Cite as Det. No. 99-271, 19 WTD 472 (2000)

BEFORE THE APPEALS DIVISION
DEPARTMENT OF REVENUE
STATE OF WASHINGTON

In the Matter of the Petition For Refund of	)	D E T E R M I N A T I O N
	)	
	)	No. 99-271
	)	
. . .	)	REAL ESTATE EXCISE TAX
	)	Affidavit Nos. . . . & . . .
	)	

[1] RCW 82.45.060; U.S. CONST. ART. VI, CL.2; 21 U.S.T. 77, T.I.A.S. NO. 6820; 23 U.S.T. 3227, T.I.A.S. 7502; 28 U.S.C. § 1610: REAL ESTATE EXCISE TAX -- SUPREMACY CLAUSE –VIENNA CONSULAR CONVENTION – VIENNA DIPLOMATIC CONVENTION – FOREIGN SERVICES IMMUNITIES ACT. Federal law and international conventions preempt Washington State from applying its real estate excise tax to sales by a foreign government of residences used to house its consular staff.

Headnotes are provided as a convenience for the reader and are not in any way a part of the decision or in any way to be used in construing or interpreting this Determination.

NATURE OF ACTION:

A Consulate General seeks a refund of real estate excise taxes it paid upon the sale of two residences in [Washington] County that had housed its consular officers and their families.[1]

FACTS:

De Luca, A.L.J. – The . . . Government (the taxpayer) has a Consulate General in [Washington], including an office and residences for its consular officers and their families. The Consulate General and its officers are located in [Washington] with the express approval of the United States Department of State (State Department). According to the Acting Head of the Mission "all foreign service personnel posted to [Washington] hold the rank of Consul and/or Vice Consul and are eligible for all the diplomatic privileges and immunities granted by the U.S. State Department…." The taxpayer purchased the two properties in question in the late 1970's to house its diplomatic personnel and their families. The taxpayer sold Parcel No. . . . on December

[1] Identifying details regarding the taxpayer and the assessment have been redacted pursuant to RCW 82.32.410.

26, 1997 and sold Parcel No. . . . on February 20, 1998. In order to close the transactions, the taxpayer paid real estate excise tax (REET) in the amounts of $. . . and $. . . , respectively. The taxpayer timely filed a refund petition for those taxes in accordance with WAC 458-61-100. The Miscellaneous Tax Section of the Department of Revenue (the Department) denied the taxpayer's petition. The taxpayer appeals the decision by the Miscellaneous Tax Section.

TAXPAYER'S EXCEPTIONS:

The taxpayer argues, as a foreign government, the real properties its consular officers used for residential purposes are exempt from taxation, including REET. The taxpayer relies on international law, diplomatic and consular conventions, and a section of the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §1610 to support its argument.

ISSUE:

Is the sale of real property in the state of Washington by a foreign government that used the property as residences for it consular officers and their families exempt from REET?

DISCUSSION:

RCW 82.45.060 imposes REET upon each sale of real property in the state of Washington by providing: "(1) [t]here is imposed an excise tax upon each sale of real property at the rate of …percent of the selling price." Sale by a foreign government of real property that housed its consular officers is not listed in RCW 82.45.010 or Chapter 458-61 WAC as one of the transactions exempt from REET. However, because the taxpayer is a foreign government our inquiry does not end with a review of only Washington law.

The Supremacy Clause of the United States Constitution provides:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding.

(Underlining ours). U.S. Const. art. VI, cl. 2. In *United States v. Belmont*, 301 U.S. 324 (1937), the U.S. Supreme Court addressed an agreement between the former Soviet Union and the United States in context of New York law and the Supremacy Clause. The Supreme Court held that New York law could not defeat the rights created by the international agreement. The Court stated at 301 U.S. at 331-32:

> Plainly, the external powers of the United States are to be exercised without regard to state laws or policies. The supremacy of a treaty in this respect has been recognized from

> the beginning…. And while this rule in respect of treaties is established by the express language of cl 2, Art. VI of the Constitution, the same rule would result in the case of all international compacts and agreements from the very fact that complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states…. In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear. As to such purposes the State of New York does not exist. Within the field of its powers, whatever the United States rightfully undertakes, it necessarily has warrant to consummate. And when judicial authority is invoked in aid of such consummation, state constitutions, state laws, and state policies are irrelevant to the inquiry and decision. It is inconceivable that any of them can be interposed as an obstacle to the effective operation of a federal constitutional power…

Thus, treaties, international compacts and agreements are the law of the land. *See also United States v. Pink*, 315 U.S. 203 at 230 (1942). Furthermore, "power over external affairs is not shared by the states, it is vested in the national government exclusively." *Id* at 233. Similarly, the Washington Supreme Court long ago held that state laws in conflict with treaties between the U.S. and foreign countries are held in abeyance during the existence of the treaties. *In re Stixrud's Estate*, 58 Wash. 339, 109 Pac. 343 (1910).

