Monetized Installment Sale
Tax Considerations

The following summarizes, in outline form, several tax aspects related to a monetized installment sale.

The sections to this outline include:

I. Step Transaction

Issue: Are loan proceeds treated as cash payment under the installment contract under the "binding commitment" test, the "interdependence" test, or the "end result" test?

Analysis: Memorandum No. 20123401F, August 24, 2012, explains the following: "The step transaction doctrine applies in cases where a taxpayer seeks to go from point A to point D and does so by stopping at intermediary points B and C. The purpose of the unnecessary stops is to achieve tax consequences differing from those which a direct path from A to D would have produced. In such a situation, courts may disregard the taxpayer's path and the unnecessary steps."

The Binding Commitment Test
Under the "binding commitment" test a series of transactions will be stepped together only if at the time that the first step is commenced there is a binding legal commitment to undertake the subsequent step(s). A seller may sell for an installment contract without committing the seller to accept a loan from the lender and a seller may apply for a loan from the lender without any commitment whatever to enter into an installment contract. Moreover, even after an installment contract is executed, the seller is not required to obtain the monetization loan. Therefore, under these facts, the "binding commitment" test would not apply.

The Interdependence Test
Memorandum No. 20123401F cited above at page 8 states, "Excluding cases involving a legally binding agreement, if each of a series of steps has independent economic significance, the transactions should not be stepped together. Reef Corporation v. Commissioner, 368 F.2d 125 (5th Cir. 1966)." Therefore, a series of transactions will be stepped together if the steps are so interdependent that the legal relations created by one transaction would have been fruitless without a completion of the series. In a monetized installment sale, as noted above, there are two separate, distinct and independent transactions and therefore the Interdependence Test does not apply.

The End Result Test

Under the end result test, a series of seemingly separate transactions will be stepped together whenever the evidence shows that the parties' intent at the outset was to achieve one particular result, and that the seemingly separate steps were all entered into as a means of achieving that one result. This test applies when the parties could have achieved the same result in a more direct manner with fewer transactions.

Whether via a cash sale or an installment sale, only one step is required. An installment contract involves no extra (that is, unnecessary) transactions. And, the seller has the complete right to choose to sell for cash or to sell on an installment contract. Even though the seller must pay tax immediately if it is a cash sale but may defer paying the tax if it's an installment sale, the tax benefit of the installment sale does not diminish a taxpayer's right to choose an installment sale.

An argument may be made that a seller may also choose to borrow money and therefore have cash, and that there is therefore an unnecessary transaction that could be 'stepped together' with the installment sale. However, it also only takes one step to complete a loan so if someone wants to sell an asset with an installment contract and also wants to take out a loan, there will be two transactions—and only two, with no unnecessary ones. As a matter of law, one cannot say that the taxpayer seller never needs or wants to borrow other money (even if he sells his appreciated asset for upfront cash).

If a seller chooses a cash sale and then borrows additional money soon thereafter would the loan transaction be stepped together with the cash sale and be treated as additional proceeds of the cash sale? If a seller chooses a cash sale, nothing prohibits him from doing so, whether he also engaged in a taxable or nontaxable transaction. If a seller in a taxable transaction sold an appreciated asset and soon after procured a loan, it would not be a step-transaction situation, because the buyer in a cash sale would have no connection with whatever loan the seller might obtain. The loan would not be an additional, unnecessary transaction. It would be a completely separate transaction based on an entirely different decision. By this same logic, the End Result test cannot be used to step together an installment sale and a separate loan which the seller may decide to take out. Just as in the situation of a cash seller who borrows money, the buyer in a monetized installment sale has no connection with what loan a seller might decide on. It is a completely separate decision by the seller.

