TXCPA HOUSTON FOUNDATION 2020 TAX EXPO

GILTI and the Acronyms – The New International Tax Tour

Sebastien N. Chain

Chamberlain Hrdlicka White Williams & Aughtry, P.C.
1200 Smith St., Ste. 1400
Houston, TX 77002
Main: 713.658.1818
Dir.: 713.654.9633
Fax: 713.658.2553
Sebastien.chain@chamberlainlaw.com

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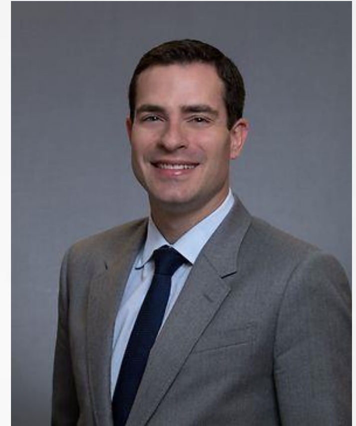


- Sebastien Chain concentrates his practice on federal tax controversy and criminal tax matters, and represents clients at the examination level, administrative appeals, and trial. He also represents clients in international and domestic tax planning and corporate matters. Mr. Chain's clients include domestic and foreign individuals, limited liability companies, corporations, partnerships, trusts and estates.

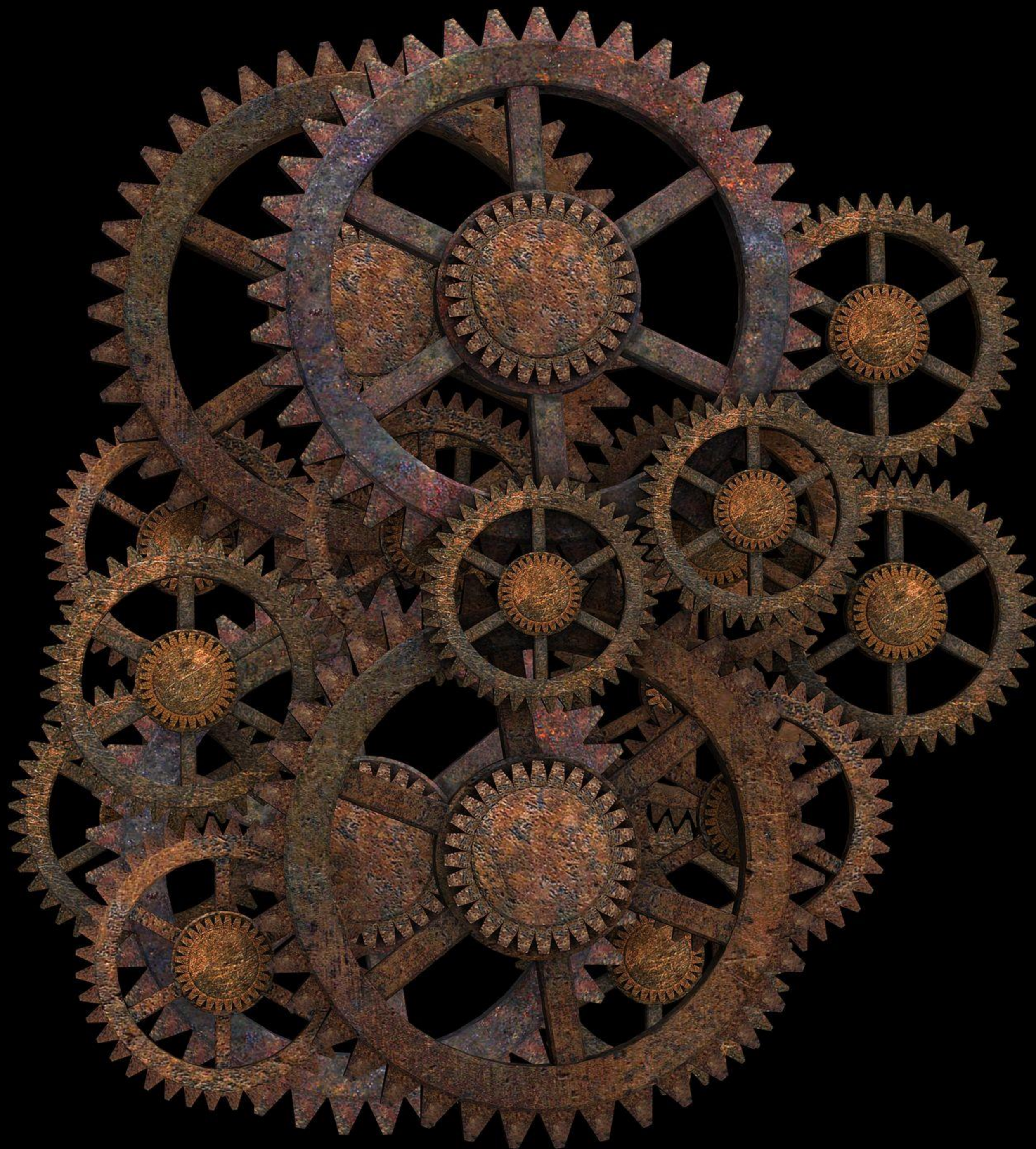
- Mr. Chain has extensive experience advising clients on the U.S. reporting requirements associated with owning foreign assets. He assists clients with unreported foreign income and foreign assets become compliant with their U.S. obligations, and he defends clients who have been charged with civil penalties or crimes related to foreign information returns. He has represented several hundred clients in connection with the IRS's various voluntary disclosure programs, including the 2009, 2011, 2012 and 2014 Offshore Voluntary Disclosure Programs, the current IRS Voluntary Disclosure Program, the Streamlined Offshore Compliance Procedures, and the Delinquent Information Return and FBAR Submission Procedures.

- Mr. Chain also advises U.S. and foreign clients on cross border tax planning issues. He has experience assisting foreign clients structure their inbound investments into the United States from an income and estate tax perspective, including investments in securities, U.S. real estate, and active business operations. He also advises U.S. clients on establishing foreign operations and reorganizing U.S. operations to move offshore. Mr. Chain also advises clients on the acquisition and divestiture of U.S. and foreign assets, and the impact of income tax treaties on these transactions.

- Mr. Chain is a frequent lecturer on international compliance requirements associated with owning foreign assets, including FATCA, FIRPTA, and the FBAR. He routinely speaks for the Texas and Houston Societies of CPAs and is an active member in the Tax Section, American Bar Association. He has been recognized as a Texas Rising Star in Tax for 2017, 2018, 2019, and 2020.

Tax Cuts and Jobs Act

- Signed into law December 22, 2017.
  - Additional guidance, regulations, and forms have been issued but still many open issues remain.
  - Other jurisdictions are arguing that new provisions violate trade agreements and tax treaties.
- The new law is not a replacement to the international tax system. It is an overlay. How it interacts with current law and structures will be a focus moving forward.
  - Similar to gears and cogs, if you change one thing-what else changes?
  - What can you change to take advantage of the new law?
- News and commentary largely focused on how it effects Apple and Exxon, but many businesses overseas are held via closely held entities. New law effects them, but in ways different than how it effects Fortune 100 companies.



