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U.S. Supreme Court strikes down mushroom promotion assessments; fate of other commodity promotion assessments unclear

On June 25, the United States Supreme Court, in *United States, et al v. United Foods, Inc.*, (533 U.S. ____ (2001), struck down the mandatory assessment provision of the Mushroom Promotion, Research, and Consumer Information Act (7 U.S.C. § 6104(g)), finding it to violate the First Amendment. This decision also brings into question the constitutionality of the mandatory assessment provisions of the similar free-standing commodity promotion programs for beef, pork, dairy, fluid milk, soybeans, cotton, eggs, wool, blueberries, honey, peanuts, popcorn, potatoes, and watermelons.

Promotion orders popular in recent years

The mandatory-assessment promotion programs are of recent vintage. The legislation authorizing the first—the dairy program—was enacted in 1983. Over the years since, one commodity group after the other has prevailed on Congress to enact similar legislation to enhance the promotion of their products. The programs grew so popular that, in the 1996 farm bill, Congress, at the request of the Administration, enacted legislation giving USDA broad authority to develop new mandatory-assessment programs through regulation. 7 U.S.C. §§ 7401- 7425.

These programs require growers and handlers to pay a small assessment on each unit of production marketed to cover the costs of promoting sales of the commodity. Usually, the mandatory assessments are not triggered until growers or handlers approve them in a referendum. Prior to 1983, commodity groups had tried, without much success, to develop promotion programs that relied on voluntary contributions by growers, so-called "check-off" programs. These programs, however, suffered from the free rider effect: many growers and handlers would not pay to support the program even though they benefitted from the promotion activity as much as those who voluntarily paid the fees.

The success of the mandatory-assessment programs to date is measured by the fact that currently the 15 programs combined raise in excess of $700 million annually to fund promotion activities. Ironically, the mushroom program is one of the smallest; its mandatory assessment raises less than $2 million a year. In addition, USDA studies of the

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"Non-African American farmers" suit dismissed

A federal district court in Mississippi has dismissed an action brought against the Secretary of Agriculture by 147 "non-African American farmers" who claimed that the USDA had discriminated against because of their race in its administration of various farm programs. *Green v. Veneman*, Civ. Action No. 3:00CV366LN (S.D. Miss. Apr. 2, 2001)(memorandum opinion and order dismissing complaint). The plaintiffs contended that the USDA discriminated against them by denying them the benefits it agreed to make available to similarly situated African American farmers when it entered into a consent decree in *Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C. 1999).

In *Pigford*, the USDA agreed to settle a class action brought by African American farmers who farmed, or attempted to farm, between January 1, 1981, and December 31, 1996; who applied for USDA benefits during that period and who believed that they were discriminated against on the basis of their race with regard to the application; and who filed a discrimination complaint on or before July 1, 1997. *Pigford*, 185 F.R.D. at 92. The resulting consent decree created a two-track process for resolving the individual claims of the class members. Claimants who opted for Track A were required to submit to a neutral adjudicator "substantial evidence" that they had been discriminated against. If a claimant with respect to a loan transaction met this burden as more specifically defined in the consent decree, the

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programs have found that the programs do work to increase consumption of the commodities involved.

Compelled subsidization of speech

The Supreme Court in the *United Foods* decision held that the mushroom promotion activities funded with the mandatory assessments amount to "commercial speech" subject to First Amendment protection, and applied to the assessments the standards the Court developed in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) on what is permissible under the First Amendment regarding compelled subsidization of speech.

Abood actually holds that forced subsidization of the speech, or the expression of ideas, *can* pass First Amendment muster if done in the context of activities by a group to which people are required by law or necessity to contribute—as in *Abood*, a union to which all employees were required to pay dues. However, under *Abood*, use of compelled assessments to facilitate the expression of ideas, if objected to by one of the payers, is allowed only if the ideas expressed are germane to a purpose for which the group is bound together.

Using the *Abood* doctrine, the Court in *United Foods* concluded it must invalidate the mushroom program mandatory assessments because they fund speech that is not germane to an *independent* purpose of the group associated together under the program. Since the mushroom program's only associational purpose is to generate the very speech that is the subject of the First Amendment analysis, to then say that such speech is germane to the program's purpose would be to say that the speech is germane to itself. To permit the forced subsidization of the speech in that circumstance, the Court held, would deprive the *Abood* doctrine of any meaning and must be rejected.

