

# Reassessing the Beloved Double Irish Structure in Light of GILTI

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In this article, the authors discuss the new global intangible low-taxed income provisions of the Tax Cuts and Jobs Act and reassess the double Irish structure and whether it continues to deliver tax savings.

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Not only did the Tax Cuts and Jobs Act of 2017 (P.L. 115-97) retain subpart F in its entirety, it added a new anti-deferral rule — global intangible low-taxed income (GILTI) — in new section 951A. In light of GILTI, U.S. multinationals are reassessing their international deferral structures.

In this article, we review the new GILTI provisions and reassess the double Irish structure using a case study that compares it with a single Irish structure. We conclude that the double Irish continues to deliver tax savings, albeit not quite as well as before GILTI.

### The GILTI Provisions

New section 951A generally provides that a U.S. shareholder<sup>1</sup> of any controlled foreign corporation must include in gross income its GILTI for each tax year.

<sup>1</sup> Before the TCJA, section 951(b) provided that the term “U.S. shareholder” meant, for any foreign corporation, a U.S. person as defined in section 957(c) that owned (under section 958(a) and (b)) at least 10 percent of the total combined voting power of all classes of that corporation’s stock entitled to vote. TCJA section 14214 amended the definition of U.S. shareholder by inserting at the end of section 951(b) “or 10 percent or more of the total value of shares of all classes of stock of such foreign corporation.” As amended, a U.S. shareholder is a U.S. person that owns at least 10 percent of the vote or value of any foreign corporation. The amendment is effective for tax years beginning after December 31, 2017.

GILTI is any excess of that U.S. shareholder’s net CFC tested income, over that shareholder’s net deemed tangible income return. The term “net CFC tested income” means any excess of the aggregate of the shareholder’s pro rata share of the tested income of each CFC, over the aggregate of that shareholder’s pro rata share of the tested loss of each CFC for which that shareholder is a U.S. shareholder for the tax year. The term “net deemed tangible income” means the excess of 10 percent of the aggregate of the shareholder’s pro rata share of the qualified business asset investment of each CFC, over the amount of interest expense used in determining the shareholder’s net CFC tested income to the extent the interest income attributable to that expense is not used in determining the shareholder’s net CFC tested income.

The term “qualified business asset investment” means a CFC’s average aggregate adjusted bases (as of the close of each quarter of the tax year) in specified tangible property.<sup>2</sup> “Specified tangible property” means property used in the CFC’s trade or business that is of a type for which a deduction is allowable under section 167.

The term “tested income” means any excess of the gross income of a CFC determined without regard to:

- U.S.-source gross income that is effectively connected with the conduct by such corporation with a trade or business within

<sup>2</sup> For section 951A(d), the adjusted basis in any property is determined by (i) using the alternative depreciation system under section 168(g) and (ii) allocating the depreciation deduction ratably to each day of the period. Special rules apply to property owned by a partnership owned by a CFC. Finally, section 951A(d)(4) directs Treasury to issue regulations or other guidance to prevent the avoidance of section 951A(d), including regulations or other guidance that provides for the treatment of property transferred or held temporarily.

the United States and that is not exempt from U.S. tax;

- any gross income used in determining the subpart F income of that corporation;
- any gross income excluded from the foreign base company income (as defined in section 954) and the insurance income (as defined in section 953) of the corporation under section 954(b)(4);<sup>3</sup>
- any dividend received from a related person (as defined in section 954(d)(3)); and
- any foreign oil and gas extraction income (as defined in section 907(c)(1)) of the corporation,

over the deductions (including taxes) properly allocable to that gross income under rules similar to section 954(b)(5) (or to which those deductions would be allocable if there were that kind of gross income).

The term “tested loss” means any excess of such deductions (including taxes), over such gross income.

In general, any GILTI that is in gross income is treated the same as an amount included in gross income under section 951(a)(1)(A) — that is, like an item of subpart F income.

