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THE FEDERAL COURTS OF APPEALS' USE OF STATE COURT DECISIONS IN TAX CASES: "PROPER REGARD" MEANS "NO REGARD"

PAUL L. CARON*

*I. The Past: The Role of State Court Decisions in the Pre-*Bosch *World*

Numerous federal tax provisions incorporate state law. However, the federal courts and the Internal Revenue Service (the Service)[1] have long struggled over how much weight must be given in a federal tax controversy to a lower state court's interpretation of state law in prior litigation involving the taxpayer. As I have explained in a recent article,[2] the struggle reflects competing revenue and comity concerns.[3] On one hand, the revenue interest would permit federal authorities to independently review the state law question in the subsequent federal tax controversy, thereby giving "no regard" to the lower state court's interpretation of state law. On the other hand, the comity interest would require federal authorities to defer to the lower state court's application of state law, thereby giving "total regard" to the lower state court's decision.[4] The Supreme Court has balanced these policies differently over time in its various formulations of the requisite degree of deference to state court decisions in subsequent federal tax litigation.

Over seventy-five years ago, the Court initially gave primacy to the comity

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1. The Service and the federal courts are referred to collectively in this article as "federal authorities."

2. Paul L. Caron, *The Role of State Court Decisions in Federal Tax Litigation:* Bosch, Erie, *and Beyond*, 71 OR. L. REV. 781 (1992) [hereinafter Caron, *State Court Decisions*]; *see also* Paul L. Caron, *Tax Myopia, Or Mamas Don't Let Your Babies Grow Up To Be Tax Lawyers*, 13 VA. TAX REV. 517, 588-90 (1994) [hereinafter Caron, *Tax Myopia*].

3. I use the term "revenue concern" to refer to the Service's interest in ensuring the correct application of state law to protect federal coffers. I use the term "comity concern" to refer to the respect that the federal courts and the Service should give to a state court's application of state law in our federal system. *See also* Younger v. Harris, 401 U.S. 37, 44 (1971) (describing comity as "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuation of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways"); Michael Wells, *The Role of Comity in the Law of Federal Courts*, 60 N.C. L. REV. 59, 61 n.5 (1981) ("Comity is a sufficiently imprecise word to permit its use in a variety of contexts that have in common little more than the perceived need for such an abstraction to aid in the resolution or avoidance of conflict between governmental bodies.").

4. *See* Caron, *State Court Decisions*, *supra* note 2, at 785-87.

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concern in *Uterhart v. United States*[5] by requiring that federal authorities defer to a lower state court's application of state law.[6] In the 1930s, before its landmark *Erie* decision,[7] the Court tried to accommodate the revenue concern in *Freuler v. Helvering*[8] and *Blair v. Commissioner*[9] by requiring that federal authorities only defer to "noncollusive" lower state court decisions.[10] Over the next thirty years, the lower federal courts balanced the competing policies differently by formulating varying definitions of "collusion." Some courts emphasized the comity concern by requiring that federal authorities defer to all "nonfraudulent" lower state court decisions.[11] The majority of courts tried to balance the competing policies by requiring that federal authorities defer only to "adversary" lower state court decisions.[12] However, these courts ignored the impact of *Erie*, decided the year after *Blair*.

In 1967, the Court tried to reinject a balance between the revenue and comity interests through the *Erie* framework. In *Commissioner v. Estate of Bosch*,[13] the Court rejected the "nonfraudulent" and "adversary" tests and instead held that federal authorities must give "proper regard" to lower state court decisions.[14] However, the Court did not further define the deference that federal authorities must afford lower state court decisions under this standard, other than noting that they "in effect, [must] sit . . . as a state court."[15] This article is the first attempt to

5. 240 U.S. 598 (1916).
6. *See* Caron, *State Court Decisions*, *supra* note 2, at 787-90.
7. Erie R.R. v. Tompkins, 304 U.S. 64 (1938).
8. 291 U.S. 35 (1934).
9. 300 U.S. 5 (1937).
10. *See* Caron, *State Court Decisions*, *supra* note 2, at 790-97.
11. *Id.* at 799-801.
12. *Id.* at 802-08.
13. 387 U.S. 456 (1967).
14. *See* Caron, *State Court Decisions*, *supra* note 2, at 808-23.
15. *Estate of Bosch*, 387 U.S. at 465. For further discussion of *Bosch*, see Kingsbury Browne, Jr. & Joseph D. Hinkle, *Tax Effects of Non-Tax Litigation:* Bosch *and Beyond*, 27 N.Y.U. INST. ON FED. TAX'N 1415 (1969); Jackson M. Bruce, Jr., Bosch *and Other Dilemmas: Binding the Parties and the Tax Consequences in Trust Dispute Resolution*, 18 U. MIAMI INST. ON EST. PLAN. 9-1 (1984); George Craven, *Tax Effect of State Court Decisions — The* Bosch *Case*, 2 REAL PROP., PROB. & TR. J. 457 (1967); Martin L. Fried, *External Pressures on Internal Revenue: The Effect of State Court Adjudications in Tax Litigation*, 42 N.Y.U. L. REV. 647 (1967); Leon C. Misterek, *A Role for State Court Adjudications in Federal Tax Cases — A Proposal*, 3 VAL. U. L. REV. 1 (1968); William H. Scharf, *State Law in the Tax Court — Controlling Precedents*, 26 TAX LAW. 293 (1972); Jonathan Sobeloff, *Tax Effect of State Court Decisions — The Impact of* Bosch, 21 TAX LAW. 507 (1968); Charles W. Ufford, Jr., Bosch *and Beyond*, 60 A.B.A. J. 334 (1974); Gilbert P. Verbit, *State Court Decisions in Federal Transfer Tax Litigation:* Bosch *Revisited*, 23 REAL PROP., PROB & TR. J. 407 (1988); Kenneth M. Wissbrun, Bosch *and Its Aftermath: The Effect of State Court Decisions on Federal Tax Questions*, 114 TR. & EST. 8 (1975); Bernard Wolfman, Bosch, *Its Implications and Aftermath: The Effect of State Court Adjudications on Federal Tax Litigation*, 3 U. MIAMI INST. ON EST. PLAN. 2-1 (1969); Patrick D. Deem, Comment, *The Relevancy of State Court Adjudications of Property Rights*, 70 W. VA. L. REV. 1 (1968); John J. Kendrick, Jr., Note, *Binding Effect of State Court Judgment in Federal Tax Cases*, 21 SW. L.J. 540 (1967); Richard L. Kintz, Note, *The Binding Effect of a Lower State Court Decision in Subsequent Federal Litigation*, 56 CAL. L. REV. 890 (1968); Randall D. Mock, Note, *The Role of State Trial Court Decisions in Federal Tax Litigation*, 21 OKLA. L. REV. 227 (1968); Arthur R. Philpott, Note, *Federal Taxation — Effect of State Court Determination of Property Rights on Federal Court*, 42 TUL. L. REV.

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systematically examine, on a circuit-by-circuit basis, how the federal courts of appeals have applied the *Bosch* "proper regard" test over the past twenty-five years.

Part II of the article reports the results of this empirical research illustrating how the *Bosch* "proper regard" standard has proven to be unworkable in practice. In particular, the courts of appeals have misunderstood the *Erie* underpinnings of the standard and have focused exclusively on the revenue concern in subjecting the state law question to a de novo standard of review and concluding in over one-half of the relevant cases that the lower state court had misapplied state law. The courts of appeals thus have undermined *Bosch* by giving "no regard" to the lower state court's application of state law, despite the *Bosch* Court's intent to use the "proper regard" test to balance the competing policies.

Part III of the article explores the lessons to be drawn from the past quarter century of misuse of the *Bosch* standard. By focusing on the nuances within and among the circuits, the article hopefully will assist lawyers, judges, and commentators both in assessing the continued viability of the *Bosch* framework and in applying the "proper regard" standard in cases in the various circuits.

II. The Present: A Circuit-by-Circuit Analysis of the Bosch *"Proper Regard" Standard*

This part examines the 233 federal appellate court cases that have cited *Bosch* in the twenty-five-year period from June 5, 1967, the date of the *Bosch* decision, through December 31, 1992.[16] As the following chart indicates, the courts of appeals have concluded in over one-half (61%) of the cases that the lower state courts had misapplied state law:[17]

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676 (1968); Note, Bosch *and the Binding Effect of State Court Adjudications upon Subsequent Federal Tax Litigation*, 21 VAND. L. REV. 825 (1968); Comment, *Federal Courts Not Bound by State Trial Court's Determination of Taxpayer's Property Interest*, 52 MINN. L. REV. 776 (1968); Comment, *State Court Determinations in Tax Litigation: A New Era*, 41 S. CAL. L. REV. 197 (1967); Note, *State Trial Court Judgments on Property Rights Not Conclusive on Federal Courts Adjudicating Federal Tax Consequences*, 21 VAND. L. REV. 161 (1967); Jeffrey M. Kilmer, Recent Case, *Decisions of Lowest State Court Are Not Binding on Federal Courts in Federal Tax Litigation*, 36 U. CIN. L. REV. 728 (1967); Stephen K. Lambright, Recent Development, *Effect of a State Court's Characterization of Property Rights on a Subsequent Federal Tax Proceeding*, 12 ST. LOUIS U. L.J. 160 (1968); Michael R. McGee, Recent Case, *Effect of a State Court Adjudication of Property Rights in Subsequent Federal Tax Litigation*, 17 BUFF. L. REV. 549 (1968); Recent Decision, *State Trial Court Determinations Not Binding in Federal Tax Proceedings*, 34 BROOK. L. REV. 156 (1967); Recent Development, *Supreme Court Announces "Proper Regard" Test to Determine Conclusiveness of State Court Adjudications of Property Rights*, 1967 DUKE L.J. 1055.

16. The cases were culled from *Shepard's United States Citations* and the *Prentice Hall Federal Taxes Citator*, as supplemented by LEXIS and Westlaw searches. In addition, other research strategies located several federal appellate court cases that considered the effect of a lower state court decision in a subsequent federal tax controversy without citing *Bosch*. Although a few relevant federal appellate court cases may have escaped this research net, there likely are not a sufficient number of such cases to detract from the article's findings and conclusions. Of course, the results of this empirical research must be interpreted in light of both the inherent limitations of such a focus on reported cases and the "selection effect." *See* Caron, *State Court Decisions*, *supra* note 2, at 823 n.195, 832 n.233.

17. This figure includes cases that take a position on any aspect of state law contrary to that of the

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TABLE 1 - *BOSCH* IN THE FEDERAL COURTS OF APPEALS				
Circuit	Cases Citing *Bosch*	Tax Cases Citing *Bosch*	Tax Cases Following State Court On State Law	Tax Cases Not Following State Court On State Law
D.C.	6	0	0	0
First	9	3	1	1
Second	25	11	0	4
Third	45	3	1	1
Fourth	20	9	0	1
Fifth	25	13	1	6
Sixth	16	4	2	1
Seventh	22	4	1	2
Eighth	6	4	2	0
Ninth	30	7	1	0
Tenth	15	8	2	3
Eleventh	2	0	0	0
Federal	12	8	1	0
Total	233[18]	74	12 39%	19 61%

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lower state court, even though the federal court may agree with other aspects of the state court's application of state law. Of course, one must be cautious in drawing conclusions from this data showing that over one-half of the cases in the courts of appeals have taken a view of state law contrary to that of the state court. Given the relatively small number of relevant cases and the lack of a comparative yardstick of results in other areas in which a federal court must rule on the correctness of a state court's application of state law in a case involving a party to the federal proceeding, the precise percentage of cases reaching this result probably is less important than the courts of appeals' adoption of de novo review in the face of the "proper regard" standard.

18. Of these 233 cases, the text of this article discusses the 33 cases that directly bear on the application of the *Bosch* "proper regard" standard in federal tax litigation. Most of these cases involve prior state court litigation by the taxpayer embroiled in the federal tax controversy. The footnotes of this article discuss many of the other cases that lack similar state court litigation involving the taxpayer but possess other features that may be helpful in determining a particular circuit's implementation of the "proper regard" standard. The remaining cases are not discussed because they generally cite *Bosch* for the determination of state law in diversity actions where there was no prior state court litigation involving the parties.

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This part discusses the 233 cases in a circuit-by-circuit format to determine how the federal courts of appeals have applied the *Bosch* "proper regard" standard over the past twenty-five years.

A. District of Columbia Circuit

None of the six District of Columbia cases that cite *Bosch* are tax cases.[19]

B. First Circuit

Of the nine First Circuit cases citing *Bosch*, three are tax cases. In the two cases that directly applied *Bosch* in tax disputes,[20] the First Circuit construed the "proper regard" standard as requiring de novo review of the probate court's application of state law.[21] In the first case, the First Circuit ruled that the probate court had incorrectly applied state law, stating that it was not bound by "the gloss of a probate court decree," particularly where it was not the product of an adversary proceeding.[22] In the second case, the First Circuit construed the probate court's decree to conform to its view of state law without commenting on the adversarial nature of the state court proceeding.[23]

In *Abeley v. Commissioner (In re Estate of Abeley)*,[24] the probate court awarded widow's allowance. The Service denied the estate's claimed marital deduction on the ground that the widow's allowance was contingent within the meaning of section 2056(b).[25] The Tax Court agreed that widow's allowance was a nondeductible terminable interest but did not rule on the validity of the probate court's interpretation of state law.[26] The First Circuit affirmed on two grounds. First, the court agreed that widow's allowance was contingent as a matter of federal tax law.[27] Second, the court conducted a de novo review and concluded that the probate court had misapplied state law.[28] The First Circuit indicated that under *Bosch*, the probate decree was to be afforded no deference:

> Whatever the motives of the heirs in perhaps assenting to, and in any event not appealing from a probate decree conspicuously outside of the

19. In Bryant v. Civiletti, 663 F.2d 286 (D.C. Cir. 1981), a habeas case in which there was a prior D.C. District Court adjudication of the defendant's guilt, the D.C. Circuit stated that, under *Bosch*, "while federal courts give 'proper regard' to decisions of lower state trial courts they are not required to follow them." *Id.* at 292 n.15.

20. In the other case, there was no prior state court proceeding. State St. Bank & Trust Co. v. United States, 634 F.2d 5 (1st Cir. 1980).

21. This article uses the terms "lower state court" and "probate court" interchangeably, regardless of differences in jurisdiction, title, and characteristics of such courts in individual states.

22. Abeley v. Commissioner (*In re* Estate of Abeley), 489 F.2d 1327, 1328 (1st Cir. 1974), *aff'g* Abeley v. Commissioner, 60 T.C. 120 (1973).

23. Estate of Draper v. Commissioner, 536 F.2d 944, 947 (1st Cir. 1976), *rev'g* 64 T.C. 23 (1975).

24. 489 F.2d 1327 (1st Cir. 1974), *aff'g* Abeley v. Commissioner, 60 T.C. 120 (1973).

25. I.R.C. § 2056(b) (1988). In the remainder of this article, sections of the Internal Revenue Code will be referred to in the text without citation, unless they are directly quoted.

26. Abeley v. Commissioner, 60 T.C. 120, 123-24 (1973).

27. *Estate of Abeley*, 489 F.2d at 1328 (citing Jackson v. United States, 376 U.S. 503 (1964)).

28. *Id.*

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> scope of the statutory provision, the taxing powers of the government are not to be avoided by private arrangements even though they receive the gloss of a probate court decree.[29]

Estate of Draper v. Commissioner[30] involved a murder-suicide in which husband killed wife and then himself. Although husband was the owner and named beneficiary of two insurance policies on wife's life, the probate court concluded that state public policy prevented husband's estate from recovering the insurance proceeds.[31] The probate court ruled that wife's estate also could not recover the proceeds because she had "no interest" in the policies; she was the insured and not the owner of the policies. Instead, the court directed the proceeds to be paid to the couple's three children. Although the Service claimed that the insurance proceeds were taxable in both husband's and wife's estates, the "essence" of the Service's position apparently was that "the insurance proceeds must be taxed in one estate or the other, if not in [husband's] estate then in [wife's]."[32]

The Tax Court held that the proceeds were taxable in husband's estate but not in wife's estate. As to husband's estate, the Tax Court concluded that the state public policy against a murderer receiving the proceeds from insurance on his victim's life was not implicated because neither husband nor his estate benefitted from the murder. Despite the probate court's reliance on this state public policy, the Tax Court focused on the payment of the proceeds to the couple's children pursuant to the exercise of the probate court's equitable jurisdiction.[33]

As to wife's estate, the Tax Court gave "proper regard" to the probate court's ruling that wife had "no interest" in the proceeds.[34] The Tax Court stated that it had "no doubt that the [highest court in the state] would have approved the order of the Probate Court if presented with the question."[35]

The First Circuit reversed and held that the proceeds were taxable in wife's estate but not in husband's estate. As to husband's estate, the First Circuit agreed with the probate court that husband and his estate were estopped under state law from receiving the proceeds. As a result, the First Circuit concluded that there was nothing of value to include in husband's estate.[36]

As to wife's estate, the First Circuit construed the probate court's conclusion that wife had "no interest" in the proceeds to mean merely that wife had no *legal* interest under state law.[37] Accordingly, the probate court did not mean to suggest that wife lacked an *equitable* interest under state law to direct the distribution of the proceeds. As a result, the First Circuit concluded that the proceeds were taxable in wife's

29. *Id.*
30. 536 F.2d 944 (1st Cir. 1976), *rev'g* 64 T.C. 23 (1975).
31. Estate of Draper v. Commissioner, 64 T.C. 23, 30 (1975).
32. *Id.* at 29.
33. *Id.* at 32-33.
34. *Id.* at 29-30.
35. *Id.* at 31-32.
36. *Estate of Draper*, 536 F.2d at 949.
37. *Id.*

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estate because they were paid to the children in accordance with her testamentary intent.[38]

The First Circuit stated that it would be contrary to state law to interpret the probate court's decree as denying wife an equitable interest in the proceeds.[39] The First Circuit cited *Bosch* for the proposition that "[a]lthough we would give [the probate court decree] 'proper regard,' it would not be binding where we believed the highest court in the [state] would rule differently."[40]

C. Second Circuit

Eleven of the twenty-five cases that cite *Bosch*[41] in the Second Circuit are tax cases.[42] Although eight of these cases involved a prior state court proceeding,[43]

38. *Id.*

39. *Id.*

40. *Id.* at 949-50 n.8.

