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Federal Taxation—Effect of a State Court Adjudication of Property Rights in Subsequent Federal Tax Litigation

Michael R. McGee

FEDERAL TAXATION—EFFECT OF A STATE COURT ADJUDICATION OF PROPERTY RIGHTS IN SUBSEQUENT FEDERAL TAX LITIGATION

In 1930, Herman Bosch set up a revocable and amendable trust, the terms of which provided that the income from the corpus was to be paid to his wife during her lifetime. Mr. Bosch amended the trust in 1931 to give his wife a general power of appointment. In 1951, Mrs. Bosch executed an instrument purporting to release her general power of appointment and convert it into a special power of appointment. This was done to prevent the assets of the trust from being taxed as part of Mrs. Bosch's gross estate. Upon Mr. Bosch's death in 1957, his executor claimed the 1951 release by Mrs. Bosch to be invalid under state law and accordingly sought a marital deduction in the amount of the trust. The Commissioner, however, relying on Mrs. Bosch's purported release of her general power of appointment, determined that the trust corpus did not qualify for a marital deduction under section 2056(b)(5) of the 1954 Internal Revenue Code,[1] and levied a deficiency. The executor filed a petition for a redetermination in the Tax Court. While the Tax Court proceeding was pending, the executor filed a petition in the supreme court of New York seeking a determination of the validity of the 1951 release by Mrs. Bosch under state law. The Tax Court, with the consent of the Commissioner, abstained from making its decision pending the outcome of the state court action. The state court found the release to be a nullity.[2] The Tax Court, while carefully stating that it did not consider itself bound by the state court decree, accepted the decree as an "authoritative exposition of New York law and adjudication of the property rights involved," and allowed the marital deduction.[3] On appeal, the Court of Appeals for the Second

1. Int. Rev. Code of 1954, § 2056(b)(5) provides:

> In the case of an interest in property passing from the decedent, if his surviving spouse is entitled for life to all income from the entire interest . . . with power in the surviving spouse to appoint the entire interest . . . (exercisable in favor of such surviving spouse, . . . or in favor of either, whether or not in each case the power is exercisable in favor of others), and with no power in any other person to appoint any part of the interest, or such specific portion, to any person other than the surviving spouse—
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> (A) the interest . . . thereof so passing shall, for purposes of subsection (a), be considered as passing to the surviving spouse, and
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> (B) no part of the interest so passing shall for purposes of paragraph (1)(A), be considered as passing to any person other than the surviving spouse.

2. Matter of Irving Trust Co. (Bosch), 150 N.Y.L.J., Nov. 15, 1963, at 14, col. 3 (Sup. Ct.). In this proceeding separate briefs were filed in behalf of Mrs. Bosch, the trustee, and by a guardian *ad litem* in behalf of one of twenty-two minors who might possibly become beneficiaries if Mrs. Bosch died without exercising her power of appointment, all three briefs argued that Mrs. Bosch's release was a nullity. *See* Commissioner v. Estate of Bosch, 363 F.2d 1009, 1011 (2d Cir. 1966).

In the New York Supreme Court's opinion it was stated that Mrs. Bosch's purported release was a nullity. The Court reasoned that Mrs. Bosch could not exercise her power of appointment in 1951 while Mr. Bosch was still alive, and therefore Mrs. Bosch could not release it. That is, a power of appointment is not releasable prior to the time it can be exercised when the power is created under a revocable deed of trust and is exercisable at will. The Court cited Matter of Piffard, 111 N.Y. 410, 18 N.E. 718 (1888) as authority for its decision.

3. Herman J. Bosch, 43 T.C. 120, 124 (1964), *aff'd*, 363 F.2d 1009 (2d Cir. 1966), *rev'd*, 387 U.S. 456 (1967).

Circuit, Judge Friendly dissenting, affirmed the Tax Court decision.[4] The Supreme Court, Justices Douglas, Harlan and Fortas dissenting, reversed and remanded the case to the Court of Appeals.[5] *Held,* Where a state court determination of property rights is material to subsequent federal tax litigation, federal authority, in the absence of a decision on point by the State's highest court, must apply what *it* finds to be the state law after giving "proper regard" to relevant rulings of other courts of the State. *Commissioner v. Estate of Bosch,* 387 U.S. 456 (1967).