Glickman v. Wileman Brothers & Elliott, Inc., decision distinguished

One of the most intriguing aspects of the *United Foods* decision is that it supersedes a contrary decision—*Glickman v. Wileman Brothers & Elliott, Inc*. (521 U.S. 457 (1997)—issued by the same court four years to the day prior to its decision in *United Foods*. The *Wileman* decision held that the mandatory assessments for promotion activities under the marketing order for California nectarines, plums, and peaches did *not* violate the First Amendment.

The Court in the *United Foods* case, however, held *Wileman* inapplicable because the earlier case involved a mandatory assessments that, rather than being part of a free-standing promotion program like the mushroom order program and the others itemized above, were ancillary to a more comprehensive marketing order program under the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601 *et seq*. Marketing orders under the 1937 Act, the Court in *Wileman* had held, are a species of economic regulation that displaces competition and allows for comprehensive control of markets for the commodities subject to the 1937 Act (mostly fruits, tree nuts, and vegetables). In the context of such extensive regulation, the *Wileman* Court held, the mandatory assessment program did not raise First Amendment concerns. However, the Court, in *United* Foods, did not find the mushroom promotion program to be part of such a comprehensive regulatory scheme. Justice Stevens described it in his concurrence as a "naked imposition of [] compulsion", subject to close First Amendment scrutiny.

What happens now?

USDA is still in the process of reviewing the Court's ruling in *United Foods* to determine what actions should be taken with respect to the mushroom promotion program.

As to the other free-standing promotion programs similar to the mushroom program, their supporters suggest that, if the commodity involved is subject to comprehensive government regulation under other statutes, the promotion program perhaps could still rely on the *Wileman* decision to continue mandatory assessments.

Also, it is argued that the *United Foods* decision did not address a possible argument in support of the programs—that they are a form of "government speech," not commercial speech. While the courts give more First Amendment leeway to the promulgation of government speech, i.e., expressions of the viewpoint of the federal government, the Supreme Court, in the *United Foods* case, declined to consider this argument because the government did not raise the issue in the court of appeals.

In my view, if USDA does not take steps to implement the *United Foods* decision for the other programs, it is most likely that the mandatory assessments under those programs will be tested in court like the mushroom order has been. On the other hand, supporters of the program may seek congressional action on the matter. What is *not* likely to happen is that the multi-million dollar promotion programs will continue on, post-*United Foods*, without some changes.

—Phillip L. Fraas, Washington, D.C.

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claimant was entitled to relief consisting of a $50,000 cash payment, forgiveness of all debt to the USDA under the program on which the claim was based, a payment to the IRS equaling 25 percent of the debt forgiven and the cash payment, termination of any USDA-initiated foreclosure proceeding in connection with the loan, and one-time priority loan consideration and technical assistance. *Id*. at 97. Track A claimants who carried their burden of establishing discrimination in a subsidy program were entitled to receive the amount wrongly denied and one-time priority loan consideration and technical assistance. *Id*. Track B claimants was designed for class members who had more extensive documentation of discrimination. If they prevailed in a one-day "mini-trial" before an arbitrator, they were entitled to actual damages and other specified relief. *Id*.

The plaintiffs in *Green* filed their class action complaint after *Pigford* was settled. Styling themselves as "non-African American farmers," they alleged that they had farmed during the same time period as the *Pigford* class and had been subjected to the same abusive treatment by the USDA as suffered by the *Pigford* class members. They further alleged that by settling *Pigford* the USDA had chosen to favor African American farmers over them by agreeing to give the *Pigford* class members remedial relief that was not offered to "non-African American farmers" who had experienced the same mistreatment. *Green*, slip op. at 6-7.

