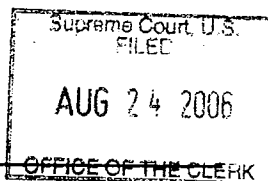


No. 06-134



In the
Supreme Court of the United States

THE PERMANENT MISSION OF INDIA
TO THE UNITED NATIONS AND THE PERMANENT
REPRESENTATIVE OF MONGOLIA TO THE UNITED
NATIONS,

Petitioners,

v.

THE CITY OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND
CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the exception to sovereign immunity for cases “in which rights in immovable property situated in the United States are in issue,” 28 U.S.C. § 1605(a)(4), provide jurisdiction for a municipality’s lawsuit seeking to declare the validity of a tax lien placed upon real property owned by a foreign sovereign?

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Second Circuit is reported sub nom. City of New York v. Permanent Mission of India to the UN at 446 F.3d 365 (2d Cir. 2006) and is reproduced in the Appendix to the Petition for Writ of Certiorari at pages App. 1 to App. 24.

The memorandum and order of the United States District Court for the Southern District of New York is reported sub nom. City of New York v. Permanent Mission of India to the UN at 376 F.Supp. 2d 429 (S.D.N.Y. 2005), and is also reproduced in the Appendix to the Petition for Writ of Certiorari at pages App. 25 to App. 45.

STATEMENT OF THE CASE

Petitioners each own and operate multi-storey properties in midtown Manhattan, in New York City. The upper twenty floors of India's building are devoted exclusively to housing for staff of India's Permanent Mission to the United Nations, and of the Indian consulate in New York, below the level of head of mission, and their families. The top three floors of Mongolia's building are devoted exclusively to housing for staff of Mongolia's Permanent Mission to the United Nations, below the level of head of mission, and their families.¹ The City of New York ("the City") has assessed real property taxes on these portions of the property, since 1981 as to Mongolia's building, and since 1991, as to India's building, which taxes have not been paid. The total arrearage continues to grow through the imposition of interest charges and additional yearly tax assessments. As a result, by operation of law, the City holds a tax lien covering both properties.²

¹ The remaining floors of each building, which floors are not the subject of this case, are used as offices of petitioners' United Nations missions, and in Mongolia's case, as the ambassador's residence.

² Real property tax liens arise as a matter of law in New York City, pursuant to NYC Administrative Code § 11-301 and New York Real Property Tax Law § 102(21), when municipal real property taxes are unpaid. Such liens encumber the property until they are paid, NYC Administrative Code § 11-301, and may be sold or assigned. NYC Administrative Code §§ 11-301 to 11-329, 11-332, 11-333.

The City commenced actions against the petitioners pursuant to New York City Administrative Code Title 11,³ seeking to obtain declarations of the validity of the liens and to embody them in judgments, although not to foreclose against the present owners.⁴ The action asserted that petitioners are not immune from liability for the taxes, charges and interest forming the subject-matter of the lien under local, state, federal or international law,⁵ and that

³ The New York City Administrative Code authorizes a proceeding to reduce tax liens to judgment after they are outstanding for one year. NYC Administrative Code §§ 11-354, 11-335.

⁴ The potential for execution under any judgment ultimately rendered in the proceedings is not implicated, since the City has represented in the suit that it is seeking only a judgment establishing the validity of the existing tax liens, and not execution upon the property.