The Supreme Court has stated, "State law creates legal interests or rights. The federal revenue acts designate what interests or rights, so created, shall be taxed."[6] Here, the federal estate tax statute is dependent on property rights created under state law since there are no federal definitions or standards provided.[7] The use of state law in applying the federal statute gives rise to the very difficult question of what effect a lower state court determination of property rights has in subsequent federal tax litigation regarding those same property rights. The Supreme Court has ruled on the effect of state court determinations of property rights in *Freuler v. Helvering*[8] and *Blair v. Commissioner.*[9] These decisions, however, are the only two Supreme Court cases directly on point, and both are over thirty years old.

While *Freuler* and *Blair* each held a state court decree to be conclusive in a federal court, their dicta indicated that a state court decree obtained through collusion would not be binding on a federal court. In *Freuler,* the Commissioner argued that the state trial court decree was not binding on the federal courts because it was "collusive in the sense that all parties joined in a submission of the issues and sought a decision which would adversely affect the Government's right to additional income tax."[10] The Supreme Court rejected this argument on the facts of *Freuler* but did not accept, reject, or even comment on this definition of collusion as argued by the Commissioner. Nor did the Court explicitly state what the effect of a "collusive" state court decree would be on federal tax litigation. Unfortunately, *Blair* did little to clarify *Freuler* as to the definition of a collusion and the effect of collusive state court decrees. In holding an

4. In affirming, the majority opinion stated that the "New York judgment, rendered by a court which had jurisdiction over parties and subject matter, authoritatively settled the rights of the parties, not only for New York, but also for purposes of the application to those rights of the relevant provisions of federal tax law." Commissioner v. Estate of Bosch, 363 F.2d 1009, 1014 (2d Cir. 1966).

5. On remand, the Second Circuit, in a *per curiam* opinion, stated, "Upon consideration of the briefs and arguments when the Commissioner's petition to review was first before us and supplemental briefs filed by the parties upon remand from the Supreme Court of the United States, we conclude that the New York Court of Appeals would not follow the decision of the Supreme Court, New York County, in *Matter of Irving Trust Co.* (Bosch), but would uphold the partial release of the general power of appointment. Accordingly, the judgment of the Tax Court is reversed." 382 F.2d 295 (1967).

6. Morgan v. Commissioner, 309 U.S. 78, 80 (1940).

7. *See* Burnet v. Harmel, 287 U.S. 103 (1932).

8. 291 U.S. 35 (1934).

9. 300 U.S. 5 (1937).

10. Freuler v. Helvering, 291 U.S. 35, 45 (1934).

Illinois Appellate Court decision binding on federal courts, *Blair* said simply,

> Nor is there any basis for a charge that the suit was collusive and the decree inoperative. *Freuler v. Helvering, supra.* The trustees were entitled to seek the instructions of the court having supervision of the trust. That court entertained the suit and the appellate court, with the first decision of the Circuit Court of Appeals before it, reviewed the decisions of the Supreme Court of the State and reached a deliberate conclusion. To derogate from the authority of that conclusion and of the decree is commanded, . . . would be wholly unwarranted in the exercise of federal jurisdiction.[11]

A widespread conflict developed among the Circuit Courts concerning the effect of state court decrees following *Freuler* and *Blair*.[12] The genesis of this conflict was the lack of precise guidelines in *Freuler* and *Blair* relative to "collusion" and "collusive" state court decrees. The manifestation of this conflict was the development in the circuit courts of very inconsistent interpretations of "collusion." The Fifth Circuit, as illustrated by *Saulsbury v. United States*,[13] used the so-called "non-adversary approach"[14] to determine whether a state court decision would be binding on a federal court. The Fifth Circuit equated non-adversary and collusive proceedings, and accordingly held non-adversary proceedings as not binding on federal courts. In explaining their position, the *Saulsbury* court stated,

> By the word *collusion*, we do not mean to imply fraudulent or improper conduct, but simply that all interested parties agreed to the order and that it was apparently to their advantage from a tax standpoint to do so. We mean that there was no genuine issue of law or fact as to the right of the beneficiary to receive this income, and no *bona fide* controversy between the trustee and the beneficiary as to property rights under the trust instrument.[15]

Gallagher v. Smith,[16] in the Third Circuit, represents the position that a showing of actual fraud is required in order to find a state court decree collusive.[17] Under *Gallagher*, non-adversity is considered only as evidence of collusion, and is not sufficient in and of itself to prevent a state court decree from having

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11. Blair v. Commissioner, 300 U.S. 5, 10 (1937). But, *Blair* involved a state *appellate* court decree, while *Freuler* was concerned with a state *trial* court decree.