41. Here and elsewhere in this article, the reference to cases that have cited *Bosch* includes cases that considered the effect of a lower state court decision in subsequent federal tax litigation without actually citing *Bosch. See supra* note 16.

42. Cheng Yih-Chun v. Federal Reserve Bank, 442 F.2d 460 (2d Cir. 1971), a nontax case, involved application of the Foreign Assets Control Regulations. A probate court ordered the Treasury to transfer funds held by a foreigner in a United States bank at his death to his son (also a foreigner). The district court held that the state court ruling did not bind the Treasury because it was not a party to the state proceeding. On appeal, the son "loudly invoking the principles of an orderly federal-state relationship," argued that "the federal court should have respected the [probate court's] decision." *Id.* at 463. Although the Service "piously" defended the district court's decision not to follow the probate court's ruling without citing *Bosch,* the Second Circuit affirmed; based on that case, the district court was not controlled by the state court ruling, "but was bound to consider, after giving 'proper regard' to the [probate court's] decision, whether the law of the [state] was otherwise." *Id.* at 464. After a de novo review of state law, the Second Circuit concluded that the district court correctly decided that the probate court had misapplied state law. *Id.*

43. The other tax cases are Rolin v. Commissioner, 588 F.2d 368 (2d Cir. 1978), *aff'g* 68 T.C. 919 (1977); Estate of Trunk v. Commissioner, 550 F.2d 81 (2d Cir. 1977), *remanding* 65 T.C. 230 (1975); Estate of Tilyou v. Commissioner, 470 F.2d 693 (2d Cir. 1972), *rev'g* 56 T.C. 1362 (1971).

In *Estate of Trunk,* wife had an income interest in three trusts established by her husband's will. Three years after husband's death, pursuant to wife's request, the trustee paid her a sum of cash from one of the trusts as an "elective bequest" under the will. Wife, as executrix, included the elective bequest as part of the marital deduction under the will. The Commissioner denied the marital deduction on the ground that the bequest was either conditional or terminable. Wife argued that the bequest qualified for the marital deduction either as an unencumbered elective bequest or as a discretionary power of appointment over a portion of wife's life estate.

Although the Tax Court denied the marital deduction, it rejected both of the Service's arguments. Instead, the Tax Court concluded that husband never intended to make an additional bequest to wife. Estate of Trunk v. Commissioner, 65 T.C. 230, 239 (1975). The Tax Court noted that although its interpretation of husband's intent apparently conflicted with the remainderman's consent to the accounting providing for the payment of the bequest to wife, under *Bosch,* "the burden rests on this Court to interpret the will, irrespective of any proceedings in the State courts." *Id.* at 240 n.3.

The Second Circuit in *Estate of Trunk* remanded to force the Tax Court to allow wife to present evidence on her husband's intent. The Second Circuit noted that "[a]lthough the proceedings in the [probate c]ourt are not binding upon the United States when not a party [under *Bosch*], it is of interest to note that the construction urged upon the Tax Court by appellant has already been agreed to by all of the parties in the [probate court's] accounting." *Estate of Trunk,* 550 F.2d at 85.

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only five directly considered the "proper regard" standard. Of the other three tax cases, two did not involve the application of state law.[44] The remaining case

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On remand, the Tax Court allowed wife to present other evidence and concluded, based on this uncontradicted evidence, that husband intended to give wife an unconditional right to receive the bequest. As a result, the bequest qualified for the marital deduction. Estate of Trunk v. Commissioner, 37 T.C.M. (CCH) 497, 498 (1978).

44. In these two cases, the federal tax issue concerned I.R.C. § 2053(a)(2), which allows administration expenses to be deducted for estate tax purposes if they "are allowable by the laws of the jurisdiction . . . under which the estate is being administered." I.R.C. § 2053(a)(2) (1988). In United States v. White, 853 F.2d 107 (2d Cir. 1988), *rev'g* 650 F. Supp. 904 (W.D.N.Y. 1987), *cert. dismissed*, 493 U.S. 5 (1989), the district court held that the Service could not "second guess" a probate court's allowance of fees paid to the estate's attorney where the probate court had "passed upon the critical facts upon which deductibility depend[ed]," absent a showing by the Service that the probate court's decision was motivated by factors such as "fraud, overreaching or excessiveness by the attorney or the [probate court]." United States v. White, 650 F. Supp. 904, 911 (W.D.N.Y. 1987). The district court stated that to allow the Service to second-guess the probate court here would destroy federal-state comity. *Id.* at 909.

The district court distinguished *Bosch* on two grounds. First, unlike *Bosch*, the legislative history of the administration expense deduction at issue in *White* did not refer to the "proper regard" standard; instead, the Code and regulations indicated that the Service "ordinarily" should accept a lower state court's allowance of administration expenses if the court "pass[ed] upon the facts upon which deductibility depend[ed]." *Id.* at 911. Second, unlike *Bosch*, the highest court of the state here had clearly set forth the legal standards to be applied in allowing attorneys' fees, and the probate court had applied those standards in approving the fees. *Id.*

The Second Circuit reversed, stating that, as in *Bosch*, there was no evidence that "Congress unambiguously intended to make state trial court decrees determinative of the federal deductibility of [administration] expenses to the exclusion of any federal inquiry." United States v. White, 853 F.2d 107, 113 (2d Cir. 1988). The Second Circuit concluded that under *Bosch* the Service was entitled to make an independent examination as to the validity of the attorney fees under state law as determined by the state's highest court: although the Service was "bound by the factors established by [the highest state court] . . . , it [was] not bound by the [probate court's] application of these factors." *Id.* at 114. Rather, according to *Bosch*, the [probate court's] ruling only need be given 'proper regard' as one court's interpretation of applicable state law." *Id.* As a result, the Second Circuit concluded that the Service could reexamine the allowability of the attorneys' fees under state law. *Id.*

In Estate of Smith v. Commissioner, 510 F.2d 479 (2d Cir. 1975), *aff'g* 57 T.C. 650 (1972), *cert. denied*, 423 U.S. 827 (1975), the executors incurred commission expenses in the gradual liquidation of the 425 pieces of sculpture included in decedent's estate. The probate court approved the estate's payment of commissions incurred in the sales. The Tax Court held that the state court's allowance of the commissions as deductible administration expenses was not the conclusive test for deductibility under § 2053(a)(2). The Tax Court concluded that the commissions were deductible only to the extent they were "necessary" under the regulations to pay the decedent's debts, administration expenses, and taxes as finally determined. Estate of Smith v. Commissioner, 57 T.C. 650, 654-55 (1972).

The Second Circuit affirmed, rejecting the executors' argument that the probate court's allowance of the commission expenses controlled their allowance as administrative expenses under the Internal Revenue Code. *Estate of Smith*, 510 F.2d at 482-83. The Second Circuit noted that the commission expenses were not contested in the probate court and there was some question whether the expenses were incurred for the individual beneficiaries rather than for the estate's benefit. In these circumstances, the Second Circuit indicated that under *Bosch*, "federal courts cannot be precluded from reexamining a lower state court's allowance of administration expenses to determine whether they were in fact necessary to carry out the administration of the estate or merely prudent or advisable in preserving the interests of the beneficiaries." *Id.* The Second Circuit stated that the Tax Court's determination was not a refusal to follow state law, but rather the result of a de novo inquiry into the factual necessity for the expenditures.

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involved the effect of a decision by the highest court of the state in a subsequent federal tax controversy.[45]

In all five of the cases that applied the "proper regard" standard, the Second Circuit indicated that *Bosch* required independent review of the state court's application of state law. In two of these cases, the Second Circuit focused on the nonadversariness of the state court proceeding. However, in the other three cases, the Second Circuit did not comment on the adversariness of the state court proceeding. Under both approaches, the Second Circuit concluded that the state court had misapplied state law.

In *Commissioner v. Estate of Bosch*,[46] the Second Circuit was required on remand from the Supreme Court to implement the "proper regard" standard. In that case, husband established a revocable inter vivos trust giving wife a life income interest and a testamentary general power of appointment over the remainder.

Id. at 483.

Judge Mulligan dissented "with respect but without reluctance." *Id.* (Mulligan, J., dissenting). Judge Mulligan argued that state law was the sole test for deductibility under § 2053(a)(2) and that "neither the Commissioner of Internal Revenue nor the Tax Court, in my view, can properly reverse the State Court determination." *Id.* He stated that "[t]he laws of the state are interpreted and administered by the courts of the state and not by the Tax Court." *Id.* at 484. He distinguished *Bosch* on the ground that unlike § 2053(a)(2), in the marital deduction at issue in that case Congress had not ceded exclusive jurisdiction on the federal tax question to state law and the state courts. *Id.* at 484 n.1. For further discussion of the proper roles for federal and state law under § 2053(a)(2), see Paul L. Caron, *Must an Administration Expense Allowed by State Law Also Meet a Federal Necessity Test?*, 70 J. TAX'N 352 (1989) [hereinafter Caron, *Administration Expense*]; Paul L. Caron, *New Decision Further Clouds Deductibility of Expenses Incurred During Administration*, 11 EST. PLAN. 164 (1984); Paul L. Caron, Note, *The Estate Tax Deduction for Administration Expenses: Reformulating Complementary Roles for Federal and State Law Under I.R.C. § 2053(a)(2)*, 67 CORNELL L. REV. 981 (1982) [hereinafter Caron, *Reformulating Complementary Roles*].

45. In Rose v. Commissioner, 855 F.2d 65 (2d Cir. 1988), *aff'g* 52 T.C.M. (CCH) 1346 (1987), a taxpayer sold property to a buyer in exchange for a seven-year nonrecourse purchase money note and mortgage. Eighteen months later, the taxpayer assigned the note and mortgage to a lender as collateral for a loan. The buyer agreed to make payments due on the note to lender, and the taxpayer guaranteed the buyer's obligations and agreed to repurchase the note. After the buyer defaulted, the lender agreed to foreclose against the property and the taxpayer agreed to repurchase the property from the lender and to pay other damages. The lender foreclosed and purchased the property at the foreclosure sale for a nominal sum, but the taxpayer refused to repurchase the property. The lender sued the taxpayer in state court, and the highest court in the state agreed with the lender's position in assessing monetary damages against the taxpayer and requiring him to take possession of the property. *See* GIT Indus. v. Rose, 464 N.E.2d 988 (N.Y. 1984), *aff'g mem.* 462 N.Y.S.2d 245 (A.D. 1983).

The taxpayer claimed a bad debt deduction as a result of the mortgage foreclosure, which the Service disallowed on the ground that the taxpayer had not proven the worthlessness of the debt in that year. The Tax Court denied the bad debt deduction because, as the highest court in the state had found, the taxpayer had received the proceeds of the foreclosure and reacquired the property. Rose v. Commissioner, 52 T.C.M. (CCH) 1346, 1346-47 (1987).

On appeal, the taxpayer argued that he did not regain title to the property in satisfaction of the debt because lender repurchased the property at the foreclosure sale and thus extinguished his rights to the property. However, the Second Circuit held that the contrary decision of the highest court in the state was binding on the Second Circuit under *Bosch. Rose*, 855 F.2d at 67.

46. 382 F.2d 295 (2d Cir. 1967) (per curiam), *on remand from* 387 U.S. 456 (1967), *rev'g & remanding* 363 F.2d 1009 (2d Cir. 1966), *aff'g* 43 T.C. 120 (1964).

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Although the revocable nature of the trust would cause it to be included in husband's estate under section 2038, his estate would qualify for the marital deduction. However, wife apparently was concerned with the tax consequences to her estate, and she partially released the power, thereby converting it into a special power. Upon husband's death, the Service denied a marital deduction on the ground that wife no longer possessed a general power as a result of her earlier partial release.[47]

While the executor's petition was pending in the Tax Court, he obtained a probate court ruling that the partial release was invalid under state law. After the Tax Court[48] and Second Circuit[49] followed the state court's position on the validity of the partial release, the Supreme Court reversed and remanded to the Second Circuit for reconsideration under the "proper regard" standard.[50] On remand, the Second Circuit, in a two-sentence per curiam opinion, concluded that the highest court of the state "would not follow the decision of the [probate court], but instead would uphold the partial release of the general power of appointment."[51]

United States v. Bosurgi[52] involved a dispute over estate taxes allegedly owed by the estate of a nonresident alien who died owning a custodial account in a United States bank. In prior litigation, an intermediate state appellate court awarded summary judgment which (1) ordered decedent's sons' attorney to hold in trust the proceeds obtained in a settlement from the bank for alleged mismanagement of the securities transferred to their custodial account at the bank from their mother's account; and (2) upheld a foreign corporation's claim that it was the rightful owner of the funds held by the sons' attorney. The district court stated that although the government was "fully aware" of, and had "informally participated" in, the state court proceedings, it was not a "formal party" to the litigation.[53] As a result, under *Bosch*, although the state court decisions were not controlling on the district court, they were entitled to "proper regard."[54]

However, the district court indicated that the state court proceedings only were entitled to "proper regard" because the government failed to prove that the state court proceedings were collusive.[55] The district court stated that in these circumstances, "since such interests as judicial economy are enhanced by allowing competent State tribunals to decide issues of State law," it was appropriate "to give *considerable regard*" to the state court decisions.[56] The district court then

47. Estate of Bosch v. Commissioner, 43 T.C. 120, 121 (1964).

48. *Id.* at 123-24.

49. Commissioner v. Estate of Bosch, 363 F.2d 1009, 1014 (2d Cir. 1966).

50. Commissioner v. Estate of Bosch, 387 U.S. 456, 466 (1967).

51. *Estate of Bosch*, 382 F.2d at 295.

52. 530 F.2d 1105 (2d Cir. 1976), *aff'g in part & rev'g in part* 389 F. Supp. 1088 (S.D.N.Y. 1975).

53. United States v. Bogursi, 389 F. Supp. 1088, 1090 (S.D.N.Y. 1975).

54. *Id.* at 1091.

55. *Id.* The district court in *Bosurgi* cited pre-*Bosch* case law for this proposition. Flitcroft v. Commissioner, 328 F.2d 449, 454 (9th Cir. 1964). The district court emphasized that the government had notice of the state court proceedings and accused the government of "grasping at straws in order to avoid the consequences of its refusal to walk across the street to the [state] Courthouse." *Bosurgi*, 389 F. Supp. at 1093 n.5.

56. *Id.* at 1093 (emphasis added); *see also id.* at 1091 (stating that it is appropriate to give

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examined the evidence before the state court, concluded that it had correctly applied state law, and granted defendants' motion for summary judgment.[57] In its Action on Decision[58] recommending appeal, the Service argued that the district court erred in following the intermediate state appellate court's decision because "a federal court should give little, if any, weight to a state court action that is not a genuine adversary proceeding."[59]

The Second Circuit held that the district court improperly gave "great weight" to the state court decisions.[60] The Second Circuit stated that "economy of judicial resources and avoidance of conflicting results would not appear to be served by giving controlling effect to the [state court] adjudication" on these facts.[61] The Second Circuit stated that under *Bosch*,

> even if *due regard* is accorded to the state court's adjudication, it would only be as valid as its evidentiary base. We have not hesitated to disregard state court judgments affecting federal tax liability where the factual questions involved were not contested in the state court, or where a lower state court made an erroneous application of state law.[62]

The Second Circuit concluded that even if the state court determinations were given "proper regard," they did not compel a grant of federal summary judgment. The summary judgment motion in state court was unopposed and the state court did not have before it the conflicting evidence submitted by the government in the federal litigation because it was not a party to the state proceedings.[63]

In *Magavern v. United States*,[64] the Service served a notice of levy to a trustee to collect unpaid taxes owed by one of the trust's beneficiaries. The trustee attacked the levy's validity in probate court, and the probate court concluded that the beneficiary did not have a property interest in the trust.[65] Armed with the probate court decision, the trustee brought suit in federal district court to quash the levy on the ground that the probate court's construction of the will was binding on the Service.[66] Relying on *Bosch*, the district court rejected the trustee's position because it would result in "questions of federal tax liability [being] routinely and

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"considerable weight" to state court decisions).

