

ID: CCA\_2009013012274850

Number: **200935029**

Release Date: 8/28/2009

Office:

UILC: 409A.00-00, 451.14-00

---

**From:**

**Sent:** Friday, January 30, 2009 12:27:54 PM

**To:**

**Cc:**

**Subject:** FW: Counsel's Position

Attached are our proposed changes to the email you regarding the case we discussed recently. There are a few minor deletions that I was unable to figure out how to show, so please compare this to the original.

If you have any questions, please contact [redacted] or myself. I will be on vacation next week, so please contact [redacted] during that week.

Thanks,

In the case we discussed recently, our arguments are as follows:

1. The doctrine of constructive receipt applies to the "salary advances" that the taxpayer made to the recipients of the same. [Accordingly, all participants in the plan would be required to include the advances available to the participant in the earliest open year in which such amount was available (even if not paid), and the amount would be subject to income tax withholding at such time as a constructive payment. Even if there was no constructive receipt, advances which the recipient is expected to earn out through future services are taxed as compensation at the time of receipt.] Accordingly, these advances would be included in the recipients' income in the year of their receipt. We are assuming that the employment tax exception we recently discussed applies to all of the salary advance recipients. Therefore, it is our position that there are no employment tax issues present in this matter.
2. Alternatively, assuming that the doctrine of constructive receipt does not apply to the salary advances, the taxpayer's "salary advance program" is problematic because it [causes] the taxpayer's nonqualified deferred compensation plan ("Plan") [to fail to comply with section 409A.] The salary advance program, as currently implemented, [causes the plan to fail] because it allows the salary advance recipients to off-set their outstanding salary advance balances against the deferred compensation to which they are entitled upon the termination of their positions with the taxpayer (i.e., the "off-set feature"), which is contrary to the provisions of IRC 409A and the regulations promulgated under that section. To remedy this situation, the taxpayer will need to discontinue its current salary advance program, or formally modify the terms of the Plan by eliminating the off-set feature, so that the Plan complies with the provisions of IRC § 409A and the applicable regulations. Notwithstanding the foregoing, the taxpayer may implement a new salary advance program in lieu of the current one as long as the new salary advance program is set up properly.

