STATE BOARD OF EQUALIZATION

February 11, 1972

L--- I---, Inc.
XXXX --- ---
--- ---, California XXXXX

Attention: Mr. R--- L. B---
Asst. Tax Counsel

Dear Mr. B---:

SR --- XX XXXXXX
W--- G--- C---
of A---

This is with reference to your letter of January 31, 1972 regarding the above-referenced matter.

While you did not raise the issue of Section 6009.1 at the hearing, we were aware of it, but dismissed discussing the question since it does not apply in the W--- situation.

Section 6009.1 has been raised by others as a defense against tax liability under conditions comparable to those in W---. However, it is our position that the section does not apply, and our authority for this is Levine v. State Board of Equalization, (1956) 142 Cal. App. 2d. 760.

This case involved tax and interest measured by the price paid by Levine for materials which were purchased in California ex tax under resale certificates. The raw materials were first placed in inventory in California and as orders were received for the erection of completed structures to be manufactured and installed by Levine, after the design and engineering work was done, the necessary raw materials were withdrawn from inventory as required and fabricated in California for subsequent erection and installation by Levine outside California on customers' jobsites. The purchase, storage, and fabrication of materials all took place in this state.

Levine's business operations included the sale of fabricated structures as well as the consumption of some. In other words, Levine did not know when materials were purchased ex tax for resale, whether they would be resold to customers and delivered to jobsites in as well as out of California or whether, pursuant to certain contracts, they would be fabricated and consumed by Levine as a construction contractor improving real property.

You argue that W--- did not know whether the electrical equipment purchased would be resold or consumed when it was purchased. However, hindsight tells us that only less than 2 percent of the equipment purchased ex tax is ever sold and when sold is sold to related foreign corporations and to the general public. In other words, W--- was not and is not engaged in the business of selling electronic equipment. W---'s business consists of oil exploration surveys, which requires much equipment. W--- is primarily a consumer of the supplies they purchase to do the work, and only incidentally do they make retail sales of new exploration equipment.

We think the argument that W--- did not know, at the time it made the purchases of the electronic equipment, whether it would be resold or not is specious. The facts in W--- indicate they were even less a retailer of tangible personal property in the course of business activities than was Levine, supra.

In Levine the court said: Where a purchaser gave a valid resale certificate pursuant to Sections 6091-6093 and the gross receipts involved were accordingly not included in the measure of the sales tax imposed upon the vendor, any use by the purchaser other than mere retention, demonstration, or display while holding the property for sale in the regular course of business was, under Section 6094, deemed a retail sale by the purchaser and subject to the sales tax measured by the purchaser's cost. An amendment in 1953 provided that the use of tangible personal property, other than retention, demonstration, or display, for sale in the regular course of business by the one who purchased the property under a valid resale certificate is subject to the use tax imposed by Section 6051.

The court went on to say:

> "But for giving of resale certificates, the sales tax would have applied at the time of the sale of the raw materials to the appellants. By giving the resale certificates appellants escaped reimbursing their seller of the obligation initially to pay the sales tax and thus there was no necessity for the sellers to collect sales tax reimbursement from the appellants as buyers. Having elected to accept the conditions of article 3, chapter 2, division 2 of the Revenue and Taxation Code, sections 6091-6093, relative to resale certificates, the appellants are in no position to attempt to avoid the conditions of that article by reference to other provisions in the code…." (Underlining added.)

"Other provisions" referred to included Section 6009.1. The court said that Levine could not use the resale certificate to strip the state of its jurisdiction merely because the ultimate and final use of the property took place in another state as part of its contracting business.

Likewise, W--- cannot use the resale certificate to strip the state of its jurisdiction merely because the ultimate and final use of the property took place in another state as a part of W---'s primary business activity of oil exploration surveying.

As in Levine, W--- having accepted the conditions of the law relative to resale certificates is in no position to attempt to avoid those conditions by reference to other provisions in the code, to wit, Section 6009.1.

In our opinion, under the circumstances, W---'s giving a resale certificate for purposes of creating a use tax exemption under Section 6009.1 is a misuse of the resale certificate.

By copy of this letter, our Petition Unit will be informed that W--- still desires a hearing before the full Board of Equalization, and the matter will be placed on the Board's hearing calendar as soon as possible.

Very truly yours,

Robert H. Anderson
Tax Counsel

RHA:lb