

01-027

**TAXATION: ELECTRIC UTILITY CONSUMPTION TAX — NATURAL GAS CONSUMPTION TAX.**

**CONSTITUTION OF THE UNITED STATES: ARTICLE VI (SUPREMACY CLAUSE).**

**Commonwealth may not levy electric and natural gas consumption taxes on diplomats from foreign countries to whom Secretary of State has granted diplomatic immunity from taxation; such prohibited taxation extends to portion of taxes remitted to localities. Method of identifying foreign nation diplomats for purposes of exemption from electric and natural gas consumption taxes.**

The Honorable Clinton Miller

Chairman, State Corporation Commission

May 16, 2001

You first ask whether the Commonwealth may levy the electric and gas consumption taxes prescribed by §§ 58.1-2900 and 58.1-2904 of the *Code of Virginia* on diplomats from foreign countries, and if not, whether such prohibited taxation extends to the portion of taxes remitted by the provider to localities in the Commonwealth.

You advise that the electric and natural gas consumption taxes became effective January 1, 2001, and that such taxes are payable to the state and to the localities in increments.<sup>1</sup> As required by §§ 58.1-2901 and 58.1-2905, service providers<sup>2</sup> and pipeline distribution companies or gas utilities collect the respective taxes as a line item on their monthly bills to consumers. The companies remit to the State Corporation Commission and to the locality a portion of the taxes collected.<sup>3</sup> Finally, you advise that the State Corporation Commission has received inquiries from individuals claiming diplomatic status concerning collection of the electric and gas consumption taxes.

In 1961, the United Nations Conference on Diplomatic Intercourse and Immunities adopted the Vienna Convention on Diplomatic Relations to establish rules for the conduct of diplomatic relations between sovereign countries.<sup>4</sup> The Vienna Convention exempts a guest nation diplomatic agent

from all dues and taxes, personal or real, national, regional or municipal, except:

(a) indirect taxes of a kind which are normally incorporated in the price of goods or services ....<sup>[5]</sup>

"The privilege extended to an individual diplomat is merely incidental to the benefit conferred on the government [that the diplomat] represents."<sup>6</sup> The Vienna Convention became applicable to the United States upon passage of the

Diplomatic Relations Act.<sup>7</sup> The purpose of the Diplomatic Relations Act is "to complement the 1961 Vienna Convention on Diplomatic Relations."<sup>8</sup> The Diplomatic Relations Act provides that the President of the United States

may, on the basis of reciprocity and under such terms and conditions as he may determine, specify privileges and immunities for the mission, the members of the mission,<sup>[9]</sup> their families, and the diplomatic couriers which result in more favorable treatment or less favorable treatment than is provided under the Vienna Convention.<sup>[10]</sup>

The legislative history of this provision reflects that it was enacted to provide the President with "discretion to extend, on a reciprocal basis, more favorable treatment or less favorable treatment than the Convention specifies, to members of missions."<sup>11</sup> The President has delegated this power to the Secretary of State.<sup>12</sup> In addition, the Foreign Missions Act vests broad authority over foreign missions in the Secretary of State.<sup>13</sup> The Act defines "foreign mission" as

any mission to or agency or entity in the United States which is involved in the diplomatic, consular, or other activities of, or which is substantially owned or effectively controlled by—

(A) a foreign government ....<sup>[14]</sup>

The Foreign Missions Act expressly authorizes the Secretary of State to decide what constitutes a foreign mission for the purposes of the Act. It also provides that "[d]eterminations with respect to the meaning and applicability of the terms used in subsection (a) of [§ 4302] shall be committed to the discretion of the Secretary."<sup>15</sup> Once foreign missions are identified, the Act vests broad authority over the missions in the Secretary of State. The Act provides that

[t]he treatment to be accorded to a foreign mission in the United States shall be determined by the Secretary after due consideration of the benefits, privileges, and immunities provided to missions of the United States in the country or territory represented by that foreign mission, as well as matters relating to the protection of the interests of the United States.<sup>[16]</sup>

The Supremacy Clause of the Constitution of the United States provides that federal laws and treaties are the "supreme law of the land."<sup>17</sup> By virtue of this clause, an exemption provided by such law or treaty would supersede state law. Thus, foreign nationals who enjoy diplomatic immunity from taxation do so by virtue of an internationally agreed status. Therefore, it is my opinion that when the Secretary of State makes the appropriate determinations under the Diplomatic Relations Act and the Foreign Missions Act, the Commonwealth may not levy the electric and natural gas consumption taxes prescribed by §§ 58.1-2900 and 58.1-2904 on diplomats from foreign countries. Furthermore, I am of the opinion that such prohibited taxation extends to the portion of taxes remitted to localities.