57. *Id.* at 1092.

58. Action on Decision, No. CC-1975-140 (May 2, 1975) (LEXIS, Fedtax Library, AOD File).

59. *Id.* at *3 (citing Bath v. United States, 480 F.2d 289 (5th Cir. 1973); Greene v. United States, 476 F.2d 116 (7th Cir. 1973)).

60. United States v. Bosurgi, 530 F.2d 1105, 1112 (2d Cir. 1976).

61. *Id.*

62. *Id.* (emphasis added) (citations omitted).

63. *Id.*

64. 550 F.2d 797 (2d Cir. 1977), *aff'g* 415 F. Supp. 217 (W.D.N.Y. 1976), *cert. denied*, 434 U.S. 826 (1977).

65. *Id.* at 799 (citing *In re* Will of Duncan, 362 N.Y.S.2d 788 (Sur. Ct. 1974)).

66. The Service had notice of the state court proceeding and made a special appearance to contest the state court's jurisdiction; the Service did not argue the merits of the case. Magavern v. United States, 415 F. Supp. 217, 219 (W.D.N.Y. 1976).

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conclusively decided by lower state courts."[67] Instead, the district court stated that it was not bound by the probate court's decision, but would "consider" it because there were no other state court decisions directly on point.[68] After examining the probate court's decision and engaging in an independent review of state law, the district court held, contrary to the probate court, that the beneficiary had a property interest in the trust under state law, thus upholding the validity of the Service's levy.[69]

The Second Circuit rejected the trustee's argument that the probate court's construction of the will was binding on the federal courts.[70] The Second Circuit noted that, under *Bosch*, "a lower state court decision was a *significant factor* for a federal court in ascertaining state law, but federal tribunals should not consider lower state court decisions binding where the highest state court has not spoken on the point."[71] Although the trustee tried to distinguish its case from *Bosch* based on the Service's appearance in the state probate court, the Second Circuit emphasized the limited nature of the Service's appearance merely to contest the probate court's jurisdiction.[72] The Second Circuit stated that under the *Bosch* "proper regard" standard, "[t]he district court, a decision by the highest court of [the state] lacking, was thus required to sit 'as a state court' to decide the case as might a state tribunal, giving proper consideration to the ruling of the [probate] court."[73] After an independent review of state law, the Second Circuit agreed with the district court's conclusion that the probate court had misapplied state law, that the beneficiary had a property interest in the trust under state law, and that the Service's levy was valid.[74]

In *Lemle v. United States*,[75] wife received payments from her life interest in a portion of the net income generated by the residue of her late husband's estate. The executors reported the payments as distributions of income to a will beneficiary and thus deducted the payments on the estate's income tax returns. Wife treated the payments as distributions from estate principal in anticipation of receiving her elective share under state law and thus did not report the payments on her income tax returns. The Service assessed a deficiency against wife for failure to report the distributions as income.[76]

Wife's right to an elective share was unclear because she had signed an antenuptial agreement waiving her right to elect against husband's will. In a probate court

67. *Id.*
68. *Id.*
69. *Id.* at 219-21.
70. *Magavern*, 550 F.2d at 801.
71. *Id.* at 800 (emphasis added).
72. *Id.* at 798.
73. *Id.* at 801 (quoting Commissioner v. Estate of Bosch, 387 U.S. 456, 456 (1967)).
74. *Id.* at 801-02. In dissent, Judge Oakes did not take issue with the majority's formulation of the *Bosch* standard. Instead, Judge Oakes argued that the majority, like the district court, had misapplied state law. *Id.* at 802-04 (Oakes, J., dissenting).
75. 579 F.2d 185 (2d Cir. 1978), *aff'g* 419 F. Supp. 68 (S.D.N.Y. 1976).
76. Lemle v. United States, 419 F. Supp. 68, 69-70 (S.D.N.Y. 1976).

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proceeding pursuant to a settlement reached between the estate and wife in which the estate acknowledged wife's right to a surviving spouse's elective share, the probate court ruled that the payments constituted payments of principal to wife in satisfaction of her elective share. Although the settlement required the estate's accountants to prepare amended tax returns for the estate and the other beneficiaries reflecting this treatment of the payments, such returns were never filed.[77] After denying wife's motion for summary judgment, the district court, contrary to the probate court, treated the payments as income.[78]

The Second Circuit agreed with the district court that the probate court had misapplied state law in treating the payments as distributions of principal.[79] The Second Circuit stated that the probate court's adoption of the settlement agreement was not binding on the district court.[80] Despite citing *Bosch*, the Second Circuit relied on the nonadversarial nature of the probate court proceeding as evidence that the probate court decision did not result in a "contested construction of state law."[81]

In *Estate of Foster v. Commissioner*,[82] wife received from husband's estate a life interest and a lifetime power to invade principal, with the remainder left to her children. The probate court concluded that wife possessed an unlimited power to consume the principal under state law, and the estate reported wife's interest as a life estate coupled with a general power of appointment qualifying her for the marital deduction under section 2056(b)(5). The Tax Court rejected the marital deduction on the ground that wife did not possess an unlimited power to consume because the power was limited by the good faith standard under state law.[83] The Tax Court stated that "with all due respect" to the probate court, it could not under *Bosch* "automatically accept" the probate court's decision in light of its contrary view of state law.[84] In affirming, the Second Circuit agreed with the Tax Court's interpretation of state law without citing *Bosch* or referring to the probate court's decision.[85]

D. Third Circuit

Forty-five cases in the Third Circuit cite *Bosch*, but only three are tax cases.[86] In

77. *Id.* at 70.
78. *Id.* at 73.
79. *Lemle*, 579 F.2d at 187.
80. *Id.* at 188.
81. *Id.* (citing Estate of Smith v. Commissioner, 510 F.2d 479 (2d Cir.), *cert. denied*, 423 U.S. 827 (1975)). The Second Circuit emphasized that the compromise agreement in the state court "did not truly reflect what the successful outcome of litigation would have established." *Id.*
82. 725 F.2d 201 (2d Cir. 1984), *aff'g* 45 T.C.M. (CCH) 679 (1983).
83. Estate of Foster v. Commissioner, 45 T.C.M. (CCH) 679, 681 (1983).
84. *Id.* at 682.
85. *Estate of Foster*, 725 F.2d at 202-04.
86. Two nontax cases gave conflicting interpretations of the binding effect of state intermediate appellate court determinations in subsequent federal litigation. In Lair v. Fauver, 595 F.2d 911 (3d Cir. 1979), the Third Circuit indicated that *Bosch* required federal courts to give "proper regard" to state intermediate appellate court decisions. *Id.* at 913-14 & n.9. However, in the earlier case of Springfield State Bank v. National State Bank, 459 F.2d 712 (3d Cir. 1972), the Third Circuit contended that "it is well settled that where, as here, state law governs, a federal court may not decline to accept a rule

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the only two tax cases that involved a prior state court proceeding,[87] the Third Circuit viewed the "proper regard" standard as requiring plenary review. In the first case, the Third Circuit concluded that the state court had correctly applied state law. In the second case, the Third Circuit affirmed without opinion a Tax Court decision holding that the state court had misapplied state law.

In *Estate of Leggett v. United States*,[88] husband died in 1909 and bequeathed a life estate in corporate stock to his wife, leaving the remainder to their children. Until her death fifty-one years later, wife managed the stock (including subsequent stock dividends and stock splits), which she kept registered in her name as executrix of husband's estate. Wife kept a complete set of books which credited the original stock as well as the subsequent stock dividends and stock splits to husband's estate. Wife's estate tax return did not include the value of the stock dividends and stock splits. While wife's estate tax return was being audited, her executor obtained a ruling from the probate court that (1) the stock dividends and stock splits belonged to husband's estate, and (2) a debtor-creditor relationship did not exist between wife and husband's estate.[89] Despite the probate court's ruling, the Service included the stock dividends and stock splits in wife's estate.[90]

The Service argued in district court that wife was a debtor to the remaindermen under state law for the value of the stock at the time she received it. Under this view, the stock dividends and stock splits received during her lifetime were her property and thus includible in her estate. In contrast, the executor argued that wife held the original securities, subsequent stock dividends, and stock splits as trustee for the remaindermen. Under this view, the dividends and stock splits were not her property and thus were not includible in her estate.[91] The district court noted that, under *Bosch*, it was not bound by the decision of the probate court,[92] but instead was required to follow the decisions of the highest court of the state in determining wife's property interests.[93] After an independent review of state law, the district court found, contrary to the probate court, that husband's will established a debtor-creditor relationship under state law between wife and the remaindermen.[94] As a result, the district court agreed with the Service that the stock dividends and stock

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announced by a court of intermediate appeal deciding a state question." *Id.* at 718. The Third Circuit cited only pre-*Bosch* authority for this proposition and distinguished *Bosch* on the dubious ground that "[t]hat case involved federal estate tax liability and presented a federal question." *Id.*

87. The other tax case is Miller v. United States, 387 F.2d 866 (3d Cir. 1968), *rev'g* 267 F. Supp. 182 (W.D. Pa. 1967).

88. 418 F.2d 1257 (3d Cir. 1969), *rev'g* 293 F. Supp. 22 (W.D. Pa. 1968).

89. The Service received notice of the probate court proceeding but did not appear. *Id.* at 1258.

90. Estate of Leggett v. United States, 293 F. Supp. 22, 23-24 (W.D. Pa. 1968).

91. *Id.*

92. The district court observed that "[i]t is a reasonable inference that [wife's executor] sought a ruling from the [probate court] in preparation for future negotiations with the Commissioner." *Id.* at 24. The district court drew this inference from two facts: (1) the executor instituted the probate court proceeding while the Service was auditing the estate; and (2) the questions addressed by the probate court were not necessary for settling either husband's or wife's estate. *Id.* at 24-25.

93. *Id.* at 24.

94. *Id.* at 25.

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splits were properly includible in wife's estate.[95]

The Third Circuit reversed. After noting that "[t]he apparatus of two trial courts, one state and one federal, [had] been employed to resolve this issue," the Third Circuit agreed that the district court under *Bosch* "was free to differ from the conclusion reached by the state court."[96] However, the Third Circuit engaged in its own de novo review of state law and held that the state court had correctly concluded that there was no debtor-creditor relationship between wife and the remaindermen.[97] As a result, the stock dividends and stock splits were not includible in wife's estate.

In *Estate of Hamilton v. Commissioner*,[98] husband upon his death left a portion of his estate in trust, with a life income interest to wife and then to sister, and the remainder at sister's death to be distributed to his two nephews. One of the nephews survived wife's death but predeceased sister. The tax question at nephew's death was whether his remainder interest was vested, and thus includible in his estate, or contingent and not includible. After the tax controversy arose, nephew's executor obtained a ruling from the probate court that the nephew possessed only a contingent remainder at the time of his death.

The Tax Court noted that, under *Bosch*, it was required to construe nephew's will in accordance to what it perceived state law to be, "rather than simply accept the construction arrived at by the [probate court]."[99] Although the Tax Court did so "with some trepidation,"[100] it concluded after a de novo review of state law that the highest state court "would very probably have overruled the [probate court's] determination."[101] The Tax Court also noted that the adversary nature of the probate court proceeding was not a "controlling factor" under the "proper regard" standard.[102] The Third Circuit affirmed without issuing a published opinion.[103]

E. Fourth Circuit

Of the twenty Fourth Circuit cases that cite *Bosch*, nine are tax cases.[104] Three

95. *Id.*

96. *Estate of Leggett*, 418 F.2d at 1258.

97. The Third Circuit held that "by her conduct, [wife] renounced and disclaimed the rights of dominion, control, and ownership of which she could have availed herself in a debtor-creditor relationship, and that she constituted herself a fiduciary for the remaindermen with their full consent." *Id.* at 1260. The Third Circuit agreed with the state court's conclusion that wife's conduct over 51 years demonstrated she intentionally waived her right as income beneficiary to receive stock dividends and stock splits. *Id.* at 1260-61.

98. 577 F.2d 726 (3d Cir. 1978), *aff'g mem.* 35 T.C.M. (CCH) 1609 (1976).

99. Estate of Hamilton v. Commissioner, 35 T.C.M. (CCH) 1609, 1614 (1976).

100. *Id.*

101. *Id.*

102. *Id.* at 1613.

103. Estate of Hamilton v. Commissioner, 577 F.2d 726 (3d Cir. 1978) (Table of Decisions Without Reported Opinions).

104. One of the nontax cases is a habeas case in which an intermediate state appellate court had rejected the prisoner's double jeopardy claim on the ground that his conduct constituted multiple offenses under state law. State v. Sanderson, 300 S.E.2d 9, 15-16 (N.C. App.), *review denied*, 304 S.E.2d 759 (N.C. 1983). In Sanderson v. Rice, 777 F.2d 902 (4th Cir. 1985), *cert. denied*, 475 U.S. 1027 (1986),

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of the nine tax cases involved a prior state proceeding.[105] However, none of these

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the district court granted habeas relief based on its conclusion that the conduct did not constitute multiple offenses under state law, despite the contrary intermediate state court ruling. The Fourth Circuit reversed and, after an independent review of state law, held that the state court had correctly applied state law. *Id.* at 903.

The Fourth Circuit noted at the outset of its opinion that "[a] federal court in a habeas corpus proceeding should be cautious in setting aside the judgment of a state court where that judgment is based on an interpretation of state law." *Id.* at 904. However, the Fourth Circuit stated that an inquiry into state law was appropriate here because, under *Bosch*, the intermediate state court proceeding was not "binding": "An opinion of an intermediate appellate court is persuasive in situations where the highest state court has not spoken but does not prevail where the federal court is convinced that the highest court of the state would rule to the contrary." *Id.* at 905 (footnote omitted). After a lengthy de novo review of state law, the Fourth Circuit concluded that the state court had correctly held that the conduct constituted multiple offenses under state law. *Id.* at 905-08. The Fourth Circuit emphasized that six state court judges, "well informed on the [state] law, have seen the matter one way," and the highest court of the state had denied review; in these circumstances, the Fourth Circuit was "loath" to give the habeas petitioner "further review in federal courts not substantively different from another appeal in the state judicial system." *Id.* at 908.

105. The other six tax cases are Estate of Casey v. Commissioner, 948 F.2d 895 (4th Cir. 1991), *rev'g* 58 T.C.M. (CCH) 176 (1989); Estate of Reno v. Commissioner, 916 F.2d 955 (4th Cir. 1990), *aff'g* 51 T.C.M. (CCH) 909 (1986), *superseded on rehearing by* 945 F.2d 733 (4th Cir. 1991) (en banc); Wisely v. United States, 893 F.2d 660 (4th Cir. 1990), *aff'g* 703 F. Supp. 474 (W.D. Va. 1988); Boyter v. Commissioner, 668 F.2d 1382 (4th Cir. 1981), *remanding* 74 T.C. 989 (1980); United States v. Ritter, 558 F.2d 1165 (4th Cir 1977), *rev'g* 416 F. Supp. 777 (S.D. W. Va. 1976); Guiney v. United States, 425 F.2d 145 (4th Cir. 1970), *rev'g* 295 F. Supp. 789 (D. Md. 1969).

In *Boyter*, husband and wife obtained a year-end divorce in a foreign country so they could file their tax returns as unmarried individuals, and then remarried in January of the following year. The Tax Court concluded that marital status was governed by state law. Because the state's courts had not determined the validity of foreign divorce decrees, the Tax Court relied on *Bosch* in stating that it "must choose the rule we believe the highest State court would adopt if faced with the question." Boyter v. Commissioner, 74 T.C. 989, 995 (1980). After a lengthy examination of state law, the Tax Court concluded that the highest court of the state would not recognize a foreign divorce decree where the parties were not domiciled in the foreign country. *Id.* at 997.

The Fourth Circuit noted at the outset that given the uncertain state law, it "ordinarily" would certify the state law question to the highest court of the state (the state statute did not permit certification from the Tax Court). *Boyter*, 668 F.2d at 1385. However, certification was not appropriate until the Tax Court first determined, as a matter of federal law, whether the divorce should be disregarded under the sham transaction doctrine even if it were respected by the state courts. *Id.* at 1385-88. In dissent, Judge Widener cited *Bosch* in arguing that this was a "classic opportunity" to invoke the state's certification procedures "so that we may actually decide a case at hand instead of deciding as we are bound to do what the opinion of a State court of last resort would be." *Id.* at 1388 (Widener, J., dissenting).

