PLR 9839001

Date: May 29, 1998

Control No. TAM 100953-98

Taxpayer's Name: ***

Taxpayer's Address: ***

Taxpayer's EIN: ***

Tax Year: ***

LEGEND:

Taxpayer = ***

Finance Sub = ***

Receivables Sub = ***

Trust 1 = ***

Trust 2 = ***

Bank 1 = ***

Year 1 = ***

Year 2 = ***

Year 3 = ***

Date 1 = ***

Date 2 = ***

Date 3 = ***

Month 1 = ***

$a = ***

$b = ***

$c = ***

$d = ***

$e = ***

$f = ***

$g = ***

$h = ***

$i = ***

$j = ***

$k = ***

$l = ***

$m = ***

$n = ***

$o = ***

A = ***

B = ***

C = ***

D = ***

E = ***

F = ***

G = ***

H = ***

I = ***

J = ***

K = ***

L = ***

M = ***

N = ***

O = ***

P = ***

Q = ***

R = ***

S = ***

T = ***

U = ***

V = ***

X = ***

Y = ***

Z = ***

AA = ***

BB = ***

CC = ***

DD = ***

EE = ***

FF = ***

[1] ISSUES

(1) Whether transfers of customer notes from Receivables Sub to Trust 1 and Trust 2 are sales or secured financings.

(2) Whether Taxpayer can challenge the form of its own transaction and argue that a transaction it originally reported as a sale is really a secured financing.

(3) If the transfers in Issue (1) are sales, how section 1286 applies to the transfer.

[2] CONCLUSIONS

(1) The transfers of customer notes from Receivables Sub to the Trusts are secured financings.

(2) Because the Commissioner agrees with the how Taxpayer now characterizes the transaction, Issue 2 is moot.

(3) Because the transfers are merely a pledge of the notes for a loan, section 1286 does not apply.

FACTS

BACKGROUND

Taxpayer, a domestic corporation, uses an overall accrual method of accounting. Taxpayer is the parent of an affiliated group that files consolidated federal income tax returns.

During the years at issue, Taxpayer sold new automobiles to its distributors, who in turn sold them to the public. Finance Sub, a wholly-owned subsidiary of Taxpayer, financed installment purchase contracts for the retail customers of the distributors. By Date 1, Finance Sub had accumulated a pool of these loans (Pool 1) with a principal amount of $a. The stated interest rates on the loans in Pool 1 ranged from A percent to B percent, based on the Rule of 78's. The loans in Pool 1 had a weighted average coupon rate (WAC) of C percent. On Date 1, Finance Sub securitized these loans, as described below. By Date 2, Finance Sub had accumulated another pool of loans (Pool 2), with a principal of $b. The stated interest rate of the loans in Pool 2 ranged from D percent to E percent. The loans in Pool 2 had a WAC of F percent. On Date 2, Finance Sub securitized these loans, as described below. This second securitization transaction was qualitatively identical to the first. Taxpayer treated each transaction as a sale on its federal income tax returns and financial statements.

YEAR 1 SECURITIZATION TRANSACTIONS

In month 1, Taxpayer formed a wholly-owned domestic subsidiary (Receivables Sub) as the first step in securitizing the loans. Finance Sub transferred Pool 1 to Receivables Sub on Date 1. Also on Date 1, Receivables Sub, Finance Sub, and Bank 1 formed Trust 1, a grantor trust. As grantors, Receivables Sub and Finance Sub were entitled to the residual of Trust 1. Trust 1 is a bankruptcy-remote entity.

Receivables Sub transferred Pool 1 to Trust 1 on a non-recourse basis. In exchange, Trust 1 issued to Receivables Sub two classes of certificates of beneficial interest, Class A and Class B. By their terms, each certificate evidences a fractional, undivided interest in Trust 1 and its assets, the pool of loans. The Class A certificates represented ownership of G percent of the principal balance of the loans in Trust 1, and the Class B certificates the remaining H percent. Both paid a coupon interest rate of J. The Class A certificates were entitled to G percent of all principal payments on the loans in the trust. The Class B certificates were entitled to the remaining H percent. As described below, the Class B certificates were subordinated to the Class A certificates. Receivables Sub sold most of the Class A certificates to the public and retained the Class B certificates.

Receivables Sub serviced the loans for Trust 1. As servicer, Receivables Sub was responsible for ensuring that the certificate holders timely received their principal and interest payments. Its responsibilities included collecting payments from the debtors (the purchasers of new cars who financed their purchase through Finance Sub), working with the debtors to avoid defaults, and remitting payments to the certificate holders. As servicer, Receivables Sub received one-twelfth of I percent of the beginning balance of the Trust each month.

