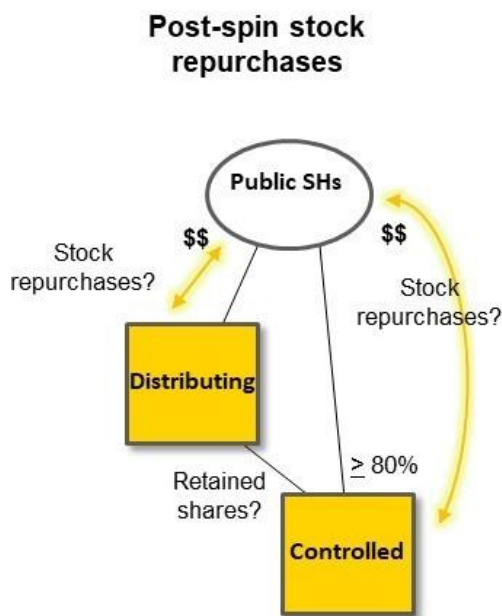


Technical Developments and Musings

“Device” and post-spin stock repurchases. A corporate spin-off fails to qualify for tax-free treatment if used “principally as a device for the distribution of the earnings and profits” of Distributing or Controlled. Post-spin sales or exchanges of Distributing or Controlled stock are typically evidence of this “device,” although not necessarily dispositive. In [PLR 202304005](#), the IRS ruled on many aspects of a proposed divi-



sive transaction, including that the spin-off is a nonrecognition transaction. This ruling was based on, among other facts, that either Distributing or Controlled might repurchase shares on the open market or through an accelerated share repurchase program following the spin-off. On this point, the PLR included an atypical ruling specifically on the “device” question, even though the PLR included a standard “no determination” caveat as to whether the divisive transaction at issue is “used principally as a device for the distribution of the earnings and profits of the distributing corporation or controlled corporation or both.” That is, the IRS specifically ruled that “Distributing’s or Controlled’s Post-Closing Share Repurchases will not constitute ‘evidence of device’ within the meaning of” Reg. §1.355-2(d)(1). This “device” ruling, although rare, appears to be based on numerous representations, including that (i) any repurchases will be motivated by a business purpose; (ii) the identity of shareholders from whom shares are repurchased will be unknown; and (iii) any repurchase will not be motivated “to any extent” by a desire to increase or decrease the ownership percentage of any particular shareholder or group of shareholders.

Funding foreign parent stock repurchases “by any means.” And on the subject of stock repurchases: publicly traded inbound groups with US subsidiaries are beginning to process the broad sweep of a “funding” rule outlined in [Notice 2023-2](#). The generally applicable rule treats a US subsidiary in such groups as subject to the excise tax when it “funds by any means (including through distributions, debt, or capital contributions)” stock repurchases of the applicable foreign corporation “and such funding is undertaken for a principal purpose of avoiding the stock repurchase excise tax.” But a *per se* rule goes further, *deeming* a principal purpose to exist regardless of actual motivations where a foreign parent or affiliate is “funded” by any means (other than distributions) and repurchases stock within two years of the funding. Although currently not strictly applicable, the *per se* rule is causing concern among inbound groups because it seemingly implicates ordinary course cross-border cash or property flows to a “funded entity,” other than by distributions. For further info, see [Tax Alert 2023-0054](#).

Deconstructing listed transaction notices. A federal district court, in [Mann Construction v. US](#), concluded that the Administrative Procedure Act left it no choice but to “set aside” a 2007 “listed transaction” notice involving cash value life insurance trusts. The court’s order could have nationwide implications, although as of this writing the government is appealing the decision. In any event, *Mann Construction* represents a growing trend of courts striking down certain “legislative” Treasury/IRS rules or notices for failing to comply with APA notice-and-comment requirements.