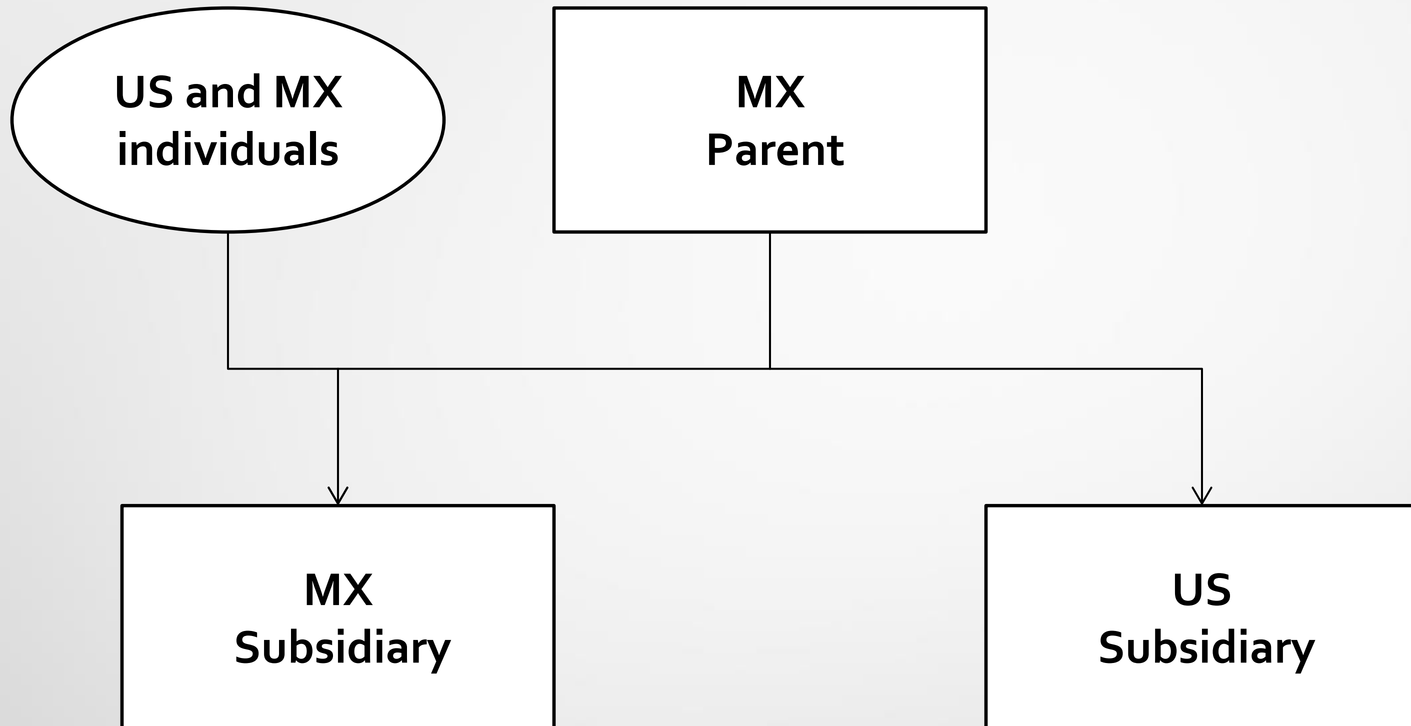
Tax Cuts and Jobs Act

- View from 10,000 Feet
  - New Anti Deferral Regime
    - GILTI, but Subpart F remains in effect
  - Participation Exemption Regime
    - DRD for dividends paid to U.S. corporate parent by foreign subs
  - Export Subsidy
    - FDII: 13.125% ETR on certain types of foreign source income earned by a US corporation
  - Anti-Hybrid Rules, New Inventory Sourcing Rule, Repeal of Grecian Magnesite Case (864(c)(8)), BEAT

Changes to Subpart F and CFC Provisions

- Subpart F still applies!
- Greater Application of High Tax Exception
  - Lower corporate tax rate means high tax exception kicks in at 18.9%.
- New US Shareholder Definition
  - Now includes owners of 10% of the corporation's value, not just vote.
- Eliminates 30 day holding requirement for Subpart F
  - If there is one day of CFC status…
- New US Shareholder Attribution Rule
  - With repeal of IRC § 958(b)(4), US persons can now have constructive ownership via foreign person through downward attribution.
    - Ex: Foreign parent company with US and foreign subsidiaries
  - Attribution rules impact CFC characterization but not share of Subpart F income. Will result in many more 5471s, although IRS did provide new constructive attribution exception in guidance and new instructions.

Example – Repeal of Section 958(b)(4)



1. 318(a)(3)(C) – US Sub deemed to own everything that MX Parent owns because it is more than 50% owned by MX Parent
2. MX Sub is now a CFC via constructive downward attribution.
3. US shareholders in MX Sub may have to recognize Subpart F or GILTI if more than 10% US Shareholder and/or more reporting (5471).

New GILTI Inclusion

- New income inclusion category – "Global Intangible Low-taxed Income" or GILTI under new IRC §951A.
  - *Prevents deferral of U.S. tax on certain items of income.*
  - *Misnomer – not really a tax on intangibles. More properly, it is a tax on income from non-tangible property.*
  - *Can greatly impact a service-based company.*
- Inclusion in manner similar to Subpart F rather than under Subpart F.
- Excess of each U.S. shareholder's pro rata share of "net CFC tested income" over his "net deemed tangible income return."

New GILTI Inclusion

- Final Regulations published in June 2019 and apply to tax years beginning after 2017.
  - Describe the manner of calculating the fundamental elements underlying the GILTI inclusion (e.g., tested income and QBAI).
  - Revise the definition of pro rata share for purposes of inclusions of both GILTI and Subpart F income.
  - Set out anti-abuse rules in respect of certain basis step-up transactions.
  - Adopt a hybrid aggregate/entity approach to US partnerships and their partners for the GILTI regime.
  - High Tax Exception applies but not yet… IRS must first finalize proposed regulations issued in June 2019.
- Reporting:
  - Report GILTI on Form 8992. Report the section 250 deduction on Form 8993. Report FTC on new basket on Form 1118.

The Mechanics

- Net CFC Tested Income
  - Tested Income
    - Excess of CFC's gross income over deductions.
    - Excludes ECI, Subpart F income, high tax Subpart F income, foreign branch income, dividends from related persons, O/G income.
  - Tested Loss
    - Excess of CFC's deductions over its gross income.
  - Guidance allows for aggregation of CFCs with tested income or loss.

The Mechanics

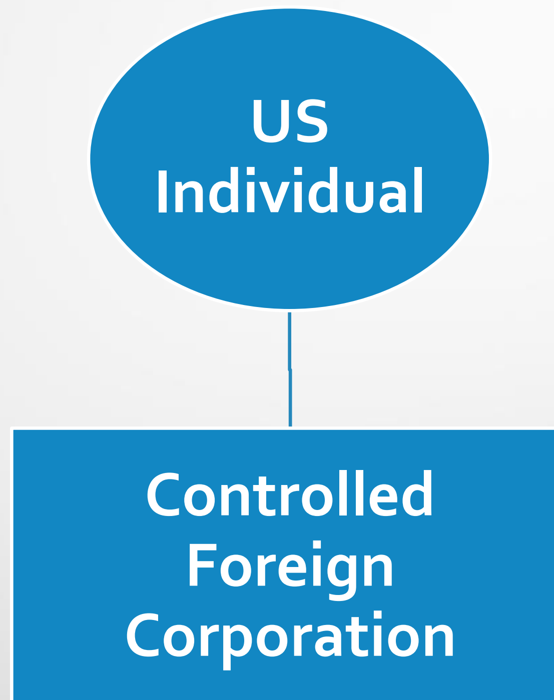
- Net Deemed Tangible Income Return
  - Excess of 10% aggregate pro rata share of QBAI over Specified Interest Expense.
  - Deduction that reduces net CFC tested income, but also reduces the amount of available FTC.
- QBAI
  - Includes only *specified tangible property*, which must*:* (i) be used in the trade or business and (ii) be depreciable under IRC § 167.
  - Average adjusted basis (measured per quarter).
  - Modified depreciation rules under IRC 168(g)(2).
- Specified Interest Expense
  - Tested Interest Income less Tested Interest Expense

GILTI and Individuals

- US Individuals
  - Applies to individuals who own interests directly in a CFC (and as we will discuss later, also through flowthrough entities)
  - Subject to tax on GILTI at their applicable marginal rate (up to 37% highest individual rate).
  - No indirect FTCs.
    - What about withholding tax on a subsequent distribution of the GILTI?

Example 1 – Noncorporate Owner

(Individual; Trust; S Corp, PS or DRE with Non-Corp Owners)



Total Global Tax = 30+25.9 = 55.9

70 GILTI (100 - 30 foreign tax)
GILTI Tax = 25.9 (70 X 37%)

- No FTC
- No deferral

Assume 100 of income earned by CFC, 30% corporate tax rate, and no QABI.

