



**Presentation:**

**US TAX REFORM: INTERNATIONAL TAX CHANGES  
66<sup>TH</sup> ANNUAL TAXATION CONFERENCE**

**Professor Bret Wells**

**November 15, 2018**



## **Agenda**

- 1. Inbound Reform**
- 2. Subpart F Reform (GILTY!)**
- 3. FTC Reform**
- 4. Territorial Regime (100% Foreign DRD)**
- 5. §367(a) reform**
- 6. New Branch Loss Recapture Rules of §91**
- 7. Foreign Derived Intangible Income Regime**
- 8. Other Item: Section 863(b) Repeal**

# 1. Inbound: Base Erosion and Profit Shifting: Background

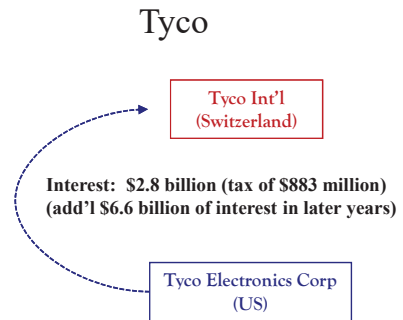
## High Profile Re-Leveraging Transactions

### Foreign Owned MNE Structure



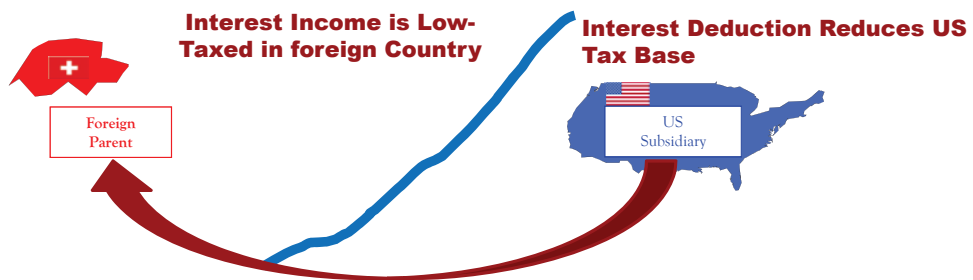
**IRS Conceded Case Before Trial**

### Inverted MNE Structure



**Outcome: Tyco settled for ~\$220 million with another \$250 million in later years.**

# 1. Inbound: Base Erosion and Profit Shifting: New §163(j)'s Disallowed Interest Definition



	Old §163(j)	New §163(j)
General Applicability	Corporations Only	"All" Taxpayers
Debt-to-Equity Threshold	1.5-to-1 Threshold	None
Related / Unrelated Interest	Related party interest	All interest
General Debt Limitation	50% of taxable income	30% ATI + Bus. Int.
Carryforward of Disallowed Interest	Yes	Yes
Carryforward of Excess Limitation	3 years	None



## 1. Inbound: Base Erosion and Profit Shifting: New §163(j)'s Disallowed Interest Definition

### General Rule

**Business Interest Expense** is not deductible to the extent it exceeds the sum of:

- (a) the **business interest income** of such taxpayer for the taxable year and
- (b) 30% of the taxpayer's **adjusted taxable income** for the taxable year and
- (c) floor plan financing interest (relevant to auto dealers who sell on credit).

**Business Interest Income** is income allocable to a **business\*** (**excludes** "investment income") and all interest includible in a C corporation's income.

**Adjusted Taxable Income** is taxable income without regard to:

- (a) any item of income/gain/loss/deduction not "allocable to" a **business\***
- (b) any business interest expense or business interest income
- (c) section 172 net operating loss deduction
- (d) section 199A deduction, and
- (e) depreciation, amortization, and depletion (for tax years before 1/1/2022).

**Note:** ATI apparently includes any GILTI, Subpart F Income, §956 Inclusions & FDII deductions.

**\*Business** is a trade or business under case law but excludes (i) trade or business of an employee, (ii) electing real property business, (iii) electing farming business, (iv) certain utility business (electrical, water, sewage, gas & steam), and (v) small businesses that have gross receipts of \$25 million or less.

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## 1. Inbound: Base Erosion and Profit Shifting: New §163(j)'s Disallowed Interest Definition

### Scope of Rule

**§163(j) applies to all taxpayers except excluded "businesses". See previous slide.**  
Special rules for partnerships/S Corps//Consolidated Groups. See Notice 2018-28.

#### Corporations:

**Business Interest Expense Limitation** applies at a **consolidated group level**.  
How will these rules apply to partnerships owned within consolidated groups?  
Stay tuned.

#### Partnerships:

1. Business Interest Expense Limitation determined at **partnership level**.
2. Deductible business interest expense is accounted for in computing the **partner's share** of separately stated income/loss. Disallowed business interest (disallowed at partnership level) is carried forward at the **partner level** to succeeding taxable years and deductible by the **partner** only if the partner is allocated excess taxable income from that partnership in a future year.
3. Partnership ATI is excluded from the partner's separate ATI calculation for purposes of applying §163(j) on items outside partnership.

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First appeared as part of the conference materials for the

66<sup>th</sup> Annual Taxation Conference session

"International Changes "