

May 1, 1990

Mr. Walter L. Williams
Assistant City Attorney
Utilities Division
1015 Third Avenue, Suite 902
Seattle WA 98104

Dear Mr. Williams,

With my apologies for the delay in responding, I write in reference to your letters to Mr. James Doyle of June 21, 1989, and December 1, 1989, and our telephone conversation in response to your June letter. Your letters addressed the State and City taxes imposed on the gross revenues of the electrical utility in Seattle, which by law are noticed on the electric company billing.

Utility tax exemption for diplomatic and consular mission members derives from treaty obligations of the United States. Treaties to which the United States is a party are the law of the land and are binding on the several States under the federal supremacy clause (article VI of the Constitution). See United States v. Arlington, 702 F. 2d 485 (4th Cir. 1983); United States v. Arlington, 669 F. 2d 925 (4th Cir.), cert. denied, 459 U.S. 801 (1982); United States v. Glen Cove, 322 F. Supp. 149 (E.D.N.Y. 1971), aff'd per curiam, 450 F.2d 884 (2d Cir. 1972). Compliance with international treaty obligations is not subject to the passage of enabling legislation by the States or localities. See H.R. Rep. No. 95-526, 95th Cong., 2d Sess. 2 ("Since the (Vienna Convention on Diplomatic Relations) is self-executing, no implementing legislation is needed.")

In each of the cases cited above, the court declared null and void real property tax assessments by local authorities on the ground of inconsistency with tax exemptions granted to governments by treaty. In Glen Cove, the court elaborated that "[m]uch less should a foreign government be deprived of a treaty benefit by the claim that a municipal government within the federal structure has power to postpone the realization of what the treaty promised. Treaties, after all, are part of the law of every state." 322 F. Supp. at 154-55.

State and city utility taxes imposed on the gross revenues of a utility company, like sales and gasoline taxes, are state and local levies from which foreign missions and their personnel are exempt under Article 34 of the Vienna Convention on Diplomatic Relations, 23 U.S.T. 3227, and Article 49 of the Vienna Convention on Consular Relations, 21 U.S.T. 77 (attached for your information). The Department is of the position that such state and local utility taxes are exempt because they are direct, that is, clearly identifiable and uniformly passed on to the consumer. The technical legal incidence of the tax on a party other than the consumer is not controlling. If the tax is readily segregable from the price of the product or service and the practical incidence of the tax devolves upon the consumer, it is exempt under the treaty provisions cited above.

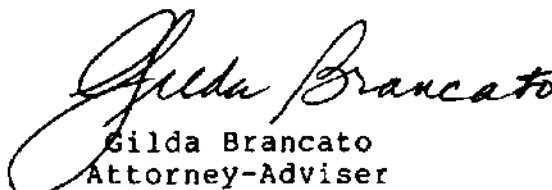
The Department's interpretation of Article 34 and the Vienna Diplomatic Convention and Article 49 of the Vienna Consular Convention is based upon the text of the treaties and their negotiating history. The language of the provisions does not exclude from exemption all "pass-along" taxes, but only those indirect taxes that are "normally incorporated into the price of goods or services", that is, hidden taxes. Where, however, as here, the tax is readily identifiable, an exception to the general rule of exemption has no relevance.

The Department's interpretation of Article 34 of the Vienna Convention on Diplomatic Relations and Article 49 of the Vienna Convention on Consular Relations is authoritative. The Supreme Court has recognized that "the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight." Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176, 184-85 (1982). Accord, Kolovrat v. Oregon, 366 U.S. 187, 194 (1961); Damjanjuk v. Petrovsky, 776 F.2d 571 (6th Cir. 1985), cert. denied, 475 U.S. 1016 (1986); Minnesota v. Block, 660 F.2d 1240 (8th Cir. 1981), cert. denied, 455 U.S. 1007 (1982); United States v. Conners, 606 F. 2d 269 (10th Cir. 1979); Dupree v. United States, 559 F. 2d 1151 (9th Cir. 1977); United States v. Guinand, 688 F. Supp. 774 (D.D.C. 1988). In Guinand, the district court stated that "the Court, although not bound by the State Department's interpretation of the Vienna Convention, finds that it is entitled to great weight...." 688 F. Supp. at 775.

Because the grant of utility tax exemption is a treaty obligation, United States Government interests and operations abroad could be affected by our failure to meet this obligation. Foreign governments rightly expect the United States to reciprocate their grant of an exemption.

We thank you for your inquiry on the subject of utility tax exemption, and ask you to please direct any additional questions to me at (202) 647-1074. We hope to hear of the implementation of the utility tax exemption in Seattle, and ask you to kindly keep our office informed of the decision in this regard.

Very truly yours,



Gilda Brancato
Attorney-Adviser
Office of Diplomatic Law
Office of the Legal Adviser

Enclosure:
as stated

cc: Mr. Keith Orton