The Secretary moved to dismiss the complaint for failure to state a claim upon which relief could be granted. The court, in granting the motion, found that the single act of discrimination complained of by the plaintiffs was "the creation of the dispute resolution mechanism to resolve the individual claims of race discrimination raised by the

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Economic Growth And Tax Relief Reconciliation Act Of 2001, H.R. 1836: summary of selected provisions

By Roger A. McEowen

On May 25, 2001, negotiators from the U.S. House and Senate agreed on H.R. 1836, a $1.35 trillion tax cut bill. The next day, the House approved the Conference Report by a 240-154 vote, and the Senate gave its approval by a 58-33 margin. The President signed the measure into law on June 7. A central feature of the legislation is reduction in marginal income tax rates, but the bill also contains provisions for marriage penalty relief, pension reform and retirement savings incentives, alternative minimum tax breaks, estate, gift and generation-skipping tax relief, and education tax breaks. Unfortunately, the majority of the relief provisions are postponed for a number of years, and, to comply with the Congressional Budget Act, the bill contains a "sunset" clause, under which all provisions will expire at the end of 2010.[1]

The following is a summary of the major provisions of the Act.

Income tax provision

Individual income tax rates

The Act provides a new 10 percent regular income tax bracket applicable to the first $6,000 of taxable income for single persons, $10,000 of taxable income for heads of households and $12,000 for married couples filing joint returns. The provision is made applicable for taxable years beginning after December 31, 2000. The $6,000 and $12,000 amounts increase to $7,000 and $14,000 respectively for 2008 and thereafter. The taxable income levels for the new low-rate bracket will be adjusted annually for inflation for taxable years beginning after 2008, and the bracket for single persons and married persons filing separately will be 50 percent of that of joint returns.[2]

The Act creates a new provision creating a rate reduction credit for 2001 and which operates in lieu of the new 10 percent bracket for 2001. Taxpayers will be entitled to a credit in tax year 2001 of five percent of the amount of the income that would have been eligible for the new 10 percent rate. The Treasury is instructed to issue checks by October 1, 2001, to taxpayers who timely filed their 2000 returns.[3]

The Act specifies that the 15 percent bracket is modified to begin at the end of the new 10 percent income tax bracket and ends at the same level as under present law. The present law regular income tax rates are reduced after June 30, 2001 as follows: the 28 percent rate is reduced to 27.5 percent in 2001, to 27 percent in 2002 and 2003, to 26 percent in 2004 and 2005, and 25 percent in 2006 and later. The 31 percent rate is reduced to 30.5 percent in 2001, to 30 percent in 2002 and 2003, 29 percent in 2004 and 2005, and 28 percent in 2006 and later. The 36 percent rate is reduced to 35.5 percent in 2001, and 35 percent in 2002 and 2003, 34 percent in 2004 and 2005 and 33 percent for 2006 and later. The 39.6 percent rate is reduced to 39.1 percent in 2001, 38.6 percent in 2002 and 2003, 37.6 percent for 2004 and 2005, and 35 percent in 2006 and later.[4]

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Repeal of personal exemption phase-out

Under current law, the deduction for personal exemptions is phased out ratably for taxpayers with adjusted incomes over certain thresholds, which are adjusted annually for inflation. For married persons filing jointly, the threshold is $199,450. The Act provides for a five-year phase-in of the repeal of the personal exemption phase-out, whereby the otherwise personal exemption phase-out is reduced by one-third in taxable years beginning in 2006 and 2007, and is reduced by two-thirds in taxable years beginning in 2008 and 2009. The repeal is fully effective for taxable years beginning after December 31, 2009. The effective date of the provision is for tax years beginning after December 31, 2005.[5]

Phase-out of overall limitation on itemized deductions

Under current law, the total amount of otherwise allowable itemized deductions (other than medical expenses, investment interest, and casualty, theft or wagering losses) is reduced by 3% of the amount of the taxpayer's adjusted gross income in excess of $132,950 for 2001 (married filing jointly). The Act provides for a phased-in repeal of the overall limitations on itemized deductions for all taxpayers as follows: the applicable overall limitation on itemized deductions is reduced by one-third in taxable years beginning in 2006 and 2007, and by two-thirds in taxable years beginning in 2008 and 2009. For taxable years beginning after December 31, 2009, the overall limitation is repealed. The provision is effective for tax years beginning after December 31, 2005. Act Sec. 103, amending I.R.C. §68.

