

Testimony of Darien Shanske
Before the
Kansas House Taxation Committee
In Opposition to HB 2421
March 17, 2021

My name is Darien Shanske and I am a professor of law at UC Davis School of law, specializing in state and local tax. I have written extensively about state conformity to GILTI.

I am testifying in opposition to HB 2421, a bill that would reduce the share of GILTI income that would be reached by Kansas' corporate income tax.

Before briefly getting into the weeds with GILTI, I want to start with a few broad points. First, the passage of the American Rescue Plan might relieve immediate fiscal pressure on the state, but it does not change the basics of tax policy. As I will argue below, conforming to GILTI is good tax policy and I have taken that position since long before the pandemic. Second, decoupling from GILTI is a structural change to Kansas' tax system and so will reduce state revenue long after the federal funds have been expended. Third, if this last year has taught us anything, it is that the future is uncertain and it might turn out that the federal infusion is insufficient even in the short term. Fourth, the American Rescue Plan contains a provision that prohibits states from using federal funds to offset tax cuts. The scope of this provision is uncertain, but it further counsels against what would be a mistake in any event.

Finally, speaking generally, it is best for states not to adopt rolling conformity (as Kansas does) because of the likelihood of the state being forced into conforming with federal choices that are dubious on their own and particularly problematic for a state to conform to during a crisis. I am thinking, for example, of federal tax changes that provide for an extra tax benefit on PPP loans. And so I oppose those parts of HB 2421 as well, though I will focus my remarks on GILTI. *GILTI is the rare (recent) federal change that represents sound tax policy and that therefore the states should conform to.*

In short, decoupling from GILTI is, pretty much by definition, a tax cut to large – profitable – multinational corporations that are involved in shifting profits earned in the US abroad to lower tax jurisdictions. Only such corporations, and particularly those that derive a great deal of income from intellectual property, are likely to generate significant GILTI income. It is hard to imagine a poorer fit for relief during the current pandemic/recession.

GILTI – Global Intangible Low Taxed Income - is a technical provision of federal corporate tax law that was added by the TCJA in 2017. It was near uniformly recognized – including by a Republican Congress and President – that the shifting of corporate profits was a large problem that was very likely to be exacerbated by

other changes made by the TCJA. A middle-of-the-road estimate is that about \$300 billion/year is shifted out of the US corporate tax base. Because Kansas largely conforms to the federal tax base, when a large MNC shifts profits out of the federal base, it also shifts that income out of the Kansas base.

At the heart of GILTI is a calculation for ferreting out shifted profits. If the formula identifies certain income nominally earned abroad as GILTI, then that income is brought back into the US tax base and subject to tax.

The formula GILTI uses had antecedents among prominent tax economists. Not only is it not arbitrary, but the preliminary estimates I have seen estimate that GILTI will bring back between \$100 and 200 billion into the US tax base, a significant share of the amount leading economists believe large MNCs have shifted out.

Kansas already protects its tax base from shifting income to other *states* through the use of combined reporting; it is hard to see why Kansas should not also protect its tax base from shifting income to other *countries*.

The notion that conforming to GILTI hurts Kansas' competitive position is not credible. Kansas apportions a small slice of corporate income to itself that it then subjects to a low rate. GILTI would expand that slice somewhat, but we are still talking about very small numbers. And so, for example, reducing Kansas payroll in response to the state conforming to GILTI would result in a tiny change in tax to these taxpayers.¹ If there is data showing otherwise, I am happy to be proven wrong, but I find it hard to believe that conforming to GILTI over these last three years has had any effect other than to raise revenue from businesses that can afford to pay.

Selected Supporting Materials

States Should Conform to GILTI, Part 3: Elevator Pitch and Q&A [4 Pages], 94 *Tax Notes State* 121 (2019) (with David Gamage), available here: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3485377.

How the States Can Tax Shifted Corporate Profits: An Application of Strategic Conformity [38 Pages], *Southern California Law Review*, forthcoming, available here: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3679356.

¹ To be concrete, take a MNC with \$1bn in ordinary domestic profits and a 1% KS apportionment factor – at 7%, that taxpayer owes Kansas \$700,000 in tax. If GILTI were to increase the taxpayer's base by 20%, a high-end estimate, then the taxpayer would owe \$840,000. Reducing the MNC's apportionment factor presence by 10% would result in tax owed being reduced to \$756,000.