not included, while inclusion of 60% of the receipts generating the NCTI instead in the denominator would result in apportioned income of $4,063, which is less than the amount of apportioned income if NCTI were not included.

Example 4:

XYZ Corporation has NCTI, and the CFC is more profitable than XYZ Corporation. In this situation (facts same as Example 2 other than the CFC's profit margin), inclusion of NCTI in the tax base and NCTI in the business allocation factor denominator results in apportioned income of $8,716, while inclusion of 60% of the receipts generating NCTI in the business allocation factor denominator instead would result in apportioned income of $5,938, which is still more apportioned income than if NCTI was not included in the tax base, but less than if only NCTI itself is included in the business allocation factor denominator.

Example 5:

XYZ Corporation has NCTI, and the CFC generates substantially more income and receipts than XYZ *Corporation.* In this computation, the CFC has a lower profit margin than XYZ Corporation but generates substantially more receipts than XYZ Corporation -- $10 million in receipts as compared to XYZ Corporation's $1 million in receipts. Inclusion of NCTI in the tax base and in the business allocation factor denominator results in apportioned income of $19,231 (which is substantially more apportioned income than if NCTI was not included in the tax base), while inclusion of NCTI in the tax base and 60% of the receipts generating NCTI in the business allocation factor denominator results in apportioned income of $3,571 (which is less than if NCTI was not included in the tax base).

	Example 1	Example 2		Example 3		Example 4		Example 5	
	No NCTI in Tax Base or Allocation Factor	NCTI in Base and in Business Allocation Factor	NCTI in Base and Foreign Receipts in Business Allocation Formula	NCTI in Base and in Business Allocation Factor	NCTI in Base and Foreign Receipts in Business Allocation Formula	NCTI in Base and in Business Allocation Factor	NCTI in Base and Foreign Receipts in Business Allocation Formula	NCTI in Base and in Business Allocation Factor	NCTI in Base and Foreign Receipts in Business Allocation Formula
XYZ 's Sales	$1,000,000	$1,000,000	$1,000,000	$1,000,000	$1,000,000	$1,000,000	$1,000,000	$1,000,000	$1,000,000
XYZ's Sales in New York City	$50,000	$50,000	$50,000	$50,000	$50,000	$50,000	$50,000	$50,000	$50,000
XYZ's Expenses	$900,000	$900,000	$900,000	$900,000	$900,000	$900,000	$900,000	$800,000	$800,000
CFC's Sales		$1,000,000	$1,000,000	$1,000,000	$1,000,000	$1,000,000	$1,000,000	$10,000,000	$10,000,000
60% of CFC's Sales		$600,000	$600,000	$600,000	$600,000	$600,000	$600,000	$6,000,000	$6,000,000
CFC's Sales in New York City		$0	$0	$0	$0	$0	$0	$0	$0
CFC's Expenses		$900,000	$900,000	$950,000	$950,000	$850,000	$850,000	$9,500,000	$9,500,000
NCTI		$100,000	$100,000	$50,000	$50,000	$150,000	$150,000	$500,000	$500,000
60% of NCTI in Tax Base		$60,000.0	$60,000.0	$30,000.0	$30,000.0	$90,000.0	$90,000.0	$300,000.0	$300,000.0
XYZ's Taxable Income	$100,000	$160,000	$160,000	$130,000	$130,000	$190,000	$190,000	$500,000	$500,000
Business Allocation Factor	5.000%	4.717%	3.125%	4.854%	3.125%	4.587%	3.125%	3.846%	0.714%
Apportioned Income	$5,000	$7,547	$5,000	$6,311	$4,063	$8,716	$5,938	$19,231	$3,571

We do not see a sound rationale for treating income from active foreign business operations differently than income from active domestic business operations. Most if not all states, perhaps based on a misunderstanding that GILTI only captures domestic profits shifted abroad via intangibles held overseas, have taxed GILTI without providing full factor representation (i.e., without including all of the receipts that generate the apportionable income). Some of these states have included just net GILTI in the receipts factor or, particularly egregiously, have included no income or receipts from GILTI in the receipts factor. These latter states have argued that GILTI should be attributed disproportionately or solely to the CFC shareholder's U.S. activities and factors, rather than to the CFC's active operations abroad. While this type of argument was unjustified prior to the OBBBA, the adjustments made to IRC Section 951A by the OBBBA, such as the elimination of QBAI, make such arguments even more unsupportable.

While GILTI often in practice included income from active business operations abroad other than intangible income, NCTI is clearly and intentionally designed to include almost all of a CFC's active income from its operations outside the U. S. If it is ultimately determined that IRC Section 951A income, net of the IRC Section 250 deduction, should remain in the New York City tax base, there is no reasonable tax policy that this active non-U.S. income should be disproportionately attributed to the U.S. shareholder's domestic activities through its domestic business allocation factor. Thus, if the IRC Section 951A

income is in the apportionable tax base, there is no reasonable tax policy argument for using net income instead of gross receipts from activities generating IRC Section 951A income in the U.S. shareholder's business allocation factor denominator, when domestic income of the U.S. shareholder is represented in the business allocation factor based on underlying gross receipts/revenue.[24]

The application of factor representation to IRC Section 951A income earned by a CFC that is included in the taxable income of a U.S. shareholder finds some additional support in the U.S. Supreme Court's recent decision in *Moore v. United States*.[25] In that case, the Court held that foreign CFC income included in a U.S. shareholder's base pursuant to IRC Section 965 can be subject to tax at the federal level. As the Court noted, IRC Section 965 "attributes the undistributed income of American-controlled foreign corporations to their American shareholders and then taxes the American shareholders on that income. By doing so, [IRC Section 965] operates in the same basic way as Congress's longstanding taxation of partnerships, S corporations, and subpart F income."