12. *Compare* Gallagher v. Smith, 223 F.2d 218 (3d Cir. 1955), *with* Estate of Faulkerson v. United States, 301 F.2d 231 (7th Cir. 1962), *and* Pierpont's Estate v. Commissioner, 336 F.2d 277 (4th Cir. 1964).

13. 199 F.2d 578 (5th Cir. 1952).

14. *See* Braverman & Gerson, *The Conclusiveness of State Court Decrees in Federal Tax Litigation*, 17 Tax L. Rev. 545 (1962); Colowick, *The Binding Effect of a State Court's Decision in a Subsequent Federal Income Tax Case*, 12 Tax L. Rev. 213 (1957).

15. 199 F.2d 578, 580 (5th Cir. 1952). *See also* Estate of Stallworth v. Commissioner, 260 F.2d 760 (5th Cir. 1958); United States v. Farish, 233 F. Supp. 220 (S.D. Tex. 1964), *aff'd per curiam*, 360 F.2d 595 (5th Cir. 1966). For discussion of "non-adversary" approach, *see* Pierpont's Estate v. Commissioner, 336 F.2d 277 (4th Cir. 1964).

16. 223 F.2d 218 (3d Cir. 1955).

17. *See* Braverman & Gerson, *supra* note 14, at 551-54; Colowick, *supra* note 14, at 218-20.

a conclusive effect in a federal court.[18] The Second Circuit's determination of the *Bosch*[19] case seemed to align it with the *Gallagher* rule, although some differences between the two have been noted.[20] The Seventh Circuit took still a third approach.[21] In an early case, *Brainard v. Commissioner*,[22] it held a state trial court decree not binding on a federal court because the questions had not been decided by the Supreme or Appellate Court of Illinois; consequently, the federal court determined the state law itself.[23] In a relatively recent case, *Estate of Faulkerson v. United States*,[24] the Seventh Circuit also held a state trial court decree not binding on a federal court, relying heavily on *Brainard*[25] in its decision.[26] The Sixth Circuit[27] and the Ninth Circuit[28] in more recent cases seemed

18. Gallagher v. Smith, 223 F.2d 218, 225 (3d Cir. 1955); *accord*, Parlington v. Commissioner, 302 F.2d 693 (3d Cir. 1962). *See* Comment, *The Binding Effect of a Non-Adversary State Court Decree in Federal Tax Determination*, 33 Fordham L. Rev. 705 (1965) (favoring the *Gallagher* approach). *See also* Teschner, *State Court Decisions, Federal Taxation, and The Commissioner's Wonderland: The Need for Preliminary Characterization*, 41 Taxes 98 (1963).

19. Commissioner v. Estate of Bosch, 363 F.2d 1009 (2d Cir. 1966).

20. *See* Note, 41 N.Y.U.L. Rev. 1007, 1009 (1966); Note, 42 Notre Dame Law. 550, 554 (1967). Both Notes point out the consideration of other factors, in addition to adversity, by the Tax Court and by the Second Circuit which approved the Tax Court's approach. Commissioner v. Estate of Bosch, 363 F.2d 1009, 1012 (2d Cir. 1966). Justice Fortas expressly approved the use of these additional factors, mentioned by the Tax Court, 43 T.C. 120, 124, in his dissent in *Bosch*, specifically mentioning,

> Whether the state court had jurisdiction; and whether its determination is fully binding on the parties; whether in practice, the decisions of the state court have precedential value throughout the State; whether the Commissioner was aware of the state proceedings and had an opportunity to participate; whether the state court "rendered a reasoned opinion and reached a deliberate conclusion," Blair v. Commissioner, 300 U.S. 5, 10; whether the state decision has potentially off-setting, tax consequences in respect of the state court litigant's federal taxes; and, in general, whether the state court decision "authoritatively determined future property rights and thus . . . provided more than a label for past events."

Commissioner v. Estate of Bosch, 387 U.S. 456, 484.

21. *See* Richter, *Effect of State Court Interpretation of Wills*, N.Y.U. 24th Inst. on Fed. Tax 257, 261-62 (1966).

22. 91 F.2d 880 (7th Cir. 1937).

23. *Id.* at 883-84.

24. 301 F.2d 231 (7th Cir. 1962).

25. *Id.* at 233.

