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In this installment of Academic Perspectives on SALT, the authors express hope that more states will take advantage of opportunities under the Tax Cuts and Jobs Act by taxing repatriated income and conforming to the global intangible low-taxed income and the base erosion and antiabuse tax regimes.

We offer no predictions about the next year in tax, but we will offer what we hope will happen — if not next year, then soon. To paraphrase Chief Justice John Roberts, we hope that when it comes to the taxation of multinational corporations in particular, states will act more like the "separate and independent sovereigns" that they are.[1]

Many of the reasons for a rethink of state public finance systems have long been noted. States are bound by balanced budget rules, but often rely on volatile revenue sources. More stable tax bases, like the sales tax and the property tax bases, are riddled with design flaws, from the sales tax base not including services and intangibles to the property tax failing to provide substantial, and automatic, circuit breakers. The corporate tax continues to yield less as corporations earn more.

The Tax Cuts and Jobs Act offered states a chance to take up the challenges relating to the corporate tax in particular, but in most cases they have not done so. Take the repatriation.[2] A sizeable portion of this money should have been taxed by the states to begin with — not just because the states also lose when corporations shift income out of the United States. In addition, corporations were incentivized by the likelihood of another federal repatriation holiday to strip out more income from the domestic corporate tax base than they might otherwise. In other words, one piece of poor federal tax policy (repatriation holidays) was exacerbating another piece of poor federal tax policy (the porous corporate tax regime).

There were — and are — additional reasons to tax the repatriation. For one, the repatriation was taxed at a bargain rate at the federal level, then this one-time money was squandered to pay for permanent tax cuts. A state-level tax could correct this to some extent. And because the repatriation also represents an inelastic tax base, states could resolutely resist the (usually specious) argument that companies would move if the state pursued a tax policy that the companies did not like.

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[1] *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 579 (2012).

[2] Most of these arguments are drawn from Darien Shanske and David Gamage, "Why (and How) States Should Tax the Repatriation," *State Tax Notes*, Apr. 23, 2018, p. 317.

And the states have needs — including infrastructure, rainy day funds, pension shortfalls, and softening the blow of the state and local tax cap. We certainly understand why not all states pursued taxing the repatriation, but virtually none? How can that be?

One explanation is ideological, namely that states with voters who liked the TCJA would not wish to act in a way that is arguably inconsistent with it. We have no idea if this is a true explanation, but if it is then it signals part of the problem. All politics is supposed to be local, not national. If the federal government — with its ability to deficit-finance — wants to leave billions of dollars on the table, then it does not follow that states should do the same. Indeed, a thrifty and lean low-tax state, as many so-called red states aspire to be, should be especially wary of leaving money on the table. These states wisely did not sit idly by and let *Quill* enable particular remote sellers to erode their sales tax bases, so why let some corporations erode their corporate tax bases?

And then what of the so-called blue states? A progressive personal income tax in Illinois is a sensible reform, but how could there have been no time for a quick repatriation bill? There was certainly time for discussion of the SALT cap workarounds in many blue states, but taxing the repatriation could have been used to soften the blow as well. Yet, crickets. And we have not even gotten around to asking why states have not conformed to the global intangible low-taxed income or the base erosion and antiabuse tax regimes or moved back to worldwide mandatory combination, especially now that it looks like the OECD is seriously considering versions of it as to non-routine profits.[3]

Perhaps when the next recession comes states will be more thoughtful, but at that point, the business community will argue that a recession is a terrible time to raise taxes on business and, in any event, taxes on profits will not raise much revenue. In other words, whatever combination of forces is stymieing states now will likely remain formidable.

We will do our best to tackle the only part of the problem that we can, which is to let states know as clearly as possible that they are missing relatively easy and sensible opportunities to improve their tax systems.

To that end, we will return to the issue of the repatriation. Clearly, states can still — and should — conform to GILTI[4] and the BEAT, but can they still tax the repatriation? The answer is yes. First, the generous structure of the repatriation backloads when a taxpayer can elect to have its earnings deemed returned. Thus, a state can tax the 84 percent of repatriation deemed returned for the next six years for those taxpayers that elected to defer, which we presume to be most if not all.[5] The rate applied to these revenues can be higher than the rate applied to ordinary corporate revenues. This can be justified as a kind of penalty/attempt to recoup the time value of money.

Second, we think a state can go back and tax the full repatriation as well.[6] After all, the TCJA gave the states a lot to respond to, and the structure of the repatriation is such that taxpayers will not suffer much harm to their reliance interests if a state now taxes the repatriation. The income was deemed returned anyway — so the taxpayer could not have done anything differently. Indeed, it is very unlikely that the statute of limitations has run on any of these tax years. A state could also justify its delay by noting that there was a prominent argument that the repatriated earnings would come home and lead to an investment bonanza.

[3] OECD, "Secretariat Proposal for a 'Unified Approach' Under Pillar One" (2019).

[4] Shanske and Gamage, "States Should Conform to GILTI, Part 3: Elevator Pitch and Q&A," *Tax Notes State*, Oct. 14, 2019, p. 121.

[5] IRC section 965(h)(1).

[6] We owe this argument to Jordan Barry, though we fear that we do not do it justice. *See* Jordan Barry, "The Transition (Under-) Tax" (forthcoming). For a thorough discussion of the law of retroactivity, see Michael T. Fatale, "Connecting Dot: Retroactive State Tax Statutes and *U.S. v. Carlton*," *State Tax Notes*, June 18, 2018, p. 1169.

And so a state might have been waiting to tax the bonanza. As has been well documented, there has been no such investment flurry, just a flurry of stock buybacks that advantage the already advantaged.[7] So there is another reasonable reason for states to act now.

We conclude where we began. States and localities are the primary providers of many government services, such as public safety and public schools. Though our federal system assigns them substantial — and growing — governmental responsibilities, the states are, to a considerable extent, left on their own as to raising revenues. No matter how much revenue a state wishes to collect, all states should seek to raise those revenues as fairly and efficiently as possible. The TCJA has given states several opportunities to raise revenue more fairly and efficiently than many of their current revenue tools, but so far the states have not acted. We hesitate to say that we see any trends, but if one squints then one might just see some signs that states are stepping up.[8] ■

[7] *See, e.g.*, Nico Grant and Ian King, "Big Tech's Big Tax Ruse: Industry Splurges on Buybacks," *Bloomberg*, Apr. 14, 2019 ("Some of the largest U.S. technology companies pushed for a corporate tax overhaul in 2017 by suggesting they would go on hiring sprees and boost the economy. Just over a year after getting what they wanted, data show these firms gave most of their huge tax savings to investors."); and Michael Smolyansky, Gustavo Suarez, and Alexandra Tabova, "U.S. Corporations' Repatriation of Offshore Profits," Board of Governors of the Federal Reserve System, Sept. 4, 2018 ("The analysis detailed here suggests that funds repatriated in 2018:Q1 have been associated with a dramatic increase in share buybacks.").

[8] See Nebraska's approach to the repatriation, Aaron Davis, "State Won't Treat Repatriated Income As Dividend," *Tax Notes State*, Sept. 23, 2019, p. 1272; and New Hampshire's approach to GILTI, Jennifer McLoughlin, "Compromise Budget Deal Would Tax Some GILTI," *Tax Notes State*, Sept. 30, 2019, p. 1383.