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## The President's Power to Exempt a Foreign Nation From Local Taxation

*United States v. Arlington*  
669 F.2d 925 (4th Cir. 1982)

On September 6, 1978, the United States District Court for the Eastern District of Virginia declared that an apartment building owned by the diplomatic mission of the German Democratic Republic (East Germany) and used to house its staff and their families was subject to a lien for unpaid taxes. The Attorney General, at the request of the Department of State, filed this action requesting: (1) a declaratory judgment that the apartment building was exempt from real estate taxes; (2) a voiding of all assessments and liens affecting the property; and (3) an injunction prohibiting Arlington County from making further attempts to collect taxes from the property or its owner. The District Court for the Eastern District of Virginia held that the county could not assess taxes on the property after May 4, 1979, but that the property was subject to a tax lien for 1977, 1978, and part of 1979. The United States Court of Appeals for the Fourth Circuit affirmed in part and reversed in part, holding: (1) the State Department was empowered to enter into an agreement with the German Democratic Republic (GDR) exempting from taxation property used for diplomatic purposes; (2) the agreement was not an unconstitutional infringement on the county's power to tax; and (3) the GDR is immune from execution of the tax lien.

The United States officially recognized the GDR on September 4, 1974 (1974 agreement), at which time the two nations agreed to establish bilateral diplomatic relations.<sup>1</sup> In 1976, the GDR purchased an apartment building in Arlington County, Virginia to house its diplomatic staff and their families.

In 1978, Arlington County brought an action against the GDR to recover unpaid taxes on the apartment building. The GDR made a special appearance contending that it is immune from the jurisdiction of the district court. The court determined that it had jurisdiction under the Foreign Sovereign Immunities Act because

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1. Agreement on Establishment of Diplomatic Relations, Sept. 4, 1974, United States-German Democratic Republic, 25 U.S.T. 2597, T.I.A.S. No. 7937.

the GDR's use of the property was of a commercial nature and because the action placed in issue rights in immovable property.<sup>2</sup> Notwithstanding, the GDR stood on their plea of lack of jurisdiction and raised no further defense. As a result, the court entered judgment against the GDR for the taxes due and declared a tax lien against the apartment building.<sup>3</sup>

In response, the State Department entered into an agreement with the GDR on May 4, 1979 (1979 agreement), which provided for the:

reciprocal exemption from real estate taxes for property owned (by either country) when such property is used exclusively for purposes of their diplomatic missions, including residences for the staff of their diplomatic missions and members of their family.<sup>4</sup>

Despite the existence of this agreement the county continued to tax the property.<sup>5</sup> Consequently, the Attorney General brought this action.

One of the county's principal contentions was that the State Department did not have the power to enter into the 1979 agreement creating the tax exemption. The court of appeals addressed this contention by determining that the 1974 agreement was a valid exercise of the power of the Executive Branch to recognize foreign governments. The court based its decision on the President's Constitutional powers in foreign relations, as articulated in *Guaranty Trust Co. v. United States*.<sup>6</sup> The court further held that this power is not limited solely to recognition, but includes the power to augment an agreement with whatever terms are necessary to complete and effectuate the recognition. The court's authority

2. 669 F.2d 925, 928 (4th Cir. 1982). The court relied on 28 U.S.C. § 1605 (Supp. 1981) which provides in part:

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case

. . . .  
(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state . . .

. . . .  
(4) in which rights . . . in immovable property situated in the United States are in issue.

3. 669 F.2d 925, 936 (4th Cir. 1982).

4. *Id.* at 936.

5. The District Court for the Eastern District of Virginia did not publish their opinion.

6. 304 U.S. 126, 137-138 (1938).

here was *United States v. Belmont*<sup>7</sup> and *United States v. Pink*,<sup>8</sup> cases upholding the Litvinov Assignment.<sup>9</sup> In addition to recognizing the Soviet Union, the Litvinov Assignment recognized the Soviet Union, but also provided for the settlement of claims against the Soviet Union as a condition to recognition. The Court in *Pink* stated: "[P]ower to remove such obstacles to full recognition as settlement of claims . . . is a modest implied power of the President. . . ."<sup>10</sup> The court in the instant case implied an identical power holding that the 1979 agreement for tax exemptions was "ancillary to the 1974 agreement for the recognition of the GDR"<sup>11</sup> and was therefore a valid exercise of the President's power to augment recognition. The ancillary agreement however, did not arise until five years after recognition, whereas in *Belmont* and *Pink*, the ancillary conditions arose simultaneously with the recognition.