Thus, of the total C percent WAC of the pool, the Class A certificate holders were paid J percent on their G percent interest in the principal, with Receivables Sub retaining the remaining K percent (plus all C percent on the remaining H percent), whether through the servicing fee, the Class B certificates it retained for itself, or its residual interest in the trust. As far as the Class A certificate holders were concerned, the trust was heavily overcollateralized.

Taxpayer took several steps to ensure that the Class A certificate holders would timely receive their principal and interest payments. First, as stated above, the Class B certificates were subordinated to the Class A certificates and the rights of Receivables Sub as servicer. The Class B certificate holders would receive no payments on a particular distribution date, whether of interest or principal, until the Class A certificate holders were paid.

Second, Taxpayer established the Subordination Spread Account (SSA) as a reserve against possible future collection shortfalls. The SSA was not part of Trust 1, but was maintained for the benefit of the Class A certificate holders. The SSA had an initial balance of $c. Afterwards, payments otherwise intended for the Class B certificate holders would go the SSA as needed to keep the balance of the SSA between $d and $e. The required balance varied depending on the how the pool of loans performed. The fewer defaults and late payments, the less the required balance in the SSA. The more defaults and late payments on the loans, the greater the required balance. At a minimum, the SSA's balance would be L percent of the Class A certificate holders' interest in the trust, and could go as high as M percent. Once the Class A certificate holders' share of the principal balance of the loans drops to approximately $f (about N percent of the original balance), the minimum balance of the SSA jumps to $g. Receivables Sub, as servicer, could reduce the formula for determining the SSA, but only if a rating agency states in writing that the change will not affect the credit rating of the Class A certificates. Taxpayer or Receivables Sub was entitled to any funds in the SSA not needed to fund the Class A certificate holders. Thus, that part of the SSA not needed for the Class A certificate holders was part of Taxpayer's residual interest in the transaction.

Third, while the sale of the loans to Trust 1 was technically without recourse, during a limited period Finance Sub had to repurchase non-conforming loans. When it transferred the loans to Trust 1, Receivables Sub made several warranties to Trust 1. These included:

(1) the loans were free and clear of all encumbrances, liens, charges and security interests;

(2) each loan was secured by a first priority perfected security interest in the car;

(3) each loan complied with all federal and state laws, including truth-in-lending, equal credit opportunity, and disclosure laws; and

(4) no loan was more than 30 days past due.

At the end of the first or second month after the transfer to the Trust, Receivables Sub had to repurchase any loan not meeting these and other requirements. Each loan had been originated before Date 1. While the loans had a weighted-average original maturity of O months, they had a weighted-average remaining maturity of P months when transferred to Trust 1. When Taxpayer securitized this pool of loans, Taxpayer's annual net losses as a percentage of the average principal amount of loans outstanding for the past 5 years and 9 months had ranged from Q percent to R percent.

YEAR 3 SECURITIZATION TRANSACTION

The second securitization transaction was substantially identical to the first, except for changes in certain labels used in the various documents and the extent to which the senior trust certificates (i.e., the class held by outside investors) were overcollateralized.

Taxpayer created Trust 2 on Date 2. On Date 2, Finance Sub transferred the second pool of loans (Pool 2) to Receivables Sub. Receivables Sub then transferred Pool 2 to Trust 2. As grantors, Receivables Sub and Finance Sub were entitled to any residual funds in Trust 2. Trust 2 is a bankruptcy-remote entity.

Receivables Sub transferred the loans to Trust 2 on a non-recourse basis. The warranties on this transfer were substantially the same as those made in the first securitization. In exchange for the loans, Trust 2 issued Class A and Class B certificates to Receivables Sub. By their terms, each certificate evidences a fractional, undivided interest in Trust 2 and its assets, Pool 2. The Class A certificates represented ownership of S percent of Trust 1, and the Class B certificates the remaining T percent. Both paid a coupon interest rate of U percent. The Class A certificates were entitled to S percent of all principal payments on the loans in the trust. The Class B certificates were entitled to the remaining T percent. As described below, the Class B certificates were subordinated to the Class A certificates. Receivables Sub sold most of the Class A certificates to the public and retained the Class B certificates.

