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Tax Accounting

By James E. Salles

The early summer saw a fair amount of regulatory and administrative guidance emerge on tax accounting issues. (More may be on the way; we have Benefits Tax Counsel's word that the proposed regulations under section 457[1] will be finalized "soon."[2]) In this month's column:

- More proposed regulations on "split-dollar" life insurance fill in some of the gaps in the regula tions package released last summer[3];
- Further steps toward "spread periods" for cumulative adjustments upon changes in methods of accounting[4];
- The IRS concedes that some utilities' special charges for fuel or conservation programs will be treated like loans.[5]

More "Split-Dollar" Proposed Regulations

In early May, the IRS issued proposed regulations filling in some of the gaps in last summer's regulation package dealing with "split-dollar" insurance arrangements.[6] The term "split-dollar" refers to an arrangement under which two parties split rights under a life insurance policy. (For simplicity's sake I shall refer to the party whose life is insured, and is typically entitled to the residual death benefit, as the "employee" and the other party as the "employer," although these arrangements are also encountered outside the employment setting.) The tax treatment of such arrangements has given rise to considerable confusion over the years. The basic question is whether the employer or the employee should be treated as the policy owner, and the degree to which policy formalities (or the parties' choice) should affect the answer.

Revenue Ruling 64-328[7] allowed the employer to be treated as the policy owner, while the employee either paid for term coverage or was taxed upon its value. As arrangements became more sophisticated, however, distortions inherent in this treatment became apparent. If the employer owns the policy, then logically any increases in the employee's withdrawal rights, at least to the extent that they reflect employer contributions, should be currently taxable under the "economic benefit" doctrine.[8] On the other hand, if the employee is the owner, employer-paid premiums are loans, meaning potential imputed interest income to the employee.[9] The policy's tax "ownership" should also determine, for example, whether distributions are treated as passing through the hands of the employer or as made directly to the employee. However, taxpayers frequently relied on Revenue Ruling 64-328 to avoid recognizing income on the policy's initial purchase, without accounting for other aspects of the transaction consistently with its assumption that the "employer" owned the policy.

The IRS began to address these issues in Notice 2001-10,[10] later superseded by Notice 2002-8.[11] The Notices basically allowed taxpayers to choose which model to follow, so long as they did so consistently. Among other things, under the "employer-owned" model, employees must pay tax on increases in cash surrender value resulting from employer contributions. (As discussed below, the taxation of increases resulting from investment gains has been unsettled.) On the other hand, if the employee is to be treated as the owner, the parties must make a reasonable effort to apply the imputed interest rules.

The 2002 Proposed Regulations

The Notices were intended as stop-gap rules while new regulations were under consideration. The new regulations will only be effective for arrangements entered into (or "materially modified") after their publication,[12] so taxpayers can rely on the Notices for arrangements in the meantime. Proposed regulations appeared in July, 2002.[13] Prop. Regs. § 1.61-22 covers "economic benefits" provided by the policy owner to a non-owner, and Prop. Regs. § 1.7872-15 "split-dollar" loans from the non-owner to the owner, corresponding roughly to the "employer-owner" and "employee-owner" models.

The regulations define a "'split-dollar' arrangement" broadly to include any arrangement between a policy owner and a non-owner under which one of the parties is entitled to recover premiums paid

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from the policy proceeds.[14] They will thus reach, for example, a "plain vanilla" secured loan, even one that does not date from inception of the policy. The new rules also apply regardless of the parties' motive for entering into the "split-dollar" arrangement, although arrangements between service provider and recipient, corporation and shareholder, and donor and donee get special treatment in some regards.[15] The regulations will apply to the first two categories even if the parties' arrangement does not meet the general definition, if the service recipient or corporation pays the premiums and the service provider or shareholder gets the death benefit.[16]

The threshold issue remains identifying the policy owner. The regulations generally do away with the Notices' elective treatment. In the compensation and gift contexts, the donor or service recipient is automatically treated as the owner if the other party's rights are limited to current life insurance protection. Otherwise, ownership is generally determined under the policy documents.[17] Once the policy owner or owners have been identified, different aspects of the arrangement can be classified according to whether the payment (or benefit) flows from the owner or a non-owner.