"Marriage penalty"

The size of the 15 percent bracket for a married couple filing jointly is increased to twice the size of the corresponding rate bracket for taxpayer filing as a single person by 2008. The increase is phased in over four years beginning in 2005. The Act specifies that the end point of the 15 percent bracket for a married person filing a separate return will be one-half of the end point of the 15 percent bracket for a married couple filing a joint return. The provision is effective for tax years beginning after 2004.[6]

Alternative Minimum Tax

The Act increased the AMT exemption amount for married couples filing a jointly and those filing as surviving spouses by $4,000. The AMT exemption amounts for other individuals are increased by $2,000. The provision is only applicable, however, for taxable year beginning after 2000 and before 2005.[7]

Comment. The reduction in the regular income tax without corresponding reductions in the AMT make the AMT more of a problem in future years. The Joint Committee on Taxation has estimated that the number of AMT payers will increase dramatically by 2011 under the provision.

Credits

Child tax credit.

The Act increases the child tax credit to $1,000, effective for taxable years beginning after December 31, 2000. The increase is phased in as follows: $600 for calendar years 2001-2004; $700 for calendar years 2005-2008; $800 for 2009; and $1,000 for 2010 and later. The credit is refundable to the extent of 10 percent of the taxpayer's earned income in excess of $10,000 for calendar years 2001-2004 and the percentage is increased to 15 percent for calendar years 2005 and thereafter. The $10,000 amount is indexed for inflation starting in 2002. Families with three or more children are allowed a refundable credit for the amount by which the taxpayer's social security taxes exceed the earned income credit, if that amount is greater than the refundable credit based on the taxpayer's earned income in excess of $10,000. The refundable portion of the credit does not constitute income and will not be treated as resources for purposes of determining eligibility or the amount or nature of benefits or assistance under any federal program or state or local program financed with federal funds.[8]

Adoption credit

The Act provides a credit against tax of $10,000 or a gross income exclusion of $10,000 for employer-provided adoption assistance. For the adoption of special needs children, the Act provides a credit against tax for qualified adoption expenses limited by an aggregate amount of $10,000 in qualified adoption expenses. The Act also provides for a gross income exclusion up to $10,000 for employer-provided adoption assistance. The Act increases the income limitation at which phase-out begins to $150,000 (from $75,000), and makes permanent the use of the credit against alternative minimum tax.[9]

Dependent care credit

The applicable dollar limit for dependent care credits is increased to $3,000 (for one qualifying person) and $6,000 (for two qualifying persons). The Act increases the applicable percentage to 35 percent (from 30 percent), but reduces the rate (but not below 20 percent) by one percentage point for each $2,000 (or fraction thereof) by which the taxpayer's adjusted gross income for the taxable year exceeds $15,000 (from $10,000). The provision applies to taxable years beginning after December 31, 2002.[10]

Earned income credit

Beginning in 2002, the amount of reduction of the earned income credit by the amount of the alternative minimum tax is repealed. The earned income amount used to calculate the EIC for married taxpayers filing jointly is increased to 110 percent of the amount for all other taxpayers eligible for the EIC. The definition of earned income for EIC purposes is amended to exclude nontaxable earned income amounts. The beginning and ending amounts of the EIC phase-out range for married taxpayers filing jointly is increased by $1,000 in taxable years beginning in 2002-2004, by $2,000 in taxable years beginning in 2005-2007, and by $3,000 in taxable years beginning in 2008. The $3,000 amount will be adjusted for inflation annually beginning in 2009. The definition of "qualifying child" for EIC purposes is expanded, and the calculation of the EIC is changed by replacing "modified adjusted gross income" with "adjusted gross income."[11]

Child care assistance credit

A tax credit for employer-provided child care is provided equal to 25 percent of the qualified expenses for employee child care and 10 percent of the qualified expenses for child care resource and referral services, up to a limit of $150,000 per taxable year. The Act provides that such credits are subject to recapture for the first 10 years after the qualified child care facility is placed in service, reduced as a percentage of the credit over the 10-year period, if the taxpayer ceases operation of the facility as a qualified child care facility or disposes of its interest in the facility and the person acquiring the interest in the facility does not agree in writing to assume the taxpayer's recapture liability. The provision is effective for taxable years beginning after December 31, 2001.[12]