In *Ritter*, the enforceability of a federal tax lien controversy turned on whether decedent retained a reversion or created a remainder interest in trust property. United States v. Ritter, 416 F. Supp. 777, 781 (S.D. W. Va. 1976). Because the highest court of the state had not addressed this issue, the district court stated it was its "duty to make an 'informed prediction of what (this) state's highest court would decide if the (instant) case were before it.'" *Id.* (quoting Maynard v. General Elec. Co., 350 F. Supp. 949, 951 (S.D. W. Va. 1972)). After reviewing state law, the district court concluded that "it is the prediction of this Court that the [highest state court] would hold that the provisions of the trust agreement, as amended, created a remainder in the trust estate." *Id.* at 784.

Although the Fourth Circuit deferred to the district judge's "experience and expertise in the law of his own state," *Ritter*, 558 F.2d at 1166, it reversed on the ground that the federal tax lien was enforceable regardless of whether the property interest was a reversion or a remainder under state law. *Id.* In a

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cases applied the "proper regard" standard. One case did not involve the application of state law because the federal tax issue concerned the deductibility of administration expenses.[106] Another case did not cite *Bosch* in affirming a lower court decision that had taken a view of state law different from the lower state court. The remaining case applied the same standard of review to a state tax administrative agency's application of state law that would be applied by the highest court of the state in reviewing the agency's decision, and concluded that the agency had properly applied state law.

In *Sappington v. United States*,[107] the federal tax issue was whether wife had received a life estate in certain property under the will of her late husband who had died over thirty years earlier (in which case it would not be included in her estate) or had purchased the property from her husband's estate (in which case it would be included in her estate). A probate court had approved the sale shortly after husband's death, and wife's executors included the property in her estate. However, in a suit against the executors, the trustee under wife's will obtained a ruling from the probate court that wife had received a life estate under husband's will. The executors then instituted a refund action in federal district court. After the complaint was filed, the highest state court affirmed the probate court's ruling that wife had received a life estate under husband's will. In the course of its decision, the court stated that wife had received the property at issue as a life tenant under husband's will. Despite this ruling, both the district court and the Fourth Circuit held that wife had purchased the property from husband's estate.

The district court focused on the earlier probate court approval of the sale and

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concurrence joined by Judge Williams, Judge Widener stated that "the district court applied the wrong State law and that the [highest state court], if called upon to decide this case, would find the [decision of the highest court of another state] to be the persuasive precedent, and would reach the same result we reach here." *Id.* at 1168 (Widener, J., concurring) (citing Commissioner v. Estate of Bosch, 387 U.S. 456 (1967)).

106. In Estate of Love v. Commissioner, 923 F.2d 335 (4th Cir. 1991), *aff'g* 57 T.C.M. (CCH) 1479 (1989), decedent at the time of her death was engaged in the business of breeding and racing thoroughbred horses. Three months before her death, she had entered into an agreement to have one of her mares (located in France) bred by a stallion. Because decedent's will directed that her foreign operations be liquidated, her executor paid $150,000 to extinguish the agreement and treated the payment as an administration expense. The probate court approved the payment as an administration expense under state law. *Id.* at 336 n.3. The probate court's application of state law was not at issue in the federal tax litigation because both the Tax Court and the Fourth Circuit did not treat the payment as a valid administration expense under federal law. *Id.* at 338.

The Tax Court agreed that the payment was necessary to the administration of the estate but concluded that the payment was not an "expense" of administration; instead, the payment was a nondeductible outlay for an addition to the estate. Estate of Love v. Commissioner, 57 T.C.M. (CCH) 1479, 1483 (1989). In affirming, the Fourth Circuit held that the deductibility of the payment was controlled by federal law rather than state law. *Estate of Love*, 923 F.2d at 338. The Fourth Circuit stated that *Bosch* "undergirded" this conclusion: "[A]ny state court decision regarding this matter, whether based on federal or state law, would not bind a federal tribunal." *Id.* (citing Caron, *Reformulating Complementary Roles*, *supra* note 44, at 986).

107. 408 F.2d 817 (4th Cir. 1969), *aff'g* 1968-1 U.S. Tax Cas. (CCH) ¶ 12,514 (D. Md. 1968), *cert. denied*, 396 U.S. 876 (1969).

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contended that the later state court litigation concerned only whether wife had received a life estate in property in fact distributed to wife, not whether wife had received the property at issue by distribution or by sale. As a result, "the factual issue here was never presented to that Court for decision."[108] The district court emphasized the nonadversary nature of the later probate court proceeding: although the trustee's complaint alleged that wife had received the property at issue by distribution, these allegations "were admitted by the defendants in the state court proceeding (who are the plaintiffs in this action and who had much to gain in agreeing to such facts)."[109] The district court concluded that the *Bosch* "proper regard" standard was not implicated here because there was no factual determination by the probate court: "[t]he crucial fact was admitted in the pleadings by parties who had much to gain from such admissions."[110] Without citing *Bosch*, the Fourth Circuit affirmed the district court's holding that wife acquired the property as purchaser from husband's estate rather than as a life tenant under husband's will.[111]

In *Estate of Dancy v. Commissioner*,[112] the issue was whether an executor had validly disclaimed decedent's interest under state law in certain pre-1982 joint property interests. After audit of decedent's state inheritance tax return, the state department of revenue concluded that the disclaimers were valid under state law and thus not subject to state inheritance tax. The Tax Court noted that under *Bosch* it "must determine, as best we can, what the highest court of [the state] would hold on the question of state law which is presented."[113] The Tax Court did not give any weight to the state agency's interpretation of state law. After a de novo review, the Tax Court then concluded that the disclaimer was not valid under state law and that the highest court of the state, "if faced with the question, would so hold."[114]

The Fourth Circuit reversed, stating that the Tax Court correctly began its analysis under *Bosch* "by surveying applicable [state] law to determine the validity of the disclaimer."[115] However, the Fourth Circuit noted that "[i]n the absence of judicial and legislative guidance, diligent inquiry should include a review of applicable administrative determinations."[116] The Fourth Circuit then elaborated on the appropriate level of deference to give to the state agency's interpretation of state law.

The Fourth Circuit first cited with approval language from a D.C. Circuit case holding that a federal court was not "at liberty to overthrow" a state administrative agency's interpretation of state law because it was the role of the state courts to say whether the agency's interpretation was incorrect, even where the agency's

108. Sappington v. United States, 1968-1 U.S. Tax Cas. (CCH) ¶ 12,514, at 87,337 (D. Md. 1968).
109. *Id.*
110. *Id.*
111. *Sappington*, 408 F.2d at 818-19.
112. 872 F.2d 84 (4th Cir. 1989), *rev'g* 89 T.C. 550 (1987).
113. Estate of Dancy v. Commissioner, 89 T.C. 550, 557 (1987).
114. *Id.* at 560.
115. *Estate of Dancy*, 872 F.2d at 85.
116. *Id.*

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interpretation "was at odds with the language of the [state] statute."[117] The Fourth Circuit stated that it was "appropriate" for it to accept the agency's application of state law here, unless it concluded that the highest court in the state would reject the agency's ruling.[118] In making this determination the Fourth Circuit looked at two canons of statutory construction applied by the state's courts in tax cases: (1) absent contrary legislative intent, tax statutes were construed against the state and in favor of the taxpayer; and (2) the agency's construction of a tax statute, although not binding, would be given "due consideration" by a reviewing court.[119] Application of these canons "persuade[d]" the Fourth Circuit that the highest court of the state would uphold the agency's recognition of the validity of the disclaimer:

> The Department of Revenue is the agency most suited to determine whether a disclaimer of a survivorship interest in jointly held personal property is valid under [state] law for tax purposes. Its ruling is not *arbitrary or capricious*, and we believe that it would not be disturbed by the [highest court of the state]. In absence of contrary authority, we conclude that [wife's] disclaimer is valid under [state] law.[120]

F. Fifth Circuit

Thirteen of the twenty-five Fifth Circuit cases that cite *Bosch* are tax cases.[121] However, five of the tax cases did not directly consider the deference that federal courts must give to a state court's interpretation of state law in a federal tax case.[122] In the remaining eight tax cases, the Fifth Circuit viewed the "proper regard" standard as requiring de novo review of the probate court's application of state law. In six of these cases, the Fifth Circuit concluded that the probate court had misapplied state law. The Fifth Circuit relied on the nonadversariness of the state proceeding in reaching this conclusion in two of those six cases. In the only case to hold that the probate court had correctly applied state law, a two-judge majority concluded that the "proper regard" standard required a federal court to

117. *Id.* at 86.

118. *Id.*

119. *Id.* (quoting *In re* North Carolina Inheritance Taxes, 277 S.E.2d 403, 407 (N.C. 1981)).

120. *Id.* at 87 (emphasis added).

121. In Finch v. Mississippi State Medical Ass'n, 585 F.2d 765, 776-78 (5th Cir. 1978), *modified*, 594 F.2d 163 (5th Cir. 1979), the Fifth Circuit first abstained from deciding whether the selection procedure for state board of health membership violated state and federal law, pending resolution of state court litigation between the parties. The Fifth Circuit later followed an intermediate state appellate court's resolution of the state law issues because, under *Bosch*, the Fifth Circuit was not "'convinced by other persuasive data that the highest court of the state would decide otherwise.'" Finch v. Mississippi State Medical Ass'n, 594 F.2d 163, 165 (5th Cir. 1979) (quoting Commissioner v. Estate of Bosch, 387 U.S. 456, 465 (1967) (emphasis deleted) (quoting in turn West v. AT&T, 311 U.S. 223, 237 (1940))).

122. Central Oil & Supply Corp. v. United States, 557 F.2d 511 (5th Cir. 1977); Dahlgreen v. United States, 553 F.2d 434 (5th Cir. 1977); Estate of Wien v. Commissioner, 441 F.2d 32 (5th Cir. 1971); Mitchell v. Commissioner, 430 F.2d 1 (5th Cir. 1970); Dodge v. United States, 413 F.2d 1239 (5th Cir. 1969).

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determine, from existing state court precedent, whether the state supreme court would have affirmed the probate court's decree had there been an appeal.

In *Cox v. United States*,[123] widow elected against her husband's will and took her dower rights and distributive share of the estate. The probate court calculated widow's marital share to include the commuted value of her dower interest and charged the entire estate tax to the nonmarital portion of the estate. The district court agreed with the Service's view that the dower rights were nondeductible terminable interests and that a portion of the estate tax was properly chargeable against the marital portion of the estate. The district court held that, under *Bosch*, federal courts are not bound by state trial court determinations, especially where "the trial court has created an apportionment statute by judicial fiat, something both the higher [state] courts and the [state] legislature have not done."[124]

After an independent review of state law, the Fifth Circuit affirmed the district court's ruling that the probate court had mischaracterized widow's dower interest as a nonterminable interest under state law.[125] However, the Fifth Circuit reversed the district court's ruling that the probate court had improperly charged the entire estate tax against the nonmarital portion of the estate.[126]

In *Risher v. United States*,[127] father died leaving a will that disinherited his adopted daughter. Under the state pretermitted heir statute, the adoption of a child revoked the adoptive parent's preexisting will and allowed the adopted child to take his or her intestacy share of the adoptive parent's estate. The probate court applied a state statute that distributed one-third of decedent's personal property to the adopted child and two-thirds to decedent's wife. The probate court refused to apply another state statute that would have divided decedent's personal property equally between wife and adopted daughter. The estate computed the marital deduction based on the probate court's decree (two-thirds to wife), while the Service determined the marital deduction based on the statute the probate court had refused to apply (one-half to wife).[128]

Both the district court and the Fifth Circuit agreed with the Service that the probate court had applied the wrong state statute. The district court stated that, under *Bosch*, "this court is not bound by another trial court's interpretation of the state law in the absence of an authoritative ruling from the State Supreme Court."[129] However, the district court noted that its decision was limited to the marital deduction question and that it did not intend "by this decree in any way to

123. 421 F.2d 576 (5th Cir. 1970), *rev'g* 296 F. Supp. 145 (M.D. Ala. 1968).

124. Cox v. United States, 296 F. Supp. 145, 147 (M.D. Ala. 1968).

125. *Cox*, 421 F.2d at 577-83.

126. *Id.* at 583-85. Because the state supreme court had never addressed this issue, the Fifth Circuit noted that it had "to determine as best it can what the [state] courts would decide." *Id.* at 583. After a plenary review of state law, the Fifth Circuit concluded that the probate court's decision matched "what the [state] courts would decide." *Id.*

127. 465 F.2d 1 (5th Cir.), *aff'g* 339 F. Supp. 484 (S.D. Ala. 1972).

128. Risher v. United States, 339 F. Supp. 484, 485-87 (S.D. Ala. 1972).

129. *Id.* at 488.

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sit as an appellate court nor reverse the [probate court's] decision on the distribution of the estate."[130]

On appeal, the Fifth Circuit relied on *Bosch* in rejecting the estate's argument that the probate court had conclusively established the state law question.[131] After an independent review of state law, the Fifth Circuit concluded that "examination of the relevant [state] statutes and case law discloses that the district court was on solid ground in its interpretation of [state] law."[132]

The Fifth Circuit characterized *Bath v. United States*[133] as "a square peg that will not fit into any neat, round tax hole."[134] In that case, mother's will provided one-third outright to older son (who was also her executor) and one-third each in trust to younger son and daughter, with older son as trustee. In light of family animosity,[135] younger son was unwilling to let his brother act as trustee over his one-third interest. As a result, younger son challenged mother's will on a variety of grounds; he alleged that mother was incompetent, subject to undue influence from older son, and failed to provide an agreed upon compensation for services that younger son had provided to mother over a twenty-five year period.[136]

After a brief probate court hearing in which older son "tacitly waived opposition" by failing to assert several substantive defenses to younger son's claims, the probate court entered judgment in favor of younger son based on a settlement agreed to by the parties that gave younger son his one-third interest free of the trust.[137] The estate and younger son treated the settlement inconsistently on their separate returns: the estate treated it as compensation for services by deducting the payment as a claim against the estate while younger son treated it as a nontaxable inheritance.[138]

In the district court litigation involving younger son's return, both sons agreed that there were no uncompensated services outstanding at the time of mother's death because younger son had received a salary as he had performed these services. Younger son testified that "the simulation of adversary litigation was necessary because of [older son's] duty as executor to defend the provisions of the will naming

130. *Id.*

131. *Risher*, 465 F.2d at 2.

132. *Id.* at 4.

133. 480 F.2d 289 (5th Cir. 1973).

134. *Id.*

135. Younger son testified in the district court that he feared arbitrary treatment by older son acting as trustee. For example, younger son stated that he had been the victim of such arbitrary treatment in a lifetime trust set up by mother with older brother as trustee. In addition, younger son testified that older son had threatened him: "If you do just exactly like I tell you . . . I will give you a little of [the testamentary trust]." *Id.* at 290. For his part, when older son learned of the will challenge, his first response was to move to have younger son declared insane and to have a guardian appointed on his behalf. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* at 292 n.3; *see also* Estate of Bath v. Commissioner, 34 T.C.M. (CCH) 493 (1975).

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[younger son's] children as remaindermen."[139] The jury found that the payment was a nontaxable inheritance to younger son.[140]

The Fifth Circuit affirmed the district court's denial of the government's motions for a directed verdict and for judgment notwithstanding the verdict. Although the Fifth Circuit cited the *Bosch* holding that federal authorities are not bound by determinations of state law made by a state trial court, the Fifth Circuit relied on the adversary proceeding test: "Especially suspect are characterizations, such as we have here, not the result of bona fide adversary proceedings."[141] The Fifth Circuit examined the evidence and concluded that although there was a "strong likelihood" that the older son's defenses would have prevailed had there been "genuine opposition" in a "true adversary proceeding" in the probate court, there was a sufficient conflict in the evidence to present a jury question.[142]

In *Wiles v. Commissioner*,[143] father transferred one-third interests in two medical office buildings to his three children, ostensibly in trust with father as trustee. The same day, father, acting as trustee, leased the buildings to himself for a ten-year period. The trusts were poorly worded, and apparently a question arose whether the property had been transferred to children outright or to father as trustee of trusts for the benefit of children. Father obtained a state court decree reforming the trusts to make clear that he held title to the property as trustee. However, after the Service questioned father's rental expense deduction, the children obtained a second state court decree that vacated the first decree and held that children held title to the property outright. The Tax Court rejected children's attempt to support father's rental deduction, concluding that the second state court had misapplied state law and that father held title to the property as trustee.[144] The Fifth Circuit affirmed in an unpublished decision.[145]

In *Estate of Salter v. Commissioner*,[146] husband's will provided for his estate to go to wife, "with any residual after her death to my hereinafter named children in equal parts."[147] Wife filed a petition in probate court seeking that the above language be construed as giving wife a life estate with a general power of appointment so that the bequest would qualify for the marital deduction. Decedent's

139. *Bath*, 480 F.2d at 290-91.

