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The Federal Tax Lien: Beyond United States v. Rodgers

John F. Hernandez

THE FEDERAL TAX LIEN: BEYOND *UNITED STATES V. RODGERS*

"The power of taxation is a fundamental and imperious necessity of all governments and not to be restricted by mere legal fictions."[1]

I. INTRODUCTION

In *United States v. Rodgers,*[2] the Supreme Court clarified the extent of the federal government's power to force the sale of jointly held property in which at least one but not all holders of an interest is liable on a tax debt. Resolving a conflict between the courts of appeals,[3] the Court held the government could force a sale even if the

1. Tyler v. United States, 281 U.S. 497, 503 (1930).
2. 103 S. Ct. 2132 (1983). *Rodgers* also had a companion case, Ingram v. City of Dallas Dep't of Hous. & Urban Rehab., 103 S. Ct. 2132 (1983). Because the facts of *Rodgers* present a clearer application of § 7403, the *Ingram* case will be disregarded except where its facts require special consideration.
3. *Compare* United States v. Rogers, 649 F.2d 1117 (5th Cir. 1981) (government could not foreclose federal tax liens on homestead interest of deceased taxpayer so long as innocent spouse maintained homestead under Texas law), *rev'd on appeal,* 103 S. Ct. 2132 (1983) [respondent's name is misspelled in the Fifth Circuit case]; United States v. Hershberger, 475 F.2d 677 (10th Cir. 1973) (where wife owns undivided one-half interest in homestead under Kansas law, such interest was immune from seizure and sale to enforce federal tax lien against the husband's interest in the property, so long as wife was living on the property); and Folsom v. United States, 306 F.2d 361 (5th Cir. 1962) (federal government cannot force sale of property of six joint owners of Alabama real property in proceeding to enforce its lien against taxpayer-joint owner) *with* United States v. Kocher, 468 F.2d 503 (2d Cir. 1972) (where delinquent taxpayer owned property as tenant in common with his wife, federal government could sell entire property, rather than just the undivided one-half interest of taxpayer, but would retain only the proceeds attributable to the delinquent taxpayer's interest), *cert. denied,* 411 U.S. 931 (1973); United States v. Overman, 424 F.2d 1142 (9th Cir. 1970) (taxpayer's undivided one-half interest in marital property was property within reach of a federal tax lien, based on taxpayer's antenuptial tax liability); and Washington v. United States, 402 F.2d 3 (4th Cir. 1968) (where

tax debtor, acting alone, could not.[4] The Court found property could potentially be subject to a forced sale if the tax debtor has or had *any* interest in the property.[5] The state-created limitations on alienation of property interests held by innocent joint owners no longer automatically barred the sale.[6] The Court indicated, however, that district courts should evaluate certain equitable considerations prior to authorization of a forced sale.[7]

A government's ability to function properly depends upon its ability to levy and collect taxes. Article I, section 8 of the United States Constitution grants taxing authority to the United States government.[8] Much of Title 26 of the United States Code, commonly called the "Tax Code," is devoted to levying of taxes.[9] The propriety of any particular tax or the application of any particular Code section to a factual setting is beyond the purview of this paper. The focus of this paper is, instead, the ability of the federal government to collect taxes[10] and, more specifically, its ability to force the sale of property in which a delinquent taxpayer holds or held an interest.

II. The Statutory Framework

Chapter 64 of the Tax Code[11] provides general guidelines for collection of federal taxes. The collection mechanism would be unnecessary if all persons paid the taxes assessed against them,[12] despite the existence of disputes over the amount. Obviously, such a situation has little to do with the realities of a complex society, and the government must collect taxes when taxed persons do not voluntarily forward payment.

Section 6321 of the Tax Code[13] provides for a lien in favor of the federal government upon all property, and rights to property, belonging to any person neglecting to pay any tax. The lien, a charge

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taxpayer's farm was sold to satisfy federal tax lien, wife's inchoate dower interest was subject to termination by the sale with that interest being satisfied from the proceeds before the remainder could be applied to the tax lien), *reh'g denied*, 403 U.S. 940 (1971).

4. 103 S. Ct. at 2142-43.

5. *Id.* at 2142.

6. *Id.* at 2146.

7. *Id.* at 2149.

8. U.S. Const. art. I, § 8.

9. I.R.C. §§ 1-904 (1982).

10. U.S. Const. art. I, § 8.

11. I.R.C. ch. 64 (West 1984).

12. "Person" will be used throughout this paper as a generic term to refer to any entity that may incur a tax liability. Note also that the male pronouns, "he," "his" and "him," will likewise be employed generically.

13. I.R.C. § 6321 (West 1984).

against specific property,[14] acts as an encumbrance on the property. If the tax debtor wants to alienate or transfer the property he first must satisfy his debt to the government. Because the government must wait until either the tax debtor desires to alienate the property or it passes at the tax debtor's death before it may actually collect the tax dollars due, the lien mechanism alone is not a very powerful governmental weapon.[15] Therefore, section 6331 of the Tax Code allows the government to levy upon all property and property rights belonging to the tax debtor.[16] The government may seize the property or property right and sell it to collect the assessed taxes.[17] The lien procedure of section 6321 and the levy power of section 6331 seem to provide a potent threat, encouraging tax debtors to satisfy their tax obligations.

Yet another enforcement procedure is found in section 7403 of the Tax Code. Section 7403 permits the Attorney General, or his delegate, to file a civil action in federal district court to enforce a federal lien on any property or property interest of a delinquent taxpayer, or to subject "any property, of whatever nature, . . . or in which he has any right, title, or interest, to the payment of such tax or liability."[18] The provision provides that all persons claiming any interest in the property involved in the civil action must be made parties to that action.[19]

At first section 7403 appears either unnecessary in light of section 6331's direct levy power, or merely provides an alternative to direct levy. If the "property" reached by section 7403 is the same as the "property" reached by section 6331, the government would have little impetus to pursue the more lengthy and costly procedure dictated by section 7403. Section 7403 requires action in federal district court, while under section 6331 the property may be directly seized. Other than the desire to avoid a possibly wrongful or inadvertent seizure of the property of innocent third parties, virtually no reason exists for the government to incur the expense of judicial proceedings.[20] If, however, the "property" subject to section 7403 exceeds the "property" within the reach of section 6331, section 7403 would constitute

14. United States v. Sullivan, 333 F.2d 100, 115 n.30 (3d Cir. 1964).

15. The tax debtor also may be subject to certain criminal sanctions or forfeitures provided for in chapter 75 of the Tax Code (I.R.C. ch. 75 (1982)). These penalties, however, are beyond the scope of this paper.

16. I.R.C. § 6331 (West 1984).

17. I.R.C. § 6332 (West 1984). Section 6331 requires no judicial proceedings; it allows for direct seizure and sale of the property by the government. *Id.*

18. I.R.C. § 7403(a) (West 1984).

19. I.R.C. § 7403(b) (West 1984).

20. *Rodgers*, 103 S. Ct. at 2144.

an additional weapon in the government's collection arsenal.

