

**New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau**

TSB-A-81 (3)
Stock Transfer Tax
October 29, 1981

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. M810622D

On July 18, 1981, a Petition was received from A.J. Armstrong Co., Inc., 850 Third Avenue, New York, New York 10022.

THE ISSUES

The issues raised are whether the Stock Transfer Tax imposed under Article 12 of the Tax Law applies to:

1) the sales of the stock of the Petitioner pursuant to the stock purchase agreements described below, if:

a) the delivery to Security Pacific Corporation of the stock of Petitioner sold under the agreements and the delivery by Security Pacific Corporation of promissory notes in payment for such stock occur in New York State, or

b) the delivery to Security Pacific Corporation of the stock of Petitioner sold under the agreements and the delivery by Security Pacific Corporation of the promissory notes in payment for such stock occur outside New York State;

2) The exchanges of the stock of the Petitioner for cash pursuant to the terms of the merger described below, if:

a) a paying agent is located outside New York State, or

b) a paying agent is located in New York State.

THE FACTS

Petitioner states that Security Pacific Corporation (Security Pacific), a Delaware corporation, and A.J. Armstrong, Co., Inc. (Armstrong), a New York corporation, have entered into agreements providing for the merger of Armstrong into Comfisco, Inc. (Comfisco), a Delaware corporation and a subsidiary of Security Pacific, pursuant to Section 907 of the New York Business Corporation Law and the Delaware General Corporation Law. Armstrong's stock transfer records are maintained in New Jersey by Registrar and Transfer Co., a transfer agent registered pursuant to Section 17A of the Securities Exchange Act of 1934.

1. The Stock Purchase Agreements

Immediately prior to the merger, Security Pacific will directly acquire approximately 85% of the outstanding voting common stock of Armstrong at \$77.20 per share from 14 stockholders pursuant to separate Stock Purchase Agreements with each stockholder (the "Agreements" or the

"Agreement"). These stockholders are (i) individuals who are residents of California, Connecticut, Florida and New York, (ii) a Delaware corporation which has a registered office in New York, (iii) a testamentary trust established under the will of a New York resident, and (iv) an inter vivos trust established by a grantor who is a resident of New York. At the closing under the Agreements, the stockholders will deliver the stock certificates to Security Pacific and will receive from Security Pacific nonnegotiable, nontransferable interest bearing promissory notes which will mature on January 11, 1982. Payments of principal and interest on the notes will be made at the place designated by each stockholder; there is no specified place for payment. Although the Agreements prescribe that the closing will occur in New York City, the parties may agree that the closing will occur outside New York State. The stock acquired by Security Pacific under the Agreements will be cancelled in the merger. The Agreements are governed by Delaware law.

The Agreements provide for counterpart execution. In fact, however, two copies of each Agreement were prepared and fully signed by both parties. Initially, separate counterparts were signed by each stockholder and Security Pacific, in the following locations. Each individual stockholder signed two copies of his or her Agreement in New York, California, Connecticut or Florida. An officer of the corporate stockholder executed two copies of its Agreement in New York. The trustees of the testamentary and inter vivos trusts also executed two copies of their Agreements in New York. Security Pacific executed one copy of each Agreement in California. Thereafter, the two copies executed by each stockholder were sent to and signed by Security Pacific in California and the counterpart signed solely by Security Pacific was destroyed.

2. The Merger

After the closing of the Agreements, Armstrong will merge into Comfisco pursuant to Section 907 of the New York Business Corporation Law and the Delaware Corporation Law (the "Merger"). The surviving corporation will be a Delaware corporation called A. J. Armstrong Co., Inc., which will be wholly owned by Security Pacific.

The Merger will be a pure cash merger. Stockholders of Armstrong who have not directly sold their stock to Security Pacific pursuant to the Agreements will be entitled to exchange their stock for cash. As of the effective date of the Merger, all stock of Armstrong, including the stock purchased by Security Pacific pursuant to the Agreements, will be cancelled by operation of law and holders of the stock not yet exchanged for cash or sold to Security Pacific will be entitled to receive cash only. It is believed that stockholders who will receive cash for their stock pursuant to the Merger will include individuals who are not residents of New York, corporations incorporated outside of New York which may or may not do business in New York, as well as other entities which may or may not have any connection with New York.

Under the terms of the Merger, stockholders will be paid upon surrendering their stock certificates to one of two paying agents. One paying agent will be located in Los Angeles, California. The other paying agent will be located either in New York City or New Jersey.

THE OPINION

Based on the foregoing, the following tax consequences will arise under Article 12 of the Tax Law. Each transaction will be discussed in turn.

