WILLIAM J. SCOTT
ATTORNEY GENERAL
STATE OF ILLINOIS
SPRINGFIELD

December 13, 1977

FILE NO. S-1322

BUSINESS ORGANIZATIONS:
Amendment of a Certificate
of Authority

Honorable Alan J. Dixon
Secretary of State
State of Illinois
Springfield, Illinois 62756

Dear Mr. Dixon:

I have your letter wherein you inquire whether your office is authorized to accept an application for an amended certificate of authority in the following situation. Corporation A, a corporate shell, filed an application for a certificate of authority under section 106 of The Business Corporation Act (Ill. Rev. Stat. 1975, ch. 32, par. 157.106) indicating that it had $1,000 in property and that 100% of its property was located in Illinois. Accordingly, it paid license and franchise taxes based upon 100% of its stated capital and

paid-in surplus which at the time totaled $1,000. Later in the same year and prior to the time it was to file an annual report under section 115 of The Business Corporation Act (Ill, Rev. Stat. 1975, ch. 32, par. 157.115), Corporation A became a holding corporation and its property holdings increased to $600,000,000, $2,000,000 of which was located in Illinois. The corporation then attempted, prior to the payment of additional franchise and license taxes owed under sections 135 and 138 of The Business Corporation Act (Ill. Rev. Stat. 1975, ch. 32, par. 157.135, 157.138), to amend its certificate of authority to reflect the changed ratio of its in-State to its out-of-State property holdings, but your office refused to accept an amended application for a certificate of authority. For the reasons hereinafter stated it is my opinion that your office was correct in refusing to accept an application for an amended certificate of authority.

There is no provision in The Business Corporation Act (Ill. Rev. Stat. 1975, ch. 32, par. 157.1 et seq.) authorizing amendment of a certificate of authority in the

aforementioned situation. Section 114 of the Act (Ill. Rev. Stat. 1975, ch. 32, par. 157.114) provides that a certificate may be amended when a corporation changes its corporate name, changes the duration of its corporate existence or desires to pursue purposes not set forth in its prior application, but the section does not authorize an amendment reflecting a change in the property figures reported in the original application. Furthermore, under the maxim "expressio unius est exclusio alterius", the authorization of amendments in certain situations impliedly excludes amendment in situations not mentioned.

While a State cannot constitutionally compel a foreign corporation to submit to a tax measured wholly or partially by property located and business transacted outside the State, a corporation may waive its rights in this regard and elect to be taxed upon 100% of its stated capital and paid-in surplus. (United States Borax & Chemical Corporation v. Carpentier (1958), 14 Ill. 2d 111, 117, 118; Allstate Enterprises Stock Fund, Inc. v. Lewis (1976), 36 Ill. App. 3d 154, 157, 158.) In the present circumstance it is clear that the corporation made an election to be taxed upon 100%

of its stated capital and paid-in surplus. Although the language contained in the application for a certificate of authority does not specifically state that information indicating 100% of the corporation's property is located in Illinois is an election to be taxed on the 100% figure, the corporation should have been on notice that its action constituted an election, particularly since your office has consistently followed procedures producing that result. Furthermore, the corporation was given ample opportunity, knowing the purposes for which it was formed, to estimate the amount of property which it would hold in Illinois and outside of Illinois when it became a holding corporation. The corporation failed to take advantage of that opportunity and simply reported its property figures as they existed at the time of the original application thereby electing to be taxed on a 100% basis, and the Secretary of State has no alternative but to base the additional franchise and license taxes on the figures contained in the original application for a certificate of authority.

Section 136 of The Business Corporation Act (Ill.

Rev. Stat. 1975, ch. 32, par. 157.136) provides in pertinent part as follows:

" * * *

> The proportion represented in this State of the sum of the stated capital and paid-in surplus of a foreign corporation shall be determined from information contained in the latest annual report of the corporation on file on the date the particular increase in stated capital and paid-in surplus is shown to have been made, or, if no annual report was on file on the date of said increase, from information contained in the application of the corporation for a certificate of authority to transact business in this State, or, in case of a merger, from information contained in the report of the surviving corporation of the amount of its stated capital and paid-in surplus following the merger."

Thus, when an increase occurs in the stated capital or paid-in surplus of a corporation, the amount of additional license fee owed is based on the proportion of property located and business transacted in Illinois as indicated in the annual report or certificate of authority on file at the time the increase occurs. (Allstate Enterprises Stock Fund, Inc. v. Lewis (1976), 36 Ill. App. 3d 154, 158.) The Secretary of State, like other officers, has only those powers expressly granted to him or necessarily implied from the powers so granted (Diederich v. Rose (1907), 228 Ill. 610, 615; McKenzie

v. McIntosh (1964), 50 Ill. App. 2d 370, 377), and you have been given no authority to substitute a proportional figure based upon a later filing for the proportional figure contained in the annual report or certificate of authority on file at the time of the increase. The procedure for the computation of additional franchise taxes is virtually identical to the above mentioned procedure for the computation of additional license taxes. Ill. Rev. Stat. 1975, ch. 32, par. 157.139.

The election made when a corporation estimates in its application for a certificate of authority that 100% of its property will be located in the State does not, of course, indefinitely bind a corporation to payment of taxes based upon that figure. The property figure may be altered to reflect changes when a corporation files its annual report under section 115. Until such time as the annual report is filed, however, the corporation is bound by the election made on its application for a certificate of authority, and there exists no authority for the proposition that that election may be changed after an increase of stated capital and paid-in surplus has occurred. Similarly, a corporation which has filed an annual report in which it has elected to be taxed

on a 100% basis is bound by that election in the event of a subsequent increase in its stated capital and paid-in surplus. Ill. Rev. Stat. 1975, ch. 32, par. 157.136 and 157.139.

Corporation A has put forth several arguments through which it has attempted to support its contention that it may file an amended application for a certificate of authority. Corporation A first contends that it was a party to a statutory merger and may report its increase in stated capital and paid-in surplus and change its property apportionment by filing a report under section 119 of The Business Corporation Act. (Ill. Rev. Stat. 1975, ch. 32, par. 157.119.) While the corporations whose assets were transferred to Corporation A were involved in a merger, Corporation A, as a mere holding company, was, itself, not a party to the merger and thus, does not fall under the special provisions of section 119. Corporation A also contends that a domestic corporation, in Corporation A's position, would be able to amend its articles of incorporation under section 52 of The Business Corporation Act (Ill. Rev. Stat. 1975, ch. 32, par. 157.52) to effect a change in its proportional figure and a refusal to allow a foreign corporation to do the same

would be a violation of the equal protection clause of the United States Constitution. This argument has no merit because, in the first place, the articles of incorporation to which the Secretary of State must look to determine the proportion of property represented by a domestic corporation to be in this State, where no annual report is on file, are the articles on file on the date an increase in stated capital and paid-in surplus occurs (Ill. Rev. Stat. 1975, ch. 32, par. 157.132), and, in the second place, the Secretary of State has never permitted a domestic corporation, in a position similar to that of Corporation A, to amend its articles to effect a change in the proportional figure. The contention has also been made that an amended application for certificate of authority may be filed under section 114 for the purpose of changing the proportional figure. For the reasons discussed above, such position is also untenable.

In conclusion, it is my opinion that the certificate of authority of a foreign corporation may not be amended to change the basis for computing additional license and franchise taxes which become due as a result of increases in the corpora-

tion's stated capital and paid-in surplus. Therefore, your office properly refused to accept an application for an amended certificate of authority.

Very truly yours,

ATTORNEY GENERAL