In recent years, the federal government has begun employing section 7403 to reach property normally not subject to levy. Although the basic elements of the section date back to 1868 revenue legislation,[21] only recently has the government attempted to use section 7403 to reach property interests held by a tax debtor as a joint owner.[22] Specifically, section 7403 has been employed to force the sale of jointly held property even though some of the property holders did not owe a tax debt to the government and their interests, as defined by state law, were beyond the reach of the other joint owners or their creditors.[23]

III. Precedential Development

Case law has created two fundamental principles regarding the reach of federal tax liens and the ability of the federal government to satisfy those liens through a forced sale. First, state-created creditors' exemptions for either specific property or an interest in property held by a debtor are insufficient to bar a federal tax lien and levy on such "property" or "interest in property."[24] A state may not constrain federal tax collection by attempting to place certain property of a debtor beyond the reach of ordinary creditors.[25] A state also may not compel the federal government to comply with local procedural rules to perfect the tax lien.[26] The Tax Code contains the only procedural prerequisites and property exemptions recognized by the federal government.[27] Under the supremacy clause of the United States Constitution[28] any state-legislated creditors' rights are superseded by

21. *Id.* at 2137. *See also* An Act imposing Taxes on distilled Spirits and Tobacco, and for other Purposes, § 106, 15 Stat. 125, 167 (1868). The language of the 1868 legislation is virtually identical to the present § 7403.

22. The case in which the government first sought to invoke § 7403 in a joint ownership situation appears to be Folsom v. United States, 306 F.2d 361, 367 n.10 (5th Cir. 1962). Several cases subsequent to *Folsom* also addressed the application of § 7403. *See, e.g.*, Ingram v. City of Dallas Dep't of Hous. & Urban Rehab., 649 F.2d 1128 (1981), *reh'g denied*, 659 F.2d 1075 (5th Cir. 1981), *cert. denied*, 456 U.S. 904 (1982), *vacated*, 103 S. Ct. 2132 (1983); United States v. Rogers, 649 F.2d 1117 (5th Cir. 1981); United States v. Hershberger, 475 F.2d 677 (10th Cir. 1973); United States v. Kocher, 468 F.2d 503 (2d Cir. 1972); United States v. Overman, 424 F.2d 1142 (9th Cir. 1970); Washington v. United States, 402 F.2d 3 (4th Cir. 1968); United States v. Trilling, 328 F.2d 699 (7th Cir. 1964).

23. *See supra* note 22 and accompanying text.

24. United States v. Mitchell, 430 U.S. 190 (1971). *See* 9 J. Mertens, Law of Federal Income Taxation § 54.52 (1982); W. Plumb, Federal Tax Lien 19-20 (1972).

25. *See* United States v. Mitchell, 430 U.S. 190 (1971). *See also Rogers*, 649 F.2d at 1127.

26. United States v. Union Cent. Life Ins. Co., 368 U.S. 291 (1961); Aquilino v. United States, 363 U.S. 509 (1960).

27. *See, e.g.*, I.R.C. §§ 6323(f), 6334 (West 1984).

28. U.S. Const. art. VI, cl. 2.

federal law. Therefore, the federal tax collector cannot be treated merely as an ordinary creditor of the debtor.

The second basic principle is that, with regard to the reach of federal tax liens, the terms "property" and "rights to property" are defined under state law.[29] Under this principle, the applicable state law might control the reach of federal liens. The Supreme Court has stated that in applying a federal revenue act, state law determines the nature of the taxpayer's legal interest in the property.[30]

Despite this apparent contradiction, in most situations these two principles will not conflict. After determining a person's tax debt, the government looks to state law to classify the "property" or "interest in property" held by the tax debtor. The government would not be prevented from seizing this property merely because a state-created exemption would have placed it beyond the reach of ordinary creditors.[31]

When applying section 7403, however, the possibility for conflict does exist,[32] particularly when the tax debtor holds property in which an innocent party also has an interest. In such a case the federal government would again look to state law to determine the interests held by both the tax debtor and any other affected person. Section 7403 sanctions the sale of property in which the tax debtor has any interest.[33] Yet problems can arise when state law either prohibits the tax debtor, acting alone, from selling the property, or when it prohibits a third party's interest from being affected by debts incurred solely by the tax debtor. These protections, rather than acting as mere state-created exemptions, are inherent in the state-defined property interest.[34]

Because of this conflict, the circuit courts were unable to agree on the scope of section 7403. In *Folsom v. United States*,[35] the Fifth Circuit held that section 7403 gave the government no greater rights in jointly held property than those held by the tax debtor.[36] *Folsom* involved property held in joint tenancy in which only one of the hold-

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29. *Rodgers*, 103 S. Ct. at 2137, *citing* United States v. Bess, 357 U.S. 51, 56-57 (1958). *See also* Aquilino v United States, 363 U.S. 509, 512-13 (1960).

30. Aquilino v. United States, 363 U.S. 509, 512-13 (1960), *citing* Morgan v. Commissioner, 309 U.S. 626 (1940).

31. United States v. Mitchell, 403 U.S. 190, 197 (1971).

32. I.R.C. § 7403 (West 1984).

33. I.R.C. § 7403 (West 1984).

34. For example, the "homestead right" held by Mrs. Rodgers was determined to be a vested property right. *Rodgers*, 103 S. Ct. at 2139. *See also* the discussion of the nature of Mrs. Rodgers' right. *Id.*

35. 306 F.2d 361 (5th Cir. 1962).

36. *Id.* at 367.

ers was a tax debtor.[37] The *Folsom* court equated the government's power over the property with the power the tax debtor had under state law.[38] The court stated that although the government could secure the tax debtor's interest, the tax debtor could not automatically have forced a sale of the property and, therefore, neither could the government.[39] The other joint tenants' rights, under state law, to have the property partitioned in-kind were superior to the government's right to sell the property.[40]

A few years after *Folsom,* the Seventh Circuit addressed a similar factual setting and reached a contrary result. In *United States v. Trilling,*[41] the court found that section 7403 allowed the government to force the sale of an entire parcel of property in which the tax debtor was a joint tenant.[42] When the sale was consummated, the government had to apportion the proceeds among itself and other joint tenants.[43] The *Trilling* court specifically refused to follow the decision of the Fifth Circuit in the *Folsom* case.[44] The Fourth Circuit, in *Washington v. United States,*[45] agreed with the *Trilling* court and held that a wife's inchoate dower interest in her husband's property could be terminated by the sale of the property under section 7403.[46] In *United States v. Kocher,*[47] the Second Circuit also disregarded the *Folsom* decision, finding that section 7403 authorized the sale of property in which a husband, a tax debtor, and wife were tenants in common, so long as the wife received an appropriate allocation of the proceeds for her interest.[48]

In *United States v. Overman*[49] the Ninth Circuit allowed a sale of community property in which only one of the owners was a tax debtor. The *Overman* court stated that section 7403 permits the district court to subject the interests of third parties to an involuntary conversion when enforcing a tax lien on the delinquent taxpayer's interests in the same property.[50] The court emphasized that the gov-

37. *Id.* at 362 (tax debtor in *Folsom* had a one-sixth undivided interest in certain real estate located in Alabama).