Education-related provisions

Education IRAs

The annual limit on contributions to an education IRA is increased from $500 to $2,000. The definition of qualified education expenses that may be paid tax-free from an education IRA is expanded. The phase-out range for marrieds filing jointly is increased so that it is twice the range for single taxpayers, resulting in a phase-out range of $190,000 to $220,000 of modified adjusted gross income. The Act specifies that various age limitations do not apply to special needs beneficiaries, and clarifies that corporations and other entities are permitted to make contributions to education IRAs, regardless of the income of the corporation or entity during the year of the contribution. Taxpayers are allowed to claim a HOPE Credit or Lifetime Learning Credit for a tax year and to exclude from gross income amounts distributed (both the contributions and earnings portions) from an education IRA on behalf of the same student as long as the distribution is not used for the same educational expenses for which a credit was claimed. Repealed is the excise tax on contributions made by any person to an education IRA on behalf of a beneficiary during any taxable year in which any contributions are made by anyone to a qualified state tuition program on behalf of the same beneficiary. The provision is effective for taxable years beginning after December 31, 2001. Act. Sec. 401, amending I.R.C. §530.

Qualified tuition programs

The Act expands the definition of "qualified tuition program' to include certain prepaid tuition programs established and maintained by one or more eligible educational institutions that satisfy the requirements of I.R.C. §529. Distributions made in taxable years from qualified state tuition programs are excluded from gross income to the extent the distribution is used to pay for qualified higher education expenses. A taxpayer can claim a HOPE Credit or Lifetime Learning Credit for a tax year and can exclude from gross income amounts distributed from a qualified tuition program on behalf of the same student as long as the distribution is not used for the same expenses for which a credit was claimed. Eliminated is the penalty on distributions not used for higher education expenses. That provision is replaced with the same additional tax that applies to educational IRAs. Assets of qualified tuition plans of private institutions must be held in trust. The provision is effective for taxable years beginning after December 31, 2001, except that the exclusion from gross income for certain distributions from a qualified tuition program established and maintained by an entity other than a state is effective for tax years beginning after December 31, 2003.[13]

Student loan interest deduction.

The phase-out ranges for eligibility for the student loan interest deduction are increased to $50,000- $65,000 for singles, and to $100,000-$130,000 for married taxpayers filing jointly. The phase-out ranges are adjusted annually for inflation after 2002. The Act also repeals both the limit on the number of months during which interest paid on a qualified education loan is deductible and the restriction that voluntary payments of interest are not deductible. The provision is effective for interest paid on qualified education loans after December 31, 2001.[14]

Deduction for higher education expenses

Taxpayers are permitted an above-the-line deduction for qualified higher education expenses paid by the taxpayer during tax years from 2002-2005. Qualified education expenses are defined in the same manner as for the HOPE credit. For years 2002 and 2003, a taxpayer with an AGI of not more than $65,000 ($130,000 for marrieds filing jointly) is entitled to a maximum annual deduction of $3,000. In 2004 and 2005, the maximum deduction rises to $4,000. Taxpayers with higher incomes that do not exceed $80,000 ($160,000 for marrieds filing jointly) may deduct a maximum of $2,000 per year. Taxpayers with incomes exceeding the limits receive no deduction and the deduction expires for tax years beginning after December 31, 2005. The deduction and the HOPE or Lifetime Learning Credit may not be taken in the same year for the same student. Likewise, a taxpayer may not claim a deduction for amounts taken into account in determining the amount excludable due to a distribution from an education IRA or the amount of interest excludable for education savings bonds. The provision is effective for education payments made in tax years beginning after December 31, 2001 and before January 1, 2006.[15]

Retirement planning provisions

Modifications of IRA contribution limits

The maximum annual dollar contribution limit for IRA contributions is increased to $3,000 for 2002 through 2004, $4,000 for years 2005 through 2007, and $5,000 for 2008. For years beginning after 2008, the limit is adjusted annually for inflation in $500 increments. The otherwise maximum contribution limit (before application of the AGI phase-out limits) for an individual who had attained age 50 before the end of the taxable year is increased by $500 for 2002 through 2005, and is increased by $1,000 for 2006 and thereafter. The provision is effective for taxable years beginning after December 31, 2001.[16]

