



NEW YORK CITY LAW DEPARTMENT
OFFICE OF THE CORPORATION COUNSEL

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Legal Primer

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For Immediate Release

**INDIA AND MONGOLIA V. THE CITY OF NEW YORK –
U.S. SUPREME COURT CASE / LEGAL PRIMER**

***BACKGROUND INFORMATION FOR THE PRESS AND PUBLIC
ON U.N. TAX CASE TO BE ARGUED BY CORPORATION COUNSEL MICHAEL A. CARDOZO
IN WASHINGTON, D.C., ON TUES., APRIL 24, 2007***

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(Issued on Fri., April 20, 2007)

Legal Background

India and Mongolia each own multi-story properties in midtown Manhattan that are used, in part, as the country's diplomatic mission to the United Nations. Upper floors of both properties are also used to house staff members ("staff housing") of the diplomatic mission as well as administrative personnel and drivers. The City has assessed real estate taxes on the portions of the properties devoted to staff housing. The City argues that international law, specifically the Vienna Conventions on Diplomatic and Consular Relations, only provides tax exemptions for the diplomatic mission itself, the consulate, and the residences of the head of the diplomatic mission and the top consulate official. Staff housing, the City argues – relying on provisions in the Vienna Convention – is not tax exempt.

India and Mongolia contend that the entire properties are eligible for a tax exemption because, among other reasons, the staff housing is vital to serving the diplomatic missions' needs. Accordingly, India and Mongolia have refused to pay outstanding taxes and interest that the City has assessed on the properties.

As a result of the unpaid taxes, the City holds a tax lien on each of the properties. In 2003, the City brought suit (originally in state court, which was removed to federal court) against India and Mongolia seeking a declaration that the disputed tax liens are valid. As of Jan. 31, 2003, India owed approximately \$16 million in taxes and interest, and Mongolia owed approximately \$2 million.

Although the tax dispute serves as the backdrop for the U.S. Supreme Court case, the precise issue the Court is deciding is whether U.S. courts have jurisdiction to hear the City's claims. Under international and domestic law, foreign countries are generally granted immunity from lawsuits (subject to the exceptions provided by Federal statute). The Supreme Court will decide whether the City's tax lien claims trigger one of the exceptions to foreign sovereign immunity so the tax dispute's underlying merits can be heard by U.S. courts. Both the U.S. District Court for the Southern District of New York (opinion by Judge Richard Conway Casey) and the U.S. Court of Appeals for the Second Circuit (opinion by Judge Robert Katzman) ruled that the City's claims did fall within an exception and therefore exercised jurisdiction.

The U.S. government has appeared as an *amicus* or "Friend-of-the-Court" party in both the Second Circuit and the U.S. Supreme Court. The United States supports India's and Mongolia's position that the courts cannot exercise jurisdiction over the present case. Indeed, the U.S. argues that disputes over tax liens are best resolved through state-to-state diplomatic negotiations. Although the U.S. argues that no jurisdiction exists, the U.S. State

Department has repeatedly advised foreign governments, including India, that the staff housing at issue in the present case is subject to taxation.

Over the last few months, the following briefs have been filed with the Supreme Court:

- By India and Mongolia (the petitioners), both an initial brief and a reply brief,
- By the City (the respondent),
- and *amicus* briefs by the International Municipal Lawyers Association and the U.S. Conference of Mayors (supporting the City's position), and the U.S. Solicitor General (supporting India and Mongolia on behalf of the United States).

The Supreme Court will hear oral arguments on Tuesday, April 24th, at 10 a.m. The case will be the first one argued that day. The City's Corporation Counsel, Michael A. Cardozo, will argue the case for the City. John J.P. Howley, of the law firm of Kaye Scholer LLP, will argue on behalf of India and Mongolia. The Solicitor General's office, represented by (Mr.) Sri Srinivasan, will argue for the U.S. A total of one hour of argument time has been allotted to the parties: 20 minutes for petitioners, who will argue first, 10 minutes for the Solicitor General, and 30 minutes for the City. The petitioners can be expected to reserve a few of their 20 minutes to offer brief rebuttal to the City's arguments.

Foreign Sovereign Immunities Act

In the U.S., exceptions to foreign sovereign immunity – i.e. instances where foreign countries can be sued in U.S. courts – are set out in the Foreign Sovereign Immunities Act (FSIA) of 1976. Prior to the FSIA's enactment, U.S. courts would defer to the State Department's recommendation as to whether a court could exercise jurisdiction over a foreign sovereign in a particular case. The FSIA aimed to take questions of the courts' jurisdiction out of the diplomatic realm, where the State Department would be subject to case-by-case diplomatic pressures, and instead to empower the courts to decide the question in accord with the statute's language.

The FSIA also sought to codify the "restrictive" view of foreign sovereign immunity as then recognized by international practice. In contrast with the "absolute" view, which provides complete immunity to foreign states, the restrictive view distinguishes between sovereign or public acts and acts that are private or commercial in character. Under the restrictive view, immunity is not provided to foreign states for acts that are not sovereign or public in nature.

