

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

TSB-A-84 (14) C
Corporation Tax
October 31, 1984

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION

PETITION NO. C820825A

On August 25, 1982 a Petition for Advisory Opinion was received from Chemco International, Inc., One World Trade Center, Suite 8321, New York, New York 10048.

At issue is whether an amount to be received by Petitioner from a sale of the stock of one of its subsidiaries to an affiliated corporation, whose stock it does not own, would be includible in Petitioner's entire net income for purposes of the Franchise Tax on Business Corporations imposed under Article 9-A of the Tax Law.

Chemco International, Inc. (Petitioner) and Chemical International Finance Limited (CIF) are wholly owned subsidiaries of Chemical Bank, a New York banking corporation. Chemical Bank, in turn, is a wholly owned subsidiary of Chemical New York Corporation (CNYC), a Delaware Corporation.

CNYC, Chemical Bank, CIF and Petitioner, together with other U. S. corporations, file a consolidated Federal income tax return. CIF and Petitioner, however, each file separate franchise tax returns under Article 9-A of the Tax Law.

CIF and Petitioner each own the stock of a number of foreign subsidiaries, including several United Kingdom corporations. To obtain tax relief in computing the U. K. corporate income tax, Petitioner proposes to form a single holding company to own the stock of all the U. K. subsidiaries. This affiliated group would then be entitled to "group relief" for U. K. tax purposes.

To accomplish the reorganization, the following steps will be taken:

- (1) Petitioner will sell the stock of all of its U. K. subsidiaries to CIF for an amount of cash equal to the fair market value of such stock;
- (2) a new U. K. holding company (Newco) will be formed, all the stock of which will be owned by CIF; and
- (3) CIF will transfer the stock of all the U. K. subsidiaries to Newco in exchange for its stock.

Only the first step is the subject of this Petition for Advisory Opinion.

Under Federal corporate distribution rules, Petitioner's receipt from the sale of the stock of its U. K. subsidiaries to CIF constitutes a distribution in redemption of CIF stock, constituting either dividends and/or gain. I.R.C. §§301-4, 318 (1983); Rev. Rul. 70-496, 1970-2 C.B. 74. The regulations applicable to consolidated returns provide for the elimination of the dividend income

and further provide that any gain realized in such a transaction is not recognized. 26 CFR §1.1502-14(a) Thus, for Federal income tax purposes the first step in the reorganization will be tax free.

For purposes of the Franchise Tax on Business Corporations imposed by Article 9-A of the Tax Law, Petitioner will file a separate report. Section 208.9 of the Tax Law, in pertinent part, provides that New York entire net income is presumably the same as Federal taxable income. In the case of a corporation filing as part of a group reporting on a consolidated basis for Federal income tax purposes, but separately for New York franchise tax purposes, "entire net income has been construed to mean the amount of taxable income a corporation would have been required to report for Federal income tax purposes if it were reporting separately for Federal purposes, subject to the applicable modifications provided for in section 208." Ruling of State Tax Commission, 1965 N.Y.T.B. - v.3 p.6. One of such modifications excludes from entire net income "income, gains and losses from subsidiary capital." Tax Law, §208.9(a)(1) The term subsidiary capital is defined as including "investments in the stock of subsidiaries," (Tax Law, §208.4), while the term "subsidiary" is defined as a corporation over 50% of the voting stock of which is owned by the taxpayer. Tax Law, §208.3.

In calculating Federal taxable income as if Petitioner had filed separately, "[t]hat portion of the distribution [in the transaction described above] which is a dividend . . . shall be included in gross income." I.R.C., §301(c)(1). Further, "that portion of the distribution which is not a dividend, to the amount that it exceeds the adjusted basis of the stock, shall be treated as gain from the sale or exchange of property." I.R.C., §301(c)(3)(a). Therefore, in determining Petitioner's New York entire net income, both the dividend and gain portion of the receipt are included in Federal taxable income, the starting point in determining entire net income. As previously noted, however, income, gains and losses from subsidiary capital are specifically excluded from entire net income. Tax Law, §208.9(a)(1). In the present case, the income in question will be derived in fact from Petitioner's sale of its stock in its U. K. subsidiaries. Further, within the contemplation of the Internal Revenue Code the income is treated as derived from ownership or redemption of shares in a corporation wholly owned (pursuant to I.R.C., §318) by Petitioner. Accordingly, pursuant to section 208.9(a)(1) of the Tax Law, this income derived from subsidiary capital should be excluded by Petitioner from the computation of its entire net income for purposes of the Franchise Tax on Business Corporations imposed under Article 9-A of the Tax Law.

DATED: October 24, 1984

s/FRANK J. PUCCIA
Director
Technical Services Bureau

NOTE: The opinions expressed in Advisory Opinions
are limited to the facts set forth therein.