30 CFC tax (100 X 30%)
70 E&P remaining for dividend

1. What if have withholding Tax at F Corp level?
2. Section 962 to the rescue?

GILTI and US Corporations

- US domestic corporations are subject to tax on GILTI at a reduced rate that can result in an ETR of 10.5%.
  - The mechanism for the reduced rate is a deduction under IRC § 250. 50% reduction until 2026, then 37.5%.
  - Proposed Regulations under IRC § 250 released on March 6, 2019.
  - A domestic corporation must report and compute the deduction on new IRS Form 8993.
- Foreign Tax Credits
  - For a domestic corporation, there is a calculation to determine a deemed-paid credit of 80% of the inclusion amount.
  - Effectively, with respect to a domestic corporation, GILTI will not apply if foreign tax rate is above 13.125% through 2026.

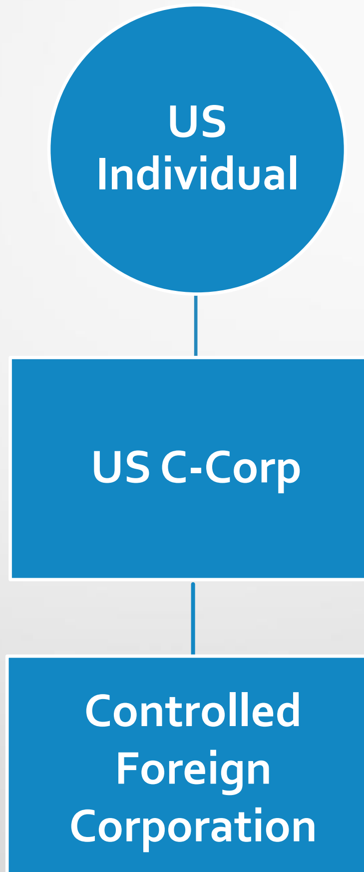
Example 2 – Corporate Owner

(Individual in Ex.1 transfers interest in F Corp to US C-Corporation)

NOTE: When dividend is paid from CFC to US Corp, there is no tax because PTI under GILTI and/or participation DRD.

But what if foreign country imposes withholding tax?

Assume 100 of income earned by CFC and 30% corporate tax rate



Total tax is 30 + 16.7 = 46.7

70 X 23.8% = 16.7
US Shareholder tax
(but this can be deferred)

10.5 GILTI tax (100 gross up – 50 deduction = 50 GILTI X 21%)
24 FTC (80% X 30)
10.5 - 24 = (13.5) so no US tax due

- GILTI FTC excess credit
- Cross credit against other GILTI tax?

30 CFC tax (100 X 30%)
70 E&P remaining for dividend

Individuals and Section 962

- Individuals are eligible for the benefits provided to U.S. corporations via IRC § 962 election.
  - E&P in excess of corporate tax paid is taxable to shareholder when distributed. Sec. 962(d).
  - IRS confirmed that individuals can use 962 election for 2018.
  - Individual are treated as a C corporation for purposes of the GILTI deduction and FTC.
  - Election made with return (plus extensions), so can be retroactive.
  - *Dougherty v. Comm'r* (allowing late 962 election after return was filed).
- Complicated reporting on the individual's tax return.
  - Tax software module for a Form 1040 (at least for 2018) was not set up to properly populate with the correct forms and treatment.
  - Manually attach Form 8992, Form 8993, Section 962 Election, Form 1118 for claiming FTC in GILTI basket.

Excel Spreadsheet Example

Individuals – US Corp or 962 Election

- GILTI applies to individuals that own CFCs.
  - Unless make 962 election, do not get the lower rate of US corporations and do not get to use FTCs like US corporations.
- Transfer CFC to a C Corp or Make the 962 election?
  - US corporation can becomes substitute for common foreign structure of no-tax holding company in treaty jurisdiction.
  - Corporation gets participation DRD, but individuals do not per *Smith* case and 962(d). Allows conversion of ordinary dividends to qualified dividends from non-treaty country CFC.
  - Foreign jurisdictions may tax the transfer of stock to a corporation.
  - Placing CFC interests inside a corporation may subject the sale of the CFC stock to double tax at federal and state level.
  - Treaty withholding rates on payments of dividends, royalties, interest, etc. will differ because 962 election and deemed corporation not respected for treaty purposes.
  - 956 does not apply to US corporate shareholders of CFCs, but it still does to individual shareholders, even with 962 election.

GILTI – Let's Look Back

- Is GILTI all that bad if the shareholder is a C corporation?
  - Even with GILTI, overall the US tax rate is 50% lower than domestic income.
    - If a CFC is in a taxable jurisdiction with a local tax over 13.125%, there is no GILTI impact. Even for a CFC in a low-tax country like Ireland, the incremental GILTI tax will be marginal.
  - Eliminates the big pre-2018 deferral benefits for corporations that had no need to repatriate funds to the US.
    - Now deferral is generally only allowed on the 10% return on tangible assets.
- What if shareholder is an individual? Make 962 election?
  - Generally a very bad result, unless the individual makes the 962 election, which essentially puts him in the same position as a C Corp with respect to GILTI income (i.e., eligible for deduction and foreign tax credit).
  - Under IRC § 962(d), the distribution of 962 election E&P is taxable to the individual, but only to the extent it exceeds the tax that was paid in the US at the time of the 962 election.
    - See *Smith v. Commissioner*, 151 T.C. No. 3 (2018).

Participation Dividends Received Deduction (DRD)

- Domestic Corporations receive a 100% deduction for foreign-source dividends received from specified 10% owned foreign corporations.
  - Applies only to CORPORATE shareholders, not all US shareholders of foreign corporations.
  - 10% ownership determined under IRC § 951(b).
  - One year holding period requirement.
  - Does not apply to foreign corporations that are PFICs and that are not also CFCs.
- Temporary and Proposed Regulations issued in June 2019.

Participation DRD

- "Dividends received"
  - Broad interpretation consistent with IRC §§ 243 and 245. For example, can receive via a flow-through entity.
  - *Not a full territorial system – still leaves much opportunity for US tax.*
    - Subpart F still in place and GILTI is added.
  - Dividends received does not include Subpart F income although effectively a deemed dividend.
    - Does Subpart F (and GILTI?) trump current year distribution? 5th Circuit in *Rodriguez* (2013) and 3rd Circuit in *SIH Partners* (2019) both suggest no and that this may be contrary to the rules' intent.
- Dividends received deduction does not apply to "hybrid dividends" received by a US shareholder from a CFC (i.e., deduction for CFC but dividend for US Shareholder).
  - Prop. Reg. 1.245A(e)-1.

Participation DRD

- Provisions for transfers of foreign corporations.
  - Repeal of IRC § 367 active trade or business exception.
    - *Otherwise could move appreciated assets offshore and potentially lower or eliminate tax on built-in gain.*
  - On sale of foreign corporation, amounts treated as dividend for IRC § 1248 are treated as a dividend for Participation DRD.
    - *Consistent with treatment under Qualified Dividend rules.*
  - For determining a loss on sale, the stock basis is reduced by Participation DRD amount.

