STATE OF CALIFORNIA

STATE BOARD OF EQUALIZATION

August 25, 1970

Dear Mr.

This is in regard to the petition for redetermination filed on behalf of the above-named taxpayer.

Your primary contention is that the amount required to be paid by the employer into the union health and welfare and retirement funds, pursuant to section 8 of the union contract, is to be included in the wages paid in meeting the state minimum wage requirement. This amount was 20 cents per hour during the period in question and is now 25 cents. I cannot accept this contention.

Regulations promulgated by the Division of Industrial Welfare, Department of Industrial Relations, concerning wages, hours, and working conditions for women and minors working in the public housekeeping industry are found in Title 8 of the California Administrative Code at Section 11380.

Under these regulations, only gratuities (tips) and meals, up to certain specified amounts, may be credited toward the minimum wage of $1.65 per hour. The difference must be paid in cash or its equivalent directly to the employee. So-called "fringe benefits" may not be credited toward the minimum wage.

The 20 cent (now 25 cent) per hour contribution by the employer to the health and welfare and retirement fund is strictly a fringe benefit. It is not a deduction from the employer's gross wages, but is required of the employer. As such it cannot be credited toward the minimum wage. I have confirmed this with the Division of Industrial Welfare.

Since the 20 cent (now 25 cent) per hour employer contribution cannot be credited toward the minimum wage, we must look elsewhere to find what makes up the difference between the amount of the required minimum wage, $12.38 (7-1/2 hours x $1.65) and the amount of the wages actually paid, $11.00 as specified in the union contract. Under the regulations of the Division of Industrial Welfare, the differences can only be made up from tips (up to 20 cents per hour) or meals (which are valued at 75 cents for breakfast, $1 for lunch, and $1.35 for dinner).

You state that neither the union nor the employer considers the meals furnished to add to or be part of the minimum wage, and that neither tips nor meals are needed to make up such minimum wage. The fact remains, however, that the $11 paid is less than the required minimum wage of $12.38, and the difference must be made up from some source. Whether it is made up from meals or tips, the difference is subject to tax under Regulation 1603 and its predecessors, Ruling 53 and BTGB 68-3 and 66-7.

Our district personnel inform me that no record exists of the amount of the tips received by the waitresses. Consequently, there is no proof that income from this source met the minimum wage requirement.

Under section 10 of the union contract, establishments which do not furnish adequate and balanced meals to the employees are required to pay to the employers, in addition to their regular wages, an amount equivalent to the values established for such meals by the Industrial Welfare Commission. This, it seems to me, establishes the fact that the union views the meals as the equivalent of additional wages paid to the employee, and not as a fringe benefit.

It is not unreasonable, therefore, to conclude as we do, that the meals are used to bring the compensation up to the minimum wage. There is no other available source which can be measured to account for the differences between the minimum wage or the actual wage. It is our position that where the meals are so used, whether explicitly or implicitly, there is a specific charge for the meals, and there is, therefore, a taxable sale of the meals to the employees.

Very truly yours,

Lawrence A. Augusta
Tax Counsel

LAA: smb [lb]