The first question concerning a payment by a non-owner is whether it represents a "split-dollar" loan under Prop. Regs. § 1.7872-15. Payments to (or for benefit of) the policy owner by a non-owner will generally be treated as "split-dollar" loans if they are loans under general tax principles or else are reasonably expected to be repaid.[18] However, these rules do not apply in the compensation and gift settings where the donor or the service recipient is treated as the policy owner. In other words, the service provider will not be treated as making a loan to the service recipient, nor a donee to the donor.[19] If the non-owner payment is not a split-dollar loan, the next question is whether it is consideration for an "economic benefit" described in Regs. § 1.61-22. If so, the non-owner will generally be entitled to net the payment in computing income from the benefit. Otherwise, general tax principles apply in characterizing the payment.[20]

In the other direction, any right that the non-owner has under, or to a benefit of, the insurance policy is an "economic benefit." Policy distributions and other payments to the non-owner (including policy loans that are not expected to be repaid) are treated as if made to the owner and then transferred by the owner to the actual recipient. Death benefits received by the non-owner will be excludable if the non-owner either paid for the coverage or took its value into account as an economic benefit. Finally, if ownership of the policy is transferred, its value is taken into account at that time, with appropriate provision to avoid double-counting.[21]

The "Inside Buildup" Problem

The treatment of increases in cash surrender value that are attributable to investment return, as opposed to additional premiums, has been a troublesome issue, partly because it has been hard to find the right analogy. Beneficiaries are taxed on the "economic benefit" when amounts are first set apart for them in a trust or escrow account, but they are not normally currently taxed on later increases in the value of their interests resulting from investment gains. In such situations, however, the investment gains will normally be currently taxable either to the employer/settlor or to the trust itself. Moreover, in the case of "employee trusts," Congress has expressly provided for taxation both "inside" and "outside" the trust.[22] That is, not only does the trust pay tax on its own income, but those beneficiaries that are "highly compensated employees" are taxed annually on increases in the value of their interests.[23]

By contrast, in the past, increases in split-dollar policies' cash values typically have not been reported by anybody. In part, of course, this reflects the exemption for "inside buildup" in a life insurance policy. However, that exemption protects policy owners, not third parties. If investment gains within an employer-owned policy permit an employee to obtain additional policy loans which in practice do not have to be paid back, then the employee is arguably in "constructive receipt" of the additional cash value.[24]

The IRS addressed the issue under "old" law in a 1996 technical advice involving a "split-dollar" arrangement between a corporation and a life insurance trust for benefit of one of its executives.[25] The corporation was entitled only to be repaid for the premiums that it had advanced. The trust had all the "incidents of ownership" and was entitled to all the other benefits under the policy. Nonetheless, the National Office, stuck with Revenue Ruling 64-328's "employer-as-owner" model, had to frame the issue as measuring the economic benefits conveyed by the "owner" (the corporation) on the "non-owner" (the trust). One of these benefits was the increases

in the policies' cash surrender values. These increases were attributable to policy earnings rather than additional premiums paid. However, the ruling concluded that "[i]ncome will be reportable in later years under section 83 to the extent that the cash surrender values of the policies exceed . . . the amount that is returnable" to the corporation to "repay" the premiums.

This technical advice attracted much critical comment, and the Notices punted on this issue, promising that the IRS would not attempt to currently tax inside buildup pending further guidance.[26] As initially released, the proposed regulations only provided that the non-owner's right to any benefit under the policy "including, but not limited to, an increase in the cash surrender value" was an economic benefit.[27] The subparagraph intended to address how to measure the income from those benefits was reserved.[28]

The New Proposed Regulations

The new proposed regulations add the missing subparagraph, which runs over a page in the *Federal Register*. The proposal divides the economic benefits to the non-owner into three categories:[29]

- current life insurance protection;
- policy cash value "to which the non-owner has current access"; and
- other economic benefits, which the preamble states should be understood broadly to cover "any benefit, right, or feature" of the life insur ance contract.[30]

The heart of the proposal is its treatment of the "inside buildup" issue. The proposal defines the portion of the policy's cash value "to which the non-owner has current access" as that portion which is *either* accessible to the non-owner *or* inaccessible to the owner or its creditors.[31] Triggering taxation when an amount is set aside from the transferor's creditors reflects the common law "economic benefit" doctrine, and in particular early cases holding that transfers of annuity policies represented more than mere "unfunded and unsecured promises to pay."[32] Taxing non-owners based on access, on the other hand, is consistent with constructive receipt.

