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## Foreign Governments Are Not Immune from New York City's Assertion of Tax Liens Against Their Diplomatic Property

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Can New York City successfully assert a tax lien against real property owned by a foreign government? “Yes,” declared the United States Supreme Court in a recent case in which the City took India and Mongolia to task for back taxes owed in connection with certain properties owned by their governments. The Supreme Court’s decision in *Permanent Mission of India to the United Nations v. City of New York*, 127 S. Ct. 2352 (2007), is significant in that it interprets one of the exceptions to the US Foreign Sovereign Immunities Act (FSIA), which normally shields foreign governments from suit in US courts, as encompassing lawsuits seeking to assert the validity of tax liens against real property.<sup>1</sup>

For years, New York City has levied taxes against the Indian and Mongolian governments for portions of their diplomatic office buildings used to house lower-level employees and their families.<sup>2</sup> Under New York law, real property owned by a foreign government is exempt from taxation only when it is “used exclusively” for diplomatic offices or for the

residences of ambassadors or ministers plenipotentiary to the United Nations. (N.Y. Real Prop. Tax Law Ann. § 418 (West 2000))

Although the governments of India and Mongolia refused to pay the taxes levied by New York City against what the City asserted were the non-tax-exempt portions of their respective buildings, New York City continued to tax these properties and, by operation of New York law, the unpaid taxes converted into tax liens held by the City. As of February 1, 2003, the Indian Mission owed approximately US\$16.4 million in unpaid property taxes and interest, and the Mongolian Ministry owed about US\$2.1 million. (127 S. Ct. at 2355)

The FSIA, which Congress passed in 1976, has been a powerful shield for foreign sovereigns in that it provides the “sole basis” for obtaining jurisdiction over them in federal court, e.g., *Argentine Republic v. Ameruda Hess Shipping Corp.*, 488 US 428,439 (1989). The FSIA does not provide blanket immunity for foreign states, however, in

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that, in accordance with international practice at the time, it codified the “restrictive theory” of sovereign immunity—that is, the concept that a sovereign’s immunity is recognized with respect to sovereign or public acts (*jure imperii*), but not with regard to private acts (*jure gestionis*), e.g., *Republic of Argentina v. Weltover, Inc.*, 504 US 607,612 (1992); *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 US 682, 711-12 (1976).

In the case at bar, the Supreme Court pronounced that “[a]s a threshold matter, property ownership is not an inherently sovereign function,” (127 S. Ct. at 2357 (citations omitted)), and highlighted the FSIA’s adoption of the pre-existing real property exception to sovereign immunity recognized by international practice. *Id.* The specific language of the FSIA’s “immovable property” exception provides that a foreign state shall not be immune from jurisdiction in any case in which “rights in immovable property situated in the United States are in issue.” (28 U.S.C. § 1605(a)(4))

The City of New York argued, and the Supreme Court (along with the Second Circuit, whose decision it affirmed) agreed, that the City’s action seeking a declaration of the validity of a tax lien fits this particular exception in that it places “rights in immovable property...in issue.” (127 S. Ct. at 2356). The Court, in reaching its determination that the present action satisfies the FSIA exception, turned to the definition of “lien” as defined by *Black’s Law Dictionary* in 1976, New York real property law, and its previous interpretations of the Bankruptcy Code. It also noted that “[the practical effects of a lien bear out these definitions of liens as interests in property. A lien on real property runs with the land and is enforceable against subsequent purchasers.” (127 S. Ct. at 2356 (citing 5 Restatement of Property § 540 (1944))) Thus, the Court held, given that a tax lien “inhibits one of the quintessential rights of property ownership—the right to convey [...]...[i]t is therefore plain that a suit to establish the validity of a lien implicates ‘rights in immovable property.’” *Id.*

The governments of India and Mongolia, on the other hand, argued that § 1605(a)(4) expressly limits itself to cases in which the specific right at issue is title, ownership or possession of property. Even Justice Stevens (joined by Justice Breyer) in his dissent, however, disagreed with this position, asserting that “a literal application of the FSIA’s text provides a basis for applying the [immovable property] exception to this case.” *Id.* at 2359. And yet, notwithstanding this literal application, Justice Stevens declared, “Given the breadth and vintage of the background general rule [providing immunity to foreign sovereigns]...it seems to me highly unlikely that the drafters of the FSIA intended to abrogate sovereign immunity in suits over property interests whose primary function is to provide a remedy against delinquency taxpayers.” *Id.*

Justice Stevens’ concern is that the Court’s “broad exception” to sovereign immunity as articulated in its decision threatens to “swallow the rule” affording immunity. *Id.* He points out that under the municipal law of New York City, liens are available against real property to compel landowners to pay for pest control and sidewalk upkeep, among other things. Thus, a “whole host of routine civil controversies, from sidewalk slip-and-falls to landlord-tenant disputes, could be converted into property liens under local law, and then used—as the tax lien was used in this case—to pierce a foreign sovereign’s traditional and statutory immunity.” *Id.*

Despite Justice Stevens’ articulation of the risks inherent in the majority’s decision, it seems highly unlikely that a court would hold that a sidewalk slip-and-fall case that was converted into a tax lien under local law, for example, implicates “rights in immovable property,” as required by the FSIA exception. Justice Stevens appears to acknowledge this unlikelihood, yet asserts that the “burden of answering such complaints and making such arguments is itself an imposition that foreign sovereigns should not have to bear.” *Id.*