Finally, the TCJA also amended section 960 (regarding deemed paid foreign tax credits for subpart F inclusions) by adding new subsection (d). The new section provides that a U.S. shareholder that is a domestic corporation is deemed to have paid foreign taxes equal to 80 percent of the corporation’s inclusion percentage<sup>4</sup> multiplied by the aggregate tested foreign income taxes<sup>5</sup> paid or accrued by CFCs.

<sup>3</sup>Section 954(b)(4) excludes from foreign base company income and insurance income any item of income of a CFC that was subject to an effective rate of foreign income tax greater than 90 percent of the maximum rate of tax specified in section 11 (commonly referred to as the high-tax kick-out). Before the TCJA, the highest rate of corporate income tax under section 11 was 35 percent; after, the highest rate under section 11 is 21 percent.

<sup>4</sup>A domestic corporation’s inclusion percentage is equal to its GILTI divided by its pro rata shares of the tested income of its CFCs.

<sup>5</sup>The term “tested foreign income taxes” means the foreign income taxes paid or accrued by a CFC that are properly attributable to the tested income of that foreign corporation taken into account by the domestic corporation under section 951A.

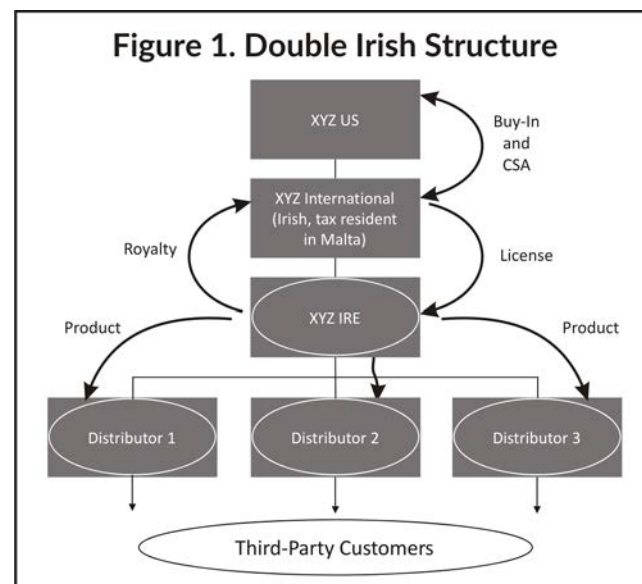
The TCJA amended section 904(d) to create a new FTC limitation basket for non-passive GILTI (with no carryforward or carryback of excessive FTCs), and amended section 78 to provide that the gross-up equals 100 percent of the deemed paid foreign taxes (except for sections 245 and 245A).

**Case Study**

XYZ Technology Corp. (XYZ US), a U.S. publicly traded company, produces software and distributes it globally. Several years ago, XYZ US formed XYZ International, a nonresident Irish company that is tax resident in Malta. XYZ US transferred the non-U.S. rights to its IP to XYZ International through a license agreement (the buy-in). Coterminous with the buy-in, XYZ US and XYZ International entered into a cost-sharing agreement to jointly fund the continuing and future development of the XYZ IP. (See Figure 1.)

**Table 1. Inputs and Assumptions**

1. U.S. Tax Rate	21.0%
2. Irish Tax Rate	12.5%
3. Maltese Tax Rate	0.0%
4. Allowed Return on QBAI Investment	10.0%
5. Deemed Paid Credit Proportion	80.0%
6. Deduction for GILTI Amount Through 2025	50.0%



Thereafter, XYZ International formed XYZ Ireland, a resident Irish company that was checked to be treated as a disregarded entity for U.S. federal tax purposes. XYZ International licensed its IP (the non-U.S. rights to the XYZ IP) to XYZ Ireland, which sells its IP and software through various wholly owned cost-plus marketing subsidiaries located throughout Europe and the Pacific Rim (the distributors). The distributors were all checked to be treated as disregarded entities for U.S. federal tax purposes.