More fundamentally, however, the installment sale and the separate loan should not be collapsed as Congress has already examined the question. In 1980 Congress amended Section 453 of the Code, providing in 453A(d)(4) that loan proceeds can be treated as installment-sale proceeds to the extent that payment of principal or interest on a loan other than an agricultural loan is "directly secured . . . by any interest in such installment obligation". That means that if the lender on a non-agricultural loan is given an interest in the installment contract as security for the loan, the loan proceeds can be treated as sale proceeds to the extent that the lender takes an interest in the installment debt to satisfy all or part of the amount owed on the loan.

The IRS has no authority to use the step transaction doctrine to ignore those statutory limitations. (Note that under a monetized installment sale for non-agricultural assets, there is no pledge or assignment of any interest).

As summarized in the General Counsel Memorandum:

> Each of the steps has independent economic significance; therefore, the step transaction does not apply under either the end result test or the interdependence test. The binding commitment test would not be applicable in this case because there is no contractual obligation to complete all of the Transaction steps.

II. Substance Over Form

In the Chief Counsel Memorandum the IRS dealt with a very complicated arrangement[1] for a monetized installment sale and declined to challenge it on either economic-substance and step-transaction grounds.

At page 9, the Memorandum states: The Transaction meets the statutory and regulatory requirements of I.R.C. § 453. It explains:

> Application of the Substance Over Form Doctrine In form, Taxpayer's Transaction comprised: (1) an installment sale, pursuant to which Taxpayer received the Purchase Notes backed by the Letters of Credit, and (2) a loan monetizing the Purchase Notes. The question presented is whether the substance of the Transaction was essentially a cash sale—shortly after the Asset sale Taxpayer obtained U% of the sales price in cash and an additional X% of the face value of the Purchase Notes through loan proceeds, all while deferring most of the gain recognition and tax on the transaction for R years. The Memorandum speaks of ways in which the transaction had economic substance but does so under the purview of "substance over form" rather than under the purview of the economic-substance doctrine as such.

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[1] In the General Counsel Memo, the asset sold qualified as agricultural assets which under the Code allows for installment sale reporting of an unlimited amount as well as is permitted to be secured). The transaction consisted of a highly mechanical series of steps which involved the issuance of a series of letters of credit by a syndicate of banks (with the buyer's deposit of the an amount equal to the purchase price) which were used as security for the issuance of a loan to the Seller by a lender (which was minority owned by the Seller).

In explaining that Economic Substance existed, the IRS reasoned:

Because Asset meets the definition of farm property under I.R.C. § 2032A(e)(4), Taxpayer can pledge the Purchase Notes and obtain cash through a separate loan under I.R.C. § 453A(b)(3)(B) without the proceeds being treated as a payment for installment sale purposes. The Code and the regulations also specifically allow a standby letter of credit to secure an installment sale obligation. The Letters of Credit issued in the Transaction meet the definition of a standby letter of credit under Temp. Treas. Reg. § 15a.453-1(b)(3)(iii) because they are non-negotiable, non-transferable, and can be drawn upon only in the event of default. Example (7) of the regulations clearly provides that a standby letter of credit can be secured by cash collateral. As in Example (7), the Deposits secure the Letters of Credit, not the Purchase Notes. The Taxpayer cannot look directly to the Deposits for payment; only the LOC Banks and Buyer have a direct interest in the Deposits. At the time of the sale, Taxpayer received the proceeds of the Monetization Loans secured by the Purchase Notes and Letters of Credit; Taxpayer did not receive funds from the Deposits securing the Purchase Notes.

