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International Law: The "Use" Standard for Real Estate Tax Exemptions

In 1947, the Republic of Argentina purchased real property in New York City for the use of its various governmental agencies. Since 1960, the premises have been used primarily by the Argentine Consulate. Real estate taxes which had accrued to the former owner (a private individual) were paid when the property was originally purchased. However, no further taxes were paid until 1960, when, after some negotiations with the city, a settlement was reached and a lump sum payment made. From 1960 to 1966, the taxes assessed were paid under protest. In August of 1966, the Government of Argentina notified the city that it considered itself exempt from taxation under international law, and in 1967 filed suit to recover all past taxes paid and to cancel all liens for unpaid taxes. The trial court granted the city's motion for summary judgment on the ground that no treaty between Argentina and the United States provided tax exemption for consular property.¹ The appellate division affirmed.² *Held, modified and affirmed*: Property owned and maintained by a foreign government and used for a governmental purpose is exempt from local real estate taxation even in the absence of a treaty. *Republic of Argentina v. City of New York*, 25 N.Y.2d 252, 250 N.E.2d 698, 303 N.Y.S.2d 644 (1969).

I. EXEMPTIONS OF FOREIGN REPRESENTATIVES

Traditional Diplomatic Immunities. The special privileges and immunities which are accorded foreign representatives are based on the concept of the sovereignty of nations.³ Chief Justice Marshall pointed out in 1813 that a foreign government cannot be sued without its consent even though its property or representative is present in the forum. For peaceful relations to be maintained between nations, each must respect the sovereignty of the other. Thus, when the United States admits the diplomatic representatives of other nations, these representatives are considered equals and do not come *under* the laws of the United States.⁴ This rationale, plus the practicalities involved, form the basis of the universally accepted doctrine of diplomatic immunity. However, this special status has been extended only to diplomatic, not to commercial, representatives of foreign governments.⁵

Because of the increase in international travel, trade, and communication, the kinds of representatives sent from one nation to another have prolifer-

¹ *Republic of Argentina v. City of New York*, 54 Misc. 2d 796, 283 N.Y.S.2d 389 (Sup. Ct. 1967).

² *Republic of Argentina v. City of New York*, 29 App. Div. 2d 1052, 290 N.Y.S.2d 706 (1968).

³ *In re Baiz*, 135 U.S. 403, 420 (1890).

⁴ *Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 287 (1813).

⁵ *United States v. Wong Kim Ark*, 169 U.S. 649, 678-79 (1898), in which the Court said: [C]onsuls, as such, and unless expressly invested with a diplomatic character in addition to their ordinary powers, are not considered as entrusted with authority to represent their sovereign in his intercourse with foreign states or to vindicate his prerogatives, or entitled by the law of nations to the privileges and immunities of ambassadors or public ministers, but are subject to the jurisdiction, civil and criminal, of the courts of the country in which they reside.

ated. Ambassadors,⁶ of course, are accorded diplomatic immunity. But since it is the function, and not merely the label, which creates the immunity, Representatives to the United Nations, Ministers, and Special Envoys are all in the protected category. However, this increase has resulted in abuses.⁷ In an attempt to limit the immunity's scope, as well as to create world-wide uniformity of treatment of diplomatic representatives, an eighty-one nation conference in 1961 formulated the Vienna Convention on Diplomatic Relations.⁸ Although the United States Senate gave its advice and consent to ratification, the Convention is not self-executing, and enabling legislation is necessary before it attains the status of organic law.⁹

Development of Consular Immunity. In addition to diplomatic representation, most nations have commercial representation in foreign countries. Traditionally, this has been considered the sole function of a consul.¹⁰ Therefore, no special privileges or immunities have been afforded such representatives.¹¹ In fact, the State Department of the United States has indicated that in the absence of treaty or special foreign law, local communities are free to treat consuls as ordinary foreign nationals and deal with them in accordance with local laws.¹²

While in theory commercial transactions and agents could be taxed and judgments enforced in the courts, practical difficulties have often prevented such action. When the representative has claimed that his activities were at the behest of his government, he would call on it to take over the tax claim, and then the local government could not enforce its judgment unless there was property to be seized. At this point the State Department has often intervened and the courts have declined to levy execution on the property.¹³

⁶ The privileges and immunities of the ambassador extend to his entire diplomatic family, which includes clerical, ministerial, technical, and domestic personnel, as well as his personal family and all of his property. All of these persons are listed in the "White Book" which is filed in the office of the Marshal of the District of Columbia in accordance with 22 U.S.C. § 254 (1964). The ambassador and his entourage are immune from both civil and criminal procedures, except in actions before the Supreme Court of the United States. U.S. CONST. art. III, § 2. And they are, of course, exempt from the sanctions of local governments, including traffic tickets. If there is any compliance with local laws, it is a matter of grace on the part of the ambassador. C. WILSON, *DIPLOMATIC PRIVILEGES AND IMMUNITIES* 92-95 (1967); Harris, *Diplomatic Privileges and Immunities: A New Regime Is Soon To Be Adopted by the United States*, 62 AM. J. INT'L L. 98, 107 (1968).