Table 2 provides the P&L statement for the double Irish structure. For the sake of simplicity, it is assumed that all profits from distribution are earned in Ireland. Table 3 then calculates the GILTI, taxes attributable to the GILTI, and deemed paid credit available under this structure. Table 4 calculates the worldwide income tax and effective tax rate under the double Irish structure.

**Table 2. P&L Statement  
(Amounts in US \$ (thousands))**

	U.S.	International	Ireland*
<b>Revenue</b>			
Sales	-	-	23,000
Royalty	600	3,300	-
CSA Payment	200	-	-
<b>Total Revenue</b>	600	3,300	23,000
<b>Total COGS</b>	-	-	2,700
<b>OPEX</b>			
Bad Debt	-	-	200
G&A	-	-	3,000
CSA Payment	-	200	-
Marketing	-	-	2,200
Sales	-	-	7,500
OPEX - D&A	-	-	2,500
Royalty	-	400	3,300
<b>Total OPEX</b>	-	600	18,700
<b>Other Expenses</b>			
Interest & Other Expense	-	-	20
Sales Tax	-	-	700
<b>Other Expenses</b>	-	-	720

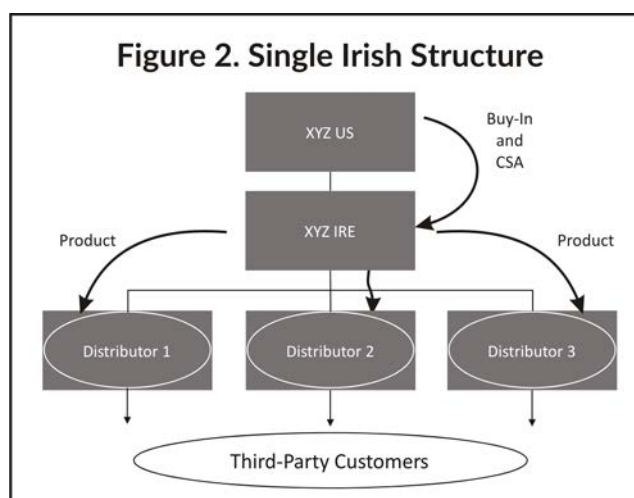
**Table 2. P&L Statement  
(Amounts in US \$ (thousands)) (Continued)**

	U.S.	International	Ireland*
<b>Profit</b>	600	2,700	880
<b>Income Taxes</b>	126	-	110

\*For simplicity, it is assumed that all profits from distribution are earned in Ireland.

**Table 3. GILTI Calculation  
(Amounts in US \$ (thousands))**

Foreign Operating Profits		3,580
Foreign Income Taxes		110
Net CFC Tested Income (Loss)		3,470
PP&E		2,300
Depreciation		<450>
Qualified Business Asset Investment (QBAI)		1,850
Interest Expense		20
Net Deemed Tangible Income Return	10.0%	165
Global Intangible Low-Taxed Income (GILTI)		3,305
Inclusion Percentage		95.24%
Taxes Attributable to GILTI		105
Deemed Paid Credit Available (FTC)	80.0%	84



**Table 4. Post-TCJA Tax Liability  
(Amounts in US \$ (thousands))**

	U.S.	International	Ireland
Total Revenue	600	3,300	23,000
Total Expenses	-	<600>	<22,120>
Net Profit	600	2,700	880
Local Income Tax Rate	21%	0%	12.5%
Income Taxes Due Pre-GILTI	126	-	<b>110</b>
GILTI Inclusion	3,305		
Section 78 Gross-Up	105		
Section 250 Deduction	<1,705>		
Adjusted Income	1,705		
U.S. Tax on GILTI (21%)	358		
FTC Against GILTI	84		
Total U.S. Tax After FTC*	<b>400</b>		
Maltese Income Tax	-		
Irish Income Tax	<b>110</b>		
Worldwide Income Tax	<b>510</b>		
Effective Tax Rate**	<b>12.21%</b>		
*400 (Total U.S. Tax After FTC) = 126 (U.S. Income Taxes Due Pre-GILTI) + 358 (U.S. Tax on GILTI) - 84 (FTC Against GILTI)			
**ETR = 510/4,180			

The single Irish structure is basically the same as the double Irish structure, except that XYZ International has been eliminated. The buy-in and CSA are now between XYZ US and XYZ Ireland. (See Figure 2.)