> **We conclude that the substance over form doctrine does not apply in this case. Using the Newman v. Commissioner criteria discussed above, the substance of the Transaction is consistent with its form. First, each step in the transaction had a specific business purpose.** The sale of the Asset was a real transaction carried out to raise cash for Taxpayer. The Letters of Credit, by definition, provided economic security for Taxpayer in the event of Buyer's default. The Deposits served as the collateral. Taxpayer negotiated the Monetization Loans with a financial institution separate from the financial institutions that issued the Letters of Credit and held the Deposits. **Second, the economic interests of the parties did in fact change. After the Transaction, Taxpayer no longer owned the K Amount of Asset, Taxpayer held the Purchase Notes backed by the Letters of Credit, and Taxpayer's SPEs were obligors under the Monetization Loans with Lender in the total amount of $B**. The economic interests of Buyer and Lender changed as well. Buyer deposited $D with the LOC Banks to secure the standby letters of credit and pay associated fees and became the new owner of the Asset. Lender parted with $B in exchange for the Monetization Loans, secured by the Purchase Notes and Letters of Credit. **Third, there is no indication that the terms of the Transaction are not arm's length. The terms of the Purchase Notes appear to be regular, commercial terms, with market-based interest rates. While the interest rate to be paid on the Monetization Loans is unusual, the loan agreement shows it to be structured as a commercial loan. Fourth, all parties involved have treated the steps of the Transaction as a separate installment sale and monetization loan.**
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> The Taxpayer reduced its risk exposure on the Monetization Loans by carrying out the monetization of the Purchase Notes through its two bankruptcy-remote LLCs and by making the Monetization Loans nonrecourse. Nevertheless, the taxpayer is still at risk. The Taxpayer only received X% of the face value of the Purchase Notes in loan proceeds and is therefore still at risk on the remaining Y% should one or more LOC banks fail. Taxpayer tried to limit this risk by spreading the LOCs among several banks and requiring LOC replacement if a bank's credit rating went below a certain level.
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> This limited the risk, but did not eliminate it, given the high concentration of Z banks acting as counterparties. In addition, to recast the transaction as a cash sale would be to assume Taxpayer had already forfeited that remaining Y%, which it clearly has not done.

Similar, in our monetized installment sales, the seller remains fully indebted and liable on the entire amount of the loan in the event of any default by the seller. The seller's litigation risk because of collection proceedings brought against the seller by the lender is limited to an amount of money that is equal to the amount that is paid on the installment contract, so the seller cannot be forced to pay the lender more than the dealer pays to the seller, if there is no default by the seller. (Note: up to the amount the dealer pays to the seller, the seller's liability on the loan is a general, not limited, liability).

In summarizing their position that the Economic Substance and Step Transaction Doctrines did not pose problems fo the transaction, The General Counsel Memorandum stated (at page 10):

Because the step transaction doctrine is an extension of the substance over form doctrine, the step transaction doctrine also does not apply to this case. As noted above, the step transaction doctrine applies in cases where a taxpayer seeks to go from point A to point D and does so by stopping at intermediary points B and C, steps which give the taxpayer a tax benefit. The question is whether the interrelated steps between Taxpayer signing the sales contract and Lender wiring the Monetization Loan proceeds directly into Taxpayer's accounts should be collapsed. "Step A" is the transfer of the Asset to Buyer while "Step D" is the transfer of the Monetization Loan proceeds from Lender to Taxpayer (through Taxpayer's SPEs). **Collapsing the Transaction and going straight from Step A to Step D does not make sense.** Taxpayer is selling the Asset to Buyer, while the loan proceeds are coming from Lender, which is unrelated to both Taxpayer and Buyer. **In fact, to go from Step A to Step D and to treat the Transaction as a cash sale would require additional steps, which the Internal Revenue Service is prohibited from creating.** See Grove v. Commissioner, 490 F.2d at 247. Furthermore, the steps that did occur between "Step A" and "Step D" were not unnecessary or meaningless steps. The Deposits made by Buyer were necessary to back the Letters of Credit. The Letters of Credit were necessary to secure the Purchase Notes in the event of Buyer's default. The transfer of the Purchase Notes to the SPEs was necessary to protect Taxpayer in the event of Buyer's default. The pledging of the Purchase Notes and Letters of Credit was necessary in order for Taxpayer to receive the amount of loan proceeds Page 9 it needed to carry out its Plan, pay off its existing corporate debt, and complete Event HH in order to accomplish Purpose. Each of the steps has independent economic significance; therefore, the step transaction does not apply under either the end result test or the interdependence test. The binding commitment test would not be applicable in this case because there is no contractual obligation to complete all of the Transaction steps. In summary, the judicial doctrines of substance over form and step transaction do not apply in this case. The steps in the Transaction accomplished legitimate business purposes and had independent economic significance. Taxpayer needed to sell its Asset and structured the sale in a way that minimized its taxes. Taxpayer did not create transactions with no substance merely to obtain tax benefits. Substantively, the steps of the Transaction matched their form: an installment sale coupled with a monetization loan. The Transaction allowed Taxpayer to take advantage of tax deferral on the Asset sale, which is a permitted result under I.R.C. §§ 453 and 453A.