⁷ See, e.g., C. WILSON, *supra* note 6, at 138-42, discussing "duty-free" privileges which can turn into smuggling; *id.* at 187, discussing situations in which children of diplomats are involved in illegal activities but are immune from prosecution; *id.* at 92-95, discussing the many traffic problems, involving speeding, parking, and other violations.

⁸ L. LEE, *VIENNA CONVENTION ON CONSULAR RELATIONS* 15 (1966).

⁹ The Convention was ratified by the Senate in September of 1965. 111 CONG. REC. 224 (daily ed. Sept. 4, 1965). There was an unsuccessful attempt to pass enabling legislation. A bill entitled the "Diplomatic Relations Act," S. 1577, 90th Cong., 1st Sess. (1967), was introduced by Senator William Fulbright in the 90th Congress. It was passed by the Senate, but the House of Representatives failed to act on it. No record of a similar bill is shown to have been introduced in the 91st Congress. CCH CONG. INDEX 2379 (1967-68).

¹⁰ The Anne, 16 U.S. (3 Wheat.) 435, 445 (1818), in which Justice Story stated: "A consul, though a public agent, is supposed to be clothed with authority only for commercial purposes." See also Bishop, *Immunity from Taxation of Foreign State-Owned Property*, 46 AM. J. INT'L L. 239, 247-48 (1952).

¹¹ See note 5 *supra*.

¹² L. LEE, *supra* note 8, at 150; G. STUART, *AMERICAN DIPLOMATIC AND CONSULAR PRACTICE* 385 (1952); Note, *Privileges and Immunities of Representatives to the United Nations*, 6 COLUM. J. TRANSNAT'L L. 305, 328 (1967).

¹³ *French Republic v. Board of Supervisors*, 200 Ky. 18, 252 S.W. 124 (1923).

The decisions have relied either on a "suggestion"¹⁴ from the State Department, or on what the court decided was a rule of international law.¹⁵ On either basis the courts have managed to defer to federal policy.¹⁶

The United States has consular treaties with a number of nations.¹⁷ Custom or tacit reciprocity usually governs the conduct with other nations, and in other situations the individual states have granted exemptions.¹⁸ The scope of the exemption granted and the interpretation of treaties has not been uniform.¹⁹ Additionally, the duties of many consuls have expanded. They now perform services not only for their own nationals and governments, but for citizens of the host country as well. In many situations they act as the representatives of their government away from the capital. Because of the need for some uniform policy regarding exemptions, various codes have been suggested.²⁰ In 1963, ninety-two nations, including the United States, drafted the Vienna Convention on Consular Relations,²¹ which was generally intended to be a codification of the prevailing rules of international law concerning the treatment of consuls. Recognizing that many consuls are no longer mere commercial agents, the Convention would accord them many of the same privileges and immunities given ambassadors. Among these immunities would be the exemption of the consulate from real property taxes.²² The United States has yet to ratify this convention.

¹⁴ In immunity cases, a "suggestion" from the State Department means that the claim for immunity has been "recognized and allowed" by the State Department. See generally Lyons, *The Conclusiveness of the "Suggestion" and Certificate of the American State Department*, 24 BRIT. Y.B. INT'L L. 116 (1947), cited in 61 MICH. L. REV. 396, 397 n.3 (1962).

¹⁵ Republic of Finland v. Town of Pelham, 26 App. Div. 2d 35, 270 N.Y.S.2d 661 (1966); City of New Rochelle v. Republic of Ghana, 44 Misc. 2d 773, 255 N.Y.S.2d 178 (Westchester County Ct. 1964); Knocklong Corp. v. Kingdom of Afghanistan, 6 Misc. 2d 700, 167 N.Y.S.2d 285 (Sup. Ct. 1957). See also United States of Mexico v. Schmuck, 293 N.Y. 264, 56 N.E.2d 577 (1944), and cases cited therein.

¹⁶ *Ex parte Peru*, 318 U.S. 578, 588 (1943), in which the Court stated that "[t]hat principle is that courts may not exercise their jurisdiction by the seizure and detention of property of a friendly sovereign, as to embarrass the executive branch of the government in conducting foreign relations."

