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## **New York Property Taxes Trump the Vienna Convention, But FSIA Prevents Foreclosure on Foreign Governments That May Have Unsellable Properties**

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Foreign governments are subject to taxation on New York real property if the foreign government uses the real property outside the scope of its respective conventions or treaties with the United States. Recently, a matter involving India and Mongolia's missions to the U.N., as well as the Philippines' Consulate General and mission to the U.N., made its way through federal courts in New York.<sup>1</sup>

Under New York law, real property owned by a foreign government is exempt from taxation if it is "used exclusively for the purpose of maintaining offices or quarters" of a diplomat "with the rank of ambassador or minister plenipotentiary."<sup>2</sup> The statute goes on to say that "[i]f a portion only of any lot or building of any such government or representative is used exclusively for the purposes herein described, then such portion only shall be exempt and the remainder shall be subject to taxation unless otherwise exempt from taxation by law."<sup>3</sup>

In this particular matter, India and Mongolia owned embassy buildings that were used to house employees who ranked below the heads of the missions. During various points in time, the Philippines used a part of its building as a restaurant, rented a portion to a Philippines bank and, subsequently, to a Philippines airline. New York City in accordance with its laws assessed property taxes on the portions of the buildings that it deemed used for nonexempt purposes. The missions refused to pay the assessed taxes, causing New York City to commence declaratory judgment actions seeking to establish the validity of the tax liens.

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<sup>1</sup> *City of New York v. Permanent Mission of India to the United Nations*, 533 F. Supp. 2d 457 (2008).

<sup>2</sup> N.Y. Real Prop. Tax Law § 418.

<sup>3</sup> *Id.*

In the ensuing litigation, the missions pursued two lines of defense. First, the missions argued that the courts lacked the subject matter jurisdiction to consider New York City's claims because foreign governments are immune from litigation pursuant to the Foreign Sovereign Immunities Act ("FSIA").<sup>4</sup> Second, even if subject matter jurisdiction existed in the case, the missions argued that they were protected from taxation under the provisions of the Vienna Convention on Consular Relations ("VCCR") and the Vienna Convention on Diplomatic Relations ("VCDR").

The U.S. Supreme Court answered the question of subject matter jurisdiction, finding in favor of the City.<sup>5</sup> The FSIA provides that subject to certain exceptions, foreign sovereigns are immune from lawsuits in the U.S. courts. One of the exceptions states that suits are permitted in disputes involving "rights in immovable property situated in the United States."<sup>6</sup> The missions argued that the language "rights in immovable property" limited the reach of the exception to actions contesting ownership and possession. The Court declined to adopt such narrow construction of the exception. Justice Thomas, writing for the majority, found that a tax lien is an interest in real property, as it "inhibits one of the quintessential rights of property ownership – the right to convey."<sup>7</sup> Therefore, a court may adjudicate the validity of a tax lien because a "suit to establish the validity of a lien implicates 'rights in immovable property.'"<sup>8</sup>

The second issue was also resolved in favor of the City by the U.S. District Court for the Southern District of New York.<sup>9</sup> The court reviewed the language of the VCCR and the VCDR, which exempt from "national, regional, or municipal dues and taxes" only the residence of the head of the mission.<sup>10</sup> Because the conventions exempt only the residences of the heads of the missions, the court held that "the plain language of the VCCR and the VCDR unequivocally supports the City's position, and that is really the end of the matter."<sup>11</sup>

With respect to the City's claim against the Philippines, the court stated that the VCCR exempted from tax only "portions of the consular premises 'used exclusively for the purposes of the consular post,' and mission premises 'used for the purposes of the

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<sup>4</sup> Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602.

<sup>5</sup> *Permanent Mission of India to the United Nations v. City of New York*, 127 S. Ct. 2352 (2007).

<sup>6</sup> 28 U.S.C. § 1605(a).

<sup>7</sup> *Permanent Mission of India to the United Nations v. City of New York*, 127 S. Ct. at 2356 (2007).

<sup>8</sup> *Id.* It should be noted that Dissent questioned the majority's logic, stating that under local laws, liens against property could be filed in many different contexts, thus transforming suits that do not implicate property rights into suits that do. The Dissent found that "[s]uch a broad exception to sovereign immunity threatens, as they say, to swallow the rule." *Id.*

<sup>9</sup> *City of New York v. Permanent Mission of India to the United Nations*, 533 F. Supp. 2d 457 (2008).

<sup>10</sup> *City of New York*, 533 F. Supp. 2d at 460-61, quoting VCCR Art. 32 & VCDR Arts. 1 & 23.

<sup>11</sup> *Id.*

mission.’ ”<sup>12</sup> The Philippines treated the bank and the airline’s presence on its consular premises as commercial tenants, and even though the bank and the airline provided some services to the consular staff, their actions were primarily directed outside the consulate. Therefore, the court concluded that the premises leased to the bank and the airline were not exempt under the VCCR and the VCDR and were subject to New York property tax. The court concluded, however, that the restaurant was exempt from property tax as it was not intended as a commercial venture, but rather existed to promote Filipino culture and traditions.

Ultimately, the court entered the final judgment in favor of the City of New York as follows: against India in the amount of \$42,451,769.35; against Mongolia in the amount of \$4,395,003.13; and against the Philippines in the amount of \$10,902,895.81.<sup>13</sup> It should be noted that the FSIA prevents the City from enforcing the liens and foreclosing on the missions’ property. However, the City stated that among other remedies available to it, “the liens would be enforceable against subsequent purchasers.”<sup>14</sup> Assuming that the missions continue to refuse paying the property taxes, plus the accruing interest, these buildings will eventually become unsellable. Some countries have already surrendered to the City. For instance, Turkey’s U.N. mission settled a similar claim by the City for \$6 million.<sup>15</sup>



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<sup>12</sup> *Id.*, quoting VCCR Art. 1(j) & VCDR Art. 1(i).

<sup>13</sup> *City of New York v. Permanent Mission of India to the United Nations*, 538 F. Supp. 2d 701 (2008).

<sup>14</sup> *Permanent Mission of India to the United Nations v. City of New York*, 127 S. Ct. 2352, fn. 1 (2007).

<sup>15</sup> See Joanne Wasserman, *City Plucks 6M in Taxes From Turkey*, *N.Y. Daily News*, 10/1/03, at 19.