⁵ The Vienna Convention on Diplomatic Relations, 23 U.S.T. 3227, Art. 1 & Art. 23 (1972), and the Vienna Convention on Consular Relations, 21 U.S.T. 77, Art. 32 (1969), exempt from real property taxation only so much of foreign-owned real property as is used exclusively for the purposes of maintaining the offices of a United Nations mission or consulate, or the residence of a head of mission. New York State's Real Property Tax Law § 418(1) follows the same formula. Similarly, the State Department has informed foreign governments that "[a]bsent a bilateral agreement, property tax exemption is not generally granted to residences owned by foreign governments used to house members of consular posts or international organizations, except . . . for career heads of the consular posts or chiefs of missions to the international organizations." U.S. Department of State, Guidance for Administrative Officers § 7.8, January 4, 2004. See also, U.S. Department of State, Diplomatic Note HC-18-93, April 14, 1993; U.S. Department of State, Diplomatic Note HC-06-93, February 17, 1993; U.S. Department of State, Diplomatic Note HC-12-01, April 5, 2001. The State Department's Guidance, at § 7.8, suggests that a broader exception for premises used to house all diplomatic staff is applicable only to embassies and consulates within the Washington, D.C. metropolitan area, subject to reciprocal treatment of similar United States-owned property abroad.

jurisdiction is appropriate under the Foreign Sovereign Immunities Act of 1976 ("the FSIA"), 28 U.S.C. §§ 1602 through 1611. At 28 U.S.C. § 1605(a)(4), the FSIA exempts from the jurisdictional immunity of a foreign state cases "in which . . . rights in immovable property situated in the United States are in issue." At 28 U.S.C. § 1605(a)(2), the FSIA exempts from such immunity those actions that are "based upon a commercial activity carried on in the United States by the foreign state."

The cases were removed by petitioners to the United States District Court for the Southern District of New York, pursuant to 28 U.S.C. § 1441(d). Petitioners then moved to dismiss the complaints for lack of subject matter jurisdiction, upon the ground of immunity from suit under § 1604 of the FSIA. The District Court held that it had jurisdiction under the FSIA's immovable property exception, basing its conclusion upon "[t]he international practice that the immovable-property exception codifies and the legislative history of the FSIA," and on the fact that "the tax liens place [petitioners'] and the City's rights in the properties in issue." App. 44, 376 F.Supp.2d at 439. The District Court relied heavily upon the decision of Scalia, J., in Asociacion de Reclamantes v. United Mexican States, 735 F.2d 1517 (D.C. Cir. 1984), which noted that the FSIA's enactment codified the restrictive view of foreign sovereign immunity, and that the FSIA's immovable property exception recognized "what is understood in domestic property jurisprudence to be the 'local-action rule'" requiring that the determination of rights in real property be judicially determined by the jurisdiction in which it is sited. Id. at 1521. The District Court did not reach the merits of the commercial activity argument, and it emphasized that its decision addressed the jurisdictional

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threshold and not the substantive issue of whether the properties are exempt from tax liability. App. 44-45, 376 F.Supp.2d at 439. This interlocutory appeal ensued.

The Court of Appeals for the Second Circuit unanimously affirmed, holding that the immovable property exception of the FSIA confers jurisdiction because “[w]hat is in dispute in this case is the extent of defendants’ obligations under local law (here, property taxes) arising directly out of their ownership of real property in the United States.” App. 21, 446 F.3d at 376. Although the City had emphasized, and continues to emphasize, that the rights in issue were embodied in a lien upon the property, the Court held that the right to tax, itself, is a right in immovable property that provides a permissible basis for jurisdiction, and that the Court “would reach the same result had this action been filed purely to obtain a declaratory judgment” regarding the taxable status of the properties. App. 21 n.16, 446 F.3d at 376 n.15. Like the District Court, the Court of Appeals did not reach the commercial activity exception, although the City had emphasized, and continues to emphasize, its applicability as an alternative ground for jurisdiction.⁶

The Court rejected petitioners’ argument “that the immovable property exception is limited to cases in which the parties dispute title, ownership or possession of the

⁶ The Court, however, noted that as an owner of real estate, a foreign government was acting in a private rather than in a sovereign capacity. App. 9, 446 F.3d at 370, citing Republic of Argentina v. Weltover, 504 U.S. 607, 612, 112 S. Ct. 2160, 119 L. Ed. 2d 394 (1992). This is the analytical framework of the commercial activity exception, under which the private acts of a foreign sovereign are not immune.