¹⁷ *Contemporary Practice of the United States Relating to International Law*, 59 AM. J. INT'L L. 103, 113-24 (1965). A letter dated Oct. 4, 1964, was sent by the State Department to the governors of the states. It contained a compilation prepared Aug. 31, 1964, entitled "Treaty Provisions in Force Between the United States of America and Other Countries Relating to the Exemption of Government-Owned Property from Real Property Taxes." There were thirty countries included in this list. Examples of the type of treaties listed and the provisions shown are: with Austria (1928): "Lands and buildings situated in the territories of either High Contracting Party, of which the other High Contracting Party is the legal or equitable owner and which are used exclusively for diplomatic or consular purposes by that owner, shall be exempt from taxation of every kind National, State, Provincial and Municipal . . ." (emphasis added); or the treaty with Korea (1963): "The sending state shall, with respect to all matters relating to the performance of consular functions . . . be exempt from payment of all taxes . . ." (emphasis added).

¹⁸ In 1943, the Attorney General of Texas ruled that land used for consular purposes in Texas is exempt from ad valorem taxation by the state or any political subdivision. L. LEE, CONSULAR LAWS AND PRACTICE 230 (1961); Bishop, *supra* note 10, at 250.

¹⁹ Finland v. Pelham, 26 App. Div. 2d 35, 270 N.Y.S.2d 661 (1966), in which the taxing authority had construed the treaty with Finland to apply only to the office of the consulate, and not to the residence of the Consul. Finland and the State Department construed the treaty to include both. The court ruled that the State Department was correct and that the town of Pelham could not tax the residence.

²⁰ E.g., *Harvard Research Draft*, 25 AM. J. INT'L L. (Supplementary Volume) 193 (1932).

²¹ See generally L. LEE, VIENNA CONVENTION ON CONSULAR RELATIONS (1966); app. 3 contains the text.

²² *Id.* at 148, and app. 3, art. 32, § 1. Of course, there are many other immunities included in the Convention, and art. 32 includes exemption from all taxes, not only those on real property.

II. REPUBLIC OF ARGENTINA V. CITY OF NEW YORK

*Republic of Argentina v. City of New York*²³ grants immunity from local real estate taxes to property owned by a foreign government and used as a consulate. In reaching this result, the court considered customary international law as well as the previous decisions of both state and federal courts. The court discovered no satisfactory factual basis for these decisions and thus had to formulate its own rule. This rule, while under the facts conforming to the Vienna Convention, is based on the kind of use to which a piece of property is put. Use is a question of fact which can be determined by a trial court.²⁴

The New York court found that there was no consular treaty with Argentina, no congressional legislation, and no certification of immunity from the State Department. The court, therefore, was free to explore the policies underlying international law before reaching a decision. A letter from the State Department explaining its views²⁵ was given consideration, but it was only part of the evidence of international law and not the sole basis for the decision. Instead, the court looked to the holdings of the United States Supreme Court and noted that great weight had been given to the works of jurists and commentators as evidence of the customs and practices of international law.²⁶ The Vienna Convention on Consular Relations constitutes such evidence, and the court noted that while it has not been considered by the Senate, the State Department appears to be in agreement with it.

Explanations of the reasoning underlying the provisions of the Vienna Convention were found in the holdings of the Supreme Court of Canada. Since tax claims are unenforceable against a foreign government, the assessment of taxes is an empty procedure.²⁷ In fact, the inclusion of such taxes in the budget of the taxing authority is unrealistic since it constitutes an

²³ 25 N.Y.2d 252, 250 N.E.2d 698, 303 N.Y.S.2d 644 (1969).

²⁴ *Brownell v. City & County of San Francisco*, 126 Cal. App. 2d 102, 271 P.2d 974, 981 (1954), in which the evidence of the trial court that property was used by the German government exclusively for governmental purposes was used to support the findings of the status of the property in re its tax exemption.

²⁵ The letter was written, on Sept. 2, 1965, by Richard D. Kearney, an Acting Legal Advisor to the Department of State to the Comptroller of the City of New York. The letter gave the opinion that foreign government-owned property should be tax exempt when used for non-commercial purposes. This view was supported by four reasons which the court considered:

(1) the practices of other countries; (2) the trend among political subdivisions of the United States to grant such exemptions; (3) the serious political consequences which would attend upon any attempt to enforce tax assessment by evicting a foreign government from its property; and (4) the lack of any valid basis for distinguishing between foreign state-owned personal property or embassy real property—which classes of property are concededly exempt from taxation—and other real property used for governmental purposes.

250 N.E.2d at 700, 303 N.Y.S.2d at 646. The United States entered this dispute as *amicus curiae*, and filed an *amicus* brief contending that taxation of this kind "will prejudice and hamper the effective conduct of our foreign relations." 250 N.E.2d at 700, 303 N.Y.S.2d at 646.

²⁶ *The Paquete Habana*, 175 U.S. 677, 700 (1900); *Hilton v. Guyot*, 159 U.S. 113, 163 (1895). Judge Learned Hand in *Berman v. De Sieyes*, 170 F.2d 360, 362 (2d Cir. 1948), writing about an international conference in Havana in 1928, said that "[c]onventions of such are weighty authority."