III. "Sham" Transaction

Issue: Can a dealer purchase a capital asset on an monetized installment sale installment contract, then immediately resell it for cash, often to someone to whom the seller would have sold directly for cash, if the seller hadn't sold to the dealer?

Analysis: Except in the case of a related party transaction, neither the IRS nor the court has ever questioned the validity of an installment seller's resell of an asset the fact that the dealer doesn't retain ownership for a period of time. Dealers commonly buy and sell assets, the quicker the better, from a profit standpoint. The longer they hold them the less they make.

While it is true that many dealers go on title on the assets they acquire, they do not always. One very relevant example: 1031 accommodators do not go on title even though the Internal Revenue Code treats a 1031 accommodator as the buyer of relinquished property. Passage of title is the result of a sale and evidence of ownership, and the buyer has the right to take title or to arrange for title to bypass the buyer and go on to someone else. It passes in whatever manner the the agreement of sale provides, to whomever the agreement of sale designates, and whenever the agreement of sale requires—at the same time as the sale, or later, even much later. Typically such issues have little or nothing to do with tax consequences.

I think what you're talking about here, in your emphasis on what is "real", is the "sham transaction" doctrine.

In regard to the sham-transaction IRS officials have said that they must find that a transaction did not exist before determining whether it lacks substance. In remarks on January 25, 2005, at the University of California Tax Institute, Donald L. Korb, chief counsel for the IRS, said:

> Naturally, before a court can determine whether a transaction lacks economic substance, the court must first determine whether the transaction itself did in fact actually occur. Thus, a court will not inquire into whether a transaction's primary objective was for the production of income or to make a profit, until it determines that the transaction is bona fide and not a factual sham. This is a threshold question—whether the transaction is a so-called 'sham in fact.'

Certainly, when a transaction never actually occurred, it is easy for a court to disallow the purported tax benefits on the fundamental ground that the transaction is not a real transaction.

It is difficult to imagine the rationale in saying that an monetized installment sale "never in fact took place." In an monetized installment sale transaction, the dealer undertakes, as a general obligation and on its faith and credit, the duty to make monthly interest payments to the monetized installment sale seller over what will usually be a 30-year period, and then to pay the entire principal at the end. For any failure to perform, the dealer would be fully liable to the monetized installment sale seller, and all of the dealer's assets would be subject to attachment and execution.

IV. Assignment of Income

<u>Issue</u>: Could the IRS use the doctrine of assignment of income to say that everything was already set in place and the seller-taxpayer can't avoid tax on the income by any change after things were set in place?

<u>Analysis</u> The assignment-of-income doctrine follows the concept that it: taxes income "to those who earn or otherwise create the right to receive it and enjoy the benefit of it when paid." Helvering v. Horst, 311 U.S. 112, 119 (1940). Further, "the mere assignment of the right to receive income is not enough to insulate the assignor from income tax liability" where "the assignor actually earns the income or is otherwise the source of the right to receive and enjoy the income". Sunnen, 333 U.S. 591, 604 (1948). A person cannot escape taxation by anticipatory assignments, however skillfully devised, where the right

to receive income has vested. Harrison v. Schaffner, 312 U.S. 579, 582 (1941). (As reiterated in Henrietta v. Rauenhorst, 119 T.C. 157 (2002)

Tthe doctrine doesn't apply in monetized installment sale transactions. When the dealer purchases a capital asset from a seller who has already contracted to sell to someone else, the dealer is buying the asset for valuable consideration, and the seller does not escape the income-tax liability; the seller still has the tax liability, but just from a different sale from the one that was first arranged.