The court found that the Diplomatic Relations Act of 1978<sup>12</sup> provided an additional source of power for this executive agreement. With this Act, Congress empowered the President to grant privileges and immunities to members of the diplomatic corps of foreign states. Literally, the Act grants privileges and immunities only to persons who are diplomats. The court, however, found that an immunity granted to a diplomat is merely a by-product of the immunity which is conferred on the government he represents. Thus, the Act was deemed to empower the President to confer privileges and immunities on foreign states with which the United States has established diplomatic relations. Since the GDR is such a state, the President had the statutory power to grant it the privilege of tax exemption.

The county's next principal contention was that even assum-

7. 301 U.S. 324 (1937).

8. 315 U.S. 203 (1942).

9. See BEVANS, 11 TREATIES AND OTHER INT'L AGREEMENTS OF THE UNITED STATES OF AMERICA 1776-1949, 1248 (1974).

10. 315 U.S. at 229-230. See also *Ozanic v. United States*, 188 F.2d 228, 231(2d Cir. 1951), where Judge Learned Hand stated:

The constitutional power of the President extends to the settlement of mutual claims between a foreign government and the United States, at least when it is an incident to the recognition of that government; and it would be unreasonable to circumscribe it to such controversies. The continued mutual amity between the nation and other powers again and again depends upon a satisfactory compromise of mutual claims; the necessary power to make such compromises has existed from the earliest times and been exercised by the offices of all civilized nations.

11. 669 F.2d at 930.

12. 22 U.S.C. §254(c)(1979).

ing that the State Department was empowered to enact the 1979 agreement, only the State of Virginia could exempt the property of a foreign government from taxation. Speaking to this contention, the court expounded on the Federal Government's exclusive powers over foreign or external affairs. The United States Government can exercise these powers free from restrictions which might otherwise be imposed by state laws and policies. The court again relied on *United States v. Belmont*. There the United States attempted to recover money deposited by a Russian corporation in a New York bank, pursuant to the Litvinov Assignment.<sup>13</sup> Subsequent to the Russian Revolution, the Soviet Union nationalized all corporations in their country. As a condition to U.S. recognition, the Litvinov Assignment required the U.S.S.R. to assign to the United States claims that it had acquired as a result of the nationalization of property held by U.S. nationals. The Second Circuit affirmed the dismissal of the complaint for failure to state a cause of action, reasoning that allowance of recovery of the claim would have been contrary to New York's laws and policies against confiscation.<sup>14</sup> The Supreme Court reversed, and held that the agreement for the recognition of the Soviet Union, with the conditions incident thereto, was an executive agreement which should be viewed as tantamount to a treaty, in the sense that it is the "supreme Law of the Land," against which no state law can prevail.<sup>15</sup> In the instant case, the 1974 and 1979 agreements combined to form an executive agreement recognizing the GDR, not unlike the Litvinov Assignment. The court of appeals held that the two agreements were to be "accorded the dignity of formal treaties," thus becoming the "Law of the Land," and the county's power to tax would have to yield to the State Department's power to recognize the GDR and to grant privileges and immunities in furtherance thereof.<sup>16</sup>

The third major issue which the court addressed<sup>17</sup> was whether the GDR was immune from execution of a tax lien which had been declared against the apartment house for 1977, 1978, and

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13. *Supra* note 7.

14. 85 F.2d 542 (2d Cir. 1936).

15. U.S. CONST. art. VI, §2.

16. 669 F.2d at 932.

17. Two minor issues raised by Arlington County were: (1) whether the U.S. had to join the GDR in this action; and (2) whether the U.S. should be estopped from litigating the issue of the tax status of the property prior to May 4, 1979, since that issue had been decided in an earlier action against the GDR. The court answered both of these questions in the negative.

part of 1979. Section 1609 of the Foreign Sovereign Immunities Act of 1976<sup>18</sup> provides that the property "of a foreign state shall be immune from . . . execution except as provided in section 1610 . . . ." The relevant exceptions provided in section 1610 are:

(a) The property in the United States of a foreign state, . . . used for a commercial activity . . . shall not be immune from . . . execution . . . if

(2) the property is or was used for the commercial activity upon which the claim is based, or

(4) the execution relates to a judgment establishing rights in property—

(B) which is immovable and situated in the United States: *Provided*, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission . . . .<sup>19</sup>

Section 1610 applies the restrictive theory of sovereign immunity as enunciated in the Tate Letter to immunity from attachment and execution.<sup>20</sup> Under this theory, the "immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*)."<sup>21</sup>

The county contended that the property was being used for commercial uses prior to the 1979 agreement, and therefore its use was *jure gestionis*, and pursuant to §1610(a)(2), not immune from execution of the tax liens. The court's response was that, regardless of what took place prior to that agreement, the record indicated that after May 4, 1979 (the day the agreement was entered into) the property was being used exclusively by the diplomatic staff and their families. Therefore, from that date the use of the apartment building was *jure imperii*, and the property was immune from execution of any tax liens to which it might have been subjected, at least insofar as § 1610(a)(2) is applicable.<sup>22</sup>

The court next addressed the question of whether the apartment building used to house the diplomatic staff of the GDR was immune from execution of the tax lien in light of § 1610(a)(4)(B)

18. 28 U.S.C. §1609 (Supp. 1981).