38. *Id.* at 368.

39. *Id.*

40. *Id.*

41. 328 F.2d 699 (7th Cir. 1964).

42. *Id.*

43. *Id.* at 702-03.

44. *Id.*

45. 402 F.2d 3 (4th Cir. 1968).

46. *Id.* at 7. The court provided that the wife was to be compensated for the value of her dower interest. *Id.*

47. 468 F.2d 503 (2d Cir. 1972).

48. *Id.* at 506-07.

49. 424 F.2d 1142 (9th Cir. 1970).

50. *Id.* at 1146.

ernment cannot retain more than the share attributable to the taxpayer's interest in the property from the sale. The government is not entitled to the proceeds attributable to the third parties' interest.[51]

The *Washington*[52] and *Overman*[53] courts literally applied section 7403, but failed to address the possible conflict between state definition of property interests and the federal government's power under section 7403.[54] These courts did not clearly define the nature of the interest held by the affected third parties. The possibility that the interests of the third parties were inherent in the state's definition of property, and not state-created exemptions, was left unexplored.[55]

The Fifth Circuit reconsidered the applicability of section 7403 to jointly held property in *United States v. Rogers*.[56] In *Rogers*, Philip Bosco and his wife, Lucille Mitzy Bosco Rodgers, then Lucille Mitzy Bosco, had purchased a residence in Texas and occupied it as their homestead.[57] After they acquired the property, Bosco, individually, incurred federal wagering taxes and penalties which he failed to pay before his death. After Bosco's death, his wife continued to occupy the property.[58] Due to her relationship to Bosco and the property, she acquired a homestead interest in the property.[59] The government sued Mrs. Rodgers under the authority of section 7403. The government sought enforcement of its tax liens, created under section 6321,[60] and the forced sale of the property in which Mrs. Rodgers still had the homestead right.[61]

The homestead right, created under both Texas state law and the Texas Constitution, gives each spouse a separate and undivided possessory interest in the homestead. The homestead right may be lost only by death or abandonment and may not be compromised by the

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51. *Id.*
52. 402 F.2d at 3.
53. 424 F.2d at 1142.
54. *Overman*, 424 F.2d at 1145; *Washington*, 402 F.2d at 7.
55. In United States v. Hershberger, 475 F.2d 677 (10th Cir. 1973), the Tenth Circuit also reached contrary to those of the Fifth. The *Hershberger* court disallowed a levy on property in which a wife, a non-tax debtor, held a homestead right under Kansas law. *Id.* at 682; *see also Rodgers*, 103 S. Ct. at 2156 n.7. Notably, however, the Tenth Circuit later partially discredited its decision in *Hershberger*, limiting it to the proposition that § 7403 did not require a sale of property in which an affected party held a homestead right. Tillery v. Parks, 630 F.2d 775, 777 (10th Cir. 1980); *see also* United States v. Eaves, 499 F.2d 869, 871 (10th Cir. 1974). The *Hershberger* court decided that once a valid lien was established, a court could order foreclosure under § 7403 at its discretion. *Tillery*, 630 F.2d at 777, *citing Eaves*, 499 F.2d at 871.
56. 649 F.2d 1117 (5th Cir. 1981); *Rodgers*, 103 S. Ct. at 2139 n.13.
57. *Rodgers*, 103 S. Ct. at 2139.
58. *Id.*
59. *Id.*
60. I.R.C. § 6321 (West 1984).
61. *Rogers*, 649 F.2d at 1119.

other spouse or by his heirs.[62] Exempt from forced sale, the homestead right requires the consent of both spouses to any encumbrance by lien, other than purchase money, property tax, and materialmen's liens.[63] The homestead right vests in each spouse and is in some respects similar to an undivided life estate in the property.[64]

The Fifth Circuit recognized that mere state-created exemptions from the claims of general creditors were insufficient to bar a federal levy for the collection of taxes.[65] According to the court, however, the Texas homestead right is not a mere exemption. Instead, it is, as defined by the state, a vested interest in the property.[66] The court ruled that Mrs. Rodgers possessed a property right separate from that of her deceased husband and, as such, it was not subject to levy.[67] The government could only levy on Bosco's property subject to Mrs. Rodgers' interest.[68] The government could either sell a future interest in one-half of the property[69] or wait until Mrs. Rodgers' interest terminated upon abandonment or death.

The court devoted most of its analysis to a determination of the nature and extent of Mrs. Rodgers' interest in the property.[70] The Fifth Circuit refused to deviate from the basic reasoning of the *Folsom* case[71] and merely noted that an opposing view had been adopted by other circuits.[72] Since Bosco could not have alienated Mrs. Rodgers' homestead interest, the Fifth Circuit stated that the government was also barred from selling the property.[73]

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62. *Id.* at 1120, *citing* TEX. CONST. art. XVI, § 50 and TEX. FAM. CODE ANN. § 5.81 (Vernon 1975).

63. 649 F.2d at 1120.

64. *Rodgers*, 103 S. Ct. at 2138-39. *See also* Williams v. Williams, 569 S.W.2d 867, 869 (Tex. 1978) ("This homestead right . . . has been held to be one in the nature of legal life estate or life estate created by operation of law.").

65. *Rogers*, 649 F.2d at 1122.

66. *Id.* at 1127.

67. *Id.* at 1128.

68. *Id.*

69. Mr. Bosco's interest was limited to one-half of the property because Texas is a community property state. The Supreme Court did not clearly address the impact of Mrs. Rodgers' community property interest. Although, under its holding Mrs. Rodgers' community property interest might also place the property beyond the reach of Mr. Bosco's individual creditors, this possibility will not be sufficient to bar application of § 7403. *See* United States v. Overman, 424 F.2d 1142 (9th Cir. 1970) (community property subject to § 7403 sale even when state law protected property from claims of one spouse's creditors). *See also* Broday v. United States, 455 F.2d 1097 (5th Cir. 1972) (court allowed levy upon a community property checking account when tax debt was that of only one spouse).

70. *Rogers*, 649 F.2d at 1120-28.

71. *See* 306 F.2d 361 (5th Cir. 1962).

72. *Rogers*, 649 F.2d at 1125 n.12.

73. *Id.* at 1127.

