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**Leonore Heavey**
*Tax Counsel*
(202) 484-5221
lheavey@cost.org

February 7, 2023

Delegate Vanessa Atterbeary, Chair
Delegate Jheanelle K. Wilkins, Vice Chair
Maryland House Ways and Means Committee
Maryland General Assembly

*Via email*

**Re: COST Opposes Portions of House Bill 337, Taxation of Foreign Income**

Dear Chair Atterbeary, Vice Chair Wilkins, and Members of the Committee:

On behalf of the Council on State Taxation (COST), I am writing to oppose portions of House Bill 337. Although these are not our only concerns about the bill, the two provisions that are particularly troubling are: (1) elimination of the incentive for domestic production (decoupling from the foreign derived intangible income (FDII) deduction); and (2) double dipping in taxing foreign income (including foreign dividends in the corporate tax base along with global intangible low-taxed income (GILTI)). The two proposed changes selectively choose provisions in the federal Tax Cuts and Job Act (TCJA), conforming to those that increase and decoupling from those that reduce the corporate tax burden on Maryland businesses. This result is both unfair to Maryland businesses and counterproductive to fostering an economic climate in the State that is conducive to capital investment and job creation.

## About COST

COST is a nonprofit trade association consisting of over 500 multistate corporations engaged in interstate and international business. COST's objective is to preserve and promote equitable and nondiscriminatory state and local taxation of multijurisdictional business entities. COST has a significant number of members that own property, have employees, and make substantial sales in Maryland that would be negatively impacted by the bill in its current form.

## Eliminating the FDII Deduction Creates a Disincentive for Domestic Production

The 2017 federal TCJA includes the GILTI provision (under IRC § 951A), which effectively taxes a portion of a U.S. multinationals' foreign source income. As a companion provision, the TCJA also includes the FDII deduction (under IRC § 250), which provides an incentive for companies that invest in U.S.-based plants and equipment used for the production of exports. Although many states chose not to tax GILTI, Maryland currently conforms to both federal provisions, following the federal government's lead in taxing 50% of GILTI and also providing the FDII deduction to encourage domestic production.

In H.B. 337, however, Maryland decouples from the FDII deduction that incentivizes the production of exports in the State, while continuing to conform to the GILTI provision that imposes a tax on foreign earnings. This change is contrary to the intent of the TCJA and counterproductive for businesses investing capital in plants and equipment in Maryland.

**Taxation of Foreign Source Dividends Is Inconsistent with the TJCA and Unconstitutional**

The TCJA significantly changed the federal government's approach to taxing foreign source income. The TCJA includes the GILTI provision which effectively taxes a portion of a U.S. multinationals' foreign source income on a current basis. At the same time, the TCJA discontinued the prior approach that taxed foreign source income (*e.g.*, foreign dividends) on a deferred basis. To make the latter change, the TJCA created IRC § 245A that provides a deduction for foreign dividends. By so doing, the federal government ensures that U.S. businesses with foreign operations are now taxed under the new GILTI rules, but not also under the old rules taxing foreign dividends. But H.B. 337 proposes to addback the federal deduction in IRC § 245A for foreign dividends. If Maryland adopts H.B. 337, it will become an outlier among the states in the taxation of foreign source income as one of only a handful of states that "double dip" and tax both GILTI and foreign dividends. To tax foreign source income on both a current and a deferred basis is inconsistent with the federal government's goals in the TCJA, unfair to taxpayers, and anti-competitive for businesses located in Maryland that have foreign operations.

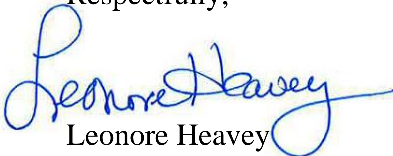
States are limited by constitutional provisions, such as the Foreign Commerce Clause, that make it impermissible for a state to favor domestic commerce over foreign commerce. Because Maryland does not tax similar domestic income earned by U.S. subsidiaries of Maryland corporate taxpayers, Maryland is foreclosed from taxing foreign dividends.[1]

**Conclusion**

H.B. 337 is inconsistent with the federal TCJA both in the way the legislation eliminates the incentive for domestic production of exports and by double dipping in taxing foreign income on both a current and deferred basis. The adoption of H.B. 337 would place Maryland at a competitive disadvantage among states and send a warning flag to multinational businesses that the State is a hostile environment for business expansion and relocation.

We respectfully request that you modify H.B. 337 to remove the provisions discussed above. Please let me know if you have any questions.

Respectfully,



Leonore Heavey

cc: COST Board of Directors
Douglas L. Lindholm, COST President & Executive Director

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[1] *See Kraft Gen. Foods, Inc. v. Iowa Dep't of Revenue & Fin.*, 505 U.S. 71 (1992).