This Week in State Tax (TWIST)

August 3, 2026

Nebraska: District court rules IRC Section 965 income warrants alternative apportionment, but both Commissioner and taxpayer proposals miss the mark

A Nebraska district court rejected both the taxpayer's and the Department of Revenue's proposed method for apportioning income deemed received under the Tax Cuts and Jobs Act (TCJA) one-time inclusion of accumulated untaxed controlled foreign corporation (CFC) earnings (Section 965 Income) in 2017. In that year, the taxpayer reported more than $280 billion of gross Section 965 Income for federal purposes. On its original Nebraska return, the taxpayer excluded Section 965 Income from both its tax base and apportionment factor. The Department issued an adjustment including approximately $160 billion of net Section 965 Income (the $280 billion of gross income minus federal deductions) in the taxpayer's pre-apportionment tax base and the full $280 billion of gross Section 965 Income in the sales factor denominator. The taxpayer protested, arguing that Section 965 Income should be excluded from the tax base or, alternatively, that sales factor representation should be based on the gross receipts of the CFCs in the years generating the accumulated earnings that were deemed repatriated in 2017. The Tax Commissioner denied the protest and affirmed the assessment. On review, after the taxpayer withdrew its deductible-dividend argument following the Nebraska Supreme Court decision in *Precision Castparts*, the district court considered whether statutory or alternative apportionment applied and whether either party's proposal satisfied the equitable apportionment requirements.

The district court first considered whether alternative apportionment was permitted. Given that neither Section 965 Income (as included by the Department in the denominator of the sales factor) nor CFC gross receipts (as included by the taxpayer in the denominator of the sales factor) were part of the standard apportionment formula, the court concluded that the proposals of both parties constituted alternative apportionment methods. The court further held that the 2017 deemed repatriation of Section 965 Income earned over multiple years qualified as a "unique and nonrecurring factual situation" justifying alternative apportionment.

The court, however, rejected both the Commissioner's and the taxpayer's proposed alternative apportionment methods, concluding that neither produced an equitable result under the alternative apportionment statute. The Commissioner's method improperly added the taxpayer's Section 965 Income to the sales factor denominator even though Nebraska's sales factor is based on gross receipts rather than income (thereby measuring the foreign activity that generated the Section 965 Income on a different and smaller basis than the rest of the sales factor and increasing the portion of income apportioned to Nebraska). The taxpayer's method, by contrast, improperly increased the denominator by including multiple years of CFC gross receipts while comparing those receipts to only one year of Nebraska sales, creating a significant temporal mismatch that favored the taxpayer. The court further found that both methods suffered from calibration defects because they did not properly align the denominator with either the gross receipts generating the Section 965 Income or the net amount of Section

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965 Income included in the taxpayer's Nebraska tax base.

The court remanded the matter to the Department to craft an equitable remedy that addressed its concerns. The court indicated that an equitable formula should: (a) represent the 965 Income on a basis consistent with the gross receipts foundations of the sales factor; (b) be calibrated such that any amount added to the denominator is consistent with the amount of income added to the base; and (c) address the temporal mismatch by reconciling the periods reflected in the numerator, denominator and income subject to apportionment.

Please contact Kara Hernandez with questions about *Apple, Inc. v. Department of Revenue* or other Nebraska income tax matters.