The due date on the tax payment is deferred, but the liability for the tax remains in place.

Similarly, in 1031 exchanges, it is often (and nearly always) the case that the exchange agreement is signed long after the contract is signed to sell the to-berelinquished property. Often the exchange agreement is actually signed at the very moment of the closing on the sale of the relinquished property. Nevertheless, no assignment-of-income problem exists because the seller's tax liability for the taxable gain on the sale is not removed, but only deferred through the 1031 exchange.   This concept applies in monetized installment sale transactions.

Moreover, when it comes to sales of capital assets, the existence of a signed contract to sell does not usually obligate the parties actually to complete the sale. The obligation to sell and buy usually is subject to a number of contingencies, including essential matters such as the existence of unencumbered title to real estate and equipment on the day of the closing, the buyer's ability to bring in the funds with which to buy, the non-occurrence of intervening events such as fire or other damage, the normal continuing of business operations, and so on. Further, even if none of the stated contingencies materializes, the buyer is typically allowed to walk away without closing, on pain of forfeiture of the buyer's earnest money. Therefore, I believe it is appropriate to say that in buy-andsell-an-asset situations (such as cash sales, 1031 exchanges and installment sales) the right to receive the income from the sale doesn't arise until the sale closes.

It may be different in sell-and-donate-asset situations, in which someone has the legal right to sell something and, to avoid tax on the gain, gives the asset to a charity or family member before the sale closes. In those situations the taxpayer is trying to avoid tax on income that the taxpayer has every right to receive.

purchases from the seller and simultaneously re-sells to a subsequent purchaser, who otherwise (in most instances) would have purchased directly from the seller.

Temp. Treas. Reg. 26 CFR 15a.453-1(b)(3)(i), explicitly provides that an installment seller to a qualified intermediary is not deemed to be in constructive receipt of sale proceeds which the intermediary receives.

The Regulation—which applies only to installment sale situations—reads in pertinent part as follows:

> For a special rule regarding a transfer of property to a qualified intermediary followed by the sale of such property by the qualified intermediary, see § 1.1031(k)-1(j)(2)(ii) of this chapter. That § 1.1031(k)-1(j)(2)(ii) states the following: (ii) Qualified intermediaries. Subject to the

> limitations of paragraphs (j)(2) (iv) and (v) of this section, in the case of a taxpayer's transfer of relinquished property involving a qualified intermediary, the determination of whether the taxpayer has received a payment for purposes of section 453 and § 15a.453-1(b)(3)(i) of this chapter is made as if the qualified intermediary is not the agent of the taxpayer.

Note: The Regulation is not saying that the qualified intermediary would otherwise be deemed to be the seller's agent if the Regulation had not been adopted; it is saying that the qualified intermediary will not be treated as the taxpayer's agent, for purposes of the seller's tax treatment. So, if the dealer acts as a qualified intermediary in its installment transaction with a seller, the dealer's receipt of sale proceeds from the subsequent buyer will not be attributed to the seller.

This is the only way to read the regulation.

V. Economic Substance Doctrine

<u>Issue:</u> Should the transaction be disrespected as it does not change the taxpayer's economic position in any meaningful way?

<u>Analysis:</u> The economic-substance doctrine has been codified in Section 7701(o). It permits the IRS to deny certain tax benefits from a transaction unless: (i) the transaction changes the taxpayer's economic position in a meaningful way (apart from federal income tax effects); and (ii) the taxpayer has a substantial purpose for entering into such transaction (apart from federal income tax effects).