26. The Seventh Circuit has been considered by some to fall into the group following the non-adversary or *Saulsbury* approach. *See* Note, 42 Notre Dame Law 550, 553 (1967); Note, 45 N.C.L. Rev. 308, 314 (1966). While *Brainard* does not use the non-adversary approach, *Faulkerson*, even though relying heavily on *Brainard*, does mention adversity as an additional factor, 301 F.2d 231, 233. *See* Richter, *supra* note 21, at 262. *See generally* Cardozo, *Federal Taxes and the Radiating Potencies of State Court Decrees*, 51 Yale L.J. 783 (1942).

Although the Supreme Court in *Bosch* reads it as such, Commissioner v. Estate of Bosch, 387 U.S. 456, 463 (1967), it is not clear that *Brainard* required a decision of the highest court of the state by the words, "Supreme or Appellate," 91 F.2d 880 883-84 (7th Cir. 1937). *Faulkerson's* mention of adversity as an additional factor to be considered, 301 F.2d at 233, further casts doubt on the view that the Seventh Circuit requires a decision by the State's highest court before holding a state court decree as binding.

It has been suggested that the strict view, relative to holding a state court decree conclusive, of the Seventh Circuit is due to the fact situations in *Brainard* and *Faulkerson*. In each case the state trial court decree in question was entered by a state court that was of equal jurisdiction with many others, and at a level where the decisions of each similar court were not binding on each other: *see* Richter, *supra* note 21, at 262.

27. *Compare* Nashville Trust Co. v. Commissioner, 136 F.2d 148 (6th Cir. 1943), *with* Old Kent Bank & Trust Co. v. United States, 362 F.2d 444 (6th Cir. 1966).

to be moving toward the *Gallagher* rule of the Third Circuit.[29] The Fourth,[30] Eighth[31] and Tenth[32] Circuits seemed to follow the non-adversary approach of the Fifth Circuit in *Saulsbury*. In the First Circuit the issue did not seem to be resolved in favor of any particular position.[33]

The preceding survey of Circuit Court decisions illustrates the conflict concerning the effect of a state court determination in subsequent federal tax litigation. There were differences even among circuits adhering to one of the main doctrines.[34] Thus, it is obvious that the situation was ripe for the Supreme Court to end its thirty year silence on the issue and resolve this longstanding conflict among the circuit courts.[35]

The Court, in the instant case, was confronted with the issue of what effect the state trial court determination of the validity of Mrs. Bosch's 1951 release should have in federal tax litigation concerning those same property rights. The "res judicata" and "full faith and credit clause" arguments were dismissed by citing *Freuler*[36] and noting that the Commissioner was not a party to the state proceeding. The legislative history of the marital deduction provision was examined, as well as the specific limitations of the statute which defines the marital deduction. After considering these two factors, the Court concluded that Congress did not intend that state trial court determinations were to be conclusive on the computation of the federal estate tax. It found, instead, a Congressional intent to construe and apply strictly the marital deduction, and a desire to eliminate loopholes and to protect the federal revenue by giving only "proper regard" to state court determinations. Authority was cited showing that state judicial decisions are held to be laws of the state.[37] Thus, it was reasoned that under the Rules of Decision Act,[38] state court decrees, as laws of the state, are regarded as rules of decision where they apply in civil actions in federal courts.

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28. *Compare* Newman v. Commissioner, 222 F.2d 131 (9th Cir. 1955), *with* Flitcroft v. Commissioner, 328 F.2d 449 (9th Cir. 1964). *See* Richter, *supra* note 21, at 267.

29. *See* Note, 45 N.C.L. Rev. 308, 312 (1966).

30. *See, e.g.*, Pierpont's Estate v. Commissioner, 336 F.2d 277 (4th Cir. 1964).

31. *See, e.g.*, Estate of Peyton v. Commissioner, 323 F.2d 438 (8th Cir. 1963).

32. *See, e.g.*, Estate of Sweet v. Commissioner, 234 F.2d 401 (10th Cir. 1956).

33. *Compare* Third Nat'l Bank & Trust Co. v. United States, 228 F.2d 772 (1st Cir. 1956), *with* Plunkett v. Commissioner, 118 F.2d 644 (1st Cir. 1941).

34. *See, e.g.*, discussion of administration of non-adversary approach in Braverman & Gerson, *supra* note 14, at 559-66, *and* Colowick, *supra* note 14, at 221-229.

