NOTICE: TAX CUTS AND JOBS ACT OF 2017
NORTH DAKOTA TAX TREATMENT OF INTERNATIONAL TAX PROVISIONS

CORPORATE INCOME TAX – FORM 40

Revised November 15, 2018

The Tax Cuts and Jobs Act (TCJA) was enacted on December 22, 2017. The TCJA, in part, makes significant changes to the taxation of foreign-sourced income earned by U.S. corporations and their foreign subsidiaries. The following provides guidance on the treatment for North Dakota tax purposes of IRC §§ 965 (deemed repatriation of foreign dividends), 951A (global intangible low-taxed income), 250 (foreign-derived intangible income), and 59a (base erosion anti-abuse tax). This guidance applies to the 2017 and subsequent tax years.

IRC § 965 - Deemed Repatriation of Foreign Income

The TCJA requires a mandatory "deemed repatriation of deferred foreign earnings" as Subpart F income. Internal Revenue Code (IRC) § 965 requires certain foreign corporations to add to Subpart F income the greater of their accumulated post-1986 deferred foreign earnings and profits, and deficits of certain foreign corporations (IRC § 965 Inclusion). These taxpayers are then able to deduct a portion of the IRC § 965 Inclusion (IRC § 965 Deduction). While the deemed repatriation is required to be reported in the 2017 tax year, a taxpayer may make a federal election to pay the liability over eight years. Corporations that have IRC § 965 income must include an *IRC 965 Transition Tax Statement* (*Transition Tax Statement*) with their federal return.

All taxpayers must treat the IRC § 965 Inclusion as Subpart F income. To properly reflect this in North Dakota's starting point, federal taxable income, the net of the § 965 Inclusion and § 965 Deduction amounts must be included in the federal taxable income amount reported on the North Dakota corporation income tax return, Form 40. IRC § 78 Gross-Up included in federal taxable income in arriving at the net federal tax liability (Line 5) on the Transition Tax Statement must also be included in the federal taxable income amount on Form 40 and treated the same as other Gross-Up would be treated.

The IRC § 965 Deduction will be treated the same as other federal deductions for dividends received and must be added back to North Dakota taxable income. This results in 100% of the IRC § 965 Inclusion being tentatively included in North Dakota apportionable income. The addback of the federal dividends received deduction on Form 40, Schedule SA, line 2, should be the sum of Form 1120, line 29b, and the IRC § 965 Deduction. Because the IRC § 965 Inclusion and § 965 Deduction are reported on the *Transition Tax Statement*, the statement must be filed with Form 40 when the IRC § 965 Inclusion is reported. A schedule detailing the computation of Line 5 of the Transition Tax Statement must also be included.

For taxpayers filing a return using the Worldwide Combined Reporting Method, the IRC § 965 Inclusion attributable to a controlled foreign corporation (CFC) that is included in the combined report is deducted as an intercompany dividend elimination. For taxpayers filing a return using the Water's Edge Method, 70% of the IRC § 965 Inclusion is deductible as a foreign dividend.

The federal election on the *Transition Tax Statement* to defer payments of the federal tax related to the IRC § 965 provisions does not impact the filing or timing of payment of North Dakota income tax.

A taxpayer that has already filed its 2017 North Dakota corporate income tax return and has not included the IRC § 965 income must file an amended return to properly report that income and associated deduction.

IRC § 951A – Global Intangible Low-Taxed Income (GILTI)

Beginning with tax year 2018, the TCJA created this new category of foreign income under IRC § 951A. GILTI requires the U.S. owner of a CFC to potentially include a portion of the CFC's earnings in the U.S. owner's federal taxable income. As deemed income to the U.S. owner, GILTI is comparable to Subpart F income. The TCJA also created a deduction related to the GILTI under IRC § 250 (GILTI Deduction).

North Dakota considers GILTI a foreign dividend that is included in the taxpayer's federal taxable income. Both the GILTI and the GILTI Deduction are reflected in federal taxable income, which is the starting point for computing North Dakota taxable income. The GILTI Deduction will be treated the same as other federal deductions for dividends received and must be added back to North Dakota taxable income. This results in 100% of the GILTI being tentatively included in North Dakota apportionable income.

All taxpayers should report GILTI as other foreign dividends are treated. For taxpayers filing a return using the Worldwide Combined Reporting Method, the GILTI attributable to a CFC that is included in the combined report for that year is deductible as an intercompany dividend elimination. For taxpayers filing a return using the Water's Edge Method, 70% of the GILTI is deductible as a foreign dividend, and 30% of the GILTI is includable in the sales factor for apportionment purposes.

Foreign-Derived Intangible Income (FDII)

For tax years beginning after December 31, 2017, the TCJA created this new deduction for corporations under IRC § 250. The deduction relates to certain federal taxable income to which a special federal tax rate is intended to apply. Because it does not relate to a deduction of dividends received, the amount is not included in the North Dakota addback of the federal dividends received deduction.

Base Erosion Anti-abuse Tax (BEAT)

The TCJA created this additional federal tax on corporations that is based on certain payments to related parties. If the volume of these payments are a certain amount of a corporation's total deductions, the BEAT is added to the corporation's federal income tax liability. Because the BEAT does not affect federal taxable income, it does not impact the computation of North Dakota tax.