This concept should be reviewed in the context of 1031 exchanges, installment sales generally, and monetized installment sales, specifically, as outlined in General Counsel Memorandum 20123401F. In all of these transactions, the taxpayers correctly took advantage of deferral provisions allowed under the Code.

As explained throughout, the monetized installment seller wants to dispose of a capital asset which will actually change hands and for which the costs and benefits will change hands.

The transaction has meaningful potential for profit apart from tax benefits That is a given; if there were not a potential for meaningful profit, the seller would not be seeking tax deferral.

The lender wants the loan term (and therefore the term of the installment contract) to be 30 years, so that the dealer can invest the proceeds for 30 years. The lender believes that history shows that when money can be invested for 30 years the likelihood is high that there will be more than sufficient funds available at the end for the dealer to pay the seller in full on the installment contract, so that the lender will be paid in full on the monetization loan.

Through a monetized installment sale transaction a seller has the have the opportunity to pursue long-term investments and long-term returns. So, it is the pursuit of 30-year investments—not tax benefits—that drives this whole thing.

VI. The Transaction Summarized

The following re summarized the transactions in the context of the chronology and tax standards that one may evoke:

Documentation. The monetized installment sale transaction is typically documented in just three instruments: the installment contract, long-term escrow instructions for the processing of the monthly installment-interest payments and final principal payment, and closing instructions for the execution of the documents and disbursement of funds.

The Loan. The lender's separate loan transaction instruments typically consist of a loan agreement, a promissory note, long-term escrow instructions for the processing of the monthly loan-interest payments and final loan-principal payment, and loan-closing instructions for the execution of the documents and disbursement of funds. Sometimes there may be a loan commitment as well.

No Unnecessary Steps. The transaction contains no unnecessary steps The monetized installment sale transaction is just one step, and the separate loan, if it occurs, is just one step. The transaction generates targeted tax incentives that are, in form and substance, consistent with Congressional intent in providing the incentives As the Office of Chief Counsel Memorandum No. 20123401F stated, "Substantively, the steps of the Transaction matched their form: an installment sale coupled with a monetization loan. The Transaction allowed Taxpayer to take advantage of tax deferral on the Asset sale, which is a permitted result under I.R.C. §§ 453 and 453A."

No Related Parties. The transaction is at arm's length with unrelated third parties the dealer, the seller and the lender are all unrelated to each other, and none has any ownership interest or management participation in any of the others. (Note that in many of the monetized installment sales that public companies have entered into, the Taxpayer / Seller /Borrower actually owns a minority interst in the Lender – up to 49%.

Economics. The transaction creates a meaningful economic change on a present value basis (pre-tax) An installment seller in an monetized installment sale transaction actually disposes of a capital asset and the risks and benefits that go with it. The Taxpayer's potential for gain or loss is not artificially limited. As is true of a cash sale, an installment seller, in an monetized installment sale realizes whatever gain or loss results from the sale, as negotiated by the parties.

No Acclerated Deductions, Losses or Offsets. The transaction does not accelerate a loss or duplicate a deduction A seller who has a loss is unlikely to use an monetized installment sale transaction anyway, and an monetized installment sale transaction does not generate any deductions that a cash sale wouldn't.

The transaction does not generate a deduction that is not matched by an equivalent economic loss or expense (including artificial creation or increase in basis of an asset) The monetized installment sale transaction doesn't generate any deductions that a cash sale wouldn't. The separate loan transaction, if it occurs, can be expected to generate interest expense deductions for the seller's loan-interest payments, but the deductions will be for interest expenses actually incurred and actually paid.