While *Moore* does not address state apportionment issues or the specifics of how partnership income, S corporation income, and income from CFCs are treated for federal purposes when attributed to the owners,[26] it does provide support for the basic premise that

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[24] While a detailed analysis of constitutional considerations is beyond the scope of this letter, such *different* treatment seems to be a clear violation of the Foreign Commerce Clause pursuant to the U.S. Supreme Court's opinion in *Kraft General Foods, Inc. v. Iowa Department of Revenue and Finance,* 505 U.S. 71 (1992).

[25] *602* U.S. 572 (2024).

[26] Under established principles of the flow-through system of federal taxation, a partner is treated as "carrying on the business" of the partnership (IRC § 701) and, for the purpose of determining the character of the partner's share of the partnership's income, is treated "as if such income were realized *directly from the source from which realized by the partnership …*" IRC § 702(b). *Similarly*, with an S corporation, "[t]he character of any item included in a shareholder's pro rata share under paragraph (1) of subsection (a) shall be determined as if such item were realized directly from the source from which realized by the corporation, or incurred in the same manner as incurred by the corporation." IRC § 1366(b). That these same rules do not apply with respect to income attributed to shareholders of CFCs is irrelevant for apportionment purposes. The purpose of an apportionment formula is to determine the amount of the taxpayer's income properly attributable

IRC Section 951A income is nothing more than income earned by a CFC that is attributed to its shareholders. Thus, in determining how much of a corporation's income is properly attributable to a jurisdiction, it makes sense that the jurisdiction include the factors of the entity earning the attributed income – whether it is a partnership, an S corporation, or a CFC – in the allocation formula used to apportion partnership or other attributed entity income to the jurisdiction.

For state tax purposes, an apportionment formula is solely designed to determine how much income is attributable to a state. There is no reason for treating income earned by a CFC and attributed to a U.S. shareholder different from income earned by a domestic corporation for determining how much income is properly attributable to a state. The mechanism of attribution makes it more equivalent to income included pursuant to a combined report than to a dividend, which involves entirely different realization, recognition, and calculation concepts. Accordingly, if New York City does continue to tax GILTI and, going forward, NCTI, the underlying sales factor of the CFCs generating such income should be included in the U.S. shareholder's business allocation factor.[27]

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to the taxing jurisdiction. To the extent income from operations – whether foreign or domestic – is attributable to the owner of an entity, such operations must get equal treatment in the allocation formula as income from the owner's own operations.

[27] Most of the Tax Section's Executive Committee agrees that it would be proper if the use of full factor *representation* for GILTI or NCTI sometimes resulted in less BCT liability for the taxpayer than if GILTI/NCTI was entirely excluded from the computation of BCT. This contrasts with the federal regime, where GILTI and NCTI are income amounts, with no negative inclusion from CFCs if the GILTI or NCTI computations result in a loss. Due to inclusion of only foreign income and not foreign losses, at the federal level the CFCs' operations can never result in a reduction of the income tax that is paid to the U.S. However, recognition needs to be taken of the rules to which states are subject. The Commerce Clause and the Due Process Clause mandate that a state can tax only income that is properly attributable to the state and the states cannot discriminate against interstate or foreign commerce. There would be discrimination against foreign commerce by not allowing operations in foreign jurisdictions to decrease the BCT in the same manner that domestic operations can decrease the BCT. Thus, a taxpayer's BCT liability should be allowed to be reduced when GILTI or NCTI is included, if this is the result of full factor representation. This letter also does not address the potential Foreign Commerce Clause discrimination resulting from the fact that

Conclusion: As stated above, in our view, New York City should not include IRC Section 951A income in the apportionable tax base, just as it does not include subpart F income in the base. Excluding IRC Section 951A income from the tax base would render factor representation unnecessary. However, such an exclusion would require a legislative change, which is beyond the scope of this letter.

Assuming that New York City continues to include IRC Section 951A income in the apportionable tax base, the regime for taxing it should provide for inclusion of the factors that generated the IRC Section 951A income in the apportionment formula. We can think of no tax policy reason for treating such income differently (and less favorably) than the treatment afforded to income from domestic operations for apportionment purposes. As a result, we believe New York City should consider exercising its existing authority under Administrative Code Section 11-654.2.12 to achieve a proper allocation. We acknowledge that this discretion ordinarily is exercised on a taxpayer-specific basis but believe there are compelling tax policy reasons to do so in this instance for GILTI/NCTI more generally. However, in the event New York City ultimately concludes it lacks the authority to achieve proper apportionment without legislative action, we would be happy to address in a future report, any detailed changes (including to the BCT) that would be necessary or appropriate.

Respectfully submitted,

Lawrence M. Garrett (Chair)

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only positive GILTI or NCTI is included in the tax base. Unlike with domestic companies, losses will never be included.

cc:

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