1. The Stock Purchase Agreements

Section 270 of the Tax Law imposes a tax upon, "all sales, or agreements to sell, or memoranda of sales and all deliveries or transfers of shares or certificates of stock . . . in any domestic or foreign association, company or corporation . . . "

Section 440.2 of the Stock Transfer Tax Regulations (20 NYCRR 440.2) provides, in part, that:

". . . if any one of these taxable events occurs within the State with reference to any transaction, it is subject to tax regardless of where the others occurred. Thus, a transfer of record ownership on the books of the corporation within the State is subject to tax even though the sale and delivery of the certificates were made outside the State. The same is true of a sale or agreement to sell, or a delivery of certificates made within the State, although all other events relating to the same transaction occurred without the State."

Accordingly:

a) If the delivery to Security Pacific of the stock of Petitioner sold under the Agreements occurs in New York State, the delivery of such stock of the Petitioner will be subject to the Stock Transfer Tax.

b) If the delivery to Security Pacific of the stock of Petitioner sold under the Agreements occurs outside New York State, the Stock Transfer Tax will still be imposed in any instance where an agreement to sell was executed in New York State. In this regard, it is noted that a serious question of fact exists concerning the sequence of execution of the Agreements, due to the destruction by Security Pacific of the signed counterpart contracts. Therefore, since it is not the function of Advisory Opinions to resolve factual questions, no opinion regarding the sequence of the execution of the counterpart contracts, and therefore of the place of execution of the agreements to sell, is here expressed.

If the delivery to Security Pacific of the stock of Petitioner sold under the Agreements and the execution of such Agreements both occur outside of New York State, then the imposition of the Stock Transfer Tax will depend solely on the location of the transfer of record ownership on the books of the corporation.

Section 28(d) of the Securities Exchange Act of 1934 provides, in part, that:

"(d) No State or political subdivision thereof shall impose any tax on any change in beneficial or record ownership of securities effected through the facilities of a registered clearing agency or registered transfer agent or any nominee thereof or custodian therefor or

upon the delivery or transfer of securities to or through or receipt from such agency or agent or any nominee thereof or custodian therefor, unless such change in beneficial or record ownership or such transfer or delivery or receipt would otherwise be taxable by such State or political subdivision if the facilities of such registered clearing agency, registered transfer agent, or any nominee thereof or custodian therefor were not physically located in the taxing State or political subdivision "

Accordingly, if delivery to Security Pacific of the stock of Petitioner sold under the Agreements and the execution of such Agreements both occur outside of New York and the transfer of record ownership on the books of the corporation is performed by the registered transfer agent within New York State, no Stock Transfer Tax will be imposed.

However, subdivision 6 of section 270 of the Tax Law provides that:

"The tax imposed by this section shall not apply to shares or certificates of stock, or certificates of rights to stock, or certificates of deposit representing certificates of the character taxed by this article, in any domestic association, company or corporation, even though a record of the transfer is made in the stock book kept in compliance with section ten of the stock corporation law, if the transfer is made upon the books of such association, company or corporation regularly kept at a transfer office or by a transfer agent outside the state, provided the keeping of such books outside the state is necessary or convenient for the transaction of the ordinary business affairs of such association, company or corporation and is approved by the tax commission, and neither the sale, nor the agreement to sell, nor the memorandum of sale, nor the delivery is made in this state and no act necessary to effect the transfer (other than the making of a record in the stock book kept in compliance with section ten of the stock corporation law) is done in this state."

Subdivision 6 of section 270 of the Tax Law imposes a tax upon all transfers made upon a New York corporation's transfer books kept outside of the State without the permission of the Tax Commission. (Matter of Stuyvesant Insurance Company, Tax Commission Decision, February 21, 1973). Armstrong has not received approval by the Tax Commission for the keeping of its stock books outside the State. Accordingly, if the transfer of record ownership on the books of the corporation is performed by the transfer agent outside the State, the transfer of such shares will be subject to the New York Stock Transfer Tax. (Matter of Stuyvesant Insurance Company, supra).

2. The Merger

Among the transfers subject to the Stock Transfer Tax under section 270 of the Tax Law are transfers of certificates of interest in property or accumulations (certificates of interest in dissolved corporations). (L. 1942, ch. 482). Accordingly, the exchange for cash of the cancelled Armstrong certificates after the merger will be subject to the Stock Transfer Tax if such exchange occurs within New York. If the exchange for cash of the cancelled Armstrong certificates occurs outside of New

York State, such exchange will not be subject to the Stock Transfer Tax since no taxable incident will occur within New York.

In addition, it should be noted that any portfolio shares of stock held by Armstrong at the effective date of the merger will be subject to the Stock Transfer Tax at the no-sale rate. These shares, if any, will be transferred by operation of law to Comfisco upon the filing of a Certificate of Merger with the New York Secretary of State.(Tax Law §270(1); 1930 Op. Atty. Gen. 166; Op. of Counsel dated July 26, 1968).

DATED: September 21, 1981

s/LOUIS ETLINGER
Deputy Director
Technical Services Bureau