140. *Id.* at 290.

141. *Id.* at 292.

142. *Id.* In the related litigation, the Tax Court also treated the settlement as an inheritance rather than as compensation. Echoing the Fifth Circuit's opinion, the Tax Court stated "that there was no real contest of [younger son's probate court] suit, that [the Tax Court] is not bound by the judgment of the [probate] court, and that the result reached by [the probate] court would have been unreasonable had the facts been presented to the [probate] court." *Estate of Bath*, 34 T.C.M. (CCH) at 504. The Tax Court denied the deduction as a claim against the estate because the court determined that mother had adequately compensated younger son for the work he had performed during mother's life. *Id.* at 505-06.

143. 491 F.2d 1406 (5th Cir. 1974), *aff'g mem.* 59 T.C. 289 (1972).

144. Wiles v. Commissioner, 59 T.C. 289, 296-97 (1972).

145. Wiles v. Commissioner, 491 F.2d 1406 (5th Cir. 1974) (Table of Decisions Without Reported Opinions).

146. 545 F.2d 494 (5th Cir. 1977), *rev'g* 63 T.C. 537 (1975).

147. Estate of Salter v. Commissioner, 63 T.C. 537, 538 (1975).

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children joined the petition and agreed to be bound by the probate court's decree. The probate court granted wife's petition. The Service disallowed the claimed marital deduction.[148]

The Tax Court noted that although the probate court had interpreted husband's will to meet the requirements of the marital deduction, the parties agreed that, under *Bosch*, the probate court's interpretation of the will was not controlling. After examining state law, the Tax Court concluded that the state supreme court, contrary to the probate court's ruling, would hold that wife received only a life estate with a limited power of disposition.[149]

The Fifth Circuit reversed, stating that, under *Bosch*,

> a federal court will look to the state's highest court as the best authority on its own law, but, significantly, in the absence of authoritative rulings from that source the federal court must apply what it finds to be the state law "after giving 'proper regard' to relevant rulings of other courts of the State." Stated another way: in the process of finding state law if there is a controlling decision of the state's highest court, the federal courts must follow it; if there is none, we may give proper regard to relevant rulings of lesser state courts.[150]

The Fifth Circuit then explained the required degree of deference to be accorded the probate court's decision under the "proper regard" test: "In the absence of a case specifically in point, the best measure of that 'regard', we think, would be to determine, from existing precedent, in our best judgment, whether the [state] Supreme Court . . . would have affirmed the [probate court's] decree had there been an appeal."[151] After an independent review of state law, the Fifth Circuit concluded that the Tax Court had erroneously held that the probate court had misapplied state law; the Fifth Circuit was "convinced that had there been an appeal the [state] Supreme Court . . . would have affirmed the decree of the [probate court], holding that the will of the decedent conferred upon his widow an absolute, unqualified right of disposition."[152]

148. *Id.* at 540.

149. *Id.* at 542. The Tax Court also concluded that the children could not disclaim their interest. *Id.* at 546.

150. *Estate of Salter*, 545 F.2d at 497 (quoting Commissioner v. Estate of Bosch, 387 U.S. 456, 465 (1967)). The Fifth Circuit also noted that "[o]rdinarily, the determination of local law by a federal Court of Appeals will be accepted by the Supreme Court." *Id.*

151. *Id.* at 500.

152. *Id.* at 501. Although the Fifth Circuit, in the nontax case of *Finch*, did not cite *Estate of Salter*, both cases support focusing on how the state supreme court would decide the issue. *See* discussion *supra* note 121. However, *Finch* suggests that greater deference may be appropriate where the state court decision is that of an intermediate appellate state court in light of the Fifth Circuit's reliance on the quotation from *Bosch* that the federal court will follow the intermediate appellate state court "'unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.'" Finch v. Mississippi State Medical Ass'n, 594 F.2d 163, 165 (5th Cir. 1979) (quoting *Bosch*, 387 U.S. at 465 (emphasis deleted) (quoting in turn West v. AT&T, 311 U.S. 223, 237 (1940))).

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In his concurring opinion, Judge Godbold refused to join in the majority's formulation of the required deference that a federal court must give to a probate court decision under the "proper regard" test. Instead, Judge Godbold would have treated a series of cases from the state supreme court as dispositive "without having to reach and rely upon the [probate court] decree construing the will and our projection of what the [state] Supreme Court would have decided had the decree been appealed."[153]

In *Newman v. Internal Revenue Service*,[154] decedent's children purported to disclaim their interest under decedent's will, thereby allowing their mother's interest to qualify for the marital deduction. Although a probate court approved the disclaimers, the parties stipulated that the disclaimers were invalid under state law because they were not filed within six months of decedent's death. The Tax Court relied on this stipulation in concluding that wife's interest did not qualify for the marital deduction,[155] and the Fifth Circuit affirmed without opinion.[156]

In *Brown v. United States*,[157] husband and wife died within one year of each other and probate was completed by 1971, but the estates remained open through 1989. The tax litigation concerned whether the estate or the beneficiaries should pay tax on the income earned during this period.[158] Section 641(a)(3) provides that income is taxed to the estate when it is received by the estate during the "period of administration."[159] The regulations provide that although the "period of administration" generally is the period actually required by the administrator or executor to perform the ordinary duties of administration (e.g., collect assets, pay debts, taxes, legacies, and bequests), the Service can treat an estate as terminated for federal income tax purposes if it is "unduly prolonged."[160]

The Service determined that the administration of the estates had been "unduly prolonged" and assessed income tax deficiencies against the couple's son (the executor and a beneficiary of his parents' estates) for 1978-82 on income previously reported by the estates. Shortly after receiving the notice of deficiency, son obtained a ruling from the probate court that the estates required ongoing management and administration. Although there was no state law limitation on the length of the estate's administration (absent objection from persons interested in the estate), the probate court authorized son to keep the estates open until he determined "in his sole discretion" that it would be in the best interests of the beneficiaries to close the

153. *Estate of Salter*, 545 F.2d at 501 (Godbold, J., concurring). Although the Service believed that the Fifth Circuit had incorrectly applied state law, it did not file a petition for a writ of certiorari. Action on Decision, No. CC-1977-78 (June 7, 1977) (LEXIS, Fedtax Library, AOD File).

154. 624 F.2d 1096 (5th Cir. 1980), *aff'g mem.* Estate of Newman v. Commissioner, 38 T.C.M. (CCH) 898 (1979).

155. Estate of Newman v. Commissioner, 38 T.C.M. (CCH) 898, 900-01 (1979).

156. Newman v. Internal Revenue Serv., 624 F.2d 1096 (5th Cir. 1980) (Table of Decisions Without Reported Opinions).

157. 890 F.2d 1329 (5th Cir. 1989).

158. *Id.* at 1333.

159. I.R.C. § 641(a)(3) (1988).

160. Treas. Reg. § 1.641(b)-3(a) (1960).

estates.[161] Armed with this ruling, son sought an income tax refund in the district court.

The district court granted the government's motion for summary judgment on the ground that the Service had properly treated the estates as closed for federal income tax purposes, despite the probate court ruling.[162] The Fifth Circuit affirmed, noting that because the government was not a party to the probate court proceeding, under *Bosch*, the ensuing order did not bind the government based on res judicata or collateral estoppel principles.[163] The Fifth Circuit then addressed the issue of "what degree of deference the district court should have accorded this state judgment."[164] The Fifth Circuit indicated that this issue can arise in two types of cases.

First, *Bosch* and similar cases involve a taxpayer whose federal tax liability turns on the characterization of a property interest under state law. Although the "greatest deference to state law is needed"[165] in this type of case, *Bosch* "adopted an *Erie* approach" in requiring only that the federal authorities give "proper regard" to a lower state court's adjudication of the property interest and "need not accept such rulings as conclusive."[166] Second, where "the federal tax law establishes a uniform criterion for taxing certain transactions or situations — irrespective of how state law might label those transactions or situations — the decision of a state probate court as to an underlying issue a fortiori should not be controlling."[167] The Fifth Circuit noted that in both types of cases "a federal court must make its own inquiry into relevant issues previously decided by a lower state court."[168]

The Fifth Circuit concluded that the issue of whether the administration of an estate has been unduly prolonged clearly fits within the second category as a question of federal law. However, the Fifth Circuit stated that, even here,

> because state law pervades every tax issue, it would not be accurate to say that a federal court is free to simply ignore a state court's adjudication of relevant underlying facts. The relevance of a state court's judgment to the resolution of a federal tax question will vary, depending on the particular tax statute involved as well as the nature of the state proceeding that produced the judgment.[169]

The Fifth Circuit then examined the nature of the probate court proceeding "to evaluate the judgment's relevance to this tax refund case and to determine whether the district court should have accorded it greater weight as an evidentiary factor."[170] Returning (without citing) to the analysis in *Bath*, the Fifth Circuit

161. *Brown*, 890 F.2d at 1335.
162. *Id.* at 1333.
163. *Id.* at 1341.
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.* at 1342.
170. *Id.*

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focused on various nonadversary characteristics of the probate court proceeding: (1) the government was not a party; and (2) all potential beneficiaries agreed that son's administration of the estate should continue (apparently because it was in their economic interests to do so).[171] As support for its statement that "[f]ederal courts have not looked favorably on taxpayer attempts to achieve post-death estate planning by employing nonadversary probate court proceedings that are essentially in the nature of consent decrees or advisory opinions,"[172] the Fifth Circuit cited only a dissenting opinion in *Bosch* and two pre-*Bosch* cases.[173]

The Fifth Circuit concluded that in these circumstances, the probate court "was not presented with all the relevant facts and differing views," and "the natural tendency of a busy probate court is to accede to a proposed order without great deliberation when all known interested parties are in agreement and when state interests are not adversely affected."[174] As a result, the probate court's decision was entitled to "little weight" in the district court because it merely "placed official approval on actions that [son] could have legally pursued without the [probate] court's direction" and "had no practical consequences apart from this federal tax controversy."[175]

In *Estate of Chagra v. Commissioner*,[176] decedent, a frequent and heavy gambler at two Las Vegas hotels, died with $400,000 of outstanding debts owing to the two hotels. Although the two hotels wrote off the gambling debts, the estate deducted the debts as claims against the estate. The Service disallowed the deduction and, one week before the Tax Court trial (and over nine years after the decedent's death), the estate obtained probate court approval of the debts as claims against the estate. The Tax Court concluded that the probate court misapplied state law because the gambling debts were unenforceable.[177] The Tax Court also relied on the nonadversary nature of the probate court proceeding.[178] The Fifth Circuit affirmed in an unpublished decision.[179]

G. Sixth Circuit

Although sixteen Sixth Circuit cases cite *Bosch*, only four arose in a tax setting.[180] Three of these cases considered the effect of a lower state court decision

171. *Id.*

172. *Id.* at 1342 n.15.

173. Old Kent Bank & Trust Co. v. United States, 362 F.2d 444, 450 (6th Cir. 1966); First Nat'l Bank & Trust Co. v. United States, 176 F. Supp. 768, 774-75 (M.D. Ala. 1959), *aff'd*, 285 F.2d 123 (5th Cir. 1961).

174. *Brown*, 890 F.2d at 1342.

175. *Id.*

176. 935 F.2d 1291 (5th Cir. 1991), *aff'g mem.* 60 T.C.M. (CCH) 104 (1990).

177. Estate of Chagra v. Commissioner, 60 T.C.M. (CCH) 104, 107 (1990).

178. *Id.* ("[P]etitioner's claims were filed ex parte. The probate court did not adjudicate anything but merely approved petitioner's uncontested document on the same day it was filed.").

179. Estate of Chagra v. Commissioner, 935 F.2d 1291 (5th Cir. 1991) (Table of Decisions Without Reported Opinions).

180. In Dennis v. Railroad Retirement Bd., 585 F.2d 151 (6th Cir. 1978), the Sixth Circuit gave "'special deference'" to a lower state court ruling in a Railroad Retirement Act case that turned on a

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in a subsequent federal tax controversy.[181] In the two cases that directly applied *Bosch*, the Sixth Circuit construed the "proper regard" standard as requiring independent review of the probate court's application of state law. In the first case, the Sixth Circuit held that the probate court had correctly applied state law, concluding that the highest court in the state would have affirmed the probate court's decision and that the Service could not "second-guess" the probate court. In the second case, the Sixth Circuit determined that the probate court had incorrectly applied state law without discussing the likely outcome of appeal in the state court system or the prohibition on "second-guessing." In the third case, the Sixth Circuit did not directly consider *Bosch* and gave "total regard" to the probate court's application of state law when it refused to "entertain a collateral attack" to the decision.

In *Underwood v. United States*,[182] decedent's will limited the compensation of his executors to 5% of the gross estate. The executors agreed to serve if they were given additional compensation, and the probate court approved compensation of 8%. The estate claimed an administration expense deduction for the full amount of the compensation under section 2053(a)(2). The Service disallowed the portion of the

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domestic relations issue. *Id.* at 154 (quoting Gray v. Richardson, 474 F.2d 1370, 1373 (6th Cir. 1973)). The Sixth Circuit held that federal courts must adhere to lower state court rulings if the following four requirements are satisfied: (1) the precise issue under consideration was determined by a state court of competent jurisdiction; (2) the state court proceeding was "genuinely contested"; (3) the issue is a domestic relations issue; and (4) the state court ruling is consistent with state law as announced by the highest court of the state. *Id.* This last requirement, in effect, requires a federal court to conduct a de novo review of state law.

181. In the other case, Trent v. United States, 893 F.2d 846 (6th Cir. 1990), *rev'g* 1990-1 U.S. Tax Cas. (CCH) ¶ 60,008 (S.D. Ohio 1987), *cert. denied*, 498 U.S. 814 (1990), decedent's will established a testamentary trust to fund alimony payments to his ex-wife. The balance of the trust income, as well as the remainder, would be paid to their children. In an uncontested probate court proceeding, ex-wife was granted an order modifying the alimony agreement to give her one-half of the value of the real estate in the trust, less the alimony previously paid to her in lieu of her interest in the trust. The estate deducted this amount as a claim against the estate under I.R.C. § 2053(a)(3). The Commissioner challenged the deduction on the ground that the modified alimony agreement did not create an enforceable debt under state law.

The district court held that the state court judgment created a valid debt and thus constituted a deductible claim against the estate. Trent v. United States, 1990-1 U.S. Tax Cas. (CCH) ¶ 60,008, at 84,213 (S.D. Ohio 1987). The district court rejected the Service's argument under *Bosch* that "where the Supreme Court of a state has not spoken the government is left free to interpret the property interest in any manner it chooses." Instead, the district court interpreted *Bosch* to mean that if the probate court decision "is an accurate expression of state law, it is binding on this court for federal tax purposes." *Id.* The district court then conducted a de novo review of state law and concluded that although the highest state court would have agreed with the probate court that the modified alimony agreement created an enforceable debt under state law, it would have reduced the amount of the alimony. *Id.* at 84,213-15.

On appeal, the government renewed its argument that the modified alimony decree did not create a deductible debt because, under *Bosch*, "the modified decree was not grounded on an enforceable right under state law." *Trent*, 893 F.2d at 851. In reversing the district court's decision, the Sixth Circuit stated that it did not have to resolve this issue because the modified alimony decree was void under state law as the probate court lacked jurisdiction. *Id.* at 851-53.

182. 407 F.2d 608 (6th Cir. 1969), *rev'g* 270 F. Supp. 389 (E.D. Tenn. 1967).

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deduction in excess of 5% of the gross estate on the ground that the probate court lacked authority to award compensation greater than that provided in the will.

The district court conducted a de novo review of state law and held that, under *Bosch*, probate court decrees are not controlling and a federal court "is free to make its own interpretation of state law[,] although decisions of other courts of the state may be persuasive."[183] The district court held that the terms of the will controlled the amount of the executors' compensation under state law.[184]

The Sixth Circuit reversed. After quoting from *Bosch* and conducting its own plenary review of state law, the Sixth Circuit differed with the district court's interpretation of state law. The Sixth Circuit concluded that "[w]e believe that the [state supreme court], given these facts, would have affirmed the action of the probate court in allowing the executors' fees."[185] However, in the last sentence of its opinion before the judgment, the Sixth Circuit cautioned that "the Government should not be permitted to second-guess the probate court."[186]

In *Krakoff v. United States*,[187] decedent's will left his entire estate to his wife. The nonprobate assets included several bank accounts and some stock owned jointly with his wife. Three months after decedent's death, wife renounced her rights as sole beneficiary under the will and instead accepted her one-third statutory share as surviving spouse. She then renounced her interest in the joint property, causing the joint property to pass through the decedent's probate estate. As a result of wife's election of her statutory share, the joint property passed one-third to wife and two-thirds to the couple's children. Wife obtained a declaratory judgment from the probate court confirming these effects of her renunciation of the joint property.[188]

The Service argued that wife's renunciation of her right to the joint accounts was not a valid disclaimer for gift tax purposes because it was ineffective under state law.[189] As a result, the Service contended that she made a taxable gift of two-thirds of the value of the joint property to the children. After an independent review of state law, the district court granted the Service's motion for summary judgment on the ground that where precedent from the highest court in the state contradicted the probate court, a federal court under *Bosch* was not required to follow the probate court's decision.[190] The district court did not cite *Underwood* or mention any limitation on "second-guessing" the probate court.