Defined benefit plans

The Act increases the $35,000 limit on annual additions to a defined contribution plan to $40,000 and indexes it in $1,000 increments. The $140,000 annual benefit limit under a defined benefit plan is increased to $160,000, and the dollar limit is reduced for benefit commencement before age 62 and increased for benefit commencement after age 65. The Treasury Secretary is to apply rules similar to those adopted in Notice 99-44 regarding benefit increases due to the repeal of the combined plan limit under former I.R.C. §415(e), according to the Statement of Managers for Conference Agreement on H.R. 1836. The Act also increases the dollar limit on annual elective deferrals under I.R.C. §401(k) plans, I.R.C. §403(b) annuities and salary reduction SEPs to $11,000 in 2002. In 2003 and thereafter, the Act increases the limits in $1,000 annual increments until the limits reach $15,000 in 2006, with indexing in $500 increments thereafter. Also increased is the maximum annual elective deferrals that may be made to a SIMPLE plan to $7,000 in 2002, $8,000 in 2003, $9,000 in 2004, and $10,000 in 2005. The limit is indexed thereafter in $500 increments. The limit is twice the otherwise applicable dollar limit in the three years before retirement. The provisions are effective for years beginning after December 31, 2001.[17]

Estate, Gift and Generation-Skipping Transfer Tax Provisions

Tax rates

The Act repeals the estate tax for decedents dying in 2010.[18] After 2001 and before 2010, the Act reduces the maximum estate and gift tax rates. For deaths in 2002, the Act eliminates the two highest rate brackets, makes the highest rate bracket 50% for

Continued on p. 6

Tax Act/*Cont. from p. 5*

transfers over $2.5 million, and eliminates the 5% surtax under current I.R.C. §2001(c)(2). For later years, the Act specifies that the rates for decedent's dying and gifts made are 49% in 2003, 48% in 2004, 47% in 2005, 46% in 2006 and 45% in 2007-2009. Likewise, because the Act does not change the present I.R.C.§2641(a)(1) provision that specifies that the applicable rate for generation-skipping transfers is the maximum estate tax rate, the rate used for generation-skipping transfers before repeal is reduced as the highest estate tax rate declines.[19] After the estate tax is repealed for 2010, the Act pegs the highest gift tax at 35%. Also, for gifts made after 2009, a transfer in trust is an I.R.C. §2503 taxable gift unless the entire trust is treated as a grantor trust for income tax purposes as to the donor or the donor's spouse and except as provided otherwise by regulation.[20]

Comments. In retaining the gift tax, the Congress apparently confirmed the notion that the gift tax not only acts as a backstop for the estate tax, but it also preserves the progressivity of the federal income tax.[21] From a planning perspective, a malpractice claim could arguably ensue against a practitioner who advises a client to enter into a transaction that would cause the client to incur a gift tax at any time before estate tax is repealed for 2010. However, not paying gift tax could ultimately increase the client's total tax liability if the Congress takes action before 2010 such that the federal estate tax is never actually repealed.

The Act also increases the complexity of drafting wills and trusts. Practitioners will need to draft language into wills and trusts that takes the possibility of either estate tax repeal or retention into account. For instance, language allowing the surviving spouse to collapse credit shelter trusts and life insurance trusts if estate tax is not in effect at the death of the first spouse may be desirable insomuch as the surviving spouse would likely prefer to own the property outright rather than in trust. Similarly, consideration may also be given to utilizing different funding formulas for credit shelter and life insurance trusts based on whether or not estate tax is repealed at the time of the decedent's death.

Exemption amounts

The unified credit exemption amount is increased as follows: $1,000,000 for estates of decedent's dying in 2002-2003; $1.5 million for 2004-2005; $2 million for 2006-2008; and $3.5 million for 2009. For gifts made after 2001, the Act establishes an effective lifetime exemption amount for gift tax purposes of $1 million. The GST exemption amount continues as under present law through 2003, for 2004-2009, the GST exemption is identical to the exemption amount for estate tax purposes.[22]

Family-owned business deduction (FOBD)

FOBD is repealed for estates of decedents dying after 2003. The recapture rules continue to apply after repeal until the recapture period expires or the recapture tax is triggered.[23]

Reduction of credit for state death taxes

For deaths in 2002, the state death tax credit allowed under I.R.C. §2011(b) is not to exceed 75 percent of the credit otherwise allowable; 50 percent for deaths in 2003; 25 percent for deaths in 2004. In 2005, the credit is replaced with a deduction.[24]

Comment. The repeal of the state death tax credit will shift much of the revenue costs of the increasing estate tax exclusion away from the federal government and onto the states, because the Congress has effectively eliminated the estate tax revenues of those states with a "pick-up" tax. This will cost the states a tremendous amount of revenue and could lead to the reenactment of inheritance taxes in such states.