The new proposal addresses the major unresolved question in the intended regulatory scheme, and matters may proceed relatively quickly hereafter. Treasury Deputy Benefits Counsel Michael Doran has been quoted as advising taxpayers to expect final split-dollar regs "in the pretty near future" after the scheduled July 29 hearing on the new proposal.[33]

Uniform "Spread Periods" Proposed

Background

Section 481 generally requires a "cumulative adjustment" to income in a year that a taxpayer changes methods of accounting. The only statutory relief is in section 481(b), an income-averaging provision that provides relatively limited benefits in these days of flat rates. The IRS has used its authority to prescribe the "terms and conditions" for effecting a change in method[34] to encourage voluntary method changes by allowing taxpayers to spread positive adjustments to income over varying periods.

Starting in the 1980s, Congress began to get into the act, specifying that particular method changes required by legislation were to be treated as having been initiated by the taxpayer with the required consent.[35] Frequently the drafters added that any necessary adjustments were to be taken into account over a specified number of years, usually four,[36] or over a period "no longer than" that.[37] Some of these provisions were transition rules that applied for a limited period after enactment. However, similar language has also appeared in both codified[38] and uncodified[39] provisions of indefinite duration that apply, for example, to all taxpayers that make a particular election or must change methods upon exceeding a revenue threshold.

These various statutory and administrative rules have engendered some confusion,[40] which the IRS seems to be trying to alleviate, as best it can, by simplifying and standardizing the rules. A 1997 overhaul of the method change procedures[41] abandoned varying spread periods for different types of changes in favor of a default period of four years, like that allowed by most of the statutory provisions. A later change headed off a possible revival of an earlier controversy by allowing taxpayers to deduct *negative* adjustments in full in the year of change.[42]

New Proposed Regulations

The IRS has now moved to make the same change under two statutory change of method provisions that are drafted flexibly enough to permit it,

issuing proposed regulations applying to method changes under section 263A (the "uniform capitalization" rules) and section 448 (which restricts the use of the cash method).[43] The preamble explains that the changes are proposed to provide administrative flexibility and eliminate any incentive for taxpayers to hold off making required changes in the expectation of later making them on more favorable terms.

The UNICAP rule illustrates the complexities than can result from the interplay of statutory and administrative method change provisions. Section 263A generally applies to taxpayers that produce property, and to taxpayers that acquire property for resale ("resellers") with gross receipts over $10 million. The section of the Tax Reform Act of 1986 that originally enacted it provided that method changes "required by the amendments made by this section" shall be treated as initiated by the taxpayer with consent and the spread period "shall not exceed four years."[44] Notably, the provision applies to method changes for *any* taxable year, so that it can still apply, for example, to a reseller that becomes subject to the UNICAP rules upon exceeding the $10 million threshold.

Reg. § 1.263A-7 provides rules for taxpayers making a broad variety of accounting method changes under section 263A. The current regulations include a subparagraph, consistent with but reaching more broadly than the statutory rule, which provides that any taxpayers "required or permitted" to change methods under section 263A shall be treated as having initiated the change and that the cumulative adjustment shall be taken into account over a period not to exceed four taxable years.[45] This provision does not itself provide consent to the change, which taxpayers not covered by the statutory provision must seek elsewhere in the regulations or in the administrative procedures. Nor does it specify exactly what period will be used.

The proposed amendments eliminate one layer of complication by substituting language that states that the taxpayer "must take the net section 481(a) adjustment into account over the section 481(a) adjustment period as determined under the applicable administrative procedures."[46] Of course, the statutory rule applying to changes "required" by section 263A (as originally enacted) remains in effect, and will have to be taken into account in any guidance. Unlike the former regulation, the statutory rule *does* provide for automatic consent, although its limitation on the spread period is likely to be academic so long as the administrative procedures do not prescribe a spread period exceeding four years.