Receivables Sub serviced the loans for Trust 2. As servicer, Receivables Sub was responsible for ensuring that the certificate holders timely received their principal and interest payments. The servicing duties were essentially the same as in the Year 1 securitization. As in that transaction, Receivables Sub retained I percent of the beginning balance of Trust 2 each month.

Thus, of the total V percent WAC of the pool, the Class A certificate holders were paid U percent, with Taxpayer retaining the remaining X percent, whether through the servicing fee, the Class B certificates it retained for itself, or its residual interest in Trust 2. As far as the Class A certificate holders were concerned, Trust 2 was heavily overcollateralized.

As in the first securitization, Taxpayer took several steps to ensure that the Class A certificate holders would timely receive their interest and principal payments. First, the Class B certificates were subordinated to the Class A certificates. The Class B certificate holders would receive no payments on a particular distribution date, whether of interest or principal, until the Class A certificate holders were paid.

Second, the Taxpayer established a Reserve Account, which functioned the same as the SSA in the Year 1 securitization. The Reserve Account had an opening balance of $i, but increased to $j by the time the first payments on the certificates were due. The balance of the Reserve Fund would range from $j to $k, varying directly with delinquencies in the underlying pool of loans. Once the Class A certificate holders' net interest in the loans in Trust 2 dropped to $l, or about Y percent of the original amount of $m the minimum balance required for the reserve account would rise to $n. This amount is about Z percent of the net balance of the Class A certificates in Trust 2. Receivables Sub, as servicer, could reduce the formula for determining the SSA, but only if a rating agency states in writing that the change will not affect the credit rating of the Class A certificates. Taxpayer or Receivables Sub was entitled to any funds in the SSA not needed to fund the Class A certificate holders. Thus, that part of the SSA not needed for the Class A certificate holders was part of Taxpayer's residual interest in the transaction.

Each loan in Trust 2 had been originated before Date 2. While the loans had a weighted-average original maturity of AA months, they had a weighted-average remaining maturity of BB months when transferred to Trust 2. When Taxpayer securitized its second pool of loans, Taxpayer's annual net losses as a percentage of the average principal amount of loans outstanding for the 9 month period ending on Date 3 and the immediately preceding 7 full tax years had ranged from Q percent to R percent.

LAW AND ANALYSIS

The first issue is whether Taxpayer sold an undivided interest in the loans to the Class A certificate holders or used the loans as security in borrowing funds from the holders. If the transactions were sales, then Taxpayer must applysection 1286 of the Internal Revenue Code and recognize any gain or loss under section 1001. If the transactions were secured financings, then Taxpayer does not include the borrowed amounts in gross income. United States v. Centennial Savings Bank FSB, 499 U.S. 573, 582 (1991), 1991-2 C.B. 30.

In general, federal income tax consequences are governed by the substance of a transaction determined by the intentions of the parties to the transaction, the underlying economics, and all other relevant facts and circumstances. Gregory v. Helvering, 293 U.S. 465, 470 (1935), XIV-1 C.B. 193. The label the parties affix to a transaction does not determine its character. Helvering v. Lazarus & Co., 308 U.S. 252, 255 (1939), 1939-2 C.B. 208; Mapco Inc. v. United States, 556 F.2d 1107, 1110 (Ct. Cl. 1977).

The term “sale” is given its ordinary meaning and is generally defined as a transfer of the ownership of property for money or for a promise to pay money. Commissioner v. Brown, 380 U.S. 563, 570-71 (1965), 1965-2 C.B. 282. Whether a transaction is a sale or a financing arrangement is a question of fact, which must be ascertained from the intent of the parties as evidenced by the written agreements read in light of the attending facts and circumstances. Haggard v. Commissioner, 24 T.C. 1124, 1129 (1955), aff'd, 241 F.2d 288 (9th Cir. 1956). But see Farley Realty Co. v. Commissioner, 279 F.2d 701, 705 (2d Cir. 1960) (“[T]he parties' bona fide intentions may be ignored if the relationship the parties have created does not coincide with their intentions.”).