19. 28 U.S.C. §1610(a) (Supp. 1981).

20. 6 G.M. WHITEMAN, DIGEST OF INT'L LAW 569 (1968).

21. *Id.*

22. 669 F.2d at 934.

which excepts from immunity property "used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission . . . ." <sup>23</sup> The court resolved this issue by applying the doctrine of *Mexico v. Hoffman*,<sup>24</sup> which required courts to weigh heavily a determination by the State Department as to whether immunity should be granted. The court held that the State Department did make such a determination and this is implicit in the 1979 agreement.<sup>25</sup> Specifically, the 1979 agreement provided for the reciprocal exemption from taxation of property "used exclusively for purposes of their diplomatic missions, including residences for their staff . . . ." When this language is viewed in the light of section 1610(a)(4)(B), it becomes clear that the State Department must have believed that the housing of a diplomatic staff was a use of property for the purpose of "maintaining a diplomatic or consular mission." Therefore, the immunity from execution provided for in section 1609 can be applied to the tax lien against the apartment building.

The scope of the President's power to enter into independent executive agreements has been the subject of much debate. In *Curtiss-Wright Export Corp.* the Supreme Court found that the President has an inherent power in foreign affairs.<sup>26</sup> This inherent power enables the President to negotiate an executive agreement without congressional approval and without the need to rely on a substantive grant of power in the Constitution, such as his position as Commander in Chief or his recognition powers. In *Pink and Belmont* the Court reinforced the concept of inherent powers when it upheld the Litvinov Assignment based on the President's authority as the "sole organ" of the government in foreign affairs.<sup>27</sup> The Court adapted this analysis even though it could have found authority for the agreement in the President's recognition power.<sup>28</sup>

During the Vietnam era, many began to fear that the President had too much power in foreign affairs. These fears arose as a result of the commitment by the President of troops to the conflict in Southeast Asia. One writer poses this question:

Would "the people" approve the presidential revision [of the

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23. 28 U.S.C. §1610(a)(4)(B) (Supp. 1981).

24. 324 U.S. 30 (1945).

25. 669 F.2d at 934.

26. 299 U.S. 304, 318 (1936).

27. 315 U.S. 203, 229 (1942); 301 U.S. 324, 330 (1937).

28. L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 178 (1972).

distribution of power] whereunder the President claims, acting alone, to commit us to a Vietnam war, if they were told that the bloodletting is justified, not by the Constitutional text nor by the framers (which runs to the contrary) but by a boot-strap theory of power built upon successive usurpations?<sup>29</sup>

The court in the instant case has embraced some of these fears and, in response, has refused to view the President as having expansive inherent powers in foreign affairs. Its basis for upholding the reciprocal tax exemption agreement was that it was ancillary to the recognition of the GDR, thus specifically relying on the President's substantive power of recognition.<sup>30</sup> The interesting aspect of this analysis is that the agreement was not a part of the initial recognition package, but rather it arose five years after recognition had been completed. Thus, the court had to stretch the President's recognition power in order to use it to support the agreement, when it would have been more feasible to uphold the agreement based on the President's inherent foreign affairs powers. Moreover, the court indicated its lack of support of a broad presidential power to conclude agreements by relying on the Diplomatic Relations Act to "buttress" its holding.<sup>31</sup> Had it been willing to view the President as having expansive independent powers it would not have developed a line of reasoning which provides congressional authorization for the agreement. The court's rationale may have been the result of the Supreme Court decision in *Dames and Moore v. Regan*, wherein the Court declined to support the position that the President has broad inherent powers for independently negotiating executive agreements.<sup>32</sup>

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29. Berger, *The Presidential Monopoly of Foreign Relations*, 71 MICH. L. REV. 1, 53 (1972). Berger's question was addressed directly to the issue of the independent actions of the President, but it still reflects the sentiment surrounding his powers in foreign affairs.

30. 669 F.2d at 930.

31. *Id.*

32. 453 U.S. 654 (1981).