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From:

Sent: Thursday, January 08, 2009 5:50 PM

To:

Cc:

Subject: [REDACTED] SALT and § 118

The attached draft reflects the preliminary comments from [REDACTED]. Please let us know if you would like to talk about any of the comments. My direct line is [REDACTED].

In light of the previous changes, we recommend revising this text. Apart from Consolidated Edison, the common element among the previously discussed materials is that when the state or local tax benefit is provided in exchange for specific services, substance will control over the form of the transaction and the taxpayer will be treated as having received an in kind payment from the taxing jurisdiction, which is then used to satisfy the taxpayer's tax liability. The transaction at issue in Consolidated Edison was in form, as well as in substance, a payment from the taxing jurisdiction to the taxpayer, which was then used to satisfy a part of the taxpayer's tax liability. There was no need to recharacterize the transaction because the court held the taxpayer to the form of its transaction. The taxpayer received a discount from the city in exchange for prepayment of its real property taxes; the city did not reduce the company's underlying property tax liability. Consequently, Consolidated Edison does not support a proposition that a tax incentive in the form of a reduction in computing tax liability should be recharacterized as an in kind payment from the taxing jurisdiction. Rather, the case shows that when there is an in kind payment in form and substance a taxpayer has income absent an applicable exclusionary provision. Consolidated Edison is also distinguishable in that, as in Watervliet Paper, the tax reduction was provided in return for a specific quantifiable benefit provided to the city, not as an incentive for an activity that had incidental public benefits.

Attachment 1: [Redacted]