A transaction is a sale if the benefits and burdens of ownership have passed to the purported purchaser. Highland Farms, Inc. v. Commissioner, 106 T.C. 237, 253 (1996); Grodt & McKay Realty, Inc. v. Commissioner, 77 T.C. 1221, 1237 (1981). In cases involving transfers of debt instruments, the courts have considered the following factors to be relevant in determining whether the benefits and burdens of ownership passed:

(1) whether the transaction was treated as a sale, see United Surgical Steel Co., Inc. v. Commissioner, 54 T.C. 1215, 1229-30, 1231 (1970), acq., 1971-2 C.B. 3;

(2) whether the obligors on the notes (the transferor's customers) were notified of the transfer of the notes, id.;

(3) which party serviced the notes, id.; Town & Country Food Co., Inc. v. Commissioner, 51 T.C. 1049, 1057 (1969), acq., 1969-2 C.B. xxv;

(4) whether payments to the transferee corresponded to collections on the notes, United Surgical Steel Co., 54 T.C. at 1229-30, 1231; Town & Country Food Co., 51 T.C. at 1057;

(5) whether the transferee imposed restrictions on the operations of the transferor that are consistent with a lender-borrower relationship, United Surgical Steel Co., 54 T.C. at 1230; Yancey Bros. Co. v. United States, 319 F. Supp. 441, 446 (N.D. Ga. 1970);

(6) which party had the power of disposition, American Nat'l Bank of Austin v. United States, 421 F.2d 442, 452 (5th Cir.), cert. denied, 400 U.S. 819 (1970); Rev. Rul. 82-144, 1982-2 C.B. 34;

(7) which party bore the risk of loss, Union Planters Nat'l Bank of Memphis v. United States, 426 F.2d 115, 118 (6th Cir.), cert. denied, 400 U.S. 827 (1970); Elmer v. Commissioner, 65 F.2d 568, 569 (2d Cir. 1933), aff'g 22 B.T.A. 224 (1931); Rev. Rul. 82-144; and

(8) which party had the potential for gain, United Surgical Steel Co., 54 T.C. at 1229; Town & Country Food Co., 51 T.C. at 1057; Rev. Rul. 82-144.

No single factor determines whether a sale has taken place. The facts and circumstances determine the importance of each factor. Thus, a factor-by-factor analysis is necessary to determine whether Taxpayer sold the loans.

In a typical high quality auto loan securitization transaction (as both the Taxpayer and the field agree is the case here), however, the economics dictate that only the last two factors have real significance, and only to the extent they are economically realistic. Thus, a sale has taken place if the investors purchasing the Class A certificates have assumed Taxpayer's risk of loss and opportunity for profit inherent in the Trusts and their underlying loans, within economically realistic limits. If so, the cash flows due the Class A certificate holders are at the risk of the underlying cash flows of the pool. A secured financing has taken place if the cash flows due the Class A certificate holders do not depend to any real degree on the performance of the underlying debt instruments (i.e., the loans in the Pools), because then the Taxpayer would have retained the risk of loss and opportunity for gain. We conclude that the latter is the case, and thus the transactions at issue are secured financings and not sales.

A typical auto loan has three payment possibilities:

(1) The loan will be paid monthly to maturity, on schedule;

(2) The loan will be prepaid, usually in full and usually due to a trade-in and not a refinancing (prepayment risk); and

(3) The loan will default and the car will be repossessed, causing a possible loss on resale (credit risk).

Barmat, Auto Loan Securitizations, 227, 229-30, in Lederman, ed., The Handbook of Asset-Backed Securities (NY Institute of Finance, 1990). Unlike the mortgages underlying mortgage-backed securities, prepayments on car loans do not vary with changes in interest rates. Curtin and Deckoff, Asset-Backed Securities: An Attractive Addition to the Low Duration Sector of the Fixed-Income Market, 195, 209, in Lederman, supra. Changes in interest rates do, however, greatly affect the pricing of auto loan asset-backed securities (ABS). ABS are priced at a spread over the Treasury yield curve. Because ABS are usually priced off the short-term, or steepest part, of the yield curve (assuming the yield curve is not inverted), changes in interest rates can greatly affect the pricing of these ABS even if they do not affect their duration (as is the case with mortgage-backed securities). Curtin and Deckoff, supra, at 207-209. Given the short term of the two transactions at issue (the expected maturity was less than 4 years), there is no real opportunity for gain due to lower than expected prepayments. Thus, who bears the risk of loss must determine whether the transaction is a sale or secured financing.

The Prospectus to the Year 1 securitization indicates that Taxpayer had experienced minimal losses on its auto loans. Its historic net losses as a percentage of average principal amount outstanding ranged from Q to R percent. Assuming the highest previously-experienced loss rate at the outset of the trust (when it had its highest principal balance), then with an initial balance of $a, the yearly losses would he expected to be no more than $h. Yet the SSA's balance was a minimum of $d, or CC percent of the losses. In addition, Taxpayer's H percent interest in the Trust as holder of the Class B certificates also was available to cover any shortfall on the Class A certificates. Finally, the residual balance of the trust was available to cover any shortfalls not covered by the SSA or the subordination of the Class B certificates.