The Sixth Circuit affirmed and, after conducting its own de novo review of state law, agreed with the district court that the probate court's determination was

183. Underwood v. United States, 270 F. Supp. 389, 395 (E.D. Tenn. 1967).

184. *Id.* at 395-96.

185. *Underwood*, 407 F.2d at 611.

186. *Id.*

187. 439 F.2d 1023 (6th Cir. 1971), *aff'g* 313 F. Supp. 1089 (S.D. Ohio 1970); *see also* Krakoff v. United States, 431 F.2d 847 (6th Cir. 1970) (denying an interlocutory appeal requesting certification of state law issue because Ohio had no certification procedure).

188. *In re* Krakoff, 179 N.E.2d 566 (Ohio P. Ct. 1961).

189. *See* Treas. Reg. § 25.2511-1(c) (as amended in 1986).

190. Krakoff v. United States, 313 F. Supp. 1089, 1092-94 (S.D. Ohio 1970).

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incorrect as a matter of state law.[191] Like the district court, the Sixth Circuit did not cite *Underwood*, mention how the probate court's decision would have fared in the state court system on appeal, or discuss the limitation on "second-guessing" the probate court.[192]

The tax question in *Griffith v. Commissioner*[193] was whether taxpayer's payments to his ex-wife constituted deductible alimony or a nondeductible property settlement. In the divorce action, the state trial court ordered a lump sum payment as a property settlement which was affirmed by the state intermediate appellate court. While an appeal was pending in the state supreme court, the parties agreed to replace the lump sum payment with monthly payments to be made over twelve years, ostensibly to permit taxpayer to deduct the payments as alimony. The agreement was filed with the state trial court and reported as its final judgment in the case. After a review of the record and of state law, the Tax Court held that the subsequent agreement did not change the status of the payments as a property settlement as originally found by the state courts.[194]

On appeal, taxpayer argued that the payments could not be a property settlement because the couple lacked sufficient assets to support such a division. However, the Sixth Circuit, without citing *Bosch*, refused to "entertain a collateral attack" on the lower state courts' findings and affirmed the Tax Court's decision that the payments constituted a property settlement rather than alimony.[195]

H. Seventh Circuit

Although twenty-two Seventh Circuit cases cite *Bosch*, only four are tax-related.[196] Three of these cases considered the effect of a lower state court decision in a subsequent federal tax controversy.[197] Although the first case did not directly

191. *Krakoff*, 439 F.2d at 1025-28.

192. None of the later cases that cite *Underwood* mention the "second-guess" language. *See* Jeschke v. United States, 814 F.2d 568, 577 (10th Cir. 1987); Oetting v. United States, 712 F.2d 358, 361 (8th Cir. 1983); Ahmanson Found. v. United States, 674 F.2d 761, 770-71 (9th Cir. 1981); Paris v. United States, 381 F. Supp. 597, 600 (N.D. Ohio 1974); Estate of Ahlstrom v. Commissioner, 52 T.C. 220, 226 (1969).

193. 749 F.2d 11 (6th Cir. 1984), *aff'g* 46 T.C.M. (CCH) 189 (1983).

194. Griffith v. Commissioner, 46 T.C.M. (CCH) 189, 191-92 & 192 n.5 (1983).

195. Moreover, the Sixth Circuit emphasized that the crucial question was whether the divorce decree was intended as a property settlement, not whether the payments in fact actually effectuated a property division between the spouses. *Griffith*, 749 F.2d at 14.

196. Two of the nontax cases are habeas cases in which there was a prior state court adjudication of the defendant's guilt. In both cases, the Seventh Circuit relied on the *Bosch* "proper regard" standard in engaging in a de novo review of a lower state court's application of state law.

In Staten v. Neal, 880 F.2d 962 (7th Cir. 1989), the Seventh Circuit "consider[ed]" an intermediate state appellate court's application of state law. *Id.* at 964. After a lengthy examination of state law, the Seventh Circuit concluded that the habeas petition had "fail[ed] to refute the conclusion of the [intermediate state appellate court]." *Id.* at 965.

In Williams v. Lane, 826 F.2d 654 (7th Cir. 1987), the Seventh Circuit cited *Bosch* in refusing to follow an intermediate state appellate court's interpretation of state law in the face of contrary (but "dated") decisions of the state supreme court. *Id.* at 661-63.

197. The other case is White v. United States, 680 F.2d 1156 (7th Cir. 1982).

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consider *Bosch*, the Seventh Circuit adopted the Tax Court's opinion following the interpretation of state law made by the highest court of the state. In the two tax cases that directly applied *Bosch*, the Seventh Circuit interpreted the "proper regard" standard as requiring plenary review and concluded that the probate court had misapplied state law. In one case, the Seventh Circuit considered whether the highest court of the state would have affirmed the probate court's decision had there been an appeal and suggested that de novo review was particularly appropriate where the probate court decision was not the product of an adversary proceeding. In the other case, the Seventh Circuit employed independent review without discussing the fate of the probate court's decision on appeal in the state court system or the adversariness of the probate court proceeding.

In *Hatt v. Commissioner*,[198] taxpayer married an older woman who gave him a majority interest in a closely held business pursuant to an antenuptial agreement. Wife's ex-husband had a preexisting consulting and noncompetition agreement requiring the corporation to pay him a weekly salary. After making payments to ex-husband for several years, the corporation, at taxpayer's urging, terminated the agreement on the ground that the contract represented an improper use of corporate assets to pay a property settlement incident to divorce. Ex-husband prevailed in a state court breach of contract action, and the judgment was affirmed by the intermediate state appellate court. The Service denied the corporation's claimed business expense deduction for the payments to ex-husband on the same ground unsuccessfully urged by the corporation in the state court proceedings. The Tax Court concluded that, under *Bosch*, the state court litigation had established the validity of the agreement and it could not be questioned by the Service.[199] In a short per curiam opinion that did not cite *Bosch*, the Seventh Circuit affirmed and adopted the Tax Court's "meticulous" and "well considered opinion" in which it "fully concur[red]."[200]

In *Greene v. United States*,[201] the tax issue was whether the estate's debts, expenses, and taxes were to be paid out of the portion of the estate renounced by the surviving spouse (as the estate contended, thereby not reducing the marital deduction) or out of the entire estate (as the Service contended, thereby reducing the marital deduction). The probate court agreed with the estate's position that the debts, expenses, and taxes were to be paid out of the renounced portion of the estate.[202]

The estate contended that the probate court's decision bound the district court, relying on a pre-*Bosch* district court decision holding that a probate court decision was binding on a federal court even if the probate court had misapplied state law.[203] The district court noted that the case relied on by the estate had been

198. 457 F.2d 499 (7th Cir. 1972) (per curiam), *aff'g* 28 T.C.M. (CCH) 1194 (1969).

199. Hatt v. Commissioner, 28 T.C.M. (CCH) 1194, 1199-1200 (1969).

200. *Hatt*, 457 F.2d at 499.

201. 476 F.2d 116 (7th Cir. 1973), *aff'g* 336 F. Supp. 464 (E.D. Wis. 1971).

202. Greene v. United States, 336 F. Supp. 464, 466 (E.D. Wis. 1971).

203. *Id.* at 466-67 (citing Weyenberg v. United States, 135 F. Supp. 299, 302 (E.D. Wis. 1955)). "'The decision of the County Probate Court has become final. We cannot now sit as an appellate court to change the result of that decision. . . . What the County Court should have done in the light of [a

"rather narrowly circumscribed" by *Bosch*.[204] As a result, the district court stated that it was "not bound" by the probate court decision, and that the *Bosch* "proper regard" standard empowered the district court to "'reexamine the facts and state law found in the . . . state court proceeding . . . [and to] . . . decide the state law . . . where the underlying substantive rule involved is based on state law and there is no decision by the highest [state] court . . . as to such law.'"[205] After a lengthy examination of state law, the district court concluded that the probate court had misapplied state law and that the debts, expenses, and taxes were payable out of the entire estate.[206]

On appeal, the estate argued that the district court had not given "proper regard" to the probate court's decision as required by *Bosch*. The Seventh Circuit noted that "the district court disagreed with the decision of [the probate] court, concluding that the [state] Supreme Court would have decided the case differently if there had been a party who had taken an appeal, and consequently decided not to follow it."[207] After a de novo review of state law, the Seventh Circuit agreed with the district court's conclusion that the probate court had misapplied state law.[208] In addition, the Seventh Circuit noted that "the record contains no indication of what reasoning or case law the state court relied upon in reaching its decision, or what 'relevant rulings' had been made by the 'other courts of the State.'"[209] The Seventh Circuit concluded that "[t]he district court may have also determined that the state court decision was not tempered by a "'genuinely adversarial proceeding,' for appellant did not contest the government's representation on this appeal that no appearance was entered for the [other legatees under the will] in the state probate court proceeding."[210]

In *Estate of Kraus v. Commissioner*,[211] husband in 1970 created a marital trust that would have qualified for the marital deduction upon his death. Seven years later, husband amended the trust in response to the Tax Reform Act of 1976. However, the amended trust failed to qualify for the marital deduction because it did not give the surviving spouse a general power of appointment. Both the original trust and amended trust were prepared by the decedent's cousin who was an attorney specializing in estate planning.[212] Husband died four years later, and the estate claimed on the estate tax return that the trust qualified for the marital deduction. After the Service disallowed the marital deduction and assessed a deficiency, the

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contrary state supreme court decision] has become a moot issue.'" *Id.* (quoting *Weyenberg*, 135 F. Supp. at 302).

204. *Id.* at 467.

205. *Id.* (quoting JACOB MERTENS, LAW OF FEDERAL GIFT AND ESTATE TAXATION § 10.23, at 343 (Supp. 1970)).

206. *Greene*, 366 F. Supp. at 468.

207. *Greene*, 476 F.2d at 119.

208. *Id.*

209. *Id.*

210. *Id.* at 119-20 (quoting Justice Harlan's dissenting opinion in Commissioner v. Estate of Bosch, 387 U.S. 456, 481 (1967) (Harlan, J., dissenting)).

211. 875 F.2d 597 (7th Cir. 1989), *aff'g* 55 T.C.M. (CCH) 600 (1988).

212. Estate of Kraus v. Commissioner, 55 T.C.M. (CCH) 600, 601 (1988).

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attorney, on behalf of the surviving spouse, petitioned the probate court to reform the amended trust to qualify for the marital deduction. The petition asserted that the decedent intended the trust to qualify for the marital deduction and that it failed to do so because of a scrivener's error. After hearing the petition at a motion call with only the attorney present, the probate court granted the requested reformation.[213]

The estate argued, based on *Bosch*, that the Tax Court was required to respect the probate court's reformation of the trust to satisfy the requirements for the marital deduction. The Tax Court engaged in a lengthy de novo review of state law and concluded that the probate court misapplied state law in reforming the trust.[214]

The Seventh Circuit explained its standard of review on appeal as follows: "Our job is to determine *de novo* whether the Tax Court applied the governing [state] law and then to determine whether the Tax Court's application of [state] law to these facts was clearly erroneous."[215] The Seventh Circuit cited *Bosch* and *Greene* for the proposition that a lower state court's reformation was not binding on the Tax Court "because only the state's highest court can make a ruling on state law that binds the federal courts."[216] The Seventh Circuit noted that under *Bosch*, "[t]he Tax Court was *only* required to give 'proper regard' to the [probate] court's ruling."[217] After reviewing the record and engaging in a de novo review of state law, the Seventh Circuit concluded that "the Tax Court gave 'proper regard' to the state court's ruling, despite the fact that the Tax Court reached a result different from that of the state court."[218]

Although the Seventh Circuit cited *Greene*, it did not mention the fate of the probate court's decree had there been an appeal in the state court system or the special factors supporting de novo review in that case. However, the Tax Court's recitation of the facts in *Kraus* demonstrates that no reasoning or support for the probate court's decision (it was issued at a motion session) was given and that the probate court decision was not the product of a genuine adversary proceeding (the decedent's children and surviving spouse consented to the relief requested in the petition, and only the estate's attorney appeared at the motion session).

I. Eighth Circuit

Of the six Eighth Circuit cases that cite *Bosch*, four are tax cases. However, two of the four tax cases did not specifically address the issue of the degree of deference that federal courts must give to a state court's interpretation of state law in federal

213. *Id.* at 601-02.
214. *Id.* at 603-04.
215. *Estate of Kraus*, 875 F.2d at 600.
216. *Id.*
217. *Id.* at 600-01 (emphasis added).
218. *Id.* at 601. Although the Seventh Circuit stated that it might "quibble" with one of the Tax Court's findings, it was not "'left with the definite and firm conviction that a mistake has been committed.'" *Id.* at 601-02 (quoting United States v. United States Gypsum Co., 333 U.S. 364, 394-95 (1948)).

tax cases.[219] In the remaining two cases, the Eighth Circuit engaged in de novo review and concluded that the probate court had correctly applied state law.

In *Keinath v. Commissioner*,[220] son disclaimed his remainder interest in a trust established upon the death of father in 1944. The trust provided a life estate for mother, with vested remainders of one-half of the trust to each of son and brother. If the remaindermen did not outlive their mother, the trust provided that their one-half share would be distributed to their children. In 1963, two months after the death of mother, son signed a document purporting to disclaim his interest in the trust. The disclaimer was filed three-and-one-half months later in state probate court at a hearing held to determine the effect of the disclaimer. The probate court ruled that the disclaimer was valid and timely under state law and thus the trust proceeds passed to son's children.[221]

The Service asserted that the disclaimer was not timely because it occurred nineteen years after the appellant knew that he would inherit the trust proceeds if he survived mother. At the time, a disclaimer was effective for federal tax purposes if it was "effective under local law" and "made within a reasonable time after knowledge of the existence of the transfer."[222] The Service argued that the disclaimer failed both requirements and, as a result, son had made a taxable gift to his children.

The Tax Court noted that, under *Bosch*, it was not bound by the determination of the state probate court.[223] However, the Tax Court avoided the issue of the validity of the disclaimer under state law and decided the case on the ground that the disclaimer was not made within a "reasonable time" as a matter of federal tax law.[224]

The Eighth Circuit reversed, concluding that the federal tax law looked to state law to determine whether the disclaimer was made within a "reasonable time."[225] The Eighth Circuit stated that, under *Bosch*, "federal courts are not bound by a particular decision of a state court regardless of whether the adjudication was

219. Elmore v. United States, 843 F.2d 1128 (8th Cir. 1988); Estate of Brandon v. Commissioner, 828 F.2d 493 (8th Cir. 1987), *rev'g* 86 T.C. 327 (1986).

220. 480 F.2d 57 (8th Cir. 1973), *rev'g* 58 T.C. 352 (1972).

221. Keinath v. Commissioner, 58 T.C. 352, 356 (1972).

222. Treas. Reg. § 25.2511-1(c) (as amended in 1986). Today, I.R.C. § 2518 provides detailed rules governing the validity of disclaimers for federal tax purposes. I.R.C. § 2518 (1988). Section 2518(b)(2) replaced the "reasonable time after knowledge of existence of the transfer" standard of the regulations with a requirement that the disclaimer be made within nine months of the earlier of (1) the date on which the transfer creating the interest in such person was made, or (2) the day on which such person attained the age of 21. *Id.* § 2518(b)(2). The legislative history of § 2518 criticized *Keinath*, H.R. REP. NO. 1380, 94th Cong., 2d Sess. 3, 66, *reprinted in* 1976-3 C.B. 735, 800, and the Supreme Court rejected the *Keinath* approach, Jewett v. Commissioner, 455 U.S. 305 (1982). *See also* Paul L. Caron, *The Lurking Retroactivity Issues in* Irvine, 61 TAX NOTES 1109, 1109-10 (1993).

223. *Keinath*, 58 T.C. at 356.

224. *Id.* at 357-58 ("We probably could wade through the morass of case law from other jurisdictions and discover the Minnesota rule; however, we believe that we can decide this case on a less precarious ground.").

225. *Keinath*, 480 F.2d at 62.

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nonadversary, consensual, or collusive[,] but instead must apply what they find the state law to be, giving *proper consideration* to the lower state court's interpretation."[226] After a lengthy de novo review of state law, the Eighth Circuit agreed with the probate court's view of state law that the period for disclaiming a remainder interest commenced with the death of the life tenant and that six months from that date was a "reasonable time."[227]

In *Folkerds v. United States*,[228] husband left the residue of his estate outright to wife. The estate claimed a marital deduction for the amount of the residue remaining after application of the state's general abatement statute pursuant to the probate court's decision. The Service disallowed the marital deduction on the ground that there was no residue remaining after application of the state's special abatement statute.