Basis rules

There is no change in the basis rules until the estate tax is repealed for 2010. In 2010, a system of modified carryover basis takes effect. In 2010, property acquired from a decedent will be treated as if acquired by gift, and recipients of the property will receive a basis equal to the lesser of the decedent's adjusted basis in the property or the fair market value of the property on the date of the decedent's death. Gain recognition results if appreciated carryover basis assets are used to satisfy a pecuniary bequest or are transferred to a nonresident alien or trust.[25] In 2010, an estate may increase the basis of assets transferred, determined on an asset-by-asset basis, by up to a total of $1.3 million, and may further increase the basis of assets by the amount of the decedent's unused capital losses, net operating losses, and certain built-in losses. Also permitted is an additional $3 million basis increase for property transferred outright or in qualified terminable interest property (QTIP) form to the surviving spouse. In no event, however, may the basis of an asset be adjusted above its fair market value. If the asset in question is the decedent's personal residence, the recipient could accede to the decedent's unused $250,000 gain exclusion.[26] Assets eligible for a basis increase at death include assets owned by the decedent (including assets held in by the decedent in a QTIP trust) and assets held in revocable trusts created by the decedent, and the decedent's half of joint-tenancy or community property.[27] However, assets subject to a power of appointment held by the decedent would not be eligible for a stepped-up basis.[28] After 2010, the basis increase amounts are indexed for inflation.[29]

Comments. Carryover basis is likely to present significant administrative problems, and ultimately be unpopular with taxpayers. In sum, it is difficult to see what the proponents of estate tax repeal have accomplished after many months of debate on the issue. The sunset provision applicable for the entire Act guarantees that the proponents of repeal will be in precisely the same position that they were in before the Act became law, but likely with much less of a constituency base supportive of total repeal. Certainly, what has been accomplished has been an injection of tremendous uncertainty in estate planning for perhaps the next ten years. Likewise, the Act provides educators with a lot of additional material to talk about, and practitioners have more work to do and potential malpractice traps to worry about.

Special use valuation

The Act waives for one year from date of enactment (June 7, 2002) the statute of limitations on estate tax refunds for taxpayers that paid recapture tax for failure to meet the post-death qualified use test. 1997 legislation added I.R.C. §2032A(c)(7)(E), which provides that the failure of a surviving spouse or lineal descendent of the decedent to use the property in a qualifying use will not result in recapture if the property is rented on a net cash basis to a family member. The provision was effective for leases entered into after 1976, but did not waive the statute of limitations with respect to closed tax years. The Act provides that, for one year from date of enactment, a taxpayer may bring a claim for any overpayment that results from the application of I.R.C. §2032A(c)(7)(E), even if the claim is otherwise barred by the statute of limitations.[30]

[1] ~~All provisions of the Act are repealed and have~~ no application to taxable, plan or limitation years beginning after December 31, 2010. Act Sec. §901.

[2] Act. Sec. 101, amending I.R.C. §1.

[3] Act. Sec 101, adding I.R.C. §6428.

[4] Act Sec. 101(a)(i)(2), amending I.R.C. §1.

[5] Act Sec. 102, amending I.R.C. §151(d).

[6] Act Sec. 302, amending I.R.C. §1(f).

[7] Act Sec. ___, amending I.R.C. §55.

[8] Act Sec. 201, amending I.R.C. §24(a).

[9] Act. Sec. 202, amending I.R.C. §23(a)(1).

[10] Act Sec. 204, amending I.R.C. §21.

[11] Act Sec. 303, amending I.R.C. §32.

[12] Act Sec. 205, amending I.R.C.§§ 38, 1016 and adding I.R.C. §45F.

[13] Act. Sec. 402, amending I.R.C. §529.

[14] Act Sec. 412, amending I.R.C. §221.

[15] Act Sec. 431, redesignating I.R.C. §222 as §223 and inserting a new §222.

[16] Act Sec. 601, amending I.R.C. §§219(b) and 408.

[17] Act Sec. §611, amending I.R.C. §§ 402, 408, 415 and 457.