IV. *United States v. Rodgers* IN THE SUPREME COURT

United States v. Rodgers presented the Supreme Court the opportunity to settle the conflict in the courts of appeals regarding the proper reach of section 7403.[74] Although the Supreme Court agreed with the Fifth Circuit that Mrs. Rodgers had a vested property interest, the Court held that this interest did not preclude the application of section 7403. The Court stated that "[s]ection 7403(a) provides, not only that the Government may 'enforce [its] lien,' but also that it may seek to 'subject *any property,* [of] whatever nature, of the delinquent, or *in which he has any right, title, or interest,* to the payment of such tax or liability.'"[75] State law determines whether the tax debtor has an interest in any given parcel of property.[76] If he does, section 7403 permits the sale of the property regardless of other interests in the property held by third parties.[77] In short, the existence of Bosco's interest in the property allowed a sale of the property under section 7403. Mrs. Rodgers' homestead interest could not automatically bar the sale.[78]

Section 7403 may not, however, act to abrogate the fifth amendment rights of affected third parties.[79] The taking of property partially belonging to affected third parties requires compensation. The government must determine the value of any third party interests in the property. Upon a section 7403 sale, the proceeds must then be apportioned among the government, which is entitled to that portion attributable to the tax debtor's interest, and the affected third parties.[80]

Despite finding authority for such sales under section 7403, the majority recognized that district courts have discretion in determining whether a section 7403 sale is appropriate in a particular factual setting.[81] The *Rodgers* majority stated that the district courts should consider how greatly the government's financial interests would be prejudiced if its only option were a forced sale of the partial interest held by the delinquent taxpayer.[82] The district courts should also

74. *Rodgers,* 103 S. Ct. at 2141.

75. *Id.* at 2142 (emphasis in original).

76. *Id.* at 2142-43.

77. *Id.*

78. *Id.* at 2143.

79. *Id.* at 2144. "[I]f § 7403 allowed for the gratuitous confiscation of one person's property interests in order to satisfy another person's tax indebtedness, such a provision might pose significant difficulties under the Due Process Clause of the Fifth Amendment." *Id. See also* U.S. CONST. amend. V. "[S]ection [7403] only used the third party's interest to facilitate extraction of the property interest of the delinquent taxpayer." 59 J. TAX'N 120 (1983).

80. *Rodgers,* 103 S. Ct. at 2144-45 & n.25.

81. *Id.* at 2149.

82. *Id.* at 2151. The Court stated that if it were shown that a partial sale would not

consider the expectations of the affected third parties and possible prejudice to them.[83] The relative values of the property interest held by the affected third parties and by the delinquent taxpayer should also be taken into consideration,[84] and the Court intimated that other equitable concerns might be relevant in particular cases.[85] The Supreme Court reversed the Fifth Circuit's holding in *Rogers* with directions to remand the case to the Northern District Court of Texas. The district court was to consider whether equitable considerations inherent in section 7403 would discourage a forced sale of the property.[86]

V. The Court's Reasoning

The Supreme Court in *Rodgers* chose not to rely solely on the wording of section 7403. Instead, it began its analysis by examining precedential support,[87] placing some reliance upon *Mansfield v. Excelsior Refining Co.*[88] In *Excelsior Refining,* decided more than ninety years ago, the Supreme Court had recognized the possibility that the government could levy on property in which not all of the interest holders were tax debtors. The Court held that, at least in certain limited situations, the property interests of innocent third parties could be subject to levy and forced sale.[89] The Court also referred to the *Trilling,*[90] *Kocher,*[91] *Washington*[92] and *Overman*[93] cases. Although the Court did not specifically discuss these cases, it cited to them in a string citation as an indication of the prevailing view that the plain meaning of section 7403 should control.[94]

Perhaps unnecessarily, the majority also relied upon an analogy between the federal government's authority under section 7403 and a state government's powers in in rem proceedings to force the sale of property to satisfy ad valorem taxes even if there are multiple owners

prejudice the government "(because the separate market value of the partial interest is likely to be equal to or greater than its value as a fraction of the total value of the entire property) then there would be no reason at all to authorize a sale of the entire property." *Id.*

83. *Id.* at 2151.

84. *Id. See also id.* at 2145. The majority illustrated how one might value a homestead interest by equating it with a life estate and then making use of actuarial tables. *Id.* at 2145.

85. *Id.* at 2152.

86. *Id.*

87. *Id.* at 2143.

88. 135 U.S. 326 (1890).

89. *Id.* at 339.

90. 328 F.2d 699 (7th Cir. 1964).

91. 468 F.2d 503 (2d Cir. 1972).

92. 402 F.2d 3 (4th Cir. 1968).

93. 424 F.2d 1142 (9th Cir. 1970).

94. *Rodgers,* 103 S. Ct. at 2141-42.

of the property.[95] A state in rem sale cuts off the interests of all joint owners.[96] The majority claimed that one evident purpose of section 7403 was to provide the federal tax collector some of the advantages that many state tax collectors possess due to in rem tax enforcement.[97] Although state in rem proceedings do not require that third parties share in the proceeds of a forced sale, the Court noted that section 7403's requirement of an apportionment of the proceeds showed the federal government's greater solicitude for third parties.[98]

After examining precedent and drawing its analogy to state in rem proceedings, the majority returned to the actual wording of section 7403.[99] It compared section 7403 with section 6331, finding that while section 6331 authorizes a sale only of property and rights to property belonging to the taxpayer, section 7403 authorizes a sale of any property in which the taxpayer has any right, title or interest.[100] By virtue of section 7403, the Court declared any analogy between the federal government and an ordinary creditor inappropriate. Although the tax collector under section 6331 may exercise only the rights of the delinquent taxpayer,[101] such a limitation is not inherent in the government's tax collecting authority.[102] Section 7403 represents the "exercise of a sovereign prerogative" and is ultimately rooted in the constitutional power to "lay and collect taxes."[103] The majority claimed there would be little or no reason for section 7403 to exist if its literal wording were not followed. If the only property that could be the subject of a forced sale were the taxpayer's "property" or "rights to property," sections 6321 and 6331 would be sufficient. The majority reasoned that section 7403 must grant authority in excess of that granted by section 6331.[104]

Furthermore, the Court concluded section 7403 is designed specifically to handle the concerns of third parties who hold interests in property with tax debtors. Section 7403(b) provides that all persons "claiming any interest in the property" must be made parties to ac-

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95. *Id.* at 2143.
96. *Id., quoting* Rogge, *The Tax Lien of the United States,* 13 A.B.A. J. 576, 577 (1927).
97. *Rodgers,* 103 S. Ct. at 2143.
98. *Id.*
99. *Id.*
100. *Id. See* I.R.C. §§ 6331, 7403 (West 1984).
101. The "step in the shoes" language is drawn from the analysis invoked by the dissent in *Rodgers.* 103 S. Ct. at 2154 n.3, at 2159 n.16 (Blackmun, Rehnquist, Stevens, O'Connor, JJ., concurring in part and dissenting in part). Basically, the proposition propounded by the dissent and rejected by the majority is that the government has no greater power over the property than tax debtors themselves have.
102. *Rodgers,* 103 S. Ct. at 2146.
103. *Id.* at 2144, *quoting* U.S. CONST. art. 1, § 8, cl. 1, and amend. XVI.
104. *Rodgers,* 103 S. Ct. at 2144.

tions brought by the government under section 7403.[105] This mandatory joinder of parties would be unnecessary if section 7403 did not permit the government to levy on the entire parcel of property.[106]