Section 448 generally forbids C corporations and partnerships including C corporations from using the cash method once their average annual gross receipts over a test period exceed $5,000,000. The statute provides that any necessary method changes are to be treated as initiated by the taxpayer with the IRS' consent and that the spread period "shall not exceed 4 years" (except for hospitals, which get ten).[47] The current regulations provide for the adjustment to be taken into account over four years, or the number of years the taxpayer used the cash method, if less. The adjustment is subject to acceleration in certain circumstances, and a special rule permits cooperatives to elect to take the entire adjustment into account in the year of the change.[48] As with the UNICAP-related changes, the proposed regulations provide that any cumulative adjustment shall be taken into account "over the section 481(a) adjustment period as determined under the applicable administrative procedures."[49]

Comments Requested

The preamble to the proposed regulations also requests comments on how to handle accounting method changes under section 381, which governs the succession of tax attributes, including accounting methods, in tax-free reorganization transactions. Generally speaking, an acquiring or successor corporation will "inherit" the accounting method of its transferor or predecessor, but methods may have to be changed in certain circumstances, such as when two or more existing corporations are combined into one.[50] The IRS requested comments about which entity should recognize the cumulative adjustment, appropriate spread periods, and associated procedural issues.

IRS: Utility "Fuel Cost Overrecoveries" Treated As Loans

In Revenue Ruling 2003-39,[51] the IRS has conceded that utilities' "fuel cost overrecoveries" will be treated as loans on facts similar to *Houston Industries, Inc. v. United States*,[52] *Florida Progress Corp. v. Commissioner*,[53] and *Cinergy Corp. v. United States*.[54] Loan treatment would mean that the utilities would never have to report these amounts as income so

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long as they were repaid in due course.

Regulated utilities' accounting has been at issue in a number of recent court cases. Several of these have involved disputes about whether a utility has been ordered to repay excess collections or merely to charge less in the future.[55] However, several taxpayers have successfully established that their rights to the "excess" amounts were sufficiently limited that these amounts were never income in the first place. The key question seems to be whether the utility has contemporaneous obligation to repay the excess received to an identifiable group of customers—whether or not these are the same customers that paid the amounts in the first place. Consistently with the rules for accrued deductions,[56] the fact that the liability may be due to a group or the particular payee unknown does not rule out treating the receipt as a loan.[57]

The forerunner of the cases cited in Revenue Ruling 2003-39 was *Illinois Power Co. v. Commissioner*.[58] There, the Seventh Circuit, reversing the Tax Court, held that Illinois Power did not have to report income from a special rate surcharge designed to encourage conservation. It had been clear all along that the utility would not be allowed to keep the proceeds, which were eventually "redistributed," with interest, among its customers. Although *Illinois Power* emphasized that regulators treated the taxpayer as in effect a fiduciary for its customers, and relied upon precedent holding that receipts under an implicit trust are not income, later cases have relied more squarely on loan principles.

In *Houston Industries*, the taxpayer was allowed to charge customers a provisional "fixed fuel factor" based on the previous year's results. These charges were subject to periodic reconciliations allowing the taxpayer to recoup underrecoveries, or requiring it to repay overrecoveries, with interest. Citing *Commissioner v. Indianapolis Power & Light Co.*,[59] in which the Supreme Court had held a utility not taxable on customer deposits, the Federal Circuit held that the taxpayer did not have sufficient "dominion and control" over the "fuel factor" proceeds to be taxed on them. The Tax Court in *Florida Progress* reached the same result, again relying on *Indianapolis Power*, with respect to a similar scheme of fuel surcharges subject to periodic "true-up" adjustments. Finally, earlier this year, the Court of Federal Claims followed *Houston Industries* in *Cinergy*, rejecting various asserted grounds for distinction.

Revenue Ruling 2003-39 merely summarizes the facts of *Houston Industries* and then concludes that "taxpayers may exclude fuel cost and energy conservation cost overrecoveries from gross income in cases involving facts substantially similar" to the cited cases, leaving the scope of the IRS' concession not wholly clear. For example, although the ruling notes that interest was charged in *Houston Industries*, this would not seem essential to loan treatment. The *Cinergy* court rejected the lack of interest in that case as a potential ground for distinction.[60] The courts' reasoning was ultimately based upon *Indianapolis Power*, where the Supreme Court stated that the key to distinguishing a payment from a loan or a deposit was "not whether . . . use of the funds is unconstrained during some interim period. The key is whether the taxpayer has some guarantee that he will be allowed to keep the money."[61] The crucial factor seems to be, as emphasized by all three courts, whether the obligation to repay is unconditional from the outset, as opposed to being conditional, for example, on customers' further energy purchases.[62]