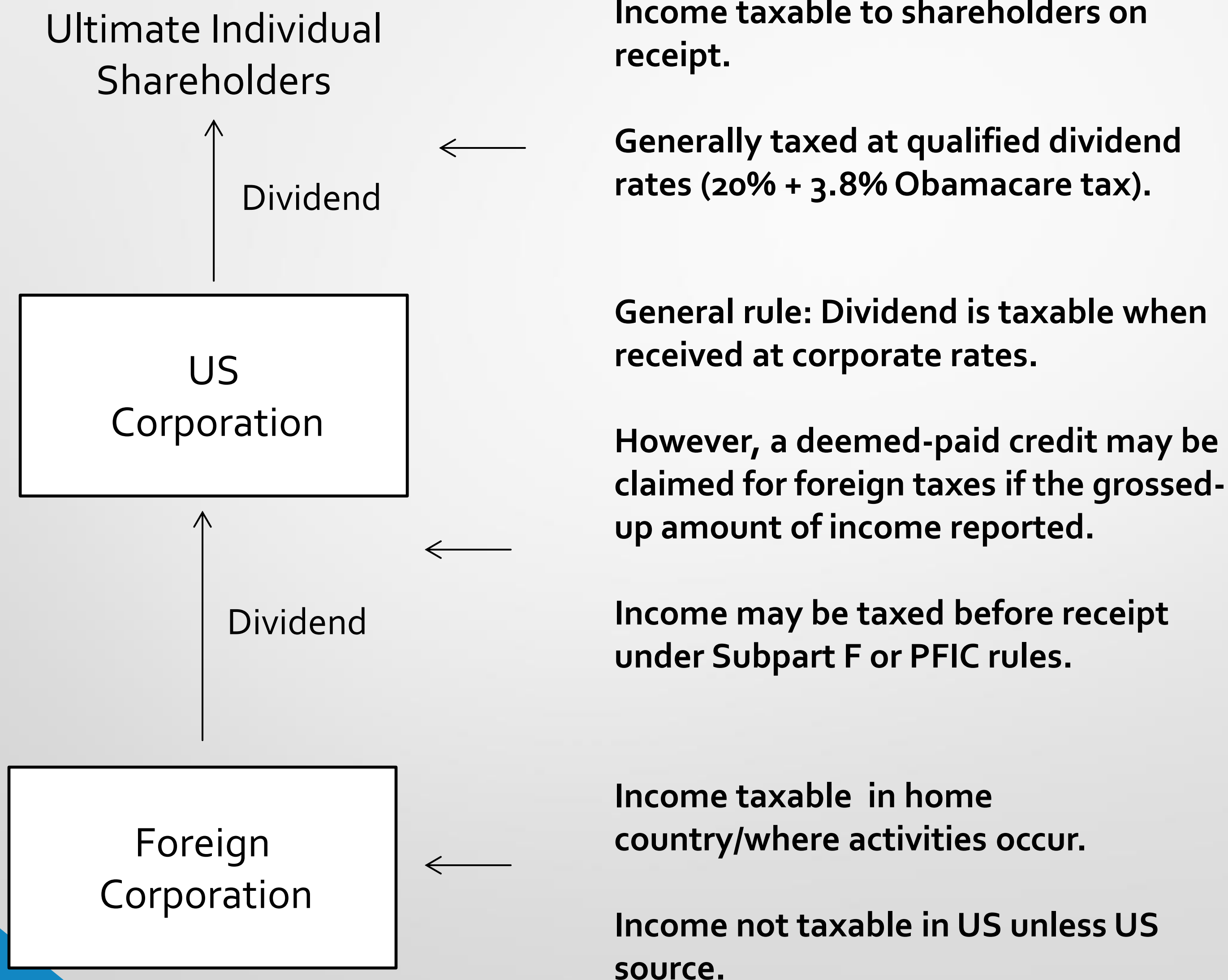
Participation DRD

- No foreign tax credit or deduction is allowed for taxes paid or accrued with respect to a dividend that qualifies for the Participation DRD.
  - Result is the repeal of IRC § 902, but generally not needed because income is already exempt from US tax.
  - Worldwide tax could still be substantial and greater than US rates.
  - Foreign tax credits still apply to Subpart F income.
  - How will the taxes "with respect to a dividend" be calculated?

Participation DRD

- How big of a benefit is this???
  - Corporation's US tax:
    - Non-GILTI income is not taxed at all.
    - GILTI income (until 2026) taxed only at 10.5%
    - Subpart F taxed at regular corporate rate of 21%
  - Shareholder's tax:
    - Generally qualified dividend – so only 20% on dividend or sale.
  - Combined US Corporation/Shareholder rate of 20% to 36.8%
  - No foreign tax credit beyond GILTI. Loss of credits can make effective tax rate greater than normal individual tax rates.

Old Law Corporate Cross-Border Tax Example



Income taxable to shareholders on receipt.

Generally taxed at qualified dividend rates (20% + 3.8% Obamacare tax).

General rule: Dividend is taxable when received at corporate rates.

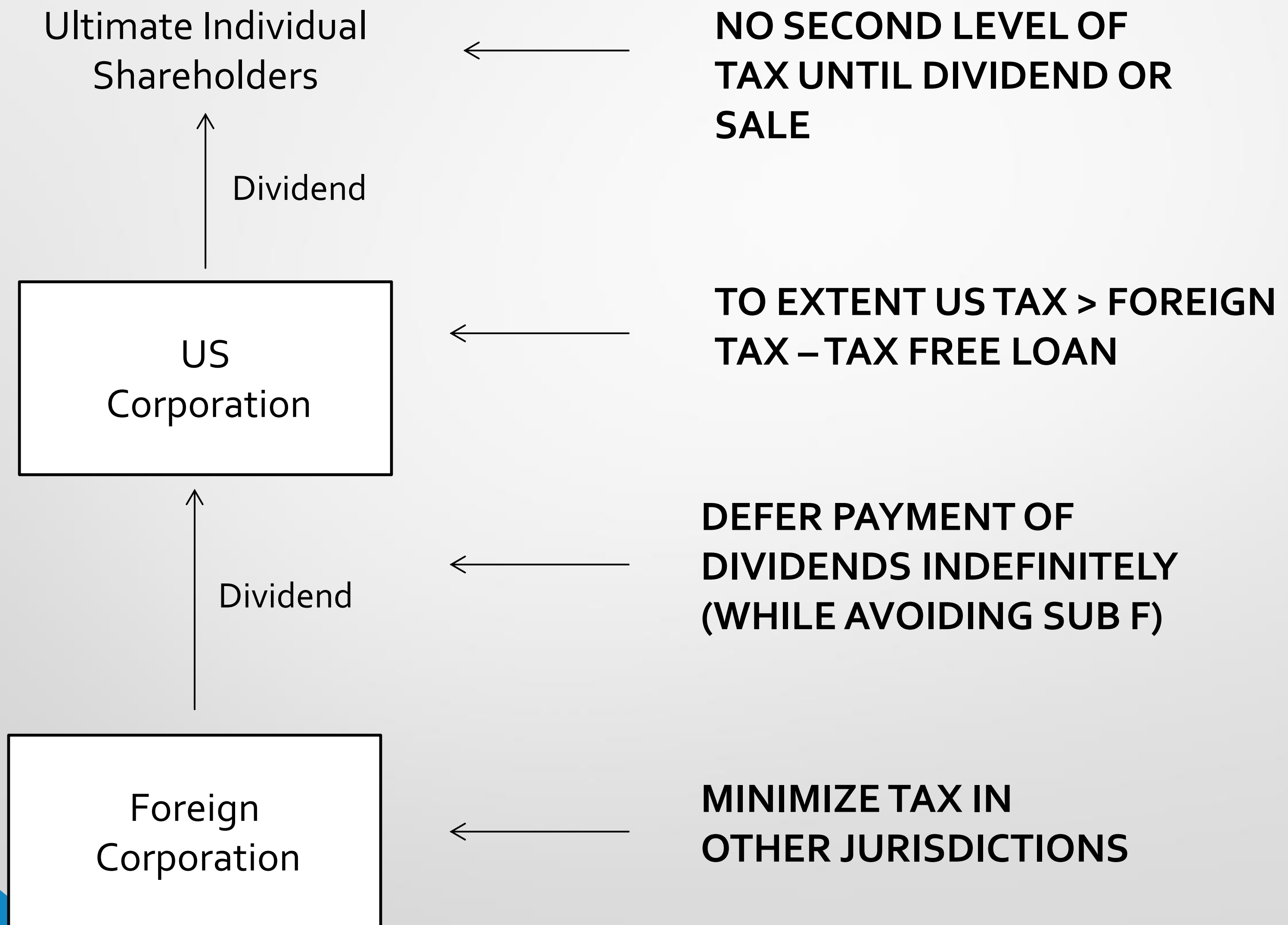
However, a deemed-paid credit may be claimed for foreign taxes if the grossed-up amount of income reported.

Income may be taxed before receipt under Subpart F or PFIC rules.