Recognizing the only weakness in its literal language argument, the Court pointed out that section 7403 authorizes the sale of property in which the taxpayer *has* any interest.[107] The present tense seems to imply the need for the delinquent taxpayer to have a current interest in the property.[108] Since Bosco was deceased at the time the *Rodgers* case was brought, he had no current interest in the property. The majority felt this literal reading of the present tense was inconsistent with the purpose of section 7403. Placing too great an emphasis on the word "has" would require the government to have levied before Bosco died. Partially relying on section 6901[109] which imposes tax liability on transferees of the interests of tax debtors,[110] the majority noted that Bosco's interests were now held by his estate or heirs.[111] This present holder had a future interest in Bosco's one-half of the community property which would become possessory when Mrs. Rodgers' homestead interest terminated.[112]

The Supreme Court declared that section 7403 does not require the sale of all property in which the tax debtor has any interest.[113] Instead, section 7403 permits such a sale in the appropriate circumstances. Although the statute specifically says "may,"[114] indicating that courts have discretion, the majority in *Rodgers* found a strict

105. *Id. See also* I.R.C. § 7403(b) (West 1984).

106. *Rodgers,* 103 S. Ct. at 2144.

107. *Id.* at 2142 n.18. *See also* I.R.C. § 7403(a) (West 1984) (emphasis added).

108. *Rodgers,* 103 S. Ct. at 2142.

109. I.R.C. § 6901 (West 1984).

110. *Id.*

111. *Rodgers,* 103 S. Ct. at 2142 n.18 ("Bosco's interests seem now to be held by his estate or heirs,. . . .").

112. Bosco's one-half interest would pass to his estate or heirs independent of Mrs. Rodgers' disposition of her property because the property is community property. *Id.* Interestingly, however, had the property been jointly held property in a common law jurisdiction, Bosco's interest would have terminated at his death. In such a case, the "has" language of the statute should perhaps be disregarded.

A tax debtor's interest in property held as a joint tenant with the right of survivorship would terminate at his death. He would no longer have any interest in the property. Acquisition of complete ownership by the surviving joint tenant is generally not looked upon as a transfer and, therefore, the survivor would not incur a transferee's liability. Tooley v. Commissioner, 121 F.2d 350 (9th Cir. 1941). The government might be forced to seek a forced sale of joint tenancy property before the tax debtor dies. "It is doubtful that even a federal tax which was assessed and became a lien before death can be collected from the joint property after the taxpayer dies." Plumb, *Federal Liens and Priorities - Agenda for the Next Decade II,* 77 YALE L.J. 605, 632 (1968).

113. *Rodgers,* 103 S. Ct. at 2148.

114. I.R.C. § 7403(a) (West 1984).

interpretation unnecessary in determining that equitable concerns pervade section 7403.[115] According to the *Rodgers* majority equitable concerns require the district courts to weigh the government's interest in prompt collection of taxes against the rights of innocent third parties with interests in the property.[116] The court should consider whether the government would be prejudiced by the sale of only the tax debtor's interest. Prejudice to the government must be determined as a matter of degree.[117] The court should compare what the government could get for the tax debtor's interest alone, with what the government could retain after selling the entire property and reimbursing the innocent property holders.[118]

Additionally, the district courts should weigh the relative character and value of the different interests in the property.[119] A sale of the property might be less appropriate if the value of the tax debtor's interest in the property is significantly less than the value of interests held by other persons in that same property.[120] Another equitable concern is the expectation of the third parties. Some vitality in state-created definitions might still exist if third parties, based on the nature of interests they held under state law, had expectations that their interests could not be disenfranchised by action or inaction of the tax debtor. The majority in *Rodgers* indicated that it was not formulating a mechanical checklist and that the discretion afforded by section 7403 was limited and should be exercised only in view of the government's *paramount* need to promptly collect taxes.[121]

The *Rodgers* Court also recognized that fifth amendment rights[122] of third parties against wrongful takings are involved and should be considered by the district courts.[123] The government may under no

115. *Rodgers,* 103 S. Ct. at 2150. The dissent in *Rodgers* emphasized the use of the word "shall" rather than "may" in a predecessor statute to § 7403. The dissent believed that a strict constructionist view similar to the one invoked by the majority would have required a sale under the previous statute. *Id.* at 2158 (Blackmun, J., concurring in part and dissenting in part). *See also* Revenue Act of 1936, Pub. L. No. 740, § 802, 49 Stat. 1648, 1743-44 (1936). The majority rejected such an analysis and claimed that the "unexplained change in statutory wording from 'shall' to 'may' is best construed as indicating a congressional belief that equitable discretion existed all along." *Rodgers,* 103 S. Ct. at 2150, *citing* Moore v. Illinois Cent. R.R., 312 U.S. 630, 635 (1941).

116. *Rodgers,* 103 S. Ct. at 2151.

117. *Id.*

118. *Id.* at 2151 n.40.

119. *Id.* at 2152.

120. For example, if the tax debtor's only interest in the property were a short-term lease, it would seem to weigh against the authorization of a § 7403 sale when the innocent lessor would suffer the loss of his property.

121. *Rodgers,* 103 S. Ct. at 2152 (emphasis added).

122. U.S. CONST. amend. V.

123. *Rodgers,* 103 S. Ct. at 2151.

circumstances collect more than the value of the property interest held by the tax debtor.[124] The rest of the proceeds must be returned to the affected third parties upon the sale of the property.[125] The majority therefore directed the district courts to determine the prejudice to third parties which might result because of the inadequacy of compensation.[126] Financial compensation might not always be an adequate substitute for the property.[127]

The minority opinion saw the new interpretation of section 7403 as a drastic departure from previous interpretations of the government's collection power.[128] The minority felt that Mrs. Rodgers' state-created property right could not be overcome by section 7403 choosing to view the federal government as "stepping into the shoes" of the tax debtor.[129] It reasoned that the common law principle limiting the lien rights of the government to those property rights possessed by the debtor limited the reach of section 7403.[130] This interpretation, the dissent recognized, would still justify the sale of property held by joint tenants and tenants in common because the debtor, as a joint owner, could force the partition and sale of such property.

The dissent found the majority's interpretation of the literal meaning of section 7403 inconsistent with prior interpretations given to the section.[131] Indicating that Congress had repeatedly addressed the issue of federal tax liens, the minority noted that Congress had never allowed such liens, under any section of the Code, to disenfranchise one who held a homestead property interest.[132] Indeed, Congress had previously considered extending the reach of federal

124. *Id.* at 2144-45, 2151 & n.40.

125. *Id.* at 2144.

126. *Id.*

127. *Id.* at 2148.

128. *Id.* at 2152 (Blackmun, J., concurring in part and dissenting in part).

129. *Id.* at 2154 n.3 (Blackmun, J., concurring in part and dissenting in part).

130. *Id. See also* J. MERTENS, FEDERAL INCOME TAXATION, *supra* note 24 ("The rights of the Government when attempting to establish its lien to property of a delinquent taxpayer are, however, never better than those which the taxpayer had."); Clark, *Federal Tax Liens and Their Enforcement,* 33 VA. L. REV. 13 (1947).