[18] The Act repeals the estate tax for estates of decedent's dying after 2009, but because of the sunset provision, the estate tax is effectively repealed only for estates of decedent's dying in 2010.

[19] Act §511, amending I.R.C. §§2502, 2511.

[20] Act Sec. 511, amending I.R.C. §§2001, 2502, 2511.

[21] See Dickman v. United States, 465 U.S. 330 (1984).

[22] Act. Sec. 521, amending I.R.C. §§2010, 2031, 2505, 2631.

[23] Act. Sec. 521(d), repealing I.R.C. §2057, by adding I.R.C. §2057(j).

[24] Act Sec.§§ 531(b), 532(a), repealing I.R.C. §2011 and adding I.R.C. §2011 (g) and enacting I.R.C. §2058.

[25] Act. Sec. ___, amending I.R.C. §§ 684, 1022(a).

[26] Act Sec. 542(c), amending I.R.C. §121(d)(9).

[27] Act Sec. 542(a), adding I.R.C. §§1022(d)(1)(A), 1022(d)(1)(B)(i)(I) and 1022(d)(1)(B)(ii).

[28] Act Sec. 542(a), adding I.R.C. §1022(d)(1)(B)(iii).

[29] Act Secs. 541, 542(a), adding I.R.C. §§1014(f), 1022, 1022(a)(2), 1022(b)(1), 1022(b)(2)(B), (C), 1022(c).

[30] Act. Sec. 581, amending I.R.C. §2032A(c)(7)(E).

Non-African American/*Cont. from p. 2*

Pigford class members and the decision to award monetary and other relief to those who succeed on their claims." *Id.*, slip op. at 10. To carry their burden that this act was racially discriminatory, however, the plaintiffs would have to show that they, as non-African American farmers who were not given the same relief, were similarly situated relative to the *Pigford* class members. As to whether the plaintiffs met this burden, the court concluded that "it is manifest that they are not similarly situated to the African American farmers that the USDA has 'chosen to favor' via the *Pigford* settlement." *Id*, slip op. at 11.

More specifically, the court pointed out that the plaintiffs before it, unlike the plaintiffs in *Pigford*, did not contend that the USDA administered its programs in a discriminatory manner. Instead, they alleged only that they had suffered from the same "maladministration and abuse" by the USDA as had the *Pigford* class members. *Id*. As characterized by the court, the plaintiffs' claim was premised on the assertion that the "Secretary indiscriminately mistreated African American and non-African American farmers alike. . .", but for the Secretary's agreement to the terms of the *Pigford* consent decree. *Id*., slip op. at 12.

Having so premised their claim, the plaintiffs ignored, in the court's view, the fact that the *Pigford* class members had founded their action on allegations that the abuse they had suffered in their dealings with the USDA was racially motivated. Relying extensively on the accounts of racially motivated USDA discrimination set forth in the *Pigford* decision, the court emphasized that the *Pigford* plaintiffs had not contended, as did the instant plaintiffs, that the USDA mistreated farmers on a racially neutral basis. *Id*., slip op. at 12-17. The court also observed that the relief offered by the *Pigford* consent decree was available only to African American farmers who had filed a discrimination complaint. *Id*., slip op. at 18. Finally, the court pointed out that the USDA in *Pigford* agreed only to provide a remedy to class members who could meet the consent decree's requirements for establishing racial discrimination. Thus, as the court noted, "many other African American farmers have been and will be denied such opportunities." *Id*., slip op. at 18 (footnote omitted).

According the court, the USDA's agreement to the consent decree in *Pigford* did not constitute favoring one race over another for race alone did not qualify anyone for relief under the decree. Also, since proof of filing of a race discrimination complaint was a prerequisite for relief under *Pigford*, the court reasoned that the plaintiffs before it and the plaintiffs in *Pigford* were not similarly situated in that no one in the former group either alleged race discrimination or filed a discrimination complaint prior to bringing the pending action. *Id*., slip op. at 20. Thus, as to the plaintiffs' discrimination claims, the court concluded that "[t]he substantive relief which the *Pigford* consent decree provides is available only to class members who prove race discrimination, and consequently, the relief made available to successful *Pigford* class members does not work any race-based injury to the plaintiffs herein." *Id.*, slip op. at 21 (footnote omitted).

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