35. *See generally* 10 J. Mertens, Federal Income Taxation § 61.03 (P. Zimet rev. 1964); Braverman & Gerson, *supra* note 14; Cahn, *Local Law in Federal Taxation*, 52 Yale L.J. 799 (1943); Cardozo, *supra* note 26; Colowick, *supra* note 14; Oliver, *The Nature of the Compulsive Effect of State Law in Federal Tax Proceedings*, 41 Calif. L. Rev. 638 (1953); Richter, *supra* note 21; Sacks, *The Binding Effect of Nontax Litigation in State Courts*, N.Y.U. 21st Inst. on Fed. Tax. 277 (1963); Sonnenschein, *The Binding Effect of a State Court Decree with Reference to Property Rights Affected by Federal Taxation*, 7 Fed. B.J. 251 (1946); Stephens & Freeland, *The Role of Local Law and Local Adjudication in Federal Controversies*, 46 Minn. L. Rev. 223 (1961); Teschner, *supra* note 18.

36. The Court cited Freuler v. Helvering, 291 U.S. 35, 43, in Commissioner v. Estate of Bosch, 387 U.S. at 462.

37. The Court cited Erie v. Tompkins, 304 U.S. 64 (1938) in Commissioner v. Estate of Bosch, 387 U.S. at 464.

38. 28 U.S.C. § 1652.

The Court then turned to a discussion of the *Erie v. Tompkins*[39] doctrine and its application to the instant case. A diversity case was cited to illustrate that while a lower state court is attributed some weight in a federal court, its decision is not controlling where the state's highest court has not spoken on the point.[40] Furthermore, it was noted that under some conditions federal authority may not be bound even by a state intermediate appellate court ruling.[41] The Court then reasoned that since a state *intermediate appellate* court decree is not necessarily binding on a federal court in a diversity action, it follows a fortiori that a state *trial* court decision, as to underlying state law involving the application of a federal statute, should not be controlling. Thus, the Court holds in *Bosch* that the *Erie* doctrine will apply in that the federal court will, absent a judgment by the state's highest court, determine state law itself after giving proper regard to relevant decisions of other courts of the state. This extrapolation of the *Erie* rule from diversity cases to the instant case is justified, according to the Court, because the reasons for applying the *Erie* doctrine are present in both situations. That is, in both cases the underlying substantive rule is based on state law. The Court felt this approach preferable because it avoids the characteristic uncertainty of the "non-adversary" approach, while still protecting the federal fisc and treating the taxpayer fairly.[42]

Mr. Justice Douglas, dissenting, took a position very similar to the *Gallagher* approach contending that a federal court should be bound by a state court determination unless the state decree is a consent decree, or was obtained by fraud or collusion.[43]

Mr. Justice Harlan, in his dissent, advocated the "non-adversary" approach for the *Bosch* situation.[44] Mr. Justice Fortas joined in this view, but stated that several other factors should be considered in addition to adversity.[45] The additional factors suggested by Mr. Justice Fortas are those first articulated in the Tax Court decision of the *Bosch* case.[46]

While the *Bosch* Court cites legislative history and mentions the Rules of Decision Act, the discussion concerning the extrapolation of the *Erie* doctrine to *Bosch* is the crucial portion of the Court's reasoning.[47] As mentioned before,

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39. 304 U.S. 64 (1938).
40. The case cited by the Court was King v. Order of United Comm. Travelers, 333 U.S. 153 (1948).
41. The Court cited West v. American T. & T. Co., 311 U.S. 223 (1940).
42. Commissioner v. Estate of Bosch, 387 U.S. at 465.
43. *Id.* at 466-71.
44. *Id.* at 471-83.
45. *Id.* at 483-84.
46. Herman J. Bosch, 43 T.C. 120, 123-24 (1964); *see supra* note 20 for list of these factors.
47. The Rules of Decision Act, 28 U.S.C. § 1652 (1964) while applicable, does not solve the problem here, *viz.*, the effect of a state court decision in litigation of a federal question. The legislative history cited by the court is cryptic and equivocal and cannot be said to dictate nor eliminate any specific conclusion. The material cited can easily be called obscure considering the context in which it appears. It consists of one sentence: "In this connection proper regard should be given to interpretations of the will rendered by a court in a bona fide adversary proceeding," S. Rep. No. 1013, Pt. 2, 80th Cong., 2d Sess.,

the Court analogized *Bosch* to *Erie,* noted the similarity relative to the use of state law, and then held the *Erie* doctrine to be applicable to *Bosch.* The Court has used this analogy only as persuasive authority to support its policy decision. This analogy was *not* used as compulsive authority, which would dictate an a fortiori decision. That is, the Court did not say this was an *Erie* situation, but rather that the *Erie* doctrine can be adopted here since the *Erie* and *Bosch* situations are similar. Due to a fundamental difference in the basis for using state law, the analogy cannot be properly used as more than persuasive authority.[48] This analysis is substantiated by the actual language of the Court,[49] and the Court's express recitation of the policy advantages of its newly promulgated approach.[50]