> It is obvious, of course, that the federal tax lien can only reach the property of its tax-debtor and that its rights as lienor to property or rights to property of its tax-debtor can rise no higher than the rights of the latter in that property or rights to property.

Id. at 17.

131. *Rodgers,* 103 S. Ct. at 2154. The dissent drew an analogy between § 7403 and the broad language in 42 U.S.C. § 1983 (1982) (a civil rights statute) and stated that if "broadly worded statutes, particularly those of some antiquity, are in derogation of common-law principles, [the] Court has hesitated to heed arguments that they should be applied literally." *Rodgers,* 103 S. Ct. at 2154 & n.5.

132. *Id.* at 2155-56.

tax liens to tenancies by the entirety, but had rejected such an approach.[133]

The minority also found little precedential support for the extension adopted by the majority. It viewed *Excelsior Refining*[134] as clearly distinguishable because the statute involved in that case provided for a signed consent by affected third parties before the property could be subject to levy.[135] *Trilling*[136] and *Kocher*[137] were not distinguished because, based on the "step in the shoes" analysis, these cases were consistent with the dissent's conclusion.[138] Apparently, the dissenting justices disagreed with *Overman*[139] and *Washington*[140] although they made no mention of these decisions. The minority did cite scholarly works to support its conclusion that section 7403 did not allow the sale of property subject to a homestead right.[141] These works maintained that the homestead property rights of an unindebted spouse may not be sold by the government to pay the other spouse's taxes.[142]

The minority also rejected the majority's analogy between state in rem proceedings and a section 7403 sale, declaring that in rem proceedings were based on a finding that the land itself was liable for the tax.[143] An in rem proceeding was, therefore, not comparable to a forced sale where the taxpayer as an individual was liable for the tax. The fact that joint owners in an in rem proceeding were not entitled to compensation highlighted the difference between the two types of forced sales.[144]

The dissent attacked the majority's reasoning that a literal interpretation of section 7403 would further the governmental policy of prompt collection of taxes, finding this basis for the decision in con-

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133. *Id.* at 2156.

134. 135 U.S. 326 (1890).

135. *Id.* at 338. *See also* An Act imposing Taxes on distilled Spirits and Tobacco, and for other Purposes, § 8, 15 Stat. 125, 128 (1868).

136. 328 F.2d 699 (7th Cir. 1964).

137. 468 F.2d 503 (2d Cir. 1972).

138. *Rodgers,* 103 S. Ct. at 2159. *See also id.* at 2153 n.2 (the dissent concedes that the *Folsom* case was incorrect in not allowing government sale of jointly held property). *See* 306 F.2d 361 (5th Cir. 1962).

139. 424 F.2d 1142 (9th Cir. 1970).

140. 402 F.2d 3 (4th Cir. 1968).

141. *Rodgers,* 103 S. Ct. at 2155 n.6.

142. *Id.* at 2155.

143. *Id.* at 2160, *citing* 2 T. Cooley, Law of Taxation 866-67 (1903) ("[T]he lien does not stand on the same footing with an ordinary encumbrance, but attaches itself to the *res* without regard to individual ownership. . . ."). The taxes contemplated by § 7403 are of a different nature altogether in that the liability for those taxes is personal rather than based on the property itself.

144. *Rodgers,* 103 S. Ct. at 2160.

travention of common sense and the traditional rules of law.[145] The possibility of a favorable outcome for the government should not determine the decision.[146] The dissent disagreed with the majority's declaration that section 7403 would add nothing to the collection power of the government if it was not interpreted as reaching "property" beyond the ambit of section 6331. Even absent such an extension, section 7403 was necessary to enable the government to sell jointly held property when the tax debtor's property rights would have allowed him to seek a forced sale.[147]

VI. Analysis of *United States v. Rodgers*

The dissent in *Rodgers* faced a formidable task when it held that section 7403 did not mean what the plain language of the statute seemed to express. Despite this impediment, a certain amount of logic supports the reasoning of the *Rodgers* dissent. The minority was apparently unconcerned with the impact of a broad interpretation on homestead rights. Actually, homestead rights, as interpreted by some states, cannot provide protection to a person in Mrs. Rodgers' situation because these rights are considered state-created exemptions, not binding on federal courts.[148] Even the Fifth Circuit has held that a spouse's homestead rights, under Florida law, are exemptions which do not protect the property subject to them.[149] The dissent also was probably unconcerned that the new interpretation of section 7403 would impact on dower rights or rights in community property.[150]

The majority decision probably troubled the dissent for two principal reasons. First, the Court diminished the traditional deference to property rights as defined by state law. Early case law clearly established that state law determinations of property interests bound the federal tax system.[151] Essentially, a state had the power to shield cer-

145. *Id.* at 2158.

146. *Id.*

147. *Id.*

148. Herndon v. United States, 501 F.2d 1219, 1222-23 (8th Cir. 1974) (Arkansas homestead exemption does not bar sale of property by government); Weitzner v. United States, 309 F.2d 45, 48 (5th Cir. 1962) (Florida homestead exemption does not bar sale of property by the government), *cert. denied*, 372 U.S. 913 (1963); United States v. Heasley, 283 F.2d 422, 427 (8th Cir. 1960) (North Dakota homestead exemption does not bar sale of property by government); United States v. Heffron, 158 F.2d 657, 659 (9th Cir.), *cert. denied*, 331 U.S. 831 (1947). *See also* Shambaugh v. Scofield, 132 F.2d 345, 364 (5th Cir. 1942) (Texas homestead right held by children of property owners does not bar sale of property by the government).

149. Weitzner v. United States, 309 F.2d 45, 48 (5th Cir. 1962).

150. The dissent does not address the possibility that Mrs. Rodgers' community property rights might create an interest in the property sufficient to impede governmental sale of the property. At least tacit acquiescence by the dissenters exists in the *Washington* and *Overman* decisions.

151. *See, e.g.*, Aquilino v. United States, 363 U.S. 509, 512-13 (1960); Poe v. Seaborn, 282

tain types of property interests from the federal government's reach when it collected taxes. Although a clear indication was required that the state-created property interest was more than a mere creditor's exemption, the power was rightfully the state's since the state was the sovereign more intimately connected with property and with persons holding such property.[152]

The *Rodgers* majority apparently decided that the state power to determine property rights was insufficient to overcome a literal interpretation of section 7403. Some justification impliedly exists for denying deference to the states. Federal taxation should aim for consistent application regardless of the particular state in which a federal taxpayer resides.[153] The Supreme Court had not previously addressed this issue. In light of the need for consistency, however, the earlier non-use of section 7403 did not lessen the power of this argument when finally addressed.