In 1969, the U.S. Senate ratified the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820 (hereinafter "Consular Convention"). Article 32 of the Consular Convention provides in pertinent part:

> Exemption from taxation of consular premises
>
> 1. Consular premises and the residence of the career head of consular post of which the sending State or any person acting on its behalf is the owner or lessee shall be exempt from all national, regional or municipal dues and taxes whatsoever, other than such as represent payment for specific services rendered.

Article 1(a) of the Consular Convention defines "consular post" as "any consulate general, consulate, vice-consulate or consular agency." Article 1(c) defines "head of consular post" as "the person charged with the duty of acting in that capacity." Article 9 §1 provides that "heads of consular posts are divided into four classes, namely: (a) consul-general; (b) consuls; (c) vice-consuls; (d) consular agents." Thus, the Consular Convention provides that heads of consular posts can include Consul Generals as well as Consuls and Vice Consuls. As noted, the taxpayer's Acting Head of the Mission declared in writing to the Department that all foreign service personnel posted to the taxpayer's [Washington] Consulate General hold the rank of Consul and/or Vice Consul. The Acting Head of Mission added that the taxpayer's foreign service staff in [Washington] serve from time to time as Acting Counsel General when the incumbent is out of the Mission's territory on official business or leave.

The Department's Miscellaneous Tax Section construed Article 32 §1 of the Consular Convention to mean that only a Consul General would be considered the head of the consular post. The Miscellaneous Tax Section further declared that it understood that "consulars", but not the Consul General, used the residences in question. Therefore, it decided the sales of the properties were not exempt from REET.

We have found no Washington cases or law concerning this particular issue or the Consular Convention in general. However, we have found persuasive case law from other jurisdictions that has addressed similar issues. The U.S. Court of Appeals held in *United States v. County of Arlington*, 669 F.2d 925 (4th Cir. 1982), appeal dismissed cert. denied, 459 U.S. 801 (1982), aff'd on remand 702 F.2d 485 (4th Cir. 1982), that an apartment building in Arlington, Virginia, owned by the former German Democratic Republic, was not subject to county property taxes. The building housed the embassy's lower echelon staff members and their families, but not the ambassador or other head of mission.

The Court of Appeals in the first *County of Arlington* case (*Arlington I*) relied largely on the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602, et seq., particularly §1609, which provides that property of a foreign state is immune from attachment and execution of judgment with some specific exceptions. One of the exceptions to the exemption from attachment and execution includes property not used for purposes of maintaining a diplomatic or consular mission or the residence of the chief of such mission. 28 U.S.C. § 1610(4)(B). Although the head of the mission did not reside at the apartment building, the Court of Appeals, supported by the State Department, held that the statutory exemption from execution "should be interpreted to include a building used exclusively for the housing of members of the mission and their families." 669 F.2d at 933. In other words, not only was the East German ambassador's residence immune from the county's property tax, so was the apartment building used as a residence by the mission's staff. As stated, this federal statutory exemption applies equally to diplomatic and consular missions and residences.

On remand, the Court of Appeals in *County of Arlington*, 702 Fed. 2d 845, (*Arlington II*) upheld its decision that the apartment building was not subject to the property tax. The court relied not only upon the Foreign Sovereign Immunities Act, but even more on Article 23 of the Vienna Convention on Diplomatic Relations, April 18, 1961, 23 U.S.T. 3227, T.I.A.S. 7502 (hereinafter "Diplomatic Convention"). This treaty provision, like Article 32 of the Consular Convention discussed above, also exempts the guest nation and the head of the mission "from all national, regional or municipal dues and taxes in respect to the premises of the mission…other than such as represent payment for special services rendered." The "premises of the mission" are defined in Article 1(i) of the Diplomatic Convention as the building and lands "used for the purposes of the mission including the residence of the head of the mission." 702 F.2d at 487. The Court of Appeals held that while the residence of the head of the mission was specifically exempt from tax, the apartment building for the staff members was also immune from the tax under the same provisions of the Diplomatic Convention. *Id* at 488. In support of this construction, the Court of Appeals in *Arlington II* quoted *Factor v. Laubenheimer*, 290 U.S. 276, 293-94 (1933), where the Supreme Court stated…" if a treaty fairly admits of two constructions, one restricting the rights

which may be claimed under it, and the other enlarging it, the more liberal construction is to be preferred." 702 F.2d at 488.

Similarly, the New York Court of Appeals in *Republic of Argentina v. City of New York*, 25 N.Y. 2d 252, 250 N.E.2d 698 (1969), ruled offices owned by the Argentine Consul General in New York City were exempt from local property tax as a matter of international law. The New York Court particularly relied on Article 32 § 1 of the Consular Convention, *supra.* The court noted that the immunity from tax applied whether the mission was consular or diplomatic property. 25 N.Y.2d at 263.

Therefore, we hold, in accordance with Article 32 of the Consular Convention and the other authority cited above, that the sales of the subject real properties where the Consuls and Vice Consuls of the Consulate General resided with their families were not subject to REET, regardless of Chapter 82.45 RCW.

DECISION AND DISPOSITION:

The taxpayer's petition for refund is granted.

Dated this 30th day of September 1999.