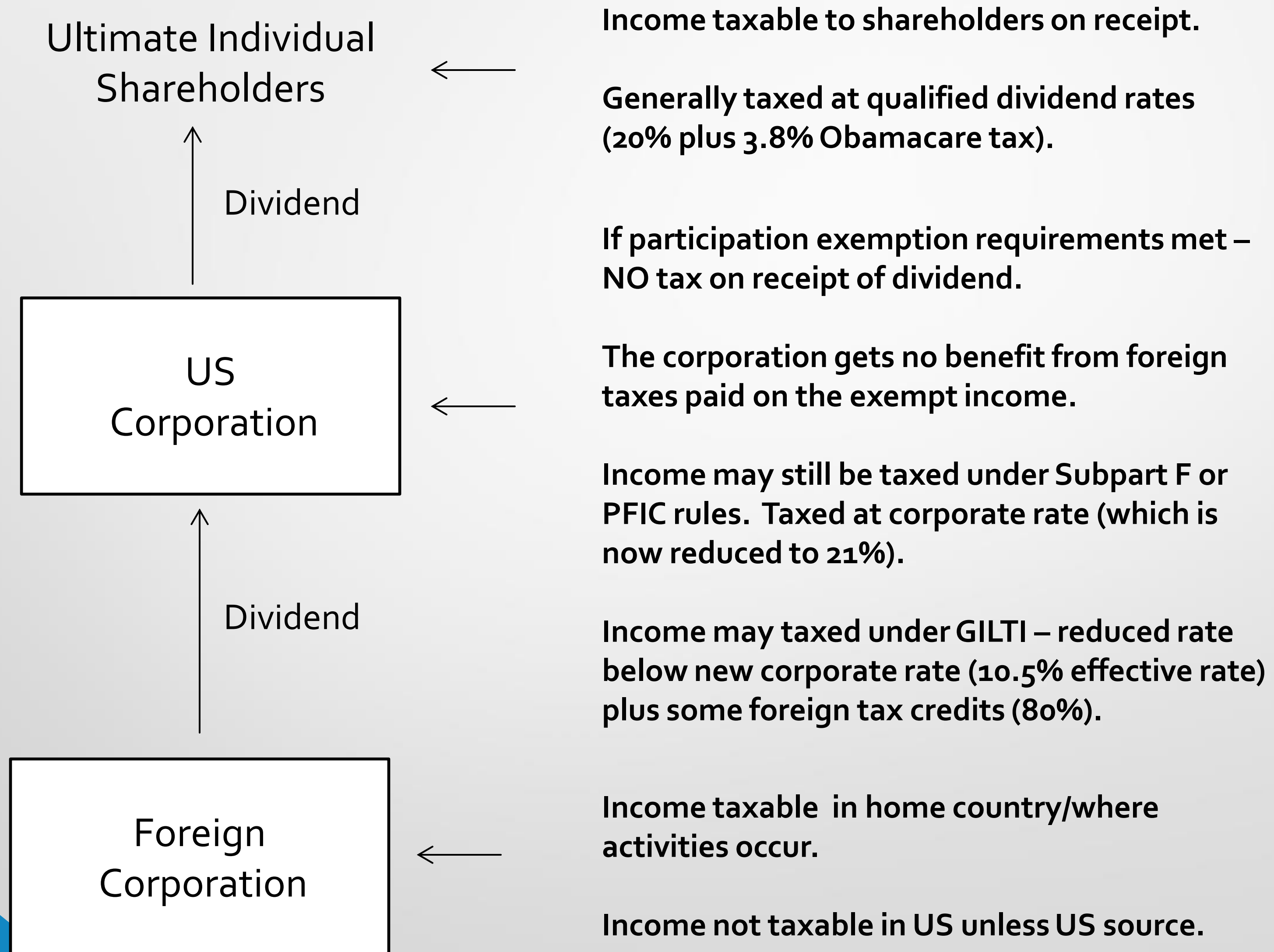
Income taxable in home country/where activities occur.

Income not taxable in US unless US source.

Old Law Corporate Cross-Border Tax Example



New Law Corporate Cross-Border Tax Example



Income taxable to shareholders on receipt.

Generally taxed at qualified dividend rates (20% plus 3.8% Obamacare tax).

If participation exemption requirements met – NO tax on receipt of dividend.

The corporation gets no benefit from foreign taxes paid on the exempt income.

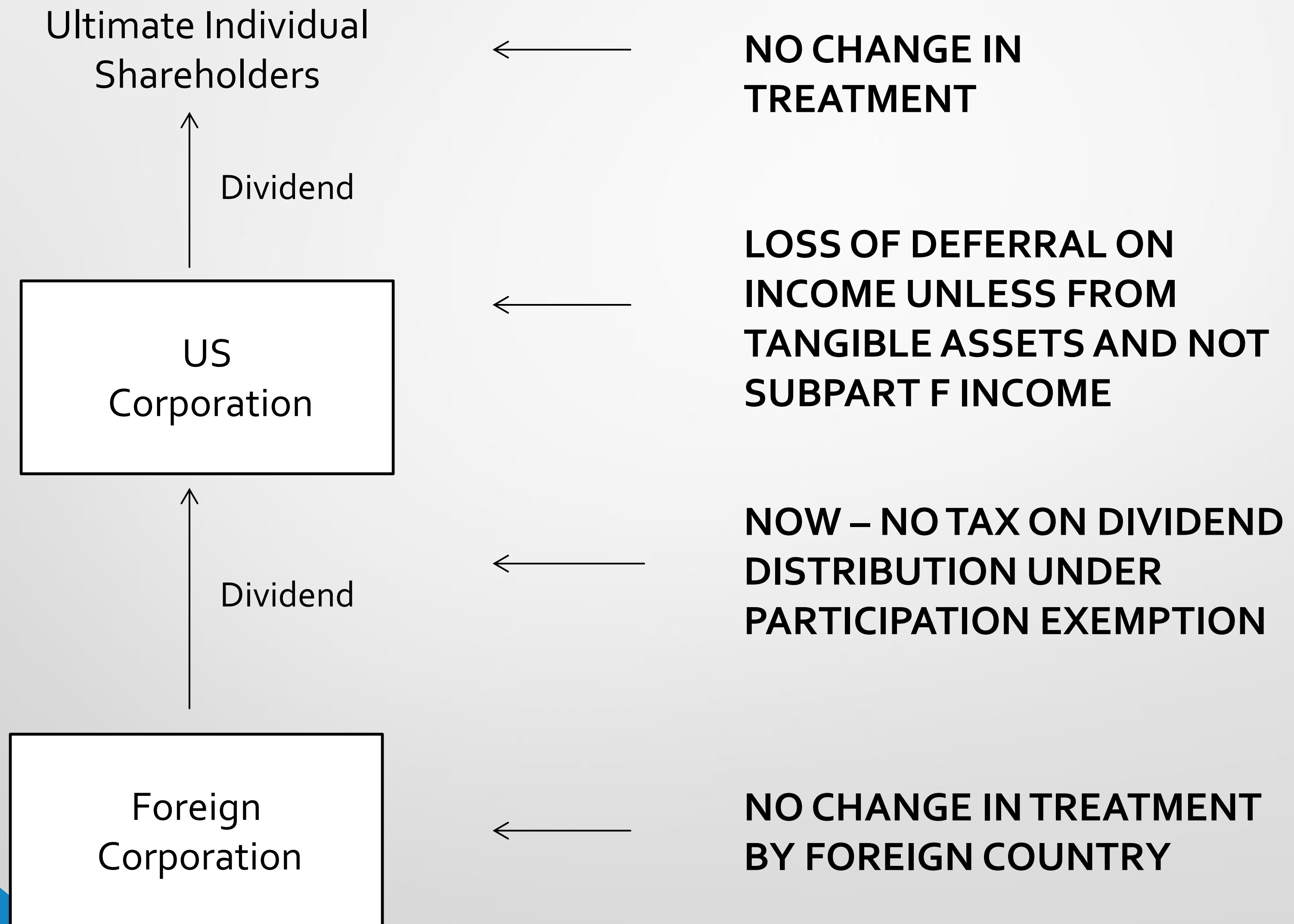
Income may still be taxed under Subpart F or PFIC rules. Taxed at corporate rate (which is now reduced to 21%).

Income may taxed under GILTI – reduced rate below new corporate rate (10.5% effective rate) plus some foreign tax credits (80%).

Income taxable in home country/where activities occur.