The minority's concern for state-created definitions of property is secondary to the other justification behind the dissent. Namely, a literal interpretation of section 7403 opens the door for a quantum leap in the reach of the federal government's collection power. The courts previously were required to examine the property interests held by innocent third parties to determine whether the government could force a sale. Under the *Rodgers* rationale, in determining the application of section 7403 the courts must merely examine whether the tax debtor holds or held *any* interests.[154] The dissent's concern becomes evident when one considers how tenuous some interests in property are. Indeed, the tax debtor's interest might be inferior both quantitatively and qualitatively to the interests of innocent third parties.

The dissent was particularly concerned about the sanctity of the tenancy by the entirety.[155] It attempted to use Congress' failure to allow tax liens to reach tenancies by the entirety to bolster its argument that homestead rights could not be reached under section 7403.[156] Tenancies by the entirety present a special problem because the property, instead of being held by either party individually, is held by an entity, the marital unit.[157] In such a case, the dissent argued, a tax lien could not attach to one party's interest alone and, therefore, section 7403 would not authorize the sale of entireties

U.S. 101, 110-13 (1930). *See also* Clark, *supra* note 130, at 17.

152. *Rogers*, 649 F.2d at 1127.

153. Tyler v. United States, 281 U.S. 497 (1930).

154. *Rodgers*, 103 S. Ct. at 2146.

155. *Id.* at 2156-57.

156. *Id.*

157. *Id.* at 2147 n.31. *See* United States v. Hutcherson, 188 F.2d 326, 329 (8th Cir. 1951). *See also* Clark, *supra* note 130, at 17.

property.[158] Indeed, earlier courts had held that a tenancy by the entirety represented the one property interest beyond the reach of the government's tax lien.[159]

Rodgers potentially disrupts this conceptualization of property because of the broad reach it accorded section 7403. Under *Rodgers* the government can force the sale of any property in which the tax debtor has any interest whatsoever. A third party cannot logically claim that a person who holds property in a tenancy by the entirety has no interest in that property.[160] Clearly, a literal reading of section 7403 would invade the tenancy by the entirety sanctuary. The majority in *Rodgers* intimated that although Congress had rejected specific authorization for tax liens upon tenancy by the entirety property, such property interests were not necessarily excluded from tax liens. Rather, Congress might have viewed such clarification as unnecessary.[161]

Even if courts were to exclude tenancies by the entirety from the reach of government tax collectors, *Rodgers* provides the government with another potentially potent weapon in its collection arsenal. If the only finding necessary to warrant a forced sale is that the tax debtor has or had an interest in the property, third parties' property interests can be adversely affected. For example, an easement is clearly an interest in property.[162] Although a person holding an easement in a parcel of property could not force the sale of that property, the *Rodgers* decision might permit the government to do so.

Other property interests also demonstrate the possible consequences of a literal interpretation of section 7403. A tax debtor's interest in a cooperative[163] might be deemed a property interest that is subject to sale. Even a delinquent lessee could provide the government the power to sell property actually owned by an innocent feeholder.[164] This absurd result is especially plausible under *Rodgers,* considering the Court's favorable citation to *Excelsior Refining*

158. *Rodgers,* 103 S. Ct. at 2147 n.31.

159. W. PLUMB, *supra* note 24, at 37. *See also* Plumb, *supra* note 112, at 634-41.

160. If the tenancy by the entirety is looked upon as a separate entity and the tax debtor holds an interest in that entity, that interest might be considered similar to the interest stock represents in a corporate entity. *Cf.* Plumb, *supra* note 112, at 605, 636 & n.206. *See* C.I.T. Corp. v. Flint, 333 Pa. 350, 354, 5 A.2d 126, 128 (1939) (analogizing the tenancy by the entirety to the corporate entity).

161. *Rodgers,* 103 S. Ct. at 2147-48 n.31.

162. 25 AM. JUR. 2D *Easements and Licenses* § 2 (1966).

163. Exactly what interest is held by one who holds an interest in a cooperative housing project is not entirely clear. It might be looked upon as essentially a long-term proprietary lease. 15A AM. JUR. 2D. *Condominiums and Co-operatives Apartments* § 78 (1976).

164. 49 AM. JUR. 2D *Landlord and Tenant* § 1 (1970).

Co.,[165] which involved a leasing situation.

Moreover, courts could conceivably find ownership of a unit in a time-share condominium an interest in property.[166] If this property interest were sufficient to invoke section 7403, a delinquent taxpayer could cause the sale of a significant parcel of property which the taxpayer did not have the power to alienate. Previously, the Internal Revenue Service ruled that a section 6321 tax lien could attach only to the specific unit of time held by the delinquent taxpayer and not to the interests of other owners in that condominium unit or to the unit itself.[167] This precedent now provides little comfort to affected third parties because, under *Rodgers*, the attachment of the lien to the delinquent taxpayer's interest alone would seem to permit a sale of the entire parcel to satisfy the lien.

The Supreme Court did, however, instruct the district courts to consider equitable factors in their application of section 7403. By providing that equitable factors be considered, the Court prevented a literal reading of section 7403 from mandating such absurd results.[168] The discretionary power of courts to force a sale under section 7403 greatly vitiates the reasoning of the *Rodgers* dissent,[169] and acts as some assurance that a section 7403 sale will occur only when the facts warrant it.[170]

Under the *Rodgers* approach, a determination must first be made regarding the value of the varying interests held in the property. This valuation is necessary not only to determine the compensation due innocent third parties whose interests might be alienated, but also to determine whether a section 7403 sale should even be ordered.[171] The relative values of each party's interest are explored prior to authorization of a section 7403 sale.[172] State-created property definitions control the value placed on the interest held by each of the parties. This control provides states that can no longer absolutely protect particular property interests held by innocent third parties with a different means of protection. In defining interests, states are able to make an innocent third party's interest relatively more valuable than that of the tax debtor.

165. Mansfield v. Excelsior Refining Co., 135 U.S. 326 (1890).

166. *See, e.g.*, FLA. STAT. § 718.103 (Supp. 1984).

167. Rev. Rul. 79-55, 1979-1 C.B. 400.

168. Courts should not automatically authorize a § 7403 sale because of equitable considerations. A judicial inquiry should keep sales from taking place in situations where the tax debtor's interest in the property is greatly inferior to that of other persons holding interests in the property.

169. The dissent, in essence, asks that § 7403 be held not to mean what it literally says.

170. *Rodgers*, 103 S. Ct. at 2152.

171. *Id.* at 2142-45, 2151-52.

172. *Id.* at 2152.