Most prepayments in an auto loan securitization occur near the end of the term of the transaction. Curtin and Deckoff, supra, at 211. Near the end of the Year 1 transaction, as the pool of loans seasons and the outstanding principal balance decreases to $f, the minimum balance of the SSA (funded by the Taxpayer) increases to $g. At this point, the SSA represents over DD percent of the outstanding balance of the pool. Default and prepayment rates would have to increase dramatically above historical levels before the SSA would be insufficient to cover any shortfall. This level of security indicates that the Class A certificate holders did not bear the risk of loss from defaults or prepayments as they would had they bought the underlying loans.

While Taxpayer transferred the loans to the Trusts without recourse, Taxpayer had to repurchase non-conforming loans during the first two months of the transaction. Afterwards, the certificate holders would bear the risk of loss from non-conforming loans. This would normally indicate that Taxpayer passed this burden of ownership to the certificate holders.

Events requiring sponsors to repurchase a pooled auto loan usually occur early in the term of the loan. Curtin and Deckoff, supra, at 208. This indicates that this particular risk of loss is economically realistic only during the initial stages of a securitization. In the transactions at issue here, Taxpayer's loans were on average almost EE months old when Pool 1 was transferred to Trust 1 (a weighted-average original maturity of O months but a weighted-average remaining maturity of P months) and over FF months old when Pool 2 was transferred to Trust 2 (a weighted-average original maturity of AA months but a weighted-average remaining maturity of BB months). Additionally, Taxpayer had to repurchase non-conforming loans for the first month or two of each securitization. Thus, by the time the two Trusts were formed and the Class A certificates sold to the investors, the loans in the two Trusts did not have an economically significant risk of loss of this sort that could be passed to the Class A certificate holders. This factor indicates the transaction was a secured financing, not a sale.

Arguably, extreme economic conditions could result in much higher than expected losses on the loans in the Trusts, in turn causing a severe shortfall in cash flows. If the resulting losses were great enough, the combination of the SSA, the subordination feature of the Class B certificates, and the residual cash flows might not be sufficient to cover the payments due the Class A certificate holders. This sort of catastrophic risk, however, is more theoretical than real. Haley, Securitizing Automobile Receivables, 60, 76, in Zweig, ed., The Asset Securitization Handbook (Dow Jones-Irwin 1989). Passing on only catastrophic risk to investors in a securitization, while retaining the historic risks, indicates that the transaction is a secured financing.

The field claims that Taxpayer structured its two securitizations the same as in two early GNMA mortgage-backed securities (MBS) rulings, Rev. Ruls. 70-544, 1970-2 C.B. 6, and 70- 545, 1970-2 C.B. 7. The field argues that the Service ruled each of these mortgage securitizations were sales and not secured financings, even though the MBS holders bore none of the credit risk on the underlying mortgages. The field thus believes these two rulings require that Taxpayer's securitizations be treated as sales.

Both Rev. Ruls. 70-544 and 70-545 addressed GNMA MBS deals. In the first ruling, “GNMA guaranteed to the certificate holders only the proper performance of the mortgage servicing ... with the certificate holders entitled only to interest and principal actually collected or collectable through due diligence.” Rev. Rul. 70-544, 1970-2 C.B. at 7. As in Taxpayer's deals, the servicer in this ruling could (but did not have to) cover deficiencies or late payments until the underlying mortgage was corrected or foreclosed. Thereafter, the MBS holders had to look to the cash flows on the underlying mortgages for the cash flows on their MBSs. The MBSs in the second ruling had “the full guarantee of GNMA to the certificate holders as to payment of interest and principal ...the full faith and credit of the United States [was] pledged to the payment of all amounts required by the certificates.” Further, the MBS holders were considered to have paid GNMA its guarantee fee. Rev. Rul. 70-545, 1970-2 C.B. at 8.

In neither of these rulings did the MBS holders look to the sponsor for timely payment on their MBSs. In the first ruling, they had to look to the underlying mortgages. In the second, they looked to GNMA, a third-party guarantor. In each ruling, the sponsor had thus relieved itself of the credit risk on the underlying mortgages. The field correctly notes that neither ruling attempted any economic analysis of whether the benefits and burdens of ownership had passed from the sponsor to the certificate holders. The transactions in neither ruling, however, appear to have been as heavily overcollateralized and subordinated as are Taxpayer's deals. The GNMA rulings simply did not require this economic analysis.