Economic Risk. The taxpayer does not hold offsetting positions that largely reduce or eliminate the economic risk of the transaction As the Office of Chief Counsel Memorandum No. 20123401F pointed out, installment sales under Section 453 are a special case: The Code and the regulations also specifically allow a standby letter of credit to secure an installment sale obligation. The Letters of Credit issued in the Transaction meet the definition of a standby letter of credit under Temp. Treas. Reg. § 15a.453-1(b)(3)(iii) because they are non-negotiable, non-transferable, and can be drawn upon only in the event of default. Example (7) of the regulations clearly provides that a standby letter of credit can be secured by cash collateral. Therefore, the existence of a limitation on an installment seller's risk of not being paid is not significant with regard to the economic-substance doctrine.

More fundamentally, however, is the fact that nothing in an monetized installment sale transaction guarantees to the seller that the dealer will in fact pay its installment debt to the seller; the seller retains that risk, and the seller retains the risk of having to institute collection proceedings if the dealer doesn't pay. It's true that an monetized installment sale seller may choose to obtain a loan with a provision which precludes the lender from compelling the seller to repay the loan to the extent that the dealer doesn't pay on the installment contract. Even so, an monetized installment sale seller with such a loan remains fully indebted on the loan and can be compelled to pay the full amount regardless of what the dealer does, if the seller defaults in any way under the loan agreement other than because of nonpayment by the dealer Further, the limitation on the seller's risk of having to pay money on the loan that has not been paid by the dealer on the installment contract has what may be a surprising, but nonetheless intentional, effect: it reduces the seller's risk of not being paid on the installment contract. The reputational cost for the dealer which would exist in the event of any failure by the dealer to pay on an installment contract as agreed is much enhanced by the knowledge that a failure to pay even one monetized installment sale seller could result in loss to a lender with whom the dealer has a highly valued relationship. The monetized installment sale seller knows that, and therefore the monetized installment sale seller knows that the risk that the dealer might not pay as agreed on the monetized installment sale contract is much lower than it would otherwise be. Therefore, the limitation in the loan agreement on the lender's ability to compel the seller to pay is a substantive mechanism to reduce the risk that the dealer might not pay as agreed on the monetized installment sale installment contract. In turn, that reduces the seller's risk of dispute with the lender.

It is a way in which the monetized installment sale seller can maximize the likelihood that the dealer will pay as agreed, by bringing to bear the leverage of a relationship that is very important to the dealer Anyway, the risk that the seller might not be paid on the installment contract is only one of the economic risks of the transaction.

As is true of cash sales, sellers in monetized installment sale transactions are always at risk of missing the market on the disposition of the asset, at risk of loss on the investment of sale proceeds, and at risk of loss under the representations and warranties accompanying the sale. Transaction does not involve a

tax-indifferent counterparty that recognizes substantial income. Neither the dealer nor the lender is tax-indifferent.

The transaction does not result in the separation of income recognition from a related deduction either between different taxpayers or between the same taxpayer in different tax years. None of this occurs in a monetized installment sale transaction.

The transaction has credible business purpose apart from federal tax benefits. The monetized installment sale seller wants to dispose of a capital asset which will actually change hands and for which the costs and benefits will change hands.

The transaction has meaningful potential for profit apart from tax benefits That is a given; if there were not a potential for meaningful profit, the seller would not be seeking tax deferral.

The transaction has significant risk of loss All of the risk of loss that pertains to a cash sale pertains to an installment sale, and more so. That includes risk of mis-pricing, and the risk of litigation or liability, or both, regarding representations and warranties, title defects, environmental contamination, and so on.

No Artificial Tax Benefits. The tax benefit (tax deferral) is generated by the actual sale of a capital asset, just as is true for any installment sale.

Not Prepackaged. The transaction is not pre-packaged. Every monetized installment sale transaction is negotiated, any loan transaction with the lender introduced to the seller by the dealer is negotiated, and the texts of the transaction documents are negotiated. Nothing about this is an off-the-shelf deal.

Ordinary Course. The transaction is not outside the taxpayer's ordinary business operations. An installment sale is a commonplace method of sale of capital assets. It's no more outside the norm for a particular seller than a cash sale would be, because nearly every taxpayer contemplates eventually selling whatever assets the seller owns.

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