In the district court, the estate contended that the Service "failed to give the decision of the State [probate] court 'proper regard'" under *Bosch*.[229] However, the district court believed that a "fair reading of the *Bosch* decision indicates that the weight to be given state [lower] court opinions depends upon the extent to which the action in the state court was contested or, in other words, whether the action was 'a bona fide adversary proceeding.'"[230] Because the probate court decision was the result of a nonadversary proceeding, the district court gave it "very little weight."[231] After a lengthy examination of state law, the district court concluded that the probate court had wrongly applied the general abatement statute.[232] On appeal, the Eighth Circuit, without citing *Bosch*, took a contrary view of state law and reversed.[233]

J. Ninth Circuit

Seven of the thirty Ninth Circuit cases that cite *Bosch* are tax cases.[234] However-

226. *Id.* at 62 n.7.

227. *Id.* at 62-65.

228. 494 F.2d 749 (8th Cir. 1974), *rev'g* 369 F. Supp. 1176 (N.D. Iowa 1973).

229. Folkerds v. United States, 369 F. Supp. 1176, 1179 (N.D. Iowa 1973).

230. *Id.*

231. *Id.*

232. *Id.* at 1179-82.

233. *Folkerds*, 494 F.2d at 751-53. In its only mention of the probate court decision, the Eighth Circuit noted that the abatement issue was "not a matter of controversy" in that proceeding. *Id.* at 751 n.4.

234. In two of the nontax cases, the parties had participated in prior state court litigation. In De Jong Packing Co. v. United States Dep't of Agric., 618 F.2d 1329 (9th Cir.), *cert. denied*, 449 U.S. 1061 (1980), a state court ruled that because the company purchased cattle under "subject" sale terms, it was not required to pay for condemned cattle under state contract law. *Id.* at 1333. In a subsequent Packers and Stockyards Act proceeding, the Ninth Circuit held, under *Bosch*, that the state court adjudication did not result in claim preclusion or issue preclusion because the state's decision "was based on the state's regulatory program rather than the federal program and the federal government was not party to the state court proceedings." *Id.* at 1337. As a result, the administrative law judge was free to conclude that the sale proceedings were conducted under "as is" rather than "subject" terms. *Id.*

In Preaseau v. Prudential Ins. Co., 591 F.2d 74 (9th Cir. 1979), a state court denied an insurance company's summary judgment motion in an action to compel payment under a personal accident policy.

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er, six of the tax cases did not involve a prior state proceeding raising a state law question at issue in the subsequent federal tax litigation.[235] In the remaining tax

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Two years later, the insurance company removed the case to federal district court. *Id.* at 75. The Ninth Circuit affirmed the district court's ruling that the insurance company timely filed its petition for removal and refused the plaintiff's motion for remand to the state court. *Id.* at 78-79. The Ninth Circuit also upheld the district court's ruling of summary judgment in favor of the insurance company, noting that under *Bosch* "this court has an independent duty to interpret and apply state law in accordance with applicable state precedent." *Id.* at 83 n.9. The court did not accept plaintiff's argument that "because the issue here is one of interpreting state law, we should defer to the state court's 'decision.'" *Id.*

235. Estate of Heim v. Commissioner, 914 F.2d 1322 (9th Cir. 1990), *aff'g* 56 T.C.M. (CCH) 146 (1988); Elder v. Commissioner, 727 F.2d 857 (9th Cir. 1984), *aff'g* 43 T.C.M. (CCH) 508 (1982); Ahmanson Found. v. United States, 674 F.2d 761 (9th Cir. 1981); Manalis Fin. Co. v. United States, 611 F.2d 1270 (9th Cir. 1980), *aff'g* 442 F. Supp. 579 (C.D. Cal. 1977); Hibernia Bank v. United States, 581 F.2d 741 (9th Cir. 1978); Robinson v. United States, 518 F.2d 1105 (9th Cir. 1975), *rev'g* 369 F. Supp. 925 (D. Mont. 1973).

In *Elder*, the state court entered a divorce decree awarding wife a promissory note. Husband's appeal to the state appellate court was unsuccessful, and he failed to make payments on the note. Husband and wife then entered into a settlement agreement to amend the divorce decree by giving wife a minority stock position in the family business and canceling the promissory note. Pursuant to this agreement, the state court modified the divorce decree, nunc pro tunc, as of the date of the first judgment, giving wife 38% of the stock and husband 62% of the stock. The company then redeemed wife's shares for cash pursuant to an agreement entered into the day before the settlement and court order. Elder v. Commissioner, 43 T.C.M. (CCH) 508, 509 (1982).

The Tax Court rejected the Service's argument that the stock redemption constituted a constructive dividend to husband as payment in satisfaction of husband's liability on the note. The Tax Court emphasized that the Service had not challenged the state court's power to modify its own order and cancel husband's liability on the note. *Id.* at 510. On appeal, the Service argued that the state court had exceeded its authority in modifying the divorce decree and that, under *Bosch*, the Tax Court should not have given effect to the nunc pro tunc order. The Ninth Circuit refused to address this argument because it was not made below. *Elder*, 727 F.2d at 859.

In *Ahmanson Found.*, estate and wife reached a settlement agreement in compromise of wife's community property claims. The estate argued that the amount wife received pursuant to the settlement agreement qualified for the marital deduction. The Service contended that, under *Bosch*, "if a state court adjudication as a result of a good faith adversary proceeding is not binding for estate tax purposes, then a fortiori a private good faith settlement cannot be either." *Ahmanson Found.*, 674 F.2d at 774. The Ninth Circuit agreed and held that, under *Bosch*, the court had to reexamine the question of whether wife had an enforceable right under state law to community property passing outside the will. *Id.* at 774-75.

In *Manalis Fin. Co.*, the district court held that Lender's perfected security interest in Hospital's account receivables had priority over a federal tax lien. Manalis Fin. Co. v. United States, 442 F. Supp. 579, 582 (C.D. Cal. 1977). The district court stated that, under *Bosch*, it was not bound by dictum in an intermediate state court decision giving priority to a state tax lien. The district court refused to follow this decision because it departed from the language of the state statute. *Id.* In affirming, the Ninth Circuit relied on the *Bosch* "proper regard" standard and noted that the state court's dictum was not "considered dictum." *Manalis Fin. Co.*, 611 F.2d at 1272-73.

In *Hibernia Bank*, the executor borrowed funds to maintain decedent's mansion and deducted the interest as administration expenses. The executor argued that the probate court's approval of payment of the interest as administration expenses made them deductible for federal estate tax purposes. Affirming the district court, the Ninth Circuit held that state law was not the exclusive test for deductibility and that the expense here was not a valid "administration expense" for federal tax purposes. *Hibernia Bank*, 581 F.2d at 744.

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case, the Ninth Circuit summarily affirmed a Tax Court decision holding that a lower state court had correctly applied state law.

In *Smith v. Commissioner*,[236] taxpayer agreed to sell certain assets to buyer pursuant to a sales contract containing a liquidated damages clause. Upon buyer's default, taxpayer claimed the amount provided for in the contract as liquidated damages. Buyer contested the enforceability of the liquidated damages clause in state court on the ground that taxpayer's actual damages were less than 10% of the amount claimed as liquidated damages. Taxpayer argued that the liquidated damages clause was enforceable because the potential damages from a breach of contract were uncertain and incapable of reasonable ascertainment. The state trial court agreed and enforced the liquidated damages clause. While buyer's appeal was pending in the state supreme court, the parties reached a settlement whereby taxpayer retained 60% of the amount claimed as liquidated damages. The settlement agreement recited the "conflict in judicial determination of the issues on appeal" and characterized the 60% payment as the amount of actual damages suffered by taxpayer from buyer's breach of contract.[237]

The Service claimed that the amount received by taxpayer pursuant to the settlement agreement was in the nature of liquidated damages and thus taxed as ordinary income. Taxpayer contended that the payments should be taxed as capital gain because they were received as actual damages to the capital asset property subject to the sales agreement. The Tax Court noted that taxpayer's argument was inconsistent with its position taken in (and sustained by) the state trial court that the payments were for liquidated damages because actual damages were uncertain and incapable of reasonable ascertainment.[238] Although the Tax Court was "not bound by the [s]tate court's decision" under *Bosch*, it concluded that the state court's decision was "clearly correct."[239] The Ninth Circuit affirmed in a two paragraph per curiam opinion that did not cite *Bosch* or refer to the state court's decision.[240]

K. Tenth Circuit

Of the fifteen Tenth Circuit cases that cite *Bosch*, eight are tax cases. However, three of the eight tax cases did not directly consider the amount of deference that federal courts must give to a state court's interpretation of state law in subsequent federal tax cases.[241] In the remaining five tax cases, the Tenth Circuit interpreted

236. 418 F.2d 573 (9th Cir. 1969) (per curiam), *aff'g* 50 T.C. 273 (1968).

237. Smith v. Commissioner, 50 T.C. 273, 278 (1968).

238. *Id.*

239. *Id.* at 282.

240. *Smith*, 418 F.2d at 574. In an unpublished decision, the Ninth Circuit indicated that, under *Bosch*, a probate court's decision in a case involving other parties could not be disregarded absent "persuasive data" that the highest court of the state would rule otherwise. United States v. Pirrie, No. 71-1146, slip op. at 2 (9th Cir. Sept. 12, 1973). In its Action on Decision, the Service contended that the Ninth Circuit misconstrued *Bosch* in treating "an unrelated probate court decree as if it were an intermediate appellate court pronouncement." Action on Decision (Nov. 16, 1973) (LEXIS, Fedtax Library, AOD File, at *2).

241. Dolese v. United States, 605 F.2d 1146 (10th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980); Imel v. United States, 523 F.2d 853 (10th Cir. 1975); Estate of Wycoff v. Commissioner, 506 F.2d 1144

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the "proper regard" standard as requiring independent review of the probate court's application of state law. After such de novo review, the Tenth Circuit held that the probate court had misapplied state law in three of these cases, and had correctly applied state law in the other two cases.

In *First National Bank v. United States*,[242] the probate court approved payment of a claim against the estate. The Service asserted that the claim was not deductible by the estate because it was not allowable by state law under section 2053(a)(3), despite the probate court holding to the contrary. The district court noted that, prior to *Bosch*, the traditional rule in such a case was that "federal authorities would accept a determination of property interests made at the state trial court level if the determination was made in an adversary proceeding absent any collusion of the parties."[243] The district court characterized *Bosch* as holding that "if the district court is not satisfied with the state determination, then it is not bound by such determination and it may redetermine the property interests."[244] After reviewing state law, the district court concluded that the probate court had correctly applied state law and thus the claim was deductible under section 2053(a)(3).[245] The Tenth Circuit affirmed and, after a de novo review of state law, agreed that "proper

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(10th Cir. 1974), *cert. denied*, 421 U.S. 1000 (1975).

In *Dolese*, the Tenth Circuit suggested that a state trial court determination carries no weight in a federal tax proceeding because the Service is not a party to the state proceeding. In that case, a state trial court ordered three corporations and the sole beneficial owner to each pay one-fourth of the legal expenses of the owner's divorce and related proceedings. The Service disallowed the corporations' claimed deductions of the expenses as ordinary and necessary business expenses and treated the payments as constructive dividends to the owner. *Dolese*, 605 F.2d at 1149. In affirming the district court's grant of summary judgment to the Service on this issue, the Tenth Circuit stated that, under *Bosch*, "[t]he state trial court had power under state law to impose the payment obligations upon the corporation, but such a court cannot determine the federal tax consequences in an action to which the United States was not a party." *Id.* at 1152.

In *Imel*, the district court had certified to the state supreme court a state law question that controlled the federal tax consequences of a transfer of appreciated property pursuant to a divorce decree. The Tenth Circuit affirmed the district court's conclusion, based on the state supreme court's answer to the certified question, that the transfer was not a taxable event under United States v. Davis, 370 U.S. 65 (1962). *Imel*, 523 F.2d at 854. The Tenth Circuit cited *Bosch* along with other cases for the proposition that although state law creates legal interests and rights, federal law determines the federal tax treatment of those interests or rights created by state law. *Id.* at 855.

In *Wycoff*, the Tenth Circuit upheld the Tax Court's judgment that the amount of the estate's claimed marital deduction had to be reduced by the amount of death taxes paid by the estate even though the state probate court had ruled that these taxes had to be paid from the nonmarital trust portion of the estate. The Tenth Circuit held that although "the apportionment of payment of death taxes is governed by state law," "[t]he value of the marital deduction and the effect of death taxes upon the extent of the marital deduction are to be determined as a matter of federal law." *Wycoff*, 506 F.2d at 1149, 1149 n.4. The Tenth Circuit cited *Bosch* for the "relevant rule of construction" that the marital deduction is to be strictly construed. *Id.* at 1149.

242. 422 F.2d 1385 (10th Cir. 1970), *aff'g* 1969-1 U.S. Tax Cas. (CCH) ¶ 12,589 (D.N.M. 1969).

243. First Nat'l Bank v. United States, 1969-1 U.S. Tax Cas. (CCH) ¶ 12,589, at 84,892 (D.N.M. 1969).

244. *Id.*

245. *Id.*

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application of *Commissioner v. Estate of Bosch* [did] not require a retrial of the issue of [the] validity and enforceability [of the claim]."[246]

In *Kasishke v. United States*,[247] the probate court, "as a matter of routine,"[248] again approved payment of a claim against the estate. The district court stated that, under *Bosch*, it was not bound by the probate court's decree. After an independent review of state law, the district court concluded that the probate court had misapplied state law. Instead, the district court held that the claim was not allowable under state law and thus not deductible under section 2053(a)(3).[249]

The Tenth Circuit affirmed, stating that under *Bosch*, a "federal court is *not necessarily* bound by the decree of the state probate court."[250] The Tenth Circuit noted that "[i]n the absence of a controlling decision by the state court, a federal district court's interpretation of local state law will be disturbed on appeal only if the appellate court is convinced that the interpretation is clearly erroneous."[251] The Tenth Circuit apparently believed that the state probate court decree was not a "controlling decision" and affirmed because it was not convinced that the district court's interpretation of state law was clearly erroneous.[252]

In *Murrah v. Wiseman*,[253] decedent died owning 50% of the stock of a closely held company which his executors included as part of his estate. Four months later, the executors obtained a probate court ruling that decedent's wife had acquired a portion of this stock as marital property during the four-year period that the community property laws of the state were in effect. The district court held that the probate court had misapplied state law and denied the executors' refund claim.[254] The Tenth Circuit affirmed, concluding after a de novo examination of state law that "this is an instance where [the federal district] court properly declined to be bound by the order of the probate court."[255]

In *Estate of Goldstein v. Commissioner*,[256] a state probate court permitted an incompetent widow to elect to take one-half of the decedent's estate even though the election was untimely pursuant to state statute.[257] The Tax Court denied the estate's claimed marital deduction on the ground that the probate court improperly allowed the election as a matter of state law.[258] The Tenth Circuit reversed after a de novo review of state law, convinced that the probate court's action was consistent with state law.[259]

246. *First Nat'l Bank*, 422 F.2d at 1387.
247. 426 F.2d 429 (10th Cir. 1970), *aff'g* 1969-1 U.S. Tax Cas. (CCH) ¶ 12,597 (N.D. Okla. 1969).
248. Kasishke v. United States, 1969-1 U.S. Tax Cas. (CCH) ¶ 12,597, at 84,922 (N.D. Okla. 1969).
249. *Id.* at 84,922-23.
250. *Kasishke*, 426 F.2d at 435.
251. *Id.*
252. *Id.* at 435-36.
253. 449 F.2d 187 (10th Cir. 1971), *aff'g* 1970-2 U.S. Tax Cas. (CCH) ¶ 12,696 (W.D. Okla. 1970).
254. Murrah v. Wiseman, 1970-2 U.S. Tax Cas. (CCH) ¶ 12,696, at 84,904-05 (W.D. Okla. 1970).
255. *Murrah*, 449 F.2d at 190.
256. 479 F.2d 813 (10th Cir. 1973), *rev'g* 30 T.C.M. (CCH) 1399 (1971).
257. Estate of Goldstein v. Commissioner, 30 T.C.M. (CCH) 1399, 1400 (1971).
258. *Id.* at 1403-05.
259. *Estate of Goldstein*, 479 F.2d at 816-20.