Your final inquiry concerns the method of identifying diplomats from foreign countries for purposes of exemption from the electric and natural gas consumption taxes prescribed by §§ 58.1-2900 and 58.1-2904.

I am advised that, pursuant to the authority of the Foreign Missions Act, the United States Department of State, Office of Foreign Missions, issues tax exemption cards to certain official personnel from foreign countries who are stationed in the United States while working as diplomats, consular officers, or staff members at foreign embassies and consulates, and other organizations, such as the United Nations.<sup>18</sup> Upon the request of the foreign official personnel, a notice is also issued to the service providers, and pipeline distribution companies or gas utilities regarding the diplomat's exemption from payment of a utility tax. Furthermore, I am advised that a diplomat may contact those providers directly to claim the exemption. The provider, then, will contact the State Department with the name of the diplomat to verify exemption from taxation. The State Department will advise the provider directly regarding whether the diplomat is exempt from payment of the tax on the particular service.

<sup>1</sup>See Va. Code Ann. §§ 58.1-2900, 58.1-2904 (Michie Repl. Vol. 2000).

<sup>2</sup>"[S]ervice provider' means the person who delivers electricity to the consumer." Va. Code Ann. § 58.1-2901(E) (Michie Repl. Vol. 2000).

<sup>3</sup>See Va. Code Ann. §§ 58.1-2901, 58.1-2905 (Michie Repl. Vol. 2000).

<sup>4</sup>Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227 [hereinafter Vienna Convention]. Nearly 150 other countries, have signed the treaty. See *Tabion v. Mufti*, 73 F.3d 535, 536 n.1 (4<sup>th</sup> Cir. 1996).

<sup>5</sup>Vienna Convention art. 34, *supra*, at 3242.

<sup>6</sup>*United States v. Arlington*, 669 F.2d 925, 930 (4<sup>th</sup> Cir. 1982).

<sup>7</sup>Pub. L. No. 95-393, 92 Stat. 808 (Sept. 30, 1978) (codified as amended at 22 U.S.C. §§ 254a-258a (1994)).

<sup>8</sup>S. Rep. No. 95-958, *reprinted in* 1978 U.S.C.C.A.N. 1935, 1935.

<sup>9</sup>"[M]embers of the mission' are the head of the mission and the members of the staff of the mission;" and "'diplomatic agent' is the head of the mission or a member of the diplomatic staff of the mission." Vienna Convention art. 1(b), (e), *supra* note 4, at 3230, 3231; *see also* 22 U.S.C. § 254a(1) (defining "members of a mission").

<sup>10</sup>22 U.S.C. § 254c.

<sup>11</sup>S. Rep. No. 95-958, *reprinted in* 1978 U.S.C.C.A.N. 1935, 1939.

<sup>12</sup>See Exec. Order No. 12101, 43 Fed. Reg. 54,195 (Nov. 17, 1978), *amended by* Exec. Order No. 12608, 52 Fed. Reg. 34,617, 34,621 (Sept. 9, 1987), *reprinted in* 22 U.S.C. § 254c.

<sup>13</sup>22 U.S.C. §§ 4301-4316 (1994 & Supp. V 1999).

<sup>14</sup>22 U.S.C. § 4302(a)(3) (1994).

<sup>15</sup>22 U.S.C. § 4302(b) (1994).

<sup>16</sup>22 U.S.C. § 4301(c) (1994).

<sup>17</sup>U.S. Const. art. VI, cl. 2.

<sup>18</sup>Mr. Edward McGill, Tax and Customs Programs, Office of Foreign Missions, U.S. Department of State, Washington, D.C. 20520, furnished this Office with samples of various tax exemption cards issued by the State Department to certain foreign government personnel and offices; see *a/so* Off. Foreign Missions, U.S. St. Dep't, 1999 Ann. Rep. 10 (2000).U.S. Const. art. VI, cl. 2.

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