²⁷ *City of St. John v. Fraser-Brace*, 13 D.L.R.2d 177 (1958); *Yin-Tso Hsuing v. Toronto*, 4 D.L.R. 209 (1950); *Reference Re Tax on Foreign Legations*, 2 D.L.R. 481 (1948).

attempt to allocate money which is not available.²⁸ Attempting to place a lien on the property, which could be enforced only on sale of the property, amounts to a deferred tax (the tax either forming part of the purchase price, or being subtracted from the selling price), and would be equally unenforceable.²⁹

It is true that inability to enforce a tax claim does not deny a government the right to assert it.³⁰ But by asserting such a right the local government is in the position of claiming it has authority over a foreign government. Local governments in the United States cannot make such a claim because the United States Supreme Court has held that there is "perfect equality and absolute independence of sovereigns."³¹ One nation, therefore, is not under any obligation to support the functioning of another through the payment of taxes. This argument explains the right of diplomats to be immune from taxes as the personification of sovereign nations.³² However, if New York were to continue to maintain the fiction that consuls are not governmental representatives because of their titles, the city would again be in the position of expecting income which could not materialize. For this reason, the New York court changed the test from one of title to one of function. Relying on international law scholars,³³ the court found that consular duties have changed and consuls have become true public servants, serving both their own nationals and citizens of the United States in many areas other than purely commercial ones. Therefore, the test for real property taxes (in the absence of a treaty or overriding law) is one of use. If the property is used for a public or governmental purpose by the foreign nation, then it is tax exempt. If it is for a private commercial purpose, then it is commercial property and should be taxed.

There is one flaw in this otherwise logical decision. Having stated that the property is exempt because it is used for a public purpose, the court nevertheless held that Argentina was not entitled to a recovery of past taxes. No reason other than the failure of Argentina to comply with an administrative technicality was given.³⁴ It would certainly appear that if the property is exempt now, it was also exempt in the past, unless its use has changed. Requiring that a foreign nation comply with local administrative procedures in order to obtain a refund for taxes improperly assessed appears to be an exercise of jurisdiction over that nation. It may be that the court was being practical. New York can not require Argentina to pay taxes, and

²⁸ Reference Re Tax on Foreign Legations, 2 D.L.R. 481, 503-04 (1948).

²⁹ *City of New Rochelle v. Republic of Ghana*, 44 Misc. 2d 773, 255 N.Y.S.2d 178, 180 (1964), in which the judge said of this suggestion: "The tongue of the U.S. Attorney must have been jamming his cheek when he wrote in his memo of law 'Rather the City of New Rochelle must recover its taxes through diplomatic channels or, alternatively these taxes remain an inchoate lien on the property to be recovered when and if the foreign governments sell the properties.'"

³⁰ 2 D.L.R. 481, 500-01 (1943).

³¹ *Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116, 137 (1813).

³² L. LEE, *supra* note 18, at 226.

³³ *Id.* at 60; Bishop, *supra* note 10, at 248.

³⁴ This technicality requires a claim for refund be made to the Comptroller before there is a cause of action. N.Y.C. ADMIN. CODE § 349a-1.0a, cited in 250 N.E.2d at 704, 303 N.Y.S.2d at 652.

Argentina can not force New York to pay a refund. In this situation, possession is apparently the law.

III. CONCLUSION

In New York state there have been an increasing number of cases involving the property of foreign governments. In each instance, the state has yielded upon the intervention of the State Department.³⁵ While the nation must assume a uniform posture toward foreign governments in order to have a coherent foreign policy, it is the responsibility of the federal government in our federal system to establish a policy which the state governments can understand and follow. By failing to ratify treaties, while actually intending to comply with them, the national government merely confuses the local authorities.

The New York Court of Appeals obviously felt a responsibility towards the national policy and wanted to enable the state to conform, not only in this particular situation, but in all similar ones. By basing its decision on "use" rather than "foreign policy," the court would appear to be trying to establish an objective standard. This would enable New York to assess or exempt foreign real estate from taxes without relying upon the State Department's requests. In so doing, New York is shouldering a tax burden from lost taxes which should be shared by the whole nation.³⁶

The test for immunity established by the New York court is a rational one. While no specific standard for public or governmental use was established, the actual use of a piece of property would be considered a question of fact to be determined by the trial court. There would be less need for the intervention of the State Department, since trial courts are experienced in, and equipped for, fact finding. This decision provides the courts with an opportunity to establish a sound legal foundation for the tax exemption policies of the State Department. However, rather than relying on *stare decisis* for uniformity, it might be wiser to ratify both Vienna Conventions and enact implementing legislation, thus binding the states to a uniform system of law in this foreign policy area.

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³⁵ See note 14 *supra*.

³⁶ The amount of taxes involved in this one case was in excess of \$200,000.