The Supreme Court's ruling in *Bosch* ends a widespread conflict in the circuit courts that had existed since *Freuler* and *Blair* thirty years before. The approach set out by *Bosch,* while very similar to that used by the Seventh Circuit,[51] does not seem to have been seriously considered by any of the other circuit courts. Prior to *Bosch,* the circuits were generally polarized around either the *Gallagher* rule (collusion equals actual fraud) or the "non-adversary" approach. Essentially, these approaches were different interpretations of "collusion" as drawn and developed from *Freuler* and *Blair.* In *Bosch,* however, the Supreme Court rejected collusion and adversity as criteria for determining the effect of state court determinations. Consequently all the circuits, except possibly the Seventh, must now abandon their collusion-oriented approaches to the problem. In addition, it now appears that the federal courts must apply the *Bosch* rule to *all* situations involving the application of a federal tax statute to rights held under state law, since the Court nowhere expressly or impliedly limited the holding to the marital deduction situation.

In comparison with the *Gallagher* rule, *Bosch* seems to offer a clearly supe-

4 (1948), which is not elaborated upon anywhere else in the extremely lengthy document in which it appears. Cited in Commissioner v. Estate of Bosch, 387 U.S. 456, 464 (1967).

48. The fundamental difference vis-à-vis the use of underlying state law is a function of the difference between the *Erie* situation and the *Bosch* situation. In *Erie,* federal authority provides a neutral forum for a contest between parties of diverse citizenship with state substantive law the criterion for the court's decision of what is essentially a state law controversy. In *Bosch* however, a federal question is involved and state law is used only because federal authority has chosen to *incorporate* state law in the administration of the federal statute taxing estates. Thus in the *Erie* situation the federal court must apply what it finds to be relevant state substantive law. However, in the *Bosch* situation involving a federal question, a federal court could conceivably disregard even a decision by the state's highest court if that decision was found to severely hamper federal taxing policy. *See* Morgan v. Commissioner, 309 U.S. 78 (1940). Thus, while both *Bosch* and *Erie* are concerned with underlying state law, the *Erie* rule does not apply a fortiori to the *Bosch* situation because there is a fundamental difference in the basis for the use of state law in these two situations.

49. The Court stated, "This is not a diversity case but the same principle may be applied for the same reason, viz., the underlying substantive rule involved is based on state law and the state's highest court is the best authority on its own law." Commissioner v. Estate of Bosch, 387 U.S. at 465.

50. The Court stated, "We believe that this would avoid much of the uncertainty that would result from the "non-adversary" approach and at the same time would be fair to the taxpayer and protect the federal revenue as well." *Id.* at 465.

51. *See* note 26 for a discussion of the Seventh Circuit's position vis-à-vis the Supreme Court's ruling in *Bosch.*

rior approach. *Gallagher*, probably the most literal interpretation of *Freuler* and *Blair*, required a finding of actual fraud to hold a state court determination "collusive" and therefore not binding on a federal court. Since an inaccurate state court determination can result without actual fraud, a federal court could be bound by an erroneous state court decision under *Gallagher*. The background of the *Bosch* case clearly illustrates this inherent defect of the *Gallagher* approach.[52] *Bosch* rectifies this defect by permitting the federal court to examine the accuracy of the state court decisions in the light of relevant state law. Thus, the *Bosch* approach provides much more protection of the federal fisc than does *Gallagher*.

The superiority of the *Bosch* rule over the non-adversary approach is not as clear cut, however. The rationale of the non-adversary approach assumes that a truly adversary proceeding, with inconsistent views vigorously urged upon the court, best assures an accurate determination by the state court. Although the adversary method is an integral part of our legal system, the problems with its use as a standard in this context seem to make the *Bosch* approach preferable.