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In *Estate of Selby v. United States*,[260] husband died five months after wife. Wife's estate passed to husband, thus escaping any estate tax liability because of the marital deduction. However, husband's estate (which included the assets received from wife's estate) incurred estate tax. Two days after husband's death, husband's executor petitioned the state probate court to approve a disclaimer renouncing all of husband's rights and interests in wife's estate. Although the disclaimer was untimely because it was filed after the period prescribed by state statute, the probate court approved the disclaimer, citing "extraordinary circumstances" and a desire "to preserve the equitable treatment of all beneficiaries involved."[261] The disclaimer did not affect the ultimate disposition of the property and was made solely to reduce the estate tax on the combined estates.[262]

The district court granted the estate's claim for a refund. The district court deferred to the state court's interpretation of state law in the interest of "maintain[ing] proper federal-state comity[,]"[263] and assumed "that the [probate] judge knew the [state] law."[264] In its Action on Decision,[265] the Service argued that the district court's blind acceptance of the probate court's decision "was clearly erroneous as a matter of law and warrant[ed] appellate review."[266]

The Tenth Circuit reversed, stating that although it "underst[ood] and appreciate[d] the district court's concern," such concern did "not permit the federal courts to defer entirely without review."[267] The Tenth Circuit observed that "[t]he problem of what effect must be given a state court decree where the matter decided there is determinative of federal estate tax consequences has long burdened the Bar and the courts."[268] *Bosch* was "directly relevant" because the probate proceeding was ex parte, was invoked to effect federal estate tax liability, and was concerned with the application of the marital deduction.[269] The Tenth Circuit stated that, "in accordance with *Bosch*, we must review the district court's decision in order to determine whether the regard it gave to the state proceeding was 'proper,' and whether it applied the correct state law."[270]

This sentence provided the framework for the court's analysis: First, did the district court give "proper regard" to the probate court's decision? Second, did the probate court[271] correctly apply state law? Unfortunately, the Tenth Circuit did not

260. 726 F.2d 643 (10th Cir. 1984).
261. *Id.* at 645.
262. *Id.* at 644-45.
263. *Id.*
264. *Id.*
265. Action on Decision, No. CC-1981-85 (Mar. 19, 1981) (LEXIS, Fedtax Library, AOD File).
266. *Id.* at *2.
267. *Selby*, 726 F.2d at 645.
268. *Id.* The court made the curious comment that *Bosch* "recognized a federal power of review in this realm that was broader than in areas not having federal tax consequences." *Id.* (citing Caron, *Reformulating Complementary Roles*, *supra* note 44, at 985-88).
269. *Id.*
270. *Id.* at 646.
271. The Tenth Circuit awkwardly refers to "it," which technically refers to the district court. However, this interpretation does not make sense because the district court here did not apply state law;

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discuss the degree of deference that a federal court must give to a state court's interpretation of state law in a federal tax case under the "proper regard" standard. However, the Tenth Circuit embarked on a de novo examination of state law and concluded that "there was *no* justification in [state] law for the probate court's grant of the Order of Disclaimer and the reopening of [wife's] estate to receive the previously distributed assets."[272]

L. Eleventh Circuit

The two Eleventh Circuit cases that cite *Bosch* are not tax cases. However, the Eleventh Circuit has adopted as binding precedent all decisions by the Fifth Circuit through September 30, 1981.[273] As a result, the Eleventh Circuit would treat the "proper regard" standard as requiring plenary review of a probate court's application of state law under the pre-1981 Fifth Circuit decisions discussed previously in this article.[274] In addition, the uncertainty in the Fifth Circuit carries over to the Eleventh Circuit. One of the two Fifth Circuit decisions relying on the adversary proceedings test was a pre-1981 decision,[275] and the sole Fifth Circuit decision requiring the federal court to determine whether the state supreme court would have affirmed the probate court's decree had there been an appeal also was a pre-1981 decision.[276]

M. Federal Circuit

Of the twelve Federal Circuit[277] cases that cite *Bosch*, eight are tax cases. However, only one of the tax cases involved a prior state court proceeding.[278] In that case, after de novo review, the Court of Claims held that the probate court had properly applied state law.

In *Sun First National Bank v. United States*,[279] grantor established a trust in 1941 that named herself as life income beneficiary. The trust consisted primarily of stock that five years earlier had been valued at $11,000. In 1965, the trust sold

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the district court merely accepted the probate court's interpretation of state law. More fundamentally, the inquiry under *Bosch* is whether the probate court correctly applied state law; the question of whether the district court correctly applied state law would bear only on whether the federal appellate court must give any deference to the district court's interpretation of state law.

272. *Id.* at 648 (emphasis added).

273. Bonner v. City of Prichard, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

274. *See supra* notes 123-56 and accompanying text.

275. Brown v. United States, 890 F.2d 1329 (5th Cir. 1989); Bath v. United States, 480 F.2d 289 (5th Cir. 1973).

276. Estate of Salter v. Commissioner, 545 F.2d 494 (5th Cir. 1977).

277. For purposes of this discussion, the decisions of the former court of claims are included because they are treated as binding precedent in the federal circuit pursuant to South Corp. v. United States, 690 F.2d 1368, 1370-71 (Fed. Cir. 1982) (en banc).

278. The other seven tax cases are Farley v. United States, 581 F.2d 821 (Ct. Cl. 1978); Bautzer v. United States, 1975-1 U.S. Tax Cas. (CCH) ¶ 9246 (Ct. Cl. 1975) (per curiam); Lewis v. United States, 485 F.2d 606 (Ct. Cl. 1973); Carver v. United States, 412 F.2d 233 (Ct. Cl. 1969) (per curiam); Landorf v. United States, 408 F.2d 461 (Ct. Cl. 1969); Henley v. United States, 396 F.2d 956 (Ct. Cl. 1968); Boyce v. United States, 405 F.2d 526 (Ct. Cl. 1968) (Skelton, J., dissenting).

279. 607 F.2d 1347 (Ct. Cl. 1979).

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the stock for $1.5 million in cash and $4.8 million in fifteen promissory notes payable annually from 1966 through 1980. The trustee treated this gain as income rather than as an addition to the corpus of the trust and distributed most of it to the income beneficiary. In 1967, a probate court approved the treatment of the trust gain as income in the course of reviewing an accounting upon the resignation of the trustee. Consistent with this ruling, for federal income tax purposes the trust reported the gain from the notes as income during 1966 through 1972, and the grantor reported amounts received as income from the trust.[280]

After grantor's death in 1968, the Tax Court held that the corpus of the trust was includible in her estate because she had retained a life interest within the meaning of section 2036.[281] The trust then filed a refund claim for 1969 through 1972 on the ground that the post-death payments on the notes constituted income in respect of a decedent (IRD) that gave rise to a deduction to the trust (as the recipient of the income) for the estate tax paid on that income. The Service rejected the refund claim because it did not treat the gain on the notes as IRD.[282]

The IRD determination turned in part on whether the trust properly treated the entire gain on the sale of the stock as allocable to income rather than corpus. After a de novo review of state law, the Court of Claims held that the government did not prove that the probate court had misapplied state law.[283] However, the Court of Claims also relied in part on the lack of any tax motivation on the part of the trustee in pursuing the probate court action.[284]

In dissent, Judge Skelton argued that the majority had misread the probate court's decision. Instead, Judge Skelton interpreted the probate court's decision in a manner that was consistent with his view of state law.[285] Moreover, Judge Skelton contended that the probate court decision was not entitled to "any weight" in light of the nonadversary nature of the proceedings.[286]

N. Conclusion

The following chart provides a circuit-by-circuit summary of the federal courts of appeals' application of the *Bosch* "proper regard" standard over the past twenty-five years. In particular, the chart notes whether a particular circuit (1) has followed the state court judge's interpretation of state law; and (2) has considered the adversariness of the state court proceeding in applying the "proper regard" test.

280. *Id.* at 1348-49.

281. Estate of Anderson v. Commissioner, 32 T.C.M. (CCH) 1164 (1973).

282. *Sun First Nat'l Bank*, 607 F.2d at 1349. The parties' arguments reversed the typical IRD contentions where the Service claims that items are IRD (and thus taxable to the recipients) and the taxpayer denies that the items constitute IRD (and thus not taxable to the recipients).

283. *Id.* at 1354.

284. *Id.*

285. *Id.* at 1364-65 (Skelton, J., dissenting).

286. *Id.* at 1366.

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TABLE 2 - SUMMARY OF *BOSCH* IN THE FEDERAL COURTS OF APPEALS			
Circuit	**Case**	**Follow State Court on State Law?**	**Rely on Adversariness?**
D.C.	-	-	-
First	*Estate of Draper* 536 F.2d 944 (1976)	Yes	-
	Estate of Abeley 489 F.2d 1327 (1974)	No	Yes
Second	*Estate of Foster* 725 F.2d 201 (1984)	No	-
	Lemle 579 F.2d 185 (1978)	No	Yes
	Magavern 550 F.2d 797 (1977)	No	-
	Bosurgi 530 F.2d 1105 (1976)	-	Yes
	Estate of Bosch 382 F.2d 295 (1967)	No	-
Third	*Estate of Hamilton* 577 F.2d 726 (1978)	No	-
	Estate of Leggett 418 F.2d 1257 (1969)	Yes	-
Fourth	*Estate of Dancy* 872 F.2d 84 (1989)	-	-
	Sappington 408 F.2d 817 (1969)	No	-
Fifth	*Estate of Chagra* 935 F.2d 1291 (1991)	No	-
	Brown 890 F.2d 1329 (1989)	No	Yes
	Estate of Newman 624 F.2d 1096 (1980)	No	-

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TABLE 2 - SUMMARY OF *BOSCH* IN THE FEDERAL COURTS OF APPEALS			
Circuit	Case	Follow State Court on State Law?	Rely on Adversariness?
	Estate of Salter 545 F.2d 494 (1977)	Yes	-
	Wiles 491 F.2d 1406 (1974)	No	-
	Bath 480 F.2d 289 (1973)	-	Yes
	Risher 465 F.2d 1 (1972)	No	-
	Cox 421 F.2d 576 (1970)	No	-
Sixth	*Griffith* 749 F.2d 11 (1984)	Yes	-
	Krakoff 439 F.2d 1023 (1971)	No	-
	Underwood 407 F.2d 608 (1969)	Yes	-
Seventh	*Estate of Kraus* 875 F.2d 597 (1989)	No	-
	Greene 476 F.2d 116 (1973)	No	Yes
	Hatt 457 F.2d 499 (1972)	Yes	-
Eighth	*Folkerds* 494 F.2d 749 (1974)	Yes	-
	Keinath 480 F.2d 57 (1973)	Yes	No
Ninth	*Smith* 418 F.2d 573 (1969)	Yes	-

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TABLE 2 - SUMMARY OF *BOSCH* IN THE FEDERAL COURTS OF APPEALS			
Circuit	Case	Follow State Court on State Law?	Rely on Adversariness?
Tenth	*Estate of Selby* 726 F.2d 643 (1984)	No	-
	Estate of Goldstein 479 F.2d 813 (1973)	Yes	-
	Murrah 449 F.2d 187 (1971)	No	-
	Kasishke 426 F.2d 429 (1970)	No	-
	First Nat'l Bank 422 F.2d 1385 (1970)	Yes	-
Eleventh	-	-	-
Federal	*Sun First Nat'l Bank* 607 F.2d 1347 (1979)	Yes	-

III. The Future: Incorporating Erie *Principles in a Post-*Bosch *World*

Over a seventy-five year period, the federal courts have come full circle on the effect of state court decisions in subsequent federal tax litigation. The Court began the journey in 1916 in *Uterhart* by focusing exclusively on the comity concern in giving "total regard" to *all* state court decisions. Twenty years later, the Court in *Freuler-Blair* tried to temper the comity policy by forcing a consideration of the revenue interest through the "collusion" standard. After thirty years of disarray as the federal courts struggled to define collusion through the varying "fraudulent" and "nonadversary" formulations, the Court in *Bosch* tried to reinject a balance between the competing revenue and comity policies through the "proper regard" test. However, the courts of appeals merely have paid lip service to the "proper regard" standard and instead have undertaken a reexamination of state law, thereby giving "no regard" to lower state court decisions. Moreover, four circuits have returned to a pre-*Bosch* (and pre-*Erie*) focus on the adversariness of the lower state court proceeding.

After twenty-five years of subversion of the *Bosch* "proper regard" standard by the courts of appeals, the Court needs to revisit this issue.[287] When it does, the

287. The Supreme Court recently granted a writ of certiorari in a case challenging both the

Court should reject the advice of commentators that exalt either the revenue[288] or the comity[289] concern at the expense of the other. Instead, the Court should affirm the use of *Erie* principles in *Bosch* and make clear that the "proper regard" test must accommodate both concerns. However, the Court should take the courts of appeals to task for using a traditional "top-down" *Erie* analysis in trying to predict how the highest court of the state, *as an original matter*, would decide the state law question. This approach ignores the special concerns in a *Bosch*-type situation where the lower state court decision was a product of litigation involving the taxpayer as a party. As I have argued elsewhere,[290] federal authorities in this situation should heed the *Bosch* Court's direction to "sit as a state court" by using a "bottom-up" *Erie* analysis by giving the same deference to the lower state court decision as would be given to it on appeal in the state court system.[291]

The cases discussed in part II of this article generally raise questions of fact or mixed questions of fact and law in which greater deference would be given by state appellate courts through "clearly erroneous," "abuse of discretion," or similar standards than the courts of appeals have given under the de novo standard.[292] As

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application and viability of the *Bosch* "proper regard" standard. However, after hearing oral argument, the Court dismissed the writ on technical grounds. United States v. White, 853 F.2d 107 (2d Cir. 1988), *rev'g* 650 F. Supp. 904 (W.D.N.Y. 1987), *cert. dismissed*, 493 U.S. 5 (1989) (per curiam). For further discussion of *White*, see Jonathan G. Blattmachr, *Attorneys' Fees in Estate Administration*, N.Y. ST. B.J., Feb. 1991, at 24; Caron, *State Court Decisions*, *supra* note 2, at 836-42; Caron, *Administration Expense*, *supra* note 44, at 352; Ted D. Englebrecht & Gregory A. Carnes, *Standards for Deducting Administrative Fees from an Estate Vary in the Circuits*, 18 TAX'N FOR LAW. 210 (1990); Jerold I. Horn, *Setting and Deducting Fees in an Estates Practice*, 24 U. MIAMI INST. ON EST. PLAN. 3-1 (1990); John B. Huffaker, *IRS Can't Second Guess Award to Estate's Attorney*, 66 J. TAX'N 312 (1987); Marilyn E. Nelson, *Deductibility for Estate Tax Purposes of Legal Fees and Administration Expenses*, 30 TAX MGMT. MEM. 287 (1989); Eugene E. Peckam, White v. U.S. *Upholds Deductibility of Attorney's Fees on Estate Tax Returns*, N.Y. ST. B.J., May 1987, at 55; Robert A. Traylor, *The Fox is on the Town, O!:* White v. United States, N.Y. ST. B.J., Apr. 1990, at 42; Comment, United States v. White: *The Second Circuit Validates an IRS Role in Policing State Probate Practice*, 56 BROOK. L. REV. 669 (1990).

288. *See, e.g.*, Michael H. Cardozo, IV, *Federal Taxes and the Radiating Potencies of State Court Decisions*, 51 YALE L.J. 783, 797 (1942) ("[T]he federal judge should be as free as a state judge to declare what the [state] law is.").

289. *See, e.g.*, Verbit, *supra* note 15, at 457 ("[A]ll final decisions of state courts should be accepted as binding in federal tax cases, regardless of the level of state court or the character of the proceedings in that court.").

290. Caron, *State Court Decisions*, *supra* note 2, at 842-53; Caron, *Tax Myopia*, *supra* note 2, at 589-90.

291. Although there is some support for this approach in the case law (Estate of Salter v. Commissioner, 545 F.2d 494, 500-01 (5th Cir. 1977); Greene v. United States, 476 F.2d 116, 119 (7th Cir. 1973); Underwood v. United States, 407 F.2d 608, 611 (6th Cir. 1969); Harrah v. Commissioner, 70 T.C. 735, 754 (1978)), one commentator has observed that the "courts adopting this view do not seem to have given much attention to the standard of review the relevant supreme court would have applied in reviewing the lower court decision." Verbit, *supra* note 15, at 442 n.188.

292. For a discussion of these standards of review, see generally 1 STEVEN A. CHILDRESS & MARTHA S. DAVIS, STANDARDS OF REVIEW 25-152 (1986); JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 13.4 (1985); FLEMING JAMES, JR. & GEOFFREY C. HAZZARD, JR., CIVIL PROCEDURE § 12.8 (1985); 9 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2585 (1971) (questions of fact); *id.* § 2588 (questions of law); *id.* § 2589 (mixed questions of law and fact);

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a result, in most cases this "bottom-up" approach would require federal authorities to give more deference to the lower state court's application of state law than is currently provided through de novo review. This approach furthers the *Erie* goal of approximating the results that would have been obtained in state court and balances the competing revenue and comity interests.

Ellen S. Sward, *Appellate Review of Judicial Fact-Finding*, 40 KAN. L. REV. 1, 5-8 (1991).

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