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1. REG-105885-99, 2002-1 C.B. 1103, discussed in J. Salles, "Tax Accounting," 3(12) Corp. Bus. Tax'n Monthly 35 (September, 2002).
2. "ABA Tax Section Meeting: Sweetnam Outlines Possible Reg Changes," Tax Analysts Doc. 2003-11826, 2003 TNT 91-21 (May 12, 2003).
3. RIN 1545-BA44, 68 Fed. Reg. 24,898 (May 9, 2003).
4. RIN 1545-BB47, 68 Fed. Reg. 25,310-01 (May 12, 2003).
5. Rev. Rul. 2003-39, 2003-17 I.R.B. 811.
6. Prop. Reg. § 1.61-22(d)(3)(ii), RIN 1545-BA44, 68 Fed. Reg. 24,898 (May 9, 2003).
7. 1964-2 C.B. 11.
8. *Cf. Sproull v. Commissioner*, 16 T.C. 244 (1951), *aff'd*, 194 F.2d 541 (6th Cir. 1952).
9. *See* I.R.C. § 7872.
10. 2001-1 C.B. 459, discussed in J. Salles, "Tax Accounting," 2(4) Corp. Bus. Tax'n Monthly 23 (July, 2001).
11. 2002-1 C.B. 398, discussed in J. Salles, "Tax Accounting," 3(8) Corp. Bus. Tax'n Monthly 33, 36-38 (May, 2002).
12. Prop. Reg. §§ 1.61-22(j), 1.7872-15(n); Notice 2002-8, Part II, 2002-1 C.B. 398,398.
13. REG-164754-01, 67 Fed. Reg. 45,414 (July 9, 2002), discussed in Gary Q. Cvach, et al., "Taxation of Compensation and Benefits," 4(1) Corp. Bus. Tax'n Monthly 30 (October, 2002), and Stewart Reifler, "New IRS Rules for Split-Dollar Life Insurance Arrangements," 4(8) Corp. Bus. Tax'n Monthly 20 (May, 2003).
14. Prop. Reg. § 1.61-22(b)(1).
15. *See, e.g.,* Prop. Reg. § 1.61-22(b)(2)(ii)-(iii), (b)(3)(ii).
16. Prop. Reg. § 1.61-22(b)(2).
17. Prop. Reg. § 1.61-22(c)(1).
18. Prop. Reg. § 1.7872-15(a)(2).
19. Prop. Reg. § 1.61-22(b)(3)(ii).