First, in some instances an adversary proceeding is not even theoretically possible, as in the situation where the interests of all the beneficiaries of a will coincide. For example, an executor, for federal estate tax purposes, may desire to reduce the taxable estate by the amount of state inheritance taxes paid. The statute permits this reduction only if the benefit of the reduction inures solely to charitable transferees.[53] Therefore, the executor will seek a state court determination that the desired reduction of the taxable estate will benefit charitable transferees only. If the will provides that the estate taxes should be borne by the estate, obviously neither the charitable transferees nor the other legatees will oppose the executor's attempt to reduce the federal estate tax paid by the estate.[54] In such a situation a court using the non-adversary approach would not be bound by a state court determination regardless of how well-considered that decision may be.[55]

Second, the actual administration of the non-adversary approach may be a problem. Precisely what constitutes an adversary proceeding is an elusive question. In determining whether a state proceeding was adversary or not, a federal court will consider such factors as: the *financial* adversity of the parties, whether the state court action appears to have been brought solely to avoid federal taxes, whether an appeal has been taken, the apparent degree of error of the state court decision, the level of the state court, and the actual tax conse-

52. On remand, the Second Circuit found in fact that the decision of the state court holding Mrs. Bosch's release invalid, Matter of Irving Trust Co. (Bosch), 150 N.Y.L.J., Nov. 15, 1963, at 14, col. 3 (Sup. Ct.) was contrary to state law. *See* quote in *supra* note 5. Thus the Second Circuit had been bound by an inaccurate state court determination while using the *Gallagher* approach. Commissioner v. Estate of Bosch, 362 F.2d 1009 (2d Cir. 1966).

53. Int. Rev. Code of 1954, §§ 2053(d)(1), (2).

54. *See, e.g.*, Estate of Darlington v. Commissioner, 302 F.2d 693 (3d Cir. 1962).

55. *See* Braverman & Gerson, *supra* note 14, at 570-72.

quences of the state court determination. Since these factors vary widely in each factual situation, the non-adversary approach tends to deteriorate to a factorial, case-by-case approach, resulting in a lack of certainty and predictability as to the outcome of such cases.[56] Under *Bosch*, the determination of a federal court is as predictable as that of a state court since state law is now the frame of reference for both federal and state court decisions.

Third, the *Bosch* holding permits a more direct confrontation with the fundamental issue than does the non-adversary approach. Both seek to assure that only accurate state court determinations are binding on subsequent federal tax litigation. One approach (the non-adversary) relies on the existence of an adversary proceeding as the standard to achieve this result, while the other (*Bosch*) actually examines the state court determination in the light of relevant state law. Thus, the fundamental issue—whether the state court decree is an accurate determination of state law—is directly confronted and examined under the *Bosch* rule. The non-adversary approach, in contrast, utilizes the somewhat indirect, superficial criterion of adversity to determine the effect of the state court decision.

The approach set out in *Bosch* is not, however, beyond criticism. One possibility, mentioned by Mr. Justice Douglas in his dissent,[57] is that under *Bosch* a taxpayer may be denied certain rights with respect to property by state law, but may still be required to pay a federal tax as though he enjoyed those rights. For example, a state court determines that *A* is not the owner of Blackacre; *A*, therefore, cannot enjoy the benefits of owning Blackacre. Subsequently, a federal court could disregard the state court determination, find *A* to be the owner of Blackacre and accordingly hold *A* liable for federal taxes on the property. This criticism also applies to the non-adversary approach. Only the *Gallagher* rule is not subject to this injustice, since under *Gallagher* the federal courts always accepted the state court decision absent actual fraud. Only a perpetrator of fraud could be a victim. Of course, a taxpayer finding himself in this situation can always appeal the state court decision, but this admittedly is a heavy burden. While this criticism is a valid one, the *Bosch* rule, with its superior protection of the federal fisc, still appears to be preferable to the alternative, *Gallagher*.

The most justifiable criticism of *Bosch* is that the power of the federal courts to disregard state court decrees is now virtually unlimited. *Bosch* states that, absent a decision on point by the state's highest court, the federal court will determine state law itself after giving proper regard to relevant rulings of other state courts. As a practical matter, an able attorney can always argue some distinction between two cases. Thus, by distinguishing all the decisions of the state's highest court from the controversy at bar, the Commissioner will often be able to force the federal court to determine state law itself. In effect,

56. *See* Colowick, *supra* note 14, at 221-29.
57. Commissioner v. Estate of Bosch, 387 U.S. at 470-71.

the Commissioner now has carte blanche to litigate de novo almost any state court determination that he deems to be unfavorable.

