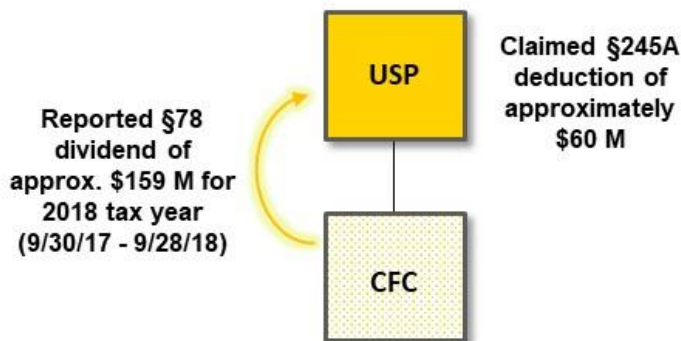


Technical Developments and Musings

Textualism and TCJA effective date mismatches. The full Tax Court came down on the side of a corporate taxpayer who claimed a deduction under §245A for a §78 deemed dividend representing a “gross up” of foreign taxes. As the court noted in *Varian Medical Systems, Inc. v. Comm’r*, 163 T.C. No. 4, the Tax Cuts and Jobs Act (TCJA) had amended both Code provisions as part of the shift to a partial territorial system on worldwide earnings. But, the court noted, there was an effective date mismatch, primarily affecting fiscal year taxpayers such as Varian, creating “a window” during which §245A was in effect but

where conforming amendments to §78 were not. (The conforming amendments to §78 generally treated the deemed paid foreign tax gross-up as a dividend for all income tax purposes “other than” two Code provisions, including §245A.) Drawing “no inference” from “congressional inaction” on a technical correction bill that would have fixed the effective date mismatch, the court said that §78 could hardly be clearer that the amount for the year in question was a dividend and that §245A authorized a deduction. The court agreed with the taxpayer that the disparate effective dates for new §245A and the amendment to §78 “resulted in a gap period in which its section 78 dividend qualified for a deduction under section 245A.” But the court also cited the recent *Loper Bright*

Effective date mismatch: Sections 245A and 78



decision by the US Supreme Court in concluding that it will not follow a regulation that purports to change this result “when (as here) it contradicts the statutory text.” The court noted that the 2019 regulations “essentially gives one of the TCJA’s amendments to section 78 an earlier effective date than provided for in the TCJA to prevent taxpayers like Varian from deducting section 78 dividends;” but were contrary to the “plain text” of the statutes. However, the court agreed with the government that under §245A(d), any foreign tax credits attributable to the amount that was deducted would be disallowed. For further info, see [Tax Alert 2024-1662](#).

Proposed dual consolidated loss regulations. The government published [proposed dual consolidated loss \(DCL\) regulations](#), primarily focused on the interaction of the DCL rules with Pillar Two of the OECD’s Global Anti-Base Erosion Model Rules (GloBE Rules), while also making several other changes to the current rules. Among other things, the proposed regulations would modify the existing intercompany transaction regulations under Reg. §1.1502-13, generally shifting, for this purpose, the application of the existing regulations toward separate-entity treatment. For further info, see [Tax Alert 2024-1529](#).

Foreign partnership also liable for 2009 withholding taxes. In *YA Global Investments LP v. Comm’r*, T.C. Memo. 2024-78, the Tax Court held that a foreign partnership was engaged in a US trade or business and is liable for withholding tax for tax year 2009 under §1446 on the portion of its taxable income that was effectively connected with that trade or business and allocable to foreign partners. The court had previously upheld similar IRS claims for tax years 2006-2008 (see [Tax Alert 2023-1943](#)).