The City claims that jurisdiction exists under two exceptions to immunity provided in the FSIA: (1) the "immovable property" exception and (2) the "commercial activity" exception. (Other exceptions in the statute, which are not relevant here, concern certain limited kinds of tort actions, wrongful "expropriation of property" and injuries from terrorist activities.)

The immovable property exception allows U.S. courts to hear cases in which "rights" in real property are "in issue." The exception is provided in recognition of U.S.'s interests, like any other country or locality, in seeing that disputes concerning real property located within its borders are decided by local courts familiar with local property law. Additionally, the exception recognizes the country's or locality's interest in having certainty with respect to property ownership within its jurisdiction.

The commercial activity exception allows for jurisdiction in cases based upon commercial activity carried on in the United States by a foreign state. Because the lower courts did not decide whether the City met the commercial activity exception, it is unlikely the Court will discuss that issue during oral argument. Whether an activity qualifies as "commercial" for FSIA purposes is determined by looking at the nature of a given activity rather than its purpose. Essentially, when a foreign state engages in activity that private actors can also undertake, the activity qualifies as commercial, even if the purpose of an activity furthers a governmental objective. The commercial activity exception was provided to ensure that foreign states, increasingly engaged in activities that private parties can also engage in, were not entitled to immunity for acts that were not undertaken in their sovereign capacity.

Immovable Property Exception

The City argues that the tax lien it holds qualifies as a "right in property" and that the lawsuit seeking a declaration of the lien's validity therefore puts that right "in issue." Furthermore, the City argues that the lien puts in issue

both India's and Mongolia's right to title. Thus, the City argues that the present case fits within the exception whether the Court focuses on the City's rights as lienholder or on the foreign countries' rights as property owners.

The City's brief demonstrates that a lien has traditionally been understood as a "right" or "interest" in property in jurisprudence dating back over centuries. The City also explains that in many legal contexts, including cases involving compensation for governmental takings to one's interpreting local statutes that require property-related disputes to be heard where the actual property is located, a lien qualifies as a "right."

The City concedes that it cannot actually foreclose on the properties, because international law and a separate section of the FSIA prohibit "execution" against diplomatic properties. However, the City argues that the inability to foreclose does not alter the fundamental nature of the right it holds. The City emphasizes that the FSIA's language itself provides for jurisdiction in cases in which the ability to execute upon a judgment will be impossible. More fundamentally, even without the possibility of foreclosure, the lien puts at issue India's and Mongolia's title to the properties in that if the lien is never satisfied, title may vest with the City when the properties are sold to a private party. In that respect, a declaration that the City's tax lien is valid will continue to put rights in issue.

Finally, the City argues that international practice at the time of the FSIA's enactment clearly allowed for jurisdiction over the City's claims. (The FSIA was intended to adopt existing international practice.) The City cites to a wide range of international sources and domestic authority interpreting those sources to argue that the immovable property exception was broad enough to encompass the present lawsuit.

India and Mongolia argue that a tax lien does not qualify as a right in property, because a lien is merely a security interest that entitles a holder to the payment of money and nothing more. Accordingly, a dispute over a lien does not trigger the immovable property exception, because the case will not affect ownership, use, control, possession or occupancy of the properties. India and Mongolia emphasize that the City's lien, in contrast to property rights such as an easement that provides a holder with access to a particular property, can be unilaterally extinguished by payment of the outstanding taxes. Thus, they argue, no actual "right" in property is placed in issue by the City's lawsuit.

India and Mongolia also argue that allowing jurisdiction would improperly expand the scope of the exceptions to immunity provided under the FSIA. Specifically, India and Mongolia argue that the FSIA drafters could not have intended that the City, by creating a statutory lien, could thereby create jurisdiction for itself under the FSIA. India and Mongolia view the immovable property exception as a narrow one limited to cases in which a plaintiff claims rights to immediate title, possession or use. Further, they dispute the City's interpretation of relevant international practice and argue that foreign states have always been immune from tax enforcement lawsuits.

As noted, both lower courts – the District Court and the Second Circuit – ruled that the City's claims fell within the immovable property exception. (The U.S. District Court for the Southern District of New York ruled on July 6, 2005, and the U.S. Court of Appeals for the Second Circuit ruled on April 26, 2006.)

The U.S. Government's Position

The United States will argue in favor of India and Mongolia, and contend there is no jurisdiction in the present case. However, in a 1985 case in the Third Circuit (which hears appeals from cases in New Jersey and Pennsylvania) involving real property owned by Libya, the United States took the opposite position and argued that a dispute over a lien triggers jurisdiction. (The Third Circuit found there was no jurisdiction in that case.) Additionally, the City emphasizes the U.S. State Department's consistent position that foreign states are responsible for the payment of taxes on staff housing outside of the Washington D.C. area.

Commercial Activity Exception

The City also argues that the tax lien arises from the activity of the foreign missions in providing housing to employees who are not the heads of each mission, and that doing so is the type of activity in which private companies would engage. Also, the City points out that whether there is jurisdiction under the Commercial Activity Exception does not turn on the purpose of the activity, but the nature of it.

Further Questions?

Questions on the case can be directed to the Law Department's Media Office at media@law.nyc.gov or (212) 788-0400.

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