An examination of the interests at stake is helpful in an analysis of the *Bosch* rule. The federal interest here is in protecting the federal fisc from inaccurate state court determinations resulting in the loss of federal tax revenues. The antipodal interest is the state interest in giving some credence to state court determinations rather than having them completely disregarded in federal courts. There are several reasons behind this interest of the state courts. One is the policy of discouraging federal interference with the administration of state law whenever possible. Another is that state courts have an expertise relative to their state law that federal courts should acknowledge and make use of to as great an extent as possible. Also, since we live under a dual system of government, uniformity and consistency between state and federal law is an important goal.

The *Bosch* approach more than adequately protects the federal interest, but does not seem to consider sufficiently the interest of the state courts. A slight limitation of the *Bosch* rule, in order to more adequately protect state court interests, would seem to be desirable.

A presumption in favor of the accuracy of state court determinations would appear to give these decisions more viability, and would decrease the chances that they will be later disregarded in the federal courts. Under such a presumption, the Commissioner would have the burden of proving that the state court determination was inaccurate relative to state law and, therefore, not worthy of being followed by the federal court. The standard to be used to determine whether the Commissioner has met this burden is, of course, a problem. A standard requiring too much of the Commissioner would not adequately protect the federal tax revenue from losses due to inaccurate state court determinations, and therefore would be inconsistent with the spirit of *Bosch*. On the other hand, a standard requiring too little of the Commissioner would not sufficiently consider the interest of giving state court decrees some credence in federal courts. The "persuasive data" standard used by federal courts in deciding whether to disregard a state *intermediate appellate* court decision is cited approvingly in *Bosch*[58] and may be of use in the development of a standard for handling state *trial* court determinations. It may be argued that the Court's use of the phrase "proper regard to relevant rulings of other courts of the state"[59] justifies a presumption favoring the accuracy of state court determinations. However, this phrase may also have been intended to illustrate that the federal court sits as a state court in that it considers state law and relevant rulings of

58. The Court stated, "An intermediate appellate state court . . . is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise." *Id.*, at 464, *quoting from* West v. American T. & T. Co., 311 U.S. 223, 237 (1940).

59. The Court stated, "If there be no decision by that court [state's highest court] then federal authority must apply what it finds to be the state law after giving 'proper regard' to relevant rulings of other courts of the State." *Id.* at 465.

other courts of the state. Presumably a standard by which the court may determine if the Commissioner had adequately shown a state decision to be inaccurate, thus requiring the federal court to determine state law itself, will have to be developed through case law. Abstract, theoretical characterizations of a standard such as this are of little value without concrete examples of its application to facts from which guidelines may be drawn by the courts.

Ideally, this "presumption" favoring a state court determination would protect and consider both interests involved here. Inaccurate state court determinations would not be followed by the federal court, but the advantages of using the state court decision would not be ignored without good reason. The expertise of the state court vis-à-vis state law would be utilized, there would be as little federal interference with the administration of state law as possible, and the uniformity between federal and state law would increase. In addition, knowledge that an *inaccurate* state court determination can be ignored would have a two-fold effect on persons contemplating an action in a state court: first, it would *discourage* actions brought solely to avoid taxes which have no rational basis in state law, and second, it would *encourage* those with sound cases, since the federal court would not ignore the state decision unless it was shown to be clearly inaccurate under relevant state law.

Thus, it would seem that a presumption favoring the accuracy of state court determinations would, by slightly limiting the *Bosch* rule, result in an approach that better protects all the interests involved.

MICHAEL R. MCGEE

LABOR LAW—NLRB'S LACK OF REMEDIAL POWER IN A RUNAWAY PLANT SITUATION

Finding adequate remedies to effectuate the policies of the National Labor Relations Act[1] is one of the major problems facing the National Labor Relations Board. A recent case, *Local 57, Garment Workers v. NLRB (Garwin Corp.)*[2] focuses sharply on one aspect of this problem. The employer, Garwin Corporation, was found by the Board to have moved its operations from New York to Florida to avoid dealing with the union representing its employees in New York. The Board ordered the employer to offer the New York employees, either reinstatement with back pay and moving expenses (if the employer remained at the Florida location), or reimbursement of income lost from the date of discharge until similar employment was found. The employer was also required to bargain with the union irrespective of the location chosen and the union's

1. National Labor Relations Act, § 10c, 61 Stat. 147 (1947), 29 U.S.C. § 160(c) (1964) empowers the Board "to take such affirmative action . . . as will effectuate the policies of the act."
2. 374 F.2d 295 (D.C. Cir. 1967).