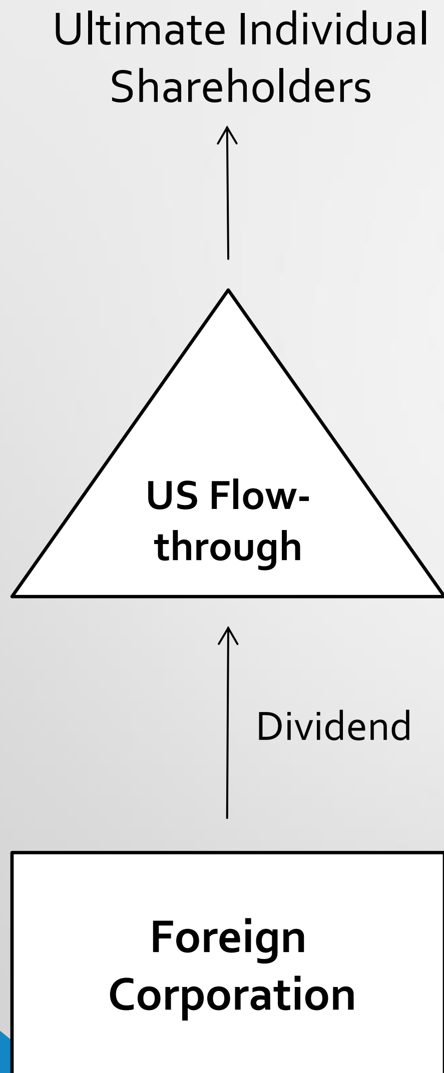
Income not taxable in US unless US source.

New Law Corporate Cross-Border Tax Example



US Flow-Through
and the TCJA

Old Law Flow-Through Cross-Border Tax Example (**Foreign Corporation**)



General rule: Dividend is taxable when received by the US flow-through at the individual shareholder's rates.

Qualified dividend rate may apply if: (1) from Qualified Foreign Corporation and (2) income is not Subpart F or PFIC.

NO FTC for taxes paid by Foreign Corporation on its income, but may be available for a withholding tax on dividend paid.

Anti-deferral: Income may be taxed before receipt under Subpart F or PFIC rules.

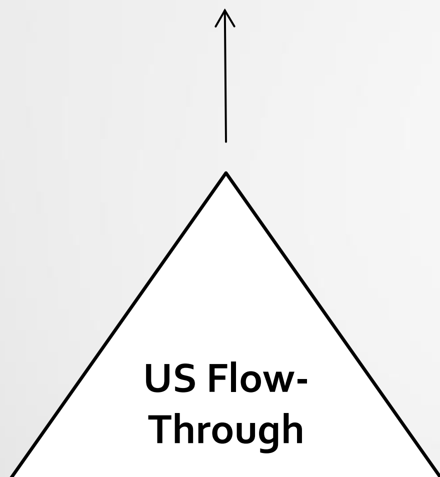
Income taxable in home country/where activities occur.

Income not taxable in US unless US source.

New Law Flow-Through Cross-Border Tax Example (**Foreign Corporation**)

Ordinary rates may be lower. →

May have tax on deemed repatriation.



Possibility of GILTI inclusion →

General rule: Dividend is taxable when received by the US Flow-Through at the individual shareholder's rates.

Qualified dividend rate may apply if: (1) from Qualified Foreign Corporation and (2) income is not GILTI, Subpart F, or PFIC.

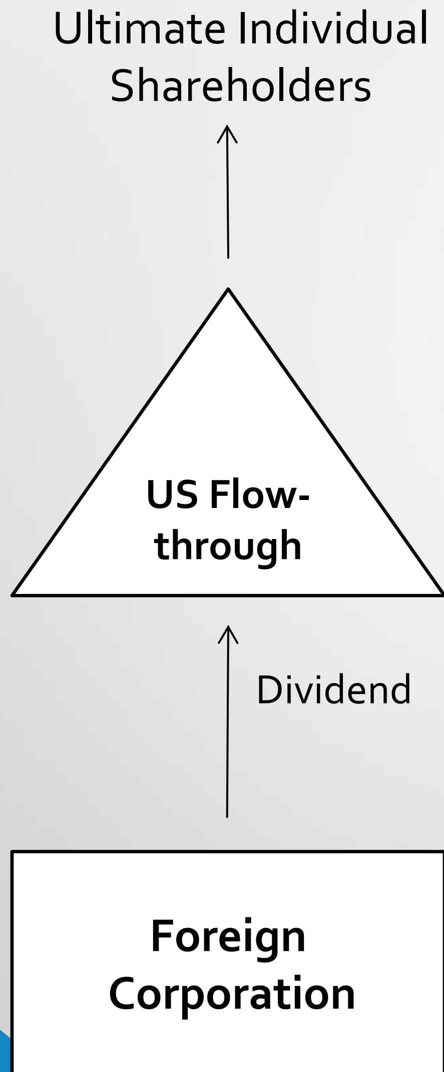
NO FTC for taxes paid by Foreign Corporation on its income, but FTC may be available for a withholding tax on dividend paid.

Anti-deferral: Income may be taxed before receipt under Subpart F, PFIC, or GILTI rules.

Income taxable in home country/where activities occur.

Income not taxable in US unless US source.

New Law Flow-Through Cross-Border Tax Example (**Foreign Corporation**)



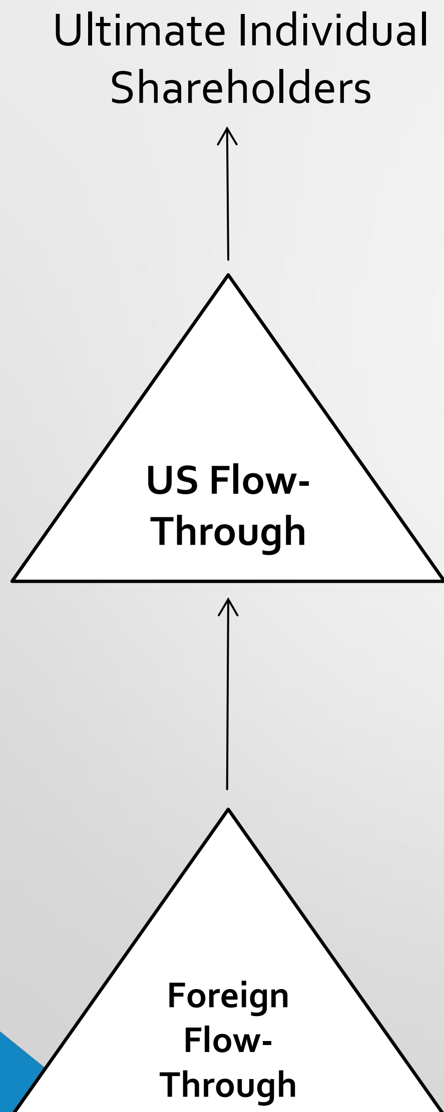
GILTI REMOVES DEFERRAL BENEFITS AND INCOME TAXED AT ORDINARY RATES WITHOUT FTC. RESULT CAN BE HIGHER TAX THAN NORMAL INDIVIDUAL RATE.

BUT THE 962 ELECTION ALLEVIATES MOST OF THESE PROBLEMS.

QUALIFIED DIVIDEND ESSENTIALLY ELIMINATED UNDER GILTI RULES

LOCAL TAX REMAINS THE SAME.

Old Law Flow-Through Cross-Border Tax Example (**Foreign Flow-through**)



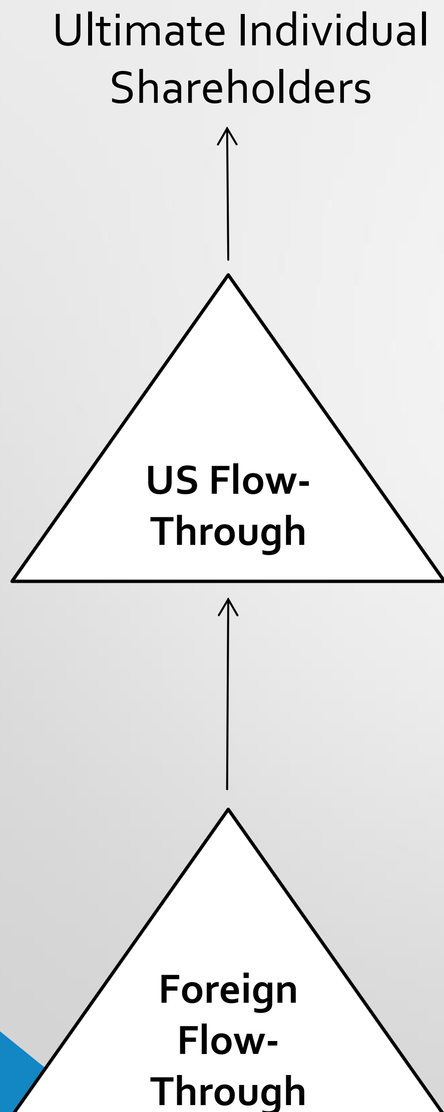
General rule: Income taxed as earned at the individual shareholder's rates.