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20. Prop. Reg. § 1.61-22(b)(5).
21. Prop. Reg. § 1.61-22(d)-(g).
22. I.R.C. § 402(b).
23. *See* I.R.C. § 402(b)(4).
24. Reg. § 1.451-2.
25. TAM 9604001 (Jan. 26, 1996).
26. Notice 2002-8, Part IV.1, 2002-1 C.B. at 399 ("the Service will not treat a service recipient as having made a transfer . . . solely because the interest or other earnings credited to the cash surrender value of the contract cause the cash surrender value to exceed the portion thereof payable to the service recipient.").
27. Prop. Reg. § 1.61-22(d)(3)(i).
28 Prop. Reg. § 1.61-22(d)(3)(ii), REG 164754-01, prior to amendment by RIN 1545-BA44.
29. Prop. Reg. § 1.61-22(d)(3)(ii)(A).
30. RIN 1545-BA44, preamble, 68 Fed. Reg. at 24,900.
31. Prop. Reg. § 1.61-22(d)(3)(C).
32. 1 T.C. 275 (1942).
33. Karl Ritterspusch, "Split-Dollar Project Expected to Move Quickly After Hearing on Most Recent Regulations," Daily Tax Report, May 13, 2003, at G-12.
34. *See* Reg. § 1.446-1(e)(3).
35. *E.g.*, DEFRA, Pub. L. No. 98-369, § 91(g)(2)(B) (election to apply new section 461(h) to taxpayer's entire 1984 year).
36. *E.g.*, IRS Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 7003(c)(2) (transition rule accompanying enactment of § 475(c)(4), excluding customer receivables from § 475's "mark-to-market" accounting regime); Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 1001(d)(4) (transition rules accompanying enactment of §§ 475(e)-(f), providing elections to extend mark-to-market accounting to commodities dealers and to traders); OBRA93, Pub. L. No. 103-66, § 13223(c)(2)-(3) (transition rule accompanying enactment of I.R.C. § 475 itself) (5 or 15 years); TRA86, Pub. L. No. 99-514, § 805(b) (transition rule accompanying repeal of I.R.C. § 166(f), which formerly allowed reserves for bad debts).
37. Job Creation and Worker Assistance Act of 2002, Pub. L. No. 107-147, § 403(b)(2) (transition rule accompanying amendments to I.R.C. § 448(d)(5) affecting "nonaccrual experience method"); Revenue Act of 1987, Pub. L. No. 100-203, § 10204(b)(2)(B) (transition rule governing uncodified provision including past service pension costs in contract costs under § 460(c)).
38. I.R.C. § 448(d)(7), discussed below (required adoption of accrual accounting).
39. Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 961(b)(2) (section 471(b) "inventory shrinkage" election); TRA86, Pub. L. No. 99-514, § 803(d), discussed below (application of UNICAP rules to inventory property).
40. *See, e.g., Hospital Corp. of America v. Commissioner*, 107 T.C. 73 (1996).
41. Rev. Proc. 97-27, 1997-1 C.B. 680 (general procedure); Rev. Proc. 97-37, 1997-1 C.B. 455 (automatic consent changes). The current version of the automatic change procedure is Rev. Proc. 2002-9, 2002-3 I.R.B. 327.
42. *See* Rev. Proc. 2002-19, 2002-13 I.R.B. 696, discussed in J. Salles, "Tax Accounting," 3(9) Corp. Bus. Tax'n Monthly 31, 35-36 (June, 2002).
43. REG 142605-02, RIN 1545-BB47, 68 Fed. Reg. 25310-01 (May 12, 2003).
44. Tax Reform Act of 1986, Pub. L. No. 99-514, § 803(d), *as amended by* Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, § 1008(b)(7) *and* Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, § 7831(d)(1).
45. Reg. § 1.263A-7(b)(2)(ii).
46. Prop. Reg. § 1.263A-7(b)(2)(ii).
47. I.R.C. § 448(d)(7).
48. Reg. § 1.448-1(g)(2)-(3), before amendment by RIN 1545-BB47.
49. Prop. Reg. § 1.448-1(g)(2)(i).
50. I.R.C. § 381(c)(4); Reg. § 1.381(c)(4)-1.
51. 2003-17 I.R.B. 811.
52. 125 F.2d 1442 (Fed. Cir. 1997).
53. 114 T.C. 587 (2000), *discussed in* J. Salles, "Tax Accounting," 1(12) Corp. Bus. Tax'n Monthly 25, 25-26 (September, 2000).
54. 55 Fed. Cl. 489, 511-15 (2003).
55. *See, e.g., MidAmerican Energy Co. v. Commissioner*, 271 F.3d 740 (8th Cir. 2001), discussed in J. Salles, "Tax Accounting," 3(4) Corp. Bus. Tax'n Monthly 34, 36-37 (January, 2002); *Dominion Resources, Inc. v. United States*, 219 F.3d 359 (4th Cir. 2000), discussed in J. Salles, "Tax Accounting," 2(1) Corp. Bus. Tax'n Monthly 36, 36-37 (Oct. 2000).
56. *Cf., e.g., United States v. Hughes Properties, Inc.*, 476 U.S. 593, 602 (1986) (progressive jackpot payable to eventual winner); *The Washington Post Co. v. United States*, 405 F.2d 1279 (Ct. Cl. 1969) (liability due dealers as a group).
57. *See, e.g., Houston Industries*, 125 F.3d at 1443 ("perfect correspondence" not possible).
58. 792 F.2d 683 (7th Cir. 1986), *aff'g on another issue and rev'g on this issue* 83 T.C. 842 (1984).
59. 493 U.S. 203 (1990).
60. 55 Fed. Cl. at 514.
61. 493 U.S. at 210.
62. *Houston Industries*, 125 F.3d at 1445-46; *Cinergy*, 55 Fed. Cl. at 513-14; *Florida Progress*, 114 T.C. at 600-01.