The field claims that Taxpayer structured its deals similar to MBS deals which the Service has ruled sales. The field says that characteristics common to these and the Taxpayer's deals include:

(1) the sponsor retained a clean-up call it could use when the outstanding principal balance of the mortgages in the pool dropped to 10 percent of their original balance;

(2) the sponsor retained prepayment penalties, late payment charges, and assumption fees (i.e., ancillary income) from the pooled mortgages as part of its servicing fees;

(3) the sponsor, as servicer, had to pay trustee's fees and mortgage insurance premiums out of its servicing fee;

(4) the sponsor retained the right to make advances to the MBS holders should the mortgagors pay late or default; and

(5) the sponsor retained the right to guarantee principal and interest payments on the mortgages, either itself or through a third party.

We believe none of these factors materially affects whether Taxpayer's securitizations are sales or secured financings.

First, a clean-up call is common in MBS deals, regardless of their tax classification. They exist in simple mortgage-backed bonds, Sullivan, Miller and Kiggins, Mortgage-Backed Bonds, 149, 163, in Fabozzi, ed, The Handbook of Mortgage-Backed Securities (1st ed. 1986), as well as in more complex debt instruments, such as inverse floaters and inverse interest-only strips (IOs), Pilpel, Inverse Floaters and Inverse IOs, 367, 377, in Fabozzi, ed, The Handbook of Mortgage-Backed Securities (4th ed. 1995). They also exist in instruments considered ownership interests in the underlying mortgages, Humphreys and Kreitman, Mortgage-Backed Securities Including REMICs and Other Investment Vehicles, 21 (1995 ed., Little, Brown & Co.).

Second, retaining the ancillary servicing income cannot affect whether a sale or secured financing has occurred. Servicing is necessary for all securitized loans, mortgages or otherwise, regardless of whether the securitization is a sale or secured financing. Servicers routinely keep the ancillary income from servicing loans as it is one of the most profitable parts of a securitization.

Third, the servicer paying trustee expenses and mortgage insurance premiums also is common to both types of securitizations.

Fourth, the sponsor retaining the right (but not the obligation) to cover collection shortfalls cannot turn a secured financing into a sale. A legally enforceable right to force a sponsor to cover collection shortfalls cannot by itself turn a secured financing into a sale. Taxpayer put in place all the other mechanisms discussed above (over-collateralization, reserve accounts, subordination, and so forth) to ensure that the cash flows due the Class A certificate holders would not be at the risk of the cash flows of the mortgages in the Pools. The lack of a legally enforceable right to force the Taxpayer to cover collection shortfalls does not outweigh all these other factors.

Fifth, guaranteeing payments on the mortgages can be crucial in determining whether a securitization is a sale or secured financing. However, neither of Taxpayer's two securitizations have any such guarantee. This factor thus has no relevance here.

The field refers to various GAAP pronouncements as supporting its contention that Taxpayer has sold the loans. GAAP, however, cannot affect federal income tax rules unless specifically made controlling. Thor Power Tool Co. v. Comm'r, 439 U.S. 522 (1979).

Finally, the field has analyzed the how the Taxpayer's two auto loan pools have performed, and claims that the Class A certificate holders actually suffered more losses from prepayments than the Taxpayer suffered from defaults. This comparison of parts of two different risks is suspect. In any event, this hindsight analysis cannot affect whether the securitization is a sale or secured financing (as the field admits). This issue is determined at the outset of the transaction.

For the foregoing reasons, we conclude that Receivables Sub retained 100 percent ownership of Pools 1 and 2. Therefore, the transfers were secured financings.

Because of this conclusion, Issue 2 is moot. The Commissioner is changing the character of the transactions. While various cases may have reached different conclusions on the proper standards to apply when a taxpayer challenges the form of its own transaction, these case do not apply. The Taxpayer merely agrees with how the Commissioner has recharacterized the transactions. No opinion is expressed whether the Taxpayer would be bound by the form of its transactions if it were the first to assert that its transactions were secured financings.

No opinion is expressed on whether the transfer of customer notes from Finance Sub to Receivables Sub is a sale or secured financing or the collateral consequences of either characterization.

A copy of this technical advice memorandum is to be given to Taxpayer. Section 6110(j)(3) of the Code provides that it may not be used or cited as precedent.