FTC for taxes paid by Foreign Flow-Through on its income and for withholding tax on dividend paid.

Income taxable in home country/where activities occur.

Income not taxable in US unless US source.

Old Law Flow-Through Cross-Border Tax Example (**Foreign Flow-through**)

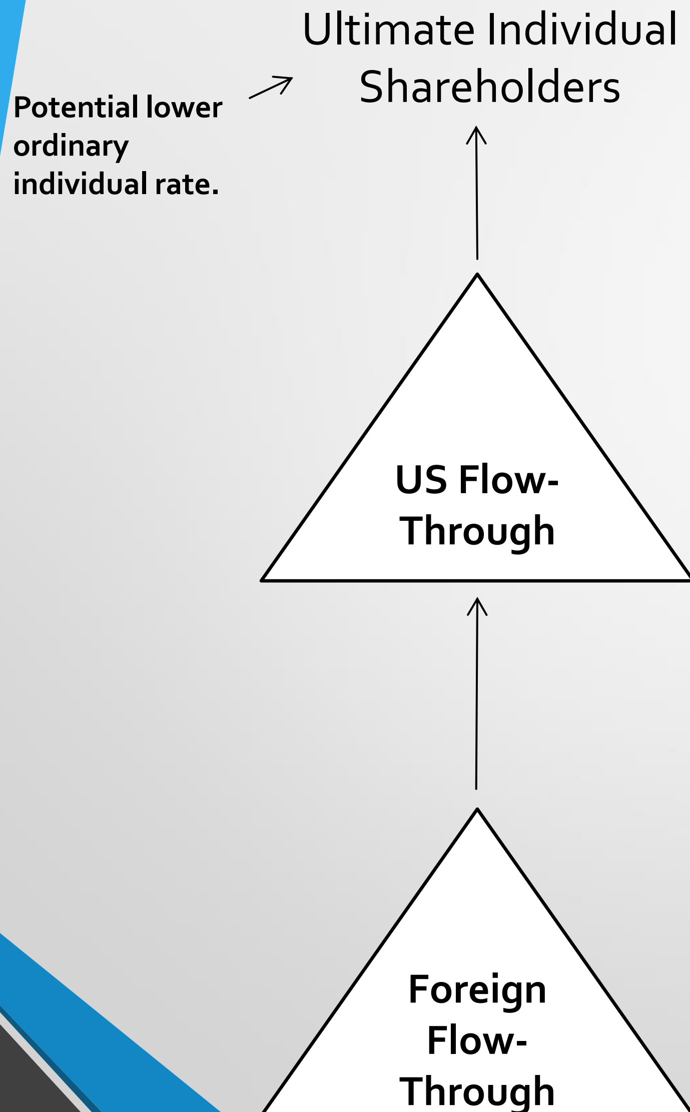


NO DEFERRAL BUT WITH FTC, TAX PAID IS GREATER OF US OR FOREIGN TAX.

OTHER BENEFITS:

***NO TAX ON REPATRIATION.**
***POTENTIAL CAPITAL GAIN RATES.**
***POTENTIAL USE OF LOSSES.**

New Law Flow-Through Cross-Border Tax Example (**Foreign Flow-through**)



General rule: Income taxed as earned at the individual shareholder's rates.

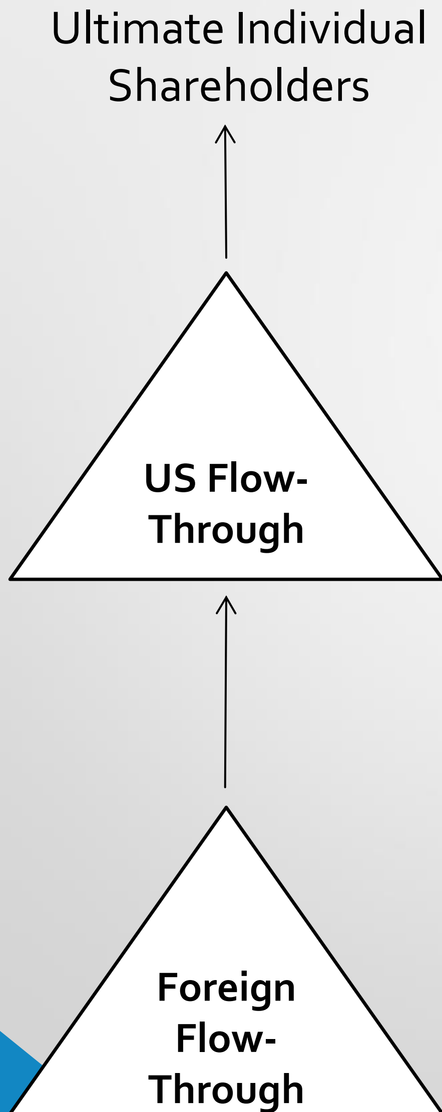
FTC for taxes paid by Foreign Flow-Through on its income and for withholding tax on dividend paid.

NO IMPACT OF GILTI OR CHANGES TO SUBPART F.

Income taxable in home country/where activities occur.

Income not taxable in US unless US source.

New Law Flow-Through Cross-Border Tax Example (**Foreign Flow-through**)



NO CHANGE EXCEPT:
- ***POSSIBLE BENEFIT OF NEW INDIV. RATES**
- ***POTENTIAL ADD'L LIMITATION ON LOSS**

Individuals and the New Flow-Through Rules

- Pass-through rules and the foreign business
  - US taxpayers do not get the lower 199A rate on foreign income earned via a pass-through.
  - Foreign taxpayers can get the lower 199A rate on US income earned via a pass-through, but branch profits tax still applies.

FDII – GILTI's (Nicer) Sibling

- Put in place to encourage investment in US.
- Provision applicable to US corporations rather than CFCs.
- FDII is only a tax benefit. Until 2026, US C corporations are only taxed at an effective rate of 13.125% on FDII.
  - Mechanism for the reduced rate on FDII is the IRC § 250 deduction.
  - Proposed Regulations under IRC §250 released on March 6, 2019. Provide guidance on both the computation of the deduction available under IRC §250 and the determination of what type of income qualifies as FDII.
  - A domestic corporation that claims a deduction must file new IRS Form 8993.
- Can claim FTC on foreign-source FDII. FTC basically offsets the amount of US tax paid on the FDII.

FDII – GILTI's (Nicer) Sibling

- Using similar calculation to GILTI, calculates FDII based on income and tangible assets:
  - FDII's starting point is income that is more than 10% of a taxpayer's QBAI.
  - FDII is the amount of this excess that is foreign sourced under the FDII rules.

