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United States Department of State

Washington, D.C. 20520

July 31, 1989

Mr. Rick H. McClure
Assistant General Counsel
Department of Revenue of the State of Florida
Tallahassee, Florida 32399-0100

Re: Gasoline Tax Exemption

Dear Mr. McClure,

Your letter to the Legal Adviser regarding the gasoline tax exemption for diplomatic and consular personnel has been referred to me for a reply. We thank you for your letter and appreciate the consideration which your office and the office of the Secretary of State (attached) is giving to implementation of the gasoline tax exemption. Kindly excuse the delay in our response to your letter.

First, per your request, enclosed please find a list of thirty-five States within the United States that have implemented the gasoline tax exemption. Officials from additional States have indicated, in response to our correspondence, that they are giving consideration to compliance with the tax exemption obligation.

Second, you requested legal authority for our statements regarding interpretation of article 34 of the Vienna Convention on Diplomatic Relations (VCDR) and article 49 of the Vienna Convention on Consular Relations (VCCR) (attached). The Department's interpretation is predicated upon the text of the provisions, negotiating history, and the custom and practice of signatory nations to the treaties cited above.

As you know, articles 34 of the VCDR and 49 of the VCCR establish a general rule of tax exemption for diplomatic and consular personnel, with specified exceptions. Subsection (a) of the foregoing provisions excludes from the normal benefit of an exemption "indirect taxes of a kind normally incorporated in the price of goods or services". By their express terms, articles 34 and 49 do not limit enjoyment of the exemption to the party who is legally liable for the tax. They only limit enjoyment where the indirect tax is "normally incorporated in the price of goods or services." This language is in marked contrast to the real property tax exemption afforded to mission premises under article 23 of the VCDR and article 32 of the

VCCR (attached). The mission premises provisions limit enjoyment of the tax exemption to the party who is legally liable for the tax. It is clear, therefore, that under the express language of the treaties, the technical legal incidence of the gasoline tax on a party other than the consumer is not controlling. Rather, the determinative factor is whether the tax is "normally incorporated in the price of goods or services".

The Department's interpretation of articles 34 and 49 is also based upon the negotiating history of the provisions. We have consulted the original sources containing transcripts and summaries of the negotiations (International Law Commission Reports) as well as the treatment of negotiating history contained in the leading treatise on diplomatic law. That treatise, entitled Diplomatic Law by Eileen Denza (excerpt attached), indicates that, as originally drafted, the relevant tax provision in the diplomatic relations treaty would have excluded all indirect taxes from the exemption. The drafters believed that this exclusion was overbroad, however, and subsequently narrowed the exclusion so that the final treaty only excludes some indirect taxes, i.e., "normally incorporated" indirect taxes (pages 197-98). "[N]ormally incorporated" indirect taxes were excluded from the normal benefit of an exemption for ease of administration (pages 195-96). It was thought by the drafters of the diplomatic relations treaty that the amount of tax at issue did not justify the administrative complications in providing an exemption (page 196).

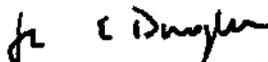
We believe that the history and the rationale of the tax provisions indicate that federal and state gasoline taxes are not of the kind intended to be excluded from the normal rule of exemption. First, the gasoline tax does not fall within the "normally incorporated" category: it is readily segregable from the price of petrol, and, indeed, is often separately identified on the gas pump. Second, an administrative burdensomeness justification has no relevance to federal and state gasoline tax exemption, which is currently being administered by the oil companies in numerous states without complication.

The Department's position on gasoline tax is consistent with foreign State practice and understanding under the Vienna Conventions. About 140 nations provide a gasoline tax exemption to United States mission personnel, and these States rightly expect the United States to reciprocate their grant of an exemption. This right of reciprocity is enshrined in VCCR article 47 and VCCR article 72 (attached).

Finally, we take the view that the State Department's interpretation of the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations is authoritative. The United States Supreme Court has recognized that "although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight." Sumitomo Shoji, Inc. v. Avagliano, 457 U.S. 176, 184-85 (1982). Accord, Kolovrat v. Oregon, 366 U.S. 187, 194 (1961); Demjanjuk 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); cf. United States v. County of Arlington, 669 F.2d 925, 934 (4th Cir.), cert. denied, 459 U.S. 801 (1982). In Guinand, the district court stated that "the Court, though not bound by the State Department's interpretation of the Vienna Convention, finds that it is entitled to great weight" 668 F. Supp. at 775.

Again, thank you for your letter. We enclose for your information a copy of recent correspondence between the Secretary of State of Florida and the Department of State regarding the gasoline tax exemption program. Please direct any additional questions which you may have to Gilda Brancato of my office ((202)-647-1074), and kindly keep us informed of Florida's decision with regard to implementation of the gasoline tax exemption.

Very truly yours,



Joan E. Donoghue
Director, Office of
Diplomatic Law and Litigation
Office of the Legal Adviser