Courts may also protect third parties through their determination of the compensation due these parties. The Supreme Court has held, in another context, that the compensation may exceed the value of the property interest taken by the government. Such factors as the reasonable cost of moving and the storage of goods may be considered in compensating innocent property holders.[173] Other equitable concerns may also operate to minimize the unjustified alienation of third-party interests.[174]

The equitable considerations expressly stated by the court are not the only factors that could discourage the application of section 7403. The government must determine, for each parcel of property in which the taxpayer holds an interest, whether to invoke section 7403.[175] As section 7403 requires the government to institute suit in a federal district court, the process can be both costly and lengthy.[176] Taxpayers in district court actions may request juries, further increasing the cost of the litigation and providing the taxpayers a potentially more favorable fact-finder.[177] The displacement of innocent third parties might often create jury sympathy.[178]

The *Rodgers* extension of section 7403 might, therefore, be more valuable to the government as a threat than for practical purposes. This threat might provide innocent third parties with the impetus to pressure the tax debtor to satisfy the debt rather than face the possibility of a forced sale of the entire parcel. Additionally, innocent third parties might choose to pay the tax debt themselves rather than lose their property, especially in situations where the innocent third party is not so "innocent."[179] For example, one spouse now might

173. United States v. General Motors Corp., 323 U.S. 373 (1945). This case dealt with the proper amount of compensation required when the government exercised its condemnation power under the Second War Powers Act of 1942, § 201 and condemned a long-term leasehold interest held by General Motors in certain storage facilities. *Id.* at 375, 383.

174. *See supra* notes 113-27 and accompanying text.

175. *Rodgers*, 103 S. Ct. at 2145-46 ("Of course, the exercise in any particular case of the power granted under § 7403 to seek the forced sale of property interests other than those of the delinquent taxpayer is left in the first instance to the good sense and common decency of the collecting authorities.").

176. A § 6331 levy requires no court action whereas § 7403 does not require that a district court exercise its jurisdiction. *See* I.R.C. §§ 6331, 7403 (West Supp. 1984).

177. No right to a jury trial exists under § 7403. *See, e.g.*, United States v. Annis, 634 F.2d 1270, 1272 (10th Cir. 1980); Gefen v. United States, 400 F.2d 476, 478-79 (5th Cir. 1968), *cert. denied*, 393 U.S. 1119, *reh'g denied*, 394 U.S. 967 (1969); United States v. Warren, 235 F. Supp. 638, 639 (W.D.N.C. 1964). *Cf.* Wickwire v. Reinecke, 275 U.S. 101, 105 (1927).

178. One can envision a case in which the government would attempt to sell property in which a widow with six minor children held a homestead interest.

179. This, of course, raises problems of attributing income to the tax debtor. Old Colony Trust Co. v. Commissioner, 279 U.S. 716, 729 (1929).

The companion case to *Rodgers*, Ingram v. City of Dallas, Dep't of Hous. & Urban Rehab., 649 F.2d 1128 (5th Cir.), *reh'g denied*, 659 F.2d 1075 (5th Cir. 1981), *cert. denied*, 456 U.S. 904

have a greater impetus to satisfy the tax debt of another spouse. A lessor might choose to pay the tax debt of a lessee rather than lose his property. In essence, the government could use section 7403 to turn joint property holders into collection agents.

VII. Planning Concerns

Persons holding property jointly or persons planning to buy property with others now face additional considerations and concerns. Potential joint owners might want to structure their interests to provide maximum safeguards from the application of section 7403. Property owners should now be concerned with the tax history of any person to whom they intend to grant easements. They might want to provide specific spatial and/or time limitations on the interest granted to diminish the value of the interests held by potential tax debtors relative to the value of the interest retained. Their precautions might, however, be to no avail as an easement is virtually unmarketable. The government might have no choice except to sell the entire property if it is to realize any money.[180]

Persons might place greater emphasis on the nature of their interests in property. For example, a husband and wife holding property as tenants in common or as joint tenants might desire to change the form of ownership to a tenancy by the entirety, although no guarantees exist that such a tenancy is protected from a sale under section 7403. Other persons holding property as joint tenants or tenants in common might want to transfer ownership to a corporate entity. Property titled in the corporate name would limit a tax debtor's interest to his stock in the corporation. The government would be unable to force the sale of the underlying property unless the tax debtor had sufficient stock holdings to warrant the sale. Of course, any changes in the form of ownership would be void if the tax debt was already owing and the transaction was merely a sham.[181]

Lessors could avoid application of section 7403 by granting short-term leases with an option to renew. This device would diminish the lessee's interest in the property because an option to renew is a contractual right rather than a property interest.[182] Value could also be diminished by making interests terminable upon an event such as

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(1982), *vacated,* 103 S. Ct. 2132 (1983), presents a clear picture of how a minimal liability on the part of the co-holder can permit a sale of the entire property.

180. *Rodgers,* 103 S. Ct. at 2158 n.13. During oral argument "[t]he government indicated that it would exercise its discretion to sell just the easement 'where there is a separate market' for it." *Id.* (quoting Tr. of Oral Arg. 9-10). One can possibly infer that if there is no separate market for the easement, the entire parcel of property would be sold.

181. Plumb, *supra* note 112, at 636-37 & n.210.

182. *See* 17 Am. Jur. 2d *Contracts* § 32 (1964).

nonpayment of taxes by one party. Courts have, however, held similar limitations invalid in the bankruptcy area.[183]

All of these considerations are speculative at best. When property holders can no longer rely on state-created protections they are forced to venture into unexplored territory. The equitable concerns voiced in *Rodgers* constitute the only available guidance in this confused area. Since the application of section 7403 will be on a case-by-case basis, potential innocent third parties can only structure their property interests so as to minimize the possibility for attack under section 7403.

VIII. Conclusion

The *Rodgers* decision departs from the deference previously afforded states in protecting certain classes of property from the reach of the federal tax collector. The effectiveness of the "new" section 7403 as a weapon in the government's collection arsenal remains to be seen. The ability retained by the states to determine the values of the underlying property interests in a parcel of property permits an inconsistent application of the federal revenue statute. In our system of federalism, however, perfect consistency sometimes must give way to a greater state prerogative.

The literal construction rationale presents the most cogent argument supporting the majority's position. The wording of section 7403 is not vague or ambiguous. By relying on the literal wording of section 7403, the majority forces the dissent into the uncomfortable position of reasoning that section 7403 does not mean what it says. Although the dissent stated that a literal interpretation of section 7403 granted lienholders greater rights than debtors over the property, the wording of the statute simply does not lend itself to the dissent's interpretation. The Tax Code in its complex morass should be interpreted literally when such an interpretation does not lead to absurd results. In light of the equitable constraints imposed by the majority and the practical constraints existing in any given situation, the Court's holding does no injustice to the statute. The decision in *Rodgers*, although recognizing the lingering possibility of some state manipulation, is a step forward in both statutory interpretation and application.

John F. Hernandez

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183. *See, e.g., In re* Fontainebleau Hotel Corp., 515 F.2d 913, 914 (5th Cir. 1975); Queens Blvd. Wine & Liquor Corp. v. Blum, 503 F.2d 202, 206-07 (2d Cir. 1974); Weaver v. Hudson, 459 F.2d 741, 743 (4th Cir.), *cert. denied*, 409 U.S. 957 (1972); *In re* Fleetwood Motel Corp., 335 F.2d 857, 862 (3d Cir. 1964); National Shoes, Inc. v. 901 Boulevard Realty Corp., 20 B.R. 55, 58 (Bankr. S.D.N.Y. 1982). *See also* 11 U.S.C. § 365(e)(1) (1982).