The Mechanics

- FDII = DII X Foreign Derived Ratio
  - DII: Deemed Intangible Income = DEI – DTIR
    - DEI: Deduction Eligible Income
      - DEI = Gross DEI – deductions allocable to Gross DEI
      - Gross DEI: Gross income, <u>excluding</u> Subpart F, GILTI, dividends from CFCs and Foreign Branch Income
    - DTIR: Deemed Tangible Income Return
      - DTIR: 10% of QBAI (used in generating DEI)
    - DII: DEI – (QBAI x 10%)
  - Foreign Derived Ratio = FDDEI / DEI
    - FDDI: Foreign Derived Deduction Eligible Income
      - FDDEI = Gross FDDEI – deductions allocable to Gross FDDEI
      - Gross FDDEI = DEI derived from FDDEI Transactions (sales and services)
      - Gross non-FDDEI = Gross DEI that is not Gross FDDEI

The Mechanics - Example

- **Facts**: US Corp sells goods to US and foreign customers with gross revenue of 5,000, and 4,000 of expenses, for net income of 1000, of which 300 of the net income is attributable to foreign customers. US has 1,000 of QBAI related to assets that produce this income
- **Solution**: FDII = DII x Foreign Derived Ratio
  - DII = DEI – DTIR = DEI – (QBAI – 10%) = 1,000 – 100 = 900
    - DEI = 1,000 (all income on net basis)
    - DTIR = 100 (1,000 QBAI X 10%)
    - DII = 1,000 – 100 = 900
  - Foreign Derived Ratio = FDDEI / DEI = 300 / 1,000
    - FDDEI = 300 (DEI attributable to foreign customers)
  - FDII = (1000 - 100) × (300 / 1,000) = 900 X 30% = 270
  - Section 250 Deduction = FDII X 37.5% = 270 X 37.5% = 101.25
  - US Tax = 21% × (1000 – 101.25) = 188.74

FDII – GILTI's (Nicer) Sibling

FDDEI – Foreign Derived Deduction Eligible Income

- FDII rules to determine foreign source
  - Property sold by the corporation to a foreign person for foreign use.
  - Services provided by taxpayer to any person or with respect to property not located in the United States (mutually exclusive rules for property services, proximate services, transportation services, and general services).
  - Sales to related foreign parties if foreign affiliate ultimately sells property to unrelated party for foreign use.
    - Unclear whether this applies to services.
  - Royalty and rental income if the licensed or leased property is used in connection with the provision of goods or services to foreign persons.

FDII – GILTI's (Nicer) Sibling

FDDEI – Foreign Derived Deduction Eligible Income

- Proposed Regulations require **extensive** documentation to confirm foreign person and foreign use.
- Must obtain prior to the FDII filing date.
- Examples: Statements by the recipient as to foreign status, intended use, or intended location of use; valid identification provided by a foreign government (in the case of individuals); contractual documents between the parties; publicly available information (such as annual reports or audited financial statements); or other documents prescribed by the IRS in forms or subsequent guidance.

Other Changes

- Sourcing Rule for Manufactured Inventory (flush language of 863(b))
  - Allocation of income now changed to be proportionate to the location of production activities.
  - Transfer of title now irrelevant but not for purchased inventory. See IRC § § 861(a)(6) and 862(a)(6)).
- Anti-Hybrid Rules (IRC § 267A and Proposed Regulations)
  - Purpose is to prevent the use of arrangements involving hybrid transactions or hybrid entities to exploit differences in the tax laws across jurisdictions.
  - Denies a deduction for interest and royalty payments paid or accrued to related parties pursuant to a hybrid transaction or a hybrid entity. In other words, attempts to deny a deduction for expenses where income not subject to tax in the counterparty's jurisdiction.

Other Changes

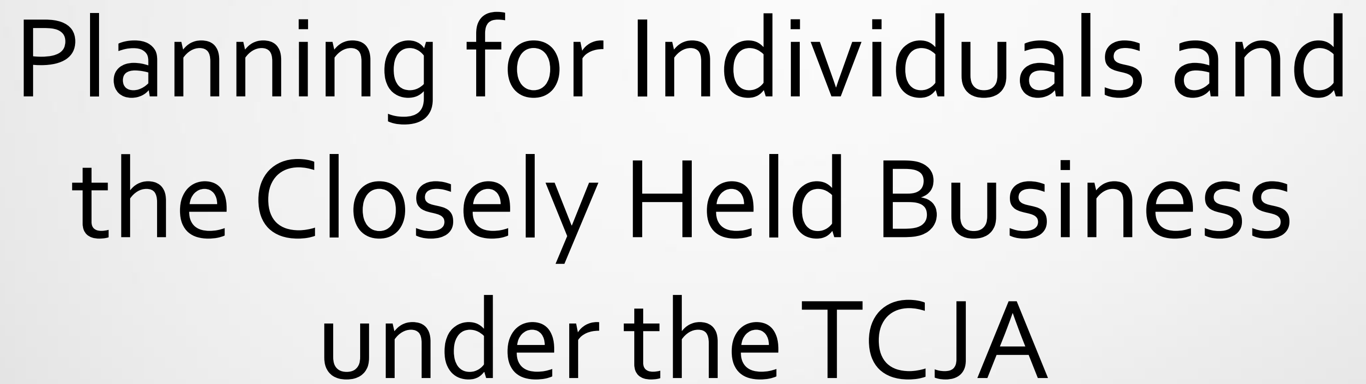
- New FTC basket for branch income (IRC § 904(d)(1)(B))
  - Applies to taxpayers that own disregarded entities or partnership engaged in trade or business in a foreign jurisdiction.
- New Sections 864(c)(8) and 1446(f)
  - Overturns *Grecian Magnesite* (but still a good read for IRS lambasting by Judge Buch).
  - Apply to dispositions of partnership interests by foreign persons.
  - Disposition of interest in a partnership that has ECI is taxable, and there is a withholding obligation imposed on the seller or the partnership.

Section 965: Transition Tax

- Mandatory tax imposed on shareholders of specified foreign corporations on their pro rata share of previously untaxed earnings.
- Applies to <u>all</u> CFCs and all foreign corporations (other than PFICs) with a 10% of greater US corporate shareholder (i.e., a specified foreign corporation or SFC).
- Most taxpayers have already paid and computed the tax, but may still apply to SFCs with fiscal years ending after 12/31/17.

Section 965: Transition Tax

- Beware of acceleration events (Sec. 965(h)) and triggering events (Sec. 965(i)).
  - Assessment of a penalty for not making an installment payment.
  - Transfer substantially all assets, including via a tax free transaction or resulting from an individual's death. Can avoid if enter into agreement and transferee agrees to be liable for transferor's remaining tax.
- IRS LB&I division announced on November 4, 2019 that it has opened a new campaign to focus on compliance with a campaign to focus on compliance with the Section 965 tax.
  - How do you correct this problem if it was missed?


Planning for Individuals and
the Closely Held Business
under the TCJA

Planning for the Closely Held Business

- First glance – Foreign business via a US corporation looks attractive because
  - US corporation – 21% tax rate and deferral
  - US flow-through – 37% tax rate and no deferral.
- However, flow-through model still can have benefits
  - FTCs are lost in participation model so that worldwide tax rate may actually be higher.
  - Flow-throughs allow potential use of losses.
  - Flow-throughs do not have to deal with Subpart F and GILTI.

Planning for the Closely Held Business

- Subpart F and GILTI may not be as big an issue with a US Corporation holding the foreign corporation.
  - While it appears Subpart F income is taxable, the corporate rate is only 21% tax rate.
  - GILTI may apply but at 10.5% effective rate and an 80% FTC offset.
  - Thus, even if these anti-deferral provisions apply, the tax may be comparable to the flow-through model but with the possibility of deferral.
  - Would deferral be stopped by Personal Holding Company Tax or Accumulated Earnings Tax? Reasonable compensation?

Planning for the Closely Held Business

- High foreign tax (or even taxes in mid-20%'s) – likely will want to prefer flow-through.
  - Otherwise combination of foreign tax plus qualified dividend rate will be greater than individual rate.
  - Avoids Subpart F and GILTI.
  - Will be best model for operations in many countries unless special local tax break can be obtained.
  - Must consider impact to cash flow.

Planning for the Closely Held Business

- Low foreign tax and few Subpart F concerns – likely will prefer US corporation with foreign corporate subsidiaries.
  - Overall tax rate likely lower than the individual rate because combined corporate tax rate plus dividend rate just below 37% individual rate.
    - Participation DRD results in one level of tax at 21%.
    - GILTI will mitigate some of the advantages – but the includible income under GILTI taxed at 10.5% effective rate plus 80% FTC offset.
  - Also possibility of deferral.
  - Negative is that lose the benefit of losses at individual level.

Planning for the Closely Held Business

- What is the worldwide tax rate?
- Does Subpart F apply?
- How will GILTI provisions likely apply?
- Are there losses that taxpayer may be able to utilize against US income?
- Is there a possibility of deferral?
- Is there a IRC § 367 cost of changing structure?