Table 5 provides the P&L statement for the single Irish structure. For the sake of simplicity, it is assumed that all profits are earned in Ireland. Table 6 then calculates the GILTI, taxes attributable to the GILTI, and deemed paid credit under this structure. Table 7 calculates the worldwide income tax and effective tax rate under the single Irish structure.

**Table 5. P&L Statement  
(Amounts in US \$ (thousands))**

	U.S.	Ireland*
<b>Revenue</b>		
Sales	-	23,000
Royalty	400	-
CSA Payment	200	-
<b>Total Revenue</b>	600	23,000
<b>Total COGS</b>	-	2,700
<b>OPEX</b>		
Bad Debt	-	200
G&A	-	3,000
CSA Payment	-	200
Marketing	-	2,200
Sales	-	7,500
OPEX - D&A	-	2,500
Royalty	-	400
<b>Total OPEX</b>	-	16,000
<b>Other Expenses</b>		
Interest & Other Expense	-	20
Sales Tax	-	700
<b>Other Expenses</b>	-	720
<b>Profit</b>	600	<u>3,580</u>
<b>Income Taxes</b>	126	<u>448</u>
*For the sake of simplicity, it is assumed that all profits from distribution are earned in Ireland.		

**Table 6. GILTI Calculation  
(Amounts in US \$ (thousands))**

Foreign Operating Profits		3,580
Foreign Income Taxes		448
Net CFC Tested Income (Loss)		3,133
PP&E		2,300
Depreciation		<450>
Qualified Business Asset Investment (QBAI)		1,850
Interest Expense		20
Net Deemed Tangible Income Return	10.0%	165
Global Intangible Low-Taxed Income (GILTI)		<u>2,968</u>
Inclusion Percentage		94.7%
Taxes Attributable to GILTI		424
Deemed Paid Credit Available (FTC)	80.0%	339

**Table 7. Post-TCJA Tax Liability  
(Amounts in US \$ (thousands))**

	U.S.	Ireland
Total Revenue	600	23,000
Total Expenses	-	19,420
Net Profit	600	3,580
Local Tax Rate	21%	12.5%
Income Taxes Due Pre-GILTI	126	<b>448</b>
GILTI Inclusion	2,968	
Section 78 Gross-Up	424	
Section 250 Deduction	<1,696>	
Adjusted Income	1,696	
U.S. Tax on GILTI (21%)	356	
FTC Against GILTI	339	
Total U.S. Tax After FTC*	<b>143</b>	
Irish Income Tax	<b>448</b>	
Worldwide Income Tax	<b>590</b>	
Effective Tax Rate**	<b>14.13%</b>	
*143 (Total U.S. Tax After FTC) = 126 (U.S. Income Taxes Due Pre-GILTI) + 356 (U.S. Tax on GILTI) - 339 (FTC Against GILTI)		
**ETR = (590/4,180)		

**Table 8. Comparison – Double vs. Single Irish**

	Double Irish Structure	Single Irish Structure	Difference
Worldwide Tax	510	590	<u>80</u>
Worldwide Operating Profit	4,180	4,180	-
Worldwide ETR	12.21%	14.13%	<u>1.92%</u>

Table 8 compares the worldwide tax and effective tax rates under the double Irish and single Irish structures. On these facts, the double Irish continues to deliver tax savings over a single Irish structure. ■